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TRANSCRIPT OF RECORD

IN THE

Supreme Court of the United States

OCTOBER TERM, 19[redacted] 1957

No. 24

STANDARD OIL COMPANY,
Petitioner,
vs.
FEDERAL TRADE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

IN THE

Supreme Court of the United States

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No.

STANDARD OIL COMPANY,

Petitioner,

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In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 9215

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Petitioner,
vs.
FEDERAL TRADE COMMISSION,
Respondent.

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12 schedules giving account numbers and explanations as to each:

1. Salesmen and Sales Promotion Expense.
2. Advertising Costs.
3. Delivery and Warehouse Cost.
4. Income and Expense Incurred at Leased Retail Outlets Served by Tank Wagon.
5. Marketing Expense Items Incurred at Privately Owned Stations Not Leased But Engaged in the Distribution of Our Products.
6. Credit Information—Bad Debts and Recovery.
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1 United States of America,
Before Federal Trade Commission. } ss.

In the matter of
Standard Oil Company. } Docket No. 4389.

I, Otis B. Johnson, Secretary of the Federal Trade Commission and official custodian of its records, do hereby certify that transmitted herewith is a full, true, and complete transcript of proceedings had before the Federal Trade Commission in the above entitled matter, consisting of:

Part 1—Pleadings (11-29-40 to 10-9-45, incl.).
Part 2—Pleadings (10-10-45 to 8-9-46, incl.).
Part 3—Testimony (Pages 1 to 990, incl.):
Part 4—Testimony (Pages 991 to 1952, incl.).
Part 5—Testimony (Pages 1953 to 2972, incl.).
Part 6—Testimony (Pages 2973 to 3904, incl.).
Part 7—Testimony (Pages 3905 to 4790, incl.).
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and separate original exhibits marked:

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That also transmitted herewith is a full, true, and complete copy of the Trial Examiner's Report and Exceptions related to this proceedings.

That this transcript and Trial Examiner's Report and Exceptions are certified to the United States Circuit Court of Appeals for the Seventh Circuit, pursuant to the filing in said Court of a petition for review of an Order to Cease and Desist, dated October 9, 1945, and modified August 9, 1946, entered by the Federal Trade Commission in the above indicated proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 5th day of November, A. D. 1946.

Otis B. Johnson,
Secretary.

(Seal)

3 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

In the matter of
Standard Oil Company. } Docket No. 4389.

COMPLAINT.

The Federal Trade Commission, having reason to believe that Standard Oil Company, a corporation, has violated and is violating the provisions of Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act (U. S. C., Title 15, Sec. 13), hereby issues its complaint, charging as follows:

Paragraph One: The respondent, Standard Oil Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with principal office and place of business located at 910 South Michigan Avenue, Chicago, Illinois. Respondent is engaged in the business, among other things, of distributing and selling gasoline to and in the City of Detroit, Michigan, and adjacent territory.

Paragraph Two: Respondent sells its gasoline to about 450 retailers thereof in the Detroit area, with a large proportion of whom respondent has entered into contracts, now in force, obligating respondent to sell and deliver to such retailers all of their respective requirements of respondent's brand of gasoline during the terms of such contracts. For the purpose of supplying said customers and of making deliveries pursuant to said contracts, respondent ships its gasoline from its refinery at Whiting, Indiana, to its terminal at River Rouge, Michigan, from which point respondent transports and delivers said gasoline to said customers in tank cars or tank wagons; and there is and has been at all times herein mentioned a continuous stream of trade and commerce in said gasoline between respondent's refinery at Whiting, Indiana, and said retail dealers purchasing the same in Detroit, Michigan. All of such purchases by said retail dealers are and have been in
4 the course of such commerce. Said gasoline is sold by respondent for resale in the Detroit area.

Paragraph Three: Since June 19, 1936, in the course and conduct of its business above described, respondent has sold, and now sells, its gasoline to four Detroit dealers engaged in reselling said gasoline at retail; at prices substantially lower than the prices charged by respondent to its other Detroit retailer purchasers for gasoline of the same grade and quality. Said four dealers are: Citrin-Kolb Oil Company; Stikeman Oil Company, Inc.; Wayne Oil Company; and Ned's Auto Supply Company. Each of said dealers owns or operates one or more gasoline stations where respondent's gasoline is sold at retail to consumers thereof, in competition with other retailers of gasoline purchasing the same from respondent or from other manufacturers. The prices at which respondent has sold its gasoline to said four dealers from time to time since June 19, 1936, have ranged from one-half cent to one and three-quarters cents per gallon lower than the prices charged by it to other Detroit retailers for the same gasoline. Under normal merchandising conditions, during the greater part of that period, respondent's price to said four dealers for its "Red Crown" gasoline (its largest selling brand) has been one and one-half cents below its price therefor to other retailers.

Paragraph Four: The effects of the discrimination in price described in the preceding paragraph hereof has been and may be to injure, destroy and prevent competition with each of the four dealers named in said paragraph, in the resale of gasoline.

Wherefore, The Premises Considered, the Federal Trade Commission on this 29th day of November, A. D. 1940, issues its complaint against said respondent.

Notice.

Notice is hereby given you, Standard Oil Company, respondent herein, that the 3rd day of Jaanuary, A. D. 1941, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule IX) provide as follows;

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on
6 the allegations of fact set forth in said complaint
and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true, and if in the judgment of the Commission such facts admitted constitute a violation of law or laws as charged in the complaint, to make and serve findings as to the facts and an order to cease and desist from such violations. Upon application in writing made contemporaneously with the filing of such answer, the respondent, in the discretion of the Commission, may be heard on brief, in oral argument, or both, solely on the question as to whether the facts so admitted constitute the violation or violations of law charged in the complaint.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 29th day of November, A. D. 1940.

By the Commission.

Otis B. Johnson,
Secretary.

9 BEFORE FEDERAL TRADE COMMISSION.

(Caption—4389)

ANSWER.

Comes now Standard Oil Company (Indiana), Respondent herein, and for its Answer to the Complaint of the Federal Trade Commission dated November 29th, 1940, admits, denies and alleges as follows:

1.

Respondent denies each and every material allegation, matter and thing in said Complaint contained not hereinafter specifically admitted or explained.

Defense No. I.

2.

Respondent admits Paragraph One of Complaint.

10 3.

Respondent denies Paragraph Two of Complaint except as herein specifically admitted and explained, and alleges the facts in respect of the subject matter thereof to be as follows:

4.

Respondent alleges that it sells gasoline in intrastate commerce to several hundred retailers of gasoline in Detroit, Michigan; that with some of such retailers Respondent has entered into contracts now in force obligating Respondent to sell and deliver to such retailers their requirements of certain of Respondent's specified brands of gasoline during the terms of such contracts and that in those instances where such contracts exist they have been negotiated entirely within the State of Michigan; that with many others of such retailers Respondent has no contracts for the sale of gasoline.

5.

Respondent alleges that from time to time Respondent ships gasoline from its Whiting, Indiana, refinery to its terminal at River Rouge, Michigan, which said gasoline is unloaded into storage tanks and comes to rest in the State of Michigan and is commingled with and becomes a part of the general chattel property within said State and as such immediately becomes and is subject to the 11 jurisdiction and laws of the State of Michigan and amenable to levy and subject to payment of State and local property taxation therein.

6.

Respondent alleges that from time to time thereafter, and as orders therefor are received at Respondent's offices within the City of Detroit, Michigan, gasoline is sold and delivered in intrastate commerce to purchasers in Detroit so ordering it, through the medium of tank cars, truck trains, and tank trucks. That the gasoline to service such orders originates in the State of Michigan at Respondent's River Rouge terminal and is withdrawn from the storage tanks thereat; that in respect of retail reseller customers referred to in Paragraph Two of Complaint such customers' orders are serviced by tank truck, and in such operation an intermediate step occurs in that gasoline originating in Respondent's storage at River Rouge, Michigan, is transported to bulk storage warehouse tanks in Detroit, Michigan, where it again comes to rest and continues in its character of commingled chattel property within the State of Michigan; that from such warehouse storage tanks said gasoline is withdrawn into tank trucks and thence delivered to Respondent's retail reseller customers in Detroit, Michigan, who have placed orders therefor in Detroit, Michigan, which orders have been accepted 12 by Respondent therein, whereupon payment for said gasoline is made by such purchasers in Detroit, Michigan, and such payment is received by Respondent therein.

7.

Respondent alleges that upon sale and delivery of gasoline by any physical means by Respondent to any of the customers referred to in Paragraphs Two and Three of Complaint, said gasoline becomes the sole and absolute property of such customer, to dispose of by resale or otherwise in such manner as he will, and Respondent has no interest in, supervision over, or control of said gasoline thereafter; that Respondent has no pecuniary interest in, supervision over, or control of the gasoline business or other business of the customers referred to in Paragraphs Two and Three of Complaint, or any of them.

8.

Respondent denies that there is or that there has been at all times mentioned in Complaint a continuous stream of trade and commerce in gasoline between Respondent's refinery at Whiting, Indiana, and the retail and wholesale dealers purchasing gasoline from respondent in Detroit, Michigan, and avers the fact to be that the customary, ordinary and usual course of the trade, commerce and business in the sale of gasoline by and between Respondent
13 and the gasoline customers referred to in Paragraphs
Two and Three of Complaint is purely intrastate in character and is not interstate in character, and that the transactions therein involved originate and are negotiated and consummated within the State of Michigan, and that said transactions, orders and sales neither directly nor indirectly influence, bear upon, burden, or affect interstate commerce in anywise whatsoever.

9.

Respondent alleges that in event there has been since June 19, 1936, or at any time, any interstate gasoline transaction between Respondent and any of the gasoline customers referred to in either Paragraphs Two or Three of the Complaint, such transaction or transactions were isolated instances and independent of and apart from the usual, ordinary, customary, intrastate course of commerce between said parties; were unusual, extraordinary, and not a customary course of commerce between said parties; have been fully consummated long prior to the issuance of the Complaint herein, and that there did not exist at that time and does not presently exist any course or ordinary flow of interstate dealings in gasoline, nor any pending uncompleted interstate transaction between Respondent and said customers, or any of them.

14 10.

Respondent alleges that since the gasoline sales, commerce and dealings between Respondent and the gasoline customers referred to in Complaint are solely intrastate in character, and since there did not exist at the time of the issuance of said Complaint and do not exist now any gasoline sales, dealings or commerce interstate in character between Respondent and said customers, or any of them, the Federal Trade Commission has no jurisdiction over Respondent in this action in respect of the matters alleged in the Complaint, nor over the transactions alleged in the Complaint, nor the subject matter thereof, and no jurisdiction, power or authority to maintain or proceed with this action except to dismiss the same and the Complaint herein, to which dismissal Respondent is entitled.

11.

Respondent hereby realleges by reference all of the allegations of Defenses No. II, III, IV, V and VI hereof as part of Defense No. I.

For further and additional defenses, and in event it should be determined that the Federal Trade Commission has jurisdiction to maintain this action, Respondent alleges, denies and explains as hereinafter set forth:

15 Defense No. II.

12.

Respondent hereby realleges by reference all of the matter contained in Defense No. I, III, IV, V and VI hereof, and denies Paragraph Three of Complaint except as in this Answer specifically admitted and explained and alleges the facts in respect of the subject matter thereof to be as follows:

13.

Respondent admits that since June 19, 1936, it has sold and now sells gasoline to four Detroit gasoline dealers named in Paragraph Three of Complaint, as follows:

Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., Wayne Oil Company and Ned's Auto Supply Company.

Respondent admits that said dealers own or control certain retail gasoline stations in Detroit, and have from time to time operated some of said retail stations and that such retail operations when existing are in competition with other retail stations in Detroit, or some of them,
16 supplied by Respondent or other suppliers. Respondent alleges upon information and belief that the following is a statement of the facts relative to each of said dealers in respect of the nature and extent of his business, and alleges as follows the prices at which Respondent sold and sells gasoline to each of them:

A. Citrin-Kolb Oil Company:

This business was originated in 1920 by J. A. Citrin as a retail gasoline business and continued to expand. In 1926 bulk storage was acquired and retail and wholesale operations continued and expanded until early 1936 when the company decided to withdraw from retail operations. This was increasingly accomplished until 1939 when approximately 96½% of the company's annual gasoline volume of in excess of five million gallons was disposed of at wholesale. For the first eleven months of 1940 such percentage dropped to approximately 86% of volume by reason
17 of necessity for the company to take back and temporarily operate some of its owned or leased stations. In 1940 the company operated six service stations and supplied in addition thereto fifty-one service stations in Detroit operated by others. Respondent became this company's gasoline supplier in 1924. The price to this customer was upon the regular dealer tank wagon basis from time to time in effect until bulk storage was acquired, after which time the price was and is the regular wholesale tank car price in effect from time to time.

B. Stikeman Oil Company, Inc.:

This company was originated in 1931 by E. D. Stikeman and acquired balk storage and engaged in wholesale and retail sales of gasoline and auto accessories. Re-

spondent has been this company's gasoline supplier
18 since that time. In 1935 this company decided to
withdraw from its retail operations and had completely withdrawn by early 1938 and since that time its annual volume of gasoline business has been approximately two million gallons, which in its entirety is disposed of by sale at wholesale. This company supplies eighteen retail service stations in Detroit. The price charged this customer by Respondent since inception of the business in 1931 has been and now is the regular wholesale tank car price in effect from time to time.

C. Wayne Oil Company:

This company was originated by E. B. Ledbetter in 1931 as a retail seller of gasoline and continued its expansion in that operation until July, 1935, when the company decided to withdraw from retail operations, acquired bulk
storage and proceeded to convert the business into one
19 of wholesaling gasoline and auto accessories. From
the fall of 1935 to the fall of 1939 all of this company's gasoline purchases were disposed of at wholesale. Since that time it has been required to take back temporarily and operate three service stations. From its annual volume of in excess of two million gallons of gasoline approximately 79% is disposed of at wholesale. It supplies twenty-four retail outlets in addition to the three it operates in Detroit. The price to this customer was upon the regular dealer tank wagon basis from time to time until bulk storage was acquired, after which time the price was and is the regular wholesale tank car price in effect from time to time.

D. Ned's Auto Supply Company:

This company was originated by Ned Gershenson and has expanded until now the company operates several com-
bined service stations and stores in Detroit and has
20 an annual volume of approximately four million gal-
lons of gasoline. The company's business is primarily retail. On March 7th, 1938 this company acquired bulk storage and began buying and receiving gasoline in tank car lots from which storage it supplies its own service stations in Detroit and has serviced some commercial accounts to a limited extent. The price to this customer was upon the regular dealer tank wagon basis from time to time in effect until bulk storage was acquired, after

which time the price was and is the regular wholesale tank car price in effect from time to time, except that from September, 1936 through February, 1938, this customer was on a price basis of ½¢ per gallon less than the regular dealer tank wagon price in effect at that time for the reason that it was necessary to make such price to meet equally low or lower prices being then offered to this customer by competing gasoline suppliers, and Respondent was forced to competitive compulsion and 21 pressure to make and maintain said price in order to retain its said customer until purchases by said customer began to be made upon the regular tank car basis, at which time said reduced tank wagon price was wholly eliminated and has not since been and is not now in effect.

14.

Respondent alleges that up until the time each of the four dealers named in Paragraph 13 above, or any of their predecessors, began purchasing upon a tank car basis, and while purchasing on a dealer tank wagon basis, that such tank wagon price to each of said four customers and to the retail dealers referred to in Paragraph Two of the Complaint was identical with the single exception explained in Paragraph 13 D above. That since each of said four dealers began to purchase on a tank car basis that said tank car prices have been identical to each of said four dealers.

15.

Respondent admits that the tank car prices at which it is now selling gasoline to the dealers named in Paragraph Three of Complaint is lower and different than the tank wagon dealer prices at which Respondent is selling 22 gasoline to retail dealers referred to in Paragraph Two of Complaint, but specifically denies that such lower and different price constitutes an unlawfully discriminatory price within the terms and meaning of Section 2 (A) of the Clayton Act as amended by the Robinson-Patman Act (U. S. C. Title 15, Section 13), or of any other law. Respondent alleges the fact to be that on different grades of gasoline since June 19, 1936 tank car prices have ranged from ¾¢ to 1¾¢ per gallon less than said dealer tank wagon prices in Detroit, and alleges the fact to be that the only instance of a ½¢ reduction below regular

dealer tank wagon price was the instance described in Paragraph 13 D above and was not a tank car price at all but was a reduction below dealer tank wagon price, which reduced price was eliminated on or about early March 1938 and has never since been used or in effect. Respondent admits that in Detroit the tank car price of Red Crown gasoline (Respondent's largest selling brand) has normally been 1½¢ below the regular dealer tank wagon price thereof since June 19, 1936, but alleges that at times such tank car price has been less than 1½¢ below dealer tank wagon price, and admits that at times since June 19, 1936 and since any one of said four dealers has had bulk storage and has been purchasing gasoline in tank car quantities, that said dealers purchased the same
23 on the tank car price in effect at the time of such purchase.

16.

Respondent alleges that since the time each of the gasoline customers named in Paragraph Three of the Complaint acquired its own bulk storage, distribution equipment and wholesale facilities, that such customer is entitled to be classified as a wholesale or jobber buyer of gasoline as distinguished from a retail reseller or service station operator who purchases gasoline on an entirely different basis of taking frequent small deliveries by tank truck from a supplier who delivers into relatively small storage tanks in or upon the service station premises, which tanks are directly connected to the retail pumps. Further, that such wholesaler or jobber buyers perform a distinctly different service and function and operate upon a different basis from retail resellers, and that such differences and distinctions in services and functions and between methods of operation have been recognized for many decades last past and are presently recognized and have been so recognized since June 19, 1936 in Detroit and elsewhere throughout the entire United States by the entire oil industry as well as by other industries dealing in substantially all kinds of consumer goods, and that in consequence of such
24 differences and distinctions in operations, functions and services, and the essential recognition thereof, the oil industry and other industries in Detroit and throughout the rest of the United States has and does classify and bona fidedly select customers on the basis of functional

services and of methods of operations entitling customers to be classified in distinctive and distinguishable classifications. Further, that such classifications are essential and necessary and appropriate to the existing and continuing business and commercial activity in consumer commodities, including oil products, in Detroit and throughout the United States, and that such system and practice of selection and classification of customers in the oil industry and other industries in Detroit and throughout the United States forms a necessary, indispensable and integral part of the commercial economy of this nation, and one which must be considered, recognized, met, and participated in by an operator engaged in the business of distribution and marketing of oil products if such business is to fairly and successfully survive in the market place in Detroit or elsewhere in the United States. Further, that as a result of such necessary selection and classification of customers, and as an integral and basically essential part thereof, and of the system of commercial economy which makes such classifications necessary, differences in prices of the same commodities are made to customers selected and falling within different classifications, and purchasers falling within the classification of wholesalers or jobbers of gasoline are entitled to purchase at tank car prices as distinguished from dealer tank wagon prices at which gasoline is sold to retail resellers.

17.

Respondent alleges that its general policy and practice of bona fidedly selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail resellers, is as follows:

That such wholesale or jobber customer so classified shall have adequate bulk storage of his own; that he be equipped to receive bulk deliveries by tank car or truck train into such storage; that he have adequate distribution and delivery facilities; that he make tank car purchases in substantial volume and do a continuing substantial volume of business as a bona fide gasoline dealer maintaining and operating an established gasoline business; that he have satisfactory credit rating; that he maintain a sufficient personnel and all requisite facilities and equipment to adequately operate his business, service his customers, and perform his functions as a wholesaler or jobber, and assume the hazard and expense of fully operating his own business.

26 Respondent alleges that each of the four customers named in Paragraph Three of the Complaint fully, fairly, and reasonably falls within not only the requirements set forth in Paragraph 17 above but within all fair, reasonable, usual and proper requirements for classification as a wholesaler or jobber, and that each maintains its own adequate bulk storage; delivery tank trucks, salesmen and operating personnel; buys in substantial tank car or truck train lots; buys commodities other than gasoline in wholesale and carload lots; bears all expense of its own operations, no part of which are borne by Respondent; becomes immediately the absolute owner of the gasoline delivered into its storage by Respondent and controls its disposition; does not depend upon or desire that its customers be serviced by Respondent's salesmen, and Respondent's salesmen do not service or solicit such customers; assumes the risk of carrying its own inventories and of extending its own credits and making collections, and assumes all the hazards of its own operations. Further, that said four customers are each bona fidedly qualified to be regarded and are regarded by the oil industry in Detroit as within the classification of wholesale or jobber customers, and they each are able to purchase as such from a great number of gasoline suppliers operating
27 in Detroit competitively with Respondent. Further, that Respondent is without power to, and is neither entitled nor required to police, control or dictate the manner or method of disposition of such gasoline as may be employed by such customers, and that such gasoline becomes the absolute property of such customers upon their purchase thereof from Respondent. Further, that said four customers and each of them are legitimately and lawfully entitled to purchase gasoline, and Respondent is entitled to sell them gasoline, within their classification as wholesalers or jobbers and at prices which are or may be at the time different and lower than prices charged by Respondent for the same product to Respondent's retail reseller customers without regard to any other consideration and without regard to any relation which such price differential may or may not bear to Respondent's differing operating costs arising from differing costs of manufacture, differing costs arising out of different methods of

sale or delivery, or otherwise, and that any such acts upon Respondent's part and the existence of any such facts have no and do not constitute a violation of the meaning and terms of Section 2 (A) of the Clayton Act as amended and are not unlawful thereunder or under any law.

28 Defense No. III.

19.

Respondent hereby alleges by reference all of the matter contained in Defenses No. I, II, IV, V and VI hereof.

20.

For further defense Respondent alleges that the differential alleged to exist from June 19, 1936 between the prices charged by Respondent for gasoline sold to the dealers described in Paragraph Two Complaint and the four dealers named in Paragraph Three Complaint, is and has been a differential which now, and at all times since June 19, 1936, made, and now makes, only due allowance for differences in the cost to Respondent of sale and delivery resulting from the differing methods and quantities in which gasoline was and is sold and delivered to dealers described in Paragraph Two Complaint on the one hand and the four dealers named in Paragraph Three Complaint on the other hand.

21.

Respondent alleges that in selling and delivering gasoline to and servicing retail resellers who received delivery by Respondent's tank trucks, which classification of dealers is referred to in Paragraph Two Complaint, that Respondent is required to and does maintain offices, 29 bulk storage plants, fleets of tank trucks, and servicing equipment and facilities in Detroit, and employs, and maintains, supervisory, clerical, real estate, sales, credit, legal, accounting and office personnel within the City of Detroit, and, in addition, employs and maintains operating personnel at various points in Detroit as well as at River Rouge, Michigan, to maintain and operate the physical equipment referred to above. Further, that in addition to the direct expense incident to the organization maintenance referred to above, there exists direct expense, allocable to said sale and delivery operation, incident to advertising, sales research and supervision, accounting, credit supervision, legal expense, general office expense, and general supervision and overhead expense arising in the general office of Respondent at Chicago, Illinois.

22.

Respondent alleges that in the type of sales and deliveries referred to in Paragraph 21 above, some of the more substantial items of cost, among others, to Respondent arise out of the necessity for maintenance of bulk plants and numerous delivery trucks and necessity for frequent small deliveries to numerous dealers who have relatively limited storage capacity; necessity for frequent sales calls requiring a large force of salesmen; and necessity for constantly servicing the accounts from the sales, credit, and maintenance standpoints, and otherwise.

23.

Respondent alleges that the four dealers named in Paragraph Three Complaint maintain, in their own business and at their own expense, their own bulk storage, delivery trucks, sales, credit and service forces, and employ personnel adequate to discharge the functions specifically set forth in Paragraph 22 above, all without cost to Respondent.

24.

Respondent alleges that in selling and delivering gasoline since June 19, 1936, and presently, to said four dealers, the items and basis for costs of sale and delivery of gasoline set forth in Paragraph 21 above are either entirely absent or relatively negligible.

25.

Respondent alleges that the marginal differences in the prices paid to Respondent for gasoline from June 19, 1936, and presently, by the dealers described in Paragraph Two Complaint, over and above the prices paid to Respondent for gasoline during and at said period by said four dealers, was and is consumed in making sales and deliveries of gasoline to the class of customers described

in Paragraph Two Complaint, by the costs of the
31 operations of Respondent referred to in Paragraphs 20, 21 and 22 above, to the extent that such costs are reasonably and fairly calculable. Further, that said additional costs to Respondent arise out of the differences resulting from differing methods of sale and delivery of gasoline to said two classes of customers as alleged in Paragraphs 20, 21 and 22 above, which costs are substantially saved by Respondent in making sales and deliveries to said four dealers, and said price differentials make only due allowance therefor. Further, that Respondent has at all times since June 19, 1936 been, and presently is, fully justified in and lawfully entitled to have made and to make the said differentials in gasoline prices as between said classes of customers, and that said acts on the part of Respondent have not and do not constitute a violation of Section 2 (A) of the Clayton Act as amended and are not unlawful thereunder or under any law.

Defense No. IV.

26.

Respondent hereby realleges by reference all of the matter contained in Defense No. I, II, III, V and VI hereof.

27.

For further defense Respondent alleges that for
32 many years last past, and since June 19, 1936, and presently, competition in all phases and branches and classifications of the gasoline marketing business in Detroit, has been, and is extremely keen, vigorous and aggressive; that many refiners, suppliers, wholesalers, jobbers and retailers of gasoline have been, and are, operating therein, and are constantly seeking new and additional outlets, markets and customers for their gasoline; that some of said marketers of gasoline continuously, and some periodically, attempt to invade, proselyte and raid the markets and customers had by other marketers; that competitive conditions and price conditions in relation to marketing of gasoline are and have been continuously chaotic, uncertain and disturbed in varying degrees for many years and are so now; that many devices, schemes, plans, concessions, premium offers, rebates, special deals,

special discounts, inducements, preferential considerations, commercial bribery, special allowances, favorable contracts, preferential offers of services and facilities, and cut prices, are constantly being used and offered by a substantial number of marketers in all branches of gasoline marketing. Further, that the State of Michigan and City of Detroit are areas high in gasoline consumption and are well supplied with water, rail and pipeline transportation; that many water terminals for the handling of gasoline exist on the boundaries of the state and more particularly on the water boundaries of the lower peninsula there- 33 of; that there exists a substantial amount of crude oil production within the state and there are numerous large and small refineries scattered through the lower peninsula thereof seeking outlets for their products; that immediately contiguous to the south of the state, and particularly in northern Ohio, Indiana and Illinois, there are many large and small refineries and crude oil and gasoline pipeline terminals which have ready and cheap means of transportation for gasoline into Michigan by means of water, rail and pipeline; that the State, and the cities within it,—particularly Detroit,—offer an attractive market to marketers of gasoline; that abundant supplies of gasoline are easily and readily available from many sources to supply that market; that all of these factors contribute to and stimulate the chaotic and disturbed competitive gasoline marketing conditions in all branches of said marketing in Detroit as referred to above.

28.

Respondent alleges that for many years last past it has operated a gasoline marketing business in Detroit under the conditions described in Paragraph 27 above; that since September, 1936 Respondent has not and does not engage in the operation of retail service stations; that Respondent's business in Detroit in gasoline marketing to resellers of gasoline is confined to (a) sales to retail resellers such as are described in Paragraph Two Complaint and who 34 are supplied and serviced directly by Respondent through its own organization and distribution system in Detroit, and (b) to wholesale and jobber dealers such as those named in Paragraph Three Complaint; that presently, and for approximately three years last past, the four dealers named in Paragraph Three Complaint are the only wholesale or jobber customers in Detroit which Respondent has; that prior thereto Respondent had other such customers but lost them to competitive suppliers by reason of lower price offers and inducements given by Respondent's competitors, which Respondent could not meet or declined to meet.

29.

Respondent alleges that said four dealers named in Paragraph Three Complaint, or their predecessors, have been continuously, for many years last past, the gasoline customers of Respondent; that at the time each of said customers went onto a tank car basis of purchasing gasoline that it could purchase on such basis, comparable gasoline to that sold by Respondent, from a number of Respondent's competitive gasoline suppliers for an equally low or lower price than from Respondent, and upon equally or more advantageous terms and arrangements in the matter of facilities, services, inducements and benefits than it could or did receive from Respondent, and each of said customers knew of such existing and current opportunities and offers from competitors of Respondent and had from such competitors specific offers equally as low or lower in price, and equally or more favorable in terms and the furnishing of services and facilities than it had from Respondent; that Respondent knew of the existence of such competitive offers to said customers from various sources and was advised of them by said customers and advised that Respondent must meet or approach meeting such offers to retain said customers; that had not Respondent at such time given to each of said customers the tank car basis and price for purchasing gasoline, each of said customers would have been lost by Respondent to a competitive supplier.

30.

Respondent alleges that from the time each of said four customers began purchasing gasoline on a tank car basis and price there has never been a time, including the present, when each of said customers could not have purchased, and they could now purchase, comparable gasoline to that sold by Respondent at equally low or lower prices and on equally or more favorable arrangements and terms from competitors of Respondent than are granted to them from Respondent; that each of said customers have from time to time, since June 19, 1936, advised of and discussed with Respondent a number of such competitive offers; 36 that in order to have retained, and to now retain, each of said customers it has been, and is now, necessary to continue it on said tank car basis and price, and that if such price or arrangement were made any less favorable to any of said customers by Respondent at the time such price and arrangement was made, or now, that Respondent would have then, or would now, immediately have lost, or would now lose, said customer to a competitive supplier; that Respondent is informed and verily believes, and on information and belief alleges, that in the face of more favorable offers from competitive dealers to said four customers frequently being made, that Respondent could not have heretofore, or could not now, retain said customers except for the existence of a long business association with them, established good will, and the public acceptance that Respondent and said customers have built for Respondent's gasoline.

31.

Respondent alleges that in respect of the reduction of the dealer tank wagon price by ½¢ per gallon of gasoline given to Ned's Auto Supply Company in September, 1936, which continued through February, 1938, that Respondent was forced to make said reduction in price by a specific offer or offers made to said customer in August, 1936, by a supplier of gasoline competing with Respondent; 37 that said competitive offer was in connection with gasoline comparable to that supplied by Respondent and was offered to said customer at a price equally low or lower, and upon terms and arrangements with respect of facilities, services and benefits equally or more favorable to said customer, than were the said reduced price and arrangement that was offered by Respondent to meet such competitive offer; that Respondent was advised by said customer of said competitive offer and advised that said customer would accept it unless Respondent reduced its price; that Respondent agreed to make said reduction to partially meet said competitive offer and because of the compulsion of such competitive offer; that said customer advised Respondent that Respondent's reduced price was not fully competitive nor satisfactory, and did not fully meet said competitive offer, but that it would continue purchasing from Respondent thereunder for the time being; that had not Respondent made such reduction in price in said instance, fully as great as it did, Respondent would have at that time lost said customer and was so advised by it; that if Respondent had not continued said reduction in effect until early March, 1938, when said customer qualified to purchase in tank car lots and on a wholesaler basis, Respondent would have promptly lost said customer upon withdrawing the reduced price, 38 and Respondent was constantly under pressure from said customer, induced by competitive offers to it, to make further reduction and to accord said customer more favorable purchasing arrangements, which matters were frequently discussed by said customer with Respondent; that as hereinbefore alleged said reduced price and basis has not been in effect or used since early March, 1938.

Further, that during the period said reduced price was in effect said customer took deliveries of gasoline in such relatively large quantities at such relatively few service stations compared to other retail resellers being serviced by Respondent, and such other facts and circumstances were existent, as to render such ½¢ per gallon of gasoline price reduction substantially commensurate with savings to Respondent arising from difference in the cost of sale and delivery of gasoline to said customer by Respondent resulting from the differing methods and quantities in which such gasoline was sold and delivered to said customer, and said ½¢ per gallon reduction in price to said customer made only due allowance for said savings accruing to Respondent as nearly as the same are fairly and reasonably calculable.

32.

Respondent alleges that at no time since June 19, 39 1936 has it offered or granted a preferential price below its established regular price, nor offered or granted concessions not regularly accorded all customers, to any of its customers, or classes of customers, except as the same was made necessary in order to meet an equally low or lower price offered by a competitor of Respondent, and Respondent has never made such preferential or reduced price offers to proselyte customers from other suppliers, and never have such preferential offers or any acts in relation thereto on Respondent's part, had the effect, or tended to have the effect, or were likely to have the effect, of substantially lessening competition in any line of commerce; nor did they tend to create a monopoly in any line of commerce (specifically including gasoline commerce), nor did they injure, destroy or prevent competition, or tend to do so, with Respondent or any of its customers, or any of its customers' customers, or with any person or persons whomsoever, or at all, in Detroit or elsewhere.

33.

Respondent alleges that as particularly set forth above, that by reason of competitive compulsion and offers made by competitors of Respondent, which offers were for lower prices and more favorable sales arrangements than those being offered by Respondent, that Respondent, in good faith and because of necessity therefor to retain its customers, met, or partially met, the lower prices and more favorable terms and arrangements in respect of services, facilities and benefits offered by Respondent's competitors to the four dealers named in Paragraph Three Complaint, and Respondent alleges that all of the lower prices alleged to have been granted since June 19, 1936, and all that were granted, to said four dealers, were made to them in every instance in good faith to meet an equally low or lower price and equally or more favorable sales arrangements in respect of services, facilities or benefits made or furnished by a gasoline supplier or suppliers which were and are competitors of Respondent, all in strict accordance with law; and, hence, all of the acts of Respondent in respect of differentials in gasoline prices granted by Respondent, as between that class of dealers described in Paragraph Two Complaint and that class named in Paragraph Three Complaint, were fully and completely justified, and do not constitute a violation of Section 2 (a) of the Clayton Act as amended, and are not unlawful thereunder or under any law.

Defense No. V.

34.

Respondent hereby realleges by reference all of the matter contained in defenses numbers I, II, III, IV and VI hereof.

41

35.

Respondent specifically denies Paragraph Four of the Complaint.

Defense No. VI.

36.

Respondent hereby realleges by reference all of the matter contained in Defenses No. I, II, III, IV and V hereof.

37.

For a further defense Respondent alleges affirmatively that none of its acts as charged in the Complaint or as set forth in this Answer, and specifically that none of its acts in granting price differentials on gasoline sold by it to the customers described in Paragraph Two Complaint as contrasted with those described in Paragraph Three Complaint, have had, nor may have, the effect in Detroit or elsewhere, substantially to lessen competition or tend to create a monopoly in any line of commerce (including specifically commerce in gasoline), or to injure, destroy or prevent competition with Respondent, nor with any of the gasoline customers of Respondent, including specifically those described in Paragraph Two Complaint and those named in Paragraph Three Complaint, nor with any customers of any of the customers of Respondent including specifically gasoline customers of Respondent's customers
42 named in Paragraph Three Complaint, nor with any person or persons whomsoever in Detroit or elsewhere. Further by reference Paragraph 32 of this Answer is specifically realleged as a part of this paragraph.

38.

Respondent alleges that at all times since June 19, 1936 there have been, and now are, in Detroit many suppliers of gasoline competing with Respondent and selling gasoline comparable to that sold by Respondent, who since said time, have been, and now are, selling, and offering to sell, their gasoline to wholesale, jobber and retail dealers in Detroit at prices consistently below the prices at which Respondent has and is selling its gasoline to like customers.

Further, that collectively the suppliers competing with Respondent, sell substantially more gasoline in Detroit than does Respondent. Further, that the ratio of the volume of gasoline sold in Detroit by Respondent to the total volume sold in Detroit has for a number of years last past steadily decreased on the average. Further, that during a number of years last past the business of many suppliers of gasoline competing with Respondent has materially increased as to both volume sold and number of customers supplied.

43

39.

Respondent alleges in respect of the specific charge contained in Paragraph Four Complaint that at all times during the period since June 19, 1936, including the present, when the four dealers described therein engaged, or do engage, in retail service station operations and in selling gasoline at retail directly, that they, together with the retail reseller customers whom they have supplied and supply, all have maintained, and do maintain, at their service stations in Detroit, the currently prevalent service station price of gasoline to the consuming public.

40.

Respondent is informed and believes, and alleges on information and belief, that the margin of differential in price accorded said four dealers below the prevailing dealer tank wagon price, is consumed in a substantially greater part by the costs and expense to which said four dealers are put in maintaining and operating their respective storage and distribution facilities and their wholesale business, of which costs retail resellers are relieved, and that said four dealers could not use said substantially greater part of said margin, and in fact have not used and do not use any part thereof, for the purpose of underselling the prevailing service station prices of gasoline in Detroit in any direct retail operations and sales in which they may have heretofore engaged or now engage.

44

41.

Respondent is informed and believes, and alleges on information and belief, that in all of the instances where said four dealers, and any of them, have heretofore supplied or now supply retail resellers who in turn sell at retail service stations, that the price charged by said four dealers to such resellers has been, and is, the regular and usual dealer tank wagon price prevalent in Detroit at the time of such sale, and is without concessions thereunder in any manner or form. Further, that said four dealers have not, and do not, exert any control over the resale price or competitive activities of their retail reseller customers. Further, that said four dealers have never, and do not now use the differential in price or any part thereof referred to in Paragraphs Three and Four Complaint, to undercut or undersell said prevailing dealer tank wagon prices, and do not in fact undersell said price, and hence have not, and do not, place their retail reseller customers in any advantageous competitive position as compared with other retail resellers in Detroit including those described in Paragraph Two Complaint who purchase at dealer tank wagon prices from Respondent, 45 as well as all retail resellers who purchase gasoline at said dealer tank wagon price in Detroit. Further, that said four dealers are confronted in the gasoline wholesale and jobbing field in Detroit with the competitive conditions described in Paragraph 27 above. Further, that none of them have or do initiate abnormal cuts in the prevailing Detroit dealer tank wagon price of gasoline, nor initiate offers of other concessions to their retail reseller customers and reduce their tank wagon price only when forced to meet, or partially meet, competitive prices in order to preserve and protect their business and retain their customers.

42.

Respondent alleges that said four dealers when engaged in any direct retail operations and sales of gasoline in which they may from time to time have engaged, or do engage, in Detroit, as well as all retail resellers to whom said four dealers may from time to time sell gasoline in Detroit, are confronted with the competitive conditions in the retail field described in Paragraph 27 above. Further, that neither said four dealers in their retail operations, nor their retail reseller customers, have ever initiated abnormal cuts in price below the prevailing service 46 station price of gasoline in Detroit, nor initiated the offer of premiums or employed other devices to give price advantages to the consuming public, but have from time to time been forced by other retail dealers to temporarily lower prices to meet, or partially meet, lower competitive prices; that as a rule such competitive prices have been only partially met in the first instance and often never completely met, and were completely met only when the force of the competitive pressure exerted by other retail resellers compelled such action as a defensive measure to preserve and retain the retail business had by said four dealers in their direct retail operations, and had by their retail reseller customers. Further, that the retail reseller customers of said four dealers always have been, and are, at liberty to exercise their own judgment and discretion as to what extent, if at all, they will meet competitive prices.

43.

Respondent alleges that the combined volume of gasoline purchased from Respondent directly by retail resellers at the prices charged by Respondent, and sold at retail, and that sold by Respondent to said four dealers at the prices charged by Respondent, and by them sold at retail or to retail reseller customers, is so small compared
47 to the total volume of gasoline sold at retail in Detroit, as to have no appreciable effect upon or substantially influence commerce and competition in gasoline in Detroit.

44.

Respondent alleges that for many years last past and since June 19, 1936, and at the present time, there have been, and are, numerous service stations scattered throughout Detroit which have and do sell gasoline of a grade and quality represented to be comparable to that sold by Respondent, at prices consistently lower, all of the time, by a range of from approximately one cent (1¢) to five cents (5c) per gallon, than the generally prevailing service station price in Detroit, and thus lower to said extent than are the prevailing service station prices maintained in Detroit by:

A. that class of retail reseller customers of Respondent described in Paragraph Two Complaint, who do in fact generally maintain the normally prevailing service station price;

B. said four dealers in their direct retail sales
48 when they are from time to time engaged therein;

C. the retail reseller customers of said four dealers.

Further, that the number of said low price service stations above referred to, and the volume of gasoline sold by them has been, and is, consistently increasing and is a substantial amount in the total volume of gasoline sold at retail in Detroit. Further, that the prices at which said low price service stations sell gasoline at retail to the consuming public is from time to time substantially below the cost of gasoline to said four dealers at the prices for which they buy the same from Respondent.

45.

Respondent alleges that neither the price differentials accorded said four dealers, nor the extent thereof, nor the use made of said differentials by said four dealers, or any of them, has been, or is, or may be, to injure, destroy or prevent competition with said four dealers nor with any of them, nor with their retail reseller customers, nor at all, in the resale of gasoline, and that neither the granting of said differentials to said four dealers, nor the effect thereof, nor the use made thereof, is in violation of Section 2 (a) of the Clayton Act as amended and is not unlawful thereunder or under any law.

49

46.

Respondent alleges by way of explanation that the term "dealer" as commonly and ordinarily used in the oil industry in Detroit and elsewhere in the United States, refers to and means a retail reseller of gasoline who retails such gasoline directly to the public from a service station or other retail gasoline outlet, and does not refer to the type of wholesale or jobber buyer of gasoline named in Paragraph Three Complaint, which latter type of buyer purchases gasoline in wholesale tank car lots and distributes the same from his bulk storage to retail resellers or commercial consumers, or to other outlets. The term "dealer" has been used interchangeably in the Complaint herein, and such terminology has been adopted in this Answer purely as a matter of convenience.

47.

Respondent asserts as its intention herein that all of the allegations of this Answer in all of its parts, shall be regarded as allegations in and respect of every defense, explanation and justification herein set forth, whether separately numbered or not, and hereby by reference re-alleges all of said allegations of this Answer as a part of, and in respect of, each of said defenses, explanations and justifications.

50 48.

Respondent specifically denies that it has violated Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act (U. S. C. Title 15, Sec. 13) or any part thereof, or any other law, by any act or acts alleged in the Complaint or set forth in this Answer.

49.

Respondent alleges that, if Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act (U. S. C. Title 15, Sec. 13), or any other law, shall be so interpreted, construed or applied by the Federal Trade Commission or any other administrative, quasijudicial or judicial tribunal, in such manner or form as to result in an order, judgment, ruling or holding that the acts of Respondent alleged in the Complaint and set forth in this Answer, are unlawful or violative of said law, or any other law, that such interpretation, construction or application renders said law, or laws, invalid, void and unconstitutional and an unwarranted and unlawful invasion and denial of the statutory and constitutional rights of this Respondent, and renders any such order, judgment, ruling, or holding void and of no force or effect.

51 Wherefore Respondent respectfully prays that this action, and the Complaint against Respondent herein, be dismissed, and that Respondent go hence.

Dated at Chicago, Illinois, this 14th day of January, 1941.

H. R. Hanley,
Attorney-at-Law for Respondent,
Standard Oil Company (Indiana)
Office and Post Office Address:
910 South Michigan Avenue
Chicago, Illinois.

52 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D.C., on the 25th day of February, A. D., 1941.

Commissioners:

Charles H. March, Chairman
Garland S. Ferguson
Ewin L. Davis
William A. Ayres
Robert E. Freer

• • (Caption—4389) • •

ORDER APPOINTING TRIAL EXAMINER AND FIXING TIME AND PLACE FOR TAKING TESTIMONY.

This matter being at issue and ready for the taking of testimony, and pursuant to authority vested in the Federal Trade Commission, under Acts of Congress (38 Stat. 717; 15 U. S. C. A., Section 41) and (49 Stat. 1526, U. S. C. A., Section 13, as amended).

It Is Ordered that Webster Ballinger, a trial examiner of this Commission, be and he hereby is designated and appointed to take testimony and receive evidence in this proceeding and to perform all other duties authorized by law;

It Is Further Ordered that the taking of testimony in this proceeding begin on Monday, March 10, 1941, at ten o'clock in the forenoon of that day (eastern standard time), in Room 859, Federal Building, Detroit, Michigan.

Upon completion of testimony for the Federal Trade Commission, the trial examiner is directed to proceed immediately to take testimony and evidence on behalf of the respondent. The trial examiner will then close the case and make his report upon the evidence.

By the Commission:

Otis B. Johnson,
Secretary.

53 BEFORE FEDERAL TRADE COMMISSION.

(Caption—4389).

MOTION TO AMEND COMPLAINT.

Now comes counsel for the Federal Trade Commission and moves the Commission that the complaint in the above entitled proceeding be amended to conform to the evidence heretofore adduced in the record of said proceeding, as follows:

1. By striking out all of Paragraph Three of said complaint, and inserting in place thereof the following paragraph:

Paragraph Three: Since June 19, 1936, in the course and conduct of its business above described, respondent has sold, and now sells, its gasoline to four Detroit dealers engaged in reselling said gasoline at retail, at prices substantially lower than the prices charged by respondent to its other Detroit retailer purchasers for gasoline of the same grade and quality. Said four dealers are: Citrin-Kolb Oil Company; Stikeman Oil Company, Inc.; Wayne Oil Company; and Ned's Auto Supply Company. Each of said dealers has, since said date, owned or operated in the Detroit area one or more gasoline stations where said gasoline so purchased has been resold (and, except as to Stikeman Oil Company, Inc., is now resold) at retail to consumers thereof, in competition with other retailers of gasoline purchasing the same from respondent or from other manufacturers. Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., and Wayne Oil Company, re-
54 spectively, are also engaged in the business of reselling, at wholesale, a large part of the gasoline so purchased by them from respondent, to other gasoline dealers in the Detroit area who are likewise competitively engaged in the resale thereof at retail. Said three named wholesalers have knowingly received the benefit of said lower prices. The prices at which respondent has sold its gasoline to the four dealers above named, from time to time since June 19, 1936, have ranged from one-half cent to one and three-quarters cents per gallon lower than the prices charged by it to other Detroit retailers for the same gasoline. Under normal merchandising conditions, during the greater part of that period, respondent's price to said

four dealers for its "Red Crown" gasoline (its largest selling brand) has been one and one-half cents below its price therefor to other retailers.

2. By inserting in Paragraph Four of said complaint, after the comma in the third line of said paragraph, the words "and with their respective customers", so that said paragraph will read as follows:

Paragraph Four: The effect of the discrimination in price described in the preceding paragraph hereof has been and may be to injure, destroy and prevent competition with each of the four dealers named in said paragraph, and with their respective customers, in the resale of gasoline.

And counsel for the Commission further moves that the testimony heretofore taken in support of the allegations of the complaint be adopted and considered as testimony in support of the allegations of the complaint as amended upon this motion.

Respectfully submitted,
Cyrus B. Austin,
Trial Attorney.

Approved:
W. T. Kelley, *Chief Counsel.*

April 9, 1941.

Service by copy admitted Apr. 7, 1941.

H. R. Hanley,
Atty. for Res.

55 (Letterhead of Standard Oil Company [Indiana])
910 South Michigan Avenue,

Chicago, Ill., April 14, 1941.

Federal Trade Commission
Washington, D. C.

Attention: Mr. Cyrus B. Austin, Trial Attorney.

Dear Mr. Austin:

Re: Standard Oil Company, Docket No. 4389.

Supplementing our oral conversation of last week, relative to your letter of April 4th, 1941, enclosing copy of your motion to amend complaint, which I received April 7th just before leaving for Washington:

You expressed a wish that I write you in connection with the position which I expect to take in connection with your proposed amendment.

Upon your theory of the case, and in line with proof which you have adduced in support of that theory, it seems to me that you are technically entitled to make and have favorably regarded a motion to amend along the lines indicated by you, so I would not care to resist the motion on that score. Furthermore, there is no sufficient element of surprise in the amendment to require that I have additional time in proceeding with our case, and consequently would not care to ask for further time or create any delays by virtue of the amendment, if the Commission allows it.

I do wish to preserve the general objection which I have already made to the type of proof to which you are now seeking to conform the complaint. I rather have the impression from you and from Judge Ballinger that it is perhaps unnecessary for me to preserve my record by making any further objection to the amendment to the complaint, inasmuch as that objection repeatedly appears
56 to the evidence and Judge Ballinger has assured that it will be understood to be taken to all of the evidence so that Respondent's theory will be fully preserved.

However, I think that it is the proper procedure, in any event, to make the objection to the amendment, so that it will be a matter of record there, as well as to advise the Commission of the Respondent's position,—and I understood from you that that was one purpose you had in requesting that I write a letter.

Consequently, I wish to advise that the Respondent does object to the allowance of the motion to amend for all of the reasons set up from time to time in the various general and specific objections made by Respondent to the reception of evidence which goes to the disposition of gasoline in the hands of someone to whom Respondent may have sold gasoline and after it has been sold and has become the absolute property of the customer who purchased from Respondent. It is in connection with this subsequent disposition of the gasoline that your amendment goes exclusively, and I am sure you are well aware of the position which the Respondent has urged and will continue to urge throughout this litigation and as the Respondent has fully set up in what has been denominated Defense No. II in the Answer as well as elsewhere at various places in the answer.

I assume we may by stipulation enter on the record the fact that this objection is preserved for the Respondent and may be considered on the whole case by the Commission at the close of the case, if the Commission desires to allow the amendment.

So far as I am aware at this time, I do not think there is occasion for filing any additional answer, in event your amendment be allowed. I assume that you would be willing to stipulate that our original answer might be regarded as an answer to the amended complaint. I am not familiar with the mechanics of the procedure in that I do not know whether it is required that you file a formal amended complaint and that Respondent then file a formal answer thereto. If this is the settled procedure, of course we will conform. If it is a matter within the control of counsel, I would be perfectly willing to stipulate that you need
not formally file an amended complaint, and that our
57 answer would apply to your original complaint as
amended, in line with your motion, if the Commission allows it.

With best personal regards and good wishes, I am

Sincerely yours,

H. R. Hanley.

Harold R. Hanley/w

58 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 23rd day of April, A. D. 1941.

Commissioners:

Charles H. March, Chairman,
Garland S. Ferguson,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer.

* * (Caption—4389) * *

ORDER AMENDING COMPLAINT.

This matter coming on to be heard by the Commission upon the motion of counsel for the Commission for an order amending the complaint in the above-entitled proceeding to conform to the evidence adduced in the record of said proceeding and adopting the testimony heretofore taken in support of the allegations of said complaint as testimony in support of the complaint as so amended, and upon the testimony and other evidence heretofore taken in said proceeding before Webster Ballinger, an Examiner of the Commission duly designated by it, and upon hearing Cyrus B. Austin, Esq., counsel for the Commission, in support of said motion, and counsel for the respondent having notified the Commission, by letter of April 14, 1941, that he does not oppose said motion and that, if said motion is granted, the answer filed by respondent to the original complaint herein may be received and adopted as respondent's answer to the complaint as so amended, and the Commission having duly considered said motion and being now fully advised in the premises;

59 It Is Ordered that the complaint herein be and the same hereby is, amended:

1. By striking out all of Paragraph Three of said complaint, and inserting in place thereof the following paragraph:

Paragraph Three: Since June 19, 1936, in the course and conduct of its business above described, respondent

has sold, and now sells, its gasoline to four Detroit dealers engaged in reselling said gasoline at retail, at prices substantially lower than the prices charged by respondent to its other Detroit retailer purchasers for gasoline of the same grade and quality. Said four dealers are: Citrin-Kolb Oil Company; Stikeman Oil Company, Inc.; Wayne Oil Company; and Ned's Auto Supply Company. Each of said dealers has, since said date, owned or operated in the Detroit area one or more gasoline stations where said gasoline so purchased has been resold (and, except as to Stikeman Oil Company, Inc., is now resold) at retail to consumers thereof, in competition with other retailers of gasoline purchasing the same from respondent or from other manufacturers. Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., and Wayne Oil Company, respectively, are also engaged in the business of reselling at wholesale, a large part of the gasoline so purchased by them from respondent, to other gasoline dealers in the Detroit area who are likewise competitively engaged in the resale thereof at retail. Said three named wholesalers have knowingly received the benefit of said lower prices. The prices at which respondent has sold its gasoline to the four dealers above named, from time to time since June 19, 1936, have ranged from one-half cent to one and three-quarters cents per gallon lower than the price charged by it to other Detroit retailers for the same gasoline. Under
normal merchandising conditions, during the greater
60 part of that period, respondent's price to said four
dealers for its "Red Crown" gasoline (its largest selling brand) has been one and one-half cents below its price therefor to other retailers.

2. By inserting in Paragraph Four of said complaint, after the comma in the third line of said paragraph, the words "and with their respective customers", so that said paragraph will read as follows:

Paragraph Four: The effect of the discrimination in price described in the preceding paragraph hereof has been and may be to injure, destroy and prevent competition with each of the four dealers named in said Paragraph, and with their respective customers, in the resale of gasoline.

It Is Further Ordered that the testimony and other evidence hereinbefore taken before Webster Ballinger, an Examiner of the Commission duly designated by it, in support of the allegations of the complaint as originally drawn and in opposition thereto, be, and the same hereby is, adopted and considered as having been taken in support of the allegations of the complaint as hereby amended; and

It Is Further Ordered that the answer to the original complaint herein, heretofore filed by the respondent, be, and the same hereby is, received and adopted as respondent's answer to the complaint as hereby amended.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

114 Before Federal Trade Commission.

* * (Caption—4389) * *

MOTION TO DISMISS COMPLAINT.

Comes now the Respondent, Standard Oil Company, an Indiana corporation, and moves the Honorable Federal Trade Commission to enter its order herein dismissing the complaint herein, and each and every count and paragraph thereof, on the following grounds, and for the following reasons, to-wit:

1. That, as appears from the record, the transactions complained of in said complaint constitute trans-
115 actions in intrastate commerce and are, for that reason, not within the jurisdiction of this Commission, as conferred by the so-called Clayton Act (38 Stat. 730; 15 U. S. C. A. 12 to 27, inclusive) as amended by the so-called Robinson-Patman Act (49 Stat. 1526-8; 15 U. S. C. A. 13, 13a and 13b), and the so-called Federal Trade Commission Act (38 Stat. 717; 15 U. S. C. A. 41 to 58, inclusive; 52 Stat. 111 to 117, inclusive).

2. That the complaint herein, and the record made thereunder, fail to state or establish that, as a matter of law, Respondent's trade and marketing practices, as herein complained of, are contrary to the provisions of any of the Federal Statutes referred to in Paragraph 1 hereof, or otherwise, or at all.

3. That the trade and marketing practices against which the complaint herein was issued, as appears
116 from the record, are widespread throughout the entire petroleum industry, and, in fact, throughout all industry; wherefore, the said complaint should be dismissed

and a Trade Practice Conference instituted in lieu of this proceeding.

4. That the so-called "Emergency Price Control Act of 1942", approved by the President on January 30, 1942, and known and designated as Public Act 421, Seventy-Seventh Congress, Chapter 26 (Second Session) in Section 205 (subparagraph (d)) provides, inter alia, as follows:

"No person shall be held liable for damages or penalties in any Federal, State or Territorial Court on any grounds for or in respect of anything done or omitted to be done
in good faith pursuant to any provision of this Act, or
117 any regulation, order, price schedule, "requirement
or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration, or of the Administration of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement or agreement may be modified, rescinded or determined to be invalid * * *."

That, under and by virtue of said statute, which in operation and effect has superseded the statutes referred to in Paragraph 1 hereof, the prices at which Respondent may sell gasoline to Ned's Auto Supply Company, Wayne Oil Company, Stikeman Oil Company and Citrin-Kelb Oil Company in Detroit, have become fixed and unalterable
except under and by virtue of said Emergency Price
118 Control Act of 1942; and that any voluntary change
in prices upon the sale of gasoline, except a further reduction thereof, to said customers on the part of Respondent, or any change therein that might ensue as the result of any cease and desist order that might be issued by the Honorable Federal Trade Commission in this proceeding, would be in derogation of and a violation of said Emergency Price Control Act of 1942 and of the orders of Office of Price Administration promulgated thereunder; wherefore, by operation of law, this proceeding is without authority of law, has become moot and cannot lawfully be further maintained, and no orders herein can be issued nor enforced except an order dismissing the complaint.

(This is a renewal of Respondent's motion as interposed before the Trial Examiner on February 16, 1942 (Record, pp. 4792-4800, inclusive), and which the Trial Examiner
denied on the ground that the motion was one ad-
119 dressed to the sound discretion of the Commission and
one over which the Trial Examiner had no jurisdic-

tion nor power to rule upon, other than to deny. (Record, p. 4800.))

5. That, as appears from the record, this proceeding is not prosecuted in the public interest but is in furtherance of the interest of a so-called pressure group, which instigated the same, whose avowed purpose is to stifle, injure, prevent and destroy, instead of to foster and promote competition, and to increase instead of lower the selling price of gasoline to the public.

6. That, as appears from the record, said complaint should be dismissed as to any and all allegations made therein with reference to Respondent's trade practices with relation to Stikeman Oil Company, for the reason that no testimony was adduced, nor attempted to be adduced, to establish, or even tending to establish, that
120 the transactions of Respondent with Stikeman Oil
Company constitute, or ever constituted, a violation of any of the statutes referred to in Paragraph 1 hereof.

7. That, as appears from the record, said complaint should be dismissed as to any and all allegations made therein with reference to Respondent's trade practices with relation to Wayne Oil Company, for the reason that no testimony was adduced, nor attempted to be adduced, to establish, or even tending to establish, that the transactions of Respondent with Wayne Oil Company constitute, or ever constituted, a violation of any of the statutes referred to in Paragraph 1 hereof.

8. That, as appears from the record, upon the undisputed evidence, the lower prices charged by Respondent upon the sale of gasoline to Stikeman Oil Company, Wayne Oil Company, Ned's Auto Supply Company, and Citrin-Kolb Oil Company, in carload quantities, was,
121 at all times, done in good faith to meet an equally
low or lower price of a competitor.

9. That, as appears from the record, the lower prices now and at any time charged by Respondent upon the sale and delivery of gasoline to Stikeman Oil Company, Wayne Oil Company, Ned's Auto Supply Company, and Citrin-Kolb Oil Company in carload quantities, involved, at all times, differentials in prices which make only due allowance for differences in the cost of manufacture, sale and delivery resulting from the differing method and quantity in which said gasoline was and is to such purchasers sold and delivered.

10. That, as appears from the record, the effect of the differential or discrimination in price charged upon the

sale and delivery of gasoline by Respondent, as between so-called tank wagon customers and so-called tank car or truck train customers, was at all times such as not to lessen competition, substantially or at all, nor to tend to create a monopoly in the gasoline business, nor to
122 injure or destroy or prevent competition with any person, firm or corporation whatsoever, nor with customers of either such person or persons, firm or firms, corporation or corporations, or of Respondent or anyone.

11. That, as appears from the record, the testimony adduced by the Attorney for the Commission wholly failed to establish a prima facie case against Respondent; and, in particular, that such testimony did not overcome nor in any manner affect the assertion and existence of right nor the legal presumption of right in Respondent to select its own customers in bona fide transactions and not in restraint of trade, and its right to functionally classify its own customers, and to grant price differentials based upon such functional differences and classifications.

The above motion is based upon the complaint and other pleadings, records and files herein, and upon the official
123 record of proceedings and testimony, and upon the exhibits offered for and on behalf of both the Commission and Respondent, and received in evidence.

The above motion is made upon the ground that, as a matter of law, based upon such complaint, pleadings, records, files, records of proceedings, testimony and exhibits received in evidence, Respondent is entitled to the entry of an order by the Commission dismissing said complaint.

Permission is respectfully requested by Respondent for oral argument and presentation of the foregoing motion.

Respectfully submitted,

H. R. Hanley
Office and Postoffice Address:
910 South Michigan Avenue
Chicago, Illinois
Arthur J. Abbott
Of the Firm of
MacMahon, Abbott & Roberts
Detroit, Michigan
Attorneys for Respondent.

Dated: September 22, 1942
910 South Michigan Avenue
Chicago, Illinois

125 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—4389) * *

MOTION TO FEDERAL TRADE COMMISSION TO STRIKE PORTIONS OF THE RECORD.

Comes now the Respondent, Standard Oil Company, an Indiana corporation, and moves the Honorable Federal Trade Commission to strike from the record in this cause the following portions thereof, to-wit:

1. The testimony of the Commission's witness, Herbert F. Taggart (Record, pp. 992-1290, inclusive); also Commission's Exhibits Nos. 75-A, 75-B, 75-C, and 76 126 offered and received in evidence in connection with the testimony of said witness.

This motion is made on all the grounds, and for all the reasons, as stated on the record. (Record, pp. 1016-1021 and 1297-1308, inclusive). (Objection Record, pp. 1016-1021 inclusive). The Trial Examiner denied the motion of Respondent to strike the Taggart testimony and Exhibits No. 75-A, 75-B, 75-C and 76. (Record, p. 1317).

2. The testimony of the Commission's witness, Charles Evan Feinberg, as the same appears at pp. 5202 to 5275, inclusive, of the Record, and also Exhibit 112-A, B, C and D offered and received in evidence in connection with said testimony.

This motion is made on all the grounds, and for all the reasons, as stated on the record at the pages thereof above referred to.

3. The offer of proof made by the Attorney for the Commission at pp. 985 and 986 of the Record.

127 In this offer, the attorney for the Commission stated, in effect, that he had talked to certain wholly unidentified persons who might be called as witnesses and who, if so called, would testify substantially the same as certain witnesses who had already testified.

The Trial Examiner denied a motion interposed by Respondent to strike said offer of proof from the record. (Record, p. 988).

4. The testimony of the Commission's witness, Irving B. Dworman, from p. 5343 to 5345, inclusive, of the record. Objections were interposed to this testimony at the

time it was offered in evidence (Record, p. 5343) (Record, p. 5435), and the objections were overruled by the Trial Examiner. This motion is made on, but not limited to, the same grounds as were stated in the objections.

5. The following statements of the Trial Examiner, wherein it was sought to comment and pass upon the
128 sufficiency of Respondent's testimony:

(a) Statements of the Trial Examiner as to competitive offer made to Citrin-Kolb Oil Company by Hickok Oil Company in 1930. (Record, pp. 2093-2102, inclusive).

(b) Statements of the Trial Examiner in referring to a competitive offer made to Citrin-Kolb Oil Company by Texas Company that the same was "nothing but a proposal". (Record, p. 2243). See also pp. 2162-2163 of the Record relative to references by Examiner to offers being "merely tentative".

The above motion is based upon the records and files herein, and upon the official record of proceedings and testimony; and is made upon the general ground (in addition to the specific grounds above stated) that the portions of the record hereby sought to be stricken are irrelevant, incompetent and immaterial, and should not be considered by the Commission as a part of the evidence.

129 Permission is respectfully requested by Respondent for oral argument and presentation of the foregoing motion.

Respectfully submitted,
H. R. Hanley,
Office and Postoffice Address:
910 South Michigan Avenue,
Chicago, Illinois

Arthur J. Abbott, by H. R. H.,
Of the Firm of MacMahon, Abbott & Roberts, 2230 Buhl Building, Detroit, Michigan
Attorneys for Respondent.

Dated: September 22, 1942.

910 South Michigan Avenue,
Chicago, Illinois.

131 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—4389) * *

MOTION OF RESPONDENT STANDARD OIL COMPANY (INDIANA) TO FEDERAL TRADE COMMISSION TO AMPLIFY RECORD.

Comes now the Respondent, Standard Oil Company, an Indiana corporation, and moves the Honorable Federal Trade Commission to enter its order amplifying the record in this cause, by including therein all testimony, oral and documentary, which was offered in evidence by Respondent, and which was excluded at the several hearings of this cause by Hon. Webster Ballinger, Trial Examiner, and, in particular, but not limited to, the following described
132 testimony and exhibits, to-wit:

1. The testimony of John C. Marshall, insofar as the same was excluded by the Trial Examiner, as the same appears in the Record at pages 1712 to 1840, inclusive, and excluded exhibit offered in connection with the testimony of the said John C. Marshall, as follows:

A. Exhibit 23 for Identification (Record, pp. 1783-1788 inclusive). (Copy attached)

2. The testimony of Elmer E. Ledbetter, bearing upon distribution costs of Wayne Oil Company in the sale of gasoline, insofar as the same was stricken and excluded from the Record by the Trial Examiner, as the same appears in the Record, at pages 1570 to 1616, inclusive, and pages 1841 to 2058, inclusive, and particularly as referred to in the motion of Cyrus B. Austin, Attorney for the Commission to strike the same from the Record, as appears at pages 2038 to 2050 of the Record.

3. A. The testimony of Elmer E. Ledbetter, bear-
133 ing upon the claim of competitive offers made by competitors of Respondent to Wayne Oil Company, insofar as the same was stricken and excluded from the Record by the Trial Examiner, as the same appears in the Record at pages 1570 to 1616, inclusive, and pages 1841 to 2058, inclusive, and particularly as referred to in the motion to strike the same from the Record (which motion was interposed by the Trial Examiner sua sponte), as appears at pages 2050 to 2058 of the Record.

B. Excluded testimony of Jacob A. Citrin, relating to any competitive offer received by Citrin-Kolb Oil Company from Hickok Oil Company, of Toledo, Ohio (Record, pp. 2193-2207). The testimony involved in the Trial Examiner's order of exclusion is at pages 2088 to 2102, inclusive, of the Record.

This testimony, it is respectfully submitted, was competent as evidence of a bona fide competitive offer received by Citrin-Kolb Oil Company from a competitor of Respondent, and, therefore, should not have been stricken from the Record by the Trial Examiner.

134 4. A. Excluded Respondent's Exhibit 102 for Identification (copy attached), the offer of which in evidence was rejected by the Trial Examiner. (Record, p. 4823; Record p. 5694).

B. Stricken testimony of B. S. Kott (Record, pp. 4801-4845); Elmer E. Ledbetter (Record, pp. 5398-5420); Max Biber (Record, pp. 5420-5429), and Page 34 of Respondent's Exhibit 100, commencing with the paragraph reading: "The Respondent's supplying company secures a reciprocal advertising advantage from jobbers, et cetera"; also the remainder of Page 34, and all of Page 35, all of Page 36, down to and including the first paragraph thereof, ending on that page, and all of Page 37, (copy attached); said pages as referred to above being all parts of Respondent's Exhibit 100.

(See the following parts of the record for proceedings relating to the striking of said testimony and documentary proof. (Record, pp. 5703, 5724, 5725, and 5726 to 5742, inclusive.)

135 C. Excluded Respondent's Exhibit 104-A, B, C, D, E, F, G, H for Identification (copy attached), being an itemized tabulation of advertising costs of Wayne Oil Company for the calendar year 1940, offered in evidence in connection with the testimony of Elmer E. Ledbetter (Record, pp. 5398 to 5420, inclusive), and excluded by the Trial Examiner. (Record, p. 5420). (Record, p. 5695).

D. Excluded Respondent's Exhibits 105-A, 105-B and 105-C, for Identification (copies attached), being an itemized tabulation of advertising costs of Citrin-Kolb Oil Company for the calendar year 1940, offered in evidence in connection with the testimony of Max Biber (Record, pp. 5420 to 5429, inclusive), and excluded by the Trial Examiner. (Record, p. 5428). (Record, p. 5696).

E. Excluded Respondent's Exhibits 106-A, 106-B, 107-A, 107-B and 108 for Identification (copies attached), being offers of proof as to itemized advertising costs of Ned's 136 Auto Supply Company, Wayne Oil Company and Citrin-Kolb Oil Company for the calendar year 1940, sought to be included in the Record both as oral offers of proof and as exhibits and rejected by the Trial Examiner both as exhibits and as offers of proof. (Record, p. 5702).

5. A. Respondent's Exhibits Nos. 18-A to 18-Z—51, inclusive, for Identification.

These exhibits consist of photographs or photostats, cards, advertisements, letters; literature and purchase receipts showing price signs and sale prices of gasoline at gasoline filling stations in Detroit in and about the vicinity of the five (5) Citrin-Kolb Oil Company service stations, which were referred to in the testimony of Commission's witnesses, with reference to the complaints of nearby gasoline filling station operators who testified as to the alleged price-cutting practices of these Citrin-Kolb stations,—principally in 1937 and 1938. (Record, p. 1431-A)

137 The locations of the five (5) Citrin-Kolb stations above mentioned are as follows:

(a) East Jefferson at Nottingham
(b) Dexter at West Chicago Boulevard
(c) John R at Euclid
(d) Linwood Avenue at Detroit Terminal Railroad
(e). Linwood Avenue at Pingree (Record, p. 1431-A)

The exhibits in question, consisting of the material above referred to, present a pictorial survey of the competitive situation surrounding these five (5) Citrin-Kolb service stations to the date of the examination of the witness, Max Biber. (Record, p. 1432.)

The Trial Examiner ruled that no competitive situations might be shown, to rebut the claim that the trade practices of Respondent had the effect of injuring, destroying or preventing competition, unless the evidence related to competitive situations or acts committed after a reasonable time prior to June 19, 1936 (being the effective 138 date of the Robinson-Patman Act). (Record, p. 2798.)

The Trial Examiner, while stating that he would not care to lay down any hard and fast rule as to what constitutes such "reasonable time", stated that a year before June 19, 1936 might be so considered. (Record, p. 2799.)

The photographs and photostats of gasoline filling stations included in this exhibit,—at least most of them,—contained typewritten notations and computations showing to what extent the station portrayed by the individual exhibits cut their price on gasoline below the then prevailing market price. (Record, p. 2808.) The meaning of the words "prevailing market price" appearing on these exhibits was explained by the witness, Max Biber. (Record, p. 2808.) Documentary evidence as to what actually was the prevailing market price on the various grades of gasoline at all times covered by the exhibits was introduced and received in connection with the examination of the witness, Paul A. Raupagh. (Exhibit 60-A, B, C, D.)

139 The attorney for the Commission objected to the reception of these exhibits (18-A to 18-Z-51) in evidence unless the typewritten notations and computations appearing thereon were, in all cases, deleted. This objection was sustained by the Trial Examiner, (Record, pp. 2838-2845) (Record, p. 2847), with the explanation, however, that the matter of deletion of the typewritten matter on the exhibits might be presented to the Commission for review of the Trial Examiner's ruling. (Record, p. 2845.) Counsel for Respondent expressly refused to agree to such deletions. (Record, p. 2846.) (Record, p. 2849.)

Later in the proceedings, during the testimony of Max Biber, a motion was made by the Attorney for the Commission to strike from Respondent's Exhibits 18-A to 18-Z-51, inclusive, all notations appearing thereon regarding "prevailing prices" of gasoline. (Record, p. 3061.) This motion the Trial Examiner granted in its entirety (Record, p. 3070), but, later, restricted the ruling so as not to
140 include the years 1940 and 1941. (Record, p. 3071.)

B. Testimony of Respondent's witness, Max Biber, and offers of proof made in connection therewith, excluded, stricken and rejected by the Trial Examiner.

This refers to the testimony and offers of proof appearing in the record, as follows:

Record, pp. 2881, 2882-2885, 2885-2891, 2891-2895, 2895-2896, 2896-2897, 2897-2899, 2900.

This testimony, and offers of proof made in connection therewith, referred to the competitive situations surrounding the five (5) Citrin-Kolb service stations referred to in Paragraph (8), supra, as to which stations there was testimony on the part of witnesses produced by the Commission relative to alleged price-cutting practices, principally in the years 1937 and 1938.

6. A. Excluded testimony of the witness, Charles Gershenson, as to trade practices of Ned's Auto Supply Company in the purchase in carload lots and sale of merchandise such as refrigerators, radios, washing machines, electrical stoves, bycycles, tires and the
141 existing price differentials and savings effected in quantity purchasing of such merchandise direct from the manufacturer; also rejected offer of proof made relative to such trade practices. (Record, pp. 3126 to 3130, inclusive.)

(Inasmuch as the above involves questions propounded to the witness, but not permitted to be answered, by reason of the Trial Examiner's ruling sustaining an objection thereto, it is requested that the Commission provide a means whereby the witness' answer may be taken and included in the record.)

B. Excluded testimony of the Respondent's witness, Charles Gershenson, as to the relation of the retail selling price of gasoline of Ned's Auto Supply Company, compared to the buying price; also as to the reasons for price concessions made by Ned's Auto Supply Company to the public on retail sales of gasoline. (Record, pp. 3152 to 3156, inclusive.)

7. Testimony of Respondent's witness, Jacob A. Citrin, excluded by the Trial Examiner, and appearing in
142 the Record at pp. 2178 to 2180, inclusive.

(Inasmuch as this involves questions propounded to the witness but not permitted to be answered, by reason of the Trial Examiner's ruling sustaining an objection thereto, it is requested that the Commission provide a means whereby the witness' answer may be taken and included in the record.)

8. Excluded exhibits offered in connection with the testimony of Paul A. Raupagh, as follows:

(a) Respondent's Exhibit # 77, A, B & C for Identification

(b) Respondent's Exhibit # 78, A, B & C for Identification

(c) Respondent's Exhibit # 79, A, B & C for Identification

(d) Respondent's Exhibit # 80, A, B & C for Identification

(Copies attached.)

The above mentioned exhibits are referred to in the Record at Pages 3539 to 3542, inclusive, and were rejected as exhibits, as shown on Page 3542 of the Record.

143 (e) Respondent's Exhibit # 78 D for Identification
(f) Respondent's Exhibit # 78 E for Identification
(g) Respondent's Exhibit # 79 D for Identification
(h) Respondent's Exhibit # 80 D for Identification
(Copies attached)

The above mentioned exhibits are referred to in the Record at pages 3622 and 3623 thereof, and were rejected as exhibits, as shown on page 3623.

The purpose of the offer by Respondent of these rejected exhibits in evidence was to show in evidence that this case is not prosecuted in the public interest, nor for the public benefit, and does not result therein. (See Statement accompanying offer of these exhibits in evidence at page 3541 of Record.) The rejected exhibits consist of copies of Retail Gasoline Dealers News, dated September 1940 (Exhibit 77); January 1941 (Exhibit 78); March 1941 (Exhibit 79); and April 1941 (Exhibit 80). This 144 publication is the official organ of Michigan Retail Gasoline Dealers Association. (Record, p. 3636.)

9. Excluded exhibits offered as follows:

(a) Respondent's Exhibits Nos. 81, 82 and 83 for Identification (Record, p. 3669)

(b) Respondent's Exhibits Nos. 84, 85 and 86 for Identification (Record, p. 3674)

(c) Respondent's Exhibits Nos. 87 and 88 for Identification (Record, p. 3677)

(d) Respondent's Exhibits Nos. 89, 90 and 91 for Identification (Record, p. 3678)

The purpose of the offer by Respondent of these rejected exhibits was to show in evidence:

(1) That in prior civil cases and criminal prosecutions sponsored by Michigan Retail Gasoline Dealers Association, against this Respondent, based on alleged violations by Respondent of State anti-discrimination statutes, in its dealings with Ned's Auto Supply Company, Merchants Supply Company, and Citrin-Kolb Oil Company, Respondent has, in each of such cases, prevailed, and 145 that such dealings, being the same as are here challenged, have been held not to be in violation of such statutes and particularly not in violation of Act 282, Public Acts of 1937, being the so-called Michigan Fair Trade Act.

(2) That Act 282, Public Acts of the State of Michigan for 1937, authorizing the making of an "Established Cost Survey" in connection with the operation of gasoline filling stations, and in pursuance of which Exhibits 75-A, 75-B, 75-C and 76 were prepared by Commission's witness, Herbert F. Taggart, and introduced and received in evidence herein, is unconstitutional and void, and that the "Established Cost Survey" authorized thereby is of no probative force nor evidential value.

(3) That the claims of Michigan Retail Gasoline Dealers Association, as set forth in its so-called "Four Point Program" in Respondent's Exhibits No. 77 A, B, C, —78 A, B, C, D, E, —79 A, B, C, D, —and 80 A, B, C and D
for Identification, and particularly with reference to
146 the alleged outcome of such proceedings in the Mich-
igan State courts, civil and criminal, is not justified by Exhibits Nos. 81 to 91, inclusive.

10. Excluded exhibit, being Commission's Exhibit No. 65 for Identification, being a printed copy of Act No. 282, Public Acts of 1937 of the State of Michigan.

This exhibit, originally offered in evidence by the attorney for the Commission and excluded on objection of Respondent, was (Record, p. 3683) offered in evidence by Respondent, and, without objection by the attorney for the Commission, the offer was rejected by the Trial Examiner. (Record, p. 3684.)

The purpose of the offer of Commission's Exhibit No. 65 for Identification by Respondent was to show in evidence the statutory basis for Exhibits 81 to 91 for Identification, inclusive.

The above motion is based upon the complaint and all
other pleadings, records and files herein, and upon
147 the official record of proceedings and testimony and
upon the exhibits offered in evidence for and on behalf of the Respondent.

The above motion is made upon the ground that Respondent is entitled to have the record herein amplified to include all the oral and documentary testimony referred to herein and which was excluded, stricken, rejected or otherwise eliminated from the record by the Trial Examiner, in order that Respondent may fairly and adequately present its defense on the merits.

Permission is respectfully requested by Respondent for oral argument and presentation of the foregoing motion.

Respectfully submitted,
H. R. Hanley
Office and Postoffice Address:
910 South Michigan Avenue
Chicago, Illinois.

Arthur J. Abott, by H. R. H.,
Of the Firm of
MacMahon, Abbott & Roberts
2230 Buhl Building
Detroit, Michigan
Attorneys for Respondent

Dated: September 22, 1942

910 South Michigan Avenue
Chicago, Illinois

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RESPONDENT'S EXHIBIT 23.

DUAL OPERATIONS BY SUPPLYING COMPANIES

Town	(1) Standard Oil				(2) Socony-Vacuum			(3) Texas Co.			(4) Phillips			(5) Shell			(6) Mid-Continent		
		Branded		Unbranded		Branded			Branded			Branded			Branded			Branded	
	Direct	Jobbers	Resellers	Jobbers	Direct	Jobbers	Resellers	Direct	Jobbers	Resellers	Direct	Jobbers	Resellers	Direct	Jobbers	Resellers	Direct	Jobbers	Resellers
Chicago	84.8%	11.0%	1.4%	2.8%	18.3%	39.6%	42.1%	34.8%	24.9%	40.3%	49.7%	44.7%	5.6%	52.6%	—	47.4%			
Fargo	53.0	—	47.0	—	67.0	—	33.0	76.0	—	24.0									
Minneapolis-St. Paul	92.7	—	0.6	6.7	73.4	10.0	7.6	86.5	8.6	4.9	83.1	16.9	—	75.4	20.2%	4.4			
St. Louis	66.9	33.1	—	—	42.3	56.4	1.3	96.8	0.6	2.6	65.5	34.5	—	84.6	15.4	—			
											(7) Gulf (Branded)								
Detroit	81.7	18.3						75.6	11.4	13.0	53.4	17.3	12.0	96.6		3.4			
												(unbranded)							
												17.3	—						
											(4) Phillips			(8) Cities Service					
Milwaukee	92.0	—	—	8.0	85.2	13.2	1.6				56.8	43.2	—	95.3	4.7	—			
Grand Rapids	83.1	15.8	1.1	—				83.3	16.7	—				50.0	50.0	—			
														(9) Continental					
Wichita	97.0	—	3.0	—	54.0	46.0	—	86.0	—	14.0	83.0	17.0	—	53.0	47.0	—			
								(10) Skelly											
Kansas City	51.1	49.6	—	—	55.0	32.0	13.0	58.0	42.0	—	54.0	22.0	—	26.0	74.0	—			
												24.0	—						
												(Unbranded)							
Des Moines	87.4	7.6	5.0	—				72.4	27.6	—	97.6	—	2.4				91.0%	9.0%	—
Sioux City	100.0	—	—	—	83.0	6.0	11.0							48.0	—	52.0	98.7	—	1.3

Compiled by:
J. C. Marshall
4-15-41

149 RESPONDENT'S EXHIBIT 102.

(Letterhead Ned's Auto Supply Co., Detroit, Michigan)

October 30, 1941.

Mr. Paul Raupagh
c/o Standard Oil Company
1011 Fourth Street
Detroit, Michigan

Dear Sir:

Following is an analysis of our advertising expenditures for the calendar year 1940, showing the amount spent in the metropolitan Detroit market:

Newspaper advertising	$66,877.69
Radio	16,280.00
Outdoor Advertising	5,580.00
Magazines, Engravings, Art Work, Telephone Directory	9,208.00
Newspapers	15,903.59
Donations	1,269.00
Theatre and Club Program Advertising	1,401.25
Outdoor Sign Maintenance	617.73
Sales Promotion Material	1,263.31
Total	$118,400.57

An analysis of our sales for the year 1940, shows the following after deducting all Federal and State tax items from gasoline and oil sales:

Store Sales:	Amount	% of Total
Tires and Tubes	$612,333.04	21.1
Automotive Accessories	553,424.22	19.1
Small Home Accessories	370,140.94	12.7
Home Appliances	444,523.00	15.3
Service Station Sales:		
Gas Island	558,649.49	19.3
Lubrication	140,840.24	4.9
Brake Work	176,338.46	6.0
Other Service Items	45,669.33	1.6
Total	$2,901,918.72	100.0%

Total payments of Michigan State Sales Tax for 1940, amounted to $75,756.91, and were included in the above sales figures.

We assure you of our cooperation should you require any additional information.

Very truly yours,
Ned's Auto Supply Co.,
B. S. Kott,
Office Manager.

From Resp. Exh. #100 -

Reciprocal Advertising Benefits

In the foregoing analysis of advertising costs directed to determining the charge against direct shipment business all consumer advertising has remained wholly as a charge against tank wagon and other method business. No part of this should be considered as a charge against jobber or other direct shipment business. The respondent contends that this is the only logical position that can be taken on such charges for the following reasons:

The respondent supplying company secures a reciprocal advertising advantage from jobber distribution which it does not and cannot secure from tank wagon resellers outlets. During 1940 the four Detroit jobbers spent the following quantities on advertising.

	Wayne Oil Co	Cit-in-Kob Oil Co	Sed s Auto Supply	St[illegible]kemar Oil Co	Grand Total
Direct Mail	48.[illegible]5				$ [illegible]
Newspapers	932.35	[illegible]5.40	7,4[illegible]		[illegible]
Posters	8.24	1,290.00	[illegible]		[illegible]
Radio	90.00	-	6,[illegible]80.00	-	[illegible]
Signs	408.90	359.63	62[illegible].75	-	[illegible]
Hand Bills	521.65	43.25	15,905.59	-	[illegible]
Novelties	903.84	325.6[illegible]	-	-	[illegible]
Donations etc	96.02	547.50	[illegible]269.00	-	[illegible]
Paint	459.90	-	-	-	[illegible]
Miscellaneous	552.84	-	[illegible]263.3[illegible]	-	[illegible]
Grand Total	$[illegible]417.19	$3,961.39	$[illegible]8,400.5[illegible]		$[illegible]
Gasoline					
% Realization ?	[illegible]0%	8[illegible].06%	19.35%	-	
Cost	$[illegible],096.45	$3,2[illegible].10	$2[illegible],85[illegible].3[illegible]	-	$2[illegible]
Gallons	2,[illegible]40,671	5,22[illegible],996	[illegible],310,465	-	[illegible]
¢ Gal	13¢	06¢	55¢	-	[illegible]

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(Note: Portion enclosed by black lines is portion stricken -)

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From Resp. Exh. #100

The grand total advertising expenditure for each jobber was extended by the proportion of gasoline realization, excluding tax to total sales. This resulted in actual costing of advertising expenditure to gasoline of $29,150.86 which, when divided by total gasoline volume, results in a per gallon expenditure of .2[illegible]¢.

During this same period total advertising expenditures in the Detroit field tank wagon reseller channel by the Standard Oil Company, including sub accounts:

005 - Salaries - Advertising

033 - Traveling Expense - Advertising

048 - Operation and Maintenance of Vehicles - Advertising

075 - Advertising [illegible] Costs

103 - Depreciation Expense - Vehicles - Advertising

amounted to $131, [illegible] 19¢ per gallon. The per gallon advertising expenditures on the part of the jobbers, therefore, are almost identical with advertising expenditures of the independent company, and since it is obvious that jobbers receive a benefit from our expenditures, we in turn receive a compensating benefit from expenditures by jobbers. While a reciprocal relationship does not exist between the supplying company and the tank wagon reseller outlet.

What advertising expenditure would be incurred in Detroit if it were not for the benefits of this reciprocal advertising on the part of jobbers, of course, is a matter that would have to be

(151 - p.57)

From Resp. Exh. #100

decided by management That an increase would be necessary is quite likely as is indicated by the following chart showing the relationship between advertising expenditures during 1940 and the potential market in each of our various sales fields Notice that according to the potential Detroit and Denver are the fields most under expended of our entire group of sales divisions Because of jobber expenditure and representation in these two fields it is unnecessary for the Standard Oil Company to make the advertising expenditure which otherwise would be required in this market

The Standard Oil Company does not make any advertising allowance to its jobbers Many other large suppliers recognize the advertising value of such distributors by defraying a part of the distributor s advertising expenditures This is not done by the Standard Oil Company although an advertising value is recognized

The amounts of money spent by jobbers advertising is not a matter of contract as the Standard Oil Company exercises no influence over such expenditures Such expenditures are incurred in the daily conduct of their business

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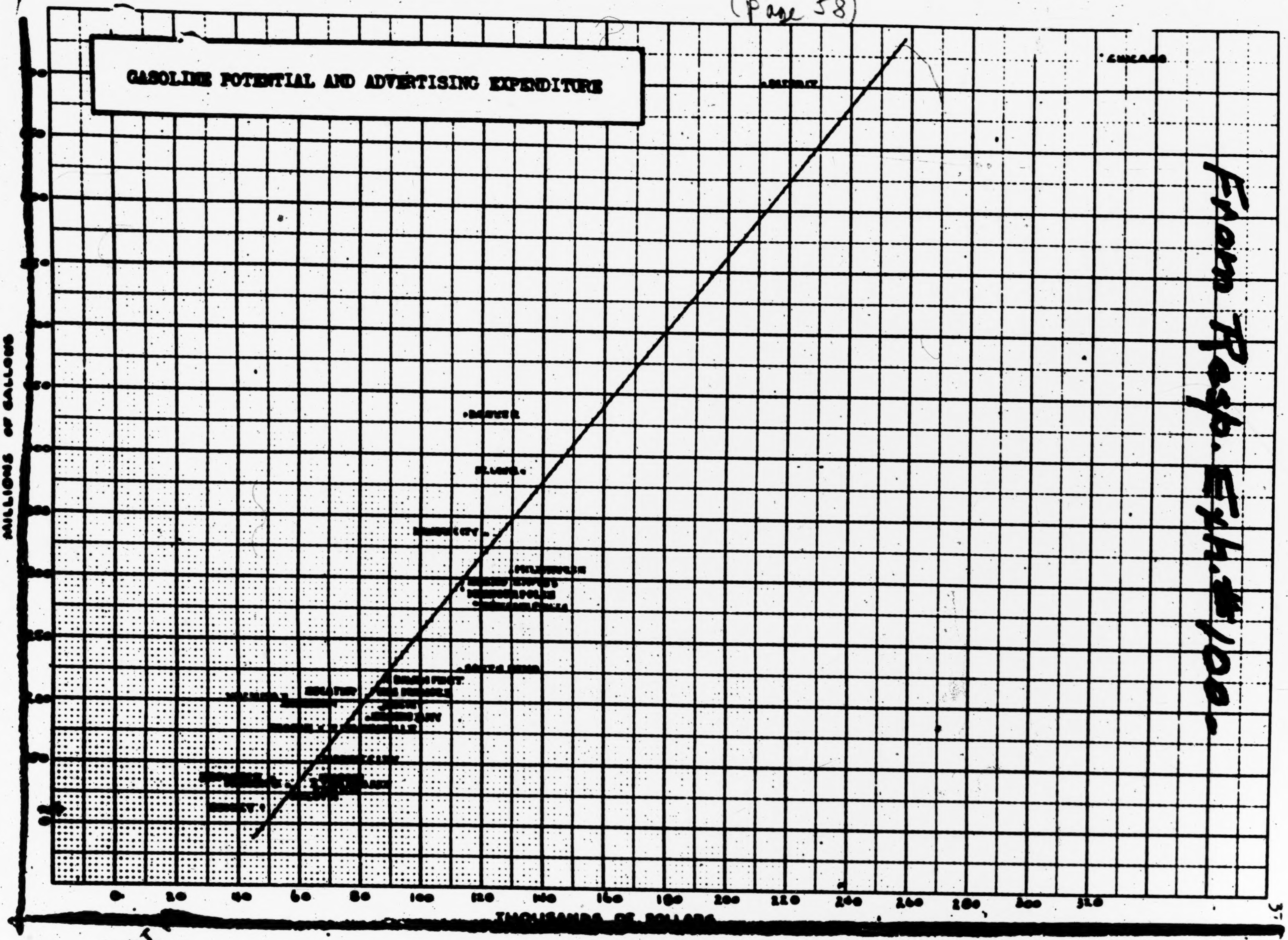

GASOLINE POTENTIAL AND ADVERTISING EXPENDITURE

From Resp. Exh. #100.

RESPONDENT'S EXHIBIT 104A.

ADVERTISING—WAYNE OIL CO. (E. E. Ledbetter)

Detroit, Mich., Nov. 12, 1941.

Supplier	1940	Description	Direct Mail	Newspapers	Posters	Radio	Signs	Handbills	Novelties Calendars	Donations, etc.	Paint	Misc.
Stockwell & Marcuse	1/31	½ page ad. Retail Gas Dealers News		26.00								
Elliott	2/22	Stencils										2.13
DuPont	2/22	1800 Post cards	27.00									
Spray it	3/11	Spray varnish old wrapped tires					7.00					
Elro Strg.	3/13	Cartons for display					2.76					
Dept. Bldg.	3/8	Sign permit					1.00					
Elliott	3/19	Stencils										4.20
Gasoline Retailer	4/6	25 copies of Magazine										1.25
Owl Printing	4/12	2000 Letterhead cards 3000 Blank cards	15.71									
Owl Printing	4/15	2000 cards	9.50									
Elliott	4/24	Stencils										1.06
Quaker State	4/30	Q. S. Shelving Unit					3.00					
Everett Sign	5/1	Repaint signs at Caras Service					6.00					
Fisk	5/6	Tire wrapping paper					6.27					
Elliott	5/1	Stencils										3.35
Fisk	5/24	Curb Sign					12.50					
Elliott	6/11	Stencils										2.14
Richmond & Backus	6/14	4 Rubber stamps	4.94									
Richmond & Backus	6/9	2 Rubber stamps	2.47									
Fisk	6/24	Tire wrapping paper					1.11					
Fisk	6/25	Tire wrapping paper					4.18					
Elliott	6/13	Stencils										2.22
Mich. Repub.	7/1	Magazine								10.00		
Murray Sales	7/1	Material for hanging signs (BR)					3.79					
Direct Adv.	7/12	331 Letters for Ed's Service—Multigraphing-Addressing	9.17									
Owl Printing	7/10	1000 Letterheads 1000 Envelope's—Ed's Service	14.42									
St. Andrews Soc.	7/24	Donation								2.50		
Fisk	7/27	Tire wrapping paper					2.63					

RESPONDENT'S EXHIBIT 104B.

ADVERTISING—WAYNE OIL CO. (E. E. Ledbetter)

Supplier	1940	Description	Direct Mail	Newspaper	Posters	Radio	Signs	Handbills	Novelties Calendars	Donation, etc.	Paint	Misc.
Fish	7/27	Tire Wrapping Paper					23.63					
Elliott	7/29	Stencils										4.23
Owl Printing	8/7	2000 Letterhead cards	10.52									
Horner Wooden Mills	9/5	Blanket Set										10.76
Direct Adv.	9/5	Addressing 1251 post cards	9.85									
Direct Adv.	9/11	Addressing 1251 post cards	9.85									
Direct Adv.	9/13	Addressing 1251 post cards	9.85									
Quaker State	9/17	10-R-60 Display racks					6.00					
Elec. Strg.	9/17	Signs					2.00					
Elec. Strg.	9/16	Weather Campaign kits					10.00					
Elliott	9/17	Stencils										4.22
Quaker State	9/23	Shelving unit					3.00					
Starkwell & Marcuse	9/30	½ page add. Retail Gas Dealers		30.12								
Direct Adv.	9/30	Addressing 2502 cards	19.70									
Owl	10/4	1000 Blank Cards	1.03									
Comm. Art Prod.	10/7	Banner Pennants					4.00					
Direct Adv.	10/9	Addressing 1251 post cards	9.85									
Owl Printing	10/14	2000 Blank Cards	2.06									
Fisk	10/1	Tire Banners					25.00					
Paul Desk	10/21	Handbills						39.91				
Stockwell & Marcuse	10/31	½ page ad Retail Gas Dlrs. News		30.12								
Direct Adv.	11/7	Addressing 1251 post cards	9.85									
Owl Printing	11/7	2000 Letterhead cards	10.82									
Paul Desk	11/9	Neighborhood news handbills						59.50				
Murray Sales	11/15	Material for hanging signs					1.44					
Elliott	11/20	Stencils										.84
Elec. Strg.	11/25	2 Weather Campaign Kits					4.00					
Federal Personnel Assoc.	11/27	Donation for ad								10.00		

RESPONDENT'S EXHIBIT 104C.

ADVERTISING—WAYNE OIL CO. (E. E. Ledbetter)

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Supplier	1940	Description	Direct Mail	News-paper	Posters	Radio	Signs	Hand bills	Novelties Calendars	Dona-tions, etc.	Paint	Misc.
Everett Sign	12/1	Letter truck panels					4.00					
Brown & Biglow	12/1	Knives & Christmas cards							28.81			
Myron Lucher	12/4	Dialists							13.91			
Elliott	12/4	Stencils										1.00
Paul Dask	12/9	Neighborhood News						65.25				
Direct Adv.	12/13	Addressing 1519 Cards	10.40									
Brown & Biglow	12/4								55.14			
Brown & Biglow	12/11								29.36			
Standard Oil	12/20	Candles							115.10			
Brown & Bigelow	12/11								110.01			
Pajot Picture Frame	12/27	Frames for B. R. Rules			8.24							
Detroit Times	12/25	News ad		3.90								
Everett Sign	1/2	Blue Ribbon signs					17.52					
Budney & Co.	1/4	Signs					12.00					
Owl Printing	2/29	2000 Letterhead cards 400 Coldwave cards	18.54									
Natl. Petroleum	4/24	10 copies 5/22 issue		1.08								
Everett Sign	6/1	Letter sign at Reeves					5.00					
Goodyear	7/9	Rotagravure papers		9.72								
Direct Adv.	7/19	Addressing 556 postcards	3.90									
Goodyear	7/23	Mailing cards & papers		3.62								
Direct Adv.	8/21	Addressing 1251 cards	9.85									
Goodyear	9/15	Mailing papers		7.24								
Owl Printing	9/23	3000 postcards size Blanks	4.89									
Standard Oil	11/22	Candles							9.48			
Cine	12/30	200 Telephone No. stickers										.77
Thos. D. Murphy	12/22	Calendars							190.13			
Western Union	1/10	Cold wave reminder	11.19									
Wm. Poster Presser	1/13	Donation								3.00		

RESPONDENT'S EXHIBIT 104D.

ADVERTISING—WAYNE OIL CO. (E. E. Ledbetter)

Supplier*	1940	Description	Direct Mail	Newspaper	Posters	Radio	Signs	Handbills	Novelties Calendars	Donations, etc.	Paint	Misc.
Ledbetter	2/21	Donation								5.00		
Ledbetter	2/23	Donation								5.00		
Metropolitan Club	2/26	Donation								3.00		
Federal Personnel	3/9	Donation for ad								10.00		
Mich. Republican	3/11	Donation								10.00		
Oscar Edwards	3/18	Signs					10.00					
Masonic World	5/11	Donations for ad								10.00		
L. Skotzke	6/10	Gloves for handling Dbn. Inn display										.88
Ed. O'Keefe	6/14	Prize										6.00
Metropolitan Club	6/17	Donation								5.00		
C. B. Hawley	6/20	Prize										4.00
C. R. Allen	6/27	Prize										3.25
Cloutier	8/7	½ cost of tickets										2.06
Direct Adv.	8/10	Typing mailing list	3.00									
Klarr	8/14	Electrical Work Eds										63.55
Al Winter	8/17	Signs					2.15					
Mich. Republican	8/29	Donation for ad								5.00		
Veterans Foreign Wars	9/6	Donation								5.00		
L. Mordrum	11/16	House-to-house canvassing										15.00
Amer. Veterans	11/22	Donation								5.00		
Legion News	11/29	Donation for ad								5.00		
Owl Printing	11/10	1000 Credit Cards										15.97
B. R. Claus	1/10	Signs					12.00					
Petty Cash	1/11	Various small items										.80
	1/17	Calendars							16.50			
B. R. Bal.	1/31	Blue Ribbon Balance										20.08
	2/23	Used tires					1.00					
	2/29	Blue Ribbon Bal.										183.78

RESPONDENT'S EXHIBIT 104E.

Supplier	1940	Description	Direct Mail	News paper	Posters	Radio	Signs	Hand-bills	Novelties Calendars	Donations, etc.	Paint	Misc.
	3/14	Petty Cash										7.30
	3/26	Petty Cash										14.99
	3/30	Blue Ribbon Balance										115.32
	4/3	Petty Cash										17.08
	4/30	Blue Ribbon Balance										245.47
	5/2	Petty Cash										.98
	5/16	Petty Cash										3.30
	5/23	Used Tires					4.10					
	5/30	Blue Ribbon Balance										296.06
	6/3	Petty Cash										8.56
	6/14	Petty Cash										12.77
	6/12	½ 6000 Coupons Cloutier										4.63
	6/25	Petty Cash										15.83
	6/29	Petty Cash										5.54
												(106.49
	6/30	Blue Ribbon Balance										(207.36
	7/13	Field Day Tickets								2.52		
	7/25	½ Cost Coupons Cloutier										4.89
	7/13	Petty Cash										2.59
	7/28	½ Cost Sign Paint									2.00	
	7/31	Blue Ribbon Balance										208.00
	7/31	Loss Night Bus Expend. Eds										163.99
	8/5	Petty Cash										14.24
	8/17	Petty Cash										7.59
	8/24	B. R. Clock West					9.03					
	8/28	½ Cost Coupons Cloutier										2.57
	8/29	B. R. Annual Rept-Fee										2.00
	8/30	B. R. Station Balance										341.19
	9/3	½ Cost Eds. Handbills						2.55				
	9/13	Petty Cash										14.35
	9/13	½ Coupons Cloutier										3.25
	9/45	Meeting Expense										7.36
Goodyear	9/16	Newspaper handbills		18.33								
	9/27	H. Thomas Drawings						8.05				
	9/26	Directory										5.75
	9/30	A. P. Cocky										10.00

RESPONDENT'S EXHIBIT 104F.

ADVERTISING—WAYNE OIL CO. (E. E. Ledbetter)

Supplier	1940	Description	Direct Mail	Newspaper	Posters	Radio	Signs	Handbills	Novelties Calendars	Donations, etc.	Paint	Misc.
Goodyear	9/30	Blue Ribbon Bal.										79.94
	10/16	½ Cost coupons—Cloutier's										3.47
	10/31	Blue Ribbon Bal.										101.50
	11/12	Directory										5.00
	11/20	½ cost coupon—Cloutier										2.32
	11/30	Blue Ribbon Bal.										55.12
	12/16	Calendars							3.28			
	12/18	Directory										10.00
	12/20	Tires to Aaronson										24.20
	12/27	½ cost coupons—Cloutier										2.32
	12/31	Blue Ribbon Bal.										43.00
	12/11	Handbills						1.50				
Surety—Rinsh & Mason	1940	Paint furnished outlets									457.90	
			238.36	130.13	78.24		206.11	176.76	571.72	96.02	459.90	2529.95

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RESPONDENT'S EXHIBIT 104G.

CHART OF BLUE RIBBON BALANCES

(WAYNE OIL CO.—Ledbetter)

Detroit, Nov. 12, 1941

Date	Novelties & Calendars	Direct Mail	Newspaper	Signs	Handbills	Misc.	Description
1/31	20.08						½ cost calendars—Rosedale.
2/29		4.00					Blue Ribbon cards imprinted.
2/29			15.00				½ cost directory adv.—Rosedale
2/29				26.75			½ cost of payment on B. R. Clock
2/29		6.66					2500 B. R. cards imprinted
2/29				26.75			½ payment on B. R. Clock—Zenith
2/29	25.00						1000 aluminum Thimbles—Allen
2/29			16.00				Front cover—Retail Gas Dealers
			3.62				News. Engraving for above.
			60.00				B. R. cuts (4)
3/30					13.00		10 cs clothes pins
3/30					43.75		12000 handbills & 2 stereotypes
3/30					2.06		Rubber bands for hand bills
3/30			56.51				April Retail Gas Dealers News
4/30				33.30			Spray varnish dummy tires
4/30					52.50		15000 handbills
4/30		75.00					Registration lists of license nos.
4/30				7.00			Tire signs
4/30					19.47		14 cases clothes pins
4/30					2.83		11 boxes rubber bands
4/30				4.50			Fisk tire signs
4/30		17.50					Oakland Co. registration list
4/30			33.37				May Gas Dealers News
5/30			26.78				Part payment of Gas Dlrs Ad.
5/30			21.25				Adv. space Briggs' Stadium
5/30			6.00				Cuts for Briggs' Stadium ad.
5/30					5.00		1500 handbills—Hawley
5/30					4.64		Rubber bands
5/30					15.45		12 boxes clothes pins
5/30					6.00		Handbills—Cora.
5/30					19.31		15 cases clothes pins
5/30		23.37					8300 B. R. post cards
5/30	71.76						Human Relations in Business
5/30					11.75		Handbills
5/30					4.64		5 lbs. Rubber bands
5/30					11.75		Handbills
5/30		9.03					B. R. Cards & envelopes
5/30			59.33				June Gas Dealers News
6/30				4.50			B. R. Emblems on Hi-boys
6/30		17.10					Mailing lists Art's & Nelson's
6/30						3.86	Personal calling cards—Mikkola
6/30			46.75				Adv. space Briggs Stadium
6/30				17.86			Galv. sheets B. R. signs
6/30					25.75		20 cases clothes pins
6/30						23.40	Dinner for B. R. members
6/30					56.50		14000 Handbills
6/30			10.00				Card space Public Serv. Empl. Ass'n
6/30					4.64		5 lbs. Rubber bands
6/30	71.76						Human Relations in Business
6/30			29.70				July Retail Gas Dlrs News
6/30				5.03			Bal. dlr Lucas B. R. Clock

161 RESPONDENT'S EXHIBIT 104H.

CHART OF BLUE RIBBON BALANCES—Page 2

Date	Radio	Novelties & Calendars	Direct Mail	News-paper	Signs	Hand-bills	Misc.	Description
7/31					41.00			Painting and building 6 signs
7/31				51.00				Adv. space Briggs Stadium
7/31	90.00							CKLW morning program
				26.00				Aug. Ret. Gas. News
8/30					20.00			8 B. R. Signs
8/30		74.76						Human Relations in Business
8/30				80.75				Adv. space Briggs Stadium
8/30			8.00					3000 B. R. post cards
8/30						24.46		12 cases clothes pins
8/30						16.75		½ cost of handbills
8/30						4.64		5 lbs. rubber bands
8/30				10.00				Adv. space—Safety campaign
8/30				33.07				Sept. Gas Dlr News
8/31		71.76						Human Relations in Business
9/30					4.50			B. R. emblem on Hiboys
9/30				42.50				Adv. space Briggs Stadium
9/30			8.00					3000 B. R. post cards
9/30							1.94	Electrotype of B. R. emblem
9/30			3.50					Mailing list S & W Serv.
9/30			8.00					3000 B. R. post cards
9/30					11.50			4 B. R. signs—Repair
10/31			8.00					3000 B. R. post cards
10/31				93.50				Adv. space Briggs Stadium
11/30				55.12				Dec. Retail Gas Dealers News
12/31			8.00					3000 B. R. post cards
12/31			9.00					3000 white cards B. R. emblem
12/31				26.00				Jan. Retail Gas Dealers News
	90.00	332.12	205.16	802.25	202.69	344.89	29.20	

Grand total $2006.31
2529.95

$4536.26

RESPONDENT'S EXHIBIT 105A.

CITRIN-KOLB OIL COMPANY
ADVERTISING YEAR 1940

Date 1940	Name	News-papers & Magazines	Donations & Mem-berships	Bill-boards	Printing	Novel-ties	Sign Painting	Maintenance of Signs	Depre. Signs	Tel. Dir.	Sign Ins.
1/10	Det. News	$15.60									
1/10	Det. Times	8.10									
1/10	Allied Jew. Camp.		$37.50								
1/10	Los Angeles San.		5.00								
1/10	Cong. B'Nei Mosha		5.00								
1/16	Det. Palestine Lodge		25.00								
1/16	Zebe			$15.00							
2/10	Det. Times	9.00									
2/10	Det. News	6.00									
2/10	Allied Jew. Camp.		37.50								
2/22	Det. Oil Mens Club		12.00								
2/24					9.50						
3/10	Det. Times	1.50									
3/11	Zedahah Club		10.00								
3/11	Allied Jewish Camp.		37.50								
3/15	Ladies Aux.		5.00								
3/6	Zebe			30.00							
4/10	Det. Times	10.35									
4/10	Det. News	12.86									
4/24	Comm. Art Prod.	7.50									
4/24	Comm. Art Prod.	7.50									
4/23	Zebe			15.00							
4/11	Relepoint Pencil					60.00					
5/1	Det. Convention & Tourist Bureau	17.00									
5/10	Det. Times	4.50									
5/13	N. R. Greena	34.50									
5/15	Harry F. Crowell.				7.25						
5/21	Harry F. Crowell				8.00						
5/27	American Hebrew		10.00								
5/7	Zebe			15.00							
5/21	S. Russinoff						26.00				
6/3	Jr. Cath. Daughters		4.00								
6/10	Allied Jewish Camp.		40.00								
6/4	Times Sign Co.						20.00				
6/10	Times Sign Co.						15.00				
7/10	Det. Times	10.80									
7/10	Det. News	12.30									
7/17	N. R. Greena	24.25									
7/10	Allied Jewish Camp.		40.00								
7/10	Ze			15.00							

RESPONDENT'S EXHIBIT 105B.

CITRIN-KOLB OIL COMPANY

ADVERTISING YEAR 1940 (Page 2)

Date 1940	Name	News-papers & Magazines	Donations & Memberships	Bill-boards	Printing	Novel-ties	Sign Painting	Main-taining Signs	Depre. Signs	Tel. Dir.	Sign Ins.
7/13	Harry F. Crowell				2.50						
8/29	Harry F. Crowell				8.00						
8/29	Harry F. Crowell				8.00						
8/10	Allied Jewish Camp.		40.00								
8/12	Los Angeles San.		5.00								
8/10	B'Nai B'Nith		5.00								
9/10	Det. News	3.60									
9/10	Det. Free Press	6.12									
9/10	Det. Times	8.25									
9/10	Allied Jewish Camp.		40.00								
10/10	Det. News	16.52									
10/10	Det. Free Press	6.78									
10/1	Allied Jew. Festival		5.00								
10/10	Allied Jewish Campaign		40.00								
10/25	Det. Comm. Fund		50.00								
10/10	Spencer & Wycoff		14.00								
11/10	Det. Times	6.30									
11/10	Det. News	15.12									
11/10	Det. Free Press	7.60									
11/10	Allied Jew. Camp.		40.00								
11/12	Det. News	1.35									
12/10	Allied Jew. Camp.		40.00								
12/10	Mich. Bell Tel.									144.00	
12/10	Rent Wood-West.			600.00							
12/10	Rent Cass-Gr. River			600.00							
12/10	Rent 14445 Linwood								110.00		
12/10	Rent 14481 Livernois								110.00		
12/10	Rent Cass-Gr. River								110.00		
12/10	Rent Wood-West.								110.00		
12/10	Rent Davison & Lawton								110.00		
12/10	Rent Jeff.-Nott.								60.00		
3/23	Clem Friedman							35.00			
4/24	Clem Friedman							50.00			
6/18	Clem Friedman							20.00			
7/13	Clem Friedman							25.00			
7/13	Clem Friedman							12.00			
7/25	Clem Friedman							70.00			
8/24	Clem Friedman							20.00			

RESPONDENT'S EXHIBIT 105C.

CITRIN-KOLB OIL COMPANY

ADVERTISING YEAR 1940 (Page 3)

Date 1940	Name	Newspapers & Magazines	Donations & Memberships	Billboards	Printing	Novelties	Sign Maintenance Painting Signs	Depre. Signs	Tel. Dir.	Sign Ins.
9/7	Clem Friedman						$65.00			
11/25	Clem Friedman						15.00			
11/25	Truck Lettering						141.26			
11/25	Truck Lettering						150.37			
12/3	Brown & Bigelow					131.35				
12/20	Bruechman					134.26				
	Sign Insurance									85.00
	Total	251.40	547.50	1290.00	43.25	325.61	664.63	610.00	144.00	85.00

Newspapers & Magazines	251.40
Donations & Memberships	547.50
Billboards	1290.00
Printing	43.25
Novelties	325.61
Sign Main. Painting Signs	664.63
Depreciation of Signs	610.00
Telephone Directory	144.00
Sign Insurance	85.00
	$3961.39

COPY
Detroit, Mich.
Nov. 4, 1941

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RESPONDENT'S EXHIBIT 106A.

No. 1.

Offer of Proof (Ned's).

Resp. Exhibit 102 having been offered in evidence and having been excluded by the examiner upon objection interposed by the attorney for the Commission, respondent, therefore, now offers to prove as follows:

(1) That the amount expended by Ned's Auto Supply Company for all classes of advertising in the calendar year 1940 was as follows:

(a) Newspaper advertising	$66,877.69
(b) Radio Advertising	16,280.00
(c) Outdoor advertising	5,580.00
(d) Magazines, Engraving, art work, and telephone directory	9,208.00
(e) Newspaper purchased and distributed to customers	15,903.59
(f) Donations	1,269.00
(g) Theatre and Club Program advertising	1,401.25
(h) Outdoor sign maintenance	617.73
(i) Sales Promotion Material	1,263.31
Total	$118,400.57

(2) That an analysis of sales of Ned's Auto Supply Company for the calendar year 1940, after deducting all Federal and State Taxes paid on gasoline and oil sales, shows as follows:

	Amount	Percentage of Total
(a) Stores Sales		
Tires & Tubes	$612,333.04	21.1%
Automobile Accessories	553,424.22	19.1%
Small home accessories	370,140.94	12.7%
Home Appliances	444,523.00	15.3%
(b) Service Station Sales		
Gas Island Sales	558,649.49	19.3%
Lubrication Sales	140,840.24	4.9%
Brake Work	176,338.46	6.0%
Miscellaneous Service	45,669.33	1.6%
	$2,901,918.72	100%

(3) That total payments of Michigan State Sales Tax for 1940 amounted to $75,756.91 and are included on the above sales figures.

166 RESPONDENT'S EXHIBIT 106B.

(4) That the items described as "Donations" represent and includes such expenditures as contributions to civic enterprises and is and was in 1940 regarded by Ned's Auto Supply Company as an advertising expense.

(5) That the item described as "newspapers purchased and distributed to customers" and amounting to $15,903.59 refers to the amount expended by Ned's Auto Supply Company in the calendar year 1940 for Detroit daily newspapers purchased from the newspaper publishers and presented to each customer of Ned's Auto Supply Company who purchased gasoline and other motor fuel on the gas island of the several service stations of Ned's Auto Supply Company at the time of each individual purchase of such gasoline and other motor fuel, during said calendar year 1940; which item of $15,903.59 was expended primarily and almost exclusively in connection with the sale of Standard Oil Co. gasoline, and which item is and was in 1940 regarded and allocated by Ned's Auto Supply Company as an advertising expense.

(6) That the amount of advertising expense of Ned's Auto Supply Co. allocated to sales of gasoline and other motor fuel is 19.3% of $118,400.57 or a total of $22,851.31 for the calendar year 1940.

(7) That the total gallonage of gasoline and other motor fuel sold by Ned's Auto Supply Company in 1940 was 4,310,465 gallons.

(8) That the advertising expense of Ned's Auto Supply Co. in the merchandising of gasoline and other motor fuel sold in the calendar year 1940 was 53¢ per gallon.

167 RESPONDENT'S EXHIBIT 107A.

No. 2.

Offer of Proof

Respondent's Exhibit 104A, 104B, 104C, 104D, 104E, 104F, 104G and 104H having been offered in evidence and having been excluded by the Examiner upon objection interposed by the Attorney for the Commission, respondent, therefore, now offers to prove as follows:

(1) That the amount expended by Wayne Oil Company for all classes of advertising in the calendar year 1940 was as follows:

(1) Direct Mail Advertising	$443.52
(2) Newspaper Advertising	932.38
(3) Posters	8.24
(4) Radio	90.00
(5) Signs	408.80
(6) Hand Bills	521.65
(7) Novelty Advertising	903.84
(8) Donations, etc.	96.02
(9) Paint for Signs, etc.	459.90
(10) Miscellaneous, including printing for Advertising and Advertising dealer Stations	552.84
Total	$4,417.19

(2) That an analysis of sales of Wayne Oil Company for the calendar year 1940, after deducting all Federal and State Taxes paid on gasoline and oil sales, shows that the percentage of gasoline sales realization to total sales realization was 70.1%.

(3) That the item described as "Donations, etc." represents and includes such expenditures as contributions to civic enterprises and is and was in 1940 regarded and allocated by Wayne Oil Company as an advertising expense.

168 RESPONDENT'S EXHIBIT 107B.

(4) That the amount of advertising expense of Wayne Oil Company allocated to gasoline sales is 70.1% of $4417.19, or a total of $3,096.45, representing gasoline advertising expense for the calendar year 1940.

(5) That the total gallonage sold by Wayne Oil Company in 1940 was 2,340,671 gallons.

(6) That the advertising expense of Wayne Oil Company in the Merchandising of gasoline sold in the calendar year 1940 was .13¢ per gallon.

169 RESPONDENT'S EXHIBIT 108.

No. 3.

Offer of Proof (Citrin-Kolb).

Respondent's Exhibit 105A, 105B and 105C having been offered in evidence and having been excluded by the Examiner upon objection interposed by the attorney for the Commission. Respondent, therefore, now offers to prove as follows:

(1) What the amount expended by Citrin-Kolb Oil Company for all classes of advertising in the calendar year 1940 was as follows:

(a) Newspapers and Magazines........	$ 251.40
(b) Donations and Memberships.......	547.50
(c) Billboard Advertising	1,290.00
(d) Advertising Printing	43.25
(e) Advertising Novelties	325.61
(f) Sign Maintenance and Painting Signs	664.63
(g) Sign depreciation	610.00
(h) Telephone Directory Advertising...	144.00
(i) Advertising Sign Insurance.......	85.00
	$3,961.39

(2) That an analysis of sales of Citrin-Kolb Oil Company for the calendar year 1940, after deducting all Federal and State taxes paid on Gasoline and Oil Sales, shows

that the percentage of Gasoline sales realization to total sales realization was 81.06%.

(3) That the item described as "Donations and Memberships" represents and includes such expenditures as contributions to civic enterprises and is and was in 1940 regarded and allocated by Citrin-Kolb Oil Company as an advertising expense.

(4) What the amount of advertising expense of Citrin Kolb Oil Company allocated to gasoline sales is 81.06% of $3961.39 or a total of $3211.10, representing gasoline advertising expense, for the calendar year 1940.

(5) That the total gallonage of gasolines sold by Citrin-Kolb Oil Company in 1940 was 5,221,996 gallons.

(6) That the advertising expense of Citrin-Kolb Oil Company in the merchandising of gasoline sold in the calendar year 1940 was .06¢ per gallon.

(P.75)

RETAIL GASOLINE DEALERS ASSOCIATION MICHIGAN

Established 1929

Rup. Ex. 77-

RETAIL GAS DEALERS NEWS

Official Organ of the Retail Gasoline
Dealers Association of Michigan

SEPTEMBER
1940

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Spread Throughou
State Imminent

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State Convention
Is Planned

General Meeting
September 9th

Resp Exh. 77 A-for Iden-

Another Good Reason Dealers Prefer to Deal with Socony-Vacuum:

You Have a Firm Foundation

FOR A SOUND, LASTING BUSINESS

Mobilgas

There's a strong business backlog behind you when you take on a Socony-Vacuum dealership. Your trademark—the famous Sign of the Flying Red Horse—is a well-known "stop sign" with millions of discriminating motorists. Your product—Mobilgas—is America's favorite gasoline. You have every opportunity to BUILD UP your business in your area on this practical basis.

SOCONY-VACUUM OIL CO., INC.
White Star Division **Detroit, Michigan**

Resp. Ex. 77-AB

Prepare for State-Wide Stability

Federal Hearing Could 'Cinch' Fair Trade for All Michigan Gas Dealers

Resp. Exh. 77B for Iden.

"WHEN will the Federal Hearing begin?"

Michigan gasoline dealers who have been following advancement of fair trading in their industry through the legislative campaign of the Retail Gasoline Dealers Association of Michigan have been asking that question for some time, not impatiently, but anxiously.

The Federal Hearing that has been anticipated for the last few months is climax in the four point program of the Association:

1. State Fair Trade Law, prohibiting sale of gasoline below cost to injure or destroy competition.
2. Prosecutions under this Law educing sworn admissions by suppliers of subsidies.
3. Federal investigation and hearing of these admitted subsidies as violations of the Wright-Patman Act and Anti-Trust laws, to the issuing of cease and desist orders ending subsidies.
4. Policing of the market to arrest illegal, below-cost sales of gasoline.

Points 1 and 2 have been carefully and successfully executed. Point 3 has been developed through the Federal investigating stage. The Federal Hearing, cease and desist orders, ending of subsidies, these phases have been awaited anxiously. It is the impending hearing, its shadow cast before as a threat over unfair discrimination, that has enabled the Association to maintain a clean market in southeastern Michigan despite desperate conditions elsewhere in the State.

The Hearing 'Soon'

Direct answer to the question, "When?" is impossible. It is known that such governmental business proceeds unhurriedly, carefully, yet inevitably. For this reason, leaders in the southeastern Michigan gasoline field, an important arena of Michigan marketing and seat of the Association's activity, have been unwilling to predict specifically the probable date of the hearing. Yet today they admit a sense of "soon," acknowledging that it may be within 30 days—or sooner.

Although the first points of the program have been concentrated in southeastern Michigan, the ultimate result will benefit the entire State. With the proper follow-up as contemplated by the Association, all of Michigan will be rid of subsidy and chiseling and the illegitimate children of these ogres—price wars and loss sales.

State-wide policing proposes the need for the Association to assume its original purpose—to act as parent organization for all associations of gasoline dealers in Michigan. There are approximately 30 local county and community associations in the State.

Assistance to local associations has been demonstrated most recently by the Association in Ferndale, Royal Oak, Pontiac and Mt. Clemens. Clean markets were won in each from depressed margins, price wars and havoc. Appeals for this same aid have come from many other hard-pressed districts.

As parent organization, the Association would issue information bulletins to all dealers throughout Michigan through local associations' officers. It would spread its educational program through these local channels without affecting the individual identity of each existing organization.

Such expansion for the promotion of the welfare of some 20,000 gasoline dealers in Michigan has been started. A "send-off" in this program has been proposed in a State Convention of Gasoline Dealers.

1940 Convention in Detroit

Detroit officials of the Michigan Association, in conferring with other officials of local organizations, have tentatively scheduled the 1940 State Convention for October 15 and 16 in Detroit. Final resolutions will be announced in trade journals and in State local newspapers.

The 2-day Convention would be concluded with a banquet at a leading downtown hotel. Display booths for suppliers and services of dealers, in the background of this business festival, would appropriately key the attendance to the Fall-Winter season just around the corner.

Local association leaders are urged to communicate with Convention Headquarters, 131 East Adams, Detroit.

Pay Dues Annually

Looking forward to the State-wide scope of Association activity, Executive-Director Rankin Peck issued a message to southeastern dealers urging them to pay dues annually instead of monthly, declaring:

"Headquarters staff will be busier than ever . . . Our investigators even now are taxed to the limit with checking rumors of under-canopy discounting, making test purchases and so forth, along with their other operations. You will be favoring them, allowing them to do their work more thoroughly, if you reduce their number of calls by paying them for a full year . . . The saving to you is not to be overlooked, either. Dues paid monthly aggregate $18 a year, but if paid annually, only $15."

A 'Plug' for an Early Hearing

(COPY) August 13, 1940

Federal Trade Commission,
WASHINGTON, D. C.

Gentlemen:

I am writing you as Chairman of the Gasoline Station Property Owners' Protective Association of Michigan, regarding the unjustified price discrimination practices of certain of the so-called major oil companies in this area.

We know that some time ago, the Retail Gasoline Dealers Association of Michigan, Inc., complained to your Commission of these practices, and we know that the investigation by your Commission that followed that complaint, was productive of beneficial results, both to the owners of gas station properties and the operators and employees.

We understand that when your investigation had uncovered, or was about to uncover the certain evidence of price discrimination, as practiced by some of the majors, voluntary action was taken by the guilty companies which eliminated this unfair practice.

However, it is evident that in some way, such unjustifiable price discrimination has been resumed, and unless soon curbed, will likely be further extended and will result eventually in irreparable loss and damage to the operators and owners of gas station properties. We have every confidence that your Commission can establish unfair trade practice by some of the companies in the past, and can prevent a continuance of these practices.

We respectfully urge that your Commission take such early action in this matter as will eliminate the price discrimination in this area, and we assure you of our whole-hearted support.

Very truly yours,
GASOLINE STATION PROPERTY OWNERS' PROTECTIVE ASSOCIATION OF MICHIGAN,
B. P. Costello.

Resp. Ex. 77-C Resp Exh. 77C for Iden.

(p.

Retail Gas Dealers News

L. L. AARONSON, Editor
Published Monthly
by

Ed. Pratt,
President

J. B. Land,
Treasurer

Al. Scott,
First
Vice-President

R. O. Knott,
Second
Vice-President

Rankin Peck, Executive-Director

131 East Adams CAdillac 5926 Detroit, Michigan

Subscriptions: $1.00 a Year to Members; $1.50 a Year to Non-Members

Vol. X Single Copies 15c No. 10

You Don't Have to Buy to Give a Salesman a Break

We ran into "Zeke" at one filling station over on the East Side, and invited him to "take a load off . . ." and sit in the car and chat a while.

Zeke slumped into the car and pushed out his legs. He was sweating—not perspiring—sweating as he sighed, grateful for the relief of rest.

"What's the matter, Zeke?" we kidded. "Trying to make us believe you work for a living? You're just a flourishing accessory salesman, living off the fat of the land." We waved our hand at the station. "Look," we chided him. "They buy 'em, sell 'em, and work like hell putting 'em on. You . . . huh! You just supply 'em!"

Zeke's eyes looked up pitying. He was too tired to move his head to complete the look of disdain. "Brother, you just don't know what you're talking about," he answered.

We could see he was serious. We changed our tone: "What's the matter? Nobody buying?"

"No. Not that. Station business is good these days. There's good selling . . . "

"Well what are you beefing about?"

"Here, friend. Here's the dope: If I see no one I get no orders. If I see four stations, I can figure on one order. In order to make a bare living I've got to take at least five average orders. That means I've got to see 20 dealers . . . Okay. That sounds easy. Without getting a traffic ticket I could scoot in and out of 400 stations in a day. But man, do you realize how long I've been right here, just at this one? I've been here since a quarter after five. That means more than an hour! At the one before, I was tied up for an hour and a half, and at the other before that I spent almost a full hour.

"Was I trying to sell all these three hours? Hell no! Most of the time I was picking my teeth or my nails—waiting. Waiting! That's the whole thing in a nutshell. It just ain't necessary. It just don't make sense. If these guys were busy all the time, that would be swell. But Cheez Christopher!

"One guy's working a crossword puzzle when I come in. Without hardly looking up he asks what's a four letter word meaning 'friend.' I tell him 'Zeke.' He shakes his head and says it begin with 'C', so I tell him 'chum.' He pops that down and is so thankful that after writing in a couple of wrong words misspelled, he lays down the sheet, takes one of my cigarettes, and starts telling me all about the war. Naturally I can't tell him right away that I want to sell him something. In due time I get to that. Just then a car pulls in. He musta known I was through listening to his unessentials, for he turns his time-wasting onto his customer who takes it for another 15 minutes. Finally he comes back, plays with some of my samples for another 15 minutes and in the end confesses that he wishes I'd been in yesterday, would I come in Thursday?

"All right, that's just one. Another one was listening so hard to the ball game I guess his ears musta heard, 'In dozen lots of Kreevich's single through the box a two per cent discount if a called third strike ending the inning and a special display for the window to substitute for Fox in right field.' He turns to me with a rapt smile and says, 'I think so too' which means he agrees with me that the Tigers will win the pennant . . . Aw NUTZ!"

He laid his hand on our arm. "Listen, pal. If you could just tell 'em that they're taking money out of our pockets when they hold us up just to kill their own time . . . If you could explain that their job is just to wait for customers to come in, while our job is to come in and wait for them . . . If you could get them to consider us as friendly business men, not just plain friends . . . If you . . . "

Have we?

HOTEL
BARLUM

ALBERT
PICK
HOTELS

21 FLOORS OF
OUTSIDE
ROOMS

EACH WITH
COMBINATION
TUB & SHOWER

From $2 DAILY SINGLE

CADILLAC SQUARE
AT BATES STREET

DETROIT

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(p. 78)

MEMBER
RETAIL
GASOLINE
DEALERS
ASSOCIATION
OF
MICHIGAN

[redacted]

[redacted]

Resp Exh. 78A - for Iden-

*Another Good Reason Dealers Prefer
to Deal with Socony-Vacuum*

"Ready-Made" Customers

MAKE MOBILGAS EXTRA PROFITABLE

Powerful, nation-wide advertising—modern refineries and research laboratories—no wonder Mobilgas and Mobiloil are out in front in popularity and quality! Every minute of every day, more than 1000 motorists stop at the Mobilgas Sign. These men and women form a ready-made source of many NEW CUSTOMERS for Mobilgas distributors. Their confidence in the Flying Red Horse sweeps away barriers to sales.

For Complete Details on the Socony-Vacuum Dealership write to

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Socony-Vacuum Oil Co., Inc.

903 West Grand Blvd., Detroit
LAfayette 3400

(P. 79)

Resp. Ex. 78-# B

U. S. Cites Four Oil Firms

Price Discrimination Charged: Foreshadows End of Chiseling Through Subsidies Here

Resp Exh. 78B for Iden—

AN ABSOLUTELY clean market, even rid of price discrimination and resultant subsidy, appears closer and certain for Detroit and Michigan.

On December 2nd the Federal Trade Commission issued complaints against four large oil companies, charging price discrimination in the sale of gasoline in the Detroit area. Hearing of answers to these charges are expected early in January.

The Federal hearing comes as a climax in the four-point program of The Retail Gasoline Dealers Association of Michigan. Briefly, the campaign as planned by The Association's executive-director, Rankin Peck, late in 1936, outlines:

1. State Fair Trade Law prohibiting sale of gasoline below cost to injure or destroy competition.
2. Prosecutions under this Law educing sworn admissions of price discrimination by suppliers; and transmission of such testimony to the Federal Trade Commission.
3. Federal investigation and hearing of this admitted discrimination as violation of the Robinson-Patman Act and Anti-Trust laws, to the issuing of cease and desist orders, ending discrimination and subsidy.
4. Policing of the market to arrest illegal, below-cost sales of gasoline.

Successful Execution

Points 1 and 2 were carefully and successfully executed during the last four years under the guidance of Mr. Peck to the present development.

It was the impending hearing, as a threat to unfair discrimination, that enabled The Association to employ its other legal resources in its united movement that stopped price wars and established legal margins in Detroit in 1939, then in Ferndale, Royal Oak, Pontiac, Lansing, Grand Rapids, Kalamazoo, Battle Creek, and their affected areas. In each area, markets remained firm thereafter.

Named in the U. S. complaint are Michigan operating units of Standard Oil, Gulf Refining, Texas, and Shell Oil Companies.

Standard, supplying about 450 retailers in Detroit, sold to four dealers, Citrin-Kolb, Stikeman, and Wayne Oil Companies, and Ned's Auto Supply Company, at prices ranging from 0.5 to 1.75 cents per gallon lower than prices charged other retailers in this area, the Commission says in its complaint.

Others Accused

It alleges that Gulf sold gasoline to stations here owned by Firestone Tire & Rubber and B. F. Goodrich Companies at prices ranging from 1 to 2 cents lower per gallon than the cost to approximately 225 other dealers. Texas, supplying 80 retailers, sold gasoline to the same two companies at reductions of 0.5 to 2 cents per gallon the Commission charges.

[illegible] accuses Shell of selling to the Grand River Oil & Gas Company at prices substantially lower than those charged other dealers.

In a statement from Standard denying the alleged violations, Buel F. Jones, general counsel for Standard, declared:

1. The company sells in tank car quantities to the four companies involved. They have their own bulk storage and deliver to retail stations with their own trucks. In this manner they assume part of the distributing expense. (This does not reconcile a discrimination of 0.5 to 1.75 cents per gallon. It has been found that storing and hauling costs here run from about 0.2 to 0.25 cents per gallon).
2. If the four Detroit firms were not buying from Standard, they could purchase in the open market at equally low prices. (But, Mr. Jones fails to add, purchases in the open market do not carry the brand label, and must be sold to the consumer without brand name and without the sales force of the brand's powerful advertising and merchandising promotion).

Dealers are confident that such defense by statement-with-omission will be penetrated if offered in Federal Hearing.

Possible Contentions Feeble

Other arguments that may be offered in defense appear equally weak: :

3. Volume sales deserve discounts. (However, in these cases discounts were given **first** against **anticipated** sales: discounts first, volume last, is the basis of subsidy).
4. Price should be lower to wholesaler. (Certainly. But when is a wholesaler not a wholesaler? When he's a retailer).
5. That not the companies, but the jobbers are responsible for the unjust application of the wholesale discount. (It is obvious that if a supplier is prohibited by law from unjust discrimination to dealers, it still would be illegal to do it through an agent, give the agent any name you choose—jobber, drummer or master of ceremonies).

Cause of Price Wars and Loss of Property

Economic evil and disaster spring from price discrimination, it has been seen time and again in gasoline marketing.

Bernard P. Costello, president of the Gasoline Station Property Owners Protective Association, described this plainly in his remarks upon the announcement of the U. S. Trade Commission's recent action. He declared:

"Without the elimination of unfair discrimination, the full benefit of the Michigan Fair Trade Law is ineffectual. Dealers find no fault with lesser rates to wholesalers, but object to the application of wholesale prices to retail sales, especially where it is used to start price cutting wars.

"Under the Fair Trade Law a minimum operating margin is recognized. In Detroit a 3-cent margin was determined as the minimum required for the most efficiently operated station. However, because of price discrimination, it is possible for a price-favored station to sell at two cents

(Continued on Page 10)

(p.80) Res. Ex. 78 – G Resp Exh. 78C for Iden

Retail Gas Dealers News

L. L. AARONSON, Editor

Cash Hawley, Detroit
Earl Coller, Lansing
Associate Editors
Fred Kramer, Gd. Rapids
Neil Lemmer, Kalamazoo

Published Monthly by

Ed. Pratt, *President*
Al. Scott, *First Vice-President*
J. B. Land, *Treasurer*
R. O. Knott, *Second Vice-President*

Rankin Peck, Executive-Director

131 East Adams CAdillac 5926 Detroit, Michigan

Hail Dealers! A Happy, Prosperous New Year to You--BY You...

As 1940 draws to a close and Michigan gasoline dealers prepare to enter a new year which promises greater prosperity and the happiness that springs from improved, stable business, it is well to remind them that they are the promoters of their own good.

We at the center of the organization appreciate the fine words of praise and thanks that have been addressed to us during the Christmas season. However, dealers must remember that they have wrought their own good fortune. They, too, must maintain it and improve it.

Therefore we are greater pleased at the pledges of continued memberships and support than at congratulations. Both are tokens of appreciation: one for work done; but the other that this work will not be UNdone.

So it is a confident wish, this message:—
A Happy, Prosperous 1941,
Michigan Gasoline Dealers!
—RANKIN PECK, Executive-Director.

NEW OPACO

Safety-Fill Nozzle

Approved by
Underwriters' Laboratories, Inc.

NO GUESS!
NO LOOK!
NO LISTEN!

Automatic shutoff prevents spilling or overflow. Promotes fillups. Reduces fire hazards. Splendid for servicing trucks, taxi-cabs and busses.

HURRY! MAIL COUPON TODAY

R. B. RICHARDSON
4720 Joy Road Detroit, Mich.
Phone TY. 5-3975

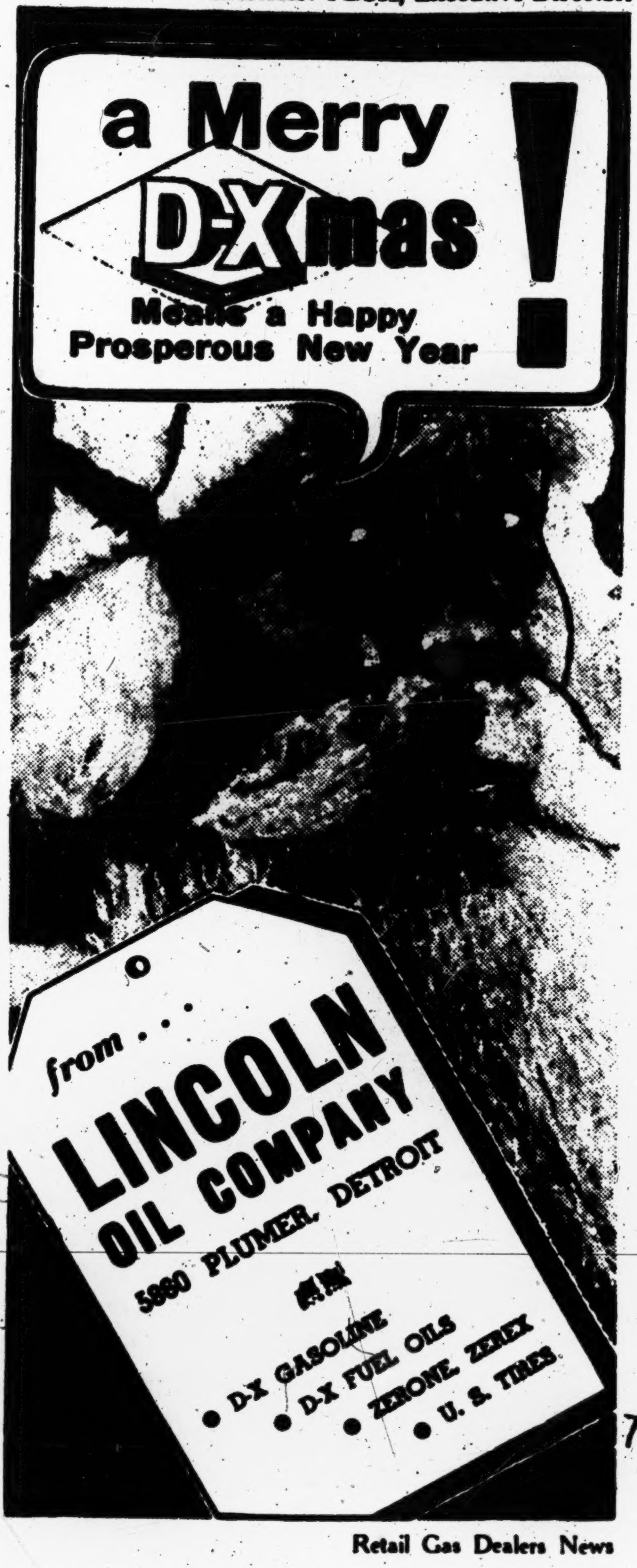
Yes I want to know more about the New "Safety-Fill" Nozzle that increased gasoline sales. Rush FACTS! We have .... pumps.

Station Name ....

Address ....

City .... State ....

We Sell ....



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CONVENTION, TUESDAY and WEDNESDAY,

RETAIL DEALERS

Official Organ of the Retail Dealers Association of

MEMBER
RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN

MORE THAN 12,000 COPIES THIS ISSUE

MARCH 1941

☆

U. S. Hearing Starts Monday, March 10

Entertainment Set for Thousands

☆

Mayor of Detroit Opens Convention

☆

Governor to Speak On Second Night

●

Ladies Will Enjoy Special Program

●

Introduce Improved Fair Trade Bill

Resp. E.L.C. [illegible]
for Iden

Thanks, congratulations to Michigan of the dealers and to their splendid Association and looking forward to seeing you all at the Convention.

Murray D. Van Wagoner

Rsp. Ex. 79-B

Federal Hearing Begins March 10

Resp Exh. 79 B for Iden—

Standard Ordered to Reply to U. S. Charges of Price Discriminations Here at Detroit

ONE of four large oil companies charged with price discrimination in the sale of gasoline in the Detroit area, Standard Oil Company of Indiana, is scheduled to make its formal replies at a two-week hearing before the Federal Trade Commission at Detroit beginning Monday, March 10.

In its complaint against Standard, issued last December, the Commission charges that Standard, supplying about 450 retailers in Detroit, sold to four firms whom Standard refers to as "jobbers," namely, Citrin-Kolb, Stikeman, and Wayne Oil Companies, and Ned's Auto Supply Company, at prices ranging from 0.5 to 1.75 cents per gallon less than prices charged other retails in this area.

Similar charges of price discrimination were levelled by the Commission in December at Michigan operating units of Gulf Refining, Texas, and Shell Oil Companies.

'Yardstick' Case

According to the FTC, the Detroit hearing will concern only the complaint against Standard Oil, but that the Commission's ruling in that case probably would serve as a yardstick for disposition of the other three cases.

In their answers to the complaints, Standard and Texas contended their price differentials merely made allowances for saving permitted by the different method of sale and delivery of gasoline to certain companies.

Standard contended further that the four Detroit dealers named in the complaint were regarded as wholesale jobber customers and that the company therefore was entitled to sell them gasoline at prices lower than to retail dealer customers.

"There has been an awful lot of talk and 'smoke-screening' going on," Executive-Director Peck comments. "So just to get the record clear, I would like to explain substantially just what the complaints of the retail gasoline dealers are:

How It Works

"A company sets its price that dealers must pay for its various brands and grades of gasoline. This, then, becomes the price that the great majority of dealers must pay. Then, among other things, certain companies appoint a 'jobber agent' whom they allow to serve certain stations sprinkled among those that the company is supplying directly at the regular posted price.

"A part of the complaint is that these jobber agents have been supplying some of their station accounts at less than the company's regular posted price that the majority of its dealers are compelled to pay. Some of these jobbers are also accused of operating chains of retail stations on the side and all the rest of the dealers have to compete with them, while they, the so-called 'jobbers,' buy at a much lower price.

"There is no objection to jobbers doing a jobbing business, but

(Continued on Page 29)

Hearing Is a Triumph in The Association's Fight Against Subsidy

The Federal Hearing comes as a climax in the four-point program of The Retail Gasoline Dealers Association of Michigan. Briefly, the campaign as planned by The Assocition's executive-director, Rankin Peck, late in 1936, outlines:

1. State Fair Trade Law prohibiting sale of gasoline below cost to injure or destroy competition.

2. Prosecutions under this Law educing sworn admissions of price discrimination by suppliers; and transmission of such testimony to the Federal Trade Commission.

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4. Policing of the market to arrest illegal, below-cost sales of gasoline.

Points 1 and 2 were carefully and successfully executed during the last four years under the guidance of Mr. Peck to the present development.

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Retailers Will Get First Hand Facts on Complaint While at the Convention

Use of price discrimination as plain and subtle subsidies to affect prices and control margins has been the root of business unhappiness and tragedy in gasoline retailing, The Association has contended. In this contention it has been backed solidly by the Gasoline Station Property Owners Protective Association.

Just how such manipulation and strategy has been employed will be explained clearly to Convention-attending dealers who until now have had but a hazy sense of the complications.

"The root of market upsets and wars is the subsidy," Executive-Director Peck has stated. "Price discrimination is the source of subsidy, and until we are rid of this unfair, illegal weapon, dealers are in constant danger of unfair competition, price and margin cutting wars, bankruptcy, and business failure.

"It is almost like a stroke of Providence, that the Hearing is scheduled to open just one day before the Convention begins, and to be held just a few blocks from Convention Headquarters. This makes it possible for all who come to attend the Convention to take an hour or two off to sit in on the Hearing and pick up some important facts.

"There will be plenty of facts to pick up about Discrimination and poisonous effect on gasoline markets right at the Convention. Every delegate has my personal invitation to ask direct questions on that subject particularly."

Resp. Ex. 79-C

New Fair Trade Bill Is Iron-Clad

All Loop-Holes Closed, Association's Improved Act Is Introduced in Senate

Resp Exh. 79 C for Iden-

SENATE BILL No. 186, sponsored by The Retail Gasoline Dealers Association of Michigan as the "Motor Fuel Unfair Practices Act," was introduced into the Senate at Lansing on February 20 by Senators Joseph A. Baldwin, of Albion, and Clarence A. Reid, of District 18, Detroit.

As a fair trade bill for gasoline dealers, the measure would make it unlawful for any person engaged in the manufacture, distribution, or sale of motor fuel to sell fuel of the same grade at a lower price to one purchaser than to another; to discriminate between sections, communities and locations as to prices.

SENATOR BALDWIN

It bars any scheme of special rebates, collateral contracts, or any similar device which would effect discrimination in violation of the intent of the act.

The act declares that its purpose is to safeguard the public against the creation or perpetuation of montopolies.

No Weaknesses Here

Senate Bill No. 186 is the fruit of years of special study by The Association and its legal and accounting staffs. All of the attorneys engaged in drawing the improved act have been intimately connected with the first Act, No. 282, which it will supercede.

Included among them are: Paul W. Voorhies, former prosecuting attorney, and his associate, R. Gerveys Grylls; Ralph Garber and Paul Mayrand, both former assistant prosecuting attorneys.

Necessarily attached to the soundness of the proposed Act is Professor Herbert F. Taggart, head of the Economics Department of the University of Michigan. Prof. Taggart, now working with the Defense Commission in Washington, has continued his supervision of the Cost Survey features of the bill, leaving local execution in the hands of W. G. Roost and other qualified assistants.

This new law has been drafted after careful study of any weaknesses of the present Law that might have appeared during its three years of use; and following just as careful consideration of similar acts in other States, and numerous recent decisions sustaining them.

SENATOR REID

Come On, Gasoline Dealers! Let's Put This Bill Through

Passage of Senate Bill No. 186 will mean that gasoline dealers will have the ideal, necessary protection of the Law against monopoly and unfair discrimination which have brought margin starvation and bitter business defeats.

Bill No. 186 must go through!

It has been referred to the State Affairs Committee, comprised of Senators Munshaw, Town, Howell, Burhans, Logie, Dignan, Milliken, Diggs and Brooks. If these Senators are in your district call on them to bring it out of Committee. If they're not handy, write them!

Every gasoline dealer should call or write the Senators and Representatives from their own districts and demand the passage of Senate Bill No. 186 just as it stands.

Show the men you sent to the State Legislature that Senate Bill No. 186 is of the utmost importance to you!

• • •

No special charges have been assessed dealers by The Association in drafting or executing Senate Bill No. 186. It is projected only through membership dues.

Inquiries from various parts of the State describe solicitations from dealers at their stations for funds to press dealer-legislation. The Association has authorized no such solicitation, and urges all dealers who may be so approached to insist that the caller identify himself by producing a letter, or card, bearing The Association's emblem.

Discrimination Exposed

(Continued from Page 5)

when they invade the retail field, they also become retailers. And it seems clear, that if a company does not see to it that all dealers selling under its brand in the same area do not have to pay the same price, those that are discriminated against have little chance in open competition.

"It seems that if the law prohibits a company from discriminating then they are still prohibited from employing an agent to do it for them."

• • •

The Hearing will be conducted in the Federal (Post Office) Building, Wayne at Lafayette Streets, in Room 859, under the supervision of Webster Ballinger of Washington, a FTC trial examiner. Cyrus B. Austin, FTC attorney, will represent the Commission.

Resp Ex 80-A

RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN

Established 1929

Resp Exh-80 A for Iden-

ED PRATT PRES [illegible] SCOTT 1ST V-PRES R O KNOTT 2ND V-PRES J B LAND TREAS

RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN, Inc.

Offices and Club Rooms: 131 EAST ADAMS AVE.
CAdillac 5926

DETROIT, MICHIGAN

ESTAB. 1929

R. P. PECK
EXEC. DIRECTOR

March 26, [illegible]

[illegible]
the State of Michigan.

Fellow Dealers:

You want higher margins. You complain your costs of labor, etc., have made the present, old margins insufficient.

You need higher margins and you can get them by proving it. You can prove it by a Cost Survey acceptable to the courts.

You can have such an acceptable Cost Survey. The Association already has prepared the proper forms. This expensive preparation has cost you nothing but membership dues.

Now the forms must be printed, mailed and returned. For this expense THERE MUST BE ENOUGH MEMBERS AND DUES. A few dealers cannot assume the costs to benefit thousands. Nor can a few counties do it for the entire State.

You want a Cost Survey—the higher margins—in your County first. Cost Surveys will go out in the only fair order possible: as sufficient money in dues is received from each County, the Survey will be sent out to it. Many Counties are already eligible. Is yours?

Don't hedge. This is urgent. Use the membership blank on page 9.

Yours truly,

R. P. Peck

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Resp. Ex. 80-B

(p.85)

Doom at Hand for Secret Rebates

End of Subsidy Thru Discrimination Looms: Dealers Urged to Press Passage of Their Senate Bill No. 186

Resp Exh-80B for Iden.

COMBINATION of bright prospects for gasoline dealers: a favorable verdict in the Federal Trade Commission's complaint of price discrimination in Michigan; and passage of The Association-sponsored Senate Bill No. 186, the new, improved fair trade law, lead to a general optimism within the trade of the clipping of secret rebates—last prong on the Marketing Devil's fork.

In connection with the Federal Trade Commission's hearing of answers to its charges of price discrimination against Standard Oil Company of Indiana, dealers were heartened in the trend. The hearing opened in Detroit on March 10 and adjourned to Washington after hearing local testimony.

Local testimony included declarations of Greater Detroit dealers of the effect of price cutting by stations which were supplied at lesser gasoline costs.

You Can Do It!

Not only God, but the Law, too, helps those who help themselves.

Dealers can help themselves by pushing to passage their new State fair trade law which is still in the State Affairs Committee. The improved act would permit swift and thorough arrest of illegal efforts to upset stability.

Call or write your State senator and representative. Tell them how essential to your business and well-being is—

SENATE BILL No. 186

One of the most important contributions was the testimony concerning distributing costs. Standard, like the three other companies accused of price favoritism by the FTC, contended that lesser prices to Ned's and others involved were due to the savings in bulk storage and delivery.

For this consideration Standard sold to four "jobbers" (operating retail outlets), at prices ranging from .05 to 1.75 cents less than to dealers. At the Hearing, in cross examination of P. H. Harrison, Sun's western regional manager, it was brought out that Sun's costs were [illegible] cents for getting a [illegible] of gasoline from Sun's bulk storage to station tanks.

This figure, identifying an inconsistency in the .05 to 1.75 cents allowed by Standard, included cost of warehousing, handling, loss, truck or delivery, office costs, and general district expenses, real estate taxes and dividends on invested capital and plant inventory, the FTC was informed.

Sun has 466 stations in metropolitan Detroit and serves these stations plus others as far away as 40 miles, with 13 trucks, Harrison stated.

Standard's is considered to be a "yardstick" case, as the decision in its case probably will be the key to the FTC's disposition of the charges against Gulf, Shell and Texas.

When the decision will be made is not certain, although it is hoped for within a month. Dealers are more hopeful of an affirmative opinion of the FTC's charges, believing that in the end there will be a cease and desist order stopping such price discriminations.

With the ending of price discriminations, leaders declare, even secret rebates will be ended. Stations giving secret rebates, appearing to sell below cost, can do so if their costs for gasoline are less than to others of the same brand.

Our Advertisers—Bless 'em! —and Patronize 'em!

Abbott Supply Co.	15
American Coverall Supply Co.	15
Aro Sales & Service	15
Auto Radio Wholesale Co.	15
Automobile Equipment Co.	2
Balk-Daugherty Sales Co.	15
Barnaby Battery & Electrical	5
Black Magic Products Co.	15
Blue Ribbon Dealers	13
Burton Business Brokers	15
Campus Auto Electric	7
Castro-Grand Oil Co.	12
Central Auto Sales	11
Cornell Wholesale Oil Co.	5
Creditors Service	15
Crest Sales & Supply Co.	14
Detroit Automotive Parts	15
Economy Printing Co.	15
E. & L. Auto Electric	7
General Speedometer Service	7
General Underwriters	15
Greenleaf, Inc.	7
Kennedy-for-Highway Comm.	4
Klann Auto Electric	7
Lawton Tire Service	15
Leonard Refineries	16
Lincoln Engineering Co.	2
Lincoln Oil Co.	13
Lincoln-Wayne Co.	15
D. Mellin Moran	7
Mich-I-Penn Oil & Grease Co.	16
Mich. Modern Overall Cleaners	14
Al Neeriemer	15
Paterson Tire Co.	15
Piston Service Co.	16
Plymouth Oil Co.	16
R. D. Rybolt	15
Rolla Battery & Electric	7
John P. Scallen-for-Judge	2
W. McKay Skillman-for-Judge	11
Tide Water Associated Oil Co.	2
Tokheim Oil Tank & Pump Co.	2
Tuthill Spring Works	16
United Auto Electric	7
Winder Towing Co.	16
Wolverine Station Equipment Co.	15

Tank Wagon, Margin

Dealers have been expecting a tank wagon hike since the first of the year, an Association survey has shown.

Dealers, generally, are determined to increase their own margin two-tenths of a cent when the tank wagon change comes, the survey revealed.

Higher costs force such a move, they declared, stating two-tenths a minimum necessity, and pointing for the Cost Survey to show them the fully required additional margin.

Ending of unfair price discrimination will put all dealers on an equal footing, basically, for free, legitimate competition.

Of thorough aid in policing and prosecuting illegally below cost sales, will be the new fair trade act, Senate Bill No. 186, designed for speedy execution and efficiency in cleaning the market and so maintaining it.

Ed Fennert (Gulf), Cadillac and Mack, died suddenly March 19. Long a member of The Association, he was well known and liked for his kindliness. His many friends offer condolences to his family.

Ed Mattson (Hi-Speed), 14636 Charlevoix, was called to his mother's bedside in Marshfield, Wisconsin, when she was taken gravely ill on March 25.

.86)

Resp. Ex. 80-C Resp Exh 80 C for Iden

Retail Gas Dealers News

Owned and Published by

Ed. Pratt, President
Al. Scott, First Vice-President
J. B. Land, Treasurer
R. O. Knott, Second Vice-President

Rankin Peck, Executive-Director

131 East Adams CAdillac 5926 Detroit, Michigan

I. L. AARONSON Editor
Cash Hawley, Detroit; Earl Coller, Lansing; Fred Kramer, Grand Rapids; Neil Lemmer, Kalamazoo Associate Editors
TOM QUINN Advertising Director

Proof of Official Recognition and Respect for Association

The Convention was a big success, a tremendous success in every way from everyone's point of view.

Just how this success is measured may be a point of curiosity to many. Usually, on assertion of success, there is the question, "How much money did you make?"

There was no money made on the Convention. True, exhibitors point to big sales made during the event. They say they made money at the Convention; and more than that, they declare, they made many friends and prospects.

That is good. These co-sponsors of the Convention all have exclaimed upon the success of the Convention, contributing to The Association's satisfaction.

The Association's own satisfaction is in many ways.

Publicity of the event brought knowledge of The Association to many previously uninformed dealers. It was reflected at once in the membership rolls; and the wave of intelligence will spread on and on.

Dealers in attendance at the Convention became aware of a business kinship with other dealers. The sentiment of unity is a powerful force for a State organization, and this sentiment is rooted firmly now almost everywhere in the Michigan gasoline business.

Important public officials were invited to attend. Many accepted and many other responded regretfully, but as a result of these sincerely pleasant calls upon them, hundreds of administrators and executives of the law and government became aware of gasoline dealers in Michigan. They learned of their organization and of their program to win, through legal assistance, a chance to earn a decent living if they worked hard—even if they insisted on doing it honestly!

These words of Success are written from The Association's point of view. It is well to seek confirmation in the words of guests and exhibitors at the Convention. Here they are summarized:

Governor Van Wagoner: (In speech at Convention Banquet) Praised The Association for its good work in stabilizing the gasoline market in Michigan. Found The Association unselfish in its platforms . . . Said that as long as Senators Baldwin and Reid had introduced Senate Bill No. 186 he saw no reason it should not pass easily in the Senate; and that he had looked it over and if it should reach his desk he would give it very careful consideration.

Mayor Jeffries of Detroit: (In formal opening of Convention, welcoming dealers from all sections of the State) Commended The Association "for its great progress in such an essential industry."

Other guests:

State Highway Commissioner G. Donald Kennedy, Secretary of State, Harry F. Kelly (through Proxy Hagan), State Senator Clarence Reid, Mayors John Cassin of Port Huron and James P. Dunnigan of West Branch, Prosecuting Attorneys William E. Dowling of Wayne, and Dunn of Calhoun, Detroit Councilmen Eugene I. Van Antwerp and Henry S. Sweeney . . .

Circuit Court Judges Vincent M. Brennan, James A. Chenot, Ira W. Jayne, Adolph F. Marschner, DeWitt H. Merriam, Guy A. Miller, Lester Moll, Joseph A. Moynihan and Robert Toms . . .

Recorder's Court Judges John V. Brennan, Joseph A. Gillis, George T. Murphy, W. McKay Skillman, and Donald Van Zile . . .

Common Pleas Court Judge Charles E. Merrill . . .

Former Circuit Judge Frank Day Smith (so well-known to gasoline dealers for his just treatment of a prosecution under the Fair Trade Law) . . . and Raymond J. Kelly, past National Commander of the American Legion . . .

All of above: CONGRATULATIONS!

Exhibitors: "No question about it . . . it was a real success"—Cy Fleming, Versnick Brothers Co. " . . . I regard this Convention highly successful . . . you should all be congratulated on its good attendance and support of your members . . . put us down for an advance reservation for a much larger space for next year's Convention"—G. M. Pratt, Buhl Sons Co. " . . . we enjoyed the Convention. We had a good time, made a lot of friends, and got a lot of business. As far as we are concerned it was a great success."—Storm Vanderzee, U. S. Automotive Corp. " . . . It was very well handled and not attended by just sight-seers, but by dealers who showed a keen interest in the various exhibitors' displays . . . "—M. E. Gardner, Automobile Equipment Co.

• • •

Convention Impression Brings Special Notices to Dealers

The great numbers of dealers who attended the Convention were impressive of the growth of The Association. This impression is demonstrated in the reaction of five gentlemen who have been friendly sympathizers with the principles of Fair Trade which underlie the program of the Association.

They had been familiar with The Association, it would appear, when its membership was but a handful. Now, realizing its great numbers, they have found it worthy of direct messages through its magazine.

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(Continued on Page 14)

Resp Exh. 78 D for Iden.

R. of Ex. 78-~~B~~D

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Dealers Acclaim U. S. Action

Michigan Retailers at Detroit Meeting Hear Judges Laud Peck, Association

SIMULTANEOUS with the Federal Trade Commission's announcement came the news that the Battle Creek-Kalamazoo area had responded to Association efforts. Market stability had been attained, and with it a general recovery of operating margins.

Among Battle Creek and Kalamazoo retailers who were prominent in the campaign for legal operation were:

G. W. Bunce (White Rose), Nate Claypool (Texaco), Andy Foster (Standard), of Parchment, Harry Gildea (Texaco), Matt Hoebecke (Sun), W. B. Johnson (Phillips 66), Neil Lemmer (Mobilgas), Irving Penney (Sinclair), Maynard Pierce (Standard), William M. Rowe (Cities Service), Larry Ulrey (Pure), and Walt Upson.

A really State-wide representation of dealers appeared at the December 9 meeting of The Association at Headquarters in Detroit. Members from Mt. Clemens clear over to Grand Rapids answered the invitation to attend the discussion of the latest brilliant achievement of The Association—the winning of official U. S. recognition of price discrimination here.

Earl Coller, representing Lansing, in describing The Association's accomplishment there, said: "We were all on a pretty lean diet before The Association came up to help us . . . But for the first time in several months I've had steak—TWICE IN ONE WEEK!"

Similarly, the gratitude of Grand Rapids-Western Michigan was expressed good-humoredly by Clair Reynolds and was received with great applause by the big assembly:

Business Life Threatened

"We were so sick we didn't even know if we were going to live or not. But as a business doctor, The Association pulled us through . . . Our dues now are like hospital insurance . . . It'll all be fine and we'll stay well if we don't forget just how sick we were. That's the trouble. When a man is well, it's too easy for him to forget how sick he was. We've got to stay in The Association if we want to avoid the big expense of sickness."

Growing memberships in several of the improved markets have contributed sufficient revenue in dues to maintain regional investigators. Policing of the market to obtain proof of illegal chiseling and to report violations of the law, is the work of Association investigators.

Assurance of maintenance of stability depends upon sufficient revenue from dues to keep an investigator in the local market.

Three prominent judges were honored guests at the State meeting. All commended highly the ingenuity of Rankin Peck in designing a program to win business justice by legal methods, and The Association for following this course zealously.

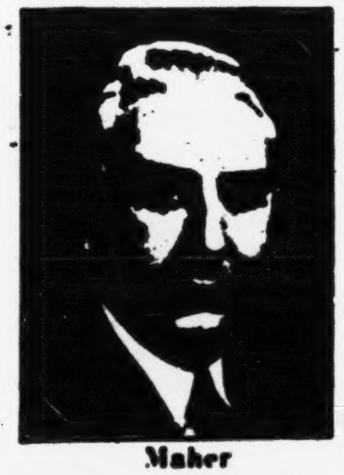
Judge Ralph Liddy, of Common Pleas Court, stressed the need for continued Faith. "Loss of Faith," he asserted, "is loss of fundamentals. Every division and department of life is based on Faith." He commented, "We forget how hungry we have been when we are well fed."

Liddy

Judge Frank Day Smith, of Circuit Court, is well-known and respected by the trade for his patient study of the oil industry which enabled him to reach an informed opinion in an important prosecution under the Fair Trade Law last year. Judge Smith declared: "I foresaw Federal Trade Commission action when sound allegations of discrimination were presented to me." He spoke in recommendation of benefits derived under the Michigan Fair Trade Law: "The 'slavery to oil barons' of which the public has heard, cannot be present in this State if the Law is observed . . ."

Smith

Recorder's Court Judge John J. Maher likewise recommended The Association to its members. "You must maintain your Association by constant membership," he advised.


Maher

WITH SINCERE
BEST WISHES

Johnson's Service Parts

23129 Woodward
EL. 6688

Ferndale
R. O. 3053

Resp Exh-78E for Iden-

Resp. Ex. 78-E

(P. 88)

Cry for More Margin Rises

Higher Costs, Especially Labor, Point To Insufficiency of Present Margins

MICHIGAN gasoline dealers need a new cost survey.

During the last two months Michigan gasoline dealers, especially in metropolitan markets, have raised a stronger and stronger demand for additional margins.

Rising costs, especially of labor, suggest strongly that the 3-cent margin, legally established as a minimum operating figure in a cost survey conducted by The Association early in 1938, is now inadequate. It may be that even dealers operating at 3.3 cents margin and greater are pumping liquid losses.

Michigan is in the best position of any State to meet the changing conditions. In other States the same sentiment may drive station postings up to cover increased costs, but just a favored or foolish few may upset the structure by chiseling.

Michigan Can Be Firm

In Michigan, however, the State Fair Trade Law recognizes minimum operating margins and prohibits selling below cost to injure or destroy competition. A cost survey establishes this minimum to the satisfaction of the court.

It is necessary now that a new cost survey be made. The new survey should cover the entire State by marketing districts. This sounds like a big, long job. Dealers throughout the State must be given form sheets to fill out enumerating necessary details of business operation. They must send them in to The Association to be compiled.

It is a big job and may take more than a month to complete despite the system that has been established for The Association in its two previous surveys. Professor H. F. Taggart, head of the Economics Department of U. of M., in charge of the cost survey division of The Association, designed the forms and procedure that found court acceptance.

"Certainly if costs have increased the survey will show it," Executive-Director Peck explained. "If dealers are to meet greater costs with greater margin, the cost survey must begin at once. Dr. Taggart is preparing the required survey sheets. But for his services, for the printing and distributing of these forms, for their collection and compilation, and for their introduction and acceptance by legal action, a large expense is required.

"It's quite plain. Dealers must show even greater effort and support to meet this Association expense to win them greater margin. They must join The Association if they do not already so that their dues will help fill the survey chest.

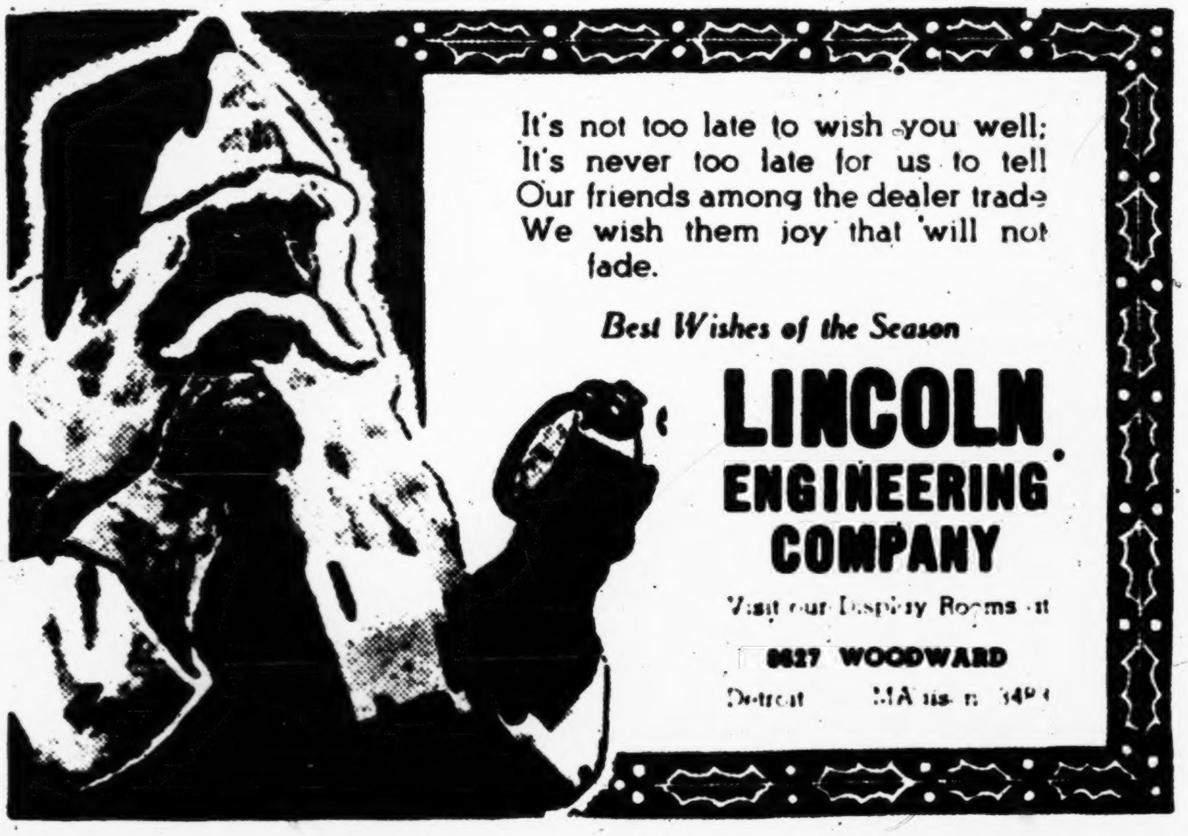
"Members themselves should pay annual dues at the $15 a year rate . . . or pay at least two to six months dues at once."

In sympathy with the financial needs of their Association to win them firmer business footing, 32 more members have paid annual dues in the last two months. They are:

American Oil Co.	**Grand Rapids**
Argo Oil Corp.	**Detroit**
Barnes Oil Co. Ser. #1	**Gd. Rapids**
Barnes Oil Co. Ser. #2	**Gd. Rapids**
Barnes Oil Co. Ser. #3	**Gd. Rapids**
Cabble Super Service	**Detroit**
Clothier-Bricker Service	**Detroit**
Cornell Whlse. Oil Co.	**Gd. Rapids**
Frank's Standard Service	**Detroit**
Gold Star Oil Co.	**Grand Rapids**
Great Lakes Sup. Ser.	**River Rouge**
Henry's Service	**Grand Rapids**
Otto Heussner Service	**E. Detroit**
Huston Super Service	**Kalamazoo**
Johnston's Service	**Detroit**
George Kelmeyer Service	**Detroit**
Ted Marks Service	**Grand Rapids**
Michigan-Braden Service	**Detroit**
Midway Super Service	**Holt**
Modern Garage	**Detroit**
Morehouse Super Ser.	**Augusta**
John Muller Service	**River Rouge**
Al Neerriemer Services	**Detroit**
Ed Pratt Service	**Detroit**
Rail Distributing Co.	**Gd. Rapids**
Jules Roberts	**Rockwood**
Ross & Holden Ser.	**Grand Rapids**
Spielmakers Mstr. Ser.	**Gd. Rapids**
Ted Tietsen Service	**Grand Rapids**
Gordon Thomson Service	**Ecorse**
R. B. Troutman Service	**Detroit**
Warren-Lorraine Service	**Detroit**

THE SEASON'S BEST

F. J. HUGHES
PUMP AN METER SERVICE
[illegible] PEARL
VI. 1-[illegible] VI. 1-[illegible]



It's not too late to wish you well;
It's never too late for us to tell
Our friends among the dealer trade
We wish them joy that will not fade.

Best Wishes of the Season

LINCOLN ENGINEERING COMPANY

Visit our Display Rooms at
8627 WOODWARD
Detroit MAdison [illegible]

(p.89)

Resp. Ex. 79-D

Resp Exh-79 II for Iden-

Retail Gas Dealers News

Owned and Published by

Ed. Pratt, President
Al. Scott, First Vice-President
J. B. Land, Treasurer
R. O. Knott, Second Vice-President
Rankin Peck, Executive-Director

131 East Adams — CAdillac 8926 — Detroit, Michigan

L. L. AARONSON, Editor

Cash. Hawley, Detroit; Earl Colley, Lansing; Fred Kramer, Grand Rapids; Neil Lemmer, Kalamazoo — Associate Editors

TOM QUINN..Advertising Director

They Like Your Business, Yes, But They Like YOU Too!

Responding to suggestions of gasoline dealers throughout Michigan who are their customers, important suppliers of retailers have seized the Convention as an opportunity to show that their "sympathy" with dealers' problems has been more than just "talk" and slick salesmanship.

They have recognized the Convention as a force to promote the good of Michigan dealers, and to aid this force as well as to show dealers "what they've got," they have taken exhibit booth spaces and declared the charges involved proper and fair. No haggling and bickering. Just plan active sympathy and co-operation.

This kind of co-operation is going to be rewarded in more than one way. "One way" is in the reflection of improved gasoline retailing on them, bringing improved business for those who sell to retailers.

There's something that's even more direct than that. Many dealers have promised to bring check books to match exhibitors' sales-books. They're out to show exhibitors that they "appreciate appreciation." One important dealer, respresenting a buying group of more than a score of dealers, has been drawing up a schedule of purchases to be made at exhibit booths. His expressed intentions only suggest the many others that reside in bosoms until March 11 and 12.

Further proof of suppliers' sincerity is seen in the generous prizes that have been bestowed. Even at magazine deadline, February 24, several hundreds of dollars of fat prizes to be won by All-Privileges ticket holders had started the list. The Prize Committee has declared "at least $1,000" in merchandise prizes as more a certainty than probability.

Year-'round profits with ~~the new~~ NOR'WAY SELF-SELLER

The new NOR'WAY Self-Seller, heavy metal, double side display stand, three colors FREE with initial order of six cans each of the new NOR'WAY Matched Cooling System Chemicals:

NOR'WAY CLEANER
Improves circulation; relieves overheating. Removes rust, grease, scale. Cleans without reverse flushing. For cooling systems up to 30 quarts.

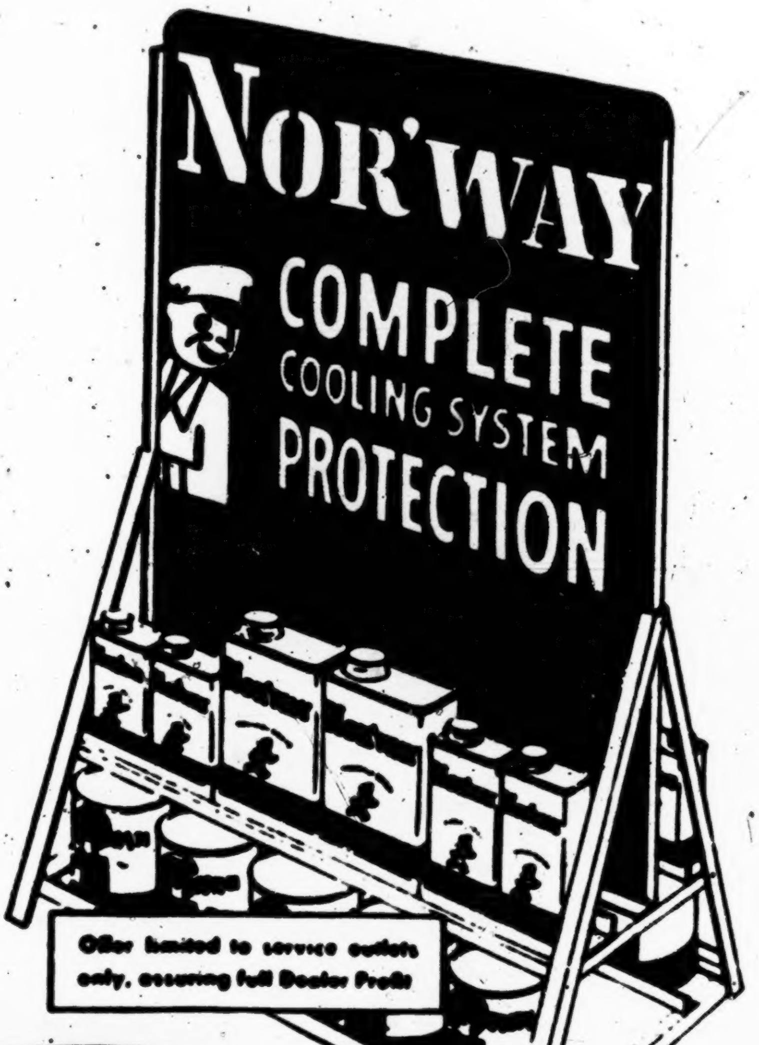
NOR'WAY QUICK FLUSH
Cleans while car is in service. For cooling systems up to 30 quarts.

NOR'WAY STOP LEAK
Will quickly stop leaks. Flows freely through system. Works with stock anti-freezes.

NOR'WAY ANTI-RUST
Prevents corrosion and rust. Protects all metals, including aluminum. For cooling systems up to 30 quarts.

A FULL-CASE PRICE FOR A SPLIT-CASE DEAL

LIMITED TIME ONLY


NOR'WAY
COMPLETE
COOLING SYSTEM
PROTECTION
Offer limited to service outlets only, assuring full Dealer Profit

COMMERCIAL SOLVENTS CORPORATION
17 East 42nd Street, New York, N. Y.

183

Ask your jobber or write us.

Launch Campaign for New Members

Retailers in Districts Captain Drives to Win Full Support for Higher Margins

"MORE MEMBERS—More Margin" is the Spring slogan of scores of key dealers in the State of Michigan these days. The cry for more margin was sounded several months ago as dealers, especially in metroplitan areas, began to squirm uncomfortably under a growing weight of operating costs.

Labor, a key to costs of station operation, transportation and materials, was the first index. As the defense program warmed up, the appeal of higher wages in factories began to show in difficulty of holding attendants.

Oil suppliers themselves began to feel the strain of operator-scarcity. Burton Business Brokers, specializing in Detroit and outstate gas station leases and sales, more than two months ago reported some leased stations closed, unable to open for lack of demand.

This labor effect was direct and first, but it has followed with inevitable indirect force in higher costs outside the station, reflecting on the station's costs.

In the present difficult business siuation, prevalent throughout U. S. gasoline markets, Michigan stands out more fortunate than others. Through the Retail Gasoline Dealers Association of Michigan's program, gasoline margins have been sufficient for operation in stabilized markets everywhere within the sphere of influence of The Association. This has established a greater appeal for gas station business here in Michigan, and less chance of abandonment by dealers and attendants.

It is the same pattern of The Association that permits easy "catching up" of the margin to meet greater costs. In other States movement of margin is uneasy, each operator fearing the next as a chiseler of gallonage, and so all may continue to sell at loss.

In Michigan, the law prohibits sales below cost to injure or destory competition. It accepts a Cost Survey as evidence of Cost. Present minimum margins were established by a Cost Survey taken long before the present upturn of costs. A new Cost Survey is required. It will discover minimum operating margains and become the basis for margin improvements.

How will the Cost Survey be obtained? The Association Cost Survey Commission, aided by Prof. H. F. Taggart, has prepared the acceptable forms already. Prof. Taggart, formerly head of the Accounting school of U. of M., and now in Washington employed in the Defense Commission, prepared the last successful survey for The Association. It is necessary now only to print and mail the forms.

How soon this will be done depends on gasoline dealers themselves. The expense of personnel, printing, mailing, compiling, filing, etc., is tremendous. Funds available to The Association to meet this expense are obtained only from membership dues. As dues sufficient to meet Cost Survey expenses are received from each County, the Cost Survey will be effected in that County.

It is this: the need for higher margin, the Cost Survey to prove it, and The Association needing funds to get the Survey, which has inspired the slogan—"More Mem-

(p.90) Resp

Dues Money Needed for Co

Resp Exh. 80 II for Iden

Seek Full Year and Business Census—K

bers--More Margin!" It has brought appointments and volunteers among dealers in Michigan to act as District Captains in a thorough membership campaign to raise the necessary funds by dues.

Dealers in every city and township in Michigan are urged to volunteer in this campaign.

"If you believe you can get even only five new members in your vicinity, even if you're not a member yourself, please write us for an appointment as District Captain," urges President Ed Pratt.

Detroit Off to Flying Start

Detroit-Wayne County gasoline dealers scheduled a meeting for Monday, April 7, at State Headquarters, 131 East Adams, Detroit, where they could organize thoroughly their regional membership campaign. District Captains will cover every section of the region in the drive for members-for Cost Survey-for improved margins.

Wayne County is off to a flying start with the greatest number of members per County in the State Association. However, the same reason which accounts for highest membership—greatest number of gas stations per county in the State—also accounts for greatest expense in issuing the Cost Survey in Wayne. Funds through dues must be increased to meet this urgent need.

Kent County, too, is in a similar position. In proportion to number of stations per County, Kent leads in membership in The Association, topping even Wayne County. Kent will have the same advantage as Wayne in meeting its membership quota to win quick issuing of its Cost Survey.

• • •

Yearly Dues Can Do It

It's not only quantity, but quality that counts. "More Members—More Margin" is a good slogan to lead to quantity of dues, but it doesn't suggest the other part of the story: Payments of yearly dues, instead of parts-of-year dues, can do as much to win sufficient funds for the Cost Survey.

For instance, during the last two months 31 members have paid their dues at the $15 yearly rate. In this they tabulate a score card reading:

r New Members

etailers in Districts Captain Drives
Win Full Support for Higher Margins

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(p.90) Resp. Ex. 80-D

Dues Money Needed for Cost Survey

Resp Exh. 80 II for Iden

Seek Full Year and Bulk Payments to Speed Business Census—Key to Minimum Margins

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For instance, during the last two months 31 members have paid their dues at the $15 yearly rate. In this they tabulate a score card reading:

(Street Address Only Identifies Detroit City)

R. L. Adams, 7145 Puritan	$15.00
Victor Almas, [illegible] W. Jefferson	15.00
American Oil Co., Plainwell	15.00
Wm. Bedford, [illegible] Joy Road	15.00
Henry Bjorke, [illegible] Oakland	15.00
Chum's Super Service, Wyandotte	15.00
W. W. Colt, [illegible] E. Jefferson	15.00
W. J. Durham, [illegible] Grand River	15.00
Ernst Super Service, Mt. Clemens	15.00
Gaeth Service, Bach	15.00
Roy Gartung, 1776 Randolph	15.00
Gehrl's Service, Fairgrove	15.00
Sam Gorber, [illegible] Gratiot	15.00
Al Haigh, [illegible] Gratiot	15.00
C. H. Haines, Vassar	15.00
Art Hall, 6621 W. Lafayette	15.00
Hamilton Auto Service, [illegible] Hamilton	15.00
Hall & Dean Service, Millington	15.00
Hanson Super Service, [illegible] Livernois	15.00
Herb's Auto Supply, [illegible]	15.00
Gordon Hunter's No. 2, Ann Arbor	15.00
A. B. Johnson, Grand Rapids	15.00
R. J. McIntosh, [illegible] E. Jefferson	15.00
Medland's Service, [illegible] Dix Ave.	15.00
Mullins Service, [illegible] Puritan	15.00
Bud Price, Riverview	15.00
School's Service, St. Clair Shores	15.00
Sebewaing Oil Co., Sebewaing	15.00
Swanson Motor Sales, Plymouth	15.00
Turner Service, [illegible] W. Vernor	15.00
Whipple Service, Benton Harbor	15.00
Total	$465.00

These 31 equal in value of contribution to the Cost Survey more than 300 new members joining at the monthly rate.

District Captains and Investigators engaged in the Spring Membership Campaign are pointing for bulk payments of dues in their drive for volume Cost Survey funds, figuring Volume equals Quantity times Quality.

130 More Dealers Join—Membership Surges Through State on Association-Whipped Waves of Stability

ANOTHER 130 gasoline dealers in Michigan acknowledged their recognition of the construction and improvements wrought by The Retail Gasoline Dealers Association of Michigan by joining in the last two months. Principal cities in point of number of new members were Benton Harbor, Kalamazoo, and Detroit.

The list of new members follows:

ANN ARBOR	
Hunter's Service No. 2	W. Huron and First
Al Klump	201 E. Huron
AUGUSTA	
Rogers Service	
BACH	
Gerth Service	
BARODA	
Mead's Service	
BATTLE CREEK	
Ben Anderson	306 Capital, N.E.
V. T. Carter	430 Capital, N.E.
BAY CITY	
Leo A. Jean	136 Garfield
BENTON HARBOR	
Al's Place	630 W. Main
Benedix Service	Colfax and Michigan
Case's Service	Empire and Colfax
Federal Service	390 E. Main
George Cripe	R. R. No. 3
Harbor Truck Service	680 W. Main
Jacob Ruff	915 Pipestone
Johnny Johnston Service	696 W. Main
Max Miney	U.S. 12
Nimtz Auto Service	1452 Colfax
Nu Way Service Stations, Inc.	570 W. Main
John Piedt	Nickerson and M-139
Ray's Service	Napier and M-139
Joe Tuka	380 Market
Tullie's Service	U.S. 12, Terr. Rd.
Whipple's Service	1666 Colfax
Wickham Service	Riverside
BIRMINGHAM	
Lancaster Hill Golf Course Service	Telegraph and 12 Mile
Nordstrom Service	28905 Telegraph
BRIDGMAN	
Leader Service	U.S. 12
CARO	
Joe Fournier	
CEDAR SPRINGS	
Henry Meyer	Box 4
COMSTOCK PARK	
John Joyce	3367 River
DETROIT	
Babbish Bros. Service	3602 E. McNichols
Gil Barrett	7046 Puritan
Brady & Woodruff	4437 Joy Road
John Burke	10050 Kercheval
C. & P. Service	19606 Fenkell
Fred Eaves	7-Mile and Charleston
Bob Edwards	683 Russell
G. A. Fry	8801 Linwood
Roy Gartung (Od. Circus Gar.)	1776 Randolph
Ben Green	16141 Livernois
Hager's Standard Serv.	7 Mile and Oakland
Frank Hesse	11446 Whittier
Husted's Service	16000 W. 7 Mile Rd.
Kercheval-Field Service	7315 Field
H. W. Lafavor	13000 Gratiot
Lenahan & Oberson	3383 W. Davison
Ralph Malloy	8147 E. Warren
Ray Marshall	Twelfth and Leslie
McDonnell Service	700 Beard
Joe Miller	10302 Conners
Earl Peters	Crane and Vernor
Puritan-Wark	Puritan & Wark
George Russell	E. Vernor and Cadillac
A. E. Sparling Equip. Co.	3572—14th
Wilshere Super Service	13001 Mack
E. T. Winchester	12th & Louise
Ben Wolff	20323 W. 7 Mile Rd.
DEXTER	
Gross & Lesser Service	8074 Ann St.
FAIRGROVE	
Gehrl's Service	
FLINT	
Alex Case	2000 Richfield
Howard Chaplain	525 E. Court
Jim Comer	922 S. Dort
Jewell Dorris	1946 Fenton
Al Hayner	Garland and Second
Paul Mauldin	Dort Hwy. & Pierson Rd.
Patterson Service	4601 N. Saginaw
Harold Schmitzer	1070 Dupont
Dixie Thornberg	3701 N. Saginaw
GALESBURG	
Dixie Garage	24 Michigan
GARDEN CITY	
Ed. Weston	
GILFORD	
Clate's Garage	
GRAND RAPIDS	
Albert Anderson	1800 Monroe N. W.
Frank J. Cebelak	866 Michigan
France's Service	1801 S. Division
John Fryling	4300 S. Division
Johnson Chevrolet Co	301 Sheldon S. E.
C. Keeling	449 N. Park
Ray Kurzee	626 Leonard
Reed's Service	1304 Butterworth
Smith & Gless Service	2213 Plainfield
Southeastern Garage	1501 Kalamazoo
Waltz Super Service	R. F. D. No. 3
KALAMAZOO	
Adam Ray Orlie	1662 E. Main
Battema Service	711 W. North
Halpin's Service	402 S. Rose
Chas. Hayward	R.F.D. No. 1
Mike's Service	2018 Gull Rd.
O'Brien's Service	N. Burdick & Paterson
Robyn Bros. Service	2601 Gull Rd.
Rusty's Friendly Service	3026 S. Westnedge
Thompson's Service	1748 Gull Rd.
Tilma's Auto Service	412 E. Vine
W. J. Van Eist	858 Portage
Vick's Service	1040 W. North
Wag's Service	Edwards and South
Weber's Service	1517 S. Westnedge
MILLINGTON	
Hall & Dean Service	
MT. CLEMENS	
Fred W. Miller	Market & Walnut
NILES	
Lee Fuller	1111 E. Main
Lehrke Service	718 N. 13th
Leo's Mobil Service	Main and Broadway
Susan & Smith Service	U.S. 12 and Cherry
Reeves Service	310 Grant
NORTHVILLE	
Bailey's Service	302 Main
PINCONNING	
R. J. Schaefer	
PLYMOUTH	
Swanson Super Serv.	883 W. Ann Arbor Trail
PONTIAC	
Schlichter's S. O. S. Service	307 Oakland
SAGINAW	
O. A. Brennan	1941 E. Genesee
Gulf Auto Clinic	Genesee & James
Herm & Heppe	2703 State
J. J. McKinney	1834 N. Michigan
Reinee J. Schnell	6th & Lapeer
ST. JOSEPH	
Otto Clauss	U.S. 12
Nelson Sech	2801 Niles
Roy Sich	R.F.D. No. 1, Box 8D
Theisen Tire & Truck	Main and Broad
Vogler Bros. Service	Main and Jones
SALINE	
Owen Hoeft	300 E. Michigan
Elmer Sterb	121 W. Michigan
SEBEWAING	
Sebewaing Gas & Oil Co.	
THREE OAKS	
Russ Cody	M-60
UNIONVILLE	
Otto's Shell Service	
VASSAR	
Giddings Service	
C. H. Haines	
H. M. Lewis	
Harry Rowland	
WARREN	
Ray Rinke	31331 Van Dyke
WAYNE	
A. S. Poole	33021 Michigan
YPSILANTI	
Midkiff's Service	3 Ecorse Rd.

"More Members

Membershi

I herewith tender
☐ $15 for One Year
☐ $3 for Two Month
As Members
Retail Gasoline Dealers

FIRM

STREET ADDRESS

CITY OR POST OFFICE

Make All Mailed Remittances P
Association of Michigan, Inc., 1

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WARREN	
Ray Rinke	31331 Van Dyke
WAYNE	
A. S. Poole	33021 Michigan
YPSILANTI	
Midkiff's Service	3 Ecorse Rd.

"More Members — More Margin!"

Membership Application

I herewith tender
☐ $15 for One Year
☐ $3 for Two Months
As Membership Dues in the
Retail Gasoline Dealers Association of Michigan

FIRM NAME

STREET ADDRESS
PHONE

CITY OR POST OFFICE
BRAND OF GASOLINE

NAME OF APPLICANT

Make All Mailed Remittances Payable to: The Retail Gasoline Dealers Association of Michigan, Inc., 131 East Adams, Detroit, Mich.

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194 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its offices in the City of Washington, D. C. on the 10th day of October, A. D. 1942.

Commissioners:

William A. Ayres, Chairman,
Garland S. Ferguson,
Charles H. March,
Ewin L. Davis,
Robert E. Freer.

* * (Caption—4389) * *

ORDER DENYING MOTION TO DISMISS COMPLAINT.

This matter coming on to be heard by the Commission upon the motion filed by counsel for the above-named respondent, under date of September 22, 1942, for an order dismissing the complaint herein, said motion being based upon and addressed to the pleadings and records of this proceeding including the official record of hearings, testimony and exhibits herein, and the Commission having duly considered the said motion and being now fully advised in the premises;

It Is Ordered that the said motion to dismiss the complaint herein be, and the same hereby is, denied, with leave to renew the arguments made in support thereof upon presentation of this proceeding to the Commission upon the merits.

By the Commission.

Otis B. Johnson,
Secretary.

196

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 28th day of December A. D. 1942.

Commissioners:
William A. Ayres, Chairman,
Garland S. Ferguson,
Charles H. March,
Ewin L. Davis,
Robert E. Freer.

* * (Caption—4389) * *

ORDER DENYING MOTION TO STRIKE PORTIONS OF THE RECORD.

This matter coming on to be heard by the Commission upon motion of counsel for the respondent dated September 22, 1942, to strike certain portions of the record herein, and the Commission having duly considered said motion and the record herein and being now fully advised in the premises:

It Is Ordered that respondent's motion to strike certain portions of the testimony of Herbert F. Taggart and Commission's Exhibits 75-A to C, inclusive, and Exhibit 76; certain portions of the testimony of Charles Evan Feinberg and Exhibit 112-A to D, inclusive; offer of proof made by attorney for the Commission at pages 985 and 986 of the record herein; certain portions of the testimony of Irving B. Dworman; and statements of the trial examiner appearing at pages 2093 to 2102, 2243, and 2162 to 2163 of the record, as set out in respondent's motion, paragraphs 1 to 5, inclusive, be, and the same hereby is, denied.

By the Commission.

Otis B. Johnson,
Secretary.

197 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 28th day of December, A. D. 1942.

Commissioners:
William A. Ayres, Chairman,
Garland S. Ferguson,
Charles H. March,
Ewin L. Davis,
Robert E. Freer.

* * (Caption—4389) * *

ORDER DENYING IN PART AND GRANTING IN PART RESPONDENT'S MOTION TO AMPLIFY RECORD.

This matter coming on to be heard by the Commission upon the motion of counsel for the respondent dated September 22, 1942, to amplify the record herein by including therein all testimony, oral and documentary, which was offered in evidence by the respondent and which was excluded by the trial examiner; and the Commission having duly considered said motion and the record herein and being now fully advised in the premises;

It Is Ordered:

(1) That respondent's motion to amplify the record herein by including respondent's Exhibit 23 for identification and the testimony of John C. Marshall relating thereto be, and the same hereby is, granted;

(2) That respondent's motion to amplify the record herein by including such portions of the testimony of Elmer E. Ledbetter excluded by the trial examiner which bear upon distribution costs of Wayne Oil Company in the sale of gasoline be, and the same hereby is, denied;

(3) That respondent's motion to amplify the record herein by including such portions of the testimony of
198 Elmer E. Ledbetter which bear upon the claim of

competitive offers made by competitors of respondent to the Wayne Oil Company and such portions of the testimony of Jacob A. Citrin which bear upon claim of competitive offers received by the Citrin-Kolb Oil Company from Hickok Oil Company of Toledo, Ohio, which were excluded by the trial examiner, be, and the same hereby is, granted;

(4) That respondent's motion to amplify the record herein by including portions of the testimony of B. S. Kott, Elmer E. Ledbetter, and Max Biber ana Exhibit 102, portions of Exhibit 100, Exhibit 104-A to H, inclusive, Exhibit 105-A to C, inclusive, Exhibit 106-A to B, inclusive Exhibit 107-A to B, inclusive, and Exhibit 108 for identification, which were excluded by the trial examiner and which bear upon advertising expense of Wayne Oil Company, Citrin-Kolb Oil Company, and Ned's Auto Supply Company, as set out in respondent's motion, paragraph 4, subparagraphs 3 to E, inclusive, be, and the same hereby is denied;

(5) That respondent's motion to amplify the record herein by including such portions of Exhibit 18-A to 18-Z-51, inclusive, which were excluded by the trial examiner be, and the same hereby is, denied;

(6) That respondent's motion to amplify the record herein by including such portions of the testimony of Charles Gershenson which concern trade practices of Ned's Auto Supply in the purchase in carload lots and sale of merchandise other than gasoline and also such portion of said witness' testimony which appears at pages 3152 to 3156, inclusive, and which were excluded by the trial examiner, be, and the same hereby is, denied;

(7) That respondent's motion to amplify the record herein by including such portions of the testimony of Jacob A. Citrin which appear in the record at pages 2178 to 2180, inclusive, and which were denied by the trial examiner, be, and the same hereby is, denied;

(8) That respondent's motion to amplify the record herein by including respondent's Exhibits 77-A to C, inclusive, 78-A to E, inclusive, 79-A to D, inclusive, and 80-A to D, inclusive, for identification, which were excluded by the trial examiner, be, and the same hereby is, denied.

199 (9) That respondent's motion to amplify the record herein by including respondent's Exhibits 81 to 91, inclusive, for identification, which were excluded by the trial examiner, be, and the same hereby is, denied;

(10) That respondent's motion to amplify the record herein by including Commission's Exhibit 65 for identification, which was offered in evidence by the respondent and excluded by the trial examiner, be, and the same hereby is, granted.

By the Commission.

Otis B. Johnson,
Secretary.

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202 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—4389) * *

ORDER DIRECTING INCLUSION OF CERTAIN DOCUMENTS IN THE RECORD.

Counsel for the Commission during the hearings before the Examiner having offered in evidence a document previously marked "Commission's Exhibit 65 for identification", to the introduction of which counsel for the respondent objected, which objection was sustained by the Examiner; and thereafter the same document was offered in evidence by counsel for the respondent without having first been given a respondent's identification number, and the Examiner of his own motion having excluded the exhibits; and thereafter the respondent having appealed from the Examiner's ruling to the Commission and the Commission having reversed the Examiner and directed that the document marked "Commission's Exhibit No. 65 for identification" be included in the record; and the Commission also having directed that Respondent's Exhibit No. 23 for identification be included in the record; now,

In obedience to said order the Record Division of said Commission is this 17th day of March, 1943, directed by the Trial Examiner to physically mark the document previously marked "Commission's Exhibit No. 65 for identification" as "Respondent's Exhibit No. 111", and to include in the respondent's exhibit said documents numbered 23 and 111, respectively, as exhibits offered by respondent.

By Webster Ballinger,
Trial Examiner.

203 Copies to:
Hon. Harold R. Hanley,
Standard Oil Company,
910 South Michigan Ave.,
Chicago, Ill.
Arthur J. Abbott,
2230 Buhl Bldg.,
Detroit, Mich.
Cyrus B. Austin,
Federal Trade Commission.

1 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—4389) * *

Room 859, Federal Building,
Detroit, Michigan.
March 10, 1941.

Met, pursuant to notice at 10:00 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

H. R. Hanley, Esq., 910 S. Michigan Avenue, Chicago, Illinois, on behalf of the Respondent.

2 PROCEEDINGS.

Trial Examiner Ballinger: The hearing pursuant to order of the Federal Trade Commission, Docket number 4389 in the matter of Standard Oil Company, is convened at 10:00 A. M. Eastern Standard time, March 10, 1941, in Room 859, Federal Building, Detroit, Michigan.

The reporter will note counsel for the Federal Trade Commission and Respondent present.

Anyone desiring a copy of the record, may obtain same by application to the reporter, who is not an employee of the Federal Trade Commission.

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

P. A. RAUPAGH was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. Will you state your full name to the reporter, Mr. Raupagh?

A. P. A. Raupagh; R-a-u-p-a-g-h.

Q. What is your address?

A. Residence?

Q. You can state your residence address.

3 A. 1230 Bishop Road.

Q. In what business are you engaged?

A. In the oil business.

Q. That is pretty general. What is your actual position? I assume that you are with the Standard Oil Company?

A. Manager of the Standard Oil Company, Detroit division.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: May it be understood that the corporate name of the Respondent is Standard Oil Company; that the company is domiciled in the State of Indiana, and the name is usually written "Standard Oil Company (Indiana)".

Trial Examiner Ballinger: It may be so understood.

By Mr. Austin:

Q. Where is the main office of the Standard Oil Company located, Mr. Raupagh?

A. In Detroit, Michigan.

Q. Isn't your main office in Chicago?

A. The Standard Oil Company?

Q. Yes.

A. Chicago, yes.

Q. And what is the location of your Detroit office?

A: 1011 Fort Street, Detroit, Michigan.

Q. What territory does your division include?

4 A. It includes the territory north of Pontiac and over to Lansing, then down to Jackson, thence, down to the Ohio line.

Q. Is it entirely in Michigan?

A. Yes, sir.

Q. Can you state, generally, the nature of the business of the Standard Oil Company; not only in Detroit, but the general business?

A. General business is to handle and supply petroleum products and other allied products.

Q. How many refineries does the Standard Oil Company have?

A. Four or five.

Q. Do you know where they are located?

A. I don't know where they are all located.

Q. Do you know in how many states the Standard Oil Company does business?

A. About fourteen states.

Q. Are those chiefly in the middle west?

A. Yes, sir.

Q. Could you name them?

A. It would be quite a job to name them all. I think we would be glad to furnish them to you.

Q. Does it include Ohio?

A. No, sir.

Q. Indiana?

A. Yes, sir.

5 Q. Illinois?

A. Yes, sir.

Q. Michigan?

A. Yes, sir.

Q. And the other states more to the West or to the East?

A. To the West.

Q. Do you have a refinery at Whiting, Indiana?

A. Yes, sir.

Q. Do you have any other refineries in Indiana?

A. No, sir.

Q. Do you have a refinery in Michigan?

A. No, sir.

Q. Where does the oil come from that goes to the Whiting, Indiana refinery?

A. From the producing fields.

Q. Do you know what fields?

A. I couldn't say, definitely.

Q. Have you ever made a study of the sources of petroleum that is used by your company?

A. I don't know as I have ever made a study of it. I have heard, from time to time.

Q. Does it come from Texas or Pennsylvania, or where does it come from?

A. I think most of it ~~would~~ come from Texas.

Trial Examiner Ballinger: Off the record.

6 (There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: The fact is, that we will agree that crude oil, to supply the refineries of the Standard Oil Company comes from various sources, but primarily from what are known as mid-continent fields; Kansas, Oklahoma, Texas, and, to some extent, for a time, from Wyoming. That is not exclusive at all, but that is the primary source.

Trial Examiner Ballinger: That is not conclusive, of course, but that will answer the question.

By Mr. Austin:

Q. We will get a little closer home now, Mr. Raupagh, and we will start you out at Whiting, Indiana, and we will talk about gasoline. I would like to have you describe and trace the movement of gasoline from the Whiting Refinery to Detroit. Before you answer that, does all of the gasoline which is sold by Standard Oil Company in Detroit, come from Whiting, Indiana?

A. Yes; it has in the past.

Q. Well, will you then describe how the gasoline is shipped or transported from Whiting, Indiana to your marine terminal in Detroit?

A. It is transported by tankers from Whiting, Indiana, to our marine terminal in Detroit.

Mr. Hanley: Just by way of keeping the record

7 straight, is River Rouge regarded as part of Detroit?

The Witness: Yes, generally regarded as part of Detroit.

By Mr. Austin:

Q. River Rouge is in Michigan, anyway, isn't it?

A. Yes, sir.

Q. On the edge of Detroit?

A. Yes.

Q. Does all the gasoline come by tanker, by boat?

A. Yes, all of it comes by boat. There may be an exception occasionally on account of an emergency, when there is some shipped in by tank cars.

Q. By tank cars?

A. By tank cars; yes, sir.

Q. Do you ever operate any so-called truck-trains between Whiting and River Rouge?

A. No, sir.

Q. Do you have any pipeline transportation of oil into Michigan?

A. No, sir.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Is Whiting located on Lake Michigan?

A. Yes, sir.

Q. And that means that those boats have to go up through the Straits of Mackinaw and on down?

A. Yes, sir.

Q. Is that waterway open during the winter, generally?

A. No, sir.

Q. What do you do during the winter?

A. We have sufficient storage at our River Rouge terminal to last us during the winter.

Q. Now I am going to divert from the course of gasoline, as long as we have it at River Rouge. Before doing that, however, I might ask you as to the capacity of your tanks at River Rouge. You said you had large storage facilities there.

A. The capacity is about a million and a half barrels, barrels of the capacity of forty-two gallons.

Q. And how is that oil loaded from the tankers into your marine terminal?

A. By pumps.

Q. Is the marine terminal a magnified bulk plant, or is it a different sort of an animal! I am not familiar with the difference between a terminal and bulk plant except as to size, and I would like to know whether there is any other difference.

A. Well, I think it is a large bulk plant.

9 Q. And I suppose it has docks and facilities where the tankers can come up so that the oil can be pumped right out into the tanks?

A. Yes.

Q. How many retail gasoline stations are there in the Detroit area to which the Standard Oil Company sells gasoline?

A. We supply about 436.

Q. That is, includes Dearborn and Hamtramck and City of Detroit, and perhaps, other suburbs?

A. I would like to correct that answer, if I may.

Trial Examiner Ballinger: You may.

A. We supply about 336, and our jobbers supply about 106.

By Mr. Austin:

Q. Does that include the suburbs or the separate towns that are in the Detroit area?

A. It includes Hamtramck and Dearborn.

Q. Now, I was under the impression, from some of the statements that have been made, either in correspondence or the pleadings, that you had about 500 stations in the Detroit area; 450 to 500. Perhaps, that included your jobber stations, but I didn't so understand it.

A. That is the number that we have in the area.

Q. At the present time?

A. Yes, sir.

Q. Will you repeat that number again, please?

A. Three hundred thirty-six, and our jobbers have 106 stations.

10 Q. Does that 336 include contract stations and leased stations, both?

A. Yes.

Q. Is that a smaller number of stations than you had, say, two years ago, or is it larger?

A. Oh, it is about the same.

The Witness: You Honor, may I make another correction?

Trial Examiner Ballinger: You may.

The Witness: I think Highland Park should also be included in that area.

By Mr. Austin:

Q. How many out of 336 stations, how many of the properties are owned by the Standard Oil Company?

A. About 200.

Q. Those stations are then leased to the operators?

A. Yes, sir.

Q. That would leave 136 which are owned by the operator, or leased by him, from some other source?

A. Yes, sir.

Q. Does the Standard Oil Company lease any oil station properties?

A. Very few. You mean—

Q. Lease them, and then sub-lease them?

A. Yes, a few of them.

Q. How many, approximately?

11 A. Oh, eight or ten.

Q. Are the majority of those 200 leased stations stations which were owned and operated by Standard Oil Company prior to the inauguration of the Iowa Plan?

A. Yes, sir.

Q. When was that ownership ceased and stations begun to be operated on a leased basis?

A. May I consult a memo that I have?

Q. Yes.

A. (Referring to document.) September 10, 1936.

Q. That is the date upon which you abandoned operation of gasoline stations?

A. Yes, sir.

Q. You might explain, for the record, what you mean by the Iowa Plan.

A. It means that we discontinued the operation of service stations that we owned; I mean direct operation, and on the particular stations that we owned, we leased them out to dealers who then operated them. We assumed the status of landlord and tenant.

Q. And does the Iowa Plan, as it is generally referred to, mean a plan whereby the rental is based upon the gallonage consumed, or is that inherent in what is known as the Iowa Plan?

A. No, our gallonage is based both on a cash rental
12 and a gallonage rental.

Q. Do you know why that system of sub-leasing is called the Iowa Plan?

A. Well, it was first started in Iowa, I believe, as far as our company is concerned.

Q. Was that partially the result of chain store tax laws?

A. I don't know.

Mr. Hanley: If you know.

Mr. Austin: What?

Mr. Hanley: If you know.

The Witness: I don't know.

Mr. Austin: It is nothing important. I was under the impression that it was partially due to that, and partially due to social security taxes, and other things which might make a chain of stations rather burdensome to the company. Is that correct, Mr. Hanley?

The Witness: I don't know.

Mr. Hanley: In part it is. If it is important—

Mr. Austin: It is not important.

Mr. Hanley: —we can develop it for you. There were reasons in addition.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

By Mr. Austin:

Q. Do I understand, Mr. Raupagh, that the stations which are owned or where the properties are owned or leased by Standard Oil, they are either leased or subleased to the operators and that there are written leases covering those stations?

A. Yes, sir.

Q. Can you state generally, but as clearly as possible, the method in which those leases are negotiated and the way that the amount of the rental is determined?

A. The amount of the rent is determined according to the valuation of the property or the valuation of the station, the business it does, its value as a service station.

Q. Is there, generally, a so-called flat rental, a certain amount per month?

A. Yes, sir.

Q. Plus a certain amount per gallon?

A. Yes, sir.

Q. On gasoline sold?

A. Yes, sir.

Trial Examiner Ballinger: And that applies to all of them?

The Witness: Yes, sir.

By Mr. Austin:

Q. How much is the rental per gallon?

A. It is generally a half cent per gallon.

Q. And does the flat rent vary?

14 A. Yes, sir.

Q. Does that vary according to the equipment in the station and the location?

A. Yes, sir.

Mr. Austin: I would like to have this paper marked for identification.

Trial Examiner Ballinger: The reporter will mark the paper Commission's Exhibit 1, for identification.

(That paper writings referred to were marked "Commission's Exhibit 1-A to 1-D," inclusive, for identification.)

By Mr. Austin:

Q. Mr. Raupagh, will you describe this paper marked Commission's Exhibit 1, and state what it is?

A. This is a lease covering the station located at 1715 Robinson Street, Detroit, Michigan, leased to Charles Dameron.

Q. Is that a typical lease between the Standard Oil Company and its Detroit stations?

A. Yes, sir.

Q. What is the flat rental per month in that lease?

A. $174.97.

Q. And the rental per gallon?

A. One half cent per gallon.

Q. Is that a rather high flat rental, or would that be lower than the others?

A. I think that is a rather high flat rental. It is a
15 very good station.

Mr. Austin: I offer this lease in evidence.

Trial Examiner Ballinger: Without objection?

Mr. Hanley: I have never seen it. May I look at it just a moment?

(The Exhibit referred to was handed to Mr. Hanley.)

Mr. Hanley: I haven't any objection to its reception.

Trial Examiner Ballinger: Without objection, Commission's Exhibit 1-A to and including D, for identification, is admitted in evidence.

(The lease referred to, heretofore marked for identification "COMMISSION'S EXHIBIT 1-A to D, inclusive," was received in evidence.)

By Mr. Austin:

Q. Now, you have about 136 stations, if I understood you correctly, that are not leased from the Standard Oil Company?

A. Yes, sir.

Q. What sort of an arrangement do you have with those stations?

A. We have regular contracts with those stations, gasoline contracts.

Q. I will show you this sheet and ask you whether that is one of the contracts to which you have just referred?

A. Yes, sir.

Q. Is that same form of contract used with all of your stations except the lessees?

16 A. Yes, sir.

Q. No variation?

A. The only variation may be as to the length of time that the contract is to be in effect.

Q. And what variation is there in that respect?

A. Well, a variation as to time.

Q. Well, I mean, how short or how long?

A. Well, they generally run for a year, but I think there are some that we have that run for a period of three years.

Q. Do you have any that run for less than a year?

A. No.

Q. After the end of the first year, though, isn't it true that they are then only renewed for six months periods, according to the terms of the contract?

A. Not this agreement, no, sir.

Q. Is that true in respect to the leases?

A. No.

Mr. Austin: I will offer this "Dealer's Agreement" in evidence.

Mr. Hanley: Off the record.

(A discussion ensued off the record.)

Mr. Hanley: I haven't any objection to the offer. I am wondering, however, what you regard their materiality to be, Mr. Austin. May I inquire as to that? Is there any issue on any of this kind of fact material?

17 Mr. Austin: No, but I think that the relationship between the company and the stations should be shown. I think it is material on the question of interstate commerce. As a matter of fact, I am introducing them on

that, and refer to them in the complaint upon that ground. I believe, in that paragraph.

Trial Examiner Ballinger: Without objection the document described by the witness is admitted in evidence as Commission's Exhibit 2.

(The paper referred to was marked "COMMISSION'S EXHIBIT 2" for identification, and was received in evidence.)

By Mr. Austin:

Q. Mr. Raupagh, I wish you would read this paragraph right here (indicating). You may wish to correct the statement you made about extensions of the leases.

Trial Examiner Ballinger: Handing witness—

Mr. Austin: Commission's Exhibit 1.

Trial Examiner Ballinger: —Commission's Exhibit 1-A through D.

A. No, I don't think I would correct that, Mr. Austin, because this paragraph simply refers to the proposition; if there is no renewal, then it automatically renews itself for a period of six months. That is the way—

Trial Examiner Ballinger: Describe the paragraph you referred to as "this paragraph." On page what? What paragraph?

The Witness: Exhibit 1-B, paragraph 11. This paragraph refers to the extension of the lease. If there is no renewal made, the lease automatically extends for a period of six months.

By Mr. Austin:

Q. Well, that is what I intended to ask you a moment ago. Of course, if there is a new lease made, that would be a renewal, and that would be for a year, but ordinarily isn't it true that these leases run without any new lease being executed?

A. No.

Q. At the end of a year?

A. No.

Q. Then is it your practice to make out a new lease for the station at the end of each year?

A. Yes, sir.

Q. Rather than to permit the lease to continue under that renewal clause?

A. Yes, sir.

Q. So that most of your lease agreements run for a period of at least a year?

A. Yes, sir.

Trial Examiner Ballinger: The renewal clause is only operative for six months, is it not?

19 Mr. Austin: Well, as I understand it, if nothing is said at the end of the year and neither side cancels, it just goes on for periods of six months at a time, subject to cancellation by either party; but I understand Mr. Raupagh to say that the practice is to make out a new lease and not allow the extension to work automatically.

By Mr. Austin:

Q. Referring to the terms of the leases, Mr. Raupagh, I wish you would read over those last two paragraphs of this statement, and if what is there is correct, I would suggest, if it is agreeable to Mr. Hanley, that it be read into the record.

Mr. Austin: Off the record, if you please, a moment.

(A discussion ensued off the record.)

By Mr. Austin:

Q. Do you agree, Mr. Raupagh, that this statement which I am here showing you is a correct statement as to the reasons for a variation of rentals?

A. Just let me read that again, please.

Q. If so, I wish you would just read that statement to the reporter, just the last paragraph.

A. Yes, that is okay.

Q. Do you want to read that to him?

A. "On other service stations which do not have these comparable facilities, the cash rental is decreased proportionately with lesser facilities. We have a number of 20 stations which are leased, with no cash rental, but with a gallonage rental of one-half cent, which is our normal gallonage rent. However, we have stations purchased a number of years ago where traffic has been diverted, the neighborhood has been run down, and we are unable to obtain our normal rent, and in these cases we lease these properties for as low as one-tenth of a cent per gallon."

Q. By what method is gasoline sold and delivered to your retail outlets?

A. By tank delivery.

Q. Where do these tank trucks start?

A. They start at our bulk plants, located in Detroit.

Q. A while ago we only got the gasoline so far as River Rouge. I wish you would carry it along from there.

A. All right. From our terminal at River Rouge, we ship by tank cars or transport truck to our bulk station located in Detroit. From our bulk station—

Q. Just a moment. What do you mean by transport truck?

A. Well, I mean that we hire somebody that makes a business of transporting gasoline by transport truck or large truck, and they deliver it in that method to our bulk plants. From the bulk plants we deliver with our own trucks to our dealers.

Q. Then the shipments from the River Rouge terminal to your bulk plants are not handled by you; that is, you employ someone to do that for you?

21 A. They are handled by us, but we employ transport haulers just the same as we would employ a railroad to ship a car.

Q. How many bulk plants do you have in Detroit?

A. Six.

Q. Does all of the gasoline that goes to the retail service stations go through those bulk plants, or does some of it go direct from the River Rouge terminal to the service station?

A. Practically all of it goes through our bulk plants. I think there is a small portion that is routed direct from our River Rouge terminal.

Q. Why is it that you use the bulk plants as an intermediate place of storage? Why not load the tank trucks at River Rouge and go directly to the service stations?

A. Well, to cut down the distance of hauling with our trucks.

Q. In other words, do you find it is less expensive to operate the bulk plant and deliver from there than it would be to deliver it from River Rouge direct?

A. Well, that is kind of a—that is quite a question at the present time, which is most economical. We are studying that situation.

Q. I don't want to go into that cost, but I just want to get into the reasons which dictated your construction and operation of the bulk plant rather than the direct deliveries from River Rouge.

A. Well, the reason why is that it would be a
22 shorter haul to our dealers; we could give better service that way.

Q. It would be partially that, then, the shorter haul, in other words, would relate to the service as well as to the cost?

A. Yes, sir.

Q. Do you know whether some of the major oil companies deliver to their service stations direct from River Rouge without operation of bulk plants?

A. Of course, you don't mean that question the way you have stated it. Off the record. There are no other companies delivering out of River Rouge.

Q. Aren't there other marine terminals at River Rouge?

A. I believe there are. I believe you are correct.

Q. I thought there were.

A. I believe you are right.

Q. Well, I won't pursue that.

Trial Examiner Ballinger: Are you acquainted with those companies?

The Witness: Yes, sir.

Trial Examiner Ballinger: With their facilities at River Rouge?

The Witness: Yes, sir.

Trial Examiner Ballinger: Do you know whether they make delivery to the retail trade direct from River Rouge?

The Witness: I couldn't say definitely whether they
23 do or not, Your Honor.

By Mr. Austin:

Q. About what percentage of your deliveries are made direct from River Rouge and about what percentage from the bulk plants?

A. Why, I don't think that our deliveries from River Rouge would run—that is, deliveries from River Rouge to our dealers, would run over ten or fifteen percent at the present time.

Q. Will you state the location of your six bulk plants?

A. Yes, if you are willing to take the locations as we designate them. I haven't got the exact street address. I would be glad to furnish those.

Q. Do you know the intersection or whatever it is? You state them your way, and if it isn't sufficient, we will ask you for more.

A. Clay Avenue, Bellevue, Lycaste, Strathmoor, Scotten. There is one other; I just can't recall where it is located.

Mr. Hanley: I will find out for you, to save you time.

Mr. Austin: I think we might get a little better address on those.

Mr. Hanley: The other is north of Detroit.

The Witness: Yes, that is the North Detroit.

Mr. Hanley: We will get you the addresses.

24 Trial Examiner Ballinger: With the consent of counsel, if he will get them and let the reporter have them, he will insert them in the record at this point.

(A discussion ensued off the record.)

(The addresses furnished by counsel for the Respondent are as follows:

Bellevue Plant, 2945 Bellevue Avenue,
Clay Plant, 1545 Clay Avenue,
Lycaste Plant, 421 Lycaste Avenue,
North Detroit Plant, 8600 E. Seven Mile road,
Scotten Plant, 3450 Lovett Street,
Strathmoor Plant, 13895 Intervale Avenue.)

By Mr. Austin:

Q. Is gasoline delivered in the same way to your lessees as to your contract dealers?

A. Yes, sir.

Q. And when the gasoline gets to the bulk plant, is it loaded there into the tank trucks and taken direct to the service stations?

A. Yes, sir.

Q. And does the driver of the truck empty it right into the tank?

A. Yes, sir.

Q. At the service station?

A. Yes, sir.

Q. Right under the pump?

25 A. Yes.

Q. How are the needs of the various service stations known so that your driver knows when to call and how much to deliver?

A. Two ways: Many times the dealers will call up our bulk plant and order his gasoline. In some cases we know just about when he is out, and the driver makes his regular routes and calls and delivers the gasoline.

Q. Then I suppose the same driver—that is, each driver has a route?

A. Yes, sir.

Q. So that he calls on the same stations from day to day or from week to week?

A. Yes, generally so.

Q. And does he become familiar with the needs and the capacity of the various stations?

A. Very much so.

Q. That being true, isn't it in a majority of instances necessary for the station to call up and order or is that only when there has been an exceptional amount of business or something of that kind where the station needs something extra?

A. Oh I think that happens quite often, because it is pretty hard to know definitely just how long gasoline will last at their stations, and there is always a danger of running short.

Q. The drivers do, however, make periodical calls and try to keep stations supplied?

26 A. That is their duty.

Q. That applies to all of the 336 stations?

A. Yes, sir.

Q. What is the average delivery of gasoline to a certain station? I suppose there is a very wide variation on that, Mr. Raupagh?

A. Yes, there is.

Q. You might state what the minimum or maximum is. I suppose the maximum would be a tank truck ful?

A. Yes.

Q. How much does a tank truck hold?

A. All the ways from—the deliveries, I would say all the way from a couple of hundred gallons up to 1,500 gallons.

Q. Is the capacity of a tank truck 1,500 gallons?

A. We have some that capacity.

Q. You have others that are a thousand?

A. Yes, sir.

Q. What is the minimum delivery that you make?

A. I don't know as we have a definite minimum delivery, but I don't think any delivery could be less than a couple hundred gallons.

Q. About 200?

A. Yes, sir.

Q. Are the majority of deliveries between 500 and 1,000, or are they a thousand or over?

27 A. Oh, I would say the most of them are between 500 and 1,000.

Q. Is it nearer a thousand or nearer five hundred?

A. Well, I think you had better say 50-50. I would hate to say.

Q. That would bring your average somewhere around 700 or 800 gallons?

A. (Witness nods head affirmatively.)

Q. Does the Standard Oil Company own the six bulk plants?

A. Yes, sir.

Q. Does the Standard Oil Company own all of the tank trucks?

A. Yes, sir.

Q. That are used for delivery from the bulk plants?

A. Yes, sir.

Q. How long have these present bulk plants been operated by you?

A. I don't know the exact date that they were constructed, but I will say that they have been operated by us for over ten years?

Q. All six of them?

A. Yes.

Q. Then the newest one is at least ten years old?

A. Yes, sir.

Q. By what other method is gasoline sold by the Standard Oil Company in Detriot, other than by this retail delivery method?

28 Mr. Hanley: Just a moment. Are you referring to sales to re-sellers?

Mr. Austin: Yes, I am referring to sales to re-sellers at the moment.

Trial Examiner Ballinger: Is your question confined to the Standard Oil Company?

Mr. Austin: Yes.

By Mr. Austin:

Q. I want to know this: You sell gasoline other than through these bulk plants and tank trucks?

A. Yes, sir.

Q. So I want to know about tank car deliveries now, to be specific, and also whether there is other means?

A. There is no other means except either tank truck or tank car deliveries.

Q. How many customers do you have that take delivery by tank car?

A. We have four customers that we designate as jobbers, who take deliveries by tank car or transport truck.

Q. Will you distinguish between tank car and transport truck—

A. No.

Q. —method?

A. No, we don't.

Q. Well, there is a difference. I am asking you to tell me.

29 You said that they took delivery either by tank car or transport truck.

A. Well, what would you like to have me answer?

Q. I want to know—well, to go back, you said there were four customers, as I understood you, who took delivery by tank or transport truck?

A. Yes, sir.

Q. Who are those four customers?

A. Stikeman Oil Company, Ned's Auto Supply Company, Citrin-Kolb Oil Company, Wayne Oil Company.

Q. Tell me which of those purchases by tank car and which by transport truck.

A. At the present time we are making deliveries to all four of them by transport truck.

Trial Examiner Ballinger: What is the distinguishing difference between the two?

The Witness: Your Honor, the only distinguishing difference is that prior to, oh, I would say, about a year ago or less, we made all shipments to these jobbers by tank cars. Then there is in the oil industry what is known as transport truck haulers, people who have trucks that hold all the way from six to twelve thousand gallons, just the same capacity as a tank car, and they simply haul it over by that method rather than shipping it by tank car.

Trial Examiner Ballinger: Is that strictly within

30 the State of Michigan?

The Witness: Yes, sir, as far as we are concerned, it is, but that is done—

Trial Examiner Ballinger: Does any of that come across the State line?

The Witness: No, sir.

By Mr. Austin:

Q. Well, that gasoline is the Whiting, Indiana, gasoline that comes from River Rouge—that goes to River Rouge and then—

The Witness: May I make a further statement?

Trial Examiner Ballinger: You may.

The Witness: These transport haulers, I believe, have to file a schedule of rates just the same as a railroad company, and as far as we are concerned, it is just a convenience of getting the gasoline delivered to these jobbers over the tank car method.

Trial Examiner Ballinger: They load at River Rouge, do they?

The Witness: Yes, sir.

By Mr. Austin:

Q. Why did you shift from tank cars to tank trains? A. More convenient to the customer, and I think a little lower rate, also.

Q. Are your deliveries now exclusively by tank train or still by tank car to some extent?

31 A. To these four customers?

Q. Yes.

A. We are delivering by truck train.

Q. Now, that truck train can go anywhere? It can go to a retail service station, can it?

A. It could, yes, providing the retail service station had the storage, and so on.

(A discussion ensued off the record.)

By Mr. Austin:

Q. Since you are making deliveries by tank train, Mr. Raupagh, it would not be necessary for a purchaser to operate a bulk plant, would it, in order to receive delivery in, say, 10,000 gallon lots? For instance, if he had a tank that large right at his service station, it would be feasible, would it not, to make delivery to him by tank truck?

A. Yes, sir, that would be feasible.

Q. What is the minimum delivery that you can make by this tank train?

A. Well, our policy, I believe, is 8,000 gallons as a minimum that we will deliver, but we do not make that kind of delivery to any station or re-seller.

Q. Well, that is your practice?

A. That is our policy, yes, sir.

Q. But there is no reason why you couldn't do it if you wanted to, is there?

32 A. No, none whatsoever.

Q. Where are the bulk plants of the four customers located? Have you got those addresses?

A. No, I haven't. I will be glad to furnish them to you. One is located at Brandon and Wyoming. There is two plants in that area, Wayne Oil Company and Ned's Auto Supply Company. That is in Dearborn, I believe, and—

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

33 A. Stikeman Oil Company is located on Waterman.

Q. I will ask you now if you can state the Citrin-Kolb Oil Company.

A. Lyndon and Livernois; Linwood and Detroit Terminal Railroad.

Q. Ned's just has one plant?

A. Yes, sir.

Q. That is in Dearborn, is it not?

A. Yes, sir.

Q. Do you have any contracts or agreements with these four buyers?

A. No, sir.

Q. What is the method of sale? Describe your method of sale and delivery to them.

A. Whenever they need gasoline or want gasoline they simply call us by telephone and order so many tank cars. I think that is the way it is generally designated, a tank car holding about 10,000 Gallons and we make the delivery from River Rouge Terminal directly to their terminal or their bulk plant. When I say "we make the delivery," we make it either by tank car or by transport haul.

Q. Do you deliver the gasoline into their bulk plant? For instance, on the transport truck does the operator of the transport truck or truck-train empty that gas or pump it into the plant?

34 A. Yes, sir.

Q. And on tank car deliveries?

A. Tank car deliveries, the railroad simply switches the tank car on their side track and it is up to them to unload it.

Q. So that there is a slight saving of expense to the buyer by tank train delivery, isn't there?

A. I believe there is, yes, sir.

Q. Is there any difference in the price charged per gallon for gasoline as between tank car delivery and tank train delivery at one time?

A. No, sir.

Q. Then, if there is any saving, as between the freight charge and the trucking charge, why, that is not deducted from the price?

A. No, sir.

Q. What sort of an agreement or understanding do you have with these four? You said you had no contract.

A. We have no contracts.

Q. You must have some basis under which you do business?

A. We sell them on our regular reseller tank car basis which generally, on house brand gasoline is a cent and a half off the posted tank wagon reseller house price.

Q. What do you mean by "reseller house price gas"?

A. I mean, standard Red Crown gasoline.

35 Q. And since you mentioned prices, what is the difference between the price of Solite Ethyl to the tank train or tank car buyer, and to the retail station?

A. I believe the price is $1\frac{3}{4}$ cents. That is, the price of Solite with Ethyl is $1\frac{3}{4}$ cents above Red Crown gasoline.

Q. Well, isn't it true that the price to a retail station of the Ethyl gasoline is one and a half cents above the tank wagon price on Red Crown, whereas the difference in the tank car price on the Ethyl and the regular is only a cent and a quarter?

A. I am under the impression it is $1\frac{3}{4}$ cents.

Q. Well, yes, but I am afraid that we may not be talking about the same thing. If I understand you correctly there is a $1\frac{3}{4}$ cent differential between the tank car and tank wagon price on the Ethyl.

A. Yes, sir.

Trial Examiner Ballinger: Is that correct?

The Witness: Yes, sir.

By Mr. Austin:

Q. And there is a $1\frac{1}{2}$ cent differential on the Red Crown between tank car and tank wagon buyer?

A. Yes, sir.

Q. But that increase of a quarter of a cent results from the fact that the tank car buyer only pays a cent and 36 a quarter more for his Ethyl, whereas the tank wagon buyer pays a cent and a half more?

A. I believe so.

Mr. Hanley: Do you understand that questioon?

The Witness: I don't believe so.

Trial Examiner Ballinger: Off the record.

(Discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Now, how about the Stanolind? Is that the third grade gasoline?

A. Yes, sir.

Q. And what is the differential there between tank car and tank wagon?

A. Generally one cent a gallon.

Q. How is your tank car price determined? It isn't always exactly a cent and a half off the tank wagon, is it, on the Red Crown?

A. No, it isn't. It depends on how low the market really is. I think there is some limit as to how low we would go. Just exactly the mechanics as to how it is determined, I don't believe I can answer that.

Q. Where is it determined? Do you determine it in your office?

A. No, we get instructions as to what our markets are.

37 Q. And where do the instructions come from?

A. They come from our main office in Chicago.

Q. And do the instructions as to the price of Red Crown also come from Chicago?

A. Yes, sir.

Q. And the Stanolind also?

A. Yes, sir.

Q. That is true both as to tank car and tank wagon prices?

A. Yes, sir.

Q. Are you familiar with the businesses in which these four tank car buyers are engaged?

A. Yes, sir.

Q. Do they resell this gasoline?

A. Yes.

Q. To whom do they resell it?

A. To their dealers and consumers.

Q. Do you know whether Ned's Auto Supply Company sells any gasoline to dealers?

A. I don't believe they do.

Q. All their gasoline is resold through their own retail stations, is it not?

A. There might be one exception. I think they have a service station that is leased out; if that could be considered a sale to a dealer, that might be the exception.

38 Q. If there is one such instance, that would be a very small portion of the gasoline which they purchase, would it not?

A. Yes, sir.

Q. Has that one station been leased out only recently, do you know?

A. No, I think it has been for a number of years.

Q. Is that a small station?

A. It is, generally speaking, a good average station.

Q. Do you know how many outlets Ned's have that they operate themselves?

A. They have six.

Q. And this one you are speaking of was aside from that?

A. Yes.

Q. Does the Stikeman Oil Company operate any of its own retail stations?

A. None.

Q. Did it formerly?

A. If you go back far enough, why, they did; yes, sir.

Q. How far back?

A. (Referring to document) I can't answer that without looking it up.

Q. Do you know whether Citrin-Colb Oil Company operates a number of retail stations?

39 A. I think they operate a few of their retail stations.

Q. And do you have exact data on that as to the number or location?

A. Only what they have given us.

Q. Do they give you that information right along?

A. Not right along, but I think you requested it.

Q. I am not trying to go into this in detail at this time, but I want to find out whether you do have the informa tion, as to the character of the business. And by that I mean information as to the character of the business of these tank car buyers. Do you make it your business to know whether they resell and to whom they resell?

A. No, sir.

Q. Then, do I understand that the character of the business of the purchaser isn't a qualification to be allowed to purchase in tank car quantities?

A. Will you state that question again, please?

Trial Examiner Ballinger: Read the question, please.

(The question was read.)

A. I think that is one of the qualifications.

By Mr. Austin:

Q. What; the nature of the business?

A. Well, you said the "character of the business."

40 Q. What must the character of the business be?

A. Well, he must have a bulk plant; he should have some established business; he should be able to purchase from a million to two million gallons a year.

Q. Why do you make that volume requirement?

A. I don't know of any particular reason excepting that for an individual or a concern to be a jobber there must be some volume involved, and that's what we consider as the proper volume.

Q. Does the jobber, to you, simply mean somebody who buys in certain quantities?

A. Who buys in certain quantities and performs a function of a jobber.

Q. What is your understanding—what is the function of a jobber?

A. First, that he buy in sufficient quantity.

Q. Is it necessary that he resell to other dealers?

A. No.

Trial Examiner Ballinger: Are there any other qualifications or requirements?

The Witness: Yes, your Honor. His credit, financial standing should be such that —

Trial Examiner Ballinger: Assuming that his financial standing is all right. It's really,—isn't really the only test as to whether or not he has storage facilities and

41 can buy in sufficient quantities?

The Witness: That is principally it.

Mr. Austin: I would like to have these documents marked for identification.

Trial Examiner Ballinger: The reporter will mark the papers referred to as Commission's Exhibits 3-A and 3-B, for identification.

(The documents referred to were marked, for identification, "Commission's Exhibit 3-A and 3-B.")

By Mr. Austin:

Q. Mr. Raupagh, I hand you these papers marked Commission's Exhibit 3-A and 3-B, for identification, and ask you to describe the contents.

A. Exhibit No. 3-A is a statement of dealer tank wagon prices; jobber tank car prices; prevailing retail prices of standard Red Crown gasoline from January 1, 1937, to March 1, 1941.

Exhibit 3-B is a statement of dealer tank wagon prices; jobber tank car prices; prevailing retail on Solite with Ethyl gasoline, from January 1, 1937, to March 1, 1941.

Q. What do you mean by "prevailing retail prices"?

A. I mean the prevailing prices posted by the majority of dealers handling major brand gasolines.

Q. Retail dealers?

42 A. Retail dealers, yes, sir.

Q. That is, other major brands as well as Standard Oil?

A. Yes, sir.

Mr. Austin: I offer these statements in evidence, your Honor.

Mr. Hanley: No objection.

Trial Examiner Ballinger: There being no objection, Commission's Exhibits 3-A and 3-B, for identification, are admitted in evidence.

(The documents referred to, heretofore marked, for identification, COMMISSION'S EXHIBITS 3-A and 3-B, were received in evidence.)

Mr. Austin: Your Honor, I have here a statement which was supplied by Mr. Hanley regarding posted retail prices of Red Crown and Solite Ethyl gasoline at retail service stations directly operated by the Stikeman Oil Company, from the period from January 1, 1937, to February 14, 1938.

I understand that counsel for the Respondent will stipulate that these go into the record, and since I am not planning to call a witness from this company, I think that the easiest way to dispose of this is to stipulate it now.

Trial Examiner Ballinger: Oughtn't the stipulation go a little further and have it in the record as being the
43 facts?

Mr. Hanley: I understand them to be the facts, your Honor, and I assume they are the facts. The information was supplied by Mr. Stikeman and we assume they are the facts and will be found by them.

Mr. Austin: I request that this be marked in evidence as Commission's Exhibit 4.

(The document referred to was marked, for identification, "Commission's Exhibit 4.")

Trial Examiner Ballinger: The reporter will mark the paper Commission's Exhibit 4 without objection and it is admitted in evidence, it being stipulated that the statements thereon appearing are true. Is that correct?

Mr. Hanley: That is right, your Honor.

Incidentally, that answers the question, I think, that Mr. Raupagh could not answer, as to the time of their stopping.

(The document referred to, heretofore marked, for identification, "COMMISSION'S EXHIBIT 4," was received in evidence.)

By Mr. Austin:

Q. I was just going to ask that. Mr. Raupagh, I would like to show you Commission's Exhibit 4. Does that help you to remember when the Stikeman Oil Company
44 ceased operating retail stations?

A. Since February 15, 1938, they have operated no retail stations.

Q. Are you positive of that?

A. Quite so.

Q. Do any of these tank car purchasers that we have referred to or, specifically, Citrin-Colb Oil Company and the Wayne Oil Company, do they file with you the prices at which they resell to their dealers?

A. No, sir.

Q. Do you keep any information on that at all?

A. No, sir.

Q. About how many tank trucks are owned and operated by the Standard Oil in Detroit?

A. About 60.

Q. Has the Standard Oil at any time furnished trucks to a tank car buyer for the purpose of delivering gas from the buyer's bulk plant to its service station?

A. I don't recall of a single instance.

Q. Has your company ever delivered gas for any of the tank car purchasers? I am referring now to deliveries either to their dealers or to their operated stations.

A. No.

Q. When you made delivery by tank car did you always deliver a full carload or is there sometimes a
45 half carload, or a quarter, or a partial carload delivery?

A. Always a full carload.

Q. Is the only variation, then, in the size of the car?

A. That's all.

Q. That is, if you have a 10,000 gallon tank car, you wouldn't deliver, say, 5,000 gallons?

A. No, sir; we haven't any such thing as a 5,000 gallon tank car.

Q. What is the smallest tank car?

A. About 8,000 gallons, as far as tank cars that are utilized for gasoline.

Q. And they run as high as what?

A. 12,000.

Q. Isn't it true that there are some tank cars that you have used for delivery here in Detroit as low as 6500 gallons?

A. There may have been some; but I don't recall any.

Mr. Austin: May I go off the record just for a moment?

Trial Examiner Ballinger: Off the record.

(Discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. How frequently, Mr. Raupagh, did your company make shipments by tank car from Whiting, Indiana,
46 refinery direct to any of these four tank car buyers?

A. I believe the last shipment was made in April, 1940, to Ned's Auto Supply Company, of some premium grade gasoline. The only time that we would make shipments of that kind would be a case of emergency, that we were out of some particular grade in the winter months at River Rouge.

Q. Were there any other instances in 1940, direct shipments?

A. Not that I know of, sir.

Mr. Austin: If your Honor please, I would like to have these papers marked, for identification. There are about 10 of them all attached to one back, if they might be marked A to J?

Trial Examiner Ballinger: Do you want each paper marked as a separate exhibit, or do you desire them under one number with alphabetical designations?

Mr. Austin: I think that is probably preferable, to keep the number of exhibits down.

Trial Examiner Ballinger: The reporter will mark the papers Commission's Exhibits 5-A to 5-J, inclusive, for identification.

(The documents referred to were marked, for identification, "Commission's Exhibits 5-A to 5-J.")

By Mr. Austin:

47 Q. Mr. Raupagh, I hand you these sheets marked Commission's Exhibits 5-A to 5-J, inclusive, for identification, and ask you if you can describe them (handing documents to witness).

A. These are prepaid freight bills. Exhibit 5-A covers UTLX 16290 shipped from Whiting, Indiana, to Detroit, Michigan, Stikeman Oil Company.

Q. Are the others similar freight bills?

A. Yes, sir.

Q. Do they all represent or show shipments from Whiting, Indiana, direct to the purchaser in Michigan?

A. Yes, sir.

Q. And are all of them to one or the other of these four purchasers that we have been talking about?

A. Yes, sir.

Mr. Austin: I offer these freight bills in evidence, your Honor.

Trial Examiner Ballinger: Let Mr. Hanley examine them.

(The documents were handed to counsel.)

The Witness: I don't see any shipment there to the Wayne Oil Company, and I believe you mentioned four of them.

Mr. Austin: I asked, I think, if these were to one or the other of the four.

48 The Witness: Pardon me.

Mr. Hanley: No objection.

Trial Examiner Ballinger: There being no objection, Commission's Exhibits 5-A through 5-J, for identification, are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "COMMISSION'S EXHIBITS 5-A to 5-J, inclusive," were received in evidence.)

By Mr. Austin:

Q. Mr. Raupagh, aside from these four concerns in Detroit, who have purchased by tank car and truck train from your River Rouge Terminal, have you made other deliveries in Michigan by tank car or truck train?

A. Yes, sir.

Q. Where do you have other purchasers located who purchase in that manner?

A. Ann Arbor, Lansing.

Q. Any others? Grand Rapids?

A. We, no doubt, have, but that is out of my district.

Q. In your district you sell by tank car in Ann Arbor and in Lansing?

A. Yes, sir.

Q. To whom? Purchasers in each one of those places?

A. One in Ann Arbor and two in Lansing.

Q. Do they get deliveries from the River Rouge Terminal?

49 A. Yes, sir.

Q. If there are any others up-state, where would they get their deliveries from?

A. Other marine terminals in Michigan, Ludington, and Bay City.

Q. Have there been any direct shipments from Whiting to the two purchasers in Lansing or the one in Ann Arbor?

A. I don't believe so. There may have been, but I don't know.

Q. How about the commercial accounts which you supply in the Detroit area such as, for instance, some of the large automobile companies? Do they receive their shipments from River Rouge, or does it come from Whiting direct?

A. It comes from River Rouge.

Q. All of it?

A. Yes, sir.

Q. Do you have occasional shipments to them direct from Whiting?

A. I don't remember any.

Q. Is there any customer in your territory to whom the company regularly ships by tank car direct, tank car or any other means directly from Whiting, Indiana?

A. I don't know of any.

Q. Well, you would know if there was, wouldn't you?

50 A. Yes, sir.

Mr. Austin: Your Honor, I suggest we might take a five minute recess.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: Take a five minute recess.

(A short recess was had.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Mr. Raupagh, are you familiar with the reports issued by the Secretary of State, of Michigan, every four months, based upon the sales tax returns of licensed jobbers?

A. Would I be allowed to say something off the record?

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

By Mr. Austin:

Q. I show you this group of reports which appear to be dated from April, 1937, through November, 1940, and ask you to state whether those are the reports issued by the Secretary of State's office?

A. Yes, they are.

Q. Do those reports show the monthly gallonage of gasoline upon which the Michigan gasoline tax was

51 paid by licensed jobbers in Michigan?

A. Yes, sir.

Trial Examiner Ballinger: Those are reports submitted by the Standard Oil Company, are they?

Mr. Austin: No, your Honor. Those are reports issued by the Secretary of State's office, as I understand it, which show for all licensed jobbers of gasoline in the State of Michigan the monthly gallonage of those jobbers, and, if I understand correctly, they are based upon the gasoline tax returns of the jobbers.

By Mr. Austin:

Q. Is that right?

A. Yes, sir.

Mr. Austin: I would like to offer these in evidence.

Mr. Hanley: No objection.

Mr. Austin: These run from April, 1937, which covers gallonage from January, 1937, up through November, 1940.

Mr. Hanley: Which would cover gallonage up to July, 1940?

Mr. Austin: No. Up to and including November, 1940.

Mr. Hanley: I see.

Mr. Austin: Each one covers the month which appears on the report and the three preceding months.

52 Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: Without objection, the documents are admitted in evidence as Commission's Exhibits 6 to 17, both inclusive.

(The documents referred to were marked, for identification, "COMMISSION'S EXHIBITS 6 to 17," both inclusive, and were received in evidence.)

By Mr. Austin:

Q. Mr. Raupagh, in referring to the sales of gasoline by your company to retail gasoline stations in Detroit, is the price charged the same to all of the retail stations?

A. Yes, sir.

Q. Over what period has that been true?

A. The last three or four years.

Q. Isn't it true that from September, 1936, through February, 1938, Ned's Auto Supply Company received a ½ cent better price on tank wagon deliveries?

A. Yes, sir, that is true.

Q. Was this the only tank wagon buyer that received that half cent differential?

A. Yes, sir.

Q. Are the posted tank wagon prices of the major oil companies in a given area generally the same?

A. Please read the question.

53 (The question was read.)

A. Generally, yes.

Q. Has that been true in Detroit during the last three or four years?

A. Generally, yes.

Q. That is, if your tank wagon price is 8.1 cents, exclusive of taxes, Texas or Sun or Shell would be selling at that same price to their stations?

A. Not always.

Q. Well, you said generally it was true?

A. I said generally, yes.

Q. Is it true as to tank car prices?

A. No.

Q. Then, there is more variation between the tank car price than between the tank wagon prices of different companies or not?

A. I think there is.

Trial Examiner Ballinger: Do you know?

The Witness: There is no way for me to definitely know, your Honor.

By Mr. Austin:

Q. Do you know whether the tank car price of most of the major oil companies on their house brand gasoline is generally a cent and a half above the tank wagon price of the same company?

54 A. You mean below.

Q. Below, yes.

A. It is generally more than that.

Q. Do you know of specific instances of that?

A. Yes.

Q. Do you keep informed as to the tank wagon prices of other major oil companies?

A. As close as we can.

Q. Yes.

Trial Examiner Ballinger: Where do you get your information from?

The Witness: From the trade.

By Mr. Austin:

Q. If one of the major oil companies lowers its tank wagon-post tank wagon price, do the other major companies generally follow?

A. No.

Q. You stated that it has not always been true that the tank wagon prices are the same?

A. That is right.

Q. Can you tell me some cases when it has not been the same?

A. Yes. Particularly in 1939, there was a period there, I think, running from September and October, when our tank wagon prices were different than other companies.

55 Q. Was that during the so-called price war?

A. Well, you can term it that.

Trial Examiner Ballinger: What year was that?

The Witness: 1939.

By Mr. Austin:

Q. And that was only over a period of about four or five weeks, was it not?

A. That is right, that particular incident, but there have been other cases where other major companies don't have the same dealer price that we have.

Q. That would likely be only for a short period of time or may it continue over a long period of time?

A. Oh, that doesn't continue for a long period of time, because gasoline, being a product such as it is, I don't think that one major company could sell for a particularly lesser price than the other for any length of time.

Trial Examiner Ballinger: Has that ever occurred except in a price war period?

The Witness: Oh, yes; yes, it has, your Honor.

By Mr. Austin:

Q. But if one company lowers its price, then the others are likely to follow in order to meet that competition; are they not?

A. Yes, sir.

Q. Now, we have certain cases where the posted 56 tank wagon price has risen; for instance, on June 17, 1939, referring to Commission's Exhibit 3-A, it appears that the posted tank wagon price was increased from 7.6 to 8.1. Do you recall that?

A. Yes, sir.

Q. When that occurs, how is such a price rise accomplished? Before you answer that question, isn't it true that on that date all of the major oil companies in Detroit increased their tank wagon price, on or about that date?

A. No, sir.

Q. What happened then to the others?

A. Well, that is up to them. If they increase their price, that is up to them, but sometimes they don't increase their price.

Q. Don't you know as a fact that the prevailing tank wagon price in Detroit did increase from 7.6 to 8.1 about June 17th, 1939?

A. Yes.

Q. All I am trying to get at, Mr. Raupagh, is that service stations, retail service stations, whether they are operated—rather, whether they sell Standard Oil gas or some other major oil gas are generally paying the same price for their gasoline at a given time? I would like to know whether that is so?

A. I don't believe it is.

57 Q. A moment ago you said that generally the tank wagon posted prices were the same.

A. Yes.

Q. Do I understand you now to change that testimony?

A. No.

Q. Then perhaps I didn't understand you, but I wish you would explain that a little bit. I thought you just said now that the service stations were not generally paying the same price.

A. What I mean to say is that there are many jobbers in the Detroit area—there are many oil companies in the Detroit area who perhaps don't maintain the same price to their dealers.

Q. I was speaking of the major oil company stations:

A. Well, that would all—

Q. —served directly by the major oil companies.

A. Served directly by the major oil companies?

Q. Yes.

A. That is true.

Q. Those stations generally pay the same price?

A. Yes, sir.

Q. What is the present posted tank wagon price of Standard Oil?

A. Standard Red Crown gasoline?

Q. Yes.

58 A. Dealer tank wagon price; is that what you mean?

Q. Yes.

A. 8.1 cents per gallon, without taxes.

Q. Are you selling or delivering to any retail purchasers in Detroit at the present time at any lower price than 8.1?

A. No.

Q. Do you have a customer known as Marvin Service?

A. No, sir.

Q. Marvin Goldberg?

A. No, sir.

Q. Are you familiar with that chain of stations?

A. Yes, sir.

Q. Who do they buy their gasoline from?

A. Let me change—can I change that testimony, your Honor?

Trial Examiner Ballinger: You may.

A. We have such a customer; yes, sir.

Q. They buy in tank wagon quantities?

A. Yes, sir.

Q. Do they lease their stations from you?

A. Yes, sir; that is, they lease two stations from us.

Q. Do they have other stations?

A. Yes, sir.

Q. And has all gasoline that you have sold that customer in the last year been sold at 8.1 cents per gallon, Red Crown?

A. It has been sold on the regular reseller tank
59 wagon basis.

Q. Well, that exhibit shows the 8.1 price going back to November 18, 1939.

A. Yes, sir. Yes, sir, sold at that price.

Q. Do you know the terms of your leases to the two stations which you say that you lease to Marvin Goldberg?

A. Not in detail.

Q. Could you obtain that information or obtain copies of those leases?

A. I would be glad to.

Q. Has your company ever paid any rebates to any retail service stations in Detroit?

A. No, sir.

Q. Have there ever been any delayed discounts or refunds or any other concessions from the posted tank wagon price?

A. No, sir.

Q. With the exception of—

A. Ned's Auto.

Q. The one-half cent to Ned's?

A. Yes, sir.

Q. While we are on this subject, will you describe what is meant by posted tank wagon price?

A. We mean by a posted tank wagon price the price that we are charging our dealers for tank wagon de-

60 livery or tank truck deliveries, and we post that price at our bulk plants, and also in the office.

Q. Is that custom of posting the tank wagon price one which is common to the major oil companies?

A. Yes, sir.

Q. That price is generally posted at the terminal or bulk plant from which the gasoline is delivered to service stations?

A. Yes, sir.

Q. What is the purpose of that posting?

A. Well, there is generally no secret about our business, so we just let anybody know what we are charging for our gasoline.

Q. Is that so all the stations can have a means of knowing at any time what the price is?

A. Yes.

Q. Any other reason for it?

A. Not particularly.

Q. Now, I understand you to say that the prices which are stated on Commission's Exhibit No. 3-A and B are exclusive of taxes?

A. May I see the exhibit?

Q. Certainly (handing exhibit referred to to the witness).

A. Yes, sir.

Q. What are the taxes on gasoline which are col-
61 lected in this area?

A. 3 cents gasoline highway tax, a cent and a half federal tax, and a 3% sales tax.

Q. The gasoline highway tax is the state tax?

A. Yes, sir.

Q. How long has the federal tax been a cent and a half?

A. I don't exactly recall that date. I don't believe I have it?

Mr. Austin: May it be stipulated that that is from July 1, 1940?

Mr. Hanley: If you know that is the fact.

Mr. Austin: I am pretty sure of it.

Mr. Hanley: All right.

Trial Examiner Ballinger: It is so stipulated.

By Mr. Austin:

Q. Prior to that time what was the federal tax, Mr. Raupagh?

A. 1 cent.

Trial Examiner Ballinger: Is that 3% sales tax? Not 3 cents on the gallon?

The Witness: It is a 3% sales tax.

By Mr. Austin:

Q. On what is that sales tax computed?

A. It is computed on the retail price.

Q. Well, now, is that so, Mr. Raupagh?

62 A. I guess not.

Q. Isn't it computed on the retail price less the sales tax and the Michigan State 3 cent tax? In other words, it is computed upon the price shown here plus the 1-½ cent or 1 cent federal tax?

A. There has been quite an argument on that. I would appreciate it if you would let me look that up and give you the correct answer on that.

Q. Well, I was just trying to hurry it. I don't want to state what it is, because it is only hearsay, as far as I am concerned.

Trial Examiner Ballinger: If it becomes material, we ought to have something definite.

Mr. Hanley: We will look it up.

Mr. Austin: Off the record?

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Can you state how those taxes are paid, Mr. Raupagh?

A. They are paid by the dealer or seller. He pays them direct to the State.

Q. That is a pretty broad statement. I think we had better itemize it. In the first place, the federal tax: who pays that?

63 A. We pay the Federal tax.

Q. Is the Federal tax added onto the price of the gasoline, as shown by this schedule, both to retailer buyers and to the tank car buyers?

A. I would have to look that up, to be sure; just exactly what our billing is on that.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. If you are not entirely familiar with that, Mr. Raupagh, I would like to get a statement of it accurately without attempting to suggest what it is, because I might be in error, although I think I understand it, and perhaps we had better postpone that.

A. We would be very glad to furnish you with a statement showing exactly how it is invoiced. Is that what you want to know?

Q. I want to know how it is computed, in the first place, and, in the second place, how it is paid; that is, how much is paid by you, how much is paid by the tank car buyer, in the case of the sale to him, and how much is paid by the retailer; both in direct sales by you and of the tank car buyer.

A. I will be glad to furnish that information.

64 Q. I think several of these gentlemen in the room probably have that at their finger tips, and can probably help you out during the lunch hour.

Mr. Austin: I think this might be a good time to adjourn for lunch, your Honor, and then we can take up this tax matter when we come back.

Trial Examiner Ballinger: Is that submitted in the form of a motion?

Mr. Austin: Yes.

Trial Examiner Ballinger: The motion is granted.

Now, at 1 P. M., the hearing stands adjourned to be reconvened at 2:15 P. M.

(Thereupon at 1 o'clock P. M., an adjournment was taken to reconvene at 2:15 o'clock P. M.)

65 Afternoon Session.

2:15 P. M.

Trial Examiner Ballinger: We are now reconvened at 2:15 P. M.

Mr. Hanley: If your Honor please, before the noon adjournment, at Mr. Austin's request, we undertook to get some facts relative to the application of taxes to the sale of gasoline. At this time I am prepared to offer at this time a stipulation for the record, if you will listen to this, please, Mr. Austin.

The Respondent is prepared to agree that in the State of Michigan there are three types of taxes applicable to the sale of gasoline.

First, a Michigan State Highway gasoline tax of 3 cents per gallon applicable to all gasoline, naphthas, or any other motor fuel used for the propulsion of motor vehicles on the public highways, and also for use in airplanes and motor boats. This tax is paid to the State of Michigan by licensed wholesale distributors on all receipts of gasoline and naphtha into the State of Michigan and on the sales of any other products that may be used as a motor fuel. This tax is passed on by the wholesale distributor through the retail vendors to the ultimate consumer.

Secondly, the Michigan General Sales Tax: this
66 is a 3% tax imposed upon sales of tangible personal
property sold at retail and including gasoline and sold in the state to consumers or users. The amount of the tax payable is determined by application of the 3% rate on all taxable sales during each calendar month. The following items under this tax are non-taxable: Michigan State Highway Gasoline Tax, Federal Excise Tax is non-taxable only to the manufacturer. The retailer must pay the Michigan sales tax of 3% on the Federal Excise Tax. This tax is payable to the State of Michigan by the retailer who is licensed under the Act and who passes this tax on to the ultimate consumer.

Thirdly, Federal Excise tax: the Federal Excise Tax on gasoline prior to July 1, 1940, was at the rate of 1 cent per gallon. Since July 1, 1940, the rate has been 1½ cents per gallon. This is a tax on all sales of gasoline and naptha and is paid to the Federal Government by the manufacturer who, in turn, passes it on to the ultimate consumer.

Each of the four dealers, to-wit, Stikeman Oil Company, Wayne Oil Company, Citrin-Colb Oil Company, and Red's Auto Supply Company are licensed wholesale distributors in the State of Michigan, and as such make their own accounting of the Michigan State Highway Gasoline Tax to the taxing authorities of Michigan.

67 The Michigan General Sales Tax being collectible by the retailer of gasoline, it being obligatory upon him to make an accounting therefor to the taxing authorities, therefore, in each instance where a retailer sells gasoline at retail he makes the accounting for the 3% sales tax thereon to the taxing authorities of the State of Michigan.

The Federal Excise Tax being a tax upon the manufacturer is billed by the supplier, the Standard Oil Company, in this instance, to its reseller customers, whether they be tank car customers or tank wagon customers, and the Standard Oil Company makes the accounting for such tax to the United States Department of Internal Revenue.

Trial Examiner Ballinger: Is the statement of counsel for the Respondent accepted by counsel for the Commission as a true portrayal of the facts?

Mr. Austin: Yes.

Mr. Hanley: Now, you asked, Mr. Austin, for the lease which—

Mr. Austin: Two stations operated by Marvin Goldberg.

Mr. Hanley: They are not operated by Marvin Goldberg. I find we have one leased to Marvin Goldberg and one to Lester Goldberg, who, I understand, is his brother. Here are the leases.

68 (Thereupon counsel for the Respondent handed counsel for the Commission the leases with the two Goldbergs.)

P. A. RAUPAGH thereupon resumed the stand, and having been heretofore duly sworn, testified further as follows:

Direct Examination (Resumed).

By Mr. Austin:

Q. Mr. Raupagh, are these the original leases now in existence with a station operated by Lester Goldberg at 1217 West Philadelphia Avenue, Detroit, and Marvin Goldberg at 3003 Fullerton Avenue, Detroit?

A. Yes, sir.

Q. I note that both of these leases expired in December of 1940.

A. Yes, sir.

Q. And there are renewal slips extending them, with some modification of terms, to April, 1941. I believe the Marvin Goldberg lease was extended to April 8th and the other to April 29th.

What was the reason for that?

Trial Examiner Ballinger: Is that correct?

The Witness: Yes, sir.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

69 Trial Examiner Ballinger: On the record.

A. The reason for that extension is that we like to have our leases expire about the same time during the year.

By Mr. Austin:

Q. Do you mean that the majority of your leases expire in April now?

A. Yes.

Q. Have you recently tried to change the terms of the leases so that would result?

A. Yes, sir.

Q. Is that a new policy?

A. Comparatively new.

Q. Why was the minimum rental on these two leases reduced on this extension?

A. Well, I assume that we couldn't get the rental that we originally had, and the value of the station had perhaps changed.

Trial Examiner Ballinger: Is that merely a presumption on your part, or have you any knowledge of the facts?

The Witness: I have knowledge of that fact, your Honor.

By Mr. Austin:

Q. What is that knowledge based on?

A. At the time we made the extension on that lease.

70 Q. Is that what they told you or what—

A. That is what they told me, yes.

Q. Do you have any figures on the amount or number of gallons they sold in 1939 and in 1940?

A. The figures were considered at that time.

Q. Do you have those figures?

A. I haven't them with me.

Q. As to the gallonage?

A. We have them in our office.

Q. Do you have the gallonage records of all of the stations that you serve?

A. Yes, sir.

Q. As to the number of gallons that they sell, that is based on the gasoline they purchase from you, I suppose?

A. Yes, sir.

Mr. Austin: If it wouldn't be too much of a burden, I would like to have in connection with these leases a statement of the gallonage records for 1939 and 1940 of these two stations.

Mr. Hanley: If your Honor please, we have no objection at all to furnishing them, and we will do so, at the request of Mr. Austin, but if this thing is material as to how this specific lease or how any lease with any of these 300 or 200 odd leases in Detroit are arranged as to terms, then it is going to involve quite a voluminous presen-
71 tation of facts, because just as a matter of mechanics in handling this thing every year, because there are some leases expiring in every year, an analysis is made of each of the stations upon which a lease may be expiring, and various factors are given consideration; as, for instance, the investment, the location of the service station, the amount of gallonage that the station is capable of handling and has handled, the general competitive situation in the area, what it is worth from a rental standpoint. So gallonage, while it is a factor, is not the sole factor. I don't understand the materiality of this.

Trial Examiner Ballinger: I presume you would include in that classification everything that would naturally fall within what is commonly known as goodwill, wouldn't you?

Mr. Hainley: Right, all of those factors.

You see, your Honor, the fact is in this filling station leasing business, by the very physical nature of a filling station it is peculiarly adapted to the sale of petroleum products. It is not like a store room in a downtown building that may be adaptable to numerous occupancies. Its value as a business location is largely determined by its value just as a filling station, how much business in petroleum products can be done through it. Now, that is one factor, and another is the amount of investment, the
72 amount of carrying cost, the potentialities: if a new highway is going through, or if a highway has been diverted. All of those factors influence the amount of rental that can be obtained.

Frankly, I don't know what the materiality is. We are perfectly willing to disclose the factors that resulted in this determination if they are regarded as material.

Mr. Austin: I don't think they are. I don't care about all the factors. I am only interested in showing any current reductions to this particular station.

If your Honor please, upon examining these more closely, I see that there is no change in the flat rental and no change in the gallonage. The only change is in the minimum rental in the case where the gallonage falls below a certain amount, and that being true, I think I will not press the request for that information, because I doubt if anything would be accomplished that would be material. I don't think these leases show any particular change.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Counsel has withdrawn the request.

Mr. Austin: I offer Commission's Exhibit 18, a lease from Standard Oil Company to Marvin Goldberg,
73 3003 Fullerton Avenue, Detroit, flat rental, monthly, 138.78, and minimum 203; Exhibit 19, a lease from Standard Oil to Lester Goldberg, Davison and Indiandale Avenue, Detroit, Michigan, flat rental, 44.85, minimum, 104.

(The documents referred to were marked, for identification, "Commission's Exhibits 18 and 19.")

Mr. Hanley: I would like to note a record objection to the materiality, if I may have it, please.

Mr. Austin: Those are offered because of the fact it is important to bring out whether any retail service stations are obtaining any price concessions against any other retail stations served by this company.

Trial Examiner Ballinger: You think this forms any part of a link—

Mr. Austin: I think if the station was receiving—for instance, getting rent free while other stations of similar facilities were paying a higher rental, that would be the same thing as a rebate on price. I am not insinuating or inferring that that is the case, but as long as I did make inquiry about this particular station, I would like to have the lease in evidence so that it will be possible to determine whether that station is receiving any advantage.

Trial Examiner Ballinger: The objection is overruled, with right reserved to counsel for the Respondent, 74 before the case is closed, to renew the motion.

(The documents referred to, heretofore marked, for identification, "COMMISSION'S EXHIBITS 18 and 19," were received in evidence.)

Mr. Austin: Will you mark this, for identification, Mr. Reporter?

(The document referred to was marked, for identification, "Commission's Exhibit 20.")

By Mr. Austin:

Q. Mr. Raupagh, I show you Commission's Exhibit No. 20, for identification, and I will ask you to tell me what this contains. If you will just look at these top two sheets and tell me what each one of them is, then you can state whether the rest of the file is not the same sort of material.

A. These are invoices. The first one that I see here is to Citrin-Colb Company, Detroit, Michigan, showing a shipment of a tank car of gasoline from our River Rouge Terminal to Citrin and Colb Company, located at 14445 Linwood Avenue, Detroit, Michigan. The next sheet is an acknowledgment of the order.

Q. An acknowledgment by whom?

A. By us.

Q. And to whom is the acknowledgment addressed?

A. This particular copy is addressed to Mr. Amos 75 Ball, General Manager.

Trial Examiner Ballinger: When you said "us" you meant Standard Oil?

The Witness: Yes, sir.

By Mr. Austin:

Q. How many copies of that acknowledgment are made out, in the usual practice?

A. I believe two. I am not positive of that, though.

Q. Well, is the acknowledgment a verification of the invoice?

A. That is it.

Q. And made from the invoice?

A. Yes.

Mr. Austin: Mr. Hanley, are you willing now to stipulate that this file marked Commission's Exhibit 20, for identification, is a bound volume containing invoices and acknowledgments as just described by Mr. Raupagh showing sales of Standard Ethyl Gasoline, Standard Red Crown Gasoline and Standard Stanolind Gasoline to Citrin-Colb, Ned's Auto Supply Company, Stikeman Oil Company, and Wayne Oil Company, the invoices covering sales at each price charged from the period, November 3, 1937, to December 31, 1939, it being my understanding that while these are not all the invoices of all sales made, that there is an invoice here showing a sale at each price so that 76 whenever there was a price change this list shows the date of the price change and the first and last sales at each price? And I would like to say that I am requesting this stipulation only for the purpose of possibly introducing some of these particular invoices later, and I would like to reserve the right to do that, but I do not intend to offer the entire group in evidence. This stipulation is requested solely for the purpose of identification so that any one of these may be offered at a later date.

Trial Examiner Ballinger. Let your reservation carry through to the close of the case.

Mr. Austin: Yes.

Mr. Hanley: Upon the representation of counsel for the Commission that certain invoices and acknowledgments of orders, as reflected in the bound volume now referred to, were supplied to the Commission by the Standard Oil Company, the Respondent stipulates that such invoices and

acknowledgments of orders are either authentic original documents or accurate copies of such Standard Oil Company documents; that it is understood that said Standard Oil Company documents—said volume does not purport to contain invoices or copies thereof of all of the orders and counsel for the Respondent is unfamiliar with the fact of whether or not said invoices disclose all of the price changes that may have occurred during the dates
77 which counsel for the Commission says are covered in the volume, but as to any of the original documents or copies that do appear in the volume, the Respondent makes no issue as to authenticity thereof. There are certain documents in the volume which appear to be notations made by someone reflecting a date and what would seem to be a price per gallon of gasoline. With respect to these memoranda Respondent has no information and makes no agreement.

The last reservation as to this stipulation was made because counsel for the Respondent is without present knowledge as to the origin of the memoranda referred to. It is not to be understood that any question is now being raised by counsel for the Respondent as to the authenticity of any of the documents and are perfectly willing that the same be checked as to accuracy at any stage of the proceeding and used if found by all parties to be an accurate reflection of any fact which the document purports to reflect.

Mr. Austin: I am satisfied with that. I think that is a sufficient identification of what we have here, and if there are certain sheets in here I may want to offer in evidence, we can talk about them then, and they will save trouble going back to find out what they are, in case Mr. Raupagh might not be here.

Trial Examiner Ballinger: Are there any further
78 questions with this witness?

Mr. Austin: Yes, I have some further questions.

By Mr. Austin:

Q. Mr. Raupagh, showing you again Commission's Exhibits 3-A and 3-B, I want to be sure that we have one point clear on the record, and that is whether, to determine the cost of gasoline to the station, service station who buys direct from you, is it necessary to add on all three of the taxes which we have discussed to these figures in the first column on these exhibits (handing documents to witness)?

A. No, not all three of them.
Q. Well, the State tax has to be added, doesn't it?
A. Yes, sir.
Q. And the Federal tax?
A. Yes, sir.
Q. And the sales tax, while it is collected by the service station, it is paid by the service station to the state, is it not?
A. Yes, sir.
Q. So that the collection of the sales tax does not involve any return to the service station, does it?
A. No, sir.
Q. Then, would it not be correct to say that all three taxes should be deducted to determine the service station's margin for operation?
79 A. Yes, sir.
Q. That's what I wanted to be clear about.
What other customers in the Detroit area, or in your territory, purchase from the Standard Oil Company in tank car quantities?
A. You mean reseller customers?
Q. Well, no. In this case, we will include commercial accounts. I don't want you to give me names, but are there other customers?
A. Yes, many of them.
Q. And they buy direct from you?
A. Yes, sir.
Q. Do any of those customers resell any of the gas which they buy?
A. Not that I know of.
Q. Are some of those customers automobile companies?
A. Yes, sir.
Q. Are some of them trucking companies?
A. Yes, sir.
Q. Have you ever made any effort to find out whether or not they resell any of the gas that they use?
A. No, sir.
Q. That they buy?
A. No, sir.
Q. Then, if they resold part of that gas to their
80 employees, would you have any means of knowing it?
A. No.
Mr. Hanley: May I inquire if that is an issue at all?
Mr. Austin: It would be in issue, if there were resales.

They would be in a position to retail it. Very material, I think.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record. I want you to understand when I say "Off the record," it is by mutual consent.

Mr. Hanley: I understand.

Trial Examiner Ballinger: If counsel advise the Examiner they desire it on the record, I shall consider it.

By Mr. Austin:

Q. What is the price at which you sell Standard Red Crown gasoline to your commercial buyers in tank car or tank train quantities?

A. The regular consumer tank car price.

Q. You mean the same price that is charged to these four buyers that we have been talking about?

A. No, sir.

Q. Is it a lower price or higher price?

A. At present, it is a lower price. Sometimes it s1 is a higher price.

Q. What is the difference between Red Crown gasoline and White Red Crown?

A. One contains lead and is colored and the other is the natural product, and the specifications are entirely different. They are two different products.

Q. And a different amount of lead?

A. No. One has no lead.

Q. The White Red Crown has no lead?

A. That's right.

Q. That is used only by commercial consumers?

A. No.

Q. Who uses it?

A. We sell some to the Ford Motor Car Company.

Q. That is a consumer, isn't it?

A. Yes, sir.

Q. I just wondered if you sell any to anybody except commercial accounts.

A. If we do, they are very, very few exceptions.

Q. Is it used at all by—well, do truck companies use it?

A. No.

Q. The private car owner doesn't ever see it, does he?

A. No.

Q. I don't want to get into that too far, but I never heard of that until the other day I saw it in one of
82 these cases, and if it is the same grade and quality of
gasoline, I would like to know it; and if it isn't, I would like to know it.

A. Well, it isn't the same gasoline.

Q. Obviously, if it has no lead, it wouldn't be.

A. And obviously it can't be the same quality, either.

Q. Does the octane rating of gasoline depend upon the amount of lead in it?

A. Yes, sir.

Q. Tetra-ethyl lead is what we are referring to, I suppose, when we say "lead"?

A. Yes, sir.

Q. Is there any of that in Stanolind?

A. Yes, sir.

Q. And a larger amount in Red Crown?

A. I can't say as to that. There may be the same amount in either one, and it may be a different octane. It all depends upon the base, although that is used in order to determine the octane you want to secure.

Q. What is the octane rating of Red Crown?

A. I think it runs about 75 A. S. T. M., and by that I mean that is the method used in testing the octane.

Q. A. S. T. M.?

A. Yes, sir.

Q. I am not going to ask you what that stands for.

83 Trial Examiner Ballinger: The Examiner would like to know.

The Witness: It is The American Society of Testing Materials.

By Mr. Austin:

Q. What is the octane rating on the Solite Ethyl?

A. It runs about 78, 79 A. S. T. M.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Mr. Raupagh, have any other Standard Oil gasoline dealers, referring now to operators of retail stations, applied to you for permission to buy in tank car quantities or by tank train?

A. Oh, from time to time they talk about it, Mr. Austin, but I don't remember any of them that are properly equipped to handle it, according to our policy, that have applied.

Mr. Austin: I move that the latter part of the answer be stricken as being unresponsive.

Mr. Hanley: We will agree.

Trial Examiner Ballinger: The motion is granted. Read the last question.

(The question was read.)

Trial Examiner Ballinger: I will sustain the motion

84 to the entire answer.

The Witness: Now may I have the question?

(The question was read.)

By Mr. Austin:

Q. Yes or no?

A. Not within the past year.

Q. Prior to that?

A. Yes, I think prior to that they have.

Q. Did you grant any of those requests?

A. No.

Trial Examiner Ballinger: You may explain your answer, if you desire.

Mr. Austin: Well, your Honor, I think the reasons for that might be brought out on cross-examination better, if it is desired to bring them out, although I will go somewhat farther with it.

By Mr. Austin:

Q. Did some of those requests come from groups of retailers who stated that they would rent a bulk plant if they could get tank car deliveries, and then deliver their gasoline to their own stations?

A. I don't recall of having such a request since 1936.

Q. Didn't you have, along in 1938, around the 1st of 1938, a request from certain groups of dealers to purchase on tank car?

85 A. No.

Q. Well, were these requests in 1938 by groups or by some individuals?

A. Well, I recall that prior to 1936 there was some individuals that made a request of that kind. However, they were not equipped with storage or anything, and even their credit responsibility wasn't of the best.

Mr. Austin: I move to strike out that last, beginning with "however."

Mr. Hanley: We resist that motion, your Honor. That is responsive.

Mr. Austin: Would you mind reading the question and the answer?

(Question and answer were read.)

Mr. Austin: The latter part is not responsive. The question was whether it was by group or by individuals.

Trial Examiner Ballinger: Do you object to the motion?

Mr. Hanley: I will withdraw the objection, your Honor.

Trial Examiner Ballinger: The latter portion—if you will read the answer, I will tell you where to strike it.

(The answer was read.)

Trial Examiner Ballinger: Commencing with "however," strike the rest of it.

86 Mr. Austin: It is objectionable as a conclusion and a lot of other things, if the objection were made from the other side. I certainly don't want it to go in on my questioning.

By Mr. Austin:

Q. Mr. Raupagh, do you recall testifying in the Recorder's Court in the City of Detroit, before the Assistant Prosecuting Attorney, Ralph Garber, in a case pending between the People and the Standard Oil Company, in 1938?

A. Yes, sir.

Q. I would like to show you this paper and ask you to read this and see whether it will refresh your recollection upon the subject we are discussing. Then I will ask you further questions.

Trial Examiner Ballinger: What year was the testimony given in that case?

Mr. Austin: In August, 1938, your Honor, and it referred to the period from, I think, February until July, 1938—March 1st, 1938, to July 29, 1938.

A. I remember that testimony.

By Mr. Austin:

Q. I ask you again, Mr. Raupagh, whether you had any requests from other dealers to be allowed to buy on a tank car basis since 1936.

A. There may have been some, but I can't recall
87 now who they were.

Q. Didn't you testify in that proceeding that there had been such requests?

A. Yes.

Q. And it is a fact, then, isn't it?

A. Yes, sir, if I testified that way, that is a fact.

Q. Did you testify that you didn't grant any of those requests?

A. Yes, sir.

Q. And that is still true?

A. Yes, sir.

Trial Examiner Ballinger: Did he state in his testimony when the requests had been made?

By Mr. Austin:

Q. Did your testimony in that case refer to the year 1938?

Mr. Hanley: Do you want to look at it?

(A transcript was handed to the witness by Mr. Hanley.)

A. This request refers to the period of March 1st, 1938, to July 29th, 1938. There may have been someone at that particular time that made a request, but I couldn't recall who it is now.

By Mr. Austin:

Q. I didn't ask you who it was, but upon thinking
88 it over, do you remember whether it was a group or whether it was an individual?

A. I couldn't say, Mr. Austin.

Q. Don't you remember that there were a number of dealers spoke to you about that?

A. No.

Q. Around that same time?

A. No.

Q. Did Mr. Blough tell you that any of them spoke to him about it?

A. No, sir.

Q. Would you mind turning to page 191 of that document that you have there before you before I ask this next question, toward the lower part of the page and the top of page 192.

A. (Witness does as requested.)

Q. If a dealer obtained permission from you or from some other company to purchase oil by tank car or tank train and he needed a bulk plant for that purpose, would it be difficult for him to obtain bulk plant facilities?

Mr. Hanley: That is objected to for the reason that it calls for a conclusion and opinion of the witness as to what some other oil company would do, and it is not a matter within the knowledge of this witness, and apparently incapable of being within his knowledge.

89 Mr. Austin: If I may repeat the question, I am not asking what any other oil company would do. The question may be restated in this way:

Q. Are bulk plant facilities easy to obtain or are they difficult to obtain in the Detroit area? Before you answer that, I will ask you whether you know the situation as to bulk plant facilities in Detroit?

A. Yes, I think I do.

Q. And are such facilities available?

A. I don't think they are. I don't think there are any bulk plants available at the present time. However, I am frank to say that if anybody has the money, they could build one.

Q. Are they expensive to—I will have to withdraw that. That would depend upon what kind of a plant you built and a lot of other things and where you built it.

Is there any shortage of storage facilities for oil in Detroit?

A. Well, that depends on the individual companies. I don't hardly see how I could answer that.

Q. Do you know whether there are not a number of companies in Detroit that will receive oil in tank car lots and deliver it for a price, and some of them may be jobbers and some of them may be only trucking companies?

Isn't there a certain amount of that business done in
90 Detroit?

Trial Examiner Ballinger: You mean receive it and store it?

Mr. Austin: Receive it, take it out of the tank car, and deliver it to the service station in a truck.

A. I only know of one such arrangement.

Q. You only know of one company that will store oil?

A. Yes, sir.

Q. Which company is that?

A. Peerless Distributing Company.

Q. Didn't you tell Mr. Garber in 1938 that at that time there would be no difficulty getting storage for oil or gasoline if a man could buy in tank car lots?

A. Why, I don't think there is any difficulty today if he has got the money to build himself a plant.

Q. Well, I suppose a man could build himself a plant, but let me ask you again whether you didn't state at that time that there would be no difficulty in obtaining bulk plant facilities, storage facilities?

A. Maybe there were vacancies at that time.

Q. You think there were more vacancies then than there are now?

A. I don't know of any right now.

Q. When you stated to Mr. Carber that there would be
no difficulty in the service station operator acquiring
91 storage facilities, were you referring to the current
situation then as to existing storage facilities, or were
you talking about whether he could build them?

A. Both.

Mr. Hanley: Would you mind directing him to the question and the answer, Mr. Austin, please?

Mr. Austin: The question and answer?

Mr. Hanley: Yes, that you are referring to.

Mr. Austin: Well, the bottom of 191 and the top of 192, but he already read those, I think.

Trial Examiner Ballinger: If the witness desires to see a transcript of his testimony to which you make reference, he may do so.

By Mr. Austin:

Q. To what were you referring at that time?

A. Both.

Q. He could either rent the storage space or he could build it?

A. Yes, sir.

Q. Are you familiar with locations in Detroit where it is possible to deliver gasoline on a railroad spur?

A. I am familiar with some.

Q. Either in Detroit or Dearborn or some place in the Detroit area?

A. (Witness nods head affirmatively.)

92 Q. How is the real estate value of those places?
Is it very high or not?

A. Well, I will say it runs all the way from very low to very high.

Q. Well, I suppose that some of it in the middle of the Ford Motor plant might be worth something?

A. That is right, sir.

Trial Examiner Ballinger: That answer is very, very definite and certain.

By Mr. Austin:

Q. Well, the question is that there are some that are very low?

Trial Examiner Ballinger: What may be considered low out here in Detroit may be very high somewhere else.

By Mr. Austin:

Q. Well, to get to the point, Mr. Raupaugh, will you say it is possible for a man to build a bulk plant, I mean within the means that might be available to any group of service station operators, who, between them, handled enough volume to buy in a tank car quantity?

A. Again, that is so indefinite—

Q. That is very indefinite.

A. —I question whether I could answer that, Mr. Austin.

Q. I assumed that when you said a man could build a bulk plant, you weren't talking about something that no service station operator or group of operators could ever expect to do. 93

A. Well, it all depends on how much money they have got and what kind of a plant they want to build and where they want to build it.

Q. Do you think at least there is a chance they might be able to rent the facilities now, though?

A. I wouldn't know where they would rent any facilities right now.

Q. You said you know of one company that is in that business.

A. One company that is in that business.

Trial Examiner Ballinger: Mr. Austin, I would like to know wherein this is material to the case.

Mr. Austin: I think it has some materiality, your Honor, to show that there are only certain retailers—in fact, only one retailer, and that is Ned's Auto Supply Company, that is getting tank car volume, and that is not available, even though it be requested by other competing retailers, who would like to have the same and its advantages.

Trial Examiner Ballinger: These competing retailers, are they shown to have been similar circumstanced and situated?

Mr. Austin: I can't bring that out from Mr. Rau-
94 pagh, but I expect to bring that out further, possibly,
by some of the men who made the requests.

Trial Examiner Ballinger: This thing of indulging in conjecture doesn't seem to me to be material.

Mr. Austin: Well, one of the arguments is that a man has to have storage space before he can become a tank car buyer. I am simply trying to show now that he could get the storage space if he could get the permission from the Standard Oil to buy at that basis. In other words, the obstacle to his getting a tank car buy is not because he can't get storage space; it is because he can't get the deal with the Standard Oil.

Trial Examiner Ballinger: Is it your contention that if they would have gotten a price from Standard Oil, they could have put in their own tankage?

Mr. Austin: Or rent it.

Trial Examiner Ballinger: Or rent it?

Mr. Austin: Yes. As I understand now, Mr. Raupagh said, at least, in 1938, when these requests were made, they could have rented.

Mr. Hanley: If your Honor please, it seems that it is immaterial on at least two grounds that are pertinent here: in the first place, if there were any bona fide efforts on the part of individuals or groups, and that has not been
shown, which individuals or groups were comparable
95 to Ned's Auto Supply Company or any of the other
jobber buyers supplied by Standard Oil Company, and
had the Standard Oil Company sold to that applicant, it would merely have aggravated a situation which the Commission is already asserting here was illegal, and two wrongs wouldn't make a right. If the custom and practice being indulged in by the Standard Oil Company and by other companies, practically all of them in this area and elsewhere in the United States, is wrong, that fact is not going to be corrected in the illegality, if any, and that practice is not going to be alleviated by increasing that type of operation.

Secondly, it has not been shown, and it cannot be shown, that there was any applicant who made any application to the Standard Oil Company who was circumstanced as was Ned's or any of these other jobbers. And in addition

to all of that, your Honor, if the purpose here is to prove that it would be easy for retailers to supply themselves with storage, I haven't any hesitancy in saying right now that so far as this Respondent is concerned, they would have to supply themselves at their own expense, either by purchasing or building or renting that storage. They would have to maintain it; they would have to have their own distribution outlet; they would have to buy and maintain their own inventories; and they would have to be able
96 to finance that operation.

But I will say further, your Honor, and I think it is true, and I think we will establish it, that if it is merely the purpose of the Commission here to show that it was easy for certain filling station operators to get storage, I think they are quite right. They couldn't get it from this Respondent, but I think they could get some storage probably for nothing from some suppliers in this area. But they couldn't get it from this company. All we have to say about this is—and I think the witness has repeatedly said it—certainly a man can buy oil tanks if he has the money, and that is all there is in this testimony so far.

Mr. Austin: I wasn't talking about getting storage from Standard Oil, and the storage has nothing to do with it. You buy it, as I understand it, first, and then you store it. But also I don't think it is at all material as to whether a man should have a tank car buy as to whether he is buying as Ned's or whether he has the same gallonage. Maybe the little fellow would like to get it, too, if he can buy one of these 10,000 gallon carloads once a month. But I don't want to go into that any farther now.

Trial Examiner Ballinger: Mr. Austin, what is confusing the Examiner is this: if you could prove what you apparently are now attempting to prove, wouldn't it
97 merely be an aggravation of an unlawful situation? Your contention is that it was unlawful, is it not?

Mr. Austin: Well, there has to be a certain background in these cases, your Honor, and it is a little early to attempt to make any argument on some of these facts, but there are a lot of things in this case such as the defense of good faith to meet competition, which is not part of my case, but when you get into what is good faith and what isn't and how many customers get a deal and how many don't, and whether it is offered a lot of them, a lot of things may be material in the ultimate consideration of the whole case.

By Mr. Austin:

Q. Mr. Raupagh, talking about the gasoline business generally and the volume of the gas business in Detroit, and not as to commercial business but as to business done through the gasoline station, the retail gasoline station, speaking of the volume of the retail gasoline business as a whole, upon what does that depend; that is, the amount?

A. It depends on the amount of automobiles in use.

Q. It depends almost entirely on that, does it not?

A. Yes, sir.

Q. Is the volume of that retail gasoline business more or less constant?

A. I would say yes.

98 Q. That is, would you say what fluctuations there are are chiefly as perhaps the number of cars in use may vary slightly from year to year?

A. Yes, sir.

Q. Then, if that is true, isn't it also true that if one dealer increases his business, that he takes that business away from other dealers?

A. Well, he takes it or he gets it somewhere.

Q. It isn't possible for a dealer to create new business, is it, by advertising or salesmanship like a man who sells carpet sweepers or Fuller brushes can go out and by pushing his product he will get somebody to buy it that hasn't thought about buying? That isn't true in the gasoline business, is it?

A. Of course, the number of cars are increasing. I mean by that, take a given population and the number of cars used by that population increases and has increased in the last two years.

Q. Isn't it true, then, that about the only new business is the new car owner who hasn't owned a car before?

A. Or if they drive more, as you stated, or other services, if that is what you mean, that they can render.

Q. Well, you mean if a dealer renders other services?

A. Yes; he increases his business.

Q. But he takes that business away from somebody 99 else, doesn't he?

A. Well, I assume so.

100 Q. That is, if I had a car, I either have a car or I don't, and if I have it, I am going to buy gasoline for it.

A. If you use it.

Q. And within any limitation within which we have been in the last seven or eight years, certainly the highest and lowest prices for gasoline, the variation—I would like to ask you whether the variation has been sufficient to make anybody quit using a car that had one? In other words, you would have to have a very high price or a very low price to affect the amount of use to any very great extent, would you not?

Mr. Hanley: I think, if Your Honor please, I will object to this line of examination. It has become argumentative and asks for a conclusion of the witness, and we can establish it by showing the public consumption of gasoline, and we propose to do that.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: There is a question that is not answered, and I would like to withdraw it. I agree it is too long, anyway, to be of any use.

Trial Examiner Ballinger: The question is withdrawn.

The Examiner inquires of Respondent whether the Respondent in its answer does not concede competition, but contend only that the competition is in intrastate and

101 not in interstate commerce?

Mr. Hanley: First, Your Honor, it is the position of the Respondent that the commerce in gasoline engaged in by the Respondent in Detroit and complained of in the Commission's complaint, is commerce which is intrastate in character, and it is our position that the Commission has no jurisdiction of the parties or the subject matter in this particular proceeding, but argue now if the Commission should take the position that there are factors in this commerce, which, in the Commission's view either constituted interstate in character, or which, in the view of the Commission, give the Commission jurisdiction to deal with that commerce, then it is the position of the Respondent, first, that the Respondent had a right to classify and select customers to the extent that the Respondent has done so.

Secondly—and irrespective of the last named defense, that the Respondent was justified on the basis of bona fidedly meeting competition in all that it did, and is now doing in the matter of giving differentials in price as between retail re-sellers and the four dealers whose operations are being questioned.

Thirdly, and in addition to the foregoing defenses, and
in spite of them, that the Respondent is justified in making
the prices to these different jobbers and making the differ-
entials that were made by reason of the fact that such
102 differentials make only due allowance for the differ-
ence in the cost of method of sale and delivery in
handling the business. Then, in addition to all of those defenses, it is asserted by the Respondent that whatever competitive effect may be sustained by commerce—passing for the moment whether it is intra or interstate—but whatever the effect on whatever gasoline commerce may arise out of the character of the operations of the Respondent, that that effect does not tend to create a monopoly, restrain trade, or injure anyone in his competition. That is to say, it is so small a factor in the overall picture in Detroit as to not give rise to any impropriety under the law or any violation of the anti-trust group of statutes.

Now, to answer Your Honor's question specifically: namely, as to whether it is the insistence of the Respondent that the competition which we admit exists technically and theoretically is in interstate or intrastate commerce: We say, of course, consistently with all our defense, that any competition that we have anything to do with in Detroit, as alleged in the complaint, is in intrastate as distinguished from interstate commerce, and we do admit that just technically a service station dealer to whom we sell gasoline tank wagon is technically and theoretically in competition with a service station which may be directly operated or supplied by one of these jobbers to whom we also sell gaso-
line in Detroit, but we say two things, Your Honor, that:
first, that competition is intrastate in character, that
103 commerce is intrastate in character, and the Commis-
sion is without jurisdiction, and; secondly, whether the
Commission has jurisdiction or not, whether it is in intrastate or interstate commerce, that it doesn't have the effect of injuring competition or restraining trade.

Trial Examiner Ballinger: Do you admit that the competition existing in the Detroit area is substantial?

Mr. Hanley: No, I don't think we care to admit, Your Honor, that it is substantial enough so that on the overall picture of the gasoline business in Detroit, that it has the effect as alleged in the complaint, of injuring gasoline commerce in Detroit. In explanation of that, perhaps, I should say at this time—so that the Court may not mis-

understand my position at all—it is a fact, and we propose to establish that there are a great number of service stations in Detroit which have been increasing in numbers over the past several years, which are continuously, and have been continuously underselling the prevailing retail gasoline market from something over one cent up to five cents a gallon, and they are selling a gasoline which is claimed to be comparable, at least, to ours, and I understand claim to be comparable to any major brand gasoline, and that the jobber business in Detroit has increased principally by these low or cut-rate operators, as they are commonly referred to in the industry; that their business has increased to a point where they are doing a very,
very substantial amount. I don't want to bind myself
104 irrevocably to figures. We will introduce them in
Exhibit form, but in my mind half of the business is done now by operators of a character who are continuously increasing their business and selling at a figure below the prevailing market, which, if these jobbers used all of their margin, couldn't possibly meet, so we say that the real competition in this Detroit picture on depressing of prices doesn't come from the kind of operation in which we are engaged. We just frankly confess we haven't met that kind of competition, and are not in a position to meet it on our present price structures and certainly our customers are not, so we say we don't injure competition in Detroit. Indeed, we say that competition has run pretty wild in Detroit; constantly on the increase.

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Mr. Raupagh, what is the most important factor in obtaining retail gasoline business?

A. To have a good quality gasoline, and to advertise it; to create a demand for it.

Q. How about price?

A. Price is also a factor.

Q. Wouldn't you say price was the most important thing with the consuming public? Let me restrict that question to major brands.

A. Not entirely.

105 Trial Examiner Ballinger: He didn't ask you whether it was entirely. Read that question.

(The question was read.)

A. No, I wouldn't say so.

By Mr. Austin:

Q. What is more important?

A. Good quality and good advertising.

Q. Well, aren't all of the major brands considered by the public to be of substantially the same grade and quality?

A. I hope not, because we claim ours is the best.

Mr. Austin: Will you read the question, Mr. Reporter?

(The question was read.)

A. No, I don't think so.

Q. What do you mean by the term "identification advertising?"

A. I mean that particular advertising that we furnish to a dealer; namely, a product identification sign, "Standard Service," that we erect wherever a dealer sells our products.

Q. And are there other things?

A. In regard to gasoline, now?

Q. Yes; globes on the pumps?

A. Globes on the pumps; road maps, circulars about the product.

Q. Are all of those things that you named as found in the service station, or as exhibited in the service station, the property of the Standard Oil Company?

106 A. Yes; with, perhaps, the exception of the maps or the circulars. If we give that to a dealer, why, it is his, to give out.

Q. The signs are your property?

A. Yes, sir.

Q. The globes are your property?

A. Yes; sir.

Q. Can you remove them from a service station at any time?

A. Yes, I think we can.

Q. Those signs and brand labels, and so forth, are of value to the service station, are they not?

A. Yes, sir.

Q. If they were removed, what effect would that have upon his business?

A. Well, it might not have such good effect on his business.

Q. Isn't it true that a lot of people drive into a Standard station because they see the Standard sign?

A. Yes.

Q. And think they can rely on Standard gasoline?

A. Yes, sir.

Q. And if those signs were taken down, the man would lose a lot of his trade, would he not?

A. Yes, I think he would.

Mr. Hanley: May I inquire the purpose of this examination, Mr. Austin? Again, are you just inquiring, or do you assert we ever do that?

107 Mr. Austin: I haven't asserted in any particular case it was done. I simply showed the ability to do it. The ownership of that particular equipment and the ability to remove it.

Trial Examiner Ballinger: You are establishing an opportunity?

Mr. Austin: Right; and presumably the service station operator knows that that opportunity exists.

By Mr. Austin:

Q. Have you or your office ever had occasion to suggest to one of your jobber accounts, not including Ned's as a jobber account, that the jobber resell to a retail dealer at less than the posted tank wagon price?

A. No.

Q. Have you ever suggested to one of your jobbers that they take over a station which was previously served by you direct?

A. Oh, I think that has happened.

Q. Can you tell me of a particular case?

A. No, I can't, offhand.

Q. How recently has that happened?

A. Well, I am thinking of sometimes we might get on bad terms with a dealer for credit reasons, or some other reasons, and the jobber is willing to take him on. I think that has happened in the past.

108 Q. Can you recall any particular station?

A. I can't, offhand, no.

Q. When any such station was taken over by a jobber, was the price to the station ever reduced by the jobber below what you had been selling the station for?

A. I assume he would be sold on the regular dealer tank wagon basis.

Q. You never made any suggestions to the contrary?

A. No, sir.

Q. In connection with Red Crown and Ethyl and Stanolind, in what percentages are those gasolines sold at retail in Detroit?

A. Stanolind would be about three or four per cent. Ethyl would run about seven to ten per cent, and the balance would be Red Crown.

Q. Red Crown would be close to ninety per cent, then?

A. That's right.

Q. Do you allow cash discounts; by "you" I mean the Standard Oil Company?

A. In some cases.

Q. What cases?

A. I believe a sale of ten cars.

Q. Is there any cash discount to the service station?

A. No.

Q. And what is the cash discount allowed on a tank car buy?

109 A. I believe it is one per cent, if paid within ten days.

Q. One per cent in ten days?

A. Yes.

Q. That would be shown on these invoices, would it not (referring to Commission's Exhibit 20, for identification)?

A. Yes.

Mr. Austin: I think that's all I have. May I request a short recess prior to the cross examination?

Trial Examiner Ballinger: Is it agreeable to the counsel for Respondent?

Mr. Hanley: Surely.

Trial Examiner Ballinger: We will take a recess for five minutes.

(A short recess was taken.)

110 Trial Examiner Ballinger: Come to order.

Mr. Hanley: May I proceed?

Trial Examiner Ballinger: Proceed with cross examination.

Cross-Examination.

By Mr. Hanley:

Q. Mr. Raupagh, I wish you would please briefly give the Court a summary of the facts relative to when you began working the oil industry, whom you worked for, where, and in what capacity—just briefly.

A. I was employed by the Standard Oil Company of Indiana on June 4, 1904, at Minneapolis, and worked there until October 1, 1907, in a clerical capacity in the sales office. From October 1, 1907, to September 1, 1909, I was city salesman in the City of Minneapolis. From September 1, 1909, to January 1, 1914, I was country or rural salesman out of the Minneapolis division office. From January 1, 1914 to January 1, 1916, I was assistant chief clerk of the Minneapolis office, a post similar to office manager. On January 1, 1915, to January 1, 1923, I was assistant manager of the Fargo, North Dakota sales division. From January 1, 1923 to December 10, 1923, I was assistant manager of Chicago sales division. From December 10, 1923, to December 3, 1929, I was manager of the Milwaukee, Wisconsin sales division. From December 3, 1929, to date, manager of the Detroit division, Standard Oil Company.

111 Q. So that since 1904, you have been connected in one capacity or another with the marketing department of the Standard Oil Company?

A. Yes.

Q. And since 1929, your connection has been that of division manager here in Detroit?

A. Yes, sir.

Q. Continuously. Now, Mr. Raupagh, I want to ask you briefly about some of the things that were touched upon in your examination in chief.

Mr. Hanley: I will say to the Court and counsel that I do not propose to go into the affirmative defense at this time, but I want to clarify some of these matters, and I will want to go into the interstate commerce feature rather fully. Otherwise, we will defer our examination until our own case in chief.

By Mr. Hanley:

Q. You were questioned about the so-called Iowa Plan, Mr. Raupagh. Did there come a time in the history of the Standard Oil Company when that company entirely withdrew from direct retail operation of service stations?

A. Yes, sir.

Q. Throughout the entire territory?

A. Yes, sir.

Q. Is that the policy that has come to be called sometimes the Iowa Plan?

112 A. Yes, sir.

Q. I believe you stated that withdrawal occurred in the Detroit area on September 10, 1936. Is that in accord with your recollection?

A. Yes, sir.

Q. Now, up until that time, was it or was it not customary for the Standard Oil Company to quote a retail service station price for gasoline?

A. Yes, sir.

Q. And that, as I understand it, was the price at which gasoline was sold by the Standard Oil Company at retail in its own directly operated stations?

A. Yes, sir.

Q. Now, at that time, did the company also post a dealer's tank wagon price?

A. Yes, sir.

Q. At that time where was the dealer's tank wagon price posted?

A. At the bulk plant, at the office.

Q. Was that a public posting, Mr. Raupagh?

A. Yes, sir.

Q. Anybody could ascertain what that posting was?

A. Yes, sir.

Mr. Austin: Pardon me. What was the other price 113 that you referred to before?

Mr. Hanley: The retail price. I am going to ask him where that was posted.

By Mr. Hanley:

Q. Where was the retail gasoline price posted, as long as you posted them?

A. It was posted at our service stations and at the office.

Q. So that that was a public posting, and anyone could ascertain what it was?

A. Yes, sir.

Mr. Austin: Was that just while you were operating your own stations?

Mr. Hanley: That is right.

By Mr. Hanley:

Q. Has the company ever posted a retail gasoline price, service station price, in Detroit, since September 10, 1936?

A. No, sir.

Q. Have you continued in the same manner to publicly post dealer tank wagon prices?

A. Yes, sir.

Q. And that custom is in use right today, is it not?

A. Yes, sir.

Q. Mr. Raupagh, you were examined at some length relative to the type of arrangements you had with dealers to whom the company leased service stations, and the relations with dealers who had their own stations or
114 leased from someone other than the company. Do you recall those questions?

A. Yes, sir.

Q. So far as a dealer is concerned, who leases from the Standard Oil Company, is there any contract or arrangement between the company and that dealer, other than the lease?

A. No.

Q. You were shown the Commission's Exhibit 2 this morning, which is a contract for the sale of gasoline. Do you recall that?

A. Yes, sir.

Q. With what dealers is that contract used?

A. That contract is used with dealers other than dealers to whom we lease our stations.

Q. Mr. Raupagh, does it make any difference at all into which category a customer, a retail dealer falls, insofar as the price is concerned, which he is charged for his gasoline?

A. No.

Q. What is that price in reference to the posted price?

A. The regular posted tank wagon re-seller price.

Q. Are there any distinguishing characteristics at all between a lessee and a dealer who owns his own station, so far as the dealings between that dealer and the Standard Oil Company are concerned, beyond the single relationship of landlord and tenant in the instance of the lessee?

115 A. No.

Q. You were shown this morning Commission's Exhibit 1-A, which was a lease on a station to sell Dameron. Do you remember that Exhibit?

A. Yes, sir.

Q. Do you recall that you said that the rental on that lease was, in your judgment, higher than the ordinary service station?

A. Yes, sir.

Q. And that the gasoline rental was one-half cent in addition to the flat rent?

A. Yes, sir.

Q. I call your attention to a statement, the last paragraph of which you read into the record, in answer to a question by Mr. Austin, and I will ask you if the station to which you were referring there and contrasting with other stations, was the station referred to in Commission's Exhibit 1-A? If you will just read that, you will understand what I mean.

A. I wish you would repeat that question.

Mr. Hanley: Will you read the question?

Trial Examiner Ballinger: Read the question, Mr. Reporter.

(The question was read.)

By Mr. Hanley:

Q. That is the Dameron station?

A. Well, the latter part of this paragraph cannot
116 be construed as to mean a station such as we mean is
comparable to the Dameron station.

Q. That is what I am trying to get at. Mr. Raupagh, isn't it a fact that the rental both as to the cash and to the amount per gallon of gasoline is arranged differently for each one of the stations which you lease in Detroit?

A. Yes, sir.

Q. And of the two hundred odd stations, which the Standard Oil Company leases, or in connection with all of those stations, is it or is it not a fact that each year an analysis is made of those individual stations, with a view to determining a proper and fair rental?

A. Yes, sir.

Q. I wish you would please give the Court, as completely as you can, a clear picture of what elements, and all the elements that are considered in arriving at the rental, that you ask for at any given station?

A. We take into consideration the value of the real estate, and also the value of the improvements. We take into consideration what the station is worth as a service station, and the gallonage that it does, getting at the point what the station is actually worth from a rental standpoint. We have to do this because there are changes in highways, or there are other factors which increase the value of a station. For instance, a station may be located

out quite a ways, and for a number of years there
117 has been no development in the way of building
residences in that particular neighborhood. Then the development starts and a considerable number of residences are constructed, which adds to the value of the station. We are also confronted with the fact that we have a number of stations yearly, which we consider cats and dogs because the neighborhood has gone down to such an extent that the value has decreased to such an extent that we are lucky if we can rent it for one-tenth of a cent a gallon, or if we can rent it at all. As a matter of fact, we have a number of service stations that we have been obliged to close, that we can't rent at the present time on account of those factors.

Trial Examiner Ballinger: Isn't the controlling factor what the station has been producing?

The Witness: I believe so, Your Honor, because unless that station was manned, perhaps, by an operator who wasn't efficient, and that determines to a great extent the value of the station, what it can produce.

By Mr. Hanley:

Q. Do you have the experience sometimes, Mr. Raupagh, of a station which represents a large investment, I mean a large cost to the company, sometimes being a much poorer producer and unable to command as much rent as some other station which represents a considerably lesser investment in cost?

A. We have that situation quite frequently in
118 Detroit, on account of real estate values at one time
being very, very high.

Q. I am not sure whether you mentioned it or not, but does the re-routing or building of through highways and heavy traffic highways have any bearing on the productivity of service stations, and if so, please explain what it is?

A. I would say it does have a bearing, and it makes a station more productive. We feel that if we can get a combination of a good highway with lots of travel and a good neighborhood—if we can get that combination, that makes the best type of service station for us.

Trial Examiner Ballinger: Doesn't that have an important bearing?

The Witness: Yes, sir.

By Mr. Hanley:

Q. Now, is there not a continuous state of flux in the relative productivity of these service stations from year to year?

A. Yes, sir.

Q. When you make your yearly analysis for the purpose of making leases on the individual stations, do you take into consideration all of those factors, Mr. Raupagh, every year?

A. Yes, sir.

Q. And is it not a fact that from year to year the rental which you set upon different individual stations will
119 materially change?

A. Yes, sir.

Mr. Austin: Are you referring now to flat rent or gallonage?

Mr. Hanley: Both.

By Mr. Hanley:

Q. I am referring, Mr. Raupagh, to flat cash rental and gallonage rental, and either one and both.

A. Yes, sir.

Q. And the total of the two.

A. Yes.

Q. When you undertake to determine the rental which you will ask for a station, do you have any element of gasoline price involved at all? Do you take that into consideration at all?

A. No.

Q. Is it not true in respect of all of these leased-out stations, no matter if the rental has changed from year to year, that the price which you charge the operator for gasoline is the dealer posted price?

A. Yes, sir.

Q. In effect from time to time?

A. Yes, sir.

Q. I wish you would make this entirely clear whether or not there is not the relationship at all between the rental you charge and arrive at, as you have explained, and
120 the gasoline price which is charged all of these dealers.

A. There is no difference whatsoever.

Q. Mr. Raupagh, if an analysis were to be made of the amount of rental which is charged the various retail dealers to whom Standard Oil Company leases in Detroit, is it or is it not true that it would involve an analysis of each of these two hundred odd locations for each of the years in question, and involve an analysis of all of the factors which you say you have taken into consideration in fixing your various rentals?

A. Yes, sir.

Q. I will ask you if in the last analysis, Mr. Raupagh, it isn't a matter of the best judgment of yourself and your staff and your real estate men in the company as to what rental you finally arrive at?

A. Yes, sir.

Q. As to any given station?

A. That is right, sir.

Q. You were interrogated at considerable length in relation to two stations, one leased to Lester Goldberg and one leased to Marvin Goldberg. The leases in question were supplied to Mr. Austin at his request, and have the identification numbers 18 and 19. Do you remember those leases?

A. Yes, sir.

Q. I will ask you, Mr. Raupagh, if in your dealings
with these two lessees, the rental amounts paid by
121 them for these stations have been arrived at always
in just the manner you have explained that you have
arrived at all these rentals?

A. It has, sir.

Q. That is to say, you have given consideration to all of these various factors that you have explained?

A. Yes, sir.

Q. Did you give consideration in that specific instance, or instances, to the price, or any change in the price of gasoline charged to those two customers?

A. No, sir.

Q. Mr. Raupagh, has the Standard Oil Company made any special deal of any kind with either one of these customers?

A. No, sir.

Q. Do they get the same price that all the rest of these retail dealers get?

A. They do.

Q. And that is the posted dealer price?

A. Yes, sir.

Q. Do they get any rebates or refunds or bonuses, or any concessions of any kind?

A. Not a thing.

Q. So they are on identically the same price basis as any other retail dealers in Detroit?

A. Yes, sir.

Q. Is that right?

122 A. Yes, sir.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

By Mr. Hanley:

Q. You were asked about whether or not you ever received any instructions from the Chicago office relative to prices which would be charged in the Detroit area. I wish you would explain clearly just what you mean by receiving instructions about prices from Chicago from time to time, Mr. Raupagh.

A. The instructions we receive from Chicago are to the effect that upon a certain day the price on a certain product is a certain price, and that remains in effect until such time that we may receive other instructions.

Q. Now, I want you to make it clear to the Court whether or not that is just an instruction that applies to a given product. Let's take Red Crown gasoline, for instance. That that instruction apply to Red Crown gasoline as distinguished from any customer who may be buying Red Crown gasoline?

A. It applies to the product, Red Crown gasoline.

123 Q. And again taking Red Crown gasoline, do you get such an instruction as to what, on a given date, the dealer tank wagon price will be?

A. Yes, sir.

Q. Then, is it not a fact that you post that tank wagon price, as you have described?

A. Yes, sir.

Q. And thereafter you sell, do you not, to all of your tank wagon dealer customers at that price?

A. Yes, sir.

Q. That is, without respect to whether the Chicago office knows anything about who they are, or not; isn't that true?

A. That's right, sir.

Q. And, indeed, is it not a fact that they don't know who they are, in many instances?

A. That's right. Of course, there is this one exception Mr. Austin brought out.

Mr. Hanley: Yes. Always we make that exception; as to the Ned's situation from September, 1936, until February, 1938.

By Mr. Hanley:

Q. That's right, isn't it, Mr. Raupagh?

A. That's from September 1, 1936, to March 1, 1938.

Q. Yes. Now, does Chicago, from time to time, advise you as to what price you should charge for tank car
124 deliveries to jobbers?

A. Yes.

Q. And that's without reference, again, to any customer, isn't it, Mr. Raupagh?

A. Yes, sir.

Q. Thereafter, you just go ahead and do business with jobber customers on that price basis, do you not?

A. Yes, sir.

Q. And the only such customers that you have had in Detroit for the last two or three years have been these four dealers that have been so frequently named today, are they not?

A. Yes, sir.

Mr. Austin: If your Honor please, I don't object to any of these questions, but I think Mr. Hanley has a little less freedom with leading questions with this witness on cross-examination than with others. I was really cross-examining, and he is, more or less, as I understand it, on direct, except he is limited to the subjects brought out by me.

Mr. Hanley: I am entirely agreeable about trying to avoid leading, your Honor, but I disagree thoroughly with the basis. I think this is Mr. Austin's witness I am cross-examining.

Trial Examiner Ballinger: This is Mr. Austin's witness and unless he displayed hostility, unless Mr.
125 Austin was surprised, he could not have indulged in cross-examination with him. The cross-examination is now being properly conducted.

Proceed.

Mr. Austin: I don't want to dispute with that, but I feel, while the witness is not in any way hostile, I feel he is adverse, and I feel there should be some limit to the amount which the attorney for the Respondent can lead the Respondent's officers on the stand, even though it is cross-examination.

Trial Examiner Ballinger: You are referring now to the Federal Rules of Procedure, I take it?

Mr. Austin: What I understand the rules are, generally, on our hearings.

Mr. Hanley: In order to avoid difficulties, I won't lead the witness. He doesn't need to be led. I thought we both understood he was thoroughly qualified.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. I think I asked you if the price was always the same.

A. Yes, sir.

Q. As between the four jobber customers; is that true?

A. That is true.

126 Q. Now, you were asked, Mr. Raupagh, if the posted price for dealers' tank wagon price was not generally the same among all major suppliers. Do you recall that discussion with Mr. Austin?

A. Yes, sir.

Q. Do you recall that you said that generally such posted price was the same?

A. Yes, sir.

Q. I will ask you whether or not it is a fact—basing your knowledge—basing your answer on your knowledge and experience as a marketer in the oil business—tell us whether or not it is a fact that that posted price is not necessarily the selling price, in all instances?

A. That is a fact.

Q. I will ask you if with this single exception on the half cent incident with Ned's, it is a fact that the Standard Oil Company's posted dealer tank wagon price is the selling price?

A. Yes, sir.

Q. And that has been true ever since June, 1936, Mr. Raupagh?

A. Yes, sir.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

127 By Mr. Hanley:

Q. You were asked, Mr. Raupagh, what determined the consumer price in Detroit. Do you recall that?

A. I don't recall that I was asked that exact question, though, in that way.

Mr. Austin: I don't recall asking those questions; what determines it.

Mr. Hanley: Perhaps I am mistaken.

Mr. Austin: I would like to know that myself.

By Mr. Hanley:

Q. Well, I will ask Mr. Raupagh. In the last analysis, Mr. Raupagh, what determines every price?

A. Competitive conditions.

Q. What you can get for the gasoline; isn't that true?

A. Yes, sir.

Q. When you get out in the market place and try to sell it; isn't that the fact?

A. That is true, sir.

Q. Now, you were questioned at considerable length, Mr. Raupagh, about applications having been made to the Standard Oil Company by dealers or groups of dealers, for tank car purchases. Do you remember that long examination?

A. Yes, sir.

Q. There was a time, was there not, in the spring or summer of 1938 when a proceeding was brought
128 against the Standard Oil Company and others in Detroit under what is known as the Michigan Fair Trade Act?

A. Yes, sir.

Q. And that law was a price discrimination and less than cost law, was it not?

A. Yes, sir.

Q. Do you recall whether or not during the pendency of that case certain service station dealers made suggestions to Standard Oil Company that they be permitted to buy on a tank car basis? Do you recall anything of that kind during the pendency of that case?

A. I believe there was a request of that kind.

Q. Now, directing your attention to the time of June, 1936, and right up until now, and having in mind this incident in 1938, I will ask you if at any time any application has been made to the Standard Oil Company here on the part of any individual service station operator or group thereof, that such person or group might buy tank car in any instance where such person or group had bulk storage; their own facilities for distributing gasoline and acceptable line of credit and a volume of business that is ordinarily found in a jobber set-up?

Mr. Austin: I think that question ought to be made a little more specific.

Anyway, before he answers it: do you mean as to 129 the acceptable credit set-up, do you mean acceptable to the standpoint of the Standard Oil Company?

Mr. Hanley: Yes; surely.

Mr. Austin: Within their exclusive judgment?

Mr. Hanley: Why, yes.

Mr. Austin: Satisfactory to them?

Mr. Hanley: Certainly that's what I mean. I don't suppose we are required to sell anybody on somebody else's judgment.

Mr. Austin: And as to whether they actually had jobber facilities at the time?

Mr. Hanley: I will break up the question, if it is preferable.

By Mr. Hanley:

Q. Was there any such individual or group who made any such application to you or your staff, to your knowledge, which individual or group had storage facilities? Answer that, in the first place.

A. May I ask what time you refer to?

Q. Any time, from June, 1936, until now.

A. Yes, I believe there was.

Q. And when was that?

A. Well, just recently received a request that one of the operators of four service stations here in Detroit wanted to purchase from us, but he had no bulk storage.

130 Q. That's what I asked you. Did you ever receive any such request from any group or individual who, at that time, had bulk storage?

A. No.

Q. Did any of them ever make a request of you when, at that time, they had a set up of distribution facilities?

A. No.

Q. Were any of them in a position, from a credit standpoint, in your judgment, to purchase from the Standard Oil Company on a tank car basis?

A. No, sir.

Q. During that period of time, June, 1936, until date, what do you say as the manager of the company here, as to whether or not you ever got a bona fide application for the purchase of gasoline on a tank car basis other than from the four buyers who are involved in this proceeding?

Mr. Austin: I object to that question, your Honor, in the first place, on the ground the use of the words "bona fide," which calls for a conclusion as to whether or not it was bona fide. This witness cannot testify to that. It refers to the person who made the application.

Secondly, he has already answered the question as to whether he received such application so that this question is only asking whether it was made in good faith, and that would involve a conclusion of the witness.

131 Trial Examiner Ballinger: Did you investigate the condition of the applicant?

The Witness: Yes, sir.

Trial Examiner Ballinger: Instead of stating it was bona fide, state what conditions you found.

By Mr. Hanley:

Q. Just go ahead and answer the Court's question, please, Mr. Raupagh.

A. The conditions I found was that he had no bulk storage; that the stations were scattered quite a ways; that it was against our policy to sell or make deliveries to a person that is located in such a manner.

Q. What do you mean by that last?

A. Well, he couldn't take a tank car of gasoline at one time. He couldn't take a transport truck a one time, because he didn't have the proper storage facuities.

Q. Now, Mr. Raupagh, just during the pendency of this action, in the spring or early summer of 1938, do you recall that there were several suggestions made about that time to you, or to somebody in your staff by dealers?

A I recall that there was one.

Q. And did you investigate that situation?

A. Yes, sir.

Q. Did your investigation disclose anything to you as to how that request came about?

132 A. No, I can't say as to how it came about.

Q. Do you recall that that was inquired into during the course of that proceeding?

A. Yes, sir.

Q. Did you learn any facts in connection with how the matter occurred?

A. Yes, sir.

Q. Your Honor, I object to any questions as to what he learned on the ground of hearsay.

Trial Examiner Ballinger: We haven't reached that point yet.

Mr. Austin: All right. I will withdraw that objection.

By Mr. Hanley:

Q. Now, without reference, Mr. Raupagh, to anything you may have heard on the trial, but, as a result of your investigation and conversations with the applicant for this tank car basis, did you learn anything about how he happened to make it at that time?

A. Yes. We saw the—I saw the contract that he had made with another supplier, selling him at the tank car price, calling for deliveries direct to his service station, and I think it specified that the gallonage was 8,000 a month.

Mr. Austin: I think it should be brought out who this is that we are talking about here.

133 By Mr. Hanley:

Q. All right. Who was it?

A. Roman Miller.

Trial Examiner Ballinger: Who was it?

The Witness: Roman Miller.

By Mr. Hanley:

Q. Had that man been a customer of the Standard Oil Company?

A. Yes, sir.

Q. Did he later leave the Standard Oil Company and buy from somebody else?

A. Yes, sir.

Q. Did he have any distribution system of his own, when he applied to you?

A. None whatever.

Q. Did he have any bulk storage of his own?

A. No.

Q. Were you willing, on the whole investigation that you made of his business, and ability to buy as a jobber, willing to sell him as a jobber?

A. No, because he wasn't a jobber.

Q. Now, did you discover any facts in your dealings with any of the individuals who made an application to you as to whether that application had any reference to the lawsuit that was being tried at that time?

134 A. I believe it was all inspired.

Mr. Austin: I move to strike that out.

Trial Examiner Ballinger: The motion is granted.

Mr. Hanley: It may be stricken.

Trial Examiner Ballinger: The answer is stricken.

By Mr. Hanley:

Q. Tell us what you learned in your investigation with these dealers who were asking you to put them on a tank car basis.

Mr. Austin: I object to that question, your Honor. Let him state what the dealer told him; what the dealer said and what the witness said.

Trial Examiner Ballinger: State what, in fact, transpired; of your own knowledge.

Mr. Hanley: Yes, that's all I am asking him for.

A. A request was made by some dealers that they wanted to purchase in tank car quantities at the tank car price. However, they had no bulk storage. They had no bulk storage in prospect or sight. They had made no effort to secure any, as far as we could learn. Their financial standing wasn't such that we would accept them.

Trial Examiner Ballinger: Do you mean they had no bulk storage, or they had inadequate bulk storage?

The Witness: Your Honor, what we term as bulk storage was not the storage they may have at their service 135 station, but it is a bulk plant separately operated and conducted from their service station. They had no bulk storage whatsoever.

By Mr. Hanley:

Q. Mr. Rampagh, did you ever have any experience with the so-called group buying—this so-called group buying that Mr. Austin was talking to you about?

A. Yes, sir.

Q. And where did you have that experience?

A. I had that experience in Chicago.

Q. And what was the result of your experience?

A. It was kind of disastrous.

Q. Just tell the Court what you mean by that.

Mr. Austin: I object to further answers on that unless he states what experience he had; that is, what sort—who applied, and what facilities they had and so forth.

Mr. Hanley: If your Honor please, if Mr. Austin will indicate what he meant, then I will try and confine my examination to what Mr. Austin is talking about, but he limited me most stringently in going into this question of who he was talking about as a group buyer.

He has created the impression here, apparently, that the Standard Oil Company has turned down bona fide applicants to buy on a tank car basis. I think it is already 136 sufficiently established here, your Honor, to justify the insertion that there was an inspired effort to make some testimony in a case in which this company was a Defendant.

Mr. Austin: I don't think there is any testimony of that kind at all in the record, and I haven't objected, Mr. Hanley, to any testimony as to what his requirements are. Now you are going to Chicago to make a basis of comparison. I want to know what happened in Chicago.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. I want to ask you something about availability of storage, Mr. Raupagh. Let me understand your testimony. Is there any way that you know of, and, if so, you tell us what it is, that anybody in Detroit can get bulk storage facilities without buying them, building them, or renting them, or have somebody give it to them?

A. I don't.

Q. So far as the Standard Oil Company is concerned, has that company ever given bulk storage—

A. No.

Q. —to any jobber?

A. No, sir.

Q. Have each of the jobbers concerned in this a
137 tion supplied at their own expense and without co
to the Standard Oil Company their own storage fa
cilities?

A. They have supplied their own facilities.

Trial Examiner Ballinger: Without any contribution
any kind.

The Witness: No contribution of any kind, your Hono

By Mr. Hanley:

Q. Some effort was made in examining you, Mr. Ra pagh, to establish that there was no increase or decreas in the consumption of gasoline from year to year in th Detroit area. I think you were asked a question that one dealer got a customer that he must of necessity tak that customer away from some other dealer. Do you reca that testimony?

A. Yes, sir.

Q. Now, do you recall whether there has been an i crease in the general consumption of gasoline through th past several years in Detroit?

A. There has been an increase in consumption of gas line yearly with the exception of 1938.

Q. Based on your experience, was 1938 a bad year i the oil industry?

A. Yes, sir.

Q. That was true all over the country?

138 A. Yes, sir.

Q. And also in Detroit.

Is it or is it not a fact that an increase in the numbe of cars would normally increase the consumption of gas line?

A. Yes, sir.

Q. Is it not also true that an increase in the buyin power of the people who operate cars irrespective of a increase in the number of cars would also increase th consumption?

A. It would.

Q. Is it a fact that whenever one dealer in gasoline get a new customer that he necessarily has taken that custome away from some other dealer?

A. Would you repat that question?

(The question was read.)

A. Not if it is an individual that has bought his first car or a new car and never used any gasoline before.

Trial Examiner Ballinger: As a general proposition, isn't it true?

The Witness: Yes.

By Mr. Hanley:

Q. I believe you said that the price might not be the most important factor in a customer changing from one dealer to another; am I right about that?

139 A. You are right, and I would like to add to that statement. When, of course, the price differential gets too large, then it is an important factor.

Q. Just a moment, on that price situation. You were asked by Mr. Austin a number of questions as to the importance of price. Are there not localities, Mr. Raupagh, where the price is one of the less important factors in the ability of a service station to obtain and retain his customers?

A. That is true, sir.

Q. And, conversely, is it not true that there are certain other localities where price assumes a greater importance?

A. Yes, sir.

Trial Examiner Ballinger: You might develop those localities a little.

Mr. Hanley: I will, your Honor.

By Mr. Hanley:

Q. In respect of the first type of locality just described, tell us what you have in mind as to the character of such a locality, Mr. Raupagh.

A. I have in mind localities like Grosse Point; Rosedale Park, and there are certain localities off Woodward Avenue, very high class neighborhoods.

Trial Examiner Ballinger: Those are localities where the stations are patronized by wealthy people?

140 The Witness: Yes, sir.

By Mr. Hanley:

Q. Places where the buyers are not price conscious primarily; is that right?

A. Yes, that is it, sir.

Q. And is it also true, Mr. Raupagh, that in those localities emphasis is placed on the effectiveness of the station and the services rendered and things of that kind?

A. Very much so.

Q. Then tell us what you mean by the other type of unit.

A. The other type are in those localities in poor neighborhoods where many people are on the Welfare and still own and operate cars, generally poor localities who are price buyers, who must be price buyers, and that generally takes place in the quite closely downtown areas, too.

Q. Some examination was made of you, Mr. Raupagh, as to identification advertising, which you said were signs identifying products and pump globes and that sort of thing.

A. Yes, sir.

Q. Ordinarily, when you lease a station, you supply that type of advertising to the lessee, do you not?

A. Yes, sir.

141 Q. And it is for his use, is it not?

A. Yes, sir.

Q. As long as he has the station?

A. Yes, sir.

Q. What is the situation with respect to a dealer who owns his own station or leases a station from someone other than the company?

A. The situation is exactly the same.

Q. Is it or is it not true that he keeps that equipment as long as he wants to deal in Standard Oil Company products?

A. Yes, sir.

Mr. Hanley: If your Honor please, I think I do not care to go into anything further except the one subject of interstate commerce, and that is a proper subject, and I can do it nearer the chronological order if we might recess at this time. I will dispose of that the first thing in the morning.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Redirect Examination by Mr. Austin.

Q. Referring to your leases, how many service stations are there in the Detroit area that pay less than ½ cent per gallon on their gallonage rent?

142 A. You mean of our own stations?

Q. Of your lessees.

A. Of our lesses. I can't answer that definitely, but I could look that up and get it for you.

Q. Are there two or five or ten?

A. Oh, yes, I would say about—I am guessing now—about ten.

Trial Examiner Ballinger: That is your best judgment, is it?

The Witness: Yes, sir.

Trial Examiner Ballinger: Not a guess.

The Witness: I will let it stand as my best judgment.

By Mr. Austin:

Q. All the others pay ½ cent?

A. No, sir.

Q. Nobody pays over ½ cent?

A. No, sir. Well, now, wait a minute. I am not so sure of that, either, but I don't believe there is anybody else that pays over half a cent.

Q. So that this variation in rental that you were speaking of largely applies to the flat rental, does it not?

A. Largely, yes, sir.

Q. And in the cases where the rental is less than ½ cent on the gallonage, those are generally poor locations?

A. Yes, sir; cats and dogs.

143 Q. You referred to Roman Miller, and I believe you said he made a request to become a tank car buyer?

A. Yes, sir.

Q. Was he a customer of Standard Oil Company's when he made that request?

A. Yes, sir. Could I make another statement in that connection?

Q. Well, that is all I wanted to know, whether he was a customer at that time, because some reference was made to a contract he had with some other company.

A. Yes, sir.

Trial Examiner Ballinger: What you have in mind, is it pertinent to any issue in this case? If so, you may make a statement.

The Witness: I believe it is, Your Honor.

Trial Examiner Ballinger: Let's have it.

The Witness: He wanted to purchase in a tank car price and wanted us to make truck train deliveries or tank wagon deliveries at tank car price direct to his service station. He went on at length to explain that that is the economical way to do, and he wouldn't think of doing business any other way. He claimed that he originated the idea in some other line of business at the time.

By Mr. Austin:

Q. At that time you weren't making any deliveries,
144 were you, by tank train?
A. We are not now.
Q. Well, you are now to jobbers?
A. Yes, to jobbers, but not to resellers.
In addition to that he showed us a contract that he had made with another supplier of major company gasoline giving him a discount on house brand gasoline of a cent and a half per gallon, and making deliveries direct to his service station at that price.
145 Q. Well, you just said he was a customer of Standard Oil. You mean this was a contract that he had?
A. We lost him.
Q. Did he show you this contract at the time he made the request, or later on?
A. Later on.
Q. That is what I wanted to bring out.
A. Yes, sir.
Q. Well, now that you are delivering by tank train—or what is the other name you called it?
A. Transport haul.
Q. Transport truck?
A. Yes.
Q. To your jobbers, and also to Ned's, there would be nothing to prevent you from delivering to a man like Roman Miller at his station, by the same means, is there?
A. There is a big distinction.
Q. Just answer that yes or no, so far as the physical ability to do it by a method which you are now using.
A. If they have sufficient storage, there wouldn't be anything to prevent us, no.
Q. Do you consider Ned's a jobber?
A. Yes, sir.
Q. Then when you used the term "jobber," you didn't mean necessarily a man who resells to other dealers, did you?
146 A. Not necessarily.
Q. You mentioned volume figures for the Detroit consumption of gasoline.

A. Yes.

Q. Where did you get those figures, or where did you get that information?

A. Well, that is something that we set up ourselves here as we thought was the right thing to do. That is our own judgment.

Q. Have you got the figures there?

A. One to two million gallons a year. You mean that a jobber—

Q. No, no. You stated in response to Mr. Hanley's question—you referred to the total gallonage of gasoline consumed in Detroit.

A. Yes, sir.

Q. You said it increased, except for 1938?

A. Yes, sir.

Q. Have you the figures on that?

A. I have the figures. I haven't them here. I have them in percentages.

Q. Where did you get those figures?

A. From the State of Michigan.

Q. As long as that question has been asked, I would like to know the total volume. Is that for the State, or just for Detroit that you were speaking of?

147 A. Well, we have it for both.

Q. I would like to know the total volume in gasoline consumption, if there is such a figure available, for Detroit, for the last five years.

A. Well—

Mr. Hanley: Just a minute.

Mr. Austin: If he has the figures.

Mr. Hanley: He hasn't got them in that form, Mr. Austin. What we did was make a computation inspired by the necessity of this litigation, which computation is based on the data that was obtained from the tax authorities of the State of Michigan. Now, it is not a record of our company; it is a computation which we think is the soundest one that can be made, but we can't give it to you as a record of our company. I have no objection to your having it if you are willing to agree that it may be used—

Mr. Austin: I want to find out— Mr. Raupagh made the positive statement here that the consumption of gasoline in Detroit had increased from year to year since 1935 or 1936, except that there was a decrease in 1938. Well, now, if that is not based on any reliable figures which are sufficiently reliable to be introduced here, then I don't see that his testimony is reliable enough to be in the record.

Mr. Hanley: I think they are reliable and sufficiently
reliable to be introduced, and I propose to put them in
148 on our side of the case, Mr. Austin. I just wanted you
to understand that they were not a record of the Standard Oil Company. They are a computation which our accountants have made, and which they make from year to year, and so do other companies, based on the records of the taxing authorities of the State of Michigan. It is the only way you can tell how much the total gasoline—

Mr. Austin: I would like to ask, then, whether Mr. Raupagh's testimony is merely his conclusion based upon those computations.

Mr. Hanley: No, it is the results of the computation. There isn't any legerdemain about this thing at all. I can show you what the computation is or explain it to you sometime during a recess.

Trial Examiner Ballinger: I understand from counsel for the Respondent that he proposes to introduce into the record as a part of the Respondent's case, the basis upon which the conclusion was reached, and I suggest that you pass the matter over at this time, and if a satisfactory basis for the conclusion which has been expressed in the record is not laid, why, you may raise the question at a later time.

Mr. Austin: Thank you, Your Honor. That, of course, I would like to do, but I didn't like to leave this thing with a statement here that there had been an increase except
in 1938, when, for all I know, the increase may be very
149 small or maybe the 1939 and '40 figures are less than
1937, and that testimony is in here to give a picture of increasing consumption and new business for retail gasoline dealers. I don't know whether there is or not, and I have no way of finding out the basis of what has been said.

Trial Examiner Ballinger: With the reservation the Examiner has given you, are you not satisfied?

Mr. Austin: I am satisfied that I may have leave to move to strike at a later time if it is not supported.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Mr. Austin: That is all I have tonight.

Mr. Hanley: I move we adjourn to reconvene tomorrow at 10:00 o'clock.

(A discussion ensued off the record.)

Trial Examiner Ballinger: Motion of counsel for Respondent is granted, and now, at 5:40 P. M., the hearing stands adjourned, to be reconvened on March 11, 1941, at the hour of 10:00 o'clock A. M., in Room 859, Federal Building, Detroit, Michigan.

(Whereupon, at 5:40 P. M., March 10, 1941, the hearing in the above-entitled matter was adjourned.)

150 Room 859, Federal Building, Detroit, Michigan.

March 11, 1941.

Met, pursuant to adjournment, at 10 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

H. R. Hanley, Esq., 910 S. Michigan Avenue, Chicago, Illinois, on behalf of the Respondent.

151 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

This is a reconvening of Docket No. 4389, a case entitled in the matter of the Standard Oil Company, at 10 A. M., Eastern Standard Time, March 11, 1941, at Room 859 Federal Building, Detroit, Michigan. The last hearing was held in Detroit, March 10, 1941.

The report will note counsel for the Commission and Respondent present.

Gentlemen, you may proceed.

P. A. RAUPAGH thereupon resumed the stand, and having been heretofore duly sworn, testified further as follows:

Recross Examination.

By Mr. Hanley:

Q. Mr. Raupagh, where is the Standard Oil Company office located in Detroit?

A. At 1011 Fort Street.

Q. Just generally, what size building is it?

A. It is ~~three~~-story building, brick.

Q. Is the building entirely occupied by offices?

A. Yes, sir.

Q. Approximately how many persons are employed in the office personnel of the company in Detroit?

152 A. There is about 165.

Q. You have stated that there are six bulk plants in Detroit. What is a bulk plant?

A. A bulk plant, as we term it, is a storage plant for gasoline and other merchandise that we use as a distributing point or center.

Q. Is it a fact that those plants are located strategically about the city so that you can conveniently serve all communities in the city?

A. Yes, sir.

Q. Are there large bulk storage tanks for the reception of gasoline and other petroleum products at those plants?

A. Yes, sir.

Q. Do tank trucks operate out of the plants making deliveries to various gasoline customers?

A. Yes, sir.

Q. I think you stated that there were approximately 60 trucks operated by the Standard Oil Company in Detroit?

A. Yes, sir.

Q. Do those trucks operate out of these 6 bulk plants that you have described?

A. Yes, sir, with the exception, I think there is a few trucks that operate out of the River Rouge Terminal.

Q. Is it true that there is a personnel consisting of truck drivers and stock men and maintenance men who work at these bulk plants?

153 A. Yes, sir.

Q. Approximately how many such employees do you have in the Detroit area?

A. You mean working in the plants?

Q. Yes, sir, driving the trucks and doing maintenance and repair work, doing any work that needs to be done in connection with operating the bulk plants?

A. Well, it would be over 200.

Q. Then would that mean that there are approximately 360 to 365 persons altogether employed by the Standard Oil Company in Detroit?

A. Yes, sir.

Q. Directing your attention to the Marine Terminal at River Rouge; is that located entirely within the State of Michigan?

A. Yes, sir.

Q. Will you describe for the Court the physical set-up of the River Rouge Terminal, Mr. Ra[illegible]gh, with reference to how gasoline is put into the terminal and how it is taken out?

A. Gasoline is transported from our Whiting, Indiana, refinery by boat or tanker. It is unloaded at the River Rouge Terminal.

Q. Does that involve the use of docks and pump lines and power pumps and that sort of thing, Mr. Raupagh?

154 A. Yes, sir.

Q. Go ahead.

A. It is unloaded at the River Rouge Terminal and comes to rest there. Then we haul or transport or ship by tank car direct to our bulk stations in Detroit, and from our bulk plants in Detroit we deliver to our customers by our own tank trucks.

Q. Is it true that all of the gasoline that goes into the River Rouge Terminal is transported to that terminal by gasoline tankers?

A. Yes, sir.

Q. And that is over the Great Lakes?

A. Yes, sir.

Q. Mr. Raupagh, is there a period in the year when, due to weather conditions, navigation on the lakes has to be abandoned?

A. Yes, sir.

155 Q. And, generally, why is that?

A. Well, it is generally four or five months during the winter period. I don't recall the exact dates, but this is whenever the lake transportation is closed or it is frozen up so that boats can't ply on the lakes.

Q. Now, I think you stated in answer to Mr. Austin's questions that the capacity of the River Rouge terminal was—it is out of my mind. What was it?

A. A million and a half barrels; barrels of 42 gallons capacity.

Q. What is the practice with reference to filling that storage during the period of open navigation on the lakes?

A. The practice is to fill the storage during open navigation so that we can draw on the terminal during the winter months, as well as during the summertime.

Q. Is that true that for your sales in Detroit to all classes of customers that you continuously, throughout the year, draw on the supplies of the terminal?

A. Yes, sir.

Q. And during the period of open navigation, it is true that supplies of gasoline are constantly being unloaded into the terminal?

A. Yes, sir.

Q. As to any given brand of gasoline during that period of unloading into the terminal, and withdrawing for sale, is that gasoline just mixed up in the tanks?

156 A. Yes, sir.

Q. Are any of these shipments of gasoline by tanker to the terminal ear-marked for any particular customer or contract?

A. No, sir.

Q. Then, if I understand you correctly, the Standard Oil Company simply ships gasoline to the terminal with the view to selling it, if the company can sell it, to any customers that you may be able to obtain here in Detroit?

A. Yes, sir.

Q. Now, how do you get gasoline from the River Rouge terminal to the six bulk plants in Detroit proper?

A. We ship it either by tank car or by transport truck haulers.

Q. Now tell us what the mechanics are of getting that gasoline out of the tanks at the terminal, across the intervening space, and into the tanks in the bulk plants.

A. The mechanics are that either a tank car or transport truck is loaded at the River Rouge terminal and is then transported to our bulk plants and unloaded there and put into our storage at our bulk plant.

Q. So the Court may fully understand, does that loading and unloading of either a truck transport or a tank car involve the use of special equipment; pumps and that sort of thing, Mr. Raupagh?

A. Yes, it does.

Q. So that any bulk storage facility, in addition to

the tanks themselves, has to have special equipment
157 for the handling of the gasoline, is that true?

A. Yes, sir.

Trial Examiner Ballinger: Will you have the witness
lescribe that?

By Mr. Hanley:

Q. Do that, will you please, Mr. Raupagh? Describe in
letail what the physical mechanics are and what the equip-
nent is that is used in this loading and unloading op-
ration.

Trial Examiner Ballinger: And wherein they differ
rom the loading of a lesser amount supplied to retail
tores.

A. When we load at our River Rouge terminal for
ransportation to our bulk plants, we draw it off from
he tank and we meter it into the tank car or transport
ruck.

By Mr. Hanley:

Q. Do you use a power pump to do that?

A. We use a power pump to do that, yes, sir.

158 Q. Go ahead.

A. It is then transported to the bulk plant and is
nloaded and placed into our bulk storage at the bulk
lant and, again, a power pump is used. From our bulk
lant practically the same operation takes place, as far
s loading tank trucks, which make deliveries to dealers.

Q. Now, is it true that in connection with some of the
elivery trucks, tank trucks which make deliveries to re-
ail stations, that you use power take-offs, or power pumps
r is that a gravity feed in the service station?

A. It is mostly a gravity feed in service stations.

Q. Is it the same equipment that is used for these large
ulk—for the transfer of gasoline?

A. No, it is entirely different, as to size and so on.

Q. And the capacity and power of the pumps: different
s to that, is it?

A. Yes, sir.

Trial Examiner Ballinger: Only as to size and power?

The Witness: Only as to size and power and one is
ocated on the truck, and, generally, at our bulk plant the
ower take-off is a part of the plant.

By Mr. Hanley:

Q. And not a part of the traveling equipment?

159 A. That's right.

Q. If I understood you correctly, ~~you said that~~ most of the deliveries to service stations don't use a pump at all; that is, merely a gravity feed?

A. Yes, sir.

Q. Now, Mr. Raupagh, is that operation of first unloading the tankers into the terminal at River Rouge, and then loading tank cars or truck transports at River Rouge for delivery to the bulk plants in Detroit, and then the delivery out of the bulk plants to customers in Detroit; do all of those operations take place within the State of Michigan; entirely within the State of Michigan?

A. Yes, sir.

Q. Do any of them take place out of the State of Michigan?

A. None.

Q. Now, how do you determine when you will move gasoline from the River Rouge Terminal to a bulk plant in Detroit?

A. We determine that by the necessity for our stock at the bulk plant. Movements take place continually.

Q. When you do move gasoline to a bulk plant, do you earmark that gasoline for any particular customer, or to fill any particular contract?

A. No.

Q. When you move it, do you put it right into the tank of the same grade of gasoline at the bulk plant?

160 A. Yes, sir.

Q. Does it become mixed with such gasoline as may already be in that tank?

A. Yes, sir.

Q. Is it true, Mr. Raupagh, that gasoline in any given tank at a bulk plant may have in it a mixture of gasoline that may have been put in there from time to time over a period of some months?

A. Yes, sir.

Q. Now, isn't that true with respect to all grades of gasoline in all of these terminal and bulk plant tanks, with the exception of a difference that occurs when you change the grade of gasoline, giving consideration to seasonal requirements?

A. Yes, sir.

Q. Perhaps it would be well to clarify what is meant by the seasonal requirements, Mr. Raupagh.

A. What we mean by season requirements of gasoline is that we make four separate grades of gasoline. By that I mean gasoline is adjusted to the weather conditions, as to quick starting, and so on.

Q. This may not be very scientific, but to summarize it: you may use a more volatile gasoline in the winter time to meet the cold weather conditions?

A. Yes, sir.

161 Q. Obtain quick starting?

A. Yes.

Q. Now, you were shown Commission's Exhibit No. 2, which is, as you said, a typical form of gasoline contract which you write with retail dealers. Do you recall that exhibit?

A. Yes, sir.

Q. When you make a contract of that kind, Mr. Raupagh, with a dealer in Detroit, just explain to the Court what happens. How does that thing come into existence?

A. It comes into existence this way: that we continually solicit the business of dealers whose business we are not securing, and we try to get the business.

If we sell the dealer upon the idea of handling our products, we make this kind of contract with him and we deliver our merchandise to him as per the contract.

Trial Examiner Ballinger: Will you pursue that contract a little farther?

Mr. Hanley: Yes, I will.

By Mr. Hanley:

Q. Now, let us start back a little ways. Are a part of this office personnel that you refer to salesmen?

A. The office personnel? No, they are not.

Q. In addition to these 360-odd employees, are there salesmen employed?

A. Yes, sir.

162 Q. About how many salesmen do you have?

A. We have about 43 salesmen.

Q. Now, do you have any other classes of employees that you haven't taken into consideration in these totals?

A. Yes. We have construction men. We have maintenance men.

Q. Well, about how many of them?

A. We must have about 25, 30 construction men.

Q. And are there any others?

A. And perhaps 10 maintenance men.

Q. And are there any other classes?

A. No; I think that's about all.

Q. Now, roughly, that would total about 440 to 450, altogether. Am I right about that?

A. Yes.

Q. Now, returning to the salesmen, do they work out of your office here in Detroit?

A. Yes, sir.

Q. And do they solicit business from dealers in Detroit?

A. Yes, sir.

Q. Is their work entirely within the State of Michigan?

A. Yes, sir.

Q. Are the dealers whom they solicit located and doing business within the State of Michigan?

A. Yes.

163 Q. Now, when a salesman successfully solicits a dealer you say that one of these contracts will result?

A. Yes.

Q. Who signs that contract?

A. The dealer signs it and I sign it, or someone in our office signs it.

Q. Here in Detroit?

A. Yes, sir.

Q. Does that whole thing happen in Detroit?

A. Yes, sir.

Q. Is the contract itself made in Detroit?

A. Yes, sir.

Mr. Austin: I object to that, your Honor, as to where he contract is made. I move the answer be stricken. It is a conclusion of law.

Mr. Hanley: I will withdraw the question, in the face of hat objection.

By Mr. Hanley:

Q. Physically, is that contract filled out and signed in Detroit?

A. Yes, sir.

Mr. Austin: I assumed that's what you meant.

Mr. Hanley: Yes, sir.

By Mr. Hanley:

Q. What becomes of the contract after it is fully 164 executed; I mean fully signed?

A. We have a file where we keep it in our office and refer to it when necessary.

Q. Is that kept in Detroit?

A. Yes, sir.

Trial Examiner Ballinger: Prior to the execution of the contract, is your office in Chicago consulted?

The Witness: No, sir.

Trial Examiner Ballinger: It is not submitted to them for approval?

The Witness: No, sir.

By Mr. Hanley:

Q. Is it true, Mr. Raupagh, that many of these contracts are fully signed and completely filled out in your office and that you supply a dealer with gasoline under them without Chicago even having knowledge of that transaction?

A. That's right, sir.

Trial Examiner Ballinger: Is that true in all instances?

The Witness: Of that kind of a contract, yes, sir.

By Mr. Hanley:

Q. Now, having the contract made, as you have described, Mr. Raupagh, what happens then?

A. We install our product advertising; put the 165 globes on the pumps.

Q. Who does that?

A. Our maintenance men.

Q. And they work out of your office in Detroit?

A. Yes, sir.

165-A Q. All right. Go ahead, what happens then?

A. Then we start making delivery to the dealer.

Q. At whose instance do you make the deliveries?

A. The dealer.

Q. Does he tell you when he wants gasoline?

A. Yes, sir.

Q. Whom does he tell?

A. Well, he either 'phones our office, tells our driver, possibly our salesmen sometimes.

Q. Is it always somebody in Detroit connected with your office?

A. Yes, sir.

Q. And does he advise how much gasoline he wants?

A. He generally does; yes, sir.

Q. Then what happens?

A. Then we make the delivery and collect for it.

Q. Out of the bulk plant, ordinarily?

A. Yes.

Q. And that goes into his tanks in Detroit?

A. Yes, sir.

Q. And then what happens?

A. Then he sells it to the public.

Q. I mean, first, Mr. Raupagh, do you bill him for that gasoline, and what takes place in reference—

A. The driver that makes the delivery makes out the bill and collects for it.

166 Q. Usually right at the time of the delivery?

A. Yes.

Q. Then what happens to that bill that the driver has made out?

A. He turns that into the bulk plant from which he operates during the end of the day, with the money or credit that he has collected.

Q. Then what happens to that record and the money?

A. The clerks in the bulk plants then transmit that report with the money and tickets to our main office in Detroit.

Q. Do you keep that record there as a permanent record?

A. Yes.

Q. Is that a record of the Detroit office?

A. Yes, sir.

Q. What do you do with the money?

A. We deposit it in the bank

Q. Where?

A. The Detroit National Bank.

Q. Do you maintain a bank account in Detroit for the business of your office therein to which you put funds and from which you withdraw funds?

A. Yes, sir.

Q. All done in your office here in Detroit?

A. Yes, sir.

167 Q. Now, suppose, Mr. Raupagh, that one of these four dealers involved in this action want some gasoline, what happens?

A. He generally calls up our order clerk in our Detroit office and we make up an order, and then it is transmitted to our River Rouge terminal.

Q. By whom?

A. By our clerk in the office.

Q. What happens?

A. And there the order is filled, either the tank car or the transport truck, that quantity of gasoline is delivered to the jobber or distributor.

Q. All right. Do all of those things physically happen in the State of Michigan?

A. Yes, sir.

Q. After the delivery is made to the bulk storage of the customer, what occurs then in reference to completing the transaction?

A. An invoice is mailed to him.

Q. From where?

A. From Detroit.

Q. Your office in Detroit?

A. Yes, sir.

Q. And mailed to the customer involved in Detroit?

A. Yes, sir.

Q. And then what happens?

A. We hope to collect for it then.

168 Q. And usually do?

A. Yes, sir.

Q. And that collection is paid to you where?

A. In Detroit, at our Detroit office.

Q. And does that terminate the transaction as far as that customer is concerned?

A. Yes, sir.

Q. Then what do you do with the money that you have received in payment of that invoice?

A. Placed in the bank.

Q. Here in Detroit?

A. Here in Detroit.

Q. Do you keep a copy of the invoice as a permanent record of the transaction in your office in Detroit?

A. Yes, sir.

Q. Now, do those sales occur both in respect to the tank car sales and in respect to the sales to retail service stations, without any reference to the Chicago office in the first instance?

A. Yes, sir.

Q. Do you pay these employees to which you have referred here in Detroit?

A. Yes, sir.

Q. Most of them are residents of Detroit and live here, do they not, Mr. Raupagh?

169 A. Yes, sir.

Q. In fact, many of them have never worked for the Standard Oil Company any place but Detroit, is that not true?

A. That is true, sir.

Q. You have referred to maintenance men. Explain just what their duties are, Mr. Raupagh.

A. Their duties are to maintain equipment that the company may own, such as pumps, and so on.

Q. Are their duties confined to work entirely within the State of Michigan?

A. Yes, sir.

Q. Primarily, I suppose, in Detroit?

A. That is right, sir.

Q. You have also referred to construction men. What are their duties?

A. Whenever we rebuild a property that we own—I mean by that a service station—they perform some of that work.

Q. Are their duties confined to work within the Detroit area?

A. Yes, sir.

Q. Entirely within the State of Michigan?

A. Yes, sir.

Q. Now, are all of these employees of the various classes to which you have referred, paid out of your office?

A. Yes, sir.

Q. Are the personnel records in connection with
170 them kept in your office?

A. Yes, sir.

Q. Does the Standard Oil Company pay real estate and personal property taxes on the land and physical equipment and facilities located at River Rouge?

A. Yes, sir.

Mr. Austin: You don't mean personal property taxes on the land, do you?

Mr. Hanley: I meant to say real estate taxes.

By Mr. Hanley:

Q. You pay real estate taxes on the land?

A. Yes, sir.

Q. And you pay personal property taxes on the facilities and equipment, do you not, Mr. Raupagh?

A. Yes, sir.

Q. Now, do you also pay personal property taxes on the gasoline inventory that may be in the tanks there, from time to time?

A. Yes, sir.

Q. Do you pay land taxes on the land that is represented by your bulk plants here in Detroit?

A. Yes, sir.

Q. To the State of Michigan?

A. Yes, sir.

Q. And that is a Michigan tax levied by the State of Michigan?

171 A. Yes, sir.

Q. Do you pay personal property taxes on the equipment and facilities located on those bulk plants?

A. Yes, sir.

Q. Do you, from time to time, pay a personal property tax that may be levied by the State of Michigan on the inventories of gasoline that are in the tanks in these bulk plants?

A. Yes, sir.

Q. Do you buy Michigan licenses for the trucks that are in use for making deliveries of gasoline?

A. Yes, sir.

Q. In respect of the leases which are made with certain dealers covering properties, covering service stations properties owned by the Standard Oil Company, please tell the Court how those leases originate, how they came into being.

A. We negotiate with property owners to make such lease, and then supply them with merchandise the same way as we do on one of the contracts that we have made.

Trial Examiner Ballinger: Who makes that lease?

The Witness: We make the lease here. We negotiate the lease here.

Trial Examiner Ballinger: Is that submitted to the Chicago office?

The Witness: I think the leases are submitted to the Chicago office.

172 By Mr. Hanley:

Q. Who signs them?

A. I think I sign a lease—I sign the lease, and I think there is a signature that is made in Chicago, also.

Q. And does the dealer sign?

A. And the dealer signs.

Q. What becomes of the original lease?

A. It is kept on file in our office.

Q. And the dealer has a copy or a duplicate, original, I presume?

A. Yes, sir.

Q. As to the service stations owned in Detroit by the Standard Oil Company and leased, does the Standard Oil Company pay real estate taxes on the land?

A. Yes, sir.

Q. And buildings?

A. Yes, sir.

Q. And does the company pay personal property taxes on any company owned equipment or facilities that may be pertinent to the station?

A. Yes, sir.

Q. And is that a tax levied by and collected by the State of Michigan?

A. Yes, sir.

Q. There seems to be a good deal of question as to 173 the distinction between tank cars and truck transports; Mr. Raupagh. First, is it true that the four dealers involved here have bulk storage facilities capable of receiving deliveries by tank car?

A. Yes, sir.

Q. And are those facilities now capable of receiving deliveries by truck transport?

A. Yes, sir.

Q. Aside from the physical differences that a tank car runs on a railroad track, and a truck transport runs on a highway, are there any substantial differences between moving gasoline by tank car and by tank truck?

A. No.

Q. Or truck transport?

A. No difference.

Q. I think you stated that the capacities of these truck transports were comparable to tank car capacities?

A. Yes, sir.

Q. Mr. Raupagh, having made a sale of gasoline to one of these retail dealers, does that gasoline become the absolute property of that customer so far as the Standard Oil Company is concerned?

A. It does.

Q. Does the Standard Oil Company have any interest in it of any kind whatsoever?

174 A. No.

Trial Examiner Ballinger: Do you have any lien on it?

The Witness: No.

By Mr. Hanley:

Q. So far as the Standard Oil Company is concerned, is that customer at liberty to do anything he pleases with that gasoline?

A. He is at liberty.

Q. As a matter of fact, most of those customers re-sell the gasoline to automobile consumers, do they not?

A. Yes, sir.

Q. Does the Standard Oil Company have anything to do with fixing the price which such dealer will demand from his customers?

A. No, sir.

Q. Is that a matter entirely within the control and discretion of the retail dealer?

A. It is.

Q. Does the Standard Oil Company have anything to do with the manner in which the dealer will operate his business?

A. No, sir.

Q. Does the Standard Oil Company have any interest in the profits of that business?

A. No, sir.

175 Q. Does the company have any control over the hours which the service station will remain open?

A. None.

Q. Do you have anything to do with the number of employees or attendants that may be employed at the station?

A. We do not.

Q. Do you have anything to do with the wages that they pay any of the employees at the station?

A. None.

Q. Have you anything to do with the subject of what other merchandise the station operator may use or sell at the station?

A. No.

Q. So far as the company is concerned, is such a service station operator a completely independent merchant?

A. Yes, sir.

Q. In respect of the gasoline that is sold the four tank car customers, does that gasoline become the absolute property of those customers after Standard Oil has delivered it to them?

A. It does.

Q. Does the company have anything to do with the price at which that gasoline may be resold by any of these four dealers?

A. No, sir.

Q. Indeed, does the Company have anything to say 176 about whether they shall resell it at all or not?

A. Nothing.

Q. Do they operate their businesses entirely independently of the Standard Oil Company?

A. Yes, sir.

Q. Does the Standard Oil Company have any interest in their profits or in their business from any standpoint?

A. No, sir.

Q. I mean, financial interest of any kind?

A. No, sir.

Q. Do they bear the entire expense of their own operations in their business?

A. They do.

Q. Do they have any assistance or help paid for by the Standard Oil Company?

A. They have none.

Q. Does the Standard Oil Company have any power or right to in any wise control any branch of the business of any of these customers?

A. They have not.

Mr. Austin: I object to that question.

Trial Examiner Ballinger: Does counsel insist on the question?

Mr. Hanley: No, I don't.

Trial Examiner Ballinger: Objection sustained.

177 By Mr. Hanley:

Q. Do you or does the company, in fact, exercise any control whatsoever over either the business of these four dealers or any of the service station operators or over the disposition of the gasoline sold to them, or any of them?

Mr. Austin: I object to that question, Your Honor. I think it is entirely too general and calls for a conclusion;

that might be argued that the company exercises control in lots of ways. I think it should be directed more specifically to the particular thing that you may have in mind. I might get up here and argue for quite a while about how much control the company has.

Mr. Hanley: I think, Your Honor, I will insist on that question. This man is not only an expert in the oil business, but he is the manager of the Respondent in this vicinity, and he knows whether there is any control or not. It seems to me he is entitled to testify specifically on that subject, and if it is insisted here—I didn't know that it was—if it is insisted here that this company does exercise any control, it is a matter of proof for the Commission, and the burden is upon the Commission to establish it.

Trial Examiner Ballinger: Haven't you pretty well covered the field in detail?

Mr. Hanley: I intended to cover it in detail, but I don't want to leave anything out, Your Honor, because we 178 don't exercise any control.

Trial Examiner Ballinger: The Examiner rules that it be a conclusion, sustains the objection.

By Mr. Hanley:

Q. Does the Standard Oil Company in its operations in Detroit, make any effort, Mr. Raupagh, of any kind to police the disposition of gasoline to any class of customers to which the company may sell in Detroit?

A. No, sir.

Q. I might ask you, Mr. Raupagh, if all of these classes of customers, both the four tank car dealers and all of the service station operators, whether they be lessee dealers, or other dealers, if they pay all of their own taxes on any property which is not company property?

A. Yes, they do.

Q. They secure their own permits to do business?

A. Yes.

Q. Licenses, if there are any?

Trial Examiner Ballinger: Does your knowledge go any further than that the Standard Oil Company does not pay the taxes?

A. Yes, it does, Your Honor.

Trial Examiner Ballinger: You know of your own personal knowledge that they pay the taxes?

A. Yes.

179 By Mr. Hanley:

Q. And does the Standard Oil Company pay any social security or workmen's compensation or any taxes of that character, if there are any levied in this State, on the employees of any of these dealers?

A. No, sir.

Mr. Austin: Your Honor, I do not object to a reasonable amount of this line, but, after all, we have not contended that the Standard Oil Company fixes the resale prices of its customers, nor have we alleged that or attempted to prove that it controls the prices at which they resell or the manner in which they run their stations. I think we are just getting a little far afield from the direct examination and from the issues.

Mr. Hanley: Now, on that statement of counsel, I will desist from any further pursuit of this subject. I don't know just what he is going to contend, Your Honor.

By Mr. Hanley:

Q. Mr. Raupagh, you were shown yesterday as Exhibit 5-A to J, being a file of freight bills originating in the year 1939, covering five cars of gasoline shipped apparently from Whiting to some or all of the four tank car dealers of Detroit.

A. Yes, sir.

Q. You have examined that Exhibit?

A. Yes, sir.

180 Q. Does that disclose shipment of five cars of gasoline in the year 1939; in the spring of 1939?

A. I am just trying to find the date (referring to document). Yes, sir.

Q. Can you explain, Mr. Raupagh, how it occurred that that shipment, or those shipments were made?

A. Yes. That was an emergency proposition. We were out of stock of this particular grade of gasoline at River Rouge, so they were shipped direct from the refinery.

Q. Does it sometimes occur, Mr. Raupagh, in the closed navigation period of the year, you will sometimes run short at River Rouge of some product?

A. Yes, sir.

Q. When that does occur, have you in the past, from time to time, supplied an order, or filled an order by asking the refinery at Whiting to make a shipment by tank car?

A. What happens.

Q. I think you have testified that the last time that that occurred, to your knowledge, was in April of 1940.

A. Yes, sir.

Q. And did that involve one tank car of material?

A. Yes, sir.

Q. Was there any other such occurrence in 1940, to your knowledge?

181 A. None that I know of.

Q. Has there been any this year?

A. None that I know of.

Q. Mr. Raupagh, was there any such transaction pending at the time that this Complaint was filed against the Standard Oil Company? For your information, the Complaint was filed December—

Trial Examiner Ballinger: The Complaint was issued November 29, 1940.

Mr. Austin: It was served on the 30th of November, I think.

Mr. Hanley: Will you read the question, Mr. Reporter?

(The question was read.)

A. On or about November 30, 1940? No.

Mr. Austin: Pardon me. What sort of a transaction were you referring to; one of these shipments?

Mr. Hanley: One of these shipments out of Whiting.

By Mr. Hanley:

Q. Has there been any such transaction since this case has been pending?

A. No.

Q. Are there any such transactions pending now?

A. No.

182 Q. Is that class of transaction, so far as supplying these four jobbers, an extraordinary, unusual method of sending them gasoline?

A. It is.

Q. Is the practice which you have described of supplying their orders out of the River Rouge Terminal the ordinary, usual, and customary method of supplying gasoline to them?

A. It is.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: You may take the witness.

Mr. Austin: I have one slight matter here that I want to ask about, which is not strictly redirect. I presume you won't object, Mr. Hanley?

Mr. Hanley: Go right ahead, Mr. Austin.

Redirect Examination.

By Mr. Austin:

Q. Mr. Raupagh, the Standard Oil Company issues what is known as credit cards, does it not?

A. Yes, sir.

Q. Will you describe those cards, and to whom they are issued?

A. I can show you one.

Q. If you will, please?

183 (The witness handed document to counsel for the Commission.)

By Mr. Austin:

Q. I notice from this card which you have handed to me, Mr. Raupagh, that this permits the customer whose name is typed on the card to purchase gasoline on credit at a Standard Oil Station.

A. That's right, sir.

Q. How many of these cards are in circulation, or how many of them have been issued in Detroit?

Mr. Hanley: That is objected to as incompetent, irrelevant, and immaterial, in view of counsel's statement a few moments ago that he wasn't pressing the issue of control or anything of that sort.

Mr. Austin: I am not.

Mr. Hanley: Then, may I inquire what the purpose of this examination is?

Mr. Austin: I want to find out the use of these cards, as a matter of records of the—as to the transactions that are carried out between the service stations and the company. That is a great deal material, along that line, in connection with price discrimination and prices charged, which doesn't have anything to do with price fixing. There is no claim of price fixing in this case.

Mr. Hanley: I still don't understand. Does your 184 Honor understand the purpose?

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record. Proceed. What is the last question?

(The question was read.)

Trial Examiner Ballinger: Do I understand that is merely a preliminary question?

Mr. Austin: That's right.

Trial Examiner Ballinger: Objection overruled.

Mr. Hanley: Exception.

By Mr. Austin:

Q. You may answer.

A. I haven't the exact number in my mind.

Q. Well, approximately is all I want.

A. Oh, eight or ten thousand.

Mr. Austin: In view of the material appearing on this card showing the territory over which it is used, I would like to offer this card in evidence with the understanding that a duplicate will be supplied by counsel for the Respondent so that I can return this one to Mr. Raupagh.

Mr. Hanley: No objection to the copy, but the offer is objected to on the ground it is irrelevant, incompetent and immaterial; on the ground there is no issue in 185 this case on that; it is entirely outside the pleadings. It is contrary to the statement of counsel on the record that he wasn't seeking to establish anything relative to the control of Standard Oil dealer stations by the Standard Oil Company; that this card has no probative value on any issue in this case or on anything alleged in the Commission's Complaint; that it is not issued to dealers in gasoline, but is issued to consumers of gasoline who are not controlled by or within the purview of the Robinson-Patman Act, Clayton Act, or any of the anti-trust acts or any of the laws under which the Commission's Complaint is leveled against the Respondent in this lawsuit.

Mr. Austin: I would like to say two things.

In the first place, counsel referred to my stipulation as to control, and I want to make it clear I stipulated we were not trying to prove price control nor control such as control over salaries and other control over employees of those stations, but I want to make it clear that what I said a while ago doesn't mean that in so far as control may be important in connection with price discrimination and the effects of price discrimination that I have certainly not intended to say that the element of control may not

A. No, prior to '40:

Q. When was that station opened at Gratiot and Madeline?

A. They were both opened within a year of each other, I think about in '38. One was in '38 and—

Q. Which one was in '38?

A. Well, Gratiot was either '37 or '38, and Woodward was either '38 or '39, but between '37 and '39 we opened both of them.

Q. And the station at John R is the oldest?

A. Yes, sir.

Q. And you opened them at Michigan Avenue, East Jefferson, and Grand River?

A. Grand River.

Q. Did you ever have a station at 15801 West Warren?

A. No.

Q. I don't know where I got that from, but some place. I knew that it wasn't right, but I thought possibly you might have had a station there and discontinued it.
215 You have six stores now; is that right?

A. Yes.

Q. Plus this store—is it? Or is it a service station that you do not operate under your name?

A. It is a service station. It is just a gasoline station. It is right across the street from our Grand River—

Q. Across the street from your Grand River store?

A. Yes, it is.

Trial Examiner Ballinger: I understand they do operate it, but not under their name.

The Witness: That is correct.

Mr. Austin: Yes.

By Mr. Austin:

Q. What name is that operated under?

A. Charlie's Service Station. That is the man who operates it. That is under his name—the man who runs it.

Q. Is that station selling Standard gas, too?

A. Yes, it does.

Q. Well, that is in competition with your Grand River Store, isn't it?

A. The same as all other stations in that neighborhood, yes. There was a Standard station there prior to the time that we acquired the lease.

be important; but not as to price fixing. There is no
claim of control fixing of retail price. That has noth-
186 ing to do, what I just said, with the question of this
card. I simply wanted to make clear what I said awhile
ago.

Mr. Hanley: If Mr. Austin can tell me what he is trying to prove with this thing, maybe I can withdraw the objection.

Trial Examiner Ballinger: I would like to know the exact purpose.

Mr. Austin: I haven't gotten to the questions I intended to ask, which are very simple.

Trial Examiner Ballinger: Before you get the card into evidence shouldn't you lay a predicate to justify its admission?

Mr. Austin: On the question of admissibility, I should pass this up to your Honor, and if you will look at the material on the inside showing the territory in which it is used, that is the reason I would like to introduce it, which may have some bearing on Interstate Commerce. I don't know.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

The objection is overruled. The document will be admitted in evidence as Commission's Exhibit 21, the present document to be withdrawn and a copy substituted.

187 (The document referred to was marked, for identification, "COMMISSION'S EXHIBIT 21," and was received in evidence.)

Mr. Austin: May I go off the record just a minute?

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Mr. Raupagh, when an automobile owner who has one of these credit cards goes to a Standard Oil Station, how does he use the card? He buys some gas?

A. He buys some gasoline and shows the card and a credit slip ~~is then~~ made up, or a charge ticket, which he signs.

Q. The customer signs it?

A. Yes, sir.

Q. Is the price of gasoline at that store the same as
216 at your Grand River store? Has it varied?

A. You mean the retail price at which he is selling?

Q: Yes.

A: There is no attempt on the part of our company to regulate the retail price. I can't answer that. I would say it varies.

Q. But it is your own station—

A. I would say it varies from time to time.

Q. You said you operate it, so you would naturally regulate it, wouldn't you?

A. No, we don't control the functions of the man who operates it. He operates on a commission basis, and he uses his own judgment on the resale price.

Q. Well, he is an employee of yours, isn't he?

A. On a percentage basis. He receives both a salary and gets a commission on his sales. He is sort of a—I would say holds a quasi employee position. He is permitted to use his own judgment in the running of that station.

Q. What is the volume of gasoline at that station? If it is small, I want to forget it.

A. I would say it runs anywhere from—it represents my best judgment—anywhere from seven to 15,000 a month, depending on the season of the year, competitive conditions, and all the other factors.

Q. What is the average volume at your Grand River store across the street?

217 A. Of course, there is no comparison in size of the physical buildings. We have a real establishment there, and about four times as many pumps, and I would say that our gallonage there is about four times what that station is running, anywhere from, oh, twenty-five to perhaps 45,000 a month, depending on all the other factors I named.

Q. Does the Standard Oil Company own any stock in Ned's Auto Supply Company?

A. No, sir.

Q. Or the Merchant's Supply Company?

A. Nor anyone else. It is all in the family.

Q. When these various stores, or, at least—well, I will make it apply to all of them, but I assume it wouldn't apply, at least, to the first two, perhaps not to the others—when those stores, the facilities were constructed, those

Q. And does he keep a copy of it?

A. He can have a copy, if he wishes it.

Q. Now, what does the service station operator do with that slip?

A. He turns it to the driver that delivers the gasoline and he is given credit for that as he pays for the gasoline.

Q. That is accepted in lieu of cash?

A. Yes, sir.

188 Q. And in the case of service stations who purchase their gasoline from, say, Ned's Auto Supply Company, or Citrin-Kolb; what do those service station operators do with those credit slips?

A. They carry on practically the same operation with the exception that they turn the charge tickets or credit slips in to the main office of their supplier.

Q. Those credit slips which are turned in to your drivers, I suppose they bring them back to your office?

A. Yes, sir.

Q. And then do you undertake to collect from the customer?

A. Yes.

Q. How often do you bill them?

A. We bill them monthly.

Q. And the slips which are turned in to the tank car or transport truck buyers, such as Ned's and Citrin-Kolb, do they not, in turn, send those slips in to you and take credit for them?

A. Yes, sir.

Q. You give them credit for the amount of those slips?

A. Either credit or cash.

Q. You give that credit without waiting to see whether you can collect it?

A. Yes, sir.

189 Q. In other words, you assume full responsibility for collection?

A. Yes, sir.

Q. Then, do you keep customers' records of all of these charge accounts at your main office?

A. Yes, sir; we keep an account with each customer.

Q. And would those accounts show how much the gasoline the customers had bought each month?

A. That would show the charge; whatever charge was on the ticket.

Q. So that would show the price per gallon, at least, over a period of a month which the customer had paid. Well, of course, it would show it for each purchase, I assume—at the time—but how ~~long~~ do you keep those credit slips?

A. We keep them a period of 90 days.

Q. And after that you still retain the records showing the customer's account charges made?

A. Yes, we have a ledger record.

Q. Would that show the number of gallons purchased by the customer as well as the price charged?

~~A.~~ I don't believe it would; it would simply show the charge, the amount of the charge.

Q. Are you sure about that?

A. Quite sure.

Q. Because when you bill the customer at the end
190 of the month, doesn't your bill show not only the charge, but what it is for, and, certainly, wouldn't it show whether it is for gasoline or accessories, or for something else?

A. No. It shows the amount.

Q. The bill that you send the customer?

A. Yes, sir. I don't mean the bill we send to the customer; I mean the statement we sent to the customer at the end of the month.

Q. Don't you send him an itemized statement, so much for gasoline and so much for oil and so much for something else?

A. We don't itemize it.

Q. Just the amount?

A. Just the amount.

Q. Well, then, sometimes doesn't the customer call you up or write in and want to know what that is for?

A. Yes______________.

Q. Well, I don't want to go into that any further, but I just wanted to show that those records are sent in and you maintain the individual slips for 90 days.

A. Yes, sir.

Q. And the charge records you keep for how long?

A. Well, that is a period of years.

Q. Mr. Raupagh, as to the tankers which bring the gasoline to River Rouge from Whiting, how frequently are those deliveries made by tanker during the summer?

191 A. Oh, they come in there every week, sometimes twice a week. It all depends.

Q. What does it depend on?

A. Well, it ~~depends on how much~~ stock we have at the terminal and how much they want to transport.

Q. How much who wants to transport?

A. Well, how much we want to transport up there.

Q. Does that determination result partially by the refinery at Whiting, or do you determine it entirely at this end?

A. Oh, that is partially determined by the refinery at Whiting.

Q. How much of that million and a half barrel storage space at River Rouge is used during different periods of the year?

A. Well, it is practically all in use.

Q. Are those tanks kept full most of the time?

A. Oh, they are not kept full, but it is all in use.

Q. Well, that is what I meant as to the capacity. Has the full capacity of the tanks there ever been filled at one time?

A. Yes, I would say they have.

Q. When would that be? In the fall?

A. That would be in the fall.

Q. Is practically the entire million and a half
192 barrel storage required to store enough gasoline for winter consumption?

A. No.

Q. How much is necessary?

A. Oh, I think we use about a million barrels.

Q. During what period?

A. During the winter months.

Q. How late do the tankers ply on the lakes?

A. Well, I can't tell you definitely just when the navigation season closes, but there is a definite date that they generally close. It depends on the weather.

Q. Is it October, November, December?

A. Yes, it is about November, December.

Q. November, December.

How do you determine how much gasoline you need to put in your storage prior to the close of navigation?

A. Well, we know about what our sales ran the previous year.

Q. Is that estimate based partly upon the requirements that are purchased by your contract dealers and lessees?

A. It is based upon the entire consumption of gasoline that we expect to have.

221 Q. What change was made about March 7, 1938?

A. Well, we acquired the bulk plant and rolling equipment, prepared to buy gasoline on a tank car basis from either the Standard Oil Company or someone else. Our volume and competitive conditions at that time reached the point where we felt that that was the basis under which we had to buy in order to be competitive, and we started to purchase from Standard Oil on a tank car basis and—

Q. Did you apply to Standard Oil to be permitted to—

A. Oh, yes, indeed.

Q. —to purchase on that basis?

A. And even before that—that had gone on over a period of two or three years.

Q. You mean you had been asking to be put on a tank car basis for two or three years?

A. Well, we had received competitive offers to buy on a tank car basis, and we would have—.

Q. I am just talking now about what you negotiated with Standard.

A. I couldn't answer your question directly, because we advised Standard Oil Company of these competitive offers, too, as a means of getting them to sell us on that basis.

Q. Why did you want to change over from tank wagon to tank car?

A. Why, one of the factors, of course, was the bet-
222 ter price. We felt that our then volume would make it possible for us to operate a bulk plant, pay the cost of operating a bulk plant and still have some profit left which would, of course, be one of the commodities that the wholesale distributor, merchants—would just result in additional profit to the operation.

Q. Did you feel that it would put you in better competitive position in the gasoline market, in the retail gasoline market?

A. Why, you mean Neil's?

Q. Yes.

A. I can't say that that was a determining factor. I don't think that entered into the matter of it, being in a better retail position. It was largely to make more profit. The same is true at any time you can better the buying price on any commodity, you primarily think of making additional profit from it. That is true in any commodity we buy, be it gasoline or tires.

Q. And that purchase by tank car has continued up to

Q. Do you keep records in your office so that you know approximately how much gas every one of your stations uses from month to month or from week to week?

193 A. We have a record in our office showing what each one of these stations—what their gallonage is.

Q. You use that, do you not, as a basis for anticipating future requirements?

A. We use the composite of those figures.

Q. Did I understand you to say that the leases are approved at the Chicago office before they are closed or delivered to the lessee?

A. I believe they are. I would have to look at one of them to be absolutely sure, Mr. Austin.

Q. Would it help you to look at this lease (indicating)?

A. Yes.

Trial Examiner Ballinger: Handing the witness—

Mr. Austin: Handing Commission's Exhibit 1 to the witness.

Mr. Hanley: I just want to make a record motion, if your Honor please. At this time the Respondent moves to withdraw all of the questions asked by Respondent's counsel of this witness as to how service station leases were completed in Detroit and to strike all of the answers of this witness to such questions; and in addition thereto, we object to the question now asked by Commission's counsel in respect of the lease, for the reason that the lease has to do with the relation of landlord and tenant as between the Standard Oil Company and the
194 respective lessees, and irrespective of where or how
such contract of lease might be made, it is not commerce in gasoline in any respect, and the only commerce that would give the Commission jurisdiction in this case would be an interstate commerce in gasoline.

Mr. Austin: I realize Judge Hanley's point, your Honor, but I think it simply goes to the weight of the evidence in this case. I think it is clearly material and competent.

Trial Examiner Ballinger: You object to counsel's request to withdraw certain testimony, to strike it from the record?

Mr. Austin: Yes. I do not accept that.

Trial Examiner Ballinger: Object to that?

Mr. Austin: Yes.

Trial Examiner Ballinger: The objection of counsel the present time, or there hasn't been a recent change to train delivery or transport truck?

A. We make no distinction between tank train—

~~Q. I just wanted to ask you whether you were—~~

A. We are still buying on a tank car basis.

223 Q. But deliveries are now made by transport truck?

A. Yes.

Q. That was covered by Mr. Raupagh?

A. Yes.

Q. It isn't necessary—

A. The only point I want to make is that it is still delivered to our bulk plant and into our bulk storage. There is no change in buying as far as we are concerned. They pump it in.

Q. In other words, you get the gas from them and you pay the price for it, and you don't care whether it comes in tank cars or by truck?

A. That is right. We have to have the same facilities there, the bulk storage tanks, and our pumping equipment.

Q. Except that you had to unload the tank cars and you don't have to unload the transport trucks; isn't that right?

A. Well, it is my impression that we use our pumps to unload the tank train. I think in our case that works out. I don't know whether the tank trains have pumps to pump it up into our high tanks. You see, our storage tanks are vertical rather than underground, and you have—and they fill from the top, so I believe we use our own pumps to unload from the tank train into our bulk storage tanks. I know of no saving that has resulted to us from receiv-
224 ing it in tank trains, as compared to tank car.

Q. Did you ask for that change, or did Standard Oil initiate that?

A. It was initiated by Standard Oil Company.

Q. Who owns the bulk plant? Merchant's Supply?

A. I believe Ned's own it now.

Q. Do they own it or do they lease it?

A. We lease it.

Q. Whom do you lease it from?

A. Lease it from the Michigan Terminal. They own the tanks. The tanks were there.

Q. Wasn't there a Gershenson Realty Company at one time that leased that property?

A. There still is.

Q. That leased that property?

is overruled and the request to withdraw or strike from the record certain testimony.

Mr. Austin: We have a question pending.

Trial Examiner Ballinger: One moment.

Judge Hanley, if you desire to insist on that request, you had better particularize as to the testimony to be withdrawn or stricken.

Mr. Hanley: Well, if your Honor please, if I think it is of sufficient importance, I will do that after I have 195 the transcript, if I may.

Trial Examiner Ballinger: At a later date.

Mr. Hanley: At a later date, or at the close of the Commission's case. I make this more for the purpose of not getting myself into any trap. I don't want to have it understood that I admit that the making of a lease is commerce in gasoline.

The Witness: What is the question?

(The question was read as follows: "Did I understand you to say that the leases are approved at the Chicago office before they are closed or delivered to the lessee?")

A. I find I am in error. These leases are signed and approved here.

By Mr. Austin:

Q. This lease is signed and approved here?

A. Yes.

Q. Are any of them—is the practice any different with any of the others?

A. No, sir.

Trial Examiner Ballinger: Is the authority obtained from the Chicago office to execute that lease?

The Witness: Yes.

Trial Examiner Ballinger: In each instance?

The Witness: No, as a general proposition.

196 Trial Examiner Ballinger: General authority given?

The Witness: Yes.

By Mr. Austin:

Q. Do you notify the Chicago office of each one of these leases?

A. No.

~~Q. And terms?~~

A. No.

Q. What correspondence do you have with the Chicago office or what approvals do you get from them?

A. I think they have a record of each lease.

Q. What approvals do you have to get in connection with these leases?

A. We talk to them about it once a year, maybe.

Q. But not before you execute the lease?

A. No. What our general policy is.

Trial Examiner Ballinger: You have general authority to execute leases and transact such business?

The Witness: Yes, sir.

Trial Examiner Ballinger: Is that in writing or verbal?

The Witness: That is verbal.

By Mr. Austin:

Q. I believe you said yesterday you had only about
197 136 dealers, retail dealers who are under contract?

A. Yes, sir.

Q. Didn't you have about 225 of those in 1938?

A. I can't say that definitely, what we had in 1938.

Q. In any event, isn't it true that these contracts and leases, such as Commission's Exhibits 1 and 2, have been continuously in effect with all Standard Oil Company retail service station operators since 1936?

A. Yes.

Q. And ever since the Standard Oil Company ceased operating its own stations, it has done business with all of its retail purchasers under either one of these contracts or one of these leases?

A. Yes, sir.

Q. Would you describe a transport truck?

A. A transport truck is a vehicle of capacity of an ordinary tank car that transports, in our case, petroleum products over the highways.

Q. Well, is it one big tank or is it a series of tanks? Does it have a trailer and—

A. Sometimes it is one big tank; sometimes it is a series of tanks.

Q. The term tank train—truck train, rather, is used frequently, and that always made me visualize a sort of
a series of separate units going along trailing one
198 after the other. Now, I wondered whether a transport
truck might be a single tank or several tanks.

A. It is both.

Q. In either case, isn't it true that a transport truck might make several stops on a trip and that it is possible for it to unload a part of its gasoline at one place and part at another place?

A. It is possible, yes, sir.

Q. It isn't necessary that it all go to one stop and be unloaded together?

A. It is, so far as our service is concerned.

Q. Well, is it necessary, ~~or is that~~ simply the way that you do it?

A. That is the way we do it.

Mr. Austin: That is all.

Trial Examiner Ballinger: Any further questions?

Mr. Hanley: I have just a few, your Honor.

Recross Examination by Mr. Hanley.

Q. I wish you would straighten us out on this lease situation, Mr. Raupagh. Is it now your testimony that these leases are negotiated and signed and completed here in Detroit without reference to Chicago?

A. Yes, sir.

Q. In respect of the credit card, Exhibit 21, to
199 whom are those credit cards issued?

A. They are issued to the consumer.

Q. What do you mean by consumer?

A. I mean automobile owner.

Q. Where are they used?

A. They are used for the purpose of purchasing at Standard Service Stations—I mean, service stations handling Standard products.

Q. Is the service station operator required to honor those cards if he chooses not to do so?

A. No, he is not.

Q. If he does honor the card, does he then make out the credit slip for the amount that he is charging for gasoline on that particular day?

A. Yes.

Q. If I understand you, he then uses that credit slip as cash either with the Standard Oil Company or his jobber supplier?

A. Yes, sir.

Q. And the Standard Oil Company assumes the responsibility of making the collection?

A. Yes, sir.

Q. In the case of the jobber transaction, where some Standard Oil products dealer may honor a card and then send the slip to his jobber supplier for credit, the
200 jobber gives him the full amount of credit that appears on that slip, does he not? That is, gives the dealer the full amount of credit that appears on the slip?

A. Yes, sir.

Q. And then, in turn, the jobber is reimbursed in like amount by the Standard Oil Company?

A. Yes, sir.

Q. So the jobber in that instance neither loses nor gains anything; is that right?

A. That is right..

Q. Now, those slips, as they come in to the Standard Oil Company office or the jobber's office, as the case may be, would indicate only the price of gasoline on the day that the slip is dated or originates; is that not true?

A. That is true.

Q. There are many stations where the use of credit cards would be very limited, are there not, Mr. Raupagh?

A. There are.

Q. It might be that a station would go for many days or weeks without having occasion to honor a credit card; is that true?

A. That is true.

Q. You do not keep the detailed records, that is, the slips beyond the period of 90 days?

201 A. We do not.

Mr. Hanley: You may take the witness.

Redirect Examination by Mr. Austin..

Q. Well, just along the line of what was asked here: Are there service stations who refuse to honor one of those cards?

A. Yes, sir. Yes, sir.

Q. What can a service station lose by not honoring—by honoring it if he uses it for cash?

A. Well, there are just some individuals that don't want to be bothered with that, even.

Q. Well, that card states on it that it may be used at any Standard Oil of Indiana service station.

A. That is; providing the service station will accept them.

A. The fall; yes.

Q. Why is it that your figures don't appear in the report of the Secretary of State?

A. That had something to do with that criminal case, too. At first, when we started on tank car, we were told we didn't have to have that wholesaler's license, which automatically reveals your figures, because we weren't soli-
231 citing other dealers' business, but, subsequent to that criminal suit which was thrown out, why, we were approached by a member of the tax office who stated that we would have to have a wholesaler's license, so we took one out at that time.

Q. Have you got your volume for 1936?

A. I have a paper here—and incidentally, that is a copy of one that our office gave your investigator on November 28th 1939.

Q. We have that. Starting—that starts January, 1937, though; the one I think you are referring to.

A. That is the earliest I have, and that runs through August of 1939.

Q. Do you know approximately what your volume was in 1936?

A. I can't answer that without referring to the record.

Q. Do you know whether it was 2,000,000 or 3,000,000? Perhaps that would be a little to broad, anyway.

A. I would only be guessing, anyway.

Q. Could you call up some time—

A. During the noon hour.

Q. —this noon and just get the total volume? I don't care about the monthly. If you will just give me the total volume for 1936 and that will give us a basis to start out with.

A. Total volume. You mean, including Ford Benzol?

232 Q. No, Standard.

A. I believe these figures we gave you included Ford Benzol.

Q. Yes. I will take that back, Mr. Gershenson. I think we should have the whole figure, because that is what is reported in the Secretary of State's reports, and that is what is on these statements I have, so it wouldn't be any use for comparison, otherwise.

A. The reason I ask, I don't think we have it broken up. These figures are the total gallons.

Q. Did I ask you what percentage of the gasoline sold

Q. Does the card say "provided the service station will accept them"?

A. I don't know.

Mr. Hanley: Yes, it does.

A. (Cont'd) But I know definitely that the dealers are not required—

Mr. Austin: It speaks for itself.

Mr. Hanley: It speaks for itself, and you put it in the record.

202 Mr. Austin: I didn't realize I said that. I don't think it is very important.

By Mr. Austin:

Q. But, in any event, I am only interested in those cards to the extent that they show the price paid, and that is what I wanted to make clear, that the customer using one of those credit cards pays the same price that he would pay if he paid cash; isn't that true?

A. Yes.

203 Q. At the particular time?

A. Yes.

Q. In other words, he is charged the same amount that he would pay if he paid cash for gas?

A. If that's what the driver elects.

Q. At that station?

A. Yes, if that's what the driver elects.

Mr. Austin: That's all.

Trial Examiner Ballinger: The Examiner would like to ask the witness a question or two.

Examination by the Trial Examiner.

Q. You are in charge of a sales district in Michigan, or in a certain section of the country, established by the Standard Oil, are you not?

A. Yes.

Q. The Standard Oil has like sales districts throughout the United States, has it not?

A. Yes, sir.

Q. Everything you do, you do as and for the Standard Oil Company, do you not?

A. Yes, sir.

Trial Examiner Ballinger: That's all.

(Witness excused.)

to stations is Ford Benzol, compared with all of the Standard gas?

A. You didn't ask that, and I can't answer that right now. I would have to check that.

Q. Would it be quite small?

A. It would vary in some stations. The Ford Motor would be higher, and certain seasons of the year, there would be a difference.

Q. Generally it would be less of the Ford Benzol and the Solite Ethyl, or what?

A. I would say Ford Benzol would be slightly more.

Q. Than the Ethyl?

A. Yes.

Q. Because we have the figures from Mr. Raupagh
233 as to the percentage of Ethyl, which is not very big.

A. About 10%. That would be a guess.

Q. If you could get more accurate information on that, without taking up time, I would like to know approximately, because I want to know what proportion of this gasoline is Ford Benzol in a rough way, in these figures; and the 1936 volume, and I think that will be all I can think of at the moment.

I would like to show you, Mr. Gershenson, the record here which purports to be—and I believe is a copy of the testimony given by your brother Samuel in that suit in 1936—yours is here, too—and I want to see if it refreshes your recollection upon the way that the transactions were handled by Ned's and Merchant's and Standard right after the bulk plant was purchased (handing documents to witness).

Mr. Hanley: What pages, please, Mr. Austin?

Mr. Austin: 18 and 19.

(The witness referred to documents.)

Mr. Austin: The witness says it does not refresh his memory, so I will abandon any further questions along that line, and, if your Honor please, I will be glad to adjourn at this time.

Trial Examiner Ballinger: The suggestion of counsel for the Commission meets with the approval of the
234 Examiner, without objection on the part of counsel for the Respondent.

Now, at 12:45 P. M., the hearing stands adjourned to be reconvened at 2 P. M..

(Thereupon at 12:45 P. M., an adjournment was taken to reconvene at 2 P. M.)

Trial Examiner Ballinger: We will have a five 204 minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: We will come to order.

Mr. Austin: Mr. Charles Gershenson.

CHARLES H. GERSHENSON, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Trial Examiner Ballinger: Let me have your full name, please.

The Witness: Charles H. Gershenson.

Direct Examination by Mr. Austin.

Q. What is your business, Mr. Gershenson?

A. I am connected with Ned's Auto Supply Company.

Q. Is Ned's Auto Supply Company a corporation?

A. Yes, it is.

Q. And what is your position with that corporation?

A. I am president.

Q. When was Ned's Auto Supply Company incorporated?

A. 1938. Prior to that it was a co-partnership. Do you want the exact date of the incorporation?

Q. Well, if you have it convenient.

A. I think I have it. (Witness refers to documents.) September 1, 1938.

Q. Who are the other officers of the corporation?

205 A. My brother William is vice-president; Aaron, treasurer; Samuel, secretary; and my sister Rose: She holds no office but is a stockholder. I am not sure of the secretary and treasurer. That might be reversed.

Q. And who are the directors?

A. We five.

Q. When Ned's Auto Supply operated as a partnership, who were the partners?

A. The same ones.

Q. The four brothers and one sister?

A. Yes.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

235 **Afternoon Session.**

2 P. M.

Trial Examiner Ballinger: Come to order.

Mr. Hanley: At this time, your Honor, we are able to supply counsel with the copies of the Goldberg leases which we agreed to have made, and also a copy of the credit card.

Mr. Austin: I believe it is only necessary for me to turn these over to the reporter and have them marked. They have already been introduced.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

CHARLES H. GERSHENSON thereupon resumed the stand, and, having been heretofore duly sworn, testified further as follows:

Direct Examination (Resumed) by Mr. Austin.

Q. Mr. Gershenson, you received a subpoena from the Federal Trade Commission requesting you to produce certain information regarding retail prices?

A. Yes, sir.

Q. Posted at the Ned's Auto Supply Company service stations?

A. Yes, sir.

236 Q. And also all discounts, premiums, rebates, and so forth, from those prices?

A. Yes, sir.

Q. Have you got that information with you?

A. I interpret that subpoena as having the information to make statements. I can testify as to that. We don't have a record—we don't have an office record as to what our continual posted price is from any single document.

Q. Can you state for the record the retail prices posted on tanks at the gasoline stations or stores of Ned's Auto Supply Company from—I would like to have it from 1937 to date, although the subpoena only says from January 1, 1938.

A. I have them from January, 1938, to date, through July, 1940.

By Mr. Austin.

Q. What is your sister's name?

A. Juliar, J-u-l-i-a-r; Rose Juliar.

Q. Where is the main office of the company located?

A. At 9465 Grand River Avenue, in Detroit.

Q. And where was the partnership office located?

A. Well, at the time we formed the corporation, at the same place.

Q. And prior to that?

A. Oh, in several places.

Q. Wasn't there an address on Greenway?

206 A. That is in the same building; that is another location.

Q. Greenway and Grand River was it?

A. Yes. Greenway runs into Grand River and there is an entrance on Greenway and one on Grand River.

Q. Are you an officer in any other corporation?

A. Yes. We have another company, the Merchants Supply Company. I am vice-president of that.

Q. When was that incorporated?

A. That was incorporated at the same time; September 1, 1938.

Q. And who are the other officers of that company?

A. My brother William is president, and my other two brothers are also officers.

Q. And are the directors of Merchants Supply Company the same as the directors of Ned's Auto Supply Company?

A. Yes, they are.

Q. And where is the office of Merchants Supply Company?

A. That is located at 4800 Greenway.

Q. Is that the same building?

A. It is in the same physical building, but have separate offices; utilize separate space.

Q. Prior to incorporation, was Merchants Auto Supply Company a partnership?

A. No, it was operated—registered as operating under an assumed name.

207 Q. Who was the operator?

A. My brother Samuel.

Q. Samuel Gershenson, doing business as Merchants Supply Company?

A. That's right. When it was incorporated, the name was changed from Merchants Supply Company to Merchants Auto Supply Company.

Q. It is now Merchants Auto Supply Company?

A. It is now Merchants Auto Supply Company, and when it was operating under an assumed name, it was Merchants Supply Company.

Q. In what business is Ned's Auto Supply Company engaged?

A. General retail merchandising business. We sell a variety of products; gasoline, tires, electrical household appliances; sporting goods; general merchandiser of that nature.

Q. Do you operate retail gasoline stations; does Ned's Auto Supply Company operate retail gasoline stations?

A. The retail gasoline islands. A part of our larger operation. We do not operate any independent gasoline stations aside from our large building.

Q. But you do sell gasoline at each of your stores?

A. Yes, we do.

Q. What business is Merchants Auto Supply Company engaged in?

A. Merchants Auto Supply Company is a distributor and wholesaler of practically the same products that
208 I have named, including motor oils and greases.

Q. Including gasoline?

A. No, we don't sell it. We did at one time.

Q. Then, as I understand, Merchants Auto Supply Company does not buy or sell any gasoline?

A. We did. We don't now.

Trial Examiner Ballinger: When did you cease?

The Witness: Oh, we sold it for just a few months around in March of 1938 until about June, and then we discontinued buying and selling gasoline.

By Mr. Austin:

Q. Prior to March, 1938, did the business, as operated by Samuel Gershenson, deal in gasoline?

A. No.

Q. And during the short period which you mentioned in 1938, the gasoline purchased by the Merchants Supply Company—which it was then—from what company was that purchased?

A. The Standard Oil Company.

Q. And to whom was that gasoline sold?

A. Why—you mean by Merchants?

Q. Yes.

A. To Ned's Auto Supply Company; to one station. That's a station which we lease, but is operated by a lessee.

Q. Who leases it? I had better make that clear. In the first place, who leases the property upon which 209 the station is located?

A. Ned's Auto Supply Company.

Q. And Ned's Auto Supply Company then sub-leases that?

A. We don't know. It was, at that time, but today Ned's Auto Supply Company holds the lease and just operates it, but not under Ned's name. We just operate it as an independent station.

Q. But it is operated by Ned's?

A. Yes.

Q. The gasoline which Merchants Auto Supply Company purchased from Standard Oil Company in the Spring and early Summer of 1938; wasn't that merely a matter of billing and transfer? As I understand it, the gasoline was billed by Standard Oil Company to Merchants Auto Supply Company and—.

Trial Examiner Ballinger: Is that correct?

The Witness: Yes, that is correct. It was also delivered to Merchants.

By Mr. Austin:

Q. Yes.

A. Merchants had the bulk plant, the warehousing facilities, the delivery equipment, and it was a functioning operation. It wasn't just a billing operation, as you stated.

Q. What I mean, was the transfer from Merchants Supply to Ned's Auto Supply at that time—was that a purchase and sale transaction on the books of those two companies, or did Merchants Supply Company just re- 210 ceive that gasoline? Just state how that was handled.

A. I don't understand the second part of your question. I understand what you mean by purchase and sale, and that's what it was. There was no "but." That's what it was.

Q. As between Merchants Supply and Ned's Auto Supply?

A. Yes; the same as merchandise to any other of its customers.

Q. But wasn't the gasoline transfer to Ned's Auto Supply at the same price which Merchants Supply paid for it?

A. No, that is not so. There was a differential that I don't recall now, but Merchants paid the operating expense and retained the profit and sold it to Ned's at the then prevailing tank wagon or dealer price. I am reasonably sure that's it.

Q. That's the way it shows on the books of those two concerns?

A. On the books. It was sold to Ned's at the regular dealer's price.

Q. That, however, only covers a period of perhaps from March until May; something like that?

A. It covers from that until the instigation of this criminal suit that has been referred to in this record. At that time, Merchants ceased buying gasoline, and Ned's started to buy it direct from the Standard Oil Company.

Q. But after Ned's started to buy it direct, it was still delivered to the same bulk plant, was it not?

A. Ned's started operating that bulk plant, yes.

Q. Ned's took that bulk plant over, then, from the 241 Merchants Supply?

A. Yes.

Q. And from May of 1938 until now, has Ned's operated the bulk plant and made all the purchases of gasoline?

A. Ned's makes all the purchases of the gasoline. I might point out this: The personnel—I think I was in error when I said that Ned's started to bulk plant. Merchants continued to operate the bulk plant and charged Ned's a certain amount for performing that function.

Q. But that was a transaction just between those two companies?

A. Between the two companies, yes. I don't remember just exactly how it was handled. The two companies are two separate corporations performing different functions, but having the same stockholders in both corporations.

Q. Yes, and Merchants Supply Company has never resold gasoline at retail, have they?

A. No, not at retail. They sold to some commercial accounts.

Q. Just during that period, or since?

A. Just during that period.

Q. Prior to 1938, where did Ned's Auto Supply Company, the partnership, obtain its gasoline?

A. From the Standard Oil Company. Prior to 1938?

Q. Yes.

A. Yes, that's right; from Standard Oil, on a tank wagon basis.

212 Q. Has Ned's always been a Standard Oil dealer?

A. From the first day; for some twenty to twenty-two years.

Q. Does Ned's Auto Supply Company sell gasoline otherwise than at retail at the present time?

A. Not as a general practice. There might have been some isolated instances where we would supply gasoline to a commercial account and whom we sell other commodities to.

Q. But not to other dealers?

213 A. No, not to other dealers other than this one station which we don't operate under our name.

Q. Would you be good enough to just state when Ned's Auto Supply Company—and I refer now in saying Ned's Auto Supply Company to the partnership prior to 1938 or prior to the date of incorporation, and since then I will be referring to the corporation, so it won't be necessary to state each time—but I would like to know—well, we will not carry back too far. You said that Ned's Auto Supply Company has been in business for about 22 years?

A. Yes.

Q. And in the beginning of 1936, how many retail outlets did Ned's have?

A. I believe it was four. Yes, it was four.

Q. Could you state approximately the date when those four stores were opened, and the locations?

A. The first one was opened—founded by our father in the fall of '18 or early 1918, out on John R. and Nevada. We still operate that one. The second one was some ten years later, approximately that, in Dearborn, at the corner of Michigan and Maple. We took over and remodeled a then renting service station. The third one was about in 1933 or '34. That was over on Jefferson and Manistique. And the fourth one was on Grand River, this one 214 where the main office is now, and Chicago Boulevard.

That was prior to '36, but right around that time—I believe '35. That covers up to the period of '36. And then between '36 and '40 we completed two others within about the same time, one at Woodward and Calvert, the other at Gratiot and Madeline.

Q. You say that was opened in 1940?

247 Q. When was that?

A. Oh, on and off for the past four years.

Q. Do you have copies of the continuities?

A. No, sir. About 50% of them the announcer ad libs. He just—it is just that type of program where he just talks about it, and I don't believe—I suppose the station has copies of that, but we never have received copies of that continuity.

Q. Has there been any radio advertising of a 2 cents a gallon discount or any other discount available at Ned's?

A. I don't recall of any in the past two years. There might have been some during the so-called price war there along some time in '38, but I have no independent recollections of any.

Q. Would that be about the first half of '38?

A. Yes.

Trial Examiner Ballinger: Has there been any advertising stating there were discounts using equivalent words: "Savings" or words to that effect?

The Witness: Yes, your Honor. I would say that there has been continuity that would make the general statement of savings, without referring to any discounts or any specific—or any posted price, just a general statement such as—

Trial Examiner Ballinger: How do you differentiate 248 between savings and discount? What is the difference?

The Witness: Well, my differentiation is this: if we were to say in our continuity: "Today's posted price is 16 cents a gallon, but during this specific period you can get a discount of 2 cents a gallon off and buy that gasoline at 14 cents," that would be a discount; while, when I refer to saving copy, I mean some general statements. You might see it in the automobile ads: "It is more economical to run our type of car than another," or "It is more economical to buy gasoline from Ned's that somewhere," the general statement.

Trial Examiner Ballinger: Where you use the word "saving": how do you use that? What does it mean?

The Witness: Not in connection with any price. If I may give a typical example: You can buy gasoline at Ned's savings, meaning by that whatever economies are available, either in service—it might not even—

Trial Examiner Ballinger: Have you coupled up the words "2 cent savings"?

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various locations that you named, did the Standard Oil Company aid in any way in financing the construction?

A. No, sir.

Q. Didn't loan you any money or the company or the partnership?

A. No, sir. Nor did we ask them to.

Q. Would that same be true as to the bulk plant?

A. Yes, sir. That is, they didn't.

Q. That is, they never had any financial interest in your company or your operations?

218. A. That is correct.

Q. Does Ned's Auto Supply Company own those six properties upon which your six main stores are located?

A. All except Dearborn, which we lease.

Q. Whom do you lease that from?

A. We lease that from—I believe it is an estate.

Q. You don't lease it from the Standard Oil?

A. No, we do not.

Q. Are any other brands of gasoline other than Standard sold at your stores?

A. Ford Benzol is sold at all of our stores.

Q. Isn't that rather customary here in Detroit, for Standard gasoline stores—Standard gasoline stations also to sell Ford Benzol?

A. I can't answer that question.

Q. Haven't you seen Ford Benzol pumps at other—

A. I have.

Q. —Standard stations?

A. I have seen Ford Benzol pumps at other Standard as well as at other stations selling Sun and all the other gasolines.

Q. Well, what I wanted to find out: the Ford Benzol doesn't have separate stations, does it?

A. I can't answer that question.

219 Q. What I mean is: just selling their own gasoline?

A. I know they used to. I don't know whether they still do or not. They might have close to the Ford Motor.

Q. What is Ford Benzol gas? What is Ford Benzol gas as compared with regular gas and Ethyl gas, and how does it sell in price?

A. It is sort of half way between both. It is generally sold at a cent a gallon more than regular and a cent a gallon under Ethyl.

Trial Examiner Ballinger: Where do they produce it?

The Witness: It is my understanding—now, this is just on information and belief, I have no direct information on this—that the product is manufactured by the Ford Motor Company but is sold by an independent distributor jobber.

Q. What is the name of the distributor from whom you purchase it?

A. My best guess is that it is Ford Benzol, Incorporated. Now, I might be wrong.

Q. Would it be Benzol Stations, Incorporated?

A. It might be Benzol Stations, Incorporated; yes. I just have a visual recollection. I don't have a—

Q. Do they have their own trucks for delivery?

A. Yes, they do, as far as I know. They might lease the equipment, but it is their own—

220 Q. It is their operated—

A. It is their operation, yes.

Q. It is their equipment?

A. Yes.

Q. Has all of the Standard Oil gasoline sold at Ned's Auto Supply Company stores since May, 1938, been purchased direct from the Standard Oil Company?

A. Yes, sir.

Q. Will you describe the method of purchase prior to March 7, 1938, and since that date?

A. Well, prior to March Ned's bought from Standard Oil Company on a tank wagon basis under the then prevailing—prior to March of 1938—under the then prevailing dealer contract, or whatever the relationship—whatever the legal relationship was, on a tank basis, and we would either call up and ask for a tank wagon of gasoline or else the driver, in his regular routine—

Q. Well, I don't care about that, Mr. Gershenson. You bought that tank wagon, and it was delivered by Standard Oil direct to the Ned's stations?

A. Yes.

Q. Is that right?

A. Yes.

Q. In the same way that other retail stations purchased?

A. In the same way that other retail—that is correct.

A. There still is. We boys have that—that was a part of the partnership, but the real estate wasn't included either in Ned's or in Merchant's when we formed a corporation, so we boys still hold the real estate in our own individual names.

Q. Well, does that lease of the bulk plant—that was leased by the realty company?

A. I believe that might run to the Gershenson Realty, and then we, in turn, lease it to Merchant's or Ned's.

Q. Was that bulk plant there when you got it? Was
225 it leased originally?

A. The equipment was there, yes, and we leased it from the Michigan—I don't recall the name.

Q. Well, that is not important.

A. It was there, though.

Q. When did you lease it?

A. Oh, about in February of '38.

Q. Did you at the time you leased it have an arrangement with Standard Oil Company to begin buying by tank car?

A. I believe we leased it before we had the arrangement. I know we had the bulk plant at the time we approached Standard Oil, because I entered into the negotiations. We were looking around for a bulk plant, and we found this one and we leased it with the expectation of buying gasoline in tank car from either Standard or somebody else. I can make the definite statement that we had the bulk plant at the time we went to Standard Oil and asked to buy gasoline on a tank car basis.

Q. After you began purchasing Standard gasoline in tank car quantities in March of '38, how did you at first obtain the transportation of that gasoline from the bulk plant to your gasoline pumps?

A. Before we bought our own equipment, we employed the Ford Benzol Company, who had excess equipment, and they used to haul the gasoline from our bulk plant to
226 our own retail stations. We hired them as a carrier.

Q. How much did they charge per gallon for that?

A. They charged us, to start with—this represents my best judgment; I might not have it exact—but it is my present impression it was ¾ of a cent a gallon for a few months, and then, I believe it went down to half a cent a gallon. I worked these negotiations out, and they said at first until they got an experience of how many trips they would have to make and work out the best route, that we agreed on three-quarters of a cent a gallon. One of the reasons we used them was to acquire some experience as to what equipment would be best suited for our deliveries, what size tank trucks.

Q. Do you recall that criminal case that you mentioned a while ago, there was some testimony taken, and I think you testified in the summer?

A. I testified. I recall that, yes.

Q. In '38. Do you recall that there was a representative of Benzol Stations, Incorporated, who appeared there as a witness and testified that the cost that they charged was .45 of a cent per gallon?

A. I didn't hear that witness' testimony. I do recall that there was a witness, that someone testified for Benzol, but I wasn't in the court room at the time, and I never seen a transcript of his testimony.

227 Q. Are you positive about that half cent figure? Might it not have been .45?

A. You mean 4.5?

Q. .45.

A. Yes.

Q. That is, of a cent.

A. You mean four and a half tenths rather than five tenths?

Q. That is right.

A. That might be so. I believe I qualified my answer and stated that it was about half a cent, as I recall it.

Q. But it may have been four and a half tenths, as you say, instead of five?

A. I know that it started with a higher figure.

Q. I suppose that could be proved?

A. That could be determined from the record, yes. I know it ranged—

Q. In any event, it wasn't over half a cent, perhaps except at the start when they may have charged a little more until they got their routes laid out?

A. I would say it was more than half a cent for a few months, maybe a month or two, and then the half cent. I believe it was half a cent when we discontinued. They wanted to raise it again, and that is when we discontinued and put in our own equipment. I am sure that that was it.

They came to us and said that they couldn't operate on
228 about half a cent, wanted to charge us more again.
That is when we took over the operation ourselves.

229 Q. Well, you either purchased or rented your own trucks, didn't you?

A. You mean, in the meantime?

Q. Yes.

A. No, I believe we got them to extend hauling it for about a month after we were ready, after they wanted us to discontinue. We were a customer of theirs, buying their Benzol, and the relationship was quite friendly.

Q. Didn't you say one of the reasons you had them in there, was wondering what sort of equipment you wanted to purchase yourself?

A. Yes.

Q. So you did want to take over the delivery yourself, after you established the bulk plants?

A. Not if we could get somebody to haul it for less than it cost us. There would be no point in taking it over.

Q. What did you do about trucks?

A. We bought one used truck and tank and one new Ford tractor, and another tank.

Q. How many is that altogether?

A. Two tractors and two tanks.

Q. And how many trucks and tractors, or tractors and tanks, do you operate now?

A. Two trucks and two tanks.

Q. That is the means by which all of the gasoline
230 is now transported from the bulk plant to Ned's stations?

A. Yes, except that Ford Benzol still deliver their gas.

Q. I am only referring now to the Standard gasoline.

A. Yes, that is right.

May I please make a comment to you, off the record; a personal matter?

Mr. Austin: Yes.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Have you the figures on the total volume of gasoline sold at retail by Ned's Auto Supply since about 1936? We have the figures in the record from the Secretary of State, but you don't start in those figures until the fall of 1938. Was that when you first registered as a licensed jobber, Mr. Gershenson?

Q. Through July?

A. Well, it has continued the same since, so that is the last change that I have.

Q. Before going into the prices on any one date, from 1936 to date, that is, to today, if a certain price is posted on the gasoline pumps of one of your stores, would the same price be posted at all of the other stores, or do the prices vary?

A. No, the same price would be at all the other stores, with this possible exception: if there is a price change
237 as of noon on a certain day, one or the other stores
might be an hour or late changing, but all stores were supposed to have changed at the same time on the same day.

Q. That has been your invariable policy, to charge the same price, or, at least, to have the same posted price at all stations?

A. Yes, it has.

Q. In giving prices, it will be understood that they apply to all of the Ned's outlets, according to the number that were in operation at the time?

A. Yes, sir; that is right.

Q. Do you recall preparing a statement for the Commission's investigator, Mr. McDonald regarding posted prices on Red Crown gasoline?

A. I didn't prepare it. There was such a statement prepared by our company, and I know one was turned over to him.

Q. I would like to show you this sheet and ask you whether that is a copy of the information which was prepared, and whether that sheet was prepared in your office.

A. I have no way of identifying it, but I would say that it was. I didn't personally prepare it, but—

Q. Well, are those prices stated there correct for the period given? You see, those go back to 1936, and I thought that would be one way to bring them in here now.

238 A. They are all correct with one exception. There seems to be an error on one of them.

Q. Which one is that?

A. The one on January, '38. This one is 16, and on my record it is 16.5. This is the only one that is—all the others are correct.

Q. Does your record show 16.5 for August, 1937?

A. No. Mine starts with January, '38. This purports to be January.

Q. Is it your belief that the figure on the list that you brought with you is correct and that this figure is incorrect?

A. Yes, it is, because this is multiplied out according to the number of gallons for a dollar.

Trial Examiner Ballinger: Which is?

The Witness: The one that I have. The other is just one listed figure.

By Mr. Austin:

Q. Will you change that to the corrected figure, then, so that I can offer that sheet?

(The witness does as requested.)

Trial Examiner Ballinger: Put your initials behind it.

Mr. Austin: If your Honor please, I would like to offer in evidence this list of posted prices on Standard
239 Red Crown gasoline about which I have just interrogated Mr. Gershenson, with the notation on the record that it refers to the prices posted on the pumps at all of the retail gasoline stations operated by Ned's Auto Supply Company during the period covered by the date stated. The sheet itself doesn't say whose prices they are, and for that reason that should appear.

Trial Examiner Ballinger: Will you show that to counsel for Respondent?

(The paper referred to was handed to Mr. Hanley.)

Mr. Hanley: No objection.

Trial Examiner Ballinger: Without objection, the document is admitted in evidence as Commission's exhibit 22.

(The document referred to was marked, for identification, COMMISSION'S EXHIBIT 22, and was received in evidence.)

By Mr. Austin:

Q. Now, commencing with January, 1938, from the information you have with you, I would like to have you state the posted retail prices at Ned's stations, giving the dates of all changes.

A. I will read these.

May I make this additional statement: that this has some prices that weren't on your statement; in other
240 words, didn't get a chance to say that before, in answer to that question, but this has about two or three price changes that weren't on that statement. This was made up in anticipation of testifying. The other was, as I under-

stood it at the time, he just wanted a casual statement, so that wasn't made with as much care as this was.

Trial Examiner Ballinger: This is a more accurate statement?

The Witness: Yes, it is. This was made up in anticipation of testimony—anticipation of testifying from it. The other, the investigator had asked me to give him a general idea as to how our prices ran.

Trial Examiner Ballinger: Was this statement you are about to refer to made up under your immediate supervision?

The Witness: Under my supervision, yes, sir.

A. January, 1938, our posted price was 16.5 cents per gallon, or 6 gallons for 99 cents.

I would like to explain this, if I may, your Honor. We both put up a price for so many gallons for such an amount of money as well as the price per gallon, and there might be 1.2 of a cent variance on the six or seven gallons. In June of 1938 our posted price was changed to 16.7 cents per gallon, or six gallons for $1.

Q. Is that any particular date in June?

241 A. I have it as to the month.

Trial Examiner Ballinger: That was in effect during the entire month, was it?

The Witness: Some time during the month that was changed.

By Mr. Austin:

Q. Some of these later on may be more important to get the particular day of the month. There may be more than one change in one month.

A. Starting with September of 1938 I have the days of the month.

Q. Fine.

A. The next one was in July of 1938, the posted price dropped to 15.3 cents, or 6 gallons for 92 cents.

September 17, 1938, the posted price was 15 cents, or 7 gallons for $1.05.

November 29, 1938, the posted price was 14.3 cents or 7 gallons for $1.

On April 10, 1939, our costs dropped, but we retained the same posted price. I have that notation in there. The wholesale price went down a cent and two-tenths, but we didn't change our retail price.

The next change on the retail price was on June 19, 1939. We went up to 15.8, or 6 gallons for 95 cents.

On November 1, 1939, the price dropped to 13.5 cents;
242 7 gallons for 95 cents.

November 10, 1939, there was a decrease of one cent a gallon to 12.5; 8 gallons for a dollar.

Q. Will you pardon me a moment, Mr. Gershenson? Do you have one there for July 1, 1939, or did I make a mistake on that? The next one I have is June 19th.

A. That is November 1st.

Q. All right. And the next one after that November 10th?

A. November 10th; 12.5 cents per gallon, 8 gallons for a dollar.

November 24, 1939, 15.7 cents, and 7 gallons for $1.10.

July, 1940—I don't have the specific date on here—16.2 cents; 7 gallons for $1.13. That is the last change that I have.

Q. Now, have you the same prices for Ethyl?

A. I don't have that on this summary. Throughout most of this period the differential was 2 cents a gallon.

Q. Haven't you the same prices?

A. I beg your pardon?

Q. Didn't you bring the same data for Ethyl with you that you have just given on Red Crown?

A. It is probably my error. I had told the clerk to prepare it on Standard gas, and he must have interpreted it just on Standard Red Crown and not Ethyl.

Q. The subpoena, I believe, asked for Red Crown
243 and Ethyl; not Stanolind.

A. We don't sell Stanolind. I was ill at the time. It was probably my fault for not having it prepared, but I can get that for you.

Q. You say the differential between Ethyl and Red Crown is generally 2 cents?

A. 2 cents a gallon, yes, sir.

Q. Has there been any variation from that?

A. Not to my knowledge.

Q. If there is any variation off the 2 cents differential, would that be more or less than 2 cents difference between Red Crown price and Ethyl price?

A. It would be less. I don't recall of any time it being more, but there might have been a period. It just doesn't come to my mind.

Q. You will produce those if I decide I need to ask for them?

A. Yes, sir.

Q. May I call for them at any time while we are here?

A. Yes, sir.

Mr. Austin: Perhaps Judge Hanley would permit you to send those in, or bring them in some time while we are in session, and I might offer them in the record.

Mr. Hanley: That will be all right, if Mr. Gershenson prepares them.

244 Mr. Austin: We might make it in a statement that we could offer as an exhibit and then it wouldn't be necessary for you to take the stand and go through them. The best way to do it would be to give me the Ethyl price on each of these dates that you have here so that they could be compared as of the same date.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Mr. Gershenson, has Ned's Auto Supply Company, either the partnership or the corporation, ever advertised gasoline in the Detroit newspapers?

A. In connection with some of our other advertisements, we have run gasoline copy, yes.

Q. And has there been any such advertising recently, relating particularly to discounts?

A. I don't recall of an advertisement relating to discounts at any time.

Q. Didn't you ever advertise 2 cents off at Ned's Stations, or a saving in purchasing gas?

A. Perhaps savings, but not discounts.

Q. Just now I am merely trying to find out the period when you did advertise in the papers.

A. I don't recall when the last advertisement was.
245 It was very likely last summer or fall.

Q. Have you copies of newspaper ads? Do you keep a file of your advertising?

A. Yes.

Q. Did you bring that with you?

A. I haven't that complete file, because it is 99% other ads, not gasoline.

Q. Have you brought any of the gasoline ads with you?

A. I have one here. I have one of June, 1939, and I can get our whole file, but I don't have the gasoline ads segregated. I would have to pick it out; and this was part of a composite ad on other merchandise.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Could you bring in your file of newspaper advertising?

A. Yes, sir, I could have it here this afternoon.

Q. Is that a pretty complete file of ads?

A. It is a complete file, but there won't be a single gasoline ad with a price or discount in there. I know that.

Q. I would like to see the advertisements of gasoline, and if you could get that brought in this afternoon, that would be helpful. Did you say you could?

246 A. Did I understand you correctly? You want our whole file of advertisements, whether they are gasoline or not?

Q. Unless you can pull out every one that relates to gasoline. I don't care about the ones that do not relate to gasoline.

A. Well, I have answered that. I have said that I went through that pile. We have no newspaper advertisements in that file which refer to discounts on gasoline. There might be some with the general statement such as "Buy your Red Crown gasoline from Ned's to avail yourself of superior service saving," and so forth, but without any price or any—

Q. Well, I can judge that better when I see the advertisement. You said that they do talk about savings, and I think it would be better—

A. Well, the subpoena asked for them with discounts, and there are none that refer to any discounts off posted prices. That was the distinction I was making.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. How about radio advertising? Did Ned's have certain radio broadcasts for a while?

A. Yes, sir.

The Witness: That has never been done, sir.

Trial Examiner Ballinger: That has never been done?

The Witness: No, sir.

By Mr. Austin:

Q. Mr. Gershenson, isn't your distinction this, that
249 when you advertise saving by buying at Ned's, you
mean that Ned's price may be lower than other prices, whereas if you advertise the 2 cent discount, they might interpret that to mean that that was a discount off your posted price? In other words, the saving would apply to the posted price as compared with other posted prices, whereas a discount might refer to a discount below the posted price?

Don't you mean that you advertise savings because your posted price was less than the price, the prevailing retail price, but that you did not give any discount off the posted price? Is that correct? I am just asking whether—

A. I don't understand your question fully. I understand half of it, the part about the discount.

Q. There is a difference between saying that your posted price—

Trial Examiner Ballinger: Let us find out what portion he does not understand.

The Witness: The portion when you say savings from a posted price as distinguished from discounts.

By Mr. Austin:

Q. No. I said that it is one thing to advertise that you give a discount off your posted price—

A. We have never done that.

Q. —it is another thing to say that your posted
250 price is less than some other fellow's price, and so
you save by buying at Ned's.

A. We have never done the second part, to say that our posted price is less than anyone else's.

Q. When you have advertised savings by buying at Ned's, wasn't that intended to mean that the price at Ned's was lower than the price might be somewhere else?

A. Well, it was a composite word, savings, meaning general to apply to the whole operation rather than to price. At no time do we say that our price is lower.

Mr. Austin: I think, if your Honor please, it would be much better if we can get copies of some of these things; then we can let them speak for themselves, and try to do that.

By Mr. Austin:

Q. Now, so far, Mr. Gershenson, I have only tried to establish the times when you advertised in newspapers and on the radio. Have you given me that as accurately as you can?

A. Yes, sir.

Q. Now, I would like to ask you directly what and when discounts have been given at any of your six retail outlets to customers so that the customer actually paid less than the posted price of gasoline purchased. I would like to know to whom such discounts have been given and when.

251 A. As long as we have been in business there has been prevalent a so-called commercial discount that operators of commercial vehicles or people operating passenger cars but performing some commercial function like collectors or vendors, candies, and things of that nature, and insurance men have received that the industry has recognized as a commercial discount. That has been in effect from the time we first started in the gasoline business right up to today.

Mr. Austin: Your Honor, I move to strike out the part, what the industry recognizes as a commercial discount in the latter part of the answer as not responsive.

Mr. Hanley: We resist that motion on the ground that this witness has shown himself qualified to express what the industry practice is in Detroit.

Mr. Austin: It is still not responsive, whether he is qualified or not.

Trial Examiner Ballinger: Read the witness' answer, first the question and then the answer.

(The record was read.)

Mr. Austin: I move to strike the entire answer except the part where he lists certain people that were given the discount. That is the only thing there that is responsive.

Trial Examiner Ballinger: Off the record.

252 (A discussion ensued off the record.)

Mr. Austin: Beginning with the word "collectors" I think can stay in, or I am willing to strike the whole thing out and start over, but beginning with the word "Collectors" to the end of that sentence is the only thing that is responsive.

Trial Examiner Ballinger: The answer in its entirety is not responsive to the question. If the motion is broadened so as to move to strike out the entire answer, the Examiner will sustain it.

Mr. Austin: I so move, your Honor.

Trial Examiner Ballinger: The entire answer is stricken. Read the question to the witness.

By Mr. Austin:

Q. In other words, Mr. Gershenson, I want to know what discounts were given, when you gave them, and to whom you gave them, and you can explain what you mean by commercial customers, if it is your statement that you gave discounts to those customers, but I am not interested in what anybody else considers them. I am only interested in whom you gave your discounts to at this time.

A. From time to time we have given—

Mr. Hanley: Just a moment, Mr. Gershenson.

253 For the purpose of the record, your Honor, I, at this time, want to object to the question on the ground that it is not material to the inquiry as to the Respondent Standard Oil Company, and that any answer that the witness may give is not binding on the Respondent, the Respondent having no obligation to police the disposition of gasoline sold to any customer, and Respondent being out of control of any disposition of the gasoline is out of control of any price that may have been charged for such gasoline.

Trial Examiner Ballinger: If this line of examination is not shown to be material to the Commission's case, the Examiner reserves to counsel for Respondent the right to move to strike it in its entirety or any portion thereof.

Mr. Hanley: Then, may it be understood, your Honor, that that goes to any testimony of this general character?

Trial Examiner Ballinger: That is correct.

Mr. Hanley: So that I won't have to make any objections.

Trial Examiner Ballinger: That is correct. You need not repeat.

Mr. Hanley: Very well. Thank you, your Honor.

By Mr. Austin:

Q. All right. Let us just try to get down to the 254 meat of this now. We are wasting a lot of time.

A. I am trying to answer as directly as I can what I understand your question to mean.

From time to time we have given commercial discounts varying from 1 to 2 cents to so-called commercial customers. These discounts were off our posted price.

Q. What did the customer have to do to qualify as a commercial customer?

A. That classification has varied from time to time depending upon competitive situation. That I can't state now, general qualification.

Q. Has that been extended to City employees?

A. Some city employees.

Q. School teachers?

A. Occasionally, yes.

Q. Have you ever—

A. That was governed, if I may answer further—that was governed entirely by competitive conditions.

Q. I am just asking now, not your reasons.

A. Yes, sir.

Q. You are not a Respondent. It isn't necessary for you to justify. I just want to know what the facts are.

Has your company in the last three years circularized or sent advertising matter to City employees, school teachers, and others in any of the municipal departments,
255 advertising your gasoline stations, and advertising the fact that they were entitled to a commercial discount?

A. We have never circularized City employees nor school teachers as a group with any such material.

Q. Have you obtained the names of certain individual employees and sent them advertising to the effect that they would be entitled to a 2 cent discount if they purchased from Ned's?

A. The proceedings are rather the other way around. That individual would apply or would state that he or she is qualified to receive that discount and give certain reasons why, and we would either extend it or not, depending upon the merits of the specific case. We at no time have circularized nor broadcast any such advertisements nor any such material.

Q. But you have sent letters of that kind from time to time to numbers of City employees, have you not?

A. Well, as I have just answered.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

(The record was read.)

Trial Examiner Ballinger: Your answer was that you had never engaged in that practice.

The Witness: Your Honor, the previous answer said—if you would please read that.

256 (The record was read.)

Trial Examiner Ballinger: As I understand, you had previous stated that you had never sent letters to City employees soliciting business; is that correct? That they would come to you?

The Witness: That is correct, your Honor. They would apply for a discount card or wanted to know whether they could qualify to buy gasoline at a discount, but we didn't send out a broadside or a letter inviting school teachers and City employees to come and buy gasoline.

Trial Examiner Ballinger: Did you do that in isolated cases?

The Witnesss: I don't recall of any. There might have been groups of so-called commercial employees where we would send a letter like that to employees of a certain company telling them that arrangements had been made by that company for them to buy gasoline at a discount, but not to municipal school teachers.

By Mr. Austin:

Q. Have you had any definition of a commercial account that you have issued to your station operators?

A. Well, that is the answer that I tried to give before, that that definition varies from time to time as to who qualifies as a commercial buyer.

257 Q. That has been a very broad definition at times, has it not?

A. At times it has been broad, yes, sir; at times, the classification.

Q. It might include any man who is driving a car back and forth to his office?

A. Well, it has never been that broad. I understand by that you mean any motorist?

Q. Yes.

A. No, sir.

Q. A man drives into your station, one of your stations, and says he wants a commercial discount. Suppose your station attendant asked him if he uses his car for commercial use, and he says yes. Does the station operator make any further check?

A. I know of no specific case, but I would say that that wouldn't be enough to qualify him for a discount.

Q. You wouldn't want to say that no automobile driver had ever obtained a discount at your station on that basis, would you?

A. I had no personal knowledge of such. I wouldn't—if it were shown that it was so—I wouldn't say that it was impossible, but I have no knowledge of such an instance.

258 Q. Well, do I understand that there are no definite instructions issued by your office to your various service stations to guide them on those discounts?

A. Oh, yes, there are.

Q. What are those instructions?

Mr. Austin: I will withdraw that.

Q. Have you any copies of those instructions?

A. No, sir. They are not written instructions.

Q. Then you can tell me what they are?

A. Those instructions vary from time to time, depending, again, upon competitive conditions. If we are satisfied that competitors generally are extending commercial discounts liberally, why, our instructions to our attendants would be to satisfy themselves that that particular customer is either buying at a commercial discount elsewhere or would buy if we didn't extend it to that customer, and then, in that case, to meet that competitive condition, why, we would extend a commercial discount. That is about the extent of the instructions.

Mr. Austin: I would like to have this paper marked for identification.

Trial Examiner Ballinger: The reporter will mark the paper Commission's Exhibit 23, for identification.

Mr. Austin: Also this paper.

Trial Examiner Ballinger: The reporter will mark 259 that paper 24 for identification.

(The paper writings referred to were marked "Commission's Exhibits 23 and 24", for identification.)

By Mr. Austin:

Q. I would like to show you two cards marked Commission's Exhibits 23 and 24, for identification, and ask if you can state what they are (handing documents to witness)?

A. Yes, sir. I am familiar with these cards.

Q. Will you describe them?

A. They are identification cards that I have already referred to, that we would mail or personally give to the employees of some commercial account which would entitle him, because of his connection with that particular account, or his individual qualifications, to buy merchandise in our store at the then prevailing commercial discounts. That applies to all merchandise.

Q. By "the then prevailing," you mean the discounts that you were allowing to commercial accounts at that time?

A. That doesn't refer to gasoline. That refers to merchandise in our stores.

Q. But referring to gasoline, it means whatever discount you were giving to commercial accounts at that time, doesn't it?

A. That part doesn't refer to gasoline. As a matter of fact, they expressly state, "Only such discount as permitted under the Michigan Fair Trade Act."

260 Q. Well, weren't the holders of cards like these given a discount on gasoline?

A. No, sir. That wasn't an identification for a commercial discount.

Q. Well, they say, "Commercial price privileges."

A. That refers to the stores, sir; within the stores.

Q. What is the distinction of gasoline, between the holders of these cards and the other people you just said did get gasoline discounts? You said some people got commercial discounts on gasoline, isn't that right?

A. They don't have to have a card.

Q. They don't have to have a card to do that?

A. No.

Q. What is the purpose of these cards?

A. I have answered that. We sell considerable other merchandise, other than gasoline, and that is intended for tires, auto accessories, and all other commodities.

Q. So that these cards were not necessary for the gasoline discount?

A. No, sir.

Q. But they were used for other things?

A. Yes, sir; that's right.

The Witness: Your Honor, if I may add a statement. I will say I have seen cards like that issued by competitors that refer to gasoline right on their face. They would state that was a gasoline tax.

261. Mr. Austin: I move that be stricken, Your Honor.

Trial Examiner Ballinger: Motion is granted.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: Now, I would like to have this sheet marked for identification, if you please.

Trial Examiner Ballinger: The reporter will mark the paper Commission's Exhibit 25, for identification.

(The paper referred to was marked "Commission's Exhibit 25" for identification.)

Mr. Austin: Are you familiar with those stamps that are shown on that sheet, marked "Commission's Exhibit 25" for identification (handing document to witness)?

The Witness: Yes, sir.

May I make a statement off the record?

Trial Examiner Ballinger: Yes. Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Will you explain those stamps, Mr. Gershenson?

A. You refer to stamps appearing on Commission's Exhibit 25, for identification?

Q. Yes.

262 Mr. Hanley: What are these, trading stamps?

Mr. Austin: Yes.

The Witness: These are trading stamps that we issued to purchasers of gasoline during October-November, 1939. Every purchaser of gasoline was given one of these stamps for every gallon of gasoline that he purchased, and they were redeemable in merchandise in any of our stores.

By Mr. Austin:

Q. And by "merchandise," you included gasoline, did you not?

A. It says right on their face, "Redeemable merchandise only excluding gasoline." I think they were redeemable on everything except gasoline.

Q. As a matter of fact, weren't they redeemable on gasoline, too?

A. I believe later they were.

Q. When did you start issuing those stamps?

A. (Referring to document) We began to issue a two cent gas saving stamp on our about August 25, 1939.

Q. And when was it discontinued?

A. Sometime between November 1 and November 10.

1939, it was decreased from two cents to one cent a gallon, and November 15, 1939, they were entirely discontinued.

Mr. Austin: I would like to offer this sheet in evidence, Commission's Exhibit 25, for identification.

263 Trial Examiner Ballinger: Let counsel for the Respondent examine it.

(The document was handed to counsel for the respondent.)

Mr. Hanley: No objection, except that general one, Your Honor, that you have reserved ruling on and that may go to all Exhibits, I assume, as well as to all testimony?

Trial Examiner Ballinger: Certainly. With that reservation Commission's Exhibit 25, for identification, is admitted in evidence.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT 25" was received in evidence.)

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Mr. Gershenson, I show you this photograph and ask you if that is a picture of one of your stations (handing photograph to witness)?

A. Yes, sir, it is.

Q. Do you see in that photograph a sign advertising trading stamps?

A. Yes, sir.

Q. Does that refer to the stamps which were just placed in evidence as Commissioner's Exhibit 25?

264 A. Yes, it does.

Q. And would you say that that was taken during the period that you mentioned?

A. From the sign, yes.

Mr. Austin: I offer this photograph in evidence.

(The photograph was handed to counsel for the Respondent.)

Trial Examiner Ballinger: Without objection, the photograph is admitted in evidence as Commission's Exhibit 26.

(The photograph referred to was marked "COMMISSION'S EXHIBIT 26," for identification, and received in evidence.)

By Mr. Austin:

Q. Are you familiar with this envelope, Mr. Gershenson (handing document to witness)?

A. Yes, sir; I am.

Mr. Austin: Will you mark that for identification, please?

Trial Examiner Ballinger: The reporter will mark the document Commission's Exhibit 27, for identification.

(The document referred to was marked "Commission's Exhibit 27," for identification.)

By Mr. Austin:

Q. Will you describe Commission's Exhibit 27 for identification?

A. Do you want me to read what is on it, or just
265 tell the use?

Q. Tell the use.

A. This envelope was issued to customers buying gasoline at the time we were giving the trading stamps for such customers to keep the stamps in this envelope; just to have a place to keep them. It had no value in itself, and when they redeemed the stamps for merchandise, why, they turned this envelope in with them. It was merely a container for such stamps, and it says so on its face. It says: "Stamps and receipts must be kept and redeemed in this container."

Q. They will speak for themselves. As a matter of fact, Mr. Gershenson, weren't these envelopes used sometimes to obtain discount on gasoline by customers who had simply to present the envelope—who would simply present the envelope when they came to the station to buy gasoline?

A. No sir—well, that might help to identify the person. At the time, we gave that envelope, that stamp, everybody received the stamp, so there was no need to use that envelope. That was the time we had the sign on the station.

Q. Was the use of this envelope discontinued at the time the use of the stamps was discontinued?

A. It was discontinued to all customers. I believe they continued to use them to these commercial discount holders which I referred to earlier in my testimony.

Q. In other words, someone might show this for the
266 purpose of getting a commercial discount?

A. No, sir.

Q. I mean, after the stamps were no longer issued, and presumably, turned-in, someone might still have one of these envelopes?

A. When we discontinued to give the stamps, we discontinued.

Q. Were these envelopes honored for discounts on gasoline; just by showing the envelope?

A. No, sir.

Q. At no time?

A. I answered that. I will re-answer it.

Q. You said they were only good as a container for the stamps. I am asking you now whether the envelope itself was ever used for the purpose of obtaining a discount?

A. No, sir, but if I may qualify the answer: These commercial discount holders would put their receipts for gasoline, subsequently, in these envelopes, and if an attendant saw someone with an envelope like that with commercial discount receipts, it might help to identify that person as being one to buy at a commercial discount.

Trial Examiner Ballinger: Was a discount ever given merely upon the presentation of one of those envelopes?

The Witness: No, Your Honor, I have answered that.

Mr. Austin: I offer this envelope in evidence, in connection with the trading stamp folder.

267 Mr. Hanley: That is the only purpose you are offering it for?

Mr. Austin: The purpose of it is to complete the information regarding the giving of discount through trading stamps. The testimony itself states what it is.

Mr. Hanley: If the Exhibit is offered for the purpose of completing the testimony of the witness in connection with trading stamps, there is no objection beyond the general objection.

If offered as proof of the giving of a discount by Ned's Auto Supply on gasoline, it is objected to on the ground that no foundation has been laid.

Mr. Austin: I think the witness' testimony speaks for itself. This can be of no evidence at all, except in connection with the testimony describing it.

Trial Examiner Ballinger: Well, is that envelope offered in evidence to establish the giving of a discount on that envelope?

Mr. Austin: No, Your Honor.

Trial Examiner Ballinger: Presentation of the envelope?

Mr. Austin: No, Your Honor, it isn't.

Mr. Hanley: That satisfies Respondent: that statement of counsel.

Trial Examiner Ballinger: Then, without objection 268 to COMMISSION'S EXHIBIT 27, for identification, it is admitted in evidence, the right being reserved by counsel for the Respondent at a later time to move to strike it from the record together with the whole line of testimony.

Mr. Austin: Of course, I reserve the right to introduce evidence and testimony with other witnesses at a later date.

Trial Examiner Ballinger: Yes. No motion will be entertained by the Examiner to strike until the Commission's case is closed.

Mr. Austin: Will you mark this letter for identification, please?

(The document referred to was marked "Commission's Exhibit 28-A" for identification.)

Trial Examiner Ballinger: The reporter has marked the document, "Commission's Exhibit 28-A" for identification.

By Mr. Austin:

Q. Will you describe that paper, please (handing document to witness)?

A. This is a letter that was sent with these courtesy cards you asked me to identify a little while ago, in response to an inquiry from the person who received it, asking for one of these. If I may read the first sentence from the letter, I think that will help explain what I am saying.

Trial Examiner Ballinger: Is that a letter written 269 by your company?

The Witness: Yes, Your Honor. The first sentence says—

Mr. Austin: Just a minute, please.

By Mr. Austin:

Q. This is a mimeographed form, is it not?

A. It looks as if it is.

Q. Is it addressed to anyone?

A. The envelope was, but the salutation on here is not, but it is obviously sent in reply to an inquiry, because it says so; or a reply to a request for one, I should say.

Q. Are you merely making that statement because that's what the letter says?

A. No, sir. I know that from my personal knowledge, that the only ones we sent that card to, or that letter, is when a person writes in or requests it, then it is passed upon, whether they are qualified to receive it, and when we send that card, we sent that letter along with it.

Q. You are quite sure of this?

A. Yes, sir; both from having read it and from what I know about it.

Q. Are the cards which were enclosed with this letter the same cards we discussed a few minutes ago, commercial discount cards?

A. Yes.

270 Q. And did the people who received those cards and this letter, did they receive commercial discount on gasoline?

A. No, sir. I have already answered that. There is no reference made of gasoline in there, and that is not the purpose of either the letter or card. It specifies in there the merchandise which they cover.

Q. That is your stationery, is it not?

A. Yes, it is.

Q. And is this the type of envelope in which those letters were sent?

A. That is our regular envelope. I have no personal knowledge that that letter was sent in that envelope.

Q. And is this another one of your special discount cards?

A. That is similar to the one you just showed me. It is the same thing.

Mr. Austin: If Your Honor please, I would like to have the envelope and card marked for identification as Commission's Exhibits 28-B and 28-C.

Trial Examiner Ballinger: The reporter will so mark them.

(The documents referred to were marked "Commission's Exhibits 28-B and 28-C" for identification.)

Mr. Austin: I would like to have this document marked for identification.

Trial Examiner Ballinger: The reporter will mark
271 the document "Commission's Exhibit 29" for identification.

(The document referred to was marked "Commission's Exhibit 29" for identification.)

By Mr. Austin:

Q. Do you recognize that letter, Mr. Gershenson, Commission's Exhibit 29, for identification (handing document to witness)?

A. I knew of such a letter, yes. I recall the circumstances surrounding.

Q. Will you state the circumstances—

Mr. Austin: Withdraw that.

Q. Was this letter sent over the signature of Ned's Auto Supply Company and the other signatures appearing on it, to a large number of retail dealers?

A. You mean operate as a retail gas station?

Q. Yes. This letter was sent to retail dealers, wasn't it; written for that purpose?

A. I had nothing to do with the sending of the letter. I just know the letter was sent. I don't know how mary dealers it was sent to, but I do know it was sent.

Q. You authorized the sending of that letter over your company's name, did you not?

A. I gave no express authorization. I knew that such a letter was going out. I don't remember whose idea it was to send the letter. I believe it was—may I see it again?

Trial Examiner Ballinger: It is immaterial.

272 A. I believe it was Stark-Hickey or Jimmie Bright.

By Mr. Austin:

Q. It was sent with your knowledge and you are one of the dealers named on it?

A. That's right. That was the extent of our contribution.

Q. I show you a copy of an advertisement which appears, upon its face, to have been published in the "Detroit Free Press" on August 7, 1937, and ask you whether that was an advertisement appearing over the name of your company?

A. The circumstances surrounding the running of this ad—

Trial Examiner Ballinger: Answer the question, please.

By Mr. Austin:

Q. Just yes or no.

A. Yes.

Q. Was that advertisement published the morning after this letter was sent out?

A. It was pertaining to the same thing. I don't recall which came first.

Q. Can't you tell by looking at the letter and the advertisement, which came first (handing documents to witness)?

A. Both have the same date.

Q. The "Free Press" is a morning paper, isn't it?

A. This was on the streets the night of the 5th; yes, sir.

Q. Aren't those dispatches dated the 6th?

273 A. Yes.

Q. And those dispatches would appear in the paper on the morning of the 7th, wouldn't they; if they are dated the 6th?

A. I don't know if this paper was the 6th or 7th.

Q. At least, it is the 6th or 7th, and the letter is dated the 6th.

A. I am answering to the best of my knowledge. I don't know which of these were sent out first, but they were both the result of the same circumstances.

Q. But at the same time?

A. Yes, at the same time.

Trial Examiner Ballinger: The paper speaks for itself.

Mr. Austin: I am just trying to identify them enough to offer them, Your Honor. Neither one alone, or at least the letter, I don't believe would be admissible except with the advertisement, but I think it is—one explains the other, and, at this point, I will offer both of these papers, Commission's Exhibit 29 and the advertisement, which has just been discussed.

(The documents referred to were handed to counsel for the Respondent.)

Mr. Hanley: We just have a general objection to these Exhibits.

Trial Examiner Ballinger: Off the record.

274 (There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: I make a specific objection to these documents that they do not prove anything as to the giving of any discounts by any of the dealers named, or that the prices charged by such dealers were at variance with ordinary and prevailing prices, and do not prove any discriminatory prices given by any of the dealers.

Trial Examiner Ballinger: Neither prove nor tend to prove. Let me examine the documents first.

Mr. Austin: I would suggest that if they may have any such tendency, then the amount to which they prove it would be something to be argued to the Commission, I should think, at a later date.

Trial Examiner Ballinger: The objection is overruled. The documents are admitted in evidence as Commission's Exhibits 29 and 30.

Mr. Hanley: May I add this further ground to my objection? The Exhibits 29 and 30 are further objected to for the reason that they indicate, if anything at all, relative to prices, that the dealers named in the advertisement and letter, had, apparently, undertaken to advance the price above what was then the prevailing price, and that the action referred to in the letter and the advertisement was not the giving of a discriminatory price by the dealers 275 named, but was merely a reduction in their price and a return to the then prevailing price.

Mr. Austin: That's, again, argument upon the face of the documents.

Mr. Hanley: I wanted to get my record straight.

Trial Examiner Ballinger: The objection is overruled, subject, however, to a later motion to strike.

(The document referred to was marked "Commission's Exhibit 30" for identification.)

(The documents referred to, heretofore marked for identification "COMMISSION'S EXHIBITS 29 and 30" were received in evidence.)

276 By Mr. Austin:

Q. Do you have a man named Kroh in your organization?

A. Yes, sir.

Q. Is he there now?

A. Yes, he is.

Q. Working with you now?

A. Yes, sir.

Q. What is his capacity?

A. He acts as a service manager in one of our stores, the one on Grand River.

Q. Which store? The Grand River store?

A. The one on Grand River, yes, sir.

Q. Have any of your stations ever given premiums with gasoline, merchandise premiums?

A. No, sir; except perhaps as an anniversary souvenir for a day or so, but not over a period of time. I have no recollection of giving premiums.

Q. How long would the souvenirs be given?

A. Two or three days maybe in connection with the opening of a new store or an anniversary; then that would be given to all customers in the store, and gasoline would be included with that. It wouldn't be limited to gasoline customers.

Q. What sort of premiums were given on those days?

A. I have no recollection now. There might be such
277 things as balloons or key cases—key rings, I should say. I recall that as a souvenir on one of the anniversaries, or other souvenirs of that nature.

Trial Examiner Ballinger: What do you mean by a balloon?

The Witness: Toy balloons. We have had a balloon made as a replica of one of our service men that were given to youngsters.

By Mr. Austin:

Q. Haven't you for a number of years given away newspapers to all gasoline purchasers, free newspapers?

A. That is not a souvenir. I wasn't thinking—

Q. I asked you about merchandise premiums.

A. Well, I wasn't thinking of that as a premium because we give that to all custemers, to people in the service as well as on the drive, and it has been our practice for a number of years to give newspapers, but it has no relationship to the gas they bought. I thought of—

Q. Did every purchaser who went into your station to buy gasoline receive a newspaper free?

A: Yes, as well as some of those who didn't buy gas.

Q. Well, just answer my question, Mr. Gershenson.

A. No, I can't answer that question.

Q. Were those papers given morning, afternoon, evening, or when?

278 A. During our business hours. There might be a number of customers who buy gasoline who don't get the newspapers. I don't—

Q. If they don't get it, it is because they don't ask for it, isn't it?

A. It is because they don't ask for it, that is right, or they don't want it.

Q. Is that always the latest edition of one of the Detroit papers?

A. Not necessarily; and there are times when we don't have any newspapers.

Q. What papers are given?

A. We have given the Detroit papers from time to time or any one of them, I should say.

Trial Examiner Ballinger: Over what period of time?

The Witness: This goes back several years, your Honor, four or five years.

Trial Examiner Ballinger: And it has continued right through?

The Witness: Yes, sir.

Trial Examiner Ballinger: Anybody buying gasoline at your store would be entitled to a newspaper of that issue, the day's issue?

The Witness: If they want one, yes, your Honor,
279 but what I tried to say is anybody buying anything
else gets it, too. I mean, it is just part of our regular—

Trial Examiner Ballinger: Anyone buying merchandise at your store—

The Witness: That is right.

Trial Examiner Ballinger: —including gasoline—

The Witness: Yes, sir.

Trial Examiner Ballinger: —would be entitled to it?

The Witness: Yes, your Honor, that is right.

By Mr. Austin:

Q. Haven't you, from time to time, given to gasoline customers with the purchase of gasoline a 2-ounce bottle of Pyroil?

A. You mean to all gasoline buyers?

Q. Well, to some of them?

A. Yes, we did that for a while to advertise Pyroil.

Q. When did you do that?

A. I have no recollection as to that. We don't have any records to show that. I would say that we have been —we started doing that about two years ago, in about '39.

Q. Started it in '39 or discontinued it in '39? I didn't hear you.

A. Maybe it was started in '38 or discontinued in '39. It had no—

280 Q. Didn't you give some Pyroil in 1940?

A. Yes, I would say. We still have some, that if a customer will ask for it, that it is available. We don't offer it to all gas customers, but if somebody wants to put some in their tank, why, we will supply it.

Q. Your service men frequently told the customers about it, didn't they?

A. If they did, it wasn't part of their instructions. It wasn't part—

Q. Didn't you ever tell them to give it away?

A. Yes, sir.

Q. You didn't have it to put away and store it?

A. We sold it in the store. We sell it in larger cans. The purpose of giving that was to get people to try it; if they liked it, to buy a larger can or put it in their motors. It was more in the nature of a sampling process.

Q. But these 2-ounce bottles were given free, were they not?

A. Yes. I should clear that. It wasn't a 2-ounce bottle. We gave them the contents of it. We retained the bottle. The bottle was worth several times over the contents. The customer didn't take the bottle. We put a little in the tank.

Q. You put the 2 ounces in the tank?

A. Or an ounce and a half.

Q. Didn't you have it in 2-ounce bottles?

281 A. No. We filled them ourselves. We buy it in the barrel. Each one of those bottles cost us less than a cent.

Q. You put it—

A. In the tank.

Q. —in the tank?

A. Yes, sir.

Q. For the customer?

A. That is correct.

Trial Examiner Ballinger: Was this that you were giving something away that you were buying or something that had been given to you?

The Witness: Well, we bought it in barrel lots.

Trial Examiner Ballinger: And gave it away in small quantities?

The Witness: Yes, sir. I might qualify that. Our price—we were given a special price with the idea of giving it away as samples, because we sold the same product in 25 or 50 cent cans, and it was part of the merchandising program of that manufacturer for us to do that. They supplied us with banners.

Trial Examiner Ballinger: Then, it didn't cost you anything?

The Witness: Well, a nominal sum, very little, if anything.

282 By Mr. Austin:

Q. Did you ever see this camera or one like it (indicating)?

A. Yes, sir.

Q. Will you state what that carton contains?

A. It contains a camera.

Q. Film also?

A. No, the film—

Q. Well, you might look and see.

A. Well, if this didn't—this one does, yes. I mean, when they came packed, there was no film in it.

Q. What connection has that with your business? That is, you describe how it was used.

A. This was—the complete story of this was covered with the ad I showed you, but we sold this camera and film for 39 cents to any customer. Well, at first it was to anybody making a purchase, they had to buy something else to buy this, and afterward we just sold them outright in connection with a snapshot contest that we were running. Either gasoline customers or anybody was privileged to buy one. We didn't give it away. We sold it.

Q. Didn't you advertise in the newspapers that gasoline customers could purchase one of those for 29 cents?

A. Well, for 39 cents, as well as any other customer.

Q. 39 cents includes the film, didn't it?

283 A. That is right, but we didn't sell the camera without the film. We sold the two together, I am pretty sure.

Q. But that was offered as an advertising inducement, was it not, to try to get people into your store to buy other things?

A. Into our store, yes.

Q. Including gasoline?

A. We didn't exclude gas customers from buying that, so your statement is correct, but it wasn't given as a premium. We sold both the camera and the film.

Q. What did the camera cost you?

A. We made a profit, I believe of 9 or 10 cents on the camera and film together.

Q. Selling them at that price?

A. Yes, sir.

Q. Were these cameras sold anywhere else at a higher price?

A. I believe they were used throughout the country for the same type of promotion. At least, the manufacturers' representative showed me ads where they had used them in other territories. I don't know whether anybody sold them.

Q. They cost you less than what you sold them for?

A. Considerably, yes.

Q. So you weren't giving away anything when you sold these for 39 cents?

284 A. No, sir; no, sir. We made a profit, and I believe they cost us 19 cents.

Q. I show you a little piece of paper here and ask you if that is a receipt issued by one of your stations, minus the writing on the front of it. I suppose that wasn't on there when it was given, was it?

A. I have no way of knowing whether it was on there. I assume that because this is a printed—all the rest of it is printed by the cash register, and that appears to be written in script, so—

Q. Is that a receipt for the purchase of gasoline at one of your stations?

A. Yes, it is.

Q. How many gallons and what price?

A. It appears to be 6.4 gallons for a dollar on May 9th.

Q. That would probably be 1940, would it not, judging from the price?

A. Yes, I think so.

Q. And that shows the posted price at the station at the time, does it not?

A. Yes, it does.

Q. That is the price at which you were selling gasoline to all retail consumers?

A. Yes, sir.

Q. And were not customers who bought gasoline 285 and received these receipts told to save the receipts?

A. May I see that?

Q. During 1940 (handing the paper to the witness).

A. On the back of this receipt there is also the stamped notation "Sold for commercial use." And that receipt identifies these commercial buyers that I referred to earlier in my testimony this afternoon, and only such receipts as had that stamp on, they were the only ones that had any value.

Q. What value did they have?

A. Whatever the prevailing commercial discount was at the time.

Q. Wasn't it most of the time 2 cents a gallon?

A. Well, it has been 1 cent and 2 cents.

When you say most of the time, I don't know what period you are referring to. It has been 1 and 2 cents.

Q. Well, I refer to 1940. How about 1940?

A. I believe it was 2 cents in '40. It might have been 1 cent in '39.

Q. Prices were lower in '39, weren't they, most of the time?

A. Well, when?

Trial Examiner Ballinger: What do you mean by "might have been"?

The Witness: Well, I don't recall now. There are
286 varying periods depending upon the cost of gasoline
at any given period as well as the posted price. If the margin in there—

Trial Examiner Ballinger: Well if you are not certain at all about it, that statement should be stricken from the record, what might have been.

Mr. Austin: Your Honor, it was at least 2 cents, he said, in 1940.

Trial Examiner Ballinger: Yes.

By Mr. Austin:

Q. I will ask you if this is correct: at the times when it was 1 cent, it was during a price war or at some other time when your margin was low, when the margin between your posted price and what you paid was very small? You couldn't afford to give a large commercial discount, obviously, at that time.

A. I can't answer that.

Q. You are not sure about that?

A. Well, I mean, just saying something about affording—I mean I can't either agree or disagree.

Q. Let's go back. We know it was 2 cents in '40?

A. I can only say that our commercial discount was whatever the prevailing commercial discount was, and we follow competitive conditions in that, and I have no independent recollection.

287 Q. Didn't you say that in 1940 you thought it was 2 cents?

A. I believe it was 2 cents.

Q. You know it has been 2 cents over a considerable period, don't you?

A. From time to time it has been 2 cents, yes.

Trial Examiner Ballinger: That is your best recollection?

The Witness: Yes, sir, it is, your Honor.

By Mr. Austin:

Q. Now, the person who received this, if I understand you correctly, would bring this back the next time he bought gasoline or any other article at your store and receive 2 cents per gallon based on the number of gallons purchased here; is that correct?

A. I don't believe I follow you.

Q. Well, then, you tell me how that was used.

Trial Examiner Ballinger: Referring to that, what do you refer to? You haven't had it marked, have you?

Mr. Austin: I think the testimony is clear, your Honor, that it refers to receipts, printed receipts issued for the sale of gasoline at Ned's, and I am going to offer it in evidence.

Trial Examiner Ballinger: You might have it identified.

Mr. Austin: I mean there may be other receipts
288 in force other than this—I don't know—but he said
this was a printed receipt given at his station.

Trial Examiner Ballinger: Let the reporter mark the document which has been referred to in the recent testimony of the witness as Commission's Exhibit No. 31, for identification.

(The document referred to was marked, for identification, "Commission's Exhibit 31.")

By Mr. Austin:

Q. Now, will you explain just what value that has to the person to whom it was issued?

Trial Examiner Ballinger: Referring now to the document just identified.

A. This receipt is only given to purchasers of gasoline who are entitled to the commercial discount, and at the end of a month or at any period that they elect, a week or a month, they could turn these in to our office and receive book credit or merchandise credit. It is the same—it amounts to payment on account for the value that they have. In other words, if it is for six gallons, this would be worth 12 cents, and it is because of the fact that that purchaser bought gasoline on the commercial price, and retail buyers didn't get any receipt at all. See, that would only be used in connection with a commercial purchase of gasoline.

289 Q. Well, by commercial purchaser, the persons whom you described awhile ago in your testimony this afternoon as being allowed commercial discounts at your stations?

A. Not only at our station. I said—

Q. I am just asking you whether the commercial purchaser you are referring to now is the same sort of a purchaser that you were referring to a while ago when we first talked about commercial discount?

A. Yes, that is right.

Mr. Austin: I offer this card, Commission's Exhibit 31, for identification, in evidence.

Mr. Hanley: No objection.

Trial Examiner Ballinger: It is admitted in evidence.

(The document referred to, heretofore marked, for identification, "COMMISSION'S EXHIBIT 31" was received in evidence.)

Mr. Austin: I think, unless I find something else, I am through with the direct examination of this witness.

Trial Examiner Ballinger: Let us take a recess for five minutes.

(A short recess was had.)

Trial Examiner Ballinger: Come to order.

By Mr. Austin:

290 Q. This is the volume of your newspaper ads, Mr. Gershenson? (Indicating.)

A. Yes.

Mr. Austin: Off the record, please.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

By Mr. Austin:

Q. What is the date that this file covers? What are the dates?

A. I haven't looked at it myself. You can tell that from the start and finish there. There are dates on there, about three or four years, I think.

Q. These apparently go from February, 1941, back to December of 1937.

Trial Examiner Ballinger: The file which counsel for the Commission holds in his hand is what?

The Witness: Is all newspaper ads that we run during the period shown on the date.

Trial Examiner Ballinger: And is a file kept in your office?

The Witness: Yes; that is, in our office.

By Mr. Austin:

Q. And it contains all of the newspaper ads; that is, there aren't any other ads that you know of in here?

A. That is right.

291 Q. On gasoline or otherwise?

A. That is correct. Oh, there might be one or two that inadvertently weren't filed, but, as far as I know, that is a complete file.

Q. I asked you to obtain certain information regarding your volume of sales in 1936. Have you got that information?

A. Yes, sir. I had it a minute ago. Our total volume in 1936 was 2,694,000.

Q. Is that for four stations?

A. One of them was opened during the year, in June of 1936. That is three stations, plus a fourth one that was opened in the middle of '36.

Trial Examiner Ballinger: That is gallons, is it?

The Witness: Yes, it is 2,694,000 gallons.

By Mr. Austin:

Q. Did you open any new stations in 1937?

A. No, sir. In the middle of '38—in July of '38 we opened a fifth one, and then in October we opened the sixth one.

Trial Examiner Ballinger: October of what year?

The Witness: 1938.

By Mr. Austin:

Q. That gallonage covers what brands of gasoline?

A. That is the composite of the Standard Oil brands 292 and Ford Benzol, both together.

Q. And the Standard Oil brands do not include Stanolind?

A. We do not sell Stanolind.

Q. Just Red Crown and Ethyl?

A. Yes, sir.

Q. And that is the total gallonage of Red Crown, Ethyl, and Ford Benzol?

A. That is correct.

Q. What percentage, approximately, constitutes Ford Benzol?

A. In 1936 it was 10%. I have it for another year, if you want it, 1940.

Q. All right.

A. 12% Benzol in 1940. I have the exact gallonage of Benzol for '36 if you want that.

Q. Well, you may state it.

A. Well, Standard was 2,449,000 and Benzol was 245,000. That is approximately 10%.

Q. Using this paper to refresh your recollection, can you state the total gallonage on your four stations in 1937, including Ford Benzol?

A. 4,393,000.

Q. Can you give the same figure for 1938, which would include two additional stations opened that year?

A. Of course, that included six stations, and that
293 was 4,797,000. For the same four stations I have that
figure here, too.

Q. Well, all right. Give the gallonage for the same four stations, the total.

A. Well, it dropped in '38 from '37. In '38 for the four stations, it was only 4,212,000.

Q. When were the other two stations opened, will you state again?

A. Well, the fifth one was opened in July of 1938, and the sixth one was opened in October of 1938.

Q. That first total that you gave includes those two stations for the balance of the year?

A. Yes, it does. That includes all six stations, whatever period of the year they were opened.

Mr. Austin: That is all.

Cross-Examination by Mr. Hanley.

Q. Directing your attention to the criminal prosecution which occurred early in 1938, Mr. Gershenson, is it true that your company and the Standard Oil Company were the Defendants in that action?

A. Yes.

Q. And was that action dismissed by the Court?

A. Yes, it was.

Q. As to all of the defendants?

294 A. Yes, sir.

Mr. Hanley: That is all.

Mr. Austin: All right. Thank you, Mr. Gershenson.

Trial Examiner Ballinger: The witness is excused.

(Witness excused.)

Mr. Austin: Mr. Biber.

Trial Examiner Ballinger: What is your full name?

The Witness: Max Biber.

MAX BIBER was thereupon called as a witness by and on behalf of the Commission, and, having been first duly sworn, testified as follows:

By Mr. Austin:

Q. What is your residence address, Mr. Biber?

A. 18251 Prairie, Detroit, Michigan.

Q. What is your business?

A. I am the general manager for the Citrin-Kolb Oil Company.

Q. Are you an attorney?

A. Yes, I am.

Q. Is the Citrin-Kolb Oil Company a corporation or a partnership?

A. No, it is a co-partnership.

Q. Who are the partners?

A. Jacob A. Citrin, Nathan Kolb, and Barney Citrin.

295 Q. In what business is the Citrin-Kolb Oil Company engaged?

A. They are engaged in the wholesale and retail sale of petroleum products.

Q. When was that partnership organized?

A. In 1922, I believe.

Q. Has that company continuously been engaged in the sale of gasoline in Detroit since that time?

A. Yes, it has been.

Q. Was it always engaged in the sale at wholesale or was it formerly only at retail?

A. I would say that the retail operations began before 1922, but it is about sixteen to eighteen years that they are also engaged in the wholesale sale of petroleum products.

Q. Does the Citrin-Kolb Oil Company now sell gasoline to other retail dealers?

A. They do.

Q. About how many dealers do you serve?

A. About 54, I believe, today.

Q. Have you the figures on that back as far as 1936? That is, as to the number of retail stations that you had as sub-dealers?

A. Yes, I believe we have. I believe you have the figures there, if I can use them. You have my last copy of
296 them.

Q. Well, I am not talking about operated stations now.

A. I understand that.

Q. I didn't know that I had the figures on the others.

A. Maybe I have a schedule here.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

The Witness: What does was that you wanted?

By Mr. Austin:

Q. From 1936 on. From 1936 on.

A. January 1st, 1936, we served a total of 29 dealer stations. As of January 19, 1936, there were 43; January 1st, 1937, 51; January 1st, 1938, 57; January 1st, 1939, 66; January 1st, 1940, 52; and December, 1940, 57.

Q. Do those figures include stations which were operated by the Citrin-Kolb Oil Company?

A. Yes, they do.

Q. What brand of gasoline does Citrin-Kolb Oil Company deal in?

A. The Standard brands of gasoline; Standard Red Crown, Solite with Ethyl, and Stanolind.

Q. Do you sell any Ford Benzol?

A. No, we don't.

Q. Do any of your stations handle Ford Benzol?

A. Yes, they do.

297 Q. All of them?

A. No, not all of them.

Q. About how many?

A. Are you referring to our dealer stations?

Q. Yes.

A. I would estimate about half of them.

Q. As to the stations which Citrin-Kolb has operated, or now operates, is Ford Benzol sold at those stations?

A. They now operate five stations, and Ford Benzol is sold at two of them.

Q. The volume figures shown in the Secretary of State's reports, which we introduced here in evidence,—are you familiar with those reports?

A. Yes, I am.

Q. Those would not include the Ford Benzol, would they?

A. I don't believe so; I don't believe we pay the state tax on Ford Benzol.

Q. You stated that you didn't sell Ford Benzol as a jobber.

A. No.

Q. And isn't it true that those reports are based upon the—

A. State tax.

Q. —State tax on sales of licensed jobbers?

A. That's right.

298 You are licensed jobber?

A. We are.

Q. Have you been purchasing Standard Oil gasoline from the Standard Oil Company since 1936?

A. We have.

Q. Have you ever purchased it from any other source?

A. No.

Q. Does your company own a bulk plant?

A. Yes, they do; two bulk plants.

Q. Where are they located?

A. One is located at 14481 Livernois and the other at 14445 Linwood.

Q. Where is your office located?

A. The office is located at 14445 Linwood.

Q. Are both of those bulk plants operated now?

A. They aren't operated today, but they are operated from time to time, when we need the storage.

Q. Is one of them operated today?

A. Yes.

Q. Which one is that?

A. 14445 Linwood.

Q. Is that the larger plant?

A. That is the larger plant.

Q. When were those bulk plants acquired?

A. The Livernois bulk plant was acquired in 1927 299 or '28, and the Linwood bulk plant was acquired in 1936.

Q. Does your company purchase all its gasoline from Standard Oil Company at tank car prices?

A. They do.

Q. And how long has it been buying at tank car prices?

A. Several years. Ten years, at least.

Q. Prior to 1936?

A. Yes.

Q. Can you state the locations and period of operation of all retail gasoline stations operated by Citrin-Kolb Oil Company from 1937 to the end of 1940?

A. Yes, I can from that information (referring to documents.) Do you want the periods of operation of each?

A. State the location of station and the dates during which it was operated.

A. The location at 14481 Livernois operated from January 1, 1937, until February, in the month of February, 1938, then we leased that station out. It came back to us and we operated it again from March 8, 1939, to December 22, 1940.

The location at Jefferson and Nottingham and Grosse Point, operated from January 1, 1938, to the present time.

The location at 2400 Brush Street operated from June 2, 1939, and we are operating it today.

The location at 9504 Woodward operated from July
300 27, 1939, to December 29, 1940.

The location at 17100 Joseph Campau operated from August 17, 1939, to February 27, 1941.

The location at Wyoming and Eaton operated from July 1, 1940, and we are still operating it.

The location at 8620 Linwood operated from January 1, 1937—may I interrupt here? Some of these were operated before January 1, 1937, but you only wanted them from January 1, 1937.

Q. Yes; that will be enough.

A. January 1, 1937, until in the month of October, 1938, and that same location, again, from September 27, 1940, to the present date.

The location at 14445 Linwood, from October 15, 1940, and we are still operating that station.

The location at 8716 Linwood, January 1, 1937, to October 6, 1937.

The location at Grand River and Littlefield from December 15, 1937, to January 21, 1938.

Q. Thank you. Now, as to the prices which were charged for the gasoline sold at these company-operated retail stations.

Mr. Austin: I would like to have these three sheets marked, for identification, Commission's Exhibits 32-A, 32-B, and 32-C.

301 Trial Examiner Ballinger: The reporter will mark the papers Commission's Exhibits 32-A, 32-B, and 32-C.

(The documents referred to were marked, for identification, "Commission's Exhibits 32-A, 32-B, 32-C.")

By Mr. Austin:

Q. I show you those documents just marked, for identification, and ask you if you will state what they are.

A. That is a schedule prepared by myself from the records of the company showing the retail prices of gasoline at these locations indicated on the schedule, at certain dates.

Q. Do those cover the prices from 1937 to the end of 1940?

A. These don't—yes, all these schedules together do cover the prices from January 1, 1937, to February 27, 1941.

Q. On this sheet marked Commission's Exhibit 32-C, which states prices from January 1, 1937, to December 21, 1938, were those prices the same at all of the stations which were operated during that period?

A. They were.

Q. So that that sheet applies to all stations which you stated to be operated during that period?

A. That's right.

Q. Are these the prices posted at the station, or the prices actually charged, or is there any difference?

A. There is no difference between the posted price and charged price.

302 Q. And is this the price actually charged?

A. That is the price actually charged.

Mr. Austin: I offer these three sheets in evidence marked Commission's Exhibits 32-A, 32-B, 32-C, for identification.

Trial Examiner Ballinger: Let counsel for the Respondent examine them.

(The documents referred to were handed to counsel for the Respondent.)

Mr. Hanley: No objection, except a general objection.

Trial Examiner Ballinger: The documents are admitted in evidence as Commission's Exhibits 32-A~~, 32-B, and 32-C~~.

(The documents referred to, heretofore marked, for identification, were received in evidence as COMMISSION'S EXHIBITS 32-A, 32-B, and 32-C.)

Mr. Austin: I would like to have this letter marked, for identification.

Trial Examiner Ballinger: The Reporter will mark the document Commission's Exhibits 33-A and 33-B, for identification.

(The document referred to was marked, for identification, "Commission's Exhibit 33-A and 33-B.")

By Mr. Austin:

303 Q. I show you this letter and ask you if you wrote that letter (handing document to the witness).

A. Yes, I did.

Q. To whom is it addressed?

A. It is addressed to Mr. Cyrus B. Austin.

Q. Was that in response to a certain request I made of Mr. Shapiro in clarification of papers demanded by subpoena?

A. That's right; it is.

Q. Will you state, generally, what that letter shows?

A. This letter shows the invoice price of Red Crown gasoline to five specific dealers inquired about by Mr. Austin, and it also shows any discounts given to these dealer accounts.

Q. Does it also contain a true statement regarding the rentals charged to these dealers?

A. It does.

Mr. Austin: I offer this letter in evidence.

Trial Examiner Ballinger: Is there an objection?

Mr. Hanley: None, except a general objection.

Trial Examiner Ballinger: The documents are admitted in evidence as Commission's Exhibits 33-A and 33-B, subject to the general objection.

(The documents referred to were marked, for identification, "COMMISSION'S EXHIBITS 33-A and 33-B" and were received in evidence.)

304 By Mr. Austin:

Q. Are the invoice prices for the five stations shown here from January 1, 1938, to December 31, 1940, identical with the prices charged all other dealers—

A. They are.

Q. —to whom gasoline was sold for resale by Citrin-Kolb?

A. Yes, sir, they are.

Q. And how many of the fifty-odd stations that you have mentioned as being operated in 1940 are lessees of Citrin-Kolb? If you can state approximately, it will be all right.

A. (Referring to documents) I think it is 22. You want the figure for 1940?

Q. Yes.

A. Yes, 22.

Q. Those are stations, I suppose, that are located on properties that are either owned or leased by Citrin-Kolb Oil Company?

A. That is right.

Q. And are your other dealers, either dealers who own them or lease their stations from some other source?

A. Yes.

Q. What is the practice of the Citrin-Kolb Oil Company regarding rentals charged to these dealers?

305 A. On our leased stations?

Q. As to amount, yes. Let me ask you, first, as to properties which you lease and then sub-lease to the dealer.

A. Properties which we lease and sub-lease are treated the same as owned properties, in that we set a value on the property as a service station but where we do lease and sub-lease, usually we determine the value by the rental which we pay. In other words, we determine that was fair rental to pay and sub-lease it at the same rental.

Q. The station pays you the same as you pay your lessor?

A. That is not universal, but usually we fix it at that. Sometimes, during a term, we reduce it, if we find a man can't make out, and sometimes we have raised the rentals.

Q. You have noted one exception here in this letter to where rent was waived due to a price war. Did that situation exist or does that situation exist with any other station?

A. No, it does not.

Q. It is also stated here that for the year 1939, the invoice price to all dealers was the same and they conformed with the above schedule, with certain named exceptions. You state 1939, I suppose, because that is the year I asked for.

A. That is right.

Q. Was the invoice price to all dealers the same, 306 with the same exceptions, in 1938 and 1940?

A. Yes, they were.

Q. The three locations mentioned in this letter, of the five, are 4200 3rd Street, 1309 West Warren, and 11301 Van Dyke. Are those three stations all operated by the same management?

A. They are.

Q. Who is that?

A. Langer and Cohen.

Q. Does Langer and Cohen also operate certain other stations?

A. Yes, they do.

Q. And how many other stations?

A. Two others.

Q. Can you state the addresses of those?

A. 13244 Dexter and the other one is John R and Euclid.

Q. Do those two stations which you have just named,—or, rather, does Langer and Cohen, in purchasing gasoline to be delivered to those two stations, receive the same rebate from the invoice price as is shown here for the three stations listed in this letter?

A. They do.

Q. Are any of your dealers charged a rental based on gallonage?

A. I think we have a few that have a gallonage rental.

307 Q. Is that in addition to the flat rental?

A. I don't believe we have any—I am sure we don't have a lease with a flat rental and a gallonage. Our leases run with a minimum rental and then a gallonage over a certain amount.

Q. In that case, would the minimum rental ordinarily be the amount that you pay for your lease?

A. No, we don't have that arrangement with any subleased station; it is only an owned and leased station.

Q. How many properties do you own on which the service station is operated by other dealers; that is, by lessee?

A. Eight, I believe. I think I have it on here (referring to a document); seven.

Q. And that gallonage arrangement would only be in connection with one of those seven?

A. That's right.

Q. Did you hear Mr. Raupagh give some testimony regarding Standard Oil charge accounts?

A. Yes, I did.

Mr. Hanley: What was that question?

(The question was read.)

Mr. Hanley: You mean the credit card?

Mr. Austin: Yes.

By Mr. Austin:

Q. Do persons holding Standard Oil credit cards
308 purchase on credit at Citrin-Kolb stations?

A. Yes, they do.

Q. That includes your dealers as well as operators?

A. That's right.

Q. And are those credit cards honored at all your stations?

A. I know they are honored at all the company-operated stations. Whether the dealers honor them or not, I don't know.

Q. Do the dealers turn in credit slips to you sometimes on those cards?

A. Do they? Yes, they do.

Q. Do you furnish any list of names to any of your subdealers of persons entitled to credit in purchasing Standard Oil gasoline?

A. Yes, we do. It isn't—

Q. What is the purpose of such a list?

A. The Citrin-Kolb Oil Company has certain accounts in the City of Detroit that probably run trucks or have many cars that run throughout the City of Detroit, and we carry those charge accounts, and these accounts may charge their gasoline at any of our dealer stations.

Q. Those are your accounts, as distinguished from Standard Oil accounts?

A. That's right. Similar set-up to Standard Oil except that they are restricted to the Citrin-Kolb account.

309 Q. In other words, you make the collection on that and people who charge on Standard Oil cards, you pass that along and let the Standard Oil make the collection?

A. That's right.

Q. Are persons on either one of those lists, that is, either on your list of credit customers or persons holding Standard Oil credit cards, are customers in either one of those groups permitted to buy at any of your operated stations at a lower price than is charged to other customers?

A. They are not.

Q. Have any of your dealers ever been requested by your company to give any discount to persons coming within either one of those categories?

A. They have not.

Q. Do you operate or lease a station at Woodward and Vernor?

A. We neither lease nor operate that location.

Q. Do you serve that dealer?

A. Yes, we do.

Q. Is that station within the last two years—has that station been given any advantage in purchasing gasoline or whether it be an advantage or not, has it received any rebate or has it paid the same tank wagon price as other stations served by you?

A. It has paid the same tank wagon price, invoice
310 price, for gasoline.

Q. Any rebate or other concessions?

A. None whatsoever.

Q. Was that station closed at one time for non-payment of sales tax?

A. I believe it was, for about four days.

Q. Is the operator of that station now the same operator that operated it previously, before it was closed?

A. No, I believe it has changed hands three times since then.

Q. In a case like that, how is that liability removed?

A. The liability for what?

Q. To sales tax.

A. I don't know that it is.

Q. I just wondered what the practice is here if a station doesn't pay the sales tax and gets in arrears, what the State does about that.

A. The State levies against the personal property belonging to the tax payer.

Q. The new operator who takes that over, is he forced to pay that off?

A. If he takes over the business of the previous operator, he becomes responsible for the sales tax. If, however, the station is closed or abandoned and the landlord
then acquires a new tenant, and the tenant takes over
311 none of the personal property of the previous tenant,
then they have no claim against the station or the new tenant.

Trial Examiner Ballinger: Is this merely informative?

Mr. Austin: Probably. If I ask one more question, I think that will conclude it.

By Mr. Austin:

Q. I wanted to ask if Citrin-Kolb Oil Company ever paid any of that arrearage for sales tax, or assumed any obligation for it.

A. They never paid it, and I don't think anybody ever will pay it.

Q. Has your company an arrangement with any gasoline station to whom you sell gasoline for—when I say gasoline station, I assume I am referring to the operator or possibly the owner of the property, whichever it may be—for an arrangement whereby you pay a certain rental per month for the right to use the driveway in that station?

A. No.

Q. You don't know of any such arrangement?

A. I know there is no such arrangement.

Q. Have you ever had such arrangement?

A. No.

Mr. Austin: I would like to have this card marked 312 for identification.

Trial Examiner Ballinger: The reporter will mark the document Commission's Exhibit 34, for identification.

(The document referred to was marked, for identification, "Commission's Exhibit 34.")

By Mr. Austin:

Q. Are you familiar with that card, or cards like it (handing document to the witness)?

A. Yes, I am.

Q. Will you describe what that card is, and how it is used?

A. That is—I imagine it is called a discount card. It says: "This card will save you 2 cents per gallon on a gallon of Standard Red Crown or Ethyl gasoline."

Q. What station is that named?

A. That is the Jefferson and Nottingham service.

Q. Is that station operated by Citrin-Kolb?

A. It is.

Q. Were those cards given out by that station?

A. Yes, they were.

Q. And when?

A. During some period of the gas war, but I don't know when.

Q. Well, 1938 or 1939; would it be one of those two years?

313 A. I would say 1938.

Q. And to whom were those cards given?

A. Given to almost anyone, I guess.

Q. Did that entitle the holder of those cards to 2 cents off the posted price?

Trial Examiner Ballinger: There is a guess again.

The Witness: They were given to anyone.

Trial Examiner Ballinger: Were they given out to anyone who bought gas?

The Witness: I imagine some of them were even distributed in parked automobiles.

By Mr. Austin:

Q. Did that entitle the holder of the card to a discount of 2 cents from the price posted?

A. Yes, it did, in the form of stamps also. It is indicated on the card they are to ask for stamps in order to get the 2 cents discount.

Trial Examiner Ballinger: The stamps ultimately were redeemed, wholly, in gas?

The Witness: In gas or other merchandise.

By Mr. Austin:

Q. Did they have to get the stamps first on the gas purchase?

A. They had to get the stamps.

Q. And those could be used on any subsequent 314 purchase of merchandise or gasoline?

A. That's right.

Q. Have you any way of establishing the length of time during which these cards were in use?

A. I remember at the time they were out about three days when a group of our dealers objected to our merchandising in that manner and we called in the cards.

Q. Would you say that those discounts were only given on stamps, were only given for a period of three days?

A. No, I would say because the cards were out and customers asked for them, I would say it possibly lasted two to three weeks before we apologized to the customers for the card.

Q. And were they ever resumed or used at any other time?

A. I don't believe they were.

Q. Are you sure that they were not used again in the fall of 1939?

A. They were used one time. If they weren't used in 1938, they were used in 1939; I don't remember which.

Q. But only during one period?

A. But only during one period.

Mr. Austin: I offer this card in evidence.

Trial Examiner Ballinger: Without objection, it is admitted.

Mr. Hanley: Nothing but the general objection.

315 (The document referred to was marked, for identification, COMMISSION'S EXHIBIT 34, and was received in evidence.)

Mr. Austin: I would like to have this card marked for identification.

(The document was marked, for identification, Commission's Exhibit 35.)

By Mr. Austin:

Q. Will you state what station that is, and whether that was an operated station of Citrin-Kolb?

A. 14445 Linwood; and was not an operated station at that time.

Q. Are you familiar with the issuance or use of that card?

A. Yes, I am.

Q. And will you state it?

A. Exactly the same as the previous exhibit; same use and same type of card.

Q. At the same period or some other period?

A. Yes, at the same period.

Q. That is, you are positive that both were started the same time and ceased at approximately the same time?

A. Within a day or two of each other.

Q. Did your company have that card printed for that station?

A. No, we did not.

316 Q. It seems to be practically identical with this card except the name appearing on it, so it must have been done at the same place.

A. There are many, many stations in Detroit which had this identical card. The man did a good business out of them!

Q. How do you know that that card was not issued by that dealer longer than the time that you used this one (referring to Commission's Exhibit 35)?

A. You mean that it didn't last any longer?

Q. Yes.

A. Our office happens to be adjacent to this dealer station and I know when it was started and when it was stopped. I am there every day.

Mr. Austin: I offer this card in evidence.

Trial Examiner Ballinger: Subject to the general objection reserved to counsel for Respondent, the document is admitted in evidence as Commission's Exhibit 35.

(The document referred to, heretofore marked, for identification, "COMMISSION'S EXHIBIT 35," was received in evidence.)

Mr. Austin: I would like to have this card marked for identification.

Trial Examiner Ballinger: The reporter will mark the document Commission's Exhibit 36, for identification.

317 (The document referred to was marked, for identification, "COMMISSION'S EXHIBIT 36.")

By Mr. Austin:

Q. Will you give me the same information for this card, if you will (handing document to the witness)?

A. Yes, this is the same kind of a card.

Trial Examiner Ballinger: Issued by whom?

The Witness: Issued by the owner of the station at 8620 Linwood.

By Mr. Austin:

Q. Is that one of your subdealers?

A. Yes, it is.

Q. That station was not operated by you?

A. No, it was not.

Q. Do you have any idea or any knowledge, rather, as to when and how long that card was used?

A. This card was used at the same time, but it was printed similar to these cards, with the legend "Citrin-Kolb Oil Products" on the card, and we asked this dealer to discontinue using that card or any card with our name on it, as he was an independent operator and in that neighborhood our reputation is good and has been for years, and our name was valuable, and we asked him to discontinue using the card and he did, I think that same day; discontinued using this card, but I believe he had another printed without our name on it.

318 Q. What is the difference between that one and Commission's Exhibit 35, which says, "Citrin-Kolb Products"?

A. No difference at all, except that that was in front of our office.

Q. Is there any reason why this fellow should use the name "Citrin-Kolb" and that one should not?

A. No. He didn't use it, either. That is how I know. When this one was stopped, he didn't use that subsequently, but he printed another card in the next few days.

Mr. Austin: I offer this card, number 36, for identification, in evidence.

Trial Examiner Ballinger: Subject to the general objection reserved to counsel for the Respondent, it is admitted in evidence as Commission's Exhibit 36.

(The documents referred to, heretofore marked for identification "COMMISSION'S EXHIBIT 36" were admitted in evidence.)

Mr. Austin: Here is a card I would like to have marked, for identification.

(The card referred to was marked "COMMISSION'S EXHIBIT 37" for identification.)

By Mr. Austin:

Q. What is the name of the station on that card?

A. John R. Horton Service.

Q. Is that a Citrin-Kolb dealer or Citrin-Kolb operator?

319 A. No, this is a Citrin-Kolb dealer.

Q. Have you ever seen those before?

A. No, this is the first experience I have with this card.

Q. If you have never seen it before, probably you cannot tell me much about it?

A. No, except what it says.

Q. Did you know that that station issued discount cards at any time?

A. No; I did not.

Trial Examiner Ballinger: Is that a station either owned or supplied by his company?

Mr. Austin: Yes. He says it is one of the stations supplied by his company, but not operated by it.

By Mr. Austin:

Q. Do I understand, then, that you have no knowledge as to whether this station ever offered the discount here stated?

A. No, I wouldn't know.

Mr. Austin: Here is another, for identification.

(The card referred to was marked "Commission's Exhibit 38" for identification.)

By Mr. Austin:

Q. I show you this card, Commission's Exhibit 38, for identification, and ask you whether that appears to have been issued by a retail dealer supplied by Citrin-Kolb?

A. Yes, it is.

320 Q. What is the name of the station?

A. There is no name on it as far as the station is concerned. The address is 9705 Dexter and Chicago Boulevards.

Q. Do you have any knowledge as to whether that station has at any time since January 1, 1937, given the discounts referred to on that card?

A. Well, I have heard that they gave discounts. I never bought gas there at a discount, but I believe they did give a discount.

Q. Did you ever see any of those cards before?

A. No, I never saw this card.

Q. Can you state whether or not that is a card which was issued by that station?

A. I wouldn't know whether they actually issued it or not.

Q. Are you familiar with the fact that a number of the dealers that purchased their gasoline from you were giving such discounts as were mentioned on the last two Exhibits during 1938 and 1939?

A. Tell me what you mean by "number" and I think I can answer that.

Q. Do you know of your own knowledge that any of your dealers were giving discounts off the prevailing retail price during that period?

A. Yes, they were.

Q. Do you know of your own knowledge whether

321 either one of these stations named on these two cards, marked for identification, were giving such discounts?

A. No, I don't.

Q. Exhibits 37 and 38. Can you state the names of any dealers purchasing from Citrin-Kolb Oil Company, who were giving discounts at some time between January 1, 1937, and the end of 1939?

A. Yes. I think the Vernor and Woodward station gave a discount.

Q. Have you purchased gasoline at other stations during that period that were giving discounts at the time you bought there?

A. You mean at other competitor stations?

Q. No, at other retail stations supplied by Citrin-Kolb.

A. No, I don't buy my gas there.

Q. You said you had personal knowledge of some cutting?

A. The knowledge I have would come through Mr. Peck of the Retail Gas Dealers Association, who would call me and say, "You have got a dealer over there that is cutting prices."

Q. After all, that is hearsay?

A. Well, on that information I would go over and talk to the fellow and he would tell me whether he is or not.

Q. Oh, I see. But you don't recall any other instances where you found that out; I mean, by your own investigation?

A. No, there is no other instance where I actually investigated and know.

322 Q. Well, that has been some two or three years ago, hasn't it?

A. Yes, it has been.

Mr. Austin: Without marking these for identification, I think I can hurry it a little bit.

By Mr. Austin:

Q. Tell me whether you have any previous knowledge of that card (indicating)?

A. No, I never saw this card before.

Q. Is that the Citrin-Kolb dealer whose name appears on the card?

A. He used to be. He isn't any more.

Q. How about this card (indicating)?

A. I have never seen this card before.

Trial Examiner Ballinger: Was that issued by one of your dealers?

The Witness: Yes, it was. It purports to be. That is one card that I don't think actually was. I don't know who made it, but I don't believe that was one.

By Mr. Austin:

Q. Well, do you know whether the Langer & Cohen station at 13244 Dexter did give any discount off the prevailing retail price during 1938 or 1939?

A. I don't believe they did.

Q. You don't know positively? You don't know that they did, do you?

323 A. I don't know that they did.

Q. I assume that you couldn't know that they didn't.

A. That is right. As a matter of fact, I don't believe that station was in existence. I don't believe the building was in existence in 1938 or the early part of 1939.

Q. How about 1940?

A. Yes, it was in existence in 1940, and I know of my own knowledge that there was no price cutting in 1940 at that station.

Q. Isn't that a pretty confident statement, Mr. Biber, knowing that you made it in all good faith, but could you know that unless you had been present there most of the time?

A. Well, I think I could because the station is operated by an employee of Langer & Cohen. In other words, the owner doesn't operate it himself, and I was present at several instances when his instructions were that there were no discounts to be given.

Q. Nevertheless, isn't it possible that these cards may have been given out to some customers without your knowledge?

A. I imagine it is possible.

Mr. Austin: In view of the fact that there has been some questioning regarding it, I would like to have this card marked for identification, and the envelope.

(The card and envelope referred to were marked "Commission's Exhibit 39-A and 39-B." for identification.)

324 Mr. Austin: 39-B is an envelope in which the card marked 39-A is contained. Rather, the card has the name of Langer & Cohen, 13244 Dexter, and is the card to which the testimony immediately preceding refers.

By Mr. Austin:

Q. Have you ever seen that card, or one like it, previously (indicating)?

A. No, I haven't.

Q. Do you know whether the Theatre Park Service at 1900 Cass Avenue offered a two cent discount on gasoline in 1939?

A. I don't know that they did.

Q. That station purchases its gasoline from Citrin-Kolb?

A. It does now, but to the best of my recollection, I don't think they did in 1939.

Mr. Austin: I think that is all, Your Honor.

You may cross examine, Mr. Hanley, if you wish.

Mr. Hanley: I have just a few questions.

Trial Examiner Ballinger: Proceed.

Cross-Examination by Mr. Hanley.

Q. What were those Langer & Cohen addresses that do not appear on Exhibits 33-A and B, Mr. Biber?

A. That is 13244 Dexter, and John R and Euclid.

Q. During the last three or four years, have you been familiar with the prevailing tank wagon price, dealer
325 tank wagon price, in Detroit?

A. Yes, I have been.

Q. With the exception shown in your Exhibit letter 33-A and B, have you continuously charged the prevailing tank wagon price?

A. Yes, we have.

Q. To all the dealers that you served?

A. That is right.

Q. Now, that prevailing tank wagon price would coincide, would it not, with the Standard Oil Company's posted dealer price?

A. Yes, it is exactly the same.

Q. Will you look at these Exhibits number 34, 35, and 36, and tell me which one, if any, was issued by a station operated directly by the Citrin-Kolb Company?

A. Exhibit 34.

Q. Is that the only one?

A. That is the only one.

Q. Are the other cards, cards that were issued by any of these stations, which are noted as having received a special discount, in Exhibit 33-A and B?

A. They are not.

Mr. Hanley: At this time, in addition to the general objection to the reception of evidence and Exhibits along this line, Your Honor, the Respondent at this time moves that Exhibits 35 and 36 be stricken from the record for
326 the additional reason that it now affirmatively appears on the Government's case that those were discount cards issued by dealers who were being charged the prevailing tank wagon price, which it now appears was the same as the Standard Oil Company's posted dealer tank wagon price, and at the start where was no differential existing between the prices paid by the dealers who are said to have issued Exhibits 35 and 36, and the prices paid by all of the Standard Oil retail customers who were being served on the regular posted dealer tank wagon basis.

Mr. Austin: Your Honor, I think that that objection, and I think one or two similar ones that Judge Hanley has made, are on some misconception. The prices which Standard Oil Company charges and which Citrin-Kolb charges are material and relevant and they are in the record, and the prices charged by Citrin-Kolb dealers are relevant, at least, to the extent that it is relevant and very material to find out what those prices are. That is in the record. Now, all that Judge Hanley is saying is, that adding the two together doesn't prove anything. Well, that may be, but that is no reason for a motion to strike.

Trial Examiner Ballinger: The motion is denied, with the right to renew at the conclusion of the Commission's case.

Mr. Hanley: We have no further examination.

Trial Examiner Ballinger: Off the record.

327 (There was a discussion off the record.)

(Witness excused.)

Trial Examiner Ballinger: Adjourned, at 5:30, to reconvene at 10:00 o'clock A. M., March 12, 1941, in Room 859 Federal Building, Detroit, Michigan.

(Whereupon, at 5:30 P. M., March 11, 1941, the hearing in the above-entitled matter was adjourned.)

328 Room 859, Federal Building,
Detroit, Michigan,
March 12, 1941.

Met, pursuant to adjournment, at 10 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission,

H. R. Hanley, Esq., 910 S. Michigan Avenue, Chicago, Illinois, on behalf of the Respondent.

329 PROCEEDINGS.

Trial Examiner Ballinger: We will come to order, gentlemen.

This is a reconvening of Docket No. 4389, a case entitled In the Matter of Standard Oil Company, at 10 o'clock Eastern Standard Time, March 12, 1941, in Room 859 Federal Building, Detroit, Michigan.

The last hearing was held in Detroit, March 11, 1941.

The reporter will note counsel for the Commission and Respondent are present.

You may proceed.

Mr. Austin: I would like to recall Mr. Biber, who was on the stand when we adjourned yesterday.

MAX BIBER was thereupon recalled as a witness by and on behalf of the Commission, and, having been heretofore duly sworn, testified further as follows:

Redirect Examination by Mr. Austin.

Q. Mr. Biber, is there a Citrin-Kolb station at Middle and Case Streets?

A. I believe you have reference to what we call Cass and Grand River. Yes, there is.

Q. Cass and Grand River?

A. Yes.

330 Q. And is that an operated station or a leased station or a contract station?

A. That is a leased station.

Q. Who is the lessee of that station?

A. Sherman Fisher.

Q. Have you any invoices or sales slips showing the sales made to that station in August, 1940?

A. Yes, I have.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

By Mr. Austin:

Q. Are these original—what do you call them? Sales receipts, invoices, or what?

A. Original requisitions.

Q. —original requisitions signed by the service station operator or someone at the service station at the time the gas was delivered?

A. They are.

Mr. Austin: I would like to have these two slips marked, for identification.

(The documents referred to were marked, for identification, "Commission's Exhibits 40 and 41.")

By Mr. Austin:

Q. I show you Commission's Exhibit 40, for identification, Mr. Biber. What is the meaning of the notation 331 on there, "1 cent on rent account"?

A. In some instances, as in this instance, the rental is collected at the rate of 1 cent a gallon, in order to facilitate the collection, and it will be a little easier for the dealer to pay it, and it is credited to a rent account, and at the end of his current rental month that is figured up and if it doesn't constitute the entire rental, why, he pays in cash or by check. In other words, it is more or less of an easy payment plan of the rental.

Q. Suppose it amounts to more than the rental?

A. Then it is returned to him or applied on the next month's rent.

Q. I see.

Mr. Austin: I will offer these two requisitions in evidence.

Mr. Hanley: May I ask a question as a foundation?

Trial Examiner Ballinger: You may.

Examination on Voir Dire by Mr. Hanley.

Q. In reference to Exhibits 40 and 41, Mr. Biber, do those reflect the gasoline price, the tank wagon price, the dealer tank wagon price in effect as to the time that the invoices show?

332 A. They do.

Q. And was that prevailing posted wagon price in effect in the Detroit vicinity at that time?

A. Yes, it is.

Mr. Hanley: We have a general objection to these, your Honor, and the further objection that they do not prove anything. There is no basis of comparison. If there is no basis for comparison of these prices with any price charged by the Standard Oil Company to any resellers of any category, it now affirmatively appears on the Government's case that these prices are their regular prevailing dealer's price and that there is no differential between this price and any other price shown in this case, and, consequently, no foundation for the reception of the evidence.

Mr. Austin: If your Honor please, that is the same kind of an objection that we had yesterday. I don't think that it is an objection at all simply to argue as to what certain evidence may prove. Furthermore Judge Hanley's question as to whether or not these show the Standard or prevailing tank wagon price is unnecessary, because we now have in the record a complete schedule of the prevailing tank wagon prices, and it is always possible that—these things speak for themselves. They can always be 333 compared with the schedule which was put in evidence on Monday to determine in any case whether or not they were. I think it is unnecessary to prove or ask the witness whether or not the price shown here is the prevailing tank wagon price. The prevailing tank wagon price is in the record, but on the objection, I—

Mr. Hanley: If that is the position—

Mr. Austin: I think it is proper for me to prove as to the prices charged to certain service stations by various jobbers buying from the Standard Oil Company.

Mr. Hanley: Before your Honor rules, and in view of the statement of counsel for the Commission as to what is in the record on the prevailing posted dealer prices, I want this on the record: That at the request of Mr. Austin the Respondent furnished him a statement of the

tank wagon dealer prices that were being charged from time to time by the Standard Oil Company, and that there is nothing on such exhibit, which I think is Exhibit 3-A and 3-B, having to do, respectively, with Red Crown and Ethyl gasoline. There is nothing on that exhibit to indicate what the prevailing prices to dealers may have been that were maintained by any of the jobbers involved in this action or anyone else; that there was also reflected on that exhibit a statement of what were supposed to be the prevailing retail prices from time to time. I want this understood
334 now, as I explained to Mr. Austin at the time, and I
think the record shows that the Standard Oil Company ceased to post retail service station prices on September 10, 1936, and the only prevailing retail service station prices that we have any knowledge of are the prices that we learned by making periodic surveys and taking a cross section of the price postings as we find them to exist from time to time. All that that exhibit purports to represent in that respect are the results of our findings in those surveys as of the time that the prevailing prices are dated.

Mr. Austin: Your Honor, I object and ask that that statement be stricken from the record as testimony by counsel. I think the document speaks for itself, and if desirable to the Respondent's attorney to show what the document proves, he should put on the witness who introduced and who prepared it.

Mr. Hanley: You introduced it, Mr. Austin; the Respondent didn't introduce the exhibit.

Mr. Austin: Then, if the document does not show what it purports to show and what the witness said it showed, then I think that that is a matter of testimony and I will not certainly object to your recalling Mr. Raupagh or asking him further about that on your case.

Mr. Hanley: Well, Mr. Austin, don't—

Mr. Austin: But I will not consent to the state-
335 ment of counsel as to what exhibits in the record mean.

Trial Examiner Ballinger: The Examiner doesn't care to hear any further discussion.

You consider this important to your case, and its relevancy and materiality will be established by the time your case is completed?

Mr. Austin: Yes, getting back to this pending objection.

Trial Examiner Ballinger: The objection is overruled, subject to renewal of your motion to strike at a later date. Proceed.

Mr. Austin: I move, your Honor, to strike the statement made by counsel for the Respondent as to the meaning and content of an exhibit which was introduced as Commission's Exhibit 3-A and 3-B.

Trial Examiner Ballinger: The correctness of that exhibit is sufficiently challenged by your own statement. Let's pass on.

Commission's Exhibits 40 and 41, for identification are admitted in evidence.

(The documents referred to, heretofore marked for identification, "COMMISSION'S EXHIBITS 40 and 41," were received in evidence.)

Redirect Examination by Mr. Austin.

336 Q. Mr. Biber, is there a Langer and Cohen service station located at Dexter and Waverly?

A. Yes, there is.

Q. That is one of the stations which was mentioned in the letter which was introduced in evidence yesterday and a letter which you wrote to me, I believe, Commission's Exhibit 33-A?

A. That is right, it is.

Q. Is there a Citron-Kolb dealer at Dexter and Courtland?

A. Yes, there is.

Q. Who is the operator of that station?

A. Myer Rosenzweig.

Q. Does he lease that station from Citrin-Kolb, or is he a private operator?

A. No, he leases it from Citrin-Kolb. We lease it and sublease to him.

Q. Will you see if you can produce sales requisitions for that station for August 1940? I would like to have two requisitions. Mr. Biber, are these invoices which you are producing typical of invoices for the month of August, 1940?

A. I don't know what you mean. Typical in what respect?

Q. I mean, would there be any variation in price during that month?

A. No, there wouldn't be.

337 Q. Then, as I understand, these invoices would be typical of the price charged any one of these stations during that month?

A. That is right.

Trial Examiner Ballinger: And you refer to invoices marked Commission's Exhibits 40 and 41?

The Witness: That's right. They all bear the same price.

Mr. Austin: I would like to have these two sales requisitions marked for identification which were just produced by the witness from his file for August, 1940, which purport to show and do show, do they not, Mr. Biber, the price at which the amount of gasoline described on the requisitions was sold to that station?

The Witness: That's right.

(The documents referred to were marked, for identification, "Commission's Exhibits 42 and 43.")

Mr. Austin: I would like to offer them in evidence.

Mr. Hanley: Same objection as to Exhibits 40 and 41.

Trial Examiner Ballinger: The objection is overruled with the same reservation to counsel for the Respondent. The documents tendered will be admitted in evidence as Commission's Exhibits 42 and 43.

338 (The documents referred to, heretofore marked for identification, "COMMISSION'S EXHIBITS 42 and 43," were received in evidence.)

By Mr. Austin:

Q. Is there a station known as Sid's Super Service at Dexter and Chicago?

A. Yes, there is.

Q. And is that one of the stations which was mentioned in that same exhibit?

A. Yes, it is.

Q. Commission's Exhibit 33-A?

A. That's right.

Q. Do you know the rent paid by that station during August, 1940?

A. $235 per month.

Q. And there was no rebate at any time to that station either on gas or rental during 1940?

A. There was not.

Q. Is there a Citrin-Kolb station at Linwood and Blaine?

A. Yes, there is.

Q. Who is the operator of that station?

A. Herbert Chaben.

Q. Is he a lessee?

A. Yes, he is.

339 Q. Is there a Citrin-Kolb station at Linwood and Buena Vista?

A. Yes, there is.

Q. Is that known as Linwood Standard Service?

A. I believe it is known as Linwood Buena Vista Service.

Q. Is that the only Standard Oil station on that corner?

A. Yes, it is.

Q. Is that a station that is leased from Citrin-Kolb?

A. Yes.

Q. Who is the lessee?

A. Edmund Clark.

Q. And the address Linwood and Detroit Terminal Railroad; is that where your office is?

A. That's right.

Q. Is there a station there called B and B Service, or was it ever called that?

A. It was formerly called B and B Service.

Q. Is that now operated by Citrin-Kolb?

A. Yes, it is.

Q. I believe that was shown by testimony yesterday.

A. Yes.

Q. During August, 1940, was that station then operated by the lessee?

A. That's right.

340 Q. Who was the lessor?

A. Morris Brandwine.

Q. I would like to ask you, Mr. Biber, to produce two invoices for each one of these stations for August, 1940. I will go back over them: Dexter and Chicago, Linwood and Blaine, Linwood and Buena Vista, and Linwood and Detroit Terminal Railroad.

Mr. Biber, referring to these specific stations here, as to which I have just asked you to produce sales requisitions, were any of those stations, other than Chicago and Dexter, mentioned in Commission's Exhibit 33-A?

A. They were not. That was the only one mentioned.

Q. Mr. Biber, I understand that you have not been able to produce any sales requisitions showing sales of gasoline in August, 1940, to Sid's Super Service, Dexter and Chicago, due to the fact that you understood that I would not require requisitions on any stations about which you were questioned yesterday.

You now produce two sales requisitions dated August 1

and 2, 1940, respectively, for the Citrin-Kolb station located at Linwood and Blaine; two invoices dated August 3 and August 13, showing sales of gasoline to the Citrin-Kolb station located at Linwood and Buena Vista, and two sales slips dated August 1 and August 3, showing sales of
341 gasoline to the Citrin-Kolb Station located at Linwood and Detroit Terminal Railroad.

Mr. Austin: I would like to have these marked, for identification.

Trial Examiner Ballinger: The reporter will mark the documents referred to Commission's Exhibits 44 to 49, inclusive, for identification.

(The documents referred to were marked, for identification, "Commission's Exhibits 44 to 49," inclusive.)

Mr. Austin: I will offer them in evidence.

Mr. Hanley: The same objection to that offer as made to Exhibits 40 and 41.

Trial Examiner Ballinger: The objection is overruled, with the same reservation to counsel for the Respondent. The documents referred to will be received in evidence.

(The documents referred to, heretofore marked, for identification, "COMMISSION'S EXHIBITS 44 to 49," inclusive, were received in evidence.)

Mr. Austin: That is all.

Recross Examination by Mr. Hanley.

Q. Are all of the prices that appear on these exhibits, gasoline requisitions for which Mr. Austin has asked
342 you, your regular dealer posted tank wagon price as of the date the invoice shows?

A. They are.

Mr. Hanley: That's all.

(Witness excused.)

Mr. Austin: I would like to call Mr. Chandler.

WILLIAM G. CHANDLER was thereupon called as a witness by and on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. Give your full name to the reporter, please.

A. William G. Chandler.

Q. What is your address, Mr. Chandler?

A. 806 Phillip.

343 Q. Are you employed by the Sun Oil Company?

A. I am.

Q. In what capacity?

A. As a salesman in the motor products department.

Q. Is that the department that handles sales of gasoline?

A. That is right, yes, sir.

Q. Among your duties are you a gasoline salesman?

A. Right, yes, sir.

Q. What is the territory which you serve, Mr. Chandler?

A. My territory starts at the River, at Beaufait—.

Q. What river?

A. The Detroit River. Goes north on Beaufait to Lafayette, goes west on Lafayette to Elmwood to Gratiot; Gratiot to Harper, everything south of Harper, and out Harper to Seven Mile back down to the Detroit River. I have nothing on Harper Avenue.

Q. Is the intersection of Jefferson and Manistique in your territory?

A. Yes, it is.

Q. Is there a Ned's Auto Supply Company station located at that address?

A. Yes, there is.

Q. In the summer of 1940, Mr. Chandler, were you directed to make a survey of all of the gasoline service stations in your territory, to determine the prices charged by those stations and the pricing policies of those stations?

344 A. Yes, I was.

Q. Who directed you to do that?

A. That was done by the management of the company.

Q. Whom did you receive your directions from?

A. Mr. Cunningham, who is our district manager.

Q. Did you make such a survey?

A. Yes, I did.

Q. In the course of your duties in making that survey, did you call upon this station of Ned's Auto Supply Company located at Jefferson and Manistique?

A. Yes, I did.

Q. Did you make any purchases of gasoline there?

A. Yes.

Q. When was this survey made?

A. Approximately from, I should say, the first of August to the two weeks after that, about the middle of August.

Trial Examiner Ballinger: What year?

The Witness: 1940.

By Mr. Austin:

Q. What facts did you ascertain from your investigations on that survey as to the prices charged at that time, August, 1940, by this Ned's Auto Service Station, and any discounts or other price reductions?

Mr. Hanley: Note a general objection as to the materiality and relevancy to this question.

345 A. Ned's Auto Supply at Manistique and Jefferson, at the time I made a buy, for which a receipt was turned in to the company—

Q. Mr. Chandler, will you state the prices and discounts, and I will ask you how you found it out or what you did, if you wish to go into that.

A. The price was 16.3 for gasoline, for which they gave me a receipt, telling me that at some later time I could redeem the receipt for two cents on the gallon. Along with that they gave me a paper, and also gave me a can of pyroil to put in the gasoline.

Q. You say they gave you a can of pyroil?

A. That was for those who asked for it, they could have it. That wasn't the usual practice. I don't know whether it was or not, but I know that if it was asked for, that it could be had at no extra cost.

Q. Did they pour that into your gas tank, or did they give you the can or the bottle?

A. They poured it into the gas tank.

(There was a discussion off the record.)

Q. Did I understand you to say, Mr. Chandler, that you were given a receipt for gasoline at 16.3 a gallon?

A. Yes, sir.

Q. And you were told that that would be good for two cents credit on future purchases of what?

346 A. Any merchandise I wanted to buy.

Q. Including gasoline, or not?

A. That was not stated.

Q. Did you try to turn any of those in?

A. No, sir.

Q. On purchases of gasoline?

A. No, sir.

Q. But did the station operator tell you that this would be good for credit on merchandise?

A. Yes, sir.

Q. Did he offer those to you, or did you ask for it?

A. He offered it to me.

Q. Before he offered it to you, did you make any representations to him as to whether or not you were using your car for commercial purposes?

A. No, sir.

Q. Are you referring now to just *one* purchase, or did you make other purchases from time to time?

A. I have made other purchases at times prior to this and after that.

Q. Have you any of those receipts with you?

A. Yes, I have.

Q. That were given to you?

(Papers were handed to Mr. Austin by the witness.)

The Witness: As I say, some of those may have been—some of those were before and some of them

347 were made after.

Q. These slips, then, that you have just handed me, were not all obtained in connection with this survey that you made for the Sun Oil Company?

A. No, sir. No, sir.

Mr. Austin: I would like to have this envelope marked for identification, please.

Trial Examiner Ballinger: The reporter will mark the envelope "Commission's Exhibit 50" for identification.

(The envelope referred to was marked "COMMISSION'S EXHIBIT 50", for identification.)

By Mr. Austin:

Q. Mr. Chandler, I show you this envelope, marked Commission's Exhibit 50, for identification, and ask you to describe what it is and where you got it.

A. This envelope was given to me by one of the attendants, after he had put gas in my car and said that it would be valuable to me to keep my receipts, which they were giving me for gasoline.

Q. The receipts are those sales receipts you have just referred to?

A. Yes, sir.

Trial Examiner Ballinger: One of the attendants of what?

The Witness: Of Ned's Service Station.

348 Mr. Hanley: May it be understood, Your Honor, that our general objection includes an objection against hearsay? I think I objected on the ground that none of this was binding on the Respondent. Of course, it is not binding on us what somebody unidentified, whose name we don't even know, may have said to this man, who went there at the instance of a competitive organization to, apparently, obtain evidence in a lawsuit. And it is, of course, the worst type of hearsay that could be offered. We want that objection to all of this class of testimony, in addition to our general objection.

Trial Examiner Ballinger: The objection is overruled, subject to renewal at a later time, if counsel sees fit to urge it.

By Mr. Austin:

Q. Are these seven slips, which I now hand you, slips which you have just referred to in your testimony as sales receipts obtained at Ned's Auto Supply Company station at Jefferson and Manistique?

A. Yes, they are.

Mr. Austin: I would like to mark one of these, for identification.

Trial Examiner Ballinger: The reporter will mark the receipt "Commission's Exhibit 51" for identification.

(The slip referred to was marked "COMMISSION'S EXHIBIT 51" for identification.)

349 By Mr. Austin:

Q. On the back of this particular Commission's Exhibit 51, for identification, appears a little stamp with "Twelve cents" printed on it. What is that?

350 A. That is the amount of savings, the amount that I could buy in merchandise at the time I turned all the tickets in that I had in my possession.

Q. You mean that that is the amount which you could get on this particular ticket?

A. Yes, sir.

Q. So that when you said all the tickets, you meant that would be the sum?

A. That would be the sum of that one ticket.

Q. In other words, this 12 cents applies only to this ticket? Is that right?

A. Yes, sir.

Trial Examiner Ballinger: Does the ticket represent a purchase of 12 gallons of gasoline?

The Witness: No, sir. I believe the ticket represents a purchase of 6-3/3 gallons of gasoline.

By Mr. Austin:

Q. 3/3?

A. Well, 3/10. Excuse me.

Q. Can you state from looking at this particular ticket, Commission's Exhibit 51, for identification, when it was that you made that purchase?

A. Only that the ticket is stamped, "October 18".

Q. Do you know whether that was '39 or '40, or either one?

351 A. No, sir, I do not.

Q. I see.

Trial Examiner Ballinger: You are certain it was one of those years?

The Witness: Yes, sir.

Trial Examiner Ballinger: '39 or '40?

The Witness: Yes, sir.

Mr. Austin: I offer in evidence this envelope marked "gasoline savings container" which has been identified as Commission's Exhibit 50; also a sales slip with a savings stamp on the back, which has been identified as Commission's Exhibit 51; also six other slips similar to Commission's Exhibit 51, except that there are no sales stamps on the back of the other six.

Trial Examiner Ballinger: Let the first ones, Commission's Exhibits 50 and 51 be received in evidence, subject to the right of counsel for the Respondent to move to strike at a later date; also Commission's Exhibit 52-A, B, C, D, E, and F, are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "Commission's Exhibits 50 and 51," were received in evidence. The documents referred to last above were marked, for identification, "COMMISSION'S EXHIBITS 52-A, B, C, D, E, and F," and were received in evidence.)

352 Mr. Austin: Your witness.

Cross-Examination by Mr. Hanley.

Q. How long have you been employed by the Sun Oil Company as a salesman in Detroit, Mr. Chandler?

A. From March 15, 1940.

Q. What was your occupation prior to that time?

A. I worked—prior to that I was an attendant in a training station at Jefferson and Beaconsfield.

Q. Whose training station?

A. Sun Oil Company's.

Q. How long were you there?

A. From December 28, 1939.

Q. Were you connected with the oil business prior to December, 1939?

A. No, sir.

Q. I don't know what the boundaries mean that you indicated as circumscribing your territory in Detroit; to those of us who are not familiar with geography, can you tell us about what portion of Detroit that covers?

A. I would say that covers the southeast section of Detroit.

Q. Would it be a fourth of the area of the city or a third or a tenth or what, Mr. Chandler? Just roughly, I don't mean to ask you to be accurate about that.

353 A. I imagine about a fifth.

Q. How many retail service stations are there in Detroit, and by Detroit I mean this contiguous area that has been under discussion here including Detroit proper, Hamtramck, Dearborn, Highland Park.

Trial Examiner Ballinger: Do you know?

The Witness: No, I don't know exactly how many there are.

Trial Examiner Ballinger: Have you information upon which you can base an approximation?

The Witness: I would say approximately in the vicinity of 3700 or 3800.

By Mr. Hanley:

Q. That is your best judgment?

A. Yes, sir.

Q. How many are in your territory?

A. As a guess, I don't know exactly, but as a guess—

Q. Your best judgment?

A. I would say around 435.

Trial Examiner Ballinger: That is your best judgment?

The Witness: That is my best judgment, yes, sir.

By Mr. Hanley:

Q. Did you call on all of them in the course of this survey you made in 1940?

354 A. Would you please state that again?

Q. Did you call on all of those stations in your territory in the course of this survey that you made in 1940?

A. Would you tell me exactly what you mean by saying did I call on them?

Q. You tell me. I don't know what you did. Will you tell us what you did in respect to these 450-odd stations in your territory in connection with this survey which you say you made in August, 1940.

A. I stopped and looked at the posted prices on the pumps in every one of these stations in my territory.

Q. Did you buy gasoline at them?

A. No, sir, not at every one of them.

Q. At several?

A. No, sir. The only buys that I have made on gasoline were made at Ned's at Jefferson and Manistique.

Q. Well, was there a posted price there?

A. Yes, sir.

Q. Which you say at that time was 16.3 cents?

A. That is right, yes, sir, for regular gasoline.

Q. Did you find posted prices at these other 450-odd stations?

A. Yes, sir.

Q. That you looked at?

355 A. Yes, sir.

Q. But you didn't buy gasoline from anybody except Ned's?

A. Yes, sir.

Q. Then, as a matter of fact, you don't know what the actual price of gasoline at any station except Ned's was, do you, in your entire territory covered in that survey?

A. I know the prices that were posted on the pump for which the meters were set.

Q. I understand, but you found the price different actually than the posted price at the only station that you bought gasoline, didn't you?

A. Would you repeat that again, please?

Mr. Hanley: Would you read it, please?

(The question was read.)

Trial Examiner Ballinger: Do you understand the question?

By Mr. Hanley:

Q. If you don't understand, I will try and clarify it for you.

A. I would appreciate it.

Q. I understand you to say that you purchased some gasoline from Ned's and were given some Pyroil and a receipt which was good for 2 cents in trade, or something of that kind; that is correct, isn't it?

A. Yes, sir.

356 Q. Let me ask you if you don't regard that as a reduction from the posted price of 16.3 cents?

A. I do regard it as a reduction from that.

Q. Now, all I am asking you, Mr. Chandler, is whether you know what prices gasoline was actually being sold at at all of these other stations in your territory, you not having—

A. I didn't buy at the other stations. I don't know actually what the price was.

Q. Isn't it true, Mr Chandler, that as far as you knew on the day you made this purchase in August, 1940, of Ned's, that price that you paid at Ned's may have been higher actually than any other price in your territory, so far as you know?

A. The price that I paid there was the same that was posted on all the gas pumps in my territory at that time. All that I checked was 16.3.

Q. I understand that, Mr. Chandler, but you don't know how much below that any other station in your territory may have been actually selling gasoline for, do you?

A. No, sir.

Q. They may have been selling gasoline for much less than Ned's sold you this gasoline; is that not true, so far as you know?

A. I don't know.

357 Q. So, really, all you know about this whole survey that you made, Mr. Chandler, is that you bought these six gallons of gasoline from Ned's one day in August, 1940, and were given a can of Pyroil and a trading stamp worth 2 cents in merchandise, and you don't know what you could have bought gasoline any place else in your territory for on that day; is that not right?

A. I don't know that the price would have been higher any place else.

Q. How do you know that?

Mr. Austin: He said he didn't know that.

The Witness: I said I didn't know that.

By Mr. Hanley:

Q. Oh, I beg your pardon.

Well, can't you answer that question as stated? Isn't it true that you don't know what the price was, the actual price any place else—

Trial Examiner Ballinger: Judge, isn't that repetitious? Hasn't the witness answered that several times?

Mr. Hanley: It is repetitious, but I haven't got even one answer yet.

Trial Examiner Ballinger: Hasn't the witness testified that he didn't know what the prices charged at the other stations were, other than the posted price?

358 By Mr. Hanley:

Q. Is that your testimony?

A. That was my answer, yes.

Q. As the Court has stated it.

Trial Examiner Ballinger: And he didn't know whether they were given any rebate in the form of receipts or otherwise at the two stations.

By Mr. Hanley:

Q. Is that your testimony also?

A. That's right; yes, sir.

Q. Now, you have traded on a number of occasions at Ned's, have you not?

A. Yes, sir.

Q. You did that on some occasions before you were employed by the Sun Oil?

A. Yes, sir.

Q. What was your business before you became connected with the Sun Oil Company, in any capacity?

A. I was a salesman for Millenbach's at Grosse Point and they were a Ford-Lincoln Zephyr dealer.

Q. Did you drive a car in the course of your work?

A. Yes, sir.

Q. And it was a business car, you used it in ~~your~~ work?

A. Yes, sir.

Q. You purchased gasoline at various places for it?

359 A. Yes, sir.

Q. Among them did you purchase gasoline at Ned's?

A. Yes, sir.

Q. Did you advise them, or anyone in attendance there, at any time, what your business was?

A. Yes, sir.

Q. And they knew you, did they not?

A. Pardon?

Q. They knew you and knew your business?

A. Yes, sir.

Q. Did you advise any other service stations in Detroit who you were and what your business was?

A. At what time?

Q. While you were working for this automobile jobber.

A. Yes.

Q. And did you receive from any other service station than Ned's a discount upon the gasoline which you purchased?

A. No.

Q. Never?

A. Not during the time I was selling automobiles, no.

Q. Did you ever ask for any such discount?

A. No.

Q. Any place except Ned's?

A. No.

360 Trial Examiner Ballinger: Did you ask for it at Ned's?

The Witness: No, sir.

By Mr. Hanley:

Q. Never asked for it at Ned's?

A. No, sir.

Q. You have stated what they told you about this receipt they gave you in August, 1940. What did you tell them when you went in? In the first place, who did you talk to if you can recall?

A. I don't know the man's name. I went in, a man came up and asked me whether he could fill the car up, or asked me what I wanted. I don't know the exact words he used.

Q. What did he say?

A. I told him to fill the gas tank.

Q. Did you tell him who you were on that occasion?

A. No, sir.

Q. Did you give him any—any name?

A. No, sir, I had no occasion to.

Q. Did you tell him who you were connected with?

A. No, sir.

Q. Did you show him this envelope, Commission's Exhibit 50, which you produced here, or a similar one?

A. No, sir.

Q. Did you tell him you had ever traded at Ned's before?

361 A. No, sir.

Q. Did you say anything to him?

A. Nothing other than the direct answers to the questions that he gave me, as to asking me how much gasoline I wanted.

Q. What did you tell him?

A. I told him to fill the tank.

Q. Is that all you said to him?

A. That's all I remember of having said to him.

Q. Then what did he say to you?

A. He handed me a paper and after he had just about finished filling the tank I asked him if I might have Pyroil and he said "Yes" and put it in.

Q. You asked for the Pyroil?

A. Yes, sir.

Q. Why did you ask for Pyroil?

A. Because it could be had at no extra price there.

Q. And they put that in your tank?

A. Yes, sir.

Q. Just as a matter of explanation: this Pyroil is a substance that is presumed to have some merit as a lubricant, when used in gasoline, isn't it?

A. It is presumed to have some.

Q. Just what were the circumstances surrounding the giving of the receipt to you? What did you say about that, if anything?

362 A. I did not say anything about it. I gave him the money and he, in turn, gave me a receipt.

Q. Did he say anything about it?

A. No, sir.

Q. You don't know whether he knew you or not?

A. No, I don't.

Q. But you had purchased, on a number of occasions prior to that time, at Ned's stations?

A. Yes, sir.

Q. They didn't give you a toy balloon at that time?

A. Not then.

Mr. Hanley: I think that's all.

Redirect Examination by Mr. Austin.

Q. One more question. Was this car that you were driving last summer when you were working for the Sun Oil Company—did it have the Sun Oil Company's name on it?

A. No, sir.

Q. Did it have any other name or business marking on it?

A. No, sir.

Q. Just a plain, private vehicle?

A. Yes, sir.

Mr. Austin: That's all.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

363 RUSSELL G. WARREN was thereupon called as a witness by and on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. What is your full name, Mr. Warren?

A. Russell G. Warren.

Q. What is your address?

A. 14941 Penrod, Detroit.

Q. Are you employed by the Sun Oil Company?

A. Yes, sir.

Q. In what capacity?

A. As a motor products salesman.

Q. Is gasoline one of the products that you sell?

A. Yes, sir, all automotive products.

Q. And do you call on service stations in your territory?

A. Yes, sir.

Q. Sun Oil Company stations?

A. Yes, sir, and competitive stations in solicitation of additional accounts.

Q. Where is your territory?

A. Do you want specific information?

Q. Just generally the part of the city.

A. I cover East River and the Down River section, in-
cluding a small part of River Rouge, Ecorse, Wyan-
364 dotte, Trenton, Lincoln, and Allen Park, and Melvin-
dale.

Q. Is there a station operated by Ned's Auto Supply Company located in your territory?

A. Yes, sir, the one at Michigan and Maple, in East Dearborn.

Q. Have you ever purchased any gasoline at that station?

A. Yes, sir, I have.

Q. Did you make any purchases there during 1940?

A. Yes, sir, I did.

Q. From time to time or at a particular time?

A. Just periodically.

Q. Did you make those purchases in the course of your employment for the Sun Oil Company, or did you make them simply for the purpose of getting gasoline to run your car?

A. I made them at the request of the executives of the Sun Oil Company; getting buys regarding checking on this discount situation.

Q. Were you instructed by the Sun Oil Company to check from time to time on the prices charged by stations selling other major brands of gasoline?

A. Yes, we are.

Q. I suppose not only major brands but all other stations in your territory; or do you check more on major brands?

A. I think our checks have been on the major
365 brands rather than on the so-called lower grades of
gasoline sold by other than major companies.

Q. Can you state the price which you paid for gasoline purchased at this station of Ned's Auto Supply Company on Michigan Avenue during 1940, and if there was any difference in the price at different times, state what it was.

A. I have no record to indicate the exact price; the prevailing price, however, during the time that the survey was made, was 16.3.

Q. Did you pay that price each time that you went to Ned's?

A. Yes, sir.

Q. Were you given any premiums or receipts or discount slips or anything of any value, in connection with those purchases?

A. I was, yes, sir. I was given a newspaper and a sales receipt similar to the exhibit that you have on file, and told by the uniformed attendant that presented it at a later date—I think in the amount of a dollar, if I remember correctly—that that could be redeemed for any merchandise available at this Ned's store.

Q. Including gasoline or not?

A. Yes. I think, if I remember correctly, it was for any merchandise available on the location.

366 Q. When you made these calls at Ned's, what sort of a car were you driving?

A. A Chevrolet town sedan.

Q. Did it have any business markings on it, or name?

A. None, other than an identification emblem which, I assume, you are familiar with.

Q. One of the small Sun Oil Company identification emblems?

A. That is correct.

Q. Those emblems are given by the Sun Oil Company to anybody purchasing gas at the Sun Oil Company stations, are they not?

A. They are not. They are sold to customers purchasing gasoline in the Sun Oil Company stations for a nickel.

Q. I knew they could be obtained, but the point I wanted to make was it wasn't only a salesman of the Sun Oil Company that had one of those emblems.

A. No. I might state quite frequently people do get those emblems without paying the nickel. However, the dealer is billed for them at the time he receives them at a price, I think, if I remember, of 3 cents. They are resold for a nickel.

Q. On any of these calls at Ned's Auto Supply Com-

pany station on Michigan Avenue, was there any conversation between you and the station attendant in connec-
367 tion with the giving of those receipts?

A. No, I believe that was the common practice. I mean, you were simply given a sales receipt for the amount of your purchase.

Mr. Hanley: Your Honor, I move to strike that answer: "common practice" unless he identifies whose common practice.

The Witness: Should I say at Ned's station they would give you a sales receipt for the amount of your purchase?

By Mr. Austin:

Q. Did the sales receipts which you received have stamped on the back "Commercial Use" or "Commercial Account", or words to that effect?

A. Only in one instance, and I don't have that particular slip, but in checking for discounts in my area, I went with a truck driver and bought a dollar's worth of gasoline and the sales slip that he was given said "For Commercial Use," and there was just a "12" marked on the back of the sales slip that he was given.

Q. Did the station operator—I believe you just said he told you they were good for 2 cents a gallon after you got a dollar's worth of them?

A. That's right.

Q. Did you make any statement to him or have any
368 conversation with him as to what business you were in at the time you made the purchases?

A. No, I didn't.

Q. You weren't asked whether or not you were driving the car for some commercial use?

A. I wasn't.

Q. Have you any of those receipts with you?

A. I do not. The only receipts I obtained I turned in to the company, I think, with my survey.

Q. I show you Commission's Exhibit 52-C, and ask you whether the receipts to which you have referred are receipts of that nature (handing document to witness).

A. They are similar to this, yes.

Q. Will you look at the back? Do you recall whether your receipts had that notation on the back, or not?

A. I do not.

Q. They may have had that notation?

A. As I recall, the receipt that I had just had; I think, either marked in green or red pencil, the "12".

Q. Was it a receipt for 6 gallons of gasoline?

A. I think, if I remember correctly, my purchase was a dollar, which, I think, would be 6 and a fraction gallons.

Q. What was your understanding of the meaning of the "12"?

A. "12" was to represent the 2 cents a gallon discount
on the 2 cents a gallon gasoline which, when the sales
369 ticket, the amount on the back of the sales ticket
amounted to a dollar, that you could use it for the purchase of the products in the Ned's station.

Mr. Austin: That's all.

Cross-Examination by Mr. Hanley.

Q. How long have you been engaged as a salesman with the Sun Oil Company?

A. It will be 15 years November 1st, this year.

Q. All the time in Detroit?

A. No, I was at Reading, Pennsylvania.

Q. Just how long in Detroit?

A. All but two years and seven months; approximately 13, 13 and a half years.

Q. Has that been continuously in Detroit, from this time back?

A. No.

Q. How long have you been with the company continuously in Detroit, up until now?

A. The last has been about nine years.

Q. Now, about how much of Detroit and its immediate inclusions is covered by your territory?

A. A very small portion of Detroit; that part of Detroit outside of Warren Avenue, or on Warren Avenue, from Greenfield, west.

370 Q. Can you give it to us in a fraction? The streets
don't mean much to us.

A. The fractional part of Detroit proper that I cover would be very, very small. I don't presume it would amount to a square mile.

371. Q. What is your knowledge as to the number of
service stations in Detroit? By that I mean Detroit, Hamtramck, Highland Park, and Dearborn?

A. I assume in the neighborhood of three or four thousand.

Q. How many are in your territory?

A. I couldn't give you the definite number that were in the survey I made, which covered every gasoline account, but I would assume I had between three and four hundred on the survey.

Q. And when was this survey made by you?

Mr. Austin: Your Honor, I object to any questions regarding the survey by the Sun Oil Company, because I didn't ask this witness anything about that subject. I only asked him if he bought gasoline at Ned's Auto Supply Company—I did ask him whether those purchases were made in his capacity as a salesman for Sun Oil, or merely buying gas for his own car; if Your Honor is of the opinion that that opens the door to survey questions, I will withdraw the objection, but it seems to me it is going a little far afield.

Trial Examiner Ballinger: The Examiner is of the opinion that the examination in chief opened the door, and this is proper cross-examination. You may proceed.

Mr. Hanley: Will you read the last question, please?

(The question was read.)

A. In August, I believe, 1940.

372 By Mr. Hanley:

Q. Do you remember the day or days?

A. As I recall, the taking of the survey covered a fairly good part of the month.

Q. Did you buy gasoline at any stations among this four or five hundred included in your survey, except Ned's station?

A. Only those selling Sunoco products in my territory.

Q. So you did buy from Sun stations; that is, dealers handling Sun products?

A. Yes, sir.

Q. But from no other product dealer except Ned's?

A. That is correct.

Q. And about how many Sun dealers are there in your territory, or among that four or five hundred stations?

A. I believe at that time there were forty; that's in the metropolitan area, going as far south as Trenton.

Q. Now, at this time, did you buy gasoline from each of the Sun dealers?

A. No, I simply bought gasoline where I needed it.

Q. You weren't surveying Sun's?

A. Yes, sir, we did.

Q. But you bought the gasoline from the Sun dealers when you wanted the gasoline?

A. That is correct.

Q. About how many of the Sun dealers did you 373 patronize at that time?

A. Oh, I presume from time to time I patronized all the dealers.

Q. I mean in the period of this survey?

A. Well, this would be a guess; I would say probably six or eight; possibly ten.

Q. Do you recall what you paid for the gasoline at those particular stations where you bought it?

A. I would assume that it was at the same—

Q. I don't want you to assume it. I want you to tell us what you know. If you don't know, say so.

A. Very well, sir. I don't know the exact price I paid in August, 1940.

Q. Then the only knowledge you have today as to the actual price of gasoline in your territory and among the four or five hundred stations in August, 1940, is the price you say you paid to Ned's, is that right?

A. Is that the only price that I know?

Q. The actual price.

A. Now wait a minute here. Let me get this thing straight. The going price at the time, during the survey—which I do not have my figures here; I could give you if I had the survey figures—would indicate that the price was 16.2 or 16.3.

Q. Just a moment. I am not asking you what some-374 thing else would indicate or what you assume. I am asking you if you know what the actual sale price of gasoline was in August, 1940, at any of these four or five hundred stations in your territory, except the one you went specifically to to make a purchase at and keep a record of; namely, Ned's.

A. At the present time, no. However, there are records available in my survey—

Q. Isn't that all that you want to say about it?

A. Sir?

Q. Isn't that all that you want to say about it, or can say about it?

A. Yes, sir; now.

Q. Is it not true that the actual price of gasoline in all of the other stations, including Sun stations in your territory at that time, so far as you know, may have been either higher or lower than the price that you paid Ned's?

A. I am not in a position to say. I just said I didn't know what the price was.

Trial Examiner Ballinger: The Examiner would suggest to counsel that if he thinks this is material, that he avail himself of the offer of the witness to produce the records.

Mr. Hanley: I don't think it is material. I don't want it.

Mr. Austin: I thought he would have his papers 375 with him. Do you have anything with you you can refresh your recollection on?

The Witness: I have here a copy of the sheet that I made of the Standard stations in my territory, and the prices at the time that this survey was made: only on the Standard dealers in my territory.

Mr. Austin: You haven't got any Sun?

The Witness: I do not, sir; but it is available.

By Mr. Hanley:

Q. You are talking about posted prices now, aren't you?

A. That is correct, sir; prices I took from the posting at the stations on the pumps at the time the survey was made.

Q. Isn't it a fact, based on your nine years experience in Detroit, that in the majority, at times, of these three or four thousand stations in Detroit, the post prices bear very little relation to the actual prices at which you can buy gasoline.

Mr. Austin: I object to that question on the ground he said, "at times." I would like to have that a little more specific, if you don't mind, Judge Hanley.

Trial Examiner Ballinger: The witness, if he knows, is capable—

Mr. Austin: He said "at times." "At times" might be when? It might be 1935, 1939, or a week, or a year.

By Mr. Hanley:

Q. At various periods from 1936 until now.

376 Trial Examiner Ballinger: Do you understand the question?

The Witness: I believe I do, Your Honor.

I would say this: That from the experience that I have had in the gas business, that, generally speaking, the posted price on the pumps is usually the price charged by the operator or dealer.

By Mr. Hanley:

Q. Isn't it a prevalent custom in Detroit for many dealers to give various kinds of concessions, premiums, rebates, bonuses of one sort or another, to their customers?

A. No, I wouldn't call it prevalent.

Q. Isn't it true that there are many stations, several hundred stations, at least, in Detroit, which have been continuously, since 1936, offering rebates in price, or offering premiums of various kinds, such as giving away eggs and cigarettes, and crockery, and all sorts of merchandising; hasn't that been your observation and experience?

A. Those conditions have existed.

Q. And haven't they existed continuously for the past four years?

A. Frankly, I would say no.

Trial Examiner Ballinger: Have there been a hundred or more stations at which that practice has prevailed?

The Witness: I presume the percentage, Your
377 Honor, would be very much higher than that, at times.

By Mr. Hanley:

Q. Didn't you find the conditions so bad in that respect that your own company protected dealers on a two cent margin?

A. During August of 1940?

Q. No, within this period from 1936 to date.

A. I would say so, sir.

Q. Isn't it true that in October and November of 1939 your own company did do that, and you gave a dealer, your dealers, an additional discount off your own dealer posted tank wagon price in sufficient amounts to make his margin two cents a gallon?

A. That is correct.

Trial Examiner Ballinger: Over what period of time?

The Witness: During the time that this price war that this gentleman speaks of was in progress, we did.

By Mr. Hanley:

Q. And at that time you had two levels of prices?

A. No, sir, we had one level of prices.

Q. But you gave this differential to your own dealers, where they were up against a competitive situation; is that the situation?

Mr. Austin: Your Honor, I don't know what the witness' knowledge is on policies of the Sun Oil Company. I have the manager of the Sun Oil Company here. I

378 expect he would be a little better witness, and, furthermore, I think it is outside of the scope of the direct examination, although I have no objection particularly to it; but I want to have the right to pursue it myself, if Judge Hanley is going to open the door on that subject.

Mr. Hanley: You have opened this whole question on resale pricing, with this witness.

379 Trial Examiner Ballinger: If the witness has personal knowledge of the facts, he may answer.

Mr. Austin: What was the question?

(The question was read.)

A. I would say it was at that time, yes, sir.

By Mr. Hanley:

Q. Did you ever buy gasoline at Ned's station prior to this purchase you have referred to in August, 1940?

A. I don't recall; I believe I did.

Q. You don't know whether you did or not?

A. I believe I purchased prior to August, 1940.

Q. Do you know whether you were known to Ned's attendants or not when you made that purchase?

A. I would say that I was not known.

Q. Well, do you know that? Do you know that you were not known?

A. No, sir, I do not.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

By Mr. Hanley:

Q. What is this Sun Oil emblem that you talk about, Mr. Warren?

A. Well, it is a personalized small metal diamond with a red arrow on which individuals' initials are put, and they are attached to the license plates of the cus-

380 tomer's car.

Q. Your dealers give that piece of merchandise to a Sun customer for 5 cents? Is that true?

A. That is correct.

Q. You regard that as a premium?

A. I don't, sir, no.

Q. How much is the thing worth?

A. Well, it is probably worth a nickel.

Q. Probably worth more, isn't it, Mr. Warren?

A. Well—

Mr. Austin: Do you know or don't you know?

The Witness: I don't think that I know how much it is worth.

Trial Examiner Ballinger: Didn't you state in your direct examination that it cost 3 cents?

The Witness: We sell them to the dealers in packages of 50 at 3 cents apiece.

By Mr. Hanley:

Q. Well, that is the selling price. That hasn't anything to do with costs, as I understand it.

A. That is the cost price to the dealer, sir.

Q. Yes. But I am talking about the worth of the thing itself.

A. Frankly, I am not in a position to know what the thing is worth. It is an identification emblem. I feel
381 that it is worth a nickel on my car.

Q. Well, you think it would be just as valuable to you as a toy balloon, don't you, Mr. Warren?

A. Well, I imagine.

Mr. Hanley: That is all.

Redirect Examination by Mr. Austin.

Q. Mr. Warren, you said that you bought perhaps six or eight or ten times from Sun stations during the period of this survey?

A. That would be my guess, yes, sir.

Q. Do you know of your own knowledge from the price that you paid at those Sun stations whether it was the same or higher or lower than the price at Ned's after deducting the 2 cents per gallon at Ned's?

Mr. Hanley: Will you read that question, please?

(Question was read.)

A. It was higher.

Mr. Hanley: That is objected to, just a minute; I move the answer be stricken. It is objected to for the reason that the witness has already answered he doesn't know what he paid at the Sun stations, and, consequently, it is impossible to make that involved calculation.

Trial Examiner Ballinger: The objection is over-
382 ruled. You may answer.

The Witness: I said that—I said yes, didn't I? I paid the posted price.

By Mr. Austin:

Q. The question was whether it was higher, lower, or the same after taking into consideration the 2 cent discount at Ned's?

A. I said that the price was higher.

Q. You were just asked about the prevalence of discounts and premiums being given by gasoline stations in the last few years. During the year 1940, since the end of the price war at the end of 1939, was the giving of premiums and discounts prevalent or not?

A. I would say that the market conditions since the end of the price war in November of '39 has been the cleanest that I have ever seen it since I have been in the business.

Q. That includes 1940?

A. I mean our market has been cleaner during that period than I have ever experienced since I have been with the Sun Oil Company.

Q. Then when you said that perhaps at time there might have been well above 100 stations giving premiums and discounts, you were not referring to 1940, were you?

A. No, I was not. I think the question was from '36 on, during which time we did have discounting, premiums,
383 and waves of one thing after another.

Mr. Austin: That is all.

Recross Examination by Mr. Hanley.

Q. Just a question or two, please, Mr. Warren.
Are you acquainted with an operator in Detroit known as Charles Austin?

A. Am I acquainted with him? No, sir.

Q. Do you know of him? I don't mean personal acquaintance. Do you know of him?

A. Yes, sir.

Q. Are you familiar with the location of his stations and his brand name?

A. I wouldn't be in a position to give the locations of his stations, but I think the brand name is Joy.

Q. Do you know it to be a fact that he has a number of stations at various points about Detroit?

A. I have seen them, yes, sir.

Q. Is it true that that gasoline is represented and sold as a comparable gasoline to the ordinary house brand major gasolines?

Mr. Austin: I object to this line, your Honor. It is off the line of anything—

Mr. Hanley: Foundation, wholly.

Mr. Austin: —on direct. Isn't that outside of 384 anything that I have gone into?

Mr. Hanley: It is just a foundation of exactly what you asked.

Trial Examiner Ballinger: It is leading up, I take it, to another question. Objection is overruled.

Mr. Austin: The witness testified he didn't even make a survey on anything except major oil.

Mr. Hanley: I am just asking for his general knowledge now.

The Witness: In other words, you want my opinion as to what I think of Joy gasoline?

By Mr. Hanley:

Q. No, no.

Mr. Hanley: Read the last question.

The Reporter: (Reading.) "Is it true that that gasoline is represented and sold as a comparable gasoline to the ordinary house brand major gasolines?"

A. I don't believe I could answer truthfully, no. I don't know.

Q. You don't know what it is represented as being?

A. No, I frankly don't.

Q. Maybe you don't know enough about this marketing thing for me to ask the question. I will do it, however. Do you know that it has been a fact during the period from 1936 and including 1940 that that gasoline has 385 been sold at retail at amounts varying from about a cent to as much as 5 cents below the prevailing market price in Detroit?

A. I wouldn't—

Trial Examiner Ballinger: Just a moment.

Mr. Austin: I must urge earnestly an objection here. I put this witness on the stand for one purpose, and the only thing I asked him about was—

Trial Examiner Ballinger: The Examiner doesn't think a sufficient foundation has been laid for this question. If there is an objection, the Examiner sustains it.

Mr. Hanley: I am inclined to agree that I can't qualify the witness about this. I don't think he knows about it. I will excuse him.

Mr. Austin: I only asked about Ned's.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Mr. Hanley: That is all I have.

The Witness: Is that all, sir?

Trial Examiner Ballinger: That is all. You are excused.

(Witness excused.)

Trial Examiner Ballinger: Take a recess for five minutes.

(A short recess was had.)

386 PAUL HENRY HARRISON was thereupon called as a witness by and on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. Give your full name to the reporter, please, Mr. Harrison.

A. Paul Henry Harrison.

Q. Your address?

A. Business address or residence?

Q. Well, give us your residence address.

A. 442 Devonshire Road, Grosse Point Park, Michigan.

Q. What business are you engaged in, Mr. Harrison?

A. I am in the oil business.

Q. Are you connected with the Sun Oil Company?

A. I am the western regional manager for the Sun Oil Company's business.

Q. Where is their office in Detroit?

A. The National Bank Building.

Q. Is that the regional office?

A. That is the regional office.

Q. For your region?

A. Yes, sir.

Q. Will you state what territory the western region covers?

387 A. It covers an area bounded on the east by the western line of the first tier of counties in Ohio down to the Ohio River.

Q. Will you just state what states, perhaps?

A. Ohio, part of West Virginia, Kentucky, Indiana, Michigan. There are eighteen of them, sir, the middle western states as far as the Rocky Mountain Divide.

Q. How many states?

A. Eighteen states.

Q. That includes Michigan, of course?

A. Yes.

Q. How many Sunoco Oil stations are there in the Detroit area, greater Detroit?

A. The district area includes approximately 480.

Q. Is the Detroit district one that includes Hamtramck and Dearborn? How much area does that include besides the city of Detroit?

A. Well—

Q. Besides the city of Detroit and Hamtramck and Dearborn?

A. It goes out as far as Ann Arbor on the west; it goes down to the Monroe County line to the south, and goes up about, well, it includes Oakland County and part of Macomb, Washtenau, part of Washtenau; it goes out to the west as far as a town called Brighton on the route to Lansing.

Q. How long have you been the western regional
388 manager for Sun Oil Company?

A. Approximately 12 years.

Q. How long have you been in the oil business?

A. It will be 20 years this fall.

Q. What was your position or occupation before you were western regional manager for the Sun Oil?

A. I was southeastern regional manager.

Q. Is that the territory in the southeastern part of the United States?

A. Yes, sir.

Q. How long were you in that position?

A. Six and a half years.

Q. How many years did you say you were western regional manager here?

A. 12.

Q. That brings it up to 18 and a half?

A. Yes, sir.

Q. Were you with the Sun Oil Company before that?

A. A year and a half prior to that. I started in September of 1921.

Q. In what capacity did you start out in?

A. So-called smokestack salesman, to start with.

Q. Did gasoline smoke in those days?

A. No. That was industrial.

Q. In the course of your duties as western regional
389 manager, have you made it your business to keep informed as to the competitive situation in the sale of gasoline at retail in Detroit?

A. Yes, sir.

Q. Now, it has been proved in these hearings, Mr. Harrison, that the Standard Oil Company sells gasoline to three or four customers who are in whole or in part operators of retail stations. I might qualify that by saying that the Stikeman Oil Company has at some time operated retail stations, but may not be doing so now,—but they have sold to some few customers operating retail stations, who buy gasoline in tank car quantities and who take delivery at their own bulk plant, and purchase at tank car prices, whereas the price which Standard Oil Company charges to the retail stations in Detroit that purchase direct from the Standard Oil Company is from one and a half to one and three-quarters cents per gallon higher than the price charged to the retailers who buy in tank car quantity. Are you familiar with that practice?

A. Yes, sir.

Q. Is that practice engaged in by other major oil companies doing business in Detroit other than Standard Oil Company?

A. I understand, yes, there are other companies that follow the same policies and practice.

390 Q. How is that practice referred to in the gasoline trade in Detroit?

A. It might be referred to as a distributorship or jobber, sometimes called agents.

A. Are those retailers buying at tank car prices ever referred to as subsidized accounts?

A. I have heard that expression used, that and others, other expressions.

Q. What are some of the others?

A. Preferential price.

Q. Aren't those tank car buying retailers frequently referred to as subsidized accounts?

A. Yes, I think I have heard them so referred to. Personally, I don't use the term. I am not as familiar with it as I might be.

Q. Does the Sun Oil Company sell at tank car prices to any purchasers of Sun Oil Company gasoline in Detroit?

A. No, sir.

Q. That is, to any purchasers who resell at retail?

A. No, sir.

Q. In your opinion, what is the effect of this practice which I have just described, with which you say you are familiar, upon retail competition in the sale of major brand gasolines in Detroit?

Mr. Hanley: Just a moment, Mr. Harrison.

391 In addition to the general objection, this question is objected to on the ground that it appears to be hypothetical, to elicit an opinion from the witness, and not even the hypothetical question is included in the present question propounded to the witness but appears to refer back to a statement made by counsel, and that even such statement does not include all of the factors of proof which are present in this case and upon which the witness would be required to base an opinion before any opinion would be admissible.

Furthermore, any opinion based on any hypothetical question, even if it did include all of the factors proved, would not be proper testimony in this case for the reason that such an opinion as is sought to be elicited is an opinion as to the ultimate issue in the case and is tantamount to asking an opinion of a witness in a criminal case whether the Defendant is innocent or guilty.

Trial Examiner Ballinger: Read the question.

(The question was read.)

Trial Examiner Ballinger: The objection is overruled.

A. My opinion is that it creates a very difficult competitive condition by reason of the fact that some marketers are able to buy at a lower cost than others; and it is the
usual practice that the preferential buying leads to
392 a lower retail price to either openly or through one
means or another of discounting.

By Mr. Austin:

Q. By marketers, you mean retail marketers?

A. I mean by retail marketers.

Q. Is it your statement that this practice leads to price cutting by the stations receiving the preferential price?

A. Yes.

Mr. Hanley: That is objected to as leading.

Mr. Austin: Well, I understood that he already said that.

Trial Examiner Ballinger: The objection is overruled.

The Witness: Repeat the question.

(The question was read.)

Trial Examiner Ballinger: If that is not his statement, the witness may answer.

The Witness: I answer yes to that question.

By Mr. Austin:

Q. And based upon your experience and observation of the competitive retail situation here, what has been the effect of such price cutting upon the business of other retail gasoline dealers who are paying the posted tank wagon prices of their respective major oil companies?

393 A. It forces—

Mr. Hanley: Just a moment, Mr. Harrison.

The Witness: Yes, sir.

Mr. Hanley: The same objection to that question, and I would like to inquire, if your Honor please, whether Mr. Austin is pointing these questions to the practice of the Respondent in this case or whether he is just talking about some general situation.

Mr. Austin: Well, in the first place, I think you will concede that Mr. Raupagh testified that the posted tank wagon prices of major oil companies are generally the same, so that that part of the question I think is based upon proof. As to the question you just asked, it is intended to show the result of this practice, whether engaged in by Standard Oil Company or by some other company, the witness already having testified that other companies engage in it.

Now, so far as this case is concerned, I contend that it is relevant only in so far as it indicates the effect of the practice as engaged in by Standard Oil, but in all fairness I didn't want to make it in any way appear that I was contending that the Standard Oil Company was the only company which engaged in the practice.

Mr. Hanley: Then to the general objection and the
objection to the hypothetical question which was earlier
394 asked of this witness, Respondent desires to add to the
objection. He has shown no qualifications to testify as to the effect of any practices in which the Respondent may have been or be engaged. He has not shown himself familiar with either the prices charged by the Respondent to any of its dealers or the jobbers, the cost of doing business, and has not shown himself familiar with the fact as to whether or not the cost of gasoline in retail stations to jobbers, to retail sellers, so far as the practices of Standard Oil Company are concerned, may not be the same.

The question is further objected to for the reason that it is now quite apparent that the hypothetical question originally asked and of which this is a follow-up lacked necessary and essential factors and elements in order to qualify the witness to express an opinion.

Trial Examiner Ballinger: Read the question.

(The question was read.)

Trial Examiner Ballinger: I will hear from counsel for the Commission.

Mr. Austin: In the first place, I don't agree that this is a hypothetical question. It is based upon—

Trial Examiner Ballinger: It is based upon his experience. Now, what experience has he actually testified to that he has actually had?

395 Mr. Austin: In the first place, it is based upon—
as to the facts in the question, it is based upon proof of the fact which has been made, that the Standard Oil Company sells to these tank car buyers at a cent and a half to a cent and three-quarters per gallon less than it sells to its posted tank wagon buyers, price buyers. The witness has stated that he is familiar with that practice. He has also stated that he has made it his business to keep in touch with the competitive situation in the sale of gasoline at retail in Detroit.

I will ask the witness whether he is familiar with what is meant by tank car buying and bulk plants and retail stations who buy at posted tank wagon prices.

Are you familiar with those subjects?

The Witness: That is, what is a tank car buyer and what is a tank wagon buyer?

Mr. Austin: Yes.

The Witness: I am familiar with that difference.

Mr. Austin: And the method in which tank car buyers handle their gasoline through their own bulk plant?

The Witness: The latter part of that question?

Mr. Austin: I say, and the method in which tank car buyers operate through bulk plants and deliver to their stations. Are you familiar with that?

The Witness: Yes, sir.

396 Trial Examiner Ballinger: The objection is overruled.

Mr. Austin: I suggest you now read the question again.

The Reporter: (Reading) "Based upon your experience and observation of the competitive retail situation here, what has been the effect of such price cutting upon the business of other retail gasoline dealers who are paying the posted tank wagon prices of their respective major oil company?"

A. In my opinion, it forces the other dealers to sell at a lower retail price, either by direct price posting or by some means of discounting, in order to meet the competition established for them in their respective trade areas.

By Mr. Austin:

Q. And in meeting that competition, does it follow that the margin—that the operating margin of the retail service station buyers is necessarily lower than the margin of the tank car buyers?

Mr. Hanley: Just a minute, Mr. Harrison. That is objected to.

Mr. Austin: I will withdraw the question.

Mr. Hanley: It is entirely immaterial on any theory in this lawsuit.

397 Mr. Austin: I think it is material, but I will withdraw it.

By Mr. Austin:

Q. Just to carry your answer to the previous question a little farther, you stated that the result is that the stations that buy at tank wagon prices and by tank wagon deliveries are forced to cut their price to meet the competition of the tank car buyers—is that what you said?

A. Well, not exactly, because the retail—the retail operator is not in direct competition with the tank car buyer. He is in competition with the stations of that tank car buyer who buy retail and—

Q. Well, now, just a minute. Don't some of the tank car buyers sell at retail?

A. Some of them, I understand, do. I would say yes, that some do.

Q. Well, I was directing my question, and I think that everything that has been said here will show, that we have only been referring to tank car buyers who are retailers, such as Ned's Auto Supply Company.

A. In that case the tank car buyer has a wider margin of profit than the ordinary dealer who buys at the ordinary tank wagon price, and, obviously, if the tank wagon buyer has to reduce his retail price, his gross return is less
398 than the operator who has the benefit of a preferential
price or tank car price.

Q. Suppose that the retail service station paying the posted tank wagon price doesn't cut his price to meet competition, as you have suggested he might. What is the result then?

A. If he is within the trade zone of a competitor making a lower retail price on comparable quality merchandise, the effect is generally that he loses volume of business. The trade of his trading neighborhood flows away from his station to another station where the price is lower, and the amount of that movement varies with different localities. The proximity of the competition has a bearing on it.

Mr. Hanley: We have the objection, I take it, to all this line of testimony.

Trial Examiner Ballinger: The objection runs to this entire line.

By Mr. Austin:

Q. In your opinion, Mr. Harrison, does an advantage of as much as one-half cent per gallon in the price paid by a retail seller for the ordinary house brand gasoline of a major oil company give that seller a substantial competitive advantage over competing sellers who pay as much as one-half cent higher price?

399 A. I would say if the retailer who has the lowest cost uses his lower price to reduce correspondingly his retail price to the public, it will effect—

Q. If he doesn't use it for that purpose, why, then—

A. It doesn't make any difference.

400 Q. What are the principal factors that will attract

automobile owners to a service station to purchase gasoline?

A. There are several elements that go in to make up what we call public acceptance; advertising, you might say, the personality of the operator of the individual station, the type of service given there, the appearance of the station, and a confidence in the quality of the material that the individual dealer may be selling. On the basis of comparable quality, price is a very effective factor.

Q. By "comparable quality" would you say that the house brand gasolines of all of the major oil companies are of substantially comparable or equivalent quality in the public mind?

A. Yes, I think so. I think there is very little difference in the public opinion as to the quality of the major companies.

Q. In your opinion, and from the observation of the gasoline business here, and in your region, during the past four or five years has a difference in price at which gasoline can be purchased in different retail stations in a locality been an increasingly greater or a lesser influence upon the retail purchaser?

A. I don't quite get that.

Q. To make it briefer: Price—you mentioned that as a very important consideration.

401 A. Yes.

Q. In determining where an automobile owner will purchase his gasoline. Has that become more or less so, in recent years?

A. It has become more so. In my opinion, the buying public, generally, not only in petroleum, but in all commodities, has become very price conscious in the general retardation of the economic situation; lower wages, reduced incomes. It has made everybody price conscious, and if the merchant satisfies the buyer and he can get it at a cheaper price, again, it is obvious where he will buy. He will buy for the lower price.

Q. Is the amount of gasoline consumed in Detroit fairly stable; aside from seasonal variations?

A. There is, generally, each year, an increase in consumption. There have been a few years of exceptions to that, but, usually, the consumption of gasoline does increase with the increase of the number of cars. Sometimes a spurt in industry will cause an increase in consumption, but, generally speaking, the consumption is pretty stable.

Q. Does the public demand for gasoline vary with minor price changes—and by "minor" I would say within the range of one cent a gallon either way, or two cents a gallon either way?

A. I don't think so. I don't think that the motoring public stops using the automobile for a difference in price.

Q. But, on the other hand, so that there will be no
misinterpretation of the use of the word "minor"
402 would you or would you not say that two cents a gal-
lon is a minor difference in price to the purchaser of
gasoline?

A. No, it is a tremendous influence. I would like to have that advantage myself.

Q. Are you familiar with so-called off-brand gasoline, or non-major brand gasoline? Will you explain the meaning of those terms?

A. Well, I have heard both of them. Off-brand is usually taken to mean a gasoline other than that sold under the brand name of a major company. They are sometimes called local brands, and they are sometimes called "gyps." I prefer to refer to them as non-major brands.

Q. [illegible] there any accepted definition of what companies are included in the term, major oil companies?

A. No, I think each company has to make up its mind individually what it considers the non-major competition. I might include in my mind a certain group, but the make-up of that group might be different with some other oil marketer. Some of them might include us as the off-brand marketer, in some cases.

Q. Well, the term "major-brand oil companies" is used so frequently that we might just make a tentative list here of the companies, at least, included in that, for reference, when that is used in the record, Judge Hanley. Let
me start out, and in deference to the witness, I will
403 make it Sun Oil Company, first; the Standard Oil
Company, the Socony Vacuum Oil Company; Texas,
Gulf, Shell, City Service, Pure Oil—is that one?

A. I would say so.

Q. Maybe you can carry on from there. Are there any others?

A. In this market here the Pure Oil is represented through the Hicock Refining Company, with a brand called Hi-Speed.

Q. Is that considered a major oil company in this area?

A. In this area.

Q. Can you think of any others that there would be no doubt of being major oil companies, that I haven't brought up? All I want is to see if you wouldn't agree, Judge Hanley—

Mr. Hanley: No, sir.

Mr. Austin: —that the ones named, are. I am not going to ask you if it is complete, or not.

Mr. Hanley: I won't agree on that proposition.

The Witness: I don't know if we missed anybody, or not. If you read the list over, we will try again.

The Reporter: "—Sun Oil Company first, the Standard Oil Company, the Socony Vacuum Oil Company, Texas, Gulf, Shell, City Service, Pure Oil."

The Witness: You forgot Sinclair.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

404 Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Getting back to what you call the non-major brands—and we will understand that we are not necessarily referring to everybody that is not named here—is competition from those brands within a two cent differential per gallon; that is within a two cent lower price per gallon at retail than the prices charged by the Sun Oil stations, considered by you a serious competitive factor?

A. In this Detroit market—now these are the non-major operators that you refer to?

Q. Yes.

A. Under the existing conditions I would say they are not very hurtful.

Q. That is, provided they are not sold at more than two cents a gallon below your price?

A. Yes; not very hurtful.

Q. I suppose you might reach a point where they would be—

Mr. Austin: I will withdraw that.

By Mr. Austin:

Q. I suppose it would follow that there might be a different answer to other differentials, but I will leave that for the time being. I might ask you whether, without any limitation as to the amount of the differential, the retail stations selling off-brand gasolines in Detroit are—

405 Mr. Austin: I will withdraw that.

By Mr. Austin:

Q. Let me ask this question: Have you any records—do you know what percentage of gasoline sold in the Detroit area is off-brand or non-major brand gasoline? That, of course, would involve some classification of your own as to what is a non-major brand.

A. Well, in my studies of the problem, I differentiate between those selling the so-called house brand quality gasoline, and those selling the so-called third grade quality gasoline. I differentiate between those two in our individual studies. I think, combining all of it, however, the third grade with the non-major group gallonage, they will run between ten and thirteen percent of the total of the potential market of the metropolitan Detroit area; twelve to thirteen percent; around there.

Q. Does that include both?

A. That will include the third grade quality, the house brand quality of the non-majors.

Q. Did the Sun Oil Company, on August 27, 1939, reduce its tank wagon price to its dealers in Detroit?

A. It did not reduce its tank wagon price, but it made a special billing to its Detroit area dealers.

Q. What were the conditions which led to that reduction?

406 A. After a study of the competitive conditions through survey, it was established to our satisfaction that the general retail market forced our dealers to sell at a point which did not allow them a two cent gross profit. In our opinion, they couldn't survive on less than two cents, and on appeal from our dealers for relief, we agreed to support them on a two cent marginal basis; that is, two cents below their selling price, and that was granted to all dealers in this marketing area; all of our dealers were put on that basis.

Q. How long did that last?

A. Probably six weeks. I am not exact as to those dates.

Q. Wasn't it until November 18th?

A. Possibly. You probably may have evidence more than I have as to the dates of those changes. I can ascertain those dates, but I haven't got them in my mind.

Q. Did you hear the testimony of two of your salesmen, Mr. Warren and Mr. Chandler, on the stand this morning, in which they both referred to a survey which they were directed to make by the Sun Oil Company?

A. I heard Mr. Chandler, completely, and part of Mr. Warren's.

Q. Are you familiar with the survey to which they referred, made in August, 1940?

A. The survey was made by my direction.

Q. And was each of the salesmen directed to turn in
407 to the district office the records which he made, or the information which he obtained in the course of his duty, as to the prices and pricing policies of all of the service stations in his area?

A. The instructions were issued to the district manager of this Detroit area, and just exactly what instructions he issued to his men, I don't know, but the purpose was that full information should be brought in by every salesman of the competitive conditions which he found in his individual area. These were reported to Mr. Cunningham, the district manager, who compiled them and sent that report in to me.

Mr. Austin: I would like to have those sheets marked for identification.

Trial Examiner Ballinger: The reporter will mark the papers "Commission's Exhibits 53-A and 53-B, for identification.

(The papers referred to were marked "Commission's Exhibits 53-A and 53-B" for identification.)

By Mr. Austin:

Q. When that report was compiled, to which you have just referred, were the reports arranged so that the stations of each oil company were segregated in a separate list?

A. Yes, sir.

Q. I show you Commission's Exhibits 53-A and 53-B, for identification, and ask you if this is a copy of the

report which you have described, based on the survey
408 made by the salesmen, showing only stations at which
Standard Oil gasoline is sold?

A. This is the compilation of the report of the prices, a certain number, 58 Standard Oil Company stations, where our investigators reported discounting in some form below the generally accepted service station price, at that time.

Q. This, then, does not contain a list of stations which were not found to be engaging in any discount practices, is that right?

A. If there were no discounting observed or discovered, that station was not listed on that list there. Those are only those at which these practices were reported.

Q. And did the entire survey cover all of the Standard Oil stations in Detroit?

A. Yes, sir.

Mr. Austin: I offer this Commission's Exhibit 53-A and 53-B, for identification, in evidence.

Mr. Hanley: Same objection, Your Honor, as formerly,
with the additional objection that that statement, as offered, is incomplete. It refers only to Standard Oil Company stations, and only a portion of them, and it excludes all other stations in Detroit which are in number, according to the witnesses of the Government, connected with the Sun Oil Company, between three and four thousand, and
this statement refers to only 58 stations.
409 Furthermore, there is no date on the Exhibit, and
it is impossible to tell therefrom on what day the price was in effect as reflected at any given station.

Furthermore, it is not disclosed on the Exhibit as to whether the service stations listed were tank wagon customers of the Standard Oil Company, tank wagon customers of one of the four jobbers involved in this action, or directly operated stations of one of the four jobbers in this action. That, in any event, the Respondent is entitled to the complete survey and all that was prepared as a result of the survey, if any part of the thing is to be introduced, and if it is regarded that any part of it has any probative value, by the same token it would all have probative value.

We now demand, if the offer is persisted in, the balance of the survey.

Mr. Austin: Would it be your contention that the survey, other than Standard Oil stations, would be material, or are you asking only for the entire survey on Standard Oil stations?

Mr. Hanley: I want the whole survey; whatever it was. Your witnesses say there were three or four thousand stations in Detroit. You reflect, here, some information, without date, as to 58 stations, all of which are Standard Oil stations, but without reference to what kind of
410 Standard Oil stations they are.

Now, I say this, Mr. Austin, that if this kind of thing has any probative value on this case at all, then the result of the entire survey has the same probative value.

I wish to make myself clear about this. The Government should not be entitled to put in this piece-meal Exhibit and draw a conclusion therefrom in support of the opinion of this witness that this discounting practice which he has talked about affects competition when, as a matter of fact, there appears there is in existence a survey which may disclose hundreds of other stations other than Standard Oil Company stations which were indulging in this practice.

If you are just trying to prove a competitive situation, we haven't any objection to your doing that. We will do that ourselves, but we do object to putting this in.

Mr. Austin: In view of the objections by counsel for the Respondent, the offer is withdrawn. I think that's all I have on direct examination.

Cross-Examination by Mr. Hanley.

Q. Mr. Harrison, I think you said you had 480 Sun stations in what you refer to as the Detroit district, and then you describe that being quite an area outside the metropolitan area of Detroit. I would like to ask you how many Sun stations there are in the Detroit area proper: Detroit,
411 Hamtramck, Dearborn, and Highland Park.

A. What we consider as the Detroit metropolitan area for ourselves, includes, in this survey that we made, 466 dealers. The difference between that and the district number of 480, lie outside of the metropolitan area; such as Ann Arbor and small towns forty or fifty miles away from Detroit.

Q. Does that mean, or did you have at that time, about 466 stations in the area that I described; that is, Detroit, Highland Park, Dearborn, and Hamtramck?

A. Yes, sir; including Mount Clemens and Pontiac.

Q. Can you exclude those, please, and just confine it to those four towns?

A. It would be a guess, sir, but I would say possibly it would reduce it by twenty; say it would be 440 to 450, excluding Pontiac and Mount Clemens.

Q. Now, you were asked your opinion, Mr. Harrison, in relation to the practice of selling to jobbers on the tank car basis and on a tank wagon basis; that is, your opinion with reference to the competitive effect. You have said, in substance, that the effect was to cause price cutting. I assume it is true that you are basing that opinion on a general observation of the oil industry wherever you have been acquainted with it?

A. Yes, sir.

Q. I think you said that that price cutting result
412 would not follow unless the additional margin as between tank wagon and tank car price was used to depress the market by the customer who had the advantage of it.

A. That is true, I said that.

Q. And that is your opinion, is it not, Mr. Harrison?

A. That is my opinion. To elaborate: If the price to the public is the same in both cases, I don't think that the cost to one merchant, as compared to another, has anything to do with the flow of the volume of business.

Trial Examiner Ballinger: The opportunity, however, is always present, is it not?

The Witness: The opportunity is there, always. The man with the wider margin of growth in his business, is always in a stronger position to lower retail or public prices.

By Mr. Hanley:

Q. Is the jobber method of distribution one very commonly in use in Detroit, Mr. Harrison?

A. Yes, I would say, confining the opinion to Detroit, that it is generally used by most of the marketers.

Q. And isn't that true elsewhere in the United States?

A. Even worse than in Detroit, in some places.

Q. Do you regard the use of the jobber system of distribution any more reprehensible in Detroit than it would be anywhere else in the United States?

A. I think it is reprehensible anywhere.

413 Q. Your company does use that system of distribution elsewhere than in Detroit, do you not?

A. Yes, but not in like manner. May I explain my opinion?

Q. Yes; if there is a difference, I would like to know what it is.

A. We do not distribute through jobbers or distributors, or agents in territories where we operate our own distribution through our own plants. Where we have distributors or so-called jobbers, they have a franchise of a certain definite area for which they become, for all intents and purposes, the Sun Oil Company. We do not send our operators into those areas.

Q. Is that true throughout your operations?

A. Insofar as we do not duplicate this distribution in any areas.

Q. There are points in Michigan where you have jobbers?

A. Yes, we have distributors—we call them distributors—we have some, probably a dozen in the lower Peninsula.

Q. And it is true that in none of those places does the Sun Oil Company sell on a tank wagon basis?

A. In none of those distributor areas—we do not operate our tank wagons.

Q. Are there any localities where you sell through a distributor that that area would come into competition with any area where you directly operate or directly sell to the service station operators?

414 A. I didn't get the last part of that question.

Q. Do the areas in which you sell through distributors, and in which you sell directly to the service station operators, conflict competitively? Do they adjoin each other in any instances?

A. They border each other but do not overlap.

Q. So that jobbers on the one hand might be operating stations or supplying stations, and just across the line you might be supplying, directly, service stations operators?

A. That's right.

Q. You have explained your testimony that the contiguous location of service stations had much to do with the effect of differentials in prices to the public, of those stations?

A. Yes.

Q. Wouldn't the same situation identically arise in the setup you have just explained, as would arise in Detroit?

A. If the distributor were selling—if he were running his own station and selling at a lower retail price, we will say, on the north side of Oakland County and Genesee, and we had a dealer on the south side of that line in a close proximity, reasonable distance from him, and the distributor's dealer was selling at a lower price than our dealer, it certainly would affect our dealer's business.

Q. And that is true every place, isn't it?

415 A. Yes. I might add, however, that we have no evidence that that is happening anywhere. If it is, we would like to know it.

Q. But as the Court suggests, the potentiality always exists?

A. The potentiality is there.

Q. Now, Mr. Harrison, you have stated that in your judgment, a differential or a lower price at one service station, to the public, than at another, was a very important factor in the purchasing public's mind; is that true?

A. Yes.

Q. I think you said, also, that, in your judgment, as much as two cents off a price to the public would be a very large reduction. Do you recall making that statement?

A. Yes, sir, with respect to the so-called non-major brands and the third grade brands; not with respect to the house brand.

Q. You don't think that a difference in retail price of two cents, as between house brand gasolines, would have any compelling effect in the public mind?

A. Yes; some.

416 Q. But not important?

A. But not in the same relative proportion. If the difference in price is between two so-called major brands, ours and some other major brand, a 2 cent differential in such case would be very important and very potent in influencing the flow of business.

Q. Well, that is what I thought you had said.

A. Yes.

Q. That 2 cents as between relatively comparable brands of gasoline would be an important factor?

A. Yes, sir.

Q. And a highly important one?

A. Yes.

Q. Now, if that be true, I don't think I understand you when you say that it would make minor or little difference in the case of non-major gasolines. Is that your view?

A. Yes. It is not as potent in the case of non-major and third grade brands as it is between major brands.

Q. Isn't it true, Mr. Harrison, that what you term as non-major brands may be a locally branded gasoline that has a large public acceptance in a city like Detroit?

A. You mean there is a difference as to how I would classify these marketers as?

Q. Well, you have named what you think are the major marketers.

417 A. That is right.

Q. In Detroit. Let me ask you, first: in your judgment, how much gasoline is sold in Detroit in a year, approximately?

A. I think it will average approximately 32,000,000 gallons per month on the average. It will fluctuate with the seasons.

Q. How much of that gasoline would you say is sold by the major companies?

A. By the major companies? Approximately 87% is sold by major companies under their brands. There is some of the gasoline not sold under major brands that is major company gasoline.

Q. But you think 87% of the total gasoline sold in Detroit is sold under major brands, as you have defined "major"?

A. Yes.

Q. Now, what percentage of the gasoline in Detroit would you say is sold through jobbers?

A. I haven't got those figures in my head, but I have got some notes here, if you want me to take time.

Q. If you can from any quick source give us the answer, I would like to have it.

A. Sir?

Q. If you have any quick source from which you
418 can gain the answer, I would like to have.

A. Somebody will have to do a little arithmetic here. I haven't got this added up. Are you going to take down these quantities, sir?

Q. They will go in the record.

Perhaps it would help you and speed this somewhat if

I ask you this question: Are you able to say whether it is not true that approximately slightly in excess of 50% of all of the gasoline sold in Detroit is sold by jobbers?

A. I am not in position to say that.

Mr. Austin: What percentage did you say?

Mr. Hanley: Slightly in excess of 50%.

Mr. Austin: By jobbers?

Mr. Hanley: By jobbers.

The Witness: I can list these in volumes, if you want to work it out, as according to my estimate, and in my opinion.

A. The Goodrich stores served by Texas and Gulf Company, 300,000 gallons per month.

Wayne Oil Company, Standard. We surveyed 20 of those stations and estimated 131,000 gallons for the group.

The Citrin-Kolb—now, this is only on the house brand gasoline. I did not include—I am not including the Ethyl or the third grade. If you want those, I will have 419 to give you three figures, if you want all of it.

By Mr. Hanley:

Q. The house brands.

A. Just the house brands.

Citrin & Kolb, 45 stations, 381,700 gallons.

Stikeman Oil Company, 9 stations, 90,000 gallons.

Ned's Auto Supply, Standard Oil Company, 257,000 gallons.

Victor and Silverman, served by Fleet Wing, a brand of the Standard Oil Company of Ohio, Fleet Wing being a jobber operation, 8 stations, 81,700.

J. J. Bright, Sinclair, 51,500, through four stations.

Carnick, handling Gulf, 6 stations, 53,500.

Firestone stores, 4 stations, served by Texas, 32,000 gallons.

The Puritan Stations, known as Zip, Pure Oil operation, 797,000 gallons.

The Joy stations, Austin Oil Company, 1,000,000 gallons.

I don't know how much that all adds up to. Let's see if I have missed anything.

Q. Well, I won't ask you to add that.

A. Sir?

Q. I won't ask you to add that.

Please tell us, though, if you have now named all of 420 the jobbers doing business in Detroit according—

A. Have I named all of them? No. There is some I haven't got. I list those under a miscellaneous group, such as the Plymouth Oil Company. That is one type. I haven't got that particularized, but I have got a miscellaneous which will add to this total of non-major. Here is some more.

The Dixie, 89,200.

Sucher Brothers, 544,000.

The Argo Oil Company; I have only 8 stations of those; 68,000.

The Dura Oil Corporation, one station, at 30,000.

Another Victor and Silverman station, at 60,000.

The Oakland County Gas and Oil, 267,000 gallons.

Peerless Distributing Company, 3 stations, 42,000 gallons.

Victor Oil Company, 4 stations, 38,000 gallons.

Keystone Refining Company, 2 stations, 8,000 gallons.

Plymouth Oil Company. I haven't got gallonage on Plymouth Oil Company. We are getting down into some pretty small figures now.

Leonard Refining Company, at 15,000.

The Petroleum Service, at 6,500.

The Globe Oil Company, 274,000.

Pennzoil Company, 17,000.

421 The Rex Transportation and Posnik, 6,000.

Red Indian Oil Company, 4500.

Terminal Oil Company, 45,000.

And the Fried Oil, at Mt. Clemens, which isn't in the picture.

Then, besides that there is a miscellaneous group selling other than major brands of 435,000.

That is all I have on my survey of other than the major companies.

Q. Do you think now you have covered with some very trivial exceptions, all of the jobbers doing business in Detroit?

A. All that I know of, yes, sir.

Q. You are not prepared, without making a calculation, to say what percentage you think—

A. Well, I said awhile ago, sir, that I would estimate it at approximately 13% of the market as the non-major group, and included the Joy and Zip group of stations, a total of 13% of this market, leaving 87% of the gallonage sold by major companies. It might be direct or it might be through jobbers.

Q. That is what I want to clear up.

A. I am not prepared to separate the jobber gallonage from the total of the major company gallonage.

Q. Now, with that basis, is it not a fact that in
422 Detroit jobbers generally engage both in retail and wholesale operations?

A. Generally, I think possibly they do; yes.

Q. Aren't you sure of that?

A. I am not familiar enough with the details to say definitely just which ones do and which ones don't.

Q. I am not asking you that, just your opinion as to whether it is the general custom.

A. Generally, yes.

Q. And isn't that—

A. I think most of them have stations of their own, one or more; some of them only have one, some may have a chain of 10 or 15 or 20 stations.

Q. Is that not generally true all over the country?

A. I think so.

Q. You have outlined a number of factors that you regarded as being important in gaining customers at a service station, among them advertising, personality of the operators, appearance of the station, and so on.

In your judgment, is it not true that those factors other than price and other than the brand of gasoline, assuming it is one of which you call major brands, are the most important factors in gaining and retaining customers?

A. Other than the price?

423 Q. Yes, sir.

A. No, sir; I don't think so. I think the price is the potent factor.

Q. Always?

A. Yes, sir.

Q. Do you think that is true in every locality; I mean in Detroit. When you say that, you mean in all communities in Detroit that that is true?

A. No. I can pick out some isolated spots such as Grosse Point, maybe Palmer Woods, or some locality there where the residents of those areas are not price conscious because they are not in that earning group. They are above the necessity point in income, and, consequently, are not affected so much by price, but in the vast majority of the areas of Detroit, which is a wage-earning class, very definitely they are price conscious and price is the predominant factor that brings their trade in or keeps it away.

Q. In giving your opinion as to the effect of the practice of distributing through jobbers coincidentally with selling tank wagon, I want to know definitely whether your opinion was based on any knowledge you claim to have of the specific operations of the Standard Oil Company in that respect?

A. I haven't any particular knowledge of the opera-
424 tions of the Standard Oil Company any more than what is generally known through the gossip of the trade, you might say.

Q. Do you have any knowledge of the costs of the four jobbers involved in this action in the operation of their own business, their own distributing business?

A. I have no knowledge of their costs whatever.

Q. Do you have any knowledge of the prices that they charge the service station dealers whom they serve?

A. No, I have no knowledge of what, to use the vernacular—what their tank wagon price is as to their dealers. I don't know that.

Q. Have you any knowledge as to whether or not the cost of these jobbers of the gasoline that they may buy on a tank car basis is not as great in their service station tanks as it is to a retail dealer who buys on a tank wagon basis?

Mr. Austin: Will you repeat that question, please?

(The question was read.)

Mr. Austin: You are referring there to retail stations operated by these jobbers?

Mr. Hanley: Yes.

Mr. Austin: Not to anything that they sell to dealers? You are talking about their retail tanks, if I understand you correctly.

Mr. Hanley: Yes.

425 The Witness: I have no knowledge of that. In such case we can only deduce—

By Mr. Hanley:

Q. I am not asking you to speculate about it. I am not asking you for opinions now, Mr. Harrison, I am asking you what you know.

A. I don't know anything—

Q. About the operation.

A. —about what prices any of these jobbers charge their own dealer stations. I don't know that, and perhaps no one knows it other than the jobber who is making the delivery."

Q. My question refers specifically to the stations operated by these jobbers; that is, a direct retail operation. You haven't answered that question.

Do you know anything about the cost of the gasoline to that jobber in his retail station tanks as compared with the cost of gasoline in the retail tanks of a tank wagon reseller?

Mr. Austin: May I interrupt, with your permission, Judge Hanley?

Mr. Hanley: Yes.

Mr. Austin: Are you willing to qualify that question, that is, the question being asked, upon the assumption that the so-called jobber was paying a cent and a half less for his gasoline than the retailer is paying?

426 Mr. Hanley: All right. I thought I covered that when I said tank wagon to tank car basis.

The Witness: The question is just a little confusing, sir, at the moment. I think I know, but I am not certain.

By Mr. Hanley:

Q. I will try and clarify it. In answering this question, bear in mind I am not asking you for an opinion; I am asking you for what you know about facts.

A. Facts, yes, sir.

Q. You have stated that you don't know what the cost is of these jobbers, what that may be in any of their operations.

A. No.

Q. It follows, does it not, that you don't know but that their gasoline actually costs them more by the time they have got it in a service station operated by them than it costs the ordinary tank wagon buyer?

A. Well, that question is perfectly clear, and I don't know.

Q. That is what I thought. When you give your opinion as to what you think the effect of this practice of selling through jobbers has upon competition, you are basing that opinion upon just the potential possibility that the additional margin might be used to depress the retail price?

427 A. No. My opinion is not based on that.

Q. Well, is it based on the operations of the Standard Oil Company?

A. No, it is not based on that. My opinion, if you want me to explain it again, is: based on purchases that we have had made to determine what is their selling price. And if we find a price that is 2 cents below the posted market, and we are, to our best knowledge and belief—we know the marketer is buying at a cent and a half a gallon below the tank wagon price, we can't very well account for a two cent discount at the retail, which would have that operator selling at a half a cent a gallon below his cost.

Q. I don't understand you, but I will try.

A. I guess we don't understand each other.

Q. If such a retailer of gasoline had only a cent and a half better price and he sold at retail at 2 cents below the general prevailing market, it follows, does it not, that he would have to take the other half cent out of what otherwise would be his profit margin?

A. Yes, sir. That is what I tried to say a moment ago.

Q. Maybe you did and I just didn't understand you, Mr. Harrison.

You don't mean to say, I take it, Mr. Harrison, that in
all instances where you have found the retail marketers
428 were cutting prices, that you reasoned that they must
be buying on a tank car basis?

A. No, I didn't have to guess at that. Those who are buying on a tank car basis are generally known.

Q. Isn't it true that competition in Detroit is such, as it is elsewhere, that some marketers are willing to take a lesser margin than others in order to increase their gallonage?

A. Yes, sir, that is right.

Q. Don't you know that in your own operations you frequently meet with cut prices by dealers who have not, to your knowledge, any price advantage at all?

A. Yes. They are working on what we call a lower margin, less than the generally accepted idea of the prevailing margin; yes.

Q. That is just one method of getting business, isn't it, Mr. Harrison?

A. That is one method to get business.

Q. And it is a perfectly legitimate one in your view, I take it?

A. Perfectly legitimate.

Q. Indeed, your own company, the Sun Company, has been very aggressive in the Detroit area in keeping down the tank wagon price to dealers, has it not?

A. No, I don't think we have been very aggressive

429 in keeping the tank wagon prices down.

Q. I mean by that, Mr. Harrison, that you make a bid to get customers, and you keep your price down to a point where it aids you to get them?

A. We, to the best of our ability in our contacts with our dealers, endeavor to school them to the thought that they must remain competitive if they are going to hold their business, if they are going to get any advantage of general increase in consumption of business. We school them just diametrically opposite to creating a lower price competition. All of our efforts are bent on those two principles, not to create a low price competition, but when they are faced with it, to meet that competition.

Q. And you follow that policy very vigorously, do you not?

A. To the best of our ability, we use the most persuasive way that we can with our dealers.

Q. And it is true of your company, is it not, that when a competitive situation arises that you, as a company and in your advice to dealers, are very prompt to meet that competitive situation?

A. Yes, sir.

Q. Now, 1938 was a bad year in the oil business generally, wasn't it, Mr. Harrison?

A. Yes, it was.

430 Q. Your company's business in the Detroit area increased in that year, however, didn't it?

A. Not in '38.

Q. Not at all?

A. It fell off as against '37.

Q. Well, did it fall off comparably with the business of other companies?

A. I don't know. I think we dropped back about 4%.

Q. You do not answer the question. Do you think you more than held your own as compared with other companies?

A. I think we did, yes. I don't think we suffered as badly as some others suffered in this market.

Q. In 1939 you increased your business in this area, didn't you?

A. Yes.

Q. And in 1940?

A. Yes.

Q. So whatever the results of this competitive situation in Detroit has been, it has not hurt your business, has it?

A. No, no, we can't say that it has.

Q. You have always followed the policy of always meeting competition?

A. Yes, sir.

Q. Isn't it true, Mr. Harrison, that oftentimes the Sun dealers have reduced their prices to meet com-
431 petitive situations before a large number of other dealers have not reduced their prices?

A. They probably have. In most cases they have been the first to meet it.

Q. When that occurs, Mr. Harrison, and some dealer then cuts to meet the general cut in price, is there any way that you know of to determine how that slide began, what initiated the situation?

A. I don't quite get that.

Q. Well, I will withdraw the question.

A. I don't quite get the point, sir. I am quite willing to answer it, if I understand what the question is.

Q. I will withdraw the question and reframe it. When there is a competitive situation that is keen, are you able to attribute that to any given factor in Detroit?

A. I attribute it, the beginning of it, in nearly all cases, to the fact that some marketer has got a preferential cost; that is, a preferential buying price, and he is anxious to expand, and he has the power to do so through having the wider margin of profit, gross profit to work with, and he wants to get more gallonage; so he does something to reduce his price to the public and that is always the start of these price-cutting orgies that we get into periodically.

432 Q. Mr. Harrison, wouldn't it amount to the same thing as a preferential price if a retail service station operator was an efficient operator and kept his cost down and did a large volume on a low margin?

A. Would it be equivalent to a preferential price?

Q. Yes.

A. No, it would not.

Q. Why not?

A. Because there is not comparable efficiency in the operation of the two plans. One man can do it because his costs are lower; that is, his purchase costs of the merchandise is lower. The other man, through skill and efficiency on his own part finds out how to run a business at a lower operating cost to himself, although he pays more for his goods, so that his net might balance against the preferential cost of the other fellow.

Q. That is what I am asking you.

A. It could be done through the efficiency of operation by large volume.

Q. Yes.

A. It could be done just that way.

Q. Don't you think it is done?

A. Sir?

Q. Don't you think it is done that way in a number of instances?

433 A. In some isolated cases.

Trial Examiner Ballinger: Could it be done where there was a preferential rate of 2 cents per gallon on gas?

The Witness: No, sir. That is asking too much, because the most that a dealer can expect over the past considerable time is the gross margin of 3½ cents on gasoline, and if he is going on a 2 cent differential against him, it would cut him down to a cent and a half, and that is not possible. The dealer will certainly go broke.

Trial Examiner Ballinger: Ordinarily could efficiency equal the 2% differential?

The Witness: The 2 cent differential?

Trial Examiner Ballinger: Yes.

The Witness: No, sir. Efficiency can't equal the 2 cent differential in price, in my opinion.

By Mr. Hanley:

Q. Do you think in your judgment, based on your experience, Mr. Harrison, that the elimination of any one of the suppliers that you have named who do business through a jobber would eliminate the competitive difficulties in Detroit?

A. I am afraid that it would not.

Q. To make that just brutally clear, Mr. Harrison:
434 if the Standard Oil Company were prevented from selling gasoline to the four jobbers involved in this action and everybody else kept on doing business as they have been doing it, as you know they are doing it in

Detroit, would it make any difference in the competitive situation in Detroit, in your judgment?

A. If any other major company, we will say comparable in public acceptance and ability of the Standard Oil Company were to take on the business of these people, it would not in any way cure or help to cure this competitive situation.

Q. Do you have the slightest doubt in your mind, Mr. Harrison, that if that business were lost to the Standard Oil Company that some other supplier, and a major supplier, would not immediately take it on?

A. There is a possibility that they would, because there is a lot of us that are still very foolish.

Q. Well, foolish or otherwise, what is your judgment as to the fact?

A. I think if they were not under the same restraint as the Standard Oil Company that they would take it on.

Mr. Hanley: I think that is all.

Mr. Austin: Now, just one or two questions, Mr. Harrison.

Redirect Examination by Mr. Austin.

435 Q. Right on that point, now, let me ask you a question in a little different form: if all of the major oil companies were prevented from selling to retail operators at tank car prices in the Detroit area, would that improve the competitive situation in Detroit?

A. I think it would.

Q. Does the Sun Oil Company maintain a constant system of cost accounting to determine its cost of delivering gasoline?

A. Yes, sir.

Q. I believe your gasoline reaches here by pipe line from Toledo; is that correct?

A. That is right.

Q. Where does it go to then? To a bulk plant?

A. It goes to our terminal at Hamtramck.

Q. How is the gasoline delivered from that terminal to the service station?

A. By truck, tank trucks.

Q. Can you state how much it costs the Sun Oil Company per gallon to deliver gasoline from the bulk plant at Hamtramck to the Sun Oil Company stations, including the cost of operating the bulk plants?

Mr. Hanley: Just a moment. That is objected to as wholly immaterial. It seeks to elicit a cost of a company who is not concerned in this action, and it seeks to 436 elicit a cost which is based upon an operation which is not involved in this action, trying to get a pipe line cost, and we have got to hire a railroad.

Mr. Austin: I am not asking about pipe line costs. I am asking the cost from the bulk plant to the service station, including operation of the bulk plant. In the first place, Standard Oil Company operates bulk plants and delivers in exactly the same method by tank wagon to its service stations. However, that is your case, and if I ask this question as far as it relates to that, I am not assuming any burden of proof, but I am merely asking it because Mr. Harrison is here, without any intention to continue with it. But, secondly, and primarily, I offer it for this reason, that in the questioning Judge Hanley raised the question as to whether Mr. Harrison was familiar with the cost of delivery of these jobbers. That is something else. These jobbers operate bulk plants. It has been proved that they deliver by tank wagons to their service stations.

I am offering this in view of the fact that you have asked questions regarding the possibility, at least, that jobbers may use up that cent and a half in delivering from their bulk plants to their service stations.

Trial Examiner Ballinger: The objection is overruled.

437 Mr. Austin: Read the question, please.

The Reporter: (Reading) "Can you state how much it costs the Sun Oil Company per gallon to deliver gasoline from the bulk plant at Hamtramck to the Sun Oil Company stations, including the cost of operating the bulk plants?"

A. That is pretty hard for me to pull right out of my head with no recent reference, but I will endeavor to do the best I can.

By Mr. Austin:

Q. Well, ~~if you~~ can, say definitely that it is less than a certain amount, or something like that.

A. I think I am safe in saying definitely that it is less than half a cent a gallon, including all costs of operating the bulk plant, that is, including the ordinary evaporation and spillage losses, the labor, operation of the warehouse, personnel, cost of the truck operations, the accounting going along with the operation, and a cost element for the amount of invested capital in the plant, which constitutes practically all of the overhead connected with delivering the gasoline to the dealer—will be less than half a cent a gallon.

Q. That is based on your personal knowledge derived from the records kept at your office?

A. Records kept in my office. The exact figures 438 are available, if necessary.

Mr. Austin: Thank you. That is all I have.

Recross Examination by Mr. Hanley.

Q. Does that include the maintenance of your bulk plants and the element for investment in the bulk plant?

A. Yes.

Q. All depreciation and repair costs?

A. And they charge us 6% on the invested money. It is all in there.

Q. And you say that you can finance that operation for less than half a cent a gallon?

A. Yes.

Q. And you deliver all over Detroit?

A. Up to a range of as far away as Saline, which I think is about 50 miles, down to Flat Rock on the south, Mt. Clemens on the northeast, and slightly north of Pontiac on the north, an average haul pretty close to 40 miles.

Q. How many trucks do you operate?

A. For gasoline, I think we operate about 12, 12 or 13 trucks.

Q. You serve all of your stations out of the one bulk plant?

A. Yes, sir.

Q. And the bulk plant is served by a pipe line?

A. Yes, sir.

439 Mr. Hanley: That is all.

Mr. Austin: That is all. Thank you, Mr. Harrison.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Trial Examiner Ballinger: What is your suggestion with reference to a recess?

Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: The suggestion of counsel for the Commission is approved. Now, at 2 o'clock P. M., the hearing will stand at recess until 2:45.

(Thereupon at 2 o'clock P. M., an adjournment was taken until 2:45 P. M.)

440 Afternoon Session.

Trial Examiner Ballinger: The hearing is now reconvened at 2:45 P.M.

Mr. Hanley: Just before the noon recess, when Mr. Harrison was on the stand, the subject of the Sun Oil Company's bulk station operation costs were under discussion, and I would like to reserve at this time the right to recall Mr. Harrison for further cross-examination on that subject, if it is going to be regarded as material.

My reason for not proceeding now is two-fold. The witness wanted to get away, and he didn't have his records and figures, and, quite frankly, I am not fully prepared to go into the figures myself at this time, but I would like to reserve the right to recall Mr. Harrison for further cross-examination.

Mr. Austin: I have no objection to such a reservation. If there is to be cross-examination, however, I assume, naturally, it will be limited to the field I covered.

Mr. Hanley: Oh, yes. I am willing to be bound by that limitation. That's all I wanted to recall him for, is the question of costs, and I am only interested in doing that in the event you press your insistence it is material, and you expect to use it.

Mr. Austin: I think by the time you get through with your defense, it will be of increasing materiality. I think it is material now.

Trial Examiner Ballinger: The witness may be re-
441 called for further cross-examination.

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I will call Mr. Pearson.

ROLAND PEARSON was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. What is your full name?
A. Roland Pearson.
Q. What is your address?
A. 690 Kimberly Road, Birmingham.
Q. That's Birmingham, Michigan?
A. That's right.
Q. What is your business?
A. Sales department, Sun Oil Company, motor products, which includes motor oil, gasoline, and grease.
Q. Where is your territory located; in Detroit?
A. Yes, sir.
Q. You work out of the Detroit district office?
A. Yes, sir.
Q. Is Mr. Cunningham the district manager?
442 A. Yes, sir.
Q. And will you state, in a general way, your territory?
A. Well, with Warren Avenue on the south and north, following Fourteenth to McNichols Road, and east to Woodward, north on Woodward to Ten Mile, east on Ten Mile to Livernois, and south on Livernois to Warren Avenue, and back to Fourteenth.

Trial Examiner Ballinger: Relatively, what portion of the city?

The Witness: You might call that the northwest; it would be in the northwest section. It covers a very narrow strip of that section.

By Mr. Austin:

Q. Do you know whether there is a gasoline station in your sales territory which is operated by Ned's Auto Supply Company?
A. Yes, sir.
Q. Where is that station located?
A. At the corner of Chicago Boulevard and Grand River.
Q. How long have you been working for the Sun Oil Company in this territory?

A. In the City of Detroit?

Q. No, in the territory where you are now?

A. Seven years.

Q. Has this station, Ned's Auto Supply Company, been there all of that time?

443 A. No, I don't think it has been there seven years, I think it is about five years. This is just an estimate. I am not positive when the place was erected.

Q. Constructed about 1936?

A. I think that is about right—no, it isn't that long. To tell you the truth, I don't know. It has been within the last five years. I know that.

Q. I think the record shows it was constructed in 1936. I was just trying to refresh your recollection on that.

Have you ever made any purchases of Gasoline at Ned's Grand River store during 1940?

A. Yes, sir.

Q. I suppose you drive a car?

A. Yes, sir.

Q. Is that a so-called private car?

A. Yes, sir.

Q. Does it have anything on it to indicate that you work for the Sun Oil Company?

A. Nothing on the automobile.

Q. It probably has one of its service emblems?

A. No, I haven't got one on.

Q. Is that the car that you drove to Ned's Auto Supply station when you purchased gasoline there?

A. Yes, sir.

Q. Now, how many times during 1940 have you
444 purchased gasoline at Ned's?

A. Between five and six times.

Trial Examiner Ballinger: Over what period of time? When did you first purchase it?

The Witness: Sixty days; during July and August, during the summer of 1940.

By Mr. Austin:

Q. Did you pay the same price for gasoline each time you purchased there, during that period?

A. Yes.

Q. Will you state what that price was?

A. As I recall it, I went in and asked for a dollar's worth of gasoline, which amounted to about 16.3 gallons;

offhand. I can't just remember, but I do remember that the price was 16.3 or 16.2 cents at the time.

Q. Did the service station give you at that time, or at any of those times that your purchased during that period, anything of value, or which they stated was of value?

A. On a few occasions I was presented with a newspaper when I drove in, and when the attendant came up and asked me what I wanted, I told him, and I also got a coupon, which was the equivalent of two cents a gallon, but I paid the full price when I purchased the gasoline, and he told me this ticket could be redeemed at a later time.

Q. Is that what they told you about it?

445 A. Yes, sir; plus the instructions on the envelope. It stated the same story.

Q. What envelope is that?

A. I don't have the envelope or any of the receipts. They have been turned in to the company and have been lost since, or destroyed. Similar to the ones you showed this morning.

Q. You referred to an envelope?

A. Yes, sir.

Q. Did you receive that envelope the first time you were there, or did you get one afterward, each time you went?

A. No, the first time I went.

Q. When was that? Do you mean the first time during this period that you have talked about?

A. That's right.

Q. Your had been purchasing there previously?

A. No, I never bought at Ned's Auto Supply.

Q. Is the envelope you refer to, similar to either Commission's Exhibits 27 or 50 (handing documents to witness)?

A. This is the one I have reference to.

Q. That is Commission's Exhibit 27?

A. Yes.

Q. What, if any, conversations did you have on any of those visits with the service station attendants, regarding the value of those receipts?

A. Well, the attendant explained that the receipt
446 was equivalent to two cents a gallon, which could be
redeemed at a later date, and the instructions were on
the envelope. They were presented at the same time.

Q. Did he say whether or not those receipts had any value in making future purchases of gasoline?

A. I can't state that. I don't know.

Q. You don't know whether they were?

A. I can't say that the attendant said that, no, at that particular time.

Q. He didn't say that they were not good for gasoline?

A. That is right.

Q. Did I understand you to say that you asked for the discount?

A. I did. I went there for the purpose to get the discount, and I asked for it, and received it, and that was the manner in which I received it.

Q. Did they ask you what your business was, before giving you those receipts?

A. No, sir, no question was asked.

Q. Were you acquainted with anybody at that station before you went there?

A. No, sir.

Q. Were you asked whether you drove your car for business use?

A. No, sir.

447 Mr. Austin: I think that is all.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Cross-Examination by Mr. Hanley.

Q. Have you had the same territory for seven years, Mr. Pearson, approximately?

A. Approximately, yes, sir.

Q. Can you tell us by any fraction, that is, a half, a fifth, or a tenth, how much area in Detroit your territory covers?

A. Now covers?

Q. Covered in 1940, August, 1940.

A. Well, I would say that area would cover about one twentieth of the City of Detroit.

Q. How many service stations were in that area at that time?

A. Approximately 300 to 325.

Q. As I understand you, your purchased gasoline at Ned's station some five or six times during July and August of that year?

A. Yes, sir.

Q. Did you buy gasoline at any other of these stations on the same day that you bought gasoline at Ned's?

A. At any other service station?

448 Q. Yes, sir, your own—that is, I mean by that, Sun dealer's station or any other station.

A. I cannot answer that.

Q. Do you know what the actual sale price of gasoline was at any of the other 300 or 325 stations in your territory on the days which you bought gasoline from Ned's?

A. The only way I can answer that is the going price or the established price at the particular time.

Q. You are referring now to the posted price, Mr. Pearson?

A. Yes, sir.

Q. I am asking you not about the posted price, but the actual price at which gasoline had been sold. The question is: Do you know what the actual price of gasoline may have been on any of the other stations in your particular territory on the day you bought from Ned's station?

A. The only way anybody could answer that, as I see it, is the posted price. That is all I know of, that particular day.

Q. I understand there was a posted price, Mr. Pearson. I am asking you if you know what the actual price was any place else. If you don't know, say so; if you do, tell us what it was.

A. Well, I don't know.

Q. All right. Now, please tell the Court just what you said and what the attendant said when you went in to Ned's Service Station on these occasions.

449 A. Well, first of all, I went in there for the sole purpose to get the receipts or to buy the gasoline at a discount, and as I recall it, the first time I went in, I had to ask for it.

Trial Examiner Ballinger: Ask for what?

The Witness: For the two cents a gallon discount.

A. (Continuing.) I drove in and I said, "I want to get a discount." And as I recall it, he said, "We will take care of you." And I said, "Well, put a dollars worth in." So I gave the man a dollar, and, as I picture it now, he goes back to the cash register, which was on the outside of the station, and came back with the envelope and the little slip. The instructions were on the envelope.

Q. And you kept going back from time to time, five or six times to—

A. To see if this practice was still continuing.

Q. And it was?

A. Yes, sir.

Q. You got the discount?

A. The discount receipt.

Q. Yes.

A. Plus a newspaper on two or three of the occasions if I wanted it.

Q. Have you told us all the conversation that took place between you and the attendants with reference to this 450 discount any of the times that you went in there?

A. Yes, I would say that that is the whole of it.

Q. Now, as a matter of fact, you do drive your car for business purposes, don't you, Mr. Pearson?

A. Yes, sir.

Q. You use it in your work as a salesman?

A. Yes, sir.

Q. You were using it at that time?

A. Yes, sir.

Q. As you say, you don't know the attendants who served you?

A. No, I wouldn't know him from—I don't know who he was, not the slightest idea.

Q. I presume you don't know whether he knows you or not?

A. I don't know. I don't presume he does. I doubt it. I don't remember if it was the same attendant twice that waited on me.

Q. Mr. Pearson, is not the Chicago and Grand River location of Ned's store, their main office building?

A. I was under the impression that was their main office.

Q. Have you ever, as salesman for the Sun Company, solicited Ned's to purchase Sun products?

A. I never have, no, sir.

Q. Is it within your knowledge that the Sun Oil Company did solicit Ned's within the period of your employment?

451 A. I cannot answer that question. I do not know.

Q. You know nothing of it?

A. I know I never did, and I don't know anybody else that ever did.

Mr. Hanley: That is all. Oh, just a moment.

By Mr. Hanley:

Q. You are acquainted with Mr. Cunningham of the Sun Oil Company?

A. Mr. Cunningham is our district manager.

Q. Is he still so?

A. Yes, sir.

Mr. Austin: That is all.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Mr. Austin: If Your Honor please, you will note I am not repeating here on any single station. Each one of these men is testifying as to a different Ned's station, and that is the reason that I am calling several of them, to testify, apparently, to the same thing.

Trial Examiner Ballinger: Call your witness.

Mr. Austin: Each one of these conversations was had in a different part of the city, and I want to point that out.

Mr. Day.

452 JOHN A. DAY was thereupon called as a witness for the Commission and having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. State your name and address, to the reporter.

A. John A. Day, 1409 Clairmount.

Q. Are you a salesman for the Sun Oil Company?

A. Yes, I am.

Q. How long have you had that position?

A. One year.

Q. What was your business before that?

A. I was working in a training station for the Sun Oil Company.

Q. Is that the way they develop and train their salesmen?

A. That is one of the ways, yes.

Q. What is your territory in Detroit?

A. I have the general territory lying on the west side of Woodward, extending from the River to the Six Mile Road, and approximately over to Fourteenth Street from the River to Six Mile Road.

Q. Do you travel throughout that territory?

A. Yes.

Q. Are you familiar with the various gasoline service stations located in that territory?

453 A. Yes.

Q. Are there any gasoline stations in that territory operated by Ned's Auto Supply Company?

A. Yes, there is one at Woodward and Calvert.

Q. Did you, during 1940, purchase any gasoline at that station?

A. Yes, I did.

Q. Was the gasoline purchased for your own automobile?

A. That is right, yes.

Q. What kind of an automobile is that?

A. 1940 Chevrolet coupe.

Q. Has it any markings on it to indicate the purpose for which it is used?

A. Only the emblem which goes on the license plate on the rear of the car.

Q. Otherwise, it is the usual private car?

A. At that time it was, yes.

Q. What time during 1940 did you purchase gasoline at Ned's?

A. I made several purchases during the summer, and I made one in the middle of August, when we were asked to make this survey of our territory.

Mr. Austin: I move to strike the latter part of that answer, Your Honor. I only asked him as to the time, and I don't want to open up this survey question on cross-examination again, if I don't have to.

454 Mr. Hanley: That may be stricken.

Trial Examiner Ballinger: The motion is granted. Now point out the portion.

Read it back.

(The record was read.)

Trial Examiner Ballinger: Commencing with the word "when"?

Mr. Austin: Yes.

Trial Examiner Ballinger: Strike the balance of the answer.

By Mr. Austin:

Q. Will you state what you did on the occasions you went there, the price that was paid, and how the transaction was handled, and any conversations that you may have had with the operator.

A. I purchased in the middle of August. I drove in and asked for a dollars worth of gas. He put the gas in. When he came back to the window, I held up an envelope which had previously been given me. He took the envelope and put the cash coupon receipt, which amounted to twelve cents, into the envelope, and told me to keep it until I had a dollars worth of redeemable coupons.

Q. Is that coupon that you have just referred to as a cash coupon receipt—I believe you called it—was that similar to this receipt which I show you, and which is
455 marked Commission's Exhibit 52-C?

A. Yes, that is right.

Q. Did it have any stamp on the back of it?

A. Yes, it did, such as that.

Q. Well, what does that stamp say?

A. "Sold for commercial use."

Q. That was stamped on the receipt you had?

A. That is right.

Q. Was there any trading stamp on the back?

A. No trading stamp on the back of the one I received.

Trial Examiner Ballinger: Who had previously given you the envelope?

The Witness: An attendant at the same station earlier in the summer.

456 Q. Now, let us go back to the time when you got the envelope. Tell us what happened then.

A. I drove in the station. The attendant came out to wait on me. I asked for a dollar's worth of gas and he put the gas in. I asked him for the discount. I told him I was in the territory there and wanted to get the 2 cent discount.

He said, "What business are you in?"

I said, "At present I do some real estate in this part of town, real estate business."

He said, "Do you drive your car for business?"

I said, "I drive it for business and pleasure;" so he went and gave me the coupon and the envelope.

Q. And thereafter did you just show the envelope and the coupon on the gas was given without question?

A. That is correct.

Q. Did you ever cash in any of those coupons?

A. No, I haven't.

Q. What did you do with them?

A. I turned them in to the company.

Q. Sun Oil Company?

A. That is correct.

Q. What was the posted price at that station at that time?

A. 16.2.

Q. Was that the prevailing posted price in your territory at major oil company service stations at that
457 time?

A. That and 16.3

Q. Which was more prevalent?

A. 16.3.

Q. During the summer of 1940 did you purchase gasoline at any other service stations in your territory other than Ned's?

A. Yes.

Q. What stations?

A. Well, the Sun stations, wherever I needed gas.

Q. And how much did you pay per gallon at those Sun stations?

A. 16.3, the full retail price.

Q. Were you given anything of value or which was alleged to have value at the time you got the gasoline?

A. Nothing.

Mr. Austin: Your witness.

Cross-Examination by Mr. Hanley.

Q. What fractional part of Detroit does your territory cover?

A. About one-tenth the area of Detroit.

Q. And about how many stations, all kinds of filling stations, are there in your territory?

A. I would estimate about 360.

458 Q. Did you buy gasoline at any of them on the days that you bought gasoline at Ned's station, as you have testified to?

A. I doubt it very much, because of the fact that a dollar's worth of gas—and you generally have some gas in the tank. I believe not.

Q. I presume it is true that you don't know what the actual price was at any other station on the day you purchased at Ned's?

A. Only the posted price.

Q. When you went to Ned's service station, isn't it true, Mr. Day, that you made such representations and statements to the attendant who was serving you as you thought would qualify you for what is commonly called a commercial discount?

A. Well, I did not commit myself to the fact that I was commercial entirely. I said I used my car for commercial and private use, both.

Q. That was true, wasn't it?

A. Yes.

Q. You do use your car for both purposes?

A. Yes, for both.

Q. And did, at that time?

A. Yes.

Q. And you were asked how you used your car, as
459 I understand it?

A. I was asked if I used it for business, and I said I use it for business and pleasure, both.

Q. And did you understand at that time that there was a custom in Detroit of giving commercial discounts to users of automobiles who used their cars in whole or in part in their business?

A. I knew that it was a general fact that some stations did, yes.

Mr. Hanley: That is all.

Redirect Examination by Mr. Austin.

Q. You referred to purchasing some gasoline in the summer of 1940 at perhaps not the same day but near the time at which you purchased this gasoline from Ned's?

A. Well, yes. Naturally I buy gas two or three times a week.

Q. Do the operators and the attendants at those Sun Oil stations know you?

A. Yes.

Q. In your territory?

A. Yes.

Q. And they knew you when you purchased gasoline?

A. Yes.

Q. But they didn't give you any discount?

460 A. That's right.

Mr. Austin: That's all.

Recross Examination by Mr. Hanley.

Q. It is the company policy, isn't it, Mr. Day?

A. Not that I know of. It was never told me it was the company policy.

Q. Isn't it customary—don't you have knowledge of the fact it is customary that employees of the Sun Oil Company pay the Sun dealers the full price the dealers post?

A. It has never been explained to me as company policy; no.

Q. You have always done it, haven't you?

A. I have done it, yes.

Q. As far as you know, everybody else has done it; employed at the Sun Company?

A. I don't know about the rest.

Mr. Hanley: That's all.

Mr. Austin: I assume it is company policy. My point was that there was no policy, also, to give commercial discounts at Sun stations, or, if so, he wasn't a commercial customer; one or the other.

I would like to make this statement on the record, if your Honor please. In view of these questions relating to commercial discount, I don't want to be understood
461 as conceding in any way that a commercial discount is any more justifiable or any less harmful to a competitor than any other kind, the only point being that if price cutting by a particular station were limited to certain accounts it would be less harmful than if extended to a greater number of customers, but it is purely the number of people that get the discount and not whether they are commercial buyers or not. That is merely a statement of my position for the benefit of counsel—of counsel for the Respondent and the Examiner.

Trial Examiner Ballinger: The only inducement that would be present for giving a lower rate to the commercial creditor would be that probably he would use a great deal more gas than he would in driving his car for his own personal use?

Mr. Austin: Surely. He is a more desirable account and is able to bring a little more pressure because he uses more gas, and, I suppose—if it isn't rambling on too far—that the same consideration applies to the very large commercial users such as big factories, automobile companies, and so forth, and that is one of the reasons or perhaps

the reason why they, as has been shown, can buy direct from the oil company on a commercial contract. Real big commercial accounts aren't even tossed to the dealers for competition. The oil companies keep those for them-
462 selves, as has been shown.

Trial Examiner Ballinger: Call the next witness.

Mr. Austin: Mr. Ecker.

L. WILLIAM ECKER was thereupon called as a witness by and on behalf of the Commission, and, being first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. Give your name and address to the reporter, please.

A. L. William Ecker; 10520 Roxbury.

Q. Are you a salesman for the Sun Oil Company?

A. I am.

Q. How long have you acted in that capacity?

A. Three years; March 8, 1938.

Q. Were you in the oil business before that?

A. I was a dealer over on East Vernor and Burlidge.

Q. Did you operate an oil station there?

A. Right.

Q. What part of the city is your Sun Oil territory located?

A. I cover Gratiot north of Houston Avenue to Mt. Clemens, including Mt. Clemens; Harper from Dickerson to Mt. Clemens, including Jefferson from the Seven Mile Road out and north of Eight Mile Road on Van Dyke
463 to Utica.

Q. What commodities or articles are you selling?

A. Regular motor products department; selling gasoline and oil to prospective new dealers.

Q. Are you familiar with all the gasoline stations locations in your territory?

A. I am.

Q. Is there any gasoline station in your territory operated by Ned's Auto Supply Company?

A. Yes, sir; at Gratiot and Madeline.

Q. Did you make any purchases of gasoline at the Ned's station at Gratiot and Madeline during 1940?

A. I have; periodically.

Q. During what period of 1940?

A. Particularly in August, 1940, and on several occasions before that. I usually make it a point to more or less check them every once in a while, myself.

Q. Why do you do that?

A. I want to know what is going on in my own territory.

Q. Do you make the same check on other stations that are not operated by Sun Oil Company?

A. Right.

Q. Had you been purchasing gasoline at Ned's prior to 1940, also?

A. Yes, because—the station only has been there for two years and I have been buying off and on there

464 for some time. Even my dealers tell me they get a discount there. That is the reason I buy there.

Q. You started going there last August?

A. Right.

Q. Do you recall what happened when you went to the station?

A. I went in and they asked me if they should fill the tank, and I told them I wanted a dollar's worth, and they brought out the newspaper to me first, and I paid them the dollar and they went through their service procedure and they came back with a cash receipt, and the attendant pointed out on the back that that entitled me to a 2 cent discount after I received a dollar's worth of them.

Q. Had received what?

A. After I had received a dollar's worth of them.

Q. That then you could turn them in?

A. Yes.

Q. Did he state what they were redeemable for?

A. Anything they had in their place. You could take it out on a refrigerator, if you wanted to.

Q. Did you show the attendant any envelope or anything of that ~~sort to indicate~~ that you had been buying there previously?

A. No, sir.

465 Mr. Hanley: Are you asking about the August, 1940, purchase?

Mr. Austin: Yes.

Q. Did that same procedure, substantially, take place each time that you called there?

A. It often did, yes, sir.

Q. Was the attendant who you said—had he known you or were you there frequently enough to remember you? I can't ask you if he remembered you, but did he give any indication of knowing you?

A. He didn't.

Trial Examiner Ballinger: What time and what year did you first receive these receipts?

The Witness: I think the store opened up in July, 1938.

Trial Examiner Ballinger: And have you been buying your gas there ever since?

The Witness: I do use Sunoco once in a while, Judge.

Trial Examiner Ballinger: How often have you been patronizing the store since?

The Witness: Oh, I will usually slide in there maybe a couple, three times a month.

Trial Examiner Ballinger: And have you received this discount each time?

466 The Witness: That's right.

Mr. Hanley: He is a steady enough customer so he is about entitled to it now.

By Mr. Austin:

Q. You stated that from time to time you have shopped around for gasoline at other stations in your territory?

A. That's right.

Q. Have you received any discounts or discount cards or discount tickets or premiums below 16.3 cents or 16.2 cents a gallon, during 1940, from any other station in your territory?

A. I have a courtesy card mailed to me from Morrison, a Gulf dealer at Gratiot and Pelenkey, I think it is.

Q. Do you have that card with you, by any chance?

A. No, I haven't.

Q. Could you state what the content of it was?

A. This card certifies the bearer to 2 cents a gallon discount at this station upon presentation of this card.

Q. 2 cents?

A. Yes.

Q. What was the location of that station?

A. Gratiot and Pelekey.

Q. How far is that from this Ned's station at Gratiot and Madeline?

A. That happens to be about a half mile from Ned's.

467 Q. On Gratiot?

A. Yes.

Q. Is Gratiot ~~what is known~~ as a through street?

A. Pardon me. I will change my answer to a mile instead of a half mile.

Q. Is Gratiot what is known as a throught street?

A. It is a U. S. Highway.

Q. Is there a large amount of traffic that would drive past both of those stations going to and from Detroit?

A. That's right. It carries tarffic all the way up to Port Huron.

Q. Is there a large amount of commuting traffic on that highway, that is, people go down to business every day and back at night?

A. That's right.

Q. Then, in your opinion would that Gulf station on Gratiot and the Ned's station on Gratiot be strictly competitive stations?

Mr. Hanley: That, of course, is objectionable. All this goes in subject to the same objection, anyway.

Mr. Austin: If you want to object on the ground it calls for a conclusion, I perhaps would withdraw the word "strictly."

Mr. Hanley: I would have to object to almost every question if I started to do that, Mr. Austin. We can 468 have the general objection. That's all I am interested in. I don't want to object to form.

Mr. Austin: I think what I mean by service stations competitively engaged is pretty clear, and I would just like to have the witness answer that question as to whether those two stations, from the nature of their locations, whether they are competitive stations.

Trial Examiner Ballinger: The witness may answer the question.

The Witness: Well, this Gulf dealer, he has often said to me that he is not going to let—

By Mr. Austin:

Q. No, I am not asking you that. I am sure that Judge Hanley would have a valid objection to that sort of testimony. Just answer my question.

Trial Examiner Ballinger: Just read the question to the witness.

The Witness: Read the question again, please.

(The question was read.)

A. Yes, they are.

By Mr. Austin:

Q. What was the answer?

A. Yes, they are.

Q. There probably have been some other stations that you have been able to obtain some discount at during 469 1939 where you have actually purchased gas; or have there been?

A. No, there hasn't. I have tried it in several cases, but I haven't been able to get the discount.

Q. You didn't actually buy any gas at this Gulf station you mentioned?

A. I did.

Q. After you got the card?

A. Right.

Q. Did you purchase gasoline at the Sun Oil stations during the same period?

A. I did.

Q. What did you pay there?

A. I paid the full price of 16.3.

Q. Could you estimate approximately from about how many stations in your territory you have purchased gas during, we will say, the last half of 1940?

A. I would say about 25 of them; 25 of my own accounts, that means.

Q. What do you mean by your own accounts?

A. My own stations.

Q. You mean Sun Oil?

A. Right.

Q. How many others besides that?

A. Well, about 6 contracts from other than Ned's accounts.

470 Q. Other than what?

A. Other than Ned's accounts.

Q. There was only one Ned account?

A. Right.

Mr. Austin: That is right.

Cross-Examination by Mr. Hanley.

Q. I didn't hear how long you had been salesman for the Sun Company?

A. Three years.

Q. You said you had purchased at Ned's station in your territory some time before August, 1940. Do you remember when you first began buying there?

A. I can't give you the exact date, no. I went into my territory March 8th, 1938, and this store happened to open up that summer of 1938.

Q. Had you been buying at Ned's stations or elsewhere in the city prior to that time?

A. No, I haven't.

Q. Now, beginning—

A. It was common knowledge, though, that you could get it. I worked at Stern's previously.

Q. What I mean is, did you personally buy any gasoline?

A. No.

Q. Prior to the opening of the store in your territory?

471 A. No.

Q. Tell the Court, please, exactly what happened the first time you ever bought gasoline at Ned's?

A. As I stopped at the pump, the attendant came out and asked to fill it up, or how many, and I told him a dollar's worth, and he went on with his procedure of service and raised my hood, and then checked the oil, and I paid him the dollar, and he automatically came out with a cash receipt.

Q. What do you mean by automatically came out?

A. That is their manner of form, that they bring a receipt.

Q. Just tell us what he did, Mr. Ecker.

A. Well, that is what I am telling you, that is what he did. He brought out the receipt to me when he brought my change out. I gave him a $5 bill. On the back of the receipt was noted a 2 cent discount.

Q. Had you said anything to him except that you wanted a dollar's worth of gasoline?

A. I hadn't.

Q. And from that time you continued to buy gasoline, did you not, from time to time?

A. That is right.

Q. Have you been receiving this discount you refer to?

A. I get the slips but I have never taken advantage
472 of the discounts.

Q. You have never done that?

A. No.

Q. You have bought gasoline at the Gulf station that offered to give you a discount, I think you said.

A. Right.

Q. Did you get the 2 cent discount at that station?

A. I did.

Q. Did you take it?

A. Right.

Q. Have you continued to buy from that station from time to time?

A. I can't use Gulf products.

Q. You use Standard products, apparently.

A. Once in a while. They are all right.

Q. Well, you have referred twice to the service procedure at Ned's. I presume you mean by that the usual wiping of the windshield and that sort of thing that is done?

A. Yes.

Q. That is done very promptly and effectively and efficiently, isn't it?

A. Very efficient.

Q. At Ned's service stations?

A. Very efficiently.

Q. Isn't that one reason why you like to go there?

473 A. Well, just like anybody else, if I was an outsider out of the oil business, I would probably take advantage of it.

Q. Well, you are in the oil business, and don't you like to have your windshield cleaned?

A. I get it cleaned.

Q. You say you haven't taken advantage of the discount there, so that hasn't been the reason you go to Ned's, is it?

A. No.

Q. Isn't the reason you go to Ned's because you like the service you get and the products that he sells?

A. No.

Q. What do you go there for?

A. I go there to see what they are doing, to keep up on their service and to get a discount.

Q. Do you also go to the service stations handling all other products than Sun products in your territory?

A. I usually see what the fellows are doing and their procedure of service and advise my dealers accordingly.

Q. That is to say, if you find that some dealer in Blank gasoline is giving some kind of a premium or a discount or a cut price, you go and tell your Sun dealers about it?

A. I usually tell them what they are doing, if they
474 ask it. I don't bring it up.

Q. As a matter of fact, don't you urge your dealers to be competitive?

A. No.

Q. Did you hear the testimony of Mr. Harrison?

A. I did.

Q. This morning?

A. I did.

Q. Do you recall that he said that it was the policy of your company to advise your dealers to be competitive?

A. Yes.

Q. Early?

A. Yes.

Q. Don't you follow out that policy in your territory?

A. Well, I think the dealer, if he is a smart business man, he is going to follow any business tactics that Ned's pull off or anybody that pulls off those business tactics.

Q. Or anybody else; isn't that right?

A. That is right.

Q. And they do, don't they?

A. And they do it, too.

Q. They sometimes do it when it isn't Ned's that is doing—

A. Listen. Ned's has started out this business in Detroit. I was a dealer for four years myself, and they
475 did it then. That is how they got their name known in
the City of Detroit.

Q. Is that the only reason, in your judgment?

A. That is right. They have to have those contacts from the pumps.

Q. Is it your testimony, Mr. Ecker, that the growth of Ned's merchandising business in Detroit has been due to the fact that Ned's has given the sort of a discount which you have been talking about on gasoline?

A. Right.

Q. Do you think that aids them to sell bicycles?

A. Right.

Q. Do you think that the general merchandising policies, the efficiency of service given by Ned's has nothing to do with it?

A. Oh, it has something to do with it.

Q. With their success in business?

A. Sure. When you treat a man right when he comes into your place, you are going to make a habit of coming back there, aren't you?

Q. Well, you have, haven't you?

A. I have periodically, yes.

Q. You have been treated all right?

A. Certainly.

Q. And you have gone back?

476 A. Certainly. They are smart people. They know how to do business.

Q. And you accord the palm to them as being good business men?

A. In their own way, yes, but not for the other fellow.

Q. Well, let us understand the implications in your testimony, Mr. Ecker. Do you wish it to be understood by this Court that Ned's service stations are the only price cutters in Detroit?

A. They aren't the only ones.

Q. Do you wish to leave the implication for the Court that they have always been the initiators of price cutting?

A. Right.

Q. Always?

A. Right?

Q. Do you mean to say that nobody ever undersells Ned's?

A. No.

Q. Is that your testimony, Mr. Ecker?

A. That is my testimony.

Q. Are you familiar with the Zip stations?

A. I am talking of major brand stations in that question that you just asked me.

Q. What kind of gasoline do they sell at the Zip stations?

A. Well, it is not a Standard brand; it is not merchandised under a major brand sign.

477 Q. Well, it has a tremendous trade acceptance in this town, hasn't it?

A. On account of price.

Q. Isn't that exactly what I am asking you, Mr. Ecker?

A. Well, speak up so I can hear you, will you?

Q. It has public acceptance, hasn't it?

A. It has to a certain extent to that class of buyer.

Q. Has there ever been a time in the last four years, to your knowledge, that Ned's service stations have ever had a price that met the Zip and Joy stations?

A. Well, Judge, you can't compare Ned's with Joy or Zip.

Q. Don't tell me what I can compare, Mr. Ecker. Just please answer that question.

A. I would like to have that question read.

The Reporter: (Reading.) "Has there ever been a time in the last four years, to your knowledge, that Ned's service stations have ever had a price that met this Zip and the Joy stations?"

A. No.

Q. So it isn't true that Ned's always had the lowest price and always initiated the cuts, is it, Mr. Ecker?

A. Not in the gasoline business here in Detroit, but in the major line of business, yes.

Q. What do you define as the major line?

478 A. Standard Oil, White Star, Sinclair, Shell, Gulf, and High Speed, if you want to class High Speed as a major here in Detroit.

Q. Well, I am asking you. Where do you put it?

A. I will put in with the majors.

Q. What is the distinguishing feature between the major brands and any other brand?

A. Just a little larger, I guess.

Q. Sir?

A. Just a little larger, I guess.

Q. How much?

A. Oh, about $50,000,000.

Q. Does that make any difference in public acceptance of gasoline and the price of gasoline in Detroit as between, we will say, your gasoline and Joy gasoline?

A. I would like to have that question read.

(The question was read.)

A. What are you referring to, the price?

Q. This definition of a major that you have given.

A. No.

Q. So from the standpoint of the customer, it is true, isn't it, that he would just as soon buy Joy gasoline as Sun gasoline or Standard Oil gasoline if it serves his purpose; isn't that true?

A. That is right. It is public instinct, price conscious.

479 Q. You answered, I think, that always those stations have been under Ned's?

A. They have. That is right.

Q. And the difference that you can assign as between a major company and all the rest of these companies, whatever you call them, is that maybe one is about $50,000,000 bigger that the other?

A. That is right.

Q. You are willing to concede, are you not, Mr. Ecker, that that difference of $50,000,000, assuming it exists, doesn't make a bit of difference to a purchaser of gasoline?

A. No. It is just like you said before. As long as the product satisfies and it is received at the right price, and it has got the acceptance, O. K.

Q. It is true, isn't it, that these low price gasolines such as Joy and Zip brands have been selling in increasing quantities over the past several years in Detroit?

A. In the past several years, but in the past six months to eight months, they have been taking decidedly a drop.

Q. Generally speaking, they have shown an increase yearly since 1936, haven't they?

Mr. Austin: Do you know?

The Witness: No, I do not know.

By Mr. Hanley:

Q. You haven't any judgment about that?

480 A. No.

Q. Now, a little while ago you made the statement which I want to give you the opportunity to correct, if you care to correct it, Mr. Ecker, that always in Detroit price reductions were initiated by Ned's service stations. Do you want to leave that testimony stand?

Trial Examiner Ballinger: Judge, as I understand his testimony, it was that in all price cutting on major company products, they were initiated by Ned's.

By Mr. Hanley:

Q. Will you name, then, slowly, Mr. Ecker, what you mean by major companies? Name the companies.

A. O. K. We will put your company first. Standard Oil Company, Sunoco, White Star, Sinclair, Gulf, Texas, High Speed.

Q. Is that all?

A. That is all.

Q. And every other company now you are excluding?

A. That is right. They are either classified as a gyp or a non-brand.

Q. Now, it is your testimony that every cut in Detroit, say, since 1936, in the sale of any of those brands of gaso line which you have named has been initiated by Ned's service stations?

A. That was before my time.

481 Q. All right.

A. Back in '36.

Q. For the past three years since you have been salesman for Sun.

A. Well, yes, because—

Q. Well, just—if yes is the answer—

A. Yes.

Q. —that is the answer. Now, that is without exception?

A. That is the selling price?

Q. Selling price, retail selling price is what I am talking about.

A. Right.

Q. That is without exception?

A. Right; yes, sir.

Q. So that if Ned's were out of business in Detroit, in your judgment there never would have been any cut prices, competitive prices; is that right?

A. No. If they don't sell Standard, they are going to sell Cities Service, or something to that effect, and as long as Standard gives them a price, they are going to buy it from them.

Q. Well, that isn't answering the question. I said if Ned's were out of business, is it your position that during the last three years there would never have been any deviation in the retail selling price in Detroit?

482 A. Yes, you always have some deviation in selling price.

Q. I am talking about the major brands.

A. Yes.

Q. Your major brand?

A. Right.

483 Q. How do you reconcile that with your statement, that without exception, Ned's has always been the originator of a cut price?

A. They have been known for that for years, ever since they started in business.

Q. Well, that is your opinion.

A. Well, as an outsider, how else would I know it?

Q. I am asking you, if you know that.

A. Why, certainly, I knew of it.

Q. And yet, do you still say that had they been out of business, that there still would have been cut prices?

A. Well, you or I haven't got any control over this market. I am not going to straighten it up and neither are you.

Trial Examiner Ballinger: That is purely conjectural.

Mr. Hanley: Will you answer the question, please?

Mr. Austin: I was just about to make the objection on the ground that the question was not capable of a direct answer.

The Witness: That is right.

Mr. Hanley: Well, he made a positive statement, and I want to be sure whether he means what he says.

Mr. Austin: I don't think your question follows, and it certainly isn't capable—

Trial Examiner Ballinger: I think that is too highly speculative.

484 Mr. Hanley: I will withdraw the question.

By Mr. Hanley:

Q. You say you were a dealer up until three years ago?

A. Right.

Q. You don't like Ned's, do you?

A. As a dealer, I cussed them, and every God damn thing else.

Q. Is that your attitude now?

A. As long as anybody starts—

Q. Well, is it or isn't it?

A. Yes.

Q. And that has been your attitude over—

A. Right.

Q. —over a period of years?

A. Right.

Q. And you don't like the Standard Oil Company because the Standard Oil Company sells Ned's gasoline; is that true?

A. No, the Standard Oil Company does things underhanded just like Ned's does.

Q. That is what you think?

A. That is what I think.

Q. Well, based on that attitude of mind, can you now answer the question that you do not like the Standard Oil Company? That is the question.

A. I am not going to give the answer to that question.

485 Q. Can't you answer it?

A. No.

Q. You don't know whether you like them or not?

A. No.

Q. You don't know that you don't like Ned's? You are very sure of that, aren't you?

A. From a business standpoint, yes.

Q. And you have a definite personal interest in how this action comes out, haven't you?

A. That is right.

Q. And you want something to happen that will be harmful to Ned's business, don't you?

A. Well, I hate to see the boys go out of business, if they have to go out of business, if that is going to be what it is, but they won't go out of business as long as Standard Oil Company, Shell, or anybody else sells them the gasoline.

Q. Well, I agree with that.

A. Or even any major company. They are going to get gasoline.

Q. That is your candid judgment, isn't it?

A. That is right.

Q. That if Standard Oil Company were prevented from selling to Ned's, they would get the gasoline someplace?

A. Anyplace.

Q. And that can easily be done in Detroit, can't it?

A. That is right.

486 Q. And if today, in your judgment, the Standard Oil Company, either because it had to or because it wanted to, quit selling gasoline to Ned's, they could immediately buy gasoline on a tank car basis, couldn't they?

Mr. Austin: I object to that.

Trial Examiner Ballinger: Objection sustained.

By Mr. Hanley:

Q. Oh, one other thing: Did you belong to the Dealers Association while you were engaged—

A. I did.

Q. —as a dealer?

A. Right.

Q. Are you a member now?

A. No, not connected with any station whatsoever.

Q. By the way, is that a qualification for membership in the Association, that you be an operator of a station?

A. I do not know.

Mr. Hanley: I think that is all, Mr. Ecker.

Redirect Examination by Mr. Austin.

Q. Mr. Ecker, when you named the companies that you considered major oil companies, you didn't mention Shell, I don't believe. Was that intentional that you left them out?

A. I think I did, if I am not mistaken. They are a major.

Q. Does this Zip gasoline, whatever it is, have the 487 same public acceptance that any of the major brands have?

A. No.

Q. Then when you said that an automobile owner would purchase Zip or some other brand, if it served the same purpose, and he could get it for a better price, does the average automobile owner know that it does serve the same purpose, or think that it does?

Mr. Hanley: Oh, just a minute. It is a conclusion, and everything else.

Trial Examiner Ballinger: Objection sustained.

By Mr. Austin:

Q. Let me ask you this: Is the Zip gasoline and, say, Standard Oil gasoline—are those two brands competitive if sold at the same price?

A. No.

Mr. Hanley: Zip and what?

Mr. Austin: Standard. That is all.

Mr. Hanley: One question, Mr. Ecker.

The Witness: Yes, sir.

Recross Examination by Mr. Hanley.

Q. You just told Mr. Austin that Zip and Standard were not competitive: What do you mean by that?

Mr. Austin: If sold at the same price.

The Witness: If sold at the same price, he said.

488 Mr. Hanley: Oh, if sold at the same price?

Mr. Austin: Yes.

By Mr. Hanley:

Q. How do you know that? It never happened; did it?

A. Pardon?

Q. I say, how do you know that? That never happened did it?

A. How do I know what?

Q. That they are not competitive if they are sold at the same price?

A. That has never happened.

Q. Well, that is what I am asking. It never did happen, did it?

A. No.

Q. Well, then, how do you know?

A. Not as I know of.

Q. How do you know that they would not be competitive if they were sold at the same price?

A. I do not know.

Q. Then you were mistaken when you answered Mr. Austin, I take it?

A. Refer me back to his question, Mr. Austin's question.

The Reporter: (Reading.) "Is the Zip gasoline and, say, Standard Oil gasoline—are those two brands competitive if sold at the same price?

A. No."

Trial Examiner Ballinger: Do you desire to change?

489 The Witness: Sure, they would be competitive if they were sold at the same price.

Mr. Hanley: That is what I thought. That is all.

Redirect Examination by Mr. Austin.

Q. What do you mean competitive? Well, we will go back to your previous answer. I think you stated that the Zip gasoline did not have a good public acceptance or as good public acceptance as Standard gasoline.

Mr. Hanley: That was stricken, as I remember it.

Mr. Austin: No, that is on the record. It wasn't objected to, I don't think.

Mr. Hanley: I am objecting to all this.

The Witness: So what the hell are you holding me up here for, then?

Trial Examiner Ballinger: What was that statement? Read that statement.

(The statement was read.)

Trial Examiner Ballinger: You desist from using that kind of language in the future.

Mr. Hanley: You got the other expressions of that kind in the record, I am sure, Mr. Reporter?

The Reporter: Yes.

Trial Examiner Ballinger: Is there a question pending?

490 Mr. Austin: No, I don't think so.

I don't think I will pursue that subject further with this witness.

Trial Examiner Ballinger: Any further questions?

Mr. Hanley: No, sir.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Mr. Austin: I move we adjourn until 10:00 o'clock tomorrow, your Honor.

Trial Examiner Ballinger: The motion of counsel for the Commission is granted, and now, at 4:30 P. M., the hearing stands adjourned until 10:00 A. M., March 13, 1941, to be reconvened in Room 859 Federal Building, Detroit, Michigan.

(Whereupon, at 4:30 P. M., March 12, 1941, the hearing in the above-entitled matter was adjourned.)

491

Room 859, Federal Building,
Detroit, Michigan,
March 13, 1941.

Met pursuant to adjournment, at 10 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

H. R. Hanley, Esq., 910 S. Michigan Avenue, Chicago, Illinois, on behalf of the Respondent.

492 PROCEEDINGS.

Trial Examiner Ballinger: We will come to order, gentlemen.

This is a reconvening of Docket No. 4389, a case entitled In the Matter of Standard Oil Company, at 10 o'clock A. M., Eastern Standard Time, March 13, 1941, in Room 859 Federal Building, Detroit, Michigan.

The last hearing was held in Detroit, March 12, 1941.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

Mr. Austin: Mr. Ledbetter.

ELMER E. LEDBETTER was thereupon called as a witness by and on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. Will you state your name, please?

A. Elmer E. Ledbetter.

Q. Will you state your residence address to the reporter?

A. 22267 Cherry Hill Road, Dearborn, Michigan.

Q. What is your business, Mr. Ledbetter?

A. I am a wholesaler of petroleum products and allied lines. That is, my company is. I am president of the
493 company.

Q. What is your company?

A. Wayne Oil Company.

Q. When was that incorporated?

A. November, 1931.

Q. Have you been president of the company since that time?

A. I have.

Q. Are you the principal stockholder in the company?

A. Yes.

Q. How long have you been in the oil business?

A. I started as an individual; that is, personally; in the summer of 1931.

Q. Did you operate a gasoline station at that time?

A. Yes.

Q. When you organized the Wayne Oil Company, did the Wayne Oil Company then continue to operate retail gasoline stations?

A. The Wayne Oil Company never started business until January 1, 1932, at which time it took over the business I was operating personally.

Q. That was a retail business, was it not?

A. That was a retail business.

Q. How long did the Wayne Oil Company continue in the retail oil business?

A. March 1, 1933.

494 Q. And what change in the business of the company took place then?

A. Let me see if that date is correct (referring to documents). That's right. On that date the Wayne Oil Company ceased operating stations and leased all of its stations to the then operators.

Q. Did the operators to whom the stations were leased then purchase their gasoline from the Wayne Oil Company?

A. No.

Q. Well, then where did they purchase?

A. From Standard Oil principally and other suppliers.

Q. At that point, then, was the Wayne Oil Company only the lessor of Real Estate?

A. I would say that was about the situation.

Q. When did the Wayne Oil Company begin to engage in the oil business?

A. The Wayne Oil Company went into the wholesaling of petroleum products in August, 1935. I should say that would be about the date that it could be said to have been actually in the oil business.

Q. At or prior to that time did it purchase oil lease or construct a bulk plant?

A. Shortly prior to the time it went into the wholesale business, it leased bulk plant facilities.

Q. Where are they located?

495 A. Wyoming and Brandt, Dearborn.

Q. Do you still lease those same facilities?

A. Yes, and except that there are more of them than there were at that time.

Q. Whom do you lease them from?

A. From the Central Detroit Terminal Warehouse Company.

Q. Does that company have other such facilities there which it leases to others?

A. It has other bulk plant facilities.

Q. Are they all in use at the present time or are there vacant facilities which are now available?

A. I believe they are all in use.

Q. Beginning in 1935 I believe you said, did the Wayne Oil Company then commence to sell gasoline to the dealers who were its lessees?

A. That is right.

Q. And was that gasoline purchased by the Wayne Oil Company at its bulk plant and delivered from the bulk plant to the service station?

A. Most of it.

Q. Where did you purchase your gasoline?

A. Standard Oil Company.

Q. Have you always purchased from the Standard Oil Company since you began operating the bulk plant?

A. Yes.

496 Q. How are those purchases made; that is, in what quantities?

A. Tank car quantities.

Q. Were deliveries by tank car until recently?

A. Yes, comparatively recently.

Q. How are the deliveries made now?

A. Transport truck they call them.

Q. Do those transport trucks bring the gasoline to the bulk plant?

A. Yes, they do.

Q. Do they unload it into the bulk plant?

A. No, we unload it.

Q. You have your own pumps?

A. Yes.

Q. That is done by you rather than by the oil company?

A. Yes, it is.

Q. After the gasoline is put into your bulk plant—incidentally, what is the capacity of your bulk plant facilities.

A. I have for gasoline—I have four 15,000-gallon tanks and six 4,000-gallon tanks.

Q. About 84,000 gallons?

A. Yes.

Q. You said for gasoline. Do you also have tanks for oil or for something else?

497 A. Well, we have yards and docks, loading docks, pumps, and equipment, and a warehouse building, and also additional space in the bonded warehouse a half a block down the street.

Q. Are you on Water?

A. No.

Q. You said docks.

A. Well, I mean loading docks for gasoline, loading up our—

Q. That term is apparently used—

A. We call them loading docks where we load our docks with gasoline.

Q. Well, I wasn't familiar with the term "docks," except on water. I was wondering whether there was any water out there.

Q. How is the gasoline delivered from the bulk plant to the service station, did you say?

A. By tank trucks.

Q. Do you own the trucks?

A. I own one of them and rent another one.

Q. You have two?

A. Yes, sir.

Q. Did I understand you to say that there was some gasoline which reached the service station by some other method?

498 A. There was for a while.

Q. What method was that?

A. Standard Oil delivered Ethyl gasoline for a time after I began to buy Red Crown as a wholesaler.

Trial Examiner Ballinger: When did that cease?

The Witness: I would say some months after I went into the wholesale business, possibly a year or less. I wouldn't—it would just be a guess unless I looked at the records.

Trial Examiner Ballinger: What year?

The Witness: Beginning with August, 1935, and from that time on, whenever it ended. I would have to guess at it, at the present time.

By Mr. Austin:

Q. Would it exceed a year?

A. I don't think so.

Q. You are a little hazy, aren't you, on that, Mr. Ledbetter?

A. Yes, I am. That is five years ago.

Q. Maybe you had better look that up.

A. I will be glad to.

Q. Can you state when they made those deliveries, how did they make them? Did they make them direct from their bulk plant by tank wagon delivery to your subdealers or did they deliver from your bulk plant to your subdealers?

A. No, they delivered from their bulk plant in their

499 own equipment.

Q. Did they charge you the tank wagon or the tank car price for that Ethyl gasoline?

A. Tank wagon is my recollection on it.

Q. They charged you a different price for the gasoline which they delivered than for the gasoline which you received at your bulk plant?

A. It is my recollection.

Q. Will you check on that?

A. I will be glad to.

Q. Did they charge you anything for the delivery service?

A. I don't believe so. I think they charged the tank wagon price, the prevailing tank wagon price.

Q. Well, presumably if they charged the tank wagon price, there would be no charge for delivery; on the other hand, there might be if it was the other price, they probably would?

A. If that was the situation, there was nothing in addition. I don't recall paying any delivery charges.

Q. Well, I wish you would check up on all those points.

A. I will be glad to do that.

Q. I believe you will be here and we will ask you at some later time.

A. Let's see. What else was it you wanted me to check up? I might as well get it down here now.

500 Q. How long they delivered.

A. Oh, yes.

Q. And what price they charged and whether there was any charge for the delivery service.

A. O. K.

501 Q. How many dealers, retail dealers did you sell gasoline to in 1936, Mr. Ledbetter; say, the first of 1936?

A. Just guessing at it, now—although I think the information is here, exact—

Trial Examiner Ballinger: If the information is here, let's have the information.

Mr. Hanley: I don't know whether Mr. Ledbetter has it. I have some information I am willing to give the Government, if they need it.

Mr. Austin: If you got it from Mr. Ledbetter, I would like to have it.

Mr. Hanley: He gave it to me. However, I won't interfere in the matter. I can give it to you.

Trial Examiner Ballinger: Guesses don't constitute acceptable evidence.

The Witness: I can give a pretty close estimate, just from memory.

Mr. Austin: I think that will do, for my purpose.

A. That would be the first of 1936?

Q. Yes.

A. Somewhere between twelve and fifteen stations, I would say.

Q. How many of those were leased on properties owned or leased by the Wayne Oil Company, and how many of
502 them were dealers who either owned their equipment or leased from some other source?

A. I can give that exact information later, but my best estimate now would be that probably all but possibly two or three of them were leased by the Wayne Oil Company and subleased to the dealers; at that time.

Q. Do you know how many stations—that is, how many retail dealers—were served by the Wayne Oil Company in 1937?

A. Well, of course—

Q. January, 1937?

A. Well, of course, I have records showing exactly, but somewhat more than that number I have just given, I would say.

Q. You haven't those records here?

Mr. Hanley: If Your Honor please, I think I could be of some assistance here. I have some data that Mr. Ledbetter prepared at one time.

Mr. Austin: We would be very glad to have you hand it to him to refresh his recollection. I am sure it would be helpful.

Mr. Hanley: I don't want to interfere in your method of examining, Mr. Austin, but I think it would shorten this thing a lot.

Mr. Austin: I am only anxious to get the answers. The easier, the better.

503 Mr. Hanley: I think I have it.

Trial Examiner Ballinger: Is this a memoranda prepared by Mr. Ledbetter?

Mr. Hanley: No, he didn't prepare it. He gave the information from which it was prepared, Your Honor.

Trial Examiner Ballinger: That should refresh his recollection sufficiently for the present purposes.

Mr. Hanley: You are asking about the number of stations?

Mr. Austin: I want to find out the number of stations he had each year.

Mr. Hanley: (Handing document to witness.) I think that will help.

By Mr. Austin:

Q. This has the number of station outlets: at least, what purports to be, Mr. Ledbetter?

A. Yes, it has.

Q. Is your recollection improved any now, Mr. Ledbetter, as to the number of outlets which the Wayne Oil Company had in 1936?

A. In 1936 and 1937, which are the two years you have already asked me about, my recollection was pretty good: had a total of 15 stations, I believe, at the first of 1936, and a total of 19 on the first of 1937.

Q. Now, will you look at the little square above that
504 column and see if that doesn't refer to the end of the
year, rather than the beginning.

A. Well, I believe it does.

Q. Well, do you wish to change that statement or not?

A. No, I don't think there was much change during the years.

Q. And how many retail stations did you supply in 1938?

A. Twenty-one, at the end of the year, I was supplying.

Q. How many in 1939?

A. Twenty-four.

Q. How many in 1940?

A. Twenty-four.

Q. How many today?

A. I believe it is twenty-four.

Trial Examiner Ballinger: That is the best recollection?

The Witness: That is within one of being exactly right, and I expect it is exactly right.

By Mr. Austin:

Q. Do you know whether your volume figures you have on that sheet there are correct, or not; and, incidentally, if you have any other material with you, I rather you would use it or check it, because I believe I asked you to prepare some figures on volume. I don't know whether you have them with you, or not, as to totals.

A. These figures are, I believe, correct. However, 505 they represent the shipments from Standard Oil Company to the Wayne Oil Company.

Q. They wouldn't be, then, exactly the same as the sales by the Wayne Oil Company?

A. That is true.

Q. Do you know whether they vary very far, or have you any statements on your sales?

A. Not with me.

Q. Are the purchases from the Standard Oil Company the same figures that are published by the Secretary of State?

A. That's right.

Q. In those state gasoline tax report? In other words, are those based on purchases or sales?

A. Those are based on Standard Oil sales to me and my purchases from Standard Oil. We both report to the Secretary of State. We don't necessarily report the same figures, but they are approximately the same. In figures this size you could say there would be practically no difference, no substantial difference.

Q. Have you any figures with you on your volume, either of purchases or sales during those years?

A. No, I haven't.

Mr. Hanley: Are you referring to his total volume of Standard Oil products and anything else?

Mr. Austin: Talking about Standard Oil gasoline. 506 He said he bought all his gasoline from Standard Oil Company.

A. These figures given here are approximately—

Q. Are they approximately accurate?

A. So far as my recollection.

Q. Will you state for the record, then, what your volume was during the years 1936 to 1940, inclusive?

A. 1936.

Q. Give it in round thousands, if you will, please, Mr. Ledbetter.

A. 1,438,000.00; 1937, 1,686,000.00; 1938, 1,825,000.00; 1939, 2,226,000.00; 1940, 2,340,000.00.

Q. Referring to prices at which you sold that gasoline to your sub-dealers, have you a statement of the prices at which you sold to sub-dealers during each of these years?

A. With me?

Q. Yes.

A. I have no written statements.

Q. Were you familiar at all times with the posted tank wagon price of the Standard Oil Company in Detroit?

A. I was.

Q. In what respects, if any, did your price to your sub-dealers differ from the Standard posted tank wagon price?

A. It did not differ.

Q. You always sold—have you always resold gasoline
to your retail dealer outlets in the posted tank wagon
507 price of the Standard Oil Company?

A. Whenever there was a posted tank wagon price of Standard Oil Company, the Wayne Oil Company did.

Q. Has there always been a posted tank wagon price since 1936, when the Iowa Plan went into effect?

A. Posted tank wagon price?

Q: Yes.

A. Yes, I believe there has. I might state it this way: Wayne Oil's prices to its dealers have always been exactly the same as Standard Oil prices to its dealers.

Q. That's what I wanted to find out. Now, Mr. Ledbetter, since the Wayne Oil Company started operating as a gasoline wholesaler in 1935, has it operated any retail stations of its own?

A. Not until September 8, 1939.

508 Q. Has it operated retail stations since September, 1939?

A. It has.

Q. Will you state what stations have been operated by the Wayne Oil Company and their locations and the times during which they were operated?

A. The station at 8400 West Chicago has been operated by Wayne Oil Company continuously up to the present date since September 8, 1939.

The station at 13100 Livernois was operated by the Wayne Oil Company from September 8, 1939, until the 1st of May, 1940.

The station at Wyoming and Brandt was operated by the Wayne Oil Company from November 1st, 1939, to October 1st, 1940.

The station at 2945 South Fort Street was operated by the Wayne Oil Company from November 15, 1939, until July 1st, 1940.

Q. Is that all of them?

A. No. The station at Schaefer and Tireman was op erated by the company from December 1st, 1939, until April 1st, 1940.

The station at 10618 West Jefferson, River Rouge, was operated by the Wayne Oil Company from June 4, 1940, to the present date.

The station at Grand River and Mendota was op-
509 erated from some time in October, 1939, to some time
in November, 1939, a period of three or four months.

Then there was one other. Some time between March 1st, 1933, and September 9, 1939, the station at Schaefer and Tierman was operated for a period of two weeks by the company.

That is the extent of the company operations.

Q. Have you prepared a statement showing the retail prices at which Standard Oil gasoline was sold at those retail company operated stations during the periods you have just mentioned?

A. All except the one isolated two-week operation at Schaefer and Tireman.

Q. May I see that statement, please?

(A paper was handed to Mr. Austin by the witness.)

Q. Does this have all the data on prices charged at all these stations except the one that you just mentioned on Schaefer?

A. Yes, I believe it does.

Q. And this covers all of the periods which you have just stated to the reporter?

A. It does.

Mr. Austin: Will you mark this for identification, please?

(The document referred to was marked, for identifi-
510 cation, Commission's Exhibit 54.)

Mr. Austin: And I offer Commission's Exhibit 54, for identification, in evidence.

Mr. Hanley: No objection.

Trial Examiner Ballinger: The paper marked Commission's Exhibit No. 54, is admitted in evidence.

Mr. Hanley: The general objection, of course?

Trial Examiner Ballinger: Subject to the general objection reserved to counsel for the Respondent.

(The document referred to, heretofore marked, for identification, COMMISSION'S EXHIBIT 54, was received in evidence.)

By Mr. Austin:

Q. How often do you receive gasoline from the Standard Oil Company at your bulk plant? I will make that apply to the time during which you received deliveries in tank cars.

A. Well, depending on the period involved—

Q. Do you place those orders from time to time from your office? Just tell me how you—

A. Yes. We call up the order department of Standard Oil Company and place our orders for the gasoline.

Q. You always order in one or more tank cars?

A. That is right.

Q. That is, prior to the tank-train deliveries?

A. That is right.

511 Q. When you now order delivery by tank train, how are those orders placed?

A. The same way.

Q. Now, you don't order a tank car any more.

A. Well, I believe our order department does order tank cars, to be exact about it.

Q. Don't they order just a certain number of gallons now rather than—

A. They specify—I think they order exactly like they did when they ordered tank cars.

Q. How did they order them, by gallons or what?

A. They would say 6500-gallon car, 8000-gallon car, 10,000-gallon car, and my recollection is they use the same terms. I don't know. I wouldn't be too sure about that.

Q. What was that lowest-sized car that they would order?

A. 6500 gallons.

Q. Did you frequently order carloads of that size?

A. I believe we used that size only for Ethyl gasoline.

Q. Could it be used for the other?

A. Yes, it could, and might possibly have been a few times. I wouldn't be sure.

Q. They also run 8,000 and 10,000?

A. And twelve.

512 Q. I believe you stated you have been familiar at all times with the price at which Standard Oil Company sells gasoline to its direct retail accounts in Detroit?

A. I think I have.

Q. Do you find it necessary to keep in touch with the selling methods of Standard Oil Company and their prices in order to operate your own business intelligently?

A. I think that is right.

Q. Have you also been familiar at all times during the past five years with the retail prices charged by your dealers?

A. I have.

Q. Have you been familiar with the retail prices charged by the majority of other Standard Oil stations to the extent that you can say there was any such price?

A. In a general way, yes.

Q. Have you then made it your business, Mr. Ledbetter, to keep in touch with the competitive situation in the retail gasoline business in Detroit?

A. Yes.

Q. Going back to, say, the last half of 1936, early in 1937, and based upon your own knowledge and observation, were there certain of the larger and more prominent service stations in Detroit that were selling house brand major oil gasoline below the prices which were then being charged by your dealers?

513 A. That is my recollection.

Q. Can you name any of those stations?

A. You are talking about major gasolines?

Q. Yes.

A. Langer's, Bright's, Ned's, and Hickey's come to my mind, and I think there were others not so big.

Q. Of those four stations which you named, have they always been known as price cutters?

A. Well, I would—

Mr. Harley: Just a minute. Do you understand what Mr. Austin means by a price cutter? If you don't understand it, you are entitled to get an explanation of it, Mr. Ledbetter.

By Mr. Austin:

Q. By price cutter, I mean selling below the prevailing retail major oil company gasoline price.

A. And by being known, I suppose you mean being known by me?

Q. No. I mean provided—if you can't answer the question, all right. I am asking you whether they are generally known among the gasoline trade; that is, you say that you know the competitive gasoline situation, you talk to your dealers and other dealers, and I am asking what that is, not what John Smith may think about it. I assume there was some general understanding in the oil business, 514 or knowledge on that question. If there isn't, say so.

A. I don't believe I could testify as to what was generally known in the gasoline trade in that respect.

Q. All right, then. If you can't answer the question, why—

Trial Examiner Ballinger: Have you any personal knowledge?

The Witness: I have a personal idea.

Trial Examiner Ballinger: What is that based on?

The Witness: Recollection of the situation as it comes to me now.

By Mr. Austin:

Q. Based on your own observations, isn't it?

A. Yes, I believe you would say that.

Q. Let's have it.

A. My own personal idea of those large concerns is that they were selling below the prices at which my dealers were selling at that time.

Q. I asked you about the latter part of 1936, I believe, and early in 1937.

A. That is right.

Q. Now, carry that along. Let's see if we can develop the situation. Did that underselling continue to be true during 1937 and 1938?

A. I would say yes.

515 Q. That is, by those four stations that you named?

A. Yes.

Q. And you also said that there were others not so large. I would like to know whether the price cutting, as I described it, by other stations increased or decreased during 1937 and into 1938.

A. My recollection is that it increased progressively, spread, if that is a better word for it.

Q. Wasn't that a very obvious spread? Wasn't there advertising price cuts and price reductions at that time by a lot of stations?

A. I would say that price cuts and advertising of price cuts increased progressively during 1936 and '37 and '38.

Q. How about '39?

A. I think it continued up into, well, through 1939.

Q. During 1937 and 1938 did you ever pass by any of the Ned's Auto Supply stations and see signs out in front advertising 2 cents a gallon discount?

A. Oh, I am quite sure that I did.

Q. Did you ever hear any radio broadcasts advertising Ned's products?

A. Yes, I have.

Q. Can you recall whether on these radio broadcasts there were any discounts or discount advertised?

516 A. Well, there was so much advertising of cut prices by various concerns, that I don't believe I could single out any one thing that I heard or saw during that period that far back.

Q. But there was a great deal of cut price advertising going on during that period?

A. There surely was.

Q. Since November, 1939, November 19, 1939, which was the time when the Standard posted tank wagon price was brought back to 8.1, where it has remained, as I understand it, ever since—since that time has there been as much or nearly as much advertised price cutting and price reductions in Detroit as there was prior to that time?

517 A. No, there has not.

Q. To what extent would you say that the open price reductions and advertised price reductions have been eliminated since then, as compared to the situation two years prior to that time?

A. To a very great extent.

Q. Do you know of any stations since November 19, 1940, that have had a posted pump price of below the prevailing retail price, or have specifically advertised a discount below that price?

A. No, I don't.

Q. Have you heard your dealers speak of any such station?

A. Yes, I have heard dealers, I think, speak of such.

Q. Of open advertising?

A. No open advertising. I don't recall that.

Q. Then, what you heard them speak of was what is so called undercover price cuts?

A. If I heard anything of that kind, that's what it was. I just don't remember any specific instance.

Q. During 1938 and 1939, did any of your dealers cut their price—and by that, I mean, reduce the margin between what they were paying for the gasoline and what they were selling it for—or to put it another way; did that bring their price below the prevailing retail price, if there was a prevailing price? I think the first definition is 518 probably better; to refer to reducing their margin.

The Witness: Will you read that question, please?

(The question was read.)

A. Yes. In 1938, in the summer of 1938, two or three of my dealers did that.

Q. Did more of them do it in the winter of 1938 or 1939?

A. I believe some more of them did it towards the latter part of 1938, and more of them in 1939.

Q. Were those reductions all after the time when you know that Ned's and these other prominent stations which you mentioned, were cutting prices?

A. Well, yes; quite a period after; about two years, I guess.

Trial Examiner Ballinger: Well, were the other companies engaged at that time in the same practice?

The Witness: I don't quite understand that, Judge.

Trial Examiner Ballinger: At the time the stations you serviced were cutting prices, were Ned's places cutting prices?

The Witness: Yes, and had been for two years.

By Mr. Austin:

Q. And it was continuing at that time?

A. That's right.

Q. On November 19, 1939, when the Standard tank wagon price was increased to 8.1, did your dealers all 519 put their retail price back up, or up to, 15.7 or 15.8?

A. Within a space of two or three days from that time they all did.

Q. What do you understand is meant by the term off brand or non-major brand gasoline?

A. Well, in my own mind I would say it is kind of an arbitrary classification, I imagine guided a good deal by classification made by people whom I know in the oil business as differentiating between two classes of oil people.

Q. Were you here yesterday when Mr. Harrison testified?

A. I was.

Q. Would his classification of major oil companies be approximately the same as yours?

A. Yes, I think it would.

Q. Then, would off-brand gasoline be referred to you as gasoline made by some other company than those which were named as major oil companies; or marketed by some other company?

A. That would be my personal classification of it.

Q. I just wanted to be sure I knew what we were talking about.

A. Yes.

Q. Has the so-called off-brand gasoline during the past five years sold generally at lower prices than the major brand gasoline in Detroit?

520 A. Yes, it has.

Q. Can you state whether there is any difference between the public acceptance in this area of off-brand gasolines and the public acceptance of major-brand gasolines?

A. I think I could.

Q. What is the difference?

A. I believe major-brand gasolines have a better public acceptance.

Q. And do you know the reasons for that; in your opinion?

A. Yes. In my opinion it is a result of, possibly, the length of time the product has been on the market, the quality of the product itself, the type of people that have contacted the public in selling it or dispensing it, the kind of service they have given, the kind and volume of advertising that has been done by them, would be some of the factors, at least, that would—

Q. Isn't national advertising a very large factor; and reputation acquired through such advertising?

A. I should say that national advertising would be a very important factor.

Mr. Hanley: That classifies us as off-brand, Mr. Austin. The Respondent does not do national advertising.

Mr. Austin: National advertising in certain companies, such as the Standard Oil Company, which operates in
certain states, and companies like Tidewater, which is
521 a major company, and American Oil, which are major
companies on the Atlantic seaboard, but I haven't heard them mentioned here—I meant to state, when I said national advertising, I meant to say, at least through a number of states in which the company operates.

Mr. Hanley: Of course, for the purposes of this hearing, we are perfectly willing to classify us wherever you want to.

Trial Examiner Ballinger: That is sufficient discussion for the record. Any further discussion will be off the record.

By Mr. Austin:

Q. What facilities are necessary for storing gasoline in tank car quantities?

A. Just storing?

Q. Yes.

A. Just sufficient storage to hold it.

Q. And assuming the gasoline stored is to be transferred in trucks for delivery, from time to time; is there any pumps or anything of that sort necessary?

A. Oh, yes; lots of additional equipment.

Q. To transfer from the storage tank to the pump?

A. To do it properly and efficiently and safely, yes.

Q. Supposing the service station had a tank right at the station, right under its pumps, that would hold
522 10,000 gallons of gasoline. That would be sufficient to take a tank train delivery, would it not?

523 A. I believe it would be a violation of the law, wouldn't it, here?

Q. I don't know. Would it?

A. I believe it would.

Q. What law?

A. I think there is an ordinance against anything more than 8,000, if I am not mistaken, in a gas station.

Q. At gas stations?

A. I believe that is true.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Q. Might not a service station operator install an 8,000-gallon or 7,000-gallon tank at his station?

A. So far as I know, he might.

Q. And apart from these transport trucks, thinking of it from the tank car delivery standpoint, would it be feasible and practicable for a service station operator to have, say, an 8,000-gallon tank at his service station, and to have a siding some place where a tank car could be delivered and then transfer that gasoline directly from the tank car into tank trucks for delivery to the service station without operating the bulk plant?

A. I presume it would be possible.

Q. Assuming that he bought one car at a time.

524 A. Yes.

Q. His practice was to empty that car, to transfer it to his service station?

A. Yes, I think it would be possible.

Trial Examiner Ballinger: Do any of the service stations have storage for as much as 8,000 gallons?

The Witness: I think there are some in the city that have that much.

By Mr. Austin:

Q. Are there companies in Detroit who make a business of hauling gasoline for hire?

A. I believe there are.

Q. Can you name any of them?

A. Ogden and Moffett, I think, are hauling gasoline for Standard Oil Company to us. L. A. Smith and Company would another one. The only two that I can call to mind now, that I could name at the present time.

Q. Those companies, then, are available if the man I was mentioning a minute ago wanted to employ someone to transfer his gasoline from his tank car to his tank in his service station?

A. I wouldn't undertake to say that, because I don't know what instructions they operate under; whether they are under the control of the Federal Government or how they do it. I wouldn't say they are available or not, 525 because I don't know enough about it.

Q. You know they are in the business of hauling gasoline but you don't know whether they are in that business for anybody who may want to come to them for tank car, is that what you mean?

A. That is about what I mean.

Q. Or truck load?

A. I don't know whether they could be said to be available. I don't know whether they want the business or what the situation is.

Q. I won't ask you anything further on that. We can call the trucking people themselves, if it becomes material. We can always do that. I thought you might have had experience at the Wayne Oil Company of employing some of those people.

A. I have never done it.

Q. When your dealers began to reduce their prices in

1938 and 1939, as you just mentioned a few moments ago, did that have any effect upon the volume of business of the Wayne Oil Company?

A. It did.

Q. What effect?

A. It increased it.

Q. In your opinion, and again based upon your experience and observation and contacts with your

526 dealers, and an observation of their business, did the sale of gasoline by Ned's Auto Supply Company in 1937 and 1938 at prices below the prevailing retail price of major brand gasoline in Detroit, did that price cutting by Ned's cause loss of gasoline business to the Wayne Oil Company's dealers?

Mr. Hanley: Pardon me just a minute. I am not sure I understood the first part of that question.

Trial Examiner Ballinger: Read the question.

(The question was read.)

Mr. Hanley: You are limiting that to Ned's only?

Mr. Austin: Limiting it to Ned's and Wayne Oil Company's dealers.

A. Well, certainly I could say that the general price cutting situation in Detroit affected the Wayne Oil Company's business.

By Mr. Austin:

Q. What other large prominent service stations are there that you can think of that deal in Standard Oil gasoline, other than Ned's?

A. Well, I wish I had a list in front of me so that I could look it over.

Trial Examiner Ballinger: Can you recall any now?

The Witness: I don't believe I can recall any quite as large as Ned's, if that is the type you want.

527 By Mr. Austin:

Q. Can you recall any quite as large as any one of Ned's stations; that is, are you referring to Ned's now as a group or as a single station?

A. I was thinking of them as a group when I made that answer.

Q. Are all of their stations large stations located on prominent intersections or on prominent highways?

A. Well, they are large institutions, but the gasoline end of the business, I think probably there are other stations around Detroit that do as much gasoline business as they do—

Q. But you can't think of—

A. —individually.

Q: —any other Standard Oil stations right now?

A. Well, no, not having paid as much attention to the rest of them as I do to my own, and mine are not that big.

Q. Well, you stated that there was price cutting that was going on at the end of '37 and early—at the end of '36 and early in '37, and that it increased during '37 and '38; is that correct?

A. I believe that is true.

Q. You mentioned four stations out of which only one, Ned's, was a Standard Oil station among the larger stations.

Now, do you recall any other Standard Oil station
528 where you saw discount signs or which you know to have been cutting prices as early? Did you know that that was true of Ned's?

A. Not offhand, I don't believe I can.

Q. Can you state whether Ned's was one of the first of the larger Standard Oil stations to reduce prices below the prevailing retail price?

Mr. Hanley: When?

Mr. Austin: Commencing the end of 1935 or the first of 1936, from that time on. I wouldn't attempt to say when it started.

A. Well, it would be my idea that they were among the first.

Mr. Austin: I think that is all I have.

Cross-Examination by Mr. Hanley.

Q. I have just a few questions, Mr. Ledbetter.

You were asked to get some information relative to deliveries of Ethyl gasoline in 1935 or '36. The volume of Ethyl which you were using or your stations were using at that time in relation to Red Crown was very small, was it not?

A. It was.

Q. Now, you have indicated that after you went into the wholesale business you did not operate any retail

529 outlets until beginning September 8, 1939. You told Mr. Austin the location of the stations and the periods which you operated at retail since.

If I understood correctly, it appears that there were times since September, 1939, when you were directly operating a good many more stations than you are now; that is true?

A. That is true.

Q. And it also appeared that you were operating some of them for only a short time?

A. That is true.

Q. Will you please explain why it was that in September, 1939, you did go into the retail operation of some of the stations and why you ceased operating them as retail from time to time since?

A. The reason the Wayne Oil Company ever operated a retail outlet since it became a wholesaler was what I would term an emergency reason. The Wayne Oil Company never took over the operation of any of those stations until September 8th, 1939, which was just about the tail end of a series of very destructive price wars running over a period of two or three years, culminating about that time. These stations—or these dealers of mine, of course, never made the money during the price war that they could have made during stable times, and these stations that the
530 Wayne Oil Company started to operate were stations that were going broke, and you might say that the Wayne Oil Company took them over as a rescue proposition to keep the people in them eating.

Q. Well, your policy as a company has been and is today, is it not, Mr. Ledbetter, to confine your business to the wholesale operation and stay out as much as you can from the retail field?

A. That is true. We want no part of the retail proposition at all.

Q. Now, with respect to these price wars, so-called, from your experience and observation in the oil industry, those periods of destructive competition occur from time to time, do they not?

A. They do.

Q. And can it be fairly said that during those periods, that no one in the oil business, no matter what branch of the business they may be in, makes as much money as during the period of more stable conditions of prices?

A. That is true.

Q. It hurts everybody, I suppose?

A. It sure hurt me.

Q. As a matter of clarification, I would like to have you explain, Mr. Ledbetter, when you order a car of gasoline, say it is a 10,000-gallon car that you order, isn't it
531 true that you in all probability get 9,870-odd gallons or something like that, or maybe 10,230 gallons, due to the inage and outage?

A. That is true.

Q. So there is always up to several hundred of gallons more or less than the exact capacity of the car?

A. That is right.

Q. And a tank car buyer doesn't pay any attention to which way it is, the overage or the underage being not important to the tank car buyers?

A. Well, let me make this clear, that a 10,000-gallon car might not hold exactly 10,000. Whatever it holds, we get and pay for, whether it is under or over. They can't be built to hold exactly, I suppose, the exact amount that they are called for.

Q. At least, they never do?

A. They never have, anyhow.

Q. You were asked, Mr. Ledbetter, if you kept in close touch with the Standard Oil Company's business, and you were asked that question in connection with your knowledge of the tank wagon dealer price of the Standard Oil Company. As a matter of fact, that is a publicly posted price; anybody can ascertain what it is any day, can they not?

A. I believe that is true.

Q. And you just knew from day to day what it was,
532 didn't you?

A. I think I did.

Q. Well, you didn't have any such contacts with the Standard Oil Company, I assume, as would give them any opportunity to even make suggestions to you as to how you would operate your business, did you?

A. Will you read that?

Trial Examiner Ballinger: Read the question.

(The question was read.)

A. Well, I think I had the contact, but they certainly never suggested to me as to how I run my business.

By Mr. Hanley:

Q. In point of fact, you did run your business entirely irrespective of the Standard Oil Company, didn't you?

A. That certainly is true.

Q. Now, a great deal has been said here, Mr. Ledbetter, about price cutting and the prevailing retail prices in the City of Detroit. Is there any such thing as a prevailing retail price that you can point to and say that is the prevailing retail price.

A. At the present time?

Q. At any time. What do you mean by the prevailing retail price?

A. Did I use that term in my examination?

Q. No. Mr. Austin used it.

533 A. Well, if I was going to use the term "prevailing price," I would have to make my own definition of it.

Trial Examiner Ballinger: Well, what would be your definition?

The Witness: My definition, I believe, would be something like this: the prevailing price of any major product would be the price at which the majority of dealers were selling at at any given time; so far as I can see now, that would be my definition.

By Mr. Hanley:

Q. And it was that type of prevailing price that you had in mind, I assume, when you answered questions about price cutting that Mr. Austin asked you?

A. I don't recall the questions, and I don't recall the way in which that word "prevailing" was used in that question at the present time.

Q. Well, you were asked questions, several of them, Mr. Ledbetter, along this line: Was there a time when certain retailers of gasoline cut the price below the prevailing retail price? And you give some instances of such cuts. Now I am inquiring if, when you made that answer, or those answers, if the prevailing price that you had in mind was the type of prevailing price that you have now defined?

A. That is right.

534 Q. Then it would follow, wouldn't it, Mr. Ledbetter, that there might be a great many service stations handling any given brand of gasoline that were using various prices and yet some majority of the cases handling

that product would be on a given price which you would regard as the prevailing price?

Trial Examiner Ballinger: Read the question to the witness.

(The question was read.)

A. I believe that would be.

By Mr. Hanley:

Q. Then you did not mean to infer, I assume, Mr. Ledbetter, when Mr. Austin asked you about Ned's, that all of the retail stations in Detroit selling Standard Oil gasoline were on one price and Ned's was on another and lower price?

A. Well, no. I wouldn't have enough information to know.

Q. In point of fact, during the period when Mr. Austin says there was a price war, isn't it a fact that price cuts, premium offers, price cut advertising was indulged in by dealers in all brands of gasoline and what have been termed here off brands of gasoline?

A. Yes, I think that probably is true.

Q. You were asked if you hadn't driven past Ned's and seen a sign "2 cents off," heard radio advertising, and
you were asked if you had seen that class of advertising
535 posted before any other service stations, particularly
major brand stations, and, more particularly, Standard Oil stations.

You said you couldn't recall specifically. I want to ask you the reverse of that, Mr. Ledbetter. Isn't it a fact that during that time, when this so-called price war was in effect, that practically all service stations were advertising some sort of an inducement or offering premiums?

Mr. Austin: I would like to have that referred to a specific time.

Mr. Hanley: Well, I will refer it to a time that Mr. Austin defines as the price war period.

Mr. Austin: You would have to go back to my testimony to find that out.

Mr. Hanley: You put a lot of it, Mr. Austin. It was late in 1938 through the fall of 1939.

Mr. Austin: Well, I only referred to a price war as about five weeks prior to November 19, 1939. I am sure that is the only period which I characterized with the term "price war," but Mr. Ledbetter testified that there was increasing price cutting during 1938 and 1939.

Mr. Hanley: I will confine it to that period, Mr. Austin, if that will clear up the situation.

Mr. Austin: I would like to also say, if I may, if this is directed to my question, as you say it is, that 536 my question was only directed to Standard Oil stations.

Mr. Hanley: I asked for both.

Mr. Austin: I only asked that particular question on Standard Oil.

Mr. Hanley: And you asked as to both, but I want to ask as to both.

Well, I had better reframe the question, there has been so much said since I asked the question.

Trial Examiner Ballinger: The question is withdrawn?

Mr. Hanley: Yes.

By Mr. Hanley:

Q. Can you recall any station in the five-week period before November 19, 1939, in Detroit that wasn't posting prices or offering premiums or otherwise advertising as participation in the so called price war?

A. I think in that period practically every station in the city had signs out on prices.

Q. That applies to both the branded products and what have been referred to as off brand and non-brand?

A. I don't think a man could have found a station in the city that didn't have a price sign out at that period.

Q. And you were asked specifically if there wasn't a time about then when Ned's was openly advertising 2 cents off. Do you recall that?

537 A. No.

Q. Do you recall you were asked that?

A. I remember some question of that type, but I don't—

Q. It is true that many stations handling all kinds of gasoline were at least that much off at that time; isn't that true?

A. There was a period in there—just where to place it, I couldn't—where practically all stations got to advertising 2 cents off. That was their form of price sign, if I remember correctly.

Q. Now, conditions began to get more stabilized from a price standpoint, did they not, in the fall of 1939?

A. They did, yes, in November.

Q. There was a time about which you were asked, when the Standard Oil Company posted a price of 8.1 cents; do you remember that?

A. I remember the question, yes; I don't remember the price.

Q. Isn't it true that about that time all suppliers of gasoline raised their dealer prices?

A. It is my recollection of it.

Q. You didn't mean by any answer that you gave to the question that Mr. Austin put that the mere fact that the Standard Oil Company raised its dealer price was the thing that stopped the price war, did you?

A. No.

538 Q. It was a general condition, was it not?

A. It was.

Q. It was also a general condition that started the price war, wasn't it; it affected all the dealers?

Mr. Austin: Do you know what started it?

Mr. Hanley: I didn't ask that. Let him answer my question, please.

Mr. Austin: I am sorry.

Trial Examiner Ballinger: Have you any knowledge?

The Witness: I don't believe I would undertake to say what started the price war.

By Mr. Hanley:

Q. But there was a general condition, affecting the whole industry in Detroit, wasn't there?

Mr. Austin: Now, I think that question is very capable of misunderstanding. Do you mean that the price war was a general condition, or do you mean a general condition caused the price war?

Mr. Hanley: I mean, wasn't the price war a general condition affecting the oil industry in Detroit?

By Mr. Hanley:

Q. Is that clear, Mr. Ledbetter?

A. Is that the question?

Q. Yes, sir.

A. I would say it certainly became that.

539 Q. There was some inference in the questions of Mr. Austin that the prices at Ned's Service Stations may have been responsible for starting this price war, without reference to what anybody else was doing. I will

ask you you mean to infer by any answers which you gave to Mr. Austin, that you held Ned's Service Stations responsible for that general price war and condition that came to exist in Detroit?

Trial Examiner Ballinger: Did you have sufficient knowledge so that you could reach a conclusion?

The Witness: I don't think so.

By Mr. Hanley:

Q. You were in the retail operation prior to the organization of the Wayne Oil Company?

A. Yes, I was.

Q. You bought gasoline from the Standard Oil Company and certain other suppliers?

A. That's right.

Q. Did you buy some from the Hi-Speed people at that time?

A. Not at the beginning. That was later.

Q. There was a time when you were buying Hi-Speed?

A. Yes.

Q. And even at that early time, isn't it true that the Hi Speed was selling gasoline to you at one-half cent less than the Standard Oil price; at least at one station?

A. Yes; I was getting it less; just what the figures 540 were, I would have to look at the records to see.

Q. One other thing: You were asked about the physical possibility of putting an 8,000 gallon tank under a service station pump. You said, of course, it is physically possible. I will ask you if it isn't a fact that that sort of operation just simply isn't done; in Detroit or anywhere else, as far as you know?

Mr. Austin: He answered that question. I am sorry. I guess you can ask him over again, on cross examination.

A. It not only isn't done, but I don't see why it should be.

Mr. Hanley: That's all.

Mr. Austin: What was the last question?

(The question was read.)

Redirect Examination by Mr. Austin.

Q. That directly contradicts the answer you gave me, Mr. Ledbetter. I think you said awhile ago, it was done in a number of instances; there were tanks that size.

A. My answer to the last question, you would have to construe that as meaning a general proposition. I am not attempting to say it never was done, because everybody knows it has been done in isolated cases. That is the explanation of my answer.

Q. Then it has been done and is done in certain cases?

A. Yes; very isolated cases.

541 Q. If it is done in isolated cases, then there is no reason it couldn't be done if someone else wanted to do it?

A. I would like to say this: As a general proposition, it isn't done, and I see no reason, from a practical, economical standpoint, why it should be done.

Q. That is something else, as to reason.

A. Well, that's the answer.

Q. I am only asking you whether it has been done here, or can be done.

A. That is the impression I intended to convey by my last answer.

Q. Your impression you intended to convey, you see no reason for it?

A. No practical or economical reason.

Q. But you didn't intend to say it couldn't be done or hasn't been done?

A. No, I didn't mean that.

Q. A little while ago, Judge Hanley asked you whether periods of destructive competition do occur from time to time in the retail gasoline business. Do you recall that?

A Yes.

Q. And you said, "Yes, they do occur"?

A. Yes.

Q. Do you mean that they do occur, or that they have occurred?

542 A. Well, using that language, I probably was referring to the past. I hope they don't any more.

Q. Did you think that it is necessary; that they always will occur, or is that part of what is to be expected; or that they are unnecessary?

A. I am sometimes rather pessimistic about it, I can tell you that.

Q. Did you intend to express it as your opinion that that is a natural cycle in the oil industry; that there must always be price wars; or were you referring only to what has happened?

A. I would say that that probably would be quite analagous to the philosophy that wars are always necessary in the world. Nobody knows. Every body hopes that they won't. I hope that there are no more price wars.

Q. What is the prevailing retail price for a house brand major gasoline today, in Detroit.

A. 16.3, I believe is the price.

Q. You don't have any trouble in stating that there is a prevailing price, do you?

A. Not right at the moment, I don't think.

Q. And don't you know that almost all gasoline stations, retail major gasoline stations in Detroit—that is, of major oil companies—are now posting that price?

A. That is my belief.

Q. And wasn't that true all during 1940?

543 A. Yes.

Q. And regarding responsibility for that price cutting situation, which you say increased during 1938 and 1939, in your opinion, was the reduction in prices or price cutting by those four stations which you mentioned, Ned's, Bright's, Hickey's, and Langer's, was the cutting by those four stations partially responsible, or responsible to a substantial degree, in your opinion, for the price cutting situation which developed in 1938 and 1939?

A. Well, I think I could say that it was responsible to a substantial degree.

Mr. Austin: That's all.

Mr. Hanley: Nothing further.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Trial Examiner Ballinger: We will have a recess for five minutes.

(A short recess was taken.)

Mr. Austin: Mr. Leake.

DOUGLAS LEAKE was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

544 Q. Give your name and address to the reporter, please.

A. Douglas Leake, 4080 Pingree.

Q. In what business are you engaged, Mr. Leake?

A. In the retail gasoline business.

Q. How long have you been engaged in that business?

A. Since May, 1936.

Q. And what business were you in before that?

A. I was employed in the retail gasoline business by the Standard Oil Company; operating a station.

Q. Did you take over the operation of that station when the Iowa Plan was put into effect here?

A. I did.

Q. Have you operated it ever since?

A. Yes.

Q. Where is the station located?

A. At 7650 Grand River.

Q. Do you lease that station now from Standard Oil?

A. Yes.

Q. What is your rental?

Mr. Hanley: That is objected to as immaterial.

Trial Examiner Ballinger: Is that material?

Mr. Austin: Well, not particularly. I will withdraw it, if there is any objection to it.

Trial Examiner Ballinger: Unless it is material. Off the record.

(There was a discussion off the record.)

545 Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. What brands of gasoline do you sell, Mr. Leake?

A. Three brands; Solite with Ethyl, Standard Red Crown, and Stanolind.

Q. Are you familiar with stations in Detroit operated by Ned's Auto Supply Company?

A. I know they operate retail outlets.

546 Q. Where is the nearest Ned's station to you?

A. A mile and a quarter up the street, Chicago and Grand River.

Q. Is Grand River a through thoroughfare?

A. Yes.

Q. Is there a great deal of traffic driving up and down that street past your station and past Ned's station?

A. Yes, there is considerable traffic.

Q. Isn't that one of the thoroughfares that runs from downtown out into the suburbs?

A. Yes.

Q. During the latter part of 1937 and the first six months of 1938, do you know whether Ned's Grand River station was selling at a different price than you were selling at retail?

A. Yes, they were.

Q. Were they selling at a lower price?

A. Yes.

Q. Do you know how much lower?

A. Approximately 2 cents a gallon.

Q. Do you recall what your margin was between what you were paying for gas and what you were selling it for at that time on Red Crown?

A. In 1937?

Q. Yes.

547 A. 4 and a half.

Q. How long did that continue, approximately, up through the first six months of '38?

A. We maintained that margin through the first six months of '38.

Q. Did you reduce that margin around the middle of '38?

A. I think in the latter part of July, '38, we reduced that margin.

Q. What was your reason for reducing the margin?

A. The drop in business practically compelled us to become more competitive in order to do business.

Mr. Austin: I would like to have this sheet marked for identification.

(The document referred to was marked, for identification, "Commission's Exhibit 55.")

By Mr. Austin:

Q. I show you this paper marked Commission's Exhibit 55, for identification. Will you state what that is?

A. That is the retail sales of gasoline month by month for 1937, '38, '39, and '40.

Q. For your station?

A. For my station.

Q. Did you prepare that from your records that you have at your station?

A. I did.

548 Q. Is that correct to the best of your knowledge and belief?

A. That is correct.

Mr. Austin: I will offer this sheet in evidence.

Mr. Hanley: The general objection.

Trial Examiner Ballinger: Subject to the general objection, the document is admitted in evidence as Commission's Exhibit 55.

(The document referred to, heretofore marked for identification, "COMMISSION'S EXHIBIT 55," was received in evidence.)

By Mr. Austin:

Q. Now, this volume statement, Commission's Exhibit 55, Mr. Leake, shows a material falling off in your volume in the first seven months of 1938. I believe you just mentioned that?

A. That is right.

Q. During the period of the first seven months of 1938, did you lose a number of customers?

A. Yes, quite a number.

Q. That is, customers that had been buying gasoline from you ceased to buy during that period?

A. Yes, they did.

Q. And did some of those customers come in for 549 grease jobs or oil but not buy gasoline?

A. Yes, that is right.

Q. And I am referring now to customers who had previously bought gasoline from you.

A. Yes.

Q. Would that apply to customers who had been rather regular buyers of gasoline from you prior to this time?

A. Yes, it would.

Q. Did you have any conversations with any of those customers as to the reasons why they had ceased buying gasoline at your station?

A. Yes, I asked quite a number of them.

Q. What reasons did they give?

Mr. Hanley: Just a minute, please.

In addition to the general objection to the witness' testimony, we object to this question as being hearsay.

Trial Examiner Ballinger: The objection is overruled. Off the record.

(A discussion ensued off the record.)

A. The reasons that the customers gave me for discontinuing buying gasoline from our station was because they could buy it cheaper elsewhere, and they didn't see why I shouldn't sell it as cheap as the stations up the street.

Q. Do you remember specifically of any customers
550 stating they could buy cheaper at Ned's?

A. Yes, several customers stated that they could buy cheaper at Ned's.

Q. Did they say they were buying their gas there?

A. They told me they were buying their gas there.

Q. Did they say why?

A. They could buy it 2 cents less than I was selling it for.

Q. Do you remember any specific conversations with any particular customer at that time that you can recall?

A. Yes; I have got a couple in mind that I could name that I had specific conversations with during that period.

Q. I suppose you don't know the names of all of the people that buy gasoline at your station?

A. Oh, no, not all of them.

Q. Well, will you relate any such conversations that come to your mind and the names of the customers.

A. Well, I had a customer by the name of George Brundage, did considerable driving, was coming in for his grease jobs and oil drain, and previously had bought gasoline, and we used to try to sell him a tank of gas at the time he got his lubrication and oil drain. He said that he would have to quit buying gas from us, because he was buying it up at Ned's at 2 cents off. It meant quite a saving to him in his business inasmuch as he drove
551 over a thousand miles a week.

Q. Do you remember any other cases?

A. Another case was a fellow by the name of Mr. Maher, who lives right close to the station, about a block away. He drives about 1500 miles a week, and he claimed that he couldn't continue to buy gasoline from us, because it meant too much of a saving; he could buy it at 2 cents off at Ned's.

Q. Going over to 1940, did you have a customer who had been buying gasoline from you in 1940 or previous to 1940 by the name of Snyder?

A. Yes, I did.

Q. What is his business?

A. He is at the motorcycle department of the Police Department, rides for the Traffic Department.

Q. Does he also drive an automobile?

A. He drives his own personal car.

Q. Did you try to persuade him or solicit him to buy gasoline at your station in the summer of 1940?

A. Yes, I did.

Q. Did you have a conversation with him on that subject?

A. Yes.

Q. Will you state that conversation?

A. Well, we used to do a little talking about gasoline when he would stop into the station, and I solicited him for his business, and inasmuch as he lived close to the
552 station, and he was living out at the cottage about 40 miles from Detroit, driving back and forth to work.

Q. You mean in the summer?

A. In the summer. And was using quite a lot of gas, and I solicited him for his business, and he told me that he had given me his lubrication and oil changes, but he couldn't give me his gasoline business, because he was getting coupons up at Ned's, 2 cents a gallon, he could turn those coupons in on tires, batteries, or any other merchandise that he happened to need for the car.

Q. And did he buy any gasoline from you after that conversation?

A. No, he didn't buy any gas from me. He came in and got his car lubricated and also his oil changed two or three times, but he never bought any gas.

Mr. Austin: That is all I have.

Cross-Examination by Mr. Hanlon.

Q. Did you say your station was a mile and a quarter from Ned's?

A. That is right.

Q. Are there other service stations between your station and Ned's station on Grand River Avenue?

A. Yes.

Q. Do you know how many?

553 A. Not exactly, no.

Q. Well, your best judgment, just give us your estimate?

A. I would say about 12.

Q. Are any of them handling Standard Oil products?

A. Yes.

Q. How many handle Standard products?

A. Three.

Q. And they were handling those products during the years '37 and '38, '39, '40?

A. Yes.

Q. Out of these stations, were those not handling Standard Oil products handling what have been referred to as branded gasolines?

A. They all handled branded gasolines.

Q. Were you familiar in 1937 and the years following with the prices actually being charged by all of those service stations between you and Ned's?

A. No, not all of them.

Q. Well, do you know actually what any of them were charging?

A. I couldn't definitely say any particular price at any particular time, no.

Q. So far as you know, then, I take it, Mr. Leake, their prices may have been below the price you were charging?

A. It could have been.

554 Q. You just don't know that?

A. No.

Q. Do you know how many customers that had formerly been your customers you lost in early 1938?

A. No, I couldn't definitely say how many really I lost.

Q. You have named two who told you that they bought their gasoline at Ned's station. You lost more than two customers, I suppose?

A. Yes. The gallonage shows that.

Q. Do you know where the other customers went after they left your station?

A. Not all of them, no.

Q. Do you know whether they left your station simply because of your price on gasoline or for other reasons?

A. Not definitely, but I would say it was chiefly price at that time.

Q. Do you know whether or not they continued in all cases to buy Standard Oil gasoline or whether they may have purchased some other brand of gasoline after leaving your station?

A. I couldn't say that.

Q. About that time in early 1938 there was a great deal of price reducing by dealers in all brands of gasoline in Detroit, wasn't there, Mr. Leake?

A. That is right.

555 Mr. Austin: About what time was that?

Mr. Hanley: Early 1938.

By Mr. Hanley:

Q. In your judgment, you say it was probably price that influenced a good many customers that you lost; that is right?

A. That is right.

Q. You think it is more a question of price than brand?

A. Yes, I do.

Q. That is to say, Mr. Leake, do you think that if the price on, we will say, Sinclair gasoline was reduced substantially below the price that you were getting for Standard Oil gasoline, that it might influence the customer to change his brand to Sinclair gasoline at a cheaper price?

A. It would some people, yes.

Q. You are generally familiar with the conditions that existed in the retail gasoline marketing business throughout 1938 in Detroit, aren't you, Mr. Leake?

A. Yes.

Q. You were also familiar with conditions for a few years prior to that and a few years since?

A. That is right.

Q. You talked with other dealers from other—you talked with other Standard Oil Company dealers from time to time as well as dealers handling other products, I sup-
556 pose; don't you, Mr. Leake?

A. Yes.

Q. I will ask you if it isn't true that so far as Standard Oil Company dealers were concerned in 1938, that there was a general falling off of business?

Trial Examiner Ballinger: Have you any personal knowledge?

The Witness: Not personal, no.

By Mr. Hanley:

Q. Well, did you gain such knowledge by your conversations with other people in the oil business?

A. Yes.

Q. What is the fact as to whether or not there was a falling off in all Standard Oil stations in 1938?

A. There was a general falling off of business in 1938, but some specific cases there was more than others. There was some instances where there were gains.

A. I don't suppose you know the over all figure or percentage?

A. No, I couldn't give you that.

Q. The conditions in 1938 in the oil business were just very highly competitive in this city, were they not?

A. That is right, they were.

Q. Is this location where you are a business district?

A. Yes, it is all business district there.

557 Q. And there are a lot of service stations in that vicinity?

A. Yes.

Q. Within just a few blocks from you, are there not?

A. Yes.

Mr. Hanley: Off the record.

(A discussion ensued off the record.)

Mr. Hanley: I just want to have marked, for identification, this map, if you please.

(The document referred to was marked, for identification, "Respondent's Exhibit 1.")

By Mr. Hanley:

Q. I show you a map of Detroit, Mr. Leake, which has been marked Respondent's Exhibit No. 1, and show you a dot on that map with an arrow pointing to the number "3" and I will ask you if that correctly represents the location of your service station.

A. That is correct.

558 Q. Just one other question—and I may have asked you that, Mr. Leake: During 1938 is it not true that all over the city, and more particularly in your territory, you observed many stations advertising price cuts and premiums, and representing all sorts of brands of gasoline?

A. That is true.

Mr. Hanley: That is all.

Redirect Examination by Mr. Austin.

Q. Did that situation become worse towards the latter part of 1938, or the summer of 1938?

A. Yes. It became worse as the year went on.

Q. And was it as bad in 1937?

A. No, we didn't feel it as bad in 1937 as in 1938.

Q. One thing I forgot to ask you, and that was about the time that you reduced your price, which, I believe you said, was around the end of July, 1938—

A. That's right.

Q. —to what extent did you reduce it?

A. To the prevailing price at that time; the lowest competition.

Q. Lowest competition?

A. That's right.

Q. What was the lowest competition? I don't mean the amount; I mean, who was it?

559 A. In our territory, Ned's Auto Supply.

Q. Do you know of any other stations on Grand River, between yours and Ned's?

Mr. Austin: Withdraw that.

By Mr. Austin:

Q. Did any customers, during that period, tell you they were getting two cents off at any other station on Grand River other than Ned's?

A. No, they didn't.

Q. And did you make any farther price reductions; I mean, did you reduce your margin further at any other time after July, 1938, up to the end of 1939?

A. Yes. In the latter part of 1938, I believe it was the latter part of November or first of December, we made a further deduction.

Q. And then, did you continue that through 1939, up until the end of the price wars?

A. Yes.

Mr. Austin: That's all.

Recross Examination by Mr. Hanley.

Q. Referring to Commission's Exhibit 55, the statement of your gallonage, Mr. Leake, you show that your gallonage in the years 1939 and 1940 are both an increase over your gallonage in 1938, is that correct?

560 A. That's right.

Q. You raised your price in 1939 and 1940 over your low price in 1938, didn't you?

A. Yes.

Mr. Hanley: That's all.

Redirect Examination by Mr. Austin.

Q. Did the other stations in your neighborhood raise their posted retail price at the same time, at the end of 1939?

A. At the same time I did, yes.

Mr. Austin: That's all.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

CHESTER MARTOGLIO was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. Give your address and name to the reporter, please.

A. Chester Martoglio.

Q. What is your business, Mr. Martoglio?

A. Operating a Standard Oil service station.

Q. Where is it located?

A. Hamilton and Collinwood; 11305 Hamilton.

561 Q. What brands of gasoline do you sell?

A. Standard Red Crown, Solite with Ethyl, and Stanolind gasoline.

Q. How long have you been in the service station business?

A. Since May of 1936.

Q. Was that the time that the Standard Oil ceased operating their own stations?

A. That's right.

Q. Were you a Standard Oil operator before that?

A. I was managing that station for the Standard Oil Company.

Q. How long?

A. Two years.

Q. Since 1936, have you leased that station from the Standard Oil Company?

A. I have.

Q. And do you purchase your gasoline from them by tank wagon delivery?

A. That's right.

Q. The present price is 8.1 plus taxes?

A. I don't know.

Q. What is the present price?

A. I wouldn't know. I haven't got it in my head. I don't know.

Trial Examiner Ballinger: I didn't get your answer.

562 The Witness: I don't know. I really don't have it on my tongue. I don't know what the present price is.

By Mr. Austin:

Q. I think we have it on the record, anyway, Mr. Martoglio.

A. I didn't look that up.

Q. Where is the nearest Ned's Auto Supply station to you, located?

A. Calvert and Woodward.

Q. How far is that from you?

A. Four blocks.

Q. Is that one of the nearest service stations to your location?

A. No, I have a Mobil gas station that is two blocks.

Q. And is that as large a station as Ned's?

A. Oh, no; and I have a few other stations that are closer than Ned's, too.

Q. Are any of them as large a station in facilities as Ned's?

A. No, they are not.

Q. Do you recall what margin you were selling gasoline at around the end of 1937 and early 1938, over the price that you paid?

A. Was that during the price war?

Q. During the first half of 1938. I won't call it a price war.

563 A. The first part of 1938 I got down as low as half a cent a gallon.

Q. When was that?

A. Around the first part of 1938.

Q. How long did that continue?

A. Only a few days; at that price.

Q. Then you raised your price again?

A. Then we raised it again, for a while.

Q. What was the address of Ned's station?

A. Calvert and Woodward.

Q. During the latter part of 1937 and first half of 1938, do you know whether Ned's was selling at a lower price than you were on Red Crown?

A. I have to explain something to you here. I don't remember whether that station was erected at that time. Ned's wasn't my competitor in my neighborhood at that time.

Q. Wasn't that station constructed in 193[illegible]

A. I don't remember that.

Mr. Austin: I know that appears.

Mr. Hanley: If you know, all right.

Mr. Austin: I am pretty sure that was one of the two that were opened in 1938, and I had forgotten, for the moment, myself.

(Counsel referred to documents.)

Mr. Austin: The Woodward Avenue station was 564 opened in 1938, according to Mr. Gershenson's testimony.

By Mr. Austin:

Q. What was the principal competition in erly 1938?

A. I had two competitors. I had I. Paul Taylor at Woodward and Davison, and Marvin Goldberg at Pingree and Grand River.

Q. What kind of gas did Taylor have?

A. Mobil gas.

Mr. Austin: Will you mark this paper for identification, please?

Trial Examiner Ballinger: The reporter will mark the paper Commission's Exhibit 56, for identification.

(The paper referred to was marked "Commission's Exhibit 56" for identification.)

By Mr. Austin:

Q. I show this sheet, Mr. Martoglio, marked Commission's Exhibit 56, for identification, and will you please describe what that is?

A. This is my gasoline gallonage for the years 1937, 1938, 1939, and 1940.

Q. By months?

A. By month.

Q. Did you prepare that for your sales tax records?

A. This was prepared for my sales tax records.

Q. Is that a correct statement, to the best of your belief?

565 A. To the best of my knowledge.

Mr. Austin: I will offer this statement in evidence.

Mr. Hanley: No objection, except the general one.

Trial Examiner Ballinger: Subject to the general objection reserved to counsel for the Respondent, the document is admitted in evidence as Commission's Exhibit 56.

(The document heretofore referred to, marked for identification "COMMISSION'S EXHIBIT 56" was received in evidence.)

By Mr. Austin:

Q. Now, when Ned's opened up their station on Woodward Avenue, do you recall the opening of that station?

A. I do.

Q. Do you recall that it was opened while you were doing business at your present address?

A. That's right.

Q. After they opened that station, did they sell gas at the same price you were, or at a lower price, on Standard Red Crown?

A. I can't answer that, and I can tell you why. Do you want me to?

Trial Examiner Ballinger: If you can't answer it.

By Mr. Austin:

Q. You don't know?

A. I don't know.

566 Q. During the year 1939, do you know, of your own knowledge, whether or not Ned's was selling at a lower price than you were?

A. The posted price, no.

Q. I am not referring specifically to the posted price. I am referring to what they charged customers, and if you are thinking of any discounts or premiums, you can describe what you know about what they were doing?

A. I do know they were giving coupons.

Q. When was that?

A. That was in 1939, and just about right on through.

Q. Have you had any conversations during 1939 or 1940 with any automobile owners who had bought gasoline from you and had ceased, or whom you solicited to buy gasoline from you, as to why they didn't purchase gas from you, and where they purchased it?

A. Yes, I have had quite a few contacts.

Q. When did you have such contacts?

A. This has been going on for the past six or eight months, but I had been noticing as they drive around, and stop them, meet them over at the bank, or over at the store, stopping them on the highway or some place, and finding out why.

Q. What was said?

A. I wasn't meeting competition with the coupons.

Q. What competition?

A. From Ned's, and lately, it is from other stations.

567 Q. What other stations?

A. Marvin's.

Q. Is that Marvin Goldberg?

A. That's right.

Q. You referred to lowering your price around the first of 1938 for a few days, and then raising it again, is that right?

A. Yes, sir.

Q. Now, going further on in 1938, when did you reduce your retail price again?

A. In July.

Q. And did you make any further reductions after that?

A. Only to meet competition. Whether I did, or not, I do not remember.

Q. What competition did you try to meet?

A. What has been called a prevailing price. At that time, on discount signs at stations, or the prices posted at the stations.

Q. You mean by the price cutting stations?

A. That's right.

Q. Did you try to meet that price?

A. Always.

Q. Why didn't you do that during the first part of 1938?

A. During the latter part of 1937, my station was being rebuilt, ~~remodelled, and I only~~ had the facilities of one
side of my pump island. While my station was in the
568 process of being rebuilt, price cutting started. I was
operating under such a disadvantage that I could not meet competition at that time, because I couldn't handle the customers when they came in. All I could do was sell gasoline. Any oil drains or any other service, I had to do

on the driveway, which was partly cluttered up by the machinery and supplies.

When my station was opened, the week before Thanksgiving of 1937, for business, I kept on doing business under the old price, not meeting competition. I went along until January, 1938. I couldn't go along any further. My business had dropped to the point that I met competition.

Q. Was there any change in your volume after you cut price?

A. Very much so. It increased.

Q. Did your profits increase proportionately to your volume?

A. No, they didn't.

Q. Do you know what it costs you to sell a gallon of gasoline?

Mr. Hanley: That is objected to as immaterial.

Trial Examiner Ballinger: Do I understand there is an objection?

Mr. Hanley: Immateriality.

Mr. Austin: We are talking about injury to competition because one dealer gets a better price than another.

569 Trial Examiner Ballinger: The objection is overruled subject to the right to reserve, of counsel for the Respondent, to move to strike at a later date.

A. I know what it cost me to operate my station per day, and that's easily found, how much it costs me per gallon.

Q. But you don't know the gallon figure, offhand?

A. I have never figured it that way.

Q. When did you get into full operation again after you remodelled your station?

A. The week before Thanksgiving.

Q. 1937?

A. Right.

Q. And was your station facilities and equipment in full operation during the first half of 1938?

A. It was.

Q. Prior to the time you reduced the price; except for that few days?

A. It was; that's right.

Q. Was your net profit on gasoline, total net profit, greater or less per month, or however you figure it, after you cut the price, than before?

Mr. Hanley: Per gallon?
Mr. Austin: No.

By Mr. Austin:

Q. I mean, did you make more money selling gasoline after you cut the price and increased your volume,
570 than you did on a higher price and a lower volume?
A. No, I didn't.

Q. In other words, even though your volume increased, your profits didn't increase?
A. On gasoline, no, sir.

571 Mr. Austin: I believe that is all I have.

Cross-Examination by Mr. Hanley.

Q. Mr. Martoglio, I show you a map of Detroit which has been marked Respondent's Exhibit No. 1, and refer you to a spot on it indicated by an arrow numbered "1". I will ask you to say whether or not that correctly represents the location of your station?
A. It does.

Q. And that red circle with a dot in it numbered "6", does that correctly represent the location of Ned's service station you have been talking about?
A. Yes.

Q. Now, you are located on Hamilton Street, are you not?
A. That is right.

Q. And Ned's is located on Woodward Street?
A. That is right.

Q. Now, those two streets are each arterial highways in Detroit, aren't they?
A. That is right.

Q. And there isn't any cross traffic at any point between your station and Ned's station, is there?
A. Not a great deal.

Q. Now, Mr. Martoglio, did you ever regard Ned's Auto Supply Company as your only competitor in the oil business?
572 A. I never have.
Q. In Detroit.

You referred to I. Paul Taylor as being one of your competitors in your neighborhood?
A. Yes.

Q. He handles Mobil gas?

A. That's right, sir.

Q. He is located closer to you than Ned's, isn't he?

A. No, sir.

Q. Isn't he?

A. No.

Q. Where is the other Standard Oil station near you?

A. You mean the Standard Oil station nearest to me?

Q. Yes, sir. I thought you referred to one.

A. I did. But that is not the nearest one to me.

Q. Oh, I see.

Well, are there a number of Standard Oil stations close to you out there?

A. I think so.

Trial Examiner Ballinger: What do you mean by "a number"?

The Witness: Well, I have one that is 8/10 of a mile away; I have one that is just about another 8/10 of a mile away; I have one that is three blocks away; I have one that is four blocks away; I have one that is eight blocks 573 away, and I have another one that is about 14 blocks away.

By Mr. Hanley:

Q. Those are all Standard Oil stations?

A. That is right.

Q. That you are talking about?

Mr. Austin: Is that Ned's that is four blocks, that you mentioned?

The Witness: Ned's are four blocks.

By Mr. Hanley:

Q. Now, in addition to Standard Oil stations, I suppose you are also surrounded with everybody's else's stations, aren't you?

A. Every major brand.

Q. Do you regard all of those stations as being your competitors?

A. I do.

Q. Including the Standard Oil stations?

A. I do.

Q. Have you ever regarded Ned's as any special competition of yours, as distinguished from everybody else selling Standard gasoline and other brands of gasoline?

A. I have to one extent, just one.

Q. What is that, Mr. Martoglio?

A. I will have to mention the name of the Wilshire Hotel. That is at 3rd and Collingwood. I used to
574 derive enough business from that place to warrant my
spending around $40 a year in advertising in that one hotel alone, and in the last year I have discontinued all advertising in that hotel because I only have four customers left, and it is one of the largest apartment hotels in that part of the city.

Trial Examiner Ballinger: Where has that patronage gone?

The Witness: Sir?

Trial Examiner Ballinger: Where has that patronage gone?

The Witness: Well, the ones that I have contacted have all gone to Ned's.

By Mr. Hanley:

Q. And where is that in relation to Ned's?

A. It is between my station and Ned's station.

Q. That is, it is within those four blocks?

A. That is right. That is right.

Q. That is the only instance that you had in mind where he was any specific competition?

A. That is the only instance where he has ever caused me any competition.

Trial Examiner Ballinger: That you know of?

The Witness: That I have made it a point to find out, yes, sir.

575 By Mr. Hanley:

Q. You haven't lost any of your gallonage during the years 1938 and '39? Your gallonage has kept up, hasn't it, Mr. Martoglio?

A. '38 and '39, the total yearly gallonage?

Q. That is what I mean.

A. The total yearly gallonage kept up.

Q. Yes. Indeed, it was better than it has been in 1940?

A. Very much so.

Q. Now, Mr. Martoglio, do you know the actual price of gasoline—do you know what the actual price of gasoline was at the various Standard Oil stations which you have mentioned being near you in 1938 and 1939?

A. I know the price of the one that I was watching at all times.

Q. Well, that wasn't Ned's?

A. No, sir.

Q. Do you know the price of any of the others, the actual price, I mean?

A. Yes, sir.

Q. All of them or—

A. No, no, by no means all of them, just the ones that I consider my competitors.

Q. Well, I mean that group around .8 of a mile. You named certain locations. Did you keep track of the
576 actual price of all those stations?

A. I didn't keep track of the actual price, no, but I kept track of whether they were underselling me or whether I was underselling them.

Q. That is, as to posted price?

A. Well, it was a posted price. The stations that hadn't cut their prices at that time, weren't posting their prices.

Q. Lots of stations didn't post their prices during that period?

A. That is right.

Q. Did they?

A. At the beginning, yes, sir.

Q. So that no one could know by driving by a station during the period—

A. Yes, you did know; you did know.

Q. —what they said the price was?

A. You did know. If you drove by a station, if he didn't have the price, he didn't have the customers. The station that had the price had the customers.

Q. I know. When you learned what the price was?

A. You didn't drive in unless you saw another one on the drive.

Q. Do you know what the actual prices were that were being charged for gasoline in the stations in your
577 vicinity in 1938 and 1939, which were handling brands other than the Standard Oil brands?

A. Definitely, no, I wouldn't know.

Q. You did mention this Mobil gas dealer, Mr. Taylor. Did you regard him as severe competition from your standpoint?

A. I did. I did, because Mr. Taylor happened to be the one that started the whole situation in my own neighborhood.

Q. Do you know whether any of these hotel people may have gone to him?

A. That I don't know.

Q. You don't know where they all went, I take it?

A. No, I don't.

Mr. Hanley: That is all.

Redirect Examination by Mr. Austin.

Q. When you said the Taylor station started the price cutting in your neighborhood, that was before Ned's station existed there, wasn't it?

A. That is right.

Mr. Hanley: Well, that wasn't—or were you through?

Mr. Austin: I am going on to some more, but if you want to ask on that particular point—

Mr. Hanley: No, no, I will wait.

578 By Mr. Austin:

Q. You just mentioned a Standard Oil station that you said you watched. Which one was that?

A. Marvin Goldberg's.

Q. And after Ned's station opened up, did Goldberg's and Ned's sell at about the same price, or do you know?

A. Well, the way I figured it, Marvin watched Ned's, and I watched Marvin's.

Q. You said that people wouldn't drive in those places unless they knew what the price was. Do you mean by that that there were signs posted at all the stations?

A. That is right.

Q. Advertising what they charged?

A. At the stations that were discounting, they posted their price, and the fellows that were not discounting, they didn't post their price.

Q. Now, at the end of 1939, in November, did you withdraw those signs and raise your price for Red Crown gas? Well, we will go back before that. How long did you have those signs up and how long did you keep them up?

A. Well, I do know this: I worked with a group of dealers to eliminate these signs at that time, and it got to the point where there was only two signs left in our neighborhood.

Q. Where were they?

A. My station and Marvin Goldberg's, and I had
579 to give in first. And then he wouldn't come down, and I think it was one of the assistant prosecutors that had to go down and remove his sign.

Q. Well, in the first place, this time that you are just speaking of, when was that: do you know?

A. That was the end of '39.

Q. And since the end of '39 have you been selling at your posted pump price?

A. I think there was a short period of a few days in '40. I am not positive, though.

Q. Well, since about that time, all during 1940, what has been your price for Red Crown gasoline?

A. Well, it has been 16.3 for quite a long while. Now, how long that has been, I am not sure.

Q. Are there any stations in your neighborhood that have been having discount signs posted in their stations during 1940?

A. Yes, sir. Three days ago Marvin Goldberg had a sign in his station going north on Hamilton, 8 for $1.26.

Q. That is, Standard Oil station?

A. That is right.

Q. Is that just recently?

A. Three days ago.

Q. Aside from that, during 1940, were major gasoline prices stable or were they identical with the posted 580 prices in your neighborhood?

A. To my knowledge, they were.

Mr. Austin: That is all.

Recross Examination by Mr. Hanley.

Q. Please assume, Mr. Martoglio, that Marvin Goldberg, whom you watch, buys his gasoline at the same price that you pay for gasoline. Then when he reduces his price below yours or any others in the neighborhood, it would follow, wouldn't it, that he was just satisfied with a less margin?

A. You want me to answer that?

Q. That is, he is willing to take a less margin?

Trial Examiner Ballinger: That is the question asked.

A. I don't think he is willing to take a less margin. I think that he is trying to build up that business.

Q. Get gallonage?

A. Right.

Q. Isn't that a common practice among merchandisers of gasoline to reduce their margins in order to build their gallonage?

A. Not a common practice among merchandisers, a common practice among a few type of dealers.

Q. And you find that type of dealers handling all kinds of brands of gasoline, don't you, Mr. Martoglio?

581 A. They do.

Mr. Hanley: I think that is all.

Redirect Examination by Mr. Austin.

Q. You said that Goldberg's is now offering 8 gallons for $1.26, or did a few days ago?

A. Three days ago.

Q. If my arithmetic is correct, that would be 15¾ cents per gallons.

A. That would be 15.8 cents a gallon.

Q. In other words, that is a half cent a gallon cut below the prevailing price?

A. That is right.

Q. Do you consider a half cent a gallon cut a material cut?

A. I am not worried about the half cent a gallon cut.

Q. Well, just answer my question, whether you consider that is a cut which is large enough to affect competition?

A. Yes, sir.

Mr. Austin: That is all.

Mr. Hanley: That is all.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Trial Examiner Ballinger: We will take a recess 582 for luncheon.

Now, at 1:10 P. M., the hearing stands in recess until 2 P. M.

(Thereupon at 1:10 o'clock P. M., a recess was taken, to reconvene at 2 o'clock P. M.)

583 Afternoon Session.

2 P. M.

Trial Examiner Ballinger: We will now stand reconvened at 2 P. M.

You may proceed.

Mr. Austin: Mr. Hawley.

CASH B. HAWLEY, was thereupon called as a witness by and on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. What is your name, please?
A. Cash B. Hawley.
Q. What is your address?
A. My home address is 18953 Westmoreland.
Q. Is that Detroit or Dearborn?
A. Detroit.
Q. In what business are you engaged?
A. Retail gasoline business.
Q. Do you operate a gasoline station?
A. I do.
Q. Where is that service station located?
A. At 19111 Grand River Avenue, Detroit.
Q. What products do you handle at that station?
584 A. Standard Oil products.
Q. Three brands of gasoline, Standard gasoline?
A. No, I have two brands; Red Crown and Solite with Ethyl.
Q. Do you handle any other brands of gas?
A. No, sir.
Q. Do you sell other products at the station besides gasoline?
A. I do.
Q. Oil and accessories?
A. Oil, accessories, batteries, and so forth.
Q. And you give service on automobiles that come in, such as grease jobs and washing?
A. I do; lubrication service, washing, and everything that goes with a super service station.

Q. How long have you been in the gasoline business?

A. It will be 11 years the 1st day of August of 1941.

Q. Have you operated that station at that address during that period?

A. I have.

Q. Are you a lessee of that station?

A. In a sense. I operate it in my own name, my own business. I lease the property

Q. That's what I mean.

A. I lease the property from my supplier.

585 Q. And who is your supplier?

A. Wayne Oil Company.

Q. You buy all of your gasoline, then, from the Wayne Oil Company?

A. I do.

Q. And it is delivered to you in their trucks?

A. Yes, sir.

Q. Is your station located in what is known as Rosedale park?

A. That is right.

Q. And what is Rosedale Park?

A. Rosedale Park is a residential subdivision of Detroit out Grand River Avenue. The Rosedale name is a name that had been adopted even before my time out there and it has been carried through by civic activities. It is highly residential.

586 Do most of your customers out there, most of the people in Rosedale Park, drive automobiles; that is, the heads of the families? Do they drive downtown?

A. Yes. Most families there have two cars, I might say.

Q. Two cars in a garage?

A. That is right.

Q. That is not saying how many chickens in the pot?

A. I am not saying that.

Q. Well, do most of those people, or, at least, the men, drive down for business and back again?

A. Just about everybody, yes; very little street car riding public there.

Q. How far out from the center of town is that?

A. Well, it is about eleven miles, I would say, approximately.

Q. Is there a service station operated by Ned's Auto Supply Company on Grand River?

A. Yes, sir, there is.

Q. How far down is that from your station?

A. Oh, that is approximately half-way dow; I would say six miles or so.

Q. Do most of the customers who purchase gasoline at your station and who drive back and forth from the city, drive past Ned's station on their way out to Rosedale Park?

A. I would say that practically all of them.

Q. You consider Ned's a competitor of yours?

A. I do.

587 Mr. Austin: Will you mark this sheet, for identification, please?

(The paper referred to was marked "Commission's Exhibit 57" for identification.)

By Mr. Austin:

Q. I show you Commission's Exhibit 57, for identification, and ask you to describe it.

A. That is the record of the gallonage pumped at my station the years 1936, '37, '38, '39, and '40.

Q. Did you prepare that at my request?

A. I did.

Q. Was that prepared from your records that you have at your office?

A. It is actual sales.

Q. Was that prepared from sales tax returns, or from your own—

A. No, that is from my own sales records.

Q. Are the figures correct to the best of your knowledge?

A. Absolutely correct.

Mr. Austin: I will offer this in evidence.

Mr. Hanley: Just a general objection.

Trial Examiner Ballinger: Admitted in evidence as Commission's Exhibit 57.

(The document referred to heretofore marked for identification "COMMISSION'S EXHIBIT 57" was received in evidence.)

588 Trial Examiner Ballinger: Without repeating at all, these are being admitted subject to an objection reserved to counsel for the Respondent.

By Mr. Austin:

Q. During the latter part of 1937 and the first half of 1938, Mr. Hawley, do you know how the prices down at Ned's Grand River store compared with your prices?

A. Yes, they were selling two cents under me.

Q. How long did that continue?

A. Well, that continued—

Q. That is, how long did that two cent difference continue?

A. It continued right up. You mean, in comparison with my selling prices?

Q. Yes.

A. Up until about July 8, 1938.

Q. Just prior to July 8, 1938, do you remember what your retail price was?

A. I can't just recall the price.

Q. At that time, were you familiar with the price being charged by other Wayne Oil Company dealers for Red Crown gasoline?

A. Yes.

Q. Can you state whether your price was the same as the price charged by other Wayne Oil Company dealers at that time?

A. It was just about the same as the majority of them.
I probably cut my price a little later, by possibly a
589 week or a few days than some of the rest of the
Wayne Oil Stations; that is—

Q. Going back to, say, January, 1938, was your price the same? If you don't know, say so.

A. Yes, I would say it was approximately the same.

Q. You mentioned cutting your price. When did you cut that price?

A. I cut that price in July. I believe the date is the 8th.

Q. How much did you cut?

A. Two cents.

Q. Did that make your price the same as the price then being advertised at Ned's?

A. Yes.

Q. When you say "advertised at Ned's," you mean advertisements which you saw at that station?

A. Yes, the sign said, "Save two cents," I think.

590 Q. I show you Commission's Exhibit 57 and I see a little dot there next to the figure for July, 1938. Does that dot have any significance?

A. Yes. It draws attention to the trend of the increased gallonage, after cutting my margin.

Q. Was that the month when you cut your price?

A. July, 1938; that's right.

Trial Examiner Ballinger: Was your reduction a cash reduction or did you give rebate slips?

The Witness: No, it was a cash reduction to everyone.

By Mr. Austin:

Q. After you reduced your price in July of 1938 and your volume increased, did your profits on the sale of gasoline also increase?

Mr. Hanley: Are you talking about gallons?

Mr. Austin: Total profits on total gallons.

By Mr. Austin:

Q. That was the way you understood the question, wasn't it?

A. That's right.

Q. During the first half of 1938 did you notice any instances of customers who had formerly been regular customers at your station, ceasing to buy from you?

A. I did.

Q. Was that an unusual occurrence, or did it hap-591 pen frequently?

A. It happened frequently but it was gradual; it kept getting worse up to that date.

Q. Up to the time you cut your price?

A. The gallonage will show several thousand gallons difference.

Trial Examiner Ballinger: Was that up to the date you cut your price?

The Witness: Yes.

By Mr. Austin:

Q. Did any of those customers come back after you cut your price?

A. They did.

Q. Did you have conversations with any of the customers who had ceased to buy gasoline from you and who had formerly been regular customers, as to why they had stopped buying at your station?

A. I always made it a point to try to find out the reason, and that was invariably the excuse for leaving—price. I can remember—

Q. What was the excuse?

A. That my price was too high. They were getting a discount down the street, you see, at Ned's, and also—

Q. Was it Ned's or someplace else?

A. I can relate a particular instance.

Q. Just answer that question, first. When customers
592 actually mentioned to you reasons for leaving you and
they said it was a question of price, where were they getting a better price?

A. At Ned's.

Q. Were there other places, too?

A. There were other places, too.

Q. But was Ned's mentioned more frequently than any other one place?

A. Yes, it was, and there was a "Free Press" paper included, that Ned's was doing better than I was, after I met the price.

Q. You said you could mention some specific instances.

A. Yes. I think of one man now. He happens to be a lawyer, a customer of mine by the name of Lester E. Deeley, who told me himself that he traded at Ned's because of the 2 cent differential and also the "Free Press" in the morning.

Q. How did he happen to make that statement to you?

A. I made a special effort to regain his business and find out the reason for leaving us.

Q. And you spoke to him for the purpose of trying to regain his business?

A. I did.

Q. Any other instance of that sort that you can relate in detail?

593 A. There were several, but I can't at this time, think of the names. He happened to be a very close neighbor to my station and is foremost in my mind at this time.

Q. Have you had any instances in 1940 or of 1941, to date, of conversations with customers whose business you were soliciting or who had ceased to buy from you, where reasons were given why the customer did not purchase from you?

A. I have in mind one case where I solicited some business from a real estate salesman hoping to get several customers from one office, and I found that a station down the street, another Standard station run by the Citrin-Kolb Company, had offered this office a cent a gallon to get this group of salesmen.

Q. This man told you that?

A. This man told me that.

Q. Did he say he had been offered this?

A. He said the group of salesmen, including himself, had been offered it.

Q. Offered one cent off?

A. One cent off. That was the reason.

Q. Where is that station located?

A. At Glastonbury and Grand River.

Mr. Hanley: I don't understand just how this occurred. I don't want to object on the ground of hearsay, 594 but this may be twice removed.

By Mr. Austin:

Q. Will you state who you talked to and what he said and you said?

In the first place, state what the subject of the conversation was; how it happened to come about.

A. Well, Mr. Ralph Lamb, a real estate salesman for a Harry J. Durbin Company, who has an office right between my station and the Citrin-Kolb station. I was getting some of the wash business from Mr. Lamb, and I was wondering of him why I couldn't get the business of all these salesmen from that office, and this was his answer, as to why he thought I wasn't getting it.

Q. I think I will have to ask to restrict yourself to what he said as to why you didn't get his business and not as to why you didn't get the other people's business, because I would have to agree with Mr. Hanley that that would be a little too far removed, but you can state what this man told you as to why you didn't get his business.

A. I couldn't say in as many words that he was accepting the cent, because he only said it was offered there; whether that was the excuse or not.

Q. Did he say that was why he didn't buy from you?

A. He did say I couldn't expect to get the business unless I met that competition so I more or less dropped 595 it, thinking I would not meet that competition.

Q. Were you talking about getting his business, also, or just the other people in the office?

A. Oh, yes; his business also; his business first.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Will you just state again what this gentleman told you about the situation, about the Citrin-Koib station?

A. He told me that the manager of this station came over to that office and solicited the business of that office at 1 cent discount, and that was the reason that I couldn't expect the business.

Q. Now, did you continue to cut your price down to the same price being advertised at Ned's station during the rest of 1938 and all of 1939?

A. I did continue to meet that competition. I did continue to meet that competition until the latter part of 1939 when there was a leveling off on the part of everyone. I was still meeting competition, but there was a—

Q. Was that the time you just referred to, the time that the Wayne Oil Company raised its tank wagon price to you to 8.1; was it some time in November?

A. I think it was; in November. Yes, it was in November.

596 Q. And since that what has your posted price been?

A. The posted price between that time and, I believe, July of 1940 was 15.8, there being a half cent Federal tax added in July, 1940. From that time on to this it has been 16.3.

Q. And have you at any time given any discount off that price, or any premiums or rebates?

A. I have not.

Q. Have you been familiar during the last few years with the gasoline prices charged along Grand River on Major brand gas?

A. I have.

Q. In 1936 were the posted prices below the prices charged at your station the rule or the exception on Grand River?

A. Just state that again, please.

Mr. Austin: Read the question.

(The question was read.)

A. I would say at that time it was the exception.

Q. Were there any stations on Grand River in 1936 down as far as Ned's station that were offering 2 cents below the price charged at your station?

A. I don't believe there were in, at least, the first part of 1936. I just can't remember the exact—

Q. When did Ned's begin to offer a price 2 cents 597 below the price you were charging?

A. Shortly after the first part of 1936 or right after the time the Iowa plan came into effect. '37 it was more prominent.

Q. You mean more prominent at Ned's or more prominent at other stations?

A. More prominent at Ned's and kept stretching out.

Q. What do you mean by more prominent at Ned's?

A. Well, more people knew of Ned's discounting.

Q. How do you know that?

A. I have had occasion to talk to lots of dealers during that time and since then.

Q. Did they have signs out at that time in '37?

A. '37, yes.

Q. And is it the best of your belief, based upon your personal observation, that Ned's was the first station on Grand River, at least, the part of Grand River between Ned's station and your station, to cut prices 2 cents a gallon?

Mr. Hanley: I don't have any objection if he answers what he knows about it.

Mr. Austin: He said he was familiar awhile ago with the prices charged down there, generally familiar.

By Mr. Austin:

Q. Now, I want to know whether you feel that you 598 can state positively, and if you can't, say so, whether there were any other stations on Grand River cutting 2 cents a gallon prior to the time Ned's advertised that cut?

A. I feel I can state positively that Ned's was absolutely the first. That is the way I feel about it.

Mr. Austin: That is all.

Cross-Examination by Mr. Hanley.

Q. Mr. Hawley, I hand you a map of Detroit marked Respondent's Exhibit 1, for identification, and ask you if you will, please, to put a dot at the point where your service station is located.

A. Right here (witness does as requested).

Q. That is in Detroit, isn't it?

A. Yes, sir.

Q. In Rosedale?

A. Rosedale Park.
Q. Which is just a designation—
A. It is just a civic association.
Q. You purchase your gasoline from the Wayne Oil Company and you pay the regular posted dealer price, Mr. Hawley?
A. The regular tank wagon price?
Q. Tank wagon dealer price.
A. Yes.
Q. And that has been true for a number of years
599 past and it is true now, isn't it?
A. Yes.
Q. I believe you said you were about six miles from Ned's Grand River station?
A. That is approximately correct.
Q. You are both on Grand River?
A. That is correct.
Q. Are there a large number of service stations between your place and Ned's on Grand River?
A. Yes.
Q. And I presume a large number between Ned's and the downtown Detroit area?
A. Yes.
Q. Does that include both stations dealing in Standard Oil products as well as stations dealing in many other brands of products?
A. That's right.
Q. About how many stations are there on Grand River between your station and Ned's? I mean total number irrespective of what they handle.
A. I wouldn't guess.
Q. Haven't you any idea at all?
A. There is a great number.
Q. Would there be as many as several hundred, would you think, Mr. Hawley?
600 A. Oh, no, I wouldn't say several hundred.
Q. Well, I just want some approximate figure. Would there be as many as 200, would you think?
A. I don't believe so.
Q. As many as 100?
A. That is possible.
Q. About how many stations are there in that area between your place and Ned's who handle Standard Oil products?

A. Oh, offhand, I would say eight or ten.

Q. And are there other Standard Oil stations in your immediate vicinity?

A. There is one now.

Q. And that one is very close to you, isn't it, Mr. Hawley?

A. Two blocks.

Q. How long has that station been there?

A. I think that opened up business about, I would say, October or November, 1939. I believe that is correct.

Q. What is the next nearest Standard Oil station to you?

A. Oh, a little better than half a mile.

Q. Are there stations close to you within a matter of a few blocks that handle other brands than Standard Oil products?

A. There is another station about the same distance out further, and then others about twice the distance

601 toward town. You understand—

Q. What distance are you referring to in that answer?

A. In other words, I said the other Standard Oil station closest to me was about two blocks. There is a Gulf station two blocks above me going away from town. There is a Texaco station about four blocks toward town.

Q. Now, at the point on Grand River where your station is located, is it a business or a residential district?

A. More residential.

602 Q. For quite an area about your station?

A. All around the station.

Q. Are you located in the center of quite an extensive residential area?

A. Practically the center of Rosedale Park.

Q. And that is primarily a residential section, I think you said.

A. That is right.

Q. You made the statement in answer to the question, that you regarded Ned's as your competitor?

A. That is right.

Q. Were you referring to Ned's Riverview station about six miles further in towards town?

A. Not Riverview, but Grand River station.

Q. Grand River. I am sorry.

A. Yes.

Q. Do you regard Ned's as your only competitor in Detroit?

A. No.

Q. Was there a time when the Montgomery, Ward Company opened a store, or, at least, added a gasoline-selling business to some store of theirs, somewhere in your vicinity?

A. Yes, sir.

Q. And when was that?

A. I can't just remember the date, but I believe it was in the Fall of '39.

603 Q. How far away from you is that station?

A. Between a mile and a half and two miles.

Q. And in what direction?

A. Toward town.

Q. On Grand River?

A. Their gasoline station is off of Grand River.

Q. How far?

A. Their store is at the corner of Grand River and Greenfield Road, and their entrance to the gas station is off of Greenfield Road about, oh, I would say, what would be an ordinary three-quarters of a block, or something like that.

Q. What kind of gasoline do they sell?

A. I don't know.

Q. Are you acquainted with a Langer station between your location and Ned's on Grand River?

A. I am acquainted with the station that used to be Langer's.

Q. Maybe that is the one I am talking about. I don't know.

A. I imagine it is.

Q. What kind of gasoline does it sell?

A. Texas; Texaco.

Q. What is the fact as to whether or not the Montgomery, Ward station, after it went into business (1939), began to sell gasoline at two cents off the so-called prevailing retail price?

A. I know nothing about that.

604 Q. What do you know, if anything, about the price that was being charged at the Langer station or this Texaco station that we have referred to?

A. That station was built several years after the starting of this price cutting.

Q. Well, when was it built, approximately?

A. I don't know exactly. It has been a few years. They seem—I might say that they seem to do just whatever Ned's done. It is a station of that type.

Mr. Hanley: I move to strike that answer, Your Honor.

Trial Examiner Ballinger: Read the question, and answer.

(The last question and answer were read.)

Trial Examiner Ballinger: Beginning with "They seem—", from there on the answer may be stricken; the motion is granted.

By Mr. Hanley:

Q. Now, Mr. Hawley, when was the time that you first knew of any service station in Detroit giving two cents off the so-called prevailing retail price?

A. The noise of the door, then—what was the first part of the question?

Trial Examiner Ballinger: Read the question.

(The question was read.)

605 A. In 1936.

Q. What time in 1936? I think you said early in 1936, in answer to some question of Mr. Austin's, and I wish you would fix it as definitely as you can.

A. I can't tell you, definitely. I believe it was the forepart or middle, somewhere along there. It is too long to remember exactly.

Q. Are you familiar with the so-called Joy and Zip string of stations?

A. I know them when I see them.

Q. Do you know anything about their prices?

A. Well, I know they have always been lower than a major brand gasoline.

606 Q. And they were much lower than 2 cents off the prevailing retail price of the so-called major gasolines for many years last past, weren't they?

A. I believe so.

Q. And they were below that 2 cents off in 1936, weren't they?

A. I don't think Joy was operating then.

Q. Well, Zip, then?

Mr. Austin: Your Honor, I feel that I would like to make an objection on the record to a continuation of questioning on the prices charged by off-brand gasolines in view of the fact that it has been proved without dispute that those gasolines have always sold at a lower price and don't have the same public acceptance, and in view of that I don't think it is material as to what prices that gasoline sells at, and further reasons, all my questions on direct examination were limited to prices of major brand gasoline, although I wouldn't object on that ground if this is purely to test the knowledge of the witness, but I do urge the ground it is immaterial to the case as a whole.

Trial Examiner Ballinger: The Examiner isn't able to see the materiality of this line of examination, but as no objection was interposed, he assumed it was material.
607 I would like to hear from counsel for the Respondent.

Mr. Hanley: It is material on our case, your Honor. We do not agree with counsel that there is no dispute at all that this gasoline isn't in competition in the city of Detroit and propose to follow that presentation through this case.

Trial Examiner Ballinger: If that is your contention.

Mr. Hanley: It does affect competition very materially in Detroit.

Trial Examiner Ballinger: The objection is overruled with the right reserved to counsel for the Commission to move to strike the testimony.

Mr. Austin: Thank you. I would like to note an exception to the overruling of the objection.

Mr. Hanley: Do you have to do that in a proceeding before the Commission, Mr. Austin?

Trial Examiner Ballinger: The Examiner will state you may have an exception to any of his rulings without formal notations on the record.

Mr. Hanley: May we have the last question read?

(The question was read.)

By Mr. Hanley:

Q. What is your answer to that?

A. I think so.

608 Q. Now, when you made the answer that your first knowledge of this 2 cent cut below the prevailing retail price came to you in early 1936, I assume you didn't have in mind your knowledge of the Zip stations, for instance, but were referring to major gasolines; is that true?

A. I was referring to major gasolines.

Q. What has been your knowledge as to the existence of a reduction of 2 cents below the generally prevailing retail price in Detroit since it first came to your attention in 1936?

A. I might say it has been gradually getting worse, up to 1939. Does that answer your question?

Q. I think so. And has that practice been prevalent and increasingly so from 1936 up to 1939 in many service stations in Detroit handling many brands of gasoline?

A. Price war naturally spreads.

Q. Well, can you just answer my question directly, please, Mr. Hawley?

A. I am afraid you will have to put the question again.

Trial Examiner Ballinger: Read the question.

(The question was read.)

A. I believe so.

By Mr. Hanley:

Q. Since 1939 has that practice, to your knowledge, been indulged in in Detroit? I want to know what you know
609 about that, Mr. Hawley.

A. It has been indulged in very secretly.

Q. Do you know that?

A. Yes.

Q. And how do you know that?

A. By having different dealers show me cards of courtesy or whatever they call them.

Q. Did you ever buy any gasoline yourself at that reduction at any station in Detroit?

A. No. I witnessed receipts.

Q. But you didn't yourself buy any?

A. I didn't pay for the gasoline.

Q. You put your price back up some time in the fall of 1939, didn't you?

A. That's right.

Q. You no longer met even the so-called secret rebates that may have been existing since then; which you believed did exist?

A. I didn't meet any secret rebates.

Q. As a matter of fact, you were meeting a general and prevailing condition, were you not, in 1938 and 1939?

Trial Examiner Ballinger: Are you speaking now about the major companies' price?

Mr. Hanley: Yes.

By Mr. Hanley:

610 Q. You may understand that that refers to major brands of gasoline.

A. Yes.

Q. The answer to the question is yes?

A. Yes.

Q. You haven't found any necessity for reducing your price, have you, since the fall of 1939?

A. No, sir.

Q. You referred to the fact that a number of customers left you in 1938. Do you know where they all went?

A. I don't know the exact spot that they all went.

Q. How many customers left you, if you know?

A. I would say about 20% of my gasoline buying trade.

Q. Can you give us any idea of the number of persons that would be?

A. That's a little difficult.

Q. Can you give us any idea about it?

Trial Examiner Ballinger: He is asking for a rough approximation.

By Mr. Hanley:

Q. That's all. I don't want to tie you to any definite figure, Mr. Hawley. I know perhaps you haven't got that in mind.

A. I would say approximately 50 customers.

Q. Now you have told Mr. Austin that one of
611 those—you named him—told you that he went to Ned's;
is that correct?

A. That's right.

Q. How many others, if any, told you where they went?

A. There were several told me that they went to Ned's. Others told me that they stopped at Langer's and I can't just recall some of the other stations that had broken down between Ned's and my station, in the meantime, but they were stopping somewhere where the prices broke down.

Q. And about that time—I am now referring to 1938, the middle of 1938—one driving from downtown Detroit to the location of your station would pass several hundred stations in that eleven miles, wouldn't they?

A. That is right.

Q. And at about that time in most of those stations it was possible to buy at this greatly reduced price, wasn't it, of major brands of gasoline?

A. Yes.

Mr. Austin: What period was that in that question?

Mr. Hanley: In 1938; about the middle of 1938.

By Mr. Hanley:

Q. You so understood it, didn't you?

A. I think so.

Q. As a matter of fact, do you know what the actual price of gasoline was between your location and Ned's location on Grand River at any time in 1938?

612 A. Do I know what the actual price was?

Q. What the actual price was.

A. I am afraid I would have to refer to the record to get the actual price.

613 Q. Do you know whether gasoline was being sold actually in other Standard stations first, above or below what you were selling gasoline for up until July, 1938?

Trial Examiner Ballinger: Do you understand the question?

The witness: I think I do.

A. The majority of Standard stations were meeting Ned's.

Trial Examiner Ballinger: Ned's price?

The Witness: Yes.

By Mr. Hanley:

Q. How do you know they were meeting Ned's and not somebody else? Do you wish to leave the impression here that Ned's is the only service station in Detroit that cut the price?

A. No, the first.

Q. You say, Mr. Hawley, that Ned's Service Station was the first station that reduced the price below the generally prevailing price in 1936?

A. Yes, I think so.

Q. Well, do you know?

A. I think—

Mr. Austin: I would like to ask whether this still relates to Standard stations. Your first question along this line was restricted to Standard.

Mr. Hanley: No, I am talking about all service
614 stations.

The Witness: Yes, I will say yes, for all service stations.

By Mr. Hanley:

Q. How many service stations are there in Detroit?

A. Approximately 2,900.

Q. Are you willing to say positively that you know that none of those stations were selling below the generally prevailing price in 1936, until Ned's offered this two cent receipt?

A. I wouldn't know the exact selling price of 2,900 gasoline stations.

Q. I wouldn't think so, Mr. Hawley.

Are we to understand from that answer that you do not know that Ned's was the first?

Trial Examiner Ballinger: You may answer that within your knowledge.

A. Within my knowledge, I think they were the first.

By Mr. Hanley: You think they were?

A. Within my knowledge they were the first, if you want it that way.

Q. Well, perhaps we can get at it this way: Were they the first you knew anything about?

A. That is what you asked me, what I knew. That is right.

Q. You keep telling me what you think, so I am trying to make it a little easier for you, Mr. Hawley.

615 A. Yes..

Q. Was that the first station that you knew anything about?

A. Yes.

Q. Are you referring to this two cent receipt that was given with the purchase of gasoline at Ned's, when you talk about a two cent cut?

A. It was given—you are talking about what date? What time?

Q. Well, the time you say you knew about the reduction, until you say it ceased to exist in 1939.

Trial Examiner Ballinger: Do you understand the question?

The Witness: I am afraid not.

Trial Examiner Ballinger: Read the question.

Mr. Hanley: I will withdraw it.

Trial Examiner Ballinger: Question withdrawn.

By Mr. Hanley:

Q. How was this two cent reduction given at Ned's, that you were referring to, Mr. Hawley?

A. Cash reduction, if that is what you mean, instead of a rebate.

Q. I want to know what you understood it to be.

A. It was a cash reduction. They was buying at a lesser price.

Q. Do you mean by that, that if there was a posted 616 price of, say, sixteen cents, that the customer was only charged fourteen cents?

A. That is right.

Q. And he only handed—

A. I am not positive about the posting.

Q. —the attendant fourteen cents?

A. I am not positive about what was posted, but they was buying two cents under the so-called prevailing price.

Q. Well, assume that the prevailing price, then, was, we will say, twenty cents, for example. Is it your understanding that a customer could go into Ned's station and buy a gallon of gasoline for eighteen cents?

A. Yes.

Q. And would he just hand the attendant eighteen cents, and that would be the end of the transaction?

A. That is right. That is my understanding.

Q. Now, has that been your understanding that the way that this two cent reduction at Ned's has been given?

A. They have had several different procedures of discounts.

Q. I am talking about this period now you referred to when you said your price was reduced.

A. Yes.

Q. That is the way it happened?

A. Yes.

Q. All right. What was your margin before you 617 cut your price in 1938?

A. Four and a half cents.

Q. What was your margin after you raised your price in the Fall of 1939?

A. Three cents, I think. Three cents is right.

Q. And has it remained the same since that time?

A. It is 3.3 now.

Q. During the period from 1938, when you cut your price, to the Fall of 1939, the price of gasoline all over Detroit for major brands was greatly reduced below what the price had been prior to July, 1938, wasn't it?

A. All over Detroit?

Q. Yes.

A. Yes.

Q. And that was true in practically all service stations handling practically all brands of gasoline?
A. Practically.

Q. Do you know anything about what the so-called non-brand gasolines were selling for, in relation to that cut-branded gasoline price during that period?
A. I don't remember.

Q. They were below it, were they not, however?
A. Yes.
Mr. Hanley: That is all.

618 *Redirect Examination by Mr. Austin.*

Q. With reference to further reductions in price in 1939, particularly in the summer and fall of 1939, which you said just now that such reductions existed all over Detroit, that is, the price then was lower than it was in '38, there were reductions in the tank wagon prices to the dealers by all major oil companies in the Fall of '39, were there not?
Mr. Hanley: Fall of '39?
Mr. Austin: Yes.

By Mr. Austin:

Q. Do you remember the Standard Oil Company—or that the Wayne Oil Company reduced its tank wagon price in the Fall of '39?
A. That is right.

Q. Do you recall that that same reduction in posted tank wagon prices was made by major oil companies?
Mr. Hanley: I don't think it went down.
Mr. Austin: It went down in November.
The Witness: It went down first—
Mr. Hanley: You fix the time, then.
Mr. Austin: I am speaking about prior to November.
Mr. Hanley: Oh, That is all I want.
A. The dealer's price went down to the public approximately—or I will say exactly three cents, and the dealer stood 1.7, if I remember correctly. 619

Trial Examiner Ballinger: And that continued until what date?

The Witness: That continued until about November 19th.

By Mr. Austin:

Q. And you made another statement, that Standard Oil dealers on Grand River, or practically all of them, are meeting Ned's—or were meeting Ned's prices in 1938?

A. That is right.

Q. Would you be a little more specific about that? Is that the Fall or the summer, or the beginning of 1938 that that was true?

A. Oh, I would say shortly after the first quarter of the year, 1938.

Q. And the price reductions became rather general after the first quarter?

A. That is right.

Trial Examiner Ballinger: Did it continue throughout the year?

The Witness: Yes.

By Mr. Austin:

Q. How about the first quarter?

A. You asked the question, more prevalent?.

620 Q. I am asking now, yes—I am asking you to explain the statement you made about the Standard Oil dealers on Grand River meeting Ned's price. I wanted to know when they started to meet Ned's price, or whether they always did meet Ned's price.

Mr. Hanley: I object to that.

A. They started immediately.

Mr. Hanley: And move that all the testimony of that character be stricken, if there is, in fact, any in the record, for the reason that this witness has shown no qualification to testify as to the reasons motivating other dealers on Grand River, in establishing whatever prices they did. Indeed, he has testified he doesn't even known how many dealers there were on Grand River, handling Standard Oil products.

Mr. Austin: If the question is subject to that interpretation, let me make it clear that when I talk about meeting Ned's price, I am talking about whether it was the same price as Ned's, or whether it was not, not the purpose.

Mr. Hanley: I wish you would so state in your questions then.

Mr. Austin: Didn't you ask him that question first?

Mr. Hanley: I asked him if there wasn't a general cut in the price, and that was what happened.

Your Honor, it is just the implication here in all 621 of these questions, that the only reason for this situation was that Ned's was the only villain in Detroit, out of these three thousand odd service stations.

Trial Examiner Ballinger: Read the question.

Mr. Austin: I will withdraw it, Your Honor, if I may, and then start over again.

Trial Examiner Ballinger: Let's have the question.

(The record was read.)

Mr. Austin: May I strike the last question, Your Honor?

Trial Examiner Ballinger: Strike the question.

By Mr. Austin:

Q. I understood you said, Mr. Hawley, in response to a question asked by Mr. Hanley, that the Standard Oil dealers on Grand River, between your and Ned's, were selling at a price which was the same, or about the same, as Ned's price in the summer of 1938. I will change that. You simply said in 1938 that they were charging a price which was about the same price as Ned's, and I want to know whether, when that became true, that most of them were selling as low as Ned's? Was it true the first of the year, or did it become true the middle of the year?

A. Just prior to the time I cut. You said most of them?

Q. Yes. Well, that is what I wanted to find out. Then the first of 1938, were the majority of them selling at a 622 price as low as Ned's?

A. I wouldn't say the majority.

Q. Some of them were?

A. Some of them were.

Mr. Austin: That is all.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Recross Examination by Mr. Hanley.

Q. You did say, did you not, Mr. Hawley, that you became aware of this two cent reduction at Ned's in the early part of 1936?

A. Yes.

Q. And is it your testimony that from that time on, you became more aware of more price cutting throughout the Detroit area, with particular intensity in 1938, and up to the Fall of 1939?

A. That is right.

Mr. Hanley: Does that clear it up?

Trial Examiner Ballinger: Continuing?

Mr. Hanley: Yes, sir.

Mr. Austin: Yes. I understood the testimony to be Ned's started in '36, but as to the dealers, these last few questions were as to '38, and I think that is clear from what you have said.

623 Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: When did you first commence price cutting?

The Witness: July, 1938.

Mr. Austin: That is all, Mr. Hawley.

Mr. Hanley: That is all.

(Witness excused.)

624 Trial Examiner Ballinger: Call your next witness.

Mr. Austin: Mr. Maloney.

WILLIAM H. MALONEY was thereupon called as a witness by and on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. What is your name, please?

A. William H. Maloney.

Q. And what is your address?

A. 16872 Snowden.

Q. What is your business, Mr. Maloney?

A. Retail gasoline dealer.

Q. Where is your service station located?

A. Michigan and Wyoming.

Q. Is that 9515 Michigan?

A. Yes.

Q. Where is that; just this side of Dearborn?

A. It is right at the Detroit and Dearborn city limits.

Q. Do you own your station or lease it?

A. Well, I don't own it, no. I lease it.

Q. Who do you lease it from; Standard Oil or not?

A. No, Stikeman Oil.

Q. Are they a Standard Oil Jobber?
625 A. Yes, sir.
Q. You buy your gasoline from Stikeman Oil?
A. Yes.
Q. What brands do you handle?
A. Two brands of Standard and Ford Benzol.
Q. Do you handle Red Crown and the Solite Ethyl?
A. Yes, sir.
Q. How long have you operated that station?
A. Well, since 1938 up to the present time I have been operating it, and then from 1936, I think from about the middle of 1936, to 1938 I was out of there, and then I believe I took the station over in 1933; 1933 to the middle of 1936.
Q. How did you happen to drop out in 1936?
A. I had some financial difficulties, not pertaining to the gasoline business.
Q. Was the station operated by someone else from 1936 to 1938?
A. Yes, it was.
Q. And you took it over again under lease from Stikeman in 1938?
A. That's right.
Q. What do you pay now for your gasoline from Stikeman?
A. I am working on a 3.3 margin. That would be 16.3 and 3.3 would be 13.
626 Q. You pay 13, including taxes; that is, including the Michigan sales tax?
A. No. Wait. That's right, there is the sales tax.
Q. If you deduct the sales tax from 13 cents you would have what you pay, wouldn't you?
A. Yes—maybe it is 12.5, 12.6. I don't know what it is.
Q. Anyway, your margin is 3.3.
A. That's right.
Q. How long has that been true?
A. That has been true from July, when they put the—I believe when they put the extra half cent in the Federal tax.
Q. Wasn't your margin 3.3 before that? The tax didn't affect your margin, did it?
A. I know; but there was— I guess it was.
Q. Did you raise your retail price a half a cent a gallon when that new tax came in?

A. No.

Q. You didn't?

A. I raised the retail price a half a cent July 1; yes; when the tax went into effect.

Q. In that case, then, your margin was just the same as it was before?

A. 3.3.

627 Q. How near are you to the Ned's Auto Supply station in Dearborn?

A. About a mile.

Q. You are both on Michigan Avenue?

A. Yes, sir.

Q. You are a little nearer downtown than Ned's; is that right?

A. That's right.

Q. In 1936 or 1937 or 1938 did you ever find out from your own investigation or from what you saw yourself that Ned's was selling at a lower price than you were?

Mr. Hanley: He wasn't in business then.

By Mr. Austin:

Q. I am sorry. You were out from 1936 to 1938.

A. That's right.

Q. Do you remember what your monthly gallonage was before you left the station in 1936?

A. Yes, I do. It was around between twelve and 15,000 gallons.

Q. And when you came back to the station in 1938 and again took it over from the previous operator, what was the gallonage of the station at that time?

A. Say about 5,000.

Q. You mean there was a drop of 10,000 gallons a month?

A. Yes.

628 Q. Do you remember what your margin was on the price that was being charged when you took the station over in 1938?

A. I think it was four and a half cents.

Q. Do you remember what the price was?

A. What price are you talking of?

Q. The retail price that you charged customers.

A. At that time it was—I don't remember offhand.

Q. Do you generally keep track of the margin rather than the actual price?

A. After all, the margin is what we are interested in.

Q. That's what I was trying to bring out. That is why I asked your margin first, because I thought you might remember it better over that length of time.

How long did you continue to sell on a four and a half cent margin after you came back in 1938?

A. About one month, approximately.

629 Q. And what part of 1938 was that?

A. I took over the station for the second time the 23rd of January.

Q. Toward the end of February—

A. Around about March.

Q. About March you reduced your price?.

Trial Examiner Ballinger: That was March, 1938?

The Witness: Yes.

By Mr. Austin:

Q. How much did you reduce it?

A. Two cents a gallon.

Q. What was it that made you reduce it two cents instead of some other amount?

A. I knew the station should pump more gallonage than it was pumping during the month of February, 1938, because I had had the station before. I knew that the station had better possibilities than that; pumping 5,000 gallons.

Q. Did your gallonage increase after you reduced your price?

A. Yes, it did.

Q. During that month, before you reduced your price, in 1938, did you get around and see or talk to any of your old customers you had in 1936, to find out what happened to them?

A. I occasionally would run across them; once in a while, yes.

630 Q. Do you remember any conversations you had with any of them as to why they weren't still buying at that station?

A. Yes, but most of the time it was just poor management. That was why they weren't coming into that station at that time.

Q. I was going to ask you, the reasons given, weren't a number of them, that they didn't like your predecessor?

A. That's right.

Q. Did any of them talk to you about discounts?

A. You mean, approach me for a discount at that time?

Q. Either that, or ask you—well; did any of them approach you for a discount?

A. I don't remember of any at that time.

Q. Did any of them that you went to find out why they had left that station since 1936, did any of those customers say it was because the price was too high?

A. I didn't call on any. I just happened to run across them on the street. That station out there is mostly transients. There aren't many people out there.

Q. Michigan Avenue is a through thoroughfare, isn't it?

A. Yes, sir.

Q. Does it go out all the way through Dearborn?

A. Yes.

Q. Aren't other residential suburbs beyond Dearborn?

A. Yes.

631 Q. I am not familiar with how far Dearborn goes.

A. On Michigan Avenue, a half mile west, there is no residential section at all there. On Michigan Avenue there is, a few blocks south, about fifty houses.

Q. It is a business section along through Dearborn, isn't it?

A. It is vacant property through here.

Q. On Michigan Avenue?

A. Yes.

Q. When you get on further past your station into Dearborn, isn't there a business district?

A. That is further out; a few blocks the other side of Miller Road; about a half mile out west of my station is where the business section starts.

Q. And isn't there a business and residential section out that way, both sides of Michigan?

A. Yes, sir.

Q. Do these people drive past your station on the way downtown?

A. Yes, sir.

Q. And is there a business section and residential section out beyond where Ned's is located?

A. Yes, sir.

Q. You said that you started cutting your price two cents a gallon in March, 1938?

632 A. That's right.

Q. Did you make any further cuts after that?

A. You mean, more than two cents a gallon?

Q. Well, a lower price than what it was after you cut the first two cents?

A. I never cut below two cents. I just followed in line with the others.

Q. You mean, you never cut more than two cents off the prevailing price?

A. That's right.

Trial Examiner Ballinger: Did I understand you to say you were merely following the others?

The Witness: That's right.

Trial Examiner Ballinger: Is that the reason you first cut your price two cents?

The Witness: Well, I knew that that station should do more business than it was doing, and I just took it for granted that it must be on account of a lot of the stations selling at two cents less.

Trial Examiner Ballinger: You just assumed that?

The Witness: Yes.

By Mr. Austin:

Q. Do you know whether Ned's was selling at a lower price than you were in February of 1938?

A. He was, yes.

633 Q. How do you know that?

A. I passed by the station two or three times a day. I would see the signs up there.

Q. Then you do know, at least, Ned's station was selling below what your station was selling at, when you first took it over in 1938?

A. That's right.

Q. How long has your present price been at a 3.3 margin?

A. Oh, I imagine about a year and a half.

Q. From around the last part of 1939?

A. About that, yes.

Q. Have you observed the posted prices on other stations on Michigan Avenue since the time I just mentioned; that is, in the last year and a half?

A. Yes, I have.

Q. What are the posted prices at those stations now?

A. Most of them are seven for $1.14; that's 16.3.

Q. Does Ned's have the same posted price now?

Trial Examiner Ballinger: If you know.

A. I don't know. I don't know if he has got a sign up there, or not.

Q. When did you last notice it?

A. I think he has got a sign up there now.

Trial Examiner Ballinger: Have you noticed the price posted on the sign?

634 The Witness: Yes, I noticed the posted price on the sign is the same I am selling, the posted price that he has there.

By Mr. Austin:

Q. Have you solicited business from any customers during the last year, or since the first of 1940, who told you the reasons why they would not buy at your station?

A. I recall one man, a street car man. He passes by my station every day.

Q. Is he a street car motorman?

A. Yes.

Q. What is his name?

A. I don't know. I know him by sight; that's all.

635 Q. I see. Well, go ahead.

A. He passes by the station every day or so, and I talked to him and I approached him one day in regard to his business, and he told me that I couldn't compete with where he was getting gasoline; therefore, I didn't get any of his business, and he told me he was getting his gasoline at a particular place, Ned's.

Q. Did he give any reasons why he bought it there instead of buying it at your place?

A. Why, it was the price.

Q. What did he say?

A. Well, that his price was cheaper than the price that I had been selling to him.

Q. Did he tell you how much cheaper?

A. 2 cents.

Q. A gallon?

A. Yes, sir.

Q. And just about when was that conversation held?

A. Well, let's see. That was, oh, approximately about a year ago, I would say.

Mr. Austin: I think that is all I have.

Cross-Examination by Mr. Hanley.

Q. Mr. Maloney, I hand you a map of Detroit marked Respondent's Exhibit No. 1, for identification, and
636 call your attention to a dot on the map indicated by an arrow with a circle numbered "4" and will ask you if that represents the location of your service station.
A. Yes, it is.
Q. Did it come to your attention within a short period after you took this station over in early 1938, that a great many service stations selling many different brands of gasoline were selling below the price that you started out to post when you took the station over?
A. Did you say did I notice that?
Q. Did it come to your knowledge.
A. Yes, it did.
Q. And as a result, I think you have said you decided you would cut your price and try to increase your gallonage?
A. That's right.
Mr. Hanley: That is all.
Trial Examiner Ballinger: You are excused.
(Witness excused.)
Trial Examiner Ballinger: Off the record.
(A discussion ensued off the record.)
Trial Examiner Ballinger: We will have a five minute recess.
(A short recess was had.)
Trial Examiner Ballinger: Come to order. Call
637 your next witness.
Mr. Austin: Mr. Ruehle.

CHARLES F. RUEHLE was thereupon called as a witness by and on behalf of the Commission, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. Give your full name to the reporter.
A. Charles F. Ruehle.
Q. Where do you live, Mr. Ruehle?
A. 1108 Nottingham Road.
Q. What is your business?
A. A retail gas dealer.

Q. Do you operate a service station?

A. That is right.

Q. Standard Oil service station?

A. That is right.

Q. Where is it located?

A. 184 West Davison and 3rd.

Q. How long have you been doing business at that address?

A. Since April, 1937.

Q. Do you purchase your gasoline from the Standard Oil Company?

A. I do.

638 Q. Do you lease your station from the Standard Oil Company?

A. No.

Q. Do you lease it from somebody else?

A. Yes, sir; DeMarr Brothers.

Q. Are you in business by yourself or is it a partnership?

A. I am in business by myself now. When we first went up there, it was a partnership.

Q. Who was the partner?

A. Hayward F. Barnes.

Q. Did you yourself go into that station, that is, were you there personally helping in the operation of that station in April, 1937, or did you go in later?

A. Well, I was there part of the time, but not very much of the time. I had a station downtown on Cass and Canfield that was in the process of being closed out and I stayed there until we disposed of that station and then I went up to 3rd and Davison.

Q. Well, down at Cass and Canfield, were you in the gasoline business there, or was—

A. Well, yes, we did. There was gasoline business there, but it was a minor part; the tires was the major part at that time.

Q. What gasoline did you handle down there?

A. I had Mobilgas in there.

Mr. Austin: I would like to mark this paper, for 639 identification, if your Honor please.

Trial Examiner Ballinger: The reporter will mark the paper, for identification, Commission's Exhibit No. 58.

(The document referred to was marked, for identification, "Commission's Exhibit 58.")

By Mr. Austin:

Q. I show you Commission's Exhibit 58, for identification, Mr. Ruehle, and ask you whether you can describe the contents of that document.

A. That is the records of my gallonage from '38 on.

Q. Does that start at the time that you closed your station at Cass and went up to this station?

A. Approximately so, yes, sir; approximately so.

Q. And does that gallonage record—was that compiled from the sales tax reports or other records at your office?

A. Well, yes, both. You might say they are both identical.

Q. Is that a correct statement of the gallonage sold at that station during the time shown?

A. Yes.

Mr. Austin: I offer this gallonage statement, Commission's Exhibit 58, for identification, in evidence.

Trial Examiner Ballinger: Admitted.

(The document referred to, heretofore marked, for identification, "COMMISSION'S EXHIBIT 58," was received in evidence.)

640 By Mr. Austin:

Q. When you went up to this station on Davison Street to actively assist in operating it in February of 1938—that is correct, isn't it?

A. Yes, sir.

Q. —was Red Crown gasoline being sold at that station at the prevailing retail price?

A. Yes, it was.

Q. And by prevailing retail price, what margin do you mean?

A. Why, I believe it was 4½. I am not positive about that, but I think that was the margin at that time.

Q. What was the gallonage at that station as shown by that exhibit in February, 1938?

A. 17,328.

Q. Did you reduce your price in March of 1938?

A. It was either the very last of February or the first of March we put out a sign, reducing 2 cents.

Q. Will you read from the exhibit what the gallonage was during March, April, May, and June?

A. 23,452 in March; 25,432 in April; 40,000 in May; 32,439 in June.

Q. During that period did you continue to keep that price reduction in effect?

A. You mean from March?

641 Q. Through June?

A. Through June? Yes.

Q. How much of a price reduction did you make in March?

A. That was 2 cents. It was 2 cents all the way along.

Q. Were there other service stations near you that were making that same 2 cent reduction during that period?

A. Yes, it was quite prevalent with some of the larger stations.

Q. Where was the nearest station to you operated by Ned's Auto Supply station?

A. Right now Calvert and Woodward.

Q. When did that station open?

A. I think that opened early in the summer of '38.

Q. Now, I carried you through June of '38. After the end of June, 1938, did you then raise the price? When did you next raise the price at your station?

A. In July of '38 we raised the price. There was some of our friendly competitors came around and said it was a bad situation, which we agreed with, and we agreed to raise the price.

Q. Who were those friendly competitors?

A. Well, there was Mr. Ferguson and Chet Martoglio and—I just don't remember; that is two of them. There were about six or eight, I should say.

Q. And did you then raise your price back to what 642 it was in February?

A. Yes, we did.

Q. Was that about the 1st of July?

A. About, approximately; yes.

Q. And how long did you keep that price in effect?

A. It was about the whole month. Not the entire month, but very close to it.

Q. And what was your gallonage for July?

A. 19,311.

Q. That is as shown by the exhibit?

A. That's right.

Q. What was the gallonage for the previous month?

A. 32,439.

Q. Did you again reduce your price?

A. We did. Then it became prevalent all over the city. Almost everybody went into it.

Q. You mean the price cutting?

A. The price cutting.

Q. Did you lower your price again at the end of July?

A. We did, yes.

Q. Back to where it was in June?

A. That's right.

Q. Do you recall whether there was any change in the tank wagon price you paid along during that period?

A. I don't believe so. I wouldn't be positive, but I don't think there was.

643 Q. Just to be clear: when you say the price in July was the same as February, and the price in August was the same as in June, do you mean the actual price you charged or—

A. I mean whatever the prevailing price was, we cut 2 cents, we discounted 2 cents from what you might call the posted price, the going price, except in July.

Q. When you didn't cut?

A. That's right.

Q. Then how long did that cut continue that you started in August of 1938?

A. Then it continued until February, 1939.

Q. In February, 1939, did you take over the sole operation of that station?

A. I did, yes.

Q. Did you raise your price in February, 1939?

A. Well, it seems to me there was a differential in price there but what we did was sell at the regular posted price. In other words, any discounts were cut out. Discounts were eliminated. I haven't any notation here as to the price the gas was selling at. However, we were selling at posted price about the last of February, 1939.

Q. Were the other service stations of the major oil companies in your neighborhood giving discounts from the prevailing price?

644 A. Prior to that?

Q. No, after February, 1939.

A. I think the situation was pretty well cleaned up. There may have been some, but most of them were selling at posted price; the going price.

Q. You are talking about February, 1939.

A. That's right, yes.

Q. After February, 1939, were there reductions in the tank wagon price, which you paid for gasoline?

A. I believe so, but I just can't remember all the fluctuations that there were from time to time.

Q. Were there changes in price you paid and in the price at which you sold during 1939; particularly in the fall?

A. I couldn't say offhand. I just don't definitely remember. There were price changes there, but just when they occurred and what they were, I wouldn't definitely remember.

Q. After February, 1939, and continuing through 1940, have there been instances where customers who previously bought gasoline regularly at your station, ceased to buy from you, or where they began to come in and get oil and grease jobs but didn't buy gasoline?

A. Yes, there was that, quite a bit of that. We have quite a few customers that have their cars lubed there and have them washed, but still don't buy any gas.

645 Q. Is that true up to the present time?

A. That is true up to the present time, yes.

Q. Have you discussed with any of those customers why they don't buy gas?

A. Yes, I have some.

Q. Can you recall any particular instances of a conversation of that sort?

A. Well, I recall one instance; Mr. Bevins. He has become a friend just through knowing him in the station, and he just came in and I said, "What's the matter with your business?" And he said, "Well, I get a better price down at Ned's. What am I going to do?" So there you are.

Q. When was that?

A. This was four to six months ago; one of the evenings I happened to be on.

Q. Do you have any other cases of that sort?

A. Very few of them will say where they are getting it, but a good many of them have said, "Well, your price is wrong; we can buy better elsewhere," and we just let it go at that.

Q. Do they say where?

A. No, they don't say where, and I never press them.

Q. Do you recall any other particular customers?

A. There was a Mr. Krause and a Mr. Cardinal. I don't know where they are buying.

646 Q. They might be buying some place besides Ned's, then?

A. They may, as far as I know; yes.

Mr. Austin: That's all.

Cross-Examination by Mr. Hanley.

Q. Mr. Ruehle, I will get you on the map, too, please!

A. All right.

Q. I hand you a map of Detroit marked Respondent's Exhibit No. 1, for identification, and will ask you if you will please put a dot at the point where your station is located; I mean the station that you have been operating since 1938.

(Witness does as requested.)

Q. Mr. Ruehle, isn't it true that about the middle of 1938 the generally prevailing retail price of branded gasoline in Detroit became a price about 2 cents less than the generally prevailing price had been prior to that time?

A. Well, the posted prices remained the same, but 2 cents discounts were almost universal.

Q. The actual prevailing price was just two cents lower?

A. That's about right; yes. Substantially.

Q. That was true in a very great many stations, was it not?

A. That is true, yes.

Q. And those stations represented all branded gasolines in Detroit?

647 A. I would say so, yes, sir.

Q. It is your recollection that the low price situation righted itself pretty well about February, 1939?

A. Yes, sir.

Q. You have told Mr. Austin that some of your customers were lost to you during 1938; is that right?

A. No, not through 1938. We maintained our customers pretty well, then, because we were discounting, with the exception of July.

Q. When did you lose your customers?

A. After 1939; after February, 1939, there was a gradual loss after that, after the 2 cent discount was definitely off.

Q. With the exception of Mr. Bevins, do you know where any of those customers went?

A. Well, that's pretty hard to determine.

Q. He is the only one that told you?

A. He is the only one that came right out and told me. We might have our suspicions, but that's all.

Q. As a matter of fact, they could have gone to a good many places and bought gasoline cheaper than you were selling, couldn't they?

A. No, not after that time. The situation was pretty well cleaned up. There was comparatively little discounting.

Q. Are you referring now to Standard Oil gaso-
648 line or all brands of gasoline?

A. I am referring to all major brands of gasoline.

Q. There has been some testimony here that this thing didn't shape up to a stabilized point very well until about the middle of November, 1939. What have you to say about that?

A. As far as my records and recollection, I feel that it was pretty well straightened out after February. You see, I took over at that time.

Q. As far as your experience went?

A. Yes; that's my experience.

Q. Did you get any new customers after February, 1939?

A. Well, we lose them and make them. The thing is static.

Q. Do you figure you have about as many customers now?

A. No, I don't think I have. I know I haven't.

Q. You say that there is some flux in the number of customers at the station; some leave and new ones come in?

A. That is true.

Q. It is true all the time in most any station, isn't it?

A. That's right.

Q. You have stated, also, that you lost some since February, 1939, and you also gained some new ones since that date?

A. Yes.

Q. Now, I want to know if there have been any times
since February, 1939, when you had as many cus-
649 tomers as you did have in February, 1939; in your
judgment.

A. Do you mean gasoline customers?

Q. Yes.

A. I don't think so. I don't believe so. I think that as far as the gas angle, I have lost customers. It shows here by my gallonage.

Q. Your gallonage has come down, you mean?

A. That's right, and it is pretty hard to just say how many customers. I wouldn't know today how many customers. I have a mailing list. I know what that is, but they are not all customers.

650 Q. Now, there are other Standard Oil stations close to you?

A. Yes, there are.

Q. What is the nearest one to you?

A. I would say the nearest one is about three blocks over on Davison, three or four blocks over.

Q. Who operates that?

A. I don't even know him.

Q. And the next nearest?

A. Well, then, there is one down Third, about six or seven blocks down.

Q. Are there stations near you within a few blocks, handling other brands of gasoline?

A. Yes, there is stations all around me.

Q. Is Paul Taylor somewhere near you?

A. He is two blocks, Woodward and Davison.

Q. Is the Carnick Oil Company station somewhere near you?

A. Carnick? Yes, they are down on Woodward, three blocks down, I believe it is.

Q. They handle Gulf gasoline, don't they?

A. That is right. I don't believe it is Carnick any more. I think they call it the Post Service now. It has changed hands, I believe.

Q. Do you know whether they were giving discounts after February, 1939?

A. No, I do not.

651 Q. Do you know whether they are giving them now, or not?

A. No, I don't.

Mr. Hanley: I believe that is all, Mr. Ruehle.

Mr. Austin: That is all.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Trial Examiner Ballinger: Call your next witness.

Mr. Austin: Mr. Tanski.

MR. JOSEPH TANSKI was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. Give your name and residence to the reporter, Mr. Tanski.

A. Joseph Tanski, 6448 Schaeffer Road.

Q. Are you in the gasoline business, Mr. Tanski?

A. Retail gasoline.

Q. Do you operate a retail gasoline service station?

A. At 3201 Mulkey Avenue, Dearborn.

Q. Dearborn?

A. Dearborn.

Q. Is that near the Ford plant?

A. Right back of the Ford plant, or in front of it.

652 Q. What brand of gasoline do you sell?

A. Standard Oil Red Crown, Ethyl, and Ford Benzol.

Q. Where do you buy your gasoline?

A. Standard Oil Company.

Q. How long have you operated that station at that address?

A. Since 1930, December.

Q. What was your business prior to that?

A. I worked for the Standard Oil Company.

Q. At a service station?

A. Service station operator.

Q. Did you become a lessee from the Standard Oil Company in 1930, or do you lease your station?

A. I own my own property and my own station.

Q. You own your own property. You have a contract with the Standard Oil Company?

A. I think I have. I haven't signed no contract for five or six years, but I believe I have. I understand a contract, if it is not signed, it automatically goes into a contract, anyway. I don't know about that. I couldn't say. I haven't signed one for a long time.

Q. How far are you from Ned's Auto Supply Company, Dearborn store?

A. Oh, less than two miles.

Q. Are there other Standard service stations closer to you than Ned's?

653 A. Two.

Q. Where are they?

A. Maloney, at Michigan and Wyoming, and I don't recall the man's name that runs the station at Ruder and Michigan.

Q. Is that Maloney the man that testified here today?

A. Yes, sir.

Q. Are either one of those stations in the same direction from you as Ned's?

A. Well, I am in kind of a funny spot there. I wouldn't say—

Q. Well, you are off Michigan Avenue, aren't you?

A. I am off Michigan Avenue.

Q. And is the traffic passing your station largely employees of the Ford plant?

A. That is right.

Q. And is it or is it not true that most of the traffic past your station from the Ford plant goes over to Michigan Avenue?

A. Well, the Michigan and Wyoming— or Michigan and Schaeffer, rather, is the center of Dearborn, and they all have a reason to go there because it is a main shopping district of Dearborn; regardless of where they live in Dearborn.

Q. Is Ned's station located near that center, too?

A. Ned's station is located a block from Schaeffer
654 and Michigan.

Q. Do you ever go over that way yourself?

A. Every day.

Q. You live on the other side of Michigan, don't you, from your station; that is, you have to cross Michigan every time you go to your home from your station?

A. I do.

Q. And do you live on Schaeffer?

A. I live on Schaeffer. I used to live right on Maple. I used to pass Ned's station all the time.

Q. When was that?

A. Oh, three, four years back.

Q. Did you frequently pass Ned's station in 1937 and 1938?

A. I passed Ned's a lot in 1937 and '38.

Q. In 1936?

A. In '36, also. I lived on Maple.

Q. Was that Dearborn store opened in '36, or was it there before that?

A. I imagine the Dearborn store has been there about ten, eleven years.

Q. In 1936 and '37, did you ever notice any discount signs posted at Ned's?

A. I wouldn't say about '36, or neither would I say about '37, but I would say in '38.

Q. The first of '38?

655 A. All of '38, most all of '38.

Q. You don't recall prior to that time?

A. I can't recall. I was too busy tending to my own business.

Q. And did Ned's Auto Supply Company ever distribute circulars or literature advertising in your neighborhood, advertising the cut prices?

A. Not to my knowledge.

Q. In 1937 what was your margin of operation between buying price and selling price of Red Crown gasoline?

A. I just can't remember. In '37 it was four and a half. That is right.

Q. And in '37 do you know what price Ned's was selling at?

A. No, I don't. I would have to look that up, according to my own selling price.

Q. Do you know whether it was higher or lower than the price you were selling at?

A. It was lower, with their secret two cents off.

Q. What?

A. It was lower, with their secret two cents off.

Q. Do you know they were giving two cents off?

A. Only from what customers would say.

Q. Customers of yours?

A. Yes, sir.

Q. How did you happen to have any conversations 656 with customers on that point?

A. Well, I have a Principal of the Dearborn School buying from me now, that asked me, and, by the way, the name is Mr. Hotchkiss, and asked me if I would discount to all the school teachers of Dearborn, and if I could, I would get all their business, which I didn't do; but he happens to be selling fire insurance and I need fire insurance for my building, so I am getting his business only through the fire insurance.

Q. Since when have you been getting his business?

A. Nearly all the time that he asked me—I have been buying the insurance all that time.

Trial Examiner Ballinger: Did he tell you anything about any discounts at the other places?

The Witness: Yes, at Ned's. He asked me if I could meet Ned's discount, which I didn't want to.

Trial Examiner Ballinger: When was this that he told you?

The Witness: This was in—late in '37.

Mr. Austin: If Your Honor please, I would like to have this paper marked, for identification.

Trial Examiner Ballinger: The reporter will mark the paper "Commission's Exhibit 59", for identification.

(The paper referred to was marked "Commission's Exhibit 59", for identification.)

657 By Mr. Austin:

Q. Will you describe this paper, marked Commission's Exhibit 59, for identification?

A. Yes, them are my records for '37, '38, '39, and '40.

Q. Your records of your monthly gallonage?

A. Monthly gallonage, total for the year.

Q. What does that include?

A. That includes '37, '38, '39, and '40.

Q. I mean, what gasolines?

A. Red Crown, Ethyl, and Benzol. That is the total of all gasolines.

658 Q. It includes Ford Benzol?

A. Ford Benzol, also.

Q. About what percentage of your sales are Ford Benzol?

A. About 40%.

Q. 40%?

A. Yes.

Q. When there has been any variation in your monthly gallonage, has the variation been about the same on the Benzol and on the Standard gasoline?

A. I wouldn't say that. I think that the variation was a little tougher on Standard gas.

Q. You mean when your volume goes down that it goes down more on Standard?

A. More on Standard than it does on Benzol.

Q. And when it goes up, it goes up more on Standard?

A. It does.

Q. Were these figures compiled from your records at your station?

A. Records of the station, yes, sir. I think that would be about—I would say the same as our sales tax records.

Q. These are correct?

A. Correct.

Q. They were compiled under your supervision, or did you do it yourself?

659 A. I did it myself.

Mr. Austin: I offer this in evidence.

Trial Examiner Ballinger: Admitted.

(The document referred to, heretofore marked, for identification, "COMMISSION'S EXHIBIT 59," was received in evidence.)

By Mr. Austin:

Q. Now, Mr. Tanski, you said that you began to observe discount signs at Ned's station about the first of 1938?

A. That is right.

Q. How long after that did you see those signs?

A. I think the signs were up there until some time around the first of 19—the first two months of 1939; that would be January and February, I imagine.

Q. After figuring in the discount, was Ned's price during 1938 lower than your price on the same gasoline?

A. 1938? I don't think so.

Q. I mean after.

A. Let me get that straight.

Q. Yes. I mean was Ned's price, after taking off the discount—in other words, the price the customer had to pay as shown by the signs you saw.

A. Yes.

Q. Was that a lower price or the same or higher than the price that the customers paid to you?

660 A. It was 2 cents lower than our price.

Trial Examiner Ballinger: That was Ned's posted price?

The Witness: Ned's posted price.

By Mr. Austin:

Q. Less any discount that wasn't included in the posted price?

A. In other words, if they advertised 2 cents off, they were 2 cents lower than my price.

Q. And you say they did so advertise in 1938?

A. They did all during 1938.

Q. Did you make any reductions in your price during '38?

A. No. I couldn't tell you just when I did make the reduction. I think it was around early in 1939. I am not sure.

Q. Would the card help you to remember?

A. Probably the card would help me to remember.

Q. Referring to Commission's Exhibit 59.

A. Well, we showed such a big loss in '38 that I couldn't remember whether that price, the discounting continued all through '38 and the first part of '39. I seem to have come back up in March or February, March, 1939, and then continued increase in my volume, and I think it was due to them stopping.

Q. Due to what?

661 A. Due to them stopping advertising discounts.

Q. Well, you haven't told me yet whether you cut your price and when you did it.

A. I can't seem to remember just what month I cut my price unless I could—

Q. You did cut it some time?

A. I did cut it.

Q. Was it in 1938 or was it after 1938?

A. I think it was late in '38, from what I heard here. They say—

Q. Well, now, don't talk about what you heard; just tell us what you remember.

A. Well, I can't remember that far back. As I says, I was interested in my own business, not the other man's.

Trial Examiner Ballinger: Well, it is your own business they are talking about.

The Witness: I know that, but I haven't got the records in front of me to be able to say when I have dropped my price and when I raised it, and that don't show that (indicating Commission's Exhibit 59).

By Mr. Austin:

Q. Did Ned's stop advertising discounts in '39?

A. They did.

Q. Did your volume increase during the early part of '39?

A. Yes, it did.

662 Q. Did you talk to any of those Ford employees who used to come to your station and also lived in Dearborn?

A. I have talked—

Q. About the purchase of gasoline?

A. I have talked to many of them, but I don't know their names, so I wouldn't want to have anything go on record if I don't know a man's name; but they have been getting discounts, and I have been losing a lot of business through the ones that were discounting.

Q. Well, did they tell your that?

A. Yes.

Q. And the people that told you that, were they people that you talked to about buying gas at your station?

A. Yes.

Q. And you said some of the others. Who were the others besides Ned's?

A. Well, there was Langer's and James Bright that were also in that discounting field.

Q. Langer's has a Texaco station in Dearborn near Ned's, doesn't it?

A. About three or four blocks, I would say that, west of Ned's.

Q. When Ned's was posting these discount signs, did Langer's do the same thing?

A. They also; they followed.

663 Q. You mean by that, that Ned's did it first and then Langer came right after them?

A. I wouldn't say that. Maybe Langer did it first and Ned's would follow; one or the other. I don't know.

Q. They both did?

A. They both did.

Q. And when Ned's stopped posting the signs in the spring of '39 did Langer also stop posting the signs?

A. They did.

Q. During 1940 have you attempted unsuccessfully to obtain gasoline business from any customers who bought other things at your station?

A. No, I haven't. I have been coming along pretty nice in my business, so I haven't had much trouble.

Q. 1940 was a pretty good year for you?

A. I would call it good.

Q. How near to you is the nearest gasoline station?

A. How near is the nearest gasoline station?

Q. Yes.

A. A block down; north.

Q. What gasoline is sold there?

A. Blue Sunoco. Excuse me. I am wrong on that. That goes to show you how much I paid attention to my neighbor's gas. It is either Shell or Gulf. I don't know.

Q. Are there many gasoline stations out there near 664 the Ford plant?

A. There are quite a few. I would say within a radius of a mile there, there must be eight or ten.

Q. Do you keep track of their prices at all?

A. No.

Mr. Austin: That is all.

Cross-Examination by Mr. Hanley.

Q. I show you a map which has been marked Respondent's Exhibit No. 1, for identification. It is a map of Detroit. Will you please put a mark where your station is located, Mr. Tanski?

A. (Witness does as requested.)

Mr. Hanley: I wanted to ask you, Mr. Austin, about these gallonage figures that you have been putting in as exhibits. I have assumed, perhaps erroneously, that those were gallonage figures relating to Standard Oil gasoline only.

Mr. Austin: I think they have been, so far as I know, except this case where it also includes Ford Benzol.

Mr. Hanley: I don't care as long as it is clear as to what it is.

Mr. Austin: I want to be clear, and this is the only case I know of. I think I have asked every witness what brands of gasoline he handled, so I think it will be clear.

665 Trial Examiner Ballinger: That is the understanding of the Examiner, that this is the first one that has included both kinds. If there is any mistake about it, it ought to be checked and placed on record.

By Mr. Hanley:

Q. Mr. Tanski, you said that you didn't know whether Langer or Ned's put up a sign advertising a discount; that is, you didn't know which one of them put up the sign first. They both did.

A. I still say I don't know which, because I don't check that close.

Q. They both took the sign down later?

A. They did.

Q. I presume you don't know which took the sign down first, either?

A. No.

Q. You were asked if your gallonage didn't begin to go up in 1939 after Ned's stopped advertising the discount, and you said that it did. Do you attribute the rise in your gallonage entirely to the fact that Ned's quit advertising a discount?

A. Well, I think it helped our business a lot; that is, helped increase our business a lot by them discontinuing that practice.

666 Q. Weren't other dealers giving the same discount that Ned's was; this 2 cents off; generally, in 1938, up until early 1939?

A. Are you referring to the big dealer or the small?

Q. Oh, just a number of dealers in your vicinity.

A. In my vicinity there weren't any giving 2 cents off.

Q. And didn't that happen at all in 1938?

A. Not that I know of.

Q. Wasn't there a Gulf station near you on Mulkey and Eagles Street?

A. There is a station there.

Q. Weren't they giving a discount?

A. Well, if I may tell you something about that station, I will tell you why I don't pay no particular attention to it.

Trial Examiner Ballinger: Just a moment. Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hayley:

Q. Can you just tell us whether or not they were giving a discount?

A. I couldn't tell you.

Q. You have suggested that you lost some business by virtue of the discounts that were being offered at that

667 time, in 1938.

A. Yes, sir.

Q. And do you think that was largely due to the price?

A. To the price, yes, sir.

Q. Do you think you lost some customers to this Gulf stations?

A. I don't see how I could when there wasn't more than 10 or 15 cars going in there a day. He wasn't doing any business.

Q. So you don't think you lost any there?

A. I don't think so.

Q. Do you think you may have lost some to Langer?

A. I think so.

Q. And you may have lost some to Ned's, you think?

A. Yes.

Q. But you didn't have any conversations with your lost customers at all, as I understand it?

A. I never inquired much.

Q. I will ask you the same question I have asked everybody: if it wasn't a fact in 1938, and at least until early 1939, throughout the Detroit area there was a very prevalent custom of offering discount from the price which had been prevailing in early 1938?

A. I didn't quite get that. I would like to have that read.

Trial Examiner Ballinger: Read the question.

668 (The question was read.)

Trial Examiner Ballinger: Do you refer to the Standard gases?

By Mr. Hanley:

Q. You may understand that to apply to branded gasolines.

A. I would say that it was.

Q. In your particular location doesn't your volume depend a good deal on the operations at the Ford Motor plant?

A. It does.

Q. 1938 wasn't such a good year in the automobile business, was it?

A. I don't believe so.

Q. And that would affect your volume to some extent, wouldn't it?

A. It would.

Q. Is there a Cities Service station near you somewhere?

A. Well, if there is, I would to take a drive around and look around to see, if there was one in the neighborhood.

Q. You just don't have any such in mind?

A. No.

Mr. Hanley: I think that is all.

Mr. Austin: That is all.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

669 Mr. Austin: I move that we adjourn until 10 o'clock tomorrow, your Honor.

Trial Examiner Ballinger: The motion is granted. Now, at 5:10 P. M., the hearing stands adjourned to reconvene at 10 o'clock Eastern Standard Time, March 14, 1941, in Room 859, Federal Building, Detroit, Michigan.

(Thereupon at 5:10 o'clock P. M., an adjournment was taken to reconvene at 10 o'clock A. M. March 14, 1941.)

670

Room 859 Federal Building,
Detroit, Michigan,
March 14, 1941.

Met, pursuant to adjournment, at 10 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

H. R. Hanley, Esq., 910 S. Michigan Avenue, Chicago, Illinois, on behalf of the Respondent.

671 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing in Docket No. 4389, a case entitled In the Matter of Standard Oil Company, is convened at 10 o'clock A. M., March 14, 1941, in Room 859 Federal Building, Detroit, Michigan.

The last hearing was held in Detroit March 13, 1941.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

Mr. Hanley: Off the record.

(A discussion ensued off the record.)

Mr. Austin: If your Honor please, I would like to make a statement for the record before we proceed with the testimony.

Trial Examiner Ballinger: Proceed.

Mr. Austin: At the close of the Commission's case, after I go back to Washington, I intend to make a motion to the Commission to amend the Complaint, and the amendments will be, in substance, as follows:

The motion will ask for an amendment of Paragraph 3 of the Complaint, to state that the four dealers named in that paragraph resell gasoline—rather, three of them, all except Ned's Auto Supply Company, resell gasoline to retail dealers of gasoline, and that the Citrin-Kolb Oil 672 sells gasoline to its subdealers or some of them at prices which are lower than the prices charged by the Standard Oil Company to its direct retail dealer purchasers, and that those retail dealers purchasing from Citrin-Kolb are in competition with other retailers of gasoline purchasing the same from the Respondent or from other manufacturers.

Further, to amend Paragraph 4 of the Complaint, to add the words "and with their customers", after the word "Paragraph" in the third line of Paragraph 4.

That is not intended to be a definite statement of the motion but will be the substance of what the motion will be, and I might say that that will conform this Complaint more nearly to the Complaint which the Commission has issued against Texas and Gulf Companies.

Mr. Hanley: I assume that this is just an advance notice to the Court and counsel as to your purpose, Mr. Austin?

Mr. Austin: It is purely to give you as much notice as possible.

Mr. Hanley: May it be understood that we may have a copy at your earliest convenience of your proposed amendment?

Mr. Austin: Yes. You will receive notice of the motion and an opportunity to be heard before the 673 commission in case you should desire that.

Mr. Hanley: Well, I understand that, but I just thought we would like to have a copy of the amendments when you have them prepared, and I understand the procedure is that we may reserve any objections or concessions or whatever it may be, for that time, before the motion is made.

Mr. Austin: I don't believe I said at the beginning of my statement that the purpose of the motion is to conform the Complaint to the proof. I take it that is the usual ground given in such cases, and the mode of action followed.

Trial Examiner Ballinger: I take it this is merely an informal notice.

Mr. Hanley: I so understand.

Trial Examiner Ballinger: Counsel for the Commission will apply to the Commission for leave to amend the Complaint to conform to the proof.

Mr. Austin: Mr. Tapert, will you take the stand?

ELTON J. TAPERT was thereupon called as a witness by and on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. What is your full name?

674 A. Elton J. Tapert.

Q. Where do you reside, Mr. Tapert?

A. 11308 Maryland.

Q. In what business are you engaged?

A. Gasoline and oil; garage business.

Q. Do you operate a service station where gasoline is sold at retail?

A. I do.

Q. Where is that service station located?

A. 13207 Jefferson.

Q. What brand of gasoline do you handle?

A. High Speed.

Q. From whom do you purchase your gasoline?

A. The Highland Oil Company.

Q. Are they a jobber or a producer?

A. I imagine they are a jobber.

Trial Examiner Ballinger: That is your best information of it?

The Witness: Yes.

By Mr. Austin:

Q. Is the gasoline delivered to your service station in tank wagons or tank trucks?

A. Tank wagons.

Q. Do you pay the posted tank wagon price of the Highland Oil Company?

675 A. Yes, I do.

Q. Do you know where the Highland Oil Company obtains its gasoline?

A. The Hicock Company in Toledo.

Q. And is that gasoline manufactured by the Pure Oil Company?

A. I understand it is.

Q. How long have you been in business at that address?

A. Five years.

Q. Where were you before that?

A. At 14308 East Jefferson.

Q. How far is that away from your present location?

A. Just five blocks.

Q. At the other location did you also operate a service station?

A. I did.

Q. In your present service station do you lease the property or do you own it?

A. I am buying it.

Q. Have you, in the past, leased it from the Highland Oil Company or has it been a company owned property; that's what I want to ask you.

A. No.

Q. What grades of gasoline do you handle, Mr. Tapert? I am not familiar with the High Speed gas.

676 A. Ethyl, Benzol, and regular.

Q. What is it called?

A. High-Speed X-Carbon. That would be just like the regular gasoline. That is the trade name they have.

Q. What do you pay for that X-Carbon gasoline now?

A. It is 12.1 cents a gallon. Just a minute. (The witness referred to a document.) 12.6; I beg your pardon.

Q. And does that include 3 cents state tax and 1-1/2 cents Federal tax?

A. Yes, it does.

Q. So that without the taxes you are paying 8.1?

A. That would be it.

Q. And is that gasoline the gasoline which you treat as comparable to the house gasolines of other major oil companies, such as Red Crown, Texaco, Shell—

A. That is correct.

Q. Now, going back, Mr. Tapert, to 1937 and 1938; do you recall what you were paying for your X-Carbon, I believe you call it, gasoline in around the end of 1937 and early in 1938?

A. It was 13.6 cents a gallon.

Mr. Hanley: With or without taxes?

By Mr. Austin:

Q. That included taxes?

A. That included the taxes, yes.

677 Q. And up to the end of 1937, or about the end of 1937, what were you selling that gasoline for, at retail?

A. 18-1/2 cents a gallon.

Q. Is there a station of Ned's Auto Supply Company located near you?

A. Yes. They are nine blocks from my present location.

Q. On the same street?

A. Same street, same side of the street.

Q. Do you know their address, there? That is at East Jefferson and what street?

A. About the 14700 block.

Q. Well, it has been shown here there is a station at 14701 East Jefferson. Would that be the Ned's station?

A. That's the one.

Q. There is no other Ned's station in that location, is there?

A. No.

Q. Around 1937 or early in 1938 was Ned's selling Red Crown gasoline at prices as high as 18.5 cents a gallon, or were they selling it at less?

A. In the early part of 1937—

Q. No, the end of 1937.

A. No, they were selling it at less, at that time.

Q. How much less?

A. The average would be 2 cents a gallon.

678 Q. Do you pass their station frequently?

A. Every day.

Q. Did they have signs in front of their stations in regard to discounts?

A. They did at the time. I don't know whether, at the beginning of 1937, whether they did or not.

679 Q. But you do know they were selling for two cents less than you were at the end of 1937?

A. Yes.

Trial Examiner Ballinger: You say they had signs up. At what period?

The Witness: It would be the latter part of 1937, and all through 1938; for about a year in that period.

By Mr. Austin:

Q. Did you reduce, or did you make any change in your price of 18.5 cents a gallon around the beginning of 1938?

A. Yes, I did. I reduced the price two cents a gallon, also.

Q. And how long did you continue that reduction?

A. Well, it was close to a year. It was either a little more than a year, or a little under a year. About a year period.

Q. Did the advertised price cutting cease, or was it greatly reduced in your neighborhood early in 1939?

A. Yes, it was.

Q. After you reduced your price to 16.5 cents a gallon around the first of 1938, did your volume decrease, or increase?

A. It increased.

Q. After you lowered your price?

A. Yes, it did.

Q. And have you a statement of your gallonage
680 figures with you?

A. I have.

Q. May I see them?

(The witness handed a document to counsel for the Commission.)

Mr. Austin: I would like to have this sheet marked in evidence.

(The paper referred to was marked "Commission's Exhibit 60-A and 60-B" for identification.)

By Mr. Austin:

Q. I show you this document, marked Commission's Exhibit 60-A and B, for identification, and ask you to describe it.

A. What is that?

Q. I ask you to describe it.

A. Well, it is the gallonage pumped at the station, from 1936 to, including 1940.

Q. From what record was that made?

A. The oil company's records.

Q. What oil company?

A. The Highland Oil Company.

Q. Was that made at their office or at your office?

A. At their office.

Q. Have you checked that with your own records?

A. Yes, I did. I didn't check every month, but I checked the average.

681 Q. Is that a correct statement, to the best of your knowledge and belief?

A. That is a correct statement; yes, it is.

Q. You asked them for a statement of your gallonage?

A. I did.

Mr. Austin: I will offer this.

Mr. Hanley: No objection other than the general objection.

Trial Examiner Ballinger: Subject to the general objection, reserved to counsel for Respondent, the document is admitted in evidence as Commission's Exhibit 60-A and B.

(The papers heretofore referred to, marked "COMMISSION'S EXHIBIT 60-A and B," for identification, were admitted in evidence.)

By Mr. Austin:

Q. I will hand you Commission's Exhibit 60-A and B, Mr. Tapert, and using those figures to refresh your recollection, I would like to ask you whether your volume of business increased or decreased during the first few months of 1938?

A. It increased.

Q. When was it that you lowered your price from 18.5 to 16.5?

A. The first part of '38.

Q. In January?

A. Probably November.

682 Q. November, '37?

A. Of '37.

Q. That is when you reduced from—

A. That is right.

Q. From 18.5 to 16.5?

A. That is right.

Q. After you made that reduction, did your business pick up?

A. Yes, it did.

683 Trial Examiner Ballinger: You mean in volume?

Mr. Austin: In volume.

The Witness: Yes, sir.

Mr. Austin: Yes, your Honor.

By Mr. Austin:

Q. Gasoline volume is what I am talking about.

A. That is correct, yes.

Q. Is there a Standard Oil station which is operated or appears to be operated by the Citrin-Kolb Oil Company in your neighborhood?

A. They are about half a mile away, yes.

Q. Where are they located?

A. On Nottingham and Jefferson.

Q. And that is East Jefferson?

A. That is correct.

Q. The same street that you are on?

A. That is right?

Q. You say about half a mile away?

A. Yes, sir.

Q. In 1937 was that station located there at that time?

A. Yes, it was.

Q. Did that station advertise a 2 cent discount during 1937?

A. How do you mean advertise it?

Q. Did it advertise any discount and do you re-684 call when they started?

A. Just about that time they advertised with a courtesy card.

Q. What do you mean by a courtesy card?

A. Well, a card that is sent out allowing any—the purchaser 2 cents off on a gallon.

Q. You mean that is what it says on the card?

A. That is what it said on the card, yes, sir.

Q. Did you see any of those cards?

A. Yes, I did.

Q. Have you any of them now?

A. No, I haven't.

Q. By the way, Mr. Tapert, is that Citrin and Kolb station the one that is located at Jefferson and Nottingham?

A. Yes, it is.

Q. I show you this card marked Commission's Exhibit 34, and ask you whether that is a card, one of the same cards, or the same type as the ones you just referred to?

A. Yes, it is. I wouldn't say it was exactly, but that is just about the way it was. That is quite a while back for me to remember, but that is just about the same thing.

Q. Were some of those cards shown to you by customers who drove into your station?

A. Yes, they were.

Q. And did those customers buy gas at your station

685 or were they buying other things?

A. Well, they were buying gasoline at that time.

Q. I mean the customers that showed you those cards.

A. Well, up until that time they were buying gasoline from me.

Q. Did some of them stop buying gasoline at that time?

A. Yes, they did.

Q. Did you speak with any of them as to the reason why they didn't continue to buy gasoline at your station?

A. I did, or they told me voluntarily.

Q. What did they say to you?

A. That they were receiving 2 cents off from the Standard Oil station, some of them at Ned's and some of them at Citrin & Kolb.

Q. Was this during 1937 that you are speaking of?

A. Yes, it was.

Q. Were there any other stations advertising a 2 cent discount in your neighborhood at that time?

A. No. I probably was the first one after they discounted.

Trial Examiner Ballinger: Whom do you mean by "they"?

The Witness: Citrin & Kolb and Ned's.

By Mr. Austin:

Q. Did you have a couple of customers at that time, one by the name of Mrs. Peabody and another one her sister?

686 A. I did.

Q. What was Mrs. Peabody's business, or did she have a business?

A. No, she was a housewife at the time.

Q. She wasn't a school teacher?

A. No, no, she wasn't.

Q. Had they prior to 1937 been purchasing gasoline at your station?

A. Yes, they had.

Q. And did they continue to buy gasoline at your station during 1937 and '38?

A. No, no, they hadn't.

Q. Did they tell you why they quit buying there?

A. They told me that they had received cards from Ned's or from—I beg your pardon—from Citrin-Kolb at the time.

Q. What else did they say?

A. That they were receiving 2 cents off on the gasoline.

Q. Did they say they were buying it there?

A. Yes, they did.

Q. Did I understand you to say, Mr. Tapert, that the advertised discounting in your neighborhood has decreased since early in '39?

A. Yes, it has.

Q. Do you know of any gasoline stations in your neighborhood that have, since January—or July 1, 1940,
687 advertised or posted prices for less than 16.3 cents
for the regular gas?

A. That is posted price? No.

Q. What is your present posted price?

A. 16.3 cents.

Q. During 1940 or 1941 to date have you lost any customers who told you that they were leaving you for another station in your neighborhood?

A. Yes, I have.

Q. Can you refer to particular cases?

A. Well, I have two customers that were steady customers; in fact, have been more or less for five years, Francis Chartier and Emil Friese. One is an individual and the other is a contractor with one truck. And they both left me to go to Ned's in the last 60 days because they were getting 2 cents off.

Q. Did you speak to Mr. Friese about it?

A. I did.

Q. What did he tell you?

A. He told me that—he told me at one time that—these were his words: that he could get 2 cents off on a gallon, and I told him that I couldn't meet it, so he said—he finally decided to go to Ned's because of the saving.

Q What did Mr. Chartier say?

A. Mr. Chartier, his words were just about the 688 same, he could save 2 cents on gasoline by buying at Ned's.

Q. Now, looking at your record there, Commission's Exhibit 60-A and B, you stated that about the end of 1937 you reduced your price from about 18½ down to about 16½, or, I believe you gave those exact figures?

A. That is right.

Q. And you stated that after you reduced your price your gasoline sales volume increased?

A. That is right.

Q. How much money did you make or how much did you lose on the sale of gasoline after you reduced your price to 16½?

A. I lost about $200 a month.

Q. And before that, when you were selling at 18.6, how much did you make or how much did you lose? What do you mean when you say you lost $200 a month?

A. Well, I had a net loss of pretty close to $3,000 for that year.

Q. Which year?

A. The year—I think that would be—just a minute—of '38.

Trial Examiner Ballinger: Do you mean by that your income for the year 1938 was pretty close to $3,000 less than your income for the year 1937, or do you mean that you sustained a loss?

689 The Witness: There was an actual loss in 1938 of $3,000, yes.

Trial Examiner Ballinger: In other words, it cost you that much more to operate your business than your income was?

The Witness: That is correct.

By Mr. Austin:

Q. Do you have any means of determining how much of that loss was due to gasoline business and how much was due to other things that you sold?

A. Well, 90% of the business is gasoline—was at that time at the station.

Q. It was?

A. Yes, sir.

Trial Examiner Ballinger: So that we may approximate what the decrease in your receipts were, what was your profit for the year 1937?

The Witness: The net profit at the end of the year, sir?

Trial Examiner Ballinger: Yes, sir.

The Witness: Well, I haven't that figure. I would—it would be between three and four thousand dollars.

By Mr. Austin:

Q. Profit?

A. Yes.

690 Q. And what percentage of your business in 1937 was gasoline?

A. Just about the same, sir.

Mr. Austin: You may cross-examine.

Cross-Examination by Mr. Hanley.

Q. Mr. Tapert, I hand you a map of Detroit, marked Respondent's Exhibit No. 1, for identification, and I will ask you to please put a dot on the map where your station is located.

691 (The witness did as requested.)

Mr. Hanley: Thank you.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. How long have you been operating a service station in any capacity, Mr. Tapert?

A. Fifteen years.

Q. And you have been at two different locations during that time?

A. I have.

Q. Just two?

A. Just two.

Q. What brand of gasoline did you first begin to handle?

A. City Service.

Q. And how long did you handle that?

A. Well, as near as I can remember, it was probably a year or a year and a half.

Q. Tell me, first, how long were you in the first location?

A. Ten years.

Q. And in your last one?

A. Five years; in the last one, five years.

Q. Tell me what you handled after you ceased handling City Service.

692 A. Standard Oil.

Q. And how long did you handle Standard Oil products?

A. I think it was about three years.

Q. After you ceased handling Standard Oil products, what was your next brand?

A. I think I handled Indian gasoline. I am quite sure that was it.

Q. And how long did you handle Indian?

A. Well, until the Indian Company went out of business—no, it was a jobber I was handling gasoline—and I handled Blue Sunoco afterwards. I just handled Indian a couple months, and I had Blue Sunoco with it.

Q. How long did you handle the Indian, first?

A. It wasn't very long, because the Indian Company sold out to Texaco; and the jobber I was buying from, handled Phillip's 66.

Q. So you began to handle Phillip's 66 a few months after you quit handling Indian?

A. That's right.

Q. But you were purchasing Indian while you were handling Phillip's 66, from the same source?

A. I did.

Q. Over what period did you handle the Indian and then the Phillip's?

A. Pretty close to five years; until the end of the 693 lease.

Q. And during part of that time, at least, you were also handling Sun Oil Company products?

A. That is correct.

Q. Was that all, from time to time?

A. That took care of everything. I handled Sunoco right up to the end of the contract.

Q. Up to then, what did you handle, Mr. Tapert?

A. That was the end of my lease, rather, and then I moved over to the other location.

Trial Examiner Ballinger: That is, the present location?

The Witness: The present location.

By Mr. Hanley:

Q. And what brand did you handle there?

A. Hi-Speed.

Q. And you have been handling Hi-Speed products ever since then?

A. Yes.

Q. And so doing now?

A. That's right.

Q. Mr. Tapert, during the time you were handling Standard Oil products, and just before you began to handle Red Indian and Phillip's products, do you remember an occasion of calling upon the Standard Oil Company and asking for a concession in price of Standard Oil gasoline?

694 A. At that time—

Trial Examiner Ballinger: First, do you recall of such an instance?

A. Yes. I know what the gentleman is referring to

695 By Mr. Hanley:

Q. Did you receive any concession in price?

A. No, we didn't.

Q. And thereafter you began to handle the Red Indian and Phillips products?

A. That's right.

Q. Did you receive a concession in price on those products below what you were paying, or had been paying to the Standard Oil Company, did you not, Mr. Tapert?

A. There might have been a concession on the Indian.

Q. Well, you know there was, don't you, Mr. Tapert?

A. Well, there probably was. I can't definitely—that is quite a while back—

Q. I am not asking you how long, I am just asking you whether there was or wasn't a concession.

A. Yes, I would say that there was at that time.

Trial Examiner Ballinger: Was that the inducing cause for the change?

The Witness: I wouldn't say yes or no on that. I imagine it had something to do with it.

By Mr. Hanley:

Q. It had a lot to do with it, didn't it, Mr. Tapert?

A. There was always a financial consideration there.

Mr. Austin: May I ask how long ago that was?

The Witness: That would be 12 years ago.

696 By Mr. Hanley:

Q. When you went to the High Speed brand, did you begin, at that time to pay the tank wagon price of High Speed Company, or the Highland Company?

A. That's right.

Q. Did they have anything to do with your location—I mean did they own the property or have a lease upon it?

A. Yes, they did. They had a lease with the party that was in there before I bought the property.

Q. Did you get any concession in price or premium or bonus or rebate or anything of value in any manner that was an inducement to you to go to the High Speed brand?

A. No, I didn't.

Q. Have you ever?

A. No, I haven't.

Q. Did you lease—when you went to the High Speed company—from them?

A. I leased it—I was the owner and I leased it to them.

Q. And did they lease it back to you?

A. They did.

Q. And was that lease based on gallonage?

A. Yes, it was.

Q. And you had a similar arrangement in your other location?

A. No.

697 Q. Who owned that property?

A. The Fred Sanders Company.

Q. Did you lease from that company?

A. Yes, I did.

Q. That was just a straight lease that you paid to the landlord?

A. Correct.

Q. And the oil company supplying you had nothing to do with that lease; is that right?

A. That's right.

Q. But when you went to your present location, you became the owner of that property?

A. That's right.

Q. And leased it to the High Speed Company?

A. That's right.

Q. And then they leased it back to you?

A. Yes—they didn't lease it. I was just put in there as their agent.

Q. Did they pay you for the property?

A. Yes, they did.

Q. Did you pay them anything for the use of the property?

A. No, I didn't.

Q. Then, as I understand it, you leased them the property and they paid you?

A. That's right.

698 Q. And then they sold you gasoline?

A. That's right.

Q. At the tank wagon price, and you paid them for the gasoline.

A. That's right.

Q. Now, were there ever any other transactions between you and the company that affected the amount of money you were paid on the lease or that affected the price of your gasoline?

A. No, there wasn't.

Q. How much did they pay you, Mr. Tapert, on your lease? Was it on a gallonage basis first?

A. Yes.

Q. How much a gallon?

A. A cent a gallon.

Q. And you owned the property?

A. That's right.

Q. And you had no lease back from them?

A. No.

Q. You used your own property?

A. That's right.

699 Q. And they paid you a cent a gallon?

A. That's right.

Q. Did you regard that as being any financial inducement to begin handling products of that company?

A. No, I didn't.

Q. Didn't it amount, as far as you were concerned, to a cent a gallon reduction over the tank wagon price?

A. No, it didn't. It amounted to a half a cent, as I remember it.

Q. Well, you could have used your own property without leasing it to the Hi-Speed Company, couldn't you?

A. That's right.

Q. And anything they paid you for using your own property was just that much, in the way of a reduction, on the gasoline price, wasn't it, Mr. Tapert?

A. That's right. I can probably straighten it out.

better than that. There was a lawsuit when I took over the property, and the Court allowed the Highland Oil Company to remain in there another year and a half.

Trial Examiner Ballinger: When did you take over the property?

The Witness: In 1937; in April.

By Mr. Hanley:

Q. Now, Mr. Tapert, you have testified that you regard the Hi-Speed house brand gas comparable to the house
700 brand gasolines of certain companies who are represented by stations around you. What are those companies?

A. Standard Oil, Gulf, Blue Sunoco, White Star—or Mobil gas.

Q. Are there any Joy or Zip stations near you?

A. Well, there is one within a mile.

Q. Are there any other service stations who are marketing local brands of gasoline near you?

A. No, not that I know of.

Q. You understand it to be a fact, do you not, Mr. Tapert, that the local branded gasolines, such as Joy and Zip, are represented as being comparable to the house brand gasoline of the Hi-Speed Company?

A. That they are comparable?

Q. Yes; are represented as being comparable and sold as being comparable?

Trial Examiner Ballinger: Do you know that?

The Witness: That would be hard to answer. They don't say that they are comparable to the—

Trial Examiner Ballinger: Do you know it?

The Witness: Do I know whether they are, or not?

Trial Examiner Ballinger: No. Do you know whether they are represented?

The Witness: No, I wouldn't say that.

By Mr. Hanley:

Q. Mr Tapert, did you ever happen to see any
701 publications in the paper by Charles Austin?

A. Yes; I have.

Q. Do you recall a comparison chart appearing in each of those issues, which undertook to compare laboratory findings of the Detroit Testing Laboratory as between the Joy gasoline and all of the house brand gasolines of large, so-called major companies in Detroit?

A. Yes, I do.

Q. Do you remember the claims that were made for Joy gasoline in those publications, as compared to Hi-Speed, for instance, or Standard Oil?

A. I do remember that.

Q. And will you tell the Court, in your language, what those claims were?

Mr. Austin: I object, Your Honor, on the ground it is entirely irrelevant and immaterial, and not relating to any matter developed on direct examination.

Trial Examiner Ballinger: Objection sustained.

Mr. Hanley: I would like to get this clear on the record, if Your Honor please. I want to ask counsel for the Commission if it is the position of the Government that any company whom the Government's witnesses have arbitrarily described as major companies, has no right to compete with what the witnesses for the Government have called non-brand or off-brand, or gyp companies? Are
702 you in a position to state the position of the Government, Mr. Austin?

Mr. Austin: I am afraid I can't answer that question in the way you have put it.

Mr. Hanley: All right.

By Mr. Hanley:

Q. Now, Mr. Tapert, you have described a station you said you thought was operated by Citrin-Kolb about a half a mile away from your location. Is that operated by Citrin-Kolb?

A. Well; it has been, off and on.

Q. What was the fact, if you know the fact, in 1937 and 1938?

Mr. Austin: That is, necessarily, hearsay, isn't it?

Mr. Hanley: Well, is there any rule against hearsay in this matter?

Mr. Austin: I think so—he can state whether he knows or not.

Trial Examiner Ballinger: The witness may answer that question.

The Witness: Do I remember whether it was operated at that time?

By Mr. Hanley:

Q. Maybe I don't have to ask you.

Mr. Hanley: Is it a matter of record?

Mr. Austin: Yes.

703 Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

By Mr. Hanley:

Q. Now, Mr. Tapert, were there any other Standard Oil stations, or stations, handling Standard gasoline near you?

A. Yes; right across the street.

Q. And who operated that station?

A. Two boys; Earl and Stan; Earl Stacey, and I don't recall the other boy's last name.

704 Q. Do you recall what they did?

A. What is that?

Q. Do you recall what they did in the matter of their prices during this '37 or '38 period?

A. Yes, they reduced their price after a while, too, shortly after I did.

Q. When, in respect to the time you reduced yours?

A. Shortly after I did.

Q. After you reduced your price?

A. Yes.

Q. Are you acquainted with the J. J. Bright string of stations in Detroit?

A. I am.

Q. Does he have a station located near you?

A. Yes, today.

Q. And where is that located?

A. That is on Emerson and Jefferson.

Q. On the same street you are on?

A. Yes.

Q. How far away is it?

A. Oh, six, seven blocks.

Q. How long has he been there?

A. About a month or two; I would say two months at the most.

Q. Now, Mr. Bright handles what gasoline, if you know?

705 A. He calls it Spitfire.

Q. Doesn't he handle Sinclair gasoline also?

A. In Detroit?

Q. Yes, sir.

A. The last time I saw his Boulevard station he was handling Sinclair at that station, also Blue Sunoco at another station on Fort Street.

Q. And he handles also a brand he calls Spitfire, you say?

A. Yes.

Q. How does the price of gasoline at that station, if you know, compare with your present price of 16.3?

A. At Emerson?

Q. Yes.

A. That is 3%—or 3 cents a gallon below the market.

Q. So he is selling at 13.3 cents?

A. That is right.

Q. Do you know whether in addition to that any premiums are being given away?

A. He has advertised sugar at different times.

Q. Isn't it true that he is advertising the giving away of several pounds of sugar every week end to customers?

A. I have seen it advertised, yes.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

706 Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Now, you reduced your price, you think, in November of 1937, 2 cents below what you had been previously selling it for?

A. That is right.

Q. During the year 1937 or part of it and 1938 and up to at least early 1939 there was an increasing reduction in price in Detroit, wasn't there?

A. That is right, yes.

Q. More and more service station managers reduced the price?

A. That is right.

Q. And the price itself was reduced to a greater extent; I mean, the spread?

A. Yes.

Q. Both as to money and as to premiums and that sort of thing given away?

A. That is right.

Q. Didn't that condition become what you term generally prevalent throughout the whole area of Detroit?

A. Yes, but they always start at the same locations.

Q. Was that not participated in by practically all of the service stations in Detroit?

A. It got to be general.

707 Q. Now, you have said that you learned of a price reduction of 2 cents at Ned's service station. When did you first learn of that, Mr. Tapert?

A. That is general, too. That is almost continuous.

Q. When did you first learn of it?

A. Well, I have had boys that work for me that worked up there and I probably always know just what they are doing.

Q. Can you say when you first learned of it, approximately?

A. I can go right through the last five years with the exception of the period when the NRA was in effect, that they have always, if they have stopped one scheme, they have started another, whether it is coupons or punching the register tickets, or whatever it happens to be.

Q. And you think you have known of that for five years?

A. I have, yes.

Q. That is, five years back from now?

A. That is right.

Q. So that would be in 1936 some time?

A. Well, I could go back farther than that, if necessary.

Q. I wish you would go back as far as you think you can properly, Mr. Tapert. Tell us when you first knew of it.

A. Well, I imagine their place was built in 1929, just about that time, and it probably was within six months after that, maybe right at the beginning, I don't know. I can't remember then, that they started discounting.

708 Q. And it is your impression that that has been going on ever since?

A. Yes, it has, with probably short periods in between that.

Q. Possibly the NRA, as you said?

A. Yes. Yes.

Q. So that this action that you have referred to on the part of Ned's was not confined to the year 1937 and '38, '39 at all?

A. No, I wouldn't say that.

Q. It didn't even begin? It was just a continuation of what already had been going on; isn't that right?

A. That is right.

Q. You have identified a card shown you, Commission's Exhibit No. 34, as being either of the same kind or similar to a card which you observed in use in 1937 or '38 issued by the Citrin-Kolb station. Tell us how long, if you know, that card was in use at that station.

A. Oh, I don't know definitely. Those cards go out just like the end of every price war. I imagine it was about six months, about as close as I can figure.

Q. Do you have any knowledge upon which you base that period of time, Mr. Tapert?

A. Well, only that I am interested generally in what the other stations are doing in the community.

709. Is it your best judgment that it was about six months?

A. I would say yes.

Q. And in what year did that six months occur?

A. I wouldn't say whether it was the last part of '37 or the first part of '38, just in that general period.

Q. You have referred to what you termed a net loss of $3,000 in the year 1938 as compared with a net profit in 1937 of from $3,000 to $4,000.

A. Yes.

Q. During the year 1937. Do you have in mind the total gallonage?

A. What is that you want?

Q. Refreshing your recollection from Commission's Exhibit 60-A and B, can you tell us in round numbers what your gasoline gallonaga was in 1937?

A. In the whole year of 1937?

Q. That is right.

A. About 240,000 gallons.

Q. And what was it in 1938?

A. About 300,000.

Q. Is it your testimony, Mr. Tapert, notwithstanding you sold about 240,000 gallons in 1937 and about 300,000 gallons in 1938, that the difference in your net income from your gasoline sales was between six and seven thousand dollars greater in 1937 than it was in 1938?

710 A. Well, it would be hard—I imagine it would have to be.

Q. Well, I understand your testimony, that is the way it figures out. You say you lost $3,000.

A. That is right, in 1938, yes.

Q. Net loss?

A. Yes.

Q. And that you made a net profit in 1937 of between three and four thousand dollars in your business?

A. That is right.

Q. This figure includes all of your business, as I understand it?

A. That is right.

Q. But you said about 95% of that was gasoline business?

A. That is right. About 90%.

Q. You figure that 90% on the basis of gallons done or dollars?

A. Dollars.

Q. Then, let me frame the question again to give it your own qualification, Mr. Tapert.

A. All right.

Q. You did approximately 240,000 gallons of business in 1937?

A. That is right.

Q. And you did approximately 300,000 in 1938?

711 A. That is right.

Q. And on your gasoline business you made a net income in 1938 of approximately 90% of between $6,000 and $7,000?

A. That is right.

Q. You cut your price 2 cents in November, 1937?

A. Yes, approximately, at that time.

Q. And did you continue that cut price in effect until the close of 1938?

A. Well, the price and the margin varied at that time. It shows a margin of 4½ cents a gallon at one time, and if we gave that, it would be 2½. I know that the net profit at one time during that period was less than 2 cents. In other words, we didn't just figure 2 cents off all the time and continually going down, because it was generally 7 for $1, and 7 for $1.05, 7 for 98 cents, and then would start—

Q. Well, when did it begin to go up from its low point?

A. Well, they all went up at one time.

Q. Didn't that happen in—I will withdraw that.

You tell us as nearly as you can when the up-trend started on your prices.

A. I would say the last of '38 or beginning of '39.

Q. How much of '38 would be influenced by that uptrend?

A. How much?

Q. Yes.

712 A. Probably just the last month or month and a half.

Q. Now, what was your margin before you made your reduction of 2 cents in November, 1937?

A. About around 4 cents a gallon.

Q. Did your cash reduction below the prevailing retail price that you were charging prior to November, 1937, ever get below 2 cents?

A. Did it ever get below 2?

Q. Yes.

A. I think it did, yes.

Q. Were the same posted prices maintained throughout this cut price period that has been in existence in early 1937?

A. The posted prices?

Q. Yes, sir.

A. By the oil company or the dealer?

Q. No, I mean your dealer—the retail prices, the retail prices posted by dealers.

A. Yes.

Q. Did they remain the same?

A. Did they remain the same, did you say?

Q. Yes.

A. No.

Q. There was a fluctuation in that?

A. Yes.

713 Q. And the 2 cents would be figured off whatever that posting was; isn't that right?

A. Well, it got down to—it wasn't 2 cents all the time. It was anything. It was what they called a bushel price, I think, generally referred to as 6 for $1, 7 for $1, 8 for $1, and it was just one thing right after another. It was lowering of the price.

Q. Now, just one more question, I think Mr. Tapert.

At any time since 1936 has the practice been used in your station and High Speed stations otherwise of giving away to your customers premiums of any kind?

Trial Examiner Ballinger: First answer, now, as to your own station, and then as to whether of your knowledge it has occurred in other stations.

A. Yes, I have given premiums away.

By Mr. Hanley:

Q. Over how long a period of time since 1936 have you engaged in that practice?

A. Well, instead of cutting the price to meet competition in the neighborhood, I gave premiums away. I think it was sugar and cigarettes at that time, and later discarded that and continued with the price cutting or met the price of the other stations in the neighborhood.

Q. Just give us an idea. During the greater or lesser part of the time since 1936 up until now have you
714 engaged in this practice of giving away premiums?

A. Well, there was just that period in there, I imagine it lasted around two months.

Trial Examiner Ballinger: What year?

By Mr. Hanley:

Q. When was the last time you ever did that?

Trial Examiner Ballinger: What year, please?

A. Well, that would—now wait just a minute. The year I was doing that was approximately '38—the latter part of '37 and the beginning of '38. In other words, instead of giving 2 cents off, why, I gave a package of cigarettes with 7 gallons of gas or so much sugar.

By Mr. Hanley:

Q. How long has it been since you at your station gave away any premiums of any kind?

A. If you are referring to the company, the company has—the company had an advertising program about a year ago.

Mr. Austin: I object, your Honor. I don't believe that is responsive.

715 Mr. Hanley: Well, I will reframe the question.

Mr. Austin: And I will object to any questions in respect to what the Highland Oil Company does. I don't mind his asking this man what he does.

Trial Examiner Ballinger: Objection sustained.

Mr. Hanley: Your Honor, do you think that is not material, what happens in the way of premiums going out of this man's station?

Mr. Austin: Yes.

Mr. Hanley: No matter whether it is the company or the individual operator?

Trial Examiner Ballinger: If they were given away at his company, that is, at his station, he may testify to it.

Mr. Hanley: Well, so I understand. I want to ask him that.

Trial Examiner Ballinger: All right.

By Mr. Hanley:

Q. Were there any premiums given away at this station, whether supplied by you or the Highland Oil Company, or any other person?

A. Yes, about ten dollars worth over a period of six months.

Q. Well, what is that system? Tell us about it.

A. Well, we were to give coupons out with the gasoline, and then if the people came in, they gave you so much cash, which amounted to about the wholesale price, I imagine, 716 and so many of these coupons got a coffee pot or an iron, or whatever it happened to be.

Q. Did you give any cash prizes?

A. No.

Q. Never?

A. Oh, yes, at one period they had an advertising campaign, cash.

Trial Examiner Ballinger: What period was that?

The Witness: That was about 1939.

By Mr. Hanley:

Q. What has been the practice in 1940?

Trial Examiner Ballinger: What time in '39?

The Witness: Well, the Courts found the contest without—

Trial Examiner Ballinger: Can't you answer as to time?

The Witness: Against the Fair Trade law. It lasted about three months, I would say.

Trial Examiner Ballinger: Well, what time?

The Witness: In about the middle of the summer.

Trial Examiner Ballinger: About the middle of 1939?

The Witness: Of '39.

By Mr. Hanley:

Q. What is the last time since any premium has 717 been given away at your station or any plan for giving away premiums operated through your station, either by yourself or by your gasoline supplier?

A. Well, they have just discontinued giving away flying stamps.

By Mr. Hanley:

Q. About how long ago?

A. A month.

Q. Has anything taken place on that yet?

A. No.

Mr. Austin: Giving away what?

The Witness: Flying stamps.

Trial Examiner Ballinger: What are flying stamps?

The Witness: If you save 600 stamps, one with every 25 cents purchase, you get a flying lesson free. It is in conjunction with other department stores in Detroit, and chain stores.

Mr. Hanley: I learn something about premiums every day.

Trial Examiner Ballinger: Is that an aviation lesson?

The Witness: Yes, it is an aviation lesson.

By Mr. Hanley:

Q. Do you know of any program in the making now to substitute for that plan?

718 A. No, I don't.

Mr. Hanley: You may take the witness.

Redirect Examination by Mr. Austin.

Q. You were asked on cross-examination, Mr. Tapert, about price cutting by Ned's Auto Supply Store, and you said, that with the exception of the NRA, that had been going back a good ways?

A. Yes.

Q. When, however, was the first time, to your knowledge, that they advertised a discount of two cents off the prevailing price?

A. You mean—how do you mean by advertising?

Q. I mean, gave it, or advertised it openly at their station through signs, or how, otherwise—any other way that came to your knowledge, that they were actually selling gasoline for two cents below the prevailing price?

A. Within the first year, they were doing business there.

Q. In other words, the discount was as great, as that, at that time?

A. Right at the beginning, yes.

Mr. Hanley: That is 1929, as I remember your testimony.

The Witness: I didn't say that the place was built, definitely, in 1929.

719 Mr. Hanley: No; about that time.
The Witness: That is right.

By Mr. Austin:

Q. And in response to another question as to the increasing prevalence of price reductions by service stations in 1936: You said, "Well, it always starts at the same locations." What did you mean by that?

A. Ned's.

Q. What did you mean by "starts"; what starts?

A. The discounting.

Q. And have the general price cutting sprees occurred several times during the past ten years?

A. Yes, they have.

Q. Did your volume increase or decrease in 1939 and 1940, as compared with 1938?

A. It decreased.

Q. Were you giving any cash reductions off the prevailing retail price during 1939 and 1940?

A. No.

Q. Then you haven't found any premiums or anything else that will take the place of the cash reductions, have you, when it comes to drawing customers?

A. No. No, I haven't.

Mr. Austin: That's all.

720 *Recross Examination by Mr. Hanley.*

Q. There is testimony here that Ned's Auto Supply Company, or its immediate predecessor, has been in business in Detroit for twenty-two years, selling gasoline, among other things, and you stated you have been acquainted with the oil business in Detroit for fifteen years.

A. That's right.

Q. Now, do you wish it to be understood, by your answers to Mr. Austin's last questions, that during the fifteen years that you have been acquainted with the oil business in Detroit, that every reduction in retail price of gasoline has been initiated by Ned's Auto Supply Company?

A. You said every one?

Q. Yes. I understand that that's what you said; that they always started at the same location.

A. Well, I would be safe in saying most of them

Q. Well, is that your testimony—

A. Yes.

Q. —that in the last fifteen years; out of how many service stations in Detroit?

A. What do you mean by "how many?"

Q. How many are there?

A. Oh, around 2,000, I would say.

Q. And no one undersells Ned's, is that true?

Trial Examiner Ballinger: If you know.

721 A. You say "no one?"

By Mr. Hanley:

Q. That's what you said. You said they always started at Ned's.

A. When I am speaking of comparative brands, yes.

Q. If you are just limiting this thing to some brands, you had better state what brand you mean.

A. I mean major brands.

Q. What major brands?

A. The Texas Company, Sun Oil Company, Mobil gas and Hi-Speed—I wouldn't say they are major. It is just a two-state oil company.

Trial Examiner Ballinger: Would you include Standard?

The Witness: And Standard Oil, yes.

By Mr. Hanley:

Q. Is that all?

A. Gulf Refining. I think that covers it.

Q. That's all?

A. Yes.

Q. Now, it is important that you get this clear, please, Mr. Tapert, in view of the next question I am going to ask you: You are referring to major brands as being the brands that you have now named. That's right, isn't it?

A. Yes, sir.

722 Q. Now, I will ask you, that if all of the cuts in the retail price of any brand that you have just named, in the City of Detroit, during the last fifteen years, that you have been acquainted with the oil business, have been initiated at Ned's Auto Supply Company?

Trial Examiner Ballinger: Do you understand the question?

The Witness: No, I don't.

Trial Examiner Ballinger: Read the question.

(The question was read.)

A. Well, it is the same answer. I wouldn't say all of them, but I said most of them.

By Mr. Hanley:

Q. And that is your testimony?

A. Yes.

Q. Covering a period of fifteen years. All right, now; which location?

A. What do you mean, "which location?"

Q. Of Ned's.

A. I would say all their locations; from the general experience I have had. Before Ned's station was built at Jefferson, I had a customer that would go out there and have his car greased, and buy his gasoline out there, in order to save money.

Q. When was the station built there?

723 A. In 1929. You said 1929.

Q. No, I didn't say 1929. I am not testifying to anything.

A. Well, it is within a half a year of that.

Mr. Hanley: All right. That is all.

Mr. Austin: That is all.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Mr. Austin: May we have a recess at this time?

Trial Examiner Ballinger: We will have a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: We will come to order, gentlemen.

Mr. Austin: Mr. Moss.

724 FRED C. MOSS was thereupon called as a witness by and on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. Will you state your name, please?

A. Fred C. Moss.

Q. Where do you reside, Mr. Moss?

A. 19215 West McNichols.

Q. What is your business?

A. Gasoline; retail.

Q. Do you operate a retail service station?

A. I do.

Q. What brand of gasoline do you handle?

A. High Speed.

Q. Where do you buy your gasoline?

A. Wilson Oil.

Q. Are they a jobber?

A. I think they are. I don't know. I am pretty sure they are.

Q. Do you know what you paying now for your regular brand of gas?

A. 8.1 plus tax.

Q. How long have you been in business at that address?

A. It will be three years in May. It will be three
725 years the 4th day of May.

Q. Have you been a High Speed dealer during all of that period?

A. I have.

Q. Have you been paying 8.1 plus tax for your regular brand of gasoline during all of 1940?

A. Well, that I wouldn't be sure of, but I think so; unless the price has changed, and I don't remember it. It seems it has been 16.3 during that period of 1940. I wouldn't be positive of that now. I didn't know I was going to be asked these questions.

Q. Don't you remember there was an additional half cent tax added on in the middle of 1940?

A. Yes, but it wouldn't affect the price, would it?

Q. No. But you said it was 16.3 and that is your selling price.

A. That's right.

Q. And that includes tax, doesn't it?

A. Yes.

Q. Mr. Moss, you recently bought that earphone you are wearing, didn't you?

A. Yes.

Q. And who did you buy it from?

A. From a man by the name of Cliff R. Cook.

Q. Was he ever a customer of yours in buying gasoline?

726 A. I don't know him personally, but he said he had stopped in passing.

Q. You mean he told you that at the time he sold you that earphone?

A. Yes.

Q. And what conversation did you have with him when you bought the earphone, about payment for the phone?

A. I asked him this—he let me have the 'phone on trial for a week or two and he came around and said, "How about buying it?"

I said, "Well, it proved satisfaction," and I would be interested in buying it provided he would trade part of it out in gas and oil or greasing and oil or tires and batteries, or anything he would need in my line.

He said he couldn't do that. I said, "Why?"

He said, "In the first place, do you give a discount?"

I said, "No, sir; I do not."

He says, "Why?" He said, "At the present time I am trading at Ned's and get 2 cents discount with a cash receipt."

He said, "I pay them for 8 gallons of gas $1.30, and he gives me a receipt—" and I haven't got any, but he showed them to me, and said he could turn those receipts in for 2 cents a gallon discount on anything Ned's had to sell, gas, oil, or a grease job, or most anything, and he did
727 say: "I have enough saved up to buy a set of car cushions; seat cushions for the car," so he was in next Monday and showed me he had purchased—showed me the seat cushions on the car; so he asked me what I ever found out about it, and I said, "I object to any discount. It seems to me like a hidden discount," and he said, "Well, I guess that's what they call it."

Q. Well, has he bought any gasoline at your station or did he agree to buy?

A. Yes.

Q. Did he agree to buy there?

A. Yes, he agreed to buy $10 worth on the purchase of this headphone, and I asked him could he buy more, and he said no. The reason that—he would give me more but that he could get 2 cents discount on his purchase of gas and he didn't feel like paying the difference of it, and he asked me would I give him the discount. I says, "No, sir, I can't do that unless you give me a discount on the headphone." He said well, he couldn't do that. And

I said, "Well, I can't do the other, either." And that is about all that we had to say about it.

Trial Examiner Ballinger: When did this occur?

The Witness: Why, around the middle of March.

Trial Examiner Ballinger: This year?

The Witness: Yes, sir.

728 By Mr. Austin:

Q. Do you mean March?

A. March. Well, that is when I first started buying the headphones.

Q. Well, this is March, you know.

A. I mean February, February of—

Q. Last month?

A. Yes, last month.

Q. Did he say what Ned's station he was buying at?

A. Well, he said at West Chicago and Grand River.

Mr. Austin: That is all.

Mr. Hanley: No cross-examination.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Trial Examiner Ballinger: I would like to confer with counsel.

(A conference was had off the record.)

Mr. Austin: Mr. Christian.

GUY EDWARD CHRISTIAN was thereupon called as a witness by and on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination.

Trial Examiner Ballinger: What is your full name?

729 The Witness: Guy Edward Christian.

By Mr. Austin:

Q. Where do you reside?

A. At 5428 Kingston Avenue, Dearborn.

Q. What is your business, Mr. Christian?

A. Retail dealer in gasoline and oil.

Q. Do you operate a retail gasoline service station?

A. I do, yes.

Q. Where is it located?

A. 14402 Michigan Avenue, Dearborn.

Q. What brand of gasoline do you handle, Mr. Christian?

A. Mobilgas.

Q. Who makes that gas?

A. The Socony Vacuum Oil Company, Incorporated.

Q. Do you buy from them?

A. I do, yes.

Q. Do you buy in tank truck delivery?

A. By truck delivery, yes.

Q. Have you records with you, Mr. Christian, as to the volume of Mobilgas sold at your station since 1936 and the prices which you charged for it?

A. I have, yes.

Q. Before I ask you for that, do you know whether you have always paid the Socony Vacuum posted tank wagon price for Mobilgas?

730 A. Yes, sir.

Q. I would like to have you take your records and, starting with January, 1936, if you have it there, state for each month the number of gallons of Mobilgas sold at your station and the price charged during that month; if there was a change during the month, you can say so.

A. Starting in January, 1936?

Q. Yes.

A. They were selling gasoline—

Mr. Austin: Off the record, please.

(A discussion ensued off the record.)

The Witness: You want this in round figures?

By Mr. Austin:

Q. Give the actual figures that you have.

A. The actual figures. Mobilgas in 1936, sold. 17,705, retailed at 15.9; that is, including the state sales tax.

Q. All of these figures include the sales tax?

A. That includes everything.

Q. Go right along for each month on that same basis.

A. There was a change of price of January 17th of a half a cent.

Q. Making it what?

A. That month. Making it 16 cents. Wait. Let's go back here now. 15.9. Yes. 16.4. That is including half a cent raise there. That was on the 17th.

731 Q. That is .9 of a cent raise? Isn't it?

A. Pardon?

Q. 15.5 to 16.4?

A. .5. That is what I said, half a cent.

Q. Didn't you say 15.5 to 16.4?

A. No. 15.9 to 16.4.

Q. Oh, I am sorry.

A. Now, in February that price remained at 16 cents and we sold 14,665.

March, their price remained the same. We sold 21,658 gallons.

Trial Examiner Ballinger: What was your price then?

The Witness: 16.4. That includes all tax.

Trial Examiner Ballinger: Now, the previous month was 16.4, wasn't it?

The Witness: That is right, back here in February. We had no price change in February. It remained the same.

Trial Examiner Ballinger: You stated 16—

The Witness: 16.4.

What confuses me here slightly is in these figures in this book here, this is my Michigan State Sales Tax report, we drop the state sales tax, the .4 of a cent on this price here; understand? The difference would be added on the book.

732 By Mr. Austin:

Q. You just state the price you sold it at and the number of gallons.

A. All right. That is fine. That is, at March it remained at 16.4, and in April the same. We sold 21,580.

May, 16, and there is a price change of ½ cent a gallon on May 30th, of half a cent. During that month we sold 25,403.

Trial Examiner Ballinger: The price then was what?

The Witness: It went up half a cent more, and that would bring it to 16.9.

Trial Examiner Ballinger: 16.9.

The Witness: .5 on top of 16.4.

By Mr. Austin:

Q. Mr. Christian, we will save time if you don't talk about half cent raises. You say, for instance, on May 30th, the price was 16.9, and then go on.

A. All right.

Q. We can figure out later whether that is half a cent up or down.

A. During June, 21,183 gallons. The price increased on the 24th, 17.4.

July, 35,430; price 17.4 all through the month.

733 August, 34,409 gallons; price same 17.4. September,

31,636; price remained the same. October 28,345; same price. November 22,730; same price. December 15,849 gallons; price remained the same. In round figures, approximately 190,000 gallons.

Q. What was that last?

Trial Examiner Ballinger: For the year.

A. For the year, that is, in round figures, approximately 190,000 gallons.

Q. All right.

A. In 1937: January 16,245; price remained the same 17.4.

February, 14,884. And on the 2nd we had an increase of .6 of a cent, made at 18.2. Get this right. Well, take it back. 18.1. My addition isn't so good. 18.1. That is on the 2nd of February.

March 17,505; price same.

April, 17,914; same price.

May, 20,804; price went up. Wait, now. Let's go easy now. It went up, yes, half a cent, which would make it 18.5; I believe. That was on the 12th.

June, 20,263; 18.5.

July, 24,742, at 18.5.

August, 23,609; same price.

734 September, 21,458; no change.

October, 21,621; same price.

November, 19,048; price same.

December, 16,521; no price change.

In round figures for the year 1937 we had 226,000 gallons, that is, Mobilgas.

Now, in 1938: January, 12,875; price same, 18.5.

February, 9,416; price the same.

March, 12,049; the price the same.

April, 12,396; price the same.

May, 11,988. Gas dropped one-half cent on the 1st day of the month, brought it down to 17.8.

By Mr. Austin:

Q. Let's pause there just a minute, Mr. Christian. What month is that?

A. That was in May, 1938.

Q. When you say gas dropped, did your tank wagon price drop or did you cut your price without any drop in the tank wagon price?

A. That probably was a station cut without any tank wagon. We were confused along with a variation and fluctuation in price. This is my station price. I can't recall right offhand whether this was tank wagon or voluntary out for ourselves. See? I could probably get those figures for you, if necessary.

735 June, 11,319; same price.

July, 12,209. Here is where we went into the scrap. We dropped the price down from 17.8 to 16.2.

Q. Was your tank wagon price that you paid for gas reduced at that time?

A. No, the tank wagon price was not reduced that I can recall right at the present.

Q. Was that a cut in your margin?

A. It was a cut in our margin to meet competition.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

A. (Continuing) August, 12,721; price remained the same.

September, 12,861.

And then in October 11,494.

November, 10,771.

December, 9,820.

In round figures, 136,000. That ends 1938.

Starting in 1939: 8,800.

736 Q. What is the price now?

A. 14.6 plus your sales tax of .4; it will be 15 cents even on Mobil gas.

Q. How long has that 15 cents been in effect?

A. That went into effect the first day of January, 1939.

Q. Is that another price cut?

A. It is another price cut.

Trial Examiner Ballinger: First day of January of what year?

The Witness: 1939.

A. The gallons on that are 8,800.

February, 9,238.

March, 13,493.

April, 16,762.

May, 19,429.

June, 18,325.

July, 19,783.

August, 19,187.

September, 18,056.

October, 15,768. We have another price reduction on that: 13.8. That went into effect, here; the first of October.

Q. Was there a cut in the tank wagon price at that time?

A. That, I can't answer right off, whether it was, or not. We had plenty of price conditions at that time.

November, 19,600.

December, 16,605, and I haven't the round figures 737 on that, in Mobil gas; I didn't total them.

In 1940 gas went up a little bit, starting the first of the month, sold at 15.8; 15,354.

February, 13,897.

March, 15,659.

Trial Examiner Ballinger: The price?

The Witness: The price remained the same; 15.8. This is since the first of the year.

By Mr. Austin:

Q. What year is this, now?

A. 1940.

In April, 15,935—

Trial Examiner Ballinger: Same price?

The Witness: Right.

A. May, 18,287.

June, 19,771.

July, 22,613.

By Mr. Austin:

Q. Wasn't there a price change in July?

A. No. No price here, showing a change. This, you understand, is .4 of a cent paid me at 15.8—

Q. Didn't you have to add on a Federal tax in July, 1940?

A. We added that on—yes, we added that on.

Q. What was your price in July, 1940? What price did you charge?

738 A. 16.3.

Q. And the previous month you told it was 15.8, didn't you?

A. 15.8. That was back in June, and I guess that's where that price came in there, of a half a cent—

Q. Was there or wasn't there a price change at that time?

A. There was a price change of the Federal Defense Act on gasoline, but that took place in July, I think.

Q. Weren't you giving us the figures for July?

A. Yes, June 15.8; and July 16.3.

August, 24,318.

September, 21,674.
October, 19,434.
November, 17,392.

Q. Still 16.3?

A. 16.3.

December, 1940, 17,710. Price was the same.

Trial Examiner Ballinger: What is your total for the year?

The Witness: I haven't the round figures for that.

By Mr. Austin:

Q. Was there a Ned's Auto Supply Company service station located near you?

A. Yes.

Q. How far from you?

A. I would say three blocks, to be exact.

739 Q. You are on Michigan Avenue?

A. That's right.

Q. And is Ned's station on Michigan Avenue?

A. That's right.

Q. Three blocks away?

A. Yes.

Q. Is there a Langer's Texaco station near there?

A. Yes.

Q. Where is that as regards your station?

A. Just across the street.

Q. When did the Langer station come there?

A. In 1936.

Q. Was there a service station at that location prior to the time that Langer's came there?

A. No, there wasn't.

Q. Was it a new station, then?

A. There was no station at all. This is a brand new setup.

Q. Do you recall what your margin was in 1936 and 1937 on the sale of gasoline; between what you paid for it and what you sold it for?

A. I am on a gallonage basis. I pay a rental of 1.7.

Q. I mean, what was your margin of gross profit; the difference between what you paid for gasoline and what you sold it for?

A. Around three, three and a half, I would say.

740 Q. That is, after you deduct the rent?

A. No.

Q. Are you talking about now, or that time; speaking about 1937 or 1938?

A. I have always been on a straight rental base with the company, regardless what the tank wagon base has been, of 1.7 per gallon.

Q. You mean you pay 1.7 per gallon?

A. I pay rental.

Q. What was this figure of 3.3 you just gave?

A. 3.3?

Q. Yes.

A. You asked me—do you want to know the dealer's margin of gross profit on the sale of gas?

Q. That's right.

A. I don't know as I can answer that right off, because the price at that time was so changing, not only from the tank wagon, but marketing conditions.

Q. Is this 1.7 a gallon you pay the company?

A. That's right.

Q. That includes all rental?

A. That's right.

Q. You have no flat rental above that?

A. No, straight gallonage rental.

Q. That station is in the business section, isn't it?

741 A. Yes.

Q. Right in Dearborn?

742 A. Well, as near as you would want to be.

Q. At the time the Langer stations started operation in 1936 was Ned's station selling at the same price you you were or not?

A. No. Ned's is more or less, ever since I can recall of being in business, there was price cutting on gasoline. Sometimes it would clear up for a short period and then break out again.

Q. In 1936 were they selling below you, or not, at the time Langer's station opened?

A. Yes.

Q. How much below?

A. Well, they had what we more or less term them secret discounts.

Q. Just tell us what the price was. I don't care about whether you tell me how they arrived at them.

A. As far as their pump settings are concerned, it is always a known fact that Ned's had a pump rating competitive with other dealers but didn't mean anything in reality.

Q. Would Ned's post any signs advertising discounts along in 1937 and 1938?

A. Oh, yes; very much.

Q. Then at that time the price cutting was open, wasn't it?

A. It was really open, on a big scale.

743 Q. And did Langer's do the same thing?

A. Yes, they did.

Q. When Langer's opened up at that location did they start selling at the same price Ned's was or at your price?

A. They started selling at the price Ned's were selling at.

Q. Has Ned's ever circulated any cards or advertisements in that neighborhood or put them on parked cars, advertising discounts?

A. I can't say that they ever did that, no.

Q. During the latter part of 1937 and the early part of 1938 do I understand you that during all of that period that Ned's price was lower than your price?

A. That's right.

Q. What observation did you make, then, regarding any customers that you know and whom you recognized, who drove by there—were there customers who drove by there regularly whom you knew and could recognize?

A. That's right. I go to the bank most every day and I have to pass Ned's establishment on the way. Many times I have seen customers of mine in there buying gasoline. I have had customers saying that 2 cents was quite a savings to them. They had nothing against my service, but were taking advantage of the 2 cents.

Q. This was along when?

A. In 1937 and 1938.

744 Q. Prior to the time that you cut your price?

A. Yes.

Q. And by that I mean the time when you said you were getting into the scrap, I believe.

A. That was before, yes. We cut our price to meet competition.

Q. Did you have a customer named Sanderson?

A. Yes.

Q. Do you know his full name or where he lived?

A. Dennis Sanderson. I believe he lives on Robertson in Dearborn.

Q. Did he buy gasoline regularly at your station at one time?

A. Yes.

Q. When did he leave you, or has he ever left you?

A. He left me the latter part of 1937 and most of 1938 and he said due to working conditions and one thing and another he tried to take advantage of this saving of 2 cents a gallon, which was not out of his way to go over there, to get it at Ned's, rather than to come over to us and pay 2 cents more.

Q. About that time, say 1937 and 1938, did you ever hear any radio broadcasts advertising Ned's station or Ned's service?

A. Yes. Ned's had a broadcast. If I recall this
745 right, it was a short—what you would call a minute or
two minute announcement of the saving. I can't say for certain whether they quoted what you saved at the time, but I do know they advertised a large savings at Ned's; their unit. They gave the locations of them, where these savings could be obtained. I won't say whether they quoted exactly 2 cents, or any figure, but I do know they quoted the savings you could receive by patronizing Ned's stores.

Mr. Austin: That's all.

Cross-Examination by Mr. Hanley.

Q. Mr. Christian, will you please locate your station on the map, Respondent's Exhibit 1, for identification?

(The witness does as requested.)

Q. As I understand you, the Langer station which opened up out there began selling when they started business at the same price that Ned's was selling?

A. That's right.

Q. And Ned's was giving the 2 cents discount at that time?

A. That's right.

Q. So Langer was also giving it when they opened their business?

A. It was competitive to us.

Q. So anyone, such as Mr. Sanderson told you, as being interested only in the 2 cents saving, they could have gone
either to Ned's or to Langer's and obtained that
746 saving over what you were selling gasoline at that
time?

A. That's right.

Q. How near are you to Michigan Avenue and Telegraph Road?

A. Five miles.

Q. I don't know anything about this geography, but I am trying to learn if there was a street out there near your station that carried heavy traffic that during 1938 or 1939, about that time, was closed or under repair or something of that sort?

A. In 1938 or 1939?

Q. Or about that time.

A. Well, if there was any structure there it didn't interfere much with us at our location.

Q. That's all I want to know. If there was any such thing out there, that hasn't affected you at all?

A. No, there was nothing like that that affected us at all.

Q. Do you recall the name of any other individual to whom you talked about the difference in price obtainable elsewhere than your station?

A. You mean a customer?

Q. Yes, other than Mr. Sanderson.

A. I talked to my customers in regard to the situation and they thought it was just about as bad a situation for me as an individual dealer having to stay there under
747 the circumstances I was under, and take the licking that I took during this price war, which I had no way at all to meet it.

Q. And you were adjacent to both Ned's and Lanker's all through that price war?

A. That's right.

Q. And you cut your price some time in 1937?

A. No, I believe it shows we cut our price back in 1938.

Q. You didn't cut—

A. We didn't get into the big price war until the latter part of 1938.

Q. When did you cut in 1938?

A. The exact date when we got into the fight was in August.

Q. 1938?

A. Yes.

Q. And when did you start up? When did you go back up? I don't mean the first time. I mean when did the thing right itself, as far as you are concerned?

A. Well, it gradually—it fluctuated as long as this price war existed, and it eventually did start to clear up a little later on in 1939. Gallonage began to come back, old customers we lost began to come back because the marketing condition began to clear up. They had nothing to induce them to go away from us to get this 2 cent saving.

748 Q. So the 2 cents wasn't being offered any more? Is that what you mean to say?

A. I can't say it wasn't being offered, because it has always been a known fact that discounts have never been out of the picture as far as Ned's is concerned.

Q. How about Langer? How about their station after they opened out there?

A. Their pump readings didn't mean anything at either place.

Q. Neither at Langer's nor at Ned's?

A. No, because customers said they could go out there and get a discount and their pumps read the same as ours, and that existed in both places.

Q. But notwithstanding that that kept on, there did come a time in 1939 when that didn't affect your business any more; customers came back?

A. It wasn't such an open war any more. It cleared up through some court action, or some things came out that things cleared up. Dealers realized they couldn't go on and stand a price war and still exist.

Q. And that's your judgment now?

A. That is my judgment now; that those in it took an awful licking.

Mr. Hanley: That is all.

749 *Redirect Examination by Mr. Austin.*

Q. Langer's is a Texaco station, is it not?

A. They advertise Texaco products.

Q. Do you know who they buy from?

A. They have a distributor—it is a Polish name—that has been delivering their gas; one of these what you might call a transport company. They deliver his gas and as to where they buy it, I couldn't tell you. It is not a genuine Texaco truck. It says on the panel on the side of this truck: "Texaco." That is the only identification you could go by, but it is a Texaco product.

Mr. Austin: That is all.

(Witness excused.)

Mr. Austin: I move we adjourn for lunch until 2:15.

Trial Examiner Ballinger: Without objection, the motion is granted and now, at 1 P. M., the hearing stands in recess until 2:15 P. M.

(Thereupon at 1 P. M., a recess was taken to reconvene at 2:15 P. M.)

750 Afternoon Session.

2:15 P. M.

Trial Examiner Ballinger: Come to order.

FRED H. BRANTON was thereupon called as a witness by and on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination.

Trial Examiner Ballinger: Give me your full name, please.

The Witness: Fred H. Branton.

By Mr. Austin:

Q. Where do you reside, Mr. Branton?
A. 319 East Euclid. It is my home address you want?
Q. Are you in the gasoline business?
A. Yes, sir.
Q. What is your business?
A. Gasoline, oils, grease jobs.
Q. Retail? Wholesale?
A. Retail.

Trial Examiner Ballinger: You run a service station, do you not?

The Witness: Service station, yes, sir.

By Mr. Austin:

Q. Where is it located?
751 A. 7635 John R.
Q. Is John R a street, avenue, road, or what? I never did find out?
A. Well, it is John R Road, I guess. That is, the original, but I think that is proper, John R Road.
Q. How long have you been in business at that address?
A. ~~About a little better than four~~ years, or about four years.

Q. How long have you been in the oil business, Mr. Branton?

A. Oil business? Well, off and on since 1907.

Q. Here in Detroit?

A. No, not altogether; no.

Q. What business were you engaged in before you started operating this station?

A. Where I am now?

Q. Yes.

A. Well, I was up in another station at John R and Euclid before this.

Q. When did you leave John R and Euclid, did you say? About five years ago?

A. Four years, around four years ago.

Q. Why did you leave there and move to your present location?

A. Well, this other—the Standard Oil people offered me this site, so I—leased me this place; why I just thought 752 it was a better proposition, and I took it.

Trial Examiner Ballinger: Did you open this station about four years ago?

The Witness: Well, no. This station has been in operation for a number of years before.

Trial Examiner Ballinger: How long under your supervision?

The Witness: Well, going on four years I have been there.

By Mr. Austin:

Q. Do you buy your gasoline from Standard Oil?

A. Yes, sir.

Q. What brands do you handle?

A. Red Crown, Ethyl, and the Blue, Stanolind—or, the green.

Q. Do you obtain your gasoline by tank truck deliveries?

A. Yes, sir.

Q. Do you pay the tank wagon price?

A. Yes, sir.

Q. After you moved from the location at John R and Euclid, what happened at that location?

A. It was taken over by the Lanco Oil people.

Q. Is that L-a-n-c-o?

A. Lanco Oil.

Q. What does that name stand for, the name Lanco?

753. A. You can't prove it by me. I don't know. It is serviced by the Citrin Oil people.

Q. By whom?

A. Citrin-Kolb.

Q. Citrin-Kolb?

A. Yes, Citrin-Kolb.

Mr. Austin: Off the record.

(A discussion ensued off the record.)

754 Mr. Austin: It will be stipulated that the station at John R and Euclid, which the witness has just referred to as a Lanco Oil Company station is a Langer & Cohen station, which is a retail dealer, supplied by Citrin-Kolb.

Trial Examiner Ballinger: That is assented to by counsel for the Respondent?

Mr. Hanley: It is, Your Honor.

By Mr. Austin:

Q. Did the Lanco station move into that address shortly after you left?

A. I presume about, possibly, five or six months after I left. The people that had the place—there were two different parties in there, I think, before the Lanco people took it over.

Trial Examiner Ballinger: You say "think." That is to the best of your recollection?

The Witness: Yes, there were two other people in there, and after that it was vacant for about two or three weeks.

By Mr. Austin:

Q. And after the Lanco Oil Company took over the station, do you know whether they were selling Standard Oil gasoline below the price you were selling at your station, on the same brands?

A. Yes, sir.

755 Q. How do you know that?

A. Well, there were customers that came down, and I lived right in that same block, and the neighbors would tell me, ask me why I couldn't give them two cents off on gas, or if I would give them two cent off on gas, and I said no.

Well, they said, "I can get it here at your old stand." Of course, that is the only knowledge I have of it. I never bought any there.

Q. How far away was your new location from the old location?

A. About five blocks.

Q. On the same street?

A. Yes, sir.

Q. Did the Lanco Oil Company station give out cards in that neighborhood, advertising cards?

A. Yes, sir.

Q. Did you see any of those cards?

A. Yes, sir.

Q. Have you any of them now?

A. No, sir.

Q. Did those cards advertise any discount?

A. Well, it mentioned discount, yes.

Q. I show you this card, marked "Commission's Exhibit 36," and ask you whether the cards to which you have referred, are similar to that card, and if so, in what respects (handing document to witness.)

756 A. The only thing I can say, that it might be similar, is in size. I don't recall anything that was on them. I know several of my customers just drop them into the station, or something. When they came in for a purchase, they said, "See what I got?" They would say, "See what I can get?"

Q. When you say they came in for a purchase, what do you mean? Gasoline, or something else?

A. Gasoline, maybe oil or grease job.

Q. Would any of them come in for a grease job and not buy gasoline?

A. Yes, I have a lot of my grease jobs and not gas.

Q. Of course, they might be there—that might be for other reasons; maybe they didn't need any gas.

A. Sure; possibly, yes.

Q. During the remainder of 1937 and early 1938, do you remember what your margin was on gasoline then?

A. I can't recall. I can't give it to you.

Q. How long did that continue after the Lanco people moved in there; that your customers would show you those cards and tell you about their discounts?

A. ~~That lasted part of one summer. I think, but it has never been any different, I don't suppose.~~ If they didn't have cards, they circulated bills.

Q. What do you mean by bills?

A. Advertising handbills. They put them all over.

757 our neighborhood three or four times last Fall or last summer.

Trial Examiner Ballinger: What did those handbills advertise?

The Witness: Advertised their discount on different articles they could get for their merchandise.

Trial Examiner Ballinger: Including gasoline?

A. Gasoline, and stating that they were giving dishes and electric clocks and so on and so forth. I can't recall just exactly word for word what was on any of them. I never kept them and never paid much attention to them. I always figured if they wanted to give their stuff away, that was their business. I wasn't.

758 By Mr. Austin:

Q. Did you ever reduce your price to meet their competition?

A. No, sir, I didn't reduce the price until we were asked to meet a certain price to stop this discounting; that's all.

Trial Examiner Ballinger: You say you were asked to do that. Who asked you?

The Witness: I think it was one of our salesmen said they were all beginning putting up signs, and would like us to follow them, to fall in line, so we did.

By Mr. Austin:

Q. You say they were putting up signs. Who do you mean?

A. All the dealers around.

Q. When was that?

A. That was around the fall of 1938; along in the winter. Somewhere in there—no, 1939, I guess it was.

Q. It was a price war in 1939, wasn't it?

A. Yes. That was the closing up of the price war, when they all set up their signs for 7 for $1.05, I believe.

Mr. Austin: That's all I have with the witness.

Cross-Examination by Mr. Hanley.

~~Q. When did the Lanco people go into this John R and Euclid station, Mr. Branton?~~

759 A. I couldn't say, but I judge it would be around five or six months after I left there, and I left there the first day of July, 1937; going on there. I think it was 1936

or 1937. They had another party in there, was in there two or three months and he had to get out and they had somebody else in there that picked up and moved in the night, and then it was vacant.

Q. Well, would it be around the last days in 1936 or first days of 1937, Mr. Branton?

A. I couldn't tell you that. As near as I can recall, it would be six months or something like that, or seven.

Q. After July, 1937?

A. After I left. I think I am right on the dates. I may have been off on that a little.

Q. When did it first come to your attention that there were sales being made at that station at a discount under your price?

A. Just as soon as they went in there, they started.

Q. And how long did that last, do you know?

A. I don't think it has ever stopped.

Q. You think it still exists?

A. Yes, sir.

Q. What leads you to believe that it is in existence now?

A. Well, a business man on the corner up there—I am right across from him—no later than ten days or so ago
760 made the remark that he didn't know why he was coming down there when he could just go across the corner and buy gas for the same price and get an electric clock given to him or a set of dishes.

Q. Well, that is the premium business?

A. Yes.

Q. What I really had in mind was this two cent business.

A. Well, I don't know about that or when he stopped it or anything.

Q. What is the last you knew of it, that that was being done?

A. Well, that might—I could put it anywhere from six months to a year after he went in, possibly.

Q. You made your cut in price at what time?

A. Well, it would be right at the closing up of the price war.

Q. When was that?

~~A. I can't answer that.~~

~~Trial Examiner Ballinger: Do you know what year it was?~~

The Witness: Well, it must have been in—I guess it must have ended up in '39. Now, you people know more about that than I do.

By Mr. Hanley:

Q. I am sure I don't.

761 A. Well, I can't—I wouldn't swear to that, because I don't know.

Q. That is your best recollection?

A. That is my best recollection.

Q. That you had a cut price for how long at that period?

A. Well, the price was on there all one summer, I guess.

Q. Do you think that was in 1939?

A. I think so, somewhere in there.

Q. How far from your location is Taylor and Woodward, the intersection?

A. Well, that is on the other side of Woodward. That will be—oh, that will be 10 or 11 blocks, I should think.

Q. Is there a Joy station at that point?

A. There is one right up there. I presume it is there. It is this side of Clairmont.

Q. Is there a Sun dealer somewhere near you?

A. Yes.

Q. How far?

A. There is a Sun dealer at Philadelphia and Woodward, and there is one at Hague and John R, I think it is, right in the corner of the alley in-between.

Q. In terms of blocks how far are those stations away from you?

A. Well, one of them would be seven and the other would be 12 or 13.

762 Q. Is there any such station about two blocks south of you?

A. Yes.

Q. A Sun station?

A. That is a—now, two blocks south of me would be Citrin-Kolb's old stand, Citrin-Kolb.

Q. You say old stand?

A. That is the stand that they used to do business in themselves and I presume—I understand they have leased it out, subleased.

Q. Is there anyone doing business there now?

A. Yes.

~~Q. What kind of gasoline do they handle?~~

~~A. Standard Oil.~~

Q. Is there a Gulf station anywhere in your immediate vicinity?

A. Yes, down the corner of Baltimore and—right down near Baltimore there and John R.

Q. In terms of blocks how far is that from you?

A. Oh, that would be about five blocks.

Q. Now, with particular reference to the Sun stations and the Gulf station that you have testified about, has there been a time since you went into that location that those stations have been selling at a price less than your price?

763 A. I wouldn't say. I don't know.

Q. You mean you just don't know about that?

A. I just don't know. In fact, I never paid much attention to them, what any of them that cut price. I couldn't cut price so I didn't pay much attention to them.

Q. I show you, Mr. Branton, a map of Detroit marked Respondent's Exhibit No. 1, for identification, and will ask you if you will put a mark on the map where you are located.

A. Well, let's see. Right here (indicating). On the southwest corner of Smith.

Mr. Hanley: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Mr. Austin: May we have a brief recess, your Honor?

Trial Examiner Ballinger: Take a recess for five minutes.

(A short recess was had.)

Trial Examiner Ballinger: Come to order.

Mr. Hanley: For the record, please. It is agreed by counsel that the Respondent may prepare a map of Detroit
indicating the locations of the various service stations
764 that have been testified to by the several witnesses,
and which may be testified to hereafter in this proceeding, and that such map may be prepared and offered as an exhibit at the option of the Respondent at some later time in the case, and that the Respondent may withdraw its exhibit marked Respondent's Exhibit No. 1, for identification, it being understood that such locations as are indicated on any map to be presented shall be as such locations are reflected in the testimony.

Is that all right, Mr. Austin?

Mr. Austin: I don't stipulate that such map may be received in evidence. I prefer to reserve my right to make any objections, if any, that I might want to make at the time. I am not indicating that there will be any, but I just want to say that I will stipulate that—I will not object to any such map for the reason that it wasn't marked or that the locations weren't identified by the witnesses as they went on the stand, provided I have an opportunity to check it.

Mr. Hanley: Will you agree that you will not object to the foundation, reserve for yourself any objections as to materiality or relevancy that you may care to reserve?

Mr. Austin: By foundation, you mean the fact that the witnesses referred to those stations here?

765 Mr. Hanley: That is right, and that the map is all right. We will produce an adequate map.

Mr. Austin: No, I won't object to the foundation as described.

Mr. Hanley: Very well.

Mr. Austin: Mr. Ward.

EARL K. WARD was thereupon called as a witness by and on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination.

Trial Examiner Ballinger: Let me have your full name, please.

The Witness: Earl K. Ward.

By Mr. Austin:

Q. Where do you reside?

A. 955 Hudson, Detroit.

Q. Do you operate a gasoline service station, Mr. Ward?

A. Yes, sir.

Q. Where is your service station located?

A. 901 West Warren, at the corner of Fourth.

Q. How long have you operated that station at that address?

A. Five years, as an independent dealer.

Q. Do you lease that station?

A. Yes.

766 Q. From whom?

A. From the Standard Oil Company.

Q. What brands of gasoline do you sell at the station?

A. I sell Standard Red Crown, Ethyl, Stanolind gasoline.

Q. Do you buy all of that gasoline from the Standard Oil Company?

A. Yes, sir.

Q. How is it delivered to your station?

A. By tank wagon.

Q. And that is true as long as you have operated the station there?

A. Yes.

Mr. Austin: Your Honor, I would like to have this document marked, for identification.

Trial Examiner Ballinger: It will be marked as Commission's Exhibit 61, for identification.

(The document referred to was marked, for identification, "Commission's Exhibit 61.")

767 By Mr. Austin:

Q. Mr. Ward, will you describe this document, marked Commission's Exhibit 61, for identification?

A. Why, it is a record of my gasoline purchases from the Standard Oil Company, all of 1937 through 1940.

Q. Does that include all three brands of gasoline?

A. That includes all brands, yes, sir.

Q. I understand that those are your purchases and not your sales?

A. That is my purchases, right.

Q. Do you maintain a very large inventory at any one time?

A. The most we could possibly maintain would be 3,000, and it doesn't average more than, I believe, twelve or fifteen hundred at any time, at any given time.

Trial Examiner Ballinger: When you say 3,000, you mean 3,000 gallons?

The Witness: Gallons, yes, sir.

Q. Now, are those figures very far different from the amount of your sales?

A. No, they would be quite similar.

Q. From what records were those figures prepared?

A. From the records of my purchases from the Standard Oil Company.

Q. Did you prepare those figures yourself?

768 A. I got them from my salesman, from the Standard Oil salesman.

Q. Did you ask him for them?

A. Yes, sir.

Q. When?

A. About three days ago.

Q. Do you have any records in your own office of the amount of your purchases?

A. Yes, I would, by going through my books or my daily receipts of gasoline.

Q. Did you compare these figures with your own records?

A. I did a couple of months, and they were right.

Mr. Austin: I offer this gallonage record of Mr. Ward, in evidence.

Mr. Hanley: Only the general objection.

Trial Examiner Ballinger: Subject to the general objection reserved by counsel for Respondent, the document is admitted in evidence as Commission's Exhibit 61.

(The document referred to, heretofore marked for identification, "COMMISSION'S EXHIBIT 61," was received in evidence.)

By Mr. Austin:

Q. Where is the nearest Standard Oil retail gasoline station to your station?

A. It is at the corner of Warren and Brooklyn.

769 Q. How far away is that from your station?

A. Two blocks.

Q. Do you know who operates that station?

A. It is operated by the name of the Lanco Oil Company.

Q. Do they have their sign on the station?

A. Yes; Lanco Oil.

Q. And does the name of Citrin-Kolb appear anywhere on the station?

A. No, I don't believe so.

Q. Do Standard Oil signs appear on the station?

A. Yes.

Q. Do they sell Standard Oil gasoline?

A. Yes, sir.

Q. The same brands you sell?

A. Yes, sir.

Q. At least, you know they sell Red Crown and Ethyl.

When did that Lanco Oil Company station open up at Warren and Brooklyn?

A. I can't answer that. It is years ago.

Q. Was it five years ago or ten years ago?

A. It would be nearer ten years ago, but they weren't handling Red Crown gasoline all the time.

Q. How long have they been handling Red Crown gasoline?

A. Since 1936.

770 Q. And when they started selling Red Crown gasoline, did you notice any advertising from that station?

A. Yes.

Q. Will you describe it?

A. Yes. I believe the day they opened up, they passed courtesy cards to the neighborhood, and a few days later, they had a large sign up, stating one or two cents discount. I can't remember.

Q. You mean a few days after they started selling Standard gas?

A. After they started selling Standard gas, yes.

Trial Examiner Ballinger: When did you say they started selling Standard gas?

The Witness: I can't say the month, but it was in the Fall of 1936. I remember that, definitely, because I leased from the Standard Oil Company in June of 1936, and they started quite soon thereafter.

Mr. Austin: In view of that testimony, Judge Hanley, I would like to ask whether you have here the figures for the volume of purchases for Mr. Ward's station for 1936?

Mr. Hanley: We have it by months, and the total. That is a statement of his purchases of Standard Oil Company.

771 Mr. Austin: Would it be agreeable to you to either read the 1936 figures into the record; let me read them in or substitute these figures for the other, so that the 1936 figures agree with the other?

Mr. Hanley: It is agreeable to withdraw the present Exhibit 61 and substitute this as Exhibit 61; is that what you had in mind?

Mr. Austin: I would be glad to do that.

Trial Examiner Ballinger: Do you ask leave to do that?

Mr. Austin: I ask leave that this sheet which was just dentified by Judge Hanley be substituted for the sheet ow in evidence as Commission's Exhibit 61.

Trial Examiner Ballinger: The request is granted. The sheet original introduced in evidence will be withdrawn and the present document substituted therefor and be marked Commission's Exhibit 61, subject to the same reservation by counsel for the Respondent.

Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Did you say that this Lanco Oil Company station was on the same side of the street or on the other side of the street from you?

772 A. It is on the same side.

Q. Did you notice any loss of business at your station after the Lanco Oil Company became a Standard Oil dealer?

A. Not an appreciable loss, no.

Q. Do you know of any specific cases where customers who had been buying regularly at your station ceased to buy and told you the reasons why?

A. Yes. They gradually dwindled off and got away from me, finally.

Q. Can you describe any specific instances that you have in mind?

A. Yes, I have. The name of the party is Coughlin and they live on Hancock. They told me at various times that they could save money by going down there, and they did. I could name a lot of others. They went to Warren and Brooklyn to save 2 cents a gallon.

Q. Did you see any signs at that station advertising 2 cents a gallon off?

A. Yes.

Q. When did you see those signs?

A. I saw them for about a year and a half, I believe, altogether.

Trial Examiner Ballinger: During what period?

The Witness: Shortly after the fall of 1936, right through 1937 and most of 1938. The signs varied, of
773 course; different times they were up and then they were down.

By Mr. Austin:

Q. Do you know whether the price being charged for Red Crown gasoline by Langer and Cohen station, from the time they moved in there up until the end of 1938, was as high as the price charged at your station?

A. It was not. The average was 2 cents lower, I would say.

Q. And when did that advertised price cutting at Langer and Cohen station—or, to change that: when did the situation, as you have just described ~~as~~ to a difference in price between their station and your station cease?

A. I believe it was in the spring of 1939 when, so to speak, everyone cleaned up. They all set their price at 15 cents a gallon, I believe.

Q. You mean in your neighborhood?

A. Yes, in my neighborhood, and general, throughout the city. Of course, we all knew that.

Q. From the spring of 1939 until the end of 1940 was there any variation between the advertised posted price at the Lanco station and the price at your station?

A. No, sir. It was posted the same as my price, I believe.

Q. About what month did that situation commence,
774 where their price was the same as yours?

A. I believe that was about March or April of 1939. I am not positive of that.

Q. Now, after that period, and during 1940, has the Lanco Oil station at Warren and Brooklyn been giving any premiums?

A. Yes.

Q. What premiums have they been giving?

A. Oh, berry sets and water sets. That's all I can say positively. I saw their circular advertising water sets. They gave one with every 7 gallons purchased until you receive a full set.

Trial Examiner Ballinger: What is a water set?

The Witness: I believe it is a pitcher and some tumblers, your Honor. They call it a water set.

By Mr. Austin:

Q. Have you had any conversation with customers in 1940 who told you that they were buying their gas at Langer and Cohen's so that they could get those premiums?

A. Oh, yes; quite a few.

Q. Do you remember any of their names or any conversations?

A. Yes. I had a Mr. Jackson who lives on Warren Avenue—he told me that the minute his old lady got the dishes over there he would be back with me. He said he would rather trade over here, but as long as he got 775 those dishes, he would rather trade with them.

Q. In other cases—are there any other cases?

A. Lots of people told me they were buying their gas there. They would come in occasionally, and I asked them why I hadn't been seeing them more regularly, and they said they were getting their premiums; trying to complete a set of some sort; that was pretty general in the neighborhood.

Mr. Austin: That's all.

Cross-Examination by Mr. Hanley.

Q. Mr. Ward, was there a variation in the prices charged at the Lanco station during this period, from the time they went in there until the early part of 1939?

A. Yes. You mean it didn't stay the same price all the time?

Q. That's what I mean.

A. No, there were various prices.

Q. Was it always as much as two cents below your price?

A. It is possible there might have been a variation of one cent, but, on the whole, it was 2. There may have been a time when it was a cent or cent and a half.

Q. How close to your location is the third and Warren intersection?

A. That is one block.

776 Q. And is there a Sun station located there?

A. Yes.

Q. Was there in 1936, and on up until now?

A. I am not positive whether he was there in the beginning of 1936 because that was a station selling another brand, but he was there during most of this price war.

Q. But there was a station there all the time?

A. Oh, yes.

Q. Do you remember what he was selling just before Sun went in?

A. It was an off-brand.

Q. Can you recall it?

A. I can recall it if I can think for just a minute. The —Zieve.

Q. Do you remember anything about the prices at that station at that time in comparison to yours?

A. They sold about the same as all the other off-brand gas, as we call it.

Q. Just what was the difference? Was that a higher or lower price than your price?

A. It was about the same as our third grade or lower than our regular gas; yes, sir.

Q. After the Sun station went in, what did you observe in connection with whether their prices were higher
777 or lower than the prices that you were selling at?

A. They were the same when they went in.

Q. The same as your price?

A. The same as my prices, yes, sir.

Q. And was there a time that you know of when their prices changed?

A. Yes.

Q. And when was that in relation to the time you changed your price?

A. It was a good long time before. They started to cut prices, so to speak, about the same time all the others did; maybe a little later.

Q. And you held onto your old price some little time after the stations around you had cut the price; is that the situation?

A. Yes, sir.

Q. Mr. Hanley: I believe that is all.

778 By Mr. Austin:

Q. Just a minute. I forgot to ask you whether it was brought out as to whether you ever reduced your price during '37, '38, or '39, except when there was a change in the tank wagon price?

A. No, I didn't. I am sure I didn't. I am quite sure there was a change in the tank wagon price when this was all levelled up for seven for a dollar and five, so I believe I am safe in saying—

Q. But you never changed your margin—you never reduced your price for the purpose of meeting the price that somebody else was charging?

A. No.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Mr. Austin: May we have another five minute recess?

Trial Examiner Ballinger: Recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Reconvened.

Mr. Austin: Mr. Richards.

EARL M. RICHARDS was thereupon called as a witness for the Commission, and having been first duly sworn, 779 testified as follows:

Direct Examination by Mr. Austin.

Q. Your full name?

A. Earl M. Richards.

Q. And your residence address?

A. 22323 Cedar Avenue, St. Clair Shores.

Q. What is your business?

A. Retail gasoline.

Q. Where are you employed?

A. I am employed with George A. Russell on 10116 Vernor Highway.

Q. Is that a Standard Oil gasoline station?

A. That is.

Q. Are you employed there by Mr. Russell, or are you in partnership with him?

A. Employed by Mr. Russell.

Q. How long have you been there?

A. Since November the 1st of 1940.

Q. Where were you before November 1, 1940?

A. At 10101 East Jefferson Avenue.

Q. Did you operate that station?

A. I did.

Q. How long were you engaged in the operation of that station?

780 A. September the 13th, 1930, until 1936, as an operator for the Standard Oil, and from '36 until 1940, as a lessee, ten years altogether.

Q. Lessee of the Standard Oil Company?

A. Lessee of that station. I was lessee from the Standard Oil Company.

Q. Did your lease terminate on November 1, 1940?

A. It did.

Q. Why didn't you renew it?

A. It was refused. They refused to renew the lease.

Q. While you were leasing that station, did you purchase your gasoline from the Standard Oil Company?

A. I did.

Q. What brands did you handle?

A. Red Crown, Solite, and Stanolind, the three grades carried by the Standard Oil.

Q. Did you receive your gasoline by tank truck deliveries?

A. Tank truck is right.

Q. Did you pay the posted tank wagon price?

A. Yes.

Q. I assume, plus taxes?

A. Plus taxes.

Q. Are there other Standard Oil stations located on East Jefferson?

A. Several.

781 Q. Were there any of those stations in 1936 or 1937 that were offering Red Crown gasoline for sale at a lower price than you were selling it at?

A. Not any of the company-owned outlets, but one at Nottingham and Jefferson, Citrin & Kolb outlet.

Q. What do you mean by company-owned outlets? Were you referring to the time when the company operated its own stations, or after that?

A. I believe that the Standard Oil owned the property and leased it out to the individual. In other words, they were there when the Standard Oil—when we were all working for the Standard Oil on a—

Q. These stations were selling at the same price you were?

A. They were.

Q. Do you know who operates the station at Jefferson and Nottingham, or who did operate it, at that time?

A. No, I don't. No, I have never stopped in at the station. I passed it, but I don't stop in there.

Q. Is it a Standard Oil station?

A. It is selling Standard Oil products.

Q. Do you know whether it is a Citrin & Kolb station?

A. It is a Citrin & Kolb.

Q. How soon after you took over the operation as lessee of the station at 10101 Jefferson, did you notice or

obtain knowledge to the effect that the Citrin & Kolb
782 station just mentioned, was selling at a lower price
than you were?

A. In the Fall of '36, about six or seven months after I had taken over the station—I took over the station May 26, 1936.

Q. How did you obtain knowledge of the fact that the station was selling below you?

A. Both through loss of gallonage and through customers coming in, saying that they could get it cheaper other places, and why pass places that were selling it cheaper, to come to me, when it was all on their route.

Q. Who told you that?

A. Several of the customers, people that had been buying there for years.

Q. Where did they say they were getting their gasoline at a lower price?

A. They were buying it at Citrin & Kolb.

Q. At Jefferson and Nottingham?

A. That is right. Later on, they also brought in Ned's Auto Supply, which is just—

Q. Where is Ned's located?

A. Ned's is located just two blocks nearer the city, on the same street, than Citrin & Kolb, about three blocks.

Trial Examiner Ballinger: What did you start to say, "later on they brought in Ned's" what?

The Witness: They were bringing in information
783 that they could buy it from Ned's as well as they
could from Citrin & Kolb; that it was more general.

By Mr. Austin:

Q. Did that price cutting become more general as to other stations?

A. It did.

Q. In 1937?

A. Yes.

Q. Or 1938?

A. Yes, it did.

Q. When? In both of those years or—

A. It was more prominent in 1938. That was when I showed my biggest loss of gasoline.

Q. You mean your volume dropped in '38?

A. My volume dropped in '38.

Q. Did you eventually cut your price, and by that I mean, reduce the margin between your buying price and selling price?

A. When I saw that I couldn't hold up otherwise.

Q. Just what did you do?

A. I dropped to meet competition, lowered our margin. We paid a certain—

Q. Did you cut your price how much? Or what did you do about that?

A. It varied at different times. Sometimes the margin would drop a cent; sometimes it would drop two cents, 784 according to the prices that were being posted.

Q. Posted where?

A. Both on sidewalk signs, and coming through the mail.

Q. At what stations?

A. Mostly—well, all of the stations along in there, all of the outlets, Standard Oil outlets, and White Star, and Sinclair, and Hi-Speed.

Q. That is, 1938?

A. 1938.

Q. They were all cutting?

A. They were all cutting their price. They were about the same as I was: They weren't trying to bring on competition, but to meet competition.

Q. Well, don't try to tell us what they were trying to do, Mr. Richards, because—

Mr. Hanley: Yes. May that be stricken?

Trial Examiner Ballinger: That will be stricken. Read that language so we will see exactly what is to be stricken.

The Reporter: (Reading.) "They were all cutting their price. They were about the same as I was: They weren't trying to bring competition, but to meet competition."

Trial Examiner Ballinger: That is what you desire stricken?

785 Mr. Hanley: It may stand, so far as I am concerned, except that portion, "They weren't trying." Beginning, "They weren't trying."

Trial Examiner Ballinger: Commencing with, "They weren't trying" may be stricken.

786 Q. Will you state again when you first noticed that advertising of 2 cent discount at the Citrin-Kolb station?

A. It was noticed in the fall of 1936.

Q. Do you recall any conversations with any of your customers whom you were soliciting to buy gasoline at your station, or did you discuss with any customers the reason why they may have left your station?

A. I didn't go out of the station to find out that, but I talked to them as they came into the station for various things, to see if I had started to cut so that they might come back to me, to buy gasoline.

Q. Yes?

A. As long as it wasn't costing them anything they would buy from me, but as long as they were saving money they would buy from somebody else.

Q. Is that what they told you?

A. Yes.

Q. Did they say where they were saving money?

A. They said they were getting it from Citrin-Kolb at that particular time.

Q. And how long did you continue to reduce your price after you—didn't you say it was in 1938 that you began to cut your price, or did I ask you that? I thought you did.

A. I believe you did ask me that question.

Trial Examiner Ballinger: When was it?

787 The Witness: Will you ask the question again, please?

By Mr. Austin:

Q. When did you reduce your price to the price which was being charged by most of the other stations in your neighborhood?

A. When I found I couldn't exist—

Q. Just what year was it?

Trial Examiner Ballinger: What year, what month?

A In February of 1937 I was buying it at 13.6 and selling it at 17.

In March, the same.

April was the same.

Then in June it was selling at 13.9 and we were selling it at 18.1. It continued that way on down through to September.

Trial Examiner Ballinger: September 1937?

The Witness: Yes, your Honor.

Trial Examiner Ballinger: The question is, when did you commence cutting your price to meet competitive posted prices?

The Witness: In 1939, the early part of 1939. In 1937 I pumped 249,000 gallons.

By Mr. Austin:

Q. I don't want to interrupt the answer to your
788 question, but I believe I can hurry this along a little bit. Will you look at your records during July, August, and September of 1938 and see whether that helps refresh your recollection?

A. In July of 1938 the gasoline was jumping around there. It was reduced one cent. We were paying 13.8 and it dropped to 12.8, and we were selling it for 18.6 from the 1st of July to the 22nd of July and 18.1 from July 22nd to the 27th, and then it dropped again to 16.1, July 27th to the 31st.

Q. Why was the cut from 18.1 to 16.1?

A. That was when we started to meet competition.

Mr. Hanley: What was that date?

Trial Examiner Ballinger: July, 1938; is that correct?

The Witness: That's right; during that month.

Trial Examiner Ballinger: That is the date you commenced cutting, to meet competition?

The Witness: That's right.

By Mr. Austin:

Q. How long did you continue that reduction which you described as a price cut?

A. The price remained the same until December of 1938. We were buying the gasoline at 12.8 and selling it at 14.6.

Trial Examiner Ballinger: Is that the date when
789 you ceased cutting prices?

Mr. Austin: If your Honor please, I would like to have him read into the record at this point, starting with July of 1938 until through March of 1939, the prices he was paying for gasoline and the prices that he was selling it at in his station.

Will you do that, Mr. Richards?

A. Starting July, 1938, for Red Crown, we were paying 13.8—

Q. You can limit it to Red Crown. You don't need to go into Ethyl or Stanolind.

A. —and we sold it at 18.6. We sold it from the 1st to the 22nd and then July 22nd, we dropped to 18.1.

Q. That's your selling price?

A. That's the selling price. On the 27th to the 31st [illegible] started selling it at 16.1.

Trial Examiner Ballinger: That is the commencement of your cut, again?

The Witness: That is the commencement of the cut.

By Mr. Austin:

Q. Will you proceed for the month of August?

A. The month of August we bought it at 12.8 and sold it ~~at 16.1~~.

September, 12.8 and 16.1.

October was 12.8 and sold at 16.1.

790 November, 12.8 and sold at 16.1 from the 1st to the 18th and then sold for 14.6 from the 18th to the 30th of November, 1938.

We were still paying 12.8 for it and selling it for 14.6 in December, right straight through the month of December.

Q. Now, in January, 1939.

A. We bought it at 11.6 and sold at 13.9.

February 11.6 and sold at 16.1.

Q. Is that the point when you quit the price-reductions?

A. That was when we were getting a little more margin on that.

Q. That was February, 1939?

A. That's right.

Q. For the next few months there did your price remain as high as 16.1?

A. No. In March it was 14.7.

April was 14.7.

May, 14.7.

Q. Was that reduction from 16.1 to 14.7 in line with the other stations in your neighborhood, or not?

A. Yes, sir. I have never made any individual changes. It was when the majority were making these changes, that I changed. In any of these figures—none of them were made of my own accord. It was sort of meeting competition.

791 Q. Does the majority include the Citrin-Kolb station at Jefferson and Nottingham; referring now to 1939?

A. No, that would not include—I couldn't say that it did, because I have no knowledge as to when they discontinued.

Mr. Austin: That's all.

Cross-Examination by Mr. Hanley.

Q. Mr. Richards, the station which you operated last was located at 10101 Jefferson Street?

A. Yes.

Q. And which way does Jefferson Street run?

A. It runs east and west at that particular point.

Q. And were these Ned's location and the Citrin-Kolb location that you have been talking about on Jefferson Street east or west of you? Where were they in relation to your station?

A. They were east of me, on the same side of the street, so any traffic coming into town would pass them as well as myself.

Q. The center of town is west of you?

A. That's right.

Q. And they were further on to the east?

A. That's right.

792 Q. Which one of them was closest to your station?

A. Ned's Auto Supply would be the closest.

Q. And how far from your station was that?

A. It would be about a mile and a half.

Q. And how far from your station was the Citrin-Kolb station that you have been talking about?

A. It would be about the same distance; about three or four blocks farther than that.

Q. So it was the Citrin-Kolb and the Ned's stations that were close together; within three or four blocks of each other, and both of them approximately a mile and a half, did you say, from your station?

A. That's right.

Q. Now, Jefferson is one of the main arteries in Detroit, isn't it?

A. That's right.

Q. There is a lot of traffic on the street and a lot of service stations on the street?

A. That's right.

Q. All the way out from the center of town here, for a number of miles? That's true, isn't it?

A. There are stations out about six miles from town from the city proper. At the city limits you go into villages there where there are very few gas stations. There is a distance of eight or nine miles where
793 there are no gas stations at all.

Q. Is that west or east of you?

A. That is east of me.

Q. But between your station location and town there were a number of filling stations?

A. That's right.

Q. And is that true in the mile and a half between you and Citrin Kolb and Ned's stations, also?

A. There are several stations in between there, yes.

Q. Those stations represent, would you say, practically all of the brands of gasoline that were sold at that time in Detroit?

A. Yes, sir.

Q. You have stated that you learned some time in 1936 that the Ned's station and the Citrin-Kolb station, to which you have referred, were selling about 2 cents lower than your price. Will you fix the time as accurately as you can in 1936 when you first learned that?

A. That would be about November. It was in the fall of 1936.

Q. Is that the first you knew of those stations specifically?

A. That is the first.

Q. Did you know of any other stations anywhere in the vicinity that were doing likewise?

794 A. Not just at that particular time. There were, later.

Q. And how much later?

A. Going into 1937.

Could I read the amount of gallons that I pumped each year, so that you might see at the time that I was taking my biggest loss? Would that help you any?

Q. I have no objection to your doing so if Mr. Austin desires that testimony. I don't care particularly to have it.

Mr. Austin: Let us let him read them in as long as we are not using the whole exhibit, if you don't object.

Mr. Hanley: No, I don't object.

795 The Witness: In 1937 I pumped 249,658 gallons; in 1938 I pumped 196,351; in 1939 I pumped 250,505. And the difference between the '37 and '38, you will see that I lost 53,000 gallons in '38, but I gained it back again in 1939, when the price became established.

By Mr. Hanley:

Q. In the first place, Mr. Richards, didn't everyone lose gallonage in '38? I mean by that, wasn't it generally a bad year in the oil business?

A. It was for some of us, but not for all of those—

Q. I am talking about the industry generally. Wasn't the general sales of gasoline lower in 1938, for instance, than they had been in 1937, or do you know?

A. I don't know that. I know that those that maintained the price, didn't have a good year, but those that didn't—

Q. Well, at that time—

A. —made a harvest.

Q. —you were getting 4.8 margin, weren't you?

A. In '38?

Q. No, no, in 19—

A. '36.

Q. —'37?

A. '37.

Q. You were attempting to maintain that margin until you made your cut in July, 1937; weren't you?

796 A. That is right.

Q. And from your experience in the oil business, Mr. Richards, would you say that it is true that there are many dealers who are willing to operate on a lesser margin than 4.8 cents?

A. No, I don't know of any dealers that are willing. There are a great many that are, but not willing.

Q. Are there not a great many who voluntarily do?

A. There are not a great many that do. There are some that are doing it, but not because they feel that that is a wise thing to do. As long as the rest don't cut price, they get the other man's business, but it starts the war all over again as soon as it is found out.

Q. Isn't it true, Mr. Richards, that after a margin reaches a certain spread, that there always has been someone, or there will always be someone who will be willing to take a lesser margin.

Mr. Austin: I object to that question, Your Honor, on the ground that it is speculative and calls for a conclusion of the witness.

Mr. Hanley: He is giving his opinions here as to what they would do and why they will do it, Mr. Austin.

Mr. Austin: You have been asking for them, but this is asking what somebody else will do.

Mr. Hanley: I ask it based on his experience and observation in the oil business.

797 Trial Examiner Ballinger: The objection is overruled. You may answer.

The Witness: Could I have your direct question again, please?

By Mr. Hanley:

Q. I will tell you. I will reframe the question so everybody will understand it.

Assuming that the cost of gasoline, plus cost of sale of gasoline, are the same to a number of dealers, and that those dealers raised that margin between that cost of gasoline, plus cost of sales, on the one hand, and retail sale price on the other, if the raising of that margin is continued, does there not come a time when some of those dealers will begin to undercut that margin and be satisfied with less returns?

Trial Examiner Ballinger: Do you understand the question?

The Witness: I believe the question is that, would the average dealer be satisfied with a given profit, or wouldn't he rather—would he undertake to sell for less and be satisfied with less?

Trial Examiner Ballinger: I think I will sustain the objection to the question.

Mr. Hanley: I think I will withdraw the question. I can prove this if it becomes pertinent, very much more directly. I believe that is all, Mr. Richards. Oh, 798 pardon me. I do have just one other thing.

By Mr. Hanley:

Q. During the last three or four years has there not been a lot of repair work on Jefferson Avenue at various points?

A. Yes, sir, there has been.

Q. It has been torn up someplace most of the time, hasn't it?

A. The biggest part of the time.

Q. And wherever it is torn up, it has some effect on the gallonage of any service stations that may be adjacent to that repair work, doesn't it?

A. That is right.

Q. Did any of that ever occur in front of or near your service station while you were located on Jefferson?

A. Not in the last four years.

Mr. Hanley: That is all.

Redirect Examination by Mr. Austin.

Q. You said that you live at St. Clair Shores?

A. Right.

Q. That is a suburb of Detroit?

A. No, sir. That is a village outside of Detroit. In travelling east, you go through Grosse Pointe.

Q. How far out is it from your station?

A. Thirteen miles from our house to my station. It is the same street, Jefferson Avenue.

799 Q. Is that the through artery for the people who live in your locality, to go back and forth from Detroit?

A. That is.

Q. And also for Grosse Pointe?

A. That is right.

Q. Do you drive back and forth every day?

A. I do.

Q. And does that take you past Ned's station and the Cifrin & Kolb station, that you mentioned?

A. It did, until I changed addresses in November, 1940.

Mr. Austin: That is all.

Mr. Hanley: That is all.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Mr. Austin: If Your Honor will be pleased to recess for five minutes, I may or may not call a witness. I haven't had a chance to talk to him.

Trial Examiner Ballinger: Take a recess for five minutes.

(A short recess was taken.)

Mr. Austin: I move we adjourn until 10:00 o'clock tomorrow, Your Honor.

Trial Examiner Ballinger: The motion is granted. Now, at 4:30 o'clock P. M. the hearing stands adjourned, to
800 reconvene at 10:00 o'clock Eastern Standard time, March 15, 1941, in Room 859, Federal Building, Detroit, Michigan.

(Whereupon, at 4:30 P. M. March 14, 1941, the further hearing of the above-entitled matter was adjourned.)

801 Room 859 Federal Building,
Detroit, Michigan,
March 15, 1941.

Met, pursuant to adjournment, at 10 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

H. R. Hanley, Esq., 910 S. Michigan Avenue, Chicago, Illinois, on behalf of the Respondent.

802 PROCEEDINGS.

Trial Examiner Ballinger: We will come to order, gentlemen.

The hearing of Docket No. 4389, a case entitled In the Matter of Standard Oil Company, is convened at 10 o'clock Eastern Standard Time, March 15, 1941, in Room 859 Federal Building, Detroit, Michigan.

The last hearing was held in Detroit March 14, 1941.

The reporter will note counsel for the Commission and counsel for the Respondent present.

You may proceed.

Mr. Austin: Will you take the stand, Mr. Miller?

ROMAN L. MILLER was thereupon called as a witness by and on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. Will you give your name to the reporter?

A. Roman L. Miller.

Q. And where is your residence?

A. I live at Mt. Clemens.

Q. Mt. Clemens?

A. That's right.

Q. What is the address there?

803 A. Beg your pardon?

Q. What is the address?

A. 1740 Clinton Boulevard.

Q. What is your business, Mr. Miller?

A. Garage and gas station operator.

Q. Do you operate a retail gasoline station?

A. Yes.

Q. Where is it located?

A. 7450 Oakland.

Q. Do you have any other property at that corner?

A. I didn't quite get that.

Q. Do you have any other property at that corner?

A. No; not at 7450. We have a garage at 7453. Is that what you mean?

Q. What is the cross street there?

A. Custer.

Q. And the garage, then, is diagonally across the street from the service station?

A. That's right.

Q. How long have you operated the service station at 7450 Oakland?

A. Since 1937.

Q. Prior to that were you in the service station business?

A. Yes. That was 7451 Oakland, which is right across the street.

804 Q. How long have you been in the gasoline business?

A. I believe it was in 1934 that we took that station over.

Q. Were you in the gasoline business before that?

A. No, sir.

Q. Did you own the property at 7451 Oakland?

A. No, we just rented that.

Q. Did you rent it from an oil company or from someone else?

A. We rented it from an individual.

Q. And you say you moved to 7450 Oakland in 1937?

A. That is right.

Q. What time in 1937, do you recall?

A. I believe it was along in July, maybe the first part of August, something like that.

Q. Do you own the property at 7450 Oakland?

A. Yes, sir.

Q. Have you owned it ever since you moved in there in 1937?

A. That is right.

Q. What brand gasoline did you handle there, at the former address, at 7451?

A. Standard.

Q. And did you handle Standard gasoline all of the time you were at that address?

A. That is right.

Q. Did you purchase your gasoline from the Stand-
805 ard Oil Company?

A. That is right.

Q. How were the deliveries made?

A. By tank wagon.

Q. The deliveries were made by the Standard Oil Company?

A. Yes, direct.

Q. In their tank wagons?

A. Yes.

Q. When you moved to 7450 Oakland, did you also handle Standard Oil gasoline in that station?

A. That is right.

Q. What brands do you handle? Red Crown?

A. Red Crown and Ethyl.

Trial Examiner Ballinger: When did you move to that address?

The Witness: I believe it was in August, July or August of 1937.

By Mr. Austin:

Q. Do you handle Standard Oil gasoline now?

A. No, sir.

Q. What brand do you handle now?

A. Cities Service.

Q. How long did you handle Standard Oil gasoline which you bought from the Standard Oil Company after you moved to the present address at 7450 Oakland?

806. A. One year.

Q. Then you changed your brand in 1938?

A. That is right.

Q. Was that about July, 1938?

A. That is right.

Q. And what brand did you change to when you changed from Standard?

A. Linco.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

By Mr. Austin:

Q. You say you handle Cities Service gasoline now?

A. That is right.

Q. Since when?

A. That would be since 1939.

Q. And you handled the Linco for about a year?

A. That is right.

Q. When you first moved into the station at 7450 Oakland, what was the gasoline tank capacity at that station?

A. We had three 2,000-gallon tanks. That would be 6,000.

Q. Three 2,000-gallon tanks?

A. That is right.

Q. Did you subsequently increase the tank capacity at that station?

807 A. I did later on, about nine months later.

Q. When would that be?

A. I would say April or May of 1939. I believe that would be right, wouldn't it?

Q. You said you moved there in 1937.

A. That must have been 1938.

Q. And how did you increase the capacity?

Trial Examiner Ballinger: That was April or May of 1938?

The Witness: That is right.

By Mr. Austin:

Q. How did you increase the tank capacity?

A. I put in a 10,000-gallon tank.

Q. Has that tank been installed in that station ever since that time?

A. That is right.

Q. So if I understand you correctly, you now have a 10,000-gallon tank, plus 3 2000-gallon tanks?

A. That is right.

Q. Were you purchasing gasoline from the Standard Oil Company at the time you installed the 10,000-gallon tank?

A. That is right.

Q. And for several months after that?

A. Yes, sir.

Q. Did you, in 1938, request the Standard Oil Com-
808 pany to be allowed to purchase gasoline in tank car quantities—in tank car—

Mr. Hanley: That is objected to on the ground that it is immaterial in the statute under which we are being prosecuted, the right specifically being given to the Respondent to select its own customer.

Trial Examiner Ballinger: Objection overruled.

Mr. Austin: I had not quite finished the question.

By Mr. Austin:

Q. I asked you if in 1938 you applied to the Standard Oil Company to be permitted to purchase gasoline in tank car quantities at tank car prices.

Mr. Hanley: Objection is renewed.

Trial Examiner Ballinger: Objection overruled.

A. Yes, sir.

By Mr. Austin:

Q. The answer was yes?

A. Yes.

Q. Was that request made after you had increased your tank capacity to 16,000 gallons?

A. Yes, sir.

Q. How was that request made?

A. First I took it up with the district salesman, and, of course, he never came back with any satisfactory answers.

Mr. Hanley: I move to strike "he never came back
809 with any satisfactory answers."

Trial Examiner Ballinger: You didn't hear anything further from him; is that it?

The Witness: That's right.

Trial Examiner Ballinger: The motion is granted.

The Witness: That means he didn't give me any answer—

By Mr. Austin:

Q. Just a minute. Did you ever receive an answer from this salesman to what you said to him?

A. No.

Q. What did you do next?

A. I wrote to Chicago.

Mr. Hanley: I move to strike the answer, no address being given.

Trial Examiner Ballinger: The motion is denied.

By Mr. Austin:

Q. To whom did you address your letter when you wrote to Chicago?

A. To Standard Oil Company. I think it is 910—whatever it is—Michigan Avenue.

Q. Have you a copy of the letter with you?

A. Yes, sir.

Q. Will you produce that letter, please?

(The witness handed document to counsel for the 810 Commission.)

Mr. Austin: I would like to have this letter marked for identification, please.

Trial Examiner Ballinger: The reporter will mark the letter Commission's Exhibit 62 for identification.

(The document referred to was marked, for identification, "Commission's Exhibit 62.")

By Mr. Austin:

Q. Is this letter, marked Commission's Exhibit 62, for identification—I will ask you what it is.

A. This is the letter I wrote Chicago.

Q. Is that the original, or a carbon copy?

A. This is a carbon copy of the letter I wrote to the Standard Oil Company of Indiana.

Q. Was that carbon copy made at the same time the original letter was written?

A. Yes, sir.

Q. And has that carbon copy been in your files since that time?

A. That's right.

Q. Produced from your files?

A. That's right.

Mr. Austin: I will offer this letter in evidence.

By Mr. Austin:

811 Q. One more question: Did you write this letter yourself?

A. Yes, sir—well, it was dictated. I didn't run the typewriter, if that's what you mean.

Q. You did dictate it?

A. Well, I was there—

Q. Did you sign it?

A. I did.

Mr. Austin: I offer it in evidence.

Mr. Hanley: The Exhibit, Commission's Exhibit 62, for identification, is objected to on the ground that it is hearsay; self-serving; a complaint by a dealer apparently written to the Standard Oil Company; is incapable of, in itself, proving or tending to prove or aiding in the proof of any issue in this case. It establishes nothing in respect of the issues and contains matter not identified by the witness.

Trial Examiner Ballinger: Off the record.

(A discussion enued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I want to say that I didn't want to be in the position of asking the witness about a letter which he said he had with him and not offer to produce it, but I do not press my offer that it be put in evidence. I am perfectly willing to bring out the facts regarding this tank car situation by oral testimony and do not feel
812 that it is important that the letter itself be introduced.

Trial Examiner Ballinger: Then the tender is withdrawn?

Mr. Austin: No, I will not withdraw the tender—in view of counsel's objection, I will withdraw the tender.

Mr. Hanley: Very well.

Trial Examiner Ballinger: Off the record.

(Discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: As I understand it, Mr. Austin, you are now withdrawing the offer of Exhibit No. 62, and hence, it is not necessary for me to amplify my objection.

Mr. Austin: I am withdrawing it in view of the fact it was objected to.

Mr. Hanley: Very well.

By Mr. Austin:

Q. After you wrote this letter, which you have referred to, to the Chicago office of the Standard Oil Company, did you receive a call from any employee or officer of the Standard Oil Company?

A. Yes, sir.

Q. And who was it that called on you?

A. Mr. Blough.

Q. Do you know Mr. Blough's position with the Standard Oil Company?

813 A. I don't know exactly, but I think he is one of the assistant managers, I believe, or something like that.

Trial Examiner Ballinger: That is your best information?

The Witness: I don't exactly know what his exact title is, but I know he is one of the men next to Mr. Raupagh.

Mr. Austin: Do you mind—

Mr. Hanley: We will stipulate. What time are you talking about?

The Witness: In March or April of 1938.

Mr. Hanley: We will stipulate that in March and April of 1938 Mr. Blough was an assistant to Mr. Raupagh, manager of the Standard Oil Company, Detroit Division.

Mr. Austin: Was he also in that same position in May, June, and July of that year?

Mr. Hanley: We will so stipulate.

By Mr. Austin:

Q. Did Mr. Blough have a conversation with you respecting your application to be made a tank car buyer?

A. Well, he came up there and we talked about the thing.

Q. Talked about what?

A. About this here tank car deal and about the only answer he gave me, that he didn't have anything for me,
814 and that was about the conversation.

Mr. Hanley: I object to the conclusion of the witness and request the conversation be given, if there was any.

Trial Examiner Ballinger: Objection sustained, and the answer is stricken.

By Mr. Austin:

Q. State the conversation, what you said and what Mr. Blough said.

A. He came up there and stated that they couldn't supply me with gasoline by tank train, like we were talking about, and, of course, then I went on further and said if I got a siding would he set it in on a siding, and I believe his answer was straight; he didn't answer yes or no.

Trial Examiner Ballinger: Did he mention the letter you had written to Chicago?

The Witness: Not to my knowledge.

Trial Examiner Ballinger: Prior to that time you had had no conversation with him about the letter?

The Witness: No, sir.

Trial Examiner Ballinger: And it was subsequent to the date when you wrote the letter to Chicago when he called on you?

The Witness: Something like three or four weeks 815 later, I would say.

By Mr. Austin:

Q. Was that Mr. Blough's language; that he didn't have anything for you?

A. Their answer was that they didn't have nothing for us.

Q. Did you tell Mr. Blough that you had 10,000 gallon tank storage at your station?

A. That's right.

Q. Or was it 16,000?

A. It was an additional 10,000 to what was already in.

Trial Examiner Ballinger: Making a total of 16,000?

The Witness: 16,000 gallons; that's right.

By Mr. Austin:

Q. Had you at that time made arrangements to have gasoline transported from a tank car siding to your station?

A. If they would be willing to put it on the siding, yes.

Q. With whom were those arrangements made?

A. Kaufman Cartage.

Q. Do you recall what the arrangements were as to the amount you were to pay?

A. You mean as to the price?

Q. Yes.

A. I believe it was .2 of a cent a gallon.

816 Q. And did you tell Mr. Blough that you had made such arrangements?

A. With the cartage company or with the siding?

Q. With the cartage company.

A. Yes.

Q. Now, as to the siding, what arrangements had you made if any, toward requiring a siding, toward acquiring a siding upon the which the tank cars could unload?

A. I did not make no arrangements direct.

Q. Where is the siding?

A. One block east of Mt. Eliot.

Q. Is that in Hamtramck?

A. Yes.

Q. Was the siding owned or controlled by the same persons from whom you purchased your 10,000-gallon tank?

A. Yes, sir.

Q. Who was that?

A. The Sterling Oil Company of St. Mary's, West Virginia.

Trial Examiner Ballinger: Do you mean a railroad spur, when you speak of a siding?

The Witness: Yes.

By Mr. Austin:

Q. Why did you think that you could obtain the use of that siding?

A. Well, it was standing there empty, and had
817 been for several years.

Mr. Hanley: That is objected to, and I move to strike out all of the evidence of the witness in reference to the siding, it now appearing he doesn't know anything about it, and he is attempting to conclude what somebody else would do, who owned the siding.

Mr. Austin: If Your Honor will have my question read back, I think you will find the question is responsive, the answer is responsive to my question.

Trial Examiner Ballinger: Objection overruled and the motion denied.

By Mr. Austin:

Q. Did you tell Mr. Blough that you had, that you would furnish a railroad siding for tank car delivery?

Mr. Hanley: That is objected to as leading. This is the Government's witness.

By Mr. Austin:

Q. All right, did you say anything to Mr. Blough about railroad siding, and if so, what did you say?

A. I asked him if they would put a carload of gas on a siding if I got a siding, and he put it there, and his answer was, they did not have nothing for me. He did not say yes or no.

Q. Did Mr. Blough or any other representative of the
Standard Oil Company either at that time or at any
818 time during the period from May to July of 1938,

from March to July of 1938, say anything to you about your credit standing?

A. No, sir, not to my knowledge, never told me anything.

Trial Examiner Ballinger: Did he make, did they make any inquiries about it?

The Witness: Did they?

Trial Examiner Ballinger: Yes, of you?

The Witness: No, sir, not of me.

Trial Examiner Ballinger: Or of anyone else, so far as you know.

The Witness: No, sir, it just so happened I had the money laying in the bank.

Mr. Hanley: I move to strike out the answer as being a voluntary statement on the part of the witness, as having no bearing on the issues in this case at all.

Trial Examiner Ballinger: Motion denied.

Mr. Hanley: Denied that he says that he has money in the bank without reference to whether you were told anybody about it.

Trial Examiner Ballinger: The witness has testified that he tried to buy gas in tank car quantities from Standard Oil, that he told them of his facilities, and that he now testifies that at that time he had the money in the bank to consummate the transaction, and that they made no inquiry of him as to his financial condition, his ability to pay.

819 By Mr. Austin:

Q. After July, 1938, you stated that you then began to purchase oil from the Linco Oil Company.

A. That is right.

Q. How was that—how were deliveries made?

A. Tank trains.

Q. By tank train?

A. That is right.

Q. Is that the same thing as transport truck?

A. I guess you would call it the same, yes, I guess.

Q. Were those deliveries made directly to your station?

A. That is right.

Q. And in what quantities did you take delivery, the largest quantities?

A. I think the largest was about 9,500.

Q. How frequently did you take deliveries in excess of 8,000 gallons?

A. Well each delivery was in excess of that. You mean how often?

Q. No, I meant rather the size of the deliveries whenever you had them.

A. That was around 8,000 to 9,500. It just depends on which train brought the gas.

Q. And what has been your method of payment for these deliveries?

820 Mr. Hanley: That is objected to as being immaterial.

Trial Examiner Ballinger: Is this another company?

Mr. Austin: Yes.

Mr. Hanley: If the question is to price, I withdraw my objection.

Mr. Austin: It isn't; it doesn't go into price.

Mr. Hanley: Well, then, I insist upon the objection.

Trial Examiner Ballinger: Objection sustained. Off the record.

(A discussion ensued off the record.)

By Mr. Austin:

Q. Have your deliveries from the Cities Service Company been in the same quantities or are you taking deliveries in a different quantity now?

A. I did not get that last part of the question.

Q. Have your deliveries from the Cities Service Company been in the same quantities, that is, of 8,000 or more, or are you now taking smaller deliveries?

A. Well, their trucks happened to be a 5,000-gallon truck, a little over 5,000, so that is the one I am using, so I take them in 5,000 gallon deliveries.

Mr. Austin: I think that is all I have of this witness, your Honor.

821 *Cross Examination by Mr. Hanley.*

Q. When did you cease buying Standard Oil products, Mr. Miller?

A. I believe it was when the contract expired, which I believe would be July 8th, 1938.

Q. And how long prior to July 8, 1938, had you been buying Standard Oil products?

A. I believe I started in January, 1934.

Q. And on July 8th you began handling what is known as Linco?

A. Yes, sir.

Q. Gasoline?

A. Yes, sir, that is right.

Q. Who supplied that?

A. Argo Oil.

Q. What is Argo Oil?

A. Well, they are the jobbers for Linco in this district.

Q. What is Linco?

A. Linco is the product of the Ohio Oil Company.

Q. Which oil company?

A. Ohio Oil Company. I don't know. Their office is in Ohio somewhere.

822 Q. There has been a lot of talk about what are major and non-major and off-brand gasolines. What is Linco gasoline in your estimation, a major or a non brand?

A. I could not answer that question. I am not familiar with their technicalities.

Trial Examiner Ballinger: You mentioned the Ohio Oil Company. Is that the Ohio Standard Oil Company?

The Witness: No, I think the Ohio Oil Company have their office in Findley, Ohio. It is an old oil company. I don't know just what is back of them.

By Mr. Hanley:

Q. How long did you handle the Linco gasoline?

A. One year.

Q. That is, until July 8, 1939?

A. That is right.

Q. What did you do then about supplies?

A. I changed to Cities Service.

Q. And since July 8, 1939, have you been handling Cities Service gasoline?

A. That is right.

Q. Are you handling it now?

A. Yes, sir.

Q. How many stations do you have?

A. Just the one.

823 Q. Are you a member of the Michigan Retail Gasoline Dealers Association?

A. Yes, sir.

Q. Do you know Rankin Peck?

A. Yes, sir.

Q. How long have you known him?

A. Ever since he started there with the Association; I imagine three years or whatever it is.

Q. Well, whatever it is, you tell me whatever it is.

A. Well, whenever he started. If there are any records when he started, that is when it is.

Q. Do you know?

A. I can't tell you exactly.

Q. Who is he in relation to the Michigan Retail Gasoline Dealers Association?

Mr. Austin: Your Honor, I object to further questioning regarding the Retail Gasoline Dealers Association or Mr. Peck, on the ground that it is immaterial.

Mr. Hanley: I will state that it is to show the animosity, prejudice, and hostility of the witness. It goes to his credibility.

Mr. Austin: The witness has testified to the fact that he actually had capacity to buy gasoline in the quantities in which he wanted to buy it, and consequently, I don't think it can be said that this is any hypothetical request of such as Mr. Raupagh referred to in his testimony.

824 Mr. Hanley: I think that is a matter for the Commission. As a matter of fact, I propose to make a motion about the entire testimony of this witness, and if you will prefer that I do it under your procedure before the cross examination, I will be glad to do that.

Trial Examiner Ballinger: You are at liberty to make that motion upon your statement that this line of examination goes to the credibility of the witness. The Examiner will admit it, subject to a motion to strike, and unless it does plainly appear that it pertains to his credibility, the motion will be granted.

Mr. Hanley: Well, I will make that motion now, and, perhaps, I should make it before the cross-examination goes, to the materiality of the entire testimony of the witness, and I will make that motion at this time. It is moved by the Respondent that the entire testimony of the witness, Roman Miller, be stricken, on the ground that it is incompetent, immaterial, and irrelevant to any issue in this case, as defined by the pleadings, or by the pleading as proposed to be amended by counsel for the Commission, that the entire substance of the evidence elicited from the witness goes to the question of whether or not he was able to buy gasoline, on terms not stated in the evidence, from Standard Oil Company, and that on terms not stated in the evidence, a failure to consummate any transaction ensued. That 825 even if there had been a definite proposition stated by the witness at the time, or by the Respondent at the time, and a consummation, though had failed, had such failure been attributable to the decision of the Respondent, the same was entirely within the rights of the Respondent, is that the Respondent is not required to sell to anybody that the Respondent does not choose to sell to, for any reason, and that the Respondent may have, or no reason at all. Further, that the specific statute under which the Respondent is being prosecuted in this action, expressly preserves the right of the Respondent to sell to its own customers. Further, that on the issue of discretion or injury to competition, the testimony of this witness can have no possible bearing. Note the end of the objection, and note on the record this request. The Respondent, at this time, requests of the counsel for the Commission, a statement as to whether or not the Government it taking the position in this proceeding that the Respondent is compelled by law, or that the Commission is attempting to compel the Respondent, for any reason, to sell to customers that the Respondent does not care to sell to, or transact business with.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: Only as to the question, I will hear from counsel for the Commission. Not as to 826 the motion.

Mr. Austin: I don't care to answer any questions of law, such as that just proposed by Judge Hanley, but I will say that I think that Mr. Miller's testimony is material; first, upon the, or may be material—

Trial Examiner Ballinger: You need not discuss that question at all. Only the question propounded by counsel for Respondent.

Mr. Austin: Well, I feel that it is not my province at this time to answer questions of law, such as those proposed by Judge Hanley; as to what the issues of the case are, I think the complaint is fairly clear on that point, particularly in connection with the rather voluminous answer of the Standard Oil Company.

Mr. Hanley: I thought it was, too, but I am very much confused now.

Trial Examiner Ballinger: The motion to strike is denied.

827 A. He is the executive secretary; if that's what you want.

By Mr. Hanley:

Q. You testified, did you not, Mr. Miller, in a case in July, 1938, in Detroit, Michigan, in which the Defendants or the Defendant was the Standard Oil Company in a criminal action in the Court of Judge Gordon; did you testify in such a case?

A. Yes, sir.

Q. That was at the time that you had written this letter that you referred to, Mr. Miller?

A. Yes.

Q. Referring back to the letter, was that letter written as the result of conversations which you and other dealers had had with Mr. Rankin Peck?

A. Not this letter.

Q. Was any letter at that time written?

A. It seems to me there was another letter. I don't have no copy of it. There was several dealers wrote to Chicago.

Q. You mean by "Chicago" the Standard Oil Company?

A. Standard Oil Company; that is right.

Q. Now, those letters were written as a matter of agreement between dealers and at the instance of Mr. Peck, weren't they?

Mr. Austin: Between whom?

828 Trial Examiner Ballinger: Judge, how does this affect the credibility?

Mr. Hanley: Your Honor, it just simply shows the whole purpose of the Defendant—in respect of this claimed testimony—is to demonstrate that there never was any bona fide intention of this man to buy tank car on the basis that Standard Oil sells tank car.

Trial Examiner Ballinger: Subsequently he did buy it.

Mr. Hanley: He bought it from one of these companies, Your Honor, that we have been trying to show, over the objection of Mr. Austin, was in competition with the Standard Oil, namely one of these off-brand outfits, the Argo Oil Company, and he got a price, and they took him away from us. We say that is competition. We have been endeavoring to assert that position over the objection of counsel.

Mr. Austin: That has nothing to do with Mr. Peck, and this witness actually bought a tank. That is the whole point. He bought a tank. He had it there and that conclusively answers the idea that the request was not bona fide.

Trial Examiner Ballinger: I don't see that it affects his credibility.

Mr. Hanley: Well, I will get on this point that your Honor has in mind, if your Honor thinks it has any 829 materiality at all; the testimony of this witness.

By Mr. Hanley:

Q. At that time, Mr. Miller, was the Standard Oil Company delivering anybody gasoline by tank train?

A. I don't think so; to my knowledge.

Q. You know, don't you?

A. I can't answer, because they might have delivered somewhere and I didn't know it.

Q. I am asking you if you know it.

A. If they delivered to anybody by tank train?

Q. In Detroit, of course.

A. I don't think they did, only out of their own bulk plants.

Trial Examiner Ballinger: The witness has answered as far as he knows they were not.

By Mr. Hanley:

Q. Was anything said by you in your conversation with Mr. Blough as to the price which you wanted on this gasoline?

A. Well, inasmuch as it would be delivered at carloads, I figured I was entitled to a carload price.

Q. Is that what you said to him?

A. I presume; in that language.

Q. Tell me not what you presume, but what you know about it.

830 A. It has been three or four years ago, but we naturally talked in those lines. If it was delivered in tank trains I should be entitled to a carload price, inasmuch as they didn't have to send cars around the siding—it would be delivered from River Rouge, or wherever the big tanks are; they would bring it in.

Q. Did you tell Mr. Blough that?

A. Yes, sir.

Q. Did you make any mention of a specific price?

A. There was nothing said, right to the penny, for the simple reason, I believe the carload price at that time was a cent and a half below tank wagon.

Q. Did you say anything about that?

A. I don't know just what we talked about. We talked for some little time, but I can't say exactly.

Q. You don't know whether that was said or not?

A. Not exactly.

Q. Did he say anything about the fact of whether or not the Standard Oil Company was delivering anybody by tank train at that time?

A. I don't recall he said they did or didn't. I know—I think I talked to Mr. Raupagh at one time and he said they didn't deliver to anyone by tank train.

Q. You knew that at that time, didn't you?

A. I think this was later, but I am not sure.

831 Q. Did you have your tanks at that time?

A. Yes.

Q. Did you tell Mr. Blough you had them?

A. Sure. And he knew I had them.

Q. You were a retail dealer?

A. That's right.

Q. Did you want to buy on a tank car basis in order to get the benefit of that reduced price?

A. Sure.

Q. Do you think that a man with 500 gallon tank capacity should buy on the same price?

A. If he had the capacity to put it.

Q. I said 500 gallons. Do you think he should buy on the same price?

A. He can't take the deliveries.

Q. I didn't ask you that. Do you think he should buy on the same price?

Mr. Austin: I object to this on the ground it calls for the opinion of the witness which he hasn't shown he is qualified to give.

Trial Examiner Ballinger: Objection sustained.

By Mr. Hanley:

Q. What do you think entitles you to a cent and a half below the tank wagon price?

A. Simply that when they deliver in tank trains 832 they save all that expense of handling.

Q. And you think that is a good reason, don't you, Mr. Miller?

A. That applies all over, if you buy strawberries or eggs or anything. A man who buys a carload of strawberries gets it cheaper than a man buying a case or a quart.

Q. By the way, did I ask you just when that conversation with Mr. Blough took place?

A. You mean with reference to this?

Q. Yes.

A. I think it was in March or April; it was in the spring, anyway.

Q. That is as nearly as you can fix the time?

A. That's right.

Q. And where did it occur?

A. Up at my station.

Q. And was anybody else there besides you and Mr. Blough?

A. Not when we were talking. We were standing outside. I know it was warm.

Trial Examiner Ballinger: I understand he called on you?

The Witness: That's right.

By Mr. Hanley:

Q. Now, when you began to buy gasoline from the 833 Argo did you get a reduction below the then prevailing dealer tank wagon price?

A. Yes, sir.

Q. How much?

A. A cent and a half a gallon.

Q. Did you get any other concessions?

A. From that company?

Q. From that company.

A. No, sir.

Q. When you began to buy from the Cities Service Company what was your price in relation to the prevailing dealer tank wagon price?

A. One cent.

Q. One cent?

A. That's right.

Q. And did you get any other concessions?

A. No, sir.

Q. Has that been the price to you from that time on?

A. Yes, sir.

Q. Of Cities Service products?

A. That's right.

Q. And how do you get deliveries?

A., As I say, their tank that they haul from the Rouge
is a 5,000 capacity and that's what they have been deliver-
ing in. The other company had an 8,000, which was
834 a tank train and trailer, but this company doesn't
have the trailer, so that makes the difference.

Q. I don't understand. What do you mean it makes a difference?

A. What I mean, it makes a difference in the quantity from 8,000 to 5,000.

Q. Does it have any reference in the difference of the price which you get, as between Cities Service and Argo?

A. No. My contract calls for 8,000 gallons, but they didn't have any 8,000 gallon tanks, and they said if it didn't make any difference to me, they would deliver in 5,000 lots, and I said, "That's O. K. with me."

Q. So they delivered to you in 5,000 lots at one cent below the dealer price?

A. That's right.

Q. And that has been going on for three years now, hasn't it?

A. A little over two years, isn't it; a year and a half—whatever it is.

Q. And going on to date; and still continuing; still continuing the arrangement?

A. That's right.

Q. Do you have a contract with them?

A. Yes, sir.

Q. A written contract?

A. Yes.

835 Q. Wherein they agreed to this arrangement on price?

A. I can't answer that exactly. I would have to take a look at it.

Q. But the fact is you always get the one cent below the dealer price?

A. That's right.

Q. Is that right?

A. That's right.

Q. Now, on this conversation you had with Mr. Blough—returning to that—I would like to have you tell the Court what was said, if anything, about any credit arrangements or any other arrangement besides your storage, in connection with your buying tank car?

A. Credit never was mentioned.

Q. Now, you were permitted to say you had the money in the bank to buy tank car, and this occurred when, in July—

A. No, March, April, or May of 1938.

Q. How much money did you have in the bank?

A. I think there was around 1300, 1400, maybe $1500, around $1500. I don't know; something like that.

Q. What bank?

A. Detroit bank.

Q. You regard that as sufficient capital to go into the tank car business and gasoline?

A. That would buy a carload.

836 Q. Yes, I agree it would buy a carload. Now, you bought merchandise from the Merchant Supply Company, didn't you, Mr. Miller?

A. Yes; I still do.

Q. And were at that time, weren't you?

A. Yes.

Q. Do you know anything about your credit rating there?

A. They get their money—2% every month, right now, I know that.

Q. Do you know what they were getting at that time?

A. I don't know. Things were pretty tough in 1938. Maybe they weren't getting their money then.

Q. Do you know what investigation the Standard Oil Company made of you as a credit risk for a tank car buyer?

A. I don't know, but I know the money was there.

Q. You know the $1500 was there?

A. You bet your boots I do!

Q. What have been your prices in respect of the retail business that you do in relation to the prevailing retail price during the time that you have been in business at your present location?

A. The prices are the regular posted prices.

Q. Have you ever given any concessions or discounts or—discounts or rebates or premiums?

A. There was a time there when the so-called price
837 war was on, I gave—I think we had a phoney price up, like all of them did, but otherwise it is the regular prevailing price to customers.

838 Trial Examiner Ballinger: You say "A phoney price." What do you mean by that?

The Witness: A little lower than the prevailing price. They had all kinds of things up. They would change your oil free, and wash free, and all that stuff. That's what I mean by "phoney prices." Everyone had a different setup.

By Mr. Hanley:

Q. In your conversations with Mr. Blough, did you have some talk about a railroad siding?

A. I asked him—first, he said they didn't have nothing for me on the tank train, and I said, "If I get a railroad siding, will you shunt a car in on that," and he said they have nothing for me. He did not answer me yes or no.

Q. All you said to him was, if you get a railroad siding?

A. That's right.

Q. That's all you said to Mr. Blough?

A. That was the end of the conversation, because when he said he had nothing for me, it was no sense in going any further. We quit then, because that was the end.

Q. You didn't, at that time, tell him you had any railroad siding?

A. I didn't have it. There was one available over there, and I figured if he would say he would, I was going to get in touch with those people and get it.

Q. You mean, you thought it was available?

839 A. It was available because it was standing idle for five years, and anything standing idle for five years, it is available.

Mr. Hanley: I move to strike the answer as a conclusion of the witness.

Trial Examiner Ballinger: Motion denied.

By Mr. Hanley:

Q. Do you know, from any transactions you had with the owner of that siding, whether or not it was available?

A. I didn't right then, because—

Q. Just answer the question. Do you know, from any transaction that you had with the other of that siding, whether or not it was available to you?

A. I take it it was; because they corresponded with me, and wanted to sell me all the tanks on there.

Q. When?

A. That was in March.

Q. How much did they want for this siding and tank situation?

A. I am telling you, I never said anything about the siding. All they wanted to do was get rid of the tanks they had there. They had about fifteen of them.

Q. You weren't corresponding about the tanks?

A. Nothing was said about the siding. They had used it in years gone by.

840 Q. How much did they want?

A. I bought the one I got for $175.00. There were 16,000 there.

Q. Where were they in relation to your station?

A. About two miles.

Q. Did you have a truck?

A. No.

Q. A tank truck?

A. You mean, to haul this gasoline?

Q. That would be capable of hauling?

A. No, I was going to hire the gasoline hauled by one of the big tank trains at .2 of a gallon.

Q. Who was going to haul it for you for .2 of a cent a gallon?

A. Kaufman Cartage.

Q. Did you have that deal made?

A. Oh, yes.

Q. Did you say any of those things to Mr. Blough?

A. I told him if he could shunt the car in, I would take the gasoline out of it and move it over here.

Q. And what did he say?

A. He said, "We have nothing for you."

Q. And you interpreted that as meaning that the Standard Oil Company wouldn't do any business?

A. On that basis; certainly not.

841 Q. And as a result of that, you began to buy an off-brand gasoline, as you call it: the Linco?

A. I didn't call it an off-brand.

Q. I beg your pardon. I don't think you did; other witnesses did. But that was a price a cent and a half off the dealer's price?

A. That's right.

Mr. Hanley: That's all.

Redirect Examination by Mr. Austin.

Q. What are you charging for gasoline?

A. I think it is 16.3 on regular; seven for $1.14.

Q. Seven for $1.14?

A. Yes.

Mr. Austin: That's all.

Trial Examiner Ballinger: You are excused.

(The witness excused.)

Mr. Hanley: I renew my objection to this testimony, and renew my motion to strike, for all of the reasons originally assigned, and for the additional reason nothing has been since elicited in the testimony of the witness, that makes it material, relevant, or pertinent to any of the issues in this case, defined by the present pleadings, or by the pleadings as proposed to be amended by counsel for the Commission.

842 Trial Examiner Ballinger: The objection is overruled, and the motion is denied. You cannot properly, at this time, submit a motion to strike that portion of the examination pertaining to Mr. Peek. When the record is written up, if you will bring it to the Examiner's attention, he will entertain a motion to strike that portion of the cross examination, which counsel stated would run to the credibility of the witness.

Mr. Austin: I have no further witnesses this morning, and I move that we adjourn until Monday at 10:00 o'clock.

Trial Examiner Ballinger: Without objection, the motion is granted, and now, at 11:35 A. M., the hearing stands adjourned, to be reconvened at 10:00 o'clock A. M., March 17, 1941, in Room 859, Federal Building, Detroit, Michigan.

(Whereupon, at 11:35 A. M., March 15, 1941, the hearing in the above-entitled matter was adjourned.)

843

Room 859 Federal Building,
Detroit, Michigan,
March 17, 1941.

Met, pursuant to adjournment, at 10:00 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

H. R. Hanley, Esq., 910 S. Michigan Avenue, Chicago, Illinois, on behalf of the Respondent.

844

PROCEEDINGS.

Trial Examiner Ballinger: Come to order, gentlemen.

The hearing of Docket No. 4389, the case entitled In the Matter of the Standard Oil Company is reconvened at 10 o'clock A. M., Eastern Standard Time March 17, 1941, in Room 859 Federal Building, Detroit, Michigan.

The last hearing was held in Detroit on March 15, 1941.

The reporter will note counsel for the Commission and Respondent present.

You may proceed, gentlemen.

ELMER E. LEDBETTER was thereupon recalled as a witness by and on behalf of the Commission, and, having been heretofore duly sworn, testified further as follows:

Direct Examination by Mr. Austin.

Q. Mr. Ledbetter, when you were on the stand before, I believe that I asked you some questions about your purchase of gasoline from the Standard Oil Company and the method in which it was delivered, and, to refresh my memory, when did you start buying gasoline in tank car quantities from the Standard Oil Company?

A. It was in August of 1935.

Q. And I believe you stated that for some time 845 after that, the Ethyl gasoline or so-called Solite Ethyl which you purchased was delivered to you by the Standard Oil Company in tank wagons and not in tank cars.

A. That is substantially the case. They delivered it to my stations or dealers.

Q. And how were those deliveries made?

A. Standard Oil tank wagon.

Q. Did you ascertain from your records what price you paid for that Ethyl gasoline that was so delivered?

A. I have sufficient records to make me absolutely positive as to the basis. I haven't all the records for the entire period. I wasn't able to find them in my files. They probably have been destroyed, some of them.

Q. To the best of your knowledge and belief, what was the price that you paid for Solite Ethyl purchased during that period, as compared with the posted tank wagon price for Solite Ethyl?

A. I paid the posted tank wagon price.

Q. Were there any exceptions to that, as far as you know?

A. I don't believe there were any exceptions to that.

Q. And did the Standard Oil Company deliver that gasoline in their own tank trucks?

A. That's right.

Q. How long did you continue to purchase the Ethyl gasoline in that manner?

846 A. July 3, 1936.

Q. In the case of the dealers whom you supply with gasoline for resale, was there Ethyl gasoline during that period received directly from the Standard Oil Company?

A. It was received by Standard Oil tank truck. I guess you would say it was directly from Standard Oil Company, yes.

Q. Did those dealers order the gasoline from you or did they order it direct from the Standard Oil?

A. It is my recollection—well, I wouldn't say. It might have been both ways. It is my idea that they would order through our office.

Q. And what price did those dealers pay for the Ethyl gasoline?

A. Exactly the same price I paid; the tank wagon price.

Q. Then you made no money on the sale of that gasoline?

A. That's right. It was handled with any profit, during that period.

Q. And how long did that continue?

A. Approximately 11 months.

Mr. Austin: I think that's all.

Mr. Hanley: No cross examination.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

847 Mr. Austin: [illegible]. Wotring.

JOHN H. WOTRING was thereupon called as a witness by and on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. Will you give your full name to the reporter, please?

A. John H. Wotring.

Q. And your address?

A. 8270 Carlin, Detroit.

Q. What is your business, Mr. Wotring?

A. Automobile business and gasoline; parts and accessories.

Q. What automobile?

A. Chevrolet and Buick.

Q. Are you a Chevrolet and Buick dealer, then?

A. Yes, sir.

Q. Where is your store located?

A. 14700 Michigan Avenue, Dearborn.

Q. Do you have car showrooms and also a gasoline station at that address?

A. Yes, sir.

Q. How long have you been located there?

A. At that particular spot, I have been there since August 1st, 1936.

848 Q. Were you in the automobile or gasoline business prior to that date?

A. Automobile.

Q. You have only sold gasoline since you have been at that address?

A. Yes, sir.

Q. What brand gasoline did you start out with there?

A. Cities Service.

Q. And how long did you sell Cities Service gasoline?
A. One year.
Q. Then what change did you make?
A. Changed to Standard Oil.
Trial Examiner Ballinger: When was that?
The Witness: August 1, 1937.

By Mr. Austin:

Q. Since August, 1937, have you been selling Red Crown gasoline?
A. Yes, sir.
Q. And what other brands?
A. No other brands.
Q. Ethyl?
A. Ethyl.
Q. Just those two; Red Crown and Ethyl?
A. Yes.
Q. From whom do you purchase your gasoline?
849 A. Mr. Ledbetter. I think it is called the Wayne Oil.
Q. Wayne Oil Company?
A. Yes, sir.
Q. How long have you been buying from Mr. Ledbetter?
A. Since August 1, 1937.
850 Q. By what method is the gasoline which you purchased, delivered to your stations?
A. Tank trucks.
Q. And are those the Standard Oil Company tank trucks, or are they the Wayne Oil Company trucks?
A. The Wayne Oil Company trucks, as far as I know they have the Wayne Oil's name on them.
Q. Do you know what price you are paying today for Red Crown gasoline?
A. I could not tell you to the cent; I know I am paying the prevailing price.
Q. You don't recall the exact figure?
A. No.
Trial Examiner Ballinger: When you say the prevailing price, you mean the posted price?
The Witness: The posted price on tank wagon lots.

By Mr. Austin:

Q. And do you know, or is it a fact, to the best of your knowledge, that since you started purchasing gasoline from the Wayne Oil Company in 1937, you have always paid the posted tank wagon price?

A. Yes, sir.

Q. Do you know what price you are selling gasoline for today?

A. Well, sir, I really don't know. I know that we are selling it at the standard retail price.

851 Q. You mean the prevailing retail price in your neighborhood?

A. Yes.

Q. Do you give most of your time to the automobile business, or the gasoline business?

A. That is right, the automobile business.

Trial Examiner Ballinger: When you say the prevailing retail price, do you mean the prevailing retail posted price?

The Witness: Yes, sir.

By Mr. Austin:

Q. I assume by posted, Your Honor, you mean posted on the pumps at the stations?

Trial Examiner Ballinger: That is right. There has been some testimony here that there was a variation between the prevailing retail prices.

Mr. Austin: Yes, certain periods. Not during 1940, but during certain periods.

By Mr. Austin:

Q. And can you tell me what your retail selling price of Red Crown gasoline was in 1937, after you started handling it, or in 1938?

A. We have always retailed our gasoline at the set retail price. We have never—in other words, we have never discounted it. Our price is given to us by the Wayne Oil Company.

852 Q. Does the Wayne Oil Company tell you what the prevailing price is?

A. The Wayne Oil Company even paints the signs.

Q. Then, do you sell merely at the price which the Wayne Oil Company tells you, or do you know that that is the prevailing price sold at to the major brand stations?

A. Well, as far as I know, it is the same price that the other, my other, competitors, such as Hi-Speed—they are right next door to me, and there is a Texaco station right across the street from me.

Q. I suppose you observe their signs?

A. Same as mine, yes, sir.

Q. During 1937, or 1938, or 1939, did you ever change the price that you were charging for Red Crown gasoline at your stations, except when the Wayne Oil Company changed your tank wagon price to you?

A. No, sir.

Q. And as I understand it, you never cut your price on gasoline during that period unless there was a drop in the tank wagon price?

A. That is right.

Q. How near to you is the nearest store and gasoline station operated by Ned's Auto Supply Company?

A. About five or six blocks.

Q. Where is it located?

853 A. On the corner of Maple and Michigan.

Q. And you are also on Michigan Avenue?

A. Yes, sir.

Q. Are they on the same side of the street, or the opposite side of the street?

A. The opposite side of the street, from me.

Q. Is Ned's nearer downtown, or farther out?

A. It is nearer town, nearer the City of Detroit.

Q. Do you know whether that station of Ned's Auto Supply Company was selling Red Crown gasoline at a lower price than you were, during any period from 1937 to 1939?

A. According to their signs, in front, they were.

Q. When was that?

A. 1938 and, I believe, the early part of 1939.

Q. You mean that you saw some signs in their stations?

A. Yes.

Q. What did the signs say?

A. 'Two cents off per gallon."

Q. Did you look at the price on the pumps, or see wha the two cents was off of?

A. No, I never bought any gas there. I just saw the big sign on the lamp posted out in front of their place.

Trial Examiner Ballinger: During what period?

The Witness: 1938, and I am pretty sure it was the early part of 1939.

854 By Mr. Austin:

Q. Is there a concern located near you, known as the Webb Lumber Company?

A. Yes, sir.

Q. Do they have lumber yards in the vicinity of your station?

A. Yes, sir.

Q. And where are the lumber yards located?

A. They are right across the street, in the same block from me.

855 Q. Who is the proprietor of that company?

A. Mr. Lowrie and Mr. Webb.

Q. Are you acquainted with either one of those gentlemen?

A. I know both of them.

Q. Did you ever solicit the business of the Webb Lumber Company—I mean the gasoline business of the Webb Lumber Company?

A. Yes, sir.

Q. Does the Webb Lumber Company operate trucks or what vehicles do they operate?

They operate both trucks and pleasure cars.

Q. Would you consider that a pretty nice piece of business if you could get it?

A. Absolutely. I imagine they operate about 20 pieces.

Trial Examiner Ballinger: When did you solicit them?

The Witness: About two months ago, right after the first of the year.

By Mr. Austin:

Q. Can you describe any conversation you had with Mr. Webb on that subject?

A. Well, I asked Mr. Webb for his gasoline business and he told me that he would be glad to give it to me, that I was much closer than Ned's Auto Supply Company, if I could meet the price of the Ned's Auto Supply Com-
856 pany, so I asked him what their price was, and he said two percent off per gallon.

Trial Examiner Ballinger: Did you say 2% off per gallon?

The Witness: I mean 2 cents off per gallon.

By Mr. Austin:

Q. Off what?

A. 2 cents off on a gallon of gas.

Q. Off of what? 2 cents off—did you tell him what your price was?

A. Yes, sir; my price was posted on the pumps.

Q. Did he tell you that Ned's was charging less than that?

A. Yes.

Q. How much less?

A. 2 cents less, and I told him I could not meet their price.

Q. And did he say he has been buying his gasoline at Ned's Auto Supply Company?

A. Yes, sir.

Q. And has he started buying any from you?

A. No, sir.

Q. Is the Webb Lumber Company closer to your station or to Ned's station?

A. It is much closer to me; about four blocks or five.

Mr. Austin: You may cross examine.

857 *Cross-Examination by Mr. Hanley.*

Q. Mr. Wotring, when you said your retail gasoline prices were given to you by the Wayne Oil Company, I presume you did not mean that they dictated to you what your price would be, did you?

A. No.

Q. You were at liberty to sell your gasoline at any price you wanted to, so far as the Wayne Oil Company is concerned, weren't you?

A. I imagine so. I pay them for it when I get it.

Q. And they just know what the prevailing retail price is and keep you advised about it?

A. Yes, sir.

Q. And you have used that price?

A. Yes, sir.

Trial Examiner Ballinger: You have no understanding with the Wayne Oil Company that you are to sell at the prices they designate?

The Witness: The only understanding that I have is that I sell at the posted price.

Trial Examiner Ballinger: And they furnish the posted price?

The Witness: They furnish the posted price; the same as the other Standard stations should sell it.

858 By Mr. Hanley:

Q. All we are seeking to learn here, Mr. Wotring, is whether you are at liberty, if you wanted to, to reduce your price of gasoline today, your retail price, a cent or half a cent or two cents or anything else you wanted, so far as the Wayne ~~Oil Company is concerned.~~

Mr. Austin: I will concede that he may do that; if that will help? I don't believe it is material, and the only thing I am interested in is what Judge Hanley, apparently, by his question, has also conceded, and that is that the price the Wayne Oil Company suggested to Mr. Wotring is what we have referred to here as the prevailing retail price.

Mr. Hanley: I think that clears it up. I wanted it understood that this man owns his own gasoline and can sell at whatever price he wants to.

Trial Examiner Ballinger: There is some doubt in the Examiner's mind, but the statement of counsel for the Commission disposes of the matter.

Mr. Hanley: Very well.

By Mr. Hanley:

Q. The lumber company that you referred to, Mr. Wotring, you said operated about 20 pieces; that is, 20 vehicles, largely delivery trucks?

A. Delivery trucks and salesmen's cars.

859 Q. During 1938 and 1939 when you observed these signs at Ned's Service Station, was it not true that during that period the practice of giving 2 cents a gallon discount and giving other discounts, premiums, and that sort of thing, was very prevalent throughout Detroit?

A. Yes, sir, it was.

Q. You never did do that, yourself?

A. No, sir.

Q. You could have done it had you chosen to do it?

A. I imagine I could have, yes, sir.

Mr. Hanley: I think that's all, Mr. Wotring, thank you.

Mr. Austin: Thank you, Mr. Wotring.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Q. Now, toward the latter part of 1937 did other stations begin to advertise discounts in your neighborhood? A. Considerably.

Q. And did you lower your price to meet—or to the same price which was being charged at any of these other stations?

A. Not for about 30 days after our two nearest competitors had dropped their price.

Q. And who were the two nearest competitors?

A. White Star Station on the corner of Rochester and Linwood and a Cities Service, across the street from us.

886 Q. When was that?

A. That was in February—I believe the White Star first started in January.

Q. January of what year?

A. January of 1938, and "Curley" Knowles, the operator of the station across the street from us, called upon them to prevail upon them to—

Q. Just a minute. Did you hear the conversation? You are just talking about a conversation between two other people?

A. No. I said myself and "Curley" Knowles, the operator of the Cities Service Station across the street, attempted to prevail upon the White Star dealer to stay along in line with us. He refused to do so, and then Mr. Knowles dropped his price, and I believe that was in February, and it caused such a tremendous loss in gallonage that we were forced to drop our price in March.

887 Trial Examiner Ballinger: March what?

The Witness: Of 1938.

By Mr. Austin:

Q. Now, did the Citrin-Kolb station, either under their name, or whoever was operating it, from time to time, continue to distribute these discount cards you have described?

A. When they first distributed the cards, and then, after concerted efforts of various dealers in making calls to dealers who were discounting with signs out, we were able to clear it up temporarily, and it was just a temporary clearing up on the part of the Citrin-Kolb station, and then they came out with another discount card and distributed them throughout the neighborhood; not only discounting on gasolines, but motor oils also.

Q. When was that?

HAROLD LEFSTAD was thereupon called as a witness by and on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. Will you state your full name?
A. Harold Lefstad.
Q. Your residence, Mr. Lefstad?
A. 11731 Nardin.
860 Q. Are you an operator of a gasoline station, retail gasoline station?
A. I am.
Q. Where is your station located?
A. 13100 Livernois, Buena Vista.
Q. That is in Detroit, is it not?
A. Yes, sir.
Q. How long have you been selling gasoline at that location?
A. Since October 1, 1936.
Q. Were you engaged in the gasoline business prior to that time?
861 A. Not just before that, no. I worked as a helper in a gas station before then, but not running one.
Q. Have you handled the same brand of gasoline since you have been at that station?
A. Yes, sir.
Q. At all times?
A. Yes, sir.
Q. And what brand is that?
A. Standard Oil.
Q. What different brands of Standard Oil gasoline do you sell?
A. Red Crown and Ethyl.
Q. Do you sell Ford Benzol or any other such brand?
A. No, sir.
Q. From whom do you buy your gasoline, Mr. Lefstad?
A. Wayne Oil Company.
Q. Is that the company which Mr. Ledbetter is president of?
A. Yes, sir.
Q. How is the gasoline delivered to your station?
A. Tank wagon.

Q. And by whose tank wagons?

A. Wayne Oil Company's.

Q. Are you familiar with the—or have you been at all times since you have been in business, been familiar with the posted tank wagon price of the Standard Oil Company?

862 A. Yes, sir.

Q. And can you tell me whether the price which you have been paying the Wayne Oil Company for gasoline, is the same as the posted tank wagon price of the Standard Oil Company?

A. Just exactly.

Q. Is there a gasoline station operated by Ned's Auto Supply Company in the same part of Detroit that you are located in?

A. Yes, sir.

Q. How far from your station is that station of Ned's Auto Supply Company?

A. About a mile.

Q. And exactly where is it located?

A. Corner of West Chicago and Grand River.

Q. Is there any through traffic from your station to or past Ned's station?

A. Yes, sir.

Q. How does that traffic run?

A. Livernois to Grand River, and Grand River, downtown.

Trial Examiner Ballinger: When you say there is some; is there a considerable volume?

The Witness: Yes, sir.

By Mr. Austin:

Q. Where does that traffic originate, or what suburbs or parts of the city does that artery serve?

A. Redford, northwest Detroit, Livernois.

863 Trial Examiner Ballinger: Is that street one of the main arteries?

The Witness: It is.

By Mr. Austin:

Q. Of course, I think we have already shown that Grand River was the main artery, but, as I take it from your testimony, do I understand Livernois runs into Grand River?

A. It crosses Grand River, yes, sir.

Q. Do you recall what price you were charging for Red

Crown gasoline in latter 1937 and the early part of 1938, or can you tell me what your margin was at that time?

A. About four and a half cents.

Q. Between your purchase price and your selling price?

A. Yes.

Q. I guess that's what margin always means.

A. Yes; about four and a half cents.

Q. At that time, do you know whether Ned's Auto Supply Company on Grand River was selling at the same price or higher or lower than you were?

A. They were selling lower than I was.

Q. How do you know?

A. Signs; there were signs up in front of Ned's.

Q. At their station?

A. That's right.

Q. Do you remember anything about those signs?

864 A. Just two cents off, is all I can remember.

Q. Did you notice the signs on their pumps?

A. No, sir.

Trial Examiner Ballinger: What period did you observe the two cents off at Ned's?

The Witness: It would be in 1938. I can't recall just when that started, but I know in the early part of 1938 they were up, the signs were up.

Trial Examiner Ballinger: Do you remember when it was discontinued, or has it been discontinued?

The Witness: Well, it was discontinued in 1939, in November, I believe. I am not sure of that, but I believe it was.

Trial Examiner Ballinger: Has it been renewed since?

The Witness: No, the signs aren't up now.

By Mr. Austin:

Q. You may look at that book, if it will help you in refreshing your recollection in answering it.

(A document was handed to witness by counsel for the Commission.)

Trial Examiner Ballinger: Handing the witness what?

Mr. Austin: A statement which he gave me, and which I hereafter intend to identify, Your Honor, but haven't reached that point now.

865 Trial Examiner Ballinger: You might identify it now.

Mr. Austin: It is a statement prepared by the witness.

Trial Examiner Ballinger: So that we will know what the witness is looking at, you may identify it now.

The reporter will mark it Commission's Exhibit 63, for identification.

(The document referred to was marked "Commission's Exhibit 63" for identification.)

By Mr. Austin:

Q. I will now show you Commission's Exhibit 63, for identification, and ask you if you will describe what that is.

A. Well, I have my daily gallonage for July, 1938, and, also, the daily gallonage for August of 1938, showing—well, our gallonage went down—

866 Q. Just a minute. Just state what it is.

A. It is the daily gallonage for the two months on the first page, and the monthly gallonage from 1936 through 1940.

Q. Who prepared those records?

A. I did.

Q. And from what source did your prepare them?

A. I have all my records.

Q. Are those the records maintained at your station?

A. Yes, sir.

Q. And do those records show your daily and monthly gallonage?

A. They sure do.

Q. These records are true, to the best of your knowledge?

A. They are.

Q. I believe you were asked by the Trial Examiner how long Ned's continued to post the 2 cent discount signs at their station.

A. That's right.

Q. And did you complete your answer to that question?

A. Well, I think I did. I think it is November of 1939.

Q. Now, after those discount signs were displayed at Ned's Auto Supply Company station on Grand River, did your volume of business increase or decrease?

A. It decreased.

867 Q. Did you have any conversations with any of your customers or former customers regarding the purchase of gasoline or discounts that they were receiving at Ned's station?

A. Well, I had several at the time, but I can't remember any particular person or persons.

Q. Can you remember any particular conversations?

A. Well, they asked for a discount. They would tell me they could get it at Ned's. Outside of that, I haven't any particular case.

Q. Did they buy at your station just the same, even though you didn't give them the discount?

A. No. Most of them didn't.

Q. You mean they would ask for a discount?

A. And leave.

Q. That's what I wanted to get at. If they bought from you, anyway, it wouldn't make much difference.

A. That's right.

Trial Examiner Ballinger: They asked for a discount and you refused to allow it and then they left, without purchasing?

The Witness: That's right.

Trial Examiner Ballinger: And that continued during the period that Ned's was giving the discount?

The Witness: Part of it.

868 Trial Examiner Ballinger: What part of it?

The Witness: Well, we met Ned's prices, I think, in August of 1938; August 4th or 5th, I believe, we also posted a sign to meet the competition.

By Mr. Austin:

Q. How much did you cut your price at that time?

A. We just met Ned's.

Trial Examiner Ballinger: How long did that continue?

The Witness: Do you mean at that particular price or—

Trial Examiner Ballinger: Yes, while you were cutting the price to meet Ned's.

The Witness: We met Ned's, then, until—I am not sure whether we met them all the time, but I know we tried to meet Ned's from then until 1939 when Ned's also took their signs down.

By Mr. Austin:

Q. Until what part of 1939?

A. November.

Q. Now, you stated that you reduced your price to the price that Ned's was charging on, I believe you said, August 5th?

A. I believe that is what it was.

Q. Does this first sheet in Commission's Exhibit No. 63, for identification, show the daily volume of gasoline 868½ sales at your station immediately before and after the time that you cut your price?

A. That is right.

Trial Examiner Ballinger: During the period when you met Ned's price, you didn't lose any customers, did you?

The Witness: No, sir.

Trial Examiner Ballinger: It was before you commenced cutting that you lost customers?

The Witness: Yes, sir.

By Mr. Austin:

Q. In the fall of 1939, in September, did you make a further price cut at that time? That is, narrowing your margin again?

A. Yes, sir.

Q. And are the dates of those price cuts which you have described, indicated on this volume chart which is marked Commission's Exhibit No. 63, for identification?

A. Yes, sir.

Mr. Austin: I will offer this booklet in evidence with the statement that it is only the first four pages that have anything on and the cover is no part of the exhibit. These pages, I assume, may be torn out by the reporter or cut out and properly marked. I think that could be done physically without in any way impairing the exhibit.

869 Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Mr. Hanley: We haven't any objection and no objection to removing the sheets and marking that.

Trial Examiner Ballinger: Well, I suggest they be removed, now, and appropriately marked and they may be posted on cards.

(Thereupon Mr. Austin tore the sheets out of the Exhibit.)

Mr. Austin: I offer, your Honor, these exhibits and suggest that they be marked Commission's Exhibits 63-A and 63-B.

Trial Examiner Ballinger: How many pages?

Mr. Austin: There are two sheets, both written on both sides.

Trial Examiner Ballinger: Without objection Commission's Exhibit 63-A and B, for identification, are admitted into evidence.

(The documents referred to, heretofore marked "Commission's Exhibit 63," for identification, were marked "COMMISSION'S EXHIBIT 63-A and 63-B," for identification, and were received in evidence.)

Mr. Austin: That is all I have right now from
870 this witness.

Cross-Examination by Mr. Hanley.

Q. Mr. Lefstad, is there a service station near you on Livernois and Davison operated by the Royal Petroleum Company?

A. Yes, sir.

Q. And how long has that station been there?

A. I don't know. I believe it has been there as long as I have, or longer.

Q. It was there through 1936, 1937, 1938, and 1939?

A. Yes, sir.

Q. And it is still there?

A. That is right.

Q. What has been the price of gasoline as to whether it was higher or lower at that station than yours?

A. Well, the price is always lower.

Q. And what has been the price at that station in relation to the price of gasoline at Ned's Auto Supply station, the one near there, as far as you know?

A. I don't think I have ever compared them, because that station has never hurt me that I know of.

Q. You do know what their price is?

A. Well, I know they are lower. I have noticed that.

Q. What do they sell?

871 A. It is an off-brand of Ethyl, I believe.

Q. Is that all?

A. I believe so. I haven't paid much attention. I believe it is all Ethyl.

Q. Is there a Savage Auto Supply Company somewhere near you?

A. Yes. I don't know—I believe it still is the Savage Auto Supply Company.

Q. That is a Texaco dealer, isn't it?

A. Yes, sir.

Q. Now, during the period of time you have been at your location, what is the fact as to whether the Savage Auto Supply Company sold gasoline at a price higher or lower than you did?

A. They have been lower, too.

Q. Have they not also been lower than Ned's during the time that you have been there?

A. I really couldn't say whether they have been lower than Ned's or not. I believe they have pretty well met Ned's.

Q. They have what?

A. I think they have been about the same as Ned's.

Q. They sell Texas gasoline?

A. That is right.

Q. Is there a station known as Cora's Service Station near you?

872 A. No, not that I know of.

Q. It is on Fenkel Street.

A. Oh, that is a long ways from me.

Q. It is?

A. Yes.

Q. Well, you are just not familiar with this station?

A. No, I don't know.

Q. Now, you said that in August, 1938, you cut your price to meet Ned's; that is true, is it not?

A. Yes, sir.

Q. Is it not true, also, Mr. Lefstad, that at that time the generally prevailing price at many service stations handling various brands of gasoline in Detroit was 2 cents off the pump posted price?

A. That is right.

Q. So isn't it true that while you did meet Ned's, you were also meeting a generally prevailing competitive condition at that time?

A. Yes, at that time.

Mr. Hanley: I am not sure I understand all your notations, Mr. Austin, on Commission's Exhibit No. 63-A and B.

By Mr. Hanley:

Q. Does this exhibit indicate two reductions in price made by you, Mr. Lefstad?

873 A. Yes.

Q. That is in August of 1938?

A. Yes.

Trial Examiner Ballinger: Referring to what?

Mr. Hanley: Referring to Commission's Exhibit No. 63-A in evidence.

A. This is the gallonage at the same time.

By Mr. Hanley:

Q. This is monthly?

A. Yes.

Trial Examiner Ballinger: Referring now to Commission's Exhibit 63-B?

The Witness: That is right.

By Mr. Hanley:

Q. And there is one other on Commission's Exhibit 63-B?

A. That is right.

Q. Does that indicate an additional cut?

A. Yes, we cut to a lower price.

Trial Examiner Ballinger: When?

The Witness: September, 1939.

Trial Examiner Ballinger: And how long did that continue?

The Witness: Until November 17, 1939.

By Mr. Hanley:

Q. And did you raise the price on that date?

874 A. Yes, sir.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

By Mr. Hanley:

Q. When you talk about these price cuts that you noted on Commission's Exhibit 63-A and B as occurring in August of 1938 and in September of 1939, are you referring to a cut in your then existing retail price?

A. That is right.

Q. So the September, 1939, cut resulted in a lower per gallon price than you had cut to?

A. Before.

Q. Before in August of 1938?

A. That is right.

Q. And that last cut was just in effect a couple of months?

A. Just two months, yes.

Trial Examiner Ballinger: How much of an additional cut did you make, commencing in September, 1939?

The Witness: I think we cut to 12½ cents. I am not sure just what it was before that, but that is the last cut we had, I believe.

Trial Examiner Ballinger: How much of a cut per gallon was that?

The Witness: I really could not say for sure.

875 Trial Examiner Ballinger: 2 cents or more?

The Witness: Well, I wouldn't want to say for sure, because I don't really know what the last cut was.

By Mr. Hanley:

Q. Whatever it may have been, what is the general competitive situation in Detroit, was the general competitive situation in Detroit such that you thought you had to reduce your price again to meet that condition?

A. That is right.

Q. I want to make it clear as to your understanding of the fact that during that period of time, in 1938 and 1939, that there were just a great many service stations all over Detroit and handling all kinds and brands of gasoline who were making this discount of price; is that right?

A. Yes.

Mr. Hanley: That is all.

Redirect Examination by Mr. Austin.

Q. Mr. Lefstad, just one more question. In regard to the amount which you reduced your prices in September of 1939, there were numerous or at least more than one reduction in the tank wagon price at that time, were there not?

A. I don't quite understand you.

Q. Well, wasn't that period from September to

876 November the end of the so-called price war?

A. That is right.

Q. And didn't the Wayne Oil Company reduce its tank wagon price to you on certain occasions between the summer of 1939 and November of 1939?

A. Well, I don't remember. Yes, they must have reduced it some. I don't remember just what.

Q. Well, the record will show what the posted tank wagon price was during that period, but I want to bring out the fact, if it is a fact, that the amount which your price was reduced, the amount per gallon that your price was reduced in the late part, the latter part of 1939, would not be entirely a reduction which you were making in your margin.

A. Oh, no, not all of it.

Q. Part of it would be due to a reduction in the tank wagon price with you were paying?

A. That is right.

Q. Is that correct?

A. Yes.

Mr. Austin: That is all.

Recross Examination by Mr. Hanley.

877 Q. Mr. Lefstad, there are—there were only the two reductions made by you which affected your margin; is that correct; or was only the first one such as to have any effect on your margin?

A. I don't know. I think they all had an effect on the margin.

Q. Well, I think what Mr. Austin and I are both trying to find out is whether or not your last reduction in September of 1939 was occasioned by a reduction in your tank wagon price that you had to pay.

A. I believe there was a reduction in the tank wagon price also.

Q. And you just passed that reduction on to your customers?

A. I am not sure whether there was any more besides the reduction in the tank wagon price or not that we passed on, but we passed it on, whatever it was.

Q. And you think you may have reduced a little more than that?

A. That is right.

Q. But you are not sure of that?

A. That is right.

Mr. Hanley: That is all.

Mr. Austin: That is all.

May we have a brief recess?

Trial Examiner Ballinger: We will take a recess for five minutes.

(Witness excused.)

(A short recess was had.)

878 Trial Examiner Ballinger: We will come to order.

Mr. Austin: Mr. Ferguson.

HOWARD A. FERGUSON was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. Will you give your name to the reporter, please?
A. Howard A. Ferguson.
Q. Where do you reside?
A. 12029 Wisconsin.
Q. Have you ever been engaged in the gasoline business, Mr. Ferguson?
A. Yes, sir.
Q. And when were you first engaged in that business?
A. Well, we took over on the Iowa Plan in May of 1936.
Q. Prior to 1936, what was your business?
A. I was working for the Standard Oil Company.
Q. In what capacity?
A. As assistant of the manager of the station at the corner of 2605 Boston.
Q. What kind of a station was that?
A. Standard Oil.
Q. And was a change in the operation of that station in 1936?
879 A. Yes, sir. We took over the lease of the station in 1936.
Q. Was that when the Iowa Plan went into effect here?
A. Yes, sir.
Q. I believe you said, "we took over." Who do you mean by "we"?
A. Mr. E. A. Bingham and myself, on a partnership setup.
Q. And how did you operate that station?
A. Under the name of Bingham & Ferguson Standard Service.
Q. Did you lease the station from the Standard Oil Company?
A. Yes, sir.
Q. And were you and Mr. Bingham in partnership?
A. Yes, sir.
Q. How long did you and Mr. Bingham continue to lease that station from the Standard Oil Company?
A. Until May 21, 1940.

Q. Did you sell all three brands of Standard Oil Gasoline during that time?

A. Yes, sir.

Q. And how did you receive delivery of your gasoline?

A. Through tank truck.

Q. From whom?

A. From the Standard Oil Company, Clay Avenue plant.

Q. Will you explain, briefly, why you happened to leave that station in 1940?

A. Well, we operated under a partnership setup, 880 and long in the time our lease was coming due in 1939, we were told by Mr. Hazel, our salesman, that it was the policy—a change in the policy of the Standard Oil Company, to discontinue partnership setups.

Q. Was Mr. Hazel a Standard Oil salesman?

A. Yes, sir, and we were called in to the office—

881 Q. What office?

A. Standard Oil Company's office at 4th and Lafayette, in regard to re-leasing the station for the coming year and through our conversation we were allowed to continue on as a partnership and then along in 1940 Mr. Hazel told us that they were going to discontinue the partnership at the termination of the lease, the 1939 lease; that they were only—there were only two stations under lease at the time, under partnership, and they were going to discontinue both of them and before the lease come up I was offered another station and we parted our partnership on the 21st of May, about five days prior to the time of the expiration of our lease.

Q. Then did you move to another Standard Oil station?

A. Yes, sir.

Q. When was that—first, where was that?

A. That was on the corner of Broad Street and Joy Road, 9201 Broad Street.

Q. And how long did you operate that station?

A. I was there from May 22nd, 1940, to October 9th, I believe of 1940.

Q. And why did you leave that station?

A. Because I found it unprofitable to operate.

Q. Now, when you took over the operation of the station—did you state on the record what the address 882 was of the station you operated from 1936 to 1940?

A. Yes; 2605 Boston.

Q. When you took over the operation of that station with Mr. Bingham, where was the nearest Standard Oil station to you?

A. A Citrin-Kolb station on the corner of Chicago Boulevard and Dexter.

Q. Was that a Standard Oil station?

A. Standard Oil; handling Standard Oil products.

Q. How do you know whether it was a Citrin-Kolb station?

A. A large sign board on the side of the station with the name "Citrin-Kolb Standard Oil Products."

Q. Was that station operating under those signs and with Standard Oil pumps at the time you took over the operation of the Boston station?

A. Yes, sir.

Q. Was that station as large then as it is now?

A. No, sir.

Q. I mean by that, in facilities; was it rebuilt, or what happened?

A. It was rebuilt.

Q. When?

A. I am not sure of the time, but it was either the latter part of 1936 or first part of 1937.

Q. Immediately after that Citrin-Kolb station was
883 rebuilt, did you see any advertising under the name
of that station or the operator of that station?

A. Yes, sir.

Q. Advertising any discounts on Red Crown gasoline?

A. Yes.

Q. Will you describe any such advertising?

A. There was cards were put out under the windshields of automobiles throughout the neighborhood, along the streets; also on cars that were parked on our driveway, advertising 2 cent discount on Red Crown gasoline.

Trial Examiner Ballinger: When was that?

The Witness: That was at the opening, after the rebuilding of their station.

Trial Examiner Ballinger: What year and what month?

The Witness: I do not recall what year that station was rebuilt, but it was either the latter part of 1936 or the first part of 1937.

By Mr. Austin:

Q. And immediately following the time those cards were distributed, as you have just described, did the monthly gallonage of your station show any change?

A. Yes, sir.

Q. In what respect?

A. We had quite a drop.

884 Mr. Austin: If your Honor please, I would like to have this paper marked, for identification.

Trial Examiner Ballinger: The reporter will mark the paper, for identification, Commission's Exhibit No. 64.

(The document referred to was marked, for identification, "Commission's Exhibit 64.")

By Mr. Austin:

Q. I show you Commission's Exhibit 64, for identification, and ask you if you will describe its contents (handing document to the witness).

A. This is our monthly gallonage from May of 1936 through to the dissolving of our partnership of May, 1940; our gallonage per month from my sales tax record reports.

Q. And is that a true statement of the monthly gallonage of the Bingham and Ferguson station during that period, to the best of your knowledge and belief?

A. Yes, sir.

Mr. Austin: I offer this statement in evidence.

Trial Examiner Ballinger: Without objection that paper is admitted in evidence as Commission's Exhibit No. 64.

(The document referred to, heretofore marked, for identification, "COMMISSION'S EXHIBIT 64," was received in evidence.)

885 By Mr. Austin:

Q. Did other service stations in your neighborhood begin to offer discounts from the prevailing price in 1937?

A. Not outside of the Citrin-Kolb station. Also Abrams Service, across the street from the Citrin-Kolb Station and the Ned's Auto Supply on Grand River.

Q. Were those the first stations that you noticed which offered discounts in your neighborhood?

A. Yes, sir.

Q. Which ones of those three stations were the first ones whose advertising of discounts you noticed?

A. Ned's Auto Supply, Chicago nad Grand River.

Q. And which one was next?

A. Then the Citrin-Kolb Station immediately followed within a day or two by the Abrams Service across the street from them.

A. That was in 1938.

Q. Towards the end or the beginning of the year?

A. I think it was toward the latter part of the year.

Q. I will show you ~~this~~ card, marked Commission's Exhibit 38, for identification, and ask you if you can identify that card (Handing document to witness.)?

A. These cards, of this type, were put on cars along the street, under the windshield wipers, and, also, on some cars on our driveway.

Q. When?

888 A. I think this was the second card they sent out, which would be somewhere along in 1938 or, possibly, the first part of 1939.

Q. Is the address stated on that card, the address of the Citrin-Kolb station which you have referred to in your testimony?

A. Yes, sir.

Mr. Austin: I offer this card, marked Commission's Exhibit 38, for identification, in evidence.

Mr. Hanley: No objection.

Trial Examiner Ballinger: Without objection, the card is admitted in evidence as Commission's Exhibit 38.

(The card referred to, heretofore marked "COMMISSION'S EXHIBIT 38, for identification" was received in evidence.)

Mr. Austin: That's all.

By Mr. Hanley:

Q. Is there a Joy service station near the Citrin-Kolb station to which you have been referring?

A. Yes, sir.

Q. And was that there in 1938, and from that time on?

A. No. I won't say whether it was Joy or Zip, but it was there at that time, yes, sir.

Q. How close to Citrin-Kolb's station?

889 A. One block.

Q. What is the fact as to the prices, whether they were higher or lower at this Joy or Zip station through all the period while you were out there, than the prices were at the Citron & Kolb station?

A. To my knowledge, they have always been lower.

Mr. Hanley: I think that is all.

Mr. Austin: That is all.

(Witness excused.)

Mr. Austin: If Your Honor please, I have here a document which purports to be a copy of Chapter 282 of the Public Acts for the year 1937. I would like to offer this statute in evidence, with the understanding that I have not personally compared this copy with the official, with any official volume, and if it should appear from the check of Respondent's counsel, or myself, that there is any error in this, that any necessary correction may be made.

Trial Examiner Ballinger: You offer the copy which purports to be a copy of the statute?

Mr. Austin: Yes, and which I believe to be a true copy.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Mr. Hanley: I am afraid we will have an objection.
890 I don't care about its being a copy, but may I inquire
the purpose?

Mr. Austin: Yes. This statute is, I believe, what has been frequently referred to as one of the Fair Trade Acts of Michigan, Section 4 prohibits anyone engaged in the production, manufacture, distribution, or sale of bakery products, or petroleum products, from selling below cost, and there are definitions of cost, and there is a provision regarding sales in good faith, for the purposes of meeting prices of a competitor selling the same article in the same locality; and I have some doubt as to whether the words, "same articles" would apply to a gasoline of another brand. Maybe they would, or maybe they wouldn't. There is also a provision in Section No. 8, which refers to an established cost survey in the locality, and the vicinity, in which the offense is committed, as being competent evidence where someone is charged with a violation of the statute.

Trial Examiner Ballinger: Is there any allegation in the complaint that directly or indirectly refers to, or relates, to that statute?

Mr. Austin: There is nothing in the complaint which directly relates to the statute, but I expect to introduce at a later date a cost survey which was, I think will be shown, was prepared in an effort, at least, to comply with this statute in relation to cost surveys. Furthermore, I think
the statute is relevant, because it may be well argued
891 that with this statute in effect, dealers may have been
prevented, for fear of violation of the statute, from
cutting their price, for fear of violation for selling
892 below cost. However, the chief reason I am offering

it is as a partial ground for offering a survey which I expect will be offered later on.

Trial Examiner Ballinger: Well, just wherein does that statute relate to any matter contained in the complaint?

Mr. Hanley: Well, I don't think ~~it does~~, your Honor, and I would like to be on the record in formal objection.

Trial Examiner Ballinger: Let us first find out from counsel and ascertain his views.

Mr. Austin: Well, it does directly pertain, of course, to the matter in the complaint, in so far as it prohibits price discrimination under the law of Michigan. The primary paragraph prohibits unfair discrimination in bakery and petroleum industries and prohibits discrimination in price with the intent to destroy business of a competitor.

Trial Examiner Ballinger: You are proceeding here under a Federal statute.

Mr. Austin: That is right, but isn't it true that if a statute of a state prohibits selling below cost, then, your Honor, if one or two competitors, we will say, to be specific, if Ned's Auto Supply is buying—is paying a price of 6.6 cents a gallon for gasoline, and his competitor is paying a price of 8.1 cents, and thereby Ned's is offering to sell at a price which would be below cost of the competitor.
893 Now, the very fact that this statute is on the books here in Michigan may add to the effect of the discrimination in price which we are proving under the Federal statute, because, under this statute, it may be that the competitor may feel that he is not permitted to meet the price of Ned's.

Trial Examiner Ballinger: The only effect of such proof would be that one was violating the State law and there is no allegation in the Complaint to the State law.

Mr. Austin: No, but Ned's wouldn't be violating the State law. That is, Ned's could sell at a price, at the price at which he is selling, without violating the State law. He would not be selling below cost, whereas the competitor, of he sold at a cost as low as Ned's, he would be selling below the cost at which he could obtain the gasoline himself.

Trial Examiner Ballinger: My recollection is that the existing evidence here indicates that most of the dealers were selling on a 4½ cent margin; is that correct?

Mr. Austin: Yes, before then, 1936 and 1937.

Trial Examiner Ballinger: Ned's cut the price two cents, but would leave the margin 2½ cents, but the statute to which you refer prohibits the sale at less than a 3-cent margin; is that correct?

894 Mr. Austin: It doesn't fix it, but in connection with the survey, I think it does fix it, I think it does do exactly that, if an established survey can be proved.

Trial Examiner Ballinger: Well, I will hear from counsel for the Respondent.

Mr. Austin: Well, it seems to me that the introduction of this statute in the record can't possibly be harmful to the Respondent, and I think it will form some additional basis for argument in the Commission's case. I don't see how it can be harmful.

Trial Examiner Ballinger: Well, if it isn't material, it ought not to be in the record.

Mr. Austin: Well, I had a feeling in connection with the survey which I expect to offer later on, where I thought it might be material.

Trial Examiner Ballinger: If it isn't material, it will only clog up the record.

Mr. Austin: Well, your Honor, this does provide for the making of a survey of costs of distribution, and it seems to me that this is a rather proper and certainly relevant background for any evidence which I may wish to offer later on, that such a survey was made.

Trial Examiner Ballinger: Do you propose to introduce the survey?

895 Mr. Austin: Yes, I propose to offer it.

Trial Examiner Ballinger: Well, I will hear from counsel for the Respondent.

Mr. Hanley: To keep the record straight, I am objecting on the ground of materiality. In the first place, if as it now appears, maybe the purpose of counsel to use this as a foundation for an exhibit to get into this record of cost survey, it will be our intention to meet that issue at the time it arises, and we certainly do not regard any cost survey such as may have been made under this statute as being material in this case on any issue at all. The costs are material here and surely they are, but only the costs of the individuals concerned; namely, the Respondent and the four dealers who were granted the tank car prices. The costs of anyone else is not material at all, your Honor. I don't know on what theory they can be offered as being material. If these dealers have been hurt, as the Government has now spent days attempting

to establish, and if the Commission and your Honor agree with the Government that they have been hurt, it is not necessary that they be hurt to a point where they were selling below their costs. It will be only material that they were substantially hurt. If I understand this Federal law at all, that is the whole story. As a matter of fact, this is a criminal statute, and we are not being
896 tried under it. We have been tried under it, and acquited, your Honor. The law itself, in every court that has had a crack at it so far has been found unconstitutional. It hasn't been passed on by the Supreme Court of this state. That is my present impression that it has not been, but the Trial Courts have always so found and it is just no good as a law itself. Now, it doesn't lend any credence at all to any survey that some economist may have made. I certainly think, your Honor, that if a survey is material here that it would be material whether this law existed or not. That is another question. The materiality of that survey, and we will meet that when the time comes, but this is entirely apart from any issue in this case so far as I am able to perceive.

Trial Examiner Ballinger: You may let the paper be marked Commission's Exhibit 65 for identification. The Examiner will withhold a ruling on the contents until he has an opportunity to examine the document.

(The document referred to was marked, for identification, Commission's Exhibit 65.)

Mr. Austin: May I suggest, your Honor, that the ruling be withheld until we are past the whole question of the survey. If I don't offer the survey which I have referred to, then I will withdraw the offer of this, and if the survey is offered, then your Honor can see whether this has any materiality in that connection.

897 Trial Examiner Ballinger: I was going to suggest that the tender of this be withheld until you are prepared to make a tender of the survey, and then the two of them be offered at that time.

Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

898 Mr. Austin: If Your Honor please, I have in my file what appears to be a carbon copy of a letter dated February 8, 1939, addressed to Honorable C. McCrea, Prosecuting Attorney of Wayne County, and signed by Herbert F. Taggert.

Trial Examiner Ballinger: Who is Herbert F. Taggert?

Mr. Austin: He is the economist who prepared the survey that we have been referring to. I have had a search made at the Prosecuting Attorney's office here of the original of that letter, and I have been advised that they can't locate the original.

Trial Examiner Ballinger: Do they admit receipt of it, or any knowledge of it?

Mr. Austin: No one who is there now does. I can produce the Prosecuting Attorney, or Assistant Prosecuting Attorney—I forget which he was, right now—at the time this letter was written, who will, I believe, recall its receipt, but what I wanted to find out now was whether in the event I should introduce this letter at a later date, identifying it through the writer, whether counsel for Respondent will make an objection upon the ground that the original should be produced as the best evidence, and if such an objection is made, then, while I am here, I would like to call someone from the office there to prove
899 that the original can't be found, and also, perhaps, prove that it was received.

Mr. Hanley: You say Taggert wrote it?

Mr. Austin: Yes.

Mr. Hanley: What is the important question; whether it was received or whether Taggert wrote it?

Mr. Austin: I think the important thing about it is whether Taggert wrote it. In fact, I am sure it is true.

Mr. Hanley: That is easy to prove with Taggart. If it should become important as to the fact whether it was received or not, then—

Mr. Austin: I just wanted to find out whether you were willing to agree. You wouldn't insist upon the production of the original if it is properly identified by Mr. Taggert?

Mr. Hanley: No, there is no objection on that.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record. Anything further, gentlemen?

Mr. Austin: Your Honor, I move that we adjourn until 2:00 o'clock.

Trial Examiner Ballinger: Without objection, the motion is granted. Now, at 12:05 P. M., the hearing stands in recess until 2:00 P. M.

(Whereupon, at 12:05 P. M. a recess was taken, to reconvene at 2:00 P. M.)

900 Afternoon Session

2 P. M.

Trial Examiner Ballinger: We will come to order. You may proceed.

Mr. Austin: Mr. Doster.

PAUL W. DOSTER was thereupon called as a witness by and on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. Give your full name to the reporter, please.
A. Paul W. Doster.
Q. Where do you reside, Mr. Doster?
A. 1200 North Alexander, Royal Oak.
Q. What is your business?
A. I am connected with the Benzol Stations, Incorporated.
Q. What is your position with that corporation?
A. I have no official title.
Q. What are your duties, then?
A. Well, at the present time, I am taking care of the books.
Q. You are in the head office of the corporation?
A. Yes.
Q. And what is the address of that office?
A. 14318 Woodward Avenue, Highland Park.
901 Q. What is the business in which Benzol Stations, Incorporated is engaged?
A. We sell Ford Benzol. We buy the entire output from the Ford Motor Company and then distribute it as wholesalers.
Q. Do you sell or have you sold Ford Benzol gasoline to Ned's Auto Supply Company?
A. Yes, we do.
Q. And did you so sell to them in 1938?
A. Yes, we did.
Q. Are you familiar with the fact that Ned's Auto Supply Company constructed or leased a bulk plant in Dearborn in 1938?
A. Well—do you mind repeating that?

Q. Are you familiar with the fact that Ned's Auto Supply Company leased or constructed or acquired a bulk plant in Dearborn in 1938?

A. Yes, they had a plant there. I don't know when they got it.

Q. Then you know they did have a bulk plant there at that time?

A. A bulk storage place.

Q. For gasoline?

A. Yes.

Q. Before continuing with that: how do you de-
902 liver Ford Benzol to Ned's Auto Supply Company?

A. In tank trucks.

Trial Examiner Ballinger: When did you first commence selling to Ned's Auto Supply Company?

The Witness: I haven't the date with me on that.

Trial Examiner Ballinger: Can you approximate whether it was spring, summer or fall of 1938?

The Witness: We sold them Ford Benzol before 1938.

903 Q. I just wanted to ask you, whether at that time, as well as now, you delivered direct to their service station in the tank wagon?

A. Right direct to their station, yes.

Q. In other words, you don't deliver to their bulk plant?

A. No, sir.

Q. In 1938, were you engaged there by Ned's Auto Supply Company to haul gasoline from their bulk plant in Dearborn to their various stores?

A. Yes, we were.

Q. When did you commence to engage in that service for Ned's?

A. On March 7, 1938.

Q. And what gasoline did you haul for Ned's; do you know what it was?

A. I don't know what it was. I did not see any bills of ladings or bills, or anything, as to what plant or gasoline it was. I don't know.

Q. Well, what arrangements did Benzol Stations, Inc., make with Ned's Auto Supply Company at that time, with regard to the hauling of gasoline?

A. They made arrangements to haul for Ned's Supply Company at so much per gallon.

904 Q. Was Merchant's Supply Company the operator of the bulk plant?

A. Those are the ones we done business with, Merchant's Supply.

Q. And where was the hauling from to?

A. We hauled from their plant at Wyoming and I forget the cross street. It is the terminal warehouse.

Q. That is in Dearborn?

A. Yes, in Dearborn. To their stations located in various spots throughout the city.

Q. Four stations, then, was it not, or was it more than that?

A. It was four, I believe.

Q. Was the hauling done in your own trucks?

A. Yes, it was.

Q. And what did you charge per gallon for that service?

A. We charged the Merchant's Supply Company .0045 per gallon.

Q. That is of a dollar?

A. That is right, of a dollar.

Q. In other words, 45/100 of a cent per gallon?

A. That is right.

Q. Was that same price charged during all the period during which you hauled gasoline for them?

A. Yes, sir.

905 Trial Examiner Ballinger: And that extended over what period of time?

The Witness: That extended from March 7th to April 24th, 1938.

By Mr. Austin:

Q. Is Benzol Stations, Incorporated, in the business of delivering gasoline; that is, partially in the business, among other things, of delivering gasoline to people who desire it hauled from the bulk plant to service stations?

A. No; as a general rule, they are not.

Q. Why did you enter into this arrangement?

A. We were delivering from the Benzol to Ned's Auto Supply Company at the time and Merchant's Supply Company asked us for a bid to haul this gasoline at the time that they evidently started this bulk plant over there. We had a couple of trucks that wasn't doing anything at the present time and we gave them a bid and eventually got the business.

Trial Examiner Ballinger: When you say "at the present time" you meant at that time, did you not?

The Witness: Yes, sir.

By Mr. Austin:

Q. Have you any record of the amount of gasoline that you hauled for Ned's Auto Supply Company at that time?

A. Yes, I have.

906 Q. Would you please state any information of that sort that you have taken from your own records, the company's records, rather?

907 A. Well, our initial delivery was made on March 7th, and in March we delivered 194,233 gallons. From April 1st to April 24th, we delivered 193,022 gallons, for a total delivery of 387,255 gallons.

Q. What was the cause of your termination of that arrangement on April 24th?

A. That, I don't know.

Q. Did you have anything to do with the arrangements with Ned's Auto Supply Company at that time?

A. Very little; not enough to know the entire workings.

Q. Do you know whether they had their own trucks then?

A. I don't believe they did.

Q. Do you know whether they started hauling the gasoline themselves, when you stopped?

A. I could not say that; I don't know.

Q. Did you have any written contract with Ned's, covering that hauling service?

A. We had a purchase order on the delivery.

Q. A purchase order on what?

A. We had a purchase order of the Merchants Supply Company to haul the gasoline.

Q. Have you got a copy of that with you?

A. No, but I have their order number. We have no copy of this.

Q. What do you mean by a purchase order?

908 A. Evidently, they gave us a purchase order to haul this gasoline.

Q. Was the purchase order—

Trial Examiner Ballinger: It was an order for the gasoline, was it not?

The Witness: Order for the gasoline to be delivered, yes.

By Mr. Austin:

Q. I suppose that stated the price?

A. Yes, it did.

Q. Do you know whether Benzol Stations, Inc., made a profit on that transaction?

A. No, I do not.

Q. Was the charge the same per gallon for all the gasoline hauled during that period, regardless of where it was delivered?

A. Yes, it was.

Q. And when your trucks went to Ned's bulk plant, how was the gasoline moved from the bulk plant into the trucks?

A. We did business with Merchants Supply Company.

Q. I have been saying Ned's. I keep forgetting that it was Merchant's Supply Company, but I ask you the same question with respect to Merchant's Supply Company.

A. All the gasoline hauled was from their warehouse. What was that question again?

909 Q. The question was, how was the gasoline moved from the tanks to the trucks? Did they do that, or you; from the bulk plants into the trucks? In other words, you sent the trucks to the bulk plant, and in some way, the gasoline had to be pumped or moved into the trucks?

A. They loaded it themselves into our trucks.

Q. And then did your trucks empty it into the tanks at the stations?

A. Into the service station tanks, yes.

Q. So that they did the loading at one end and you did the loading at the other?

A. That's right, yes.

Q. Did Benzol Stations, Inc., propose to Ned's, or to Merchants Supply Company that they would raise the price for hauling, if they continued after April 24th?

A. That I don't know.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: That's all I have on direct examination.

Cross-Examination by Mr. Hanley.

Q. Mr. Doster, I think you stated that all gasoline which your company hauled for Merchants Supply Company was hauled at the same price per gallon of .45 of a cent?

910 A. Yes.

Q. Are you sure of that? The reason I ask you that, I am informed, Mr. Doster, that when you first began to move the gasoline, that the price was fixed at something higher than .45 of a cent, and then, at some period, while you were doing the hauling, the price was reduced to .45 of a cent. Do you recall any such facts as that?

A. No, I do not.

Q. It is your impression that it was the same price all the time?

A. That's right.

Q. Did I understand you to say that your company does not generally engage in the business of hauling gasoline for hire?

A. We do not.

Q. Were you hauling for anybody else at the time you were hauling for Ned's?

A. No, we were not.

Q. Was this just an unusual situation?

A. That's right.

Q. You do not have a license, I take it; that is, a public utilities license, as a common carrier?

A. No, we do not.

Q. Have you ever hauled gasoline under similar circumstances for anybody else?

A. Not to my knowledge.

911 Mr. Hanley: That's all, Mr. Doster.

Redirect Examination by Mr. Austin.

Q. Did you state whether these records as to prices and amounts were taken from the books at the office of your company?

A. They were taken from our books.

Q. And you went through all of the transactions with Ned's Auto Supply Company during that period?

A. Yes, sir.

Mr. Austin: That's all.

Recross Examination by Mr. Hanley.

Q. Mr. Doster, in addition to the business of your company in hauling Ford Benzol gasoline, do you also act as a jobber for Sinclair gasoline?

A. Yes, we are the agents for Sinclair Refining Company.

Q. Is that what is known as a commission agent?

A. I don't know what they call it.

Q. How do you do that? Do you haul out of the Sinclair bulk plants?

Mr. Austin: Your Honor, I don't see it is in any way relative to the direct examination.

Mr. Hanley: I don't think it is. I thought, to be quite frank about it, while the witness is here, to lay these
912 few foundational questions.

Trial Examiner Ballinger: Do you want to make him your own witness?

Mr. Hanley: I am perfectly willing to do that.

Trial Examiner Ballinger: The witness is now the witness for the Respondent.

By Mr. Hanley:

Q. Are you familiar with the arrangements which your company has with the Sinclair Company, Mr. Doster?

A. No, I am not.

Mr. Hanley: I think that ends it. That's all.

Mr. Austin: That's all.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Mr. Austin: If Your Honor please, having no more witnesses here now, I move that we adjourn until ten o'clock tomorrow morning.

Trial Examiner Ballinger: Without objection, the motion is granted, and now, at 2:30 P. M., the hearing stands adjourned until ten o'clock A. M. Eastern Standard time, March 18, 1941, to be reconvened in Room 859, Federal Building, Detroit, Michigan.

(Whereupon, at 2:30 P. M., the further hearing in the above-entitled matter was adjourned.)

913 Room 859 Federal Building,
Detroit, Michigan,
March 18, 1941.

Met, pursuant to adjournment, at 10 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

H. R. Hanley, Esq., 910 S. Michigan Avenue, Chicago, Illinois, on behalf of the Respondent.

914 PROCEEDINGS.

Trial Examiner Ballinger: We will come to order. The hearing in Docket No. 4389, Case entitled In the Matter of Standard Oil Company is reconvened at 10 o'clock A. M., Eastern Standard Time on March 18, 1941, in Room 859 Federal Building, Detroit, Michigan.

The last hearing was held in Detroit, Michigan, on March 17, 1941.

The reporter will note counsel for the Commission and Respondent present.

You may proceed, gentlemen.

PAUL HENRY HARRISON was thereupon recalled as a witness by and on behalf of the Commission, and, having been heretofore duly sworn, testified further as follows:

Further Cross-Examination.

By Mr. Hanley:

Q. Mr. Harrison, at the close of your last appearance as a witness here, you were interrogated to some extent about your costs of doing business out of your terminal or bulk plant here in Detroit; that is, the Sun Oil costs.

A. Yes, sir.

Q. I want to call your attention to an answer which you made at that time and perhaps I had better give 915 you the question. You were asked: "Can you state how much it cost the Sun Oil Company per gallon to deliver gasoline from the bulk plant at Hamtramck to the Sun Oil Company stations, including the cost of operating the bulk plants?" There was some little discussion in between and then you gave this answer: "I think I am safe in saying definitely that it is less than half a cent a gallon including all costs of operating the bulk plant, that is, including the ordinary evaporation and spillage losses, the labor, operation of the warehouse, personnel, cost of the truck operation, the accounting going along with the operation, and a cost element for the amount of invested capital in the plant which constitutes practically all of the overhead connected with delivering the gasoline to the dealer—will be less than half a cent a gallon."

Do you recall that question and answer?

A. Yes.

Q. Now, in connection with spillage and evaporation losses, Mr. Harrison, is it true that the more rapid the turn-over of stock and the less handling of the stock, that normally the loss will be the spillage and evaporation loss?

A. That is, you say the more rapid the turn-over?

Q. Yes, sir. The faster you get the stock out of storage and the less you have to handle it, given those 916 two conditions, doesn't it relatively reduce the amount of loss from spillage and evaporation?

A. Yes, it does. If you handle it once, you have one loss for a given time, and if you handle it twice, your losses are probably doubled, and so on. Each time you expose gasoline to the air, you have evaporation and, also, every mechanical handling, you have some spillage or seepage.

Q. Now, having in mind these items that you included in your answer, Mr. Harrison, I want to discuss with you perhaps a more exhaustive break-down of items which I think you may have included. I would like to get your statement as to any that are included or are not included in what you have in mind in this answer. Have you given consideration to these items: drivers' salaries?

A. Yes, sir.

Q. Do you have any break-down in terms of cents per gallon as to the different items that you have included available to you now, Mr. Harrison?

A. Personnel.

Q. —personnel, but do I understand, now, that your company makes an allocation for advertising costs to this district?

A. Yes, sir.

Q. What personnel in your field office handles what I think you commonly designate as point of sale advertising; like signs and pump globes and maps and folders and little things like that, that you hand out.

A. If they are painted sign boards, we employ a painting contractor to do that. If it is a paper poster board, the usual advertising poster, advertising companies, we contract for that. The miscellaneous small advertising materials, folder, maps, and that sort of thing, is distributed by our salesmen to their dealers.

Q. And do you regard the cost of the materials, like the making of the maps; does that come in as an administrative matter in the field office, or is that one of
945 these things that the general office does, and then allocates to you?

A. That is done in the general advertising office at Philadelphia and cost of providing that material and service is charged to us on the gallonage basis.

Q. The costs of taking care of the signs of the station and so on, whether you use your own people or whether you employ regular bill posters, that is a charge against the doing of the business in the district?

A. Yes, sir.

Q. Now, have you any break-down in figures per gallon, Mr. Harrison, as between the direct costs of operating your field office and the costs of your general office, which may be properly allocated to your field office, or do you lump that all together?

A. I am trying to get that distinction clear in my mind. I gave you the items of cost we included in our warehousing and delivery.

Q. Yes, sir. Perhaps I had better ask you to go right ahead, now, and tell me what costs of doing business applicable to gasoline in your field office.

A. Yes.

Q. You have in addition to the .0036 that you have explained.

A. Yes, I have a schedule in that. It includes dispensing

A. Yes, sir.

Q. How much per gallon is allocated to drivers' salaries?

A. The break-down doesn't carry it into that detail. Our accounting report made to me gives it as trucking cost in fractions of a cent per gallon, and that includes 917 wages, depreciation of equipment, gas and oil, and tires and supplies used in the operation of the truck, insurance, license fees; every item of overhead connected with the operation of the truck.

Q. Perhaps it would speed the matter if I just ask you which items by name are included, and then you can exclude or include, as the fact may be. It is highly improbable that the items I have listed will be coincidental with your methods of keeping books, of course. You say you have included drivers' salaries?

A. Yes.

Q. Now, have you included salaries of warehouse labor at the plant? That is, accounting personnel and warehousemen and anyone else whom you may employ?

A. Under warehouse heading, it is in the cost figure.

Q. Do you include what might be termed the miscellaneous drivers' expense, that is, cash expense to which drivers may be put; telephone calls, luncheons, or anything of that kind, that they may incur?

A. Yes, sir.

Q. How about plant maintenance?

A. That is included in warehousing cost.

Q. Water, light; fuel; that's in?

A. That's in.

Q. Telephone, telegraphs?

918 A. Yes, sir.

Q. Any miscellaneous operating expense? I have in mind there a catch-all account like if you break up a driveway, a truck wheel went through it, or something of that sort; you would include that?

A. I haven't any experience in that, and I don't know whether an item of that nature would be included in the warehousing expense or in another phase of the business having to do with relations with the public.

Q. That isn't so important, as to what account you classify it in, if you can tell me whether or not it would be included in the half cent cost that you finally arrive at.

A. I can't. I don't know enough about their accounting system to pick out that one item.

Q. That item wouldn't be a large one, in any event, would it?

A. No. As I say, I have had no experience with it.

Q. Do you include general supplies, as forms, delivery tickets and that sort of thing?

A. Yes, sir.

Q. Do you include operating tools and equipment in use at the plant?

A. Yes, sir.

Q. Now, have you an inclusion for a cost of auditing the accounts at the plant? I assume you do do
919 that, in some manner.

A. Do you mean an audit of the individual customer account?

Q. No, I mean an audit of the terminal accounts themselves.

A. That would not be in my warehousing cost.

Q. That would not be included in this one-half cent item?

A. No, sir.

Q. Do you have an inclusion of any item for losses by accident to other than company property?

A. We carry public liability, public damage insurance, both on our automobile or on our automotive equipment of the plant, and also with regard to the service stations where we have any public liability. The insurance on the truck equipment would be included in this cost item.

Q. If there were any loss that was not referable by way of insurance, such as you have described, would you include that in the half cent item?

A. I don't think we would. I know of no case of that having happened, but I doubt if we would. We would probably place that under the head of legal expense.

Q. Do you have any item included covering direct miscellaneous losses to company property; from any cause?

A. You mean, for instance, the loss of a truck or damage to a building?

920 Q. Yes; knocking a corner off a door, or something of that sort.

A. That would be in this warehousing figure. This cost of warehousing and delivery; it would be included.

Q. You covered stock loss and evaporation, did you not?

A. Yes.

Q. That's included?

A. Yes.

Q. Do you include in the half cent any item for depreciation on the plant, machinery, equipment, and furniture and fixtures?

A. Yes, sir.

Q. On all of those items?

A. Yes, sir.

Q. And do you include a cost item for operation and maintenance of the trucks?

A. Yes, sir.

Q. And how about depreciation on trucks?

A. Included.

Q. Do you have, in the half cent, an item for real estate and personal property taxes and vehicle licenses and any licenses to operate the plant or any of the equipment?

A. All of those items are included, with the possible
921 exception of the license to operate the plant. That might come under general expense covering everything of our business in Detroit, to do business in Detroit, and might not be particularized as a warehousing item.

Q. But the real estate and personal property taxes and car licenses, which would be the big item there, are included, are they?

A. Allocated to that plant.

Q. Now, in your computation of the one-half cent, have you included old age and unemployment insurance applicable to drivers and all of the labor personnel at the plant?

A. Yes, that is included in the payroll costs and is included in the expense of the employees at that plant.

Q. That is, so it gets into the one-half cent?

A. It gets into the one-half cent.

Q. Do you carry insurance on the plant?

A. Yes, sir.

Q. Have you included your cost of insurance in the one-half cent?

A. Yes, sir.

Q. Now, Mr. Harrison, on your last examination, you made reference to an item of investment cost and interest which you had included in the one-half cent. Will you please explain just what you mean by that?

A. Yes. In the land and equipment of the plant,

equipment complete, we have a certain capital invest-
922 ment. Our cost accounting—we are charged with an interest charge on that invested capital. We are also charged with an interest on the value of the inventory at that plant, and that is what I meant.

Q. Now, let me see if I understand you, Mr. Harrison. Your company keeps investment records on all of their property, no doubt?

A. Yes, sir.

Q. And a certain investment is represented by your Detroit terminal?

A. Yes, sir.

Q. In land and buildings and equipment.

A. Yes, sir.

Q. Now, in your cost accounting, if I understand correctly, based on the amount of that investment in the terminal, your office here is charged up with an interest rate which I think you said was 6 cents?

A. I think it is 6 cents.

Q. Now, whatever that amounts to in money, is that allocated to the cost of operating that plant?

A. Yes, sir.

Q. And you have given that item consideration in your one-half cent computation?

A. Yes, sir.

923 Q. Now, how much per gallon would that item amount to?

A. That interest item—I can't give you that offhand. I didn't bring any statistics along with me on that point. It is included in what we call the general district expense under warehousing, district operating cost, but to pick out the interest alone, I can't do that, because in the general expense, also, are the taxes, for instance, that are paid; real estate taxes.

Q. Are you able to give us just from your own knowledge of the situation any figure which we will understand will be an estimated figure, Mr. Harrison? I would like to get some idea of how much of this half cent is represented by that item.

A. Well, it would be the wildest kind of a guess, because I haven't got the figure in my mind of the total amount of invested capital on which the interest would be reckoned. I can't separate that particular item. That is, just from out of my head.

Q. Can you give us an answer to this: in your judgment, and compared with all of the rest of the costs that you have named, would that item be relatively trivial; per gallon?

A. Yes, it would be small. I might say that the group insurance, that item would be included; general district expense costs us .03 of a cent per gallon; .03 of a
924 cent per gallon.

Q. So it is really quite trivial?

A. It is a small item.

Q. Now, when you gave us the answer of the one-half cent cost, had you allocated your costs between products handled at the plant?

A. These figures are on gasoline only.

Q. That is what I am getting at. There are no inclusions in your cost of gasoline of one-half cent which apply at all to any other products that you may handle at your plant?

A. No.

Q. You do handle a number of other petroleum products, do you not, Mr. Harrison?

A. Yes, sir.

Q. Well, did you also separate your costs relative to this half cent on delivery of gasoline as between channels? That is, as between deliveries to consumers, as distinguished from deliveries to retail outlets?

A. No, we have practically none of the so-called commercial delivery.

Q. Your business is almost entirely to reseller outlets?

A. Yes, sir.

Q. Would the attempted allocation as between those channels in your business have any material effect on
925 the cost of one-half one way or the other, in your judgment?

A. It would be to the fifth or sixth decimal place, if it affected it at all.

Q. Now, out of the number of items that I have asked you about, you have indicated that you excluded two items in your one-half cent calculation; namely, an item for the auditing cost of the plant itself. That would also include that kind of an item, traveling expense and auditors or accountants, and the expense incident to their vehicles, would it not, Mr. Harrison?

A. None of the expense connected with the audit or getting the personnel to the plant and getting them away from it and whatever living expenses incident to the audit of the plant, would not be included in my warehousing cost.

Q. But you do have that kind of a cost in your operation?

A. In our over-all operation.

Q. Even though it is not included in the one-half cent?

A. Yes.

Q. And you have excluded the losses, if you have any, to other than company product resulting from accident?

A. In part. I include public damage and public liability in connection with the truck operations and
926 they are in there in our trucking expense. The cost of that insurance, for instance, is in the trucking expense. If we have a truck accident, that is included in the expense.

Q. Now, I wish you would tell us and give us per gallon figures, as best you have them, as to the classifications you have and the items that you have included in the one-half cent, Mr. Harrison.

A. I am very much embarrassed, sir. I will have to amend my figure when I give you this detail.

Q. I think you will. I think it is going to be less.

A. Under the bracket of district operating costs, item, warehouse, average for the year 1940, 4/100 of a cent, handling loss, including evaporation, if any, 4/100 of a cent; trucking costs, including all items of expense connected with the operation of a truck on the streets, 2/10 of a cent; office costs, accounting with respect to this warehouse, 3/100 of a cent; office costs, credit and collections, 1/100 of a cent; office costs, sales and operations, 1/100 of a cent; general district expense, 3/100 of a cent; total under district warehouse operating, 36/100 of a cent average for the year 1940 at Detroit, Michigan. That is all of that bracket.

Q. Now, do I understand that this is all of your inclusions in the items that you formerly said you thought would cost about a half cent?

927 A. Yes, sir.

Q. You now, based on your 1940 figures, find it to be 36/100 of a cent?

A. Yes, sir.

Mr. Austin: I think Mr. Harrison's testimony was before that it would be less than one-half of a cent. He could not remember the figure.

Mr. Hanley: He did say that, and don't understand I am questioning that at all. I used a half cent because it is easier to say.

The Witness: I used it because I always allow myself a little factor of safety.

Mr. Hanley: That's a good idea.

By Mr. Hanley:

Q. Now, your general office, Mr. Harrison, is in Philadelphia, is it not?

A. Yes, sir.

Q. And you have a district office here in Detroit?

A. Yes, sir.

Q. Which immediately supervises the operation of your company in the territory in and about Detroit, which you described?

A. Yes.

Q. Does the office here in Detroit administer the affairs of your company over a considerable area other than
928 the immediate Detroit vicinity?

A. My office here in the National Bank Building is the general administrative office. There is another office for the district management, the district operations, which is on Brooklyn Avenue.

Q. Would that be Mr. Cunningham?

A. Yes, that is Mr. Cunningham.

Q. In your office proper, without reference to district personnel, have you a substantial personnel?

A. No, I would say not. It is a relatively small personnel.

Q. As compared, for instance, with a district office?

A. Yes, sir.

Q. Now, I want to ask you, Mr. Harrison, about certain items of the cost of selling gasoline to retail resellers, which apparently you have not included in this computation that you have made. Do you have a cost item of field supervision which would include the salaries of your manager, assistant managers, office managers, in this district?

A. In our selling expense, we would not include the office manager and the accounting, because that is not a selling expense. That is an accounting expense.

Q. You do have the item of expense irrespective of whether you call it accounting or selling; is that right?

A. Yes; and if you are going to ask for these
929 figures, I have got to tell you what is in these figures.

Q. I understand. I am going to ask you in the same way I did before, Mr. Harrison. I want to know what inclusions you make in the items I have in mind, and then I will ask you to give us the results as you keep your books.

Mr. Austin: What is this directed to?

Mr. Hanley: The cost of selling gasoline.

Mr. Austin: Your Honor, this is outside the scope of the direct examination, and if there is to be any questioning on selling, I request that Mr. Harrison, for that purpose, be the witness of the Respondent, and that I be given the right to cross examine.

Mr. Hanley: Well, if your Honor please, I have a statement on that that I would like to be heard on. In the first place, I don't know what it means in Commission practice whether a witness is the Government witness or my witness. They are just witnesses, as far as I know.

Trial Examiner Ballinger: The contention of counsel is that this matter was not dealt with on direct examination.

Mr. Hanley: Well, in response to that contention, if your Honor please, this witness testified to certain costs of delivering or selling gasoline in Detroit. It will appear on the Respondent's case, certainly, both with respect to the Respondent and with respect to the several
930 jobbers involved in the action.

Trial Examiner Ballinger: If you will separate your selling and delivery, I understood counsel has run to the cost of delivery and not to the cost of selling. Now, if you will separate them.

Mr. Hanley: We will not only separate them in so far as a separation is possible, but, your Honor will observe that I have been very careful with this witness to give him a full opportunity to separate them. I haven't any desire to confuse the two on anybody's system of bookkeeping, but the point is this: that it has already become apparent that different companies and operators keep their costs in a different way. For instance, Mr. Harrison has just said that his manager's cost in this district, in the office, he classifies as an accounting cost and not a sales cost. So, it is necessary, if this testimony is to be used for comparative purposes, and Mr. Austin has as-

sured us that it is, that we have a careful analysis from this witness as to all he included in what he calls a delivery cost and what he excluded therefrom and what he include in and excludes from the additional cost of selling gasoline to a retail reseller. Otherwise all of this testimony becomes utterly valueless for comparative purposes. Of course, your Honor understands that it is the Respond-
ent's position that costs of the Sun Oil Company or
931 any other company not involved in this action are
not material and are not valid for purposes of comparison, but Mr. Austin has introduced that testimony over our objection, it has been received by the Court, and the statement of counsel is to be used for comparison, for comparative purposes. Now, the distinct function of cross-examination is to delineate the various items of cost that are in the mind of the witness and are used by his company and arrived at by his company and where they fit in this over-all cost of selling gasoline, which is the thing that they have got to be ultimately compared with, if they are going to be compared at all.

Trial Examiner Ballinger: I don't understand that during the direct examination there was any testimony adduced running to the cost of sale, and the testimony related solely to the cost of delivery. Therefore, the Examiner rules that your cross-examination will be limited to the cost of delivery.

Mr. Hanley: Well, does that mean, your Honor, that to continue with this examination, the Respondent is forced to make this its own witness?

Trial Examiner Ballinger: That has been the practice before the Commission, as I understand it.

Mr. Hanley: I don't understand what the significance
of that is in the Commission practice. If this witness
932 is my witness, what difference does that make? I
am just asking for information, your Honor, because I am ignorant of the significance of it in the Commission practice.

Trial Examiner Ballinger: Frankly, I do not attach so much importance to it, but it is a rule of practice.

Mr. Hanley: For ten years I have tried to rule on it myself, and never knew what it meant.

Trial Examiner Ballinger: And in conducting the hearings before the Commission, we try to conform, as nearly as possible, to the rules of Court.

Mr. Hanley: And that being the case, I am going to make this witness my witness, but I want to make a statement on the record to protect my own position in it, very briefly.

Trial Examiner Ballinger: With this witness it appears to the Examiner that it is wholly immaterial whether it is direct examination or cross examination. The witness is frank, has furnished all the information that he can, and it doesn't seem to me that it puts the Respondent to a disadvantage to make him his own witness ~~or gives~~ him any advantage by cross examination.

Mr. Hanley: Well, I quite agree, and I am going to make him my witness.

Mr. Austin: Yes, I feel inasmuch as the burden of
933 proof is on the Respondent, and I also want to ask the same courtesy which I accorded to Judge Hanley, and I may, at some later date, if we are back here, want to call Mr. Harrison for cross examination on my case.

Mr. Hanley: There will be no objection on that, and you don't have to make him your own witness, if you don't want to.

Trial Examiner Ballinger: The witness is now a witness for the Respondent.

Mr. Hanley: In making the witness a witness for the Respondent, counsel for Respondent states that such action became essential to the progress of the examination in view of the rulings of the Court if Respondent were to be permitted to continue the examination, and counsel for Respondent, at this time, requests a ruling of the Court to the effect that the Respondent, having made the witness his own witness, may be regarded as having done so on the Government's case and without prejudice to any motions that Respondent may make in respect to the Government's case exactly as though no evidence had been introduced on the part of Respondent. That is all for the record. Have I made it clear?

Trial Examiner Ballinger: Yes, and the evidence is being received without prejudice to the Respondent's case to the same extent as though this had been reserved
934 until the Commission closed its case.

Mr. Hanley: Very well. Thank you.

PAUL HENRY HARRISON was thereupon called as a witness by and on behalf of the Respondent, and, having been heretofore duly sworn, testified as follows:

Direct Examination.

Mr. Hanley: Will you read the last question back, please, Mr. Reporter?

(The last question was read as follows: "I am going to ask you in the same way I did, Mr. Harrison. I want to know what inclusions you make in the items I have in mind and I will ask you to give us the results as you keep your books.")

By Mr. Hanley:

Q. As you keep your books, just as I did in connection with these other costs. Now, with that understanding, the question is: you do have a field office expense for manager and assistant managers and office managers, don't you?

A. Yes. I will have to explain the way our accounting is set up.

Our office manager is purely an accounting man. He is not in any way a sales or operating man. Consequently
that part of the office expense incident to the handling
935 of gasoline is in the accounting cost enumerated under
the first bracket which came out to .36 of a cent overall. The manager for sales, the sales manager, assistant sales manager, the sales personnel salesmen, all expense connected with those individuals, the manager, assistant manager, and salesmen expense, including car allowances and incidental expense for telephone calls, street car fare, or what have you, are included in our selling expense; if that is the figure that your want.

Q. Well, I will reach it eventually, but I want to go through the items with you, Mr. Harrison.

Now, your managers and assistant managers have a clerical force working for them in your field offices, haven't they?

A. Not as such.

Q. Well, all right. They just work in the office, then?

A. That is right.

Q. And under your system some of them may be allocated to general accounting in the office and some may be to sales; however it works out in your own bookkeeping?

A. Yes, sir.

Q. Now, they have traveling expense, the executives, the managers, and supervisory executives have traveling expense?

A. Yes, sir.

936 Q. And how do you allocate that; just as a part of the general office expense?

A. No, that is included in the selling expense item.

Q. And they operate automobiles?

A. Yes, sir.

Q. At company expense, or company owned cars?

A. They are owned by the individual and allowance made for the use of the cars.

Q. Now, do you have, aside from this executive or supervisory force that we have been talking about, Mr. Harrison, a group in your field office that might be regarded as sales promotion personnel which has supervisory and directional duties over the salesmen?

A. No, sir; we have no such function in our set-up.

Q. Is everyone connected with sales and sales promotion, aside from your managers and assistant managers, designated just as salesmen in your organization?

A. Yes, sir.

Q. You have their salaries as an item of selling cost?

A. Yes, sir.

Q. And you have travel expense?

A. Yes, sir.

Q. And their car expense; operation?

A. Yes, sir.

Q. Do they use their own cars, as you described 937 about the other personnel just a moment ago?

A. Well, these are the same people I referred to; the salesmen; own their own cars. The company makes an allowance for its use.

Q. To clear the whole thing up in one question: in any of your personnel that I have already asked you about or will ask you about, do you furnish company owned cars to that personnel, or is it a rule of your company to have them operate their own car upon an allowance made by the company?

A. The only car furnished by the company is that to the district sales manager, who is the senior executive of the Detroit area; is the only one furnished a car by the company.

Q. And that car, its expense, operation, and depreciation, would constitute a cost of selling gasoline, somewhere in your figures?

A. Yes, sir.

Q. You pay Old Age and Unemployment Taxes on the salary of your sales personnel, I assume?

A. Yes, sir.

Q. And that also constitutes a cost of selling gasoline?

A. Yes, sir.

Q. Now, let it be understood, Mr. Harrison, that the costs I am talking about are the costs of selling 938 gasoline in all of these questions. I wish we may both make the same distinction that you have testified to that you made on the bulk plant; namely, we are disregarding any allocations of costs to other products than gasoline.

A. Yes, sir. These figures are exclusively relative to gasoline.

Q. Yes, sir. Do you have a field advertising personnel in your district office?

A. No, sir.

Q. Do you have anybody in your district office that does anything about advertising?

A. No, sir.

Q. So you have no district office expense in that regard?

A. For advertising.

Q. Yes, sir.

A. No, not under selling expense.

Q. Do you have a personnel or an operation in your district office connected with advertising under any designation or account?

A. No, sir.

Q. Your company has some method of lending or renting or furnishing dispensing equipment to service station dealers, have you not?

A. Yes, sir.

939 Q. You loan or furnish pumps or tanks for gasoline operation?

A. Yes, sir.

Q. You install that equipment?

A. Yes, sir.

Q. And have an installation cost, such as labor and piping and electrical connections, and so on?

A. Yes, sir.

Q. You also furnish compressed air stands and compressors?

A. Not to all of the stations; only where we have an interest in the real estate.

Q. But is it one item that you take into consideration in the over-all?

A. Yes; it is in the cost.

Q. Do you also supply your retail dealer stations with small tools and accessory equipment, like battery testers and radiator testers and things of that kind?

A. No, we do not.

Q. Your district office undertakes the maintenance of this loaned-out equipment, does it not, Mr. Harrison?

A. Yes.

Q. And you maintain a force of men and equipment to care for the maintenance of that loaned-out equipment, don't you?

A. Yes, sir.

940 Q. And that would be a cost of selling gasoline to retail dealers which would find its way somewhere into your accounts?

A. It would find its way into our accounts, but not under the heading of selling costs.

Q. Perhaps not. Understand me, again, because our discussions here have been denominated selling cost of gasoline, Mr. Harrison. I don't mean to be bound by your actual name of selling costs. I don't care what account you put it in if it is a cost along one of these items I am referring to, finds its way into your account somewhere.

A. Yes.

Q. You maintain an accounting personnel in your district office, do you not?

A. Yes, sir.

Q. And you have salaries for the various types of account?

A. Yes, sir.

Q. You have an item of office supplies, stationery, postage, whatever is needed to operate the office?

A. Yes, sir.

Q. Telephone, telegraph; you pay a bank exchange for handling your collections. I think you have already described your method of handling automobiles and vehicles. That applies to the accounting personnel equally with the sales personnel?

941 A. Yes, sir.

Q. Do you maintain a credit department or personnel in your field office?

A. Yes, sir.

Q. A credit man or manager, and assistants?

A. Yes, sir.

Q. Do you purchase credit information from various suppliers of that kind of information?

A. Yes.

Q. Do you have any outside collection expense?

A. Other than the use of these credit service companies, like Dun & Bradstreet, for instance.

Q. What I had in mind about the credit service company would be more investigation expense, Mr. Harrison, like a Dun & Bradstreet report rather than a lawsuit to try to collect a bill that had already been incurred.

A. Yes, we have both of those items. We employ the services of the credit information agency and we also have a collection attorney. We sometimes have the fees for those which are included in our credit and collections cost.

Q. You have some expense, of course, incident to these outside collections; collections that you have to make outside your own office?

A. Yes.

942 Q. Do you have any legal department or what you call a legal department, in your field office?

A. No, sir.

Q. If you had occasion to use lawyers in matters of that kind, it would be someone you would employ locally?

A. Called in for the individual case.

Q. Yes, sir. You have some expense or loss in the matter of charge-off of bad accounts, do you not?

A. Yes, sir.

Q. In respect, also, of these accounting and credit people you also have the item of Old Age and Unemployment expense, or tax, do you not?

A. Yes, sir.

Q. Do you have any real-estate department or personnel in your field office?

A. No, sir.

Q. No one who handles that particularly?

A. No, sir.

Q. A moment ago you were talking about this dispensing equipment and you said that you maintained a force of men as construction and maintenance men and they have equipment to do that in, trucks, or something of the kind?

A. Yes, sir.

Q. That is company operated?

A. Yes, sir.

943 Q. And you have an item of the cost of operation and depreciation on those vehicles?

A. Yes, sir.

Q. Do you have any personnel supervisor in your office?

A. No, sir.

Q. The district office?

A. No, sir.

Q. Of a safety supervisor?

A. No, sir.

Q. Where do you charge up the donations you make in the district? I assume you make them.

A. Unavoidable. I am not certain, but I doubt if that item of donations is in any way included in this figure in the cost of selling and delivering the gasoline and serving the dealer. I doubt if that—it would be another very small item, if it were in there.

Q. You think it would be just a general overhead, then; general overhead thing?

A. Yes, sir.

Q. Now, Mr. Harrison, I wish you would tell me if I have left out of the items that I have called to your attention any items of cost that you have, incident to the operation of your field division office?

A. I think you have covered everything that I can think of.

There is one item which possibly might be included 944 in selling expense, and that is the item of advertising. Our offices are charged for the advertising done in the marketing area of each office. Detroit is charged for the advertising done in the Detroit marketing area. There is an item of cost for that. I think that is the only one you missed.

Q. I asked you about the field advertising set-up, and you said you didn't have any—

equipment; the replacement of installation, of main-
946 tenance, of depreciation of dispensing equipment; a selling expense and an advertising expense, which makes up our total costs for the selling to the dealer and the delivery of the product to him, including the advertising help that he gets through our general advertising, and his particular advertising at his station, in any form that he gets.

We had, in 1940, we had no replacement costs. Costs of installation, .01 of a cent; cost of maintenance of equipment, .05 of a cent; depreciation of equipment, .02 of a cent; selling expense, .06 of a cent; advertising, .21. I think that adds up to .35.

Q. Where in those items are your salesman's costs?

A. In the .06 selling cost.

Q. Does that include all of the salaries and expense incident to keeping your salesmen on the job?

A. Yes, sir; that is the manager, assistant manager, and the salesmen. There are incidental costs of travel expense, automobile allowance, salaries, and bonuses, if any.

Q. Now, in this advertising cost, see if certain of these figures that I have here agree with your recollection or knowledge, and tell me if they are included in the allocation of cost to Detroit. For instance, last year, newspaper space, $37,090. Does that figure mean anything to
947 you?

A. No. Advertising space in Detroit newspapers—that's right?

Q. That's right.

A. It would be included in this cost.

Q. Radio, for time only, about $38,000, in round numbers; would that be included?

A. Yes.

Q. And outdoor advertising, something like $11,000 or $12,000?

A. Yes, sir; $11,000 or $12,000?

Q. Yes.

A. Yes, sir.

Q. That would be included?

A. Yes.

Q. Then, there is always a cost of mechanical and art work that runs around 15% for this kind of advertising, isn't there, Mr. Harrison?

A. I know practically nothing about advertising.

Q. You are fortunate.

A. I know practically nothing about the costs, except the costs they charge me.

Q. Is the cost of the talent that's used, advertising agencies and copy-writers, as well as radio singers and comedians and that sort of thing that you may use in
948 radio programs, charged up to you?

A. As far as I know, we haven't used any comedians as advertising. We may have some comedians, otherwise other than advertising.

Q. Whatever they are, whether they are funny or not, are they charged up to you, Mr. Harrison?

A. If they were used, they would be charged up pro rata on this figure, based on 1940 figures, at .21 of a cent a gallon, for every gallon I put through that plant.

Q. Now, in your general office—and I am talking now, Mr. Harrison, about your general office in Philadelphia, the over-all control of your organization, as well as at your office here in Detroit, your own office, as distinguished from the field manager's office, if any of my questions are applicable to your office here in Detroit—there is a cost allocable to the gasoline business in Detroit arising in the general office, a sales supervision standpoint, is there not?

A. Yes, there is a cost. What I would call an administrative cost.

Q. Yes, sir. And the same is true of accounting in the general office?

A. Yes.

Q. And also advertising; indeed, that's all done there?

A. Yes, sir.

949 Q. And in addition to these items of cost of space and talent and so on, there is the maintenance in the general office of the advertising personnel, supervisory personnel, is there not?

A. We can particularize on the advertising, because that would include the cost of management of the advertising department in Philadelphia, the personnel of the manager's office and the costs of preparing the advertising all would be included but, aside from advertising, the administrative cost would not appear; would not be a charge against me.

Q. Do I understand that in your operations you are able to and do lift advertising clear out of your other operations?

A. Yes, sir.

Q. And you keep your books on that basis?

A. Yes, sir, and it is budgeted every year.

Q. And that includes everybody that has anything to do with advertising?

A. Yes, sir.

Q. For instance, how do you get over this hill, Mr. Harrison: the directors' time, your president's time, Mr. Pugh's concern with advertising, and that general supervisory function? Do they pay no attention to the advertising operations?

A. They pay a great deal of attention to it; that is,
950 they pass on it after the advertising people have prepared what they call their copy on their slogans, or what have you. It is all finally passed on by the general sales executive, Mr. Eckert; he has the final approval of it.

Q. What consideration have you given in your cost analysis here to that item? Is that included in the cost of advertising as it is broken down for you?

A. No, it is not included beyond the advertising department itself. That is included in my pro rata share.

Q. But the general overhead supervision, administration, as you call it—

A. The Board of Directors and the administrators, the expense isn't in there.

Q. Now, you have a law department; the Sun Oil Company?

A. I don't know whether it is part of the company or not, but we have lawyers around.

Q. You have a lot of legal expense; you know that?

A. Yes.

Q. And that expense is reflected back out here in Detroit?

A. Yes.

Q. Whether your office keeps the records here or whether you don't?

A. I get a direct charge for any legal expense incident to any happening within this Detroit district—

Q. That is to say, that if it were a direct expense,
951 Mr. Harrison—

A. That's right.

Q. —but your general law expense, which has to do with general problems?

A. Yes.

Q. That wouldn't be charged to your district, here in Detroit?

A. No, sir.

Q. But it would be a cost of your doing business here in Detroit, none the less, wouldn't it; as well as elsewhere in the country?

A. Of course, it is a general company cost. It is a cost to the corporation. It is not definitely allocated down to this particular unit, or broken down to a cost of so much per gallon on this district. That is not done on the legal expense.

Q. Your company makes no effort to do that at all; is that right?

A. That's right.

Q. What is true with respect to your general office construction and maintenance personnel? You do have such a personnel or department in your general office, don't you?

A. Yes, we have a construction engineering department attached to my office that works for all districts. That is not allocated to the district.

952 Q. That means that you don't have that operation in Philadelphia, that is under your jurisdiction here?

A. I have an engineering office here and then they have a central engineering office in Philadelphia.

Q. Then those two work together in administering the construction, engineering and maintenance of all equipment problems of your company?

A. Not equipment, Judge, in the sense of equipment that is out with these dealers. The engineers have supervision over the planning and construction of plants, actual building of the plants, and building of service stations, but they have nothing to do with the maintenance of that equipment, either at the plant or at the dealers.

Q. What is done in respect of that cost, so far as your doing business in Detroit is concerned?

A. That is not allocated on these figures I have given you here.

Q. Not any place?

A. The district is charged on the profit and loss statements, but it does not appear on this break-down of gasoline handling costs.

Q. We have already mentioned, in connection with advertising, the general overhead administrative cost of your

general office, and this applies also to your office
953 here in Detroit, and by "yours" I mean yours in-
dividually as distinguished from the field office.

A. Yes.

Q. Is any effort made by your company to allocate such general overhead administrative costs; that is, supplies for your general office, salaries of your over-all executives, like the president and the management executives?

A. I don't know, of my own knowledge, that any such allocation is made. I have never seen it allocated at my office. That is a cost figure incident to the operation of the general office in Philadelphia.

Q. But that cost is there, isn't it?

A. That cost is in the over-all cost of running the corporation business, yes.

Q. Do you maintain in your office a sales research and development organization?

A. We have in Philadelphia a so-called sales promotion department.

Q. And what is the nature of the duties of that department?

A. They make market studies and prepare data and statistics and demonstration equipment for educational purposes of the education of our salesmen and the education of our dealer connections. They prepare the material for that type of schooling or education.

Q. Is that reflected in these figures you have given to us?

954 A. I can't say that it is or that it is not. I don't
know. It is handled by the advertising department.

Q. You mean by that that they supervise the direction of that work?

A. Yes. The same individual is the head of the advertising department and the sales promotional group.

Q. Now, in your company do you have any plan for annuities and employee insurance or special allowances, death benefits, or things of that nature?

A. We have a group insurance. We have no retirement or annuity policy. We have a so-called Employees' Stock Purchase Plan through which the employees purchase stock in the company.

Q. Now, first, with respect to the group insurance: does the company bear any portion of the cost of that insurance to the employee?

A. The company furnishes the employee with $1,000 of insurance on which the company pays the premiums. Insurance over $1,000 is paid for by the employee at the group rate.

Q. In respect of the Employees' Purchase Plan for stock, does the company contribute anything toward the purchase price of the employees' stock?

A. Yes. It contributes for every dollar the employee puts into the plan, the company puts in 50 cents, and the stock bought by this pool, at the end of a 5-year
955 period, becomes the property of the employee.

Q. Well, do you have, in addition to those two plans, any other sort of annuities or special allowances to employees or death benefit plans?

A. No, not as such. Each case has been handled individually, and some superannuated employees or disabled employees are paid something, but it is not on a fixed schedule or fixed plan. It is individual.

Q. Are those plans optional in their operation so far as any employee is concerned? That is may he participate or not as he chooses?

Mr. Austin: Your Honor, perhaps I am rather slow in making this objection, but this is Respondent's case, and my contention is that no expense of the home office, either the Sun Oil Company or the Standard Oil Company, can possibly have any relevancy here in determining the differences in cost of sale and delivery between the different classes of customers we have to deal with here in Detroit, and I, therefore, object to this line of testimony as to what the Sun Oil Company does in Philadelphia, as having no possible bearing on the issue.

Mr. Hanley: I don't, either, but I am in the same situation I was before.

Trial Examiner Ballinger: The Examiner will re-
956 serve to counsel for the Commission his objection, which may be renewed at the conclusion of the witness' testimony, accompanied by a motion to strike. I am doing this in order that the testimony may be in the record, irrespective of whether the Examiner strikes it or not for consideration by the Commission and in order that the Commission may pass upon the correctness of any ruling made by the Examiner.

Mr. Austin: Yes, I would like to make, if I may, this one observation. If the testimony is not relevant and material, there is some extent to which Mr. Harrison should be questioned as to the internal workings of the company when the questions are coming from a competitor. And, of course, if the testimony is necessary and relevant and proper in this case, that is one thing, but if it isn't, that is another thing.

Trial Examiner Ballinger: The Examiner thinks that it is proper that the matter should be in such shape that it may be reviewed by the Commission. If the Examiner should sustain a motion to strike, the testimony would then be in the record, and the action of the Examiner would be subject to review by the Commission. If the Examiner should sustain a motion to strike, the testimony would then be in the record, and the action of the Examiner would be subject to review by the Commission. If the Examiner should sustain the objection now and the Commission should later overrule the Examiner, it would be necessary to come out here and take it over again.

Mr. Hanley: I don't think I need an answer to that 957 last question that I asked of Mr. Harrison.

By Mr. Hanley:

Q. I asked you as to whether this was an involuntary participation plan. I am not really concerned about that. I will withdraw that question.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

By Mr. Hanley:

Q. I do want to ask you this question, Mr. Harrison: If the expense that your company is put to in respect to these contributions of insurance and purchases of stock for employees is allocated to your cost of doing business here in Detroit.

A. Not within the limits of those figures I have already given to you.

Q. That is what I mean.

A. They are not in those figures.

Q. But if you had one of your employees at the terminal in Detroit who was a participant in either one or both of these plans, and your company was contributing, as you have described, that cost to your company, while a cost in connection with that employee, is not reflected anywhere in these figures that you have given?

A. No, sir.

958 Q. Now, do you have a general office expense of taxes and insurance, Mr. Harrison?

A. Taxes and insurance are handled in the general office. We have no function of that nature out here, either in my office or in the district office.

Q. Taxes that run to—for instance, the terminal out here, the taxes that are paid on the terminal, are they paid out of your general office?

A. No, this is included in my expense.

Q. I know the taxes themselves are, but I am talking about the administration of your tax department, wherever it is. Do you have an accounting force in the field office or the general office to handle that?

A. The taxing matters are handled by the general office in Philadelphia.

Q. So the only items that you have here included are the taxes themselves?

A. That is right.

Q. Without any cost for administration of your tax personnel or department?

A. No.

Q. Do you have a real estate department in your general office or in your office here in Detroit, your own office?

A. No.

Q. Don't you have a real estate department any-
959 where in your organization?

A. A real estate department in the Philadelphia office.

Q. That is what I mean.

A. The general office, yes.

Q. They handle any real estate matters that may arise here in the Detroit area?

A. Practically, no. The papers are passed from this office to the general office, and papers from that office are passed here, but they perform no function in this area of mine.

Q. Where are your abstracts looked over and opinions written and your leases drawn and detail of that sort handled, Mr. Harrison?

A. All of the contractual documents are prepared in my office, lease purchase contracts, and so forth. They are sent to Philadelphia, and the examination of title is made through a regular title examining people, by contract with a local abstractor or title examiner or a title insurance company.

Q. Now, that expense is not reflected in your figures here?

A. Yes; it is reflected in there. It comes into a rental cost, a rental expense or a rental profit or loss on the real estate as it is in use, and the cost of acquiring the property would include all this title examination.

960 Q. Would there be a definite allocation of cost to your district out here from the general office for that kind of cost?

A. Yes.

Q. And of the account that you have given us, would that be reflected in?

A. That is in what we call the dealer cost here, under lease station expense. May I be off the record for a few minutes?

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. I will ask you this, Mr. Harrison, is it not true that in your accounting practices within this company, your company, your Detroit office, in so far as it's practical from an accounting standpoint, is set up on a separate basis, and your general office is set up on a separate basis, and that your accounting practice is designed in so far as you can to keep separate records as between the two operations?

A. Yes, it is so set up.

Q. So that your costs in the districts are not regarded by the general office as its cost and you do not regard general office costs as your costs?

A. That is correct.

961 Q. Just one other general question along that line: Do you have any labor and public relations department in your business, Mr. Harrison, either here or in your general office?

A. There is what you might call a public relations. It is not a department. In fact, it is just one man with a stenographer.

Q. It wouldn't be very much, no matter how you figured that cost?

~~A.~~ That is right.

Q. It has been called to my attention that you may have overlooked mentioning accounting cost in the field division. I think we went into that quite fully. You maintain an accounting force in the Detroit office?

A. In the Detroit district office. And the costs of that are included in these figures.

Q. Now, have you included in those figures somewhere both the accounting cost that takes place right out at the terminal—

A. Yes, sir.

Q. —and the cost at the field office?

A. Yes, sir.

Q. That covers the point.

Now, reverting for a moment to the physical method
of making deliveries here from your Detroit terminal,
962 Mr. Harrison, you operate, do you not, large trucks,
as compared to trucks generally in use for gasoline
delivery?

A. I think that generally speaking, our trucks have a larger load capacity than most other, although some other companies have the same size trucks, I believe.

Q. But you adhere pretty generally to the use of those trucks, uniformly?

A. Yes, sir.

Q. I think you said that you had 10 or 12 trucks operating.

A. I find it was 13.

Q. Do you have some routing plan in effect whereby you adhere, generally speaking, at least, to making only a certain number of calls a week or a month on a dealer?

A. Yes, sir, we have a routing plan, with that as an objective.

Q. Is the effect of that to limit the number of calls within a given time?

A. That is the purpose of it, to make as few deliveries as possible, delivering a maximum load each delivery.

Q. ~~Now,~~ as a part of that plan, you also have a minimum delivery figure, do you not, ordinarily in effect?

A. Yes. It is not particularly applicable to dealer de-
liveries, because practically all the dealers take a much
larger delivery than that limit. That limit is on a so
963 called commercial delivery.

Q. That is designed for the same purpose, to increase the efficiency?

A. Yes, sir; to increase the efficiency and reduce operating costs.

Q. Now, Mr. Harrison, those figures, so far as you have been able to give them to us here, were derived from your operations in 1940; that is true, is it not?

A. Yes.

Q. It is true that your operations have increased so far as gasoline volume is concerned from year to year steadily over the last three or four or five years, have they?

A. Generally speaking, yes, they have increased.

Q. Isn't it also true that your costs, over-all costs, of sale and delivery to the retail reseller trade have decreased somewhat over the same period of time?

A. Yes, the unit cost, using the gallon as the measuring stick, the unit cost has gone down as the volume goes up.

Q. I don't think it is in the record from you, Mr. Harrison: You sell only one grade of gasoline out of your Detroit terminal, do you not?

A. That is correct.

Q. And that is the Sunoco gas?

A. New Blue Sunoco Motor Fuel.

964 Q. Just incidentally, would that not make some difference in the cost of the handling and operating the bulk plant as distinguished from handling, say, three different grades that had to be kept separated and handled?

A. I don't think but what there is any question that it is less expensive to operate with the one material than with three or four. Any duplication or, we will say, multiplication of grades or commodities is bound to run your cost up.

Q. And that is particularly true in the oil industry, isn't it, Mr. Harrison?

A. Yes.

Q. I would like to have the Court understand that while what you say might be true as regards different grades of molasses—

A. Yes, sir.

Q. —it is even more true, is it not, when you are handling products like petroleum products, like gasoline and naphtha and inflammable dangerous materials must not be permitted to mix?

A. It is, I think, the duplication, or multiplication, I will say, of commodities handled through a plant under the conditions under which petroleum has to be handled, would greatly increase the cost of plant operations.

Mr. Hanley: Now, I have a few more questions, your Honor, but they will be very few, but I would like to
965 take a few minutes recess if we may have it at this time.

Trial Examiner Ballinger: All right. We will take a recess for five minutes.

Off the record.

(A discussion ensued off the record.)

(A recess was taken.)

Trial Examiner Ballinger: Come to order.

By Mr. Hanley:

Q. I think I am about through with this thing, Mr. Harrison, on costs, but recapitulating what I understand to be your answers, it appears that your organization generally is about like this: That you have here in Detroit your terminal, and you allocate to that what you call warehousing and delivery costs; and then you have a field office, and that is the office that Mr. Cunningham directs here in Detroit.

A. Yes.

Q. And that has direct charge of the operations out at the terminal and the business of selling here in Detroit?

A. Yes, sir, that is correct.

Q. And then you have a division office here in Detroit which you manage?

A. That is correct.

Q. And then you have the general office of the company in Philadelphia. You really have those four divisions
966 of operations?

A. Just three. Mr. Cunningham also is manager of the terminal as well as the sales office. There are just three divisions.

Q. So the field office and the warehouse are, in your mind, practically one unit?

A. One operation, yes, sir.

Q. Now, the costs that you have given us, generally, are the costs that you have allocated particularly to the warehousing and delivery operation out of the terminal and such additional costs as you think are applicable in the field office of Mr. Cunningham?

A. That is correct.

Q. And you have excluded costs that might arise in your own office and in the general office in Philadelphia?

A. That is correct.

Q. Now, in the over-all marketing cost picture, Mr. Harrison—and let me preface this question by saying I may have been—I may have inadvertently created a little confusion by saying cost of selling when I was maintaining and intending and meaning that you should understand the over-all cost of marketing gasoline, and in that over-all cost of marketing gasoline, to retail resellers, you do have costs, as you have indicated, in these other divisions of your business. That is, in your office and in the
967 general office in Philadelphia?

A. That is correct, which costs do not appear within these figures that I have given of record.

Q. Now, directing your attention particularly to this item of 3/100 of a cent which you designated as your office accounting cost and your item of 1/100 of a cent, which I understand, you designated as your credit accounting cost, would you check that and see if I am right?

A. Yes, there are three items under office cost: accounting costs, such as the bookkeeping, invoicing, and so forth.

Q. And that was how much?

A. That was 3/100.

Q. Yes, sir.

A. And the office costs for credit and collection:

Q. Yes, sir.

A. That was 1/100 of a cent.

Q. Yes, sir.

A. And the office costs connected with the sales and operations of the plant and office, 1/100 of a cent.

Q. So you have there a total of 5/100 or 5/100 of a cent?

A. And then I have got general district expense which included the items of interest on invested capital in plant and inventory, 3/100 of a cent.

Q. That certainly would not come within what I
968 have in mind. I think it is within the three items:

A. In office costs?

Q. Yes.

A. And that is 5/100 of a cent.

Q. Now, I think that you have told us that you have included in that 5/100 of a cent some place the accounting at the warehouse physically, too, as well as the accounting in Mr. Cunningham's office?

A. That is correct.

Q. Now, in that figure of 5/100 have you given consideration to these items, if you have any cost of these items, the record of delivery by accounts at the warehouse? Do you keep a record by accounts?

A. Of the quantities delivered?

Q. Quantities delivered and to whom delivered, and when?

A. Yes.

Q. Have you included that?

A. That is in the cost.

Q. Do you keep an efficiency record on your trucks?

A. We keep a truck operation record which includes—well, we will say, the truck itself, the depreciation on that truck, the license, the taxes, the cost of gasoline used, oil used, tires used, and repairs are included in that.

Q. And do your keep records of just what that truck does?

A. We keep records of the gallonage delivered, the
969 miles run, the gallons delivered per mile run, and the
gallons delivered per hour run.

Q. So you have an individual account with every truck?

A. Yes, sir, every truck.

Q. Is that included?

A. That is included.

Q. When I say from here on, "Is that included?" I am talking about this 5/100, Mr. Harrison.

A. Yes, sir.

Q. Do you keep a record of your sales by accounts?

A. Yes, sir.

Q. And is that included?

A. That is included.

Q. Do you have ledger accounts on each reseller that you serve?

A. Yes, sir.

Q. And do you keep retail accounts with each reseller?

A. Yes, sir.

Q. And that applies to both real estate and rental of the equipment, if you rent any equipment?

A. Rental of the plant, we say, and not equipment. The building where we rent it and where we own it and in both cases, have a tenant operator or, as generally known, as a dealer, that is all included in these figures.

Q. Now, do you keep a record on equipment at each place?

970 A. Yes, sir, we keep an inventory of every item of equipment that is placed with the dealer and where it is located.

Q. And that is included?

A. That is in there. That accounting is all in there.

Q. Do you have a check and record department taking care of all these sales tickets, delivery tickets?

A. Yes.

Q. Is that included?

A. That's included.

Q. Do you have any portion of your accounting department; which devotes itself to making compilations of sales reports, summaries, things of that sort?

A. The district office makes a summary report every week of the sales made during that past week, and that is sent in to my office and the cost of preparing that report is in that expense.

Q. That's done by the accounting force that you have referred to?

A. Yes, sir.

Q. Now, you have told us that your company credit records and credit costs, including investigation, collection, salaries, and the records in connection with that, that is included here, is it not, in one of those segregated items?

A. That's right.

971 Q. Now, your company issues credit cards, does it not, Mr. Harrison?

A. Yes.

Q. Do you have any personal set up to take care of credit or credit cards or the general handling of that business?

A. Not separated from the general credit and collection work.

Q. Is all of that work included in this .05 figure?

A. Yes, sir.

Q. Do you maintain an order department?

A. Yes, sir.

Q. And is that included?

A. That's included.

Q. Now, directing your attention not to the specific costs which you have outlined in figures here, but to the general cost of marketing gasoline to retailers in Detroit and immediate vicinity; has not that been generally, in the past several years, about 1½ cents per gallon, perhaps from 10 to 15 points or hundredths of a cent below that; hasn't that been your experience, Mr. Harrison?

A. I would like to have that question again.

Trial Examiner Ballinger: Read the question.

(The question was read.)

972 By Mr. Hanley:

Q. I will try to clarify that by perhaps less 10 or 15 points: Hasn't it been around approximately 1.35 or 1.40 cents, in your experience?

A. No, sir.

Q. Haven't you had a number of conversations with Mr. Raupagh and perhaps others, Mr. Harrison, in which you have generally discussed your over-all costs of marketing? Do you recall having such conversations?

A. Yes. I have discussed these marketing problems.

Q. And that has happened on a number of occasions when you would get together, in the past several years, has it not?

A. That is correct.

Q. Do you recall saying in those conversations that your over-all marketing costs approximate somewhere in the neighborhood of 1.30 or 1.35 or 1.40 cents a gallon?

A. I don't recall making such a statement.

Q. In this system of bookkeeping that exists between your Detroit marketing set-up and your general office, is it not true that the company allows a cent and a half as a mark to shoot at, at least in the marketing cost of gasoline to retail dealers?

Mr. Austin: Oh, I object, your Honor, on the ground that our statute refers only to cost of manufacture 973 and sale and delivery. There has been no question here of cost of manufacture. Therefore, this inquiry must necessarily, under the statute, be restricted to sale and delivery. Up to this time testimony has been restricted to sale and delivery. We are now confronted with the term marketing costs. If it means anything other than sale and delivery, it is improper and irrelevant and has no bearing upon the issues.

Mr. Hanley: I will say to your Honor it certainly does not mean manufacturing costs. I am not inquiring anything about manufacturing costs. I am talking about marketing costs which, I think, we all understand, now, in view of the explanation of the witness.

Trial Examiner Ballinger: Possibly the witness may have more knowledge than either of the attorneys.

Mr. Austin: Does marketing costs mean sale and delivery only?

Mr. Hanley: It certainly includes sale and delivery. We may be in dispute on the argument of this case as to whether it means anything about the president, Mr. Pugh, and Sun Company, but we want to reserve the right to argue about that, at least. It doesn't include manufacture. I can say that right now. My question isn't pointed to any inclusion of any manufacturing costs of gasoline.

974 Mr. Austin: Beyond that, my objection is based on the ground that marketing costs might be broader than sale and delivery, and I think we ought to continue to talk about sale and delivery, and not add on a term that might include something else. I don't know if it includes something more than that, or not.

Mr. Hanley: Isn't that up to the Commission, as to which of these terms may be included in sale and delivery, as the statute provides?

Trial Examiner Ballinger: The Examiner thinks the witness ought to be advised exactly what you mean.

Mr. Hanley: I have tried to advise him, but I will do so again.

By Mr. Hanley:

Q. I wanted you to understand, Mr. Harrison, through this I am asking you now I am not referring exclusively and explicitly to the division of costs you have given us figures on here, that is, your terminal and Mr. Cunningham's field house, I am referring to that plus over-all marketing cost for gasoline to resellers in Detroit, which cost may also arise and be applicable to marketing costs in your office in Detroit and in Philadelphia. Now, taking the whole picture but allocating now to marketing costs of the gasoline to resellers in Detroit, is it not true that in this bookkeeping set-up in existence in your company that it is expected that that cost will be kept within a cent and a half?

975

Mr. Austin: Your Honor, I don't see that it is at all material as to what the Sun Oil Company's central office expects of its regional executives, or whether they expect to be below a cent and a half or not, or what it is. All these items, I agree with Judge Hanley, it may be a question for the Commission what items are properly included, or not, but I don't think this present question about what the Sun Oil expects is material, and I object on that ground.

Trial Examiner Ballinger: The Examiner doesn't perceive the materiality of it, but to save time and to afford counsel full opportunity, the witness may answer.

A. If I have a clear understanding of your question, you mean that there are costs in addition to those I have mentioned on the record incident to the expense of my office and of our general office in Philadelphia, which increment, added to the figures I have given you, would bring that cost up somewhere in the neighborhood of 1.35 or to one and a half cents?

By Mr. Hanley:

Q. Yes, sir.

A. My answer to that is no.

Q. How high would it bring it, in your judgment, then?

976 A. The addition of the administrative costs in my office and the general office would make a very small difference, relatively in the cost, and I am not qualified to say how much. I don't know the costs of the general office in Philadelphia that would be included in this bracket of costs.

Q. I don't want to press you, if you don't care to give a figure, Mr. Harrison, and if you don't, why, just say so, if you can be helpful.

A. It is not a question of my willingness to give it. I just don't know, and, consequently, I don't want to testify to something that I don't know.

Q. Very well. We will just leave it there.

Mr. Hanley: Now I have a few questions, your Honor, that are strictly cross-examination because they are just clarifications of a couple of questions in the examination of last week.

Trial Examiner Ballinger: Counsel for the Respondent may now recur to cross-examination, the direct examination having ceased.

PAUL HENRY HARRISON, was thereupon recalled as a witness by and on behalf of the Commission, and, having been heretofore duly sworn, testified further as follows:

977 *Further Cross-Examination by Mr. Hanley.*

Q. You will remember, Mr. Harrison, in your last examination that we were discussing the policies in effect by your company relative to your use of jobber distribution as distinguished from your own direct distribution, and you stated that elsewhere at certain points in this state—that is, elsewhere than in Detroit—and at certain other points in the state, you distributed through jobbers. Do you recall that testimony?

A. Yes, sir.

Q. It is not clear, from your testimony whether or not you stated that those jobbers which you used elsewhere in this state and elsewhere in the United States generally engaged in both direct retail operations themselves as well as supplying retail dealers who are independent operators. Is that generally the custom among your jobbers?

A. I think that all of them operate directly as their own station, one or more stations. I think the largest one operated by any one of our distributors is six stations of his own.

Q. As I recall your testimony, you did say that in the use of the jobber system, generally, by the whole industry, that it was your understanding that jobbers generally did engage in both retail operations directly, as well as in the wholesale operation to other resellers?

978 A. That's my understanding.

Q. Now, again directing your attention to your testimony on that general question of how you operated, as distinguished between jobbers and direct deliveries, I asked you this question, as to whether or not that was true throughout your operations. It is true, isn't it, Mr. Harrison, that in Detroit and in the fuel oil business that you use the resellers who are classified as both service station men or retailers and resellers who are classified as jobbers or tank car buyers, in the distribution of your fuel oil as well as distributing directly to consumers, yourself?

A. You are speaking of domestic fuel oil, furnace oil, to particularize?

Q. Yes.

A. Yes, we sell both by tank car to distributors who, in turn, deliver it to household by truck delivery. We sell to those people in tank car. We also operate our own truck delivery system of furnace oil in Detroit.

Q. And do you not also sell to service station operators?

A. By truck delivery, from our own plant, yes.

Q. You have a differential in price—I don't care to ask you what it is—between the tank wagon price to the resale dealers on fuel oil, as distinguished from the price you charge the tank car resellers, do you not?

979 A. Yes, there is a difference—

Q. And the tank car price is lower?

A. —between tank car price and tank wagon price, the tank car price being made to the distributor who operates a plant, and the truck delivery being made from our own plant.

Q. To the resellers?

A. To the reseller, in the case of a few service stations; by truck to the consumer, in the case of the domestic oil; that is, the oil burned in the domestic furnace.

Q. Excluding deliveries to consumers, because that apparently isn't in the picture, on gasoline here, that operation, so far as you indulge in it, in fuel oil, is just the same as the operation of delivering gasoline by tank wagon at a tank wagon price to a reseller, and delivering gasoline by tank car at a lower and tank car price to a jobber with a plant, the only difference being that in the one case it is gasoline and in the other case it is fuel oil; is that not true?

A. I think the two operations are comparable; that the actual operation of selling to the distributor by tank car and he, in turn, operating his truck, would be the same operation essentially as if we sold him gasoline in tank car, and he operated the plant and he sold it either to a retailer or to a consumer.

980 Mr. Hanley: You may take the witness. Thank you, Mr. Harrison.

Redirect Examination by Mr. Austin.

Q. Mr. Harrison, you came here on last Wednesday—I believe that was March 12th. Did you come under subpoena?

A. Yes, sir.

Q. Subpoena from the Federal Trade Commission?

A. Yes, sir.

Q. And did you receive that subpoena before you ever met me, or talked to me about this case?

A. Yes, sir. I received it by registered mail several days before I saw you.

Q. Prior to the time you were subpoenaed, had you ever discussed this case with any representative of the Federal Trade Commission?

A. Yes, sir.

Q. When I say "this case" I mean after the issuance of the Complaint against Standard Oil Company, which was in December of 1940?

A. No. I was called on by Mr. McDonald, I think, of the Federal Trade Commission, prior to the filing of this bill.

Q. That was 1939, was it not; around the fall of 1939?

A. Yes, sir.

Q. And did Mr. McDonald come to see you by your
981 request or on his own initiative, so far as you know?

A. I certainly didn't ask him.

Mr. Austin: That's all I wanted to ask. I don't believe I have anything further.

Mr. Hanley: That's all I have.

Trial Examiner Ballinger: Mr. Harrison, you are excused.

(Witness excused.)

Trial Examiner Ballinger: Is there anything further?

Mr. Austin: Yes, your Honor.

At an earlier period in the hearing, there was marked for identification, a volume of invoices and acknowledgments from the files of the Standard Oil Company. It was admitted at that time that they were invoices and acknowledgments from the Standard Oil Company's files and I believe it was agreed that if I so desired, at a later time, I might offer certain of those invoices and acknowledgments in evidence, and at this time I have a few of those here which I have picked out of that file, Commission's Exhibit 20, for identification, which I would like to offer in evidence just so that the method of some of these shipments may appear.

Incidentally, five of these are shipments direct from
Whiting, Indiana, of which I find that four are ship-
982 ments which were covered by Commission's Exhibits
5-A to 5-J. There seems to be one here that is not so covered.

Mr. Hanley: Are you going to offer duplicate exhibits?

Mr. Austin: They are not the same sheets. This previous exhibit was bills of lading, apparently, or some railroad documents, but I would like to offer in evidence, I think, 14 of these invoices and acknowledgments taken from the file which I have just described.

Mr. Hanley: I don't understand the purpose, now, your Honor. Your Honor reserved the ruling on this whole file.

Trial Examiner Ballinger: The Examiner was under that impression.

Mr. Hanley: What is the purpose of introducing these exhibits, Mr. Austin, and, especially, duplicate exhibits? We just don't want to get this record too voluminous, your Honor. Do these things dispute any of the prices that we have admitted were charged?

Trial Examiner Ballinger: What do they pertain to? Do they pertain to the Interstate Commerce character of the business?

Mr. Austin: Five of them are on Interstate shipments; there are three from Muskegon and one from River
983 Rouge; all show there was a 1% cash discount made
to tank car buyers, which Mr. Raupagh has testified were not made to tank wagon buyers and while it is small, it is still an element in the case.

Mr. Hanley: Certainly it isn't disputed.

Mr. Austin: And, also, there are various sizes of tank cars there that I thought having those invoices in might show a pretty good picture of how gasoline was delivered. I am perfectly willing to withdraw four of those five from interstate shipments, because I think there is only one that is not included. That would reduce it down to ten.

Trial Examiner Ballinger: There should be no duplications.

Mr. Hanley: I want to object to this, in view of the statement of counsel, on the ground it is cumulative and encumbers the record. We have to buy this record, and photostats of all of these things, and Mr. Austin hasn't indicated a single thing that they prove. Everything that they prove is admitted on this record.

Trial Examiner Ballinger: Let us wait until there is a tender and then I will hear you fully on your objection.

Mr. Hanley: I am sorry. I thought he did make
984 a tender.

Trial Examiner Ballinger: Mr. Austin, I suggest you hand those to the reporter and let him put the identification numbers on them so that you may have the numbers when you tender them.

(The documents referred to were marked for identification, "Commission's Exhibits 66 to 74," inclusive.)

Mr. Austin: Now, your Honor, I will offer in evidence these nine invoices marked Commission's Exhibits 66 to 74, inclusive, for identification, which were withdrawn from the volume of invoices which was previously marked Commission's Exhibit 20 for identification, and I will point out that these are Standard Oil Company invoices showing shipments of gasoline to Merchant's Supply Company, Ned's Auto Supply Company, Wayne Oil Company, and Stikeman Oil Company.

These invoices are for various shipments of gasoline in different sized tank cars for different destinations and show the cash discount allowance and one of them marked Commission's Exhibit 66, for identification, is an invoice for a shipment from Whiting, Indiana, to the Wayne Oil Company direct, which does not appear to be included in the bills of lading put in in Commission's Exhibit 5—or freight bills, perhaps they were.

985 Mr. Hanley: Please note an objection on the part of the Respondent to the effect that the exhibits offered are cumulative; do not prove anything that is not admitted either in the pleadings or in the testimony, or both, and go to matters wholly undisputed. It may do me some good, if I ever have to print the record.

Trial Examiner Ballinger: The objection is overruled, and the documents, Commission's Exhibit 66 to and including 74 are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "Commission's Exhibits 66 to 74," were received in evidence.)

Mr. Austin: Now, if your Honor please, I would like to make an offer of proof at this time.

I have called some 15 or 16 dealers here to the stand to testify to loss of business and to the customers of the Standard Oil Company named in the Complaint who have been buying gasoline in tank car quantities and to some of their subdealers. I have talked to a number of other dealers and have them available for testimony, but, in my opinion, any further testimony along that line would be cumulative, and, therefore, I will offer to call those dealers subject to your Honor's opinion or ruling as to whether additional testimony upon that line should be brought forward.

986. Trial Examiner Ballinger: The Examiner understands that the testimony that you have thus far introduced is typical of the testimony that would be given by other dealers if called, and that their testimony would merely be cumulative; is that correct?

Mr. Austin: That is my opinion.

Trial Examiner Ballinger: Upon that representation the Examiner declines to receive them.

Mr. Hanley: At this time the Respondent moves that the statement of counsel denominated an offer of proof, just made, by physically stricken from the record on the ground that the same is merely the hearsay, unsworn testimony of counsel who states that he has talked to certain unidentified witnesses whom he says will testify to the same things that certain witnesses he has already called have already testified to, and such motion is made for the reason that such statement of counsel cannot be binding in any manner upon the Respondent.

Further, that there is no occasion for an offer of proof as of the time it was made by counsel for the Commission in that he had not been precluded from offering any testimony from any witness that he might choose to call, and the Respondent is not entitled to be bound by the suggestion of counsel or anybody else that testimony is available and can be produced against the Respondent, unless
987 such witnesses are called and produced, and the Respondent has an opportunity to hear their testimony and cross-examine such witnesses.

Further, the reason that, if such testimony were admissible in this hearing, that the Respondent could and would offer to prove by as many as 15 or 16 witnesses in respect of service stations handling each of the products herein denominated as branded products and products in this case denominated as non branded products, were originators of price cuts in their various vicinities and were responsible, so far as such witnesses were concerned, for the necessity, on the part of such witness, to reduce his retail price and that indulgence in such offers of proof of controversial matters on the part of counsel for the Commission and counsel for the Respondent would amount to nothing but argumentative exchange based on no evi~~dence at all, and would dege~~nerate into a colloquy of unsupported bickering which could be of no aid to the Commission and certainly isn't binding upon the respondent.

Trial Examiner Ballinger: Judge, it is your contention that the testimony adduced was incompetent and immaterial.

Mr. Hanley: I understood I had that objection all along.

988 Trial Examiner Ballinger: That is a reserved objection.

Mr. Hanley: Yes, sir. This is a specific, additional objection. I don't think this kind of an offer ought to be made, Judge.

Trial Examiner Ballinger: Your motion now is to strike the statement of counsel for the Commission that he can or will, if permitted, introduce further evidence of the same nature?

Mr. Hanley: Yes. I don't want to be bound by that statement. If he can, I think he ought to do it, if he wants the evidence.

Trial Examiner Ballinger: It being apparent with somewhere between two and three thousand dealers in Detroit that similar testimony could undoubtedly be introduced, the Examiner being of the opinion that it is wholly unnecessary, it would merely be cumulative, the motion of counsel for the Respondent to strike the statement of counsel for the Commission is overruled and denied.

Mr. Austin: If your Honor please, I would like to say a couple words on the record, in view of this long statement of Judge Hanley's.

Mr. Hanley: You may talk the Court out of his ruling. It is all in your favor, so far.

989 Mr. Austin: I assume whatever counsel says on the record is not evidentiary, and, secondly, there was no intention on my part to try to testify for any supposed witnesses in here, but simply to say that I was making an offer to call future witnesses for the purpose of producing some testimony. I am sure I don't know what they would have said when they got here, so if I said that, you can ignore that, and I am sure the Examiner has already done so.

Trial Examiner Ballinger: Let us proceed. The Examiner has already ruled.

Is there any further business?

Mr. Austin: I have nothing further on the Commission's case in Detroit, your Honor, and, therefore, move that the hearings be adjourned until some future date. Perhaps your Honor can state what the further proper practice is. I am not ready to close the Commission's Case at the present time. I may desire to hold one further hearing at Washington, but I cannot set the date or ask the date be set definitely, for that at this time.

Trial Examiner Ballinger: Upon statement of counsel for the Commission, the case of the Commission is not closed, if he desires to call one or more additional witnesses and he is not prepared to fix a time when the hearing should proceed, the Examiner will adjourn the hearing subject to five days' notice to counsel.

990 Now, at 1:05 P. M., the hearing stands adjourned, to be reconvened upon five days' notice to respective counsel.

(Thereupon at 1:05 o'clock P. M., the hearing in the above entitled matter was adjourned to reconvene upon five days' notice.)

991

Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Tuesday, April 8, 1941.

Met, pursuant to notice, at 10 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., appearing on behalf of the Federal Trade Commission.

H. R. Hanley; Esq. (910 South Michigan Avenue, Chicago, Ill.), appearing on behalf of the Respondent.

992

PROCEEDINGS.

Trial Examiner Ballinger: This is a reconvening upon notice at 10 a. m., Eastern Standard Time, in the hearing room of the Federal Trade Commission, Washington, D. C., of Docket No. 4389, in the case entitled in re Standard Oil Company. The last hearing was held at Detroit, Mich., March 18, 1941.

The Reporter will note Counsel for the Commission and the Respondent present.

You may proceed.

HERBERT F. TAGGART was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. State your name, please.

A. Herbert F. Taggart.

Q. Where do you reside, Dr. Taggart?

A. Ann Arbor, Mich.

Q. And what is your occupation or profession?

A. I am an accountant and also a professor of accounting.

Q. Where are you a professor of accounting?

A. At the University of Michigan.

Q. What are your present duties; that is, at this
993 time here in Washington?

A. At the present time I am on leave of absence from the University of Michigan. I am acting as chief of the Cost Accounting Branch of the Price Stabilization Division of the National Defense Commission.

Q. You say you are here on leave of absence from your position as professor at the University of Michigan?

A. That is correct.

Q. How long have you taught accounting at the University of Michigan?

A. I started teaching accounting at the University of Michigan in 1920, and I taught accounting there ever since except for 2 years spent at the University of Kansas, and two or three periods of several months to a year at a time down here in Washington. At those times I have been on leave of absence from the University.

Q. I assume you started in as an instructor in Michigan in 1920, and I believe you are now a full professor; is that correct?

A. That is correct.

Q. Having been an associate professor and assistant professor previously.

A. That is right.

Q. Have you specialized in cost accounting?

A. That has been my primary field for a consider-
994 able number of years, and when I first started out I
taught general accounting and economics, but as time went on I took over the cost accounting courses, and for the past 10 years, approximately, I have taught very little except cost accounting.

Q. What particular branch of cost accounting, or does cost accounting have branches?

A. Well, I teach, as a matter of fact, the general course in cost accounting, which is more or less similar to courses given in other universities. I also have one of the few courses in distribution cost accounting that are taught in the country.

Q. Are you a member of the American Accounting Association?

A. That is right.

Q. And any other associations of cost accountants?

A. I am a member of the National Association of Cost

Accountants. I am also a member of the Michigan Association of Certified Public Accountants.

Q. Do you have a particular position upon the board of directors of the American Accounting Association?

A. I am one of the two co-directors of research for the American Accounting Association.

Q. Now, you mentioned that you have been previously in Washington before your present experience. When was that?

A. On two different occasions during the N.R.A. I was here from the fall of 1933, full time, until the fall of
995 1934, and part time from then on until the Schechter decision in the spring of 1935. At that time I was chief of the cost accounting unit of the Research and Planning Division of the National Recovery Administration.

The second occasion of my being in Washington was during the four months from February to June of 1938, at which time I was a consultant on distribution costs with the Bureau of Foreign and Domestic Commerce.

Q. Did you conduct or participate in conducting any cost surveys while you were here with the N.R.A.?

A. Yes, I did. It was necessary in connection with my duties on the N.R.A. to pass upon the results of cost surveys which had been made in various industries for the purpose of establishing minimum prices. There were a number of these surveys in which I had more or less part; perhaps the most extensive one was that in the paint industry, in which the members of the paint industry were attempting to establish a series of minimum prices for the various products of that industry.

At that time they proposed a cost survey and brought into my unit their questionnaires that they proposed to use, and we went over them carefully and discussed them with them and suggested changes, and so on, and when the questionnaires had been sent out to the industry and were returned we received them and checked them very care-
996 fully and analyzed them, tabulated the results, and came to certain conclusions with respect to the minimum prices that had been proposed.

Q. Have you written any books or treatises on cost accounting, Dr. Taggart, which have been published?

A. Yes; the only one which is primarily on cost accounting is a publication by the Department of Commerce called "Distribution Cost Accounting for Wholesalers."

I have written, however, other books, two of them in particular, which came as a result of my N.R.A. experiences. One is called "Minimum Prices Under the N.R.A." and the other is called ~~"The Cost Principle in Minimum~~ Price Regulation." The later book was not confined entirely to N.R.A., but dealt also with such laws as with cost accounting problems, cost determination problems under such laws as the California Unfair Practices Act, and the so-called Michigan Fair Trade Act.

Q. Did you, in 1938, Dr. Taggart, have occasion to make a survey of the cost of selling gasoline by retail service stations in Detroit?

A. That is correct.

Q. Or in Wayne County, Michigan?

A. In Wayne County, including Detroit.

Q. Will you tell us how you happened to make that survey, or by whom you were retained to make it, if you were retained by someone, and the circumstances which 997 preceded your actual commencement of that work?

A. I came to make it because of the fact in my professorial capacity I was interested in such things. I had watched the growth of such legislation as this Michigan law, to which I referred, and was particularly interested in the provision in the law which provides for the establishment of a cost survey, and the reason I was interested in that, of course, was because of the fact that I had participated in certain cost surveys in the N.R.A., and I knew something about the problems and the technique involved.

Q. Well, who retained you to make the survey, or asked you to make it, or paid for the work?

A. Mr. Peck, the executive director of—oh, I forget the exact title. It is the Retail Gasoline Dealers Association, made the arrangement for the survey, and retained me for the purpose. The money for the survey was raised by the Association partly, I think out of their own treasury, and partly by subscriptions which they obtained from various sources.

Q. Were you reimbursed by the Association, or not?

A. Well, yes, broadly speaking, that is as I understand it the money that I received did not come out of the Association's normal funds, at least entirely.

Q. But it either came from the Association or was raised by the Association?

A. It was raised by the Association, yes, subscribed
998 as a result of their solicitation.

Q. Will you state broadly the purpose of the survey which you set out to accomplish?

A. The purpose of the survey was to conform with a provision of the law.

Q. Well, pardon me. I mean aside from that, what did you attempt to establish or find out through the survey?

A. Well, I attempted to find out what the cost of retailing gasoline was.

Q. In Wayne County?

A. In Wayne County.

Q. How was the survey commenced? I wish you would state from the beginning the means which you employed to make it.

A. The means that were employed was the questionnaire method. It was not felt that it was feasible to carry on a survey of such magnitude entirely by any other means. These questionnaires were rather extensive documents, were distributed among the gasoline dealers of Wayne County by a procedure which was carefully worked out and intended to furnish every gasoline station in the county with a questionnaire.

Q. Who did the distributing?

A. The distributing was done largely, if not entirely, by chosen members of the Gasoline Dealers Association who were assigned districts as nearly as possible to their—

Q. Well, who chose those members?

999 A. Why, I think they were largely chosen by Mr. Peck and the board of directors of the Association.

Trial Examiner Ballinger: You say "I think." Do you know? Have you any knowledge?

The Witness: Well, they could not very well have been chosen by any one else.

Mr. Hanley: I move to strike that, if the Examiner please.

Trial Examiner Ballinger: The motion is granted.

By Mr. Austin:

Q. Dr. Taggart, did you personally meet and instruct the people who made the distribution of the circulars?

A. Yes.

Q. So that regardless of who chose them, they came to you, did they not?

A. That is right.

Q. That is what I wanted to bring out.

And did you give them instructions regarding the distribution of the questionnaires?

A. Yes.

Q. And what were their instructions?

A. Their instructions were to leave a questionnaire blank at every gasoline station in the area to which they were assigned, and to make a record of leaving the blank on sheets which were specially ruled for the purpose
1000 of making such record. The record shows the date and the hour of leaving the blank, the name by which the gasoline station was known. There was a space also for the signature of the person who received the questionnaire. That space was not always used because signatures were not in every case obtained, but they were obtained in a very large majority of cases. At the bottom of each sheet was a space for a statement by the persons who distributed the questionnaire blanks to the effect that they had made the distribution, and that to the best of their knowledge they had covered every station in their assigned area.

Q. Were those sheets returned to you?

A. Yes.

Q. Did they remain in your possession?

A. They are still in my possession. I have had them continuously.

Mr. Austin: Your Honor, I request that this document be marked for identification as Commission's exhibit.

Trial Examiner Ballinger: The Reporter will mark the document "Commission's Exhibits 75-A, 75-B, and 75-C," for identification.

(The document was marked "Commission's Exhibits 75-A, 75-B, and 75-C," for identification.)

By Mr. Austin:

Q. I show you this document, Dr. Taggart, which
1001 is marked Commission's Exhibits 75-A, 75-B, and 75-C, for identification, and ask you if you will or can describe it.

A. This consists of three items, the one being the white original copy of the survey blank, the second being the pink duplicate copy of the survey blank which was furnished to all of the dealers in order that they might retain a copy of what they had sent in, and the third being an envelope which was supplied with the blank to the dealers for returning the completed survey to me.

Q. Did you prepare this survey blank?

A. I did.

Q. And were the returns upon which you made your survey returns made upon blanks identical with this?

A. That is right.

Mr. Austin: I offer this questionnaire marked "Commission's Exhibits 75-A, 75-B, and 75-C," for identification, in evidence.

Trial Examiner Ballinger: Is there any objection?

(Mr. Austin hands the exhibit to Mr. Hanley.)

Mr. Hanley: Commission's Exhibits 75-A, 75-B, and 75-C are objected to by the Respondent for the reason that the same are immaterial, irrelevant, incompetent, and impertinent in this action. They are not binding upon the Respondent, and is offered for the purpose of supporting any purported survey pointing to finding an average cost of selling gasoline in Detroit or elsewhere, that
1002 the same is immaterial for the reason that such survey is immaterial, incompetent, irrelevant, and impertinent. The only cost relevant in this case being the cost of the respondent and possibly the cost of the specific dealers named in paragraph 3 of the complaint; further, that the same is hearsay as to the Respondent, and no proper foundation has been laid for the reception of the exhibits.

Trial Examiner Ballinger: Have you concluded, Judge?

Mr. Hanley: Yes, sir.

Trial Examiner Ballinger: The objection is overruled. The documents are admitted in evidence as Commission's Exhibits 75-A, 75-B, and 75-C.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS 75-A, 75-B, and 75-C," were received in evidence.)

By Mr. Austin:

Q. Do you recall the time when you instructed these men to distribute these questionnaires, and the time when they were to be returned?

A. The time when the instructions were given was early in June, 1938. I can't recall the precise date.

Q. And was a date fixed either in the questionnaire itself, or otherwise, for their return to you?

1003 A. There was no date fixed in the questionnaire itself. However, after a certain time had elapsed every dealer whose name and address we had as a result of distributing the survey was sent a postal card indicating that surveys received after July 14, 1938, would not be considered.

Q. Now, do I understand you mean that every name on those lists which were returned to you were sent post cards?

A. That is right.

Q. And that is the list returned to you by the men whom you instructed to distribute the questionnaires?

A. That is correct.

Q. Who sent those post cards that you just referred to?

A. I did.

Q. Where from?

A. From Detroit.

Q. Were any returns received after July 14th used in your computations?

A. No.

Trial Examiner Ballinger: When did you say the survey commenced?

The Witness: Early in June of 1938, approximately—well, perhaps the middle of June, I don't remember the exact date.

By Mr. Austin:

Q. For what period was the cost information 1004 obtained from the service station?

A. Partly for the month of May, 1938, and some data for the year preceding; that is, the year 1937.

Q. Did you attempt to establish retail selling costs for other than May, 1938, for any other period?

A. My intention was to establish the retail selling costs as of that date, but on such basis that it would be fairly representative of costs over a longer period, such as a year.

Q. Why did you choose the month of May, 1938, for the survey?

A. I chose the month of May, 1938, for the reason that we felt that that would be representative of a year's operations, and, if anything, on the conservative side; that is, May is a good gasoline month, generally speaking, the sales are relatively high, and I felt that it was desirable to choose such a month for obtaining the monthly costs and the gallonage in order that the survey should result in a conservative conclusion.

Q. I see that the survey, Commission's Exhibit 75-A—

Mr. Hanley: Do you mean the survey or the questionnaire?

Mr. Austin: Well, it is called a survey in one place and a questionnaire in another on the same document. That is the reason I identify it by the exhibit number.

This survey or questionnaire asks for a statement
1005 of the number of gallons of gasoline sold in each
month from January, 1937, through May, 1938.

The Witness: That is correct.

By Mr. Austin:

Q. Did you make any computation or comparison of the May gallonage in 1937 and in 1938, respectively, as compared with the average monthly gallonage for the whole year in the case of 1937 or for the first 5 months in the case of 1938?

A. I did.

Q. What was the result of that?

A. The result of that was that the gallonage in May, 1938, was, if I recall correctly, approximately 5 per cent higher than the average monthly gallonage for the first 5 months of 1938; furthermore, the gallonage for May, 1937, was found to be something like 9 percent higher than the average monthly gallonage for the 12 months of 1937.

Q. And in your opinion, based upon the results of your experience, and results of this survey, does the cost per gallon, distribution cost per gallon of retail service stations in selling gasoline increase or decrease with an increase or decrease in gallonage?

A. The cost per gallon decreases with an increase in gallonage in a given period.

Q. Then, accepting the statement which you have just
made that the average, or, rather, that the gallonage
1006 for May, the average gallonage for May was higher
for these stations than the average gallonage for the
balance of the year in so far as shown by these returns, would that mean that the average cost per gallon of selling gasoline through these stations would be higher or lower in May than for the balance of the year?

A. It would be lower.

Q. Now, this exhibit, Commission's Exhibit 75-C, is a return envelope addressed to Dr. Herbert F. Taggart, Post Office Box No. 31, Ann Arbor, Mich., was a similar envelope attached to each one of these surveys?

A. An envelope similar to that accompanied each survey blank.

Q. Did you receive these surveys or questionnaires filled out at Ann Arbor?

A. That is right.

Q. Did you receive any of them at any other address?

A. I did not.

Q. Then, do I understand that all of the filled-in questionnaires which were used by you in the survey were received by you direct by mail to Ann Arbor?

A. That is correct.

Q. Who opened these envelopes when they were received?

A. I opened a good many of them. My assistant opened also a considerable number of them.

Q. Who was your assistant?

1007 A. My assistant was a graduate of the School of Business Administration at Ann Arbor. His name was Gordon Roeglin.

Trial Examiner Ballinger: Were the replies you received under oath? Were they subscribed to before a notary public?

The Witness: They were.

By Mr. Austin:

Q. And where has been the physical location of these returns since you received them?

A. They have been in Ann Arbor.

Q. Have they been in your possession at all times?

A. Yes.

There is one slight exception to that, that is—well, two exceptions. In the first place, we took some of them, that is, on trips, field trips, in order to check them, so that they were out of Ann Arbor but not out of our possession. The second was that some of them were taken into court in Detroit in connection with litigation which followed this.

Q. Well, in that instance you have just mentioned, was that after the completion of your computations?

A. Oh, yes, entirely after.

Q. And all your computations made upon those returns?

A. That is correct.

Q. Now, you have just made a reference to a field check in Detroit. Before asking you about that,
1008 were some of these returns or questionnaires, when
they came to you, obviously incomplete, or did some of them have defects of one sort or another, or lack of notarization, or errors in arithmetic, that sort of thing?

A. That is very true.

Q. Have you any idea what percentage of them would have such obvious errors?

A. It would be necessary to guess. I prefer not to—relatively a small percentage.

Mr. Hanley: May I have that question and answer, please.

Trial Examiner Ballinger: Read the question and the answer.

(Question and answer read.)

By Mr. Austin:

Q. Do your know definitely that it was a relatively small percentage?

A. Oh, yes, definitely.

Q. Now, what was done with those returns that had these obvious defects on them?

A. Each return that had an obvious defect was marked for further investigation.

Q. What was the nature of that further investigation; that is, what further investigation was actually made?

A. The returns were taken by myself, or by my
1009 assistant, to the station from which they originated,
and there either the defect was remedied or we determined that the defect could not be remedied. In general, the defect was remedied.

Q. Suppose it was not remedied.

A. Then we threw the return out of the computation.

Q. Did you make a field check personally, or, through your assistant, under your direction, upon any returns which on their face did not appear to have any defect?

A. That is true, we did.

Q. In above how many of those returns were field checks made?

A. The total number of returns on which field checks were made for any reason was approximately one-third of the entire number received. I am sorry to be unable to give you an exact breakdown as to—

Q. I do not care for the exact percentage, Doctor. I expect your mind runs to exact percentages when I ask you these questions, and you dislike to answer them otherwise, but I want only an approximate answer.

I will ask you a further question along that line. I am particularly interested in knowing what your field check was upon returns which did not have any ~~defects~~ upon their face?

A. In general, we found that they had been prepared very accurately and in almost no instances were
1010 changes in such returns found necessary.

Trial Examiner Ballinger: What does a field check consist of?

The Witness: We visited the stations and inspected their records. If they had a complete set of double-entry books, which was frequently the case, we examined those books to check the figures which had been reported against the books which they kept. Where they did not have a complete set of double-entry records, which was also frequently the case, we inspected such records as they did have for the purpose of checking the accuracy of the reports which they had made, and also for the purpose of supplying in some cases figures which they had not given us, or in a few cases where they had combined figures or failed to follow instructions.

By Mr. Austin:

Q. How many of these completed survey blanks were returned to you at Ann Arbor?

A. May I look at my report here?

Q. Yes.

(The witness examines a paper.)

A. 555.

Q. And how many of them were used in making your computations?

A. 489.

Q. What accounts for that difference?

1011 A. The 66 returns which were eliminated were those which were defective in one way or another, and from which it was impossible to remove the defect.

Q. Did you make any analysis of the distribution of these 489 stations throughout the County of Wayne?

A. Yes.

Q. How was that done?

A. We spotted each station which made the return on a map of Wayne County, and we divided the county up into five districts, then bounded by the city limits of Detroit, by the Detroit River and Michigan Avenue, and Woodward Avenue and Gratiot Avenue, so that four of the districts were within the city, and the fifth consisted of all of Wayne County outside of the City of Detroit. The number of stations in each of those districts ranged from 80 in the district outside of the City of Detroit to 121 in District 2, which was the district between Michigan Avenue and Woodward Avenue, running from the river out to the city limits.

Q. How many stations were located in each of the other three districts?

A. In District 1, 107; that was between the Detroit River and Michigan Avenue.

District 3, 82, which is between Woodward and Gratiot.

And District 4, 99, which is the district between

1012 Gratiot and the river.

Q. Among the 489 stations whose returns were used by you in making your survey computations, what was the range in the number of gallons of gasoline sold during the month of May, 1938?

A. The range was from 1049 gallons to 30,844.

Q. And how many major brands of gasoline were represented?

A. I think all of the major brands of gasoline were represented, and a considerable number of minor brands and unbranded varieties.

Q. Have you any record of the major brands which were represented?

A. Mobil Gas—

Q. And you might state the number of stations, also.

A. Mobil Gas, 102; Standard, 82; Sunoco, 52; High Speed, 42; Sinclair, 40; Shell, 39; Texaco, 31; Gulf, 29; Cities Service, 9; miscellaneous brands, 22; brands unreported, 107; total of stations all reports received, 555.

Q. About what percent of the service stations in Detroit sent in these questionnaires which you received at Ann Arbor?

A. Between 22 and 23 percent.

Q. From your experience in conducting the cost surveys by the questionnaire method, is that a high or a low return?

A. It is a very high return.

Q. What is your opinion regarding the accuracy 1013 of the cost survey, conducted by the questionnaire method, in so far as such accuracy is affected by the percentage of units, unit stores or stations sending in returns; that is, is 20 percent big enough representation to give reliable results, or would a lower or higher figure be better?

A. A lower figure, in my opinion, would give fully as accurate results. A higher figure is always preferable because it tends to create greater confidence. However, by a random sampling process I proved to my own satisfaction that a much smaller number of returns would have been entirely accurate and satisfactory.

Q. You mean by random sampling process of these returns?

A. That is correct.

Q. And were the results upon such a random sampling process substantially the same as by using all of them?

A. That is correct.

Q. Did you make separate computations of the retail selling cost of the service stations located in the various districts; that is, each of these five districts in Detroit that you have described?

A. I did.

Q. How much variation, if any, was there between the result for the different districts?

A. The variation in the average results of the average was two-tenths of one cent.

1014 Q. That is between the highest and the lowest?

A. No, four-tenths of one cent between the highest and lowest, two-tenths from the average in either direction.

Q. Do you mean that no one district varied more than two-tenths of a cent from the average?

A. That is correct.

Trial Examiner Ballinger: I understood you to say that four-tenths percent was the extreme variation.

The Witness: Of the average in these districts.

Trial Examiner Ballinger: Yes.

The Witness: Yes.

Mr. Austin: Well, my understanding was that the witness stated that two-tenths of one cent was the variation of any district from the average, but any district might have been two-tenths above the average to two-tenths below, so that the variation between the highest and the lowest district, there was four-tenths of a cent, but that no one district was two-tenths of a cent off the average; is that correct?

The Witness: That is right.

Trial Examiner Ballinger: That is what I understood him to say.

By Mr. Austin:

Q. In your opinion, Dr. Taggart, were the mechanics of this survey and its coverage and representation of the accounting procedures and methods used such as to
1015 produce reliable and conservative results as to the retail service station cost of selling gasoline in Wayne County, Michigan?

A. Yes.

Q. What conclusions as to the retail selling distribution cost of gasoline in Detroit did you reach as a result of your computations upon this survey?

Mr. Hanley: Just a moment, Doctor.

Is that intended to elicit what average cost the Doctor arrived at?

Mr. Austin: Yes.

Mr. Hanley: May I inquire, Your Honor, what is the status of the record in relation to this statute which was offered by the Government, section 282, wasn't it? Has that been excluded definitely?

Trial Examiner Ballinger: I do not recall.

Mr. Austin: If Your Honor please, that was offered in evidence, and Your Honor reserved the ruling on it. I believe I stated at the time that I thought it might have some relevancy as to a background for the survey. I think that perhaps the easiest thing will be for me to withdraw that offer because I am not approaching that survey from this angle at all. I am inquiring of Dr. Taggart, as an expert, and asking him—having qualified him—for his expert opinion on what he did, and I am not offering this testimony, nor will I offer the survey
1016 as in any way binding or relevant because of anything done under section 282 of the Acts of Michigan of 1937.

Trial Examiner Ballinger: The offer of that exhibit which was marked for identification is withdrawn.

Mr. Hanley: Now, as to this question, Respondent objects as follows:

Testimony sought to be elicited and the survey are irrelevant, incompetent, and immaterial, and impertinent to any matters in this litigation; that no adequate foundation and no foundation at all has been laid for the reception of the testimony; the same is not binding upon and is prejudicial to the Respondents; that it is an unwarranted and prejudicial encumbrance on the record; that it is unauthorized and not contemplated by any law under which Respondent is here charged; that if the purpose of the offer is to establish average cost of retailing gasoline in Detroit it is de hors the Robinson-Patman Act and is worse in that it is expressly contrary and antagonistic to the terms of the Robinson-Patman Act, which expressly makes material only the specific individual costs of Respondent in marketing; that if offered with a view to establishing or fixing prices in any manner, it is wholly outside the issues in this case, and invades a province ultra vires the powers of the Federal Trade Commission, and is not only unauthorized by the law under which this action is brought, but is directly derogatory of and offensive to such law;
that if offered for any purpose other than to establish
1617 average gasoline retailing costs in Detroit it is inherently
incompetent for any such purpose, it now appearing from the testimony of the witness that the survey was and is exclusively concerned with such average costs determination and with nothing else; that if offered to make a comparison of the cost of any retail dealer, such comparison would not only be incompetent and immaterial but fails completely for the reason that no witness advanced by the Government has testified, and no evidence has been adduced, as to cost of any retail dealer; that if offered to prove average retail cost it is competent not only as offensive to the Robinson-Patman Act but because it now affirmatively appears that Respondent is not engaged in gasoline retailing operations in Detroit, and the only cost that is material under the law involved herein is the individual cost of Respondent in its sales to resellers of gasoline; further, that as to the survey itself, as to the testimony of this witness relative thereto, and as to the answer now sought to be elicited from the witness, it affirmatively appears that the survey and the results predicated thereupon is or are an indistinguishable inseparable conglomerate and composite hearsay, conjecture and transaction interalios than Respondent or any buyer specified

in this action; that it assumes to arrive at a so-called average cost totally unrelated to the actual individual cost of any dealer; that it is ineffective and insufficient to
1018 arrive any reliable average cost even if such were useful in this litigation, which it is not; that it fails to give any consideration at all to some essential element and factors involved in cost and as to other elements and factors it gives inadequate and erroneous consideration; that it does not appear that it was prepared from any adequately kept or complete records of the operations of the relatively few dealers who are assumed to be covered, or that the reports made by such dealers were complete, accurate, or competently made, or that they even substantially reflect the true costs of such dealers; that it does not appear that the computations and conclusions on the dealer reports were made by anyone familiar with the authenticity or accuracy or value of such material; that different factors and items were used in the case of some dealers than were used in respect of others, and that the so-called average is a resultant including of incomparables; that the coverage of the survey was inadequate and failed to provide opportunity for all retail operators to report their records; that the number of reports made by retailers was wholly inadequate in relation to the total number of retail outlets; that the number of reports and degree of coverage fails to reflect a fully representative cross-section of the retail business either from the standpoint of the number of outlets covered or the amount of gallonage involved, or the geographical area contem-
1019 plated, or with respect to the economic differences and functions involved in the varying character and types of retail outlets; that the survey makes no distinction between the classification of the many divergent and varying types and methods of retailing; that the survey purports to have been made in the middle of 1938, nearly 3 years ago, and is thus incompetent in point of time and there is no showing that conditions have been and now are substantially comparable, or comparable at all; that the survey assumes to cover a geographical area other and different than the area involved in this litigation; that the calculations employed in the survey involve arbitrary and dogmatic formulae at times applies to incomparable sets of factors and resulting in a purely arbitrary and forced uniformity; and that improper values and weights are

given to certain factors, and that any computation designed to arrive at an average must necessarily carry into such average arrived at any fundamental error which exists in the premises; that it does not appear that the alleged average cost asserted in the survey equals or even approximates the actual cost of any single retailer in Detroit or in the area covered now or at any time of the survey; that it affirmatively appears that the average arrived at by the method disclosed has inherent in it a necessary lack of coincidence with the actual costs of any given dealer; that the survey is particularly objectionable in this case not only because it does not purport and
1020 cannot purport to give the actual costs of respondent, or of any of the four denominated buyers in their operations, but because it does not appear that such operations, or any of them, were even considered in arriving at the average cost in the survey; that even if the survey were properly directed in point of time geographically, numerically, and representative coverage, and if its results were bottomed on sound predicates and acceptable accounting costs and allocation principles, none of which this survey is, it would still be impertinent in this case for the reason that the very fact that it deals with an over-all average cost precludes its competency to establish an actual individual cost of a specified business or of Respondent involved in this litigation, which latter is the only pertinent cost here; that hence this survey is useless in this case and is without probative value on any issue herein; and that likewise any answer that might be elicited from this witness as to his conclusion, as to what the average cost of selling gasoline at retail in Detroit or in Wayne County, whichever it may be, in the year 1938, is equally valueless and useless, and without any probative value in this action, and not binding on this Respondent.

Trial Examiner Ballinger: Have you concluded, Judge?

Mr. Hanley: That is all.

Trial Examiner Ballinger: Counsel's all-inclusive
1021 and exclusive objection is overruled.

Mr. Austin: Will you read the question, please?

Trial Examiner Ballinger: Read the question.

(Question read.)

A. My conclusions were as follows: First, that the average cost of retailing a gallon of gasoline in Wayne County was 4.8 cents; secondly, that the cost of selling gasoline tends to vary inversely with the number of gallons sold in a given period; third, that there seems to be a rather definite lower limit to the cost of selling gasoline per gallon, which limit is in the neighborhood of 3 cents; fourth, that the average cost of selling gasoline by the stations which were most efficient in that they sell within the lowest 25 percent in unit cost, is 3.5 cents per gallon; fifth, that factors other than gallonage sold, such as location within the county, status of ownership, and proportion of gasoline business to total business done have had no appreciable or determinable effect on the unit cost of selling gasoline.

Mr. Austin: If Your Honor please, I think that I would like to make a very brief statement for the purpose of this survey in view of the long statement which has been placed on the record by Judge Hanley, not in relation to his objection, but simply to clarify for the record the purpose for which this evidence is being offered.

Trial Examiner Ballinger: You may proceed.

1022 Mr. Austin: I will make it very brief.

Trial Examiner Ballinger: You may proceed. Off the record.

(Short statement off the record.)

Trial Examiner Ballinger: Proceed.

Mr. Austin: This testimony is offered as a part of the Commission's case in proving the effect upon competition by discrimination in price, by the Respondent, which I believe has been proved, and, in fact, has been admitted as to the difference in price charged to different customers. The foundation for this testimony has been laid by the introduction in evidence in Detroit of the price which service stations in Detroit, particularly the Standard Oil Service Stations, and also some others, have paid for gasoline, particularly during 1937, 1938, and 1939, at the time when this survey was compiled. Furthermore, by showing the prices at which gasoline was sold by Ned's Auto Supply Company, Citrin-Kolb Oil Company, and other customers of the Respondent who received a lower price, paid a lower price for their gasoline than was paid by other retail stations served by the Respondent, so that in determining whether or not a retail service station could sell gasoline at a profit for the service station and meet the price which was being charged by Ned's Auto Supply Company, for example, it is important to know what the

retail cost of selling gasoline is; in other words,
1023 several service stations, quite a number of them,
testified they, at certain times during 1938 in particular, they reduced their price 2 cents a gallon to meet the price being charged at that time by Ned's Auto Supply Company and by some Citrin-Kolb station. It is therefore very easy to determine in the light of Dr. Taggart's testimony whether they could make a profit after reducing that price; or, in other words, if meeting the competition they were not selling gasoline at a loss, and that is the purpose of this testimony, because, if in order to meet that competition they had to take a loss, I think that brings out discrimination in price which is alleged in the complaint. In other words, it is one link—this evidence is one link in the chain of evidence, which we believe builds up a complete showing of injury to competition resulting from price discrimination.

Trial Examiner Ballinger: The Examiner had in mind the facts stated by counsel when he overruled the objection to the question.

Mr. Hanley: I do not know that it is necessary, Your Honor, but perhaps to be cautious I should say that I have no doubt, of course, that the purpose of Mr. Austin in offering this testimony is just as he has now stated, but the Respondent, of course, takes a view, and must necessarily proceed on the view that the material is in evidence
and may be used for any purpose that the Commission
1024 and the Examiner might find it useful for. Of course,
we do not concur in the statement of Mr. Austin at all; do not propose to be bound by it.

Trial Examiner Ballinger: The Respondents will not be bound by the statement of Counsel for the Commission. We will take a recess for 5 minutes.

(There was a short recess taken.)

Trial Examiner Ballinger: Come to order, gentlemen. Proceed.

By Mr. Austin:

Q. Dr. Taggart, I believe you stated a moment ago that upon your survey you reached the conclusion that the average retail station cost of selling a gallon of gasoline in Wayne County in 1938 was not less than 4.8 cents per gallon?

A. That is correct.

Q. Did you make a separate computation for the City of Detroit upon the returns from stations that were located in the City of Detroit alone?

A. I did.

Q. What was the result as to unit cost for the City of Detroit?

A. The average unit cost for the City of Detroit was 4.8 cents.

Q. And did you make a similar computation for the stations reporting for Wayne County outside of Detroit?

1025 A. I did.

Q. What was the result there?

A. The average unit cost of selling gasoline in the stations reporting from Wayne County outside of the City of Detroit was 4.6 cents per gallon.

Mr. Austin: I would like to have a document marked for identification, if Your Honor Please, as the next Commission's exhibit.

Trial Examiner Ballinger: The Reporter will mark the document Commission's Exhibit 76, for identification, the document containing 25 pages.

(The document was marked for identification "Commission's Exhibit 76.")

By Mr. Austin:

Q. I show you Commission's Exhibit No. 76, for identification, and ask you if you can describe that document.

A. This is a copy of report prepared by me as a result of my survey of the cost of retailing gasoline in Wayne County, Michigan.

Trial Examiner Ballinger: Is that a carbon copy?

The Witness: It is made by a duplicating process, which is ordinarily described as dittoing.

Trial Examiner Ballinger: It is made from the same stencil that the original is made from?

The Witness: Oh, yes.

1026 By Mr. Austin:

Q. Did you have this particular document prepared?

A. Yes.

Q. Where was it prepared?

A. In Ann Arbor.

Q. Does this document marked Commission's Exhibit 76, for identification, contain a complete and accurate statement of the mechanics—well, I will remove the word "complete."

I will change that and ask you whether this document contains an accurate statement and description of the mechanics of the survey which you have described, of the coverage and representation of the survey, of the accounting procedures and methods used in the survey, of the results of the survey, and of the conclusions which you have already stated on the record?

1027 A. It does.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Is this a report which you prepared upon your own volition?

A. Yes.

Q. For what purpose was it prepared?

A. It was prepared simply as a report of the results of my survey. I had it copyrighted with the expectation of protecting my rights and interests in the results of the survey.

Mr. Austin: I am not going to offer that in evidence at this time, if your Honor please, but I simply desire to have it marked and identified in case it may seem desirable to offer it later.

The purpose of the questions I have asked has been solely for the purpose of identification and description for laying the basis for offering it, but I do not feel that it is necessary to encumber the record with that document at the present time, in view of the fact that the conclusions reached by the witness have already been stated on the record.

Mr. Hanley: May I ask you if that is Wayne County Survey, the 555 stations, Mr. Austin?

Mr. Austin: 555, and a total of 489 returns were

1028 used in making the computation, 555 is the number of returns which the witness stated he received.

Mr. Hanley: 555 and 489?

Mr. Austin: That is right.

By Mr. Austin:

Q. Dr. Taggart, in the course of the survey did you direct any special attention to service stations which reported exceptionally low costs, and by exceptionally low costs I mean below 3½ cents a gallon, in order to determine whether such low costs of those particular stations were typical of their annual business, or were the results of unusual conditions during May, 1938?

A. I did.

Q. Just what check or analysis did you make of those stations, and how many of them were there?

A. There were 30 such stations, and we took the average gallonage of those stations for the first 5 months of 1938, and compared it with the gallonage for the month of May, 1938, in order to discover whether there was anything about the month of May as such which brought about this extraordinarily low cost, and in doing that, the cost was divided by the average gallonage for the 5 months as well as by the gallonage for May, and as the result these 30 stations whose costs for May are included in the survey, averaged 3.1 cents, their cost as found by the alternative procedure averaged 3½ cents.

1029 Q. How many of the 489 stations included in the survey computations reported a distribution cost unit cost of less than 3 cents a gallon for May, 1938?

A. 7.

Q. Did you make any particular analysis or study of the cost figures for those stations?

A. In each one of those stations we went through the procedure just described, namely, dividing the costs and their monthly operating costs by the average gallonage for the first 5 months of 1938. In every case but one the resulting unit cost from that computation was 3 cents or higher. We also in the case of each of these 7 stations went to the stations themselves, that is, they were included in the field check which we made in order to make sure that the figures which they had reported were correct.

Q. What relationship did you find upon your field check as to the relationship of the May gallonage of these 7 stations compared with their normal gallonage for the 5 months or the year and a half preceding?

A. In general it was substantially higher.

Q. You mean the May gallonage was higher?

A. Yes, the May gallonage was substantially higher; in

the case of the lowest cost station, for example, the gallonage in May was approximately 100 per cent higher than it had been in any month for which this station had
1030 reported.

Q. How many of these 7 stations showed a substantially higher gallonage for May than their average for the year up to that point?

A. All of them.

Q. Wouldn't that be generally true that most stations would sell more gasoline in May than they sold in January, February, March or April?

A. Month by month, yes, that is true, as far as our—the figures which we obtained show.

Q. Well, then, why were these stations different, in what way were they different, if they were different, from the trend of the other stations for which the average had been made up?

Trial Examiner Ballinger: Read the question to the witness.

(Question read.)

A. The only difference which I could state is that their May gallonage was higher than their 5 months' average to a greater extent, to a greater degree than was true of the general run of stations as we found them.

By Mr. Austin:

Q. Do you have any specific figures as to the degree which the May gallonage increased on any of these 7 stations, compared with their average for the 5 months?

1031 A. One station, May gallonage was more than twice as high as its average gallonage for the year to date, that is the station to which I referred a moment ago. The next lowest station, the gallonage was 22.5 per cent higher than the average gallonage for the year to date.

Q. Did the average gallonage include May?

A. Included May, yes.

Mr. Hanley: Please let the record show that the witness is now referring to Commission's Exhibit No. 76 marked for identification, and has heretofore in many of his answers referred to the same exhibit.

Trial Examiner Ballinger: The record will so show.

Mr. Austin: I believe that is all I have on direct.

Trial Examiner Ballinger: Do you rest in chief?

Mr. Austin: Yes.

Mr. Hanley: At this time the respondent moves that Commission's Exhibit received in evidence, No. 75-A, 75-B and 75-C, being the questionnaire identified by the witness, be stricken on all of the grounds and for the reasons included in respondent's objection to the question immediately preceding the witness' testimony as to his conclusions reached on this survey, and for the additional reason that it now affirmatively appears from the testimony of the witness that such conclusions were based upon a survey in Wayne County as indicated by Commission's Exhibit for identification No. 76, and to which exhibit
1032 the witness referred in giving his conclusions in answer to the question objected to, and it affirmatively appearing that such survey pertains to Wayne County as distinguished from the City of Detroit and the area involved in this litigation.

Trial Examiner Ballinger: The Examiner inquires, what is the Commission's Exhibit 76, to which you referred?

Mr. Hanley: Exhibit 76, Commission's Exhibit, this last document.

Trial Examiner Ballinger: The motion is denied.

Mr. Austin: If your Honor please, may I ask one more question before the judge proceeds?

Trial Examiner Ballinger: You may.

By Mr. Austin:

Q. Dr. Taggart, in stating your conclusions based upon this survey you stated that there seems to be, or perhaps you said that there is a rather definite lower limit to the cost of selling gasoline per gallon which limit is in the neighborhood of 3 cents per gallon. Now, I would like to ask you whether that conclusion is based upon all of Wayne County or only upon the City of Detroit, and if upon the former whether there is any difference in the lower limit for the City of Detroit, in your opinion, and as determined by your survey computation and investigation?

A. The conclusion as stated in the exhibit is based—

1033 Q. There is no exhibit in evidence. I am just asking you your conclusion.

A. Oh, pardon me. The conclusion as stated is based on the survey both in the City of Detroit and in Wayne County as a whole.

Mr. Hanley: That is the—excuse me, that is the 3 cent minimum cost?

Mr. Austin: Yes, that is right.

By Mr. Austin:

Q. Did you make any separate report or compilation similar to Commission's Exhibit 76 for identification for the City of Detroit alone?

A. I did.

Q. As to the 3 cent minimum, did you reach any similar conclusion in the report for Detroit?

A. Exactly the same conclusion.

Q. One more question.

Can you tell me, Dr. Taggart, the geographical limits of Wayne County, or how much there is of Wayne County outside the City of Detroit? I do not want the geographical limits, but I want to know what towns, territories, or how much there is outside Detroit, for instance, I know it includes Hamtramck, and Dearborn, is that correct?

A. It includes Hamtramck, and Dearborn, and Highland Park; well, it includes a village, I think by the name of Flat Rock, Plymouth also, was that mentioned?

1034 Trial Examiner Ballinger: The Examiner would suggest that if that is material it can best be illustrated by a map.

Mr. Austin: Well, I won't pursue it further.

Trial Examiner Ballinger: And not have any guessing.

Mr. Austin: We have had testimony in this record regarding Dearborn at least, and I only wanted to bring out that Dearborn is in Wayne County. Beyond that I won't attempt to proceed.

Mr. Hanley: Have you finished now?

Mr. Austin: That is all.

Mr. Hanley: Your Honor, do you wish me to proceed at this time?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

The hearing will stand in recess until 1:15 o'clock p. m.

(Whereupon, at 12:20 o'clock p. m. a recess was taken until 1:15 o'clock p. m.)

1035 Afternoon Session, 1:15 P. M.

Trial Examiner Ballinger: Come to order.

HERBERT F. TAGGART resumed the stand and testified further as follows:

Cross-Examination by Mr. Hanley.

Q. Doctor, you have been professionally engaged in accounting since about 1920; is that right?

A. Yes; accounting broadly defined.

Q. You are a general accountant as well as a cost accountant?

A. Oh, yes.

Q. Indeed, you are a certified public accountant, are you not?

A. That is correct.

Q. But, as I understand, you have specialized in cost accounting for a number of years, have you not?

A. That is true.

Q. Now, you made some reference to having given particular attention to what you characterized as distribution cost accounting. What do you mean by distribution cost accounting, Doctor?

A. The cost of selling goods, getting them into the hands of consumers, as opposed to the cost of manufacturing goods.

Q. Now, related particularly to the marketing of gasoline, what would distribution cost accounting 1036 mean?

A. Distribution cost accounting?

Q. Yes, sir.

A. It would be accounting for the costs beyond the refinery.

Q. That is to say—

Trial Examiner Ballinger: Pardon me. Off the record.

(Discussion off the record.)

By Mr. Hanley:

Q. Well, does it mean an allocation of the costs of marketing gasoline after it gets into the hands of the marketers from the refiner?

A. Not necessarily.

Q. In relation to gasoline.

A. It would include such distribution costs as the refiner himself might have, plus such costs as any jobber or wholesaler who handled the gasoline might have, plus such costs as the retailer might have.

Q. Well, in relation to the average cost which you had found for the retailing of gasoline in Detroit and vicinity, is that all of the costs that you distribute to gasoline marketers?

A. It is not all of the costs of marketing gasoline.

Q. What else is there?

A. Such costs as the refiner has and such costs
1037 as the jobber or wholesaler, if there is one—such costs as he has.

Q. You gave no consideration to those costs in this particular survey, as I understand it?

A. That is correct.

Q. I understood you to say that you made this survey because you were interested in it and interested in the laws which provided for surveys of this character; is that right?

A. That is how my connection with it originated, yes.

Trial Examiner Ballinger: I did not get the answer.

The Witness: That is how my connection with it originated.

By Mr. Hanley:

Q. Is it not true that you made this particular survey with particular reference to a law of Michigan known as Act 2-8-2 of the Public Acts of Michigan for the year 1937?

A. That is correct.

Q. And, indeed, that appears on the questionnaire, Commission's Exhibit No. 75-A, does it not?

A. That is true.

Q. Do you know Mr. Rankin P. Peck?

A. Yes, sir.

Q. Who is he, Dr. Taggart?

A. He is the executive director of the Retail Gasoline Dealers Association of Michigan.

1038 Q. Was it he who made the deal with you to proceed with this survey and make your report?

A. He was the principal one with whom I had dealings in connection with the survey, yes.

Q. And was it to him that you looked for your compensation?

A. Not to him personally. I looked to—

Q. I am not referring, Doctor, to where the money may have actually come from, but I am referring to the arrangement you had.

A. It was to him that I addressed my bills.

Q. I see.

And did you understand that he was representing this organization of dealers?

A. Yes.

Q. Was it your understanding at the time that the purpose in making this survey was to form the foundation of actions at law brought under Section 8 of Article 2-8-2 of the laws of Michigan for 1937?

A. Yes.

Q. And, in fact, certain prosecutions were instituted, were they not, to your knowledge?

A. They were.

Q. And you testified in some proceedings, didn't you?

A. That is true.

1039 Q. Now, you have stated that it was not feasible to make this survey other than by what you have characterized as the questionnaire method. Why?

A. Because it would take too long a time and be much too expensive.

Q. A matter of convenience, then?

A. A matter of practical necessity.

Q. Well, do you mean by that that it could not be done otherwise than by questionnaire?

A. Oh, it could be done by other means than the questionnaire if the conditions were suitable.

Q. As an accountant and an economist, Doctor, would you regard it as a more satisfactory method if you or someone qualified to do so were to have made a personal field survey of the records and data that form the foundation of your report?

A. Certainly, providing it would have been possible for him to make as wide a coverage.

Q. But for practical reasons you regarded that as not feasible, and you adopted the plan of using a questionnaire?

A. That is correct.

Q. Now, as I understand you, those questionnaires were distributed by individuals who were introduced to you by Mr. Peck; is that true?

A. That is true.

Q. How many were there?

1040 A. There were approximately 40 districts, and one individual was put in charge of each of the districts into which the county was divided.

Q. Do you remember any of those individuals now?

A. No.

Q. Did you meet them all?

A. I met them all as a group.

Q. Did you give the instructions to which you have testified to each of those individuals?

A. I gave them as a group.

Q. What were they? What was their business?

A. These individuals?

Q. Yes, sir.

A. Most of them, I was told, were gasoline dealers.

Q. From where?

A. Detroit and vicinity.

Q. You were told that?

A. Yes.

Q. By whom?

A. Mr. Peck.

Q. You did not know any of these people individually, I take it?

A. No.

Q. Did you ever see them after that one meeting?

A. Not to know who they were.

1041 Q. Now, if I understand correctly, Mr. Peck arranged for a meeting and had in attendance some 40 persons, and you addressed those 40 people, giving them certain instructions as to how they were to distribute the questionnaires in Wayne County; is that true?

A. That is correct.

Q. And that is the only time you ever saw those individuals in connection with this matter?

A. So far as I know, that is true.

Q. Later you got back certain filled-out questionnaires through the mail?

A. That is correct.

Q. And you assumed that all were signed by these 40 individuals who distributed the questionnaires to dealers in the Detroit area?

A. I have the records which they prepared in the course of distribution. I have every reason to suppose that is correct.

Q. Well, they did not tell you that. You never saw them, did you?

A. No.

Q. But you did get questionnaires back?

A. That is correct.

Q. And you did get some kind of a statement from each of these 40 people—or did you?

A. I did.

Q. From all of them?

1042 A. Yes—a written statement.

Q. And just what kind of a statement was that?

A. I do not remember the precise wording—I am sorry that I do not have one of the sheets with me—but it was to the effect that they had covered all of the stations in their area, and they signed their names. In each case the primary distributor was accompanied by an assistant, in some cases his wife, in some cases an employee, and in some cases another gasoline dealer, and both of these individuals signed the statement.

Q. So, from your own knowledge, Doctor, you do not know who distributed these questionnaires, do you?

A. I did not see them distributed personally, no.

Q. You do not know whether it was the man addressed at the meeting, or whether it was his wife, or an employee?

A. Not of my own knowledge.

Q. You do not know what he said to the dealer to whom he handed the questionnaire, I suppose?

A. Not at all.

Q. Do you have those statements that were submitted to you by the distributors of the questionnaires?

A. I have them, but not here.

Q. All of them?

A. Yes.

Q. And how many would you say there are?

1043 A. Well, there was at least one sheet from each of the roughly 40 districts, and most districts had more than one sheet, perhaps, oh, 5 or 6 sheets in some cases. I do not know how many sheets that makes.

Q. Well, in the absence of that data, Doctor, just what was the nature of the information that was given to you on these reports made by the persons who distributed the questionnaires?

A. The sheets were specially printed and ruled for the purpose, containing a column for the date on which the questionnaire was distributed, and the hour at which the particular station was approached, and the name by which the station was known as, such as Ed's Service, or whatever it might have been, and the brand of gasoline sold at the station, and a space for the signature of the person receiving the blank, and also a space for remarks. I recite that from memory. It may possibly have contained additional information.

Q. Did some of the distributors make remarks in the space provided on your form?

A. Very, very few.

Q. Well, in those instances where remarks were made, did you give consideration to them?

A. Not at all.

Q. You paid no attention whatever to any remarks that these people made?

1044 A. That is correct.

Trial Examiner Ballinger: What was the nature of the remarks?

The Witness: Well, there were very few of them, and I do not recall, as a matter of fact.

Trial Examiner Ballinger: Do you recall what the remarks pertained to?

The Witness: Insofar as I have my recollection of the remarks, there were a few instances where the recipient expressed some commendation of the survey, or the idea of having a survey, or some willingness to furnish his figures.

Trial Examiner Ballinger: Is that typical of the remarks that appeared on the documents?

The Witness: Well, so far as I recall any remarks at all. In almost all cases the remarks column was simply checked or nothing at all appeared there.

Trial Examiner Ballinger: I say upon those that did contain remarks were the remarks that you have outlined here typical of them all?

The Witness: I think so, yes. As my recollection goes, that is true.

Trial Examiner Ballinger: Excuse me, Judge, for breaking in.

By Mr. Hanley:

Q. You have testified, Doctor, that you gave con-
1045 siderable time to cost accounting work in connec-
tion of the NRA setup?

A. That is true.

Q. You wrote a book, did you not, entitled "The Cost Principle in Minimum Price Regulation," published in 1938 by the University of Michigan Press as volume 8, No. 3? If you want to look at it (handing a book to the witness)—

Trial Examiner Ballinger: Witness is examining the book.

A. That is true.

By Mr. Hanley:

Q. That had to do primarily with the discussion of cost accounting and the elements of cost accounting and the procedures that you believed were proper in the matter of cost accounting, did it not, Doctor?

A. For the purpose under discussion, yes.

Q. I will ask you generally, first, Doctor, if it is not true, in your judgment, that cost accounting is a thoroughly inexact science?

A. Cost accounting is not an exact science.

Q. You are not willing to go quite as far as the question.

Well, I refer you, Doctor, to page 4 of the book which was just identified, wherein you state:

"A realistic approach to the problem of enforcing
prohibitions of sales below cost requires some method
1046 of indicating to those at whom the laws are di-
rected what cost is and how it is to be ascertained.
The term "cost" is not self-explanatory. Cost accountants themselves differ widely in their conceptions of cost, and it is hardly to be expected that lawyers and judges without accounting training will agree any more fully, unless definitions and rules for the ascertainment of cost have been set up in advance and unless these definitions and rules are sufficiently precise to be capable of being followed and sufficiently reasonable so that neither seller nor buyer is injured by being forced to abide by them."

Do you recall that statement?

A. (After examining the book) Yes.

Q. That was your opinion when you wrote the book, I take it, Doctor?

A. That is true.

Q. Is it still your opinion?

A. It is.

Q. You refer to the proposition that lawyers and judges will hardly be expected to understand these various methods of cost accounting. Is it not true that accountants themselves differ?

A. I do not think I said that lawyers and judges could not be expected to understand them.

Q. Well, without some definite rules.

1047 A. Well, with that modification.

Q. With that modification, of course.

A. I think that is probably true.

Q. Is it not true that accountants are in the same fix as lawyers and judges without that qualification?

A. Well, yes, although I think accountants would tend to agree a little better.

Q. Do you think accountants agree?

A. No, not at all.

Q. Doctor, I am going to refer you to page 119. Doctor, I am using the page numbers that appear in the brackets at the bottom of these pages.

A. Those are the correct pages.

Q. That is what I thought.

A. Yes.

Q. As follows:

"It is perhaps hardly necessary to restate the conclusion in the first chapter that any comprehensive effort to establish uniform methods of cost for purposes of forbidding sales below cost is bound to be a failure. To anyone who has examined the succeeding chapters, which point out specific problems and recount the extent to which these problems were not solved by the most earnest combined efforts of administration officials and industry representatives during the NRA period the reasons for this neg-
1048 ative conclusion will be plain. Simply put, the fact is that cost accounting does not consist of a set of fixed rules universally recognized and universally applicable. For one thing, cost accounting is too new a science—it is a long way from that degree of maturity which partially characterizes certain other branches of accounting. For another, and perhaps more important thing, trade and industry are far too complex to be neatly classified for the application of uniform costing rules, even if these could

be developed. The National Recovery Administration found the complexity of industry to be one of its most vexatious problems, not merely in connection with cost accounting, but for purposes of making wage and hour rules and all the other industry regulations."

Do you recall that statement, Doctor?

A. (After examining the book) Yes.

Q. Were you of that opinion when you wrote the book, Doctor?

A. I was.

Q. Are you still of the same opinion?

A. I am still of the same opinion.

Q. You have been of that opinion ever since 1938, have you not?

A. That is true.

Q. And were when you made this gasoline cost survey?

A. That is correct.

Q. I now call your attention, Doctor, to page 123
1049 of the book, wherein you state as follows—having to do with a discussion of provisions such as were contained in Section 8 of Article 282 of the Public Acts of 1937:

"This provision is intended to aid the prosecution of those accused of below-cost selling by making it necessary for the complainants to produce evidence of specific costs of the particular class of business complained of. It does not necessarily mean that such specific costs will be disregarded, but the defendant has to introduce them counter to the prosecution's evidence of 'average overall cost of doing business.' In other words, the burden of proof is placed on the defendant that he is not guilty; otherwise the prosecution would be forced to prove by the only evidence that is really pertinent, namely, specific cost, that the defendant is guilty. Thus if a defendant is not in a position to employ the accounting talent necessary to prove specific cost, he may be convicted on the basis of evidence that is not really germane to the proceedings. This provision was doubtless adopted because the law was found unworkable without it. 'Average overall cost of doing business,' it is needless to say, is seldom if ever a fair measure of the cost of selling particular commodities or transacting business with particular customers or in a given territory."

Does that appear, Doctor?

A. (After examining the book) Yes.

1050 Q. Were you of that opinion when you wrote the book, Doctor?

A. It was my opinion, yes.

Q. Has that been your opinion ever since?

A. That is true.

Q. I now call your attention, Doctor, to page 125 and page 126 of your book, wherein you are discussing particularly the Michigan statute under which you prepared this survey, as follows:

"In Michigan, especially, much reliance must be placed on this feature of the law"—referring, Doctor, to the provision authorizing a cost survey—"since both the trades affected offer exceptional difficulties in cost accounting and in both the science is in a highly undeveloped state."

Did you make that statement in your book, Doctor?

A. (After examining the book.) Yes.

Q. Were you of that opinion when you wrote the book?

A. Yes.

Q. Have you been of that opinion ever since, Doctor?

A. Yes.

Q. You believe it to be true, in respect of ascertaining the cost of selling gasoline, that there are exceptional difficulties involved?

A. So far as the individual dealer is concerned.

Q. Exactly.

1051 Now, on the same page, 126:

"In order to obtain the backing of public opinion the gasoline dealers point out evils which they claim result from price-cutting. They cite adulteration as having been forced on certain members of the trade in order to meet cut prices, and their implication seems to be that price-cutting is impossible without such practices. What objection can there possibly be to legislation which has the worthy object of eliminating these evils? The answer is two-fold: In the first place, the legislation may eliminate the good with the bad and prevent the public from gaining any advantage from efficient operation. At the same time it may destroy a strong inducement to efficient and inexpensive distribution techniques. In the second place, the law seeks to do by indirection that which should and presumably could be done directly."

Did you write that statement in your book, Doctor?

A. (After examining the book.) I did.

Q. Was that your opinion when you wrote it?

Mr. Austin: Your Honor, I fail to see the relevancy of that particular quotation to the witness' testimony regarding cost survey or cost accounting. It seems to me that has more to do with some economic desirability of the law against selling below cost.

I move that that quotation, if such it be, that has been read by counsel for the respondent, be stricken from
1052 the record on the ground that it is irrelevant and immaterial.

Mr. Hanley: Well, if there is any doubt in the Court's mind about admitting this, your Honor, I want to say now that I cannot prove everything in one question. This is the foundation.

Trial Examiner Ballinger: The Examiner is ready to rule.

Mr. Hanley: Sir?

Trial Examiner Ballinger: The Examiner is ready to rule on the motion.

Mr. Hanley: Very well.

Trial Examiner Ballinger: The motion to strike is denied.

Mr. Hanley: Is there an unanswered question?

(Last question read.)

A. It was.

By Mr. Hanley:

Q. Has that been your opinion ever since, Doctor?

A. It has.

Q. Now, adverting to page 123, on which you make the statement, which you have already seen, "In other words, the burden of proof is placed on the defendant that he is not guilty; otherwise the prosecution would be forced to prove by the only evidence that is really pertinent, namely, specific cost, that the defendant is guilty," you were referring there, were you not, Doctor, to these statutes,
1053 such as Section 282 of the Michigan Law under which you prepared this survey?

A. That is true.

Q. And that is your view, is it not, that the only evidence of cost that is really pertinent is the individual cost in the case of any particular defendant?

Trial Examiner Ballinger: Judge, the statutes referred to were penal statutes, were they not?

Mr. Hanley: Yes.

A. I think perhaps that statement is broader than it should have been.

By Mr. Hanley:

Q. Have you changed your mind about it?

A. I do not think I changed my mind in any fundamental respect. Other evidence than the defendant's own individual cost has been made pertinent by statute.

Q. Oh, I understand; Doctor—

A. Or at least—

Q. —anything may by statute become pertinent. But as an economist and a student, I assume that you arrived at this conclusion, is that not true, irrespective of what statutes provide?

A. Furthermore, in addition to the fact that this has been made pertinent by statute, it is a fact that when one
is studying the cost of anything, be it steel or retailing
1054 gasoline, or what not, that evidence with regard
to costs generally, or cost of a group, is actually pertinent to arriving at some conclusions as to what the costs of an individual may be.

What I was referring to there was the fact that an individual who was accused under such a statute should, of course, be convicted, if at all, on the basis of the evidence of his own costs. However, the study of costs of others, if extensive enough—

Could I have a drink?

Trial Examiner Ballinger: Three minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Will you read the last part, please? I do not think he completed his statement.

(The record was read.)

Trial Examiner Ballinger: Do you care to complete that statement?

The Witness: The study of the costs of others, if extensive enough, is, in my opinion, sufficient to establish at least a prima facie opinion as to what the costs of the individual may be.

By Mr. Hanley:

Q. That is to say, Doctor, isn't it, that academically such a survey might establish something in the nature of an average cost?

1055 A. Oh, I think it will establish much better than that. Surveys are very commonly used for other purposes.

Q. Well, as an economist, and in the light of the statement which you have made on page 123 of your book, do you think that a conviction should be sustained on the basis of such an average cost as distinguished from the specific cost of the individual involved?

Mr. Austin: I object, your Honor, on the ground that that is directed to the question of how a conviction under the criminal statute should be obtained. Therefore, it has no relevancy. I object to that particular question.

Mr. Hanley: It goes to the witness' opinion as to the value of this type of survey.

Trial Examiner Ballinger: The objection is overruled.

The Witness: Would you mind repeating the question?

(Question read.)

The Witness: Would you mind letting me see the statement on page 123?

Mr. Hanley: Surely (handing a book to the witness).

Trial Examiner Ballinger: The question runs to the accuracy of the results obtained?

Mr. Hanley: Right.

A. I do not think any respondent ought to be—or 1056 defendant ought to be found guilty on the basis of an average cost.

By Mr. Hanley:

Q. Now, Doctor, directing your attention to Act 282 of the laws of Michigan for 1937, I assume you were thoroughly conversant with that law, were you not?

A. I was at the time of the survey, and looked at it recently.

Q. Well, you have studied that law and others of similar character?

A. That is true.

Q. Now, is it not your opinion, Doctor, that that law and others of similar character are in fact price fixing laws?

Mr. Austin: Your Honor, I am forced to object again, this time on the ground that he is talking about a statute which is not in evidence, and which was objected to. I believe if we are going to have questioning about that statement, that Respondent's counsel ought to offer the statute so that we will see what he is talking about; otherwise I object to the question as directed to a statute which is not in the record.

Trial Examiner Ballinger: The Examiner will hear from Judge Hanley.

Mr Hanley: If your Honor please, I am not asking these questions, of which there will be a series, with a view to bringing this particular Michigan law into the case, but rather to direct the attention of the Court and the 1057 witness to particular statements which this witness has heretofore made relative to cost accounting and with particular reference to serving the purposes of statutes of this character, and, indeed, of the character of the Robinson-Patman Act, if this type of evidence that has been received is deemed to be pertinent in an action of this kind.

I do not think that the Michigan statute as such is admissible in this case, and I do not propose to draw that into the proceeding. It is just necessary to refer to it, to give the witness and the Court a background, a foundation for the statements which the witness himself has made, which go to the value and weight and propriety of costing on the basis that this witness himself has undertaken to do cost accounting in the survey which your Honor has received in this case.

I again say I can not ask all of these questions in one question, but they all will clearly be pertinent on what I seek to show relative to the value and pertinency of this survey in this type of an action.

It may be that some specific question which I ask does not appear on its face to have that pertinency, but it is an integral part of the whole, and it fits, as will appear when I have concluded the examination. There is, of course, no purpose in asking these questions unless 1058 that is the result. So it is pointed to that pertinent thing in this case.

Mr. Austin: Your Honor, my objection was not directed to the question of relevancy, but was directed to the fact that when we talk about a statute of that character, it is meaningless unless we know what the statute is. I do not think we can refer to a statute and ask the witness about a statute when we do not know the character of the statute.

Mr. Hanley: If that is the difficulty, perhaps I can straighten it out very promptly by the witness, your Honor, and I will be glad to do that.

Trial Examiner Ballinger: It is very clear to the Examiner that the statute referred to is a penal statute. Prosecution under such a statute requires much stricter proof than it does in a civil proceeding such as we are now engaged in.

Mr. Hanley: Oh, I appreciate that.

Trial Examiner Ballinger: And on account of that, Judge, I have been a little bit in doubt about the admissibility of some of this evidence.

Mr. Hanley: Oh, but, your Honor, it is not a matter of procedure.

Trial Examiner Ballinger: I want to incorporate into this record everything that is material to the defence or to the case of the Commission.

1059, Mr. Hanley: Well your Honor, I am fully appreciative of the fact that when there is any doubt in the prosecution of a defendant criminally that the burdens of the prosecution are very much more stringent than they are on the government in a proceeding of this character.

Trial Examiner Ballinger: Yes, and a conviction can only be obtained where there is no doubt.

Mr. Hanley: That is right.

Trial Examiner Ballinger: It must be beyond a reasonable doubt.

Mr. Hanley: This has nothing to do with that. The frailties, if they exist in a survey of the type offered against us, exist in the quantum that they may exist. Now, true, that quantum of frailty may be entirely insufficient in a criminal prosecution. Your Honor might regard it as not a degree so unsatisfactory as to exclude it in a proceeding of this character, but no matter what the proceeding is, be it criminal or civil, the fact remains there is a degree of frailty or strength, as the case may be, in the survey.

Now, as to its admissibility or weight in a criminal proceeding as distinquished from a civil proceeding is not of interest to us here. We are entitled to establish exactly what the value and merit and weight of that survey is, and then it becomes your Honor's duty and that of the Commission, in the light of that testimony to give this

1060 survey such value as you deem proper. That is all we seek to do here.

Trial Examiner Ballinger: Read the question, please, sir.

(Question read.)

Trial Examiner Ballinger: Now, Judge—

Mr. Hanley: If your Honor please, I want to make one further statement, which will aid in clarifying my position. This morning Mr. Austin made a statement as to why he was putting this survey in the record. If your Honor will recall, the respondent reserved, or, rather, declined to make any concurrence in Mr. Austin's statement of purpose. That was done for the reason that Mr. Austin simply is not in control of what use your Honor or the Commission may make of that evidence. It is in. Now, you can make, the Commission can make, any use you wish that you think might be pertinent of the evidence. Now, I do not know what use might be made of that evidence. Clearly it could be used, as I propose to show, as this witness has himself said, as a price fixing setup. Now, we are entitled to qualify this witness' own conclusions by his own views as to what those conclusions mean and how they can be used, what they are worth, what they do.

Trial Examiner Ballinger: We are not interested
1061 here particularly in the question of price fixing,
Judge; we are interested in determining or ascertaining what the reasonable cost of operation is, and—

Mr. Hanley: I appreciate that, your Honor, but this witness himself, as will be demonstrated by his own work here, which I have been quoting, finds that the effort to determine the very thing that this proceeding is designed to find and determine is arrived at, as he views it, through the medium of what are in effect price fixing statutes.

Trial Examiner Ballinger: I understand that the same medus operandi or method of procedure is probably employed in ascertaining cost of operation and in price fixing, and to that extent his testimony may be pertinent.

The objection is overruled. The witness may answer.

Mr. Austin: If your Honor please, I think we have gotten clear off the point here. I am ready to concede all Judge Hanley said in his last statement. But he is arguing about the relevancy of this testimony. I am arguing about the question itself. The question refers to statutes—to this and other statutes of like character. I submit that that question has no meaning unless we know what kind of statute we are talking about. I am not objecting to this question on the ground of relevancy—I rather assumed your Honor overruled me a while ago—but I say this question means nothing unless the statute is in.

1062 Trial Examiner Ballinger: Gentlemen, let us have the question read again.

(The question was read as follows:

("Q. Now, is it your opinion, Doctor, that that law and others of similar character are in fact price fixing laws?")

Mr. Hanley: I will say, your Honor, if there is any question about the type of law I am referring to, I will be glad to clarify that, if that is the objection.

Mr. Austin: Well, my objection is that you are asking a question about a statute and statutes of similar character and we do not know what you are talking about, and neither will the Commission.

Mr. Hanley: I will clarify that.

Trial Examiner Ballinger: The question is withdrawn?

Mr. Hanley: Yes, I will withdraw the question.

By Mr. Hanley:

Q. You have stated, Doctor, that you are familiar with Act 282 of the laws of 1937 of Michigan.

A. In a general way, yes.

Q. And you have made a study of similar laws in other states, have you not?

A. That is true.

Q. Is it not true, Doctor, that those laws generally 1063 provide a prohibition against selling below a merchandiser's cost?

A. Some of them are more sweeping than that. They provide against selling even below a manufacturer's cost.

Q. But practically all prohibit selling below the merchandiser's cost, do they not?

A. I think that is true.

Q. And some of them, at least, provide, do they not, for the admission in evidence of an average cost applying to the sale of the commodities under question as competent evidence of the defendant's cost?

A. I would not be sure about that.

Q. Well, is that true of the Michigan law?

A. No.

Q. Doesn't the Michigan law make it competent evidence; that is, a survey and an average cost?

A. It makes a survey competent evidence. It says nothing about average cost.

Q. Do other laws of similar character make surveys competent evidence?

A. They do.

Q. Would a survey develop anything but average cost, Doctor?

A. It would.

Q. Have you ever made a survey, Doctor, that 1064 developed anything but average cost?

A. Oh, yes.

Q. But you did not make that kind of a survey in connection with the Detroit situation, did you?

A. Oh, by all means.

Q. Did you?

A. Yes.

Q. That is not the survey which you have testified to here today, is it?

A. Certainly.

Q. Well, just explain that, Doctor. Have you testified to any individual operator's cost—

A. No.

Q. —selling gasoline in Detroit?

A. Well, I have the individual operator's cost.

Q. Do you know the cost of any individual operator in Detroit for 1938 or any time since?

A. Yes, I think so.

Q. Well, what is it and whose?

A. It would be necessary for me to refer to my records, of course.

Q. So what you arrived at out of this survey was an average from all of the reports you got from individual operators; isn't that true?

A. That is one of the things I arrived at.

1065 Q. Now, again, adverting to this type of statute, such as the Michigan law, is it not true that you regard such a statute as a price fixing law primarily?

A. No.

Q. All right.

I refer you, Doctor, to page 7 of the book, which was identified a few minutes ago, page 7 and page 8, and I will ask you if you did not make this statement:

"It is the contention of this writer that the working out of such rules in any complete sense is impossible and that, therefore, the rule against sales below individual cost is chimerical and incapable of enforcement. The inevitable result is the substitution, at the best, of loss limitation, as seems to have been done in California, or, at the worst, of price fixing, which was done under the NRA.''

Did you make that statement?

A. (After examining the book.) That is right.

Q. Was that your opinion then?

A. It was.

Q. Has it been your opinion ever since?

A. My opinion on that particular point has been somewhat modified by rather more intimate acquaintance with attempts at working out this kind of statute in Michigan.

Q. You have had something to do with working out a new statute in Michigan; is that right?

1066 A. Working out a new statute?

Q. Yes.

A. Oh, they have introduced a new law.

Q. You have had something to do with that, did you not?

A. I have attempted a meeting at which that law was discussed.

Q. Well, we will reach that in a moment.

Referring you to page 22 of your book, Doctor, did you not make this statement:

"Legislators have not been made aware of the fact that such methods of analysis are in their infancy and, even if developed, probably could not be used by the great majority of members of distributive trades because of prohibitive expense. This fact does not disturb the proponents of the legislation, since what they want is not what the law calls for but either loss-limitation or price-fixing.''

A. (After examining the book.) Yes.

Q. Was that your opinion when you wrote the book?

A. Yes.

Q. Has it been your opinion ever since?

A. In a general way, yes.

Q. On page 23 of the book:

"Code authorities gave some lip-service to the other advantages of cost accounting, and some of them were sincere in their desire to help to improve management 1067 generally, but the more usual attitude was one of callous disregard of the virtues of cost accounting excepting only as it might furnish a basis for minimum prizes. As one code authority official wrote, "Unless selling below cost can be established as a code offense, there is little value to a uniform cost finding method.''

Trial Examiner Ballinger: Judge, I would like to hear from you as to the applicability of that.

Mr. Hanley: Well, on the next page he gives his opinion about that, Judge.

Trial Examiner Ballinger: I know, but that all relates to the NRA.

Mr. Hanley: No, it does not. You will find that it relates to all statutes of this class, including, Judge, the R.-P. Act. If this is admissible under the R.-P. Act—of course, you understand, your Honor, that we say this is not admissible, but it is admitted. Now, being admitted, we are entitled to show the opinion as to its value of the very man that made it.

Trial Examiner Ballinger: The Examiner is admitting it subject to a motion to strike.

By Mr. Hanley:

Q. Was that statement made by you?

A. It was.

Q. And that was true at the time?

1068 A. That was true at the time.

Q. And still is true?

A. No.

Q. No?

A. That referred strictly—what you are reading there referred strictly to uniform cost accounting systems as provided by codes and developed under the NRA. It has reference to laws of the type that you and I have been talking about.

Q. I see.

Mr. Austin: In view of the answer, I move to strike the last question and the last answer.

Mr. Hanley: It may be stricken.

Trial Examiner Ballinger: Motion granted.

By Mr. Hanley:

Q. I call your attention to page 24, on which you state: "This feeling on the part of those interested in the establishment of minimum prices should give pause to accountants who may be tempted to take pleasure in the passage of laws forbidding sales below cost. The establishment of cost systems for this purpose is an unhealthy growth. Cost accounting is not primarily a price-making device."

Is that your opinion as of the time you wrote the book?

A. It is very true.

1069 Q. Is it your opinion now?

A. It is.

Q. Was it your opinion when you made this survey in 1938?

A. It was.

Q. I call your attention, Doctor, to page 71 of your book, on which you make this statement:

"Such were the problems of determining the cost elements which might properly be introduced into a uniform cost formula for purposes of preventing sales below individual cost under the NRA codes. Such problems must inevitably arise in any such program, although they are blithely disregarded by the proponents of such legislation. The reason for this freedom from worry may be that these people do not seriously expect that the law will actually prevent sales below individual cost. Their real aim is something else, and the difficulties of cost accounting have no bearing on this aim."

Did you write that?

A. (After examining the book.) I wrote it.

Q. Was that your opinion at the time?

A. Yes.

Q. Has it been your opinion ever since?

A. Partly speaking, yes.

Q. What is the real aim to which you refer?

A. The aim is, in general, as I have stated it in

1070 other places there, namely, a limitation of loss selling.

It is a loss limitation law, which is quite different from a law prohibiting sales below cost, or—

Trial Examiner Ballinger: Different from what?

The Witness: Different from a law prohibiting sales below individual cost, or in some cases it may actually be that the aim is price fixing.

Mr. Austin: Your Honor, I do not want to be obstructive here at all, but there is no charge in the complaint of anyone selling below cost and there is no charge of price-fixing, and this sounds to me like an inquiry into what is necessary to establish either one or the other of those things.

I have stated on the record what this survey is for, and, whether I have stated it or not, it certainly can not be used on something that is outside the issues in this case.

I object to a continuation of this line of questioning on the basis of the economics of selling below cost of price fixing, unless either one of those things has some bearing on the question of price discrimination and price competition.

Mr. Hanley: Your Honor, I have only three more of these references and I will be away from this thing. And I must insist, no matter what the degree of good 1071 faith of Mr. Austin and his purpose in introducing this evidence may be, he is just out of control, and I do not know what it may be used for, and I am certainly entitled to meet it on the theory that it may be used for any purpose in this case. But, in any event, I have only three more of these and then I will be away from this. I do think I am entitled to prove it, and the quickest way to prove it is by question and answer. I can make an offer of proof.

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Doctor, I refer you to page 120 of your book, on which you make the statement:

"There is no doubt, however, that proponents of price legislation are willing to accept the apparently innocuous provisions against sales below cost, not because they believe that cost can be defined fairly and the rule enforced literally, but because they see in the rule a club with which they can force recalcitrants into line. The threat of prosecution may be even more effective than prosecution itself."

Did you write that, and was it your opinion when you wrote it, Doctor?

A. (After examining the book.) I wrote it. It was my opinion at that time.

Q. Has it been your opinion ever since?

1072 A. ~~My~~ opinion since that time has been modified somewhat.

Q. What has changed your opinion since you wrote this book, Doctor?

A. My experience with the Detroit gasoline situation very largely.

Q. With what?

A. With the Detroit gasoline situation.

Q. Just one survey?

A. Yes, largely.

Q. It is the only one you ever made, isn't it?

A. It is the only one I made under this type of law, yes.

Q. Did you ever make any other survey at all of the Detroit situation relative to the cost of retailing gasoline?

A. No, of course not.

Q. Then, this is the only one, isn't it?

A. It is the only one I made of that particular situation.

Q. And that is what changed your opinion?

A. Yes.

Q. Did you make that survey after you wrote that book?

A. That is correct.

1073 Q. I call your attention to the following page, No. 121, in which this statement appears: "Voluntary education in cost keeping, tedious, expensive and apparently unremunerative though it be, offers much for the alleviation of industrial ills, including those relating to prices. The same cannot be said, however, with regard to authoritatively imposed cost accounting. Not the least serious aspect of the situation from the standpoint of the cost accountant would be the blighting effect of authoritarian codification of costing rules on the development of the science."

Did you write that?

A. I did.

Q. Is that your opinion now?

A. It certainly is.

Q. One other reference on this topic and we are through, Doctor.

(Page 122 of your book: "Authoritative imposition of cost accounting, it must be remembered, would be aimed at one thing only—namely, pricing policies."

Did you write that?

Trial Examiner Ballinger: Judge, what is the relevancy of that statement?

Mr. Hanley: It will appear, Your Honor. I assure you it will appear.

Trial Examiner Ballinger: This is all being 1074 admitted subject to a motion to strike.

A. I made the statement.

By Mr. Hanley:

Q. Was that your opinion when you wrote it?

A. Taken in its context, yes.

Q. Is that your opinion now?

A. Yes.

Q. Your survey of the gasoline industry in Detroit, 1938, has not changed your opinion about that statement, has it?

A. Not taken in its context.

Q. Well, now, Doctor, after all these quotations relative to your views of what these statutes are, and what their effect is, do you want to say to the court that you have any different opinion than those expressed by the quotations that have been read to you, which you say were and are your opinions?

A. May I recast my opinion? I think it will agree substantially with those quotations.

Q. Well, that is what I asked you to do, Doctor, is to just answer that question.

A. My opinion, in general, of this type of legislation, as represented by the Michigan statute, is not favorable, and has not been favorable, and probably will not be as a general public policy. Such legislation may—it can, in some cases, degenerate into price-fixing legislation, but the
aim of those who sponsor it may, in some cases, be
1075 such an aim; on the other hand it is entirely conceivable that such legislation, through wise administration and intelligent handling, and a reasonable attitude on the part of the parties, might contrive a good deal of good.

Q. Will you agree that that is a very optimistic and idealistic viewpoint, Doctor?

A. It is optimistic.

Trial Examiner Ballinger: Judge, since when did the wisdom of the Robinson-Patman Act become injected into this case?

Mr. Hanley: I did not ask about that, Your Honor. The witness just gave his voluntary statement about it. I have not questioned it.

The Witness: I said nothing about the Robinson-Patman Act.

Mr. Hanley: He said he wanted to express an opinion. I said go ahead.

Trial Examiner Ballinger: He is expressing an opinion of laws along the same line.

Mr. Hanley: I have asked no questions about their wisdom, Your Honor. That just appears in the statement of the witness.

By Mr. Hanley:

Q. You stated, Doctor, that you have had something to do with consideration of legislation in the State of 1076 Michigan along the line of the Act of 1937—282. Have you given it consideration since that became law?

A. Yes.

Q. Have you consulted with Mr. Peck and others about it?

A. I have.

Q. Have you advised concerning the provisions that should go into a law of that character?

A. I have.

Trial Examiner Ballinger: Judge, I don't want to interrupt you, but where is there anything relevant in the questions you are asking, relevant to any issue in this proceeding?

Mr. Hanley: Your Honor, I do not know whether it will become relevant or not, except I know it is relevant on this issue, irrespective of what use the Commission may make of evidence, it is relevant on the issue of the value of this type of a survey.

Now, that is the announced purpose of Mr. Austin, in putting this survey in. However, if the Commission seeks to use this testimony for any purpose other than that which Mr. Austin offers it for, which concededly the Commission has a perfect right to do, then the Commission also is entitled to have before it the opinion of the value of that testimony of the man who gave it.

Trial Examiner Ballinger: This is not running to 1077 the value of his testimony. This is asking him for opinions with reference to the wisdom of certain laws that have been enacted.

Mr. Hanley: No, not the wisdom. I have not asked him any question as to the wisdom.

Trial Examiner Ballinger: But the effect.

Mr. Hanley: The effect. I have asked him about the effect.

Trial Examiner Ballinger: The effect.

Mr. Hanley: Not the wisdom.

Trial Examiner Ballinger: But that is not the issue here.

Mr. Hanley: It may be in issue. I do not know what the Commission will do with this survey. If the Commission says, as a result of this evidence in this case, anything that prevents a recovery of at least 4.8 cents by a retail dealer is essentially wrong, then it becomes pertinent to establish what the effect of the modus operandi is in arriving at the 4.8 cent figure. Now, of course, I propose to get into the mechanics of that figure. This is purely foundation.

Trial Examiner Ballinger: Well, you do not contend merely because this survey was made under a law that may or may not have been, or may have been declared unconstitutional, that it strips it of whatever evidentiary value it would have had if it had been made wholly independent of such a law?

1078 Mr. Hanley: Oh, not at all. I do not think the law has a thing in the world to do with it, Judge, just as I said in Detroit in objecting to the law, I think the thing has to stand on its own feet, but—

Trial Examiner Ballinger: Whatever merit it has.

Mr. Hanley: But the attitude of this witness toward these laws, which he is working under, his expressed opinion as to their effect, and the effect of his work in a survey under those laws, that becomes important irrespective of the law itself. After all, he has undertaken to say that in the City of Detroit it costs 4.8 cents on the average to market a gallon of gasoline at retail. He says that was true in the summer of 1938; presumptively, and without any foundation, as we say, Counsel for the Government is going to urge that that is true today.

Now, we are entitled to show just what this witness, who arrived at that conclusion, really thinks of his own testimony. He arrives at it, how, because it is a matter under laws which he just has said he does not think are very good, and that is his opinion. I did not ask him that. He arrives at it under these laws, and he admits that he does not think that they achieve the result and effect that they are intended to achieve; that they have frailties, in other words. Now, we are entitled to do two things. We are entitled to show his familiarity with the laws them-

1079 selves, with their operation, and his familiarity with the mechanics of making the survey and applying it. All I want to do now is to ask him—

Trial Examiner Ballinger: The Examiner agrees with you as to that statement. The only question is as to the accuracy of the result obtained.

Mr. Hanley: That is right. That is the ultimate.

Trial Examiner Ballinger: That is the ultimate.

Mr. Hanley: Without any question, that is the ultimate, Judge, but in order to reach that ultimate we have to learn the value of all this foundational stuff.

Trial Examiner Ballinger: I appreciate that some of the testimony that you have offered from the witness' book has direct bearing upon that point, but now, when we get fully into these statutes, it seems to me that we are getting far afield.

Mr. Austin: And, Your Honor, I would like to state on the record, if I may, that the Commission can't do whatever they please with this testimony, as Judge Hanley has said. The Commission cannot use it for any purpose outside the issues of this case, and I still do not see that the witness' opinion regarding these cost accounting statutes, and so forth, have any relevancy on the issues of price discrimination and effect of price discrimination, which are in this case. The Commission can't just take testimony here and say, as Judge Hanley did, that if a service
1080 station can't make below 4.8 cents a gallon on a gallon
of gasoline that Respondent is doing something, some other thing, or engaging in some unfair method of competition, or fixing prices, or something—this case is brought under section 2 of the Clayton Act.

Trial Examiner Ballinger: Mr. Austin, have you adduced testimony from this witness with reference to the cost of selling gasoline in Detroit?

Mr. Austin: That is right.

Trial Examiner Ballinger: Upon that question Counsel for Respondent has a right to test this witness' knowledge of what he actually did in making this survey, and some of the statements that he made in his book may or may not have a direct bearing.

I am going to ask Counsel to confine his cross-examination so far as he reasonably can to the one question.

Mr. Hanley: I will do it better than that, Your Honor. I will just make an offer of proof. I am practically through on this phase of the matter, anyhow.

Off the record, Judge?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: At this time, and in view of the objections of Counsel for the Government, the Respondent offers to prove on the cross-examination of the Witness 1081 Taggart that he is a proponent of, a consultant concerning, and an advisor in connection with the support of Senate Bill No. 186, introduced in the Michigan Sixty-first Legislature, Session of 1944, which is a revised law of the same general character as Act 282 of the Public Acts of Michigan for the year 1937, and I will leave this subject then.

Trial Examiner Ballinger: The tender is rejected.

By Mr. Hanley:

Q. Now, Doctor, coming down to this survey which you made more in detail, I refer you to page 180 of your book, in which you outline the requirements which are necessary in connection with a questionnaire such as you used. I wish to call your attention particularly to the statement wherein it refers to the geographical distribution.

You said—

Mr. Austin: I object to Counsel's statement that that book sets forth the requirements for a questionnaire such as that which was put in evidence today as Commission's Exhibit 75-A, B, and C, unless the witness will verify that statement.

Mr. Hanley: I will ask him.

By Mr. Hanley:

Q. Doesn't your book generally outline what, in your opinion, are the principal elements and requirements to be considered in making a survey such as you made 1082 in Detroit in the summer of 1938?

A. Let me see the book.

(Mr. Hanley hands the book to the witness.)

Mr. Hanley: It is all there, Doctor; that's where I have it opened is one place.

A. There is in the book an appendix C, so-called, which is entitled "Note on the 'Established Cost Survey,'" which was written prior to my making the Detroit survey.

By Mr. Hanley:

Q. Well, did you not make this statement: "The returns from the questionnaires must be sufficiently numerous and sufficiently varied as to guarantee that the result is a representative cross-section of the trade or industry in the area covered. This is the hardest requirement to fulfill. The representation must be adequate (a) numerically and from the standpoints of (b) geographical locations within the area (c) size of enterprise, and (d) economic characteristics of the enterprise."

A. That is correct.

Q. That was your opinion at the time, wasn't it?

A. Yes.

Q. It was your opinion when you made this survey in Detroit?

A. It was.

Q. Is it your opinion now?

1083 A. It is.

Trial Examiner Ballinger: Did this survey meet all of those requirements?

The Witness: It did.

By Mr. Hanley:

Q. Now, you testified, did you not, Doctor, in a case held on September 17, 1939, before Judge Donald Van Lyle, in Detroit, which case is entitled the People against the Chicago Dexter Service and others.

A. If that is the correct date, the information—

Q. I took the date from the transcript.

A. I do not remember the date.

Q. You remember the incident?

A. Otherwise I remember the case.

Q. Now, I am referring to this, Doctor, because I am not clear on what you did in the way of elimination of stations that may have been involved in this survey other than those in the Detroit area.

Do you recall testifying that there were about 80 stations reported from the County of Wayne?

A. Well, somewhat more than 80.

Q. How many more?

A. Oh, ten or fifteen, roughly; I do not recall the precise number.

Q. Probably this will help you: Do you remember 1084 this question and answer:

"Q. How many returns did you receive from the county outside of Detroit?

"A. My recollection is 93."

A. That is probably true, then.

Q. Is that your best recollection now?

A. It is within the limit that I stated.

Q. Now, you said this morning that you received returns from approximately 555 stations.

A. That is true.

Q. And of those you used how many?

A. 489.

Q. And that applies to the entire county of Wayne?

A. That is correct.

Q. Are you able now to give any more definite answer as to what is included in the County of Wayne than you were this morning, Doctor?

A. No.

Q. Well, it includes Detroit proper, doesn't it?

A. Yes, that is what I understand.

Q. It includes Highland Park?

A. Yes.

Q. Dearborn?

A. Yes.

Q. Hamtramck?

1085 A. Yes.

Q. Now, does it also include the several Grosse Pointe areas?

A. I think it includes some and excludes others, but I—

Q. There are four or five of them, are there not, Doctor?

A. Well, there are Grosse Pointe Farms and Grosse Pointe Shores, I believe, and—

Q. Well, now, does it include a number of suburban places out substantially from what might be regarded as the metropolitan Detroit vicinity?

A. Why, I should think perhaps the best example of that would be Plymouth, although the area is built up now almost clear out to Plymouth, too.

Q. Was it in 1938?

A. Well, pretty much.

Q. How far away is Plymouth from Detroit, downtown Detroit?

A. Oh, I could not answer that; 15 miles, I suppose.

Q. Have you any idea?

A. Fifteen miles, I suppose.

Q. You said something about a place called Flat Rock; maybe I am wrong about the name.

A. I think I mentioned that, and then I was not sure whether that was one of the villages in the county or not.

Q. Don't you know whether it was included in the survey or not?

1086 A. Oh, I could not tell you offhand.

Q. Do you know any other places?

A. I think it was; that is my recollection.

Q. Do you know any other places?

A. I believe Ecorse was included.

Q. In any event, Doctor, your Wayne County survey included more territory, substantially, that Detroit proper, Hamtramck, Dearborn, and Highland Park, did it not?

A. Yes, it did.

Q. Now, when you made your analysis in respect of Detroit, what did you do in the matter of eliminations from your Wayne County survey?

A. I do not understand the question.

Q. Did you not undertake to find an average cost for Detroit?

A. That is true.

Q. Did you not do that on the basis of your survey of Wayne County?

A. Of the survey of Detroit and the survey of Wayne County, were made simultaneously.

Q. It was all one survey, wasn't it?

A. No, in a very real sense it was two surveys.

Q. Well, just explain that, please.

A. Because it was necessary for purposes of the case
under Judge Van Lyle, whose jurisdiction is solely
1087 in the City of Detroit, as I understand it, to make
a separate tabulation of the figures for the City of
Detroit.

Q. Well, that was done at the same time that you made the general survey, was it not?

A. Yes.

Q. That is, you never made a speech to these distributors but once, did you—I mean, distributors of the questionnaires?

A. Oh, no.

Q. And you never sent them out but once, did you?

A. That is true.

Q. And they distributed these questionnaires in Detroit and elsewhere in the County of Wayne?

A. Yes.

Q. That is one proposition.

A. That is very true.

Q. Now, when you got the returns back you made a report relative to Wayne County, did you not?

A. Well, I made my first report relative to the City of Detroit and the balance of Wayne County separately; that is two reports.

Q. But you did it—you made both reports on the basis of the returns that you got from the one distribution.

A. Yes, that is true.

Q. Now, the report—

Trial Examiner Ballinger: Judge, I haven't 1088 understood the witness to so testify.

Didn't I understand you to state that you arrived at your conclusion of the cost in Detroit from the questionnaires that were received, or responses to the questionnaires received from the operators in Detroit?

The Witness: That is correct.

Mr. Hanley: Well, I do not have any different understanding, I do not think.

By Mr. Hanley:

Q. Doctor, the point is, you did not make separate surveys of Wayne County outside of Detroit and of Detroit?

A. In a very real sense I did. The mechanics of the two surveys were necessarily combined for the purpose of economy.

Q. Well, that is what I say, you got all these returns, but you segregated Detroit out of Wayne County?

A. That is correct.

Q. Now, was that segregation of Detroit, the City of Detroit proper?

A. That is correct.

Q. It did not include anything but Detroit; is that right?

A. That is correct, as far as we were able to make sure.

Q. So you never made a segregation, did you, of an area which would be inclusive only of Detroit, Dearborn, Hamtramck, and Highland Park?

A. No.

1089 Trial Examiner Ballinger: We will take a recess for 5 minutes.

(There was a short recess taken.)

Trial Examiner Ballinger: Come to order, gentlemen. Proceed.

By Mr. Hanley:

Q. Doctor, on September 8, 1938, do you recall making a speech before the Retail Dealers Association of Michigan at the Fort Wayne Hotel in Detroit at which time you reported the results of your gasoline cost survey?

A. Yes.

Q. Do you remember the incident?

A. I remember the incident.

Trial Examiner Ballinger: And it was approximately the time mentioned?

The Witness: Yes.

By Mr. Hanley:

Q. At that time did you announce to the audience whom you were addressing that the average cost of selling gasoline per gallon in Detroit was 4.8 cents, as you have testified here?

A. I presume I did.

Q. And did you at that time state that the cost of selling outside of the City of Detroit was 4.6 cents per gallon?

A. I presume there probably I did.

Q. That concurs, does it not, with your present conclusion?

1090 A. Yes.

Q. And as you have testified here?

A. It concurs with the conclusion in the survey.

Q. Now, that conclusion, and your present one, are based on the analysis which you made out of the 489 stations in Wayne County that you analyzed?

A. That is true.

Q. Now, how many of those stations were used in the computation of the average cost outside of Detroit resulting in the 4.6-cent figure?

A. Eighty stations.

Q. How many stations in Wayne County are there outside of the City of Detroit?

A. I don't know.

Q. Did you know then?

A. Approximately.

Q. How many did you understand that there were at that time?

A. Well, somewhere between five and six hundred.

Q. Now, I am referring to that area including all of

Wayne County and exclusive of the City of Detroit, Doctor; is that what you understand?

A. That is exactly what I am referring to.

Q. Do you regard 89 stations reporting as a satisfactory cross section of that number of stations upon 1091 which to base a conclusion as to the average cost of selling in Wayne County exclusive of Detroit?

A. You told me a while ago it was 93 stations.

Q. I didn't tell you, Doctor. I don't know, it was a conclusion you used.

A. You read it from something you had there to the effect that I had 9? stations which I presume was the case.

Q. Well, I will ask you now how many stations did you use outside of Detroit?

A. The ones whose costs were included in the computation were 80.

Q. Well, that is what I am getting at.

A. Well, O. K.

Q. Now, do you regard 80 stations as a representative cross-section from all of the various angles that you think the cross-section should be taken of from five to six hundred stations?

A: I do.

Q. Were you then, and are you now satisfied with that number of stations as being a fairly representative sample?

A. Of that number of stations, yes.

Q. Were those 80 stations distributed all over the area in Wayne County outside of Detroit?

A. Yes.

Q. Did you make a map of that, too?

1092 A. I did.

Q. Do you have that map here, Doctor?

A. No.

Q. Is it available?

A. It is in Ann Arbor.

Q. I take it that all of this basic material is available some place, is it not?

A. Oh, yes.

Q. You have not destroyed any of it?

A. So far as I know, I have not destroyed any of it.

Q. And it all could be produced?

A. Yes.

Q. If the need arose.

A. Yes.

Q. Now, you have indicated that it is your opinion that there must be a sufficient numerical representation in a sample?

A. That is true.

Q. For a survey of this character.

A. Yes.

Q. All told in the County of Wayne how many service stations were there at the time that you made this survey?

A. The records of distribution of the questionnaires showed 2,242.

Q. Now, that is in Wayne County?

1093 A. That is right.

Q. Now, how many were there in Detroit, the City of Detroit?

A. I do not have the figure by which I could refresh my recollection, but it was somewhere in that neighborhood of 1880.

Q. Now, how many were there in the area comprised by Detroit, Highland Park, Hamtramck, and Dearborn?

A. I do not know.

Q. Did you know then?

A. I never took occasion to count them up. It could have been ascertained from my records.

Q. So you do not know how many total stations were in that area nor how many stations reported from that area?

A. Simply because I did not have any occasion to count them up.

Q. Well, you never did do that?

A. I never did do it, no; of course not.

Q. Now, do you regard the number of stations reporting, namely, 555, from the Wayne County area, as a sufficient numerical representation to give you a fair cross-section and sample of all of the stations in that area?

A. I do.

Q. How many stations reported from Detroit proper?

A. Well, if you subtract 93 from 555 that gives you 462, isn't it, 462; yes.

1094 Q. And how many of them did you use?

A. 409.

Q. Do you regard 409 stations as being a satisfactory sample, as representative of 1880 odd in the City of Detroit?

A. Yes.

Q. Do you care to make any estimate at all, Doctor, as to the number of total stations in Detroit, Dearborn, Hamtramck, and Highland Park at that time?

A. No, I do not care to.

Q. You just don't know that?

A. No, I ~~do~~ not know that.

Q. I will ask you if it is not a fact, or if it agrees with your best judgment, that there were approximately 2297 stations in that area in 1938, and in 1940 approximately 2533 stations?

A. I have nothing on which to base any judgment.

Q. You just don't know that?

A. That is correct.

Q. Well, now, assuming that those figures are correct for that area, namely Detroit, Hamtramck, Highland Park, and Dearborn, would you say that the use of 409 stations, all out of the City of Detroit proper, was a fair cross-section and sample of an assumed total of 2297 stations in the area which I have designated?

1095 A. I should say the two figures are entirely incommensurate. You cannot asume that a thing is a cross-section of something which contains a greater totality than the sample covers very well.

Q. Well, that is what I think about this survey, Doctor. Then, you do not think that your survey relative to Detroit has any value in the consideration of the selling costs in an area comprised of the City of Detroit, Dearborn, Hamtramck, and Highland Park?

A. Oh, yes, very decidedly.

Q. Well, then, let me ask you the same question again. You have arrived at a cost by the use of 409 stations in the City of Detroit of 4.8 cents, haven't you?

A. That is an average cost.

Q. Now, asuming that in the City of Detroit and Hamtramck, Highland Park, and Dearborn there were in 1938 2297 stations. Are you willing to say on the basis of your survey of Detroit that the cost of selling gasoline in those 2297 stations in the area described equals 4.8 cents a gallon?

A. It is not necessary for me to draw any such conclusion out of my imagination. All that would be necessary would be to get the records, and that could be very easily tested.

Q. I am not asking you to draw it out of your imagination. I am asking you if you know the answer.

A. Would you mind repeating the question.

Trial Examiner Ballinger: Read the question.

1096 (Question read.)

A. I think there is every reason to believe from my survey that that is probably the case.

By Mr. Hanley:

Q. Are you willing to commit yourself to that proposition, Doctor?

A. I am willing to commit myself to exactly what I said.

Q. Well, I am not sure that that is clear.

Are you willing to say that the average cost of selling gasoline retail in 1938, in May, 1938, in Hamtramck, Dearborn, Highland Park and the City of Detroit was 4.8 cents a gallon?

A. That would be my opinion.

Q. Now, do you recall what the total gallonage was, of sales from the stations which you received as reported from May in the City of Detroit?

A. Not in the City of Detroit; I do not have that figure.

Q. Doctor, did you make a document entitled "A Supplement to Report Dated August 8, 1938 on Survey of Cost of Retailing Gasoline in the City of Detroit, Mich."?

A. Could I see it?

(Mr. Hanley hands a paper to the witness.)

A. Yes.

Q. Can you refer to that document and then testify as to the total gallonage which you considered in your

1097 survey as having been sold in the month of May, 1938?

A. It says here 3,187,534.

Q. Now, in 1938 how many gallons of gasoline were sold in total in the City of Detroit?

A. I do not know.

Q. Well, approximately?

A. I do not know that.

Q. Well, did you know in 1938?

A. No.

Q. Well, if you did not know in 1938 how did you know whether you had a fair sample or not?

A. Because of the number of stations covered.

Q. Well, would the number of stations have anything to do with it if it had no relation at all to the amount of total gallonage?

A. Oh, if it had all been very small stations selling a thousand gallons a piece, the number would not have been adequate.

Q. Well, do I understand you say, Doctor, that you accepted these reports as being a sufficient cross-section of the industry in Detroit without any knowledge as to the total gallonage that was handled in the City of Detroit?

A. I made some effort through the Gasoline Tax reports from Lansing to determine what the total gallonage in Detroit was, but those sales tax records were not 1098 adequate, or gasoline tax records were not adequate.

Q. What was the best information you got?

A. The best information I got was total gallonage in the State of Michigan.

Q. Well, did that help you in respect to Detroit?

A. Why, somewhat, but not—

Q. Well, however you got it, and however you figure it, Doctor, where did you arrive as to the amount of total gallonage handled in Detroit in 1938?

A. I did not arrive at it.

Q. You just never did figure that out; is that true?

A. That is broadly true.

Q. So you haven't any idea now and you had no idea in 1938 what the ratio in gallonage of your sample was to the total gasoline handled in Detroit; is that true?

A. I would not say I did not have any idea.

Q. Well, I have been trying to find out what your idea was, Doctor.

What was it?

A. I knew it was a very substantial gallonage. I also knew through tests which I made on my own, the questionnaires that came in, that a very much smaller sample would have achieved the same result since the very much smaller sample would have given the same ultimate figures, it would hardly seem necessary to worry about a larger sample.

1099 Q. Well, in that figuration, Doctor, you were just taking a sample of a sample, weren't you?

A. I was taking a sample of the returns that came in, yes.

Q. And that was a sample of a sample; isn't that true?

A. Oh, a certain sort of sense.

Q. Well, in an actual sense, isn't that true?

A. Well, a sample, of course, is ordinarily a deliberate predetermined affair.

Q. Well, let us get at it this way, Doctor. You had a sample of 409 stations, didn't you, in Detroit?

A. I had, yes.

Q. And you do not know how much gallonage they did in relation to the total gallonage in Detroit?

A. Well, not any exact knowledge.

Q. Well, do you have any approximate knowledge?

A. No.

Q. All right.

Now, you took a sample out of your sample of 409 stations, and you got a result similar to the result you got using the 409 stations, didn't you?

A. That is true.

Q. And therefrom you concluded that even though you had used fewer stations than 409 you would have gotten the same result; is that right?

A. I think that is true.

1100 Q. Now, Doctor, if there was any error in your premises on the 409 stations, that error would necessarily be included in and carried into any sample you took out of the 409 stations, wouldn't it?

A. Not necessarily.

Q. Well, what do you mean by that, if your premise is wrong to begin with what did you do in taking the sample of the sample to correct it?

A. Of course, I have not admitted that my premise was wrong to begin with.

Q. Well, assume that, assume that there was an error in your premise on the 409 stations. Now with that assumption any sample you took out of the 409 stations would have inherently the same error, wouldn't it?

A. It might.

Q. Well, what do you mean by that? Can't you say whether it would or not?

A. Well, in taking a sample out of the larger group I might possibly omit stations with certain characteristics. It was purely by accident—it was purely by accident.

Q. It would be accident, wouldn't it?

A. If I—

Q. Yes. Isn't it true that the more carefully you did your work, assuming a fundamental error, the more 1101 certain you would be to carry into the samples of samples of the original error?

A. Well, I presume it is true. If a sample taken at random out of the 409 stations actually contained a cross-section of those 409 stations, that is, stations with the individual characteristics of all of the types that appeared in the 409 stations, then necessarily the result would be the same.

Q. Now, does 600,000,000 gallons of gasoline in volume in total for Detroit for a year sound to you like a reasonable figure, Doctor?

A. I do not know.

Q. You have no idea at all about that?

A. No.

Q. Well, suppose that is the figure, would you still regard your sample as a fair and representative cross-section?

A. I do not see why not.

Q.. Well, you may not see why not, Doctor, but do you see why? Why it is a fair sample, I mean.

A. Why, yes, of course.

Q. All right. You have stated the gallonage for May as 3,000,000,000—187,000—31,187,000, I guess you said, did you not?

A. No.

Q. Was it 3 million?

A. I think 31 million would be too many.

Q. I think it would. What did you say?

1102 A. 3,187,534.

Q. Now, 12 times that would be, oh, approximately 38 million gallons, wouldn't it, Doctor, just approximately?

A. O. K.

Q. Assuming that the annual total gallonage of business done in Detroit was, oh, instead of 600,000,000 gallons a year, say it was 400,000,000 gallons a year. Do you think you would then have a fairly representative cross-section from the standpoint of gallonage?

A. I should think so.

Q. At least, you are satisfied with it, Doctor?

A. Oh, yes.

Q. Now, just by way of summary on this numerical situation. As I understand your testimony, you did not know in 1938, and you do not know now, what the total number of service stations were in the area comprised by Detroit, Hamtramck, Highland Park, and Dearborn; is that right?

A. That is correct.

Q. You did not know then and you do not know now what the gallonage, total gallonage was in Detroit or in Wayne County; is that right?

A. The gallonage sold by all stations?

Q. Yes, sir.

A. That is correct.

1103 Q. And you did not know what the total gallonage was in the area comprised of Dearborn, Highland Park, Hamtramck, and Detroit?

A. No.

Q. Supposing, Doctor, that the number of stations in that last named area has increased since 1938 by some two or three or four hundred stations, would that fact in itself make any difference in your judgment as to the propriety of your figure of 4.8 cents now?

A. Not that fact in itself, no.

Q. Now, you have given some testimony here as to the minimum and maximum gallonage limits of the stations which you considered in your survey, and I understood that they ran from, roughly, about a thousand gallons to about 30,000 gallons.

A. Per month.

Q. Did you arrive at an average?

A. Yes.

Q. What was it?

A. The average in Wayne County was 7,917.

Q. And what was it for Detroit?

A. 7,793.

Q. Will you state those again, please, Doctor.

A. As in the report here, this Wayne County report, it says 7,917 for Wayne County.

Q. And for Detroit?

1104 A. 7,793.

Q. Now, again referring you to the address which you made on September 7, 1938, did you not at that time state that the gallonage in Detroit was 7,793 as you have now stated, and 8,549 in the county and surrounding trade area?

A. Oh, yes, of course.

Q. Well, now, I do not understand, Doctor, just what you meant by—

A. The figure I was reading here, 7,917, is the consolidated.

Q. Detroit and surrounding area?

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A. That is correct.

Q. I see.

Now, what predominated in the returns that you got from service stations, large ones or small ones, on the basis of gallonage handled?

A. You will first have to define large ones and small ones.

Q. Well, you define them on the basis of the kind of reports you got. You have given two extremes. Now, what kind of stations predominated in reference to volume of gallonage?

A. Well, perhaps I can answer that. No, I guess perhaps I do not have the table that I thought I had. Obviously the number of individual stations that sold below the average number of gallons is going to be larger than the number of stations that sold more than the av-
1105 erage gallonage; precisely what those relationships are I do not know.

Q. And that factor in itself would tend to increase cost, wouldn't it?

A. To increase cost?

Q. Yes, sir.

A. Oh, I don't think so.

Q. Didn't you—

A. The average is simply a mathematical result of the factor. It is inevitable where you have a situation, where you are getting an average; using average gallonage, as I just did then, as a standard, that the number of small ones is going to exceed the number of those that are larger than the average. That is mathematically impossible that it should be otherwise.

Q. You now conclude, if I understand you rightly, Doctor, that there must have been a predominance of stations reporting to you which handled an amount of gallonage less than the average?

A. Less than the average as shown.

Q. As is shown by your survey.

A. That is probably true.

Q. You also reached the conclusion to which you testified this morning that the cost of selling gasoline decreases as the gallonage rises. Am I right about that?

A. Up to a certain point, yes.

1106 Q. Now, if both of those conclusions are true, then the result of your survey inasmuch as most of the reporting stations were small, were below the average arrived at in your survey, it would tend to increase the average cost?

A. Oh, no, not at all.

Q. It would not?

A. No, not in the slightest.

Q. Well, why not?

A. Because it is a weighted average.

Q. Well, it is weighted with all these small stations, isn't it?

A. It is weighted only with gallonage. It is not weighted by the number of stations at all.

Q. Well, the small number of gallons irrespective of the number of stations represented by that small amount of gallonage would represent a high cost, would it not?

A. Broadly speaking, that is true, that relatively high cost, high unit cost, goes along with relatively low gallonage.

Q. And that is reflected in your final average of 4.8 cents a gallon, isn't it?

A. Well, it is not reflected any more than the other end of the ladder, your relatively low cost stations.

Q. Perhaps we are not understanding each other, Doctor.

If you got a reporting station that had a low
1107 gallonage, as you say, approximately a thousand
gallons as one extreme.

A. Yes.

Q. That station would have a relatively high unit cost, wouldn't it?

A. That is true.

Q. Then, if you got another station of approximately 30,000 gallons, your other extreme, you would have a station of relatively low cost per unit; wouldn't you?

A. Broadly speaking, that is true.

Q. Now, as I understand your testimony, you say that you got a predominate number of small volume stations with the result that it pulled your average gallonage down to somewhere in the neighborhood of between seven and eight thousand gallons per month; that is true, isn't it?

A. I do not know about this predominant business. I do not understand that; that is, we had stations that ranged all the way up and down.

Q. Well, I just asked you, Doctor, if you did not get—

or, first, I ask you what type of stations predominated in amount of gallonage sold that reported to you, and you told me that most of them must have been below the average that you arrived at in your survey.

A. You did not ask me how they predominated as to the amount of gallonage sold. You asked me how they
1108 predominated as to numbers, the numbers of individual stations. Obviously, there were more stations which sold less than the average gallonage than there were number of stations which sold more than the average gallonage.

Q. That sems to me to mean the same thing.

A. It does not predominate as to the amount of gallonage, though.

Q. There were a greater number of stations selling a small number of gallons per month than there were numbers of stations selling a high volume of gallonage per month?

A. That is true.

Q. And you took into your consideration all of the gallons from all of the stations.

A. Yes.

Q Those stations reporting low volume had a higher cost than the stations reporting a high volume per unit; didn't they?

A. Oh, yes.

Q. So your final average of cost was weighted and reflects a predominating number of small stations handling a small volume of gasoline; isn't that true.

A. I can't agree to that statement at all. It does not reflect the number of stations in any way; the number of stations was not used as a factor in obtaining the unit cost.

Q. It does not make any difference, Doctor. Let me
1109 put it this way: Suppose that ten stations reported, two of them reported 30,000 gallons a month, eight of them reported 1,000 gallons a month. Now, you arrive at 60,000 gallons on the one hand and at 8,000 gallons on the other or a total of 68,000 gallons; didn't you?

A. Yes.

Q. Now, your cost as to the 8,000 gallons was weighted heavily by reason of a high unit cost; is that not true?

A. Well, not weighted heavily because after all the stations were very small, the total cost of operating that very small station is so small in comparison to the total cost of operating a large station that the weighting is not as serious as it would seem to sound.

Q. Let us leave that for a moment. I think you have a table on it. We will go back to it, Doctor.

A. All right.

Q. Just now I want to ask you if in your judgment you satisfied the requirement which you have laid down in your book as to the size and character of the business represented.

A. I think I did.

Q. Now, in your judgment, did you satisfy the requirement which you, yourself, have laid down in your book relative to the economic characteristics of the enterprise?

A. As far as those could be judged on the basis of the information that we had, yes.

1110 Q. Well, do you know whether or not you had accurate information?

A. I had as accurate information as appeared on the questionnaire blanks.

Q. The fact of the matter is, Doctor, isn't it, that you depended on those questionnaires; if anything is wrong with them there is something wrong with your survey; isn't that true?

A. Remember, of course that those questionnaires were tested very thoroughly by field checks in sufficient number to satify me they were reliable.

Q. We will get into that, but irrespective of that is my postulate correct?

A. You mean if the survey blanks, even after our checking, were wrong then was I misled?

Q. Yes.

A. Well, presumably so.

Q. Well, to eliminate any onerous implications, whatever the survey blanks, questionnaires showed you predicated your survey on that information?

A. On that information plus the checking which we did in the field.

Q. Now, are you familiar with a gasoline outlet in Detroit known as Ned's Auto Supply Company?

A. I have heard of them.

1111 Q. Did you receive any data from that organization in connection with your survey?

A. I did not.

Q. Are you familiar with an organization in Detroit known as the Citrin-Kolb Oil Company?

A. I have heard of them.

Q. Did you receive any information from that organization in your survey?

A. I am not sure.

Q. You do not know whether you did or not?

A. I could not be sure.

Q. Do you know of Wayne Oil Company in Detroit?

A. I have heard of that.

Q. Did you receive any information from them in connection with this survey?

A. I could not tell you for sure.

Q. Are you familiar with an organization known as the Stikeman Oil Company?

A. Pardon?

Q. S-t-i-k-e-m-a-n Oil Company?

A. Never heard of them.

Q. Then, I suppose you did not receive any information from them?

A. I do not know.

Mr. Austin: If your Honor please, I would like to 1112 have it appear that the record shows that at the time this survey was taken, May, 1938, the Wayne Oil Company was operating no retail stations, and the answer states, Respondent's answer, that the Stikeman Oil Company did not operate any retail stations since early in 1938; so that there is no reason to believe that either one of those companies which has just been mentioned operated any retail stations which could have received these questionnaires.

Mr. Hanley: At this time the Respondent desires to add to its objection to the questions asked this witness as to his conclusions based on his survey in Detroit and to the motion to strike Commission's Exhibits 75-A, 75-B, and 75-C, the additional reason as now stated by Counsel for the Commission, namely, that the Wayne Oil Company and the Stikeman Oil Company were not engaged in retail gasoline retailing operations in Detroit in 1938.

Mr. Austin: I said May, 1938.

Mr. Hanley: May, 1938.

Trial Examiner Ballinger: Is this a further motion to strike?

Mr. Hanley: I am just adding that, Your Honor, to the motion.

Trial Examiner Ballinger: The addition is overruled.

By Mr. Hanley:

1113 Q. Now, in this survey, Doctor, did you get reports from operators who were running so-called curb pumps?

A. I do not know.

Q. Well, now, that is a common method of distributing gasoline at retail, isn't it?

A. Not in Detroit.

Q. It is not? Are there none in Detroit?

A. There may be some; I am not sure about that.

Q. Well, how many?

A. Well, I have no idea about that.

Q. Well, you have an idea that it is not a common practice; haven't you any notion how many there are?

A. No.

Q. Do you still think it is not common?

A. Yes.

Q. All right. You do not know whether any of them were represented in your survey?

A. No, I do not know that.

Q. Were any so-called drive-in stations represented in your survey?

A. What do you mean by drive-in stations?

Q. Well, just what the name implies; that is commonly used in the oil industry; aren't you familiar with it, Doctor, driveways to pumps?

A. A driveway from the street, is that all you mean by that?

1114 Q. Yes.

A. Why, yes, of course.

Q. Haven't you heard that expression frequently in connection with your gasoline retailing business?

A. Oh, yes, I have heard that, but I did not know what you had, whether some special type of station.

Trial Examiner Ballinger: Are there any service stations that are not drive-ins?

Mr. Hanley: Yes, a good many.

By Mr. Hanley:

Q. Some of them were represented, were they?

A. Drive-in stations?

Q. Yes.

A. Oh, yes, yes, sir.

Q. How many?

A. My impression is that most of the stations represented were of that type. There may have been some curb stations, too.

Q. Well, did you undertake to ascertain in 1938, on the occasion of the survey, how many there were?

A. No.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

1115 Q. Did you have some statement you desired to make about curb stations, Dr. Taggart?

A. When you asked me the question about curb stations, I thought only of stations where perhaps there was a single pump in front of a grocery store, directly on the street.

Q. Well, that is really what I did have in mind, that type of curb pump as distinguished from what has been now designated as a drive-in station.

A. Well, you mentioned further as included in curb stations stations which are located in parking lots.

Q. Well, I am going to ask you about that.

A. Well, all right.

Q. You have testified as to the drive-in stations. Now, are you familiar with the term super-service station?

A. I have heard the term, yes.

Q. What does it mean to you?

A. Why, to me it means a relatively large station that supplies gasoline and oil and washes cars, and possibly makes minor repairs, and sells perhaps tires and certain other types of merchandise.

Q. Were any of them included in your survey?

A. Yes.

Q. How many?

A. I do not know.

Q. Did you know in 1938?

1116 A. No.

Q. Were any auto dealers who sold gasoline included in your survey?

A. Yes.

Q. How many?

A. I do not know.

Q. Did you know in 1938?

A. No.

Q. Were any parking lots which sold gasoline included in your survey?

A. I am not sure about that.

Q. There are a good many of them, are there not, in Detroit?

A. Well, there are a good many parking lots; as to how many sell gasoline, I do not know.

Q. Well, as a matter of fact, don't most parking lots sell gasoline?

A. Oh, I should not like to make a statement on that; I do not know.

Q. Well, do you know?

A. I do not know.

Q. Do you know what the fact is in Detroit?

A. No.

Q. As of 1938?

A. No.

Q. You made no investigation of a station of that kind?

1117 A. That is correct.

Q. A little while ago in your testimony you made reference to the number of stations reporting that handle major brands of gasoline. What do you mean by a major brand?

A. Well, nothing more than the man on the street would mean by the same expression.

Q. Well, I have not the faintest idea of what he means. Just what do you mean?

A. Generally speaking, a brand which emanates from one of the large companies in the industry, such as Red Crown, for example, Shell.

Q. Well, what makes it major as distinguished from something that is not a major company in your mind?

A. Why, in general, presumably the size of the company that produces it.

Q. Does the amount of gasoline sold in the City of Detroit have anything to do with your characterization of a company as a major or a non-major?

1118 A. Oh, not the amount that they sell in Detroit, no, I would not think so. Major in that particular area, of course, it might be very large as compared to somebody else in that particular area. I am speaking of major in terms of the national picture.

Q. Solely the national picture without any reference to Detoit?

A. I think that is the common definition, just a, purely a curbstone definition without any particular significance.

Q. That had no reference in your mind or in your classification to the amount of gallonage that such a so-called major might have done in the city of Detroit in 1938?

A. No, I don't think so.

Q. So it may be true that some company which you classified as a non-major; or unbranded dealer actually sold more gasoline in Detroit than what you characterize as a major?

A. It could be.

Q. Now, did you include in your survey what you have characterized as major as well as non-major or unbranded?

A. Yes.

Q. Did you make any classification with respect to the prices charged by the various vendors of gasoline?

A. No.

Q. Now, in your consideration of these costs, as reported to you, did you deal at all with any operations
1119 where the retailer hauled his own gasoline from bulk
storage, as in the case of a wholesale dealer, or a jobber on gasoline? Do you understand that question?

A. I understand that question. I did not know that retailers did that very frequently. I do not know.

Q. You do not know whether you had any of that in your survey or not, is that right?

A. Well, I am not sure. It may have been, it may not have been.

Q. Now, I wish you would consider this situation, Doctor: Assume that a service station operator acquired a location of ground at a low price some years back, and established a service station on it, and that land values in that locality became greatly enhanced, as much as seven or eight or ten times as great as they were when the first operator obtained his location. First, that is true in certain localities in Detroit, is it not?

A. I do not know.

Q. Don't you know whether land values have increased, multiplied many times in business areas in Detroit?

A. I have heard that that is true, yes. I have no reason to doubt it.

Q. Well, you do not know it?

A. It increased from a point of time, like when Detroit was settled by the French, presumably.

1120 Q. Well, speaking of the last few years, four or five or six years, ten years?

A. I would be inclined to question it for four or five or six or ten years for that matter.

Q. Well, assume it then, if you do not know, Doctor, suppose that such values did increase and that some service station operator purchased on the high value across the street from the first operator at the high value.

A. Yes.

Q. What consideration did you give to that difference in investment cost in your treatment in this survey?

A. Insofar as there was investment in land, the only difference it would have made is in the fact that a 5 per cent interest rate was computed, 5 per cent interest on the actual investment.

Q. But as between those two operators under the assumptions which I have made, there would be a difference in their cost of retailing the gasoline, would there not?

A. Oh, I think so, all other things being equal, of course.

Q. Yes, assuming other things being equal.

Now, when you arrived at their cost, at an average cost, such as you arrived at in this survey, as between those two dealers, it would not be the cost of either one of them, would it?

1121 A. Oh, if you added their gallonage and their cost together, and divided by the total gallonage, it would not be the specific cost to either one.

Q. It would be higher than one and lower than the other?

A. Yes, that is probably true.

Q. That is actually true, isn't it?

A. Well, again, everything else being equal, of course.

Trial Examiner Ballinger: Doctor, do I understand that in computing costs you took the value of this land or station, that is, the cost value to the property irrespective of what it was worth at the time this survey was made?

The Witness: That is correct.

By Mr. Austin:

Q. Well, you took 5 per cent of that, didn't you, that is as interest?

A. For the purposes of computing it, yes.

Trial Examiner Ballinger: That forms no basis for valuation.

By Mr. Hanley:

Q. Now, Doctor, I am going to use an example in the city of Chicago, because I do not know enough about Detroit; at what is known as Clark and LaSalle Street in Chicago there is a service station upon which is located a small service station building, and maybe a dozen or fifteen pumps, and that service station does a tre-
1122 mendous gallonage of gasoline; it does not have any places that are commonly called stalls for greasing, washing cars, or changing tires, and that sort of thing. They do not do that kind of business. The investment in the buildings and equipment is relatively low for the amount of gasoline sold. On what is known as Ridgeland Avenue in Evanston is a very large service station, I think it has four stalls. Its predominating business is greasing, lubricating cars, washing cars, tire, battery service, things of that nature as distinguished from selling gasoline. Both are located on very prominent traffic arteries. In Detroit it is true, is it not, that they are similar kinds of business?

A. That is probably true.

Q. Now, what consideration did you give the difference in the economic characteristics of those kind of places in your survey, if indeed any of them answered your questionnaires?

A. All of them were included. I did not discriminate against either variety of operation.

Q. Well, then, you did not classify them, did you?

A. Classify them?

Q. Yes, that is to say, you treated everybody alike, you took his costs and his gallons of gasoline sold and reached your average, isn't that right?

A. Reached my average with the rest of the con-
1123 clusions that I reached.

Q. Yes, so you made no special treatment by classification of any of these different economic types?

A. No, I suppose not.

Q. Now, that is true all the way through your survey, isn't it, Doctor, in reference to the two types of stations that I have just outlined, and with reference to the curb pumps and garages, and parking lots, trackside service stations, branded and unbranded, cut price and regular price, and everything else, you took them just as they came, didn't you?

A. That is correct.

Q. And you lumped them all together?

A. For the purpose of obtaining the average.

Q. And your factor was gallons sold and cost of doing business irrespective of how they did it, or where they did it, or irrespective of any other economic factors, isn't that true?

A. Insofar as the obtaining of that grand average is concerned, yes.

Q. Now, I want to refer you, Doctor, to your book again, page 181, in which you state: "The economic characteristics of especial importance are chiefly those concerned with the types of business done. For example, the retailing of gasoline is usually accompanied by a greater or 1124 smaller amount of sales of oil, grease, tires, and automobile accessories and by the rendering of services, such as washing, greasing, tire and battery repairs, and the like."

That is your understanding of the usual business of retailing gasoline, isn't it, Doctor?

A. Yes.

Q. And was in 1938?

A. That is true.

Q. Now, do you think that a method of attempting to ascertaining costs of retailing gasoline is adequate that fails to take into consideration a classification of the economic characteristics of gasoline retailing as you have defined those characteristics in the quotation just read to you?

A. I have no doubt but what all of those different varieties of stations were represented.

Q. You think they were, but do you know?

A. I do not know because I did not see every station that is included. I saw a number of them.

Q. Was there anything to indicate on the questionnaires what the economic characteristics of the outlet were?

A. There were in a good many cases; there was one very important fact, and that was the relative amounts of money involved.

Trial Examiner Ballinger: The what?

A. There was one very important fact, and that is 1125 the relative amounts of business done.

By Mr. Hanley:

Q. But as I understand your testimony, Doctor, you did not in 1938 make any effort to ascertain, and you did not ascertain, and you did not know how many of these various classifications of retail gasoline businesses were represented in your survey?

A. Not how many, we saw something like a third of the total number of stations that were included, and of those stations that we saw some were very small, and possibly this curbside variety, some were almost purely gasoline stations, some were those large super-service variety station that you refer to, some were connected with automobile salesrooms, and so on.

Q. Did you yourself look at the third?

A. No, not all of them.

Q. How many did you look at?

A. Oh, it is hard to say exactly how many I did look at. I had an assistant who covered the major portion of that field work. I covered part of it with him.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Can you give me any number of stations that 1126 you personally saw?

A. I do not think I personally saw more than 25 or 30. I did see, however, a very considerable variety in that relatively small list.

Q. Well, now, as to the stations that you personally saw or as to the third that somebody else may have seen, and I suppose talked to you about, is that true?

A. That is correct.

Q. Did you make any effort to classify from the standpoint of economic function even that third of the stations?

A. I do not know just what you mean by classify.

Q. I mean as between these various types of outlets like curb pumps, or garages, or auto dealers, or drive-in stations, parking lots, super-service stations, trackside stations, just the different kinds?

A. Do you mean check them off and add up the numbers of such stations?

Q. Well, classified. I don't know. You are the economist, Doctor, and I want to know if you made any classification and gave any particular consideration to what you have referred to as an essential in a survey of this kind, namely, the economic characteristics of the enterprise, the size of the enterprise, the function that it discharges, just, I want to know whether you did give any consideration to it or not. If you did not, say so. If you did, 1127 tell us what it was.

A. I did say I did give consideration to that.

Q. You gave consideration to that gallonage?

A. Oh, yes, and to other things, too.

Q. And you arrived at their cost of selling gasoline on the basis of their gallonage, didn't you?

A. Yes.

Q. And you did that by the same process in connection with a little service station that sold nothing but gasoline and only about a thousand gallons of that a month, in the same way that you did it in reference to a super-service station, for instance, that sold 30,000 gallons of gasoline a month, and did a tire business, and a battery business, and accessory business, greasing business, and all these other services?

A. Substantially, yes.

Mr. Hanley: I think your Honor, that that reaches a point where we can stop at this time, if you desire to adjourn.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Now, at 4:35 p. m. the hearing stands adjourned to reconvene in the hearing room of the Federal Trade Commission Building, April 9, 1941, at 1:30 p. m.

(Whereupon an adjournment was taken to April 9, 1941, at 1:30 p. m.)

1128
Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Wednesday, April 9, 1941.

Met, pursuant to adjournment, at 1:30 p. m.

Before: Webster Ballinger, Trial Examiner.

Apearances:

Cyrus B. Austin, Esq., appearing on behalf of the Federal Trade Commission.

H. R. Hanley, Esq. (910 South Michigan Avenue, Chicago, Ill.), appearing on behalf of the Respondent.

1129 PROCEEDINGS.

Trial Examiner Ballinger: This is a reconvening at 1:30 p. m., April 9, 1941, in the hearing room of the Federal Trade Commission of Docket No. 4389, in the case entitled in re Standard Oil Company.

The last hearing was held in Washington, D. C., April 8, 1941.

The Reporter will note Counsel for the Commission and for the Respondent present.

You may proceed.

HERBERT F. TAGGART, resumed the stand and testified further as follows:

Cross-Examination by Mr. Hanley (Continued).

Q. Doctor, I assume that this survey which you have prepared does not purport to fix the costs of any individual dealer; is that right?

A. To fix the costs.

Q. Yes.

A. I do not understand what you mean by "fix."

Q. I mean to establish what the actual cost is of any individual dealer.

A. The costs of all of the individual dealers were established—were determined in my survey.

1130 Q. Well, so you will understand it, let me approach it this way: You have arrived at an average cost of 4.8 cents a gallon. Now, I am asking you, Doctor, if that figure purports to be the cost, the actual cost, of any individual dealer in Detroit?

A. It might coincide with the actual cost of some individual dealer, or possibly a considerable number of individual dealers.

Q. It might, but you do not know that, do you, Doctor?

A. Oh, well, there were cases among the 489 whose costs were 4.8 cents.

Q. There were some that were as high as 15 cents, too?

A. Oh, yes, that is very true.

Q. What I am seeking to learn now is whether or not the average which you arrived at purports to be pointed to the actual individual cost of any particular station operator.

A. I must say I do not just understand the question.

Q. Well, I will try and make it more specific. You have testified that you are familiar with the fact that there is an organization in Detroit retailing gasoline known as Ed's Auto Supply Company; that is true, isn't it?

A. I have heard of it, yes.

Q. Would you say that your figure of 4.8 cents a gallon has any reference to the actual cost of retailing gasoline by Ned's Auto Supply Company?

1131 A. "Any reference" is a very broad term. I should hate to say that it had no reference whatever; on the other hand—

Q. All right, Doctor. Do you know what Ned's costs are?

A. No.

Q. You do not know whether they are one cent or six cents a gallon, do you?

A. I think I have an opinion, which would fall somewhere in between those two extremes.

Q. What is your opinion based upon? You have testified you did not get any figures from them.

A. That is correct.

Q. Well, then, how do you have an opinion?

A. I have an opinion because I saw the costs of a very large number of gasoline dealers.

Q. Did you ever see their costs?

A. No, I never saw their costs.

Q. Do they handle bicycles and roller skates, and batteries and washing machines, and dozens of items, do they not?

A. That is what I understand.

Q. And gasoline is just one of the items among many which that organization sells; that is true, isn't it?

A. I presume that is true.

Q. And you have never seen their costs about anything; have you?

A. I have never seen any of their figures at all.

1132 Q. Now, on that basis of lack of knowledge, Doctor, do you care to express an opinion as to what their cost is relative to selling gasoline?

A. Based on the results of the survey, I think I could at least have an opinion within certain limits.

Q. All right. What is Ned's cost?

A. Well, I should say it probably lies within the limits that you suggested, between 1 and 6 cents in all probability.

Q. Doctor, I am not suggesting anything. I am asking you. I do not know. What do you say Ned's costs are?

A. I am quite willing to say that I think that is probably where they lie.

Q. Where?

A. Somewhere between—

Q. Name a figure.

A. I would not care to.

Q. Then, do I understand that you just don't know and don't care to express an opinion as to what their cost is?

A. I think it would be extremely rash for anyone to express an exact opinion as to what anybody's costs are.

Q. So do I.

A. Without having seen their books.

Q. Now, Doctor, your survey gave consideration to some four hundred odd stations in the City of Detroit, and on that you reached an average cost; that is true, isn't it?

1133 A. That is true.

Q. Now, isn't it inherent in any such average that it condemns the efficient operator and blesses the inefficient operator in this, that your average cost is higher than that of the efficient operator, and lower than that of the inefficient operator?

A. I do not see that that necessarily condemns anyone, either the efficient or the inefficient.

Q. Well, is what I have said true as to the cost itself, the average cost, just factually; it is higher than the efficient operator and lower than that of the efficient operator; isn't it?

A. Oh, yes, of course.

Q. Now, if you impose it as an arbitrary cost does it not have the effect of condemning the efficient operator who can operate for less, and, I will say, blessing the inefficient operator whose cost is higher?

A. I should rather put it that it handicaps the efficient operator, may handicap him very seriously.

Q. All right. It handicaps him?

A. That is correct: I thoroughly agree with that.

Q. Doctor, did you experience any difficulty in getting accurate data from these various service stations that you surveyed?

A. Any difficulty?

1134 Q. Yes, sir.

A. Why, I suppose probably I did in certain cases; in fact, of course I did in certain cases, those stations that we attempted to get the cost information from.

Q. I call your attention, Doctor, to a paragraph on page 181 of your book, as follows: "The necessity of including both large and small enterprises as well as all the gradations in between is obvious since unit costs of operation have a tendency to vary inversely with the size of the establishment (assuming that they are comparable in other ways). This characteristic is not likely to be easily attained since the only concerns with relatively large volumes of business are apt to have the accounting and statistical records necessary to supply required information."

Did you write that, Doctor (handing book to the witness)?

A. Yes.

Q. Was that your opinion at the time you wrote it?

A. Yes.

Q. Is it your opinion now?

A. It is.

Mr. Austin: I suggest that the witness should be asked as to whether that is his opinion regarding retail gasoline stations.

Mr. Hanley: All right.

1135 Mr. Austin: Otherwise it has no applicability.

Mr. Hanley: I will do that.

By Mr. Hanley:

Q. Is that your opinion in reference to the gasoline retailing industry?

A. In general the larger stations tended to have somewhat more complete and accurate records than the smaller stations.

Q. Has that continued to be your opinion since you wrote this statement in relation to the gasoline retailing industry?

A. That is true.

Q. I call your attention to a statement on page 71 of your book, as follows:

"Once the questions as to cost elements have all been answered, however, the cost formulae are only begun. The problems of the application of these elements to particular products and transactions are far more numerous and difficult of solution. At this point we are in the position of a cook who knows only that a cake is composed of flour, eggs, shortening, sugar, salt, leavening agent, milk and flavor, without having the least idea how much of each ingredient to use or how to commingle or to bake them."

Did you make that statement in your book (handing to the witness the book)?

A. Yes, that is true.

Trial Examiner Ballinger: Judge, the Examiner 1136 wants to know the relevancy of that type of testimony.

Mr. Hanley: Judge, the relevancy is this, that this witness has admitted now affirmatively that he has mixed up all these elements in the gasoline business. He has pointed out in his own work, this book, the fraility of that approach.

Trial Examiner Ballinger: Doesn't it fall of necessity without any proof, that if the witness considered entire overhead of the service station, and only a part of the business was the sale of gas, that his report as to the cost of selling the gas of that station would be under and not over?

Mr. Hanley: Judge, if there were a norm—you have said a service station. If there were any such thing perhaps this survey would be not open to at least question as it is, but there is not any such thing. This witness has conceded that there are all kinds of outlets of different economic status; as, for instance, drive-in stations, garages, curb pumps, parking lots, track side stations, and so forth.

Now, we say, Your Honor, that he has taken the ingredients of the cake to which he alludes in the reference that I have just now made in his own book, and he has put them together, and he has baked up something. Now, we want to illustrate the fallacy that exists in just indiscriminately putting those ingredients together and getting your results without a classification from an economic functional standpoint of the various ingredients that he considered.
1137 He treated them all as one thing. He has said that all he was interested in was gallonage.

Trial Examiner Ballinger: I appreciate that, but doesn't it stand to reason that he included costs in that survey that are not properly chargeable to the sale of gas?

Mr. Hanley: He did, and I propose to illustrate that, Your Honor, later this afternoon.

Trial Examiner Ballinger: Is it necessary to illustrate it? He has admitted the inclusion of these items in his costs are rather its—

Mr. Austin: What costs? I do not understand there is any such admission.

Trial Examiner Ballinger: I understood the witness yesterday to admit that he did not take into account whether the service station confined its sales strictly to the sale of gas, or whether it included oil, all automobile accessories, washing cars, and it might have also run a mercantile store.

Mr. Austin: Well, Your Honor, on the contrary, he has made an analysis of that very thing. There is a whole schedule right in that survey which demonstrates that the stations are divided up as to amount of gallonage, whether their business was mostly gasoline or clear down to the ones that were mostly the other way, and demonstrated conclusively it makes no difference in the results.

1138 Trial Examiner Ballinger: I have not seen his survey, but his testimony would control, and if I am in error I would like the witness to correct me because that was my understanding yesterday.

Mr. Austin: Well, then, he should, because the survey, as he has already testified, shows what he actually did.

Trial Examiner Ballinger: Well, the survey would fall in view of his testimony, if I have correctly quoted the witness.

Have I correctly?

The Witness: I certainly did not intend to convey that impression, Your Honor, because I did take into consideration the sales of other commodities.

Trial Examiner Ballinger: Other commodities?

The Witness: Oh, yes.

Mr. Hanley: Judge, in fairness to the witness, and by way of explanation to the Court, this witness has in his survey, as relates to the City of Detroit alone, made an effort to take into consideration and devalue it, the gasoline sales as contrasted with sales of service and accessories and other things. Now, he has done that in his survey. I propose to reach that later in this examination, and I think the question that is in your Honor's mind will
1139 be fully developed with the witness.

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. I would like to call attention to these two references—maybe I have already done so as to one.

What is the record as to this page 71?

(Question read.)

Q. Does that statement apply to the gasoline industry as well as to industry generally?

A. It does.

Q. I call your attention to the last one of these in the book, Doctor, on page 77, you make this statement:

"This completes the story of application of cost formulae to direct labor and materials. It can be seen that even in these fields which are relatively free of controversy, problems do exist in some industries whose only solution on a uniform basis seems to involve a degree of arbitrary allocation which may result in a divergence from the principle of individual cost and an approach to an artificial or uniform cost."

Did you make that statement in your book?

A. I did.

Q. Was that your opinion at the time you wrote it?

A. It was.

Q. Is it your opinion now?

1140 A. It is.

Q. Does it apply to the gasoline retailing industry?

A. I do not think it applies to the matter that we are talking about because what is being talked about here is uniform cost accounting systems for industries.

Q. Well, isn't the sale of gasoline an industry?

A. There is nothing in this survey about the Michigan law under which the survey was conducted which requires the gasoline dealers to keep books on a uniform basis.

Q. Well, irrespective of how they keep their books, does your statement apply to the gasoline industry?

A. Well, if a uniform system of accounts and cost accounting were to be developed for the gasoline retailing industry, this statement would apply.

Q. As a matter of fact, you did not find any uniform system of keeping books; did you?

A. Oh, no, of course not.

Q. You found about 409 different systems, didn't you, Doctor?

A. Not quite that many.

Q. Didn't you find a different system in practically every station you investigated?

A. Oh, that is much too broad a statement. The Standard Oil Company of Indiana, for example, has tried
to assist its dealers from time to time by making
1141 suggestions as to how they should keep their books,
and I do not know whether they provided them with
sample forms or not, and we found in a good number of cases that dealers were following some variety of more or less standardized systems.

Q. You did not mean to infer, did you, Doctor, that the Standard Oil Company of Indiana has imposed upon these dealers any method of keeping books?

A. Oh, of course not.

Q. And, they may have followed suggestions, and most of them did not; isn't that what you found to be the facts?

A. I found the first part; I should hate to subscribe to the last part.

Q. Now, Doctor, there are all kinds of methods, are there not, of cost accounting in the matter of including certain things and excluding certain factors; didn't you find that true in your efforts when you were working for the Government in connection with many cost accounting formulae under the N.R.A.?

A. Yes, I think that is probably a fair statement.

Q. I call your attention, Doctor, to a list which you have prepared on pages 69 and 70 of your book. I have checked them in red for your ready reference, and ask you if those are not items of cost which are controversial and which you excluded, or which were excluded under the N.R.A., and which you have in part excluded and in part included in your analysis of the cost of retailing 1142 gasoline in Detroit?

A. You mean these that are checked in red at the left?

Q. Yes, particularly those that are checked in red.

A. There are a number of them that are checked in red here; at least one, of course, which obviously does not fall under that classification.

Q. What is that?

A. You have here checked in red, for example, this statement: "The basis for the cost of raw material is actual cost or current replacement value; whichever is lower." That does not indicate any element of cost.

Q. It is a controversial question among cost accountings, anyway, isn't it?

A. Oh, cost accountants do argue about it.

Q. Yes. All right.

Go ahead.

1143 A. Then we have—do you want me to read these?

Q. Look at them, Doctor, and if you disagree with my question as to their—controversy about their inclusion or exclusion, please explain.

A. If there hadn't been any controversy about any features of them they wouldn't have been included in the list here at all.

Q. Well, that is what I thought, but I want you to say so, Doctor, if that is true.

A. Obviously, these reflect problems which came up during the NRA in connection with these uniform cost formulae or uniform cost accounting systems which the codes were intended to provide.

Q. Well, isn't it true that there are ten or a dozen of those controversial items checked which were all or in part considered by you in your survey of the cost of marketing gasoline?

A. Presumably all of these—well, now, wait a minute. No; not all of them were given any consideration at all, as a matter of fact. Some of them were; some of them weren't.

Q. In any event, wherever they were given consideration, Doctor, it was your conclusion and judgment that prevailed as to whether they should be included or excluded? Is that not true?

A. Yes; that is true.

1144 Mr. Austin: I would like to ask what it was you referred to as the subject of that question. I am not quite clear in that connection.

Mr. Hanley: Perhaps it would be better if that were in the record, your Honor. I am perfectly willing that it go in the record. May it be understood that there will be copied in the record the items under the title "Exclusions from Cost" on pages 69 and 70 of the book written by Professor Taggart entitled "The Cost Principle in Minimum Price Regulation," which items are numbered as follows: 3, 4, 5, 6, 7, 9, 10 and 11.

Mr. Austin: Off the record.

(Discussion off the record.)

Mr. Austin: Your Honor, I object to putting this sort of thing in, aside from the context. I suggest this book be offered in evidence, it has been quoted from so many times. If the Judge doesn't offer it, I shall.

Mr. Hanley: All right. You offer it if you want to. I don't care to offer it, your Honor. I could read these things. I thought it would shorten it if I did it this way.

Trial Examiner Ballinger: This is off the record. Strike it.

(Discussion off the record.)

Trial Examiner Ballinger: Then, is there an objection to the—off the record.

1145 (Discussion off the record.)

Trial Examiner Ballinger: You withdraw your objection to it?

Mr. Austin: Yes.

Trial Examiner Ballinger: Counsel for the Commission withdraws his objection to the inclusion in the record of the matter indicated, and the matter is to be included—shall be included in the record.

(The material referred to is as follows:)

"3. For the avoidance of handicapping the production and marketing of new products, no research, developmental, or extraordinary sales promotional or advertising expenses may be included.

4. In order to avoid handicapping such activities, the cost of voluntary employee welfare, group insurance, or similar activities, and donations to charity or for similar purposes are to be excluded.

5. Any amount of depreciation shown on the books in excess of that allowable for Federal Income Tax purposes must be excluded.

6. Any uniform minimum rates of depreciation, overhead, or other factors will be disregarded. Such items must depend on facts and experience of each concern.

7. All depreciation, insurance, and taxes, and all expense of protecting and maintaining plant and 1146 property completely inoperative, must be excluded from cost.

9. No interest of any kind is to be included in cost for this purpose. This involves disregarding interest as such and also the interest element in plant rentals.

10. No reserve for contingencies or similar item which does not represent reasonably ascertainable cost, but merely an estimate of uncertain eventualities, is to be included.

11. Federal or State income and profits taxes shall be excluded."

By Mr. Hanley:

Q. Doctor, I hand you what is entitled "A Supplement to Report Dated August 8, 1938, On Survey of Cost of Retailing Gasoline in the City of Detroit, Michigan," and I handed this to you once before and I am not sure I asked you if you were certain that that is a copy of what you prepared on that subject.

A. I prepared such a report with such a title, and this has the general appearance of being a copy—

Q. Will you take a moment to satisfy yourself that that is a copy of what you prepared?

A. I should hate to say it was an accurate copy.

Q. Well, can't you look at it for just a moment and determine whether or not it is a copy?

1147 This is off the record.

(Discussion off the record.)

A. It isn't a complete copy.

Q. What is short?

A. There were, I think, four appendices or supplements to the report originally—

Q. Well—

A. —which were important, as a matter of fact, for purposes of judging the adequacy of the report.

Q. Judge, insofar as the report does portray anything, is it a copy of what you wrote? Irrespective of whether there was something else or not, does what appears there coincide with what you originally reported?

A. Those supplements that I referred to, as a matter of fact, or appendices were rather an important component part of the entire report.

Q. Well, Doctor, maybe they were. I am not asking you about them. I am asking you if what appears in this document is a copy of what you wrote, so far as this goes?

A. It seems to be, as far as it goes. As I say, I reserve a right to check the accuracy.

Mr. Hanley: May I now have it marked, your Honor, for identification?

Trial Examiner Ballinger: The reporter will mark the document—this is off the record.

1148 (Discussion off the record.)

Trial Examiner Ballinger: The reporter will mark the document Respondent's Exhibit 2 for identification.

(The document was thereupon marked "Respondent's Exhibit No. 2," for identification.)

Mr. Hanley: May it be noted that it is on the cross-examination of the witness?

By Mr. Hanley:

Q. Now, I will leave this with you, Doctor—

A. O. K.

Q. —because I am going to ask you some questions about it.

Now, as I understand it, Doctor, this report, Respondent's Exhibit No. 2, is the report which you prepared relative to the city of Detroit alone, is that right?

A. With the usual exception, that there were supplementary matters contained in the report, that is true.

Q. So whatever appears in this report has to do with the city of Detroit, excluding all other territory?

A. That is true.

Q. Now, will you please look at page 4? It appears that you considered 409 stations in the city of Detroit for the purposes of making your conclusions; that is right; isn't it?

A. I considered more than that.

Q. Well, let me state it this way: You used 409?

1149 A. In preparing the final computations.

Q. Yes, sir. Now, how many did you consider on the city of Detroit. You will find it on page 4, Doctor.

A. It is also at the top of page 3. 462.

Q. Now, tell us what became of the difference between the total of 462 returns and 409 returns.

A. What became of them?

Q. Yes, sir. What did you do with them?

A. They are in my files in Ann Arbor.

Q. I know, but why didn't you consider them?

A. For the reason that they were either inadequate or unsatisfactory, or one reason or another.

Q. You say "inadequate or unsatisfactory." Now, in whose judgment were they inadequate or unsatisfactory?

A. Mine.

Q. Why?

A. Because in some cases we were unable to check figures which appeared on them and in certain cases the station operator reported on the wrong period of time, in spite of the fact that the questionnaire was very clear on that point. And there were certain cases where the reports were not notarized and the operator was either unable or unwilling to remedy that fact.

Q. Isn't it true, Doctor, that these 50 or 60 odd reports that you eliminated appeared on their face to be 1150 improper for your use?

Trial Examiner Ballinger: What do you mean by the word "improper"?

Mr. Hanley: Well, I don't know, Judge. I am asking the witness. Perhaps it is unfortunately framed. I will reframe the question.

By Mr. Hanley:

Q. Is it not true, Doctor, that you discarded from your consideration these 50 odd or 60 stations for reasons that appeared to you to be sufficient and which reasons were apparent on the face of the questionnaires themselves?

A. I think in most cases that would be true. I should hate to say that it was uniformly true that the reasons for discarding them appeared on the face of the returns.

Q. Do you think it is true in most cases?

A. I think, broadly speaking, that is true.

Q. Now, Doctor, you received 462 returns. I am talking about Detroit alone now.

A. That is right.

Q. And you say in your report on page 4 that you found it necessary to eliminate 53. Do you not regard 53 stations out of 462 as a high percentage of faulty returns?

A. Not at all.

Q. You don't think so?

A. No.

1151 Q. Now, you say, beginning at the bottom of page 3:

"In some cases it was necessary for the station operator to make out a complete new return which was duly notarized and used in place of the original return, but in most cases it was necessary only to fill in missing figures or to alter figures which were faulty."

Do you find that statement?

A. That is here.

Q. Now, did you do that?

A. Did I do that?

Q. Yes.

A. It doesn't say that I did anything.

Q. Well, I am asking you now, Doctor, did you?

A. Such action as was taken and described here was taken by the station operator.

Q. Well, did you fill in missing figures or alter figures?

A. No.

Q. Who did?

A. The station operator or in some cases my assistant, while he was at the station under the station operator's own eye.

Q. How do you know that? You weren't there; were you?

A. Those are the instructions I gave.

Q. Are you satisfied that they were followed, Doctor?

A. I certainly am.

Q. That is what you think; isn t it?

1152 A. That is what I believe.

Q. But where figures were filled in or altered you personally had nothing to do with it; was that true?

A. I didn't fill in or alter any figures on the returns.

Q. Any that were filled in or altered came to you without any knowledge on your part as to the basis for that filling in or that alteration; is that true?

A. No, I don't think that is true.

Q. Well, what did you know about it?

A. Because in such cases as I personally went on these field trips, where any figures were needed to be supplied, they were supplied by the station operator.

Q. I asked you that, Doctor, if there were any instances where you personally filled in figures or altered figures, tell us about it.

A. I filled in no figures on any returns and altered no figures on any returns.

Q. Well, did anybody do it in your presence?

A. Oh, undoubtedly in—in some of the—well, this was three years ago. In some of these details precisely what happened on some returns and some field trips are a little bit difficult to recall.

Q. I appreciate that, Doctor, but it is important that you remember if you can. You have reached a conclusion here which is, assumably up to this time binding upon
1153 a defendant in this lawsuit.

Now, I want to know in how many instances you filled in or altered figures.

A. I have already answered that question.

Q. Well, you haven't given us a figure. Can you?

A. I answered the question "no."

Q. You don't know?

A. I did not say that.

Q. Well, tell me how many figures—

Mr. Austin: He said "no." He said he never did.

By Mr. Hanley:

Q. Well, did you do it in the presence, or did anyone do it in your presence?

A. It might have been done in my presence by the station operator.

Q. Have you any notion how many stations that might have happened at?

A. Very few in my presence.

Q. Well, three or four or ten or a dozen?

A. Oh, more likely three or four.

Q. I see. So, as a matter of fact, if any figures were filled in or altered, as you have stated on page 4 of Exhibit 1, it was done by someone other than yourself and not in your presence; is that right?

A. In general, that is right.

1154 Q. Now, in the last paragraph on page 4 you say:

"After the returns had been completely checked computations were made of the cost of selling gasoline by each individual gasoline station."

What do you mean by the term "completely checked"?

A. Checked to such—that is, completely checked as far as the procedure seemed to demand.

Q. Well, we don't know what that means, Doctor. Tell us what you did.

A. Well, as the returns came in each one was carefully inspected by me.

Q. By whom?

A. By me.

Q. Everyone of them?

A. Everyone of them.

Q. All right. Go ahead.

A. I went over them with great care, and all of those which appeared to be or actually were defective on the face of them were checked in the field with the station operator out of his records. A considerable number—a considerable number of additional returns which did not appear to be defective on the face were also checked in the field in the presence of the station operator.

Q. All right. Taking the total of those returns that
were checked in the field, irrespective of whether you
1155 thought they were defective or not, how many out
of the 409 stations did you check in the field?

A. Did I check personally?

Q. That is right.

A. Well, that is one of the details that I can't recall precisely. I suppose perhaps, oh, between 10 and 20, say.

Q. That is, you examined between 10 and 20 out of 462?

A. In the field; yes.

Q. In the field?

A. That is true.

Q. Now, did somebody else check some more in the field?

A. Oh, yes.

Q. Who was that?

A. That was my—one of my assistants.

Q. And how many did he check, if you know?

A. I think the figure here is 183. That is—that is—

Q. Do you know that?

A. —that is the total number that were checked.

Q. Do you know that?

A. He reported to me that he checked them.

Q. All you know about it is what he told you; is that right?

A. Also in the case of those that were—

Q. Well, is that right, Doctor?

A. Oh, no, of course, it isn't right.

1156 Q. Well, then, tell me what the fact is. You can answer it yes or no, you know, if you want to.

A. Well, insofar as returns were defective on their face, that is, perhaps they didn't report certain important figures such as the total number of hours worked, for instance, which was necessary; and he took them out in the field. They were brought back with such—in general with such figures supplied or without them, in which case they were discarded.

Q. That is to say, Doctor, he took certain reports out and he came back with certain figures, and that is all you know about it; isn't it?

A. I wasn't with him.

Mr. Austin: Your Honor please,—

By Mr. Hanley:

Q. Do you know where he got the figures?

Mr. Austin: —I think this line of questioning is going pretty far. It is perfectly obvious nobody can make a survey on gasoline stations in an area as large as Detroit and do it personally, unless it is done under supervision. The witness has testified it was done, in his opinion, according to proper accounting principles. He has testified who his assistant was, and so forth, and this seems to be more or less quibbling upon whether or not he knows what was done. I don't think this is at all a question of hearsay evidence when you are talking about an economic report.

1157 Trial Examiner Ballinger: Apparently counsel for the respondent is merely endeavoring to ascertain just what knowledge this witness had of the facts—or the statements embodied in his report.

Mr. Hanley: Exactly.

Judge, I am going to give you now the basic theme in this examination. It may be that Dr. Taggart did a careful job in his report. I don't know. I am not an economist myself. I think there are fallacies in it, but irrespective of that fact, Dr. Taggart has just reached a wrong answer. Now, that much I know. And I want to find out where the difficulty is, why he got that wrong answer, because, Judge, he got it. That is all there is to that.

Trial Examiner Ballinger: Proceed.

1158 Mr. Austin: Well, starting out on the assumption he got a wrong answer, of course, there could be an awful lot of questioning, and after it is all over it may turn out the answer is right; we don't know.

Mr. Hanley: Well, if we know anything in our shop, we know the oil business.

Trial Examiner Ballinger: That is the province of the cross-examination, to find out if he can.

Mr. Hanley: May I have the record as to the last question and the answer, please?

(Question read.)

By Mr. Hanley:

Q. Now, will you answer that, please?

A. Which figures were these?

Q. The figures that were supplied or altered in the field.

A. My instructions to him were to—

Q. I did not ask you that, Doctor. Do you know where he got the figures that were filled in or altered?

(There was a short lull.)

Q. Don't you understand that question, Doctor?

A. I understand it very well, indeed.

Q. Can you answer it?

A. I am trying to formulate my answer.

I know where he got them so far as any accountant or statistician or economist knows where figures were
1159 obtained by someone under whose direction they were—

Q. Do you mean by that he told you where he got them?

A. Yes.

Q. I am not interested in what he told ~~you~~. I am interested in what you know about it.

Do you know that?

A. Not in any absolute sense, no.

Q. Doctor, just to clarify this thing, if you will, please, refer to page 5 of that Exhibit 1, and to page 2 there seems to be a discrepancy in the number of stations considered, 1886 on page 2 and 1879 on page 5. That may be typographical. Can you clear it up for us.

A. It was not precisely typographical, as a matter of fact, but it amounted ~~to that~~. It was matter of the failure to count the individual stations on these sheets that we talked about yesterday correctly.

Q. Now, on page 9 of your report you have indicated that it was impracticable on account of the large expense, and so forth, to make a survey of these stations individnally. I think you have testified, Doctor, that that would have been the preferable method if you could have employed it.

A. That is true.

Q. And this is the next best method that you could devise; is that right?

A. That is very true.

1160 Q. Will you please turn to page 15. I find this statement, Doctor:

"Many of the returns bore evidence that certain of the figures had been estimated rather than taken from books of account."

Did you reach that conclusion after your review of the returned questionnaires?

A. Yes.

Q. Did you have any information as to the basis for the estimation of any of those figures?

A. We did in those cases where they were checked, where those estimates were checked.

Q. Now, you mean by that, as I understand you, Doctor, that you sent somebody into the field with instructions to find out about these questionnaires, and he came back and reported certain things to you and you are just presuming, are you not, now, that he learned from the station operator the basis of the estimation?

A. That is what he reported to me.

Q. And that is all you know about it, isn't it?

A. That was enough to satisfy me.

Q. Well, you are satisfied, Doctor, because you believed the man you sent into the field, now, isn't that the fact?

A. I should not have hired him if I had not thought he was trustworthy.

1161 Q. Well, I understand, but you believed him, didn't you?

A. Of course.

Q. And all you know is what he told you?

A. In the absolute sense in which you are using that term.

Q. Right.

A. Yes.

Q. Now, so far as you know all he knows or knew was what the service station operator told him; is that no true?

A. Well, he was instructed to look at the service station operator's records.

Q. I don't care what he was instructed to do, Doctor. Isn't it a fact, so far as you know, that all he knew was what a service station operator may have told him?

Mr. Austin: I object, Your Honor. That is a conjectural question. The witness has stated what his instructions were, and he stated he only knows what report was brought back pursuant to those instructions.

Mr. Hanley: I think that is sufficient.

I will withdraw the question, Judge.

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Hanley:

Q. Now, Doctor, on the same page 15, you make this statement:

> "Wherever we found that an estimate was either
> 1162 too high or was not founded on reasonable demonstrable facts, we eliminated the figure from the computation."

What do you mean by "we"?

A. Well, that might be an editorial "we." As a practical matter of fact, I should have used "I."

Q. All right, you did it. Now, on what basis did you do it?

A. On the basis I felt the figure was not reliable, therefore it should not be used.

Q. In other words, you used your own judgment?

A. That is correct, I used my own judgment.

Q. In other words, you took these returns and you put them into shape that you think they ought to have been in; is that right?

A. It is not precisely correct.

Q. Well, explain.

A. I took the returns as they came in, checked them to such extent as seemed necessary under the circumstances, and in general accepted the result.

Q. In general?

A. Yes, in general.

Q. You accepted the result?

A. That is true.

Q. Now, if there was something out of line with the "in general conclusion" that you reached, you just
1163 fixed it up; is that right, Doctor?

A. Fixed it up might be in either direction.

Q. Well, I suppose so.

A. What is said here is that the figure was eliminated.

Q. Yes, sir. When you eliminated it, what was the result after that, did you use it at all?

A. In some cases—do you mean use that figure?

Q. Let me understand you, Doctor.

Did you eliminate some figures on some questionnaires and then used that questionnaire in your survey?

A. Yes.

Q. So you took out of some of these questionnaires the figures that had been put in there by the service station operators?

A. That is correct.

Q. And you did that on your own judgment; is that true?

A. I doubt if any figures were eliminated unless we had attempted to check them in the field and found that the service station operator either could not substantiate them, or that he had misunderstood or in some other way we discovered the figure was not a satisfactory figure.

Q. I see. But, Doctor, however you may have eliminated the figure, you did use the questionnaires from which you eliminated certain figures?

A. That is correct.

1164 Trial Examiner Ballinger: Doctor, except where you made a recheck back against the books of the service station owner, what basis could you have had for the elimination of any figures?

The Witness: Well, I do not think that as a matter of fact that we did eliminate any figures except in those cases where we did make some attempt to check them with the station operator.

Trial Examiner Ballinger: Well, you say you do not think you did. Is that your best judgment?

The Witness: That is my best judgment, yes. As I say, this was 3 years ago, and some details of the operation have escaped me which I should have remembered if this examination had taken place—

Trial Examiner Ballinger: Could you conceive any other basis for elimination of figures other than the one I stated?

The Witness: No, no reasonable basis; that is true.

By Mr. Hanley:

Q. Are you willing to say positively, Doctor, that you did not eliminate any figures from any of these questionnaires except where you checked in the field?

A. I should hate to make that statement with complete positiveness. I think it is a bare possibility that we
1165 might have found a figure, for example, which obviously did not belong in the picture which perhaps was labeled in such a way as to indicate that it was not a proper figure, and under those circumstances we would eliminate it.

For example, certain station operators are purchasing equipment or purchase their stations under contract, and once in a while we found a case where the operator indicated on the face of his return, contract or payment on contract so much, $89.50, or whatever the amount might be. Now, under those circumstances that is obviously a figure which we did not ask for, which did not belong in the computation, and, therefore, we eliminated it, and would eliminate that without any reference to the dealer himself; that is, he was simply mistaken in believing that that was part of his operating costs.

Q. So you did eliminate figures without reference to the service station operator himself?

A. It could have happened under those circumstances.

Q. Now, on page 18, Doctor, at the top of the page, you make the statement: "Miscellaneous expenses were accepted as reported with the exception of certain cases where they appeared to be obviously too high."

What do you mean by "obviously too high"? Too high to whom?

A. Too high in view of the character of the opera-
1166 tion, and the station, and the volume of gas sold.

Q. What do you mean by that, in your judgment they were too high?

A. They appeared to be too high and that was one of the circumstances we would take the return back to the operator, try to get an explanation.

Q. Now, did you revamp any figures of that character that you did not take back to the service station operator himself, could you say that positively?

A. It indicates here that there were some cases where an explanation of the miscellaneous expense items which we requested indicated clearly that it did not belong there.

Q. That is what I am asking you about, Doctor. Is that statement, Doctor,—and I am asking you now if you did it in any case where you did not take it back to the service station operator?

A. And in those circumstances where the explanation indicated clearly that the expense item, so-called, did not belong, we may have eliminated it without taking it back to the service station operator.

Q. You may have done so?

A. We may have done so.

Q. You are not able to say whether you did do so; is that right?

1167 A. I am not able to say that we did. It is entirely possible.

Q. Now, doctor, you knew yourself to be a much better bookkeeper than any one of these service station operators, didn't you?

A. Well—

Q. We concede that, Doctor. You do not need to be modest about it.

A. I do not think that is true. As a matter of fact, we found some of these service station operators that were very good bookkeepers.

Q. You had a most unusual experience.

A. I said bookkeepers, of course.

Q. But you could tell, so you thought, could you not, the proper relations of these various items of expense that came in in the questionnaires, so that if one was abnormally high or abnormally low it registered on your mind; isn't that true?

A. That is broadly true, yes.

Q. And you fixed it up; isn't that true?

A. After the proper checking and consultation with the station operation and other examination.

Q. And in some cases without consultation with the station operator; isn't that true?

A. Only where it was indicated on the fact of it that the item was improper.

1168 Q. Are you sure of that?

A. I answered that question before.

Q. Well, answer it again, Doctor.

What I am trying to find out is a very simple thing, Doctor. I want to know if you altered, entered, or eliminated any figures on any of these questionnaires without consultation with the service station operator for any reason?

A. That has been answered in the affirmative.

Q. Now, you considered in your analysis certain cost factors based on whether a service station operator owned his property or leased it; that is true, isn't it?

A. That has been answered in the affirmative.

Q. Now, you considered in your analysis certain cost factors based on whether a service station operator owned his property or leased it; that is true, isn't it?

A. That is true.

Q. And you accepted the statement of the operator in his questionnaire as to the facts relative to his leasing or owning his property?

A. That is true.

Q. On page 19, Doctor, in the second paragraph, the second sentence, you make this statement: "the rate used, namely, 5 percent, was thought to be conservative and was also very convenient for purposes of computation."

Now, you are referring there, are you not, to a 5 percent interest rate which you allocated as a cost in cases where property was owned by the operator?

A. That is true.

1169 Q. Now, did you use 5 percent because it was conservative or convenient?

A. Primarily because it was conservative.

Q. Ten percent would have been more convenient than 5 percent, wouldn't it?

A. It certainly would have, very much more.

Q. But 5 percent was sufficiently convenient?

A. That is the case.

Q. Now, Doctor, I would like to have you tell the court in how many instances you personally looked at the basic records of service stations in Detroit in 1938?

A. I have already testified that I do not remember the exact number of stations which I visited at that time; in fact, I unfortunately did not keep a precise record in those cases where I did visit; however, I saw such books and records as the station operators had.

Q. And your best judgment as to the number?

A. I think I testified a few minutes ago that it probably was somewhere between ten and twenty.

Q. Now, isn't it a fact, Doctor, that service station operators do not keep adequate records of their business, generally speaking?

A. It depends on what you mean by "adequate." It depends entirely on what your standards are.

Q. Well, I will let you define the word "adequate," in your judgment as an economist, and a bookkeeper, 1170 and an accountant. Is it or is it not true that service station operators generally keep adequate records of their business?

Trial Examiner Ballinger: Now, when you say "adequate," you mean a record that fairly reflects their expense and income?

Mr. Hanley: Right, Judge, fairly reflects the whole complexion of their business.

Mr. Austin: I object to that question unless it is restricted to whether they keep adequate records for the purpose of obtaining information used in this survey. The Doctor prepared a questionnaire. He may have prepared that questionnaire with some knowledge of what kind of records service stations keep and have asked for cost items which he thought they could supply. I don't know, but I just—I feel that the word "adequacy" of the records of a service station from the standpoint of an expert accountant may be one thing, and their adequacy for the purpose of a cost survey may be something else. If you restrict it to the question of cost —

Trial Examiner Ballinger: The sole purpose of the examination is to elicit whether from their records they could have prepared and furnished the information that was later included in this report.

Mr. Austin: Yes, the information asked for in these questionnaires.

Mr. Hanley: Right. Of course, Judge, I do not 1171 expect this witness to place upon the filling station man the standard or yardstick of accountancy that he, himself, might use. I am asking him if they had adequate records of their business. He knows surely what that means, a reflection, a true reflection of what they did.

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

A. In so far as we had opportunity to examine their records, we found that in most cases they were adequate for the purpose of supplying the information which was contained on the blanks that they filled out.

By Mr. Hanley:

Q. Well, isn't it true, Doctor, that service station operators, generally speaking, keep very incomplete and inadequate records of their business?

A. They keep incomplete records, that is the impression that I have. As far as inadequacy is concerned, you again must define the term "inadequate." They keep such records as generally satisfies them.

Q. Does it satisfy you?

A. And if it satisfies them that is one test of adequacy.

Q. Well, does that satisfy you?

A. It might or it might not.

Q. That is to say, Doctor, if they had expense ac-
1172 counts for the month of February and did not have
any for the month of May, that might be entirely adequate to satisfy the service station operator as to what his cost was, but did you accept that kind of a record?

7 A. Oh, no, of course not.

Q. That would not be adequate to satisfy you, would it?

8. A. Obviously not.

Q. Now, with at least that much of a definition, did you find or has it been your observation and experience that service station operators generally keep complete and adequate records of their business?

A. Our observation in those cases where we observed was to the effect that their record were not complete.

Q. As a matter of fact, Doctor, the only business place handling gasoline at retail that kept reasonably good and complete records were large outlets, were they not?

A. I would not say that.

Q. Haven't you so stated in your book?

A. Where?

Q. Well, I am sorry. I gave it to the Reporter but didn't you make a statement to the effect that it was difficult to find adequate and complete records of a bookkeeping nature in small businesses, and that statistical data could only be acquired in reasonably complete form from large out-
lets? That is not your language, Doctor, but I am
1173 trying to give you the substance of what I think you
said in your book.

A. I may have made some such statement as to the first part of that. The second part obviously might or might not be true depending on what kind of statistical data you wanted and how complete the statistical data had to be, and for what period, and so on and so forth; that is, there are small businesses which might be able to furnish certain data quite satisfactorily, many of them.

Q. Now, Doctor, I ~~do not want to pursue this any fur-~~

ther. I just want a candid answer from you for the aid of the Court in just a layman's terminology: Isn't it true that these small retail outlets do not keep good records, whereas the big outlets may do so?

Trial Examiner Ballinger: Restricting it now to the area in which your survey was made.

A. I think if you qualify that statement by saying generally or broadly speaking.

By Mr. Hanley:

Q. I wish to qualify it that way, Doctor.

A. It is true that the records of the larger stations, as we found them, were generally more complete, and, if you please, more adequate, and for more purposes than the records of the small stations.

Mr. Hanley: Off the record, please.

Trial Examiner Ballinger: Off the record.

1174 (Discussion off the record.)

Trial Examiner Ballinger: On the record. We will take a recess for five minutes.

(There was a short recess taken.)

Trial Examiner Ballinger: Come to order, gentlemen. Proceed.

By Mr. Hanley:

Q. Doctor, adverting to the time contemplated by your survey, which was the month of May, 1938, please tell us just why you chose May.

A. For two reasons: One was that May was a suitable month for this purpose, in my judgment.

Trial Examiner Ballinger: Now, you say "suitable." What do you mean?

The Witness: I mean that it is a fairly representative month in the gasoline business, that sales are relatively high in comparison to the general average of sales, and that business is presumably fairly normal at that time, that expenses might be expected to be more or less normal, and so on and so forth.

By Mr. Hanley:

Q. Have you concluded your answer?

Trial Examiner Ballinger: What is your second reason?

The Witness: Oh, my second reason. As a matter

1175 of fact for choosing May, rather than June, for instance, which would have been equally good, for the reasons that I have stated, was that it was desired to get the survey started and under way and completed in as expeditious a manner as possible in view of the local situation.

By Mr. Hanley:

Q. Now, Doctor, is it not true that the year 1938 was a bad year in the oil business? I mean by that, there were abnormally reduced sales of petroleum products, including gasoline?

A. That is entirely out of my territory.

Q. Well, don't you know that?

A. No.

Q. Didn't you undertake to learn anything about that in choosing a time for developing a general cost survey, Doctor?

A. No.

Q. You just ignored that?

A. I ignored it.

Q. I will ask you if it is not a fact that in 1938 the consumption of gasoline in the State of Michigan declined 5.1 percent from that of 1937?

A. Are you asking me if that is a fact?

Q. I am asking you.

Trial Examiner Ballinger: Have you any knowledge?

The Witness: I have no knowledge.

1176 By Mr. Hanley:

Q. Did you undertake to learn anything about that when you made your survey?

A. At the time, of course, it was impossible to learn about that because the year had not passed yet.

Q. Well, did you know anything about the situation in 1938 as compared with other years?

A. No.

Q. And you didn't undertake to learn?

A. That is true.

Q. Is it not a fact that gasoline consumption in 1938 was 8.6 per cent below the accomplishments of 1939 in Detroit?

A. Are you asking me if that is a fact?

Q. Yes; I am asking you.

A. I don't know.

Q. Have you made any effort to ascertain?

A. I don't see that that has any bearing on the survey, as a matter of fact.

Q. Well, irrespective of your judgment in that respect, just please answer the question. Have you made any effort to ascertain?

A. I have not.

Q. So you just don't know; that is right, isn't it?

A. That is correct.

Q. Well, isn't it true that sales levels were abnormally low in 1938 in respect of sales of gasoline
1177 in Detroit?

Trial Examiner Ballinger: Have you any knowledge on it?

The Witness: No.

By Mr. Hanley:

Q. Did you undertake to learn anything about that in connection with your survey?

A. No.

Q. Is it not true that there was a general business recession in 1938, including commerce, in sales in gasoline?

A. There was a general business recession which started, presumably, along in the fall of '37. The production indices, and so on, indicates that, and which presumably wasn't entirely passed in the spring of '38.

Q. Wasn't that recession more severe in the City of Detroit than elsewhere in the country?

A. I don't know as to that.

Q. Have you any familiarity at all with the automobile industry in the City of Detroit?

A. Oh, I know where the large units of the automobile industry are located in Detroit; yes.

Q. Detroit is essentially a producer of automobiles; is it not?

A. Well, I wouldn't go so far as to say that. There is quite—

1178 Q. Well, it is a large producer of automobiles?

A. Oh, it is a large producer of automobiles; yes.

Mr. Hanley: May we have this marked as an exhibit, Your Honor?

Trial Examiner Ballinger: The Reporter will mark the document Respondent's Exhibit 3, for identification.

(The document was marked for identification "Respondent's Exhibit 3.")

By Mr. Hanley:

Q. Doctor, I hand you what has now been marked Respondent's Exhibit 3, for identification, which purports to show, in graph form, the automobile production in this country, seasonally adjusted, and which purports to show the nadir of the line in the summer of 1938, including May of 1938, and will ask you to examine it and state whether or not, in your judgment and knowledge as an economist, it fairly and accurately portrays the trend of the automobile business?

A. I couldn't venture an opinion.

Q. You just don't know anything about that; is that true?

A. I have seen charts like that, and I know that they are prepared by statisticians and others, and presumably very capable ones, but that doesn't indicate who prepared it or where or when or by what method the figures were arrived at, or anything of the kind. I have no way of knowing that.

Q. Doctor, I am asking you—just assume the office boy
made it. I am asking you if it correctly portrays
1179 the fact, in your judgment and opinion as an economist?
Can you answer that question?

A. I haven't followed the industry with any such care.

Q. You don't know, then; is that true?

A. That is true.

Trial Examiner Ballinger: The Reporter will mark the document Respondent's Exhibit 4, for identification.

(The document was marked for identification "Respondent's Exhibit 4.")

By Mr. Hanley:

Q. Are you able to say, Doctor, out of your own knowledge, without reference to any figures, that automobile production was abnormally low in May, 1938, as compared with a couple of years before and after May, 1937?

A. No.

Q. You are not able to say that?

A. That is correct.

Q. Doctor, do you regard the Standard Oil Company of Indiana as a fairly representative marketer of gasoline in the City of Detroit?

A. I should think so

Trial Examiner Ballinger: Judge, merely for the purposes of the record, when you refer to the Standard Oil Company of Indiana you are referring now to the Respondent?

1180 Mr. Hanley: That is true, Your Honor.

By Mr. Hanley:

Q. I show you what has now been marked Respondent's Exhibit, for identification, No. 4, which purports to show the variance of sales of gasoline in the City of Detroit, and call your attention particularly to the point that is represented by the month of May, 1938, and will ask you if you think that that is fairly representative of the trend of sales of gasoline in Detroit for the years 1937 through 1940.

Mr. Hanley (To Mr. Austin): I will give you copies.

Mr. Austin: Your Honor, the witness has already testified that he doesn't know how '38 compares with other years.

Trial Examiner Ballinger: Well, if he has any knowledge—

Mr. Austin: And obviously he doesn't know anything about it, Judge.

Trial Examiner Ballinger: —basic knowledge—knowledge upon which he can base an answer, he may answer.

Mr. Hanley: Of course, I think that is the fault in this survey, that he doesn't know.

By Mr. Hanley:

Q. Can you answer that question, Doctor?

A. I can't answer it, and, furthermore, it couldn't have been answered in 1938.

1181 Q. Well, it could have been answered in 1938 as related to previous years, couldn't it, Doctor?

A. Oh, as related to previous years; yes.

Q. Did you make any effort to learn what the facts were in connection with previous years?

A. It was entirely unnecessary to make any such study for purposes of the survey.

Q. That is your opinion?

A. That is my opinion.

Mr. Hanley: May we have this marked Exhibit 5?

Trial Examiner Ballinger: The Reporter will mark the document Respondent's Exhibit 5, for identification.

(The document was marked for identification "Respondent's Exhibit 5.")

By Mr. Hanley:

Q. Doctor, I hand you what has now been marked Respondent's Exhibit No. 5, for identification, purporting to show, in graph form, the total consumption of gasoline in the State of Michigan from the year 1933 through the year 1940, and will direct your attention particularly to the situation as disclosed for the year 1938, and, more particularly, for the month of May, 1938, and will ask you if it isn't a fact that consumption of gasoline in the entire State of Michigan, including Detroit, declined materially in May, 1938?

Trial Examiner Ballinger: Is his answer to be 1182 based on the information contained in the document?

Mr. Hanley: No. No. I am just asking him, Your Honor. If he gets any aid from the exhibit, all right, but I am asking him.

A. Of course, you realize I know nothing about this exhibit, who prepared it, what it is—

By Mr. Hanley:

Q. I am not asking you about the exhibit.

Will you read the question, please.

Trial Examiner Ballinger: Have you any personal knowledge, independent of that document, or does that document refresh your recollection?

The Witness: The personal knowledge that I have, independent of this document, is in connection with the stations whose returns we got, and in the case of those particular stations the gallonage in May was higher than it had been, on the average, in the preceding months of 1938.

By Mr. Hanley:

Q. Do you conclude from that fact, Doctor, that there was an increased consumption of gasoline in Detroit in the year 1938, or, more particularly, in the month of May, 1938, as contrasted with prior periods?

A. Of course not.

Trial Examiner Ballinger: Judge, what is the materiality of that question?

1183 Mr. Hanley: The materiality, Your Honor, is that the witness chose a bad month. It doesn't reflect the facts. This is one reason for it. There was a depressed market.

By Mr. Hanley:

Q. Now, Doctor, is it not true that the period of heaviest gasoline consumption or sale occurs over the week ends?

A. That is true, of certain types of gasoline consumption or sale. That is for—

Q. I am referring to total consumption.

Trial Examiner Ballinger: Have you any knowledge about the consumption of gasoline over the week ends?

The Witness: I do. I do have a certain amount of knowledge of that because, of course, I know in general who consumes it. It is consumed by pleasure cars and by cars used for business and by delivery trucks and for commercial purposes generally, and so on.

Now, some of those uses obviously would be more heavy in the week end and others would be lighter.

By Mr. Hanley:

Q. Well, can you make a direct answer to the question, Doctor: Is it not true that the peak period of gasoline sales occurs on the week ends, as contrasted with other days in the week?

A. Some types of sales, yes. Other types of sales, no.

Q. In relation—

1184 Trial Examiner Ballinger: Upon the whole, have you any knowledge that would enable you to answer the question?

The Witness: I couldn't answer that, on the whole.

By Mr. Hanley:

Q. Doctor, is it not true that during May, 1938, the precipitation in Detroit was abnormally heavy, being 4.42 inches as against a normal of 3.21 inches? Do you know?

A. I don't know.

Q. Did you make any effort to find out?

A. No.

Q. Did you give any consideration to that subject when you made this survey?

A. I did not.

Q. Is it not true that on the week ends for May, 1938, in Detroit the record of participation is as follows—

A. The record of what?

Q. Precipitation.

A. Oh, excuse me.

Q. —is as follows: May 1st, Sunday, no rain; May 7th, Saturday, .01 inch; May 8th, Sunday, .22 inches; May 14th, Saturday, 1.04 inch—

Mr. Austin: Your Honor, I object to reading these figures.

Mr. Hanley: Let me finish my question.

Trial Examiner Ballinger: One moment. Let
1185 counsel finish his question.

By Mr. Hanley:

Q. —May 15th, Sunday—

Mr. Austin: Well, it just goes in the record, is all.

Q. —.35 inch; May 21st, Saturday, a trace of rain and threatening; May 22d, Sunday, a trace of rain and threatening; May 28th, Saturday, .02 of an inch; May 29th, Sunday, a trace of rain and threatening?

Do you know?

A. I don't know.

Q. Did you make any effort to find out?

A. No.

Q. Did you give any consideration at all to the fact when you made your survey and chose the month of May?

A. I did not.

Mr. Austin: Now, Your Honor, I move to strike physically from the record the reading of what Counsel purported to be weather reports, upon the ground that it is prejudicial and improper to read into the record material which is presumably correct and yet which it is obvious at the time it is put in that witness knows nothing about.

Trial Examiner Ballinger: It has no evidentiary value.

Mr. Austin: It has no evidentiary—

1186 Trial Examiner Ballinger: It is in the record, but it has no evidentiary value.

Mr. Hanley: I just asked a question. Unless we prove it—

Mr. Austin: Therefore, I move to strike it physically because I think it has a—conceded it is not evidence, but I do not think it is proper to read material into the record for the purpose of having it on the record.

Trial Examiner Ballinger: The Examiner cannot very well direct that it be stricken physically. The only thing he could do would be to direct that it be stricken, and it would be in the record the same.

Mr. Austin: That is why I object to it.

Trial Examiner Ballinger: It has no value, evidentiary value.

Mr. Hanley: We understand that.

Trial Examiner Ballinger: And the Respondent is paying for this record largely, so—

Mr. Hanley: Yes; unless we prove it it has no probative value. We concede that.

Mr. Austin: Well, I still wish to have my protest recorded against reading material into the record which has no evidentiary value, which it is known in advance that the witness cannot affirm.

Mr. Hanley: I am going to prove it. I will—

1187 Trial Examiner Ballinger: Unless Counsel is a mind reader he couldn't very well know in advance that the witness had no knowledge.

Mr. Austin: The witness so testified.

By Mr. Hanley:

Q. Now, Doctor, you undertook, by your use of the month of May, to get a figure which would be representative of a normal month over a long period of time; did you not?

A. That is very true.

Q. Is it not true that gasoline sales during the month of May represent a higher proportion of total income at a service station than does the average month of the year?

A. I have no knowledge of that.

Q. Didn't you undertake to prove it in your survey by a reference to the first five months of 1938 and by a reference to the year 1937?

A. No revenue figures were obtained for other months, as a matter of fact, on the basis of which such a conclusion could have been reached. I—such a conclusion may possibly be true but—

Q. Didn't you reach it, Doctor? Look at your report.

A. Pardon?

Q. Look at your report. Didn't you actually reach that conclusion?

A. You better restate the question. Not as I 1188 understood you.

Q. All right.

That gasoline sales during the month of May represent a higher proportion of total income than does the average month of the year?

A. Gasoline sales during the month of May represent a higher proportion of income—you mean a higher proportion of total revenues of the gasoline station?

Q. That is right.

A. I don't see why they should.

Q. Well, didn't you reach a conclusion of that kind in your report, Doctor?

A. Oh, no. Not at all.

Q. Well, assuming that that is true, if you don't know, would not the use of a ratio of 80.75 percent as a means—that is, percent of total revenues—as a means of determining the proportion of expense assessable to sale of gasoline be high as compared with a corresponding figure based on annual dollar volume?

A. Of course, I didn't use that ratio, as a matter of fact. The ratio—

Q. Well, look at your report. It is on page—

A. —actually used—oh, excuse me. Yes.

Q. Page 14.

A. I was thinking of the Wayne County report. I am sorry.

1189 Q. You did use 80.75 percent as a ratio; did you not?

A. That is what the ratio was in the month of May.

Trial Examiner Ballinger: In the Detroit report?

The Witness: In the Detroit report; that is correct. That is what the ratio was during the month of May, 1938.

Mr. Austin: Ratio between what, may I ask?

The Witness: Gasoline sales and total sales.

Mr. Austin: In dollars?

The Witness: In dollars.

Mr. Austin: Dollar sales.

By Mr. Hanley:

Q. Now, is it not a fact, Doctor, that the so-called spring or summer service on automobiles is largely completed through the month of April and prior to the month of May? For your information, I mean by that the change-over from winter conditioning to summer conditioning of cars; that is, changing of oil and grease and anti-freeze solution and new tires, and so on.

A. I don't know that.

Q. You didn't give any consideration to that fact in choosing the month of May?

A. If it is a fact, I didn't.

Q. Is it not a fact that change-over period results in a high revenue during the months of April and March at service stations in relation to the amount of gasoline sold?

1190 A. It might represent a fairly substantial amount of revenue in whatever period it takes place, whether it would be—

Q. Well, do you know whether it would be—

A. Whether it would be high in comparison to the normal ratio of gasoline sales, I don't know.

Q. I am just asking you, Doctor. If you don't know, say so.

Trial Examiner Ballinger: He says he doesn't know.

Mr. Hanley: I want it on the record, Doctor.

By Mr. Hanley:

Q. Do you know or don't you?

The Witness: Would you repeat the question?

(Question read.)

A. I don't know.

Q. Very well.

Are you familiar with the fact, Doctor, that in 1938 there was in Detroit in the retailing of gasoline what was known at the time as a price war?

A. I understood that that was true, yes.

Q. And the retailing business in gasoline was highly depressed? Did you so understand?

A. I didn't understand that; no.

Q. Didn't know that was true? You gave that no consideration in your survey?

A. Wasn't necessary for purposes of the survey.

Q. Well, irrespective of that, did you or did you

1191 not give it consideration, Doctor?

A. Survey was intended to find costs—

Q. Can you answer that "yes" or "no"?

Trial Examiner Ballinger: Doctor, you could answer the question "yes" or "no."

A. No, for the reason that the survey was intended to determine the costs—

Q. I don't care what it was intended for.

Trial Examiner Ballinger: One moment. The witness may explain his answer.

A. —for the reason that the survey was intended to determine costs as they actually existed at the time. The fact that there may have been a depression in the gasoline industry generally during 1938 has no bearing on the validity of the survey.

Mr. Hanley: I move to strike the voluntary speech of the witness for two reasons: First, it is immaterial, and, in the second place, the witness has already stated that he doesn't know that there was any such situation.

Trial Examiner Ballinger: Motion is denied.

By Mr. Hanley:

Q. Now, Doctor, how did you treat the item of depreciation?

A. How did I treat it?

Q. Yes, sir. What did you do with it in your analysis of costs?

1192 A. I included it in the computations.

Q. How?

A. It was ascertained for—on an annual basis, since depreciation is normally so stated. The amount was—together with other similar annual expenditures—was divided by twelve for purposes of reducing it to a monthly basis.

Q. How did you happen, Doctor, to arrive at the percentage of 5 percent?

A. Which 5 percent is that?

Q. That you used for depreciation, if you used that?

A. I used it in certain cases; yes.

Q. How did you happen to arrive at that?

A. That was the depreciation rate which was used as a standard in connection with depreciation on buildings.

Q. And that was the rate that was generally used in your work as you observed the N.R.A. cost set-ups; was it not?

A. Oh, not necessarily at all.

Q. Well, generally speaking?

A. No, no, no. Not at all. Not generally. Some buildings.

Q. Was there any reference at all to the allowance by the Internal Revenue Department on income taxes?

A. Oh, it has a reference to it, of course.

Q. Well, how does it relate?

A. Well, the Internal Revenue Bureau permits a reduction for depreciation on buildings, machinery, equip-
1193 ment, and similar assets, which allowance is commonly determined by applying some rate to the cost value.

Q. And what rate?

A. Oh, the rate varies, according to the nature of the—

of the asset. There are rates of one percent; there are rates of fifty percent, and probably rates higher than fifty percent, even, depending entirely on the nature of the asset and the circumstances under which it is used.

Q. How did you happen to arrive at 5 percent in connection with the particular property that you were dealing with in this survey?

A. It is a rate very commonly used by gasoline dealers in making up their income tax returns.

Trial Examiner Ballinger: Doctor, was it merely arbitrarily adopted by you, or did you have some basic reason?

The Witness: It was not adopted arbitrarily. It was adopted—

Trial Examiner Ballinger: State the basic reasons for the adoption of the rule.

The Witness: It was adopted after consultation with gasoline dealers and others who knew about gasoline dealers' operations, and I found that—

Trial Examiner Ballinger: Well, what factors entered into it?

The Witness: The two principal factors entering 1194 into all depreciation rates. One is wear and tear, and the action of the elements; that is, physical wearing out of the assets which makes it necessary to replace them. Another is the complex of the economic results which are commonly known as obsolescence and inadequacy, and so on, and every depreciation rate, practically speaking, that is in actual use both for accounting purposes, for purposes of determining costs; and for purposes of the income tax computations, are based on those two principal factors. I found that gasoline dealers very commonly used a rate of 5 percent on their buildings, as a matter of fact. In a great many cases I actually found that they used higher rates than that. In relatively few cases where they actually made income tax returns did they use a lower rate than 5 percent.

Trial Examiner Ballinger: You are speaking now of the Wayne County District?

The Witness: Of the Detroit and surrounding area; that is true.

By Mr. Hanley:

Q. Were you not influenced to a considerable extent by reason of the fact that they used that 5 percent rate in income tax reports, Doctor?

A. Yes, I think I was influenced by that fact.

Q. I call your attention, Doctor, to page 42 of your book, on which you make this statement:

1195 "For the most part"—you are talking about depreciation—

"For the most part, the N.R.A. authorities attempted to settle comfortably back on the rules as to both factors developed by the Bureau of Internal Revenue, even though it was recognized that rules satisfactory for income tax purposes might not be entirely suitable for cost accounting."

Again quoting:

"A few codes contained a provision which purported to be an acceptance of the income tax basis for depreciation, but which was, in fact, a joke to anyone who read it with care and an elementary knowledge of federal income tax practice. This provision specified 'depreciation * * * computed according to the maximum rates of the Income Tax Procedure.' It ignored the fact that the rates must be applied to some base, in order to obtain any result, and assumed that there were such things as 'maximum rates of the Income Tax Procedure.' The Bureau of Internal Revenue has never committed itself to any generally applicable rates of depreciation, maximum or otherwise, and presumably never will."

Again quoting:

"Strict adherence to the income tax return might, in some cases, produce no depreciation at all, either because the concern has failed to take advantage of the deduction through ignorance or inertia, or because an industry
1196 member, seeing an opportunity to 'chisel' the cost formula, might deliberately fail to take a depreciation allowance in years when, on account of being in the red anyway, he could afford to neglect it. The income tax law does not force the taking of depreciation, if the taxpayer chooses to ignore it, and there are many concerns which are not earning their fixed costs, including depreciation, and can disregard depreciation without increasing their taxes."

Did you make these statements?

1197 Mr. Austin: Your Honor, I object to this question which includes what has been read into the record on the ground that it is irrelevant and immaterial, and that the witness, while he said he was influenced by the practice, the existing practice of using 5 per cent in return of these gasoline dealers, that is a fact and has nothing to do with what the practice of the Internal Revenue Bureau is, or what the witness' opinion of the practice of the Internal Revenue Bureau is.

Trial Examiner Ballinger: The examiner is of the opinion that it has some possible connection, and accordingly the objection is overruled.

The Witness: Your Honor, this series of quotations which Judge Hanley has just read is taken out of the context of a discussion of the depreciation for NRA purposes which runs over a total here of some 10 or 11 pages, which does not fully express my views on the subject of depreciation. He has omitted between the sentences which he chose to quote a considerable number of sentences which further clarify what I was talking about at the time, which make it obvious that—without which the quotations which he had read are not completely understandable—

Mr. Hanley: Now, just a moment, Doctor.

I move to strike all of the voluntary statement of the
witness. I asked the question of the witness as to
1198 whether he made certain statements. That is the
only question on the record. If the witness has any
explanation of those statements either the court or his
own counsel can give him an opportunity to make such
explanation, and it is entirely improper for the witness
to inject a voluntary statement on the record having
reference to some treatise that he wrote and without
reference to his present opinion.

Trial Examiner Ballinger: The Trial Examiner does not agree with counsel.

The Trial Examiner is of the opinion that the witness is strictly within his rights. He claims that the question did not fairly portray what he had, or his position.

Mr. Hanley: I am willing to give him that opportunity, Judge, if he will just answer the question now.

Trial Examiner Ballinger: And the Trial Examiner will afford the witness the opportunity to mark the portions in the book that he thinks fairly portray his position and will direct the inclusion of those portions in the record.

Mr. Hanley: Very well.

By Mr. Hanley:

Q. Can you mark them, Doctor?

A. I certainly can.

Q. Will you do so?

A. I think this entire section on depreciation belongs in the record just as much as the portions which you 1199 read. It is necessary as a practical proposition for understanding the expenses.

Q. Well, let me get your—

A. Which you—see what I am talking about.

Q. Let me get your opinion now, Doctor.

Do you think now that the use arbitrarily of a rate of depreciation that is accepted by the Internal Revenue Department is a fair and reasonable cost depreciation figure to use in such a cost analysis as you made in 1938?

A. Entirely fair and reasonable.

Q. Do you think so?

A. Yes, sir.

Q. Notwithstanding what you said?

A. That is correct.

Q. In your book?

A. What I said in my book was that depreciation for income tax purposes might not be satisfactory income basis for cost purposes. In general my opinion is precisely the opposite, namely, that depreciation for tax purposes having been developed over a series of years by the taxpayer, by the Internal Revenue Department, oftentimes in controversy as to precisely what the rate ought to be, is a fair measure of the actual operating costs of a taxpayer and therefore is properly usable for cost accounting purposes, just as much as it is properly usable for income tax purposes.

1200 Q. Now, that necessarily goes back, does it not, Doctor, to the type of property involved, and the amount of valuation placed upon that property?

A. The income tax rules, of course, have only one primary basis for valuation, for depreciation purposes, and that is cost.

Q. I am not referring to income tax now. I am referring to the propriety of the use of an arbitrary base, such as you used in your cost survey.

A. It was not arbitrary.

Q. Didn't you use 5 per cent throughout?

A. That is not the base; that is the rate.

Q. Well, didn't you use that rate throughout?

A. No, sir.

Q. Well, what other rates did you use?

A. I used the figures in general that were supplied by the gasoline station operators.

Q. So you may have depreciated on the basis of 5 per cent or 6 per cent or 7 per cent, or any per cent, whatever was reported, is that true?

A. Well, not any per cent, not whatever was reported.

Q. Well, did you change the rate that was reported in some instances?

A. Only in certain cases where consultation was had with the gasoline station operator, and then only downward.

1201 Trial Examiner Ballinger: Then only what?

The Witness: Only downward. What I was seeking for was a conservative statement of his costs without any overstatement of cost. In cases—

By Mr. Hanley:

Q. But you did change the rate?

A. Where he showed a figure which would be based on substantially what appeared to be a high rate, that was one of the reasons why we carried the return back to him, to make sure that he had actually taken that rate of depreciation for tax purposes, and thought it was correct. In those cases we consulted with him, we thought his tax return in general, or a copy of it, would be retained, of course. In general we found that that higher rate was justifiable because of peculiar circumstances; occasionally it was a matter of the building having been erected on leased land which had to be returned to the owner of the land at the end of a specified period, such as 50 years. In those cases obviously 5 per cent is not enough. You have to use a rate that is just and commensurate with that 50 year lease period, where the return showed a lower rate than 5 per cent it was not questioned, because we felt then that that was a satisfactory figure.

Q. In any event, you changed it where you thought it did not reflect the proper depreciation charge?

1202 A. That is not true.

Q. Isn't it true at least as respects those instances where you consulted with the station operators?

A. There may have been a few instances where we saw a depreciation charge which appeared to be large, and where we consulted the station operator and found that he had either made an error in computation or had failed to understand the instruction with regard to reporting depreciation, and in those cases his depreciation figure would be revised downward in accordance with what we felt was the proper procedure.

Q. Now, you used that 5 per cent on buildings and land, is that right?

A. No, sir.

Q. On what?

A. On buildings.

Q. On buildings. All right. You used 10 per cent on what?

A. On machinery and equipment.

Q. Now, you asked in your questionnaire that the operator tell you the cost of buildings, land and equipment, that is true, isn't it?

A. That is correct.

Q. What costs did you understand you got from the reporting operator?

A. The amount he had actually paid or agreed to pay for the property.

1203 Q. So the figure you got denominated no reference at all to the then value, is that not right?

A. If the then value was different from cost, that certainly is possible, that the value would be different from cost.

Q. Well, in any event, the figure you got or thought you got represented what the operator spent to get the property under consideration?

A. That is true, and that is the commonly accepted method of determining depreciation.

Q. That did not have any reference to when he got it, how long he had it, or what the replacement value was, or what its existing value was?

A. That is true, because the commonly used method of determining depreciation is precisely that, namely, original cost is used regardless of whether the property was bought yesterday or last year, or 10 years ago, and regardless of current value which in a great many cases is wholly unascertainable, and which is not ascertained normally for depreciation purposes.

Q. Now, you charged 5 per cent interest, did you not, on land, buildings, and equipment owned by the operator?

A. That is true.

Q. Why did you do that?

A. Because I felt that that was necessary in 1204 order to place the—well, there are two reasons, one, that I felt that it was necessary to place the operators of owned stations, that is people who had made their own investment on an equal footing as far as possible with those who rent their stations from others; in the second place, interest on owned capital is a well recognized element of cost by a great many accountants, and especially for this purpose where comparisons are to be made of the costs of one operator as against another, or one group of operators as against another group, or for one period as against another period.

Q. All right, Doctor.

Assuming the propriety of an interest charge at all, would it not have been more conservative and more in line with fact if you had calculated interest on the present value of the properties?

A. I do not think so.

Q. Is it not true that under your method of calculation you may have a service station loaded with a cost for interest charge calculated on the basis of an investment which no longer exists?

A. That is the common method of—to calculate interest.

Q. I did not ask you that, Doctor.

Will you please read the question?

Trial Examiner Ballinger: Read the question.

(Question read.)

1205 A. That is possible; it is equally true also that you may in a goodly number of cases have interested computed on the basis of a cost figure which is very much less than the current value of the property as a practical proposition; furthermore, this interest was computed on the actual investment of the station operator in every case in order to put them as far as possible on an equal footing.

By Mr. Hanley:

Q. That is to say, you think it is; you took the figure you got on the questionnaire, didn't you?

A. In those cases where we checked them in the field, we found that—

Q. Didn't you take those figures, Doctor?

A. We took those figures, and where we checked them in the field we found them entirely accurate and satisfactory.

Q. At least they suited you?

A. They certainly did,

Q. And you do not know whether they were high or low on the basis of actual present value in any instance, do you?

A. Presumably in some cases—

Q. I did not ask you presumably; do you know, Doctor? Please try to answer these questions. We are working to a deadline, Doctor.

A. I do not know, but undoubtedly—

Q. That is all right, if you don't know.

1206 A. Undoubtedly, if you do not mind me adding a little further—in some cases the amount that the man had actually paid for it was less than the present value, in fact we talked with some people in whose case that certainly was true, and in other cases probably the amount that they paid for it was more than they would have had to pay at the particular time.

Q. Now, Doctor, on your questionnaire you asked the station operators to list certain taxes, notably the sales tax and the Social Security tax. Did they do so on these reports which you received?

A. In general, yes.

Q. In 1938, in May, how many different taxes were there, and in what amounts, applicable to gasoline?

A. Well, there was a state gasoline tax which at that time was 3 cents.

Q. Now, that is an excise tax as distinguished from a sales tax, isn't it, Doctor?

A. I think that is true.

There was a Federal tax of 1 cent per gallon at that time. The state sales tax—

Q. Now, that 1 cent government tax would also be an excise tax, wouldn't it?

A. I think it was so called, yes.

Q. Well, it is not very important. I just wanted to clearly distinguish it from the sales tax in Michigan.
1207 Doctor. There was a sales tax, wasn't there?

A. Of course, you are getting into territories there where I do not pretend to be an expert as to the precise terminology as to how taxes ought to be described.

Q. I just want to have it clear for our own purposes, Doctor.

A. I know that there was—

Q. There is a sales tax, so called?

A. I know that there was a Federal tax of 1 cent, and also a state tax of 3 cents, whether they be excise taxes or what they be, they exist.

Q. Let us just call them that to distinguish them from the Michigan sales tax; there was a sales tax?

A. There was a Michigan sales tax also applicable.

Q. Of how much?

A. That was 3 cents.

Q. And that 3 cents was based on the volume of sales, dollar volume?

Trial Examiner Ballinger: Was that 3 per cent?

The Witness: 3 per cent, that is 3 per cent on the dollar volume of sales.

By Mr. Hanley:

Q. Now, please explain exactly what your method was of handling those taxes.

The Witness: Could we have a little recess?

1208 Trial Examiner Ballinger: We will take a recess for 5 minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order, gentlemen. Proceed.

Mr. Hanley: Is there a question on the record, please?

(Question read.)

Trial Examiner Ballinger: Do you understand, Doctor?

The Witness: I think I understand enough.

Trial Examiner Ballinger: What taxes you are referring to?

The Witness: The taxes we were talking about.

By Mr. Hanley:

Q. The three, Doctor, to summarize, the 3-cent state tax which we are calling for convenience the excise tax, the 1-cent Federal tax, which we called for convenience an excise tax, and the 3-per cent Michigan tax which I think is denominated as a sales tax. Now, it is the treatment of all those three categories that I want to develop.

A. In the case of the state and Federal taxes on gasoline, which you denominate as excise taxes, those two taxes

were handled precisely alike. That is, they appear as
1209 on the records of the gasoline dealers, as in the first
place, part of his cost of gasoline, and in the second place he collects those taxes along with the rest of the price of the gasoline from the customer; in the case of the state sales tax, the state sales tax of course is not a part of the cost of gasoline, but is essentially, in my estimation, a direct deduction from sales, that is the theory I think under which most businessmen in Michigan operate, although some consider it as an operating expense and would prefer to include it in their income statements as an operating expense. I did not so treat it in this. I considered it as a direct deduction from sales, and therefore the expenses per gallon do not include any allowance for sales tax.

Q. Now, let me see if I understand thoroughly about it, Doctor, as to the 3 per cent Michigan sales tax, you just eliminated that from the calculation; you did not use it as a cost?

A. I did not treat that Michigan sales tax as a cost.

Q. But as to the 3-cent per gallon Michigan excise tax and 1-cent per gallon Federal tax that appeared in the price of the gasoline as sold, you did include as a part of the price of gasoline sold, and it is reflected in the total revenues of each of the service stations which you considered; is that right?

A. Yes, that is true.

1210 Q. Now, Doctor, there of course is no markup at all on the part of the service station operator on these taxes; there is a 4-cent total excise tax which he collects, is it?

A. I do not know about that; the markup is on the gallon of gasoline as such. Whether he considers that is a markup on only a part of his purchase price or on all of his purchase price, I do not know. I suppose some dealers would think of it one way and some another.

Q. In any case it is immaterial, isn't it, merely a matter of trading dollars; isn't it true that the service station operator pays these taxes to the taxing authorities, and then in turn when he sells a gallon of gasoline he collects an equal amount from the purchaser of that gasoline?

A. In general, the ordinary retail dealer pays an amount to his supplier which includes these taxes as well as what you choose to call the price of the gasoline.

Q. Yes.

A. To the retailer it makes no difference whether the money that he pays out for the gasoline ultimately finds its way to the tax collector or whether it is retained by his supplier.

Q. That is right.

A. That is, it is all cost of gasoline to him. Now, whether he considers his markup on gasoline to be a markup on the totality of that amount or whether he considers it to be a markup on only part of that total amount is
1211 also of no significance.

Q. All right. Doctor, now, just taking your statement as it stands, it is of no concern to the retail dealer what becomes of that 4 cents ultimately. He ~~pays~~ it out when he buys a gallon of gasoline, doesn't he?

A. He does.

Q. And subsequently he collects it from the purchaser of that gallon of gasoline?

A. He tries to.

Q. Well, he does normally, doesn't he?

A. Well, that depends. What he tries to collect, what he wants to collect from the purchaser of gasoline is the totality of the selling price.

Q. Well, he always adds his taxes to the selling price, does he not?

A. In self protection a dealer frequently at least has a listing of the prices somewhere about his station which is intended to indicate to the ultimate consumer what the component parts of that price are. The purpose of that very largely in a great many cases, was especially during, shortly after the imposition of these taxes, was to protect the dealer against accusation of raising his price of gasoline unnecessarily. He felt that the purchaser of the gasoline should know why the price of gasoline had gone up 3 cents, for example after the state of Michigan had imposed a tax.

1212 Q. Doctor, without reference to the refinements of handling the thing, it is true, isn't it, that a retailer of gasoline collects the excise taxes from the consumer to whom he sells?

A. He collects the amount which he is charging for gasoline as a dealer.

Q. Which includes the tax, does it not?

A. He hopes that it will include the cost of the gasoline as such, and also the excise taxes, and also the sales tax, and also something to cover his overhead and expenses, and perhaps a little something besides.

Q. It always does include the tax, doesn't it, Doctor? Have you ever seen an instance where gasoline is sold at a price less than the cost of the gasoline plus the so called excise taxes?

A. I should think such instances would be quite rare.

Q. Well, do you know of any?

A. I did not see any in the course of the survey.

Q. All right. Now, Doctor, what excise taxes, if any, apply to services such as are rendered in service stations like lubrication, fixing tires, cleaning spark plugs, that sort of thing; are there not?

A. You are referring solely to the labor element of those services?

Q. Yes.

A. None, unless the Social Security tax is an ex-
1213 cise tax. I do not suppose it is.

Q. Well, of course, you gave Social Security tax consideration in your costs, didn't you?

A. Oh, yes, of course.

Q. I am referring now to a tax which would be comparable to the 1-cent federal and 3-cent state on a gallon of gasoline.

A. As far as I know there were no such.

Q. And there were none in 1938?

A. No, I don't think so.

Q. At least, you gave no consideration to any, did you?

A. Well, no, I certainly was under the impression that there were none.

Q. Now, with respect to other commodities like tires, batteries, lubricating oil, grease, windshield wiper blades, and Coca-Cola, the accessories that are sold at a filling station other than gasoline, what excise taxes are these on those commodities comparable to the 3-cent state and 1-cent federal tax on gasoline?

A. There is an excise tax on lubricating oil. I think it is 1 cent a quart.

Q. All right. On anything else?

A. There have been federal taxes on tires and radios and so on at various times.

Q. Were there in May, 1938?

A. I am not sure whether there were in May, 1938, or not.

1214 Q. If there were, you gave them no consideration?

A. They did not enter into the computations.

Q. Now, in determining your ratio of cost, Doctor, you took first the total dollar revenue of the station, didn't you?

A. That is true.

Q. Then, you took the total dollar revenue from sales of gasoline at that same station, didn't you?

A. Yes.

Q. Then you determined what the percentage of the total dollar sales of gasoline was to the total revenues of the station, is that true?

A. Let's see, the percentage of the total sales of gasoline to the total revenue of the station?

Q. Yes, sir.

A. Yes, sir, that is true.

Q. And you arrived, did you not, so far as the city of Detroit is concerned, at a percentage of 80.75 per cent?

A. That was the average.

Q. That is what I am asking.

Mr. Austin: Judge Hanley, just to keep the record straight, didn't the witness testify that in taking total sales of gasoline for that purpose that he deducted the sales tax?

Mr. Hanley: Well, I will develop it. I thought it was clear.

1215 By Mr. Hanley:

Q. Now, in that total sales of gasoline, Doctor, you did deduct the 3 per cent Michigan sales tax, that is true, isn't it?

A. No, I don't think it is.

Q. Well, did you include that?

A. As all other elements which compose the price.

Q. Well, then, in your total figure of gasoline sold, there was included three tax items, one the 3 per cent Michigan sales tax, 2, the 3-cent per gallon so called Michigan excise tax, and, 3, the 1-cent per gallon so called Federal excise tax, is that right?

A. What was included in sales was simply the amount received by the station operator for the gasoline sold, whether that covered those tax items and whether it covered the cost of his gasoline, whether it covered his overhead and so on, was not taken into consideration.

Q. I will get at it through the back door, Doctor.

In arriving at your total dollar value of gasoline sold you did not eliminate from that value any one of these three tax items, namely, the 3 per cent Michigan tax, the 3-cent per gallon Michigan tax, and the 1 per cent federal tax?

A. That is correct.

Q. Yes, sir.

1216 A. No reason why I should.

Q. Now, the whole heart of your survey, Doctor, centers around that percentage which you arrived at by determining the ratio of gasoline sales to total dollar sales at the station, doesn't it?

A. That is a very important element of the computation.

Q. Isn't that percentage factor that you used to determine out of total costs at the station the amount of costs which you allocate to gasoline and from which calculation you arrive at your figure of 4.8 cents per gallon?

A. Did you complete your question?

Mr. Hanley: Will you read it?

The Witness: I am sorry. I missed the question.

Trial Examiner Ballinger: Read the question.

(Question read.)

A. I did use that ratio for that purpose.

By Mr. Hanley:

Q. Well, that is to say, Doctor, that you found on averaging the 409 stations in the city of Detroit that those stations had a certain total revenue from all thing sold and services rendered, and they had a certain total revenue from the sale of gasoline and the percentage of the total revenues from gasoline of the total overall sales, was 80.75 per cent, that is right, isn't it?

A. That is correct.

1217 Q. Then, you had a calculation of the total cost of doing business at those stations as reflected by the questionnaires which you sent out?

A. That is correct.

Q. And you took 80.75 per cent of that total cost of doing business as the cost allocable to the sale of gasoline, is that right?

A. That is true.

Q. Now, in that 80.75, Doctor, is this figure of 4 cents a gallon taxes plus 3 per cent on the sales price of the gasoline, that is true, isn't it, at least it was not eliminated?

A. It was not eliminated, but it is no more true that that is there than is true that there is also there something for the gasoline and something for the stations' overhead expenses, and possibly in some cases something for the station's operator's profit.

Q. All right. Doctor, there was not any tax load like that on even the lubricating oil that was sold by this station, was there, you say it was 1 cent a quart, that is the only other thing you have indicated as having a tax in 1938?

A. It may not have been the only thing.

Q. Well, it is the only one you gave any thought to at the time, isn't it?

A. Well, I didn't give any thought to that.

Q. I see. There was no tax added to services ren-
1218 dered on the sale of tires, and that sort of thing, was there?

A. Not so far as I know.

Q. So Doctor, isn't it true, that where you took a dollar revenue originating from the sale of gasoline and balanced that dollar revenue from the sale of gasoline against a dollar revenue obtained by the station through the sale of services and other merchandise, that you have that gasoline dollar loaded with taxes that you do not have in the other commodities?

A. I do not think that is necessarily true, or if it is, it is not important.

Trial Examiner Ballinger: Doctor, will you answer the question yes or no?

The Witness: It is not a type of question that can be answered, your Honor.

Trial Examiner Ballinger: You may answer it yes or no, and then offer any explanation that you may have.

The Witness: Would you please repeat the question?

Trial Examiner Ballinger: Read the question.

(Question read.)

A. Well, the answer is yes, but the explanation is simply that the breakdown of the total revenues of the business includes necessarily certain taxes, and it also includes other operating costs of various kinds. It includes the cost of the gasoline and of the oil and of the grease.

1219 Trial Examiner Ballinger: Doctor, he is speaking now of taxes only. The question was directed to taxes only.

The Witness: Well, I think it is true that it is commonly considered the gasoline is weighted with taxes; that is very true, I should agree on that point.

By Mr. Hanley:

Q. It is largely a mathematical matter, Doctor, and perhaps I can speed the thing along by speaking to the arithmetic of it. It happens that there was 4 cents a gallon tax on gasoline plus the 3 per cent Michigan sales tax. You have said you do not regard the addition of that tax in the total revenues from gasoline as important. Now, just suppose instead of that being 4 cents plus, that that tax was 10 cents a gallon, assume that, Doctor, and assuming it, doesn't it necessarily follow that arithmetically you would get a much higher percentage of gasoline revenues to total revenues than 80.75 per cent with a consequent higher unit cost for the sale of gasoline under your method of calculation in this survey? Is that clear, Doctor?

A. That is true, providing the dealer's price is sufficiently raised to pass on this 10 cents tax.

Q. And I think you have said you know of no instance where it was not at least that high?

A. There is also another consideration.

Q. Well, can't you answer that last question, Doctor?

1220 A. Well, I answered it.

Q. You say you do not know of any instance?

A. Pardon?

Q. You say you do not know of any instance?

A. Which question is this?

Q. I asked you if you knew of any instance where the price of gasoline that is sold by the retailer was not sufficiently high to include the cost plus the taxes?

A. No, I saw no instance of that.

Q. Now, Doctor, assume that you had eliminated from gasoline revenues these taxes as they are eliminated from all other services, and revenues which you included with the possible exception of the 1 cent a quart on lubricating oil, then does it not follow arithmetically that the percentage of 80.75 which you reached on page 14 of your Supplemental Report would be materially reduced resulting in a material reduction of the unit price or unit cost of marketing gasoline in Detroit?

A. Arithmetically that is true. However, the substantial increase or the substantial decrease of an excise tax on gasoline unquestionably affects the demand for gasoline and affects the difficulty of selling gasoline and affects the cost of selling gasoline.

Q. Oh, but Doctor, that does not cut any ice about this 4.8 cents, does it?

1221 A. Just in the same way that an increase in the cost of gasoline, in the price charged for gasoline by the refiner also increases the difficulty of selling gasoline because it is necessary for consumers—

Trial Examiner Ballinger: Doctor, that is not involved here, about the sale of gasoline. It is a direct question which you have answered.

A. The point I was trying to bring out, your Honor, is the fact that although arithmetically the answer to the—

Trial Examiner Ballinger: That is all he asked you about, was arithmetically.

Mr. Hanley: That is all, Doctor.

1222 Q. Now, I assume, as you have found in your survey, that these stations were doing on the average approximately 8,000 gallons of gasoline a month at a unit cost of sale, as you find, of 4.8 cents a gallon. If you had either eliminated these taxes from gasoline revenues or, on the other hand, had added a comparable amount of taxes to all other revenues, would you not in either instance have gotten a result for the cost of sale of a unit of gasoline less by a considerable amount than 4.8 cents a gallon?

A. Arithmetically, the result would have been less, but by how much I don't know.

Q. Now, Doctor, will you please explain, if you can, why you used two incomparables such as revenues plus taxes and revenues exclusive of taxes, in undertaking to get a constant or a factor upon which your whole survey is dependent?

A. In answering that question, in the first place, I don't think that the figures that you say are incommensurable are actually incommensurable. It is my studied opinion that the gasoline dealer, like anyone else, should consider the amount which he pays for gasoline or any commodity as its cost. Certainly, the fact that these taxes were a part of the costs of the gasoline to him is no different economically in any way than the fact that the amount he paid to the refinery was of such and such an amount. The

addition of excise taxes, as I was saying here a while
1223 ago—I was really answering this question a moment
ago. The addition of excise taxes to any particular commodity necessarily changes competitive relationships between the commodity and other commodities, other uses to which the consumer might put his money. In precisely a similar way an increase or a decrease in the price of the gasoline as such would have the same effect on the consumer. For that reason the marketing of gasoline costs what it costs partly, at least, because of the existence of these taxes. In other words, if these taxes did not exist it is a fair assumption that more people would be able to take Sunday afternoon rides, that more commercial transportation would be carried on by means of motor trucks as opposed to railroads, for instance, and that the gasoline business would be— would be importantly affected. For those reasons the mere fact that a part of the cost of the gasoline to the gasoline dealer is tax does not justify deducting that tax from the selling price.

Q. All right, Doctor. Accepting arguendo your metaphysical analysis, do you think that the additional cost of selling gasoline because taxes are added to it amounts to as much as approximately 1¼ cents a gallon?

A. It wouldn't be greatly surprising.

Q. Are you willing, Doctor, as a responsible economist, to state that the cost of selling gasoline in Detroit is increased by as much as approximately 1¼ cents a gallon because there is a State tax and a federal tax on gasoline?

1224 A. I should state as my opinion that the cost of
selling gasoline is substantially increased by those taxes. Whether the amount—

Q. Well, is it 1¼ cents? That is what I asked you.

A. Whether the amount is actually 1¼ cents or not I don't know.

Q. Well, how much?

A. I don't know.

Q. Haven't you any idea?

A. There is absolutely no way of finding out.

Q. I didn't think there was, Doctor. As a matter of fact, the 4 cents plus the 3 percent sales tax constitutes about 25 percent of the sale price of a gallon of gasoline; does it not?

A. And for that very reason—

Q. Well, does it or does it not, Doctor?

A. It does, and for that very reason—

Q. All right. Then it costs 4.8 cents per gallon to sell that gallon of gasoline, according to your survey?

A. That is the average, as shown by the survey.

Q. Now, if you eliminate 25 percent of the revenues by which you reach that 4.8 cents figure, you eliminate approximately a cent and a quarter of your costs; do you not?

A. That may be true; I haven't figured it out.

1225 Q. Well, approximately, Doctor. I am not asking you to make the arithmetical calculation in detail. It is approximately true; isn't it?

A. Arithmetically, I think that is true.

Q. Yes.

Now, just one other question on this tax matter: On page 17 of your report, Doctor, you refer to Social Security taxes, old age benefits, and so on. You indicate that there was a considerable lack of uniformity in the returns that you got from the service station operators. Did you consider that class of taxes in some instances and disregard them in other instances?

A. Where they reported no such tax I did not consider them.

Q. And contrariwise, where they did report it, you did consider them?

A. That is right.

Trial Examiner Ballinger: Excuse the Examiner just a moment.

(There was a short pause.)

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Doctor, in your returns you found some stations having an extreme high of 15 plus cents cost per gallon and an extreme low of 2 plus cents cost per gallon; didn't you?

A. That is true. You are referring to the Detroit situation only?

1226 Q. Yes; that report you have in your hand.

A. May I glance at those?

Q. Yes; [illegible]ely.

A. The low was 2.3 cents per gallon, and the high was 15.4 cents per gallon.

Q. Now, refer to that a moment, Doctor: I want to ask you what did you do in reference to the premiums that were given by service stations in Detroit in May of 1938 and free gasoline given away by those stations?

A. In so far as there were any premiums given away by any of the reporting stations, or free gasoline, they were included in advertising costs.

Q. Did you just assume that they were included in that item?

A. I think in the cases where we checked with the station operator for any reason upon advertising expense and his other expenses, we found that to be true.

Q. Did you do that yourself in any instance?

A. I don't think I visited any station myself where premiums were being given away.

Q. So you don't, yourself, know what may have been done in so far as the inclusion of that item is concerned?

A. No; any more than I know what was done with regard to any of the items on any of the questionnaires.

Q. For which in the main you relied entirely on the reporting operator, as I understand it?

1227 A. I relied on the reporting operator in the main because the check that I performed convinced me that the returns had been adequately and honestly prepared.

Q. Out of the ten or twenty stations that you visited?

A. Out of the ten or twenty that I visited and the considerably greater number that my assistant visited.

Q. Now, Doctor, it is true, is it not, that during that period of time, May, 1938, it was a very prevalent practice in Detroit to give away premiums and free gasoline at service stations?

A. Well, I don't know how prevalent. I know it was being done.

Q. You weren't familiar with that in detail?

A. Not in detail.

Q. Compared to now, for instance, what was the fact?

A. I—I haven't been in the City of Detroit to—in—to observe any such thing as that, oh, for a considerable period; so I don't know what is going on in the premium business in Detroit.

Q. At any rate you didn't give it any particular thought at the time; did you? At the time you made the survey?

A. No; no.

Q. I neglected to ask you, Doctor, and I want to, if on this tax matter which we were discussing a moment ago relative to the elimination of the total of the 4 cents excise

taxes and the 3 percent sales tax, if that problem oc-
1228 curred to you at all in May or June, 1938, whenever you made up this survey,—

A. Oh, certainly, it occurred to me.

Q. —did you deliberately take the line of procedure that you have followed in your report?

A. Very deliberately, because I was convinced that that was the only proper method of doing it, after giving it very careful thought and consideration.

Q. So you did consider the problem of excluding these taxes from gasoline returns?

A. I did consider it.

Q. Now, Doctor, assume that one station operator is working alone at a station on an 8-hour shift, and that during that 8-hour shift that operator greases cars and services tires, and so on, for 7 hours, and that for one hour he pumps gasoline. Now, it is true, is it not, that that operator will pump enough gasoline in an hour so that it will result in a far higher dollar return to the station than will the efforts of that operator in connection with his greasing services, and so on, during the other 7 hours? Is that not true?

A. That may be true.

Q. Well, Doctor, I am using an 8-hour shift because it is a convenient length of time. As a matter of fact, the proportion is probably more nearly ten to one, but if you don't know all I am permitted to do is to ask you to assume it.

1229 Now, assuming that in the hour that attendant will pump more dollar value of gasoline than he can earn for the station in the other 7 hours in greasing services, and so on; is it not true that under your system of accounting by which you have arrived at this figure of an average of 4.8 cents per gallon as a marketing cost, that you have taken the revenues from the gasoline that that attendant would pump in one hour and used that total revenue as a percentage against the total revenue that that attendant earned during the entire 8 hours? That is true, isn't it?

A. If I followed you, I think it is true, providing your assumption can be properly—

Q. Well, I am asking you to assume that.

A. —can be properly made.

Q. Then you have in that set-up, Doctor, more of that man's labor allocated to gasoline than you have allocated to other services, notwithstanding that that man labored for 7 hours on things other than gasoline and for only one hour on gasoline; is that not true?

A. I don't think so.

Q. Isn't that mathematically true under your method of figuring?

A. It is not mathematically true because I did not apply the ratio to which you refer to any single expense item. I applied the ratio to the combination of expense
1230 items.

Q. All right.

Doctor, we will take it the way you want to take it. When you got the report from that station you got an item of labor, didn't you?

A. Yes; an item of labor.

Q. And that attendant's 8 hours of labor and the money he was paid for it was in that cost item, wasn't it?

A. It was included in the total.

Q. At least you think it was. Now, when you undertook to allocate costs to gasoline you took that item of labor and you applied against it 80.75 percent, which was the relation of total gasoline sold to the total revenues of the station. You did that, didn't you?

A. No, sir.

Q. Didn't you do that?

A. I did not.

Q. All right. What did you do?

A. I applied the ratio of total gasoline sales to total revenues of the station to the totality of all of the costs.

Q. That is just what I asked you, Doctor.

A. I am sorry; you asked me if I applied it to the labor.

Q. Wasn't the labor included in the items of expense?

A. It was.

Q. So it formed a part of what you termed the totality of expense; didn't it?

1231 A. It did.

Q. So when you apply 80.75 percent against it you got 80.75 percent of the labor that is included in the totality; don't you?

A. No, I am sorry to say that I don't. Now, that answer needs explanation, I understand, for the reason that arithmetically that sounds very plausible. Precisely the same question came up in connection with the Standard Brands case before this Commission, and I had occasion in writing

about the Standard Brands case to comment on that theory—on that very matter in which Counsel for—in which Counsel on one side or the other—I forget which—tried to carry out that same line of reasoning, but, as a matter of fact, it really is a very different thing to apply a ratio of this sort to total expenses than it is to apply a ratio of this sort to any individual expense. Now, it might not be the opinion—it might not be true that such a ratio applies uniformly all the way down the line to every one of those expense items. I doubt very much if it does. However, some of these expense items, as a practical proposition, are more largely allocable to gasoline than they are to the rest of the business per dollar of sales. Some of the items are more largely allocable to the rest of the sales than they are to the gasoline. Now, in order to do a
careful and detailed job on all of the items individ-
1232 ually, it would be necessary to carry out procedures
which, in view of the purpose of the survey, of its effect on the situation, in view of the time and money limitations which were extremely stringent, were utterly

Q. I understand that, Doctor.

A. —were utterly impossible.

Q. What you are saying, Doctor, is that you did the best you could with the tools that you were given to work with. We fully understand why you used the method of the questionnaire and so on.

To summarize this thing, arithmetically, what I stated to you in this hypothesis is true, isn't it?

A. I am sorry to have to disagree with you

Q. Isn't it true—

A. —but to me—

Q. —arithmetically, Doctor?

A. It isn't true arithmetically. To me that just simply is not the case. In other words—

Q. You mean when you take 80.75 percent of a figure that you don't result in 80.75 percent?

A. Mathematically, you—the result here is that the figure which is arrived at as a cost of gasoline sales is 80.75 percent of the total cost of operating the stations.

Q. Exactly, and—

A. It is not necessarily 80.75 percent of any one single cost item.

1233 Q. Doctor, in that total cost of operating the stations is the total paid this attendant for 8 hours' service; isn't it?

A. It is there.

Q. Now, no matter what else is in that total, if you take 80.75 percent of that total don't you just necessarily get 80.75 percent of the amount paid that individual for his labor?

A. Mathematically, that is not correct.

Q. Well, I give up. That isn't—

Trial Examiner Ballinger: Judge, you needn't proceed any further.

Mr. Hanley: Sir?

Trial Examiner Ballinger: You needn't proceed any further with this question.

By Mr. Hanley:

Q. Now, Doctor, what was your treatment of withdrawals of merchandise by owners? What did you do with that?

A. I eliminated it from the computations entirely.

Q. You mean you took it clear out?

1234 A. It wasn't considered.

Q. In every instance?

A. That is correct.

Q. And you used a figure of 2 per cent on bad debts. Do you recall that?

A. In some cases that is true.

Q. Where did you get that figure of 2 per cent?

A. I advised with various members of the Retail Gasoline Station Operators, with various operators, and they told me that in their estimation that was a very low and conservative estimate of bad debts of total credit sales. My own experience over a considerable period of years with a large variety of business concerns would lead me to believe that under the operating conditions existing in the gasoline station industry that undoubtedly is the case.

Q. So it is your best judgment?

A. That is correct.

Q. On your questionnaire, Exhibit 75, Doctor, under E-4, you requested the reporting operators to give certain information and explanations. Will you look at this? (Handing document to the witness.)

A. That is true.

Q. Did you receive certain comments from the operators under that request?

A. Frequently.

1235 Q. Did you give them consideration in making your survey?

A. Wherever pertinent.

Q. Did those comments vary the figures as were disclosed by the balance of the questionnaire in any particulars?

A. They assisted me in a good many cases in determining whether or not to use them. I called your attention to one of those cases a little while ago where, for example, included under "miscellaneous expense" would be something that just did not belong, and the explanation which I asked the operator to give under E-4 would disclose the facts.

Q. Some reporting operators didn't make any comment, I suppose, Doctor?

A. Oh, frequently they didn't use that space.

Q. Now, in making a survey of this kind or solving a problem such as was presented by this survey is it not usually true, and was it not true in this instance, that you got reporting stations which showed very abnormal extremes at both ends? I mean by that abnormally high unit costs per gallon and abnormally low unit costs per gallon?

A. I would agree on the abnormally high in a certain sense, although I think those high costs are probably fairly typical of some marginal or sub-marginal stations as a practical proposition. As far as abnormally low is concerned, yes, I think probably in some cases there were probably abnormally low costs, for the reason that the month of May in those particular cases happened to

1236 be an extremely high month so far as gallonage was concerned.

Q. Doctor, isn't it regarded by economists and accountants as the most reliable and conservative practice in problems of this kind when an average is sought to eliminate as much as 10 per cent on either end of the list in order to eliminate the abnormal extremes?

A. Frequently in the compilation of data for the purpose of obtaining averages, that is done, as a matter of fact. It depends on the circumstances, depends on what use the average is to be put. Personally, I wasn't greatly concerned with the average.

Q. You didn't adopt that practice in your survey; did you?

A. No, I didn't.

Q. Referring to page 6, Doctor, of the Supplemental Report, Table 1, you have set out there the number of stations, by brands, that were reported to you?

A. That is true.

Q. Now, as to Mobil gas your report shows that 17.97 per cent of the stations reporting handled Mobil gas; Standard 14.51 per cent; Sinclair 6.71 per cent; Shell 6.06 per cent; Sunoco 6.28 per cent; Texaco 5.41 per cent; Hi-Speed 6.06 per cent; Gulf and all of the balance of the column 37.01 per cent. I think those are accurate percentages, Doctor. I will just ask you to assume the
1237 correctness of the arithmetic.

A. They sounded fairly reasonable as you went along.

Q. Assuming it to be true that the consumer use of these brands of gasoline in Detroit runs in this percentage: Mobil gas 14.40 per cent; Standard 18.10 per cent; Sinclair 3.70 per cent; Shell 4.50 per cent; Sunoco 16.40 per cent; Texaco 2.80 per cent; Hi Speed 13.20 per cent; and Gulf and the other items in the column 26.90 per cent. Assuming that, Doctor, do you think that your distribution sample, as indicated in your table 1, is an adequate, fair and representative sample?

A. I don't see why not, and furthermore I don't see that it makes any difference.

Q. Very well. Please refer to table 11 in the Supplemental Report on page 29.

A. Page—oh, oh, page 29. Excuse me.

Q. Page 29, Table 11.

A. Yes.

Mr. Hanley: I am hurrying this just as much as I can, Judge, trying to get through promptly.

By Mr. Hanley:

Q. Have you found it, Doctor?

A. Yes.

Q. In that table you have broken down these reporting stations with reference to the amount of gasoline
1238 that they handled in 5 per cent divisions; is that right?

A. That is with reference to the proportion of gasoline sales to total sales.

Q. That is right. Now, you have concluded that the relation of gasoline sales to total sales hasn't any par-

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icular importance so far as your conclusion as to the cos f selling gasoline is concerned; that is true, is it?

A. Not the proportion of gasoline sales to total sales s such. However, it is true that there seems to be a sort f tendency not—certainly not very well discernible, for he stations who have a very high ratio of gasoline sales o total sales to be small stations. It is hardly true, to the ontrary, that those that have a low proportion of gasoline ales to total sales are necessarily large stations, although hey may be; but it is generally true that those who have very high proportion of gasoline sales to total sales unning above 95 per cent, are likely to be rather smal tations, in the sense that their total sales of gasoline are mall.

Q. Well, you reach a general conclusion, do you not, in our report, Doctor, that there isn't any particular trend ne way or the other, so far as cost of selling gasoline is oncerned, which is predicated on the factor of gasoline ales to total sales?

A. That is the conclusion I reached, based on the information available.

239 Q. Now, you have—

Trial Examiner Ballinger: Judge, you are stil eferring to the report in the Detroit area?

Mr. Hanley: Yes, sir. This Supplemental Report, so alled, Judge, is all on Detroit. This is the only one I have never saw—

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

By Mr. Hanley:

Q. I am now referring and have been referring in these uestions as to tables and conclusions to the Supplementa Report identified as Respondent's Exhibit No. 2 for dentification. Now, on page 29, Table 11, of Exhibit 2 Doctor, you have made that demonstration by using 5 per ent groups of your total of 409 stations?

A. Yes; that is true.

Q. Do you find that? Is it not true that some of those per cent groups reflect a number of stations that is holly inadequate as a sample? For instance, one station , 3, 3, and so on.

Mr. Austin: Which table is that, please?

Mr. Hanley: Page 29, table 11.

A. I shouldn't like to take those numbers as an ade uate sample.

By Mr. Hanley:

1240 Q. Now, Doctor, if you, instead of using 5 per cent, use 10 per cent; that is, if you combine each of the pairs as you do down the list—

A. Yes.

Q. —would it not give you a better sample, a better scatter, as you people call it?

A. Well, in the cases that you refer to, of course, you would double an extremely small number, and I question even whether that would be a thoroughly adequate sample.

Q. Well, in the first place, you double 19 and 75 stations; don't you?

A. Yes; that would make 94.

Q. And then you would double 93 and 96 stations, or add them?

A. You would add them; yes.

Q. That would give you a fairly representative sample out of your 409 stations; wouldn't it?

A. Well, no. You see, when you talk about a sample out of the 409 stations you should, strictly speaking, take stations at random, for example, not stations specially chosen for some particular characteristic.

Q. Well, now, these stations 93 and 96 have an average gallonage, if you will note, of from 7,736 to 8,046 gallons per month. You find that?

A. That is true, one group has an average gallon-1241 age of 7,736 and the other has an average gallonage of 8,046.

Q. Now, that checks, doesn't it, approximately, with the average gallonage that you found on the overall test?

A. It was somewhat lower; but that is not far away.

1242 Q. Now, if you use that method of calculating, that is, on the basis of 10 percent samples, is it not true that you would get for the first group a cost of 5.2 cents, for the second, and at least the largest numerical group, 4.6 cents, and for the next group 4.7 cents, and for the next 4.6 cents, and for the next group, which includes only seven stations, 6.4 cents cost?

A. You have made the computation. They sound—they look, from the appearance of these figures, to be approximately correct.

Q. Assuming the correctness, Doctor, and then 4.6 cents is the cost you would arrive at on the basis of those tables calculation; isn't it?

A. I do not follow you at all.

Q. That refers to the second group of 93 plus 96.

A. That is the average cost of those 189 specially picked stations.

Q. That is right.

A. Yes.

Q. The average may be around 8,000 gallons a month, which is the general average of your survey, isn't it?

A. Oh, yes, for those particular stations, yes.

Q. Now, so far as the tables as a whole is concerned, Doctor, it fails to give consideration to all of the other variable factors, doesn't it, which appear in your table
1243 No. 3 and No. 4, being all of the expense items?

A. Fails to give consideration?

Q. Total of those variable items, the only thing you are considering on table 11 is the relation of the gasoline sales to the total sales without reference to any other variable factors?

A. Table 11 is a classification of these gasoline stations on that basis—namely, the ratio of gasoline sales to total sales. I also have other tables where I classified them on the basis of geographical location and on the basis of the size of the station as represented by gallonage, and so on.

Q. Doctor, are you familiar with the organization known as Dan and Bradstreet?

A. I have heard of that.

Q. Do you regard them as a reputable and competent organization for the purpose of making a business analyses and reports?

A. I think they are generally so regarded, and I have no reason to suppose that they are not.

Q. I think you have testified that you did not make any survey of the cost of selling gasoline other than this particular one made for May, 1938, in Detroit; that is true, isn't it?

A. I have never personally made any other survey. I have participated in one survey which was made subsequent to this in the City of Lansing.

1244 Q. Did you examine any surveys, or the results thereof at the time that you made your survey in 1938?

A. I attempted to locate anything that was in readily available published form, which would be in any way comparable, and I found very little.

Q. Are you familiar with the fact that Dun and Bradstreet makes a survey yearly on this subject of the cost of retailing gasoline?

A. No, I am not.

Q. You do not know that?

A. No.

Q. Have you ever examined any of them?

A. No.

Q. Do you know it to be a fact that reports made for 1940, concerning retail operations of filling stations, that the unit cost of selling gasoline figures 3.8 cents a gallon?

A. I am not familiar with that.

Q. Are you familiar with a survey of this character made by the Petroleum Administrative Board?

A. Petroleum Administrative Board?

Q. Yes, sir.

A. Who are they?

Q. I don't know. Don't you?

A. Could it have been in connection with the N. R. A. Code Authority?

1245 Q. I would not be a bit surprised, but I do not know.

A. I know that they did make a survey of the sort, or attempt one.

Q. Are you familiar with it?

A. Not in detail.

Q. Do you know whether it is not a fact that that Board reported on August 22, 1936, that the actual cost of selling a gallon of gasoline through the average service station is 3.6 cents?

Trial Examiner Ballinger: Did you know that?

The Witness: Not in detail, no. I knew that they had made a survey. I was not familiar with the details of it, however.

By Mr. Hanley:

Q. Now, are you familiar with hearings that were held in the United States Congress relative to this question of cost of retailing gasoline at which time a Mr. Richard F. Cleveland testified concerning a survey which had been made of trackside stations made September 21, 1934; do you know anything about that?

A. No.

Q. Have you ever seen anything to the effect that that survey disclosed that the average cost of selling gasoline is from 2.78 cents to 3.16 cents covering every cost?

A. No, I am not familiar with that.

1246 Q. You are familiar, are you not, Doctor, with the fact that there was a cost survey made, or an attempt to make one in Detroit also prior to the one you made?

A. That is correct.

Q. You are familiar with that one, aren't you?

A. Yes.

Q. Is it not true that that survey indicated a cost of about one-half cent per gallon less than you show in this present survey?

A. I think that is true. However, I am so familiar with that survey that I should certainly place no reliance on it.

Q. Well, surveys are sometimes like that, aren't they?

A. Oh, surveys are sometimes like that, of course.

Q. But so far as your own survey is concerned, you show a difference of two-tenths of a cent a gallon as between the City of Detroit and the balance of the County of Wayne; do you not?

A. Yes, I think that is true.

Q. Now, Doctor, are you familiar with the reports of the Dun and Bradstreet organization in connection with various types of business organizations which reports disclose the number of such businesses that are operated on a profitable basis?

A. Why, I have heard of such reports. I am not familiar with Dun and Bradstreet's. I have seen reports gotten out by other agencies.

1247 Q. Well, I will ask you this, Doctor: If the reports which I shall now read and which are prepared and published by Dun and Bradstreet accord with your own knowledge and views as an accountant and economist, such reports relating to the year 1940, as to retail filling stations the proportion of profitable concerns reporting are 71 percent; as to the automotive, accessory and parts concerns, the proportion of profitable concerns reporting, 75 percent; as to—

Mr. Austin: Is this a hypothetical question, Judge?

Mr. Hanley: No; I am asking for his judgment. I am going to predicate another question on it.

Mr. Austin: I mean, you are reading those things into the record. Is he supposed to assume that they are correct?

Mr. Hanley: Now, let me repeat—

Will you read the question?

(Question read.)

Mr. Hanley: I am asking his—

Mr. Austin: You say if they accord with his views, and then you are reading them. I do not know whether it is supposed to be conceded that those are correct figures. I just want it to appear.

Trial Examiner Ballinger: They have not been proven.

Mr. Austin: No.

Trial Examiner Ballinger: And they are not being
1248 accepted as correct until they are proven.

Mr. Hanley: Will you read my question again as far as I got.

(Question read.)

By Mr. Hanley:

Q. —as to hardware and farm implement concerns, 54 percent; farmers supply stores, 73 percent; farm implement dealers, 52 percent; country general stores, 66 percent; motor vehicle dealers, 65 percent; garages, 63 percent.

A. Now, what am I supposed to do, please?

Q. Does that accord—do those figures accord with your knowledge and views as an economist?

A. It is certainly an extremely vague question.

Trial Examiner Ballinger: Well, if you cannot answer—

Mr. Hanley: If you cannot answer it, that is all you need to say, Doctor. I do not care whether you know or not, if you will just tell me which it is.

A. Well, if I could express it this way, I should not be inclined to doubt that the results actually obtained by Dun and Bradstreet in whatever mode of inquiry they followed, have been correctly reported. I am not greatly surprised, as a matter of fact, at any of the figures; I would not be surprised, either, at quite different figures, as a matter of fact—

1249 Mr. Austin: I suggest the witness state whether he knows.

Trial Examiner Ballinger: I have asked him; if he does not know he has no business guessing.

The Witness: I certainly do not know whether those figures are representative.

By Mr. Hanley:

Q. Now, then, Doctor, assuming that they are right, it does appear to you, does it not, that the filling station businesses are relatively profitable concerns?

Mr. Austin: I object to that question.

Mr. Hanley: All right. Perhaps it is objectionable.

Trial Examiner Ballinger: The question is withdrawn.

Mr. Hanley: In view of the witness' testimony.

By Mr. Hanley:

Q. I will ask you this question, Doctor: What was the average gross margin of the stations reporting on your questionnaire? I mean by gross margin the difference between the cost of gasoline and the sale price of gasoline?

A. I can't answer that for the Detroit survey. That figure may have been computed but it was not included in this particular report. On the other hand, for the Wayne County survey, I can give you an answer.

1250 Q. What was it for the Wayne County, if you have that?

A. I mean for the county as a totality, not for the balance outside of Detroit.

Trial Examiner Ballinger: We will take a short recess.

(There was a short recess taken.)

Trial Examiner Ballinger: Gentlemen, please come to order.

Proceed.

By Mr. Hanley:

Q. Doctor, you were about to give us the gross margin as figured by you in the Wayne County survey.

A. Yes, as I figure it, it is 3.63 cents.

Q. But you did not figure it for Detroit alone?

A. Well, I might have figured it, but it is not included in this report, and I have forgotten.

Q. Well, in your judgment would it be somewhere in the neighborhood of 3.63?

A. Oh, I should think so. I have no reason to suppose it would be.

Q. In any event, it would be substantially less than 4.8 cents, wouldn't it?

A. Oh, yes, I am sure of that.

Q. Now, that being the case as reflected by your study of this matter, Doctor, as an economist, how do you

1251 think it possible that these service station dealers have been able to remain in business in Detroit?

A. Two reasons for that: One is, of course, that in the first place a very considerable number of them haven't been able to remain in business. Mortality among gasoline stations is notoriously high as it is among a great many types of retailing businesses; and, in the second place—

Q. Just a moment there, Doctor, permit me to interrupt you, please.

If you assume the correctness of these Dun and Bradstreet reports that I read to you, doesn't the filling station business enjoy a particularly high place in the field of profitable businesses?

Mr. Austin: I object to that, Your Honor. I objected to the same question a while ago and it was withdrawn.

Trial Examiner Ballinger: Well—

Mr. Hanley: Well, the witness has now characterized this business as having a high mortality.

Mr. Austin: That is asking for an assumption of correctness of figures which have not been proved, and as to which the witness states he has no knowledge, so I do not think the witness—

Trial Examiner Ballinger: The objection is sustained.

By Mr. Hanley:

1252 Q. All right, proceed with your answer.

A. In the second place, it is important to recognize that no small part of the gasoline station operators' expenses are non-cash costs; that is, they do not involve paying out of money. Ordinarily speaking, those costs are, as a matter of fact, rather important; that is true with depreciation. For instance, he does not have to pay out money except when he purchases property. It is true of interest on investment except to the extent where he has actually borrowed money and has to pay out interest there, and, after all, the interest that he actually has to pay out must be taken into account as an offset to the non-cash character of the interest on investment. In the third place, his own wages which were necessarily included in the cost computations are a pretty flexible item; that is, in other words, he would like to make as high a wage as possible for his services. He is entitled to a wage, in a social sense, of an amount equal to whatever value his services may have to society. He can probably get along in a good many cases on the 40-cents-an-hour wage which was used

in these computations; he can probably get along, as a matter of fact, in a great many cases, especially where his family is small, and his wants are small, on even a smaller amount than 40 cents an hour. For those reasons, the fact that some of these marginal people who stick in business
claim to whatever hold they have on the gasoline
1253 business is not at all remarkable. They can, so long
as the direct cash outlay does not exceed the intake
over a considerable period, a good many of them, of course, also keep in business because of the fact either that they had a considerable capital to start with and were able to live on their fat, as the saying goes, or that in some cases they have other sources of livelihood, such as the ownership of rental property, for instance, or perhaps their relatives are able to support them in some cases, and so on; all of those factors have an important bearing on the apparently rather surprising thing that this margin is substantially lower than the average cost.

Q. But it is a losing game in the long range, isn't it?

A. Well, that depends on your definition of losing.

Q. Well, my definition of losing is 4.8 cents minus 3.63.

A. Well, someone else's definition might be different.

Q. Well, that is what I am asking you; those are your figures.

Now, can a business indefinitely continue under that disability, assuming that the business is not provided for by some angel with more money than brains?

A. No, presumably an individual business under those circumstances could not continue indefinitely; it could continue for a very long period of time, surprisingly long.

Q. And in point of fact these businesses have continued
and are continuing in Detroit, the same operators,
1254 over many, many years; isn't that true, within your
knowledge?

A. I presume that is true. I talked with some who have been in the gasoline station business for 10 years, or 15 or 20 years, some of them quite old hands. Of course, the gasoline station, as you know very well, is not a very old business as businesses go.

Q. Isn't it true that these operators, on the average, make more money for themselves now than service station managers made when the service stations were operated by the supplying companies?

A. Well, you are asking me there for something that is entirely outside of the scope of the survey and also outside of my knowledge.

Q. If you don't know, that is all right, Doctor. But you do know, I take it, that these businesses, many of them, have continued for a substantial number of years notwithstanding the disability that you have arrived at in your survey?

1255 A. A substantial—

Trial Examiner Ballinger: Judge, the witness has answered that question once or twice.

Mr. Hanley: If he has that is sufficient.

By Mr. Hanley:

Q. I think I did ask you, Doctor, if an average such as you have arrived at in your survey necessarily is not coincidental with the actual cost of any service station operator?

A. Not necessarily coincidental, no, that is true.

Q. It just might be in some few instances?

A. Oh, yes, undoubtedly so.

Q. But doesn't the term "average", and the very method of finding the average, tend to reach a middle ground which does not reflect the actual cost of any service station?

A. Well, it reaches a middle ground, it may actually reflect, of course.

Q. In some instances?

A. Oh, yes.

Q. That happens—

Trial Examiner Ballinger: Judge, you went into that very thoroughly.

Mr. Hanley: I was not sure I did.

Mr. Hanley:

Q. I want to ask you specifically this: Do you know anything about the costs of the Standard Oil Com-
1256 pany, the respondent in this action?

A. Nothing at all.

Q. Relative to its marketing of gasoline in Detroit?

A. Nothing at all.

Q. Do you know anything about the marketing costs of any one of the following organizations, Ned's Auto Supply Company, Wayne Oil Company, Stiteman Oil Company, or Citrin-Kolb Oil Company?

A. I know nothing about the marketing—

Mr. Austin: Do you mean the retail marketing costs?

Mr. Hanley: Any costs.

Mr. Austin: All right.

A. I know nothing about the marketing costs of any of them unless they were included in the survey except as I have some knowledge of marketing costs of retailing gasoline generally.

Q. Which information you have from the survey, is that right?

A. Well, that, plus the survey that was made in Lansing subsequently.

Q. All right. Now, Doctor, does this 4.8 per cent figure purport at all to reflect the cost of respondent, Standard Oil Company, or any of those other four named organizations?

A. No.

1257 Mr. Hanley: I think I am through, if you want to go ahead you take the witness, Mr. Austin, and if I do have another question—

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

Redirect Examination by Mr. Austin.

Q. Dr. Taggart, you were just discussing the question of the ability of a gasoline station to continue in business at a unit cost of marketing the gasoline of, say, averaging around 4.8 cents per gallon running down perhaps as low as, I believe your survey shows, as low as 3 cents a gallon on more efficiently operated stations, but assuming that the cost of many stations is 4½ cents a gallon or more, I believe also you referred to some figure of 3.63, of Judge Hanley, or as to the margin between what the gasoline pays and what it sells, and is that a figure which came from your report somewhere, or where did that 3.63 come from?

A. That figure came from my Wayne County report, that is the report on the totality of Wayne County.

Q. Now, it however has been proved in this record that current margin between cost and selling price during 1940

and 1941 to date in Detroit has been 3.1, that is on
1258 major brands of gasoline, and on prevailing retail
prices, was that 3.63 somewhat that you ascertained to be the fact in 1938?

A. That was the way it actually averaged out at that time, on the basis of the 489 stations that reported.

Q. Do you know whether the average margin of profit of the station in Detroit previous to that time was larger, or lower?

A. I was told that margins had been higher prior to that time. I had no personal knowledge of it, however.

Q. In explaining why a service station, gasoline station might continue in business, even though its margin of profit was less than its average cost per gallon of selling gasoline, you said nothing, I believe, about the possibility that the gasoline station might be engaged in selling other things besides gasoline. Is it true that the majority of gasoline stations, in fact nearly all of those covered by your survey sell other things than gasoline?

A. That is literally true. I thought of that particular point which, in some cases certainly is a very important one, after I finished answering Judge Hanley's question.

Q. Well, might it not be that the gasoline station operator may show a profit on his entire business even though he sells gasoline at a loss?

A. Oh, entirely possible, entirely.

1259 Q. Do you know whether that is true in many instances, or did you make any study of that?

A. I should not like to say that that was true in many instances.

Trial Examiner Ballinger: Is it true in any instance that came to your notice?

The Witness: Yes, it was, because we did in some cases see the books sufficiently so that we saw the entire sweep of their operations, the revenues and the expenses over a sufficiently long period and the net profit.

By Mr. Austin:

Q. Is it or is it not true to your knowledge as to your experience that many people who come into a gasoline station buy gasoline and also buy accessories and other things, whereas if they could not get gasoline there they would not stop for the accessories?

A. Why, I should think that is probably true. That certainly is the theory on which many gasoline stations operate, that the gasoline and the accessories and the other things go together, that is, one works as against and for the other, that is the theory, I think, on which the so called super-service station is based.

Q. Now, a question on taxes. You stated that in taking the figure for total sales of gasoline, and the figure for
total sales of other merchandise and accessories for
1260 the purpose of making an allocation of the sales of
gasoline as to the total expense, rather an allocation
of overhead costs as between gasoline and the total expense, that you did not deduct the Michigan sales tax.

A. That is true.

Q. On the total for gasoline?

A. That is true.

Q. Is there a Michigan sales tax on accessories and other articles sold?

A. Oh, yes.

Q. In gasoline stations?

A. Oh, yes, it applies to all merchandise of all sorts and kinds.

Q. And did you deduct the sales tax from the total for sales of other things besides gasoline?

A. Of course not.

Q. Who pays the federal and state gasoline taxes, what has been referred to here as excise taxes?

A. Do you mean who actually writes out the check payable to the government?

Q. Yes, who pays the tax?

A. Well, it is not the retail dealer, it is—

Q. Well, who pays, is it some—

A. I think it is the refiner or—the refiner who pays the tax.

1261 Q. Well, that is a sufficient answer for what I
am leading up to. Therefore, when a retailer gasoline dealer buys a truckload of gasoline and pays for it, does he pay taxes, or does he pay a price of so many cents?

A. I think the proper way to look at it is that he pays a price of so many cents a gallon.

Q. Is he responsible in any way for what is done with the money which he pays for that gasoline?

A. Not in any way.

Q. And when he sells that gasoline to the automobile owner, does he collect a price, or does he collect a tax?

A. He collects a price in my estimation. That too is what the consumer thinks he is paying, is a price, at least that is the way I feel about it.

Q. If I understand you correctly, in using the total selling price of gasoline in your figures, you treat that as simply an article of merchandise for which the dealer has paid a price and which he sells for a price, and no part of which includes tax, as the sales tax?

A. I think that is a fundamentally sound way of looking at it; as a matter of fact, I think you can look at the sales tax situation in exactly the same way.

Q. Well, however, the dealer does pay the sales tax out of—

A. Oh, yes, in that respect, the sales tax is dif-
1262 ferent, the dealer does turn a certain amount of
money over to the state government, which may or
may not be the amount which he collects from customers.

Q. Aside from the sales tax, does he pay any taxes with the rest of that money he gets for the gasoline, I mean any gasoline tax?

A. No, oh, no!

Q. Now, let us assume that the retail gasoline dealer is currently at a particular time selling gasoline for 2 cents a gallon more than he pays for it?

A. Yes.

Q. Including sales tax, if you wish. Would it not be just as correct to say that that total price which he receives for gasoline, and assuming that his cost of selling is, we will say, 4.8 per gallon, would it not be just as correct to say that that price, that number of cents per gallon that he receives covers his overhead costs of operation including the amount he originally pays for the gasoline, the depreciation, interest on investment and other items which you have included in cost, but does not cover the amount of the 4 cents state and federal tax, would that be as correct as to state that it included 4 cents federal tax but did not include all these other things?

A. I think so.

Q. Is that what you had in mind when you stated
1263 that it did not necessarily follow from the price re-
ceived by the station that he always collected the
federal and state tax in the price he sells for?

A. That is exactly what I mean. I felt that a breakdown of that price in terms of receiving some items of his cost and not receiving other items of his cost is highly artificial. It is done very frequently, as a matter of fact, in business analyses, and sometimes it is done one way and sometimes another, depending entirely on what the person that is making the analysis is trying to bring out.

Q. Now, if you will turn to page 20 of your Wayne County report, which was marked for identification as Commission's Exhibit 76, I believe that you stated that there were, that special attention was directed to stations which exhibited especially low costs. How many service stations were there whose average cost for the period of the survey, average unit cost of selling gasoline was less than 3½ cents a gallon?

A. 30.

Q. And what was the average cost, unit cost of selling gasoline for those 30 stations during the month of May, 1938?

A. 3.1 cents.

Q. How many individual stations were there who showed a cost of less than 3 cents a gallon?

1264 A. 7.

Q. I believe you said yesterday that a field check was made by you or your assistant of all of those 7 stations?

A. Yes.

Q. Do you know whether those 7 stations turned out to be any particular kind of a station, having any special economic characteristics as it was referred to by Judge Hanley, were they curb stations, or were they automobile garages, or what were they?

A. Now, are you referring to these 7 stations only?

Q. Referring to the 7 stations only.

A. Well, I do not recall that they were any particular variety of station, so far as curb station or drive-in, or what not.

1265 Q. How about the 30 stations that had the lowest unit cost, was there any indication that they were stations of a particular kind?

A. I would be quite sure that they would not be.

Q. So that regardless of the various types of stations, or the various characteristics of the stations included in this report, doesn't the survey show that the lowest unit cost shown for any group of stations in the survey was above 3 cents a gallon other than these seven **stations?**

A. For any grouping that was actually made for any purpose, that is true. Well, yes, except for those seven, any grouping above that point of course would show an average; that is, leaving out those seven.

Q. Well, the point I want to make is that this survey covered the stations who received questionnaires and who sent them in, as I understand it, regardless of their so-called economic characteristics of type of station?

A. Yes, that is true.

Q. And so is it not true that the minimum shown in your survey for any station or group of stations covers stations of all types? Now, that is not very well stated, but regardless of the type of station, would you include in here, and if there were any stations of a particular type with a low average cost, they are included within the analysis made?

A. That is true; we actually had at least one
1266 trackside station which I personally visited, included
in the survey. You mentioned those a moment ago.

Q. And I believe you stated yesterday on the record that you found special reasons for all of these seven stations, as to why they happened to run below 3 percent during May, and I think you found, was it in all cases or all cases but one, that their average for the first five months of 1938 was above 3 cents? I am not trying to testify, but I think that was the answer yesterday.

A. The figure computed the way it is stated in this report, yes.

Mr. Austin: The point I am trying to make, Your Honor, is that there is a minimum here which applies over all stations, so that regardless of what argument may be made about classification as to the different kinds of stations, where they may come, whether they are up in the 5-cent range or down in the 3-cent range, they are all of them above 3 cents, and, to my opinion, the minimum cost is perhaps more important than the average cost.

Trial Examiner Ballinger: I think the record fairly portrays the situation.

By Mr. Austin:

Q. Will you turn to page 15 of your Wayne County report, Dr. Taggart, table 6.

A. Yes.

1267 Q. Will you describe what that table is?

A. That table is a compilation which classifies gasoline stations included in the survey in accordance with their gallonage, beginning with stations which sold from zero to 2,000 gallons, and proceeding from that point up by 2,000-gallon intervals to the largest station included in the survey.

Q. What trend does that table show?

A. It shows a fairly clear though not entirely uniform trend in the direction of lower costs as the gallonage increases.

Q. Does the trend toward lower costs slow down, if I may put it that way, as the gallonage increases above a certain point?

A. Yes, it does.

Trial Examiner Ballinger: Has the document to which you are now referring been admitted in evidence?

Mr. Austin: No, Your Honor; it has been identified.

Trial Examiner Ballinger: Then, please—have you referred to it?

Mr. Austin: Yes, I referred to it as Commission's Exhibit 76, for identification.

Trial Examiner Ballinger: Unless it is included in the record these questions will be meaningless.

Mr. Austin: Well, I am going to offer it, but I
1268 thought perhaps, for Your Honor's benefit, I would go through the questions first.

By Mr. Austin:

Q. Have you an opinion, Dr. Taggart, as to whether there is any minimum cost below which a gasoline station would not go even though gallonage was increased indefinitely, or would it simply be a gradual reduction of unit cost of selling gradually tapering off more slowly as gallonage increased more rapidly?

Trial Examiner Ballinger: Would you say a point below which it could not go? Do you mean below which it could not go without losing money?

Mr. Austin: No. I mean as to whether or not, would it be true that indefinitely, considering a station's gallonage, get greater and greater, would the costs of sales per gallon always get less and less.

A. My opinion is that that is not the case, that there is a more or less indefinite lower limit to which cost must necessarily arrive and there stop. As a matter of fact, it might very well be that beyond the lower limit the unit cost might actually rise, because of the very large size of the organization which frequently is not as efficient as medium-sized establishments.

Q. Is it true that it would be impossible for any survey to actually, no matter how classified, or how large a
1269 survey, to conclusively fix such bottom price due to the fact that as to two stations selling gallonage at the same time one is always going to be more efficient than the other?

A. I don't know that I got the first part of that question.

Q. In other words, is it possible to fix minimum—possible to fix the minimum cost of selling gasoline based on gallonage alone?

A. Oh, no, because other factors enter into it.

Q. And one of those factors is the efficiency of the station, is it not?

A. A very important factor.

Q. You were questioned regarding certain questionnaires which were returned to you and which were found to be defective, and were not remedied, or could not be remedied, and those returns were discarded in making your final computation; is that right?

A. That is correct.

Q. Did you, for test purposes, make a computation, so far as possible, just using those discarded returns?

A. For what it was worth I did make such a computation.

Q. And what result did that show?

A. Well, the result it showed, that the figures as given, with the figures as given, was an average cost for those discarded returns of 5.3 cents.

Q. That is higher than your average for the other
1270 stations, is it not?

A. Yes, it is a half cent higher than the general average.

Q. I don't believe I asked you yesterday regarding your assistant except as to his name, and I think you said he was a graduate of the University of Michigan.

A. That is true.

Q. He was a student in your classes?

A. Yes, sir.

Q. What degree did he receive?

A. He received a Master of Business Administration degree at the University of Michigan in June, 1938, prior to my employing him on this survey.

Q. Had he been in any of your classes before that?

A. He had been in my classes during the preceding two years. I had ample opportunity to observe him. He made a very good record with me, and in the school generally, and he had specialized in accounting, taken very extensive courses in accounting, including courses in auditing and public accounting procedure.

Q. Where is he now?

A. He is located in Detroit.

Q. Do you know with whom?

A. He is with a—he is, or was at least, the last contact I had with him, which was some months back, the principal accountant for a publishing house there in Detroit.

1271 Q. When these field checks were made on the some 108-odd returns, or, I think you said it was about a third of the total, you stated that you went out to somewhere from ten to twenty stations with your assistant; is that right?

A. That is correct.

Q. And did you give him instructions as to checking, that he was to do, and how he was to do it at stations that he went without you?

A. Yes, we talked that matter over carefully, and I pointed out the figures which would require special attention, of course; indeed, all of the figures required attention, and told him in general what the type of questions to ask the station operator, and on what information he should base his conclusions.

Q. Now, going back to some of those returns which did not appear to be entirely correct, or where there were revisions made after you got them. Did you supply any figures in any of the returns used in the computation where there was no figure on the return when you received it without—that is, without a field check on consultation with the service station operator?

A. Yes, I did.

Q. And what type of figures were those?

A. The figures on depreciation, primarily. Of course, also the figure of interest on investment, and what wages were computed, figures based on—figures supplied to 1272 me by the station operators.

Q. Now, will you explain what you mean by supplying the figure on depreciation?

A. Where the station operator did not show—well, first, where he showed that he did own buildings and equipment, which are depreciable assets, and gave the cost, and still down below in the questionnaire did not show any depreciation charge whatever, then and only then I supplied a depreciation figure based on the 5 percent on the cost of buildings, and 10 percent on the cost of equipment.

Q. Those are the figures that you previously testified to, are they not?

A. That is correct.

Q. And if I understand that on wages, and interest, they were simply figured upon the number of hours worked by the operator,—I do not mean wages generally,—I mean operators' compensation.

A. Yes, that is true.

Q. That was figured on total hours shown to have been worked by the operator?

A. That is right.

Q. And in that case was the figure submitted by the service station always used?

A. Oh, yes, if the service station did not supply that figure of course that was the occasion for going back
1273 and checking on the return.

Q. Do you mean to find out whether or not the operator did put in any time himself?

A. Yes. We always inquired into that particular matter.

Q. Well, did you ever supply any time for an operator unless that was reported by the service station?

A. Oh, no, of course not.

Q. Now, I asked you about supplying figures. Let me now ask whether any figures of cost, expenses, were ever eliminated by you from these returns because they were, in your opinion, too low to be correct?

A. No.

Q. I think you stated that where you did have some too high to be correct, that you then eliminated or reduced after checking?

A. Where figures appeared to me to be too high we ordinarily checked and the result was either elimination of the figure or modification of the figure.

Q. But did you ever eliminate a figure because it appeared to you to be too low?

A. No, not at all.

Q. Were there some figures which did appear to you, such as depreciation, perhaps, or other things, which appeared to you to be too low?

A. There were figures which were ridiculously low.
1274 As a matter of fact a depreciation is perhaps a good
example where the station operator would show, oh, perhaps one percent depreciation. In those cases, unless we had other reason to question the return, we simply accepted the figure as his without any further checking.

Q. And if you had other reason to question the return, do you mean by that that you gave it a field check?

A. Yes, oh, yes.

Q. Were any figures which were given in the return ever revised upward as contrasted with—eliminated—were any of them ever revised upward without checking with the service station?

A. No.

Q. Were any returns used in your final computation returns which were in any respect inaccurate or incomplete, in your opinion, except in such cases as you have just mentioned, where an expense figure was probably too low?

A. No.

Q. I would just like to ask you one question about the questionnaires as reporting gallonage. Well, the questionnaire is in evidence, Commission's Exhibit 75-A, B, and C. I believe it shows that the service station operators were requested to report the number of gallons of gasoline sold for each month during 1937 and for the first 5 months of 1938, and did you make a computation to compare the
month of May, 1938, with the average 5 months, and
1275 the Month of May, 1937, with the average for the 12
months?

A. I did.

Q. Do you have the percentages which resulted from that comparison?

A. Which report would you like percentages from?

Q. Wayne County.

A. Wayne County. The May gallonage in 1938 based on the reports received was 5 percent higher than the average monthly gallonage for the first 5 months of that year, including May. The May gallonage for 1937 was 9.22

percent higher than the average monthly gallonage for the entire year 1937, for those stations reporting gallonage for the entire period.

Q. Then, does that give your results of your survey a margin of accuracy, or, rather, a lowness of result below the average for the months reported which might offset certain other factors which might, if taken into consideration, have resulted in a lower cost?

A. The fact is the final result has what is known among statisticians and economists as a bias downward, which would not have existed if a less prosperous month in the gasoline business had been chosen, and that bias created by that fact would definitely offset any opposite bias to a large extent which might be created by some other factors which for one reason or another affect May, as compared with other months.

1276 Q. Will you turn to page 21 of your Wayne County report? That table marked Table 10, is that the table corresponding to table 11 in the Detroit report which you were referring to a while ago?

A. Yes, it is.

Q. Will you describe ~~the~~ contents and purpose of that table?

A. This table contains a tabulation of all of the 489 stations which were included in the computations for Wayne County classified for purposes of this table according to the percentage of gasoline sales to total sales.

Q. Total sales of what?

A. Of all commodities and services by the station, the intervals chosen more or less arbitrarily were 5 per cent ~~intervals beginning with those stations whose bias was~~ 95.01 per cent, gasoline and higher, and proceeding with groups of stations at 5 per cent intervals down from that figure.

Q. How many stations were there that reported that their business was less than 50 per cent gasoline?

A. Just one in this tabulation.

Q. And is it not so that the table indicates that the majority of the stations reporting it, that is, that their gasoline business was from 65 per cent to 95 per cent of their total business?

A. By far the majority, yes.

1277 Q. And over half of them ran from 86 per cent to 90 per cent, is that right? I guess it is not over half, but it is a little less than half.

A. Yes, it is somewhat less than half.

Q. Did you conclude as a result of this tabulation or otherwise, that there would be, that the percentage of gasoline sales to total sales had any constant effect upon the unit cost of selling gasoline?

A. There is no discernible effect at all. I should like to call attention not only to the last column in the tabulation which certainly does not appear to have any definite trend, but also to the third from the last column which is entitled "range of unit costs," and in that you will find low cost stations as well as high cost stations in every category excepting only the last two, where the numbers are so small that the range is not of any consequence.

That particular column, a column similar to that, does not appear in Table 11 of the Detroit report.

Q. Now, Dr. Taggart, you were questioned to some extent regarding the propriety of including in total dollar sales of gasoline the 4 cents federal and state taxes when making an allocation of overhead costs on the dollar value basis as between gasoline and other sales, and I believe Judge Hanley pointed out that the taxes were some 25 per cent of the total sales price of gasoline.

1278 Now, I assume that we can eliminate sales tax because that was on everything, whether it was gasoline or something else, so that the 4 cents would be perhaps a little under 25 per cent of the total received for gasoline by the retail service station operator. However that may be, let us take 25 per cent as a round figure for the proportion of the tax, even though they are not paid by the retail operator, the proportion of the taxes to the total price, and let us assume that on $100 worth of business, that $80 of that business is gasoline, including gasoline taxes, and $20 other things, so you would have a figure of 80 per cent. On that basis you would allocate 80 per cent of total overhead expense to total sales of gasoline, is that right?

A. That would be the procedure that I followed.

Q. Now, let us assume we take out that 25 per cent, so we will say that you have $60 for gasoline, and we will leave the entire 20 in for the rest, even though there may be some taxes there, so now by leaving out 4 cents from your computation, you get a figure of 60 and 20, or 75 per cent for your proportion of gasoline sales, that is correct, isn't it—it is 60 and 20?

A. Yes.

Q. Now, do you follow me that far, Doctor, that on the
figures I have given based on $100 if the 25 per cent for
tax was eliminated from gasoline sales, we would
1279 now have, after eliminating the sum of $20, we would
now have a total of $80 out of which this $60 is gasoline and $20 is sales of other articles?

A. That is correct.

Q. So that on that basis the proportion of the cost to be allocated to gasoline would be 75 per cent instead of 80 per cent, is that correct?

A. That is correct.

Q. Now, going on with your computation, you then apply 75 per cent instead of 80 per cent to the expenses of overhead costs which you are attempting to allocate?

A. Yes, that would be the procedure.

Q. And having obtained a result there you would then divide that into the total number of gallons of gasoline, is that correct?

A. That is correct.

Q. Now, let me ask you at that point, is there anything else which is divided into the total gallons of gasoline which is not subject to this allocation based upon dollar sales? I do not know. I just want to find out whether all the costs which go into your total for the station have been put through this percentage allocation or whether there is something else.

A. All the costs have been put through that computation.

Q. Therefore, after having a percentage of 75
1280 per cent instead of 80 per cent computed against your
total costs, you now divide your resulting figure into
your total gasoline. Is that correct?

A. That is correct.

Q. Now, I understood you to say a while ago, that the result of deducting the amount of those taxes, in other words 25 per cent of the gasoline price, which only results in a 5 per cent difference on your allocation, would result in reducing your net unit cost by the sum of 25 per cent, in other words from 4.8 down to 3.6.

Now, I want to know whether this is so, and whether you still make that same answer, and if your have any doubt about it, I would like to have you do a little arithmetic on some round numbers.

A. Well, it is rather obviously not so. As a matter of fact, I did fall into that arithmetical delusion in the heat of the moment, but it certainly is quite obviously not mathematically correct.

Q. Would it be anything near that reduction?

A. Oh, nothing like it, nothing like it, as your reduction is made 80 per cent of your hypothesis, which is very close, of course, to the percentage which was actually used down to 75 per cent, that is a reduction of 5 out of 80 points, which is in the neighborhood of a 6 per cent reduction. Now,
6 per cent applied to 4.8 cents, or to any other figure—
1281 well, 6 per cent applied to 4.8 cents, well, runs roughly
3 tenths of one cent, so that on that basis the 4.8 cents would be reduced to 4.5 cents.

Q. Then, in other words, the only effect, is this not true, that the only effect it would have upon your result, if you had not included those $4 taxes in your computation, that is in computing this allocation of total costs, and that is the only place you did use it, isn't it?

A. Yes.

Q. If you had not used it there, wouldn't that result have been merely, that you would have perhaps gotten a result 4.5 cents instead of 4.8 cents?

A: That is substantially true.

Q. I wish to recall again that in stating the question I did not make any tax reduction whatsoever from the other items besides gasoline.

A. Yes.

Q. Although there undoubtedly would have to be some corresponding tax reduction made there as much as a dollar a quart that you mentioned—not a dollar a quart, but how many cents a quart?

A. One cent.

Q. One cent a quart on oil?

A. Yes, in order to be comparable with the gasoline station.

1282 Trial Examiner Ballinger: Do you now desire to correct your former testimony?

The Witness: I most certainly do.

By Mr. Austin:

Q. Judge Hanley, if you will let me have that book that you were reading from a while ago.

(The book referred to is handed to Mr. Austin.)

Mr. Austin: I do not believe this was ever marked for identification, but it is a pamphlet or book entitled "The Cost Principle in Minimum Price Regulation," by Herbert F. Taggart, and I believe it will be stipulated that there have been a number of quotations from this book read into the record by counsel for the respondent.

Mr. Hanley: I will agree that that is true.

Mr. Austin: For the purpose of having this book available so that the opinions of the witness which he has stated were still his opinions and which were quoted from this book may be read in the context, I offer the book in evidence.

1283 Mr. Hanley: Just before the court's ruling on the objection, please.

Trial Examiner Ballinger: Let the book be marked for identification as Commission's Exhibit No. 77.

(The document was marked for identification "Commission's Exhibit No. 77.")

Mr. Hanley: The exhibit, Commission's Exhibit No. 77, offered, is objected to for the reason that it is immaterial and irrelevant in substantially all of its parts and merely is an encumbrance upon the record. There is no objection to an offer of any portions of the book which the witness may say are necessarily a part of his opinion as reflected by any portions that were quoted by Counsel for Respondent.

Trial Examiner Ballinger: For the purposes for which the document is tendered, the objection is overruled and the document is admitted in evidence as Commission's Exhibit No. 77.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT 77," was received in evidence.)

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

It is understood that the document now tendered
1284 which contains some mutilation may be withdrawn and
a complete copy substituted therefor.

Mr. Austin: Your Honor, I marked for identification yesterday Commission's Exhibit No. 76, and I think that the witness testified at some length as to what it contained, and it shows the procedures used, and the mechanics, and so forth, in this survey.

Trial Examiner Ballinger: Frequently referred to in the testimony and extracts read therefrom.

Mr. Austin: I had better ask the witness a couple of questions on that.

By Mr. Austin.

Q. Mr. Taggart, you have answered quite a number of questions on cross-examination which were directed to the report referred to as the City of Detroit report, and which was marked for identification as Respondent's Exhibit No. 2. Were the conclusions reached and stated in the report identical with the ones stated in the Wayne County report?

A. They are substantially identical.

Q. Aren't they identical word for word?

A. They may be word for word. I should have to compare them.

(The witness is making a comparison between the two papers referred to.)

A. There are only two differences, both very
1285 minor. One is in the fifth line from the bottom, the fourth conclusion, where the Wayne County report says that the average cost of selling gasoline by the stations which are most efficient in that they fall within the lowest 25 percent in unit cost is 3½ cents, the Detroit report says instead that that unit cost ranges from 3½ cents to 3.7 cents. Then, in the fifth conclusion in the Wayne County report, I have used the term "location within the county" and in the Detroit report I used the expression "geographical location."

Q. Are those the only differences, in the conclusion?

A. Those are the only differences.

Q. Referring to the tables in the respective reports, are the tables in the Wayne County report in general the same, or do they correspond to the tables in the Detroit report, except that there are 80 more stations included in the Wayne County report than in the Detroit report?

A. In general they do; that is true.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I offer this in evidence, Commission's Exhibit No. 76, for identification.

Trial Examiner Ballinger: Is there any objection?

Mr. Hanley: Yes. The Respondent objects to the offer of Commission's Exhibits 76 upon the grounds set 1286 out in the objection to the question propounded to this witness which sought to elicit his conclusions from his survey, which objection appears, which objection begins on page 1016 of the transcript of testimony, and for the additional reason that it now appears from the testimony of the witness that he does not regard the results of the report on the territory covered by the report as comparable to the territory under consideration in this action as follows: Question propounded to the witness, page 1094 of the record: "Well, now, assuming that those figures are correct for that area, namely, Detroit, Hamtramck, Highland Park, and Dearborn, would you say that the use of 409 stations, all out of the City of Detroit proper, was a fair cross-section and sample of an assumed total of 2297 stations in the area which I have designated?

"A. I should say the two figures are entirely incommensurate. You cannot assume that a thing is a cross-section of something which contains a greater totality than the sample covers very well."

It now appears that the offer has to do with a report which covers the territory entirely other and different even though it may be inclusive of the geographical territory involved in this action.

Trial Examiner Ballinger: Have you concluded, Judge?

Mr. Hanley: That is all.

1287 Trial Examiner Ballinger: The objection is overruled.

The document is admitted in evidence as Commission's Exhibit No. 76.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT 76," was received in evidence.)

Trial Examiner Ballinger: Have you concluded, Mr. Austin?

Mr. Austin: Yes, I think that is all.

Trial Examiner Ballinger: Have you anything further, Judge?

Mr. Hanley: I will be through very shortly, indeed.

Recross Examination by Mr. Hanley.

Q. You did include operators' time as a cost on the basis of wages assigned to that time in preparing your survey, didn't you?

A. That is correct.

Q. Do you regard this survey made as of May, 1938, covering first the County of Wayne over all, and, secondly, the one covering the City of Detroit proper as being applicable today in 1941 to the territory comprised by Detroit, Hamtramck, Highland Park, and Dearborn?

1288 A. No, I should not expect it to be entirely applicable today, to today's conditions, even to the territories.

Q. That it purports—

A. That it covered in 1938.

Q. Within your knowledge did any survey or report of gasoline retailing costs portray a cost figure as high as the one which you reached in your 1938 survey?

A. Do you mean as to the average?

Q. Yes, sir.

A. No, I do not think I have ever seen one where an average cost was arrived at that arrived at a figure quite as high as that.

Q. Some discussion was had by you and Mr. Austin as to the reason for the choice of May. It is true, isn't it, Doctor, that irrespective of any month and its representative character it would be a safer, more reliable procedure if you could have annual figures rather than monthly figures?

A. It would be a better procedure if it were possible to carry out to have complete figures over an entire year.

Q. Now, on this tax thing, Doctor, did you assume to give an exact figure in relation to how much your cost would be reduced if you eliminated the excise taxes?

A. No, we were talking in approximations.

Q. Have you in mind an exact figure?

A. It would be very easy to derive an exact figure, 1289 but, of course, I do not have an exact figure.

Q. I am wondering if there is enough data, Doctor, in either one of these reports to enable one to calculate the difference that would arise?

A. Oh, yes, I think the data exists.

Q. I am unable to find in your report the total amount of gasoline sales and the total amount of all sales.

A. Those figures probably are not in the Detroit report. They are, however, in the Wayne County report.

Q. Now, Doctor—

Mr. Austin: May I state, Judge, that they are on page 6 of Commission's Exhibit No. 76.

By Mr. Hanley:

Q. Well, if there is enough to give us the arithmetic that is all right.

So far as the Detroit report is concerned, Exhibit 2, Doctor, it would amount to multiplying by 4 cents the May gallonage of 3,187,534 gallons, and deducting the result from the figure that you used as total gasoline sales, wouldn't it?

A. Total dollar sales; yes, sir; that would be the way it would be arrived at.

Q. And that would necessarily reduce the percentage of 80.75 in some degree?

A. It would reduce it in some degree.

1290 Q. Now, you think there are enough figures in the Commission's Exhibit 76 to enable one to make that arithmetical calculation?

A. The figures are here on page 24 of Commission's Exhibit No. 76.

Mr. Hanley: All right. I think that is all.

Trial Examiner Ballinger: Gentlemen, is there anything else?

Mr. Hanley: Yes, I have one other thing on the record.

The Respondent now moves to strike from the record the answer of the witness to which objection was made beginning at page 1016 and to strike from the record Commission's Exhibit No. 75-A, 75-B, and 75-C, and Commission's Exhibit 76 for all of the reasons set forth in the objection referred to and for the additional reasons set up in the objection made to Commission's Exhibit No. 76.

Trial Examiner Ballinger: The Examiner will take the motion under consideration and announce a decision at the convening of the next hearing.

Mr. Hanley: I think that is all I have.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

(Witness excused.)

Mr. Austin: The Commission rests, Your Honor.

1291 Mr. Hanley: Well, then, I will have some motions, Judge; but I will send you those, both of you.

Mr. Austin: You can make them at the next hearing before the start of the witnesses.

Mr. Hanley: That will be fine for me.

Trial Examiner Ballinger: What is that?

Mr. Hanley: I say I will have some motions that will properly come at the conclusion of the Commission's case.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Now, at 7:35 o'clock p. m., the hearing stands adjourned to be reconvened at 10 a. m., Eastern Standard Time, April 21, 1941, in Room 859, Post Office Building, Detroit, Mich.

(Whereupon, at 7:35 o'clock p. m., April 9, 1941, the hearing in the above-entitled matter was adjourned.)

1292

Room 859, Post Office Building,
Detroit, Michigan,
April 21, 1941.

Met pursuant to adjournment, at 10 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold A. Hanley, Esq., 910 South Michigan Ave., Chicago, Illinois, and

Arthur J. Abbott, Esq., of the firm of Abbott, MacMahon, and Roberts, 2230 Buhl Building, Detroit, Michigan, on behalf of the Respondent.

1293 PROCEEDINGS.

Trial Examiner Ballinger: We will come to order. This is a reconvening, April 21st, 1941, at the hour of 10 A. M., Eastern Standard Time, at Detroit, Michigan, of Docket No. 4389, case entitled in re Standard Oil Company. The last hearing was held April 9, 1941, at Detroit, Michigan.

The reporter will note counsel for the Commission and Respondent present.

Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: I will return this, Mr. Austin, (handing bound document to counsel for the Commission).

Mr. Austin: Oh, yes.

I think you have pretty complete copies, but I brought the original of it along.

Mr. Hanley: Yes, we will need some of them. I will have to ask for those invoices, to take photostats. We can't locate our originals for copies of them, so I will want them.

Mr. Austin: I think everything is here; supposedly.

If your Honor please, I would like to state that I received informal notice on Saturday that the Commis-
1294 sion had granted the motion made by the attorney
for the Commission to amend the Complaint, a copy of which motion was served upon counsel for the Respondent, and I assume that both counsel for the Respondent and myself will receive formal service of the Order amending the Complaint, but I wish to state on the record at this time that the motion has been granted; that is, the amendment has been granted in the form in which it was moved.

Trial Examiner Ballinger: The Examiner should have been advised, and a copy of it furnished him so that it might be inserted in the record. When it is received, if counsel will present the Examiner with a copy, he will discuss its inclusion in the record.

1295 Mr. Austin: Yes, I mentioned that now because
I believe the action taken by the Commission was last Friday, and therefore I don't believe any of us have had time to receive copies.

Trial Examiner Ballinger: I appreciate that. Counsel for Respondents having been fully advised may govern themselves accordingly.

Mr. Hanley: We are willing to proceed on that basis, your Honor.

Your Honor, may the record show at this time that Mr. Arthur J. Abbott of the Detroit Bar is formally appearing of record as counsel for the Respondent.

Trial Examiner Ballinger: Proceed. On the record.

Mr. Hanley: The Respondent objects to the amendment of the complaint filed by the Commission for all of the reasons set up from time to time during the course of the trial.

Trial Examiner Ballinger: Let me interrupt you. Off the record.

(Discussion off the record.)

Mr. Hanley: What was the last I said?

(The last statement of Mr. Hanley was read.)

1296 Mr. Hanley: Denominated both general and specific objections made to the reception of evidence which goes to explaining or outlining the disposition of gasoline in the hands of someone to whom Respondent has sold the same, and relating to such disposition after sale and after such gasoline has become the absolute property of the vendee.

1297 It is understood that the proposed amendments go entirely and exclusively to the question of the matter of pricing of gasoline after the same has been sold by the Respondent and after Respondent has lost control over the disposition or pricing or sale of such gasoline and it is re-asserted as a ground and reason for this objection that the Respondent has neither the right nor the obligation to police gasoline after it has been sold by Respondent and does not and cannot control the disposition thereof, the manner of sale or the pricing policies which may be used or adopted by any resellers of gasoline or others who may have purchased such gasoline from the Respondent.

The Respondent does not object to the form of the amendment and concedes that on the Commission's theory of trial that the amendment does conform to the proof that the Commission has adduced and which has been received by the Court on the theory of trial adopted by the Commission.

Trial Examiner Ballinger: The objection being to the action of the Commission, the Trial Examiner has no power but to refer the matter back to the Commission for appropriate action.

Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: Upon request of the Examiner, Respondent will first urge a series of motions which already

1298 appear on the record, having to do with striking from the record the testimony of Herbert F. Taggart, and Exhibits 75-A, B, and C, Exhibit 76, and Exhibit 77.

At this time the Respondent renews its motion to strike all of the testimony of Herbert F. Taggart relative to a survey of cost of selling gasoline in the city of Detroit at retail during May, 1938, and to strike Exhibits 75-A, B, and C, 76, and 77, offered ~~by the~~ Government and received in evidence on the examination of said Taggart, for reasons and upon the grounds as follows, but without limitation—

Trial Examiner Ballinger: If I can interrupt you, and off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: —but without limitation to such specified reasons:

First, for all of the reasons set forth in the objection to the question asked of Professor Taggart, which objection begins on page 1016 of the record; and for the additional reasons added to such objection during the course of the examination of said Taggart, and for all the reasons assigned in a similar motion to strike made at the close of said Taggart's testimony. And for the additional specific reasons set forth as follows, including
1299 such specified reasons but without limitation thereto.

2. That it now affirmatively appears from the testimony of the witness Taggart that the surveys which were discussed in his testimony and the only surveys which he made were (a) one dealing with Wayne County, Michigan, as a whole, and (b) a segregation therefrom of the city of Detroit proper and that in no instance did the said Taggart make a survey of the geographical territory that has been covered in this proceeding, namely, the cities of Detroit, Hamtramck, Highland Park, and Dearborn, and that, hence, said survey does not apply geographically to the territory involved, and that the witness Taggart has affirmatively testified that his survey is inapplicable to the territory involved in this action.

3. That said survey deals with a time involving May, 1938, whereas the point of interest in this action is directed to the present time, and it affirmatively appears by the testimony of the witness Taggart that he regards his survey made in 1938 inapplicable, even to the geographic territory which it presumed to cover in 1938, which inapplicability is to a point of time in the present, and that it obviously follows that the survey which was made

in 1938 and is deemed by the witness himself as inapplicable to the geographic limits of the territory covered in this action, even as of May, 1938, it obviously fol-
1300 lows—and the witness has so testified—that it would
have no validity at all when such inapplicable geographic survey of 1938 is now proposed to be directed in point of time to 1941 and covered a different geographic territory.

4. That it appears from the affirmative testimony of the witness Taggart that he altered figures on the questionnaires that he received. That he does not know to whom the questionnaires were distributed except by indirection, implication, or self-serving hearsay. That he has no knowledge and did not undertake to obtain knowledge as to the accuracy of the figures presented in the questionnaires. That he arbitrarily assumed the existence of values upon which he predicated interest and depreciation charges. That he regarded certain items of cost in connection with some service stations because they appeared on the questionnaires and disregarded said items of cost in connection with other service stations because they did not appear.

That he was totally without information and did not undertake to obtain any information as to the total amount of gasoline sold in the month of May or even the year 1938 at retail in Detroit, and had in May, 1938, no knowledge and has no knowledge now of the relation of the sample in gallonage which he obtained, to the total
1301 gallonage:

That by his own test and testimony he has failed to establish that he had a fair and sufficient sample upon which to predicate any conclusion.

That his numerical sample on the basis of total service station survey is not sufficient: that he does not even know now, and did not know in May, 1938, what the numerical total of service stations was in the territory involved in this action; that he made no effort to functionally classify service stations with reference to their economic functions and purpose, size, and method of operation; that he made no effort to determine the essential influential factors relative to the gasoline business in the month of May that would have been essential to determine in order to properly evaluate the month of May, 1938, as a proper sampling month; that he made an arbitrary allocation of

expense to gasoline without any fair consideration of other functions performed at service stations, and without any fair consideration of the ratios of expense that should be allocated to gasoline and to other products sold, and service rendered at service stations; that he repeatedly admitted that cost accounting is an inexact science, and that cost accountants disagree; that he admitted affirmatively that many items of cost were left out of his plan of survey that oftentimes were included in cost sur-
1302 veys, and that he included in his survey items of
cost that were frequently left out of cost surveys; that he affirmatively admitted that in a proceeding which had to do with the cost of any individual Defendant or Respondent, that the only evidence that is really pertinent, namely, specific cost, is the actual cost of the Respondent or the Defendant involved, and made the specific answer beginning at page 1055 of the record: "I do not think any Respondent ought to be, or Defendant ought to be found guilty on the basis of an average cost."

That the witness affirmatively admitted that his survey had to do with averages only; that he made a fatal blunder in allocation of expense to gasoline, which is indicative of the unfairness and unsatisfactory character and invalidity and lack of value appertaining to the entire survey, in that he admittedly and affirmatively testified to the fact that he overloaded revenue receipts from the sale of gasoline with excise taxes and sales taxes, which were not made applicable in like amount, or in some instances at all to sales of products and services other than gasoline; and that such method of allocation violently distorts the percentage ratio figures which form the heart and basis of the conclusion reached by the witness as to average cost; that in respect of this particular defect in the survey, the witness Taggart affirmatively demon-
1303 strated that he is without knowledge as to the mathe-
matical effect of such tax overloading, and that in one instance he testified that it might affect costs as much as 1¼¢ per gallon of gasoline, and later in another instance testified that it would amount to approximately .3 of a cent per gallon of gasoline, but he was unable to state any positive figure as to how much it would, in fact, affect his conclusion as to the cost of sale of gasoline; that the results of the Wayne County survey, as testified to by the witness Taggart, indicated that the overall margin be-

tween cost of gasoline and sale price of gasoline was 3.63¢ per gallon, and that when asked as to how service station operators could survive when they had a cost of 4.8¢ per gallon to sell gasoline and only had an overall margin of 3.63¢ per gallon, that he answered, among other things, that the mortality is high among service station operators, but immediately thereafter testified that he had known of many operators who had been in business for a period of many years and sought to further explain his answer by such reasons as the fact that service station operators might have rich relatives; and as to the surveys made by Taggart, he found different conclusions as to cost relating to Wayne County, in that he arrived at a
conclusion of 4.6¢ on that survey, and then by some
1304 means of segregation, which is not entirely clear
from his testimony, he arrived at a conclusion that the cost in the city of Detroit proper was 4.8¢ per gallon; and such attempts as the foregoing to support a cost survey by a reputedly responsible cost accountant and economist are sufficient in themselves to render such a survey invalid and valueless for any purpose, and to demonstrate its uselessness and absurdity in an action of this character.

5. That irrespective of the validity or invalidity of the survey, as such, it concededly purports to show nothing except an average cost of sale of gasoline, and was concededly made under what the witness Taggart has admitted is essentially a price fixing statute, and necessarily condemns the efficient operator and blesses the inefficient operator; that unless by pure accident or coincidence such average cost does not equal or even approximate the actual cost of any operator; that certainly it does not purport to be the actual cost of any operator; that it affirmatively appears in the Wayne County survey that the lowest cost which Taggart said was reported to him was slightly in excess of 2¢ per gallon, and that the highest cost reported to him was in excess of 22¢ per gallon; that in the attempted segregation by the witness Taggart of the city of Detroit, he stated for reasons best known to him-
self, and which are not clear in the testimony, that
1305 the lowest cost reported to him was slightly in ex-
cess of 2¢ per gallon, and the highest cost something
in excess of 15¢ per gallon; that the absurdity of such figures are patent upon their face; that nothing was done

to alleviate the improper and erroneous defect of the inclusion of such figures in the analysis made by the witness Taggart and the resulting conclusions upon his survey, in that he affirmatively testified that he took into consideration the highest and the lowest costs and lumped them altogether and averaged them, but conceded that good accounting practice in a survey of this character would indicate that perhaps as much as 10% of the two extremes, namely, the minimum and the maximum, at either end of the list of reporting stations, should have been eliminated before arriving at the average in order to escape the distorting influence of abnormal lows and highs.

6. That irrespective of the validity or invalidity of the survey, the witness Taggart testified that it does not even include figures from Ned's Auto Supply Company, and that he has no knowledge of whether it includes the costs of any of the other wholesale dealers involved in this action or the costs of any dealers which may have been, in May, 1938, supplied by any of the wholesale dealers involved in this action.

7. That the witness Taggart has affirmatively testified
1306 that it does not purport to show the cost of any of the four dealers in either their wholesale or retail operations, if any, and indeed the witness testified that he did not now and never did know anything about the costs of said four dealers.

8. That the witness Taggart affirmatively testified that he never knew and does not now know anything about Respondent's costs of marketing gasoline, and that his purported survey does not even pretend to know anything in respect thereto.

9. That the survey is wholly immaterial and valueless in this action in that the only costs that are of any value herein, or of any pertinence, are those of the Respondent which are clearly not considered in any manner or affected in any manner in 1938 or now by the surveys made by the witness Taggart and he has so affirmatively testified. Further, that if any of the costs of any or all of the four wholesale dealers involved in this action are material at all for any purpose, that the survey is equally valueless to establish anything as to them in that the witness Taggart has affirmatively testified that the survey does not establish

and does not purport to establish their costs or that their costs were even considered in the compilation of the survey and in his arrival and his conclusions as to costs.

1307 10. That the witness Taggart affirmatively testified that this was the only gasoline cost survey that he had ever made and it appears that he has no knowledge or connection with the oil business or the gasoline business except the one relative to the making of this survey. That his conjecture and guess as to the mortality among service station operators is without value. That the witness has affirmatively shown by his own testimony his lack of familiarity with what the real rate of mortality is among service station operators. Further than that he has demonstrated a lack of that knowledge which, as a responsible economist, he should have, in that he knows nothing about the rate of mortality or the degree of profitable operation, not only of service stations, but of allied businesses.

That the witness affirmatively admitted that while he knew of other cost surveys in relation to the sale of gasoline, he did not take the trouble to examine any of them before making his own survey, nor did he trouble to check his conclusions with any other survey.

That the witness affirmatively admitted that in the case of all of these other surveys, it was his understanding that a lower unit cost of sale had been reached and affirmatively stated that to his best knowledge—whatever that is worth—his survey arrived at the highest cost per 1308 unit of sale that he knew anything about.

Trial Examiner Ballinger: Have you concluded?

Mr. Hanley: Yes.

Trial Examiner Ballinger: The Trial Examiner will hear from counsel for the Commission.

Mr. Austin: If your Honor please, I have listened with interest to Judge Hanley's statement of the grounds of his objection to Dr. Taggart's testimony and survey. I don't agree with all that he said. I don't know that it was entirely correct in his reference to the statements of the witness, but I will not attempt to answer the objection at length because I think there is a very complete answer to the entire objection, which I think can be very briefly made.

Dr. Taggart, of course, was qualified as an expert, and his testimony was opinion testimony and opinion evidence. He was very completely and eminently qualified to give his opinion upon this subject and to make the survey which he stated that he made. That is completely brought out in his testimony, both as to his experience as an educator and professor and also as to his experience with the NRA and other undertakings, where he either made or participated in the making of cost surveys. He has specialized in distribution cost accounting. Therefore, there could be no question as to his qualifications.

1309 At page 1014 of the record, immediately preceding the statement of his conclusions, I asked Dr. Taggart this question:

"In your opinion, Dr. Taggart, were the mechanics of this survey and its coverage and representation and the accounting procedures and methods used such as to produce reliable and conservative results as to the retail service station cost of selling gasoline in Wayne County, Michigan?"

His answer was: "Yes." So that as a well qualified expert, he has testified that the results of this survey were reliable and conservative.

Now, that being true, the testimony and the survey are unquestionably competent evidence. They are unquestionably relative and material in this case.

On the question of materiality, I refer to the statement which I made as counsel for the Commission on page 1022 of the record, as to the purpose for which Dr. Taggart's testimony was offered. Now, returning to the objection just stated by counsel for the Respondent, his objection, I submit, goes almost entirely to the weight of Dr. Taggart's testimony and not as to its competency, its relevance, or its materiality. I think the question of weight to be given to Dr. Taggart's testimony is one for the Commission. Whether the Commission decides later on to make a finding that Dr. Taggart correctly

1310 determined the cost of selling gasoline at retail in Detroit, is another question, but I think we are only concerned here with the competency, relevancy and materiality of the testimony, and in view of Dr. Taggart's considerations and the fact that he has given his opinion as an expert, I don't believe that can be in any way shaken by statements of counsel in the respects he disagrees with the experts who testified for the Commission.

Trial Examiner Ballinger: Are you ready for a ruling?

Mr. Hanley: I want to refer, very briefly, if your Honor please, in answer to a situation which was presented by counsel for the Commission.

In the first place, I am very sure, indeed, that I haven't overlooked in any of the motions, the objection as to the relevancy of this survey in this action, irrespective of its weight or its character. Always, we have taken the position, and now take it, that no matter how good the survey might be, whether done by Professor Taggart or someone else, and irrespective of the care with which it were prepared and the accuracy with which the calculations were made and the conclusions reached, that it still just doesn't belong in this proceeding.

Now, that is the primary basis of this objection. It was the basis of the objection before it developed that there were as many defects in this survey as there
1311 are; because we had to assume, at least arguendo, that the Government might put on a competent economist, and he might prove that he had made a good survey, so our objection then went to its relevancy, as such, in this action, and not to its weight or validity as a survey at all.

Now, your Honor, the thing is in, and Dr. Taggart has testified, and your Honor heard him testify; saw him on the witness stand, and I take violent exception to the statement of counsel that the survey now presents a question of weight that is for the Commission alone. I grant, your Honor, certainly it is a rule of law in a proceeding of this kind that if competent evidence is offered and there is some reasonableness as to its degree of weight, if it is competent and relevant, the ultimate trier of the fact must essentially determine how much weight to give that thing, but I submit, your Honor, that in any trial court, when evidence is offered that is so patently without any weight, that it becomes the duty of the trier of the immediate fact to exclude that, not on the basis of the fact of how much weight it has, but one basis of fact that it doesn't have any weight, and I say to your Honor that it is just an outrage, in my view, that this Respondent is forced in this action to meet a thing like that. I think it is just totally unfair that we should be put
1312 up against the burden in the expenditure of time and

money and effort to have to meet a thing which this witness himself has said, in so many words, is not applicable.

1313 He said it is not applicable geographically and to the territory involved in this action, and furthermore he said "My own survey made in 1938 wouldn't be applicable in my judgment to this same territory in 1941."

Trial Examiner Ballinger: Wasn't he testifying then as to a question of law and not fact?

Mr. Hanley: No.

Trial Examiner Ballinger: Wasn't the question of applicability one of law?

Mr. Hanley: No, sir, it was not, your Honor. If I can find the quotation I will call it to your attention. He was expressly asked about that very thing.

Trial Examiner Ballinger: That is a question for the Commission, not for that witness to determine.

Mr. Hanley: If it were a matter of law, but he is testifying as an economist, and he was asked if in his judgment a survey that he made covering a certain territory would be applicable to some other territory, and he said no. Then he said, "I don't think it would be applicable even to the same territory several years later."

Now, that is his judgment as an economist that had nothing to do with the law of the case.

Mr. Austin: The territorial question, the average which he found, was the average for all of Wayne County and
Detroit separately, and there was .2 of a cent dif-
1314 ference outside of Detroit. There is absolutely no
evidence here that there was any variation in the results for any particular district.

Trial Examiner Ballinger: The Examiner is prepared to rule unless counsel desires further argument.

Mr. Hanley: If there is any question in your mind about whether he was testifying on the question of law or question of fact as an economist, I want that clearly in the record.

Trial Examiner Ballinger: His testimony as to whether or not a survey made in '38 was applicable to the conditions at the time he was testifying in a question of fact and not of law, upon which his testimony is valuable. But as the Examiner understands the survey made in '38 may on certain aspects of this case have some bearing.

Unless counsel desires to be heard further the Examiner is prepared to rule.

Mr. Hanley: I don't care to be heard further, if that matter is clear on their record.

I now assert that the witness himself condemned the value of his testimony in this: That he testified, first, that his survey was not applicable—testified in substance to this: First, that his survey was not applicable to a territory other than that it purported to cover; and second, that it was not applicable in 1941 to the same territory which is covered in 1938, and that such answers were given
as answers to questions eliciting statements of fact
1315 from an expert witness who himself prepared the
surveys and was testifying as an expert on their usefulness in respect of the questions which he was being asked and was not being asked, and he was not testifying in respect of any question of law.

Trial Examiner Ballinger: Counsel for Respondent has moved to strike from the record Commission's Exhibits Nos. 75-A, 75-B, 75-C, and 76, for the reasons advanced at the time said documents were admitted in evidence, and which reasons appear in the record pages 1001-2, and 1285-6 and for the further reasons assigned this morning; and to further strike from the record all of the testimony of the witness Taggart for the reasons stated by counsel, and appearing on pages 1016-20, both inclusive; and supplemented by the additional reasons assigned by counsel this morning.

Commission's Exhibit 75-A is a questionnaire distributed under the direction of the witness Taggart to 2,442 gasoline stations in the locality and vicinity of Detroit as a basis for a survey to determine the marketing cost of gasoline during the month of May, 1938. Exhibit 75-B is a duplicate, except as to the color of the paper, of Exhibit 75-A, and was designed to be retained by the owner or operator of the station who filled out the questionnaire, Commission's Exhibit 75-A. Commission's Exhibit 75-C is a sample envelope delivered with Commission's Exhibit 75-A to be used in the transmission of said exhibit
to the witness Taggart when filled out by the service
1316 station operator.

489 service station operators responded to the said questionnaire and their returns were used in the final computation. On the basis of the 489 returns the witness Tag-

gart prepared a report showing the cost per gallon of marketing gasoline in the month of May, 1938, the testimony of the witness Taggart sought to be stricken embodied the basis for and his conclusion set out in the report with reference to the cost per gallon of marketing gasoline in Wayne County, Michigan, in May, 1938.

1317 Without attempting to consider each of the separate objections urged by counsel for Respondent, it is the opinion of the Examiner that Commission's Exhibit 75-A, B, and C, and Commission's Exhibit 76, taken together, form some evidentiary value as tending to establish the cost of marketing gasoline in Wayne County in the month of May, 1938, and were properly admitted in evidence; that the testimony of the witness Taggart sought to be stricken, was competent as tending to establish the cost of marketing gasoline in the month of May, 1938, which is material to the issues here joined. The Examiner is of the opinion that said evidence tending to establish the cost of marketing gasoline throws some light upon the effect of discrimination in prices charged in the complaint; that said exhibits and said testimony are therefore competent, were properly admitted in evidence, and the motion of counsel for Respondent to strike said exhibits and said testimony of the witness Taggart referred to are each separately accordingly denied.

Mr. Hanley: I don't know how to designate these motions, your Honor; I have a series of them. Perhaps for quick reference on the record, I can use letters, A, B, C, if that is satisfactory.

A. The Government having rested its case, the Respondent now moves for a dismissal of this action

1318 against the Respondent on the ground, and for the reason, that there is a total failure on the part of the Government to establish that the transactions involved in the action and complained about by the Government involve interstate commerce; and, further, that it has been affirmatively established on the government's case and by their own witnesses, that the transactions complained of, and that the course of dealing referred to in the Complaint and concerning which the Government complains, were all and are all intrastate in character, and that the Federal Trade Commission is wholly without jurisdiction to proceed further in this action except to enter an order of dismissal thereof.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Does counsel for the Commission desire to be heard?

Mr. Austin: I don't believe so, your Honor. I think our position is sufficiently clear in the testimony that has been brought out, and allegations of the Complaint on interstate commerce.

Trial Examiner Ballinger: The motion just made is one that is properly directed to the Commission. The Examiner has no power to pass on it other than to deny it.

Mr. Hanley: Mr. Reporter, will you please denominate
1319 this motion B.

The Respondent at this time, the Government having rested its case, moves for a dismissal of the action on the ground that the Government has failed to establish a prima facie case in that it has not overcome the assertion of right, and the existence of right, and the legal presumption of legal right in the Respondent to bona fidedly select and to functionally classify Respondent's own customers, and to grant price differentials placed upon such functional differences and classifications.

Trial Examiner Ballinger: The same ruling.

Mr. Hanley: Motion C.

The Government having rested its case, the Respondent moves for a dismissal of the action on the ground of—on the ground that the Government has failed to show prima facie, or at all, that any of the practices or transactions of Respondent complained against have had any material or substantial effect whatsoever upon either interstate or intrastate commerce of an injurious nature, or that such practices and transactions have created or tended, or tend to create any monopoly in gasoline commerce in Detroit, either of an interestate or itnrastate character, and the Government has failed to show any injury or tendency to injure competition in either interstate or intrastate commerce in gasoline in Detroit, or elsewhere, or at all.

1320 Trial Examiner Ballinger: Same ruling.

Mr. Hanley: Motion D. The Government, having rested its case the Respondent moves for a dismissal of this action on the ground that if there has been any prima facie case made by the Government by either the admission on the part of Respondent of the existence of a differential in price, or adduced in this case, such prima facie case has been fully overcome and met by a fair preponderance of

the evidence; although that would not be necessary to entitle Respondent to a dismissal, but that such evidence overcoming any such prima facie case has been introduced and developed in the Government's own case, and it has been affirmatively established that such differentials in price were fully justified on the part of Respondent on two grounds regularly recognized expressly by the statute under which the complaint is made, namely: One. It has been affirmatively shown that there was a necessity imposed upon Respondent to meet competition, which was done bona fidedly by Respondent, and was done by the granting of terms and prices no greater than were essential to enable Respondent to retain its customers, and in some instances such competition was not fully met by Respondent, and that Respondent has been shown in no instance to have gone beyond meeting such competitive offers and efforts on the part of suppliers competing with Respondent, and it has been affirmatively shown that all of the efforts
1321 of Respondent and the differentials granted were
done bona fidedly to meet an equally low or lower price offered by competing suppliers.

2. That it affirmatively appears on the Government's own case that the differential in price granted by Respondent to tank car buyers is fully justified in that it makes only due allowance for savings in cost to Respondent in methods of delivery and sale of gasoline insofar as such costs are reasonably and physically calculable.

Trial Examiner Ballinger: Same ruling.

Mr. Hanley: E. The Government having rested its case the Respondent moves for a dismissal in this action of the complaint wherein it refers to transactions alleged to have taken place between Respondent and the Wayne Oil Company, and between Respondent and the Stikeman Oil Company, and to dismiss and preclude any further consideration of any of such transactions, for the reason that there is an absolute failure of proof to establish first, that there was any use made by either of said buyers of any differential which may have been granted to them to depress or otherwise influence the prevailing retail market of gasoline in Detroit at any time; second, that there is no evidence that either of said buyers at any time ever undercut or depressed the prevailing tank wagon price of gasoline in Detroit at which price they supplied certain retail resellers who were customers of said buyers.

1322 3. That there is no evidence at all in the case. That the transactions between the Respondent, on the one hand; and said two buyers on the other hand, had the slightest deleterious influence upon commerce of either intra or interstate character in the city at any time or that said transactions in any wise at any time injured competition in either inter or intrastate commerce in gasoline in Detroit.

4. That all of the foregoing affirmatively appears by affirmative evidence adduced by the Government on its own case and that such evidence is undisputed on the record..

Trial Examiner Ballinger: Same ruling.

Mr. Hanley: Motion F.

The Government having rested its case, the Respondent at this time renews its motion to strike all of the testimony on the record which has to do with alleged reduced prices offered by retailers supplied either by Respondent or by any of the four tank car buyers, for the following reasons:

1. Respondent has never had, and does not now have any obligation, duty, or right to police the disposition, manner or terms of sale or prices, once gasoline is delivered to a purchaser, whether he be a retail purchaser buying on a tank wagon basis, or a wholesale buyer purchasing on a tank car basis.

1323 2. That it has been affirmatively shown on the Government's own case, and it is undisputed, that in any of those instances where it has been shown that any of such purchasers operating at retail, whether they bought from Respondent or one of the four wholesale buyers, such retailers were reducing prices in a competitive market, which reduction was being participated in generally by retail markets of gasoline throughout the city of Detroit and that there is no evidence in the record upon which a reasonable man could conclude that such price cuts or reductions, or any of them, were induced, caused, influenced or occasioned by any of the operations or transactions of Respondent, or by reason of any prices granted to anyone by Respondent.

Trial Examiner Ballinger: This motion is directed to the sound discretion of the Trial Examiner and is by the Trial Examiner, accordingly, overruled.

Mr. Hanley: Motion G.

The Government having rested its case, the Respondent, then, moves to strike all the testimony tending to show that any retail outlets directly operated by Ned's Auto Supply Company, and Citrin-Kolb Oil Company sold at prices less than the alleged prevailing retail prices of gasoline in Detroit, for the following reasons:

1. That there is no obligation upon the Respond-
1324 ent to police the sale or disposition of gasoline sold
to any of its customers, either retailers or wholesalers. That the title to such gasoline sold passes absolutely. That the Respondent has neither the right nor the obligation to control methods, manner, terms, or prices of the reseller of such gasoline.

2. That it affirmatively appears on the Government's own case, and is undisputed on the record, that in those instances where said two wholesale buyers, to-wit, Ned's and Citrin-Kolb, were directly operating retail outlets reduced the retail price below the alleged prevailing retail market price in Detroit, that the same was made necessary and occasioned by the general competitive situation in the city of Detroit, and that such operators were justified in meeting that situation and that such situation was entirely without the control of the Respondent and the manner of meeting the same, if met at all by said two operators, was without the control of the Respondent, and that such competitive conditions were generally prevailing and universal at Detroit at the times when it was indicated that said operators may have made a price reduction and that there is no evidence showing or tending to show that any of the activities, transactions, or prices done or given by Respondent had any causal effect resulting in said re-
duced prices by said operators in their retail opera-
1325 tions or had any influence whatever, substantial or
otherwise, upon other intra or interstate commerce in gasoline in the city of Detroit, or upon competition in either intra or interstate commerce in such gasoline.

Trial Examiner Ballinger: The Examiner is of the opinion that discrimination has been shown and that the question of justification is not sufficiently established by the record to absolve Respondent from the duty and obligation of establishing same. The motion is, accordingly overruled.

Mr. Hanley: Motion H. The foregoing motion, denominated Motion G, was made with respect to the retail operations of Ned's Auto Supply Company and Citron-

Kolb Oil Company. The Respondent now moves the same motion, the Government having rested, in respect of the transactions of a wholesale character or tank wagon character indulged in by all of the four wholesale buyers named in this action; to-wit Ned's Auto Supply Company, Stikeman Oil Company, Wayne Oil Company, and Citrin-Kolb Oil Company, it being the purpose in this motion, without repetition to my motion G, applicable to such wholesale and tank wagon operations.

Trial Examiner Ballinger: Is this a motion, now, to dismiss, or is this a motion to strike testimony?

Mr. Hanley: This is a motion to strike testimony.

1326 Trial Examiner Ballinger: The motion is denied.

Mr. Hanley: Motion I.

The Government having rested, the Respondent now moves for a dismissal of this action on the ground and for the reason that if it has been shown that there were any cuts in price, or reductions in price of gasoline below the alleged prevailing retail market in gasoline in Detroit, that if the same had any effect whatsoever on commerce in the city of Detroit, that such effect was upon intrastate commerce in gasoline in Detroit, as distinguished from interstate commerce, and that if there was any such effect on intrastate commerce, that such effect constitutes no burden upon interstate commerce, and has no influence whatsoever thereupon and even though it were assumed that there were some influence upon gasoline commerce in the city of Detroit, by virtue of reduced retail prices, which the Government may contend existed, the existence of which the Government may assert it has proved, as having been offered by either Ned's Auto Supply Company or by Citrin-Kolb Oil Company operating retail outlets directly or offered by dealers supplied by any of the four wholesale buyers named in this action, that the same is a matter wholly without the jurisdiction of the Federal Trade Commission in that it has been affirmatively established on the Government's own case that all of such transactions
1327 involve intrastate commerce only and that in the
event the Government has totally failed to sustain its obligatory burden of establishing that there was any burden cast upon interstate commerce, either because the commerce involved is interstate commerce, or by reason of the influence that intrastate commerce might have upon interstate, and it affirmatively appears that whatever the rec-

ord may disclose as to price differentials, reductions, and competitive activities, in the city of Detroit, that none of it tends to show and, taken as a whole, it fails to show any burden or influence whatsoever upon interstate commerce or competition in interstate commerce.

Trial Examiner Ballinger: The foregoing motion is properly directed to the Commission, the Trial Examiner having no power to do other than to deny it.

Mr. Hanley: I think that concludes these motions.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

On the foregoing rulings of the Examiner, exceptions are automatically allowed, which applies to all rulings heretofore and that may hereafter be made by the Examiner.

At this time we will take a five minute recess.

(Thereupon a five minute recess was taken.)

1328 Trial Examiner Ballinger: On the record. Reconvening.

Mr. Abbott: It now being 12:02 o'clock p. m., may I make the suggestion that we now adjourn until 2:00 o'clock p. m.

Trial Examiner Ballinger: In the absence of objection, the suggestion is adopted by the Examiner, and the hearing now stands in recess until 2:00 p. m.

(Whereupon, at 12:02 p. m., a recess was taken until 2:00 p. m.)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of Volume I of the printed transcript of the record, filed in this office on July 12, 1948, in:

Cause No. 9215.

Standard Oil Company,
Petitioner,
vs.
Federal Trade Commission,
Respondent,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 25th day of May, A. D. 1949.

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

SUPREME COURT, U.S.

VOL. II, pp. 851 to 1736a.

TRANSCRIPT OF RECORD

IN THE

Supreme Court of the United States

October Term, 19[redacted] 1957

No. 24

STANDARD OIL COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.

STANDARD OIL COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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In the

United States Circuit Court of Appeals

For the Seventh Circuit

No. 9215

STANDARD OIL COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

Petition for Review of Order of the Federal Trade Commission.

[illegible]

TRANSCRIPT OF RECORD FILED NOV. 7, 1946.
PRINTED RECORD.

In the

United States Circuit Court of Appeals

For the Seventh Circuit

No. 9215

STANDARD OIL COMPANY,
Petitioner,
vs.
FEDERAL TRADE COMMISSION,
Respondent.

Petition for Review of Order of the Federal Trade Commission.

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2. Advertising Costs.
3. Delivery and Warehouse Cost.
4. Income and Expense Incurred at Leased Retail Outlets Served by Tank Wagon.
5. Marketing Expense Items Incurred at Privately Owned Stations Not Leased But Engaged in the Distribution of Our Products.
6. Credit Information—Bad Debts and Recovery.
7. Field Office and Accounting Cost.
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1329 Afternoon Session.

2 P. M.

Trial Examiner Ballinger: We will come to order. You may proceed.

Mr. Abbott: Mr. Biber.

MAX BIBER was thereupon called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Abbott.

Q. State your full name.

A. Max Biber; B-i-b-e-r.

Q. You are identified, Mr. Biber, with the Citrin-Kolb Oil Company of Detroit?

A. I am.

Q. In what capacity?

A. General manager of the company.

Q. And how long have you been with the company?

A. In this capacity since the late part of 1935.

Q. You are also a member of the State Bar of Michigan, aren't you?

A. Yes, I am.

Q. When were you admitted to the practice of law?

A. In 1923.

1330 Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Abbott:

Q. And are you acquainted with the history of the Citrin-Kolb, since the time that you became identified with it?

A. Yes, I am.

Q. How many bulk plants has the Citrin-Kolb Oil Company?

A. Two.

Q. Where are they located?

A. One is located at 14481 Livernois, and the other at 1445 Linwood, both in Detroit.

Q. And have you figures there showing the total investment of the company in each one of your bulk plants?

Trial Examiner Ballinger: The Examiner inquires how that becomes material in this proceeding.

Mr. Abbott: Well, the purpose of that is, your Honor, to show that the tank car customer here is required to go to considerable expense in maintaining the facilities which enable it to take delivery in tank car as distinguished from tank wagon, from the Respondent.

Trial Examiner Ballinger: It just runs to the question of cost?

Mr. Abbott: Yes.

A. The investment in the plant at Livernois is $42,160.

1331 Q. And Linwood, at the Detroit Terminal Railroad?

A. $43,762.28.

Q. What is the approximate total investment in the company, Citrin-Kolb Oil Company?

A. You mean in these two bulk plants?

Q. No, I don't mean that. I mean the approximate total investment.

A. Approximately $250,000.

Q. Is Citrin-Kolb—

Mr. Austin: Just a minute. Will you give me that first figure again, please?

The Witness: $42,160.

Mr. Austin: That was for the Livernois plant?

The Witness: That is right.

Trial Examiner Ballinger: What other activities does the company carry on besides these two plants?

The Witness: They have service stations.

By Mr. Abbott:

Q. These two plants that you have mentioned have what gallonage capacity; I mean, for storage, what storage capacity?

A. 260,000 gallons.

Q. At the Livernois and Linwood plant, how many tanks have you?

A. Three tanks.

1332 Q. And those are each of 20,000 gallon capacity, are they?

A. That's right.

Q. And how many at the Linwood and D. T. Railway?

A. There are ten 20,000-gallons.

1333 Q. Total of 200,000 gallons?
A. Yes, 200,000 gallons.

Q. When I say D. T. Railroad, I mean Detroit Terminal; is that the location of your Linwood plant?

A. That's right.

Q. It is on a railroad sidetrack, is it not?

A. That's right.

Q. At both of these plants do you have sidetrack facilities for receiving tank cars?

A. At both plants we have our spur tracks off the railroad.

Q. Now, what was the volume, if you have the figures, of the gasoline sold by you at wholesale from the years 1936 to '40 inclusive?

Trial Examiner Ballinger: What do you mean by wholesale?

Mr. Abbott: I mean gasoline sold by them otherwise than at their own retail stations.

Trial Examiner Ballinger: Would that include retail?

Mr. Abbott: No. I say exclusive of retail operations.

A. The figure for 1936, 1,420,524.

Q. Is that gallons?

A. That is gallons. 1937, 4,594,917 gallons; 1938, 5,501,243 gallons; 1939, 4,593,088 gallons; 1940, 4,931,481 gallons.

1334 Q. Now, the figures for 1939 show a decrease of approximately 90,000 gallons compared with 1938; is that correct?

A. That's right.

Trial Examiner Ballinger: The sales you have referred to were sales to retailers, were they?

The Witness: To other retailers, yes.

Q. Now, will you state the same years and give the figures including retail sales at stations which are operated by you as wholesale—as retail outlets?

Trial Examiner Ballinger: Wouldn't it be better to have him give the figures of the deliveries to his retail stations? Or is that what you are asking?

Mr. Abbott: Yes, but it would be very difficult.

Q. How many have you—57 altogether, haven't you, 57 stations that you operate in all ways, by all methods I mean?

A. Does the Examiner mean the total delivered to the retailer?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Q. Will you give the total sales in gallonage of gasoline, including not only wholesale sales but also sales at retail stations operated by your company?

A. For 1936, 2,014,359 gallons; for 1937, 5,435,419 gallons; 1938, 5,967,638 gallons; 1939, 5,172,992 gallons; 1940, 5,305,880 gallons.

1335 Q. This likewise shows that in 1939, as compared to 1938, you had approximately sales of 800,000 gallons less than the preceding year?

A. That's right.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Q. The question was: Can you give, Mr. Biber, separately the retail sales for each year?

A. For 1936, 593,834; for 1937, 840,502; 1938, 466,593; 1939, 579,906; 1940, 374,399 gallons.

1336 Q. What is the business set-up of the Citrin-Kolb Company? Is it a corporation or co-partnership?

A. Co-partnership.

Q. Consisting of whom?

A. Consisting of Jacob A. Citrin and Nathan Kolb and Barney Citrin; the interest of Nathan Kolb being held jointly by Mr. Kolb and Mollie Kolb, his wife.

Trial Examiner Ballinger: As trustees?

The Witness: No; just joint tenants.

By Mr. Abbott:

Q. In other words, one-third partnership interest is held by husband and wife jointly?

A. That's right.

Q. And has Citrin-Kolb Oil Company been a customer of the Standard Oil Company of Indiana for a very long period of time?

A. I would say 20 years.

Q. And to your knowledge, how have they been purchasing gasoline from the Standard Oil Company during that period—on a tank wagon basis or tank car basis?

A. Well, originally on a tank wagon basis, and since 1926 on a tank car basis.

Q. And during the time that they have been on a tank car basis, have they had separate facilities set up for receiving delivery on that basis?

A. They have.

1337 Q. When was there a change made from receiving deliveries on a tank car basis and receiving deliveries on what is known as a truck-train basis?

A. I believe it was in 1940; the early part of 1940.

Q. Well, that is close enough if you don't know the exact month.

A. I think it was February of 1940.

Q. And what facilities were changed at that time in order to receive deliveries on a truck-train basis, as distinguished from a tank car basis?

A. Well, the unloading facilities had to be changed. The unloading pipes and hoses and the accommodation for the pipes and hoses had to be changed.

Trial Examiner Ballinger: Now, will you explain the difference between those two systems?

The Witness: Yes. Formerly, when unloading from tank cars, there were facilities in order to conform to the Detroit Safety Code which provided for pumping units which pumped the gasoline from the top of the car into the underground tank.

Trial Examiner Ballinger: That's in the tank car?

The Witness: That's in the tank car. The tanks were connected to these unloading devices providing for unloading from tank cars.

When the method of delivery was changed, it was
1338 necessary to create fill pipes running to the tank to
accommodate the large hose; I believe it is a 2-inch
hose, that runs from the tank car directly into the tank.
In other words, the tank truck loads into the tank itself
and necessitated a different sized opening, different kind
of opening, and different kind of hoses.

Trial Examiner Ballinger: A large hose?

The Witness: That's right.

By Mr. Abbott:

Q. What can you say as to the comparative volume of delivery as between the tank car and truck-train method of operation which has been in effect since February, 1940?

A. Well, the truck-train, each individual truck-train brings in about as much as a tank car.

Q. That is to say, in the vicinity of from eight to twelve thousand gallons?

A. Gallons.

Q. At a delivery?

A. At each delivery.

Trial Examiner Ballinger: And it is unloaded much sooner, is it?

The Witness: I would say it is unloaded sooner, from the tank truck.

By Mr. Abbott:

1339 Q. During the time Citrin-Kolb Oil Company has been purchasing from the Standard Oil Company on a tank car or truck-train basis, do you know at what prices it had purchased the gasoline, according to that method?

A. I couldn't tell you the price—

Q. I don't mean as to what the price was, but I mean whether it was at the tank car price or what price?

A. Since they have been receiving gasoline in tank car or truck-train, they have paid the tank car price for gasoline.

Q. And has there ever been, to your knowledge, any deviation from that?

A. No, there hasn't been.

Q. And do you know what, for the most part, has been the differential during the period from 1936 to 1940, as between the dealer tank wagon price and the tank car price?

A. I would say from 1¼¢ to 1½¢.

Q. And do you know what it is at the present time? And what it has been for the past year?

A. 1½¢.

Q. 1½¢.

Mr. Austin: What gasoline is that?

By Mr. Abbott:

Q. Is that on any particular kind of gasoline?

A. Red Crown.

Q. House brand?

1340 A. House brand Red Crown gasoline.

Q. What can you say as to the differential on Stanolind and Ethyl, as compared with house brand?

A. The differential is higher on Ethyl and lower on Stanolind.

Trial Examiner Ballinger: How much lower?

The Witness: I don't remember exactly how much that is.

Mr. Abbott: We will introduce testimony on that, if the Court please.

I believe the last Respondent's Exhibit was 5. I would like to have this marked, for identification as Respondent's Exhibit 6.

(The document referred to was marked, for identification, "Respondent's Exhibit 6.")

By Mr. Abbott:

Q. Mr. Biber, I show you Respondent's Exhibit 6, for identification, and ask you to state what that is (handing document to witness).

A. This exhibit is a chart showing the set-up of the stations serviced by Citrin-Kolb Oil Company as of December 31, 1940.

Q. And is that substantially the same set-up as you have at the present time?

A. I think it is exactly the same as it is at present.

1341 Q. Exactly the same.

A. Yes.

Q. Now, Mr. Biber, Respondent's Exhibit 6, marked, for identification, has on it five vertical columns which have these headings: first, "Owned and operated." Will you state what that column means?

A. That column refers to stations in which we own the property and operate the retail business.

Q. And that consists of three stations?

A. That's right.

Trial Examiner Ballinger: Those are retail stations?

The Witness: That's right.

By Mr. Abbott:

Q. The second column is headed, "Owned and leased." What is the significance of that heading?

A. Those are locations which the company owns and are operated by independent operators.

Q. And that consists of seven stations designated by street number?

A. That's right.

Q. And the third column is headed: "Leased and operated." Will you state what that signifies?

A. Those are locations which the company holds as lessee and operates as a retail business.

1342 Q. And the vertical column 4 is headed: "Leased and subleased."

Will you state what that signifies?

A. Those are locations in which the Citrin-Kolb Oil Company are the lessee, and, in turn, sublets these stations to independent operators.

Q. That consists of 13 stations that are designated by street and number.

A. That's right.

Q. And vertical column 5 is headed: "Dealer contracts." Will you state what that signifies?

A. They are locations in which the Citrin-Kolb Oil Company has no interest, as far as lease or real estate is concerned, but are merely operated under a dealer contract relationship.

Q. This vertical column 5 has 32 stations, according to my count, designated by street and number.

A. That's right.

Q. Is that the number of stations which you supply which are not leased by you; in which you have no ownership of the land? You merely supply the person that operates the station?

A. That's right.

Q. And this accounts for how many stations, altogether, that you either own and operate or lease and operate,

1343 and those that are operated by others?

A. 58.

Q. 58 stations within the Detroit area; is that correct?

A. That's right.

Trial Examiner Ballinger: What date does Respondent's Exhibit 6 for identification relate to?

Mr. Abbott: December 31, 1940.

Trial Examiner Ballinger: Is that correct?

The Witness: That is correct, up to this present time.

Mr. Abbott: I also asked the witness if that is the same set-up that obtains today, and he said it was.

I offer this exhibit in evidence.

Mr. Austin: Do I understand that these dealer contracts, Mr. Biber, are—these are a different list of stations than these other four columns?

1344 A. That's right. There is no repetition.

Trial Examiner Ballinger: When you say "these are," what column do you refer to?

Mr. Austin: Dealer contracts in the fifth column, your Honor.

Does this statement as to operated stations correspond with the statement which was previously put in, Mr. Biber, when you were on the stand as a witness for the Commission, showing operated stations?

The Witness: Yes, it does.

Trial Examiner Ballinger: Both as to stations and as to dates?

The Witness: That's right.

Mr. Austin: Well, this only has one date, whereas the exhibit that was put in previously showed the stations operated over a period of years, but I just wanted to know if this is consistent, if it covers the same date.

The Witness: These six locations are on the other exhibits I furnished as of the date of 1940.

Mr. Austin: I have no objection.

Mr. Abbott: Very well.

Trial Examiner Ballinger: Without objection Respondent's Exhibit 6 for identification is admitted in evidence.

(The document referred to, heretofore marked for identification "RESPONDENT'S EXHIBIT 6", was received in evidence.) 1345

Q. Referring again to Exhibit 6, Mr. Biber, do I understand that the stations which are in columns one and three are the only ones that are operated by your company?

A. That's right.

Q. And all the others, including vertical column two, four, and five, are the stations that are not operated by your company; is that correct?

A. That's correct.

Q. Will you state what the policy of the Citrin-Kolb Oil Company is with reference to the operation of stations itself?

A. Well, the Citrin-Kolb Oil Company is not interested in operating retail stations; the only occasion upon which they operate retail stations is when they are responsible on a lease, or own a piece of property for which they cannot secure an operator, and during the period which there is no other operator to put into the station Citrin-Kolb Oil Company operates the retail station.

Q. And does that explanation apply to all of these six stations that you have mentioned and which appear in columns one and three of Exhibit 6?

A. Yes, it does.

Q. One of these stations, however, is one that is located at your Linwood Avenue bulk plant, is it not?

1346 A. That's right, it is.

Trial Examiner Ballinger: What has been its policy in the past, for the past four years?

The Witness: Relative to operating retail stations?

Trial Examiner Ballinger: Yes.

The Witness: That has been the policy of the company for the past four years. As a matter of fact, these stations listed here have not been operated consistently by the company for the past four years; some of them have been operated by the company only for the past few months, because they lost the former operator.

Q. Then I understand from that that during the past four or five years the number of operator operated stations have gone up and down, depending upon conditions; is that true?

A. That's right. At times we operated only one or two.

Q. You mean to say that within the last four or five years you have operated as low as one or two stations?

A. Yes.

Q. Has there been any time when you have only operated one station?

Mr. Austin: Your Honor, I would like to call Mr. Abbott's attention to the fact that—as well as your own attention, of course—that there is a statement which was submitted by this witness in the record showing the list of all stations operated by the Citrin-Kolb Oil Com-
1347 pany during the past five years, and the addresses and the length of time as to which they were operated, so it seems to me that it is unnecessary to go over that ground again with the same witness unless there is something—they desire to correct an error.

Mr. Abbott: I want to bring out here just the matter of policy of the company with reference to whether they are predominantly wholesale or a retail organization.

Trial Examiner Ballinger: Hasn't the witness fully covered that?

Mr. Abbott: I think he has now, yes.

1348 Q. Now, Mr. Biber, in your capacity as general manager of the Citrin-Kolb Oil Company, have you prepared a survey as to the cost of handling gasoline delivered in tank cars or truck-trains over the past five years, from 1936 to 1941, inclusive?

A. I don't think I understand the question.

Q. The question is—

Mr. Abbott: Will ~~you repeat that, please?~~

Trial Examiner Ballinger: Read the question.

(The question was read.)

A. No; the figures I prepared were the costs of delivering gasoline from our bulk plant by train truck to service stations.

By Mr. Abbott:

Q. Well, maybe the question is confusing. The question I meant to ask was this: Have you prepared a survey showing the cost of handling gasoline in the operation from the time it leaves your bulk plant until the time that it is placed in the tanks at the filling station?

A. Yes, I have.

Q. Has that survey been prepared in itemized form for all those years?

A. Yes, it has been.

Trial Examiner Ballinger: Did you personally prepare the statement?

1349 The Witness: It was prepared under my supervision.

Mr. Abbott: This is Exhibit 7, please.

(The document referred to was marked, for identification, Respondent's Exhibit 7.)

Trial Examiner Ballinger: The Reporter will mark the document No. 7, for identification.

By Mr. Abbott:

Q. I show you the exhibit in question, Mr. Biber, and ask you what that is.

A. That is at schedule showing the operating costs, overhead costs and the gallons handled during each year from 1936 to 1940, and then computing the rate per gallon for the years from 1937 to 1940.

Q. Now; take the first column "Year", 1936—there appears to be nothing in that but the gallons handled?

A. That's right.

Q. What is the explanation of that?

A. Well; it was my understanding that the only information wanted was from the beginning of 1937 to date.

Q. And from 1937 you have in the first column what figure?

A. The first column, the operating cost of the business.

Q. The second column?

A. The overhead costs.

Q. And the third column?

A. The total costs.

1350 Q. Which appears as what amount?

Mr. Austin: Your Honor, this is not in evidence yet; I would rather object to anything further here than is—

Trial Examiner Ballinger: Objection sustained.

Mr. Abbott: Very well.

By Mr. Abbott:

Q. And the next to the last column?

A. Is the number of gallons handled during that year.

Q. And is that in accordance with the statement you have already put in evidence as the number of gallons handled during the year 1937?

A. That's right.

Q. And the last column is what?

A. Shows the rate or cost per gallon for delivery of gasoline.

Q. Now, for the year 1938, do the respective columns show the same information as for 1937?

A. They do.

Q. And what does the last column show?

A. The last column also shows the rate per gallon for the delivery of a gallon of gasoline.

Q. Now, the figures for the year 1939, which is line No. 3, in the compilation, does that show the same data with reference to each column?

A. Yes, it does.

1351 Q. As for the other years?

A. Yes.

Q. And the last column, for the year 1939 purports to show what?

A. Also shows the rate for the delivery of a gallon of gasoline.

Q. For the year 1939?

A. That's right.

Q. Now, for the last line of the survey, line No. 4, does that show for each column the same figures as are shown for the other years?

A. It does.

Q. And the last line of the column shows what?

A. Shows the rate and cost for the delivery of a gallon of gasoline in 1940.

Mr. Austin: Are you offering this?

Mr. Abbott: I offer the exhibit in evidence.

Trial Examiner Ballinger: Does the statement cover the entire calendar years '37, '38, '39, and '40?

The Witness: That's right, it does.

Mr. Austin: Mr. Biber, this last column ~~here under~~ rate per gallon, is ~~that dollars~~ or cents or what? It isn't marked.

The Witness: That is cents.

1352 Mr. Austin: Is that first figure in that column—would that mean that that was 1½ hundredths of a cent?

The Witness: No, it means 1½¢.

Mr. Austin: That is dollars?

The Witness: From the first decimal point is dollars.

Trial Examiner Ballinger: The Examiner suggests that before it is admitted in evidence that it be so marked that we can tell the difference—the cents and the dollars.

Mr. Austin: You ought to have a dollar sign here.

Mr. Abbott: Yes.

Trial Examiner Ballinger: Let the witness make appropriate changes so that the exhibit will speak for itself without further explanation as to dollars and cents.

Mr. Austin: Mr. Biber, who prepared this schedule?

The Witness: Well, the girls in the office prepared it, the actual physical preparation.

Mr. Austin: Take this column here "operating costs.," I assume that involves a lot of items?

The Witness: It does.

Mr. Austin: Who segregated those various items making up the total to determine what each of them should be?

The Witness: The auditor and myself segregated them.

1353 Mr. Austin: And how about items comprising over head costs?

The Witness: The same thing is true on overhead costs.

Mr. Austin: You said the auditor and yourself. Who is the auditor?

The Witness: Well, there are several. There is—that is, the auditors in our office, Mr. Manning and Mr. Axelrod.

Mr. Austin: Did you say that was done under your supervision?

The Witness: Yes, it was.

Mr. Austin: You testified you were a lawyer, Mr. Biber. Have you had any accounting experience? Are you a certified public accountant?

The Witness: I am not.

Mr. Austin: What accounting training have you had?

The Witness: I wouldn't say I had any actual accounting training.

Mr. Austin: Your Honor, I am forced to object to this on the ground the witness hasn't shown qualifications to make up such a survey, and that the figures here are total figures for operating costs and totals for overhead costs, and it is not shown as to what items were included in making up those totals, or as to what accounting prac-
1354 tices were used or how those various items were arrived at. These totals are, it necessarily seems to me, more in the nature of a conclusion, and we have no expert testimony here to say they were correctly arrived at according to accounting principles. And I think on that basis the statement is not admissible. I object to it.

Mr. Abbott: I may say on that: we have other tabulations which break down these items, if the Court please; there are about 10 or a dozen schedules that itemize each one of these columns and explains just what items go into them.

Trial Examiner Ballinger: The Examiner will reserve his ruling on the objection until the other evidence is introduced.

Mr. Abbott: Very well. Exhibit 8, for identification, please.

(The document referred to was marked, for identification, "Respondent's Exhibit 8.").

Trial Examiner Ballinger: The reporter will mark the document Respondent's Exhibit 8, for identification.

By Mr. Abbott:

Q. Mr. Biber, I show you Exhibit 8, for identification, and ask you to identify that, and state what it is.

A. That is a schedule showing the actual operating costs or the costs of distributing gasoline at wholesale for
1355 the years 1937 through 1940, and itemizes the items which go to make up these costs.

Q. Does that explain the second column on Exhibit 7, for identification?

A. Yes, it does.

Q. Now, Exhibit 8, for identification, Mr. Biber, has 15 items in the first column; are those numberings of the items which appear in the second column?

A. Yes, they are.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Abbott:

Q. What does the second column consist of?

A. The second column consists of a list of items which we have taken as expense items or operating cost items charged against the delivery of gasoline.

Q. The third column is what?

A. In the amount for each of the numbered items for that year.

Mr. Austin: Pardon me—

By Mr. Abbott:

Q. For what year?

A. 1937.

Mr. Austin: It would be a great deal more helpful if I have something like that in front of me. I don't

1356 know what you and the witness are talking about.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Abbott:

Q. Now, the fourth column, Mr. Biber, is what?

A. The fourth column shows the amount of each of the numbered items for 1938.

Q. And the fifth column?

A. Shows the same thing for 1939.

Q. And the sixth column?

A. The same thing for 1940.

Q. Now, the totals at the end of each column represent what?

A. The total operating cost for the year in that column.

Q. And that includes the sum total of 15 items which appear in each column; is that right?

A. That's right.

Q. Those items are the ones that enter into actual operating costs; is that correct?

A. That's correct.

Q. Now, there is a deduction on the bottom of the exhibit which is—what does that deduction represent?

A. That deduction represents the amount of this operating cost which we allocate to products other than gasoline.

1357 Q. And what product is that?

A. Motor oil.

Q. Motor oil.

Mr. Abbott: I offer the exhibit in evidence.

Trial Examiner Ballinger: Is there an objection?

Mr. Austin: Well, yes, your Honor, but I would like a moment here, if you please.

(Counsel referred to document.)

Mr. Austin: Mr. Biber, does this statement here, Respondent's Exhibit 8 for identification, cover costs of distributing all gasoline by Citrin-Kolb, including that sold at retail stations as well as that sold to other dealers?

The Witness: Yes. All gasoline.

Mr. Austin: For instance, on this No. 1, advertising. Is that your entire advertising expense for the year?

The Witness: That's our entire advertising expense. That does not include advertising at retail stations.

Mr. Austin: It does not?

The Witness: No.

Mr. Austin: And does any of this other, heat and water and electric current, and so forth, does that include any expenses—

The Witness: No, those are expenses entailed in the delivery of gasoline from the bulk plant to our operators or to our retail stations.

1358 Mr. Austin: Are the records of your company, Mr. Biber, upon which these figures were obtained, available so that an accountant for the Commission could inspect them?

The Witness: Surely.

Mr. Austin: Make a check, if desired, and would the company be willing to have that done?

The Witness: Certainly.

Mr. Hanley: We might be willing to use the Taggart survey on this matter?

Mr. Austin: Well, your Honor, I make the same objection to this exhibit that I made to the previous one: That there is no showing, here, that this has been prepared by an expert accountant and, subject to verification, I would like to have the objection stand.

Aren't there certain items on here, Mr. Biber, such as interest and insurance, which are allocated as between your wholesale and retail stations?

The Witness: I don't know what you mean by "allocated."

Mr. Austin: This wouldn't be your total interest charge for the year on the interest of the entire company, would it?

The Witness: No. Any item here is only on the wholesale operation. The retail operation is entirely separate, on a separate balance sheet and set of books.

1359 Mr. Austin: Isn't there necessarily some separate allocations between wholesale and retail on some of these figures? Didn't you have to divide up certain figures and allocate certain parts, such as insurance, for instance, to wholesale, and certain to retail; or as to interest?

The Witness: No, I don't believe so.

Mr. Austin: How about taxes, telephone expenses? Were those already segregated?

The Witness: Yes.

Mr. Austin: They were segregated on your books, no doubt, but how were they segregated as between wholesale and retail?

The Witness: As an example, the taxes we figured on the wholesale were personal property real estate taxes and Social Security taxes and other government taxes on the property, real estate, personal property or covering the employees operating out of the bulk plant and bulk stations for the office.

Mr. Austin: Were there any joint costs incurred as between the wholesale and retail operation?

The Witness: No, I can't conceive of any joint costs.

Mr. Austin: Well, do I understand, then, that you can testify from your own knowledge that these are actual expenses? Is this on a cash basis, I assume; actual ex-
1360 penses that were paid for these various items?

The Witness: That's right. My job was to ask for the items which I thought were the actual cost and distribution and the auditors' job was just to give me the figures that were prepared over the years, in the books.

Mr. Austin: Did your calculation of these figures involve any joint cost calculations or allocations?

The Witness: You mean both; between wholesale and retail?

Mr. Austin: Yes.

The Witness: None.

Mr. Austin: Now in deducting this five per cent, here, for oil. What was the basis of that deduction? How did you arrive at the five per cent?

The Witness: That is five cents per gallon.

Mr. Abbott: Not five per cent; five cents.

Mr. Austin: That is a deduction of five cents per gallon?

The Witness: Per gallon, for every gallon of motor oil sold.

Mr. Austin: And how is that arrived at?

The Witness: It was a calculation that we arrived at from our experience, there being no absolutely positive way of knowing what part of the expense to be allocated to motor oil, because there are instances where a gasoline truck also carries motor oil. 1361

Mr. Austin: How did you arrive at the figure five cents a gallon?

The Witness: From our experience we were able to compute the cost of delivering motor oil when it was not involved in a gasoline delivery. We knew the cost of our stake trucks or other vehicles which do not carry gasoline. We took the items of insurance. Allocated to those trucks the salaries. Allocated the salaries to men who load and unload motor oil and those that deliver motor oil and that figure was very close to five cents a gallon and we thought that would be a fair figure to use throughout that period.

Mr. Austin: Is this figure for oil the same each year? I notice it is based on 75,000 gallons, apparently.

The Witness: Because that is very close to what it is.

Mr. Austin: You mean you sold practically the same amount for each one of these years?

The Witness: 1937 to 1940.

Mr. Austin: Isn't that somewhat unusual; there should be almost the same amount of oil sold each year?

The Witness: No. Your oil is pretty well determined by your gasoline sales and your—

Mr. Austin: They varied, didn't they?

The Witness: They didn't vary enough in proportion to vary the oil sales, very much. 1362

Mr. Austin: Your Honor, I have no objection to this schedule, so far as it covers these fifteen items and what the expenses of the company are, with the understanding that the figures are available for check, but as to the allocation of five cents a gallon for oil, I don't know whether that is correct or whether it is not correct and I don't think this witness is qualified to say whether or not that is a proper amount. Maybe it is too low and maybe it is too high. I don't know.

Mr. Abbott: He is the only one that is qualified in his company to make that allocation; from his own testimony.

Mr. Austin: It seems to me that is a matter that requires the opinion of an expert accountant to know how that allocation should be made. All that has been said here is that the witness thinks that it was done fairly. I have no doubt he thinks it was done fairly, but I don't know whether he knows.

The Witness: Mr. Austin, this amount, if it were eliminated—if it were doubled or eliminated altogether, would hardly alter the overall costs at all. The amount is so small and insignificant, compared with the total, that I don't think it would alter the cost. If we left the whole thing in I don't think it would alter the cost of rate per gallon by 1/10 of a cent.

1363 Mr. Austin: I haven't figured that through, Mr. Biber. Maybe that is correct. It appears to me quite a difference in the total of operating cost, but perhaps, applied to the gallonage cost, it may not. I don't know.

Trial Examiner Ballinger: Does counsel for the Commission desire an opportunity to examine and inspect the books, or do you intend to avail yourself of the opportunity which has been offered?

Mr. Austin: Well, your Honor, I would like to say yes to that; that we do expect to avail ourselves of the opportunity, provided it seems necessary to do so, after the figures have been reviewed by the Commission's accountants.

Trial Examiner Ballinger: Then after that inspection do you desire to reserve cross-examination of this witness until that is done?

Mr. Austin: Oh, yes, absolutely.

1364 Trial Examiner Ballinger: With that understanding, the Examiner will reserve his ruling upon the admissibility of Respondent's Exhibit 8 until a later date.

Mr. Abbott: Very well.

I would like to have these documents marked, for identification.

Trial Examiner Ballinger: The reporter will number the documents handed to him by counsel for the Respondent's Exhibits 9 to 15, respectively, for identification.

(The decouments referred to were marked, for identification, "Respondent's Exhibits 9 to 15.")

By Mr. Abbott:

Q. Mr. Biber, I show you Exhibits 9 to 15, inclusive, marked for identification, and ask you to state what they are.

Starting with Exhibit 9, which is headed "Schedule of Operating Costs." Is that heading correct?

A. It should be "Schedule of Overhead Cost" in the form of Exhibit 6.

Q. I will make that correction. That should be "overhead" instead of "operating"?

A. That's right.

Q. And what does that Schedule 3 consist of, Exhibit 9, for identification?

1365 A. That consists of a schedule of overhead costs chargeable to the distribution of gasoline at wholesale.

Q. And is that a break-down of a figure which appears on Exhibit 6?

A. Yes, it is.

Q. What figure is it that appears on Exhibit 6 you have there, of which this is a break-down?

Mr. Austin: What is Exhibit 6? Which is Exhibit 6?

A. It is Exhibit 7. That is in the fourth column, under "Overhead cost."

Q. This Exhibit 9, then, is a break-down of the items which enter into that column?

A. That's right.

Trial Examiner Ballinger: What column of Respondent's Exhibit 7, for identification?

The Witness: Fourth column of Exhibit 7.

By Mr. Abbott:

Q. And that consists of 10 items, does it not?

A. That's right.

Q. As shown by Exhibit 9?

A. That's right.

Q. And the totals at the end of the column for each year. Are those the same as appear in the totals in column 4 of Exhibit 7, for identification?

A. They are.

1366 Q. Referring to "Overhead costs"?

A. That's right.

Q. Now, referring to Exhibit 10, for identification, will you state what that consists of?

A. Exhibit 10 is a schedule of depreciation taken from the income ~~tax~~ return of the company on those items applicable to ~~the~~ distribution of gasoline at wholesale.

Q. And are the totals shown for the years 1937, 1938, 1939, and 1940, the same as appear on Exhibit 7, which was introduced for identification?

A. No, these totals appear—

Q. They appear on a previous exhibit. Will you state which one?

A. On Exhibit 9.

Q. And this shows the depreciation on real estate, does it not?

A. That's right.

Q. On how many locations?

A. There are three locations mentioned, but inasmuch as we only use two for bulk plant facilities, we have only taken the depreciation on the two bulk plant locations.

Q. And the one at Meyers and Lyndon, you have taken no depreciation on?

A. No.

Q. Exhibit 11, for identification, shows what?

1367 Mr. Austin: Will you pardon me, Mr. Abbott?

Mr. Abbott: Do you wish to ask a question?

Mr. Austin: Yes.

On this one it says: "Warehouse, land, and building," on this No. 10, for identification. Is that Linwood?

The Witness: That's Linwood, yes.

Mr. Austin: In other words, if the top one says Livernois and Linwood—

The Witness: That's the address. That is the Linwood and Detroit Terminal Railroad warehouse.

By Mr. Abbott:

Q. In other words, there is no warehouse at Livernois and Linwood: is that right?

A. There is, but we don't call it a warehouse.

Q. Go to Exhibit 11, for identification. What does that exhibit purport to represent?

A. A schedule of depreciation of equipment or personal property used by the company in the distribution of gasoline at wholesale.

Q. And does that show the depreciation there for each of the years, for 1937, 1938, 1939, and 1940?

A. Yes, it does.

Q. And that also ties in with the previous exhibit, showing depreciation?

A. That's right: on Exhibit 9.

1368 Q. On Exhibit 9, for identification.

A. Yes.

Mr. Austin: Mr. Abbott, would you mind asking him if that was taken from depreciation figures from the income tax returns?

By Mr. Abbott:

Q. Is that rate taken from the rate you took on your income tax returns?

A. That's right.

Mr. Austin: Federal Income Tax?

The Witness: It is.

By Mr. Abbott:

Q. Figured at 6%?

A. That's right.

Q. Exhibit 12 represents what?

A. It is an obsolescence estimate of items used in the distribution of gasoline at wholesale.

Q. Showing for each of the years 1937, 1938, 1939, and 1940 the same figures that appear on Exhibit 9, for identification?

A. That is correct.

Q. And Exhibit 13?

A. Exhibit 13 is a schedule showing interest on money used and invested by the company in order to operate the distribution plants for the distribution of gasoline.

1369 Q. And does this show those items for all of the four years in question?

A. 1937 through 1940.

Q. And reflects the totals as shown on Exhibit 9 of those items?

A. That's right: they do.

Q. This covers the matter of interest on the use of money invested?

A. That is correct.

Q. Exhibit 14 shows what?

A. Exhibit 14 is a schedule showing the cost or interest on money invested for the purchase of personal property by the company, which said personal property is used in the distribution of gasoline at wholesale.

Q. And does it also reflect for each of the years in question the same items as are shown on Exhibit 9, for identification?

A. It does; from 1937 through 1940.

Q. Exhibit 15?

A. Exhibit 15 is a schedule showing the interest on the investment of real estate used by the company in the distribution of gasoline at wholesale covering the bulk plants and bulk plant property.

Q. And is that shown for each of the years 1937, 1938, 1939, and 1940?

1370 A. Yes, it is.

Q. And those totals on the last column, are those a tie-in with Exhibit 9, for the same item? Namely interest on the investment of real estate?

A. Yes, they are.

Q. Yes.

Mr. Abbott: I offer the Exhibits 9 to 15, inclusive, in evidence.

Mr. Austin: May we make the same objections I made to Respondent's Exhibit No. 9, and request that the same ruling be made? In other words, that ruling be reserved pending an opportunity to cross-examine and to check these figures.

Trial Examiner Ballinger: The Examiner withholds his ruling as to the admissibility of Respondent's Exhibits 9 to 15, for identification, until Counsel for the Commission has had opportunity to examine the records and further examine the witness.

Mr. Hanley: If your Honor please, do we understand that the Government is going to cross-examine twice on this thing? They have already been cross-examining this witness. Are they going to cross-examine to predicate an objection and then cross-examine after the exhibit is admitted? What is the procedure here?

Trial Examiner Ballinger: Judge, there is a serious 1371 question in the mind of the Examiner as to whether these exhibits have been sufficiently authenticated.

and if you desire to press that question at this time, the Examiner is prepared to rule.

If, on the other hand, any possible defects may be cured, completely cured, by affording the Commission an opportunity to examine the records, it may save an immense amount of time.

Mr. Hanley: We don't want this witness on for direct, having Mr. Austin objecting and cross-examining as he is giving his direct examination, and that's what the Government has just been doing right along, here, this afternoon.

We haven't any objection to producing the information or the witness being subjected to cross-examination, but we think that he ought to be permitted to give his direct examination without continuous interpolation of cross-examination.

Mr. Austin: I only intended, when these papers were offered for identification—I assume I am entitled to ask some questions with regard to identification of the document. I hadn't intended to go beyond that, Judge.

Trial Examiner Ballinger: It is the intention of the Examiner to permit the cross-examination to proceed as though these papers had been admitted in evidence and if,
subsequently, an investigation discloses that the pa-
1372 pers have not been sufficiently authenticated, or they
are inaccurate and should not be admitted in evidence, to then deny the admission of the documents in evidence and strike the witness' testimony predicated thereon.

With that understanding, you may proceed.

Mr. Abbott: Will you mark these documents, for identification (addressing the reporter)?

1373 Trial Examiner Ballinger: The Reporter will mark
the documents Respondent's Exhibits 16 and 17 for identification.

(The documents referred to were marked "Respondent's Exhibits 16 and 17" for identification.)

Q. Mr. Biber, I show you Respondent's Exhibit 16 for identification and ask you to state what that is?

A. It is a computation or breakdown of gasoline sold during each year from 1938 to 1940, inclusive, showing the number of gallons sold at retail and the number of gallons at wholesale and number of gallons sold to consumers on wholesale accounts; showing the total wholesale and retail sales and percentages of each.

Q. Showing the wholesale and retail operation and percentages, ratios of each?

A. Yes.

Q. This is broken down to five years; 1936 to 1940, inclusive, is it not?

A. Yes.

Q. And it has seven horizontal columns, and what does each one of those columns show?

A. Column 1 is the retail sales through outlets operated by the company.

Q. That is the figure that the Examiner asked you to give once before?

1374 A. That's right. Column 2 is wholesale sales to retail outlets.

Column 3 are wholesale sales to consumers.

Column 4 is a total of items 2 and 3, or the total wholesale sales.

Column 5 are the total sales.

Column 6 is the percentage of retail sales through outlets operated by the company and column 7 is the percentage of total wholesale sales.

Q. To the total sales?

A. Percentage to the total sales.

Mr. Abbott: I offer Exhibit 16 in evidence.

By Mr. Abbott:

Q. Is this exhibit compiled from data under your supervision in the office of the company?

A. That is right, it is.

Mr. Austin: No objection, your Honor.

Trial Examiner Ballinger: Respondent's Exhibit 16 for identification is admitted in evidence.

(The document referred to, heretofore marked for identification "RESPONDENT'S EXHIBIT 16", was received in evidence.)

By Mr. Abbott:

Q. I show you Respondent's Exhibit 17 marked for identification, and ask you what that is?

1375 A. That is a further breakdown of the distribution of gasoline per station and per gasoline pump.

Q. Now, Exhibit 17 shows the records for each year, 1936 to '40 inclusive, does it not?

A. That's right, it does.

Q. And is it compiled from records in the office of the company?

A. Yes.

Q. Under your supervision?

A. Yes, it was.

Q. It shows not only the gallonage for each year but also the number of pumps that were operated?

A. That's right.

Q. And in the last column it shows the average gallonage per pump?

A. That's right.

Mr. Abbott: I offer the Exhibit in evidence.

Trial Examiner Ballinger: Any objection?

Mr. Austin: I don't see the materiality of this, your Honor, and I would like to ask—because this simply shows the total number of stations, and the total number of pumps, average gallonage sold per station, and average gallonage sold per pump. It says "To the outlets of Citrin-Kolb Oil Company"; does that include retail outlets?

The Witness: It includes them all.

1376 Mr. Austin: It includes all stations operated or supplied by Citrin-Kolb?

The Witness: Yes.

Trial Examiner Ballinger: You mean all retail stores?

Mr. Austin: Retail and wholesale.

They are all retail stations, yes, your Honor, but they are the stations to whom Citrin-Kolb sells, as well as the ones Citrin-Kolb operates.

By Mr. Abbott:

Q. This includes all the 51 stations?

A. Yes.

Mr. Austin: Regardless of whether Citrin-Kolb operates them or sells the gasoline to the operator?

Trial Examiner Ballinger: Does this relate to retail, or does it take in—strike that out.

This relates exclusively to retail establishments either operated or served by Citrin-Kolb?

Mr. Austin: That's right.

Mr. Abbott: That's right.

Mr. Austin: I object to it upon the ground that it is irrelevant and immaterial.

Trial Examiner Ballinger: Do you consider it material to your case?

Mr. Abbott: Yes, we do.

1377 Trial Examiner Ballinger: Objection is overruled and the document is admitted in evidence as Respondent's Exhibit 17.

(The document referred to, heretofore marked for identification "RESPONDENT'S EXHIBIT 17", was received in evidence.)

By Mr. Abbott:

Q. You heard the testimony, I believe, Mr. Biber, which was introduced in the Government's case of the witness Paul Harrison, regional director of the Sun Oil Company, relative to the cost of handling gasoline; did you not?

A. Yes, I did.

Q. And the figures as shown on Exhibit No. 7 for the rate per gallon of distributing gasoline at wholesale of the Citrin-Kolb Oil Company for the year 1937 shown as .0154, or approximately 1½¢ per gallon?

A. That's right.

Q. I believe the testimony of Mr. Harrison given in his testimony was that the cost of handling gasoline at wholesale in the Detroit area is .76¢ per gallon; do you recall the testimony to that effect?

A. Yes, I do.

1378 Q. How do you account, if you do account, for the difference between your handling costs and Mr. Harrison's testimony as to such handling costs?

Mr. Austin: I object to that, your Honor, upon the ground that this Respondent's Exhibit 7, for identification is not in evidence; counsel has read a figure from it, and upon that he predicates the difference between that figure and Mr. Harrison's figure, and it is not apparent that any difference exists until this figure, as offered today, is established.

Mr. Abbott: I understand—

Trial Examiner Ballinger: The Examiner has announced that he will permit an examination of this witness based upon these documents to the same extent as though they had been admitted in evidence, reserving to counsel for the Commission the right to move to strike at a later date; if the exhibits marked for identification should be excluded from the evidence then the testimony of the witness based upon those exhibits will likewise be stricken.

Mr. Austin: Very well, your Honor. Then, I would like to have—

Trial Examiner Ballinger: And then Examiner adopts that course, believing it will save time.

Mr. Austin: I would like to have an exception noted to any line of testimony based upon these exhibits. 1379 I understand that that is noted.

Trial Examiner Ballinger: Certainly this line of testimony is now being permitted subject to an objection and later to a motion to strike.

Mr. Austin: Yes.

Trial Examiner Ballinger: The Examiner believes that such a course will greatly facilitate the expedition of the case.

Mr. Abbott: Will you repeat the question to the witness, please.

(The question was read as follows: "How do you account, if you do account, for the difference between your handling costs and Mr. Harrison's testimony as to such handling costs?")

Mr. Austin: Your Honor, I will have to object to that question, perhaps, upon the further ground that that calls for a conclusion of the witness upon questions of accounting as to which it appears he is not qualified to answer. Both of those cost items were made up of a great many components.

Trial Examiner Ballinger: Even though he is not an accountant, isn't he fully qualified to explained the basis upon which this statement is made up, and the difference between that and the basis of the statement made up by the accountants?

1380 Mr. Austin: Well, I don't think he knows how Mr. Harrison's statement is made up. I don't know how it is made up. And I don't believe that this witness' conclusion as to the difference between Citrin Kolb operating cost and Sun Oil operating cost is of any materiality.

By Mr. Abbott:

Q. Mr. Biber, you are familiar with the testimony of Mr. Harrison given at the previous hearing, are you not?

A. Yes.

Q. In the month of March?

A. I am.

Q. And the question as I am asking you is how you account, if you do account, for the difference between Mr. Harrison's statement as to hauling and handling cost and your statements as you have just stated it in your testimony based on Exhibit 7, for identification.

Trial Examiner Ballinger: You were present and heard Mr. Harrison's testimony, weren't you?

The Witness: Yes, I did.

A. Mr. Harrison testified—

Mr. Austin: Did your Honor rule on that? I want to press the objection that this witness isn't qualified to draw a conclusion as to what Mr. Harrison said about the Sun Oil Company, and what he knows about Citrin-Kolb.

1381 Mr. Abbott: We are not asking for him to express any conclusion, we are merely asking him to state what the difference is, or if he accounts for the difference between Mr. Harrison's testimony and his testimony, based upon any factual situation which exists.

Trial Examiner Ballinger: Objection is overruled. The witness may answer.

Mr. Austin: Exception.

A. Mr. Harrison testified that they delivered one brand of gasoline, Blue Sunoco, and our cost includes the delivery, the loading and unloading at the station and at the bulk plant, of three separate brands of gasoline.

By Mr. Abbott:

Q. Would that account for any difference?

A. I would say it would, in that it takes three operations or three pumps to load a truck rather than having it loaded from one pump; it also means we have to unload the gasoline into three separate tanks at the service station, rather than unloading one load into one tank.

Q. But the loading operation and the hauling operation in your case involve the same truck, or could it be done on one truck?

A. It can be done on one truck.

Q. For all three brands?

A. Yes. But it sometimes has to be done on more than one truck, if the compartments do not accommodate

1382 the order.

Trial Examiner Ballinger: That is, a truck has more than one compartment?

The Witness: Yes. And Mr. Harrison testified that there were no administrative costs or executives' administrative costs allocated to the cost of delivery of gasoline in the figures which he produced. And our figures include salaries to the partners, and other administrative costs, as well as depreciation, obsolescence, and so forth, and the adding of those figures to any figures that Mr. Harrison has given would account for a difference.

By Mr. Abbott:

Q. Anything else in the factual situation as you see it?

A. Mr. Harrison testified to the fact that they made deliveries on a certain schedule or route, and that his trucks ran for 18 hours a day.

Q. What is the situation in your picture?

A. We deliver only upon order, and our deliveries are much smaller than the minimum that Mr. Harrison says—I believe he says he placed the minimum of 2,000 gallons. Our minimum is anywhere from 250 to 400 gallons.

Q. Is the cost of handling 400 to 500 gallons orders larger proportionately than the delivery of 2,000 gallon orders?

A. Not only is the cost of handling it more, but it
is obvious that if you deliver 300 gallons to a station,
1383 he is probably going to order gasoline every day,
where if you deliver 2,000 gallons, you won't have to
make that call again for a week or two weeks.

Q. That is, assuming that the station has a gallonage—

A. I am assuming that they have—

Q. —of what average?

A. Of equal volume to our stations.

Q. What would you say that is?

A. I would say an average gallonage per station of around eight to 10,000 gallons a month.

Q. Of course, if the gallonage of a station was 8,000 gallons a month, and deliveries of 2,000 gallons at a time, you are assuming that there would only have to be four deliveries a month?

A. That's right.

Q. And would that have any appreciable effect on the cost of handling?

A. I think it affects the greatest item in the cost of handling, the delivery cost.

Q. And you referred also to the fact that he testified that deliveries of Sunoco was made on schedule?

A. That's right. He testified—

Q. Are your deliveries made on schedule?

A. No. We deliver only on order, 'phone order.
1384 Q. In other words, whenever the filling station man

wants gasoline, he telephones your station, does he, your bulk plant?

A. That's right.

Q. And when he telephones your bulk plant, do you send him his order of gasoline?

A. That's right, we do.

Q. Do you regulate the amount of delivery, or does he?

A. He regulates the amount of delivery.

Q. By that you mean that the filling station operator tells you how much he wants?

A. That's right.

Q. Now, you testified when you were on the stand last month that you gave certain discounts to three retail dealers, serviced from your bulk plant. Those dealers—one of them was Langer and Cohen; how many stations do they operate?

A. Five.

Q. And one other was Ferguson and Coury; how many stations do they have?

A. One.

Q. Where is it located?

A. 8501 Gratiot Avenue.

Q. And the other was who?

A. The other was Sid's Superservice on Chicago and Dexter.

1385 Q. What did the discount or preferential treatment consist of in the latter case, the Chicago and Dexter location?

A. It was the waiver of rent for a period of three months during the gas war, during a period when Cities Service station directly across the street had instigated a gas war in the neighborhood. And in order—

Q. Was there any preferential given in the price of gasoline to that station?

A. To the station at Chicago and Dexter?

Q. Yes.

A. There was not.

~~Q. Merely the preferential consisted only in the cancellation of three months rent?~~

A. That's right.

Q. What rate per month?

A. $235 per month.

Q. What was the reason for that cancellation, if any?

A. Well, the operator, in order to maintain his business, had to meet competition of the station across the street, and he came into the office and told us he would not be able to operate—not be able to pay his rent, or not be able to exist in business if he had to continue the same overhead and sell at the cut-rate prices. So in order to keep him in business, we waived that rental for the period of three months.

1386 Q. Was there any other competition that he had had, or that he mentioned, except the Cities Service station across the street?

A. Yes. He had Zip station just one block away.

Q. That is at the corner of Dexter and Boston?

A. That's right.

Q. And do you know how much they were selling for at that time?

A. 10 gallons for $1.

Q. How much per gallon, if you remember, or if you know, was that under the prevailing filling station rate at that time?

A. I believe it was 5½¢ under the prevailing rate.

Q. So from the Cities Service station across the street, the station at Chicago and Dexter had to compete with a 2¢ discount?

A. That's right.

Q. Per gallon?

A. That's right.

Q. And on the Joy stations, they were required to compete with a 5½¢ discount per gallon?

A. Yes.

Mr. Austin: He said Zip station.

The Witness: Zip station.

Mr. Abbott: I stand corrected on that question. It
1387 was a Zip station instead of a Joy station.

By Mr. Abbott:

Q. Now, with reference to Langer and Cohen, you say that they were operating five stations at the time when you gave them preferential treatment with reference to the price of gasoline—and what year was that?

A. 1936.

Q. At that time did you give them any preference based on volume?

A. Yes. Preference was based on volume.

Q. What was the volume they were consuming at that time at the five stations they operated?

A. They had a volume of a million gallons a year.

Q. And was there any other feature that entered into the question of—or the matter of giving them preferential treatment?

A. Yes. The real reason for giving them this treatment in the beginning was to meet the competition of other offers which they had.

Mr. Austin: Your Honor, I object to the question, any further questions as to the reasons for Citrin-Kolb giving preferential treatment to a service station on the ground it is immaterial and irrelevant to any of the issues in the case.

Mr. Abbott: There have been questions, to which we have objected, as to the relevancy of this, but we have 1388 to meet it because of the fact that they have introduced testimony to show that there has been some preferential treatment given by the jobbers whom we supply to resellers whom they, in turn, supply. And I think we have to show the justification for the preferential treatment given by the jobber to his retailers, in order to meet the Government's case.

Mr. Austin: My theory there is if the preferential price which the customer, such as Citrin-Kolb, receives, enables him to pass part of it on, that that is the end of the matter. And as to whether he has also some other reason for passing it on, or why he decided to pass it on, is immaterial, as long as it actually was passed on.

Mr. Abbott: It was done in order to meet the competition in the neighborhood where the reseller is located. I think that is material under the Act.

Trial Examiner Ballinger: The Examiner is under the impression that the main question here is whether or not the Respondent was giving preferential to customers. In other words, discriminated in the prices in selling to its customers, and the effect of that. Isn't that the only question?

1389 Mr. Abbott: If you are getting into the effect of that, we have to go into this line of inquiry. We have ~~got to show that the reason why the reseller is given preferential treatment, so-called, by the so-called jobber.~~ If you are going to present the whole picture, then we have got to go into this situation to show that this whole thing is occasioned by the necessity for meeting competition in the particular neighborhood where the retail station is being operated.

Mr. Hanley: Isn't the short answer to this objection, why did the Government prove it in the first place if it isn't material? Having proven it, aren't we under an obligation to answer it?

Trial Examiner Ballinger: Did the Commission in its case in chief go any further than to offer testimony tending to show the prices at which gasoline was being sold to the retailers, and the cost of marketing the gasoline, and the effect upon the retail trade?

Mr. Abbott: Well, the effect which they claim was that it caused price cutting. Now, we are attempting to show by this testimony that the reason for the preferential treatment brought out by the Government itself on its case in chief was that it was necessary for the reseller, the retailer, to meet competition in the neighborhood. Now, they brought it up; we have to meet that.

1390 Trial Examiner Ballinger: But here is a retailer that is both a jobber and a retailer, and do you think that it is proper for you to show that it was necessary for you to sell to this jobber and retailer at a price so that he could retail in his retail stores gasoline to meet the competition of some other competitors?

Mr. Abbott: This doesn't involve stations where he retails himself. This is a case where he sold to the Langer and Cohen, one of his retailers.

Your Honor, you see, this doesn't involve one of our company operated stations, one of Citrin-Kolb operated stations—

Trial Examiner Ballinger: I think you are a step removed from any question there is in this case.

Mr. Abbott: Well, I think we have to show that in order to rebut the Government's case. Because if they hadn't gone into it, of course, we wouldn't be required to meet it at this time.

Trial Examiner Ballinger: What testimony do you think the Government admitted that renders this testimony—the Government offered, that you think renders this testimony necessary?

Mr. Abbott: They brought it out themselves that we made—there were three cases, Langer and Cohen, Ferguson and Coury, and Chicago and Dexter, known as 1391 Sid's Super Service Station, where there were discounts or some preferential given by Citrin-Kolb Oil Company in 1936, 1937, and 1938.

Now, there has been testimony here already—

Trial Examiner Ballinger: Citrin-Kolb Company isn't the Respondent.

Mr. Abbott: I know, but these are not stations, if your Honor please—these three stations are not stations operated by them, these are all stations operated by resellers whom they supply. Now, the Government has sought to show by other testimony of people who complained about these stations as to which preferential treatment was given, that they were instigating price cutting in those communities.

Now, we have a right to show what the competitive situation was around these stations which made it necessary, or any other fact which made it permissible under the act for these people to be given preferential treatment.

Trial Examiner Ballinger: You mean you are going to try to show by this situation that rendered it necessary for the Respondent to sell to them at tank car rates?

Mr. Abbott: No, not made it necessary to sell to them, that wasn't the reason why we sold to them.

Trial Examiner Ballinger: If it doesn't run to that, the objection is sustained.

Mr. Hanley: Doesn't it, your Honor, go to the effect of what the Respondent did on competition and on gaso-
1392 line commerce? We are in this position, if your Honor excludes this testimony, of being charged by the Government with having done a thing which they say is wrong, and they were permitted to put in evidence of this thing over our repeated and strenuous objections, as your Honor knows. Now, it is in, and they say it proves we are guilty. Certainly we are entitled to put in a defense. We still say it is not material, and the Government now seems to be taking a similar position. But it is in here, and certainly we are not to be forced to stand mute, are we, and permit the Government to say, "You are guilty, but we won't let you put in a defense"?

Trial Examiner Ballinger: Judge, so that we may know definitely and certainly what we are talking about, what evidence do you refer to?

Mr. Hanley: I refer, your Honor, to all of the evidence, whether it had to do with Citrin-Kolb, or whether it has to do with the Ned's Service Stations, wherein the Government undertook to prove:

1. That certain of these wholesale customers of the

Respondent gave a price to some of their customers less than the tank wagon price that was prevailing in Detroit at the time.

2. I refer to that evidence wherein the Government sought to prove that in direct operations of retail 1393 stations wherever that occurred in the case of these wholesalers, that there was or were instances of sales of gasoline below the prevailing retail market in Detroit.

Now, that fact coupled with the fact that "you, Respondent, gave a preferential, that is tank car as distinguished from tank wagon, results in an injury to competition, and a violation of this law." We say, "No, it does not." Because even if true, that these preferential tank wagon prices and preferential retail prices, if you please to call them that, given by any of these four wholesale buyers, were justified by those wholesale buyers, and if they were justified in doing what they did we can't be guilty of any violation of this law.

Trial Examiner Ballinger: Judge, I understand the position of the Commission to be in substance this: That in three instances the Respondent sold to companies operating both a jobber's business, and also retail stores at a preferential price over that which the other retail stores obtained from Respondent. The mere fact that it gave these four stations a preferential rate placed in the hands of those stations an opportunity to afford to sell at a reduced price. And that the testimony goes a step further and shows that they actually availed themselves of the opportunity. Now, with that situation I don't see that this testimony is material.

Mr. Hanley: We say yes, admitting that the Gov- 1393½ ernment did pull that a step further, which we say they had no right to do, but that is an issue ultimately in the case. They did go that step, the evidence was received. Now we say all right we have got to meet it. They were justified in availing themselves of what your 1394 Honor has said is an opportunity to make a lower price, but if they were justified in making that lower price, then we say, first, we cannot be held responsible in any event for what they did; but if justified, secondly, and surely there has been no injury to gasoline commerce and competition in Detroit. The opportunity, your Honor, certainly isn't a sufficient thing to establish our guilt under this statute. A man has a jack knife in his pocket, he has the opportunity to cut somebody's throat, but he is not a murderer until he does.

Trial Examiner Ballinger: What counsel is now attempting is justification for the acts of one of the customers.

Mr. Hanley: Exactly.

Trial Examiner Ballinger: (Continuing.) Of the Respondent company, in selling gas at a reduced price.

Mr. Hanley: Exactly.

Mr. Austin: That is just the point, your Honor, the statute makes that sort of justification a defense to the Respondent, because the statute says that, and the statute doesn't go any further, so it is not a justification.

Trial Examiner Ballinger: That is the view the Examiner takes, and the objection is sustained.

Mr. Hanley: I want to make this statement on the record, if it please your Honor. It now appears that the
Government, having introduced evidence of the use
1395 by the four wholesalers involved in this action of a
differential, which use was, according to the Government's proofs, or claimed proofs, to depress the tank wagon market to the customers of such wholesale dealers, and in some instances where such wholesale dealers operated service stations at retail directly, it is claimed by the Government that the margin of differential had by such wholesale customers was used to depress such retail market for gasoline in Detroit. The Government advanced this proof, and it was received over the objection of Respondent, and upon motion of the Respondent to strike it from the record, such motion has been denied, and all of that testimony stands in the record.

Further, that the Respondent conceives it to be its duty primarily to justify its own prices, irrespective of anyone else's prices, and has repeatedly asserted that position upon the record, and insisted that the Respondent did not have either the obligation or the right to police the disposition or pricing of gasoline once it was sold to Respondent's customers, but Respondent having been consistently overruled in that position, Respondent now asserts that it has the right, certainly, if not the absolute duty, to meet the testimony which has been admitted and stands in the record in support of the Government's contention that Respondent has violated the law.

Further, it is the position of the Respondent that
1396 it assumes and discharges the burden of justifying

such prices as may have been made by Respondent's four wholesale customers, that whatever effect, in fact, the making of such prices by said four wholesale customers may have had, relieves that effect of any legal onus or oprobria, and that Respondent cannot be held liable for a violation of a statute prohibiting an injury to competition, when it is factually demonstrated that the results of Respondent's conduct and actions utterly failed to have any such injurious effect upon competition, which would necessarily be the result from a legal standpoint if it is shown that the prices paid by the customers of Respondent claimed to have been given a preferential price did not improperly or illegally use that preferential price to injure competition or restrain trade in any substantial degree. And at this time Respondent offers to prove by question and answer by this witness, and by others, that in every instance in which any of these wholesale customers extended to their customers a tank wagon price below the prevailing tank wagon price in Detroit, that such extension of price was fully and legally justified.

And further offers to prove by this witness, and other witnesses, and by competent evidence, that in every instance where these wholesale customers of Respondent operated any service stations directly and sold gasoline at below the prevailing retail price in Detroit, that 1397 such reduction was fully and legally justified, and that in turn that fact cannot be used against the Respondent in this action.

1398 Trial Examiner Ballinger: Judge, if you will make a proffer of what you propose to prove by this witness, the Examiner is prepared to rule and that will put the question square to the Commission and to the Courts.

Mr. Hanley: The best way we can make the offer of proof is by question and answer. I know of no fair way to make an offer of proof except by question and answer.

Mr. Abbott: May I also make this suggestion: Do I understand that the last objection has been sustained?

Trial Examiner Ballinger: Yes.

Mr. Abbott: I want to say this, in addition to what Judge Hanley has said: That a great deal of testimony will be offered along this line, and it seems to me that with all deference to your Honor's ruling that it might be handled in this way: that the Examiner take the evidence and then, if, at the conclusion of the Respondent's case, it should be determined that it should be stricken, then it may be stricken, but if it is ruled out at this time, it will result in not taking the evidence.

Trial Examiner Ballinger: If the Examiner entertained any doubt in his own mind, I would adopt the course suggested by counsel, which is the safe way where it admits of doubt, but the Examiner is of the opinion that under the applicable law under which we are proceeding, when discrimination, commerce, and competition are shown,
1399 that it is unnecessary for the Commission to proceed further. That then it is up to the Respondent to show justification, not justification for the acts of those to whom the Respondent sells but justification for the acts of the Respondent in selling to those parties, and here you have a situation where the Respondent is dealing both with retailers and with jobbers and with jobbers also engaged in jobbing and in retailing and selling to those jobbers who are performing the dual business of both retailing and also jobbing at the jobber's rates.

Now, the Examiner is of the opinion that it is too plain to admit of doubt. It is incumbent upon the Respondent to justify its act in selling to those customers who are conducting a dual business of retailing and jobbing at a preferential price.

Mr. Abbott: It is our contention, of course, that we were not under the duty to police the jobber and superintend the disposition of the product after it came into his legal custody and after the title passed to him, but we were overruled on that and now we are put in the position of not being able to answer the conditions which have been established upon the Government's case in showing justification for the very things that they have claimed and brought up in the testimony. They were the ones that brought up the matter of these three preferences.

1400 Trial Examiner Ballinger: It is the opinion of the Examiner that it was unnecessary for the Commission to have gone any further than to have shown discrimination. I think the Commission could have properly stopped there.

Mr. Abbott: Then, it is up to us to show justification.

Trial Examiner Ballinger: But the Commission went a step farther in order to be on the safe ground and did show a utilization by the customer of that preferential price to the detriment of competitors. Now, the matter is in the record and probably may be essential.

Mr. Abbott: On the question of detriment to competitors, the thing we are trying to show by this testimony is that this situation was just necessitated by competition in the neighborhood and we are going to show that by competent testimony; both pictorial and by buys. It is going to invade the entire testimony; not only of this witness, but of other witnesses.

Trial Examiner Ballinger: The Examiner is of the opinion that when discrimination was shown, and the sale of gasoline to these three or four jobbers who were also engaged in retail business, at a preferential price, that that requires justification on the part of the Respondent, if Respondent can show it.

Mr. Abbott: I will proceed, then, by question and 1401 answer.

Trial Examiner Ballinger: You may proceed so that we may get the matter squarely on the record, because I want to afford you a full opportunity to present this case, both to the Commission and to the Court.

Mr. Hanley: I would like to make a motion, if your Honor please.

At this time, and in view of the statements of the Examiner to the effect and in substance that the evidence adduced by the Government relating to the utilization, if any, that was made by the four wholesale customers of the differential in price granted to them by Respondent is, in the judgment of the Examiner, immaterial and a non-essential part of the case and inasmuch as the present ruling of the Examiner precludes the Defendant or the Respondent from what would apparently seem to be Respondent's normal right to defend against anything that is in the record against it, and especially in view of the now announced view of the Examiner as to the immateriality of this class of testimony, the Respondent now renews its motion to strike from the record in this case all of the testimony of every witness and all of the evidence of every character that relates to or tends to have to do with the prices, either tank wagon or retail, which were made by any of the four wholesale customers named in the Complaint, or any 1402 of their customers at any of the times set forth in the Complaint.

Trial Examiner Ballinger: The motion is denied.

Mr. Austin: I would like to say on the record, please, that I don't understand at all that the Examiner said that he didn't consider the testimony of injury to competition which the Commission introduced to be material. That the Examiner was discussing a question of law as to whether, as a matter of law, it was necessary to introduce such testimony to make a prima facie case. It is entirely different from you saying that any such testimony is immaterial.

Furthermore, I think we are still discussing the question of law and, as the Examiner said, it is one thing for the Respondent to attempt to justify its own acts by showing that it was meeting competition, and it is another thing, as a question of law, as to whether such justification proved as to a customer is any defense, and I understand it to be, on the question of law, what may be relevant as to the Respondent may be a defense as to the Respondent, is, as a matter of law, not a defense to a Respondent when merely proved as to a customer.

I would like to say further at this point, if your Honor please, I made a statement awhile ago in referring to Section 2-b of the Robinson-Patman Act making evidence of justification on behalf of the Respondent admissible
1403 with reference to meeting competition and it may be
that my language, as it appeared on the record, might be subject to misconstruction, so, without going back to it, I want to say I made no concession as to the meaning of the Section 2-b of the Robinson-Patman Act beyond the concession that under that section evidence tending to show that a lower price of the Respondent was made in good faith to meet the equally low price of a competitor may be introduced. I made no concession as to the effect of any such testimony or as to whether or not it is or is not a complete justification after it is introduced.

Now, if your Honor please, getting back to this point where we are: I believe it is suggested here that questions be asked so that an offer of proof may be made. That might go to a great deal of length and require an objection to every question, either by me, or at least a ruling by the Examiner—on every question, and if the Examiner has ruled, as he has, as I understand, as a matter of law, that an attempt to justify the acts of a customer by showing that the customer was meeting competition, is inadmissible, that then these future questions that are going to be asked in the way of offers of proof, ought to be limited.

Trial Examiner Ballinger: The Examiner will permit counsel to proceed, at least for a while, along this 1404 line.

Mr. Hanley: We can make the offer of proof, your Honor, if that is the way the Court desires.

Trial Examiner Ballinger: You may do it either way. You may proceed, as you are, sufficiently far to fully develop the rulings of the Examiner, or you may make a proffer of proof which the Examiner is prepared to rule on.

Mr. Hanley: Maybe we can save some time on this thing. We are prepared to make an offer of proof, but before I go to the trouble of making an offer of proof by statement to the record, any further than I have made it—and I should want to make it in considerable detail, if it is done that way, of course—I understand it to be the rule and that it will be the rule here that the offer as made will be accepted as fact in this court and in the Commission and that it will turn purely on a question of law.

Trial Examiner Ballinger: That is correct.

Mr. Hanley: So we can make an offer of proof, if your Honor prefers us to make a statement in connection with all of this class of testimony, without the necessity of going through the question and answer method, if that is agreeable to you (addressing Mr. Abbott):

Mr. Abbott: Yes. I think we can do it that way.

Mr. Hanley: We can do it that way a lot shorter, 1405 of course.

Trial Examiner Ballinger: If you can do that, and if you want time to consider your proffer of proof, and submit it, we will take an adjournment and afford you an opportunity.

Mr. Hanley: ~~I would like~~—and I'm sure Mr. Abbott joins me in this—we would like to prepare a careful offer of proof, because that is going to be the facts on this question in this lawsuit from now on, if I am correctly informed, as to the law.

Mr. Austin: It won't be the facts, because I am not going to admit—an offer of proof must, as I understand, if the Examiner refuses the offer, why, then, you are in a position to argue that you could have proved that if you had been given the opportunity, but it does not bind me to the point that if it had been admitted I wouldn't have an opportunity to rebut. You realize that.

Mr. Hanley: I understand that.

Trial Examiner Ballinger: Counsel for the Commission will be afforded a full opportunity to make any objections to the proffer of proof.

Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: The nature of the offer which we are 1406 prepared to make is to show that other oil companies, other suppliers made offers to Langer and Cohen and made actual sales of supplies to Langer and Cohen at a reduction in price which it was necessary for Citrin-Kolb to meet in order to keep their trade and their patronage, and I am prepared to make an offer of testimony to that effect showing offers made by other oil companies to sell to Langer and Cohen, which made it necessary for Citrin-Kolb Oil Company to sell to them at a 1¢ discount from the tank wagon price, beginning in 1936.

Trial Examiner Ballinger: And you make a proffer of such proof?

Mr. Abbott: I do.

Trial Examiner Ballinger: Do I hear from counsel for the Commission?

Mr. Austin: I object to that, your Honor, upon the grounds we have stated: that it is an effort to show meeting of competition by Citrin-Kolb and not by the Respondent, and that by meeting competition, they—the evidence of meeting competition by a customer of the Respondent is not available to the Respondent as a defense in this case.

Trial Examiner Ballinger: The Examiner rejects the offer.

By Mr. Abbott:

1407 Q. Now, in the case of Ferguson and Coury, they have only one station; 8500 Gratiot Avenue?

A. That's right.

Q. When did you first solicit their account?

A. In 1936.

Q. They operate a boat works, don't they?

A. Yes; motor boat works.

Q. And they have a filling station in connection with it?

A. That's right.

Q. Now, you made a discount on their account of ½¢ from the tank wagon, did you not?

A. That's right.

Q. And was that done in order to meet the competition of Gulf Refining Company?

Mr. Austin: I object, your Honor.

Trial Examiner Ballinger: Objection sustained.

By Mr. Abbott:

Q. In order to make the record clear, I want to ask you this: did Fergtison and Coury, in 1936, take up with you the matter of having been made an offer by Gulf Refining Company, a supplier of gasoline, to sell gasoline to them at a discount of ½¢ from the tank wagon price?

Mr. Austin: I object to that on the same ground.

Trial Examiner Ballinger: Objection sustained. This Citrin-Kolb Company is not a Respondent here.

1408 Mr. Abbott: This all goes to the question that your Honor has often mentioned; the potentiality in the situation. The fact that the Government claims that by reason of selling gasoline to Citrin-Kolb Oil Company at a differential of 1½¢ from the tank wagon price, a potential situation is presented which makes it possible for them to offer gasoline to their customers at less than the tank wagon price.

It is our contention, and we have a great deal of evidence along this line, that that situation on the part of Citrin-Kolb, in being required to make a preferential rate in some cases to these few instances which have been brought out by the Government, can be justified upon the ground that it was done in order to meet the competition of some supplier of gasoline of a comparable grade to that supplied by the Standard Oil Company, the Respondent.

I think that brings the question before the Commission, and, as I say, the door has been opened by the Government in insisting upon having that testimony be in the record. I am merely referring to cases that they themselves brought out in the Government's case; that is, these three instances.

Now, your Honor says that that is redundant on the record on the part of the Government; that they didn't need to show those cases.

Trial Examiner Ballinger: The Examiner expected
1409 the opinion that was unnecessary, but that is, however, a matter for the Commission.

Mr. Abbott: If it is redundant, then I say Judge Hanley's motion should be granted, and it should be stricken, and if it is not redundant, and it shouldn't be stricken, then I say we should be permitted to answer it on the record.

Trial Examiner Ballinger: That question shows that the opportunity afforded these four companies was utilized by them as against their competitors.

Mr. Abbott: And I say we have a right to show the circumstances under which it was utilized and which made it necessary to utilize it, namely, they were merely meeting competition of some larger gasoline company, in the latter case, the Gulf Refining Company, to sell at a 1½¢ reduction from tank wagon price at Ferguson and Coury at Gratiot Avenue.

Trial Examiner Ballinger: It certainly afforded them an undue advantage over other retail gasoline stations who were buying from the Respondent the same gasoline at a higher price.

Mr. Abbott: We had better work out the offer and present it in the morning, I suppose, because there is a great deal more along this line.

Mr. Austin: It seems to me, your Honor—it is probably unnecessary to say anything further—but the statute 1410 specifies that certain things constitute a violation of the law; that is, discrimination in price and a certain effect. Until you get the discrimination and the effect, you don't start talking about justification. As soon as you start talking about justification, you assume that the elements of the offense are there. The statute says that is a violation of law. Therefore, you can't go outside the statute in looking for what constitutes a justification and the statute says certain specific things may be shown, and you cannot go outside the statute in looking for what may be shown in the way of justification. What the Respondents are seeking to show is clearly outside the statute, and if it is not in the statute, it can't be there, because it simply is no defense. The statute itself outlines and states specifically what justifications there are to a price discrimination having an effect on competition. That is the Examiner's ruling. It is unnecessary for me to elaborate on it, because that's what I understand the Examiner said.

Mr. Abbott: Are you referring to the proviso of Section 2-b of the Robinson-Patman Act?

Mr. Austin: Sections 2-a and 2-b.

Mr. Abbott: "Provided, however, that nothing herein contained shall prevent a seller from rebutting a prima facie case, this is made by showing his lower price 1411 or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor."

Is that the language?

Mr. Austin: Yes. I thought there were some more words in it.

Mr. Abbott: That is the end of the sentence.

Mr. Austin: That is just one clause. There are several things in 2-a and 2-b that the statute says may be shown by way of justification, but what you are offering is not one of them.

Mr. Abbott: I still say that the Government has gone into this, and I think we are obligated, in order to discharge our duty, to show the reason why these discounts from the tank wagon price were made by the Citrin-Kolb Oil Company. I think we have a right to show the circumstances under which those discounts were made; otherwise the record merely will show that they were made and will not give us any opportunity to rebut that evidence.

Trial Examiner Ballinger: This record will contain an offer of the Respondents to show the facts. If that offer should be accepted, it will cover everything that you could prove in evidence. If it should be rejected, then you
1412 will be afforded an opportunity to bring your witnesses in here and ask them questions, and we will pass upon the questions as and when propounded.

Mr. Austin: May I go off the record a moment?

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By agreement of counsel, the hearing is now, at 4:30 P. M., adjourned to reconvene in Room 859 Federal Building, Detroit, Michigan, at 10 o'clock A. M., April 22, 1941.

(Thereupon at 4:30 o'clock P. M., April 21, 1941, an adjournment was taken to reconvene on April 22, 1941, at 10 o'clock A. M.)

1413 Room 859, Federal Building,
Detroit, Michigan,
April 22, 1941.

Met, pursuant to adjournment, at 10 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold A. Hanley, Esq., 910 South Michigan Ave., Chicago, Illinois, and Arthur J. Abbott, Esq., of the firm of Abbott, MacMahon and Roberts 2230 Buhl Building, Detroit, Michigan, on behalf of the Respondent.

1414 PROCEEDINGS.

Trial Examiner Ballinger: This is a reconvening at 10 A.M., April 22nd, 1941, in Room 859 Federal Building, Detroit, Michigan, on Docket No. 4389 in the case entitled Standard Oil Company. The last hearing was held in Detroit, April 21, 1941.

The reporter will note counsel for the Commission and Respondent present.

Off the record.

(Discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: I wish at this time, on behalf of the Respondent, to make an offer of proof that we discussed last evening at the conclusion of the hearing.

In the Government's case testimony was adduced over the objections of Respondent as shown by record page 303 to the effect that Citrin-Kolb, a tank car customer of Respondent, in 1938, 1939, and 1940 gave a preferential price to Langer and Cohen, operating five stations which are identified in the record by their street numbers in the city of Detroit, of 1c per gallon less than the prevailing dealer tank wagon price as shown by record page 302 and 303 and Commission's Exhibit 33-A.

In the Government's case testimony was also adduced
over the objection of Respondent that Citrin-Kolb
1415 Oil Company, in 1938, 1939, and 1940, gave to a station operated by Ferguson and Coury, at 8501 Gratiot Avenue, Detroit, Michigan, a discount of ½¢ per gallon off the dealer tank wagon price as shown by the record pages 302 and 303 and Commission's Exhibit 33-A.

In the Government's case testimony was also adduced over the objections of Respondent that as to the stations supplied by Citrin-Kolb Oil Company at Chicago Boulevard, at Dexter Boulevard, in the City of Detroit rent was waived for the months of August, September, and October, 1939, for the reasons as stated in Exhibit 33-B, shown on record pages 302 and 303, and Commission's Exhibit 33-B.

For the purpose of showing that the practice of Respondent of supplying gasoline to Citrin-Kolb Oil Company during said period at the regular tank car price was a discrimination, so-called, the effect of which was not "substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them," Respondent offers to prove as follows:

1. That the discount offered and allowed by Citrin-Kolb Oil Company to Langer and Cohen was done in order to
meet the competition of Cities Service Oil Company,
1416 which offered in said year of 1936 to sell gasoline to
Langer and Cohen at a discount of 1¢ per gallon off the regular dealer tank wagon price, and that the discount offered and placed in effect by Citrin-Kolb Oil Company was for the purpose of meeting the competition of Cities Service Oil Company, and also other supplier oil companies hereinafter mentioned.

2. That Langer and Cohen in 1936 and in subsequent years bought a volume of 1,000,000 gallons of gasoline per year and upwards.

3. That Langer and Cohen, in consideration of receiving said discount from Citrin-Kolb Oil Company agreed to take deliveries in minimum of 1500 gallons at a delivery.

4. That Langer and Cohen, in addition to receiving deliveries of gasoline from Citrin-Kolb Oil Company, purchased from other suppliers, among which were Victor Oil Company, Fleet Wing Gasoline, and Plymouth Oil Company Dixie Gasoline, and that on January 25, 1940, Victor

Oil Company sold 1500 gallons of Fleet Wing gasoline to Langer and Cohen, of which 744 gallons of 74-76 octane gasoline was sold at 10.75¢ per gallon, and 850 gallons of Ethyl gasoline was sold at 12¢ per gallon, both of which prices included state and federal taxes, which prices represented a discount in excess of 1¢ per gallon from the 1417 regular dealer tank wagon price at said time. Also on November 25, 1940, Plymouth Oil Company sold to Langer and Cohen 790 gallons of Dixie gasoline at a price of 11.25¢ per gallon, which was a discount in excess of 1¢ per gallon from the dealer tank wagon price in effect at that time. And that by reason of such competitive situation it was necessary for Citrin-Kolb Oil Company, in order to retain Langer and Cohen's patronage, to sell to them at their various stations gasoline at a discount of 1¢ below the regular dealer tank wagon price prevailing at the time of sale.

Respondent further offers to prove with reference to Ferguson and Coury, 8501 Gratiot Avenue, that their business was solicited by Citrin-Kolb Oil Company in 1936, and that in order to secure their business, it was necessary to meet a price representing a discount of ½¢ per gallon from the regular dealer tank wagon price offered Ferguson and Coury by Gulf Refining Company, and that the price representing a discount of ½¢ per gallon from the regular dealer tank wagon price for gasoline delivered in tank wagons to 8501 Gratiot Avenue was made by Citrin-Kolb Oil Company to Ferguson and Coury for the purpose of meeting the price of Gulf Refining Company at the times mentioned in Exhibits 33-A and B; that with reference to the waiver of rent referred to in Commission's Ex- 1418 hibit 33-B, Respondent offers to prove that said rent was waived for a period of three months in order to keep the station in operation. This, for the reason that the station across the street selling Cities Service gasoline was selling gasoline at a discount of 2¢ per gallon.

And for the further reason that a Zip station at the corner of Dexter and Boston Boulevard, one block away, was selling gasoline at the price of 10 gallons for $1.

And that by reason of such competition, and further by reason of litigation in the Circuit Court of Wayne County for injunctive relief filed by the Standard Oil dealer at the Chicago Boulevard and Dexter, he lost considerable of his business, and that in order to keep the tenant in business, Citrin-Kolb Oil Company decided to waive the three months' rent in order to enable the tenant to rehabilitate himself and to keep him in business.

Now, the testimony that we offer to meet by this offer of proof is contained in the record at the pages indicated, and also on Exhibits 33-A and B, consisting of a letter written by Citrin-Kolb Oil Company to Cyrus B. Austin, Federal Trade Commission, and is made not for the purpose of rebutting the prima facie case which has been made by showing that the lower price of Respondent for the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally 1419 low price of a competitor, but is made for the purpose of meeting the evidence which is in the record, and which was placed in the record by the Commission over the objection of the Respondent. And in order to dispel the effect of the testimony to the effect that Citrin-Kolb Oil Company did grant these preferential prices to Langer and Cohen, Ferguson and Coury, and to the station at Exeter and Boston Boulevard, for the purpose of showing that such discrimination on the part of said oil company as alleged in the Complaint herein was not—did not have a potentiality of operating substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition, for the reason as we shall show by this testimony, if it is received, that it will appear from such testimony that the competitive situation was such in the city of Detroit that the operations in question could not have the effect substantially of lessening competition or tending to create a monopoly or tending to injure, destroy or prevent competition.

Now, I wish to make that plain, because it seems to me that yesterday the Examiner based his ruling on the other section of the Robinson-Patman Act which refers to showing that a lower price is made in good faith to meet an equally lower price of a competitor. I wish to make it clear in making this offer that the offer is made for 1420 the purpose of showing that the discrimination, so-called, of Standard Oil Company has no tendency, under the circumstances, to create a monopoly or to injure, destroy, or prevent competition in the Detroit area.

Trial Examiner Ballinger: Anything from counsel for the Commission?

Mr. Austin: Well, I feel that this offer of proof should be rejected for the same reasons which were specified yesterday. It may be that the offer is now made as an answer or in reply to evidence of the Commission tending to show injury to competition resulting from discrimination of the Standard Oil Company. Whether this is in direct reply or directly counter to evidence upon the question of injury to competition or whether it is intended as a justification, I think it is clearly inadmissible and does not constitute a defense as a matter of law upon either ground.

On the question of injury to competition, if the discrimination in price by the Standard Oil Company is proved, as it has been, and that the Citrin-Kolb Oil Company received a lower price than certain other buyers, the Citrin-Kolb Oil Company is thereby enabled to charge its customer a lower price than the Standard Oil Company is charging the retail stations to whom it sells direct, then the question is whether or not there is a resulting injury to
1421 competition as between the purchaser from the Citrin-Kolb Oil Company, in this case Langer and Cohen being one of those referred to, and retail stations who buy directly from Standard Oil Company or from other major oil companies. Evidence that there has been such resulting injury to competition cannot be rebutted or overcome by showing someone else was not injured, and it seems to me that if such injury resulted from the fact that lower price was charged by Citrin-Kolb to its stations than was charged by Standard Oil Company in sales direct to its retail stations—meaning the retail stations which it served—it is no answer to explain or prove the reasons which prompted the Citrin-Kolb Oil Company in a particular case to charge a lower price than it charged to its other stations.

Now it is clear here that Citrin-Kolb Oil Company, in many cases—I believe in the majority of cases—charged its subdealers the same price for Red Crown gasoline which Standard Oil Company charged at stations buying from it direct.

Now, in certain cases there was a lower price charged by the ~~Citrin-Kolb~~ Oil Company. The effort here is simply to show what the reasons were that prompted the Citrin-Kolb Oil Company from charging that lower price at certain stations, all of which, I submit, is entirely

1422 immaterial, the only reason being what the effect was
of the lower price and not the reasons why it was charged.

I think that is sufficient, your Honor,

1423 Mr. Abbott: I want to say this, additionally: I
think Mr. Austin has hit the nail right on the head when he says that the inquiry here, as to whether the practice in question operated to lessen competition, tended to create a monopoly or to injure competition with any person who either grants or knowingly receives the benefit of discrimination. I think it would be very regrettable, your Honor, if this record should be made without the inclusion of this evidence which is necessary to rebut the effect of exhibits 33-A and 33-B. Here it is. It is right here in the record. It shows a preferential treatment by Citrin-Kolb Oil Company of these three customers of Citrin-Kolb Oil Company without any explanation excepting in the case of the station at Chicago and Dexter. There is no explanation in Exhibit 33-A or 33-B of the reason why—or the effect of the granting of that preferential treatment to Langer and Cohen and Ferguson and Coury.

Now, Mr. Austin also hits the nail on the head when he says that the question is not as to the meeting of competition but is as to the effect of the giving of this preferential treatment to these two stations, or those two dealers; it relates to the effect, and that is the thing, if anything, that is to be brought out and shown by this rebutting testimony; the effect upon the competitive situation in the Detroit
area and, particularly, with reference to the situation
1424 around the stations in question; five stations of
Langer and Cohen and the one station of Ferguson and Coury at 8501 Gratiot Avenue and the one station at Boston and Dexter which happened to be the only one in which Citrin-Kolb Oil Company made any preferential allowance upon the sale of gasoline supplied to it by the Respondent.

Now I want to say very earnestly that it seems to me that it would be regrettable if this record were made without allowing the Respondent to show the effect of that preferential treatment upon competition, the purpose of it being to show that by reason of the general competitive situation here in Detroit, the granting of those preferences by our jobber-customer could not have the effect of lessening competition or injuring, destroying or preventing com-

petition with other persons in the community, and I think, for that purpose, the testimony has the tendency and, without any question, has the effect of dispelling the effect of Exhibits 33-A and 33-B which, under the circumstances, we really are obliged, here, to rebut because the Government puts those in evidence and they are, up to this time, unexplained by any testimony offered in this case and I earnestly represent, your Honor, therefore, that in order to make a complete record we need to have this testimony in evidence. Without it the record will be incomplete and, as I stated to your Honor yesterday, I think it is your
1425 practice in these cases, in a case of doubt—and your Honor stated yesterday that there has been no adjudication upon this particular point—I think in a case of doubt it ought to be in the record for the Commission to consider and leave it up to the Commission. With all deference to your Honor's ruling, I say this: I think it should be in the record for the Commission to decide as to its relevancy.

Trial Examiner Ballinger: The Examiner is of the opinion, and so rules, that the proffer of proof, if established by proper evidence, would constitute neither a defense nor justification. The proffer is rejected.

Mr. Abbott: I will recall Mr. Biber.

MAX BIBER resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Abbott.

Q. Mr. Biber, in connection with Exhibits 7 to 15 for identification, offered yesterday, you testified that these exhibits were prepared under your supervision, is that correct?

A. That is correct.

Q. As a matter of fact did you participate in the preparation of these exhibits?

A. I did.

Q. And did anybody assist you in their preparation?

1426 A. Yes; the auditors and bookkeepers of the Company assisted in the preparation of this.

1427 Q. Do you have an auditor from outside who comes in and works on your books?

A. From time to time, yes, we have.

Q. And you also have bookkeepers in the plant?

A. That's right, we have.

Q. Do you have more than one bookkeeper?

A. Yes, we have.

Q. Now, what professional training, if any, have you had in accountancy yourself?

A. Just that training which goes with the pre-law training of two semesters in accountancy at Wayne University, in Detroit.

Q. What is Wayne University?

A. Wayne University is the municipal university owned and conducted by the Board of Education of the City of Detroit.

Q. And what courses did you take in accountancy and when did you take them in Wayne University?

A. In 1931, accountancy 1 and 2 constituting two semesters.

Q. And what did accountancy 1 and 2 consist of?

A. It consisted of the elementary accountancy and carrying through a set of books during the period of one semester.

Q. By a semester you mean a half year?

1428 A. A half year, and at the end of the year, after carrying the books through the scheduled semester, drawing a profit and loss statement and balance sheet of the business, for which the books were run.

Q. That was accountancy 1, was it?

A. That's right.

Q. And what was accountancy 2?

A. Accountancy 2 was a further instruction on balance sheet and profit and loss statement, elementary cost accounting, and, I believe, some mathematics. I don't know exactly what the other courses were.

Q. You did have, then, some training in cost accounting, did you?

A. Whatever there was in that course; I did have that training.

Q. As a result of this training in Wayne University, do you possess knowledge as to the fundamental principles of accounting and cost analysis?

A. I would say from that training and from subsequent experience, I have the knowledge of the fundamentals of accounting.

Q. You took that accountancy work in Wayne University before you went to law school, did you?

A. That's right.

Q. And at that time did you anticipate taking a 1429 business administration course instead of law?

A. Yes, that was one of the things I considered when I took that course.

Q. And what year was it that you took this course in cost accounting and accountancy 1 and 2 in Wayne University?

A. 1930 or 1931; I am not certain.

Q. And subsequent to that time did you go to the University of Michigan?

A. No, I didn't.

Q. Was it before then that you went to the University of Michigan?

A. That's right.

Q. Your work, then, at the University of Michigan was prior to the accountancy courses that you took in Wayne University?

A. That's right.

Q. And subsequent to that, subsequent to taking the accountancy work did you go to the law school at Wayne University?

A. Yes, I did.

Q. In addition to the theoretical knowledge that you have of cost accountancy, what practical experience have you had in accounting practice and cost analysis?

A. Well, I have had the experience of being very close to the books and accounting of the Citrin-Kolb Oil 1430 Company and, before that, I had considerable experience as trustee and receiver in bankruptcy in several cases issued out of this court, of the United States District Court and Federal Court Judge Ernest A. O'Brien.

Q. And did you get those cases by assignment from the Court?

A. That is right; I did.

Q. And did they involve accountancy and the analysis of costs for the firms that were involved?

A. Yes, they did.

Q. Now, as a result of the combination of theory and practice along this line, do you feel that you know the elements which enter into an analysis of the cost of business operations?

A. I feel I do, or I wouldn't have undertaken this analysis of these exhibits.

Q. And in particular, do you, by reason of this study and experience, know the elements which enter into an analysis of the cost of handling gasoline in the wholesale operations of Citrin-Kolb Oil Company?

A. I believe I do.

Q. In the preparation of Exhibits 7 to 15, for identification, inclusive, did you apply ~~the~~ knowledge of which you have testified, both theoretical and practical?

1431 A. I did; I needed all of it.

Q. And do Exhibits 7 to 15, for identification, inclusive, accurately reflect the cost per gallon of handling gasoline in the wholesale operations of Citrin-Kolb Oil Company for the years 1936 to 1940, inclusive?

A. They do.

Mr. Austin: I assume you mean in his opinion?

Mr. Abbott: Yes.

The Witness: That's right, they do.

By Mr. Abbott:

Q. Your testimony is they do so reflect?

A. That's right, from the figures that I compiled and from the evidence taken, I say, in my opinion, it does.

Trial Examiner Ballinger: You wouldn't have compiled them otherwise, would you?

The Witness: They would have been useless, wouldn't they?

By Mr. Abbott:

Q. Were these Exhibits Nos. 7 to 15, for identification, inclusive, prepared by you with care?

A. I would say they were prepared with the utmost care.

Q. And you vouch for their accuracy, do you?

A. Yes, I do.

Q. You recall that in the Government's case relating to preferential prices given by certain of your retail
1431½ stations, which were suplied by Citrin-Kolb Oil Company, particularly in the years 1938 and 1939, that there was complaint made by certain station operators in the vicinity as to price cutting operations at those particular stations.

A. That is right.

Q. Will you name those stations based upon your recollection of that testimony?

A. You mean those stations which Government witnesses said were cutting prices?

Q. Yes.

A. I believe there was—

Q. Just a moment. I want to give you something to refresh your recollection on that.

A. I think I have a list here, Mr. Abbott.

Q. Name the stations.

A. Station at East Jefferson and Nottingham; Dexter and West Chicago; John R and Euclid; West Warren and Brooklyn; Linwood and the Detroit Terminal Railroad; and Linwood and Pingree.

Q. Are those all the stations that were referred to in the testimony of Government witnesses with reference to the complaints of nearby operators who testified as to the alleged price cutting of these locations?

1432 A. Those were all the locations, either serviced or owned by Citrin-Kolb that were mentioned in the testimony.

Q. I see. Now, as to all these stations complained about by Government witnesses in this case, have you prepared a pictorial survey showing the general competitive conditions surrounding these stations for 1938 and '39, and during the time intervening until the present time as to the stations in question?

A. Yes, I have.

Mr. Abbott: Will you mark this as an exhibit, please?

Trial Examiner Ballinger: The reporter will mark the documents Respondent's Exhibits 18-A and then go on through.

(The documents referred to were marked, for identification, "Respondent's Exhibits 18-A through 18-z-51.")

1433 Q. Now, Mr. Biber, I show you Respondent's Exhibit 18, which has been numbered as 18-A to 18-z-51 and ask you to identify these exhibits and state what they are?

A. These exhibits are photostats or photographs, cards, advertisements, letters, literature and purchase receipts showing price signs and sale prices of gasoline at stations in and about the vicinity of the five stations mentioned before, or having been testified to in the Government's case, and showing the competition around those stations.

Q. You mean five stations, or six stations?

A. Six stations.

Q. And those stations are the ones that you have testified to as located at the locations appearing on the cover of those exhibits?

A. That's right.

Q. Now will you state what these exhibits consist of, from Exhibit 18-A through Exhibit 18-Q?

A. Exhibits 18-A through 18-Q are discount cards, letters and advertisements sent out by chain stations, or operators who operate more than one station and thereby are considered competitive with all stations in the City of Detroit.

Q. And was that material from Exhibits 18-A to 18-Q compiled by you, personally?

A. Yes, it was.

Q. And were the purchases that appear in there 1434 made by you personally?

A. Yes, they were.

Q. And they were made for the purpose of showing the competitive situation as relating to Exhibits 18-A to 18-Q, generally, or with reference to particular locations?

A. Well, these 18-A to 18-Q were actually made, generally.

Q. Generally. To show the general competition; general competitive situation?

A. That's right.

Q. Now referring to Exhibits from 18-R to 18-U, inclusive, will you state what those exhibits cover; within those limits?

A. Those exhibits are photographs of stations in the vicinity of the station at East Jefferson and Nottingham, showing price signs and the price at which gasoline was sold at those stations.

Trial Examiner Ballinger: And the time on the signs appear?

The Witness: And the time, and the date, of the photographs.

By Mr. Abbott:

Q. Now referring to each one of the exhibits within those numbers and letters, will you state what it shows with reference to the prevailing price at the time in question; as to each of the exhibits?

A. The photographs on 18-S—

1435 Mr. Austin: Your Honor, I object to that question. I don't know that that is proper as a question of identification. It seems to me that the document would speak for itself if it were introduced.

Mr. Abbott: What I want to show is that it appears on all the exhibits and I am merely having him state what the exhibits show collectively. I don't want to put them in evidence until I make the offer.

Trial Examiner Ballinger: You may give the general description of them.

By Mr. Abbott:

Q. State generally what is included on those exhibits?

A. The Exhibits carry the prevailing retail prices at the time that the photographs were made of premium, house brand and third grade gasoline. Shows the price of gasoline sold at the station shown in the photograph and it shows the amount of cut of this gasoline below the house brand gasoline of the prevailing retail prices at the time the photographs were made.

Q. When you say "cut," do you mean the amount of discount which is—

A. The amount of discount below the prevailing retail price.

Q. When you say "cut," do you mean the prevailing retail price.

Q. As shown by the photographs?

A. That's right.

1436 Q. Now, is that the general plan of all the exhibits between 18-R and 18-U?

A. Yes, it is.

Q. Now, taking up Exhibits 18-V to 18-z-11, inclusive: Will you state what the general plan is with reference to those exhibits? What do they show?

A. These exhibits also show photographs and price signs and also show the prevailing retail prices of premium, house brand and third grade gasolines and also show the amount of cut or discount off the prevailing retail price at which gasoline was sold at the stations shown in the photographs.

Q. And at the time that the photograph was taken?

A. At the time that the photograph was taken.

Q. And is that shown to each one of the pictures that is included within the limits that I mentioned?

A. Yes, it is.

Q. Now, referring to the exhibits between 18-z-12 and 18-z-17, will you state what the exhibit consists of, as to those particular exhibits?

A. These exhibits consist of photographs at stations and information showing the prevailing retail price of premium, house brand, and third grade gasolines, and also the price at which gasoline was sold at the station shown in the photograph, and the amount of discount off of the prevailing retail price.

1437 Q. As to each of such stations?

A. As to each of such stations.

Q. And those were stations in the vicinity of what station that was referred to in the Government's testimony?

A. John R and Euclid.

Q. And all those photographs, as I understand it, are of stations in the vicinity of John R and Euclid; is that right?

A. That is correct.

Q. Now, referring to Exhibits between 18-z-17 and 18-z-21, will you state what those exhibits show?

A. Those exhibits show photographs and advertisements showing the price at which gasoline was sold at the station shown in the photographs, and also the prevailing retail price, the prevailing retail price per gallon, the price in the picture, and the break-down of the price per gallon in the picture, and the per gallon difference, or discount, and also shows a premium given at the station indicated in the photograph.

Q. Now, you are referring to Exhibit 18-z-18?

A. 18-z-18.

Q. With reference to the general plan, though, will you state what the exhibits show within those numbers that are mentioned?

A. The exhibits show the prevailing retail price of 1438 gasoline for the three brands, premium, house brand, and third grade, and show the price at which gasoline was sold at the station shown in the picture, and the difference or discount below the prevailing retail price.

Q. Now, referring next to Exhibits 18-z-22 to 18-z-30, inclusive, will you state with reference to what station referred to in the Government's testimony those exhibits are intended?

A. These Exhibits are in relation to the station at Linwood and Pingree, and show photographs of stations showing the price at which gasoline was sold at those stations, and also show the prevailing retail prices of premium, house brand, and third grade gasolines, and further showing the discount or cut below the prevailing retail price at the stations shown pictorially.

Q. And are all those stations in the vicinity of this station at Linwood and Pingree?

A. Yes, they are.

Q. Now, referring to Exhibits 18-z-31 and 18-z-51, will you state what those exhibits show?

A. Those exhibits show pictures of stations showing price signs.

Q. In the locality of what station?

A. In the locality of the station of Linwood and the Detroit Terminal Railroad, show price signs indicating
the price at which gasoline was sold at the stations,
1439 and also showing the prevailing retail prices of gasoline and the per gallon difference or discount of the prevailing retail price.

Q. Now, those pictures which constitute the exhibits in question over what period of time as to the entire exhibit?

A. Cover from 1937 to 1940, through 1940.

Q. Through 1940?

A. Yes.

Q. And I will ask you this: the buys that appear, the vouchers for purchases made, were those all made by you personally?

A. Yes, they were.

Q. And the data—

Mr. Austin: Where are these vouchers, if I may interrupt?

Mr. Abbott: There are a number of vouchers.

The Witness: Page 23 is one of them.

Mr. Abbott: They are on your copy. I think the originals are only shown.

The Witness: They are photographed.

Mr. Abbott: Yes, they are photographed.

Trial Examiner Ballinger: By page 23 you mean Exhibit 18-z-18, don't you?

The Witness: For Mr. Austin's information. I
1440 don't think he has them marked as an exhibit.

By Mr. Abbott:

Q. They appear on what exhibit?

A. 18-z-6 is one of them; 18-j is another; 18-z-10 is another.

Q. When you say another, you refer to—

A. Another buy.

Q. Vouchers for purchases made by you?

A. That's right. Here is another buy on 18-z-51.

Q. Now, Mr. Biber, are all these exhibits proposed to be introduced for the purpose of showing the competitive situation adjacent ~~to the~~ stations referred to in the Government testimony?

A. Yes, they are.

Mr. Austin: I object to that, Mr. Examiner, and I move the answer be stricken. Counsel is asking the witness the purpose of the introduction.

Trial Examiner Ballinger: Objection sustained, and the answer stricken.

By Mr. Abbott:

Q. Now, were all these pictures and all the exhibits which is included in Exhibit 18 to 18-z-51, prepared by you or under your supervision?

A. Yes, they were.

Mr. Abbott: I offer the Exhibits from 18 to Exhibit 18-z-51 in evidence. 1441

Mr. Austin: I would like to ask a few questions of the witness, your Honor, before making any comment on the offer.

Mr. Abbott: I understand—off the record.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: You may proceed.

Mr. Austin: There are a number of photographs here, Mr. Biber; who made the photographs?

The Witness: Most of them were made by myself, and a few were made by commercial photographers on my order.

Mr. Austin: There are a lot of photographs; I assume those are photostats of material that you had in your possession?

The Witness: That's right.

Mr. Austin: And did you compare them with the originals?

The Witness: Yes, I did.

Mr. Austin: They are correct copies, are they?

The Witness: Yes, they are.

Mr. Austin: 18-B, that appears to be a photostat of a card, Lee's Grosse Pointe Service; is that a photostated card you have in your possession?

The Witness: Yes.

1442 Mr. Austin: Where did you obtain the card?

The Witness: It was furnished by the service station dealer at Kercheval and St. Clair, Standard Oil dealer.

Mr. Austin: To whom was it furnished?

The Witness: To me.

Mr. Austin: You collected it personally?

The Witness: That's right. No; it was brought to me.

Mr. Austin: By whom?

The Witness: By the dealer.

Mr. Austin: At your request?

The Witness: No; just in answer to a general request to all dealers that they turn in any such information during that period of time that they might acquire.

Mr. Austin: What dealers brought it to you?

1443 The Witness: The dealer that operates the station at Kercheval and St. Clair.

Mr. Austin: Is that a station that is supplied by Citrin-Kolb Oil Company?

The Witness: No, it isn't.

Mr. Austin: Now there is a typewriter notation at the top of that exhibit. Was that placed there by you?

The Witness: Yes.

Mr. Austin: And does that state your conclusion regarding the card?

The Witness: That's right. It is an explanation of the card.

Mr. Austin: I notice on Exhibit 18-C for identification: it appears to be from Rantanen & Bicknell Oil Company. There is a notation there that that was supplied by Gulf Refining Company during 1936. What is the meaning of that?

The Witness: That is our notation that that is the product that they distributed. That was not part of the original letter.

Mr. Austin: You mean, there, that this station sold Gulf Gasoline?

The Witness: That's right.

Mr. Austin: To whom was this letter addressed?

The Witness: It wasn't addressed to any particular
1444 party. The greeting is: "Dear Friend:" It was sent out on a mailing list, I understand.

Mr. Austin: Where did you get it?

The Witness: I got it from one of the dealers who received it at his home.

Mr. Austin: From one of the dealers?

The Witness: Yes.

Mr. Austin: Have you any personal knowledge that that was a letter that was circulated or distributed by this station?

The Witness: Only what the letter purports to show.

Mr. Austin: Off the record, please.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

May I inquire of counsel for the Respondent the object and purpose of the tendered exhibits 18-A through 18-z-51?

Mr. Abbott: There was testimony adduced by the Government in its case in chief of operators of stations adjacent to Citrin-Kolb Oil Company-supplied stations at East Jefferson and Nottingham, Dexter and West Chicago Boulevard, John R and Euclid; West Warren and Brooklyn; Linwood and the Detroit Terminal Railway and Linwood and Pingree relative to price cutting at those
1445 stations which were complained of and which was claimed by the Government in its case in chief was the result of the alleged discrimination in price allowed by the Respondent to the Citrin-Kolb Oil Company and which is claimed had the effect of substantially lessening competition and of injuring, destroying or preventing competition in that particular area with which we are here concerned and with particular reference to the area around these six stations supplied by the Citrin-Kolb Oil Company.

Now, the purpose of these exhibits 18-A to 18-z-51 is to show the competitive situation from 1937 to 1940, inclusive by pictures, by evidence of the prevailing prices at the time the picture was taken, and by showing the price that was advertised as being charged at the station adjacent to these six locations supplied by Citrin-Kolb Oil Company and by showing, also, the price differentials which were being allowed to the public at these various stations which are pictorially illustrated in these exhibits adjacent to these six stations supplied by the Citrin-Kolb Oil Company, so as to show that the result of the alleged discrimination to the Citrin-Kolb Oil Company could not be substantially to lessen competition or tend to create a monopoly or to injure, destroy or prevent competition.

1446 In other words, we propose to show by this exhibit, or by these exhibits, the competitive situation in each of these locations in order to show the price cuts which were being allowed the public by other stations adjacent to the stations complained of. This is merely for the purpose of meeting and rebutting the testimony offered by the Government as to each of these six stations as shown by the record.

Trial Examiner Ballinger: As the Examiner remembers —and if he is in error, I request counsel to correct me—the object and purpose of the testimony offered by the Commission was to show or tend to show that the four companies receiving preferential rate from the Respondent and operating service stations, commenced the reduction in price; am I correct or—

Mr. Austin: I wouldn't want to say that the purpose of it was to show that they commenced it, but regardless of who commenced it, the purpose was to show that an injury resulted to the stations that were paying a higher price from the Respondent and to the major oil companies.

Mr. Abbott: May I interrupt here, in this connection, that the competitive situation in all of these locations, by the testimony of the witness, was something which was not initiated by the person supplied by the Citrin-Kolb 1447 Oil Company, but that the situation which is shown by these pictorial exhibits and by the buys was one which has existed in these locations for a long period of time, even previous to 1936 when the pictures and other evidence was collected and taken.

In other words, this testimony is offered in rebuttal of the testimony which was offered by the Government as these six stations, and the conditions surrounding them.

Trial Examiner Ballinger: Did not the Government's testimony establish or tend to establish that after the war started, everybody got into it; all the stations? They had to? All of them had to, in order to do business; they had to meet the price of their competitors?

Mr. Abbott: Of course, we have a right to show that these stations did not instigate the war, as you refer to it.

Trial Examiner Ballinger: That's what I am trying to get at. Do these exhibits you are now offering establish or tend to establish that Citrin-Kolb Oil Company, and its stations, did not have anything to do with the precipitation of these price wars?

Mr. Abbott: I will say this: that they do, in connection with other testimony which will be adduced from this witness and which is, necessarily, bound up with these exhibits.

1448 Trial Examiner Ballinger: I haven't had an opportunity to examine the exhibits, and before I would care to pass on them, it would be necessary for me to personally examine them and to hear from the counsel with reference to each one.

Mr. Austin: If your Honor please, at this point I would like to make a general objection to the production of any of this group of exhibits numbered 18-A and various letters and numbers thereupon, upon the ground that they are inadmissible because they are incompetent, irrelevant, and immaterial, upon the same ground that was discussed yesterday afternoon, and, to some extent, this morning, upon the offer of proof made by Respondent.

In other words, it seems to me that the purpose of all of these exhibits, photographs and so forth, is to try to show that these Citrin-Kolb stations were meeting competition in the prices that they charged, or that there were other stations around them which were selling at as low a price or at a lower price than the price charged by the Citrin-Kolb stations, or perhaps lower than the prevailing price, because there are numerous notations here on the prevailing price and on the difference between these prices shown in the photographs and the prevailing price.

Now, I submit it is not a defense and is not relative 1449 in this case for the Respondent to attempt to show that stations operated by Citrin-Kolb Oil Company or stations operated by Ned's Auto Supply Company were selling at a price which was not lower or perhaps not as low, in some cases, as other gasoline stations in the vicinity. I believe that the Respondent's defenses here, as stated in the statute, Section 2-a of the Robinson-Patman Act, and 2-b of the Robinson-Patman Act, are that the—that is, the Respondent may show that the difference in price charged these four so-called jobbers and its other retail stations was justified by differences in cost; that is, Respondent's costs within the proviso of Section 2-a, or that the Respondent's price to these four jobbers, or any of them, was made in good faith to meet an equally low price of a competitor of the Respondent, but whether there were other stations in the vicinity of these Citrin-Kolb and Ned's stations which were selling gasoline at as low or lower price than the Ned's stations or Citrin-Kolb stations were charging, it seems to me is immaterial and does not constitute a defense and I do not see that it is in answer to evidence introduced by the Commission to show injury to certain stations in the neighborhood.

Now, the situation is this: we have, say, a Citrin-Kolb station in a location. There is, maybe, testimony in the record—we will assume that there is testimony in the
1450 record from some other retail station in the neighborhood that the Citrin-Kolb station was underselling the other retail stations, and that the other retail station suffered loss of business.

Now, the Respondent comes and offers to show that aside from these two stations, there were a lot of other stations in the neighborhood selling lower than the Citrin-Kolb stations were selling at. I can't see that that is any answer to the injury sustained by the particular station who, perhaps testified in this case.

1451 If the Citrin-Kolb station as a result of the price which Citrin-Kolb gets from the Standard Oil Company is enabled to undersell a single station in the same locality, I don't believe it is any defense to show this with a lot of other stations in that same locality who were reselling gasoline as low or lower price than that which was being given by the Citrin-Kolb station. So that I think here again we are one step too far down in the line of competition, and I believe that evidence of competitive prices may be admissible under certain circumstances within the statutory defense, when we are talking about competitors of the Standard Oil Company, but I don't believe that all of this material is admissible as to the prices charged at different times by various and sundry other retail stations. And if this kind of testimony could go in it would be almost an endless proposition.

Now, true, on the Government's case, the Commission's case there was a good deal of testimony regarding the competitive situation at different times, and the fact that there was more price cutting openly advertised at certain times than there was at other times, and that was in con-

nection with the showing of cut prices and reductions in prices by some of the station operators who were on the stand. And I wouldn't want to go so far as to say that
Respondent couldn't introduce some evidence to show
1452 what the competitive situation was in Detroit during
the last four years, but I object to the admission of all these exhibits here upon the ground that it is no defense to show these specific prices charged by other stations in the neighborhood of these Citrin-Kolb stations which were mentioned in the Commission's case.

Mr. Abbott: Now, we are concerned here, your Honor, with the effect of the discrimination, so-called—

Trial Examiner Ballinger: Can you furnish the Examiner with exhibits, please?

Mr. Abbott: Yes.

(The witness handed the Examiner the exhibits in question.)

Trial Examiner Ballinger: You may proceed.

Mr. Abbott: I say, we are concerned here with the effect of the so-called discrimination price between the tank car method of delivery, and the tank wagon method of delivery which amounts to a differential of a cent and a half to the four jobbers who are involved in this case, and as to whether the effect of such so-called discrimination is substantially to lessen competition or tends to create a monopoly, or to injure, destroy, or prevent competition with any person in the area which is involved in the territory around these six stations which were brought out in the Government's testimony in their case last month.

Now, Mr. Austin says he doesn't pretend to claim
1453 that we haven't any right to show the competitive
gasoline situation in the City of Detroit. I claim we have a right to show that competitive situation. We have a right to show whether the Citrin-Kolb supplied stations, which are included in this exhibit, were responsible for instigating the price cutting which was complained about by the Government witnesses who testified in the month of March in this case. This testimony is intended to rebut their testimony, which testimony was to the effect that they operated stations which were adjacent to Citrin-Kolb Oil Company supplied stations, at the addresses given on this exhibit, which has now been offered in evidence, and that their business suffered from the competition which was offered by these six stations in question.

Now, it certainly is material in this case to show that that was not the situation that existed as to these six stations.

This exhibit is offered for the purpose—Exhibits 18 to 18-z-51—are offered for the purpose of showing as to all the localities in question; namely, in the locality immediately adjacent to those six locations which are involved in the testimony adduced by the Government, what the competitive situation was. We don't pretend to go over the entire Detroit area for that purpose, because the Government has focused their testimony on these six loca-
1454 tions which are referred to in this exhibit, and it
certainly is material for the Respondent, as a part of its case, to show what the competitive situation was around those stations, and to show in connection with this exhibit, and testimony that will later be adduced, to the effect that the situation shown by this exhibit was not instigated nor caused in its inception by the operation of the Citrin-Kolb Oil Stations in question.

That is the purpose of this exhibit. And it is a very important part, I may say, not only in connection with this witness, but in connection with other witnesses that will be called in connection with the competitive situation in Detroit to show just what was the reason for price cutting at the Citrin-Kolb Oil stations; that it was purely defensive, and that it was caused by the price-cutting of the stations which are shown in Exhibits 18 to 18-z-51.

Why, there are illustrations in this book of exhibits which show that adjacent to the Citrin-Kolb stations they had competition which had existed for a long time, and which was the cause of this price war; stations which gave a differential to the buying public of in excess of five cents per gallon on sales of gasoline, which Citrin-Kolb Oil Company never could hope to meet, and which it never has met in all the time covered by this exhibit; differentials in price so far below what Citrin-Kolb Oil Company charged at those stations, and which they have always charged, as they had no hope of meeting that competition. And that
1455 the situation that is complained about in the testimony
of the Government's witnesses is one which the Citrin-Kolb Oil Company did not instigate in the first place, and which its preferential treatment of the public has merely been made necessary by ruinous competition which has been made possible by the stations which are shown in

that exhibit, and which show much larger differentials than offered by the Citrin-Kolb Oil Company supplied stations. Now, we only limit this to the six stations that are in the exhibit. We want to be orderly about it. We want to present it in such a way so that it will not involve endless testimony. And that is the reason it is presented in these books, so that it could be easily referred to, and in an orderly way, as to each of the six stations involved. We have a right, I think, to show merely to rebut the Government's case, and in line with the phraseology of the Robinson-Patman Act which relates to the question as to whether the discrimination allows a potentiality for substantially lessening competition, or tends to create a monopoly, or tends to injure, destroy, or prevent competition. That thing is material to our case. It is very necessary that we be permitted in this case to show what the competitive situation was in those localities.

Trial Examiner Ballinger: Well, let us see if
1456 there is any difference of opinion between counsel
for Respondent and the Examiner with reference to the provisions of this statute, and what is necessary for the Respondent to establish.

The Section 2-a first prohibits discrimination in commerce and then provides, "And where the effect of such discrimination may be substantially to lessen competition, or tends to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person, who either grants, or knowingly receives the benefits of such discrimination, or with customers, or either of them."

Mr. Abbott: That's right.

Trial Examiner Ballinger: Now, as the Examiner recalls, testimony was introduced first establishing the fact that four companies who were, at least to some extent, engaged in the retail business, were receiving a preference price of 1½ to 1¾c per gallon for gas. There was a potential power placed in the hands of those companies.

Now, the Commission went one step further and offered testimony to show that those companies exercised and utilized that potential power. Now, you propose to show here by some exhibits that those companies were forced, I presume, to resort to that method or reduction in price
in order to meet competition elsewhere. And how
1457 do you propose to show that? By some photographs
taken around at different times; some of which were

not even taken by this witness; by letters written, which were not received—purported to be written by companies, which were not received by this witness; and other evidence of which this witness has no personal knowledge that it ever emanated from the source which it purports to have emanated.

The Examiner is very strongly of the opinion that, first, he is doubtful whether such evidence is admissible at all; and, secondly, if it is admissible, then you will have to establish it by competent testimony.

I don't want to pass on these exhibits tendered in block as they are, without first scrutinizing them carefully.

Mr. Abbott: I can offer them singly if the Examiner insists upon it, but it will take a long time to do it.

Trial Examiner Ballinger: I take it that will be necessary, and that opportunity should be afforded counsel for the Commission to inquire fully of the witness with reference to his knowledge of each one of the exhibits, if you care to proceed that way.

Mr. Abbott: I am willing to go ahead on that basis, if the Examiner wishes to have it done that way.

Trial Examiner Ballinger: I think that is the only
1458 way possible to dispose of the exhibits.

Mr. Austin: If your Honor please, it wouldn't be necessary to do that if the Examiner should rule on the general objection that these are not admissible. And I would like to say a word or two more on that.

After hearing what Mr. Abbott says, it gets back to meeting competition, not by Respondent, but by customers of the Respondent. And I think your Honor very correctly stated the question here is as to the differential—the effect of the differential given to Respondent's customers as against other retail customers of the Standard Oil Company.

Now, if these Citrin-Kolb stations were selling gasoline at a certain price, and if another Standard Oil Company station, we will say, in the neighborhood suffered injury as the result of the lower price which Citrin-Kolb received from the Standard Oil Company, and, as you say, the Commission went a step farther to show that that benefit of a lower price was utilized, now, it seems to me that this testimony, the purpose of it, is simply to say: "Well, if this retail station buying direct from Standard Oil, if that station lost business to Citrin-Kolb, why, it must have lost business to a lot of other people in the neighborhood, too, because they were all selling at the same price."

1459 And I don't think that that aids the Respondent at all.

Now let's assume they were all selling at the same price; we have a Citrin-Kolb station, and we have a lot of photographs and things which we will say indicate other stations in the vicinity were selling at as low or lower price as the Citrin-Kolb station, and let's assume there is a station buying direct from the Standard Oil Company in the neighborhood, and it sells at the same price as the others. Well, if the Standard Oil direct station is selling, we will say, at a margin of 2¢ a gallon, that means if it is selling at the same price at the Citrin-Kolb station, that the Citrin-Kolb station at that point has a margin of 4¢ a gallon, less whatever the expense may be involved in the operation of the bulk plant. But that is something besides.

1460 Mr. Abbott: You are assuming the differential is two cents?

Mr. Austin: I will change that, because it wasn't two cents, it was a cent and a half. Thank you, Mr. Abbott. On the Red Crown.

Mr. Abbott: That is assuming also they are selling at their own retail station?

Mr. Austin: That's right. That is what these six stations are, are they not?

Mr. Abbott: I will ask the witness that.

The Witness: No, they aren't.

Mr. Abbott: Not one of them.

The Witness: One of them is; the first one.

Mr. Abbott: Just the bulk plant at Linwood and D. T. Railroad.

Mr. Austin: I was under the impression that these six stations were all operated stations by Citrin-Kolb.

Mr. Abbott: They are not.

Mr. Austin: If they are not stations operated by Citrin-Kolb, are they stations which were mentioned in that letter? That is, are they Langer and Cohen stations or Sid's Service?

The Witness: I believe there are two Langer and Cohen stations, and one operated station. I believe the other three are just independent dealers. Let's see the addresses.

1461 (Witness refers to paper.)

Mr. Abbott: State which one is which.

The Witness: East Jefferson and Nottingham was operated by the company; Dexter and West Chicago is Sid's Service.

Mr. Abbott: Is that operated by the company?

The Witness: No. John R and Euclid and West Warren are Langer and Cohen stations; and Linwood and the Detroit Terminal Railroad, and Linwood and Pingree were independently operated.

Mr. Abbott: I just wanted to correct the impression.

Trial Examiner Ballinger: The Examiner is not sufficiently familiar with the various documents tendered in block or separately, and he would not care to rule upon them in block.

If it is desired, we will take the time to consider each one of them. There may be some of them that wouldn't fall within the general objection; there may be some of those about which this witness has personal knowledge.

Mr. Austin: Mr. Biber, these last two here, Linwood and Pingree, and Linwood and the Detroit Terminal Railroad, did you testify on direct examination regarding the prices charged to those stations by Citrin-Kolb Oil Company? Do you recall?

The Witness: Prices charged to these stations by
1462 Citrin-Kolb Oil Company?

Mr. Austin: Yes.

The Witness: Yes.

Mr. Austin: I believe you have been familiar at all times since 1937 from time to time with the posted tank wagon price of the Standard Oil Company?

The Witness: Yes, I have been.

Mr. Austin: And at any time from January 1, 1937, to date was the price charged by Citrin-Kolb Oil Company to either of these stations any lower than the posted tank wagon prices of Standard Oil Company?

The Witness: They were not.

Mr. Austin: Were they always charged to posted tank wagon prices?

The Witness: Yes, they were.

Mr. Austin: Your Honor, I think that disposes of these last two pages marked for identification 18-z-21 to 18-z-51, inclusive.

Trial Examiner Ballinger: How do you think it disposes of them?

Mr. Austin: I think because there has been no testimony in the case that either of those two stations were either operated by the Citrin-Kolb Oil Company.

That is correct, isn't it, Mr. Biber?

The Witness: That's right.

1463 Mr. Austin: Were either of them operated by Citrin-Kolb during this period?

1464 The Witness: I don't believe they were, during the period of that previous testimony. They are now. We got them back.

Mr. Austin: Since when?

The Witness: I don't know. If it is before, it is on your list. I don't remember the date, and if it is not—

Mr. Austin: Were either of those stations on the list of operated stations that you submitted here last month?

The Witness: I don't remember whether it was. It was just about that time. The list would show that.

Trial Examiner Ballinger: What opportunity, Mr. Austin, for cross-examination would these documents afford? The witness has no personal knowledge with reference to many of them.

Mr. Austin: He has, with reference to some of them.

Trial Examiner Ballinger: Some of them, he has personal knowledge of. I don't know how far his personal knowledge extends with reference to them.

Mr. Austin: Well, I wouldn't object on that point, if the witness actually made buys at a station, or actually was handed out a card at a station so that he could testify of his own knowledge that that station was advertis-
1465 ing a lower price. I mean, aside from other objections, I wouldn't object on the ground of personal qualifications, provided he could testify to that.

Mr. Abbott: We can take up each one of them separately, but it will take a long time to do it.

Mr. Austin: Let me proceed on this line, if your Honor please.

Trial Examiner Ballinger: This is a rather important case.

Mr. Abbott: That is true.

Trial Examiner Ballinger: I am not going to act on these unless counsel agree. If they will agree, I will go along with them.

Mr. Abbott: It may be that the Government would be willing to take this exhibit and indicate to us which of the pictures and other data he is willing to admit in evidence.

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if the general objection is ruled on to the effect that if properly identified they may be received in evidence, and then, as to the others, we can decide which ones we want to have testified to separately and in that way possibly shorten the procedure.

Trial Examiner Ballinger: The Examiner is of the opinion that this may be shortened by our taking an adjournment for lunch, provided you will furnish the Examiner a copy of these exhibits so that he may examine
1466 them and counsel for the Commission may have an
opportunity to examine them during the same period.

Mr. Abbott: Yes, we will give you a copy.

Mr. Austin: Your Honor, may I proceed just for a moment along this line of thought I was on here?

Trial Examiner Ballinger: You may.

Off the record.

(Discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: May I ask you, Mr. Biber, in these exhibits which have been marked, for identification, beginning with 18-z-22—do you have a copy there?

The Witness: No, I haven't.

(The witness was handed documents.)

Mr. Austin: Beginning with 18-z-22, is there any material from that point on, which refers to a date in connection with the Linwood and Pingree station on or after September 27, 1940, and as to the Linwood and Detroit Terminal on or after October 15, 1940?

Mr. Abbott: Now, just what does that date refer to; the time that they took the station over themselves?

Mr. Austin: That's right.

Mr. Abbott: I fail to see the materiality of that, if your Honor please, and object to the question on the ground it is irrelevant and immaterial.

1467 Mr. Austin: I am asking him what is in there at the present time, and then I will try to bring out why it is material.

The Witness: What page did you start with?

Mr. Austin: Those last two sheets.

Trial Examiner Ballinger: Will you state the materiality of the question as asked?

Mr. Austin: I think it is material, your Honor, because I believe that if there is nothing in these offered exhibits, that is, these two sheets, relating to the Linwood and Detroit Terminal station, and the Linwood and Pingree station which relates to them at any time while they were being operated by the Citrin-Kolb Oil Company, and there is no evidence in the case that they ever got a preferential price from the Citrin-Kolb Oil Company, I don't think it is responsive to anything in the Commission's case. I think it is entirely immaterial.

Trial Examiner Ballinger: Is it true that the record now portrays the Citrin-Kolb Company took over these two stations on the dates you have given?

Mr. Austin: That I just mentioned, yes.

Trial Examiner Ballinger: And thereby operated them?

Mr. Austin: Yes. From October, 1940.

Trial Examiner Ballinger: Prior to that they were
1468 leased or operated by independent operators?

Mr. Austin: Yes.

Mr. Abbott: You see, if the Court please, the testimony in the Government's case involved complaints by different station operators in the vicinity of these stations relating back to 1937, 1938, and 1939, as to alleged price cutting by these stations, so I don't think it makes any difference whether at a subsequent time the stations were taken over and operated by the Citrin-Kolb Oil Company. As a matter of fact, according to the Government's theory, the fact that they were company-operated would give them still greater opportunities for discriminating in the pricing to the public.

Mr. Austin: That's what I contend.

Mr. Abbott: So it is just in the inverse of what you contend.

Mr. Austin: On the other hand, I agree with what you have just said.

Mr. Abbott: I understand it is the Government's contention that if any one of these four jobbers operates a station itself, that increases the potentiality; is that right?

Mr. Austin: Oh, certainly.

Mr. Abbott: So I don't understand that it makes any
difference whether these exhibits refer to a period
1469 before 1940 or after 1940. As a matter of fact the
testimony that they are intended to rebut is testimony of witnesses as to conditions which obtained previous to 1940. Therefore, the exhibits are equally material and the question is irrelevant.

Mr. Austin: My position on that is—I don't think I made it clear, perhaps—that as to the period prior to the time when these stations were operated by Citrin-Kolb Oil Company, if there is no evidence in the record that those stations paid any lower price for their gasoline than were being paid by other stations buying direct from the Respondent, that as to competition with those stations there is no evidence of any injury resulting from any discrimination by the Standard Oil Company. I am making an admission, really, in your favor, Mr. Abbott.

Mr. Abbott: There is a claim, though, in the record of injury, and we have a right to rebut that.

Trial Examiner Ballinger: In view of the admission of counsel for the Commission, that he makes no claim of injury prior to the time the Citrin-Kolb Oil Company took over and operated these two stations, do you agree with counsel that a certain portion of those exhibits pertaining to those two stations now become immaterial?

Mr. Abbott: I will ask him this: are you willing to
strike out all the evidence in the record of the wit-
1470 nesses who complained of these two stations? If you
are willing to do that, then we don't need to meet it.
I will ask the Government's counsel if he is willing to do that.

Mr. Austin: I would have to go back to the record, Mr. Abbott. My recollection is any testimony of that kind must have come in incidentally, with some other stations. It probably would be inseparable.

Mr. Abbott: Would you look up the testimony and decide whether you are willing to have it stricken as to these two stations?

Mr. Austin: I couldn't answer that without reviewing the testimony.

Mr. Abbott: Linwood and Pingree, and Linwood and Detroit Terminal Railroad.

Mr. Austin: That would take a lot of time, to hunt through the record and find out where they came in. I don't know where they came in.

Trial Examiner Ballinger: Gentlemen, to save time, [illegible] will take a recess until 2 o'clock, during which time counsel may examine the exhibits and the Examiner also will examine them.

Mr. Abbott: I may say, in that connection, your Honor, that Judge Hanley may have a witness from out of town that he may wish to put on at 2 o'clock and I assume that will be satisfactory to the Commission.

1471 Trial Examiner Ballinger: We will try and accommodate counsel and not hold anyone over.

Mr. Abbott: Yes.

Trial Examiner Ballinger: Now, at 12:05 P. M., the hearing stands in recess until 2 P. M.

(Thereupon at 12:05 o'clock P. M., an adjournment was had until 2 o'clock P. M.)

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Afternoon Session.

2 P. M.

Trial Examiner Ballinger: We will come to order. Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

You may proceed.

Mr. Hanley: On the record, please.

As I understand, your Honor, Mr. Abbott has advised the Court we would like to put on a witness who comes from New York and is anxious to get back tonight, and if we may have permission of the Court to interrupt the other witness, we would like to put him on now.

Trial Examiner Ballinger: That privilege will be accorded counsel.

Mr. Hanley: Mr. Dyer, please.

JAMES E. DYER was thereupon called as a witness by and on behalf of the Respondent, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Hanley.

Q. Mr. Dyer, will you please give your name with initials to the reporter, and your place of residence?

A. My name is James E. Dyer. My home is in New York.

1473 Q. As I understand it, you desire, if possible, to complete your appearance here today and get back this evening.

A. I would be very grateful if I could complete my work here to day. I would like to go back tonight.

Q. Mr. Dyer, what is your present occupation?

A. I am assistant to the vice president and general sales manager of Sinclair Refining Company. Sinclair Refining Company is a corporation engaged in the manufacture of petroleum products, whose operations in the United States generally are in the territory east of the Rocky Mountains.

Q. How long have you been engaged in the oil business; associated with it, Mr. Dyer?

A. I have been in the oil industry for 26 years.

Q. Now, will you please tell the Court what your first association with the oil industry was and what steps were they you have taken in the industry up to the present time?

A. Yes. I started—my first job in the oil industry was with the firm called Cudahy Refining Company. The position which I first held was that of a general utility man in a bulk plant operated by that company in Kansas City, Kansas, and the general character of my duties there was to do all of the work that is usually done around those plants; the receiving of merchandise, the recording of the 1474 stocks as they were received and disbursed, the loading of trucks, the taking of orders over the telephone, and, as time went on, and as our business grew, I went from one position to another through the warehouse, in the office, then out into field work, and in 1916 the company, the Cudahy Refining Company was taken over by the Sinclair Refining Company, with which concern I have been continuously ever since, and from 1916 on, as the Sinclair Refining Company grew and expanded throughout this territory east of the Rockies, I have had occasion to work in all of the parts of the country in which our company operates and from one time to another to have occupied almost every position in the distributing end of the business. I have worked in all phases of the sales and the marketing, the operating end of the business and have occupied positions from the most modest, in those capacities, to through the position of district manager, on through to my present assignment.

There were some interludes to my employment that I might mention. During the days of the National Recovery Administration—that is, from 1933 until the NRA was invalidated in 1935—I was farmed out, so to speak, to the Code Authority for the Oil Industry under the National Recovery Administration, and I had charge of the administrative work of the Code in what was known as District

No. 1, with headquarters at New York. I might ex-
1475 plain that that work brought me in very intimate association with marketers in all phases of the marketing end of business with the major companies and smaller companies, dealers and retailers, and in every phase of the operation.

After the invalidation of the Petroleum Code, I spent some two years with one of the Sinclair Companies, whose business is confined almost entirely to jobbers; the jobbing business.

1476 Q. What was the name of that company, please?

A. That is the Richfield Oil Corporation of New York.

Q. And what was your designation in that company?

A. I was executive vice-president of that company.

Q. And generally what business did that company engage in?

A. The company was engaged in the business of, well, I would say it might be called a cargo marketer; we bought gasoline, fuel oil and other petroleum products in cargo lots, handled them through deep water marine terminals, and resold those materials to jobbers and distributors located throughout New England and along the Atlantic seaboard as far south as North Carolina.

Q. What territory generally does the Sinclair Refining Company operate in from a marketer's standpoint, Mr. Dyer?

A. Our company operates in all of the states east of the Rockies; that is to say, New Mexico, Colorado, Wyoming, Idaho, and then going east to the Atlantic seaboard, and then from the Canadian line down to the Gulf.

Q. Is it not true that your company advertises its products nationally and markets them nationally?

A. Well, I would say that is correct, except that our products are not marketed directly by our own company west of the Rocky Mountains.

Q. How long have you held your present position?

A. I have been in my present position since the fall of 1937.

1477 Q. And just generally, what are your duties in your present position?

A. My duties as assistant to the vice president and general sales manager are to generally supervise the sales operations, initiate the sales policies of the company, personnel and operating policies, for the marketing end of our company's operations throughout the territory in which we operate.

Q. Now, have you actually worked as a service station operator or attendant?

A. Yes, sir.

Q. Mr. Dyer, if there are any, what functions in the marketing of gasoline have you not had experience in?

A. Well, I can't recall any right now. I have worked in every department of our own company's business, and I would say that I have pretty well covered the field.

Q. You have made reference to working with the Code Authority under the NRA. What was the nature of your work during that period?

A. I had charge of the administration of the Code which had been approved by the president pursuant to the provisions of the National Recovery Act.

Q. Now, did that have reference to marketing, Mr. Dyer?

A. Yes. And I might say by way of explanation, that
I handled the administration in other phases of the
1478 business as well, but the principal importance of the
Code in the area in which I worked was that of the
marketing side of the business.

In the administration of the Code, we had the responsibility of organizing Code Authorities in the States comprising the regional District No. 1. Regional District No. 1 included New England, New York State, Pennsylvania, Delaware, Virginia, and West Virginia, and the District of Columbia.

In addition to seeing that the rules were properly understood by the industry, which was a sort of educational function of the Code Authority, we were required to receive, investigate, and act upon complaints of violations of the provisions of the Code, not only as to the marketing provisions, but as to the labor provisions as well. We also acted as a sort of conciliation agency where there were labor difficulties.

Trial Examiner Ballinger; May I inquire the relevancy of this line of testimony?

Mr. Hanley: If your Honor please, we propose to show by this witness the position of the jobber in the oil industry.

Trial Examiner Ballinger: Not under the NRA, but generally?

Mr. Hanley: Just generally. I am simply qualify-
1479 ing the witness as an expert on marketing, that's all.

Trial Examiner Ballinger: Proceed.

The Witness: That, I think, in a general way, summarizes my work with the Code Authority.

By Mr. Hanley:

Q. You have made some reference to work on the TNEC, Governmental agency; what was the nature of that, Mr. Dyer?

1480 A. Well, by the TNEC, I suppose you mean to the Temporary National Economic Committee?

Q. That's right.

A. I did not work on that. I merely observed the proceedings in the hearings that related strictly to the oil industry.

Q. Now, Mr. Dyer, does your company, the Sinclair Company, operate in the State of Michigan and the City of Detroit?

A. Yes, sir.

Q. What is the fact relative to whether or not in the oil industry the use of jobbers as a system of distribution is widely employed? And just amplify that on the basis of your knowledge and understanding of the situation.

A. Well, it would be my suggestion, if I may be permitted to do it, to attempt to define what I mean by a jobber.

Q. Perhaps that would be best. The word, I might say, has been used in evidence here rather interchangeably with tank car buyer, wholesale buyer, and bulk quantity buyer; and just what is a jobber as you propose to use the term?

A. In order to give a little background for the definition, I would like to read into the record, if I may, a definition of the word jobber, distributor, or wholesaler, as those words were defined in the National Code of Practices for marketing refined petroleum products, which was authorized by the Federal Trade Commission on June 12, 1931. That Code of Practices carried the following definition of jobber, distributor, or wholesaler:
1481 "One who carries a stock of petroleum products to sell to retail dealers or others for resale, but who may sell direct to consumers."

I would like also to read into the record the definition of bona fide jobber, jobber, distributor, wholesaler, as it appeared in the Code of Fair Competition for the petroleum industry under the National Recovery Administration.

1482 Mr. Austin: Pardon me, please. I fail to see why that should be read in, unless that document has some materiality.

I don't object to the witness giving his opinion, but I object to having a quotation from some other document, in the absence of any materiality of the document itself, as to the authority.

Trial Examiner Ballinger: The Examiner is in doubt as to the materiality.

Mr. Hanley: Perhaps I can straighten that out right away.

By Mr. Hanley:

Q. Mr. Dyer, do you agree with the definitions you are now reading?

A. Yes, sir.

Mr. Hanley: I think that covers it.

Trial Examiner Ballinger: What application has that to this case?

Mr. Hanley: Well, if your Honor please, this case involves a charge against the Respondent, specifically, but actually this case involves an attack upon the oil industry and upon the economic structure of the distribution of petroleum products, not merely in Detroit, but in the United States. Now, we propose to show in the record of evidence in this case exactly what the effect of any

1483 rule be that is made by the Commission as a result of this lawsuit.

We propose to show by this witness what jobbers are, and what they do, and how they do it, and why they do it, and what the effect is of their activity and what the effect would be if there were an adverse ruling in this particular proceeding. We think we are entitled to do that.

It has been observed here throughout the record that a jobber may not be a retailer. We say he is, in the contemplation of the economic structure in the oil industry; that there is no narrow definition of that term. We think we are entitled to show that. We want that on the record.

Trial Examiner Ballinger: What you are now attempting to show is, I take it, that a person who buys in tank car or jobber lots may be engaged in retail; that is, actual operation of retailing the products to the public, as well as the sale and resale of the product to retailers.

Mr. Hanley: That's right. And that is the Federal Trade Commission's definition with which this expert has said he agrees.

Trial Examiner Ballinger: You may put it in the record.

By Mr. Hanley:

Q. You may proceed.

Mr. Austin: I don't believe there has been a
1484 ruling, yet, on my objection.

My objection is, your Honor, I don't object to this witness giving his opinion as to what a jobber is. I do object to him reading that from an identified document.

Trial Examiner Ballinger: Well, without identifying the document?

Mr. Austin: If he simply replies to a question as to what, in his opinion, is a jobber, I am not objecting to that.

Mr. Hanley: Very well. I will undertake to surmount that difficulty and technicality.

By Mr. Hanley:

Q. Mr. Dyer, please state your definition or definitions of a jobber, as an expert. You may refer to any document that you have. You may read from any document you have. Please do not give any source, other than your own opinion.

A. In my opinion—and I think that I may say that this is a very widely-accepted definition in the industry—a jobber, or a distributor, or a wholesaler, or a bona fide jobber is one who is engaged in the purchase and sale of a petroleum product and who operates a storage tank or tanks of tank car capacity in conjunction with facilities for the storage of lubricants and greases and this bona fide jobber, jobber, distributor, or wholesaler will sell a substantial part of his petroleum products direct to
1485 resellers or consumers, but he may supply his own or controlled service stations or filling stations.

Now, that opinion, or that definition is, in my opinion, about as good a definition as I can think of, and one that has been accepted, to a large proportion, of the oil industry.

Mr. Austin: I move that last part be stricken, your Honor, as unresponsive.

Trial Examiner Ballinger: The motion is granted.

Mr. Hanley: Is that unresponsive; on the ground that it is unresponsive?

Mr. Austin: Yes. Where he says it is accepted by a large proportion of the oil industry.

Mr. Hanley: That's all you moved to strike?

Mr. Austin: Yes.

By Mr. Hanley:

Q. I will ask you whether in your knowledge that definition of a jobber is generally accepted in the oil industry?

A. It is.

Q. I will ask you if you are able to state, from your knowledge and experience with the NRA Codes, if that was a definition that was generally accepted by the United States Government through the agency of the NRA set-up?

Mr. Austin: I object to that question, your Honor.
1486 I think it is immaterial as to what was accepted during the NRA. I have some doubt as to materiality as to what the oil industry accepts now, but I didn't object to that.

Trial Examiner Ballinger: The objection is sustained.

By Mr. Hanley:

Q. Now, Mr. Dyer, I advert to the question which I asked you a few minutes ago, and having in mind the definition of a jobber or wholesale buyer which you have now given, will you please state on the basis of your knowledge and experience the degree of prevalence that that system of distribution has in the United States in distributing petroleum products, including gasoline?

Mr. Austin: Pardon me. I would like that question re-read.

Trial Examiner Ballinger: Read the question, Mr. Reporter.

(The question was read.)

Mr. Austin: The question there is directed to a system of distribution. I don't believe that the witness has done anything more than what he understands a jobber to be. Now, I certainly don't understand what is referred to here by a system of distribution, and I think that the question is entirely too indefinite, and has no meaning, as
1487 referring to previous testimony. I object to it on that ground.

Mr. Hanley: I will develop it if there is any question in your Honor's mind.

Mr. Austin: I sincerely don't know what you are referring to, Judge.

Mr. Hanley: Is there any question in your Honor's mind?

Trial Examiner Ballinger: The Court isn't entirely certain on it.

Mr. Hanley: I will develop it, then.

By Mr. Hanley:

Q. Mr. Dyer, how do you get gasoline? Where does it come from?

A. Gasoline usually and ordinarily comes from the refinery where it is manufactured.

1488 Q. Who uses it?

A. Gasoline is used by the owners and operators of automobiles, trucks, busses, marine motors; for illuminating purposes, in a restricted way; in some cases for heating purposes. That, generally, suggests the uses.

Q. How does the gasoline get from the refinery where it is manufactured to the individual or the place where it is used in the various ways that you have indicated?

A. The movement of gasoline from the refinery to the ultimate consumer is through a wide variety of channels and methods and functions.

I think perhaps by illustration I might convey the idea more clearly.

When gasoline has been manufactured—and this is true of other petroleum products, such as fuel oils and lubricants—when the gasoline has been manufactured and made available at the refinery, it starts on its transportation to the ultimate destination of the consumer.

Some gasoline that starts through that pattern of distribution will be loaded into cargo vessels, if it happened to be a tide-water refinery. It will be transported in those cargo vessels to a bulk deep-water terminal, which is a location of a rather large storage vessel which will accommodate the contents of one of these large vessels.

From the bulk water terminal the material may be loaded into barges to then be sent on to smaller water 1489 boat plants or it may be loaded into tank cars and transported by rail to bulk plants, or it may be loaded into trucks of large capacity, frequently referred to as transport trucks, and transported to bulk plants or directly to retail outlets.

After the material has reached a bulk plant by one of the processes to which I have referred, the material then is transshipped or transdelivered by tank truck, usually, if it is bulk merchandise, either directly to the consumer—for instance, in the case of a truck fleet operator who has the facilities for the accommodation of a truck load of gasoline or storage or dispensing facilities for it, or it is delivered into a storage system of a gasoline and oil service station and the next move through this latter course to the consumer is for the consuming motorist to drive into the station and have the material pumped through the dispensing facilities into the storage tank on the consumer's motor vehicle. From then on the gasoline moves through the circulatory system of the automobile to the motor, where it is consumed and dissipated and its value destroyed.

Q. Now is the process which you have generally described the means by which somebody in Detroit can buy five gallons of gasoline at a service station that came out of the ground as crude oil, perhaps in Texas, and was refined in Illinois or Indiana and was transshipped to Detroit as a finished product?

1490 A. Yes, sir.

Q. Is that process one which you describe generally by the term distribution of gasoline?

A. Yes, sir.

1491 Mr. Hanley: May we have this marked Respondent's Exhibit 19, for identification?

Trial Examiner Ballinger: Respondent's Exhibit 19, for identification.

(The document referred to was marked, for identification, "Respondent's Exhibit 19.")

By Mr. Hanley:

Q. Mr. Dyer, I hand you what has now been marked Respondent's Exhibit 19, for identification, entitled Flow Chart of Gasoline from Refiner to Consumer, and I will ask you if you have ever seen it before.

A. Yes, I have seen it.

Q. Did you have anything to do with the preparation of that chart?

A. Yes, sir.

Q. What?

A. It was prepared generally under my direction and with my collaboration for the purpose of showing the flow of gasoline from the refiner through the various channels and functions of distribution to the consumer.

Q. Does that graphically portray the system of distribution which you have just orally described in a general way?

A. Yes, sir.

Q. In your judgment, and from your experience, will you tell us what your opinion is as to whether or not the system of distribution of gasoline is an intricate,
1492 involved, and complicated one?

A. It is my opinion, and I think it can be demonstrated from the facts, that the distribution of gasoline is an intricate, complex, complicated system, with many functions, and many inter-relations of functions, and employing numerous types and methods of distribution.

Q. When was the chart, Exhibit 19, prepared, Mr. Dyer?

A. Well, it was completed in May of 1939, but we were working on it for some months prior to that.

Q. And will you tell us, please, the primary purpose of the preparation of the chart?

A. Well, the very complexity of the processes was the reason why we got it out. There were so many people in our organization, which is a large organization, who were not intimately acquainted with these various processes, and we made it up for the information of our own people. We have with our affiliated companies, men who are engaged in the production of crude oil, the transportation of it by pipe lines, and the manufacture of it at the refineries, and those men, of course, are interested in our marketing picture, and we made up this map largely for the information of those people.

Q. That is to say, Mr. Dyer, that the distribution of gasoline takes such varied forms, and is so complex that you, as a marketing supervisor, found it necessary to educate your own marketers, is that true?

1493 A. Yes, sir.

Mr. Hanley: I offer Exhibit 19 in evidence.

Trial Examiner Ballinger: Let counsel for the Commission examine it.

(The document was handed to Mr. Austin.)

Mr. Austin: I would like to ask just one question, please.

Mr. Hanley: Very well.

Mr. Austin: Do the size of these various rectangles in the chart enclosing the various names, do the various sizes here have anything to do with the amount of gasoline going through those?

The Witness: By no means. They are just accidental in their size, more or less to fit into the picture, and there is no attempt made in here to weight the value or importance of these particular channels.

Mr. Austin: I have no objection.

Trial Examiner Ballinger: Without objection, Respondent's Exhibit 19, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 19," was received in evidence.)

By Mr. Hanley:

1494 Q. Now, having covered to some extent, the A, B, C's of this distribution question, Mr. Dyer, I will again advert to the question I asked you a little while ago: basing your answer on your experience in the oil industry, what is the degree of prevalence of the use of jobbers or wholesale buyers of gasoline, bearing in mind your definition of such a buyer, throughout the United States, in the distribution of gasoline?

A. The jobber's place in the distribution of gasoline is portrayed on this Flow Chart, and I would say that the operation of the jobber, his importance is known and felt in every section of the country. With our company, we operate some 2000 bulk plants; we have some 500 jobbers. That is an indication of the importance of the jobber, as far as our own company is concerned. There are thousands of jobbers, and when I say thousands, I would like to be more precise, but there are no data available where I could give you a specific number. But my estimate based upon data which has been accumulated by sources that I have thought to be probably the most reliable, gives me the opinion that there are not less than 10,000 jobbers in the United States, and that there are probably a very much larger number, because of the fact that the census data on which many of these estimates are based includes a large number of concerns who were engaged in the jobbing of petroleum products in connection with other

1495 lines of business; for instance, lumber business, grain elevator business, grain and feed and coal and so on, where I am of the opinion that the predominating business of that particular marketer probably determined the classification in which he is put, and it is my own opinion, which I am sorry to say I can't support beyond what I have said, that there are probably 10,000 jobbers, and very probably many thousands more than that whose identity is more or less merged or submerged, you might say, in their other lines of activity.

Q. Now, with regard to the operations of large oil companies generally—when I say large oil companies, I mean companies, Mr. Dyer, which are generally comparable in size and operations with your own company; in respect of their distributing methods, what is the fact as to whether or not they use a substantial number of jobbers in a substantial portion of the territory in which they operate?

Mr. Austin: I don't object to that, your Honor, provided that witness will state what he means by a substantial number of jobbers. Otherwise—if Judge Hanley will amend his question.

Mr. Hanley: I can't put the figures in my question, because I don't know them. But I will ask the witness to try to meet the objection which counsel is making, be as explicit as I can.

1496 The Witness: May I ask that that question be read?

Mr. Hanley: I will withdraw the question and try and frame it so it won't be subject to any objection.

By Mr. Hanley:

Q. Is it or is it not true, Mr. Dyer, that oil companies, generally, employ the jobber system of distribution of gasoline in the United States, including Michigan and Detroit?

A. Yes, sir.

Q. Within your experience and observation, to what extent is that method used? And just amplify your answer to any degree you wish, based on your knowledge and experience?

A. Well, the jobber has a very wide, and I would say comprehensive place, in the market structure; he is found wherever petroleum products are marketed in this country. The degree of density, I don't believe very much from the Rocky Mountains to the Seaboard. It is a well-known and well-accepted method that has been in the industry ever since I have been in it. It has always been an important part of the distribution set-up, and I would say that almost without exception marketers of petroleum products, refiners of petroleum products use the jobber as a part of their distributing function.

Q. Since you have been acquainted with the oil business, Mr. Dyer, what is the fact relative to
1497 whether or not that system of distribution has been increasing or decreasing?

A. Well, ever since I have been in the industry and have had particular occasion to observe, and opportunity to observe, the jobbing functions closely, and that has been, I would say, some twenty years, the jobber has, I would say, grown in extent of numbers, and in importance, and I would say as of today that that trend has rapidly accelerated.

I would say that the jobbers' importance in the marketing picture is more inclined to grow today than it has at any time in my experience, and there are a number of reasons for that.

Q. What would you say as to whether or not it has increased in terms of money invested in jobber business?

A. I would say that it has increased in amount of money invested as well as in number of jobbers engaged in the industry.

Q. And the same question, Mr. Dyer, in respect of the number of persons employed by the jobber industry?

A. That number has also substantially increased.

1498 Q. Now, if I understand you correctly you have indicated that the jobber system of distribution was employed by oil companies generally?

A. Yes.

Q. Large and small; am I right about that?

A. Yes.

Q. There are some companies, Mr. Dyer, which are designated as being integrated companies; what is your understanding of that term?

A. Well, as the term is usually used in the industry, it means a concern that embraces a number of the functions in one ownership and management.

A completely integrated company would be a company which was engaged in the exploration for oil, the drilling for oil, the production of oil, the transportation of the oil by pipe line, tank ship, the refining of the petroleum into its various refined products, the marketing of those products through its own facilities and through jobbers and dealers, and all of the other avenues of distribution as is shown in the flow chart from the refinery to the consumer.

Q. Is it not true that generally speaking the companies which you have described are the larger oil companies?

A. Yes, sir.

Q. Are they not what some people sometimes loosely describe as major companies?

1499 A. Yes, I think that name applies.

Q. Now, in respect of those companies, do they not generally have well known brands of gasoline?

A. Yes, sir.

Q. Some of them are nationally advertised, are they not?

A. Yes, sir.

Q. Is it not true that many of those companies in many territories in which they market sell their gasoline directly to retail operators, filling stations I mean?

A. Yes, sir.

Q. Is it not true that they have bulk plant facilities, and a set up which enables them to make deliveries of gasoline directly to retail outlets which are operated by independent sellers of gasoline?

A. Yes, sir.

Q. What is the fact with reference to whether or not those companies—confining your answer now to this class of companies which we have just now been discussing—what is the fact as to the extent that that class of companies uses the jobber system of distribution?

A. Well, they generally employ the system of distribution through jobbers. It is a generally accepted method, and is not confined to large or small refiners, nor to integrated, semi-integrated, or any other division of the industry.

Q. Now, at the other end of the scale, Mr. Dyer,
1500 isn't it true that there are a large group of refiners which are just refiners? They just make gasoline?

A. Yes, sir.

Q. Is it not true that many of them have no distribution system of their own at all?

A. Yes, sir.

Mr. Austin: Judge, would you mind not making those questions so leading.

Mr. Hanley: I won't lead, if you prefer. But this witness is highly intelligent, he isn't going to let me trap him into any answer he doesn't think is the truth. But I will try not to lead so much.

What was the last question?

(The last question and answer were read by the Reporter.)

By Mr. Hanley:

Q. In respect of that class of refiner, what generally is the method of distribution that they employ?

A. The usual and ordinary method that a refiner having no direct marketing facilities of his own uses—is to either sell all or a part of his refinery output to other concerns in the industry who do have such facilities, or to sell these products to jobbing companies who buy the material from the refiner and resell it to resellers and to consumers and to their own service stations.

1501 Q. Is it or is it not true, in your judgment, that there are many, many millions of dollars invested in the jobbers' business in the United States?

A. Yes, sir; I know that there are many, many millions, many tens of millions of dollars invested.

Q. Is it not true that there are many, many thousands of individuals employed in the same industry?

A. Yes, sir.

Q. Now, with respect to all of these jobbers, whether they handle a branded product or whether they handle an unbranded product, what is the fact, generally, as to whether they engage in a direct retail operation as well as in the operation of wholesaling gasoline to other retailers?

A. Well, it's a very common and, I might say, usual thing for a jobber to be engaged not only in the resale to retailers, but also to own and operate retail outlets of his own.

I might say, just to amplify that, if I may, that a more or less typical jobber set-up, in the way of facilities, would be something like this: a bulk plant which has storage capacity for at least a carload of the respective grades of products that are handled in bulk and a warehouse which will accommodate a carload or at least a full truckload of lubricants in packages, from one to two or three motor vehicles, say two ordinary tank trucks, one of them a
1502 stake truck, a number of dealers, it may be large and small—and by dealers, I mean individual business men—who own and operate a service station to which or

to whom the jobber resells the merchandise he obtains from his supplier and who, in return, retail directly to the consuming trade and usually from one up to, sometimes, a much larger number of retail stations which are owned by the jobber himself and to which he delivers the material from his bulk plant, and which he operates usually through employees, though sometimes these stations are, in turn, leased to dealers who operate a station.

Q. Is that typical set-up which you have described generally prevalent throughout the United States?

A. Yes.

Q. You live in New York, Mr. Dyer. What is the situation in that respect in New York City?

A. Well, the situation with respect to jobbers in New York City, I think, is probably a little bit unique. That is to say it is different from the pattern that we find in other parts of the country because, as you know, Manhattan, which is a part of New York, is an island. Long Island, which has the Boroughs of Brooklyn and Queens is also an island. It is necessary, to be in that market down there, to be able to accommodate very large in-bound cargoes of petroleum products and because of the aggregation of
1503 capital required, the jobber, as we encounter him out
in this part of the country—he just isn't known, simply by reason of the fact that the average individual wouldn't be able to go into that market with such facilities, so that the jobbers down there are almost entirely jobbers of what you referred to as major company products. As a matter of fact, if they didn't have the major company products, they wouldn't be able to get any, in that particular market. That's what I meant by its being unique. The functions aren't any different, but it just so happens because of that structure I referred to that the jobbers who are in business are jobbers of the major companies' merchandise.

Q. Mr. Dyer, I am now going to use the term dual operation. I will mean by that an operation where a jobber or any gasoline supplier or seller indulges in both the retail operation directly and in the business of selling wholesale to a reseller. Is that clear?

A. I am not so sure that I do understand that point, Mr. Hanley.

Q. First: such a purveyor of gasoline sells through his own retail outlets?

A. Yes.

Q. Secondly: he also sells gasoline to other and independent retail resellers of gasoline; that's what I
1504 mean by the use of the word "dual." Is that clear
now?

A. You mean is there a situation where a supplier, let us say—

Q. No. I am just trying to define the word that I want to use. I mean by the word "dual" that kind of an operation.

A. Where a man is engaged in two functions?

Q. In those two functions.

A. Yes, that is very common.

Q. That is clear to you?

A. Very common; yes.

Q. Do these jobbers in New York, which you have just been describing, engage in that dual operation?

A. Yes, sir.

Q. And I think you have already explained that it is a common practice for jobbers everywhere in this country to engage in that dual operation.

A. Yes, sir. I would say that is the usual situation.

Q. Is it or is it not true that sometimes these jobbers engage exclusively in a retail operation?

A. Yes, that is more rarely the situation.

Q. Does it happen with some incidence all over the United States?

A. Yes, you find them here and there.

Q. There are some situations within your experi-
1505 ence where some companies have observed the policy
of not supplying retail resellers directly, where they
have a jobber?

A. Yes. There are some companies who follow the practice and the policy in those areas in which they have established their own distribution, they do not sell to jobbers in that same area. It would be almost impossible, I think, to say what the balance is between those who do and those who do not, but I would say that the balance is pretty substantially on the side of those who do. Our own company does not. Where we have a jobber, we do not operate directly, or, conversely, if we are operating directly, we do not supply jobbers in that same marketing area.

Q. I don't think I understand just which practice you think may be the more predominant.

A. Well, I would say that the practice that is the opposite of our own practice is the predominating practice.

Q. That is to say, the dual operation by the supplying company is more predominant than the exclusive operation?

A. That is true.

Q. Now, assuming an exclusive operation of a jobber supplied by some company, what is the general practice as to whether that jobber engages in a dual operation in his business, in his own business, that is, operates as a retailer as well as a wholesaler?

1506 A. It is generally the practice that he operates in both capacities.

1507 Q. Suppose, Mr. Dyer, that in any given territory where a supplying company was selling to a wholesale buyer that for some reason that company were prevented from continuing to sell to that wholesale buyer what, in your judgment, would be the result in respect of the ability of that wholesale customer to obtain gasoline on the same or better terms?

Mr. Austin: I think that question is too hypothetical, your Honor. It involves too many questions of a credit rating, of the jobber customer's credit rating, and other brands of gasoline available, and all sorts of things.

Mr. Hanley: That's exactly what I want to prove: the availability of gasoline.

Mr. Austin: The question was, as I understand it, if one company refuses to further sell, or is prevented from selling to the jobber, what would be the fix the jobber is in, and could he get gasoline from somebody else. It seems to me it could be readily shown, and perhaps has already been shown, what sources of gasoline are available in the given territory.

Trial Examiner Ballinger: It would depend upon the territory; it would depend upon the financial condition of the jobber—many elements would enter into it, would they not, Judge?

Mr. Hanley: All right. I will withdraw the question and fix it up.

1508 By Mr. Hanley:

Q. Assuming this, Mr. Dyer: It has been proved in this case that there is a jobber in the City of Detroit known as Ned's Auto Supply Company which buys in the neighborhood of four to five million gallons of gasoline a year. The credit rating of that company is excellent. They have their own storage facilities. They have their own delivery trucks and distribution system. They have outlets at which they sell gasoline. They have been in the gasoline business for twenty-odd years. Their business has consistently increased right up until the present time. That company is being supplied by the Standard Oil Company, the Respondent in this action.

Suppose further, that the Federal Trade Commission issued a cease and desist order against the Standard Oil Company from selling to Ned's Auto Supply Company on the basis of any differential below the ordinary tank wagon price to dealers. What, in your judgment, would be the ability of Ned's Auto Supply Company to obtain gasoline on a tank car basis and at a price less than the ordinary tank wagon basis?

Mr. Austin: I object to that, your Honor. In the first place I think it is irrelevant and immaterial and, in the second place, even aside from that I would object more or less, unless the witness could state that he had some means or facts at his disposal upon which he could base a 1509 reply, and I believe he hasn't.

Mr. Hanley: This man is the best qualified expert that has appeared in this case yet, Judge. I don't know what else you would want.

Mr. Austin: I am not questioning that but I don't think this man would contend that he knows, as an expert, of Ned's Auto Supply Company; what Ned's Auto Supply Company could buy in Detroit.

Trial Examiner Ballinger: Do you mean, Judge, could he buy from another company provided he continue in his dual operation? That's what you mean, is it not, by the question?

By Mr. Hanley:

Q. Mr. Dyer, I mean could that buyer, Ned's Auto Supply Company, on the basis of the facts that I have just stated, buy gasoline on terms less than the ordinary tank wagon price in Detroit? That's all I mean.

A. He would have no difficulty at all in obtaining a source of supply on the basis that you cite. As I mentioned before, our own company, because of its particular policy, wouldn't be interested in that business but—I don't know

Ned's Auto Supply, either; I might add that—but assuming the facts to be as he gave them to me, he would have no difficulty in obtaining supplies.

Q. And would it make any difference what he did
1510 with the gasoline; whether he sold it at retail or wholesale—

A. No, sir.

Q. —or threw it in the river?

A. Well, I wouldn't include throwing it in the river but I will go along to that point.

Trial Examiner Ballinger: Do I understand you to state that in the event a cease and desist order should issue against this Respondent, that Ned's Auto Supply Company would have no difficulty in going to another oil company and obtaining from them exactly that which the Federal Trade Commission had prohibited this company from delivering him?

The Witness: Well, my answer to that would be yes, if the same prohibition didn't extend to other marketers.

Trial Examiner Ballinger: Don't you know, as a practical man, that if it did, a proceeding would immediately follow against the company that did deliver to him?

Mr. Hanley: If your Honor please, I am sorry but I think I must object to your Honor's question, for this reason: That it places the witness at an unfair disadvantage is that it requires the witness to determine a matter of legal policy on the part of another oil company without the witness having been advised that if a cease and desist order were introduced against the Standard Oil Company in this case, that that cease and desist order would not be binding upon any other oil company in the world.

1511 Trial Examiner Ballinger: Yes, but this witness has had vast experience in operations and he knows, or at least should know, that that which one company was prohibited from doing, the Federal Trade Commission would prohibit another company from doing.

Mr. Hanley: Well, if your Honor please—and in explanation of my objection—the difficulty with this whole proceeding is it doesn't get that result. The only result that can be obtained in this proceeding is that there is: first, a dismissal of the Respondent, or; second, a cease and desist order which is binding only on the Respondent and the only penalty is a contempt proceeding and the only company that can be guilty of the contempt is the Respondent in this action. That is, your Honor, is one reason we are putting in this general character of proof.

We say this: That you have brought a proceeding here which is bottomed in inequity, in that you are doing a thoroughly inequitable thing and you are aiming at a point which is directly antagonistic to the purpose of all of the laws which the Federal Trade Commission is charged with administering; namely, promoting the public interest. If you prohibit us in this proceeding from selling gasoline as it is generally sold throughout the country and you turn our competitors loose, but put us in a particular pen, and restrict us—and there isn't any punishment for these
1512 other companies—you put us under a rule that nobody else in the industry is under and, your Honor, make no mistake about it, competition is such in the oil industry that any time any company can get one of our customers, they take him, and we are no lily in that regard, ourselves. We hire salesmen in our efforts to gain business.

Now, when you ask this witness what some other company would do, without explaining to him the consequences of their action, I just say it is an unfair question. The worst that could happen to another company that took over this business would be that a complaint would be filed and they would go through this kind of a proceeding and they would be prohibited in the future from repeating that operation and they would not be punished for anything that they had done in the past and if they can get five million gallons of gasoline a year, as long as they can get it, they just take it.

Trial Examiner Ballinger: The question, if it had been propounded to a witness of less experience and less intelligence than this witness, might have been considered unfair but I am sure this witness understood it, and I am sure understood the consequences of the acts of any other company which undertook to do that which the Respondent here was stopped from doing by the Federal Trade Commission.

1513 Now, with reference to other competitors, I take it it goes, of necessity, that if an order should issue against the Respondent company, and the other companies didn't follow suit and get in line, that proceedings would immediately commence against all violators.

Mr. Hanley: Well, I haven't your Honor's sanguine attitude toward that. I don't think we would complain so much if the rule were universal. I am just afraid it might not be. I think, however, this witness has answered that question "Yes," that there would be other suppliers who would take on the business.

By Mr. Hanley:

Q. Is that right?

A. Yes—and I would like to explain to his Honor that when I answered that question—I am not an attorney, by the way—I had in mind the intense competition in our industry. There are many engaged in it. It is the business of—a business of intense competitive effort. There is a constant struggle going on to obtain new business and, particularly, business of large volume with accounts that can pay for the merchandise which they get, and what I had in mind in the question put to me was the idea of the availability of this merchandise at these prices, thinking of the condition as I know it every day when people are out struggling to get that very type of business.

1514 As I say, our company wouldn't take it, because it conflicts with a fundamental policy of our marketing problem, but I realized there are many hungry mouths in the oil industry that would be wide open for, generally speaking, that type of business.

I am sorry I conveyed the impression to you that I would be attributing motives to other people in the industry that they would go out and violate the law. That never even entered my mind when I answered the question. It would be an impertinence, had I had that in mind, but—

Trial Examiner Ballinger: You still think there are some in business who would take the chance?

The Witness: I think that is a realistic viewpoint. I think that is a realistic viewpoint based upon observation. I say that regretfully, too, because I am proud of the industry and what it has done, but I think that is a realistic answer.

By Mr. Hanley:

Q. Mr. Dyer, we have been discussing jobbers and tank wagon buyers and so on, and I haven't developed with you the question of price. Is it or is it not true that these so-called jobbers or wholesale buyers ordinarily buy at some price less than what is commonly known as the tank wagon price?

A. Yes, sir. I think I can explain that in this way: 1515 those people—when I refer to these jobbers and bona fide jobbers, I refer to the people in the industry who perform a certain function of taking this merchandise away from the refinery and delivering it either to resellers or to consumers through their own stations, and they are performing a function to which a cost attaches. In other words, a refiner who is marketing through a jobber in a given area is having that jobber perform a function in the handling of this merchandise from his refinery to the ultimate consumer that must be done at a cost. If he undertook to do it direct, it would cost him a certain amount of money, depending upon the circumstances in the case. So that every jobber who is in business buys at a price less than the price at which he resells it. Otherwise he couldn't stay in business.

Now, that price varies throughout the country. I couldn't give you market quotations, but I would say that generally speaking it will range from a cent and a half—very frequently below that, although under some conditions it has been less—and it will run up in some parts of our country today to 2½¢.

Q. In your judgment a cent and a half is about as low as the margin ever gets?

A. That is just about low ebb. There have been cases when it has been less than that, but it was due to 1516 immediate market conditions. I would say that a cent and a half is rather on the low side.

Q. Would it follow, in your judgment, Mr. Dyer, that the general average of the size of the margin throughout the United States will be something above a cent and a half?

A. Yes; it would be 2¢ or more, if you struck averages. It would be above 2¢.

Trial Examiner Ballinger: What would the maximum be?

The Witness: The maximum, your Honor, that I know of at the moment, is 3¢. 2½¢ is not uncommon in certain sparsely populated parts of the country. 2¼¢ is the generally prevailing difference that you will find along the Atlantic Seaboard. In the interior here frequently it runs around 2¢ or a little bit less or a little bit more.

Trial Examiner Ballinger: Depending upon the population, does it not?

The Witness: Yes; usually in a populous area the margin will be less, because really the employment—you might say the employment of a jobber by a marketer who is going from his refinery to the consumer is based more or less on what it would cost him to do the job himself. In populous areas the cost of marketing is usually less on a per gallon basis. So that you will find jobber margins in
populous areas usually less than in less populous
1517 areas. And the thing that keeps it more or less in
equilibrium is if the refiner is selling through to the consumer, employing jobbers, and he finds out he can perform that function at a less cost himself, he will do it himself.

By Mr. Hanley:

Q. Mr. Hanley, suppose that for some reason the refiners of the generally known brands of gasoline were prohibited from selling to jobbers on a jobber basis in territories in which those suppliers also sold on a tank wagon basis; in your judgment what would be the result on the jobber business?

Mr. Austin: Would you mind having that question reread, please?

Trial Examiner Ballinger: The reporter will please read the question.

(The question was read.)

Mr. Austin: I don't think that is based on any set of facts in this case; it is hypothetical and doesn't relate to any situation present in this proceeding. I object to it.

Mr. Hanley: It is the hypothesis that your Honor assumed would occur if there were a cease and desist order entered in this case; namely that these suppliers would respect such an order, notwithstanding the order was not
entered directly against them. Now, this witness is an
1518 expert and is entitled to testify as to what the result
would be on the jobber business if these jobbers could not select their suppliers.

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

A. Well, in many—or I would say in some cases, it would mean that the jobber would simply have to go out of business; he would have no source of supply.

Trial Examiner Ballinger: Wouldn't it, as a matter of fact, mean that he would have to elect whether he would stay in the retail business or whether he would confine his business exclusively to that of a jobber?

The Witness: Well, he no longer would be able to continue to function in the—

Trial Examiner Ballinger: Dual capacity?

The Witness: In the matter which he had before.

By Mr. Hanley:

Q. Mr. Dyer, irrespective of his decision as to how he would operate his business, he still couldn't buy from one of these makers of the well known brands of gasoline unless that refiner also elected as to which class of customers it would sell; isn't that true?

Mr. Austin: Now, that is why I objected to the question. The question was so broad, you see, that it covered—there was a possibility which isn't concerned in
1519 this case at all, which refers to an order preventing
an oil company from selling to a jobber, where it also sells to retailers in the same territory. And that question isn't involved in this case, except where the jobbers may resell at a lower price, or where the jobber resells at retail. But unless you put in both of those qualifications, the question is meaningless as to this case.

Trial Examiner Ballinger: The Examiner was under the impression that counsel for Respondent had included both stipulations in his question.

Mr. Hanley: Well, I moved for two hours, your Honor, trying to get one of those situations dismissed yesterday morning, and the Government said it belonged in the case. Now, I think I am entitled to meet it.

Trial Examiner Ballinger: Proceed.

Mr. Hanley: Will you read the question, please?

(The question was read.)

Mr. Austin: I object to that as a leading question, your Honor.

By Mr. Hanley:

Q. Is it or is it not true?

A. Well, I must confess I am a little bit bewildered on that question. I am not sure I know precisely what you mean.

Mr. Hanley: I will withdraw the question and reframe it, Mr. Dyer.

1520 By Mr. Hanley:

Q. If these makers of the better known brands of gasoline were prohibited, for any reason, from conducting the dual operation, as that has been explained, and declined, for any reason, to sell to jobbers, would that or would that restrict the business of jobbers, irrespective of how one jobber might conduct his own business with reference to whether he conducted a dual operation or otherwise?

1521 A. Yes.

Q. Now, will you amplify that and explain why.

A. Well, I think the most convenient way to explain it will be to refer to this situation that I spoke of as obtaining in the New York area. In that area, because of the conditions that I referred to, the only—well, I won't say the only, but the completely preponderant market there is served by these companies to which you refer. And if they were precluded for any reason from selling to a jobber, the jobber would have no source of supply. And that was the reason why I said yes. He wouldn't have an available source of supply.

Trial Examiner Ballinger: Wouldn't that of necessity force the jobber to elect as to which line of business he was going to continue in?

The Witness: Well, it would force him out of business as a jobber, your Honor.

Trial Examiner Ballinger: Well, would it necessarily, if he saw fit to give up his retail end of it?

The Witness: Well, to that extent he would be out of what is now considered a part and parcel of the jobbing function.

Mr. Hanley: Let me understand your Honor. Is it your Honor's position that it is the character of the jobber's business that is controlling here, rather than the character of the ~~Respondent's business~~?

1522 Trial Examiner Ballinger: You have this situation present, where this Respondent is selling to certain customers engaged in both the retail and the jobbing business.

Mr. Hanley: Right.

Trial Examiner Ballinger: (Continuing.) At a lower price than he is selling to those, his other customers, engaged in strictly a retail business.

Mr. Hanley: Yes, sir. Now, is it your Honor's position—

Trial Examiner Ballinger: Now, that is what is complained of.

Mr. Hanley: Is it your Honor's position that if these jobbers were not engaged in any degree in retail operations, that there would be no basis for this complaint?

Trial Examiner Ballinger: I don't know that it is proper for me to attempt to pass on that. But I take it that if the retail end of it was eliminated this complaint would never have issued.

Mr. Hanley: On the basis of the statement of the Examiner, I renew the motion to dismiss from this action any further consideration of the transactions between the Wayne Oil Company and the Stikeman Oil Company on the one hand, and the Respondent on the other hand.

Trial Examiner Ballinger: The motion is denied.

Mr. Austin: I would like to amplify—rather, make
1523 a statement on behalf of the Commission.

Your Honor said that possibly if there had been no retail selling by these jobbers this complaint wouldn't have issued. That is not the only thing involved in the complaint. It is, perhaps, the principal thing involved, and in point of size of transactions involved, but the sales by the so-called jobbers to the dealers are involved to the extent that some sales may be made by the jobbers at a price below the posted tank wagon price of the Standard Oil Company.

Trial Examiner Ballinger: That naturally followed.

Mr. Austin: That is the amendment to the complaint which we just made.

Trial Examiner Ballinger: That was the natural consequences of the first preferential—of the first step; namely, the preferential rate obtained by these four parties engaged in these dual operations.

Mr. Austin: That's right. But even if one of those jobbers was not involved in the dual operation—in other words, one of them sold, as the Stikeman Oil Company does now, sold only to other dealers, the complaint would still apply if it were shown that the Stikeman Oil Company was selling to some of its dealers at a lower price than the Standard Oil Company posted tank wagon price in Detroit.

Mr. Hanley: That hasn't been shown.

1524 Mr. Austin: I know. I am not speaking—I am speaking generally here, because there has been some attempt to outline what the case covers. I want to make this statement very definitely, though, that insofar as a

jobber resells in territory, such as Detroit, where the Standard Oil Company sells direct to retail service stations, if the jobber also sells to retail service stations in the same territory, and at a price equal to or higher than the posted tank wagon price of the Standard Oil Company, then so far as this complaint is concerned there is no allegation of any violation of the law in that method of doing business.
1525 And I think that is what the Trial Examiner had in mind when he says that the jobber could remove himself from any prohibition that might be issued in this case by restricting himself to a jobbing business.

I am only adding to what the Trial Examiner has said by saying if he restricted himself to a jobbing business and did not sell to his customers at a lower price than the oil companies sold directly to its customers in the same territory.

Mr. Hanley: On the basis of that statement, and on the basis of the Examiner's statement, what is the resistance to our motion to dismiss the Wayne Oil Company and the Stikeman Oil Company here?

Mr. Austin: They are not Respondents. I don't understand the motion.

Mr. Hanley: Well, the motion was to eliminate from this proceeding any transactions between the Stikeman Oil Company and the Wayne Oil Company, on the one hand, and the Respondent, on the other hand.

True, they are not charged as Respondents, but you seek to prove us guilty because of certain transactions we had with them.

Now, you say those transactions are all right. If they are all right, why leave them in the case?

Trial Examiner Ballinger: The only power the
1526 Examiner would have would be to strike out all testimony relating to the transactions.

Mr. Hanley: In view of the statement of the Examiner, I now move to strike all of the testimony in the record relating to transactions between the Stikeman Oil Company and the Wayne Oil Company, on the one hand, and the Respondent, on the other hand.

Mr. Austin: Well, I would just as leave your Honor would rule on that. But let me say that I rather recall the fact that both of those companies are admitted to have operated retail stations themselves since 1936. So I don't—

Trial Examiner Ballinger: The motion is denied.

Mr. Hanley: Is there any unanswered question on the record, please?

(The record was read.)

By Mr. Hanley:

Q. Mr. Dyer, irrespective of the type of business that the jobber chose to engage in, would not that restriction materially confine him in his ability to select his supplier?

A. Will you read that question, please?

(The question was read.)

Q. Maybe I am confusing you by the word "restriction"
in that question, Mr. Dyer. I mean by restriction the
1527 prohibition upon these better known branded com-
panies to sell to the jobber.

A. Well, I would say it would impose a very definite restriction upon him; if part of his existing functions were taken away from him, to a large extent his usefulness as a market outlet might be impaired.

Q. Now, Mr. Dyer, directing your attention to another line of thought—

Mr. Austin: Judge Hanley, since you are stating you are moving to another line of thought, I want to make one statement here again with reference to the last question and answer. Because I think it is important, and it seems to me that there has been rather consistent attempts here to create an impression by questions and answers that have been going into the record that there is an effort by the Commission in this case to obtain an order which would prohibit the Standard Oil Company from selling to jobbers in territories where the Standard Oil Company also sells to retailers. And I wish to state for the benefit of the witness and all concerned, that there is no attempt in this case to obtain an order which would prevent Standard Oil Company from selling to a jobber in territories where it also serves retailers.

Mr. Hanley: You mean if we sold them in tank
wagon?
1528 Mr. Austin: Yes, where you also serve retailers
at tank wagon prices.

Mr. Hanley: You say it is all right for us to sell a bulk buyer who buys four or five, six million gallons a year and has his own storage and runs his own set-up, so long as we sell him at a tank wagon price?

Mr. Austin: No, I didn't say that. There is no attempt here to prevent the Standard Oil Company from selling to jobbers at a so-called jobbers' differential or functional discount of a cent and a half, or whatever it may be currently in territories where at the same time he sells to retail dealers at its posted tank wagon price, if—or so long as—the jobber engages solely in the business of reselling the gasoline that he buys to his sub-dealers or retail dealers, at a price as high as the Standard Oil Company's posted tank wagon price. In other words, there is no conflict, as I see it, in the issues of this case between a company selling to jobbers and the retailers in the same territory, at different prices, so long as the jobber does not engage in the resale of that gasoline at retail, nor does he pass along any of his jobbers' margin to his retail dealer customers.

Mr. Hanley: On this statement of counsel for the Commission, I renew the motion to strike from the record all testimony relative to the transactions between the Wayne Oil Company and the Stikeman Oil Company, on the 1529 one hand, and the Respondent, on the other hand, and to dismiss from further consideration in the hearing, and in the Complaint, all reference to any transaction between the Stikeman Oil Company and the Wayne Oil Company, on the one hand, and the Respondent, on the other hand.

Trial Examiner Ballinger: Without an opportunity to examine the record and know what there is in the record, the Examiner couldn't entertain the motion, and it is, therefore, denied.

Mr. Hanley: I think there is no question now, Mr. Dyer.

By Mr. Hanley:

Q. From your general experience and observation of marketing generally in the United States with reference to all consumer commodities, are you able to state whether or not the jobber's system of distribution is commonly used in connection with the distribution of a very great many consumer commodities?

A. Yes, I know that to be a fact. It is common and usual and a widely accepted means of distribution of all commodities. Particularly consumer goods.

Q. And is it not true that the jobbing of gasoline as you have described it today is generally of the same type and character as the jobbing of a great many consumer commodities?

1530 A. Yes, in a broad, general way.

Q. Mr. Dyer, what are some of the reasons, based on your experience and in your judgment, why the jobber belongs in and fills a place in the distribution of oil products?

A. Well, I think there are a number of reasons which make the jobber, or that puts the jobber in a peculiarly advantageous position in the marketing system or marketing structure. I think it can be said and proven that a local business man who is engaged in the jobbing business, who has reasonable capacity and reasonable and adequate capital behind him, enjoys a number of natural advantages which are just almost inalienable, that nobody can take away from him, and under present conditions, he enjoys certain artificial advantages, you might say, in the fact that there are many laws to which he is not—he is either not amenable or not answerable, which gives him a substantial advantage in many cases as against a large company operating as his competitor. I don't mean to say that every jobber takes advantage of all of these natural advantages that he has. I don't mean to say that he has the competency always to do it, or if he has the competency he has the will and energy to do it. But I mean he does have certain natural inherent advantages in his set-up that put him in a very favorable position in the marketing scheme.

And I would like to enumerate some of those ad-
1531 vantages.

Q. I wish you would, please.

A. I believe they are self-evident to anyone who has had any experience and any observation of marketing generally in our country.

In the first place, the local jobber is usually a long-time citizen in the community, went to school there, belongs to the churches, belongs to the societies, and the clubs, and the organizations, and he is a part and parcel of the community in which he lives. Due to that fact, if he is a business man with any capacity at all, he knows local values thoroughly; if he goes to buy a piece of property, he can buy as advantageously, and usually more so, than some large company that comes in from the outside. If he is engaged in the leasing of property, he can usually negotiate a more advantageous lease. I can say, as a matter of fact, based on my observation, that ordinarily he doesn't have to pay as much in taxes on similar properties, due to the fact that he is on the job there watching his interests day in and day out, and the absentee landlord frequently doesn't have the same care in watching those things.

He is usually able to make a better selection of his employees. He is able, by reason of his proximity to them and his association with them, to get a higher degree of 1532 loyal and cooperative response. He frequently doesn't have to pay the general market level of wages; and frequently doesn't pay it. He frequently works his employees longer hours than his large competitor. He is able to use to the very utmost the considerations of prestige and reciprocity, and to use his interests in other lines of activity to help promote his oil business.

And just to sum up those advantages which I think are natural and inherent and inalienable, that just can't be taken away from him, if he recognizes them and takes advantage of them, there is the fact that he is not amenable or answerable to many laws. For instance, chain store tax laws. Now, the laws apply evenly where they apply. But they don't start to apply until you get over a certain number of stations, so that actually although he is amenable, he isn't answerable to it, because ordinarily the number of stations he has wouldn't make ~~him~~ amenable.

The Social Security Tax doesn't apply to many a jobber operation because of the small number of employees that he has.

The Robinson-Patman Act, which has been the bane of most marketers' lives since it was passed some years ago, rests very lightly upon the local independent jobber.

I probably elongate that list, but those of us who are familiar with the complex laws that effect large business today know that there is a disproportionate burden 1533 put upon the back of large aggregations of capital operating over large territory that in no way touches, and really confers a preferential advantage upon a local business man.

I don't think I am doctrinaire on the idea at all, but I believe the jobber's place in the business is there simply because it is entitled to be there. It isn't a hypothetical situation. He always has been there; he is here today, in a very important fashion. As I have said, many of the trends indicate that his place in the picture in the future is going to be more important than in the past.

I don't know the issues in this case very well. I have

amplified a little more than I was asked to do, because I would like to see this record freighted with something to be said upon the contribution which he is making to this industry. And, furthermore, I don't think we should overlook the fact that the public has a very real interest at stake here, because, as I said, the jobber comes into the picture, and has to stand on his own bottom; he has to do a better job than some large aggregation of capital can do itself directly. And when he does that job well, and when his costs are on such a basis that he is able to affect the price structure, he makes a contribution there in our competitive system in the matter of keeping the equilibrium of prices that is a very genuine and very real con-
1534 tribution. And I think that in any discussion we have of a jobber's place in the picture, we should have that fact in mind.

Q. Do I understand you to mean, Mr. Dyer, that these advantages which the jobber has enables him, in your observation, to reduce his costs and thus pass on the benefits of lower prices to the public?

A. Yes, I mean that is in the chain of consequences.

Q. What is the fact in your observation as to the effect of that kind of competition upon a large supplier of gasoline operating in the same territory, even though it be the same supplier that is supplying the jobber?

A. Well, I would say that it is self-evident that where jobbers, for one reason or another, are able to translate into lower prices advantages which they have in costs, or regardless of what enables them or what motivates them in reducing their price, that over the long pull the market in that territory must—is going to be affected. And everybody who is in the market is going to feel the effect of that condition.

Now, it is difficult to measure it over a short range, because there are too many other factors. But projecting that over a period, there is no question but that the question of prices is very substantially affected by the operations of jobbers.

Q. In your judgment and observation has that in
1535 the past, and does it now redound to the benefit of the public?

Mr. Austin: I object to that question, your Honor. In the first place, I don't know whether the witness is talking about the jobber cutting his price to the retailer or whether he is talking about a jobber who is a retailer. In the second place, he talks about benefiting the public by some method of lowering prices, and unless we are talking—at least, I would like to know whether we are talking about wholesale or retail. I don't know that, and I don't think the witness knows it.

Trial Examiner Ballinger: Objection sustained. Counsel will reform the question.

Mr. Hanley: What was the last statement of the Court, please?

(Last statement of the Trial Examiner was read.)

By Mr. Hanley:

Q. What is the fact, Mr. Dyer, in your observation and experience, with reference to whether or not the presence of the jobber system in the gasoline distributing picture has any effect of lowering prices of gasoline to the ultimate consumer of gasoline?

A. Well, I would say that it has made a contribution to that end. The facts of the matter are, the presence of the jobber in the picture from the public standpoint, in my opinion, is a very wholesome and a very useful
1536 influence in the pattern of prices over a long pull.
As I say, you can't measure that from one day to another. But if you have some vigorous, aggressive jobbers—and many of them are—engaged in the oil business, and taking advantage, even to a partial extent, of these undoubted advantages, that they have, marketing on a lower cost basis, and bidding for business, either from the retailer or from the dealer, on a lower price basis, that over the long pull there is a substantial contribution to the public in the fact that the public's interests are subserved by having a free competitive market based on open competition.

1537 Q. Now, to summarize, Mr. Dyer, when you used the word "jobbers", in the answer to this last question, and as you have used that term throughout your testimony, do I correctly understand that you mean the type of wholesale buyer that you defined in the early part of your testimony who engages in the dual operation of selling both at wholesale to other retailers and also directly operating retail outlets?

A. Yes, sir.

Q. Does it apply also to those wholesale buyers or jobbers who engage exclusively in operating their own retail outlets?

A. I would say yes to that, also.

Trial Examiner Ballinger: We will take a two-minute recess.

(A two-minute recess was taken.)

Trial Examiner Ballinger: We will come to order.

By Mr. Hanley:

Q. Mr. Dyer, just another question or two.

You will recall that in the course of your examination the operation of what is known as Ned's Auto Supply Company in Detroit was explained to you.

A. Yes.

Q. And it was stated that that organization is engaged primarily and almost exclusively in the retailing of gasoline through its own outlet. Its supplier is the Standard Oil Company, the Respondent in this action, and
1538 Ned's sells the brand of products of the Standard Oil Company and has delivered those products for many years.

Assuming that a cease and desist order were entered against the Standard Oil Company preventing the Standard Oil Company from selling to Ned's Auto Supply Company and assuming that such an order were either introduced against other refiners handling well known brands of gasoline or that, as a matter of policy, other refiners of well known brands of gasoline refused to sell Ned's on the tank car or jobber basis on which that customer is now buying; in your judgment, and based upon your experience and observation of the oil industry, what would be the situation of Ned's Auto Supply Company with reference to their ability to obtain gasoline competitively?

A. May I ask you to amplify that question to the extent of telling me what you mean by "competitively"?

Q. I mean by that, what would be their situation in respect of their ability to compete in an open market as a retailer of gasoline to the degree that they would be able to compete if they had the right and opportunity to select their own supplier?

A. Well, I can say they would be affected. I don't know that I could presume to say the degree to which they would be affected because I don't know what other materials they might obtain. I am assuming that under this question that they would not be able to purchase from

any supplier in tank cars? Is that pre-supposed in
1539 this: That they could not obtain from any supplier
in tank car lots?

Q. Suppose they could obtain in tank car lots. Who, in your judgment, would be in a position to sell them in tank car lots, assuming that the makers of the better known brands of gasoline were prevented from selling?

A. Well, I am not sure that I precisely understand that question.

Q. I will state it this way: Is it or is it not a fact that under that situation a purchaser such as Ned's would be largely restricted to buying from small refiners or buying an unbranded type of gasoline?

A. Obviously. If he couldn't buy the branded gasoline, he would have to buy unbranded gasoline.

Mr. Hanley: You may take the witness.

Cross-Examination by Mr. Austin:

Q. Mr. Dyer, supposing that the Federal Trade Commission did issue an order against the Standard Oil Company prohibiting it from engaging in some practice in connection with the sale of gasoline, such as prohibiting it from selling at tank car prices to purchasers who resold at retail and to the extent that they resold at retail. Then suppose that that order was in full force and effect and had been upheld by the courts. Would the Sinclair
Oil Company then, not being subject to such an or-
1540 der, then proceed to engage in that same practice?

Mr. Hanley: That is objected to as calling for a conclusion of the witness for which no foundation has been laid and asking for the policy of the company concerning which it has not been demonstrated the witness has been qualified to testify. It has to do with a future situation and involves elements and questions of policy that have not been adequately expressed in the question.

Mr. Austin: Well, that is exactly the very similar question to what was asked by Judge Hanley, I believe,—I believe he asked the witness whether if the Standard Oil Company was prevented from selling to such a reseller, whether other oil companies wouldn't take the business.

Trial Examiner Ballinger: This witness is an exceptionally capable witness. The objection is overruled. He may answer, if he can.

Mr. Hanley: If you can.

A. Well, I think that I explained before that our company, which markets directly in this market in which Ned's, I understand, markets, as a matter of practice does not now and has not sold to jobbers in the territory in which it markets directly, so that if our policy continued to be that—and I know of no reason why it should not continue—we would not sell Ned's or any other jobber
1541 in this Detroit market as long as we operate directly.

By Mr. Austin:

Q. That is why I framed the question that way, Mr. Dyer. I am not referring to the Detroit market. You do sell to jobbers in some markets, don't you?

A. Yes.

Q. And you said a jobber may be someone who sells at retail?

A. Yes.

Q. You said if another company were prohibited from selling in a territory where you do sell to jobbers engaging in that practice, would your company then attempt to get that business?

A. Where our company was not prohibited?

Q. Where you had not been prohibited but where you knew there was an order prohibiting that practice by someone else?

A. I don't believe that I can answer that question. I am not competent, based upon my experience, to tell what the effect upon us, legally and morally, would be, if there was a rule of some character that prevented another marketer from selling to a particular account. I don't think I have ever encountered that and I don't believe I am immediately prepared to give you the answer to that. I would like to, but I can't answer it.

Q. Didn't you say a while ago other oil companies would rush in and get that business?

1542 A. I said I was afraid they would and I rather regretted that, regretted to make that admission. I know from a realistic standpoint in the industry that there has always been somebody available to take on every piece of business available and it has always been a real tussel between competitors for existing outlets.

Q. Are you referring to a case where there has been an order of the court or the Federal Trade Commission declaring a practice unlawful?

A. That is a point where I do not have the experience. I do not recall a single case where any company has ever been prohibited from satisfying any function in the industry. It would be wholly unprecedented, I think. I can't recall any such case.

Q. Then do you know whether or not the retailer who was buying as a jobber would be able to buy as a jobber from some other company if his supplier were prevented from selling him?

A. Well, if the same prohibition applied to others, I would say no.

Q. You would say no to what?

A. In other words, let us take the case of the Standard Oil Company. If they were prohibited and the same law applied to everybody else who was marketing gasoline, and it was enforced against them, I doubt that the 1543 business would be taken on by anyone else.

Q. By "law" you mean the law under which the order was issued, do you not?

A. I am not competent to deal with that question; really.

Q. Are you prepared to say that the Sinclair Oil Company would engage in a practice which had been declared unlawful by an order of the Federal Trade Commission?

Mr. Hanley: That is objected to as unfair to the witness; calling for a conclusion; that no witness ought to be asked to testify to.

A. I have no objection to saying our company does not violate the law and will not violate the law; hasn't any intention of violating the law, but to make the specific application you asked me to make, I must protest that I am just not competent to do it. There has been no body of experience that I know of, or any such prohibition issued and it would be a wholly unprecedented thing for a marketer to be prohibited from selling anybody in the chain of the market. While we have refrained from selling jobbers in the territory, I would feel very much astounded if we were told, by law, we couldn't sell.

Q. Would you feel astounded if you were told you couldn't sell to a retailer at a lower price than you sold to others?

A. I have already been told that. That is already the law of the land.

1544 Q. We are talking—here, at least, you have been talking about jobbers who may be solely retailers.

A. I have been talking about people who are primarily in the function of jobbers.

Usually the business of becoming a jobber is a matter of evolution.

Many a jobber started off with a curb pump, or with one service station. Then he has gone into the business, usually, of establishing storage for taking carloads of supplies. When he does that, he invades the function of the jobber but he doesn't give up his retailing; he continues to be a retailer. He continues to be a jobber and the pattern of experience in the industry is that, almost without exception, the jobber is a retailer. He is—to borrow your expression—in a dual capacity. He functions in a dual capacity. That is just the fact. Whether it might be challenged, or otherwise, that is the basis on which the business is built. That is the basis on which most jobbers operate.

Q. Would you consider that it would be very upsetting, in any way, to the distribution of gasoline which you have described, if one of these so-called jobbers, exercising his dual function, was required to pay a higher price for the gasoline he resold at retail than for the gasoline he resold at wholesale?

1545 A. Yes, I would say that that would have a very serious effect.

Q. That would affect only the retail business of that jobber, wouldn't it?

A. It would affect his whole function in this dual capacity. I don't know how you would make any general rule that would enable you to separate a function that has started out and grown into a new function.

Q. Well, is the retail business of that jobber, the sale of gasoline at a retail service station, is that a part of his jobber's function?

A. As such, as a retailer, but if he is also a jobber he is functioning in a dual capacity. In other words,—I don't know that I follow you.

Q. Just let me pursue that a moment.

When you talk about a dual capacity aren't you talking about two functions? Isn't that what you mean by dual capacity?

A. Yes. There are two functions, both of which have

become integrated to such an extent that, as my definition earlier indicated, they are really referred to, generally, as one function. In other words, the jobber who follows the definition, that, I would say, would accurately define a jobber, is one who is a buyer in tank cars and who resells
to resellers and who also delivers materials to his
1546 own retail station and retails them through his own
retail station.

Trial Examiner Ballinger: Could you tell me how long that latter definition has been in use?

A. Well, it was approved by the Federal Trade Commission in 1931 and as a matter of fact, that has been the fact as far back as I can recall, but it has had that definition, as I said, has had two sanctions, you might say, or two blessings put upon it; one by the Federal Trade Commission and the other by the approval, generally, of the industry and by the President under the NRA. I think it has always been the fact.

Q. Ordinarily a jobber was known as a wholesaler, was he not?

A. That term has been used. I don't think it is used so much in our industry, though.

Q. A wholesaler is just the reverse of a retailer, isn't he?

A. Yes—not exactly the reverse, but it is certainly a separate function. They both sell, but they sell in different functions.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. You stated that a jobber performed a very
1547 definite function or, rather, the jobbers in the exer-
cise, in the carrying out their link in the chain of distribution, perform a function which is a public contribution, is that right?

A. That is my opinion, yes, sir.

Q. Now what function does the jobber perform to the extent that he sells through retail service stations?

A. Well, where he sells through a retail station he has performed two functions in the industry. He has performed the function of getting the material from a refinery to a bulk plant and he has performed the function, beyond that, of getting the material to a service station and he has performed the function of retailing the material through the service station.

Q. Well, he could get his delivery at his retail service station directly from his supplier, couldn't he, without operating the bulk plant?

A. He could, yes.

Q. Well, what public benefit is there in the fact that he operates a bulk plant and takes his own delivery instead of getting his deliveries from his supplier by tank truck right at his service station?

A. Well, he performs that very function.

I think I can illustrate it in this way:

Assume I am a refiner in Michigan and I am making gasoline and I would like to have my gasoline sold at
1548 retail stations in Detroit. I might come down to
Detroit and pick out some man who looked like he was competent and well-financed and ask him if he wouldn't provide a bulk plant down here, go into the jobbing business and take these materials that I was manufacturing; handle them through his bulk plant and, in turn, deliver them to the service station. Now that is the function that the jobber plays in the illustration that you just make.

Q. Now suppose you already had your own bulk plant here in Detroit and were delivering through your own trucks, through numerous retail service stations. In that case what advantage is there to you to have the one man who operates a retail service station buying through his own bulk plant instead of buying direct from your trucks?

A. Well, one of the considerations in distribution is volume distribution and it is not likely that a man who just operated one service station would provide for you the volume of outlet that a man who had a bulk plant and, possibly, several stations of his own and who is serving, in turn, many dealers. Many times that business is already built up so that if you wanted to expand your business without a great outlay of capital, you would want to take on that man even though he was carrying on a function that you were carrying on in the same market.

Q. Then it is just a matter of getting business from an existing source, is it not?

1549 A. In that illustration I mentioned, that would be the case.

Q. What I want to get at is what different function this jobber performed by selling at retail than any other retailer who buys in the tank wagon quantity, so far as his function in the operation of his retail stations? Isn't he performing a retailer's function, insofar as he sells at retail?

A. Yes.

Trial Examiner Ballinger: Every instrumentality that assists in getting the gas to market is a public benefactor, isn't it?

The Witness: I think so, and the better the job is done and the more economically it is done, the more it contributes to the public benefit.

By Mr. Austin:

Q. Do you know, Mr. Dyer, what proportion of Sinclair Gasoline is sold by the Sinclair Oil Company to jobbers?

Mr. Hanley: May I have that question, please?

(The question referred to was read by the Reporter.)

A. I can make a guess that is not far off. I would say 20 per cent.

Q. And I understand you to say that where you sell to jobbers you don't sell direct to retailers, in the same territories?

A. That is correct. Where we are operating 1550 directly, we do not sell to jobbers.

Q. Do you know whether that percentage is representative of the general percentage of gasoline of other major oil companies?

A. It is pretty much on the same order, yes. That is, if you take the average and throw it all together. We might top the average, somewhat, but—you see I have no reliable data on which I can base what other people are doing but I have had occasion to refer to information that pretty well substantiates, to me, that the average in the country of business going through jobbers is around 17 per cent. That would be, I think, a reliable indication. It probably might be more than that, if we could isolate all of these jobbers that are submerged, as I explained, in other businesses, but where you can reach out and lay your hands on jobbers and check figures for the jobbers, the average throughout the country is 17 per cent and ours, I would say, 20 per cent.

Q. Does that 17 per cent include jobbers that purchase from the refineries you spoke of that don't have their own retail distribution system?

A. Yes, sir.

Q. Then if you were to be asked the percentage of the gasoline of major oil companies which sold to jobbers, I assume, of course, that all so called major oil companies have their own means of distribution down to the retail station?

1551 A. Yes.

Q. I think that is true; isn't it?

A. Yes, sir.

1552 Q. And taking the case of a major oil company which does not have your policy of not selling to jobbers and direct to retailers in the same territory; in other words, a company which, wherever it operates, sells direct to retailers, wouldn't the percentage of its gasoline to jobbers probably be lower as a result of that different policy?

A. Yes. You have pretty nearly every different shade in the industry from those companies who, as a matter of fact, market their material directly. I think there are some companies who market their entire output directly. They don't have any jobbers. They feel they can do a sort of streamlined job directly to the consumer and they do not have any outside intermediaries. They do the whole job themselves.

Then you have companies whose entire output is marketed through jobbers and that is true of some major companies. When I say the entire output, I mean the overwhelming preponderance of their business is through jobbers.

Then you have other companies, like our own company, who more or less work on this basis: that based, on experience, there are some areas and territories in which we know that a jobber can do the job better than we can. That is our opinion, of course, and in those territories we have always tried to keep our jobbers—some of them have been with us 20, 18, 19, 17 years—we try to have them stay

1553 on in the business as jobbers. When we go into new territories of that same type, we try to go in there through jobbers. In other territories we feel it is better for us, or more proper for us, not to do that, so we just fit the jobber into our pattern where he is more likely to do the job the way we think it ought to be done.

Q. You referred a while ago to a 2¢ differential. You said that the differential in some parts of the country went up higher than that, 2½, 2¼, or higher?

A. Yes.

Q. Tell me just what you were speaking of. I am not sure I understood clearly at that time. The differential between what?

A. Between the price that the jobber pays, and the price at which he sells to dealers, in the market in which he is operating.

To put it another way, the difference between the tank car price and tank wagon price.

Q. That is something different from what you just said. You said a minute ago the price at which the jobber resells—

A. The jobber resells at that price.

Q. Well, he may or may not; isn't that so?

A. He usually does—he buys at the tank car price and resells at the tank wagon price.

Q. That is the usual thing, isn't it, Mr. Dyer?

1354 A. That is the usual situation. He buys at one price and resells at another price. He resells to dealers at the tank wagon price and he resells to consumers—if he is also in the retailing end of the business—at a retail price which may or may not be the same price as others, in the same market, are selling.

Q. Did I understand you to say that the tank wagon price to which you have referred, in other words, the jobber's tank wagon price, is generally the same as his supplier's tank wagon price where the supplier sells to retailers in the same territory?

A. I would think that that probably was the situation. I think it would be more or less natural situation for it to be in that grade.

In some cases I know jobbers really, for business, have been known to go out and make inducements for business at lower prices, but I would say, as a matter of common practice, the man is buying at one price. He is trying to make a profit and retailing at the best price he can. He can't sell at a profit any higher than the material is being sold by somebody else.

Q. And that being true, can you conceive of a situation where an oil company is selling direct to retail stations in a territory and also has a couple jobbers, we will say,

in the same territory? Could you conceive of a situ-
1555 ation where the jobber offered generally, in that ter-
ritory, a lower price to retailers than his supplier
was offering?

A. No.

Q. Then it is true, is it not, that there are some limitations upon the amount of price-cutting, or price-reducing, that the jobber can do?

A. Yes, there are very definite limitations as to that. He has to pay a certain price for his merchandise and he has to pay all of his expenses, and he certainly must recover, in his resale price, the cost of his material plus his expenses plus a profit. That is a very definite limitation.

Q. And that uses up, does it not, that margin we were talking about, in most cases? That is, including a reasonable profit?

A. Yes, I would say that it does; generally speaking.

Q. What I have in mind now is the fact that you were referring to certain competitive advantages that a jobber has, perhaps, over a major oil company because of the fact he is a local man and doesn't perhaps have to be bothered so much about the Robinson-Patman Act and so forth, and you mentioned you thought a jobber had some competitive advantage, did you not?

A. I said that he had certain—I called them natural
advantages. It is all the same, to me. He just had them,
and there they were, and there wasn't anything to be
1556 done about it. They were his more or less by nature.

Q. That is always limited, isn't it, by the margin that the jobber has, because he is always limited by the fact that he can only buy his gasoline at a cent and a half to 2c or 2½c, but certainly not over that, generally, below the price that other people can buy it for?

A. I think I might illustrate the situation this way: as I told you, I know of jobbers who started in, initially, with a curb pump. One case it was a curb pump in front of a livery stable.

The man went from the business of putting in the curb pump business into the bulk plant operation business.

Then he established some service stations, and after he had done that, he established a water bulk plant, so all of the time working further and further back toward the supply source, so that in the difference between the cost of the merchandise to him and what he could realize in the market he had this continuing spread as he built himself up higher and higher in the business. That is the evolution of most of the major companies. Most of them started off small and many of them started off, if you can trace them right back to their very beginning, they started up in some such way and then, by building back, and accretion and mergers and consolidation, and so on, they built up their present marketing picture.

1557 Q. Have you had any experience, Mr. Dyer, with competition between refiners and jobbers in territory where the refiner sells to the jobber and both the jobber and refiner sell to retailers? In other words, where the refiner in a territory sells both to jobbers and to retailers; in that case, I suppose it might be said that the jobber handling the same brand of gas as the refiner, having bought it from the refiner, was in competition with the refiner in selling to retailers?

A. Yes, he conceivably could be. That, by the way—if I may interpolate,—is the reason why our company has not seen fit to go into business that way, because we have always felt that if we were doing business with an enterprising, aggressive jobber, which is the type of jobber we like to have, and if we had an organization of our own which was enterprising and energetic, that sooner or later, if you were working in a small territory, you would reach the point where you might have some conflict. That conflict would just be the competition for business. We encounter that every place that we operate. I don't mean within our own organization, but every place in every locality in the country where we do business there are jobbers of companies who are handling the same material as some major supplier in that territory.

Q. And they are competing for your business and
1558 you are competing for theirs; isn't that right?

A. That is right.

Q. But if you had a jobber there whom you supplied, do you think that would be a healthy situation for you two to be competing for the same business on the same brand of gasoline?

A. Well, practically, we would have the business that the jobber has, so that the area of conflict would be minimized, but from a practical standpoint, I can see where a man who is a jobber and feeling that he has more or less worked up to a saturation point, what he can get without moving in on his supplier, that sometime there would be an element of conflict there, but I am speculating there, because we have not had to deal with that situation because of our policy.

Q. Wouldn't the supplier have the advantage if there was a question of competition there, assuming that the supplier would continue to sell the jobber? Would the supplier have the advantage or the jobber, if either one tried to get stations from the other?

A. There is a sort of general identity of interest there, that I think would pretty well take care of that sort of situation.

Q. Isn't it true, Mr. Dyer, that there would be certain
fields of activity that would have to be more or less
1559 marked out and adhered to in order to permit that
situation?

A. I would think, from a practical standpoint, that there would have to be.

Q. I should think so, too.

A. I can't imagine people—as a realistic proposition, I can't imagine two people, one buying from the other, going out fighting with each other, when they both are trying to sell as much as they can—

Q. And where one buys from the other.

A. Yes. That is the practical side of it.

Q. Do you know—or did I ask you this—I am not sure: whether you know what percentage of operators, we will call them, buying at tank car lots—or we will refer to them as jobbers, in the way you have referred to them as jobbers—what percentage of those jobbers engage partially or wholly in the operation of retail service stations?

A. I couldn't give you a precise figure, but I would say that the overwhelming majority of them do.

Q. Partially or wholly?

A. Partially. Usually the picture is that they operate a bulk plant, make tank wagon deliveries to commercial customers and to dealer stations and to their own stations.

I might just amplify that by saying that I have had occasion recently to look over some 20 jobbing operations of
the oldest jobbers we have had; jobbers who have been
1560 with us during all the long period of the depression
during the thirties and who have survived the thing
and are still with us, and we are very proud of the relation
we have had with them, and I find in every single case that

the pattern I have just given to you applies; namely, they have a bulk plant, they are serving dealers, serving commercial customers, farmers, and have their own service stations.

Q. Mr. Dyer, in that connection there has been testimony here by at least two jobbers to the effect that they are engaged chiefly in the business of reselling at wholesale to retail dealers. They, perhaps, own some stations as property of the station; others they hold leases on. Occasionally it is impossible for them to find a satisfactory dealer to operate those stations so they take over the operation temporarily. The testimony has been that they don't desire to operate those stations themselves, but occasionally it becomes necessary so that the property shall not remain idle or operated by someone who is inexperienced and it becomes necessary to take over the operation and they do so and operate those stations for a few months or maybe over a period of years, at times, but that that is incidental to their wholesale business and engaged in more or less as a matter of necessity rather than as a matter of desire. Now, I think I have stated correctly what has been testified to in this case here, by two jobbers.
1564 I would like to ask you whether that is or is not the usual situation and the usual reason why the jobber operates frequently, or most of the time, as you say, operates some retail stations of his own?

A. Well, no doubt that has been, in a great many cases, applicable. I wouldn't say that was in the majority of cases, however. You might take what I said about the advantage the jobber enjoys, the natural advantage, and the incentive he has to do a good job in the function of taking the material from a bulk plant and delivering it to a retail station and say those same things could almost be said word for word in respect to a neighborhood location, neighborhood operator of a service station, and since the functions are competing—if the jobber feels he could do a better job by getting a Polish man in a Polish neighborhood, rather than sending some of his help over there to run his station, he would prefer to have a dealer lease that station from him and operate it as an independent dealer. There are all of those considerations that flow through this, and I don't mean to say it is just a rigid matter, if a man owns a station that he must necessarily hire the men who are at that station. That doesn't always follow.

Q. I am trying to get at the question as to whether or
not it is the usual thing for the jobber to carry on
1562 where he owns or leases service station properties,
whether it is the general rule that he operate those
himself, or does he try to lease them out, or do you know?

A. I couldn't tell you the percentage but he certainly does both of them.

Q. How many cases do you know of where a so-called jobber engages in no business except the sale of gasoline at retail?

A. I know of very few; very few that I could name where a jobber delivers—you mean to his own stations?

Q. Yes. I mean where he has a bulk plant but delivers only to his own stations and doesn't sell to other dealers.

A. I would say those cases are relatively few.

~~Trial~~ Examiner Ballinger: Do you know of any precise cases?

The Witness: Yes, I do, but I must say that the ones I do know of I look upon as rather unique. I wouldn't predicate any rule—I would say that that type of operation is a very unusual one; a man who has a bulk plant and who is the usual, energetic business man, would, it seems to me, seek ~~to~~ get a larger usefulness for that bulk plant, and that's exactly what he does, but I do know of that type of operation that you speak of.

Q. Now, are you familiar with the business of the Sinclair Oil Company here in the Detroit area?

1563 A. Just in a broad, general way.

Q. Do you sell here through jobbers or do you sell direct to retail service station operators?

A. We sell direct. We have no jobbing representation. That applies in Detroit, as well as elsewhere.

Q. When you say you have no jobbing representation, do you mean that the Sinclair Oil Company does not sell to anyone here on a tank car basis?

A. That is correct.

Q. Doesn't the Sinclair Oil Company sell to a service station or stations operated under the name of James J. Bright and Sons here in Detroit?

Mr. Hanley: That is objected to as immaterial and irrelevant and not material on the direct examination and outside of the scope of the cross-examination dealing with a specific operation in the city of Detroit, which was not gone into on direct examination, and is immaterial in the case.

Trial Examiner Ballinger: Objection sustained.

Mr. Austin: If your Honor please, may I state that this witness was asked on direct some questions about Ned's Auto-Supply Company. He stated that his company was not in a position to take that type of business over in the Detroit area.

The Witness: I did not say we were not in a position to do it. I just said we would not, as a matter of policy, 1564 do it. Nothing to prohibit our doing it.

Mr. Austin: I understood that was the policy of your company.

The Witness: Yes.

Mr. Austin: It seems to me it is within the scope of cross-examination to ascertain whether or not the Sinclair Oil Company is engaging in the selling to a retailer in Detroit in the same manner as the Standard Oil Company sells to Ned's Auto Supply.

Trial Examiner Ballinger: I understand the witness to answer apparently the same question, in a little different form, two or three times.

The Witness: I don't know the names of our customers here in Detroit, so I can't be very specific on those things, but I will say this, and, as I say, it is more or less repetitious, that we do not sell in Detroit to any jobbers. I say that just because I know that our policy is applicable in Detroit as it is elsewhere.

By Mr. Austin:

Q. And by that you mean you do not sell to anyone in—

Trial Examiner Ballinger: In tank car lots?

The Witness: I am talking about resellers. We may have the business of the United States Government or some large automobile—

By Mr. Austin:

1565 Q. I am talking about resellers, too, Mr. Dyer.

A. No, we do not.

Q. I was under the contrary impression, and that is why I asked you, but I won't pursue the matter farther, if that is the case.

A. I hope you have my limitation in mind in answering your question because I don't know these things, but based upon my knowledge and the instructions of the company and the information that has gone out with respect to that type of procedure, we do not. If it has been, it is a violation of our rules, and it is beyond my knowledge. I have no knowledge of it.

Mr. Austin: That's all.

Redirect Examination by Mr. Hanley.

Q. Mr. Dyer, you were asked a series of questions relative to the ability of a jobber to compete in price with a supplier, which supplier was both selling the jobber and selling tank wagon in competition with a jobber in the same territory, and I understood you to say that, generally speaking that price would probably be the same; tank wagon?

A. I think that would probably be correct.

1566 Q. Now, averting to the natural advantage which you have stated the jobber has, I refer you to a question Mr. Austin asked you to the effect that the supplier in that situation would have the competitive advantage over the jobber. Is it not true that over the long haul, the natural advantages of the jobber will affect the tank wagon price that any supplier or any jobber could get in a given territory?

A. Yes, I think so.

Q. And wouldn't that reduced cost and efficiency of operation be reflected to the advantage of the public in a lower price to the ultimate consumer of gasoline?

A. Well, that is my opinion. Awfully difficult to demonstrate, but that is my opinion.

Q. You were asked if in your experience you had known of many set ups like that of Ned's Auto Supply where most all of the gasoline was disposed of at retail. Your answer was that you knew of some, but that it was not a general type of operation, and that usually a man with a bulk plant sought to get outlets so that the growth was often from a bulk plant to the retail operation; is that right?

A. Yes.

Q. Is it not also true, Mr. Dyer, that the reverse operation occurs where a man develops retail outlets and retails a high volume of business and works back to the obtaining of bulk supplies, or builds or obtains a bulk plant and

1567 buys in tank car quantities?

A. Yes.

Q. So the integration, if you call it that, may occur from either end; is that not true?

A. Yes, sir. Some years ago, when I was a little more acquainted with Detroit, and had occasion to come here more often, I can recall there was an operation that grew up along the lines that you latterly suggested, and it finally wound up where this man's business became so large—I can't recall his name right now—but he is probably well known to other men here—so large that he imported gasoline from abroad in cargo lots.

Q. We have painful recollections of it, Mr. Dyer.

A. I don't know whether he is still in business here or not. I haven't heard recently.

Mr. Hanley: That is all.

Mr. Austin: That is all I have.

Trial Examiner Ballinger: You are excused, Mr. Dyer.

The Witness: Thank you for permitting me to testify this afternoon, Judge.

Trial Examiner Ballinger: What is your pleasure, gentlemen? Do you desire to proceed further this afternoon or take an adjournment until tomorrow morning?

Mr. Hanley: That is all I have. I will let Mr.
1568 Abbott answer that.

Mr. Abbott: I suggest, your Honor, that we adjourn to tomorrow morning at ten o'clock.

Trial Examiner Ballinger: The suggestion meets with the approval of the Examiner, and now at 5:10 p. m. the hearing stands adjourned to be reconvened at 859 Federal Building, Detroit, Michigan, at 10:00 a. m., April 23, 1941.

(Whereupon, at 5:10 p. m., April 22, 1941, the hearing in the above-entitled matter was adjourned, to reconvene April 23, 1941, at 10:00 a. m.)

1569

Room 859, Federal Building,
Detroit, Michigan,
April 23, 1941.

Met, pursuant to adjournment, at 10 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois, and

Arthur J. Abbott, Esq., of the firm of Abbott, MacMahon, and Roberts, 2230 Buhl Building, Detroit, Michigan, on behalf of the Respondent.

1570

PROCEEDINGS.

Trial Examiner Ballinger: We will come to order.

This is a reconvening at 10 A. M., April 23, 1941, in Room 859 Federal Building, Detroit, Michigan, Docket No. 4389, in the case entitled: In the Matter of the Standard Oil Company.

The last hearing was held in Detroit, April 22, 1941.

The Reporter will note counsel for the Commission and counsel for the Respondent present.

Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

ELMER E. LEDBETTER was thereupon called as a witness on behalf of the Respondent, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Abbott.

Q. State your full name.
A. Elmer E. Ledbetter.
Q. What is your occupation, Mr. Ledbetter?
A. I am in the jobbing business, Petroleum products.
Q. What is the name of your company?

A. Wayne Oil Company.

1571 Q. Is that a corporation?

A. Yes.

Q. Who are the stockholders?

A. Myself and wife and son and a couple of the employees.

Q. That is practically a family corporation; is that right?

A. Yes.

Q. Now, in July, 1931, what was your occupation; previous to the time you went in the oil business?

A. For four months previous to the time I went in the oil business I had none.

Q. Were you ever with the Everhot Heater Company?

A. I was.

Q. And what was your office in that company?

A. Vice president and treasurer.

Q. And as treasurer of the Everhot Heater Company, were you in charge of its financial affairs including its accounting affairs, keeping of its books?

A. Well, I was in authority, I guess.

Q. Were you the treasurer?

A. I was.

Q. As treasurer?

A. Yes.

Q. What was the nature of the business of the Everhot Heater Company?

1572 A. Manufacturing water heaters.

Q. About the month of July, 1931, did you embark in the oil business?

A. Yes.

Q. And how did you do so?

A. I purchased a little gas station at Six Mile and Evergreen Road in Detroit.

Q. At the time that you purchased this gasoline station was it being supplied by Standard Oil Company as a tank wagon customer?

A. It was.

Q. On a tank wagon basis?

A. Right.

Q. And after you purchased the gasoline station at Six Mile and Evergreen Road in Detroit, did it continue to be supplied by the Standard Oil Company?

A. It did.

Q. On what basis?

A. Same basis; tank wagon basis.

Q. And at tank wagon prices?

A. Right.

Q. Later did you purchase two other stations, one at 19111 Grand River, and one at 8400 West Chicago Boulevard?

A. Yes, that same year.

Q. And did you have those stations supplied by
1573 the Standard Oil Company?

A. I did.

Q. And were they supplied on the tank wagon basis also?

A. Yes.

Q. And you paid the regular dealer tank wagon price for all the three stations?

A. That's right.

Q. Now, by July, 1935, how many stations did you have in operation, approximately?

A. I should say about 12.

Q. And were they located all in the city of Detroit?

A. Well, either in the city of Detroit or adjacent suburbs.

Q. And to what extent had your gallonage increased up to about 1935?

A. I believe I was up to about a million gallons a month—a year, rather.

Q. Was that all being purchased from the Standard Oil Company or from other suppliers?

A. Not all from the Standard Oil.

Q. All that was purchased from Standard Oil was being purchased on what basis, when you had 12 stations?

A. Up to August, 1935, all of the gasoline I purchased was purchased on a tank wagon basis.

Q. And was it all purchased at the regular pre-
1574 vailing tank wagon prices?

A. It was.

Q. Now, when the volume increased to aproximately 1,000,000 gallons per annum, what did you do with reference to the continuation of your business? The Wayne Oil Company?

A. In August, 1935, I became a Standard Oil jobber.

Q. Well, had negotiations been pending previous to that time?

A. I had been trying to get Standard Oil to let me go on that basis for probably two years prior to that time.

Q. Well, what was the reason that two years was taken after your application was made to go on that basis, if you know?

A. Well, the reason I got on that basis, or the principal reason, I believe, was the fact that I succeeded after two years' effort in selling them on the idea that I could do a better job for less money.

1575 Q. Well, at that time, when you first applied to them for a tank wagon basis, did you have bulk storage facilities?

A. No, I didn't have, but I could have secured it immediately.

Q. You mean by leasing them?

A. Surely.

Q. At that time did you have any hauling facilities?

A. No, but I likewise could have obtained them instantly.

Q. Then it took two years for you to convince the Standard Oil Company that you should be placed on the tank car basis, is that right?

A. I think it was—well, at least a year, or two years. It was a long time, a long period of time, I know, that I was trying to sell them on the idea.

Q. What was the particular reason why you wanted to go on the tank car, as compared with the tank wagon basis that you had been on for several years?

A. Well, I found it very difficult to make a living; trying to skim out a little of the profit for a retail operation for myself; even though I had twelve stations.

Q. And even though you had a million gallon capacity. Now what did you then do, in August of 1935?

A. I became a Standard Oil jobber.

Q. And did you acquire bulk plants?

A. I did.

Q. And did you acquire hauling facilities?

1576 A. I did.

Q. In 1935 did you have a gasoline filling station at Vinewood and the Boulevard in Detroit?

A. Yes.

Q. I mean by that, for the record, Vinewood Avenue and Grand Boulevard.

A. That's right.

Q. And how did you acquire that station?

A. Lease.

Q. From whom?

A. Highland Oil Corporation.

Q. And they are suppliers of Hi-Speed Gasoline in Detroit, or were, at that time?

A. That's right.

Q. And until September of 1935 did you buy gasoline for that station from the Highland Oil Company?

A. Yes.

Q. On what basis?

A. My recollection is it was about a cent a gallon below the regular prevailing tank wagon basis.

Q. And it was on the tank wagon basis, was it, that you purchased the gasoline for that station from the Highland Oil Corporation?

A. Well, there was a concession there of about a cent beyond the prevailing tank wagon basis.

1577 Q. How long was it that you were purchasing gasoline for that station from the Highland Oil Company handling Hi-Speed Gasoline at one cent below the prevailing dealer tank wagon price; how many months?

A. Oh, I would be guessing at it. Probably six or seven months, I think.

Q. Did the Standard Oil Company ever sell gasoline to you at any price below the regular tank wagon basis during the time that you were a tank wagon customer?

A. No.

Q. Now after you acquired your bulk plant and your tank truck delivery equipment, you began to receive tank car deliveries, did you?

A. I did.

Q. And was that at Grand and Wyoming?

A. That's right.

Q. And you leased that bulk plant from whom?

A. Central Detroit Warehouse Company.

Q. And have you leased it from them ever since?

A. Yes.

Q. And you are at the present time occupying that bulk plant as your place of receiving truck-train shipments, is that right?

A. That's right.

Q. When did you change from the tank wagon shipment basis to the truck-train basis?

1578 A. That was some months ago. I expect about a year.

Q. What change was necessary in your facilities to change over from the tank car basis to the truck-train basis?

A. We had to enlarge our yard gates and do some piping; re-arrange our piping connections to the meters and pumps, and so forth.

Q. You have always had a side track there, haven't you?

A. Yes; still do.

Q. And is that a side track from the Detroit Terminal Railroad, or from some other railroad?

A. Yes; the Detroit Terminal.

Q. The truck-train delivery obviates the necessity of using the spur track, does it not?

A. Yes.

Q. Because the truck-train travels on the street?

A. That's right.

Q. And not on the track.

A. That's right.

Q. Did you at the time you went on the tank car basis in August of 1935 arrange to sell tires and other accessories as well as gasoline?

A. I believe we have always sold a small quantity of that kind of thing.

Q. But the predominating character of your business is the sale of gasoline; is that right?

1579 A. That's right.

Q. And did you, after you went on the tank car basis, disposed of your retail outlets?

A. Yes.

Q. And did you do that to the extent of 100%?

A. I did.

Q. From October 1, 1935, until September of 1939, will you state whether you were on a hundred percent wholesale basis?

A. I was.

Q. Since 1939 what can you say relative to the station at 8400 West Chicago, in the city of Detroit?

A. I took that over in September, 1939, and operated it since.

Q. And what was the occasion of your taking it over?

A. Well, the station became insolvent, the dealer became insolvent; I was on the lease and subleasing to him, and in order to keep him eating, I took him over.

Q. And has he been an employee of yours?

A. He has.

Q. Ever since?

A. Yes.

Q. And with reference to the station at 10618 West Jefferson, River Rouge, suburb of Detroit, what can you say as to that station?

1580 A. Same identical situation, except that that happened last June, June 1940.

Q. June of 1940?

A. Yes.

Q. And did that station also go insolvent?

A. Yes.

Q. What have you been doing with reference to that station since it became insolvent?

A. It has been a company-operated station, and the former dealer is an employee.

Q. So at the present time you are operating two retail stations?

A. Yes.

Q. Would you say that that more or less was an emergency situation?

A. Yes, I would say that is what it was.

Q. Well, do you intend when and if you can to put those stations on a wholesale basis?

Mr. Austin: I object, your Honor; irrelevant and immaterial as to what the witness intends to do.

Trial Examiner Ballinger: Objection sustained.

By Mr. Abbott:

Q. Now, at the present time, I believe you have a total of 24 stations; is that the number?

A. Well, it might be 23 today.

1581 Q. Well, somewhere approximately 24?

A. Yes.

Q. Of which all but two are operated by others; is that correct?

A. That's right.

Q. Am I correct in stating that the capacity of your bulk plant is 104,000 gallons, approximately?

A. Well, I believe that is the total tank capacity on there. Although, I generally considered it as being 87,000—rather, 84,000.

Q. You have four 15,000-gallon tanks?

A. Yes.

Q. And six 4,000-gallon tanks?

A. Right.

Trial Examiner Ballinger: Pardon me. How many service stations are you operating today?

The Witness: Two.

By Mr. Abbott:

Q. And you have one 20,000-gallon tank?

A. Yes, there is a 20,000-gallon tank.

Q. Yes.

Trial Examiner Ballinger: At the time the Respondent's Answer was filed, you were operating three, were you?

The Witness: No; I think it was two.

1582 By Mr. Abbott:

Q. Did you have three at any time in the last year?

A. Yes, I have.

Q. Where was the other one that you were operating within the past year in addition to the two that I have mentioned?

A. There has been a total of five or six since September, 1939.

Q. But you have been able to place all but two back on a wholesale basis; is that correct?

A. That's right.

Trial Examiner Ballinger: One other question. As to the volume of gallons handled, what does that aggregate now per annum?

The Witness: 1940, I believe it was close to two and a half million gallons total.

Mr. Abbott: We are going to put in gallonage per years. Mark this an an exhibit, please.

(The document referred to was marked, for identification, "Respondent's Exhibit 20.")

By Mr. Abbott:

Q. Mr. Ledbetter, I show you Respondent's Exhibit 20, for identification, and ask you to identify it.

A. Well, that is the sheet showing as of December 31 1940, the station—the stations with the names and
1583 addresses leased and operated by the Wayne Oil Company, leased and subleased by the Wayne Oil Company, and simply supplied as independent, wholly independent dealers by the Wayne Oil Company.

Q. Have you got another copy of that in your book?

A. Yes, I have.

Mr. Abbott: I want to give a copy to Mr. Austin. It is just a photostat of the set-up of the stations supplied by the Wayne Oil Company, showing the two that are operated by the company, and the rest being leased and subleased or dealer contracts.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Abbott:

Q. Will you verify Exhibit 20, for identification, and see whether there are not, in fact, 24 stations that are on that photostat?

A. There are 24.

Mr. Abbott: I offer it in evidence. I offer Exhibit 20 in evidence.

Trial Examiner Ballinger: Any objection?

Mr. Austin: No objection.

Trial Examiner Ballinger: Respondent's Exhibit 20, for identification, is admitted in evidence.

1584 (The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 20," was received in evidence.)

By Mr. Abbott:

Q. Mr. Ledbetter, will you state by years from 1936 to 1940, inclusive, the gallonage of gasoline that you handled in the business of the Wayne Oil Company?

Mr. Austin: If your Honor please, that has already been placed in evidence by the records of the Secretary of State on behalf of the Commission, the Commission's Exhibits 6 to 17, inclusive. Now, I believe Mr. Ledbetter was here at the time that those exhibits were introduced, and I believe—at least, I request that he state at this time whether those figures previously introduced are correct or not, and if not, I am perfectly willing, of course, to have any corrections made. On the other hand, if they are correct, then I think it should appear there in a duplication.

1585 Q. Well, I will ask him this: Do you remember, Mr. Ledbetter, whether there was any evidence put in as to the gallonage delivered by you during these years—and when I say "you" I mean the Wayne Oil Company?

A. It seems to me like there was.

Q. And do you remember whether the figures given were correct?

Mr. Abbott: I think I ought to read the figures.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Abbott:

Q. Don't the state record, Mr. Ledbetter, show a deviation of 3 per cent from the amount of gasoline actually sold by you? In other words, would they be the same?

A. Well, the state record shows the 3 per cent, but it don't show any deviation of 3 per cent.

Q. What I mean to say is don't the state records show a reduction of 3 per cent from the actual gallonage which was handled by the Wayne Oil Company during those years?

A. I don't think that is exactly correct because it shows the net gallonage and the 3 per cent. You can add the two together, if you want to, and get the total. It shows both.

Q. You have your gallonage, haven't you, handled by
the Wayne Oil Company, in your records, there, so
1586 that you can just dictate them into the record and
then, if there is any difference, why, we can check
that and reconcile it? What is the 3 per cent that I have
mentioned, Mr. Ledbetter?

A. I beg your pardon?

Q. What is the significance of the 3 per cent that I have mentioned in my question to you?

A. That's what the state allows for shrinkage and loss in handling.

Q. Evaporation?

A. You don't have to pay the highway tax on 3 per cent of the gallonage we have.

Q. That is for spillage—

A. Yes.

Q. —evaporation, loss in handling?

A. That's right.

Q. Can you state those figures, Mr. Ledbetter, by word of mouth?

A. Yes, I can.

Q. Very well. 1936?

A. 1,348,348.

Q. 1937.

A. 1,686,637 gallons.

Q. 1938.

A. 1,825,038 gallons.

Q. 1939.

1587 A. 2,226,177 gallons.

Q. And 1940?

A. 2,340,394 gallons.

Q. I have that figure 2,341—

A. Maybe it is 1. Yes, it is 1.

Q. 2,341,394 gallons.

A. That's right.

Q. Have you, since the time that you went on the tank car basis—when I say "you," I mean the Wayne Oil Company—always paid the regular tank car charge for gasoline delivered to your bulk plant from the Standard Oil Company?

A. Yes.

Q. There has been no deviation from that at any time?

A. No.

Q. Now in reselling to the retailers supplied by you, on what basis have you sold the gasoline?

A. At the tank wagon price; prevailing tank wagon price. Always the same prices at which Standard Oil sold their gasoline to the retailers throughout the city.

Q. And you don't make any reduction to any of the stations that are shown on Exhibit 20?

A. No.

Trial Examiner Ballinger: And haven't.

The Witness: And haven't, is right.

By Mr. Abbott:

1588 Q. Now with reference to the cost of handling gasoline delivered to your bulk plant by the Standard Oil Company by tank car or truck-train: When you receive the gasoline at your bulk plant do you do the hauling to the 24 stations that you testified about?

A. Yes.

Q. And you do that by what means?

A. Tank truck.

Q. Do you have more than one of those?

A. Two.

Q. And what is the average delivery that you make to resellers from your bulk plant?

Trial Examiner Ballinger: Per day, week, month, or year?

By Mr. Abbott:

Q. No. I mean the average delivery in gallons.

A. You mean individual delivery.

Q. Yes.

A. I haven't compiled any statistics but I have a pretty good idea.

1589 Q. I mean just the approximate average.

A. It would be around 500 gallons.

Q. Just as bearing on other testimony in the case, would hauling in quantities of a thousand, 1500, or 2000 gallon lots, reduce the cost of handling? Would that operate to reduce the cost of handling, if gasoline were delivered in those quantities rather than in 500-gallon lots?

A. Surely.

Mr. Austin: I object to the question, your Honor, on the ground the witness has not been qualified to answer that question. It calls for a conclusion.

Mr. Abbott: Well, he is pretty well qualified to answer the question based on his experience.

Trial Examiner Ballinger: Well, the Examiner thinks the witness is sufficiently qualified to answer the question.

A. Why, certainly it would reduce the cost.

Trial Examiner Ballinger: It stands to reason, does it not, that dealing in larger quantities would be at a lesser cost than in smaller quantities?

Mr. Austin: Well, how much less would be another question. And there might be a lot of other factors.

Trial Examiner Ballinger: We haven't come to that yet.

By Mr. Abbott:

1590 Q. Do you know, of your own knowledge, the differential which is given by many major oil companies, do you or do you not know this, between the tank wagon and tank car price, which, in the case of Standard Oil Company, is 1½¢ at the present time, is more than 1½¢ in the case of many other major oil suppliers; is that or is that not a fact?

Mr. Austin: Would you mind repeating that question, please?

(The question was read.)

Mr. Austin: I would first like to know whether the witness knows. And I would like to know whether the question is limited to Detroit.

Trial Examiner Ballinger: The question, in the opinion of the Trial Examiner, is somewhat ambiguous.

Mr. Abbott: I will withdraw it and reframe it.

By Mr. Abbott:—

Q. Mr. Ledbetter, do you know, of your own personal knowledge, whether other major oil companies in the Detroit area allow more than 1½c differential as between tank wagon and tank car deliveries of gasoline.

Trial Examiner Ballinger: Do you know that of your own knowledge?

The Witness: Can I make an answer off the record?

Trial Examiner Ballinger: I am afraid—

1591 Mr. Abbott: Make it on the record, whatever it is, base it on your personal knowledge.

A. Well, my answer to that would be that while I am about as certain that that is true as that I am sitting here, I have never seen it actually done.

By Mr. Abbott:

Q. So you have nothing in your own personal experience which would enable you to answer that question positively; is that right?

A. I have enough in my personal experience to make me certain that it is true.

Mr. Austin: Your Honor, I move to strike the answer of the witness. He has testified that he has no personal knowledge of the price charged by any oil company here other than the Standard Oil Company, if I understand him correctly. I, therefore, move to strike his answer regarding his personal certainty, which he states himself is only his own conclusion and not based upon any facts.

Trial Examiner Ballinger: The motion is granted. Undoubtedly, if it is a fact, it can be proved by witnesses who have personal knowledge.

By Mr. Abbott:

Q. What personnel do you have at your office?

A. Well, I have a little office force and a little shipping force, and a little sales force.

1592 Q. And what is the nature of your duties?
A. Everything from president on down.

Q. And do you do anything with the auditing of your accounts, the keeping of your books?

A. Well, I supervise it.

Q. And have you made an analysis of the cost of handling gasoline during the period from 1936 to 1940, inclusive?

Trial Examiner Ballinger: What do you mean by handling it? Commencing at what point and ending at what point?

By Mr. Abbott:

Q. From the time that the gasoline arrives at your bulk plant until the time that it is placed in the tanks of the outlet?

A. I know what the cost is per gallon of gasoline to run my business.

Q. Well, will you answer the question as to whether you have made an audit of the cost of selling and transporting gasoline in your business from the years 1936 to 1940, inclusive?

A. Well, I don't know just what you mean by audit, to tell you the truth.

Q. A survey.

A. I have computed the cost per gallon of gasoline handled for running my business, covering all of
1593 the expenses of business operation.

Q. I see.

Mr. Abbott: May I have this marked as Exhibit 21, for identification?

Trial Examiner Ballinger: The reporter will mark the document Respondent's Exhibit 21, for identification.

(The document referred to was marked, for identification, "Respondent's Exhibit 21.")

By Mr. Abbott:

Q. I show you Exhibit 21, for identification, and ask you what that is, Mr. Ledbetter?

1594 A. That is the operating cost of selling gasoline by the Wayne Oil Company.

Q. For what period?

A. For the years 1936, '37, '38, '39, and '40.

Q. And is that based on the gallonage that you previously testified you handled during those five years?

A. It is.

Q. Can you vouch for the accuracy of this statement or survey?

Trial Examiner Ballinger: Let's find out whether or not he prepared it himself.

By Mr. Abbott:

Q. Was it prepared under your supervision?

A. Yes, under my supervision and with my help.

Q. And in your office?

A. That's right.

Q. Is that right?

A. That is right.

Q. And based on that can you vouch for the accuracy of the figures stated on there?

A. I can vouch for the accuracy of these figures.

Mr. Austin: Your Honor, I object to any further questioning on this matter. In the first place, the cost of the wholesaler in distributing gasoline from his bulk plant to the dealer to whom he sells is entirely immaterial
1595 and irrelevant in this case, and I object to it on that ground.

If there is any relevancy in the cost of the Wayne Oil Company at all, it would be in the cost of the bulk plant and the delivery operation in connection with retail operated stations, of which there are at the present time only two. And which there were none, as I understand it, during part of this period.

In the third place, Mr. Ledbetter has not been qualified as an accountant, and this sheet here simply states a conclusion as to operating cost per gallon, doesn't state the figures upon which it is based, and the witness has not been in any way qualified to reach such a conclusion, either upon his own figures or any other figures.

Mr. Abbott: Now, if the Court please, this exhibit is offered in the case for the purpose of tending to show that the differential between the tank car and the tank wagon basis, which is a cent and a half is made in good faith, and that it is justified by the difference in the cost of manufacture, sale or delivery resulting from the different methods or quantities in which the commodities are sold or delivered to the purchaser. That which I have just now read is from the Robinson-Patman Act itself. And I say that the testimony of Mr. Ledbetter as to his costs of selling and transporting gasoline from his bulk plant

to the retail outlets, including the cost of administra-
1596 tion of his business, has a probative value in this
case, as showing the differential of one and a half cents between the tank wagon and tank car price is reasonable and justified under the Robinson-Patman Act.

As to Mr. Ledbetter's qualifications to make this survey or audit or statement, it is ridiculous, of course, to suggest that he has to be a public accountant, or even an accountant to do that, because he has testified that he has been the treasurer of the company that he was with before he became identified with the oil business. And since he has been in the oil business, ever since more than seven or eight years ago, he has been actively identified with the keeping of the books of his company, and has been almost the sole stockholder in the company, and has testified that this statement or audit was prepared not only under his supervision, but also by him personally, that he participated in the preparation of it.

I don't think there is any question that the exhibit is admissible.

Of course, the Government will have a right to examine him as to its authenticity and as to the reliability of the figures which appear upon it, if they wish to do so.

1597 Trial Examiner Ballinger: I desire to ask counsel for the Commission a question.

What is the object and purpose of Taggart's testimony? Is it not to establish cost of marketing?

Mr. Austin: The object of Taggart's testimony was to establish the cost of distributing gasoline by retail service stations in Detroit.

Furthermore, Dr. Taggart was thoroughly qualified before he was asked any conclusion.

Trial Examiner Ballinger: I am not speaking about conclusions.

Mr. Austin: The object of the testimony was to establish the cost of distribution of the gasoline at retail at service stations in Detroit.

Trial Examiner Ballinger: This statement, as I understand, relates only to the cost of distributing from the bulk plant to the retail station; is that correct?

Mr. Abbott: That is correct.

Mr. Austin: To retail stations to whom this wholesaler sells, and in respect of which he is engaged in business as a wholesaler, and I contend that that is entirely immaterial

to any issue in this case, and that the only place where distribution costs are admissible or in any way relevant is where they are so set up as to show the difference be-
tween the cost of distributing gasoline to retail sta-
1598 tion, that is, the operation of the bulk plant and de-
livery, in the one case, as against where a retail station buys directly from the oil company. Any additional costs which result from the fact that the supplier buys by tank car instead of by tank wagon, I think, are admissible, but I don't think that this is admissible at all, unless it is separated and unless Mr. Ledbetter could testify and show that he had made an allocation of his costs so that he was prepared to state the cost per gallon of distributing gasoline to retail stations which he operated and state that those were costs which he would not have had if he had taken delivery at those stations directly from the Standard Oil Company. In other words, if a man operates a retail station, and, as a result of operating the bulk plant and making his own deliveries, he has certain expenses which he would not have, had he taken delivery from the oil company directly at the station, then I think that is probably a proper subject of proof because that is an expense which he incurs by operating the bulk plant and making his own deliveries.

Mr. Abbott: I want to ask you, then, Mr. Austin, what was the purpose of Mr. Harrison's testimony in which he testified that the cost of selling and delivering gasoline by the tank wagon method was .76¢ per gallon over
the tank car method. Now, this, if you see, your
1599 Honor, is directly on that point; as to the difference
between the cost of handling by the two methods.

Trial Examiner Ballinger: There are two questions here that the Examiner has in mind: first, whether or not this testimony, if proper, is pertinent, germane, and admissible.

Secondly, the Examiner is in serious doubt as to the admissibility of the document; there is no break-down, there is nothing to indicate what items of expense enter into the cost.

Mr. Abbott: That is a matter that can be gone into.

Trial Examiner Ballinger: Those matters will have to be gone into before, certainly, this document could be admitted in evidence.

Mr. Abbott: We are willing to do that, if the Examiner wishes to have it done.

Trial Examiner Ballinger: Then we will first dispose of this question as to whether or not evidence of the cost of delivery from the bulk plant to the service station is material.

Mr. Abbott: That is just the thing that Mr. Harrison of the Sun Oil testified about in the Government's case.

Trial Examiner Ballinger: The Examiner was un-
1600 der the impression that that was the subject of a
part of Mr. Harrison's testimony which was considered material by counsel for the Commission. Am I not correct?

Mr. Austin: You are correct, your Honor, to the extent that the Sun Oil Company is not a jobber; it is a refiner, and so is the Standard Oil Company, and I am not saying that the cost of the Standard Oil Company, both selling in tank wagon and tank car quantities is not admissible. That is comparable to Mr. Harrison's testimony, but this is the testimony of a jobber. If the purpose of this testimony is in some way to compare Mr. Ledbetter's costs with the Standard Oil Company costs, to say: This is what it cost the Standard Oil Company to operate a bulk plant and deliver gasoline; if that is the purpose of this testimony, then I would have to concede it might have some relevancy—I won't concede it has any relevancy, but I would concede that the offer was proper to the same extent that the offer of Mr. Harrison's testimony was proper.

I don't understand, Mr. Abbott, you are offering this testimony of Mr. Ledbetter for the purpose of proving what the Standard Oil Company's costs are.

Mr. Abbott: We intend to show it two ways. We intend to show not only the difference from the standpoint of the Respondent, but also the difference from the standpoint
of the jobber, because they both have a tendency to
1601 show the same result under the Robinson-Patman Act,
as to the difference between the cost of sale and delivery under the two methods and also this is offered for the purpose of showing that the testimony of the witness Harrison is not accurate when he says that the difference in cost is .76¢ per gallon, because we claim that that does not include certain items which ought to be considered in such a computation, Mr. Harrison having testified that in a great many respects his method of delivering gasoline is different than the method which Mr. Ledbetter uses.

In connection with that, I want to say that Mr. Ledbetter has already testified that his average delivery is in lots of 500 gallons whereas Mr. Harrison testified that he delivered in much larger lots.

This is testimony which I think is necessary to rebut Mr. Harrison and also as having a tendency to show that the differential between the tank car and tank wagon price is justified, under the Robinson-Patman Act itself.

Trial Examiner Ballinger: Is this testimony designed to establish the cost of marketing gasoline?

Mr. Abbott: Yes, it is for the purpose of showing the cost of marketing gasoline, so far as it relates to the cost of sale or delivery as between the tank car and the tank wagon method of delivery.

Trial Examiner Ballinger: Then, in order to pre-
1602 sent the entire picture, you should have the cost of
delivery to the jobber plus the cost of the delivery of
the jobber to the service station, plus the cost of the operation of the service station, should you not?

1603 Mr. Abbott: Well, not as far as this witness is
concerned, because he hasn't any cost except at the time it is delivered to him. We can't prove it all by him. There are a great many other elements, of course, which enter into the matter, when we come to the costs of the Standard Oil Company, the Respondent, which is something entirely different.

Trial Examiner Ballinger: What is bothering the Examiner is for what purpose has this evidence been offered?

Mr. Abbott: First, for the purpose of rebutting the testimony of Mr. Harrison which your Honor has already referred to. I think when you mentioned Taggart, possibly you intended to refer to Mr. Harrison, because, as Mr. Austin has stated, Mr. Taggart testified on a somewhat different subject than Mr. Harrison.

Trial Examiner Ballinger: Mr. Taggart made a survey or claimed to have made a survey of this area to determine the cost of marketing gasoline.

Mr. Abbott: Yes; of the retail operator.

Trial Examiner Ballinger: Mr. Harrison testified, as the Examiner recalls, with reference to the cost of delivery of the gasoline from the bulk plant of the—was it the Sun Oil Company?

Mr. Abbott: Yes; Sun Oil Company.

Trial Examiner: —Sun Oil Company, to the jobber. Am I correct?

1604 Mr. Abbott: No. He testified with reference to the cost of delivery from the jobber to the retail outlet; just what Mr. Ledbetter is proposing to testify to.

Mr. Austin: I don't think either of you stated that correctly, if I may respectfully state so. He stated the cost of delivery from the bulk plant of the Sun Oil Company to the retail station, including the operation of the bulk plant.

Trial Examiner Ballinger: That's as I understand it.

Mr. Abbott: That's what I meant to say. Whether it is one bulk plant or the other, doesn't make any difference.

Trial Examiner Ballinger: This testimony, if admitted, wouldn't prove nor tend to disprove the statements of Mr. Harrison. There is an entirely different situation.

Mr. Abbott: I certainly differ with the Examiner, because it makes no difference what bulk plant you take, if you are making deliveries by tank wagon out of a bulk plant to a retail station the costs are comparable. I don't care whose bulk plant it is; whether it is the Sun Oil Company or Mr. Ledbetter's; because the gasoline comes to rest in the bulk plant and from there is put into a tank wagon and then delivered to a retail outlet. That is the same situation and the same process; no matter who operates the bulk plant.

Mr. Austin: If the Standard Oil Company wants to 1605 prove what it costs it to deliver gasoline from its own bulk plants to the Standard Oil service stations it certainly has that material and those figures at its command and it seems to me that the only proof in that respect is direct proof of its own costs. Why it should want to come in for that purpose and show what it costs a jobber like the Wayne Oil Company are, to carry out that same operation, I don't quite understand.

Mr. Abbott: We propose to show in this case, your Honor, as to the various jobbers, what their gallonage cost is for selling and transporting gasoline from the bulk plants to the retail outlet, and that is the purpose of this testimony and it was introduced also in connection with the testimony of Mr. Biber. All the exhibits that were put in evidence there, were for the same purpose; to show the same cost with reference to the Citrin-Kolb Oil Company and we now ask leave to introduce that testimony on behalf of the Wayne Oil Company for the purpose of showing the incidence of the costs of such operation with the figures which will be introduced to show the costs involved for the Standard Oil Company itself.

1606 Mr. Austin: If your Honor please, those papers that Mr. Biber had are not exhibits; they were offered, and your Honor reserved his ruling on them, and so far they have not been admitted, and I may say they were in probably a good deal better shape than this statement.

Mr. Abbott: If the Court please, I want to say that in order to save time, I will ask that the Court reserve ruling on this offer in order that we may proceed, and if it later appears that it is not proper, of course, it can be stricken. I would like to get along with Mr. Ledbetter's testimony and put in whatever testimony I have for him to answer with reference to this exhibit, and if it should later appear irrelevant, your Honor, of course, can strike it.

Trial Examiner Ballinger: You think it is material to the Respondent's case?

Mr. Abbott: It is very material. It is one of the principal defenses we have, to show that nothing—the Act says: Nothing herein contained shall prevent differentials which make only due allowance for the differences in the cost of manufacture, sale, or delivery, resulting from the different methods or quantities in which such commodities are to such purchasers sold or delivered.

Trial Examiner Ballinger: You think that extends not
only to the Respondent, but also to the jobbers who
1607 buy from the Respondent? How far down the line do
you think that projects?

Mr. Abbott: I don't say that. I say this testimony here that is offered in evidence has a tendency to prove just what that section of the Robinson-Patman Act provides, in connection with the testimony which will later be introduced to show the cost to the Standard Oil Company.

I am reading now, if the Court please, from the Robinson-Patman Act proviso, starting with the words: "Provided that nothing herein contained shall prevent differentials which make only due allowance for differences in cost of manufacture, sale, or delivery, resulting from the different methods or quantities in which such commodities are to such purchasers sold or delivered." The wording of the Clayton Anti-Trust Act is somewhat different from that. Of course, my brother, Mr. Austin, knows what the difference is.

Trial Examiner Ballinger: Well, the Examiner is of the opinion, and so rules, that that section or the proviso to which counsel has directed the Examiner's attention is not applicable to this situation, and accordingly sustains the objection to the exhibit, Respondent's Exhibit 21.

Mr. Abbott: If the Court please, I earnestly ask that the Examiner reserve ruling on this exhibit, because
1608 we concede it is very essential to the Respondent's case that this schedule of costs be placed in the record in this case. If this evidence is not to be taken, then I certainly submit that the testimony of the witness Paul Harrison should be stricken, because that testimony is to the same effect, only it presents a different figure, namely, a figure of .76¢ per gallon, instead of the figure which is submitted by Mr. Ledbetter, and which averages one and forty-three hundredths cents per gallon as his cost.

And if your Honor is to rule that this evidence shall not be admitted, then I move to strike the testimony of the witness Paul Harrison on that point, which was taken the last day—

Trial Examiner Ballinger: The Examiner couldn't entertain such a motion unless counsel referred with particularity to the page and lines of the record which he desires to have stricken.

Mr. Austin: If your Honor please, I would like to point out a very important difference between this proposed—

Trial Examiner Ballinger: Just a moment.

Mr. Abbott: I have the record here, your Honor.

Trial Examiner Ballinger: So that the record may be clear, let us find out what testimony you propose to strike.

Mr. Abbott: Very well. It will take about ten
1609 minutes to get it here.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: I made a motion, if the Court please, to strike all the testimony of the witness Paul Harrison in relation to the cost of sale and delivery from bulk plant to retail outlet of gasoline from the Detroit area at the present time. I believe his testimony related to the current situation in that respect. I make this motion upon the ground that the Court or Examiner has ruled that the Respondent's Exhibit 21, relating—

Trial Examiner Ballinger: For identification.

Mr. Abbott: —for identification, relating to the unit cost of the Wayne Oil Company is not admissible, under that section of the Robinson-Patman Act which provides, "That

nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the different methods or quantities in which such commodities are to such purchasers sold or delivered." It being my contention that if Exhibit 21 should be refused admission in evidence, then, by the same token, the testimony of Mr. Harrison on the same question should likewise not be in the record,
1610 and should be stricken from the record. I, therefore, make the motion that Mr. Harrison's testimony on that point be entirely stricken. And for the purpose of the motion, I say that I shall be able to give you the pages of the record on which Mr. Harrison's testimony so appears.

Trial Examiner Ballinger: Will you furnish those to the reporter so that he may include them in the record at this point?

1611 Trial Examiner Ballinger: I will hear from Mr. Austin.

Mr. Austin: If your Honor please, just to point out a very distinct difference between Mr. Harrison's testimony, that is, the subject covered by it, and the subject matter of these figures which have been offered through Mr. Ledbetter, Mr. Harrison was asked what the cost of the Sun Oil Company was of delivering gasoline from bulk plant to the service station, including the operation of the bulk plant.

Trial Examiner Ballinger: To where?

Mr. Austin: From the bulk plant to the retail service station. Including the operation of the bulk plant.

Now, this statement of costs offered by the Respondent is a statement showing the entire operating cost to the Wayne Oil Company. It is not restricted to the cost, unit cost per gallon of delivering gasoline including the operation of the bulk plant.

Trial Examiner Ballinger: I will ask you to confine your remarks here between the distinction of the Wayne Oil Company and the Sun Oil Company's deliveries.

Mr. Austin: That is exactly the point. This includes a lot of other things besides operation of a bulk plant and delivery of the gasoline from the bulk plant to
1612 the retail station. Mr. Harrison's costs, which he introduced, were restricted to that.

I will concede on behalf of the Commission that it would be relevant for the Respondent to produce figures for the purpose of showing any additional cost which a jobber incurs as a result of operating retail stations resulting from the fact that he buys in tank car quantities and not directly by tank wagon.

1613 Mr. Abbott: My understanding is that the additional cost which a jobber incurs by buying in tank car quantities as to his retail operations is the operation of the bulk plant and the delivery of the gasoline in his own trucks, because he wouldn't have to do that if he bought directly from his supplier by tank wagon delivery.

Mr. Austin: Now, consequently my objection to this exhibit is based upon the fact that it includes the entire operating cost of the Wayne Oil Company, and in that respect it is different from what Mr. Harrison was asked and covers different operations and different costs than those covered by Mr. Harrison's answer. For that reason I contend that the two are not comparable.

Mr. Abbott: If the Court please, I contend they are strictly comparable because this only purports to cover the operating costs of the bulk plant and the cost of delivery by the delivery facilities from the bulk plant to the gasoline filling station.

Trial Examiner Ballinger: But the statement contains no breakdown to indicate what items enter into it.

Mr. Abbott: We propose to introduce further evidence to show what the breakdown is.

Trial Examiner Ballinger: Well, you certainly would be required to do that before that statement would be admissible.

If you think you can establish those figures, furnish
1614 proper background for the admissibility of that document in evidence by this witness, the Examiner suggests you withdraw the tender until that is done, and then the Examiner will pass on it.

Mr. Abbott: I would like to clear up this point. Does the Examiner claim that evidence of the jobber's cost in this operation is admissible if properly established in the way you have indicated?

Trial Examiner Ballinger: Apparently counsel for the Commission concedes that.

Is the Examiner correct?

Mr. Austin: Well, I will be bound by the statement I made on the record. I think that statement very clearly—

Mr. Abbott: Would you just as soon answer the question I asked the Commissioner, and which he asked of you?

Mr. Austin: You will have to restate the question.

Mr. Abbott: Will you repeat it, Mr. Reporter.

Trial Examiner Ballinger: Read it, please.

(The record was read by the Reporter.)

Mr. Abbott: Instead of by reference, would you just as soon put it on the record directly.

Mr. Austin: I will state again I have no objection to the introduction of cost of any one of these four jobbers, costs which are costs incurred in the connection with the operation of retail service stations, and which costs 1615 result from the fact that the jobber obtains his gasoline for those service stations through his own bulk plant delivery, rather than by delivery through the Standard Oil Company.

Mr. Abbott: That is not the question. What if you had a situation where the jobber didn't have any retail stations; would you then contend that his cost of operation of the bulk plant for delivering gasoline to retail outlets is admissible?

Mr. Austin: To bring it to a specific case, I contend that the present costs of the Stikeman Oil Company, assuming that they do not operate retail stations, was entirely inadmissible.

Mr. Abbott: Inadmissible?

Mr. Austin: Yes.

Mr. Abbott: That is the very point, if the Court please, as to whether those costs, assuming that the jobber has no retail stations, as in the case of the Stikeman Oil Company, and which might be the case with the Wayne Oil Company, conceivably, whether that cost is admissible under this section or proviso of the Robinson-Patman Act.

1616 Trial Examiner Ballinger: To avoid further discussion, in order that we may progress, the Examiner will permit the introduction of the testimony, reserving to counsel for the Commission a motion to strike at the conclusion of the testimony.

Mr. Abbott: That is just what I asked the Commissioner to do, because I think it should go in, and then if it is found to be irrelevant, then it can be cured by motion.

Mr. Austin: May I ask your Honor to please explain that ruling for my benefit. I don't understand, do I, that this exhibit is admitted?

Trial Examiner Ballinger: No. That exhibit in the opinion of the Examiner, has not been sufficiently authenticated.

Mr. Abbott: Very well.

I want to say that Judge Hanley has a witness from Chicago, and we wish to interrupt in order to have his testimony considered at this time.

Trial Examiner Ballinger: And withdraw the present witness?

Mr. Abbott: Yes.

Trial Examiner Ballinger: It is agreeable to the Examiner. The witness is withdrawn. Call your next witness.

(Witness temporarily withdrawn.)

1617 Mr. Hanley: Professor Clark, please.

FRED EMERSON CLARK was thereupon called as a witness by and on behalf of the Respondent, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Hanley.

Q. Professor Clark, will you please give your full name and your address to the reporter?

A. Fred Emerson Clark; 1602 Ashland Avenue, Evanston, Illinois. That's my home address.

Q. And what is your present occupation, Professor?

A. I am a teacher; I am professor of economics and marketing, Northwestern University; Chairman of the Department of Marketing and Director of the graduate division of the School of Commerce of Northwestern University.

Q. Beginning with your formal schooling, after high school, will you please tell us what colleges or institutions you have attended?

A. Do you want the degrees, too?

Q. Yes, sir.

A. I got my Bachelor of Arts Degree at Albion College, 1912; Master of Arts Degree in Economics, University of Illinois, 1930; Degree of Doctor of Philosophy in

1618 Economics from the University of Illinois in 1916.

Q. When you obtained your degree as a Master of Arts, Professor, were you required to write a thesis, and, if so, what was the subject of that?

A. Yes. The thesis of my Master's Degree was a cooperative grain elevator movement in Illinois dealing primarily with the marketing of grain by cooperative grain elevators.

Q. During the period when you were attending school, did you also do any work as an instructor?

A. Yes. I was a Teaching Fellow at the University of Illinois one year and then one year, or the years 1913, 1914, 1915, I was instructor in economics at the University of Arizona.

Q. Now, beginning in 1916 after you had received your Doctor's Degree in Economics, what teaching experience did you have?

A. Well, the school years of 1916 and 1917 I was instructor in Commerce and Industry at the University of Michigan, teaching marketing, foreign trade, industrial organization, and management. The following year, 1917 and 1918, Professor of Business Administration at the University of Delaware.

I taught accounting, industrial organization, and management, and marketing.

1619 The following year I went back to the University of Michigan as Assistant Professor.

Q. In what subject?

A. Commerce and Industry, which was in the Economics Department, and I taught there again Marketing, Industrial Organization, and Management, and Foreign Trade.

Then, in the fall of 1919 I went to Northwestern University, Associate Professor of Economics and Marketing in the School of Commerce.

In 1923 I was made a Professor of Economics and Marketing. 1927 I became Chairman of the Department of Marketing, and in 1937 I became Director of the Graduate Division of the School of Commerce, and am still those three things at Northwestern University.

Q. Are you a member of any organizations of economists or men in related professions?

A. Yes. I don't know that I can remember all of them. I belong to the American Economics Association; American Farm Economics Association; American Management Association; and I am also a member of the American Marketing Association.

Q. Is there an organization known as the National Association of Teachers of Marketing and Advertising?

A. Well, it is not known as that name now. There was such an organization until 1938. I was president of
1620 that organization in 1929.

Q. Is there a publication known as the American Marketing Journal?

A. Yes, there is.

Q. Have you had any connection with that?

A. I was associate editor of the American Marketing Journal ~~from 1924~~ to 1926.

Q. I think you have referred to the American Marketing Association.

A. Yes. The American Marketing Association was organized in 1928, bringing together the American—bringing together the National Association of Teachers of Marketing and Advertising, which was made up primarily of teachers of marketing and the National Marketing Society, which was made up primarily of business men interested in marketing. Those two were joined in 1937, I believe, and I was made president for the year 1938.

Q. Have you had occasion to write any articles or books dealing with the subject of marketing, Professor?

A. Yes, I am author of "The Principles of Marketing" published in 1922, revised in 1932.

Q. Now, is that book rather widely used among teachers of marketing?

A. Yes, that book has been very widely used over the last, well, approximately 20 years, and also two other
1621 books "The Readings in Marketing," an editorial job
published in 1924, revised in 1933, and then I am co-author with L. D. H. Weld "Marketing Agricultural products in the United States" published in 1932. That's also very widely used as a text and reference.

1622 Q. Now, in addition to these books have you had occasion to write articles for technical or trade journals or magazines?

A. Yes. Articles, a number of them, but from the scientific point of view, the "American Economic Review," and the "Harvard Business Review," the "Journal of Marketing," and bulletins of the "American Management Association."

Q. I presume, Professor, that in the course of your work you have had occasion from time to time to write up various studies of the marketing business?

A. Yes, and supervised many.

Q. Have you had any connection with the University of Chicago?

A. Well, I taught marketing and sales administration there one summer session. Also at Columbia University and at the University of Wisconsin.

Q. All of that experience, Professor, had had to do with the broad question of marketing and economics, has it not?

A. Yes. With the marketing of various types of products to consumers of industrial goods.

Q. I wish you would just explain, please, what is meant by this term marketing as you have used it in connection with your work?

A. The term marketing covers all the operations involved in taking goods and services from producers to consumers. It includes buying and selling, the physical distribution of goods; that is, the transportation
1623 and warehousing and financing of marketing activities, standardization operations in marketing, risk-taking operations in marketing and general aspects of market news service, and things of that type.

Q. Professor, are you connected in any way or have you ever been connected in any way with the oil industry?

A. No.

Q. I suppose it is true that you have given consideration to petroleum products as a commodity which was marketed, in the economic structure in this country?

A. Oh, yes.

Q. Have you any interest in any oil company?

A. None.

Q. I will ask you particularly, have you any interest in the Standard Oil Company of Indiana?

A. No, I have none.

Q. Have you any interest at all, of a personal nature, or financial nature, in the outcome of this action?

A. This action?

Q. Yes.

A. None.

Q. Professor, have you read, this morning, the testimony of Mr. James E. Dyer given in this case yesterday afternoon?

A. Yes, I have read it.

Q. ~~In~~ that testimony did you read the definitions
1624 of the term jobber or wholesaler or distributor which
Mr. Dyer made?

A. Yes.

Q. I will ask you if it is your opinion, and if you agree with the accuracy of the definition of the term jobber, wholesaler or distributor, as given by Mr. Dyer?

A. Those are the definitions that are commonly understood by those terms.

Q. One of those was a definition approved by the Federal Trade Commission in 1931, was it not?

A. Yes.

Mr. Austin: I object, your Honor. I don't think the record shows that.

Mr. Hanley: I am very sure that it does.

Mr. Austin: The objection was made and sustained yesterday by the Examiner and Mr. Dyer was told to give his own opinion.

Trial Examiner Ballinger: The objection is sustained and the answer is stricken.

Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: In order to save time and inasmuch as we are now being tried by the Federal Trade Commission and inasmuch as the term jobber, or the definition thereof,
is highly material in this action, the Respondent now
1625 offers in evidence the definition of the term jobber,
distributor or wholesaler as the same appeared in the National Code of Practices for Marketing Refined Petroleum Products, authorized by the Federal Trade Commission June 12, 1931, and which definition is as follows: "—

Mr. Austin: Pardon me, your Honor. I don't know whether that was so approved, or anything about it.

Mr. Hanley: You can find out. I am making an offer of proof, here.

Mr. Austin: I object to that being read into the record except upon proper identification.

Trial Examiner Ballinger: The tender will be received subject to check and if it is not in conformity with the action of the Federal Trade Commission, it will be stricken from the record.

Mr. Austin: Does that make it incumbent upon me to check it after it is in rather than incumbent upon the party offering it to properly identify his offer?

Mr. Hanley: Well, Mr. Austin, if I offered something that your own outfit did, I take it you ought to be able to check that without placing that burden on us. We say you made this definition. Now if you didn't, you are entitled to point out our error.

Trial Examiner Ballinger: The Examiner will admit it subject to check.

1626 Mr. Hanley: May I finish my offer, please?

I started to quote, after the word "Which definition is as follows: Jobber, distributor or wholesaler. One who carries a stock of petroleum products to sell to retail dealers or others for resale, but who may also sell directly to consumers."

The Examiner having requested a reference to the record as to the testimony of Mr. Dyer wherein the definition of the term jobber, distributor or wholesaler as approved by the Federal Trade Commission became a part of the evidence, I now refer to page 1480 of the record of testimony and to the following answer given by the witness Dyer:

"In order to give a little background for the definition I would like to read into the record, if I may, a definition of the word jobber, distributor or wholesaler, as those words were defined in the National Code of Practices for Marketing Refined Petroleum Products, which was authorized by the Federal Trade Commission on June 12, 1931."

Further, that on page 1481 of the record the witness then quoted the definition as it appears in the quotation just above made.

Mr. Austin: I don't want to quibble about that, Judge, but I don't think he quoted anything. I think he gave his opinion and, otherwise, I would have objected to it. As a matter of fact I did object to him giving anything ex-
1627 cept his own opinion. I believe he did state that he approved of that document.

Mr. Hanley: I am just assuming that the opinion of the Federal Trade Commission has some weight in this proceeding.

Mr. Austin: That is the whole point. I am not conceding it is the opinion of the Federal Trade Commission but I am not making any further objection as to the inclusion of that at this time.

1628 By Mr. Hanley:

Q. You have stated, Professor, that you have read all of the testimony of the witness Mr. Dyer.

I will ask you, based upon your experience as a marketing economist, if you agree with the answers which Mr. Dyer made to the questions which were propounded to him?

A. Yes, I agree with the answers as to principle and as to nature of the wholesale operations involved. Of course, I don't pretend to the knowledge of the oil industry which Mr. Dyer obviously had, although I am somewhat acquainted with it.

Q. With reference, Professor, to the function of a jobber, wholesaler, or distributor, generally, in the distribution of goods, please explain just what that function is; how such an operator works, and what he does, and what service, if any, in your judgment, he performs. Now, I am referring to all goods, Professor, including gasoline.

Trial Examiner Ballinger: Are you referring strictly, now, to the services of the jobber there?

Mr. Hanley: Jobber, wholesaler, or distributor.

A. I suppose it would be a little better if we would confine it to manufactured products?

By Mr. Hanley:

Q. Yes; that is all right.

A. The operations are rather technical, if you 1629 covered all of them.

This type of jobber, distributor, or wholesaler, the terms, unfortunately, are used somewhat synonymously, and, used in different terms, covers what we normally call the wholesale function. That is the operation in the case of consumers' goods between the producer of the goods, the manufacturer, normally, and the retailer.

The general function of the jobber is to pick out those goods which he thinks his retail customers will desire to buy; to purchase them in large quantities, if possible, from the manufacturers; to store them and, likewise, he operates in a financial way, because he normally pays cash for those goods, or pays for them within a relatively short time, and, on the other hand, he very commonly gives credit, and frequently rather long credit to the retail dealer.

He also sells the goods and usually delivers them to the retail dealer. In other words, he performs all the operations which are involved in getting the goods from the manufacturer to the retailer. We sometimes call him merchant middleman, meaning by that he takes title to the goods and then resells those goods as his own.

Q. Now, again referring to manufactured products, consumer-commodities of that type, what is the fact with reference to whether or not the so-called jobber, whole-
1630 saler or distributor not only distributes to retail resellers, but also distributes at retail to ultimate consumers?

A. Well, there are a great many jobbers, probably, in most lines of trade, who not only resell to retailers, but also have a small or a larger number of retail stores of their own through which they sell to the retailers, and then we have a similar operation which is performed by a good many types of organization, the department store, for example. The larger ones really perform a combined jobbing and retailing operation; that is, they buy in large quantities and store them and deal them out to their retail store or stores. The large chain stores perform a similar operation in that they cover both jobbing and retailing, but the individuals that we normally call jobbers or wholesalers or distributors, as the terms are used here, do frequently sell through their own retail stores.

Q. Do you know that to be true in reference to gasoline, as well as to other commodities?

A. Yes.

Trial Examiner Ballinger: Of your own knowledge?

The Witness: Yes, sir, of my own knowledge.

By Mr. Hanley:

Q. And is that true, generally, throughout the United States?

A. I don't know, from my own experience, that that is true, but from the information that I have in reading
1631 about the oil industry, I assume that it is true.

Q. Now, ordinarily, Professor, is it or is it not true that the so-called jobber or distributor bears the expense of storing and distributing the goods, either to a retail reseller or to the ultimate consumer, and relieves the manufacturer of that expense?

A. Yes, that is true of the great number of jobbers and distributors. There are a small group, of course, of what are sometimes called limited function wholesalers, who, possibly, perform only the selling operation and usually the collecting operation, too; I mean, collecting accounts. The normal jobbing function, however, is to buy the goods in quantity, store them, and redistribute them to the retailers as they sell them to them.

Q. In respect of the matter of price, what is the general rule and practice as to the jobber or distributor receiving a lesser price than a retailer receives from the supplier or manufacturer?

A. You mean by that he pays a lesser price?

Q. Does he pay a lesser price, generally speaking?

A. Generally speaking, he does. We have what we sometimes call a functional discount, meaning by that the jobber would pay a lower price than the retailer does, because the jobber performs these functions which we have just enumerated.

Q. In your opinion as a marketing economist, what
1632 have you to say as to whether or not that practice is
justified?

A. Well, it is very definitely justified. In the first place, obviously the jobber couldn't perform those operations if he weren't paid for it. They cost him money, and, consequently, he has to have a lower price in order to resell at a price which will give him—at least covers his cost and, presumably, a profit on his operations.

It is justified also because if the jobber didn't perform that function, then, in normal operations, the manufacturer would have to do it; and it would cost the manufacturer money, and, of course, in any given case—it depends on which seems the more economical method—which one will be used. By and large, jobbing is considered to be a very economical method of marketing, because, normally, the jobber handles either in large quantities or a number of articles, and the expense of his operation can be spread over all these various articles. That, of course, varies with industries, but the operation is thought to be economical because of the intensification of his work in a given area, and the saving in cost in handling a wide volume of goods.

Q. Is it or is it not true that, generally speaking, jobbers of manufactured commodities, including gasoline, take an absolute title to the property and dispose of it at their
own pleasure and in their own methods, without re-
1633 ferring to the supplier?

A. That is the normal operation. They are, as we say, merchants. They buy, and goods are theirs, and then they resell them.

Q. What is the fact, professor, as to whether or not there are many millions of dollars invested in the United States in the jobbing business of commodities, including gasoline?

A. Well, there are no figures as to the investment, but you can get some idea of the investment from the fact that the United States Bureau of the Census, in its figures on census distribution for 1939, show that what they call full function and limited function wholesalers, is their term for these jobbers, distributors, and so on, did over $23,000,000,000 worth of business in 1939, and the same source, I believe, shows in the neighborhood of $4,000,000,000 on what they call bulk tank stations in the petroleum industry.

1634 Q. With reference to the gasoline marketing industry, particularly, is it or is it not true that there are many millions of dollars invested in that jobbing business, and that there are many thousands of persons employed in the jobbing business?

A. It definitely is true.

Q. Would you say, Professor, that a necessary and integral part of the marketing structure for consumer commodities, including gasoline, in the United States involves the use of jobbing or wholesale or jobber or bulk buyer function?

A. Well, you say "necessary"; if you mean necessary from the point of view of economy and service to retailers and consumer, the answer is definitely yes.

Q. Without any reference to necessity at all, is it not a fact that the jobber system of distribution is an integral part of the distributing system?

A. It is, yes.

Q. As a matter of fact, Professor, that function that is performed by the jobber just has to be performed by someone, doesn't it?

A. Yes, someone; by the manufacturer or the jobber or the retailer, somebody has to perform that function.

Q. And whoever does it has to pay for it?

A. It costs money to perform that function, definitely.

Q. So in any instance where a jobber buys gaso-
1635 line by tank car from a supplier, and thereafter undertakes all of the burdens of distributing that gas-

oline, whether he sells it to other retailers or whether he retails it himself, is it not true that he bears a substantial burden of the cost of distribution that in turn his supplier is relieved of bearing?

A. Yes.

Q. Now, Professor, I assume that this is true, that all that you have said about the United States and marketing set up in the United States, is equally true of the State of Michigan and the City of Detroit?

A. The general pattern is the same.

Q. And applies to the marketing of gasoline and other petroleum products?

A. Yes, the pattern is the same.

Q. Now, supposing, Professor, that if for some reason it became improper, or at least the custom were abandoned, to use the type of buyer we have been discussing, and that is the jobber or distributor, would it or would it not, in your judgment, have a serious economic effect upon our national economic existence and marketing and distributing structure?

A. Yes, I think it would have a very unfortunate effect. In the first place there are many cases in which that is the most economical method of selling commodities, and consequently the general public benefits from using that method.

In the second place, it is a method of distribution or
1636 marketing, as we call it, which is competitive. It com-
petes with other methods of distribution, so that over
a period of years the better methods normally work out.

It would be unfortunate in many cases, because there are many manufacturers who do not have the ability or the financial resources for marketing their own products.

Q. Is it or is it not true that many producers of goods rely almost entirely upon the jobber method of distribution?

A. Many of them do, yes.

Q. And many rely on both the direct and the jobber method of distribution?

A. Very common method of distribution.

Q. The use of the two together, that is to say?

A. Yes; in some areas through jobbers and others through their own methods, and other areas through both.

1637 Q. From your experience, Professor, what have you to say just as a ~~practical matter as to the ability~~ of some manufacturers to market their goods, if they were deprived of the right to use these various means of operation, both direct operation, and in conjunction with the jobber operation?

A. To use both methods, you say?

Q. Yes.

A. Well, if they couldn't use both methods, it would probably mean a curtailing in their sales operations, because they normally use the jobber when he can do a selling job better than they can and ~~or~~ combined with that usually if he can do it more cheaply than they could.

If you were to destroy the jobber's operation, it would not only interfere with his operation, but would tend to increase the price of the product to the final consumer, because of the more expensive marketing method.

Q. And supposing for any reason a manufacturer of gasoline were deprived of the right to use both methods jointly, that is, the direct supplying of retailers, as well as the supplying of jobbers, what in your judgment would be the result so far as the public is concerned in connection with the price of gasoline?

A. You mean any one manufacturer or all manufacturers? I didn't get that.

1638 Q. Suppose all manufacturers were under that prohibition.

A. Well, I would expect it would tend to raise the price of gasoline, because presumably the jobbers are used where it is more economical to use them. Consequently, if the public that is supplied through those jobbers had to obtain gasoline without the jobber, more expensive methods of distribution will have to be used, and the public will have to pay for it.

Q. Now, Professor, suppose that just one supplier of gasoline were prohibited from indulging in this universal practice as you have described it, I will ask you what is your judgment as an economist relative to the effect of that on that particular supplier?

A. Well, it would tend to do one of two things: it would either reduce the volume he sold in that area, or else, in order to continue to sell the volume he had before, he would probably—I say probably, because presumably he has been selling to the jobber because it is cheaper—his expenses of marketing would increase, if he couldn't sell through the jobber.

Q. Well, suppose, Professor, that some one manufac-
turer or producer of gasoline was required to desist from
the use of the jobber system of distribution as you have
described it, what, in your judgment, would be the result
as to whether the former customers of that producer
1639 could continue on in that function as wholesale buyers
or jobbers in the matter of getting their supplies from
other producers of like products?

A. Well, I think other producers would probably be very glad to sell them. It is a highly competitive industry, and they would be glad for more outlets. I don't mean all of the producers, but many of the producers, they would be tickled to get a chance.

Q. Is it not true, Professor, that such a thing as that would simply result in a shifting of the source of supply, without changing the distributive factor in the slightest?

A. Yes, that would be just handicapping the one manufacturer, and the others would still have the other jobbers open to them. It would simply mean the jobbers would be buying of other manufacturers.

Q. So that if there is any detriment to the public, Professor, in one supplier indulging in this practice which you have described, is it not true that the interest of the public would be in no wise served by placing a prohibition upon that one supplier?

A. The answer is yes. But I don't want to be put in a position by saying that method is a detriment to the public.

Q. I don't want to put you in that position. Under-
1640 stand your opinion is the reverse, Professor.

But just assuming that the Federal Trade Commission thought that the jobber structure which you have described is an improper one for some reason, and suppose that they applied a rule to just one supplier of gasoline: in your judgment, as an economist, would that have any effect at all in eliminating the evil of the practice?

A. No.

Q. Assuming that it is an evil practice.

A. No. If I understand, it would be just the same, because the other manufacturers could still sell through the jobbers.

Q. Now, I think you better make it entirely clear, Professor, as to what your opinion is relative to the propriety and the good effect and the beneficial interest that is involved in the use of this jobber system of distribution.

A. Well, the justification of the jobber system of distribution from the economic point of view, and from the social point of view, is that it leads to more economical distribution. The jobber operates on a large scale. He buys products in large amounts; he represents, if you will, the way the retailers are making contact with various manufacturers who might have products that the retailers want to distribute; the expenses of carrying on his
1641 wholesale operations are normally spread over a considerable variety and volume of products. So that in many cases this wholesale function is carried on more cheaply by the jobber than it can be carried on by the manufacturer. And particularly the function of buying and storing and delivery is carried on much more cheaply than the ordinary retailer could operate if he had to perform his own wholesale functions.

Then there is another economy that for many manufacturers is important, and that is the manner of credits. The jobber is right on the ground, frequently is usually able to keep in close contact with his retail customers, he sees them frequently, and he can check on their credit, make collections; whereas the manufacturer is usually a distance, frequently selling a small number of products, and his costs of investigating credit and making collections would be much higher than are those of the jobber.

The general justification for the jobber, to summarize, is that it results in an economical method of distribution, a method which is frequently more economical than either direct sale by the manufacturer or direct purchase by the small retailer.

Q. Professor, in your judgment does the jobber system of distribution, as you have described it, tend to contribute to or lead to monopolistic tendencies or restraint of
1642 trade, in any community or territory in which it is used?

Mr. Austin: I object to that question, your Honor. It is a conclusion of law.

Mr. Hanley: I am not asking him his opinion as to the law. I am asking him now a question of fact, your Honor.

Trial Examiner Ballinger: Read the question.

(The question was read.)

Trial Examiner Ballinger: The objection is overruled.

A. Why, definitely the use of the jobber brings in another competitive factor in the marketing picture. So that it leads away from monopoly. Certainly not toward it. Without the jobber you would have a very much smaller number of competitors in the field.

Trial Examiner Ballinger: That is assuming that some other activity didn't take the place of the jobber?

The Witness: Well, if some other activity took the place of the jobber, you mean by that, the manufacturer, for example, might sell? You still would have a smaller number of operators in the field, presumably, because in many lines of industry now the manufacturers are selling, and they are also selling through jobbers, so that you have even the same product going through two or more points.

1643 Trial Examiner Ballinger: When that happens does that happen in the same districts?

The Witness: Frequently, yes.

Trial Examiner Ballinger: The larger companies?

The Witness: Larger companies, yes; many of them sell, for example, large accounts directly, and the jobber sells the smaller accounts. It is an economical distribution of their operations, and sometimes they both compete for the same accounts.

Q. Professor, is it not true that jobbers do have certain economic advantages in their own community, small locality in which they do business, as contrasted with the large company which may do business over a very extensive territory?

A. Yes, they do have economies. I don't know whether you want it repeated or not, but the testimony which was referred to before covered many of those items, which economy recognizes.

Q. I don't care to have you repeat it. I just want to lay the foundation for another question.

A. Yes.

Q. Is it not true that those economies are ultimately reflected in the price which the entire public pays for gasoline, for instance, irrespective of who supplies that gasoline?

A. Yes, they are a competitor in this field, and if their costs of operation are lower in a competitive market that tends naturally, to the reduction of prices. And the

1644 fact that they are there and can, if they do reduce prices, means that others eventually must follow suit.

Q. I show you, Professor, what has been marked Respondent's Exhibit 19, entitled Flow Chart of Gasoline from Refinery to Consumer and I will ask you if you have examined that exhibit?

A. Yes, I have.

Q. In your judgment, does that fairly portray the general system of distribution of gasoline in this country?

A. Yes, it does.

Q. Is it not true that that chart might apply to other commodities, as well as gasoline?

A. Well, yes. Not in detail, of course, but in general complication and methods of distribution it could apply to many industries.

Q. Suppose, Professor, that the Federal Trade Commission or some other authority were to fix the channels of distribution in that a supplier could not sell in the same territory to different types of buyers at different prices, please give us your opinion as to what the economic result of that canalization of industry would be.

Mr. Austin: I object to that question, your Honor, and any questions based on what the Federal Trade Commission might do. I think it is highly speculative.

Mr. Hanley: I withdraw that portion of the question.

Mr. Austin: And outside the issues of the case.

1645 Trial Examiner Ballinger: Let's see what portions of the question remain. Read the question.

(The last question and the record were read by the Reporter.)

Mr. Hanley: I withdraw my offer to withdrew. The question is all right.

Trial Examiner Ballinger: Objection sustained.

By Mr. Hanley:

Q. I will ask you, Professor, what your judgment is as to the economic result in commerce in gasoline, assuming that channels of distribution were fixed or canalized in such a way that a distributor or maker of gasoline could not sell in the same territory to different types of buyers at different prices, specifically if he could not sell in the same territory to what you have described as a jobber, and at the same time sell to a retailer at a higher price?

A. Well, in the first place I think it would very likely lead to higher costs of marketing.

In the second place, however, from a little longer run point of view, it would be very unfortunate because it is through selling to different types of buyers in this way that competition is continued, and methods of marketing are improved. Whereas if channels of distribution were frozen, there would be no opportunity for experimentation or improving channels of distribution.

1646 Q. Professor, it has been established in this lawsuit that the Respondent, the Standard Oil Company, is selling to four jobbers or distributors in Detroit known as Ned's Auto Supply, Wayne Oil Company, Citrin-Kolb Oil Company, and Stikeman Oil Company. Generally speaking, the price to those four distributors is about one and a half cents per gallon below the usual tank wagon price, which the Standard Oil Company charges to retail dealers or service station operators, and the Standard Oil Company is engaged in selling gasoline by tank wagon to retail filling station operators. Each of these four dealers has his own bulk storage which he maintains at his own expense, he has his own trucks for delivery of gasoline, he operates his entire business at his own expense, the Standard Oil Company does not participate at all in the maintenance of his establishment. One of those distributors, Ned's, disposes of practically all of the gasoline purchased at retail through its own retail outlets, supplying its own retail outlets from its own bulk stations by means of its own trucks; one of the distributors, namely, the Stikeman Oil Company, does not do any retail business at all, it supplies other independent retailers exclusively; the two others, namely, Citrin-Kolb and Wayne, supply mostly retail dealers who are independent, but on some occasions,
1647 and from time to time, those two last named companies operate retail service stations directly. In the aggregate, those companies buy somewhere in the neighborhood of fourteen to fifteen millions of gallons of gasoline a year, and the companies respectively handle from approximately 2,000,000 gallons each up to 5,000,000 gallons a year. Basing your answer on your experience and knowledge as an economist, state whether or not in your view ~~there is~~ anything economically unsound in that set-up and system of distribution.

A. Well, the set-up seems entirely sound to me. All of these organizations, as you enumerated them, are performing what we call the wholesale function, and would be justified—in fact, they would have to obtain a functional discount on that basis, because of the expenses of operation. And that it is quite possible also that they might be justified in some or all of that lower price because of the quantities in which they purchase.

Q. Is there anything in that set-up as it has been outlined in the preceding question, which, in your judgment, as an economist, tends to create a monopoly, tends to restrict or injure competition, or tends to lessen competition or restrain trade in any particular?

Trial Examiner Ballinger: Or injure a competitor?

By Mr. Hanley:

Q. Yes, or injure competitors in the gasoline business?

1648 Mr. Hanley: You better read that question now.

(The record was read as follows: "Question: Is there anything in that set-up as it has been outlined in the preceding question, which, in your judgment, as an economist, tends to create a monopoly, tends to restrict or injure competition, or tends to lessen competition or restrain trade in any particular?

"Trial Examiner Ballinger: Or injure a competitor?

"Question: Yes, or injure competitors in the gasoline business?")

A. Why, the answer to the first part of the question is definitely no. That tends to increase competition, having these various methods of selling.

Now, as to injuring a competitor, it depends on what you mean by "injure." If a company in this way distributes more effectively than a competitor that distributes in some other way, probably they will outsell him on the market. But I see nothing that could be construed as unfair about it.

By Mr. Hanley:

Q. Well, Professor, if any distributor can reduce his cost and distribute more efficiently, in your view as an economist, isn't that exactly what competition means?

A. That is what we want to get from competition.

Q. Does not that result, in your view, to the benefit
1649 to the public?

A. Very definitely a benefit. The lower prices and better service.

Mr. Hanley: You may take the witness.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: Now, at 12:50 P. M., the hearing stands in recess until 2 P. M.

(Thereupon at 12:50 P. M., an adjournment was taken to 2 o'clock P. M.)

1650 Afternoon Session.

2 P. M.

Trial Examiner Ballinger: We will come to order.

Mr. Hanley: I released Professor Clark, but, your Honor, I do have one or two other questions I would like to develop with him.

Trial Examiner Ballinger: Proceed.

FRED EMERSON CLARK resumed the stand, and testified further as follows:

Further Direct Examination by Mr. Hanley.

Q. Professor Clark, this morning in your testimony you referred to the fact of large department stores—you may have mentioned chain stores, but I will include chain stores in my present question—as indulging in the retail operation; that is, selling to the ultimate consumer, and also indulging in the wholesale operation; that is, selling at a lesser price to either large consumers or other resellers. I would like to clarify that. Just what type of business did you have in mind when you gave that testimony?

A. Well, I had in mind, so far as department stores are concerned, what is ordinarily considered as a department
store, such as Macy's, Hudson's, Marshall Field's,
1651 Carson-Piere-Scott, all of whom not only sell to the
ordinary consumer at retail, but—I am not sure of this, although I assume this would be true—because most all department stores have what they call a contract department, selling to hotels, clubs, places of that kind, or even handle the decoration of large homes through their contract department, and they also sell to other retail stores, and that is done by the chain stores, particularly in the food fields, and to some extent in the drug field, so that they are carrying on, at least, the two types of operation.

Q. This morning you referred at length to the expense of conducting the jobber operation, which expense must be borne by someone in the distributing gasoline and other commodities. Now, I will ask you, Professor, if the following items might be fairly considered or should be fairly considered in the list of expense items that apply to the jobber operation: advertising discounts, and insurance?

A. Yes, at items, yes.

Q. Gasoline and other commodities used by the company in its operations?

A. Oh, yes, that is part of the expense.

Q. Interest on money borrowed or invested?

A. Yes.

Q. Heat and water?

1652 A. Yes, used in their wholesale operations or in the office.

Q. The same with reference to electric current?

A. Yes.

Q. Licenses for cars or licenses to do business of any kind which may be required?

A. Yes.

Q. Repairs on equipment and facilities?

A. Yes.

Q. Supplies—I mean by that any kind of supplies that are necessary to the operation of the office or the operation of the facilities?

A. Yes.

Q. Telephone, telegraph expense, postage?

A. Yes.

Q. Wages and salaries paid personnel, employees?

A. Yes.

Q. Taxes of all kinds?

A. Yes.

Q. Charge-off of bad debts?

A. Yes.

Q. Depreciation of real estate and equipment?

A. Yes.

Q. Obsolescence of equipment and properties?

A. Yes.

1653 Q. Interest on cash capital invested?

A. Yes.

Q. This may be a similar item, but would not interest on personal property invested in the business be an expense?

A. You mean like office equipment and things of that kind?

Q. Yes; be in the same category as cash invested?

A. Yes, used in the business.

Q. In addition to these particular items, is it not true that there are certain miscellaneous items that cannot be definitely allocated to any one of these particular accounts that do form a part of the expense of operating the business?

A. Yes. Either cannot be allocated or are not allocated.

Trial Examiner Ballinger: Or if allocated, allocated in part?

The Witness: Yes, that would be true.

By Mr. Hanley:

Q. It has been called to my attention that I may have overlooked salaries. I thought I asked you wages and salaries, if they were not included as proper expenses.

A. Yes.

Q. Now, Professor, is it not true that all of the administrative expense, some of which has been itemized in this list which I have given you, as well as all of this out-of-pocket expense of handling the jobber functions is 1654 properly given consideration in determining what the cost of a jobber is in performing his function as a distributor?

A. Yes, of course.

Q. Professor, what is competition?

1655 A. Well, competition, in the business sense, is a striving after business with the attempt, normally, to obtain as much as you can and it involves striving with others, each of whom are trying to obtain some business or all business that you are attempting to obtain.

Q. The term has been used in connection with your testimony and otherwise in this case and, indeed, appears in the statute under which the Respondent is charged here, namely: "Injury to competition." Is it not true that whenever anyone, for any reason, is able to sell more efficiently than his competitor, and reduces the price of a commodity, that that results in an injury to the competitor in the sense that the competitor must reduce his price?

A. Yes. It results in injury to the competitor in that he must reduce his price or if he doesn't reduce his price, he is likely to lose business. Of course, the very essence of competition is that that sort of thing will happen and those competitors who can't meet competition on a price or service or product basis, are either forced out of business or else they will have to improve their own service so that they can compete again and it is this change of competition that keeps on improving our system of marketing as well as our system of production.

1656 Q. As an economist, do you think there is anything unsound about the idea of competition?

A. No, it is the thing that we think characterizes the effectiveness of our present economic system and we pass many laws in order to keep competition going so that we will gain the advantages which result.

Q. Does it not result ultimately in the benefit of the public in the price of commodities which they have to buy?

A. Yes, it is the interest of the public that we have primarily in mind in urging the advantages of competition; that it results in lower prices and/or better service and improved products and the whole net result of competition is felt by the consumer advantageously.

Mr. Hanley: That is all. You may take the witness, Mr. Austin.

Cross-Examination by Mr. Austin.

Q. Are you familiar with the Robinson-Patman Act, Mr. Clark?

A. I am familiar with it. I am not an expert on it. All American students are interested in it.

Q. You probably read it very shortly after it was passed, didn't you?

A. Yes.

Q. And have you read any of the decisions that have been issued under it?

1657 A. Some of them, yes.

Q. Have you ever written any books or treatises on the Robinson-Patman Act, or on the price discrimination provisions of that Act?

A. No, I haven't. I am revising my own "Principles of Marketing" now, and I probably will be, but I haven't done it yet. I have the material ready for it.

Q. Have you ever written anything treating with the exercise of what has been called, here, a dual function by a jobber or wholesaler; that is, treating, for instance, allocation costs of business as between the retail and wholesale end of the business where a wholesaler also operates a retail store?

A. I haven't written anything on the cost aspects of that. You can't write on marketing, hardly, without discussing that type of operation, of course.

Q. Can you refer me to anything that you have written that has been published on that type of operation?

A. Yes; Chapters 8, 9, and 10 in my "Principles of Marketing" discuss in various places that subject and, also, Chapter 12, which deals with, among other things, the department stores and chain stores, which touches on that.

Q. Anything else that you think of at the moment?

A. No, I think not. Of course, you have the same type
of operation in marketing farm products, too, and I
1658 have touched on it in the book on marketing farm
products.

Q. You mean wholesalers also selling at retail?

A. Yes; you have that type of operation, and then, of course, you have also another mixture of function where wholesale receivers receive from the country, also, sometimes carry on the jobbing function.

Q. Well, that is more or less of a producing and wholesaling mixture, isn't it? Not producing, but—

A. In agricultural marketing, you have two types of wholesaling; you have one which is a collection of commodities at central markets which in a sense would correspond to your manufacturer. Then you have another wholesaling function of re-distributing those products. And those two functions are sometimes combined in a marketing of farm products.

Q. Two bites to the wholesale cherry, you might say?

A. How is that?

Q. Two bites to the wholesale cherry, you might say?

A. Well—

Q. At least, two types of middlemen; would that be right?

A. Yes, yes.

Q. Now, we have referred here—you have referred in your testimony to jobbers, and sometimes to wholesalers or wholesaling, and to retailers and retailing: are wholesaling and retailing two separate functions in the marketing picture?

1659 A. Yes, they are two separate functions in the
marketing picture, although, of course, they are functions which are frequently combined in one organization.

1660 Q. Well, if one organization was engaged in both,
would that organization be performing just one function or two functions?

A. It would be performing both the wholesaling and retailing operations.

Q. Then the wholesale function, referring to that, or to the jobbing function, is it true that you are referring to one thing, and if you refer to the function of a retailer, you are referring to something else? That is, is there a line of division where you can say one stops and the other begins? That is what I mean.

A. Well, there is a line of division. Of course, it is a hazy line of division at some points. But there is a pretty definite line of division, we distinguish between wholesaling function and retailing function. Now, in operation there frequently will be, as we said before, one organization performing both.

Q. I believe you said, Professor, that the normal function of a jobber is to resell to retailers; is that correct?

A. Yes, that is what we consider the normal function.

Q. That is, as I understand you, the wholesaler or jobber is a middleman who gets the goods from the manufacturer to the retailer, when we are talking about manufactured products?

A. That's right. Of course, I also indicated in my testimony that many wholesalers do also retail.

1661 Q. Yes. But when they also retail, then they are performing the retailing function, are they not?

A. Then they are performing both the jobbing function and the retail.

Q. But it is still two functions, isn't it?

A. That's right.

Q. Then is it correct to say that in the case of a jobber who also sells a portion of the goods which he buys as a jobber, at his own retail stores, that his wholesale function ceases when the goods reach the retail store? I should say his wholesale function in connection with the marketing of those goods.

A. Well, when the goods reach the retail store?

Q. Reach the retail store, yes.

A. Yes, I should say they do end then, yes.

Trial Examiner Ballinger: His control over and connection with those goods cease when they reach the retail store, is that it?

Mr. Austin: I didn't say that, your Honor, because he operates the retail store. I am trying to find out when he ceases to be a jobber and becomes a retailer.

Trial Examiner Ballinger: Now, I am speaking of a case in which he is selling to a retailer.

Mr. Austin: Well, that is another question.

Mr. Hanley: In view of the statement of counsel, 1662 the question is objected to for the reason that it implies a definition of jobber which is in the mind of counsel and is no where in evidence.

Mr. Austin: I think there is no question pending now, Judge, except one by the Examiner. We are going to get mixed up here.

The Witness: May I clarify my testimony on that point?

Trial Examiner Ballinger: Yes.

The Witness: If I understood your question, you were asking about the jobbing function?

By Mr. Austin:

Q. As respect to a particular goods or lot of goods that is starting from the manufacturer, purchased by the jobber, and thereupon transported by him to his own retail store.

A. But not as to what that man might be known as in the trade or what he might be defined as?

Q. That's right. I am talking about the exercise of the function.

A. Yes.

Q. Then, did I understand your answer to be that when the goods reaches his retail store, from that point on, as to those goods, he becomes a retailer and is no longer a jobber?

A. Well, of course, you can't say that, because he is a jobber. From that point on he is performing the retail functions.

1663 Q. As to those goods?

A. Yes.

Q. Of course, he may be at the same time, of course, a jobber bringing along some more goods?

A. That's right.

Q. Down the stream of distribution?

A. Yes.

Q. Now, you made some references to functional discounts, and perhaps you better define that again:

A. The term functional discount is a term which is applied to a discount which is given to a particular middleman because of his position in a channel, of distribution; for example, a wholesaler in a particular line of business, you might give a 30 per cent discount off of list, whereas if you were selling to a retailer in that line, you might give him 20 per cent off of list. The functional discount is given on the assumption that the particular middleman who is given the discount performs certain operations, and the discount is for the purpose of covering his expenses of doing that thing.

Q. Well, you mean, do you not, operations which the retailer does not perform?

A. Well, that depends on which function. You will give functional discounts to retailers too.

Q. Yes, but I am now referring to the wholesaler function.

A. Take in the case I mention, I mentioned 30 per
1664 cent to the wholesalers and 20 per cent to the retailer;
now, that is 10 per cent additional, 10 per cent that is given to the wholesaler on the assumption that will cover his cost of operation, and then he will give approximately the 20 per cent discount to the retailer, and it is given to him to cover his wholesaling operations, the costs of his wholesaling operations.

1665 Q. Well, that's what I understood you to mean,
Professor Clark, and is it not true, then, that properly defined, a functional discount is given for the purpose of covering and should cover—and I am still referring to the wholesale function—such a discount should cover only functions which are not performed by a retailers; that is, a function which is in addition or apart from or precedes the retail function?

Mr. Hanley: Are you asking his opinion as an economist as to what should be included?

Mr. Austin: I am asking him whether functional discount, as the term is generally understood and used, is an additional discount given to a wholesaler or a jobber for performing a wholesaling or jobbing function, as distinguished from retail functions.

A. If I understand your question, the answer is yes. In other words, he would get from the list price the whole discount which the retailer would obtain plus an additional discount for performing his wholesaling operations.

Q. So that if he resold those goods to the retailer, he would have a 10% margin to cover his expenses and profit; is that right?

A. As a wholesaler.

Q. As a wholesaler.

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A. And the remainder would be to cover his ex-
1666 penses and profits as a retailer.

Q. You are assuming, when you make that statement, are you not, that he will resell to the retailer at a discount of 20% from list?

A. Not necessarily. He may resell, himself, as a retailer. Department stores get that type of discount, for example.

Q. If he resells to a retailer?

A. If he resells to a retailer, he would get the 10% and give the remainder to the retailer.

Q. Now, if the wholesaler instead of reselling to the retailer, resells the goods at retail himself, you would still treat the 10% as the functional discount, would you not?

A. Well, in that case I suppose you could treat that as a functional discount, or treat the whole thing as a functional discount. It amounts to the same thing in the end. He would be getting 10% covering his wholesale operations and he would sell at the retail price and the remaining 10% would cover his retailing operations; if I understand your question.

Q. Well, suppose that the manufacturer was selling direct to retailers in the same territory, as you said, he may do, with 20% off list, and—

Mr. Hanley: What is "list"? Just a moment, please.

1667 Mr. Austin: The witness said 20% off. I can ask him what he meant: off of what?

By Mr. Austin:

Q. I ~~presume you~~ meant manufacturers' list, did you, Professor Clark?

A. I said off the list price. Of course, you don't always have the list price. Sometimes they are built up.

Q. No; but we have got to start some place.

A. Yes.

Q. If the jobber is operating his own retail store in a territory where the manufacturer sells direct to retailers at 20% off and the jobber gets 30% off—

Mr. Austin: I will withdraw that. I am afraid I am getting into a question which I would have to make so many qualifications with that it might not be intelligible after I finished it.

By Mr. Austin:

Q. Getting back to the question of the limitation of the functions, Professor Clark, which was what I was pursuing. When you said that the jobber's function is a necessary function in marketing, were you referring to retail resales by the jobber in the cases where the jobber makes such sales at retail, or were you referring only to the middleman function?

A. Well, I believe I covered that in two ways. Of course, the main part of my testimony was with re-
1668 gard to the function performed by the middleman
by resale at retail is often necessary or desirable on the part of the jobber. It is the type of organization which frequently leads to more flexibility in marketing, and, of course, carried into some of our well-known retail fields, we find that this is the basis of our chain store operation and, to a considerable extent, the basis of some of our department store operation.

Q. By that, do you mean the department store or chain store may do their own warehousing and buy on the jobbing basis?

A. Yes.

Q. And are you familiar with the limitation in the Robinson-Patman Act regarding price discriminations and cost justification?

A. Yes, I believe I am. You mean on the basis of cost or selling or service or physical distribution.

Q. Do you consider that that proviso in the Act regarding differences of cost in manufacture, sale, or delivery resulting from the differing methods of sale and delivery, of different methods of which goods are sold and delivered; are you familiar with the proviso?

A. Yes.

Q. Are you of the opinion that that is an economic limitation upon the benefits which department stores and chain stores customarily get, or should get, as dis-
1669 tinguished from retailers who do not do their own
distributing?

Mr. Hanley: That is objected to as incompetent, primarily for the reason that it refers to cost without any definition of costs being given to the witness. There is an evident purpose and effort on the part of the Commission to limit costs as referred to in the Robinson-Patman Act to certain out-of-pocket costs without giving consideration to the costs which this witness has testified may be properly taken into consideration as being a cost of the jobber function. This question entirely disregards the scope of the term "cost" as used in the statute.

Further, that it calls for a legal conclusion on the part of the witness as to what the Congress of the United States meant when they passed the Robinson-Patman Act.

Mr. Austin: I don't think it calls for a legal conclusion. I asked the witness whether or not, referring as he has to department stores and chain stores, whether he thought that the statutory proviso is a proper economic limitation upon the extent of the advantage that these jobber retailers, such as department stores and chain stores, should be entitled to, due to the fact that they perform both functions.

I would first like to ask the witness whether he understands the question.

1670 Trial Examiner Ballinger: Do you understand the question?

The Witness: Well, I think I do. I wish I knew what the next one was going to be.

Trial Examiner Ballinger: Do you understand what he means by the word "costs"?

The Witness: As I understand it, you mean a lower price which stores ~~of~~ this type have to pay for the goods they purchase. Is that justified, economically. Is that your point?

By Mr. Austin:

Q. First, is it your opinion that there should be some limitation upon the price benefits or lower price to which they are entitled because of their size, and the fact that they perform certain jobbing functions?

A. Yes, I think there should be some limitation.

Q. Now, having reached that conclusion, I ask you whether you think the statutory limitation is a proper one based upon your opinion as an economist?

Don't answer, because I am trying to clarify the question and there is an objection pending.

Mr. Hanley: That is objected to as calling for a legal conclusion on the part of the witness; not a matter of expert testimony, not a matter within the knowledge 1671 of the witness, and is argumentative. It goes to the wisdom of the statute rather than any question of fact which might be determined on the basis of knowledge of economics.

Mr. Austin: I think a great many questions on direct examination went to just that same sort of thing, and the only objection that I could see that there would be to that question would be the question as to what the statute means by "cost". I am perfectly willing to let the witness answer it on his own idea of wholesale and retail cost.

Trial Examiner Ballinger: The objection is overruled.

The Witness: Would you read the question again?

(The question was read as follows: "Now, having reached that conclusion, I ask you whether you think the statutory limitation is a proper one based upon your opinion as an economist?")

Mr. Hanley: Just a moment, Professor Clark, I would like to ask a question as a foundation for the objection.

Trial Examiner Ballinger: You may.

Mr. Hanley: Professor Clark, do you know what the statutory limitation as to cost is?

The Witness: Well, if I understand the question he
asked, it has to deal with the section that says that
1672 lower prices must be justified by savings in selling
costs, service costs or delivery costs; is that right?

Mr. Austin: That's right; which results from the differing methods or quantities in which the goods are sold or delivered.

Mr. Hanley: Do you understand, Professor Clark, what is contemplated by the statute as being included within its terms; namely, the differing costs in marketing or delivery of goods?

The Witness: Well, my reply was going to be that you can't answer that question until you know how the Act is interpreted.

Mr. Hanley: Exactly.

The Witness: In other words, the Courts or Federal Trade Commission might allow only certain costs which I thought are not adequate, so I don't believe that question could be answered until you know how the Commission and courts interpret the statute.

By Mr. Austin:

Q. That is a fair answer, Professor Clark. I wanted to know whether you had an opinion in that in your own mind, if you had made it up, as to what costs were covered there, you might be able to answer it.

1673 Q. Counsel for the Respondent asked you a few moments ago whether certain items, such as advertising, discounts, salaries, and depreciation, and so forth, were proper in whole, or in part, to be allocated to wholesale operations, and I believe you said they were?

A. Right.

Q. Was that in any way intended to be a complete statement?

A. How is that?

Q. Was that in any way intended by you to be a complete statement of the items which go into wholesale costs?

Mr. Hanley: Just a minute. May I have that question please?

(The record was read by the Reporter.)

Mr. Hanley: That is objected to as entirely adverse to the testimony which the witness has given. He has listed a great number of items which go into the cost.

Mr. Austin: Of course, that is what I am referring to. Whether the items which were enumerated were a complete list.

Trial Examiner Ballinger: Well, the witness enumerated many other items.

Mr. Austin: Yes. I am referring to the entire list.

A. Well, I wouldn't say whether that would be an entire list or not. It is a very long list. I am not a cost accountant, and my reason for saying yes to those is because they obviously involve operations which are
1674 undertaken in this wholesaling or jobbing function,
and with the legitimate charges against that function, so long as they were undertaken in the performance of that function.

Q. Well, you have just stated that you are not a cost accountant, Professor Clark.

A. Right.

Q. Would you be able to state then how to separate or allocate those various items that you mentioned as between wholesale and retail business of a concern engaged in both functions?

A. Would I be willing to say how to do it?

Q. Yes.

A. Well, that is the job of a cost accountant.

Q. There ~~has~~ to be some allocation, has there not?

A. There should be.

Q. With many of those items?

A. Yes.

Trial Examiner Ballinger: I understood you to say that would be the job of a cost accountant?

The Witness: Yes. For somebody who knew cost accounting.

By Mr. Austin:

Q. Would it be possible for you to answer the question I asked you a moment ago about the cost proviso in
the Robinson-Patman Act, if you accepted as a guide
1675 the statement that you made as to these various
costs which in your opinion should be considered in
determining the cost of operating the wholesale function?

Mr. Hanley: Just a moment, Professor.

When you stated that this list of items might be properly considered as jobber costs, did you mean by your testimony that there might not in many instances be other items that would constitute cost of the jobber function?

The Witness: No; I was asked to go over this specific list.

Mr. Hanley: Did you mean by your answer that these items as outlined were proper costs?

The Witness: That's right.

Mr. Hanley: Is it not true that there might be others in addition to these items?

The Witness: There might be, yes.

Mr. Hanley: The question is objected to on the ground that it now appears there is no adequate definition of what the costs are to which the question pertains.

Trial Examiner Ballinger: Let me have the question.

Mr. Austin: I withdraw the question, your Honor. I think to save time.

Trial Examiner Ballinger: The question is withdrawn.

Mr. Austin: I agree that it would be of little
1676 benefit to either side for the reason Judge Hanley
stated, because we haven't got a complete definition
of costs.

By Mr. Austin:

Q. Professor Clark, I believe that you were questioned somewhat as to the benefits of the jobber function to the economic structure, and you stated that the jobber's function and the exercise of it by jobbers, is of benefit both to retailers and to manufacturers?

A. That's right.

Q. Now, I believe that we have already reached the conclusion that a jobber, while he may be both a retailer and a jobber, becomes a retailer after the goods reach the place where they are sold at retail.

Mr. Hanley: That is objected to as a mis-statement of the witness' testimony, the witness having testified that the function may be different, but that a jobber was a jobber, irrespective of whether he operated at both retail or at wholesale or both.

Mr. Austin: I will reframe the question. I understand the witness to say, however, that he ceased to be a jobber as to those goods after they reached the retail store.

Mr. Hanley: That is what I am objecting to. I don't think he said anything of the kind.

Mr. Austin: I think he did say that.

Trial Examiner Ballinger: Counsel may ask the
1677 witness.

By Mr. Austin:

Q. I will ask you, if there is any question about it, will you please state again, Professor Clark, whether as to particular goods, state when the jobbing function begins as to those goods and when it ends, when those goods go down the stream of distribution?

A. Well, the jobbing function begins, so far as goods are concerned, when he gets the goods from the manufacturer's place of business, or his own place of business, depending on how it is delivered.
1678 So far as buying and selling is concerned, it begins whenever he begins to buy, on the one hand, and goes through his selling and delivery, on the other. Now, when it comes to the retailing operation, he may perform the retailing operation, which we distinguish from the jobbing operation, but he would still be a jobber, as a business man.

Q. Yes. But as to those goods, when does he cease to be a jobber and become a retailer, when he sells those goods at his own retail store?

A. Well, at the point where, so far as the physical distribution is concerned, at the point where he delivers them to the store and charges them to his store.

Trial Examiner Ballinger: You mean his retail store?
The Witness: Yes.

By Mr. Austin:

Q. In other words, as soon as you say the man performs a dual function, you say he performs two different functions?

A. That's right.

Q. Now, he may be called a jobber at all times, but I want to know when physically in the handling of those goods he ceases to be a jobber and becomes a retailer as to any particular goods, and necessarily if he is performing a dual function, one function must end at a certain
1679 point, and the other one must commence?

A. That's right.

Q. And I understand that that is when the goods reach the retail store or are delivered at the place of where they commence to be dealt in at retail?

A. That's right.

Q. I started to ask you about the benefit of the jobber's function to retailers and to manufacturers. And in referring to those benefits, I think one of them was handling of credits, and another one was more economical distribution?

A. Yes.

Q. Where the jobber's function is utilized?

A. Yes.

Q. In referring to those benefits of the jobber's function, were you referring to the exercise of the retail function by the jobber, or were you only referring to the jobbing function up to the time the goods reached the retail store?

A. Well, in the testimony I was being asked about the jobbing function.

Q. Yes.

A. On the other hand, it is very clear, from experience of business, that there may be economies in direct distribution.

Q. What economies would those be?

1680 A. For example, a man who is capable of building
up a jobbing business is probably a pretty good business man, and if he should decide to go into the retail business, he probably would do a pretty good job at that. That is what I have in mind. He is a superior type of business man.

Q. Well, then, that would be simply a benefit to the public of having another efficient man entered in the retail business; is that right?

A. Yes, that would be a benefit to the public, yes.

Q. Now, that is hardly a benefit which could be attributed to the function, is it? Isn't that a benefit which applies anywhere when someone enters into a business and makes a success of it? What I am trying to get at is: as to whether the fact that a man is both a jobber and retailer in itself makes him any more desirable as a retailer?

Mr. Hanley: I don't understand that question. Do you, Professor?

The Witness: I am not sure I do.

By Mr. Austin:

Q. Well, you said that the jobber's function is of benefit. And to the public it is particularly a benefit to the retailer and manufacturer. And now in a way he serves both the retailer and manufacturer?

A. Yes.

Q. Now, he also engages in the retail function, in
1681 which case he comes in competition with other retailers, and I want to know whether such public benefit,
as he may achieve by engaging in the retail business, results in any way from the fact he is also a jobber?

A. Well, I doubt it, except in the way I have mentioned, that is, after all, when he does that he is performing two different groups of marketing functions, and they both cost him money. Consequently, he is performing a jobbing function and retailing function, and the public benefit would result simply if he performed either function or both functions better than somebody else does.

Trial Examiner Ballinger: When you say "benefit" you mean either in service or in price?

The Witness: In the case of a middleman, service or price, yes, sir.

By Mr. Austin:

Q. Again referring to jobbers who also sell at retail, that is, who perform both functions, am I or am I not correct then in understanding that all of your testimony this morning regarding the jobbing function applies to the operations of the jobbers only up to the time the goods reach the retail store?

A. Well, the bulk of my testimony certainly did, yes. There may have been other questions, but the bulk of the questions apply to that, yes.

1682 Q. Was there any of your testimony in which you referred to the operation of jobbing function or the benefits of the jobbing function in which you were referring to the jobbing function referring at the same time to the exercise of the retail function by the jobber?

If you can't answer that, say so, Doctor.

A. No, I can't answer that. I would say no, but I am not sure.

Q. I mean, I don't want to tie you down to any technicality where you might have overlooked something. But if you can answer it clearly.

Is it correct to say, in general, in referring to the jobbing function, you do not refer to the sale of goods at retail?

A. That's right, in general.

Q. Now, with reference to the economies which may be affected or effected by the exercise of the jobber's function and its place in the channels of marketing, assume a case where in a certain territory a manufacturer has a system of distribution which reaches throughout the particular marketing area, and reaches both large and small retailers.

In other words, where the manufacturer sells direct to retailers, and as in the oil business, frequently, and as is true here in Detroit of the Standard Oil Company,
1683 the company operates a fleet of trucks and makes both large and small deliveries to large and small retail gasoline stations.

Now, I am simply giving you that as an example of the type of case that I am talking about, where the manufacturer has a system of retail distribution, and where he sells to small retailers as well as to large retailers. And assume further that the jobber's distribution of that manufacturer's product in the same territory is relatively small, but that there are some jobbers in the territory who buy from the manufacturer and resell to retailers, or perhaps operate their own retail stores. Are any appreciable economies effected in such a situation by the exercise of the jobber function as to a portion of those goods?

A. You mean by the use of independent jobbers as to a portion of those goods?

Q. Yes, I have reference specifically to your testimony that in some cases the result of the jobber's function was to result in—that the result of the jobber's function, or the effect of it was that prices might be lowered. I believe you testified to that this morning, and I think you said that the reason for that is that it was more economical a means of distribution, otherwise it wouldn't be utilized.

A. Yes.

Q. Now, I am asking you about a case where the manufacturer distributes direct to retailers and to
1684 jobbers in the same territory, and I ask you there
whether the use of the jobber method in part for the distribution of manufacturer's goods can have any appreciable effect upon prices?

Mr. Hanley: Just a moment, please.

By Mr. Austin:

Q. And I am referring to retail prices, of course.

Mr. Hanley: That is objected to, if it is a hypothetical question intended to be based on the situation involved in this lawsuit, for the reason that it fails to take into consideration the essential elements of proof, it refers to the volume of business done by jobbers to total volume as being relative. The witness is unadvised as to the total business and as to the amount of business done by the jobbers, and has no means of knowing what the term "relative" means.

Further, the question implies a necessary knowledge on the part of the witness relative to the cost and efficience of operation of the four jobbers in order to enable the witness to answer as to the economic effect of the type of distribution or contrast of types of distribution implied in the question.

Mr. Austin: If your Honor please, I stated clearly, I think, that I was only referring to Standard Oil Company as an illustration of the general thing that I am talking
about. I am referring specifically to testimony of
1685 the witness given on direct examination that the
exercise of the jobber's functions in many cases results in a lowering of the retail price to the public, because it is a more economic means. And I think that the witness was referring to a case where there is no other well-established means of distribution, and the jobber's method of distribution—and the jobber's function filled the gap.

Now, I want to know whether his answer would be the same in the case I put where the manufacturer has a well-established means of distribution, and is willing to sell to small, as well as large retailers, and where there is also a much smaller distribution of the same goods through jobbers.

Trial Examiner Ballinger: Objection is overruled.

A. Well, of course, as to a specific case one wouldn't know, but, as a matter of principle, there could very well be economies there. For example, it costs money to sell gasoline. If you have a jobber here who has a clientele that are buying of him, your selling problem is taken care of. Moreover, he also carries out the other wholesale function which you otherwise would have to carry out. In other cases—

1686 Q. Pardon me, Professor. My question was whether the fact that there was a partial distribution through jobbers would be likely to have any appreciable price—that is, result in any appreciable price reduction to the public and, if so, why?

A. Of course, what you mean by "appreciable," is difficult to say. Over a period of time, however, you have, even within the distribution of this very company's products, two different types of control of the jobbing operation and, in the first place, one may prove to be more economical than the other, in which case it would tend to prevail.

In the second place, a jobbing operation may be operating in a part of the market more economically than the manager could sell directly. Whether that would be appreciable at any one time, or not, of course no one could say.

Over a period of time, however, I think that the fluidity of that marketing organization tends to lead to a higher degree of competition and makes both groups stick on their toes to get the business, as well as their competitors. Many marketers have their own distribution and also sell through jobbers for various reasons; sometimes, in the same territory.

Q. Now, Professor Clark, I am going to ask you to assume another case. Suppose that there is a retailer of gasoline and suppose that he operates in a metropolitan area a chain of service stations where he sells gaso-

1687 line at retail and he buys from an oil company who makes deliveries in tank wagons at his gasoline stations.

Now assume that a new arrangement is made between the supplier and the retailer. The retailer continues to operate this same chain of stations at the same localities but instead of taking deliveries by tank wagon he acquires a bulk plant and buys a few trucks sufficient to make his own deliveries and thereupon begins to purchase his gasoline by tank car at tank car prices, or of a lower price, making the assumption, as it is in this case, on house brand gasoline, a cent and a half a gallon below the price which he was paying before. He doesn't take on any sales to other retailers. He continues to operate the same stations as before but he now takes delivery in wholesale quantities and performs the jobbing function to the extent that he operates a bulk plant and makes his own deliveries. Who, if anybody, benefits by that change in method of doing business?

Mr. Hanley: Just a moment, Professor. That is objected to as an improper hypothetical question in that it obviously is directed to a situation which it will be contended by the Government to exist in this lawsuit but the question fails to take into consideration all of the elements and circumstances relating to the operation outlined in the question, which elements and circumstances are necessary
for the witness to have in mind before the witness
1688 can make any conclusion or express any opinion.

That the question is unfair to the witness and if the witness undertook to answer it, if it were such an answer as were to condemn any such operation as is involved in this action, that it would be unfair to the Respondent in that the witness has not been advised of just what particular operation and what circumstances are involved in this lawsuit.

1689 Trial Examiner Ballinger: The objection is overruled.

Mr. Hanley: I think, if your Honor please, I am entitled to advise this witness now that if he doesn't understand a question, he is entitled to ask for a clarification of it.

Trial Examiner Ballinger: That is a matter you are entitled to.

Mr. Austin: I think, your Honor, Professor Clark will do that on all questions. I hope so.

Trial Examiner Ballinger: The objection runs to a matter that you could reach on further redirect.

The Witness: May I have the question read again?

(The question was read as follows: "Now, Professor Clark, I am going to ask you to assume another case.

Suppose there is a retailer of gasoline and suppose that he operates in a metropolitan area a chain of service stations where he sells gasoline at retail, and he buys from an oil company who makes deliveries in tank wagons at his gasoline stations. Now, assume that a new arrangement is made between the supplier and retailer. The retailer continues to operate this same chain of stations at the same localities, but instead of taking deliveries by tank wagon, he acquires a bulk plant and buys a few trucks, sufficient to make his own deliveries, and
1690 thereupon begins to purchase his gasoline by tank
car at tank car prices, or of a lower price, making the assumption, as it is in this case, on house brand gasoline, a cent and a half a gallon below the price which he was paying before. He doesn't take on any sales to other retailers; he continues to operate the same stations as before, but he now takes delivery in wholesale quantities and performs the jobbing function to the extent that he operates a bulk plant and makes his own deliveries. Who, if anybody, benefits by that change in method of doing business?")

Mr. Hanley: I object to the question now on the ground it is unintelligible.

A. There is just no way of telling. It depends on matters of costs that you don't know anything about. You can't tell in a hypothetical question of that kind what the benefit will be.

By Mr. Austin:

Q. Is there any marketing benefit which results in a change of arrangement where, in other words, the only change is that the retailer who continues to be a retailer, now also takes on part of the jobbing function and receives a lower price?

A. There may be benefits, yes. A jobbing function may be performed more cheaply. The jobber may give more effective distribution to his own retail stores
1691 than they received from the manufacturer. Things
of that kind, but, of course, in a hypothetical case there is no way of telling, but there may definitely be benefits.

Q. Is there any benefit to the manufacturer? Might there not be?

A. There might be; a cheaper way of distribution.

Q. That's what I am interested in, Professor Clark.

The case put was where the tank car price was a cent and a half below the tank wagon price which the customer had previously been paying. If the cost to the purchaser of operating his bulk plant and delivering his gasoline, including all costs properly allocable to that transaction, amounted to less than a cent and a half, then he would gain, wouldn't he, by the change in the method of operation?

Mr. Hanley: That is objected to as too indefinite, uncertain, and the hypothetical fails to take into consideration the necessary facts.

Trial Examiner Ballinger: Objection overruled. Read the question.

(The question was read.)

A. Well, he would have to take on another operation, of course. The jobbing operation, he would have to take on, and any gain would be the difference between the costs of his jobbing operations and the price at which he sold his commodity.

1692 By Mr. Austin:

Q. Don't you mean the cost of his jobbing operation and the reduction in price which he got by taking on that operation?

A. I was thinking of between his costs and the margin of operating the retail store. In other words, whether his additional costs, whether they are smaller, then the additional amount he gets, why, he would make a profit on that operation. It might very well work the other way, however; it would cost him more than the discount he gets.

Q. Carrying it one step farther, let us assume, now, that the additional operations which this customer took on through buying his bulk plant and making his own delivery, that these additional operations cost him ½¢ a gallon. He received, on the other hand, a lower price of a cent and a half a gallon when he became a jobber. Now, at the same time the gasoline company is selling to other retailers in the same neighborhood delivering by tank wagon and still selling at the tank wagon price, which is a cent and a half higher than the price being paid by this newly-become jobber. In your opinion, does that method of distribution have any elements of public benefit in it, or is it of benefit to the public?

Mr. Hanley: Just a minute, Professor Clark. That is objected to as an improper hypothetical in that it 1693 fails to take into consideration the necessary elements to provide the witness with a basis for answer and as developed in the record, of testimony and evidence, and is worse in that it assumes facts which are not proved.

Trial Examiner Ballinger: The objection is overruled.

Mr. Hanley: May I inquire where there is any evidence in this record about a ½¢ cost?

Mr. Austin: There is none, I will concede that.

Mr. Hanley: Does your Honor regard that as a proper hypothetical?

Trial Examiner Ballinger: There is some testimony in this record given by the witness Harrison to the effect that the cost of delivery from the bulk plant to the service station is about ½¢.

Mr. Austin: Even so, your Honor, I don't think that the question depends upon that. I think that the ½¢, as far as I am concerned, is immaterial. I was simply making the case where the price is substantially lower, where there is a substantial difference to the so-called jobber, to the price to the so-called retailer, even deducting cost. Whatever the reduction is, I don't care, for the purpose of the question.

Trial Examiner Ballinger: You may answer the question.

1694 (The last question was read.)

A. If he can distribute for a half a cent a gallon and he is given a margin of a cent and a half on the assumption that that is a normal expense of operating a jobbing business, he has a benefit, and he ought to have it, because he is evidently a very efficient operator and so far as the benefit to the general public is concerned, an efficient operator of that kind is just the kind we have in mind in competition. He would probably profit for a while. Ultimately he would begin to reduce prices and then somebody else would have to begin to imitate his operations so they could become as efficient.

1695 Q. And that would give him a competitive advantage over other retailers who were still buying at tank wagon, would it not?

A. I don't know you would say—it would give him a competitive advantage as a result of efficiency of operation.

Q. But that wouldn't be an efficiency of retail operation, would it? It would be an efficiency of wholesale operation?

A. Yes, but if another jobber would come in and operate as efficiently as he did, then those retailers would get that reduced price.

Q. Just a minute, now. This man, however, is only operating as a retail store, in the case in question.

A. But he is now taking on the job—

Q. Then you say, in order to compete with him somebody else would have to come in and also begin buying trucks and a bulk plant?

A. No, I said somebody else would have to operate the jobbing function as efficiently as he does in order to compete with him.

Trial Examiner Ballinger: In other words, somebody else would have engage in the jobbing business?

The Witness: Somebody else might be the jobber—

By Mr. Austin:

Q. In the case he be the company, is distributing directly?

A. Yes.

1696 Q. So that the competitors of his man are buying direct from the company. Now those other retailers have no opportunity to put in any such economies, do they, in the jobbing function; because they are not engaged in it.

A. If they don't have, that is their tough luck. It is a competitive situation and I can't believe a hypothetical case of the kind you mention would ever arise in the world.

Trial Examiner Ballinger: Does a man situated, as has been described in the question, have a competitive advantage over those who are buying from the company in tank wagon lots? That's all he asked you.

The Witness: Of course, he has competitive advantages, because he is a more efficient operator.

By Mr. Austin:

Q. Professor Clark, when you say a more efficient operator you are talking about the efficiency by which he is efficient in his jobbing operations; that is, before the gasoline got to the station, isn't that correct? That's where those efficiencies are you are talking about in this particular case?

A. Yes.

Q. So that it doesn't necessarily follow he is a more efficient retail service station operator, does it, in the case I put?

A. Not necessarily.

Q. But he still has the competitive advantage, doesn't he?

A. Yes.

1697 Q. In response to a question asked by counsel for Respondent you stated your understanding of the meaning of the word competition.

A. Yes.

Q. I am not going to question your definition but I believe you further stated that whenever a new merchant—be he wholesaler or retailer, I assume—comes into the field and he is particularly efficient; that due to his efficiency of operation there is resulting injury to his competitors, is that right?

A. That's right.

Q. Now, there was some reference made to the Robinson-Patman Act and, as I said a moment ago, your definition was of competition?

A. Yes.

Q. Not of competitor.

A. Yes.

Q. I want to ask you whether there isn't a different meaning in your mind and in your use of the phrase "injury to competition," and "injury to a competitor?" Are those synonymous or do they have different meanings?

A. Well, injury to competition—that depends on what you do mean. If you mean competition in general—

Q. You were talking about this efficient operator and whether or not his efficiency doesn't result in injury to competitor.

1698 A. Yes.

Q. Does that sort of efficiency result in injury to competition?

A. Do you mean competition in that sense, or in the sense of other competitors?

Q. I mean competition in the broad sense in which you defined it as people, I believe, who were going after the same business.

A. Now the question is: Does that injure competition?

Q. I asked you whether, when you said that an efficient operator, by getting business, injures his competitors, whether you would also say that there was injury to competition?

A. No. No. I should say that helps competition.

Q. That's what I should think.

A. Yes.

Q. So that isn't it true that injury to competition, which is the phrase that Judge Hanley quoted from the Robinson-Patman Act, may mean something quite different than injury to a competitor?

A. That's what I don't know, what it does mean, in the Robinson-Patman Act. That hasn't been interpreted, yet, has it? It could mean either.

Q. But in the case you put it it means almost directly diametrically opposite, doesn't it?

1699 Trial Examiner Ballinger: The question was whether there was a difference between injury to competition and injury to a competitor.

A. My answer is that depends on how the Act is interpreted, because the word "competition" may mean there competition as a system or it may mean competition in the sense of plural of competitor; those who are competing with the company.

By Mr. Austin:

Q. Getting back to the case you referred to on direct examination where you say that an efficient operator, by his efficiency and methods of doing business, may take business away from somebody and thereby injure his competitor—

A. That's right.

Q. But, thereby, does he or does he not injure competition?

A. No; that is the heart of competition.

Q. That's all I wanted to bring out, Professor Clark, on that point.

You were asked on direct examination whether certain items of cost were properly to be included in the costs of a jobber in performing the jobbing function in connection with gasoline. Do I understand correctly that in answering those questions you answered as a marketing expert rather than as a cost accountant?

A. That's right.

1700 Q. Now, what I have to ask you will be with the same understanding. In other words, I am not trying to be technical, but simply trying to find out what you had in mind. One thing you referred to was advertising, and I want to know what kind of advertising you had in mind.

A. Well, from the point of view of the jobber, I would have in mind any advertising which was directed primarily at obtaining the business of the retailers. That might be advertising directly to the retailers or, of course, it is conceivable, as in the case of some manufacturers, it might be even advertising to the consumers of those retailers, but it would be advertising which was used for the purpose of building up the jobber's business.

Q. And by that you mean sales to retailers?

A. His business would be sales to retailers, yes.

Q. If that jobber, so-called jobber engaged in no business except the—except reselling at retail, would—could he have any advertising expense which could be allocable to the jobbing function?

A. Of course, as a matter of practical operation, he would have to charge his advertising to his whole operation. That is, if I understand you correctly, any advertising he does would bring business to his retail stores.

Q. It would be, I should think, necessarily, for that job?

1701 A. Yes, but, on the other hand, he looks on his whole operation, both jobbing and retailing, as his business.

Q. But if you had to make an allocation for the purpose of determine what advertising is attributable to the retail part of his business and what was attributable to the wholesale part of his business, would you say that any of that advertising expense, in the case I put, would be allocable to the wholesale part?

A. It would be hard to allocate, but I think it should, because if he doesn't get business at his retail store, he doesn't sell the commodities he buys to sell at wholesale, but I would hate to have the job of allocating it.

1702 Q. For the purpose of such advertising, would it make any difference whether this man exercised the jobbing function or not; that is, he might—we will assume he might acquire his gasoline at his retail stations by tank wagon, in which case he wouldn't be a jobber, or he might, as we have supposed, be the jobber through his own bulk plant. Now, his retail station operation would be the same in either case. At least, I am so assuming. And would the character of his advertising differ in any respect, dependent upon whether he purchased in tank car quantities of a jobber or purchased at tank wagon?

A. I am not sure it would differ in any respect, but he would have more stake in it, because he now has a larger business operation he is carrying on, he has more investment, consequently he has a larger stake in his operation, and possibly might spend more money in advertising than he would if he had just the retail stores, because the net effect of that advertising is now to help not only his retail business, but also wholesale operations.

Q. I promise not to go too far into the cost accounting field, Professor, so I will pass that one along and ask you what you meant in reference to discounts? What kind of discounts?

A. Well, I refer to functional discounts, I referred to quantity discounts.

Q. These were costs you were referring to: advertising, discounts and insurance were the first three things.

1703 A. I assumed that meant discounts which were given to the customers. I don't remember. That was read in with something else.

Q. Well, do you know what you did mean when you said that you thought discounts were a proper wholesale cost?

A. I am just trying to think of the theory of it. I know they are accounted as wholesale costs by the accountants, I am not sure of the theory back of it.

Q. Do you know what kind of discounts or discounts to whom?

A. I assumed they were discounts to customers, when it was read.

Q. Isn't a discount to a customer part of the price, or something that is used in figuring a price?

A. No; they are frequently figured in as profit of the organization and charged against the product.

Q. What is that?

A. I understand they are frequently figured in as a part of the profit to the organization and charged to the product from an accounting sense.

Q. Did you refer to interest on investment as a proper cost?

A. Interest on investment?

Q. Yes.

A. Interest on investment in the jobbing business?

Q. Yes.

1704 A. I would refer to it as a proper cost, because, after all, a man must make—should make interest on his investment, if he is going to continue in the business.

Q. You, I think, referred to interest on invested personal property.

A. Yes.

Q. Now, referring to interest on equipment, buildings, machinery, did you also include the item of depreciation?

A. Yes, I would.

Q. On those items?

A. Surely.

Q. In your opinion, should both depreciation and interest on the same items of personal property be allowed as a discount?

A. Interest and depreciation?

Q. Yes.

A. Yes, I think so; the depreciation is done for building up the equipment again, but it is still a part of the original investment.

Q. Do you feel competent to express an opinion on distribution accounting principles on that question?

A. No; I would prefer not to. I am just looking at it from the point of view of the obvious commonsense of business operation, not as an accountant.

Q. Well, I won't pursue it, provided it is clear
1705 that you did not express an opinion on that subject
as a cost accountant, and did not profess to.

A. I said that to start with.

Mr. Austin: I think I am all through. We might take a five minute recess, if your Honor please. I would like to look this over for a minute.

Mr. Hanley: You are not sure—

Trial Examiner Ballinger: We will recess for five minutes.

(A short recess was had.)

Trial Examiner Ballinger: We will reconvene.

Mr. Austin: That is all.

Redirect Examination by Mr. Hanley.

Q. A long line of questions were put to you, apparently in an effort to distinguish an individual who was engaged in the jobber operation as being part time jobber and part time retailer. Isn't it true, Professor, that a jobber is a jobber in contemplation of the industry, but that he may engage in the two functional operations of wholesaling and retailing?

A. Will you repeat that?

Trial Examiner Ballinger: Read the question.

(The question was read.)

By Mr. Hanley:

1706 Q. I mean he is a jobber if he is a jobber?

A. Yes, yes.

Q. Irrespective of whether he indulges in the two functional operations of just the wholesaling operation?

A. Yes, I would say he is a jobber.

Q. Some effort was made in your cross-examination to elicit an opinion from you relative to your views of injury to competition as distinguished from injury to a competitor. Now, referring to competition as you have defined it, as an economist, what is your opinion as to whether or not competition in the gasoline industry would be disadvantageously affected if some rule were made that required a fixed price be granted or made applicable to gasoline on the basis of the method which that gasoline was resold; that is to say, if a fixed price were required to be applied to all gasoline sold at retail, and the fixed price required to be applied to all gasoline sold at wholesale, just irrespective of the character of the business of the dealer in the gasoline, if that were done, what, in your judgment, would be the effect as to whether or not it would injure competition?

Mr. Austin: If your Honor please, I would like to request Judge Hanley to clarify that question before the witness is permitted to answer it by explaining what he means by a fixed price.

1707 Does he mean merely an idenfical price, or does he mean fixed? And if so, fixed by whom?

Mr. Hanley: All right.

By Mr. Hanley:

Q. Suppose that some rule were made, Professor, that the effect of which was to require the Standard Oil Company in the City of Detroit to sell every gallon of gasoline that it did sell, and which was resold at retail, at the same price, which price might be fixed by the Standard Oil Company, and that the same rule required that every gallon of gasoline that was sold to be resold at wholesale carried a different price, which price might be fixed by the Standard Oil Company; if that happened, what, in your judgment, would be the result as to any injurious effect upon competition?

A. Well, anything that freezes a price in that way would reduce competition, and there would be certain types of operations that probably couldn't function under those conditions.

Q. As a matter of clarification, Professor, you were asked about discounts as—discounts as constituting a proper cost, and I think you said you had in mind functional discounts or discounts given to customers?

A. Yes.

Q. Arithmetically, wouldn't it amount to the same thing
if a discount were treated as a cost as against a list
1708 price, or just taken off the list price and treated as a
reduction in price? Isn't it just a matter of accounting?

A. You mean as to whether you add it on or take it off?

Q. Yes.

A. It is just a matter of accounting, not of arithmetic, I should say.

Q. Mr. Austin started to ask you a question which I am going to try to finish, Professor. He withdrew it.

He assumed that a manufacturer sold to a retailer at 20% off some list price, and might sell to a wholesaler at 30%, we will say, off the same list price. Assuming that the wholesaler who receives the 30% off is engaged in both the retail and the wholesale operation; after you have given a consideration to that operator's costs of doing business, both at wholesale and at retail, is there necessarily any price advantage enjoyed by that customer?

A. No, there is not necessarily any price advantage. The 10% would cover his wholesaling operations, the 30% would cover his wholesaling and retailing operations.

Q. Is it or is it not a fact, Professor, that generally speaking, in relation to all consumer commodities, including gasoline, that after a manufacturer sells the merchandise to a jobber, that manufacturer thereafter exercises no control over the manner in which the jobber sells,
whether at wholesale or retail, nor as to the price at
1709 which the jobber sells the merchandise?

Mr. Austin: I object to that question, your Honor. How can the witness answer as to whether or not it is a fact? It may or may not be a fact. A manufacturer may or may not control the retail price.

Trial Examiner Ballinger: Objection sustained.

By Mr. Hanley:

Q. You have referred to the methods of operation employed by large stores, such as Hudson's here in Detroit and Carson's and Marshall Field's in Chicago. What is the fact, Professor, as to whether or not organizations of that kind buy all kinds of merchandise at a very much reduced price over what the ordinary retailer buys the same merchandise?

A. Well, the fact is that the majority of things which they buy, they buy on what could be roughly called a wholesale price basis. There are, undoubtedly, some items that the manufacturers may not sell them on that basis, or which they buy in such small amounts. But by and large they buy on the wholesale basis, because they perform both the wholesale and retail functions.

Q. I want to ask you a question which the gentlemen have already developed by their own witnesses, Professor.

Irrespective of the differential in price that may be
given to a jobber, is it not economically true that if that
jobber either consumes that differential in taking
1710 care of the cost of his own operation or pockets the
differential or expends it in some manner other than
passing it on to his customers, that his customers are on an
absolute equality, so far as price is concerned, with those
who do not have the advantage of such differential?

Mr. Austin: I would like to ask that that question be re-read, please.

Trial Examiner Ballinger: Read it, please.

(The question was read.)

A. Yes.

Mr. Austin: I object to that question as indefinite and not permitting of a definite answer, because there is a reference to who does not have the benefit of the differential.

Mr. Hanley: I will withdraw it.

1711 By Mr. Hanley:

Q. Suppose, Professor, that the Standard Oil Company sells on a tank car basis to the Stikeman Oil Company, that basis being 1½¢ below the Standard Oil Company's tank wagon price to retailers; is it not true that if the Stikeman Oil Company either consumes that 1½¢ in taking care of the costs of their own jobbing operation, or if it is pocketed by the owners of that business, or if it is expended in any way other than passing the whole or any part of that differential on to the tank wagon customers of the Stikeman Oil Company, in those circumstances are not the tank wagon customers of the Stikeman Oil Company on an absolute equality, so far as price is concerned, with the tank wagon customers of the Standard Oil Company, assuming that the same prevailing tank wagon price is maintained?

A. Now, in that case the price should be the same to each retail customer.

Mr. Hanley: That is all.

Mr. Austin: That is all. Just one moment.

(There was a slight delay at this point.)

Mr. Austin: That is all.

Trial Examiner Ballinger: The Examiner wants to ask the Professor a question.

The definition you gave of a jobber is a definition that was originated in 1931; is that correct? Or adopted in 1931?

1712 The Witness: That wasn't my definition. That was read into the testimony, it was my understanding.

Trial Examiner Ballinger: And that is the definition you subscribe to.

The Witness: Yes.

Trial Examiner Ballinger: That was long before the Robinson-Patman Act was enacted, was it not?

The Witness: That's right.

Trial Examiner Ballinger: In view of the Robinson-Patman Act, do you think that definition is still applicable?

The Witness: Yes. Definitions are a matter of fact, and not what the law says.

Trial Examiner Ballinger: Do you think that would fit the situation?

The Witness: Yes.

Trial Examiner Ballinger: That is all.

Mr. Hanley: That is all.

Mr. Austin: That is all.

(Witness excused.)

Mr. Hanley: Mr. Marshall.

JOHN C. MARSHALL was thereupon called as a witness for the Respondent, and, having been first duly sworn, testified as follows:

1713 *Direct Examination by Mr. Hanley.*

Q. Will you please state your name and residence, Mr. Marshall?

A. John C. Marshall, 5000 Cornell Avenue, Chicago, Illinois.

Q. What is your present occupation?

A. I am employed by the Standard Oil Company of Indiana.

Q. Is that the Respondent in this action?

A. Yes, sir. As manager of the gasoline and refined oil department, and assistant to the general manager of sales.

Q. How long have you been connected with the oil industry?

A. Thirty-five years and six months, I guess.

Q. When did you start and what was your occupation at that time?

A. I was employed by the Standard Oil Company in September, 1905 as a clerk and stenographer in the office of general manager of the sales department.

Q. Have you been continuously in the employ of the Standard Oil Company since that time?

A. Yes, sir.

Q. Has that employment been in the marketing department?

A. Entirely in the marketing department.

Q. Please tell us briefly what various positions you have held and what localities you have lived in and worked in in connection with your duties as marketer of the Standard Oil Company?

1714 A. Well, very shortly after my employment I became in charge of the office of the general manager, and continued in that capacity for about ten years. I think it was about 1915 when I started to travel the field on behalf of the general manager and assistant general manager, principally at that time in Illinois and Indiana and Michigan, contacting the local managements, selecting and directing the construction of bulk plants, service stations, offices, warehouses, and generally supervising the sales activity in the field.

During that period I was completely in contact with every phase of the sales developments, which were very rapid in that period.

In 1920 I was appointed manager at Grand Rapids, Michigan, and in November, 1922, I was transferred to the position of manager in Indianapolis. These two divisions happen to be among our largest divisions, exceeded only by Chicago and Detroit.

That brings me up to Indianapolis. I remained in Indianapolis until early in 1929, and I was appointed assistant general manager, and with headquarters at Chicago, and in charge of the Western Division as constituted at that time, which embraced the states of Iowa, Missouri, and Kansas, and part of Oklahoma.

In 1933 I was given charge of the Northern Division,
which included the states of North and South Dakota,
1715 Minnesota, and part of Wisconsin. And at intervals
during that period of years from 1929 to 1935 I, of course, traveled over other parts of the territory, so that I covered the entire marketing area of the Standard Oil Company of Indiana, with the exception of the Rocky Mountain division, which consists of Colorado, Wyoming, and Montana.

In 1935 I was given the title of assistant to the general manager, and placed in charge of gasoline and refined oil departments, with the exception of bulk sales, which was then handled as a separate department; bulk sales involved tank car sales, and barge sales, and other sales of that character.

In 1939 the bulk sales department was merged with mine. Since that time I have been in charge of the entire operations so far as sales are concerned and refined oil.

1716 Q. Generally, what are your duties in your present office?

A. Well, my office is the clearing house for all sales policies, prices, and all sales of every description, gasoline and refined oil and certain other products, distillates, furnace oils, and such products.

Q. During the course of your experience in the marketing of gasoline, Mr. Marshall, have you had occasion to observe the development of the use of the jobbers' system of distribution of gasoline?

A. At the time I joined the company in 1905 gasoline was a comparatively unimportant product. The volume of sales of it were not great, and its distribution was not wide spread. Shortly thereafter as the use of the internal combustion engine increased automobiles began to be operated in large numbers, of course the development was very rapid, and I have had the privilege of observing and being in contact daily with the entire development of the system of marketing gasoline as it exists today.

Q. Did you hear the testimony of the witness James E. Dyer given yesterday?

A. Yes, sir.

Q. Do you recall the definition which Mr. Dyer gave of a jobber, wholesaler, or distributor?

A. Yes, sir. I am very familiar with that definition.

1717 Q. Do you concur in that definition?

A. Entirely.

Q. What is the fact, Mr. Marshall, as to whether or not jobbers of gasoline engage in the dual operation of selling gasoline at wholesale and at retail?

A. A bona fide jobber, as included in the definition, almost invariably indulges in both the functions that have been described; that is, tank wagon distribution to dealers and consumers, and the direct operation of the service station.

Q. In the oil industry, is there any distinction made in the classification of tank car buyers on the basis of whether that buyer disposes of gasoline in whole or in part at retail or wholesale?

A. I make a personal distinction, which I think is also made by a great many others in the industry. And in explanation of that statement, I might say to you that during the past 15 years or so there has grown up a large and increasing number of what I might term, and do term mentally, tank car resellers. These people are sometimes designated as trackage stations. They have only one location, or if they have more than one, they are segregated in their operations, and each one is complete as a unit. They receive their gasoline in tank cars, and through a suitable
system of piping, distribute it to the public through
1718 measuring pumps, without any intervening operation.
Their entire operations being resale. They frequently erect signs which in so many words describe the sale as "From Tank Car to You." And their principal induce-

ment to the public to deal with them is that they can give a lower price by reason of their elimination of the customarily intervening operations.

There has also grown up methods of distribution by old line elevators, as distinguished from cooperative elevators, and cooperative oil companies.

The story is, within my personal knowledge, that the old line elevators found their business was being taken away from them by reason of the association of the cooperative elevator with a cooperative oil company. These concerns very frequently carrying long time credit for the farmer, supplying him with his petroleum products, with the arrangement that the price of these petroleum products will be deducted from the value of his grain when deposited in the elevator. So these old line elevators in many instances, particularly in North Dakota, Kansas, Montana, but here and there in other states, put up tank car storage and began buying gasoline in tank cars, so that they might follow the same practice. The cooperative oil company is a bona fide jobber in practically all instances. On the other hand, the old line elevator is of this classifica-
1719 tion that I have personally designated as a tank car reseller. But they also have a dual operation, in that they will fill the farmers' barrel or barrels at what is, in effect, a wholesale price, and out of the same storage tank, and through the same pumps they will fill an automobile fuel tank at a different and higher price.

Q. Mr. Marshall, in respect to each of these types of operators that you have just described, I think you have said that all buy on a tank car basis?

A. They all do buy on a tank car basis, yes.

Q. Does it follow that they buy at some differential under the tank wagon price that their supplier may have?

A. Well, the great custom throughout the industry in selling to the so-called jobber tank car buyer, who resells, is to predicate the price on the published quotations in the trade journals, particularly the Chicago Journal of Commerce and Platts Oilgram, Oklahoma edition, for comparable price. With the further provision of a discount off the tank wagon price in the locality where the consumer is situated. And the purchase is consummated, the purchase and sale are consummated, at whichever of these prices may be lower at the moment.

1720 Q. Does that method of arriving at a tank car price result in a lower price than what is commonly known as the tank wagon price of a supplier of gasoline?

A. Necessarily so, because one of the elements in that method of pricing is a discount below the local tank wagon price.

Q. Are you familiar with the four jobbers who are named in this action; namely, Ned's Auto Supply Company, Stikeman Oil Company, Wayne Oil Company and Citrin-Kolb Oil Company?

A. Well, I don't know what you mean by "familiar." I am not familiar—

Q. Do you know them to be customers of the Standard Oil Company?

A. Oh, yes. I met a couple of the gentlemen at this hearing and I haven't met some of them, yet, but I am aware of their existence and, in fact, we sell them, some.

Q. Are you familiar with the general type of operation in which they engage?

A. Yes.

Q. Are you familiar with the fact that in the aggregate they handle approximately 14 to 15 million gallons of gasoline yearly?

A. I had thought it was around 13 million, or something like that, but it undoubtedly varies from time to time.

Q. Do you know it to be a fact that each of these companies has its own bulk storage and maintains its own
1721 delivery system facilities?

A. I don't know that of my own knowledge as I have never inspected the bulk plants but I am assured, on very reliable authority, that that condition exists. I accept it as so.

Q. You understand that to be the fact?

A. Yes.

Q. Are you familiar with the fact that those companies have for some time past been purchasing gasoline on the tank car basis?

A. Yes, sir.

Q. Do you regard those four companies as being bona fide jobbers and entitled, as such, under industry practice and contemplation, to buy on a tank car basis?

A. I regard them under general industry practice as absolutely entitled to buy on the tank car basis.

I will go further and say that I doubt that they could be sold, by us, at least, and probably not any other unit in the industry at other than tank car prices.

Mr. Austin: I move the last of the sentence be stricken as not responsive and stating a conclusion that is not asked for.

Trial Examiner Ballinger: Read the last sentence of the answer.

(The last sentence was read by the Reporter.)

Mr. Hanley: It may be stricken.

1722 By Mr. Hanley:

Q. In your opinion and judgment, Mr. Marshall, do you think it would be possible to sell gasoline to any of these four dealers at a price above the prevailing tank car price in Detroit?

Mr. Austin: I object to that question, your Honor.

Trial Examiner Ballinger: Objection sustained.

By Mr. Hanley:

Q. Based on your experience and knowledge, Mr. Marshall, what in your judgment is the fact as to whether or not each of these four jobbers could at any time now purchase gasoline, from a number of different suppliers on a tank car basis?

A. My definite knowledge is that they could.

Q. Are their operations such as to make them of a type of buyer that is generally regarded in the industry as a tank car buyer or jobber?

A. Certainly.

Q. It has been shown in this case that the differential under the tank wagon price which has been given to each of these jobbers on a tank car basis is about a cent and a half on the average. What is your information as to whether that is a smaller or a larger differential than is ordinarily accorded jobber buyers?

Mr. Austin: Are you referring to house brand gasoline?

1723 Mr. Hanley: Well, I will refer to house brand gasoline.

By Mr. Hanley:

Q. You may understand that the question refers to house brand gasoline.

A. It would be necessary to limit the question to house brand gasoline.

Q. You may so understand.

A. It is a smaller discount. The general practice of the oil industry throughout the middle west is to allow a discount of 2¢ below the tank wagon price for that type of trade. In the Rocky Mountain Division, certain parts of it, that discount is expanded at least to 2½ and, I think, in some instances, 3¢ per gallon below the local tank wagon price.

Q. Within your knowledge, Mr. Marshall, are there many jobbers operating in the middle west and who purchase their gasoline from some supplier other than the Standard Oil Company and whose operations are comparable to the operations of these four dealers in Detroit?

A. There are a great many; several thousand.

Q. You say several thousand.

A. Yes.

Q. You referred to cooperative oil companies or elevators.

A. Pardon me. You said purchasing from other than the Standard Oil Company?

1724 Q. From other than the Standard Oil Company.

A. As a matter of fact Standard Oil Company has very few such; comparatively few.

Q. You mean the Standard Oil Company has comparatively few jobbers?

A. That's right.

Q. As distinguished from other suppliers?

A. That's right.

Q. You referred a moment ago to cooperative oil companies as buyers on a tank car basis. They supply service stations, do they not, in some instances?

A. Their own, only, as a rule. There may be a few exceptions where they supply other dealers, but the cooperative oil company, as a rule, attempts to confine its operations entirely within itself. The only—between itself and its customers.

Q. And such organizations give any savings that they make in their operations to their patrons as patronage dividends, do they not?

A. Yes, they do.

Mr. Austin: I object, your Honor, and move that the answer be stricken. There is some question here about cooperative oil companies. This is the first time I have heard about them in this case and I submit that any testimony as to cooperative oil companies is irrelevant and immaterial.

1725 Trial Examiner Ballinger: The witness has testified with reference to them. They are in existence.

Mr. Austin: Only in the preceding question do I understand that there was some mention of cooperative oil companies.

Trial Examiner Ballinger: Previously, he testified as to the existence of cooperative oil companies.

Mr. Austin: If he has testified to it, I still say that it is irrelevant and immaterial and it is no reason for permitting further testimony along the same line.

Mr. Hanley: We won't pursue it any further.

Trial Examiner Ballinger: I don't see the materiality but I overrule the objection.

Mr. Austin: It is not contending that the Standard Oil Company is a cooperative oil company, is it, Judge Hanley?

Mr. Hanley: No, except as we try to be cooperative as long as you let us but we are not a cooperative in that we are out from under the Robinson-Patman Act, if that's what you mean.

By Mr. Hanley:

Q. Mr. Marshall, I hand you what has been marked espondent's Exhibit 19, entitled Flow Chart of Gasoline from Refiner to Consumer, and will ask if you have examined that chart (handing document to witness)?

A. Yes, I have looked at it rather carefully.

1726 Q. Does that accurately portray, in a general way, the system and methods of distribution of gasoline in this country?

A. It is quite comprehensive, from that standpoint. It includes methods that are not used by all oil companies but it appears to include all methods that might be used by oil companies. There are methods shown here that the Standard Oil Company doesn't use, but such methods are used by some companies.

Q. Within your knowledge.

A. Within my knowledge.

Q. You heard the whole of the testimony of Mr. Dyer, did you not, Mr. Marshall?

A. Yes, sir.

Q. Do you agree with the answers which Mr. Dyer gave to the questions which were propounded to him?

A. In the main, yes.

Trial Examiner Ballinger: That is very indefinite.

Mr. Austin: Yes.

A. I would say, yes.

Mr. Hanley: All right.

Trial Examiner Ballinger: Now, do I understand that you are changing your testimony and agreeing with all of them; every statement that he made?

The Witness: I don't remember, your Honor, every answer verbatim that he said, but I—

Trial Examiner Ballinger: Do you think you can 1727 correctly answer that question?

The Witness: That is why I said, "in the main," because I feel I am entitled to some qualification.

Trial Examiner Ballinger: But that leaves us in doubt as to which one of the questions—

Mr. Hanley: I will ask another question, if I may be permitted to do so.

Mr. Austin: I would like to move that that be stricken, first.

Mr. Hanley: All right. It may be stricken.

Referee: The answer is stricken.

By Mr. Hanley:

Q. Is there anything in the testimony of Mr. Dyer as to his answers with which you disagree, Mr. Marshall?

A. I don't recall anything.

Q. Do you agree in principle with the answers which Mr. Dyer made to the questions which were propounded to him?

Mr. Austin: I object to that, your Honor. It is entirely too indefinite. It is an attempt to cover the entire testimony of an expert witness by indirection.

Trial Examiner Ballinger: Objection sustained. Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

1728 Q. Mr. Marshall, advertising to the dual operation indulged in by these various jobbers throughout the country—and by "dual operation" I mean indulgence in the retail operation as well as the wholesale operation—have you had any occasion recently to determine to what extent some of the larger suppliers of gasoline employ that jobber system of distribution?

A. I have, in certain specific towns.

Q. Can you give us at this time some of the results of your investigation in that direction?

A. If I may refer to a memorandum on that?

Q. Surely.

Trial Examiner Ballinger: You may. The memorandum was made by you?

The Witness: Well, I didn't physically make it, but it was all done under my supervision, by my direction and I collected the figures made on this memorandum.

Trial Examiner Ballinger: You may use it.

The Witness: Developed the whole thing.

Mr. Austin: Your Honor, I request that the memorandum be marked for identification, if the witness is going to use it.

Mr. Hanley: Well, we haven't any objection to that. I don't know whether that is a necessary part of the procedure, or not.

1729 The Witness: I don't think it would mean much to anybody else.

Trial Examiner Ballinger: Hand the memorandum to the Reporter and let him mark it Respondent's Exhibit 22 for identification.

(The memorandum referred to was marked "Respondent's Exhibit 22" for identification.)

A. These figures that I am about to testify to represent dual operations on the part of the supplying company; that is, where they operated directly and also sell to jobbers in the same locality.

By Mr. Hanley:

Q. To clarify that: Is that the type of operation that is analogous to the operation of the Standard Oil Company in Detroit?

A. That is so.

Q. And further, Mr. Marshall, before you go on in respect of the jobbers that are used by those supplying companies, is it not true that they also engage in the dual operation of direct retail selling as well as wholesale selling?

A. Yes, sir.

Mr. Austin: I would like to know whether the witness knows that of his own knowledge, about these jobbers.

The Witness: I am very familiar with the operations in all these towns that I will refer to.

1730 Mr. Austin: How is that?

The Witness: I am very familiar, personally, with the operations in all these towns that I will refer to.

Mr. Austin: Of the jobbers, as well as the suppliers?

The Witness: Yes.

Mr. Austin: All right.

A. I have visited these towns at frequent intervals; not all of them in the immediate past; and that is why I compiled the information, had the information compiled for me to verify my personal knowledge.

Mr. Austin: All right.

A. The figures which I will give for the Standard Oil Company are accurate and exact. The figures which I will give for the other companies are based on the best and most reliable information obtainable where tax records and cooperative records were available, that was the source of them. Where official records were not available, they were based on observation and general knowledge of the local management.

1731 Mr. Austin: Your Honor, I object to that, where it goes beyond observation, where it is based upon some records, tax records of some other companies, and those things are not here and not authenticated. I don't object to this as far as it is within the witness' own knowledge, or even where it might have been prepared by some subordinate from personal knowledge. I would accept the witness' word for that, but this appears to have been collected from some records about which I know nothing, and I object to it to that extent.

Trial Examiner Ballinger: Let us go off the record a few minutes and find out about it.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record. Objection sustained.

By Mr. Hanley:

Q. I will ask you, Mr. Marshall, to give your knowledge of the extent to which oil suppliers are using the jobber method of distribution in the same territory where the supplier is also supplying retailers directly. If you have a memorandum—

Trial Examiner Ballinger: Do you understand the question?

The Witness: Yes, I understand the question.

Mr. Hanley: I am not trying to qualify this memo-
1732 randum as an exhibit, your Honor. This memorandum, yet, is none of the Government's affairs.

Trial Examiner Ballinger: I merely asked the witness if he understood the question.

By Mr. Hanley:

Q. I want your own knowledge now, Mr. Marshall. If you need to refer to any memorandum; refer to it, but I am asking you for your knowledge; wherever you got it.

A. I can't give it to you on a percentage basis, but I will say that that type of operation is confined to the larger metropolitan centers, and it was for that reason that I had a survey made of those metropolitan centers.

Q. Can you approximate the percentages, the split, as between direct operation and jobber operation of any oil suppliers in any communities?

A. Yes.

Q. Again, you may refer to any memorandum which you may have.

A. Yes. Shall I select a community?

Q. Yes.

Mr. Austin: Anything you can testify to of your own knowledge.

Trial Examiner Ballinger: You are not to use official figures, but anything of which you have any personal knowledge, you base your answer upon.

1733 The Witness: Then I can only testify to the Standard Oil Company.

By Mr. Hanley:

Q. Mr. Marshall, irrespective of where you got your information, whatever your sources may have been, are you able now to give us the approximate percentages which I have asked you about?

A. Yes, sir.

Q. Of your own knowledge?

A. Yes, sir.

Q. All right.

A. Chicago: Standard Oil Company, 84.8%—these are based on 1940 gallonage—84.8% direct operation, which means our own tank wagon distribution. 11% through jobbers who are conducting the entire jobbing business. 1.4% through jobbers who are merely tank car resellers.

Trial Examiner Ballinger: You said another class were conducting the entire jobber operation. What did you mean by that?

The Witness: They distribute through tank wagon and other facilities.

By Mr. Hanley:

Q. And they may, also, retail?

A. They may also retail.

Mr. Austin: What are the last ones?

1734 The Witness: They buy in tank car lots and sell through service stations.

Mr. Austin: You mean retailers?

The Witness: Yes, tank car resellers, but included in this classification of jobbers as has been used here, and we have some unbranded jobbers, that is, concerns who buy but don't use the Standard Oil Company's trade mark brand in their own operations. That represents 2.8% of our business.

Socony Vacuum, 18.3% direct; 39.6% through the jobber who conducts the entire operation, and 42.1% through the jobber who is simply a reseller.

Q. That's like Ned's in Detroit, again?

A. Yes, sir.

Mr. Austin: I believe, your Honor, that I am entitled to an objection here, to reading in these percentages for other oil companies, unless the witness knows or examined the records of those companies and can state that he got the information from original sources. He read in the Standard Oil, and I haven't objected to his testimony that other companies engage in this practice to a greater extent than Standard Oil. Beyond that, I don't feel called upon to admit specific figures of other companies.

1735 Trial Examiner Ballinger: Aside from the testimony with regard to the Standard Oil Company, it seems to me this testimony is hearsay.

Mr. Hanley: He says he knows, your Honor.

Trial Examiner Ballinger: I understand he says he knows, but when he is examined further, he says he gets them from official sources.

Mr. Hanley: I am going to offer to prove it. I will read it in the record myself in the form of an offer. We certainly are entitled to prove this.

Mr. Austin: You are entitled to prove it by a proper witness.

Mr. Hanley: Well, if a witness says he knows, your Honor, he is entitled to—

Trial Examiner Ballinger: But he also says that he has relied upon information that he has obtained from official sources. That is not personal knowledge. He also says he has relied upon information he has obtained from other sources, and that isn't personal knowledge.

Mr. Hanley: Of course, that is true, but he is an expert in the oil industry. He has followed this thing for 35 years. He knows whether these percentages are approximately correct without talking to anybody in any other oil company or seeing any of their records.

I know the world is round, but I never stood off and looked at it and saw it appear as a ball in the air, but 1736 I know it is round. How do I know? Because of the general information that has come to me that I couldn't escape in living.

Mr. Marshall couldn't escape this type of information, even if he tried, and I say when an expert, qualified as Mr. Marshall is, is willing to say that of his own knowledge these are approximately correct percentages, he is entitled to testify to it. He is subjected to cross-examination and if he is mistaken, it may be developed.

Trial Examiner Ballinger: He has already, by his own admissions, disqualified himself from testifying.

Mr. Hanley: Very well. I want to make the offer.

Mr. Austin: I think the Examiner will well remember one Professor Taggart if the University of Michigan, where questioned as to his knowledge of things done by his assistant, under his direct supervision—

Mr. Hanley: His testimony, incidentally, goes into this record, if you will remember, Mr. Austin, notwithstanding the rankest kind of hearsay, admitted by Professor Taggart.

Mr. Austin: His opinion testimony got in and I got in the facts of what was actually done.

Trial Examiner Ballinger: Here is a case where there are official figures and records available. This witness may have examined them and he may have taken the 1737 figures from them, but the objection is sound. Counsel is entitled to the production of the original documents, if he insists upon them.

Mr. Hanley: Well, of course, we can't produce them.

Mr. Austin: I am only making this objection because it seems to me that the only material thing is whether or not this practice is engaged in by other companies, and I don't think the exact percentages are material, anyway, and I don't want to be bound here by material that is given as exact figures of other oil companies.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Mr. Marshall, in the course of your experiences, up to the present time, have you observed the practices of the Socony Vacuum Oil Company in respect of whether that company uses the jobber system of distribution jointly with the direct system of distribution?

A. I have, and they do.

Q. Have you also observed the practices of the Texas Company, the Phillips, and the Shell, and the Sinclair Companies?

A. I have, and they do. I have got to make an 1738 exception on the part of Sinclair because you mentioned Sinclair. I have got to make an exception on the part of them, because of the testimony I heard yesterday.

1739 Q. Have you observed the practices of the Socony-Vacuum, Texas, Phillips and Shell in the cities of Chicago, Duluth, Fargo, Minneapolis and St. Paul, St. Joseph, St. Louis, Detroit, Milwaukee, Grand Rapids, Wichita, Kansas City, Des Moines and Sioux City?

A. Well, I couldn't observe the practices of all of them in all of these towns because they are not all represented in all of these towns but I have observed the practices by the companies that are represented in these towns; the direct or dual operation.

Q. That is to say, if I understand you correctly, Mr. Marshall, that where any of the companies which I named operated in any of the cities which I named, you have had opportunity to, and have observed their practices?

A. Yes; most certainly.

Q. Have you observed the practices of the Gulf Oil Company in the City of Detroit with respect to this dual operation?

A. Yes.

Q. And have you observed Cities Service in the City of Milwaukee?

A. Yes.

Q. And the Continental Oil Company in the City of Wichita?

A. Yes.

Q. And the Skelley Company in the City of Kansas City?

A. Yes, sir.

1740 Q. And the Mid-Continent Company in the City of Des Moines?

A. Yes, sir.

Q. Have you made a personal observance from time to time over the years that you have been connected with the industry of the activities of these various companies in these various places?

A. Yes, sir, in many instances.

Q. I think you have testified that you have actually seen this practice grow up in the industry.

A. Yes.

Q. And in the territory in which these cities are located?

A. Yes, sir.

Q. In the course of your duties are you not required to supervise certain of the activities of the field or district offices of the Standard Oil Company?

A. In relation to their sales of gasoline and refined oils, yes.

Q. Do you not, periodically, and have you not, periodically, over a long period of time, received reports of various kinds, oral and written, that indicate to you what is going on in the matter of the use of this dual operation by other oil companies; I mean, other than Standard?

A. I do receive such reports currently.

Q. Before you made any investigation of figures, as I think you were requested by me to do, relative to

1741 these percentages about which you have been asked, did you have any knowledge of your own as to whether the Standard Oil Company indulged in this jobber system of distribution to a lesser or greater extent than these other companies which I have named?

A. I had absolute knowledge.

Q. And what was your knowledge in that respect?

A. That the extent of the Standard Oil Company's activity through this method of marketing is extremely small in comparison to the activities of the industry as a whole and much smaller than those of any other individual company.

Q. Did you have any knowledge prior to the obtaining or making any figures on the subject relative to whether or not these companies other than Standard sold more gasoline or less gasoline through the jobber system than through the direct sale system of distribution?

A. Yes, sir.

Q. And what is the fact as to whether or not these other companies sell a greater amount through the jobber system or through the direct operation?

A. In specific areas in many—let me qualify that: In a number of these larger metropolitan centers other so-called major oil companies distribute substantial proportions of their entire volume through jobbers; in some instances more through jobbers than they do direct.

Q. Did there come a time recently when you were 1742 requested to determine the figures, the degree of relationship between these various methods of distribution in the various companies which have been named?

A. Yes, sir.

Q. And did you do so?

A. I did so and at a number of specific metropolitan areas where, of my own knowledge, I was aware that such activities existed.

Q. Now, how did you proceed to do that, Mr. Marshall?

A. I asked the local manager to give me the percentages of volume sold through the respective channels by the oil companies which I named in the towns where I knew such activities existed, merely for the purpose of enabling me to answer the question which you had made to me, propounded to me, and to verify my knowledge to the extent that such operations continued to exist since the last time I had observed them personally.

Q. Are the localities to which you refer the list of cities which I mentioned a moment ago in some question?

A. Yes, sir.

Q. Are the activities that occur in those cities, in relation to this dual operation, generally the same type of activity that occurs throughout the country, in gasoline distribution?

A. No.

1743 Q. What areas would you think were excluded, if any?

A. I have already stated that these dual operations principally occur in large metropolitan areas. There may be a very few instances where they occur in smaller towns but there are very widespread areas where even the major oil companies, whose names you have mentioned, do not market direct at all but market entirely through jobbers, if at all.

Q. The condition which you have indicated as existing in these named cities, then, if I properly understood you, are typical of larger centers of population in the country?

A. Yes. I have not attempted to cover all of the towns or cities where these activities are carried on, but just to select a few to demonstrate the point.

Q. The dual operation, if I correctly understand you, is not so prevalent in the rural communities where they have the rural circuits and bulk plant operations?

1744 A. The dual operation on the part of the oil company who is a refiner, and that is the dual operation we are talking about now, we are not talking about the jobber's operation.

Q. But there are jobbers who serve the rural communities?

A. Oh, many of them; thousands of them.

Q. And those do indulge in the dual operation, do they not?

A. Almost invariably.

Q. Now, you have started to tell us how you obtained these figures. I think you said you applied to the various division managers to aid you.

A. Yes.

Q. Did your office do any work on this at all?

A. Yes. I personally checked these figures and tabulated them and had them reduced to statement form for my convenience.

Q. Was the entire job, whether done in your office or in the division office, done under your supervision and management and your direction?

A. Yes, sir.

Q. Did there come a time when you got some figures?

A. Yes.

Q. Did you look at them?

A. I certainly did. I studied them.

Q. When you saw them, did they accord with what you knew to be the fact, before you asked for the figures?

1745 A. They absolutely verified the understanding which I personally had from former observation; current knowledge of what was going on.

Q. Are you able to say now from your own knowledge that the percentage figures which you have show, with close approximation, the percentage of indulgence in the direct operation and in the jobber operation in the various localities named by the various companies name?

A. I am, with a further statement that the figures, as far as the Standard Oil Company is concerned, are, of course, accurate.

Mr. Hanley: Off the record, please.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. I think I did fail to ask you, Mr. Marshall, if, in obtaining these percentage figures, you had recourse to public and official tax records and other records applying to the gasoline business.

A. Not in all cases.

Q. Did you have access or recourse to many different sources of information of various kinds?

A. I did have access to all that were available.

Q. Do you know that those were reliable sources?

1746 A. I know they are reliable sources.

Q. As a matter of fact, you rely on them in doing your own business, don't you, Mr. Marshall?

A. Surely.

Q. I now ask you, Mr. Marshall, to state from your own knowledge as close an approximation as you can of the percentage of the business done in Chicago by the Socony Vacuum Company by direct sales to retailers.

Mr. Austin: Is this the same question or is this something that is limited to his own personal knowledge?

Mr. Hanley: Will you read the question, please?

(The last question was read.)

Mr. Austin: I request that the witness be instructed that from his own knowledge does not mean from records, but his own knowledge means from information he has obtained himself from the books of the company which is, I assume, the only place it could exist. If that isn't true, then I still make the same objection that I did before: if this material is from the same source as before referred, to.

1747 Mr. Hanley: I object to the statement of counsel as being unfair to the witness and misleading to the witness, for the reason that the witness has been asked to give his own knowledge, and that he may not be told what his own knowledge is; that he is the only man on earth that knows what his own knowledge is; and the Court nor anyone else can tell him what it is, irrespective of where he may have obtained it.

Trial Examiner Ballinger: The witness may answer the question, but will confine it to matters of which he has personal knowledge, and not include therein any matters that have come to him by hearsay.

Mr. Hanley: To get the record straight, I object to the restriction placed upon the witness by the statement of the Court.

By Mr. Hanley:

Q. Now, Mr. Marshall, can you answer the question in view of the restriction made by the Court?

A. I cannot.

Mr. Hanley: All right. We are up to the point where I can make the offer, if your Honor please, and I don't know whether you want me to proceed any further with it or not.

Trial Examiner Ballinger: You better dispose of this matter.

1748 Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: You may proceed to ask the witness any questions you want.

Mr. Hanley: I will do it that way, if that is preferred.

By Mr. Hanley:

Q. Mr. Marshall, I will ask you if you have arrived, in the manner in which you have indicated, at certain percentage figures in relation to this dual operation which, in your knowledge and best judgment, accurately reflect the split or degree of use of the two methods by the various companies in the various localities which have been discussed in your testimony?

A. I have.

Q. You may state what those are.

Mr. Austin: I object, your Honor.

Trial Examiner Ballinger: One moment. Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

(The record was read.)

Trial Examiner Ballinger: Objection sustained.

Mr. Hanley: In view of the ruling of the Court, the Respondent now offers to prove by the witness J. C. Marshall, who has been qualified and shown to be a competent witness to give testimony, that if permitted so
1749 to do, the witness will testify that in his knowledge
and best judgment the following percentage figures fairly approximate the amount of business done directly and through jobbers by the several oil companies hereafter named in the localities hereafter named; to-wit:—

Mr. Austin: I would like to interpose an objection at this point. If your Honor please, I think an offer of proof such as that proposed to be made by counsel for the Respondent is entirely improper, immaterial, and would be improper practice to permit it to go into the record, for the reason that the question here is not as to the admissibility of the evidence proposed at all; the only question is whether or not this witness is competent to give the answer. That question is already thoroughly portrayed on the record. I contend that an offer of proof is only proper where there is a question of ruling upon the admissibility of evidence. The admissibility of the evidence has not been placed in question, but only the competency of this witness to give the evidence, or to testify to this particular subject matter. Therefore, there is no need for an offer of proof. The only question as to any ruling that has been made here is whether this witness is qualified to give the answers which are asked for.

Trial Examiner Ballinger: Judge, hasn't counsel
1750 for the Commission correctly stated the legal status?

Mr. Hanley: The best answer to that, if your Honor please, is this: that if the Commission or a Court reviews this record, and disagrees with the propriety of your Honor's ruling in excluding this testimony from Mr. Marshall, then where are we? It isn't in the record. The Commission may say it would have been proper for Mr. Marshall to have testified to these figures. But he hasn't been permitted to testify to these figures, because in the judgment of your Honor I haven't properly qualified him. Now, I think I have, and I hope the Commission will agree with me.

Now, if they do, then, these figures should be in the record, because if they are not, what are we going to do about it?

Trial Examiner Ballinger: If the Commission disagrees with the ruling of the Examiner, and they consider this material to a determination of the case, the Commission will promptly reopen the case, remand it back for the inclusion of this evidence in the record.

Mr. Hanley: That is a long road.

Trial Examiner Ballinger: That is the road that they customarily take.

Mr. Hanley: Of course, I would have much less difficulty if I could understand the reason for this hypertechnical objection. I can't, for the life of me, see what is frightening anybody about me putting this stuff in
the record. Who is going to see it that is going
1751 to get hurt by it? I just don't know why they object.
I bow to your Honor's ruling that this witness is not competent to testify to it. All I want it in there for is to have it in there if the Commission says he was competent to testify to it.

It is easy enough for counsel to say, "Well, you ought to go and bring in all these oil companies."

That isn't so easy to do.

Trial Examiner Ballinger: The Examiner is perfectly frank in saying that if this evidence is material at all in ought to be in the record with a greater degree of accuracy and definiteness than as it now appears. And that he would like very much to have it in the record, but that his hands are tied. He has no other alternative but to sustain the objection.

Mr. Hanley: Do I understand, your Honor, that I am not permitted to go on and dictate my offer into the record? Is that the ruling?

Trial Examiner Ballinger: The Examiner so rules.

Mr. Hanley: Very well.

Now, I will prepare this same information in the form of an exhibit, and I will offer that exhibit through Mr. Marshall, and then it is bound to be in the record.

Trial Examiner Ballinger: Well, it will be avail-
1752 able, at least—

Mr. Hanley: Even if it is rejected.

Trial Examiner Ballinger: Even if it is rejected, were it can be included in the record without recalling the witness.

Mr. Hanley: I wonder if we might recess now? I don't know where I go from here with this witness.

Trial Examiner Ballinger: Upon motion of counsel for Respondent, at 5:35 P. M., the hearing stands adjourned to be reconvened at 10 A. M., April 24, 1941, in Room 859 Federal Building, Detroit, Michigan.

(Thereupon at 5:35 o'clock P. M., April 23, 1944, an adjournment was taken to reconvene at 10 o'clock A. M., April 24, 1941.)

1753

Room 859, Federal Building,
Detroit, Michigan,
April 24, 1941.

Met, pursuant to adjournment, at 10 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois, and

Arthur J. Abbott, Esq., of the firm of Abbott, MacMahon and Roberts, 2230 Buhl Building, Detroit, Michigan, on behalf of the Respondent.

1754

PROCEEDINGS.

Trial Examiner Ballinger: We will come to order.

This is a reconvening at 10 A. M., Eastern Standard Time, April 24, 1941, in Room 859 Federal Building, Detroit, Michigan, of Docket No. 4389, in the case entitled In Re: Standard Oil Company. The last hearing was held in Detroit, April 23, 1941.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

JOHN C. MARSHALL resumed the stand, and having been heretofore duly sworn, testified further as follows:

Direct Examination (Continued) by Mr. Hanley.

Q. Mr. Marshall, in your testimony yesterday you were outlining several different practices that involved tank car sales to jobbers and resellers of gasoline. I understand that there is one that you think you either did not cover or didn't cover as fully as you wish to. Do you have in mind that one this morning; something that either originated in Kansas or was quite prevalent in Kansas, as well as elsewhere?

A. Yes. There are, in the State of Kansas, many
1755 instances where small, comparatively small cross-
roads service stations have erected large capacity storage on the same lot and receive their supplies of gasoline direct by transport truck from Kansas and Oklahoma refineries. They have no sidetrack facilities. They are a distance from the railroad, as a rule, but by that means of operation they are put into the same classification as these tank car resellers that I spoke of. That situation is developing to some extent in Oklahoma and also in western and southwestern Missouri. It appears to be in the process of development in areas that are close enough to refineries or terminals where that type of transportation can be economically used.

Q. And that last statement, do you mean that the custom and practice is spreading generally territorially over the country?

A. It is.

Q. What is the usual price basis in that type of operation?

A. A price f.o.b. the refinery, which is, in effect, a tank car price, plus the compensation to the carrier for transporting the product.

In some instances the carrier makes the purchase itself at the refinery—I mean the transport truck operator makes the purchase himself at the refinery, and then adds onto its cost whatever he sees fit.

In other instances the purchase may be made by
1756 the filling station operator who will compensate the
transport truck operator at the established hauling rate.

Q. And that gasoline is resold by the purchaser at retail?

A. At retail entirely, except as in the case of those old line elevators that I spoke of yesterday, farmers bring their barrels in and buy at a lower price, the barrels being filled through the same measuring pumps as the tanks of automobiles may be filled.

Q. With respect to jobbers generally throughout the country, Mr. Marshall, what is the fact as to whether or not most of them have a retail service station or outlet as a part of their plant, irrespective of whether they have other outlets, retail outlets, which they operate or not?

A. It is very frequently the case that at the bulk plant, and as an integral part of it, the jobber has retail pumps. He may not have a service station building separate and distinct from his warehouse or office, but in some instances, the so-called service station building combines the general office and warehouse facilities. But almost invariably the jobber has facilities for retail sales at his bulk plant.

Q. From your experience, Mr. Marshall, are you able to give us any idea as to the extent of the investment in this country in the jobber business?

1757. A. I couldn't estimate it in dollars and cents because it will run into many, many millions. And in reaching that conclusion I have personal knowledge of an instance of a jobber in the state of Indiana who was able to sell out, some ten years ago, to a major oil company—not the Standard Oil Company—for around $5,000,000, which, of course, included physical properties and his good will and so forth; entire business was sold out at a figure of around $5,000,000.

Q. Was that—

A. In one instance, of course. That is unusual and unique, I will say. But with the thousands of jobbers that are in business, the total investment which they have must run into many, many millions.

Q. That particular instance that you have referred to, was that jobber engaged in what we have been calling dual operation?

A. Oh, yes. He delivered by tank wagon to dealers and consumers, and conducted by direct operation, salaried and commissioned employees, a very large number of service stations.

1758 Q. Do you happen to recall who his supplier was?
A. Yes.

Q. Do you know whether that supplier engaged in the dual operation, also; that is, supplying jobbers as well as retail outlets?

A. Oh, yes; yes.

Q. You have testified, Mr. Marshall, that you are generally familiar with the set up here in the Ned's Auto Supply Company and with their operations in respect of merchandising gasoline and certain other commodities: more particularly, automobile accessories. Do you have in mind, and do you know of many other instances of like operation throughout the country?

A. Yes, I know of quite a few.

Q. With reference to Chicago, for instance; are there any there of comparable size and character?

A. From the standpoint of gasoline marketing, yes. Possibly not from the standpoint of marketing items such as tires and refrigerators and radios, and so forth The concerns in Chicago that I have in mind don't market these electrical devices. They confine themselves, to my knowledge, entirely to related products of the petroleum industry, such as tires and batteries and things of that sort.

1759 Q. Are some of them considerably larger, from the standpoint of volume of gasoline handled, than Ned's?

A. Well, Ned's is a very large volume seller, but my judgment would be that there are at least two and possibly three such concerns in Chicago, who, by reason of having a larger number of outlets, and, of course, a larger city to sell their products in, handle more gasoline than Ned's do.

Q Now, you are familiar with the fact, are you not, Mr. Marshall, that Ned's handles a great many tires?

A. Oh, yes.

Q. I don't know, but I think it is in evidence in this case—it will be, at least—but that organization either is now or was, a short time ago, the largest distributor in the country of the Firestone tire line.

A. That has been my personal opinion, sir.

Mr. Austin: Your Honor, I don't think it is material how many tires Ned's sells. I don't think it is in the record. I object to a statement going into the record for that effect.

Mr. Hanley: I think he testified to it, your Honor. I am not sure, whether on his adverse examination, and he may be asked to testify to it, and thih is a foundational question.

Mr. Austin: I don't see what the regulation of
1760 the sale of tires has to the sale of gasoline.

Mr. Hanley: Well, if you let me ask the question, it may appear pertinent to you

Trial Examiner Ballinger: Reserving the objection to counsel for the Commission, with the right to move to strike, the witness may be permitted to answer.

By Mr. Hanley:

Q. Now, based on your knowledge and experience in marketing, Mr. Marshall, what have you to say as to whether it is true or otherwise that a purchaser of large quantities of gasoline or large quantities of tires or large quantities of any consumer commodity can and does purchase those commodities at a lesser price than such commodities can be purchased in relatively small quantities or by relatively small outlets?

Mr. Austin: Your Honor, I don't believe that—well, I don't think that question is susceptible to definite answer. It applies to practically every kind of an article that is sold.

Mr. Hanley: It does, I think.

Mr. Austin: It is so perfectly obvious that there are different rules by different sellers in each industry—to say that everybody that buys in a certain quantity gets a better price, I think the Court could take common judicial knowledge of the fact that that is not so, before the
1761 witness answers it. It simply couldn't be so.

Mr. Hanley: Do you mean quantity prices—

Mr. Austin: There is no such thing as saying everybody that buys in a certain quantity gets a lower price than somebody buying it on a lower quantity.

Mr. Hanley: That is not my question. Will you read the question, please?

(The question was read as follows: "Now, based on your knowledge and experience in marketing, Mr. Marshall, what have you to say as to whether it is true or otherwise that a purchaser of large quantities of gasoline or large quantities of tires or large quantities of any consumer commodity can and does purchase those commodities at a lesser price than such commodities can be purchased in relatively small quantities or by relatively small outlets?")

Mr. Austin: I will be glad to hear the witness answer that question, because it is so impossible of answer. I would like to know whether the witness would try to answer, or not, so I withdraw the objection.

A. I think it is a matter of common knowledge, and it is my personal opinion, based on my experience and contact with these various lines of business, that a concern like Ned's Auto Supply, handling a tremendous volume of tires—

Mr. Austin: I object, your Honor. That is not 1762 responsive.

Mr. Hanley: It is responsive. Let him finish his answer.

Mr. Austin: I request that the question be reread.

The Witness: I will leave out Ned's Auto Supply, if you wish.

Trial Examiner Ballinger: I take it he is answering this question piecemeal. He is segregating the various items included in the question.

Mr. Hanley: It is his answer, certainly, Judge. Counsel asked him to try, and he is trying.

Trial Examiner Ballinger: Proceed.

1763 A. But a concern purchasing a tremendous number of tires secures a benefit of a lower price from his supplier than another reseller of the same brand of tires who handles a relatively small volume.

It is a general practice in industry that carload buyers receive a lower price than small quantity buyers. It is self evident on the streets of Detroit that a buyer of five, ten, or fifteen gallons of gasoline from any supplier or through any method pays a higher price than the buyer of ten thousand gallons of gasoline at one delivery in a tank car or five or six thousand gallons of gasoline at one delivery in a transport truck.

In the fuel oil industry, it is public knowledge that even the domestic heating operator, that is the householder who has an oil burner in his home, pays a higher price for a delivery less than a certain volume, which is customarily one hundred gallons than he does if he buys three or four hundred gallons at a single delivery.

I could go on, because it is so well established as a practice that the quantity buyer receives the benefit of the lower price. There just isn't any argument about it.

Q. Now, Mr. Marshall, out of your experience and observation as a marketer, are you able to express any opinion as to whether that system is economically sound or otherwise?

1764 A. In my opinion it is economically sound and fundamentally essential in the conduct of business.

Q. What is your opinion as to whether that practice is promotive of competition or has a tendency to stifle, hamper competition?

A. It does not hamper competition in any way. In fact, I would say it stimulates and strengthens competition.

Q. In your experience have you observed any economic unfairness as a result of that general marketing structure and system? I mean now unfairness as between competitors in any line of commerce?

A. I have not, because all suppliers offer quantity prices to prospective customers who are situated with physical facilities and financial ability to make quantity purchases. To be precise, when an oil marketer establishes tank car storage with side track facilities and proper unloading equipment which permits him to receive tank car shipments of gasoline under the Interstate Commerce regulations, he is naturally solicited on a tank car basis by the various suppliers of gasoline. And it would seem almost an absurdity for any supplier to approach such a purchaser on any other basis. As if such purchaser were not privileged to buy on a tank car basis there would be no reason for him making the investment providing these large facilities. He might just as well have a few smaller tanks, such as the ordinary reseller has.

1765 Q. You have indicated that there is a tremendous money investment in this type of operation, jobber operation. Now, Mr. Marshall, assume that a jobber who has set up a business and has purchased some brand of product for many years and sold it, what is the fact as to whether or not that jobber builds up a clientele or customer following and a good will for his business and for the product which he sells?

A. Well, there is a certain volume of that business, that is the jobber's business, because of his local prestige and so forth; and to that class of customer he could in the end undoubtedly sell whatever product he might handle, assuming that it was a fairly satisfactory one. But the trade mark brand which he handles is of an estimable value to him, and should he be compelled to change after a period of many years from one trade mark brand to another, which might not have the same public acceptance in the locality, or to an unbranded product, and attempt to establish that product from the ground up, in the minds of the public he would inevitably sustain a very serious loss, and it would take him years to build back to where he was immediately prior to the change.

1766 Q. Would that not be true, Mr. Marshall, without any reference at all to the merits of the gasoline, for instance?

A. Well, the merits of the gasoline, necessarily, are an important element. If he went to an unsatisfactory product or a product without merit, his business naturally would be destroyed.

Q. I don't think I have made it clear, Mr. Marshall. Assuming that a jobber who has—well, I think I can make it more concrete.

It has been shown in this case that Ned's Auto Supply Company, for instance, has handled the branded gasoline of the Respondent for 20 odd years, I believe, and has built up from a small to a large volume of sales. Now, assuming that for some reason Ned's Auto Supply Company was unable to continue to purchase that brand of gasoline, and assuming that he could purchase a brand of gasoline that had equal merit with Standard gasoline—parenthetically, that is a violent assumption to ask a Standard Oil marketer to make—is it not true that for a time, at least, he would lose business?

A. It is true. Any change which would result temporarily in a loss of business, unless the change were made from a less popular brand or an unbranded product to a
well-known branded product, which has very large
1767 public acceptance in the locality. All these brands
have more or less of the following: they have been
advertised, accepted by the public for many years, but there is a degree of acceptance which varies very considerably as between the brands. Standard Oil Company was one of the earliest marketers in this area, if not the earliest, and its products have been before the public and accepted by the public as a standard—and I am not playing on the word; I am using the word "standard" in its ordinary acceptance—and consequently the product and name, the brand have their individual following and Ned's

couldn't sell some of these people other products if he tried.

Trial Examiner Ballinger: Judge Hanley, the materiality of this line of testimony hasn't occurred to the Examiner.

Mr. Hanley: Well, of course, if your Honor please, I am not at all clear—indeed, I have never found anybody who was entirely clear—on just how the Robinson-Patman Act may be applied and interpreted. Theoretically, I assume it to be designed to prevent injury to anybody. I assume that the interest of the Commission in the handling of any application of the law is freighted with the underlying concept of public interest.

Now, there are always various elements in the public. One is the ultimate consumer. For instance, in this 1768 matter there are thousands of people who are buying gasoline and putting it in their automobiles. I assume that that is one element of the public that the Commission would have in mind.

Another element of the public that, I assume, would be regarded by the Commission, are the various marketers of gasoline which, in turn, break down into refiners and suppliers, into jobbers of these myriad types that have been testified to here, and retailers who follow no other function.

Now, any application of the law that results injuriously to any of that group or any of those groups, any application with distorts an obviously economically sound marketing structure, may well be regarded by the Commission as an improper interpretation and application of the law. It is no more proper that this law be applied in such a way as to injure one jobber than it is proper that it be applied in such a way, or not applied in such a way as to result against a public interest, having in mind the ultimate purchaser of gasoline; the consumer of gasoline.

We think that it is entirely proper in this proceeding to paint the entire picture for the Commission. All of these elements in the marketing structure, their place in it, how they reached that place, the functions that they per- 1769 formed and what would result if the thing were done which it seems to be the purpose of the Complaint filed in this action to bring about.

Unquestionably it is going to distort and re-arrange in some way a marketing structure in this country that has been the result of the growth of many, many years and involved many thousands of people and many millions of dollars.

Now, the purpose in this line of questions is simply to give the Commission the picture of what really happens in the marketing business.

Trial Examiner Ballinger: Doesn't this testimony or line of testimony presuppose a situation whereby an order might issue against, for instance, this Respondent, and the Respondent would be precluded from selling to these four companies in tank car lots and that one of their competitors, or somebody else, could step in and supply the same—that is, their product in like quantity, to the same four operators? Do you think that a condition of that kind would be tolerated or could exist or the Government would, under any condition, permit it?

Mr. Hanley: I am very sure it could exist, your Honor, as the expert marketers have testified. If the Commission were to file complaints against everybody in the industry and issue cease and desist orders against
1770 everybody in the industry, and everybody were put
on an equality and everyone were required to operate his business under the same rules, then I can see no reason why any one company could have any serious complaint. It might involve re-arrangements of their methods of doing business which might hurt them, but I don't think that under our system of government we can complain about the passage of a law that is a proper law and which applies equally to everyone. We just have to fit ourselves into that picture, but we have a situation here where it is quite apparent that this proceeding is starting at the wrong end of the road in this: that this Respondent has been singled out, out of all of the thousands of companies, large and small, that are operating under an accepted marketing structure.

The only thing that can happen in this proceeding is either that the Commission will say that we were either justified or have presented a sufficient defense, and dismiss the proceedings, or the alternate to that is that the Commission will say that we have been guilty of some infraction of the law and will enter a cease and desist order against us; one company.

Now, it would seem that it must be quite clear, without any evidence, notwithstanding, I recognize my obligation

to prove it on the record, that that kind of an order would
immediately result, so far as the Standard Oil Com-
1771 pany is concerned, in very serious damage. First, it
would deprive us of a tremendous amount of business,
and whatever other companies might do, I assume that the
policy of our company would be, if you entered a cease
and desist order against us here in Detroit, that even
though the order were limited to Detroit and to specific
jobbers, that we probably would operate in violation of
the spirit of that order in our own affairs elsewhere in
our territory.

1772 I think it may be unfortunate, but I think it is true,
just as these experts have testified, that that order
wouldn't be binding on any other company and they
wouldn't so regard it and they would just take our business.

Judge, the public interest hasn't been served at all. We have just been penalized for something we did in the past that was regarded as fair by everybody and the effect would be to penalize us and punish us for something that we did in the past, without having any future beneficial effect on the public interest, because nothing would be corrected. This thing would go on, just as it is going on now, without any result except that the Standard Oil Company would be sitting apart and hampered, restricted, placed under a rule of conduct that makes it impossible for it to compete with the suppliers who were engaged in identically the same line of business and with whom, I think, it is recognized we are entitled to compete on any fair basis.

Now I just feel that we are entitled to present that thing
clearly to the Federal Trade Commission. I said a moment ago I thought this proceeding was starting at the
wrong end. I mean by that that instead of the proceeding
picking out one company out of all of these thousands and,
in effect, making a guinea pig of that company, that this is
an industry situation and if this thing is wrong, which we do
not concede at all—which these experts say is sound—
but if it is wrong, if that is the view of the Commis-
1773 sion and if that is what this law means, if it is proper
to abolish this type of marketing by governmental
authority; law; then that thing ought to be done from the
foundations. It ought to permeate the whole structure. It
ought to be just the same kind of law as the law against
larceny. That anybody that violates it has committed an

offense. It ought not to be applied singly to one company when it is perfectly obvious in the industry that first it just punishes and damages that company and, secondly, it doesn't accomplish anything.

This matter, as I recall the so-called Mother Hubbard suit, started by the Attorney General, was not completed. It apparently wasn't regarded—this specific thing—as a vice and I think they have picked out about everything they could think of that was vicious, in the Attorney General's view, in the oil industry, and I don't understand that the Government now is seeking—I mean the Government in that suit—is seeking to place any such rule as this on the oil industry. That is the purpose of all this line of examination, Judge.

1774 Trial Examiner Ballinger: You may proceed.

Mr. Austin: If your Honor please, I object to the statement that the practice involved in this case is something that everybody agrees is fair and recognized. It obviously isn't considered fair or recognized by a lot of people who came down and complained to the Federal Trade Commission from time to time against it.

Trial Examiner Ballinger: The mere fact that the Federal Trade Commission instituted this proceeding indicates that they want and desire an inquiry into the matter.

Mr. Austin: Yes. And I don't think it is, of course, any defense, nor of any relevancy or materiality to show that other companies are engaged in the same practice. Because if someone else is violating the law, it is certainly no defense to the Standard Oil Company, and that goes without saying. And I don't think Judge Hanley was even attempting to suggest that.

But, after all, the Commission has issued four Complaints against four companies already, here in Detroit. And for the purpose of the hearings, I can't see how it is a subject upon which testimony should be taken as to the number of companies engaging in the same practice. I don't see that that proves anything one way or the other about the practice.

1775 Mr. Hanley: I don't want to be misunderstood, your Honor, about this thing. It is highly important to us, of course, and I don't want to be misunderstood at all. I, of course, concede that if I commit a murder and I am caught and tried, the fact that John Jones committed a murder and was acquitted is no defense for me.

If this thing is, indeed, against the law, I know of no reason why the Standard Oil Company or any other company shouldn't be proceeded against. We are not complaining about the mere fact that there is an inquiry. We think, however, that there has been no determination so far by the Commission of the application of this law to this type of a structure, and that the Commission—just in fairness to the Commission, as well as to the Respondent—is entitled to know the magnitude of the results that would follow by placing the rule on this one company. Now, assumedly—

Trial Examiner Ballinger: Now, the Examiner looks upon the evidence as more informative than having a direct bearing upon any issue in the case. And upon that theory we will proceed and admit it.

By Mr. Hanley:

Q. Mr. Marshall, assuming that a cease and desist order were entered in this case against the Standard Oil Company, the effect of which would be to prevent the
1776 Standard Oil Company from selling gasoline at tank car prices to the four jobbers, or any of them. What, in your judgment, would be the fact as to whether or not those four jobbers could purchase gasoline elsewhere?

Mr. Austin: I object, your Honor, on the ground that it is immaterial as to what Mr. Marshall thinks about whether those jobbers could buy from somebody else in the event that there was an order by the Federal Trade Commission, or upon any other contingency.

Trial Examiner Ballinger: Well, the Examiner is of the opinion that it has no direct bearing upon any issue in this case. It may have an indirect bearing. It may be informative. And upon that ground he overrules the objection and will take the answer.

A. With due respect to statements previously made by the Examiner in my hearing, I will say that these jobbers would be solicited, if not by suppliers who are already represented here, by suppliers who are not represented in direct operation. They would secure their requirements in tank cars at as favorable or possibly a more favorable price than they are enjoying today. But these jobbers would be placed in the position where they would be unable to go out in the open market and buy products of their own selection. They would be limited, in other words, to buying products not generally distributed in this area, having

1777 no public acceptance, and possibly of not as acceptable
quality. The Standard Oil Company would also be
prohibited from following the function for which it was
created, and which—

1778 Mr. Austin: I object to that statement and request
that it be stricken.

Trial Examiner Ballinger: That portion is granted.

Mr. Hanley: You mean as to the statement the Standard Oil Company—

Trial Examiner Ballinger: Yes, the purposes for which it is created.

Mr. Hanley: You may proceed with your answer.

A. (Continuing.) Can I express it differently?

The Standard Oil Company would be prohibited from entering into full enjoyment of the market that is available to it and selling on the same basis and to the same classes of trade as its competitors were permitted to do.

Q. Assuming, Mr. Marshall, that the outcome of this proceeding were to result in an order which prevented by any means what has been referred to as the dual operation, either on the part of a supplier or refiner, or on the part of a jobber; what in your judgment as a marketer would be the result with respect to the various jobbers doing business in the City of Detroit, and the result as to suppliers such as the Standard Oil Company?

Mr. Austin: Your Honor, I object to that question, and
I would like to have the objection to that question, the
previous question, and all further questions which are
based on, in any way, if the Federal Trade Commis-
1779 sion issued an order. Because the Federal Trade
Commission has no discretion as to whether it issues
an order or does not issue an order; it must issue an order
under the statute if it finds the law has been violated.
Therefore, questions as to what would happen if the order
was issued are entirely immaterial, because they could in
no way effect the discretion of the Commission, for the
simple reason that the Commission has no discretion.

The only question here is whether or not the Robinson-Patman Act has been violated. It is not even a question as it is under the Federal Trade Commission when the Commission has to determine whether there is a public interest. But although I believe that is only determined at the time of issuance of the complaint, perhaps by inference it might apply to issuances of an order. But upon that I express no opinion.

But under the Robinson-Patman Act, either it determines that the law is violated or is not, and if it is violated an order issues, and the Commission has no discretion to refuse to issue the order under those circumstances, regardless of what it may conceive to be the order or the public interest affected.

For that reason I believe that any questions based upon the witness' opinion, or asking the witness' opinion as to what may be the result of an order issued by the
1780 Commission in a Robinson-Patman Act case are improper.

Mr. Hanley: May I inquire, your Honor, is it regarded by your Honor as true that the Commission is without any discretion at all under the Clayton Act, and not entitled to regard the public interest in its interpretation and application of that act?

Trial Examiner Ballinger: The Examiner is of the opinion that the Commission would act only in the interest of the public.

Mr. Hanley: I had so understood the law and the policy of the Commission. But it seems not to be the view of Mr. Austin.

Just for my own information I wanted to get that clear.

Mr. Austin: My opinion is the only thing that the Commission can determine is whether or not the act has been violated.

1781 Now, if there is some question as to what the Act means, I don't know that I ever heard of—well, strike that.

But if conceivably in some way the question of public interest could be involved in an interpretation of the statute, than it might come in at that point. But certainly there is no question of consideration of public interest as to whether an order should issue once it is determined that the Act has been violated.

In other words, the Commission can't say, "Well, we think the Act has been violated, but we won't issue an order, because we think to issue an order would be contrary to public interest." The only remedy would be to go to Congress and ask for a repeal.

Mr. Hanley: Those statements are probably technically true, your Honor, but it seems we are getting a little metaphysical in these discussions. All we want to do is aid the Commission in sizing up this marketing structure.

Trial Examiner Ballinger: The objection is overruled.

Mr. Hanley: And to apply the law.

Trial Examiner Ballinger: The witness may answer.

Mr. Hanley: Will you read the question, please?

(The last question was read.)

Mr. Austin: I further object to that question, 1782 your Honor, upon the ground that it is speculative and not based upon any proper hypothetical set of facts and doesn't permit of a definite answer.

Trial Examiner Ballinger: Well, that runs to the weight of the evidence. The witness may answer.

A. In my opinion, and it seems to me quite obvious, that the activities of the jobber would be very materially circumscribed, with a resulting loss to them in the conduct of their business.

I have testified that the vast majority of the bona fide jobbers operate one or more service stations directly, as well as selling by tank wagon to dealers and consumers. And to the extent that their gallonage went through their service stations, their business would be destroyed. So far as the effect on the supplier, is concerned, it would take away from him—and I mean the industry, as a whole—a substantial portion of the market, which he could only regain by very heavy investments for direct operation, or owned facilities, which many marketers would be unable to make. And it would result in a restraint of competition, or restraint of trade, which I have always felt we wanted to avoid.

Any rule or ruling of this character which wipes out a long-established avenue of trade and commerce would, in my opinion, necessarily have the result I have indicated.

1783 Q. Mr. Marshall, it has been testified to, I think by Mr. Dyer and by Professor Clark—the testimony, I believe, you heard, did you not?

A. Yes, sir, I heard it.

Q. You may have testified to it yourself.

—that there were in instances at least economies in the use of the jobber system of distribution that made that system in certain localities and certain times more economical than the distribution could be done directly by a larger refiner. Do you agree that that is true?

A. Yes, sir.

Q. Then, is it not also true that if the results occurred that you have indicated in your opinion would occur in your previous answer, that it would have the effect in many instances of bringing about a less economical system of distribution than now exists?

A. That would necessarily follow.

Q. And that, in turn, would be reflected to the disadvantage of the public who buys gasoline, would it not, Mr. Marshall?

A. In several ways, yes.

Mr. Hanley: May I have this marked as a Respondent's Exhibit?

Trial Examiner Ballinger: The reporter will mark the document Respondent's Exhibit 23.

(The document referred to was marked, for iden-
1784 tification, "Respondent's Exhibit 23.")

Q. Mr. Marshall, I hand you what has now been marked for identification Respondent's Exhibit 23 entitled: "Dual Operations by Supplying Companies," and without stating the contents of the paper tell us what it represents, if you know.

A. In relation to certain towns which are listed here this statement purports to show the percentage in business done by certain companies who are listed on this statement, direct through their own operations or through jobbers.

Q. Did you have that compiled?

A. Yes, sir.

Q. Was it compiled under your supervision and direction?

A. Yes, sir.

Q. I will ask you, Mr. Marshall, if the figures that appear under column No. 1 relate to the Standard Oil Company, the Respondent in this action?

A. They do.

Q. Are those figures accurate and taken from your records and the records of the Respondent?

A. They are accurate and taken from the records of the Respondent, as far as the year 1940 is concerned. These percentages will vary, from year to year, of course.

Q. As to the other percentage figures relating to other companies, are you able to say that such percentage figures
closely approximate the percentages of gasoline sold
1785 through the various channels of distribution that are
indicated on the chart?

A. To the best of my information and belief, they do.

Q. Now, those figures and percentages are the same material that were under discussion, are they not, Mr. Marshall, in your testimony?

A. Yes, sir.

Mr. Hanley: Now, if your Honor please, I certainly don't want to bore the Court and burden the record with any further qualification. I am wondering if it may not be understood that the questions, the testimony relating to the qualification or competency of this witness to answer the questions asked of him yesterday, may not be regarded as the Respondent's testimony to qualify and form the foundation for the offer of this exhibit.

Trial Examiner Ballinger: I will hear from counsel for the Commission.

Mr. Austin: Is that being offered in evidence?

Mr. Hanley: I am going to offer it but, of course, I don't want to offer it until I have offered the testimony which I think qualifies it. I am just asking, now, to avoid going through a lot of those questions, if they may not be regarded as asked in support of this document.

Trial Examiner Ballinger: Your request is that the testimony introduced yesterday pertaining to this 1786 matter may be here considered in connection with the presentation of the matter now, is that correct?

Mr. Hanley: That's right. We haven't anything more to offer in the way of qualification or competency. I take it, unless there has been a change of mind or heart on the part of someone, that the ruling is going to be the same as it was yesterday. I just don't want to go through the mechanics of asking those questions again.

Trial Examiner Ballinger: Before the Examiner rules on that I want to direct the Reporter to read the last question and answer.

(The last question and answer were read by the Reporter.)

Mr. Hanley: I might ask one further question.

By Mr. Hanley:

Q. So far as you know, Mr. Marshall, they are the exact percentages, aren't they?

A. I again have to answer as I did before, that they are, to the best of my information and belief.

Q. And they may be exact?

A. Yes.

Q. But you are sure they closely approximate them? A. There is no question about that.

1787 Mr. Hanley: Is there any objection, Mr. Austin, to that line of testimony being regarded as supportive of the offer which I proposed to make?

Mr. Austin: I thought it already was in the record.

Mr. Hanley: It is. I wasn't offering any exhibit yesterday.

Mr. Austin: I don't see there is anything to object to there. There is no offer of anything in evidence.

Trial Examiner Ballinger: His request is to the effect that it may be considered as transposed and here considered.

Mr. Hanley: As supportive of this offer.

Trial Examiner Ballinger: As supportive of his offer.

Mr. Austin: There has been no offer yet, has there?

Mr. Hanley: No, Mr. Austin, but I didn't want to make the offer until I had the basis made. I will make it right away, as soon as I find out what you are willing to do about this.

Trial Examiner Ballinger: Irrespective of objection, it may be so considered.

Mr. Hanley: Very well.

I now offer Respondent's Exhibit 23, for identification, in evidence. 1788

Mr. Austin: I object, your Honor, on the same grounds stated yesterday. This states figures as to other oil companies upon which I would have no opportunity for cross examination, either as to the figures or as to the material from which they were based, and that it appears that this is simply a compilation of figures which the witness has made from other sources, and there is no original source of information offered.

Mr. Hanley: In fairness to counsel and Court I ought to direct attention to the fact that the first column reflects the Standard Oil figures, and I don't think you mean to object to that.

Mr. Austin: I don't object to the first column.

Trial Examiner Ballinger: The Examiner will permit counsel to read into the record that portion of this statement relating to the Respondent company, and sustains the objection to all other portions. You may read it in.

Mr. Hanley: If your Honor please, I am not sure that I want to read in the one list unless the Commission feels

it proper, ultimately, to consider all of the figures, so if
I may have the privilege of deferring the presentation of
that portion of the exhibit that is admitted until the deter-
mination of the ultimate question, I would like to do
1789 it that way. It will be available for everybody now,
anyway.

You may cross-examine.

Trial Examiner Ballinger: We will have a five minute recess.

(A short recess was had.)

Trial Examiner Ballinger: We will come to order.

Cross-Examination by Mr. Austin.

Q. Mr. Marshall, you stated that there is no argument that buyers in smaller quantities pay higher prices, and I believe you were making that general statement regarding purchasers of various commodities in various industries.

A. Yes, I did.

Q. Would you say that there is any relationship between the amount of an article purchased and the price paid in any industry, or as to any commodity?

A. There might be an exception, of course, but if there is an exception, I can't think of it at the moment.

Q. Well, do you think there is such a relationship, or there isn't?

A. Certainly there is.

Q. Well, what is the relationship?

A. Oh, you mean the definite relationship?

Q. Yes; any constant relationship.

1790 A. Oh, there isn't any constant relationship and
not necessarily the same relationship as between one
commodity and another.

I can buy a package of cigarettes for 15c and I can buy a carton of cigarettes for proportionately less per package. I can buy a single cigar for a price and a box of cigars at a substantially lower price, but, again, if I buy, say, a hundred boxes, I will get a still lower price than I will get for a box.

Q. Necessarily?

A. As a rule of the business. As a practice in the business.

Q. Well, don't you know that there are many manufacturers that charge the same price for—per unit for their articles?

A. On the list price, yes. They have a unit price; nearly everybody, I think, has a unit price.

Q. And don't you know that there are a lot of manufacturers that don't make reductions on quantity purchases?

A. If there are, I don't know who they are.

Q. Well, do you know that in the paint industry that the hardware store that buys $80 worth of paint gets the same price as the hardware store that buys half a carload?

A. No, I don't know that.

Q. Do you know that the Sherwin-Williams Paint Company and, I believe, the duPont Company make no reduction for an $80 purchase of paint and a carload
1791 of paint; anything less than a carload of paint?

A. I don't know—if you will pardon my saying so—what an $80 purchase of paint represents. I don't know how much paint they would get for $80.

Q. I assume that they get about 40 gallons.

A. I am sure they get more paint for $80, proportionately, than they get for $2. Proportionately, I mean.

Q. Well, let us ask about gasoline. If the Citrin-Kolb Oil Company orders a carload of gasoline and suppose that the next week they order two carloads; do they get a better order on the two carloads than the one?

A. No. The carload becomes the unit. In various industries there are different relationships. There is a relationship peculiar to the oil industry. It is not on the same basis as the sales of certain other products. In the oil industry we have a carload price and a tank wagon price and those who operate service stations have a service station price and these are the three units of purchase. We don't operate on the basis of a list price from which various deductions are made.

Q. Isn't that arbitrary, to make a tank car price and a tank wagon price? That is, suppose somebody wants half a carload?

A. They can't order half a carload, because it just doesn't come that way. You can't ship a half a carload, tank car of gasoline.

1792 Q. How much does a tank car hold?

A. Well, tank cars are of various capacities, running from—I don't think you get any of them much below six thousand gallons, today, and they run up, a very few of them, to twelve thousand, but a great many of them to ten thousand.

Q. Suppose a retail dealer orders delivery of two hundred gallons of gasoline and another retail dealer on the same day wants delivery of three thousand gallons of gasoline. Do they pay a different price?

A. Pay exactly the same price because it is within the same method of delivery and subject to the same unit of price.

Q. We are talking about quantities. Then it doesn't follow that the price varies according to the quantity?

A. That's what I said. In the oil industry the price structure is on a slightly and necessarily different basis than what it is with solids.

Q. And it might be, as to some solids, that there would be an entirely different arrangement as to the relation of price as to quantity, isn't that right?

A. I think I know what you are trying to get at but I cannot fix the breaking point. I attempted to bring that out with the cigarette illustration. Nobody buys one cigarette unless they buy it out of a vending machine. They have got a unit, there, which is the package and the next unit is the carton. Now that is certainly not true with certain other products.

1793 Q. Who fixes those breaking points, as you call it?

A. The industries themselves; by established custom.

Trial Examiner Ballinger: Those are arbitrarily fixed, aren't they?

The Witness: Surely. According to the—

By Mr. Austin:

Q. Now, Mr. Marshall, there was a retail dealer on the stand in this case who testified that he had a ten thousand gallon tank at his retail station. Assuming that he was buying his gasoline from the Standard Oil and he order the delivery of ten thousand gallons, which is as large as a tank car delivery. Would he receive the tank car price?

A. By what method of delivery would he receive it?

Q. The same method of delivery that you use in delivering to these four jobbers, here, which is by truck-train, at the present time.

A. By truck-train he would receive the benefit of the tank car price. By tank wagon, which, by the way, cannot deliver ten thousand gallons in one delivery—it would take many deliveries, because the tank wagons do not, as a rule, run over a thousand to fifteen hundred and, sometimes, in the rural districts not that high; three hundred fifty to five hundred fifty gallons, is the capacity of the tank wagon in the rural districts. It is based on the method
of delivery there plus the quantity involved. In other
1794 words, you can't get the method of delivery without
a certain quantity.

Q. I am assuming he orders ten thousand gallons. Now there is nothing to prevent you from running a tank train to his tank, as well as to the storage plant of the jobber, is there?

A. Oh, yes, there is. His tankage may not be so constructed or situated or placed that he can take tank train delivery, truck-train delivery.

Q. I am assuming he has a ten thousand gallon tank.

A. There are certain arrangements that have to be made in order to do that.

1795 Q. Well, will you permit anybody who has a 10,000-gallon tank and facilities for emptying the gasoline from the truck-train to purchase in tank car quantities?

A. If we accept the business, yes.

Q. If you accept the business?

A. Yes.

Q. The mere fact that he offers to buy and is able to buy in 10,000 gallon quantities, doesn't entitle him to the lower price, does it?

A. If we accepted the business and delivered to him through that method, he would get the benefit of that price.

Q. Well, but, do you accept the business from everybody who—

A. We can't take on all the business that is offered to us. We still reserve the right to select our customers.

Q. In other words, you may charge one man who offers to buy in 10,000-gallon lots one price, and somebody else who buys in the same quantity may pay another price; isn't that right?

A. No.

Q. Well, you just said you might not give this man with the 10,000-gallon tank—

A. I said we might not accept the business. If we accepted the business, I said he would get the benefit of the same price as others receiving deliveries in the same 1796 manner and for the same proportionate quantity.

Q. You mean you wouldn't sell to him at all or sell to him in tank-train?

A. We might not sell to him at all. I said we reserve the right to select our customers.

Trial Examiner Ballinger: Depending entirely on acceptance?

Mr. Austin: That is what I am trying to bring out.

By Mr. Austin:

Q. It doesn't depend on quantity at all, as I understand you, Mr. Marshall. It depends on whether or not you want to sell at a given price; isn't that so?

A. Well, of course, if we don't sell, the thing is all out. There isn't anything about it.

Q. Mr. Marshall, a witness in this case has testified, and Mr. Rupagh, who was your Detroit manager, has also testified, that an offer was made to purchase in 10,000-gallon lots at tank car prices, if the witness has a tank for that purpose, but he was not given the tank car price, although he was being sold gasoline by the Standard Oil Company. Now, he was refused, according to the testimony in this case, he was refused the tank car price upon deliveries of 10,000-gallons. I am not questioning—

A. Then we didn't accept the business.

Mr. Hanley: I object to that unless the witness 1797 is advised that no delivery was made by tank train in a 10,000-gallon lot.

Mr. Austin: That is true at that time.

By Mr. Austin:

Q. And I am asking the witness now, since it is established that they do deliver by tank-train to jobbers, whether there is any physical reason why you couldn't also make delivery by tank-train in 10,000-gallon lots to a retailer who has a 10,000-gallon tank.

A. No physical reason you mean?

Q. That's right.

A. Well, I can think of some physical reasons which you might think that I am drawing the long bow. There are a lot of things involved in it: industry problems and all that sort of thing. There is a limit to your capacity to

load and handle these trucks through your terminal. There
ought to be, and presumably is, some limitation as to the
crowding of the streets and time of deliveries and the
hours of the day you can work, and all that sort of thing.
And I have got to consider, and I do consider currently
the limitations of all these things, starting with the limi-
tations of the terminals from which the product may be
drawn, the degree of facilities that they have got there
for taking care of that type of business, and all that sort
of thing. We just can't have—if you are familiar with
the operations, you would appreciate it — we just
1798 can't have a myriad of trucks running in and out of
our plants all day long. We have got to utilize the var-
ious methods of delivery that are available to us. And
sometimes we reject the business on the truck-train basis
because of our inability to handle it agreeably to ourselves.

Q. Mr. Marshall, does every dealer, whether he be a retailer or jobber, who offers to buy in a 10,000-gallon quantity from you, is he entitled to a 10,000-gallon price? Is that the policy of your company? Or does it not depend on whether or not you want to give it to him?

A. It depends on whether or not we want to accept the business on that basis. And if we accept the business on that basis, with that method of delivery, he gets the benefit of that price.

Q. And if you don't accept the business on that basis, he doesn't get it?

A. That's right. And we continue to deliver by tank wagon, and he pays the tank wagon price.

But let me say this to you: that if there were a dealer
who had supplied himself with sufficient tankage and other
facilities to enable him to take deliveries by truck-train;
and we refused to accept the business on that basis and
give him the benefit of the truck-train price, he would buy
from somebody else. He would just be silly to con-
1799 tinue to pay us a higher price for the tank wagon
delivery when he had gone to the expense of making
the investment necessary to equip himself to get the bene-
fit of the lower price. So the whole thing is theoretical,
Mr. Austin, if you will pardon me for saying so.

1800 Q. What I am trying to get at, Mr. Marshall, is
as to whether a price is determined solely by quan-
tity or whether it isn't also determined to, at least a great
extent, by the pricing policy of the supplier?

A. In the oil industry the price is determined not only by quantity but by method of delivery, and all people—when I say "all" I am talking for the Standard Oil Company—all people in the same classification getting the same type of delivery pay the same price. We have a tank wagon price, we have a tank car price, we don't have any service station price ourselves today because we don't operate service stations.

Q. You concede that method of delivery is one thing by which the price is determined, and in addition quantity?

A. In the oil industry, yes.

Q. And the method of delivery may be withheld or granted in the discretion of the Standard Oil Company, isn't that right?

A. Certainly. The acceptance or rejection of the business is discretionary too.

Q. And that depends on your pricing policies?

A. No, it doesn't depend on the pricing policies; it depends on a lot of things.

Q. It depends on your policies—it depends upon your discretion as to how you want to do business and who you want to do it with?

1801 A. That's right, to a certain extent. It may depend on the physical conditions I have already pointed out.

Q. Then would you say that any purchaser who comes to the Standard Oil Company to order ten thousand gallons of gas, and assuming that his credit is good and you know he can pay for it, would you say that he is entitled to a tank car price?

1802 A. If we accept the business on that basis, yes.

Q. Well, is he entitled to it? Do you always—

A. He is entitled to it whether we accept the business or not. Yes, he is entitled to it.

Q. If he is entitled to it, why doesn't he get it?

Mr. Hanley: He does get it. I object to this. It is argumentative.

A. I don't know what you are getting at. I am trying to answer you.

By Mr. Austin:

Q. I am asking you if it is the policy of your company to grant a tank car price to anyone who has good credit and who orders 10,000 gallons of gasoline.

A. If he has the facilities to take in the tank car quantity.

Q. I request a yes or no answer.

A. I want to qualify my answer.

Mr. Hanley: I object to any demand for a yes or no answer to that question unless the witness himself wants to answer it that way.

A. I can answer you this way, Mr. Austin: I can say to you that a retail dealer who receives his products by tank wagon in two or three hundred lots or a thousand, even if it is a thousand a day, and in the course of a month buys twenty-five or thirty thousand gallons, 1803 pays the tank wagon price, regardless of the fact that he bought 30,000 gallons in a month. But if he is equipped with large storage, has the facilities to take tank-truck or tank-car deliveries, and we accept the business on that basis, if he only buys three tank cars representing 30,000 gallons in a month, he pays the tank car price.

Q. I understand that, Mr. Marshall.

A. So that again you have got a case there where quantity is not necessarily in the oil industry the controlling element, because there is the other important element of the method of delivery.

Q. I ask you again whether a dealer purchaser or would-be purchaser comes to you and orders 10,000 gallons of gasoline, and he has a place, he wants it all at once, and he has a place where he can receive it, and his credit is good, is it the policy of your company in every such case to sell that gasoline to such purchaser at the tank car price without any other considerations than I have mentioned?

Mr. Hanley: That is objected to as repetitious, already having been asked and answered, placing unfair and argumentative restriction on the witness. It has been asked and answered a dozen times.

Mr. Austin: I don't think he has answered my question. He has evaded it now.

1804 Trial Examiner Ballinger: Let me have the question, please?

(The record was read by the reporter.)

Trial Examiner Ballinger: The Examiner is of the opinion that a direct answer has not been given. The witness may answer. You may answer it yes or no and explain your answer.

A. With due respect to the Court, I must point out that the question is incomplete, in that it does not indicate the method of delivery desired.

By Mr. Austin:

Q. Well, the method of delivery desired is any method of delivery that the Standard Oil Company wants to get the gasoline there in. All the purchaser wants is the gasoline. He wants 10,000 gallons of it, and he wants it at one time.

A. Still incomplete, Mr. Austin. If we delivered it by tank wagon he would pay the tank wagon price; if we delivered it by transport truck, which we would not do unless all proper facilities were established, he would get the benefit of the transport truck price. I have already explained to you that the purchaser of as much as 30,000 gallons, taken piecemeal day by day throughout the month, pays the tank wagon price.

Q. I want to know whether or not the quantity
1805 ordered determines the price which you charge.

A. I have already informed you that in the oil industry method of delivery is also an element in determining the price.

Q. I have said that the customer isn't interested in the method of delivery; that is up to the Standard Oil Company. I am asking you whether or not the fact that a person will buy, can buy and pay for gasoline in 10,000-gallon quantity, entitles him—

Mr. Austin: And that is what I am getting at, this repeatedly saying somebody was entitled to a price because they buy a certain quantity. Now, what does he mean by entitled? Does that mean any time anyone orders 10,000 gallons of gasoline he gets tank car price he is entitled to it?

Trial Examiner Ballinger: I have understood the witness to state that an applicant might be entitled to it, to the tank car price, and his application might be rejected, that they reserved the right to select their customers and determine what orders they would accept and what they would not accept.

Have I correctly stated the situation?

The Witness: You have correctly stated the situation.

Mr. Austin: I understand that, too, but what does
1806 the word "entitle" mean?

By Mr. Austin:

Q. I want to know if someone buys in 10,000 gallons is he entitled to it? Entitled might mean, to my way of thinking, he has a right to it, and yet you say you have a right to refuse it.

Mr. Hanley: That is objected to as argumentative. It is a quibble on a question that isn't in this lawsuit at all, and that is the question of the right of the Standard Oil Company, or anybody else, to select its own customers. We don't have to sell anybody gasoline if we don't feel like it. We want to, as a rule. We are after the business, and so is everybody else. But everyone has the right to select his own customers.

Trial Examiner Ballinger: If the Examiner isn't unduly interrupting, the Examiner will ask the witness a few questions.

In the Detroit area, the Respondent company sells direct to the service station, does it not?

The Witness: Direct to service station operators, yes.

Trial Examiner Ballinger: It also sells through, sells to jobbers, does it not?

The Witness: Yes, sir.

Trial Examiner Ballinger: Who, in turn, are
1807 direct competitors of the company from whom they buy; that is correct, is it not?

The Witness: (No answer.)

Trial Examiner Ballinger: In the retail trade?

The Witness: Well, Judge, you have got another step in there.

Trial Examiner Ballinger: All right. Let us have the step.

The Witness: The Standard Oil Company does not operate any service stations.

Trial Examiner Ballinger: I appreciate that.

The Witness: They are in competition to the degree that they are in competition with the private service station operator.

Trial Examiner Ballinger: That's right. Now, some of your jobbers sell direct to private station operators, don't they?

The Witness: That's right.

Trial Examiner Ballinger: To that extent the Standard Oil Company is in direct competition to the jobber?

The Witness: Yes, yes. You mean as between whether the service station operator buys from us or buys from the jobber who is handling our products; yes, sir.

Trial Examiner Ballinger: Now, does not the 1808 question as to how many jobbers and to what extent the product of the Respondent company shall be sold through jobbers enter into the question as to whether or not you will accept or reject an offer in tank car lots?

The Witness: Would you kindly repeat that?

(The last question by the Examiner was read.)

The Witness: From a jobber?

Trial Examiner Ballinger: That's right.

The Witness: Yes, I would give consideration to that if the matter was presented to me.

Trial Examiner Ballinger: In other words, you would consider as one of the elements in determining an application as to whether you desired to sell additional gasoline through jobbers or whether you desired to market it direct?

The Witness: Yes, absolutely.

Trial Examiner Ballinger: That is all.

By Mr. Austin:

Q. Mr. Marshall, is anyone entitled to a tank car price or any other price from the Standard Oil Company?

A: If we accept the business and the customer has the necessary facilities. And again I might remind you the regulations of the Interstate Commerce Commission, you have got to recognize them.

Mr. Austin: I would like to request the Examiner 1809 to instruct the witness to answer my questions directly. I cannot proceed with this cross-examination if the witness is going to be continually making unresponsive answers on the record. I would like to go back and have the question read and have a yes or no answer.

The Witness: If your Honor please, I have no desire to be argumentative—

Trial Examiner Ballinger: Let me have the question, please.

(The last question and record were read.)

Trial Examiner Ballinger: Isn't the question repetitious?

Mr. Austin: No. Because I have been trying to get an answer for the past half hour, and he hasn't answered yet. The witness stated on direct examination that price was determined by quantity, and he also stated that anyone who bought in certain quantity was entitled to a certain price. And he has repeatedly refused to say whether or not if a customer wants to buy a certain amount of gasoline he is entitled to a certain price, whether in every case he gets it. And that is what "entitle" means to me.

Trial Examiner Ballinger: He also stated the Standard Oil Company reserved the right to select its own customers. He has already stated one or two other exceptions. And it seems to me that unless you desire him to particularize as to the exceptions—

1810 Mr. Austin: I don't. I want—

Trial Examiner Ballinger: He has admitted that the Standard Oil Company does not sell to everyone who makes application to purchase in tank car lots.

Have I correctly stated you?

The Witness: Yes, sir.

I am sorry, Mr. Austin, but I can't answer that question. I am trying to be helpful. Because you have not included some very essential elements. In the first place—

By Mr. Austin:

Q. I am not asking you, Mr. Marshall, what elements you consider or what the Standard Oil Company—

A. Then I can't answer your question.

Q. You can consider all the elements in your mind before you make the answer. I am simply asking you whether or not anyone who offers to buy from the Standard Oil Company in ten thousand gallon quantities and has good credit, whether it is the policy of the company to give him tank car price?

Mr. Hanley: That is objected to as repetitious, for the reason that the witness has stated time and time again, if after having considered the elements the Standard Oil Company accepts the business on a tank car basis, that that customer gets the tank car price, because he is then entitled to it.

Mr. Austin: That isn't an answer at all. They 1811 may not accept the business.

Mr. Hanley: They don't have to, do they?

Mr. Austin: No.

Trial Examiner Ballinger: The witness has stated repeatedly that they reserve the right to pass on the application, and that there are many elements that enter into the question as to whether they will or will not accept.

Mr. Austin: Then, why can't he say in so many words that anyone who offers to buy gasoline in ten thousand gallons is not entitled to it.

Trial Examiner Ballinger: He has said in effect, if not in so many words, that they do not accept every offer of that nature that is submitted.

Mr. Austin: Was that your testimony, Mr. Marshall?

The Witness: Yes.

Mr. Austin: All right. That is the first time it has been on the record, your Honor.

Trial Examiner Ballinger: He stated it in effect several times.

By Mr. Austin:

Q. Then, is it or is it not true, Mr. Marshall, that in the gasoline business that the quantity of gasoline purchased determines the price received, and I will say—I will limit that as to whether a person buys in tank car lots or less than tank car lots?

1812 A. When you limit it to that, then I have to say, yes, the quantity determines, because the quantity is one of the elements that determines.

Q. Wait a minute. I asked you if the quantity determined. If there are other elements, then the quantity doesn't determine.

A. The quantity becomes a unit in tank car sales, but it doesn't matter whether it is one or two or three.

Mr. Austin: Will you read the question?

A. You asked me that before.

Mr. Austin: Will you read the question, please?

Trial Examiner Ballinger: Read the question.

(The record was read.)

By Mr. Austin:

Q. Now, Mr. Marshall, when I asked you whether quantity determines, I mean exactly what I said, and not whether quantity and a lot of other things determine.

Mr. Hanley: Then the question is objected to as repetitious and argumentative. The witness has explained exactly how this thing happens.

Trial Examiner Ballinger: I thing the position of the witness is clearly portrayed on the record.

Mr. Austin: Can't he answer whether quantity does
or does not determine price? He said on direct examina-
tion there was no argument that it did. Now, I
1813 understand that—in many ways, except directly
admitted, that his direct testimony was not correct.
And I want to pursue the matter.

The Witness: We were talking about industry generally then. Not specifically about the oil industry.

Trial Examinar Ballinger: Can you answer that question with directness?

The Witness: Quantity is not the sole element that determines the price of gasoline.

By Mr. Austin:

Q. Ultimately, Mr. Marshall, does not the price charged to any purchaser to whom you choose to sell depend upon the pricing policy of your company? That is, does it not depend upon your company's individual pricing policies? And if you say pricing policies is too narrow, upon your marketing policy?

A. The actual price applicable to a specific shipment does, yes.

Q. And isn't that true as to any commodity in any industry, that is, the price charged a particular customer on any quantity depends upon the marketing and pricing policy of the supplier?

A. Yes; depends upon the practice in that particular industry.

Q. Mr. Marshall, in your testimony yesterday,
1814 page 1722 of the record, you were asked whether
these four jobbers in Detroit supplied by the Stan-
dard Oil Company—rather, as to those four jobbers, you
were asked whether their operations are such as to make—
make of them, I suppose, the type of buyer that is generally
regarded in the industry as a tank car buyer or jobber?
And you answered that their operations were of that type.
Now, in stating that the operations of those four jobbers
were such as to make them of a type generally regarded
in the industry as tank car buyers or jobbers—

Mr. Austin: Your Honor, I request that the witness be not referring to his testimony.

Mr. Hanley: If your Honor please, I insist that he has a right to see what he said.

Trial Examiner Ballinger: The Examiner rules that the witness is entitled to look at his testimony.

Mr. Hanley: You may look at that, Mr. Marshall.

Trial Examiner Ballinger: So that he may know what he did testify to.

Mr. Austin: I assume if I make any misstatement I will be corrected by counsel.

Trial Examiner Ballinger: If the witness desires to examine his testimony before answering, he may do so.

Mr. Austin: Well, if it is a question of misquoting, I certainly agree, I want to be corrected.

1815 Mr. Hanley: I don't know whether you misquoted or not. I am not presuming you did.

Mr. Austin: I don't believe the witness ordinarily has the right on cross-examination to—as a matter of fact, it is rarely that he ever has the opportunity, because the transcript isn't ready. I don't believe he would have the right to read the entire context of what he said before answering questions.

Trial Examiner Ballinger: He would be entitled to it to the same extent as though you were examining him on something that he had previously written.

The Examiner rules that if the witness desires, before answering the question, he may examine the transcript.

Mr. Austin: Your Honor, that would be impossible of being carried out in the ordinary case if I asked him something that he said this morning.

Trial Examiner Ballinger: The Examiner has ruled. Proceed.

Mr. Austin: All right. I don't say—

Off the record.

Trial Examiner Ballinger: Off the record.

(A discussion was had off the record.)

Trial Examiner Ballinger: On the record.

1816 By Mr. Austin:

Q. You are familiar with the testimony to which I just referred, Mr. Marshall?

A. Yes.

Q. In referring to what is generally regarded in the industry as a tank car buyer or jobber, were you referring to the definition which I believe Mr. Dyer put in the record a day or two ago?

A. Well, I didn't have the definition specifically in mind, when I answered the question.

Q. Well, I will turn back—

A. I wasn't asked whether it fell with~~in that~~ definition or not. I was just asked if they were generally regarded as the type known as jobbers or tank car buyer, as I recall the question.

Q. Are these four generally regarded in the industry as a jobber or tank car buyer?

A. Yes.

Q. I would like to read from Mr. Dyer's testimony in which he said—and I believe you stated yesterday that you agreed with Mr. Dyer upon this definition—

A. Yes, on the definition.

Q. "A jobber or a distributor or a wholesaler or a bona fide jobber is one who is engaged in the purchase and sale
of a petroleum product and who operates a storage
1817 tank or tanks of tank car capacity in conjunction with
the facilities for the storage of lubricants and grease;
and this bona fide jobber, distributor or wholesaler will sell a substantial part of his petroleum products direct to resellers or consumers but he may supply his own or controlled service stations or filling stations."

Now, is that the type of business which you referred to in your statement, that these four jobbers are what is generally regarded in the industry as a tank car buyer or jobber?

A. Surely. It is a type of business.

Q. In other words you are satisfied with the definition as applied to your answer to this question?

Mr. Hanley: Do you understand that, Mr. Marshall?

The Witness: I don't quite appreciate what you mean, Mr. Austin. I have adopted the definition and I have testified to these four operators in Detroit are the type that are generally regarded in the industry as tank car buyers or jobbers. I don't think I can go further than that.

By Mr. Austin:

Q. Then by the use of the word tank car buyer or jobber were you referring to the sort of jobber or dealer as described by Mr. Dyer?

Mr. Austin: Your Honor, the witness has testified to
this. I was trying to make it short by not question-
1818 ing him all over again as to what he means by jobber
and he can't even say, now, as to whether or not he
still agrees with Mr. Dyer, although he said so yesterday.

Mr. Hanley: You had better go ahead and ask him what he means, Mr. Austin, because if you don't, I am going to.

Mr. Austin: He has, already, and you are bound by his testimony,—

Mr. Hanley: I am not bound by that definition at all.

Mr. Austin: That he said he agreed with Mr. Dyer. Now I want to know if he doesn't agree with him any more. I want to know that.

Trial Examiner Ballinger: The witness says he will answer.

A. I will say yes, although I didn't have in mind specifically the definition. I answered the question as put to me.

By Mr. Austin:

Q. If you had anything else in mind than that definition when you made this answer yesterday, what did you have in mind?

A. Regular trade practice.

Q. What did you have in mind by tank car buyer or jobber, as generally regarded in the industry?

A. The type of people that are under discussion
1819 now; that is, these four jobbers. They represent
both classifications.

Q. Did you have in mind what was described by Mr. Dyer and, if not, what did you have in mind?

Mr. Hanley: That is objected to as repetitious. The witness just got through saying what he had in mind.

Mr. Austin: I don't understand it that way at all.

Mr. Hanley: Read it please, Mr. Reporter.

Mr. Austin: It seems to me the answers of this witness are continually evasive.

(The question and answer referred to were read by the Reporter.)

Trial Examiner Ballinger: That certainly is responsive.

Mr. Austin: Why no, your Honor, because what he said was that these four jobbers are of the type generally regarded in the industry as tank car buyers or jobbers. Now I wanted to know just exactly what he means these four people are. I assumed he meant what Mr. Dyer described. Now, he is not sure of that, any more.

Mr. Hanley: That is a mis-statement and unfair to the witness.

Mr. Austin: I have asked him three times to tell me what he does mean, or if he accepts Mr. Dyer's definition.

Mr. Hanley: I object to that as untrue. You have 1820 asked him three times, and more than that, and he has answered it three times.

Trial Examiner Ballinger: Objection sustained.

By Mr. Austin:

Q. Mr. Marshall, will you describe what is the type of buyer that is generally regarded in the industry as a tank car buyer or jobber?

A. A jobber—I have got to differentiate—a jobber is one who equips himself with large storage facilities which enable him to buy gasoline and other products in car load lots which he distributes by tank wagon to dealers and consumers and may sell through service station facilities operated by himself.

Q. Did you say that he sells part of his—

Mr. Austin: Will you read the answer, please?

(The last answer was read by the Reporter.)

By Mr. Austin:

Q. Now, Mr. Marshall, that was only preliminary. I was simply trying to establish what we were talking about. If any concern which meets the description you have just given, comes to the Standard Oil and desires to place an order for the purchase of gasoline in tank car quantities, what do you consider before determining whether or not to fill that order?

A. Well, the first thing, naturally, is whether we 1821 want the business.

Q. If you don't want it, you don't accept it, is that right?

A. If you don't want it—and there are various reasons why we might not want it—we just don't go any further with it.

Q. Would you say, then, that any such concern coming to you was entitled to buy gasoline from you on a tank car basis?

A. Entitled to buy gasoline on a tank car basis; not necessarily from us, but if he bought from us he would get the tank car price.

Q. But, as you say, there are various considerations upon which you might not sell?

A. Yes; again getting back to the question of the right to select our customers.

Q. Yes, which I am not questioning.

A. No.

1822 Q. Then, so far as the Standard Oil Company is concerned, would it be true that anyone filling the description you have given would be entitled to buy on a tank car basis?

A. Yes. I will go further and say: couldn't be sold on any other basis.

Q. I am directing your attention to the word "entitled." You said you might refuse to sell him for considerations of your own.

A. Yes.

Q. If he is entitled to it, how could you refuse to sell him? I think it is a question of what we mean by the word "entitled," Mr. Marshall.

A. Well, I qualified my previous answer. I said not from us, necessarily, but that he was entitled to buy.

Q. But I am asking now only as from you; whether such a buyer or any other buyer is entitled to buy anything from the Standard Oil Company.

A. I have to answer that, no, because there is no obligation to us to sell to anybody if we don't want to.

Q. Well, of course, I expected that that would be your answer. And it is true, isn't it?

A. Yes.

Q. So not to be repetitious again, but regardless of the qualifications of the would-be customer, and whether he fills this description or not, it wouldn't follow from any
1823 description of his business, or regardless of the type
of his business, it wouldn't necessarily follow that you would sell him, would it?

A. Not at all. Not at all.

Q. Now, Mr. Marshall, again referring to these four tank car buyers in Detroit, you are familiar with them; the same ones we have been talking about?

A. Yes.

Q. You were asked what, in your judgment, is the fact as to whether or not each of these four jobbers could at any time, now, purchase gasoline from a number of different suppliers on a tank car basis and your reply was: "My definite knowledge is that they could." Do you recall that testimony?

A. Yes.

Q. If you wish to see it, it is on page 1722 of the record. Now, how do you know, and what is the source of your definite knowledge that each of those four jobbers could at any time now purchase gasoline from a different supplier on a tank car basis?

A. Well, in the first place, I am fully familiar with the fact that other oil companies are endeavoring to sell their goods in the Detroit market.

In the second place, it is reported to me—

1824 Mr. Austin: I object to what is reported, Mr. Marshall, if you please.

Mr. Hanley: He is answering the question, your Honor. It may be hearsay, but it is what he asked him.

The Witness: Well, I have already answered it, but I was going further—

Mr. Hanley: Go ahead. Finish your answer.

Trial Examiner Ballinger: You may answer.

A. —that one or more of these jobbers has advised us that he has been solicited and is being solicited currently by other suppliers.

Mr. Austin: Now I move to strike that last sentence, your Honor, on the ground that it is hearsay.

Mr. Hanley: We resist the motion. It is the explanation of the answer which the witness was asked about.

Trial Examiner Ballinger: Motion is denied.

Mr. Austin: Well, I take it that that is only the reason for the statement that he gave, so that I concur in your Honor's ruling.

I would like to have the first sentence read, please, of that last answer.

(The answer was read as follows: "Well, in the first place, I am fully familiar with the fact that other oil companies are endeavoring to sell their goods in the Detroit market.")

1825 By Mr. Austin:

Q. Mr. Marshall, do you have any personal knowledge of any offer made to any of these four jobbers by any other oil company to sell them gasoline at tank car prices?

A. No, sir, I have had no personal contact with these jobbers. They are sold, or they are handled by our Detroit people, our Detroit office. I don't have personal contact with them.

Q. Then, having in mind the fact you said a moment ago that the Standard Oil might exercise its right to refuse to sell to any customer, if the Citrin-Kolb Oil Company, for instance, applied to a particular supplier of gasoline, wouldn't that supplier have the same right to refuse to sell to the Citrin-Kolb Oil Company for any reason it chose?

A. Surely. In that event, they probably wouldn't solicit them, though.

Q. I didn't say who solicited who. It might work either way?

A. Yes.

Q. But I think I did assume that the jobber went to the oil company.

A. Well, that very seldom happens. A trough doesn't come to a horse, you know!

Mr. Austin: Your Honor, based upon the answers 1826 which the witness has given, I move to strike from the record the answer of the witness to the question on page 1722 of the record, in which he says: "My definite knowledge is that they could," on the ground that the witness has just testified that he has no personal knowledge upon which he based that answer, and it is based upon hearsay and upon simply his general knowledge to that other suppliers of gasoline are selling at tank car prices in Detroit.

Trial Examiner Ballinger: May I see the record, please?

(A copy of the record was handed to the Examiner.)

Mr. Hanley: I would like to be heard, if there is any thought in your Honor's mind of granting that motion.

(Thereupon the Examiner referred to a copy of the transcript.)

Mr. Hanley: The motion goes to the one answer: "My definite knowledge is that they could."

Mr. Austin: Yes. And I want to say that that is what I have been trying to lead up to by a good deal of this testimony which I hope, now, its relevancy appears, if, perhaps, it didn't at the time I was trying to ask the preliminary questions.

Trial Examiner Ballinger: Do you resist the motion?

Mr. Hanley: I resist the motion, Judge. All I can say 1827 about this is that the examination which has now transpired on cross may go to the weight of the testimony; that is, it may go to the basis upon which the wit ness expresses the thought that he had definite knowledge, but it doesn't go to the extent of saying that you can take a witness' answer out of the record. This witness believed the man that told him that these jobbers had definite offers and they did have, and we are going to prove it, and I suppose that's what's troubling Mr. Austin is that there is a definite statement in the record that these jobbers could have bought from somebody else besides the Standard Oil Company. I don't think they are entitled to ask to have an answer of a witness stricken simply because his knowledge of the answer is the result of the information which has been brought to him by others. That is the way we get most of our information.

Mr. Austin: I suppose that is a question of practice, whether or not it is proper or necessary to strike the answer from the record. I believe it definitely appears now that the answer is valueless and is not based upon definite knowledge, although the witness stated that it was his definite knowledge. Whether that is sufficient or whether my motion is in order to strike it from the record, is a matter which I certainly refer to your longer and broader experience.

1828 Trial Examiner Ballinger: The Examiner is not familiar with the procedure suggested by counsel. The Examiner denies the motion on the sole ground that the question is one of weight to be attached to the witness' answer.

By Mr. Austin:

Q. I believe, Mr. Marshall, you said yesterday at one point that the Gulf Oil Company was engaged in the practice in Detroit of exercising the so-called dual function; that is, that it sells direct to retail stations and also sells to jobbers?

A. Yes.

Mr. Hanley: What oil company?

Mr. Austin: Gulf Oil.

A. I didn't testify exactly that way, but it was one of the names I mentioned I was going to give some figures on.

Q. You mentioned Gulf Oil as to Detroit, I am sure of that.

A. Yes.

Q. And I don't believe you mentioned any other oil company in Detroit, specifically.

A. Yes.

Q. To what jobbers does the Gulf Oil Company sell in Detroit?

A. I couldn't give you any names. I merely know the fact it is so.

1829 Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. How do you know that the Gulf Oil Company sells to a jobber in Detroit, Mr. Marshall, without in any way disputing the fact; that is, without your assuming that I am, because I am simply asking for information.

A. I testified yesterday as to the manner in which I obtained all of the information. I was so informed and have been so informed from time to time by the Detroit management and verified that at the request of Judge Hanley in advance of this hearing.

Q. That is the information you received through your contacts with the Detroit office of the Standard Oil Company?

A. Yes, sir; in that particular instance.

Q. And you say you don't know any particular jobbers—

A. I don't recall the name of the jobber, no.

Q. This morning I think you mentioned some large jobber that does around 5,000,000 gallons a year business.

A. Yes.

Q. That you had particularly in mind, and I believe you said he was as large or larger than Ned's Auto Supply Company.

1830 A. Somewhere about that.

Q. Was that a jobber in Detroit or somewhere else?

A. No, that jobber was in Chicago.

Q. Would you mind stating his name?

A. I had in mind Gale and Sloan, who are jobbers of Socony Vacuum Oil Company products, and I also had in mind Waggoner's Service Stations. They operate a number of super service stations in Chicago. At the present time I think—I don't want to be positive; my mind is getting a little confused on the break-down of the brands, but I think they are handling Texas, I am not sure.

Q. Perhaps, then, you were referring, in the case of that jobber—perhaps in that testimony you had the same thing in mind that you had when you mentioned, I believe, awhile ago, upon questioning by Judge Hanley, certain Chicago jobbers who sell more at retail than Ned's Auto Supply, in your opinion?

A. That's what I had in mind, yes. There was one of our own I hadn't mentioned.

Q. What I intended to ask you was: whether you did say or did intend to say that those jobbers handled or sold more gasoline than Ned's at retail? What you said was they sold more gasoline than Ned's Auto Supply Company. I just wanted to ask you whether they were retailers, largely, or are they partially or largely wholesalers?

1831 A. My understanding of their operations is that they are retail entirely. This Waggoner Service Station, regardless of whose product they handle, is entirely a retail operation, and, to the best of my knowledge, and belief, Gale and Sloan is also a retail operation.

Q. Do they both operate bulk plants and deliver to their own stations?

A. You get into a still further element there which has not been brought up before, which is one that I didn't naturally think of, because we don't do it. It is on that chart of marketing operations that was introduced in evidence, and that is what is called a yard hauler. There are not a great many instances, within my own knowledge, but there are some, and these two I speak of are examples of that type.

They take over the transportation of the product from the bulk plant to their own service stations. In other words, they are permitted to drive into what is ordinarily the bulk plant, as distinguished from the terminal or refinery, with their own trucks and to do their own transportation and they get a yard price on the basis of being yard haulers, which is just another ramification of this competitive activity in the oil industry.

Q. You mean they drive their own trucks into the oil company's bulk plant?

1832 A. Yes, and get the benefit of a price that is lower than the tank wagon price, but according to my best information and belief may not be exactly as low as the tank car price or the transport truck price.

Q. You don't know the exact price that they pay?

A. I don't know the exact price, but I know it is a preferential price. There are just so darn many ramifications in this oil industry, unless an example of this sort comes up, that it might not be mentioned.

Q. How do you know it is a preferential price?

A. Oh, it is common knowledge in the industry and it is evident from the marketing set-up followed by these people. They wouldn't do it if they didn't get a preferential price. They wouldn't spend the money for trucks and labor and hauling and all that sort of thing.

Q. At least you assume they wouldn't?

A. I know darn well they wouldn't.

Q. That reminds me of one other question that I was going to ask you, Mr. Marshall. Perhaps you have already inferentially answered it.

Didn't you say awhile ago that there would be no point in the jobber operating the bulk plant and making his own deliveries unless he got a better price than he could get at a service station?

A. That's right.

1833 Q. That is, assuming that he operates a retail service station?

A. That's right.

Q. Now, again assuming that the jobber is wholly or largely engaged in resale at retail like Ned's and some of these others we have been talking about, how much better price must the jobber receive to make it worth his while to operate the bulk plant and make his own deliveries?

A. Well, that is more governed by industry practice and competitive situations than by how much he must receive. There isn't any such thing as how much he must receive. It is how much can he get.

Q. Of course, he would get all he can, I suppose.

A. Yes.

Q. Now, let us assume it cost a jobber a cent and a half a gallon to take on this additional operation of operating the bulk plant and making his own deliveries and suppose he gets a cent and a half gallon better price than the tank wagon price. Then he still wouldn't gain anything, would he, by having some tank wagon deliveries?

A. No, he isn't much ahead, there; if anything.

Q. Well, tell me whether it is or is not the general rule and practice that the jobber's margin is more than enough to compensate him for the actual expense of his jobbing operation. 1834

A. I would think, from my experience, that the jobber's margin, as a rule, outside of these highly competitive areas where it may be shrunk, as it is here and there—and I am thinking of the two cents and the two and a half that obtains in some areas, and even the three cent that occasionally obtains—is, as a rule, at least enough and sometimes more than enough to cover the difference of the cost of these operations, unless the jobber anticipated that he would make some profit out of that or gain some advantage out of that type of operation, I don't think he would go into that. You can't make a positive statement on that, because there are differences of degress in efficiency of operation on the part of the jobbers. Some of them are better business men than others, and all that sort of thing enters into it, but, on the whole, I am satisfied with my answer, if you are.

Q. Assuming a man is operating a chain—had a chain of retail stations that he operated himself. He could get delivery by tank wagon. Now, there wouldn't be any point in him changing over to tank car delivery and operating a bulk plant unless—wouldn't his natural objective in doing that be to make a profit; more profit?

A. Yes; to gain more personal advantage in doing so. The unfortunate thing is most of them don't gain
1835 the personal advantage; sometimes it is passed out in the reduction of price, for instance, in the trackage station I referred to yesterday, and all that sort of thing. Those trackage stations get their advantages in large gallonage rather than in additional profit per gallon.

Q. But take the normal case. If there is a normal case of a jobber who—I believe you mentioned one in Chicago, and we have Ned's here—who are engaged entirely in or almost entirely in selling at retail rather than in serving other dealers. Wouldn't you assume that they would not be purchasing in tank car quantities unless there was more profit in that than buying in tank wagon?

A. That would be the natural assumption, otherwise there would be no reason in the world of going to the expense, the risk of the investment, and all that sort of thing.

Mr. Austin: I think that's all I have.

836 *Redirect Examination by Mr. Hanley.*

Q. Mr. Marshall, the Court asked you a number of uestions on the subject of the various things that you conidered when you determined whether or not you would ccept a certain jobber's business. Do you recall the tesimony of Mr. Dyer and Professor Clark wherein they aid, in substance, that a choice was made by distributors f gasoline as to whether they would indulge in direct ales to retailers or operate through jobbers or employ the ual method of distribution and in their judgment, usully, the question was resolved on the economies and adantages of distribution, as the particular company viewed t at the time in the locality. Do you recall the testimony f the substance of that character?

A. Yes.

Q. In your experience and observation is that generally done by oil companies when they determine upon what method of distribution they will use?

A. Surely. They have to make a selection.

Q. And is that what you mean when you say that there re times when you give consideration to the fact that whether you already have distribution, either through jobbers or through direct operations in determining whether you will accept business further from jobbers?

A. Yes.

1837 Is it not true, Mr. Marshall, that there are a great many things that are considered by the Standard Oil Company, at least when a decision is made, as to whether or not a customer will be sold; on any basis?

A. Yes, sir.

Q. I take it that in the main, you want to sell as many customers as you can?

A. Surely.

Q. And as much gasoline as you can?

A. That's right.

Q. A very lengthy examination was made of you, Mr. Marshall, as to the basis for the difference in price between the tank car and the tank wagon methods of pricing or delivery and some effort was made to tie you to the proposition that quantity, solely, and nothing else, made the difference in pricing in gasoline and I understand you to—

Mr. Austin: On the contrary, Judge, I was trying to prove just the opposite.

Mr. Hanley: You may have been trying to prove the opposite but that is the way I got it.

By Mr. Hanley:

Q. Anyway, you said, Mr. Marshall, did you not, that so far as gasoline was concerned, methods of delivery and quantity were both elements which resulted in pricing these different units like tank wagon and tank car?

1838 A. That's right.

Q. Now in the very physical nature of things isn't there a very definite relation between the quantity that may be involved and the method of delivery, in the gasoline business?

A. Yes, there is, because of the limitation of the size of the tank truck that is used in the tank wagon method of delivery and the limitation of the capacity of the tank car. You can't make a shipment with a thousand gallons in a ten thousand gallon car. If you put five thousand gallons in a ten thousand gallon car the thing would topple over the first corner it went around, the first curve, I mean, because of the swishing back and forward of the fluid in the car and, anyway, you pay on the full capacity of the car, whether it has a full volume in it or not. Suppose you get a ten thousand gallon car and are foolish enough to let it go out with nine thousand or ninety-five hundred gallons, even if the railroad accepts it and can handle it safely, you pay on the capacity of the car.

Q. In your judgment is it not or is it true that this practice in industry, generally, of granting lower prices as a rule for larger quantities is affected in part, at least, by the different methods of delivery that are applicable to large quantities, as contrasted with the methods of delivery that usually are employed in delivering small quantities?

A. That is true.

1839 Q. So they are rather inseparable; they are rather an inseparable thing; in the gasoline business, at any rate, aren't they?

A. Yes, sir.

Q. You were asked a number of questions about whether or not a jobber, as you have repeatedly defined a jobber, was entitled to buy from the Standard Oil Company and you have explained the reservation, the right of that company to select its own customers. Then you were asked

you had said that a jobber of the character that you have
escribed would not just be entitled generally to buy gaso-
ne on a tank car basis and you said yes, he would be en-
tled to buy. I will ask you if it is true that what you
ean by that is that if some one supplier chooses to sell a
bber, as you have described a jobber, that in the view of
he industry, generally, that jobber would be entitled to the
ank car price?

A. That is a correct statement.

Q. That's without reference to any compulsion on any
ompany to sell?

A. Yes.

Q. And you do not mean, I take it, Mr. Marshall, that
ny jobber is entitled to buy from any supplier in the sense
hat some supplier has to furnish gasoline.

A. That's true.

1840 Q. You answered, Mr. Marshall, that you had definite knowledge that the four jobbers in this action
ould at any time now purchase gasoline from a number
f different suppliers on a tank car basis. You remember
he discussion about that answer in your cross-examina-
n?

A. Yes.

Q. I will ask you now, based on your experience, knowl-
edge, and observation, what is your opinion as a marketer
of gasoline as to whether or not these four jobbers or any
one of them could at any time purchase gasoline in tank
car quantities and on the tank car price basis from a number of suppliers other than the Standard Oil Company,
at this time?

A. My opinion is that they could; definitely.

Mr. Hanley: That's all, your Honor.

Trial Examiner Ballinger: Any further questions?

Mr. Austin: No.

Trial Examiner Ballinger: Mr. Marshall, you are excused.

(Witness excused.)

Trial Examiner Ballinger: Now, at 1:00 p. m. the hearing stands at recess until 2:00 p. m.

(Whereupon, at 1:00 p. m., a recess was taken until 2:00 p. m.)

1841 Afternoon Session.

2 P. M.

Trial Examiner Ballinger: Come to order.

ELMER E. LEDBETTER having been heretofore duly sworn, resumed the stand and testified further as follows:

Trial Examiner Ballinger: You have been previously sworn?

The Witness: Yes, I have.

Direct Examination by Mr. Abbott (Continued).

Q. Mr. Ledbetter, yesterday Exhibit 21, for identification, was offered in evidence as to the per gallon price of wholesaling gasoline by the Wayne Oil Company. That was objected to by the Commission because, among other things, it was based on net profit basis rather than on an operating expense basis. Now, have you, at my request, since that, taken the figures from the Wayne Oil Company books to show the per gallon cost of wholesaling gasoline on an operating expense basis in relation to gallonage sold?

A. I have.

Q. And are you now prepared to state the per gallon wholesaling cost for 1938, 1939, and 1940, on the basis of operating expense in the wholesaling of gasoline alone as it pertains to Wayne Oil Company business for those years?

1842 A. I am.

Q. Taking the year 1938, what were the total sales of the Wayne Oil Company, including the State Highway and Federal tax on gasoline?

A. Total sales in dollars and cents was $276,202.04.

Q. And what was the State Highway and Federal tax on those sales?

A. $71,683.82.

Q. Leaving a total net after deducting taxes of what amount?

A. $204,518.22.

Q. Now, what were the gasoline sales excluding the Highway and Federal tax?

A. $169,109.68.

Q. I understand, then, that the item of $204,518.22 involved something else besides gasoline?

A. It does.

Q. What else?

A. All other sales made by the Wayne Oil Company.

Q. Now, what were the total of sales other than gasoline wholesaled by you in 1938?

A. $35,408.54.

Q. What was the percentage of gasoline sales to the total sales, expressed in percentage?

1843 A. Using the total sales, not including Highway and Federal tax, the percentage of gasoline sales to those net sales was 82.7%.

Q. And that represents the percentage of gasoline sales alone?

A. That's right.

Q. Excluding Federal tax?

A. Yes, excluding Federal and Highway State tax.

Q. And also State Highway tax?

A. Yes.

Q. What was the total operating expense, then, for 1938, on the total sales?

A. The total operating expense of the Wayne Oil Company for 1938 was $33,059.66.

Q. What was the total expense for the wholesaling of gasoline, applying that percentage that you have just mentioned?

A. $27,340.34.

1844 Q. What was the total gallonage of gasoline sold in 1938 by the Wayne Oil Company?

A. 1,821,002 gallons.

Q. And what was the cost per gallon of wholesaling gasoline, based on those figures, for 1938?

Mr. Austin: Your Honor, I assume that this calls for the conclusion which has been led up to and I object to the witness answering the question on the ground that the question is immaterial and irrelevant to any of the issues in this case.

Mr. Abbott: What is the particular basis of the objection?

Mr. Austin: I think I stated it at some length yesterday, that I urged that the cost of selling gasoline at wholesale is immaterial. That the cost of selling gasoline at retail by a jobber may be material to some extent but even there it must be limited to expenses resulting, or attributable to the operations which are engaged in by tank car buyers but are not engaged in by tank wagon buyers.

Mr. Abbott: Now, if your Honor please, we submit that this evidence is admissible on two grounds:

First, on the ground that the expense of wholesaling gasoline by the Wayne Oil Company is material on the question as stated by your Honor yesterday when your
Honor stated that if the differential of a cent and a
1845 half between the tank car and the tank wagon price
is not amortized or used up by the expense of selling, that there is an opportunity on the part of the person who is engaged in the wholesaling of gasoline, if he has retail stations, it is indulged in price-cutting and it is, therefore, very material for us to show what percentage if any of the differential which the Wayne Oil Company enjoys in buying gasoline in tank car lots is used up by way of expense in the marketing of that gasoline until the time that it gets in the tanks of the retail seller and the purpose of this testimony is, therefore, primarily to show that there is no such opportunity on the part of the Wayne Oil Company because, as we shall show, the cost of handling and selling gasoline by the Wayne Oil Company is approximately the same as the differential between the tank car and the tank wagon differential.

1846 Now, in the second place, it is contended that this
testimony is material in that it has a tendency to show whether the differential is justified by the difference in the costs of marketing. That, I realize, is primarily a question for the Respondent to show by its own figures as to its marketing costs, but the operation of the Respondent and the operation of the jobber is essentially the same. I mean the steps taken in marketing between the bulk plant and the tanks of the retail dealer. They have the expense of maintaining the bulk plant, the administration expenses, depreciation on their investment, interest on the money invested, and the expense of hauling equipment; the expense of maintaining their personnel and salaries; those things go into the question of ~~whether the~~re is an opportunity on the part of the wholesaler, who also retails, as your Honor so aptly said yesterday, for him to indulge in price-cutting operations, and, thereby, to disturb competition, and I think

that this is very material to the Respondent's case to show what the actual costs of the jobbers are. For that reason I submit that the testimony should be admitted.

Trial Examiner Ballinger: Does counsel for the Commission desire to be heard further?

Mr. Austin: Well, I don't know that I have any further statement to make. I still, however, feel that as
1847 to a wholesaler or jobber, that there is no basis here
on any of the issues for making of any relevancy the cost of that jobber in selling gasoline to other dealers. Of course, where he sells through a retail station, there are certain operations which would be engaged in in the same way, whether the gasoline would be sold to another dealer or delivered to a retail station, and there may be some of those costs that are material in certain limits, but I just don't think it proves anything after you have got it in.

Trial Examiner Ballinger: That is the question that has been bothering the Examiner. I understand the total cost of distributing the oil, after it reaches the hands of the jobber, is, after it has been delivered in tank car lots, the total cost of distributing that to not only his own stations but to all of the service stations that he sells to, those expenses, as I understand now, are intermixed in this statement; is that correct?

Mr. Abbott: This includes only the wholesale costs, and, as your Honor stated yesterday, it bears upon the question of opportunity of the person who engages in the dual operation of price-cutting, and that is the principal purpose for which it is now offered, because if it should appear that there is no difference between the differential between the
tank car and the tank wagon price of the cent and a
1848 half, and the amount which it costs the jobber to do
that operation, then, you see, there is no opportunity for the cutting of price. In other words, if he has no margin, then he can't offer gasoline to the public at his retail stations for less than the amount which it costs him. He would have a loss, otherwise.

Trial Examiner Ballinger: Is it not a fact that it cost less to deliver to his own service stations than it does to market it by selling it to other service stations which he supplies?

Mr. Abbott: Well, that is a question I would like to ask the witness, instead of answering it myself. I think we ought to go into that. But I think this—

Trial Examiner Ballinger: I think you should go into that before there is any question as to the cost of marketing.

Mr. Abbott: I don't think the one necessarily depends on the other. However, I would be glad to ask the witness the question.

Trial Examiner Ballinger: I think that should be inquired into first.

By Mr. Abbott:

Q. I will ask you, then, Mr. Ledbetter—

Mr. Abbott: I understand that this question has not been answered, and I would like to have it understood
1849 that after I go into this other matter—

Trial Examiner Ballinger: The Examiner is reserving his ruling on the question.

Mr. Abbott: Yes.

By Mr. Abbott:

Q. Is there any distinction or difference between the cost of selling and transporting gasoline to one of your company-operated stations and the oest of selling it and transporting it to one of your dealer stations? Do you understand the question?

A. I think I do. There were no company-operated stations in the period about which I have just testified.

Q. That is 1938?

A. Yes. Does that answer your question?

Q. Yes. Well, as to that year it ought to answer it. That year, I understand, that all of your business was with resellers and not through any retail cutlet?

A. I had no company-operated stations in the year 1938.

Q. Very well.

Mr. Abbott: Now, for that year, I think, if the Court please, with that explanation, that the original question should be answered. I will ask him the same question, of course, with reference to any possible difference for the year 1939.

Trial Examiner Ballinger: Now, the Examiner
1850 doesn't appreciate the relevancy of that testimony as to that year.

Mr. Abbott: Well, we have got to strike an average, of course, and see whether it might be more for one year than for another. I mean, the cost of wholesaling might be different for one year than for another. So we would like to take three years in order to see whether it represents a fair situation.

Trial Examiner Ballinger: It is the opinion of the Examiner that you are entitled to show the cost of transporting your gasoline from bulk stations to and delivering it into the tank of the service station operated by your company. Any other testimony doesn't appear to be relevant. But upon that point I would be very glad to hear from counsel.

Mr. Abbott: Well, the Robinson-Patman Act, if the Court please, provides that it is a defense, one of the defenses which may be urged is that—and this is the provise in Section 2 of the Act: "Nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery,"—

Now, your Honor mentioned delivery, but it includes also sale as well as delivery.

"—resulting from the different methods or quan-
1851 tities in which such commodities are sold or delivered."

Trial Examiner Ballinger: But the difficulty that the Examiner encounters is that here is a company that is engaged in a dual operation. First the jobber's functions, and is what the Examiner would consider properly the jobber's function, buying it in quantity and reselling it.

1852 Now, you have another portion of the business, and that is the retail business.

Mr. Abbott: Which is only incidental, and which did not exist at all in 1938 as this witness has testified.

Trial Examiner Ballinger: Now, the Examiner doesn't appreciate the materiality of testimony with reference to the cost of jobbing. I don't understand that there is any question present in this case where the party devoted his business exclusively to that of a jobber, but it is only where he has intermingled the jobbing business with the retail business that complaint is made.

Am I correct about that, Mr. Austin?

Mr. Abbott: Is that correct?

Mr. Austin: I would like to say in the first place I don't see that the—

Mr. Abbott: Will you answer the question of the Examiner, Mr. Austin, because I would like to have it on the record.

Trial Examiner Ballinger: I would like to get it cleared up.

Mr. Austin: I would like to say first that the proviso of the Robinson-Patman Act refers only to the Respondent Standard Oil Company, so I don't see that has any application at all.

Mr. Abbott: I wish again to interrupt and ask Mr. Austin if he won't please answer the question of the
1853 Examiner.

Mr. Austin: I will get to that in a minute.

Mr. Abbott: All right.

Mr. Austin: Do I understand the question to be that the issues in the complaint only apply to sales by jobbers at retail or where they sell both at retail and wholesale?

Trial Examiner Ballinger: I take it that is the ground of this complaint.

Mr. Abbott: What I understood your Honor to say was, you asked him this question:—I think I would like to have the Stenographer repeat it, because I think it is important.

Trial Examiner Ballinger: Read the question.

(The Reporter read the following statement: "Trial Examiner Ballinger: Now the Examiner doesn't appreciate the materiality of testimony with reference to the cost of jobbing. I don't understand that there is any question in this case where the party devoted his business exclusively to that of a jobber, but it is only where he has intermingled the jobbing business with the retail business that complaint is made.

Am I correct about that, Mr. Austin?")

Mr. Austin: Well, the amendment to the complaint which has, I understand, just been made—and I say parenthetically I have been trying to get from Washington the copy of the order amending it, but so far haven't
1854 succeeded, so that your Honor could have it before him—the complaint as amended alleges that certain of these jobbers, including the Wayne Oil Company and the Citrin-Kolb Oil Company, resell to certain dealers, and that as the result of the discrimination in favor of those companies as against other retailers, some of whom are in competition with their customers, competition with their customers may be injured. In other words, if either of these companies passes on a part of that cent and a half differential to a subdealer, that subdealer has a competitive advantage over a station buying direct from the Standard Oil Company.

Trial Examiner Ballinger: Well, is it the contention of counsel for the Commission that the Respondent must police the sales after they are consummated to the jobber?

Mr. Austin: It is, your Honor, in territories where, as here, the Respondent elects to sell direct to retailers in the same territory. The theory there is that it would be idle for the Commission to prohibit the Respondent from directly discriminating between retailers, if it might set up a jobber, or through a jobber sell gasoline and the jobber perhaps at the Respondent's direction, and under the Respondent's control, which are matters which would be most difficult of proof, might have the jobber give the same concession to a retailer which the Respondent is now giving directly, and the Respondent might accomplish by indirection that which it would be prohibited from

1855 accomplishing directly, and it would be a matter most difficult to prove.

Mr. Abbott: You mean then we are required to reserve control over the gasoline after it is sold to a jobber?

Mr. Austin: If you elect to sell direct to retail stations by tank wagon in a district, and you also sell to jobbers in the same district, and the jobber resells at less than your tank wagon price, that you are responsible for that discrimination.

1856 Mr. Abbott: What part of the Robinson-Patman Act do you claim covers that?

Mr. Austin: It is the result of the better price you give the jobber, you are selling to the jobber at a lower price than you are selling to your tank wagon stations.

Mr. Abbott: You say that affords him an opportunity to discriminate?

Mr. Austin: Affords the jobber the opportunity to pass part of that differential on.

Mr. Abbott: The purpose of this testimony is, your Honor, to show the differential is all used up in the cost of wholesaling, and, therefore, it has a direct bearing on the question as to whether that opportunity is afforded to the jobber. I would like to say, though, before your Honor rules on that, that Mr. Austin hasn't yet answered the question.

Mr. Austin: I answered that a long time ago.

Mr. Abbott: No. Your question was this—I think I am stating now the question of the Examiner—

Trial Examiner Ballinger: The Examiner has received from counsel an answer satisfactory to the Examiner.

Mr. Abbott: Then I would like to ask a question of Mr. Austin.

1857 Trial Examiner Ballinger: You may.

Mr. Abbott: Is it your contention in this case in situations where the jobber does no retailing at his own outlets, that there is no offense charged, and that this complaint is not intended to cover situations of that kind?

Mr. Austin: Well, if the jobber does no retailing in his outlets, he still might resell to some of his customers, as I said a moment ago, at a price below the posted tank wagon price of the Standard Oil Company.

Mr. Abbott: Where there is no testimony in the Commission's case of any such situation, do you claim then that you have a case based upon that situation? I mean where you have not shown—

Mr. Austin: There is some proof of that in this case.

Mr. Abbott: Where you haven't shown that there is any distinction made or any preference given in the sale of gasoline to the dealer outlets, we will say, of such a company as Stikeman Oil Company, and where they operate no service stations of their own, do you claim, then, that there is any case predicated upon a situation of that kind?

Mr. Austin: Well, I would say as to a case like Mr. Ledbetter, where if there is no proof that he has cut the price to any of his subdealers, that there would be 1858 nothing in his testimony which would support the theory which I have just outlined as contained in the amendment.

Mr. Abbott: When you say "subdealer" do you mean a dealer?

Mr. Austin: A dealer to whom he sells.

Mr. Abbott: Yes.

Trial Examiner Ballinger: There has been no proof adduced by the Commission that shows or tends to show that he has sold at preferential prices to retailers who have utilized the reduction in cutting prices, is there?

Mr. Austin: There has been no proof, I believe, that Mr. Ledbetter has sold to any retailer at a lower price than the prevailing price.

Mr. Abbott: In that case, then, I make a motion formally on the record that as to the Wayne Oil Company the complaint be dismissed and that the Wayne Oil Company be removed from any further consideration in this Complaint.

Trial Examiner Ballinger: Your motion should be properly addressed to the Commission. The Examiner has no power to act on it other than to deny it.

Mr. Abbott: Then I make it for the record because, in this case, I think that motion should be granted, and I wish to make it a matter of record.

Trial Examiner Ballinger: There is some evidence here that at certain times the Wayne Oil Company has operated its own service stations. I am not certain
1859 whether there is any evidence—and I ask to be advised with reference to that—as to whether service stations operated by the Wayne Oil Company participated in the price wars and reduction in prices.

Mr. Abbott: There is no testimony, as I understand, on the record, to that effect.

Trial Examiner Ballinger: Is there, Mr. Austin?

Mr. Austin: I wouldn't want to make any commitment on that point, your Honor. It has not been shown that the Wayne Oil Company sold to anybody below the tank wagon price.

Mr. Abbott: The question is whether any of their dealers sold to the public at less than the prevailing marke prices.

Mr. Austin: I wouldn't say that the Standard Oil Company was responsible for that, if they did. In other words, if the service station pays the same price as anyone else, I suppose if he wants to cut the price to the public, he has a right to do it.

Mr. Abbott: You mean, without any reflection on the Standard Oil Company?

Mr. Austin: Yes. If they all pay the price, they are on the same competitive advantage.

Mr. Abbott: So you don't claim, in that case, we
1860 don't have to do any policing?

Mr. Austin: No. I would like to call attention, as long as the reference has been made to the Act, to Section 2-A of the Clayton Act.

Mr. Abbott: You mean as amended?

Mr. Austin: 2-a of the Clayton Act as it stands now, yes, which refers to "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them."

The case I was just putting is within the Act in that it is an injury to competition with customers of these jobbers; that is, the customers of persons who receive the benefit of the discrimination, and that may be true where the jobber sells to the retail station at lower than tank wagon price, but where that theory is invoked it seems to me it is entirely immaterial what the jobber's costs are of selling to his customers, because if the jobber has a cent and a half margin and he is selling to his customer at a one cent margin, the more it costs the jobber, the less able he is going to be—the more it costs the jobber to handle that gasoline, why, the more obvious it is that the concession that he has is necessary to enable him to sell at that price. It doesn't do a bit of good to show it cost him a cent or a half cent or two cents—the fact of the matter is, 1861 he is still selling it on the margin of a cent.

Trial Examiner Ballinger: Evidently there has been, attemptedly, to bring into the case a new element, an additional element.

Mr. Abbott: One more link, as it were.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

1862 Mr. Abbott: The point I make from the discussion which has just been indulged in between counsel and the Examiner is this: If there is nothing in the processes of the Wayne Oil Company which have been substantiated which would reflect on the liability of the Standard Oil Company in this complaint, then I say that that part of the complaint referring to the Wayne Oil Company should be dismissed from further consideration in the case.

I realize that the Wayne Oil Company is not a Respondent here; the Standard Oil Company is the Respondent. However, if it appears, and it does now appear, it seems to me that nothing has been shown with reference to the practices of the Wayne Oil Company which would constitute any violation of the law, then I say that any case predicated on their practices should be dismissed. I mean that part of the complaint should be dismissed and withdrawn from further consideration in the case.

I don't see why we should be put to any defense with reference to the oil company's operations.

Mr. Austin: Well, if your Honor please, there is plenty of evidence here as to the Wayne Oil Company which is very material and relevant.

Mr. Abbott: At what point?

Mr. Austin: It has been proved that the Standard Oil

Company sold to them at a lower price than you sell
1863 to other dealers in Detroit.

Mr. Abbott: We sell to them at the regular tank car price.

Mr. Austin: It is true they operate some retail stations?

Mr. Abbott: But it has been shown they never sell for less than the prevailing retail market price, in the Detroit area.

Mr. Austin: That depends on whether or not there is a case against the Standard Oil Company, when we get through. I don't see how it is possible to separate this thing and they are not a Respondent, either.

1864 Mr. Abbott: It is also a fact that there is no proof
that the Wayne Oil Company ever sold to any of our dealers at less than the regular dealer tank wagon price at any time.

Mr. Austin: Those are things to argue before the Commission on the whole record, Mr. Abbott. At least, that is my opinion.

Trial Examiner Ballinger: Is there a motion pending?

Mr. Abbott: There was an objection made by Mr. Austin relative to the offer of proof of costs of the Wayne Oil Company in wholesale operations for the year 1936.

Trial Examiner Ballinger: The Examiner, to save time, will admit the evidence subject to objection, and at the conclusion a motion to strike in whole or in part.

Mr. Austin: Now that that objection is disposed of, I wish to make another one upon the ground that the witness has not been qualified as an accountant and that he has admitted joint costs are involved here and it has been necessary to make an allocation, and it is my contention that only an expert accountant is able to do that.

Mr. Abbott: He qualified yesterday. For one thing, he
testified he was the treasurer before he went into the
1865 oil business of the Everhot Heater Company, a Detroit company manufacturing hot water heaters. That he had, in that position, charge of the financial affairs of that company.

He testifies, also, that he is the majority stockholder of the Wayne Oil Company. In fact, it is a family corporation, and that he has charge of the management of its financial affairs and is the one who takes care of the books of that company.

That he has taken these figures that he is now proposing to submit to your Honor in the record, from the books of the company.

Now, I don't understand that anyone, to testify about his own personal, financial affairs has to be a certified public accountant or even an accountant who is not certified.

Trial Examiner Ballinger: Isn't there a question of allocation?

Mr. Abbott: That is true, but nobody knows anything more about that than Mr. Ledbetter himself. The only allocation here is between gasoline sales and sales of other merchandise, and he has determined that in the same way that Mr. Taggart did in the testimony which Mr. Taggart gave.

By Mr. Abbott:

Q. Have you determined it from the proportion of gross
sales of those commodities, gasoline and other mer-
1866 chandise; is that the basis, Mr. Ledbetter, upon which
that has been computed in dollars?

A. I am not quite sure what you mean by gross sales.

Q. I mean gross sales less taxes, both Federal and State.

A. Yes:

Mr. Abbott: That is just exactly the same thing that Mr. Taggart did, as I understand it, only Mr. Taggart didn't reduce the cost of gasoline by the taxes, which we claim he should.

Trial Examiner Ballinger: To save time, again, the Examiner reserves an objection to counsel for the Commission; the objection is overruled, reserving, further, the right to counsel for the Commission to strike the testimony in whole or in part.

Mr. Abbott: Very well.

By Mr. Abbott:

Q. Now, Mr. Ledbetter, we got down to the cost per gallon of gasoline for 1938. Will you state what that cost was; I mean the cost for wholesaling gasoline for that year?

A. The cost per gallon was 1.501¢ or one thousandth of a cent over a cent and a half.

Q. Now, taking the same study for the year 1939, what were the total sales, including State Highway and Federal tax for that year?

1867 A. $314,210.97.

Q. What was the amount of the State Highway and Federal tax on gasoline sold by you during that year?

A. $86,656.52.

Q. What was the amount of total sales less State Highway and Federal tax?

A. $227,554.45.

Q. Now, what was the amount of gasoline sold during that year, excluding Highway and federal tax?

A. $180,907.39.

Q. And what were the total sales of merchandise, other than gasoline?

A. $46,647.06.

Q. What was the percentage of gasoline sales to total sales?

A. 79.5%.

Q. What was, then, the total operating expense for 1939?

A. $43,715.80.

Q. And what was the total operating expense for gasoline during 1939?

A. $34,754.06.

Q. What was the total gallonage of gasoline sold in 1939?

A. 2,212,085.

Q. And what was the per gallon cost of wholesaling
1868 gasoline, based on those figures, during 1939?

A. 1.571¢

Q. How much was that in excess of 1½¢ per gallon?

A. .071¢.

Q. That is to say it was .071¢ in excess of a cent and a half; is that right?

A. That's right. I believe that's right. The cost was 1.571¢.

Q. Now, taking the figures for 1940, what were the total sales, including State Highway and Federal tax of the Wayne Oil Company during 1940?

A. $374,422.98.

Q. What was the amount of the State Highway and Federal tax on gasoline sold?

A. $98,272.57.

Q. What was the amount of total sales less the Highway and Federal tax?

A. $276,150.41.

Q. Mr. Ledbetter, in the $98,272.57, I think I said State Highway and Federal tax on gasoline. Did that include some other merchandise upon which there was some Federal taxes or State taxes?

A. No, we just used that on gasoline in these figures.

Q. I had in mind the Federal tax on lubricating oil.

Now, what was the total sales less Highway and 1869 Federal tax? Would ~~you~~ just give that?

A. $276,150.41.

Q. What was the total in dollars of gasoline sales excluding Highway and Federal tax?

A. $193,672.48.

Q. What were the total sales other than gasoline?

A. $82,477.93.

Q. That is, of merchandise other than gasoline?

A. That's right.

Q. Now, what was the percentage of gasoline sales to total sales?

A. 70.1%.

Q. What were the total operating expenses of the Wayne Oil Company for 1940?

A. $49,720.96.

Q. What was the gallonage for that year, 1940?

A. 2,340,671.

Q. What was the total operating expense allocated to the sale of gasoline?

1870 A. $34,854.39.

Q. And what was the cost of selling gasoline per gallon at wholesale during the year 1940?

A. 1.489¢.

Q. That was how much under a cent and a half?

A. .011¢.

Q. .011 of a cent less than a cent and a half, is that right?

A. That's right.

Q. Now, I want to ask you this: In the item of total operating expenses for 1938, will you state what items you include in that figure of $33,059.66?

A. Do you want the amounts of each item?

Q. Yes.

A. Salary and wages, $18,135.72.

Charged off bad debts, $633.43.

Interest paid, $100.44.

Taxes, $1,065.85.

Depreciation of equipment, $2,294.22.
Insurance, $87.16.
Telephone, $720.76.
Advertising, $2,494.83.
Maintenance of equipment, $532.04.
Miscellaneous expense, which means various expenses not previously classified, $6,295.21.

1871 Q. What is the total?

A. $33,059.66.

Q. That is the total which you have testified to in connection with your testimony as to 1938 per gallonage cost of wholesaling gasoline?

A. Yes.

Q. Now, on that miscellaneous item, Mr. Ledbetter, that you supported by your books which you have at your place of business?

A. Yes.

Q. And are those items of depreciation and interest on money and property invested, and other items such as that, taken from your income tax reports for that year of 1938?

A. Well, they are all in the income tax reports, taken from our books.

Q. I see. Have those been verified and accepted by income tax authorities of the United States?

A. They have. 1938 has. 1939 has.

Q. Very well. Now, taking the same comparative item in your 1938 account, namely total operating expenses for 1939, will you state what items enter into that figure, the same as you have for 1938?

A. Well, salaries and wages, $21,345.39.

Mr. Austin: If your Honor please, if these are all going in for every year, why wouldn't it have been much 1872 easier to put it in a schedule, instead of reading them off into the record?

Mr. Abbott: We only have one more year, we are just about through with it.

Trial Examiner Ballinger: Proceed.

Mr. Abbott: All right.

A. Loss on rent, $366.16.
Bad debts, $716.37.
Interest, $78.27.
Taxes, $995.64.
Depreciation, $2,506.17.
Maintenance of equipment, $508.31.

Telephone, $1,080.84.
Insurance, $1,406.48.
Advertising, $4,432.77.
Allowances in discounts, $2,146.41.
Reserve for doubtful accounts, $1,805.21.
Truck expense, $1,170.04.
Stationery, $108.86.
Legal expense, $50.11.
Postage, $286.19.
Miscellaneous expense, $4,712.58.

Q. Making a total of what?

A. $43,715.80.

Q. Now, referring to the 1940 statement, will you 1873 state into the record the total operating expenses for 1940 in itemized form?

A. Salaries and wages, $25,378.28.
Loss on rent, $1,213.67.
Bad debts, $2,250.09.
Interest, $74.97.
Taxes, $1,802.32.
Depreciation, $2,702.50.
Maintenance of equipment, $1,401.74.
Telephone, $1,258.64.
Insurance, $986.51.
Advertising, $3,594.04.
Truck expense, $971.58.
Stationery, $88.94.
Legal expense, $113.64.
Postage, $455.71.
Station expense, which means the loss at gas stations company operated, $32.43.
Miscellaneous expense, $7,445.90.

Q. Total?

A. $49,720.96.

Q. Now, are those figures, Mr. Ledbetter, all supported, that you have just now read, are they all supported by your books to which access is invited to the Commission if it so desires?

1874 A. Right.

Q. It would appear from your figures of operating costs for these three years of 1938, 1939, and 1940, that the per gallonage cost of wholesaling gasoline for those three years, if you average it, amounts to slightly in excess of a cent and a half per gallon; is that not true?

A. I haven't figured it, but I believe it is; the average of those three figures I believe would be slightly in excess of a cent and a half.

Q. You mean to say then that your company actually lost business by reason of being a tank car customer and receiving the cent and a half differential when your operating cost was more than a cent and a half?

Trial Examiner Ballinger: You don't mean lost business, do you?

By Mr. Abbott:

Q. I mean lost money?

A. No, we never have lost money, we have always made a little, shown a little profit.

Q. Well, what do you mean by that? Your salary is included in the figures, is it not?

A. Right.

Q. And in the figures as to the salaries and wages, have you set up there in some way so that you could put it in the record as to the amount of salary that you have
1875 drawn for those three years?

A. I have it here.

Q. Will you state on the record what that has been?

Trial Examiner Ballinger: Do you want the salaries of all executives?

Mr. Abbott: No, just the salary of Mr. Ledbetter.

By Mr. Abbott:

Q. I have it here, I don't know whether I took it off your figures or where I got it, but I show you this memorandum just to refresh your recollection, without putting it in evidence, and ask you whether that refreshes your recollection as to the amount you received for salaries in 1938, '39, and '40?

A. Well, I have it right down here for the two years except 1938, and I have it in my file, but I recognize the figure.

Q. Will you state, if you please, what was the amount for 1938 that you received for your salary?

A. $9500.

Q. And for 1939?

A. $8250.

Q. And for 1940?

A. $12,000.

Q. And the other items of salaries and wages covered what?

A. Cover my help, employees.

1876 Q. Both office help and drivers and persons who are in the personnel of the company?

A. That's right.

Q. Is that right?

A. That's right.

Q. Now, Mr. Ledbetter, did you ever have offers or solicitations to purchase your gasoline at tank car prices or less from any other suppliers of gasoline besides the Standard Oil Company?

A. Yes, I have.

1877 Q. And will you state who those companies were that made such offers to you?

Mr. Austin: Pardon me. What period is that referred to, Mr. Abbott?

Mr. Abbott: I am asking him what companies made such offers during any time since he became a tank car customer of Standard Oil Company or before he became a tank car customer of Standard Oil.

Mr. Austin: Your Honor, ~~I object~~ to that unless it is directed to specific conversations, and if it is based on letters or written offers, I submit that they should be introduced. If it is based on any personal conversation with representatives of an oil company, then I request that the witness be directed to state with whom conversation was had and when it was had and what was said.

Mr. Abbott: Very well.

Trial Examiner Ballinger: It should be confined to the period since June, 1936.

Mr. Austin: Yes.

Mr. Abbott: You mean after he became a tank car customer?

Trial Examiner Ballinger: Yes.

Mr. Abbott: Or do you mean after the time that the Robinson-Patman Act became effective?

1878 Trial Examiner Ballinger: After the effective date of the Robinson-Patman Act.

Mr Abbott: Very well.

Well, now, I don't mean by saying "very well" to admit that we are bound in the case of these jobbers to confine our questions on that to offers made since 1936 or since 1935, or any other date, because in the case of some of these jobbers that have been jobbers for a long time, some competitive offers may have been made previous to 1936.

I just make that for the record, because I don't want to be bound by any statement I make to the effect that we are willing to be circumscribed in our testimony to that extent.

By Mr. Abbott:

Q. Now, will you state, Mr. Ledbetter, what companies did make competitive offers to you, or did solicit your business to serve you on a tank car basis, and whether the offer was made in writing, and if not, how it was made, and who made it? What was the first company that solicited your business to serve you on a tank car basis?

A. Well, the first one that I can testify to, of course, is fairly recent, because I don't remember those things too long definitely. But on December 10, 1940, Wayne Oil
Company was offered 80 octane gasoline delivered
1879 by transport truck at our bulk plant at the price of
6.1¢ per gallon without tax.

Q. That is to say excluding tax?

A. Yes.

Mr. Austin: Your Honor, I assumed, or, rather, understood—

Mr. Abbott: We are going to bring in the name of the company. I understand you want that, and want the name of the person who made the offer, is that right, on behalf of the company?

Mr. Austin: Know how it was made. And I don't know whether it is admissible testimony. If the offer was made in writing, I claim the answer is inadmissible.

Mr. Abbott: I will ask this witness this:

By Mr. Abbott:

Q. Was the offer made by the company that you have reference to, in writing, or was it made verbally to you by some representative?

A. Verbally.

Q. And you say it was made on December 10, 1940?

A. Right.

Q. And who was the person who made the offer?

A. Howard MacGready, Howard J. MacGready.

Mr. Austin: Your Honor, I object to the form of the

questioning. The proper way for these questions to
1880 be asked, I submit, is to ask him whether he had a conversation with a representative of some oil company on a certain date, and have him say what was said. Now, counsel is referring to who made an offer; did he receive an offer from a certain oil company, and I claim that those questions are improper and leading and not based on anything which the witness has said. I am only insisting on this now, because they are evidently going on over a period of transactions.

Mr. Abbott: I will ask him what the conversation was.

By Mr. Abbott:

Q. You may state what the circumstances were and what was said between you and the representative of the oil company and also state, if you will, the name of the company.

A. The name of the company was Aurora Gasoline Company.

Q. And you may state also—you have already stated the date—state the circumstances and the conversation that took place as nearly as you can. I don't mean state the exact words, but just the purport of how it happened.

A. The purport of it was that they offered to sell me 80 octane gasoline delivered by transport truck at our bulk station at the price of 6.1¢ a gallon.

Q. How did that happen to be said? Where was the offer made?

1881 A. In the Detroit-Leland Hotel.

Q. And who was present besides you and the man whom you say represented the Aurora Gasoline Company?

A. Nobody.

Q. And what was his name?

A. Howard J. MacGready.

Q. How did you happen to be at the Detroit-Leland Hotel?

A. I believe we were over there together at the Oilmen's Club.

Q. What is the name of the Oilmen's Club?

A. Detroit Oilmen's Club.

Q. And did you happen to be there for lunch or under what circumstances?

A. It runs in my mind that we were at lunch or there prior to lunch.

Q. What is 80 octane gasoline, as mentioned by you?

A. Pretty good gasoline.

Q. Well, how does it compare with the ordinary house brand gasoline, if you know?

A. Very favorably.

Q. Well, do you mean by very favorably, that it is comparable or better?

Mr. Austin: Your Honor, I have to object to that again on the ground of lack of qualifications. That seems to me something for a chemist to testify to.

1882 Mr. Abbott: I think Mr. Ledbetter, no doubt, knows the gasoline business. It is not shown that it involves any technical understanding of octane rating, but is only a designation of a certain quality of gasoline, so far as I understand. I think the witness can clear that up, if your Honor has any question about it.

Mr. Austin: I think he should be qualified as to whether he can compare one brand of gasoline with another, and whether he knows what is in them.

By Mr. Abbott:

Q. Mr. Ledbetter, is there anything of a technical nature about octane rating of gasoline?

A. Well, somewhat, yes, and in some respects, quite a lot. But for the purpose of determining general overall qualities of gasoline, not so much. It is a generally accepted method of comparing performance qualities of gasoline.

Q. According to its octane rating, is that right?

A. Yes.

Q. Now,—

Mr. Austin: I think there is an objection that hasn't been ruled upon, and I would like the question re-read.

Trial Examiner Ballinger: Read the question, please.

(The following question: "Well, how does it 1883 compare with the ordinary house brand gasoline, if you know?" and record were read by the reporter.)

Mr. Austin: That is the question I object to, your Honor.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: Let me reframe the question, Mr. Ledbetter.

By Mr. Abbott:

Q. How does 80 octane gasoline, if you know, compare with the octane rating of house brand gasoline?

A. Which house brand?

Q. Standard Oil house brand.

A. At that time I believe 80 octane was higher than Standard Oil's house brand.

Q. And you say that Mr. MacGready—I believe that is the name of the man?

A. MacGready, yes.

Q. How do you spell that?

A. M-a-c G-r-e-a-d-y.

Q. And how is he identified, if you know, with the Aurora Gasoline Company?

A. Sales manager, I would call him. It was in that capacity.

1884 Q. Sales manager?

A. Yes.

Q. Is the Aurora Gasoline Company a local gasoline company?

A. Yes, it is.

Q. At that time you say he offered you a price delivered by transport truck at your bulk plant at the price of 6.1¢ per gallon, excluding tax?

A. Right.

Q. How did that price compare on December 10, 1940, with the then-prevailing Standard Oil truck transport price of gasoline, house brand gasoline of Standard Oil Company?

A. It was half a cent less than Standard Oil's price.

Q. ½¢ less?

A. Yes.

Q. Per gallon?

A. Right.

Q. Did you communicate that offer to Standard Oil Company?

A. Well, not right at the time, but shortly after that I did.

Q. What did you do, communicate it verbally or by letter?

A. Verbally first, and then by letter.

Q. Then did you transmit it by letter?

A. I did.

Q. Did the offer of 80 octane gasoline delivered
1885 by transport truck to your bulk plant at a price of ½¢ less than the then prevailing tank car price, did that offer—was it considered by you in any way with the idea of accepting it?

Mr. Austin: I object to that question.

By Mr. Abbott:

Q. What did you tell Mr. MacGready when he made you the offer?

Trial Examiner Ballinger: What is the materiality of it?

Mr. Abbott: He asked me for the conversation that was had with the representative of the Aurora Gasoline Company. I think we ought to know whether the offer was considered by Mr. Ledbetter as to whether he should accept it or not.

Trial Examiner Ballinger: He may answer.

Mr. Austin: I don't think consideration amounts to anything. I have no objection, your Honor, to what he said, but I object to what he considered.

Mr. Abbott: I withdraw the question.

By Mr. Abbott:

Q. What did you tell Mr. MacGready when he made you this offer?

A. I don't remember, to tell you the truth.

Q. Did you accept the offer?

A. No, I didn't.

1886 Q. Well, you say you did transmit it, however, to the Standard Oil Company.

A. I did.

Q. What was the purpose of doing that?

A. Because they asked me if I had had any such offers within recent times, about that time.

Q. I see. Do you know what the Aurora Gasoline Company is?

A. Yes. It is a refinery.

Q. And how many refineries do they have in the Detroit area, if you know?

A. I know of one.

Q. Is that located in River Rouge or at Lincoln Park?

A. It is down in that direction. I believe it is in the city limits of Detroit. I wouldn't be too sure, but it is down in that section.

Q. It is down in the southwest portion of Detroit metropolitan area?

A. Yes, sir.

Q. And do you know that they have another refinery at Elsie, Michigan?

A. I don't know, but it runs in my mind that they do have.

Q. And do you know whether that is a company with a large capacity or small capacity for furnishing gasoline?

A. I think it is quite large.

Q. How large volume, do you know; if you do know, do they have per day; expressed in gallons?

1887 A. I can't say now. It was told to me at that time, but I don't remember it.

Q. You can say, though, it is large and not small; is that right?

A. Yes, it is a large company.

Q. And do you know whether the Aurora Gasoline Company operates a marine terminal in the Detroit area?

A. I believe they do.

Mr. Austin: Do you know whether they do?

A. Well, I know they say they do. I have never seen it.

Q. Did Mr. MacGready tell you that?

Mr. Austin: I object to what Mr. MacGready told him about the business of the Aurora Gasoline Company as hearsay.

Trial Examiner Ballinger: Objection sustained.

By Mr. Abbott:

Q. Did you ever have any other offer on the part of any competing oil supplier to supply you your requirements of gasoline on a tank wagon basis?

Mr. Austin: I object to the use of the word "competing" your Honor, as calling for a conclusion.

Trial Examiner Ballinger: Objection sustained.

Mr. Abbott: I withdraw the question and I will reframe it.

By Mr. Abbott:

1888 Q. Did you ever at any time since 1936 have any other offer from any other supplier of gasoline to supply you with your requirements of gasoline on a tank car basis?

A. Yes.

Q. When was that?

A. December 13, 1940.

Q. Where was that offer made?

A. It was made in the office of the Stikeman Oil Company, Detroit.

Q. And how do you happen to be at the Stikeman Oil Company, Mr. Ledbetter?

A. Mr. Stikeman and the company that made the offer invited me to come down to their office to get the offer.

Q. Stikeman Oil Company is one of the other jobbers of the Standard Oil Company, is it not?

A. That's right.

Q. And what time of day was it that you were summoned to come down to the Stikeman Oil Company?

A. Sometime in the forenoon.

Q. And did you go down to the Stikeman Oil Company?

A. Yes.

Q. And who was present?

A. Mr. Stikeman, myself, and the oil company representative.

Q. Do you recall his name?

A. Yes.

1889 Q. Very well, state what it is.

A. J. R. Rickley.

Q. How do you spell that?

A. R-i-c-k-l-e-y.

Q. What company did he state he represented, if he did so state?

A. He represented the National Refining Company at Cleveland.

Q. Do you know of your own knowledge what the National Refining Company is?

A. Yes.

Q. What is it?

A. It is a refiner.

Q. Of gasoline?

A. Yes, motor oils, petroleum products.

Q. Is it a refiner on a large scale or a small scale, if you know, of your own knowledge?

A. I would say it was a large one.

Q. And what did Mr. Rickley say to you—

Mr. Austin: Just a moment, please.

Mr. Abbott: Pardon me.

Mr. Austin: I think the witness ought to qualify what he means by large or small, unless your Honor thinks that is proper ground for cross-examination.

Trial Examiner Ballinger: I think it would be best
1890 for him to explain what he means by large and small, if he can, in his direct examination, and save much time on cross.

By Mr. Abbott:

Q. Just what do you mean by large and small refiner, Mr. Ledbetter?

A. Why, the National Refining Company operates throughout several states and Canada, and therefore I would call it large. It seems large to me.

Q. Does the National Refining Company supply gasoline to any companies, according to your knowledge, operating in the Detroit area?

A. No, not in the Detroit area.

Q. It does not?

A. Not gasoline.

Q. Does the Aurora Gasoline Company, the other company you testified about, supply any companies or jobbers operating in the Detroit area, if you know?

A. Well, I only know what they have told me.

Q. Well, what do you know from what you have been told?

A. They do.

Mr. Austin: I object, your Honor. That is hearsay.

Trial Examiner Ballinger: Well, do you know by general reputation?

The Witness: Yes.

By Mr. Abbott:

1891 Q. What do you know according to the general reputation?

A. They supply considerable gasoline in Detroit.

Q. Now, what did the representative of the National Refining Company tell you when you got down there to the Stikeman Oil Company?

Was Mr. Stikeman present?

A. He was.

Q. All right. State what was said.

A. A summary of what was said was this: He offered the two companies, Stikeman Oil Company and the Wayne Oil Company, as an inducement for the two of them together to purchase their requirements from the National Refining Company, their house brand gasoline, with the exclusive sales for Detroit, and a guaranteed margin of

1½¢ on a 6¢ Detroit market or better; below 6¢ we to stand the cut fifty-fifty.

Trial Examiner Ballinger: Was the offer submitted in writing?

The Witness: No. Verbally.

By Mr. Abbott:

Q. You say that offer was—

A. We were to have the difference between the Detroit market and the Chicago Journal of Commerce average any time it was more than 1½¢.

Q. In other words, do I understand from that that he told you that in some instances it the price got up
1892 to a certain point that your margin would be more than 1½¢?

A. Yes, that is the meaning of that.

Q. And that offer was made both to the Wayne Oil Company and to the Stikeman Oil Company; is that right?

A. Right.

Q. Any other conversation between you, Mr. Ledbetter: what other conversation was there between you and Mr. Stikeman and the representative of the National Refining Company?

A. The only thing I remember now is that we asked him to submit it in writing.

Q. Very well. And now have you or Mr. Stikeman, to your knowledge, acted upon that offer; at any time from December 13, 1940, up to this time?

A. I haven't. I don't think he has.

Q. I believe you stated yesterday, when you testified, that in the year 1935 you operated a station at Vinewood Avenue and Grand Boulevard in the City of Detroit. When I say "you," I mean the Wayne Oil Company; is that correct?

A. Yes.

Q. And whom did you lease that station from?

A. The Highland Oil Corporation.

Q. Are they distributors of Hi-Speed Gasoline?

A. Yes.

Q. And were they, at that time?

A. Yes.

1893 Q. During the year 1935 did you distribute Hi Speed Gasoline at that station?

A. Yes, we sold it at that station.

Q. And who supplied it to you?

A. Highland Oil Company, or Corporation; I forget which it is. I think it is Corporation.

Q. And was that supplied to you on the tank wagon price or on a tank car price?

A. It was supplied to us by tank wagon delivery.

Q. At what price?

A. The price was a cent a gallon below Standard Oil's price, at that time.

Q. You were receiving, in other words, tank wagon deliveries but were getting it at a one cent discount from the regular prevailing tank wagon price at that time, is that right?

A. Well, it was a cent below Standard's.

Trial Examiner Ballinger. When was that?

The Witness: That was the first part of the year 1935.

By Mr. Abbott:

Q. Now are there any other offers that you have had which you can state definitely in the record, Mr. Ledbetter, at any time since you became a Standard Oil tank car jobber?

A. Nothing that I can recall sufficiently definite at the present time to testify to.

1894 Q. What is your general recollection on that point; in a general way?

A. Well, in a general way, what I might consider—

Mr. Austin: I object, your Honor. I would like to have that question reread, at least, before the witness answers it.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Mr. Austin: What is the point?

Mr. Abbott: I will withdraw the question, if there is any objection to it, and ask you this; Mr. Ledbetter:

By Mr. Abbott:

Q. Has there been any time since you became a jobber of Standard Oil Company on a tank car basis, that it has been impossible for you to deal with other major oil companies on the same basis? In other words, has it at all times been possible, according to your knowledge, for you to secure the same basis and terms from other major oil companies?

Mr. Austin: I object to that question, your Honor, as calling for a conclusion.

Trial Examiner Ballinger: Objection sustained.

By Mr. Abbott:

Q. Now, Mr. Ledbetter, in order that it may be definitely in the record, will you state whether you have ever sold gasoline to any of your dealers—and when I say
1895 "you," I mean the Wayne Oil Company—at less than the regular dealer tank wagon price of the Standard Oil Company?

The Witness: Read that question again, please.

(The question referred to was read by the Reporter.)

A. I have never done it. The Wayne Oil Company has never done it.

By Mr. Abbott:

Q. Yes. I will ask you, also, in order that it may be definitely in the record, whether at any time that you have operated retail stations—and by "you," I mean the Wayne Oil Company—have you always charged, in your retail operations, the prevailing retail price of Standard Oil retail stations in the Detroit area to the consuming public?

A. I have always charged as much or more than the prevailing retail price; never less.

Q. You never have been a price cutter?

A. During the price wars we were frequently about the very last to meet the price cutting situation, so I would say in those circumstances we could easily have been selling at above the prevailing price.

Q. Does the Wayne Oil Company ever exercise any control over the price at which its dealers sell gasoline to the public?

A. Nothing beyond good business advice, once in a while.

Q. What I mean to say is, do you ever dictate to your dealers?

1896 A. No, we don't dictate. We try to convince them, sometimes, when they go haywire, a little bit. We try to correct them by argument.

Q. Will you state, Mr. Ledbetter, based upon your experience as a Standard Oil Tank car jobber during these years, what would be the consequences if the Standard Oil Company were prohibited from selling gasoline to you on a tank car basis? In other words, would it be possible for you readily to secure the same or more advantageous tank car prices from other major oil companies in the Detroit area?

Mr. Austin: I object to that question, your Honor, upon the ground that the witness has not been qualified to state his conclusions upon that point. Similar questions were asked of qualified experts but I don't believe this witness has been so qualified.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Mr. Austin: I would just like to say one word more. It is quite obvious that the witness has had no experience with that particular situation.

Mr. Abbott: You don't have to be an expert to answer that question. This man has had a long experience as a Standard Oil jobber and I am asking him to state, based upon his experience.

1897 Trial Examiner Ballinger: Can he testify, based upon his experience, with any degree of certainty what would happen in the event such an incident occurred?

Mr. Abbott: I am asking him to state whether he would be able to purchase from other suppliers if the Standard Oil Company were prohibited from selling to him.

Trial Examiner Ballinger: Can he answer that question?

Mr. Abbott: I would like to ask the witness whether he can answer it, or not.

Trial Examiner Ballinger: Isn't any answer that he gives purely speculative; is it possible for him to give a definite answer?

By Mr. Abbott:

Q. I will ask you this: based upon your experience, Mr. Ledbetter, could you secure your supply on an equal or more advantageous basis from other suppliers of gasoline in the Detroit area?

Mr. Austin: I object to that, unless the witness testifies he has ever tried to do it. If he has never tried to do it, why—

Trial Examiner Ballinger: Objection sustained.

By Mr. Abbott:

Q. In the conversation you had with the representatives of the Aurora Gasoline Company in the Detroit-Leland 1898 Hotel, were any other Standard Oil jobber customers present or any representative of any such company?

A. No, we were alone.

Q. Do you remember whether Mr. Citrin was at the meeting which you were attending on that day?

A. No. He was at one similar to that, maybe the same day, later on, but the offer that I received was personally with me, alone.

Q. Did you overhear the same offer being made to Mr. Citrin of the Citrin-Kolb Oil Company by the representative of the Aurora Gasoline Company?

A. I heard some such conversation as that. Whether it was on that day or not, I wouldn't say, but it was at about that time.

Q. Did you overhear it, did you say?

A. Yes.

Q. You overheard the conversation?

A. Yes. It wasn't very formal. I wasn't associating it with this offer that I had, personally.

Trial Examiner Ballinger: Will you state again, approximately, when that conversation occurred?

The Witness: December 10, 1940, is the date that I had the offer from them.

By Mr. Abbott:

Q. That is, from the Aurora Gasoline Company?

1899 A. That's right. That is the one you are talking about, isn't it?

Q. Yes. There was another offer on December 13th from the National Refining Company?

A. That's right.

Q. Yes.

Trial Examiner Ballinger: One was December 10th and the other was December 13, 1940?

The Witness: That's right.

Trial Examiner Ballinger: And both of them were subsequent to the issuance and service of the Complaint in this case?

The Witness: I think that is true.

Trial Examiner Ballinger: The Complaint was issued November 29, 1940.

By Mr. Abbott:

Q. Do you know, Mr. Ledbetter, of your own knowledge, whether there was any connection between those offers and the fact that this Complaint had been issued?

A. Well, I think there was.

Q. In what way?

A. I think Standard Oil wanted the evidence for what it was worth to them.

Q. Do you mean to tell me that Standard Oil—

A. If I had any offers.

1900 Q. You don't mean to say, do you, that Standard Oil had anything to do with the National Refining Company and Aurora Gasoline Company in making the offers?

A. I should say not.

Q. What I wanted to ask you is this: when I asked you if there was any connection between the making of the offers and the fact that the Complaint had been issued, was there any connection between those two events?

A. I don't think so.

Q. I understood you to say there was.

A. Why, no. I didn't understand that question to be that way at all.

Q. All right. I was mistaken, then.

A. I think the question was asked by the Examiner, wasn't it? I would like to have that question again.

Trial Examiner Ballinger: I think the record is clear now.

Mr. Abbott: Repeat the record from the time the Examiner asked the question, because we don't want to have the record inaccurate.

(The record was read as follows:)

"Trial Examiner Ballinger: Will you state again, approximately, when that conversation occurred?

1901 "The Witness: December 10, 1940, is the date that I had the offer from them.

"Question: That is, from the Aurora Gasoline Company?

"Answer: That's right. That is the one you are talking about, isn't it?

"Question: Yes. There was another offer on December 13th from the National Refining Company?

"Answer: That's right.

"Question: Yes.

"Trial Examiner Ballinger: One was December 10th and the other was December 13th, 1940?

"The Witness: That's right.

"Trial Examiner Ballinger: And both of those were subsequent to the issuance and service of the Complaint in this case?

"The Witness: I think that is true.

"Trial Examiner Ballinger: The Complaint was issued November 29, 1940.

"Question (By Mr. Abbott.) Do you know, Mr. Ledbetter, of your own knowledge, whether there was any connection between those offers and the fact that this Complaint had been issued?

"Answer: Well, I think there was.

"Question: In what way?

"Answer: I think Standard Oil wanted the evidence for what it was worth to them.

1902 "Question: Do you mean to tell me that Standard Oil—

"Answer: If I had any offers.

"Question: You don't mean to say, do you, that Standard Oil had anything to do with the National Refining Company and Aurora Gasoline Company in making the offers?

"Answer: I should say not.

"Question: What I wanted to ask you is this: When I asked you if there was any connection between the making of the offers and the fact that the Complaint had been issued, was there any connection between those two events?

"Answer: I don't think so.

"Question: I understood you to say there was.

"Answer: Why, no, I didn't understand that question to be that way at all.

"Question: All right. I was mistaken, then.

"Answer: I think the question was asked by the Examiner, wasn't it? I would like to have that question again.")

By Mr. Abbot:

Q. Now, that you have heard the questions and answers, Mr. Ledbetter, do you wish to make any statement to clarify the evidence?

A. Yes. What I wanted to convey was that it was my idea that Standard Oil wanted any competitive offers
1903 on gasoline that had been made to me within recent
times, or any times, and that was the reason why they wanted—why they asked me if I [illegible] had any, and I naturally told them that I had, and I gave them the information that I had.

Q. And whom did you give the information to?

A. Mr. Raupagh.

Q. And I understand that you did not mean to indicate by your answer to my question that there was any connection, any casual connection between the making of those offers and the fact that there had been a Complaint issued in this case?

A. No, no. No, that wasn't the way I got the question at all.

Trial Examiner Ballinger: Do you remember approximately what date the Standard Oil Company inquired of you as to whether or not you had had any offers from what company?

The Witness: I have quite a distinct recollection that it was about a day or two after I got the first offer; that is, the first offer that I have related here, December 10th. I know that I had already had that offer when they first made that request, and it is my recollection that the National Refining Company proposition came in about the next day or two, so about that, Standard's request was between the two offers. That is my recollection of
1904 it at the present time.

Mr. Abbott: You may take the witness.

Trial Examiner Ballinger: Mr. Austin, there is a certain portion of the witness' testimony to which you were reserved the right to move to strike in whole or in part. You may cross examine on that without impairing your right to move to strike.

Mr. Austin: Thank you, your Honor. I will take up a few other matters first here, and I will get back to that a little later.

Trial Examiner Ballinger: And in the event your motion to strike should prevail, both the direct and cross will go out.

Mr. Austin: May I say something off the record?

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Cross-Examination by Mr. Austin.

Q. Mr. Ledbetter, referring to the National Refining Company, did you state what octane that gasoline was supposed to be?

A. Could I state or did I state?

Q. Did your state, or do you know?

1905 A. I don't think I stated, but they did represent to us that it was comparable to good branded gasoline; competitive.

Q. Was it an unbranded gasoline that they wanted to sell you?

A. No, branded.

Q. What was the brand?

A. White Rose.

Q. Is that the brand of the National Refining Company?

A. That's right.

Q. Do you know anything about the quality of that gasoline beyond what they told you?

A. Well, by general reputation, yes, I know that it is good gasoline.

Q. Is it a major brand of gas?

A. There are probably some major companies that wouldn't consider them a major brand of gasoline, but they are a well-recognized national manufacturer of good gasoline.

Q. National? What do you mean by National?

A. Well, I would say they do business over quite a territory, several states and Canada.

Q. Well, several states doesn't mean national, does it?

A. Maybe not.

Q. Do you know what states they do business in?

1906 A. No, I couldn't enumerate the states. I know some of them.

Q. What states can you enumerate?

A. Indiana, Ohio, Michigan, Illinois; I believe are the only ones I have ever seen it in.

Q. Do they sell to any other wholesalers or retailers in Detroit?

A. No; not gasoline.

Q. Did this representative of them give you any indication as to—that they wanted to come into Detroit or why he was making you the offer?

A. I got the impression that they would like to be in Detroit.

Q. Do you know anything about the public acceptance of that gasoline, that is not sold here? Are you familiar with that public acceptance of that gasoline anywhere it is sold?

A. Yes, by general reputation, I am.

Q. What do you mean by general reputation?

A. Well, the kind of knowledge that a man in the business would have of a competitive product; naturally.

Q. What territories does that reputation cover?

A. Around in this section of the country. Around Michigan here.

Q. You mean it is sold in Michigan outside of Detroit?

1907 A. It is; quite close to Detroit.

Q. And did Mr. Rickley tell you anything about the quality of this gas as compared with house brands of other companies?

A. That's my recollection of it, that he did.

Q. Did he contend it was equivalent to the house brand of Standard Oil, for instance?

A. Yes. That is the way I recalled it. The fact of the matter is, I believe he said it was even better.

Q. I was wondering whether he probably didn't say that.

Mr. Abbott: I move to strike the last statement: "I was wondering whether he didn't probably say that."

Trial Examiner Ballinger: The motion is granted.

By Mr. Austin:

Q. You said that you were attending a luncheon at the Detroit-Leland Hotel at the time that you had a conversation with Mr. MacGready.

A. That is my recollection.

Q. Had you met him before that time?

A. Oh, yes.

Q. Does the Aurora Gasoline Company have any distribution in Detroit?

A. Yes, they do.

Q. And is that how you happened to know Mr. MacGready?

1908 A. Really, the way I became best acquainted—the way I became more or less intimately acquainted with him, was because he was a brother member of the Detroit Oilmen's Club. We are both members of the same club.

Q. How long have you known him?

A. I had known him casually up to that time probably four or five years.

Q. Hadn't he ever approached you before to make an offer to sell you gasoline?

A. He had. Before even we were ever in the club together.

Q. I understood you to say that this one in December was the first one you could recall.

A. It was the first offer I could recall. I don't know what it was—he had solicited me for gasoline business at least, oh, within probably three or four years ago, half a dozen different times.

Q. But he never made you any specific offer at those times?

A. I can't recall whether he did or not. I know he was after my gasoline business.

Q. How did you happen to remember this particular conversation, particularly?

A. Because the request from the Standard Oil for any such evidence came in to me so shortly after the thing was made, why, I remembered it definitely.

1909 Q. Did you know before you had this conversation with Mr. MacGready, did you know about the Federal Trade Commission's Complaint against the Standard Oil Company in this case?

A. I might have. If the news came out before that, I did. I couldn't tell you whether I did or not.

Q. Did you have any previous indication when you went to that luncheon that Mr. MacGready was going to make you an offer to sell gasoline?

A. Well, in connection with this offer, he took me out to his cracking plant and took me all through it, and I can't recall now whether that was before this conversation or after. My personal recollection is that we went out and looked over the plant before we went up to the club and he made me this proposition. I wouldn't be too sure about it.

Q. Do you know whether—or was there any indication that anyone else other than Mr. MacGready and yourselves knew about this offer at that time, at the time it was made?

A. I don't believe there was.

Trial Examiner Ballinger: We will have a five minute recess.

(A short recess was taken.)

1910 Trial Examiner Ballinger: We will come to order.

By Mr. Austin:

Q. Mr. Ledbetter, referring again to the offer which you say you received from a Mr. Rickley representing the

National Refining Company, will you state again how you happened to go to the Stikeman Oil Company at that time, December 13, 1940?

A. Either Mr. Stikeman or Mr. Rickley asked me to go down there so that we could be together. He wanted to submit the proposition to the two of us, trying to get the two of us to take on his products.

Q. Do you remember who told you that?

A. Who told me that he wanted to submit the proposition together?

Q. Yes. Was that a telephone conversation?

A. I can't say. Rickley had been talking to us in this same way off and on for probably six months, and this is the first time that a real concrete offer ever came out of it. I had been down to Stikeman's office talking to Rickley probably three or four different times prior to that, and at one of which times he brought his—I believe his vice president from Cleveland—over to see us; probably six months prior to this time.

Q. Was Mr. Rickley the only representative of the National Refining Company present at that conversation on December 13?

1911 A. December 10th.

Q. Well, I think you said it was December 13.

A. December 13, that's right. Yes, he was.

Q. In your opinion was the offer which you described as having been made on that date a bona fide offer by the National Refining Company?

A. I believe it was.

Q. Was anything said by anyone at that conversation as to why the offer was made to you and Mr. Stikeman at the same time, or why Mr. Rickley wanted you both together at the time it was made?

A. The National Refining Company had been soliciting Stikeman and Wayne Oil Company off and on for a period of several months, and I would say—I can't say that anybody said as to why—but that must be the reason why is because they wanted to get the two outfits together to take on their line. Naturally, because the two concerns together would afford a distribution over Detroit that would warrant them coming in here and spending the money advertising to put it over.

Q. Was it a joint offer? In other words, was the offer made upon such terms that it wasn't open to you to accept unless Mr. Stikeman did also, or was not open to him unless you also accepted?

Mr. Abbott: I object to that upon the ground that we are entitled to know what the conversation was. He
1912 is asking the witness as to his conclusion from the conversation.

Trial Examiner Ballinger: This is a cross-examination.

Mr. Abbott: That doesn't avoid the effect of it, which is to ask him what his conclusions were. He asked me to supply the conversation. I think I have the same right.

Trial Examiner Ballinger: I think you have supplied the conversation, and he is trying to get the results.

A. I have to go back to that question, I am afraid.

Mr. Abbott: I understand the objection is overruled?

Trial Examiner Ballinger: That is right.

Mr. Austin: Read the question, please.

(The question referred to was read by the Reporter.)

A. The whole thing was verbal, and there wasn't anything that definite about it, but I am sure that Mr. Stikeman understood it exactly the way I did, which was that it was a joint offer.

By Mr. Austin:

Q. You referred, Mr. Ledbetter, to the fact that in 1935 you leased a service station property from the Highland Oil Company?

A. Yes, that's right.

Q. How long did you lease that property?

A. I think it was about seven or eight months.

Q. Did you continue to lease it after you began to
1913 purchase Standard Oil Gasoline on a tank car basis?

A. I believe for probably a month or two, that is my present idea about it.

Q. During the term and period of that lease did you operate the station yourself or did you sub-lease it?

A. I sub-leased it.

Q. Well, didn't you state that you purchased gasoline from the Highland Oil Company that was sold at that station?

A. I purchased the gasoline or guaranteed the account of the dealer, I don't remember which, or rather I believe that the contract for the purchase of gasoline was in the name of Wayne Oil Company; and my present idea is that I resold it to the dealer at my cost, which is the way that

I handled all of my operations from about 1933 up to 1935. They were all sub-leased on a profit sharing lease.

Q. Well, will you explain that a little further. I understand you were operating retail stations up until the time you began to purchase by tank car from Standard Oil?

A. Well, that impression might easily be gained, but that is not the fact. I bought gasoline for a good many stations, you might say, and sold it to them at my cost, bought it for them because their credit wasn't as good as mine; those stations were all sub-leased by me to those dealers, and if they didn't have a credit standing sufficient to do business with the supplier, I furnished the credit. So
1914 the gasoline contracts frequently were in the name of the Wayne Oil Company.

Q. How many suppliers were you buying from at that time on that basis?

A. At that particular time I should say probably two or three different ones.

Q. Who else besides the Highland Oil Company?

A. Sun Oil Company, I think at that time.

Q. Standard?

A. Standard. Gulf.

Q. Was the gasoline so purchased delivered directly to the service station?

A. Yes, by the oil company, not by me.

Q. You stated that the Highland Oil Company was charging, I believe, a cent a gallon below the Standard Oil Company posted tank wagon price, during seven or eight months in 1935?

A. That is my recollection.

Q. Are you sure?

A. I am quite sure that I got a concession of something like a cent a gallon. It might have been in the form of rent from the Highland Oil Corporation partly, and partly in the price of gas. But it runs in my mind quite distinctly that the total concession was about a cent a gallon.

Q. Did you obtain that same concession from any other supplier at that time?

1915 A. No.

Q. And did I understand you to say that that was over a period of only seven or eight months that you got it from Highland?

A. I think that's right. I think it was the early part of 1935. And I think in September, 1935, I gave it back to them.

Q. You mean you terminated your lease?

A. Yes; month to month lease.

Q. So that you didn't sell any gasoline at that station after September, 1935?

A. That's about the time.

Q. Either at the station or to the operator of the station?

A. That's right, that is about the date. Now, understand, I am not making that date definite.

Q. Why did you give that lease up?

A. They cut out the concession they were giving me.

Q. Why wasn't it still as profitable a lease as any of your other leases—or was it?

A. It would have been if it was pumping the gallonage that some of the others were. But it wasn't. It was a very poor producer as a station. It wasn't making enough for the man that was running it to make a decent living out of it. And shortly thereafter I got the man after I termi-
nated my lease, I got him and leased him another sta-
1916 tion that I had where I had Gulf.

Q. Where what had Gulf?

A. The station; where we had Gulf Gasoline.

Q. After you leased it to him, you sold him Standard Oil though, didn't you?

A. No, I never did sell this man Standard.

Q. Well, have you dealt as a jobber in other gasolines than Standard?

A. No. Only as a retailer.

Q. Well, in a case like—

A. I would say after 1933 at the time I leased all of these stations out, sub-leased all of these stations, leased on these profit sharing leases, I wasn't even a retailer. I was just a landlord, as I figure it.

Q. This is in '35 after you became a tank car buyer from Standard Oil?

A. Yes.

Q. That you gave up that lease with the Highland Oil Company?

A. I believe that is true.

Q. Now, you say after that you leased the same operator another property where he sold Gulf Gasoline?

A. That's right.

Q. And where did you get the Gulf Gasoline?

A. From Gulf.

Q. Are there any other stations that you are the 1917 lessor of to which you do not supply gasoline?

A. Not at the present time.

Q. Did the Highland Oil Company at the time we were speaking of, while you had that lease, offer to make you the same concessions to any other properties which you operated?

A. I can't recall that they did.

Q. Then, if I understand you correctly, Mr. Ledbetter, at the time that you obtained your tank car arrangement with the Standard Oil Company in 1935 and started selling gasoline to retail dealers, you were not operating any retail stations yourself?

A. No. I don't think—

Q. I mean just prior to that time, within a month previously, we will say.

A. I don't believe I operated any retail stations between sometime in 1933 and September 8, 1939. In fact, I know I didn't.

Q. Yesterday, Mr. Ledbetter, you gave some gallonage figures, I believe the total gallonage of your business firm—was it 1937 to 1940?

A. I believe it was '36.

Q. Where did you obtain those figures?

A. Those are Standard Oil's figures covering the gallons their records show they sold me.

Q. Where did you get them?

1918 A. From Standard Oil.

Q. When?

A. I think it was yesterday when it was handed to me. Although I had seen them before.

Q. Well, did you check them with your own figures?

A. I did.

Q. And are they correct?

A. They are correct, I believe, insofar as what they purport to represent. They are approximately the same as the figures I have on my books as to our purchases.

Q. Why did you use the figures that you got from Standard Oil Company instead of the figures from your own books?

A. Because Standard Oil Company handed me the exhibit and asked me questions about it, I guess.

Q. Now, if they just handed you those figures yesterday, how did you have any opportunity to check them?

A. I told you I had seen them before and checked them.

Q. Well, now, with regard to the Commission's Exhibits 6, to 17 inclusive, I believe—anyway, there are the reports from the Secretary of State's office—did the gallonage figures that you gave, do they correspond with the figures in the Secretary of State's reports?

A. You mean the gallonage figures I gave today?

Q. Yesterday.

1919 A. No, those figures I gave yesterday were Standard Oil's figures.

Q. Well, how about the figures you gave today?

A. These are sales, my sales figures.

Q. And what are the figures in the Secretary of State's reports?

A. Those are my purchase figures.

Q. The figures that you gave yesterday, the figures Standard Oil supplied you with, are those purchase sales?

A. Those are Standard Oil's sales figures to me.

Q. That is the same thing as your purchase?

A. No, it might not be exactly the same. They could be a little different, because—do you want me to explain why?

Q. Yes.

A. I don't know they are different, but I would say that they might be for this reason; I think Standard Oil takes its figures as of the date of shipment to us. We make our figures as of the date the gasoline goes into our storage tanks.

Q. What do they charge you for?

A. What do they charge me for?

Q. Yes.

A. They charge me according to their figures, and that is what I pay for. But their figures will differ from 1920 the Secretary of State's figures very likely in that small way, that the Secretary of State's figures are taken from my figures which are based on the day the gasoline goes into our storage tanks, when we unload it, then we figure we have it, and we start to account for it to the State. Their figures I believe date from the time they ship it to me. Over the course of the year the total should be just about the same.

Q. Did Standard Oil Company furnish you with any other figures yesterday?

A. I don't recall any right now.

Q. Have you ever compared your gallonage figures—strike that.

Do you have any knowledge of the amount of gasoline sold by the three other Standard Oil jobbers in Detroit, other than the figures contained in the reports of the Secretary of State?

A. No, I don't. That is the only source that I have.

Q. Have you ever compared your gallonage figures as shown by those reports with the gallonage figures of other Standard Oil jobbers?

Mr. Abbott: I object to that upon the ground it is wholly immaterial.

What do you claim for it, Mr. Austin?

Mr. Austin: I am not quite sure whether Mr. Ledbetter yesterday gave any testimony regarding any other gallonage than his own. It seems to me he did give some.

1921 Trial Examiner Ballinger: Objection is overruled. You may answer.

A. Yes, everytime I get one of those reports I scrutinize it pretty carefully to see what my competitors are doing. I do compare them.

Mr. Abbott: Are you referring now to the State reports that were introduced in evidence?

Mr. Austin: Yes.

Mr. Abbott: There are three columns there. Which one are you referring to? A, B, or C?

Mr. Austin: I asked him about the total gallonage. Whatever column that is shown in.

1922 Mr. Abbott: Well, here is one of them. Off the record, Mr. Examiner?

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Which column do you understand shows your total sales for a given month?

A. That doesn't represent my total sales, that report, that represents my purchases.

Mr. Abbott: I think you better identify what you mean by "that," and also your question is a little bit indefinite.

By Mr. Austin:

Q. From the Standard Oil Company?

A. Yes.

Trial Examiner Ballinger: Kindly connect that up, please.

Mr. Austin: Yes.

Trial Examiner Ballinger: Has the paper been marked for identification?

Mr. Austin: They are in evidence.

Trial Examiner Ballinger: If it is in evidence, refer to the exhibit, please.

Mr. Austin: Well, I did a little while ago. It
1923 is Commission's Exhibits 6 to 17, inclusive.

By Mr. Austin:

Q. And I ask you, Mr. Ledbetter, which column in those exhibits shows your total purchases from the Standard Oil Company, or purports so to show?

A. May I see the exhibit?

(Mr. Austin handed the witness a paper.)

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Read the question, please.

(The last question was read.)

Trial Examiner Ballinger: Referring to—

Mr. Austin: Commission's Exhibits 6 to 17, inclusive, your Honor.

Trial Examiner Ballinger: All right.

A. Generally speaking Columns A and C added together, represent the purchases from Standard Oil.

By Mr. Austin:

Q. Mr. Ledbetter, have you any arrangements with any of your lessees or service station operators now similar to the ones you described a moment ago with the man who sold the Gulf Gasoline or the one who sold the Hispeed?

Mr. Abbott: Just a moment, now, if the Court please.
That is not within the issues raised on the direct
1924 examination of the witness, and unless you want to
make him your witness, I object to it.

Trial Examiner Ballinger: In other words, your claim is that it is not proper cross-examination?

Mr. Abbott: That's right.

Mr. Austin: I think it may be proper cross-examination on the question of costs and the questions which were asked on direct about the prices that he sells at.

Trial Examiner Ballinger: Read the question.

(The question was read.)

Trial Examiner Ballinger: The present period isn't embraced in the Complaint, is it? If you will confine that to the period covered by the Complaint—

By Mr. Austin:

Q. Well, did you, in 1940, have any such arrangement?

Mr. Abbott: I object to it on the same ground and also on the ground that it assumes a fact not in evidence, namely, that there was an arrangement with the man who was at the Gulf station. The only testimony is with reference to the Hi Speed.

Mr. Austin: He testified as to both of them. He had a method of purchasing gas for them and it was redelivered.

Trial Examiner Ballinger: The objection is overruled.

1925 A. Well, I have arrangements similar in this respect, that several of my stations are subleased, but none of them obtain gasoline from anyone except the Wayne Oil Company as supplier.

Q. Has that been true ever since you became a tank car buyer?

A. No, I don't think that has been true except, as I say, some time in 1938.

Q. Have you, during 1937, 1938, 1939, or 1940 had any arrangement or has there been any arrangement or agreement between you and any of the operators of the service stations supplied by the Wayne Oil Company other than a seller-purchaser relation? In other words, the Wayne Oil Company, as I understand it from you, sells gas to a service station operator?

A. That's right.

Q. Now, in all cases are they independent operators or do they, any of them, have any agreement with you or with the Wayne Oil Company as to profit-sharing or other disposition of the proceeds of the station?

A. Nothing except the company-operated stations.

Q. In those cases, the operator is an employee of the company, isn't he?

A. That's right. Now, I believe—I think I ought to try to explain this, I think it was some time in 1938 that I
1926 disposed of the last competitive brand station that I had any interest in.

Q. By "competitive brand" you mean some brand other than Standard?

A. That's right. And that particular station, I didn't dispose of the station. I disposed of the brand and took it over myself and supplied it.

Q. Well, Mr. Ledbetter, I just want to clear up that question of your dealing with your service station operators. I believe that since 1939 you found it necessary to operate some of those stations?

A. I did.

Q. And didn't you state the reason was that the stations were not making good or the operator was failing?

A. They were going broke.

Q. Did you ever have a case where that situation seemed to be existing or in danger of existing; ever make any concession to the service station operator in the nature of rent concession or rebate or otherwise?

A. There have been cases where the rent has been changed somewhat, but nothing on merchandise.

Q. Well, will you state just what has been done in individual cases as to rent?

A. Oh, I don't know that I could remember. You are referring to stations that have been or are now oper-
1927 ated by the Wayne Oil Company? Is that part of your question?

Q. No. Stations that were leased from the Wayne Oil Company. I am asking you whether you ever waived the rent or made concessions or rent or other concessions to the operators.

A. Yes, I can recall one station in particular at Grand River and Birwood where my rent, the rent that I had to pay for the station under the lease, I had with the property owner, went up each year? I had it over the period of the price war. I remembered that I did not increase the rent to the tenant, and by the time the lease was up, he was broke and out of there, and I was paying the full rent on a closed station. My rent kept going up. His didn't.

Q. Have there been any cases where the service station operator has failed to pay his rent to the Wayne Oil Company?

A. Yes, along with his bills for merchandise.

Q. Has any of that rent ever been waived?

A. No. It has been charged off; uncollectible; but not waived.

Q. Was the rent ever reduced to any service station operator after he was in default on any payments, either for rent or for merchandise?

A. I think it has, but I just don't recall any specific instances.

1928 Q. You don't remember any case?

A. It runs in my mind that one of the stations that I operate at the present time, and I would have to check my records to see if this was true—which I took over because it became insolvent, and largely because of high rent and I was on the lease, that I made reductions during price wars on his rent.

Mr. Abbott: You are asking him with reference to stations which were operated by dealers, aren't you?

Mr. Austin: That's right.

The Witness: He was a dealer at that time. I wouldn't be too sure that that is true. I would have to look at the records.

By Mr. Austin:

Q. In your opinion, didn't that have the same effect as if you had reduced the price of gasoline and retaining the rent at the same price?

Mr. Abbott: Just a moment. I object to the question on the ground it is argumentative; as to whether it had the same effect.

Trial Examiner Ballinger: The objection is overruled.

A. I don't think so.

By Mr. Austin:

Q. Will you explain that answer?

1929 A. Yes, I can. The rent at that particular station was out of all reason, compared to the rents that my other stations were paying. I mean the man who got hooked on that lease was me, and I felt that I should take some of the gaff which I did, if it is true that I did reduce the rent at that station during the time that that man was a dealer. I am not so sure, but I think I did.

Mr. Abbott: That answer indicates to me that it is going to be necessary for Mr. Ledbetter to verify his office records on that, and it will necessitate his coming back here and stating what, definitely, is the fact. I just say that, because I thought, possibly, we could get through with him tonight. You wish to verify that from your office records, don't you, Mr. Ledbetter?

The Witness: Not to the extent of making another trip back here, if it is possible to avoid it.

Mr. Austin: I am satisfied with the witness' answer. Of course, I can't govern what the Respondents want to do, but I understand his answer to be that this rent was a high rent, and after he reduced it it was still as high as an average rent for a station doing average gallonage.

The Witness: And still the man went broke, after it was done. I am not saying it was done. I just have an impression it was.

1930 Trial Examiner Ballinger: The whole answer is
pivoted upon an "if". If it is satisfactory to you,
let us go on.

The Witness: I will say this much: that I never gave any reductions in rent that could ever have been construed by my other dealers as any concession in price, because they all know each other's business. It wouldn't be possible, in my outfit, to get away with that.

By Mr. Austin:

Q. I don't doubt the sincerity of your answer at all, in making that statement, Mr. Ledbetter, but that is just a matter of your opinion, isn't it?

A. No. They have a very tight little association of their own, incorporated, and officers that really take their job seriously.

Q. To get back to the facts. Has there ever been a case where any rent for a service station was due the Wayne Oil Company, and where that rent had become due, that the payment of it was waived?

A. Never. Never. I want to qualify that to this extent; uncollectible rent has been charged off if it wasn't possible to collect it. I have charged off, as a bad debt, and if you get by the Federal Government with that, you are O. K., too.

Q. When any rent has been charged off as a bad
1931 debt was the man who owed you the rent still in
business?

A. No, sir.

Q. Was he still operating the service station?

A. The one I have in mind I have never been able to find him since, and neither have the officers! He not only got away with the rent, but $500 worth of tires.

Q. Have you ever charged off rent as a bad debt where the debtor was operating a gasoline station supplied by the Wayne Oil Company?

A. No, never.

Q. Mr. Ledbetter, you have here for 1940, "Bad Debts, $2250."

A. Right.

Q. Can you state what those are comprised of?

A. Uncollectible debts, is about all I can tell you about them right at this minute.

Q. Do your know what kind of debts they were, or who owed them?

A. Yes. Dealers.

Q. What for?

A. Merchandise; probably some rent.

Q. But you have no record of it here?

A. I haven't got it with me, no.

Q. You read some figures into the record here regarding your gallonage and receipts, I believe, for gaso-
1932 line and operating costs. How were those figures
prepared? Were they taken right from your books, Mr. Ledbetter?

A. They were.

Q. That is, was there any computation, or are they figures which actually appear on your books?

A. These are figures from our books.

Q. And who prepared the statement that you have given?

A. I did the most of it personally, with the help of my bookkeeper.

Q. Did anyone connected with the Standard Oil Company suggest to you the various items of operating costs which should be itemized and stated?

A. No.

Q. How did you set up your statement of operating cost that you read into the record; the various items, such as advertising, telephone, insurance, depreciation, and so forth?

A. I took my income tax returns and I copied the expense items off of those. Then I checked with the bookkeeper. She turned to her general ledger as far back as it would go and verified it with me.

Q. Did you not testify yesterday, Mr. Ledbetter, regarding your opinion as to whether there is a saving in unit costs when larger quantities of gasoline are delivered?

That is, didn't you say it would cost less per gallon to deliver gasoline in 2000 gallon quantities than in quantities of, say, 300 gallons?

1933 A. I believe I did.

Q. Do you know how much less it would cost, for any particular amount?

A. No, not offhand, I don't.

Q. Have you ever made any cost analysis to attempt to determine that?

A. I don't believe anything that I have ever done on that line could be called a cost analysis.

Q. Is that statement just your conclusion based upon your general business experience; that larger deliveries would cost less per gallon?

A. It wasn't really what you could call a conclusion; just one of the things that anybody in business knows.

Q. All right. I am not disputing it, except that I wanted to know whether you could state the difference in cost per gallon?

A. No, I couldn't.

Q. As between making deliveries in certain average quantities?

A. I believe I could figure it from our records; even though we don't make the big deliveries. I think I could come pretty close to it, but I don't know offhand what the difference is.

Q. But you are quite positive there would be a difference; is that right?

1934 A. I am sure there would be a difference.

Q. How many brands of gasoline does the Wayne Oil Company sell? I mean by that, brands of Standard Oil gasoline?

A. Two.

Q. Do you deal in any other brands than the Solite, Ethyl, and Red Crown?

A. No.

Q. No Ford Benzol or any other brand?

A. My dealers do, but I don't.

Q. And you don't sell any Stanolind?

A. No.

Q. What proportion of your sales are Red Crown and what proportion Ethyl?

A. Without looking at my records, I would guess at it, but I would say it was about 12 to 15% Ethyl; maybe not over 10%. It is small.

Q. Do some dealers order Ethyl and other dealers order Red Crown, without ordering both at the same time?

A. Once in a while. That is, once in a while for Ethyl, only. Quite a few of them order Red Crown only.

Q. Are the deliveries of Red Crown in larger amounts, larger quantities than the deliveries of Ethyl?

A. Oh, yes.

Q. I mean single deliveries to a station?

1935 A. Nearly always, yes.

Q. How is that handled? Do you have separate trucks for Ethyl, or do you have separate compartments?

A. We have eparate compartments on ths same trucks.

Q. Is it not true, then, based upon the same reasons which prompted you to say that it costs more to deliver in small quantities than in large quantities, that it costs you less per gallon to deliver Red Crown gasoline than it does to deliver Ethyl gasoline?

A. Why, I doubt if you would find any difference in my operation between the delivery of the two.

Q. Well, you deliver Red Crown ~~in~~ larger quantities than you deliver Ethyl, you said.

A. Well, the question as to delivery, originally, was as to total quantities delivered of gasoline.

Q. All right, now; isn't it true that you deliver frequently a thousand gallons or more of Red Crown to your station whereas your average for Ethyl would run much smaller than your average for Red Crown?

A. We very rarely make a run with Ethyl alone.

Q. Isn't the handling of the gasoline a considerable item in the delivery of it?

A. In the delivery of it? The handling?

Q. Yes; transferring it to the truck and out of the truck again, when it gets to the station?

1936 A. Will you state that question again?

Q. Well, the operation of handling the gasoline, which involves, as I understand, a certain amount of leakage, evaporation, and so forth; don't such handling costs increase per gallon when you make deliveries in small quantities?

Trial Examiner Ballinger: He is referring to loading and unloading; are you not?

Mr. Austin: Yes. Including evaporation and leakage which, I understand, are things that occur whenever you transfer gasoline.

A. I don't think there is any doubt that handling costs would go up with smaller quantities, when smaller quantities are handled, and they go down when larger quantities are handled.

1937 Q. Well, I want to know whether it is your opinion that your cost per gallon of delivering Red Crown is greater or less or the same as your cost of delivering Ethyl?

A. Scientifically it might be slightly costlier. I think they are about the same, in my operation.

Q. Can you explain why it costs no more to deliver Ethyl than it does cost you to deliver Red Crown?

A. Ordinarily Ethyl is delivered at the same time Red Crown is delivered, in the same load; very rarely does Ethyl ever go out by itself. And it seems to me that in a case like that, Ethyl weighing the same as Red Crown, which I presume it does—in fact, I know it does—I can't see any difference in the cost of handling a truck load of gasoline part of which is Ethyl and part of which is Red Crown, or all one or the other.

Q. Well, aren't the two gasolines handled separately both at your bulk plant and at the service station? That is, doesn't it take one operation to empty the Red Crown into one tank and another operation to empty the Ethyl into another tank?

A. It takes an operation in loading and unloading to handle a compartment separately. Whether or not it has got Red Crown or Ethyl in it doesn't make any difference, so far as the loading or unloading is concerned, so far as I can see now.

Q. Let me ask you this: Suppose you have two
1938 compartments in a truck—I don't know how many
you have—

A. You generally have four?

Q. Supposing you have—take two compartments, and suppose you have Red Crown in both of those compartments—well, before I go ahead with that, tell me a little more about the compartments on the truck. What size are they?

Mr. Abbott: Your Honor, I fail to see the materiality of this. I would like to have some clearing up on that if we are going to keep on this track.

Mr. Austin: Because you have costs here covering all his gasoline, how much it cost a gallon to deliver it. I want to find out whether it is the same for both or whether it should be split up.

Trial Examiner Ballinger: Objection overruled, if there is an objection. The witness may answer.

A. The compartments run from 250 gallons up to 400 or close to it, in my trucks. Does that answer your question?

By Mr. Austin:

Q. Yes. Well, if I understand you correctly, tell me if I don't, does it cost you just as much to deliver 600 gallons of gasoline by putting them into two compartments and taking them out of those two compartments, say 400 and 250, putting them into two separate tanks, would that cost be the same or greater than the cost of delivering per gallon of just delivering the same
1939 amount of gallonage in one compartment into one tank?

A. Well, theoretically that would be a slightly increased cost, you probably would have to have a microscope to see it. Actually in my operation I doubt if it could be detected, the way I understand your question.

Q. Well, when does—in your opinion—does the difference begin? If you say that your deliveries of Ethyl cost about the same as the deliveries of Red Crown, is that because of the size of your deliveries—I am trying to find out your distinction between your situation and the situation you testified to a moment ago when you said that the large deliveries would clearly cost less per gallon?

A. Well, I believe that question was embodying a 2000 gallon tank or something delivery, or some such example?

Q. Yes, I think it was.

A. Well, that is quite different from mine, where my deliveries average probably 500 gallons.

Well, I can see that if I could deliver 2000 gallons at a delivery, instead of an average of 500, then I undoubtedly could save quite a little money.

But as between the delivery of Ethyl and Red Crown in my operation, except insofar as we have to make a run with Ethyl only in a small compartment, I don't see any particular difference in the delivery cost or handling cost. There might be a slight one, but I don't see it offhand.

1940 Trial Examiner Ballinger: Is there any difference in the bulk or weight?

The Witness: Bulk and weight are both exactly the same.

Trial Examiner Ballinger: That is what I assumed.

The Witness: They are, the same.

By Mr. Austin:

Q. Mr. Ledbetter, has the Wayne Oil Company ever paid any dividends?

A. No.

Q. Do you know whether—I am sure you know—have you paid an income tax? Federal income tax during the past four years?

Mr. Abbott: When you say "you", you mean the corporation?

Mr. Austin: The Wayne Oil Company.

A. Yes. You can ask me that too.

By Mr. Austin:

Q. Can you state the net profit shown upon the income tax returns of the company during the past four years?

A. Yes, I believe I can.

1937, $709.80.

1938, $521.85.

Now, I can't answer your question exact either, I don't believe. Maybe I have that for the next two years, I will see if I have.

1941 (Witness referring to papers.)

Your question is what my income tax report showed, or what I paid?

By Mr. Austin:

Q. What your income tax report showed for net upon which you paid your tax.

Mr. Abbott: You mean oil company?

Mr. Austin: Yes.

Trial Examiner Ballinger: Were the figures given for '37 or '38 the amount you paid or the amount of your net?

The Witness: That is the amount of the net income that I paid income tax on. I would have to look at the report of the other two years to give you the exact answer to your question.

By Mr. Austin:

Q. That is pretty recent, can't you give it to us approximately?

A. I can tell you what the sum of the two years would be, because I made a mistake in 1939 and adjusted it for

1940. And I don't know what the income tax figures will show. If you get what I mean.

Q. You mean you can give me the total for the two years?

A. Yes.

Q. What was that?

1942 A. $2334.35, plus $1431.90. I think that is it.

I would like to have the privilege of checking that and correcting it if it isn't right.

Trial Examiner Ballinger: You may do so.

By Mr. Austin:

Q. Now, Mr. Ledbetter, with respect to the operating costs which you testified to this afternoon I believe it was, of the Wayne Oil Company, for the years '38, '39, and '40—you didn't testify to '37, did you?

A. No, I didn't.

Q. Suppose that instead of the way you do business now, let's assume that during those three years all of the service stations supplied by the Wayne Oil Company had been operated by the Wayne Oil Company? Do you understand that?

A. The last three years?

Q. Yes. Just assuming for the purpose of this question that you were operating all of your stations. In other words, you were selling gasoline only at retail, but supplying the stations yourself?

A. Yes.

Q. (Continuing) In the same manner that you now supply them, or did supply them during that period. Are there any costs which you stated in making your itemization of operating costs, which you would not have had under that system of operation?

1943 Mr. Abbott: Just a moment. I object to that question upon the ground that it is purely hypothetical, assuming the facts not in evidence, and it is therefore irrelevant, and inadmissible.

1944 Mr. Austin: If your Honor please—

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: Read the question, please.

(The entire question was read.)

Mr. Abbott: That is purely hypothetical. He is asking him to assume now whether he would have had those costs if he operated the stations himself. I submit that the question is not proper, and purely hypothetical.

Mr. Austin: I would like to make it clear what I mean. The witness now operates or has for a year or two operated at least three retail stations, maybe it is two at the present time. I am asking him whether in his operating costs he included costs which are connected and arise from the wholesale operation.

By Mr. Austin:

Q. In other words, stations to which you sell, but which expenses would not exist if all of the stations were operated by Wayne Oil Company?

Trial Examiner Ballinger: Do you understand the question?

The Witness: I don't believe I do. I am sorry.

By Mr. Austin:

Q. Well, I will try again. Do you know what costs you have in the operation of these two stations that
1945 you are now operating?

Mr. Abbott: Just a moment. I objected to the question, and I don't think that there has been any ruling upon the objection.

Trial Examiner Ballinger: The witness couldn't answer it. It was unnecessary to rule on it.

Mr. Abbott: I think regardless of that the objection should be ruled upon.

Trial Examiner Ballinger: If the witness understood the question the Examiner would have permitted him to have answered.

The Witness: Now, did I answer your last question? What was it?

By Mr. Austin:

Q. I will say it over to save time. Do you understand whether you have any differences in costs as to the stations which you operate, and as to the stations to whom you sell?

A. Let me explain that, and I think I can clear you up. We probably conduct our bookkeeping with reference to those company-operated stations a little differently from what anybody else would do it, or from what you think we would do it. We do it this way: so far as our books are concerned, we treat those stations exactly the same as any other dealer, running a ledger account, customers' ac-

count with them, the same as we would any other
1946 dealer; charging every expense to them that they
should bear, such as rent, merchandise; all other things that we furnish for them, that they should pay us for. We treat them just exactly the same as any other dealer.

Q. Well—

A. I haven't finished.

Q. That is sufficient.

Mr. Abbott: He wants to finish.

Mr. Austin: I want to interrupt.

Mr. Abbott: I submit he should be permitted to finish.

Trial Examiner Ballinger: The witness should be permitted to finish.

Mr. Austin: I am not going to pursue it.

Mr. Abbott: I submit he should be allowed to finish.

Mr. Austin: I don't object to it. I just want to save time.

Trial Examiner Ballinger: Is there anything further?

The Witness: I am not anxious to pursue it. I just wanted to clear up Mr. Austin.

By Mr. Austin:

Q. Thank you. I wanted to clear up you, because I know you don't understand what I am driving at.

1947 A. Apparently I don't, because I don't quite get it.

Q. Let me ask you about the particular item such as bad debts, which is included in the items of costs.

A. Yes.

Q. If you were operating all of these service stations yourself, could there be any item of bad debts?

Mr. Abbott: I object to that on the ground that it is purely hypothetical.

Trial Examiner Ballinger: Objection overruled.

A. Could there be an item of bad debts if I was operating these stations myself?

Q. Aren't all of these bad debts, bad debts to dealers to whom you sell?

A. I believe they are.

Q. Then, if you weren't selling to any dealers, that item would not be there, would it?

A. Why, sure it would be there, because I would be selling the public instead of the dealers, and they are just as crooked.

Q. Well, correct, Mr. Ledbetter, but you wouldn't have—

hese particular bad debt items would not be on your books ·you had not sold to any dealers during that period, ould it?

A. No, but they would be there just the same in somebody else's name.

948 Q. But that would be bad debts, then, which resulted from the sale of gasoline at retail?

A. That's right. Just as bad.

Q. Isn't this item of bad debts one which relates only o the wholesale end of your business and not to the operaion of your retail stations?

A. I believe it is. I believe under our system that is he way it would be.

Q. I forgot to ask you about the operation of your etail stations.

Now, how about the costs of operating those stations, re they included in this statement of operating costs?

A. Yes. But I can tell you just what the cost was, xactly.

Q. Well, does this statement of operating costs include he salaries paid to the operators of the retail service tation?

A. Indirectly. Now, I will—I started to try to tell you ow I did it. I believe you should have let me finish it.

Q. Well, go ahead. Now we are talking about somehing else.

A. All right. Now, here is how we do it, and you have n accountant there, and I believe he will be able to tell ne if we are wrong about it.

We treat these company-owned stations exactly as 1949 any other dealer, so far as our bookkeeping is concerned, and anything that they owe us at the end of he year unpaid is charged off, and that is the loss that hey can't pay out of their assets and keep running. So hey are charged with gasoline at exactly the same price s any other dealer, and all other merchandise and rent and verything, just the same, you would never know they vere company-owned to look at our books. But what they ose is tallied up at the end of the year and we know xactly what the whole bunch of them lose altogether at he end of the year, we know what it costs us, and I have hose figures here for the two years.

Q. Suppose they make money.

A. I beg your pardon?

Q. Suppose they show a profit.

A. That would be fine. They haven't done it yet, quite.

Q. Haven't any of them shown a profit?

A. Yes, but the losses have offset the profits.

Q. Where are those losses reflected in this statement that you put in?

A. I believe—that is three years, isn't it?

Q. Yes.

Mr. Abbott: Yes.

A. Well, there wasn't any in '38, of course; we didn't have any such stations.

1950 In '39 I believe it is reflected in miscellaneous expense; and in 1940 it is shown as a separate item, station expense.

Mr. Abbott: Will you state the amount of each one of those?

The Witness: 1939—I can't give you the—yes, I can give you the exact amount of loss on these stations.

For 1939 it was $726.60.

Mr. Abbott: What is 1940?

The Witness: $32.43.

Did you get it, Mr. Austin?

By Mr. Austin:

Q. I didn't get the last statement, but I understood you were stating the amount of it.

A. The amount of loss for 1940 shown as station expense.

1951 Q. I got that, yes.

A. $32.43.

Q. In every case, Mr. Ledbetter, did you offset the receipts of those stations against their cost of operation?

A. Well, sure, that is necessarily done.

Q. Well, I mean it isn't necessarily done, because you might treat all the expenses of those station operations to the Wayne Oil Company, and then you might add the receipts of those stations to your receipts from stations to whom you sell gasoline at wholesale. But as I understand you, you offset—you treat that station as a separate enterprise, and only account, for the purposes at least of these figures, for a net profit or a net loss, and in this case a net loss?

Trial Examiner Ballinger: Is that correct?

A. No; I don't think you understand it, or I don't understand you. We have an account on our general ledger nat covers station operation, and the gain or loss of these tations goes into that account, and of course the gains ffset the losses, and vice versa; at the end of the year the alance, whether it is gain or loss is shown in this statement here. Is that clear to you?

Q. I think it is clear to me. But I want to be sure ... her any expense, operating cost incurred by Wayne il Company in operated stations as such, is included in ny of these figures?

A. Yes, there is $726. in 1939 that strictly belongs 952 to the retail operations; that is loss in those figures.

There is $32.43 in 1940; that is strictly a retail operating loss.

Q. That is a net figure, though, rather than any paricular operating cost, isn't it? It is a net result?

A. It is a net lump result of the operation of all the tations for the entire year, offsetting gains against losses nd so forth, right down the line; that is the net result.

Trial Examiner Ballinger: Gentlemen, it is now 5:30 . m., and it is perfectly obvious this examination cannot e finished this afternoon.

Mr. Austin: I guess we better come back. At the rate his is going, your Honor, I may be—

Trial Examiner Ballinger: You mean come back tomorrow morning?

Mr. Austin: Yes, tomorrow morning.

Trial Examiner Ballinger: Now at 5:30 p. m. the hearng stands adjourned to be reconvened in room 859 Federal Building, Detroit, Michigan, at 10:00 a. m. Eastern Standard Time, April 25, 1941.

(Whereupon, at 5:30 p. m., April 24, 1941, the hearing n the above-entitled matter was adjourned, to reconvene at 10:00 a. m., April 25, 1941.)

1953

Room 859, Federal Building,
Detroit, Michigan,
April 25, 1941.

Met, pursuant to adjournment, at 10 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commisison.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois, and Arthur J. Abbott, Esq., of the firm of Abbott, McMahon, and Roberts, 2230 Buhl Building, Detroit, Michigan, on behalf of the respondent.

1954

PROCEEDINGS.

Trial Examiner Ballinger: We will come to order. This is a reconvening at 10 A. M. Eastern Standard Time, April 25, 1941, in Room 859 Federal Building, Detroit, Michigan, of Docket No. 4389, in the case entitled In re: Standard Oil Company. The last hearing was held in Detroit, Michigan, April 24, 1941.

The Reporter will note counsel for the Commission and Respondent present.

Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

You may proceed.

Mr. Abbott: Mr. Ledbetter.

ELMER E. LEDBETTER resumed the stand, and having been heretofore duly sworn, testified further as follows:

Cross-Examination by Mr. Austin (Continued).

Q. Mr. Ledbetter, yesterday you read into the record a statement of operating costs of the Wayne Oil Company for the years 1938, 1939, and 1940. The first item on that list and the largest is entitled "Salaries and Wages."

You yesterday told us what your salary or drawing account
had been. What else is included in that salaries and
1955 wages item?

A. All salaries and wages paid by the company.

Q. To whom?

A. To employees.

Q. What sort of employees?

A. All sorts.

Q. Can't you tell us some of them; the principal types, as to salaries paid?

A. Yes; office help, stock room help, and delivery help.

Q. How about truck drivers?

A. That's delivery help.

Q. I see. How about salesmen?

A. Any commissions paid salesmen would be in that.

Q. Do you employ salesmen?

A. Yes.

Q. What is the distinction between commissions and salary, as to salesmen?

A. There isn't any in our records. We class commissions as salaries and wages.

Q. When you referred to commissions just now, were you referring to salesmen's compensation?

A. Yes.

Q. That is, do you pay salesmen anything else besides a commission, or is it just a matter of terminology? Or,
you better just tell me how you treat your salesmen
1956 and go into it.

A. At the present time I have one salesman on part time, and he gets a commission for whatever work he does, a sales commission. Does that answer your question?

Q. What is that commission based upon?

A. Based upon his sales.

Q. What does he sell?

A. He sells motor oil, anti-freeze, spark plugs, tires, and if he secures a dealer account, I give him a commission for that. I think that about covers the subject.

Q. Is he being paid on the basis of what he sells or is he paid for the time he spends?

A. He is paid only on the basis of what he sells.

Trial Examiner Ballinger: Does the same practice obtain during the last four or five years?

The Witness: During such portion of that time as I had a salesman at all, that is about the way it has been handled throughout.

By Mr. Austin:

Q. What selling expenses did you have in 1938? I am saying now "selling expenses," which is a broader term than merely a reference to salesmen.

A. Selling expenses, I don't believe I could tell you offhand what selling expenses I had.

Q. Did you have any such expenses?

1957 A. Surely.

Q. And where are they included on this list of operating expenses?

A. I couldn't tell you where, offhand, where you would find them in those expenses, because we don't subdivide our accounting into selling expense.

Mr. Austin: Well, see, your Honor, if we had a list here the witness could refer to it. But he must have the list he read from yesterday.

By Mr. Austin:

Q. Haven't you got that list with you?

A. I have.

Q. Well, will you refer to that, and perhaps you can answer the question.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: I will say this, Mr. Austin, if it will assist you any, I would be perfectly willing to have this list in the record.

Mr. Austin: I have a pencil copy. If he has something to refer to, let him go ahead.

Mr. Abbott: All right.

By Mr. Austin:

Q. I want to know, Mr. Ledbetter, whether in the

1958 item of salaries and wages for 1938 there is any selling expense or salesmen's commissions or salaries?

A. For 1938?

Q. Yes. The figure, I think, is eighteen thousand and some dollars, is it not?

A. Yes. That's the figure. There might be. I couldn't tell you without making a research.

Trial Examiner Ballinger: Have you a memorandum portraying the items that enter into each one of the months?

The Witness: I have none here. That's in our books, and that's quite a complicated process, digging it out. It would be my present idea that during the years that I had any selling expense in the way of salesmen—and I don't believe I had any such in 1938, though I wouldn't be sure—I might have paid a commission or so on a new dealer obtained—

By Mr. Austin:

Q. They even have new dealers in Detroit, do they?

A. They are rare birds in Detroit, as far as my company is concerned You are asking me for something that is difficult to answer without studying it out and looking over my books. I don't think I had a salesman, as such, in the year 1938.

Q. What selling expense, if any, did you have in 1938? I am not asking you now for dollars, but to describe it.

1959 A. Well, I would say that a great deal of my salaries could be properly allocated to selling; a great deal of it, for one thing, because it is the selling proposition that I have been able to do since I started this business that has really resulted in the building of the business and holding it intact through the years through which we have gone, which have been very difficult years.

Q. Does that selling apply to the various products that you named awhile ago, as well as gasoline, or does it apply to gasoline?

A. It applies, naturally, to all of them, but I would say the biggest share of it applies to gasoline because that is really the meal ticket of my business.

Q. You are referring now to your own selling efforts?

A. That's right. It seems to me that all of these other subdivisions, nearly all of them, at least, could be charged with some of the selling expense, for instance, telephone, insurance—there is miscellaneous expense. I have an idea that there is quite a lot of things in there that could be properly allocated to selling expense, had we carried it on a subdivision in our accounting or tried to allocate our expenses to selling.

Q. I was going to come to that item of miscellaneous expense a little later, but I might ask you now: there is an item of $6,295.21 in 1938. Can you give me any
1960 break-down as to any specific items that go in there?

A. I could, but I cannot now. I could give you every item.

Q. Can't you tell me now the principal items, not in dollars, but in type of cost that is included there?

A. Only in this way; it includes every type of cost we have that is not classified in the subdivisions above. It is a catch-all for all of the expenses we had that are not actually segregated in these other items.

Q. Can you explain why that miscellaneous column drops down considerably in 1939 and then goes up—jumps up about $2700 or 50%, between 1939 and 1940? It would appear that there were items included in the miscellaneous expense column in 1940—rather, the miscellaneous expense item, that were not included in 1939.

1961 A. That probably is true. But I can't tell you definitely without investigating to see, which I haven't done. Wait a minute.

(There was a slight delay at this point.)

No, I couldn't tell you without investigating, which I would be glad to do if you want it.

Q. Well, I will determine that later. I may ask you to bring an itemized statement of your miscellaneous expenses here, because they are the second largest item on your entire list.

A. I will be glad to do it.

Q. We have been discussing selling expenses, Mr. Ledbetter. Was any of the selling expense included anywhere in your operating costs that you have stated? Was any of that expense in 1939 or 1940 incurred in connection with the sale of gasoline through the retail service stations which were operated by the Wayne Oil Company? I am referring to selling expense in this account.

A. I think I understand your question. Well, I think it was.

Q. What part of it was?

A. That I couldn't attempt to give you offhand.

Q. Well, what operations or services were in that connection?

A. Well, the way I kept books on these company owned
and operated stations I think I gave them exactly the
1962 same kind of selling effort and expense that I did my
regular dealers, for one thing.

Q. Well, you didn't have to sell to those retail operated stations, did you?

A. Why, certainly; the way I kept my books; that is the way my books showed.

Q. They were your stations, weren't they?

A. That's right.

Q. You didn't have to expend any sales effort to get them to buy gasoline or other supplies from the Wayne Oil Company, did you?

A. I guess I probably didn't understand your question. Because I can plainly see that I am not answering the thing you have in mind. Would you mind restating your question again.

Q. I assume that there is some selling effort in connection with the station itself, but I understood you yesterday that all expenses in connection with the station itself were offset against the returns from that station, and that there was a small net loss which was included here. So I am not talking about anything that is any selling expense in connection with marketing products which are sold at the retail stations. I am talking about, however, whether there is any selling expense included in the cost items of your
wholesale business, which you stated in the record
1963 yesterday, which was incurred in connection with
your retail operation. By that I mean everything
connected with your retail station.

1964 A. I think the answer to that involves theoretical
knowledge of accounting beyond me. But I think I can give you the elements so that you or your accountant could determine it.

Q. Do the best you can, Mr. Ledbetter, on that.

A. When you consider that so far as our company-operated stations are concerned, we treat them exactly as we do an independent dealer, charging to them everything that we would charge to that station if he was an independent dealer, and determine the net loss or gain of that operation as an independent dealer, and absorb the loss or the gain, whatever it is. But it seems to me like you could tell, or your accountant could tell, what part of my selling expense belongs to that retail operation. I just don't seem to be able to determine it.

Q. Well, do you know approximately what portion of what you call selling expense it involved in, we will say, pushing the sale of items, or what part of it is in connection with the sale of any items handled by the Wayne Oil Company, including gasoline, to the dealers who purchase from the Wayne Oil Company?

A. No, I don't. I can't tell you that.

Q. Well, is a major part of your selling expense directed in maintaining the business of your dealers, or keeping them in line and getting them to buy accessories,
1965 tires, and so forth? Do you work at that all the time?

A. I will tell you. Quite a large part of the selling expense of my business is devoted to keeping the business from shrinking or dying. During the past years. And also devoted to an effort to cause it to increase. How to get it any more definite than that, I don't know.

Q. Well, those efforts—

A. That is about all I do about the place.

Q. Those efforts are directed toward your dealer customers, are they not?

A. They are directed to every phase of activity that will keep the thing from dying on my hands, or possibly make it grow a little. It is so involved and so intricate and complex that I don't see how you could separate it. I wish I could help you more and maybe I could if I understood just exactly—if I were sure just exactly what information you wanted.

Q. I won't pursue that further except to ask you: You only have two classes of customers, don't you Mr. Ledbetter; one class being retail service station operators, and the other class being people who purchase at retail at the two stations which you operate?

A. That is substantially true, although I do have a little so-called commercial customer.

Q. You have a certain amount of commercial busi-
1966 ness. Is that very small?

A. Very small.

Q. Is that as much as 1% of your total volume in gasoline?

A. No, it isn't; about a half of 1%.

Q. Will you now, Mr. Ledbetter, turn to the item of depreciation. That in 1938, was $2,294; is that correct?

A. $2,494.

Q. $2,494.

A. Yes.

Q. And what is the figure for 1939?

A. $2,506.17.

Q. And in 1940, was it $2,702?

A. That's what it was until the income tax people came in and set me right.

Q. What did they do?

A. They said it was too much.

Q. What was the adjusted figure?

A. You are talking about 1940 now?

Q. 1940; that's right.

A. It was 1939 that they came in to me about it and I revamped my method of computing, after these figures were made. Now, then, what is the question?

Q. Give me what you believe to be the correct depreciation figure as computed by the method approved by the Income Tax authorities.

1967 A. For 1940?

Q. Yes.

A. I don't believe I can do it without looking at my books.

Q. You have no record of it here?

Mr. Abbott: We had better make a list of these things you want.

Mr. Austin: I don't know whether this will all be in the record. If the Examiner should happen to strike it out, I won't have to ask for anything more.

Mr. Abbott: I thought we might as well make a list of it as we go along, in case you do want it.

Mr. Austin: If I ask him for anything, I will have to know what I want to ask him for.

A. For the year 1940, I think I would have to look at the books. I don't have anything here that will help me.

Q. How about 1939? Was that changed, too?

A. Yes. I believe I have the Examiner's report and findings here (referring to documents). The depreciation allowed for 1939 by the Bureau of Internal Revenue was $2,149.26.

Q. Was the reduction for 1940 in approximately the same amount; that is, in percentage?

A. The reduction?

Q. Yes. Do you remember that?

A. 1940 hasn't been checked by the Bureau.

Q. You have changed the figures—

1968 A. I tried to make it so they would pass.

Q. I just wondered whether that resulted in about the same percentage of reduction from your previous figures, that resulted in 1939. If you don't know, all right.

A. I don't think I do know, offhand. I know I gave you some incorrect figures yesterday when you asked me for the net income reported for the years 1936 to 1940, inclusive. For the last two years, I gave you those figures wrong. I reserved the right to correct them, do you remember?

Q. Will you correct those now, while we think about it?

A. Yes. The net income reported by the Wayne Oil Company to the Bureau of Internal Revenue for 1939 was $529.24, and for 1940 was $854.01.

Q. Was the figure for 1938 correct as you gave it yesterday?

A. Yes.

Q. There has been no revision of that?

A. No, nor 1937 and 1936.

1969 Q. In your 1939 return were any other figures which you gave yesterday changed by the income tax reviewer?

A. Yes. That is, 1939?

Q. Yes.

A. In 1939 I unwittingly set up a reserve for bad debts, not knowing that the Bureau wouldn't allow it where you hadn't started out that way, of $1805.21, and they wouldn't allow it. I took that into consideration when I first attempted to determine the cost per gallon of selling gasoline.

Q. To determine what?

A. The cost per gallon of selling gasoline based on the net profit of the business and to the figure of $529.24, which I had recorded as net income to the Bureau I added this $1805.21. That was before I filed my 1940 report with the Bureau; is when I made that computation, and I think that's what's puzzling you about those figures.

Q. I don't know whether I understand you correctly now. The figure you gave a moment ago was $529.24.

A. That's the net income reported in my income tax report for 1939.

Q. You say you added this $1805. figure to that. That's what I didn't understand.

A. I think you were asking me questions from a table you had there showing the cost per gallon of handling
1970 gas based on net profit of the business where I reported a net profit for 1939 of $2334.35. That figure that I used there of $2334.35 was this $1805 which the income tax people wouldn't allow me to have in 1939 as an expense so, in order to give a true picture, or as nearly true as possible, I included that arbitrarily in my table showing

he profit for 1939. Now I think that's what is puzzling ou.

Mr. Austin: May I have an adjournment for a moment?

Trial Examiner Ballinger: We will recess for five min- ites.

(A short recess was taken.)

971 Trial Examiner Ballinger: Come to order.

3y Mr. Austin:

Q. How about the bad debt item, Mr. Ledbetter, for 940, $2250; should that be eliminated from the operating osts for 1940 for the same reason that you eliminated the 939 figure?

A. I didn't eliminate bad debts for 1939; did we?

Q. You said you took the $1805 out.

A. No; the bad debt proposition stands. I just took out he $1805 reserve set up by mistake.

Q. Well, what figure is left for bad debts?

A. Just what is shown there for bad debts. What is it?

Q. All I have here is $1805.

A. Well, let's see. Bad debts, $716.37.

Q. Did you have a figure for reserve for bad debts in 1940?

A. No.

Q. What was the figure for bad debts in 1940?

A. $2250.09.

Trial Examiner Ballinger: What part of those bad lebts were allocated to gasoline and what part to your other business?

The Witness: I couldn't state without an exhaustive research.

Mr. Abbott: Your Honor, on that point in connec-
1972 tion with your Honor's question, I wish to say that
Mr. Ledbetter has made a general allocation as between gasoline and all other merchandise, which is the same or practically the same allocation as made by Mr. Taggart for the purposes of his cost survey, and we, therefore, submit that if it was sufficient for Mr. Taggart's survey, it ought to be sufficient with respect to [illegible]is witness.

Trial Examiner Ballinger: The Examiner is not entirely clear upon that point. I will hear from you fully later on when we reach the matter.

Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Mr. Ledbetter, now, will you turn to the item of depreciation? I think—let's see. We just discussed that, did we not, to some extent, about a change that we made in 1939?

A. Yes.

Q. Upon what buildings and equipment was that depreciation figured?

A. No buildings.

Q. Is that entirely depreciation on equipment?

A. That's right. Furniture, fixtures, and equipment.

1973 Q. Where is that equipment located?

A. Mostly at gasoline stations. Some at the bulk plant, and, of course, some little at the office.

Q. What portion of the equipment and fixtures at the gasoline stations is owned by the Wayne Oil Company? Again, I am not asking for dollars. I want you just to tell me about it.

A. Roughly—

Q. Not even in amount. Just tell me about what it is. What is the nature of the equipment?

A. Oh. We ordinarily own the underground tanks, the pumps, gasoline pumps, the oil containing or dispensing equipment, and in some instances compressors and hoists.

1974 Q. Is this depreciation figured upon all those properties that you have just described?

A. This depreciation is figured on all of the equipment of every kind and description that the Wayne Oil Company owns.

Q. And in referring to the ownership of such equipment does that apply to all of the stations to whom you sell gasoline or only to part of them?

A. It applies to most, if not all, in varying degrees.

Q. In that figure for depreciation was that depreciation computed in part upon the value of the equipment; tanks, pumps, and so forth, at the retail stations operated by the Wayne Oil Company?

A. Such equipment as is at the stations owned by the Wayne Oil Company, was in these figures.

Q. Is there anything at those stations that is not owned by the Wayne Oil Company?

A. Yes.

Q. Who is it owned by?

A. The property owner from whom I lease the stations.

Q. Then I will have to ask you as to those two stations—or as to the three stations which have been operated by the Wayne Oil Company, whether you can state the value of the equipment or the figures upon which depreciation was figured for those stations.

1975 A. I could give it to you quite accurately by looking at my records, but I think I can give it to you fairly satisfactorily, offhand.

1976 Q. All right. If you are not sure, Mr. Ledbetter, just let me ask you this: does the Wayne Oil Company own the tanks and pumps at the operated stations?

A. Yes—no. Wait a minute. Owns the tanks and pumps at one, and the pumps and greasing equipment at the other. The property owner owns the tanks at one of those stations.

Q. How about the third one, that you did operate?

A. The Wayne Oil Company owns the pumps and tanks, and, of course, there are others besides the third one. There are five or six altogether that I have operated.

Q. You mean that you have operated from time to time?

A. Yes.

Q. Do you own the tanks at all of those?

A. I can't say without recalling the stations—

Q. I meant to say the pumps. I don't know whether it makes any difference in your answer.

A. Well, I believe I did.

Q. What is the most valuable equipment at a service station in the point of dollar value upon which depreciation is figured?

A. I don't know that I understand that question. It sounds rather—

Q. Is it the pumps, the tanks, the furniture, or what is it?

1977 A. I think the thing that runs into the most dollars and cents around a station, any one item, might be said to be pumps.

Q. What is the rate of depreciation that you use in figuring the depreciation on pumps?

A. Approximately 10% a year.

Q. How did you decide that?

A. I came to that conclusion after instructions from the Bureau of Internal Revenue.

Q. Now, turning to advertising, Mr. Ledbetter. You have a figure, according to the notes I took, of about $2500 for 1938, a little over $4400 for 1939, and about $3600 for 1940.

A. That's right.

Q. Will you describe the nature of that advertising which is represented by that expense item, or those expense items?

A. Yes. Part of it is advertising, you might say institutional advertising, by the Wayne Oil Company in an effort to obtain standing prestige and new dealers.

Q. That is a small portion of it, isn't it?

A. Well, it might be less than half. I doubt if it is much less than that. A part of it is an assistance we give our dealers or have given our dealers in recent times.

Q. Will you explain that?

A. Well, I think I ought to explain how it got
1978 under way and how it got started. It got started
during the price war times.

Q. Please explain first how the expense was arrived at; what sort of advertising it is, and what is advertised?

A. Most of that expense, outside of institutional advertising, as I call it, would be advertising expense that we give to our dealers in this way: we encourage our dealers to advertise rather than cut prices, in order to stay in this business. That is the way the thing got started, got started in 1938. If you notice for 1937 there is practically no advertising expense. We adopted a policy of encouraging dealers to advertise and maintain their business or try to stay in business by means of advertising rather than cutting prices or meeting cut prices. It was quite a desperate struggle.

Q. Now, what portion of the dealer's advertising does the Wayne Oil Company pay?

A. I was just getting to that. To do that, we adopted this policy: that where the Wayne Oil Company O. K.'s or approves any expenditure that a dealer wants to make in the way of advertising to carry out that fundamental idea, we pay half of it, and he pays half.

Q. What is the practice in that respect, does the dealer prepare the advertising and submit it to you for approval?

A. No, no; we prepare it ourselves. There isn't 1979 any dealer that is competent to do it in our outfit.

Q. I thought, perhaps, he might employ somebody.

A. Once in a while he will get a little hand bill, and it goes through without any change from us. But the most of it is done in our office and through our advertising counsel.

Q. And do you advise the dealer in the amount of advertising that they need?

A. In a way I do, yes.

Q. That is,—

A. I encourage them to use it. Or have been doing it.

Q. The Wayne Oil Company employs advertising counsel for that purpose, did I understand you to say?

A. We have advertising counsel. I wouldn't say it was for that purpose. It is for the general purpose that any advertising counsel is used for.

Q. And is the advertising that you speak of advertising of the various service stations?

A. Most of it is.

Q. That is, I mean the advertising in each case refers to a single case.

A. Most of it is advertising directed by a service station to the neighborhood immediately around it, to get business. That is the character of most of it.

Q. Now—

1980 A. Could I add another reason as to why we felt it necessary to do that advertising?

Q. If you wish, yes.

A. There are two large competitive oil companies in this town that do a tremendous lot of local advertising, Sun Oil Company and the Socony Vacuum, and I felt that it was absolutely necessary for our dealers, some way or another, to meet that advertising competition. And this is just one of the ways of trying to do it.

Q. Did the Standard Oil Company ever suggest to you that you do that, or have any part in it?

A. No, never had any part in it. Never even knew we were doing it, so far as I know. It was our own idea.

Q. Mr. Ledbetter, in connection with that advertising, service station advertising, as to which the Wayne Oil Company paid half of the cost, did that include advertising of or for the service stations which were operated by the Wayne Oil Company?

A. Yes; just exactly the same as the other dealers.

Q. Well, in the case of that advertising, I suppose one-half of it was charged to the advertising expense of the Wayne Oil Company, and the other half to the operating expense of the retail station?

A. One-half of it would be in this advertising expense here, and the other half would be in the retail
1981 operation; that's right.

Q. Mr. Ledbetter, did that advertising in this case take the form of giving away free goods of any kind?

A. Give away matches, advertising novelties, if you call that free goods.

Q. Any premiums in connection with gasoline?

A. No. No.

Q. Now, in connection with miscellaneous items that you read—I already asked you why that jumped in 1940 from 1939, and I believe you said you would give me a statement of it if I wanted it?

A. Yes, I will be glad to. I can, if I get back to the office, easily determine why the jump. It probably is due to some re-classification of accounts.

Q. Now, in 1939 you have an item of $2,146, according to my notes for discounts?

A. Right.

Q. You had no such discount item in 1938 and none in 1939, according to my notes; is that correct?

A. I believe that is true.

1982 Q. First will you tell me what those discounts represent?

A. They represent trade and cash discounts in the main.

Q. Just explain how they arrive on your operating expense list? That is, where does the money go? How is it an expense?

A. It is an expense only where the goods are sold at the full price, and that is treated as income. Now, for instance, in 1940 I don't believe you will find it there. The reason for that is that I was noticing the fact that it wasn't in 1940 myself and I looked to see why; it was deducted from sales, that item was deducted from sales.

Q. And how about 1938?

A. 1938 I couldn't tell you, because I didn't investigate it to tell you the truth.

Q. Do you think it was deducted from sales then too?

A. No. It would be my idea that in that year it is in miscellaneous expense, because I don't believe it was customary to deduct it from sales until 1940.

Q. That item then of discounts doesn't represent any expense or any money paid out by the Wayne Oil Company; is that correct?

A. I believe you are right. I think that is improperly included. That is my present idea about it, as an operating expense. That is for the year 1939—that is the only one that it appears in, isn't it?

1983 Q. That's right.

Trial Examiner Ballinger: What is the amount?

The Witness: $2146.

By Mr. Austin:

Q. Now, Mr. Ledbetter, there is an item of trucking expense of $1170 in 1939, $978 in 1940, according to my notes?

A. Yes.

Q. Where is the trucking expense included for 1938?

A. In miscellaneous expense.

Mr. Austin: Now, if your Honor please, I renew my motion—or, rather, I will move to strike from the record the figures which were read into the record yesterday by Mr. Ledbetter, including all of the figures which preceded the statement of his conclusions as to the cost of the Wayne Oil Company of selling gasoline at wholesale and including those costs which were based upon his previous figures.

Trial Examiner Ballinger: The Examiner asks that you make your motion more definite and certain. Can you refer to the page of the record and the lines?

Mr. Austin: Commencing on page 1841,—

Trial Examiner Ballinger: Line what?

Mr. Austin: Line 22, over to and including line 5 on page 1844, and then commencing again on line 17, page 1866 to page 1876, through line 5. I believe that's all.

Trial Examiner Ballinger: Let me see the portion 1984 to which the motion is directed.

(A copy of the transcript was handed to the Examiner.)

Trial Examiner Ballinger: Proceed.

Mr. Austin: The motion to strike is upon the ground that in view of what has been brought out in cross examination the figures are inaccurate on their face. That they do not portray either the cost per gallon of selling gasoline by the Wayne Oil Company at wholesale or at retail and that no allocation has been made as between the wholesale and retail functions. That certain retail expenses are included in what purports to be a wholesale computation.

Furthermore, I object to this testimony upon the ground that it is immaterial and irrelevant to the issues in this case, it being my contention that the per gallon cost of distribution of gasoline by the Wayne Oil Company, covering all of its wholesale operations, is immaterial and irrelevant in this case.

Mr. Abbott: Your Honor, in opposition to this motion I wish to make four separate points; first, that the motion should be properly deferred until Respondent has had an opportunity to cross-examine the witness with reference to alleged discrepancies in the figures, because it may be that the record will show that these discrepancies which he has testified to are not material, if he is further questioned upon redirect examination.

1985 Trial Examiner Ballinger: You don't mean until he is further cross-examined, do you?

Mr. Abbott: No. I mean until he is subjected to redirect examination by the Respondent.

Trial Examiner Ballinger: I understood you to say cross-examination.

1986 Mr. Abbott: Secondly, it appears from the testimony which was adduced yesterday that the witness has made an allocation comparable to that made by Professor Taggart in his testimony that was taken in Washington as the basis for his so-called cost survey—

Trial Examiner Ballinger: Will you kindly state the particular items in which they are comparable?

Mr. Abbott: Yes. In that both of them, both Mr. Ledbetter and Professor Taggart made an allocation of cost as between gasoline and all other merchandise, Mr. Ledbetter having made that allocation in his testimony yesterday for the year 1938 on the basis that the operating cost of selling gasoline for the year 1938 was 82.7%, and that the balance of the operating cost was allocable to other merchandise.

For the year 1939 the allocation as to the cost of selling gasoline alone was 79.5%. The balance of the percentage between 79.5 and 100 being the operating cost for the sale of all other merchandise except gasoline sold by the Wayne Oil Company.

That in the 1940 figure as given by him the allocation

which would pertain to the sale of gasoline, the operating cost of the sale of gasoline, was 70.1%, the balance of approximately 30% having been allocated by him in his figures to the operating cost of selling all other merchan-
1987 dise, so, upon the claim of the Commission attorney,
that there is no proper break-down as between gasoline and all other merchandise—

Mr. Austin: I didn't make that claim, Mr. Abbott, and don't make it now.

Mr. Abbott: You have made the claim, and I want to get this in the record.

Mr. Austin: No, I haven't made such a claim.

Mr. Abbott: I understand that you don't make any claim that there is no proper break-down as between gasoline and all other merchandise?

Mr. Austin: I did not make such claim and don't make it now.

Mr. Abbott: Very well.

In the third place, as between the operating cost of operating retail stations operated by the Wayne Oil Company and the operating cost in connection with the servicing of dealer stations, I say this: that redirect examination of this witness, I am confident, will bring out this point based on his statement of the costs as given yesterday: the witness having testified that it is physically impossible to make a break-down because he has kept his books in such a way as to treat the two or three operated stations in the same bookkeeping method as dealer stations, that it will
1988 appear from the redirect examination that the cost of
operation allocable to operated stations, stations operated by the Wayne Oil Company will be so infinitesimal as not substantially to change the per gallonage cost of operation which has been testified to by him in his testimony here this morning and yesterday.

Now, upon the other ground, No. 4, which I wish to raise, that relates to the general objection, which was stated by counsel yesterday, and which has been repeated just now. It is our theory and contention, with reference to the general admissibility of this evidence, and I understood yesterday that your Honor ruled that you would pass upon that at a later time, and for the present would permit such evidence to be considered, that this evidence is admissible on two grounds:

First, that it rebuts that element in the case which your Honor has often mentioned, namely, with reference to the opportunity of a jobber to use his differential for the purpose of cutting prices.

Now, on that point, with reference to the Wayne Oil Company, it has been my contention all the time, and I think it is well taken; as to the Wayne Oil Company and the Stikeman Oil Company there should be no issue made to those companies in this case at all. And I have made a motion several times that consideration of those two companies
1989 should be entirely dismissed from this case. But in order to rebut in this case the inference, or the implication, I should say, that there is an opportunity on the part of this jobber or any other jobber to use the differential between the tank car and the tank wagon price for the purpose—or, at least, the potential purpose of cutting prices to the public, it is important to consider whether the operating costs are more or less than the figure of 1½¢ per gallon, which is the difference between the tank car and the tank wagon price of gasoline applicable to the house brand sold by the Standard Oil Company. And, by house brand, of course, I refer to what is also termed Red Crown. Now, in the second place, I say that testimony as to the operating cost of the Wayne Oil Company, or any other jobber, also has a tendency to prove that the differential as between the tank car and the tank wagon price is justified by the difference in the cost of sale and delivery resulting from different methods or quantities in which such commodities are to such purchasers sold or delivered. Using in that statement the language of the Robinson-Patman Act. It is a defense in this case, and we are going to meet that defense—or, going to use it—that the differential between the tank car and the tank wagon price makes only due allowance for differences in the cost of sale and delivery from the bulk plant of the jobber to the tanks of the service
1990 station, the retail outlet, taking into consideration administration cost and other costs of sale, and also delivery costs, which are the words used by the Act: "Sale and delivery." Now, therefore, we say that on the general proposition as to the admissibility of such evidence, that it is admissible for these two reasons:

First, as showing the absence of opportunity for the jobber to cut prices, and

Second, because it has a tendency to show that the differential between the tank car and tank wagon price is justified by the cost of sale and delivery as between the two methods of delivering gasoline.

Now, it was my understanding that on this latter point, on the general point as to admissibility, your Honor intended to reserve ruling until at least we have an opportunity to subject this witness to redirect examination.
1991 Because I don't think the entire picture would be before your Honor until that time, until we have concluded the examination of this witness.

Trial Examiner Ballinger: The Examiner will withhold his ruling on the motion until you have concluded your redirect examination of the witness in order that the entire picture may be in the record.

Mr. Abbott: Very well.

Trial Examiner Ballinger: Proceed.

Mr. Austin: I am through on cross-examination.

Mr. Abbott: Are you though on cross-examination?

Mr. Austin: Yes.

Redirect Examination by Mr. Abbott.

Q. You advised me this morning that you wished to make some other corrections in your testimony that you gave yesterday with reference to some slight discrepancies in the matter of sale and delivery cost for 1940?

A. Yes.

Q. Will you make them at this time?

A. I testified that the total operating expense for 1940 was $49,720.96. It actually was $49,770.96.

Trial Examiner Ballinger: What is the difference?

The Witness: $50. A typographical error.

By Mr. Abbott:

1992 Q. As I understand it, the only material change in
your figures is the item of $2146 attributable to trade and cash discounts included in the 1939 figures of costs, operating costs?

A. That is an entirely different proposition from what I am talking about.

Q. I know it is.

A. What is that question?

Q. There was one item which you mentioned, it was the large item of $2146 attributable to trade and cash discounts?

A. Yes.

Q. For the year 1939?

A. Right.

Trial Examiner Ballinger: That can have no relation to the item about which you were making inquiry.

Mr. Abbott: That's right. I am just asking him to correct though any items which he wants to correct at this time.

1993 The Witness: I haven't finished with this one.

By Mr. Abbott:

Q. All right. Go ahead.

A. I also testified that the cost of wholesaling gasoline for the Wayne Oil Company for the year 1940 was 1.489¢.

Q. Yes?

A. The correction of the figure that I have just given you makes the cost per gallon 1.486¢. Now, then, this allowance in discounts in 1939 of $2246.41 appears to me not—

Mr. Austin: Just a moment. What is the pending question?

Mr. Abbott: Well, I asked him to make any corrections that he wished to in his figures, either for 1938, 1939, or 1940, just so we will have them on the record.

By Mr. Abbott:

Q. Were you now referring to the trade and cash discount figure?

A. Yes.

Mr. Austin: This is redirect examination. I want the witness to make any corrections, too, but we have been over some of these things, and if the correction has already been made, is it necessary or proper to ask the witness
1994 again about the same figure on redirect examination? I don't mind specific questions, but I don't want to open the door wide open and go through all this.

Mr. Abbott: I will withdraw the inquiry at the moment, because I want to go into other things.

Trial Examiner Ballinger: The Examiner requests that you tie these up so that we will know what they relate to.

Mr. Abbott: I intend to do that. I am going to withdraw that question as to that item of $2,146, Mr. Ledbetter, and go into some other matters, and then come back to that.

By Mr. Abbott:

Q. Did you know, when Mr. MacGready of the Aurora Gasoline Company, made you an offer to sell your requirements of 80 octane gasoline delivered by truck transport to your bulk plant at ½¢ less than Standard Oil home brand at tank car price, that Standard Oil wanted some evidence of competitive offers? That offer was, as I understand, made on December 10, 1940.

A. I did not.

Q. In other words, at that time when the offer was made, you had no knowledge that the Standard Oil Company was—

Mr. Austin: I object to that as leading.

Mr. Abbott: I just want to understand what he says.

1995 Mr. Austin: The record will show what he said.

Mr. Abbott: I will withdraw that question and reframe it.

By Mr. Abbott:

Q. Had anyone at the Standard Oil Company office told you, previous to December 10, 1940, that they wanted any such evidence reported to them?

A. I don't recall that they did.

Q. And when you stated yesterday that the offer of the Aurora Gasoline Company pertained to 80 octane gasoline delivered by transport truck at your bulk plant at the price of 6.1¢ per gallon excluding tax, there was a question asked you as to whether that gasoline was comparable to Standard Oil house brand, and you answered the question. Now, by "house brand" did you refer to the Standard Oil Red Crown gasoline?

A. Yes, sir.

Q. How many months before December 13, 1940, when the offer was made to you by National Refining Company of Cleveland, Ohio, as testified by you yesterday, had Mr. Rickley of the National Refining been attempting to get the Wayne Oil Company's business?

Mr. Austin: I object to that, your Honor. Let him state the conversations or what was said.

Mr. Abbott: If you wish to have the conversations 1996 we will supply them.

By Mr. Abbott:

Q. But I am asking you now how many months was it Mr. Rickley had been negotiating with you on that point?

Mr. Austin: There is an objection to that.

Mr. Abbott: I am not asking for the conversation but only as to the number of months that had been going on.

Trial Examiner Ballinger: Objection sustained. You can ask him when they commenced.

By Mr. Abbott:

Q. When did Mr. Rickley commence those negotiations with you?

A. I couldn't give the date, but it was probably several months or maybe a year prior to that—and you used the term "those negotiations". I don't just exactly understand that. He was trying to interest us in—

Mr. Austin: Pardon me. I move that the question and answer be stricken upon the ground that the witness has stated he doesn't understand the question when he answered.

Mr. Abbott: I don't think that is justified by the record.

Mr. Austin: I think the objection is good because the question is still, as the witness has just stated, and as I noticed at the time, referred to negotiations without stating what sort of negotiations, and if the witness was
1997 asked what sort of negotiations, I think—

Trial Examiner Ballinger: The motion is granted, and the testimony stricken.

By Mr. Abbott:

Q. How long was it before December 13, 1940, that Mr. Rickley began to talk to you about supplying you with tank car gasoline?

A. Several months; maybe a year.

Q. You say that the National Refining Company which made its offer to Wayne Oil Company on the date of December 13, 1940, made its offer to your company and Stikeman Oil Company jointly, as I understood your testimony.

A. Right.

Q. From the conversation that you had with the representative of the National Refining Company, were you, by that conversation, given the opportunity to accept the National Refining Company offer by yourself, separate from the Stikeman Oil Company?

Mr. Austin: I think I asked the same question of the witness yesterday and he answered it, so I won't object. I assume he will answer it the same way.

A. I didn't so take it.

By Mr. Abbott:

Q. What was the conversation with reference to the nature of the acceptance?

1998 A. I can't tell you the conversation.

Q. Tell us the purport of it.

A. That was the purport of it.

Q. What was the purport of it?

A. That he made a joint offer to us in an endeavor to get sufficient distribution over the City of Detroit to warrant them to come in here and spend the money necessary to put it over, and it would take more than one little outfit like mine to do it. That was the gist of the way I got it.

Q. At that time, Mr. Ledbetter, was your company, the Wayne Oil Company, and the Stikeman Oil Company, considering a merger?

A. Well, at least we had talked about such possibilities. I wouldn't say we were considering it.

Q. Had you and Mr. Stikeman talked that over before December 13, 1940?

A. Yes.

Q. For how long?

A. Well, at least since 1935, when I became a Standard Oil jobber.

Q. And was that proposition discussed in the meeting of December 13, 1940, with the representative of the National Refining Company?

A. No, I don't believe it was.

1999 Q. Now, I understood you to say yesterday that you reported the offer of the National Refining Company to Standard Oil Company.

A. Yes, I did.

Trial Examiner Ballinger: I understood you to say that those negotiations had extended over some period of time and that they finally culminated in an offer submitted on or about December 11th?

The Witness: December 13th.

Trial Examiner Ballinger: December 13th? 1940?

The Witness: Right.

2000 Trial Examiner Ballinger: That was the first definite offer that was made?

The Witness: That's right; and to call them negotiations, isn't accurate. You might say it was solicitation by them, would be a more accurate term to use. They were looking for customers. We weren't really negotiating. We were being solicited.

Trial Examiner Ballinger: You were not, then, negotiating for a new source of supply?

The Witness: No, we weren't.

By Mr. Abbott:

Q. You say you were not negotiating for a new source of supply?

A. No, I don't consider that we were. We were listening to propositions.

Q. And you had a proposition made to you, didn't you?

A. That's right.

Q. As you stated yesterday?

A. That's right.

Q. By that you mean to say that the initiative was taken by the National Refining Company, and not by yourselves?

A. Right.

Q. Now, there has been some testimony to the effect that your statement of operating costs for the years 1938, 1939, and 1940 included the cost or the expense of
2001 operating your retail stations; I mean, the two stations or three stations, as the case may be, directly operated by your company. Can you state to what extent such operating costs of direct operation enter into the per gallonage cost for each of these three years; whether it was great or small?

A. Yes, I can.

Q. All right; so what—

Mr. Austin: Pardon me, please. I am sorry, but I would like to have the question read.

(The question referred to was read by the Reporter.)

Mr. Austin: I object to that, your Honor, as a conclusion. I don't object to him stating what costs of his retail stations go into it.

Trial Examiner Ballinger: Objection sustained.

By Mr. Abbott:

Q. I will ask you to state this: What costs did enter into the cost of operating your retail stations, if you know?

A. I do know.

Q. All right. State what they are.

A. 1938, there were none. 1939, there was $726.60 loss.

Trial Examiner Ballinger: That is not responsive.

Mr. Austin: Your Honor, I must object to that, too, because that calls for a conclusion and the witness is trying to state what costs—

Trial Examiner Ballinger: Objection sustained and
2002 the answer is stricken.

By Mr. Abbott:

Q. What was the figure for 1940?

Mr. Austin: Objection; same ground.

Mr. Hanley: You Honor; isn't the witness permitted to testify at all? The objection was made before a question was asked him.

Mr. Austin: He asked him for the figure. Wasn't that the same figure that was asked for for 1939; and to which an objection was sustained. I understood it was.

Mr. Abbott: I am asking him if he can state the figure as to the operating costs as to the retail stations for 1940.

Trial Examiner Ballinger: Do you mean the total operation cost?

Mr. Abbott: Yes. In other words, if you can make my breakdown, Mr. Ledbetter, in any way, based upon your figures, for 1940.

Trial Examiner Ballinger: He had better give us the breakdown, before he answers the question.

Mr. Abbott: I think he is entitled to give the answer to the question and then, if he has any breakdown, I can ask him that. I think it is purely arbitrary to insist that it be done the other way, if your Honor please.

Trial Examiner Ballinger: You think it isn't
2003 necessary for him to show his knowledge; a knowledge sufficient to answer the question?

Mr. Abbott: I think it is necessary for him to show the knowledge but I don't think—the breakdown would naturally follow after he answers the question.

Trial Examiner Ballinger: This is all being admitted subject to a motion to strike.

He may answer.

The Witness: Now, what is the question?

(The record was read as follows:

"Mr. Abbott: I am asking him if he can state the figure as to the operating costs as to the retail stations for 1940.

In other words, if you can make any breakdown, Mr. Abbott, in any way based upon your figures, for 1940?")

A. For 1940 the retail operation cost the Wayne Oil Company $32.40 more than the wholesale operation did.

By Mr. Abbott:

Q. Just what do you mean by that, Mr. Ledbetter?

A. That is just another way of putting what I have been telling you all along; we keep our books on our company-owned station the same as an independent dealer.

Q. Making no distinction?

A. None whatever, as far as accounting is concerned, and for the year 1940 the total retail operation showed the Wayne Oil Company a loss of $32.40.

2004 Q. Was that by reason of the fact that you operated that station as a retail station? I mean was that loss attributable to that fact?

A. I don't know hardly how to answer that question. "Loss attributable to that fact—"

Q. What was that loss caused by; that figure you gave of $32 and some cents?

A. I couldn't tell you.

Q. Why is it there, then, Mr. Ledbetter? Just tell us why that is in the statement; that item of thirty-two and some cents, and what it represents.

A. Because that is the amount by which the station failed to make its income equal its expenses; I presume, or some such situation. It is an ordinary business loss.

Q. And apart from that, I understand the stations, the retail stations, the retail stations, were treated the same way as any wholesale station that you were supplying?

A. They were treated just exactly the same, so far as accounting is concerned.

Q. And the figure for 1939 comparable to the figure of $32 and some cents for 1940, was what figure?

A. $726.60.

Q. And in 1938 you testified that you didn't operate any retail stations?

A. That's right.

2005 Q. In other words, your operating costs for the year 1938 are based wholly on wholesale operations?

A. That's right.

Trial Examiner Ballinger: Let me see if I understand your testimony.

I understand you testified that you received a differential as a wholesaler of a cent and a half a gallon?

The Witness: Yes.

Trial Examiner Ballinger: And it cost you more than a cent and a half a gallon to transport it from your wholesale bulk plant to these retail stores—retail stations, and put it in the tanks?

The Witness: Well, that you don't understand right, Judge. That isn't what I have testified to or what I have intended to testify to.

Trial Examiner Ballinger: If it isn't, I want to get it cleared up.

The Witness: This, in a nutshell, is what I mean by my testimony: that it costs about very close to a cent and a half a gallon for my company to perform all the functions of wholesaling gasoline. The figures that I have given seem to be slightly in excess of a cent and a half, so far as the cost is concerned. That could be true, and still the company could make money, because we sell other merchandise.

2006 Trial Examiner Ballinger: Let me ask you this—and I am merely seeking information.

The Witness: And I am trying to give it.

Trial Examiner Ballinger: Did it cost you more to supply the service stations to whom you furnished gasoline, sold it, than it did to supply the stations your company operated?

The Witness: That is very theoretical, and I doubt—

Trial Examiner Ballinger: You know whether or not the cost was greater or less, do you not?

The Witness: Well, I say—I still say that is a very theoretical problem. And offhand—the way I see it at the present time, I don't believe there is any appreciable difference between the two. And when you consider all the functions that we do, so far as wholesaling gasoline, which is considerably more than just storing and delivering—it is a business venture; credit hazards, investment hazards, insurance, all kinds of expenses, taxes, and so forth, are involved, besides just delivery.

Trial Examiner Ballinger: Do I understand you to testify that it actually cost you more than a cent and a half per gallon to transport the gas from your bulk plant to these service stations that are operated by you?

The Witness: Just to transport the gasoline? No, 2007 I wouldn't say that.

Trial Examiner Ballinger: Well, the allocable overhead.

The Witness: You take in all of the elements necessary to the wholesaling of gasoline, and it seems to me that there is no appreciable difference between handling the wholesale function, so far as our own retail outlets are concerned. I can't see where there is any difference between that and an independent dealer, offhand.

Trial Examiner Ballinger: Did you or did you not sus-

~~tain a loss on the service that you supplied to your own~~ retail stores?

Mr. Abbott: You mean for 1939 and 1940?

Trial Examiner Ballinger: Yes.

The Witness: Sustain a loss?

Trial Examiner Ballinger: Yes.

The Witness: I don't see how I can answer that other than to give you the figures that I have already given you: that according to the way my books are kept, my system of bookkeeping, which I believe is a perfect—as perfect a method as could be devised for separating retail and wholesale functions—I can't think of a better one—

Trial Examiner Ballinger: On the basis of your books, did you or did you not sustain a loss?

2008 The Witness: For any one year?

Trial Examiner Ballinger: '39 and '40.

The Witness: Just about broke even, so far as the gasoline wholesaling was concerned. Based on an allocation of expenses with reference to dollars and cents sales.

Trial Examiner Ballinger: Did you or did you not sustain a loss on your deliveries to the service stations you were supplying and you did not own nor operate during that period?

Mr. Abbott: Now, does your question, Judge, include sale and delivery of gasoline to those stations?

Trial Examiner Ballinger: Yes.

Mr. Abbott: Do you understand the question, Mr. Ledbetter?

The Witness: I am just trying to determine in my mind whether I do or not.

Mr. Abbott: Do you want to have the question re-read to you?

The Witness: No, I don't think that is necessary.

I don't believe, your Honor, that I can answer that question yes or no.

Trial Examiner Ballinger: Do you think you are in the twilight zone?

The Witness: Yes.

2009 Trial Examiner Ballinger: That is all.

By Mr. Abbott:

Q. You mean with reference to the twilight zone—what do you mean by that, when you answered that question?

A. I think you should ask the Court what he meant by it. I didn't use it.

~~Q. You said "Yes" in answer to it. I just wondered~~ what you had in mind yourself.

Trial Examiner Ballinger: Well, I assume you meant that the line of demarcation between profit and loss was so narrow that it was indistinguishable; is that correct?

The Witness: Something like that; and yet there is another element in it. I am asked to answer whether I did or did not do a certain thing, when the only thing that I have to guide me as to whether I did or did not is a purely theoretical percentage allocation. And I submit that I shouldn't be compelled to say that I did or did not. All I can do is say that according to these figures, I did or did not. Which I am willing to say.

2010 Trial Examiner Ballinger: Mr. Ledbetter, all I am endeavoring to do is to clear up a situation here that has resulted in many questions being asked, and time is being consumed.

The Witness: I don't blame anybody for being puzzled by it.

By Mr. Abbott:

Q. Mr. Ledbetter, do I understand then that your selling and delivery costs were very close to the figure of 1¼¢ per gallon on gasoline for all these years?

A. Still I want to say that my costs are the costs of wholesaling gasoline.

Q. I understand that.

A. According to my lights. Now, you say "selling and delivery." Maybe it is selling and delivery. It costs me that much to run my business.

Q. It costs you what—the figures you have stated in operating costs?

A. The figures I testified to and are in evidence here.

Trial Examiner Ballinger: I also understood you to testify that throughout all of the years you mentioned you did derive a profit, but that that profit is accounted for in your salary. Did I correctly understand you?

The Witness: No, that isn't right. My salary is charged as an expense of the business. And the profit that 2011 we have reported—

Trial Examiner Ballinger: Then in addition to that you did actually make a profit?

The Witness: That's right.

Trial Examiner Ballinger: Then if that is the case you couldn't have consumed the full cent and a half in costs, could you?

The Witness: In handling—in wholesaling gasoline?

Trial Examiner Ballinger: Yes.

The Witness: Yes, we could have, because we sell other things besides gasoline. That little bit of difference there could easily be taken up by the profit on other merchandise.

Trial Examiner Ballinger: But you haven't any breakdown that shows the profit on the gas separate from the profit on the other items that you handled, have you?

The Witness: No breakdown showing net profit.

Mr. Abbott: Well, I want to ask some questions on that.

By Mr. Abbott:

Q. There was a breakdown made in your figures, was there not, Mr. Ledbetter, to exclude the operating cost with reference to the sale and delivery of miscellaneous merchandise? In other words, in the 1938 figure you took a percentage of 82.7 per cent as the operating cost for
2012 selling and delivering gasoline alone?

A. Yes.

Q. Now, what was that based on?

A. It was based on the relation of gasoline sales to total sales.

Q. In dollars?

Mr. Austin: What figure is that, Mr. Abbott?

A. Yes, dollars and cents.

Mr. Austin: Which figure is that?

Mr. Abbott: That is in 1938, figure 82.7 per cent.

Mr. Austin: Oh yes.

By Mr. Abbott:

Q. So that the difference of 17.3 per cent was allocated by you to the cost of selling other miscellaneous merchandise; is that right?

A. Yes.

Q. And that allocation was based on the ratio of gross sales in dollars and cents as between gasoline and other merchandise?

A. Yes.

Q. And where did you get that figure?

A. From our books.

Q. From your books?

A. Yes. These figures are right.

2013 Q. Those figures are correct, are they?

A. Yes.

Q. And you vouch for their correctness?

A. All except this one item in 1939 of discounts and allowances, which I still feel ought to come out of there.

Q. We will come to that in a minute. Now, for 1939 you made a further breakdown as between the operating costs of selling gasoline on the one hand and miscellaneous merchandise on the other hand, did you not? Will you refer to your figures?

A. Yes.

Q. And the ratio there in the 1939 figures is 79.5 per cent?

A. Yes.

Q. What is that based on?

A. Same thing exactly as in the year 1938. It is all done the same.

Q. Is that based also on the ratio between total sales of gasoline and total sales of miscellaneous merchandise in dollars and cents?

A. That's right.

Q. And then you allocated the balance amounting to 21.5 per cent to the operating costs of selling miscellaneous merchandise; is that correct?

A. That's right.

2014 Q. Now, coming to the year 1940, the percentage that you have allocated to the operating costs of selling gasoline is what per cent?

A. 70 and 1/10 per cent.

Q. And you thereby allocated the balance of 29.9 per cent to the operating costs of selling miscellaneous merchandise; is that correct?

A. That's right.

Q. And what was that based on? I mean the ratio of those two percentages 70.1 per cent as compared with 29.9 per cent?

A. (No answer.)

Q. Let me ask you this: Is that the ratio based upon the comparison of total sales in dollars and cents of gasoline compared to total sales of miscellaneous merchandise?

A. Yes, that is what it is.

Q. The same as for the other two years?

A. Right.

Q. So you have made a very definite breakdown as between gasoline sales and miscellaneous sales?

A. Why, yes.

Q. For all three years?

A. Yes.

Q. And that is based on definite figures taken from your books?

2015 A. That's right.

Q. Now, will you state, Mr. Ledbetter, based upon your knowledge of your business as to retail operated stations to what extent the figures given by you on selling and delivery costs as to those stations—

Trial Examiner Ballinger: What cost could there be of selling where it is delivery to his own stations?

By Mr. Abbott:

Q. I believe you stated with reference to the question asked by the Examiner that you operated those retail stations on the same basis as dealer stations for all those three years, did you not? I mean for 1939 and '40?

A. Yes.

Q. And did you make the same charges for selling and delivering gasoline to them on the same basis as you did dealer stations?

A. I did.

Trial Examiner Ballinger: And that included an item of cost of sale, did it?

The Witness: Yes, I think it did.

By Mr. Abbott:

Q. With reference to these—

The Witness: (Continuing.) Strange as it may seem.

By Mr. Abbott:

Q. With reference to these retail outlets you had
2016 the same functional operations, did you not, that you
had with reference to dealer stations that you had all
the way through?

A. It appears that way to me. I can't see it any other way.

Q. And you have placed in the 1939 and '40 figures an item which represents the loss that you had on the operation of these retail stations?

A. That's right.

Q. And I want you now to state for 1939 the amount of that figure?

A. For 1939?

Q. Yes.

A. You mean the loss that I had on the retail operations?

Q. Yes.

A. $726.60.

Q. And that is placed in this tabulation of operating cost for 1939 as an expense of operation, is it not?

A. That's right, it is.

Q. That item then which you have just mentioned is included as an operating cost in the 1939 figures?

A. It is.

Q. Now, what is the figure comparable to that for the year 1940?

A. $32.43.

2017 Q. And have you included that figure in the operating costs for the year 1940?

A. Yes.

2018 Q. Now, you have put in some evidence as to your net income for 1939 and 1940. Yesterday you stated that the net income for 1939 was $2334.35. I understand that that was not the amount you reported to the Internal Revenue Department?

A. That's right.

Q. But was that the actual amount of net income as it was later revised?

A. No, not exactly, but very nearly.

Q. Well, would you say approximately the amount of net income for that year?

A. Yes.

Q. And for 1940, I believe you stated that the amount of your net income was $1431.90; is that correct?

A. Yes, I did.

Q. But that was not the amount that you reported to the Internal Revenue Department for 1940, was it?

A. No.

Q. Was the figure of $1431.90 approximately the amount of your net income for that year?

A. No. It was four hundred and some odd dollars too high.

Q. And what was that attributable to?

A. To this: that was before I filed my income tax return. I had already figured my profits for the year.
2019 I had taken depreciation, according to a formula of my own, and then because of the rather growing complicated nature of the income tax return, for the first time

since I have been in business, I called in a certified public accountant to prepare it for me. He said I hadn't taken enough depreciation according to the way I figured it. And the difference between the amount I reported to the Bureau and the $1431 is the difference between his figures and mine on depreciation.

Q. Was that later amended by the Internal Revenue Department?

A. The figures you are talking about, the $1431, were compiled before that time. Naturally, I just forgot about it, about them ever being out any place, until they came up here.

Q. Now, you mentioned the matter of advertising in connection with the giving away of matches. Were these matches the small paper containers, such as hotels and clubs give away in advertising?

A. Yes; imprinted with the dealer's address.

Q. They were in paper containers, were they?

A. Yes, sir.

Q. And you and the dealer, I understand, each shared the expense of putting those out?

A. 50-50, yes.

Mr. Abbott: Your Honor, I want to ask at this
2020 time permission for the witness to consult with our
accountant who is here, and I would like to have him
straighten out one or two things before he proceeds with
his examination. I don't want to adjourn at this time,
necessarily.

Trial Examiner Ballinger: We will take a recess for five minutes.

Mr. Abbott: Yes, that is what I had in mind.

(A short recess was had.)

Trial Examiner Ballinger: We will come to order. You may proceed.

Mr. Abbott: Your Honor, at this time I wish to state that I have been asked to go over to the Wayne County Building and testify in a case pending there, for a few minutes, and I therefore ask that this hearing be at this time adjourned until 2 o'clock this afternoon at which time I guarantee to be back here.

Trial Examiner Ballinger: The motion is granted, and now, at 12:10 P. M., the hearing stands in recess until 2 P. M.

(Thereupon, at 12:10 o'clock P. M., an adjournment was taken to reconvene at 2 o'clock P. M.)

2021 Afternoon Session.

2 P. M.

Trial Examiner Ballinger: We will come to order. We are now reconvened at 2 P. M.

You may proceed.

ELMER E. LEDBETTER, having been heretofore duly sworn, resumed the stand, and testified further as follows:

Redirect Examination (Cont'd.) by Mr. Abbott.

Q. Mr. Ledbetter, over the noon hour have you made certain corrections of the figures that you have submitted in evidence as to the wholesale cost of gasoline operation for the year 1939 covering sales and deliveries for that year?

A. I have.

Q. There was an item of $2,146.41 which you testified about this morning that was attributable to cash and trade discount, was there not?

A. That's right.

Q. Have you made any determination as to what should be done with that item?

A. Yes, I believe it should be taken out of the 2022 operating expenses.

Q. For the year 1939?

A. That's right.

Q. And have you so taken it out?

A. I have.

Q. Have you done anything with reference to the item of $726.60 which, as I remember, represented a loss from retail station operations for the year 1939?

A. I have.

Q. What have you done with reference to that item?

A. Taken it out of the operating expenses for 1939.

Q. Now, the total of those two items amounts to what figure?

A. $2,873.01.

Q. Have you applied the ratio for 1939, which is the ratio between the gasoline costs and the costs of selling other merchandise, to that figure?

A. Yes.

Q. And what is that ratio; what is the percentage?

A. The percentage is 79.5.

Q. And if you apply that ratio to the sum of $2873.01, what figure do you arrive at?

A. I didn't do it that way. I deducted the $2873.01 from the total operating expense that I testified to yesterday, and applied the 79.5% to that.

2023 Q. To the whole amount? You mean to the gross amount?

A. That's right.

Q. Of operating expenses for the year?

A. The same thing done in a different way. Which leaves a result—

Q. Let me ask you this question—

Mr. Austin: The witness hasn't finished yet.

Mr Abbott: He was going to answer another question.

By Mr. Abbott:

Q. You started to say it leaves what?

A. $32,470.02 applicable to the gasoline operation.

Q. Now, if you apply to that the total gallonage of gasoline sold during the year, what figure do you arrive at as the per gallon cost of wholesale operations for the year 1939?

A. 1.468¢.

Q. Instead of what?

A. Instead of 1.571.

Q. In other words—

A. As testified to yesterday.

Q. A difference of approximately .1¢ is that right?

A. Yes, approximately.

Q. Now, Mr. Ledbetter, is this figure of 1.468¢ an accurate reflection of your wholesale per gallonage cost 2024 for gasoline for the year 1939?

Mr. Austin: I object to that question, your Honor, as to whether it is an accurate reflection. I assume it is accurate to the best ability of the witness. But I submit the witness has not been qualified to testify as to whether or not his results are accurate.

Mr. Abbott: The witness is an expert as to his own business, if the Court please. I think it has been sufficiently shown in this case that he has sufficient knowledge of the operation of his own business to testify.

Trial Examiner Ballinger: The Examiner is of the opinion that if the witness answered it would add nothing to the testimony the witness has already given. Accordingly, he sustains the objection.

By Mr. Abbott:

Q. With reference to the 1940 operations, there is an item which you included in the operating cost of $32.43. Have you, over the noon hour, come to any conclusion as to how that item should be treated?

A. Yes, I have.

Q. And what have you decided should be done with that item?

A. I think it should be removed from the operating expense of the wholesaling of gasoline.

Q. And have you made that reduction to the extent of $32.43?

2025-2026 A. I have.

Q. And does that make any change in the amended cost per gallon which you testified to this morning?

A. Yes.

Q. Well, now, state what, if any, change it makes.

A. It puts the per gallon cost of gasoline back to the same figure I testified to yesterday; 1.489. That is carrying it to three decimal points. It is the same.

Q. In other words, you testified yesterday that the per gallonage cost of selling and delivering gasoline at wholesale in 1940 was 1.489¢ per gallon.

A. That's right.

Q. Did you not?

A. I did.

Q. And this morning you amended that to the figure of 1.486¢ per gallon?

A. Yes.

Q. And you say that the elimination of the item of $32.43 from operating costs now changes the figure back to 1.489¢ per gallon?

A. Yes.

Q. Have you now, Mr. Ledbetter, segregated the wholesale from the retail figures on operating cost?

A. I have.

Q. And do these figures, as they now stand, cor-
2027 rectly reflect the cost of operation at wholesale on

a gallonage basis for gasoline for the years 1938, 1939, and 1940?

Mr. Austin: Same objection, your Honor.

Trial Examiner Ballinger: Same ruling; objection sustained.

By Mr. Abbott:

Q. You testified that your figures on depreciation were amended by consultation, I believe, with the Internal Revenue Department?

A. Yes.

Q. Did the operating cost figures given by you yesterday represent the amended figures on depreciation? I mean, as amended by the Department of Internal Revenue for 1939?

A. I don't believe so.

Q. Well, what do they show, there, in the figures for 1939 and 1940, as to depreciation?

A. You mean the figures?

Q. Yes.

A. 1939 is $2506.17.

Q. 1940?

A. $2702.50.

Q. Was there any amendment of those figures by the Internal Revenue for 1938?

A. No.

2028 Q. There was not?

A. No.

Q. Do you want to make a computation, Mr. Ledbetter, right here as to the effect of amending the figure as to depreciation on your per gallonage operation cost?

A. I would like to.

Mr. Abbott: All right. Would your Honor permit us to make that figure? It will take just a few minutes to do that.

Trial Examiner Ballinger: Do you desire a recess?

Mr. Abbott: The witness has testified he omitted to change the depreciation figures for 1939 and 1940, and I wish therefore to have the figures that represent that correct, and they will require a moment of computation in order to do that.

Trial Examiner Ballinger: We will take a five minute recess to give him that opportunity.

Mr. Abbott: Very well.

(A short recess was taken.)

2029 Trial Examiner Ballinger: Come to order.

By Mr. Abbott:

Q. The item of depreciation which you testified about his morning was $2506.17 for 1939, was it not?

A. Right.

Q. And what was the amount that it was finally amended o?

A. $2149.26.

Q. Leaving a balance of what figure?

A. The difference between the two.

Q. Yes. Now, have you made a computation to ascer- ain what change the difference would make?

A. Yes.

Q. On the per gallon cost for 1939?

A. I have.

Q. And what difference does it make?

A. .017 of a cent.

Q. And deducting that from the figure that you testified o of 1.468, leave a balance of what?

A. 1.451¢.

Q. Now, was there any change in the depreciation figure 'or the year 1940?

A. No.

Q. None at all. Have you therefore segregated the
wholesale and retail figures for the year 1939 as they
2030 now stand, as that figure now stands?

A. I think we have.

Mr. Abbott: Take the witness.

Recross Examination by Mr. Austin.

Q. Mr. Ledbetter, did I understand you to testify that n the operating costs for 1939 which you gave yesterday, here was included an item of reserve for bad debts of $1805? Just look at your figures.

Mr. Abbott: That's for 1939?

Mr. Austin: Yes.

A. I believe that's true.

By Mr. Austin:

Q. Did you state this morning that the item was im-properly included and had been rejected by the Internal Revenue Department?

A. I think I did.

Q. Well, has that figure been eliminated in making your revised statement of operating expenses for 1939? I mean, upon which your last testimony of per gallon operating costs was given? You know whether you eliminated that figure, do you not; since your computation of yesterday?

A. I am trying to think whether we did or not.

Q. Who do you mean by "we?"

A. Myself and the people I have been trying to
2031 figure it out with; Mr. Boatwright, for one. I don't
believe it has been taken out.

Mr. Abbott: Well, be sure about that, Mr. Ledbetter; because if there are any other items, we had better get them all at once.

The Witness: Well, I can't be too sure in too big a hurry, here.

Mr. Abbott: Take your time.

By Mr. Austin:

Q. Mr. Ledbetter, you have finished your answer, I believe, on that?

A. Well, I finished the answer I can make at the present time, without studying it some more.

2032 Q. Now, on the item which I believe you just discussed at some length with Mr. Abbott of discounts of $2146.41, which was included for '39, you stated this morning it was improperly included, and I believe you stated this afternoon that you had made a new computation eliminating that item from operating costs from 1939; is that correct?

A. That's right.

Q. At page 1867 of the record in your testimony of yesterday you stated that the total amount of gasoline sold during 1939, that is, excluding Highway and Federal tax was $190,907.39. When you made this re-computation this noon in determining your allocation figure, did you deduct that item of $2146.00 from the total sales of gasoline for '39?

A. No.

Q. Well, after you arrived at your total costs, didn't you then take a percentage figure which was based upon the total gallons of gasoline, total dollar sales of gasoline as related to your total sales of all merchandise? You gave a figure of seventy-nine some percent, I believe, a minute ago.

A. Yes. That seems to me like that remains constant. I don't see yet how that is affected.

Q. What was the figure that you gave this afternoon for the percentage of gasoline sales to total sales for '39?

2033 A. 79.5.

Q. That was used in your most recent computation?

A. That's right.

Mr. Abbott: Let me interrupt again a minute. What is that figure for reserve on bad debts for 1939 that you testified to?

Mr. Austin: $1805.

The Witness: Yes, and 21¢.

By Mr. Austin:

Q. Prior to last December, did you at any time have any agreement with Mr. Stikeman of the Stikeman Oil Company, or did the Wayne Oil Company have any agreement with the Stikeman Oil Company, providing for a merger of those two companies?

A. No.

Q. I want to ask you one more question about this allocation of operating costs. Were all operating costs of the Wayne Oil Company included in that allocation, regardless of the nature of such costs?

I am not trying to make you forget something, Mr. Ledbetter, but what I have in mind is this, whether, for instance, I would assume that depreciation on pumps was something that peculiarly relates to gasoline and not to any other item; would you agree with that?

I can understand how that might be so considered.

2034 Q. I am not questioning what you did, I just want to find out. Was that depreciation expense and expenses, such as trucking expense, was that all put into the pool in making your allocation?

A. I tried to take all of the operating expense connected with the wholesaling of merchandise through my establishm [illegible]

Q. [illegible] ated this morning that you had a salesman, I believe, in 1940; at least one.

A. That's right.

Q. And he worked on a commission basis and sold tires and accessories and so forth?

A. That's right.

Q. Did he get any commissions on the sale of gasoline or did he sall any gasoline?

A. He didn't sell any gasoline, but he got commissions, very likely, that could be chargeable to gasoline alone. If he got a new dealer on gasoline, he would get a commission based on the gasoline gallonage of that dealer.

Q. Did he get a new dealer?

A. I would have to look at the records. I think there was something of that kind last year; two or three occasions.

Q. I should think if the salesman got a commission on
the sales of accessories, I would think none of that
2035 would be properly allocable as an expense to direct
cost so I am just asking you whether expenses of all
kind correctly allocated or not, were put together here for
the purpose of making an allocation based on your total
dollar sales.

A. I think that is true.

Q. I understood that was so, but I just wanted to be sure there was no direct allocation of costs either to gasoline or other items.

A. No. It is just an allocation based on the percentage of sales of each item.

Mr. Austin: If your Honor please, I now renew my motion to—

Mr. Abbott: Just a moment. There was another question I wanted to ask the witness before you proceeded with that.

Mr. Austin: Would you prefer to do it first? That is all right with me.

Trial Examiner Ballinger: Finish the examination before the motion.

Mr. Abbott: Your Honor, I ask the indulgence of the Court to allow Mr. Ledbetter to make another computation. May we have a recess of five minutes? I think this will be the last one.

Trial Examiner Ballinger: You may.

(A short recess was taken.)

2036 Trial Examiner Ballinger: Reconvening.

Redirect Examination by Mr. Abbott.

Q. Now, Mr. Ledbetter, there was an item for reserve for bad debts which was included in your 1939 figures of what amount?

A. $1805.21.

Q. And I believe you stated in answer to Mr. Austin's question just a few minutes ago that that had not been excluded from your operating costs for 1939. Have you made a computation now excluding that item from the 1939 operating costs on gasoline?

A. Yes, I have.

Q. And by what amount does it reduce the per gallonage operating costs of gasoline for 1939?

A. 65/1000 of a cent per gallon.

Q. Leaving the figure for 1939 at what point?

A. 1.386¢ per gallon.

Mr. Abbott: That is all.

Have you any further testimony?

Mr. Austin: Just one question on allocation, Mr. Ledbetter

Recross Examination by Mr. Austin.

Q. In relation to that discount figure for 1939 of 2037 $2,146, you told us what those discounts were. I don't remember whether you said whether they were figures of discounts on gasoline entirely or whether they were partly on something else. Can you tell me that?

A. They were not discounts on gasoline; we don't have any at all on gasoline. They were other discounts, trade discounts, cash discounts.

Mr. Abbott: They are out now, anyway. So does it make any difference?

By Mr. Austin:

Q. What do you mean by trade and cash discounts?

A. Well, cash discounts is the discount for payment of a bill within a certain period.

Q. Well, that would be on gasoline, would it not?

A. No. We allow no discounts on gasoline, no cash discounts, nothing. Gasoline is cash business.

Q. Well, can you tell me on what items those discounts were allowed?

Mr. Abbott: Just a moment. If the Court please, it has been eliminated from the 1939 statement, it is, therefore, immaterial.

Mr. Austin: It may be immaterial for this computation.

Mr. Abbott: I object to it on the ground it is immaterial and irrelevant, having been eliminated 2038 from consideration as a part of the 1939 operating costs. It is not in the case, therefore has no relevancy, and I object to having any questions asked as to the meaning of a trade or cash discount for that reason.

Trial Examiner Ballinger: Objection is overruled.

A. I have forgotten the question.

By Mr. Austin:

Q. I want you to tell me what those discounts are and on what articles they are granted?

A. They are granted on tires, anti-freeze, batteries, spark plugs, some on motor oil, not very much; that applies both to the cash and trade discounts. No trade discounts on motor oil. That is sold net, subject to cash discount. Cash discounts on motor oil. Trade discounts on anti-freeze, things of that type; tires.

Mr. Austin: That is all I have.

Mr. Abbott: That is all. You may be excused.

Trial Examiner Ballinger: Mr. Ledbetter, you are excused.

The Witness: Thank you, Judge.

(Witness excused.)

Mr. Austin: Now, if your Honor please, I renew my motion to strike from the record the portions of Mr. Ledbetter's testimony which I described this morning by 2039 pages. And the motion, I assume, should extend to testimony given this afternoon which amended those figures. I have no means of making it definite as to pages at this time.

Trial Examiner Ballinger: The testimony you propose to strike relates to the witness's conclusions with reference to the cost of marketing the gas to the service stations he furnished, and also the cost of furnishing gasoline to the service stations his company operated; is that correct?

Mr. Austin: It is correct so far as it includes all the conclusions that the witness gave, and figures as to what he called the wholesale cost of distributing gasoline per gallon.

Trial Examiner Ballinger: Those all entered into the final conclusion, did they, as to the cost?

Mr. Austin: I understand that they did. I made the motion this morning, I believe, chiefly upon the ground that his testimony was irrelevant and immaterial. I now wish to extend the ground of the motion to urge that this testimony is incompetent as well as irrelevant. And on that point I wish to point out that there have been numerous errors in these computations, some of which have been admitted, and perhaps some of which have been corrected, but in addition to that, it is now clear from the testi-
2040 mony of the witness that these computations involve an allocation of costs as between the wholesale business and the retail operated stations of the Wayne Oil Company.

It appears from the witness' testimony, for instance, that certain advertising costs have been included in this computation which were advertising costs of retail operators, or so far as paid by the Wayne Oil Company were paid merely as a participation in the cost of retail service station advertising.

It appears that advertising of stations operated by the Wayne Oil Company was included.

It also appears that depreciation of equipment of stations operated by the Wayne Oil Company was included.

And any attempt at segregation of those items, if any has been made, involves questions of expert accounting and accounting principle, which it does not appear that this witness has been qualified to make.

In view of the fact that this appears to be an inseparable mixture of retail and wholesale costs—the witness has testified he makes no separation of such costs on his books, but operates his retail stations upon the same accounting system with his wholesale stations—I submit that these figures do not even—on their face—present a correct analysis or computation of the wholesale cost of distributing gasoline by the Wayne Oil Company, and I submit
2041 that the witness has in submitting these figures not been shown to be qualified to make any such computation.

2042 Mr. Abbott: Now, if the Court please, the reason that I asked this morning that ruling on the motion be reserved until I had an opportunity to take the witness on redirect was this: He has, upon redirect examination, segregated retail operations from wholesale. As a matter of fact the testimony which he gave this afternoon and this morning shows that he treated his wholesale outlets, the dealer stations, and the few retail stations that he himself operated—when I say "he," I mean the Wayne Oil Company—as a matter of bookkeeping, on the same basis.

Therefore, the per gallonage cost of handling gasoline, selling and delivery of gasoline, would be the same per gallon whether it was a wholesale station or a retail station. There wouldn't, therefore, be any difference on the per gallon cost for any of these years and, of course, it must be borne in mind that in the year 1938 he had no retail stations and, therefore, there can be no question but that as to that year the figure that he has testified to as to the cost of operation, of wholesale operations, is, without any question, accurate for the year 1938 and, therefore, even if the Court should, by any chance, decide that there has been no proper allocation as between wholesale and retail, that conclusion could not, by any stretch of the imagination, be directed to the 1938 figures in which there were no retail operated outlets.

2043 Now, as to 1939 and 1940 there were, it is admitted, some mistakes made by the witness in including some items in operating costs which should not have been included in those figures. Among those items was the sum of $2,146.41 allocable to trade and cash discounts for that year, which he eliminated. Also the figure of $726.60, which was loss from retail station operation in the year 1939. That has been eliminated by the witness from consideration of 1939 costs.

He has also eliminated in the testimony the item of reserve for bad debts, and after all those eliminations, the figure that he originally testified to as constituting the per gallonage cost of wholesale operation for the year 1939 has been reduced to the figure of 1.386¢ per gallon for the year 1939. That figure is submitted in view of these corrections, and the Government, of course, has brought to light everything that they could possibly think of that might constitute an allowable deduction. That figure, I submit, is a fair figure, and he has testified that he has segregated, as to that year, the wholesale and the retail figures as to the cost of operation of the Wayne Oil Company for the period in question. I don't think it can reasonably be argued as to this year or as to 1940, as to which year there were no changes excepting for a change of $32.43, which made only a 2044 microscopic difference in the figure for 1940 so infinitesimal as not to be entitled to any consideration, leaving the figure for that year practically the same as testified to yesterday, and so, upon the ground as stated by counsel this morning, that the figures are not reliable, I now submit that by reason of the mathematical theory that he had a uniform flow of gasoline which went both to his dealer outlets and to his retail outlets, and the objection was the same on both of those; same operations of the bulk plant, the same haulage, the same time consumed in delivering to a retail outlet as to a wholesale outlet, the per gallonage cost—I don't care whether it was a retail outlet or a wholesale outlet—was necessarily the same, because he put it through his books and treated it on the same basis.

Therefore, I submit that the figures for 193(in which he did have retail operations, as well as wholesale, do show an accurate segregation of the figures as to the wholesale and retail operations of the Wayne Oil Company.

Now, I have already stated with reference to the general objection which was made by counsel this morning, that testimony as to the operating cost per gallon of a jobber in this case is necessary and relevant on the subject which has been often referred to by your Honor, namely, the
2045 opportunity of indulging in price cutting in the event that the operating costs were appreciably less than the differential between the tank car and the tank wagon method of delivery by this supplier.

Trial Examiner Ballinger: You need spend no time on that.

Mr. Abbott: Now, I also urge in the record that this testimony has a further purpose, intending to show, just as in the wording of the act, the Robinson-Patman Act itself, to the effect that the differential may be justified, may be defended by testimony to show that it was reasonable, in view of the cost, the difference in the cost of selling and delivery under the varying methods in which the merchandise was delivered, and that is the one purpose for which the testimony is offered in this record. I say it is for a dual purpose, and I think that for both purposes it should be left in the record.

I think on the question of the accuracy of the figures and on the question of the segregation, we have very painstakingly reduced that, now, to a point where the witness himself has testified that it represents an accurate segregation as between wholesale and retail operations of the Wayne Oil Company, and that these figures now accurately

reflect the per gallonage cost of sale and delivery at wholesale of gasoline for the three periods in question and
2046 as to the 1938 period I again direct your Honor's attention to the fact that there can be no question as to that year as to the accuracy of the figure, because in that year there were no operations of the Wayne Oil Company at retail.

Trial Examiner Ballinger: I take it you also contend that the witness has sufficient basis to arrive at a proper conclusion as to the cost of delivery to his own retail stations?

Mr. Abbott: Yes, indeed, because he testified that the cost of delivery to his own retail stations was essentially the same as the cost of sale and delivery to other stations, which were supplied on a dealer basis; there being no difference in the way that he handled those deliveries on his books.

Trial Examiner Ballinger: I will hear from counsel solely with reference to the year 1938.

Mr. Austin: Well, as to the year 1938, my contention is that there is still an allocation required.

Trial Examiner Ballinger: That year the Wayne Company operated no service stations, did it?

Mr. Austin: It did not, but he, nevertheless, testified that certain advertising of retail service stations was contributed to by the Wayne Oil Company, and that that contribution is included in the expenses. It is my contention that that is strictly a retail service station expense
2047 and not an expense of the whole distribution of gasoline.

Mr. Abbott: To get the picture straight, he testified that was an advertising expense which he put on in order to facilitate and further his wholesale operations, and in order to make the market distribution of gasoline wider by advertising to the public, and that this expense was participated in 50% by the Wayne Oil Company, and 50% by his dealers.

2048 Mr. Austin: Yes, and that over half of this figure, here, was his contribution to that.

Mr. Abbott: That's right, but that is a wholesale operation.

Mr. Austin: Depreciation, also, on equipment at the retail service station, in my opinion, is not part of the wholesale operation; at least not unless it is considered in connection with rentals, and I don't find on this list, either—I don't find here as to operating expenses, at least, any reference to rentals. I don't know whether there were any rentals, but I assume no rentals were included in the receipts that were used for the purpose of making the allocation. Do you know about that?

Mr. Abbott: Rentals of what? Dealer stations?

Mr. Austin: Yes.

Mr. Abbott: I assume that that was figured in. I don't think there is any testimony on that. We can't go beyond the record.

Trial Examiner Ballinger: Are you ready for a ruling?

Mr. Austin: Yes, your Honor. I had one other very minor thing I was going to say but it slips my mind at the moment.

Trial Examiner Ballinger: The Examiner doesn't question the good faith of the witness Ledbetter, but he is
2049 of the opinion, and so holds, that the witness had no
sufficient basis for the conclusion he reached. Accordingly, the motion to strike is granted, and not only the testimony indicated, but all relating testimony appearing in the record is stricken.

Mr. Abbott: Now, do I understand, if the Court please, that that includes testimony for the year 1938?

Trial Examiner Ballinger: Yes, sir.

Mr. Abbott: In which he had no retail operations at all?

Trial Examiner Ballinger: That is correct.

Mr. Abbott: May I ask the Court, also on the record, whether the ruling is made on the basis that there was no proper allocation as between gasoline sales and other sales of merchandise for those years?

Trial Examiner Ballinger: Partially upon that ground. Partially upon the ground that the Examiner is of the opinion that there was no sufficient basis for any of the conclusion arrived at.

Mr. Abbott: I wish to draw the Examiner's attention to the fact that in the Taggart testimony your Honor permitted an allocation—

Trial Examiner Ballinger: That is, any of the ultimate conclusions arrived at.

Mr. Abbott: What I was about to say is, in the
2050 examination of Mr. Taggart he arrived at the alloca-
tion as between gasoline and other merchandise sold by gasoline station operators on the same basis as Mr. Ledbetter used in his computation as to costs.

Trial Examiner Ballinger: To that extent the allocation was identical but from there on there was a broad distinction.

Mr. Abbott: Wherein does that distinction exist? Do you mean as between wholesale and retail sales?

Trial Examiner Ballinger: Yes. Elements that enter into costs in both the wholesale and items that enter into costs of retail. The Examiner hasn't the record before him. In order to make an accurate and detailed statement it would be necessary for him to examine the record. The ruling of the Examiner stands.

Now before we proceed further the Examiner, of his own motion—and he does this in order that he may fully apprise counsel for the Respondents of his conclusions—will entertain a motion to strike from the record the testimony of the witness Ledbetter with reference to two offers made by two separate oil companies to furnish gas to his company, the offer having been made in the month of December, 1940; to strike all the testimony relating thereto from the record.

Mr. Abbott: Do I understand that the Examiner's suggestion is that this be done by the attorney for the
2051 Commission?

Trial Examiner Ballinger: The Examiner will do it of his own motion and the reason that he is doing it is that he desires to be fair with counsel for the Respondent. If the record stood as it is the Examiner would wholly disregard the testimony in his report and he is advising counsel now, by stating that he will either entertain a motion of counsel, or he will, of his own motion, direct that the testimony be stricken.

2052 Mr. Abbott: May I ask the Examiner the reason for that observation?

Trial Examiner Ballinger: The reason for that conclusion is this: the testimony was adduced presumably under the proviso to Section 2-b of the Clayton Act; am I correct?

Mr. Abbott: Just a moment. I will have to refer to my book.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

The provision of the statute, as the Examiner understands, under which the testimony referred to was offered, is the proviso to Section 2-b of the Clayton Act as amended by the Robinson-Patman Act. The proviso is as follows: "That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Mr. Abbott: That is correct.

Trial Examiner Ballinger: The Respondent here had been furnishing the services complained of four years before this offer was made, and therefore the facilities
2053 furnished could not have been furnished by the Respondent to meet competition or the prices offered by competitors for the offers tendered were four years after the Respondent commenced furnishing the facilities and the prices complained of to the four jobbers.

Mr. Abbott: Now, let me ask you: yesterday you made the observation that we couldn't introduce any testimony of other competitive offers made previous to July, 1936; is that correct? That is the effective date of the Robinson-Patman Act?

Trial Examiner Ballinger: That is correct.

Mr. Abbott: Now, assuming that a jobber became a customer of the Respondent previous to July of 1936, and was put on a tank car basis, I understand you to say that we couldn't offer in evidence any competitive offers on the part of other oil companies to supply the jobber, if those offers were made before July of 1936, and yet you are now saying that if he went on a tank car basis before July, 1936, we couldn't put in evidence any offers made after that date, either?

Trial Examiner Ballinger: The Examiner rules that it would have been necesary for you to have shown at the inception of the effective date of the Clayton Act that it was necessary for this Respondent to continue to maintain those prices in order to meet competition.

2054 Mr. Abbott: Well, of course, that presents a question of law for the Commission.

Trial Examiner Ballinger: That is correct.

Mr. Abbott: And I submit that it should not be acted upon by the Examiner at this time.

Trial Examiner Ballinger: Well, the Examiner is merely apprising you of the fact that unless counsel moves to strike the testimony, the Examiner will direct that the testimony be stricken. And he is doing that to apprise you of the fact that he will wholly disregard it in his report.

Mr. Abbott: Of course, both of those propositions involve matters of law, and I submit to your Honor that as to any tank car customer put on a tank car basis before July of 1936, upon your own ruling, we are foreclosed to show any competitive offers either before July, 1936, or after July, 1936, under the statement that is made by your Honor. In other words, it forecloses us both ways.

Trial Examiner Ballinger: Well, the law wasn't effective until the effective date of the Clayton Act; therefore, it wasn't necessary that there should have been any competition or that you had to reduce your prices in order to meet competition. But from the effective date of this Act, if you continued to maintain those prices, it is necessary for you to show that it was incumbent upon you to
2055 do so in order to meet competition.

Mr. Abbott: Yes, and I submit—

Trial Examiner Ballinger: And the only evidence that you have tendered is evidence of some offers made four years later.

Mr. Abbott: Well, they have a tendency to show that, I submit; and it is also testified that Mr. Ledbetter was solicited by one of these competitors for several months previous to December 13, 1940.

Trial Examiner Ballinger: That is only a difference of a few months.

Mr. Austin: There was no offer of any price, anyway, and this specifically refers to a lower price of competitor.

Mr. Abbott: There was an offer made, and there were lower prices both on December 10, 1940, and December 13, 1940.

Mr. Austin: But prior to this time he testified there had been no offer.

Trial Examiner Ballinger: The Examiner will entertain such a motion if counsel desires to make it, otherwise the Examiner will, on his own motion—

Mr. Abbott: It doesn't make any difference one way or the other if you are going to disregard it; whether there is a motion made or not, is immaterial.

2056 Trial Examiner Ballinger: I want to be as fair as I can with counsel so that you will not feel you have been taken by surprise when the report is submitted.

Mr. Abbott: Of course, here is the situation, your Honor: we can only introduce testimony as to the offers that have been bona fidely made—I mean on the part of competitors; therefore, we are obliged to take the situation and the facts just as they are.

Now, I think that we are entitled to show all those matters in the record. We are entitled to bring in the record all the matters of defense that we have.

Trial Examiner Ballinger: The Examiner has permitted you to incorporate them in the record, so that the record fully portrays the situation.

Mr. Abbott: That is all we ask.

Trial Examiner Ballinger: And from the Examiner's ruling you have an appeal to the Commission, and from the Commission, if you desire to pursue the matter further, to the Courts.

2057 Mr. Abbott: I realize that. Well, I think we are adequately protected.

Trial Examiner Ballinger: If the Examiner hadn't desired to afford you that opportunity he would have eliminated the testimony before it ever reached the record.

Mr. Abbott: I appreciate that. But I don't think the Examiner intends to do that, and I don't think he should do that.

Trial Examiner Ballinger: No.

Mr. Austin: Your Honor, I make the motion at this time that the testimony of Mr. Ledbetter, all testimony with respect to certain alleged offers, which he stated were made to him by oil companies, other than the Standard Oil Company, for the sale of gasoline to the Wayne Oil Company, be—

Trial Examiner Ballinger: And which were made during the month of December, 1940.

Mr. Austin: Yes, your Honor, the testimony so shows.

Be stricken from the record, because I am definitely of the opinion as your Honor stated that such testimony has no probative force in showing that a lower price of the Respondent was given to meet—in good faith to meet an equally low price of a competitor, within the meaning of Section 2-B of the Robinson-Patman Act.

2058 Mr. Abbott: Now, for the record I want to say that I resist the motion as suggested by the Examiner, and as now made by the attorney for the Commission, upon the ground that such testimony does come within the proviso of Section 2-B of the Robinson-Patman Act, which provides: "Provided however that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

I therefore resist the motion and ask that it be not granted.

Trial Examiner Ballinger: The motion to strike is granted.

Mr. Abbott: Mr. Citrin take the stand.

JACOB A. CITRIN was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Abbott.

Q. State your full name.
A. Jacob A. Citrin,
Q. Where do you live, Mr. Citrin?
2059 A. 507 West Grixdale, Detroit.
Q. What is your business, Mr. Citrin?
A. I am engaged in the oil business.
Q. And in what firm?
A. Citrin-Kolb Oil Company.
Q. Is that a partnership or a corporation?
A. It is a partnership.
Q. And who are the other partners besides yourself?
A. Mr. Kolb and my father.
Q. Is it a three-way partnership?
A. It is based on a percentage, forty, forty, and twenty.
Q. What I mean to say is are there three equal partners or is one of the wives a partner?
A. Well, Mr. Kolb and Mrs. Kolb own their percentage jointly.
Q. And you own your percentage singly; is that right?
A. That's right.
Q. How long have you been engaged in the oil business?
A. About twenty years.
Q. And when did you first embark in that business?

A. Late in 1920.

Q. How did you start in the operation of the oil business?

A. As a boy I worked a short time for my brother who owned a service station.

Q. And did you in 1920 buy a service station yourself?

2060 A. [illegible] did.

Q. Is that located at 8611 Linwood Avenue?

A. It was.

2061 Q. What brand of gasoline was sold at that station?

A. Lincoln gas.

Q. Had you met Mr. Kolb at that time?

A. I had not.

Q. When did you first meet him?

A. I would say around 1923.

Q. And at that time did he have a different kind of business than the oil business?

A. He had just arrived from Baltimore, where he worked for his uncle, and he was looking to enter into some business.

Q. And did he have an accessory business on Fenkel Avenue?

A. He did buy an accessory store on Fenkel.

Q. That is before you went into partnership with him, was it?

A. That's right.

Q. And this place was on Fenkel Avenue near Dexter Boulevard, was it?

A. It was.

Q. And you decided, did you, to go into partnership with him?

A. Yes.

Q. Was the partnership—

Mr. Austin: He decided, too, didn't he?

2062 By Mr. Abbott:

Q. Well, was it mutual? You had a mutual agreement to go into a partnership?

A. Yes.

Q. Was that partnership with reference to both locations, the one on Linwood and the one on Fenkel?

A. No.

Q. As to which?

A. First we entered into this accessory store.

Q. On a partnership basis?

A. Yes.

Trial Examiner Ballinger: What is the date of the formation of that partnership?

The Witness: I would say it was around 1923.

By Mr. Abbott:

Q. And did you still retain the service station on Linwood in your own name?

A. I did, that's right.

Q. Not in the partnership?

A. No.

Q. That was not in the partnership?

A. That is right.

Q. Later did you build a service station on Fenkel Avenue near Dexter?

A. We did.

2063 Q. And was it operated by you alone or in the partnership?

A. We bought the land as a partnership, and then we erected the service station.

Q. You built the service station?

A. That's right.

Q. And did you operate that service station at the start as a partnership?

A. We did.

Q. But later did you take in the Linwood Avenue station in the partnership?

A. We did.

Q. Now, you say that you originally sold at your Linwood Avenue station Lincoln gasoline and petroleum products?

A. We did.

Q. Under the brand name of Linco?

A. Yes, I believe they call their gasoline Lincoln gasoline.

Q. While the station on Fenkel Avenue was being built on the land that you bought, did you change your brand of gasoline at that time while the building was being erected on Fenkel Avenue from Lincoln to some other brand?

A. When we completed the station on Fenkel and Dexter, we had also—yes; we changed the gas to Standard.

Q. Changed at that point?

A. That's right.

2064 Q. That was about 1923?

A. Yes.

Q. Is that correct?

A. That's right.

Q. From that time on did you acquire other service stations in the partnership?

A. We did.

Q. Was the next one built at 8620 Linwood Avenue?

A. Yes, the next one was built on the original location. We shared a corner between the Moran Brothers, who operated a battery station, and I operated a service station; the lease having been on a month to month basis, necessitated us to go across and buy that corner. We did buy that corner and we erected a service station.

Q. That was across the street?

A. Across the street.

Q. From 8611?

A. That's right.

Q. What intersecting street it near?

A. Pingree.

Q. Did you later erect a service station at Linwood and Buena Vista?

A. We did.

Q. Just south of Davison?

A. Yes.

2065 Q. Did you later, after that, erect another station at Linwood and Rochester?

A. We did.

Q. Did you about the year 1926 acquire bulk storage from anyone?

A. It was between the year of 1926 and 1928, that we acquired bulk storage.

Q. From whom?

A. From another jobber. We shared storage with another jobber.

Q. And was the name of the jobber the Carnick Oil Company?

A. It was.

Q. And where was the bulk storage plant located?

A. It was in the rear of a coal yard on six mile road, right near Swift Avenue.

Q. Is that east or west of Woodward Avenue?

A. It is east of Woodward Avenue.

Q. And did you take shipments of gasoline at that bulk plant?

A. We did.

Q. Was that Standard Oil Gasoline?

A. It was.

Q. Well, what year was that that you went on a tank car basis? I mean, at the Carnick Oil Company bulk plant; if you did?

2066 A. It was between the year of 1926 and 1928. I am not quite sure; I am quite indefinite as to the exact date of starting. I haven't been able to just locate the records, but it was between the year of 1926 and 1928.

Q. Previous to that year and from 1920 on, at these various station addresses that I have mentioned, did you receive your supply of gasoline from either the Lincoln Oil Company or the Standard Oil Company on anything other than the tank wagon prices; tank wagon basis?

A. Well, the reason for purchasing gasoline from the Lincoln Oil Company was that at the time they owned a company station on Warren and 24th and they offered that station to us at a low rental as a consideration of purchasing their gasoline.

Q. And did you take over that station?

A. We did.

Q. When was that with reference to the time that you had the station erected on Fenkel and Dexter Boulevard; afterwards or before?

A. It was prior to the date.

Q. Before?

A. Yes.

Q. The question that I asked you was did you receive your gasoline from Lincoln Oil Company or from the Standard Oil when you had these stations on Linwood, mostly, and on Fenkel Avenue; did you receive them in tank
2067 car or tank wagon deliveries; your supply of gasoline?

A. At first we received them at tank wagon deliveries.

Q. Was that from the Lincoln as well as the Standard Oil?

A. From the Lincoln as well as the Standard Oil.

Q. And did you pay the regular tank wagon prices for your supply?

A. We did.

Q. Now did you do that with the Lincoln Oil all the time from 1920, when you first acquired the 8611 Linwood Avenue station, up to the time that you took over Standard Oil Company as a supplier?

A. We did.

Q. You received deliveries from Lincoln Oil on a tank wagon basis?

A. We did.

Q. But you say you had some consideration on the rental of a station on Warren Avenue?

A. That is correct.

Q. But you leased from the Lincoln Oil?

A. That's right.

Q. Now after you acquired your bulk plant storage—let me ask you this: What was the occasion or reason why you acquired bulky storage from the Carnick Oil Company?

A. Having had a few service stations at that time, and knowing that there were jobbers who had as many 2068 service stations or less than we had, who had been buying on a tank car basis, we had started to negotiate many connections in order to obtain tank car prices and we found that we had to have a siding and tank facilities.

Q. Who did you find that out from?

A. Well, the first company we inquired from was the Paragon. It was a Toledo company, at that time.

Q. What is the full name of that company, do you know?

A. It was Paragon Refining Company.

Q. What negotiation did you have with them? State what was said and where it was and what date, approximately, as far as you can remember?

A. As far as I can remember we were aware that they were supplying the gas to Waco; that is a jobbing outfit in Detroit.

Q. Is that the Schlee Brothers?

A. Yes.

Q. They are the ones that made the trip around the world, aren't they, in the airplane?

2069 A. That's right, and we believed that from the gas that Lincoln was delivering to us, also was sold to them by the Paragon, and we had inquired—I believe there was a representative that contacted us.

Q. Of the Paragon?

A. Of the Paragon, yes.

Q. Was that before you acquired the Carnick Oil bulk plant facilities?

A. Well, it was—I am just trying to remind myself—

Q. Take your time and be sure about it.

A. —whether we had the storage first or afterward. I believe it was before we acquired the storage.

Q. State what negotiations you had, giving the conversation, and the date, and the place.

A. It was a representative of that company that talked to us, and we told him the approximate gallonage that we had, or expected to have, with the additional outlet.

Mr. Austin: What year was that, Mr. Citrin?

The Witness: I would say that was around—well, between 1926 and 1928. I just can't remember the exact year.

By Mr. Abbott:

Q. Whenever it was, you were still acquiring gasoline on a tank wagon basis, were you not?

A. That's right.

2070 Q. Now, state what the conversation was which constituted the negotiations with Paragon?

Mr. Austin: Your Honor, I would like to raise a question here, also. I will object to this line of testimony on the ground it is immaterial as to what conversation he had with other oil companies as long ago as 1926 and 1928.

Trial Examiner Ballinger: The Examiner doesn't perceive the materiality of the testimony. He would like to be enlightened.

Mr. Abbott: As I say, it puts us in this position. You say we cannot introduce testimony as to any competitive offers by competitors previous to July, 1936, and yet you have ruled that if we put a man on a tank car basis before 1936, that we can't introduce testimony as to any offers made after we put him on a tank car basis. Now, you see, that forecloses us from putting in any evidence of competitive offers in a case of that kind, and I don't think that that is the law. It can't be the law.

Trial Examiner Ballinger: I don't think you have correctly stated the Examiner's position. The Examiner hasn't held that after the effective date of this Act you could not have shown that offers were submitted, and that it was necessary for you to maintain the price in 2071 order to meet competition, but the only testimony that has been tendered here was testimony with reference to other instances four years after the effective date—more ~~than four years after the effective date of the Act.~~

Mr. Abbott: I know, but you are assuming that we have no other testimony on behalf of the officers of the Company, the Respondent, to the effect—

Trial Examiner Ballinger: Now you are proposing to offer testimony, again, that seven years ante-dates the effective date of the Act.

Mr. Hanley: Suppose it were 30 years, your Honor, when they went on the tank car basis? Isn't the Commission interested in knowing what the development of these companies may be and what the relations between the Respondent and these companies are, and why they are?

Trial Examiner Ballinger: Judge, I permitted the testimony to go into the record, but the Examiner directed that it be stricken. You have all the benefits of the testimony and exceptions to the Examiner's rulings, so that your rights are fully preserved.

Mr. Hanley: Was any testimony stricken as to competitive offers?

Mr. Abbott: Yes; the two offers of the Aurora Gasoline Company and National Refining Company made in December, 1940.

2072 Mr. Hanley: To the Wayne Oil Company?

Mr. Abbott: Yes.

Mr. Austin: I have an objection pending and I would like to get a ruling on it, but I would like to say, before your Honor rules, that in using this objection, I have not taken any position, one way or the other, as to the admission of bona fide offers to a customer of the Standard Oil Company within a reasonable time prior to 1936. My objection is based upon these conversations which go back to 1926 to 1928, which, I say, on their face, are so far back that they would have no probative force.

Mr. Abbott: How far back of 1936 would you suggest?

Mr. Austin: I won't attempt to say, but it would depend upon the particular case. I do think that the objection is proper here.

Trial Examiner Ballinger: Tell me what the object of this testimony is; what you think it tends to prove in this proceeding?

Mr. Abbott: We are going to show, in this witness' case, a course of dealing with reference to his company of many competitive offers made between 1926 and the present time which made it necessary for the Respondent to

maintain the jobber, Citrin-Kolb Oil Company, o
2073 the tank car basis in order to keep from losing thei
business, which the Respondent would have been deprived of if they had not met the competitive offers o
other persons who made such offers between—

Trial Examiner Ballinger: Do you think—

Mr. Abbott: Just a moment, if the Court please—

Trial Examiner Ballinger: You think this testimony is material to your case, do you?

Mr. Abbott: I do.

Trial Examiner Ballinger: The Examiner will admit it subject to a motion to strike.

Mr. Abbott: Very well.

Do you wish to make a statement on the record, Judg Hanley?

Mr. Hanley: Yes.

Trial Examiner Ballinger: Judge, the matter to which you evidently desire to address yourself has been disposed of by the Examiner.

Mr. Hanley: I understand that, and I want to take an exception on the record.

Trial Examiner Ballinger: The exception has already been taken.

Mr. Hanley: Do I understand I cannot except and state the reasons on the record to the rulings of the Court,
which reasons the Respondent feels the Court should
2074 be advised of at this time?

Trial Examiner Ballinger: Counsel will be afforded full opportunity to present those reasons to the Commission. The Examiner declines to hear counsel upon that question at this time.

Mr. Abbott: What was the date of the filing of the Complaint in this case, Mr. Austin?

Trial Examiner Ballinger: The Complaint is dated November 29, 1940.

Mr. Austin: And it was served on the following day.

Mr. Abbott: So it was served on November 30, 1940; is that correct?

Mr. Austin: Unless November 30th were Sunday, in which case it was served December 1st.

Mr. Hanley: As I understand the effect of the ruling of the Court, it is that no offers subsequent to that time are material?

Trial Examiner Ballinger: No offers subsequent to which time?

Mr. Hanley: To the filing of this Complaint.

Mr. Austin: I think the Examiner's statement on the record at the time will show that.

Mr. Hanley: Off the record.

(A discussion ensued off the record.)

2075 Trial Examiner Ballinger: On the record. Read the last question.

(Last question was read as follows: "Now, state what the conversation was which constituted the negotiations with Paragon.")

By Mr. Abbott:

Q. I mean, give the purport of the conversations and state the time and place. Was it here in Detroit?

A. It was in Detroit; at our station on Linwood. A representative contacted me, and, as I recall, at that time, there were several jobbers, who I had related to this representative, and I pointed out that those jobbers not having any more outlets than we had, were buying in tank cars, and we felt that we were going to expand and that we wanted to negotiate a deal.

2076 I pointed out to them the various jobbers having been in business and who had bought gas in tank cars. If you would like to, why, I would like to—if I may be permitted, I would like to call out some of the jobbers.

Q. You may state what your personal knowledge was as to the situation that existed at that time?

A. Well, the Lincoln Oil Company was buying in tank cars. The Great Western Oil Company; Waco; Savin Oil; Zip; Wilson Oil Company—and Indian Gas were sold, I believe, through a distributor at that time.

Q. Was this in 1926?

A. Yes, between the years 1926 and 1928, when we negotiated.

Q. So you had that knowledge of the Detroit area situation, did you?

A. Yes.

Q. When you talked to the representative of Paragon?

A. That's right.

Q. You may state further what conversation you had with him.

A. The first he told us that we would have to have facilities and he saw no reason why we shouldn't be able to buy in tank cars.

Q. Was anything said about the price at that time?

A. No, there was no price discussed at all.

2077 Q. Was there anything said about the difference between the price of tank car delivery and the price of tank wagon delivery?

A. Well, we knew there was quite a differential. I just couldn't remember right now as to what the differential was at that time. I know the differential at that time was—some cases, there, it ran between two and three cents.

Q. It was more then, than it is now?

A. Oh, yes:

Q. Proceed with the conversation that you had with him?

A. He was going to investigate and we were trying to obtain facilities.

Q. At that time you didn't have the Carnick Oil Company bulk plant?

A. No. Right after that we negotiated with Carnick to share his storage and we had also been building this station.

Q. On Fenkel Avenue?

A. At Fenkel. So we went to the Standard at that time —wait a minute, now. We did handle Standard Gasoline at that time.

Q. You were getting Standard Oil Gasoline in tank wagons, is that right?

A. Yes, in tank wagons.

Q. What stations were they supplying at that time?

A. The station at Fenkel and Dexter.

2078 Q. Any other?

A. And we were buying at 8620 Linwood.

Q. From Standard, also?

A. Standard, yes.

Q. The rest of the stations were being supplied by whom?

A. Then we had this Buena Vista station; Linwood and Buena Vista station.

Q. Who supplied that?

A. Standard. We had one station at Rochester, we bought gas from White Star, at that time.

Q. Was that bought on the tank wagon basis and price?

A. Yes.

Q. In other words, at that time, previous to this conversation with Paragon, you had always bought on the tank wagon basis, is that right?

A. Yes.

Q. With reference to the conversation concerning the bulk plant—

A. You mean the conversation between this representative?

Q. Of Paragon; was there anything else said at that time?

A. No, there was nothing else, only that he was to advise us and we weren't sure at that time whether we wanted to buy from them. We were just sort of feeling our way. We negotiated this storage with Carnick and went to Standard on the basis that we felt we had sufficient gallonage that we wanted to combine those 2079 outlets and that we were going to buy in tank car lots.

Q. Whom did you contact with the Standard Oil?

A. The first I contacted was Mr. Bennett, who was the sales manager, who referred me to the assistant manager, Mr. Carrington and Mr. Carrington took the matter up with Mr. Raupagh and I believe that several weeks—

Q. Did you talk with Mr. Raupagh?

A. Yes.

Q. Personally?

A. Several weeks had elapsed and finally they had started to sell us in tank car.

Trial Examiner Ballinger: When was that?

The Witness: Between the year of 1926 and 1928.

By Mr. Abbott:

Q. Can you more definitely fix the date of that by any of your records?

A. Well, having started off in sort of a small way, and moving several times, we just sort of lost the records, that far back.

Mr. Abbott: That will be identified, your Honor, by the records of the Company, then.

Trial Examiner Ballinger: I don't think it is material.

Mr. Austin: I think it is in the record now, if we 2080 go back to Mr. Raupagh's testimony.

Trial Examiner Ballinger: I am merely trying to get some starting point.

By Mr. Abbott:

Q. Before the Standard Oil put you on a tank car basis did you acquire any other bulk plant?

A. It was a while later that we had to acquire another bulk plant.

Q. Did they put you on the tank car basis while you only had the facilities of the Carnick Oil Company bulk plant?

A. If I may explain this—

Q. Go right ahead.

A. Just in my own way; to the best of my recollection. It later turned out that the Standard Oil were not aware of the fact that we were sharing this storage with another jobber and Mr. Raupagh, having found that out, has advised me that unless we had our own independent railroad facilities, storage and trucks, that they would not be able to go on selling us.

Q. When did he tell you that? Was it after you went on the tank car basis?

A. It was a short while after that. I know that we were put to a considerable amount of trouble.

We had sort of a lease with Carnick on this storage and the Standard Oil Company having refused, or
2081 threatened to refuse to deliver, we were sort of on
the spot with Carnick. We had—we were tied up to him and I know we went back several times and tried to straighten the matter out and Mr. Raupagh put it to me in this manner. He said, "Now here: Assuming that we would let you handle the gasoline on the basis where you are now getting it with Carnick in the same storage. On that basis nothing would stop any dealer or bunch of dealers who would get together and acquire one tank, and they could all ship their gas in one tank and they would want to buy in tank car lots," so they said, "if you are a distributor and you want to continue to buy in tank cars, you must make an investment, have your own trucks and make your own deliveries," and they certainly wouldn't change their attitude at all. It was either get the storage or else they were going to stop selling us.

Q. What did you do after they told you that?

A. Well, we, at that time, bought the corner at Livernois and Lyndon.

Q. Is that where one of your bulk plants is now located?

A. Yes.

Q. And did you purchase that outright or lease it?

A. We did. We purchased that outright.

Q. Did you erect the building that constitutes the bulk plant?

A. Yes. We erected a small warehouse. We had 2082 a two-car railroad siding installed for us. We also erected, in connection, a service station and offices.

2083 Q. Did you erect any tank car storage?

A. Yes, we installed three 20,000-gallon tanks.

Q. What year was this?

A. I would say it was, oh, I'd say, six or eight months from the time we started buying gas originally in tank cars.

Q. In the meantime—

Trial Examiner Ballinger: Can you place that in any one year?

The Witness: I would say it was early in '29; either the latter part of '28 or '29.

Q. Now, after you went on a tank car basis, with deliveries made to the Carnick Oil Company plant, was there any stoppage of your supply on that basis until you got the Lyndon and Livernois plant erected?

A. No. We told them we had bought this property; that is, that we were having the storage erected, and that the matter would be straightened out, and they continued for a while to deliver on the same basis.

Q. Then, when you had the Lyndon and Livernois bulk plant finished, did you begin to receive deliveries of tank cars at that plant on the sidetracks that you had provided?

A. We did.

2084 Now, you first went on the tank car basis with deliveries being made to the Carnick Oil Company on Six Mile Road east of Woodward Avenue—about what year did you say?

A. Between the year of '26 and '28.

Q. And first when you went on that basis, did you operate on a dual basis both as wholesaler and retailer, or how?

A. We operated solely as a retailer.

Q. That is to say you sold your entire supply of gasoline at your own operated service stations?

A. That is right.

Q. Now, did you change that method of operation after you went on a tank car basis?

A. We did.

Q. When did you do it, and what were the circumstances?

A. Having acquired several wholesale—that is, retail dealers—we found that we would be required to decide whether we were to operate either as a retailer or a wholesaler.

Trial Examiner Ballinger: When did you discover that?

The Witness: Well, I would say around 1935.

By Mr. Abbott:

Q. Well, before that, after you went on the tank car basis in 1926 to 1928, what price did you pay for your gas-
oline that you received on the tank car basis from the
2085 Standard Oil Company, delivered on tracks at your
bulk plant, either at the Carnick Oil Company plant or at your own plant at Lyndon and Livernois, what price did you pay?

A. It was a cent and a half below the tank wagon price.

Q. Did that vary from time to time?

A. It did.

Q. Is it your recollection that it varied back into 1926-28 period or was it fairly constant?

A. I would say it varied in later years.

Q. At that time it was fairly constant?

A. Yes.

Q. But you stated awhile ago that the prevailing differential between tank wagon and tank car prices in those days was more than a cent and a half, I thought?

A. It was on other brands. We knew that the other jobbers were getting a better price than we were.

Q. You refer to the jobbers that you have mentioned in your testimony this afternoon?

A. Yes.

Q. Well, why was it, then, that you decided to take on the contract with the Standard Oil on the basis of 1½¢ differential, if you could get more from other suppliers, more differential?

A. First of all, when we started at Fenkel and Dexter,
that station having been somewhat one of the first
2086 stations down in that section, we started to do a
tremendous business there, and, of course, we were sort of attributing a large part to the products we were selling, and we just felt that we would be better off to continue with Standard inasmuch as we had already established a certain amount of business in the stations we had.

Q. Was that about the time that Dexter Avenue opened up as a business street?

A. Yes, we completed the station just about the time they paved Dexter through Fenkel.

Trial Examiner Ballinger: Was that about the year 1929 or '30?

The Witness: Oh, it was prior to that time.

By Mr. Abbott:

Q. Dexter Boulevard had not been developed as a business street originally, had it?

A. Well—

Q. I mean before it was paved it was a residential section?

A. Residential, yes.

Q. Down around Chicago Boulevard and from there north to Fenkel Avenue?

A. With the exception of a piece right by the railroad crossing there, there were two or three—well, the motorbus company was there.

2087 Q. And there are also some factories there at the river?

A. Yes, Borden's.

Q. Aside from that it was mostly a residential street?

A. Residential, yes.

Q. And it later developed into a business street with a consequent increase in traffic and patronage of gasoline stations, did it not?

A. That's right.

Q. Now, after you went on the tank car basis with the Standard Oil Company and acquired your bulk storage at Lyndon and Livernois Avenue; I will ask you whether you had any negotiations with a Mr. Bailey of the Wilson Oil Company?

A. We did.

Q. What gasoline did they distribute? What brand of gasoline?

A. At the time when we talked to Mr. Bailey they were appointed sole distributors for Hi-Speed.

Trial Examiner Ballinger: Will you please state when that was?

The Witness: That was about 1930.

By Mr. Abbott:

Q. That is when you had the conversation with Mr. Bailey of the Wilson Oil Company?

A. Yes, sir.

Q. And how did that come about?

2088 A. Well, there again it is sort of hard to connect up just how we happened to—whether they came to us or we went there. Now, I will tell you, when we originally purchased gas from the Lincoln, we were quite friendly with one of the owners down there, Mr. Matoski, one of his sons was quite a friend of mine, and they were quite familiar with this Wilson set-up that they had obtained from Hi-Speed, that is Hicock.

Q. At that time Highland Oil hadn't been organized?

A. No; they hadn't been in the picture. I know that a meeting was arranged. We met Mr. Bailey—

Q. When you say "we" whom do you mean?

A. Mr. Kolb and I. And at that time he introduced us to a Mr. Van Kuren, who was a direct representative of Hicock.

Mr. Austin: Did the witness state when this took place?

The Witness: I would say around 1930.

By Mr. Abbott:

Q. The Hicock Oil Company you mentioned, where did it have its offices?

A. Toledo.

Q. And did you ever go down there to have any of these discussions in connection with Hi-Speed?

A. Both Mr. Kolb and myself.

2089 Q. Mr. Kolb and you?

A. Yes.

Q. Who was instrumental in getting you to go down there?

A. As I stated, we were introduced to Mr. Van Kuren who was the representative of Mr. Hicock, who suggested that we take a ride to Toledo; that he would be glad to furnish the car and take us out there and have us meet Mr. Hicock. A date was set, and Mr. Van Kuren took us out to Toledo. We met Mr. Hicock after business hours, it was around, I would say around 7 o'clock in the evening.

Q. Was that at his office?

A. At his office, yes.

Q. That was an old frame house?

A. It was a sort of a house; it was either an apartment house or—it was a pretty good sized house.

Q. That is where the Hicock Oil Company had its office in Toledo?

A. That's right. I remember he pointed out various rooms; one room was the printing, and furnished the advertising; he took us into another room and showed us a photograph of various service stations.

Q. Mr. Hicock was present, was he?

A. Oh, yes: Yes.

Q. Was Mr. Kirkbride present, the vice president of the company?

2090 A. No. There was one man he introduced us to, I believe he was in charge of the advertising. I can't remember the name.

Q. What conversation did you have with Mr. Hicock in the presence of Mr. Kolb?

A. Well, naturally Mr. Van Kuren must have previously advised them as to our coming out there. We got into the conversation of entering into a similar deal such as was made between them and the Wilson Oil Company.

Q. Let me ask you this: at that time you were dealing with Standard Oil on a tank car basis, were you?

A. Yes.

Q. I mean the Citrin-Kolb Oil Company?

A. Yes.

Q. Proceed.

A. He proceeded in outlining the advantages that we would have in making a deal with them, and told us about the way that they would make the deal. They would offer us a guaranteed contract, a margin, rather, of 6½¢ per gallon. In those days the margin was based from the retail price to the consumer.

Q. In other words, 6½¢ below the retail price to the consumer?

A. That is correct. In other words, the dealer margin would come out first, and whatever would remain would be the jobber's margin.

2091 Trial Examiner Ballinger: Do I understand that you were to have a differential of 6½¢ a gallon?

The Witness: No, your Honor. 6½¢ was the price under the retail. In other words, if a motorist would buy the gas, we would buy the same gas and we would sell to the motorist at 6½¢ below—

Trial Examiner Ballinger: I mean a differential between the purchase and sale price of 6½¢?

The Witness: Yes.

Mr. Austin: Not between the purchase and sale price of the jobber. Between the retail service station price—

The Witness: That is right.

Mr. Austin: —and the jobber price?

The Witness: That's right.

Mr. Austin: Now, in between you have got the retail margin, and secondly the wholesale margin, if I understand it correctly?

The Witness: That is right.

By Mr. Abbott:

Q. Is that correct, Mr. Citrin, in order to confirm Mr. Austin's testimony?

A. That's right.

Trial Examiner Ballinger: Let us get this straight.

2092 You were to buy it at 6½¢ above the retail price; is that correct?

The Witness: Below.

Trial Examiner Ballinger: Below the retail price?

The Witness: Yes, below the retail price.

By Mr. Abbott:

Q. Was there any discussion of taxes in connection with that?

A. No.

Q. In other words—

A. That was the net price to us.

Q. The net price excluding taxes?

A. Yes.

Q. All right. In other words, this 6½¢ margin didn't include any taxes that you had to absorb?

A. No.

Q. Now, was there anything else in the deal that they discussed and offered to you at that time?

A. Well, they offered us unlimited credit facilities in the way of—

Q. What do you mean by that?

A. Well, first of all in order for us to get that kind of a deal they claimed that they would have to have us assign to them a certain portion of the stock of the company; we would have to incorporate.

2093 Q. In other words, in order to comply with their arrangement you would have to change your structure from a partnership to a corporation?

A. To a corporation, that is right.

Trial Examiner Ballinger: And take them in as stockholders?

The Witness: They would get 51 per cent of the common stock. We would—our investment would be returned to us by preferred stock.

By Mr. Abbott:

Q. In other words, the amount that you had invested in the business you would acquire or keep by initial preferred stock?

A. Yes.

Mr. Austin: Your Honor, I think counsel is doing a little too much testifying here.

Mr. Abbott: I didn't suggest that. He said it and I merely reiterated it.

Mr. Austin: The witness has been stating conclusions as to what was offered, rather than stating what was said. I haven't objected to that. But please, if he is going to give the conclusions, let him make it himself.

Trial Examiner Ballinger: I would like to inquire of counsel how this becomes material?

Mr. Abbott: If your Honor please, we have a right—

Trial Examiner Ballinger: Here is one outfit selling their stock to another outfit in which they are to become a part owner to the extent of 51 per cent of the common stock. 2094

Mr. Abbott: That is true.

Trial Examiner Ballinger: Do you think that can afford any basis for establishing competition? I would like to hear from you on it.

Mr. Abbott: I am not going to say very much on that proposition, but here is a case where the margin was guaranteed per gallon on a Hi-Speed gasoline, which he testifies here the gasoline is comparable in quality to that of Standard Oil house brand gasoline, 6½¢ margin per gallon below the retail price, excluding taxes—

Trial Examiner Ballinger: Provided he organized a company and took them in as partners and gave them a part of the profit.

Mr. Abbott: Not as partners. They were to get their investment back.

Trial Examiner Ballinger: I don't mean as partners, but stockholders.

Mr. Abbott: They were to get their investment in the business back, or guaranteed to them by initial preferred stock.

I want to ask the witness something about that. I am not through with the witness.

2095 Trial Examiner Ballinger: You may proceed, but do you think this is material?

Mr. Abbott: I certainly do.

Trial Examiner Ballinger: Proceed, then.

By Mr. Abbott:

Q. Now, with reference to the conversation relative to preferred stock, was there any discussion as to the amount of investment that you had in your company and your facilities?

A. Well, the only discussion we had about that was that we wanted to know how much interest we would get on our investment, and in turn—

Q. You mean what per cent of interest?

A. Yes. They were to pay us 6 per cent interest on the preferred stock; that is, the company was to pay. First, out of the profits—

Q. You mean the incorporated company?

A. Yes. First, out of the profits we were to draw out 6 percent interest on the preferred stock. And then Mr. Kolb, my father, and myself would be the officers of the company, and we would be entitled to a certain fixed salary. After having drawn out the interest, salaries, and paid all expenses, if any profit remained we would be entitled to 49 per cent on the common stock.

2096 Q. And you would have 49% of the common stock allocated to you as stockholders?

A. That's right.

Trial Examiner Ballinger: And the common stock was the voting stock, was it?

The Witness: Yes.

Trial Examiner Ballinger: So that they would control the company.

By Mr. Abbott:

Q. The preferred stock, did that participate in any way in the voting in the company?

A. Not the way they explained it to us. They claimed that the preferred stock was equivalent to a mortgage on the business.

Q. And that was preferred as to dividends up to 6%?

A. Yes.

Q. Was it also preferred as to distribution of assets? Do you understand what I mean by that?

A. No, I don't, Mr. Abbott.

Q. I mean was it preferred both as to interest and as to assets? In other words, you say it was explained to you that it was a mortgage on the assets?

A. That is right.

Mr. Austin: I object, your Honor. This witness is really testifying as to a conversation he had with
2097 somebody. The limit of strict admissibility here is what was said to him and what he said. He is being asked to draw conclusions from that, and I think that the conversation should speak for itself.

Mr. Abbott: We will attempt to restrict it to conversation, but this was a long time ago.

Mr. Austin: That is why I haven't objected, Mr. Abbott, to most of this.

Trial Examiner Ballinger: Then the witness' memory should be better than yours. As I take it, you obtained your information from the witness.

Mr. Abbott: Well, that was very recently, however. I dont' think there is any knowledge between my memory and the witness'.

By Mr. Abbott:

Q. Now, at the 6½¢ margin between the retail selling price and the price which you were to purchase your requirements at, do you recall how that compared with the deal that you at that time had with the Standard Oil Company to purchase gasoline on a tank car basis?

Mr. Austin: Your Honor, I object to comparisons being made. He can describe his deal with the Standard Oil Company, if it isn't already described, and he can describe the deal here, and the Commission can make the comparison.

Trial Examiner Ballinger: Objection sustained.

2098 Mr. Abbott: I will ask it in this way:

By Mr. Abbott:

Q. At that time your differential between the tank car and the tank wagon price on Standard Oil house brand gasoline you testified was 1½¢ a gallon; is that correct?

A. Correct.

Q. And do you recall what was the difference, the prevailing dealer margin over and above the tank wagon price between that price and the retail price to the public? If you recall?

A. As I recall it, the 6½¢ would have given us 2½¢ differential.

Q. In other words, 2½¢ more than you were making on Standard Oil house brand gasoline?

A. 1¢ more. As I recall it, the dealer margin at that time was around 4¢.

Q. You had a 1½¢ differential between tank wagon and tank car which made 5½¢?

A. That is right.

Q. And you were to receive 6½¢ from the Hi-Speed?

A. We would have received 6½¢, yes.

Q. So that was a cent better than the Standard Oil price at that time?

A. Correct.

Q. Now, at that time did the Wilson Oil Company, to your knowledge, have a similar arrangement with the
2099 Hi-Speed Oil Company, the Hicock Oil?

A. They told us that that was the exact same deal, and in later years it was proven—well, it was common knowledge that they were operating right along, and still do, on the same basis.

Q. Wilson Oil Company still operates on that basis, to your knowledge?

A. Yes.

Q. Did you have any other knowledge—

Mr. Austin: He didn't say to his knowledge, I don't believe.

Mr. Abbott: Well, he is stating what it was, and I assumed that is his knowledge.

Trial Examiner Ballinger: Have you any personal knowledge with reference to the matter?

The Witness: The only knowledge I have is from the time that Mr. Bailey of Wilson told me that that is the deal he had.

Trial Examiner Ballinger: In other words, he told you that?

The Witness: Yes.

Q. Who told you that: Mr. Wilson or Bailey?

A. Bailey.

Q. And Bailey was the man who originally took
2100 you down to Toledo, wasn't he?

A. Van Kuren.

Q. Well, Bailey is the one that introduced you to Van Karen?

A. That is right, introduced us.

Mr. Austin: Your Honor, I think that answer is objectionable, and I would like to state that I assume that the purpose of the testimony is to show that Mr. Bailey told Mr. Citrin that he was offering Mr. Citrin the same deal that they were giving the Wilson Oil Company?

The Witness: Mr. Austin—

Mr. Austin: If it is testimony as to the Wilson Oil Company deal with the Highland, I think it is hearsay. But if it is part of the conversation, I don't object to it. I am not clear which it is. I just wanted to ask for some clarification.

Trial Examiner Ballinger: The Examiner is likewise in doubt.

By Mr. Abbott:

Q. When Mr. Bailey originally introduced you and brought this matter up and introduced to you Mr. Van Kuren, is that a part of the conversation that Bailey told you that the Wilson Oil Company had this deal with the Hicock Oil Corporation?

A. Yes. And then later Mr. Hicock told us that if
2101 we—we were always questioning him if that was the
same deal that Wilson Oil had, and Hicock told us if we would make that deal with them, they would be willing to show us papers that our papers would be written in the same manner and the same deal that the Wilson Oil Company had. That was where I got my belief that their deal was the same as the one offered to us.

Q. At that time or some time shortly thereafter did you know a company by the name of Savin Oil Company?

A. Yes, I knew of such existence.

Q. Did you know, have any personal knowledge to the effect that,—with reference to a deal they made with the Hicock Oil Corporation or Hicock Oil Company of Toledo, Ohio?

Trial Examiner Ballinger: What materiality has this?

Mr. Abbott: The purpose of this is to show, your Honor, that the Citrin-Kolb Oil Company did not accept the offer of the Hicock Oil Company, but that the Savin Oil Company did. And I wish to show by the witness what has been the subsequent developments with reference to the acceptance by the Savin Oil Company of the same deal that was offered to the Citrin-Kolb Oil Company by the Hicock Oil Corporation of Toledo?

Trial Examiner Ballinger: Well, suppose they would
have accepted it and suppose it had been a great suc-
2102 cess. How would it become material in this case?

Mr. Abbott: Well, this testimony relates to a competitive offer by another major oil company which was offered to the Citrin-Kolb Oil Company, which was a cent better than the then existing tank car price.

Trial Examiner Ballinger: Not made to this witness' company, was it?

Mr. Abbott: Yes, it was. That is what he has been testifying to.

By Mr. Abbott:

Q. Did you communicate that offer—

Trial Examiner Ballinger: Are you speaking about the offer of the Hicock Company to him?

Mr. Abbott: Yes, I am.

Trial Examiner Ballinger: That offer was not made to him, but was made to a company of which the Hicock Company was to be—was to have the controlling interest.

Mr. Abbott: Well, it was made to the Citrin-Kolb Oil Company and to the witness.

Trial Examiner Ballinger: In other words, it was an offer made to themselves, in effect.

Mr. Abbott: It was made to the Citrin-Kolb Oil Company in such a way as they were to receive full credit of
their investment by way of preferred stock, and were
2102 also to receive a larger differential on the sale of
gasoline from tank car deliveries.

Mr. Austin: I request, if the Court please, that the last question, if there is any question, be re-read.

Trial Examiner Ballinger: Read the last question.

(The record and the last question were read by the reporter.)

By Mr. Abbott:

Q. Did you tell Standard Oil Company that you had received—

Mr. Abbott: Well, I understand there was an objection to the question as propounded to the witness just preceding, and I withdraw the question for the moment.

By Mr. Abbott:

Q. Did you communicate the fact that you had received this offer from the Hicock Oil Company to your supplier the Standard Oil Company of Indiana?

A. I did, personally.

Q. Whom did you communicate it to?

A. I can recall talking to Mr. Bennett about that particular offer.

Q. Did you make any request of the Standard Oil Company in relation to it?

A. I don't recall as we did. The only request we
2103 made, as I get it—as I can recall, the difference to us at that time, it seemed the amount of money that they were willing to advance to us for expansion, willing to give us an unlimited amount of credit in the form of gasoline shipments, and talking to Mr. Bennett, I pointed out—

Q. Who was willing to do that?

A. The Hicock.

Q. All right. Proceed.

A. I pointed out to Mr. Bennett the advantages and credit facilities. Of course, the differential margin was explained to me, and I realized that in order to obtain that differential, we would have to incorporate, and a certain amount of the profits would be shared by the Hicock.

Q. After you received 6% on your investment?

A. And the salaries.

Q. And your salaries?

A. Yes.

Q. Was there any further discussion with Mr. Bennett of the Standard Oil Company concerning the Hicock offer?

A. No.

Q. You have already fixed the year as 1930. About that time was it in 1930, if you recall?

A. I would say that it was in the fall. I remember that when we got there it was quite dark, and it must have
2104 been around 6:30 or 7.

Q. Now, in 1930, did you have any conversation with a representative of the Shell Oil Company concerning an offer to supply you with your requirements of gasoline?

A. I had conversation with several representatives of the Shell Oil Company.

Q. When was that with reference to the time that you had the conversation with Mr. Hicock at Toledo?

A. I would say it was—I would say it was a little while after that.

Q. It was after the conversation in Toledo, was it?

A. Yes.

Trial Examiner Ballinger: Approximately how long?

The Witness: I am sorry, your Honor, it is so hard to remember.

Trial Examiner Ballinger: Was it a year? Two years?

The Witness: I wouldn't say it was even a year.

By Mr. Abbott:

Q. And whom was it, if you recall, that you talked with representing the Shell Oil Company?

A. That is something that I have already forgotten since.

Q. Where was it? Here in Detroit?

A. They had a sort of convention that was held in the Statler Hotel. I was called down there by another jobber, Mr. Middleton. 2105

Q. Is he of the Middleton Oil Company?

A. He was.

Q. And you met the representative of the Shell, did you?

A. I met several of them. Also at a later date—well, the second day, I think they stayed there about three days—I met the credit man, who wanted us to give him a statement. But I don't recall their names.

Q. Well, where were they from—out of town?

A. St. Louis.

Q. And at that time what brand of gasoline was the Shell Oil Company distributing that you made inquiry about?

Trial Examiner Ballinger: He hasn't testified he made inquiry.

By Mr. Abbott:

Q. What brand of gasoline were they handling, if you know?

A. They themselves were in this city handling Shell gasoline. They also have another brand which is not handled in this city which is called Silver Flash.

2106 Trial Examiner Ballinger: Mr. Abbott, let him tell, now, what transpired.

Mr. Abbott: All right.

By Mr. Abbott:

Q. Now, state what conversation was had between you and the representative of the Shell Oil Company?

A. An offer was made to us, as well as to Middleton Oil Company, to take over the sole distribution of Silver Flash, not only in the city of Detroit, but, I believe, the whole Wayne County.

Q. Proceed. I don't want to lead you. Just state what the conversation was.

A. They endeavored to entertain us about three days—

Q. When you say "us," who do you mean?

A. Mr. Kolb was down there, Middleton, and myself. I understand at that time they had Mr. Roy Fisher down there from the Argo.

Q. Mr. Kolb, Middleton, and yourself?

A. Yes.

Trial Examiner Ballinger: Do you mean they offered you an exclusive agency?

The Witness: That's right, your Honor. They pointed out the advertising they would do for us; the equipment they would furnish; paint and also pointed out that 2107 the Silver Flash was a brand gasoline which was equally as good as Shell, which was handled in the city and is distributed in other states—or was distributed in other states at that time.

By Mr. Abbott:

Q. Was anything said about the price at which they would deliver to you?

A. The price—again I must say, was much more than the price that we got from the Standard.

Q. When you say it was much more, what do you mean?

A. I would say it was between a half and three-quarters of a cent.

Q. What do you mean by "more?" More differential, or greater price?

A. In addition to what we were receiving from Standard at that time.

Q. You mean that the differential between the tank wagon and the tank car price was half to three-quarters of a cent more than a cent and a half?

A. It would have been more, Mr. Abbott, only they pointed out that there was a certain amount of money taken out for the furnishing of advertising and paint. It would have left us a net of between a half and three-quarters of a cent in addition, or extra to the margin that we were receiving from Standard.

2108 Trial Examiner Ballinger: Was that offer to sell it to you in tank car lots or was it an offer of an exclusive agency in Detroit under which you were to handle all of their product in the City of Detroit?

The Witness: Well, we were to handle just Silver Flash Gas. We were to handle their oil. They would have allowed us to handle another competitive brand of oil.

Trial Examiner Ballinger: But you were to be their exclusive agents?

The Witness: That's right.

By Mr. Abbott:

Q. In other words, as an inducement you were to be given the entire distribution of this without competition in the Detroit area, is that right?

A. Well, Middleton and our company would have been the only ones.

Q. You and Middleton.

A. Yes.

Q. At that time was the Middleton Oil Company a jobber of the Standard Oil Company?

A. They were, yes.

Q. At the time you had that conversation?

A. Yes.

Q. And Mr. Middleton was a party to the conversation—

A. Yes.

2109 Q. Was he, at the Statler Hotel, a party to the conversation?

A. Yes.

Q. Did you accept the offer of the Shell Oil Company?

A. We did not.

Q. Do you know of your own knowledge whether the Middleton Oil Company accepted their offer?

A. They did.

Q. And did the Middleton Oil Company thereupon discontinue being a jobber for the Standard Oil Company?

A. They did discontinue.

Q. And they took over the offer of the Shell Oil Company?

A. They did.

Q. Did you communicate to the Standard Oil Company the fact that you had been made this offer by the Shell Oil Company?

A: I did.

Q. Whom did you talk to about it?

A. Mr. Raupagh.

Q. What conversation did you have with Mr. Raupagh? Was this before you had decided whether you would accept the Shell Oil Company offer? I will withdraw that and ask you this question: Did you immediately decide, after the talk with the representative—

Trial Examiner. Ballinger: Ask him when he decided.

2110 By Mr. Abbott:

Q. When did you decide whether you would accept the offer of the Shell Oil Company?

A. Several days later.

Q. And did you talk the matter over with Mr. Raupagh?

A. I did.

Q. Was that talk that you had with Mr. Raupagh before you came to a decision?

A. I would say it was.

Q. And what conversation did you have with Mr. Raupagh in the matter?

A. Well, there were so many different conversations that I had with Mr. Raupagh. Everytime we would have a different offer, I would go to him and point out the advantages and it sort of got to be a regular sales talk between one time and the other. In fact I remember walking out of there with the idea, "Well, there again you have done a good job of talking me out of leaving you, or quitting this company." It seems all the conversations were just a continuous sales talk on Mr. Raupagh's part.

Q. In 1930, before you had decided whether you would accept or reject the offer of the Shell Oil Company, you, as you say, had a conversation with Mr. Raupagh?

A. Yes.

Q. Did you tell him what the offer of the Shell Oil

2111 Company was?

A. I believe I did.

Q. And what other conversation did you have? I don't want to lead you but merely state what the purport of the conversation was?

A. I believe I acquainted him of the fact that Mr. Middleton was strongly impressed with the proposition and that I thought that Mr. Middleton was going to leave them.

Q. Going to leave whom?

A. The Standard Oil.

Q. Did you state whether you were considering them yourself?

A. For a while I did, but—

Q. Did you tell Mr. Raupagh anything about that?

A. Yes, but again—.

Q. What did he say to that?

A. But again he pointed out the advantages; that we had built up a good share of our business on the Standard Oil franchise.

Q. Did you ask Mr. Raupagh to meet the price of the Shell Oil Company?

A. Well, I always did ask him to boost up the price.

Q. What do you mean by boosting the price?

A. Well, we still do.

Q. When you say "boost the price," what do you mean?

A. Boost up the margin; the margin of profits.

2112 Q. When you say "boost the price" you don't mean to increase the price?

Trial Examiner Ballinger: You meant a greater differential, didn't you?

The Witness: That's right.

By Mr. Abbott:

Q. Did you ask him at that time in 1930, before you decided whether to accept or reject the Shell Oil Company's offer, to make a better differential for you?

A. Yes.

Q. You did?

A. Yes.

Q. And what did he say to that; I mean Mr. Raupagh?

A. Well, he thought that we had a better deal, although the differential was less; on account of the—

Q. And did he refuse to change the differential?

A. Yes.

Q. Now after that, what happened? Did you communicate your decision to the Shell Oil Company?

A. Yes, we did. I don't recall whether we wrote to them or they contacted us by telephone, but we did turn the offer down.

Q. But Mr. Middleton of the Middleton Oil Company, you say, accepted their offer?

A. Yes.

2113 Q. And he left the Standard Oil Company as a jobber?

A. He did leave.

Q. That was in 1930?

A. I would say it was around 1930. I couldn't swear as to the exact date. Again I say it is so difficult, eleven years having gone by, to remember the exact date.

Q. Now, Mr. Citrin, about 1935 did you withdraw from the retail operations in the City of Detroit; in the Detroit area?

A. Well, we started to withdraw. I would say at least a good portion of our stations, right after that.

Trial Examiner Ballinger: You started to tell us about that a little while ago. Will you tell us about your withdrawal and your reasons for withdrawal?

The Witness: Well, first of all, we realized that we would have to make up our minds whether to operate retail outlets or else be going more extensively into the wholesale business. Having had a few stations at that time, we found that it would be to their advantage if we would just conduct our business either one way or the other, either retail or wholesale, and we decided on taking the wholesale route.

Trial Examiner Ballinger: Was that purely for business reasons or because of something else?

The Witness: Well, Judge, we just felt that we
2114 weren't big enough or at least we didn't have the personnel at that time to conduct on a dual basis. In other words, we figured we were going to be either a wholesaler or retailer. It would be a lot easier for us.

By Mr. Abbott:

Q. At the time that you made this decision you had eighteen stations, didn't you, or thereabouts?

A. I would say that would be about the number.

Trial Examiner Ballinger: Mr. Abbott, let the witness testify as to what he had.

Mr. Abbott: You mean to say I can't suggest to him he had eighteen service stations?

Trial Examiner Ballinger: He knows, or should know how many service stations he had.

Mr. Abbott: I can't change the number and I don't think I can change his mind as to the number.

Trial Examiner Ballinger: But he says he thinks he had that number. You are stating the amount and he thinks that is correct. Let us get the facts from him.

The Witness: I could better testify to the number—that is the correct record of the number of outlets we had in the various years. I assume you read from the number on the list we furnished you, is that right, Mr. Abbott?

Mr. Abbott: I am not reading from a list. I am merely reading from a statement of the number you had at 2115 that time, in 1935. That is not very long ago.

Trial Examiner Ballinger: If you desire any data with which to refresh your recollection, you may have it.

The Witness: I would say that we had eighteen stations.

Mr. Austin: What year, Mr. Citrin?

The Witness: When we started to lease out some of our stations right after 1935.

2116 By Mr. Abbott:

Q. Did you go on an entire wholesale basis?

A. It took us a little while. We don't just lease out the stations over night. We first have to obtain tenants.

Q. Were you successful in going on an entire wholesale basis?

A. Yes.

Mr. Austin: I object to that question, your Honor; whether he is more successful.

Mr. Abbott: I didn't ask him if he were more successful by reason of going on the basis. I asked him whether he was successful in going on the basis. I will reframe it this way, if you object to that:

By Mr. Abbott:

Q. Did you ultimately go on a hundred percent wholesale basis?

A. There was a short time where we had been a hundred percent wholesale.

Trial Examiner Ballinger: Can you give us a date when you had completely divorced all of your retail business and you were on a strictly wholesale basis?

The Witness: I would have to refer to some records, Judge.

Trial Examiner Ballinger: Are they here?

The Witness: I believe that there were always 2117 one or two stations that we had been endeavoring to lease out, but there was a short while during the period after 1935.

Trial Examiner Ballinger: Have you the records here that you refer to?

The Witness: I don't know.

Mr. Abbott: I will say this, your Honor, if I may interrupt: that we will put that in in connection with Mr. Biber, who is the general manager of the Citrin-Kolb Oil Company, if it is agreeable to the Commission.

By Mr. Abbott:

Q. Now, in the year 1936, Mr. Citrin, did you have any offer from any other supplier of gasoline to supply your requirements of gasoline on a tank car basis?

A. We had an offer through a representative of the Gulf.

Mr. Austin: I object to that question and answer, your Honor. I request that they be stricken.

Trial Examiner Ballinger: The objection is sustained and the motion granted.

By Mr. Abbott:

Q. Did you have any other offers from any other gasoline suppliers to supply your requirements of gasoline on a tank car basis, stating the conversation?

Mr. Austin: I object to that on the same ground, that he is asking the witness whether he had an offer and I 2118 think that calls for a legal conclusion.

Trial Examiner Ballinger: Objection sustained.

Mr. Abbott: I will withdraw the question.

By Mr. Abbott:

Q. Subsequent to the time that you had the offer from the Shell Oil Company, did you have any conversation with representatives of any other gasoline suppliers to supply your requirements of gasoline?

A. I personally had a conversation with a Gulf representative.

Q. And when and where was that?

A. I would say it was in the early part of 1936.

Q. Well, can you fix the approximate time?

A. All I could say is it was in the winter time. By saying that I sort of connect the salesman or the representative—why, I remember he wore an overcoat.

Q. Do you know the name of the representative?

A. I believe his name was Mr. Chandler.

Q. And where was the conversation that you had with him?

A. He called on me at one of our stations at Linwood and Buena Vista.

Q. And you can't state the month of the year 1936?

A. No. I couldn't. I would say that it was the early part of the year 1936.

2119 Q. You mentioned the fact that he had an overcoat on, to fix the time of the year.

A. Yes.

Q. State what conversation you had with him.

Trial Examiner Ballinger: He stated it was in the winter time, and the early part of the year.

Mr. Abbott: Yes, I know.

Mr. Austin: If your Honor please, in the absence of any statement by the witness to the effect that he has any knowledge that this man represented the Gulf Oil Company, I object to the conversation.

Mr. Abbott: Well, didn't he state that the man stated he was a representative of the Gulf Oil Company, Gulf Refining Company? I think he has definitely stated that this man—

Trial Examiner Ballinger: Did you know him to be a representative of the Gulf Refining Company?

The Witness: Oh, yes. He was introduced to me by another Gulf salesman who I had known for a good many years.

Trial Examiner Ballinger: The objection is overruled.

By Mr. Abbott:

Q. State the conversation.

A. Mr. Chandler called on us quite frequently with the idea of getting us away from the Standard Oil Company.

2120 Mr. Austin: I object to that, your Honor, and ask it be stricken.

Trial Examiner Ballinger: Objection sustained and the statement is stricken. State what occurred; what was said.

A. Well, now, maybe—if I may put it this way: I don't know what I may admit in there or not. That will be up to you, your Honor. I do know this: that Carnich Oil Company was a Gulf distributor at that time, and Mr. Chandler was aware of the fact that we had some connection with Carnick and he knew the gallonage and he was calling on us with the idea of getting us to buy in tank cars from them on the same basis that they were selling to Mr. Carnick.

Q. Well, what conversation did you have, now?

A. Well, he was telling us the advantages, such that were offered or that were being given to Carnick.

Q. What did he state that advantage was, if anything?

A. Mainly that Gulf would furnish the equipment; they would paint the stations. That we would also not be required to buy in large quantities or store large quantities, rather. We could haul out of their yard. It would not necessitate so much of an investment. We would not have any shrinkage. There were a good many advantages.

Trial Examiner Ballinger: Did he offer to sell you 2121 at less than tank car lots?

The Witness: Well, it would really be less, if you considered the amount that we would save by not having to furnish storage facilities; not having to invest money for the storing of gasoline or equipment; painting of the stations. It would involve—it would mean quite an increase in—

Trial Examiner Ballinger: At that time you owned your own operating facilities, did you not?

The Witness: Yes.

By Mr. Abbott:

Q. What was it proposed to do with your bulk plant, if you did that? Was that discussed?

A. Well, of course, I pointed out that we would not be so bad off inasmuch as the bulk plant—we also had a service station erected there, doing a fair business.

Q. You mean the one at Livernois and Lyndon?

A. Yes. He pointed out that our office was on that ground and the service station. That it wouldn't be a total loss.

Q. In other words, you were, according to this plan, drawing gasoline out of their bulk plant instead of out of your own?

A. Yes.

Trial Examiner Ballinger: Was there anything said about price?

2122 The Witness: The price was comparable to the Standard Oil with the exception of those differences.

By Mr. Abbott:

Q. What do you mean it was comparable?

A. Well, the differential between the tank wagon and tank car was 1½c.

Q. And you were to receive it at the tank car price?

A. Yes.

Q. But you were to receive it out of their bulk plant?

A. That's right.

Q. Without maintaining any bulk plant of your own; is that right?

A. Yes.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Abbott:

Q. Then, as I understand, Mr. Citrin—and tell me if I am mistaken—the arrangement would eliminate the bulk plant costs; is that right?

A. Oh, yes.

Q. Was there anything said about furnishing station equipment for your dealers?

A. Yes. They would furnish equipment such as pumps.

2123 Q. Under your arrangements with the Standard Oil Company, what was the arrangement you had at that time with the Standard Oil Company?

A. We had to furnish our own pumps.

Q. Did the Gulf Refining Company's representative state that they would furnish the pumps for your agents?

A. Yes.

Q. I mean for your dealers.

A. Yes.

Q. Was there any other advantage that was discussed by him with you?

A. The maintenance of equipment.

Q. What did that involve?

A. That is quite an item; repairing the pumps, painting the station, and stuff.

Q. Under your arrangements with the Standard Oil at that time did you attend to those items of expense yourself?

A. We have, and we still do.

Q. Still do?

A. Yes.

Q. That relates to painting?

A. Painting, furnishing equipment, upkeep. We have to do all of that ourselves.

Q. Upkeep of what?

A. Of the tanks, pumps, installation of pumps.

Q. That's at the service stations of your dealers; 2124 is that true?

A. Yes.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Now, at 5 P. M., the hearing stands adjourned to be reconvened April 26, 1941, at the hour of 10 A. M., Eastern Standard Time, in Room 859 Federal Building, Detroit, Michigan.

(Thereupon at 5 o'clock P. M., the hearing in the above entitled matter was adjourned to reconvene at 10 A. M., April 26, 1941.)

2125

Room 859 Federal Building,
Detroit, Michigan,
April 26, 1941.

Met, pursuant to adjournment, at 10 A. M.

Before: Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois, and

Arthur J. Abbott, Esq., of the firm of Abbott, MacMahon, and Roberts, 2230 Buhl Building, Detroit, Michigan, on behalf of the Respondent.

2126 PROCEEDINGS.

Trial Examiner Ballinger: We will come to order. This is a reconvening at 10 A. M., April 26, 1941, in Room 859 Federal Building, Detroit, Michigan, of Docket No. 4389, in the case entitled: in the matter of the Standard Oil Company.

The last hearing was held in Detroit, Michigan, April 25, 1941.

The reporter will note counsel for the Commission and the Respondent present.

You may proceed.

JACOB A. CITRIN, having been heretofore duly sworn, resumed the stand, and testified further as follows:

Direct Examination by Mr. Abbott (Continued).

Q. Mr. Citrin, did you have any other offers in the year 1936 from any other gasoline supplier to furnish Citrin-Kolb's requirements of gasoline by the tank car method of delivery?

A. We did.

Q. Relate the time, place, circumstances and conversations comprising the offer; first, as to the time.

2127 A. In August of 1936 we had an offer from the Texas Company whereby—

Q. Well, now, don't state the conclusions, but where was the conversation; where did it take place?

A. In our office.

Q. And who was present?

A. Mr. Germain, Mr. Murdy, on some occasion Mr. Kolb was in the same room when they were there.

Q. Was there anyone else?

A. And a credit man from the Texas Company.

Q. Where was he from?

A. Chicago.

Mr. Austin: What was his name?

The Witness: I can't recall his name.

By Mr. Abbott:

Q. What were the circumstances, how did they happen to come out there?

A. Prior to that time Mr. Germain, who was a special representative for the Texas, here, called on us constantly, and several times sold us some oil, Havoline Oil, and was leading up to the proposition of selling us Texas gasoline and making us the Detroit jobber. On the date, as I stated, in August, he has arranged to have Mr. Murdy and this credit man from Chicago to come to the office.

Q. Now, state what conversation took place between you gentlemen at the Citrin-Kolb Company office.

2128 What office was this?

A. On Livernois and Lyndon.

Q. That is where your first bulk plant was located?

A. Yes.

Q. The one you bought and built the first time?

A. Yes.

The conversation between us was merely to iron out some points as to the advertising, as to the type of contract that they would give us, and the type of contract that we wanted.

Q. Well, what was stated with reference to the terms of the contract? Had it been drawn up at that time?

A. Well, no, it hadn't. We first ironed out the clauses of the contract, such as we were to have a five-year contract, and it was to be an uncancellable contract on either part. And it provided for the furnishing of advertising, paint, globes, and the fixed margin.

Mr. Austin: Pardon me. Did the witness say this was written out?

Mr. Abbott: No, it hadn't been written up up to this point.

The Witness: We were ironing out the clauses that should go into the contract at that time.

Trial Examiner Ballinger: Was the contract later reduced to writing?

2129 The Witness: At the conclusion of the meeting, it was agreed—

Mr. Abbott: Just a moment, if the Court please. I will state on the record—well, go ahead and ask the witness.

Trial Examiner Ballinger: Was the contract reduced to writing?

The Witness: We had written the contract.

Trial Examiner Ballinger: Well, it was then reduced to writing?

The Witness: Yes, but not in their presence, your Honor. They told us to prepare the contract on the basis that we talked about. And we were to prepare the contract, submit it to them for acceptance.

Trial Examiner Ballinger: Was that done?

The Witness: It was done on our part. We, however, didn't give them the contract, because they wanted us to prepare the contract, we should sign it, and on giving it to them, so far as we were concerned, we would be bound by the contract.

Trial Examiner Ballinger: Evidently there was no completed contract.

Mr. Abbott: No.

By Mr. Abbott:

2130 Q. You were just about to state what arrangements were made, or what the conversation was as to the margin.

A. The margin was 5½c off—that is, below the retail price.

Q. And at that time what was the dealer margin, if you know?

A. Dealer margin was 3½c.

Q. And what was the conversation with reference to the amount of differential between the tank car and tank wagon?

A. It left a 2c differential.

Q. Now, after those matters were discussed—and, by the way, did Mr. Kolb participate in those discussions?

A. He came in at various intervals. He met the people. Kolb at that particular meeting was busy and excused himself a couple of times, but he did meet the men that were out there.

Q. Who did the talking?

A. I did, mostly, and they did; I mean we talked between us.

Q. Well, you say there was Mr. Germain, Mr. Murdy—

A. Mr. Germain, Mr. Murdy, and this credit man.

Q. What did the credit manager—what participation did he have in the negotiations?

A. Well, it was assumed—

Q. Not what was assumed. Just state what participation he had?

2131 A. Well, it was agreed that we were going to go through with the deal. But it was then necessary for us to furnish our credit statement and he was asking for such statement, was looking over our facilities, properties, so as to tell us at that time how much credit they would be able to give us.

Q. Well, did you have your credit statement there that you submitted to him?

A. We did.

Q. Well, then, did he participate in the negotiations as to the terms?

A. Well, he sat in there. Of course, the terms were leading up prior to that meeting right along, and it was just merely confirming of the terms at the time that Mr.

Murdy was brought out, because we were to make up the contract on the basis—

Q. Had Mr. Murdy been out there before August, 1936?

A. No, I don't believe he had.

Q. Had Mr. Germain been out there before?

A. Yes. As I stated, he called on us constantly.

Q. Well, how long had they been going on?

A. I would say that he called on us for a year, and he sold us a considerable amount of Havoline Oil.

Trial Examiner Ballinger: If you will permit an interruption: did you draft a contract and execute it
2132 and transmit it to the Texas Oil Company for execution?

The Witness: We drafted a contract, signed it, but we never delivered it, your Honor.

By Mr. Abbott:

Q. Now, did you communicate the matter of this offer to the Standard Oil Company?

A. I did.

Q. And with whom did you talk about it?

A. Mr. Raupagh.

Q. When and where?

A. Right after such meeting—right after the last meeting with Texas, we had prepared this contract, signed it and then the partnership had agreed that we should go down and talk to Mr. Raupagh on the basis that there was a contract that was going to guarantee us a certain fixed margin for a period of five years.

Q. Now, what margin do you refer to when you say "certain fixed."

A. 5½c off of the retail price, and that inasmuch as that we were buying from Standard at a lower margin, and also we had no protection as to contract, merely on a day to day basis with Standard, we felt that we ought to give the Standard Oil Company a chance to meet that proposition.

Q. Did you then take the matter up with Mr. Raupagh?

2133 A. I did.

Q. And did you discuss the matter with him?

A. I did.

Q. What did you say and what did he say?

A. Pointed out the negotiations. Pointed out the contract. I believe I showed him the contract that we had prepared, and, again, Mr. Raupagh took a couple of hours in convincing me that—

Q. What did he say?

A. What did Mr. Raupagh say?

Q. The point is, Mr. Citrin, the Court has several times asked that you state the conversation and not your conclusions.

Trial Examiner Ballinger: What did he say to you and what did you say to him?

By Mr. Abbott:

Q. It has been a long time, but all you are required to say is the purport of the conversation.

Mr. Austin: I rather object to the word, "purport." I think substance is better. He doesn't have to quote exactly anyway.

Mr. Abbott: All right. Substance.

Trial Examiner Ballinger: You state as nearly as you can recall, the conversation.

The Witness: I will.

2134 A. As I recall, Mr. Raupagh told me that he thought it was a mighty good deal and that he couldn't give me as good a deal, and that inasmuch that we had years of business relations and they were pleasant and had proven profitable to us, that he still was convinced that we would be better off if we stayed a Standard Oil Company customer, regardless of price or contract protection.

He also stated that as to the contract, he said that we had no contract for years, and we got along all right, and that no doubt we would get along in the future.

As to the price differential or advertising, he said that Standard was by far a better selling gasoline and that if we would make such a change, our sales would fall off and thereby, in the long run, reduce our profits so that the differential, the increase that we would get in this new deal would not even come up to the amount of business that we would lose.

Q. What did you say to that?

A. Well, I continued to ask him if they couldn't give us a contract, and also asked him to meet their deal or take it up at Chicago, and he continually pointed out that the deal we had was the best deal that they could give us at that time.

Q. Who said that?

A. Mr. Raupagh. We spent quite a bit of time. I 2135 remember, I told him, "By God," I said, "every time I come down here, you either have a spell over me or something, but," I said, "I have still got to go back to my partners and tell them on what basis that we should still be a Standard Oil customer."

And those were the very words. He thought that I, perhaps—

Q. State what he said.

A. Well, he said that if I would analyze the facts, that is, the proposition that we would lose business, and just take into consideration all of the advantages we had, that we had established our business on Standard Oil products, and I pointed out those elements to my partners, and that they more or less looked up to me, to my judgment, and I would have no trouble in convincing them to abide by my judgment.

Q. Is that what he said to you?

A. Yes.

Q. Well, what was there about this deal with the Texas Company besides the price that you talked about? You mentioned—I will just say this, without leading you—you mentioned something about the furnishing of equipment.

A. Well, equipment, I mean globes—globes, globes are considered as equipment; paint, that is quite an item, to furnish paint.

2136 Trial Examiner Ballinger: He was unwilling to make any greater differential to you in order to meet the competitive price, was he not?

The Witness: You mean Raupagh was unwilling?

Trial Examiner Ballinger: Yes.

The Witness: Oh, yes, definitely.

By Mr. Abbott:

Q. Did you go back and talk the matter over with your partners?

A. I did.

Q. And what was the outcome? What was the result?

A. The result was that we did not submit the contract to the Texas Company.

Q. Are you referring now to the written contract that you drew up on their suggestion?

A. That is right.

Q. At the time you went down to see Mr. Raupagh, did I understand you to say that you showed him this contract?

A. I did. As I recall it.

Q. Did he read it, if you recall?

A. I recall him looking at it. I don't think he took the time to read it. Yet, he might have read it, because the contract, as I recall, was a four-page contract, it was possible for him to read it in a short time, as I recall right now.

2137 Q. Did you communicate to the Texas Company your conclusion?

A. I did.

Q. Or decision?

A. Yes.

Q. To whom did you convey that?

A. I told Mr. Germain.

Q. These other men, Mr. Murdy and the credit manager, did I understand you to say that they were both from Chicago, or only one of them?

A. Well, I knew that the credit man was from Chicago; Mr. Murdy at that time was sort of a—well, he was in charge of several districts, and he was traveling; I don't know whether his office was in Chicago, but I do know that he was from out of town.

Q. He wasn't from Detroit?

A. No.

Trial Examiner Ballinger: The paper can hardly be referred to as a contract. It was a proposed contract.

Mr. Abbott: I realize that, and if it had been executed and delivered, then, of course, the other negotiations would have been merged in it.

Q. You mentioned the fact that at that time you were on a day to day basis with the Standard Oil Company,

2138 and didn't have any contract.

A. We were, and we still are, as of this date.

Q. Has that been the situation all the time?

A. It has.

Q. Since you went on the tank car basis?

A. Yes.

Q. Well, now, tell us something about that. What do you mean when you say you are on a day to day basis?

A. Well, first of all we have no contract in existence between the Standard Oil Company and ourselves. We never did have.

Trial Examiner Ballinger: Either express or implied?

By Mr. Abbott:

Q. Well, I don't know whether you understand what the Court means by ~~that?~~

A. I don't Mr. Abbott.

Trial Examiner Ballinger: Have you any understanding of any kind with them?

The Witness: The only understanding we have is that they could stop selling us or refuse to ship any order that we may give them. And as to our side of it, we could quit any day by not giving them an order for gasoline, just merely ordering from somebody else.

Trial Examiner Ballinger: Every order you send 2139 to them is subject to their rejection if they see fit?

The Witness: That's right.

By Mr. Abbott:

Q. And on the other hand, from your standpoint, you can stop sending them orders?

A. That's right.

Q. You can get your gasoline somewhere else?

A. We can.

Q. Has that been the situation ever since you first began to receive tank car deliveries from the Standard Oil Company?

A. It has.

Q. Now, has that been the subject of conversations and interviews between you and the Standard Oil Company during the intervening time? I mean, have you objected to that arrangement?

A. We have always objected, and we still do. It is a sort of uncertain way of being in business. Yet, there are certain advantages, as we understand it, now, because we could always entertain a better proposition or quit. But that has been the business relations between the Standard Oil Company and ourselves.

Q. Well, on the occasion when you saw Mr. Raupagh, at the time that you took up with him the Texas proposal, did you discuss with him the matter of giving you a contract?

A. We have.

2140 Q. I understand that the Texas proposal contemplated a five-year guaranteed contract arrangement? Is that right?

A. It did.

Q. And guaranteed a margin of 5½¢ below the prevailing retail price?

A. It did.

Trial Examiner Ballinger: Will you repeat your testimony with reference to what was said to you when you submitted to the representative of the Respondent, the proposal from the Texas Company?

Mr. Abbott: By Respondent, he means the Standard Oil Company.

The Witness: Yes.

Well, Mr. Raupagh pointed out that he could not meet the price, he could not give us a contract.

Trial Examiner Ballinger: What I had in mind was what he said to you with reference to your past and possible future relations.

The Witness: He said that in the past we have done pretty well in handling Standard Oil and that he thought we would lose a certain amount of business if we handled Texas. As to the contract, he just merely said that he could not give us a contract. That in the past we did not have a contract. The business relations were agreeable and
2141 that no doubt that in the future it would be to an advantage to both of us to go on on the same basis, inasmuch as that we had the same privileges of stopping to do business at any time any one of us felt that it was to our betterment. Does that answer your question, Judge?

Trial Examiner Ballinger: You were at that time seeking security through a contract, were you not?

The Witness: We were.

Trial Examiner Ballinger: That's all.

By Mr. Abbott:

Q. And Mr. Raupagh, as I understand you, said that the Standard Oil would not meet the 2¢ differential between—

Mr. Austin: I think the witness said what Mr. Raupagh told him. I object to the question.

Mr. Abbott: The reason I ask that is this: the witness said Mr. Raupagh told him he could not meet the proposed Texas price.

By Mr. Abbott:

Q. What do you mean by "Meet the Texas price?" Just state the conversation of Mr. Raupagh. Did he use the word "meet"?

A. Well, he used the word that the extra half cent that we would have gotten would have been—

Q. Gotten from whom?

A. From Texas. But first of all, he couldn't give us that extra half a cent, and, secondly, that he thought
2142 that it wouldn't do us any good inasmuch as that we would lose a certain amount of business by making the change.

Q. Lose gallonage?

A. Yes.

Q. You testified yesterday in connection with an offer of Gulf Oil or Gulf Refining Company made to you in the early part of 1936. In connection with that testimony will you state whether, when you submitted that to Mr. Raupagh, as you stated, whether Mr. Raupagh said anything about meeting the Gulf offer?

A. Well, in meeting the Gulf offer, you mean by furnishing the equipment and painting the stations, furnishing paint; is that what you mean, Mr. Abbott?

Trial Examiner Ballinger: And also the lower price.

The Witness: There wasn't any lower price, your Honor. I didn't make any such a—

By Mr. Abbott:

Q. What I referred to was you stated yesterday that Gulf proposed that you should haul gasoline out of their own bulk plant.

A. Yes.

Q. Did you take that up with Mr. Raupagh?

A. Yes.

Q. And what did he say about that when you took
2143 up with him the matter of the proposal of Gulf that you could haul gasoline at tank car prices out of their own bulk plant and not out of yours? Was that what the proposal was?

A. Yes.

Q. What did Mr. Raupagh say when you put that up to him?

A. He said that he could not change the methods, and the way they were serving us, and that as to the other differentials, they would have to remain the same. He couldn't meet the Gulf offer.

Q. The Gulf offer, as I understand it, contemplated that you would not use the Livernois and Lynden bulk plant for distributing gasoline; is that right, excepting at the retail station there?

A. That was right.

Q. Were you using that bulk plant at that time—that was before you constructed the one, the bulk plant at Linwood and the D. T. Railroad, wasn't it?

A. Yes.

Q. Were you using the Lyndon and Livernois bulk plant at that time for the purpose of a distributing point for the distribution of gasoline to your dealer stations?

A. We were.

Q. And, as I understand it, the Gulf offer proposed that you should haul gasoline direct out of the Gulf bulk plant and not out of your own?

2144 A. It was.

Q. Would that have eliminated some expense?

A. Yes, it would have.

Q. And it also related to the furnishing of some materials, as I understand it, and equipment; the Gulf offer did.

A. Pumps, maintenance of the pumps, painting of stations.

Q. At that time did the Standard Oil Company supply that equipment?

A. No.

Q. Or that maintenance?

A. No.

Q. Or the painting of the stations?

A. No.

Q. Did you take that up with Mr. Raupagh?

A. Yes.

Q. As to the Gulf offer?

A. Yes.

Q. What did he say as to that?

A. Just wouldn't meet it.

Trial Examiner Ballinger: Would you state the year of the Gulf offer? I do not recall it.

The Witness: As I recall it, Judge, it was the early part of 1938; yet—as I stated, the only way that I can connect the time of year was I recall he had an over-

2145 coat. Yet, it might have been later on. It might have been in the fall of 1936.

By Mr. Abbott:

Q. You say it might have been in the fall of 1936 when you received the Gulf offer?

A. Yes.

Mr. Austin: When was the Texas offer?

Mr. Abbott: He testified the Texas offer was in August, 1936.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Abbott:

Q. You knew the Carnick Oil Company at this time, didn't you?

A. Yes.

Q. At the time of the Gulf offer?

A. Yes.

Q. And as a matter of fact, you had shared storage with them on Six Mile Road east of Woodward Avenue at their bulk plant, hadn't you?

A. Yes.

Q. That was in the early days before you got your own bulk storage?

A. That's right.

2146 Q. And was the Carnick Oil Company a Gulf Refining Company jobber?

A. They were, at the time that this Mr. Chandler was calling on us.

Q. That is, when Mr. Chandler called on you and made the proposal?

A. Yes.

Q. Was anything discussed between you and Mr. Chandler relative to the fact that the Carnick Oil Company had this same deal? If so, state the conversation.

A. Well, all he told me, that Carnick was doing a good job. I naturally assumed—

Q. Now, not what you assumed.

Trial Examiner Ballinger: Where was Carnick operating?

The Witness: In Detroit.

By Mr. Abbott:

Q. Is Carnick a jobber also?

A. Yes.

Q. Operating his own retail stations, or operating through dealers?

A. Well, he had—I don't know whether he still has—I know he has some of his own stations. He serves to dealers.

Q. What I am referring to, Mr. Citrin, is not so much what the Carnick Oil Company does, as what Mr.
2147 Chandler told you about the Carnick Oil Company at the time he made the proposal to you to take your gasoline supply from Gulf.

Mr. Austin: How is that material, Mr. Abbott?

Mr. Abbott: If there is anything about it—I don't know. I haven't interrogated the witness about this previously, but I just wonder whether there was any discussion about the fact that Carnick Oil Company had the same kind of an arrangement.

Mr. Austin: That would be hearsay, anyway. It doesn't relate directly—

Mr. Abbott: Not if Mr. Chandler discussed it.

Mr. Austin: I object to the question. I don't believe it is material, anyway, what kind of a deal the Carnick Oil Company had in this connection.

Mr. Abbott: It would enter into the question. This witness knew the Carnick Oil Company, because they previously had shared a bulk plant, as he testified yesterday. If there was anything said with reference to the fact the Carnick Oil Company had this same deal that the Gulf was offering to the Citrin-Kolb Oil Company, I would like to have the witness state it. He can say yes or not as to whether or not there was any conversation.

Trial Examiner Ballinger: Do you know what kind of a deal the other company had?

2148 A. Well, I do know this, that Chandler told me that Carnick was a pretty smart business man, said that—

Trial Examiner Ballinger: That doesn't enter into the question.

Mr. Abbott: He ought to be permitted to state what the conversation was. He is just leading up to what your Honor asked him.

The Witness: I am trying to bring out just what he told me, if I may be allowed to.

Mr. Abbott: Proceed, unless there is an objection.

Mr. Austin: I object, because I don't believe the witness answered your Honor's question as to whether or not he knew the deal. And if this is an attempt to prove by hearsay the deal between the Carnick Oil Company and a somebody else, why I object to it.

Mr. Abbott: Your Honor asked him if he knew what the deal was. Will you answer that question.

Trial Examiner Ballinger: Do you know what the deal was?

The Witness: Only that Chandler told me that it is the same deal that Carnick had.

By Mr. Abbott:

Q. The deal he was offering you?

A. Yes.

Q. And did you know what deal Carnick Oil Company had?

2149 Mr. Austin: I ask for a ruling on that. I move to strike it out on the ground, first, it is irrelevant; and second, that it is hearsay. It is hearsay.

Mr. Abbott: Not what Chandler told him. That relates to the offer made by the Gulf Refining Company. Part of the conversation in the offer.

Mr. Austin: I don't think that is any part of the offer. I think that may be some sales talk to say, "I am giving you as good an offer as I gave somebody else."

Trial Examiner Ballinger: Did he offer you the same service that he was furnishing to the Carnick Company?

The Witness: He said it was.

Trial Examiner Ballinger: Objection is overruled.

By Mr. Abbott:

Q. Did you have any other offers between 1936 and 1940 from any other gasoline supplier to furnish your requirements of gasoline by the tank car methods of delivery after receiving the offers from the Gulf Refining Company and the Texas Company in 1936?

A. We did.

Q. When and with what company? Pardon me, strike that. When and from what company?

A. In 1939 the Argo Oil Corporation.

Q. That is all I asked you, the name and the time.

2150 Is the Argo Oil Corporation a Detroit concern?

A. It is.

Q. And in 1939 what business were they conducting in Detroit—a jobber business or what?

A. They are a jobber.

Trial Examiner Ballinger: What were they then?

The Witness: What they have been?

Trial Examiner Ballinger: What were they in '39?

The Witness: They were a jobber.

By Mr. Abbott:

Q. Dealing in what brand of gasoline?

A. Marathon.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Abbott:

Q. Now, relate the circumstances, and the conversation comprising the offer, and with whom. First, who was the person?

A. Mr. Roy Fisher.

Q. And what were the circumstances?

A. He came out to our office on Lynwood on the pretense that he had been sent out to collect a donation for an Allied campaign that they were conducting at that time.

Trial Examiner Ballinger: When did you say this was?

2151 The Witness: It was in 1939.

By Mr. Abbott:

Q. Can you fix the date with reference to the time of that Allied campaign that you referred to?

A. Well I—to the best of my knowledge I think it was in '39. But, Mr. Abbott, if it is essential it would be no trouble for us to look up the date of the check of the donation that we gave them, and we would have the exact day.

Trial Examiner Ballinger: Why do you say he came out on pretense?

The Witness: Do you say why?

Trial Examiner Ballinger: Why do you say that, yes.

The Witness: Because shortly after it—

Trial Examiner Ballinger: Was that merely a conclusion of yours?

The Witness: Well, it might be called a conclusion. Yet—

By Mr. Abbott:

Q. Well, state what you mean by pretense, Mr. Citrin.

A. Well, I couldn't say that he exactly walked in and the first thing he did was start talking gasoline. The first thing he did, he came in and introduced himself and told me what his business was there, and then while we were talking about the amount of money that we wanted to
2152 give, and he was to get, why—

Q. Did he ask you for a contribution?

A. Yes.

Q. Had you known the gentleman before?

A. Well, I had seen him several times.

Q. Is he in the oil business now, do you know?

A. Yes.

Q. And had you known him before that as being identified with the Argo Oil Corporation?

A. Yes.

Q. After you gave him the contribution—did you give him the contribution that day?

A. We did.

Q. Then what else was the conversation between you, if anything?

A. Well he started to tell us about the experiences that he had in the jobbing business. He pointed out the various deals that he had made with large oil companies for the distribution of gasoline; that he was going in on a big scale. I believe he even discussed the time there where he was going to take the entire output of the Mexican government petroleum. At least, that is what seems to come into my mind that he talked about.

Q. At that time had Mexico taken over the private petroleum interests in Mexico? Do you recall? Was that discussed?

2153 A. He just told me that he was going to have a big thing out of this oil jobbing business, he was going to do a big job.

Q. At that time he was distributing Marathon Gasoline, is that correct?

A. Well, Mr. Abbott, it was Marathon or Linco, really both of those come from the same company. It is the Ohio Oil Company.

Q. I see. And what did he say to you? Did you discuss terms of supplies?

A. He proposed—well, at first he sort of admired the amount of business that we had and the volume. He knew that we had a couple of salesmen that worked for us at that time that were previously connected with him.

Q. Who were they?

A. Mr. Treppech.

Q. How do you spell that?

A. T-r-e-p-p-e-c-h.

Trial Examiner Ballinger: Was the product he proposed to furnish you the product of the Ohio Standard Oil?

A. It was Ohio, it was Standard Oil of Ohio.

By Mr. Abbott:

Q. When you say Standard Oil of Ohio, do you mean Standard Oil of Ohio or do you mean Ohio Oil Company?

A. Ohio Oil Company. I get them confused.

2154 Trial Examiner Ballinger: Which one was it?

The Witness: The Ohio Oil Company.

2155 Q. You were going to state what the conversation was as to the terms of sale.

A. Well, he knew of the amount of business we were doing, and knowing of the salesmen that we had, he told me that if we started buying gas from him, or through him, that we could do a big job, a better job, and we would have more money to do the business with.

Q. Are you relating now his conversation, are you?

A. Yes.

Q. State what he said about terms of selling gasoline to you.

A. Well, I tried to find out, knowing the various big deals that he was intimating, or he was telling me about that he had; I tried to pin him down as to how much more margin we could get, or how much of a contract he had, and of course he didn't want to tell me everything that he was getting, but he did tell me that our margin would be 2*c*, if not more.

Q. When you say margin, do you mean the margin between the tank car and tank wagon price?

A. That is what I mean, yes.

Q. Did you tell him what margin you were at that time receiving from the Standard Oil Company? Was that discussed?

A. Yes.

2156 Q. What did you tell him as to that?

A. Well, I told him that taking on another brand of gas, unless we received a considerable amount more than we were getting from Standard we would not be interested.

Q. Well, what did you tell him as to what you were getting from Standard?

A. We told him we were getting a cent and a half, and that is when he said that his deal would be 2*c*, if not more at times.

Q. Now, what else was said during that interview?

A. Well, he pointed out the fact that they were a big corporation, and stated that they had built up the largest fuel oil business—I believe he told me at that time that his business ran upwards of 20,000,000 gallons a year in the fuel oil business.

Q. Did he say anything about his gasoline gallonage?

A. Well, he thought that he had enough experience that he expected to do an equally as good a job on gasoline as he did on fuel oil.

Trial Examiner Ballinger: Did he tell you what business he was then doing in gasoline?

The Witness: The amount of business?

Trial Examiner Ballinger: Yes. That his company was doing in gasoline.

The Witness: No, he didn't give me the figures
2157 on gasoline.

Trial Examiner Ballinger: Did he tell you in what territories they were operating?

The Witness: Well, no, only in Detroit, as I recall it.

By Mr. Abbott:

Q. Are they a company that has a distribution outside of the Detroit area?

Mr. Austin: Do you know?

A. I don't know.

By Mr. Abbott:

Q. Did you take up this—well, was any further conversation had between you? Did Mr. Kolb participate in it?

A. No.

Q. And this was at the bulk plant at Livernois and Lyndon, was it?

A. No; this was on Linwood.

Q. Linwood?

A. Yes.

Q. That was after you built the Linwood plant?

A. Oh, yes.

Q. That is where you moved your office?

A. That's right.

Q. From the Livernois-Lyndon plant?

A. Yes.

2158 Q. When did you make that removal?

A. Well, I think it was '37.

Q. Did Mr. Fisher—when Mr. Fisher left, did you leave anything to be attended to in a later conversation, or what was the conversation when he terminated the interview?

A. Well, I told him I would consider the matter, and if we wanted to proceed, I would call him.

Q. Did you take the matter up then with your partners?

A. I talked to Mr. Kolb.

Q. Then did you take it up with the Standard Oil Company?

A. I did.

Q. With whom?

A. Mr. Love.

Q. Who is Mr. Love, or who was he at that time?

A. He was the sales manager in Detroit for the Standard Oil Company.

Q. And where was that interview? Where did it take place? At your office or the Standard Oil Company's office?

A. At the Standard Oil Company's office.

Q. How long was it after you had the talk with Mr. Fisher?

A. I would say about two weeks.

Q. And in the meantime had you talked the matter over with Mr. Kolb?

A. I did.

Q. And what did you say to Mr. Love?

2159 A. Well, first I told him that the Argo is going in and they were going to do a big job in the jobbing business of gasoline. I told him they had a good deal, more margin, and that the offer was made to us, and that we were considering it.

Q. What did he say?

A. Well, he just talked in a manner, he thought that I ought—if I wanted to do something about it, tell it to Mr. Raupagh, who was out right at that moment.

Q. Well, did Mr. Love—did you say anything about submitting it to Chicago?

A. I did ask him, and he said that such a procedure would have to go through Mr. Raupagh's office.

Q. Was Mr. Raupagh in Detroit at that time, if you know?

A. I don't know. I know he was out of his office.

Q. Do your know that Mr. Raupagh in 1939, or thereabouts, was in Mayo's Clinic in Minnesota? Does that refresh your recollection of the matter?

A. I knew that Mr. Raupagh was at Mayo's. I don't just seem to be able to connect the period there.

Q. Well, anyway, you said when you went down to discuss the matter with the Standard Oil Company, Mr. Love was the one you talked to and not Mr. Raupagh?

A. Yes.

Q. Did you discuss this matter with Mr. Raupagh?

2160 A. No, not that particular matter.

Q. Did you discuss it at any other time with Mr. Raupagh?

A. Not the Argo, no.

Q. Was anyone else in on the conversation you had with Mr. Love concerning the Argo deal at the Standard Oil office?

A. Not in his office.

Q. Did you talk the matter over with any one of the other officials in the Standard Oil office except Mr. Love?

A. No.

Q. As I understand you, did he say that he would submit the matter to Chicago?

A. He said that he would have to have it submitted through Mr. Raupagh.

Q. Did you receive any reply from Mr. Love on the matter, or any statement as to whether the Standard Oil Company would meet the extra ½c differential?

A. I wouldn't say we received a reply as to that offer. I do know that all replies in general were always that they wouldn't meet any other price than the one they were giving us at the time.

Q. After the Argo Oil Company—I think you said Argo Oil Corporation offer—was made, did you receive any other offers from any other gasoline suppliers to furnish Citrin-Kolb Oil Company its requirements of gasoline
2161 by the tank car method of delivery, either in 1939, 1940, or 1941?

A. I did receive another offer in 1940.

Q. Relate the time, place, circumstances, and conversation comprising this offer. First as to whom, as to the company.

Mr. Austin: I would like to ask counsel for Respondent if he will agree that the use of the word "offer" which he has used repeatedly in questions just past and previous questions, in asking the witness whether he received an offer, that he is not asking for a legal conclusion, but simply using that in a broad sense?

2162 Mr. Abbott: That, of course, is true. I merely am asking it in order to get the information as to what conversation took place, if any.

Counsel's statement is a correct statement for the purpose of asking the question in that way.

Mr. Austin: I didn't want it to appear that the witness was answering the question as to whether any particular word constituted an offer in a legal sense.

Mr. Abbott: We wouldn't indulge in any legal conclusions or conclusions of fact or law either.

Trial Examiner Ballinger: I understand that all of these proposals were merely tentative; is that correct?

Mr. Abbott: I won't agree to that. Because they speak for themselves. They were made—in fact, the Texas offer was not only not tentative, because it was reduced to written form, and was considered by the Citrin-Kolb Oil Company—

Trial Examiner Ballinger: Yes, but not by the other company, the company that was to accept it.

Mr. Abbott: I don't agree to that. There is nothing in the testimony—

Trial Examiner Ballinger: Well, the record speaks for itself.

Mr. Abbott: There is nothing in the record that shows they were tentative.

2163 Mr. Austin: I think the record will show on that. I was just avoiding making objections as to questions which I don't really think are objectionable, but read on the record it might appear that some conclusion was involved as to the meaning of the word "offer".

Mr. Abbott: I don't know how any conclusion could be reached that these were merely tentative offers, because they were made directly and definitely.

Trial Examiner Ballinger: The record will speak for itself.

Mr. Abbott: Very well.

By Mr. Abbott:

Q. State the name of the company with reference to the offer made subsequent to 1939?

A. Aurora.

Q. What is the full name of the company, if you know?

A. It is the Aurora Oil Corporation.

Q. All right. What was the time?

A. Well, there were several times. There was one time that is outstanding in my mind, and that was in December. I will say that I heard another witness testify before me about the same occasion.

Q. What was the occasion?

Trial Examiner Ballinger: December when?

2164 The Witness: December 10.

Trial Examiner Ballinger: December 10, 1940?

The Witness: That is right.

By Mr. Abbott:

Q. Where was it?

A. It was at the Leland Hotel.

Q. In Detroit?

A. Detroit. At luncheon.

Q. Who did you talk with?

A. Mr. Howard J. MacGready.

Q. Now, you may state the circumstances of the conversation which was had with Mr. MacGready?

A. Well, at first, as I recall it, we were to meet there at a luncheon upon request of the Oil Club. Having arrived there a little earlier, Mr. MacGready invited me to have a drink with him, which we did. He started to tell me about this new refinery that they were going to enlarge, and the output was going to be so great that they were going to be able to supply a good many large jobbers, and that they were supplying.

Q. Did he tell you where this refinery was?

A. He did.

Q. Where did he say?

A. It was a suburb of Detroit here; I believe it is Lincoln Park.

2165 Q. Did he say they had more than one?

A. He said they had another one. As I recall I think he said Elsie.

Q. Michigan?

A. Michigan.

Q. Is that E-l-s-i-e?

A. Yes.

Q. All right. Proceed.

A. We got talking about the business that James J. Bright—

Q. In what connection was Bright mentioned?

A. He was telling me that eventually he was going to switch over all his stations, he thought, because he was doing a pretty good job in two of his stations.

2166 Q. Who was going to switch whose stations?

A. Bright.

Q. At that time, to your knowledge, was Bright distributing Aurora gasoline?

A. He was selling Aurora gasoline that he was buying in tank cars from Aurora at his retail station.

Trial Examiner Ballinger: In Detroit?

The Witness: In Detroit, a one-man station, I believe it was, was in Royal Oak.

By Mr. Abbott:

Q. That is, Bright was selling Aurora gasoline?

A. Bright was selling Aurora gasoline.

Mr. Austin: I move the last answer be stricken on the ground the witness has stated it was hearsay, only, from Mr. Bright.

Mr. Abbott: He is stating what Mr. MacGready told him prior to the conversation of making the offer.

The Witness: Yes.

Mr. Abbott: I think you are laboring under a misapprehension, Mr. Austin, as to that.

Mr. Austin: Of course, the witness knows what Mr. MacGready told him. If it is only a part of that conversation, all right, but my point is it has no probative value as to how Mr. Bright carries on his business, or as to the truth of what Mr. MacGready told him, but if you
2167 want to just prove what Mr. MacGready told him,
if that is a part of the conversation, that is all right.

Mr. Hanley: If your Honor please, I am reminded by objection of counsel, of a favor I would like to ask of the Court. During the presentation of the Government's case, your Honor was kind enough to advise me of the name of a case under which you were ruling on the question of hearsay. I think I took a note at the time, but I have been unable to find it, and if your Honor would again advise me, I would be very grateful, indeed.

Trial Examiner Ballinger: I don't know that it was a case that related strictly to hearsay, but I had in mind the Danbury Hatters case.

Mr. Austin: Isn't that Lowe against Lawlor?

Trial Examiner Ballinger: I think so, but it is listed in the United States Supreme Court Reports as the Danbury Hatters case.

Mr. Austin: It is known by that name, but very frequently it is known by, I think it is Lowe against Lawlor.

Mr. Hanley: Thank you very much.

Trial Examiner Ballinger: Not at all.

Mr. Abbott: I would like to say to the Court I would like to have it definitely understood as to what extent we may rely on hearsay testimony in a hearing of this kind. I think that was the purpose of Judge Hanley's
2168 observation because, as I understand in the Commission's case, not only the Taggart testimony, but also in other testimony all through the record, it was permitted for the Commission to introduce testimony which was, to a large extent, hearsay testimony, and in our case, from the very start Mr. Austin has been making objections on the ground of hearsay.

Trial Examiner Ballinger: I don't understand that Mr. Austin's objections have run to anything that the party to whom this witness was talking had told him, except where the matter was wholly immaterial to any issue in the case.

Mr. Abbott: Do I understand, then, that objections, as your Honor understands, of Mr. Austin's on the ground of hearsay, have also been linked up with the matter of materiality?

Trial Examiner Ballinger: Yes.

Mr. Abbott: And that is the basis upon which the rulings have been made?

Trial Examiner Ballinger: That is correct.

Mr. Austin: I wouldn't subscribe to that fully, your Honor. I think the record already shows what I have said. There is a distinction, and it is somewhat the same distinction as in the Danbury Hatters case, as between what was said to the witness being proved; if that, in itself, is material and relevant. Of course, he may tell what he heard somebody say to him. That, in itself, consti-
2169 tutes proof, but, on the other hand, if the effort was to show a contract between James J. Bright and the Aurora Oil Corporation, and if that was what was to be proved, what was being attempted to be proved, that could not be proved by the witness saying that Mr. MacGready told him that such a contract existed, because, as to this witness, that would be purely hearsay. Of course, he knows—it isn't hearsay what Mr. MacGready said to him, but the truth of what Mr. MacGready said to him would not be within the knowledge of this witness.

Mr. Abbott: What do you call knowledge?

Trial Examiner Ballinger: What materiality had the other contract with any matter in issue in this proceeding?

Mr. Austin: Whether it had any materiality or not, it couldn't be proved by this witness telling what somebody else told him.

Trial Examiner Ballinger: I subscribe to that statement.

Mr. Austin: But, on the other hand, any conversation which is material to the point that Mr. Citrin has been testifying on, of course, I don't object to that as hearsay; Mr. Abbott. It depends entirely on what you are trying to
prove. Are you trying to prove what Mr. MacGready
2170 told this witness or what the contract was between
Mr. Bright and the Aurora?

Mr. Abbott: What Mr. MacGready told Mr. Citrin.

Mr. Austin: If it is material in connection with this present case, in connection with the rest of the conversation between Mr. Citrin and Mr. MacGready, why, then, I wouldn't object to it. I would still say it had no probative force as to what the actual contract was between Bright and Aurora.

Mr. Abbott: You say that that distinction was established by the Danbury Hatters case?

Mr. Austin: I won't say that particular distinction.

Mr. Abbott: Or by the Lowe vs. Lawlor case you mentioned?

Mr. Austin: No. Established by the hearsay rule as well established in any treatise—

Trial Examiner Ballinger: Proceed, gentlemen.

By Mr. Abbott:

Q. Mr. MacGready was talking to you about the Bright contract?

A. As I understand, Mr. Abbott, I was to tell exactly what Mr. MacGready was telling me.

Q. That's right.

A. What we were talking about.

Q. That's right.

2171 A. That was the reason I brought in this Bright.

Q. Proceed.

A. On the same basis.

Q. Tell us what Mr. MacGready said about Bright.

A. He told me that Bright was buying gas from them and that he was doing a pretty good job.

Q. You said something about Bright switching. Did Mr. MacGready tell you that?

A. He said—

Mr. Austin: I object to that, Mr. Examiner, on the ground it is immaterial whether Mr. Bright switched or not, and also I don't think it is material to the offer which the witness is attempting to describe.

Mr. Abbott: I understand he is leading up to what Mr. MacGready said about the offer, but I think anything germane to that can be stated so far as it only relates to statements made by Mr. MacGready. If there was any inducement, in other words, which Mr. MacGready put into his conversation by showing Mr. Bright was switching over to Aurora gasoline, then I think that is material and I think he should be permitted to answer.

Mr. Austin: If that is the ground, I withdraw the objection.

Trial Examiner Ballinger: Proceed.

By Mr. Abbott:

2172 Q. State what he said about Bright, particularly with reference to the switching that you mentioned.

A. He thought that by the way that Bright was selling their gasoline and that the type of—quality of gasoline that they were supplying, that there was no doubt in his mind that eventually Bright would handle his gas in all his stations and he started talking about the price being charged, and he told us that he could sell us gasoline at 2c differential.

Q. Between what?

A. The dealer price and the tank car price.

Q. Did you tell him what differential you were at that time getting from the Standard Oil Company?

A. Yes.

Q. What did you tell him?

A. I told him we were getting a cent and a half, and, again, I told him that anybody taking on his brand of gas, although he claimed it was much better than Standard Red Crown, would still have to buy it much cheaper than Standard, because of not having the advertising.

Q. What else was said?

2173 A. Then I asked him as to how he knew that the gas was better and I didn't enter into any octane conversation with him. He told me that he would guarantee the test and prove that the gas that they are making, to be delivered to us, would be better than Standard Red Crown.

Q. And delivered to you at a differential of 2¢ between the tank car and the tank wagon price, is that right?

A. That's right.

Q. Was anyone else present at the time that Mr. MacGready had this conversation with you?

A. Not at the exact moment when we were having the drink, but later on we went upstairs and we had our lunch. After lunch there were several jobbers there and I remember at the time he was sitting right next to Mr. Ledbetter, then talking, and I remember walking up there and sort of hearing the talk about gasoline and, naturally, Ledbetter being a jobber and buying from the same supplier, and we sort of sometimes sympathize with each other. I walked up and I remarked, in front of Mr. Ledbetter, of the good offer that MacGready was offering and I asked if he had a similar offer.

Mr. Austin: Asked who?

The Witness: Ledbetter.

By Mr. Abbott:

Q. By Ledbetter, you mean the Wayne Oil Company?

A. That's right.

2174 Q. The man who was here yesterday?

A. Yes. And, well, there was some talk, there, right between all the three of us.

Q. MacGready being present?

A. MacGready being present, yes, and he extended an invitation to go out and see this refinery. Told me that he would call me.

Q. To whom did he extend that invitation?

A. Well, he extended the invitation to me right in front of Ledbetter and from the conversation I understood that he also extended one to Mr. Ledbetter, before.

Q. All right. What was said by you as to whether you would accept the invitation?

A. I told him I would be glad to go out to the refinery and he was to call me, which he did a few days later. He was supposed to call me the first of the week, and, as I recall it, he called me a couple times claiming that it would be no use going out. It had rained and the one day it was cloudy. He said he would rather have me go out when the weather was much better and that we would have to postpone this date for sometime next week.

Q. Did you take up the matter of this offer with your partners?

A. Yes.

Q. And did you discuss it with them?

2175 A. I did.

Q. And did you consider the matter with them as to whether you should accept the offer?

A. I did.

Q. And did you take the matter up with the Standard Oil Company?

A. I did.

Q. With whom?

A. Mr. Raupagh.

Q. And when was that, with reference to December 10, 1940?

A. Oh, I would say it would be about ten days later.

Q. And what conversation did you have with Mr. Raupagh?

A. Just merely told him that, again, we thought that the costs of operation and delivery of gasoline was going up and that labor was going up and we again thought we should have an increase in our margin.

Q. You say your costs of labor was going up. Do you mean the cost of operating your business?

A. Yes, and I told him that, again, we had an offer.

Q. You say you spoke to him also about other costs. What costs did you speak to him about?

A. Well, as to the details—but I mean, the costs, when you wind up a month, and find out that you don't make any money, you naturally know your costs are going up
2176 and that you should, in order to be able—

Q. What relation does that have to your margin of a cent and a half between tank car and tank wagon prices?

A. You mean the cost?

Q. Yes.

A. Only to this extent: When you are going along and you have sufficient money left over after a profit, or you can meet your expenses, you feel you are doing all right, or else you are doing pretty fair, but when it gets to a point where you are not making any money and you have other companies offering you a greater margin, you feel that you have a right to point that out that you really need an increase in the margin.

Q. Did you take that up with Mr. Raupagh when you talked with him?

A. I always do. That is, ever since we have been able to buy or could have bought gas cheaper, we continually endeavor to get them to increase the margin to put it in line with the competitive companies.

Q. Did you talk with him along that line in December, 1940?

A. I did.

Q. What did he say?

A. Well, he just couldn't do anything about it. He said that that was the deal, and that the company wouldn't

2177 increase it.

Q. Did you discuss the possibility of your company leaving the Standard Oil at that time; say anything about that?

A. I told him that if conditions keep on, we may have to leave and get a better margin.

Q. Was any further discussion had with Mr. Raupagh, or did you then terminate it? Was anything further said along that line?

A. Well, I believe I again talked to him about helping out or the equipment or, at least, taking the burden off, because that is quite a costly burden. He again refused, and that's about all we talked about.

Q. In that connection did you discuss, in the December, 1940, meeting, with Mr. Raupagh, the offer that the Gulf Refining Company had made to you? Was that brought up at all?

A. Not at that time.

Q. Now have you, up to this time, April 26th, 1941, declined the offer made to you by the Aurora Gasoline Company?

A. Well, I wouldn't exactly say we declined it. We are still considering it.

Q. You are still considering it?

A. Yes.

Q. Right at this moment?

A. Yes.

Q. As far as you know the offer is still open?

A. As far as I know, it still is.

2178 Q. Mr. Citrin, based on your experience in the oil business, is it or is it not your opinion there has been any time since you began to receive gasoline from Standard Oil Company on a tank car basis that you have not been able to buy in the Detroit area your requirements of gasoline of a quality comparable with Standard Oil brands from other suppliers of gasoline at tank car prices, either equal to or less than the prevailing tank car prices of Standard Oil Company?

Mr. Austin: I am forced to object to that, your Honor. I don't doubt the witness has some experience, but it involves a conclusion on the question of comparable quality, for one thing, which I think makes the question bad.

Trial Examiner Ballinger: The witness has testified to the facts and I don't think he is—

Mr. Abbott: I am asking him to state, based on the fact that he has been in the oil business for 20 years; he qualifies for that reason as an expert on the question of gasoline prices in the Detroit area.

He has testified with reference to representations made to him by these various suppliers as to the quality of their products, and by the very force of circumstances he must, as an expert on that subject, have a knowledge as to the quality of gasolines furnished by the different oil companies including Gulf, Texas, Argo, Aurora gasoline and other companies concerning which he has testified 2179 here this morning, and also yesterday, in his testimony.

I submit that it is material and that the witness should be permitted to answer as to whether there has been any time, any day, any hour, any moment from the time he became first a tank car customer of the Standard Oil Company, when he has not been able to purchase on the open market gasoline of comparable quality to Standard Oil brands at prices either equal to or less than the tank car price of Standard Oil Company's prevailing at all times.

Mr. Austin: I am sure that all the other gasoline—that the Standard Oil Company doesn't contend that all the other gasolines sold in Detroit are comparable to Standard Oil, and the answer would be meaningless unless you first defined what is meant by comparable quality.

Secondly, he has stated, as I understand it, all the offers which he has claimed to have received from other gasoline companies and, therefore, he can't know beyond that whether he could have bought from anyone else or not or from the same ones at any other time, because, as Respondent's witnesses have testified, any company has a right to choose its customers, and it doesn't follow from the fact they charged somebody a price that they will sell to somebody else at the same price.

Mr. Abbott: I didn't ask him whether he could have purchased. I asked him whether he was at all times able to purchase gasoline.

Trial Examiner Ballinger: What do you mean by the word "able"? Do you mean that he was financially in a position?

Mr. Abbott: No. I mean considering the existing conditions of the market, whether he was able to make an offer to purchase, and whether that offer would have been accepted at all times by gasoline suppliers in the Detroit area at prices either equal to or less than the prevailing tank car prices of the Standard Oil Company.

Trial Examiner Ballinger: The Examiner is prepared to rule, unless you desire to be heard further.

Mr. Abbott: I have stated all my reasons why I think an answer should be permitted.

Trial Examiner Ballinger: The objection is sustained.

Mr. Abbott: May I suggest we have a five minute recess at this time? It is half past 11.

Trial Examiner Ballinger: You may. We will take a five minute recess.

(A short recess was had.)

Trial Examiner Ballinger: Reconvening.

Mr. Abbott: You may take the witness, Mr. Austin.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

2181 Mr. Hanley: On the record. If your Honor please, your discussion now remainds me of a statement I wish to make for the record—more accurately, a request I wish to make to the Court. That henceforward in this trial, all statements of every nature made by the Trial Examiner or by any counsel for any party during open sessions of the Court be a matter of record and reflected by the record, and that no statements during open sessions of the Court be made off the record.

Trial Examiner Ballinger: The Examiner will exercise his own discretion in the allowance of the request.

Mr. Abbott: Your Honor, I understood you to say that any time we wanted anything on the record when you said, "Off the record," we could make an objection and it would go on the record.

Trial Examiner Ballinger: That is true. But where there is consent of counsel that we go off the record for an informal discussion, there is no occasion for it being on the record, which would be required under the request made by the Judge.

Mr. Hanley: Of course, that is implied in the request, that if there is an agreement of counsel the request is abrogated, I understand.

Trial Examiner Ballinger: Then the request with 2182 that modification is granted.

Cross-Examination By Mr. Austin.

Q. When was it, Mr. Citrin, that you approached the Standard Oil Company about being permitted to buy gasoline on a tank car basis?

A. As I stated right along, it was between '26 and '28.

Q. Did you say at that time that you had been operating retail stations? By "you" I mean Citrin-Kolb Oil Company.

A. Yes.

Q. Was your operation at that time chiefly the operation of retail service stations?

A. Yes.

Q. Were you supplying any dealers at wholesale at that time?

A. Not when we became—not until we became a tank car buyer.

Q. I believe you made the statement that around that time you had acquired several retail dealers, and you wanted to get on the tank car basis, and I didn't know just what you meant by that.

A. Well, if I did, I just merely made a mistake. I don't recall making such a statement. And I think we acquired several retail stations.

Q. About how many stations did you have then?

2183 A. Well, I would say we had five or six.

Q. That was the number you had when you first acquired your bulk storage with the Carnick Oil Company?

A. Well, let me just recall which location we had.

(There was a slight delay at this point.)

A. We had at that time four stations.

Q. Now, after you started to purchase in tank car quantities from Standard Oil, how long after that did you continue to operate all those stations at retail?

A. We operated, as I recall it, until—well, until '35.

Q. Was it around '35 when you began to change your business over to—that is, when you began to resell to dealers?

A. I believe we had some dealers prior to '35. But it is around '35 when we started to lease out our company stations.

Q. You mean stations as to which you owned or leased the properties?

A. Yes.

Q. But in the meantime had you acquired some dealers to whom you were selling wholesale?

A. We did.

Q. How did you get that new business?

A. Well, we just merely went out, making contacts with some of the dealers in the stations, sold them on the
2184 idea that we were just starting out, that we were close
to them, and that it would mean a great deal if they would buy gasoline from us rather than from the supplier that they were getting it from at that time.

Q. What do you mean when you say "it would mean a great deal"?

A. Well, by saying that I mean that starting off in a small way and realizing that any additional business that we may obtain would reduce the cost of the distribution of the gasoline. We had at that time made quite an investment, and starting off small, we were sort of worried about those investments.

Q. Well, you mean it would reduce your distribution costs?

A. Well, naturally it would. In other words, if we delivered, let's say, 50,000 gallons of gasoline, and we had a rental on the property, or payments, insurance, and truck expenses, and a driver, it is no secret if you deliver twice as much it would reduce the cost than if we delivered half as much.

Q. Did you offer any of these dealers whom you took on as wholesale accounts, any lower price than they were getting from the supplier they already had?

Mr. Abbott: Just a moment. If the Court please, this

goes outside the scope of the examination on direct.
2185 If the Commission wishes to make the witness their
own witness, I think it might be admissible. But
otherwise not. Because it is not proper cross examination.

Mr. Austin: I am just pursuing a subject which was brought up as to the development of the business on direct examination. I am not—I want to find out how his business developed and changed over from retail to wholesale business.

Mr. Abbott: You are going into the question as to whether they gave any preferential prices to dealers that they took on as an inducement to do business with the Citrin-Kolb Oil Company, which is outside the scope entirely of the direct examination

Mr. Austin: I am not talking about preferential prices by Citrin-Kolb; I am not asking, or assuming that he charged one dealer a different price from another dealer, at this point. What I am asking is whether he obtained these new dealers by offering them a lower price than the dealers' suppliers. In other words, than that dealer had previously been paying somebody else.

Mr. Abbott: That also goes outside the scope of the direct examination.

Mr. Hanley: There is no desire on the part of the Re-
spondent's counsel to argue the objection, but it is called
to the attention of the Trial Examiner that upon the
2186 case in chief of the Government, a strict rule was ap-
plied as to the requirement that a witness be made
the witness of the Respondent when it went in the least
ways outside the scope of the direct examination.

Mr. Austin: I don't think that is true, either, because I only recall that being done in one case, and that was when Mr. Harrison was asked to testify about selling costs. I think that is the only place that the Respondent was required to make the witness their own witness.

Mr. Abbott: Is there any particular objection to making him your witness on this point?

Mr. Austin: Yes, because I am not pursuing any particular line of proof. I am just questioning the witness about what he testified to on direct examination. I am trying to find out what he meant by a previous answer.

Mr. Abbott: He didn't testify to that at all.

Trial Examiner Ballinger: The Examiner is of the opinion that the question asked is very remotely related to anything asked on direct examination, and sustains the objection.

By Mr. Austin:

Q. Aside from price, Mr. Citgin, let me ask you if any of these dealers whom you began to supply prior to 1935 had formerly been supplied directly by the Standard
2187 Oil Company.

A. They were not.

Q. Now, since 1935 you have increased greatly the number of stations that you served, have you not?

A. We have.

Q. And has that increase been due to the acquisition of service station property by your company, or have the majority of these dealers been dealers to whom you sell, but as to whose station properties you have no control?

A. Well, I would say that was true on both parts; in other words, we have acquired more property, built more stations, and we have also acquired more dealers.

Q. Have you acquired any dealers who, before you started to sell to them, were purchasing their gasoline from the Standard Oil Company?

2188 A. I didn't get that, Mr. Austin. Would you mind repeating that.

Q. Were any of these dealers to whom you sell gasoline formerly direct customers of Standard Oil Company, before you began to sell them?

A. No.

Q. Now, didn't you state on direct examination that around 1935 you decided to make a change in the nature of your business and try to become wholesalers rather than retailers, so far as possible?

A. I believe I did state so.

Q. And what was the reason for that change?

A. I believe I had explained—at least the best way I knew why—as to why we decided to change the operation methods.

Q. Well, would you state that again? I didn't think that you finished your answer on that, or stated it very fully yesterday.

A. Well, I will be glad to.

Trial Examiner Ballinger: Has counsel a copy of yesterday's record?

Mr. Austin: I have, your Honor.

Mr. Hanley: I have one here. I will be glad to let the Examiner see it.

Trial Examiner Ballinger: May I have it, please?

2189 Mr. Abbott: May I say, that the matter now under discussion was gone into in some length with this witness, and he made a rather involved statement as to the reasons why he wanted to go on a wholesale basis in 1935.

I assume that is what your Honor wants to get the testimony for.

Trial Examiner Ballinger: Proceed.

A. As I recall it, we were doing a wholesale business and a retail business; having been limited to the amount of executive abilities that we had in our partnership, or else having realized that if we were to continue we would have to expand in such a way that we would have to hire more help, more personnel, that is the two businesses would require—well, in other words, one would have to run the retail end of it, and one would have to run the wholesale, and it would require quite a bit of more help. And we also realized that if we went into the wholesale end of it we could do a better job by devoting all our efforts just going after the wholesale end of it. So, for that reason we decided that not being large enough that we should decide which way to continue, and we have decided to continue in the wholesale manner.

By Mr. Austin:

Q. Was the matter of expense a consideration? That is considering the nature of your retail operations and wholesale operations, which at that time you were 2190 combining, and did you decide—or, was it your opinion that if you restricted your operations to wholesale that it would decrease the cost of distributing gasoline?

A. Well, in reference to expense I could point out as to what we thought would increase the expense. In other words, if we operated a chain of retail stations and yet operated and supplied to wholesale accounts, first of all we would have the expense of hiring supervisors to supervise those retail stations; we would have to maintain an employment department; operating a chain of stations would also necessitate advertising. Whereby if a man operates one station it is a lot easier for him to do business in one station than it is in a chain of stations, because you work in the station yourself, you get to know your neighbors, you treat them—you give them personalized service. Then, going into operating a chain of retail stations, you sort of have to offset that by being able to advertise, or give such services that you otherwise could not—would not give. And all of that would entail additional expenses.

Q. Is it your opinion then, Mr. Citrin, that by restricting your business entirely to wholesale or almost entirely, that it is possible for you to operate your business more efficiently?

A. Well, at that time, Mr. Austin, it seemed to be the best road to follow; at least the most reasonable way to do business.

Q. Can you answer that question?

2191 A. I beg your pardon.

Q. Can you answer that question, whether, in your opinion, by restricting your operation to wholesale, that you could operate more efficiently than by engaging in both wholesale and retail?

A. I can state that but my opinion, when we operated a number of retail stations—

Q. Yes.

A. —at that time we did operate a number of retail stations and my opinion, or the partnership's opinion, it was that we would be operating cheaper if we operated at wholesale business.

Mr. Austin: Now I would like to make a motion at this time, your Honor, directed to the testimony of the witness regarding conversations he had with the representatives, I believe of the Hicock Oil Company of Toledo. The testimony in connection with an alleged offer made by the Hicock Oil Company to Citrin-Kolb Oil Company somewhere around 1928—

By Mr. Austin:

Q. Is that correct, Mr. Citrin? You testified yesterday when it was.

A. I believe it was around 1930, Mr. Austin.

Mr. Austin: 1930.

Mr. Abbott: That's what he testified to.

Mr. Austin: I thought that that Hicock deal went back farther than that?

2192 Trial Examiner Ballinger: 1930, was the testimony.

Mr. Austin: Wasn't the date of your Shell testimony 1930?

The Witness: Yes.

Mr. Abbott: Yes, the same year.

The Witness: Yes.

Mr. Austin: I would like to check that, please, before going further. My recollection is to the contrary. I am probably wrong, if Mr. Abbott says so, but I would like to see the record.

Trial Examiner Ballinger: The motion may remain open.

Mr. Austin: (Referring to record.) Page 2069 of the record, the witness says:

"I would say that was around—well, between 1926 and 1928. I just can't remember the exact year."

Mr. Abbott: Which one is that?

Mr. Austin: Perhaps I was referring to the wrong company.

Mr. Abbott: That is when he said he went on a tank car basis and had bulk station relations with the Carnick Oil.

Mr. Austin: Oh, yes.

Trial Examiner Ballinger: We will go off the record until we can agree on this date.

2193 Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I am in error. I will proceed, your Honor, in reference to the testimony of the witness respecting an alleged offer from Hicock Oil Company.

I move that all testimony relating to that transaction and conversations with representatives of the Hicock Oil Company be stricken from the record upon the ground, first, that the transaction in question is too remote to have any bearing upon the good faith of the Respondent in lowering a price or making a low price to meet a low price of a competitor, after the passage of the Robinson-Patman Act or, in other words, during any of the time covered by the Complaint and;

Secondly, and more particularly, upon the ground that this statement, or rather the description of the conversation, clearly related to an offer to obtain an interest in the Citrin-Kolb Oil Company and was clearly not an offer for the sale of gasoline. It was, rather, an offer which involved the acquisition and control of the Citrin-Kolb

Oil Company and, consequently, cannot be possibly considered as an offer of a price of the sale of gasoline.

Trial Examiner Ballinger: I will hear from counsel for the Respondent.

2194 Mr. Abbott: I understand the motion is based on two grounds:

First, as to the alleged remoteness of the offer from the Hicock Oil Company of Toledo.

Secondly, that it involved other considerations than price.

The part of the Robinson-Patman Act which is involved here is in sub-division "b" and reads as follows:

Trial Examiner Ballinger: The effective date of which, was what?

Mr. Hanley: June 19, 1936.

Mr. Abbott: Yes.

"Provided, however, that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor."

Now that was, of course, an amendment to the Clayton Anti-Trust Act which was enacted by Congress in 1914.

Trial Examiner Ballinger: This proceeding is brought under the Robinson-Patman amendment to the Clayton Act.

Mr. Abbott: Yes.

Now, as to the claim of remoteness, the Respond-2195 ent maintains that it is material on this record, which is to be presented to the Commission, to show a continuous course of dealings between this jobber and the Respondent from the time when, in 1926, to sometime in 1928, the jobber was placed on a tank car basis of delivery, after which time it has been shown by the evidence there were repeated efforts on the part of other suppliers to proselyte this account of the Citrin-Kolb Oil Company by offering equal or a better price to the Citrin-Kolb Oil Company than was offered or maintained in the delivery of tank car shipments to the Citrin-Kolb Oil Company by the Standard Oil Company.

I wish further to bring to the attention of the Court that it is in the testimony here, not only on the testimony of Mr. Raupagh, but on the testimony of this witness, that the arrangement which the Standard Oil Company placed Citrin-Kolb Oil Company on in 1926 to 1928, when they first went on the tank car basis, was a day to day arrangement, no contracts having been entered into; nothing to prevent the arrangement being cancelled on the part of either the Respondent or the jobber. It therefore, it seems to me, becomes necessary and pertinent to show, in order to establish a continuity and persistent course of dealing as between Respondent and the jobber, on the one hand, and other suppliers of gasoline on the other, to secure this account of the jobber from the Citrin-Kolb Oil Company by other oil companies, both major and 2196 others, that have been testified to in this case, from the Standard Oil Company, the Respondent.

Now those offers began, according to the testimony, here, from 1930 to the time of the offer of Mr. Bailey and Mr. Hicock of the Hicock Oil Company, right down until the present time and there is an offer at the present time, even under consideration by the jobber.

Trial Examiner Ballinger: Pardon an interruption. The Examiner would like to hear from you as to whether or not the Hicock offer was, in fact, an offer to supply gasoline to the Citrin-Kolb Oil Company at a price.

Mr. Abbott: I was going to come to that. If your Honor wishes me to pass from the matter of remoteness, I will do so.

In the second place, it is claimed by the Commission that the offer of the Hicock Oil Company of Toledo involved other considerations than price.

On the proposition, the testimony by this witness was that they were offered a contract by the Hicock Oil Company of Toledo which even went to the point of having Mr. Citrin go down to Toledo and confer with Mr. Hicock, himself, who is the head of that company, which contract guaranteed a 6½¢ margin per gallon; that is to say, 6½¢ under the prevailing retail price which the witness has testified involved a margin between the tank car and the 2197 tank wagon price prevailing of 2¢ a gallon.

Trial Examiner Ballinger: With whom was the contract to be made?

Mr. Abbott: With the Hicock Oil Company of Toledo.

Trial Examiner Ballinger: Yes, but who was the party in Detroit?

Mr. Abbott: The Citrin-Kolb Oil Company.

Trial Examiner Ballinger: I do not so understand.

Mr. Abbott: I know what the Examiner has in mind.

You have in mind the additional consideration that the offer involved the feature that the Citrin-Kolb Oil Company should be incorporated and I say that the Act here, which we are considering, says that if an offer was made to meet an equally low price of a competitor, then it is a defense under the Act and there is—

Trial Examiner Ballinger: I understand—

Mr. Abbott: If I may be permitted to continue until I finish the sentence—and there is, in this case, in this offer, a definite offer not only to meet the price of the Standard Oil Company on tank car shipment but also to better that offer; namely, to give a differential not of a cent and a half as between tank car and the tank wagon price, but a differential of two cents.

2198 Now, as to whether the additional consideration of incorporating the Citrin-Kolb Oil Company and allocating stock to the Hicock Oil Company on the basis of 51% of stock, to 49% to the partners in the Citrin-Kolb Oil Company partnership, with the proviso that preferred stock should be issued, in addition, to those stockholders representing the amount of their investment in the Citrin-Kolb Oil Company, I say that merely goes to the matter of the weight of the testimony.

Trial Examiner Ballinger: Now will you permit an interruption?

Mr. Abbott: Yes.

Trial Examiner Ballinger: As the Examiner remembers, there was no offer to furnish the Citrin-Kolb Oil Company gas at any price. There was an offer that in the event a corporation was organized, in which the Hicock Company was to own or receive 51% of the common stock, to then sell to the new corporation at a certain price. Now, if the Examiner is in error, I would like to have you point it out.

Mr. Abbott: I would like to have an opportunity to read the testimony, but I don't want to take the time, because there is quite a lot of testimony on the point, and, I, therefore, suggest that the Court reserve ruling on that until we have an opportunity to block out the testi-
2199 mony and bring it to your Honor, because I don't
want to take the time here. I would like to get on with the testimony, if it is permissible. I can't refer to it offhand, but I would like an opportunity to read that testimony back to the Court.

Trial Examiner Ballinger: The Examiner's memory is very clear with reference to the testimony.

Mr. Abbott: I say, also, in that connection, that the fact that these incidents were involved in the offer does not detract from the proposition that there was an offer to sell the requirements of gasoline of the Citrin-Kolb Oil Company at a larger differential than they were then securing from the Standard Oil Company, and there was an element of price involved, and [illegible] Act itself merely says that if the offer—that is to say, [illegible] the offer of the Standard Oil Company—from day to day to sell tank car shipments was made in good faith to meet an equally low price of a competitor, which the Hicock Oil Company certainly is, then it is competent evidence, even though something else is involved in the offer. That is a question involving the construction of the Act.

I submit that it is purely a matter presented to the Commission as a matter of law as to whether this testimony comes within the Act. We are involved here, as I understand it, in making a record for the Commission, and
2200 I think that testimony should be permitted to stand
because it does involve a question as to whether that offer comes within the purview of subdivision "b" of the Robinson-Patman Act, which contains the language I have quoted.

Do you wish to say anything on that, Judge Hanley?

Mr. Hanley: Yes, I do, and may I have the objection of Mr. Austin read, please?

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: For the record: Counsel for the Respondent at this time states to the record that counsel for the Respondent will not argue any question in the matter of the ruling of the Court until and unless the Court invites argument by counsel.

At this time counsel for the Respondent wishes to continue the stated reasons for its opposition to the allowance favorably of the objection of counsel for the Commission, or motion to strike on the part of counsel for the Commission, of certain evidence relating to certain offers made to the Citrin-Kolb Oil Company by the Hicock Company, and, as a part thereof, counsel for the Respondent alludes to, because of inseparability, the rulings of the Court in

respect of the admissibility of evidence and relevancy of
evidence concerning competitive offers to the jobber-
2201 customers of the Respondent. That, without repeat-
ing any of the factual matter alluded to in the state-
ments of Mr. Abbott, there is added thereto, on the question of the character of the Hicock offer as a competitive offer, the statement of Respondent that the same is entitled to be considered as a competitive offer, notwithstanding that all of the circumstances and facts surrounding the same were not identically comparable to the relations existing between the Standard Oil Company and Citrin-Kolb Oil Company. That the effective situation results under the statute when the customer involved receives an offer, irrespective of what it is, which in his mind resolves itself into an inducement paramount to the inducements being offered or enjoyed from his then supplier and that the comparableness of the circumstances and terms are utterly immaterial.

Further, that it is error on the part of the Examiner to exclude any evidence of any offer that may be made by a competitor of the Standard Oil Company to any customer of the Standard Oil Company in this trial, for the reasons heretofore assigned, and for the following reasons:

First, that the Examiner has indicated on page 2051 of
the record, in striking the testimony in relation to com-
petitive offers made to the Wayne Oil Company, as fol-
lows: "If the record stood as it is, the Examiner
2202 would wholly disregard the testimony in his report,
and he is advising counsel now by stating that he will
either entertain a motion of counsel or he will of his own motion direct the testimony be stricken."

And, again on page 2054 of the record, the Examiner stated, after inviting the prosecuting attorney to make a motion to strike—

Trial Examiner Ballinger: You mean counsel for the Commission?

Mr. Hanley: Yes. I beg your pardon.

Mr. Austin: I don't think this has any relevancy to the present objection.

Mr. Hanley: It will have. It all ties in.

The Examiner stated, quoting: "Well, the Examiner is merely apprising you of the fact that unless counsel moves to strike the testimony, the Examiner will direct that the testimony be stricken. And he is doing that to apprise you of the fact that he will wholly disregard it in his report."

Further, that the Examiner has indicated by his rulings that he regards any testimony of any offers subsequent to the filing of the Complaint as immaterial. And that he regards any offers of competitive nature to any dealer as immaterial, if such dealer were on a tank car basis on the effective date of the Robinson-Patman Act.

2203 That the result of such theory of trial and rulings of the Court result in an impossible situation and an impasse, so far as both the Federal Trade Commission and the Respondent are concerned, in that, first, if a dealer were on the tank car basis prior to the effective date of the Robinson-Patman Act, there is no challenge to the legality of that relationship.

If the legality of that relationship continues, there is no reason why the Respondent should justify the existence thereof.

If that relationship is challenged in its legality, as must be implied by reason of the fact that the Federal Trade Commission has charged the Respondent herein with an illegal relationship, the same must have occurred coincidentally with the approval of the Robinson-Patman Act in 1936.

That if such legality be challenged in this proceeding, then the Respondent is entitled to justify under any statutory grounds granted the Respondent for such justification, including the meeting of competition.

If there is no necessity, and it is not material that the Respondent justify or present evidence as to competitive offers since June, 1936, and after the customer went on the tank car basis, then the Respondent is entitled to have dismissed from this proceeding all of the transactions

2204 relating to the relations, on the one hand, of the Citrin-Kolb Company, the Wayne Oil Company, the Stikeman Oil Company, and, on the other hand, the Respondent Standard Oil Company.

Further, that if said transactions are retained in the proceeding, the Respondent is entitled, under the provisions of the statute, to justify its continuance of the tank car price on the basis that it is necessary to do so to retain its own customers in the face of competitive offers.

Further, that if there be excluded from the evidence any offers subsequent to the filing date of the Complaint, as was done by the Examiner in the matter of the competitive offers to the Wayne Oil Company made on December 10 and on December 13, 1940, then an impossible situation and impasse is created for both the Federal Trade Commission and the Respondent in this: That any result in this action adversely to the Respondent could result only in a cease and desist order, which cease and desist order would provide for conduct in the future from its date, which date would necessarily be not later in any event under such ruling of the Court than the filing date of the Complaint, and which order would preclude the Respondent from operating in a manner which had been established on the record up to but not beyond the filing date of the Complaint.

2205 And assuming that if the said three jobbers be retained in the action on the theory that they have been violating the law since June, 1936, that they have so violated the law up until the filing date of the Complaint, then they have cured such violations by a competitive offer bona fidely met on December 10th and December 13th, and the Federal Trade Commission, in entering its order, would be in the untenable position of entering an order based upon evidence that they never heard, and the Respondent would have been precluded from presenting a statutory and complete justification of the continuance of its operations after December 10th and December 13th.

That concludes that motion.

I am sorry, your Honor.

If it be the contention of the Government, as indicated it may be by the statement of the Trial Examiner, that no evidence of justification on the grounds of competition is admissible after the establishment of customers on a tank car basis, when it is shown that such establishment on said basis occurred prior to June, 1936, then, in that event, it must necessarily follow that there is no violation of law by continuing such customers, and consequently it is moved by the Respondent that all transaction alleged in the Complaint between the Citrin-Kolb Company, the Wayne Oil Company, and the Stikeman Company, on the one
2206 hand, and the Standard Oil Company, Respondent, on the other hand, be dismissed.

Trial Examiner Ballinger: Judge, the Examiner cannot entertain two motions at the same time. There is a motion pending. He will not entertain the last motion you have submitted.

Mr. Harley: I will be glad to renew that, of course, Judge. I don't want to get the thing too complicated.

Trial Examiner Ballinger: The Examiner is prepared to rule.

Mr. Austin: If your Honor please, may I make just two sentences before you rule?

Trial Examiner Ballinger: You may.

Mr. Austin: In the first place, I would like to state for the record that the Complaint in this case involves no charge that any of the four jobbers named therein has violated any law administered by the Federal Trade Commission.

Secondly, directly in respect to the motion, I want to say in my opinion Section 2-b of the Robinson-Patman Act, when it refers to an equally low price of a competitor, as applied to this case, refers to a price for gasoline, and that the price mentioned or referred to by the Hicock Oil Company in its conversation with Mr. Citrin, was not a price for gasoline. It was a price for a lot of other
2207 things.

Mr. Abbott: What other things do you refer to, I would like to ask?

Mr. Austin: This was a price for agreeing to incorporate, and have 51% of the common stock issued to Hicock Oil Company.

Trial Examiner Ballinger: The Examiner refers to the record as affording sufficient grounds for the Examiner's previous rulings on all motions. On the pending motion of counsel for the Commission the Examiner sustains it and directs that the testimony of Jacob A. Citrin, so far as related to any offer received from the Hicock Company, be stricken from the record.

Mr. Hanley: Now, in view of your Honor's statement before ruling that there were two motions on the record, I would like now to renew the second motion, your Honor.

Trial Examiner Ballinger: You may present any motion you have.

Mr. Hanley: It is on the record.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

(The following motion by Judge Hanley was read by the reporter:

2208 "If it be the contention of the Government, as indicated it may be by the statement of the Trial Examiner, that no evidence of justification on the grounds of competition is admissible after the establishment of customers on a tank car basis, when it is shown that such establishment on said basis occurred prior to June, 1936, then, in that event it must necessarily follow that there is no violation of law by continuing such customers, and consequently it is moved by the Respondent that all transactions alleged in the Complaint between the Citrin-Kolb Company, the Wayne Oil Company, and the Stikeman Company, on the one hand, and the Standard Oil Company, Respondent, on the other hand, be dismissed.")

Trial Examiner Ballinger: Motion by counsel for the Respondent is denied.

By Mr. Austin:

Q. Turning now, Mr. Citrin, to your conversation, I believe, in 1930, with someone whom you said represented the Shell Oil Company, who was that conversation with?

A. Well, there were three of them from the home office of St. Louis.

Q. Did you know any of them before?

A. No, I didn't.

Q. Will you recall again how you happened to meet these three men at that time?

2209 A. Well, as I stated before, Middleton, having been a Standard Oil jobber—

Q. That is Mr. Middleton here in Detroit?

A. Yes. —whom the Standard Oil Company later lost as a result of the Shell offer—,

Mr. Austin: I object to the statement. I move to strike the last clause.

Mr. Abbott: I object to that. He is stating just what he testified to yesterday, that Middleton Oil Company was lost by the Standard Oil because of this very offer that was made to the Citrin-Kolb Oil Company.

Mr. Austin: I don't know whether they were lost. And the witness doesn't know whether it was as a result of this offer, obviously.

Mr. Abbott: I don't know if that is so. I think he did have knowledge as a result of this offer.

Trial Examiner Ballinger: You may find out.

By Mr. Austin:

Q. Well, anyway, Mr. Middleton had been a Standard Oil jobber?

A. Yes.

Q. And so let's now get ahead, and just stay on what happened at that time, and go ahead.

2210 A. Having been practically a neighbor of Middleton, as far as our bulk plants were concerned, he was located at that time on Fenkel, and we were located on Livernois close to Fenkel, we would frequently have sessions between us, inasmuch as we were handling the same products, and we would discuss the possibilities of expansion and what the future held for us, and as a result of such meetings he told me that the Shell was after him, and that he thought if we would entertain such proposition with our office and his we would have a better chance to start out distributing the products in question. He told that the Shell were going to have a sort of convention here in Detroit, and that the officials that he was in contact with would be here, and that he wanted me to come down and meet them. Which we did. We spent about three days in the Statler and met these people. I don't recall their names, it has been so long ago.

Q. Did any one of those three tell you what position he held with the Shell Oil Company?

A. One was the credit manager; I know that; because he always wanted to know about our financial end of it.

Q. Did any one of them tell you that they were authorized to make any offer to you on behalf of the Shell Oil Company?

A. Oh, yes. In fact, as I recall it, they had form contracts that they were showing and they were quite anxious
in getting us to sign up right then and there over that
2211 period of three days they were to spend, here. They
were sent here with the idea of obtaining a jobber or jobbers in the City of Detroit to handle their products, as well as Wayne County.

Q. That's what they told you?

A. Yes.

Q. Now that conversation was about Silver Flash Gasoline, wasn't it?

A. Yes.

Q. And is that a brand made by Shell?

A. It was a brand made by Shell which, as they explained to me, was as good as their regular Shell brand, only that in some states they advertised and sold their gasoline under the name of Silver Flash where, in other states, they sold it as Shell.

Q. Let me ask you this: Is Silver Flash Gasoline sold in Detroit now?

A. No, it is not.

Q. You said the Middleton Oil Company took it on?

A. Yes.

Q. After that time?

A. Yes.

Q. Shortly after that time?

A. They did take it on shortly after that time.

Q. And what happened to that?

A. Well, it since—of course, you don't know—

2212 Q. I am not asking you what happened to the Middleton Oil Company. I want to know whether the Silver Flash was discontinued by Shell or whether it is not handled by the Middleton Oil Company?

A. It was discontinued by Middleton in Detroit, as I recall it, by reason of his failure in his business.

Q. The Middleton Oil Company did fail?

A. To the best of my knowledge; I think they did.

Q. Now do you know whether Shell Oil Company makes or sells a gasoline under the brand of Silver Flash now?

A. Right today, I couldn't say that I know.

Q. It hasn't been sold in Detroit for several years, has it?

A. No.

Q. Isn't the Silver Flash the same gasoline that is now known as Silver Shell; third grade Shell Gas?

A. Now that you told me, you call it to my attention, I believe that that's probably what they are doing.

Q. And their regular house brand is called Golden Shell, is it not?

A. I believe that that, possibly, is correct.

Q. You stated that the Middleton Oil Company accepted an offer from Shell; that is, this offer which was discussed at the Statler, was it, at that time?

Didn't you state that the Middleton Oil Company
2213 made a deal with Shell?

A. Oh, yes.

Q. Did you ever see the contract, or do you know whether there was a contract made by the Middleton Oil and Shell?

A. Well, I saw the contract that was proposed to us.

Q. Did you ever see it after it was signed by either the Middleton Oil Company or the Shell Petroleum Company?

A. All I saw, that the same contract that they gave me, they also gave to Mr. Middleton.

Q. And you know that later on he began to sell this Shell Gasoline?

A. I do.

Q. But do you know, of your own knowledge, what deal he actually made with the Shell Oil Company?

A. Well, I know that the deal he made must have been the same as the one offered at the time.

Q. Couldn't it have been changed? It might have been made better for him, mightn't it, after you got through talking, or not so good?

A. It might have, yes.

Q. And you don't know what deal he actually closed with the Shell Company, do you?

A. I do know that after he made the deal, that upon several occasions that he told me that he accepted their offer on the basis that they had outlined to us and he thought—

2214 Q. Is that the only knowledge you have, is what he told you?

A. Yes.

Mr. Hanley: Pardon me, Mr. Austin. May I interrupt a moment, your Honor?

Mr. Austin: Yes.

Mr. Hanley: I am doing this on behalf of associate counsel.

I am just advised that he made an appointment today for one o'clock with the understanding that we were going to adjourn at one o'clock. I would just like to remind the Court of that fact.

Trial Examiner Ballinger: The Examiner assumes that it will require some little time to finish cross-examination?

Mr. Austin: It may take a little while, yes.

Trial Examiner Ballinger: The Examiner will entertain a motion to adjourn.

Mr. Abbott: In connection with that, your Honor, I wish to say that Monday morning we have two witnesses coming here from a distance and it will be necessary, because they have been advised to be here at the opening of the hearing on Monday morning, to take that testimony up at that time.

I don't like to break into a witness' testimony, but that

2215 is the situation we are under and we will have to adhere to that program.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: I move we adjourn at this time until Monday morning, April 28, at 9:00 o'clock a. m.

Trial Examiner Ballinger: The motion of counsel for the Respondent is granted and now, at 1:10 p. m., the hearing stands adjourned to be reconvened at the hour of 9:00 o'clock a. m. April 28, 1941, in Room 859 Federal Building, Detroit, Michigan.

(Whereupon, at 1:10 p. m., April 26, 1941, the hearing in the above-entitled matter was adjourned to reconvene on April 28, 1941, at 9:00 a. m.)

2216

Room 859 Federal Building,
Detroit, Michigan,
April 28, 1941.

Met, pursuant to adjournment, at 9 A. M.

Before: Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois, and

Arthur J. Abbott, Esq., of the firm of Abbott, MacMahon, and Roberts, 2230 Buhl Building, Detroit, Michigan, on behalf of the Respondent.

2217 PROCEEDINGS.

Trial Examiner Ballinger: We will come to order.

This is a reconvening at 9 A. M., Eastern Standard Time, April 28, 1941, in Room 859 Federal Building, Detroit, Michigan, of Docket 4389 in the case entitled Standard Oil Company.

The last hearing was held in Detroit, April 26, 1941.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

JACOB A. CITRIN, having been heretofore duly sworn, resumed the stand, and testified further as follows:

Cross-Examination by Mr. Austin (Continued).

Q. Mr. Citrin, you were talking about the conversations you had with some men who were supposed to be from the Shell Oil Company. I believe you said that they came from St. Louis.

A. I did.

Q. Now, they talked to you and to a Mr. Middleton; is that right?

A. That's right.

Q. And I believe you said they were trying to get jobber representation here in Detroit. Wasn't there something about exclusive territory? Did they offer you, 2218
or either one of you, exclusive territory, or was there any offer that you and Mr. Middleton, between you, would have the sole representation here? How was that talked about?

A. Well, to the best of my recollection, we were trying to tell them that if we entertained a proposition of that kind, that we would want it exclusively, and not having completed the deal, I don't think we would have had any trouble obtaining it exclusively, because Middleton, having been the only one that they put on—there were no other jobbers at that time—so I—

Q. But was there anything said as to you and him, when they talked to you together about what—were they going to divide up the territory in Detroit, or what was the arrangement?

A. Well, we were mostly interested in the things they were going to do for us. As to the territory, it was understood we were going to be the only two.

Q. Is that so?

A. Yes.

Q. And I believe you said that after you had this talk with these Shell representatives that you then related your conversation to Mr. Raupagh.

A. Well, Mr. Austin, as I stated—

Q. It is quite a long time ago, I know.

2219 A. As I stated in the past, I have more or less related all of these offers at one time or another to the

Standard Oil Company management, either the manager was out, or it was the salesmanager or the assistant manager; most of the offers we had were related to them in connection with the better deals that we could have gotten.

Q. Do you remember whether or not you told Mr. Raupagh about this at that time?

A. The Shell offer; yes.

Q. And I believe, on direct examination, you said in talking to him that he rather tried to persuade you to stay with Standard, and I think you said that he argued that your deal with Standard was a better deal, even though it was a smaller differential?

A. Yes.

Q. What reasons did he give in arguing that?

A. Well, namely, that we had built up a pretty good business on the locations that we had sold Standard. Silver Flash, although having been the first grade of Shell gas, would be a new product in the city of Detroit, and it would take quite a while before the public would start buying it, and that the gallonage, no doubt, would suffer. And, therefore, although we would have obtained a better margin or spread, still it would have been eaten up in the loss of business.

2220 Q. Do you remember anything else that was said at that time?

A. Well, we talked about the painting they were going to do for us; also talked about, as I recall it, that Middleton might obtain that proposition and he may lose a customer. Also wanted to know if we could have gotten a contract at that time; at least give us some protection—

Q. You were trying to see what you could get from Standard Oil to see whether there was anything to offset the other deal; is that right?

A. That's right.

Q. You finally decided to stay along with Standard?

A. Well, it took us a little while before we made up our mind, and turned it down.

Q. Since you started your bulk plant operation, you never have purchased any other gasoline except Standard, have you, through your bulk plant, at tank car lots?

A. No.

Q. Now, in 1936, Mr. Citrin, you told us about some conversations you had with a Mr. Chandler whom you said represented Gulf Oil Company, I believe it is, or Gulf Petroleum, I don't know which—

A. Yes.

Q. —I don't know what their title is. I think they have companies under both names, as a matter of
2221 fact. But, at least, we are referring to the major oil company that is known as Gulf?

A. That's right.

Q. And also that you had some conversations with some representatives of the Texas Company?

A. Yes.

Q. Do you remember which was first, whether the conversations with the Gulf people that you talked to, or the conversations with the Texas people, were earlier, in 1936?

A. Well, the conversation with Gulf went on for quite a period, ~~and I~~ would say that the Gulf was first, although I wouldn't say that they were last, because the representative called on us constantly, and—

Q. Well, that is the time that the man that you said wore an overcoat, so you decided it was winter—

A. That's right.

Q. —but you weren't sure whether it was early spring or late fall. You can't place those two conversations by relating one to the other; the Texas and the Gulf?

A. I am quite definite the Gulf was before the Texas, but what I meant before in stating what I did, right after the Texas offer, we still had a representative from Gulf called on us; not only Mr. Chandler but Mr. Cole called on us constantly, so I wouldn't say that the Gulf was the last one, but the offer first was from Gulf; before Texas.

2222 Q. Do ~~you~~ remember when Standard Oil ceased operating retail stations here and changed over to a leasing basis?

A. Well, I think they started in early 1936.

Q. I think the record shows it was September 10, 1936, when they started the Iowa plan here in Detroit.

A. I thought it was around 1936.

Q. So, do you remember whether this offer from Gulf was before that or after that?

Mr. Abbott: Now, Mr. Austin, it took a little while, didn't it, to change over? I think, in fairness to the witness, you should ask him whether it was before or after they started this change-over, or whether it was before they finished the change-over.

Mr. Austin: I mentioned the date September 10th, and

I thought perhaps he would know when they started, and by recalling that date it would help. I assumed that you didn't do it all in one day, although Mr. Raupagh did give a definite date, and I suppose that means when a number of the leases were started in effect; is that right?

Mr. Raupagh: That's when they were completed.

Mr. Abbott: That is when the arrangement was completed, and they made the change-over 100%.

Mr. Austin: Then that is so much the better.

By Mr. Austin:

Q. Does that help you any, Mr. Citrin?

2223 A. The only thing I could say is that I know that the Standard started leasing out,—whether they completed leasing out to stations, I wouldn't know—but it was some time in 1936. I also testified that the Gulf offer, I assume, was in the early part of 1936.

Trial Examiner Ballinger: What was the date that the Standard completed the change?

Mr. Austin: Put it into effect September 10, 1936.

Trial Examiner Ballinger: That is the effective date?

Mr. Abbott: That's right. I understand the only purpose of this is to try to enable the witness to connect up one date with another.

Trial Examiner Ballinger: Yes. But I was in doubt as to the date when they first decided to make the change and then the date when it was actually put in operation.

Mr. Austin: So was I, your Honor.

Trial Examiner Ballinger: I am still in doubt. We have a date of September 10, 1936. Was that the date when they decided to commence?

Mr. Abbott: No. That is the date when they put the plan in operation. Now, as to when they began to consider it, I don't think there is anything in the record on that. The fact of the matter is, I don't think there 2224 is anybody who knows.

By Mr. Austin:

Q. What position with the Gulf Petroleum Company, or the Gulf Company, did Mr. Chandler hold?

A. He claimed that he was a special representative calling on larger accounts.

Q. Where did you meet him first?

2225 A. Well, he called at one of our stations. I don't know just where his first call was. I know that most of the times when he came out was at Linwood and Buena Vista.

Q. The Buena Vista station?

A. Buena Vista, yes.

Q. That was one of the service stations that Citrin-Kolb was operating at that time?

A. Yes. In fact, before we got Livernois, the Buena Vista station was a newer station built, and we had built, then, sort of a one room little office in there, and that was considered—well, the place where we held our books and records. It was considered our main office at that time.

Q. Did you ever call at the offices of the Gulf Oil Company here at about that time, or were all of your conversations with Mr. Chandler out there at your station?

A. I was over at the Gulf over on Warren, several occasions. I don't know whether it was right around that time or whether Mr. Chandler arranged for an interview. I know I was over at the Gulf offices.

Q. Do you remember talking with anyone at the Gulf offices about purchasing gasoline from Gulf?

A. I must have been talking to them about gasoline, all right, or else he wouldn't have been over there, but I just don't seem to connect whether I was in there when Mr. Chandler was there, or before that, or whether
2226 they had asked me to come up there, but I do recall being at the office up there.

Q. Do you remember when?

A. I couldn't remember.

Q. Do you remember who you talked to?

A. I don't remember. No. I was trying to associate a certain gentleman I have seen there. I don't think I could state who he was.

Q. As I understand it, these talks with Mr. Chandler that you testified about on Saturday, or it may have been perhaps Friday afternoon, all took place at your Buena Vista station?

A. I don't believe that I testified just exactly where, but as I recall it, now, it seems like they were mostly at the Buena Vista station.

Q. And did you testify that Mr. Chandler did not indicate to you that Gulf would give you any price reduction but that they made several other offers which you thought were beneficial?

Mr. Abbott: Now just a moment. I don't think that is fair to the witness because he did say that they—offered to—

Mr. Austin: I am asking him now, please—I object to interruption by counsel unless there is an objection to the question in which case I think the objection should be stated.

2227 Mr. Abbott: That assumes something not in evidence.

Trial Examiner Ballinger: Is there an objection to the question?

Mr. Abbott: I object to the question the way it is stated.

Trial Examiner Ballinger: State your grounds.

Mr. Abbott: The ground is it assumes a fact that is not in evidence in this case.

Mr. Austin: I ask the question be read. I did not assume any facts. If I am wrong, he can say so.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

2228 Mr. Austin: I asked the witness a question not based on any assumption.

Trial Examiner Ballinger: I will hear from you on your objection.

Mr. Abbott: The objection, as I stated, attempts to inject into the record a claim that the Gulf Refining Company did not offer any differential as between tank wagon and tank car deliveries.

Now, the witness very plainly stated in his direct examination—

Mr. Austin: Your Honor, I think this is absolutely improper for counsel to state what he thinks the witness said. I asked the witness whether he said a certain thing; if the witness can't state the same thing Friday and today, we ought to know, without counsel getting up and reminding him what he said before. I don't think it is important, but I object to it on principle, and I want that to appear on the record.

Trial Examiner Ballinger: Witness, step out in the hall.

(At this point the witness left the hearing room.)

Mr. Abbott: The point that I make, if the Court please, is that counsel is trying to mislead this witness by stating on the record to the witness that there was no differential in the price offered, but merely some other incidentals which did not go to the question of price.

2229 Now, I think it is unfair to attempt to mislead this witness in that situation.

Trial Examiner Ballinger: The Examiner does not consider the question misleading, and the objection is overruled.

Recall the witness.

(At this point the witness resumed the stand.)

Trial Examiner Ballinger: Read the question to the witness.

(The last question was read by the reporter.)

A. Shall I answer now?

By Mr. Austin:

Q. Sure.

A. As I stated a little while ago, between Mr. Chandler and the other representative, Mr. Cole, in the period they were calling on us, as I recall, they pointed out that the difference would be, over a period of time there when they were calling on us, the difference between us hauling the gas out of the yard and that they would furnish the equipment, paint the service stations; and that seemed to have been the only difference between the Standard Oil and the Gulf offer.

Mr. Austin: Would you reread that answer, please?

(The last answer was read.)

2230 By Mr. Austin:

Q. Well, that is the way I recall it, Mr. Citrin, and I just wanted to go a little more into detail as to what the offer was regarding the equipment and obtaining of gas and so forth.

Now, what equipment did Mr. Chandler say that Gulf would be willing to furnish in the event you would be willing to become a Gulf customer?

A. Well, it is a common practice, or was at that time, that the oil companies in obtaining a dealer, that they would furnish equipment—when they say "equipment" that largely pertains to gasoline pumps—and if we obtained a dealer, we would have to furnish such equipment. Now, the difference was that the Gulf were going to furnish that equipment for us rather than us furnishing the equipment and spending our own money, because Standard would not do that. Now, that was the difference.

Q. Well, you already had your own equipment at that time at your various stations, did you not?

A. Yes. Yes.

Q. Did you at that time own the pumps at all stations which were being operated by Citrin-Kolb Oil Company, or do you lease them? What was your arrangement on that?

A. Well, I would say we owned most of them with the
exception that we may have bought some equipment
2231 on time, or maybe we had some equipment billed to
us and it was not paid for.

Q. Was Gulf going to furnish those pumps free of any rent, or were they going to rent them to you?

A. Well, as I recall it, Mr. Austin, at that time, when a pump is furnished to a dealer, they used to charge them, I believe, a dollar a year per pump. I think that was the practice. And if they would have furnished the equipment, there would have been a charge made of a dollar a year a pump.

Q. That is sort of a nominal rental; isn't it?

A. Yes, I suppose that is what it was.

Q. Yes.

Trial Examiner Ballinger: Was the question of rental considered?

The Witness: We really didn't talk about that. It was such a minor subject as to that dollar a year.

Trial Examiner Ballinger: Was there anything mentioned about—

The Witness: There wasn't anything mentioned about the charge. The only talk was about the equipment to be furnished.

By Mr. Austin:

Q. This was in '36, Mr. Citrin; how many stations
were you supplying at that time?

2232 A. Well, Mr. Austin, I wouldn't want to state
without having the record or the schedule. I believe the records that Mr. Biber had or was going to testify to, has schedules of the various years.

Mr. Austin: Haven't we got an exhibit that went in here the other day? Have you got a copy of it? Do you know the number of it? Could we go off the record?

Mr. Abbott: You mean as to the number of stations?

Mr. Austin: I think it has gone in evidence while Mr. Biber was on direct examination.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: The desired exhibit having been located, we will now go back on the record.

By Mr. Austin:

Q. Mr. Citrin, it appears here from Respondent's Exhibit No. 17, that at the beginning of 1936 the Citrin-Kolb Oil Company had a total of 14 stations. I suppose that that includes the stations, if any, which you were operating, as well as those which you were serving?

A. I would say that was correct.

Q. At the beginning of 1937 there were 32 stations, so I suppose during 1936 you were somewhere between 14 and 32, is that correct?

A. I would say.

2233 Q. For the different times of the year?

A. I would say whatever the records show, I would say that as having been right.

2234 Q. Now, as to any of those service stations which were supplied by you in 1936, were the properties of any of those stations rented by you from the Standard Oil Company?

A. No.

Q. Do you know whether any of the dealers whom you were supplying at that time rented any of their properties from the Standard Oil Company?

A. None.

Q. Did the Standard Oil Company at that time furnish or had it furnished or supplied any of the equipment at any of these retail stations?

A. Of our own retail stations?

Q. The ones you supplied, these fourteen to thirty-two.

A. Well, I can answer that question this way, Mr. Austin: I think I called it to your attention before that there may have been some equipment that wasn't paid for. But prior to becoming a tank car buyer I testified that we bought gas from Standard at some of our stations at tank wagon price, at which time they may have furnished some equipment. Having become a tank car buyer, that equipment was billed to us, and whether it was paid for immediately or maybe spread out over a period of six months I just would have to refer to actual records. But the equipment was sold to us.

Q. I see. What was the arrangement suggested by Mr.

Chandler by which you were to obtain your gas, if you should buy it from the Gulf Company? I mean, as
2235 to where you were to get it?

A. Well, it was assumed that we were going to get it the same way as Carnick.

Q. How did they get it?

A. Well, I thought that he was hauling it out of the yard, out of the Gulf yard.

Q. What do you mean by the yard?

A. Well, at their bulk plant.

Q. Well, didn't Carnick have their own bulk facilities?

A. Well, he did at first, and it seemed like he abandoned it later on.

Q. Do you know whether he did?

A. Well, I wouldn't—

Q. You say "it seemed like he did."

A. I know that he hasn't used it for years. Now, as to the time or place that that took place I just couldn't tell you exactly when it happened, but I know that he has been hauling out of there, and the proposition to us was similar to the kind that was offered to Carnick.

Q. What was the arrangement that Mr. Chandler suggested to you?

A. Well, as I testified before between Mr. Chandler—over a period of time prior and later on—that there was a time there where he said that we could have the same kind of deal as Carnick. And I thought it included, or I
2236 am pretty sure it included, hauling out of their yard.
Whether that came right early in January of '36 or later on, or whether it came over a period of time there, why, I just couldn't place the exact date when he said that. But I know it was quite a while they called on us, and then Mr. Cole called on us. I know Cole called on us for at least a couple of years.

Q. Where did you meet Mr. Cole.

A. He called on us at the station.

Q. Suppose you got your gasoline at the Gulf yard; as you call it. Who would haul it?

A. Well, we would haul it. We would have to.

Q. In your trucks?

A. Our trucks, yes.

Q. And your truck drivers?

A. Yes.

Q. Now the conversations with the Texas Company.

Mr. Citrin, you mentioned in that connection a Mr. Germain and Mr. Murdy and a credit man.

A. I did.

Q. Which one of these gentlemen did you meet first, or did you meet them all at the same time?

A. No, Mr. Germain had called on us for quite sometime.

Q. And do you know what his position was with the Texas Company?

2237 A. He told me that he was sort of a manager, here. He was in charge of the bulk plants.

Q. Did he call on you at the service station, too?

A. No. He called on us—well, now, I get it, now. I connect these two things up. No, he called on us at Livernois. That's right, yes.

Q. And did he bring Mr. Murdy and the credit man with him?

A. Yes.

Q. Had you ever met either of them before?

A. I don't believe I have, although I have heard of Mr. Murdy. He was originally a manager in Detroit; stationed in Detroit, prior to the time they transferred him; giving him a better job. He was in charge of several districts.

Q. Is that you say now anything that you would say of your own personal knowledge; that you know?

A. I knew he was manager in Detroit and he was moved.

Q. Manager of what?

A. Of the Texas Company in Detroit.

Q. Then you heard he was moved from Detroit to some other office?

A. That's what Mr. Germain told us.

Q. I wish you would explain again just how it happened that you prepared that draft of a contract which I believe you said you did prepare, setting forth what you understood were the terms suggested by Mr. Germain and Mr. Murdy; is that correct?

2238 A. Yes.

Q. Will you tell me again just how you happened to reach the point of preparing that document?

A. Well, Mr. Germain, upon calling on us, seen, more or less, how loyal we were to Standard products. I know he worked quite hard before he sold us a carload of this Havoline Oil. He seemed to bring out the fact that they brought over a contract for our signature, which contract was a better deal than what we were getting from Standard.

We seemed to think that we would just use that contract or take that contract over to Standard and just sort of flash it and try to—~~first of all, show~~ what offer they had, right black on white, and he sort of insisted that we have everything executed and prepared and then give it to them for their signature. Now does that answer your question, Mr. Austin.

Q. Yes, except as to just how you arrived at the terms which you put into that draft?

A. Well, we talked about the differential; the different things that were going to be embodied in the contract; the territory. It wasn't anything out of the ordinary. It was just a certain amount of margin below the tank wagon price.

Q. Now you just said "below the tank wagon price." As I recall your testimony the other day the margin was to be 5½¢ off the retail price.

2239 A. Yes, that's right, but—

Q. Is that what your understanding was?

A. —but when I talked below the tank wagon price, Mr. Austin, we ourselves are mostly interested in the differential between tank wagon price and the tank car. At least that's our interest at stake.

Q. Oh, surely, but did Mr. Germain or Mr. Murdy make any statement to you—did they make any statement to you that the Texas Company would be willing to give you any definite margin?

2240 A. It was based with a 5½¢ margin off of the retail price.

Q. And was that the definite statement that was made? Did they say that the Texas Company would well you gasoline at that margin?

A. I believe that was the clause that we put in; although I again want to refer to the differential between the tank wagon and tank car price, because that was what we were mostly interested—

Q. I know, obviously, but what I want to know was what they said at the time. I believe the record will show, and Mr. Abbott can correct me on this if I am wrong, that your testimony was, the other day, that the offer was—or the arrangement, at least, which you discussed with Mr. Germain was that the margin was to be 5½¢ off the retail price, and I want to know whether that is correct, or whether there was anything else said about margin, other than that.

A. Well, I almost wish we had that contract, because it would sort of clear a lot of things up, but we talked about a 5½¢ guaranteed margin. Whether it was to be embodied in there or whether it was embodied two different ways—either 5½¢ or the differential between tank wagon and tank car, I am not just positive, but I do know it was a 5½¢ margin and I recall that the difference between the tank wagon and tank car was 2¢.

2241 Q. Well, that's because there was a 3½¢ dealer's margin?

A. Yes.

Q. At that time; is that correct?

A. Yes, that's right.

Q. Now, when you say 5½¢ off the retail price, how was that to be determined; that is, how was the retail price to be determined?

A. Well, the retail price at that time—there wasn't any secret about it. The majority of the dealers were selling at that price.

Q. That is why; one of the reasons, at least; I asked you about the Iowa plan, because, as I understand it, when the Standard Oil was operating its own stations and the Texas Company was operating its own stations, they had a posted retail price, but when they changed over in 1936, then they no longer had a posted retail price, but they did have a posted tank wagon price, so that you see, I want to find out whether this retail price here was the price of a company-operated station, or did that refer to a situation under the Iowa plan?

A. I understand, Mr. Austin, your point, and I don't think that I could testify here whether the Standard Oil Company, at the time of leasing out their stations at the time of the Iowa plan, or the Texas Company, 2242 whether they all took part at that time. Maybe Texas were still operating their stations based on the tank wagon price. I don't recall that they all followed; that is, that they all did the same thing right at the same time.

Q. To get back to the point, Mr. Citrin: Was anything discussed or was anything understood between you and Mr. Germain as to how this retail price was to be determined, or did you just understand that they were talking about the prevailing retail price for major brands?

A. Well, I know that we talked the 5½¢ price. I know that the dealer margin was 3½. As to the absolute correctness as to how we put it in the contract, I just couldn't swear as to how we did put it in, but I know that those were the two points in there.

Q. The two points. You mean the 5½ below the retail?

A. 5½, and there was a 2c differential there between the tank wagon and tank car.

Trial Examiner Ballinger: I understood you to say there was nothing in the contract about the 2c differential.

The Witness: Well, it seemed to me that we talked more about the 5½c.

Trial Examiner Ballinger: What I want to know is what there was in the contract.

2243 The Witness: Right now I don't know whether both were in there. I know I was positive one of them was in.

Trial Examiner Ballinger: You are uncertain about the other?

The Witness: I don't recall. Maybe we put them both in.

Trial Examiner Ballinger: I see.

Mr. Austin: If your Honor please, there was never a contract, you recall. There was a draft, which Mr. Citrin prepared.

Trial Examiner Ballinger: I understand that.

Mr. Abbott: You mean there was no written contract.

Trial Examiner Ballinger: No written contract. There was a proposal.

Mr. Abbott: It was signed by Citrin-Kolb, and it was drafted as I understand it, according to their conversation.

Trial Examiner Ballinger: Nothing but a proposal.

By Mr. Austin:

Q. Who did prepare that draft of that contract?

A. Mr. Biber.

Q. Did he prepare it under your direction—let me 2244 ask you this first: Was Mr. Biber present at any of these conversations with Mr. Germain or Mr. Murdy?

A. No, he wasn't. He was doing work for us, but he wasn't in our office yet. I would just call him up and tell him to prepare certain agreements at various times, or I would see him at his office, and he would come out—

Q. He was an attorney then?

A. Yes.

Q. And he would represent you in connection with some of your business?

A. Yes.

Mr. Austin: Maybe all of it, Mr. Biber, at that time, I wouldn't know.

Mr. Biber: I wouldn't know myself.

By Mr. Austin:

Q. Did you ever show that draft of contract to Mr. Germain or Mr. Murdy, after you had completed it?

A. Well, they wanted us to sign it and deliver it to them. That was supposed to be all, as far as we were concerned. I didn't deliver that contract. We had signed it up. We were quite definite in taking it up. As I testified, we changed our mind after having talked with Mr. Raupagh.

Q. Now, I believe the next conversation that you told us about was one when a Mr. Roy Fisher of the Argo Oil Company—

2245 A. Yes.

Q. And Mr. Fisher was collecting other things besides tank car agreements, wasn't he?

A. I wouldn't say "things." He was in there on a mission; on one mission.

Q. Well, he was out there, anyway. I believe you told us that he was collecting some donations for some war chest of some kind or another, and you are not sure whether he came primarily to see you for the donation or to talk to you about gasoline.

A. Could I answer this—

Q. I don't think it is important.

A. I can explain to you why he came out on the pretense, really, to talk gas. If I may, I can enlighten you a little on it.

Q. Let's have it.

Trial Examiner Ballinger: What materiality is what this witness thinks?

Mr. Abbott: I don't think there is any use of encumbering the record.

Trial Examiner Ballinger: If he knows the object and purpose of this person's visit, I think he may state it, but if he is merely thinking and conjecturing, I don't see it is material.

Mr. Abbott: He has testified about that Allied 2246 Campaign enough, I think. That was the reason Fisher came out there originally, I think.

Trial Examiner Ballinger: That was apparently the reason assigned for his visit. What his real object or purpose may have been, is conjecture.

The Witness: Mr. Austin, if I may, or if you ar through with this—the Judge here said he was assigned What I tried to say was that I worked on those campaign myself and I know sometimes that these slips are no assigned. You rather pick these slips and prospects. know I have done it myself.

Trial Examiner Ballinger: You don't know he picked it, do you?

The Witness: Well—.

Trial Examiner Ballinger: So far as you know, he was sent there, was he not?

The Witness: That's right.

By Mr. Austin:

Q. Is the Argo Oil Company a jobber?

A. Yes.

Q. What's their business here in Detroit?

A. Well, fuel oil; distributors of gasoline.

Q. Is their business mostly fuel oil or mostly gasoline?

A. Well, I would say that they—and yet, I couldn't say.

Trial Examiner Ballinger: Do you know?

2247 The Witness: Not right now. I haven't checked the records to find out whether they do more gas business or fuel oil. At one time they were doing more fuel oil business.

By Mr. Austin:

Q. When was that?

A. Oh, I would say four or five years ago.

Q. Haven't they been known here in Detroit chiefly as a fuel oil jobber?

A. Until they entered into the gas business, they were a fuel oil jobber, but they are pretty large gas jobbers now.

Q. Do they sell branded or unbranded gasoline?

A. They sell a branded gasoline.

Q. What is the brand?

A. Marathon.

Q. Do they sell to retail stations or to jobbers—or do you know?

A. They sell to both.

Q. Do you know the names of any retail stations they sell that Marathon brand?

A. Yes.

Q. The names or the locations?

A. Singer on Linwood and Monteray, I believe; it is one of those stations.

Q. What is that?

2248 A. Linwood and Monteray.

Q. Is that Singer, S-i-n-g-e-r?

A. Yes.

Q. Is that a chain of stations?

A. Well, there is a family of Singers. I know that this particular one there, while they have another one, they have one on Oakland Avenue.

Q. Do you know anybody else that handles this Marathon gasoline?

A. Well, there is a station on Linwood and Puritan. There are quite a number of stations. I just couldn't name the streets. They are quite obvious on a lot of streets.

Q. That is a major brand gas?

A. It is Standard Oil of Ohio—I mean Ohio Oil Company.

Q. That is something else, isn't it?

A. They are a large company, a major brand.

Q. Do you call them a major brand here?

A. Yes.

Q. Well, Marathon, is that just a name that the Argo Oil Company uses here, or is that used anywhere else other than Detroit, or do you know?

A. It is used other places, in Ohio.

Q. Isn't Linco sometimes used for that?

A. Yes, Linco. A lot of those Oil Companies, they have several brands or names.

2249 Q. Well, what I mean is do you know whether Marathon is a brand name of the Argo Oil Company, or is it a brand name of the Ohio Oil Company?

A. It is a brand name of the Ohio Oil.

Trial Examiner Ballinger: You referred a few moments back to the Standard Oil of Ohio. Do you mean the Ohio Oil Company?

The Witness: There are two oil companies in Ohio. One is the Ohio Oil Company and one is the Standard Oil Company of Ohio.

Trial Examiner Ballinger: Which did you refer to?

The Witness: I referred in this case to the Ohio Oil Company.

By Mr. Austin:

Q. When did you first meet Mr. Fisher? Did you know him before he came out to your station that time on a campaign?

A. I met him a couple of times previous at campaign headquarters.

Q. Had you ever talked gasoline with him until he came out to your station at that time that you referred to?

A. Prior to the time?

Q. Had you ever talked to him about gasoline prior to this time that you have told us about?

A. Just in a general way. Talked about the gas business.

Q. But you never discussed tank car prices with
2250 him before, had you?

A. No, not tank car prices, although I discussed other deals.

Q. Do you know of any other jobbers in Detroit who buy from the Argo Oil Company?

A. I know of one particularly, yes.

Q. Who is that?

A. Patterson Oil Company.

Q. Patterson Oil Company?

A. Yes.

Q. Did Mr. Fisher say to you that he was authorized to make an offer to you on behalf of the Argo Oil Company?

A. Well, he was the Argo Oil Company, having been president of it; when he talked he talked for the Argo Oil Corporation.

Q. You say he was president of the company at that time?

A. Yes.

Q. How do you know that?

A. Well, they referred to him as president. He has always been the chief executive of the company.

Q. Who referred to him?

A. Well, the various salesmen. I know the sales manager refers to him as the boss, the president. Now, whether to check his official title, I never did, but I know his sales manager, Roy Buesett, he always referred to the boss,
2251 the chief, or the president. I assume that he is the president.

Q. Well, did he actually make any offer to you on behalf of the Argo Oil Company? In other words, how far did your discussion go? Did you just talk about the possibility of the Citrin-Kolb changing its source of supply, or was there a definite offer? Just tell me again what he did say to you?

2252 A. Well, he told me that he had made some very fine connections, he had some very good contracts, and if we would start selling the same brand of gas that he had, that through him we would share in this good contract that he had obtained; that it would help—

Q. Will you pause there just a moment. When you say he told you he had made some connections—and did you say you would share in the good contract he obtained?

A. Yes.

Q. What was he referring to, or what did he say he was referring to?

A. When I say "contract," when we talked about price he told us that we would get the gas through him, although he would make a little profit on it, sort of as a broker, that we would still be able to get two, or sometimes more than two cents differential.

Q. What was this good connection he was talking about?

A. Well, he made this contract with the Ohio Oil Company, and then he was talking to me about a big deal with the Mexican Government, and—

Q. Hadn't he had a contract with the Ohio Oil Company before that?

A. Yes.

Q. Well, what was new about this deal with the Ohio Oil Company?

2253 A. Well, there wasn't anything new about it only at the same time he was telling me he was going to have bigger deals yet, he was going to take up the output of the Mexican Government, and he was going to bring in gas here by boat loads; just talking in general.

Q. Has he ever been bringing in gas by the boat loads, to your knowledge, since that time?

A. I know the gas that he distributes now comes in to the Marine Terminal here on Wyandotte by boat loads.

Q. How did he get it in at that time?

A. I couldn't say at that time, but I didn't get into details as to how he was getting it in. We were just talking about prices.

Q. Now, he told you about all of this—and what did he offer to the Citrin-Kolb Company?

A. He told us that we could have a much bigger margin of profit to work on than we then had.

Q. If you would take on his gas?

A. Yes.

Q. And was that to be Marathon Gas or was it to be some kind of Mexican gas? What was it going to be?

A. He was talking of the gas he was handling at that time.

Q. Now, I think you said that there was to be a two cent jobber's differential between tank wagon and tank car?

A. Yes. At least two cents.

2254 Q. Was there any means of delivery discussed? How did he propose to get the gas to you? Was it going to be through your bulk plant or was anything said about that?

A. We didn't talk about that, Mr. Austin, as to how the gas was to be delivered, because he knew we were getting it in tank cars.

Q. Well, did Argo have a marine terminal at that time?

A. No, Argo didn't.

Q. How did they bring their gas i.. at that time?

A. Well, they would have the gas delivered to them, and they would have some come over in tank cars, as I recall now.

Q. From where?

A. Well, that we didn't talk about.

Trial Examiner Ballinger: Mr. Austin, if I may interrupt. Last Saturday it was understood that Judge Hanley might produce a witness this morning at ten o'clock from out of town. Is that desired?

Mr. Hanley: If your Honor please, I don't want to interrupt this witness. I think it is much better, certainly I would think it is more agreeable to Mr. Austin, if he could conclude his examination of this witness. It is perfectly agreeable to proceed.

Trial Examiner Ballinger: Proceed.

Mr. Austin: You have no one here right now, have you, Judge, at the moment, that you are waiting to put on?

2255 Mr. Hanley: I am ready to go on just immediately that you conclude. However long it takes you, go ahead. I don't care.

Mr. Austin: I don't think it will be very long.

By Mr. Austin:

Q. Well, now, Argo Oil Company is a jobber themselves, are they not, here in Detroit?

A. Well, Mr. Austin—

Trial Examiner Ballinger: Can't you answer that question yes or no?

A. Well, they are considered a jobber.

By Mr. Austin:

Q. Well, what I wanted to ask you was when they sell to other jobbers, or if they do—I believe you mentioned the Patterson Oil Company—did I understand you to say that if you should have purchased gas through them that your understanding was that they would act more or less as a broker and perhaps get some commission on what you bought?

A. That's right.

Q. But that your source of supply would be the same as their source of supply?

A. Well, that is quite common.

Trial Examiner Ballinger: Well, what was the talk?

The Witness: Well, the talk was that we were to get the same kind of gas. As to whether he would bill us 2256 or the Ohio Oil Company would bill us, it was immaterial to us. The thing was that he was just going to merely make a certain broker's profit on the negotiation of the deal, which is similar to the kind that is being done by other oil companies here in the city even right now.

By Mr. Austin:

Q. But, since they had no marine terminal here, then that wasn't contemplated that they were going to get gas and deliver it to you, but rather that you would get it from the same source they would, and you might, as you say, be billed by them or the home office; is that correct?

A. That is correct.

Q. That is what I was referring to about the question.

A. We didn't get into too many details as to whether the gas would be delivered by them or whether it would come in by car to us. We assumed that the procedure would be similar to the kind that was being in effect at that time.

2257 Q. Now, I think we have one more here, Mr. Citrin, which is the Aurora Oil Corporation, and that brings us back to the conversation you had with a Mr. MacGready at the Detroit-Leland Hotel.

A. Yes, sir.

Q. And I believe Mr. Ledbetter was over there, or, at least, he testified that he also talked to Mr. MacGready at the Detroit-Leland; I am not sure whether his conversation is the same day as yours or not.

A. As I testified before, and we had several conversations, but I remember one in particular where Mr. Ledbetter was there and I walked up and they were talking, and we engaged in a sort of round table discussion there about the good deal that—

Q. That was last December, wasn't it?

A. Yes.

Q. Now, does the Aurora Oil Corporation handle branded or unbranded gasoline?

A. Well, they sell it as unbranded, I would say. They have a name for it, although—

Q. Isn't it unbranded gasoline, Mr. Citrin? Aren't they known as sellers of unbranded gasoline, and may not that gasoline come from any number of different sources?

Mr. Hanley: Your Honor, I am sorry, but I must object to that question as calling for a conclusion of the
2258 witness. He has said they have a name for it. And this question implies an intention on the part of the Government to arbitrarily classify gasolines.

Mr. Austin: I will withdraw it, Judge.

By Mr. Austin:

Q. Just restrict it to whether or not they sell branded or unbranded gasoline.

A. Well, they are known as an independent refiner who sells their gasoline for the sole purpose—for the jobber to establish his own brand on the particular gas that he buys.

Q. Do they have a refinery here in Michigan?

A. Yes.

Q. And do you know where their crude oil comes from?

A. I couldn't say that I know exactly. It would be just assuming.

Q. That is probably not a fair question. You would have to assume your answer, and I really had in mind more of the practice of these local refineries. But perhaps I shouldn't ask you that specifically as to Aurora.

You might explain a little further what you mean about selling gasoline to jobbers so they could establish their own brand. Does that mean that the Aurora Oil Company sells—rather permits the customer to sell the gasoline under any brand he chooses?

2259 A. Yes.

Q. What is the name that Aurora has for their gasoline?

A. I don't recall as I even asked them the name of their gasoline. We rather talked about quality of the gas, which was supposed to be guaranteed, because—

Q. Well, will you explain what you mean by an unbranded gasoline?

A. I didn't say it was unbranded. It is an independent jobber who sells a gasoline that is as good or better than major gas, which can be sold by independent jobbers under their own brand name.

Q. Well, when you say it is as good or better than major gas, weren't you just speaking of what they say about their gas?

A. What he said to guarantee, that he would guarantee to me. Now, when a man says that he is going to guarantee it, you assume that he will.

Q. But you don't know, do you?

A. I wouldn't know.

Trial Examiner Ballinger: Well, would that be considered a branded or unbranded gas, here in the trade?

The Witness: Well, your Honor, some major companies here sell their gasoline—

Trial Examiner Ballinger: Now, can't you answer my question?

2260 The Witness: It may be considered a branded gasoline, that they call a branded gasoline, but still that brand name wouldn't exactly mean a thing to the jobber.

By Mr. Austin:

Q. Mr. Citrin, perhaps I can help a little here. I think you are thinking a lot about quality. Now, for the purposes of this question, I will concede with you, usually, that we don't know what the quality is of an unbranded gasoline. Perhaps it is as good or better than some of the major brands, or, as I understand it, there is a certain spot market, and perhaps some of the major gasolines, maybe Standard, may be sold on that market, but it is not sold—

tell me whether I am correct—is not sold as "Standard gasoline"; in other words, under the "Standard" brand, but it may be the same gasoline; is that right.

A. As I understood it, Mr. Austin, gasoline may be sold by a major company and the only reason that they couldn't advertise it as Standard, because maybe the Standard wouldn't undertake to furnish advertising such as globes, but it is still a branded gasoline. At least, that is my opinion of it.

Q. But a branded gasoline—by that, do you mean gasoline sold under the brand, or where the name appears that can be used on the trucks, or on the pumps. It seems to me, just to try to clear this up, that you are thinking
2261 about whether it is the same gasoline, and I am thinking about whether it has a name on it.

A. Standard may sell a gasoline with a name, and yet not furnish their advertising, and it would be nameless. In other words, the gasoline we buy from Standard; it wouldn't mean a thing to us unless they furnish us the advertising that goes with it.

Q. Do you know, Mr. Citrin, whether there is a price differential between gasolines which are sold under the brand name and those which aren't, on the Detroit market?

A. Oh, I don't know whether there would be any price differential. It is just merely a matter of policy.

Q. What is the policy?

A. Well, it would be the matter of a policy if a major company sold a gasoline and wanted to furnish their advertising or didn't want to furnish their advertising. I don't know as they would make a concession or sell it for less if they didn't furnish the advertising, because, after all, they have their prices established on the gasoline. They want a certain price for it.

Q. Did you ever buy any gasoline on the tank car market?

A. We didn't.

Q. Do you know whether, if you bought gasoline on the tank car market, that you could sell it under the brand of the company that made it, assuming you knew the
2262 company made it?

A. I don't know. We haven't bought any.

Q. Does the Aurora Oil Company have any service stations in Detroit that carry the name Aurora Oil Company, or did you ever see any gasoline sold at retail in Detroit under any brand name that is identified with the Aurora Oil Company?

A. I don't recall right now as I have. They are strictly a refiner. They sell in tank car or tank transports. They don't engage in the retail business. They make it a business to sell to jobbers.

Q. Did you ever see any advertising of an Aurora brand or any brand identified with the Aurora Oil Company?

A. I have not.

Q. Do you know what Mr. MacGready's position is with the Aurora Oil Company?

A. He is their tank car representative.

Q. And who told you that?

A. Well, he quite often tells me of the various accounts he calls on, and that he is just assigned to the wholesale, that is, the tank car business of gasoline. He don't even sell any oil. That is his business.

Q. Do you know Mr. Max Fisher?

A. I met him two or three times.

Q. Is he an official of the Aurora Oil Company?

2263 A. Yes, I would say that.

Q. Did you ever meet Mr. MacGready, or, rather, did you ever talk to him about the subject of purchasing gasoline from the Aurora Oil Corporation at any other time except at the Detroit-Leland Hotel?

A. No. I talked to him. I have known Mr. MacGready prior to this date that is in this testimony, for a year.

Trial Examiner Ballinger: Can't you answer that question direct? Read the question.

(The question was read.)

Trial Examiner Ballinger: Did you ever have any discussion with him with reference to the purchase of gasoline except at that meeting?

The Witness: Why, your Honor, that's what I meant. I have been meeting with him for over a year previous to that offer that they have made, and we talked about gasoline and the purchase and methods prior to that.

Trial Examiner Ballinger: That is, at previous meetings?

The Witness: Yes; right along.

By Mr. Austin:

Q. But this is the first time that he ever made anything which you would call an offer?

A. Well, it is the only time that he pointed out the fact
that he was obtaining some pretty large accounts in
2264 the city, as I mentioned.

Q. Is there any petroleum produced in Michigan? I mean any appreciable quantities? I suppose that is a matter of common knowledge to the gentlemen here in the room.

A. Well, there is crude oil and this Keystone have a refinery here.

Mr. Abbott: I object to this on the ground—we didn't go into it on direct examination.

Mr. Austin: I will withdraw it. I will ask Mr. Raupagh or somebody important, and he can probably tell us right offhand.

Mr. Hanley: He will prove it for you in detail.

Mr. Austin: I think the witness previously said he doesn't know exactly where the crude oil comes from that goes to the Michigan refineries.

By Mr. Austin:

Q. That's right, isn't it, Mr. Citrin?

A. I don't believe that question was ever asked me.

Q. I started to ask you where the Aurora Oil Company got their crude, but I believe you said you didn't know, or, if you had any knowledge, it was only hearsay.

A. Hearsay; that's right, Mr. Austin.

Mr. Austin: I believe that's all I have, your Honor.

Trial Examiner Ballinger: I want to ask the wit-
2265 ness just one question that I am in doubt about.

What did you say the Argo Company did? Were its functions merely those of a broker?

The Witness: Well, I wanted to elaborate a little bit on that.

Trial Examiner Ballinger: Now, can't you answer my question?

Mr. Abbott: Well, if he can answer it yes or no.

Trial Examiner Ballinger: Yes. Can you answer it yes or no?

The Witness: They are a jobber.

Trial Examiner Ballinger: What do you mean by a jobber? Do they buy from a refinery?

The Witness: Yes.

Trial Examiner Ballinger: And resell?

The Witness: They could resell it to another jobber and maintain a sort of a broker's profit on it. That's what I meant, your Honor.

Mr. Austin: If your Honor please—the witness will correct me, if I am wrong—they may enter into both functions. I understand Mr. Citrin's testimony to be—

Trial Examiner Ballinger: I want to find out from him—.

Mr. Austin: All right. I will say nothing further.

2266 Trial Examiner Ballinger: —if he knows; I am in doubt—

The Witness: Your Honor, if I may, I do know of one particular case that was related to me that brought out some of the facts that would clarify—

Trial Examiner Ballinger: Weren't they operating here as mere brokers? You know that, don't you?

The Witness: Well, they are considered a jobber. Yet, when they see that a certain amount of gas delivered to another job from the refinery, although they would bill them for the gas, yet they would get a certain margin of profit which would ordinarily be called a broker's profit.

Trial Examiner Ballinger: All right. Proceed.

Redirect Examination by Mr. Abbott.

Q. Well, Mr. Citrin, with reference to the offer which the Argo Oil Company made to you in 1939, do you know whether the proposal made to you was as a broker or a jobber?

Trial Examiner Ballinger: If he doesn't know whether they were brokers or jobbers, how could he answer that?

Mr. Abbott: I am asking him in reference to the proposal made to him.

By Mr. Abbott:

Q. Did they offer to furnish you the gasoline here in Detroit?

2267 A. Yes.

Q. I understand that that proposal was not reduced to writing, in that instance?

A. It was not.

Q. And that they offered you a differential of 2¢ a gallon.

A. Or more, at various times.

Q. At that time you say that they were getting their gasoline from the Ohio Oil Company at a terminal or by tank cars?

A. As I stated, we didn't really talk too much about how they were getting it, I would assume—

Q. Not what was assumed. You seem to lapse into that quite a bit, but that is not testimony.

A. All right. By that I mean I knew how we were buying our gas, and we were going to buy it the same way.

Q. All right. Now, at that time, do you know whether they were getting their supply from the Ohio Oil Company in Ohio?

A. I did.

Q. That is where they were getting it?

A. Yes.

Q. And this talk about the Mexican Government, what was that?

A. Well, there was quite a bit in the papers about
2268 it, and I questioned him about it—

Q. Was he getting any supply from the Mexican Government at that time?

A. He told me he was not.

Q. He was not?

A. No.

Q. That was merely some talk, wasn't it?

A. Yes; and paper talk, newspaper talk.

Q. And they were getting their gasoline in tank cars from the Ohio Oil Company, a supplier in Ohio; is that right?

A. Well, again; Mr. Abbott—

Q. Answer that yes or no.

Mr. Austin: If he doesn't know—

A. I don't know how they were getting it—.

By Mr. Abbott:

Q. I mean from any talk that you had with Fisher, to find out where they were getting their supply?

A. I wasn't interested that much. I didn't find out.

Q. But you submitted that offer to Mr. Raupagh, didn't you?

A. I believe you stated that the other day.

A. No, I believe I stated I submitted that offer to Mr. Love.

Q. Mr. Love; Mr. Raupagh was out of town then; out of the office?

A. He was out of the office, at least at that time.

2269 Q. With reference to the Gulf Refining offer made in 1936, you testified that that provided for a cent and a half differential, but that it eliminated the bulk plant operations. You testified this morning that you were going to draw the gasoline in your own trucks from the Gulf Refining Company's bulk plant. Now, was anyone else doing that at that time, that you know?

2270 A. Over the period of time that they were calling on us, right along, they pointed out that Carnick was doing it.

Q. Carnick had been doing it for a long time?

A. At least that's what I thought.

Q. What did they tell you?

A. Well, I think—they were pointing out those advantages that I stated before.

Q. You knew Carnick, didn't you?

A. Yes.

Q. He was the one that you had a bulk plant with way back there in 1926, wasn't he?

A. He was.

Q. And you knew how he operated, didn't you?

A. I didn't after we stopped doing business, because of the trouble we have had on this storage that we signed up for.

Q. I understood you to say that the Gulf told you that you would have the same deal as with Carnick?

A. That's right.

Q. Now, the matter of furnishing and maintaining the equipment: was that a substantial item of expense or a small item of expense to you? I mean, in your dealings with the Standard Oil Company?

A. It is a large item of expense.

Q. How large an item is it? I don't mean in dollars and cents, because that is too much to ask you, but is it large or small? 2271

A. It is large. To my recollection a five hundred or six hundred dollar investment in each location: furnishing the equipment plus the maintaining, over a period of time, while doing business with that dealer.

Q. What is usually the life of equipment, including pumps, at a gasoline filling station?

A. The life is quite long. The only thing is that the dealers continually change over to up to date models. It is more or less like automobiles.

Q. In other words, you mean they become out of date?

A. That's it.

Q. And the Gulf Refining Company agreed that they would furnish the station equipment on the pumps as a part of the deal?

A. Yes.

Q. And I believe that you stated that you took this up with Mr. Raupagh?

A. Yes.

Q. And that he refused to meet it?

A. Yes.

Q. Now, the Texas offer was in August, 1936, you testified the other day, and it was testified here this morning that the Iowa plan went into effect in September of 1936
and you had Mr. Biber draw the contract that you had
2272 discussed with Mr. Germain, Mr. Murdy, and the
credit manager. Did Mr. Biber draw the contract?

A. Yes.

Q. Did he return it to you?

A. Yes.

Q. And when you talked to Mr. Raupagh, did you show him the contract?

A. I did.

Q. And you stated this morning that Mr. Murdy and Mr. Germain wanted that contract signed the way it was drafted. Now what do you mean by that?

Mr. Austin: I don't know whether the witness said that, your Honor.

Mr. Abbott: I took it down verbatim.

Mr. Austin: Did he say "the way it was drafted"?

Mr. Abbott: He said the way it was drawn up. I don't know whether he said "drafted."

Mr. Austin: That's the point.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Abbott:

Q. We will go into that in Mr. Biber's testimony, Mr. Citrin. The question was: You stated Mr. Germain, Mr.
Murdy and the credit manager wanted the contract
2273 signed the way it was drawn up. What do you mean
by that? Is that something they told you?

A. Mr. Abbott, I may be wrong. I merely stated, on Mr. Austin's request as to why he prepared a contract and why we signed it, and I stated that we did prepare it and sign it and that they were going to take it and accept it after we had signed it.

Q. Did you sign it up?

A. Yes.

Q. And was it signed up when you took it to Mr. Raupagh?

A. Yes.

Q. Was it just the way you had discussed it with Mr. Murdy, Mr. Germain, and the credit manager; do you recall?

A. I am pretty sure it was the way, because I made some notes on it when we talked about the various—

Q. And I believe you stated the other day that Mr. Raupagh, when you showed it to him, refused to meet the proposal?

A. I did.

Trial Examiner Ballinger: If you will permit an interruption:

Was that so-called contract drawn up and taken to Mr. Raupagh for the purpose of endeavoring to secure a lower rate from the Standard Company? Was that the object and purpose?

The Witness: That was the object, yes, or else, if we could obtain a lower rate, the object was to tell him 2274 that we were going to leave him because we had signed up.

Trial Examiner Ballinger: But did you tell him?

The Witness: Yes.

Trial Examiner Ballinger: That unless he did make a lower rate, you were going to leave him?

The Witness: Yes. Told him that there were the partners' signatures on it and all we had to do was to give this contract to Texas and it would be too late for us to back out.

Trial Examiner Ballinger: That isn't exactly what I asked you. Did you tell him unless he did give you a lower rate you were going to quit dealing with the Standard Oil Company?

The Witness: Yes.

By Mr. Abbott:

Q. Now, with reference to the Argo Oil proposal. You mentioned some stations in Detroit that handled Argo Oil under the Marathon brand; among them, Linwood at Puritan?

A. Yes.

Q. I. P. Taylor at Woodward and Davison.

Mr. Austin: I don't believe the witness mentioned any such station as that on direct—I mean, on cross-examination.

The Witness: Not that station, although he does handle it.

2275 Mr. Austin: I move the question and answer be stricken, your Honor.

Mr. Abbott: Possibly I was in error in suggesting it to him. I didn't mean to lead the witness. It may go out.

Trial Examiner Ballinger: The Examiner maintains the objection to the question and strikes the answer.

Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Abbott:

Q. Do you know of any other stations that handle Marathon gasoline?

A. I believe, Mr. Abbott, I have stated that there are a lot of stations; quite obvious. Exactly, I can't point out to the exact address of those stations but all you have to do is drive around and see a number of Marathon stations with signs up.

Q. They always have the signs exhibited, do they?

A. Yes.

Q. With reference to the Aurora offer, which is much more recent. You have a pretty good recollection of that, don't you, because it was only four or five months ago?

A. Yes.

Q. Now you say with reference to that gasoline 2276 that it is one on which the jobbers establish their own brand, is that what you understand?

A. That's what I understand.

Q. Now do you know whether J. J. Bright sells Aurora Gasoline?

A. I do.

Q. State whether or not he does sell it.

A. He does sell it at two of his locations, that I know of.

Q. What locations are those?

A. One is on Jefferson, East Jefferson. One is in Royal Oak.

Q. The one on East Jefferson is out in the location of the Cinderella Theatre, isn't it?

A. Yes.

Q. And is that location near your station at Jefferson and Nottingham, or quite a little ways off?

A. Pretty close. The same neighborhood.

Q. And is that station also close to Ned's station at Jefferson and Manistee?

A. Just within a couple or three blocks.

Q. The Aurora Gasoline is sold at the Bright station on Jefferson Avenue under the name of Spitfire, isn't it?

A. That's right.

2277 Q. And I believe you stated that MacGready told you, when you had this conversation with him at the Detroit Leland Hotel, that he made some statement with reference to the quality of Aurora gasoline.

A. He guaranteed that it would be even better than the Standard house brand gas.

Q. Now I understand you to say that the Paragon offer made to you, before you went on a tank car basis, somewhere between 1926 and 1928; the Gulf offer made in 1936; the Texas offer also made in 1936; the Argo offer made in 1939 and the Aurora offer made in 1940, were all submitted to the Standard Oil Company?

A. I did.

Mr. Austin: Your Honor, I don't want to be too technical but I would like counsel to do a little less leading and, particularly, on redirect. A good many of these questions have been just a request of the witness to state in counsel's language matters which he already stated on his direct examination, rather than anything new brought out by cross-examination. I am not an authority on how far one can go on redirect, but I don't believe the purpose of redirect is just a restatement, in counsel's language, of what was formally answered on cross-examination.

Mr. Abbott: I will withdraw the question.

2278 Q. All the offers that you have mentioned were submitted to the Standard Oil Company, were they not?

A. They were at various times.

Q. And they refused to meet them?

A. Yes.

Mr. Abbott: That is all.

Mr. Austin: Two more leading questions that the witness only needed to say "Yes."

Mr. Abbott: That is all.

Recross Examination by Mr. Austin.

Q. In regard to that contract, where it was a draft of a contract which was drawn up by Mr. Biber and which you signed, did you, Mr. Citrin?

A. Yes.

Q. And after that draft was prepared, you have already told us you never delivered it to Texas. Did you show it to Mr. Germain or Mr. Murdy at any time after you signed it?

A. I already testified as to that question. If we would have shown it and delivered it to them, it would have—

Q. Maybe you did answer it before, but—

Mr. Abbott: I submit the witness ought to be permitted to state his reply. He was cut off here.

Mr. Austin: I want him to.

2279 Trial Examiner Ballinger: As to his reasons, that may or may not be material later on. But can't he state what he did, without stating why?

A. I did not deliver the contract.

By Mr. Austin:

Q. Did you ever show it to Mr. Germain or Mr. Murdy?

A. No.

Q. That is what I wanted to know.

And you said that James J. Bright sells a brand of gasoline called Spitfire?

A. Yes.

Q. Is that a name which Bright gives to it himself?

A. Yes.

Q. Do you know of any gasoline sold under that brand name in any other station in Detroit?

A. I haven't seen it.

Mr. Austin: That is all.

Trial Examiner Ballinger: Any further questions?

Mr. Abbott: Just a moment.

Redirect Examination by Mr. Abbott.

Q. You say that you didn't show the Texas written draft of your proposal to Mr. Murdy or to the other two representatives of the Gulf Refining Company — or the Texas Company, but you did show it to Mr. Raupagh?

2280 A. Yes.

Mr. Abbott: That is all.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Trial Examiner Ballinger: We will take a recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: The hearing is reconvened.

JOHN W. BOATWRIGHT was thereupon called as a witness by and on behalf of the Respondent, and, having been first duly sworn, testified as follows:

Trial Examiner Ballinger: Your name, please?

The Witness: John W. Boatwright, B-o-a-t-w-r-i-g-h-t.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Direct Examination by Mr. Hanley.

Q. Mr. Boatwright, tell us first what your formal training has been with respect to your school training?

A. Would you like to start with my college training?

Q. Yes, after high school, start there and tell us.

A. I started in 1921 to attend William Jewel College at Liberty, Missouri. I was in and out of school intermittently with the necessity of stopping to rebuild 2281 my financial picture, and continued, graduating in 1927. The last year that I was in school I taught in the local high school as well as completed my course work at college. That was the year '26 and '27.

In the summer of 1927 I attended the University of Kansas. I taught in the high school at Liberty, Missouri, in '27 and '28, and again attended the University of Kansas summer session in '28.

In the fall of 1928 I received a Fellowship from American

University in Washington, D. C., and I attended the American University in '28 and '29, taking my master's degree there in the spring of 1929.

One of the men under whom I studied at the American University was W. H. S. Stevens, he was assistant chief economist for the Federal Trade Commission. The Bill authorizing the chain store inquiry was passed, I think, in January or February of that year, and he made arrangements with the faculty of the American University, which permitted me to retain my Fellowship and start working at the Federal Trade Commission.

Q. So the fact is that you actually did work as an economist for the Federal Trade Commission?

A. That is correct.

Q. For some period of time?

2282 A. That is correct. I left the Federal Trade Commission in September of 1929 to start teaching at Northwestern University. My position there was lecturer in economics in the School of Commerce.

And the following year I retained that title and became research assistant to Dean Ralph E. Heilman at the University.

I received my doctorate at Northwestern in June of 1932; taught there in the summer session, and started working for the Standard Oil Company on September 6, 1932, as an economist in the sales research department.

Q. Permit me to interrupt you a moment. Did you have occasion to write theses in connection with getting your several degrees?

A. Yes. I wrote a thesis in connection with my work on my master's degree, which was a study of the central European tariff situation for the ten-year period following the World War. The thesis for my doctorate was a tracing of the evolution of economic concepts of the Supreme Court of the United States as used in their various cases of a trade regulatory nature.

Q. Now, in connection with your study preparatory to writing that thesis did you make a study of the several decisions of the Supreme Court of this country in connection with regulatory trade matters?

2283 A. Yes, sir. Every case before the Supreme Court, and many before the Appellate Courts were studied for a period of eighteen months prior to starting the actual writing of the thesis.

Q. I think you brought us up to a time when you went to work for the Standard Oil Company, the Respondent in this action. When did that happen?

A. September 6, 1932.

Q. And in what capacity did you go to work?

A. I went to work as an economist in the sales research department.

Q. Now, let me go back a moment. There came a time in your formal education when you received a Doctor's degree?

A. That is correct.

2284 Q. When was that?

A. In June of 1932.

Q. So that you are entitled to be addressed as Doctor, if anybody around our shop paid any attention to that sort of thing?

A. That is correct.

Q. The fact is we don't.

A. That is right.

Trial Examiner Ballinger: What official position do you hold with this company?

The Witness: May I continue my relation of experience, which will bring that out, Judge?

Mr. Hanley: We will bring that out.

By **Mr. Hanley:**

Q. You went to work as an economist.

A. That is correct.

Q. Now, just trace for the court your various positions in the Standard Oil Company up until the present time.

A. From 1932 until the Fall of 1935 I was an economist in the sales research department.

In the Fall of 1935 I was asked to prepare estimates of value for the following year and prepare the annual product budget, looking to refinery schedules of operation, product movement by tankers, pipe lines, to the various terminals and so forth. That work was continued in
charge of budget preparation to '36 and until No-
2285 vember 16, 1937.

November 16, 1937, I became head of the combined budget and sales research activity for the company. I have continued in that capacity to the present time, my title being manager sales research department.

Q. Now, do you have a staff in your department that assist you in your several duties, Mr. Boatwright?

A. Yes, sir.

Q. Can you tell the Court please what the general nature of your duties are at the present time?

A. Yes, they divide, in my mind, usually into six broad classifications.

No. 1 is the preparation of the annual budgets.

Q. Now, just stop a moment and tell the court what you mean by that.

A. The preparation of the annual budget means making estimates of sales by individual products, by months, by channels, by sales divisions. These estimates of sales are then adjusted for goods used, stock losses, and other shrinkage, as well as variations of seasonal inventory flow. This correction leads to an estimated shipment schedule from our various terminals or supply points. The shipment schedules at our lake terminals, our inland waterway terminals, are then adjusted for variations of inventory policy at these individual terminals into a refinery production requirement schedule. The refinery production schedule establishes the level of our operations
2286 by our various refinery units for the following year. This budget must be submitted prior to November 15 for the following year to enable our crude purchasing departments, our transportation departments, and the manufacturing departments to set up their plants in accordance with the anticipated requirements.

That in brief is the one function, is one of the six classifications.

Q. What other functions does your department discharge?

A. Another broad classification of studies have to do with prices. There is usually in our department at all times a study of price conditions on some one product, or many products, or a regional study of prices, in progress most of the time.

The next broad classification of duties is the cost accounting work, wherein we are responsible for preparing and submitting to the board of directors once a year an analysis of profits and marketing expenses by products, by channels, by sales division, for each of our major products. That includes the various brands of gasoline, refined oils, motor oils, tractor fuels, fuel oils, domestic heating oil, kerosenes, and so forth.

2287 A fourth broad classification has to do with advertising. Advertising studies may involve size of space that it is desirable for us to purchase, the type of an advertising appeal which should be used, the desirability of buying radio vs. newspaper, the desirability of adopting certain headlines or sales appeals in our advertising method.

Another broad classification has to do with consumer research. Each year we interview thousands of consumers both in the retail and the rural markets in an effort to ascertain their buying habits, their motives, their needs, their desires, their likes and their dislikes. These studies may have to do with gasoline, fuel oil, motor oil, the Atlas line of products, and so forth. I do not mean that we conduct all studies of this type each year in all channels, but there is usually one large study of consumer wants and needs in progress most of the time.

Now, there is a sixth classification. I think I have named five at the present time.

Q. That is right.

A. This sixth classification, for lack of a better term, I refer to as contingency problems. That covers a broad range of any type of contingency problem that Mr. Seubert or the executive vice president, Mr. Barkdull wishes to assign to our department for analysis. It may be the 2288 introduction of a new product, how it should be priced, distributed, how it should be handled on our accounting records, how it should be delivered, and so forth; it may mean an unusual competitive condition developing a given area; it may mean making a selection of the prope channels of distribution; it may be a problem of selection and training of salesmen, or selection and training of people on driveways in the form of reseller assistants. These, as I say, are merely a broad classification of any type of problem that they wish to assign.

Q. Mr. Boatwright, are you familiar with the fact until just recently there was a company belonging to the Standard Oil known as the Standard Oil Company of Nebraska?

A. That is correct.

Q. And did it occur that company dissolved and its corporate charter and assets were acquired by the Standard Oil Company of Indiana, the Respondent in this action?

A. Yes, sir.

Q. Did you have anything to do with the mechanics of that acquisition? And if so, what?

A. I was loaned to the Standard Oil Company of Nebraska in November or December of the year prior to the dissolution thereof, and the acquisition by the Indiana Company.

My assignment was to go out to the Nebraska
2289 Company, study its entire marketing structure, ac-
counting, and distribution plan, and realign that plan
in an effort to find means of distribution whereby expenses
could be kept within the limits of the gross margin.

Q. Now, did that study, Mr. Boatwright, involve cost accounting?

A. Yes.

Q. As related to various products which this company proposed to sell?

A. Yes, it did. It involved the entire mechanism of maintaining records.

Q. Now, in your department, in Chicago, is it or is it not a fact that you have a large group of assistants who are technically trained economists, cost accountants, and statisticians?

A. Yes, sir.

Q. Do you have access to the general accounting department of the Standard Oil Company and the several field accounting departments of the Standard Oil Company in your work?

A. Yes, sir.

Q. And that, I assume, just involves literally hundreds of people; is that not true?

A. Yes, sir.

Q. In your work, Mr. Boatwright, to whom do you report primarily?

2290 A. My department reports primarily on five of the
six classifications mentioned to a sales research com-
mittee. This committee is composed of Mr. Seubert—

Q. Who is Mr. Seubert?

A. The president of the Standard Oil Company of Indiana. The initials are E. G.; Mr. C. J. Barkdull.

Q. Who is he?

A. Executive vice president of the Standard Oil Company of Indiana; Mr. Allen Jackson, vice president; Mr. Amos Ball, vice president, in charge of the sales department; Mr. R. H. McConnell, general manager of the sales department; Mr. H. E. Hanson, assistant general manager of the sales department; Mr. W. H. Tell, assistant to the vice president, in charge of operations. He is assistant to Mr. Amos Ball, and he is in charge of the operations of the sales department. This committee receives these reports, the recommendations included therein, and if any of them desire, prepare a rebuttal to the recommendations. The committee meets in session approximately once a month to go over the recommendations of the department, the rebuttal of the various individuals that may be involved, and in case the study touches upon any of the other departments of the company not represented on that committee, the head of these respective departments are invited to participate in the discussion.

2291 Now, in connection with the budget work, the sixth classification, that is reported direct to the Board of Directors.

Q. Beginning as of the time when you went with Standard Oil Company, Mr. Boatwright, can you give us an approximation of the number of studies that your department has been concerned with and made? Just an approximation.

A. Our studies at the inception of the department were divided among those given serial numbers and those which were brief reports not numbered. I shall exclude those short reports which were just analyses of minor conditions. Of the major studies we are now working on Study No. 105.

Q. Have those studies consistently, so far as you are concerned, involved the oil business in some of its ramifications?

A. I think there is not a single exception.

Q. I don't believe I have asked you, or I don't believe I know, how many people are there in your own department itself?

A. The number varies, depending upon the flow of studies. Our normal load is about 19.

Q. And have you any idea how many people there are in the general accounting department in our office in Chicago?

A. It would be a guess, Mr. Hanley.

Q. It would be hundreds, wouldn't it?

2292 A. Yes.

Q. I show you what has been marked Respondent's Exhibit 19, and admitted into evidence, entitled "Flow Chart of Gasoline from the Refiner to Consumer" and will ask you if you have made a study of that chart?

A. I examined that chart.

Q. And do you agree that that fairly portrays the general flow of gasoline from producer to consumer?

A. It does.

2293 Were you here in attendance on the Court during the testimony of James E. Dyer?

A. No, sir.

Q. Were you here and did you hear the testimony of Professor Clark of Northwestern University?

A. Yes, sir.

Q. Do you agree with and adept the answers which Clark made to the questions that were propounded to him?

A. Yes, sir.

Mr. Austin: Your Honor, I contend that is a little too general. I didn't have an opportunity to object to it, but I object—

Mr. Hanley: We are willing that the answer be stricken if counsel wants to make an objection.

Mr. Austin: I object to it on the ground it is too general.

Trial Examiner Ballinger: With consent of counsel for the Respondent the question and answer is stricken.

Mr. Hanley: I don't want to strike the question. I was agreeable that the answer be stricken so that counsel can make his objection.

Trial Examiner Ballinger: Only the answer is stricken. Now, the Examiner is not entirely clear, but he is of the impression that Professor Clark adopted the testimony in
part of the witness Dyer, and the present witness
2294 didn't hear the testimony of the witness Dyer so the
Examiner doesn't understand now how he can subscribe to all of the answers made by Professor Clark.

Mr. Hanley: Well, that was true, Judge, as to certain definitions. Your Honor is quite right as to certain definitions, but they appear in the testimony itself, so there isn't any part of the testimony that is undisclosed to the witness in the question.

Trial Examiner Ballinger: I am not clear about it and I take that is the basis of the objection.

Mr. Hanley: What is the state of the record?

Trial Examiner Ballinger: An objection has been interposed to your question.

Mr. Austin: There has been a ruling on it, hasn't there?

Trial Examiner Ballinger: I haven't ruled. I merely made an inquiry of Judge Hanley and he answered.

Mr. Hanley: Well, if your Honor please, I just think

I am right about it and I say that the only thing that Professor Clark was permitted to adopt in the testimony of Mr. Dyer were these definitions of a jobber which were read into the record and became a part of the testimony of Professor Clark. Consequently, when I asked Mr. Boatwright if he agrees with the testimony of Professor Clark, there isn't anything in Professor Clark's testimony 2295 that is linked to Mr. Dyer's testimony, that doesn't appear in Professor Clark's testimony.

Trial Examiner Ballinger: Well, if counsel for the Commission insists upon it, I take it his objection was probably good and it would be necessary for counsel for the Respondent to traverse the various matters testified to by the witness Dyer.

Objection sustained.

By Mr. Hanley:

Q. Mr. Boatwright, in the course of your work as an economist and an accountant for the Standard Oil Company, have you had occasion to observe the different types of operations in the matter of distributing gasoline that are used by the Standard Oil Company and by other oil companies?

A. Yes, sir.

Q. As a suggestion to you, have you seen anything of what is commonly understood in the industry as the jobber system of distribution?

A. Yes, sir.

Q. And what has been your experience as to observance of the direct distribution; that is, the selling by tank wagon directly to retail outlets by a refiner?

A. Do you limit your question to our company, or do you include—

Q. No, I am asking you the general question, now, 2296 as to the oil industry as you have observed it?

A. I have had many and intimate contacts with direct distribution of our own company and have observed the practices of others.

Q. What is the fact relative to whether or not oil companies generaly indulge in the practice of distributing gasoline by both the medium of a jobber and by direct distribution to retail outlets in the same territory?

A. It is a frequently encountered distributive plan.

Q. Directing your attention to the jobber who buys gasoline on that basis, what is the fact relative to whether he, in turn, generally speaking, operates service stations of his own and also supplies to the retailers?

A. You will find all three types of operation. You will find some jobbers who supply resellers, only. You will find some jobbers who operate only their own stations. You will find other jobbers who serve resellers as well as their own operated on controlled outlets.

Q. Are you familiar with the operation of Ned's Auto Supply Company in Detroit?

A. Yes.

Q. What have you to say as to whether or not that is a type of operation which occurs with frequency throughout the United States in the oil industry?

A. It does; definitely.

2297 Q. Many times?

A. Yes, sir.

Q. In many localities?

A. Yes, sir.

Q. Is it regarded as an integral part of the distributive system in the oil industry?

A. It is, sir.

Mr. Hanley: Now may I again go off the record for a moment, your Honor? It is for the witness' convenience.

Trial Examiner Ballinger: You may.

(Discussion off the record.)

Trial Examiner Ballinger: Back on the record.

Mr. Hanley: I request to have this marked Respondent's Exhibit 24 for identification.

Trial Examiner Ballinger: The Reporter will mark the document tendered by counsel for the Respondent as Respondent's Exhibit 24 for identification.

(The document referred to was marked "Respondent's Exhibit 24" for identification.)

By Mr. Hanley:

Q. I hand you, Mr. Boatwright, what has been marked Respondent's Exhibit 24 for identification and will ask you if you know what that represents?

A. Yes, sir.

2298 Q. Did you have anything to do with the preparation of that exhibit?

A. I did prepare it.

Q. State just generally what your connection with its preparation was?

A. It was prepared under my supervision and, in part, directly by my own efforts.

Q. And what does the exhibit purport to represent, Mr. Boatwright?

A. This exhibit purports to represent the sources of various petroleum products supplying the three eastern states of Standard Oil of Indiana, excluding the upper part of Michigan, which is in the Upper Peninsula. It is limited to the Lower Peninsula of Michigan, Indiana, Illinois.

It shows all refineries, refined products, pipe lines, all river terminals, all gasoline or refined product terminals on the Great Lakes as well as refineries and other sources of supply in the near vicinity in adjacent states.

Q. Has there been an increasing production and supply of gasoline in the State of Michigan, with particular reference to the Lower Peninsula, during the last several years?

A. Are you speaking of Michigan production or 2299 are you speaking—

Q. I am speaking both of Michigan production and available gasoline supplies.

A. I would say that there has been an increase in both respects. There has been an increase in the production of Michigan refineries operated and located within the Lower Peninsula, as well as an expansion of terminal facilities serving this area, receiving, originally, their supply from outside of the State.

Q. And has that increase been going on during the past four or five years?

A. It has, sir.

Mr. Hanley: I think it might be well to mark this document with letters; there are two sheets.

Trial Examiner Ballinger: The reporter will mark the document handed to him by counsel for the Respondent as Respondent's Exhibits 25-A and 25-B, for identification.

(The documents referred to were marked, for identification, "Respondent's Exhibits 25-A and 25-B.")

By Mr. Hanley:

Q. I hand you, now, what has been marked Respondent's Exhibits 25-A and 25-B, for identification, which are a graph and a tabulation of figures, and will ask you if you know what those exhibits represent.

A. Yes. Exhibit 25-A is a chart showing the re-
2300 finery capacity of refineries within the State of Mich-
igan as reported to the United States Bureau of Mines. The capacity as reported in total reads from the scale in the left-hand side of the chart, in terms of thousands of barrels per day, all barrels referring to units of 42-gallon capacity. The chart covers the time period from 1935 through 1940.

Q. What does Respondent's Exhibit 25-B, for identification, represent, Mr. Boatwright?

A. Respondent's Exhibit 25-B is the data that is pictured in the chart, taken originally from the United States Bureau of Mines Reports.

Q. Do you receive those reports currently, and are they a part of the records of your office upon which you rely in compiling data from time to time?

A. I do receive them regularly, and they constitute a part of our regular source in information.

Q. Were these exhibits numbered 24, 25-A and 25-B, for identification, compiled under your direction and supervision and at your request by your staff?

A. They were.

Mr. Hanley: The Respondent offers in evidence Exhibits Nos. 24, 25-A, and 25-B.

Trial Examiner Ballinger: Is there any objection?

Mr. Austin: Well, it is not clear to me just how these
are relevant. I assume counsel thinks they have some
2301 relevancy to his case, or he wouldn't offer them.

I would not want to accept Respondent's Exhibit 24, for identification, as a correct showing of what refineries are operated by major companies and what refineries are not, in the absence of any indication of what this witness' opinion is as to majors and non-majors, or whether he is qualified to give such an opinion. I wouldn't intimate that he is not qualified to give it, but there seems to be a good deal of difference of opinion on that subject.

Mr. Hanley: There is, and I think that objection is perhaps very well taken, your Honor, and I will undertake to clarify it, if I may.

By Mr. Hanley:

Q. Mr. Boatwright, on Exhibit 24, you have a symbol, which, according to the legend, represents a major company refinery and another symbol, which, according to the legend, represents other than major company refineries. Will you please explain for the Court what you mean on that exhibit by a major company and other than a major company?

A. Our terminology of major company, when speaking of total territory, designates those companies which are major competition throughout our entire territory. They are Sinclair, Phillips, Socony Vacuum, Texas, and Shell. These are, in our concepts, territorially speaking, major competitors, inasmuch as all of them operate through-
2302 out the territory.

Now, in any given locality, if we were to name the majors in a restricted locality, we might include others.

Mr. Austin: Is that an arbitrary classification, then, which is on the basis which you have just stated?

The Witness: That is correct.

Mr. Austin: May I ask the witness another question (addressing Mr. Hanley)?

Mr. Hanley: Surely.

Trial Examiner Ballinger: The Examiner rules on the admissibility of the examination.

Mr. Austin: Respondent's Exhibits 25-A and 25-B refer to the capacity of Michigan refineries. Has that got anything to do with the amount of gasoline actually turned out by those refineries?

The Witness: It has a direct bearing. They need not be the identical amounts. In other words, you may have a capacity of 9,000 barrels a day. Your plant-operating schedule at the particular time may be 7,000 barrels a day. An availability of capacity, however, tends to be reflected in the actual production that is accomplished in given areas.

Mr. Austin: Hasn't there been a variation in the amount of capacity?

The Witness: Oh, from time to time, yes.

2303 Mr. Austin: I mean the amount of capacity—I mean in the percentage of capacity at which the plants have been operating at times; from time to time?

The Witness: That is correct, and that is likewise reported to the Bureau of Mines, although that is not reported by individual state areas. That is available on a monthly basis.

Mr. Austin: In any event, these Exhibits 25-A and 25-B only purport to show capacity and do not necessarily represent production; is that correct?

The Witness: They do not.

Mr. Austin: I have no further objection with those—

Trial Examiner Ballinger: With that understanding,—

Mr. Austin: With that understanding.

Trial Examiner Ballinger: —Respondent's Exhibits 24, 25-A and 25-B, for identification, are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 24, 25-A, and 25-B," were received in evidence.)

By Mr. Hanley:

Q. Mr. Boatwright, you have just been asked about production in gasoline. I think I want to refer my question, however, to consumption; that is, gasoline used in Michigan. Are you able to say, Mr. Boatwright, to what
2304 extent in the past year or two or three, Michigan has been able to produce the gasoline that is actually consumed in the State of Michigan?

A. The 1940 figures are not yet available.

For the three years prior to that, I could give you domestic consumption within the State of Michigan, as well as domestic production of gasoline.

Q. Will you please do that?

A. (Referring to documents.) I am afraid I don't have that paper here with me at the present time.

Q. Just out of your own knowledge and experience, can you give us an approximation of the percentage, Mr. Boatwright?

A. May we speak of the year 1939? The last reported figure?

Q. That's right.

A. The total production of gasoline within the State of Michigan in the year 1939 was 333,000,000-plus gallons. That is production.

Total consumption was 1,100,000,000-plus gallons. It was between the 1,100,000,000 and the 1,200,000,000 gallons. The exact figure, I can't quote.

Q. Mr. Boatwright, in respect of the gasoline prices to the public, what has been the general trend in the past several years as to whether those prices have been increasing or decreasing?

Mr. Austin: Is that limited to a particular terri-
2305 tory?

Mr. Hanley: I will limit it to Detroit.

By Mr. Hanley:

Q. First I will ask you over the country as a whole, what is the fact?

A. The fact is that there has been a reduction in the prices gradually over a period of years. In fact, the index of all petroleum products has showed a gradual decline over recent years.

Trial Examiner Ballinger: Does that refer to the retail price? What price?

The Witness: Are you referring to gasoline only, now, Judge?

Trial Examiner Ballinger: Yes.

The Witness: The retail price as reflected by the 50 leading city indexed has been interrupted in so many places because of the leasing program that we do not have a continuous series of data in that respect.

By Mr. Hanley:

Q. What I am interested in is this, Mr. Boatwright: Is it or is it not a fact that in the United States generally that first the quality of gasoline has improved and the price thereof has consistently decreased to the public over the past several years?

A. That is a fact.

2306 Q. Now, with respect to Detroit, what is the fact?

A. Both of those statements are likewise the fact.

Mr. Hanley: I would like to have this document marked for identification.

Trial Examiner Ballinger: The reporter will mark the document handed to him by counsel for the Respondent as Respondent's Exhibit 26, for identification.

(The document referred to was marked, for identification, "Respondent's Exhibit 26.")

By Mr. Hanley:

Q. I hand you what has been marked Respondent's Exhibit 26, for identification, Mr. Boatwright, and will ask you if you have any knowledge as to what that represents.

A. Yes. This is a chart showing the Standard Red Crown tank wagon consumer price in the City of Detroit for the period of January 1, 1931, through and including most of April, 1941. The actual cents per gallon is read from the scale on either side of the chart.

Q. Now, referring to the broken line, I will ask you if that is not the important line on this chart, in reference to the question which you have been asked as to whether or not the general level of price has gone up or down?

A. That is correct. The broken line represents the trend of prices in the City of Detroit over this time. It is a mathematically calculated and fitted curve.

2307 Trial Examiner Ballinger: This line (indicating)?

The Witness: That is correct.

Mr. Hanley: I offer Respondent's Exhibit 26 in evidence.

Mr. Austin: I would like to ask a question or two. Mr. Boatwright, what 's this jagged line; what does that represent? Up at the top it says "Tank Wagon Consumer Price." What is the meaning of that term?

The Witness: That is the price at which we make tank wagon dealers, direct to consumers.

Mr. Austin: To consumers. That is, commercial accounts?

The Witness: Yes; it may be commercial accounts.

Mr. Austin: This is not what is called the posted tank wagon price to retail service stations then?

The Witness: It is not—are you referring now to the posted tank wagon dealer price?

Mr. Austin: Yes.

The Witness: This is not the posted tank wagon dealer price. It is impossible to show a price series on that class because we do not start posting a price on the tank wagon dealer until after the leasing of the service stations. Prior to that our price was a price to the ultimate consumer through company-operated stations.

2308 Mr. Austin: Yes, but you didn't deliver—when the company operated the stations, why, of course, the delivery was at the station to the automobile owner, so that wouldn't—even when you operated your stations before 1936, you wouldn't call the price charged at the retail service station a tank wagon consumer price, would you?

The Witness: No, sir. This is not that. The tan' wagon consumer price in our price structure, is the basic price structure. Other prices, through other channels, are usually determined as deviates from this price structure.

Mr. Austin: Your Honor, I object to this on the ground it is immaterial, because we have had nothing in the issues in this case or in the testimony as far as I know, that has related to tank wagon sales by the Standard Oil Company direct to consumers. I think I asked Mr. Raupagh a couple of questions about who they sold to, and so forth, on direct examination, but I don't think it had anything to do with this particular subject.

Mr. Hanley: Perhaps the purpose of this offer is being misunderstood.

It is true this applies to consumer prices because the statisticians found that that is the only index that they could use that would accurately indicate the trend.

2309 Now all I am seeking to prove, here, is that there has been a general trend in the United States down in the prices of gasoline to the ultimate consumer, without reference to taxes, of course, which the refiner, of course, has no control over, and that the quality of the gasoline has increased and the price in cents per gallon has decreased. I think that is really a matter of common knowledge. I just feel sure, perhaps the Commission is apprised of that fact, already. It has been published so many times in trade magazines and A.P.I. reports and various petroleum journals, and so on, that I just don't think there can be any question about it. It all goes to this point, your Honor: The question of the public interest. We say that we have accomplished a job, here, in that we have reduced the ultimate price to the consumer.

Now, as to what is material, that is for the Commission; as to its materiality. That's all we are trying to prove, here; not the service station price, or anything of that kind; just the trend.

Trial Examiner Ballinger: With that explanation, is it still objected to?

Mr. Austin: Yes, I think it might be misleading because, first, as to a tank wagon consumer price, which is something we have had no testimony about and, furthermore, I think the Consumer in this case, as far as we have referred to him, is the automobile owner who purchases 2310 his gasoline at his service station and this has nothing to do with the price that he pays. Whether this chart, in general, indicates the trend of retail service stations' prices, I don't know. It doesn't purport to, and I am not questioning the correctness of the chart at all, but I don't think that it relates to consumer prices or tank wagon prices as they have been referred to in this case.

Mr. Hanley: That is quite true, Mr. Austin, and maybe I can get the same result, here, by a question of counsel: I am perfectly willing to withdraw the offer if it can be agreed, Mr. Austin, that the general trend of gasoline prices, exclusive of taxes has been downward during the last several years.

Mr. Austin: Judge, I just don't know.

Mr. Hanley: Well, it is true, and I just want to prove it, Judge. How I prove it, may be another matter, but that's all I am trying to prove. It is true, and this is one index that is the best that our statisticians could figure out.

Trial Examiner Ballinger: If counsel for the Commission desires to withhold his objection or allow it to pend until he has an opportunity to cross-examine the witness, the Examiner will withhold his ruling.

Mr. Austin: I have no more cross-examination on this. I think it just happens that it doesn't relate to any-
2311 thing that has been in the case and that is conceded and, as I understand it, the only offer is—this shows what the situation is as to retail prices insofar as the result is concerned, but this is not based upon any facts as to retail service stations' prices.

I just don't know. I don't like to concede that it go in, because it has the right result, even though it is reached upon some method based on different facts.

Mr. Hanley: In all fairness I want to state on the record that this exhibit is not offered with any view to trying to establish what retail service stations' prices may be. I have no interest at all, your Honor, in the cents per gallon. I don't care at all about that. All we seek to show by this is that on the over-all picture, whether you buy gasoline to run an automobile or clean your wife's clothes, or what you buy it for, the price of gasoline during the past several years to the ultimate consumer has consistently gone down. That's all in the world that this exhibit is offered for.

Mr. Austin: Judge, I don't deny that. I don't know whether it is true and, if it is true, I don't know whether it has any materiality, but I just don't want to concede that this exhibit would prove it.

Trial Examiner Ballinger: Can't this witness testify to that?

2312 Mr. Hanley: Of course he knows it. I thought it would be just a graphic way of testifying to it. Perhaps he has testified to it.

The Witness: The testimony did state that this price, tank wagon price structure to consumers, was our basic price structure. That the prices in other channels are determined as deviates from this particular price structure.

Trial Examiner Ballinger: Did your testimony relate to the country at large?

The Witness: It did.

Trial Examiner Ballinger: Or to the Detroit area?

The Witness: It related to both. I stated the decline of gasoline prices in the country at large and, specifically, in Detroit.

Mr. Austin: May I ask the witness one more question on that?

Trial Examiner Ballinger: You may.

Mr. Austin: Isn't it true, Mr. Boatwright, that competitive situations in particular areas, such as price wars and other local conditions, may pull your curve out of line from what it would be upon your general trend based upon this curve?

The Witness: I am not sure I know what curve you are referring to.

Mr. Austin: In other words, you said, I believe, 2313 this is your basic something that you—

The Witness: That's right.

Mr. Austin: That other prices more or less follow.

The Witness: This is our basic price structure.

Mr. Austin: That, as you just told the Examiner, is true as to your whole territory but would this necessarily be indicative of the price structure or the trend of the price structure in any other area, such as Detroit?

The Witness: This particular chart is Detroit city.

Trial Examiner Ballinger: The objection is overruled. The Examiner holds that the witness has testified to the fact and that this is merely a picture of what he has testified to.

(The document referred to, heretofore marked for identification "RESPONDENT'S EXHIBIT 26," was received in evidence.)

Mr. Hanley: Judge, I am just about to go into a new phase of testimony, here, and I am just wondering if you mind adjourning at this hour for the noon recess. I would be glad to reconvene at any time your Honor suggests.

Trial Examiner Ballinger: We will adjourn at this time to reconvene at 1:30 p.m.

Now, at 12:00 p.m., the hearing stands at recess until 1:30 p.m.

(Whereupon, at 12:00 p.m., a recess was taken until 1:30 p.m.)

2314 Afternoon Session.

1:30 p.m.

Trial Examiner Ballinger: Come to order.

JOHN W. BOATWRIGHT, having been heretofore duly sworn, resumed the stand, and testified as follows:

Direct Examination by Mr. Hanley (Continued):

Q. Mr. Boatwright, are you familiar with what are known as the Zip and Joy stations in Detroit?
A. Yes, sir.
Q. Have you been familiar with those stations over a number of years in the past?
A. Yes, sir.
Q. Do you regard the Zip and Joy stations as being competitive to the Standard Oil Company in the sale of gasoline?
A. Definitely, they are.
Q. Do those stations sell a substantial amount of gasoline which is sold in the Detroit metropolitan area?
A. They have a large volume. Is that what you mean by a substantial amount?
Q. Yes, that is what I mean.
A. Yes, it is correct, they do.
2315 Q. And do they or do they not have a good public acceptance in Detroit?
A. They do.
Mr. Hanley: Will you mark this, please?
(The document referred to was marked, for identification, "Respondent's Exhibit 27.")

By Mr. Hanley:

Q. I hand you, Mr. Boatwright, what has now been marked Respondent's Exhibit 27, for identification, and ask you if you are familiar with that chart?
A. Yes, sir, I am familiar with it.
Q. What does it represent?
A. This represents the volume of Zip and Joy gasolines and the Sunny Service Oil Company, and the price differential at which their merchandise is sold below the prices maintained by dealers of Standard Oil gasolines. The

studies of the price differentials are a discreet series specifically timed, starting in March of 1938, the last study being made in March of 1941. Would you like an explanation?

Q. Let me ask you this, Mr. Boatwright: are the results, as disclosed by the chart, Respondent's Exhibit 27, results which you and your department reached after a study or studies of the competitive situation in Detroit?

A. It is, sir.

Q. Were these studies made with a view to ascer-
2316 taining the competitive situation for the benefit of
the Respondent, the Standard Oil Company and without any reference at all to this particular lawsuit or proceeding?

A. They were made in that manner, sir.

Q. And do you have personal knowledge of the results, as they are disclosed by the graph or chart, Respondent's Exhibit 27, for identification?

A. I do.

Trial Examiner Ballinger: When was the chart made?

The Witness: The chart was made approximately six weeks ago.

By Mr. Hanley:

Q. The Court has asked you when the chart was made. I will now ask you when were the studies made upon which the chart is based, Mr. Boatwright?

A. There were ten studies. One was conducted in March of 1938; one in May of 1938; one in July of 1938, and one in September of 1938. One was conducted in March of 1939; one in September of 1939; and one in December of 1939. The next study was conducted in June of 1940. The next one in November of 1940, and the last one in the early part of March, 1941.

Trial Examiner Ballinger: They are each portrayed on the exhibit, are they?

The Witness: That is correct.

2317 Mr. Hanley: We offer Exhibit 27 in evidence.

Trial Examiner Ballinger: Is there any objection?

Mr. Austin: May I question the witness?

Trial Examiner Ballinger: You may.

Mr. Austin: Mr. Boatwright, there is a column over on the left entitled "Volume: Millions of Gallons," and "Price Differential in Cents Per Gallon."

The Witness: That is true.

Mr. Austin: To which of those columns do the vertical black lines apply?

The Witness: The vertical black lines are read from the scale on the right of the chart.

Mr. Austin: What is the purpose of that column on the left?

The Witness: The volume as shown by the tax records of the State of Michigan, consolidating the volume of Sunny Service, Puritan Oil Company, and Charles E. Austin.

Mr. Austin: Then that curve line there, I guess you would call it, refers to the left column and not to the right; is that right?

The Witness: That is correct.

Mr. Austin: These heavy black lines running up from the bottom refer to the price differential column?

The Witness: Yes, to the price differential as shown on the right, but have no relation except as the line
2318 of volume moves with the extent of the price differential.

Mr. Austin: Does the line of volume move with the extent of the price differential?

The Witness: Yes, sir.

Mr. Austin: Would you say that there is a constant relationship there?

The Witness: There is no constant relationship in any one determinate of patronage.

Mr. Austin: Perhaps "constant" is not the right word. I wondered whether this was intended to show that volume increased as the price differential increased.

The Witness: It does so indicate.

Mr. Austin: Who is Sunny Service?

The Witness: Sunny Service is a predecessor of the—either the Puritan or the Charles E. Austin. I am not sure which of those two it was the predecessor company of.

Mr. Austin: What did it sell?

The Witness: It sold gasoline.

Mr. Austin: Under any brand or—

The Witness: Yes, it had a brand name. I don't recall the brand name.

Mr. Austin: Why is that included in here with these other two?

The Witness: Charles E. Austin does not date back to

the beginning of the chart. The chart starting with
2319 1935 volume. Charles E. Austin was not in existence
under that name at that time.

Mr. Austin: What does Charles E. Austin sell?

The Witness: He sells gasoline.

Mr. Austin: What brand?

The Witness: I think his brand is the Joy gasoline.

Mr. Austin: Do you know?

The Witness: No, I don't know, I couldn't tell you whether it is Joy or Zip. It is one or the other.

Mr. Austin: How about Puritan Oil Company?

The Witness: Puritan Oil Company distributes the other.

Mr. Austin: Well, you say up at the top "Volume of Zip and Joy Gasolines," and then you have got these three names down here in the square?

The Witness: That is correct.

Mr. Austin: Do you know whether Sunny Service ever sold Zip or Joy?

The Wtiness: No, I am not sure whether the brand name was Zip or Joy at the time Sunny Service was distributing prior to the origin of the Charles E. Austin.

2320 Mr. Austin: Was it either one?

The Witness: That is what I say, I am not certain.

Mr. Austin: Now, on this price differential chart it says "for a price advantage of leading cut price marketers secured from independent consumer surveys during the months indicated"; who are the leading cut price marketers whose data is included in makiing this chart?

The Witness: Zip and Joy, as far as prices are concerned, were the ones distributed during the time period when the consumer surveys were conducted.

Mr. Austin: Well, is this phrase here "leading cut price marketers"—does that refer only to Zip and Joy?

The Witness: It does.

Mr. Austin: In your opinion are they the only leading price cut marketers in the Detroit area?

The Witness: They are the leading cut price marketers.

Mr. Austin: Don't you think it would be less misleading to refer to Zip and Joy there instead of saying leading cut price marketers," down there in the lower right?

The Witness: I don't think that it would. I didn't think so when I made the chart.

2321 Mr. Austin: Well, there is nothing—

The Witness: There are other price-cut marketers, that is why I indicated that Zip and Joy were the leading cut price merchandise and—

Mr. Austin: I don't think it is clear from your statement down here in the square at the lower right that you are referring only to Zip and Joy.

The Witness: I should think it would be clear when taken in conjunction with your main title on the chart. The chart is clear in that respect: it says: "The volume of Zip and Joy gasolines and the price differential below prices maintained by Standard dealers."

Trial Examiner Ballinger: Are Zip and Joy standard gasolines?

The Witness: By "standard" are you implying the name of a corporation, your Honor, or are you implying quality?

Trial Examiner Ballinger: Quality.

The Witness: I am not a chemist; I can speak as to the consumer acceptance; I cannot speak as to the chemical components of the product.

Trial Examiner Ballinger: Speaking as to the consumer acceptance.

The Witness: They have a good consumer acceptance
in the Detroit area, and are represented in the adver-
2322 tisements of these respective distributors as being
better than the house brand gasolines of major companies. The usual advertising compares them with the Ethyl product of the major distributors.

Mr. Austin: Now, there is a reference—are you through, your Honor?

Trial Examiner Ballinger: Yes.

Mr. Austin: There is a reference here to information secured from independent consumer surveys conducted during the months indicated. What surveys are referred to?

The Witness: That will require a detailed explanation. Do you wish that I give the explanation of the process?

Mr. Austin: I want to know—I want you to answer my question in as much detail as necessary as to what surveys you were referring to when you refer to independent consumer surveys.

The Witness: Those surveys are conducted by my department. We have found over a period of years that it is

extremely difficult to get reliable price information from postings. Accordingly, we periodically make interviews on the streets of different metropolitan markets throughout our territory. These interviews are made by individuals who do not know the company that is paying for their
expenses, and their salary. The interview of this
2323 type is usually limited to three major questions: the
opening question is: "Have you bought any gasoline lately?"

Any individual seated in a car will normally answer that question, "Yes." If they say "No," we go on to the next respondent. If they say, "Yes," we ask them the brand that they purchased on their last purchase. Then we ask, if they recall the price that they paid for that merchandise. And they tell us the price. The interviewer jots down the make and age of car and the license number, and that completes that particular interview.

Now, to illustrate the process, in the City of Detroit we first lay out the city according to income areas, there is an exact number of interviews specified by particular locations. If we designate a particular corner at which there shall be 23 interviews, the interviewer is to secure 23 interviews, with male members only, seated in their cars. Having jotted down the identification of the car, every tenth interview is checked by correspondence to insure accuracy of reporting. When the cards for the entire metropolitan area are secured and tabulated, the make and age of car is then classified against R. L. Polk car registrations by make and age of car. The distribution of our sample must compare with the distribution of the car registrations in the Detroit area before it is accepted.

To illustrate, let us say 23% of the cars in Detroit
2324 are five years of age or older, 23% of our interviews,
or a close approximation thereto, may be ½ of 1% on either side, must be cars of five years of age or older. Now, the result of that, we take the prices that the consumer actually paid—it is not the posted prices, it is what he paid, if he gets any discounts, if he gets any undercutting of any kind of manipulation or anything of that type, that is all excluded from the actual prices that he paid. To
check that in another way—

2325 Mr. Austin: Let me ask at that point: this survey
didn't cover just Zip and Joy, because you wouldn't know; when your asked the customer where he bought?

The Witness: No.

Mr. Austin: So did your survey cover all kinds of gasoline?

The Witness: That is correct; a study of this type gives us two findings; one, the study gives us our position in the retail market and, secondly, it gives us our prices and the prices that prevail on the competitive gasoline sold in competition with our product.

I started to mention another check that we exercise on this. We frequently ask the offices to transmit to us tickets on credit card sales. That is only our own products, you see. They do that and we average the actual price as shown on the credit card sales receipts against the price that the consumers said they paid for our products and that usually averages within 1/10 of one per cent, that the prices that the consumer average indicates.

Mr. Austin: Just tell me that again. Who do you get that information from, that check.

The Witness: We get that from the field offices.

Mr. Austin: Of whom?

The Witness: To illustrate: We have done this particularly in the Indianapolis and Minneapolis markets.
2326 We ask the Standard Oil credit men to transmit a tabulation of the credit card sales in those communities for comparison with the prices the consumers said they paid for the Standard gasolines in those communities during the identical time period.

Mr. Austin: How would those credit cards work out with anything like Joy or Zip? Do they have credit cards?

The Witness: No, please understand. I said that is a check against the accuracy of our sampling process and if our credit card sales, which reflects against it, and what the consumer has told us he actually paid corresponds, then we have an accurate reflection of the prices maintained by Standard Oil dealers in that community, do we not?

Mr. Austin: Yes.

The Witness: It is merely a check of the accuracy of the proceedings.

Mr. Austin: That wouldn't apply, however, to the accuracy on the others except, possibly, by inference, is that right?

The Witness: It applies primarily to the Standard Oil accuracy but we have checked our sample two ways. First against R. L. Polk data, on car registration, which is universal and as a second check, if the price, as shown by credit card sales of Standard Oil products, corresponds exactly to the price as reported by customers of 2327 Standard Oil, there is every presumption our sampling process has been an accurate one.

Mr. Austin: Now on a survey of that sort how do you obtain your figures, here represented by this curve for millions of gallons? In other words, for volume?

The Witness: That line is, as I stated, taken from the tax records of the State, which are shown monthly.

Mr. Austin: Then the surveys are used in preparing these vertical lines on cents per gallon of price differential—it is these straight black lines?

The Witness: Yes, they are derivative entirely from the survey. The curve, as you refer to it, is the volume that is taken entirely from the tax records of the State of Michigan.

Mr. Hanley: Which I understand, if your Honor please, have been introduced in evidence here by the Government.

Mr. Austin: Yes, if it is those same records. I don't know whether Joy and Zip appear in those records.

Mr. Hanley: There aren't any different records. Tax records are tax records; that's all there is to that.

The Witness: You understand on a tax record it is not shown according to brand name, it is shown according to the company report.

Mr. Austin: That's right. And, your Honor, I 2328 object to this going in evidence for several reasons.

In the first place, it is not what it purports to be on its face. There is no adequate explanation here of the meaning of an independent consumer survey and the word independent, to me, if I were going through the record in this case in the position of the Commission or court, I certainly would not think that independent meant something that was compiled by the Standard Oil Company.

Furthermore, the statement down here, in reference to the survey, refers to "leading out price marketers," and the statement up in the top refers to price differential, but I don't think that the statements here, in either case, show clearly that the reference to leading price cut marketers is intended to refer only to Zip and Joy gasolines and I think if it is, it is a conclusion and that there is no reason why this statement down here shouldn't refer specifically to Zip and Joy.

Further, in regard to the surveys, I think that it is obvious that information obtained in that manner from consumers, as to the price differential, is not the best evidence because it is a question of fact as to what was the price differential between the prices charged at various times at Zip and Joy stations, and the Standard Oil stations and while the prevailing service station price at Standard Oil stations has been placed in the record, here, it seems to me that there must be better evidence than going to
2329 consumers to determine the price charged at Zip and Joy stations, and that whatever the automobile owner, sitting in his car, may say, that is only hearsay as to the price which he paid, and it is entirely different from getting the information at the source where is was compiled or from the man who has knowledge of it.

2330 I will have to change that statement. Of course, each car owner has knowledge of the price he paid in a particular instance, but, nevertheless I think that if this is intended to be a survey of price differentials based upon the reports made from consumers rather than from reports by the station owner, that it ought to so indicate. If it is intended to allege here that the consumers' statement as to what they paid is more reliable than any service station owner's posted price, I would quite agree to that, but that may be true in regard to proving a certain sale on a certain date, but it seems to me that this is a rather unreliable method, and certainly not the best method of showing the prices charged at these stations, and that it could be proved, I should think, by the companies themselves directly, just as the Standard Oil prices have been put in here by the Standard Oil Company.

I wouldn't object to this so much if it is indicated just what it was.

Trial Examiner Ballinger: In view of the explanation offered by the witness, his explanation taken in connection with the exhibit, have you any objection?

Mr. Austin: I object to the things that I have already stated here about this use of the phrase "leading cut price marketers." I think that ought to be changed, if it goes in evidence.

2331 Trial Examiner Ballinger: The explanation would be read into the exhibit, would it not?

Mr. Austin: The purpose of the exhibit, I always thought was to look at the exhibit and learn something without turning to the record. Otherwise you might just as well read the whole thing into the record. The exhibit is a very convenient means of putting in some testimony which, otherwise, might take a long time to put in, and not be as graphic after it was in.

Another objection is that this Sunny Service appears here, and the witness states he doesn't know of his own knowledge Sunny Service sold Zip or Joy gasolines, and yet the proposed exhibit purports to relate only to Zip and Joy.

The Witness: May I amplify that, your Honor?

Trial Examiner Ballinger: You may.

The Witness: As I stated, that Sunny Service was a predecessor company of either the Puritan or Charles E. Austin. I did not state which firm it was the predecessor of.

Mr. Austin: Didn't you say you didn't know whether it sold either one of these brands?

The Witness: I said I did not know whether, when it was a predecessor company as a distributor of gasoline, called its product either Zip or Joy.

2332 Mr. Austin: Do you know whether it called it one or the other?

The Witness: I will give you my recollection on it. I am under the impression that it was the Zip brand of gasoline.

Mr. Austin: I am trying to make the question clear. We have both been using the question here at cross purposes; I will try again and ask you whether you know whether Sunny Service sold either one or the other of Zip or Joy gasoline.

The Witness: It sold one, yes.

Mr. Austin: That was where I misunderstood you, I thought you said you didn't know—

Mr. Hanley: I have something in my hand here that was just handed to me by our manager here, relative to these names of the Sunny Service Company and the Puritan Oil Company and so on. They change names and they have a continuing evolution in their corporate existence. I didn't think that was important. But if it is deemed important, we can prove it but they do sell the gasoline and they have been selling the gasoline under one name or another, and it just didn't seem to me to be important as to what their corporate name might be at any time.

Trial Examiner Ballinger: I take it the material point is the character of the gasoline?

2333 Mr. Hanley: Yes, that seems to be the only thing that is real important here. We can prove it, and be glad to do it, if your Honor thinks it has any materiality, but I just didn't think it did have any materiality what the corporate names of these companies might be from time to time.

My associate reminds me it covers nothing but this Zip and Joy gasoline. That's what we are talking about.

Trial Examiner Ballinger: I understand.

Mr. Austin: Well, do you know whether any of the service stations covered by this Sunny Service, Puritan Oil, or Charles E. Austin, handled more than one brand of gasoline?

The Witness: I don't think they did.

Trial Examiner Ballinger: Have you any knowledge—

The Witness: I don't.

Trial Examiner Ballinger: —sufficient to answer?

The Witness: I do not have definite knowledge as to whether they handled one or two brands.

Mr. Austin: If they handle two brands wouldn't they be lumped in the Secretary of State's report?

The Witness: That's correct.

Mr. Austin: So there, again, your Honor, there is no assurance here that this volume curve is restricted to either Zip or Joy, in case they sold some other brand at

2334 the same station.

The Witness: I stated that that was the total volume as reported on the State tax report.

Mr. Austin: Yes, the total volume, which might include more gasoline than Zip and Joy, if they sold something else.

The Witness: That is correct.

Trial Examiner Ballinger: That is correct, isn't it?

The Witness: That is correct.

Mr. Austin: However, I don't think the volume curve here is particular important, but—

Trial Examiner Ballinger: The Exhibit purports to show the volume.

Mr. Austin: Whether one curve is supposed to show the volume of gasoline sold and the other lines are supposed to show the average difference in price, I guess at the periods on which these surveys were taken, and I object

to this price differential chart upon the ground that it is not shown to be reliable evidence or a reliable means of getting evidence upon the information which is attempted to be portrayed. It seems to me that these surveys have a very definite purpose, and I have no question about the fact that they were well conducted for the purpose which they were intended to cover various brands of gasoline and obtain important information for the Standard
2335 Oil Company, but when you get it down to the question of price per gallon and the price differential charged by Zip and Joy, on the one hand, and Standard Oil Company, on the other, as distinguished from a survey covering a general situation, it seems to me they are likely to be quite unreliable.

Trial Examiner Ballinger: Do you think the volume of Zip—and what is the other name?

The Witness: Joy.

Trial Examiner Ballinger: —Joy gasoline sold is material?

The Witness: Is your question directed to me?

Trial Examiner Ballinger: No, to Mr. Austin.

Mr. Austin: I think it is material only to the extent that it may have some materiality on the contention that these are—well, I don't think it is material, but I think that the Respondent's contention is that it is material, and if he is right, why, of course, it is a question that is rather hard to argue. I am assuming that if it goes in at all that it is material. But I don't see any direct materiality of it except as to the percentage of this gasoline that is sold in Detroit, and possibly to the question of how much of a competitive factor it is. It may have some materiality.

Mr. Hanley: The witness has testified, your Honor,
2336 that it was a competitive gasoline so far as our company is concerned; that is the reason we offer it.

Trial Examiner Ballinger: Do you consider the volume material?

Mr. Hanley: Absolutely, sir. I may say to your Honor, in all fairness to your Honor, in view of the obligation your Honor has to rule, that we expect to prove, in detail just what that volume is before we have finished our case.

Trial Examiner Ballinger: Then the Examiner will withhold his ruling on this exhibit until further proof is offered.

Mr. Austin: What is the last statement of the Examiner?

(The record was read.)

Mr. Hanley: Will you mark this, please?

(The document referred to was marked, for identification, "Respondent's Exhibit 28.")

By Mr. Hanley:

Q. Before we leave Exhibit 27, Mr. Boatwright, and so there may be no opportunity to misunderstand, the heavy black vertical lines represent, as I understand it, the differential at which these several companies were selling below the prevailing service station price, as indicated by the right-hand column; is that right?

2337 A. That is correct. That is below the Standard Oil dealers' price?

Q. Yes, sir.

A. Yes, sir.

Q. So taking the highest vertical column, and following it out to the right-hand side, does that indicate or does the chart mean—well, I will ask you what the chart means.

A. That indicates that during the month of May, 1938, the brands of gasoline sold at Joy and Zip were sold at a price averaging exactly 6¢ per gallon less than the average prices maintained by Standard Oil dealers on Standard Oil products.

Q. Yes. Now, referring you to the "Volume" line which you say is controlled by the figuration on the left-hand side of the chart, will you state what relation there is between that volume line and the price differential as indicated by the vertical lines?

A. Yes. I should like to state that the unusual growth that was taking place during the year 1938 in this market by this class of distributors led to our department being assigned the task of studying prices. Three times between the month of March and the month of July, when the price differential is the widest, the growth of the volume as indicated by the tax reports is the more rapid. As the price differential is reduced, the growth is reduced, or it

2338 may even be reversed.

Q. Now, Mr. Boatwright, I hand you what has been marked by the reporter as Respondent's Exhibit 28, and I will ask you if you have seen that exhibit before?

A. I have seen this chart before.

Q. Was that chart prepared under the direction and supervision of your department?

A. It was.

Q. What does it represent?

A. This chart represents the gasoline price maintained by Standard Oil Company dealers with prices maintained by leading cut-price marketers in the Detroit area.

The lower part of the chart shows the relationship between the price differential maintained by cut-price distributors under prices maintained by Standard dealers and our proportion of the retail market in the Detroit area as indicated by last time purchases of the responding consumers' interview.

Q. Mr. Boatwright, just assume that we don't know anything about this at all, and take the upper half of the chart first, and the lower half next, and just tell us in A, B, C's, exactly what it proves.

Trial Examiner Ballinger: What it purports to prove.

By Mr. Hanley:

2339 Q. All right. What it purports to prove.

A. May we start with the first line on the chart?

Q. Surely.

A. Each of the surveys as to the date of the interviewing is indicated by the circled cross incorporated in the line. The circled cross indicates the average absolute price paid by consumers for Standard gasoline in the Detroit area during the respective months. The connecting line is merely an indication of the movement as we go across the time series chart. But the chart is not a continuous series of studies broken down by individual months. Each of the respective circled indicators show at that particular date the prices maintained on Standard gasolines.

The Reporter: Is that "Standard" a proper name?

The Witness: Yes.

A. (Continuing.) The second line indicates a similar factual condition relative to the prices paid on cut price gasoline.

2340 Mr. Austin: Mr. Boatwright, let me interrupt a minute. The Reporter asked you if you meant "Standard" meaning Standard Oil Company. What gasoline do you mean? Is this restricted to Red Crown, or does it cover all three?

The Witness: The average price paid for the three Standard brands Stanolind, Standard Red Crown, and Solite.

A. (Continuing.) Now the area between the two observations indicates the price difference that prevailed at the date that survey was made. That difference is transposed into the third line on the chart which reads from the lower level of the chart upward, according to the scale as shown on the lefthand side of the chart. It is the dotted line which shows the price advantage of the leading cut price marketers, which is merely the difference between the top two lines of the chart.

Now, the fourth line shows the reported proportion of the retail market being served by Standard Oil branded motor gasolines, Stanolind, Red Crown, and Solite.

The significance of the chart is that our market position in the Detroit area tends to move in an inverse relationship with the width of the price differential maintained by these leadings price cut marketers. Thus, if you will read the line from right to left on your chart you will notice that when the price differential was between 5½ and 6¢ per gallon—

2341 Trial Examiner Ballinger: You are now referring to the—

The Witness: Third line, so called.

A. (Continuing.) Our market position was declining quite rapidly. That as the prices grew closer together, as you will note when you compare lines one and two, and as is reflected again by line three, where the price differential was approximately 3½¢, the Standard Oil dealers started showing a gain in market position. That gain was continued by successive studies until the early part of 1939, at which time the price differential again had exceeded 5¢ per gallon.

Again our market position reversed. It struck a low of about 17 per cent of the market which we maintained for the period of November 1939 until June of 1940. During this time period the differential grew narrower again, and we started gaining in market position. As the differential continued to narrow we continued to show an improvement in our position, indicating the tendency of our market position to move in a negative relationship with the price differential maintained by these products.

By Mr. Hanley:

Q. Now, Mr. Boatwright, just to boil this thing down in the simplest kind of language, in your judgment, and based on your studies of the competitive situation, is it or is it not true that as these so-called cut price marketers 2342 reduce their price they sell more gasoline and we sell less, and as that margin narrows we sell more gasoline and they sell less?

A. That is correct.

Mr. Hanley: I don't know whether I made an offer of this particular exhibit or not.

Trial Examiner Ballinger: It has merely been identified.

Mr. Hanley: I offer it now, Exhibit 28.

Mr. Austin: Just a moment, please.

Mr. Boatwright, on Respondent's Exhibit 28 for identification at the top of that the heading refers again to "leading cut price marketers in Detroit"; to whom do you refer there?

A. Zip and Joy.

Mr. Austin: And is that same reference intended wherever you say "leading cut price marketers"?

The Witness: On these charts, that is correct.

Trial Examiner Ballinger: Limited to those two brands entirely, isn't it?

The Witness: It is limited to the volume of those companies distributing those two brands entirely.

Mr. Austin: Are the surveys referred to on Respondent's Exhibit 28 the same as those referred to on Respondent's Exhibit 27?

The Witness: That is correct.

Mr. Austin: And in Respondent's Exhibit 27 when
2343 you were making up this computation of price differential, and as I understand it, the same differential is shown on Respondent's Exhibit 28—is that correct?

The Witness: That is correct.

Mr. Austin: Were the prices of all three gasolines sold at Standard Oil stations included? That is, was an average price taken?

The Witness: That is correct.

Mr. Austin: How was that weighted, or was there any weighting done?

The Witness: According to the number of purchases of individual brands. The respondents automatically weight your price according to the flow of merchandise. If your respondent told you he bought Solite, that would be at that price. The majority of them naturally telling us they bought Standard Red Crown, some few buying Stanolind. They automatically weight themselves according to your flow of merchandise.

Mr. Austin: But all three gasolines were included in that?

The Witness: That is correct.

Mr. Austin: How about the computations made on responses from people who bought at Zip and Joy stations? Did that include any brand of gasoline they might have bought at those stations?

2344 The Witness: That includes only the brands that they designated as Zip and Joy. In other words, had we in a given community had made an interview or series of interviews in which everybody said they bought Standard Red Crown, it would only be an average of the actual responses, and would in that case represent that particular brand. Now, in the respondents of Zip and Joy every consumer's price is averaged according to the brand name of Zip and Joy.

Mr. Austin: Did you find that there were different prices charged at the same station?

The Witness: Such a study does not isolate the station; it isolates brands, but not stations, you see. May I amplify that just a little bit to say that we do find different prices, and that is why this type of a study is conducted. The posted prices frequently are not an accurate reflection of the true price condition in a given area. I am speaking now as an economist. We know from our experience that the posted price does not reflect the true price condition in an area, and accordingly we ask the consumers what they pay, because it is difficult to kid twelve hundred consumers about the prices, when you don't know which twelve hundred you are starting your joking with.

Mr. Austin: What I am getting at is do you know whether there is more than one priced gasoline sold at any of these stations, or did the information obtained from these consumers include at all the stations where
2345 they bought it, or only the brand?

The Witness: It included the brand.

Mr. Austin: Brand only?

The Witness: Brand only.

Mr. Austin: Then it wouldn't necessarily show how many prices there were at one station at one time?

2346 The Witness: It does not.

Mr. Austin: I make the same objection to Respondent's Exhibit 28 that I made to Respondent's Exhibit 27. I think that upon the basis upon which they were compiled, that they are immaterial, and if they go in the record, I feel there should be some change made in the typing on them. I can suggest specific changes, if your Honor wishes to indicate just what they refer to.

Trial Examiner Ballinger: What changes would you suggest?

Mr. Austin: In the first place, on Respondent's Exhibit 27, I think in the last sentence in the block down here in the lower right-hand corner, the words "leading cut-price marketers" should be eliminated and "Zip and Joy dealers" should be inserted in place of that.

And the word "independent" should be stricken out, and after "consumer" surveys—rather, after the word "conducted", I should say, should be inserted the words "by the Standard Oil Company", so that it will show just who made the survey, and what brands are referred to.

Now, on Respondent's Exhibit 28, again, I think the words "leading cut-price marketers" should be eliminated wherever they appear, and "Zip and Joy stations" or "Zip and Joy retail dealers" should be inserted in place of that. That simply makes it more accurate, and it doesn't vary at all from what the witness has said

2347 these things are.

And I think, again, that down here in the lower right-hand corner of Exhibit 28 where it says "Private surveys conducted in the Detroit market," it should read: "Private surveys conducted by the Standard Oil Company in the Detroit market."

Mr. Hanley: Have you finished, Mr. Austin?

Mr. Austin: Just a moment. I think I have.

Mr. Hanley: Of course, your Honor, I think the witness has explained what the language means on the exhibit, and of course we are offering the exhibit which was prepared by an economist of the Standard Oil Company. We are not offering an exhibit that is prepared by counsel for the Commission here. If there is anything that is not fully explained, certainly I think we should explain it. It is an obligation we have in offering the exhibit, and the witness is subject to cross examination.

As to materiality or relevancy, I don't care to make any argument at all, but I do want to request, if your Honor will do me the favor, I haven't laid as much foundation about the mechanics of how the surveys were conducted as I can lay, and I just don't want to get into any trap about that. If any part of this objection goes to that feature, I would like to lay more foundation.

Trial Examiner Ballinger: That was the only question that the Examiner had in mind.

2348 Mr. Hanley: If your Honor does have such a question, may I -

Trial Examiner Ballinger: If the objection doesn't run to that, as to the foundation upon which the exhibit is based, then the Examiner is prepared to rule.

Mr. Austin: I won't concede that these surveys are formed on a sound basis for the conclusion reached. But on this question of what was said in here, there is certainly—no exhibit is admissible if it says on its face one thing, and it is something else. And I think that goes to the fact where the language is misleading. If your Honor will just permit me to express an opinion on it, I don't think that it is proper to admit the exhibit in evidence if it is misleading, even though the witness has explained what is on there. If it says one thing and the witness says it means something else, then I think that the exhibit itself should be corrected, because there is no point in an exhibit unless it can be read apart from the testimony.

Trial Examiner Ballinger: Apparently the only difference is in the use of language. The witness has used the language that would properly identify it in his mind; you have described it as it would be described by the attorney.

I think the record fairly portrays the true meaning 2349 and intent for which the exhibit is offered, and the meaning of the exhibit, and unless the objection runs to the basic ground upon which the exhibit is based, the Examiner overrules the objection and admits the document in evidence.

Mr. Hanley: Do I understand, Mr. Austin, that your objection does go to just the mechanical foundation of this exhibit?

Mr. Austin: Well, my objection goes to the point that I don't believe the surveys as described by the witness establish what is intended to be stated by the exhibit as a fact. I am not convinced that that is the proper way of obtaining that sort of information.

Mr. Hanley: Then I think there is an obligation upon me to examine him further, your Honor.

By Mr. Hanley:

Q. Mr. Boatwright, in respect of both Exhibits 27 and 28, will you please tell the Court in meticulous detail just exactly what you and your department and your staff did in the matter of collecting and then compiling the information which is reflected by these exhibits.

A. Well, our first step is segregating the city, any given city, according to income groups, for areas in which interviews are to be conducted.

Our questionnaire is as simple as it was outlined in
2350 my previous testimony.

Trial Examiner Ballinger: State what it is.

A. Namely, covering three questions: one, being a lead question, merely to start conversation: "Have you bought any gasoline recently?"

Nothing is done with the answer to that particular question.

2. "What brand of gasoline did you buy at your last purchase?"

3. "What price did you pay for the purchase of that gasoline?"

The questionnaire then contains notations as to the make, the age of the car, and the license number.

No interviews are conducted on corners at which service stations are located, but frequently will be conducted in local trading areas in outlying as well as downtown sections so that we are not getting the influence of a particular location, but, rather, the influence of the branded distribution.

Having laid the plans for the study, we call for bids of outside commercial consuming research organizations.

Such organizations at which we usually get bids are the Booz, Fry, Allen, and Hamilton, being the firm name of one organization; secondly, the Psychological Organization of America; thirdly, the Market Research Corporation of America and two or three others, the names
2351 of which do not come to me at this particular moment.

The bids for making and conducting this survey exactly in accordance with the rules laid down by my department, are received. Their interviewees are trained centrally so that interviewers in the Detroit area will be comparable with similar individuals gathering similar information in other metropolitan areas.

They are then sent to the respective markets and they pick up the identical designated number of interviews, according to identical corner locations in given communities, and then each tenth interview, according to the license number of the car, is addressed, and mail follow-up as to

whether that particular respondent had been approached, asked specific questions, and as to his responses on the questions. Any time that the interview check does not indicate a good return of the direct mail follow-up, the interviews are reconducted in those given areas to insure an accurate portrayal of the prices consumers tell us that they are selling gasoline for. The results of this study are sent back to the successful bidder, be it either the Psychological Corporation or the Booz, Fry, Allen, and Hamilton firm, or any other successful bidder, and are there tabulated according to the cross tabulations which we designate. Those tabulations, in brief, provide information on the proportion of the market being served by each of the leading competitive brands in that given
2352 area.

I use the word "leading" there to differentiate from the word "major" as it has been used in this testimony.

To illustrate, Sun and Hi-Speed would be tabulated separately in the Detroit area. Those brands would not be tabulated separately in any other metropolitan market.

The market position is shown for the City of Detroit and the surrounding suburbs. In addition, this is but a part of a similar study conducted throughout the State of Michigan which is weighted, according to the relative proportion of gasoline consumption, by given county areas in the state that we have at one time the proportion of the retail market we are to do, and in the Lower Peninsula of Michigan, as well as the portion of the market we are securing in the market through our sellers in the Detroit metropolitan area.

The second tabulation has to do with prices at which the various brands of gasoline are being sold. This is merely an averaging process of the interview responses as given to the interviewee. It is averaged by brands and the total isolated by individual outlets.

Have I adequately covered the subjects?

2353 Q. I think so.

Now, Mr. Boatwright, the process and mechanics that you have been describing, as I understand it, apply to the basis of the information upon which you predicate Exhibits 27 and 28. Am I right about that?

A. That is correct.

Q. Let me ask you this further question: Were any of these surveys, upon which these exhibits are predicated, made in connection with or in contemplation of this lawsuit?

A. Definitely not.

Q. Are they made as a matter of information for the Standard Oil Company in the conduct of its own business?

A. Certainly.

Q. Is it or is it not a fact that upon the results of your surveys and your conclusions and judgment the management of the Respondent company, the Standard Oil Company, spends large amounts of money every year?

A. It is correct.

Mr. Hanley: I now offer, again, Exhibits 27 and 28.

Mr. Austin: I would like to ask another question, if your Honor please.

Trial Examiner Ballinger: You may.

Mr. Austin: I intended to ask it before. Well, in the first place, what area is covered by Respondent's
2354 Exhibit 27 for identification?

The Witness: That is Detroit.

Mr. Austin: I don't see that it says so on there anywhere, although it does say on Exhibit 28.

The Witness: Well, I have so stated. It is Detroit.

Mr. Austin: Now, when these surveys were made I assume, of course, that they were made here in Detroit as well as other places. Do you know as to any survey, what percentage of the responses received were related to purchases of gasoline at Zip or Joy stations?

The Witness: The studies did reveal that. I did not have the complete studies with me but they do reveal that.

Mr. Austin: Do you know as to any of these surveys how many responses were received and tabulated in the City of Detroit?

The Witness: In total?

Mr. Austin: Yes.

The Witness: Yes.

Mr. Austin: Can you tell me that?

The Witness: Yes. The recent studies cover, approximately, fifteen hundred interviews. Earlier than that, the earlier studies covered about eight hundred to a thousand.

Mr. Austin: That is just the City of Detroit, you
2355 are speaking of?

The Witness: That is the City of Detroit, Dearborn, Hamtramck; the metropolitan area.

Mr. Austin: But in referring to other portions of the state—because I think you said about a survey having been made in the whole State of Michigan—

The Witness: That's right. We make about three thousand in the lower peninsula of Michigan, of which approximately 50 per cent are made in the Detroit area.

Mr. Austin: And over how long a period is the survey conducted?

The Witness: All interviews must be made and submitted to the Chicago office of the contracting company within a ten day period from the letting of the contract to the receipt of the responses.

Mr. Austin: I would be interested in knowing how many responses were included in each one of these tabulations; I mean, in the tabulation on each one of these surveys, from persons who said that they purchased at Zip or Joy stations?

The Witness: I have that information right here. Would you like that I should read this into the record?

Trial Examiner Ballinger: You may.

Mr. Austin: Yes.

The Witness: In March of 1938 sixty-one respondents stated that they purchased Zip and or Joy.

2356 Mr. Austin: Have you got Standard Oil for the same survey?

The Witness: No, but I have the total number of interviews.

Mr. Austin: All right. State that.

The Witness: That particular study encompassed 769 interviews.

The May study of 1938 showed 77 Zip or Joy and 760 total interviews.

The June, 1938, study was 59 Zip or Joy, out of a total of 751 interviews.

September, 66 Zip or Joy; 763 total interviews.

March of 1939, 102 Zip or Joy, out of 1299 studies.

August of 1939, 134 Zip or Joy, out of 1522 interviews.

November of 1939, 90 Zip or Joy out of 1494 interviews.

June, 1940, 104 Zip or Joy, out of 1496 interviews.

November of 1940, 74 Zip or Joy, out of 1531 interviews.

March of 1941, 63 Zip or Joy, out of 1687 interviews.

Mr. Austin: Based upon the figures from the Secretary of State and from the gallonage figures of the Standard Oil Company itself, as for its own volume, do you know how the volume of gasoline sold by Zip and Joy in Detroit compares with the volume of gasoline sold in Detroit by the Standard Oil Company; say, for 1940? Do you know it for that year?

2357 Mr. Hanley: If your Honor please, that seems to be clearly a matter for cross-examination.

We recognize the right of counsel to test the foundation for the introduction of this exhibit but it is assumed, of course, that the cross-examination will be curtailed; in relation to the extent to which counsel goes in his examination now. I don't think he is allowed to go into purely cross-examination questions at this time, beyond the foundation of the exhibit.

2358 Mr. Austin: I don't want to. The only thing that suggested that question is the fact that the market position here, for Standard Oil, was shown on this Respondent's Exhibit 28, and I assume that means—well, what does it mean; that fourth line, I believe you would call it?

The Witness: That proportion of last time purchases that were Standard gasolines.

Mr. Austin: On the surveys?

The Witness: Yes, sir.

Mr. Austin: Oh, I see. Then, at a particular time here the figures 4½¢ a gallon—I guess it is over on the other side—percent of retail gasoline market; that is the position of Standard Oil Company, based upon your surveys, is it not; upon your actual figures?

Trial Examiner Bailinger: Which exhibit are you referring to?

Mr. Austin: Respondent's Exhibit 28, in the lower half; the solid line which, I believe, refers to the tabulation on the right-hand side.

The Witness: That is correct.

Mr. Austin: That is based on the survey, as I understand it, and not upon your own gallonage figures?

The Witness: That is based upon the survey responses.

2359 Mr. Austin: So that it isn't necessarily the same as your own figures would be, compared with such other gallonage figures as you obtained from other companies?

The Witness: May I explain that you cannot get from any public source the market position in the reseller channel as distinct from the total consumption figure. This pertains to only reseller portion market. The State tax reports indicate the total consumption according to brands, as reported by the various marketers. It is impossible to split that according to channels of sales. There is no way that can be done.

Mr. Austin: That being true, then, why is there any reliability to this line here, on Respondent's Exhibit 27, for identification, which is supposed to be the volume of Sunny Service, Puritan Oil, and Charles E. Austin? Why isn't that subject to the same criticism, that that does not relate strictly to retail reselling?.

The Witness: That is the total sales of gasoline as reported by those companies as it is associated with the price differential maintained in the retail market. These distributors are primarily resale distributors, marketing primarily through resale outlets to consumers. They may have some direct distribution to the ultimate consumer, but their retail sales, primarily, reflect their total volume.

2360 Mr. Austin: You think to a greater extent than the Standard Oil Company retail reseller business would?

The Witness: I think so, yes.

Mr. Austin: Do you have any knowledge as to the amount of business that the sellers of Zip and Joy gasoline have, other than sales through retail gasoline stations?

The Witness: That is indicated in the State tax report where it is sold with the purchaser paying the tax. You see, the State tax reports are broken down and show the gasoline upon which the marketer reports and sells direct and pays the tax. It also shows, separately, sales of gasoline by that marketer in which the purchaser pays the tax.

Mr. Hanley: May I ask a question, your Honor, just while I think of it, on this subject?

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Do you know of your own knowledge, Mr. Boatwright, whether it is or is not a fact that almost the entire sales of the Zip and Joy gasoline are to consumer accounts at service stations; that is, resales at service stations, rather than to commercial consumers?

A. I know that most of our sales are through their reseller channels.

Mr. Austin: I think that's all I have, your Honor.

2361 Mr. Hanley: I think, if your Honor please, that there was an offer made of the Exhibits Nos. 27 and 28, which inspired this examination by the counsel, and we have that offer pending on the record.

Trial Examiner Ballinger: I was in doubt whether you had furnished the greater mechanical basis for your Exhibit 27 than existed at the time that I reserved my ruling on that.

Mr. Hanley: Oh, yes. I went into it further, if your Honor please. We went into it, into the details of how many interviews were had and when they were had and how they were performed. That evidence, I think, went in under your Honor's suggestion.

Trial Examiner Ballinger: I was under the impression that was in at the time you tendered 27.

Mr. Hanley: It may have been, your Honor, but I am sure it is in now and I will re-tender the offer of Exhibits 27 and 28.

Trial Examiner Ballinger: The objection is overruled and Respondent's Exhibit 27 and 28 are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 27 and 28," were received in evidence.)

2362 Mr. Hanley: May I suggest these next documents be marked Respondent's Exhibits 29-A, 29-B, and 29-C? They are of the same character, and it will help to identify them if we just give them letters with the same number.

Trial Examiner Ballinger: The reporter will mark the documents Respondent's Exhibits 29-A, 29-B, and 29-C.

(The documents referred to were marked, for identification, "Respondent's Exhibits 29-A, 29-B, 29-C.")

By Mr. Hanley:

Q. Now, Mr. Boatwright, inviting your attention to Exhibit 28, which has been under lengthy discussion here, and which refers to the City of Detroit, I now call your attention to three exhibits denominated Respondent's Exhibits 29-A, 29-B, and 29-C, and which appear to refer to the Cities of Minneapolis and St. Paul, as one unit; the City of Milwaukee, and the City of Chicago, and will ask you if those represent, in graph form, the same information that is represented on Exhibit 28 in respect of Detroit, the lower half of Exhibit 28, I should say?

A. These charts do represent the same type of analysis as revealed by the lower chart on Exhibit 28; for these respective cities.

Trial Examiner Ballinger: For the record, will you state the materiality of this line of testimony?

Mr. Hanley: Surely, your Honor. There has been some suggestion—more than a suggestion—it seems to me
2363 there has been a studied intention on the part of the
Government to arbitrarily define what kind of gasoline the Respondent was in competition with.

We take this position, and assert that the Respondent is in competition with gasoline in the City of Detroit and elsewhere in its territory, irrespective of whether it may be arbitrarily, by some people, called unbranded or branded, or what have you. We are proving by these exhibits and by this witness that our volume of business is affected, not only in Detroit, but elsewhere in our territory, by the kind of competition that is offered by what the Government says is an off-brand and which the Government says, or is seeking to imply is a gasoline which is not in competition with us in the City of Detroit. Now, we know from our studies, and that's what we seek here to prove, that we are in competition with those gasolines and that it materially and financially affects our business, here and elsewhere. I am offering these three studies from other cities.

We have the studies in many cities, Judge, but I just thought I would give the Commission three other cities, here, just to point the objective. We could go on indefinitely, but we don't care to do that.

There is one other reason; and I thought that had been made clear from the outset, here: that in view of the existence of these competitive gasolines, all at a lower
2364 price, consistently, than any gasolines that our company offers for sale, that there can be no injury to competition by reason of any price differentials that our company gives, because the lowest price that we ever gave to anybody under any circumstances in Detroit was far higher than the actual retail sale price of these gasolines in the filling station market, so they are the real Defendant in this action, as we see it. They are the people who really determine what competition is in Detroit.

Trial Examiner Ballinger: Is there any objection?

Mr. Austin: There is nothing pending. I think your Honor asked counsel to state the relevancy of certain papers there, that have not been offered yet.

Mr. Hanley: I am not sure I asked the qualifying question yet. I will.

By Mr. Hanley:

Q. Are these statements that have now been presented to you, Mr. Boatwright, Exhibits 29-A, 29-B, and 29-C, made up in the same way in relation to the respective cities which they represent as Exhibit 28 in respect of Detroit?

Trial Examiner Ballinger: And from corresponding information?

A. They are, in response to both questions.

Mr. Hanley: I offer the exhibits.

2365 Mr. Austin: I object, if your Honor please, upon the ground that they are irrelevant and immaterial and relating to other cities. That they are outside of the Detroit area, which is the only area involved here, and I can't see that they could tend to prove anything that is relative with respect to the Detroit area.

Trial Examiner Ballinger: Well, the Examiner is of the opinion that that is a matter that should be passed on by the Commission. He overrules the objection and admits the documents as Respondent's Exhibits 29-A, 29-B, and 29-C.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 29-A, 29-B, and 29-C," were received in evidence.)

Trial Examiner Ballinger: We will have a recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: We will come to order.

2366 Q. Mr. Boatwright, in connection with these several exhibits in your testimony the term "cut rate stations" has been used quite extensively, and I think it is quite clear on the record in relation to these exhibits in Detroit that you have been referring to Zip and Joy stations?

Trial Examiner Ballinger: Is that correct?

A. That is correct.

By Mr. Hanley:

Q. Now, in your judgment and experience what have you to say as to the effect of the operations of those stations in the matter of their proximity to outlets which deal in Standard Oil Company gasolines?

A. That has a very definite relationship.

Q. Just explain in detail to the Court what that effect is and how you know how that effect results?

A. Let me state first that there is no product that I know of of the ordinary consumer type of merchandise on which a price comparison of an individual with any shopping tendency can be made as is true of gasoline. Prices normally are posted, and rather than attempting to shop by making purchases you observe your prices as you drive by and make comparisons.

In 1938 I made a special study in the Detroit area in the month of July. At that time there were some stations selling either Joy or Zip at 8 for $1, and other stations selling
Joy or Zip 7 for $1. I took 31 of our stations that
2367 were not located on traffic arteries or in the trading
zones of the particular outlets of either Joy or Zip—in other words, geographically and according to the traffic flow they were isolated as well as it is possible to isolate a mobile market. Our losses at these 31 stations over the corresponding first six months of 1937 was ~~slightly~~ in excess of 10 per cent.

Mr. Austin: Pardon me. I think you ought to explain what you mean by "our losses."

The Witness: The losses of the Standard Oil Company dealers.

A. (Continuing.) Was slightly in excess of 10 per cent. Where they were not in the immediate trading area of the Joy and Zip outlets.

Trial Examiner Ballinger: You say 10 per cent?

The Witness: 10 per cent.

Mr. Austin: I don't want to ~~interrupt~~, Judge, but I don't know what he is talking about as to 10 per cent of what when he is talking about loss. Is it money, gallons, or what?

The Witness: I stated it was a 10 per cent loss over the corresponding first six months of the preceding year.

Mr. Austin: Loss in gallonage?

The Witness: I am referring to gallonage, yes, sir.

Mr. Austin: I see.

2368 Mr. Hanley: Your Honor, we are just undertaking to show here what the influence of these so-called cut rate stations are as they have been defined by the witness. Isn't that clear?

Trial Examiner Ballinger: I so understood from your question.

Mr. Hanley: That is the purpose of the question.

A. (Continuing.) I then took a second group of Standard Oil dealer outlets in the trading vicinity, or on traffic arteries passing Joy and Zip outlets which were posting prices of 8 for $1.00; the losses of sales for the first six months of 1938 at this second group of Standard dealers as compared with the first six months of the preceding year was 17 per cent plus; it was between 17 and 18, but it was better than 17.

I then took a third sample of Standard stations located in the trading areas or on traffic arteries passing Joy and Zip stations where they were posting prices of 9 for $1.00. Our losses through this third group of Standard dealers for the first six months of 1938 as compared with the corresponding period of the preceding year on gasoline was 20.8 per cent.

I think this indicates rather clearly that the proximity of the competitive outlet has a definite influence upon the diversion of gallonage from one supplier to the second supplier.

By Mr. Hanley:

Q. You made some reference to the fact that there
2369 was a great facility in shopping for gasoline as
compared to other commodities. I don't think that is explained as fully as it should be. Mr. Boatwright, just what do you mean by that?

A. Perhaps I can best illustrate it by purchasing habits; let us say my wife—if she wants to buy food for our table, and she compares canned peas, she must go into a store, observe the prices on different brands of peas, or any other commodity that she may wish, and her price comparison on that commodity involves both time and effort on her part. In the gasoline market, likewise, representing a product for consumption, wherein purchases are made with a relatively high degree of repetition, the comparison involves little time and little effort as prices are posted prominently and large enough in front of the station so the operator of that outlet will hope that the passerby can easily detect the price differences and compare it with other stations on the same artery. It is, perhaps, the commodity in which price comparisons are made with the greatest facility of any ordinary consumption commodity.

By Mr. Hanley:

Q. Mr. Boatwright, what is your judgment and opinion in respect to this matter: Is there a point between the cost of gasoline and the sale price of gasoline—that is the spread for the margin, or whatever you call it—beyond which a marketer cannot go without inviting competition and cut prices?

2370 Do I make that clear, Mr. Boatwright?

A. Yes, I think so. May I rephrase slightly your question as I understand it?

Q. Surely.

A. Is the margin over your accepted tank car spot market in a given market, having varying widths, a factor in determining the flow of gasoline purchases among the varying brands?

Q. Yes.

A. If that is your question, the answer is yes, definitely.

Q. Now, you referred to—

Trial Examiner Ballinger: Do you care to elaborate on your answer?

The Witness: I shall be glad to.

Trial Examiner Ballinger: I would like to have you do it.

A. When the margin of gasoline, margin on gasoline, reaches certain levels—

Mr. Austin: Pardon me, Mr. Boatwright. Are you talking about the manufacturer's margin, the jobber's margin, or the retailer's margin?

The Witness: I am talking about the margin between the price to the consumer as maintained by the reseller on one side, and the recognized spot market on the other.

Trial Examiner Ballinger: What do you refer to as the spot market?

2371 The Witness: The accepted tank car market by given communities.

As that margin widens the distribution of gasoline attracts capital, which, in turn, attracts additional distributing facilities. These additional distributive facilities, to acquire volume, will offer an incentive to the consumers. The change of your pattern of distribution in a given market may take a year in its completion, but it is a change that will take place in that market whenever your gross margin between these two price levels reaches a point sufficient to attract added capital into the distribution of petroleum products. I should state that that margin required to acquire capital will vary among different metropolitan areas; will likewise vary according to different economic conditions in different areas; and will vary according to the degree of satiation that there is in that market of the particular class of cut price distributors. But in each market there is some level at a given time in which this margin becomes an effective means of inviting competition. And you will notice I limited that to a time. It tends to vary in a given market from time to time also.

By Mr. Hanley:

Q. I don't wish to limit you to any figure unless you have one in mind, Mr. Boatwright, but referring you now to tank wagon prices as distinguished from tank car 2372 prices, does there come a time when the difference between the tank wagon price to a reseller of gasoline and his price to the public reaches some degree when that spread invites competition and cut prices?

A. Oh yes. It works exactly the same as I have just illustrated, the only difference is you are taking one segment of your price function.

Q. I am taking the tank wagon and reseller.

A. It works the same. You have taken a segment of your total price structure, while I took a slightly broader segment. The principles are exactly the same.

Q. Mr. Boatwright, did you yourself ever work in a service station?

A. I did.

Q. And garage?

A. I did.

2373 Q. What have been your experiences in that?

A. Well, while I was in college I spent almost four years in a combination service station and garage, having drive-in facilities, and I was a night attendant at this outlet while I was going to school.

Q. So you have had actual experience on the driveway of these service stations?

A. I have.

Q. You might tell us where that occurred, Mr. Boatwright?

A. That was at Liberty, Missouri, which is about 15 miles northeast of Kansas City.

Q. Now, in the course of your work in the Federal Trade Commission, and more particularly in the Standard Oil Company, have you had experience with cost accounting?

A. I have.

Q. Has that experience been an extensive one?

A. It has been particularly extensive and continuous in the Standard Oil Company.

Q. Is it or is it not a fact that the conclusions which your department reaches, and for which you are responsible, in matters of cost accounting, form the basis for decisions by the management of the Standard Oil Company, based upon which decisions they risk a substantial amount of capital every year?

A. That is correct.

2374 Q. Do you know Herbert F. Taggart, or do you know of him?

A. I do not know him personally. I know of him.

Q. Do you know who he is?

A. I do.

Q. Have you read Exhibit 76 in this case, which I think is a survey of costs prepared by Mr. Taggart on Wayne County?

A. I have read two surveys by Professor Taggart; one being Wayne County, and one being, as I recall, a supplement, or part thereof, limited to Detroit.

Q. Just to keep the record straight, I think the Wayne County survey is Exhibit No. 76 in evidence, Mr. Boatwright, and the other one which has to do with Detroit proper—do you remember such a survey?

A. I do.

Q. —is Respondent's Exhibit No. 2, for identification.

A. I have read both of them.

Q. Have you read both of them?

A. Yes.

Q. Have you read a copy of the questionnaire which was prepared by Mr. Taggart?

A. I have.

Q. And is it your understanding that that is the questionnaire upon which he based his conclusions in his two surveys?

2375 A. It is.

Q. Have you read all of the testimony of Dr. Taggart given in this proceeding?

A. I have.

Q. You have given us some indication of the type of work that your department does in making surveys; is this survey that was made by Dr. Taggart of a general character such as your department is continuously making?

A. We have made several studies that would be closely related to this type of study that Dr. Taggart has made. To amplify, we have studied profits of reseller outlets; we have studied expenses; we have studied sources of profits by products, and we have studied especially under company operation, we have made detailed and exhaustive studies of profits and expenses by sizes of reseller outlets.

Q. Now, have you studied carefully the analysis made by Dr. Taggart as reflected by his surveys and by his testimony?

A. I have.

Q. Based upon your experience, what have you to say as to the propriety of the procedure which Dr. Taggart followed in that survey?

A. There are several points on which the conduct of such a study, if made by my department, would have differed widely from the procedure followed by Professor Taggart.

2376 Q. When you say "as made by my department", Mr. Boatwright, do you mean by that that you think there are different approaches which should have been made?

A. I do.

Q. From the standpoint of an economist?

A. Yes, definitely.

Q. Now, directing your attention primarily to the sources of information upon which Dr. Taggart based his conclusions, namely, the service station operators, in your view are there or are there not any probable defects or possibilities of lack of reliability in those sources from the standpoint of those reported?

A. Well, I would say, first, that I would question whether the reports as submitted came from an unbiased source.

Q. Well, now, will you just amplify that, Mr. Boatwright. Tell us what you mean by that.

A. Yes. One of the first precautions in making any

survey such as those I have described in the consumer survey, or anything else, is to insure an unbiased source of your data. I noticed in the explanation of the study, and in the testimony submitted by Professor Taggart, that he was employed by the dealer associations his questionnaires were distributed by individuals furnished by the dealer association; they were delivered in person by these
2377 individuals; the explanation of the questionnaire was first given to individuals furnished by the association, and, in turn, was explained to the individuals submitting the answers to the questionnaires by individuals secured or furnished by the association; therefore—

Q. By the use of the word "association," are you referring to the Michigan Retail Dealers Association?

A. I am, sir.

Q. Proceed.

A. Therefore, had there been any bias or had there been any margin wherein an estimate or a bias could have existed in the data, because there are places in the questionnaire where Professor Taggart asked the respondents in case they didn't have the exact amount of sales to calculate it based on gallonage sold at differen price levels and so forth. It leaves room in the completion of the questionnaire for bias to exist. This could have been checked against very easily.

Q. Explain how it could have been protected.

A. Had Professor Taggart, upon the receipt of his questionnaires, classified his results according to membership or non-membership in the association, and had the results of his cost per gallon calculated by individual outlets and then classified according to dealer membership showed one level of cost as compared with another
2378 level of cost, when the calculations were classified upon the basis of non membership, he would have had his first inkling as to the lack of reliability or the presence of any bias in his data.

Q. Now, in your analysis of his reports and of his testimony, did you find any place where he had taken any such precautions as you suggest?

A. I found no such place. In fact, I tried to find from the responses received whether they were wholly from or largely from association members. I can find no such evidence.

Q. Now, it appears from the evidence that Dr. Taggart based his findings on figures which he gleaned covering the month of May, 1938. In your studies, as a general rule, do you attempt to determine representative costs based on a period limited to only one month?

A. We do not.

Q. Why not?

A. It is so difficult to find a normal or representative month in the petroleum industry. Especially in a restricted locality. We prefer to take a longer time period, and if necessary, a smaller sample to determine the representative condition.

Q. Do you mean by that, Mr. Boatwright, that you would regard it as more authentic to have a small
2379 sample over a long period of time than a large sample over a short period of time?

A. I do, if the proper precautions are taken to insure that your small sample represents a cross section of your population that you are studying.

Q. Now, referring you specifically to the month of May, 1938, are there any features about that month that occur to you as making it an inappropriate month for basing a cost study?

A. It was an unfortunate month to select.

Q. Will you please just go ahead in your own way, Mr. Boatwright, and tell us why you think that?

A. In the first place, it was a month in which there was an abnormal amount of precipitation; precipitation influences retail sales; that is particularly true when that precipitation or threatening weather conditions exist on week ends, as it did in May of 1938.

Secondly, it was a month in which industrial conditions in the Detroit area were at a very low ebb. That is indicated in several ways:

First, it is indicated by automobile productions as reported by the Federal Reserve Bank.

Secondly, it is indicated by bank debits. If we tabulate bank debits for the Detroit Metropolitan area, and for the rest of the State of Michigan, and in the third
2380 classification for the country as a whole, the bank debits in Detroit reached a lower index in the year 1938 than did the bank debits for the rest of the state, and did the bank debits for the rest of the United States.

Nextly, I would say that the month of May, coming after the majority of the spring change-over period is a month in which gasoline sales as a percentage of total sales are not representative of conditions throughout the year. The usual tendency in May is, of the total receipts from the operation of the outlet during that month, is that gasoline tends to represent a higher proportion of the total than it does in many other months during the year. And it is higher than the average months of the year.

Q. Now, in respect of the average price of gasoline sold per gallon, do you recall what the findings of Dr. Taggart were?

A. Yes. 18.16 per gallon.

Q. And do you know what the average price was, in fact, in the City of Detroit during that period?

A. I know that the average price of gasoline in the City of Detroit during that period on Standard gasolines was 18.2. The overall average price on all grades of gasoline in the Detroit area at that time was 17.1.

Q. Now, on the basis of Dr. Taggart's finding of the sale price of gasoline being 18.16 as against the actual
2381 price as you stated over all of 17.1, what would
be the general effect of that difference in respect of the conclusions at which Dr. Taggart arrived in his survey?

A. It leads me to two thoughts:

First, that if Dr. Taggart's study indicated a price of 18.16, it would appear that a sample was made up largely of stations distributing so-called major gasolines, because the price so reported is almost identical with the price reported by Standard Oil Company customers in Detroit at the same time.

Secondly, if the price of 18.16 was high, relative to the actual price prevailing in the market, when he allocated his costs on the basis of the percentage of gasoline realization to total, his 80.99% which he used in the Wayne County study is high, because of that higher price reported.

Q. Now, with—would the same influence be apparent in his factor of 80.75 used in the City of Detroit survey?

A. Yes, the same principle exactly would apply.—

Q. Am I right about that?

A. 80.75 in Detroit, and 80.99 in the Wayne County study.

Q. What is your judgment, Mr. Boatwright, as to whether or not there was a fair inclusion of all types of price stations in the City of Detroit in view of the fact that Dr. Taggart reached an average price of 18.16¢ per gallon?

2382 A. In the absence of the data of his actual work sheets, I could conclude nothing other than the suspicion that the reports were submitted primarily by the representatives of the major companies' products.

Q. Doesn't that just mathematically follow from the fact that the average price as you found it from a consumer's survey was 17.1¢?

A. It does.

Q. Now, if you know, tell us what the relation was as between 1938 in the matter of gasoline consumption in the State of Michigan, in relation to the year 1937 and the year 1939.

A. 1938 gasoline consumption in the State of Michigan dropped 5.1%, as I recall the figure, over the year of 1937. Gasoline consumption in 1939 was 8.6% higher than it was in 1938. I may be wrong by a tenth of a percent, but those are approximately the magnitudes.

Q. Now, assuming that the exigencies of the situation required that Dr. Taggart use the short time period in which to make his determination, and that he found it advisable to use the month of May, are there any tests or checks that he could have introduced into his survey to indicate whether or not the costs as he found them or as calculated on the basis of the reports for that month were representative fairly of a longer time period?

2383 A. Yes, there are several checks he could have made. He stated that some of the reporting stations maintained records for the preceding year. He could have checked his calculated cost for this group of stations for one month as against the cost which prevailed at these identical stations for the preceding year. Had his costs for the one month corresponded exactly with the costs for the preceding year at this sample within a sample, he would have felt a greater justification in the representativeness of his cost. Had it differed widely, I believe that the student normally would inquire as to the cause of that difference. Another thing that he could have done, having used a short time period of which he recognized limitations, he could easily have checked the results tabulated by his analysis with several other published reports. I think of the report on Allen County, Indiana; I think of the Profit Standards for Service Station Operation established by the National Petroleum News, almost coincidental with that study; I think of the testimony on costs submitted to the investigating body when they were establishing the codes; I think of the annual reports submitted each year by Dun & Bradstreet on service station or filling station operation; and here are others which have occurred in the trade press from time to time, the names of all of which I do not recall.

Now, that would have been a second general class-
2384 ification of checks which he could have introduced
to insure the representativeness of his sample.

2385 A third thing which he could have done was to
have studied the economic conditions in the market for which his analysis was intended to purport cost conditions as representative of a longer period of time; to see whether the conditions in that market were normal as to economic income, industrial activity, bank debits, factory payrolls, temperature and weather conditions, and all of the ordinary precautions relative to the reliability of the time period used in his analysis.

Q. Were you able to find any indication in your analysis of either of the reports prepared by Dr. Taggart or in his testimony that he had taken any of these precautions?

A. As I recall there were only two precautions that were mentioned in his evaluation of the month of May. He pointed out that the month of May was larger in terms of gallonage than was the average monthly sales during the first five months of the year. That is true, and that occurs normally year after year. It is indicative, however, of the relative significance of May on an annual basis, because that is usually merely a seasonal influence.

Secondly, he pointed out that May of the preceding years at those stations which had maintained books on an annual basis represented a certain proportion of the annual business. He did not inquire as to whether the month of May
in 1937 was representative, if his inquiry is properly
2386 portrayed in his report.

Q. And is there anything in his report to advise anyone as to whether or not it is properly portrayed?

A. No, there is not.

Q. Assuming that you were making a survey, Mr. Boatwright, in an effort to determine a fact as Dr. Taggart was attempting to determine it, would you have followed a similar procedure of allocating costs? And if not, why not?

A. We would not.

In studies that we have made of a similar nature those items of expense which can be charged direct to given services are as a rule, so charged; thus, if you have a super station in which you have a boy working on the wash rack, and his full time is devoted to wash rack activities, we would not have included that in the lump sum to be allocated on a ratio basis, but would have charged it against the service of washing. Having charged direct as much of the total expenditures of operating the outlet as possible, we would then have pro rated the residual amount among the different products for services on some basis as logical as we could determine. In some such studies a time analysis has proven to be desirable. In other such analyses it has been necessary to use the total realization. In a comparatively few cases when neither the time analysis or the total realization seemed adequate we have used a gross margin basis of allocation among products. In using
2387 the gross realization we exclude the tax feature.

Q. Now, you recall, I assume, Mr. Boatwright, that Dr. Taggart in his computations included in the total revenues of gasoline sold the excise and sales tax, which amounted to a State tax of 3¢ a gallon, a Federal tax of 1¢ a gallon, and an amount equal to 3 per cent of the sales price as a State sales tax. Having in mind those considerations, and that the use of the total gasoline revenue was the basis for Dr. Taggart's cost factor, what have you to say as to the influence that the inclusion of the taxes referred to would have as weighting his cost factor?

A. The inclusion of the tax factors would tend to increase the proportion of gross realization represented by gasoline sales. As that ratio increases, and the application of that ratio on to total expense, it would tend to increase the amount of the total expense chargeable to the distribution of gasoline. As you increase that proportion of the total chargeable to gasoline, dividing it by your gallonage, it would tend to increase the cost.

Q. As an economist, Mr. Boatwright, are you able to think of any reason or justification for including taxes in the gasoline revenues when such revenues were used as Dr. Taggart used them to form a basis of arriving at a cost percentage or factor?

A. No, I cannot. And that struck me as quite surpris-

ing. Because a tax of an excise tax nature is usually
2388 a part of price upon which the merchant does not make a mark up, does not anticipate an added profit, and does not receive a compensation for its collection. It is in reality merely a part of the money which passes through his hands for State and Governmental purposes.

Q. Did you find from your analysis of Professor Taggart's work that that part of the service station revenues that he employed, but which did not originate from the sale of gasoline, was weighted with taxes of any kind?

A. That is not apparent in either his study of Detroit or of Wayne County. It came out in his testimony that he had included the excise taxes: You cannot find, from the study itself, whether he did or did not. The only way that could be determined would be from the actual questionnaires and the questions and responses. He did, however, state in his testimony he did not exclude excise State and Federal taxes.

Q. As to all commodities and services other than gasoline, would there have been in May, 1938, within your knowledge, any tax other than an excise tax of 1¢ a gallon on lubricating oil and 3 per cent of the sales price of commodities as a State sales tax?

A. You are wrong on your tax on lubricating oil. The tax on lubricating oil is 4¢ a gallon. It is a cent a quart.

Now your question was whether any other excise taxes other than on gasoline and motor oils?

2389 Q. That's right.

A. And the 3 per cent sales tax.

Q. Yes, which, as I understand, applied to commodities and not to services. Am I right about that?

A. That is my understanding, yes, sir.

No, I know of no other excise tax other than the gasoline and the motor oil taxes.

Q. So it is true, is it not, Mr. Boatwright, that in Dr. Taggart's computations he had, on the one hand, gasoline revenues which included 3¢ State excise tax and 1¢ Federal excise tax and 3 per cent Sales tax, based on the sale price?

A. That is correct.

Q. On the other hand he had a sum of money resulting from all other revenues that accrued to the station, which included no taxes except 4¢ a gallon excise on lubricating oil and 3 per cent sales tax on commodities sold, which does not apply to services rendered. Is that right?

A. That is true. I think that there was an excise tax on tires, at that time, to the exact extent of which I don't know, but there was a small excise tax on tires. I think that was introduced prior to May 30, 1938. I don't know the exact date of its introduction.

Q. Now without consideration of any other factors at all about Professor Taggart's computations, but with reference only to this question of tax inclusion; In your
2390 judgment would it have materially affected his conclusions, had he excluded taxes from his revenues for gasoline?

Mr. Austin: I object to that question, your Honor, upon the ground that it is indefinite. The witness should be asked to state—in the event that he does know the answer, he should know how much. I think "materially" is a conclusion, there.

Mr. Hanley: He made them.

Trial Examiner Ballinger: The objection is overruled.

A. It would have a material influence on the resultant per gallon cost, as reported.

Q. After your reading of Dr. Taggart's testimony and his report, have you been able to determine, Mr. Boatwright, that there was any classification of varying types of gasoline outlets given any consideration by that survey?

A. He didn't report in his study a classification by types of outlets; no, sir.

Q. Well, in your judgment what effect would the overweight of a number of large super service stations have on the cost figure obtained by Dr. Taggart?

A. If his sample represented a higher proportion of so-called super service stations then existent in the entire market, his resultant analysis would have shown a cost figure on a per gallon basis higher than would be rep-
2391 resentative of conditions if representing a true cross section of the market.

Q. Now assuming that an excessive number of large service stations had been included. Would you expect that the cost of operation charged to gasoline would be increased?

A. Yes, sir. By "large", there, you are referring to the super service station type, as distinct from large gallonage?

Q. Yes, sir. Is there anyway that you can tell or, in your judgment, any economist could tell, from a review of

Dr. Taggart's surveys, or his testimony, how many of any particular types of outlets he used?

A. It cannot be determined.

Trial Examiner Ballinger: What is the distinction between a super-service station and an ordinary service station?

The Witness: In the parlance of the trade—

Trial Examiner Ballinger: Is there any line of demarcation?

The Witness: The super service station is usually regarded as the so-called one-stop outlet, performing all of the functions of washing, greasing, and selling gasolines and motor oils; tires, tubes, batteries, accessories, and pretty generally conforming to the one-stop idea of a motorist's needs. We differentiate that, normally, from what we might regard, first, as a neighborhood station.

Now the neighborhood station may not perform the
2392 washing part. It may have a greasing rack. It may sell tires, tubes, batteries, motor oils, accessories, and so forth, but it does not serve all the motorist's needs.

The third broad classification is the highway or transit station, where the operator depends largely upon transit business and it is a drive-in and drive-out type of activity with little of the elaborate service that you can get at the so-called super service station.

Does that clarify the differentiation?

Trial Examiner Ballinger: Yes, but I wonder how many stations there are that have a fairly complete service?

The Witness: There are many in the City of Detroit.

Trial Examiner Ballinger: Roughly, could you give me an approximation?

The Witness: I am sorry. I could not. I couldn't do that on any town unless I had a survey on something I had completed or worked out.

By Mr. Hanley:

Q. Giving consideration, Mr. Boatwright, to these different types of outlets, would you, had you been making a survey of this kind, have used any constant ratio as to all outlets in reference to allocating costs?

A. No, we would not.

Q. And just tell the court why you wouldn't have done it?

A. The reason is largely explained in the answers as given.

2393 Your expense at different types of outlet are susceptible to a classification according to product, of service, to a greater extent in one type of outlet than another. Therefore, the expenses of a direct nature would have been classified and then we would have determined the ratios applicable for the distribution of residual amounts, according to classes or types of outlet. That is, if we were classifying all in one classification, would be the super service type. In that we would charge all direct, we could. Those expenses that we could not charge direct; if they were using net realization for our factory and allocating other costs; we would determine a ratio for that class of stations.

Then we would determine a ratio for the parking gasoline sales type. Then we would have to determine another type for gasoline, groceries, and miscellaneous type.

Another one for the transit station, and so on.

Q. Do you recall an item employed by Dr. Taggart of 2 per cent charge-off for bad debts?

A. Yes, sir.

Q. What have you to say as to the propriety of the use of 2 per cent as a bad debt charge-off in the service station business, based on your experience with that business?

A. It is too high.

Q. What do you think is a proper percentage?

A. ½ of 1 per cent.

2394 Q. Do you usually charge interest on investment in an analysis of cost?

A. No, unless we are figuring on a contemplated investment. As long as the capital still retains the degree of fluidity, as a bank account or capital that is not invested in some fixed type of investment, we normally regard interest, there, as a cost to determine the allocation of capital funds.

However, once capital is invested in equipment of a fixed nature, we do not normally charge interest on investment. I think that is the more frequent manner of preparing operating statement commonly accepted.

Trial Examiner Ballinger: When you say "we," are you referring to the practice of the Standard Oil Company?

The Witness: To the practice of the Standard Oil Company and to the cost analysis work which we do in my department.

Trial Examiner Ballinger: Do you do any work except for the Standard Oil Company?

The Witness: We do not.

By Mr. Hanley:

Q. That's a matter on which there is disagreement, is there not, Mr. Boatwright, among accountants?

A. Yes, there is disagreement among both accountants and economists on that question. You can find both practices followed.

2395 Q. Suppose you were to include a cost of that type. Upon what basis would you make the calculation?

A. If I were to include interest on investment, my interest charge would be against the depreciated book value of the properties, or if I had a reasonable impartial or fair appraisal, I might base the calculation on that. You can find illustrations where both practices have been followed.

Q. Do you have any objection, as a cost accountant, to including interest as a cost based on original investment? If you do, please explain.

Mr. Austin: Your Honor, I don't think this witness has been qualified to answer questions as a cost accountant. At least, I would like to object to any such questions unless I could ask him a few questions along that line.

Mr. Hanley: I would be glad to have you.

Mr. Austin: Probably he is, but I think we should have it on the record.

Trial Examiner Ballinger: You may examine him.

Mr. Austin: Are you a certified public accountant, Mr. Boatwright?

The Witness: I am not.

Mr. Austin: You are not?

The Witness: I am not.

Mr. Austin: At the outset of your testimony you told us something about your education. I think you went
2396 to the University of Kansas.

The Witness: I did.

Mr. Austin: Did you study accounting at the University of Kansas?

The Witness: I did not.

Mr. Austin: Did you study accounting at the American University?

The Witness: I did not.

Mr. Austin: Have you ever taken a course in cost accounting?

The Witness: No, sir, I have never taken a course in cost accounting.

Mr. Austin: In what subject did you obtain your doctor's degree at Northwestern?

The Witness: The field of economics and statistics.

Mr. Austin: Have you ever made a study of production cost accounting?

The Witness: Have I ever—

Trial Examiner Ballinger: What do you mean by production cost accounting, may I inquire, please?

Mr. Austin: I think the witness ought to be able to tell us that.

Mr. Hanley: Suppose you tell us. You asked the question.

Trial Examiner Ballinger: Do you understand what 2397 he means, Mr. Witness?

The Witness: There are so many phrases used. They refer to distribution cost accounting, cost accounting generally, and so forth. I am not sure what the attorney has in mind.

Mr. Austin: Can you answer the question as to whether you ever studied production cost accounting as a subject?

The Witness: I have never taken a formal college course in production cost accounting.

Mr. Austin: You said that, and that included, I presume, neither did you in distribution cost accounting.

The Witness: That is correct.

Mr. Austin: Can you tell me, Mr. Boatwright, when have you been employed as a cost accountant, or have you ever been so employed.

The Witness: That is one of my regular responsibilities at the present time.

Mr. Austin: When did you start working on cost accounting?

The Witness: It was about 1933, when I began looking into cost accounting, as far as the Standard Oil Company is concerned.

Prior to that I have read many books that discussed problems in cost accounting and problems in other 2398 accounting not having to do with the costing processes; while associated with the University.

Mr. Austin: Can you tell me some of the treatises that you have read on distribution cost accounting?

Mr. Hanley: Judge, I don't know that I have any objection to that question beyond the fact that it seems it is just an encumbrance on the record. This man is certainly a cost accountant. To try and find out now what books he read years ago just seems to burdening us with just an unusual and unfair burden.

Trial Examiner Ballinger: Well, I don't know the importance of it, but if counsel desires to pursue this line of inquiry, I take it he is entitled to it.

Mr. Hanley: If your Honor please, the Respondent now objects to any further questioning on the part of counsel for the Government:

First, that this is not cross examination. That the witness is on direct examination, and the witness was merely asked a question which had to do with a cost accounting practice. The witness has been qualified as a cost accountant and an economist.

It is not understood by the Respondent that in order to defend itself before the Federal Trade Commission on a matter of costs, that its employees must necessarily
2399 have had a formal education in cost accounting or any other kind of accounting.

This witness has testified that the results of his cost accounting are acted upon by this Respondent to the extent that this Respondent risks vast sums of money every year on the basis of his judgment, and it just amounts to a denial of common justice, your Honor, when there is an attempt made to disqualify testimony on his part because he may not have gone to school as an accountant.

Trial Examiner Ballinger: Judge, we haven't come to the point as to whether or not the witness may testify—

Mr. Hanley: That's what this is all pointed to, and I don't like to have this witness subjected to this kind of an examination.

Trial Examiner Ballinger: The objection is overruled.

The Witness: Would you read the question?

(The last question by Mr. Austin was read.)

The Witness: I can't give a complete list. I can enumerate some. I have read Professor Finney's, at Northwestern; David Himmelbau's work; Gillespie's Treatise on Cost Accounting. I have read Professor Taggart's book on that subject. There is a professor at the University of Minnesota that has written and treated particularly with
2400 distribution cost accounting. I am sorry I can't recall his name at the present moment, but he is a capable student on the question also.

Mr. Austin: Do all of those deal with distribution cost accounting or simply cost accounting, generally?

The Witness: Not necessarily. May I also add to the list Mr. Clark's book on the "Economics of Overhead Costs," which I think is recognized among both economists and accountants as a classic in the field.

Mr. Hanley: That is the Professor Clark who testified here some days ago, is it not?

The Witness: No, it is not. He is at Columbia University. This is Professor of Economics at Columbia University. J. M. Clark's "Economics of Overhead Costs."

Mr. Austin: I understood you to say just now these books you just referred to are not limited to distribution cost accounting?

The Witness: They are not limited to that subject, no.

Mr. Austin: Do you know whether—how about Professor Taggart's book?

The Witness: Taggart's book, Gillespie's book, and the professor at the University of Minnesota are the three having to do primarily with distribution costs. I am
2401 sorry I can't give you his name at the moment.

Mr. Austin: When did you first begin to work at cost accounting in the course of your business or profession?

The Witness: When did I start to work as a cost accountant?

Mr. Austin: Yes, when were you first employed as a cost accountant?

The Witness: I was employed as an economist on September 6, 1932. The first study that I undertook with the Standard Oil Company involved a complete break-down of costs. That was in the fall of 1932 and spring of 1933.

Mr. Austin: Do you understand the words "economist" and "accountant" to be synonymous?

The Witness: Not at all.

Mr. Hanley: That is objected to, your Honor.

Trial Examiner Ballinger: The witness is fully able to take care of himself.

Mr. Austin: I will rephrase that. Is an economist, necessarily, an accountant?

The Witness: Not necessarily.

Mr. Austin: That was the question I was asking.

And since that time, to what extent have you been employed, or have you employed your time with the Standard Oil Company as a cost accountant, distinguishing there

between cost accounting, as such, and general advice
2402 and supervision as an economist?

Mr. Hanley: If there is any distinction.

Mr. Austin: Well, I want to lay the basis for it.

The Witness: I think the testimony I offered this morning bears on that subject. I stated that one of the six principal classifications of my duties had to do with the preparation of an analysis of profits and expenses by products, by sales divisions, and by individual channels of distribution. These studies covered the principal products distributed by the Standard Oil Company; are prepared once a year, and are submitted to this group of gentlemen that I enumerated this morning under the heading of the Sales Research Committee.

In addition to that, there is scarcely a study that we undertake that does not involve or bear directly upon some cost analysis, be it the introduction of a new product, or be it the changed method of distribution of a product, or be it some question of reorganization of a subsidiary company. All of these subjects have their cost element in anything that we do touching upon possibilities of improving profit. They all bear on that subject.

Mr. Austin: How many men do you have under you in your department?

The Witness: That was testified to this morning as varying, according to the flow of assignments on our
2403 docket. Our normal personnel covers between 17 and 20.

Mr. Austin: Are any of those men certified public accountants?

The Witness: None.

Mr. Hanley: Is this all on the one question that counsel asked on direct examination?

Mr. Austin: Yes. Well, isn't it a fair assumption, Judge, that you were going to ask this witness' opinion as an accountant on many other questions?

Mr. Hanley: I am going to. He is a cost accountant, and I am going to put in costs by him. If you have any notion that he doesn't know about costs, I think he will educate you tomorrow. This seems to be cross examination, Judge.

Trial Examiner Ballinger: I realize it is probably broader than counsel would be entitled to, but I also have an idea that the same question will arise frequently, and I propose to let counsel exhaust himself at this time.

Mr. Austin: You referred this morning, Mr. Boatwright, to the general accounting department in Chicago of the Standard Oil Company.

The Witness: That is correct.

Mr. Austin: That is not your department, is it?

The Witness: It is not.

2404 Mr. Austin: Is that department in charge of the cost accounting for the company?

The Witness: We have several accounting departments. I think my reference this morning had to do with the general accounting department in the sales department. We have a so-called general books department, which is directly under the comptroller. We have a manufacturing accounting department. We have a sales accounting department.

Mr. Austin: That's your department?

The Witness: No. My department is the sales research department.

Mr. Austin: Oh, yes.

The Witness: Now, no one of these have information of the overall nature of the entire company. Thus the sales accounting department does not know product cost.

The manufacturing accounting department does not know sales costs.

The comptroller, or the general books, takes the results of these two departments and puts them together.

My department has access to the information of the three departments, and we do make these analyses continuously and present them to the sales research steering committee.

2405 Mr. Austin: As I understand it, then, you have access to the work of these other departments, but does your department make any determinations, itself, of costs?

The Witness: Many, many of them; yes, sir.

Mr. Austin: In what field? That is, referring, now, to the company's business?

The Witness: In the field of marketing and distribution.

Mr. Austin: And how does your work in that respect differ from the work of the sales accounting department?

The Witness: The sales accounting department keeps a tabulation of the past expenditures and classifies them. It times results of our studies, which is classification of costs. In our work we go behind the various items of cost and break them down according to various functions performed, frequently to a greater extent than is maintained regularly by our sales accounting department. Our sales accounting department maintains a record which is primarily directed and intended for a purpose of expense control. It has proven itself to be an efficient form, and has enabled us to control various expense items. Our analysis frequently goes behind the itemization that the sales department employs, as to the component parts of these different items of cost.

2406 Mr. Austin: Is there anyone who now has supervision of your work as a cost accountant for the Standard Oil Company?

The Witness: I don't think so. It is a difficult question to answer. The Company is so big and there are so many items of cost entering into any decision that it is foolhardy for one man to attempt to reach a decision without consultation.

You recall this morning I set forth the line of my authority from my department to the Board of Directors. As such, we have complete freedom of movement among all the different departments, and we do consult. We counsel with, we secure their advice, and they consult, counsel with and discuss problems with us, but, as far as an individual having supervision over us; no, only as any of us exchange ideas among each other.

Mr. Austin: How long have you been at the head of the sales research department?

2407 The Witness: I think I stated the exact date in the testimony this morning—

Mr. Austin: I think you did, too.

The Witness: —as being November 16, 1937.

Trial Examiner Ballinger: Any further questions?

Mr. Austin: If your Honor please, that's all I have on qualification of the witness and I submit that it is clear that the witness has never been employed as a cost accountant except in connection with his work with the Standard Oil Company. It appears he has worked on cost accounting for the Standard Oil Company for a number of years and the witness is not a certified public accountant and I think his work has been largely of a statistical nature and based upon the results obtained by cost accountants rather than on direct cost accounting work.

However, the record, I think, now shows pretty well what the witness' qualifications are and I would like to make an objection upon the record to the qualification of the witness to answer questions calling for his expert opinion as a cost accountant.

I make no objection to his answers and have made none, have made no objection to his answers as an expert economist, but I do not believe he has been shown qualified to testify as an expert cost accountant.

Mr. Hanley: Let the record show counsel for the 2468 Respondent is taken at a disadvantage—

Trial Examiner Ballinger: The Examiner doesn't care to hear from counsel for the Respondents.

The objection is overruled.

Mr. Hanley: I haven't the vaguest idea, your Honor, what question I asked which precipitated this cross-examination and I was just about through with this examination, anyhow, and I wonder if we might recess until morning and I will start on the costs.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: I am just about to get into the question of costs. I am almost through with this line of examination.

Trial Examiner Ballinger: Upon the motion for counsel for the Respondent, at 4:50 p.m. the hearing stands adjourned to be reconvened at 10:00 o'clock, April 29, 1941, in Room 859 Federal Building, Detroit, Michigan.

(Whereupon, at 4:50 p.m., April 28, 1941, the hearing in the above-entitled matter was adjourned, to be reconvened on April 29, 1941, at 10:00 a.m.)

2409 Room 859 Federal Building,
Detroit, Michigan,
April 29, 1941.

Met, pursuant to adjournment, at 10 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois, and

Arthur J. Abbott, Esq., of the firm of Abbott, MacMahon, and Roberts, 2230 Buhl Building, Detroit, Michigan, on behalf of the Respondent.

2410 PROCEEDINGS.

Trial Examiner Ballinger: We will come to order.

This is a reconvening at 10 A. M., Eastern Standard Time, April 29, 1941, in Room 856 Federal Building, Detroit, Michigan, of Docket 4389 in the case entitled Standard Oil Company.

The last hearing was held in Detroit, April 28, 1941.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

JOHN W. BOATWRIGHT, having been heretofore duly sworn, resumed the stand, and testified further as follows:

Direct Examination by Mr. Hanley (Continued).

Q. Mr. Boatwright, at the last hearing I had asked you a question which precipitated a discussion relative to your qualifications.

Mr. Hanley: I think I had better withdraw that question, if your Honor please, and I will re-ask it.

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Haney:

Q. Substantially, it was this: What would be your objection to including interest as a cost based on original investment? 2411

A. Why, there are two objections normally offered to that procedure. One objection has to do with the fact that frequently current values are absolutely unrelated to the original values of properties, and, secondly, when you are charging a depreciation on your original investment, if your properties are substantially depreciated, interest on investment, at whatsoever rate you may use, tends to double up.

To illustrate, if you are using a 5% depreciation rate, your building and properties having been in existence for 10 years; let us say, instead of using 5% you are, in reality, using approximately 10% as your ratio of interest on investment.

Q. In your various studies, when you attempt to determine the representative cost, do you always use a weighted average of the entire sample?

A. No, we do not.

Q. Just at that point—did Professor Taggart use the entire sample?

A. He used a weighted average cost on a per gallon basis, using the volume of the stations during the month of May as his weighting factor.

Q. Just explain what your criticism of that is, if you have one.

2412 A. Well, if we are seeking a truly representative cost of a particular class or type of business operations, we frequently exclude sport cases on either end of the series.

Q. Just tell the Court what you mean by a sport case.

A. A sport case is an observation that is so far removed from the centralizing tendency that it obviously is not representative of conditions in that particular class of business. To illustrate by an example: Professor Taggart shows his costs of marketing of gasoline above 22¢ a gallon. According to his own evidence the average price per gallon was 18.16. In such an illustration as that, there is obviously some condition, either in his processes of manipulation of costs, or in the conditions incident to the operation of the unit study that is not representative of conditions within the industry.

I think he would have been on substantially sounder ground had he eliminated the so-called sport cases from his analysis.

Q. Now, assuming, Mr. Boatwright, that you were charged with the responsibility of making a survey designed to determine what Professor Taggart is trying to determine, would you have attempted to check your results irrespective of what they might have been before presenting them or representing them as representative of distribution costs in any phase of the petroleum industry?

2413 A. Yes, I would have introduced every check that I could think of.

Q. Just explain to the Court what you mean by those checks. What would you have done?

A. I think, perhaps, one of the best illustrations of what we mean by introducing checks was given in the testimony of yesterday when I explained the different checks that we introduce in attempting to insure the price data secured by these surveys to represent truly the conditions in an area. In this particular case, had Professor Taggart made several checks, he could have insured the representativeness of his findings to a far greater extent than it is obvious that he did.

First, he could have checked his results against the various published studies of a similar nature. He could have checked his results against the books and records of those reporting outlets who had maintained a set of records over the preceding year. He could have taken his expense items and classified them according to functions performed, and then expressed each of his various expense items as a proportion of realization for comparison with such reports as are published by Dun & Bradstreet's or other similar reporting commercial organizations.

Now, had any expense, any particular expense been completely out of line with these published reports, he 2414 could have made inquiry as to the justification of the deviation that he had as compared with other studies in existence at that time.

Q. You have testified, Mr. Boatwright, that over a number of years last past you have had occasion to make in excess of 100 surveys involving the petroleum business and gasoline distribution. What has been your experience and observation in attempting to find accurate records of either expense and or profits maintained by service station operators?

A. Our particular experience in that respect has been quite unsatisfactory, in this respect: we have found it very difficult to find true records of profits or expenses at the retail outlets.

Q. Is your statement applicable to all types, sizes, and kinds of outlets?

A. Not equally so. Where records are found, they are usually found at the larger stations operated by the more alert merchandising men who gauge and judge their operations largely from a profit point of view. Such records as we find reflect the upper level of service station operations rather than the medium or the lower level.

Q. Now, if you feel willing to do so, I would be glad if you could give the Court some percentage figure, Mr. Boatwright, as to the number or proportion of outlets
2415 at which you find reasonably good records of the business.

A. We are currently engaged on a study wherein we are attempting to determine expenses and profits resulting from the distribution of a particular line of merchandise. Either one of the members of my department or myself has visited eight of our sales divisions, attempting to secure records of accomplishments by filling station operators. We are not finding 5% of the outlets with books on costs and profits.

Q. That is to say, Mr. Boatwright, that in your experience there are less than 5% of the outlets which keep accurate records; is that right?

A. That is correct.

Q. Now, giving consideration to all of these various things that you have developed in your testimony relative to what you think the witness Taggart should have done in his survey, what have you to say as to whether or not his results or conclusions as to the cost of selling gasoline in Detroit would have been higher or lower had he observed these precautions that you suggest are proper for an economist to observe?

A. His findings on the per gallon cost would have been below the 4.8 reported.

Q. Professor Taggart testified that as a result of his

survey, he found that the spread or gross margin be-
2416 tween the cost of gasoline and the average sale price
of gasoline was 3.63¢ per gallon, and, as you know,
he found that the cost or average cost of sale was 4.8¢ per
gallon.

A. That's right.

Q. Now, as an economist, Mr. Boatwright, could that condition persist for any appreciable length of time and anybody remain in business?

A. Your question is extremely broad in the effect that you ask if anybody could. I would say that if that condition prevailed over a substantial period of time, service station operators, as a class, would have extreme difficulty in staying in business, because, as a rule, we do not find these individuals sufficiently fortified financially to operate at a loss over extended periods of time.

Q. Well, just mathematically, those figures demonstrate a loss, do they not, Mr. Boatwright?

A. That is correct.

Q. Now, supposing that you add up a number of items of expense and arrive at a total and then supposing that you take 80.75% of that total. Mathematically and economically, Mr. Boatwright, do you not take 80.75% of every component part of that total?

A. It is the same thing.

Q. That's just mathematically true, is it not?

A. That is correct.

2417 Q. In the course of your duties, do you have occa-
sion to analyze reports of organizations such as Dun
& Bradstreet and other economic organizations which make
reports on the condition of business in the United States?

A. We do.

Q. Do you learn anything from your current analysis of those reports relative to the comparative mortality in the service station business as compared with other businesses?

A. Yes. The service station business could not be classified as the most profitable independent business man type of operation. On the other hand, it usually falls in the upper one-half of the more profitable classifications of independent business operation.

Q. That fact could not persist, could it, Mr. Boatwright, unless service station operators, generally speaking, were able to and did sell their produce or their merchandise in some amount in excess of their cost of operating their business?

A. That condition could not exist unless that condition that you just described prevailed.

Q. Yesterday there were introduced some exhibits in relation to the effect of the Sunny Service, Puritan, and Charles E. Austin gasolines, on the competitive situation in Detroit.

2418 Mr. Hanley: If your Honor please, I would like to have a document marked for identification at this time.

Trial Examiner Ballinger: The reporter will mark the document Respondent's Exhibit 30, for identification.

(The document referred to was marked, for identification, "Respondent's Exhibit 30.")

By Mr. Hanley:

Q. I hand you now what has been marked Respondent's Exhibit 30, for identification, and will ask you what it represents, if you know.

A. The data represented on Respondent's Exhibit 30, represents the taxed gallonage of the Sunny Service, Puritan, and Charles E. Austin Companies, separately and in toto, by years, from 1935 through 1940. The only exception being that the 1940 annual amount is estimated upon the basis of the accomplishments during the first eleven months of the year.

Q. And from what source did you secure these figures, Mr. Boatwright?

A. From the State of Michigan tax reports.

Q. And do you understand that those are the same tax reports that were offered and received in evidence by the Government?

A. I do.

Mr. Hanley: We offer Exhibit No. 30 in evidence.

2419 Trial Examiner Ballinger: Any objection?

Mr. Austin: I object to it on the ground it is irrelevant and immaterial.

Trial Examiner Ballinger: I request counsel to state for the record the purpose of the exhibit.

Mr. Hanley: The purpose, your Honor, is simply to support further the factual proof that is indicated on the exhibits that were offered and received yesterday, namely, as to the extent of the business that was being done by these operators named in the City of Detroit, and the ratio or proportion of the total business that they do.

2420 Mr. Austin: Your Honor, I would like to ask—the exhibits yesterday don't show the percentage of the Standard Oil Company, and this shows the total gallonage of these companies; is the percentage of both the Standard Oil and these shown anywhere, or is the total volume of both shown anywhere?

Mr. Hanley: I may say this, your Honor, it is perhaps true what counsel says, I don't remember the exhibit well enough to be sure in my own mind, but I can assure your Honor this: That we propose to offer exhibits which will show the gallonage of each of these various types of operators, the total gallonage and the percentage of gallonage, so that the thing will all tie together in the final record in the case.

I just can't offer them all at once.

Trial Examiner Ballinger: Objection is overruled and Respondent's Exhibit No. 30 for identification is admitted in evidence.

(The document referred to, heretofore marked for identification "RESPONDENT'S EXHIBIT 30", was received in evidence.)

By Mr. Hanley:

Q. Mr. Boatwright, have you any knowledge relative to the amount of production and consumption of gasoline in the State of Michigan for the years 1937, 1938, and
2421 1940? If so, please state just what your information is.

A. That information is made available in the Minerals Year Book of the Department of Commerce. It has been made available for the years enumerated, and I think, as I stated yesterday, I could only recall one figure, namely the production in Michigan during the year of 1939, the last year that this information is available, the 1940 Minerals Year Book not as yet being in my hand. The production of gasoline in Michigan in 1939—

Mr. Austin: If your Honor please, I object to the witness stating what he has read out of some book. I don't know whether it is material, but if this is an official compilation I think it ought to be introduced.

Mr. Hanley: Let us find out what it is. I will ask the witness what the publication is.

Trial Examiner Ballinger: If counsel for the Commission insists upon it, I think it will be necessary for you, Judge, to produce the document.

Mr. Hanley: Perhaps that is true. But I would like to learn what it is.

By Mr. Hanley:

Q. What is this publication?

A. The Minerals Year Book is an annual publication prepared by the Department of Commerce on various mineral activities as reflected by production, consump-
2422 tion, product movement, and so forth. The petroleum economics division of the Department of the Interior secures monthly reports from various petroleum producers, refiners, and marketers, which enter into the reports of the Minerals Year Book of the United States.

Q. Is it a publication which comes currently to your office?

A. Yes, I get a copy each year.

Q. And do you regard it as reliable, and do you rely upon it for the information disclosed in it?

A. It is, perhaps, the most reliable source of data that we have on the petroleum industry. The reports as summarized in the Mineral Year Book and the reports as published by the petroleum economics division of the United States Bureau of Mines are generally regarded as the most dependable data that we have to work with of a public nature on the petroleum industry.

Mr. Hanley: If your Honor please, I have just learned that the publication under discussion is available in this building, and I have just sent for it. And we will try to overcome the technical objection of counsel for the Commission.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

2423 By Mr. Hanley:

Q. Do you in the course of routine of your office receive reports relative to various business indices, Mr. Boatwright, and if so what are they?

A. Oh, my, they are infinite; we receive so many that are used currently in connection with our forecasting activities in the preparation of the budget. There are hundreds and hunderds of various economic series secured.

Q. Let me direct your attention particularly to what I think are commonly understood by economists to be bank debits, an index known as bank debits. Do you receive that?

A. We do. We receive the regular publication of the
Federal Reserve Bank showing bank debits by reporting
banks in different areas throughout the United States.
2424 They frequently report by municipalities, thus the
Detroit area will show bank debits, and then for other
sections throughout the State of Michigan, they would show
bank debits for other communities, and then they will show
bank debits by reserve bank districts, and then bank debits
for the total country.

Q. Now, have you made any analysis of that particular index with a view to determining the general business condition in the City of Detroit in 1938 as compared with 1936, '37, '39, and '40?

A. Yes, we prepared an analysis of the bank debits for the City of Detroit, the State of Michigan, and the rest of the United States, excluding greater New York City. The object being to evaluate the representativeness of economic conditions in the Detroit area during the year 1938, the year in which Professor Taggart collected, assimilated, and analyzed data on service station operation.

Q. Were you able to arrive at any conclusion?

A. I did. Using the bank debits for these particular
three series, Detroit, the State of Michigan, the rest of the
United States, excluding New York, we arrived at the con-
clusion that if we use 1936 bank debits as a base of 100%,
expressing subsequent years as a proportion of the bank
debit volume in the past year of 1936, conditions in 1937
in Detroit were better than they were in the rest of the
2425 State of Michigan, but during 1938 the bank debit in-
dex indicated that Detroit was lower,—substantially,
than the rest of the State of Michigan, and Michigan, in
turn, was lower than the rest of the United States.

Q. In your judgment as an economist, what effect, if any, does that have on the Taggart study?

A. It tends to show that the data secured for only one month of a year in which economic conditions were abnormally low, that is not truly representative of any long time cost of operation.

Q. I am not sure whether I asked you or whether I didn't, Mr. Boatwright, whether or not as an economist, you would have checked the results of a cost study, such as Dr. Taggart was undertaking to make, against the results that may have been found by other students of the question?

A. You did so ask, and I testified as to several different checks that I would have made, before presenting the results of the analysis.

Q. I wonder if I asked you about your knowledge, if you have any, of a report of a study, the results of which were published in the "National Petroleum News" for June 1st, 1938?

A. You did not ask. However, I enumerated that as being one of the various published studies that I would have checked my results against, had I made the studies 2426 Professor Taggart did.

Q. Did you state the results of that study, do you recall?

A. I did not.

Q. Do you have in mind that study?

A. Yes. The "National Petroleum News" during the year 1938 was establishing various cost and profits standards for different phases of the distribution of the petroleum industry. They had a series of bulk plants; they had a series of terminals; they had a series of service station operation, and other phases of the distribution problem of petroleum. In particular, I recall one statement made in their profit standards established for service station operation. It was to the effect that the ordinary service station in a neighborhood community, performing greasing, washing, selling gasoline, motor oil, tires, tubes, batteries, accessories, and so forth, should have an aggregate cost which, when divided by its volume of gasoline only, did not exceed 4.75¢ per gallon.

Q. Now, on the basis of that, Mr. Boatwright, what have you to say as to whether or not the results arrived at by Dr. Taggart are too high or too low?

A. Well, that indicates that Dr. Taggart's analysis resulted in a cost figure that was too high.

Q. Did you hear Mr. Marshall's testimony, Mr. Boatwright?

A. Not entirely.

2427 Q. There was a long discussion in the cross-examination of Mr. Marshall relative to the relation between quantity of any commodity sold and the method of delivery and the sale of that commodity." Tell us, if you can, what your view is as to whether or not, first, there is such a relation?

A. Your question is, is there a relation between quantity and price?

Q. That's right.

A. Normally, there is.

Q. Now, explain for us, please, what that relationship is. Now, I am referring, Mr. Boatwright, not merely to gasoline, when referring to commodities generally.

A. Well, in your field of commodities generally, the relationship is that as your quantity increases, your net price to the buyer tends to decline.

Mr. Hanley: At this time, if your Honor please, the Respondent offers in evidence an opinion rendered by the Honorable Homer Cummings, Attorney General of the United States, on the Robinson-Patman Act, which opinion was dated December 28, 1936, and had particular reference to Government contracts for supplies, but which opinion is offered here for the reason that it discusses the general question and is based upon the conclusions of the Attorney General as to the relationship between quantity and price,
and I would now request the privilege of reading the
2428 opinion into the record rather than offering it as an
exhibit.

Trial Examiner Ballinger: Before you proceed, Judge, let counsel for the Commission examine it.

Mr. Hanley: I will, but may I state that the reason for that is that the physical thing that I have in my hand is included in a publication of the Federal Trade Commission, and it just isn't in form to offer as an exhibit, physically (handing document to counsel for the Commission).

Trial Examiner Ballinger: Are you familiar with the document, Mr. Austin?

Mr. Austin: No, I am not familiar with it. I am familiar with this whole document, yes.

Well, your Honor, this has to do with the question of prices on Government business, and I can't see, by any stretch of the imagination, where it has any materiality here. I object to it.

Mr. Hanley: Of course, your Honor will understand that I am not trying to confuse the prices that are involved in this action with any prices that may be quoted on Government business. I am making the offer because of the language which deals with a principle and not with any particular price, either to the Government or anyone else.

Trial Examiner Ballinger: For the purpose in-
2429 tended counsel may read the extract appearing in the document into the record.

(The document referred to was read into the record, as follows:

"Excerpts From The Opinion Of The Attorney General Of The United States Dated December 28, 1936, Regarding The Application Of The Robinson-Patman Act To Government Contracts For Supplies.

"The Act Of June 19, 1936, merely amended the Act of October 15, 1914, as above pointed out, and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts. The practice in this respect indicates that it has been customary in the past for those dealing with the various agencies of the Federal Government to grant to them special prices on contracts for supplies. Such prices are often below the regular market for similar material supplied to the regular trade—due, perhaps, to an estimated lower cost of doing business with the Government because of quantity purchases and absence of credit risk, solicitation, expense, etc., although it may often be impossible to evaluate such factors with exactness.

"It has been suggested that the force which would ordinarily be attributed to this practice may be weak-
2430 ened because of the probability that the prices named have seldom, if ever, violated the statute, even assuming its application. Perhaps this is true. It is also conceivable that if the past practice is maintained the prices hereafter named to the Government will seldom, if ever, violate the amended statute, likewise assuming its application; and this would seem to supply another reason for avoiding a construction that would make the statute applicable to the Government in such matters, in the absence of any clear indication that it intended to depart from that policy in this instance.

"It is therefore my opinion that the Act of October 15, 1914, as amended by the Act of June 19, 1936, is not applicable to Government contracts for supplies.

"Respectfully,

"(Signed) Homer Cummings,

"*Attorney General.*"

By Mr. Hanley:

Q. Now, Mr. Boatwright, in the course of your duties during the years 1936 to 1941, inclusive, did you keep track of the automobile production in the United States?

A. We do.

2431 Q. I hand you what has already been marked as Respondent's Exhibit No. 3, for identification, and which was exhibited to Mr. Taggart on his examination. I will ask you if you prepared that chart?

A. I did.

Q. What does it represent?

A. It tends to show the automobile production index seasonally adjusted, as reported by the Federal Reserve Bank.

Q. What, if anything, in your judgment, does it have to do with the Taggart study?

A. Well, it clearly indicates that Detroit, being the center of automobile production, with its principal industry in a marked decline, the amount and the time period selected for the study was not representative of normal conditions in the Detroit market.

Q. Now, I hand you, Mr. Boatwright, what has been marked, for identification, as Respondent's Exhibit No. 5, which has to do with total gasoline consumption in the State of Michigan, and concerning which you have already testified. Did you prepare that exhibit?

A. Yes, sir.

Q. What does it represent?

2432 A. This represents the total gasoline consumption in the State of Michigan by months and by years for the period 1933 through the month of November, 1940.

In addition, the actual level of gasoline consumption by months it shows in a dotted line, a 12-month moving average of the observations, which is an indication of the trend.

Q. I note that on the bottom of the chart there are a number of columns of figures. Will you please tell the Court what they represent?

A. That is the total gasoline consumption by months in the State of Michigan stated in terms of fifty gallon barrels.

Q. Directing your attention, Mr. Boatwright, to Exhibit No. 3, there appear on the lower half of the chart to be several columns of figures. Will you please explain what those represent?

A. Yes, those figures by months for the time period from 1936 through January of 1941 represent the Federal Reserve Bank adjusted index of automobile production as related to the average for the base years 1935 through 1939.

Would you like me to interpret any given figure?

Trial Examiner Ballinger: Yes, if you please.

The Witness: As an illustration, January of 1941 the figure is 149. That means that the adjusted automobile production rate in January of 1941 was 149 per cent
2433 of the average production rate during the months of base years 1935 through 1939.

Mr. Hanley: At this time the Respondent renews its offer in evidence of the exhibits which have been marked Nos. 3 and 5 for identification.

Mr. Austin: May I ask what these figures in 5 are based upon? I didn't have this in my hand when you explained it.

Trial Examiner Ballinger: Referring to Respondent's Exhibit 5 for identification.

The Witness: Yes. That is based upon consumption as reported by the American Petroleum Institute for the months and years in question, which in turn are predicated upon the tax records of the State of Michigan.

Mr. Austin: Your Honor, I have no objection to No. 5 for identification, but I object to No. 3. I don't believe it has been shown that the witness has any knowledge of automobile production, and I am not clear on these figures or on the conclusions, and therefore I object to this or any similar evidence unless it is brought forward by the persons who compiled the information and can be cross-examined upon it.

Trial Examiner Ballinger: Respondent's Exhibit 5 for identification is admitted in evidence.

(The document referred to, heretofore marked for
2434 identification "RESPONDENT'S EXHIBIT 5", was received in evidence.)

Trial Examiner Ballinger: Can I hear from counsel for Respondent with reference to the objection by counsel of Commission?

Mr. Hanley: Your Honor, we offer No. 3 and let me hand it to your Honor so he will be familiar with what is being discussed; this, as its title indicates and as the evidence has disclosed is just a chart which purports to portray the automobile production of this whole nation during the years indicated; namely, from 1936 through 1940.

Now, this is just one of the things, if your Honor please, that comes to the desk of an economist or research man just in the routine of his work. We offer it here just to aid the Court and the Commission in determining what conditions were in 1938 when the so-called Taggart survey was made.

Technically the objection here requires that we should bring in every automobile producer in the United States for the years involved. Obviously we cannot do that. That just can't be done.

We offer this because we thing it may be of some assistance to the Commission. I apprehend that the desire of the Commission is to get information from reasonably reliable sources, and this type of information has to be com-
2435 piled by someone. It can't be proved the way you
prove a murder case, Judge; it just can't be done. And if your Honor excludes this exhibit it just estops us, we can't go any further. We can't bring in all of the automobile makers in the country, and we won't even try. We just have to forego whatever benefits may exist in the fact that production in May, 1938, was at the nadir of the line.

Mr. Austin: Are you through, Judge?

Mr. Hanley: I may say this, your Honor, I just can't conceive of counsel for the Commission taking the position that there is any unreliability in this, or that there is anything erroneous about the evidence. We didn't make it; we took it out of reports that came from organizations whose business it is to make these reports, and we offer it for whatever assistance it may be to the Commission.

2436 Trial Examiner Ballinger: This was compiled
from reports, was it?

Mr. Hanley: That is right, Judge. I think I have established that Mr. Boatwright currently in his office receives reports from Dun & Bradstreet, and many other commercial and economic reporting institutions whose business it is to advise industry and commerce about the indices of business in the country.

It is like offering your Honor a business index as might be published in the New York Times on the stock market. We couldn't prove that individually. But certainly it is a reliable source for this type of testimony if the Commission is interested at all, and we think the Commission ought to be.

Trial Examiner Ballinger: Well, Judge, if it is material to the case, all opportunity of cross-examination is denied to counsel for the Commission as to the authenticity of the data from which it is made up.

Mr. Hanley: Well, your Honor, I recognize that. That is quite true, but to advert to the Taggart survey itself, in which this is offered, and only offered in connection with the Taggart survey, and Professor Taggart testified that he took questionnaires from, I think, 487 or 489 service station men, and, Judge, we were denied the opportunity even to look at the questionnaires, much less 2437 cross-examine the individuals who made those questionnaires. And I say to your Honor that thing has been presented in courts in Michigan many times and not once in the State of Michigan has any Court ever received the Taggart study as competent evidence.

Mr. Austin: Your Honor, my information is directly contrary to what Judge Hanley has just said, and it is that the Taggart report has been received and acted upon in criminal convictions in the State of Michigan, and has never been declared unconstitutional.

Mr. Hanley: I won't argue that. I will prove it.

Mr. Austin: You won't be able to. But my information is absolutely the contrary, since yours is on the record; I have been told by reliable sources here that the contrary is the fact. Now, I am not intimating for a minute that the Judge doesn't believe what he says.

Mr. Hanley: We may be wrong in arguing whether the Taggart survey has been received in Michigan or not, but you asked on the hearsay question.

Trial Examiner Ballinger: It is immaterial in this proceeding whether the law under which that survey was made has been declared unconstitutional or constitutional.

Mr. Hanley: But to directly answer your Honor's query, and I take it that is all your Honor is interested in, you have suggested that there is no opportunity on 2438 on the part of the Commission to examine the people who might have the basic source of information which goes into this chart. I concede that is true, your Honor, but we are offering this evidence as having an influence upon the Taggart study, and we assert this: that we, the Respondent, were deprived of any opportunity to examine the sources on which the Taggart study was based.

Now it just seems to me, your Honor, that it makes good sense and is good law that if the hearsay rule is applicable against the Respondent now, it should have been applicable against the Government on the Government's case.

Trial Examiner Ballinger: Do you care to be heard further, Mr. Austin?

Mr. Austin: Yes. It seems to me that the proper way to handle a thing of this kind, if it has any materiality is to put in some recognized report, like Ward's Automotive Reports, or some recognized report which states the automobile production, if that is what is to be proved. That is all that is necessary to put in evidence. And a recognized report of that kind, I think, could be properly offered just as similarly referred to by Judge Hanley, if you want to prove stock exchange prices on a certain day, you probably put in a copy of the commercial chronicle, perhaps the Wall Street Journal. There are recognized reports; Ward's is one for automobile production. Now, if
2439 there is to be a graph made of it, and it is to be contended that the national production was an indication of the Detroit production, those things are more or less argumentative, and I think they find a more proper place in briefs and arguments than they do in evidence. The only real evidence here is the figures for automobile production. And if that is material, that can be introduced through recognized reports which set forth those figures, and from which, undoubtedly, the witness got the material which he has here.

Mr. Hanley: May I ask the witness one more question?

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. Tell us, Mr. Boatwright, please, just where you got the information you have reflected on the Exhibit No. 3.

A. The index, as reflected by Exhibit 3, is predicated upon the reports of the Federal Reserve Bank regular publication.

Mr. Austin: May I ask what the witness means by "predicated upon"?

Mr. Hanley: Surely.

The Witness: Taken direct from. These figures are reported by the Federal Reserve Bank as reflecting the index of automobile production.

2440 Mr. Austin: Then, your Honor, I suggest that those figures which are desired to be used, that the

Federal Reserve Bank reports should be offered in evidence, and this sort of thing can be attached to Respondent's brief if they want to use it.

Mr. Hanley: Well, Judge, we just don't have here—I have got one book which I was fortunately able to obtain in the building—I just don't have those reports, and I just have some difficulty in understanding the type of objection that is confronting us here. We didn't make this chart out of the air. If we can have the opportunity, if there is no objection to the reports themselves, we will make them a part of the record later.

Trial Examiner Ballinger: Do I understand that these figures portrayed on Respondent's Exhibit 3, for identification, were taken from the official publications of the Federal Reserve?

The Witness: Yes, sir.

Mr. Austin: I am not even familiar with such publications, and I don't believe your Honor knows what the nature of them is, and I don't know what these figures mean, and I wouldn't know unless I saw those reports.

Trial Examiner Ballinger: Could you designate the particular reports you have in mind?

The Witness: I receive so many, Judge, I am sorry

2441 I can't tell you the exact name. I will tell you where you can get a—

Trial Examiner Ballinger: Well, you have them in your office?

The Witness: I have them in the office, yes.

Trial Examiner Ballinger: In Chicago?

The Witness: In Chicago, yes.

2442 Trial Examiner Ballinger: Will you transmit those to counsel for the Commission for examination and check on this exhibit?

Mr. Hanley: Surely we will do that, Judge.

The Witness: Sure.

Mr. Hanley: Anything you want.

Trial Examiner Ballinger: Affording counsel for the Commission full opportunity to check the exhibit and verify it; the objection is overruled and Respondent's Exhibit No. 3 is admitted in evidence, subject, however, to the check indicated.

Mr. Austin: Your Honor, I will refuse that check and will have to stand upon the objection. I believe this is absolutely inadmissible under any rules of evidence, and

I entirely submit to the ruling, but I will not request any check, because I don't believe that will cure it. So I am just stating on the record that it will be unnecessary for you to submit any figures.

Mr. Hanley: Irrespective of the statement of counsel, counsel for the Respondent stands ready to do exactly what the Examiner indicates we should do.

Trial Examiner Ballinger: Do you concede that if the reports of the Federal Reserve portray the figures as stated on the chart Respondent's Exhibit 3, that they would be admissible in evidence if presented here?

2443 Mr. Austin: I do not.

Trial Examiner Ballinger: On what ground—

Mr. Austin: I admit—perhaps I didn't understand your Honor. I admit, and would not object to the figures, that is to the report itself, this Federal Reserve report, assuming that it states figures for national production for automobiles. I would not object to the introduction of those figures. But even if those figures were introduced, I would still object to the introduction of this exhibit based upon those figures. I think the figures are proper evidence, but I think that this is used to submit a conclusion upon those figures and for argumentative purposes.

Trial Examiner Ballinger: Objection is overruled.

(The document referred to, heretofore marked for identification "RESPONDENT'S EXHIBIT 3", was received in evidence.)

2444 Mr. Hanley: May I go off the record a moment, your Honor. I don't remember what this book relates to.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record. We will take a recess for five minutes.

(A short recess was had.)

Trial Examiner Ballinger: We will come to order.

By Mr. Hanley:

Q. Mr. Boatwright, you were asked a few minutes ago your opinion or knowledge as to the relative production and consumption of gasoline in the State of Michigan as between the year 1938, on the one hand, and 1937 and 1939, on the other hand, and it was suggested that the source of your information, namely, "The Minerals Yearbook" should be produced. I now hand you "The Minerals Yearbook" for the State of Michigan, and ask you if you can now give your opinion or your knowledge in response to the question?

A. "The Minerals Yearbook" is for the entire country. It is a publication of the United States Department of Interior, Bureau of Mines, prepared under the direction of R. R. Sayers of the Bureau of Mines, while the entire compilation is under the direction of H. Herbert Hughes.

I read from a table on page 1005, the State of Michigan production, all quantities are stated in terms of thousands of 42-gallon barrels. 2445

Mr. Austin: What is that, crude oil?

The Witness: Gasoline.

A. For the year 1937: production, 5,672; consumption, 26,443.

The year 1938: production, 6,822; consumption, 25,094.

In 1939: production, 7,932; consumption, 27,455.

Q. Now, Mr. Boatwright, in your judgment as an economist, what do those figures mean, in relation to the survey made by Professor Taggart?

A. Well, the outstanding thing about the figures is the indicated decline during the year in which he gathered his data. His study, likewise, points out that costs tend to fluctuate or to vary with gallonage. His conclusion in that respect is confirmed by many of the analyses we have conducted. Therefore, if consumption declines and if your costs tend to vary with gallonage during this period of low consumption; low gallonage, high costs result.

Q. So you may be advised, Mr. Boatwright, I am going into the question of costs now. I will leave Dr. Taggart.

A. All right.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

2446 Q. Mr. Boatwright, are you familiar with the fact that there came a time in 1936, about September, when Ned's Auto Supply Company was put on a basis of purchasing gasoline at ½c below the then prevailing tank wagon price?

A. I am familiar with that.

Q. Have you made any survey and analysis of the costs of the Standard Oil Company in relation to serving Ned's Auto Supply Company, on the one hand, as distinguished from serving regular tank wagon customers, on the other hand?

A. I have.

Q. When did you do that?

A. Within the past two months. The exact date, I don't recall.

Q. Were you assisted in that survey by anyone, and, if so, whom?

A. I was assisted by various members of my own department, as well as having reviewed the processes and the findings with the head of the sales accounting department, Mr. F. L. King; the head of the sales operating department, Mr. W. H. Tell; the assistant comptroller of the general office, Mr. O. M. Perrenot. In addition to that assistance or counsel, the processes and the work was done largely by cost accountants in my own department, with the assistance of accounting men in the Detroit sales accounting department.

2447 Q. Did you review all of the procedure and conclusions that went into the results which you ultimately found to exist?

A. I did.

Q. And do you personally have knowledge of both the procedure and the results?

A. I do.

Mr. Hanley: I hand the witness a paper entitled: "Differences in Certain Marketing Expense Items Incurred by Distributing through Regular Reseller Outlets Versus Distributing through Ned's Auto Supply Company, 1937." The paper is also designated as "Schedule A," and I ask to have it marked Respondent's Exhibit 31-A for identification.

Trial Examiner Ballinger: The reporter will so mark the paper.

(The document referred to was marked, for identification, "Respondent's Exhibit 31-A.")

By Mr. Hanley:

Q. Mr. Boatwright, there appear on Respondent's Exhibit 31-A, on the left hand side, certain items by name and then there appear three columns of figures. Will you explain what those mean?

A. Yes. The name of the items are the marketing expense items according to either individual items or
2448 classifications of items of a similar nature going into our general marketing cost statement.

The first column of figures is the resultant per gallon cost for each of these items individually and in total for serving our regular reseller business.

The second column of figures are the marketing costs of serving Ned's Auto Supply Company by tank wagon for these particular marketing expense items.

The third column shows the difference of marketing costs between those costs incurred on our regular reseller business, and costs incurred in supplying Ned's Auto Supply. They are shown, as I say, by individual items, classifications of items, and . total.

2449 Q. Does Exhibit 31-A reflect your conclusion as to the difference in the cost of sale, delivery, and market of gasoline to Ned's, as contrasted with the regular reseller outlet?

A. It reflects my conclusion as based upon marketing expense items that could be calculated separately by customers.

In addition to the conclusion as shown on schedule A there is a long list of marketing expense items which will be shown later that could not be segregated among customers but which, from my experience, tend to make the conclusions as shown by schedule A an understatement of the true cost difference.

Mr. Hanley: Now, if your Honor please, I propose to go into some detail with the witness in relation to the supporting data that he has used to arrive at these conclusions. I don't know just how your Honor may think it may be most helpful for me to do that. I am perfectly willing to introduce the documents in evidence right now or I can go into it orally and then introduce them later. I will do it anyway that seems to be most desirable to Court and counsel. I intend to offer them, anyway, I can assure your Honor of that, now.

Trial Examiner Ballinger: Has counsel for the Commission any suggestion?

2450 Mr. Austin: Well, do I understand you are going into an analysis of each one of these items?

Mr. Hanley: That's right, Mr. Austin; each one of them; in detail.

2451 Mr. Austin: Are you going to offer the basic figures in evidence?

Mr. Hanley: I am going to offer Exhibit 31-A in evidence, but I propose to support it.

Trial Examiner Ballinger: The Examiner would suggest that you have the papers identified and then proceed with your examination, so that we may follow. Identify the papers.

Mr. Hanley: Very well, I will be glad to do that, your Honor.

Trial Examiner Ballinger: The reporter will mark the document handed in by counsel for the Respondent as Respondent's Exhibits 31-B to 31-Q, for identification.

(The documents referred to were marked, for identification, "Respondent's Exhibits 31-B to 31-Q.")

Mr. Hanley: At this time, it appearing that the Respondent is unable to furnish complete copies of the Exhibits marked, for identification, it is requested that we may adjourn, and the Respondent be afforded the opportunity to make typewritten copies of the proffered Exhibits for the use of Court and counsel during the examination of the witness.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

The motion is granted, and now, at 11:45 A. M., the
2452 hearing stands in recess until 1:30 P. M.

(Thereupon, at 11:45 o'clock A. M., an adjournment was taken to reconvene at 1:30 P. M.)

2453 Afternoon Session.

1:30 P. M.

Trial Examiner Ballinger: We will come to order.

Mr. Hanley: On the record, if you please.

I am now able to supply Court and counsel with copies of the exhibits that were marked, for identification, this morning.

Trial Examiner Ballinger: Respondent's Exhibits 31-A to 31-Q, both inclusive.

Mr. Hanley: Yes, your Honor.

And, for the information of Court and counsel, I would like to say, now, that in this examination on these exhibits, and in relation to the cost analysis of the Respondent, the Respondent stands on no ceremony at all in reference to whether it is direct examination or cross examination, and invites—

Trial Examiner Ballinger: Or voir dire.

Mr. Hanley: Right. Anything at all. We invite any inquiry by Court and counsel at any time that will aid either Court or counsel in understanding the witness; without reference to any technical rules of procedure at all.

JOHN W. BOATWRIGHT, thereupon resumed the stand, and testified further as follows:

2454 *Direct Examination (Continued) by Mr. Hanley.*

Q. Mr. Boatwright, this morning you were asked to identify the exhibit now marked as Respondent's Exhibit 31-A for identification.

A. That is correct.

Q. In your own words, I wish you would please explain just how you have arrived at each of the figures that appear on Exhibit 31-A, and in so doing you may refer to Exhibits 31-B to 31-Q, inclusive, or any other memoranda which you may have.

Trial Examiner Ballinger: Please make particular reference to the exhibit to which you refer.

The Witness: I shall.

A. As we go through this explanation, I shall explain the various forms, and if the explanation is not detailed enough, if you will stop me, I shall be glad to elaborate.

The first attempt was to determine the difference in cost for labor for delivery to Ned's Auto Supply units as contrasted with the labor cost of the delivery for serving our own reseller outlets.

By Mr. Hanley:

Q. Let me ask you, Mr. Boatwright, if in contemplation of this chart and at my request, your department made a
detailed analysis in Detroit and in Chicago of this
2455 question of cost of delivering and selling to Ned's as
contrasted with selling to other reseller buyers?

A. At your request we did make the detailed analysis in Detroit and Chicago.

Q. Please proceed.

Trial Examiner Ballinger: You are now dealing with the first item on Respondent's Exhibit 31-A under the heading "Salaries—Drivers"?

The Witness: That is correct.

A. (Continued.) We maintain in our warehouses an efficiency record upon truck operation. Each time that a delivery truck pulls into our warehouse yard there is an indicated time in, there is a loading time marked for the subsequent load, and then upon the return there is a time back to the yard. We refer to this form as form 018, which shows on the record the size of the dump or delivery, and the time involved in making that delivery. When a truck is in operation a salaried driver is likewise in operation. The salaried rate for drivers in the Detroit area averages 95.2¢ per hour.

We selected two trucks that had been used to deliver nothing but gasoline. Frequently our other trucks deliver gasoline in the summer, make fuel oil deliveries in the winter, or other products. We felt that it would be a better
representation of our gasoline delivery costs to limit
2456 our inquiry to trucks used exclusively for that pur-
pose. We likewise selected two trucks which were of average tank capacity, and of average age and about average maintenance cost, so we would have as accurately as possible the true reflection.

Now, from these form 018 tickets, we studied the time consumed when this truck was making full dump deliveries, or when this truck was making multiple dump deliveries operating on a route.

The Ned's Auto Supply, as a type of outlet, would take full dump deliveries. The rank and file of our reseller outlets are what we call multiple dump deliveries, and the truck operates on a route.

We segregate the 018 tickets according to whether the truck, upon leaving the yard, was destined for a full dump delivery. From the two trucks, we took 94 tickets for truck No. 34,270, and 200 tickets for truck No. 29,525.

These tickets were studied by segments that I could insure that we had reached a stability of accomplishment. Is that clear; just exactly what I mean?

Then we took the number of gallons as represented by these respective tickets, and the time involved, according to the actual record, of the accomplishments of the trucks; reduced it to a gallon per hour and extended the gallonage per hour by the hourly salary rate of the driver which, when divided by the output, gave the cost per gallon
2457 averaging for the two trucks .074. Calculations thus far are prior to the 3% Federal insurance and unemployment tax which, during 1937, were at the rate of 3%, which was then added to the .074, giving an average delivery cost on a full capacity basis of .076 per gallon.

Q. Now, Mr. Boatwright, is that figure .076 reflected anywhere on Exhibit 31-A? If so, please point it out.

A. It is, sir. It is reflected in the second column of figures under Ned's Auto Supply Company, "Costs, cents per gallon basis, No. 1-A; Salaries, Drivers, .076c."

Q. You have been discussing, if I correctly understand your testimony, the material which is reflected on Respondent's Exhibit 31-B; am I correct about that?

A. That is correct.

Q. Please proceed, Mr. Boatwright.

Mr. Austin: May I ask a question?

Mr. Hanley: Surely.

Mr. Austin: I believe you said we might interrupt occasionally.

Perhaps you explained it, but if you did, I didn't catch it, as to why it was 94 of these 018 used for one of these trucks, and 200 for another.

The Witness: Yes. The 94 tickets are those we could clearly get the time without interruption for the noon hour.

In other words, there were 94 tickets that there would
2458 be a dump without any challenge of authenticity of the time record.

Mr. Austin: How about the 200?

The Witness: Serving different types of reseller outlets and routes. There merely happened to be more of them, of one truck than another.

By Mr. Hanley:

Q. That is to say, if I understand right, Mr. Boatwright, that you eliminated the possibility of any time influence by reason of the truck driver taking time out for lunch, or anything of that sort?

A. Yes. Frequently the truck would pull out of the yard, say, at 11:30 in the morning, and he might check back in the yard at 2:30 in the afternoon. During that time period he has had a lunch period which, according to the normal procedure, is usually one hour, but he may have taken 55 minutes or 45 minutes and quit five or ten minutes earlier that evening, so all tickets of that nature were not included in the analysis. These tickets are only those where we have an exact time for the truck in the yard, out, and back in the yard with the empty truck.

Now, for comparison purposes—and here I am referring to what I think is Respondent's Exhibit 31-C—I did not have my sheets marked in accordance with the exhibit, but I shall attempt to refer to them.

2459 Q. You go right ahead and I will fix one up for you.

A. All right. For comparative purposes we wanted the costs per gallon of delivery for salaries to drivers for the rank and file of reseller outlets.

We maintain, in our bulk plants, a truck efficiency report wherein we have recorded by individual trucks every hour of operation and every gallon of product distributed. That report will indicate the exact hours of a truck's utilization for gasoline and the through put during those exact hours.

The four Ned's outlets being served during the year 1937 were served respectively out of our Scotten Avenue plant, Lacaste plant, and North Detroit plant. Now, the actual hours of operation are recorded in our marketing expense item, 1006 or 2006. Therefore, the hourly cost of 95.2 was extended times the number of hours that drivers were operating for delivery of gasoline, to secure a total salary cost during this particular time period for these three plants. Below that is shown the gallons delivered out of those three plants, and the cost per hour on an average basis prior to Federal Insurance and Unemployment Tax. The average cost out of Scotten Avenue plant was .110¢ per gallon. Out-of Lacaste plant, .113¢ per gallon, and out of the North Detroit plant, .111¢ per gallon, or averaging, for the three plants, .111¢.

2460 Trial Examiner Ballinger: Why were those three plants selected?

The Witness: They were the three plants which were serving the four outlets, Ned's Auto Supply.

By Mr. Hanley:

Q. Mr. Boatwright, please explain to the Court what the fact is as to whether or not you and members of your staff came to Detroit and actually looked at these tickets and made these calculations from the tickets themselves?

A. The entire calculation, as explained to date was made by one of my assistants and myself, assisted by one member of the sales accounting department in Detroit. When we add the 3% Federal Insurance and Unemployment tax to the average cost per gallon for salaried drivers of .003¢, we secure an average overall cost for serving our reseller—our rank and file of reseller—gallonage for truck driver's salary only of .114.

Q. May I ask, Mr. Boatwright, if that figure is reflected anywhere on the summary, Exhibit 31-A, and if so, where?

A. That figure is then transposed to the summary under No. 1 "Delivery Costs", subdivision (a) "Salaries - Drivers", and is under the column "Regular Reseller Business".

Q. Now, to clarify this, does that mean that it cost .114, according to your survey to deliver to the ordinary reseller outlet as distinguished from a cost delivered 2461 to Ned's Auto Supply Company, .076¢?

A. That is exactly the differentiation.

Mr. Austin: You don't exactly mean that, do you, Judge? You mean to put that in the past tense and refer it back to the cost in 1937?

Mr. Hanley: Well, this survey covers 1937, so it must necessarily relate to 1937.

Mr. Austin: These two tables don't cover '37. They are tests made in 1939 and 1940, and it is true, is it, Mr. Boatwright, that none of the deliveries which were used here were deliveries to Ned's Auto Supply? In other words, this is a test made of conditions in 1939 and 1940 for the purpose of determining something that happened in 1937; is that right?

The Witness: Yes. We do not maintain the form

018 tickets beyond one year at our bulk plant. My statement that it is the difference in cost is that I have taken a type of delivery which corresponds with the type of delivery made to Ned's on the one hand—

Mr. Austin: That was made?

The Witness: That was made to Ned's, and compared that with a different type of delivery that was continuous in '36, '37, '38, '39, '40, and is still continuing; the rank and file. If there is any challenge of this particular fig-
ure, it is an understatement, because we have intro-
2462 duced increased efficiencies of truck operation be-
tween the time period. The actual union agreement and the per hour cost of labor was reached between the company and the union during the early part of 1937, so that the hourly rate is the same as prevails during this time study.

By Mr. Hanley:

Q. Now, just to be very sure we are right about this, Mr. Boatwright, as I understand it, you didn't use 1937 figures, because they weren't available?

A. That is correct.

Q. You did use 1939 and 1940 figures because they were available?

A. That is the full year 1940.

Q. I see.

A. Except as indicated in the exhibits where we may have taken four monthly periods rather than doing an intricate amount of detail work.

Q. Now, are you able to say from your knowledge and experience the figures that you have used are typical of the figures that would exist in the year 1937?

A. I am able to say from my knowledge and experience, based on a study of a similar nature conducted by my department in 1936, that the differential in cost thus established is narrower than the differential in cost of a
similar nature established in adjacent fields in a
2463 special study we made on this problem in 1936, in
connection with our leasing of service stations.

Q. Frankly, I don't know just what that means. I think, perhaps, if you develop the figure at the bottom of page, Exhibit 31-C, on the basis of the difference of marketing costs; that we can get at the question in my mind. Will you please explain that?

A. Surely. Having established in per gallon cost of delivery on a full dump basis as being .076, and having established a cost for salaried delivery on a multiple dump basis of .114, there is a savings which accrues to the company of .038 per gallon, when we compare full load deliveries with multiple load deliveries. My answer, as previously given, was that in a similar analysis made during the year 1936, we secured and established a wider differential than .038.

Q. I see. I think that answers my question.

Now, I think you have testified about three figures in the first line of your Exhibit 31-A—I mean I think you have transposed those three figures to the first line of 31-A. Will you please now go to the subject of 1(b), "Equipment," and explain how you arrive at the figures disclosed on Exhibit 31-A in relation to equipment.

A. Our equipment cost differences is explained starting on Exhibit 31-D. The source of our information is
2464 the maintenance costs of records obtained from our machine shops in Detroit.

The depreciation rates used in this calculation are those established by the company and approved by the Department of Internal Revenue for tax purposes.

The goods used were included on a cost basis representing manufacturing costs plus transportation plus state and federal taxes.

Our procedure was to take the operating and maintenance costs on these same two trucks, Nos. 34,270 and 29,525.

Q. Mr. Boatwright, I think it is clear, but I want to emphasize it, if it isn't. Those are two actual trucks that were operating in Detroit?

A. Yes, sir.

2465 Q. Is that right?

A. Yes, sir.

Q. Go ahead.

A. When we secured the annual costs—

Trial Examiner Ballinger: You haven't finished your statement there with reference to operating.

A. (Continuing) The operating and maintenance cost of these same two truck numbers as given—

Trial Examiner Ballinger: Compiled from what?

A. (Continuing) Were compiled from the above sources for the full year of 1940.

The annual costs when divided by the hours of operation gave an equipment cost per hour. The per hour cost of operation was divided by the hourly outputs to obtain the per gallon cost on a full dump basis, and the per gallon cost on a multiple dump basis when serving the rank and file of all reseller accounts. Our investment in each of these trucks, the chassis thereof is shown. The investment in the tank mounted on this chassis is shown.

Q. Now, are you referring to Exhibit 31-D?

A. That is correct.

Q. Go ahead.

A. The depreciation on the chassis of trucks is at a 12 per cent rate, while the depreciation on the tank mounted on that chassis is on a 5 per cent rate. The goods
2466 used were costed as I explained, and are shown for
each of these two trucks for the year 1940.

Q. What do you mean by goods used?

A. The gasoline and the motor oil, grease consumed by the operation of these two vehicles for effecting deliveries during the year 1940.

2467 Q. And how did you cost that?

A. That is costed on a manufacturing cost basis, plus actual transportation costs, plus state and federal taxes. That is the actual cost to our company. There is no profit margin nor no marketing margin included in that figure.

Q. Are there any excise taxes included in it anywhere?

A. There are excise taxes, because the gasoline and motor oil is consumed on public highways, and the excise tax is paid.

Q. So we have to pay that?

A. That is correct.

Q. And that is a cost to the company; is that correct?

A. That is correct. Then we took the licenses on the trucks, the casing, the tube, and battery repairs, then the machine shop repairs, mechanical adjustments, miscellaneous mechanical work, and so on plus miscellaneous expense, amounting to the figure $20.46 for truck No. 34,270, and $39.73 for truck No. 29,525. The sum total of these items gives the annual operating cost of these two trucks for effecting gasoline deliveries to reseller accounts in the Detroit area for the full year 1940.

Referring now to Respondent's Exhibit 31-E:

Trial Examiner Ballinger: Where is that reflected on Respondent's Exhibit 31-A?

2468 The Witness: It will be necessary to continue the explanation, because there is no figure shown on Respondent's Exhibit 31-D that is reflected on the subject as yet.

By Mr. Hanley:

Q. In other words, Mr. Boatwright, that is just a part of the computation on this equipment cost which continues on Exhibit 31-E?

A. That is correct.

Q. Will you please continue with your explanation?

A. Now, from our analysis of form 018, it was indicated that the time per ticket for truck No. 34270 was 64.3 minutes when that truck was working on a full dump basis, and 87.8 minutes when that truck was operating on a multiple dump basis following a route.

Comparable time consumed by truck No. 29525 in making full dump deliveries was 74.6 minutes, and on a multiple dump basis 107.8 minutes. The calculations were as follows: The number of tickets, by truck, is shown on Respondent's Exhibit 31-E as being 94 for truck No. 34270, and 200 for 29525.

Q. Let me ask you again, Mr. Boatwright, did you or members of your staff or both of them actually examine those physical tickets in the City of Detroit?

A. Yes, sir.

2469 Q. And are those tickets kept as a matter of regular routine in the bookkeeping of the Standard Oil Company?

A. They are.

Q. Are they available now, if the Government wants to look at them?

A. They are.

Q. You may proceed.

A. The time consumed on the 94 tickets for truck No. 34,270 was 6,043 minutes, while the time consumed on truck 29,525 was 14,925 minutes, making the average time per minute, as indicated in the testimony just preceding. A similar computation and a similar measurement of time was made on these same two trucks when operating upon a multiple dump basis.

The results of that calculation have just been placed in the record in the testimony, likewise, just preceding.

Q. And that appears on Respondent's Exhibit 31-E.

A. That is correct.

We then took the total number of tickets for each of these two trucks made during the entire year 1940 wherein the delivery was of a full capacity dump: that is, single stop.

Likewise we took the number of tickets that were written when these trucks were making multiple dump as they operated on routes serving the rank and file of our reseller outlets. The result of addition of time de-
2470 voted to single dumps and time devoted to multiple dumps gave the total minutes of operation and, hence, the total hours of operation of these two trucks during the year 1940, aggregating as is shown in the last figure on Respondent's Exhibit 31E, a total hours of operation of 4,254 hours for the two trucks.

Continuing to Respondent's Exhibit 31-F. The cost of operating each of these two trucks on an annual basis, as was explained in detail on Respondent's Exhibit 31-D, was divided by the total hours of operation to secure an equipment cost per hour of operation. For truck No. 34270 the equipment cost per hour was 49.04¢.

2471 Q. That is, per hour?

A. That is per hour, sir.

The total equipment cost for operating truck No. 29525 averaged 48.8¢ per hour, giving an average for the two of 48.52¢ per hour.

The average equipment cost per hour on the above trucks was then divided by the average hourly output for single dump deliveries as determined from our above analysis, which resulted in a cost per gallon as follows: The average hourly cost of 48.52¢ per hour was divided by the average hourly output of 1,292.4 gallons, giving an average cost per gallon of .038¢, when operating your equipment making full dump deliveries.

This figure is transposed to Respondent's Exhibit 31-A, being a summary of this calculation and is shown under item 1, subpoint (b), "equipment" in the second column.

To secure the equipment cost per gallon for delivery to the rank and file of retail outlets, the annual cost of the two trucks was divided by the total annual output. The total annual cost of the two trucks was $2,063.89, putting out a total annual volume of 4,228,839 gallons, dividing total gallonage into total cost we have a cost per gallon, when serving the rank and file of reseller outlets, for equipment only, of .049¢. This figure was likewise 2472 transposed to Respondent's Exhibit 31-A, being a summary of these calculations and is shown under "1. Delivery cost, (b) equipment," the first column being "Regular Reseller Business Cost per Gallon."

The difference between the .049 representing our cost of delivery to the regular reseller outlets and the cost of .038 representing cost of delivery on a full dump basis, is .011¢ per gallon saving when full truckloads are made in contrast with when the truck makes multiple dumps to empty its capacity.

Q. Mr. Boatwright, in every instance does Column 3 on Respondent's Exhibit 31-A represent the difference between Column 1 and Column 2? I am now referring by numbers to the columns that have figures in, without reference to the item.

A. Column 3 is the difference between Column 1 and Column 2.

2473 Q. You have now testified to item No. 1, an arithmetical number, having to do with "salaries—drivers," and "equipment," and will you tell us do we correctly understand that the difference between the cost of that service to regular reseller outlets, on the one hand, and Ned's Auto Supply Company, on the other hand, is represented by column 3 on Exhibit 31-A?

A. That is correct.

Mr. Hanley: Now, if your Honor please, I would like to request, on behalf of the witness, that we take a short recess. He contracted a cold last night and he says he is perfectly willing to go on but—

Trial Examiner Ballinger: The request is granted. We will take a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: We will come to order.

By Mr. Hanley:

Q. I think, Mr. Boatwright, you had concluded your remark relative to item No. 1, "delivery cost," on Exhibit 31-A through Exhibit 31-F. Would you please now explain the items under No. 2 on Exhibit 31-A?

A. Item No. 2 is indicated as being "Marketing Expense Items Not Influenced By Ned's Auto Supply Company" volume.

Subpoint "a" under that is "Sales Promotion". I refer

you to Respondent's Exhibit 31-G, as to the explana-
2474 tion of this particular item.

Our business association with Ned's Auto Supply Company was such that the Standard Oil Company assumed no responsibility for sales promotion activity.

Accordingly, the following expense items, which are allocated to our various channels of marketing upon a distribution of time basis were taken from form 189 titled "Comparative Statement of Expense," for the year 1939 and divided by tank wagon reseller gallonage, excluding volume sold to Ned's Auto Supply Company, to secure the marketing cost saving on a per gallon basis.

Trial Examiner Balfinger: Will you permit an interruption? What is form 189?

The Witness: That is the Standard Oil Company's form showing a breakdown of our marketing expense items (showing document to Examiner).

Enumerating the individual items included under this caption, they would be as follows: Account No. 1002—

By Mr. Hanley:

Q. Just to clarify the exhibit, Mr. Boatwright, these account numbers which appear on Exhibit 31-G, and else-
where through these exhibits, what do they represent?
2475 A. They are the numbers assigned to various ac-
counts in which we classify our various marketing expense items as per the code of accounts of the sales accounting department of the Standard Oil Company.

Q. Are those routine per books accounts of the Standard Oil Company?

A. They are.

Q. Do they have any reference whatsoever to this lawsuit?

A. They do not.

Q. Has that been the accounting procedure of the Standard Oil Company for many years last past?

A. It has.

Q. Is it the accounting procedure of the Standard Oil Company now?

A. It is.

Q. You may proceed.

A. I think I had given you account No. 1002, being titled: "Salaries—Sales Promotion."

The expenditure for that particular item was $6,597.25.

Account No. 1003—

Mr. Austin: Pardon me. Can't the witness make a little statement of explanation of what those are as he goes along?

Mr. Hanley: Yes.

Mr. Austin: What kind of salaries and what kind
2476 of services or what is included there? I mean for what.

The Witness: I should be happy to do that.

Mr. Hanley: I thought it would be better if we put in a blank form 189 that the witness has referred to.

Trial Examiner Ballinger: It occurred to me at the time.

Mr. Hanley: I will ask the witness that.

By Mr. Hanley:

Q. I will ask you, Mr. Boatwright, if you have with you a blank copy of what has been referred to as form 189.

A. I have a blank copy, and on this blank copy I have written from our code of accounts the principal expense items entering into each classification.

Q. Will you please produce that?

Mr. Hanley: I think, if your Honor please, this will be helpful not only on this, but also on the cent and a half classification that we hope to make later.

Will you mark this, please?

Trial Examiner Ballinger: The reporter will mark the paper—

Off the record.

(A discussion ensued off the record.)

Trial Examiner Bal[illegible]: On the record.

The reporter will mark the document handed him by counsel for Respondent, Respondent's Exhibit 32, for
2477 identification.

(The document referred to was marked, for identification, "Respondent's Exhibit 32.")

Mr. Hanley: Now, if your Honor please, in order to keep the record straight, I ask the privilege on behalf of the Respondent to substitute for what has now been marked Respondent's Exhibit 32, for identification, a blank form identified in the company nomenclature as form 189, for the reason that there appear on this particular document certain pencil notations made by Mr. Boatwright for his own information as to what the accounts include.

I wish to say now that so far as these pencil notations are concerned, and so far as the fact is concerned, as to what the several accounts include, we will be glad to supply any information that either counsel or Court may desire, either through Mr. Boatwright or through any other source that we have.

Mr. Austin: Of course, I am not asking for those particular pencil notations, but—

Trial Examiner Ballinger: Without objection, counsel may substitute a form without the pencil notations, and withdraw the one now marked for identification; substitute one to be marked Respondent's Exhibit 32, for identification.

Mr. Hanley: We will have that within a day or two.

2478 The Witness: Counsel for the Commission, as I recall, asked the question prior to the discussion as to what items of expense are included in subaccount 1002 entitled "Salaries—Sales Promotion." In each of our division offices we maintain a sales manager, wholesale sales; a sales manager, reseller sales; the sales manager, wholesale, has charge of the sales promotional function to the tank wagon consuming market; the sales manager, reseller, has charge of the sales promotional function through the reseller channel of our distribution.

Each of these gentlemen has an assistant whose salaries are likewise included under the caption. This item represents the salaries of the sales manager, reseller; and the assistant sales manager, reseller, in the Detroit area.

Mr. Austin: That is Mr. Raupagh's office here in Detroit?

The Witness: That is correct.

By Mr. Hanley:

Q. Well, that applies to each of the divisional offices of the Standard Oil Company?

A. Yes, each of our 28 divisions have exactly the same set up in that respect.

Subaccount 1003, being entitled "Salaries—Sales Promotion—Others" represents the income to the clerical assistants, the stenographers, and the office boys who 2479 work in the sales promotion departments, representing the sum total of the clerical assistants to the sales manager and the assistant sales manager, as I have previously explained.

Mr. Austin: Only for the reseller?

The Witness: That is correct.

Mr. Austin: Sales manager and assistant sales manager?

The Witness: That is correct.

Mr. Austin: Don't some of the employees work for both, and has there been an allocation for that?

The Witness: There is an allocation wherever there is an individual who works, let us say, as an office boy for the two, his time and expenses—may I clarify the record? His expenses are allocated on a time split basis according to the manner in which he devotes his time first to the reseller function, as distinct from the consumer function.

By Mr. Hanley:

Q. Now, Mr. Boatwright, to clarify this thing, so far as Exhibit 31-G is concerned, has there been an allocation to the reseller channel in these figures of all of the items that have been incorporated in the several accounts which appear on 31-G?

A. There has been a distribution, and, as stated, 2480 this distribution is predicated upon a break-down of time, the ratios of time of employment being applied to the total to get an assessed expense against individual channels.

(Continuing.) These two items being entirely salary items upon which a Federal Insurance and Unemployment Tax of 3% was paid, there is included in our total payments of insurance in items 1243 and 1244, 3% of the two sums mentioned, namely, $6,597.23.

Q. 25¢.

A. 25¢, yes. Plus $3,294.42. Applying the 3%, there is a tax assessment against these two items of $296.75.

The next item is our subaccount 1031, which represents the traveling expense of the sales promoter and the assistant sales promoter as he works about among the various salesmen, the various reseller outlets, and so forth. He incurs miscellaneous expenditures. The item is small, being for the year 1937 $235.92. The sum total of this item is allocated along channels on the same time split basis as is any of the other sales promotional items.

By Mr. Hanley:

Q. Do we understand from that, properly, Mr. Boatwright, the figure you have included on Exhibit 31-G is an allocation to the gasoline reseller channels exclusive of wholesale operations or any other kind of operations?

2481 A. That is correct. That is a reseller cost.

Q. I see. All right.

A. Continuing. The next item being 1046, represents the operation and maintenance cost of cars furnished to the sales manager and the assistant sales manager. This item being $161.41 for the year 1937, represents the cost that is assignable to reseller gallonage.

Item 1101 is the depreciation expense of the vehicles or automobiles furnished to the sales manager and the assistant sales manager, in this case representing $80 for the year. The sum total of these various sales promotional expenses is $10,665.75.

The total reseller gallonage of the Standard Oil Company, excluding the volume of Ned's Auto Supply in the Detroit area, was 66,588,527 gallons. Dividing the $10,665.75 by this gallonage results in a per gallon sales promotional expense of .016¢ per gallon.

2482 Now, is that figure reflected anywhere on Exhibit 31-A, Mr. Boatwright?

A. That figure is reflected on Exhibit 31-A under two (a) entitled "Sales Promotion."

Q. And under the column "Regular Reseller Business"; is that correct?

A. That is correct.

Q. You have indicated, Mr. Boatwright, both on the Exhibit 31-A and in your testimony that this is an item of expense not influenced by Ned's Auto Supply Company. I wish you would now please explain to the Court just why you think that none of this expense was applicable to Ned's Auto Supply Company in 1937?

A. Our business association with Ned's Auto Supply was to the effect that we had no responsibility and had been asked not to assume any responsibility for the driveway training in merchandising procedure of employees of Ned's Auto Supply. They did, and did undertake, to train their own driveway salesmen according to their own patterns, rather than expecting or requesting the Standard Oil Company to do the training in that respect. Hence we did not have the sales promotional obligation with that customer that we have with our regular reseller accounts.

2483 Now, that particular item amounts to .016 of a cent, as I understand your figure, Mr. Boatwright?

A. That is correct.

Q. You have another item, parenthetical subdivision (b) under No. 2 on Exhibit 31-A. Will you please explain how you arrive at that figure?

A. Yes. I refer you to the explanation on Exhibit 31-H, which is under the title "Other," or other expenses not influenced by Ned's Auto Supply. In addition to the sales promotional item of expense, there are certain other marketing expense items of an overhead nature that are not influenced by Ned's Auto Supply business. These are as follows:

Account 1004, entitled "Salaries—Supervision—Others."

Mr. Austin: Mr. Boatwright, are these also items which appear upon that form 189?

The Witness: They do.

A. (Continuing) This particular item is made up of a secretary to the manager, clerk, draftsman in the construction department, and the stenographer in the construction department.

The next item—

Mr. Austin: Pardon me just a moment. Anticipating, perhaps, what you are going to ask him later in line
2484 with the question you have just asked him about why the items on 31-G were not allocable in any part to Ned's, would it be better, since there is a miscellaneous list, to have him explain as to each one of these as he goes along?

Mr. Hanley: You mean as to what appears on 31-H, Mr. Austin?

Mr. Austin: Yes. In view of th[illegible]ct that they are miscellaneous items.

Mr. Hanley: You mean it in relation to Ned's?

Mr. Austin: As to why they are not allocable to Ned's.

Mr. Hanley: Yes.

By Mr. Hanley:

Q. Will you please do that, as you explain what these items are, please tell us as you go along, why you do not think they are properly applicable to Ned's in 1937?

A. Certainly.

Mr. Hanley: That is what you meant, isn't it?

Mr. Austin: Yes.

A. Certainly a draftsman in our construction department who works on designs and lay-outs of proposed remodeling of company-owned stations, or of remodeling

of other plant facilities, having done nothing of that
2485 nature in connection with Ned's Auto Supply, couldn't
be logically charged as any cost incurred because of the Ned's business, nor would the clerk or stenographer in the construction department be regarded as cost against doing business, to Ned's Auto Supply.

The manager's stenographer, representing the salary of the stenographer of one individual working for Mr. Raupagh, is not a marketing expense item that could be influenced by the acquisition or the loss of any such account as Ned's Auto Supply. That has remained constant except as may have been influenced by increases because of service for a period of years.

Mr. Austin: Did I understand you to refer to a stenographer for Mr. Raupagh?

The Witness: That is correct.

Mr. Austin: Does that have some special allocation to construction? I am not quite clear whether everything in this 1001 relates to the construction department.

The Witness: No. And may I point out here that I have taken these pencilled memorandum from our code of accounts, and these items represent our particular charges under these particular classifications, although there may be cases where you have an account which you may classify
as an open and account that it would be impossible,
2486 without reprinting the entire code of account, to give
you every minute detail, but, in this particular item, it represents the manager's stenographer, clerk, draftsman, or stenographer in the construction department.

Mr. Austin: You mean the manager of the construction department? You said the manager's stenographer or something.

The Witness: Manager's stenographer. Mr. Raupagh's stenographer.

Mr. Austin: I don't want to get into any argument or cross examination here now. I am just trying to get this explained.

Mr. Hanley: I think I perceive your difficulty, Mr. Austin. There are certain individuals whose salaries are included in this particular account, and I am afraid it is not quite clear, Mr. Boatwright, just who those individuals are.

By Mr. Hanley:

Q. Will you just state them again, please?

A. Yes. The field manager's stenographer.

Mr. Austin: Who is the field manager?

The Witness: Mr. Raupagh. The clerk, the draftsman—

Trial Examiner Ballinger: Isn't he also superintendent
of this entire district: in charge of this entire
2487 district?

The Witness: We refer to him as the sales field manager. He is in charge of the Detroit division.

Mr. Austin: Wouldn't some portion of the expense of his office be allocable to Ned's?

Mr. Hanley: There is; and that appears.

The Witness: That does appear.

Mr. Hanley: That will appear, Judge, as we go along.

Trial Examiner Ballinger: Proceed.

The Witness: Do we have further question on that?

Mr. Austin: You just said field manager's stenographer. Will you go on and include the other stenographers included in 1001?

The Witness: Yes. A clerk in the construction department, or a stenographer or draftsman in that department. Generally speaking, any item included in this particular classification does not fall into the regular classifications, such as promotion, warehouse, and so forth. They are miscellaneous-type salaries included in the field division office.

Mr. Hanley: Does that clarify that particular account in your mind?

Mr. Austin: Yes. Just to be sure on one point: you
mentioned construction, not as anything referring par-
2488 ticularly to 1001, but, rather, as only an example of
a number of things. Do I understand your last state-
ment to be that that is miscellaneous salaries in Mr. Raupagh's office? In other words, this isn't particularly a construction division item, is it, this 1001?

The Witness: Not necessarily, although it so happens that the principal component parts of this expense item are incurred in the construction department.

Mr. Austin: But, in general, is the item supposed to be miscellaneous salaries—well, you go ahead. I think I have it now.

Mr. Hanley: I would be very glad to have it cleared up now, Judge, if there is any question about it.

Trial Examiner Ballinger: Yes. Clear it up.

Mr. Hanley: I don't know, myself, what is meant. I would be glad to have it clarified.

Mr. Austin: Mr. Boatwright, 1002, which we dealt with on the sheet marked 31-G, had to do with salaries for sales promotion, reseller, and those are salaries in Mr. Raupagh's office. Now, does this item 1001 on 31-H cover all other salaries in Mr. Raupagh's office except—well, I suppose, for instance, the direct consumer sales promotion isn't there, but—

The Witness: No, the direct consumer sales promotion is not there.

2489 Mr. Austin: Is everything else in there except sales promotion?

The Witness: No.

Mr. Austin: Is Mr. Raupagh's salary there, or any part of it?

The Witness: No. Mr. Raupagh's salary and the assistant manager's is in 1000, being salaries—supervision.

By Mr. Hanley:

Q. That appears where, here, Mr. Boatwright?

A. I have placed that item on page 16, being a listing of the items that are not incurred to as great an extent on Ned's volume as on regular reseller business.

Q. So we will discuss that later, as we go through these exhibits?

A. Yes.

Mr. Austin: Let us then get back to where we were, here. Did you start to give an all-inclusive statement of this item 1001? You mentioned Mr. Raupagh's stenographer. You mentioned construction department, clerks, stenographers, draftsmen, is there anything else?

The Witness: I don't think of anything else. I would be glad to consult the code of accounts to ascertain that and advise tomorrow. In other words, I have here enumerated the principal items making up this account. I
could testify that in this particular field there might
2490 not be some mail boy working in the construction
department, or something like that, that would enter
into that account.

Mr. Austin: Then you simply took this figure off the 1001 rather than deciding that certain salaries should go in and then deciding what they were?

The Witness: I took this figure directly from the marketing expense statement 189.

Mr. Austin: Because, if you first set down certain expenses to go in here, then you would be able to tell me.

now, what they were, so I assume, therefore, these were taken from an account, and you are not now sure of all the items that may be in that account number?

The Witness: In this particular field.

Mr. Austin: Yes.

The Witness: That is correct.

By Mr. Hanley:

Q. Form 189 of the Standard Oil Company; is that or is it not a regular form of accounting that has been adopted by the company and is in current use by the company?

A. It is a regular form and is in current use.

Trial Examiner Ballinger: And has been in use for a number of years?

The Witness: For a number of years.

By Mr. Hanley:

2491 Q. Tell us where the figures come from that go into form 189.

A. It is a compilation, a classification of all expenses incurred in the field, coming directly from the vouchers for payment. The number of records on which the 189 is predicated, Judge, is tremendous.

Q. Yes, I know that. Just very briefly, if you will, please, Mr. Boatwright, try and give the Court some conception of just what a mass of accounting detail underlies form 189.

2492 A. Perhaps I could best do that by explaining that the code of accounts, which is written and furnished from the general office for the accountants at each sales field to follow, to insure our accounting procedure is identical, encompasses, in total, four loose leaf notebooks of at least 2½ inches in thickness. Perhaps that is the best explanation of the magnitude of the items entering into the 189 and the 189 is merely a summation, also, of all of these instructions and all of these forms and all of these expense items allocated and set down according to this uniform code of accounts applicable in all sales divisions.

Q. Now, Mr. Boatwright, form 189 is made up on the basis of all of the accounting records of the company, is it not, and has been made up from year to year without any reference at all to the fact that the Standard Oil Company was in this particular lawsuit?

A. Oh, certainly.

Trial Examiner Ballinger: I think that is very clear on the face of the record, now.

By Mr. Hanley:

Q. I would like to ask this one further question, Judge: Is it or is it not true, that the particular figures which appear in this series of exhibits 31-A through 31-Q are drawn from the records of the company and are not developed on the basis of any build-up in reference to this
2493 particular lawsuit?

A. That is true, except as it pertains to certain items, such as salaries for delivery or equipment items, where we had to make the time study that I described in the testimony this morning.

Q. I will ask you if it is not true that you did point your answers to this particular lawsuit in respect of those items where you were requested to determine the cost as to selling and delivering Ned's, on the one hand, as distinguished from regular resellers, on the other?

A. That is true.

Q. But in doing so, Mr. Boatwright, is it or is it not true that you used the regular routine, ordinary and customary company records?

A.. That is correct.

Should we go to the next item?

Mr. Hanley: If Mr. Austin has concluded?

Mr. Austin: Yes.

Trial Examiner Ballinger: Yes, if Mr. Austin is satisfied with the explanation.

Mr. Hanley: I inquired and he said he was.

2494 A. The next item is account No. 1215, being entitled "Expense—Salaries—Others."

This particular item of marketing expenditure is made up of salaries paid to the employees in the real estate and tax department; the supervision of those departments; the clerical help; the stenographic help, and others who are employed on real estate and tax work.

Again we have two pure salary items, one 1001, and the other 1215, to which the Federal Insurance and Unemployment Insurance taxes of 3% applicable in 1937 was applied, giving a total tax for these items of $403.87.

The next item—

Mr. Austin: Just a moment, please, Mr. Boatwright. Now, you referred to the real estate and tax department. Is that two departments or one? Is there a real estate department, and a tax department, or do you call it the real estate and tax department?

The Witness: That varies among the different fields. In our larger sales divisions—

Mr. Austin: Well, we are only talking about Detroit now, aren't we?

The Witness: That is true, but you asked a question, and I am answering according to the books of the company. In some fields they are consolidated. In the Detroit 2495 division I don't know whether they are consolidated or handled separately, in this particular division.

Mr. Austin: These figures are solely Detroit figures, aren't they?

The Witness: Certainly they are solely Detroit figures, but I don't know whether they are handled here by the same men or different men.

Mr. Austin: I don't know that that is so important.

Mr. Hanley: Will it answer the question, Mr. Austin, if the witness can tell us whether the figures are consolidated as to the departments?

Mr. Austin: They are at least consolidated here, because they are all added together; isn't that right?

The Witness: Yes, these are all taken from the books.

Mr. Austin: As to whether it is one or two departments in the Detroit office, at least it is real estate and tax. What other items are included in this item opposite 1215?

The Witness: I have enumerated the items in that classification.

Mr. Austin: I thought you enumerated real estate and tax, and I didn't think you enumerated anything further.

The Witness: May I repeat?

2496 Mr. Austin: Yes.

The Witness: Employees in the real estate or tax department encompassing supervision, clerical, and stenographic salaries of individuals employed in the real estate and tax work in this particular area.

Mr. Austin: Then that is only real estate and tax?

The Witness: That is correct.

Mr. Austin: That is what I wanted to find out.

The Witness: Yes.

Mr. Austin: Whether it went beyond that, and just for the purpose of finding out what was included.

The Witness: I see.

Trial Examiner Ballinger: Before you proceed to the next item, we will take a recess for five minutes.

Mr. Hanley: Thank you, on behalf of the witness.

(A short recess was taken.)

Trial Examiner Ballinger: We will come to order.

By Mr. Hanley:

Q. Mr. Boatwright, I think you had just completed an explanation of account Nos. 1243 and 1244 on Exhibit 31-H. Will you please continue with an explanation of the following items on that exhibit?

Trial Examiner Ballinger: Judge, I think you are one item too far.

Mr. Hanley: Am I?

2497 Trial Examiner Ballinger: Had you offered an explanation of 1243 and 1244?

2498 The Witness: I think the record is clear on that; that that is merely the application of 3 per cent Federal insurance and unemployment taxes on the above items.

Mr. Austin: I don't think Mr. Boatwright had told us why the items opposite account No. 1215 are not in any part allocated to Ned's.

The Witness: I shall be glad to do so. The tax and real estate activities as conducted by employees of the Standard Oil Company were not in any way involved in the tax and real estate problems of the Ned's Auto Supply who own all of their own outlets and who took care of all of their tax problems. We had nothing to do with their real estate and tax problems.

By Mr. Hanley:

Q. Was the Standard Oil Company involved in any expense at all in relation to the tax or real estate problems of Ned's Auto Supply Company?

A. It was not.

Q. Did that company, so far as you know, take care of all of their own expense in that direction?

A. Within the limits of my knowledge that is a correct statement.

Q. At least is it or is it not true that our company had nothing to do with it?

A. That is correct.

2499 Trial Examiner Ballinger: The next item will be 1054.

A. (Continuing.) Subaccount 1054 is the "Operation and Maintenance of Vehicles—all other (other than office)" amounting in total to $208.89.

By Mr. Hanley:

Q. $280.

A. $280.89, yes. This particular item is the expenses incurred in operating a vehicle from time to time—a vehicle or vehicles from time to time—by the following members: Auto mechanic, construction man, electrician or painter other than employed by the machine shop; passenger cars only.

You will notice that the cars or car operated by these individuals was not involved in any way, nor were our expenses increased in any way by the volume of business moving through Ned's Auto Supply, inasmuch as our construction man did not work on that account, our automobile mechanic did not work on the cars for that account except as it will be brought out under the car used by salesmen contacting the account, for which a due charge is subsequently made, and except as it involves a delivery truck, for which an expense item has already been duly made.

Trial Examiner Ballinger: Mr. Austin, are you interested in a detailed statement of those items appearing
2500 on Respondent's Exhibit 31-H where the aggregate amount is less than $375?

Mr. Austin: No. Not at this time, anyway.

Trial Examiner Ballinger: Then you will proceed with the four items, four remaining items where the aggregate of each is more than $375.

Mr. Austin: Well, if your Honor please, I perhaps didn't understand you. I would like to have the witness go down the list and make an explanation on each of them; but I don't intend to—I don't require now a particular statement as to each one of those smaller items you mentioned about allocation to Ned's and so forth, but I would like to know what is in them.

2501 Mr. Hanley: May I suggest, Mr. Boatwright—

Mr. Austin: I probably wouldn't stop him or ask him.

By ~~Mr.~~ Hanley:

Q. May I suggest, Mr. Boatwright, where there is a large item that you explain in some detail what is included. Where there is a small item, that you cover it just as briefly as you can, and if counsel wants to know anything more about it, he can ask you.

Mr. Austin: I would like to interrupt, if I may, Judge, to ask another question just now.

Mr. Hanley: ~~Any time. Sure~~.

Trial Examiner Ballinger: Proceed.

Mr. Austin: There are three brands of gasoline, Stanolind, Red Crown, and the Ethyl sold through the Detroit Office both to the Ned's and to the other tank wagon purchasers; and taking these statements as a whole, how has that been handled, or has there been any segregation or allocation?

The Witness: We do not segregate our marketing expense items among the different brands of gasoline. These expense items are the items of expense incurred upon our three motor gasolines, irrespective of brand.

By Mr. Hanley:

Q. Mr. Boatwright, would such an allocation be a 2502 practical thing?

A. No. It would be extremely difficult to allocate our costs among brands. To illustrate, assume you attempted to allocate your delivery cost among brands, your five compartment tank truck may pull out of the yard having one compartment filled with Solite, and one with Stanolind, and three compartments filled with Standard Red Crown; what part of your marketing cost is chargeable to Solite, what part to Stanolind, and what part to Red Crown—it is a division, the expenses of which, if we attempted to segregate it, would be so great that we would get no value out of it, commensurate with the expenses incurred in its accumulation.

By Mr. Hanley:

Q. I think you are now down to item 1066, Mr. Boatwright, which is a large one: "Miscellaneous Expense"; please explain that.

Mr. Austin: I would like to ask one more question about those gasolines, and this is a matter which I would like to have my recollection refreshed on as to whether or not it appears in the record as to the price differential, if any, which Ned's received during 1937 and parts of 1936, and '38, over other tank wagon purchasers in Detroit as to Stanolind, and Ethyl. Now, it has been referred to here today that there is a half a cent on Red Crown.

2502 A. Is there a statement in the record—there may be in Mr. Raupagh's testimony?

Mr. Hanley: It is my recollection that Ned's doesn't handle Stanolind at all, and has not done so. Just a moment, and I will try to find out if he handles Solite.

(There was a slight delay at this point.)

Mr. Hanley: I don't know whether it appears in the record yet or not, your Honor, but we will make it appear. It seems to be the fact that there was just the same ~~differential on Solite as there was on Red Crown, namely~~ ½c off of tank wagon price. And he did not ~~and does not~~ handle the ~~third grade, Stanolind~~.

The Witness: I shall proceed with expense item 1066, being titled "Miscellaneous Operating Expense," aggregating $40,142.68. This is the type of an item which I referred to a moment ago as being an open end account, and if a particular expense is incurred, which is not subject to the usual code of account classifications, it will be found in this particular item.

This item of $40,142.68 is for the reseller channel for Detroit only. Wherever it is possible, such expenses are charged direct to the channel; where expenses are incurred which it is impossible to charge direct to that channel, they are allocated upon an all gallonage basis. That
2503 is why, as we shall see later, I used a different divisor on this particular classification than I did on the preceding classification of expense items.

2504 It would be well if I read the principal items entering into this particular account. Room rent for dealers' meetings, salesmen's meetings, refreshments served at dealer meetings, moving expense for reseller salesman, wrapping paper, postage on coupon books, the notary fees. Wherever evidence is gathered on competitive subnormal prices to provide us with bona fide evidence for meeting competition. Sales awards in sales contests in the reseller channel. Window shades placed at various dealer outlets.

Mr. Austin: Have you any dollar amounts for those various things you are reading?

The Witness: It would be impossible without going through all of the vouchers.

Mr. Austin: You see what I am getting at, this is a forty thousand dollar item, and I was wondering if you could tell us among the things you are reading where the principal part of this forty thousand dollar part comes from.

The Witness: I am reading the principal items making up this expense.

Mr. Austin: I see. But not in the order necessarily of their weight?

The Witness: Not necessarily. Although I think that was the natural tendency on the part of my accountant when I asked him to give me the items of importance making up this total. I think it is natural that he would
2505 put down the large items first, although I could not
testify that this is in accordance with the magnitude of the items.

Should I continue reading?

Trial Examiner Ballinger: You may.

Mr. Austin: Would that detail be here or in Chicago or where would it be?

The Witness: To get this detail for the year 1937 would involve pulling your expense vouchers and spreading the sum total of your expense vouchers according to the spreading among channels and among different expense classifications as was done when the books of the company were made up. In other words, it would practically mean a recalculation of our marketing expense for the Detroit division for the year 1937 from the original expense vouchers. It would take months.

Mr. Austin: Well, will you continue to read the principal items.

The Witness: Surely.

A. (Continuing) Then we placed Standard product signs in reseller outlets; in other words, signs other than advertising signs, warning signs, and things of that nature are included in this particular itemization. We have a transportation cost of Stanolind Records. That is the official house organ of the company, and we incur certain postage on that, as we send this out to the different dealers.
2506 Cost is incurred because of errors of shipment or
returns to our warehouses.

Those are the principal items.

By Mr. Hanley:

Q. Mr. Boatwright, the next item is one of some consequence, well in excess of a thousand dollars, having to do with the safety expense. What does that mean?

A. The item 1084 "Station Safety Expense—Salaries and All Other Expenses," of $1,343.24, is made up of safety signs, salary of our safety representative, traveling expense of the safety representative, his car expense, and if he has any clerical assistants in the safety department, it is found in this item. In other words, he may dictate certain letters which will be written or typed by the stenographic department, and they assign to his department this cost in terms of time of that particular assignment.

Trial Examiner Ballinger: I understood you to enumerate the signs as part of expense of miscellaneous operating expense?

The Witness: No. Our sign cost will be found almost entirely under the heading of "Advertising," under the heading of "Safety," or under the classification enumerated in 1066. There is no overlapping, but at times, especially when we have outside greasing pits rather than the hoist, it is necessary to post a warning sign at that
pit to comply with certain rules and regulations in
2507 which municipality we were operating. That would
be distinctly a safety sign.

Does that answer your question?

Trial Examiner Ballinger: Yes.

By Mr. Hanley:

Q. Mr. Boatwright, is it a matter of classification as to where you charge these sign costs?

A. The classification is in accordance with the function performed for which the sign is intended.

Q. That is right. And you get that cost in one of these three accounts that you have referred to?

A. I think those are the only three accounts.

Q. And you say you don't get any overlapping?

A. There is no overlapping.

Mr. Austin: Which three are those? Those two right here, 1066 and 1084; and what is the other one?

The Witness: We shall come to advertising.

Mr. Austin: I assume that is the third?

The Witness: That is right. That is your big classification.

By Mr. Hanley:

Q. Mr. Boatwright, in line with the suggestion of the Court as to those amounts of lesser importance, I will ask you to drop down to account No. 1220, which is in ex-
cess of $2,000, and unless counsel desires to inquire
2508 about the others, I will pass them. Just explain
what is involved in that item.

A. Account 1220, entitled "Expenses—Employment Department—Salaries and all Other Expenses," amounting to $2,231.16, is made up of the total cost, including salaries, traveling, and car expense, of the personnel supervisor, and expenses incurred in conducting the personnel department.

2509 Now, you will notice—

Mr. Austin: Is that in Detroit?

The Witness: That is in Detroit, yes, sir.

By Mr. Hanley:

Q. These figures are all Detroit, aren't they?

A. Yes.

Mr. Austin: We haven't come to anything that is an allocation of anything in the Chicago office, have we?

Mr. Hanley: Not yet.

The Witness: Not yet. I shall, for your convenience, if I come to such an item, I shall explain the allocation as made in the Chicago office.

A. (Continuing) In particular with reference to subaccount 1084 "Safety" which, as I stated, included salaries, and subaccount 1220 "Employment Department" which are largely salaries, we did not include any tax item of 3 per cent on these two items, because they are not purely salaries, but you include in addition certain automobile and other expenses incident to performing of their jobs. We thought it would be better not to apply the 3 per cent on that sum total item because of some small quantity not represented by salaries.

Now, the sum total of this list of expense items is $59,186.15.

2510 Mr. Austin: Mr. Boatwright, on item 1804 did you explain why that is only allocated to reseller customers other than Ned's? Or why it is not allocated in any part to Ned's?

Mr. Hanley: May I suggest, Mr. Austin, that this whole list has been classified by Mr. Boatwright as marketing expense not influenced by Ned's, and I am going to ask him that general question.

Mr. Austin: I thought we agreed before we started on this list, since it was a varied list that it would be better for him to tell us as to each main item.

Mr. Hanley: Maybe you are right. That is all right. I will withdraw my remarks if you prefer to have it individually.

The Witness: Yes. Our safety man did not deal with safety problems at Ned's outlets as he dealt with safety problems at stations owned or leased or under sales contract with the company. Ned's ran their business as a separate and complete entity as distinct from the performance of the safety function on the part of our representative and our various and sundry resale outlets.

Mr. Austin: In that respect, Mr. Boatwright, I assume you are relying—and I am not intimating that you are improperly relying—upon information received by you from Mr. Raupagh or other officials of the company?

2511 The Witness: I think it would be a fairer statement to say that no one of these expense items were accepted in this classification without full discussion and consultation with parties having to do with the marketing through Ned's outlets during the time involved. You are quite correct that I did discuss it with Mr. Raupagh. I discussed it with his assistant managers; I discussed it with the sales promoters, and I discussed it with the safety men in the Detroit division, as well as with the employment man, real estate men, and so forth. I asked them "Did you have anything to do with this contract?" Naturally such inquiry is a means of determining the classification that I have to give an expense as an economist.

Mr. Austin: Well, were you informed or did you make any inquiry to determine whether there were any other stations besides Ned's where, for instance, there was no safety expense or no selling expense?

The Witness: I was informed that there were other stations besides Ned's that required substantial time on the part of the safety man. I did not ask of these four hundred odd stations that we may have in the Detroit area "Was there any one station in 1937 at which you had no time devoted?" I couldn't answer that. I doubt if the ~~safety man could answer that. But I asked him.—~~

2512 Mr. Austin: Because it would seem to me that on the theory of eliminating Ned's from these expenses, that maybe there should be some other stations that should also be eliminated. I didn't want to go any further than to ask you whether you made an inquiry.

The Witness: I would differ from your position on that, for this reason. We have here a class of outlets which we have been describing as our regular reseller outlets. They are composed of stations that were owned and built by the company but are operated by lessees, plus stations that we leased, and, in turn, sublet to lessees and what we regard as 461 contract accounts, where it is merely a sales contract. Now, a safety man, in the course of his regular duties, will not work at every one of those outlets during the period of a year. His work, of necessity, is rotated from year to year among the different outlets and whereas he may not actually have called on a particular outlet in 1937, he may have called on that outlet in December of 1936.

It is like a painting program, if you understand what I mean. We don't paint each station each year, but if we take our work on a flow basis, attempting to maintain expenses approximately uniform as we go, from year to year to year, we scatter our painting work among the different
outlets over a period of time rather than doing all of
2513 the jobs, in every case, one year, and none of them
the subsequent year.

Mr. Austin: You are referring to a case where, perhaps, there was none of this expense going to a particular station, more or less by accident, during 1937, whereas at Ned's you say it is not by accident, but due to your particular business relationship with them; is that right?

The Witness: That's right. They attended to their safety problems, entirely.

Mr. Austin: So what I was getting at, whether there were any other stations, as a rule, that were known to do such things?

The Witness: There were no such stations that were known, in the discussion with the safety representative, that he called to my attention, sir. I would not anticipate that there would be any.

Mr. Austin: That's all.

~~Now, is there any particular explanation to be made on~~ item opposite account No. 1220: "Expenses—Employment Department—" Oh, I was going to ask you there: what are the duties of the employment department?

The Witness: Well, there are quite a list of them, sir. One of the principal time-consuming parts of his work is
interviewing applicants for jobs; filling out and main-
2514 taining personnel records on these individuals; main-
taining personnel records on the individuals in the
various branches of our business in conformity of different rules and regulations of municipalities or different Gov-

ernment agencies, under which we work. That, largely, is their function.

In addition, there are personnel supervisors in some fields who make detailed studies of the characteristics of individuals most adapted to particular types of work.

To illustrate: a personnel director in one of the fields with which I am acquainted has made a complete tabulation of the experience of all lessees prior to becoming a leasee, so that he will be able to advise his management the type of experience prior to work on the driveway that results in the best accomplishments. He has isolated the various factors of health, as it affects sales. He has isolated the various trades or professions of individuals. All of that work of that nature is performed by the personnel director in a given field.

Mr. Austin: The Standard Oil doesn't employ anyone who works at these retail stations supplied by it, does it?

The Witness: No, we do not employ them.

Mr. Austin: Is the work of this employment department partially, or in a substantial part, devoted to
2515 interviewing and employing and taking care of personnel problems in connection with employees of the company itself; that is, in the Detroit office, or working out of the Detroit office, such as truck drivers and such as employees at the bulk plants, and such as employees at Mr. Raupagh's office?

The Witness: It does.

Mr. Austin: Now, has there been an allocation of that expense of the employment department so that part of that expense is allocated to consumers and jobbers and other elements as to which the persons employed by it might be, in part, devoted?

The Witness: There has been an allocation of the total cost of the personnel department among the different sales channels. I think that is the direct answer to your question.

Mr. Austin: In other words, this opposite 1220: does that include the entire expense of the employment department for 1937, or only part of it?

The Witness: It is only a part of it. It is the reseller portion.

Mr. Austin: That's sufficient.

The Witness: All right.

Mr. Austin: That is a complete answer.

The Witness: Yes, sir.

2516 Mr. Austin: If that is the case.

The Witness: Now, I have enumerated in the testimony, as we were going through these different items, one or two places where we have to make an allocation on the basis of gallonage where such items cannot be charged direct. Accordingly, instead of dividing by the reseller gallonage, excluding Ned's Auto Supply, we divide by the sum total of the gallonage, which includes Ned's and all others, of 70,629,027 gallons.

Trial Examiner Ballinger: You are now referring to Respondent's Exhibit 31-I?

The Witness: That is correct.

By Mr. Hanley:

Q. The upper part of that page?

A. The upper part of that page.

We know that the divisor we have used results in a cost which is slightly below our actual cost, if it were possible to break down all of the expense vouchers, according to two different gallonage factors. This was an impossibility. Recapitulating this explanation, the sum total of other marketing expense items not influenced by Ned's Auto Supply Company volume, amounted to .084c per gallon, which, again, was carried forward to Respondent's Exhibit 31-A and is shown under point "2" subdivision "b", .084.

2517 Q. Now, let me ask you some general questions in the matter of summarizing, Mr. Boatwright.

Is it or is it not true that all of the items on Exhibit 31-H and carried over to your computation on the top part of 31-I, are allocations made to reseller channels of gasoline in the City of Detroit?

A. That is correct. All items and all amounts indicated on this analysis are reseller amounts, only.

Q. Now, you have been asked in respect of certain individual items on Exhibit 31-H, as to why you excluded them as a cost item applicable to Ned's. The fact is, as I understand you, you have excluded all of the items on 31-H as applicable to Ned's. Please give us a general statement of your reasons why you think they are not properly costs applicable to Ned's.

A. As a general statement, a complete examination of the component parts of the various marketing costs entering into these amounts—these items, as I have enumerated.

lead us to the conclusion that they were items not properly chargeable to Ned's Auto Supply Company, but items solely chargeable to our regular reseller business.

Q. Now, taking those items in their entirety, are we correct in understanding that they amount to .084 of a cent per gallon?

A. That is correct.

2518 Q. Now, will you please pass on, Mr. Boatwright, to item No. 3 which appears on Exhibit 31-A? I think it is entitled "Semi-Direct Expense Items Not Incurred in Handling the Volume of Ned's Auto Supply Company."

A. Yes.

Referring now to Respondent's Exhibit 31-I, subdivision 3, entitled as given, there are certain marketing expense items of a semi-direct nature tending to vary with gallonage, which are not influenced by sales of Ned's Auto Supply Company.

2519 These expense items are charged direct, wherever possible.

However, in the case of subaccount 1087, 1088, and 1204, some portion is, of necessity, handled on a pro rata basis. For this reason we have again used as our divisor, in determining the per gallon cost, the sum total gallonage of our reseller channel of distribution, including Ned's Auto Supply volume, for a total of 70,629.027. Referring to the individual items making up this classification of marketing expense I would refer you first to 1087 entitled "General Supplies Used," amounting to $1,258.94.

Q. What does that include and why doesn't it apply to Ned's?

A. It is made up of drinking water in bottles; rope, brooms, towels, soap, first-aid kits, flashlights, labor in handling mailing items, and so forth; defying classification of the usual expense items.

Again this item, as I have enumerated it, is the reseller expense only and it is allocated to that channel when we take the sum total of these items, it is allocated to the reseller channel on the basis of tank wagon gallonage.

Q. Referring to the next item, 1088: "Station Operating Tools and Equipment." What does that involve?

A. The principal items entering into that account are buckets, wrenches, ash cans, chains, chairs, ladders, cuspidors, electric fans, barrel faucets, funnels, pump
2520 nozzles, locks, pails, pipe wrenches, radiator covers, brakes, ice scrapers, water coolers—

Mr. Austin: What do you mean by stating "operating?" The Standard Oil Company didn't operate any stations in 1937, Mr. Boatwright.

The Witness: No. This is a title which has been on our statement for some years.

Trial Examiner Ballinger: It embraces what?

The Witness: It embraces the classification of expenses that I have enumerated, whether those be incurred at our division office, if they have to buy a rake or ice scraper for our division office, whether it be at one of our bulk plants and irrespective of the location of one of this miscellaneous type tools, it is thrown under this general classification: "Station Operating Tools and Equipment."

Mr. Austin: "Station," there, doesn't mean, then, service station?

The Witness: It does not mean that.

Mr. Austin: Does it mean operated in part by the company?

The Witness: It could mean that, in part.

To illustrate: With the leasing of our company-operated station the tools that were necessary in conjunction with the operation of that outlet were likewise leased to the tenant. We maintain tools subject to the normal wear
2521 and obsolescence, I presume would be the term, under the condition of the lease.

Mr. Hanley: I am impressed, your Honor, with a thought that it may seem a little unimportant with the idea of rakes and hose nozzles but it does appear that our company in Detroit spent, this year, $13,453.67 in that kind of item, so there is a considerable cost.

The Witness: There should be added to your statement—

By Mr. Hanley:

Q. Yes. I would like to ask you about that, now. What do you mean by "Office Expense Exchange?"

A. Account 1204 entitled "Office Expense Exchange" is, in reality, the sum total of the cost of performing the banking function, which is incurred in conjunction with the distribution of gasoline. Thus our driver may deliver gasoline to a reseller outlet. That reseller may have cashed several checks for his customers and, in turn, in payment of his account to our driver, or to the company, he endorses those checks.

Those checks then are handled individually through our account and proceed with any clearance or fee incident thereto being charged.

2522 In addition, there is included in that item the transmission of funds from any station outside of the main metropolitan area of Detroit to our Detroit central deposit banks.

Q. Now, you have arrived, Mr. Boatwright, on Exhibit 31-I, at a gallonage figure of .019c. Is that reflected on Exhibit 31-A any place?

A. Not direct, because from Exhibit 31-I we continue to Exhibit 31-J, which reflects a negative figure rather than reflecting the .019.

Q. Will you please continue and explain the upper portion of Exhibit 31-J?

A. Now, on the conduct of our normal reseller business, we incur certain credit costs.

The following items, also of a semi-direct nature, are charged direct to the various sales channels, no one of which would be influenced in its magnitude by volume sold to Ned's Auto Supply. Our divisor in this case, therefore, should be the volume through the reseller channel, excluding sales to Ned's Auto Supply.

These items are subaccounts 1510 titled "Losses by Bad Debts," aggregating $2,782.73.

Item 1511, "Expense Collecting Bad Debts—Current Year," $139.69:

2523 Subaccount 1512, "Expense Collecting Bad Debts—Prior Years," $437.31, against which we have shown account 1400, being "Bad Debts Collected—Written Off in Prior Years," as a receipt of $4,900.75, giving a cost for the credit function, which would represent an increase to the company of $1,541 for the year of 1937.

Q. The net effect of that, Mr. Boatwright, is a credit, is it not, against the cost which you have set up over "III," on Exhibit 31-I?

A. That is correct. Any time that you take a segment of time limited to 12 months, when your bad debts are charged off on the basis of 12 months, or more, past due, you may take any one year and have a net income, according to your system of keeping books, and, in this case, it does result to a credit of .002 of a cent.

Q. Do these figures refer to any specific year, and, if so, what year?

A. These figures refer specifically to the year 1937; Detroit.

Q. Might that figure be greater or less than some other year?

A. Oh, yes. In some years, where the bad debts is charged off, it may be charged off in prior years as to total a net expense. In this particular year it totals a credit.

2524 Q. Now, adverting to III on Exhibit 31-I, is it your judgment and opinion that none of those items are properly allocable to Ned's Auto Supply Company as an expense?.

A. That is my judgment and opinion.

Examination on Voir Dire by Mr. Austin.

Q. Mr. Boatwright, the first figure there, "Losses by Bad Debts," on page 9 here opposite account No. 1510.

A. Yes, sir.

Q. Is that "Losses by Bad Debts" on sales made during 1937 or is that bad debts written off during 1937?

A. Bad debts written off during 1937. You can't determine whether sales made during 1937 will become bad debts until the subsequent period.

Q. Now, I would like to have, perhaps, a little further explanation as to why this 70,000,000 gallon figure was used on schedule 3 here, page 8. I guess it is 31-I, and over on 31-J, under the same schedule, and 66,000,000 gallons a year was used for the volume..

A. Certainly.

The 70,629,027 gallons was used in the first part of that, because, as I think the testimony will reveal, wherever possible, these expense items are charged direct. However, there are certain items that cannot be charged direct and are allocated on a gallonage basis among the different sales channels.

2525 Q. Are all of these three items; 1087, 1088, and 1204; are they the kind of items that you have just said could not be directly charged?

A. Some parts could not be charged direct and, therefore, inasmuch as a part of the sum total is allocated on a gallonage basis, it seemed the conservative thing to do to use your largest divisor against the totals of these three items.

By Mr. Hanley:

Q. Just let me interrupt. Doing that, Mr. Boatwright, gives you a lesser cost per gallon, does it not?

A. Yes.

Q. Than if you had used a divisor exclusive of Ned's gallonage?

A. Well, it is a choice that anyone has to exercise in a compilation of this kind. I will state that by using the larger gallonage we have arrived at the lower or more conservative cost. It is a physical impossibility to draw out each of these expense items on pails and ropes and chains and things, for the year 1937. It would take us a year. Therefore, wherever there is any part of an expense allocated on a gallonage basis, I have used the maximum gallonage, preferring to understate rather than overstate the cost.

Q. Now to follow through: Where you arrived at a credit on Exhibit 31-J, why did you use the lower divisor there?

A. Because we had no bad debt losses. We had no
2526 expenses of collecting bad debts prior years, or no
credit cost function involved on Ned's account. Therefore, the credit function in the reseller channel was incurred on reseller accounts other than Ned's. Therefore, I should use the gallonage excluding Ned's.

Q. Now giving consideration to the entire item of III as reflected in 31-I and 31-J, it amounts to a cost, apparently, of .017 of a cent. Is that correct?

A. That is correct.

Q. Now is that figure reflected anywhere on Exhibit 31-A?

A. Yes. The net of III of .017 of a cent is shown under 3. "Semi-Direct Expense Items Not Incurred in Handling The Volume of Ned's Auto Supply Company," column 1, Respondent's Exhibit 31-A.

Q. Mr. Boatwright, perhaps I have asked you this: If so, I will stand corrected if the Court will correct me. Have you explained why, in your judgment, you think no part of this expense is fairly applicable to Ned's Service Station?

A. I think I have explained.

Mr. Hanley: I am just in doubt, Judge. If I have asked that, I will withdraw the question.

Trial Examiner Ballinger: Whether the witness has given all the explanation he desires, or not, I do not know.

He has certainly made an explanation.

2527 Mr. Hanley: I don't want to repeat the question. If I have put the question, I don't want to repeat it.

The Witness: Yes, your question was asked and I responded in view of the sum total of items entering into these—

Mr. Hanley: Very well. That is sufficient.

By Mr. Hanley:

Q. Now, may I direct your attention, please, to item No. IV, "Selling Cost", on Exhibit 31-J and as it appears on Exhibit 34-A. Will you please explain that item, Mr. Boatwright?

A. Yes. Referring, now, to the lower part of Respondent's Exhibit 31-J entitled "Selling Cost."

In order to determine the savings in selling expense incurred in serving Ned's Auto Supply outlets, information was obtained from the Detroit division covering the salesmen calling on Ned's Auto Supply during the year 1937, together with the expense incurred. The names of the salesmen, together with salary and traveling expense incurred while on the territory covering Ned's outlets, were obtained from the Detroit office; that is, the payroll records. Where it refers to salary or machine shop records; where it refers to maintenance or the salesmen's expense accounts; where it refers to their expenses.

Q. In what you have just said, are you referring
2528 to the usual routine and ordinary accounting records of the company?

A. I am.

2529 Q. That are kept without any reference at all to the lawsuit; is that true?

A. That is correct.

The source of salary, as I have just stated, is the payroll record.

During the year 1937 it happened that the sales territory which encompassed the Ned's Auto Supply outlets was served by three different salesmen: Mr. L. L. Robinson covered this territory for the first three and a half months of the year; Mr. T. G. Meulenberg covered the territory for four months, while Mr. Paul Coutchie covered it the remaining four and a half months. Their salaries, including the 3% Federal Insurance and Unemployment Tax, were obtained and are enumerated on Respondent's Exhibit 31-K.

Their traveling ~~expense was taken direct from their expense accounts, as submitted to the company.~~

The sum total of the salesmen's cost of working this territory for the year 1937, for these two items was $3,144.42. This total was added to car expense, which was obtained in the following manner:

The investment in salesmen's cars in the Detroit division for the year 1937, according to the company investment records—

Q. Those are the records of the routine investment records?

2530 A. That is correct. The investment in salesmen's cars in Detroit for the year 1937, according to the company investment records, was $43,085.

The number of salesmen in the Detroit area, according to Mr. W. H. Tell's records—

Q. Perhaps you had better explain Mr. W. H. Tell, in relation to this exhibit.

A. Mr. W. H. Tell is assistant to the vice president in charge of sales, in charge of operations. Maintains records and costs and all equipment, number of units, and so forth. The number of salesmen was 69. Each of those men having a car, have an average investment of $624.42, according to our books, per vehicle.

The total, subaccount 1047—which, for your sake, is the "Maintenance Cost,"—was taken from the Detroit 189 for the year 1937 on those vehicles and represents $24,525.71. This maintenance cost was incurred on a total number of cars having an actual investment of $43,085, and dividing our sum total of our maintenance cost by our investment record gives a maintenance cost per dollar of investment and equipment. This amounted to 56.92 cents per dollar for the maintenance of the vehicles.

Our depreciation rate on salesmen's cars equals 20%, computed according to the company depreciation rate.

Therefore, the maintenance cost of each car is equal 2531 to 20% of the average investment per car of $624.42, or $124.88 depreciation plus the maintenance cost which, as we have it above, indicated was placed on a per dollar of investment to equalize the expense among different units of 56.92 per dollar investment of $624.42, giving an operation and maintenance cost of $355.42 per salesmen's car, totalling the operating cost per vehicle of $480.30.

Referring next to Respondent's Exhibit 31-L, and continuing: the operating cost per salesman's car was estimated by the proportion of the time that each salesman served on the territory. Therefore, we figure in that manner an operation and maintenance cost per vehicle to add to the salary plus 3% insurance and unemployment tax and the traveling expense as was reported on the top part of Respondent's Exhibit 31-K. This gives a total cost of serving the territory in which the volume of Ned's Auto Supply Company was located, of $3,624.72.

However, not all the time of these individuals was spent on calling on Ned's accounts. It was estimated by Mr. Raupagh and Mr. Blough that Robinson spent 35% of his time at Ned's, of which 7% was on gasoline; Meulenberg spent 25%, of which 5% was on gasoline; Contchie spent 25%, of which 5% was on gasoline. Using these percentage figures against the above expense for each of the individual salesmen's expense, show a cost of selling gasoline to
2532 Ned's Auto Supply for the year 1937 of $200.41.

Dividing this selling cost by Ned's gallonage of 4,240,500 gallons results in a selling cost incident to the Ned's outlets amounting to .005c per gallon.

2533 Q. Now let us stop there a moment, Mr. Boatwright, and referring to Exhibit 31-A, this .005. Does that figure of .005 of a cent appear on Exhibit 31-A and, if so, where?

A. The figure of .005, representing selling costs of serving Ned's Auto Supply outlets is reflected on Respondent's Exhibit 31-A under item 4, titled "Selling Cost," column 2, headed Ned's Auto Supply Company.

Q. Now does that item of .005 of a cent, as a selling cost relating to Ned's have any relation to any comparable figure having a relation to the regular reseller business of the company?

A. I have here a calculation of our selling cost of doing business through the regular reseller channel.

Q. I know you have. I just want you to give us the foundation for that, now. To what figure do you refer?

A. I am referring, now, to Respondent's Exhibit 31-A, item 4, "Selling Cost," shown under the column headed "Regular Reseller Business", of .079c per gallon.

Q. Now have you developed that beginning on the bottom of Exhibit 31-L, and continuing on Exhibit 31-M?

A. I have.

Q. How have you arrived at that figure?

Mr. Austin: May I ask a question, please?

Mr. Hanley: Surely.

Mr. Austin: On page 11 of this report, the part 2534 you have just been over—

The Witness: Yes, sir.

Mr. Austin: It is stated there that the percentage of these salesmen's time spent at Ned's, and the percentage on gasoline, was estimated by Mr. Raupagh and Mr. Blough. Is that entirely their estimate?

The Witness: In the discussion which resulted in these figures, they called into consultation the sales manager and his assistant in the reseller division of our company. In other words, men who at that time in 1937 were supervising the function of reseller selling effort.

Mr. Austin: Did you talk to any of these three men themselves, these salesmen, or ask them about it?

The Witness: I did not.

Mr. Austin: Are they still in the employ of the company?

The Witness: I couldn't tell you. However, the estimate of time of a salesman is reported quarterly to the accounting department, and is used as one of the determinates of our allocating costs both as to channels and where necessary as to products. We have, therefore, a pretty good index as to whether or not the estimate of time as given is reasonable.

By Mr. Hanley:

Q. As a result of your studies, Mr. Boatwright, and without respect to any particular individual sales-2535 man, do you or do you not know what the usual percentage of time is that is spent by a salesman on the various allocations of his duties?

A. That is an important part of our regular annual studies of profit by product, by channels, by fields, and the result of this analysis results in the sales promotion department frequently re-directing their selling efforts according to the variation of profits; thus, we may find an individual or individuals who are on the payroll as salesmen that are devoting themselves primarily to some function which could be better performed by an office boy or something like that, and not devoting their time and attention to the job of selling merchandise. Therefore these analyses bring out annually the different ratio of effort in different fields by channels; yes, sir.

2536 Mr. Austin: Are these figures as to percentages of time and percentage on different products, are they based on any salesman's reports or time sheets turned in by these salesmen themselves?

The Witness: They are in keeping with reports submitted by salesmen in the Detroit division of time devoted to different products.

Now, as to whether this particular percentage, for instance, of Mr. Robinson, 35 per cent on Ned's outlets is shown on his report, I would say it is not likely. He makes his split of time according to different products.

Does that answer your question?

Mr. Austin: Well, there are two things—different products and different places where he was?

The Witness: That's right.

Mr. Austin: Do you know whether the salesman makes a daily report on either one or both of those matters?

The Witness: They make a daily report on where they were.

Mr. Austin: And the amount of time they spent at each place?

The Witness: Yes, sir. They are supposed to.

Mr. Austin: Well, are these percentages of time spent at Ned's based upon any reports of those salesmen or are they based upon your general estimates?

2537 The Witness: They are based upon the general information of the men who were supervising their actions and their functions.

Mr. Austin: Well, how about, for instance, Robinson, who is estimated to have spent 7 per cent on gasoline and 7 per cent of his time while he was at Ned's? Is that based upon any report of the salesman or is that purely an estimate?

The Witness: That is an estimate arrived at by men supervising the salesmen's functions during the year in question?

Trial Examiner Ballinger: Who were those men and what positions did they hold?

The Witness: The manager of the division—

Mr. Hanley: Name them if you can.

The Witness. Mr. P. A. Raupagh; Mr. Blough, assistant manager, in 1937 in charge of reseller salesmen and reseller sales; Mr. Bill Lock, sales manager, reseller sales; and his assistant—I am sorry I can't tell you that man's name; I know both the assistant manager, resale, and the assistant manager, wholesale, but I don't know which is which.

2538 Q. Did Mr. Hammer have anything to do with this?

A. No; Mr. Hammer was at that time in the Chicago office.

Mr. Hanley: I will state to your Honor and to the record that these men are all available right here in Detroit if there is any desire on the part of the Government to call them. I will be glad to produce any of them without subpoena if the Government desires to interrogate them.

Trial Examiner Ballinger: What records did they have to be allocated?

The Witness: Time is allocated among products by the salesmen themselves each quarter of the year, and we use their estimate of time on those products to allocate their costs among products. We do not make an allocation of expense among outlets served by these people. That, I am sure, you will conceive to be an infinitely detailed task. In this particular case these salesmen each had a territory which encompassed approximately 40 reseller outlets, four of which were Ned's. The first reaction I got to the question was that it was too small to find; therefore, they have a feeling that they were over-estimating rather than under.

Mr. Hanley: Of course, your Honor, probably it is of some merit to direct attention to the fact that whatever the allocation is and however it was arrived at it amounts to only .005 of a cent a gallon of gasoline, and it is
2539 very largely unimportant one way or the other, and I
think it may be taken as a practical matter that we just didn't have much selling expense with Ned's. We are charged here with having obtained him because we gave him a preferential price. Now, we just didn't have to go around and sell him every week; he was our customer; so we just didn't have this selling expense, that is all there was to it.

Trial Examiner Ballinger: Let's pass on to the next item.

Mr. Austin: Your Honor, I am not through with this yet, if you please.

Trial Examiner Ballinger: All right. We will continue on this item, then.

Mr. Austin: The very importance of this is because it is so small. Maybe it ought to be larger. This is the Ned's portion. And it is the small ones that do have the importance when they are in that column.

Now, I am not clear yet, Mr. Boatwright, what this 35% of time at Ned's as related to Mr. Robinson is based upon, and if it is not based upon any of the records of the salesman himself, is it based upon the number of stations he had in his territory or the amount of gallonage sold at Ned's and the others, or is it based upon anything of that sort that could be put down in figures?

The Witness: Well, I think I explained in the
2540 testimony that in the discussion of this particular
item I asked for the opinions of individuals who were supervising these salesmen at the time this account was being served under this basis. Those individuals have been named. It is predicated upon their judgment upon the number of accounts that were assigned to that salesman, his total territory; and it is predicated also upon their knowledge of the normal split of salesmen's efforts by products as reported in the time split analysis to the accounting department on a quarterly basis.

Mr. Austin: And who makes that report?

The Witness: The salesmen make that report.

Mr. Austin: Is that the salesman's estimate of the time he spends, the portion of his time he spends on each of the various products that he sells during the period?

The Witness: That is correct.

Mr. Austin: Are those reports still available for this period?

The Witness: He makes his estimate of time split on the basis of different products for his total division. He does not attempt a series of perhaps 40 different estimates of time split for 40 different accounts. That report is made and it is recapped quarterly by our accounting department, and is used as a basis for allocating the
2541 expenses referred to by our accounting department,
and I do not know whether that particular report is still available for the year 1937, as some of those records we maintained for a six months period, some for a year, some for time immemorial; and whether this particular one is one which we may have on a five-year schedule, I couldn't tell you. I would have to examine the records.

2542 Mr. Austin: You just stated that each one of these salesmen covered a territory with approximately forty accounts in it.

The Witness: That is the normal assignment to this area, yes.

Mr. Austin: Isn't there only one salesman shown here rather than three? In other words one of these men here it says three and a half months, another one four months, and another one four and a half months, so I assumed that those salesmen were salesmen who replaced each other; rather the second replaced the first, and the third replaced the second in the same territory, so that the three of them covered one salesman's territory for a year?

The Witness: That is correct. Except the number of outlets and the volume within a salesman's territory does not remain constant throughout a year, you see.

Mr. Austin: But this is really—in total it is one salesman, isn't it, in one sales territory?

The Witness: That is correct.

Mr. Austin: Now, Ned's had four outlets located in various parts of the city, and that puzzled me a little here about why there is really only salesman's activity for a year shown.

The Witness: Instead of, perhaps, three salesmen you mean?

2543 Mr. Austin: Three or four, yes.

The Witness: No, that I don't think would be at all a practical matter to have three different men running in to one account. I think you will concede that as an ordinary merchandising principle, if you try to cover your individual accounts by one salesman rather than have three different men running into that account. Therefore, even though there were four accounts scattered over the city, it would be much better—

Mr. Hanley: You mean four outlets of the same account?

The Witness: Four outlets of the same account, yes. The salesman calling on Ned's business would be the one in which—in whose territory the headquarters were located, and he would call on Ned's. You will recall that I have stated in the testimony that we did no driveway training, we did no training in merchandising effort on the driveway; the only selling function that was involved was dropping into the headquarters of Ned's Auto Supply on the part of one salesman.

Mr. Austin: Is this schedule made up on that theory that the only selling cost, as selling cost is included here, was in connection with calls at Ned's main office?

The Witness: The items of expense included in this 2544 so-called selling cost, as you are referring to it, are enumerated as being the salaries, the tax, and insurance, the traveling expense, and the car expense incurred by this individual serving this account. In the comparative figure which we shall discuss next I limit the selling costs to the same classification of items.

Does that answer your question, sir?

Mr. Austin: Well, I don't quite get the last statement, but I was only asking here whether or not you were in this territorial analysis with these three salesmen simply referring to the single salesman who had the territory in which Ned's main office is located? Of course, there are three salesmen here, but they were operating at three different times during the year?

The Witness: That's right.

Mr. Austin: I see. Now—

Mr. Hanley: If your Honor please, apropos to the line of questioning that counsel has just now indulged in, I submit it is just a purely practical common sense proposition that none of these salesmen who were doing labor work around Detroit in 1937 sold Ned's a gallon of gasoline on behalf of the Standard Oil Company; this is a bookkeeping figure purely in an effort to try and make a fair allocation of cost. Mr. Raupagh and Mr. Gershenson figured out the business relations between these companies. What 2545 these salesmen may have done from time to time in calling on Ned's has nothing at all to do with the fact whether Ned's were sold gasoline or not. We are just trying to find a time allocation that makes a fair approximation of costs in doing business.

Trial Examiner Ballinger: This examination was in response to your invitation?

Mr. Hanley: Absolutely it is. And my remarks were directed merely to the weight of the evidence, whatever the evidence is.

Mr. Austin: Mr. Boatwright, I assume you are proceeding on the next item here in explanation—

Trial Examiner Ballinger: Mr. Austin, before we proceed, it is now 5:00 o'clock, the witness has been testifying now for more than an hour, and I think we will take an adjournment.

Mr. Austin: I will gladly postpone that question.

Trial Examiner Ballinger: At 5:00 p. m. the hearing stands adjourned to be reconvened April 30, 1941, at the hour of 10:00 a. m. in room 859 Federal Building, Detroit, Michigan.

(Whereupon, at 5:00 p. m., April 29, 1941, the hearing in the above-entitled matter was adjourned, to reconvene on April 30, 1941, at 10:00 a. m.)

2546 Room 859 Federal Building,
Detroit, Michigan,
April 30, 1941.

Met, pursuant to adjournment, at 10 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois, and

Arthur J. Abbott, Esq., of the firm of Abbott, Mac Mahon, and Roberts, 2230 Buhl Building, Detroit Michigan, on behalf of the Respondent.

2547 PROCEEDINGS.

Trial Examiner Ballinger: We will come to order.

This is a reconvening at 10 A. M., Eastern Standard Time, April 30, 1941, in Room 859 Federal Building, Detroit, Michigan, of Docket 4389 in the case entitled Standard Oil Company.

The last hearing was held in Detroit, April 29, 1941.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

JOHN W. BOATWRIGHT, having been heretofore duly sworn, resumed the stand, and testified further as follows:

Direct Examination (Cont'd) by Mr. Hanley.

Q. I think we were discussing, Mr. Boatwright, yesterday, Exhibits 31-L and 31-M, which related to the figure transposed to 31-A under No. 4, "Selling Costs." I think you had explained the .005 of a cent.

A. That is correct.

Q. I think you were engaged in a discussion of the other figures under that item.

A. That is correct.

Q. Will you please continue that discussion?

2548 Mr. Austin: I was about to ask a question last night. Perhaps, before we get onto that next point, there are a couple of things I would like to ask the witness, if I may.

Mr. Hanley: Very well.

Mr. Austin: All right.

Trial Examiner Ballinger: Before we proceed, may I ask a question? What territory does this survey include?

The Witness: This includes the Detroit area encompassing the boundaries as given by Mr. Raupagh in his testimony. It includes Lansing, Ann Arbor, I think south of Pontiac. The exact dimensions I could not give from memory, but it is the Detroit vicinity.

By Mr. Hanley:

Q. It includes a territory, does it not, Mr. Boatwright, that is a division used in keeping the regular routine records of the company?

A. That is correct.

Trial Examiner Ballinger: I think it is—or, I assume it is the district described by Mr. Raupagh.

Mr. Hanley: That is right.

Trial Examiner Ballinger: I merely desired to make that inquiry for the record.

Mr. Austin: I might suggest it would be a good idea if we had a map showing that territory or a more 2549 definite description. I don't think Mr. Raupagh's testimony showed the territory beyond saying that it went north of Pontiac and included Ann Arbor and Lansing, and I think he said it went down to the Ohio line. If I had to know where it went or show where it went on the map I don't believe I could do it.

Mr. Hanley: May we dispose of it this way: that we will show it by Mr. Raupagh in detail? He is going on the stand, and he will show it.

Mr. Austin: Well, that can be brought out either by testimony or a map.

Mr. Hanley: If you want a map, we will have a map, but we will show it.

The Witness: We have maps of the territory.

Trial Examiner Ballinger: Proceed.

Mr. Austin: Mr. Boatwright, this item of selling cost that you are on now, in comparing that or referring back to the item of sales promotion, which was No. 2(a) on Respondent's Exhibit 31-A, for identification, in the previous item, that is 2(a), sales promotion, are there any salesmen's salaries or salesmen's time included in that item?

The Witness: In the sales promotional item itself?

Mr. Austin: Yes.

The Witness: No, sir.

Mr. Austin: I wasn't sure of that.

2550 The Witness: There is not.

Mr. Austin: In other words, any selling time or sales promotion of the salesmen is included down here under No. 4, "Selling Costs"?

The Witness: The salary of the salesmen is included only in item 4.

Mr. Austin: Now, one more question on this question of salesmen here. Mr. Robinson and Mr. Meulenberg and Mr. Coutchie, who, according to this outline under subheading 6 IV, served or called upon Ned's Auto Supply Company in 1937. Did those three salesmen call on Ned's Auto Supply Company as a special assignment, that is, were they especially assigned to Ned's or did they call on Ned's as a part of their routine work in selling in a certain territory?

A. In our sales structure, each salesman is definitely responsible for the sales of our company in a given specified area. The Ned's Auto Supply outlets, or, in particular the head or home office of that organization was located in the territory of these men. Any leg work incident to a contract would have been performed by one of these men.

Q. Did you ascertain whether there were any other salesmen assigned to that territory during this period?

A. I did. There was no other salesman other than
2551 these indicated.

Q. And is there a statement here of the territory which those men covered at that time?

A. No, there is not. You mean as a geographical unit?

Q. Yes.

A. There is no such statement. It is merely one of our salesmen's territories in the City of Detroit.

Mr. Austin: I suppose that that information is available in the Detroit office?

Mr. Hanley: If you wish it.

By Mr. Hanley:

Q. I just suppose, Mr. Boatwright, that is just a limited area within the metropolitan area here in the City of Detroit itself?

A. It is a limited area within the city.

Now, these sales territories are changed from time to time and whereas I think it would be entirely possible to get the territory covered by these men in 1937, I cannot assure that records prevail as to the exact territory and the accounts covered by these men, now, four years ago. At least, we could give a very close approximation of the territorial limitations.

Mr. Austin: You stated yesterday, I think, there were about 40 stations in the territory.

The Witness: That's right.
2552 Our reseller salesmen normally carry a load of about 40 reseller accounts.

Mr. Austin: Well, Judge Hanley, if it is convenient, and you say Mr. Raupagh is going to be on the stand, you might ask him at that time, if you will, to try and give me a statement of the territories in which Ned's—I guess it is the Grand River Store, their head office, is located. It is the territory covered by these three salesmen in 1937 and the stations which they served.

Mr. Hanley: Well, we will do it two ways. If we have the records that show it exactly, we will produce those records, and if we don't have those records, we will develop it from the recollection of Mr. Raupagh as best we can, of course.

Mr. Austin: You have whatever records, I suppose, were available—

Mr. Hanley: We have whatever information Mr. Boatwright used in making this compilation, and we will develop that.

Mr. Austin: I don't know how important it is, but I thought while we were on the subject, I would ask you for it now, and at the time Mr. Raupagh is on the stand he would have it, and not have to go back to the office and have it prepared.

Mr. Hanley: Well, we will do that.

2553 Mr. Austin: That's all I have now. Thank you, Judge.

By Mr. Hanley:

Q. Now can you go ahead, Mr. Boatwright, and explain, I think it is the figure .0079 that has to do with exhibits 31-L and 31-M?

A. Yes.

Referring to Respondent's Exhibit 31-L, starting on the lower part of that page under the caption: "Selling Expense Incurred on Reseller Gallonage Other Than Ned's."

The source of this information is the regular marketing expense sheet from 189 for Detroit for the year 1937.

The salesmen's salaries, including the 3% Federal and Unemployment Insurance Tax, under account No. 1004, as paid in the Detroit division in 1937, amounted to $42,115.74.

The sum total of the traveling expense of these salesmen, as indicated by our subaccount No. 1032 titled: "Traveling Expense—Salesmen," amounted to $3,988.70.

Subaccount 1047 being the operation and maintenance of the vehicles of these salesmen, amounted, in total to $4,740.65, while subaccount 11020, being the depreciation expense on the vehicles used by the salesmen, amounted to $1,646, giving a total of $52,491.09.

2554 Now, we have previously allocated $200.41 of this total for the identical items to the Ned's Auto Supply outlets, so we deducted $200.41 from the above-mentioned total, which leaves us a cost of $52,290.68.

2555 This amount was then divided by tank wagon seller gallonage other than Ned's, amounting to 68,388,527 gallons, which resulted in a per gallon cost of .079c.

Trial Examiner Ballinger: Per gallon?

The Witness: Per gallon cost. That is correct.

A. .079 per gallon cost for selling to our regular reseller business was then carried forward to the Respondent's Exhibit 31-A and is shown under item 4, "Selling Cost," first column, "Regular Reseller Business."

Deducting the selling cost assignable to Ned's Auto Supply of .005 of a cent from the selling cost of the regular reseller accounts of .079 of a cent, gives a difference of .074¢ per gallon as representing the difference in our selling costs of our regular reseller business in contrast with Ned's Auto Supply Company.

2556. Q. Will you please proceed, Mr. Boatwright, to the next item which appears on Exhibit 31-A under item 5: "Dispensing Equipment Loaned"; and which appears to be discussed on Exhibit 31-M.

Mr. Austin: Before you do that, Dr. Boatwright, will you tell me how many salesmen there were here whose salaries were included in this computation?

The Witness: All salesmen classified as reseller salesmen.

Mr. Austin: Do you know how many there were?

Mr. Hanley: That appears on Exhibit 31-K.

The Witness: I think not. 31-K includes lubricating salesmen also having cars. You see, only the salesmen serving reseller accounts—it does not appear on any of these exhibits, nor do I have the exact number with me.

Mr. Austin: Well, K only refers to—I see, 69.

The Witness: 69 of the total salesmen, each of whom would have a car, while all salesmen in the calculation that we have just explained is limited entirely to the classification of men which we refer to as reseller salesmen.

Mr. Austin: You don't know how many reseller salesmen there are?

The Witness: I do not have the exact figure.

Mr. Austin: How about this 3% that you have told us
what that is several times in other connections, Fed-
2557 eral Insurance and Unemployment Insurance Taxes?

The Witness: That is correct.

Mr. Austin: Was that the correct amount in 1937? I was under the impression, without having looked it up, that it hadn't reached that point yet as the employer's contribution, at least.

The Witness: Employer's contribution in 1937 was 3% in the State of Michigan.

Mr. Austin: I see. That is partly Michigan and partly Federal Tax?

The Witness: That is correct, yes.

By Mr. Hanley:

Q. Was that an item that was actually an out-of-pocket cost paid by the Standard Oil Company?

A. Definitely, yes.

Mr. Austin: Is there any limitation or maximum as to the application of those taxes? For instance, if a man makes a salary over a certain amount, does that tax have to be paid?

The Witness: I think the limitation applies to salaries of $3,000. In other words, the 3% applies to the first $3,000 of income.

Mr. Austin: Weren't any of these men making over $3,000?

The Witness: In the reseller salesman classification?

2558 Mr. Austin: Yes.

The Witness: I don't think so. I would have to check it.

Mr. Austin: If they were, then you wouldn't have the same tax on the excess; is that correct?

The Witness: Quite likely you would not. But for reseller salesmen, the top salary of $250 a month would be a high salary, sir.

Mr. Austin: Is that so?

The Witness: The average salary in the Detroit area would come more close to $220 than it would to $250.

Mr. Austin: Now, in computing the selling expenses for Ned's here on 31-L, it appears that those three salesmen named there only spent part of their time on gasoline. Now, why is it that on 31-M that there is no division made as to time spent on gasoline and time spent on other things to service stations?

The Witness: We make an allocation of the salary that is assignable to the different products and channels, as I explained yesterday, on a time split basis; thus a salesman at the end of each quarter prepares for the accounting department an estimate of the allocation of his time. Let us assume that he spends $10 of his time on Atlas merchandise; that 10% will be applied to his total salary and will be allocated to the Atlas costs as would be shown
2559 on our 189. Let us assume that he spent 30% of his time on motor oil; that would be allocated to the "Other Methods" channel. Our process of allocating among the different channels of distribution meets your objection, because that allocation has already been made. This is not the total salary paid these men, it is merely that portion which is allocated in our regular course of accounting to the reseller business.

Mr. Austin: Of gasoline?

The Witness: Gasolines. There may be a few gallons of kerosene in there, because sometimes a service station will have a barrel in the back or something in there, and our delivery man may make a delivery of 50 gallons of kerosene. But it is truly gasoline representative marketing cost.

Mr. Austin: Now, on 31-L, where the column here refers to the salaries for a certain period of Robinson, Meulenberg, and Coutchie, is that their total salary for that period?

The Witness: Yes. That is the total salary, because you see we apply below the various percentages.

Mr. Austin: Well, then, in other words, you use on 31-M salaries, an allocation has been made thereunder account No. 1004, an allocation has been made to reseller, to sales of gasoline to reseller customers, and that is only
2560 that portion of the salaries of these salesmen?

The Witness: That is correct.

Mr. Austin: Whereas on 31-L the total salary is shown and then an allocation is made in this computation?

The Witness: That is correct.

Mr. Austin: That is all.

By Mr. Hanley:

Q. I think maybe some explanation will be helpful, Mr. Boatwright, on the subject that Mr. Austin has just been developing. I think you have said that as a matter of routine account, this allocation is made as between the different channels as to gasoline, for instance, and Atlas lines, and so on, which is reflected in account 1004 as shown on 21-M; that is right, isn't it?

A. That is correct.

2561 Q. Now, in making this study where you segregated out of the reseller group one station, specifically Ned's, it is true, is it not, that you had to make an allocation specifically to that one station, which was not reflected on the books?

A. That is right.

Q. And is that not the reason why you show a percentage allocation on Exhibit 31-L and just show a general per book account on No. 31-M?

Mr. Austin: I object, your Honor, it is a leading question. I certainly don't think Mr. Boatwright ought to have suggested to him the reasons why he did anything by counsel. And I move that—well, I object to the question.

Mr. Hanley: Well, he knows a great deal more about it than I do, Judge. I just thought that was the fact. If it isn't, I request the witness to put us right.

Trial Examiner Ballinger: I am going to overrule the objection.

Mr. Austin: Mr. Boatwright has shown a great facility, and ability, I should say, which I sincerely mean, in answering these things, that I would much prefer to have him state his answers, and I am sure he would prefer it.

2562 The Witness: Your Honor, the testimony already given clearly indicates the answer to the question. I did state that on Respondent's Exhibit 31-M the allocation had already been made. While when we attempt to get the cost for an individual account it was necessary that we make an allocation of total to secure the selling cost of that particular account.

Trial Examiner Ballinger: The Examiner understood the questions asked by Judge Hanley were in the nature of a recapitulation.

By Mr. Hanley:

Q. May we proceed to this item No. 5 "Dispensing Equipment Loaned" on Exhibit 31-A, and also on 31-M?

A. Taking next the item of "Dispensing Equipment Loaned" I refer you to Respondent's Exhibit 31-M in the lower part of the page, which is in explanation of the sources of the information and the calculations made.

Q. That is designated by Roman numeral V?

A. Roman numeral V, the sources are designated by Arabic numeral 1, while the procedure follows immediately thereafter.

Q. Will you please explain how you arrive at these several figures under item 5 on Exhibit 31-A?

A. Yes. We obtain from our Detroit office form 16, an itemization of all equipment installed at the Ned's 2563 Auto Supply outlets during 1936, which was owned by the Standard Oil Company. The sum total value of that equipment, as shown by our books, as to the original investment, was $2,878.60. The depreciation rate applicable to this class of capital outlay is established at 4%, giving a depreciation factor chargeable against this equipment of $115.14.

Q. Now, let me ask you if that is the regular and ordinary depreciation rate used on that particular item?

A. It is a regular and ordinary depreciation rate used in calculation of income tax for the Internal Revenue Department.

It is not a true reflection of costs absolutely incurred, because obsolescence on this type is far greater than would be indicated by the rate of 4%.

The next item was the Detroit personal property tax. That tax has a rate of $3.0146 per $100 of investment, giving a personal property tax payment on that particular equipment for the year of $86.76.

Now, in order to obtain the maintenance cost per dollar of investment, the depreciation rate shown on the equipment loan agreements for the Detroit field form 189, amounted to $4,305.86, was expended to 100% to represent the investment in equipment loan agreement, dispensing equipment loaned, which amounted to a total of $107,646.50.

On this investment, the Detroit division spent a total
2564 of $17,144.69 for maintenance, repairs, and so forth,
during the year 1937.

Taking our total capital outlay for the Detroit division during that period, and our total maintenance and repair cost, dividing, we find that we spent 15.09¢ per dollar of investment for maintenance and repairs. Ned's investment amounting to $2,876.60 was extended by this maintenance rate to determine a maintenance cost for Ned's particular outlets equalling $457.70 during 1937. Adding these three items, namely, the depreciation on equipment, the personal property tax rate, and the maintenance of the equipment at Ned's Auto Supply outlets, equals a total cost to the Standard Oil of $659.62. This was divided by the gallonage sold to Ned's of 4,240,500, giving a cost per gallon of .016¢. For comparative purpose a similar calculation was made to determine the cost per gallon of dispensing equipment loaned to other reseller outlets.

Q. Are you now referring to Exhibit 31-N?

A. Yes, sir.

Mr. Austin: Did the witness state what he means by "Loaned" in connection with equipment? I would like to know what kind of a transaction you are talking about when you talk about a loan.

By Mr. Hanley:

2565 Q. Explain it, please, Mr. Boatwright.

A. In a regular operation of a reseller outlet, there is certain equipment owned by the company and is installed at that reseller outlet and we indicate that on our records as being equipment loaned to the reseller outlet. It may be a pump, it may be a tank, it may be a loopster—do you understand what I mean by a loopster?

Mr. Austin: No.

The Witness: A loopster is a tank that comes in two sizes, either in 15-gallons or, I think, it is about 50 gallons. They have a pump at the top and they are used for storing motor oil, and the pump at the top throws one quart at a pump so that we can fill these bottles, you see. This equipment that is placed at these outlets is owned by the company. They are in there for the purpose of providing property inventory facilities to insure that our merchandise, when it reaches a customer's tank, has quality and the true characteristics that we intend our merchandise should have.

Examination on Voir Dire by Mr. Austin.

Q. How about the loopster? If that is only oil, it would not be included here, would it?

A. It would not: I was illustrating a type of equipment on gasoline. It might be the pump, it might be the
2566 gasoline storage tank under the ground, and so forth.

Q. Do you know what sort of equipment supplied at Ned's station is included here in this item of $2,787?

A. I know it is identically the same type of equipment entering into that expense.

Q. Was it tanks or pumps, do you know?

A. Do I know whether there were any tanks or pumps?

Q. Yes.

A. I am sure that there were. I am sure that there were pumps.

Q. Isn't that—the loaning or supplying of equipment, the loaning or supplying of equipment common or engaged in to a greater extent on leased stations than it is with station operators who either own their own property or lease it from some other source?

Mr. Hanley: Just a minute, Mr. Boatwright.

I don't know whether, your Honor, that has any materiality at all in this case. I don't think it has, but, certainly, it doesn't have any materiality on cross examination of this witness. He has undertaken to determine the cost by reason of actual equipment and investment in that equipment at Ned's Auto Supply service stations as contrasted with all the investment in similar equipment loaned to all of the rest of the reseller group, irrespective of whether they are lessees or what we call the 451 contract or who they are.

2567 This is a question of cost, not a question of taxes or propriety in practice or loaning equipment.

Trial Examiner Ballinger: Do I understand there is an objection?

Mr. Hanley: Yes, I do object on the ground it is not proper cross examination. It is not applicable to the subject under consideration, at all.

Mr. Austin: I am only trying to ask at this time, anyway, just certain questions to help obtain a clear understanding of this. I am not attempting to go into any cross examination, really; at least, not at any length.

Trial Examiner Ballinger: The Examiner thinks it is outside the scope of the direct examination.

Mr. Austin: No, your Honor. I would ask your Honor to reconsider that before you make a ruling because I will have dozens of questions that will be farther removed on cross examination and I would just get nowhere on cross examination at all if your Honor should say this sort of question was too far removed from direct. I really want to say, now, I hope to have great latitude on cross examination and will require it with this witness, to complete the examination.

Trial Examiner Ballinger: The examination will be confined to the question of costs.

2568 Mr. Austin: I consider this is very relevant on the question of costs and anything that goes into the nature of these items.

Mr. Hanley: Your Honor, I don't want counsel limited and if the witness knows and can answer this question and it will be of any help to counsel, I am willing he answer it. I will withdraw the objection.

Mr. Austin: I will withdraw the question, Judge. That will make it simpler, now. I would much rather do that than to have a ruling on it now because I don't think it is particularly important at this time but I would be rather alarmed if the objection were sustained on the ground it is not proper cross examination, so I would rather withdraw it and not pursue the subject, if that is agreeable with your Honor.

Trial Examiner Ballinger: The question is withdrawn.

Mr. Hanley: Have you finished, Mr. Austin?

Mr. Austin: Yes.

By Mr. Hanley:

Q. Will you go ahead, Mr. Boatwright? I don't know where you were.

A. I think I had just completed the explanation of the per gallon cost of dispensing equipment loaned to Ned's Auto Supply and gave a summary figure of .016¢ per gallon.

This figure is transposed to Respondent's Exhibit 2569 31-A and is shown under item 5, under the second column, being headed "Ned's Auto Supply Company."

Q. Now please explain, Mr. Boatwright, how you have arrived at the other figures appearing on Exhibit 31-A, under item 5, and indicate whether or not in your explanation your are referring to Exhibit 31-N?

A. Referring to Respondent's Exhibit 31-N you will find an explanation of the procedure followed in calculating the cost for dispensing equipment loaned for regular reseller type of accounts. Again the source is taken from form 189 for the Detroit division for the year 1937.

The total charge for subaccount 1070 which we designate as E.L.A. expense, being equipment loaned expense, amounting to $17,144.69.

The depreciation expense on equipment loaned, as indicated by subaccount 1111, was $4,305.86.

Subaccount 1513, entitled "Losses by Dismantling—Out of Pocket Expense—Equipment Loan Agreement," is $672.31 while the personal property taxes on it, $107,646.50 at the prevailing rate in the Detroit area at this time, resulted in a cost of $3,245.11, giving a total equipment loan agreement cost of $25,367.97, from which we deduct the similar items which were allocated to Ned's Auto Supply Company, totaling $659.62, giving us a residual charge incurred against other reseller costs of $24,708.35.

2570 Now this expense was incurred on accounts signed on our agreements numbered 461 and 385.

May I explain those for you, your Honor?

Q. I think you had better. You are going to be asked, eventually, anyhow.

A. Any reseller accounts signed on either of these contracts are purely sales contracts. They are not stations owned and leased to lessees nor are they stations leased outright and then sublet. These are the accounts having a sales contract with our company.

Q. And just one step further: Such an agreement may be had with a purchaser of Respondent's gasoline who owns his own garage or service station or outlet; whatever it may be?

A. Oh, yes.

2571 Q. Indeed, that is where they are used, is it not, Mr. Boatwright?

A. Yes.

Q. Primarily?

A. Primarily this type of an account is a garage, the curbstone account, the small stores, and accounts of that nature.

Q. In the property of which the Respondent has no interest at all?

A. We have no interest in the property.

Mr. Austin: Is that 461 or 385 you are referring to?

Mr. Hanley: That is my understanding of 461.

The Witness: That is the 461.

Mr. Austin: What is the 385?

The Witness: I shall have to get a copy of the contract. I don't recall the particular account the 385 applies to.

Mr. Austin: What is the difference between 461 and 385?

The Witness: That is my response. I would have to review the contracts. I don't recall. We have about six different reseller contracts, and I don't recall the terms of each of them.

A. (Continuing.). The gallonage distributed by these outlets was secured by deducting the volume sold by 2572 Ned's Auto Supply Company, company owned service stations—leased, and privately owned service stations—leased from the total tank wagon sales through the reseller channel. The residual volume was 26,987,052 gallons.

Therefore, dividing the cost of $24,708.35 by the 26,987,052 results in a cost per gallon for dispensing equipment loaned of .092.

This amount is carried forward again in Respondent's Exhibit 31-A and shown under item 5, first column, titled "Regular Reseller Business."

The difference between the dispensing equipment loaned cost for our regular reseller business of .092, a similar cost incurred at Ned's of .016, gives a difference of our marketing cost on a per gallon basis of .076.

By Mr. Hanley:

Q. Now, will you proceed, please, Mr. Boatwright, to item 6, appearing on 31-A titled "Advertising Cost."

Mr. Austin: I have a couple of questions, if you please, I am going to ask you on this point we have just been on to try to clear up this explanation on—rather, to amplify the explanation on page 31-A. That gallonage figure, Mr. Boatwright.

Examination on ~~Voir~~ Dire by Mr. Austin.

Q. When you referred to the 26,000,000 gallons, it 2573 says: "—secured by deducting the volume sold by Ned's Auto Supply Company, company-owned service stations—leased," Now, that means, where the company owned the property and leased the stations?

A. That's right.

Q. "Privately owned service stations—leased." What are privately owned service stations—leased?

A. Just as the name indicates. Our reseller business is divided largely to these various classifications mentioned. We may own outright the property and lease the property to an operator-individual called, in this case, the lessee.

Let us assume that some individual having a desirable corner location decides it would be a good capital investment for him to build his own gasoline retail outlet. Frequently, in the construction of such an outlet, the property owner will attempt to make a lease of that property outright to some petroleum company, and in this case, we may be the original lessor of the property. Not being in the retail business, we, in turn, sublet that property. According to our classification, that becomes a privately owned service station—leased.

Q. That is, you have leased it from the owner and subleased it to the operator?

A. That is correct.

2574 Q. Well, I take it from these schedules that the company doesn't receive any rental on this equipment from tanks or anything that is supplied to this type of station.

A. Oh, no.

Q. You are positive of that, are you?

A. Quite positive.

Q. Is that why the leased stations are not included here?

A. Yes. It would not have been a true calculation had I included the leased stations.

Q. Because of the rental?

A. Because we get an income on those. I had to limit it to this particular class of distributing outlets.

By Mr. Hanley:

Q. To clarify that, Mr. Boatwright: when a station is leased, it is leased with the equipment; is that not true?

A. That's right.

Q. And the lessee pays a rent for the whole ball of wax, so to say?

A. That's it.

Q. The pumps, the tanks, and everything that is there?

A. He re-leases a retail outlet, which is an entire unit. It would not have been a true calculation had I included this type of outlet in that classification.

Mr. Austin: Thank you.

Trial Examiner Ballinger: We will take a recess for five minutes.

(A short recess was taken.)

2575 Trial Examiner Ballinger: Come to order.

By Mr. Hanley:

Q. I think, Mr. Boatwright, we had reached item No. 6 Exhibit 31-A entitled "Advertising Cost," which is also dealt with on Exhibit 31-O; will you please explain how you arrived at the figures which appear on Exhibit 31-A under that denomination?

A. Yes. Referring to Respondent's Exhibit 31 we took the following expense items from our marketing expense statement 189 for the tank wagon reseller channel which were divided by the tank wagon reseller gallonage for the year 1937. Advertising costs incurred at Ned's, together with the gallonage sold at these outlets, were deducted from both the cost and the volume figures. The results were as follows:

Our account No. 1005, being "Salaries—Advertising" in the Detroit field, of $3,637.34, to which was added 3 per cent Federal, Old Age, Unemployment Insurance tax, giving a total of $3,746.46.

The traveling expense incurred by the advertising representative is shown in our account No. 1035 to the extent of $246.61.

The operation and maintenance of vehicles used, it would be a passenger car or an advertising truck, shown in our account 1048, amounted to $360.16.

2576 Depreciation expense on vehicles used in advertising, as shown in our subaccount 1103, amounted to $107.90.

These four items total $4,461.13. To this was added our advertising account 1075, being the total advertising costs of an "All Other" nature, other than the ones enumerated.

Trial Examiner Ballinger: What do the words "Including ELA" mean?

The Witness: In particular, that refers to jewel globes placed on equipment at Equipment Loaned Agreement accounts. We classify the jewel globes at the top of our pumps as being an advertising expenditure.

The sum total of this account 1075 is $154,635.04, which gives a total advertising cost, tank wagon reseller charge, Detroit area, of $159,096.17. From this we deduct the advertising cost incurred at Ned's Auto Supply outlets totalling $1,065.42, giving a net cost of advertising of $158,030.75. When we divide this amount by the tank wagon reseller gallonage of 66,388,527, we secure an advertising cost per gallon of .238¢.

Trial Examiner Ballinger: Will you explain the term used by you "Detroit area"?

The Witness: Again I am referring to the Detroit sales division. Wherever I mention Detroit, I am referring to the territory as explained in Mr. Raupagh's
2577 testimony, the limitations of the Detroit field, which is the Detroit metropolitan area and a surrounding zone, which is our regular sales division, and our books are established on that basis.

Now, to continue the explanation on 31-O of the advertising expense incurred at Ned's outlets, our procedure here was to get a list of all dealer signs or any other advertising material, which was obtained from the records of the advertising representative in the Detroit division. Our advertising representative in any given field is charged with the responsibility of maintaining records on every piece of advertising equipment that is in existence in the area. Thus he has a list at any given time of every sign, where that sign is installed, and so forth. It was considered that all of the expense occasioned by equipment installed or placed at the Ned's Auto Supply outlets was

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chargeable to gasoline except the 28 x 44 frames, and to some extent; therefore, our figures are overstated due to the fact that some of the expense should have been chargeable to other products.

2578 By Mr. Hanley:

Q. Let us understand that, Mr. Boatwright. Does that mean that you have overcharged, in your judgment, gasoline to some extent and allocated a higher figure to Ned's cost than perhaps would be justified if a more detailed allocation were attempted?

A. Yes. To illustrate: In the calculation on advertising costs of Ned's Auto Supply we charged the sum total of all of the signs installed at these outlets, with the single exception that I mentioned the 28 by 44 signs, to gasoline, and in addition we charged them off on the basis of one year. A Standard-service sign, which you gentlemen have probably seen at the outlets is installed—it has a normal life on the average of seven years—it is a sign which advertises Standard service and represents not only gasoline but motor oils, and other products that we have available at our outlets. You could not in this case have allocated with any degree of accuracy four or five signs between different products. Therefore we charged all of it against advertising.

Now, the cost of these items was obtained from our advertising department in Chicago. The computation was as follows:

We had four Standard service signs at $75 per sign installed; we had one Standard service sign at $50

2579 installed; during the course of the year '37 we had furnished two thousand maps per outlet, at a cost of .179c per map, for a total map cost of $143.20.

In the year 1937 we had certain "Point of Sale" advertising material, which according to our advertising department was allocated to the different fields on an outlet basis. This "Point of Sale" advertising material for our total company was represented by the items of banners, games, and displays—

Q. Now, that "Point of Sale", Mr. Boatwright, tell the Court please just what you mean by that term.

2580 A. It is a name which we give to a certain type of advertising expenditure. To illustrate: I think in the City of Detroit at the present time, are canvas banners suspended between posts on the driveway urging the spring change-over from the winter motor oils to the summer or lighter grade oils. Any of these signs of this nature we merely classify them as "Point of Sale Advertising"; they are distributed purely on an outlet basis; gallonage, in other words, has nothing to do with that distribution.

Does that explain that, sir?

Trial Examiner Ballinger: Yes.

A. (Continuing) Taking this total of "Point of Sale Advertising" of $143,393.52—

Mr. Austin: Will you explain to us the other items, games and displays, while you are at that point?

The Witness: Yes. During 1937 we had, oh, certain give-away games. I don't recall the exact games that we had that particular year, but they were games that could be given to children of customers on the driveway, or it might have been a kite, as a display item, or it might have been a little paper hat to give to youngsters, or something of that type.

Mr. Austin: Were those distributed to all stations in Detroit? Is that same thing included back here on page 31-O in "Advertising Costs"?

2581 The Witness: Yes, that would be included in account 1075 on the preceding page.

Mr. Austin: All right.

A. (Continuing) As I stated, these items are distributed and allocated to the various fields on an outlet basis. Therefore, this figure was divided by the total outlets by the company, which equalled a figure of $6.23 per outlet.

Mr. Austin: Will you tell us what displays are, Mr. Boatwright? You told us about banners and games.

The Witness: Yes. I am trying to think of any displays that may have been in existence that particular year; I am sorry I can't give you exact illustrations, but if you have a card cut out which you place in the window of a retail outlet, or if your have, as we do have from time to time, some display which you place on the pump or on the globe of the pump, it would be in this particular expense item.

Mr. Austin: Is it of a permanent nature or is it something that is used for a short time? I mean as distinguished from globes and signs, I want to find out what are the displays.

The Witness: No. As a rule, these displays are only
used for particular campaigns. Let us say you are hav-
ing a spring campaign. Now, at the present time we
2582 have the Ten Star spring tune-up campaign at our
particular outlets. Now, that might involve, first,
a banner across the drives; secondly, it might involve cer-
tain cut-outs for display purposes. In this particular
campaign we are not giving away any games, but in
others, in '37, we did have some games which were given
out too at that time. All of this is advertising which will
be associated with a campaign that might be in progress
at any time.

Does that meet your question?

Mr. Austin: Yes.

2583 A. (Continuing) Now, there were four Ned's Auto Supply outlets, so our cost per outlet of $6.33 was extended by the number of outlets of Ned's Auto Supply, giving us a cost of $25.32 for "Point of Sale" advertising at Ned's outlets during 1937.

There was one sign of $750 cost of the company, which was written off in a 19-months period, and 12/19s of that cost is included as the advertising, amounting to $473.68.

We had three pumps at three of the outlets requiring nine jewel globes, and five pumps at the fourth outlet requiring five jewel globes. The average cost per jewel globe is approximately $5.23. The reason I say it is approximately is that the Solite globe is less than $5.23. That is the only exception. Giving us a total cost for jewel globes of $73.22, or a total advertising expense incurred at Ned's of $1,065.42. When this amount is divided by Ned's gallonage of 4,240,500, it equals a cost per gallon of .025c. This figure likewise was carried forward to the summary in Respondent's Exhibit 31-A, and is shown under item 6 "Advertising Cost" second column headed "Ned's Auto Supply Company." Deducting the advertising cost incurred at Ned's of .025 from the advertising cost for our regular reseller business of .238 leaves a difference of marketing cost assignable to this item of .213. Recapitulated the third column showing "Differences of Marketing Costs" adds to a total of .529.

2584 By Mr. Hanley:

Q. Now, Mr. Boatwright, you have explained a number of costs which you have indicated you gave consideration in connection with the regular reseller business of our company in Detroit and also gave consideration in connection with Ned's Auto Supply Company in Detroit. Are there any costs of which you have knowledge that were sustained by the Standard Oil Company which are not reflected in the various figures which you have discussed and which are summarized on Exhibit 31-A?

A. May I explain that Respondent's Exhibit 31-A recapitulates the differences in marketing costs on only certain selected costs incurred by this company?

In addition to those costs which find their recapitulation on Exhibit 31-A, there are certain other reseller costs which could not be allocated on an accurate basis, and, in addition to those which could not be allocated on an accurate basis, there are certain other items of marketing expense that just don't seem to be influenced in any way, shape, or form, or have no bearing on this cost comparison.

Q. Well, do those other items to which you now refer apply to the Respondent's costs of marketing gasoline in Detroit?

A. They are definitely a part of our costs.

2585 Q. Now, do you have any exhibit which specifically refers to those excluded items of cost?

A. I have an exhibit which has been indicated as Respondent's Exhibit 31-Q, which is an itemization of various marketing expense items in the tank wagon reseller channel, only which have not been split between cost incurred in doing business through Ned's and in our regular tank wagon reseller channels.

Q. Are those costs, that are indicated on Exhibit 31-Q, excluded from the figures appearing on Exhibit 31-A, applicable to both regular reseller business and Ned's?

A. They are.

Q. So, do we correctly understand that they just weren't considered at all, so far as making up these figures that you have testified to are concerned?

A. They are not considered at all.

Q. Now, before I ask you to explain the several items that appear on Exhibit 31-Q, I will ask you what is your opinion as to whether or not a substantial part of that cost might fairly be allocated to the reseller business other than Ned's?

Mr. Hanley: Perhaps that is badly framed. I think I will withdraw that question.

2586 By Mr. Hanley:

Q. Regarding the matter on a gallonage basis, on a unit gallon basis, Mr. Boatwright, in your judgment and opinion, if this cost on Exhibit 31-Q could be allocated to individual gallons, what is your opinion as to whether gallons other than Ned's would have a higher or a lower allocation of cost than Ned's?

A. Basing my answer purely upon my experience and knowledge of the items entering into these accounts, the gallonage sold through the regular reseller accounts would carry a substantially greater proportion of these charges than would gallonage sold to the Ned's Auto Supply outlets.

Q. Then what is the fact, Mr. Boatwright, assuming that you had been able to allocate the expense indicated on 31Q; what would have been the result as to whether or not it would have increased or decreased the regular reseller costs that you have shown on Exhibit 31-A?

Mr. Austin: I object, your Honor. There has been no allocation made of these items and if they weren't allocated, or couldn't be allocated, then I submit it is immaterial to state what would have happened if something had been done which could not be done. No allocation was made and I submit either it should be made or the items should be abandoned.

Trial Examiner Ballinger: If there is no sufficient 2587 basis for allocation, what basis could this witness have for his answer to your question?

Mr. Hanley: Well, if the Court please, we could have made an allocation. I submit that this just demonstrates that the witness has been extremely conservative in his allocation of costs. These costs which I will ask him in a moment to explain in detail are a cost of marketing gasoline. Now they are a cost of marketing gasoline to everybody in Detroit to whom gasoline is sold. It is the witness' opinion that a greater proportion of those costs per gallon is allocable to gallons sold to others, than to Ned's.

Now he says he hasn't undertaken to make that allocation in dollars and cents because these things are overall costs and it is difficult to break them down but just as a matter of demonstrating the conservativeness of his figures, we think we are entitled to ask him this question. He may not know exactly in dollars and cents what the allocation should be but I understand he does have an opinion as to which type of gallonage would be most heavily freighted with this cost. We are not advancing it in terms of dollars and cents but we do say that if he has left out a cost in this calculation which is heavy on gallonage other than Ned's, that it demonstrates the utmost conservatism in the calculation and that we are entitled to show it for that reason.

2588 Trial Examiner Ballinger: The statement that he gives would be so indefinite as to amount, that it would serve no useful purpose, would it?

Mr. Hanley: Maybe I am asking the question a little bit prematurely. I will ask him now to explain the several items that appear on Exhibit 31-Q, and then I think it will become apparent to the Court.

Trial Examiner Ballinger: Your question at this time, then, is withdrawn?

Mr. Hanley: I will withdraw that question.

By Mr. Hanley:

Q. Will you please go ahead and explain those items, Mr. Boatwright?

A. Surely.

Mr. Austin: I would like to make an objection to the record of even going ahead and making an explanation of these items, because this 31-Q states, in the very first sentence: "No exact allocation of these items can be made." Now, if no allocation can be made, then I can't see that an explanation of the items or a statement of them in the record would, in any way, help the Respondent's case, the Respondent having the burden on cost justification.

Trial Examiner Ballinger: The statement is that no exact allocation can be made.

The Witness: May I speak to this general question, your Honor? 2589

Trial Examiner Ballinger: Yes, you may make a statement.

The Witness: The reason that statement of "No exact allocation of these items can be made" was put in the exhibit, was because this pertains to the time period of 1937.

We do not, in our regular bookkeeping requirements, have the necessary time study based on the year 1937 to accurately break these figures down. This is time passed and experience passed, and we do not have any records upon which we could break these down and defend them, as we have all the other items enumerated.

Trial Examiner Ballinger: I will overrule the objection and reserve the right to counsel to move to strike.

The Witness: Should I continue?

By Mr. Hanley:

Q. You may go ahead and explain Exhibit 31-Q, Mr. Boatwright.

A. The Exhibit 31-Q, under Roman numeral VII, offers a schedule of marketing expense items which are incurred on both Ned's Auto Supply volume and regular reseller channel, but to a lesser extent on Ned's volume than on regular tank wagon reseller business.

2590 As previously indicated in the testimony, an exact allocation of these items cannot be made. It is our opinion, based on knowledge of the functions for which these items of expenditure were incurred, that our regular reseller business is responsible for a greater portion of this cost than would be represented by the proportion of gallonage done through these regular outlets. They are enumerated separately to show the conservative nature of the cost comparison set forth in Exhibit A, indicated as Respondent's Exhibit 31-A.

2591 Q. Now referring you to the first column entitled "Account Number," on Exhibit 31-Q. Does that refer to regular, routine and current accounts that are kept by the Standard Oil Company and were kept in 1937?

A. It does.

Q. In respect of this entire group of exhibits, 31-A through and inclusive of 31-Q, is it true that all of these figures relate to the gasoline reseller channel of distribution in Detroit?

A. It does. It relates to the tank wagon reseller gasoline sales channel.

Q. And have you, in these computations, excluded costs incurred in connection with the distribution of other products?

A. Yes, sir.

Trial Examiner Ballinger: You say it relates to tank wagon. Does that also include the tank car deliveries?

The Witness: No. This is the tank wagon reseller channel marketing cost.

Mr. Austin: Which item are you referring to, now, Mr. Boatwright?

The Witness: All items that we have given numbers of various expense accounts.

Mr. Austin: All the way clear through the thing?

The Witness: All the way through.

2592 Mr. Austin: I thought you were on 31-Q?

The Witness: I am, sir; and any account number therein indicated. I have taken as the dollar amounts only that portion which is indicated on our marketing expense statement under the tank wagon reseller channel only.

Mr. Austin: Nothing for tires, or anything else of that sort?

The Witness: No.

Mr. Austin: Or oil?

The Witness: No. That is excluded.

By Mr. Hanley:

Q. Now haven't you done that throughout all of these figurations appearing on Exhibit 31-A all through and inclusive of 31-Q?

A. I have.

Q. So there are no figures here, if I understand you rightly, Mr. Boatwright, that deal with the costs of the sale of products other than gasoline in Detroit.

A. With the single exception that was mentioned previously in the testimony: That in some cases where our reseller outlets do carry refined oil.

Q. That is, kerosene?

A. Kerosene, and do have a barrel at their outlet and do receive shipments, maybe of 50-gallon quantities, it is
2593 impossible to segregate the cost on that particular
small quantity. I did state, I think, in the testimony, that these were truly gasoline marketing costs. They are truly representative of the gasoline marketing costs.

Q. That kerosene thing: What is the fact as to whether or not that is so trivial that if you could segregate it, it wouldn't have any effect on these figures?

A. That is the reason for my answer as given. It is so trivial that in all true senses of the word, the costs that I have indicated are the truly representative costs for the distribution of gasoline.

Q. Mr. Boatwright, as a result of your study of this situation in Detroit, and the business done by the Standard Oil Company with Ned's and with other resellers in Detroit, were you able to, and did you arrive at any opinion as to whether or not the type of business that the Respondent was doing with Ned's was more, or less, profitable to the Respondent by reason of lesser costs, than was the type of business being done by the Respondent with other resellers in Detroit?

A. I did so reach a conclusion.

Mr. Austin: I object to that, your Honor—

By Mr. Hanley:

Q. Will you state your conclusion?

Mr. Austin: —I object to the last question as
2594 irrelevant and immaterial.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Mr. Hanley: I think that question was answered, Judge.

The Witness: I merely answered to the effect that I had reached a conclusion.

By Mr. Hanley:

Q. That you had formed an opinion.

A. I had formed an opinion.

Mr. Hanley: Then I asked him to state his conclusion?

Trial Examiner Ballinger: I will hear from counsel on that.

Mr. Austin: Well, I don't see that it makes any difference on the question of cost justification whether or not the Respondent made a profit or didn't by giving Ned's a half a cent better price. That is a question which goes to the price charged for gasoline, as well as to the cost of sale and what the Respondent's reasons were for giving Ned's a half a cent differential is entirely immaterial and whether it found it was a profitable deal or whether they found it was not.

Mr. Hanley: I didn't ask him whether we made a profit,
or not. I didn't ask him that, your Honor. I don't
2595 know whether we made a profit, or not. I don't know
whether he knows. I asked him if it was not more
profitable for the Respondent to do this type of business because of a lesser cost, than doing business with other resellers. I don't know whether we made a profit or not and I didn't ask him that and I don't intend to ask him that.

I am asking him to put it in his simplest terms: Whether or not, in the judgment of this witness, that he found as a result of this study, that our company could sell a gallon of gasoline to Ned's at less cost to our company, at less selling cost to our company, than we could sell a gallon of gasoline to other resellers in Detroit. That certainly goes right to the issue that is involved in this lawsuit, it seems to me.

2596 Trial Examiner Ballinger: The objection is overruled.

A. I stated that I had reached a conclusion. With the selling costs incurred in doing business with Ned's, as compared with selling costs of doing business with our regular reseller outlets, business done with the Ned's in the year 1937 was more profitable to the Standard Oil than business done through our regular reseller outlets.

Mr. Hanley: At this time, if your Honor please, the Respondent offers in evidence the Exhibits which have been marked, for identification, as Respondent's Exhibits 31-A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, and Q.

Trial Examiner Ballinger: Any objection?

Mr. Austin: I have a couple more questions to ask here, that I didn't get in as we went over the latter part of this, along the line of the previous questions.

Examination on Voir Dire by Mr. Austin.

Q. Turning to page 31-Q, Dr. Boatwright, that first item there, under account 1000.

A. Yes.

Q. Can you state some of the salaries, or can you tell me one of the salaries that is included in that list?

A. I can tell you the positions, but I cannot tell you the salary of a single man entering into that make-up.

2597 Q. Well, the position, then.

A. Surely. Under the classification included in our subaccount 1000 we find salaries of superintendents of construction; superintendents of equipment; superintendents of maintenance; plant supervisors; managers and assistant managers of the individual fields.

Q. Would "manager" be Mr. Raupagh?

A. It would.

Q. Take Mr. Raupagh's salary, for example. How is that salary divided and allocated as between reseller gasoline costs and other gasoline costs, and costs of sale of other materials?

A. It is allocated on an all-gallonage basis.

Q. As to gasoline?

A. As to gasoline and refined oils and tractor fuels. You see, when we get into the consuming channel, it becomes, there, a sum total of your gasolines, your tractor fuels, of rural sales of refined oils, and things of that sort. Therefore, his salary is allocated upon an all-gallonage basis of the petroleum products.

Q. Doesn't the company sell other things besides gasoline and oil here in Detroit?

A. Oh, yes.

Q. How would the allocation be made of those?

A. It is made only on the all-gallonage basis.

2598 Q. Gallonage refers to liquids.

A. That is correct.

Q. How about other things: accessories, tires?

A. Greases, of course, are translated into gallons. Accessories and tires were introduced by our company long after we were in the petroleum business and of this particular item there is no charge made against the accessory line of merchandise for Mr. Raupagh's salary. To that extent, it is regarded as an increment of business.

Q. An increment of business?

A. Yes. The accessory line is regarded, as I say, as far as Mr. Raupagh's salary and the other gentlemen I have enumerated here, as far as their salaries are concerned; they were incurred prior to the introduction of this line, and their cost is still spread among the different channels on that basis today.

Q. You mean in 1937 you didn't sell batteries and tires?

A. I do not. I mean we did. I mean, in spreading our cost, we still spread their particular cost on a gallonage basis.

Under Mr. Raupagh's supervision there is a tire man who works entirely on the promotion of the Atlas line of merchandise. His salaries and expenses and his costs are in one of these items we have charged. It is charged wholly and purely to the Atlas line of merchandise.

2599 Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Now, at 12:10 P. M., the hearing stands in recess until 1:30 P. M.

(Thereupon at 12:10 a recess was taken, to reconvene at 1:30 o'clock P. M.)

2600 Afternoon Session.

1:30 P. M.

Trial Examiner Ballinger: Come to order.

Mr. Hanley: I am not sure what is the last thing on the record.

(The last question and answer were read.)

Mr. Hanley: Have you any further questions, Mr. Austin?

Examination on Voir Dire (Cont'd.) by Mr. Austin.

Q. Dr. Boatwright, will you turn to page P, or 31-P, in the middle of the page there is an item for $750 for a sign for a period of 19 months; why was that amortized over a period of 19 months? Doesn't it have a longer life than that?

A. That sign was sold to the Ned's Auto Supply Company at the end of 19 months. We had our investment in it only for a period of 19 months. Therefore, 12/19 of our cost was amortized in the year 1937.

Q. On the top of that same page is four Standard service signs at $75 each, and one Standard service sign of $50. Now, am I correct in assuming that signs of that same character and also jewel globes, which are mentioned on the same page, that such signs and globes are also included opposite account 1075 on 31-O, for service stations other than Ned's?

2601 A. That is correct.

Q. Why are those signs and globes charged at cost value as an expense rather than being charged as an item of maintenance and depreciation? Instead of being capitalized and an amount charged for depreciation and maintenance, as was done in the case of the loaned equipment?

A. The life and the tenure of the signs is not equal to the life and tenure of a pump, as an illustration. You see, those globes may not actually be broken for a period of quite a number of years, but a jewel globe becomes dim, it has to be taken down. It has to be sent back to the factory, and it has to be replaced. To reconstruct a globe is about the same cost as to buy a new globe. It is not quite as great. These items in total that you have enumerated are items of such a small nature that it is not logical to capitalize them and to charge depreciation rates as we have the other equipment.

Q. Would that statement you have just made apply to signs? I notice these are $75 cash; at least the four specified here?

A. Yes. There is, with the signs—the $75 includes the cost of installation. You are acquainted with the sign. It is the large bracket that stands out on the curb before an outlet. That sets in a concrete base. It is wired. Part of the $75 is the labor of installation.

2602 Nextly, the sign face is enameled. They may become chipped or dim with the passage of a few years, and we have to replace the face of that. It isn't an item, I believe, which normally would be capitalized in any business.

Q. Am I correct, then, in stating that those Standard service signs are charged as an expense at the time when they are installed, or if there is a replacement, at the time they are replaced?

A. We do so charge them as a marketing expense item.

Q. In your opinion, is such an expense a direct expense which could be charged directly against the service station where they are installed? That's what was done here, as to Ned's, wasn't it, as to these four?

A. Absolutely. Yes, I think that is the logical direct charge against the outlet.

Q. I should think so, and I just wondered whether you were making any distinction in that respect as to these signs for Ned's and any other signs that might be installed some place else?

A. No, we do not. If we have a large, spectacular sign, as we do at a service station in St. Louis, I would say no, but signs of this nature are a direct charge to this outlet.

Q. How about this $750 sign?

A. That is a Neon sign. We have several of those 2603 in the Detroit area. We have different sized signs and different types of signs. It is merely a different size and different type of installation.

Q. Do you know where any of the other Neon signs are located in the Detroit area?

A. I couldn't name them, but I have seen them since I have been in Detroit here. I have seen them on the streets. You probably have seen them at several stations.

Q. Matters such as these games and displays and maps. I see there were 2,000 maps here. That is the number that was actually turned over to Ned's by the Standard Oil Company during the year 1937, is it, Mr. Boatwright?

A. That on maps is the estimate of the advertising representative in the Detroit division who had charge of the distribution. We do not keep a record for four years on the exact number of maps per outlet, no.

Q. Who is the representative who has charge of that distribution?

A. I don't know his name.

Q. Is he the same man that has charge of the distribution of games and displays and other advertising material of that sort?

A. Yes, sir.

Q. You said that that was his estimate; this 2,000.

A. That's right.

2604 Q. How did you get that estimate?

A. I discussed it with him.

Q. Oh, you know who he is, but you don't remember his name?

A. That is correct. I don't recall his name. I discussed it with him and I asked him if he would review his 1937 records.

Q. Maybe as long as I am asking that question, if it is agreeable with the Examiner, Mr. Raupagh might supply that name.

Mr. Hanley: Who is it, the advertising representative?

The Witness: The advertising representative.

Mr. Hanley: Who is it, Mr. Raupagh?

Mr. Raupagh: James Quick.

The Witness: James Quick, is the name.

Examination on Voir Dire (Cont'd) by Mr. Austin.

Q. Do you know, or did Mr. Quick tell you what the basis for distribution of such material is, between the stations? How does he determine what banners or how many maps to give to a particular station?

A. Well, there is no problem involved, of course, on banners, because that is merely according to the number of outlets or dealers. That is purely a driveway problem. A service station has a driveway. Therefore, 2605 the number of banners automatically takes care of it self. He knew the number of banners that we furnished that year. That is apparent in our advertising records.

Q. Does every service station get a banner?

2606 A. Oh, yes. Every driveway of every drive-in service station all have them.

The number of maps is allocated, in a field, on a gallonage basis. Two thousand maps for this one outlet is an unusual volume of maps and it is because of the large gallonage it is as large a figure as it is.

By Mr. Hanley:

Q. Is it or is it not a fact Mr. Boatwright, Ned's may have gotten many less than two thousand maps?

A. It is.

Q. And that two thousand is determined upon the basis of their gallonage and not upon the basis of how many maps they may actually have gotten?

A. That is correct.

Trial Examiner Ballinger: May he not have received more than two thousand?

The Witness: It is a possibility. However, I raised that question with Mr. Quick, in discussing this, and he said he was satisfied that he had placed the estimate high enough so it would not be an understatement of our supplies in that respect.

Examination on Voir Dire by Mr. Austin.

Q. Turning to page 31-O, there is an item there opposite account No. 1075 of $154,635.04; would it be pos-

2607 sible for you to prepare and submit a breakdown of that item setting forth all of the items of cost which—or all of the items, rather, which went into that total—both as to amount and as to the character of the item?

A. That would be perfectly possible. It could not be done from Detroit records. It would have to done from the general office records in Chicago.

Q. Have you any idea of the total number of items entering into that figure?

A. It would be a rank guess. I would prefer not to guess on the witness stand.

Q. I wondered if you could do it within—

A. I prefer not to guess, because this is a classification of expenses. And it would be purely a guess. I don't know how many newspapers we use in the area, as an illustration, and yet each newspaper would be a separate billing.

2608 Q. Well, Dr. Boatwright, that item, as you know, is about 97% of the total cost charged there against service station advertising in Detroit, and the other 3% is explained, but the 97% has no explanation on this list, and it would probably be of considerable help to the Commission in analyzing this—it certainly would to be—to have a breakdown of that statement. Certainly, at least, into major items. You referred to newspapers. Of course, you could put in one item for newspaper advertising. I would want to know where at least. If it was advertising in different cities, I would want to know that. I assume it is Detroit.

Mr. Hanley: First, that question is objected to on the ground that it assumes a percentage which has not been testified to by the witness. There is no objection to the question on that ground if the witness is willing to accept the percentage. I just don't know.

Mr. Austin: I haven't asked any question.

Mr. Hanley: Just a moment, please.

Trial Examiner Ballinger: I understand there is no question pending.

Mr. Hanley: Secondly, it is objected to—.

Trial Examiner Ballinger: There is no question pending.

Mr. Hanley: There is a question.

2609 Trial Examiner Ballinger: Read the question, then.

(The following was read by the reporter:

"Question: Well, Dr. Boatwright, that item, as you know, is about 97% of the total cost charged there against service station advertising in Detroit, and the other 3% is explained, but the 97% has no explanation on this list, and it would probably be of considerable help to the Commission in analyzing this—it certainly would to me—to have a break-down of that statement. Certainly, at least, into major items. You referred to newspapers. Of course, you could put in one item for newspaper advertising. I would want to know where at least. If it was advertising in different cities, I would want to know that. I assume it is Detroit.")

Mr. Hanley: I assume that is a question. If it isn't, I move it be stricken as just an argument.

Trial Examiner Ballinger: The Examiner concludes it is in the form of a question.

Mr. Hanley: Then, I would like to continue with my objection.

Mr. Austin: I deny it is a question. I don't think there is any question pending.

Mr. Hanley: Then I move it be stricken as an argument and statement volunteered by counsel, and has
2610 no purpose in the record.

Mr. Austin: The purpose of the statement is simply telling the witness what I want. Awhile ago I asked him if he could give me a complete break-down of this item. And I was simply going into, to some extent, the reasons for asking it, and the latter part of it was directed to what we wanted.

Trial Examiner Ballinger: The motion to strike is overruled.

Mr. Hanley: Then I would like to continue with the objection.

Secondly, the witness has testified he is not prepared to make the break-down which is suggested by counsel in his statement or question, whatever it may be. But the Respondent at this time offers to open its books to the Commission for examination as to this item or any item which may have been included in or discussed in respect of any of the exhibits heretofore offered, including 31-A to 31-Q.

Trial Examiner Ballinger: The Examiner will ask the witness a question.

With reference to item No. 1075: "Advertising Costs—Other Costs (including ELA)", can you furnish a break-down of that item?

The Witness: I cannot furnish that from Detroit. I would have to break down that particular item in our
2611 office in Chicago.

Trial Examiner Ballinger: But that could be done?

The Witness: It can be done.

Trial Examiner Ballinger: How much effort will it require?

The Witness: I couldn't answer that question, Judge, without reviewing the records.

May I ask how detailed a break-down would be required on that?

Mr. Austin: Could Mr. Warmack answer that, or could we go off the record on that point?

Mr. Hanley: Let's answer it on the record, but we have no objection to Mr. Warmack making the answer.

Trial Examiner Ballinger: You may.

Mr. Warmack: I should think that this item of advertising appearing on Respondent's Exhibit 31-O and the item amounting to $154,635.04 should be broken down to the extent that the major items included in that amount, that is, items of advertising, would be shown separately, but maybe not to the extent of going down to every cent. In making that analysis, I rather think that it would be well to picture this advertising—this particular cost of advertising—as it applies to the Detroit area, or district, in total, which would probably be much more than $154,000, and then make the separation or let the separation be shown 2612 as between gasoline and other products supported by information with respect to how that separation was made. Then, picking up the question that is applicable to the gasoline products, that portion which has been applied to resellers. If we have that information, we certainly can appraise the situation properly, I think.

Mr. Hanley: Well, if your Honor please, do I understand that this is a request of the Respondent that we furnish additional figures on this thing? If it is, we will furnish them, but we want to know if it is a request for figures. Of course, we have to know what figures are desired.

2613 Trial Examiner Ballinger: Has Mr. Warmack sufficiently indicated what he desires?

Mr. Hanley: I don't know. I will ask the witness.

Do you understand that request, Mr. Boatwright?

The Witness: The figure as requested—the information as requested would not be a true reflection of our advertising cost in this area. To take one simple illustration: If we advertise in the Detroit Free Press, it would be an unfair charge to charge the total of that advertising cost to gasoline business in the Detroit area. Our process of allocating is to allocate the costs of these large metropolitan areas on a circulation basis by counties. Thus if the Detroit Free Press extends over into our sales division in Saginaw or in Grand Rapids, it would be a loading of the cost to charge that entire amount to the Detroit area.

If you would enumerate rather than the method in which you have stated, that you would like some such a breakdown as newspapers, wherein we have made what we regard as the most logical and practical allocation we can among the different sales fields, outdoor, radio, stamps, signs; in that manner specify types of expenses incurred, I think we would be much more nearly able to comply with your request.

2614 Mr. Warmack: Of course, you understand, Dr. Boatwright, that I could only know in a general way what is included in this advertising from what experience I have had in the handling of similar items of cost. And we might say this, that all we would like and what we need in the Commission in order to appraise the situation properly and give it all the consideration that it merits is just a true picture of the situation as it exists.

Mr. Hanley: Judge, I wonder if this would be helpful: that if the Commission prefers, that they make their request of us as to just what figures they want? If they will do that, we will furnish those figures, or, in the alternative, if the Commission prefers, our books are open for their inspection, and cannot that be done at some later time?

Trial Examiner Ballinger: That may be done, but, Judge, I apprehend that the Commission may desire time for cross-examination, and that probably should be done before the cross-examination is commenced.

Mr. Hanley: I would assume so, your Honor, and I think it would be helpful if they are going to request figures rather than an examination of the books, that they let us know promptly what figures they want. If they want us to furnish the figures, we will do it. If they would rather
look at the books themselves, that is all right, too,
2615 but I would like to have it done so Mr. Boatwright can
be cross-examined and released just as early as possible. I don't know just what they want; what kind of a breakdown they want. We will give them anything we have available, if we know what it is.

Trial Examiner Ballinger: May we inquire, Mr. Austin, when you can advise counsel definitely as to what is required or what course you elect to pursue, some time tomorrow morning?

Mr. Austin: I would like to go ahead right now, for a moment.

Trial Examiner Ballinger: You may.

Mr. Austin: See how far we get.

Examination on Voir Dire by Mr. Austin.

Q. Mr. Boatwright, let me ask you with regard to this item of $154,000, account 1075: Have all of the advertising costs and other costs included in that total, other than those which are in whole, in your opinion, allocable to gasoline, or, I should say, perhaps, those which have been in whole allocated to gasoline on the books of the company; have all the other items included there been allocated as between gasoline and other products and as between reseller gasoline and other types?

A. Your question is quite broad. There are so 2616 many items entering into this particular cost.

To illustrate: if we run an advertisement in a farm paper in the State of Michigan, no part of that cost would be in this particular item. If, on the other hand, we run an advertisement in one of the Detroit metropolitan papers, in our judgment, and I think rightly, that is primarily an advertisement to consumers buying from resellers, and is, therefore, a reseller advertisement cost. Now—

Q. Just at that moment are you referring only to a gasoline advertisement?

A. Well, I will continue. If we run a motor oil ad, the advertising on motor oil will not be found in this particular channel of tank wagon reseller ads, but will be found on our marketing expense statement under "Other Methods."

By Mr. Hanley:

Q. Let's get that clear, Mr. Boatwright. In your item here on Exhibit 31 O, you have not charged against the reseller channel any advertising that Standard Oil Company bought, except advertising of gasoline. Am I correct in that?

A. That is correct.

Examination on Voir Dire by Mr. Austin.

Q. Well, that item there "Other Costs." Does 2617 that in any part include advertising of other oils or other products?

A. Sometimes when we send out these 28 x 44 faces—are you acquainted with what I mean?

Q. No.

Mr. Hanley: I don't think the Court knows, either. Will you explain?

A. The 28 x 44 is merely a steel frame sign which stands in front of our various service stations that has a display face, front and back. It has no permanent display, but we insert in this frame, paper or cardboard displays from time to time to catch the passing motorist's eyes.

Now, frequently, in sending out the respective faces to be placed, there will be a postage charge or a transport item incurred. When you get to things of that kind, it is allocated among the different products on the best basis we know how. That is a small part, but such an item would be included under the "Other Costs" feature of advertising; postage, barrel containers where they have those long tube-like containers in which you have to ship this material, all cost, and they would be in it.

Examination on Voir Dire by Mr. Austin.

Q. Is the only portion of such cost included here, the cost of portion which is allocated to gasoline?

A. To the very best of our ability to allocate cost.

2618 Q. And to resellers?

A. That is correct.

Q. Then is it true that a large part of the cost items going into this total of one hundred fifty-four thousand odd dollars are items resulting from an allocation of a particular cost item as between gasoline and other products and as between different types of gasoline business?

A. I am not sure I understand your question.

Mr. Austin: Will you read it again? I am sure you will bear with me if some of my questions are not properly phrased.

(The question referred to was read by the Reporter.)

A. Any newspaper insertion results in an allocation problem. To illustrate, we may run an advertisement having to do with a ten star spring tune-up.

Trial Examiner Ballinger: What does that mean?

The Witness: That means that is our current campaign having to do with the ten leading services the resellers offer to perform for the motorist.

Now, obviously, a part of that is gasoline.

By Mr. Hanley:

Q. I will ask you, Mr. Boatwright, isn't that the name of an advertising campaign?

A. That's right; in the Detroit area.

Q. Which is being currently used by the Standard
2619 Oil Company?

A. Yes.

Part of that advertisement has to do with gasolines, part of it with motor oils, and part of it has to do with other services rendered at the outlet.

You automatically encounter a problem in products in such a case as that. In almost any item of advertising insertion that you make, even if you run an advertisement primarily on Isoviz, you still have a problem of allocation because there will be some block or some plug in that newspaper insertion which will be a plug for Quaker State or Polarine or Stanolind, other motor oils; or you might have a plug in there to do with gasolines. That is as nearly as I can answer your question.

Examination on Voir Dire by Mr. Austin.

Q. What I was trying to ask you, Mr. Boatwright, is this: Where such a problem—wherever that problem arises, or wherever there should be an allocation, has such an allocation been made?

A. Yes, sir.

Q. And is the only portion of that advertising cost included here, the portion that was allocated to the retail reseller gasoline business?

A. Yes, sir.

2620 Q. That was really the question that I intended to ask.

A. Yes, sir.

Q. To bring out the fact that in arriving at the various—and I assume numerous cost items go into this $154,000—that in a great many instances it was necessary to make such an allocation as you have just described.

A. You are quite correct and the only item I have used is that item which has been allocated to the tank wagon reseller gallonage on gasoline.

2621 Q. Now, getting back to the question of summation of a break-down of this item.

I believe you suggested that you might be able to give a break-down and an itemization by character of cost items; if that's a fair description.

A. I stated I think we could do that more easily and probably give you better results than we could if we took the total expenditures and then attempted to break out certain of those totals that didn't apply because of the manner in which we were allocating our newspaper advertising.

Q. Then could you give us a break-down of that kind by character of advertising or by character of item? That is, in other words, describing the type of advertising, and I assume that that would show, at least make it pretty clear, what sort of an expenditure it was; whether you referred to newspaper advertising or radio advertising or maybe it is maps, maybe those various things of that kind.

A. Signs.

Q. Yes. You could do that, and you could also—this is getting back to my question of a minute ago—you could also give us a statement appended to that list, could you not, of the methods of allocation you used? That is, it would be possible to give a general statement or any indication of how the allocation was made of items that 2622 are the result of allocation as between gasoline and other products and between different types of gasoline business?

A. I think that would be possible. I think it will be quite a volume.

Q. Well, I am exploring here now to a certain extent.

A. I think that would be entirely possible. That could not be done in a short time, your Honor. We couldn't have such information as that before,—because merely the problem of typing these figures, these various expense items, would be a detailed problem—

Q. I suppose we should be satisfied as to method of allocation, if that has to be a separate description of method, of different items—it might be restricted to large items, but wouldn't one method of allocation be used for a number of items, so that one descriptive method used in allocating would apply to a good part of the list, or would that vary?

A. That, frankly, varies. Sometimes you allocate between products on a measurement of your ad basis. Thus, if you have a motor oil ad and a plug in that ad having to do with gasoline, you will measure your ad and allocate a certain portion, maybe 5% or 10%. That is done on a basis of relative weights assigned by experienced people in the advertising department.

Q. Exploring a little further along that line; instead of

attempting to give the description of the method used
2623 for allocation, would it be possible, opposite every
item which has resulted in allocation, to give the percentage allocated to the reseller gasoline business? That is, if an item is a hundred dollars and the total expense of that character was $200, why, then, the figure would be 50%. That wouldn't tell us how it was done, but, at least, it would show the result, which might be more important.

A. We might be able to do it on that basis.

Trial Examiner Ballinger: Would that require some time?

The Witness: All of this which has been requested would require some time. You see, our records for 1937 have now been transferred from the active files to the warehouse files in our main station plant.

Trial Examiner Ballinger: When you say, "some time," could you give me some approximate idea of within weeks?

The Witness: Any estimate of time would have to be a guess, your Honor, without seeing the records, but I should think it would be at least a week, as a minimum to dig that information out and to prepare it.

Examination on Voir Dire by Mr. Austin.

Q. And while we are on this subject, I would like to
say, now, that I want to make the same request as
2624 to the item on 31-H, account No. 1066, "Miscellaneous Operating Expenses," $40,142.68.

2625 The Witness: Your Honor, I explained yesterday
in my testimony the only way that expense item can be broken down in detail is to go to the original vouchers of expenditure on the part of the company, which would be a reconstruction of expense statements for the Standard Oil of Indiana, the Detroit division for 1937, and would involve months.

Mr. Austin: I had, perhaps, forgotten that statement.

The Witness: It would take at least three months and quite a staff of men to reconstruct that figure.

Mr. Hanley: I might suggest, your Honor, while we are perfectly willing to furnish all these figures, their results amount to just a matter of a few hundredths of a per cent. They aren't very important.

Mr. Austin: These two are the most important. They are the ones that make up a large part of this cost difference.

Mr. Hanley: I fully concede the right of the Commission to examine into them, irrespective of how much they amount to, and we are perfectly willing to cooperate in any way we can but, Judge, after all, some day we have to get through with this lawsuit.

Mr. Austin: Yes.

Examination on Voir Dire by Mr. Austin.

2626 Q. Well, will you refresh my recollection, Mr. Boatwright, on this item I just referred to here?

A. Item 1066?

Q. Yes; as to where that came from. Now, obviously, the source of that, as you got it, is available now without going through this long research?

A. Yes, it is available on our marketing expense statement for the Detroit field.

Q. Is it broken down—you didn't lift this 40,000 as one item off of the books, did you?

A. I did lift this from the tank wagon reseller expense off of the books, but I did not include other miscellaneous expense incident to the distribution of the Atlas line, I didn't include other miscellaneous expense incident to the motor oil, I didn't include other miscellaneous expense incident to the tank wagon consumer. This is purely tank wagon reseller miscellaneous expense.

Q. But when you say you lifted it off the books, it didn't come off as an item of over $40,142. Wasn't it taken off as a number of different things and added up to make this total?

A. No, sir, it was taken off the form 189; the marketing expense statement, which is a recapitulation of those various items of expenditure that I have previously enumerated and wherever it is possible, as I stated in my testi-
2627 mony yesterday, any item of expense that can be charged direct, is charged direct.

Items of expense which cannot be charged direct are allocated upon a gallonage basis and, for that reason, I used the highest possible divisor, including all gallonage, so I would not overstate the cost. If anything, I have understated the cost on that item.

Q. But do I understand you have no readily available breakdown of the particular expenses which go to make up that item No. 1066?

A. I have a breakdown of 1066 among different channels of distribution.

Q. What do you mean by different channels of distribution?

A. As I have explained it before.

Q. You mean resellers, and so forth?

A. Reseller, consumer, other methods to which we allocate costs; distribution of motor oils, industrial lubricants, and things of that kind, and the Atlas line, tires, tubes, batteries, accessories, and so forth.

Mr. Hanley: May I again direct the attention of the Court to the fact that the item now being discussed, the forty thousand odd dollars, is an item in a total of fifty-nine thousand odd dollars, which item of fifty-nine thousand odd dollars results in the reflection of approximately .08 of a cent in the total cost?

2628 Mr. Austin: Yes, and that .08 of a cent is approximately 15 or 16 per cent of the total difference in marketing costs, here, that is claimed to exist as between Ned's and the other stations. In other words, it is one of the chief items.

2629 Mr. Hanley: Well, Judge, may we not shorten this, please? We are willing to give the information. We will open our books. We will respond to any specific request. We will do anything in the world the Commission wants, to get the facts.

Trial Examiner Ballinger: May I have the attention of counsel?

With reference to the item opposite Respondent's No. 1075, "Advertising Costs," appearing on Respondent's Exhibit 31-Q, amounting to $154,635.04, I understand Respondent has agreed, or has offered to furnish all the available information that it has and can assemble without unusual and extraordinary effort. Is the offer of the present witness acceptable to counsel?

Mr. Austin: Well, does the witness understand what I mean on this—what is it, 1075?

The Witness: Yes.

Mr. Hanley: I don't know whether the witness understands or not, your Honor, but I will make it on the record, and I will make it so specific that nobody can misunderstand it. It doesn't matter whether I understand the request or not, whenever it is satisfactory to the witness who is going to have to do the work or order accountants to do the work, that will suit me. But I want one or two things.

2630 First, a specific request that the accountants are going to understand. We can't go back and say to our accountants, "Give us a figure," without telling them what figure we want. Nothing else makes sense. Now, that is one thing we will do.

Or, if the Commission desires it, we will throw our books open and they can send their accountants in and look at the books. I don't care which. We will do either one, or both.

Trial Examiner Ballinger: The Examiner suggests to counsel that he confers with the witness and see if they can't reach an understanding and announce the understanding at the reconvening of the hearing tomorrow morning.

Mr. Austin: To do that, your Honor, I would like to confer with Mr. Warmack, and perhaps we can prepare a written request, and then discuss—or, perhaps we can discuss it with the witness either before or after, or both.

Trial Examiner Ballinger: Now, with reference to item 1066, "Miscellaneous Operating Expense", $40,142.68, appearing on Respondent's Exhibit 31-H, I understand the witness to say that is taken from the books, and that you have—he has already given you the break-down as clearly as he can. Now, if you can't reach an agreement as to any further data to be furnished with reference to that, then the Examiner suggests that you accept the offer of
2631 counsel and make an inspection of the books and records.

Mr. Austin: Your Honor, it occurs to me that this item 1066 is not broken down here. It is a substantial item. It involves apparently a number of joint costs. The burden of proving justification in this case being upon the Respondent, my opinion is—of course, while they can rely upon whatever they wish to, that the Commission cannot consider figures of this kind that are not substantiated much more than this figure has been substantiated here. Consequently, if nothing further is submitted on it by the Respondent, why, I just wish to say upon the record that I am not, on behalf of the Commission, assuming any responsibility or any burden of going and examining the books for the purpose of determining it.

Trial Examiner Ballinger: It is only, then, a question as to whether or not the item has been sufficiently proven?

Mr. Austin: That is right. It would be upon final argument, and that is a matter, of course, which Respondent's counsel and economists can determine for themselves. Of course, we may or may not—we may look at the books and we may want to do it on a number of things; we may want to look at the books in connection with advertising, even if we get such a statement as has been discussed. But
what I am trying to say is that I am not accepting any
2632 obligation to either look at the books or accept this
item. I assume that I may do as I choose upon that.

2633 Trial Examiner Ballinger: Counsel for the Respondent has tendered to you the services of his company in furnishing any additional data in connection with any one of these items that you may desire, if you will only indicate it with such precision that he may understand what you desire.

Mr. Hanley: Exactly right.

Trial Examiner Ballinger: And that offer is open.

Mr. Hanley: We will answer the question if we know what the question is.

Mr. Austin: That is appreciated and undoubtedly will be availed of, but without any acceptance of any obligation upon the Commission's part to fulfill any burden of proof in so doing.

Trial Examiner Ballinger: You may proceed.

Mr. Hanley: I think, your Honor, that there is still on the record an offer on the part of the Respondent of all of this series of 31 numbered exhibits which were not ruled upon because counsel for the Commission wanted to ask some questions. They were offered in evidence. I don't know whether an objection was made or not. I don't recall it if there was one.

Mr. Austin: Would I be out of order—

Trial Examiner Ballinger: Before I would like to
2634 hear from counsel for the Commission, I desire to
call counsel's attention to the computation at the bottom of Respondent's Exhibit 31-Q, figures $295,831.14 over the figures 70,629,027 gallons—42¢ per gallon.

Mr. Hanley: .42.

Trial Examiner Ballinger: Yes; .42 of a cent per gallon. The Examiner doesn't understand that there was any testimony with reference to that, and the Examiner doesn't understand how that becomes important.

2635 By Mr. Hanley:

Q. Mr. Boatwright, referring to the calculation on the bottom of Exhibit 31-Q, which results in a gallonage charge of .42 of a cent a gallon, and then referring to Respondent's Exhibit 31-A, state what the fact is as to whether or not that .42 of a cent a gallon would be added to either one or both of the costs, on the one hand, resellers other than Ned's, and, on the other hand, Ned's, if you had undertaken to give these costs consideration in your preparation of Exhibit 31-A?

A. The sum total of .42 of a cent a gallon was not added to the individual marketing expense items recapitulated on Exhibit 31-A under the cost items for regular reseller business, nor was it included as a part of the cost of doing business through Ned's Auto Supply outlets. This amount in total on a per gallonage basis as represented on Respondent's Exhibit 3-Q represents expenses, which I stated in my testimony this morning, could not be allocated accurately at the present time, although my knowledge of the functions for which these expense items were incurred, led me to the conclusion that were it possible to allocate these particular items, the entry under our "Regular Reseller Business" on a per gallon basis would be greater than any corresponding entry of the proportion of the expenses thus incurred for the volume of 2636 business moving through "Ned's Auto Supply Outlets."

Trial Examiner Ballinger: These items couldn't all be allocated to the sale of gas?

The Witness: They are allocated to the sale of gas in the tank wagon reseller channel purely and simply.

Trial Examiner Ballinger: But they also include the sale, do they not, of tires and all kinds of accessories?

The Witness: Yes, sir, your Honor, but each of these items have been allocated either on the basis of an estimate of time split, or they have been allocated on some gallonage basis or some principle of cost allocation among, first, the different channels and different products.

Mr. Hanley: I think I understand what the trouble is, Mr. Examiner. It troubled me, as a matter of fact, for a while.

Trial Examiner Ballinger: I confess I don't understand it.

By Mr. Hanley:

Q. Let us take, for example, Mr. Boatwright, account No. 1000, which is the first item on Exhibit 31-Q; now, that item shows as "Salaries—Supervision," $33,760.06. As a matter of fact, is it not true that item in toto, so far as the company is concerned, is considerably in excess of the amount of money that you have shown?

2637 A. I have the record here. Would you like the exact figure on that?

Q. You might do that.

A. Prior to allocation that figure was $56,592.11.

Q. Now, that includes all of the efforts of that particular group of individuals?

A. That is correct.

Q. Now, what have you done on Exhibit 31-Q to reduce that item of fifty-odd thousand dollars to thirty-three odd thousand dollars?

A. That item is allocated on the basis of the total tank wagon gallons; thus, gallonage moving through the different channels of distribution each assume a weight of equal importance in the allocation of the supervision function of our marketing cost.

Trial Examiner Ballinger: I understand both from your statement and from your testimony that there is no way by which you could make an exact allocation? I take it that is at best an approximation?

The Witness: My testimony was to the effect that I couldn't allocate among particular customers within a channel, as you recall, for instance, Ned's Auto Supply was one customer out of perhaps 400 within the tank reseller channels, I can't allocate that, but we could do, and our books are set up to allocate among all reseller business as distinct from all tank wagon consumer business.
2638 But I can't isolate the particular time factor and the particular cost factor involved in handling one customer of a particular classification.

By Mr. Hanley:

Q. To proceed with Exhibit 31-Q, you have indicated that there is allocable, as I now understand you, to gasoline only an additional amount of .42 of a cent a gallon which the Standard Oil Company sustains as an expense, and did sustain in 1937; is that right?

A. That is correct.

Q. Now, had you given those figures consideration without any reference to your opinion as to which gallon should be weighted the heaviest, would it not have simply resulted in adding .42 of a cent a gallon to columns 1 and 2 on Exhibit 31-A, without making any difference at all in the difference as disclosed by column 3 on Exhibit 31-A?

A. That statement is correct.

Mr. Austin: I suggest a five minute recess.

Trial Examiner Ballinger: Let us take a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Hanley: If your Honor please, we still await a ruling on the offer of the Respondent of this Exhibit 31 series.

2639 Trial Examiner Ballinger: I will hear from counsel for the Commission.

Mr. Austin: Well, I am not prepared to permit these to go in without objection, your Honor, but I would like to request that the ruling on them be withheld until after I have had an opportunity to cross-examine the witness upon these exhibits, and I think that will require some study before I am prepared to go ahead with that. And it may also be—although I can't say definitely that this will be true—but it may be that we will want to receive the figures which we are preparing to ask the witness to get upon account 1075—I think that is the number.

Mr. Hanley: If your Honor please, I am not very much concerned about what method of procedure we use to get along here, but it does seem to me that the objection now of counsel should be made to the exhibits if he has an objection. He has his right of cross-examination. And indeed, under what I think was a liberal offer on the part of the Respondent, he has been entitled to, and has cross-examined at length during the course of the direct examination. We have now proved these exhibits. We have established that they are our cost justification on the one-half cent feature of this case. Counsel will have a right to cross-examine concerning them. He may be able to do something about the weight of the exhibits, but we think we are entitled to have them on the record.

2640 Trial Examiner Ballinger: The Examiner is prepared to rule.

Mr. Hanley: Very well. I am sorry, Judge.

Trial Examiner Ballinger: The objection is overruled, and Respondent's Exhibits 31-A to and including 31-Q are admitted in evidence.

(The documents referred to heretofore marked, for identification, "RESPONDENT'S EXHIBITS 31-A to 31-Q, inclusive," were received in evidence.)

Mr. Austin: If your Honor please, whether it is necessary to put this on the record or not, or maybe it is unnecessary for me to ask it, but I assume that I may move to strike all or any part of these at any later time in the case, if I may desire to make such a motion?

Trial Examiner Ballinger: Such a motion will be considered when presented.

Mr. Hanley: If your Honor please, I now ask the permission of the Court to have the reporter mark another series of exhibits with the next number and by letter as in the case of the last series.

Trial Examiner Ballinger: The reporter will mark the documents handed him by counsel for the Respondent Respondent's Exhibits 33-A through E.

(The documents referred to were marked, for identification, "Respondent's Exhibits 33-A through 33-E.")

2641 Mr. Hanley: At this time, your Honor, may I inquire what status the record is in with relation to Exhibit 32, which is the blank form of the Respondent, known as 189.

Has that been admitted in evidence?

Mr. Austin: Yes.

Trial Examiner Ballinger: What was your request?

Mr. Hanley: I was wondering if this blank form 189 of Respondent which has been marked Exhibit 32 has been admitted in evidence? I am told by Mr. Austin it has been.

Trial Examiner Ballinger: My record does not show it has been, I think, though—off the record.

(A discussion ensued off the record.)

Mr. Hanley: May the record now show that Respondent's Exhibit 32, for identification, is offered and received in evidence?

Trial Examiner Ballinger: The record will so show.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 32," was received in evidence.)

By Mr. Hanley:

Q. Mr. Boatwright, I hand you what has now been marked as Respondent's Exhibits 33-A, B, C, D, and E, for identification, and will ask you if you prepared those exhibits?

A. I did.

2642 Q. As a matter of easy identification for Court and Counsel, have you designated this series of exhibits as Schedule B?

A. I have.

Q. And does it have to do with a discussion of the Respondent's cost justification of the 1½¢ differential in price granted to jobbers off the tank wagon price to reseller customers?

A. It does.

Q. Now, did there come a time within your knowledge, Mr. Boatwright, when Ned's Auto Supply Company went off the pricing plan which we have been discussing here for nearly two days, namely, ½¢ off the tank wagon price?

2643 A. There did come such a time when they went on the tank car basis of purchase.

Q. Do you recall about when that was?

A. March, 1939, I think it was.

Q. Now, within your knowledge, has anyone of these four customers, except Ned's Auto Supply Company, had a price basis such as has been discussed here in the last day of your testimony; namely, ½¢ off the tank wagon price?

A. They have not.

Q. Is that the only instance that is involved in this proceeding where that particular price basis was used?

A. That is my understanding.

Q. Now a moment ago you said you thought that that price basis was abandoned in March, 1939. I will ask you if it is not true that it was abandoned in March, 1938?

A. That is true. I gave the wrong year.

Q. Since March, 1938, has Ned's, or any other customer of the Standard Oil Company in Detroit, been on the price basis of ½¢ off the reseller tank wagon price?

A. There has not been.

Q. Do you have it within your knowledge, Mr. Boatwright, as to whether or not there was a period in March, 1938, after this price basis was abandoned, and before

Ned's went on to the tank car basis, when Ned's was back on the regular tank wagon price?

2644 A. I do not know.

Q. Do you know whether Ned's did go on the tank car price sometime around March, 1938?

A. I do.

Q. And do you have it within your knowledge that the other three jobbers involved in this action had been on the tank car price for some years prior to that?

A. I do.

Q. Now referring you, Mr. Boatwright, to Exhibit 33-A: I call your attention to item No. 1, entitled "Tank Wagon Reseller Marketing Cost," which is followed by two columns, one entitled "1940," under which appear the figures "1.72¢" and a second column entitled "1939," under which appear the figures "1.81¢" per gallon. Will you please explain what those figures mean and how you arrived at them?

A. Certainly.

This schedule is based directly upon our form 189 marketing cost statement, limited to the tank wagon reseller channel for the years 1939 and 1940. It represents the distribution costs incurred in the entire Detroit field at salaried and commission points.

The tank wagon reseller marketing cost for the year 1940 is indicated as 1.72 per gallon. This is taken directly from the form 189 for the Detroit field and from form 439 for the year 1940.

2645 Mr. Austin: May I interrupt?

Mr. Hanley: Surely.

Mr. Austin: I would like to ask you what you mean by "Salaried and Commission Points."

The Witness: Certainly. Some of our stations in the Detroit vicinity, for instance, the City of Detroit, is served by salaried tank wagon drivers.

The area of Dearborn is served by a driver or agent who works on a commission basis. It is our different means of compensating the truck drivers.

By Mr. Hanley:

Q. What is the fact, Mr. Boatwright, as to whether or not it makes any difference whether a man driving a truck is on a salary or on a commission basis, so far as the company is concerned, relative to the necessity of paying the truck driver?

A. Why, there is no difference. They have to be paid, in either case.

Q. Is it not true that it is just a different method of arriving at how much money the company has to pay the individual who renders the service?

A. That is correct.

Q. Will you please go ahead, Mr. Boatwright?

A. Now, the procedure:

The total tank wagon reseller expense for the
2646 year 1940 amounted to $1,145,399.13.

To this amount the direct leased service station expense applicable to tank wagon reseller business was added. This expense was obtained as follows: the total leased service station gallonage of 54,255,291. The leased service station tank wagon gallons includes motor oil and grease. Therefore, we had to split these particular products out of our calculation by the gallonage figures as are shown on our form 439. Splitting it out so that it would come back to a gasoline volume of 53,406,269, or 98.44% of the total petroleum products volume moving through this channel, was gasolines.

The leased service station expense for the year 1940 amounted to $48,506.44. We apply 98.44% to that amount, giving us a charge of $47,749.74, expense applicable to tank wagon reseller channel.

Adding that to our tank wagon reseller cost of $1,149,399.13, gives us a total distribution cost through the entire reseller channel of $1,193,148.87.

This amount was divided by the total reseller tank wagon gallons of 69,301,586 gallons, resulting in a cost per gallon of 1.72¢.

Q. Now, where does that figure appear on Exhibit 33-A, if it does appear?

A. That figure appears on Respondent's Exhibit
2647 33-A under item No. 1, under the column headed "1940".

The identical procedure, the identical source and the identical forms were used in preparing the figure shown on Respondent's Exhibit 33-A under item No. 1, under column "1939" being 1.81¢ per gallon.

Q. Now, there appears to be a difference between the Respondent's cost in 1940 and in 1939, Mr. Boatwright. What, if any, explanation do you have for that difference?

A. The explanation is primarily one of gallonage. You see, our expense in the tank wagon reseller channel in the year 1940 amounted, as I have read, to $1,145,399.13. The divisor was given as 69,301,586 gallons. For the preceding year the tank wagon reseller expense was almost the same figure, varying only by a few hundred dollars, being $1,145,879.56. In that year, however, our divisor was 66,141,604 gallons, which, as you will note, is approximately 3,000,000 fewer gallons of gasoline.

2648 Q. Now to simplify it for us, Mr. Boatwright, is it or is it not true that the unit cost of the Respondent in the year 1939 and the year 1940 was substantially the same?

Mr. Austin: I object to that question, your Honor. The figures speak for themselves.

Mr. Hanley: I will withdraw it. I am just trying to get this thing explained.

By Mr. Hanley:

Q. Let me ask you this, Mr. Boatwright: If it didn't cost the Respondent, the Standard Oil Company, approximately as much in total to market gasoline in Detroit in 1939 as it cost in 1940?

Mr. Austin: Same objection.

A. It did.

Trial Examiner Ballinger: The objection is overruled. The figures are here and they speak for themselves.

By Mr. Hanley:

Q. Is the unit cost that you have disclosed on Respondent's Exhibit 33-A for the year 1940 and 1939, wherein there is a difference in the unit cost per gallon, accounted for, as you have explained, just by the gallonage; the divisor that was used in those respective years?

A. The difference in the unit cost is almost entirely due to the use of a larger divisor in 1940, which resulted from the increase in sales that took place in this area.

2649 Q. Are these figures which you have disclosed in item 1, Exhibit 33-A, the per books figures of the Standard Oil Company?

A. They are.

Q. Have they anything at all to do with this lawsuit?

A. They do not.

Q. I mean by that, are they not the routine, regular ordinary accounting entries?

A. They are.

Q. Made without reference to any lawsuit?

A. They are.

Q. Will you please pass to item No. 2, Exhibit 33-A, entitled "Jobber Marketing Costs," and please explain each of the figures that are disclosed under that item?

A. Yes.

Mr. Austin: May I interrupt, Judge?

Mr. Hanley: Surely.

Mr. Austin: I have some questions at this point.

Examination on Voir Dire by Mr. Austin.

Q. On Exhibit 33-B, will you please explain, Dr. Boatwright, what you mean by "Total Reseller's Tank Wagon Expense," as distinguished from "Direct Leased Service Station Expense?"

A. Yes, in our bookkeeping practice we maintain, on
certain items of marketing expense, a separation be-
2650 tween the reseller, on the one hand, and the company
owned service stations leased, on another.

Q. For the purpose of terminology isn't a company owned and leased service station a reseller?

A. It is, but on our particular books—you see, we maintain an allocation on certain items of expense where we follow those separately, and it was necessary on a comparison of this type that those columns be united and that is all that I did.

Q. Going back to the various sheets under Respondent's Exhibit 31: We had, many times, there, or you did, occasion to make reference to retail reseller expense on gasoline. Weren't we there, or weren't you referring—weren't you, there, in using that term, referring to leased stations, as well as to the contract stations?

A. You will recall that, in the discussion of the exhibit referred to, we dealt with particular items of expense. Now if our taxes, maintenance and depreciation on retail outlets owned and leased by the company, as compared with the rent income on those stations did not result in a net income or a net deficit, it wasn't necessary that we bring that expense item into it at all. We limited our discussion to only certain expense items. We did not discuss the full range of all expense items; all reseller business.

In that particular calculation we limited our discus-
2651 sion to particular items of expense that we could dif-
ferentiate between, in the year 1937.

Now our work is what does it cost to do business through the sum total of all the different types of reseller outlets, tank wagon, as contrasted with doing business on a jobber basis.

2652 Accordingly, if there is a net rent deficit, as compared with maintenance, depreciation, taxes, on this particular group of stations we own, that becomes a cost of doing business through all reseller outlets.

Q. Does this only apply to such a deficit?

A. I don't know whether there is or is not a deficit in Detroit, but it applies to any of these expense items which are incurred jointly.

To illustrate: a salesman's salary, a reseller salesman will have under his supervision some company-owned stations leased; some private owned service stations leased; some 461 and some 385 type contracts.

Now, to allocate that man's cost among those different types of contracts would be difficult, as well as impractical. Therefore, any item of expense which, for our particular records, it is necessary that we segregate between the tank wagon reseller of the ordinary type, as distinct from this particular classification of company-owned and leased stations, I am now throwing those two together to give you a total tank wagon picture.

Q. Well, again referring to the cost items we discussed under Exhibit 31. There, there was an effort to show the cost of serving Ned's Auto Supply Company, I believe, as distinguished from the cost generally of serving what you called retail resellers; is that correct?

2653 A. That is correct.

Q. And in making that classification as to Ned's, on the one hand, and the cost to retail resellers, on the other, on the per gallon cost, did you not, except where you specifically stated to the contrary, include company-owned and leased stations as well as the independently operated stations in your figures?

A. I did.

If it would be of any convenience to you, I will read the particular items which we carry separately between the company-owned service stations leased, on the one hand, and the other items. Would that help you in your thinking?

Q. Yes, it would; at least, in so far as those items appear anywhere in Exhibit 31, or in this exhibit, either.

A. There is no conflict with Exhibit 31 on any of the items carried separately.

Q. Well, my recollection is that on loaned equipment, that you eliminated leased service stations at that point, and that is the only place that they were eliminated.

A. Yes, because, as was brought out in the record, the equipment installed at one of the company-owned outlets leased, when the tenant signs the contract for the lease, he rents the entire retail outlet.

Q. I understood the reason for it, but—

A. There is no conflict in this at all between Ex-
2654 hibit 31 and 33-A. There is no overlapping or conflict of the expense items dealt with.

Q. Now, then, turn back to Exhibit 33-B. The item "Total Reseller Tank Wagon Expense," which amounts to $1,145,399.13. Does that include any expense in connection with the sale or delivery of gasoline to lessee stations?

A. Why, certainly. It includes most of the marketing expense of lessee stations, except items of expense that have to do with a property type of cost.

2655 Q. All right. Now, that being true, then, it seems to me that we should have a little fuller explanation of what is included here, as in the item "Leased Service Station Expense."

A. I should be glad to enumerate those items for you. Is that what you wish?

Q. Yes, and will you read the amount opposite the item, as you read them?

A. Yes.

I shall read them direct from the marketing expense statement.

Subaccount 060A is plant maintenance on service station properties owned; $48,864.99.

060B is plant maintenance on service station properties where the building is owned but located on leased ground; $1,372.60.

060C is plant maintenance on privately owned service stations leased, where the property are leased out to individuals; $5,448.68.

061B is the rental expense on leased ground used for owned service station buildings; $15,738.89.

061C is rental expense on privately owned service station properties leased out; $91,224.41.

065A, rent revenue service station properties owned; this is an income figure of $321,905.45.

2656 065B, rent revenue service station owned; buildings on leased ground; a net income of $9,880.18.

065C, rent revenue, privately owned service stations leased, $82,155.34.

Items 066A, miscellaneous operating expense, service stations owned properties complete $45,917.77.

066B, miscellaneous operating expense, service stations owned; buildings on leased ground, $1,016.33.

066C, miscellaneous operating expense, privately owned service stations leased. Properties leased out, $3,500.35.

088A, station operating tools and equipment; service stations owned properties complete, $9,555.19.

2657 088B, Station operating tools and equipment; service stations owned buildings on leased grounds, $152.59.

088C, Station operating tools and equipment; privately owned service stations properties leased out, $1,806.93.

Account No. 110A, Depreciation expense—plant; buildings, machinery, and equipment, furniture and fixtures, service station owned properties complete, $87,396.51.

110B, Depreciation expense—plant; buildings, machinery and equipment, furniture and fixtures, service station owned buildings on leased grounds, $2,210.94.

110C, Depreciation expense—plant; buildings, machinery and equipment, furniture and fixtures, privately owned service stations, properties, leased out, $3,615.68.

112A, Depreciation expense—real estate improvements (service station owned properties complete), $43,121.63.

086A, Taxes; service station owned properties complete, $100,178.64.

086B, Taxes; service station owned buildings on leased grounds, $1087.56.

086C, Taxes; private owned service stations, leased, properties leased out, $237.72.

The grand total expense for this column, recognizing both income and outlay, leaves a net cost of $48,506.46, which is the figure I read to you previously.

Q. Now, perhaps I didn't follow all of that. The record may show what I am going to ask you. I know the 2658 total of all the items you read is a greater amount than $48,000. Where is the offset?

A. Rent revenue. The rent revenue is the income.

Q. Is that shown?

A. Yes, it is. All of these rent items are property items, and we have certain expense and we have certain income.

Mr. Hanley: If your Honor please, certain of the objections and many of the questions of counsel indicate in my mind that there is some confusion in counsel's mind and it may exist in the mind of the Court, as to the different classifications referred to in this cost testimony.

Now, the first group of costs dealt with in the series of exhibits 31-A and so forth, had to do with the segregation of the cost of doing business with Ned's Auto Supply Company when Ned's Auto Supply Company was on the basis of receiving deliveries by tank wagon.

Now, we classify, in our company, that group which includes those purchasers who take delivery by tank wagon. That may include persons who own their own property and run a service station. It may include persons who have built their own service station and leased it to our company, and we, in turn, have leased it to somebody else, or it may include instances where our company owns the service
station property and has leased it to an operator. We
2659 regard that all as one group of tank wagon reseller
business of which Ned's, when he was on this half cent
price, was a component part, and in this series of Exhibit 31, and so forth, we were undertaking to segregate him out of that picture.

2660 Now we are on an entirely different proposition. We are now seeking to distinguish between the tank wagon reseller group, on the one hand, and the jobber or tank car buyer, on the other hand, and there isn't any particular legerdemain or mystery about a leased out station and, so far as these cost figures are concerned, they are just part of this tank wagon reseller group, in our account.

Mr. Austin: I think the witness has explained what I wanted to find out.

Mr. Hanley: I know the witness understands it but I was just afraid you didn't, from the questions you have been asking.

Mr. Austin: I understand, now, part of the costs on leased stations are included in the large figure and the smaller figures are certain costs applying to those stations in particular, and the nature of which the witness has stated, is that correct?

The Witness: That is correct, and constitute a part of our over-all reseller marketing cost for this area.

By Mr. Austin:

Q. I would like to ask another question, if I may, now: Did Exhibit 31, including the last page, 31-Q, portray all of the marketing costs which the Standard Oil Company treats as applicable to the reseller gasoline business in Detroit? 2661

A. It did not.

Q. I was under the impression that when you added on the 31-Q, that that included everything that was not in the others?

A. Oh, no. There are still items of expense which we incur which, as I pointed out, and I think is covered in the testimony, that just weren't affected at all, and we made no effort to allocate them at all.

Q. I think you did say that.

A. Yes.

Q. Well, are some of those expenses which could not be allocated or which you did not attempt to allocate as between Ned's, a tank wagon buyer at that time, and other tank wagon buyers, are some of those costs included in 33 here where your distinction is now between tank car and tank wagon?

A. Yes, sir, 33 is the sum total of our marketing cost, tank wagon reseller channel Detroit area, for the years in question.

Q. That I assume is the reason your figure here is 1.72¢ a gallon for 1940, whereas the total on 31 I believe was a little over 1.1¢ even if you added on all of 31-Q?

A. That is correct.

Mr. Austin: All right, Judge.

2662 By Mr. Hanley:

Q. I had asked you, Mr. Boatwright, to advert to item No. 2 on Exhibit 33-A, denominated "Jobber Marketing Costs" and explain how you arrive at those figures. Will you please do that?

A. I refer you to Respondent's Exhibit 33-C for the detailed explanation of the procedure. At the termination of the year 1939 the sales research department was given an assignment by the management of our company to determine the profitabilty of jobber operations, such jobbers being located in the State of Oklahoma, as a component part of our Kansas City or Wichita field. To the best of our knowledge there has been no other detailed time study or a complete cost analysis of jobber business made other than this particular analysis.

2663 Our accounting, our selling, and our marketing procedures in the Kansas City and Wichita and Detroit fields are exactly the same. They work under the same code of accounts, and there is no reason why costs of handling tickets, recording of information, and so forth in those two respective areas would not be duplicated to the same extent in the Detroit area. This entire study was upon an actual time basis spent with the various jobbers on the part of the managers, assistant managers, any special representative that may have contacted them, any other members of the supervisory staff, and their expenses, as are reported on the regular expense form 028. The accounting costs were determined on the basis of estimates of various accounting departments of the time required in handling the total sales tickets represented by this volume. An actual count of the tickets was made and the departments, upon a sampling basis, determined the time of accounting department personnel in handling them.

I come to subdivision A, entitled: "Accounting Cost." The total accounting cost of the Kansas City and Wichita fields, for the year 1939, according to a separate analysis of sales tickets, time estimates by department heads, equal $2,226.32. This expense was divided by 2,166,168 gallons, the volume moving through these accounts, resulting
2664 in an accounting cost per gallon of .1 of a cent per gallon.

Q. Now, those figures that you have just given refer to your survey in the Kansas City and Wichita fields. What have you to say as to the effect of whether or not that figure applies to the accounting costs of these four jobbers in Detroit? I mean Respondent's accounting costs in relation to the four jobbers in Detroit.

A. The fields work under the identical code of accounts, every ticket handled by the Kansas City office would be handled in the identical manner by our Detroit office. Therefore, the accounting costs incurred in handling these tickets should be entirely comparable with or identical costs incurred in the handling of the same code of accounts in other fields.

Q. Well, do you say it is the same?

A. It is the same.

Q. You may proceed.

A. Credit cost, subdivision B. Credit cost was handled in much the same manner. The actual cost of securing credit reports from the various accounts, the time spent by the credit department in analyzing the credit risks of the various jobbers, collection costs, and so forth, were totaled for jobbers served out of both Kansas City and Wichita fields, and for the year 1939 these costs amounted to $604.45. This amount was again divided by the 2665 volume of 2,166,168 gallons for a resultant cost per gallon of .03¢.

Subdivision C: "Supervision and Selling Cost." The actual time expended by the management, expenses, is shown on form. 028, plus salesmen's salaries, car and traveling expenses were secured from the records in the respective fields. This total expense was allocated according to the field's estimate of time devoted to each product, to secure the cost of this marketing function. The total product cost for gasoline and refined oil was then divided by these gallons sold, to obtain a cost per gallon. Calculations are shown on Respondent's Exhibit 33-D. The 2666 two fields combined incurred a total cost of supervision and selling of gasoline and refined oil of $2,601.60. The volume of the gasoline and refined oil combined was 4,206,686 gallons. Divided by the combined gallonage of gasoline and refined oil the dollar amount of $2,601.60 results in a cost per gallon of .06 of a cent.

Subdivision D, "General Office Expense"—

Mr. Austin: Mr. Boatwright, what is the difference in this gallonage figure of 4,206,686 and the one used above of 2,166,168?

The Witness: The supervision time and the managers' salaries, and so forth, expenses in serving these accounts is allocated on our books on an all gallonage basis. Therefore the same practice of allocation of cost is followed here as is followed on our regular books.

Mr. Austin: Well, by that are you referring to this 4 million figure?

The Witness: Yes.

Mr. Austin: What is the two million figure?

The Witness: The two million figure is the figure for gasoline; the four million figure is the amount of total gallonage of gasolines, refined oils, and so forth.

Mr. Austin: Is the difference between the figure under your subdivision C, which is four million, and the figure of
two million, under subdivision B and A, is the dif-
2667 ference between those two figures the amount for
refined oil, or what is it?

The Witness: Refined oils, tractor fuels, fuel oils, motor oils, greases, and so forth.

2668 A. (Continuing.) Turning next to subdivision B. On this type of business we incur a certain amount of general office expense. We maintained in our office at that time a tank car sales department for refined oil and gasoline. The cost of maintaining that department for the first six months of 1939 was used on a monthly basis, because that department in 1939, July 1st, was consolidated with the price department, therefore, we took the cost for the first six months, and extended it to a full year's basis on that identical function. The cost for the first six months was $9,223.08. The cost for the full year on that basis would have been $18,446.16. The volume in gallons of gasoline and refined oil moving through this department for that year was 190,845,750 gallons. Dividing the annual cost of the department by the annual through put of gasoline and refined oil, results in a general-office cost of .01¢ per gallon.

Subdivision E "Point of Sale Advertising." An itemization of all advertising signs, jewel globes, and maps used was supplied by the General Office and the fields' advertising departments. The calculations are shown on Respondent's Exhibit 33-E, the lower part of the page. The signs, jewel globes, and so forth, for the two fields for these
particular accounts, total $1,434.50. Maps used for
2669 the two fields for these accounts total $576.42. For a
total cost of $2,010.92.

In this particular expense item we used the larger divisor of the total sales of gasoline and refined oil of 4,206,686 gallons, resulting in a cost per gallon of .05¢.

These summary figures were transposed and are shown on the Respondent's Exhibit 33-A under item 2 subdivisions A, B, C, D, and E, totaling for the five subdivisions .25 of a cent per gallon. A deduction of the summary of item 2 is made from item 1 for the years both '39 and '40, showing a differential cost in the two types of doing business for 1940 of 1.47¢, and for 1939 of 1.56¢.

By Mr. Hanley:

Q. Mr. Boatwright, when you made the Oklahoma jobber cost survey which you have been testifying to, was that made for the information of the Standard Oil Company and its management?

A. It was.

Q. Had it anything to do with this lawsuit or any other lawsuit?

A. It did not.

Q. If you know, please state whether or not it was made for the guidance of the management in determining facts as to what they should do in connection with management affairs of the Standard Oil Company?

A. It was made solely for that purpose.

2670 Q. Do all of the figures under item 2 on Respondent's Exhibit 33-A, in your judgment, apply to the respective items of cost relative to jobber marketing costs in Detroit?

A. They do. There is one conservative feature about these particular cost tabulations.

Q. Just explain that.

2671 A. In the matter of car and traveling expense these jobbers were located at longer distances, so that the salesmen did more driving between points than would be necessary or required in one metropolitan area. Likewise the sales of the individual units. And accordingly the divisor is slightly smaller than would be the case in the Detroit area.

Q. Well, giving consideration to the thing you have just now referred to, Mr. Boatwright, would that have the effect of raising or lowering the item of the cost of jobber marketing?

A. It would have the influence of lowering the jobber cost.

Q. And would that in turn have the effect of making greater the differential between the cost of jobber marketing and the cost of tank wagon reseller marketing?

A. It would have the influence of increasing the differential as shown by Respondent's Exhibit 33-A.

Q. You have shown on Exhibit 33-A the two years 1939 and 1940 in detail. I will now ask you if the cost figures in respect of tank wagon reseller marketing costs and jobber marketing costs, with particular reference to Detroit, are substantially relative from year to year?

A. They are.

Mr. Hanley: At this time, if your Honor please, the Respondent offers in evidence what have been marked
2672 Respondent's Exhibits for identification No. 33-A, B, C, D and E.

Mr. Austin: May I ask a question or two?

Trial Examiner Ballinger: You may.

Examination On Voir Dire.

By Mr. Austin:

Q. Mr. Boatwright, in connection with Exhibit 33-C, you refer there to a time and cost analysis of jobber operation in the State of Oklahoma?

A. That is correct.

Q. Then a little further down you talk about the Kansas City and Wichita fields, and I would assume that was either Missouri or Kansas or both. What is the relation between that and the Oklahoma study?

A. Our only operation in the State of Oklahoma is through jobbers. The jobbers are serviced and sold and handled out of our Kansas City office, or our Wichita office. You see, we have two sales divisions covering the southern part of the State of Kansas; one of them headquartering at Kansas City, and one of them headquartering at Wichita. Therefore, merely for convenience of serving or contacting these accounts the jobbers in Oklahoma are assigned to those respective offices.

2673 Well, did this time and cost study cover the entire territory served from the Kansas City and Wichita offices?

A. No; it covered only the jobber costs.

Q. Well, all the jobbers in the territory of those two offices?

A. No, sir. It covered these particular jobber costs of the jobbers located in the State of Oklahoma.

Mr. Hanley: You might state, Mr. Boatwright, how many jobbers there were involved.

The Witness: I think the figure was 12.

Mr. Austin: Only the ones located in Oklahoma?

The Witness: That is correct.

Mr. Hanley: As distinguished from four in Detroit?

The Witness: Yes.

Examination on Voir Dire.

By Mr. Austin:

Q. And it did not cover any jobbers located in the State —in the City of Kansas or in the City of Wichita?

A. I don't think we have a jobber in Wichita. It did not cover a jobber in Kansas City. In the City of Kansas City.

Q. What other cities, if any, are covered by this survey?

A. You mean the individual location of the jobbers?

Q. Yes, if there was any city.

2674 A. Oklahoma City, Tulsa, McAllister. I am sorry I can't give you a complete listing at this time.

Q. Do the Kansas City and Wichita divisions cover the entire State of Oklahoma?

A. No, we don't market in the entire state of Oklahoma.

Q. Well, they do cover the State of Oklahoma in so far as you market there?

A. That is correct, except for one small portion, I think, that the St. Louis division has one station or one or two stations in the Ozark section, clear down in one section of the state of Oklahoma.

Q. Were those covered in this time and cost study?

A. There is no jobber operation in the St. Louis division in the State of Oklahoma.

Q. Those totals, then, given on Exhibit 33-D for identification, there is a dollar figure given opposite the words "Kansas City" and another one opposite the word "Wichita", and my understanding is—from the testimony you have just given—that those refer to the Kansas City and Wichita fields and only to the Oklahoma part of those fields.

Or, if that isn't correct, will you please explain it?

A. Those figures represent the actual costs incurred in these respective fields for doing the business of the Oklahoma jobbers indicated on this exhibit.

Well, did those costs involve an allocation of joint 2675 costs? That is, those totals there refer back to the statement regarding salesmen's salaries, car and traveling expenses, and actual time expended by management. How was that segregated to the 12 jobbers in Oklahoma?

A. Well, I think that is both in the testimony and on the exhibit. The exact number of days that the manager or any of the supervision spent in that area on these jobber accounts was taken from their exact records. Their expenses were taken from their reports. I think it is 028 expense report. The salesman who covered these accounts, we used his car, traveling expense, and his salary, and we allocated it on a gasoline and refined oil basis as is shown in the lower part of that report.

Q. Well, I suppose the management item involved an allocation as between the other parts of the territory and these jobbers?

A. This is limited purely to the time when the management left their respective division offices and went down into Oklahoma to deal with these jobber problems, irrespective. It is an actual measurement of their time according to their reports.

Q. Is that time and cost analysis which you have referred to here in the Kansas City and Wichita fields available?

A. The entire study of the profitability of operation
which involves all of the phases of supplying products
2676 through Oklahoma jobbers is in our Chicago office.
It is not limited to a market phase. We dealt with only, in this analysis, that part of costs having to do with marketing.

Q. But I assume that you call that a survey or time and cost study? What do you call it?

A. It is one of these 105 studies that I testified earlier that our department had made.

Q. I assume that is available for inspection, and that that will show in some detail the method at which these figures were arrived at?

A. All of the work sheets on that study are available. There are infinite number of work sheets that have nothing to do with this lawsuit in conjunction with that study, however.

Q. We are not interested in any of the rest of it.

Mr. Hanley: Again, if your Honor please, we make the offer that any of the basic material that goes into these figures is available for the inspection of the Commission.

Mr. Austin: I believe there is an offer pending, isn't there, Judge Hanley?

Mr. Hanley: There is. And before I renew the offer, I would like to ask the witness one more question.

Trial Examiner Ballinger: You may.

By Mr. Hanley:

2677 Q. Mr. Boatwright, please tell us in terms of man hours or man days or weeks of work, or any way you can, how much work and effort and time went into collecting the data and collate that is reflected in this Oklahoma jobber survey?

A. Why, I had one man assigned to this study for a period of three months. During the processes of calculations he was assisted by varying numbers. I think it would be about two clerical assistants throughout the three month period. Now, that, in addition to the time taken in the counting of tickets in the field office and so forth.

Q. Somebody from your department did go down to those fields and make a study of those fields?

A. Yes, one of my cost accountants lived in these two field office division points in counting the tickets, in analyzing personally the expense statements, in going over every detail entering into this calculation.

2678 Mr. Hanley: If your Honor please, the Respondent now renews the offer in evidence of Exhibits 33-A, B, C, D, and E.

Trial Examiner Ballinger: Any objection?

Mr. Austin: Yes, your Honor, I object to the admission of these proposed exhibits upon the ground that to put these in evidence amounts to a little more than a statement of the expert opinion of the witness as to what the difference of cost of sale and delivery is to the two types of customers here in Detroit; and that the figures stated here are upon their face insufficient to form the basis for even an expert opinion; and that they are not supported by sufficient figures to substantiate them or to permit the Commission to reach a conclusion as to whether or not they do prove or do satisfy the purpose for which they are offered; and, therefore, I submit that they should be excluded, unless supported by figures upon which the conclusions reached can be justified.

Mr. Hanley: I would like to ask the witness a question which I may have overlooked. Perhaps I should ask it.

By Mr. Hanley:

Q. Mr. Boatwright, referring to Exhibit 33-A, item 1 "Tank Wagon Reseller Marketing Cost" under column 1940 there appears the figure 1.72¢; does that mean
2679 that the Standard Oil Company actually sustained a

money cost in 1940 in selling each gallon of gasoline in Detroit through the tank wagon reseller channel?

Mr. Austin: Will you pardon me. I would like to know just what figure you are referring to there?

Mr. Hanley: 1.72, under 1940.

A. It does.

By Mr. Hanley:

Q. Is the same true with reference to the figure 1.81¢ per gallon under column 1939?

A. It is.

2680 Mr. Hanley: We renew our offer.

Trial Examiner Ballinger: Objection is overruled; Respondent's Exhibits 33-A, B, C, D, and E are admitted in evidence.

(The documents referred to heretofore marked, for identification, "RESPONDENT'S EXHIBITS 33-A, B, C, D, and E," were received in evidence.)

Mr. Hanley: Now, if your Honor please, I am prepared to release the witness for cross-examination with the suggestion that there may be a question or two that I have overlooked that I would like to ask on direct examination. But so far as I know, you may take the witness.

Mr. Austin: I am not ready to cross-examine the witness at this time, and will request that time be allowed for study of these exhibits and for determination as to what, if any, additional figures we may wish to ask for in connection with Exhibits 33-A, to E, as well as these which we have already indicated our desire in connection with on Exhibit 31.

Trial Examiner Ballinger: Reasonable time will be allowed counsel for the Commission.

Mr. Hanley: Judge, I don't think we are in position to proceed. I don't know. I didn't anticipate that counsel would want to excuse this witness.

Did your Honor have it in mind that we should, in view of this request, go forward with our testimony?

2681 Trial Examiner Ballinger: If you are not prepared to do so, we will take an adjournment.

Mr. Hanley: I don't know if we are or not.

Trial Examiner Ballinger: Let us take a recess for five minutes and find out.

A short recess was taken.

Trial Examiner Ballinger: Come to order.

Counsel for Commission not being prepared to proceed with cross-examination of the witness, the hearing is adjourned at 4:20 P. M. to be reconvened May 1, 1941, at the hour of 10 A. M., in Room 859 Federal Building, Detroit, Michigan.

(Thereupon, at 4:20 o'clock P. M., April 30, 1941, an adjournment was taken, to reconvene May 1, 1941, at 10 o'clock A. M.)

2682 Room 859 Federal Building,
Detroit, Michigan,
May 1, 1941.

Met, pursuant to adjournment, at 10 A. M.

Before: Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois, and

Arthur J. Abbott, Esq., of the firm of Abbott, MacMahon, and Roberts, 2230 Buhl Building, Detroit, Michigan, on behalf of the Respondent.

2683 PROCEEDINGS.

Trial Examiner Ballinger: We will come to order.

This is a reconvening at 10 A. M., Eastern Standard Time, May 1, 1941, in Room 859 Federal Building, Detroit, Michigan, of Docket 4389 in the case entitled Standard Oil Company.

The last hearing was held in Detroit, April 30, 1941.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

Mr. Hanley: If your Honor please, I would like to request that we may have two exhibits marked for identification on the direct examination of Mr. Boatwright.

Trial Examiner Ballinger: The reporter will mark one of the documents Respondent's Exhibits 34-A and 34-B, and the other document Respondent's Exhibit 35.

(The documents referred to were marked, for identification, "Respondent's Exhibits 34-A and B and 35.")

Mr. Hanley: Now I offer these exhibits in evidence, your Honor.

Exhibits 34-A and 34-B is what is referred to in Mr. Boatwright's testimony and in the exhibits already in evidence as Form 018, being the form used by the Respondent in connection with the operation of trucks, de-
2684 livery trucks out of bulk stations, and it is on the basis of these tickets that much of the cost information was developed that was testified to by Mr. Boatwright.

Mr. Austin: No objection.

Trial Examiner Ballinger: Respondent's Exhibits 34-A and 34-B are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 34-A and 34-B," were received in evidence.)

Mr. Hanley: The other exhibit, Respondent's Exhibit 35, for identification, is Respondent's form 028, which was likewise referred to in the testimony of Mr. Boatwright, and which is an expense account form from which he gleaned some of the information that he testified about. I would like to offer that in evidence.

Trial Examiner Ballinger: Is there any objection?

Mr. Austin: It says 028-247A.

Mr. Hanley: I suppose that is the full form number, but it was referred to in the testimony as form 028.

Mr. Austin: Who uses this form?

Mr. Hanley: That form is used by everyone who has an expense account. It is a break-down of the expense account of salesmen and various people who are working for the company and have occasion to charge up expense in the course of their duties. I offer these merely for the
2685 assistance of the Government. They are blank forms. I don't regard them as important on our case. I just thought they would be helpful.

Mr. Austin: I have no objection to it.

Trial Examiner Ballinger: Without objection, Respondent's Exhibit 35 is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 35," was received in evidence.)

Mr. Hanley: Now, I am not entirely sure, your Honor, that the record is as clear as it should be in respect of the offer which was made by the Respondent relative to the willingness of the Respondent to develop any figures or offer any opportunity to the Commission to develop any figures that may be desired. I just don't want to be trapped into any technical situation about that, and some specific, as well as general objections, were made to certain of the figures and exhibits offered in Mr. Boatwright's testimony, and I want the record to be very clear, indeed, and I want Court and counsel to understand it very clearly, that all of the facilities of the accounting department of the Respondent are available to the Commission to get any answers at all that the Commission wants with respect of any of these figures.

It has now been decided by the Court that the Com-
2686 mission may have a matter of two weeks or more
in which to prepare the cross-examination of Mr. Boatwright, and during that time we will be glad to develop any figures that the Commission may desire.

Trial Examiner Ballinger: The time allowed will be determined after conference now going on between Dr. Boatwright and a representative of the Commission.

Mr. Austin: Well, I understood Dr. Boatwright wanted to go on a two-weeks vacation. My plan had been simply to ask for a day's recess or a day or two recess some time or other here when convenient to you, and then to go ahead with the cross-examination. But I am perfectly agreeable to waiting until after you finish your case in such time as it is convenient to him. It wasn't entirely a request for time on our part. That is, for two weeks or more time.

Mr. Hanley: I make no point of that at all. The time exists now, and I suggest that there is that period of time in which we are glad to aid the Commission in developing any figures out of our accounting department that they may want.

I understand this morning the cost accountant for the Commission, Mr. Warmack, is consulting with Mr. Boatwright, and I am hopeful they will arrive at some plan of
procedure. But I just want the record absolutely clear
2687 that any supporting figures that the Commission may
want or may think ought to be added here we will add.

Trial Examiner Ballinger: It may be understood unless the cross-examination of Dr. Boatwright can be conducted within the next day or two, that it will be deferred for at least two weeks.

Mr. Austin: If your Honor please, I believe the conference which you referred to between Mr. Warmack and Dr. Boatwright has to do with ironing out and making more definite the request for additional information in connection with Exhibits 31-A to Q of the Respondent. Whether or not any information is being formally requested in connection with Respondent's Exhibit 33, I don't know. The only request I talked over with Mr. Warmack before putting it in definite form was the one we discussed here yesterday in regard to Respondent's Exhibit 31.

Now, on 33, which covers retail reseller and jobber costs in Detroit for the years 1939 and 1940, there are here just five pages and the retail reseller cost is referred to, I believe, only on one page, and there is one item here of $1,405,000 that is not broken down at all.

As I think I stated yesterday, in objecting when these were offered, that the Respondent has the burden of proof on this phase of the case, and it is not my opinion that any such offer as this will satisfy that burden of proof. That may be a matter which the Commission will have to decide and, in spite of the willingness of the Respondent to open its books and permit the Commission to get any information it may want, it may be up to the Commission itself to decide what information it does want, or the Commission may simply leave it to the Respondent to submit such information as it chooses.

Certainly, as counsel for the Commission, I am not at this time going to assume any responsibility for outlining to the Respondent or telling it what I think is necessary to prove its case on costs, so if the Respondent desires to rest on this, I may or may not ask for further information, but, at the present time, I cannot, on a mere over-night glance at these figures, make any request as to what further information the Respondent should furnish, and, as I say, it may be up to the Respondent to determine or itself whether or not it desires to furnish more information.

I just want to say I appreciate the offer of Judge Hanley to make available to the Commission the Respondent's books and to supply anything that is desired, but I also want to make it clear that I do not understand that we have any burden or responsibility for taking advantage of that offer or, in the alternative, accepting what has been submitted.

2689 Mr. Hanley: If your Honor please, that is exactly the objection that I am trying to meet and trying to avoid. Now it is true that there is an item of a million odd dollars in this exhibit and counsel suggests that there may be a burden of the Respondent to break that down, just as a burden on the defendant in its main case. We might break it down into five hundred dollar items and still those five hundred dollar items would be made up of fifty dollar items. I don't know how far the rule requires us to go. I think we have proved it but I don't know and I don't just want to be trapped, as I said a moment ago, into a technical situation, because we will, if your Honor will designate or the Commission will designate the extent of our burden, we will meet it. We can meet it. We have the books and it is just a question of how much of it you want in this record and I just don't want to get into any unfair technical situation here.

Trial Examiner Ballinger: The Examiner has admitted the documents in evidence.

The items referred to by counsel for the Commission, as has been testified to, are made up of thousands of items.

Now is it the contention of the Commission that it is necessary for the Respondent to bring in all of these thousands of items and that we are to sit here and 2690 examine each one and then make a computation or make a record from which a computation can be made? I would like to get the views of counsel for the Commission.

Mr. Austin: Well, your Honor, I am not going to say very much more about this, right now. I think the Respondent has the right to put in what it chooses and the question is then whether the Commission will consider that the Respondent has met the burden of proof. I can't decide it. The Examiner can't decide it. I only want to make myself clear now, as to attempting to do what Judge Hanley says he wants to avoid, and that is to get into some technical situation, because while I realize that Respondent is willing to give the Commission what information they have, I don't want to be in a position, in the event I don't ask for anything, of leading Judge Hanley to believe that we are accepting as a sufficient proof what he has presented. Now I think that what we both said makes our respective positions clear and on the question of what the Respondent's burden of proof is, I don't care to express myself further at this time because I think that is a matter to be argued before the Commission.

Trial Examiner Ballinger: I think it is clear on the record that the Respondent has offered to throw open its books and records to representatives of the Commission for examination.

2691 That it has also offered to furnish the Commission breakdowns to some reasonable extent of the various items set forth in the exhibits which have been admitted in evidence.

Now if the Commission should conclude that the testimony given in connection with the exhibits should be inquired into further, it appears to the Examiner that the Commission should accept the tender made by counsel fo. the Respondent.

2692 Mr. Hanley: Judge, I think that is a complete answer to the query I had in my mind. That is to say if the Commission now or later thinks that we haven't discharged our full burden then we wouldn't want to have the case decided against us on that technical situation. We would like the opportunity to meet the burdens that the Commission thinks are obligatory upon us. And that will satisfy us completely. That is all I have in mind.

Mr. Austin: Well, I would like to say also, to perhaps make myself a little more clear. I think—at least I, in my own mind, have no doubt but what it is necessary to have a great deal more information put into the record upon this question of retail reseller costs. It is just a question of how it is done. If we went to the Commission on the record as it stands now and the Commission decided that you had made a prima facie case, I think they would direct me or our accountants to go ahead and ask you, as you are now suggesting, for such information as we might want, and proceed to develop the case. In other words, you would have a sort of situation where, at the end of Plaintiff's case in the Court, the Defendant moves to dismiss the complaint, and the Court denies it, then he has to go ahead with the defense, and that is the position we would be in now. On the other hand, if the Commission
should decide that there has not been sufficient put
2693 in to sustain your burden of proof, then they might
simply direct you to go ahead and submit more evi-

dence. I suppose in either case it would be an indication as to what was wanted. So I don't know but what we might reach approximately the same result in either case. But I am not prepared right now, Judge, to take the position either way on it. And the only reason I said anything at all this morning is that in view of your offer, I didn't want in any way to make you feel if I don't ask you for something else on this point in the next day or two that I am accepting what has been put in. And as long as I am clear on that, why, I really—it is impossible for me to go any further than that with just an overnight perusal of these figures.

Mr. Hanley: I think I understand your position on that, Mr. Austin. If, in your judgment, the Commission felt we hadn't discharged our burden, whether you request anything specifically or not, if we still have the opportunity to present any supporting information—

Mr. Austin: Sure. You would then have the alternative.

Mr. Hanley: Then, that will satisfy me. I think you must perceive my difficulty. I don't want to be technically convicted in this case, because we haven't guessed right on the quantity of proof. We have got the records,
2694 and we will use them, but I just want to be sure we have the opportunity.

Mr. Austin: Well, I can't speak for the Commission, but I am pretty certain, Judge, that if the Commission decided that—that is, if this case went to the Commission on this point, as the record stands now, and the Commission decided you had not put in sufficient to enable it to determine whether or not there was cost justification, then you would have the choice of standing on that and going to court with it, or going back and putting on more; whereas, if the Commission held in your favor on that point, they, no doubt, would direct its own staff to go ahead and put in more testimony.

Mr. Hanley: I think that solves the problem that is troubling me.

Trial Examiner Ballinger: You may proceed.

Mr. Abbott: Mr. Bradshaw.

HAROLD E. BRADSHAW was thereupon called as a witness by and on behalf of the Respondent, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Abbott.

Q. State your full name.
A. Harold E. Bradshaw.
2695 Q. Where do you reside?
A. Flint.
Q. And are you an officer of the State of Michigan?
A. Yes.
Q. What capacity?
A. Director of gasoline tax department of the Department of State.
Q. And as such do you have general charge of the collection of the State Gallonage Tax on gasoline?
A. Yes.
Q. Will you state in the record, Mr. Bradshaw, if you have the figures, the amount of the collections on the State Gallonage Tax for the years 1934 to 1940, inclusive, if you have those figures available?
A. 1934, $21,913,193.04; 1935, $24,007,863.17; 1936, $26,882,277.21; 1937, $30,723,953.47; 1938, $28,980,487.72; 1939, $31,367,888.94; 1940, $34,042,930.99.
Q. All the figures you have given are in dollars, are they not?
A. That is correct.
Q. And are these the figures for the entire State of Michigan?
A. That is correct.
Q. Are they, in your opinion, Mr. Bradshaw, an index of the gasoline tax collections and gasoline consump-
2696 tion in the Detroit area also? I mean on the same ratio?
A. Approximately the same ratio would apply in any particular locality in the State.
Q. The figures you have mentioned show that there was a decrease in the gasoline tax collections in the year 1938 as compared with 1937. What is the approximate amount of decrease as between those two years?
A. Approximately $1,800,000.
Q. And as between 1938 and 1939, was there an increase over 1938 in the year 1939 in the collections?

A. There was.

Q. Approximately what amount?

A. $2,000,000. I would like you to understand that I am not making these subtractions—

Q. Not arithmetically?

A. Yes.

Q. Approximately $2,500,000; is it not?

A. Yes, that would be a better approximation.

2697 Q. Are you familiar, Mr. Bradshaw, as the Director of Gasoline Tax Administration, with the methods of wholesale and retail gasoline distribution in Michigan and the Detroit area?

A. Yes.

Q. One question I want to ask you which I omitted to ask you is this: Were you subpoenaed to appear here for this hearing?

A. Yes.

Mr. Abbott: Will you mark this, please.

Trial Examiner Ballinger: The Reporter will mark the document Respondent's Exhibit 36 for identification.

Mr. Abbott: Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Mr. Abbott: On the record, again. Exhibit 36 for identification on page 62—

Trial Examiner Ballinger: Wait a minute. Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: Respondent's Exhibit 36 for identification is a list of the registered wholesale distributors of gasoline as of February 1, 1941, by counties, and I understand
that the attorney for the Commission is willing that
2698 only pages 62, 63, and 64, comprising the list of such
registered wholesale distributors for Wayne County
may be admitted in evidence, or may be considered as the exhibit; the reason for that is we don't want to encumber the record with the rest of this book.

Trial Examiner Ballinger: What is the identification—official publication?

Mr. Abbott: I will ask the witness that.

Trial Examiner Ballinger: Doesn't it show on its face?

Mr. Abbott: It shows on its face to be the official publication of the State of Michigan.

Trial Examiner Ballinger: Read what it says.

Mr. Abbott: (Reading) State of Michigan, Department of State, List of Registered Wholesale Distributors of Gasoline as of February 1, 1941, issued by authority of Harry F. Kelly, Secretary of State, Harold E. Bradshaw, Director of Gasoline Tax Department.

Trial Examiner Ballinger: And that is an official publication by the State, is it?

The Witness: Yes, your Honor.

2699 Trial Examiner Ballinger: The reporter will mark the document Respondent's Exhibit 36-A and the respective pages, numbers 62, 63, and 64, Respondent's Exhibits 36-B, 36-C, and 36-D.

(The documents referred to were marked, for identification, "Respondent's Exhibits 36-A, B, C, D.")

Trial Examiner Ballinger: The document so marked, without objection, the document and respective pages are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 36-A, B, C, D," were received in evidence.)

Mr. Abbott: Will you mark this as Exhibit 37-A, 37-B, 37-C, and 37-D?

Trial Examiner Ballinger: The reporter will mark the document handed in by counsel Respondent's Exhibits 37-A to 37-D, for identification.

(The documents referred to were marked, for identification, "Respondent's Exhibits 37-A, B, C, D.")

By Mr. Abbott:

Q. Now, Mr. Bradshaw, I show you Respondent's Exhibits 37-A, 37-B, 37-C and 37-D, for identification, and ask you to identify that. State what it represents.

A. A list of present Wayne County wholesale distrib-
utors of gasoline as of February 1, 1941, by firm name
2700 and date of first registration as a licensed wholesaler
in the State of Michigan.

Q. I will ask you whether that is the same as appears in Exhibit 36-A, 36-B, 36-C, and 36-D, which is the list in the printed list of registered wholesale distributors of gasoline just now introduced and admitted in evidence? Is the list the same as appears in Exhibits 36-A, 36-B, 36-C, and 36-D?

A. Yes, it is.

Q. Yes.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Abbott:

Q. What additional information is contained in Exhibits 37-A, 37-B, 37-C, and 37-D, which is not in Exhibits 36-A, 36-B, 36-C, and 36-D, Mr. Bradshaw?

A. The date of first registration of record of all present Wayne County gasoline wholesalers.

Q. And is that information, as contained in the second column of Exhibits 37-A, 37-B, 37-C, and 37-D, taken from your records as Commissioner of the State Gasoline Tax Department?

A. It is.

Mr. Abbott: I offer Respondent's Exhibits 37-A,
2701 37-B, 37-C, and 37-D, in evidence.

Trial Examiner Ballinger: Any objection?

Mr. Austin: No objection.

Trial Examiner Ballinger: Respondent's Exhibits 37-A, 37-B, 37-C, and 37-D, for identification, are admitted in evidence.

(The documents referred to, heretofore marked for identification, "RESPONDENT'S EXHIBITS 37-A, B, C, and D," were received in evidence.)

By Mr. Abbott:

Q. Now, Mr. Bradshaw, there was certain other information which you were asked to bring with you from Lansing. I understand you have Mr. Griswold, your deputy, and it is desired Mr. Griswold be used in order to introduce those matters in evidence.

A. He is the office manager.

Q. He is the office manager.

A. Yes.

Mr. Abbott: That's all. You may take the witness.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: It appears on Exhibit 36-B that Washtenaw County appears on the upper part of that page, and
it is not the intention of Respondent to include Wash-
2702 tenaw County in the exhibit, and it may, therefore,
be not considered in evidence.

Trial Examiner Ballinger: That portion of Respondent's Exhibit 37-B which includes Washtenaw County will be excluded from the exhibit, and the exhibit confined exclusively to Wayne County.

Mr. Austin: No cross-examination.

(Witness excused.)

Mr. Abbott: I will call Mr. Griswold.

FREDERICK W. GRISWOLD was thereupon called by and on behalf of the Respondent, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Abbott.

Q. Will you state your full name?

A. Frederick W. Griswold.

Q. And where do you live, Mr. Griswold?

A. I live on a farm northeast of Lansing. I don't know whether you want the business address or my home address.

Q. No. That is sufficient. What is your occupation?

A. I am the office manager of the Gasoline Tax Department.

Q. And were you subpoenaed to appear here at this time?

A. I was.

2703 Q. And were you asked to bring with you certain records in connection with the registered wholesale distributors of gasoline in Wayne County?

A. I was.

Q. And have you produced those records?

A. I have.

Mr. Abbott: Please mark this Exhibit 38-A to 38-E.

Trial Examiner Ballinger: The reporter will mark the documents handed in by counsel for the Respondent as Respondent's Exhibits 38-A, 38-B, 38-C, 38-D, and 38-E, for identification.

Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Abbott:

Q. Now, Mr. Griswold, I show you Exhibits 38-A, 38-B, 38-C, 38-D, and 38-E, for identification, and ask you to identify that, and state what it is. You may read the head ing on it, and otherwise state what the document consists of.

(The documents referred to were marked, for identification, "Respondent's Exhibits 38-A, 38-B, 38-C, 38-D, 38-E.")

2704 A. "Information as to 42 Wayne County Gasoline Wholesale Distributors, compiled from records of Gasoline Tax Department of the State of Michigan for the year 1941 (as to retail stations and bulk plants) and for month of March, 1941 (as to gasoline suppliers.)"

Q. What does the first vertical column of that exhibit consist of?

A. Give the name of the distributor.

Q. And those consist of 42 Wayne County Gasoline Wholesale Distributors? Is that correct?

A. Yes, sir.

Q. What does column two consist of and represent?

A. It shows the number of retail stations which these distributors operate.

Q. In some instances is it or is it not a fact that it is shown that they do not operate any retail stations?

A. In some instances, yes, sir.

Q. And in the instances where they do so operate, the number of retail stations is given, is that correct?

A. Yes.

Q. What does vertical column three of exhibits 38-A, 38-B, 38-C, 38-D, and 38-E represent?

A. It shows whether or not they operate a bulk plant.

Q. And in cases it is shown that they do, is the number of bulk plants operated shown?

2705 A. Yes, sir.

Q. What does vertical column four of Exhibits 38-A, 38-B, 38-C, 38-D, and 38-E show?

A. It shows the names of the wholesale distributors from whom the companies on the first column purchase their gasoline.

Q. Do you mean it shows the name of the wholesale distributor from whom they purchase?

A. Supplying the gasoline to the name of the distributor in the first column.

Q. Do [illegible]u mean to limit the column four to designating them as wholesale distributors?

A. Yes, sir. They are wholesale distributors.

2706 Q. What does column 5 of Exhibits 38-A, 38-B, 38-C, 38-D, and 38-E, inclusive, represent?

A. It shows by what method of delivery the gasoline is made.

Q. Column 5 and Column 6, I believe, shows that information?

A. Column 5 shows the deliveries by truck and Column 6, by tank car.

Q. And is that shown in Columns 5 and 6 as to all of the wholesale distributors mentioned in Column one of the exhibit?

A. Yes, sir.

Q. Now, is this information which appears on Exhibits 38-A to 38-E, inclusive—does that reflect the information which is contained in the official records of your office which you were asked to produce here?

A. Yes, sir; they were taken from the records.

Q. And are the records themselves in the court room?

A. Yes, sir.

Q. And you brought them with you to substantiate the exhibit, did you?

A. Yes, sir.

Q. Now, what particular records do you have here from your office from which this data has been compiled, which is expressed in Exhibits 38-A to 38-E, inclusive?

A. The applications for wholesale distributor's license.

2707 Q. And for what year?

A. For the year 1941.

Q. What part of the information which appears on Respondent's Exhibits 38-A to 38-E, inclusive, was taken from the 1941 application for wholesale distributor's license?

A. The name of the distributor and the number of retail stations which they operate.

Q. Now, what other official record of your office was used in compiling Exhibits 38-A to 38-E, inclusive?

A. The monthly tax report of these distributors.

Q. And for what month?

A. For the month of March, 1941.

Q. And was that monthly tax report furnished as to each of the wholesale distributors which appear in Column 1 of this exhibit?

A. Yes, sir.

Q. What information appears on this Exhibit 38-A to 38-E, inclusive, which was taken from the monthly report of these various distributors for the month that you have stated?

A. The information in Columns 4, 5, and 6.

Q. And what information is that?

A. That is the information showing the companies that furnish the gasoline to the distributors on Column 1.

2708 Q. And, also—

A. And also the method in which it is delivered; either by truck or tank car.

Q. Where did you get the information on Exhibits 38-A to 38-E, inclusive, as to whether they operate a bulk plant?

A. That is from the application for license.

Q. The 1941 license?

A. That is right.

Q. Now, state whether it is a fact, or not, as to whether this information is from statements made by the wholesalers themselves, which are a part of the records and files of your office?

A. Yes, sir.

Q. Are those reports and applications required by you to be filed by all of the wholesale distributors whose names appear in this exhibit?

A. Yes, sir.

Mr. Abbott: I offer the exhibit in evidence.

Trial Examiner Ballinger: This relates to the year 1941, does it?

The Witness: Yes, sir—well, partly—on the wholesale distributors, on their application for license for the year 1941, and then the information in regard to the suppliers of gasoline is taken from the month of March, 1941, tax reports.

2709 Trial Examiner Ballinger: When were those applications submitted?

The Witness: The most of them are submitted prior to January 1, 1941.

By Mr. Abbott:

Q. Are they required by law to submit their application for license prior to January 1, 1941?

A. Yes, they are, although sometimes there are cases we don't get them in until a little after January 1.

Q. Then, as I understand it, these Exhibits 38-A to 38-E, inclusive, reflect the information which appears on there as of the year 1941, as of what month?

A. March, 1941.

Q. Now, there is one thing I want to ask you before

Mr. Austin asks you any questions, and that is as to the Speedway Petroleum Corporation, which appears on Exhibit 38-D of the Exhibit. Is there a correction you wish to make with reference to that corporation?

A. There is some correction there. On the Speedway Petroleum Corporation we show there 12 retail stations. The Speedway Petroleum Corporation is controlled by people by the name of Sucher Brothers, and the Sucher Brothers are organized under another corporation.

Q. What is the name of that corporation, if you know?

A. I think that is just Sucher Brothers.

2710 Trial Examiner Ballinger: The corporation name is Sucher Brothers?

The Witness: The Sucher Brothers Oil Company. I am not sure.

By Mr. Abbott:

Q. It uses the name Sucher, does it?

A. Yes.

Q. Is there anything you want to correct about this exhibit in that respect?

A. The only thing is, it is claimed by the Speedway Petroleum Corporation that Sucher Brothers Corporation operate the 12 retail stations.

Q. And not the Speedway Petroleum?

A. And not the Speedway Petroleum.

Mr. Abbott: I make the offer with that correction of the exhibit.

Examination on Voir Dire by Mr. Austin.

Q. Do I understand you to say that these stations are or are not operated by Speedway Petroleum Corporation?

A. The Speedway Petroleum—I suppose when I made up the tabulation that they were operated by the Speedway Petroleum.

Q. You mean they so reported?

A. Well, they reported on their application that they did ~~not~~ operate these stations,

2711 Q. Yes?

A. But we understood up at our office that the Speedway Corporation took over the Sucher Brothers' operation, and in making up this tabulation, I put on the number of stations that were operated by Sucher Brothers, thinking that Speedway was operating those stations, and then I found out afterward that through some business expediency or something or other, that Sucher Brothers were operating the stations, retail stations, but were being furnished the gas by Speedway Corporation.

Q. Then, you didn't make this report entirely from your records, did you, Mr. Griswold?

A. Well, with the exception of that one. In making up that, I thought that they had made an error, that the Speedway people had made an error in making that report, and I put that in there.

Q. Did you think anybody else had made any errors?

A. Well, no, I didn't know that they did on there, because I took those and the rest of it from the record.

Q. Everything else is taken from your original records?

A. Yes.

By Mr. Abbott:

Q. Did you wish to have this exhibit corrected so as to show instead of 12 stations operated at retail, none operated?

A. None, according to the application of Speedway Petroleum Corporation. 2712

Q. And I understand, Mr. Griswold, that you personally prepared this tabulation, Exhibit 38-A to E, inclusive?

A. Yes, sir.

Mr. Abbott: Go ahead.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Examination on Voir Dire by Mr. Austin.

Q. The information on the first three columns here, rather, in the second and third columns, Mr. Griswold, you said that was contained in the license application for 1941?

A. That's right.

Q. Wouldn't that information be information for 1940, then?

A. No. It would be for 1941. They are making the application for their 1941 license.

Q. Yes. But when was the application filed?

A. Well, I would have to look back. A part of their were filed prior to December 31, 1940, and some of them were filed after January 1, 1941.

Q. Well, those applications, then, couldn't very well tell you how many retail service stations they 2713 operated in 1941, could they?

A. Well, it had shown they had that many or proposed to operate that many retail stations during the year of 1941.

Trial Examiner Ballinger: That was merely an application for authority to operate a certain number of stations during the year 1941, was it not?

The Witness: That's right.

Mr. Austin: I would certainly object, then, to that column, your Honor, because this shows what they intended to do in the future, and they were merely obtaining licenses to operate a certain amount of retail service stations, and, apparently, according to the witness' statement, it isn't based on any fact as to how many stations they operated in 1940 or any other time.

Mr. Abbott: On that, your Honor—are you through?

Mr. Austin: No.

Mr. Abbott: I think the application, as the witness has stated—

Trial Examiner Ballinger: Let him finish his examination.

Mr. Abbott: He made an objection, and I want to make a statement. But I will wait until he finishes the examination.

2714 *Examination on Voir Dire (Cont'd) by Mr. Austin.*

Q. Now, Mr. Griswold, does this list purport—strike that.

In the first place, let me ask you whether the names of distributors which appear in the first column on this exhibit Respondent's Exhibit 38-A to E inclusive, do those names all represent registered wholesale distributors of gasoline? And by that I mean do they represent persons or corporations who have been licensed as distributors of gasoline in Michigan?

A. Yes, sir.

Q. Do the names of all of them appear in this 1941 list?

A. I want to make one correction to that. The name of Charles E. Austin, Incorporated, is not on that book there (indicating).

Mr. Abbott: When you say that book you mean Exhibit 36-A to D inclusive?

The Witness: That is right. The reason the license has not been granted is it is held in abeyance on account of a court case that we have against the Austin Company.

Examination on Voir Dire (Cont'd) by Mr. Austin.

2715 Q. That who has?

A. The State of Michigan.

Q. Well, has Charles E. Austin been granted a license as a registered wholesale distributor, or has he not?

A. Not for the year of 1941. Not yet.

Q. Was he granted a license in 1940?

A. Yes, sir.

Q. But as I understand it this information here has been taken from an application for 1941 which has not been granted; is that correct?

A. It is taken—that's right. It is taken from the application. But the license has not yet been issued.

Q. Is there any other name on this list that doesn't appear in the Department of State list?

A. No, sir.

Q. You have a column here, Mr. Griswold, the second column on this Exhibit 38 which refers to the number of retail gasoline stations operated by each of these distributors.

A. Yes, sir.

Q. And that is the same column we were discussing a moment ago?

A. That's right.

Q. Is there anything in this compilation, again referring to Exhibit 38, which indicates whether any of these concerns named as distributors sell gasoline at wholesale?

2716 A. You mean the distributors in column one?

Q. Yes. Is there anything on this report that shows whether they sell any gasoline to retail dealers; or if so how many?

A. There is nothing on this report that shows it, no.

Q. Now, turning to the fourth column on the report, which is entitled "Gasoline Supplied By" will you tell me again what that is taken from?

A. That is taken from the monthly tax reports of these—

Q. You said it was March—something that related to March?

A. Of the tax report for March, 1941.

Q. And do those tax reports state for each person filing a report the sources from which they buy their gasoline?

A. Yes, sir.

Q. Is there anything in this report here which you have prepared to indicate whether any of these suppliers sell gasoline directly to any retail gasoline service stations?

A. Nothing in these reports, no, sir.

Q. This is not a complete list in column one of all of the licensed distributors in Wayne County, is it, Mr. Griswold?

A. No; that is only 42.

Q. Why did you pick out these 42?

A. They were picked out at the request of the Standard Oil Company.

2717 Mr. Austin: Your Honor, I object to this; it is not a complete—I think it is immaterial and irrelevant, because it doesn't—this information here by itself doesn't prove anything; but aside from that it appears now that this is a list of names picked out of the licensed wholesale distributors list by the Standard Oil Company including one name which does not even have a license, and—

Trial Examiner Ballinger: I didn't get your last statement.

Mr. Austin: I said it appears that this is some information regarding a list of names picked out by the Standard Oil Company from the wholesale distributors list from Michigan, and it includes even one name that hasn't even been given a license, although the information is supposed to be regarding licensed distributors. And it is not a complete list. And there has been no showing as to what probative value this could have. It is only a statement which is based upon some applications for licenses and state tax returns made by a selected group of distributors in Wayne County. And I submit if it is going to be offered at all, the information should be offered for all of the distributors in Wayne County, and that since it is made from records it would have been just as easy to have made a complete list. But as it stands I am not clear as to the purpose for which it is offered. But 2718 it seems to me that as a whole it is incomplete; it has not been accurately compiled. At least in a couple of cases. And the second column "Retail Stations Operated" is now admitted to be only the number of retail stations contained in a license application and not a statement of fact as to what has been done in the past.

2719 Mr. Abbott: I want to ask the witness one or two other questions before I reply to the objection.

Trial Examiner Ballinger: Before you get into that. This has no relation to anything that transpired prior to January 1, 1941, has it?

Mr. Abbott: That is what I was going to ask him. With reference to the number of retail stations operated, I wanted to clear that up.

By Mr. Abbott:

Q. Mr. Griswold, on the application for license of the wholesale distributor of gasoline for the year 1941, would you be able to get your file that you have of those applications in order to answer one or two questions that I would like to ask you?

A. I will, sir.

Q. Now, I would like to ask you what the questionnaire contains on the application from which you got the information on Exhibit 38 as to the number of retail stations operated?

Mr. Abbott: I think, possibly, this ought to be marked for identification, this application, because we are going to talk about it.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

2720 By Mr. Abbott:

Q. State, then, Mr. Griswold, what the questionnaire contains as to the matter of retail stations operated. That is No. 11 on the application.

A. Shall I answer that question?

Q. Yes.

A. On Line 11 of the application there is a question: "Do you own and operate retail gasoline service stations?"

Q. And underneath the line?

A. The answer is: "Yes." "And if so, how many?" And the answer is: "24."

Q. You are talking now about the Charles E. Austin?

A. Charles E. Austin, Incorporated, application, yes.

Trial Examiner Ballinger: Where does that appear?

(The witness indicated to the Examiner.)

By Mr. Abbott:

Q. And do I understand you, then, that on the applications, as they appeared in your office, the questionnaire asks in line 11: "Do you own and operate retail gasoline service stations? And if so, how many?" Is that correct?

A. That is right.

Q. Now, on Exhibit 36, which is the book containing the wholesale licensed distributors in Wayne County, does that list include the four Standard Oil jobbers involved in this case, namely, Ned's Auto Supply Company, Citrin-
2721 Kolb Oil, Stikeman Oil Company, and Wayne Oil Company?

A. I will have to look at the record there, but I am pretty sure that it does.

Q. Taking them in order, alphabetical order, first, Citrin-Kolb Oil Company?

A. Yes, sir.

Q. Next, Ned's Auto Supply?

A. Yes, sir.

Q. Next, Stikeman Oil Company?

A. Yes, sir.

Q. And next, Wayne Oil Company?

A. Yes, sir.

Q. And it also includes all the other licensed wholesale distributors in Wayne County?

A. Yes, sir.

Trial Examiner Ballinger: Let's go off the record for a few moments.

(Discussion ensued off the record.)

Trial Examiner Ballinger: We will take a five minute recess.

(A short recess was taken.)

2722 Trial Examiner Ballinger: We will come to order. Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: It appears, your Honor, that Mr. Boatwright, for the Respondent, and Mr. Warmack, for the Commission, have had a conference relative to certain requests that the Commission desires to make in connection with the accounting figures and procedure testified to by Mr. Boatwright, and those requests have been reduced to written form and supplied to Mr. Boatwright, with a copy to counsel for the Commission. It is understood that the Respondent will make the answers and supply the material that are outlined in the memorandum, and I shall send those answers to the Commission for the attention of Messrs. Austin and Warmack.

If there are additional requests for further information, if Mr. Austin or Mr. Warmack will communicate with me, I will develop that information and send that as promptly as our accountants can give me the answers.

Mr. Austin: The written memorandum which counsel for the Respondent has just referred to relates to the Respondent's Exhibits 31-A to 31-Q, and not to Respondent's Exhibits 33-A to 33-E.

Mr. Hanley: I understand Mr. Warmack dictated
2723 the memorandum. Am I right about that?

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: If your Honor please, I would like to make a request on the record at this time to the Respondent to furnish, as soon as possible, to the Commission a statement showing the names of all of the retail reseller customers of the Respondent in the Detroit area in 1937, and their addresses, and the number of service stations operated by each in the case the customer operates more than one.

Trial Examiner Ballinger: And location?

Mr. Austin: Well, yes, where there is more than one service station, the locations of the various outlets should be listed, and the total gallonage purchased by each customer. That is, gallonage of gasoline purchased by each customer during the year 1937. That is intended to cover—if I said Detroit area, I meant the Detroit division—covering Mr. Raupagh's division. I assume those records are available here in the Detroit office.

Mr. Hanley: I don't understand the request, Mr. Austin. Do you want the whole Detroit division or just this territory that we have been discussing in this case? Namely, Detroit, Hamtramck, Highland Park, and Dearborn?

2724 Mr. Austin: No. Because this request is in relation to Respondent's Exhibit 31, which has been stated covers the entire Detroit Division.

Mr. Hanley: I see. Well, you want an itemized list of the individual tank wagon reseller buyers?

Mr. Austin: That's right.

Mr. Hanley: Their location, and the amount of their 1937 gallonage?

Mr. Austin: That's right.

Mr. Hanley: For the entire Detroit division?

Mr. Austin: Yes. And if one of those customers operates a chain of stations, then I want the number of stations and the various locations. If he only operates one station, why, of course, then the address of the customer would presumably be the address of that service station.

Mr. Hanley: I think those records are surely available, your Honor, and we will get them up. Of course, you understand, there are a good many hundreds of them, and it takes a little while to dig out the records. But we can get them.

Mr. Austin: Well, I don't know exactly how many hundreds there are.

Trial Examiner Ballinger: The Examiner understands the information will be furnished.

Mr. Hanley: We will get it as soon as we can.

2725 Trial Examiner Ballinger: You may proceed.

By Mr. Abbott:

Q. Mr. Griswold, the question was asked you by counsel for the Commission as to why on Exhibit 38-A to E inclusive only 41 names of wholesale distributors were included, whereas on Exhibit 36-A to D there are over 200 of such distributors included; is it not a fact, that Exhibit 36 contains the names of many factories in Detroit?

A. Yes, sir.

Q. In fact, isn't it a fact that most of the names on that exhibit are factories?

A. Factories and individuals purchasing gasoline for their own use.

Q. For their own consumption?

A. For their own consumption, yes, sir.

Mr. Abbott: Now, if the Court please, I wish to state that the primary purpose of the tabulation which is identified as Exhibit 38-A to E inclusive is to show an absence of substantial injury to competition. We intend to tie this up with the testimony of Mr. Raupagh hereafter to be adduced to show that there are in Wayne County approximately 40 operations comparable to that which is carried on by Ned's Auto Supply, which is one of the operations complained of in this proceeding.

2726 Furthermore, it is offered to show that many wholesale jobbers even operate without a bulk plant, thereby giving them a distinct cost advantage over Standard Oil jobbers, and particularly Ned's Auto Supply Company.

Third, to show that many wholesale jobbers use the bulk plants of their supplier and receive tank wagon deliveries. And we intend to tie this up with testimony to show that such deliveries, although made by tank wagon and tank truck, are made at tank car prices.

Fourth, to show that many major oil companies except the Standard Oil Company and some others, supply branded gasoline to wholesalers in the Detroit area and Wayne County. And

Fifth, to show that there is no discrimination in this case which even remotely injures competition by such testimony.

And this testimony which is now offered in Exhibit 38-A to E, inclusive, is necessary as a basis for other testimony which will be offered in evidence in the Respondent's case in which we propose to tie up with the information given on Exhibit 38-A to E, inclusive, the matters which I have just referred to, which are necessary to the defense of the Respondent as bearing upon the claim that there has been substantial injury to competition by the operations complained of.

2727 Trial Examiner Ballinger: You have now stated your reasons for the purpose for which the exhibit is offered. Will you now address your remarks to the objections made by counsel for the Commission?

Mr. Abbott: Yes. Now, the first of the objections, as I understand it—

Mr. Austin: I have further objection, too, your Honor. I don't want to interrupt further now, but I wish just to state that I have some further objections to make.

Trial Examiner Ballinger: If counsel has further objections, I am going to request counsel for the Respondent to suspend, and let's get in all of the objections at this point.

Mr. Abbott: Very well.

Mr. Austin: May I ask the witness some further questions?

Trial Examiner Ballinger: You may.

Q. Mr. Griswold, does this report, Exhibit 38-A to E for identification, show the price at which any of the distributors purchased their gasoline?

A. No, sir.

2728 Q. Do you know, in any case, whether the distributor purchased at a tank car price or at a tank wagon price?

A. Our records don't show anything about the price.

Q. Column 5 here and 6, refer, as I understand it, to statements on their tax reports as to whether they purchase by truck or by tank car.

A. That's right; on the last two columns.

Q. Do you know, or do those reports show whether the distributors who purchase by truck, pay a tank car price or a tank truck price?

A. No, sir.

Q. Is there anything on this report which indicates whether or not the gasoline supplied to these distributors by the suppliers in Column 4 is branded gasoline or unbranded gasoline?

A. No, sir.

Q. Now, turning to Column 2: you stated that that refers to the license application and was in answer to a question on the application as to whether or not the applicant operates retail stations?

A. Yes, sir. That's right.

Q. Did the answers on the applications state the number of retail stations operated?

A. Yes, sir.

Q. Is that where this list came from?

A. Yes, sir.

2729 Q. Now, turning to Exhibit 38-B. Do you have any knowledge, other than the figure on the application, as to whether the Firestone Tire & Rubber Company operates 16 retail stations?

A. No, sir.

Q. Do you know whether the Highland Oil Company operates 29 retail stations?

A. Only what is shown on the application.

Mr. Austin: That's all, Mr. Griswold.

Now, if your Honor please, if this is offered to prove the number of retail stations operated by these named distributors, it is purely hearsay. It would not be hearsay if it is offered to prove the number of stations reported by them on these reports, but I submit that the number of service stations reported to the Secretary of State is entirely immaterial and irrelevant.

If there is any relevancy in this, it would go to the actual fact as to how many retail stations they operated and as to that fact, this witness has nothing but hearsay, and, as I say, if the purpose it to prove only to prove what these people reported to the Secretary of State, I claim that is entirely irrelevant and immaterial.

2730 Furthermore, I think the answers which the witness has given, show conclusively that this report does not in any way prove the things that Mr. Abbott said it was offered for; either as to price or as to branded gasoline or as to whether or not these buyers participate in bulk plant facilities of their suppliers. There is absolutely nothing here that shows that.

Mr. Abbott: It is, of course, admitted that there is nothing on the exhibits 38-A to 38-E which bears on this question of price.

As I stated, that was merely foundational and the matter of price will be offered in subsequent testimony.

This Exhibit 38-A to 38-E includes only factual matters which appear on the State records and the tabulation is merely to enable the evidence to be included in this record without encumbering it with the original document which, of course, for another reason, cannot be admitted because it is a State record.

With reference to the claim of hearsay, your Honor, it would of course, be possible to issue subpoenaes for each one of these wholesale distributors and put their testimony in the record but I contend—and I think it is true—that this is a positive statement and evidence as to the number of retail stations that they operate and, also, as to the number of bulk plants which they operate, because
2731 on the back of the application for license they asked the question: "Bulk stations owned or operated by applicant."

Trial Examiner Ballinger: Is that in the record?

Mr. Abbott: Well, I will ask the witness if that is not the fact.

By Mr. Abbott:

Q. Mr. Griswold, on the back of the application for license as a wholesale distributor of gasoline, I will ask you to state what question is asked as to the operation of bulk stations. State the exact phraseology as to the question which is answered by the applicant; upon which you based—

Trial Examiner Ballinger: Will you hand the Examiner a copy of the form of application?

Mr. Abbott: Yes, your Honor (handing document to Examiner.)

2732 Mr. Abbott: The first page, line 11.

Trial Examiner Ballinger: The applications are filled out and then sworn to and acknowledged by a notary public?

The Witness: Yes, sir.

Mr. Austin: If your Honor please—

Mr. Abbott: There was a question pending, Mr. Austin.

By Mr. Abbott:

Q. I want you to state in the record the phraseology used in connection with bulk stations on the back page of the application.

A. We have a section of the report headed "Bulk Stations," and then "Owned or Operated by Applicant," with columns there for listing the bulk stations and the city and the capacity of the bulk station.

Mr. Abbott: Now, Mr. Austin.

Mr. Austin: I just wanted to say, in further explanation of my objection, that there are certain things like gallonage reported for tax purposes that I think one could very properly get off of State reports. A man pays tax on gasoline and it is pretty certain he sold at least that much, but when you get into this question of operation of retail service stations, that question might be answered in a lot of ways, and I don't know—for instance, when it 2733 talks about some of these companies like Highland Oil operating 29 stations, and Firestone operating 16, and various other figures on here, while I don't know very much of Detroit, I never heard of any such chain of stations being operated by Firestone, to make one specific example, and it seems to me that this certainly is not the best evidence, and if the Respondent is permitted to prove or to put into the record, for the purpose of proving, the number of retail stations operated, simply by Secretary of State reports, or a report based on them, why, that simply is what this man told the Secretary of State as to how many stations he operated, and what his business dealings were with those stations, and whether he actually operated them or only supplied them as a wholesaler, I have no chance of cross examination on that point at all, and I think, for the purpose for which this is offered, it is purely a hearsay proposition.

I am not objecting to it because they don't bring the original secretary of State's reports here. I would object to them, on the same ground.

Mr. Abbott: The question as to operation of retail gasoline stations is covered by the phraseology as testified to by the witness: "Do you own and operate retail gasoline service stations?". That is on subdivision 11 of page 1.

2734 Trial Examiner Ballinger: Now, does the answer to that appear in Column 2?

Mr. Abbott: That's right. And that's the exact phraseology: "operate retail station."

Trial Examiner Ballinger: And that related to the period about the month of December, 1940, did it?

Mr. Abbott: January 1, 1941. The witness has testified to that.

Trial Examiner Ballinger: The applications had to be filed before the 1st day of January, 1941, as I understand it?

Mr. Abbott: That's right.

Trial Examiner Ballinger: So that the application must have been made prior thereto.

Mr. Abbott: That is correct.

Trial Examiner Ballinger: The same thing is true with reference to Column 3, is it not?

Mr. Abbott: That is correct, excepting as to Column 3 the month of March, 1941, is applicable, as stated in the heading on the exhibit, because that was supplied on their March, 1941, report. That information is contained in the March, 1941, report.

Trial Examiner Ballinger: Are we referring to the same column? Are you referring to the column with the heading: "Operate Bulk Plant"?

2735 Mr. Abbott: No; that information is supplied from the application for license which was filed, as the witness has stated, in December, 1940.

Trial Examiner Ballinger: The fourth column, as the Examiner understands, relates to the operations done during what month?

Mr. Abbott: March, 1941, as stated in the caption.

Trial Examiner Ballinger: And as shown by the official reports?

Mr. Abbott: That's right. And also the information as to whether gasoline is delivered by trucks or by tank car: that is also from the same month, March of 1941.

Trial Examiner Ballinger: Have you concluded?

Mr. Abbott: Yes, your Honor.

Trial Examiner Ballinger: It is now 12:30 P. M. The Examiner will reserve his ruling until we reconvene at 2 P. M., and now, at 12:30 P. M., the hearing stands in recess until 2 P. M.

(Thereupon at 12:30 o'clock P. M., a recess was taken to reconvene at 2 o'clock P. M.)

2736 Afternoon Session.

Trial Examiner Ballinger: Come to order, reconvene.

Mr. Abbott: I think there is a motion pending, your Honor, as to the offering of Exhibit 38-A, B, C, D, and E.

Mr. Austin: Your Honor, before you rule, may I ask the witness one or two more questions?

Trial Examiner Ballinger: You may.

Examination on Voir Dire by Mr. Austin.

Q. Now, these names of distributors that are in the first column—have you a copy of this exhibit?

A. I have it right here.

Trial Examiner Ballinger: Referring to Respondent's Exhibit 38-A to E, inclusive.

By Mr. Austin:

Q. Are all of those persons or corporations named in that column persons or corporations who filed applications for distributors' licenses and gave their address as Wayne County?

Let me ask you in another way: I believe you said that all of those names appear under the Wayne County list in this Exhibit 36?

2737 A. That's right.

Q. What is the basis for listing them under Wayne County?

A. We list them according , we have in that book a listed also an alphabetical list, and then we list them by counties in order to check them up quicker.

Q. How do you know what county to list them under?

A. How do we know?

Q. Yes.

A. We take that from the application as it comes in.

Q. Was that the address given on the applications?

A. Yes, Wayne County.

Q. In other words, if the address is in Wayne County, you list them under Wayne County?

A. That's right.

Q. Now, going to the second and third columns referring to retail stations and bulk plants, is there any statement in the application as to where those retail stations or bulk plants are located?

A. In quite a good many of them they are asked to list them, and they do list them. Some of them do not.

Q. You say they are asked for a list of them?

A. Yes.

Q. What do you mean by that?

A. Well, on the wholesale distributions, we issue a unit license to their different outlets that they have; that
2738 is, we issue a unit license bearing their wholesale distributor's number instead of a retail license.

Q. You mean where they operate a retail service station?

A. That's right.

Q. Now, what I am trying to find out is, Mr. Griswold, do the applications or forms from which this report was made state the addresses of the retail service stations and bulk plant?

A. Some of them do. The bulk plants most all of them are stated. When they list them on the report—or on the application, and usually the larger distributors, where they have a good many of their stations, they list the stations, and where they are located.

Q. Do you know, in a case of these figures in columns 2 and 3, here, whether those figures represent service stations and bulk plants located in Wayne County?

A. No, I presume some of them are not located in Wayne County.

Q. Have you made any record of the locations of the ones that are listed here?

A. Not any separate record, no, except what is on the state records.

Q. Well, might not some of these retail stations be located in other counties?

A. Yes.

2739 Q. The same is true with bulk plants, isn't it?

A. Yes. It might be true of the bulk plants.

Mr. Austin: If your Honor please, I would like to add to my ground of objection the fact that it doesn't appear that if introduced in evidence that this proposed exhibit would form any basis of comparison with a situation in the Detroit area.

Mr. Abbott: Your Honor, we are not concerned in this study as to the territorial distribution either of retail stations or bulk plants. This is not a cost analysis restricted to a particular area. We are only concerned here with the principle as to whether wholesale distributors who register from Wayne County, operate retail stations, either as a part of their operation or exclusively.

We are interested in the matter of operation of bulk plant, not from the standpoint of where the plant is located, but from the standpoint that a great many of these wholesale distributors conduct their business without any bulk plant at all, as shown by the exhibit. That is the thing we are primarily interested in, and the question as to where either the retail station of the bulk plant is located is wholly immaterial for the purpose of this exhibit.

Now, of course, the only thing that could be tabu-
2740 lated from the original record was the answer of the wholesale distributor to the question on the questionnaire which related to the operation of retail stations as to January 1st, 1941, and as to the operation of bulk plants as of that time, because the questionnaire said: "Do you operate retail stations?" and "If so, how many?" And then, on the back of the same blank, it asks the question as to the operation of the bulk plants, "How many are operated, if any?" And, as I say, we are primarily interested there in ascertaining whether they operate any bulk plant at all; from the standpoint of showing that a great many of the wholesale distributors operate their business without any bulk plants whatsoever.

Now, whether the bulk plant is located in the Detroit area or outside the Detroit area is wholly immaterial. I submit that the objections which are here raised by the attorney for the Commission are, upon the testimony of this witness and upon the exhibit as submitted not well taken and that the exhibit should not be admitted in evidence.

Trial Examiner Ballinger: The Examiner rules that the Exhibits 38-A to and including 38-E do not furnish the best evidence.

He further rules that the exhibits and testimony of the witness furnish no basis for cross-examination.

2741 Accordingly Respondent's Exhibits 38-A to 38-E, inclusive, are excluded.

Mr. Hanley: The Respondent at this time moves, upon the basis of the objection of counsel for the Commission and upon the basis of the ruling of the Examiner, that the so-called Taggart survey, Exhibits 75-A, 75-B, 75-C, and Exhibit 76, and the entire testimony of the witness Taggart be stricken from the record.

Trial Examiner Ballinger: The motion is denied.

Mr. Abbott: For the record, is this ruling based upon the ground that the information is hearsay; upon which the tabulation is based?

Trial Examiner Ballinger: It is not the best evidence. The best evidence—and if this is material to your case—can be obtained from these dealers, and that would afford an opportunity of cross-examination.

Mr. Abbott: Of course, we can subpoena each one of these 42 wholesalers—

Trial Examiner Ballinger: It is impossible for counsel for the Commission to, by cross-examination, test the accuracy of any statement appearing on these exhibits.

Mr. Abbott: Well, by the same token it was impossible for the attorney for the Respondent to test the accuracy of the questionnaire submitted by the station operators as the basis for the Taggart survey.

2742 Trial Examiner Ballinger: That is a matter of water passed over the dam. The Examiner has ruled on it, and it is not open for further discussion.

By Mr. Abbott:

Q. I want to ask you this, Mr. Griswold: of your own personal knowledge, as the office manager of the Gasoline Tax Department, is it or is it not the general marketing practice of wholesale distributors, so-called, both in the Detroit area and throughout Michigan, to market gasoline at retail direct to the public?

A. Yes, sir.

Q. You say it is?

A. Yes, sir.

Q. I will ask you, of your own personal knowledge, is it or is it not the general marketing practice of wholesale distributors both in the Detroit area and throughout Michigan to operate retail gasoline stations in some cases exclusively?

Mr. Austin: Of course, this question is asked of the witness of his own personal knowledge, it doesn't call for an opinion, so I have no objection to it.

Mr. Abbott: That is what I am asking the witness.

By Mr. Abbott:

Q. Whether of your own personal knowledge, you know it is the practice of wholesale distributors both in
2743 Detroit and throughout Michigan to operate retail stations exclusively?

Trial Examiner Ballinger: The question is to be answered of your own personal knowledge, and not what you gained from either reading or from hearsay.

By Mr. Abbott:

Q. Do you have personal knowledge of that, Mr. Griswold?

A. Yes, sir.

Q. And what is your answer?

A. My answer is that they do.

Q. That they do?

A. Yes, sir.

Q. I will ask you, Mr. Griswold, your answer having been in the affirmative, how long, to your knowledge, has that practice continued, both of operating retail stations in whole or in part, on the part of wholesale distributors, both in Wayne County and throughout the State of Michigan?

A. For as long as I have been with the gasoline tax division, which has been for about ten years.

Q. Of your own personal knowledge, I will ask you what is the fact as to whether Wayne County wholesale gasoline distributors, and wholesale gasoline distributors throughout the State of Michigan, do their business without operating a bulk plant? And I ask you that, also of your own personal knowledge.

A. Yes, sir, there is quite a lot of them.

2744 Q. Your answer is that they do?

A. That they operate without a bulk plant, yes.

Trial Examiner Ballinger: What do you mean by that? Explain your statement, please.

The Witness: What do I mean by it?

Trial Examiner Ballinger: Yes.

2745 The Witness: I mean they don't have any bulk plants. Quite a lot of distributors are licensed in the book there that do not have a bulk plant; they buy gasoline in a tank truck and operate right from the tank truck.

By Mr. Abbott:

Q. What bulk plant, if any, do they use in that operation?

A. Well, they don't use any. They go—a lot of them go to the refinery and buy the gasoline and sell it right from the refinery.

Q. You mean in cases where they buy it from the refinery?

A. Yes.

Q. Well, of your own personal knowledge is it or is it not a fact that many wholesale distributors, instead of having a bulk plant of their own use the bulk plant of the supplier, which furnishes them with gasoline? Do you know what the situation is with reference to that, of your own knowledge?

A. Well, I wouldn't say as to that, Mr. Abbott.

Trial Examiner Ballinger: Mr. Griswold, you are testifying here with reference to your own personal knowledge; do you know of your own personal knowledge that these jobbers obtain their supply direct from the bulk plant of the refinery?

The Witness: Yes, sir.

Trial Examiner Ballinger: You have seen that?

2746 The Witness: I have come in contact with it. That is, in our work up there, we know they do.

Trial Examiner Ballinger: And you know that was their regular source of supply?

The Witness: Sure, because we get their report from them.

Trial Examiner Ballinger: Well, now, are you dealing or basing your statement upon their report, or what you know?

The Witness: I am basing it on both.

Trial Examiner Ballinger: You have personal knowledge of it?

The Witness: Yes, sir.

Mr. Abbott: Is your Honor through?

Trial Examiner Ballinger: Yes.

Mr. Abbott: You may take the witness.

Cross-Examination by Mr. Austin.

Q. Mr. Griswold, I believe you stated that it is the practice for wholesalers in the State of Michigan to sell entirely at retail—or, will you repeat what you said in regard to that? I think you were asked whether you know that these wholesale distributors or some of them sell entirely at retail?

A. Yes, sir.

2747. Q. Will you name some that do that?

A. I probably could by going down through the list.

Q. Go down through what?

A. Down through the list of wholesale distributors.

Mr. Austin: I have no objection to the witness referring to this—

Mr. Abbott: Exhibit 38-A to E inclusive.

2748 Mr. Austin: No. 36.

Trial Examiner Ballinger: I hand the witness the document excluded from evidence, Respondent's Exhibit 38-A to E.

Mr. Austin: I prefer to hand him 36. If your Honor please, I would prefer to hand him 36. That is what I intended to do.

Mr. Abbott: If the Court please, 36 contains the names of a great many factories and consumers of gasoline; 38-A to E is much more representative.

Trial Examiner Ballinger: This is cross-examination and counsel may elect as to which document to use.

Mr. Hanley: It is submitted at this time that the witness is entitled to answer the question that has been asked him from any memorandum that he has, or from his own memory. He tried to give the answer to this particular question by referring to Exhibit 38 which lists the individual organization which market the gasoline.

Now, the witness, I submit, is entitled to refer to anything he wants to refer to in answering the question.

Mr. Austin: I also state on the record that the witness didn't actually refer to the document, but it was offered to him by counsel for the Respondent without any request of the witness that he see it.

Trial Examiner Ballinger: It was offered to him 2749 by the Examiner.

Mr. Abbott: It was offered to him by the Examiner.

Mr. Austin: Well—at least, he didn't ask for it.

By Mr. Austin:

Q. Go ahead, Mr. Griswold.

A. There is one right on the first page: J. J. Bright & Son. They are just retailers. They aren't wholesalers.

There is another one on the second page, Sam Hartman. They don't sell any wholesale.

Zieve Oil Company, they are just retailers.

Q. I didn't understand that.

A. Zieve Oil; on the last page.

Q. Do you know of any others that do business only at retail?

A. National Garages. They sell at retail.

Q. Who is that?

A. National Garages.

Q. Only at retail?

A. I don't know of any wholesaling that they ever did.

Trial Examiner Ballinger: Do you have any knowledge as to whether or not they engage in wholesale and retail?

The Witness: We would have the knowledge if they did, because it would come in on the report.

Trial Examiner Ballinger: Then your answer 2750 would be based solely on the report?

The Witness: No, on both, because we have been down and we have investigated the National Garages quite a number of times.

By Mr. Austin:

Q. When you say "we" who do you refer to?

A. Our investigators and myself. On the National Garages, I have been down in Detroit.

Mr. Austin: I can't hear the answers of the witness.

The Witness: I say, on the National Garages I have been down in Detroit.

Trial Examiner Ballinger: Read the answer.

(The last answer was read.)

By Mr. Austin:

Q. Do you know of any others?

A. Charles Austin sells all of his at Retail.

Q. Now, are you acquainted with the suppliers of Charles E. Austin, Incorporated?

A. One or two of them, I am.

Q. Do you know anything about their business other than supplying Austin?

A. The Midwest Refineries, and Roosevelt, I know them. The others are outside the state.

Q. Who else do they supply besides Austin?

2751 A. They supply quite a number of others in Detroit.

Q. Do they supply anyone besides jobbers?

A. You mean, do they supply retail stations?

Q. Yes.

A. They might. I wouldn't know, no. No, sir.

Q. Do you know whether they do or not?

A. I wouldn't know, no; because we wouldn't get any report of that at all.

Q. Do you know whether the Argo Oil Corporation supplies any retail stations other than James J. Bright?

A. I couldn't tell, because we don't get that report. We would, if they were wholesale distributors. If they were, we would know. If they were not, why, we wouldn't.

Q. Well, you don't know, do you?

A. No.

Q. Do you know whether the Theisen-Clements Company supplies any retail service stations in Detroit other than those operated by National Garages, Incorporated?

A. Not if they are just retail stations.

Q. Now, you referred to some distributors that you say obtain their gasoline direct from their suppliers' bulk plant in tank trucks; is that correct?

A. I don't know what you mean. I know that there are wholesale distributors that operate just a tank truck and
go to the refiners and these other places and get their
2752 gasoline and distribute it.

Q. What do they do with it, after they get it?

A. They sell it to retail stations and to farmers. They retail it and wholesale it, too.

Q. What does their retailing operation consist of? Do they operate retail stations?

A. Some of them do and some of them don't. Some of them just have a tank truck and sell mostly to farmers.

Q. Can you name an instance of any distributor who obtains his gasoline that way and operates retail stations?

A. And operates retail stations?

Q. Yes.

A. I don't know as I can in this list here in Wayne County but outside of Wayne County, probably.

Q. The only ones you know of are outside of Wayne County?

A. Yes.

Mr. Austin: That's all I have.

Redirect Examination by Mr. Abbott.

Q. Which ones do you recollect are outside of Wayne County, of your own knowledge?

A. I would have to look down through the list.

Q. Could you remember it by looking at Exhibit 36?

Mr. Abbott: May I hand the witness Exhibit 36 which has been introduced in evidence?

2753 Trial Examiner Ballinger: You may.

Mr. Austin. I suggest it is immaterial—well, I will withdraw that. It has been stated that this line of testimony is to show some general practice.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record. Read the last question.

(The record was read as follows: "Question: Which ones do you recollect are outside of Wayne County, of your own knowledge?

"Answer: I would have to look down through the list.

"Mr. Abbott: May I hand the witness Exhibit 36, which has been introduced in evidence?")

A. There is a concern in Gratiot County that sells all their stuff at retail. That is the Farmers' Gas and Oil Company.

By Mr. Abbott:

Q. Where are they located?

A. They are located at Ithaca.

Q. You say they operate retail stations only?

A. That's all.

Q. Do you have any other information as to who their supplier is?

A. Well, they buy mostly wherever they can buy 2754 it the cheapest, I guess. They have quite a number of suppliers.

Q. Do they take delivery by tank car or by truck, do you know?

A. Mostly altogether by truck.

Q. Do they have any bulk plant, do you know?

A. Well, they have quite a good sized storage up there.

Q. But they distribute entirely at retail?

A. Yes, sir.

Mr. Abbott: Are you through with the witness?

Mr. Austin: Yes.

By Mr. Abbott:

Q. Taking Exhibit 38-A to 38-E, inclusive, again, which I understand the Examiner stated you might use for refreshing your recollection, I will ask you, referring to page 2 of the exhibit, whether A. W. Collins Oil Company, Wayne County Wholesale distributor, to your knowledge, operates retail stations?

Mr. Austin: Your Honor—

A. I couldn't say that.

Mr. Austin: —I am not sure about what is proper on these things, and I don't want to try to limit it too much, but I asked the witness a question and the witness certainly has a right to refer to something to refresh his recollection but I don't believe it is correct for counsel to refer the witness to a particular place to a particular
2755 document for that purpose. I think the witness should know whether his recollection needs refreshing.

Trial Examiner Ballinger: The witness should state from his own recollection. If his recollection is incomplete, he may then refresh his recollection with reference to some paper or memorandum.

By Mr. Abbott:

Q. I will ask you, Mr. Griswold, whether you are acquainted with the operation of the Duro Oil Corporation of Detroit, of your own knowledge?

Trial Examiner Ballinger: The Examiner will instruct the witness to close up that exhibit and to answer the question, if he can, from his own knowledge.

A. No, I can't say from my own knowledge on the Duro Oil. The only way is to get it from the report.

By Mr. Abbott:

Q. I will ask you from your own knowledge, if you are acquainted with the operation of the Firestone Tire & Rubber Company which operates—

Trial Examiner Ballinger: The Examiner has instructed you not to examine that paper until you have first answered these questions.

Mr. Hanley: Let the record show, please, that the witness has been deprived of memorandum that he has made from the official records of his office of the State of
2756 Michigan. I would suggest, for the record, that the
witness physically lay the document where he cannot reach it, in view of the instruction of the Court.

Mr. Abbott: Now, read the last question.

(The last question was read.)

By Mr. Abbott:

Q. (Continuing) —retail stations, as you have already stated, in the State of Michigan?

A. Well, only so far as the Tax report shows that they do not do any wholesaling business.

2757 Q. Do you know of your own knowledge—well, state—

Trial Examiner Ballinger: The latter portion of the witness' answer is clearly improper.

By Mr. Abbott:

Q. State the fact whether Firestone Tire & Rubber Company, of your own knowledge, operates exclusively at retail in its distribution in the State of Michigan? That question, of course, pertains to gasoline.

Mr. Austin: Your Honor, I think the record will show that I asked the witness to give a full list of stations that he knew of that operated solely at retail. He answered my question, and I gave him an opportunity twice to state any others. Now, I think the record shows that the witness has already given what he himself stated were all of the distributors that he knew of his own knowledge that operated exclusively at retail.

Trial Examiner Ballinger: That is true, but counsel may refresh his recollection, if he has any.

By Mr. Abbott:

Q. What was your answer as to the Firestone Tire & Rubber Company?

A. My answer is that the reports—their tax reports do not show that they do any wholesaling.

Q. Now, what do you know of your own knowledge with

reference to Jeffers & Company, as to whether they
2758 operate exclusively at retail?

Trial Examiner Ballinger: You may answer that yes or no.

By Mr. Abbott:

Q. (Continuing) In the distribution of gasoline?

Trial Examiner Ballinger: But do not refer to your tax records.

A. I do not know.

By Mr. Abbott:

Q. What do you know of your own knowledge as to the fact whether Meurer Brothers Incorporated of Detroit in their distribution of gasoline operate exclusively at retail?

A. I couldn't tell you without referring to the report.

Q. What do you know of your own knowledge as to the fact whether or not Montgomery Ward & Company, in the distribution of gasoline, wholesale distributors, operate exclusively at retail?

A. Now, your Honor, I don't know how to answer that. The only way I can answer that is being familiar with the report.

Trial Examiner Ballinger: Then your only information comes from the report?.

The Witness: That is all, as far as Montgomery Ward.

2759 Trial Examiner Ballinger: Then your answer is no you don't know.

By Mr. Abbott:

Q. Have you investigated that, Mr. Griswold, so as to answer that question of your own personal knowledge exclusive of the report?

A. No.

Q. Based on your own personal knowledge state the fact as to whether Premier Tank Car stations of Detroit, Wayne County wholesale distributors, distribute gasoline exclusively at retail?

A. Well, my answer would have to be the same on that.

Q. You have no independent knowledge?

A. Not personal knowledge except what comes from the report.

Q. Based on your personal knowledge state the fact as to whether Puritan Stations Incorporated, Wayne

County wholesale distributor, distributes gasoline exclusively at retail?

A. I couldn't tell you that; that is, from going to it personally.

Q. In other words, you say you have no personal knowledge as to that wholesale distributor?

A. No.

Mr. Abbott: Now, your Honor, I wish to reoffer Exhibit 35-A to E inclusive upon the ground that the attorney for the Commission has gone into that exhibit in
2760 such a way further to qualify it with this witness, and I move that it be received in evidence.

Trial Examiner Ballinger: What exhibit did you offer?

Mr. Abbott: 38-A to E inclusive.

Trial Examiner Ballinger: I think you stated 35.

Mr. Abbott: Well, I meant to say 38, and I amend the record to that effect.

Trial Examiner Ballinger: The offer is again rejected for the same reason.

Mr. Abbott: That is all, Mr. Griswold.

(Witness excused.)

Mr. Hanley: Mr. Suffert.

DANIEL W. SUFFERT was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Hanley.

Q. Mr. Suffert, will you please state your name and residence to the Court?

A. Daniel W. Suffert, S-u-f-f-e-r-t.

Q. And you reside where?

A. My residence is 7300 South Shore Drive, Chicago, Illinois.

2761 Q. What is your occupation, Mr. Suffert?

A. I am with the Texas Oil Company as superintendent: that includes sale and operating matters.

2762 Q. Well, how long have you been connected in any capacity with the oil industry?

A. Eighteen years, in round figures.

Q. With whom did you begin?

A. I began with the Standard Oil Company.

Q. Standard of Indiana?

A. Standard of Indiana.

Q. And in what capacity?

A. As a service station operator.

Q. And how long did you work for that company?

A. Slightly in excess of four years. I'd say about four years and two months.

Q. During all that time as a station operator?

A. No. I started as a service station operator and was later promoted to what was known as a service station instructor in a supervisory capacity over a group of stations.

Q. Was that during a period of time when the Standard Oil Company was operating service stations directly, Mr. Suffert?

A. They were operating them exclusively on that basis.

Q. After your four years of service or thereabouts with the Standard Oil Company, what did you next do?

A. There was an interval of about four months when I worked in a parking lot in Chicago who also handled Standard Oil products. 2762

Q. And following that what did you do?

A. Following that I went to work for the Texas Oil Company. The Texas Company.

Q. Have you been engaged in some capacity with the Texas Oil Company until the present time?

A. With the exception of one year my total service with the Texas Company was in a supervisory capacity with direct relation to retail marketing.

Q. So all of your work has been to do with the marketing end of the business?

A. All but the one year I spoke of.

Q. What was that one year?

A. That was the first year I went to work for the Texas Company.

Q. What did you do that year?

A. During that year I worked in the office; I was a clerk-cashier.

Trial Examiner Ballinger: What calendar year was that?

The Witness: That was the last half of 1929 and the first half of 1930.

By Mr. Hanley:

Q. How long have you occupied your present position with the Texas Company?

2764 A. It will be four years next July.

Q. Is there some particular territory that you supervise, Mr. Suffert; and if so, please state what it is.

A. The Lower Peninsula of Michigan entirely, and the northwest corner of the State of Indiana, comprising those towns and the country immediately surrounding them, of Elkhart, Mishawaka, South Bend, LaPorte, Valparaiso, and Crown Point.

Trial Examiner Ballinger: The Lower Peninsula may be very definitely known to people up here, but for the purpose of this record, I would like to have a better description.

By Mr. Hanley:

Q. Does the Lower Peninsula of Michigan include Detroit, Mr. Suffert?

A. It does.

Q. Indeed, so far as those who live in it are concerned, it includes the entire state, doesn't it?

A. It seems to be the opinion, yes.

Q. It is the greater portion of the State of Michigan, is it not?

A. That's right; if not in area, then in population.

Q. Had you concluded your answer as to the geographical territory that was covered in your duties or supervision?

A. I think so. I meant to conclude it with the naming of the towns in the northwest corner of Indiana. 2765

Q. Is the Texas Company a national marketer of gasoline?

A. They are.

Q. In your capacity as marketer for that company, have you had a general experience and observation of methods used by the Texas Company and other oil companies in the United States in the marketing of gasoline?

A. Yes.

Q. Have you been familiar with the methods used by your company and by other oil companies generally in their methods of marketing gasoline in the Detroit vicinity over the last several years?

A. Yes, sir.

Q. Are you familiar with those conditions at the present time?

A. Yes.

Q. State generally what your duties are in your present position with the Texas Company?

A. I am the contact man in the field with the local zone managers, local zone supervisors, in the area I stated before. That is comprised of six sales zones; each one of these zones has a zone manager in it. I act in a supervisory capacity under the district manager at Chicago as a member of his staff.

Q. Is there specifically included in your territory
2766 the Detroit area in Michigan?

A. Yes.

Q. What is the fact, within your judgment, and based on your experience, Mr. Suffert, as to whether or not oil companies, generally, in the United States, market both through the medium of the tank wagon sales to resellers and also by tank car sales to jobbers at a differential in price as between tank wagon sales and tank car sales?

A. I would say that that was a general industry practice.

Q. What is the fact in relation to the area of Detroit, Michigan?

A. I would say that that includes Detroit.

Q. Is it true that that operation, which I will refer to as a dual operation, is indulged in by some companies some places through the United States, generally? Do you understand that question?

A. I think so.

Q. I mean, does any one company engage in the dual practice in a single territory?

A. No; that is a general industry practice. There are certain spots in markets that I am familiar with where one marketer may not employ the practice in one town that he may use in another town maybe a hundred miles away.

Q. Just for example, Mr. Suffert, are you familiar with the fact as to whether or not the Standard Oil
2767 Company, the Respondent in this action, markets in Detroit by selling both tank wagon to resellers and by selling tank car to jobbers at a differential in price?

A. Yes, they do.

Q. You know that?

A. Yes.

2768 Q. Does your company do that in Detroit, as a general practice?

A. Yes, we do.

Q. Does your company do that in Chicago?

A. Yes, we do.

Q. From your knowledge and experience in the oil industry, what is the fact as to whether or not jobbers who purchase on a tank car basis, generally speaking, operate both retail outlets themselves, as well as serving other resellers?

A. I believe that is a general practice.

Q. When you say "a general practice," do you mean throughout the industry, throughout the country?

A. Well, I am familiar with a portion of Illinois—not recently; not within the last six years—but I would say that that practice does prevail in Chicago, with which I am familiar. I live there and I am familiar with that market to a certain extent and that practice does exist in Michigan.

Q. And in Detroit?

A. And in Detroit.

Q. Is there ordinarily a differential between tank wagon price and the tank car price?

A. Yes, there is.

Q. And is the tank car price the lower price, Mr. Suffert?

2769 A. Yes, it is.

Q. Is that a general industry practice and condition?

A. Yes, it is.

Q. Is there anything unusual or extraordinary or unique about Detroit, as compared with the rest of the country, in reference to the industry practices prevalent in Detroit; so far as you know?

Trial Examiner Ballinger: Judge, this witness has confined his knowledge to a limited area.

Mr. Hanley: I am asking him as an expert.

Trial Examiner Ballinger: If he has knowledge of the situation that obtains all over the country, he may so state.

Mr. Hanley: I am asking him as an expert. I have qualified him, your Honor.

Trial Examiner Ballinger: I appreciate that.

Mr. Hanley: And I am asking him his opinion, as his opinion based on his knowledge and experience in the oil industry.

Mr. Austin: Well, without questioning the qualifications, I would just like to observe that whether a man

has been qualified as an expert for the purpose of giving an opinion, when he testifies as to facts, the question of knowledge is just as important: I think you must draw
the distinction between what is opinion and what
2770 is fact. I understand these recent questions have
been directed to what is fact and what is opinion.

Trial Examiner Ballinger: Judge, I don't understand any foundation has been laid here for an answer to the question.

Mr. Hanley: Is it the view of the Court that this witness is not qualified as an expert in the gasoline marketing industry?

Trial Examiner Ballinger: Certainly; within the areas within which he is familiar, or about which he has knowledge.

Mr. Hanley: He has testified that he is generally familiar with those conditions throughout the country. That his company markets nationally.

Trial Examiner Ballinger: Judge, the Examiner may be in error, but he understood the witness, in answer to your questions, to qualify his answer and limit it to
certain localities.

2771 Mr. Hanley: Wherever the witness does that, he
may do so, of course. It is the witness that is doing the testifying.

By Mr. Hanley:

Q. What is your opinion, Mr. Suffert, based on your experience as a marketer of gasoline, as to the fact of whether or not throughout the United States it is a general industry practice for suppliers of gasoline to sell at a tank wagon price, and also at a tank car price, which is lower than the tank wagon price?

A. I have definite knowledge that in the entire United States that is true. That marketing practice is engaged in the United States.

Q. And is it engaged in the same geographical territory by the same company frequently?

A. I am afraid I would have to qualify that answer by saying that the same companies do not operate generally. In other words, I might say for example, that the Standard Oil Company of Indiana might not operate in an area with which I am familiar, recently, on the Pacific Coast, where major competition may be some company who is unknown in the Detroit market, but it is a general industry practice to sell by both methods.

Q. And when that is done, what is your knowledge and opinion, based upon your experience as to whether or
2772 not the jobbers who receive gasoline on the tank car basis then resell that gasoline both at retail and at wholesale?

Mr. Austin: I object to the form of the question on the ground that it was asked for the witness' knowledge and opinion. I think that it should appear whether the witness is giving his knowledge or as to territories with which he is personally familiar, or whether he is giving his opinion based upon the general familiarity with the industry.

By Mr. Hanley:

Q. I will re-form the question, eliminating from it the words "and opinion" and I wish it to appear on the record that counsel for the Respondent is entirely unenlightened as to the studied continuance and apparent effort of counsel for the Commission to try and keep this record and the Commission in ignorance of universally known customs in the oil industry.

Now, do you understand that question, Mr. Suffert? I am asking you for your knowledge now, Mr. Suffert.

A. Will you please repeat the question?

Trial Examiner Ballinger: Read the question.

(The question was read as follows: "Question: And when that is done, what is your knowledge or opinion, based upon your experience as to whether or not the jobbers who receive gasoline on the tank car basis then
2773 resell that gasoline both at retail and at wholesale?"

A. May I qualify that answer a little bit?

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. Just state the fact. Whatever you understand the fact to be.

A. In three years in business, for business reasons as well as for vacation and touring purposes, I have been in 39 states and probably, like all oil men, we talk shop wherever we go, and I have discussed local markets in those areas when and as I came in contact with other members of my own company who were in similar capacities to mine with the company.

I can state that in each case they informed me that the problems which I recited relative to marketing practices in the area in which I work, were directly parallel to their marketing practices in their respective areas, in each case. They stated that their jobber or tank car purchaser resold to other service stations and, in the majority of cases, did own or control stations which they serviced.

Mr. Hanley: You may take the witness.

Mr. Austin: I move the last answer be stricken as not responsive to the question as either stating the wit-
2774 ness'—all he asked for was knowledge. I think the answer states certain matters that he was told by other people in other parts of the country, and I believe if the question and answer were read it would be found the answer is not responsive to the question. It does not constitute the statement of the witness' knowledge, for which he was asked. It was a fair answer as far as the witness was concerned, but I don't believe it was responsive to the question nor admissible as an answer to the question.

Trial Examiner Ballinger: I will hear from counsel for the Respondent.

Mr. Hanley: I don't care to argue that, your Honor. We offer this witness as an expert. One of the means of getting his knowledge is talking to other people in the industry and comparing their problems with his own. He has said he found problems in 39 states comparable to those which he personally handles in his own territory. We submit that that is competent testimony, and should stay in the record.

2775 Mr. Austin: I would just like to have the question read.

Trial Examiner Ballinger: It is unnecessary to read the question. The motion is granted and the answer is stricken. Hearsay.

Cross-Examination by Mr. Austin.

Q. Mr. Suffert, where is your office: here, or in Chicago?

A. My office is in Chicago.

Q. Does the Chicago office cover this Detroit area?

A. Yes, sir.

Q. Are you familiar with the fact that the Federal Trade Commission has a Complaint pending against the Texas Company?

A. Yes, I am.

Q. And do you know whether that Complaint does not involve, substantially, the same charges that are involved against the Standard Oil Company in this case?

Mr. Hanley: That is objected to as a conclusion of the witness. The lawyers for the Respondent can't even find out what issues are involved in this case.

Trial Examiner Ballinger: The witness may answer.

A. If I answer that, sir, it would be hearsay, again. I don't know, from positive personal knowledge, what the charges are.

2776 Q. Do you know whether that Complaint against the Texas Company involves certain practices alleged in the Complaint to have taken place in the Detroit area?

Trial Examiner Ballinger: Have you any knowledge as to the contents of the Complaint?

The Witness: No, I don't.

By Mr. Austin:

Q. Have you ever seen it?

A. No, I haven't. Just gossip, as to its nature, is all.

Q. Just what?

A. Just gossip, as to its nature, is all. That's all I know of it.

Mr. Austin: That's all. No further questions.

Mr. Hanley: That's all. Thank you, sir.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Mr. Abbott: Your Honor, may I suggest we take a recess at this time before we put on another witness.

Trial Examiner Ballinger: We will take a five-minute recess.

(A short recess was taken.)

2777 Trial Examiner Ballinger: Come to order.

Mr. Abbott: All right, Mr. Biber, will you resume the stand?

MAX BIBER, a witness called by and on behalf of the Respondent, having been heretofore duly sworn, resumed the stand and testified further as follows:

Trial Examiner Ballinger: Mr. Biber, you have previously been sworn?

The Witness: Yes, sir.

Mr. Abbott: We come back now to Exhibit 18 to 18-z-51, and I believe at the time that Mr. Biber was on the stand before we gave Mr. Austin, attorney for the Commission, this exhibit, and he was going to look it over and indicate on the record to what extent he was willing to concede that it might be received in evidence.

Is that correct, Mr. Austin?

Mr. Austin: Yes.

Mr. Abbott: Do you wish to ask any questions of the witness with reference to the exhibit?

Mr. Austin: I understood you had some more direct. Do you want me to go ahead and cross examine on this?

Mr. Abbott: I want to ask him one or two more questions.

2778 *Direct Examination (Resumed) by Mr. Abbott.*

Q. Mr. Biber, with reference to Exhibit 18 to 18-z-51, as to all these stations which are portrayed in that exhibit, do you have personal knowledge from inspection of the service stations portrayed by the photographs in this exhibit so that you can say that you are familiar from that knowledge that these photographs accurately portray the stations which they purport to represent, together with the postings that appear in the photograph?

A. Yes, I have that knowledge.

Q. I understand from your previous testimony that you either took the picture yourself, the pictures, I will say, which are in this exhibit, or that you had them taken by a commercial photographer, and that at the time of the taking by the commercial photographer, you personally inspected the subject of the photograph; is that right?

A. On the same day, yes.

Q. Now, with reference to the purchases which are portrayed in this exhibit, and identified as Exhibits 18-B to 18-R, in so far as these exhibits refer to purchases and advertisements made by the stations which they pertain to, have you personal knowledge with reference to the purchases? First, did you take them yourself?

A. That is 18-B to—

Q. 18-B to 18-R, inclusive.

2779 A. Will you tell me what pages those are?

Q. They are from pages 1 to 14, as you have numbered them.

Trial Examiner Ballinger: You propose to offer them in block?

Mr. Abbott: I am going to offer the whole thing as a block, because they are all one exhibit under the number 18.

A. I believe in that group there was one purchase, and that was made by myself.

Q. And the rest of them refer to advertisements by the station which is referred to in the exhibit; is that right?

A. That's right.

Q. What knowledge have you with reference to those advertisements?

A. Those advertisements came to me through dealers who brought them to my attention. The dealers either got them in the mail or told me they got them in the mail or picked them up or they were passed out to them at their places of business and turned over to me.

Q. And have you been, over some period past, making a survey and collection of such advertisements?

A. Yes, I had been and did at the time.

Q. And you kept them, did you?

2780 A. Yes.

Q. Were they kept with reference to this proceeding?

A. No. I have a lot of other information—

Q. I mean, did you make the collection of these advertisements in order to make any build-up for this proceeding?

A. No, this started long before this proceeding started.

Q. Now, there are attached to Exhibit 18-z-6 some loose leaves which have been identified as Exhibits 18-z-2, 18-z-3, 18-z-4, and 18-z-5. Possibly I ought to ask you some questions with reference to these.

I show you Exhibit 18-z-2 and ask you what that is.

A. That is a card inviting patronage to a Gulf Service Station at 17501 Livernois, offering a free gift to each customer on certain dates. The gift being a box of chocolates.

Q. And that is near what station which is either operated or supplied by Cit[illegible]-Kolb Oil Company?

A. It is near the station at Livernois and Lynden and also at Linwood and Detroit Terminal Railroad.

Mr. Abbott: The Examiner wishes to see that.

(The document was handed to the Examiner.)

By Mr. Abbott:

Q. I refer you next to Exhibit 18-z-3, and ask you to identify that.

A. That is a cash receipt for the purchase of 7 gallons at the Chicago-Dexter Service on January 9, 2781 1941, and this purchase was made by myself.

Q. Now, with reference to the station which was complained of in the Commission's case, located at the corner of Dexter and West Chicago, is it not?

A. That is correct.

Q. And where is the station which is represented by that exhibit, with reference to the station at the corner of Dexter and West Chicago Boulevard?

A. Directly across the street.

Q. What was the reason why you felt it necessary to make a buy at that station?

A. At this time the station at Chicago and Dexter, being Cities Service Station, had posted a new sign setting a price of 8 for $1.30, which is the regular posted consumer price for gasoline—

Q. Or was at that time?

A. Was at that time. On that date I took a photograph of the station and went across the street and made this buy of gasoline, because I had suspicioned that they were not selling at the regular posted price.

Q. What is known as an under-canopy discount?

A. An under-canopy discount is a discount that is given to a customer which creates a price for gasoline which is lower than the price posted at the station, or on the pumps.

2782 Q. And what is the result, as illustrated by Exhibit 18-z-3? In connection with the securing of that exhibit, what did you find was the condition which obtained at that station? Were you able to purchase gasoline at less than the posted price—

A. Yes.

Q. —on the date that that pertains to?

Mr. Austin: If the Court please, I would like to note on the record an objection to all of this line of questioning. I think it is the same objection I have made at numerous times, and that is that it is irrelevant and immaterial as to the prices charged by another service station in the City of Detroit; that is, service stations not served by the Standard Oil Company or by any of the jobbers named in the Complaint.

Mr. Abbott: The purpose of this, of course, is to show the competitive conditions and there was no substantial injury to competition under the terms of the Act.

Trial Examiner Ballinger: The objection of counsel is reserved to him with the right to move at a later date to strike the testimony.

By Mr. Abbott:

Q. Do you want the question, Mr. Biber?

A. I think I remember that question.

2783 The result of this purchase showed that I could buy gasoline for 2.1¢ per gallon less than the posted price at the station.

2784 Q. Now I show you Exhibit 18-z-4 and ask you to identify that exhibit and state what it is.

A. This is a cash receipt for seven gallons of gasoline from a Sun station at 2304 East Vernor Highway; a purchase made on January 30, 1941.

Q. In connection with that station either operated by or supplied by the Citrin-Kolb Oil Company was that purchase made?

A. The station at 2700 East Vernor Highway.

Q. Is that a company-operated station; or supplied by the Citrin-Kolb Oil Company?

A. Supplied by the company.

Q. And what is the reason it was necessary, deemed necessary for you to make a purchase at that station, instead of relying on the photograph?

A. Our dealer at 2700 Vernor Highway complained there was price cutting in the neighborhood and from all visual evidence there didn't seem to be any price cutting, so I undertook to make a survey of the neighborhood and found that this station, just a block and a half away, sold gasoline as shown by this purchase at 2¢ less than the price posted at the station; 2¢ per gallon.

Q. And on what date was that?

A. January 30, 1941.

Q. Did you also take a picture of that station?

2785 A. I did not,—I don't believe I did.

Trial Examiner Ballinger: If you will pardon the interruption.

The Examiner calls your attention to Respondent's Exhibit 18-z-2. Unless the Examiner is in error, the witness testified that this was an invitation to the public to visit the station and that all those who visited the station would receive a half-pound box of chocolate. I will ask you to look at that exhibit and see whether or not a half-pound box of chocolates was to be given to every person who visited the station, or to be limited to customers?

The Witness: To customers.

By Mr. Abbott:

Q. What you meant was that the exhibit invited the people who bought gasoline there to receive a premium: is that right?

A. That's right.

Q. I show you Exhibit 18-z-5 and ask you to identify that and state what it represents.

A. This is a cash receipt for a purchase of seven gallons of gasoline at the service station at Dexter Boulevard and Tuxedo, purchase made on January 29, 1941, and shows—

Trial Examiner Ballinger: By whom?

2786 The Witness: By myself.

A. (Continuing) Shows the purchase of seven gallons of gas for $1.00.

By Mr. Abbott:

Q. Why did you deem it necessary to make a purchase at that station instead of relying on the photograph?

Mr. Austin: Your Honor, I guess there have been a couple of similar questions asked before, but I submit that it is irrelevant and immaterial as to the reasons which the witness had for making the purchase. I think—I was going to say that the purchase would speak for itself, but perhaps that is beside the point; the question now is whether the reasons of the witness for making the purchase have any relevancy. I don't think they do, and I object to the question upon that ground.

Trial Examiner Ballinger: I will take his answer and reserve to you the right to move to strike.

A. This was a newly remodeled station at that time; I think it had been remodeled and completed about three days before this purchase.

By Mr. Abbott:

Q. What was the location of it?

A. Dexter and Tuxedo.

Q. Let me ask you this question: In competition with what station of your company, either operated or supplied, was it?

2787 A. Dexter and Chicago, Dexter and Cortland, Dexter and Waverly.

Q. Had you previously taken a picture of this station that this exhibit refers to?

A. I don't believe I have a photograph of this. I don't remember.

Q. Well, what does the exhibit represent?

A. It represents the cash receipt for seven gallons of gasoline for $1.00.

Q. State, if you know, whether that agreed with the posted price at that station on the day it bears the date?

A. No; it was 2½c under the posted price at that time.

Q. That is, as I understand it, what you refer to in your testimony as an under canopy discount?

A. That's right.

Q. Now, the purpose of the pictures which appear in Exhibit 18-z to 18-z-51, is to show—

Trial Examiner Ballinger: Just a minute. Let him tell.

Mr. Abbott: Withdraw the question.

By Mr. Abbott:

Q. What is the purpose of the pictures which appear in this Exhibit from 18-z to 18-z-51?

2788 Mr. Martin: I object to that, your Honor. I don't know whose purpose. And in any event, I think the pictures speak for themselves if they have any evidentiary value.

Trial Examiner, Ballinger: The witness may answer the question.

Mr. Austin: Whose purpose? Does that mean the purpose of the witness in gathering the pictures together?

Trial Examiner Ballinger: You will find out. You have reserved to you the right to move to strike.

A. Since 1935 from various cases started and various agitation, it has seemed advisable—

Trial Examiner Ballinger: To who?

The Witness: To myself and the company; myself as representative of the company; to gather what evidence and what facts we could relating to competition in the retail marketing of gasoline in and about the areas where we have stations which we either operate or serve. And this has been a collection, I believe, dating back to June of 1935.

2789 Q. And all the pictures in this were either, as I understand, taken by you or taken under your supervision?

A. That's right.

Mr. Abbott: All right, Mr. Austin, you may examine.

Examination on Voir Dire by Mr. Austin.

Q. What do you mean when you say the [illegible] were taken under your supervision?

A. Well, I'd say—I don't think of an exception where I passed the station or drove by the station, and if convenient, either took the picture myself or called the office and told them to send one of the men out and take that picture.

Mr. Austin: Your Honor, I don't propose to object to any of these photographs, because the photographer isn't called, or they are not properly authenticated as pictures of what they purport to portray upon the dates stated. However, waiving any such possible objection as that, I would like to renew my objection to the entire volume as being irrelevant and immaterial.

Now, if that objection is not granted, then I propose to take up each of those pages separately. I believe your Honor stated on the record previously that you would not pass upon a blanket objection, but I am just renewing the objection so that it will appear upon the record
2790 at this time, anticipated that it will be overruled.

Trial Examiner Ballinger: The objection is overruled.

Mr. Austin: I hope Court and counsel will bear with me. I went through this whole book a week and a half ago one evening with the expectation that I would have to take it up the next morning, and these notes are pretty cold right now, and I will have to try and see if I can remember what they mean, because they are pretty much abbreviated.

Mr. Abbott: I think you will agree with us that we tried to facilitate this investigation as much as possible, and the next morning we had another witness from out of town—

Trial Examiner Ballinger: It was unavoidable.

Voir Dire Examination by Mr. Austin.

Q. Mr. Biber, I think the record will show that I started in on the first two of these when you were here before?

A. I think you did.

Q. I haven't got the transcript with me, so will you state again as to Exhibit 18-B, page 1, how you acquired possession of the card which is pictured there?

A. This card was given to me by the operator of the station at Kercheval and St. Clair; that is a Standard Oil Company station.

Q. Is that the same station that is named in the card?

A. No. No.

Q. Well, the card refers to Lee's Grosse Pointe Service, Kercheval and St. Clair.

A. This card is of a Hi-Speed station directly across the street from the Standard station operator who collected this card.

Q. Do you know whether this card was issued by the Hi-Speed station at that address?

A. I only know what the card purports to be.

Mr. Austin: I object, then, to the admission of 18-B, for identification, on the ground that it is not properly authenticated.

Mr. Abbott: Well, your Honor, it appears to be a printed card, and I don't understand the rule to be that we have to subpoena in here the person who operated Lee's Grosse Pointe Service at Kercheval and St. Clair and have him testify to the authenticity of that card. Presumptively a card having been issued and coming to the possession of the station across the street, that emanated from the station which appears on the card.

Trial Examiner Ballinger: Anybody might have had the card printed, might they not?

Mr. Abbott: I suppose that assumes a fact which by a stretch of the imagination could be conjured up.

Trial Examiner Ballinger: Do you think the mere presumption is sufficient to carry it over?

Mr. Abbott: I think when a card is printed and distributed and comes to the hands of the public, that the law will not—especially in an investigation of that kind—will not require that we subpoena in the operator of the station which is shown on the card and have him admit that he issued the card.

Trial Examiner Ballinger: Objection sustained.

Mr. Austin: My objection will be, your Honor, on all of these cards and letters, that I will require the same thing that a letter would, prove the signature, or in some way prove that it was written by or issued by the person it purports to have been issued from.

I would like to recall that on direct examination in the Commission's case, Mr. Biber was shown by me a number of cards, and I only offered in evidence those which he personally knew were issued by the Station in question, and as to at least one of those cards he said he didn't believe it was issued by the station whose name was on it. And I judged from that that he assumed the possibility that perhaps some cards were fraudulently issued.

Trial Examiner Ballinger: The Examiner has 2793 ruled. Pass on to your next exhibit.

Examination on Voir Dire by Mr. Austin.

Q. Well, the next one is 18-C, and I know that I questioned Mr. Biber about that one, and I believe you stated, did you not, Mr. Biber, before that you had no knowledge that this letter was written by Rantanen and Bicknell Oil Company, or that this signature "J. Smith" is genuine?

A. I do not know.

Q. And do you have any knowledge as to the issuance of the card portrayed at the top of the page by Rantanen and Bicknell Oil Company?

A. No, I don't.

Mr. Austin: I move to strike that one on the same ground.

Mr. Abbott: Well, the same thing would apply.

Mr. Austin: I mean by striking it, I object to it on the same ground.

Trial Examiner Ballinger: Objection sustained.

Voir Dire Examination (Continued) by Mr. Austin.

Q. Exhibit 18-C portrays a letter which appears to be on stationery of James J. Bright and Son. It bears the signature "William DeWitt, manager." Are you acquainted with Mr. DeWitt's signature, Mr. Biber?

2794 A. I am not.

Q. Did you receive this letter yourself?

A. I did not.

Q. How did you receive it?

A. It was given to me by a dealer on 2nd and Seldon.

Q. Have you any knowledge of that other than the fact he turned it over to you?

A. That is the only thing I know about it.

Mr. Austin: I object to the admission of Exhibit 18-D.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: Objection to Respondent's Exhibit 18-D is sustained and the tender rejected.

Examination on Voir Dire by Mr. Austin.

Q. Referring to Exhibit 18-E, for identification: do you know who Mr. H. E. Stewart is?

A. I do not.

Q. Do you know whether that letter was prepared or circulated by James J. Bright and Son?

A. I do not.

Mr. Austin: It is objected to for lack of authenticity, your Honor.

Trial Examiner Ballinger: The objection is sustained and the tender rejected.

2795 Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Examination on Voir Dire by Mr. Austin.

Q. The next, Mr. Biber, is Exhibit 18-F; that is, page 5.

The next is Exhibit 18-G, page 6.

The next is Exhibit 18-H, page 7.

The next, Exhibit 18-I, page 8.

A. Pages 8 and 9 I know about, because I got the card and made the buy.

Q. Do you have any personal knowledge about the origin of Exhibits 18 F, G, or H; page 5, 6, and 7?

A. I do not have.

Mr. Austin: An objection is made to those, your Honor.

Trial Examiner Ballinger: Objection sustained as to the Respondent's offer of Exhibits, for identification, 18-F, 18-G, and 18-N.

Examination on Voir Dire by Mr. Austin.

Q. Now, Exhibit 18-I appears to be a photograph of a card with the name Hoffman and Levine, Incorporated; Dexter, Corner of Tuxedo. Did you collect that card yourself, Mr. Biber?

2796 A. I did; at the station.

Q. The typing on this page says that similar cards were given out early in 1936. What part of 1936 do you refer to?

A. Oh, I would say it was about May.

Mr. Austin: I would object to the admission of Exhibit 18-I, your Honor, upon the ground that it relates to a competitive situation prior to the passage of the Robinson-Patman Act and is, therefore, irrelevant and immaterial.

Trial Examiner Ballinger: Objection sustained.

Examination on Voir Dire by Mr. Austin.

Q. Exhibit 18-J appears to be a photograph of a receipt for the purchase of gasoline. Did you make that purchase?

A. I did.

Q. And is this a photograph of the slip which you received?

A. That's right, it is.

Q. Incidentally, that isn't one of the slips that Mr. Abbott showed you awhile ago, is it?

A. No.

Trial Examiner Ballinger: When was the purchase made?

The Witness: September 8, 1936.

By Mr. Austin:

2797 Q. In the event that your previous testimony was incorrect, Mr. Biber; you didn't collect this card, did you, on the same day you made the purchase?

A. No.

Mr. Abbott: With reference to the card, your Honor, I want to be heard on that with reference to the time of the respective dates.

Trial Examiner Ballinger: Counsel hasn't up to this time objected.

Mr. Austin: As to the card, yes. Your Honor has already ruled on that.

Trial Examiner Ballinger: Which one is that?

Mr. Abbott: Exhibit 18-I.

Trial Examiner Ballinger: Then we will return to Respondent's Exhibit 18-I, for identification.

I will hear counsel for the Respondent.

Mr. Abbott: I want to go on the record as to that.

The Robinson-Patman Act became effective June 19, 1936, and it provided, with reference to discrimination:

"Where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person." Now, the original Clayton Act passed in 1914, of which the Robinson-Patman
2798 Act was amendatory, provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce either directly or indirectly to discriminate in price between different purchasers of commodities which commodities are sold for use, consumption, or resale within the United States where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Trial Examiner Ballinger: This Complaint was filed under the Clayton Act as amended by the Robinson-Patman Act so we are proceeding with the latter Act; that is, the Act as amended by the latter Act, exclusively.

Mr. Abbott: Do I understand from the Court's ruling that no competitive situations may be shown, with the idea of rebutting the claim that the practices of the Respondent had the effect of injuring, destroying, or preventing competition, unless the evidence relates to acts committed after June 19, 1936?

Trial Examiner Ballinger: Or within a reasonable time before that. In the case of the Respondent, it was in business before that time. Now, within some reasonable time before the effective date of the Robinson-Patman Act, you may offer evidence.

Mr. Abbott: What would be a reasonable time,
2799 your Honor? In order that we may be guided. I wouldn't want to commit the Examiner, but I do want to know for our own information.

Trial Examiner Ballinger: I wouldn't care to lay down any hard and fast rule, but a year before.

2800 Mr. Abbott: Then this exhibit relates to May, 1936; the exhibit in question.

By Mr. Abbott:

Q. Is that true, Mr. Biber?

A. That's right.

Mr. Abbott: Therefore, upon that basis, I submit that the objection made by counsel for the Commission was not well taken. It hasn't been testified by Mr. Biber that he personally was given that card by Hoffman & Levine Incorporated in May of 1936—

Trial Examiner Ballinger: You are referring now to Respondent's Exhibit 18-I?

Mr. Abbott: 18-I; yes, sir.

Trial Examiner Ballinger: And that the Examiner previously sustained the objection to?

Mr. Abbott: That's right.

Trial Examiner Ballinger: The Examiner reverses his previous ruling and admits in evidence Respondent's Exhibit 18-I.

Mr. Austin: Now, if your Honor please, am I precluded from having anything further to say about that card?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

2801 Mr. Austin: In the first place, on that point, I am not contending that no evidence—the issues in this case, or of any facts prior to June 18, 1936, is admissible, but this relates to competitive situations of retail stations and it seems to me it is of such doubtful relevancy and materiality, even during the period covered by the Complaint, that when it goes back before 1936, that this particular type of evidence as to prices charged by other retail stations could not be material because the Respondent could not be lowering the prices before the Act for the purpose of meeting competition. I don't care if it was one day before the Act was passed, I would make the same argument, but as long as the ruling is reopened I would like to ask the witness another question that may possibly dispose of this.

Trial Examiner Ballinger: You may.

Examination on Voir Dire by Mr. Austin.

Q. Mr. Biber, this card refers to a special consideration which is indicated by the card was available at the station. There is no mention of gasoline, unless I don't understand the meaning of all those listed products down below. The only one that I could see that might be gasoline may be "Penn Master." Is that gasoline, or oil?

A. That is oil.

Q. Do you know whether this special consideration
2802 referred to in the card was made available by that
station to purchasers of gasoline at the time the card
was acquired by you?

A. Yes, it was. I got the consideration at the time.

Mr. Abbott: The next exhibit refers to that.

Examination on Voir Dire by Mr. Austin.

Q. But you said you did not make this purchase at the time you got the card?

A. I did not, but I purchased gasoline at the time I got this card.

Q. But you haven't a copy here of the receipt on that?

A. No, I didn't get the receipt at that time. I didn't care about it. The only time I ever made a purchase of gasoline, as I did in September, was when the posted price was one thing and I suspected the sales price was another. Then I asked for a receipt, if I wanted it.

At this time there was no posted price and they were selling on a discount card basis, which was prevalent at that time.

Mr. Abbott: You have the original exhibits, haven't you?

Mr. Austin: I wanted to find out whether the card re-
ferred to gasoline. It doesn't appear so, on its face, but I
am satisfied with Mr. Biber's testimony on that point, so
I will restrict the objection to the one previously
2803 made, that the Respondent could not have been reduc-
ing its price to meet a competitive price prior to the
passage of the Robinson-Patman Act and that, therefore, it
is immaterial.

Mr. Abbott: The thing I have reference to is you will have to give the Reporter the copy, there, because I suppose each one of those will have to be marked as we go along. You will have to stamp each one separately because you are ruling out some of them and admitting others.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: The Examiner having made a ruling, I don't feel—well, I didn't intend to question the ruling except I wanted to ask this second question. That, apparently, has amounted to ~~nothing, so~~ I am perfectly willing to submit to the ruling made.

Mr. Abbott: It is only a question, now, as I understand, how to handle the exhibits.

Trial Examiner Ballinger: The Examiner overrules the objection to Respondent's Exhibit 18-I and admits the document in evidence.

(The document referred to, heretofore marked for identification "RESPONDENT'S EXHIBIT 18-I", was received in evidence.)

2804 Trial Examiner Ballinger: Let us proceed to Respondent's Exhibit 18-J, for identification.

Examination on Voir Dire by Mr. Austin.

Q. Do you have personal knowledge of the supplier from whom Hoffman & Levine Incorporated buys its gasoline?

A. Yes. The Texas Company.

Q. How do you know that?

A. From seeing the trucks on the driveway.

Q. Well, this Exhibit 18-J says, at the top: "Fleet-Wing Gasoline, Supplied by Red Indian Oil Company."

A. Which page is that?

Q. Page 9 (referring to Respondent's Exhibit 18-J for identification).

A. I don't see that.

By Mr. Abbott

Q. That must have been typewriten on, Mr. Biber. You have a photostat there, don't you?

A. Yes.

Q. It is the negative photostat.

A. Yes.

Mr. Austin: In view of the witness' answer, I submit that the typing appearing at the top of the page on the righthand side should be physically stricken.

Mr. Abbott: It should be stricken.

Mr. Austin: If the Exhibit is offered.

2805 Mr. Abbott: That's right.

I make the offer without the appendage "Fleet-Wing Gasoline, Supplied by Red Indian Oil Company." I ask to have the Exhibit amended.

The Witness: That error occurred because it is Fleet-Wing now, but it wasn't at the time.

2806 *Examination on Voir Dire by Mr. Austin.*

Q. Now, further referring to Exhibit 18-J, page 9, there is some typing at the bottom of the page referring to "Prevailing retail prices," and the price on this receipt, and there is a computation of the difference per gallon. What prevailing retail price is that, or how do you know that 5 gallons for 87¢ was the prevailing retail price at that time?

A. Well, the prevailing retail price indicated on this exhibit was taken from the sheet furnished the Commission showing prevailing retail prices. I believe you have that.

Mr. Abbott: It is already in evidence.

Mr. Austin: That sheet does not go back to 1936. It only goes back to 1937, so I don't believe there is any evidence as to the prevailing retail price at this date.

Mr. Abbott: I will say this: in connection with Mr. Raupagh's testimony, that will be brought out Monday, but prevailing retail price as of this date will be submitted in evidence and we will offer to connect it up in that way.

The Witness: I have the figures on the prevailing retail price available.

Mr. Austin: Those were furnished by the Standard Oil Company?

2807 The Witness: That's right, but I have the same copy and I worked from the same copy.

Mr. Austin: Now, your Honor, this question is going to arise upon a great many of these, and perhaps we should, at least, investigate as to whether a general ruling can be made. There are a number of these proposed exhibits which have a computation on them; prevailing retail price, and the prevailing retail price per gallon, and the price per receipt or, on many of these, it is the price shown on the photograph. Then the difference per gallon between the price on the photograph or the recipt and the computation. That is a computation printed on a great many of these, and if I have to go into all of those, I have to go into arithmetic and methods of computation on a lot of them which do not appear to me to be correct; on their face, or, at least, if they are correct, I don't understand them, and the question as to whether the prevailing retail price is the prevailing retail price for the gasoline shown in the picture, and I have great doubt as to whether or not that sort of a typed statement is proper, anyway. It seems to me that that is more or less argumentative, and, at most, it only shows what is to be computed from the exhibit itself.

Trial Examiner Ballinger: Unless the facts were testified to, the Exhibit would not be admissible in evi-
2808 dence with the statements on them.

Mr. Austin: At best, they are computations which you can make from the exhibit only after knowing what the prevailing retail price is. There are some of them I wouldn't question the accuracy of, as to the prevailing price, if it is on major brands, but a majority are not the major brands.

By Mr. Abbott:

Q. I will ask the witness: what is the meaning of the word "Prevailing retail price per gallon" on this exhibit, and on other exhibits in the series?

Trial Examiner Ballinger: If the words "Prevailing retail price" on all the exhibits refer to the same thing.

A. They refer to the same kind of thing, yes. These photographs were taken at different dates and the date of the photograph controls the prevailing retail price. In other words, the words "Prevailing retail price" indicate the price prevailing, retail price, of major gasoline at that date. The date the picture was taken, and those figures were taken from the exhibit that is now in evidence. I believe that the only exception is this exhibit we are talking about now, which happens to be before 1937. I don't recall of any photograph in this group which was taken before January 1, 1937.

Mr. Austin: The only prevailing prices that are
2809 in the record are prevailing prices on major brands
of gasoline in Detroit, and the question would arise in a great many of these cases whether you could say what the prevailing price was as to the brand of gasoline shown.

Mr. Abbott: It isn't claimed that anything but the prevailing retail price of any other gasoline excepting major brand of gasoline is referred to in these pictures.

With that understanding and qualification, I submit that the picture is admissible—that the Exhibit 18-J is admissible in evidence upon the testimony of the witness that that is the meaning of the words "Prevailing retail price."

Mr. Austin: I don't know whether I made my objection very clear, your Honor. I thought, perhaps, it was enough to point out these computations are on here, and I think they are doubtful at best, and I don't think they ought to be added to the exhibits themselves. But as long as we are talking about retail prices, if you have a picture on here of a Zip or Joy station, and then you put on this exhibit the prevailing retail price of major brand of gasoline, then they deduct the Zip or Joy price from that, and then they try to show that that particular station is selling at a certain number of cents below the prevailing retail price—that price in the picture may be the prevailing retail price for that brand of gasoline, for all I know.

2810 Mr. Abbott: Yes. The picture wouldn't mean anything if your construction were put on it.

I want to make a statement on the record which will show that the words "Prevailing retail price" which appears on this exhibit and also on other exhibits in proposed Exhibits 18 to 18-z and 18-z-51, in all cases refers to the prevailing retail price of major brand gasoline as the name has been established by evidence already in the record, and as will be established as to all dates antedating the date of January 1, 1937, by the testimony of Mr. Raupagh, who will testify and will put in evidence the prevailing retail prices as to all dates which are covered by these exhibits.

Now, with that explanation, I submit that the exhibit is admissible in evidence.

Mr. Austin: I submit it is not admissible for the same reason, and I would like to get a general ruling upon all of these computations.

Has your Honor got a copy of this?

Trial Examiner Ballinger: I haven't. I don't know what it is.

(The witness handed the Examiner a copy of the exhibit in question.)

Mr. Abbott: You might show the Court Exhibit 18-J and also 18-K.

2811 I may say these have all been prepared with a great deal of care, extending over many years, and if there is any question as to any computation or the accuracy, of course, that is one thing. But unless they are found to be inaccurate, I submit that they are entitled to credibility.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: I now move we adjourn until 10 o'clock tomorrow morning, Friday, May 2, 1941.

Trial Examiner Ballinger: Motion of counsel for Respondent is granted, and now at 4:50 P. M., the hearing stands adjourned to be reconvened at 10 A. M., May 2, 1941, in Room 859 Federal Building, Detroit, Michigan.

(Thereupon at 4:50 o'clock P. M., an adjournment was taken, to reconvene May 2, 1941, at 10 o'clock A. M.)

2812
Room 859 Federal Building,
Detroit, Michigan,
May 2, 1941

Met, pursuant to adjournment, at 10 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois, and

Arthur J. Abbott, Esq., of the firm of Abbott, MacMahon, and Roberts, 2230 Buhl Building, Detroit, Michigan, on behalf of the Respondent.

2813 PROCEEDINGS.

Trial Examiner Ballinger: We will come to order. This is a reconvening at 10 A. M., Eastern Standard Time, May 2, 1941, in Room 859 Federal Building, Detroit, Michigan, in Docket 4389, in the case entitled Standard Oil Company.

The last hearing was held in Detroit, May 2, 1941. The reporter will note counsel for the Commission and Respondent present.

Gentlemen, you may proceed.

Mr. Hanley: If your Honor please, before the witness resumes, there is a matter I think I should give your Honor notice of, because it may be that something will have to be done preparatory to the eventuality.

In view of the ruling on Exhibits 38-A to 38-E, which exhibits were excluded, and which, to refresh your Honor's memory, were the tabulations prepared by the State Tax authorities, and tabulated from reported returns made by some 42 jobbers and dealers in Detroit, and your Honor having indicated his view as to how the Respondent should proceed, the Respondent viewed that as material testimony and the Respondent would like now to give notice that we propose to subpoena the 42 dealers and I assume that perhaps the Court here is not prepared to forthwith
issue those subpoenas; it might need some time in
2814 order to prepare to do that.

Trial Examiner Ballinger: It will be necessary for the Examiner to obtain the subpoenas from Washington which he can undoubtedly do within 48 hours.

Mr. Hanley: Then we might have them ready for issuance Monday?

Trial Examiner Ballinger: I believe that can be arranged.

Mr. Hanley: Now, I should like to go off the record.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: I wish to say with reference to the Exhibits 18-B to 18-z-51 that there seems to be an intention on the part of the Commission to require us to change the notations on these pictures to quite a considerable extent. It was suggested last evening by Mr. Austin that the words "Prevailing retail prices" should be amended to show that they are the prevailing major retail prices. And he also indicated that he would require that the amount of the differential, which is merely a matter of arithmetic, be excluded from the exhibits.

Now, we have set about to give the Commission a pic-
ture of the competitive situation on the question
2815 as to whether there is any substantial injury to com-
petition in the Detroit area, and I had always assumed that it was the desire of the Commission to be fully informed as to all the facts relative to the situation, in the Detroit area, including such matters as are on these pictures, and in such a way that the Commission can see by a glance what the actual situation is.

I don't conceive that there is any point in excluding from these pictures the mathematical computation as to the differential. It would seem to me that if the computation is accurate, and of course we concede that if it is not accurate it should be either corrected or deleted. But if it is accurate, I see no reason why it should not be included in these exhibits.

Trial Examiner Ballinger: These photographs are being introduced in evidence to portray the actual situation existing on the day the photograph was taken.

Mr. Abbott: Correct.

Trial Examiner Ballinger: The notations appearing on the photographs form no part of the photograph, and any matters or any notations on the photographs, the Examiner thinks probably are inadmissible.

The photograph will be considered in connection with the witness' testimony, and the witness will testify with reference to the facts.

2816 Mr. Abbott: That is going to make it necessary for the witness to go over every one of these exhibits and state what the facts are, at the time the photograph was taken; if the Examiner wishes to have it presented that way.

Trial Examiner Ballinger: No notations should properly appear on any exhibit that are not testified to either by this or some other witness.

Mr. Abbott: We can save time if the question is asked of the witness whether the notation on the exhibit, after he examines it, is in accordance with the facts which existed at the time the picture was taken, without going into a mass of testimony to establish that; independent of the notation.

Trial Examiner Ballinger: If you can reach an agreement with counsel for the Commission, it will be accepted by the Examiner, but if there is objection, the Examiner will require you to prove, by proper testimony, all the notations that appear on the exhibits.

Mr. Abbott: I may say that we are going to have some more books of these, and the same plan has been used.

We have taken a long time to collect this material in good faith because we believed it was something that the Commission ought to know and if this plan—I don't
2817 say there is any attempt to frustrate it, but I do say
it is going to tend to prolixity of testimony. Mr. Biber might take a long time to testify as to each one of

these photographs, I think there ought to be some way of avoiding that.

Trial Examiner Ballinger: Well, the photograph and any notation on it must be proven by competent evidence, and if it is necessary for the Examiner to suggest what that is to present counsel for the Respondent—

Mr. Abbott: I understand Mr. Austin has no objection —he stated yesterday he has no objection to the receiving of these photographs in evidence. There was objection only to the memorandum as to the prevailing retail price and as to differential.

Trial Examiner Ballinger: If counsel agree on what may be included in the form of notations on these Exhibits, the Examiner will admit them, if there is no objection.

Mr. Abbott: Well, I think we should come to some agreement in order to save time.

Trial Examiner Ballinger: Do you desire a recess?

Mr. Abbott: I think we ought to come to some agreement, because it might save a day of testimony.

Mr. Austin: Well, I don't think there is going to be any testimony—at least I hope not—on each one of
2818 these as to a lot of arithmetical computations. I feel very sure that none of these typed notations on here are evidence of any kind. The most that can be said for them is they may be a correct statement of something somewhere else in the record. The Examiner has already indicated that.

Now, so far as any attempt to testify to that, certainly it would be senseless for a witness in each case to take a computation and say five gallons for 87¢ is the same as 1 gallon for 17.4¢. That is a matter you could do in your briefs or argue to the Commission if you care to present it. But I don't think it has any place on any of these. And certainly, as far as I can see, there would be no point in attempting to prove it. And even if you proved it, there would still be testimony in the record that still is not on here, you have to refer to the record. You have your prevailing prices already.

Mr. Abbott: You are departing from the agreement we had yesterday as to what should go in. I understood the only thing you objected to was the designation "Prevailing retail price" and also the amount of the differential. Now each day that we take this up we come into something different.

Mr. Austin: No. I am going to object to any notations on these where I think that they may be or are 2819 misleading, and that will probably apply to all of these where there is not a major brand of gasoline. There are some where there is a major brand that I don't care very much whether the notation is taken out or not. I probably will just let those go in as they are. Although I don't think the notations are proper on these, either. But it isn't worth objecting to.

Trial Examiner Ballinger: Gentlemen, it is perfectly obvious that the discussion isn't leading to a solution of the problem. Let's proceed with the exhibits.

Mr. Haniey: I wanted to suggest that I am just afraid, your Honor, that Mr. Austin is confusing his theory of the case with the rule of evidence he seeks to apply. I think we understand that Mr. Austin expects to try his case on the theory that the Standard Oil Company is in competition only with Standard major companies; that Mr. Austin reserves the right to arbitrarily designate that. Now, that is a perfectly legitimate theory for Mr. Austin to adopt if he wants to adopt it, and we can't complain about his arguing that.

The theory of the defense here, however, is that we are in competition with gasoline in the Detroit area; we proved already by Mr. Boatwright what effect on our business that competition had.

Now, it is sought here, if I understand these nota- 2820 tions, to give the Commission a quick picture in schedule form of a calculation, the basis for which is in the record. It was testified to on the Government's case what the prevailing prices were; we are now showing what these other prices were; and can there be any objection to putting that in in tabular form? Of course, we could make the calculation in brief, Judge, but that means dozens and dozens and dozens of pages of brief, and I apprehend that we are going to be confined to some reasonable limits of time and space when we argue this thing to the Commission. If we can do this by an exhibit, certainly we ought to be entitled to do it that way. It is in the record; it has been testified to.

Trial Examiner Ballinger: It is perfectly obvious that there is confusion between counsel for the Commission and Respondent. But it is essential that the documents introduced and admitted in evidence must not only be proved in part, but in whole, of all the notations appearing thereon.

Mr. Hanley: There is no disagreement on that. We simply say that it is proved; it is proved on the Government's case what these figures are, so far as the prevailing price is concerned. This witness establishes by the photograph what the price is at the service station indicated on the photograph. And then it is just a matter
2821 of easy calculation to show the difference right on the photograph.

Trial Examiner Ballinger: If the computations are correct, it might be of assistance to both the Examiner, counsel, and the Commission.

Mr. Hanley: We thought so.

Trial Examiner Ballinger: But if there is any question about it, it must be proven.

Mr. Abbott: That is what we say.

Mr. Hanley: We thoroughly agree with that. But is there any question, Mr. Austin?

Mr. Austin: The question as to their application; and I don't care how well they are proven, I don't think they are evidence. I think it is purely argument.

Mr. Hanley: That is a different objection, Judge.

Trial Examiner Ballinger: Then the question arises as to whether or not they are material evidence.

Let's proceed with your exhibits, Mr. Abbott.

Mr. Abbott: We will proceed the way Mr. Austin wants us to. We may be here for quite a while.

Trial Examiner Ballinger: The Examiner would like to expedite and shorten the hearing, but if it is necessary to pursue this course—

Mr. Abbott: Do you want to examine the witness yourself?

2822 Mr. Austin: I thought I was proceeding. I had gotten through nine of these yesterday, and was going to proceed. They had already been offered.

Mr. Abbott: Go ahead.

MAX BIBER, having been heretofore duly sworn, resumed the stand, and testified further as follows:

Mr. Austin: Now, Exhibit 18-J we discussed yesterday, and I believe it was agreed that the typewriting in the upper right-hand part of the sheet might be stricken. If that will be done by the reporter, I will make no further objection to the offer of that sheet in evidence.

Trial Examiner Ballinger: The reporter will physically strike the typewritten notation on the exhibit indicated.

Mr. Austin: On the upper right-hand corner.

(The reporter did as instructed.)

Trial Examiner Ballinger: We will take a recess for a minute.

(A short recess was taken.)

Trial Examiner Ballinger: We will come to order.

With the typewritten portion, to which objection has been made stricken, from Respondent's Exhibit, Respondent's Exhibit 18-J is now admitted in evidence.

2823 (The document referred to, heretofore marked for identification, "RESPONDENT'S EXHIBIT 18-J," was received in evidence.)

Examination on Voir Dire by Mr. Austin.

Q. As to 18-K, Mr. Biber: Have you a copy of that photograph there?

A. Yes, I have.

Q. Now, I see right in the middle of that photograph a sign that says 6 for 96¢. Do you see that?

A. Yes.

Q. And I also see a star which, I assume, indicates that this is a Texaco station; is that right?

A. That's right, it is.

Q. Do you know it to be a Texaco station?

A. Yes, I do.

Q. Is there anything on this photograph which indicates what grade of gasoline is being offered at 6 for 96¢?

A. No, I don't believe that the sign says. It just says 6 for 96¢. It doesn't say the grade.

Q. Did you make any purchases at this station at that price?

A. I did not. Except that the picture does indicate that it must either be regular or Ethyl.

Q. How does it indicate that?

2824 A. Because there are four pumps on the location. Three carry the Texaco emblem on the globe, which is the regular gas, and the white pump in front is a Ford Benzol globe.

Q. That is the one right to the left of the sign?

A. Yes, just at the sign. That is a Ford Benzol globe, and there are no pumps which carry an insignia of a third grade or premium grade gasoline.

Q. Do you know whether this station sells the Ethyl or the third grade Texas gasoline?

A. Whether they did at the time this picture was taken?

Q. Yes.

A. I would say that they did not.

Q. Now, you have got a computation up at the top of this one, Mr. Biber, and 6 into $1.08, according to my mathematics is 18¢ instead of 18.1¢.

A. The price of gasoline, the prevailing retail price of gasoline at that time was 18.1, but because the prices were given in comparable gallonage, amounts as 6 or 7 or 8, the closest full cent price was 6 for $1.08. In other words, it wasn't 6 for $1.09 and it wasn't 6 for $1.08. That was as close as they could come to it on a 6 gallon basis, and the prevailing price that went in on the Government's case was 18.1¢ per gallon. That's why both types of prices were shown, because there might be a .1¢ difference.

2825 Q. It may not be very material. I will not make any further objection to that.

Mr. Austin: I think there is a slight error when you are comparing a 6 gallon price of one with the other, but I am not going to argue about it, your Honor.

Trial Examiner Ballinger: Without objection, Respondent's Exhibit 18-K is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 18-K," was received in evidence.)

Examination on Voir Dire by Mr. Austin.

Q. Exhibit 18-L. Will you describe what that is, Mr. Biber.

A. 18-L is a card bearing the legend "Free Gasoline Each Week. Have this Card Punched every Week at any Hi Speed Station in Wayne County."

Q. Where did you acquire that card?

A. I acquired that card at Woodward and Spencer, Vandenberg's Service.

Q. Is that the name that seems to be stamped on the card?

A. Yes.

Q. And you obtained it there personally?

A. Yes, I did.

2826 Q. And what about the lower half of the page?

A. The lower half of the page was information that was printed on the back of the top part of the page, which are the rules and regulations of this contest.

Q. The top part looks like two sides of the same card.

A. No, it was a folder. There are actually four sides to the whole thing.

Q. When did you get the card?

A. Some time in 1939. This contest ran for six or seven months in 1939.

Mr. Abbott: The date is indicated on the exhibit, is it not, as to the contents?

Mr. Austin: That is what I am asking him. Whether he got it around that time.

Your Honor, I have no objection to this, except the general objection which I have made to all of these. I believe that is clear, that I am not consenting to any of these going in, but I understand that my general objection is overruled, so when I say I have no further objection, I make no objection in addition to the general objection to all of them, that they are irrelevant and immaterial.

Trial Examiner Ballinger: Respondent's Exhibit 18-L for identification is admitted in evidence.

2827 (The document referred to, heretofore marked for identification, "RESPONDENT'S EXHIBIT 18-L," was received in evidence.)

Examination on Voir Dire by Mr. Austin.

Q. How did you obtain the card which is marked 18-M for identification?

A. That was given to me by the operator at Jefferson and Nottingham.

Q. Do you have any personal knowledge as to whether this card was distributed to Government employees?

A. I don't have any personal knowledge as to whether it was distributed.

Mr. **Austin**: I object to this, your Honor, upon the ground that it is not properly authenticated. There is certain typing on here which, perhaps, it is unnecessary to object to.

Mr. Abbott: Let the record show that it consists of a printed card.

Jefferson and Nottingham is one of your Citrin-Kolb stations, it is not?

The Witness: That's right.

Trial Examiner Ballinger: Objection sustained.

Voir Dire Examination by Mr. Austin.

Q. Exhibit 18-N is a typewritten statement, and it 2828 is descriptive.

A. Yes.

Mr. Austin: It purports to describe certain gasoline stations in Detroit. I would like to know whether counsel for Respondent contends that this is evidentiary.

Mr. Abbott: No, it is merely descriptive of other exhibits.

Mr. Austin: I object to it, because on its face—

Mr. Abbott: We concede, your Honor, that the offer should be rejected on that one.

Trial Examiner Ballinger: The objection to the admission in evidence of Respondent's Exhibit 18-N for identification is sustained, and the document rejected.

Examination on Voir Dire by Mr. Austin.

Q. Now, Exhibit 18-O, Mr. Biber, appears to be a picture of—well, your tell me what it is a picture of? I am not sure.

A. It is a picture of a cover of a pamphlet given to me at the Liberty Service Stores at 2790 West Grand Boulevard, which reads: "Your choice of a thousand and one—"

Q. You don't need to read it. That will show on the exhibit itself.

What are the Liberty Service Stores?

A. They are a chain of three stations—it was three

2829 at the time, I believe, and it is four now—operating in the City of Detroit super service ~~stations handling~~ Fleet-Wing gasoline.

Q. You said they were super service stations?

A. Yes.

Q. It has a date on here, "March 19, 1940." What does that represent?

A. That is the date it was collected.

Q. You say you collected it yourself?

A. Yes.

Mr. Austin: If counsel will agree to the elimination of this typed line at the bottom, I will make no other objection.

Mr. Abbott: Very well.

Trial Examiner Ballinger: The reporter will physically delete the notation from the exhibit at the bottom as designated.

(The reporter did as instructed.)

Trial Examiner Ballinger: With the deletion agreed upon by counsel from the exhibit, Respondent's Exhibit 18-O is admitted in evidence.

(The document referred to, heretofore marked for identification, "RESPONDENT'S EXHIBIT 18-O," was received in evidence.)

Mr. Austin: Does counsel urge the admission of 2830 Exhibit 18-P?

Mr. Abbott: No. That is another descriptive memorandum. It may be rejected.

Trial Examiner Ballinger: Respondent's Exhibit 18-P, for identification, is rejected.

Examination on Voir Dire by Mr. Austin.

Q. Will you describe what is represented by Exhibit 18-Q for identification?

A. That was a pamphlet distributed by Fleet-Wing dealers in Detroit.

Q. Where did you acquire it?

A. I acquired this at Dexter and Longfellow; Fleet-Wing station.

Q. And when did you require it?

A. I believe the date is March 19, 1940.

Q. Is this a cover of some pamphlet or circular?

A. It is the top of a folder.

Q. What is Fleet-Wing? What kind of gasoline is that?

A. Fleet-Wing is a product of Standard Oil Company of Ohio.

Q. Who markets it?

A. Red Indian Company, Victor Oil Company, and I think, Terminal Oil Company, are the jobbers.

Mr. Austin: I object, your Honor, to the type-
2831 written statements at the bottom of the page. Beyond that I don't object to the photograph or the designation at the top.

Mr. Abbott. That would be the descriptive material about the pages he testified to. Therefore, it may be deleted from the exhibit.

Trial Examiner Ballinger: The reporter will physically delete the indicated typewritten portion agreed upon from the exhibit.

(The reporter did as requested.)

Trial Examiner Ballinger: As so deleted, Respondent's Exhibit 18-Q is admitted in evidence.

(The document referred to, heretofore marked for identification, "RESPONDENT'S EXHIBIT 18-Q," was received in evidence.)

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I object to the admission of Exhibit 18-S for identification upon the ground that there are certain typed and printed notations on it around the margins.

Mr. Abbott: Which ones do you refer to specifically?

Mr. Austin: All of them except the date. And I
2832 would like to ask the witness whether he knows whether these stations are operated by Charles E. Austin, Incorporated?

The Witness: Yes, they are. This is one station; two photographs of one station.

Examination on Voir Dire by Mr. Austin.

Q. How do you know that this station is operated by him and not by a lessee selling his brand of gasoline?

A. I couldn't say that I know that, except that I know he doesn't lease out his stations.

Q. Do you have any knowledge as to whether or not Charles E. Austin, Incorporated, sells gasoline to any retail dealers?

A. I don't know of any retail dealers to whom he sells gasoline.

Q. You know the gasoline business pretty well; you are practically certain of that? I know you are a lawyer and therefore hesitate to testify to personal knowledge, but I will take your opinion as an expert.

A. I would say that he does not sell gasoline to any other dealers except his own stations.

Mr. Austin: Then my objection does not go to the words "Charles E. Austin, Incorporated," at the top nor to the date, but it goes to all the other typing in the margins.

2833. Mr. Abbott: Does it go to the location of the stations?

Mr. Austin: Not the locations or dates.

Mr. Abbott: Well, on the marginal notation, it would seem necessary for me to ask the witness some questions in order to qualify it.

Trial Examiner Ballinger: You may.

Mr. Austin: My objection is, your Honor, that any such notations on here, not being part of the photograph, and not being necessary to identify the photograph, are not evidentiary, and regardless of whether they are testified to or appear somewhere else in the record, that they are inadmissible.

Mr. Abbott: The testimony as to the prevailing retail prices was all put in with the Government's case. I have that before me.

Trial Examiner Ballinger: The Examiner has no idea what you are talking about. Let him see the Exhibit.

Mr. Abbott: We regret that we haven't an extra book.

(Mr. Austin handed the Examiner the exhibit in question.)

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

2834 *Direct Examination (Resumed) by Mr. Abbott.*

Q. Mr. Biber, with reference to Exhibit 18-S, there is a notation on the bottom of the Exhibit to this effect: "Prevailing retail prices"; what does that refer to?

A. That refers to the amount of the prevailing retail prices for major brands of gasoline on August 31, 1939.

Q. And the rest of the notation giving the prices of the three brands of gasoline, what does that represent?

A. Those are prevailing retail prices for the three brands of major gasolines on August 31, 1939.

Q. What are they shown to be there?

A. The premium grade gasoline is shown to be 6 for $1.05, or 17.1¢ per gallon, including taxes.

Q. Do you have any recollection as to whether that memorandum is correct?

A. Yes, that memorandum was taken off of the same exhibit that is in evidence in the Government's case.

Q. All right. As to house brand?

A. House brand gasoline sold for 7 gallons for $1.10, or 15.4¢ per gallon, including tax.

Trial Examiner Ballinger: Do I understand there is any objection to this line of examination?

Mr. Austin: Examination?

Trial Examiner Ballinger: Yes.

2835 Mr. Austin: I am not objecting to his answering these questions; as a matter of fact, it is already in the record on premium and house brand; if he is just asking him what the prevailing prices are.

Mr. Abbott: This is already in evidence, but inasmuch as it seemed necessary to put it in—

Mr. Austin: I don't think it helps the exhibit any if that is what your Honor means.

By Mr. Abbott:

Q. Well, the third line on the bottom of the exhibit, what does that show?

A. Shows prevailing retail prices for third grade gasoline, being 8 gallons for $1.05, or 12.9¢ per gallon, including tax.

Q. On the right-hand side of the page, there are two memorandums; the one at the top represents what?

A. Represents the difference in the price per gallon between the gasoline sold in the station on the photograph and the prevailing retail price for house brand major gasoline, which is 5.6¢.

Q. And the other memorandum opposite the lower photograph?

A. Indicates that the station displays the same price sign, and the differential is the same.

Q. Is that, as a matter of fact, the same station portrayed on Exhibit 18-S?

2836 A. Yes, they are both the same station taken from different angles.

Mr. Abbott: That is all.

Trial Examiner Ballinger: As the Examiner understands, you have merely asked him if those ~~are~~ portrayed on that exhibit, but not as to whether or not they are facts.

Mr. Abbott: Well, I asked him whether this was in accordance with the testimony which is already in the record in this case, as a part of the Commission's case, as to the prevailing retail prices. That has already been testified to in this record.

Mr. Austin: If it already is in the record, it certainly isn't material to put it in on each one of these. The only purpose here is to make some sort of argument or conclusion in the exhibit itself.

Now, I submit that the only thing here that constitutes evidence is the photograph, and that it may be proper to have certain dates on here and street locations to indentify the photograph, although even that wouldn't necessarily have to be printed here. But I think it is a reasonable thing that it should be; I am not objecting to it. But the rest of this is an attempt to combine the photograph with certain other evidence in the record and draw a conclusion from it.

2837 Mr. Abbott: Now you are amplifying your objection from what you said yesterday, because yesterday you said all you wanted to put in there was "major" after "prevailing."

Mr. Austin: I said twice this morning that I objected to these on—and would object to them—on all of these photographs, except possibly on some of the photographs of major stations, when I didn't think it was material.

Mr. Abbott: That is not what you said yesterday.

Mr. Austin: Regardless of what I said yesterday, that is the position I am taking this morning.

Mr. Abbott: Now, your Honor, what the Commission is trying to do here is to try to make it impossible for the members of the Commission, when this is presented to them, to ascertain by looking at this photograph what it represents and what differential is involved. Of course, we could point it out in brief, but just as Judge Hanley said, that will involve a great deal of unnecessary work in presenting the case to the Commission in the brief. This could all be set forth in the brief, I will grant that, everything on that memorandum could be set forth in the brief. We

have the date; we have in evidence the amount of the prevailing retail price, and it is just a matter of mathematics to compute the differential. But it seems to
2838 me just an attempt to frustrate the presenting of an adequate picture, and to obscure the record in this case, to take that attitude.

Mr. Austin: Well, my objection to it is, your Honor, that it is misleading, and the inference here that this grade of gasoline is comparable with house brand, the inference down here that there is some basis for comparison between the major prevailing price and the price of these gasolines, those are matters which are seriously contested, and if it is material, if that sort of testimony is material in the case, I think it might well be misleading to anyone who knows any less about the case than we do, and it would have been misleading to me—in fact, was, when I first looked at it, because—well, regardless of whether it is misleading to me, I think it may be misleading to the Commission to go on in that form.

Mr. Abbott: Judge Hanley said this morning we are competing with gasoline in the Detroit area, and I think we have a right to show that there is a gasoline which was being sold at this station which was being sold on the date represented by this picture at 5.6¢ below the then prevailing price on house brand gasoline.

Trial Examiner Ballinger: Well, irrespective of your theories, if the prevailing retail prices of the
2839 three brands are shown by other evidence in the record, the notations appearing in this Exhibit 18-S are not essential to the exhibit, and unless the notations are eliminated the exhibit would be rejected. If they are eliminated the exhibit will be received in evidence.

Mr. Abbott: Well, according to that ruling, then, we have no alternative.

Trial Examiner Ballinger: Which alternative do you elect?

Mr. Abbott: Well, according to the ruling of the Examiner, the memorandum on the bottom and at the side of this page, which merely portrays something that is already in evidence, and which is put on the exhibit merely for the purpose of assisting the Commission in ascertaining what the situation was at the station on the day that the exhibit bears date, then we are obliged to accede to the ruling of the Examiner, although we do it under protest: we are obliged to accept the alternative of having these memoranda deleted, and having the exhibits admitted in evidence.

Trial Examiner Ballinger: No, you are not required to accept the alternative. You can note an appeal or an objection to the Examiner's ruling, and when this case goes to
the Commission secure a review of the Examiner's
2840 ruling by the Commission, and if the Commission con-
cludes that that exhibit is entitled to admission with all the notations appearing thereon, the Commission will direct its inclusion in the record. So that you are not required to go to the other alternative here. You may elect as to whether or not it will be introduced in evidence with the notations eliminated, or you may note an exception which you already have automatically to the Examiner's ruling, and the exhibit will be rejected, and you may present the matter then to the Commission.

Mr. Abbott: Well, may we take a minute recess?

Trial Examiner Ballinger: You may.

(A short recess was taken.)

Trial Examiner Ballinger: We will come to order.

Mr. Hanley: It has been in my mind, your Honor, to make a request which goes to procedure rather than to substance. It has to do with two different methods of ruling in connection with testimony and exhibits. In some instances your Honor has admitted a question or an exhibit, reserving to the other party a right to move to strike or admitting it subject to objection, or something along that line, but receiving the material in the record.

On other occasions testimony has been excluded or an exhibit rejected, as has happened more recently just during the Respondent's case.

I was wondering if there could be any reasonable
2841 objection to the adoption of the first plan which your
Honor has adopted in part. It is the universal rule in trying equity cases. It is the rule always where there is a reference and a Referee takes testimony and receives evidence. Of course, it is always the rule in taking a deposition. It seems to me that the most reasonable way of getting this thing presented and the least difficult way is to have the whole thing on the record with the reservations, stated reasons for objections, if there be any, and then either party is relieved of what otherwise becomes a procedural necessity to make motions and argue them just to get a consideration of the propriety of a ruling on the exclusion or admission of evidence.

I apprehend that in the case of any exhibit, that it would be far more simple for the Commission to have that in the record, and then examination or consideration could be urged by the proponent of that evidence, and contested by the party objecting to it, if it was then desired to do so by either party. I am just very, very fearful, indeed, your Honor, that the Respondent now is in a position here where we are just actually being deprived of a fundamental right, in this: that the burdens of trial that are being placed upon us just become tantamount to a denial of trial, since we will be under a necessity, the expense of time and effort and
money to continuously present procedural motions
2842 merely to get, matters before the Commission for a
consideration as to whether they were properly included or excluded in evidence, and that is going to be fearfully burdensome. That is apparent now, and I can conceive of no reason why there would be any objection to the uniform adoption of the rule which your Honor has adopted in many instances during the course of this trial: simply receive the evidence subject to whatever objection or motion might be desirable on the part of the other party. In either event, of course, the Commission ultimately decides the issue and looks at the exhibit or the testimony, as the case may be, but in the one case it is a separate thing to be tried, to bring a motion, argue it, file a brief, do something in order to get the thing decided. In the other instances, the Commission would do what any Court of Equity does; they would consider the record and the objections. If there were something there that they thought they ought not to consider because of immateriality or for any reason that appears sufficient to them, they would, of course, I assume, disregard that testimony.

Now, we have a number of exhibits which are of this character which we propose to offer. They are being gone through here item by item and it is just an appalling task to get a review of this thing as a procedural matter unless
these things can be included in the record
2843 This is procedural, Judge. I am not poling any of
the decisions the Court has made. I am not asking for any reconsiderations of rulings, or anything of that kind. I am just seeking to get this material in the record protected in any way that the Commission wants to protect, but just so it will be there.

There has been the utmost confusion, it seems to me, on the part of the counsel for the Commission in respect of evidence or what rulings on evidence he should request, and on his theory of the trial. There, of course, should be a clear distinction. One is procedural; the other is substantive, and goes to the merits, and goes to the defense, to our defense, and ~~we are~~ entitled to make our defense.

The Commission may not agree in all instances with our views, but the insistence that we are meeting and have been meeting on the part of counsel for the Commission, for instance, that this sort of a line of exhibits is not admissible because he has the theory that it should refer to only major brands—that's just one of his objections, but it is one—that's just like saying to a man charged with a criminal homicide that he may defend on the ground that he has an alibi if he can prove one, but that he may not defend on the ground that it was excusable or justifiable or that he was temporarily insane. You are just depriv-
2844 ing us of a trial here, Judge.

I urge this most earnestly and most respectfully. I urge it on the ground that our constitutional and statutory rights ought to be conserved.

Trial Examiner Ballinger: Will you let the Examiner have Exhibit 18-S, for identification?

(The document referred to was handed to the Examiner.)

Mr. Austin: I don't know whether your Honor desires to hear any reply to what Judge Hanley says.

Trial Examiner Ballinger: The Examiner doesn't consider it necessary.

In the view of the Examiner, there is no question of substantive right, nor is there a question of procedure involved. We have here this situation: A photograph of a service station is offered in evidence. Not the mere photograph of the station, but with notations appearing thereon.

It is claimed by counsel for the Respondent that at least a part of the notations appearing thereon are merely recapitulations of evidence introduced or to be introduced in the case.

Counsel for the Commission complains that with those notations on the document, the document may cause a wrong impression to be drawn by the Commission, or those
2845 wholly unfamiliar with the case, when they come to consider it.

The Examiner has ruled that the photograph is admissible, but that that notations, to which objection has been interposed, appearing thereon, must be eliminated. Otherwise he will reject the entire document.

Now, the Examiner has expressed his views with reference to it, and if counsel for the Respondent is not satisfied, you have a complete remedy through review of the Examiner's rulings by the Commission.

Mr. Hanley: Of course, my remarks were addressed to a procedural matter involving all exhibits and all rulings, Judge; not particularly with reference to this, you understand. As to this exhibit, the Respondent simply offers the exhibit, and we understand tha. the photograph is regarded as admissible. The other material is not regarded as admissible. We exercise no choice.

Trial Examiner Ballinger: In the form of notations on the exhibit.

Mr. Hanley: In the form in which the exhibit appears, as it is offered. Now, we offer the exhibit. We exercise no choice as to deletion or elimination of any part.

Mr. Austin: I think if we would proceed with this, we could get through with it now.

Mr. Hanley: The reason, of course, for that is 2846 that we agree to no ruling of the Court that excludes the exhibit, and the Court has been requesting the reporter to physically delete certain portions of the exhibits, which we have offered. Of course, there can't be any review, if that is done.

Trial Examiner Ballinger: That has been done by consent of counsel.

Mr. Hanley: We no longer consent to the mutilation of exhibits we offer. If parts are regarded as admissible and parts are regarded as inadmissible, we are entitled to have the admitted portion in now and have a review as to the portion regarded by the Examiner as inadmissible, and the thing, in its entirety must be in the record, or we can't obtain it.

Trial Examiner Ballinger: Then do I understand that counsel for the Respondent tenders Respondent's Exhibit 18-S for identification for admission with all the notations appearing thereon?

Mr. Abbott: We have already done that on the record. Just a moment, if the Court please. May I suggest we take a recess at this time?

Trial Examiner Ballinger: We will take a five minute recess.

(A short recess was taken.)

2847 Trial Examiner Ballinger: Come to order.

I ask counsel to step up here a moment to get this cleared up.

Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Respondent's Exhibit 18-S is a photograph of a service station. On the right-hand side of the photograph appears the notation in pen: "Amount of cut. Premium—. H. B.—5.6¢. T. G. —"

At the lower portion of the exhibit appears another photograph of apparently the same station, to the right of the photograph appears the notation in handwriting: "Same as above."

At the bottom of the exhibit appears the following notations: "Prevailing Retail Prices—Premium—6 for $1.05 (13.1 plus 4¢ taxes—17.1)

"House brand—7 for $1.10 (11.4 plus 4¢ taxes—15.4)

"Third grade—8 for $1.05 (8.9 plus 4¢ taxes—12.9)."

The notations appearing thereon are objected to by counsel, which objections are sustained, and the exhibit, as tendered, with the notations, is rejected.

Mr. Abbott: Now, your Honor, without waiving exception to the ruling of the Court in any way, we re-offer this exhibit 18-S, and also the other exhibits from
2848 18-S to Z, and also 18-Z to 18-z-51, without the inclusion of the memorandum as to prices. I think that appears on all the exhibits I mentioned, memoranda as to the prevailing retail price and also the amount of the differential as shown between the retail price and the posted price as shown by the photograph.

Trial Examiner Ballinger: Will counsel delete from the exhibits the portion to which objection has been made.

Mr. Abbott: I say we offer them with that deletion.

Trial Examiner Ballinger: I say, will you delete from the exhibits so that when they are admitted in evidence, the objectionable matter will have been deleted from the exhibits.

Mr. Abbott: We will do so, of course, reserving our exception to the ruling of the Court, because I think that should be done on the record.

Mr. Hanley: I wonder, your Honor, if the reporter shouldn't do that either with the Court or with counsel for the Commission. We want to have no part in rubbing out any part of these exhibits.

Trial Examiner Ballinger: Well, the Examiner presumes that the deletion would occur with the approval of counsel for the Commission.

2849 Mr. Austin: I suggest, your Honor, that these things are offered in that manner, that the reporter be instructed to strike out the notations of the character which your Honor has described on Exhibit 18-S.

Trial Examiner Ballinger: The Examiner doesn't care to impose that responsibility upon the reporter.

Mr. Austin: We could show him in each case what is to come off.

Mr. Abbott: Under the re-offer, we are willing to indicate the portion which is to be deleted under the new offer, without, however, agreeing or consenting to the ruling which your Honor has just made with reference to the entire exhibit. We preserve our exceptions to that.

Trial Examiner Ballinger: Is there any further objection on the part of counsel for the Commission to the tender?

Mr. Austin: Not on 18-S, nor 18-T. I will have to go through these, but if it is understood that these notations as to prevailing retail prices and any computations based thereon are in each case to be stricken, it won't take long to go through. There will be a great many of them where that will be the only thing to be done.

Trial Examiner Ballinger: We will take a recess for five minutes, and during which counsel are requested to go through the exhibits and instruct the reporter as to

2850 what shall be deleted.

(A short recess was taken.)

Trial Examiner Ballinger: We will come to order.

Mr. Abbott: I, at this time, without waiving the exception referred to to the previous ruling of the Examiner, offer in evidence Respondent's Exhibits 18-S, 18-T, and 18-V, with the deletion of the marginal notations as to the prevailing retail prices and the computations and the statement as to the differential.

Trial Examiner Ballinger: Respondent's Exhibit 18-S, 18-T, and 18-V are admitted in evidence.

(The documents referred to, heretofore marked for identification, "RESPONDENT'S EXHIBITS 18-S, 18-T, and 18-V," were received in evidence.)

Mr. Abbott: On the record I want to say this: that I understand that the Examiner, with reference to pictures of major branded gasolines, has no objection to the notation on the margin. Is that correct, Mr. Austin?

Mr. Austin: I think the quickest way to handle this is to go right through them, and I think that will be true in almost all, if not every case.

Mr. Abbott: Very well.

Trial Examiner Ballinger: Proceed.

Off the record.

(A discussion ensued off the record.)

2851 Trial Examiner Ballinger: On the record.

Mr. Austin: On Exhibit 18-W, the Commission has no objection except the general objection, which was made to all of them.

Trial Examiner Ballinger: The objection is overruled, and Respondent's Exhibit 18-W is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 18-W," was received in evidence.)

Examination on Voir Dire by Mr. Austin.

Q. Mr. Biber, have you a copy there of Exhibit 18-X?

A. Is that page 19?

Q. Yes.

A. Yes, I have.

Q. Incidentally, are those the same sort of prints that I have here? Would there be anything legible on yours that is not legible here, or vice versa? I think I had better show you these.

Mr. Abbott: They are all the same, Mr. Examiner.

Mr. Austin: Sometimes you get different prints from the same negative with different legibility, and these are the ones that are marked.

(Counsel and the witness confer.)

2852 By Mr. Austin:

Q. Now, these prints show a Cities Service Station; is that true?

A. Yes, it is.

Q. That is portrayed there?

A. Yes.

Q. And there is a sign there that says, as I read it, "Save," and then a figure "8," and then a figure "98"; now, have you knowledge of what brand of gasoline or what grade of Cities Service gasoline was offered—was referred to on that sign? I am assuming that means 8 for 98¢, although you can't see all of the words. But is there anything in this photograph which shows what sort of gasoline was offered at that price, or have you any knowledge of that?

A. Yes, I believe if you know the word ahead of time, you may be able to read it. "Save 8 for 98¢ Koolmotor." That would be "Koolmotor" at the bottom of the sign then.

Q. I believe that can be made out by very close examination.

A. I am sure it is.

Mr. Austin: With that explanation, I will make no further objection than the general objection, which I assume I won't need to mention every time.

Trial Examiner Ballinger: Respondent's Exhibit
2853 18-X, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 18-X," was received in evidence.)

Examination on Voir Dire by Mr. Austin.

Q. Exhibit 18-Y, Mr. Biber, has the notation at the right of the photograph, "H. B.," which I suppose means house brand, and "3.3¢," referring to the words "amount of cut"; there are several signs in that picture; which one is referred to?

A. 8 for 99.

Q. Is there anything in the photograph which shows what grade of gasoline was being offered for that price?

A. No. Fleet-Wing does not have a third grade of gasoline; that is, either house brand or premium brand.

Q. Do you know whether a Fleet-Wing station ever sells any other brand of gasoline or grade of gasoline than Fleet-Wing house brand or Fleet-Wing Ethyl?

A. I wouldn't know, but I don't believe so. I don't believe there are any split accounts.

Mr. Austin: With that explanation, I will make no further special objection to this.

Trial Examiner Ballinger: Respondent's Exhibit 18-Y, for identification, is admitted in evidence.

2854 (The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 18-Y," was received in evidence.)

Mr. Austin: No special objection to 18-Z, as now offered. And this refers to one where the certain notations have been stricken out in accordance with the ruling of the Examiner.

Trial Examiner Batlinger: Respondent's Exhibit 18-Z, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 18-Z," was received in evidence.)

Examination on Voir Dire by Mr. Austin.

Q. Exhibit 18-z-1, Mr. Biber, entitled "Dexter-Buena Vista Service," appears to be a picture of a coupon. How did you acquire that coupon?

A. I got that coupon from Mr. Jack Rosenthal, the proprietor of the station.

Q. When did you obtain it?

A. In March, 1940.

Q. How did he happen to give it to you?

A. I went in to the station and asked him for it.

Q. Well, did you go in as a customer, or were you known to him?

2855 A. Oh, he knows me.

Q. Do you know whether he was giving these cards to customers at that time?

A. Yes. That is the reason I went in there. I had been told that he was, and I went in and asked him if he was, and he said that he was, and he gave me a sample of the coupon.

Q. Then, I assume that the words "Sun Dealer" here reflect your own knowledge as to the brand of gasoline dealt in?

A. That's right.

Mr. Austin: I have no objection to this exhibit down through the picture of the card, but would object to the typing below the card upon the ground that it is simply a descriptive statement.

Have you any objection, Mr. Abbott, to striking that?

Mr. Abbott: This is a Sun Oil Company leased station and duplicates the memorandum at the top, so I have no objection to that going out.

I would like to ask the witness one question.

Mr. Biber, did Mr. Rosenthal advise you what the figure "1" on the coupon represents?

The Witness: Yes.

Mr. Austin: I object to that, your Honor; as to what Mr. Rosenthal told the witness. It is only hearsay, and if this has any evidentiary value it should show on its face what it is supposed to be.

2856 Mr. Abbott: This is Mr. Rosenthal's card, which the witness says he got from the dealer, Mr. Rosenthal being the dealer.

Mr. Austin: I don't object to that sort of testimony, Mr. Abbott. Of course, I assume if it is relevant to show offers made by service station operators, you can do it by people who receive the offer. I am only objecting to it, with any relevancy to my objection, about this typing on the exhibit. I understand this is redirect. I won't object to it, if you want to go into it.

Mr. Abbott: The exhibit is ambiguous on its face in that the letter "1" which appears on it is not explained. I think we have a right to show, if the witness knows of his own knowledge, as to what the figure "1" represents.

Trial Examiner Ballinger: Apparently all he knows is what he was told.

Mr. Austin: Well, he was told by the actual operator of the station that gave him the card. I don't want to object on the ground—except that I think it is irrelevant and immaterial—which is my general objection to all of this, but my point is this: that I thought Mr. Abbott had done all the qualifying he wanted to do before these were offered.

Now, if he wants to go back and do more qualifying,
2857 after these are offered here, I don't object to that.

So perhaps I had better withdraw the objection. I thought it went to the question of the typing.

Mr. Abbott: No, that didn't go to the question of the typing. It went to the patent ambiguity in the card itself. I understand the objection is withdrawn?

Mr. Austin: Yes, but I have an objection to the typing. That's what confused the matter.

Mr. Abbott: On the typing, I am willing to concede that the typing on the bottom of the exhibit should go out.

Trial Examiner Ballinger: Then it may be deleted, and when deleted, it will be offered.

Mr. Abbott: I make the offer of Exhibit 18-z-1 as the same has been changed by the deletion of the typewritten material on the bottom of the exhibit.

Trial Examiner Ballinger: The Respondent's Exhibit 18-z-1 for identification is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 18-z-1" was received in evidence.)

Mr. Abbott: Now, with reference to this exhibit, Mr. Biber, will you state what information you got with reference to the significance of the letter "1" on the exhibit?

The Witness: The letter "1" indicates the number
2858 of gallons of gasoline for which the coupon is credit.

Mr. Abbott: To what extent, if you know?

The Witness: Well, it represented a cent a gallon.

Examination on Voir Dire by Mr. Austin.

Q. What is the origin of Exhibit 18-z-2, Mr. Biber?

Mr. Abbott: He testified on those yesterday. I don't have any objection to going over them again.

Q. Where did you get that?

A. I got that at my home. The station happened to be just a half a block from my home.

Trial Examiner Ballinger: When you refer to "that" you refer to Respondent's Exhibit 18-z-2?

The Witness: That's right.

Mr. Austin: Do you know whether these cards were issued by Jameson's Gulf Service Station?

The Witness: Only what the card purports to show.

Mr. Austin: I object to this, your Honor, as not being properly authenticated, and also as being immaterial upon the additional ground that it only refers to a special sale on three days.

Mr. Abbott: Let the record show that the Exhibit 18-z-2 is a printed card purportedly having been issued by Jameson's Gulf Service Station which the witness
2859 states that he received at his home.

Trial Examiner Ballinger: The objection is sustained. The exhibit is excluded.

Examination on Voir Dire by Mr. Austin.

Q. Exhibits 18-z-3 and 18-z-4 and 5, I believe, are receipts which, I believe, you obtained personally for purchases of gasoline? Did you so state yesterday on the record?

A. Yes, those are the same ones I testified to yesterday.

Q. Were they all purchases made by you yourself?

A. They were.

Q. What brand of gasoline was covered by Exhibit 18-z-3?

A. Cities Service.

Q. What grade?

A. Koolmotor, regular.

Q. House brand?

A. That's right.

Q. And I ask you the same question as to 18-z-4.

A. That is Sun; they have only one grade.

Q. What brand of gasoline was purchased by you when you received this receipt marked 18-z-5?

A. That is Hi-Speed, regular.

Q. What was the name of the station where that was purchased?

2860 A. It is the Dexter-Tuxedo Service.

Mr. Abbott: For the record, I want to say that I examined Mr. Biber yesterday with reference to all three of these exhibits.

Mr. Austin: No further objection on those three.

Trial Examiner Ballinger: Respondent's Exhibits 18-z-3, 4, and 5, for identification, are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 18-z-3, 18-z-4, and 18-z-5," were received in evidence.)

Examination on Voir Dire by Mr. Austin.

Q. Exhibit 18-z-6, Mr. Biber, is that not a photograph of Exhibit 18-z-3?

A. It is.

Q. Yes.

Mr. Austin: Then, your Honor, I object to that as a duplication. It is merely a picture of the original sales slip which has already been received.

Mr. Abbott: On that I would like to ask Mr. Biber a question.

By Mr. Abbott:

Q. Does the sales slip show the same situation as the picture shows?

2861 A. I don't believe there has been a reference to the picture, Mr. Abbott.

Q. Well, the picture—I mean the sales slip has been admitted in evidence.

Mr. Abbott: Is that the objection you made, that the picture shows the same thing?

Mr. Austin: The picture is a picture of the sales slip; it is identically the same thing.

Mr. Abbott: I see. I thought it referred to a picture.

Mr. Austin: No.

Mr. Abbott: Therefore, my remarks are not pertinent.

Trial Examiner Ballinger: Respondent's Exhibit 18-z-6 is rejected.

Mr. Abbott: Yes, it should be, because it is the same exhibit. I was referring to z-7. I thought that was the one you were talking about.

Mr. Austin: No special objection to Exhibit 18-z-7.

Trial Examiner Ballinger: Respondent's Exhibit 18-z-7, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 18-z-7," was received in evidence.)

2861-A Mr. Austin: I have no special objection to Exhibits 18-z-8 and 18-z-9.

Trial Examiner Ballinger: Respondent's Exhibits 18-z-8 and 18-z-9, for identification, are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 18-z-8 and 18-z-9," were received in evidence.)

Examination on Voir Dire by Mr. Austin.

Q. As to 18-z-10, Mr. Biber, which constitutes a photostat of two coupons and a sales slip; is that slip a receipt for the purchase of gasoline that you made personally?

A. Yes, it is.

Q. Did you obtain the coupons which are here pictured at the time that you made the purchase?

A. I did.

Mr. Austin: No farther objection.

Trial Examiner Ballinger: Respondent's Exhibit 18-z-10, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 18-z-10," was received in evidence.)

Examination on Voir Dire by Mr. Austin.

2862 Q. Mr. Biber, can you tell me how many grades of gasoline are sold at Zip stations?

A. There have been times when they have advertised two grades. I would say in the main they have sold one grade.

Mr. Austin: I have no special objection now to the admission of Exhibits 18-z-12, 13 and 14. They have certain material on them which has been stricken.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: Respondent's Exhibits 18-z-12, 13, and 14, for identification, are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 18-z-12, 18-z-13, and 18-z-14," were received in evidence.)

Mr. Austin: I have no further objection to Exhibit 18-z-15 and Exhibit 18-z-16.

Trial Examiner Ballinger: Respondent's Exhibits 18-z-15, and 18-z-16, for identification, are admitted.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 18-z-15 and 18-z-16," were received in evidence.)

Mr. Austin: The same as to z-18.

Trial Examiner Ballinger: How about 17?

Mr. Austin: That is a separation sheet in this
2863 binder.

Trial Examiner Ballinger: Respondent's Exhibit 18-z-18, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 18-z-18," was received in evidence.)

Examination on Voir Dire by Mr. Austin.

Q. Is this photostat shown on 18-z-19, Mr. Biber, a copy of a handbill or a newspaper advertisement, or what is it?

A. It is a handbill.

Q. Where did you acquire possession of it?

A. It was given to me by the dealer at Warren and Brooklyn.

Q. Warren and Brooklyn?

A. Citrin-Kolb dealer at Warren and Brooklyn.

Q. Do you know whether these handbills—do you know what service station, if any, prepared and distributed these handbills?

A. Did you say who prepared them?

Q. Prepared and distributed them.

A. I don't know who prepared them. I only know what station addresses appeared on the circular.

Q. Did you obtain such a circular from any one of the stations listed here?

2864 A. No, I did not, myself.

Mr. Austin: I object to Exhibit 18-z-19 as lacking proper authentication.

2865 Mr. Abbott: Let the record show that this exhibit is a printed handbill advertising Benz High Power Gas, the same having been handed to the witness by one of Citrin-Kolb Oil station dealers.

Trial Examiner Ballinger: The Respondent's Exhibit 18-z-19 for identification is rejected.

Mr. Austin: No objection to 18-z-20, as now offered.

Trial Examiner Ballinger: Respondent's Exhibit 18-z-20 for identification may be admitted in evidence.

(The document referred to, heretofore marked for identification "RESPONDENT'S EXHIBIT 18-z-20", was received in evidence.)

Mr. Austin: No objection to Respondent's Exhibit 18-z-22.

Trial Examiner Ballinger: How about 21?

Mr. Austin: That is a tab sheet.

Trial Examiner Ballinger: Respondent's Exhibit 18-z-22 for identification is admitted in evidence.

(The document referred to, heretofore marked for identification "RESPONDENT'S EXHIBIT 18-z-22", was received in evidence.)

Mr. Austin: No special objection to Exhibits 18-z-23, 18-z-24, and 18-z-25.

Trial Examiner Ballinger: Respondent's Exhibits 2866 18-z-23, 18-z-24, and 18-z-25 for identification are admitted in evidence.

(The documents referred to heretofore marked for identification "RESPONDENT'S EXHIBITS 18-z-23, 18-z-24, and 18-z-25," were received in evidence.)

Mr. Austin: Exhibit 18-z-26, Mr. Biber; is that a duplication of a photograph previously offered in evidence?

The Witness: What page is that?

Mr. Austin: It is page 40. I think you will recall the same photograph, because I asked you about that 8 for 99¢?

The Witness: Yes, this is a duplication.

Trial Examiner Ballinger: Is the Exhibit withdrawn?

Mr. Austin: I would like to say, your Honor, that the way these were offered in this folder, they were offered as showing stations which were competitive with Citrin-Kolb Oil Company's stations. The reason that one of those, one of two of these photographs were in here more than once, is that it was contended they were competitive with a Citrin-Kolb station on one side and perhaps another one on another side, so the same photograph is shown to show competition with more than one station. I still think we shouldn't have a duplication on that because it seems 2867 to me that if one station is competitive with the Citrin-Kolb Oil Company, that it is not particularly material to show that perhaps the same Fleet-Wing station, for instance, might be competitive with more than one Citrin-Kolb station. That would happen in so many instances of the way gasoline is sold, and people drive around, we would get an endless amount, so duplications, it seems to me, of this picture of one station on the same date, just one picture should be enough.

Mr. Abbott: I will withdraw that exhibit.

Trial Examiner Ballinger: Respondent's Exhibit 18-z-26 for identification is withdrawn.

Examination on Voir Dire.

By Mr. Austin:

Q. Exhibit 18-z-27 shows a picture of a discount card and bears the name "Linwood Tire & Battery Service, 13542 Linwood." Did you obtain that card at that station, Mr. Biber?

A. Yes, I did.

Q. And when did you obtain it?

A. In March of 1940.

Mr. Austin: Will counsel for the Respondent consent to striking out all of the typing at the top of the page?

Mr. Abbott: Yes. Everything that is shown in 2868 the typewriting appears on the card and, therefore, we agree to have the typewriting stricken.

Trial Examiner Ballinger: Then the portion objected to is expurgated. Respondent's Exhibit 18-z-27 for identification is admitted in evidence.

(The document referred to, heretofore marked for identification "RESPONDENT'S EXHIBIT 18-z-27", was received in evidence.)

Examination on Voir Dire by Mr. Austin.

Q. Exhibit 18-z-28, Mr. Biber: There is a sign, there, that has—I should say it is a photograph which appears to be of a Cities Service station and the date is January 29, 1941; is that correct?

A. That's right.

Q. There is a sign, there, that has the words "Ethyl," or "Benzol," I think it says "Genuine Ethyl," or "Benzol." Then it says "7 for 98." I see nothing on the sign that indicates that that is Cities Service gasoline, or what brand of gasoline it is. Do you have any knowledge of that?

A. Yes. There are only two pumps at the station. You will notice that they both have Cities Service globes on them; clover-shaped globes.

Q. Is it your belief that the sign refers to Cities
2869 Service gasoline?

A. Yes, it does.

Mr. Austin: No special objection to Exhibits 18-z-28, 29, or 31; 30 being one of the tab separation sheets in the folder.

Trial Examiner Ballinger: Respondent's Exhibits 18-z-28, 18-z-29, and 18-z-31 for identification are admitted in evidence.

(The documents referred to, heretofore marked for identification "RESPONDENT'S EXHIBITS 18-z-28, 18-z-29, and 18-z-31," were received in evidence.)

Mr. Austin: Exhibit 18-z-32, which is a large full page photograph of a Fleet-Wing station, depicts a sign with the legend "Save 2¢ Gal." Does that photograph contain any indication, Mr. Biber, of what price that 2¢ is to be deducted from?

The Witness: No.

Mr. Austin: Did you make any purchase at this station at or about the date shown on the photograph?

The Witness: I don't believe I did.

Mr. Austin: In view of that testimony I submit that the typing here regarding prevailing retail price should be eliminated and, if it is eliminated, I will not object to the introduction of the photograph.

Mr. Abbott: Reserving our original exception to 2870 the ruling of the Court, the typewritten part of this Exhibit may be deleted.

Trial Examiner Ballinger: Has it been deleted?

Mr. Austin: It has.

Trial Examiner Ballinger: Respondent's Exhibit 18-z-32 for identification is admitted in evidence.

(The document referred to, heretofore marked for identification, "RESPONDENT'S EXHIBIT 18-z-32," was received in evidence.)

2871 Mr. Austin: No special objection to Exhibits 18-z-33, 34, 35, 36, or 37.

Trial Examiner Ballinger: Respondent's Exhibits 18-z-33, 34, 35, 36, and 37, for identification, are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 18-z-33, 18-z-34, 18-z-35, 18-z-36, and 18-z-37," were received in evidence.)

Examination on Voir Dire by Mr. Austin.

Q. Mr. Biber, is it not true that 18-z-38 is a duplication of a photograph which has already been received in evidence? I can't, without going back through the list, find it, but I expect I might be able to in a moment.

A. Yes, it is.

Mr. Austin: I object to that on the ground it is a duplication of a previous exhibit.

Trial Examiner Ballinger: Is the exhibit withdrawn?

Mr. Abbott: It is, your Honor.

Trial Examiner Ballinger: Respondent's Exhibit 18-z-38, for identification, is withdrawn.

Mr. Austin: No special objection to 18-z-39.

Trial Examiner Ballinger: Respondent's Exhibit 2872 18-z-39, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 18-z-39," was received in evidence.)

Mr. Austin: 18-z-40 is objected to as a duplication of an exhibit already received.

The Witness: Yes, we have that one.

Mr. Abbott: Very well. That is withdrawn.

Trial Examiner Ballinger: Respondent's Exhibit 18-z-40, for identification, is withdrawn.

Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Examination on Voir Dire by Mr. Austin.

Q. On 18-z-41, page 54, Mr. Biber, there appears there a comparison of prevailing retail prices with prices shown or supposed to be shown in the photograph both on premium and house brand gasoline; now, I could see the sign on the house brand gasoline, but the price on the Benzol-Ethyl sign is not legible to me. It might be any place from a dollar to a dollar nine cents. Also—

Mr. Abbott: Pardon me. Have you got a magnifying glass?

Mr. Austin: I don't think the Commission ought
2873 to use a magnifying glass on these. But, I am not—

The Witness: It is 7 for $1, is what it is.

Mr. Austin: Well, perhaps we have prevailing prices on Ethyl, assuming that Hi-Speed is a major brand, and someone said it was.

Examination on Voir Dire by Mr. Austin.

Q. Do you consider Hi-Speed a major brand, Mr. Biber?

A. Certainly.

Mr. Austin: The only objection I have to this one is the comparison on the Ethyl brand gasoline when it seems to me there is nothing in the photograph which makes the comparison one which can be easily verified by looking at the photograph, and I would—

Trial Examiner Ballinger: Is that a notation on the exhibit?

Mr. Austin: Well, there is one of these notations here with prevailing retail prices and amount of cut on both premium and house brand gas, and it is supposed to reflect what is in the photograph, and I was going to make the suggestion that we strike out just the reference up here, just the one line, the words "Premium 1.8¢."

Mr. Abbott: I don't think it is very material, because it shows the differential on house brand, which is indicative of the cut. So strike it out.

2874 Mr. Austin: It is a bigger differential than house brand, anyway.

That has been stricken, your Honor, and I have no further objection.

Trial Examiner Ballinger: Respondent's Exhibit 18-z-41, for identification, as deleted, is now admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 18-z-41," was received in evidence.)

Mr. Austin: No objection other than a general objection, which I am preserving, to 18-z-42, 43, and 44.

Trial Examiner Ballinger: Respondent's Exhibits 18-z-42, 43, and 44, respectively, for identification, are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 18-z-42, 43, and 44," were received in evidence.)

Mr. Austin: Exhibit 18-z-45 is objected to as a duplication. It is a card which was shown previously. However, I would like to check to find out whether it is the same date.

The Witness: It is the same.

Mr. Abbott: It is withdrawn.

2875 Trial Examiner Ballinger: Respondent's Exhibit 18-z-45, for identification, and offered in evidence, is now withdrawn.

Mr. Austin: No objection to 18-z-46 and 47.

Trial Examiner Ballinger: Respondent's Exhibits 18-z-46 and 47, for identification, are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 18-z-46 and 18-z-47", were received in evidence.)

Mr. Austin: I believe that Exhibit 18-z-48 is a duplication of 18-z-28.

Mr. Abbott: That is correct.

Mr. Austin: And that 18-z-49 is a duplication of 18-z-29.

Mr. Abbott: As to 48, it is correct, and the exhibit is withdrawn.

As to 49, I will ask Mr. Biber to make an examination.

The Witness: It is a duplication.

Mr. Abbott: 49 is withdrawn.

Trial Examiner Ballinger: The offer in evidence of Respondent's Exhibits 18-z-48 and 49, for identification, are withdrawn.

Mr. Austin: I have no objection to 18-z-50, except that the price for third grade gasoline at the station shown in the photograph is not legible in the photograph, and, 2876 therefore, I object to the price comparison on third grade gas.

By Mr. Abbott:

Q. Mr. Biber, what do you interpret the picture showing on third grade, if anything?

A. I don't interpret it.

Mr. Abbott: Very well. Strike it out. That refers to the last line of the notation in typewriting at the bottom of the exhibit.

Mr. Austin: No objection, with that correction, your Honor.

Trial Examiner Ballinger: With the elimination indicated, Respondent's Exhibit 18-z-50, for identification, is now admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 18-z-50," was received in evidence.)

Mr. Austin: Exhibit 18-z-51 is objected to as a duplication of a previous exhibit.

Mr. Abbott: Is that true?

The Witness: Yes, it is.

Mr. Abbott: Withdrawn.

Trial Examiner Ballinger: Respondent's Exhibit 18-z-51, for identification, and offered in evidence, the offer is now withdrawn.

2877 Mr. Abbott: Your honor, I wish to say that Exhibit 18-A to 18-Z, and 18-Z to 18-z-51, as originally offered, contains some separation sheets being Exhibits 18-A, 18-R, 18-U, 18-z-11, 18-z-17, 18-z-21, and 18-z-30, giving the addresses of Citrin-Kolb stations with which the various exhibits were claimed to have been in competition. I would like leave of the Examiner at this time to have the exhibits that have been offered and received in evidence placed in the binder at the place where they were, with reference to these separation sheets, in order that they may show the situation that is intended to be shown by this entire exhibit or series of exhibits.

Mr. Austin: I have no objection to that.

Trial Examiner Ballinger: The request is granted.

Mr. Austin: I believe that nothing that has been offered in evidence under Exhibit 18-A has been admitted, and I, therefore, object to the admission of Respondent's Exhibit 18-A.

The Witness: There were three exhibits under 18-A that were admitted before.

Mr. Austin: I withdraw the objection.

Trial Examiner Ballinger: The objection is withdraw. Now, at 1:10 P. M. the hearing stands in recess 2878 until 2:15 P. M.

(Thereupon at 1:10 o'clock P. M., a recess was taken, to reconvene at 2:15 o'clock P. M.)

2879 Afternoon Session.

2:15 P. M.

Trial Examiner Ballinger: We will come to order.

MAX BIBER, heretofore duly sworn, resumed the stand, and testified further as follows:

Direct Examination (Continued) by Mr. Abbott.

Q. Mr. Biber, of your own personal knowledge, state the fact as to whether or not the conditions as shown by the buys and pictures referred to in Exhibits 18-A to 18-Z and 18-z-51, insofar as they have been admitted in evidence, show conditions which have been typical of the price cutting prevalent in the Detroit area for the years 1938 to 1941, inclusive?

A. They certainly are typical of the conditions during those years.

Q. Of your own personal knowledge, state the fact as to whether those conditions, as depicted by the pictures, in Exhibits 18-A to 18-Z and 18-Z to 18-z-51, showing price cutting conditions in the Detroit area in those years, were present prior to any price cutting by the six Citrin-Kolb stations complained about in the Commission's testimony, namely, Citrin-Kolb stations at East Jefferson and 2880 Nottingham, Dexter and Chicago Boulevard, John R. and Euclid, West Warren and Brooklyn, Linwood and Pingree, and Linwood and Detroit Terminal Railroad?

Trial Examiner Ballinger: And confine your answer to the photographs that have been admitted in evidence.

A. Well, I do know that the conditions shown on the photographs admitted in evidence are conditions that existed before any price cutting by any of the named stations operated or served by Citrin-Kolb Oil Company.?

Q. Does that apply to all stations either operated by Citrin-Kolb Oil Company or supplied by Citrin-Kolb Oil Company during those years?

A. I wouldn't include it as to all stations.

Q. How is that?

A. I wouldn't know, as to all stations.

Q. I am limiting it to the six stations which I stated in my previous question.

A. That is true as to all those stations.

Q. State the facts, of your own personal knowledge, as to whether any of those six retail outlets either operated by Citrin-Kolb Oil Company or supplied by Citrin-Kolb Oil Company ever instigated in any way the price cutting activities in the locality in which they are situated.

A. I know of—

Mr. Austin: I object to that question as calling for a conclusion of the witness as to what is the meaning of 2881 the word "instigated"; and I think that question ought to relate to some sort of facts. I think it calls for a conclusion.

Trial Examiner Ballinger: Objection sustained and the partial answer as given is stricken.

By Mr. Abbott:

Q. Mr. Biber, of your own knowledge, state the fact as to whether any of the six Citrin-Kolb outlets described as East Jefferson and Nottingham, Dexter and Chicago Boulevard, John R and Euclid, West Warren and Brooklyn, Linwood and Detroit Terminal Railroad, and Linwood and Pingree ever started any price cutting activities in the localities where they are located, before the price cutting became prevalent in those localities as shown by the pictures described in the record as Exhibits 18 to 18-Z and 18-Z to 18-z-51.

Mr. Austin: I object to that, your Honor, because it makes an assumption that price cutting was prevalent in these localities, and I don't think that has been proved at any particular time.

Trial Examiner Ballinger: Objection sustained.

By Mr. Abbott:

Q. State the fact, of your own knowledge, as to whether competitive activities in the Detroit area have to some extent become stabilized in the year 1941 as compared 2882 with the previous years from 1937 inclusive on? From that time up to 1941?

A. I think the market is much steadier and much cleaner since the winter of 1940 up to and including April of 1941.

Q. Of your own knowledge, if you know, state the reason for that stabilization?

Mr. Austin: Well, I object to that as of the witness' own knowledge. It calls for an opinion, and I have no objection to the witness giving his opinion upon that point.

Mr. Abbott: That is what I am asking him for.

Trial Examiner Ballinger: The question is to relate now only to the witness' opinion?

Mr. Abbott: Yes. Of course his opinion is based on his knowledge of conditions.

Mr. Austin: Well, all opinions are based upon knowledge, even of experts.

Trial Examiner Ballinger: You may state your opinion.

A. Well, I believe the stabilization of prices is due in the main to the fact that the rise in crude oil and in refined gasoline, rise in price, has caused the so-called cut rate operators to pay more for their gasoline and raise their price so that the differential between the cut rate oper-2883 ators, such as Zip and Joy, the differential between their price and the price of major gas is much less; and consequently major gasoline service station dispensers are getting their share of the business and are not compelled to cut to meet this competition.

By Mr. Abbott:

Q. Taking your last answer, what, in your opinion, has been the reason for the price wars in the Detroit area for the years 1937, 1938, and 1939?

A. There is no question in my mind that the instigation or beginning of price cutting always resulted from the posting of a lower price, much lower price, by these so-called cut rate operators, and when their price became considerably lower than the major gas prices, the loss to major gas stations—it was necessary for them to cut this price to meet the competition.

Q. And when you say "cut rate operators" to whom do you refer?

A. I refer to such marketers as Zip, Joy, Duro, Benz, Speedway.

Q. Any others?

A There is Zieve Oil.

Q. How do you spell that?

A. Zieve, Z-i-e-v-e. I don't recall any others. There are, but I don't recall their names.

2884 Q. Of your own personal knowledge, state the fact as to whether those socalled cut price operators were in business previous to 1937?

A. Yes, they were.

Q. And state of your own knowledge the fact as to whether they were indulging in their cut price activities previous to 1937?

A. Yes, they were.

Q. Have you, Mr. Biber, in connection with your duties as general manager of your own company, made a study of the competitive situation in relation to attempts by other suppliers of gasoline to proselyte your own dealer outlets by offering the advantageous prices?

A. Yes, I have.

Mr. Austin: I object to that question, your Honor. I don't think that question is proper unless based upon factual testimony as to what efforts, if any, have been made by other operators—

Mr. Abbott: This is preliminary.

Mr. Abbott: —to obtain business from Citrin-Kolb stations and, in any event, I think it is immaterial and irrelevant.

Mr. Abbott: I was just going to say that that is preliminary to testimony of such activities based on facts which I now propose to ask the witness to state.

2885 Trial Examiner Ballinger: The objection to the question is sustained, and the answer is stricken. You may first develop the facts.

By Mr. Abbott:

Q. Do you know an individual by the name of Thomas Di Pietrello?

A. Yes, I do.

Q. In what connection did you know this individual?

A. This individual has a service station and had been solicited by our salesman for the sale of Standard products.

Q. Did you ever have his account?

A. Did we ever have it?

Q. Yes.

A. We had a contract signed for this account with Mr. Pietrello, but never delivered gasoline under that contract.

Q. What year was that?

A. I believe it was in 1940. I think I have it here.

Q. What were the circumstances—

Trial Examiner Ballinger: What time of the year 1940?

The Witness: I think I have the actual date. Did I give you that contract, Mr. Abbott?

By Mr. Abbott:

Q. You stated it was in 1940.

A. It was in May of 1940, but I think the contract 2886 has the actual date.

Q. That is close enough.

What were the circumstances in connection with that transaction?

Mr. Austin: I object, your Honor. I don't see how it is relevant or material here as to why any particular retail operator bought or refused to buy from The Citrin-Kolb Oil Company.

Mr. Abbott: Well, the purpose of this is that there has been the intent here to show on this record that the Citrin-Kolb Oil Company, in some of their activities made discounts from tank wagon price to some of their dealer outlets, and it becomes important to have testimony in the record to show the competitive situation which had a bearing upon the necessity of granting preferential terms to some of their dealers, by reason of the competitive conditions. This all has a bearing on the question as to whether there is any substantial injury to competition as defined by the Robinson-Patman Act.

Mr. Austin: The Citrin-Kolb Oil Company is not a respondent, and I believe there is no issue here as to whether or not Citrin-Kolb Oil Company was or was not meeting competition in connection with any price which they may have given.

2887 Mr. Abbott: There is a claim that they sold Langer and Cohen and to the station at 8501 Gratiot Avenue, Ferguson and Coury, and also to the station at the corner of West Chicago Boulevard and Dexter Boulevard, at a differential off the tank wagon price. Now, that claim has been made. In fact, it was brought out by the Commission in its testimony; it becomes, therefore, a material and a necessary part of our case to show the competitive condition, and the reason why it was necessary for them to do that in order to meet the competitive condition then existing. And I make the offer of proof upon that basis.

Trial Examiner Ballinger: This was a solicitation of a new account, apparently.

Mr. Abbott: Well, would your Honor differentiate between that and a situation where they had an account which was secured away from them by competitive offers by other suppliers?

Trial Examiner Ballinger: Well, the Examiner would naturally think that if it was a competitive proposition and they had a regular customer, and it became necessary to reduce the price to that customer in order to hold the customer, that—

Mr. Abbott: Or what if they refused to reduce their price and the customer was lost to them?

2888 Trial Examiner Ballinger: Apparently this is not that kind of a case. This is solicitation for a new account.

Mr. Abbott: I am prepared to show by this testimony that they secured this account, and then the account was taken away from them by a competitive offer of another company. I make the offer of proof on that basis.

Trial Examiner Ballinger: The Examiner will admit the testimony subject to a motion to strike.

By Mr. Abbott:

Q. I merely asked you to state the circumstances of this transaction that you referred to.

A. Di Pietrello was a Gulf operator on Gratiot in the City of Detroit, and had been solicited by our salesman for some time, and finally had signed a contract, gasoline dealers' agreement with us, with Citrin-Kolb Oil Company, and Mr. DiPietrello came in to my office, and we sent the required registered cancellation notice to the Gulf Refining Company and to the Carnick Oil Company, cancelling his gasoline contract with them at the end of the contract period. The agreement being that we were to deliver gasoline on the day following the Gulf contract expiring.

After sending this registered notice, and when we were prepared to send out gasoline and globes to Mr. DiPietrello's station, Mr. DiPietrello asked me to come down to his station, because he wanted to speak to me. And he told me at that time that he would like to get his con-
2889 tract back, because after Gulf had gotten the cancellation for this, they had come and offered him an additional half cent margin, If we—

Q. Off what?

A. Off the tank wagon price. And if Citrin-Kolb were willing to meet them, he would go through with his contract. Otherwise he would be unable to do that.

Q. Did you meet it?

A. We did not.

Trial Examiner Ballinger: Was the contract executed by both parties?

The Witness: Yes, it was.

Trial Examiner Ballinger: It was within your power to enforce it; was it not?

The Witness: It was.

Trial Examiner Ballinger: And you voluntarily surrendered the contract?

The Witness: Well, it isn't a good idea to sue one dealer—

Trial Examiner Ballinger: You voluntarily surrendered the contract?

The Witness: We never surrendered it. I still have it.

Trial Examiner Ballinger: You never enforced it?

The Witness: That is right.

2890 By Mr. Abbott:

Q. Do you know a company by the name of Pike Service?

A. Yes, I do.

Q. Where is that located?

Trial Examiner Ballinger: Now, the Examiner will entertain a motion to strike the witness' testimony with reference to the last transaction.

Mr. Austin: I move to strike the testimony regarding Mr. DiPietrello on the ground it is irrelevant and immaterial to any issue that is properly within the limits of the Complaint in this action.

Trial Examiner Ballinger: The Examiner sustains the motion to strike the testimony.

Mr. Abbott: May I ask the Examiner if that is upon the ground that they never actually had this customer?

Trial Examiner Ballinger: No. The Examiner's ruling is based upon several grounds:

First, Citrin-Kolb is not a respondent in this case. Their transactions are not in issue.

In the second place, if this transaction could be properly considered, all this witness known is that he had a contract, and that the customer told him that he would like to be released from the contract, because he could buy from someone else at a lower price. He didn't verify it. That is merely hearsay.

2891 Mr. Austin: I might say, however, if your Honor please, to clarify the record on that point, that that sort of evidence, of course, I know that your Honor recognizes—and I don't think you meant to intimate otherwise—that that type of evidence is admissible under the limitations of the Danbury Hatters case, when the issue is one of proving injury resulting from a previously proved practice. So that I assume that your Honor's ruling is, in part, based upon the ruling or the conclusion that loss of business through competitive offers to the Citrin-Kolb Oil Company is not a material issue.

Trial Examiner Ballinger: That is correct.

By Mr. Abbott:

Q. I was about to ask you whether you knew a company by the name of Pike Service.

A. Yes, I do.

Q. Located where?

A. At 14445 Fenkell.

Q. Were they at one time a dealer of your company?

A. Yes, they were.

Q. What year?

A. For a year and a half, up until October of 1940.

Q. At that time what happened?

A. At that time Mr. Pike, of Pike Service, informed me that he was going to put in another gasoline.

2892 Q. What gasoline?

A. Dixie.

Q. Did he state the reason?

Mr. Austin: I object to this line of testimony upon the same ground as urged in connection with the testimony respecting the DiPietrello transaction.

Mr. Abbott: You mean in connection with the claim it is hearsay?

Mr. Austin: Upon the ground that it is immaterial and irrelevant. I am objecting to the whole line.

There may be specific objections on hearsay, but I am simply now urging my general objection to this whole line of testimony.

Trial Examiner Ballinger: Now, as to your objection that it is irrelevant and immaterial I would like to have you elaborate on that objection.

Mr. Austin: It is based upon the ground that Citrin-Kolb Oil Company, not being a Respondent in this case, is not called upon to justify any lower price which it may have given to particular customers, and it seems to me that this testimony is directed to showing a certain loss of business by Citrin-Kolb Oil Company because it refused—or because it at least was advised its customers had competitive offers, or perhaps it goes no farther than saying they lost business because their customers asked for a lower price and they didn't give it to them, but,
2893 in any event, it is directed to showing that the Citrin-Kolb Oil Company lost business because of alleged competitive offers, and I can see no purpose to it, unless it is to show that in certain cases where they did lower the price, they had to meet competition.

I am not very clear myself as to what the theory is of Respondent in offering it but I feel very clear it is not responsive to any issue in this case.

Trial Examiner Ballinger: I would like to hear from counsel for the Respondent as to the theory of this offer.

Mr. Abbott: The reason this offer was made is that there was testimony adduced on the Commission's case to the effect that Citrin-Kolb Oil Company, with reference to certain of its outlets, granted preferential prices.

That was done in the case of five stations operated by Langer and Cohen, one station operated by Ferguson and Coury, 8501 Gratiot Avenue, and one station operated called Sid's Service, at the corner of Chicago Boulevard and Dexter.

Now, the purpose of this testimony is to show—we have already made an offer of proof with reference to those three stations, to justify those preferences as given to those three stations.

2894 We now wish to show the general competitive condition in the Detroit area, not to show any justification by reason of competitive offers of other gasoline suppliers to proselyte the customers of Citrin-Kolb Oil Company, but to show that the preference given to Citrin-Kolb Oil Company, by giving them tank car prices, did not have any substantial tendency to injure competition, as those words are used in the Robinson-Patman Act, but showing what was the general competitive situation in the Detroit area in the years which are involved in these offers of testimony, and to show that Citrin-Kolb Oil Company was up against a continual effort on the part of other suppliers to secure the business of their outlets which they supplied with gasoline during those years.

I have a great many cases of this kind which I now propose to offer in evidence. This is one of them.

Mr. Austin: May I make a further statement?

Trial Examiner Ballinger: You may.

Mr. Austin: It now appears that this testimony may have two purposes. It is not the purpose of the testimony to show why a lower price was given by Citrin-Kolb to Langer and Cohen, because Langer and Cohen—at least in the testimony so far, there has been no reference to competition with Langer and Cohen, and, in any event, your Honor ruled out such testimony on an offer of proof
2895 previously made, so there are two other purposes which might be ascribed to this testimony. One is to show that the Citrin-Kolb Oil Company lost business as a result of competitive offers made to its customers, and I think that is entirely immaterial as to whether Citrin-Kolb lost business to competitors or why it lost business to competitors. It seems to me that is self-evident; that is, it is outside the issues of the case.

The only other reason I could see for this testimony would be to continue the line which was commenced by the offer of the photographs this morning and to show by this witness that certain other jobbers or suppliers were offering in Detroit low prices. Now, if that is the purpose of the testimony, then any evidence as to what some customer told this witness would be merely hearsay on that point, as your Honor pointed out a moment ago, so that it seems to me on the one ground it is entirely irrelevant and immaterial, and on the second ground, anything that has been offered so far is merely hearsay.

Trial Examiner Ballinger: The objection is sustained.

Mr. Abbott: At this time the Respondent offers to prove, in respect of this witness upon the question that Pike Service at 14445 Fenkell Avenue, that Pike Service, previous to October, 1940, was a dealer of Citrin-Kolb Oil Company, and that Pike Service discontinued doing 2896 business with the Citrin-Kolb Oil Company because they received an offer from Plymouth Oil to sell them gasoline at less than tank wagon price.

Trial Examiner Ballinger: The offer is rejected.

By Mr. Abbott:

Q. Mr. Biber, do you know an individual by the name of Dave Davis?

A. Yes, I do.

Q. Who is, or was, Dave Davis?

A. Dave Davis is a Citrin-Kolb dealer located on the corner of Brush and Baltimore.

Q. And is he still a customer of yours?

A. Yes, he is.

Q. Has he ever ceased being your customer?

A. No.

Q. Was that account, to your knowledge, solicited by the Highland Oil Company, dealers in Hi-Speed gasoline?

A. It has been.

Q. When was that?

Mr. Austin: I object to this testimony on the same ground, and suggest that if this means that the Respondent is going to start offering a number of these instances, that the offer of proof that is made might be broadened to other evidence of a similar character, or something of that sort, to save time of going through each one of these up to 2897 the point that we find what they are.

Mr. Abbott: I understand the question is objected to?

Trial Examiner Ballinger: Objection sustained.

Mr. Abbott: At this time the Respondent tenders an offer of proof to show by this witness that Dave Davis, at Baltimore and Brush, a customer of Citrin-Kolb Oil Company, was at several times, during the interval from 1937 to 1941, solicited by Highland Oil Company, distributors of Hi-Speed gasoline in the Detroit area, with offers to sell Hi-Speed gasoline to Dave Davis at differentials of ½ to ¾¢ off the tank wagon price.

Trial Examiner Ballinger: The offer is rejected.

By Mr. Abbott:

Q. Do you know an individual, Mr. Biber, by the name of Joe Cuffe?

A. Yes, I do.

Q. Who is Joe Cuffe?

A. A Citrin-Kolb dealer at the corner of Woodrow Wilson and Grand.

Q. And is he a customer of your company?

A. Yes, he is.

Q. Do you know whether Joe Cuffe was attempted to be secured as a customer away from you by Highland Oil, Hi-Speed, dealers?

2898 A. Yes, I do know that.

Q. When was that?

Mr. Austin: Same objection to this line of testimony, your Honor, if it is leading to the same point. It appears to be.

Trial Examiner Ballinger: You may answer this question.

A. Yes. I know that he has been solicited and has been until—the last I heard, was 10 days ago.

Q. On what basis?

A. Of a half a cent off the tank wagon price on a regular contract basis, or a cent off, in the event he would assign his lease to the station to the Highland Oil Company, and allow them to sublease it back to them.

Q. Do you know an individual by the name of Herbert Pavey?

A. I do.

Q. Where is he located?

A. He is located on the corner of Six Mile Road and Connors.

Q. Is he a customer of the Citrin-Kolb Oil Company?

A. Yes, he is.

Trial Examiner Ballinger: Is this testimony, now, along the same line as the testimony just given?

Mr. Abbott: That's right.

Trial Examiner Ballinger: Any objection to it?

2899 Mr. Austin: Yes, I make the same objection to this whole line. I assumed I wouldn't have to make it each time.

Mr. Abbott: The Respondent now offers to prove that Herbert Pavey, located at Six Mile Road and Connors, in the City of Detroit, a customer of the Citrin-Kolb Oil Company, was solicited in September, 1940, by Carnick Oil Company, selling Gulf Gasoline, and offered ½¢ off the tank wagon price if he would leave the Citrin-Kolb Oil Company and become a customer of the Carnick Oil Company.

Trial Examiner Ballinger: The offer is rejected.

By Mr. Abbott:

Q. Do you know an individual by the name of Norman Wade?

A. Yes, I do.

Q. Located at where?

A. At Harper and Raymond.

Q. And is he now a customer of Citrin-Kolb Oil Company?

A. Yes, he is.

Q. Do you know of your own knowledge whether Norman Wade was recently solicited by Red Indian Oil Company?

A. Yes, I know that he has been.

Q. On what basis?

Mr. Austin: I object, your Honor.

Trial Examiner Ballinger: Objection sustained.

2900 Mr. Abbott: The Respondent offers to prove by this witness that Norman Wade, located at Harper and Raymond, was solicited during the past year by Red Indian Oil Company, distributors of Fleet-Wing gasoline, supplied by Standard Oil Company of Ohio, with offers to sell such gasoline to Norman Wade at 1¢ per gallon off the regular posted tank wagon price.

Trial Examiner Ballinger: The offer is rejected.

By Mr. Abbott:

Q. Did Norman Wade, Mr. Biber, leave your company?

A. No, he hasn't; to date. He is still under contract.

Q. You say he is still under a contract?

A. Yes.

Q. Mr. Biber, have you, as general manager of the Citrin-Kolb Oil Company, made an audit or a survey as to the operating costs, overhead costs, and rate per gallon for sale and delivery of gasoline at wholesale for your company for the years 1936 to 1940, inclusive?

A. Yes, I have.

Q. For the year 1937, based upon that audit, what was the operating cost of selling and delivering gasoline at wholesale for the Citrin-Kolb Company?

A. $35,347.39.

Mr. Austin: Pardon me, Mr. Abbott. Will you read that previous question again, Mr. Reporter?

2901 (The last question was read.)

By Mr. Abbott:

Q. You have stated the amount?

A. Yes, I have.

Q. You differentiate that operating cost from overhead cost?

A. Yes, I do.

Q. What, for that year 1937, was the overhead cost of Citrin-Kolb Oil Company attributable to the selling and delivering of gasoline to wholesale?

A. $84,084.94. Pardon me. That is $48,084.94.

Q. What is the total for the year 1937 for operating cost and overhead cost?

A. $83,432.33.

Q. What was the number of gallons handled by the Citrin-Kolb Oil Company during the year 1937? When I say "handled" I mean sold and delivered.

A. 5,435,419 gallons.

Mr. Austin: If your Honor please, maybe I am a little tardy here, but I move to strike out the questions and answers of the witness on the two questions preceding this last question, on the ground that he has not been shown to be qualified. He is reading into the record now certain figures which are on Respondent's Exhibit 7 and 8, for identification, which have previously been offered in
2902 evidence and to which your Honor reserved his ruling, so that any ruling upon the motion I have just made would be really a renewal—or the motion was really a renewal of the motion which we made as to these exhibits, and the objection that we made to them at the time. I don't remember whether it was an objection or motion.

Mr. Abbott: You mean on the ground of qualifications of the witness?

Mr. Austin: Yes.

Mr. Abbott: Your Honor, upon that point I would like to be heard on the record.

Trial Examiner Ballinger: You may proceed.

Mr. Abbott: The testimony which was adduced from Mr. Biber after the offer to show the selling and delivery costs of the Citrin-Kolb Oil Company for 1937 to 1940:

inclusive, was later connected up by testimony to the effect that Mr. Biber, first, has been for several years the general manager of Citrin-Kolb Oil Company, and as such in charge of its operations and the keeping of the books and the auditing of its accounts. The testimony also being that previous to becoming the general manager of that company he was for some years identified with it as its attorney. The testimony also shows with reference to his qualifications that he is a member of the Bar, and that previous to becoming a member of the Bar he took 2903 courses in accounting at Wayne University, the municipal university located in Detroit, where he took two courses in accounting, accounting 1 and 2; that subsequently he decided not to pursue a business course, but went to the University of Michigan at Ann Arbor, where he took a general course in liberal arts, and later came back to Detroit, entered law school, and completed his law school work, and was admitted to the Bar, and has become a member of the Bar of the State of Michigan.

Now, he has also stated that in addition to his theoretical experience and training as an accountant, in Wayne University, where he took these courses, identified as accounting 1 and accounting 2, that he has had practical experience in accounting not only in general accounting, but also in cost accounting, and in analysis of costs, in connection with his company, of which he is the general manager, for several years.

Now, I don't understand it upon this record that it is necessary for a witness, in order to be qualified to state what the costs are of handling merchandise, that he be a certified public accountant, or that he shall have completed a course in accountancy, if it is sufficiently shown that he is a practical accountant, that he is the only one who is charged with the duty of keeping the accounts and running the business of this oil company, or any oil 2904 company, for that matter. I don't understand that it is necessary for those qualifications to be shown to that extent.

In fact, I think it would be ridiculous to insist that a person can be shown to be qualified purely on the basis of theoretical and scholastic training along accounting and cost accounting lines.

If there is any disposition on the part of the Court or the Examiner, I should say, to exclude the testimony, I respectfully ask that in accordance with the principles discussed by Judge Hanley this morning, that the testimony be taken in order that we may not be foreclosed on this record from having our day in court, which is, I think, very serious. I think it would be very disturbing, certainly, to the Respondent, if this testimony were to be excluded, so that we would have to cover it by an offer of proof.

I hope your Honor will not go to that extent in connection with this testimony.

Trial Examiner Ballinger: I will hear further from counsel for the Commission.

Mr. Austin: Well, your Honor, this testimony in these schedules are very similar—in fact, it is an identical situation with that that we had with Mr. Ledbetter. It seems to me that before the witness can put these in—these costs admittedly are no costs just lifted from books 2905 of the company, because they refer to distributing gasoline at wholesale, and the company is engaged in some retail operation, so it is obvious that joint costs are included, and some allocation has been made—and I think I should have the privilege of questioning the witness to determine his qualifications, and then your Honor can rule on that point. If he does not appear to be qualified, then, in line with the procedure that we followed with Mr. Ledbetter, I think that I should be permitted to cross-examine upon the figures themselves to show whether or not they are merely figures which are lifted from the books of the company, and whether or not they are properly in the schedules. Because I will concede that even though the witness may not be an expert accountant, why, if it is simply a matter of compiling figures upon the company's books, of course, he is better familiar with those figures than anybody else. But it is my contention that it is first necessary for him to be qualified as an accountant in order to put in a statement of operating costs and both overhead and actual operating costs, as they are described here, because of the fact that there is a question of whether or not these figures do reflect the wholesale operating costs of the Citrin-Kolb Oil Company. And it is my contention that this witness at least has not been shown to be qualified to make such a conclusion.

2906 Mr. Abbott: We would be very glad to have counsel ask him any questions he wishes to with reference to his qualifications.

Trial Examiner Ballinger: Counsel may examine the witness on the voir dire, and if necessary further on cross-examination.

Before you proceed, there was an exhibit offered and identified: what is the number of that?

Mr. Austin: 7 and 8. Pardon me, I think that runs—I don't know.

There are a lot more pages. Can you find out (addressing the reporter)?

(The reporter informed Mr. Austin that ruling had been reserved on Exhibits 7 through 15.)

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Were the answers you made in the last two questions taken from one of your exhibits marked for identification?

The Witness: Yes. Exhibit 7, for identification.

Examination on Voir Dire by Mr. Austin.

Q. Mr. Biber, did you say you took a couple of courses in accounting in Wayne University in Detroit?

A. Yes.

2907 Q. Were those half year courses or full year courses?

A. Two half year courses.

Q. When was that?

A. I think it was in 1930. I believe it was 1930.

Q. Was that before you went to law school?

A. It was during my second or third year in law school.

Q. Well, where did you take your law work?

A. At Wayne University.

Q. And was that an accounting course given in connection with the law course?

A. It was required. It was a pre-law requisition, and I had not taken such a course during my pre-law years, and I took it at that time to make up that credit.

Q. Do you consider yourself an accountant now?

A. I do not.

Trial Examiner Ballinger: I didn't get your answer.

The Witness: I do not.

Mr. Abbott: You mean by that a public accountant?

Mr. Austin: I asked him a question and the witness answered it.

Examination on Voir Dire by Mr. Austin.

Q. Have you read any books on the subject of accounting, Mr. Biber?

A. I don't think I could say I read any books outside of text books I used at school. 2908

Q. Can you tell us what those text books were?

A. The first year was Blanchard on Accounting; and I don't remember what the second term volume was.

Q. What kind of accounting did you study?

A. It was general accounting. It amounted to, if I remember it, the carrying out of a full set of books for a hardware store, the first semester, retail hardware store, including the recording of purchases, sales, charge accounts, and going through the year and making a profit and loss statement and balance sheet.

Q. Would you like to have me ask you the meaning of certain terms used in accounting? I don't want to unless you feel you would like to try to answer it.

A. I may be able to learn the answer if I don't know them.

Q. I am afraid I would have to ask you the answer rather than give it.

Have you ever read any books or treatise on distribution cost accounting?

A. I have not.

Q. Can you state the meaning of the term "Standard Costs"?

A. No, I cannot.

Mr. Hanley: May we inquire, just out of fairness to the witness and Respondent, where counsel got the names of the terms, or whatever it is he is beginning to read?

2909 Mr. Austin: I got them in consultation with the accountant for the Commission.

Mr. Hanley: Well, is he qualified? This is in the nature of a trick, your Honor, he might read a Chinese word; there isn't any showing here that any of the terms he has read or proposes to read were necessary to the knowledge of this witness to prepare the costs which he did prepare. There has to be some relation, it seems, in this matter of qualification.

Mr. Austin: Well, I may say that I have had a brief course in accounting myself, and that I think I have so far asked the witness one definition, and I, at least, know that

that is a well-known accounting term, well understood in accounting. I certainly wouldn't ask the witness any question that wasn't.

However, I don't think that it is necessary to proceed with that line of questioning, because I think the witness has sufficiently stated that he isn't familiar with the treatises on accounting and has made no study of accounting beyond a preliminary course which he took in law school, and I certainly have no desire to pursue the subject further in view of the very frank statement that the witness has made as to the extent to which he has gone.

He is a lawyer, and I am sure a good lawyer, and I don't
think that he is at all embarrassed by not saying he
2910 is an accountant.

Examination on Voir Dire by Mr. Austin.

Q. Does Citrin-Kolb Oil Company employ accountants?

A. Yes, they do.

Q. And do they work under your department?

A. They do.

Q. Or under your supervision?

A. Yes, sir, they do.

Q. When you desire any statement of costs prepared or accounting analysis, do you ask them to do it, and tell them what you want?

A. Yes, I always have.

Q. And do you rely upon their judgment as to the accounting principles used?

A. I don't know what you mean by the accounting principles.

Q. I mean do you attempt to tell them pursuant to what accounting principles any cost statement should be made, or do you ask them to do it and rely upon their accounting knowledge?

A. I tell them what figures I want, and I rely upon them to copy them out of the books and present them to me,

Q. Well, suppose there is some question other than
copying out of the books, such as an allocation of
2911 joint costs; have you ever attempted to do that, or do
you ask them to do it? Tell them as between what
activities or expenses the costs are to be allocated?

A. If there is any instance of allocation of joint costs in these exhibits, and I don't remember one, I would do it, because I don't believe the accountants would be competent to do it. Not that they couldn't make up the figures, but they wouldn't know what process to use. All they do know is the figures that are submitted to them.

Q. Can you give me a definition of what is meant by joint costs?

A. I mean by joint costs those costs which may relate to either two different methods of marketing, two different or more than one kind of merchandise or class of merchandise, or relating to more than one activity in a particular business.

Q. What is the difference between joint costs and product costs?

A. (No response.)

Q. Pardon me. I should have said by product costs.

Mr. Hanley: That indicates the fallacy of this kind of an examination, your Honor, and we would like to renew the objection which I think was not ruled upon, in view at that time counsel having abandoned the line of questioning.

2912 Trial Examiner Ballinger: Do any of the terms used by counsel for the Commission appear in any of the exhibits for identification?

Mr. Austin: Pardon me, your Honor, I didn't get that.

Trial Examiner Ballinger: Read the question?

(The question by the Examiner was read.)

Mr. Austin: Well, I think they were involved in making the computations, but I will not request further—I will withdraw that last question.

Trial Examiner Ballinger: It isn't necessary, then, for the Examiner to rule.

Mr. Austin: I will refer to some terms which are used in these exhibits which have been used.

Examination on Voir Dire by Mr. Austin.

Q. Can you state the theory of the term "Depreciation"? What is meant by that term?

A. Depreciation is a rate which is either—which a business may determine, at which the cost or original price of certain property is reduced as it is used or used up or as it becomes obsolete.

Q. What is the underlying theory which allows that charge to be made?

A. I would say under the theory that any property, as it ages, is worth less than it is worth at the time of its
2913 creation, and the theory of the percentage would be the division of the value by the approximate number of years which is accounted as the life of that certain property.

Q. What is the meaning of obsolescence?

A. Obsolescence is the condition of property when it has lost all its value.

Mr. Abbott: May we have a recess at this time?

Trial Examiner Ballinger: We will have a five-minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: We will come to order.

Mr. Austin: If your Honor please, the witness has stated that he is not an accountant. On the other hand, he has supervision of the bookkeeping of his company. I don't know what the situation is at the present time.

Mr. Abbott was starting some direct questions and he was asking for figures that were on these exhibits 7 to 15, inclusive.

Now, I believe that I was the one that referred to these and not Mr. Abbott, so I don't know whether counsel for Respondent is re-offering these exhibits or whether he is going along now on another course.

Mr. Abbott: I was asking the witness questions as to his per gallonage cost of selling and delivering gasoline at wholesale.
2914 I don't know the purpose of this inquiry, because I understood that you were still engaged in examining the witness on the question of his qualifications.

Mr. Austin: Perhaps that is so. Perhaps that applied to the questions you asked as well as to the figures here.

Mr. Abbott: That's right.

Mr. Austin: So that I will renew my objection to these schedules, Respondent's Exhibits 7 to 15, inclusive, and I make the same objection to the questions which were being asked by counsel for the Respondent: First, upon the ground that the wholesale costs of the Citrin-Kolb Oil Company are irrelevant and immaterial, and, secondly, upon the ground that it appears upon the face of these schedules that certain computations relative to overhead costs are involved: depreciation, obsolescence, allowance of interest on invested property, and so forth, which, if these are offered solely upon Mr. Biber's opinion, I submit he has not been shown qualified to give an opinion as to the propriety of including all of these figures in a statement of the per gallon wholesale distribution costs of his company.

Trial Examiner Ballinger: The exhibits, as I understand, have not yet been tendered in evidence.

The witness is testifying now with reference to sev-
2915 eral exhibits.

Mr. Austin: They were tendered in evidence, your Honor, early in the Respondent's case, some time last week.

Trial Examiner Ballinger: And the Examiner reserved his ruling upon them. This witness is part owner of the Citrin-Kolb Oil Company. He has charge—

Mr. Austin: He is not part owner; no, sir. He is general manager.

Trial Examiner Ballinger: Well, he is general manager; and, as such, he has charge of the accounts.

I don't know of anyone who is better able to testify as to the income and the outgo in expenses of the company than this witness.

The only question is as to whether or not there has been a proper allocation of expense; provided only that the question of cost of distribution of this company is material in the present case, and, upon that point, I will hear from counsel further.

Mr. Austin: Well, I would like to say that it is my opinion that a showing of the wholesale distribution costs of the Citrin-Kolb Oil Company cannot be a defense to the Respondent in this case, and neither can it have any tendency to show that the price which the Respondent charges
Citrin-Kolb Oil Company by tank car for gasoline is
2916 not a cause—I will have to change that and start from
the other end. It can have no tendency to show that the price which Citrin-Kolb Oil Company charges to its dealers is or is not the result of the tank car price which the Respondent charges the Citrin-Kolb Oil Company.

Now, it has been shown on the record that as to certain stations served by the Citrin-Kolb Oil Company, there has been a reduction by the Citrin-Kolb Oil Company of 1¢ below the posted tank wagon price of the Standard Oil Company.

Assuming that the Citrin-Kolb Oil Company's differential at the time was a cent and half, that means that the

Citrin-Kolb Oil Company sold to those stations at ½¢ higher than the price that Citrin-Kolb Oil Company paid.

Now, it is quite obvious that if the Citrin-Kolb Oil Company had paid a half a cent more for the gas, it couldn't have sold it at that price to its sub-dealer.

On the other hand, paying the price that it did, even if its costs were a cent or two cents a gallon, that would simply make it all the more difficult rather than less difficult for it to give its price to its subdealer, and I don't see what difference it makes on that question whether the costs of the Citrin-Kolb Oil Company are a half a cent or a cent and a half or two cents a gallon, because it would just mean that the bigger their costs, why, the more they were
2917 losing, assuming that they lose anything on that business.

It is a rather difficult thing to argue right here on the record, but it seems to me that it is a necessary result, and if there is any other reason for it, for the offer of this evidence, other than to try to establish the point which I have outlined, I don't know what it is, but I submit, your Honor, that the wholesale costs of the Citrin-Kolb Oil Company are irrelevant and immaterial, and, as I said, I think last week several times on the record, that I conceded that the costs of any jobber involved in this case of operating a retail station would be material in so far as those costs are additional costs resulting from the fact that the jobber purchases at tank car, but there is no attempt here to limit this statement of costs to that sort of a showing. In fact, it is, of course, admitted on the face of this document that this is the entire wholesale cost of the Citrin-Kolb Oil Company and hasn't any relation to any costs incurred by that company in operating the bulk plant and making deliveries—of course, those costs are included, but there is no allocation here, and there is no contention that there is any allocation to overhead costs to any expenses of the Citrin-Kolb Oil Company which it incurs in operating retail stations due to the fact it has to operate its own bulk plant and make its own deliveries.

2918 Trial Examiner Ballinger: Is that a correct statement?

Mr. Abbott: The fact is, as I understand it, that these Exhibits 7 to 15, inclusive, cover the schedule of costs per gallon of Citrin-Kolb Oil Company for distributing gasoline at wholesale.

Trial Examiner Ballinger: What do you mean by distributing gasoline at wholesale? Do you mean by distributing it to the retailer?

Mr. Abbott: Selling and distributing; to the retailer.

Trial Examiner Ballinger: And, also, the cost of distributing to their own stations; its own stations?

Mr. Abbott: No, that is allocated out. As a matter of fact, the testimony on this record is that this company only incidentally handles retail stations. That is merely an incident.

Trial Examiner Ballinger: But it has, during the period covered by this complaint, handled retail stations.

Mr. Abbott: It has under emergency; when, for instance, a reseller has, for any reason, been unable to carry on and they found that they had a lease on their hands; or a station which they could not find a reseller to take
over, then, as a matter of temporary expediency they
2919 have operated such stations, but the ratio of that op-
eration to the wholesale operation is very slight, in the case of this wholesaler.

Trial Examiner Ballinger: Does this show the cost, or purport to show the cost per gallon of distribution of gas by the jobber to the retailer?

Mr. Abbott: To the retailer, yes.

Trial Examiner Ballinger: And is it your contention that the average cost shown would be the approximate cost of delivering gas to their own retail outlets, when operated?

Mr. Abbott: No, we don't claim that this is any reflection of their own retail costs, except as it might be shown that the retail stations are handled on the same basis. Of course, that is a matter that hasn't been developed in connection with this witness. I intend to ask him some more questions, if you are through with your examination, Mr. Austin. I would like to ask the witness some more questions.

Trial Examiner Ballinger: You may.

By Mr. Abbott:

Q. Now, Mr. Biber, you were asked the question: Are you an accountant, and you stated that you are not. What is your occupation?

A. My occupation is general manager of the Citrin-Kolb Oil Company.

2920 Mr. Abbott: I have a series of questions relating to the qualifications of the witness. Do I understand that your Honor is satisfied upon that question? If so, I won't pursue it.

Trial Examiner Ballinger: He has admitted he is not a cost accountant or an economist. Therefore, whatever knowledge he has is the application of practical sense—

Mr. Abbott: It is practical, yes.

Trial Examiner Ballinger: —business methods to the business he is conducting or supervising.

Mr. Abbott: I thought if your Honor is satisfied on that matter, I wouldn't pursue the matter further.

Trial Examiner Ballinger: If you think you can develop any greater qualifications than those he has stated, why, proceed.

By Mr. Abbott:

Q. You say you instruct your auditors in your company how to do the accounting for the Citrin-Kolb Oil Company in connection with the income tax reports, and the like? Do you supervise that work?

A. Yes, I work with them on the income tax work and they put down the physical figures, but I work the income tax report out.

2921 Q. Are they or are you the one who determines the matters of policies with reference to allocations in connection with income tax reports and other accounting problems that come up in connection with the administration of the Citrin-Kolb Oil Company?

A. I determine the policies and the allocations.

Q. Now, in your income tax reports which you make to the Government, are you the one who dictates the matter of policy as to the depreciation to be charged or allowed on your accounts, as shown by your books, or do they do that?

A. Well, the amounts and rates of depreciation are rather determined by the Internal Revenue Bureau.

2922 Q. And are you the one who counsels with the accountant of the Internal Revenue Department if the matter of the challenging of any of those figures is presented?

A. Yes. As a matter of fact, we did have a conference on the 1940 return.

Q. And are you the one who engages in the conference with the Internal Revenue agents?

A. Yes, I am.

Q. Is the same true with reference to charge-offs for obsolescence, as well as depreciation?

A. That's right. That was the question in controversy this year.

Q. Are you the one who counsels with the Internal Revenue Department as to the proper deduction for interest on money invested in the operation of the Citrin-Kolb Oil Company?

A. I don't believe we ever counseled with the Income Tax Department on that.

Q. Do you include such figures in your reports to the Income Tax Department?

A. If such—

Mr. Austin: What figures are you asking about?

Mr. Abbott: Charges for interest on money invested.

A. Yes, when those questions are asked, we do in-
2923 clude them to the Income Tax returns.

Q. Are you the one who determines the matter of policy with reference to those terms?

A. Yes, I would say I do.

Q. Now with reference to interest on investment in real estate, who is the one that determines the matter as to how much shall be charged off or deducted for income tax purposes attributable to interest on investment both in real estate and personal property?

A. Well, I wouldn't say I determine it. It is my job to find out how much we can deduct, and then deduct that amount.

Q. And are those deductions—have they been approved by the Income Tax Department?

A. They have.

Q. Is that after consultation, or has no question been raised by the Government on those questions?

A. There was no question raised except the question of obsolescence came up this last year, and we talked to the Department and asked how they advised we handle it.

Q. What was your answer with reference to the difference between obsolescence and depreciation?

A. Well, I understood depreciation to be the reduction

in value by years or by fiscal periods of certain prop-
2924 erty during its life; and obsolescence is the final depreciation or the devaluation of the entire value of the property.

Q. Both real and personal?

A. Yes.

Q. And has there been a breakdown or allocation in your figures as you present them here in schedule 7 to 15 inclusive as to other merchandise handled by the Citrin-Kolb Oil Company other than gasoline?

A. Yes, there has been.

Q. Point out where there is any breakdown as between gasoline and other merchandise sold by the Citrin-Kolb Oil Company.

A. On the bottom of Exhibit 8.

Q. And that covers lubricating oil, does it?

Trial Examiner Ballinger: 8, you say?

The Witness: Yes.

By Mr. Abbott:

Q. Does that cover lubricating oil or other merchandise?

The Witness: It covers everything else we sell except gasoline. It is practically all lubricating oil and greases.

Q. The question was asked by the Examiner as to whether this was any breakdown as to your wholesale as distinguished from your retail operations in gasoline. What is your answer?

2925 A. There are no retail operations in the schedules at all; no items of retail operation.

Q. Well, how do you allocate from your books the costs both overhead and operating with reference to gasoline as between retail and wholesale operations?

A. Well, retail operations are carried in different accounts entirely. They are not together in any one item. They are separate.

Q. Are you responsible for carrying them in a separate account?

A. Yes, I am.

Q. And are those carried on different books entirely?

A. Some of the items may be in the same volumes, and I'd say most of them were even in separate volumes.

Q. So the expenses of your retail operations are separate and distinct in the figures as shown by these exhibits?

A. That's right, they are.

Mr. Abbott: Those are all the questions I have to ask of the witness on redirect.

Trial Examiner Ballinger: Let me ask a few questions. Exhibit 7 is headed Schedule of Costs Per Gallon to the Citrin-Kolb Oil Company Distributing Gasoline at Wholesale; that is designed—intended to show the approximate
cost of delivery from your bulk plant to the retail
2926 outlets?

A. That's right.

Trial Examiner Ballinger: I inquire of counsel how does that become material in this case?

Mr. Abbott: It is material for two reasons: First, as has already been referred to, the operation in selling and distributing gasoline from bulk plant to retail station is virtually the same, as to physical process involved, on the part of a jobber as in the case of the Respondent. Now, the cost may be different, I grant you, but I say that the cost as shown by this testimony, or as proposed to be shown by these exhibits in question, have a tendency to show the approximate cost of selling and distributing gasoline at wholesale from bulk plant to retail station.

But more important than that, and on the second ground upon which I claim that these exhibits are very material—

Trial Examiner Ballinger: If you will pardon me.

Mr. Abbott: Yes.

Trial Examiner Ballinger: This company is not a Respondent in this case.

Mr. Abbott: Well, that is admitted.

Trial Examiner Ballinger: Now, how does the ques-
tion of the cost of distribution from its bulk plant
2927 to the retail stations it serves become material in
this case?

Mr. Abbott: I was going to get to that, because this is a respect in which it is very material. Your Honor has several times adverted to the proposition that of the question of opportunity for the jobber in the event that his costs are less than the differential as between tank car and tank wagon prices, to cut prices by passing the differential on to the ultimate consumer. Now, very obviously if the cost to the Citrin-Kolb Oil Company of selling and distributing gasoline at wholesale is equal to or greater than the amount of the differential which he is allowed by the Respondent between tank car and tank wagon de-

liveries, that opportunity does not exist. And it is very important to the Respondent in this case to show the cost to this jobber in selling and distributing gasoline at wholesale, as bearing upon the question as to whether that has any tendency to create the condition which it is claimed here by reason of that discrimination injures competition; to use the words of the Robinson-Patman Act. And upon that theory I say that it is very important to the Respondent in this case to show that that opportunity does not exist, because as shown by the figures which we offer here, the cost of selling and distributing gasoline at wholesale to this jobber is more than the differential of a cent
2928 and a half a gallon. And it is upon that theory that I respectfully urge upon the Examiner that this testimony here is admissible as a matter of law in this case.

Trial Examiner Ballinger: That condition has run over a series of years?

Mr. Abbott: That is correct.

What condition do you mean—the matter of the price cutting?

Trial Examiner Ballinger: No; the delivery at a loss.

Mr. Abbott: Well, it is shown here by—I don't know as I am permitted to state in the record until these are—

Trial Examiner Ballinger: I say, that is what it purports to show, is it?

Mr. Abbott: That is true; that on gasoline this jobber, if you give effect to salaries, which have been taken out by the partners as a part of administrative costs, these exhibits—to answer the question asked by the Examiner—show that the Citrin-Kolb Oil Company in some years had just about broken even on the differential, and in some years that the cost of selling and distributing gasoline has exceeded the differential.

Trial Examiner Ballinger: I will hear from counsel for the Commission if he cares to make any further
2929 statement.

Mr. Austin: I don't believe that I have anything further to add, your Honor, beyond the statement I made a moment ago on the relevancy of these exhibits.

Of course, I recognize that the theory of counsel for Respondent may be somewhat different from mine. I firmly believe that they have no relevancy and are not material in proving any issue which is available or which is the subject of proof in this case. So, consequently, I make the objection upon that ground.

Trial Examiner Ballinger: The Examiner rules that the Citrin-Kolb Oil Company may show the cost of distribution of gasoline from its bulk plants or plant to the retail stores.

Mr. Abbott: In view of the ruling of the Examiner I now reoffer Exhibits 7 to 15 inclusive.

Trial Examiner Ballinger: The Examiner, if it is desired, will withhold his ruling until after cross-examination.

Mr. Austin: Yes. I perhaps misunderstood—can we go off the record for a minute, please?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: If the Court is of the opinion that 2930 the ruling on the admissibility of Exhibits 7 to 15 inclusive should be reserved, then I wish to further examine the witness.

Trial Examiner Ballinger: You may.

By Mr. Abbott:

Q. You had proceeded with the 1937 schedules, Mr. Biber, by stating the total of operating costs and overhead costs as being $83,432.33. How many gallons of gasoline were handled by the Citrin-Kolb Oil Company in 1937?

A. 5,435,419 gallons.

Q. And applying that gallonage to the total of your costs, both operating and overhead, what was the rate per gallon for 1937 of selling and delivering gasoline at wholesale?

A. 1.54¢ per gallon.

Q. For the year 1938 that was the operating cost of the Citrin-Kolb Oil Company in connection with the selling and distributing of gasoline at wholesale?

A. $48,605.08.

Q. The same figure for overhead costs?

Mr. Austin: Your Honor, I question filling the record up with this, when this is just reading off the figures that are on Respondent's Exhibit No. 7, which has already been offered.

Mr. Abbott: I submit this is going to be shorter 2931 than the other way. I started off this way, and I wish to continue this way.

Mr. Austin: But you have offered this. This is a duplication of what already has been offered.

Mr. Abbott: I started off this way and I don't want to mix up the method of treatment.

Trial Examiner Ballinger: You may proceed.

By Mr. Abbott:

Q. The same figure, I said, Mr. Biber, for overhead costs for 1938.

A. $48,553.38.

Q. The total of overhead and operating costs for 1938.

A. $97,158.46.

Q. The gallonage handled in 1938?

A. 5,967,636 gallons.

Q. Applying that gallonage volume to the total of operating and overhead costs for 1938, what figure do you arrive at for the cost per gallon for selling and delivering gasoline at wholesale in 1938?

A. 1.66¢ per gallon.

2932 Q. Now, taking the figures for 1939. What was your operating cost for 1939?

A. $42,221.57.

Q. The same for overhead costs.

A. $51,887.41.

Q. The total of operating plus operating cost of selling and distributing gasoline at wholesale for 1939?

A. $94,108.98.

Q. The number of gallons handled for 1939?

A. 5,172,992.

Q. Applying the gallonage handled to the total of overhead and operating cost for 1939, what figure do you arrive at for the per gallonage cost of selling and delivering gasoline for 1939?

A. 1.82¢ per gallon.

Q. 1940: what was the operating cost in selling and distributing gasoline at wholesale?

A. $45,568.71.

Q. The overhead cost for the same operation?

A. $52,661.56.

Q. The total of the operating and overhead cost?

A. $98,230.27.

Q. What gallonage was handled by Citrin-Kolb Oil Company in its wholesale operations for 1940?

A. 5,305,880 gallons.

2933 Q. Applying that gallonage to the total of operating and overhead cost for 1940, what figure do you arrive at for the per gallonage cost of selling and delivering gasoline at wholesale for 1940?

A. 1.85¢ per gallon.

Q. Now, Schedule 2 (referring to Respondent's Exhibit 8, for identification), on the subject of operating costs for 1937. What amount of operating cost is allocated to advertising?

A. $1,445.98.

Q. What amount to discounts?

Mr. Austin: Now, your Honor, having gone through 7, they are going down through these figures, and the obvious purpose of this is so that if your Honor won't permit these to go in, they will be in the record, anyway.

Mr. Abbott: I submit that is the way it should be done.

Mr. Austin: In other words, the Respondent is trying to take the determination of that away from your Honor by getting it in here now and I think your Honor should pass on it. There is page after page of these figures, and there is an effort here to read it into the record.

Mr. Abbott: I think that is the way it should be, because I think this should be presented in the record 2934 to the Commission. There is nothing in this which in any way takes advantage of any situation, because I believe under your Honor's ruling that this is a matter which should be in the record.

Trial Examiner Ballinger: Is this adding anything to the evidentiary value of the exhibit, if it should be admitted in evidence?

Mr. Abbott: Well, I think these figures should be in the record. As we stated to your Honor several times, this record is supposed to be a statement of the testimony which we wish to introduce in this case. Now, if the Court should hold, finally, that it is not admissible, what would there be to present the matter to the Commission without having the figures in the record? This is the same method of treatment that was used in the case of the witness Ledbetter, in the case of the Wayne Oil Company. Those figures are in the record, and it is now, therefore, within our power to have the Commission pass upon the question as to whether they are properly in the record. Otherwise, we have no way of testing that.

Trial Examiner Ballinger: Is that your object now in asking the question and having the witness answer from this exhibit, so that they will these figures in the record in the event this exhibit should be rejected?

Mr. Abbott: Why, yes, your Honor. There is 2935 nothing wrong about that.

Trial Examiner Ballinger: I was merely inquiring as to your object.

Mr. Abbott: That is true.

Trial Examiner Ballinger: If that is the case, the Examiner will exclude further direct examination and afford counsel for the Commission opportunity to cross-examine.

Mr. Abbott: Very well. When I say "very well" I don't mean to agree with the ruling of the Examiner.

Mr. Austin: If I am going to start on this now, and don't complete tonight, will I be permitted to go ahead the first thing Monday morning with it?

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Examination on Voir Dire by Mr. Austin.

Q. Mr. Biber, on direct examination you were asked what is the investment in the Citrin-Kolb Oil Company, and I believe you answered $250,000.

A. Approximately.

Q. What was the meaning to you of the word "investment"?

A. I believe the question was as to investment in property in the Citrin-Kolb Oil Company.

2936 Q. I don't recall if was put that way, but I haven't got the transcript here. But, anyway, just state what you meant when you gave the answer of $250,000.

A. I mean the investment in bulkplant properties, service station properties—I don't believe I included in that merchandise or equipment; stock.

Q. Was that or was that not used by you as synonymous with invested capital?

A. I believe I answered that question it wasn't.

Q. You also stated on direct examination that in your opinion it would cost more per gallon to deliver gasoline in 2,000 gallon tankloads than in quantities of two hundred fifty or five hundred or a thousand gallons?

A. It would cost less, in 2,000 gallons.

Q. Yes.

A. Yes; that's right.

Q. If I didn't say that, I meant to.

Was that answer a statement of your opinion, or was it based upon any facts?

A. It is based on facts; based on records we keep of truck operations.

Q. Have you kept records of the cost of delivering gasoline in different quantities?

A. Yes, we have.

Q. Can you state, then,—well, for what quantities 2937 have you kept those records?

A. We keep a sheet which records deliveries under 300 gallons, and delivery over 300 gallons, and we keep our costs on that basis.

Q. What percentage of your deliveries to retail stations are under 300 gallons?

A. I would say about 25% are 300 or under.

Q. And have you made any segregation as between amounts of delivery over 300 gallons; in keeping those records?

A. Yes, and then the others are—the balance of 75% are grouped in the record as deliveries of 300 gallons or over.

Q. Have you determined the cost, for instance, of delivering in quantities of between 1,000 and 2,000?

A. No.

Q. Or between 500 and 1000?

A. No.

Q. Over what period were those computations made?

A. Over the period of the last year, I imagine. They are still being kept.

Q. Do you know what any of those figures are now? Could you tell me what your results were for deliveries under 300 and delivery over 300?

A. I don't remember, offhand.

Q. Are those studies worked out on sheets?

2938 A. Yes, on regular form sheets.

Q. For how long a period do they show? Are they annual, or what?

A. One sheet is kept daily and they are posted from a daily sheet onto a monthly sheet, and kept on a monthly basis.

Q. Do you figure up your cost per gallon for delivery in those different quantities for each month or year, or what?

A. We figure them by the month. The only costs we were interested in determining on that basis was the actual trucking cost; the vehicle and the driver's salary.

Q. Are those sheets available for the years 1939 and 1940?

A. I am not sure whether they were kept in 1939, but they are available for 1940, and right up to the present day.

Q. Would you mind producing them on Monday?

A. Do you want them all?

Q. You say they are a separate sheet for each month.

A. There is a separate sheet for each day by driver and then they are posted onto a monthly sheet.

Q. I was only interested in monthly sheets, and if it is a fact that those sheets contain a computation, the purpose of which is to arrive at the cost per gallon of delivering gasoline.

2939 A. Yes, those sheets are available. I will be glad to bring them.

Q. Do they give that result? That is are they carried out—

A. I am not sure whether they have been carried into dollars and cents or not, or whether we have been satisfied to carry them into driver hours and truck hours. I don't remember whether the final computation is broken down by the amount of the driver's salary or not, but if it is not, it would be an easy thing to do, because if it is broken into hours, the computation of hours into the driver's rate would be a very simple computation to make.

Q. Do you have those monthly sheets in the files of your company at your office?

A. Yes.

Q. And how many sheets would that require you to produce? Suppose for the last six months of 1940?

A. That wouldn't be many sheets.

Q. Would that be just one or two sheets for each month?

A. It might be as high as five or six, depending on how many drivers there were at that time.

Q. I am still not clear, after you get all that data on the sheets, whether you have made a computation of the cost per gallon of delivering gasoline, on the one hand, as to deliveries of 300 gallons and less, and, on the other hand, over 300?

2940 A. As I say, I don't know that we have broken it down to so many dollars and cents or not, or whether we have been satisfied to bring it down to the hours or minutes it takes for deliveries, but if we haven't gone that additional step, it would be an easy thing to do, because all you would have to do would be to divide the hours by the hourly pay rate of the driver.

Q. Would that give you the result for the company, or each driver?

A. That would give you each driver's time. In other words, it was kept for several purposes. One purpose was to show which drivers are more efficient and, also, to determine whether or not small deliveries cost more than large deliveries.

Q. Where is the cost of delivering gasoline shown on these schedules; Exhibits, for identification, 8 to 15; or, if it isn't shown, where is it included?

A. It is included in all the expenses shown on Schedules 2 and 3, and subsequent. The depreciation, for instance, on trucks and equipment, is on Schedule 5.

Q. Do these sheets that you refer to contain all of the expense allocable to that delivery operation?

A. That's right, they do.

Q. We would appreciate it then, if you would bring those down with you on Monday.

2941 A. I would be glad to.

Q. Mr. Biber, I think you testified that there were three operations in loading one gasoline truck, and I think you referred to the fact that trucks have various compartments and that you sell three grades of gasoline?

A. That's right.

Q. Have you ever made a separation of your wholesale distribution costs as between the three grades of gasoline?

A. Never.

Q. If, as you say, there are three operations in loading one truck, is it not true that the cost of handling and trucking gasoline by that method would vary, as to the different grades, due to the fact that the Red Crown is handled in larger quantities than the other two?

A. No, it would not.

Q. For instance, doesn't it cost more to load 500 gallons of gasoline—cost less, rather, to load 500 gallons into the larger compartments of the truck than it costs per gallon to load quantities of, say, 100 or 200 gallons, of another grade?

A. No. The only cost involved in loading a truck is
the electric current which operates the pump and the time
of the man who is loading the truck. It still takes a fifth
of the time to load 100 gallons of Stanolind than it does
to load 500 gallons of the regular, and a fifth of the
2942 pump power, so it makes no difference in the loading
what grade of gasoline there is.

Q. Isn't there more evaporation and leaking in loading and unloading smaller quantities than in loading and unloading larger quantities?

A. I don't think so. I think the evaporation is only during the period it is exposed, and if it is exposed only for 100 gallons, that's all there is.

Q. I believe I am correct in saying that Citrin-Kolb is still a partnership, is it not?

A. Yes.

Q. Just for a moment I had a sort of hallucination that it was incorporated, but I was thinking of some other company.

Did the Citrin-Kolb Oil Company, the partnership, file information returns with the Income Tax Department for the years 1937, 1938, 1939, and 1940?

A. They did.

Q. Have you with you the records of the amount of net profit shown on those returns?

A. No.

Q. I assume that you could obtain that information?

A. Yes.

Q. I would like to ask you on Monday, I wish you would
be prepared to answer the net profit shown by the
2943 Citrin-Kolb Oil Company for each of those years
of the return filed by the partnership. I am referring
to what is called partnership return of income, I believe,
on the form.

A. Each partner makes a return, and the partnership makes a return. Are you interested in the individual return or co-partnership return?

Q. The partnership return, because the individual return would, perhaps, include other things.

A. That's right.

Q. How many trucks does the Citrin-Kolb Company operate?

A. Six.

Q. And can you tell me how many have been operated during the period 1937 to 1940?

A. There were 5 in 1936, and 5 in 1937, and 5 in 1938, and in 1939,—1939 to 1940, there have been 6.

Q. '39, there were 6?

A. Yes.

Q. And 1940, 6?

A. Yes.

Q. How many drivers are employed for driving those trucks?

A. There are five full time drivers and one part time driver.

Q. And has that varied during the years when there were only 5 trucks?

2944 A. Yes, it has. It has even varied in the last year, depending on the volume of the business.

Q. And when there has been a variation, has there been more than 5 full time drivers, or less?

A. There has never been more than 5 full time drivers.

Q. Never more than 5?

A. That's right.

Q. And have you ever more than 1 part time driver?

A. Yes, on occasions we have had.

Q. What would you—would you say that the 5 full time and 1 part time driver—that is, the maximum number at one time during the four years?

A. Yes.

Q. Now, on Respondent's Exhibit 8, at the bottom of that page, there is a deduction from total direct operating costs, or it is called actual operating costs here of the amount $3,750 for each year, and that, apparently, is in connection with oil. It says, "Less Oil at 5¢; 75,000." What does that 75,000 mean?

A. 75,000 gallons.

Q. And how was the figure of 5¢ arrived at?

A. We were unable to make an exact deduction for the expenses involved in delivering oil, so we took our average gallonage of oil for the years 1937 through 1940, and the average was something under 75,000.

2945 We placed the round figure at 75,000 and computed it at 5¢ a gallon, which is an amount much larger than actually involved, but, inasmuch as we were unable to make an exact computation, we took the amount of $3,750 off each year, as expenses. I believe our closest computation at the time was around $2200. We added $1500 on that to be sure that it included everything other than gasoline.

Q. Then, when you say "less oil" you mean less oil and other products?

A. Yes, less oil or anything else; but our other products are insignificant.

Q. Doesn't the amount of oil that you sell every year vary?

A. It hasn't varied very much, because the amount of oil sold is comparable to the gallonage, and the gallonage has been fairly steady and the oil business has been fairly steady.

Q. Well, you just said, I believe, that you used the pronoun "we" in connection with the opinion that this was an adequate allowance for oil. Who did you refer to, other than yourself?

A. Myself, Mr. Citrin, and the Auditor.

Q. Is this figure of 5¢ a gallon for oil, or the total of $3,750, based upon any method of allocation, or is it
2946 just an arbitrary figure?

A. This $3,750 is actually an arbitrary figure; placed arbitrarily high. As I say, in our computation, as close as we could come to it, was about $2200, we thought we ought to deduct.

Q. An accurate computation of that figure would involve an allocation of the majority of these items on these various schedules, would it, to gasoline, on the one hand, and other products, on the other hand?

A. I would say it would.

Q. Then, if I understand you correctly, you didn't attempt to make any such computation, but you simply put a figure on here which, in your judgment, was a fair figure; in other words, on the greater than the lesser side, so far as you could—

A. That's right. That is, we did attempt an allocation. We found it was such a difficult allocation to make, we would rather give them some than go through another allocation.

Q. Turning again to Schedule No. 2, Respondent's Exhibit No. 8, will you describe what is included in item No. 1: "Advertising"? And by what is included, I mean the character of the advertising that resulted in these costs for which that money was expended?

A. Yes, advertising includes direct mail to the dealers.

2947 Q. Direct what?

A. Direct mail advertising to the dealers, monthly sales letters, a monthly publication which we printed and mailed to the dealers; it includes a Christmas party for the dealers; and it also includes in each year an anniversary dinner which we give on the anniversary of the founding of the company, for all the dealers. I believe those are all of the items included in advertising.

Q. Is any of it directed to consumer acceptance?

A. None of it is.

Q. All to the dealer acceptance.

A. Yes.

Q. Now, item 2 on that schedule "Discounts"; will you explain that item?

A. Yes. In discounts we carry an item which is really an exchange item. It is those items where the dealer complains of mis-delivery of a product, where he might claim that the driver poured the Ethyl into the regular tank, and so forth. And we make good for those mistakes by paying him a certain amount, whatever the difference is.

Q. Well, that is a rebate, isn't it, rather than discount?

A. You might call—

Q. Refund, perhaps?

A. You might call it a refund, yes. It is something that we pay back to him.

That is true in 1938, 1939, and 1940. And in 1937, in
2948 addition to that item, there was also included prize
money which we gave to certain dealers on a cleanliness contest. That is the one year we had it. And we threw it into "discounts" at that time.

Q. What is your opinion as to whether that would properly be included in "discounts" or under "advertising"?

A. It might be advertising or discounts. We paid it out in the form of checks to the dealers, and I remember seeing the item, that we did throw it into "discounts" rather than any other item.

Q. Would you describe it as a discount?

A. I would not describe it as a discount. I don't know what happened at the time that it got into that account, but that is where it is. It could be transferred back into advertising, but we have never found it necessary.

Q. Were you here when Mr. Ledbetter was on the stand?

A. Yes, I was.

Q. Do you recall that he had an item "discount" in his wholesale costs, and that he agreed that that should be— that that was not properly included as a wholesale cost, and it was eliminated from his computation?

A. Yes. But his computations, I understand, were trade discounts, amounts that were not paid out. And that is not true in our case, because gasoline is a net cash proposition. We don't have a discount. The face of the invoice is paid.

2949 Q. Well, is this item largely what you have described as refunds?

A. Refunds, yes.

Q. Well, in your opinion, isn't that properly deductible from the selling price of the gasoline, just as a true discount would be?

A. I don't believe so. I believe it is an expense item. It is actually payment for carelessness of a driver or carelessness of an employee. Just as possibly an uninsured accident that we would have to pay for. It is obvious there are no actual discounts in here, because the amounts are so small. $200 for one year.

2950 Q. Well, it is quite large for 1937, and why is that so much larger for that year?

A. That is that prize money for service station that went into that account.

Q. I see. Now, on item No. 1 again "Advertising" I want to ask you one more question about that.

Is any portion of that allocated on your books to the retail service stations operated by Citrin-Kolb Oil Company?

A. There is none of that that is allocated to that purpose.

Q. The third item is "Insurance" on schedule 2. Now, will you tell me what is insured? Does that represent premiums?

A. That is premiums. That is the public liability, property damage, fire and theft on the motor vehicles, and fire insurance, riots, civil commotion, tornado, public liability, and burglary insurance at the warehouse and offices.

Q. I was just going to ask you whether some of that is not on the buildings at the main office?

A. Yes, it is all at the buildings at the main office.

Q. It is what?

A. It is all on the buildings at the main office.

Q. Well, there is some of it for insurance, li-
2951 ability insurance that is just on—just for trucks; is it not?

A. No. There is also public liability insurance.

Q. You mean public liability, of course?

A. Yes.

Q. I was thinking of automobile insurance. Is any of that insurance upon the buildings at the service stations operated by the Citrin-Kolb Oil Company?

A. No.

Q. Or upon the buildings at any of the service station properties owned and leased by the Citrin-Kolb Oil Company?

A. No; this is restricted to 14445 Linwood.

Q. You mean that only insofar as it is insurance on buildings?

A. Yes.

Q. Because you stated—I assume there is insurance on trucks?

A. That is right.

Q. How about the Livernois bulk plant?

A. We could not carry insurance there as a bulk plant. We use it only intermittently, and the insurance company allows us to bind it whenever we have merchandise there. And so that premium was not included in that amount.

Q. As I recall it, what you call your warehouse is your bulk plant at Linwood?

A. That's right.

2952 Q. Isn't there service station property there too?

A. Yes, there is.

Q. You say none of this insurance listed here is insurance upon that service station property?

A. No. That is at a separate address. Covered under a separate address.

Q. The fourth item on that schedule is "Gas, Company Use"; what is that?

A. That is gasoline used by the trucks and myself.

Q. Item 5 "Interest"; do the figures opposite that—rather, on that line—indicate money actually paid out during the year by the Citrin-Kolb Oil Company?

A. Yes, it does.

Q. Is that interest on borrowed money?

A. It is interest on borrowed money, and it is also interest on land contract for the property at 14445 Linwood.

Q. What do you mean land contract—mortgage?

A. No; it is purchased on land contract.

Mr. Austin: Well, I don't know whether it is material. Does your Honor understand what a land contract is? I don't. If you do, I will let you tell me some other time.

Trial Examiner Ballinger: If it is material, put it on the record.

By Mr. Austin:

2953 Q. Perhaps that is something you have here that we don't have in New York.

A. It is a method of conveying property.

Q. Well, all I wanted to know is if it is somewhat similar to the indebtedness that is paid on the principal of a mortgage debt.

A. That is right, it is.

Q. I take it there is no interest on investment included under that item, Mr. Biber?

A. What was that?

Q. I take it there is no interest on investment included under that item of interest on Respondent's Exhibit 8.

A. You mean in that No. 5?

Q. Yes.

A. No.

Trial Examiner Ballinger: Is there any item in there for money used in reconditioning any station taken over?

The Witness: No.

Examination on Voir Dire (Continued) by Mr. Austin.

Q. On item 6 and 7 will you explain why there is only one figure given for heat, water, and electric current for 1937, whereas they are broken down for the other years;
and why the figure is so much larger for 1937 than
2954 for the total of the two figures for the other years?

A. Yes. First, in 1937 we carried heat, water, and electric current in one account; just indicated it after the amount what it was. And the amount is more because in 1937 we actually operated the Livernois bulk plant, as well as the Linwood bulk plant, because the warehouse on Linwood was not entirely completed, and we had both offices going, and of course heated both places, and electric currented both places.

Q. Then do I understand that the warehouse or the bulk plant at Livernois and Lyndon has not been operated since 1937?

A. It has been operated. It has been operated in 1941, but not regularly or steadily. The warehouse has never been used, but the bulk plant facilities have been. The storage tank and pump house facilities have been.

Q. You distinguish between warehouse and bulk plant. I have noticed some reference here to warehouse at 14445 Linwood, and in several instances, I was rather wondering whether you didn't mean the Linwood bulk plant when you referred to warehouse?

A. Well, the warehouse is the enclosed part of the bulk plant. We refer to a bulk plant as the outside storage tanks and the pumping equipment.

Q. What is the warehouse? Is that just what 2955 the name implies?

A. Yes; the warehouse is the inside building.

Q. Well, when I come to warehouse here later on I can ask you again about that. But I was a little confused. Particularly as to the Livernois plant, as to whether or not it had been operated.

A. Yes, it is operated intermittently right up to now.

Q. Your statement is as to the Livernois plant that the warehouse has not been used since 1937, but that the bulk plant has been.

A. I don't believe the warehouse at Livernois has been used since 1937. I don't remember of an instance that it was.

Q. Would that account for this large increase in heat, water, and electric current?

A. In 1937?

Q. Yes.

A. We were actually paying double heat and double electric current for two locations.

Q. And you don't have any such expense if you operated the bulk plant without the warehouse?

A. Yes, we would have, and it is included in here. But it is very slight. We might operate it three months out of the year.

Q. If that is the only explanation you have of 2956 the difference I am satisfied with it, Mr. Biber.

A. Yes.

Q. Item No. 8 "License"; just what licenses are included?

A. That is the wholesale distributor's license, and the gas tax bond necessary to be furnished under that license.

Q. That doesn't include the automobile licenses for the trucks, does it?

A. In 1938 and 1939 it does; in 1940 it does not.

Q. Is that the reason why the figures for '38 and '39 are larger than those for '37 and '40?

A. That's right; in '40 we separated them.

Q. Where do they appear in 1940?

A. I believe under truck expense.

Mr. Abbott: Mr. Biber, do you want a recess? You have been on quite a while.

The Witness: No.

Mr. Abbott: I don't want to interrupt.

Mr. Austin: I was going to suggest that we adjourn after we get through with this question, but I am perfectly willing to go on.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: We will take a five-minute recess.

(A short recess was taken.)

2957 Trial Examiner Ballinger: Reconvening.

Examination on Voire Dire (Continued) by Mr. Austin.

Q. Then, point that out to us.

A. I looked through the exhibit, Mr. Austin, and it does not appear. It appears that we left it out.

Mr. Abbott: What is that you left out?

The Witness: Truck licenses for 1940.

Examination on Voire Dire (Continued) by Mr. Austin.

Q. The same is true for 1937?

A. No; it is included in '37. In '37 we had smaller trucks and the licenses were proportionately less, and our gas tax bond was much less. They raised it in 1938. In 1937 everything was included.

Q. Item 9 is entitled "Miscellaneous", and that is a fairly large item for each one of four years. Will you describe the types of expense that have been grouped together under that heading?

A. Yes. I have here "Court Costs." This happens to be a take-off for certain months of 1940, the actual items.

Q. It happens to be what?

A. Take-off from the books. These are the actual items taken from the books of 1940.

2958 Mr. Abbott: Can you itemize them as you read them?

The Witness: Yes.

Trial Examiner Ballinger: Are these for the year 1940?

The Witness: Yes, January, 1940.

Mr. Abbott: State the amount.

A. (Continuing.) Court Costs $2.60; Wrights Florist, $8.76.

By Mr. Austin:

Q. Mr. Biber, this total here for 1940 is some five thousand dollars. I imagine it would take you a pretty long time to read all the items, unless a few of them are large; and will you give us only the items that are more than a hundred dollars.

A. I don't believe there are any, Mr. Austin. This one group is seven or eight pages. The only large items over one hundred dollars are Christmas gifts, which were billfolds in that year printed with the dealer's name; it was $161.

Q. What is the total of those sheets you have in your hand?

A. The total of the sheets is $5,750.60 for 1940.

Q. Well, the figure here is $5,352.27.

A. There was a deduction, I think, of $392 that
2959 we took out of this list because we thought that they
should be allocated to the service station. Sometimes they were thrown in here, like a two dollar court cost, and it might have involved an account at the service station and by error gotten into this account. So we went through it carefully.

Q. By service station you mean that—operated stations or what?

A. Operated station, or even our dealers, if they have an account that wasn't paid them, I sometimes furnish my services to draw up the papers and start the case and spend two dollars for them so they could start a Common Pleas Court case. And there was—

Q. I would like, if there is no objection, to have those sheets you have there and offer it in evidence.

A. Not at all. I have two or three copies of it.

Q. May I see it?

A. Yes, sure.

Mr. Abbott: May I get the amount allocated to resale stations from your notes (addressing the Reporter)?

(The Reporter read the following figures $5,352.27 and $392.)

Mr. Austin: I don't know whether it is proper for me to make any motion with respect to this now, your Honor, but I would like to state that if your Honor accepts 2960 the offer of these schedules marked Respondent's Exhibits 7 to 15 in evidence, that I would like to have this schedule miscellaneous expenses, handed me by Mr. Biber, to go in as an exhibit 8-A, to follow Respondent's Exhibit No. 8. And for that reason I will now ask that it be marked for identification.

Trial Examiner Ballinger: The Reporter will mark the document—just a moment. There are several sheets on there.

Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: The Reporter will mark the documents handed him by counsel for the Commission as Commission's Exhibit 78-A to E, for identification.

(The documents referred to were marked "Commission's Exhibits 78-A to E" for identification.)

Examination on Voir Dire by Mr. Austin:

Q. Now, Mr. Biber, I want to ask you whether the items of expense shown on Commission's Exhibit 78-A to E for identification are representative of the items which go into the totals here for '37, '38, and '39, opposite item 9 "Miscellaneous" on Respondent's Exhibit 8?

A. They are.

2961 *Examination on Voir Dire by Mr. Austin.*

Q. Do you know of any items under the miscellaneous heading, or included under that heading, for 1937, 1938, or 1939, which are substantial in amount—and you may interpret that as meaning more than a hundred dollars—

which are not included in the list which has been marked for identification?

A. I don't believe they are. They are all small amounts.

Q. Are there any items of expense listed in Commission's Exhibit, for identification, 78-A to 78-E, which result from the operation of the bulk plant and the operations in connection with the delivery of the gasoline by truck?

A. Are you restricting that to the actual physical delivery?

Q. Well, any items which result from the bulk plant and delivery operations, or which are allocated or would be allocated to those operations, if you had to make such an allocation?

A: Yes, they are.

Q. Are any substantial amount of them?

A. If I understand your question correctly, I would say all of them.

Q. Is that so?

Mr. Abbott: Do you understand what the question is?

2962 The Witness: I think I do.

By Mr. Austin:

Q. Well—

A. I would say that these are all included in the costs of operating the bulk plant and delivering gasoline.

Q. I am just trying to think of a way of making my question a little clearer.

For instance, would you say that item No. 5 on Respondent's Exhibit 8, interest on item No. 1, advertising, were allocable to the operation of the bulk plant, and delivery?

A. Yes.

Q. Those were the type of items which I had in mind which I rather assumed were not allocable to the operation of the bulk plant and delivery, because they did not result from direct operation, so, perhaps my question should be directed to what you call physical operation.

A. Yes. I see the distinction you are trying to ma ; now. Do you want me to answer the question on that basis?

Q. Yes.

A. I would say that there were some of these amounts that would be allocated to the physical delivery and operation of the bulk plant.

Q. I won't pursue that. I take it they are all small items.

2963 A. Yes.

Q. And it would be rather hard to identify them, is that correct?

A. Yes, they are. I see items here for 19¢ and 50¢ and so forth.

Q. Item 10 on Schedule 2, Respondent's Exhibit 8, is entitled "Repairs." That is also a fairly large item for each year. What do those repairs consist of?

A. Consist of repairs to trucks, pumps, building and equipment, typewriters, adding machines.

Q. Does that include repairs at the office building?

A. Yes.

Q. Repairs at the bulk plant?

A. Yes.

Q. Does it include repairs upon equipment at any service station?

A. Yes, it does.

Q. Does it include repairs upon equipment at service stations operated by Citrin-Kolb?

A. No. That is on a separate account.

Q. What equipment does Citrin-Kolb Oil Company own and repair at its own expense at service stations served by it?

A. Only pumps.

Q. Then, the repairs that relate to retail service stations are pump repairs?

2964 A. That's right.

Q. Would you say that pump repairs at a retail service station are allocable in any part to the operation of the bulk plant and delivery operations; in other words, are they a wholesale expense?

A. I would say they were.

Q. What is your theory on that?

A. The only repair of those pumps that we own, if we own the dispensing equipment at the station, we make the repairs, our equipment order agreement requiring we do, and that would be part of the furnishing of the gasoline. If we did not furnish the pump at the station through which the gasoline is dispensed, we wouldn't be operating through that station.

Q. Do you furnish the pumps of all stations which you serve?

A. No, we furnish only a very small part of the pumps.

Q. Why do you say you wouldn't be servicing the station?

A. At those stations at which there are no pumps or at which a former competitive company owned the pumps, when we go in, part of the deal of going in is to furnish pumps to replace the pumps of the former oil company, or where you are going into a new location, the property owner usually requires the oil company to furnish the pumps.

Q. Is that where you own the property or sublease it?

2965 A. No, that might be a contract dealer. For instance, we might go into a Texaco account and Texas may own three pumps there. When their contract is cancelled, they remove those pumps and our obligation is to replace the equipment.

Q. Don't you rent those pumps to the dealer?

A. No.

Q. Then, why is it that some dealers supply their own pumps? I should think it would be much better for you to supply them.

A. It just happens that in those instances the owner of the property either furnished the pumps at the time, or the dealer bought pumps at a previous time, but dealers are no longer that ignorant. New pumps, very seldom, belong to the operator of a station.

Q. On the stations which you lease; there, you receive rental for the equipment, do you not?

A. Yes, the rental includes the equipment.

Q. And are any of these repairs charged on pumps at leased stations?

A. No, our lease simply is the building and equipment are in good shape and will be returned in the same manner. We do no repairs for these stations. If we did, it could not be included in here, because that gallonage to our leased stations is included. I believe it would be a proper item of expense to be included here.

2966 Q. You say gallonage is included, but you have made no offset here anywhere for rent received, have you?

A. No. That is the point. That is why I say we left the account out entirely.

Q. I am just trying to understand the situation in that regard. If I understand you correctly, if a man owns his own property, or leases it from somebody else, you furnish the pumps and he doesn't pay any rent on them.

A. That's right.

Q. And you repair them?

A. That's right.

Q. But if he leases a station from you, he pays rent on the pumps, and then, also, has to pay his own repairs?

A. You see, Mr. Austin, it is not a matter of mechanics, it is a matter of policy. The station we have a lease on, we tell the fellows: "You are going to repair your own pumps," because we are not going to lose that station, but if I tell that to one of our contract dealers, the next week we come around, there will be new globes on the pumps. On our leased stations we have no fear of losing the stations. We tell the man to repair his own pumps and that's what they do, but on the contract account, we are leery of doing that.

Q. Then it is due to the fact you have more control over the business of your lessee than you do over
2967 your contract operator?

A. That's right.

Q. Would you say that that was true of jobbers generally?

A. I would say it was true of everybody generally.

Q. Item 11 is entitled "Supplies." What does that refer to?

A. That is office supplies and stationery.

Q. Any reason for the drop of that expense in 1939?

A. None; except that we may have been stocked up in 1938.

Q. Item 12; "Telephone." Does that include any telephone expense from telephones installed at retail service stations?

A. No, it does not. It includes the telephone and switchboard at the bulk plant and any advertising or listings of the bulk plant in the telephone directory.

Q. Is that expense to operating stations kept separate?

A. Yes, it is; each address separate.

Q. Item 13, which is the largest item on this list, is entitled "Wages." Does that include your salary?

A. The $15,000 item?

Q. Yes; item 13.

A. It does not.

Q. Where is your salary included here?

A. My salary wasn't included here at all. There was my salary and one man more that wasn't included
2968 here, and one girl that wasn't included here.

Q. Why was that?

A. The man's salary that was not included here, he has supervisory duties, in part, over some retail stations, so rather than question it or cut it up, we left it out entirely. One of the girls, as part of her work, listed the daily report sheets of the operated stations, so we left that out, and inasmuch as sometimes I spent some of my time on the retail stations, calling on them, either speaking to them or making the leases for them, we left that out; so those three items were left out rather than apportioning them.

Q. What wages are included in that item? What wages or salaries?

A. Truck drivers; warehouseman; switchboard operator; bookkeeper; two auditors.

Q. Is that a complete list of the salaries that are included here?

A. Yes. There is only one other I think of, and that is the porter.

Trial Examiner Ballinger: Mr. Austin, when you have finished that item, we will adjourn.

Mr. Austin: I only have two more items on this Schedule 2, Respondent's Exhibit 8. I would like to finish
2969 those.

Trial Examiner Ballinger: Proceed.

Examination on Voir Dire by Mr. Austin.

Q. Item 14 is taxes. Will you tell us what taxes are included in that item?

A. Yes. Those are the real estate taxes.

Q. And on real estate taxes on what real estate?

A. On the location at 14445 Linwood.

Q. Including the service station property?

A. No. That is a separate address that is assessed at 14441; the station. Personal property taxes on the merchandise, equipment, furniture, and fixtures, at the 14445 Linwood.

Q. Are these taxes only upon property at that address?

A. That's right. In 1937 I think part of it was for personal property at 14481 Livernois, as well.

Q. Aren't there any taxes included there for any of those four years upon the real estate at Livernois? Isn't that owned by Citrin-Kolb Oil Company?

A. Yes, it is, but since 1937 we have not considered that as a bulk plant entirely. The taxes have been on the bulk plant facilities and not on the front location. There is a service, also, at that location, and we have separated that. The only taxes included here would be on the personal property and the bulk plant facil-
2970 ities in the back.

Q. Are such taxes included here for 1938, 1939, and 1940?

A. Yes, they are.

Q. I understood you to say for those three years it was only in the Linwood property.

A. There is no personal property tax for those three years, because we didn't have any merchandise there.

Q. But there is a real estate tax item there on the Livernois property.

A. Yes, there is.

Q. The last item on Respondent's Exhibit 8 is bad debts. Will you explain that item, please?

A. Those are uncollectible items from dealers.

Q. All from dealers?

A. All from dealers.

Q. None that involve retail accounts?

A. No, there are no retail accounts included on here. All from dealers, 75% of which are NSF checks upon loads of gasoline.

Q. Are what?

A. Are not sufficient funds checks, upon loads of gasoline.

Q. Is there any reserve for bad debts included there?

A. No.

Q. That seems to be a pretty large item; particularly in 1939, Mr. Biber, and you say those bad debts are
2971 all debts owed by dealers?

A. That's right.

Q. And that means operators of service stations to whom you sell gasoline?

A. To whom we sold gasoline.

Q. Do you sell—still sell gasoline to any of those operators?

A. No. We don't write them off as long as they are still our accounts. I believe this item of $2,000, out of 5,000,000 gallons of gasoline, is very small.

Q. That was the reason for my last question, because it seemed to me that bad debts of dealers would necessarily be small, because they could hardly exist while you were continuing to serve the dealer, so that is why I asked you if you were continuing to serve any of these dealers.

A. No. If the account was written off, we wouldn't serve the dealer.

Q. Then, is it your statement that these bad debts are all bad debts of dealers who have ceased to be your customers and who owed you money at the time they ceased to be your customers?

A. Yes. These figures were taken off of income tax returns.

Mr. Austin: That would be a very good place to make a break, now, if your Honor please.

2972 Trial Examiner Ballinger: It now being 5:40 P. M., the hearing will adjourn to be reconvened at 9:30 A. M., May 5, 1941, in room 859 Federal Building, Detroit, Michigan.

(Thereupon at 5:40 o'clock P. M., an adjournment was taken, to reconvene on May 5th, 1941, at 9:30 o'clock A. M.)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of Volume II of the printed transcript of the record, filed in this office on July 12, 1948, in:

Cause No. 9215.

Standard Oil Company,
Petitioner,
vs.
Federal Trade Commission,
Respondent,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago this 25th day of May, A. D. 1949.

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

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TRANSCRIPT OF RECORD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1[redacted] 1957

No. 24

STANDARD OIL COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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United States Circuit Court of Appeals
For the Seventh Circuit

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Respondent.

U. S. C. A.-7
FILED
JUL 12 1948
KENNETH J. CARRICK
CLERK

Petition for Review of Order of the Federal Trade Commission.

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TRANSCRIPT OF RECORD FILED NOV. 7, 1946.
PRINTED RECORD.

In the
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For the Seventh Circuit

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12 schedules giving account numbers and explanations as to each:

1. Salesmen and Sales Promotion Expense.
2. Advertising Costs.
3. Delivery and Warehouse Cost.
4. Income and Expense Incurred at Leased Retail Outlets Served by Tank Wagon.
5. Marketing Expense Items Incurred at Privately Owned Stations Not Leased But Engaged in the Distribution of Our Products.
6. Credit Information—Bad Debts and Recovery.
7. Field Office and Accounting Cost.
8. Supervision Cost Incurred in Sales Field.
9. Losses—Taxes—Insurance and Additional Salary Considerations.
10. Miscellaneous Marketing Expense Items.
11. Marketing Expense Items on Lubricating Oils.
12. General Office Marketing Costs. 4889

No. 100—Distribution cost analysis, tank wagon reseller channel versus gasoline sales, Detroit field, 1940. This exhibit contains 133 pages showing the actual allocations and figures in carrying out the work explained in Ex. 99 under each of the 12 schedules referred to therein, with numerous sub-schedules under each and explaining exactly what was done in each case 4914

No. 101—Standard Oil Company Form G. O. 189 Long, being the Sales Department Comparative Statement of Expense, Detroit field, year 1940, completely filled out and reflecting the results and processes set forth in Ex. 99 and 100. 5043

No. 103-A, B, & C—Letter Feb. 2, 1942, Mr. Hanley of Standard Oil to Mr. Austin of FTC 5045

Trial Examiner's Report, dated June 25, 1943 5047

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Motion of Commission to modify Order to Cease and Desist, dated Jan. 21, 1946 5185

Order to show cause, entered Jan. 23, 1946 5188

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Order modifying Order to Cease and Desist issued Oct. 9, 1945, and denying certain other motions, entered Aug. 9, 1946 5253

Modified Order to Cease and Desist, entered Aug. 9, 1946 5254

Dissenting opinion to modified Order to Cease and Desist, dated Aug. 9, 1946 5257

Vol. I, pages 1 to 850; Vol. II, pages 851 to 1736; Vol. III, pages 1737 to 2586; Vol. IV, pages 2587 to 3454; Vol. V, pages 3455 to 4298; Vol. VI, pages 4299 to 5046; Vol. VII, pages 5047 to 5288.

Petition for Review, filed Oct. 4, 1946 5270

Statement of Points 5276

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Designation of Record 5285

Respondent's Designation of Record 5287

Vol. I, pages 1 to 850; Vol. II, pages 851 to 1736; Vol. III, pages 1737 to 2586; Vol. IV, pages 2587 to 3454; Vol. V, pages 3455 to 4298; Vol. VI, pages 4299 to 5046; Vol. VII, pages 5047 to 5288.

2973

Room 859 Federal Building,
Detroit, Michigan,
May 5, 1941.

Met, pursuant to adjournment, at 9:30 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois, and

Arthur J. Abbott, Esq., of the firm of Abbott, MacMahon, and Roberts, 2230 Buhl Building, Detroit, Michigan, on behalf of the Respondent.

2974

PROCEEDINGS.

Trial Examiner Ballinger: We will come to order.

This is a reconvening at 9:30 A. M., Eastern Standard Time, May 5, 1941, in Room 859 Federal Building, Detroit, Michigan, in Docket No. 4389, in the case entitled Standard Oil Company.

The last hearing was held in Detroit May 2, 1941.

The reporter will note counsel for the Commission and Respondent present.

Gentlemen, you may proceed.

MAX BIBER, having been heretofore duly sworn, resumed the stand, and testified further as follows:

Examination on Voir Dire by Mr. Austin.

Mr. Biber, on Saturday, or Friday, I guess it was, you were asked to state by Mr. Abbott the facts as to whether or not the conditions as shown by the buys and pictures referred to in Exhibits 18-A to 18-Z and 18-Z to 18-z-51, in so far as they have been admitted in evidence, show conditions which have been typical of the price cutting prevalent in the Detroit area for the years 1938 to 1941, inclusive. You answered: "They certainly are typical of the conditions during those years."

Mr. Abbott: Just a moment, now. State your question, I want to make an objection.

2975 Mr. Austin: All right. I was reading from the record.

Trial Examiner Ballinger: Let the counsel complete his question.

Mr. Abbott: Yes; go ahead, Mr. Austin.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Examination on Voir Dire by Mr. Austin.

Q. The photographs and sales slips referred to were pictures of stations, and, I believe, sales slips indicated purchases made at stations near a certain group of Citrin-Kolb Stations.

A. That's right.

Q. Six stations which were either operated by or supplied by Citrin-Kolb. By your answer to that question, did you mean to indicate that all of the stations in the neighborhood of those six Citrin-Kolb stations were charging the prices shown in those pictures?

Mr. Abbott: Just a moment, now, if your Honor please, I am at somewhat of a loss to understand whether this is cross-examination or a continuation of the voir dire on the schedules. If it is cross-examination, I don't think it is in order at this time, because I am not through 2976 with this witness. We are now engaged, you see, in putting in the Respondent's case in chief, and Mr. Austin, as I understand it, has been engaged in voir dire examination of the schedules on the subject of operating costs.

Trial Examiner Ballinger: It is the recollection of the Examiner that he reserved ruling on Respondent's Exhibits 7 to 15, inclusive, until both the voir dire and cross-examination.

Mr. Abbott: Yes; but he was engaged in the voir dire on Friday and had not completed that. Now, it appears from the last question that he is now proceeding to cross-examine the witness, before the witness is turned over to him for cross-examination by the Respondent.

Mr. Austin: That is all right with me. If Mr. Abbott isn't through on direct, and it is his understanding that the cross-examination now is only directed to the schedules, I would be perfectly pleased to go ahead with the schedules, your Honor, and postpone this question and one or two others I had, until later.

I was under the impression I was on cross-examination, but I may be wrong.

Trial Examiner Ballinger: The course indicated may prolong the examination of the witness. You may adopt it, confining your examination, now, to the voir dire examination.

2977 Mr. Austin: I can come back to that at any time.

Examination on Voir Dire by Mr. Austin.

Q. Will you turn to Respondent's Exhibit No. 9, Mr. Biber, and tell me—where is the copy of that that was marked by the reporter?

Mr. Abbott: The Examiner has it.

Q. Has the word "operating," the third word in the heading, has the word "operating" been changed to "overhead"?

Trial Examiner Ballinger: It has.

Q. The first three items, there, Mr. Biber, are salary items of $10,000 for each of the three partners for each of the four years; 1937, 1938, 1939, and 1940?

A. That is right.

Q. Is that $10,000 something in the nature of a drawing account or how was that figure arrived at for the purpose of this report?

A. Well, it is drawn by the partners in monthly installments for the year in an agreement between themselves that they will draw that much per year. It is a partnership, and, of course, they can put this money back in and take it out any time they like, but they have allocated $10,000 a year for each of them.

Q. I asked you, I believe, on Friday for the amount of net profit shown on your partnership return for the 2978 years 1937, 1938, 1939, and 1940?

A. Yes, I have them here.

Q. Would you let me have them, please?

A. Do you want me to read them?

Q. Yes.

A. 1937, $45,839.59; 1938, $40,116.13; 1939, $34,207.42; 1940, $32,190.45.

Q. Does Mr. Citrin give all of his time to the business, Mr. Biber?

Mr. Abbott: Which Mr. Citrin? There are two of them.

Q. Mr. Jacob Citrin.

A. Yes, he does.

Q. Is he engaged in any business other than the Citrin-Kolb Oil Company?

A. No, he is not.

Q. How much time does he regularly give to the business?

A. Regular time. He is in the office every day.

Q. Every day. Well, I did not mean to ask you how much time he took off for lunch or anything like that.

A. He goes to Florida every once in a while.

Q. He is referred to here as partner in charge of sales contracts and deals. Could you eleborate that a little bit, please?

A. Yes. I would not call any of these descriptions
2979 exclusive descriptions, because in the partnership as
they are, their duties will overlap, but he is in charge of purchases, sales, he determines largely whether or not he will take on a new dealer, whether or not any contract for purchase, sale of property, real estate, or merchandise is a good one or not. And, I would say he acted as the chief executive, and that those were actually his duties.

Q. Does Mr. Kolb give full time to the business of the Citrin-Kolb Oil Company?

A. He does.

Q. Is he engaged in any other business?

A. No, he is not.

Q. Does either Mr. Jacob Citrin or Mr. Kolb have any interest in any other retail gasoline business?

A. No, they do not.

Q. What portion of Mr. Jacob Citrin's time is regarded as applicable to the operation of the service stations which are operated by the Citrin-Kolb Oil Company?

A. I would say none of his time.

Q. And the same question as to Mr. Kolb.

A. I would say none of his time is applicable, either.

Q. How much time does Mr. Barney Citrin give to the business?

A. He gives his full time to the business.

Q. Does he come to the office daily?

2980 A. Every day.

Q. And what are his general duties?

A. Well, he is actually cashier and in charge of the daily and perpetual inventory of merchandise at the premises. We have a report that carries a daily-perpetual inventory. The inventory is kept on a deduction basis after each delivery. That is his job.

Q. I don't think I asked you what Mr. Kolb's position is.

A. Mr. Kolb is really in charge of deliveries; in charge of the warehouse. He acts in the purchasing of equipment; hires drivers.

Q. I understand your statement to be that it is a full time job for each of the three partners?

A. Oh, yes. All three of the partners put in their full time and have no other business.

Q. Schedule 4 is Respondent's Exhibit 10, a depreciation schedule on real estate; is that correct?

A. That's right.

Q. That is, the buildings. Now, the first item is the Livernois and Lyndon address. The second refers to warehouse. Does that mean at 14445 Linwood?

A. That's right.

Q. Is there a retail service station building at either one of those addresses?

A. There is a retail service station at each of those

2981 addresses.

Q. Well, is that building included here?

A. No.

Q. In neither case?

A. In neither case.

Q. Do these figures here, given for the land at either address, include any of the land where the retail service station is located?

A. No, it is not. It was cut up and apportioned by size.

Q. What do you mean by the warehouse, or did you explain that the other day?

A. The warehouse is the enclosed part of the bulk plant, the building of the plant.

Q. Why isn't the balance of the bulk plant included?

A. The balance of the bulk plant are the underground tanks.

Q. Is that so?

A. And they are listed as equipment.

Q. I wasn't clear about that, although I know you told me the other day at the Livernois address the warehouse was used for storage and for other things. You say the tanks are underground: I don't believe I realized that the bulk plant storage tanks were underground. I rather pictured them as above the ground.

2982 A. All our tanks are underground.

Q. Is that personal property?

A. Yes. When you look at the place, there is not—there is no bulk plant. All you see is a pump.

Q. Now, as I recall it, we were also talking Friday about a warehouse at Livernois and Lyndon.

A. That's right.

Q. Under item 1, you say, "Livernois and Lyndon." Under item 2, you say, "Warehouse."

A. That is just descriptive of the place. It could read, just as well, 14445 Linwood.

Q. What does the cost of the land represent in each case? Does it represent the actual amount that was paid for the land, or does it represent something else?

A. It is the actual cost of the price paid for the land less that amount of land which was allocated to the service station.

Q. Was that allocation made upon a square foot basis?

A. Per foot basis.

Q. And how was the value of the building stated here arrived at?

A. Both buildings were arrived at from the price, that is, the cost, of building at the time of erection.

Q. Does that $12,620, the first item, represent what was paid for the construction of that building?

2983 A. That's right.

Q. And is the same true of the item $23,722.68?

A. No, it does not, because we did not construct that second building at 14445 Linwood. That includes the price we paid for the buildings at the time we purchased them, plus the price of the erection of the new portion that we put up.

Q. But the one at Livernois and Lyndon was constructed by you—was any of the land at either of these properties purchased from any one of the partners?

A. No. The land at Livernois and Lyndon was purchased from the Robert Oakman Realty Company, and the land and buildings at 14445 Linwood were purchased from the receiver of the National Bank here in Detroit.

The buildings themselves at the time we purchased them we estimated were worth about $60,000, and I think the price the receiver put on them was about a third of the value we put on the building.

Q. Who was the building at the Linwood address purchased from?

A. The Linwood address?

Q. Yes.

A. The building was there; part of the building. The underground storage was there and the land was purchased from the receiver of the First National Bank.

2984 Q. That was there, of course, when you bought the land?

A. Yes.

Q. Now, you stated that there was an addition constructed to the Linwood plant?

A. That's right.

Q. How was the valuation of that addition arrived at?

A. We priced the addition at the actual cost of construction.

Q. And that was added to the cost of—

A. The former buildings.

Q. How was the cost of the land and buildings apportioned, as between land and building, that you bought from the receiver?

A. We apportioned at one-third buildings, and two-thirds land, because the land there is quite extensive.

Q. Was any interest during construction included in the cost of construction of the addition?

A. Will you repeat that?

Q. Any interest, during construction, included in the cost of construction of the addition?

A. I don't believe I understand—

Q. Interest during construction means interest on capital investment during the construction period.

A. Added to the construction price?

Q. Yes.

2985 A. No, it was not.

Q. Or included in the construction price?

A. No, it was not.

Q. Were there any profits to the partners on the construction of the addition?

A. No.

Q. Schedule 5, Respondent's Exhibit No. 11, Mr. Biber, you have an item No. 1, "Machinery and Equipment," and an item No. 3, "Furniture and Fixtures," and those are repeated for each year, 1937, 1938, and 1939 and 1940.

A. That is right.

Q. Referring to those two items as repeated for each year, do the cost figures give a—well, do those figures include any machinery, equipment, furniture, or fixtures at any retail service stations?

A. No, there isn't any here.

Q. Do the figures in the cost column represent the actual carrying cost of the equipment at the end of the year?

A. Yes, that was taken right off of our cost sheets. If they had—if the machinery, equipment, or furniture and fixtures were older than 1937, the cost figure shown in the first column was the figure to which it had been depreciated.

Q. Now, I refer to equipment located—that is, 2986 included here—where was it located?

A. At the bulk plant. That includes pumping equipment, loading equipment, and unloading equipment on loaders, safety features on the side track at both bulk plants.

Q. That is machinery and equipment?

A. Yes.

Q. How about furniture and fixtures?

A. Furniture and fixtures; well, it includes the fixtures at the office; typewriters, adding machines, billing machines, and so forth.

Q. And whose automobile is that? Is that more than one? It says "Auto" as if it were singular.

A. Well, we carry it that way. That is the delivery equipment at the bulk plant. That is called trucks and automobiles.

Q. Does that include any automobiles driven by yourself or the partners?

A. No.

Q. How was that rate of 6% arrived at for depreciation of equipment?

A. We have depreciated our machinery and equipment at 6% on our income tax.

Q. Was that accepted by the Federal Income Tax people?

A. Yes.

Q. Well, was that the same percentage for trucks 2987 and autos and furniture and fixtures?

A. Yes, we depreciated it all at the same figure.

Q. Now, there appears here a figure in each case which is 10%, while you state that you took off 6% on the income tax.

A. That is because it includes an additional 4% of obsolescence. In other words, on our income tax return, we can take 6%. They don't allow you to take obsolescence and depreciation. They allow you to depreciate it at the rate of 6% and when you find that your equipment or machinery is obsolete, you can take the additional as obsolescence. These figures were really interim figures and inasmuch as we felt we are entitled to the obsolescence and these figures, we don't have to wait until the truck is junked to take the obsolescence, and, therefore, we added the obsolescence to the depreciation and took it on that basis because, obviously, a truck is not good for more than ten years.

Q. Well, your figure here only shows 6% on the truck and auto and 10% for machinery and equipment.

A. Well, we had intended to take 10% on all these items. We should have taken 10% on our trucks and autos and furniture and fixtures as well. I believe we took 10% on the furniture and fixtures and equipment and machinery and the 6% on the trucks and autos.

2988 Q. Well, this schedule appear to be incorrect on its face, because of the 10% instead of 6%, and I don't understand, anyway, why you should take an extra 4% of obsolescence on machinery and equipment. I can understand what you have said might refer to your trucks and autos, but it wouldn't refer to gas tanks, would it?

A. I think that is true. I don't think you will find you can keep gas tanks underground more than 10 years. They have to be replaced. They rust through and they wet through.

Q. Is the figure of 6% what was allowed on the income tax for depreciation?

A. Yes, that was the figure.

Q. Do you attempt to take any obsolescence on the income tax return for any of these items?

A. Yes, as a matter of fact, in 1939 we took 10% on the theory that we would take our depreciation and obsolescence during the life of the machinery and equipment and furniture and fixtures, and they called us on that and told us we were entitled to 6%, and that when the equipment was obsolete we could report it as such and take the balance as obsolescence. They would not let us take it all at one time.

Q. When would they permit you to take it?

A. When you reported the equipment as obsolete.

2989 Q. That would be after you had already taken depreciation over a number of years?

A. That is right, and the balance would be obsolescence.

Trial Examiner Ballinger: Are the figures showing depreciation for the years 1937, 1938, 1939, and 1940, appearing on Respondent's Exhibit No. 11, for identification, supposed to represent 10% of the cost as shown in the third column?

The Witness: That is right.

Trial Examiner Ballinger: Are they not inaccuracies in the computations?

The Witness: I don't believe they are inaccuracies in the computation. I think what we ought to do is to change that rate to 10% instead of rating it at 6%.

Trial Examiner Ballinger: If you changed it to 10%, would it not be inaccurate yet?

The Witness: No.

Trial Examiner Ballinger: Take, for instance, item No. 4, "Machinery and Equipment." The cost price is $15,149.20 and 10% of that would be $1,514.92; but the amount shown is $1,519.50.

The Witness: That is right.

Trial Examiner Ballinger: Like discrepancies appear throughout.

2990 The Witness: That is off. That is off about $5.

By Mr. Austin:

Q. Well, these figures given for depreciation for 1937, 1938, 1939, and 1940 are not the figures that were given on your income tax returns for those years, are they, Mr. Biber?

A. The figures for depreciation?

Q. Yes.

A. I think they are.

Q. Well, you just said that they did not allow you to take 10%.

A. No, this is the 6%. We have added the 4% to the 6% on here.

Q. Well, I am asking you whether these figures appear on the income tax return?

A. No, they are 4% less on the income tax return.

Q. Will you turn to Schedule 6, Mr. Biber, Respondent's Exhibit No. 12. Will you state what properties are included in that schedule which appears to be an obsolescence schedule?

A. Yes. Those are properties which the company owns upon which are located service stations, retail service stations.

2991 Q. Were those the only properties owned by the company on which retail service stations are located?

A. I believe they are, with the exception of 14481 Livernoise, at Lyndon.

Q. Why isn't that included here?

A. It isn't included there because at the time these schedules were made up, and right now, we intend to demolish that building and erect a new one.

Q. This is for the years 1937, 1938, 1939, and 1940.

A. That's right. And in 1937 we used most of that building as a warehouse and the entire building was used as a warehouse. The only parts allocated to the service station were the pumps in front of it, so again, rather than allocate that piece of property, or the amounts involved, we just left it out.

Trial Examiner Ballinger: Was that true in 1938 and 1939?

The Witness: No. We used it very little in those years.

By Mr. Austin:

Q. What property is represented by the third column there, which is entitled "Cost"?

Trial Examiner Ballinger: What exhibit?

Mr. Austin: We are speaking of Respondent's Exhibit 12, your Honor.

Trial Examiner Ballinger: For identification.

2992 Mr. Austin: Yes.

A. I don't understand what you mean; what property?

By Mr. Austin:

Q. "Obsolescence Estimate of Items used in the Distribution of Gasoline at Wholesale."

A. That is the service station building on the premises.

Q. The service station building?

A. That's right.

Q. Does it include the underground tanks or pumps?

A. Yes, I would say it included the underground tanks. Not the pumps.

Q. Not the pumps?

A. No. We depreciate the pumps as personal property.

Q. Are any of these stations operated by Citrin-Kolb?

A. At the present time the only one operated by Citrin-Kolb is 14445 Linwood.

Q. How about during the period represented here, 1937 to 1940?

A. I would say that during that period, off and on, some of the others were operated.

Q. Of course, I realize we have that in the record, Mr. Biber.

A. Yes. There have been some of these that were operated by the company during that period, for sporadic periods.

2993 Q. Except for the time they were operated by the company, the company received rent for them, did they not, from the operator?

A. Yes.

Q. I take it that none of the property upon which obsolescence is taken in Schedule 6, was included in either Schedule 5 or Schedule 4. I would like to have your answer to that, however.

A. Not in Schedule 5, but you will notice in Schedule 4, we take a 4% rate of obsolescence. That is because we took that rate on the income tax return on our warehouse. We were—

Q. Now, just a moment. On Schedule 4 you take 4% for depreciation on building.

A. That's right.

Q. In what item on Schedule 6 is any of that property repeated?

A. In the last item, No. 8, at the bottom of the page.

Q. Yes.

A. We have taken an additional 6% for obsolescence. The 4% is depreciation.

Q. Is the 4% what was allowed on your income tax return?

A. That's right; 4% depreciation.

Q. Was this 6% claimed on the income tax return?

A. No, we can't claim that until the property is obsolete.

2994 Q. Under your item 8, "Warehouse," on Schedule 6, there is a statement: "See note in explanation." What note is referred to?

A. This is the explanation I have just given you. We were going to type that down, that 4% had been taken for depreciation, and this is an additional 6%.

Q. Turning back to Schedule 4, which is Respondent's Exhibit 10, for identification. I intended to ask you there, if you will look under the column 1937, and opposite item 2, "Warehouse," there is a figure of $475.25, which is apparently only 2% instead of 4%. Why was only 2% taken there?

A. Because in 1937 we only had that for half the year.

Q. And should not the first figure under the 1937 column be $504.80?

A. I don't know, unless I made the computation wrong.

Mr. Abbott: What schedule is that?

The Witness: Schedule 4.

A. 4%, $504.80.

Q. What do you mean by the column "Income Tax Rate, 2½%"?

A. That is the rate we were permitted on these properties in our income tax returns, on retail stations.

Q. You were permitted to take obsolescence, or did you take it as depreciation?

2995 A. We took it as depreciation.

Q. 2½%?

A. That is right.

Q. And why is it that for the purposes of this cost statement you have only used 7½%, instead of 10%?

A. Because we felt, inasmuch as these were retail stations, and the only reason they are included here was because we had the investment in these retail stations, in order to increase our wholesale gallonage and inasmuch as we had taken the depreciation of 2½% on our partnership return, we actually had credit for the depreciation on our partnership return for the retail stations. Therefore, we took only the difference between the 2½% and the 10% obsolescence figure. We felt we had already received credit for 2½%.

Q. Where?

A. In our income tax return. We had taken that, and inasmuch as this was a retail station, we didn't take that 2½% again, but felt it had come off—

Q. Where else had you received credit here on your cost statement?

A. We hadn't taken credit for it here again at all.

Q. I don't quite understand on what theory you only take 7½% here, whereas you claimed 10% total on your warehouse.

2996 A. On the warehouse we felt we were entitled to the entire amount, because the warehouse is used for the wholesale business and used in the wholesale business while the retail stations are actually used in the retail business, but their purpose, and our investment is in the service stations, in order to increase and make up the gallonage of our wholesale business, and the practical purpose of not including this 2½% again was to try to make these figures as conservative as possible. We felt that actually the wholesale business had gotten credit for 2½% for these retail stations, so we didn't put them in here again. We took the 7½% which we figured was the obsolescence figure, and didn't take any depreciation for service stations.

Q. As a cost item why shouldn't this be set off against rent, rather than included as a wholesale cost?

A. That is exactly the difference. A depreciation item—in other words, if we took this 2½% a year as a depreciation item, I think it should be set off against rental, but the obsolescence figure should not.

At the end of 10 years, a service station is generally obsolete. It is changed about every seven and a half years, in style and equipment, and our two and one-half percent depreciation rate should be covered by the rents.

Q. Don't you consider that the probable period of 2997 the obsolescence of the property, in determining what rent to charge?

A. No.

Q. You know what it is going to be?

A. Yes. You couldn't get that kind of a rental for a service station.

Q. Would you say that this was a cost which was allocable to the entire wholesale business, or isn't it a direct cost which is allocable only to these particular stations?

A. No. I think it is allocable to our wholesale business.

Q. What is your theory for that?

A. Many of these locations that have been built in the last three or four years have been built specifically for the purpose of stimulating the wholesale business. We weren't interested in any money we made, or we might make, on rental, or in the interest per service station. We were interested in the profits from the bulk plant to the service station. In other words, we were acquiring another customer by building that station. A service station, whether we own it, lease it or is a contract dealer, is a customer, as far as we are concerned.

Q. Referring to your wholesale business; to your sale of gasoline from your bulk plant to that station; in your opinion, shouldn't the expense of the station property, in so far as it is not recovered through rentals, be
2998 charged as a direct cost to the proportion of the wholesale business which you do, to that customer, rather than to all of your business? In other words, when you built a service station and leased it out, you have a new customer. Perhaps your rent doesn't cover the entire investment, considering depreciation and obsolescence, but that increases your wholesale business only to the extent of the gasoline you sell to that station; isn't that right?

A. That may be true, but I don't think you allocate expenses to any particular customer. In other words, if we deliver 200 gallons of gasoline to a man and 2,000 gallons to another customer, the cost of the 200-gallon delivery is obviously much more than the 2,000-gallon delivery. Nevertheless, when we make a break-down and acquire a per gallon cost, we don't charge one cost to one customer and the other cost to another customer. We just average them. We may, at times, make a greater investment in a contract dealer than we do in one of our own stations. Still we do not charge that expense to the individual customer.

A man may build a station and we take a lease on it, or he wants to operate it himself, and in order to get that business, we have to install tanks, pumps, and possibly paint the building, put up advertising, billboards, 2999 and we may have an investment of three or four thousand dollars in that property and we only have an independent dealer; nevertheless, we don't attribute that expense to this dealer alone. We attribute it to our entire wholesale operation and we have treated these stations in the same manner. We haven't differentiated merely because we own the property.

Q. Are these obsolescence charges recorded on your books?

A. This 10% charge.

Q. Or the 7½?

A. No, we haven't taken that off on our books.

Q. Do you judge whether or not a station is profitable by the gallonage that the station uses?

A. Yes.

Trial Examiner Ballinger: Does Exhibit 12, for identification, relate exclusively to stations owned by Citrin-Kolb?

The Witness: That's right. We owned those properties.

By Mr. Austin:

Q. Mr. Biber, does any of this service station equipment—incidentally, do these items included in Schedule 6, Respondent's Exhibit 12, include any buildings? Do they include buildings as well as tanks? I guess you did say they do.

3000 A. The buildings and tanks, yes.

Q. Now, turning over to Exhibit 13, Schedule 7, under item 5: "Personal Property." Is any of the property upon which obsolescence was taken in Schedule 6, included in that personal property item under Schedule 7?

A. No, it is not. The personal property includes bonds, stocks; it includes merchandise purchased that is not yet in the hands of the Citrin-Kolb Oil Company. For instance, merchandise which we purchased from the Standard Oil Company, motor oils, and we make our contract and order ahead of time for the coming season. We do not have it as inventory in our warehouse yet. Still it belongs to us. We have to insure it and it is charged to us, and all those items are included in that personal property.

Q. Well, now, isn't that item under 1937 of $25,280.30—do you see that?

A. Yes.

Q. Isn't that the same item that appears on Schedule 5, for machinery, equipment, trucks, autos, furniture and fixtures?

A. Yes, that is the same item.

Q. Well, that is not correct that that includes bonds and stocks and so forth?

A. No. That is included in the investing of merchandise. That was included in one of these figures.
3001 That must have been included in Item No. 4 that I described, because personal property is a carry-over from Schedule 5.

Q. Does Item No. 4, "Investing of Merchandise," include the sort of things you described?

A. Yes, I knew one of these things was made up from that, and also merchandise not yet in our warehouse.

Q. Well, then, Item No. 4, "Investing of merchandise," that is not a good heading for that?

A. No. That is why I had this explanation. I knew this would be explained, and it isn't a full description of it, but I thought it was convenient to put it in there, and I knew I would remember the items that were in there.

Q. Well, then, to repeat a question I asked you a while ago: are any of the items included for obsolescence in Schedule 6 repeated in whole or in part under the personal property item of Schedule 7?

A. Well, that is the same item as is No. 5 of Schedule 7. The Schedule 5 is repeated as No. 5 on Schedule 5.

Trial Examiner Ballinger: Why is it repeated?

The Witness: Because that is an investment that we have in personal property, and we are charging interest on that investment. The investment may be worth less each year by depreciation, but still the balance of that investment is still charged with the interest of that investment.

Mr. Austin: Could we take a five minute recess,
3002 if your Honor please?

Trial Examiner Ballinger: We will have a five minute recess.

(A short recess was had.)

Trial Examiner Ballinger: Com[illegible]o order.

By Mr. Austin:

Q. Turning to Respondent's Exhibit No. 12, for identification, again, Mr. Biber, do you have with you the figures of the rental charged to the operators of those seven stations? I believe there are six of them that are operated by others than the Citrin-Kolb Company.

A. I know what the rentals are now to them, but I don't know what the rentals are for this entire period.

Q. Could you state what the rentals are now?

A. Yes. The rental at Dexter and Fenkell is $125 a month; the rental at Wyoming and Eaton is $80 a month; and this Linwood-Pingree station is in transition where we might be operating it tomorrow, and we might not, but the rental is $110 a month; Gratiot and Saratoga, $50 a month; 14445 Linwood, we are operating; Livernois and Sparta is run at the rate of half a cent a gallon, no minimum.

Q. Do you know what that amounts to?

A. About $18 or $19 a month.

Q. $18 or $19 a month?

A. That is right. This is the property where
3003 the front end was cut off for the front end of the street, and it is practically valueless. The entire building is priced at $1,500. Now, John R and Horton, $50 a month.

Q. Why is that such a low rental at John R and Horton?

A. I believe it was about nine months ago that the street became a one-way street, and this station happens to be so situated on the street that it is almost inaccessible now that it is a one-way street, although the building is a large and expensive one, and the drive-in now is so inconvenient that the business is practically nil.

Q. Prior to nine months ago, do you know what the rental was?

A. $125 a month, plus a cent a gollon over every gallon over 12,500 gallons. That may be more or less than nine months ago, whenever the traffic was changed there to a one-way street.

Q. Now, why wasn't the rental offset against the obsolescence of each station?

A. Because we did not figure that the rental paid for the obsolescence of the building.

Q. What did it pay for?

A. It paid for the use and occupancy, and took care of the depreciation of the building, and nothing more.

Q. Well, doesn't—where is depreciation taken care of in this return, if it is not taken care of here? I mean, 3004 in this schedule.

Trial Examiner Ballinger: You are speaking of Schedule No. 12?

Mr. Austin: I am speaking of all the schedules.

The Witness: Depreciation on these rental stations?

By Mr. Austin:

Q. Yes.

A. We have not taken depreciation here, because, actually, the rental would cover depreciation, as we take it.

Q. Do you consider the 2½% to be the depreciation allowance?

A. That is all we were allowed.

Q. Where? Allowed where?

A. By the income tax.

Q. If you were computing the wholesale cost per gallon of distributing gasoline to these seven stations, would you not charge all of those obsolescent figures against these particular stations?

A. I would say if those were the only stations we had.

Q. Well, they are not the only ones you had, but I am asking, if you were making a computation of the cost per gallon of delivering to those stations. In other words, assuming as to the rest of your costs where you allocated it on a gallonage basis.

A. I don't know. I imagine that would depend 3005 on the purpose of what I wanted the costs for.

Q. Well, if, taking into consideration these obsolescence figures, you would show a loss on these stations, do you think that that is a fair method of computing costs on your entire wholesale business, to throw your loss onto the rest of the business, whereas, it seems to me that actually they occur because of the fact that you have an investment in these particular stations?

A. I don't know, Mr. Austin, that we would show a loss on that. You mean, now, we would show a loss as far as our rental was concerned?

Q. Yes.

A. Well, that is true, but we still own the property, and the land.

Q. If there is a loss in your rental, that may be made up by your profits in selling gasoline to the stations?

A. Yes, that is right.

Q. But that would still be a matter of computing the profits on the particular station?

A. As I say, the way we carry it, we feel it is a charge against our entire wholesale operation. There is no question that it is a loss, that there is a loss incurred at that particular station or that particular group of stations.

Q. There is no question of it?

3006 A. There is no question that any loss occasioned in any of these stations on rental comes strictly out of these stations, but we allocate it as an expense to the entire operation.

Q. Well, now, how does the operation of these stations affect or increase the sale of your wholesale business?

A. How does it?

Q. Yes.

A. That if we didn't have these stations, we wouldn't have that gallonage.

Q. You wouldn't have the gallonage at these stations?

A. That's right.

Q. But does the operation of these stations affect your gallonage or your costs as to any other station? I mean as to the sale of gasoline to any other station?

A. I don't understand. Do you mean does the operation of these stations increase our cost to any other stations?

Q. Increase it or decrease it. In other words, Mr. Biber, if you didn't have these six stations, if you sold all of those properties, do you know, would that affect your gallonage or profit in selling gasoline to any of your other stations?

A. Oh, yes; I think it would.

Q. How?

3007 A. Well, if we have our investment now in a bulk plant and trucks and drivers and so forth, now, if we deliver, oh, possibly a million and a half gallons, that these stations represent less than our per gallonage, our costs would go up. In other words, if our volume is down, our costs will go up.

Q. Then, do you mean that by investing in these properties, and operating these stations, that by getting more volume that it may, to that extent, decrease your per gallonage cost?

A. That's right.

Q. On the total?

A. That's right.

Q. And have you any idea—have you ever made any computation to determine how much effect it would have in that respect?

A. No, never.

Q. Now, turning over to Schedule 7, Respondent's Exhibit 13, for identification. That is entitled: "Interest on Use of Money Invested by Citrin-Kolb Oil Company to Operate the Business of Distributing Gasoline at Wholesale." I assume there is no real estate included there anywhere?

A. No.

Q. What does that total figure of $100,000 for 1940, represent?

A. That represents the total of the items 1 through 6. "Cash on Hand, Cash in Bank, Accounts Receivable—"

Q. Is that supposed to be capital investment?

A. Yes. That's what we have. That's the money used.

3008 Q. How did you arrive at the figure of 6%?

A. Figuring that as an interest charge at 6%.

Q. Why 6% rather than some other amount? If you had that money in the bank you wouldn't get 6% on it, would you?

A. No. The figure of 6% is purely arbitrary. It is a figure that we put on it.

Q. Were you present when Mr. Boatwright gave some testimony regarding the propriety of considering interest on investment as a distribution cost?

A. I believe I was.

Q. Do you recall that he stated that in his opinion, under good accounting practice, that interest on investment was not a distribution cost?

Mr. Abbott: Now, just a moment, if the Court please. As I recall the testimony on that, it was that there was disagreement on that subject on the part of economists and accountants, as to whether that should be charged or not.

Mr. Austin: Well, he stated, did he not, Mr. Abbott, that the Standard Oil Company does not do it, and, in his opinion, it was not a proper charge?

Mr. Abbott: Of course, the record will show, but I recall distinctly he said there was a disagreement on that.

I think ~~Mr.~~ Warmack will bear me out in my statement.

3009 Therefore, just for the record, I object to the question on that ground: that it states a fact not in evidence.

Mr. Austin: I didn't state any fact. I asked the witness what he recalled.

Trial Examiner Ballinger: Read the question.

(The question was read.)

Trial Examiner Ballinger: The objection is overruled.

A. I don't remember what he said on that, Mr. Austin, but I—

By Mr. Austin:

Q. What is ~~your~~ opinion on it?

A. I wouldn't want to express an opinion on it. If Mr. Boatwright said it wasn't, ~~my opinion~~ would be that it wasn't.

Q. Without attempting to go back to find out, now, what he actually said, I believe I am correct in saying—and I don't want to say this, if it is not so, Mr. Abbott—that the Standard Oil Company, in the cost figures submitted by Mr. Boatwright, did not include interest on investment.

A. As I say, I don't know it is good accounting practice, but in my taking these figures out, as a practical matter, I felt that money invested could be used elsewhere, and if you are using it in your business, you are entitled to interest on that investment. As I say, the rate of 3010 interest was purely arbitrary at 6%.

Q. In your testimony Friday, Mr. Biber, you were asked this question: "Q. Now, with reference to interest on investment in real estate, who is the one that determines the matter as to how much shall be charged off or deducted for income tax purposes attributable to interest on investment, both in real estate and personal property?

"A. Well, I wouldn't say I determine it. It is my job to find out how much we can deduct, and then deduct that amount.

"Q. Are these deductions—have they been approved by the Income Tax Department?

"A. They have.

"Q. Is that after consultation or has no question been raised by the Government on these questions?

"A. There was no question raised except the question of obsolescence came up this last year, and we talked to the Department, and asked how they advise we handle it."

I am calling your attention particularly to the statement that these deductions have been approved by the Income Tax Department. I have here a blank "Partnership Return of Income Tax" for 1940. [illegible] would like to have it marked, for identification.

Trial Examiner Ballinger: The reporter will mark 3011 the document Commission's Exhibit 79, for identification.

(The document referred to was marked, for identification, "Commission's Exhibit 79.")

By Mr. Austin:

Q. Will you take this return, now, Mr. Biber, Commission's Exhibit 79, for identification, being a blank form "Partnership Return of Income, 1940," Federal return, and show me where, if anywhere there, that you deduct on your partnership return for Citrin-Kolb Oil Company any amount for interest on investment of either personal property or real estate?

A. I don't think we did. I thought your question had to do with depreciation on invested capital. I don't believe—I don't know; there may be here, if I look this over, but I don't believe there is a deduction for interest on invested capital.

Trial Examiner Ballinger: You may examine the document.

The Witness: Will you give me that question again, Mr. Austin?

By Mr. Austin:

Q. Well, this was in connection with the income tax returns, questions by Mr. Abbott, and he asked you with reference to interest on investment:

"Who is the one that determines the matter as to how much shall be charged off or deducted to income tax 3012 attributable to interest on investment both in real estate and personal property?" And you said that it was your job to find out how much you could deduct and then deduct that amount, and then the next question:

"Q. Are those deductions—have they been approved by the Income Tax Department?"

"A. They have."

A. I don't believe there is any deduction for that item.

Because the question was asked, I assumed that was depreciation they were speaking about. I don't think there is such a deduction for interest on investment capital.

By Mr. Austin:

Q. I don't think so, either.

A. No. I don't think anybody would believe that. Because the question was asked, I assumed that must be depreciation.

Q. I thought perhaps you would like to correct that, if it was incorrect.

A. Yes. Because the matter that came up with the Income Tax Department was depreciation, not interest on invested capital.

Q. I will ask you now, Mr. Biber, whether any of the charges or items listed here as cost expenses under the headings "Interest on Use of Money Invested," under Schedule 7, Respondent's Exhibit 13, or any of the deductions taken for the purposes of this cost report, under Respondent's Exhibit 14, Schedule 8, were approved
3013 by the Federal Income Tax authorities?

A. No, they were not. I don't believe there was even room for such a deduction on an income tax return.

Q. They weren't submitted to those authorities, were they?

A. No.

Q. And they were not included on your partnership return?

A. No; I am sure they weren't.

Q. Now, will you turn to Schedule 8, Respondent's Exhibit 14, for identification? I would like to ask you whether that schedule isn't a duplication of the charge taken in Schedule 7 upon the items listed opposite item 5, "Personal Property"?

A. Yes, that is the same amount. Schedule 14 is merely an explanation of Item 8 on Schedule 3.

Q. Well, what is the difference between your charge of 6% interest on Exhibit 14, and your charge for 6% interest on Exhibit 13; on the same item?

A. You mean the charge on Schedule 3 and the charge on Schedule 7?

Q. No. I am talking about, now, Schedule 7 and Schedule 8, which are Exhibits 13 and 14, for identification. Now, on Schedule 7, opposite "Personal property" we have certain items.

A. That is true.

3014 Q. Certain amounts for each year.

A. Yes.

Q. A 6% interest is taken on those and charged as a distribution cost on Exhibit 9. Now, on Schedule 8 we find the same items of cost, but there is a deduction for depreciation and then, apparently, 6% is taken of the balance.

A. That's right.

Mr. Abbott: That is a misinterpretation of the exhibit. 6% is taken on the item in column 3.

By Mr. Austin:

Q. Do you understand what I am getting at, Mr. Biber?

A. Yes, I do, now.

Q. I just want you to explain why those personal property items are included both on Exhibit 13 and Exhibit 14, and what is the difference between the schedules in that respect?

A. Exhibit 13 is computed for the interest of the use of the money invested by the Citrin-Kolb Oil Company in these items.

Q. Yes.

A. Now, Exhibit 14 is an item taken off of Schedule 3, which is 6% of the difference between the cost and the depreciation which we figured is cost of the money invested in the personal property.

3015 Q. Well, doesn't Schedule 7 refer to the interest on the money invested in the personal property?

A. Yes.

Now, if you wait a minute, maybe I can get the words to explain it. I see the difference, but I—

Q. Well, tell me this, Mr. Biber, while we are on that: where is this depreciation figure, or, I believe it is a net figure on Schedule 8, where it says: "Less depreciation." That means as to some deduction of depreciation?

A. That's right.

Q. And where did the amount of the deduction come from?

A. The depreciation item?

Q. There is no depreciation item here, as I understand it, but the depreciation item would be the difference between the cost column and the "Less Depreciation" column; is that right, or not?

A. This "Less Depreciation" column is the amount that has been deducted. The difference is the present investment in the property. This "Less Depreciation"—6% of $14,712.79.

Q. As I read this, then, the column rate, these figures are the result of taking 6% of the depreciation column?

A. That's right. In other words, the depreciation column is the difference between that amount taken off, and your cost. I know the difference between these two—

Q. Then, the 6% is 6% of the depreciation figure
3016 on Schedule 8, apparently?

A. No, that 6% is 6% of $14,712.79.

Q. You said that was depreciation—if I understood you correctly.

A. The difference between "Less Depreciation" and "Cost" is your depreciation. In other words, we don't show the amount of depreciation on this schedule.

Q. That's what I understood you to say awhile ago and I understood you to contradict me.

A. No, the difference there—

Trial Examiner Ballinger: The depreciation has been computed over a series of years and deducted; is that it?

The Witness: Yes, it is off of here. It isn't on here at all.

By Mr. Austin:

Q. Are the annual amounts of depreciation shown on any of these schedules?

A. Yes, on Schedule 5.

Q. Well, doesn't that only show part of it?

A. That shows for the individual years.

Q. Isn't there more than four years depreciation taken off under Schedule 8?

A. In 1937, yes. That probably goes back to the original life of the equipment that has been depreciated up until 1937.

3017 Mr. Abbott: I presume, Mr. Biber, you could get those figures for Mr. Austin, if he wants them, from your books.

The Witness: Yes, Schedule 5 just shows the annual depreciation.

Mr. Abbott: As I understand it, the depreciation figure goes back to 1937.

The Witness: Yes. Of course, they started to depreciate before then.

Examination on Voir Dire by Mr. Austin.

Q. You are there, then, charging as a wholesale distribution cost, 6% of the cost of machinery and equipment and trucks and so forth?

A. Yes.

Q. After taking depreciation?

A. That's right.

Q. Now, to that extent, why is that not a duplication of the 6% taken on the total cost under Schedule 7?

A. That goes back to that original question.

Q. Yes.

A. Well, you see, the schedule 13 and 14 are not additional figures. They are explanations of the figures on Schedule 3 and refer back.

3018 Q. The figures at the bottom of Schedule 13 and the bottom of Schedule 14 are carried over to Schedule 3?

A. They are.

Q. So they are the same figures?

A. You say they are carried over?

Q. Yes.

A. Well, then, the figure on Schedule 13 is interest on cash capital invested.

Q. Yes.

A. And the figure on Schedule 14 is interest on personal property invested.

Q. Well, what is the difference?

A. As I say, I think I see the difference thoroughly.

Q. Isn't it true that on Schedule No. 7, you have simply taken the gross property value without deducting the depreciation?

A. That is right.

Q. Whereas on Schedule No. 8 you have taken the net property value after deducting depreciation?

A. That is right, because the items will differ. In Item No. 7 or on Schedule 13, the purpose of that deduction is interest on the actual cash outlay. In other words, we have taken a certain amount of cash and put it into personal property, and we figure our interest on that amount.

Q. Yes?

3019 A. Now, this Item 8 on Schedule 14 is your interest on the personal property investment that you have at the present time.

Q. Well, that is still the money that you put into it, less depreciation?

A. Yes, I imagine it is. It comes from the original money. There is no question about that, but you have paid for the use—

Q. Well, don't you think it is an error to include Schedule 8 or the correspondent item on Schedule 3 and that that is a duplication in part of—

A. I don't believe it is.

Q. —of the previous 6% taken on the cost of personal property under Schedule 7?

A. I don't believe so, Mr. Austin. The way I took this figure out is this, my explanation for it is this: when we bought this personal property, say, $25,000 worth, we used $25,000. We borrowed it and had to pay interest on it, or we had it and could have gotten interest on it, and bought the personal property. Had we borrowed that $25,000, we would have had to pay interest on it. Now, we have in our possession personal property which is worth $25,000, less the depreciation that we have taken over a period of years. Now, if we sold that personal
property and, say, the value is $15,000, we would
3020 have the use of that money at 6%. Whether or not
an accountant would do it that way or not, I don't know, but practically and actually, we have that expense.

Q. Well, still, the $15,000 you get is left of the $25,000 you put in?

A. It is a result of that.

Q. Yes. Well, I think we have explained sufficiently, perhaps, what that is.

Turning to Schedule 9, Mr. Biber, Respondent's Exhibit No. 15, for identification, is your theory of the charging of interest on Schedule 9 the same as your theory of the charging of interest on personal property on Schedule 7?

A. Yes.

Q. And it is true, I take it, that these figures were not allowed on any income tax return?

A. No, that has no place on the income tax return.

Q. Are they recorded on your books of account; these charges?

A. No. The values, the costs set up are recorded on our books.

Q. And is this 6% rate also an arbitrary figure?

A. Yes, as an interest rate.

Q. Looking at one or two of those figures, under the column headed "Less Depreciation Charged," now,
3021 turning back to Schedule 4, the total depreciation for 1937 on Schedule 4, appears to be $975.20, whereas on Schedule 9, the figure appears of $1,705.10.

A. I would like to look at those values again and tell you what that is. That figure includes both the depreciation and obsolescence.

Q. What is that?

A. That figure of $1,705.10 includes depreciation and obsolescence. In other words, there is a figure on Schedule 4, and to that was added an obsolescence figure.

Q. Was that only done for 1937?

A. Well, I believe that was done for every year.

Q. Well, if you will compare those two schedules, you will see that the figure for 1938 and 1939 is just carried over.

A. Yes, that is carried over. Let me see if I can explain that 1937 figure now.

Q. Mr. Biber, maybe I can help you on that. If you will turn back to Schedule 4, you will remember you told me you took only six months' depreciation in 1937. It appears that that whole year has been taken in.

A. Yes. That is where the error is. They have taken depreciation on the Linwood property for the entire year.

Q. Well, then, the figure on Schedule 9 should be $975.20?

3022 A. Yes.

Q. Of course, that will slightly increase your interest charge, will it not?

A. Yes, it will make the charge a little larger.

Q. And I believe there is a typographical error in the next figure of $1,405.54, which should be $1,450.54?

A. Yes. $1,450.54.

Mr. Austin: I think that is all, your Honor, that I have on cross-examination on the exhibits offered by the Respondent, Nos. 7 to 15, inclusive.

Mr. Abbott: I would like to ask some questions in cross-examination of the voir dire.

Trial Examiner Ballinger: All right.

By Mr. Abbott:

Q. Mr. Biber, on Schedule 2—

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Abbott:

Q. On Schedule 2 the last item is for deduction for oil at 5¢ a gallon, taken at 75,000 gallons for each year. What price for oil is that based on, if it is based on a price per gallon? Or, isn't it based on that?

A. It is not based on the price. It is just based on the cost of delivery, cost of handling.

3023 Q. How is that delivered? How is that item delivered; is it in bulk or how?

A. Well, it is either bulk or in cans. It is delivered on the gasoline truck and the gasoline truck has five racks to accommodate the carrying of oil either in boxes or in cans, and it is delivered in that manner.

Q. Is it delivered, in any event, in one of the compartments of the truck?

A. No.

Q. In your opinion, is that a proper deduction to be made, to be allocated to the cost of sale and delivering motor oil?

A. Is the amount proper?

Q. Yes.

A. I think the amount is excessive.

Q. In other words, it is conservative?

A. Yes.

Q. Now, referring to your examination of this morning, in referring to Schedule 5, which is Exhibit No. 11, for identification, introduced by Respondent, it appears there are some mathematical inaccuracies on that schedule. Have you made a computation to correct those inaccuracies? Or, I will ask you this: Have you made a computation to show the amount of interest representing depreciation at 6% on the whole schedule instead of computing it at 10%?

3024 A. Yes, I have computed it so that the figures will conform with the 6% rate.

Q. All the way through?

A. All the way through.

Q. And what difference—what is the figure for 1937, basing it on the 6% rate?

A. $1,516.81.

Q. What is the figure for 1938, basing it on the 6% rate all the way through?

A. $1,748.85.

Q. What is the figure for 1939, basing the depreciation on the 6% rate all the way through?

A. $2,138.52.

Q. And what are the corresponding figures, what is the corresponding figure for 1940, basing depreciation on the 6% rate all the way through?

A. $2,500.74.

Q. Now, have you made a computation to determine whether substituting those figures for the ones which appear on Exhibit No. 11, it would make any difference in the per gallonage cost of selling and delivering gasoline at wholesale?

A. I don't think it would make any difference within three decimal points.

Q. Well, the question was whether any computa-
3025 tions were made to determine whether there was any difference excepting—

A. No, I haven't computed the difference.

Mr. Abbott: Well, can we have a five minute recess, your Honor? I want to have him make a computation.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: I now move that we adjoin, to reconvene at 1:15 P. M.

Trial Examiner Ballinger: Motion granted, and now, at 11:50 A. M., the hearing stands in recess until 1:15 P. M.

(Thereupon at 11:50 A. M., a recess was taken, to reconvene at 1:15 o'clock P. M.

3026 Afternoon Session.

1:15 P. M.

Trial Examiner Ballinger: We will come to order.

Mr. Abbott: I want to make a motion first with reference to Respondent's Exhibit 18.

It appears from the record, your Honor, that in connection with Respondent's Exhibits 18-A to 18-Z and 18-Z to 18-z-51, that there are some separation sheets identified in the exhibit as Exhibits 18-A, 18-R, 18-Z 18-z-11, 18-z-17, 18-z-21, and 18-z-30, with respect to which no motion is made that they be received in evidence.

Trial Examiner Ballinger: The designated exhibits are now admitted in evidence.

(The documents referred to, heretofore marked, for identification "RESPONDENT'S EXHIBITS 18-A, 18-R, 18-U, 18-z-11, 18-z-17, 18-z-21, and 18-z-30," were received in evidence.)

By Mr. Abbott:

Q. Mr. Biber, this morning, I believe made a statement with reference to the net profits of the Citrin-Kolb Oil Company for the years 1937, 1938, 1939, and 1940, and you stated the amount of net profits for those years. With relation to the salaries of the partners, will you state 3027 whether that net profit is exclusive of those salaries, or includes those salaries?

A. That net profit includes those salaries.

Q. Now, Schedule 5, which is Respondent's Exhibit 11, for identification, appears to have some inaccuracies in the computation of the percentage. Have you recomputed those percentages on the basis of 6% overall?

A. Yes, I have.

Trial Examiner Ballinger: Which exhibit are you now referring to?

Mr. Abbott: Respondent's Exhibit 11, for identification.

By Mr. Abbott:

Q. I think this is already in the record, but, applying the 6% rate to the items for the four years, what result do you get for 1937?

A. For 1937, it is $1,516.81.

Q. For 1938?

A. $1,748.85.

Q. For 1939?

A. $2,138.52.

Q. 1940?

A. $2,500.74.

Q. Now referring to the same schedule, and also to Schedule 6, which is Exhibit 12, in your opinion, are 3028 the items set forth on Exhibit No. 12 for obsolescence proper charges for this item?

A. I believe they are.

Q. Schedule 6, which is Exhibit No. 12, for identification, includes only, as I understand it, obsolescence on the land and building at the various locations mentioned?

A. That is obsolescence on the buildings in the locations mentioned.

Q. On buildings, yes. Now, Schedule 5, which is Exhibit

No. 11, I believe you said was repeated as Item 5 in Schedule 7, which is Exhibit 13.

A. Yes, that figure is repeated in Exhibit 13.

Q. That is to say, the item of cost?

A. That is right.

Q. Of machinery and equipment, truck equipment and furniture and fixtures?

A. That is right.

Mr. Austin: That is right. The witness was just referring to Schedule 6.

The Witness: Schedule 7.

Mr. Abbott: Schedule 7

Mr. Austin: Well, it might be well to make it clear. At least, I am not clear as to what figures he says are now included in Schedule 7.

Mr. Abbott: I will make it clear to this extent.

3029 By Mr. Abbott:

Q. The total cost of the items of Schedule 5, which is identified in this record as Exhibit No. 11, and transposed to Schedule 7, where they appear as item No. 5, is that correct?

A. That is correct.

Q. You are referring to Exhibit No. 12, again, which is Schedule 6, and, did I understand you to say that the stations which are identified on that schedule have a gallonage output of approximately 1,500,000 gallons a year?

A. Yes, I would say that that would be the approximate gallonage of those locations.

Q. That is approximate, is it?

A. Yes.

Q. Referring to Exhibit No. 13, for identification, which is Schedule No. 7, the last line, you used the percentage of 6% as the interest on use of money invested, and you stated, in your examination, that this was an arbitrary figure. In your opinion, is that a reasonable figure to be taken?

A. I always thought 6% was a reasonable interest figure.

Mr. Austin: If your Honor please, I move to strike that question and answer upon the ground that on the question of accounting procedure and what are the proper figures, I don't think the witness is qualified. He is 3030 certainly qualified to tell us what figures are on the books of the Citrin-Kolb Oil Company and how they have been handled on those books, but he hasn't stated any basis for the use of such a figure. And he testified that it was an arbitrary figure, and I submit that he has not been shown to qualify to state an opinion upon what constitutes a reasonable figure for interest. There has been no basis of any knowledge upon which to give such an opinion, or there has been no basis for the opinion that any figure is a reasonable figure, or that the item should be charged at all. As I understand, the witness stated that he put it in here because he thought that interest on investment was a proper thing to put in as an item of cost, and there is no—it is conceded, apparently, that even that is, at least, subject to doubt.

Mr. Abbott: I am asking the question based upon his theoretical knowledge of accountancy, and also based upon his practical experience as the general manager of the Citrin-Kolb Oil Company.

Trial Examiner Ballinger: The objection is sustained. The motion is granted. The question and answer are stricken.

By Mr. Abbott:

Q. Now, Mr. Biber, referring to Respondent's Exhibit
9, for identification, which is Schedule 3; if you omit
3031 item 6 on Exhibit 9, for identification, which is headed
"Obsolescence"; if you also omit Item 7, which is
"Interest on Cash Capital Invested"; if you also omit
Item 8, which is "Interest on Personal Property Invested"; if you also omit Item 9, which is "Interest on Real Estate Invested" and if you correct the figures on Item 8, as you have indicated for "Depreciation of Equipment;" and recompute the per gallonage cost of selling and delivering gasoline for 1937, 1938, 1939, and 1940, what figure do you get for the per gallonage cost for those years, assuming that all those items are omitted from the schedule of operating costs? Have you computed that during the noon hour?

A. Yes. I have taken the total operating cost from Exhibit 8 as it stands and—

Q. Well, Exhibit 8 is "Overhead costs"?

A. "Operating cost."

Q. You haven't changed that?

A. No, I haven't changed that at all; and adding to that only Items 1, 2, 3, 4, 5, and 10, and eliminating all obsolescence and interest on cash capital or interest on personal property, interest on real estate invested, the computations on the per gallonage figures is as follows: 1937: 1.30¢ per gallon; for 1938, 1.41¢ per gallon; 1939, 1.69¢ per gallon; 1940, 1.53¢ per gallon.

Q. That is to say, if you eliminate all the items to
3032 which there has been exception raised by counsel for the commission, eliminate them all entirely, that is the result that you would get?

A. That would result in the figures I have just stated.

Mr. Abbott: That's all I have as cross-examination on the voir dire.

May we have a couple of minutes, if your Honor please?

Trial Examiner Ballinger: We will take a recess.

(Thereupon a short recess was had.)

Trial Examiner Ballinger: Reconvene.

Examination on Voir Dire by Mr. Austin.

Q. I have just one question, Mr. Biber. I am not sure whether I asked you this or not: but, turning to Schedule 6, which is Exhibit No. 12, for identification, are those figures for obsolescence in the last four columns of that schedule carried as obsolescence figures on your books of account?

A. No, they are not.

Mr. Austin: I think that is all on these schedules.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Any further questions?

3033 Mr. Abbott: Yes, I want to ask the witness a few more questions on direct examination.

Direct Examination (Continued) by Mr. Abbott.

Q. Mr. Biber, of your own knowledge, will you state the fact as to whether the Citrin-Kolb Oil Company is at the present time considering any offers from other suppliers of gasoline to supply their requirements of gasoline?

A. Yes, there is one offer which we are considering at the present time.

Q. And which is that?

Mr. Austin: I object to that, your Honor, upon the ground that—well, the time the offer was received has not been established, but Mr. Citrin testified to all the offers received and if it is something that has happened since Mr. Citrin's testimony, it seems to me that I am in doubt as to whether it could have any materiality or relevancy.

Mr. Abbott: I will say for the record that it doesn't refer to anything that has transpired since Mr. Citrin testified.

Trial Examiner Ballinger: I understand it is with reference to some negotiations or tentative negotiations now being conducted; is that correct, Mr. Abbott?

Mr. Abbott: That is correct.

Trial Examiner Ballinger: Objection sustained.

3034 By Mr. Abbott:

Q. I don't know whether you answered this or not, Mr. Biber, but does the Standard Oil Company ever pay any of the expense of equipment or maintaining equipment at any of your retailer outlets or stations that you either supply or operate?

A. They do not.

Q. Who does maintain that expense?

A. The Citrin-Kolb Oil Company.

Q. Does that include replacing ~~parts~~ that become worn out?

A. That includes maintaining the equipment, replacing parts of the equipment, or replacing the entire equipment.

Q. Does it include maintaining the appearance by repainting?

A. Yes, it includes repainting of buildings, repainting of pumps, even replacement of concrete on driveways.

Q. Do I understand that the Citrin-Kolb Oil Company pays all that expense?

A. That is right, they do.

Q. And as to whether Standard Oil Company at any time has paid any of that expense with reference to those stations, either operated or supplied?

A. They never have since we have been on a tank car basis.

Mr. Abbott: That's all with the direct examination.

3035 *Cross-Examination by Mr. Austin.*

Q. Who owns the equipment that you have been referring to, at the retail stations that you serve?

A. You mean the equipment that I say we maintain?

Q. Yes.

A. We own a lot of it, and some of it the station operator owns, and some of it the owner of the property owns.

Q. I suppose you only refer to what you own, when you say you maintain it in repair?

A. Yes, that is the only equipment we are obliged to maintain, although at some instances, to keep a customer satisfied, we do fix a pump or repair a hose, or something of that sort.

Q. And where does that expense appear in these schedules, or does it appear?

A. I believe that is either in maintenance or repairs. I don't remember the item.

Q. Item 10 on Exhibit 8 is "Repair."

A. I don't believe that figure includes any of that repair. This figure includes repairs at the bulk plant and bulk plant equipment and truck repairs, pump repairs at the bulk plant, repairs of the buildings, and so forth. I don't believe that item of pump repair appears here at all. I don't think it is an item in any of these schedules.

3036 Q. Is that because you consider it an expense incident to retail rather than wholesale operation?

A. Yes, that's part of it; because our account that carries that would also carry the repairs to equipment at our own leased and our own operated stations, so instead of trying to break the amount down, we just left it out.

Mr. Austin: That's all.

Mr. Abbott: That's all the cross examination?

Mr. Austin: Yes.

Trial Examiner Ballinger: There is one matter to be disposed of.

The Examiner, at the conclusion, would like to ask the witness a few questions, but they don't pertain to the admissibility of Respondent's Exhibits 7 to 15, inclusive, for identification.

I will hear from counsel for the Commission with reference to the offer or motion for the admission of Respondent's Exhibits 7 to 15, both inclusive, for identification, in evidence.

Mr. Austin: If your Honor please, I renew my objection to them upon the ground that the wholesale cost of distribution is immaterial and irrelevant, and, secondly, upon the basis of the cross examination I object upon the ground that there are certain items here that are or were in-

cluded in Schedule 5, which is Respondent's Exhibit
3037 11, for identification, and items in Exhibits 12, 13,
14, and 15, as to which no proper ground has been laid for including as wholesale costs upon the basis of any testimony upon the theory of including such items by any witness qualified to testify.

Of course, I realize that a recomputation has been made leaving those items out, so that, as I understand it, the offer includes now the—well, I don't know that the offer includes it. I suppose it is proper to say that the testimony of the witness now includes a computation of costs based upon these schedules, and leaving out certain of these figures, but I think at least it can be said that certain of these schedules which are here included and which are being offered, have not been properly substantiated as wholesale costs, and should not be admissible as evidence of the costs to the extent that the costs proposed to be proved are only supported by those schedules and by the testimony of the witness in regard thereto.

Mr. Abbott: Your Honor, on the question of the general admissibility, I have already stated on the record that there are two reasons why, in our opinion, this testimony is relevant. First, because, although we realize that the primary inquiry is as to the cost of the Respondent, yet the operation, the mechanical operation which is involved with reference to the sale and delivery of gasoline at retail
3038 from bulk plant to service station is practically identical, no matter who performs the function, and, therefore, the per gallonage cost of selling and delivering gasoline at wholesale from the bulk plant to the service station of this jobber has a tendency, in connection with the testimony as to the per gallonage cost of the Respondent, to tie into that testimony and to show its accuracy.

Secondly, it is our contention that this testimony is relevant because it shows a lack of opportunity, or, a lack of the potentiality—I think was the word which has been often used by the Examiner—to pass on a part of the differential between the tank car and the tank wagon price in the form of a price cutting by the jobber who participates both in wholesale and the operation of retail stations, and it is on account of this latter consideration that we particularly urge the relevancy of this testimony because in the case of this jobber, figures show that in the year 1940, the cost of selling and delivering gasoline was 1.53 per gallon or .03

more than the differential between the tank car and the tank wagon price.

Now, upon the question as to the objections raised to certain of the exhibits which have been offered in evidence. I refer now to Exhibit 9, for identification, which is Schedule 3.

During the noon hour Mr. Biber stated that he re-
3039 computed the per gallonage cost of selling and de-
livering gasoline at wholesale for all four years and eliminated from his computation entirely items 6, 7, 8, and 9 on Exhibit 9 for identification. In other words, he eliminated obsolescence entirely for each of the four years.

He also eliminated the item of interest on cash capital invested for all four years.

He also eliminated item 8, which is headed "Interest on Personal Property Invested," and he also eliminated item 9, which is headed "Interest on Real Estate Invested."

He also corrected the amounts on Item 5 by computing the depreciation at a flat 6% instead of 10%, as was done in some cases, because there was objection raised to that, and based upon those eliminations which I think take care of every objection raised by counsel for the Commission, he finds, upon such recomputation, that the per gallonage cost for 1937 was 1.30¢ per gallon; for 1938, 1.41¢ per gallon; 1939, 1.69¢ per gallon, and for 1940, 1.53¢ per gallon. In other words, eliminating every possible objection that has been raised by the attorney for the Commission, he has amended the per gallonage cost in such a way as to amend by oral testimony Schedule 1, which is Exhibit 7, for identification.

Trial Examiner Ballinger: Is it now your desire that the Exhibits shall be considered in the light of the
3040 witness' testimony?

Mr. Abbott: Yes, your Honor.

Trial Examiner Ballinger: And that such amendments and changes as he has testified to would be proper may be considered as made on the exhibits.

Mr. Abbott: Yes, your Honor. Yes, that is what I mean to say, and with those amendments which I do not concede must be physically made on the exhibits, but may be taken in connection with the testimony of Mr. Biber, I submit that the exhibits, as so amended, should be admitted in evidence, because they eliminate every conceivable objection that has been made during the examination today on the part of the attorney for the Commission. And, therefore, there is no further objection that I conceive that can be made to the exhibits as they have been thus amended.

Mr. Austin: If your Honor please, I have to take issue with Mr. Abbott's statement that the elimination of those three schedules or those four schedules and the correction on the fifth one would eliminate all objections which might be made.

Mr. Abbott: I say that have been made.

Mr. Austin: The only—there has been no objection made as such. The witness has been questioned as to all
of these schedules, and while they appear from his
3041 testimony given that some items are more doubtful
than others, I just want to make it clear that I am not conceding on any item here that it is a proper item of the wholesale cost. I want to state that for the record I don't believe I have made or have not attempted to make any statement of the objection that I might argue or might urge to the Commission in the event that this was submitted in evidence; so that is made to reserve my position in that respect.

Trial Examiner Ballinger: The Examiner is in serious doubt as to the weight to be given the testimony of the witness and the exhibits: Respondent's Exhibits 7 to 15, inclusive, for identification, but believes that that is a matter that should be passed upon by the Commission, accordingly, he overrules the objection and admits Respondent's Exhibits 7 to 15, for identification, in evidence; the exhibits, however, to be considered in the light and in connection with the witness' testimony.

Mr. Abbott: That is all, Mr. Biber.

Mr. Austin: Now, if your Honor please, I will move to strike from the record Respondent's Exhibits 12, 13, 14, and 15, and also to strike Respondent's Exhibit 11, unless it is physically corrected in the manner which the witness testified after we returned from lunch.

Trial Examiner Ballinger: The Examiner thinks the
correction should be made so that the exhibits will
3042 conform to the witness' testimony.

Mr. Abbott: Well, I don't think those exhibits 12, 13, 14, and 15, should be physically stricken from the record, because I think the Commission would want to see what they contain. Of course, the testimony of Mr. Biber assumes that the items which are contained therein shall be eliminated for the purpose of a computation which he makes.

Mr. Austin: Well, let me qualify my motion, if you will; please? I am not moving that 12, 13, 14, and 15 be physically stricken, but I am moving that they be stricken from the record, and I move that No. 11 be physically corrected to eliminate the errors in computation.

Mr. Abbott: Well, I think that possibly that last observation is well taken, but as to the striking of No. 12, 13, 14, and 15, I see no reason why they should be stricken from the record, because the Commission may want to examine into the contents of those exhibits. I understand you to say that you don't mean that they shall be physically stricken.

Mr. Austin: Well, I made the motion the same as to testimony in the record, unless there is a different policy as regards exhibits. How would that work out, your Honor?

Trial Examiner Ballinger: Without reference to the exhibits, would the Commission understand the testi-
3043 mony of Mr. Biber without the exhibits?

Mr. Abbott: I don't think they would.

Mr. Austin: If it is intended here, but I understand in answer to your Honor's statement a moment ago, before you admitted these, Mr. Abott stated they were being offered really on the last computation, which was a change in Respondent's Exhibit No 7., and that they were being offered without using or including the figures on Exhibits 12, 13, 14, and 15. Now, if that was the offer and if they were admitted upon that basis, then I think that Exhibits 12, 13, 14, and 15 should be stricken from the record, and Respondent's Exhibit No. 7 should be corrected in the margin of the exhibit, as well as to correct Exhibit No. 11.

Mr. Abbott: Well, I think the record is sufficiently clear without doing that. I don't see why it should be done that way, because the Court now, with Mr. Biber's testimony, shows us what is intended to be done, and they have all been admitted into evidence, and I think that that is the most logical way to do it, to allow the exhibits to remain in the record the way they have already been admitted by your Honor.

Mr. Austin: Well, I would like to have it appear on the record as to whether or not the Examiner has admitted in evidence Schedules 12, 13, 14, and 15, and the compu-
3044 tations based thereon or whether the admission in evi-

dence was an admission of computation made without using the figures on those schedules.

Trial Examiner Ballinger: The Examiner admitted all of the exhibits in evidence to be considered in the light of and in connection with the testimony of the witness. He understood that the witness, in his last computation, omitted all of the items appearing on Respondent's Exhibits 12, 13, 14, and 15. That is clear on the record. While the exhibits are being included in the record, to be considered as having been put into discard by the witness.

Mr. Austin: Well, then, in that case your Honor, I move—I withdraw my previous motion and request that on Respondent's Exhibit No. 7, the figures in the last column—no. I move that Respondent's Exhibit No. 7 be stricken, but that the Respondent be permitted to substitute for that a computation based upon the figures as stated by Mr. Biber after lunch. I don't think they could be corrected, but I think it should be stricken and another exhibit put in its place, and, if that is done, then I don't object to leaving 12, 13, 14, and 15 in evidence, and if the Respondent wants to argue to the Commission later that those should have been included, then he can also do that, but I understand it now, Exhibit 7, as it stands, is not what is admitted into evidence.

3045 Trial Examiner Ballinger: The corrections which the witness has testified, should be made.

Mr. Abbott: Well, they are already made on the record.

Trial Examiner Ballinger: I say they are made on the record.

Mr. Austin: Don't you think that when anything is put in in the form of an exhibit that it should reflect on its face what is in the record? I see no advantage of an exhibit unless you can look at it, and, without turning to the record, get some benefit from it. If the exhibit alone is misleading, I don't think it is any good.

Trial Examiner Ballinger: I think it would be helpful to anyone picking up the record and examining only the exhibit, but I think this may be informative to the Commission to let these exhibits stand as they are, and considered in the light of the witness' testimony.

The motion is granted.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 7 to 15, inclusive," were received in evidence.)

Mr. Abbott: That is all, Mr. Biber.

Mr. Austin: Just a moment, Mr. Biber. I have something in mind here.

3046 *Cross-Examination (Continued) by Mr. Austin.*

Q. Would you mind referring to your figures again on your net profits shown on the partnership returns for 1937, 1938, 1939, and 1940? Now, will you tell me again the net profit figure for 1938?

A. $40,116.13.

Q. And for 1939?

A. $34,207.42.

Q. Wasn't there—what is 1937? That was the first one.

A. $45,839.59.

Q. Now, turn to Respondent's Exhibit No. 7, Mr. Biber. Does the next to the last column of that show the total gallons of gasoline sold by the Citrin-Kolb Oil Company in the representative years given there?

A. Yes.

Q. And that is exclusive of gasoline sold at the retail stations you operated, is it not?

A. That is right, it is.

Q. Have you made a computation for any year—and I would suggest the use of the year 1938, because that seems to be the largest gallonage and it isn't the largest profit year—so that for an average year, fairly average year, I would suggest that the profits for the year 1938 be divided by the number of gallons of gasoline, and if they were done, would that, in your opinion, show the net profit per 3047 gallon of gasoline made by the Citrin-Kolb Oil Company during that year?

A. No.

Q. There would have to be some deduction for oil, I suppose.

A. There would have to be deductions for oil. There might have to be deductions if there were any profit in rent.

Q. Were there—

A. I don't know that there were, but the figures that I gave you for the net profits have nothing to do with allocating it to gasoline. The net profit as shown on the income tax return is everything.

Q. Of course, if there were any profits in operating the retail stations, that would have to be eliminated, is that right?

A. That would have to be eliminated.

Q. And profits on the sale of oil?

A. That would have to be eliminated.

Q. And profits on real estate transactions which, I suppose would include rental?

A. That's right. That would have to be eliminated.

Q. On rental profits, that would be simply the excess of rent received over rent paid, or what would it be?

A. Excess of rentals received over rent paid; and
3048 that's possible in 1937 and 1938 that there was.

Q. I would like to have, if it could be obtained without any great difficulty, a break-down of your net profits; that is, have you make an allocation. It doesn't have to be absolutely accurate, but I would like to have an allocation made of your net profit as between gasoline and other sources of revenue and have you able to tell me, if you submitted such an allocation, how you made it.

A. I don't think it is possible to make it.

Q. You don't think it is possible?

A. No. The retail stations are all in that. In other words, on the income tax return we cannot and would not be allowed to make any differences. We can't file more than one return, and I—

Q. You very readily here made a deduction here for costs on oil and other things.

A. If that is the kind of a computation you want, then we could do it. In other words, we could break it up in round figures. ~~There wou~~ldn't be any difficulty about that, but if you wanted us to go back into the books and divide them, I don't know how that could be done.

Q. As long as these cost statements have been submitted upon the assumption—whether it be right or wrong—that the proper charge for oil was 5¢ a gallon on costs—

A. That's right.

3049 Q. —if the sum of $3,750, which is your sum of cost for oil, if that were taken as a percentage of your total costs, then I assume your could apply the same percentage to this income figure?

A. Yes it can be done on that basis.

Q. And it seems to me that would be consistent. If you are going to apply that to costs, it could be just as well applied to profit?

A. If you want to determine from what we know about the business, about how much profits is in oil and what part of the profit is in real estate and what part of the profit is in gasoline, we could do that. But I was thinking of pulling these figures out of the books.

Q. No. I was trying to ~~get~~ merely a rough approximation, and, as I understand your testimony, this figure of 5¢ a gallon, while it is attributed to oil, it is intended to cover all the expenses other than wholesale gasoline costs.

A. That's right.

Q. I believe that is sufficient, because anything beyond that would be computation. Can you think of any reason why it wouldn't be possible, from the figures here to make that sort of computation?

Mr. Abbott: I will object to that on the ground it calls for a mathematical conclusion of the witness.

Mr. Austin: I am not trying to do that.

3050 A. Apportioning the profit would be a tough proposition.

I happen to remember one instance where we bought some tanks we thought we might be able to use. We found out later we had no use for them and we sold them at a profit. Those items would come in. We sold real estate at a profit. There would be a lot of items to consider.

Q. What those would be, outside of anything comparable to an allocation in costs of operation?

A. That's right. In other words, they wouldn't be reflected in the cost, and still it would be in the profit.

Q. Do you know whether in 1938 and 1939 there were any substantial real estate transactions that resulted in a profit?

A. I would say there were some. I wouldn't say they were substantial.

I know of a couple of pieces sold, that were vacant, that we contemplated erecting stations on and sold them for the land itself, at a profit.

Q. Would that be in 1938 and 1939?

A. 1937 or 1938.

Q. We have been told here several times, 1938 was not such a good year, so I was wondering whether you had any of those unusual transactions in 1938.

A. Well it might have occurred in 1938, because it was easy to buy things cheaply in 1938 if you had the cash.

3051 Q. But, of course, that wouldn't have resulted in any profit until you were ready to sell it?

A. Not until we sold it.

Mr. Austin: I think we have pursued that far enough. Thank you, Mr. Biber.

Mr. Abbott: That's all, Mr. Biber.

Mr. Abbott: That's all, Mr. Biber. May I go off the record?

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I am through on the schedules, but I have further cross-examination.

Cross-Examination (Continued) by Mr. Austin.

Q. Mr. Biber, I would like to have the reporter read the record in the voir dire examination, and wish you would answer the last unanswered question.

The Reporter: "Q. The photographs and sales slips referred to were pictures of stations and, I believe, sales slips indicated purchases made at stations near a certain group of Citrin-Kolb stations.

"A. That's right.

"Q. Six stations which were either operated by or supplied by Citrin-Kolb. By your answer to that question did you mean to indicate that all of the stations in the

3052 neighborhood of those six Citrin-Kolb stations were charging the prices shown in those pictures?"

A. I would say by that answer I meant that these pictures and the buys made were not the only one that I could have made at that time in those vicinities.

Q. Do you mean at the same price?

A. At the same price or at a discount price.

Q. Well, will you answer my question, which was whether or not in giving this answer on page 2879 of the record, you meant to say that all of the stations in the neighborhood of the six Citrin-Kolb stations were charging the prices shown in these photographs.

A. All of them? No.

Q. Did you mean that the majority of these stations in that neighborhood were charging the prices as low as those in the photographs?

A. At the time the photographs were taken I would say they were, with the exception that there weren't other stations selling at the same price as shown in the photographs of Charles Austin's stations, Joy or Zip stations, but where the photographs showed a discount sign on a major product, I would say that a great majority of the stations around that station also displayed signs.

Q. But you would not apply that to any of the pictures or sales slips except those on major products?

3053 A. That's right. There never has been a meeting of the posted price on that Joy or Zip gasoline.

Q. Now your answer covered the years 1938 to 1941, inclusive, and you stated, I believe Friday, that conditions have been much better since November, 1939.

A. Yes, they have been.

Q. Then, would you say as to the period from November, 1939, to date, that those pictures and purchase receipts showed conditions typical of the price cutting prevalent in the Detroit area?

A. I would say that there are a great number of stations in the Detroit area that did sell gasoline at the same price as the buys or pictures shown in the exhibits; right up to the present time.

Q. What do you mean by "great number"?

A. It is almost impossible to say, because you would have to make a buy. There is no indication at stations now of discount selling. All discounts now are under canopy discounts.

Q. Going back to the years 1938 and 1939. Do I understand you to say that the majority of the service stations in the neighborhood of those six Citrin-Kolb stations, respectively, were selling gasoline at retail at prices below what has been referred to as the prevailing retail price?

A. Yes, I would say a great majority of them had been.

3054 Q. What is your understanding of the term "prevailing retail price" as it has been used in this case?

A. Well, the prevailing retail price, as used in this case are those figures on the schedules in evidence here, which are prices from which the trade computed their discounts. It was a figure that the trade and the industry at large accepted as the retail selling price, and it is true that in many instances a lower price actually prevailed. The word "prevailing" is rather a name of the price rather than a description of the price.

Q. Is it your understanding that the term "prevailing retail price" means the price being charged at any one time by the majority of retail stations selling major brand oil?

A. No, that is not what was meant by a prevailing retail price, and it is not the sense in which prevailing retail price is used in the industry.

Q. Who determines what the prevailing retail price is?

A. I would say custom and usage in the industry determines that. In other words, when 75% of the stations display signs 2¢ off and the prevailing retail price is 17¢, in the definitive form, the prevailing price is 15¢, but using the prevailing price in its descriptive form, the prevailing price is 17¢. It has got to be 2¢ off of something, and it is what we call 2¢ off the prevailing price.

3055 Q. How does the 17¢ come into being?

A. Well, I would say since 1937 and 1938 the prevailing retail price here in Detroit has been determined largely by the dictates of the Gasoline Retailers Association. They have told their dealers that they ought to have a certain margin, and that is the margin they ought to sell at, and anybody selling under that margin is either approached by members of the Association or otherwise approached through the oil companies, through the suppliers, to meet that price. It is a price they said gasoline should be sold at.

Q. It doesn't appear that the efforts of the Association did much good, if the majority of the members sel below it.

A. I don't say the efforts did much good, but I say that is a way of determining what the retail, prevailing retail price was. Using the prevailing retail price as we have used it here, rather than—

Q. Isn't the prevailing retail price, the price which most of the major dealers have posted on their pumps?

A. Yes, posted on their pumps; that's right.

Q. And isn't it true that the number of stations advertising cuts below that posted price varied, from time to time?

A. The number of service stations varied?

Q. Yes.

A. Oh, yes.

3056 Q. In the areas which those photographs are supposed to cover?

A. Oh, yes; surely.

Q. Then, again referring to your statement that those buys and pictures show conditions typical of price cutting prevailing in the Detroit area for the years 1938 to 1941, inclusive, do I understand you now to say that such price cutting was not prevalent during the years 1940 and 1941? I am talking now about advertised price cutting, now, Mr. Biber, because that's all the photographs show.

A. You mean posted discounts?

Q. Yes.

A. You asked me about photographs and buys. On the photographs, alone, since the latter part of 1939, many of the signs have been eliminated, and I would say in the last, possibly last year, there are very few signs posted, although there are still some today.

Q. Have you any personal knowledge, beyond the purchases which you have made and testified to here, as to the extent of under canopy discount which was present during 1940? I would like to amend that by striking out the word "prevalent". I would like to say which existed during 1940.

A. Do I have personal knowledge?

Q. Yes.

A. I believe I have. I have been told by salesmen.
3057 I have been told by our supervisor to go out and make buys, to get information. I have a lot more information in my files that spreads over the City of Detroit.

Q. Do you have any information of discounts being given, other discounts than to what you have testified?

A. Yes.

Q. You have made purchases at other stations?

A. Oh, yes; I have made other purchases, but when I say "Yes" now, I don't say from purchases I have made. From conversations with the dealer himself, and conversations with customers, conversations with customers we have lost; under canopy discounting is quite prevalent today.

Q. When you say "prevalent" I would like to get at that.

A. I wouldn't like to put a percentage on that. I would say you wouldn't have to go three blocks to get a discount on your discount.

Q. Today?

A. Today.

Q. Does that apply to stations dealing in brands of major oil companies?

A. Yes, I am talking about major brands.

Q. You referred a moment ago to the prices charged by the Charles Austin stations, Zip and Joy gasoline, and didn't you say that their advertised price was always lower than the major price? You said something
3058 about a differential which had always existed there.

A. Yes. No major product has ever met the price of Austin's stations.

Q. Isn't there a certain recognized differential as between those gasolines and major gasolines?

A. Is there a recognized differential?

Q. Yes.

A. I only know that there always has been a differential. Whether there is any recognized figure, or not, I don't know. I don't believe there is.

Q. Is the difference between the price at which they sell and the price at which major brands sell at retail generally referred to as a differential?

A. I don't believe so.

Q. You quoted that on Friday in your testimony. You referred to the differential between Zip and Joy stations and majors, and I think you said something about it being greater at some times than others.

A. That's right. There hasn't been any fixed differential; that is, as between tank car and tank wagon price. There is a difference in price.

Q. How is that generally referred to as?

A. It is generally referred to as a differential, but not the differential.

Q. Well, a differential.

3059 A. Yes. There is no question there is a difference in price.

Q. Aren't the Zip and Joy prices generally referred to as—rather, the difference between those prices and major prices, isn't that generally referred to as the differential, rather than a price cut?

A. I would say—I don't know whether it was referred to that way or not, but I would say it was. In my own mind, it is a differential.

Q. What would you say is a normal differential or can you make any statement on that, as between Zip and Joy gasolines, and gasoline of that type?

Mr. Abbott: I object to the use of the word "normal".

Mr. Austin: I am asking him whether he can state it. I will withdraw that, because it is too indefinite. I will restrict it to Zip and Joy.

Mr. Abbott: On the word "normal". I object to that on the ground the question isn't intelligible because it might be assumed that the word "normal" would mean what was to be expected. I think the question is indefinite.

Trial Examiner Ballinger: Read the question.

(The last question was read.)

Trial Examiner Ballinger: What do you understand by the word "normal"?

The Witness: Well, I understand Mr. Austin to
3060 mean what difference in price would be allowed and still leave the products comparable in price.

Mr. Austin: That's right.

Trial Examiner Ballinger: Ordinarily?

The Witness: Ordinarily. I would say there should be a 1¢ differential.

By Mr. Austin:

Q. 1¢?

A. That's right. That, I believe, is a figure accepted by most operators and most people in the industry, and a figure once quoted at the Retail Gasoline Dealers Association Directors meeting, in my presence, as being the proper differential.

Q. By "proper differential" do you mean a price at which the—

A. By that I mean that anything, any differential over 1¢ should be considered price cutting, because a differential of 1¢, I would say, is proper, but if Austin's prices are more than 1¢ lower than major prices, the difference between that price and 1¢ is price cutting.

Q. How about gasolines like sold on tank car spot market, or any unbranded gas?

A. I wouldn't venture as to that gas, because that is a product that changes every day. These people buy a different brand every day. There is no brand or quality to their gasoline.

3061 That gasoline is not comparable to Zip or Joy which he advertises and which is subject to chemical analysis and which he advertises as Grade 1.

Q. In other words, you consider the Zip and Joy as having a better public acceptance than the unbranded?

A. Oh, yes; unquestionably.

Mr. Austin: Now, if your Honor please, upon the basis of the witness' testimony, I move to strike from Respondent's Exhibit 18-A to 18-Z-51, all notations that now appear thereon with regard to prevailing prices, upon the ground that the witness has testified that they do not represent the prevailing price within the usual meaning of the word "prevailing" and, therefore, there is no basis for comparison, because the prevailing price stated on there is a fictitious price, or, at least, was not the price charged by the majority of stations during the periods referred to.

Trial Examiner Ballinger: Let the Examiner see the exhibits and notations to which reference is made.

(Thereupon the documents referred to were handed to the Examiner.)

Mr. Austin: You can just open them at random. Here is one of them (referring to a document).

Mr. Abbott: That is the Standard Oil Company of Ohio. Is that what you referred to?

Mr. Austin: I just opened it at random. I move
3062 to strike out all of them that appear on these sheets.

Mr. Abbott: Is it my understanding you claim Mr. Biber's testimony is different than what was stated the other day as to what constituted the prevailing retail price?

Mr. Austin: I don't know whether there has been a statement before. I asked Mr. Biber whether the majority of these stations, at the time these photographs were referred to, were charging this price, and he said the majority of them were cutting, and I say that if the majority were indulging in it, they were not the prevailing price. The prevailing price means the price charged at the majority of stations at any one date, and if it means something else, I don't think this annotation should be on here.

Mr. Abbott: If your contention is correct, you would have to compute for every year to determine the number of stations who were price cutting and determine whether there were more that were price cutting than weren't price cutting. I don't think you could make any substantial evaluation of the situation, based on the four years involved in that book, because those pictures cover 1937, 1938, 1939, and 1940.

Trial Examiner Ballinger: The witness has testified, as the Examiner recalls, that the prevailing retail price is the price prevailing at the majority of the stations. Is that correct?

3063 Mr. Austin: I don't understand it quite that way, your Honor. I understand him to say that the word "prevailing" has two meanings, the technical meaning, and then of the definitive meaning. He has said this is not the price being charged at the majority of stations, but it is the price posted on the pumps at the majority of stations, and I am not sure, farther, whether he went on to say it was simply a basis used for cuts.

Mr. Abbott: I will say this, your Honor. I think the motion is purely premature. I don't think the motion should be asked until I have an opportunity to redirect examine the witness, because as the Court has stated, the witness' testimony is not very clear, and I think it should be definitely brought out on redirect examination.

Mr. Austin: I think it is very clear.

Mr. Abbott: As to what he meant when he answered that question.

Mr. Austin: I think it is very clear that the witness has stated that at least in a considerable part of the time covered by these photographs, that the price here called the prevailing price was not the price in the majority of the stations.

Trial Examiner Ballinger: The witness testified to that with certainty.

Mr. Abbott: I wish to redirect examine the witness before the Examiner passes on that motion. I
3064 think I have a right to do that.

Trial Examiner Ballinger: You may do so at this time.

Mr. Abbott: I would also like to have an opportunity to examine the record and have read back the testimony which was asked him when he made the answer as to what was the prevailing retail price, so it could be identified as to the year as to which it was testified.

Trial Examiner Ballinger: Mr. Reporter, read the record, in that regard.

(The record was read.)

Redirect Examination by Mr. Abbott.

Q. Well, Mr. Biber, having considered the testimony which you gave a few minutes ago, and which has now been read to you, I will ask you in connection with Exhibits 18-A to 18-Z and 18-Z to 18-Z-51, what you meant to testify with reference to what constitutes the prevailing retail price and what constituted the prevailing retail price for the years which the pictures in that exhibit portray?

A. Well, as I said, the term "prevailing retail price" is a price which the industry understands to be the retail selling price, the consumer's price.

Trial Examiner Ballinger: That is the actual price?

3065 The Witness: No, that is not the actual price. It is a word used from which the actual price is computed, if a man were going to discount, if a man were going to sell at full price, he would sell at what we call the prevailing retail price, prevailing not meaning the price at which gasoline is sold at most stations. It is a term used which I think ought to be defined in the manner of the term used. For instance, we used the term "drum" as meaning a barrel for oil, and an orchestra leader thinks of a drum as an instrument, a musical instrument. Now, by the same token, it is not what Webster would call in his dictionary, but what the industry calls it, and the prices on those pictures and the testimony I gave concerning retail prices is a term used in the industry, but it is not and does not mean sold at most of the stations, but the price at which most of the stations sold it. The pump carried the price 17¢, and most of the stations carried it at 17¢. Now, that is the prevailing price as used in the industry. The fact that they may have sold under that and given 2 or 3 or 1¢ discounts had nothing to do with the term "prevailing retail price".

Mr. Abbott: In view of the testimony the witness has given, I move that the motion be denied.

Mr. Austin: Let me ask one more question, your Honor.

3066 Trial Examiner Ballinger: All right.

Recross Examination by Mr. Austin.

Q. At the time shown in those pictures, were the prices charged by the Citrin-Kolb Oil Company and its various stations—

A. I can explain that this way: the reason for taking these pictures in many cases was to show surrounding competition to justify our cutting the price. Later, and I would say that in most of these instances, soon after these photographs were taken or some time after these photographs were taken our stations cut to meet this competitive price, and that originally was the purpose of these photographs. So, our stations never cut prices on the date that those photographs were taken or before, but usually after, except in the instances of 1940 and 1941, our stations cut prices to meet that competition, and in 1940 and 1941 we never cut the price.

Q. Did the majority of the stations cut the price in 1940 and 1941, the major oil company stations?

A. No.

Q. In 1940 and 1941, is it your testimony that the prevailing price shown by the pictures and buys shown for that period represent the price?

A. Yes. You mean in 1940 and 1941?

3067 Q. Yes.

A. Yes, I think that would conform to my definition and your definition of 1940 and 1941.

Q. Now, as to 1938 and 1939, do I understand your testimony to be that the majority of the stations in those neighborhoods did not charge what is referred to as the prevailing retail price?

A. That is right.

I would say in 1938 and 1939 most of the stations were giving discounts off of the prevailing retail price.

Q. And you are using "prevailing price" now in the technical industry sense?

A. That is right.

Q. Just one more question. Why, in that period, were those Citrin-Kolb stations among the last ones to, or at least not among the first group to cut? I understand your testimony to be now that the majority of the other stations in the neighborhood were cutting before the Citrin-Kolb stations?

A. That is right.

Q. Does that apply to the six stations?

A. That applies to any station that we happened to be operating at the time.

Q. Operating?

A. Yes, I am talking about operated stations. When I say Citrin-Kolb stations cut afterwards, it is with
3068 reference to operated stations.

Q. It was to your advantage, as a wholesaler, to have your dealers as well as operating stations maintain the higher price, meaning the technical prevailing price, as long as possible, provided you could do so without losing too much volume; isn't that right?

A. Yes, sure. They could pay their rent and pay their bills.

Mr. Austin: Now, your Honor, I renew my motion, but only as to the references in those exhibits to prevailing prices, and any computation based thereon where it appeared upon the photograph, where the notations appear prior to January 1, 1940; and I withdraw the motion as to the notations on the 1940 and 1941 photographs, because it now appears that the notation as to prevailing price there would not be misleading.

Mr. Abbott: Well, they are not misleading as to any of them, and the testimony of the witness was only with reference to the locations in which these six Citrin-Kolb stations, as shown in Exhibit 18 are located, with reference to whether the majority of the stations in those localities only were selling below the normal price. That doesn't refer, you say, to the entire metropolitan area of the City of Detroit. The answer of the witness was restricted to those six locations, and, therefore, it
3069 cannot be said in any way to qualify his definition of what constitutes the prevailing retail price. This is merely an attempt, if the Court please, to play on words, and, as Mr. Biber has stated, he has stated what the words "prevailing retail price" mean in the market or in the sense of the understanding of the person engaged in the gasoline industry in Detroit. I don't think that the motion is well taken as to any of the years which are represented by that exhibit.

Mr. Austin: If your Honor please, I think it is very well taken, and if there is any play on words, I think it is by the Respondent offering that. It is quite obvious that if you had a price, as Mr. Biber so states, called a prevailing price of 17¢, and if every station in a certain neighborhood had a sign up "2¢ off," and were selling for 15¢, there would be absolutely no point in those pictures and they would not at all prove what they are introduced to prove. They are put in there for the purpose of showing what is called price cutting and if all the stations charged the same price, all the major stations charged the same price, then I submit that no station charging such a price is a price cutter in that particular time.

Mr. Abbott: In that particular location?

Mr. Austin: Yes. The exhibit is limited to competitive areas around there, competitive stations around there.

3070 Mr. Abbott: The exhibit refers to competitive prices in the Detroit area. There are 2,500 of those involved. Mr. Austin's play on words is only with reference to the six locations shown by Exhibit No. 18. Those are isolated locations and they were put in there for the purpose of showing the six stations, as to which complaint was made by the testimony in the Commission's case. But it doesn't cover the entire city of Detroit. Now, what was the prevailing retail price in those particular six locations is not going to determine what is the prevailing retail price in the Detroit area. That is, as far as Mr. Austin's objection goes, and, for that reason, it is not well taken on this record, and the motion should be denied.

Mr. Austin: It is quite obvious, your Honor, if that is not intended to be the prevailing retail price in the localities in which that exhibit refers to, it certainly should not be there at all.

Trial Examiner Ballinger: The Examiner sustains the motion, and all the notations appearing on the exhibits will be stricken. We will take a five minute recess.

Mr. Abbott: That is only for two years.

Trial Examiner Ballinger: That is right.

Mr. Abbott: Well, I want to have your Honor restrict your ruling so as not to include the years 1940 and 1941.

Trial Examiner Ballinger: That is right. The
3071 motion was to strike the notations appearing on it
as to the date prior to January 1, 1940, and that
motion was granted by the Examiner.

Now we will take a five minute recess, and the notations appearing on the Respective exhibits may be expunged.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Abbott: Mr. Biber, I want to ask you one more question on the record. You don't need to take the stand.

You said something in your testimony about the supplier of gasoline having something to do in relation to the determination of the retail price. Now, when you use the word "supplier" did you refer in any way to the Standard Oil Company, the Respondent?

The Witness: No, I don't know what the Standard Oil Company does, but I believe the testimony was that the gas dealers association either informed their dealers what they thought the prevailing retail price was or else they informed the supplier to inform the dealer to meet that price.

Mr. Abbott: Who is the supplier?

The Witness: I know it has been done in our case. I don't know about other people, though.

Mr. Abbott: Do you mean to imply that the Standard
Oil Company, the Respondent has anything to do with
3072 establishing retail prices in the Detroit area or has
had anything to do in that connection since it went
on the Iowa plan in 1936?

The Witness: No, I did not imply that or I did not mean to imply that.

Mr. Abbott: I see. That is all.

(Witness excused.)

Mr. Abbott: I call Mr. Charles H. Gershenson. Mr. Gershenson, take the stand.

CHARLES H. GERSHENSON was thereupon called as a witness by and on behalf of the Respondent, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Abbott.

Q. Mr. Gershenson, where do you live?

A. At 17305 Muirland Avenue in the City of Detroit.

Q. That is M-u-i-r-l-a-n-d?

A. Yes, sir.

Q. What is your business, Mr. Gershenson?

A. I am connected with Ned's Auto Supply.

Q. What is your official connection with that company?

A. I am the president.

Q. Is that a corporation?

A. Yes.

3073 Q. Organized under the laws of the State of Michigan?

A. Yes, it is.

Q. And how long has that company been in existence, Mr. Gershenson?

A. You mean in its present corporate form or right from its inception?

Q. Yes, you may state that, and I will ask you how long it has been in business under other forms.

A. I don't have the exact date of the incorporation, but I could refer to it from the file.

Q. Well, approximately how many years has the company been incorporated?

A. In 1939—about three years.

Q. And prior to the time of its incorporation, what was the nature of its existence?

A. As a co-partnership.

Q. As a co-partnership, how long had it existed previous to the time of its incorporation?

A. About ten years.

Q. Ten years. By whom was the business established?

A. It was originally established by our father.

Q. And what is his name?

A. His name was Ned.

Q. His name was Ned Gershenson?

A. Yes, sir.

3074 Q. And the word "Ned's" as now incorporated in the corporate name was from his first name; is that correct?

A. Yes, it was.

Q. And how long ago did he start to be engaged in the gasoline business?

A. In the fall of 1918.

Q. And how long, do you know if the Standard Oil Company of Indiana has been the supplier of either your father, when he was engaged in the business and of the company when it was a partnership, and of the company when it was been a corporation? What is the total number of years?

A. Approximately 23 years now. Since the very first day my father started in business, we started to buy Standard Oil gasoline. We never changed.

Q. Where did your father start in this business? Where was the business located?

A. At 18023 John R Street, near Nevada. It is off the corner, between Nevada and Savannah on John R.

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Q. Did he have more than one station at the time he started in?

A. No, he did not.

Q. And when he first started in, was he a tank car or a tank wagon customer of Standard Oil?

A. Tank wagon customer.

Mr. Abbott: Will you mark these, Mr. Reporter—

3075 I have six exhibits, your Honor, which I wish to have marked for identification.

Trial Examiner Ballinger: The reporter will mark the exhibits—

Off the record.

(A discussion off the record.)

Trial Examiner Ballinger: On the record.

The reporter will mark the documents Respondent's Exhibits 39, 40, 41, 42, 43, and 44, for identification.

(The documents referred to were marked, for identification, "Respondent's Exhibits 39, 40, 41, 42, 43, and 44.")

By Mr. Abbott:

Q. I show you, Mr. Gershenson, Respondent's Exhibit 39, for identification, and ask you to identify that and state what it is, please?

A. That is the current photograph of the station that my father first opened up on John R and Nevada.

Q. And is that still being operated as a company station?

A. Yes, it is.

Mr. Abbott: I offer the exhibit in evidence.

Mr. Austin: Is this station still operated by the supplier, by the supply company?

The Witness: Yes, it is.

Mr. Austin: I have no objection.

3076 Mr. Abbott: There is no objection to the admission of Exhibit 39, your Honor.

Trial Examiner Ballinger: Respondent's Exhibit 39, for identification, will be admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 39," was received in evidence.)

By Mr. Abbott:

Q. Now, I show you next, Mr. Gershenson, Respondent's Exhibit No. 40, for identification, and ask you to identify that and state what it is, please.

A. That is also the photograph of one of the service stations we operate, located at Michigan and Maple Avenues.

Q. And is that presently occupied as a company station?

A. Yes, it is.

Trial Examiner Ballinger: When was this photograph taken?

Mr. Abbott: These are intended, your Honor—

Trial Examiner Ballinger: I would like to know whether it was 20 years ago or 10 years ago, or the present time?

The Witness: That is a current photograph. That is taken within the past three or four years, and there has been no physical change.

3077 Trial Examiner Ballinger: When was Respondent's Exhibit 39, that photograph, taken?

The Witness: That would follow within the same category, within the past five years, based on the physical appearance of the building.

By Mr. Abbott:

Q. Both these exhibits, 39 and 40, represent the respective appearance of the premises at which the business is at the present time?

A. Yes, they do.

Mr. Abbott: I offer Exhibit No. 40 in evidence at this—

The Witness: Except for some signs.

Mr. Abbott: This offer of Exhibit 40 is not done for any idea of displaying the price at which gasoline was sold. I merely wish to have the portrayal of the places where the Ned's Auto Supply does business.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: Do you know the dates of any of these photographs, Mr. Gershenson?

The Witness: No, I do not. I could tell from the physical appearance of the building how recent they are.

Mr. Austin: Are there any of them more than four years old?

3078 The Witness: They might be five years old. I saw the sign on the John R station, which might go back about—no, I don't believe that one was more than four years old.

Mr. Austin: This one at Gratiot Avenue and Madeline was marked April 18, 1941.

The Witness: I had not seen that yet. He had not shown it to me. They are all comparatively current, within the past four years.

Mr. Austin: Who took those photographs?

The Witness: I don't know.

Mr. Austin: Where did they come from? Where did you get them?

The Witness: Mr. Abbott just gave them to me.

Mr. Austin: Do any of these photographs show any changes in the set-up of the stations which have been made during the past four years?

The Witness: They represent the current physical appearance of the buildings, as I looked at them.

Mr. Austin: But do they represent the way the station looked, say, in 1937 or 1938?

The Witness: Yes, they do, if the station was there. A couple of them weren't built at that time.

Mr. Austin: All right. I won't object to them.

Mr. Abbott: I offer Respondent's Exhibits 40, 41, 42, 43, and 44, which were marked for identification, in evidence at this time, your Honor.

3079 Trial Examiner Ballinger: Without objection, Respondent's Exhibits 40, 41, 42, 43, and 44, for identification are admitted in evidence.

(The documents referred to, heretofore marked for identification, "RESPONDENT'S EXHIBITS 40, 41, 42, 43, and 44," were received in evidence.)

By Mr. Abbott:

Q. Now Mr. Gershenson, taking all those exhibits together, will you state whether they all represent the current appearance of your various gasoline filling stations, together with Exhibit No. 39, according to the street number or intersection number, as indicated on the Exhibits?

A. Yes, they do.

Q. All right. How much of an investment, in dollars, has Ned's Auto Supply in this business at the present time?

A. I don't quite understand the question. You mean in land, buildings, and inventory, the total investment?

Q. Yes, what is the total investment of the Ned's Auto Supply in business at the present time?

A. My best judgment would be that, and this is just in round numbers, about $100,000 in each station. About $600,000 for all of them together.

Q. About $600,000 total?

A. That represents my best present estimate.

3080 Q. And what volume of total sales does your company have at the present time on an annual basis?

A. Well, that would be—

Trial Examiner Ballinger: Sales of what?

Mr. Abbott: Merchandise.

Trial Examiner Ballinger: How is that material?

Mr. Abbott: I would like to have the Commission, if the Court please, get a true picture of the nature of this company's business, and the annual volume it does.

The Witness: About $2,000,000 a year.

By Mr. Abbott:

Q. And does—do you sell anything besides gasoline and petroleum products?

A. Yes, we do.

Q. What range of merchandise do you sell?

A. We sell all automotive supplies, such as tires, batteries, and what is commonly incorporated in the term automotive accessories; and electrical appliances, home appliances, such as refrigerators, washing machines, ranges, gas and electric ranges, vacuum cleaners, radios, sporting goods of various kinds, such as fishing and base ball, tennis, and golf equipment, as well as other miscellaneous items, such as gardening needs and hardware, paints, and I guess that covers all the broad fields. We,
of course, have also service garages where we render
3081 automobile services, such as lubrication, brake work,
and tire and battery service.

Trial Examiner Ballinger: Repair work?

The Witness: No general repair work, no, sir; no motor work, no ignition work.

By Mr. Abbott:

Q. You already stated that from the time your father went into business selling gasoline, he was on a tank wagon price. Now, up to what time were you on a tank wagon price?

A. Up to March of 1938.

Q. Some time previous to that, did you go on a basis just less than the tank wagon price?

A. In September of 1936.

Q. And how much differential off the tank wagon price did you receive at that time?

A. ½¢ a gallon.

Q. ~~And~~ that condition existed for how long?

A. How long?

Q. From when to when?

A. From September of 1936 to March of 1938.

Q. What has been your company's gallonage from 1936 to 1940, inclusive? I mean gallonage of gasoline sold?

A. I have most of that if I can look at the memorandum.

Q. Yes. Just refresh your recollection and tell us from the record.

3082 A. In the year 1936, 2,400,000; 1937, 4,240,000; 1938, 4,800,000; 1939, 4,200,000; 1940, 4,200,000. That is in round numbers. I don't have it right out to the last gallon.

3083 Q. And did you give us the date of going on the tank wagon method and price?

A. You say tank wagon. Do you mean tank wagon or tank car?

Q. Going off the tank wagon and going on the tank car price.

A. It was in March of 1938.

Mr. Abbott: I wish to have this document marked for identification.

Trial Examiner Ballinger: The Reporter will mark the document Respondent's Exhibit 45 for identification.

(The document referred to was marked "Respondent's Exhibit 45," for identification.)

By Mr. Abbott:

Q. I show you, Mr. Gershenson, Respondent's Exhibit 45 for identification and ask you to identify that and state what it is.

A. It is a letter that we—that is, our company—wrote to the Standard Oil Company, addressed to Mr. Raupagh, written on August 27, 1936, just prior to when we got the half cent a gallon lower price, advising them of a competitive offer.

Trial Examiner Ballinger: Just a moment,—

By Mr. Abbott:

Q. You needn't state what the contents of the letter are.

A. Pardon me. It is a letter we had written to the Standard Oil Company on August 27, 1936, addressed

3084 to the attention of Mr. Raupagh.

Q. The letter seems to be signed by William Gershenson. Will you state the circumstances why it was signed by him and not by yourself; if you know.

Trial Examiner Ballinger: Who was William Gershenson?

The Witness: That is my brother.

A. We have connecting desks and if one of us dictates a letter, by the time the stenographer brings it in typed, if the other one isn't there, the other one will sign it.

Q. Do you have a recollection as to this letter?

A. I do. I dictated this letter.

Mr. Abbott: I offer this letter in evidence as Respondent's Exhibit 45 (handing document to counsel for the Commission).

The Witness: I had previously spoken to him and dictated the letter.

Mr. Austin: Your Honor, I don't think this letter is admissible at the present time. It may become so, later. I therefore object to its admission at the present time unless it is offered to show—no, I believe it is inadmissible on any ground because it doesn't do any more than make a statement regarding an offer.

Trial Examiner Ballinger: There has been no evidence that the letter was ever delivered.

Mr. Austin: It certainly would be of no value for
3085 the purpose of which it is offered, unless it was received by the Standard Oil Company and I request your Honor to look at the letter. I object to it upon the ground that there is no foundation of proof of the transaction referred to and even if there were, it doesn't amount to a notice of any transaction.

Mr. Abbott: I will ask the witness further qualifying questions.

Trial Examiner Ballinger: Let me see the letter.

(The document was handed to the Examiner.)

By Mr. Abbott:

Q. Mr. Gershenson, with respect to Exhibit 45 for identification, do you know whether that letter was mailed to the Standard Oil Company, the addressee?

A. I have no personal knowledge of mailing it. I know they received it because Mr. Raupagh talked to me about that letter; called me about it.

Q. When did you next see the letter—

Trial Examiner Ballinger: One moment. Did you receive a reply in writing to this letter?

The Witness: No, sir. I don't recall a written reply but I remember a telephone conversation and a visit with Mr. Raupagh.

Trial Examiner Ballinger: What transpired after the letter was written?

3086 The Witness: To the best of my recollection—it is a long time ago—that I received a telephone call from Mr. Raupagh asking me to come down to his office and discuss the matter with him.

By Mr. Abbott:

Q. Did you at that time see the letter in his office?

A. I don't recall.

Q. How did you get this letter, at the time of this trial?

Trial Examiner Ballinger: Where did this come from?

A. It came from Mr. Raupagh's file, somebody's file over at the Standard Oil Company.

By Mr. Abbott:

Q. From the time it left your office until the time you saw it in the Standard Oil Company file—

Mr. Austin: I object to that, your Honor.

Trial Examiner Ballinger: The witness hasn't testified that he ever saw it in the Standard Oil Company's file.

Mr. Abbott: Are we going to be so technical here, your Honor, that we have got to withhold this until Mr. Raupagh testifies he received the letter on behalf of the Standard Oil Company? Of course we can connect it up.

Trial Examiner Ballinger: There is something more important to establish than that, in connection with 3087 this. The fact that he had received such a letter as that—

Mr. Abbott: We can't put the case in all at once. I am going to ask the witness some other questions with reference to that.

By Mr. Abbott:

Q. Previous to writing this letter of August 27, 1936, had you received any offers from any supplier of gasoline to supply the requirements of Ned's Auto Supply Company for gasoline, Mr. Gershenson?

Mr. Austin: Your Honor, I think I made a previous objection to that form of question. I object to the use of the word "offer," because an offer is something that has some legal significance and I think the witness ought to be asked whether he had any conversations with anybody

Q. And do you have recollection that the letter was sent to the Standard Oil Company?

3113 A. Yes, sir.

Q. After this letter was sent to the Standard Oil Company did you have any talk with Mr. Raupagh?

A. I had a conversation and several meetings; yes. It was the letter that, as I say, brought about our going on the tank car basis.

Q. Now, what conversation did you have between the time of the date of this letter and the time when you went on the tank car basis, with Mr. Raupagh?

A. Well, I don't recall the specific conversation, but I know—I told Mr. Raupagh that that letter represented the ultimatum and, after that—

Q. Now, what other conversation did you have with him concerning negotiations with other companies; with other suppliers of gasoline?

A. During my conversations with him I elaborated—

Q. What companies did you discuss, if any?

A. Shell, Red Indian, and Texas.

Q. All right. Now, what did you tell him about Shell, Red Indian, and Texas, specifically?

A. I don't recall the exact language.

Q. Just the purport?

A. The purport of it was that we would take advantage of one of these other three offers if they didn't start selling us on a tank car basis.

3114 Q. Did you tell them what the specific offer of the Red Indian Oil Company was, as made to you?

A. I am reasonably sure that I did.

Q. And what did you tell him in that regard?

A. I told him that we could buy gasoline from the Red Indian Oil Company on a tank car basis of—well, specifically, we could buy it from them and pick it up at their bulk plant without having to have a bulk plant of our own, at a cent and a half a gallon off, or have it—yes, we pick it up at their bulk plants at a cent and a half, without having to have a bulk plant facilities, which would be about a half a cent better than even Standard Oil's then prevailing tank car price.

Q. What gasoline?

A. That was on Fleet-Wing.

Q. What brand is that?

A. Standard Oil of Ohio. That is the offer that—

regarding the purchase of gasoline, or anything of that sort. Now I am not trying to tell Mr. Abbott how to ask these questions but I think unless the word "offer" is used without any legal significance, I object to it.

Trial Examiner Ballinger: The objection is sustained. The witness may testify as to what was said, if it is a conversation, and if it is in writing, the witness may produce the written document.

Mr. Abbott: That's right. That's all I want him to state.

By Mr. Abbott:

3088 Q. In connection with any conversation or circumstances that you had concerning the supplying of gasoline by anyone other than the Standard Oil Company, you may state whatever conversations you had and with whom and the place where the conversations took place, and the circumstances, Mr. Gershenson.

Trial Examiner Ballinger: And who were present.

A. Well, that covers quite a wide range.

Q. All right. I am just giving you, now—I am asking you to state what company it was and who—

A. There were several companies. I might go back. Perhaps I can develop it in this way: I can give it in narrative form, as it happened.

Q. Just state it in your own language.

A. Part of this goes back over ten years but starting with about—oh, subsequent to—right around 1930, was when our company, consistent with the way we did business, generally started to approach different suppliers, as well as entertain, at least, conversation from them, relative to our buying gasoline on better than a tank wagon basis. The method of distributor distribution was becoming more prevalent in Detroit and the first conversation that I definitely recall having had—I can't fix the year. I can fix the fact of having had that conversation in our office out on John R Street—was about the time—by a representative of the Argo Oil Company—I recall

3089 they had been selling fuel oil. They started selling gasoline and I believe it was Mr. Fineberg, the vice president—

Q. His name was F-i-n-e-b-e-r-g, is that correct?

A. Yes; Charles Fineberg.

He drove up to our station on John R Street and wanted

Q. What was the basis of your statement to Mr. Raupagh?

A. That was based on an offer that I had had from the Red Indian Oil Company soliciting our business.

Mr. Austin: I object to that answer and move that the question and answer be stricken, your Honor.

Trial Examiner Ballinger: The motion is granted.

By Mr. Abbott:

Q. What specific conversation had you had with the representative of the Red Indian Oil Company at
3115 any time prior to September 9, 1938, with reference
to any negotiations to furnishing you with your requirements of gasoline?

A. You said September, 1938. I think you probably mean March or February.

Q. March 7, 1938?

A. I don't recall how soon before that letter was written—I mean whether it was a day or two before that, that—

Q. You don't need to definitely establish the date.

A. Well, within a month prior to that, I had confirmed the fact that we could buy gasoline from Red Indian on a tank car basis.

Q. State who the conversation was with.

A. With Mr. Dworman.

Q. Where was it?

A. As I said, it was either over the telephone or in our office, because—

Q. Where was your office at that time?

A. Our office at that time was on Chicago Boulevard.

Q. Was that at the corner of Chicago and Greenley?

A. Yes.

Q. That is where you had your offices at that time?

A. They are still over there.

Q. And I believe you said that the Red Indian Oil Company was furnishing you with Quaker State Motor Oil?

3116 A. And several other items. That's why—

Q. Were they, at that time?

A. Yes.

Q. And did Mr. Dworman,—did he come to see you quite often?

A. Yes, and I would have lunch with him.

Q. Who is Mr. Dworman?

A. He is president of the Red Indian—now, I say president; I assume so. His title isn't on here. I am looking to know whether we would be interested in buying gasoline at a tank wagon basis—

Trial Examiner Ballinger: Tank wagon basis?

The Witness: I am sorry—yes, that's right, sir; tank wagon. We had no bulk plant, no tank car facilities—at a cent a gallon better than our then tank wagon price.

By Mr. Abbott:

Q. What gasoline did he sell?

A. I was just trying to think. I believe they were selling, to the best of my recollection, Dixie gasoline. They changed. They went from Dixie to Shell, I think. I don't remember specifically which one, but I told him—I knew him quite well, on a friendly basis, and I told him we weren't interested in changing from Standard to another brand, and nothing more. I discouraged him. That we weren't interested in that offer and that died right there.

The next one I have a definite recollection is of an offer—and that one is very vivid in my mind, because that offer and that source of supply has continued right up to today.

3090. Trial Examiner Ballinger: When did that occur?

The Witness: It was about in 1930; the year. I can't associate in my mind the specific month.

By Mr. Abbott:

Q. What company?

A. The Red Indian Oil Company, because we buy from them and one of their representatives visits us every week in connection with the other merchandise we buy from them and—

Q. What other merchandise do you buy from them?

A. Up to very recently we bought Quaker State Motor Oil, and they were the local distributors and jobbers for Quaker State Motor Oil.

Q. You were stating a conversation with Mr. Fineberg back in 1930.

A. Yes.

Q. Just limit yourself to that.

A. I am all through with that. He had driven up in his car and came into the store and—

Q. What else? I am talking about the Red Indian offer.

A. That is something else. That wasn't Mr. Fineberg. Mr. Fineberg wasn't with Red Indian.

Q. All right.

A. The man from the Red Indian Oil Company was Mr. McLean.

Q. How do you spell that?

A. It is either M-c-, or M-a-c, or Mr. I. B. Dwor-
3091 man—they both actively solicited me for our gasoline
business, as well as my brother Bill, over the last
ten years; very periodically.

The most recent offer was sometime in November.

Q. Just confining yourself in 1930 and then progress chronologically from there.

Mr. Austin: Your Honor, I move to strike out the statement that they solicited him over a period of ten years as being a conclusion and I am sure the witness will have a chance to tell us what they actually did.

Trial Examiner Ballinger: The motion is granted.

A. At that time Red Indian were selling Phillips 66, which was a nationally—well, I am very familiar with it. I would call that a branded, well advertised gasoline, and that had more acceptance than the gasoline that the Argo Oil Company had, and at that time the cent a gallon off tank wagon was quite a prevalent jobber's price. I mean from my knowledge in the industry I knew we could get that from any one of several sources.

Q. State what Mr. McLean told you.

A. I am coming to that.

He stated that they would supply us gasoline delivered at our price at a cent a gallon off tank wagon or, picked
up at their bulk plant and hauling ourselves, at approxi-
mately a cent and a half off tank wagon price.
3092 Now if I may develop that and carry that on right
through up to the present.

The reason I said we were actively solicited: We continued doing business with them since 1930. Still do business with them, and within the last several months when—

Q. Now, Mr. Gershenson, can't you develop that chronologically instead of jumping from 1930 to—

A. I was just finishing that relationship. I can drop that and come back, but I was trying to answer Mr. Austin's objection about continually having been solicited for ten years, because that is the only way I could state that.

Q. When, after 1930, would you state you had any conversation with the representative of the Red Indian Oil Company?

A. I would have to name the years, several times a year, because they were actively soliciting our business every time that the opportunity presented itself.

Mr. Austin: I move the answer be stricken and ask that the witness be instructed to tell us what they said to him and what he said to them.

Trial Examiner Ballinger: The motion is granted.

A. I can bring it up to 1933, because I have a very definite recollection. At that time, this was about in May or June of 1933, the Firestone Tire & Rubber Company had contracts with Texaco and—I knew it was Texas and Cities Service and one other supplier—I am not sure
3093 who they were, and they had completed a bulk plant
here and were buying gasoline at 4¢ a gallon on house brand gasoline off tank wagon prices and I approached the local representative of Firestone and told them we would like to buy gasoline on the same basis that they were buying it and had some correspondence with Akron where an appointment was made for me to meet a Mr. Dodge, who was then vice-president, I believe, and sales manager of Texas and I met Mr. Dodge in Akron. This was in June of 1933 in the offices of—

Mr. Austin: Your Honor, I would like to know whether this still refers to Red Indian Oil Company. Mr. Gershenson is now talking about Firestone and Texas. I don't like to be bound by all this testimony.

The Witness: If I may clarify it:

I had made the statement that I recall another specific offer in 1933 from the Red Indian Oil Company but I recall that because it was after I came back from the trip to Akron, at which time we had received another offer from the Texas Company, and I am trying to state what happened there, to bring it up to date; to tie that up with the offer from the other company.

By Mr. Abbott:

Q. Proceed.

A. This is all ten years ago and I am just answering your questions to the best of my ability.

3094 Q. You are stating something now that happened in 1933?

A. In 1933.

Q. Proceed with the negotiations that you had in Akron, Ohio.

A. I had lunch with Mr. Dodge at the Firestone club house and told him about service stations here. That we were buying on a tank wagon basis from the Standard Oil Company. That we weren't satisfied. That we knew of the contract that Firestone had with the Texas Company and could we get the same kind of a contract. That was the reason for meeting him there and that was the basis of my visit to Akron.

He wanted to know whether we had facilities for handling gasoline on a tank car basis.

We discussed the terms of the Firestone contract and, as I recall it now, their differential was 4¢ off tank wagon on the house brand gasoline and, if I recall, it was either four and a half, or it might have been 5¢ a gallon off the tank wagon on the premium gas, which was the Ethyl.

We didn't have a bulk plant at that time and I returned to Detroit to see whether we could share Firestone's bulk plant, or whether we would have to build one of our own and I told Mr. Dodge that we would communicate with him further, as soon as we had facilities to avail ourselves of tank car deliveries, and communicated to Mr. Raupagh that offer.

3095 Q. What did you tell Mr. Raupagh?

A. I told Mr. Raupagh—

Trial Examiner Ballinger: How did you communicate with him, now? Did you write him a letter?

The Witness: Well, I think that is the letter you are referring to, here.

By Mr. Abbott:

Q. The one that has been marked Exhibit 45?

A. No. That came after that; but that there had been that offer. No at that time, I telephoned Mr. Raupagh.

Q. You telephoned him, you say?

A. Yes.

Q. State what was said. Go right ahead.

A. I can't recall the telephone conversation. I am sorry. I know I made an appointment with him.

That subsequent to that telephone call I saw him personally in his office.

Trial Examiner Ballinger: What year is it, this transaction that you have just been talking about.

The Witness: The one I have just been talking about now was late in 1933 or 1934; in the Summer of 1933.

Mr. Abbott: That was in Akron.

Trial Examiner Ballinger: You think this letter to Mr. Raupagh had relation to that transaction?

The Witness: I don't think, your Honor; I know it had
relation to that transaction because that was a con-
3096 tinuing offer that we didn't act on and that was in
my mind when I wrote that letter two years later.

Trial Examiner Ballinger: This letter is dated August 27, 1936.

The Witness: That's right. That letter followed up the original offer. We had several offers that carried along for two or three years and then we finally act on them, that somebody wants to supply a certain commodity, and we aren't in a position to take advantage of it. We have a contract with another supplier and have to wait until that contract expires, to act on it.

Trial Examiner Ballinger: Did you have at that time a contract with the Standard Oil Company?

The Witness: No, your Honor, but we had a very long relationship and we didn't want to change unless it was impossible to get a similar offer from the Standard Oil Company.

By Mr. Abbott:

Q. You stated already about the time Exhibit 45 for identification was written to the Standard Oil Company, and in response to that letter you went to the office of the Standard Oil Company.

A. If I would be permitted to chronologically develop this and when I am asked a question like this, that jumps over a two-year period and that—

3097 Q. Go ahead.

A. But I would say that subsequent to that period I had a telephone call to Mr. Raupagh. I called him and we had a meeting. It was very likely a luncheon. I don't specifically recall where we were; whether it was at Mr. Raupagh's office, or lunch. We have these meetings periodically, and I told him of that offer.

Q. Which offer?

A. Of my visit down to Akron and the fact we wanted to buy and we were negotiating to buy gasoline from Texas on the same type of contract that Firestone had and as he had previously done, he sort of appeased me, sort of said—well; it is difficult; on his approach he would take it under advisement and not to be too hasty about it and used all the sale arguments he had previously done to keep us happy with Standard Oil Company.

Q. That was in 1933?

A. That was in 1933.

Q. Now develop it your own way. Chronologically, what happened?

A. At about that same time I was approached by—it was right around—I can't fix the date of that because I don't have the correspondence. I have correspondence on that visit to Firestone in the file, and meeting Mr. Dodge in Akron. I have that in the file where I received a
3098 letter from Firestone telling me that the appointment had been made, and that is how I can fix that time. I have that in the file and I have refreshed my recollection on that since—

Trial Examiner Ballinger: Have you any offer in writing, or any letter submitting any definite proposition to you?

The Witness: Yes, your Honor, I have—not from Texas. I have from another company. I have a letter from the Red Indian Oil Company.

By Mr. Abbott:

Q. Just a moment, Mr. Gershenson. You want to develop it chronologically, I understand.

A. I am trying to answer these questions, too.

From 1933 to 1936, I was going to say in this way, that until we got the additional half cent that it was a constant tug of war between Standard Oil and us. We wanted to make some other connection and Mr. Raupagh kept keeping me satisfied, or keeping us satisfied, until such time until some better deal could be worked out for us, and at about that same time—

Trial Examiner Ballinger: How did he keep you satisfied?

The Witness: Well, the most important way was that he said we would have to start building up a clientile on a competitive brand of gasoline. In other words, that
3099 the loss of volume from Standard to some competitive brand would more than offset the additional margin we would make on the other brand, so that it would be a stand-off, we would have to develop new customers, and I was inclined to think that he was right. That is

how, he kept me satisfied; not only inclined to think but that represented our sincere business judgment. What we were trying to do was to get a lower price from Standard Oil Company so that we could retain that good will and customer contact and, at the same time, make another margin of profit and there was another factor in there—I don't know how important it is—was the fact our father had started that contract with Standard Oil Company. We attached some importance to that and we didn't want to change unless we had to do that. It had been a tradition. Our father started the Firestone contract. Our father passed away, in the meantime. We just felt, emotionally, maybe, it was a superstition, that the last thing we wanted to do was change from the Standard Oil Company.

3100 By Mr. Abbott:

Q. You may go on and state what happened between 1933 and 1936, the date that appears on Exhibit 45.

A. In that same time, the Shell Oil Company had a dealer jamboree, and I remember attending the dealer meeting at the Book-Cadillac Hotel, and I met a Mr. Jack Reed.

Trial Examiner Ballinger: What year?

The Witness: Either 1933 or 1934, but I say, I recall the fact when I attended the big meeting in the Book-Cadillac Hotel, when all their executives had a dinner and explained their product.

At that time they were actively coming into this market and this man, Jack Reed—I met him that evening of the party, and the next day, or very soon thereafter I made an appointment with him and had lunch with him—I knew him quite well socially, and we used to go out—and he said they were looking for a distributor, and he said if we could set ourselves up to handle tank car deliveries, they would sell us as a tank car jobber. They wanted a jobber in Detroit at 2¢ off, which was then the prevailing differential between tank wagon and tank car.

Q. Was that the prevailing differential at that time?

A. Yes, as I recall. It might have been only a cent and a quarter. I am pretty sure he said 2¢ to the best of my recollection.

3101 Trial Examiner Ballinger: Was that an exclusive agency?

The Witness: He didn't say so, but I think he did say that they only wanted one. They felt that they should have only one jobber, and he felt that they should—that we should take it—he used that as an argument, if we didn't they would get somebody else, and if we didn't, it wouldn't be available, and I said I hated to leave Standard Oil Company.

By Mr. Abbott:

Q. Did you communicate that to Mr. Raupagh?
A. I did, but I would like to finish this, if I may.
Q. Very well.
A. We had several meetings, then, but after that he said they got Stark Hickey. I don't know whether I communicated that offer. I know I did. I referred to that offer in a letter we wrote to Mr. Raupagh.

Trial Examiner Ballinger: Is that letter available?

The Witness: I don't know if Standard Oil Company has it, but I remember writing such a letter. I assume they have it. Do you want me to answer that, your Honor?

Trial Examiner Ballinger: You answered it.

Mr. Abbott: We will put that in in chronological order, your Honor.

Trial Examiner Ballinger: This is the appropri-
3102 ate place, if there is such a letter.

Mr. Abbott: Your Honor, the Respondent reserves for itself the order of proof with reference to these various matters because this matter was in connection with going on the tank car basis, and I wish first to develop the situation with reference to the ½c differential.

Trial Examiner Ballinger: Then what the witness testified to, as embodied in that letter, should be stricken from the record.

Mr. Abbott: I think in so far as he purports to say what the letter contended, that is true.

Trial Examiner Ballinger: It will be so stricken.

The Witness: I recall communicating that offer to the Standard Oil Company.

By Mr. Abbott:

Q. What offer are you referring to?
A. From Shell.
Q. Yes.
A. That's what I mean.

Q. And that refers to what year?
A. I don't remember.
Q. You stated 1933 or 1934.
A. Oh, no. I say, I didn't communicate that at that time. We kept that and probably used that in a letter later on, when we were attempting—
3103 Q. Now, about—
A. We had a whole statement, if I may make this statement: we had several of these negotiations that we had with these different suppliers—I would call them an offer, because that's all they mean to me—
Q. You are a lawyer, aren't you?
A. Yes, I am.
Q. You graduated from the University of Michigan, didn't you?
A. Yes.
Q. In the law school?
A. Yes.
Q. In what year?
A. 1926.
Q. And you have practiced law, haven't you, in Detroit?
A. Yes, I did.
Q. How long did you practice?
A. About two years; two or three years.
Q. And that was prior to going into the oil business, was it?
A. Well, I had a law office, and I didn't devote all my time to the—
Q. The reason I bring this up in connection with your statement as to your observance of the—
A. Had all the elements of a legal offer. The only
3104 thing that would have kept it, if we didn't accept it,
so that it ceased to be an offer because of the passage
of time, but at that time it was a legal offer.
Q. This relates to the Shell transaction?
A. Yes.
Q. Do you wish to develop this in your own way, year by year?
A. I am practically through with the Shell negotiations. He told me—Jack Reed kept me posted on what they were doing, and he said they had signed up somebody else, and I told him not to feel badly. We didn't intend to change from Standard Oil Company.
Q. You said you had talked to Mr. Raupagh about that.

You said you included it in a letter to him and that was stricken because of some suggestion that it was in a letter. What verbal communication did you have, if any, with Mr. Raupagh, concerning the Shell offer?

Mr. Austin: When was this?

The Witness: I don't recall whether or not I specifically mentioned the Shell Oil Company in communicating this offer verbally to Mr. Raupagh.

By Mr. Abbott:

Q. Now, in 1930—

A. Yes, this was between 1933 and 1936.

Q. Yes. Now, you went on the ½¢ off the tank
3105 wagon price on September 9th, 1936, as you testified.
Now, prior to that event, will you state what happened with reference to any negotiations you had with the Standard Oil Company?

A. Well, on August 27, 1936, I dictated and wrote a letter to the Standard Oil Company—

Q. That is the one that has been referred to as Exhibit 45, for identification?

A. Yes.

Q. After you wrote that letter what negotiation did you have?

A. I didn't disclose the company. I was afraid the Standard Oil Company might go to that company and that—anyway, I don't think I told Mr. Raupagh whom the offer was from, but I told him we could buy a major brand gasoline at a much better price than we could buy from them.

Q. When was that?

A. That was in that letter.

Q. What conversation did you have with Mr. Raupagh verbally, disregarding the letter. You have already stated, that after the letter was sent you had a talk with Mr. Raupagh—now, state what was said.

A. You mean this was subsequent to the letter, now?

Q. Yes.

A. I told him that this letter was an ultimatum, that we had definitely made up our mind to accept a competitive
offer unless we got a better deal from the Standard
3106 Oil Company, and I asked for the privilege from
Mr. Raupagh to go down to Chicago, going over the
heads of the Detroit office. That if we were going to
break our relationship with the Standard Oil Company,

we wanted the satisfaction of being turned down by the home office.

Q. Did you go to Chicago?

A. I did. I made arrangements that I could meet his immediate superior, or one of his superiors, and I made the arrangements—

Q. When, with reference to August 27, 1936, did you go to Chicago?

A. Two or three days after that. It was some time between then and—

Q. And whom did you see in Chicago?

A. I saw a Mr. Lewis. I don't remember his initials.

Q. Where was that?

A. In the Standard Oil Building in Chicago.

Q. Do you remember the location?

A. It is on Michigan Avenue. It is about across from the Illinois Central Railroad, as I recall it. I was—

Q. And state what conversations you had with Mr. Lewis?

A. I was admitted to his office, and I told him what I was down there for. He seemed familiar—I didn't have to develop the whole thing—he seemed to be familiar with our account and with the competitive situation here.

3107 Q. At that time what gallonage did you have; about, if you can recall.

A. That was in 1936—about 2,400,000. Whatever I read off before.

Q. Very well.

A. Over 2,000,000, and I told him I was there representing our company.

That if they didn't give us a better price, either a better tank wagon price or tank car price, that we were going to stop doing business with them, and he, at that time—I don't think he told me—I don't recall now whether he told me that day or Mr. Raupagh told me the next day I came home—that we were getting an additional half cent margin off our tank wagon price.

Q. Had you suggested, then, you be given such a differential?

A. I not only suggested, I told him we wanted a cent a gallon, because that was what we would get from other jobbers, locally.

Q. What other offers had you received?

A. The one specifically I had in mind was the one I referred to; from Red Indian, and—well, I had several in mind. I knew that there were several.

At that time Hi-Speed, Hicock Oil had a cent a gallon better tank wagon price, and we had been approached—been approached by them.

3108 Mr. Austin: I move to strike the answer that they had been approached by them, your Honor, unless it goes on to tell what actually was said and what happened.

By Mr. Abbott:

Q. What did Mr. Raupagh say to you after you got back from Chicago?

Trial Examiner Ballinger: Motion is granted.

Mr. Abbott: That is, just as to the Hicock Oil?

Trial Examiner Ballinger: Yes.

A. I think—I don't know whether Mr. Raupagh or Mr. Lewis—I am inclined to think it was Mr. Raupagh, after I got back. I don't recall—Mr. Lewis was very optimistic. He told us not to be too hasty. We had been a good customer, and he gave me the usual—they didn't want to lose our business—they would do the best they could to meet our competitive situation, and the lost gasoline—he kept telling us, through changing brands we had no way of knowing—that was their strongest argument, and they used that, but, as I say, he was very optimistic about their being able to do something on it, and then it was either the next day or day after, I had lunch with Mr. Raupagh and he told me of this half cent better price as of, I think, September 1st.

Q. What did you say about that, if anything?

A. I know how we felt. We accepted it as better 3109 than nothing at all, but we weren't satisfied.

Q. What do you mean by you weren't satisfied? What did you want?

A. We wanted tank car at that time, or a better tank wagon price. We wanted a cent a gallon off the tank wagon price.

Q. Did you tell Mr. Raupagh or Mr. Lewis you could get a cent off from anybody else?

A. Yes, I did.

Q. Did you tell him from whom?

A. I don't recall anything then. It is contrary to our practice to name a competitive price, as to whom it comes from; the supplier, because a competitive thing—there are too many arguments directly, and too many things to spoil them.

Q. Prior to that time you had proposed that they supply you at a cent off tank wagon price?

A. I started to say.. I am satisfied—

Q. I am not asking you that.

A. Hicock Oil. We could have bought Hi-Speed gasoline at 1¢ a gallon off tank wagon—I don't recall the specific instance of that offer, but we were constantly being solicited by a number of places. By that time—

Mr. Austin: I move to strike the answer, your Honor, but I don't like to keep doing that, because I know Mr. Gershenson is trying to tell us.

3110 The Witness: That's what happened. I am going back 10 years—

Trial Examiner Ballinger: Motion is granted.

Mr. Abbott: As to the Hicock Oil.

Mr. Austin: And the motion also went to the statement subsequent to that.

A. The one, specifically, I had in mind, that I knew—because, as I said—I know we still can get a cent a gallon off the tank wagon price from the Red Indian Oil Company, and that is the one I had in mind.

I might even have mentioned that to Mr. Raupagh. I don't recall.

By Mr. Abbott:

Q. That is the one you say has been persistent?

A. Yes. The Red Indian Oil Company sells Fleet-Wing gasoline, which is Standard Oil Company of Ohio. The reason that is consistent is we feel we would suffer least in volume if we changed from Standard Oil of Indiana to Standard Oil of Ohio, because in our advertising we can say that it is Standard Oil Company. That is the one offer—

Q. Between September, 1936, and March, 1938, according to your testimony, you were on the tank wagon basis receiving a ½¢ differential.

A. Yes, sir.

Mr. Abbott: I would like to have this document 3111 marked, for identification, as Respondent's Exhibit 46.

Trial Examiner Ballinger: The reporter will mark the document as Respondent's Exhibit 46, for identification.

(The document referred to, was marked, for identification, "Respondent's Exhibit 46.")

By Mr. Abbott:

Q. I show you, Mr. Gershenson, Respondent's Exhibit 46, for identification, and ask you to identify that and state what it is.

A. It is a letter we wrote to Standard Oil Company just prior to going on the tank car basis, advising them that if they didn't—

Trial Examiner Ballinger: No.

The Witness: I am sorry.

By Mr. Abbott:

Q. Don't state the contents of it.

A. It is a letter we wrote to the Standard Oil Company.

Q. When you say it is a letter, do you mean that that is the original?

A. This looks like a photostatic copy of an original letter. That is the letter that I dictated.

Q. Do you understand that that, Mr. Gershenson, is the original letter, or is it a copy of the letter?

A. I don't understand your question. I know that—

Q. Have you ever seen the original of that letter?

3112 A. Surely. The original was on our letterhead. That's what I say. This is a photostatic copy of the letter we sent.

Q. Does that show your letterhead in the photostat?

A. No, it doesn't.

Q. Do you have any recollection of that letter having been sent from your company?

A. Yes, I do.

Q. Did you dictate it?

A. Yes.

Q. It appears to be signed by William Gershenson. Can you explain why that was?

A. You asked me that before today.

Q. I know, but not with reference to the same letter.

A. I will answer that for both letters. The way we work, I am there mornings. I will do the dictating and then, like today, about 10 or 11 o'clock I will go out and the girl will finish the typing and my brother Bill is there and he signs it. That's all.

Q. Do you recall that you dictated that letter?

A. I am reasonably sure I dictated that letter. I am as sure as I can be—because I know that that's my language and I know the fact of the letter.

at a letter which he signed. I believe he is president. Anyway, he is the top executive of that company.

Q. And you also mentioned Mr. McLean, in connection with that company?

A. I would say he holds the title of sales manager.

Q. And then, a month before that, you said you talked to Mr. Dworman?

A. Yes.

Q. You may state what the conversation was. Just state the purport of it.

A. I asked him whether we could buy gasoline from them on a tank car basis better than tank wagon, and he said, "When you are ready, we will sell you."

Q. And did he state at what price?

A. Yes, he did.

Q. What did he say?

3117 A. I have already answered that.

Q. I want you to answer it again.

A. I will give it to you again.

We had a choice of either picking it up at their bulk plant in our own trucks or having it delivered at our own stations by their truck. If we—

Q. And what was the price as to each?

A. I am coming to that.

Q. Yes.

A. If we picked it up, used our own hauling, the discount was 1.5, as near as I remember that.

Q. All right.

A. No. 1.5 if they delivered it—I misspoke there, 1.5 if they delivered it to our place. There is a differential of 2½, or 1.7, if we picked it up ourselves.

Q. Did either one of those operations require you to have a bulk plant?

A. Neither of the operations required us having our own bulk plant.

Q. At that time did you have a bulk plant?

A. Not yet, but we were negotiating for one.

Q. Did you communicate those prices to Mr. Raupagh in your discussions with him?

A. I told him we had a better price. I don't recall whether I gave him the specific cents and tenths of a cent, or not.

3118 Q. What did he say? Was this in the month before March 7, 1938, as you testified?

A. This was as a result of this letter. I believe he told me on the telephone the first time when he said that they would sell us on a tank car.

Q. Who said that?

A. Mr. Raupagh.

Q. I know, but how soon did that come before March 7, 1938; that he told you that?

A. Just a day or two before.

Q. In the month before March 7, 1938, what negotiations did you have, if any, with Mr. Raupagh?

A. Well, subsequent to this letter, I had one or two talks with him about that, and I satisfied him that we meant business this time. We were really going to change, and I feel and know that as a result of that, that we were put on a tank car basis.

Q. What did you tell him in connection with making a change? When I say "him" I mean Mr. Raupagh.

A. I told him the strongest argument then for it was—in the meantime we had built two more service stations. Our volume had gone up. Our volume at that time was 4,000,000, and we felt, even with the loss of some volume of Standard Oil to some of the others, that was the argument I used with him that that loss of the volume
3119 wouldn't begin to offset the additional advantage of buying all of our gasoline on a tank car basis. I felt we could operate our own bulk plant, do our own hauling and still have enough margin so as to make it profitable for us to buy on tank car.

Q. What did Mr. Raupagh say, if anything, relative to bulk plant facilities?

A. Well, you mean at that time? Well, he had previously, as well as at that time, told me that if they would sell us on tank car, that we would have to have our own bulk plant facilities, as well as hauling equipment.

Q. Did you, previous to March 7, 1938, make any arrangements to acquire bulk plant facilities?

A. Yes, we did.

Q. What arrangements did you make?

A. We entered into an agreement with the Ford Benzol people to haul gasoline from our bulk plant, as well as to re-lease the storage tanks and railroad siding from the— I don't remember the name of the company, but we leased a bulk plant.

Q. Was that the plant at Brandt and Wyoming?

A. Yes, at Brandt and Wyoming.

Q. Is that pretty close to where Mr. Ledbetter has his storage?

A. It is right across the tracks.

3120 Trial Examiner Ballinger: That was in 1938?

The Witness: Just prior to March, 1938, probably three or four days.

By Mr. Abbott:

Q. You say the negotiations with Mr. Raupagh within a month previous to March 7, 1938, you talked to him about the Red Indian Oil Company's offer, distributors of Standard Oil of Ohio. I believe you said you also discussed an offer of Shell Petroleum?

A. Yes.

Q. State what you told him about that.

A. I told him that we could buy Shell on a tank car basis at 2¢ off a gallon—2¢ off the tank wagon price.

Q. Was that based on any conversation you had with Shell?

A. That was based on a conversation we had had some time before that. I wasn't sure at that time, whether or not the Shell offer—I hadn't confirmed that—whether we could start getting Shell on the tank car; whether they had gotten other distributors where they would be no longer interested in our account.

Q. Did you tell them the differential with Shell?

A. I am reasonably sure I told him it was 2¢ a gallon.

Trial Examiner Ballinger: Mr. Gershenson, you have been talking for some little time. Would you like to have a little recess?

3121 The Witness: I would like to go on.

Mr. Abbott: I presume we will adjourn in about 15 minutes. I would like to have a recess at this time for five minutes.

Trial Examiner Ballinger: I hope we can conclude with this witness today.

Mr. Abbott: I know we can't conclude with him today.

Trial Examiner Ballinger: We will have a five minute recess.

(Thereupon a short recess was had.)

Trial Examiner Ballinger: Come to order.

By Mr. Abbott:

Q. Mr. Gershenson, you were talking about the conversation had with Mr. Raupagh shortly before March 7.

1938, and you said something about ultimatum. State now what you mean by ultimatum, and what it is based on.

A. I used the term, "Ultimatum," to indicate that that was—

Mr. Austin: I object to that, your Honor. I think the witness should testify what he said and not what—

By Mr. Abbott:

Q. Yes; tell us what you said to Mr. Raupagh.

A. I told him that that was the last time that they would talk us out of accepting a competitive offer; that they
would either sell us a tank car or we would buy from
3122 someone else and that we were all prepared to make
the change.

Q. Did you mention any particular firm?

Trial Examiner Ballinger: You mean company?

Mr. Abbott: Yes.

By Mr. Abbott:

Q. Did you mention any particular company?

A. I don't specifically recall having done it right there at that time. If he asked me, I told him which offer we had.

Q. Had you told him?

A. Previous to that, yes.

Q. Which particular company offer had you told him about?

A. I told him about three specific ones; the Red Indian, the Shell, and the Texas, at different times.

Trial Examiner Ballinger: Did you go into detail and tell him exactly what the offers were?

The Witness: I don't recall having done that.

By Mr. Abbott:

Q. At this time or at any time within a month previous to March 7, 1938, do you specifically recall if you told him about the Red Indian offer?

A. Yes, I told him about the Red Indian offer, and I had also told him about the Texas and the Shell.

Q. About the price?

A. Yes, but I don't recall giving him the details
3123 of the Shell offer.

Q. But you did of the price?

A. Of the Red Indian and of the Texas.

Trial Examiner Ballinger: The Red Indian is a product of what company?

The Witness: The Standard Oil Company of Ohio. The brand name is Fleet-Wing, but the name of the jobbers, the distributor, is the Red Indian Oil Company.

By Mr. Abbott:

Q. And I believe you said, Mr. Dworman—

A. Yes, that is the one.

Q. I want to ask you this, Mr. Gershenson, you stated that the Red Indian Oil Company at one time handled Phillips Petroleum?

A. Yes.

Q. Do you remember whether that was the brand they handled in 1933 when you first said you talked to them about supplying you?

A. I don't remember when they first changed. It was some time around there. It was from Phillips to Standard Oil Company of Ohio. The first time we talked to them, my recollection goes back that it was Phillips 66.

Q. Well, what was the result of your last meeting with Mr. Raupagh previous to March 7, 1938? What happened, if anything?

3124 A. The next important thing that happened was that they granted us a tank car price and tank car deliveries.

Trial Examiner Ballinger: State what price they granted you.

By Mr. Abbott:

Q. What was the differential between tank car and tank wagon that they granted you? You were receiving a half cent off tank wagon, were you not, previous to that?

A. It was a cent better, it was a cent and a half better than the tank wagon price, the tank car price.

Trial Examiner Ballinger: At that time had you established bulk storage?

The Witness: Yes, sir.

By Mr. Abbott:

Q. You have stated that you established bulk storage out on Wyoming Avenue?

A. Well, we did not have our own hauling trucks. We had entered into agreement with the Ford Benzol who had that equipment, and they hauled it from our bulk plant to our retail stations.

Q. There was some testimony in the Commission's case to the effect that you had a contract with the Benzol people to haul for you or some arrangement.

A. We had an arrangement. There was no written contract.

Q. And that was on the basis of .45 of a cent?

3125 A. For just hauling it from our bulk plant to our stations. We operated our own storage.

Q. You operated the storage?

A. We unloaded the cars into our own bulk storage, and we also operated the man power to unload from our tanks into their trucks, although their driver was right there.

Trial Examiner Ballinger: What do you mean by the man power?

The Witness: Well, somebody to man the pumps in our bulk plant.

Trial Examiner Ballinger: Did you have electrically driven pumps at that time?

The Witness: Yes, I use the word man power figuratively, because the pumps actually operated the operation.

By Mr. Abbott:

Q. In other words, those pumps don't operate automatically?

A. They have to be turned off and on. They measure automatically, though.

Q. I believe there was a statement made in the Commission's case as to the price you paid the Ford Benzol Company to do that hauling operation for you. What was that price?

A. My recollection is that it was half a cent. You just said four and one-half tenths. That may be right. My recollection is of a half a cent a gallon.

3126 Q. Somewhere around a half a cent?

A. Yes.

Q. Did that include, if you recall, any administrative duties, or just the duties of a truck man?

A. No, as far as I know, that was just their—I don't know what—

Trial Examiner Ballinger: Well, that was the contract price?

The Witness: Yes. I don't know what their cost that run into, but that is what we paid them.

By Mr. Abbott:

Q. What did they do for half a cent a gallon?

A. As I said, they took the gasoline from our bulk plant and delivered it to the retail stores on our order. We told them where to take it.

Q. How many retail stores did you have at that time?

A. I think only four.

Q. Now, Mr. Gershenson, you handle a large variety of merchandise besides gasoline. You have already stated that. I will ask you whether you purchase refrigerators, radios, washing machines, and other merchandise in carload lots in your business?

A. Yes, we purchase all the items you mentioned and many more.

Q. Well, state what others you purchase.

3127 Mr. Austin: I object to that, your Honor, as irrelevant and immaterial.

Mr. Abbott: I have a right to show by this witness, if the Court please, this matter, and I make an offer of proof to the effect that they purchase refrigerators from the General Electric Company, electrical ranges, washing machines from the same company; refrigerators from Kelvinator Corporation; washing machines from the Hurley Machine Manufacturing Company.

Trial Examiner Ballinger: What was the latter?

Mr. Abbott: Washing machines from the Hurley Machine Manufacturing Company. And, a long list of other items from national concerns in carload lots, at a differential from a price which they would be required to pay if they received deliveries in less than carload lots. In other words, the purpose of this is to show a general custom in the United States of selling merchandise other than gasoline on a carload basis, which relates—which is analogous to the tank car price which is used in delivering gasoline. I offer to show the differentials which the Ned's Auto Supply receives from the national concerns, like the General Electric Company, if they purchase these articles in carload lots, as distinguished from deliveries in other lots, in lesser lots. I think it has a bearing upon the issues in
this case, upon the basis of showing that it is a gen-
3128 eral custom in merchandising throughout the United
States to grant price differentials based upon quantity, and particularly in quantity of carload lots. It is right along the line of testimony of Professor Clark and

the testimony of Mr. Dyer, who came here from New York to testify.

Mr. Austin: If your Honor please, I don't think that that proves anything. There is no indication that this group of companies, those companies sell those materials to retailers in the same territory at a higher price, and even if they do, it might still be that a difference in price in those cases and for those goods could be justified by differences in cost as a result of the larger quantities delivered and it would not follow that that was true for gasoline if it were true for the other things, so, I don't think it could possibly have any probative value.

3129 Trial Examiner Ballinger: The objection to the proffer is sustained.

Mr. Abbott: Can I make a general offer of proof?

Trial Examiner Ballinger: You may.

Mr. Abbott: The Respondent offers to prove by this witness that Ned's Auto Supply Company engages in the merchandising of general merchandise, such as refrigerators; electrical ranges; washing machines; electrical ranges; oil heaters; motor oil; denatured alcohol; bicycles; garden hose; anti-freeze for automobiles, purchased from Dupont at Delaware; automobile heaters; radios and tires. That it purchases refrigerators; electrical ranges and washing machines from General Electric Corporation of Schenectady, New York; that it purchases refrigerators from the Kelvinator Corporation of Detroit; Thor washing machines from the Hurley Machine Manufacturing Company; Tappan ranges from the Tappan Range Company; duo-therm oil heaters from Morley Brothers; washing machines from the Maytag Manufacturing Company; Quaker State motor oil from the Quaker State Motor Oil Company of Emblenton, Pennsylvania; denatured alcohol; bicycles and other merchandise mentioned, in carload lots and differentials, at differentials based on quantity, which differentials, it will be shown, are substantial in comparison with the price which they would be required to pay if they purchased in lesser quantities, less than carload lots.

3130 We also offer to show by this witness that these various companies which supply the articles mentioned also supply these articles to wholesale houses, in the City of Detroit, which, in turn, sell them to retailers, such as hardware stores and other supply stores, in the Detroit area at prices greater than the carload price. And that, by this process, the jobber, Ned's Auto Supply Company, is able to secure these articles at a less price than as if they were purchased from a wholesaler in the City of Detroit, the purchases being made in carload lots and, in this way, direct from the manufacturer.

We also offer by this witness to show specifically the list price, the L.C.L.—What is the L.C.L.?

The Witness: Less than carload lots.

Mr. Abbott: (Continuing) Less than carload lot prices, the carload price and all the differentials which I have mentioned which Ned's Auto Supply Company handles in addition to gasoline and petroleum.

Now, that is the offer. That is the offer which I wish to make at this time on the record.

Trial Examiner Ballinger: The proffer of which is rejected.

Mr. Abbott: Your Honor, I wish at this time to enter upon another inquiry and I would like to ask if we could have an adjournment at this time. We can't possibly
3131 finish with this witness, but I am very sure that before
tomorrow noon we will have time to finish him then. I wish to say that Mr. Gershenson has a very important meeting tomorrow noon, between 12 o'clock and 3 o'clock and I would like to offer that we excuse him now.

Trial Examiner Ballinger: The Examiner wishes to make inquiry on the record as to how much longer time the Respondent would require to put in its case?

Mr. Abbott: The entire case will consist, your Honor, of testimony of Mr. Raupagh, which will be extensive, and also the testimony of the jobbers for whom we have requested subpoenas and, by the way, I would like to ask you, your Honor, to give me the subpoenas before I leave this evening because we wish to send certain of them out for witnesses to appear here on Wednesday or Thursday.

Trial Examiner Ballinger: You will be furnished with subpoenas whenever the request is made.

Mr. Abbott: I make the request at this time.

Trial Examiner Ballinger: Now, can testimony be disposed of this week?

Mr. Abbott: Well, I think it should be. It depends on how—I don't wish to be limited.

Trial Examiner Ballinger: The Examiner doesn't wish to unnecessarily hurry these hearings nor subject counsel to any inconvenience, but if the testimony is going 3132 to extend over this week, that is, the hearings commencing at 9:30 and extending until 5 p.m., the Examiner intends to enlarge the hours and extend the hearings possibly to a later hour in the evening or possibly in the evenings.

Mr. Abbott: Well, that would be satisfactory excepting for the evening part of it. I don't appreciate the idea of—is this on the record?

Trial Examiner Ballinger: Yes.

Mr. Abbott: I don't appreciate the requirement of holding evening sessions because I think, however, it is, if your Honor will open the session tomorrow at nine-thirty—

Trial Examiner Ballinger: Why not at nine o'clock?

Mr. Abbott: I will then communicate with Judge Hanley and ascertain how long, in all possibility, the testimony of Mr. Raupagh will take and, I wish at this time to make a formal request that we be given the subpoenaes for the witnesses, consisting of jobbers referred to in the testimony of Mr. Griswold, the office manager of the State Gasoline Tax Division.

Trial Examiner Ballinger: The Examiner is prepared to meet any request of counsel for the Respondent with reference to subpoenaes.

Mr. Abbott: Well, just what do you mean by that?

Trial Examiner Ballinger: He has the subpoenaes and they are in his possession here and he is ready to 3133 make delivery at any time they are requested.

Mr. Abbott: Do you mean by that that you will give us the subpoenaes just to fill out the form and send to the witnesses?

Trial Examiner Ballinger: Either that, or the Examiner will, at least, insist upon a list of names of the witnesses to be subpoenaed that may be arranged without difficulty.

Mr. Abbott: Yes. What I wish to say is this; we wish to send out some subpoenaes today, tonight, by registered mail and I haven't the list of those whom we have wished to subpoena. We are going to subpoena them all for the same day. Their testimony will be very short and I would like to have at least ten subpoenaes this evening.

Trial Examiner Ballinger: You can have all the subpoenaes you desire.

Mr. Abbott: Yes.

Trial Examiner Ballinger: All you have to do is after we adjourn, to make request of the Examiner and they will be furnished to you.

Mr. Abbott: All right. I make request at this time.

Trial Examiner Ballinger: Do you desire the subpoenaes delivered to you at this time?

Mr. Abbott: No, I just want the record to show
3134 that I am asking for the subpoenaes.

Trial Examiner Ballinger: The record shows that you have made the request and that the Examiner has stated he is prepared to comply with your request at any time.

Mr. Abbott: Very well, that is all I wish to know.

Trial Examiner Ballinger: Now, it is only ten minutes after five. Can't we finish this direct examination of this witness this evening?

Mr. Abbott: No, I can't do that. I wouldn't get through with him this evening and I understand Mr. Austin to say that he wanted to go at five o'clock.

Mr. Austin: Oh, I will stay.

Trial Examiner Ballinger: Well, the Examiner will entertain a motion now for adjournment, with notice, commencing tomorrow, that the Examiner is going to insist on longer hours.

Mr. Abbott: Well, I move at this time that we adjourn at 5:10 o'clock p. m. and that we reconvene on Tuesday, May 6th at 9:30 o'clock a. m.

Trial Examiner Ballinger: Without objection, the motion is granted and now, at 5:10 p. m. the hearing is adjourned to reconvene at 9:30 a. m. on Tuesday, May 6, 1941, Room 859, Federal Building, Detroit, Michigan.

(Whereupon, at 5:10 p. m., May 5, 1941, the hear-
3135 ing in the above-entitled matter was adjourned, to
reconvene on May 6, 1941, at 9:30 a. m.)

3136 Room 859 Federal Building,
Detroit, Michigan.
May 6, 1941.

Met, pursuant to adjournment, at 9:30 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois, and

Arthur J. Abbott, Esq., of the firm of Abbott, MacMahon, and Roberts, 2230 Buhl Building, Detroit, Michigan, on behalf of the Respondent.

3137 PROCEEDINGS.

Trial Examiner Ballinger: We will come to order.

This is a reconvening at 9:30 A. M., Eastern Standard Time, May 6, 1941, in Room 859 Federal Building, Detroit, Michigan, in Docket No. 4389, in the case entitled Standard Oil Company.

The last hearing was held in Detroit May 5th, 1941.

The reporter will note counsel for the Commission and Respondent present.

Gentlemen, you may proceed.

Mr. Abbott: Your Honor, at this time, on behalf of the Respondent, I wish to re-offer Respondent's Exhibits 38-A, 38-B, 38-C, 38-D, and 38-E in evidence in this case. These have already been marked for identification.

Trial Examiner Ballinger: Any objection?

Mr. Austin: I will withdraw the objection previously made, your Honor.

Trial Examiner Ballinger: There being no objection, Respondent's Exhibits 38-A to and including 38-E, for identification, are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 38-A to 38-E, inclusive," were received in evidence.)

CHARLES H. GERSHENSON having been heretofore duly sworn, resumed the stand, and testified further, 3138 as follows:

Direct Examination by Mr. Abbott (Continued).

Q. Mr Gershenson, in your testimony yesterday, referring to page 3117 of the transcript, in discussing the offer made to you by the Red Indian Oil Company prior to March of 1938, the question was asked you with reference to the price at which they offered to deliver to you Standard Oil of Ohio gasoline, and you said: "No. 1.5 if they delivered it. I misspoke there. 1.5 if they delivered it at our place. There is a differential of 2½ or 1.7 if we picked it up ourselves." Now, will you state on the record whether that answer by you is correct or whether you wish to correct that now?

A. It isn't the way it was transcribed—that isn't correct. When I said 2½, I meant two and one-half tenths of a cent additional margin that we picked it up.

Q. Making it—

A. Making it 1.75 rather than 1.5 differential. When I said 2½ I meant tenths of a cent rather than 2½¢ margin.

Q. So that will you state again the price which was offered to you prior to March of 1938 by the Red Indian Oil Company for Standard Oil of Ohio gasoline so that the record will be correct?

A. We had a choice of taking delivery in one of 3139 two ways: Either picking it up ourselves at their bulk plant terminal, which would give us a margin of 1.75 or having them deliver the gasoline to our retail stations in their tank trains. I don't know what methods they were going to use to get it to our stations, but our margin would be 1.5 off the tank wagon price.

Q. I see.

Trial Examiner Ballinger: In what quantities were the deliveries to be made?

The Witness: In our needs. We were to enter into a contract with them to buy all of our requirements and they would give deliveries as requested.

Trial Examiner Ballinger: And in whatever quantities you desired?

The Witness: We didn't go into the details of the minimum quantity they would deliver at a time. That wasn't discussed.

Trial Examiner Ballinger: Nor was the maximum quantity?

The Witness: No, sir, but it was predicated on a tank car buying price. That was the understanding. May I complete that?

By Mr. Abbott:

Q. Yes, go ahead.

A. They might have been able to—they could 3140 have, I should say, deliver part of the tank car load to one of our stations and drive over to another one and dump the rest.

Q. State the fact as to whether any other oil companies have, since March, 1938, had any negotiations with you relative to furnishing your requirements of gasoline.

A. They did—or I have had—

Q. Now, this relates to the time since March of 1938?

A. If I may make this statement, perhaps this will clear it up.

Q. Yes.

A. Since this fall, in November or December, in anticipation of being called to testify, I personally called a series of five companies which we had previously had negotiations with, to bring their offers up to date, and I have a memo here that I made up subsequent to these discussions in which three of the companies confirmed their previous offers to sell us on a tank car basis and two stated that they had adequate distribution, and they were not in a position to take care of our business.

Q. What are those three companies?

A. The three who confirmed the offer—and I have a letter here in my file, confirming this oral offer—was the Red Indian Company—

Mr. Austin: Your Honor, if he has a letter, I ask it be introduced.

3141 By Mr. Abbott:

Q. Did you have a conversation?

A. Yes, I previously had a conversation. I asked for the letter to confirm the conversation we had.

Q. If you had a letter from one of them, don't state the conversation, but state the one it is.

A. The Gulf Refining Company, Mr. Crawford, the district manager, as well as Mr. Croson, the sales manager, came over to our office and confirmed the previous offer to deliver us gasoline at our bulk plants in tank cars at .066. That was the same price that we were buying from Standard Oil Company. This was between December 20th and 24th. My memo was the 24th. They were over in my office between December 20th and 24th, 1940.

Red Indian's offer was 7.25 tenths of a cent better than the tank car price from Standard Oil Company. I mean we could buy Standard Oil Company of Ohio at approximately three-quarters of a cent lower price than we were buying Standard of Indiana.

Q. You say that you have a letter confirming that offer from the Red Indian. Will you produce that letter?

(The witness handed document to counsel.)

Mr. Abbott: I would like to have this document marked, for identification.

Trial Examiner Ballinger: The reporter will mark
3142 the document Respondent's Exhibit 47, for identification.

(The document referred to was marked, for identification, "Respondent's Exhibit 47.")

By Mr. Abbott:

Q. I show you Exhibit 47, for identification, Mr. Gershenson, and ask you to identify and state what it is: without stating the contents of the letter.

A. That is a letter from the Red Indian Oil Company written to our company relative to a gasoline contract.

Trial Examiner Ballinger: And dated when?

The Witness: Dated April 30, 1941.

Mr. Abbott: I offer this Exhibit 47, for identification, in evidence.

I may say, your Honor, that the letter, although dated April 30th, referred back to a proposal made during the fall of 1940, and is merely a confirmation of that offer to which the witness has testified.

Trial Examiner Ballinger: Let counsel for the Commission examine the exhibit.

(The document was handed to counsel for the Commission.)

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

3143 *Examination on Voir Dire by Mr. Austin.*

Q. Have you had any previous correspondence with Mr. Dworman?

A. Yes, I have.

Q. Are you familiar with his signature?

A. Yes, I am.

Q. Is this his signature, to the best of your knowledge and belief (indicating)?

A. It is.

Q. Do you recognize it?

A. I do.

Mr. Abbott: There being no objection, your Honor—

Trial Examiner Ballinger: Any objections?

Mr. Austin: No objection.

Trial Examiner Ballinger: Respondent's Exhibit 47, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 47," was received in evidence.)

Mr. Abbott: For the record, I wish to read this letter into the record.

Mr. Austin: Now, I don't believe that is necessary. I object to that.

Mr. Abbott: Well, the letter is very short, your
3144 Honor, and I think it will lead to a better understanding of what the offer is if I read it.

Trial Examiner Ballinger: You can read it and counsel for the Commission can read it, and the Examiner, if necessary, can read it without incorporating it in the record. It will be a duplication.

Mr. Abbott: Very well.

By Mr. Abbott:

Q. Now, Mr. Gershenson, the letter from Mr. Dworman and the Red Indian Oil Company—by the way, do you know what office he fills in that company?

A. I said yesterday he was the executive head of that company, and it is my understanding he is president. He has never signed the title to it, but he acts in that capacity, and I know no one else in the company who supersedes him.

Q. In his letter he quotes a tank wagon price on the gasoline as .081 per gallon. Do you recall whether that was the tank wagon price in the fall of 1940?

A. The tank wagon price?

Q. Yes.

A. I couldn't tell. I took it as being so from the letter.

Q. He states that offer as the tank wagon price, and he states in his letter: "We were to allow you jobbers discount of .017." 3145

Now, how does that figure compare with the differential that you received from the Standard Oil Company in the fall of 1940, to which time your letter refers?

A. It is .2 of a cent better. We were getting a differential of 1.5 from Standard Oil.

Q. Yes; and he says further: "In addition thereto we would allow you .001 per gallon to haul gasoline out of our pipe line terminal." Do you know where that terminal is located? Is it in Detroit?

A. Yes, it is.

Q. And he goes on and says: "And also an advertising allowance of .25 points per gallon on all regular and Ethyl gasoline purchased from us." As an advertising allowance. Had you discussed that with Mr. Dworman?

A. They gave us that discount and we use it as we see fit. We can either retain it or spend it.

Q. What is meant by an advertising allowance?

A. I don't know just what they mean by it. As far as I am concerned, it was a price reduction. I mean that is the only way I can interpret it. They give us that additional discount there and we spend it as we see fit, either to promote the sale of the product through advertising, or creating good will, or giving good service, or any one of many different ways.

3146 Q. And he further states in his letter: "Our Ethyl gasoline is shipped from Toledo refinery, and if you wish to haul that product from Toledo, the hauling allowance would be .004 per gallon."

A. I did not take that into consideration, and I just ignored that.

Q. Have you figured up, based on Exhibit No. 47, what the total of the differential would be for the base differential and the hauling differential? And also the advertising allowance differential?

A. Yes, I did. As a matter of fact, over the telephone he gave me this net figure which I tried to state before, which I would like to now give.

Q. You mean per gallon?

A. Yes.

Q. What is that.

A. That is .05875.

Q. Per what?

A. That is for the regular gasoline.

Q. Expressed in what?

A. In cents.

Q. in cents?

A. Yes. That is 5875/1000 of a cent.

Q. State how much better that price was at the time it was made than the Standard Oil differential.

3147 A. Subtracting that price from .066, which was the price we were then paying Standard Oil in tank cars and having to have our bulk plant, too, the Red Indian price did not require us to have a bulk plant, so the price differential was actually .00725.

Q. And that is approximately what?

A. Approximately .7 of a cent better than the Standard Oil's tank car price on what we consider comparable quality gasoline, because they are both Standard Oil Company.

Q. Is this the same company that made you the offer which was testified about yesterday before you went on the tank car price with the Standard Oil Company in March of 1938?

A. That is the same company that made us that offer, as well as the one I referred to before. We got the additional half cent, and that is also the company that I stated has constantly solicited our business throughout the past ten years.

Q. Is this the same company that you have stated sold you the Quaker State Motor Oil?

A. Yes, the Quaker State Motor Oil and are still selling us motor oil.

Q. You state the Red Indian Oil Company offer would contemplate the elimination of your bulk plant, Mr. 3148 Gershenson. Do I understand that you have at all times, since 1938, maintained a bulk plant which you testified about yesterday?

A. Yes, we have and still do maintain it.

Q. What do you mean specifically when you say that acceptance of the Red Indian Oil Company offer would eliminate the use of your bulk plant?

A. Well, the price is picked up at their bulk plant. We can drive over to their bulk plant or their pipe line terminal and take our gasoline from their bulk facilities and all we would have to have would be just trucks to haul it, and we would eliminate the cost of operating our own storage facilities.

Q. There was marked yesterday for identification Exhibits 45 and 46, which were letters which you testified were written to the Standard Oil Company under date of August 27, 1936, and February 14, 1938. Were those letters written in contemplation of any prosecution or investigation such as the one now in progress?

A. No, sir.

Q. As a matter of fact, were they both written before the State prosecution which you have now?

A. Yes, they were. I write the Standard Oil Company comparatively often. If we run into a bad competitive price, I write to Mr. Raupagh about that.

3149 Q. Now, Mr. Gershenson, there was testimony in the Commission's case last month to the effect that—or, rather, it was in March instead of last month, to the effect that in 1938 and 1939, in particular, Ned's Auto Supply Company gave preferences to their customers on purchases of gasoline by issuing credit cards, trading stamps, and other price concessions. I believe you testified something about the cost of trading stamps to Ned's Auto Supply Company. Will you state that again on the record as to what the cost was of issuing these trading stamps, based on the actual redemptions made?

Mr. Austin: How is that material? I object to it on the ground that it is irrevelant and immaterial as to what the cost was to him. Whatever proof there is in the record relating to the issuance of those to customers and what it costs Ned's Auto Supply Company to issue them, it seems to me, is the point.

Mr. Abbott: Well, what I want to bring out is this: I will ask the witness this question. Withdraw the other question which is objected to.

By Mr. Abbott:

Q. What was the nature of these trading stamps that you issued in those years of 1938 and 1939?

A. That was during the prevailing so-called price war when there were all sorts of offers and inducements being made to the public by our competitors.

3150 Trial Examiner Ballinger: Read the question to the witness, Mr. Reporter.

(The last question was read.)

Mr. Abbott: The Examiner wants you to understand that question.

A. I am trying to answer it to the best of my ability. I am trying to give you the inducement for the—

Trial Examiner Ballinger: Forget the inducement and tell us what the nature of it was.

The Witness: I don't get what you mean.

By Mr. Abbott:

Q. What were they?

A. They were trading stamps having a face value of 2¢ gallon, but which the net cost to us was half a cent in redemption value.

Q. Why was that?

A. Why, there were—

Mr. Austin: I object to it, to what the cost was to the company.

Trial Examiner Ballinger: Objection sustained.

Mr. Abbott: I think he has a right to show, if the Court please, what the ultimate result was in the issuing of these stamps which had a face value of 2¢ if they were redeemed.

3151 Trial Examiner Ballinger: Suppose they had been redeemed in gas?

The Witness: Your Honor, they weren't redeemed in gas. That's what I am trying to explain. If I am given a chance to submit all the facts, I think I might be helpful. I am the only one that has this information and the Commission is anxious to know the facts, and I am glad to supply them.

Trial Examiner Ballinger: If it is designed to prove by this witness the trading stamp testified to by another witness, redeemable in gasoline, or not redeemable in gasoline, the witness may so testify.

Mr. Austin: The testimony is the testimony of this witness that is in the record, and I think the testimony will show whether they were redeemable in gas or weren't, right now.

By Mr. Abbott:

Q. Were these trading stamps, Mr. Gershenson, redeemable in gas or other merchandise?

A. They stated on their face and stated on it that they were redeemable in other merchandise.

Trial Examiner Ballinger: Were they redeemable in gas?

The Witness: No, your Honor, they were not.

By Mr. Abbott:

3152 Q. Before you went on a tankcar basis in 1938 had you—and when I say "you" I mean the Ned's Auto Supply Company—been offering commercial discounts to commercial customers?

A. I have previously testified, and we had extended commercial discounts as long as we had been in the gasoline business, because there were commercial discounts available when we first went into the gasoline business, and we just met that competition.

Q. After March of 1938 did you offer any inducements other than or different in character than you had offered previous to March of 1938?

Mr. Austin: I object to that question on the ground that it is indefinite and calls for a conclusion as to what is an inducement. Further, on the ground that the—

Trial Examiner Ballinger: Objection sustained.

Mr. Abbott: Well, I will reframe the question.

By Mr. Abbott:

Q. After you went on the tank car basis in March, 1938, did you offer any different price concessions to the public, either in character or amount, than you had offered previous to the time that you went on the tank car basis?

Mr. Austin: I object to that, too, your Honor, and maybe here, if they wish to, desire to ask this witness about what he did give, why, all right, but the whole question is so indefinite as to what it is based upon or whether 3153 it means reduction from the so-called prevailing price, and whether it means price, and whether it means trading stamps, and it is really calling for the conclusion of the witness as to a comparison of what he did before and after that date.

Trial Examiner Ballinger: Objection sustained.

By Mr. Abbott:

Q. All right. I will ask it this way, Mr. Gershenson: What did you offer to the public previous to March of 1938 in the way of price concessions, premiums, or trading stamps, etc.?

A. As I have already stated, we met competition on commercial discounts—

Trial Examiner Ballinger: Just read that question to the witness: Can't you answer the question direct?.

(The last question was read.)

The Witness: Will you please read my answer?

(The last answer was read.)

The Witness: I submit, your Honor, that is a concession.

Trial Examiner Ballinger: What did you offer?

The Witness: A commercial discount, to start with.

Trial Examiner Ballinger: Tell about it.

By Mr. Abbott:

3154 Q. What else?

Mr. Austin: How much?

A. I can't testify. That covers a long period. It might be changed. Whatever the prevailing commercial discount was. Maybe 2¢. It was never more than 2¢, to my recollection.

By Mr. Abbott:

Q. What else besides commercial discounts?

A. No other special inducement except during a price war, whatever the prevailing situation was. I can't answer that question generally, unless you ask me about some specific time.

Q. I am asking you about the time before you went on a tank car basis in March of 1938. This relates to the time before you went on a tank car basis. Was there anything else that you offered to the public by way of price inducements or premiums or trading stamps, etc.?

A. I don't remember whether the trading stamps were in 1939 or 1938, so—I believe we were giving the trading stamps before we went on a tank car basis.

Q. What did you offer in that line after you went on a tank car basis?

A. Nothing more than we had previous. I might make this general statement, if I may. Our buying price has no bearing on our retail selling price. We meet competi-
3155 tion in a general way. Our buying price doesn't enter into it.

Mr. Austin: I move that last statement be stricken from the record, your Honor.

Trial Examiner Ballinger: Motion granted.

By Mr. Abbott:

Q. Mr. Gershenson, what was the reason specifically, for giving these concessions to the public on retail sales of gasoline?

Mr. Austin: I object to that also, your Honor. The reason why the witness did it has nothing to do with their effect. We are concerned in this case with what was done and what its effect was. I don't believe a statement by the witness as to why he gave any discount is in any way material.

Mr. Abbott: On the question as to whether there was a competitive situation which required Ned's Auto Supply to meet that competition, I think the question is material.

Mr. Austin: That's a question of opinion of Ned's Auto Supply Company. It appears to me that it could not possibly have any probative value.

As to whether, in their opinion, they needed to meet competition or there was competition, or whether the price was reduced for that purpose, or some other purpose; we have had repeated attempts to show that same thing—

3156 Trial Examiner Ballinger: Objection sustained.

By Mr. Abbott:

Q. Mr. Gershenson, in 1938, or 1939, you had a station at Jefferson and Manistique, did you not?

A. Yes, sir.

Q. When was that station opened?

A. It was opened in June of 1933.

Q. And will you state the fact as to whether there was a Joy station selling Joy gasoline at the corner of Vernor and Elmwood, in the City of Detroit at the time that the Ned's station was opened at Jefferson and Manistique, or at any time between then and April, 1938?

A. On April 3, 1938, that Joy station, which is in competition with our Jefferson station, was selling Joy gasoline at a differential of—

Trial Examiner Ballinger: One moment. He merely asked you whether there was a Joy station.

The Witness: Yes, there was.

By Mr. Abbott:

Q. All right. Do you know, in a general way, what that station at Vernor and Elmwood sold Joy gasoline for in the year 1938?

A. I have a memo as to its differential. I don't remember how much per gallon.

Q. How much were they selling that gasoline at
3157 the Joy station in question below the price at which you were selling gasoline at your station at Jefferson and Manistique, if you know?

Mr. Austin: I make the same objection to that, your Honor, that I have been making all along; on the ground it is irrelevant and immaterial as to what prices other retail service stations were charging. That is the same general objection that I made to the photographs and the—

Mr. Abbott: The situation involved here is this, your Honor: There has been testimony in the Commission's case with reference to all of the Ned's stations, including the one at Jefferson and Manistique, on the part of gasoline station operators in that locality. That they were injured by the reason of the fact that Ned's Auto Supply Company was making these prices, these price concessions that have been referred to this morning, and it becomes material in the Respondent's case to show—for the purpose of showing that there was no injury to competition, as using the words of the statute under which this case is brought, to show what the competitive situation was in the vicinity of Ned's station at the corner of Jefferson and Manistique in the City of Detroit. That's what this testimony is intended to show.

Trial Examiner Ballinger: The objection is overruled.

Mr. Abbott: Will you read the question?

3158 (The last question was read.)

A. They were selling at 5½¢ a gallon under our price; under our selling price.

By Mr. Abbott:

Q. That was in 1938?

A. That was April of 1938.

Q. Do you know whether in the years 1938 and 1939 there was a Hi-Speed station at the corner of Vernor and McDougal?

A. Yes, there was.

Q. Are you familiar with that station?

A. Yes.

Q. And do you know at what price they were selling gasoline at that station in the year 1939, compared with the price that they were selling Standard gasoline at your station at Jefferson and Manistique?

A. The price was a cent and a half under our selling price.

Q. Do you know the station—

A. That was in November of 1939.

Q. Do you know a station—

Mr. Austin: I assume my objection as to relevancy and materiality will go to this whole line of examination, your Honor.

Trial Examiner Ballinger: It runs to the entire line.

By Mr. Abbott:

3159 Q. Do you know a station operated by James J. Bright on Jefferson Avenue?

A. Yes, I do.

Q. What corner is that; what intersection?

A. It is Jefferson and Emerson.

Q. And how far is that from your station at Jefferson and Manistique?

A. A half dozen blocks or so; six or eight, something like that.

Q. And do you know the price at which Bright was selling gasoline, or which it is now selling gasoline for, for that matter, under the price at which you sell Standard gasoline at Jefferson and Manistique?

A. Yes, I do.

Q. What is the differential?

A. The differential there is 2½¢, and, in addition to that, he offers premiums; free premiums.

Q. That is the situation which obtains to the present time; isn't it?

A. Right today; yes, sir.

Trial Examiner Ballinger: What kind of gas is he selling?

The Witness: He was selling Sun at one time. He has recently changed. I don't know who he gets it from now; Sun and Sinclair.

3160 By Mr. Abbott:

Q. What kind of a sign does he have up there?

A. I don't remember the brand name. It is Spitfire, I believe.

Q. It is called Spitfire?

A. I believe.

Q. Do you know whether in 1938 and 1939 there was a Joy station at the corner of Kercheval and Chalmers?

A. Yes, Kercheval and Chalmers.

Q. How far away is that from the Standard Oil station at the corner of Jefferson and Manistique, approximately?

A. About four blocks; three or four blocks.

Q. Is Kercheval the street immediately north of Jefferson?

A. Yes, it is; one block north. It parallels it.

Q. And do you know the price at which the Joy station at that corner is selling Joy gasoline presently?

A. I checked that within the past few days, and that price is 4½¢ under our retail selling price.

Q. At the present time?

A. Yes, sir.

Q. Do you know whether in 1938 and 1939 the differential was larger, as between their selling price and your selling price, on Standard gasoline?

A. I don't have a memo on that station, but if their
price was the same as for the Joy station at Vernor
3161 and Elmwood, why it was 5½¢; a cent more. That
was in 1938 or 1939.

Q. Do you know of your own knowledge that there is a Zip station on the corner of Kercheval and Ashland?

A. Yes. That is two blocks away.

Q. Just two blocks away from your station?

A. Yes.

Q. Kercheval—

A. It might be two or three.

Q. Where is Kercheval with reference to Jefferson?

A. I would say Kercheval is the next parallel street, running north.

Q. And how far is Ashland from Manistique?

A. The second block from Manistique; running east.

Q. And do you have personal knowledge as to how much they are selling gasoline for at that station at this time, below the price at which you are selling Standard Oil gasoline?

A. Yes, I do. Their price [illegible]he same as Joy's.

Q. What is that?

A. 4½¢ under our price.

Q. Now, do you know whether the Zip station at Kercheval and Ashland was in operation in 1938 and 1939?

A. I am sure that it was.

Q. And do you know of your own knowledge—

3162 A. I am not sure whether the Joy station at Kercheval and Chalmers—I don't recall. I think that followed. This Zip station was there before the Joy station.

Q. This Zip station was there, you say, in 1938 and 1939?

A. Yes.

Q. Of your own knowledge, state whether they were selling gasoline at a higher or lower differential, compared with the Standard Oil price at your station at Jefferson and Manistique in 1938 and 1939.

A. I don't remember—you said higher price or higher differential?

Q. Higher or lower differential.

A. They were selling at a lower price. There was a higher differential.

Q. I mean, as compared with the present time. You stated now it is 4½¢.

A. At that time the differential was higher.

Q. How much higher?

A. At least a cent. In other words, there was a 5¢ difference, 5 to 5½¢.

Q. Have you ever attempted to meet that competition at your Manistique and Jefferson outlet?

A. We have never been able to meet Joy and Zip prices at any of our outlets.

3163 Q. With reference to Hi-Speed and the other stations that you have mentioned in your testimony just now, have you attempted to meet that competition in 1938 and 1939?

Mr. Austin: I object to that question as calling for a conclusion of the witness and he should state what he did.

Trial Examiner Ballinger: Objection sustained.

By Mr. Abbott:

Q. I will reframe it this way: During those years 1938 and 1939, when you testified that you were selling gasoline under the price of Standard Oil gasoline, have you met that competition?

A. We have never had a price as low as the lowest prevailing prices in the City of Detroit; either during price wars or at other times.

Q. Now, referring to your station at Grand River and Chicago Boulevard. When was that station opened?

A. That was opened in June of 1936.

Q. Do you have knowledge that there is a Joy station at the corner of Grand River and Stopel?

A. Yes, I do.

Q. How far is that located from the Grand River and Chicago outlet of the Ned's Auto Supply Company?

A. It is less than six blocks. It may be only four.

Q. It is also on Grand River?

A. Yes, it is; on the same street.

3164 Q. And do you know whether that station was in operation in 1938 and 1939?

A. Yes, it was.

Q. State for the record how much less or how much more that station was charging for Joy gasoline in 1938 and 1939 than was charged for Standard Oil gasoline at your Grand River and Chicago outlet?

A. They were selling at 6¢ a gallon under our retail price in April of 1938.

Q. Do you know of your own knowledge whether there is a Speedway Petroleum Corporation station at the corner of Davison and Detroit Terminal Railway?

A. There are two of them. There is one at Davison and Detroit Terminal and another at Livernois and Kendall.

Q. Where are these stations with reference to your station at Chicago?

A. They are within a half a mile radius. I don't recall all the cross streets, but they are direct competition.

Q. Directing your attention to the year 1939, do you have any data with reference to the price at which they were selling Speedway gasoline under the price at which you were selling Standard Oil at your Grand River and Chicago Boulevard branch?

A. Both Speedway stations then, even as now, had a retail price of approximately a cent and a half to a
3165 cent and seven tenths under our retail selling price.

Q. You say that condition even prevails now?

A. Right today, yes.

Q. Do you have knowledge that there is a Shell station at the corner of Grand River and Plymouth?

A. I am familiar with the Shell station at Grand River and Plymouth. That is Stark Hickey's, I believe you mean.

Q. Is that a large outlet?

A. Yes, very large.

Q. And Grand River and Plymouth; is that an important intersection in Detroit?

A. Yes, it is.

Q. Do you have knowledge of the price at which they were selling gasoline in 1939, lower or higher than the price for which you were selling Standard Oil gasoline at Grand River and Chicago Boulevard outlet?

A. Their price was a cent and four tenths under our price.

Trial Examiner Ballinger: What gas?

The Witness: Shell gas. That is Stark Hickey's.

By Mr. Abbott:

Q. Do you have knowledge of the fact that at the corner of Grand River and Plymouth there is another station?

A. There is a White Star station there. That and Stark Hickey's adjoin each other on a triangle. They 3166-3167 are right together.

Q. And when you say White Star, what gasoline do you refer to?

A. I believe it was White Star then. It is now Socony Vacuum. That is Standard of New York, I believe.

Q. Directing your attention to the year 1939, do you know at what price Stark Hickey, at that station, was selling Socony Vacuum gasoline, either higher or lower than the price at which you were selling Standard products?

A. You were mistaken. This was another station next to Stark Hickey's. Stark Hickey was selling Shell. It is the White Star station next to Stark Hickey. They had the same price as Stark Hickey. Their price was always the same.

Q. What was that?

A. It was 1.4 less than our price.

Q. Less than the price that you were selling Standard gasoline?

A. Yes.

Q. What year was that?

A. That was in September of 1939.

Q. All these matters are stated on your personal knowledge, are they?

A. Yes.

Q. Are you accustomed to keep track of the competitive conditions around all of your stations at any time?

3168 A. That is my immediate responsibility, and I do that by driving around to each of our stations daily, or as often as is possible.

Q. Do you have knowledge that there is a station at the corner of Grand River and North Lawn?

A. There was one there, yes; Grand River and North Lawn, in 1939. It was a Shell station— I don't know whether it is still the same brand or not, today. You mean today or back—

Q. I mean do you know whether it is there today.

A. Well, there has been one change there somewhere. I don't know whether that is it or not.

Q. Well, we will pass that.

Do you know a Cities Service station at the corner of Livernois and Dover?

A. Yes.

Q. Where is that with reference to your station at Grand River and Chicago Boulevard?

A. That is a little longer than the rest of them. It is between a half mile and mile and—well about a half a mile.

Q. Livernois is a main artery of Detroit, is it not?

A. Livernois is a main artery.

Q. Where is it with reference to Grand River?

A. It intersects Grand River about two or three streets beyond our station at Grand River and Chicago Boulevard.

3169 Q. You think this station, though, is about a mile away from Grand River and Chicago?

A. I don't have the mental picture of that.

Q. Well, we will pass that.

Do you know whether there is a station operated by Montgomery Ward Company at Grand River and Greenfield?

A. Yes, I do. There is another one next door, too.

Q. We are just referring to the competition around your Grand River and Chicago Boulevard outlet.

A. Yes, there is. There is a more recent one. That opened in January.

Q. Can you state of your own knowledge the price at which Montgomery Ward Company sell gasoline at their Grand River and Greenfield station, with reference to the price charged by you for Standard Oil gasoline?

A. Yes, I can.

Trial Examiner Ballinger: When was that station opened?

The Witness: That's what I tried to say. That was opened in January of this year; January of 1941.

By Mr. Abbott:

Q. Do you know of your own knowledge at what price they are selling gasoline at that station?

A. Yes. It is 2¢ under our price; 2¢ a gallon.

Trial Examiner Ballinger: What kind of gasoline
3170 are they selling?

The Witness: Well, I don't know, today. It was my understanding at one time—

Trial Examiner Ballinger: Unless you know—

The Witness: No, I don't know.

Mr. Abbott: That will be supplied by other testimony.

By Mr. Abbott:

Q. You say that they sell gasoline at the present time at 2¢—

A. At 2¢ a gallon under their house brand gasoline. The one that compares to our Standard Red Crown.

Mr. Austin: I object, your Honor, about the statement that it compares to the Standard brand, and move that it be stricken, unless knowledge is shown—

Trial Examiner Ballinger: Motion is granted.

By Mr. Abbott:

Q. With reference to the competitive situation around your Chicago Boulevard and Grand River stations, have you ever met any of the prices concerning which you testified this morning?

A. During the price war we met some, like Stark Hickey, but not the Joy and Zip and Speedway. We have never been able to meet their prices.

Q. During the time of the price war of 1938 and
3171 1939, I believe you stated that the Joy station at Grand River and Stopel sold gasoline at 6¢ under the price at which you were selling gasoline at that time?

A. Yes.

Q. What is their differential at the present time, if you know, over the price at which you sell Standard gasoline?

A. 4¢ a gallon. I haven't figured it out. They have varying prices, at different times.

The Joy and Zip competition, we just are never able to meet it, and I don't follow their prices today.

Q. At the present time, do you know what the postings on that station at Grand River and Stopel are?

A. No, I do not. I would have to go back and check it.

Q. Referring to your store at John R and Nevada. When was that station opened?

A. That was the first one that was opened in 1918.

Q. That is your original store?

A. Yes, it is. It is the one started by our father.

Q. Do you have knowledge of a station operated by Sun Oil Company, or a Sun Oil station at Six Mile Road and John R?

A. It is operated by Sun Oil Company. There is a dealer selling Sun gasoline there now.

Q. And do you know whether that station, during 1938 and 1939, offered premiums?

A. Yes, I do.

3172 Q. What kind of premiums?

A. A variety of premiums. They had dishes; an assortment of dishes on their drive, and I believe they gave cigarettes at that time, too. They are, today, giving free inducements. I passed that yesterday.

Q. What do you mean by inducements?

A. Well, free wash and free lubrication jobs; gasoline—or a wash job for 29¢ with a purchase of gasoline.

Q. Is that what they are advertising at that station?

A. Yes.

Q. You say you saw it yesterday?

A. They have a sign out at Six Mile Road and John R.

Q. Do you know of your own knowledge that there is a Sinclair station at the corner of Eight Mile Road and Woodward?

A. Yes.

Q. Is that one of the important intersections of Detroit?

A. Yes, it is. There is a closer one at Six Mile and John R. That is the thorn in our side. That is six or eight blocks away.

Q. We will discuss both of those.

The one at Eight Mile Road and Woodward; do you know whether that was operated in the year 1939?

A. Yes, it was.

Q. And do you know what they were selling Sin-
3173 clair gasoline for at that station in 1939?

A. 1.7¢ off our retail price.

Q. What month was that in 1939?

A. That was in November of 1939.

Q. And the station at Six Mile Road and John R, which is also a Sinclair station; do you know at what price they were selling gasoline at that station a year ago?

A. Yes, sir; 2¢ a gallon off our retail price, and are, right today. That sign was there this morning on Sinclair H-C house brand gasoline.

Q. And how long has that been going on?

A. That has been going on since 1938; three years.

Q. Have they offered the same 2¢ off all that time?

A. Openly, with a sign eight feet square; 2¢ discount as well as—they multiply it out—8 for so much.

Q. Do you know of your own knowledge that there is a Cities Service station at Oak and Avenue and State Fair Avenue?

A. Oakland and State Fair, yes.

Q. Has that station been there for some time?

A. That station has been there. I am not sure that it has always been Cities Service.

Q. At the present time do you know whether they are offering gasoline—

Trial Examiner Ballinger: Just a moment. Do 3174 you know what it is at the present time?

The Witness: Yes. That is Cities Service today; as of January of this year.

By Mr. Abbott:

Q. Do you know at what price they sell Cities Service gasoline?

A. Their price in January of this year was 2½¢ under our price.

Q. How far is that station from your John R and Nevada station?

A. That would be close to a mile; between a half mile and a mile.

Q. Oakland Avenue is an important street, isn't it?

A. Oakland is a street that parallels John R, the next important street running north and south; that is, east of John R; but State Fair is about three-quarters of a mile north of Nevada.

Q. I believe you stated that the principal competition you had was the Sinclair station at Six Mile and John R?

A. As well as the Sun station, also, at John R. and Six Mile.

Q. You said there were two stations—

A. Kitty-cornered.

Q. And how far is that from John R and Six Mile?

A. Only five or six blocks, and they are at an important
3175 intersection. All our customers pass that intersection, and they tell us what is going on down there.

Q. Do you know of a Cities Service station at Woodward and Colton?

A. Yes, I do.

Q. Was that in operation in 1939?

A. Yes, November of 1939.

Q. And have you a recollection what they were charging for Cities Service gasoline at that station in November of 1939?

A. They had a sign out, 2¢ gallon off.

Q. 2¢ off.

Have you ever met the competition of 2¢ off offered by the Sinclair station at Eight Mile and Woodward, Sinclair station at Six Mile and John R, and Cities Service Station at Woodward and Colton? In other words, have you ever sold gasoline at your John R and Nevada station at a discount of 2¢ to the public?

A. No, sir; only during that short period of the price war, but since then the Sinclair station has continued to sell at 2¢ off, and we haven't met them since 1938.

Q. Now going back to Maple and Michigan, that is your Dearborn station, is it not?

A. Yes, it is.

Q. When did you open that station?

A. That was opened in March of 1931.

3176 And are you familiar with a Langer station in that vicinity?

A. Yes, I am. That is on Michigan Avenue just a couple of blocks away.

Q. What is the full name of it?

A. It was then Langer's Auto Supply, and it is now Art's.

Q. Has that station been operated for some time?

A. It has been there for about five years.

Q. Do you know what gasoline they sell?

A. I believe they sell Texas now.

Trial Examiner Ballinger: How long have they been selling Texas, do you know?

The Witness: Since they started.

Trial Examiner Ballinger: Since when?

The Witness: Since they opened up.

Trial Examiner Ballinger: When did they open?

The Witness: About 1936—1935 or 1936. That is my best recollection.

By Mr. Abbott:

Q. Do you know at what price they sell Texas gasoline?

A. I know what price they were selling in March of last year, March of 1940.

Q. What price is that?

A. 2¢ off our price.

3177 Q. 2¢ off of your price?

A. Yes, sir.

Q. Based on what gasoline?

A. Based on their house brand gasoline or Standard gasoline.

Q. Have you knowledge of a Joy station operated at Michigan and McGraw?

A. Yes, I do.

Q. How long has that station been operated?

A. I can't answer that. I know it was there on the first of this year, and it has been there for some time.

Q. Do you have knowledge of the price at which they were selling Joy gasoline at that station in January of 1941?

A. Yes, I do.

Q. What was it?

A. I believe 4¢ a gallon off our price.

Q. You mean the price at which you were selling Standard gasoline at your Dearborn station?

A. Yes.

Q. Do you have knowledge of a Zip station at Michigan and Shaw?

A. Yes. That is the same price as Joy gasoline. They are within a block of each other.

Q. They are within a block of each other?

A. Yes.

3178 Q. And they both sell at the same price?

A. Yes.

Q. And now much is that under the price at which you sell Standard gasoline at your Dearborn station?

A. In January of this year it was 4¢ a gallon under.

Q. 4¢ a gallon under?

A. Yes.

Trial Examiner Ballinger: Under your price?

The Witness: Yes.

By Mr. Abbott:

Q. Mr. Gershenson, you have been testifying about the conditions in the vicinity of your Michigan and Maple Avenue station. Have you ever met the price that you have been telling us at which gasoline has been sold at these stations that you mentioned?

A. Never met Joy and Zip. We have met Langer's.

Q. Well, are you selling gasoline at a discount at the Michigan and Maple station at the present time?

A. No, we are not. You asked me have we ever met the price. During the price war—

Q. I understand you did meet Langer's price?

A. During the price war, yes.

Q. Well, now, at any time that you say you met the prices of these competing stations, did you ever sell for less before they sold for less?

3179 A. No. When I say we met them, that is how I got this question. We will make a survey following receiving certain information as to what our competitors are doing, sometimes through signs, although there haven't been many signs in the last year and a half or so, and when the competitive situation is such that we know we are losing volume to our competitors, why, we will meet their prices wherever possible. We have never been able to do that, as far as Joy, Zip, Speedway, Fleet-Wing, and, oh, a number of outlets all around us that you haven't asked me about.

Q. All right.

Now, do you have a station at 14340 Gratiot Avenue?

A. That is Gratiot and Madeline.

Q. Gratiot and Madeline?

A. Right near the Seven Mile Road.

Q. When was that station opened up?

A. That was opened in June of 1938.

Q. Do you have knowledge of a station operated by Montgomery Ward & Company at Gratiot and Lappan?

A. Yes, that is right across the street from us. One block over.

Q. Was that station being operated in 1939?

A. March of 1939, yes.

Q. Will you state on the record at what price they were

selling Montgomery Ward's gasoline at that station
3180 in March of 1939?

A. That was when that station opened up, and it was at 3¢ off our price.

Q. 3¢ off?

A. 3¢ per gallon off our price.

Q. How long did that continue, approximately?

A. There is at least still 2¢ difference now. I haven't checked the price recently in their station, which is off of Gratiot and is sort of back of their store.

Q. What do they call that gasoline, if you know?

A. I don't believe I know.

Q. Now, are there any Shell stations out in that vicinity?

A. There are several Shell stations within a mile. There is one at Gratiot and Seyburn and Gratiot and Orleans and Gratiot and Waterloo, and in November of 1939 they had a price of 1½¢ a gallon under our price.

Q. How long did that continue?

A. I can't answer that.

Q. Was that during the so-called price war?

A. I don't know when they start and stop. I can only tell you the certain day I am there and saw their price. I have no knowledge of when they started and when they stopped.

Q. Do you have knowledge of a Texas station at Gratiot and Cedargrove?

A. Yes. In November of 1939, during the price
3181 war, on November 17th, to be exact, it was 2.6¢ a
gallon off our price.

Q. You mean less than the price at which you were selling gasoline?

A. Yes.

Q. That is at your station at Gratiot Avenue and Madeline?

A. Yes.

Q. Do you know of a station at 12500 Gratiot Avenue?

A. Yes, that is Bertrand's.

Q. What do they sell?

A. Gulf gasoline.

Q. That is called "Good Gulf," that is what they call it, isn't it?

Trial Examiner Ballinger: I suggest that you let the witness testify.

The Witness: They use that in their advertising.

By Mr. Abbott:

Q. Do they have a Gulf sign on that station?

A. Yes.

Q. Do you have any knowledge of any time during the past year when they have been selling Gulf gasoline at that station for less than the price at which you have been selling Standard gasoline in your station?

A. A year ago, in May of 1940, they were selling at 2¢ off our price. It is my understanding, although I have
3182 no personal knowledge, that they still do.

Mr. Austin: Motion to strike out the last part of the answer.

Trial Examiner Ballinger: Motion granted.

By Mr. Abbott:

Q. The time at which they were selling at a reduction of 2¢ off the price of Standard house brand gasoline was when?

A. In May of 1940.

Q. Now, is there a Montgomery Ward station at Seven Mile Road and Gratiot Avenue?

A. Yes, I have already stated that. That is at Gratiot and Lappan. That is a block off of Seven Mile. The back part goes around to Seven Mile Road, the parking lot.

Q. That is very close to your station?

A. It is right across the street on the other side of Gratiot Avenue. We are on the east side and they are on the west side.

Q. Do you say that ever since they opened they have been selling at 3¢ less than the Standard price of gasoline?

A. I said it was then 3¢. It is now 2¢ off our price.

Q. At any time in 1938 and 1939 and 1940 and 1941, have you met the price of any of these stations?

A. I have never met Montgomery Ward, or as I previously testified, Joy or Zip.

3183 Q. You haven't testified about any Joy or Zip stations. Are there any in the locality of your Gratiot Avenue station, that you can recall?

A. Not very close. They are further down on Gratiot.

Q. Have you ever met the price of the Texas station at Gratiot and Cedargrove?

A. As I have already said, in 1939, during the price war, we came within a half a cent of them.

Q. What were they selling gasoline for?

A. 2½¢ off, and ours, during the price war, was 2¢.

Q. Now, coming to the station at Woodward and Calvert, that was opened when?

A. That was also opened in 1938, October of 1938. It was just a few months after the Gratiot Avenue station.

Q. Was that the last—

A. Yes, sir.

Q. —the last one in Detroit that you have opened up?

A. Yes.

Q. And do you have knowledge that there is a Joy station at the corner of Woodward and Taylor Avenue?

A. Yes, sir.

Q. Is that very close to your Calvert station?

A. Yes, sir, very close, and an important competitor.

Q. In 1938, after you opened or about the time that you
opened your Woodward and Calvert station, do you
3184 know at what price Joy gasoline was being sold at
Woodward and Taylor?

A. The differential at that time was 7½¢ off our gasoline.

Q. 7½¢?

A. Yes, they used to line up on Woodward Avenue for blocks. I might say that that Joy station used to have a lower price than other Joy stations. I don't know for what reason.

Q. Do you know what their price is at the present time, as compared with your price, for Standard gasoline, at Woodward and Calvert?

A. 4 to 5¢ a gallon. That station took their signs down entirely now, for some reason.

Q. You say it is between 4 and 5¢?

A. Yes; off our price.

Q. Do you have knowledge of a Gulf station at Woodward and Tyler?

A. Yes, that is Carnick Oil Company.

Q. And was that station being operated in 1938?

A. Yes, in May.

Q. Have you any information—

A. 2¢ a gallon off our price.

Q. In what month?

A. That was in May of 1938.

3185 Q. And do you have knowledge of a Mobilgas sta-
tion at the corner of Davison and Woodward?

A. Yes, that is what I called Taylor.

Q. Is he the former mayor of Highland Park?

A. He held some office in Highland Park. I don't know whether he was mayor.

Q. How long has he been operating the station at Davison and Woodward?

A. At least five years. There was a station prior to that, but he took it over in 1937 or 1936.

Q. Do you have any knowledge, from your own personal inspection, as to what he was selling gasoline for in 1938?

A. Yes. 2¢ a gallon off our price.

Q. What month?

A. In May of 1938.

Q. Now, have you any knowledge of any other Joy, Zip, or Speedway stations in the vicinity of the Woodward and Calvert Avenue station, where you last constructed a station?

There is another Zip station at Woodward, around King or Hague, which is on the other side.

Q. That is just south of Clairmount?

A. Yes, on the east side of Woodward Avenue, and their price is approximately 4¢ off our price. They came into being after the Joy Station at Woodward and Taylor.

Q. Now, do you meet the prices of the Joy and Zip
3186 stations, which are adjacent to your Woodward and
Calvert outlet?

A. I have answered that three times this morning. We have never been able to meet Joy and Zip prices since we have been in business, nor come close to it. That goes for all of our stations, which all carry the same price. And we have never been able to meet Joy or Zip's lowest prices anywhere, nor even their highest prices. Their prices vary, but our stations all carry the same price.

Q. Are those all the stations, Mr. Gershenson? Have I referred to all the stations that you operate in the City of Detroit?

A. Yes, you have.

Q. You stated yesterday, Mr. Gershenson, on the record, the gallonage that you had from 1936 to 1940, inclusive. I will ask you whether after you went on the tank wagon—

Mr. Abbott: Strike that out, Mr. Reporter.

Q. I will ask you whether, after you went on the tank car basis in March of 1938, the gallonage of Ned's Auto Supply Company increased?

A. On the contrary, it decreased for the same number of outlets. We added ~~two~~ outlets after that, we added two ~~outlets~~ after that, but, for the ten months following March of 1938, for the four stations we had at that time, the gallonage decreased.

3187 Q. And in the year 1939, the figures which you gave yesterday were 4,336,000 gallons. Was that less than your gallonage in 1938? If so, by how many gallons?

A. I will have to get my memorandum on that.

Q. All right, take your time.

A. By approximately 550,000 gallons, 1939 was lower than 1938.

Q. And was 1940 lower than 1939?

A. Yes; it was, by, oh, approximately 20,000 gallons.

Q. How did 1940 compare with 1937?

A. Oh, just a slight bit higher.

Q. In 1937, how many stores did you have? How many outlets?

A. We had four and in 1940 we had six.

Q. How many more gallons did you sell in 1940 than you sold in 1937, approximately?

A. About 80,000 gallons for the year.

Q. Notwithstanding the fact that you had two more stations?

A. That is right, our gallonage has definitely not increased. As a matter of fact, it went down after we went on the tank car basis.

Q. Has there been any difference in your pricing policy since you went on a tank car basis?

A. No, sir.

Mr. Austin: I object to that, your Honor, unless 3188 we know what the witness' pricing policies are and I think that would be immaterial.

Trial Examiner Ballinger: Sustained.

By Mr. Abbott:

Q. Have your prices, since you went on the tank car basis in March of 1938, been any lower? I mean, the prices at which you offer gasoline at retail?

A. No.

Mr. Austin: I object to that and ask that the answer be stricken out.

Trial Examiner Ballinger: Objection sustained.

By Mr. Abbott:

Q. Of your own personal knowledge, Mr. Gershenson, will you state the fact as to whether Ned's Auto Supply Company has ever started price cutting in any of the locations where you have outlets?

Mr. Austin: I object to that question, likewise, your Honor, as being irrelevant and immaterial and also it doesn't appear that, it hasn't been established what is meant by price cutting nor has it been established that this witness has knowledge of any prices at any particular time in question charged in the other stations in the neighborhood. He would have to know the prices of the other stations and it would just have to be established that price cutting existed.

3189 Mr. Abbott: I am asking just a general question which I think your Honor has quite often asked in reference to price cutting, that has been used quite often in this case and the meaning is pretty definitely established. I am asking this witness this question as a matter of general policy since 1938 when he went on a tank car basis.

Trial Examiner Ballinger: Objection sustained.

By Mr. Abbott:

Q. Mr. Gershenson, in your capacity as president of Ned's Auto Supply Company, have you, during the past four or five years kept a portfolio of photographs and other material to show the competitive situation in Detroit?

A. I have kept a file and portfolio.

Q. Did you at one time have a portfolio of pictures and other material?

A. I had quite a comprehensive collection of receipts and photographs and cards.

Q. What became of that?

A. I turned it over to an investigator for the Federal Trade Commission.

Q. What was his name?

A. Donald McDonald. I say I turned it over to him. I did not mean to give him possession of it, but he took it.

Q. What conversation did you have with him at the time?

A. He came out about a year ago and identified 3190 himself to me and he said he wanted to know whether I would make certain records available for him, that ~~he was making an~~ investigation for the Federal Trade

Commission and it was voluntary whether we showed him these records or not and I did and I got into a conversation with him and we found out we had mutual friends going to law school at Michigan and he invited me down to his hotel in the evening for a social visit and he was staying at the Royal Palm Hotel and he told me, he said that he found me to be quite well informed on the situation here and that I could save him a lot of leg work if I would come down and visit him and tell him what I knew. He said he had had a talk with a Mr. Peck and, in fact, he said it was through Peck's solicitation that he was here and he said if I could give him a comprehensive story of what the competitive situation was here, I could save him some work and I told him I had quite a file and I stayed in his room until it got quite late and he asked me if I would leave that file with him until the next day and he would go over it until the next morning and, I did, and that was the last I saw that file until I received some photostatic copies after this trial began.

Q. Did you ever see the file back?

A. Never saw it back.

Trial Examiner Ballinger: Did you ever request its return?

3191 The Witness: Yes.

By Mr. Abbott:

Q. How did you make the request of?

The Witness: I made it to—I did not know where to reach Mr. McDonald.

Trial Examiner Ballinger: You knew he was connected with the Federal Trade Commission, did you not?

The Witness: Yes, I did.

Trial Examiner Ballinger: You knew that a letter addressed to him at the Federal Trade Commission would reach him, did you not?

The Witness: I had no need for it until they started this suit. He was supposed to return it to me voluntarily the next day, but he went to Washington and I had called the hotel the next day or the day after and they said he had left and carried that file off to Washington with him, but it was my understanding when I gave it to him that he would return it to me the next day.

By Mr. Abbott:

Q. You haven't got the file back?

A. I made a request of Mr. Austin before this trial began, at least I told him I would like to get it back and he suggested how I might go about getting it back.

Q. What conversation did you say you had about Rankin Peck with Mr. McDonald?

3192 Mr. Austin: I object, your Honor. Any conversation he had with the Federal Trade Commission examiner regarding any one outside of this case, I think, is entirely irrelevant and immaterial.

Trial Examiner Ballinger: Sustained.

Mr. Abbott: Do you claim that Mr. Peck is outside the case?

Mr. Austin: Yes.

Mr. Abbott: You may take the witness.

Mr. Austin: If your Honor please, I would just like to state on the record that Mr. Gershenson did not make any request of me for any papers, photographs, or anything else before this trial started because I never saw Mr. Gershenson until I met him here in the courtroom and I may have spoken to him on the telephone a time or two before we came in and, in any event, I turned over to Judge Hanley all of the papers, photographs of the nature that Mr. Gershenson has described that I had in the file with me here and he made photostats of that, I believe, and, in any event, I told Judge Hanley they were available to him and the originals would be also available at any time if needed and, of course, as far as I am concerned, I knew nothing of the matter until Mr. Gershenson mentioned it to me on the telephone while I was here in Detroit a day or two prior to the hearings.

Trial Examiner Ballinger: We will take a five-3193 minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Abbott: I want to ask the witness a couple more questions, your Honor.

By Mr. Abbott:

Q. Mr. Gershenson, at the present time do Ned's Auto Supply Company allow any price concessions to the public, excepting special discounts?

A. No.

Q. For how long have you been allowing no price concessions, excepting commercial discounts?

A. Since that last price war, around 1938 or 1939, late in 1938, I believe.

Mr. Abbott: I have an exhibit for identification, your Honor.

Trial Examiner Ballinger: The Reporter will mark the document as Respondent's Exhibit No. 48, for identification.

(The document referred to was marked "Respondent's Exhibit 48", for identification.)

Mr. Abbott: There is a memorandum on the bottom of it, your Honor, that I want to cross out because it has no connection with the exhibit.

Trial Examiner Ballinger: It may be stricken off

3194 the exhibit.

By Mr. Abbott:

Q. Mr. Gershenson, I show you Respondent's Exhibit 48 for identification and ask you what that is.

A. It is a letter I wrote to Mr. Raupagh on December 23, 1940.

Q. And did you sign that letter yourself?

A. My secretary signed it.

Q. Did you dictate the letter?

A. Yes, I did. She signed my name for it. That is not my signature, not my own signature that I signed. I might say, she has power of attorney. She signs my checks also.

Q. I will ask you, Mr. Gershenson, with reference to the Red Indian Oil Company offer on which there is a letter introduced in evidence, being Respondent's Exhibit No. 47, is that offer of the Red Indian Oil Company under consideration by your company at the present time?

Mr. Austin: Will you repeat that last question please, Mr. Reporter?

(The question referred to was read by the Reporter.)

Mr. Austin: I object to that question as irrelevant and immaterial.

Trial Examiner Ballinger: Sustained.

Mr. Abbott: You may take the witness.

3195 *Cross-Examination by Mr. Austin:*

Q. Mr. Gershenson, I think yesterday you referred to a conversation you had with a Mr. Jack Reed.

A. Yes.

Q. Who does he represent?

A. Shell Oil Company at that time, subsequently he went with Argo and I had some conversation with him then.

Q. How do you know he represented the Shell Oil Company at any time?

A. I saw him when he conducted the Shell Oil Company meeting.

Q. Is that the Jamboree you spoke of?

A. Yes, and several times subsequently to that.

Q. You referred to some conversation you had with him. When was that?

A. There were several conversations. There was one that evening at the Shell banquet, or Shell party.

Q. When was it?

A. He had invited me. As I stated yesterday, the date of that party slipped my mind. I could not even give you the year, but I remember the fact that there was a party.

Q. Do you remember how long ago it was?

A. About seven or eight years ago; sometime in 1932 or 1933 or 1934.

Q. Just what was said at that conversation?

3196 A. He told me that they were looking for a tank car outlet in Detroit and he also told me that if that would be a good thing for us to take on.

Q. Did he say they just wanted one tank car outlet?

A. That is my recollection: He said they wanted one jobber or large operator of that type. By jobber, I mean with retail outlets, because they subsequently took on Stark Hickey, which is a set-up something like ours.

3197 Q. Well, in other words, then—

Mr. Abbott: Just a moment. He didn't complete his answer, did he?

A. Yes. I said they took on Stark Hickey, which is a set-up substantially similar to ours.

Q. Does Stark Hickey sell at wholesale to dealers, do you know?

A. I can't answer that. The name is the Grand River Oil Company. He might, or might not.

Trial Examiner Ballinger: You don't know.

The Witness: No.

By Mr. Austin:

Q. Did Mr. Reed know, then, or did you tell him that you didn't sell at wholesale to dealers?

A. I didn't discuss that. I am sure he knew then that we didn't sell at wholesale to dealers, because we weren't doing it.

Q. Did he indicate when he said he wanted a jobber that he wanted someone who had wholesale outlets?

A. Primarily, yes.

Q. He said he wasn't interested in a jobber to sell to dealers?

A. No, sir.

Q. Did I understand you to say that after Shell began to sell to Stark Hickey he told you that the offer was
3198 no longer open?

A. He told me at one time that offer was no longer open, and I assumed that was when they signed up Stark Hickey, although he didn't tell me who they signed up. He said they had someone else.

Q. You do know that they sell to Stark Hickey now?

A. Yes, I do. That's how I tie the two up.

Q. Referring to the Red Indian Oil Company, what is their brand of gasoline, or do they have a brand?

A. Fleet-Wing, Standard Oil of Ohio.

Q. Do they sell their gasoline under the name Fleet-Wing?

A. Yes, they do.

Q. What jobbers does Red Indian Oil Company sell to, in Detroit, now?

A. I have a memoranda on that. I can't tell you offhand.

Mr. Abbott: Do you have it here?

The Witness: Yes, I am pretty sure it is in my file.

Trial Examiner Ballinger: You may refer to it.

By Mr. Austin:

Q. If you can refer to anything and can tell me what jobbers in Detroit handle Fleet-Wing gasoline.

A. Well, I know of a hundred retail outlets. I don't know whom these outlets are supplied by, whether direct by Red Indian or direct from other jobbers.

3199 Q. Do you know of any jobber that sells Fleet-Wing gasoline?

A. I am sorry to keep the Court waiting, but I had no idea how to file these. I had names on different things, but I didn't know, chronologically, how I would be asked it.

Trial Examiner Ballinger: Take your time.

(The witness referred to documents.)

A. I know there is the Wings Petroleum products.

Q. What is that name?

A. That is a retail outlet. I don't know whether they would be classified as a jobber or not. Wings Petroleum. I have another name here, I can't answer from my own knowledge—from my personal knowledge, of any jobbers that Red Indian have, other than the one I mentioned.

Trial Examiner Ballinger: When you refer to Red Indian, you refer to Fleet-Wing?

The Witness: Red Indian Oil Company. They sell Fleet-Wing gasoline.

Trial Examiner Ballinger: Fleet-Wing?

The Witness: Yes, sir.

Trial Examiner Ballinger: Red Indian is—

The Witness: That is the trade name—that is the company name; Red Indian Oil Company. I would call the Red Indian Oil Company a jobber, myself.

Trial Examiner Ballinger: Is the Red Indian Oil
3200 Company the distributing agent for Fleet-Wing?

The Witness: Yes, sir.

Trial Examiner Ballinger: That is a separate and distinct company from the company that manufactures Fleet-Wing?

The Witness: That is my understanding of it. Fleet-Wing is the brand name of Standard Oil Company of Ohio, from whom the Red Indian Oil Company buy their gasoline.

Trial Examiner Ballinger: Does the Red Indian Oil Company distribute to the retail trade?

The Witness: Yes, it does; and to other dealers.

By Mr. Austin:

Q. Have you any knowledge of what the arrangement is between the Red Indian Oil Company and Standard Oil of Ohio?

A. No, I do not, other than—

Q. Do you know whether they are an agent or whether they buy their gasoline?

A. I can't answer that.

Q. Well, you say that you had some conversations with their representatives about your purchasing at jobber's price; is that right?

A. Yes. Here is the representation that he has made to me directly, on your question. He has, at time, said that

he has been authorized by Standard Oil of Ohio to give us
these terms. He stated that in this letter. He has
3201 told me that.

Q. Who is "he"? Do you mean Mr. Dworman?

A. Mr. Dworman, yes. I don't know what the relationship is other than that.

Q. On March 7, 1938, was that the time that you got the tank car agreement from Standard Oil Company?

A. Yes, sir.

Q. And I believe you stated that you had—a day or two before that you had a conversation with Mr. Raupagh?

A. Yes. For several days preceding that. I had several conversations.

Q. In relation to that date, when did you acquire your bulk plant storage? When did you lease that bulk plant?

A. March 1, to the best of my recollection.

Q. At the time you leased the bulk plant, did you have any understanding with the Standard Oil Company that you would be able to buy from them at tank car prices?

A. We had an option on that bulk plant a month or so before that. We negotiated for that bulk plant in either January or February, with the understanding we would start paying rent as soon as we got gasoline. We had no understanding with the Standard Oil at the time we completed our arrangements on the bulk plant because if we wouldn't have gotten it from Standard Oil, we would have
gotten it from somebody else. We were ready to buy
3202 in tank car. I told Mr. Raupagh we had a bulk plant.

Q. Now, again, in relation to the Red Indian Oil Company, you said this morning in connection with a letter that was put in evidence, Respondent's Exhibit 47—there is a mention here of an advertising allowance, what discussion, if any, did you have with Mr. Dworman about that advertising allowance?

A. Well, I testified to that this morning. I said he said that that's an additional reduction from our purchase price that we could use as we saw fit. We had no specific discussion as to how that should be spent.

Q. Did he tell you that?

A. Not in so many words. I don't recall the exact words. I told him to embody it in the letter. That that would be the exact evidence, and I don't recall beyond—that is the reason I got the letter, so I don't attempt to remember the conversation.

Q. The letter refers to an advertising allowance?

A. That's what it means. That's all I can tell you about it. That wasn't my choice of words. That is in his letter and it is embodied in that, and I can't tell you what he had in his mind.

Q. I think you also said this morning that you had reached the conclusion, after adding these various discounts together, that you would receive a better price;
3203 I think you said of .77¢. I am not sure of that figure.

A. No; .007; 7/10 of a cent.

Q. 7/10 of a cent.

A. I tell you how I arrived at that. Over the telephone he gave me—

Q. Just a minute, Mr. Gershenson. I want to get the figure correct, whatever figure you put in evidence this morning. How did you arrive at that figure? Did you arrive at that by adding together what is in this letter or—

A. He gave me the net price over the telephone. He said, "I will write you a confirming letter," and I haven't—

Q. What was the net price?

A. I testified to that this morning. I have that on a memo here.

Q. I wasn't sure whether you were referring to a letter or some other conversation.

A. To my memory that is .05875. That is 5 and that fractional part of a cent. Picked up at their bulk plant.

Q. And that is the figure that he gave you over the telephone?

A. Over the telephone, yes.

Q. When was that that he gave it to you?

A. That was on November 5th.

Mr. Abbott: What year?

The Witness: 1940.

3204 A. (Continuing.) My memoranda is made December 20th, I made myself; adding that up with that of Gulf, and so on.

Mr. Abbott: He gave you that in December; not at the time you wrote this letter?

The Witness: No, I asked him since. When I knew I was going to testify I asked him for a letter, because these figures weren't so clear in my mind. He gave me them over the telephone. I see Mr. Dworman about twice a week.

By Mr. Austin:

Q. What price are your service stations charging now for Red Crown?

A. It has changed twice in the past two weeks.

Q. I had forgotten that. What price were you charging prior to these recent changes? Let us take for 1940.

A. I would have to check to be exact. I might be off a tenth of a cent. I am not prepared to answer exactly.

Q. I meant to ask you what the posted price was.

A. The same answer for that. The posted price that we have on our pumps is what we are selling at.

Trial Examiner Ballinger: That is a matter that comes under your direct supervision; is it not?

The Witness: Under my executive supervision, yes, but when the change comes through, the office manager computes it and tells the man down there that sets the
3205 pumps, and that is the way it works.

By Mr. Austin:

Q. What do you mean, when the price change comes through?

A. When we are advised of the price increase and what Mr. Peck's association tells us at what we have to sell it, that's what we do rather than submit to his tactics.

Q. Is that were you get your information from, as to the price; Mr. Peck's association?

A. That is where we had to, in the last year and a half, if we want to be safe. We don't like his tactics, but rather than disagree with him, we sell at his price. I mean that in all seriousness on my account.

Q. You said this morning that at one time Stark Hickey, at least one of his stations, was selling at 1.4¢ below your nearby station.

A. Yes.

Q. Will you tell me just when Stark Hickey was selling or posting a price which was 1.4¢ below your posted price?

A. I am not sure it was a posted price, but on my information, the data, I went up there myself—during the price war I made a number of buys myself. My brothers did. We went out on a shopping tour.

Q. You say during the price war. When was that?

A. I am coming to that. That was in September: September 6th of 1939, at Grand River and Plymouth,
3206 1.4¢ under our price.

Q. How long did Stark Hickey's station there continue to offer 1.4¢ below your price?

A. I don't know how soon after that we met it. After we made this survey and we lost enough business, why, we changed the meter. I don't remember now when that was.

Q. That was in 1939, you say?

A. Yes. That's what my memo says. This is the memo that I made from this file of information that I turned over to Mr. McDonald; Donald McDonald, the investigator for the Federal Trade Commission.

Q. Now, you made some mention of Langer's Texaco station at Dearborn.

A. Yes, sir.

Q. It is right across the street from you, isn't it?

A. Not quite right across.

Q. Down the street?

A. It is further west, about a block or so, on Michigan. It has been changed. It is no longer Langer's today. It is Art's.

Q. What has happened to Langer's?

A. As I understand it—I know that Goodrich took the operation over from Langer and then turned it over to Art's.

Q. Do you know when Langer operated it, where he bought his gasoline?

3207 A. I can answer from personal knowledge: through the B. F. Goodrich Rubber Company.

Q. I think you said this morning that there was a time when the Langer's Texaco station was advertising a price, or selling at a price 2¢ below your Michigan Avenue station price.

A. To my understanding, they still do it, or were, the first of this year.

Q. Well, is their posted price now below your posted price?

A. I haven't checked that—you mean the price on their pumps?

Q. Yes.

A. I don't know. I can't answer that. I haven't checked it.

Q. When do you know that they advertised or posted a 2¢ lower price than you did?

A. I said sold at a lower price than we did. I had customers tell me within the past couple of months at our store that they can buy gasoline at 2¢ a gallon under our price at Langer's. That's what I base my answer on.

Q. You mean 2¢ a gallon under your posted price?

A. Yes, sir.

Q. Isn't it a fact that you have at all times, or practically all times, posted the same price that Langer's
3208 have, on those two stations out there?

A. No, that is not a fact. As a matter of fact, as I testified earlier today, that Sinclair station right under our nose for the past three years—

Q. I am talking about Langer's now.

A. I am trying to give a simile, that Sinclair and Langer's fall in the same category, and for years Langer's were giving eggs, one egg with a gallon of gasoline. We didn't meet that. Langer has a store right near our Gratiot store, too, where the same situation prevails; within a half mile from our store.

Q. Is that Art's, now, too?

A. Yes, it is.

Trial Examiner Ballinger: You don't know what kind of eggs they were giving away, do you?

The Witness: No, sir; the signs read "Strictly fresh," though!

By Mr. Austin:

Q. You have testified in response to Mr. Abbott's questions, over a great number of stations here this morning, referring to service stations which you have said were near your various stores?

A. Yes, sir.

Q. And that they sold at various prices below your prices?
3209 A. Yes, sir.

Q. In referring, in all those instances, to your prices, were you referring to the prices posted at your service station?

A. Yes, sir.

Trial Examiner Ballinger: Do you always sell at the price posted at your station?

The Witness: Always, except during the price war, when we gave the stamps. We always sold at the posted price, but when we gave these trading stamps, or during that short period—I would like to modify that answer—during the short period at the height of the price war, where we had a sign, "2¢ off," why, at that time, we were selling at 2¢ off our posted price. That was for about a month or so.

By Mr. Austin:

Q. And these commercial discounts you referred to are 2¢ off, too, are they not?

A. They are today, yes, sir.

Q. Bertrand's Gulf station. Where is that located? You made some reference to that this morning.

A. The one, specifically, is at Gratiot. I don't remember the cross street.

Q. Do they buy from B. F. Goodrich?

A. I don't know their source of supply. They have about five or six stations in Detroit. I think I have a
3210 memo I can give you that from.

Q. If you can refresh your recollection on that, you may do so.

A. (Referring to document.) Yes, they buy from Goodrich. They have four retail stores. Art's buy from Goodrich, my memos tell me.

Q. That is the successor of Langer's?

A. Of Langer's, yes. I knew that from personal knowledge, but that's merely to confirm it.

Q. Is the Carnick Oil Company a jobber?

A. Yes, and they have been for some time. By that— I use the term jobber; they buy on tank car basis, the same as we do. I don't know whether they sell to any other dealers or not.

Q. Do they operate a station at Woodward and Tyler, a retail station?

A. Yes, they do. I referred to that earlier this morning.

Q. And do you know whether their Gulf gasoline is supplied to them by Goodrich or direct by Gulf?

A. It is not by Goodrich, I am sure, because they sell a competitive tire, so I know that, and they would have to sell Goodrich tires to buy from them. They sell U. S. tires, so my best knowledge is that they buy direct from Gulf.

Mr. Austin: That's all, Mr. Gershenson.

Redirect Examination by Mr. Abbott.

3211 Q. Mr. Gershenson, there was some testimony relative to Langer's Texaco station at 14340 Michigan, at Schlaff. Mr. Austin asked you something about that station, didn't he?

A. Yes, he did.

Mr. Austin: Michigan, yes; yes, I did.

A. That is the one out near our Dearborn store.

Mr. Abbott: I would like to have these documents marked for identification.

Trial Examiner Ballinger: The reporter will mark the documents Respondent's Exhibits 49-A and 49-B, respectively.

(The documents referred to were marked, for identification, "Respondent's Exhibits 49-A and B.")

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Abbott:

Q. Mr. Gershenson, I show you Exhibit 49-A, for identification, and ask you to identify that and state what it is. (Handing document to witness.)

A. It is a letter I wrote to Mr. Raupagh March 23, 1940. It has not my signature. I dictated this, although I didn't personally sign this myself.

Q. I show you Exhibit 49-B, for identification, and
3212 ask you what that is.

A. That is a letter I had received at home from Langer that I sent along to Mr. Raupagh with that letter.

Q. Did you enclose Exhibit 49-B in with Exhibit 49-A?

A. Yes, sir, as well as two pennies that were attached thereto. I sent that to Mr. Raupagh, just as I had received it.

Q. Exhibit 49-B, I understand, is something that you received at your home; is that right?

A. Yes, sir.

Q. Did it come in the United States mail?

A. It might have come in open mail, I don't recall.

Q. Is that at your home on Muirland Avenue?

A. Yes, it was.

Q. And you enclosed Exhibit 49-B, as I understand it, in your letter to Mr. Raupagh.

A. Yes.

Q. Which is identified as Exhibit 49-A?

A. Yes.

Mr. Abbott: I offer Exhibit 49-B in evidence at this time.

Mr. Austin: I object to 49-B unless 49-A is offered with it, for one thing.

Mr. Abbott: 49-A I intend to offer in connection with Mr. Raupagh's testimony, unless you prefer to have 3213 it offered at this time.

Mr. Austin: I object to 49-B unless it is offered with 49-A, and then I—

Mr. Abbott: Then, I offer 49-A and 49-B in evidence at this time.

Mr. Austin: Then I want to look at both of them together.

Examination on Voir Dire by Mr. Austin.

Q. Do you know anything about this, other than the fact that you received it in the mail?

A. Yes, indeed, I do.

Trial Examiner Ballinger: You are referring now to what exhibit?

Mr. Austin: Exhibit 49-B, for identification.

Examination on Voir Dire by Mr. Austin.

Q. Do you have any knowledge that this was issued by the Langer station at Michigan and Schlaff?

A. Yes, I do.

Q. How do you know that?

A. Our customers brought them in to our store on Dearborn and—I know Langer personally, and I discussed that with him.

By Mr. Abbott:

3214 Q. What discussion did you have with him in connection with Exhibit 49-B?

A. I made a couple of facetious remarks, when I saw him. When I saw him, I said I had received a couple of cents, and said that was the first thing I ever got from him. I asked him how extensive it was, and he didn't answer. He said, "You must be on a preferred list." He said, "We send that out on mailing lists." I don't know how it was, but it was in the nature of sort of letting him know I knew he was doing that.

Mr. Austin: Your Honor, I object to Exhibit 49-A because I think it has no relevancy whatsoever, and, as to 49-B, I have the same general objection that I have had to the other testimony regarding prices charged by other retail stations. This is very similar to material introduced by Mr. Biber, and other testimony given by this witness, but, so far as the identification of it, I think that Respondent's Exhibit 49-B is probably sufficiently identified with Mr. Gershenson's testimony, and Exhibit 49-A, as far as I can see, says nothing and will just clutter up the record more.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

The objection to the receipt in evidence of Respondent's Exhibit 49-A and 49-B is overruled, and the two exhibits, for identification, are now admitted in evidence. 3215

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 49-A and 49-B," were received in evidence.)

By Mr. Abbott:

Q. Mr. Gershenson, in connection with Exhibit 49-B, which has been admitted in evidence, did I understand you to say that there was some money attached to that when you got it?

A. There were two pennies; held on with a sticker, in the place that appears blank, that came with it, and they were enclosed when I mailed that to Mr. Raupagh.

Q. Did you send the pennies with the exhibit to Mr. Raupagh?

A. Yes, I did.

Mr. Austin: Did Mr. Raupagh keep the pennies?

The Witness: I don't know. I can't answer that. I was tempted to keep them, I might say that.

By Mr. Abbott:

Q. You made the statement that Mr. Rankin P. Peck dictates the retail price that you charge for gasoline at your retail stations.

Mr. Austin: I object to that. He didn't say he dictated the price. I asked him where the price came from and he said it came from somewhere, and I understood him to say it came from Mr. Peck's organization.

3216 Mr. Abbott: I will withdraw the former question.

By Mr. Abbott:

Q. I will ask you this, Mr. Gershenson: You made some statement in relation to Mr. Peck, in connection with retail prices. What was it that you stated?

A. These last two retail changes, as to what the price would be within the past month, that were provoked by changes in the wholesale price, were dictated—we were told what to sell at, by Mr. Peck. In one instance Mr. Peck personally, and the other instance he came—that's what Peck said the association members would sell at, and we should sell at that price.

Q. Is that what he told you?

A. I beg your pardon.

Q. Is that what he told you?

A. No, I didn't have the conversation with him. My brother, or one of the other members, but I know from personal knowledge, because I was—this has been going on for a year and a half or two years, now. That is, that the retail gas dealers association sets the selling price, because I was on the board of directors of the Retail Gas Dealers Association.

Trial Examiner Ballinger: Do you adhere strictly to the price set by the Retail Gas Dealers Association?

The Witness: Since December, 1939; the last year or so.

3217 Trial Examiner Ballinger: And either directly or indirectly sold under those prices?

The Witness: I don't understand what you mean by "directly."

Mr. Abbott: Repeat the question:

(The question referred to was read by the Reporter.)

The Witness: We don't feel bound by those prices but, as a matter of conforming, if the competitive situation permits us, and nobody sells under it, why, we adhere to the prices and if the competitive situation is such that it is impossible for us to continue to sell at those prices, why, we would change. We aren't members of the association. We don't have to—

Trial Examiner Ballinger: Then you are in no wise bound?

The Witness: No other than as I said, the safeguarding the smooth running of our business, because we have had in the past few years some dire consequences from not following the price that they told us to sell at.

Mr. Abbott: What do you mean?

Mr. Austin: I object to any further continuation of history of what the Gasoline Dealers Association might do. There is no issue on that here in this case, at all. I don't see any reason for continuing it. I didn't object to Mr. Abbott's question as long as he asked the witness
3218 where these prices came from but I believe the witness has answered that.

Mr. Abbott: That's all from this witness.

Trial Examiner Ballinger: Any further questions?

Mr. Austin: No further questions.

(Witness excused.)

Mr. Abbott: I would like to ask Mr. Biber a few more questions before we adjourn this noon, that I didn't ask him yesterday.

MAX BIBER resumed the stand and testified further as follows:

Redirect Examination by Mr. Abbott.

Q. Mr. Biber, it is in evidence here that the Citrin-Kolb Oil Company's sale and delivery costs for the year 1940 was in excess of 1½¢ per gallon for its wholesale operations. That being the case, can you explain how it is that you are able to sell Langer & Cohen a million gallons of gasoline a year at a price of ½¢ off tank wagon price?

A. We sell them at 1¢ off.

Q. 1¢ off, I should say.

A. Well, I feel we can sell them and I think we still make money on the transaction and, originally, they picked their own gasoline up at our bulk plant so our entire
3219 expense is merely storing it for them to pick up.

Since we started delivering the gasoline our only operation, as far as that gasoline is concerned, is hauling. There is no credit involved.

There is no sales expense involved. We don't have to sell them anything on that basis. They are our customer;

and we feel that the only expense involved is the hauling and we can make money at hauling gasoline for a half a cent a gallon. It is really, I feel, increment business.

In other words, we have the bulk plant; we have the facilities and the manpower and, adding that million gallons a year has not necessitated the adding of any additional equipment, any additional bulk plant, so it has been increment business and, on top of that, it has enhanced our position with the Standard Oil Company or any competitors of the Standard Oil Company in that it has increased our annual volume. It has made us a greater factor in the business.

Q. Mr. Biber, since the time that you have become affiliated with the Citrin-Kolb Oil Company as its attorney, I will ask you whether Citrin-Kolb Oil Company has considered accepting any offers of any other gasoline supplier, to supply its requirements of gasoline?

Mr. Austin: I object to that question, your Honor, on the ground it is irrelevant and immaterial. The same question was asked Mr. Gershenson: I don't think 3220 that consideration of a jobber or any other customer is material.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Trial Examiner Ballinger: Objection sustained.

Mr. Abbott: That's all.

Mr. Austin: No questions.

(Witness excused.)

Mr. Abbott: I make a motion at this time that we adjourn, at 12:10, which is the time at present, and reconvene at 1:30 o'clock p.m.

Trial Examiner Ballinger: The motion is granted.

The hearing, now at 12:10 p.m., stands in recess until 1:30 p.m.

(Whereupon, at 12:10 p.m., a recess was taken until 1:30 p. m.)

3221 Afternoon Session.

Trial Examiner Ballinger: Come to order at 1:30 P. M. You may proceed, gentlemen.

Mr. Hanley: I call H. R. Hanley as a witness, your Honor. This is a formal matter concerning the custody of papers.

HAROLD R. HANLEY was thereupon called as a witness by and on behalf of the Respondent, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Hanley.

Q. State your name.

A. H. R. Hanley.

Q. Where do you reside?

A. 1124 North Euclid Avenue, Oak Park, Illinois.

Q. What is your occupation?

A. I am general attorney for the Standard Oil Company of Indiana, the Respondent in this action.

Q. Were you such general attorney in August, 1936? And have you been since that time?

A. Yes.

Q. I show you Respondent's Exhibit No. 45, for 3222 identification, and will ask you if you ever saw that letter before, and, if so, when was the first time you saw it?

A. I saw it within a few days following the date it was written on August 27, 1936.

Q. Where did you see it?

A. In my office in the general office building of the Standard Oil Company in Chicago.

Q. What were the circumstances under which you saw it?

A. It was exhibited to me by Mr. H. A. Lewis of the Standard Oil Company.

Q. Who was Mr. H. A. Lewis?

A. At that time he was assistant general manager of the sales at large of the Standard Oil Company.

Q. Do you recall when you next saw the letter?

A. Yes, sir, it was some time after the institution of this proceeding when I examined the files at the Standard Oil Company with relation to this proceeding.

Q. Did you find the letter in the files?

A. Yes, sir.

Q. What did you do with it?

A. I extracted the letter from the files, and brought it from Chicago to Detroit with me, and ~~handed~~ it to Mr. Abbott, associate counsel for Respondent, for his use in this lawsuit.

3223 Q. I refer you to Respondent's Exhibit No. 46, being a letter or a copy of a letter dated February 14, 1938, and will ask you when you saw that copy or any copy of that letter?

A. I saw several copies of Exhibit No. 46, when I examined the file of the Standard Oil Company in the general office of Chicago after the institution of this proceeding.

Q. Did you make a search of the files of the Standard Oil Company in connection with Ned's Auto Supply after the institution of this proceeding and with particular reference to obtaining the original of the letter, Respondent's Exhibit 46, for identification?

A. I did make a personal and thorough search of such files.

Q. Did you cause anyone else to make any such search?

A. I did.

Q. What was it?

A. I met with Mr. Amos Ball, Mr. R. F. McConnell, and Mr. Martin Hassold in Mr. Amos Ball's office in the General Office in Chicago, and requested that all of the files in connection with Ned's Auto Supply Company be produced, and that a search be made for the original of the letter, Exhibit No. 46, for identification.

Q. Who is Mr. Amos Ball?

A. Mr. Amos Ball is the vice president in charge of sales of the Respondent Standard Oil Company.

3224 Q. Who is Mr. R. F. McConnell?

A. He is the general manager in charge of sales of Respondent, Standard Oil Company.

Q. Who is Mr. Hassold?

A. He is secretary to Mr. Amos Ball.

Q. Did you see these gentlemen personally make a search of the files of the Standard Oil Company in an effort to locate the original of Exhibit No. 46?

A. I did.

Q. Was any original found?

A. No, sir.

Q. Were any copies found in the files?

A. Yes, sir; several copies were found in the files.

Q. Are you able to say that you have made a thorough search of the files of the Standard Oil Company in the General Office at Chicago for an original of Exhibit 46?

A. I am.

Q. Has that search been successful?

A. It has not, except to develop the fact that a number of copies of Exhibit 46 are reflected in the files of the Standard Oil Company in the General Office in Chicago.

Q. Did you do anything else in an effort to find the original of Exhibit 46?

A. I did.

Q. What was it?

3225 A. I requested the district office at Detroit to make a search of its files to find, if possible, the original of Exhibit No. 46.

Q. Has the original of Exhibit 46 ever been delivered to you?

A. It has not.

Mr. Hanley: You may cross-examine.

Mr. Austin: No cross-examination.

(Witness excused.)

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: Mr. Raupagh.

P. A. RAUPAGH, was thereupon called as a witness by and on behalf of the Respondent, and having been heretofore duly sworn, testified as follows:

Mr. Hanley: If your Honor please, in respect of this examination, Mr. Raupagh has been on the stand before at considerable length and has testified at considerable length in respect of his qualifications. Indeed, one whole volume of the transcript has to do with his examination, or more, and on page 110 of the transcript his qualifications were gone into at length.

I have sought, in the preparation of this examina-
3226 tion, to eliminate as much repetitious matter as pos-

sible, in an effort to conserve time, and I expect to ask the witness a number of questions of an expert character, and unless it is the view of the Court that he has been qualified as such, I shall go further into his qualifications, but I think that they are adequately on the record, as they presently stand.

Trial Examiner Ballinger: The qualifications to testify as to what?

Mr. Hanley: As an expert in the gasoline marketing business in Detroit, primarily.

Mr. Austin: Well, as far as Detroit is concerned, I shouldn't think there should be any question, Judge. I just wondered whether it is contended he is an expert on marketing conditions over the entire country in the oil industry.

Mr. Hanley: I think he is. He has testified that he has been engaged in marketing since 1900—since 1904, in various places from the Dakotas to Minnesota and Wisconsin and Chicago and Michigan, at various places in the United States, and I do expect to ask him some questions about his knowledge or opinions relative to general marketing conditions throughout the United States of a very general nature. Most of my questions will be confined to the Detroit situation. I just do this in the
3227 interest of saving time. It is in the record.

Mr. Austin: Even as to the area served by this company, I don't remember what it shows, and I just wondered what your contention was on that subject before we started in.

Mr. Hanley: Well, I think he is qualified as a marketer of petroleum products to testify as to general marketing conditions throughout the country, and I am primarily concerned about the area in which Respondent markets and more primarily concerned about the Detroit vicinity, with which he has had an intimate contact for the last number of years, I think, since 1929. I can go ahead and qualify him in detail if that is deemed necessary.

Trial Examiner Ballinger: Unless counsel insists upon further qualifications of the witness—

Mr. Austin: No.

Trial Examiner Ballinger: —it will be dispensed with.

Mr. Austin: I haven't that portion of the record, and I wouldn't want to read it if I had it, and I don't believe we will have any difficulty—

Mr. Hanley: Very well, I will go ahead.

Mr. Austin: —unless something very unexpected arises.

Mr. Hanley: May I have the reporter mark these 3228 photographs, if your Honor please, for identification?

Trial Examiner Ballinger: The reporter will mark the photographs Respondent's Exhibits 50 and 51, for identification.

(The documents referred to were marked, for identification, "Respondent's Exhibits 50 and 51.")

Direct Examination by Mr. Hanley.

Q. Mr. Raupagh, I hand you what has been now marked Respondent's Exhibits 50 and 51, which appear to be two photographs, and will ask you if you know what those photographs represent.

A. These photographs represent what is referred to in the oil industry as a transport truck or truck-train.

Q. Is that the type of conveyance that you referred to as a truck-train or transport-train in the testimony which you have heretofore given in this proceeding?

A. Yes, sir.

Q. Is that what you understand to be a transport-train, as referred to by other witnesses in this proceeding?

A. Yes, sir.

Mr. Hanley: As a matter of information and aid to the Commission, we offer these exhibits in evidence.

Examination on Voir Dire by Mr. Austin.

Q. What is the capacity of these truck-trains 3229 shown in these photographs, Mr. Raupagh?

A. I believe their capacity is about 10,000 gallons.

Q. That is for the total capacity—

A. For the two.

Q. —in the two tanks?

A. Yes, sir.

Q. And the same in each?

A. Yes, sir.

Mr. Austin: No objection.

Trial Examiner Ballinger: Without objection, RESPONDENT'S EXHIBITS 50 and 51, for identification, are admitted in evidence.

(The documents referred to were marked, for identification, "Respondent's Exhibits 50 and 51.")

Trial Examiner Ballinger: May I see those, Judge Hanley?

Mr. Hanley: Surely.

(The documents were handed to the Examiner.)

Mr. Hanley: May I have two further exhibits marked, your Honor?

These might be marked Respondent's Exhibit 52, with a letter.

Trial Examiner Ballinger: The reporter will mark the documents Respondent's Exhibits 52-A and B, for identification.

(The documents referred to were marked, for identification, "Respondent's Exhibit 52-A and B.")

3230 Q. Mr. Raupagh, I show you what has been now marked as Respondent's Exhibit 52-A, for identification, having to do with the prices of Solite with Ethyl gasoline, and will ask you if that was prepared under your supervision and at your direction?

A. Yes, it was.

Q. And I hand you Exhibit 52-B for identification, which appears to have to do with Red Crown gasoline, and refers to the prices thereof, and will ask you if that was prepared under your supervision and direction.

A. Yes, it was.

Mr. Hanley: These exhibits are now offered in evidence, if your Honor please, and the reason I lay no further foundation arises from the fact that they are identical with certain exhibits which were introduced by the Government and which were requested from the Respondent with the exception that the exhibits now offered show the prevailing price on regular grade of gasoline and compute the differential obtained by the service station operator.

I will say for the record, now, that we will prove by Mr. Raupagh the basis on which the prevailing price was computed, which will be in line with the proof which has already been advanced by the Government in that connection.

Trial Examiner Ballinger: Do you recall the Commission's exhibit to which you relate?

3231 Mr. Hanley: No, not by number, Judge, I don't just recall them by number.

Mr. Austin: I think Exhibits 3-A and 3-B; something like that.

Mr. Hanley: Yes, I believe those were the numbers.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: 3A and B, a statement of dealer tank wagon prices and jobber tank car prices, 3-A referring to Red Crown and 3-B referring to Solite, Ethyl, and the dates are from January 1, 1937, to March 1, 1941.

I note that the dates on Exhibits 52-A and 52-B, for identification, are not to March 1st, but run to March 6th, instead of March 1st, but they also commence with January 1, 1937, and there are two additional columns on the exhibits now being offered, but they amount to no more than arithmetical computations with a statement at the top of the column showing what the computations represent.

Mr. Hanley: That's right.

Trial Examiner Ballinger: Without objection, Respondent's Exhibits 52-A and 52-B, for identification, are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 52-A
3232 and 52-B," were received in evidence.)

Mr. Austin: I would like to say on the record, I haven't examined those, but I assume from counsel's statement that the figures given for tank wagon price and jobber price and prevailing retail price are the same as those which appeared upon the Exhibits 3-A and 3-B. Is that your understanding?

Mr. Hanley: That is my understanding, and I rely on the comptometer girls for that. They checked them. Of course, I intended they be the same.

Mr. Austin: Well, that's all I wanted.

By Mr. Hanley:

Q. Mr. Raupagh, there has been a great deal of evidence introduced in this case as to the general practice in the oil industry of selling to jobbers who, in turn, sell at wholesale and at retail. I want to ask you, briefly, a few questions about that, to get your knowledge of the matter on the record.

From your experience, what is the fact as to whether or not suppliers of gasoline and refiners sell both to retail resellers at a tank wagon price, and, also, to jobbers at a tank car price, in the same territory, with particular reference to the area of Detroit?

A. That is the general practice of the oil industry in the Detroit area.

3233 Q. In so far as you are familiar with the custom and practice in the oil industry elsewhere in the United States, what is the fact in that connection?

A. I have never seen any exception anywhere, that I have been.

Q. Referring to the jobbers who are sold on the tank car basis: what is the fact, in your observation as to whether or not those jobbers, generally speaking, sell both wholesale to other resellers and also engage in the retail operation themselves?

A. They generally do.

Q. Is that true of gasoline in the Detroit area?

A. Yes, sir.

Q. Is that true elsewhere, so far as your observation has gone?

A. Yes, sir.

Q. We have been talking about gasoline primarily. With reference to any other petroleum products, is that custom generally observed?

A. Yes, it is.

Q. With respect to what petroleum products?

A. Fuel oils, for instance.

Q. Any others that you think of?

A. Kerosene.

Q. Do you recall the testimony of Mr. Paul Harrison given on behalf of the Government in this lawsuit?

3234 A. Yes, I do.

Q. Do you recall that he testified that his company was engaged in a dual operation of selling fuel oil in Detroit directly to resellers and also selling it to jobbers of fuel oil?

A. Yes, sir.

Q. Do you have personal knowledge of that operation on the part of the Sun Oil Company?

A. Yes, I have.

Q. Is that a common custom in the Detroit area?

A. Yes, it is.

Q. On the basis of unit price, is fuel oil more or less expensive than gasoline?

A. It is generally less expensive than gasoline.

Q. Are you familiar with the differential as between the so-called tank wagon price and the so-called jobber/or tank car price of fuel oil, generally, in the City of Detroit?

A. The differential generally is—

Trial Examiner Ballinger: Just a moment. Answer the question.

By Mr. Hanley:

Q. Yes, you can answer that yes or no.

A. Yes.

Q. Are you familiar?

3235 A. Yes.

Q. What is the differential, Mr. Raupagh?

A. The differential is all the way from a cent and a half a gallon to about 2½¢ a gallon.

Q. Mr. Raupagh, do you happen to have any knowledge of your own as to what the difference is in the Sun Oil price set-up?

Mr. Austin: Is that between fuel oil and gasoline?

Mr. Hanley: No. This is between the two prices on fuel oil, Mr. Austin; the tank wagon price and tank car or jobber price on fuel oil.

A. Yes, I have, in some cases.

By Mr. Hanley:

Q. What is the difference?

Trial Examiner Ballinger: What do you mean by "some cases"?

The Witness: I mean this: that they have what you might term as brokers or agents; people that take orders for fuel oil, and on those orders that they turn in to the Sun Oil Company, they pay them a half cent per gallon.

I know that they employ burner mechanics and burner agencies and on any business that these agencies are able to turn over to the Sun Oil Company, they receive a half cent per gallon commission. I know, also, that the 3236 Sun Oil Company sells fuel oil in tank cars at tank car prices and I know, also, that they deliver direct to the consumer or home owner at another price.

Q. And do you know what the difference in price is as between those two deliveries?

A. The difference in price runs between a cent and a half and 2¢ per gallon.

Q. And I think you have said that that is on a type of commodity that has a lesser unit price than gasoline.

A. Yes.

Q. Now, you have testified, Mr. Raupagh, to the general custom of selling to jobber customers or tank car buyers on a tank car basis. Is there a difference between the price basis to a jobber who buys in tank car or truck-train lots and the price basis upon which the filling station operator buys the tank wagon?

Mr. Austin: Does that refer to gasoline?

Mr. Hanley: I am referring now to gasoline.

The Witness: To gasoline?

By Mr. Hanley:

Q. Yes.

A. There is no difference.

Q. I don't think you understand it. I will reframe the question.

First, is there any difference so far as the Standard 3237 Oil Company is concerned as between the tank wagon price granted to reseller service station customers?

A. There is no difference.

Q. So far as jobber customers or tank car buyers are concerned, is there any difference in the price granted by the Standard Oil Company to that class of customer?

A. Yes, there is.

Q. What do you mean by that?

A. Well, I mean that there is a difference between the tank wagon price and the tank car price.

Q. Well, I will get to that. But as between the jobber or tank car customers themselves, as a group, Mr. Raupagh, is there any difference between the tank car price granted to each of them?

A. There is no difference.

Trial Examiner Ballinger: Has there been during the period covered?

The Witness: No, sir.

By Mr. Hanley:

Q. Now, as between the two groups of buyers: namely, the tank wagon customer, on the one hand, and the tank car customers, on the other hand, is there ordinarily a differential in price?

A. Yes, there is.

Q. Is that true in the City of Detroit?

3238. A. Yes, sir.

Q. And, just generally, what is it?

A. The differential is generally a cent and a half per gallon, as far as the Standard Oil Company is concerned.

Q. Have you any knowledge as to what that differential generally is throughout the country?

A. The differential, generally, I will say yes.

Q. And what is it, from your experience?

A. The differential, generally, is from a cent and a half to two cents a gallon, and in some cases $2\frac{1}{2}$¢ per gallon.

Q. Well, I am not sure whether I have gone through this, Mr. Raupagh, but so far as suppliers, generally, are concerned in the oil business, if a customer is a tank car jobber buyer, does it make any difference to the supplier whether that jobber is engaged exclusively in wholesaling or exclusively in retailing, or in a combination of both functions?

Mr. Austin: I object to that question, your Honor, on the ground that the witness cannot know the answer except as to the Standard Oil Company. He perhaps may testify to the practice; but I do not think he may testify as to whether it makes any difference to the oil industry, the way the question was worded, of the policy of the company.

Mr. Hanley: Well, I will reframe it.

3239 Trial Examiner Ballinger: The question is withdrawn.

By Mr. Hanley:

Q. As a matter of practice in the oil industry, do suppliers sell to jobbers on a tank car basis and, by that I mean tank car price, irrespective of whether or not those jobbers are engaged exclusively in wholesaling or exclusively in retailing, or in a combination of both functions?

A. They do sell to such customers, and seem to be glad to sell to them.

Q. Has that occurred within your experience since 1929, continuously, in the City of Detroit?

A. Yes.

Q. Has it occurred with respect to many suppliers of gasoline and many jobber buyers?

A. It has.

Q. Now, Mr. Raupagh, so far as the Standard Oil Company is concerned, what, generally, are the policies and the requirements established by our company in classifying a jobber buyer? What must he do? What characteristics must he have in order to be entitled to a tank car price, from the Standard Oil Company?

A. He must have equipment; he must have equipped himself with bulk storage, and, by bulk storage, I mean sufficient storage so that he can take care of tank car 3240 quantities of gasoline; he should have a volume of business amounting to about 1,000,000 to 2,000,000 gallons per year; his credit responsibility and so forth must be satisfactory; he should have an established business.

Q. What about his own distribution equipment, sales personnel, and so on?

A. He should be equipped so that he can distribute the products that we sell him. By that, I mean, for tank truck and so forth, equipment to take care of it, personnel to handle it.

Q. What is the fact as to whether or not he must perform all of those functions at his own expense and without any contributions from the Standard Oil Company?

A. He must perform them all at his own expense.

Q. What is the fact relative to whether or not the Standard Oil Company undertakes to exercise any control over, first, the jobber's business, after he has been sold the gasoline at tank car, or secondly, over the disposition of that gasoline? Can you split those answers up to meet the duplicity of that question?

A. The Standard Oil Company exercises no control over the first instance you mention, nor over the second instance that you mentioned, either.

Q. Now, Mr. Raupagh, since you have been engaged in the marketing of gasoline and allied petroleum prod-3241 ucts, state what the fact is as to whether there has been a time when it was not a recognized custom in the oil industry for suppliers of gasoline to sell on the tank wagon basis and on the tank car basis and on the tank car basis to jobbers who had storage and were equipped to receive deliveries in that method?

Mr. Austin: Would you mind having the question read, please?

Mr. Hanley: Surely.

Trial Examiner Ballinger: Read the question, please.

(The question was read.)

Mr. Austin: All right.

By Mr. Hanley:

Q. Did you understand that? Is it clear to you?

A. Yes, it is. That has been the custom as long as I have been in the oil business.

Q. From your experience as a marketer of petroleum products, including gasoline, do you regard that method of distribution and marketing as a necessary and integral part of the marketing economy of gasoline?

Mr. Austin: I object to that question on the ground that it is immaterial what the opinion of the witness is regarding the necessity of this practice to the oil industry.

3242 Trial Exaimner Ballinger: Overruled.

By Mr. Hanley:

Q. The Court says you may answer.

A. I do.

Q. As a fact, is it an integral part of the marketing structure of gasoline, Mr. Raupagh?

A. It is, and has been ever since I have been in the oil business.

Q. Now, Mr. Raupagh, it has been brought out, there has been brought in this action a complaint against the Respondent, Standard Oil Company, which could result in an order against the Standard Oil Company prohibiting it from selling to the four jobbers named in the Complaint at a tank car price or at a price less than the tank wagon price that is charged to other customers of the Standard Oil Company. If such an order were entered, and the Standard Oil Company were prohibited from selling at tank car to those four customers, what, in your judgment, would be: first the ability of those individuals to buy gasoline of comparable quality on at least as good or better terms than those customers are now buying from the Standard Oil Company in Detroit?

Mr. Austin: I object to that question, your Honor, on the ground that it is speculative and calls for a conclusion of the witness as to what the effect of an order

3243 of the Federal Trade Commission might be, and I submit—

Trial Examiner Ballinger: Objection sustained.

Mr. Hanley: Well, is the objection sustained on the theory that I am asking the witness what the effect of an order of the Commission might be, your Honor?

Trial Examiner Ballinger: Correct.

Mr. Hanley: I didn't mean to imply that in the question.

By Mr. Hanley:

Q. I will reframe it, Mr. Raupagh.

Suppose that for any reason the Standard Oil Company ceased to sell to these four jobbers involved in this case on a tank car basis. What is your judgment as to whether those four jobbers could purchase gasoline of comparable quality on equally good or better terms than they are now purchasing from the Standard Oil Company?

A. They could purchase from many other sources, immediately, a gasoline of comparable quality and at a better price than they are paying at the present time. By a better price, I mean a lower price.

Q. If, for any reason, Mr. Raupagh, the Standard Oil Company were required to withdraw from that market, what, in your judgment, would be the result so far as the Standard Oil Company is concerned, on its business?

A. We would be deprived of—

3244 Mr. Austin: I object to that question, for the same reason, your Honor. It supposes that the company be compelled to withdraw, and, of course, if the company withdraws from certain business, naturally, they don't have it any more, but I think it is speculative. I think it is irrelevant as to what the effect upon the company might be in the opinion of the witness, in the event of something that has not happened.

Trial Examiner Ballinger: Read the question.

(The question was read.)

Trial Examiner Ballinger: Objection sustained.

By Mr. Hanley:

Q. Mr. Raupagh, suppose that the Standard Oil Company refrained from granting tank car prices to the four jobber customers involved in this action. What, in your judgment, would be the result as to whether or not the Standard Oil Company could retain that business?

A. They could not retain the business.

Q. What is your judgment as to the effect on the business of the Standard Oil Company if the Standard Oil Company were to demand of these four jobbers that they pay what has been referred to here as the tank wagon price?

A. I know we would immediately lose the business of those four customers.

Q. Mr. Raupagh, have you been generally familiar

3245 with the various jobbers of gasoline and their business in the City of Detroit during the past ten or twelve years?

A. Yes, sir.

Q. Do you from time to time see their physical properties?

A. Yes, sir.

Q. Do you from time to time, in the regular routine and course of your office duties, get commercial and credit reports concerning them?

A. Yes, sir.

Q. Are you generally familiar with their operations?

A. Yes, sir.

Q. What is your opinion as to the approximate or, in your mind, estimated value of the investment in money in the jobber business in the City of Detroit?

A. It would run into millions of dollars.

Q. You are now referring, I take it, to the City of Detroit alone?

A. Yes, sir.

Q. Is it true that there are comparable business enterprises in substantially all of the cities in the country?

A. There are.

Q. Adverting now, Mr. Raupagh, to the specific relations with the jobbers involved in this action. We will go, first, to Ned's Auto Supply Company. I don't want to repeat, Mr. Raupagh. I think it has been fully estab-
3246. lished on the record, and if I am wrong on this, check
me, please. I think it has been shown here, when these jobbers first began buying tank car and what their several storage capacities are, and so on. With particular reference to Ned's Auto Supply Company, I think it has been shown that they purchased gasoline from the Standard Oil Company something over 20 years?

A. Yes, sir.

Q. And that up until September, 1936, they always purchased on the prevailing Standard Oil Company tank wagon basis; is that true?

A. Yes, sir.

Q. Was there a time in September, 1936, when they went on a different basis, and, if so, what was it?

A. On September 1, 1936, they went on the basis of ½c less than the dealer tank wagon price in Detroit.

Q. Did there come a time, Mr. Raupagh, when that price plan was abandoned, and, if so, when?

A. Yes, that price plan was abandoned on March 7th or 8th, 1938. They were placed on a tank car basis.

Q. Was there a period between the time that that half cent reduction plan was abandoned, and the time when Ned's Auto Supply Company went on the tank car basis?

A. Yes, sir.

Q. Do you have in mind, now, how long a period that was?

3247 A. Yes; about seven days.

Q. Just a short period of time?

A. Yes, sir.

Q. Since some time in March, 1938, and up until the present time, has Ned's Auto Supply Company been continuously on the tank car basis?

A. Yes, sir.

Q. With reference to Citrin-Kolb, Wayne, and Stikeman, were all of those companies on a tank car basis with the Standard Oil Company prior to June, 1936?

A. Yes, sir.

Q. Have they been continuously on a tank car basis since that time?

A. Yes, sir.

Q. You have outlined, Mr. Raupagh, the requirements of the Standard Oil Company for a tank car jobber buyer. Do each of these four jobbers meet those requirements?

A. They do.

Q. Do each of them have their own storage?

A. They do.

Q. Do they have their own distributing systems?

A. They do.

Q. Do they employ their own personnel?

A. They do.

Q. Do they have their own sales force?

3248 A. They do.

Q. Do they pay all of the expenses of operating their bulk storage and distributing system?

A. They do.

Q. Does the Standard Oil Company contribute anything toward the expense of operating the bulk storage or wholesale distributing business of any of these jobbers?

A. They do not.

Q. Do salesmen of the Standard Oil Company call upon the customers of the several jobbers, where they are engaged in wholesaling activities?

A. They do not.

Q. Who does, if anyone?

A. Their own salesmen. I mean the four jobbers mentioned in this action.

Q. And that is done at the expense of those jobbers; is that true?

A. It is.

Q. With respect to advertising, Mr. Raupagh, do any of these jobbers advertise on their own account and at their own expense?

A. They do.

Q. Do you know to what extent they indulge in advertising at their own expense? I don't necessarily mean in terms of money, but just give us an idea of the kind of thing they do.

3249 A. Ned's Auto Supply Company do quite extensive advertising in the newspapers and they have also advertised over the radio.

Wayne Oil Company do quite extensive advertising as in the Dealer Association magazine. They do quite a lot of advertising in sending out literature by mail to drum up trade.

Citrin-Kolb does some advertising in the way of signs and ads in the Dealer Association magazine and other periodicals.

The Stikeman Oil Company does very little advertising. I think I have seen one or two ads of theirs. That is about all.

Q. I don't believe I asked you specifically about the furnishing of equipment. Is it or is it not customary for suppliers of gasoline to furnish resellers who buy on a tank wagon basis certain classes of equipment or facilities for use at their service stations?

A. It is customary to furnish certain equipment.

Q. Is that generally true throughout the industry?

A. It is.

Q. What, generally speaking, are the kinds of equipment that are furnished?

A. The kinds of equipment generally furnished are
gasoline pumps, tanks, tanks and pumps for oil re-
3250 quirements, identification advertising—I mean the
insignia of the company, or the brand of gasoline.
That's generally what it is.

Q. In respect of the dealers who purchase from these jobbers, what is the fact as to whether or not the Standard Oil Company furnishes pumps and other equipment to them?

A. The Standard Oil Company does not furnish any pumps or equipment to dealers of our jobbers.

Q. How do they get the equipment?

A. The dealer either buys it himself or the jobber furnishes him with the equipment.

Q. If the Standard Oil Company supplies any such equipment, what is the fact as to who pays for it?

A. The jobber would have to pay for it.

Q. Do we understand by that that the Standard Oil Company would bill the jobber for a pump, for instance, that might be furnished to one of his dealers?

A. Yes.

Q. Now, Mr. Raupagh, there has been considerable testimony in this case about major companies and non-major or non-brand, or off-brand, whatever the particular witness chose to call it. Having particular reference to certain exhibits which are not yet identified, but with which you are familiar and in which there is reference made to major dealers, will you please give us, now, the names of the companies that you have referred to in those exhibits, and which are generally referred to in Detroit 3251 as being the major dealers, or the major brands?

A. The term major brand is rather loosely defined in the industry, and there is a great deal of difference in opinion as to what is a major brand in the industry. For the purpose of making certain records, statements, and so on, we have defined as major companies: First, Standard Oil Company of Indiana; Sun Oil Company; Shell Oil Corporation; Sinclair Oil and Refining; Socony Vacuum; Texas Company; Gulf Corporation; Cities Service Oil Company; Pure Oil,—by the way, Pure Oil handles Hi-Speed oil and gasoline in this district—Mid-Continent Petroleum; Ohio Oil Company, and the Standard Oil Company of Ohio. Then, there are—

Q. Just at this point, Mr. Raupagh, are you able to tell us which of those companies in this territory are engaged in the operation of selling directly to resellers and also selling to jobbers?

A. Sinclair, the Texas Company; Gulf Oil, Mid-Continent. That is all.

Q. Now, in addition to that list which you have named, are there any other companies marketing in the Detroit area that you regard as major marketers?

A. There are a certain number of companies who, in
this area, as far as their marketing is concerned and the
establishment of their brand and their sales, are just
3252 as much major companies as the others that I have
mentioned. They are: Charles E. Austin, Incorporated; Puritan Stations; Sunny Service; Speedway Petroleum Company; Globe Oil and Refining Company; Pure Oil Corporation; Keystone Refining Company; Aurora Gasoline Company: Leonard Refineries; Roosevelt Refining Company, and there perhaps are some others.

Q. Now, Mr. Raupagh, there seems to be some confusion in the record as between the brands known as Joy and Zip. Is there presently any relation at all between those two brands of gasoline?

A. There is not.

Q. First, who handles Joy?

A. Joy is handled by Charles E. Austin. He started his chain of stations on February 28, 1938. That is when he took out his wholesale distributor's license, and I know that he severed his connections with other stations that he was operating previous to that time, namely: Puritan Stations, Incorporated, and Sunny Service Oil Company, who were marketing under the brand of Zip gasoline, Z-i-p.

Q. At the present time, if you know, who operates the so-called Zip stations, Mr. Raupagh?

A. They are owned and operated by the Hicock Oil Corporation of Toledo, Ohio.

Q. And, does the Pure Oil Company, which you
3253 have designated as one of the majors, have any con-
nection with that Hicock Company?

A. It has a connection with the Hicock Company, yes, sir.

Q. And what is that, to the extent of your knowledge?

A. Well, they have a contract or did have a contract which I saw a copy of at one time, to the effect that the Pure Oil Company furnishes the Hicock Oil Corporation with gasoline at a certain price below the established retail price and then there was also a provision that whenever the profits of the Hicock Oil Corporation were large enough, the Pure Oil Company, in some way, shares in those profits to get control of the Hicock Oil Corporation.

Mr. Austin: I object to any further discussion of the contract between the Hicock and Pure Oil Company. I don't see any relevancy. It has not been stated that the Pure Oil Company furnishes any of the gasoline which is sold at the Zip stations.

Mr. Hanley: We submit to that objection from that point on.

By Mr. Hanley:

Q. I will ask the witness if he knows whether or not Pure Oil Company does furnish any gasoline to the Hicock Oil Corporation.

A. It does.

Q. And that comes from Toledo?

3254 A. It does.

Q. And is that gasoline sold at the Zip stations in some instances?

A. That, I can't say.

Q. Now, Mr. Raupagh, so far as this list of 12 major companies that are usually regarded and called Majors, and the additional list that you have indicated, is there any necessary relation between those two lists as to the amount of gasoline that they sell in the City of Detroit?

A. There is not.

Q. Is it or is it not a fact that some of the last named list sell more gasoline than some of the first named list; with reference to the City of Detroit?

A. They do.

Q. For instance, you have included Mid-Continent in the list of 12 so-called majors. Does that particular company sell more or less gasoline in the City of Detroit than do some of the companies in your second list?

A. It sells less.

Q. If you were determining who was a major marketer of gasoline in the City of Detroit on the basis of gasoline sold, what is the fact as to whether or not you would exclude from that list of majors some of the 12 companies that you have named in your first list and include some of the companies that you have included in your second list?

3255 Mr. Austin: I think he intended to say volume of gasoline sold, did you not?

Mr. Hanley: That is what I had in mind.

The Witness: On volume I would exclude the Mid Continent Petroleum on the first list and add Charles F. Austin, Puritan Stations, Globe, and some of the others.

By Mr. Hanley:

Q. Now, is it or is it not a fact, Mr. Raupagh, that certain companies, and, specifically, those which you have included in your first list of 12, have just been commonly referred to in the industry as major companies, and that for that reason they continue to be referred to as major companies?

A. That is right.

Q. And that classification, as we understand it, if we understand it correctly, has no reference to the relative volume of gasoline that they sell in the City of Detroit; is that true?

A. It has not.

Q. Since you have had experience with Detroit, Mr. Raupagh, what is your judgment as to the character of Detroit as a highly competitive area in gasoline commerce?

A. It is the most highly competitive point in which I have ever operated, and it is generally considered one of the, if not the most, highly competitive, a very highly 3256 competitive spot as far as the oil industry is concerned.

Q. Now, does that answer apply to both its competition between the suppliers of gasoline to resellers, and the competition between resellers?

A. Yes, it does.

Q. Is it true throughout all channels of distribution of gasoline in Detroit?

A. Yes, sir.

Q. Please state, if you can, Mr. Raupagh, what some of the reasons for that condition are.

A. Some of the reasons for that condition are: first, that we have here a very large potential market for gasoline; we have a large city; we have a large industrial activity in this city; it is so located that its distributors are easily accessible, as far as the transportation is concerned, on account of being located on the Lakes. You can get good water transportation. It is, of course, very easily accessible by rail. Furthermore, we have Michigan refiners who are producing a fairly good grade of gasoline and are continually improving their gasoline, and who must find a market here in Detroit. Years back, it used to be considered that Detroit was a sort of dumping

ground for gasoline, and that whenever refineries from farther away, the Mid-Continent field, or, I mean, Oklahoma, and so on, had a surplus of gasoline, and so on,
3257 and even if they were not marketing in this area, they felt this was a good place to dump it, because transportation facilities were good, and so on.

Q. Is it not true that Michigan itself is a crude oil producing state?

A. It is.

Q. And is it not true that there are a substantial number of refineries in Michigan refining Michigan-produced gasoline which is sold in the Detroit market?

A. That is true.

Q. Have you any idea, Mr. Raupagh, how many such refineries there are now operating?

A. There are about 30. That might vary one way or the other; a few.

Q. Do you recall the testimony of, I think it was, Mr. Boatwright, that approximately 30% of the consumption of gasoline in Michigan was gasoline produced within the state?

A. Yes, sir.

Q. Does that concur with your own knowledge and experience?

A. Yes, sir.

Q. Now, have you in mind the Marine Terminals that are adjacent to the Detroit area?

A. There are a number of marine terminals located in the Detroit area. Would you like to have me name them?

3258 Q. I would like to have you name them, please.

A. Shell Oil Corporation, Cities Service Oil Company, Ohio Oil Company, Standard Oil Company of Indiana, Texas Company, Mid-Continent Petroleum, Charles E. Austin, Incorporated, Puritan Stations, Incorporated, Keystone Oil and Refining Company, Globe Oil and Refining Company. I believe there is one more operated by the Brownley Lumber Company.

Q. Now, are there any refineries, to your knowledge, in the immediate vicinity of Detroit?

A. There is one in Detroit and one in the immediate vicinity of Trenton. The refinery in Detroit is known as the Keystone Oil and Refinery Company.

The refinery at Trenton is operated by the Socony-Vacuum Oil Company.

Q. What is the fact, in Detroit, as to whether or not gasoline and petroleum products are imported into the City through the medium of pipe lines?

A. They are.

Q. Do you have in mind any pipe lines that are run into Detroit, with particular reference to delivering gasoline, Mr. Raupagh?

A. Yes, there is a pipe line running from Toledo to Detroit delivering gasoline and used by the Sun, and the Hi-Speed or Hicock or Pure Oil Companies, and by the Gulf Company.

3259 Q. What is the fact, relative to the economy of pipe line transportation of gasoline as compared with rail transportation or truck transport transportation?

A. It is much more economical.

Q. Are you familiar with the situation existing in Northern Indiana and Northern Illinois as to the existence in those areas of numerous refineries, pipe line terminals and oil depots of one sort or another?

A. I know that there are quite a number there.

Q. Now, with reference to all of these things that you have been talking about, Mr. Raupagh: In your judgment, what has been and what is the effect of those factors upon the competitive situation in Detroit in gasoline commerce?

A. It makes it readily more competitive.

Q. In your experience, Mr. Raupagh, has there ever been a time when there has been a dearth or insufficiency of gasoline in Detroit?

A. Never.

Q. What have you to say as to whether or not the contrary is true?

A. I would have a good deal to say. That the contrary is true: There has been a surplus of gasoline at all the times that I have been here.

Q. I take it you mean by that that somebody, some supplier always has gasoline for sale in Detroit?

3260 A. I have never seen the time that there hasn't been a number of suppliers or that they always had gasoline for sale; as long as I have been here.

Q. Have they had it for sale in quantities that the market in Detroit did not readily absorb?

A. They have.

Q. And what has been the result of that, in your judgment, in respect of marketing conditions and competitive conditions in the City of Detroit?

A. It has made it more competitive and marketing more difficult.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record. We will have a recess for five minutes.

(A short recess was had.)

Trial Examiner Ballinger: Come to order. You may proceed.

By Mr. Hanley:

Q. Mr. Raupagh, we have been dealing primarily with the competition that exists in the Detroit area as between suppliers of gasoline to resellers of different classes. I would like to advert now to the competition which you have found in your experience in Detroit to exist between resellers to the public and as between jobbers who 3261 were in competition with each other, and who may have been engaged also in the retail function. With reference, first, to the Standard Oil Company stations or to stations handling Standard Oil products in the Detroit area, what has been the fact, just generally speaking as to whether or not they have maintained a fairly consistent prevailing retail price?

A. In my judgment, as far as the stations handling Standard Oil products are concerned, I think that they have done about the best job when compared with stations handling other products of gasoline as to maintaining a fairly steady retail price.

Q. With particular reference to those Standard Oil dealers who are supplied by any or all of these four jobbers involved in this action, what is the fact as to whether or not they have, generally speaking, maintained the prevailing retail price in Detroit?

A. They have maintained the prevailing retail price, generally. I think they have done a good job.

Q. Now, generally in the retail competitive situation, I wish you would please just go ahead in your own words, and tell the Court what conditions you have found to exist over the past years, and, with particular reference to the past four or five years.

A. I believe about the best illustration of price
3262 situations, as they exist, and one that has been referred to in this hearing so many times, is the year 1938. Do you wish me to go ahead on that?

Q. I wish you would. As a foundation for that, was there, in 1938, what has been commonly referred to industry-wise as a price war in the retail price of gasoline?

A. Yes, I would say it was a very much demoralized retail situation, and it can be called a price war or anything else, but there are some fundamental principles which cause demoralized retail situations of that kind.

Q. Just go ahead and explain what those causes are, in your judgment, and in your observation, Mr. Raupagh.

3263 A. Well, referring particularly to the year 1938,
we had to start with a decrease in the consumption of gasoline.

According to the State figures issued by the Gasoline Tax Department of the State of Michigan, there was a decrease in the consumption of gasoline of 5.4% for the year 1938, as compared with the year 1937.

In the Detroit area, from computations that have been made, we find the decrease in consumption was about 10%.

It is only natural that when there is a general decrease in the consumption of gasoline, that if all stations were operating on the same service basis—they all give about the same service—that they would all lose relatively that same amount of volume of gallonage, which is represented by the percentages that I have mentioned.

When that occurs, there is generally a scramble for gallonage, as far as retailers are concerned.

Another fundamental cause for disturbed retail situation is when there is a decrease in industrial activity—and there was such a decrease in 1938—and I am referring to the automobile industry, as industrial activity in general in Detroit. There was considerable decrease in that activity which meant that many people who own and drive automobiles, their earning capacity was less than in 1937. They didn't have as much money to spend.

Then there is another factor which continually
3264 creeps into the proposition as to demoralized retail
markets and it did, particularly, in 1938, and that is dealer margins. Whenever dealer margins get too high, then there is too much of a spread between the dealer

price charged by major brand dealer and the retail price charged by other brand dealers. The differential is too large and many customers of major brand dealers leave them and buy the non-brand or no brand gasolines.

In the forepart of 1938, particularly for the first five months, there was the dealer margin of 4½¢ per gallon which entirely causes too much of a spread between those stations selling non-brand and those selling branded gasolines and, consequently, they lose business.

As an illustration: Our surveys for 1938—and we made them frequently, in connection with our business—showed that in January, 1938 we had 721 stations selling as much as 5½% below the price of Stanolind, or third brand gasoline.

In February, the number of stations selling below got up to 903, that were selling below the price of regular.

Q. You used the term "we had" a moment ago. What do you mean by that?

A. I mean by that the Standard Oil Company of Indiana.

In March the number of stations, according to the sur-
veys we had made, had dropped down to 119 that were
3265 selling below the prevailing wholesale prices of major
brand dealers; and that was because of the activity
of taking down signs. There was considerable union activity in 1938. By union I mean the A. F. of L., who got busy and made a concerted drive to have all dealers remove their signs.

Mr. Austin: Was that 119 stations? Out of what group of stations were you referring?

The Witness: That's out of the group of stations in the Detroit area.

Mr. Austin: You mean all brands, all retail stations?

The Witness: All retail stations. It was up as high as 903. And that's of the stations who had a posted price. In making this survey we took only the stations who had a posted price.

By Mr. Hanley:

Q. I am not sure the record is clear on an answer you made a moment ago, Mr. Raupagh. The 900-odd stations you now refer to do not refer to Standard Oil stations, do they?

A. No.

Q That's all stations?

A. They refer to all stations in the area.

Q. How about the 119?

A. That also refers to all stations in the area.

Q. Irrespective of whether it includes Standard
3266 Oil Company dealers, or other dealers?

A. That had price signs up that were visible.

Mr. Hanley: Yes, sir.

A. Coming along to May, 1938, that had crept up again to 457 stations who were posting prices below the price of the regular major brand gasoline.

Mr. Austin: If your Honor please, I believe that is the result and these are results of a survey made. They necessarily involve information collected by others and I don't want to be bound by them as fact and I want to object if it is clear on the record if the witness is stating the result of a survey and if it is conceded by counsel for the Respondent that the value of the evidence stops there and is not being offered for the purpose of proving the fact as to the number of stations that were cutting prices on any date.

Mr. Hanley: If your Honor please, I should perhaps advise the court and counsel that we will later introduce the results of current surveys that were kept duing the years 1936, 1937, 1938, 1939, and, I think, part of 1940, which were kept as a matter of record, as a matter of routine office practice and procedure and without any reference at all to this litigation. We do that just as a matter of business routine and practice and this witness, and I will undertake to show that, that at the time he has
3267 a great deal of personal knowledge, by virtue of actually going out there himself and looking at these stations and he is also advised by others who are on his staff and who also go out, just as in the case of the Government's evidence by Mr. Harrison where he, on behalf of his company, the Sun Oil Company, conducted a survey and we do it just as a matter of record and do it without reference to and have it here without reference to any preparation for this litigation and I propose to put that in and we will fully lay the foundation for it, Mr. Austin.

Mr. Austin: Well, I know that I offered some of the figures of Mr. Harrison and those were objected to.

Mr. Hanley: Well, they were objected to, if you Honor please and if your Honor will recall on the theory that they did not offer the whole survey. On the other morning when

I asked you, your Honor, what we should do about a subpoena, the fact of the matter is we were subpoenaing Mr. Harrison for the specific purpose of putting in the entire survey which Mr. Harrison had made and now we discover on analysis of his entire survey that it was far less comprehensive than our own survey and I just thought it was a cumulative thing. It is good evidence so far as we are concerned and we would be glad to put it in, but it just did not seem to be helpful. We have more of our own
evidence than he was able to supply and we made no
3268 objection to the competitive situation as it was dis-
closed by Mr. Harrison's survey. We objected on the ground that the Government sought to put in just a segment of what they referred solely to the Standard Oil Company stations and Mr. Austin withdrew the offer and your Honor did not rule on it at all.

The Witness: Can I proceed?

Mr. Hanley: No.

Mr. Austin: Well, I still say there has been no basis laid as to the number of stations selling below the retail price at any particular time.

By Mr. Hanley:

Q. Mr. Raupagh, without giving any figures as to the number of stations, just go ahead with your answer as to the reasons for this price war, as you understand them, and the general retail competitive situation.

A. As another indication as to the trend in 1938 affecting the retail market, the prices posted by retail stations ranged all the way from 3¢ a gallon to 6¢ a gallon below the price of third brand or standard gasoline, the cheapest gasoline that we market. Whenever a condition of that kind exists, that is, when you have a high margin or a high retail price that the dealer is charging for his product, you have a decrease in consumption and you have a decrease in industrial activity, which means a decrease in
employment, and it is natural that every dealer will
3269 try to get as much business as he possibly can or make
up for the business that he naturally would have to lose on account of those factors. You see, there is consequently a scramble for business and with that high margin, he figures out that "Well, I can handle just that much more business even if I have to cut the price a couple of cents per gallon." Because our records show and I know

of my own knowledge that during 1938 we had more signs up and by "we" I mean the dealers, service station dealers of all companies, posted more prices than at any other time previous or since; prices reading as follows, so much off per gallon, 2¢ off or 1¢ off per gallon. My estimate is for 1938, for the first six months that about fifty per cent of all dealers of all brands were dealing in ~~some form or~~ other, were discounting in some form, or other, whether it was under canopy or open posted signs, but they were discounting. Another factor that was very effective to demoralize the retail market in 1938, there was a surplus of Michigan gasoline. The Michigan refiners were offering to dealers Michigan gasoline at 3¢ below the prevailing tank wagon dealer price. That condition improved somewhat later in the year of 1938, and the dealers were cutting down their margins to about 3.3 and finally settled down to that. A portion of the time, however, the margin got as low as 2.4¢ per gallon and during a period of this kind when there is a demoralized retail situation, it seems that that is
the time when the non-brand or no brand or off brand
3270 marketer profits most because from knowledge I
have, I know that that type of marketer made considerable gains in gallonage. It was very outstanding as to the amount of gallons they gained as compared with those dealers who were handling major brand products. Have I gone far enough?

Q. Well now, let me ask you this, Mr. Raupagh. Does the crude oil production situation and the price of crude oil have any effect upon the gasoline volume available and the price available?

A. Yes, it does.

Q. Do you know what that relation was in 1938?

A. Crude oil was down in price in 1938 and I can't recall just how much.

Q. What does that mean, in terms of availability of low price gasoline?

A. ~~It means that~~ there is, first, a surplus of crude oil and it means, second, that refiners are able to secure all the crude oil that they want at a low price and, consequently, they can have their manufactured product as gasoline at a lower price and, consequently, they sell it
to their trade at a lower price.

3271 Q. In your judgment, Mr. Raupagh, is there any
one, or any six retail service stations in Detroit that

ever was responsible for a price war of the generally prevalant character of the 1938 price war?

A. No. Couldn't be.

Q. Is it or is it not a fact, in your judgment, that such an economic condition must arise out of generally prevalent economic conditions existing in the industry?

A. Yes, sir.

Q. You referred to discounts of various types; like under-canopy cutting; selling under the posted price, and so much per gallon off. Was the device of offering premiums used?

A. Very much so.

Q. What kind of premiums were offered?.

A. They range all the way from free cigarettes to free automobiles, to dolls and chinaware and glassware and silverware, clocks, and watches, and it is just difficult to mention the various devices, the extent of them that have been used in giving away premiums.

Q. Groceries?

A. Sugar; yes, sir. Sugar is being used today, even.

Q. Eggs?

A. Eggs were extensively used by one marketer who,
at that time, marketed as Langer's Auto Supply
3272 Company; now known as Art's Service Station. He
gave away an egg with every gallon of gasoline.

Trial Examiner Ballinger: What do you mean by free automobiles?

The Witness: I mean that there was a ticket or number given out when a purchase was made of gasoline and then a sort of raffle conducted, and the lucky winner got the automobile, and they generally had the automobile displayed, too, so that the people could see it. I think it would take a long time for me to mention all of the devices and the practices that have been used in the way of trying to get more business at retail service stations, in the way of giving premiums and discounts and offers, and that practice has continued for as long as I have been here. Sometimes it is a little more prevalent than at other times, but it is here with us all the time. There is never a time when it isn't with us.

By Mr. Hanley:

Q. There has been a good deal of evidence, Mr. Raupagh, about three classes of what might be termed inducements to the retail customers; namely, trading stamps and courtesy cards and commercial discounts. Are you familiar with those three types of discounting, if that's what they are?

A. Yes, sir.

Q. Have those three devices been prevalently used
3273 in the Detroit vicinity over a considerable period of time by a number of different marketers?

A. Yes, they have.

Q. Were they used prior to 1936?

A. Yes, sir; they had been used prior to 1936, and subsequent to 1936.

Q. What is the fact as to whether they have been used continuously by a number—and by a number, I mean several thousand—retail marketers in the City of Detroit, continuously over the period of time that you have had experience in Detroit?

A. You mean as to any one of those devices?

Q. Yes.

A. Yes, sir. That has been continuously going on for the 11 years that I have been there.

Q. Now, adverting to this so-called price war in 1938, Mr. Raupagh, when an economic situation like that exists, in your judgment, can anyone tell exactly what one specific factor may have caused it?

A. No, sir.

Q. In your judgment, does it arise out of a combination of economic factors that are generally prevalent?

A. Yes, sir, it does.

Q. Now, did there come a time, Mr. Raupagh, when the market became more stable, after the so-called 1938 price war?

3274 A. Yes, sir.

Q. And in your judgment, when did that occur?

A. It occurred when the dealer margins had decreased so that the posted retail price of major brand service stations were selling at a lesser price.

I might add to that: and other economic factors had corrected themselves.

Q. Now, since 1939 what has been the general marketing situation with reference to a normal, comparative stability, in reference to other years that you have observed in Detroit?

A. I would say that we have had a normal Detroit market, than relates to Detroit in other years.

Q. Is there always some disturbance in the retail market in Detroit?

A. Yes.

Q. Adverting to the 1938 price war; are you familiar with the prices generally that were being charged at retail by that class of distributors which you put in your second list of majors?

A. Yes, sir.

Q. Do you remember what I am referring to?

A. Yes, sir.

Q. As to whether or not their retail prices were less than the prices at which the Standard Oil Company 3275 was selling its jobbers?

A. Yes, sir. At one time their retail prices were less than the price at which the Standard Oil Company was selling its jobbers.

Q. With regard to those operators, Mr. Raupagh, are they continuously with you, here in Detroit?

A. They are not only continuously with us, but they are growing and expanding very rapidly.

Q. Do you regard them in your business, as manager for the Respondent, Standard Oil Company, as a serious and effective element in your competition?

Mr. Austin: Just a moment, please. Does that refer to jobbers or to the non-major refiners?

Mr. Hanley: I am referring to the list which Mr. Raupagh itemized.

Mr. Austin: Those which he said were not major brands, but they did a major amount of business?

Mr. Hanley: That's right.

Mr. Austin: All right.

Mr. Hanley: The second list. Is that clear to everyone? I want it very definite, because it is very important. Beginning with the Charles Austin Company, the Zip and Duro, and so on.

Trial Examiner Ballinger: Read the question.

(The last question was read.)

3276 Mr. Austin: I object to the question unless it is explained what is meant by "serious and effective." I wouldn't object to—well—

Mr. Hanley: It seems that the question is clear, but I will try and clarify it further, if I can, Judge.

By Mr. Hanley:

Q. I mean by serious and effective, Mr. Raupagh, do they affect your ability to market gasoline? In your judgment, do they impress themselves on the market, and do they get the business that you think you could, otherwise, get?

A. They do. They very seriously affect our business. As an illustration: In 1938 Charles E. Austin took out a wholesale distributor's license and started a chain of cut-rate service stations.

His gallonage, according to the State's figures, for 10 months in 1938 was over 14,000,000 gallons, and every gallon sold at retail, so that it shows that he has very good consumer or automobile owner acceptance, in order to sell that gallonage, and any time that a marketer can do that in any market or any city the size of Detroit, and immediately take on that much gallonage, that is a serious—it has a serious effect on the business of any major brand marketer. It has a serious effect on all business.

Q. Now, Mr. Raupagh, was there a time in the last several years when the Standard Oil Company sold
3277 on a tank car basis to jobbers other than the four jobbers involved in this action?

A. There was such a time.

Q. And will you tell us, please, who those jobbers were?

Trial Examiner Ballinger: First, will you tell us the time?

The Witness: The time was prior to 1936, your Honor; with one exception. We sold the Carnick Oil Company prior to 1936. We lost their business to the Gulf Oil Corporation. Carnick purchased in tank car quantities. He was a jobber. We lost him on account of better offers made by Gulf Oil Corporation in—

Mr. Austin: I object to that last sentence, your Honor, and move that it be stricken.

Trial Examiner Ballinger: Objection sustained; motion granted.

By Mr. Hanley:

Q. Were you advised by the Carnick Oil Company that the reason that they were leaving the Standard Oil Company was because they could get better prices elsewhere?

A. Definitely so.

Q. At the time you were dealing with the Carnick Oil Company, were you selling them on a jobber tank car basis?

A. Yes, sir.

Q. And about when did you lose them?

3278 A. This was prior to 1936. I should judge about 1933 or 1934.

Q. Have you ever had that customer back?

A. No, sir.

Q. Have they continuously been supplied by some other supplier on tank car basis?

A. I know they have been continuously so supplied by the Gulf Oil Corporation, but not on a tank car basis; only as to price. They haul out of the bulk plant of the Gulf Oil Corporation, and do away with the necessity of owning and operating a bulk plant.

Trial Examiner Ballinger: What was the tank car differential at that time?

The Witness: What was the tank car differential at that time? You mean when we lost them?

Trial Examiner Ballinger: Yes.

The Witness: I think the tank car differential at that time was much smaller than it is today.

Trial Examiner Ballinger: Do you recall what it was?

The Witness: Not exactly, no, sir.

By Mr. Hanley:

Q. Can you guess approximately, Mr. Raupagh?

A. Yes, it was a cent or below.

Q. Now, were there any other customers which 3279 you were supplying on a tank car basis that you have ceased to supply?

A. Holzbaugh, but he went out of business.

Q. When was that?

A. I think we shipped him the last car in April of 1936 or 1937.

Q. Were there any others?

A. Middleton Oil Company. We lost that, I believe, in 1933, to the Shell Oil Company.

Q. Now, in respect to the Middleton Oil Company, do you have any knowledge as to whether an offer of like character as that made by Shell to Middleton was also made to Citrin-Kolb?

A. Yes, there was.

Mr. Austin: The witness hasn't stated that he knows of any offer made to Shell.

Mr. Hanley: I was just taking a short-cut. If counsel wants to insist upon it—I will withdraw the question.

By Mr. Hanley:

Q. Did you learn of an offer made to the Middleton Oil Company by the Shell Company at a time while you still were supplying Middleton?

Mr. Austin: If your Honor please, I request the witness be restricted to stating what was told to him by the customer and not what he heard some place.

3280 Mr. Hanley: It seems to me it is just a little bit picayunish to quarrel about what an offer is. These men are in the business, and they know what an offer is.

Mr. Austin: If a customer of the Standard Oil Company says he got a customer from some place else, and he is a Standard Oil Company man, maybe he is just sounding out the other company.

Trial Examiner Ballinger: Objection sustained.

By Mr. Hanley:

Q. Was there a time, Mr. Raupagh, when anything was said to you by the Middleton Oil Company with regard to anything about their buying gasoline from the Shell Company?

A. Yes, sir.

Q. And about when was that?

A. It was some time in 1933.

Q. And at that time was there anything said to you by the Citrin-Kolb Oil Company in respect to the question of their buying gasoline from the Shell Oil Company?

A. Yes, there was.

Q. Now, without stating what was said, were you told by the Middleton Oil Company that they had an offer of any kind from the Shell Company to sell them gasoline?

Mr. Austin: I object to that, your Honor, unless it is proved that Shell did make such an offer, and the price of the offer is proved. As to Citrin-Kolb, such

3281 proof has been given, but I don't believe it has been given to Middleton.

Mr. Hanley: That is an impossible rule, Judge. If they come and tell us they have got an offer, we are entitled to tell at least that much. We lost this customer. We did not meet the offer. We are not trying to justify anything about Middleton. We are just trying to prove that they did have a better offer and they took it and we lost it, and that was all there was to it.

Trial Examiner Ballinger: Objection overruled.

By Mr. Hanley:

Q. The Court says you may answer. Do you want the question read back?

A. Yes, please.

(The last question was read.)

A. Yes, they did tell me that.

By Mr. Hanley:

Q. Did they tell you what it was?

A. They told me it was on a tank car basis, with Shell gasoline, known as Silver Flash; Middleton at that time had a bulk plant and he stated that, in his opinion, it was a better proposition than he had from us, from the Standard Oil Company.

Q. Did he ask you to do anything about it?

A. Yes, he asked me if we would give him a bet-
3282 ter tank car price than we did at that time.

Q. And what is the fact as to whether or not you declined to do that?

A. I declined to do it.

Q. And what happened in respect to whether or not you retained or lost the business of the Middleton Oil Company?

A. Lost the business of the Middleton Oil Company.

Q. Have you ever had it since?

A. No.

Q. Is the Middleton Oil Company still in business?

A. They are now in business, although I think they changed hands a year or two after that, and it went back in business.

Q. Now, were there any other companies to whom you were selling on a tank car basis, Mr. Raupagh?

A. Yes, we were selling to Dick Lock on a tank car basis.

Q. And did there come a time when he ceased to do business with the Standard Oil Company?

A. Yes, sir.

Q. And about when was that?

A. That was about 1933 or the early part of 1934.

Q. And what were the circumstances of your losing him, so far as you know?

A. The circumstances were that he had received and did accept an offer from the Gulf Oil Company and took on their brand of gasoline, and before leaving us he
3283 explained the proposition to me.

Q. Just for the record, is the name of the Gulf Company the Gulf Oil Refining Company or the Gulf Oil Corporation?

A. I believe it is Gulf Oil Corporation.

Q. You mean what is commonly referred to as the Gulf Company every so often?

A. That is right.

Mr. Austin: Just for the record, your Honor, I make the same objection to these last questions and answers, and move that they be stricken out on the same ground, that there is no foundation of proof that any offer was made on any price or that any price was made by a competitor and no offer has been made to prove it.

Trial Examiner Ballinger: Objection overruled.

By Mr. Hanley:

Q. Well, the fact is you did lose Mr. Dick Lock, didn't you?

A. Yes, sir.

Q. And you lost him, didn't you after he told you that he had a better offer from the Gulf people?

A. Yes.

Q. And you never had him back as a customer?

A. Oh, yes.

Q. Had you?

A. We never had him back as a customer, but 3284 we have one of his stations which we supply.

Q. Well, did you offer him any inducements?

A. No, sir.

Q. On what basis is that customer?

A. He is on a tank wagon basis at the present time.

Q. And did you say what time you lost this customer, Mr. Lock?

A. 1933 or the early part of 1934.

Mr. Hanley: At this time, your Honor, we ask to have marked, for identification, the paper outlining the sales volume of the four jobbers.

Trial Examiner Ballinger: Two papers?

Mr. Hanley: Yes, two, but they are unrelated. They may have separate numbers.

Trial Examiner Ballinger: The reporter will mark the two documents as Respondent's Exhibits 53 and 54, for identification.

(The documents referred to were marked, for identification, "Respondent's Exhibits 53 and 54.")

By Mr. Hanley:

Q. Mr. Raupagh, I hand you what has now been marked Respondent's Exhibit No. 53 entitled "Total Gasoline Sales Volume in Gallons and Ratio of Retail and Wholesale Sales to Total Sales of Standard Oil Company Jobbers for the Years 1936 and 1940," and I will ask 3285 you if that exhibit was prepared under your supervision and at your direction.

A. It was, sir.

Q. Does that reflect the gallonage of each of the four jobbers mentioned in this lawsuit?

A. Yes, sir.

Q. Does it reflect the break-down of their sales as between wholesale and retail sales, in terms of gallonage?

A. Yes, sir.

Trial Examiner Ballinger: From what records was it prepared?

Mr. Hanley: I beg your pardon?

Trial Examiner Ballinger: From what records was it prepared?

Mr. Hanley: I will develop that, your Honor.

By Mr. Hanley:

Q. Was that prepared from the records of the Standard Oil Company in so far as the gallonage figures are concerned.

A. It was prepared from the records of the Standard Oil Company as far as the gallonage figures are concerned.

Q. In so far as the break-down between the wholesale and the retail sales are concerned, did you have success to any other source of information than the records of the Standard Oil Company, and, if so, what?

A. Yes, we had access to the records of the four companies mentioned on this exhibit, namely, Stikeman 3286 Oil Company, Wayne Oil Company, Citrin-Kolb Oil Company, and Ned's Auto Supply Company, and from these records, we determined that break-down.

Mr. Hanley: I think I will offer, first, Respondent's Exhibit No. 53, and I will state to your Honor that all of the material on the exhibit has already been verified by the Wayne Oil Company, Citrin-Kolb Oil Company, and Ned's Auto Supply Company, and I don't understand there is any dispute as to the fact that the Stikeman Oil Company is not operating any service stations at this time. It is a summary and here is a copy, Mr. Austin.

It is a summary exhibit which has been used here frequently, and much of it is in the record, by way of word of mouth testimony. I think it would be a very convenient and quick analysis.

Mr. Austin: Well, you believe these figures are correct, don't you, Mr. Raupagh?

The Witness: Yes, I do.

Mr. Austin: I would like to ask you one question: whether the totals here under the column headed "Total Sales", does that mean sales between jobbers or sales between the Standard Oil Company and the jobbers?

The Witness: That means sales by the Standard Oil Company to jobber.

Mr. Austin: And then it wouldn't follow that the sum of the last two columns would equal the second

3287 column?

The Witness: Oh, yes.

Mr. Austin: I mean they don't resell exactly the same number of gallons each year that they buy from you?

The Witness: Not any more than they don't have the same inventory each year, but it is too small and it wouldnt' make any difference.

Mr. Austin: I was just basing it on what I think Mr. Biber or Mr. Ledbetter might have said to me at one time, that their figures shown on the Secretary of State gasoline tax returns wouldn't be the same as the figures that—I forget now whether those tax returns are based on their returns or what they sell. I should know.

The Witness: I can tell you this: our sales, I mean Standard Oil Company sales to them and what appears on the State tax records, would be so small a difference, if any, that you would have to have a spy glass to find it many times.

Trial Examiner Ballinger: There would be some loss, would there not?

The Witness: Yes, there would be some loss, and there might be some difference in inventory, too. You see, we take the figures as to the amount of gasoline the Standard Oil Company sells, and, they, of course, have to report that to the State.

Trial Examiner Ballinger: Off the record.

3288 (A discussio nensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I have no objections, your Honor.

Trial Examiner Ballinger: No objections. Respondent's Exhibit 53, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 53," was received in evidence.)

By Mr. Hanley:

Q. I now hand you, Mr. Raupagh, what has been marked Respondent's Exhibit 54, and I will ask you if that was an exhibit which was prepared in your office and under your direction and supervision?

A. Yes, it is.

Mr. Hanley: I offer Exhibit 54, which is also in the nature of a summary exhibit to disclose the gross gallonage and the number of outlets served, whether retail or otherwise, of the various jobbers. Again, I think this has been testified to by the witnesses themselves who were operating the stations, with the possible exception of the Stikeman list.

Mr. Austin: No objection.

Trial Examiner Ballinger: Without objection, Respondent's Exhibit 54, for identification, is admitted in evidence.

3289

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 54," was received in evidence.)

Mr. Hanley: At this time the Respondent requests that it may have marked, for identification, a document entitled "Gasoline Sales in the Detroit Area Including Highland Park, Hamtramck, and Dearborn, of Wholesale licensed Jobbers and Distributors of Branded Gasolines."

Trial Examiner Ballinger: The Reporter will mark the document Respondent's Exhibit 55-A and 55-B, for identification.

(The document referred to was marked, for identification, "Respondent's Exhibit 55-A and B.")

By Mr. Hanley:

Q. I hand you what the reporter has now marked Respondent's Exhibits 55-A and 55-B, and will ask you to explain what that exhibit is.

A. This Exhibit 55-A and 55-B, is a statement of gasoline sales in gallons in the Detroit area, including Highland Park, Hamtramck, and Dearborn, of wholesale licensed jobbers and distributors of branded gasoline.

Trial Examiner Ballinger: By whom was it prepared?

The Witness: It was prepared under my direc-
3290 tion; my supervision.

By Mr. Hanley:

Q. Now, Mr. Raupagh, without stating any figures, I wish you would please explain what each of the columns in this exhibit purport to represent, taking first the column under the title "Jobber or Distributor." There appears to be a name. What is that name of?

A. The first column, under the title "Jobber or Distributor," is the name of the company or corporation listed on this report.

Q. Now, the second column, under the title "Date Received; Wholesale Distributors License." And there are figures which apparently mean dates; is that true?

A. Yes.

Q. What do those dates represent?

A. That column represents the dates opposite the name of each company when each company received its wholesale distributor's license from the State of Michigan.

Q. And from what source did you obtain that date?

A. That date was obtained from the Gasoline Tax Department of the State of Michigan.

It also means that where the date is 1932, it may mean that the license was obtained prior to 1932.

Q. Why is that?

A. Because they had no records available going
3291 back further than that, at that time.

Q. But, in any event, is it true that this date is the date reflected by the tax records of the State of Michigan?

A. Yes, sir.

Q. Going to the next column, entitled "Supplier." What appears under that title?

A. Under that title of "Supplier" appears the name of the company which supplies gasoline to the jobbers or distributors mentioned in the first column.

Q. I will ask you what is your source of information as it appears under the title "Supplier"?

A. My source of information as to the supplier is my own personal knowledge, and, also, as to the Gasoline Tax records of the State of Michigan.

Q. Following that column entitled "Supplier" are five columns entitled "1936" through 1940, inclusive, and under each year appear certain figures. What do those figures represent opposite the name of each jobber or distributor?

A. It represents the yearly gallonage as reported by these jobbers or distributors to the Gasoline-Tax Department of the State of Michigan, and as taken from the records of the monthly published records of the Gasoline Tax Department's records, which records are in evidence in this case.

Q. Directing your attention to the second page, 55-B, there is a note: "Sales figures of the major com-
3292 panies such as Socony Vacuum Oil Company," and then goes on to list certain other companies in the Detroit area, "are not available". What does that mean?

A. It means that the figures are not available as to the amount of gasoline that these companies sold in the Detroit area, according to the tax reports of the State of Michigan, the Gasoline Department.

Q. There follows another note, the effect as follows: Neither are such sales as are made by any supplier through commission agency arrangements, and so forth, as such operators are not licensed as wholesale distributors. That is—and then there appears a list of companies supplied by certain other companies. What does that mean?

A. It means that the list of companies that are shown under that heading, or on this page, as being supplied by the major companies represented, that there is no way of securing their gallonage, although I personally know that they are being supplied by these companies. They make no reports to the State of Michigan as to their gasoline taxes, but some of them perform all the functions of a jobber.

Q. What is a commission agency arrangement?

A. A commission agency, or a commission agency arrangement, such as we refer to on this exhibit—for instance, the Carnick Oil Company, which is supplied by the Gulf Refining Company,—Carnick Oil Company hauls
3293 the gasoline out of the bulk plant of the Gulf Company and distributes that gasoline to other dealers and consumers or to stations which they may operate themselves. They buy on a tank car basis. The supplying company—I mean the Gulf Company furnishes the equipment to the dealers or consumers that Carnick Oil Company may supply.

Mr. Austin: I object to further continuation of testimony concerning commission agencies. I don't believe there is any showing of relevancy at all to such an agreement. It is the first time it has been mentioned in this case.

Mr. Hanley: It has been mentioned many times by many of these witnesses. These yard haulers; that's what they are.

Mr. Austin: Commission agencies? I think the witness was asked to describe what he meant by a commission agency agreement. I didn't object to that. I think he is now going beyond, in answer to the question, going into specific cases, and I object to that.

Mr. Hanley: All right. You may discontinue answering, Mr. Raupagh.

By Mr. Hanley:

Q. There is another note following the one which you have just been discussing in which there are listed four named companies followed by the following note: "—are the source of supply for a large number of cut-price 3294 non-brand distributors and dealers, the portion of their gallonage going to such cut-price non-brand operators cannot be determined." What does that mean, and why can't it be determined?

A. It means that the names mentioned on this sheet as suppliers of that kind of gasoline, which means that they have what we term a major brand gasoline, and they sell to people that come to their yards and haul it out and which it isn't necessary for them to report on their gasoline tax reports because they sell it tax paid. We have no way of determining the amount of such major brand gasoline which is sold to cut-price or non-brand distributors, although we know that it actually exists, and we know that it is quite prevalent.

Q. Now, with respect to the figures which I think you have stated represent gallonage under the several years, in the last five columns on Exhibit 55-A. What is the source of those gallonage figures?

A. The gasoline tax reports of the State of Michigan.

Q. Are those the same reports that were introduced by the Government in the first week of this hearing when, I think, you were on the witness stand, or some witness for the Government was on the witness stand?

A. Yes, sir.

Mr. Hanley: We offer the Exhibit, if your Honor please.

3295 Mr. Austin: I would like to ask some questions.

Examination on Voir Dire by Mr. Austin.

Q. Mr. Raupagh, referring to these notes on the second page, there is a note there opposite Red Indian and Victor. Do you see that?

A: Yes, sir.

Q. Now, is the gallonage referred to in that note included in the gallonage shown opposite those companies on the first page of the exhibit? That note refers to a portion of the gallonage. Does that mean a portion of the gallonage given on 55-A?

A. That's right. I mean that if the gallonage by Victor Oil Company—and most of this gasoline is sold tax paid—it would not appear in the figures.

Q. It would not appear in the figures?

A. No.

Q. What do you mean by selling it tax paid?

A. I mean selling it with all taxes paid. I mean the supplier, in this instance, Victor Oil, pays it to the State of Michigan.

Q. If he pays it to the State of Michigan, why doesn't it appear in the Secretary of State's reports?

A. It wouldn't appear in this report for the simple reason that it would be listed in Column B as gasoline handled by Victor Oil Company, and, consequently,
3296 we haven't included that in the report, because it is gasoline handled, and which means that they might have bought or sold that gasoline tax paid.

Q. Don't the Secretary of State's reports show all gasoline gallonage upon which a tax is paid?

A. Yes, but there may be some duplications in it if you take all three columns. Consequently, we only took Column A and Column C, to be doubly sure that we were conservative, if anything.

Q. Now, why do you refer there to cut-price non-brand distributors and dealers? There is nothing else relating to price on this exhibit anywhere.

A. Because we know that the gasoline that they sell that way generally goes to the cut-price non-brand distributor.

Q. Do you use those two words as synonymous? Is a non-brand distributor always a cut-price distributor?

A. Well, just about always, Mr. Austin.

Q. Isn't there a rather recognized difference between non-branded and branded gasoline in the industry here in Detroit.

A. No.

Q. You just said it is true that the non-branded gas generally sells at a lower price than the branded.

A. That's right, but as to any recognized differential, no.

3297 Q. You mean that there isn't any steady difference in price; is that what you mean?

A. That's what I mean.

Q. What is the usual difference?

A. Well, I can't even answer that, Mr. Austin, because it is all over the map. It runs to 6¢ a gallon, and it runs to 1¢ a gallon, and all the way in between there; depending upon conditions, and so forth.

Mr. Austin: Your Honor, I have no objection to this exhibit with the exception of the second and third notes appearing on 55-B, and I object to those as I don't think the information there is properly authenticated or that it appears that this witness has any knowledge of the arrangements between these various companies in the second note and their supplier, and the third note is a statement, really, of something that is not included here, and I don't see how this could be evidence of something that isn't here. It is just an attempt to say that there is something that is not in the exhibit, and the exhibit, it seems to me, would be perfectly clear without that note.

Mr. Hanley: That is the next to the last, beginning: "No record of the date"?

Mr. Austin: No, I am talking about these two notes here, that include lists of oil companies. The list of

3298 agency agreement and non-brand distributors.

Mr. Hanley: If there is an objection to that portion of the exhibit, I would like to examine somewhat further.

Trial Examiner Ballinger: You may do so.

Mr. Austin: And I would like to ask counsel for the Respondent what his purpose is in offering it. I rather assumed it had to do with gallonage of licensed distributors and jobbers.

Mr. Hanley: It does. That's exactly what it is.

Mr. Austin: And if so, there is an attempt in these two notes to bring in quite a list of people who are not licensed distributors and jobbers, without showing they perform the same function, and, also, there is an attempt to bring in some activities of licensed jobbers which, apparently, there is no definite information about.

Mr. Hanley: I will examine further on that. I play the cards the way they are dealt, Mr. Austin. I am just trying to prove the oil business the way it is, not the way it ought to be.

By Mr. Hanley:

Q. Referring, Mr. Raupagh, to the note beginning with the listing of the Carnick Oil Company. It is indicated on that exhibit, for instance, that the company is supplied by the Gulf Refining Company. Do you have any 3299 knowledge about that?

A. Yes, I have.

Q. Personal knowledge?

A. Yes.

Q. I think you testified a little while ago that the Standard Oil Company lost the Carnick Oil Company to the Gulf Oil Company?

A. Yes, sir.

Q. Do you have personal knowledge of the suppliers of the entire list of the companies that appeared in that note and, if so, how did you get that knowledge?

A. Yes, I have knowledge that they are the suppliers to the list mentioned here. For instance, J. J. Bright, I actually saw the truck of J. J. Bright loading at the plant of the Sinclair Refining Company.

National Petroleum Products Company; they display a Sinclair sign at one of their service stations, and I have known for some time that they handled Sinclair products and haul it out of the Sinclair bulk plant.

The same way with Bernard Albert, William Bauer, Arthur Adams, and D. J. Horte. I personally know they are haulers for the Texas Oil Company. They call upon our trade. They call upon our accounts. We come in daily contact with them in a competitive way.

3300 The Dearborn Oil Company and Miller Auto Supply Company, being supplied from Cities Service Oil Company, I positively know that is true and I know about how they are supplied.

Q. Now this Exhibit, as I understand it, Mr. Raupagh, purports to show the sales by the named jobbers or distributors of branded gasolines as disclosed by the State report which the Government put in evidence.

A. Yes, sir.

Q. Now explain for the Court again, if you please, why it wouldn't show any sales that might be made through this last list you have just discussed; beginning with the Carnick Oil Company.

A. The reason that there wouldn't be any sales shown by the Carnick Oil Company is that the Carnick Oil Company has no wholesale or distributor's license from the State of Michigan; consequently is not required to make a report to the State of Michigan and does not do so.

Mr. Austin: I am not disputing any of that, as to who these people are supplied by, Judge Hanley. I am objecting to just two things, here, if you would like to have me state it again for your benefit.

Mr. Hanley: I would, if I am going about it wrong.

Mr. Austin: I am objecting with reference to cash
3301 agency agreement and I am objecting to the reference
of cut-price, just the words cut-price, in relation to non-brand distributors.

Mr. Hanley: I am trying to explain both but I can't do them both at once.

I submit, your Honor, that this commission agency arrangement has been testified to frequently in the case. Sometimes it has been called the yard hauler. That is someone that picks up in his own truck, gasoline at the bulk plant of a supplier at a reduced price, and then acts actually in the nature of a peddler. He goes out to try to sell it to consumers or resellers or wherever he can and that has been frequently testified to in the case. Maybe not under this term but the fact has been testified to. If that's the objection, it seems to me it is not well taken.

Mr. Austin: No. It seems to me, though, the only question is whether this witness has any knowledge of the arrangement, if any, existing between these people and their companies.

Mr. Hanley: He has just testified with positive knowledge.

Mr. Austin: He doesn't know what the arrangement is between them.

Mr. Hanley: He says he knows.

Q. Is it a fact, Mr. Raupagh, that it is or isn't a 3302 matter of common industry knowledge in Detroit that the list, beginning with the name of the Carnick Oil Company, which you have been discussing, are supplied by the suppliers which follow their names as commission agency drivers and under a commission agency arrangement?

A. Yes, sir.

Q. Do you know that of your own knowledge?

A. Yes, sir.

Q. Have you seen their trucks?

A. Yes, sir.

Q. Have they solicited your customers?

A. Yes, sir.

Q. Have you had reports on their activities in the routine operation of your office over the past several years?

A. Yes, sir.

Q. Now in respect of the second note which deals with the Red Indian Oil Company and three others, I will ask you if that note means anything at all except that those four named dealers sell certain branded gasolines to what are commonly called non-brand dealers?

A. That's right.

Q. Is that all it means?

A. That's all it means.

Mr. Hanley: We reoffer the exhibit.

Trial Examiner Ballinger: And you know that 3303 latter of your own knowledge, do you?

The Witness: Yes, sir; I do.

Trial Examiner Ballinger: Yet the Examiner now see the document.

(Thereupon the documents referred to were handed to the Examiner.)

Trial Examiner Ballinger: The portion objected to is what?

Mr. Austin: Well, I think I will withdraw the objection in view of the testimony of the witness. I think it is a little more clear now. I felt that a lot of those were very largely unexplained. While they still might be technical objections, I will withdraw them.

Trial Examiner Ballinger: The objection is withdrawn and Respondent's Exhibits 55-A and 55-B for identification are admitted in evidence.

(The documents referred to, heretofore marked for identification "RESPONDENT'S EXHIBITS 55-A and 55-B", were received in evidence.)

Mr. Hanley: Your Honor, I have two other exhibits of a nature very similar to this one, but perhaps it is so late that I ought not to start on them. Your Honor requested a map the other day and we have had it prepared and at this time we would like to have it marked for identification.

Trial Examiner Ballinger: The Reporter will mark
3304 the document as Respondent's Exhibit No. 56 for identification.

(The document referred to, was marked "Respondent's Exhibit 56" for identification.)

By Mr. Hanley:

Q. Mr. Raupagh, I show you a map of the State of Michigan which I have now had marked for identification as Respondent's Exhibit 56 and it includes the Detroit metropolitan area which, on this map, has been marked with a hevy green line. I will ask you, first, if the lines were put on that, the green lines, at your direction and under your supervision?

A. They were.

Q. And what does the area bound by the green lines represent?

A. The area bounded by the green lines represents the Detroit division or total ~~sales~~ division of the Standard Oil Company of Indiana, which is under my jurisdiction.

Mr. Hanley: We offer Respondent's Exhibit 56 in evidence.

Trial Examiner Ballinger: Any objection?

Mr. Austin: I haven't seen it yet. I assume it is all right. I will ask the witness, where is the Detroit division? Is this it down here (indicating)?

Mr. Hanley: Yes.

Mr. Austin: No objection.

Trial Examiner Ballinger: Respondent's Exhibit
3305 56 for identification is admitted in evidence.

(The document referred to, heretofore marked for identification "RESPONDENT'S EXHIBIT 56," was received in evidence.)

Mr. Hanley: Now, Judge, it is just up to your Honor's judgment and desire as to whether I can go into one of these further long exhibits of figures now, which will be similar to the one I just concluded and I am perfectly willing to go forward if you desire.

Trial Examiner Ballinger: Could you advise the Examiner how long you think the direct examination of the witness will take?

Mr. Hanley: Judge, the way we are getting along, I don't think it is going to take much longer. We are getting along with great rapidity. I do want to say this, just in fairness to the Court and counsel, we are going to have a lot more pictures, but we are not going to take any such length of time as was taken here the other day. We will arrange some way to handle them en bloc somehow and we won't consume any great amount of time. Counsel for the Commission may want to riffle through them and make some specfic objections, but I think they are all of a character that can be readily grouped and indeed we have tried to group them so that anything that has been applicable to one book would apply equally to all.

3306 Trial Examiner Ballinger: Does counsel desire to make a motion at this time?

Mr. Hanley: Well, I would like to move that we adjourn. I would be glad to start at nine o'clock or nine thirty, whatever the Court desires.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

The motion of counsel for Respondent is granted and now, at 4:50 p. m. the hearing is adjourned to reconvene at 9:00 o'clock a. m. May 7, 1941, in Room 859, Federal Building, Detroit, Michigan.

(Whereupon, at 4:50 p. m., May 6, 1941, the hearing in the above-entitled matter was adjourned, to reconvene on May 7, 1941, at 9:00 a. m.)

3307 Room 859 Federal Building,
Detroit, Michigan,
May 7, 1941.

Met, pursuant to adjournment at 9 A. M.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois, and

Arthur J. Abbott, Esq., of the firm of Abbott, MacMahon, and Roberts, 2230 Buhl Building, Detroit, Michigan, on behalf of the Respondent.

3308

PROCEEDINGS.

Trial Examiner Ballinger: We will come to order.

This is a reconvening at 9 A. M., Eastern Standard Time, May 7, 1941, in Room 859 Federal Building, Detroit, Michigan, in Docket No. 4389, in the case entitled Standard Oil Company.

The last hearing was held in Detroit May 6, 1941.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

Mr. Hanley: If we may, your Honor, the Respondent would like to have marked for identification as an exhibit a document entitled: "Gasoline Sales of the Detroit Area of Licensed Wholesale Cut-Price Non-Brand Jobbers and Distributors." That consists of two pages.

Trial Examiner Ballinger: The reporter will mark the paper, as Respondent's Exhibits 57-A and B, for identification.

(The document referred to was marked for identification, "Respondent's Exhibit 57-A and B.")

P. A. RAUPAGH, having been heretofore duly sworn, resumed the stand, and testified further as follows:

Direct Examination (Continued) by Mr. Hanley.

3309 Q. Mr. Raupagh, I hand you what has now been marked. Respondent's Exhibits 57-A and B, for identification, and I will ask you if that exhibit was prepared under your direction and supervision?

A. Yes, sir.

Q. I show you Exhibits 55-A and B, which are now in evidence, Mr. Raupagh, and I will ask you if Exhibits 57-A and B were made up in exactly the same manner as 55-A and B, with the exception that this last Exhibit 57-A and B deals with jobbers handling non-brand and cut-price gasoline?.

A. That is right.

Mr. Hanley: We offer Exhibits 57-A and B in evidence, your Honor.

Mr. Austin: What are Exhibits 55-A and B? May I see them, Mr. Reporter?

(The documents were handed to Mr. Austin.)

Mr. Austin: Are all the gallonage figures taken from the Michigan Gasoline Tax Division reports?

The Witness: Yes, sir.

Mr. Austin: The same ones which are in evidence in this case?

The Witness: Yes.

Mr. Austin: Well, your Honor, I object to those because it is simply a duplication of the figures which 3310 the witness has stated are already in the record, and if it is desired by the Respondent to segregate certain distributors and present their gallonage in groups, the Respondent has ample evidence in doing that, and I submit there is nothing new here.

Mr. Hanley: It forms the foundation of an exhibit which I propose to enter. It is necessary for us for a foundation for a certain number of exhibits which I propose to introduce.

Trial Examiner Ballinger: The objection is overruled. Respondent's Exhibits 57-A and B are admitted in evidence.

Mr. Hanley: The Respondent requests to have marked, for identification, a chart entitled "Statement of Gasoline Sales Volume—"

Mr. Austin: May I interrupt? I have something else on this 57-A and B that I neglected—if I may. I would like to object to this further to the title which refers to cut-price non-brand jobbers and distributors. I submit that there has been absolutely no proof of any such title. I objected to the same words yesterday, used in 55-A, and I think it is unwarranted, and I submit to your Honor that any such—those two words "cut-price" and "non-brand", if they are to be used here, they should be proved exactly what that means of every one of these people listed, by competent testimony.

3311 Mr. Hanley: We will agree that "Cut-price" be stricken from the document. It has been fully proved what non-brand means, I am sure, and, also, what cut-price means, but I just don't want to argue about it. We will concede that the word "cut-price" may go out of the exhibit. It is the non-brand, as distinguished from the branded dealers we are trying to segregate here.

Trial Examiner Ballinger: The witness has testified that cut-price and non-brand were used interchangeably.

Mr. Hanley: That's right. The testimony is in the record, and I don't think the objection is well taken. We propose to prove with this exhibit—

Mr. Austin: I am not taking your word for anything you propose to prove. We have been having that through the whole case.

Mr. Hanley: I am willing that the word "cut-price" go out on this exhibit, if the Court thinks it should. I am sure it has been proved.

Mr. Austin: If the "cut-price" goes out, I will withdraw my objection to the "non-brand." I don't know whether they are non-brand, but—

Trial Examiner Ballinger: Counsel for the Respondent may then strike physically from the exhibit the word "cut-price".

3312 Mr. Hanley: May I now have this exhibit marked—for identification?

Trial Examiner Ballinger: You may. The exhibit again is admitted in evidence as Respondent's Exhibits 57-A and 57-B.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 57-A and 57-B," was received in evidence.)

Trial Examiner Ballinger: The reporter will now mark the document handed him by counsel for the Respondent as Respondent's Exhibit 58, for identification.

(The document referred to was marked, for identification, "Respondent's Exhibit 58.")

By Mr. Hanley:

Q. I hand you Respondent's Exhibit 58, for identification, Mr. Raupagh, and will ask you if that exhibit was prepared under your direction and supervision and in your office.

A. It was.

Q. It consists, apparently, of nine columns, vertical columns. Tell us, please, what the first column is.

A. The first column designates the year.

Q. And without stating the figures, what does the second column refer to?

A. Total sales, Detroit area.

Q. And the third column?

3313 A. Total Standard Oil Company sales; percent of total sales.

Q. The fourth column.

A. Standard Oil Company sales, excluding jobbers; percent of total sales.

Q. And the fifth?

A. Standard Oil Company jobber sales; percent of total sales.

Q. What does the sixth column represent?

A. Sales of licensed wholesale jobbers and distributors of branded gasoline exclusive of Standard Oil Company jobbers; percent of total sales.

Q. What does the seventh column represent?

A. Sales of licensed wholesale cut-price jobbers and distributors of non-brand gasoline; percent of total sales.

Q. And the eight column?

A. Total sales of all licensed jobbers and distributors including Standard Oil Company jobbers; totals of columns 5, 6, and 7; percent of total sales.

Q. And the ninth?

A. Sales all other companies, including majors; column 2 less columns 4 and 8; percent of total sales.

Q. Now, where were these figures obtained, Mr. Raupagh, with reference to the sales of the Standard Oil Company? In the area described in the title of the 3314 exhibit, both in total and as described through the channels of jobbers and other jobbers? The columns 3, 4, and 5?

A. They are the Standard Oil Company's actual sales.

Q. Now, with reference to Column 6, having to do with distributors of branded gasoline, where did you get those figures?

A. Those figures were secured from the State Gasoline Tax Sale records.

Q. And does column 6 refer to the gallonage and other individual companies which appear on Respondent's Exhibit in evidence 55-A and B?

A. Yes, sir.

Q. With reference to column 7, having to do with distributors of non-brand gasoline, where did you obtain those figures?

A. From the State of Michigan Gasoline Tax records.

Q. And does that column refer to the gallonage figures and the companies named on Respondent's Exhibits in evidence 57-A and B?

A. It does.

Q. Now, column 8 is merely an addition, is it not, of the three columns preceding, which gives a total of sales through jobbers?

A. It is.

Q. Now, what companies are included in the 3315 column under the number 9?

A. All of the major companies whose figures could not be segregated on the Gasoline Tax reports as to their gallonage in this area.

Q. The total sales in the Detroit area as appear in column 2 refer to that area, do they not, which is described in the title to the exhibit?

A. It does.

Mr. Hanley: We offer Respondent's Exhibit No. 58 in evidence.

Mr. Austin: I would like to have about five minutes to look over this, your Honor.

Trial Examiner Ballinger: We will recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Reconvene.

Mr. Austin: As to Respondent's Exhibit 58, for identification, I have no objection to it going in evidence except the objection which I made to Respondent's Exhibit 57. In other words, the word "cut-price" appears here in two places.

Mr. Hanley: It may come out.

Trial Examiner Ballinger: Counsel will delete it.

Mr. Austin: With that change, I have no objection.

3316 Trial Examiner Ballinger: Respondent's Exhibit 58, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 58," was received in evidence.)

Mr. Hanley: If your Honor please, I would like to interrupt the examination of this witness for just a moment to hand him certain things which he has requested from the Respondent, that is, Mr. Austin requested them.

Trial Examiner Ballinger: Do you desire to go off the record?

Mr. Hanley: No, I want it on the record, because there are certain understandings that we have had.

Trial Examiner Ballinger: You may proceed.

Mr. Hanley: I hand you, Mr. Austin, first the list of reseller accounts in the Detroit field for 1937 with annual gasoline gallonage for that year, as requested by the Commission.

Mr. Austin: Do I understand that this shows where one operator operates more than one service station?

Mr. Hanley: It would show it if it were true, but it isn't true.

Mr. Austin: Isn't it true?

Mr. Hanley: In that year they did not have any tank wagon dealers who were operating more than one station, and the notation to that effect appears on the memo.

3317 Mr. Austin: Oh, I see it down at the bottom, Judge.

Mr. Hanley: Secondly, in response to your request concerning which I asked you to write a letter, but it seems that our accountants were able to understand what you wanted, at least, as well as I could explain it to them after talking to you, and that information consists of a statement showing the 1940 sales: A. Gasoline Tank Wagon Reseller. B. Gasoline Tank Wagon Consumer. C. Gasoline Tank Car Jobbers (Four jobbers named in action).

D. Gasoline All Other—Other Method and Tank Car. E. Motor Oil Reseller Sales. F. Sales of Motor Oil and Greases to Four Named Jobbers.

Mr. Austin: Thank you.

Mr. Hanley: Thirdly, certain requests were made in respect of permitting the Commission to examine parts of Respondent's code of accounts and copies of Respondent's code of accounts are now handed to the Commission in response to such request.

There was an understanding with counsel that these copies would be used to any extent the Commission might find it essential to use them for its own purposes in this case, but that no copies would be taken, and that these copies would be returned to the Respondent and no publications of any of that matter permitted. As to that, it 3318 would be easier to just copy that into the record.

There is now handed to counsel for the Respondent these items:

A. Pages 1-2-3-4-5—Subs of Marketing Expense—Petroleum Products.

B. —Pages 1-2-3—Basis of Closing Tank Wagon Pro Rata.

C. —Pages 1-2-3-4-5-6—Basis of Closing General Pro Rata.

Fourthly, there was also a request made for a memorandum covering distribution of time procedure. That memorandum, together with a copy of a form in use by the Respondent entitled: "Distribution of Time by Method of Delivery" is handed to counsel for the Commission.

May I have marked, for identification, an exhibit entitled: "Yearly Increases or Decreases in Gasoline, Sales, and so forth"?

Trial Examiner Ballinger: The reporter will mark the document ~~Respondent~~'s Exhibit 59, for identification.

(The document referred to was marked, for identification, "Respondent's Exhibit 59.")

Mr. Austin: Thank you again, Judge, for all of this, if I haven't already said so.

Mr. Hanley: All right.

By Mr. Hanley:

Q. Referring you to Exhibit 59, for identification, 3319 Mr. Raupagh, was that prepared under your direction and supervision in your office?

A. It was.

Q. Just explain what that exhibit represents, without using the figures.

A. This Exhibit 59, of Respondent's, represents the yearly increases or decreases in gasoline sales, gallons and percent, for the years 1937, 1938, 1939, and 1940, for State of Michigan, Detroit area; total Standard Oil Company, Standard Oil Company jobbers, branded jobbers, cut-price non-brand jobbers, all jobbers, and all others.

Q. And what is the derivation or source of the figures which appear on that exhibit?

A. Official Michigan State Gasoline Department reports.

Mr. Hanley: I note that the word "cut-price" appears in two places. I am deleting that in both instances, and, as deleted, will offer the exhibit in evidence.

Examination on Voir Dire by Mr. Austin.

Q. Did you state how the consumption figures for the Detroit area were estimated?

A. No, I did not.

Q. Will you do so, please?

A. Yes, sir.

Q. And, likewise, I would like to know how the
3320 last figures "All Other Companies" in the Detroit
area—that appears also to be an estimate.

A. The figures of consumption for the Detroit area, which includes Detroit, Hamtramck, Highland Park, and Dearborn, were obtained on this basis:

First we took the consumption of gasoline for the entire State of Michigan as per the Gasoline Tax reports; the tax reports that are in evidence in this case.

We obtained the Motor Vehicle Registrations of the State of Michigan from the proper authorities of the State. We then divided to secure the unit motor vehicle consumption per year.

We then took the Motor Vehicle Registrations of Wayne County. We multiplied that by the unit consumption per motor vehicle, to secure the consumption of gasoline in Wayne County.

We then took our actual sales—I mean Standard Oil Company sales in Wayne County—and secured the percentage that those sales, Standard Oil sales, represent to the total.

We then took the actual sales in the Detroit area—that is, Detroit, Hamtramck, Dearborn, and Highland Park—and applied the same percentage that we had arrived at for Wayne County.

We then divided to determine what 1% is in gallons. We
multiplied same by 100, which gave us the total esti-
3321 mated consumption in the area.

We further checked these computations, and figures, with other statisticians, including one of the major companies here in Detroit who have a statistician employed; including Mr. Boatwright, and, on the testimony of Mr. Harrison, the figures are very closely related.

Q. I am afraid you got a little ahead of me on your method there, but did you mean that Mr. Harrison put in some figures when he testified here as to consumption in Detroit?

A. He gave some estimated figures which check closely to these figures.

Q. You mean his testimony here in the record?

A. Yes, sir.

Q. Because I would have to look back at that. I didn't remember that any such figure was in.

How was your figure for sales of all other companies in the last column arrived at?

A. The figures for sales of all other companies was arrived at after we had taken the figures of the various headings; that is, branded jobbers, non-brand jobbers, our own sales, and the reason that we had to use the figure arrived at in that manner on column No. 9, is because the Gasoline Tax Report of some of the major companies, of
all the major companies like Socony Vacuum and
3322 Sinclair and all of the other large companies, the tax
reports do not segregate the area, nor can we obtain the figures directly from them or, at least, we did not. But, according to all the statisticians, after we have taken the gallonage into consideration and other headings, column No. 9 can only represent the gallonage of those other companies who operate directly in the Detroit area.

Mr. Austin: Well, your Honor, inasmuch as this is merely offered as an estimate on the consumption in the Detroit area and the figures for—grouping of other companies in the Detroit area, if it is so offered, I will accept it upon that basis. I would like—I don't know. I don't feel that there is necessarily anything here that indicates any very accurate estimate. Probably the best has been done that can be done, but I believe I will object to those two columns upon the ground that they are estimates and do not reliably show the figures for the consumption in the Detroit area on the sales of companies other than Standard Oil in the Detroit area.

Trial Examiner Ballinger: Which is that?

Mr. Austin: The second horizontal line and the last horizontal line. Both of them are marked as estimates.

Mr. Hanley: They are offered as an estimate, based on the calculation which has been explained by the witness.

It is the best figure that is obtainable, your Honor,
3323 as will be disclosed by a study of the exhibit, fits in
with the actual figures, concerning which there is no estimate, which is, in itself, a proof of reasonable accuracy. It is just impossible to get that figure from any public records, and it is the method which is used continuously by oil companies, our own included, for their own purpose. I can ask the witness some further questions about that, if there is any doubt in your Honor's mind.

Mr. Austin: I just want to point out, your Honor, that while for 1938, where the red figures are there on the exhibit, that there is a decrease in consumption of gasoline for the State of Michigan as indicated as 5.4%, whereas it is 10% for Detroit.

Mr. Hanley: Which, again, is verified, if your Honor please, by certain charts that were prepared by Mr. Boatwright, and which we put in on his testimony. There was a lower consumption, relatively, in Detroit in 1938 than the balance of the State.

Trial Examiner Ballinger: You may examine.

By Mr. Hanley:

Q. Mr. Raupagh, is the method which you have explained to obtain the total consumption of gasoline in any segregated area like the City of Detroit, a method which you currently use in operating your business?

A. It is.

3324 Q. Have you been using it for many years past?

A. We have.

Q. Do other oil companies employ the same method?

A. They do.

Q. Do you exchange information from time to time as to the results that you reach?

A. Yes, sir.

Q. As to totals?

A. We do.

Q. Do you, in your business, act upon the results which you reach?

A. We do.

Q. Do you keep your own records, based upon the results that you reach by this method?

A. We do.

Q. Is it not true that you actually arrange and budget inventory and make investment of money and store gasoline on the basis of your findings as a result of these calculations?

A. It is true.

Q. Is it the best figure obtainable for the purpose?

A. It is the best figure obtainable.

Q. After you operate over the years in using it, have you found it to be an inaccurate figure in any given year?

A. We have found it a very accurate figure.

3325 Q. I might ask you this: the method was not at all prepared in order to prepare figures for this lawsuit, was it, Mr. Raupagh?

A. It was not.

Q. It is just as much a part of your books as any other figure you have, is it not?

A. It is.

Trial Examiner Ballinger: If counsel for the Commission has anything to be heard from on, he may proceed.

Mr. Austin: No. Except I would like to know how the witness has found the figure to be accurate. You said you found it to be a very accurate figure. Had you any means of checking the accuracy?

The Witness: Well, we know about how our business runs along according to these figures, and also with other companies that have statisticians who check as to the amount of business that may be secured in the area, or that others may be figuring and securing in the area. From a combination of those things, we found that these figures are accurate.

Mr. Austin: Well, I don't want to waste a lot of time on this, but if you have another means of ascertaining what is accurate, it seems to me, if this is an estimate and then you find it is accurate, you must have had some way 3326 of checking other than the method used here. Otherwise, you don't know whether it is accurate. If you say you rely upon it, that is something else.

The Witness: Well, only from our actual experience as to these figures, we have found that they are accurate and they are accurate enough for us to rely upon them so that we may make investments and so on.

Mr. Austin: Well, you do rely upon them, anyway, Mr. Raupagh?

The Witness: Yes.

By Mr. Hanley:

Q. On this question of checking, Mr. Raupagh, let me ask you a few questions and try to sew it up. In your experience over the year, have you ever been let down by these figures in your reliance upon them?.

A. No, sir.

Trial Examiner Ballinger: Objection overruled, and Respondent's Exhibit 59, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 59," was received in evidence.)

By Mr. Hanley:

Q. Mr. Raupagh, in relation to these several exhibits, 55-A and B, 57-A and B, 58, and 59, the terms "ma-
3327 jor oil companies" has been used. You, yesterday,
defined or made a list of 12 companies which you referred to as major companies. Do you recall that?

A. Yes, sir.

Q. Are those the companies that are referred to in these exhibits as major companies.

A. They are.

Mr. Austin: What references are you making there? I don't offhand see any reference to major companies.

Mr. Hanley: The major brands.

By Mr. Hanley:

Q. The same is true wherever the term major brand is used, isn't it, Mr. Raupagh?

A. Yes, sir.

Q. You have testified in this proceeding, Mr. Raupagh, that you arrived at certain prevailing retail prices of gasoline in Detroit. Now, what major companies, if you used major companies, or brands, were used in your determination of the prevailing retail price?

A. In determining the prevailing retail price of service stations, we used the 12 major brands that I mentioned in my testimony yesterday, taking the posted price of the dealers and using it according to the majority of postings of those dealers.

Trial Examiner Ballinger: I don't understand 3328 that. Will you explain it further?

The Witness: Yes, your Honor.

To arrive at the prevailing retail price we make periodical checks of the postings of the dealers handling major brand products, and whatever is predominantly posted by those dealers, we consider the prevailing retail price. The postings are general price signs, and practically every service station displays them.

By Mr. Hanley:

Q. Now, in the course of your business what is your custom and practice relative to keeping continuous track of price postings on all gasolines sold in Detroit?

A. On all gasolines—since 1936, and previous thereto, we kept a continuous record of the prevailing retail price postings.

Q. How was that done?

A. It was done by our own men, who work under my supervision and who made weekly checks for some of the time during those years of the prevailing retail prices by going to the stations themselves and checking the prices as they are posted and reporting to our office, where the compilation is made.

Q. And did you personally participate in some of those surveys?

A. I personally participated in some of those 3329 surveys.

Q. That is to say, do you actually drive about town and look at these stations yourself?

A. I do.

Q. Did you keep records of the results of that type of survey, for your own information, and as a record of your office?

A. Yes, sir.

Mr. Hanley: May we please have this marked as an exhibit? There are four sheets.

Trial Examiner Ballinger: The reporter will mark the documents Respondent's Exhibits 60-A, 60-B, 60-C, and 60-D, for identification.

(The documents referred to were marked, for identification, "Respondent's Exhibits 60-A, 60-B, 60-C, 60-D.")

By Mr. Hanley:

Q. I hand you, Mr. Raupagh, what has now been marked, for identification, Nos. 60-A, B, C, and D, and will ask you if it is a record of your office.

A. It is, sir.

Q. Was it made in the normal routine course of the business of your office and under your direction, and, at times, with your participation personally?

A. It was.

Q. Is it a continuous running record of what it 3330 purports to show to be, the fact relative to retail prices of gasoline in Detroit as a result of your surveys?

A. It is.

Q. And is it kept in your office continuously for the purposes of your business, upon which you rely?

A. It is.

Q. Was this a record existing in your office and as a part of the records of your office prior to the time that the Federal Trade Commission filed the Complaint in this proceeding?

A. It was.

Q. I wish you would please take the record, Mr. Raupagh, and explain column by column what the exhibit shows, without stating the figures that are reflected.

A. Respondent's Exhibit 60-A, 60-B, 60-C, and 60-D, is a record or compilation of the retail gasoline price situation in Detroit. All prices indicated on the record are exclusive of all taxes.

Under the first set of columns we have the record on third grade gasoline.

The first column gives the date, year, month and day of the month.

The second column gives the prevailing retail service station price.

Q. Now, just at that point: Is that arrived at in 3331 the manner which you have just explained to the Court, as you measure, of the prevailing retail price at any particular time?

A. It was.

Q. And, again, does that have reference to the so-called 12 major brands of gasolines?

A. It does.

Q. I intended a moment ago, Mr. Raupagh, to ask you to name those 12 again, to be sure that everybody knows what we are talking about in connection with these exhibits.

Mr. Austin: They are in exhibits in the record.

Mr. Hanley: I know they are in the record, but I don't want anybody bobbing up and saying they are not properly identified in connection with these exhibits. You suggested a moment ago we hadn't proved anything in this case, and I am going to prove this again.

Mr. Austin: I am sure I didn't suggest you hadn't proved anything, Judge.

Mr. Hanley: Maybe the reporter got it wrong. It doesn't matter. It is just an argument, anyhow.

By Mr. Hanley:

Q. I would like to have you name the 12 companies to which you refer, the 12 brand names.

A. Standard Oil of Indiana; Sun Oil Company; Shell
Oil Corporation; Sinclair Oil and Refining Company;
3332 Socony Vocuum Oil Company; Texas Company; Gulf
Oil Corporation; Cities Service Oil Company; Pure
Oil Company, Hi-Speed distributors; Mid-Continent Petroleum; Ohio Oil Corporation; Standard Oil of Ohio.

Q. You have also named certain other companies or brands which you, at the time when you testified yesterday, stated you thought were properly regarded as major brand dealers in Detroit. Now, in connection with Exhibit 60-A, B, C, and D, did you survey the stations dealing in the products of those other companies which you called majors?

A. Yes.

Q. Now, for the record, will you again state what those brands or companies are?

The Witness: May I confer with counsel, your Honor?

Trial Examiner Ballinger: You may.

Mr. Hanley: It is that same list.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: I was wrong, and I apologize. I will straighten it out.

By Mr. Hanley:

Q. Mr. Raupagh, I think I have confused you by references to the 12 major brands or companies which you named yesterday and which I have just asked you

3333 to name again, in relation to certain other companies which you stated you thought were majors in Detroit. Now, in order to clarify this thing, having reference only to the Exhibits 55-A, 55-B, 57-A, 57-B, 58, and 59, but excluding this exhibit 60-A, B, C, and D, which you have in your hand, do the 12 major brands refer to your use of the words "major brands" in those exhibits which I have named?

A. They do.

Q. And do not refer to those additional, to this additional list?

A. That is right.

Q. Now, referring to Exhibit 60-A, B, C, and D, I wish you would please state whether your analysis of the prevailing price in Detroit, as at any given time reflected on the exhibit, gives consideration to other brands than those 12 major brands?

A. It does. It gives consideration to all brands.

Q. Now, will you please name the additional brands? That is, additional to the 12 that would receive consideration in your determination of the prevailing retail price at any given time.

A. We would give consideration to and include them in our surveys and compilations, the following: Charles E. Austin, Puritan, Speedway, Globe Oil and Refining Company, Duro Oil Company; Keystone, Aurora, Leonard, Roosevelt Refining, and any others that post a price.
3334 I mean by that, any other retail station that posts a price.

Q. And you would look at them all throughout the city as I define them now?

A. Yes.

Q. Now, then, you would determine, as you have explained to the Court, from all of those postings what was the prevailing price?

A. That is right.

Q. Now, will you please go ahead and explain, Mr. Raupagh, further, in connection with Exhibit A, Exhibit 60-A. I think you had just started on the title entitled, "Prevailing Retail Service Station Price."

A. The second column gives the prevailing retail service station price. The third column is the dealer tank wagon price, and that is our dealer tank wagon price. That means Standard Oil Company's dealer tank wagon price.

The third column shows the margin that the dealer has according to the Standard Oil Company's posted dealer tank wagon price, and the retail price.

The next column indicates the number of service stations selling below the prevailing retail market or price.

The next column gives the average amount below the prevailing retail market, taking them altogether and grouping them.

3335 Q. Now, do the columns mean the same thing, and are the same computations arrived at the same way for each of the off brands, like third grade, house brand, and premium brand?

A. Yes, sir.

Q. I note that ~~on~~ No. 60-A, there are no figures under the broad heading "Premium Grade." What is the reason for that?

A. The reason for that is that for those years we did not make the survey to cover the premium grade of gasoline.

Q. And did there come a time when you began to keep the survey in connection with premium grade, and, if so, when?

A. On October 29, 1937, we made the first survey in regard to the premium grade of gasoline.

Q. Now, referring you to the year 1938, on page 60-B, please look under the column "'Service Stations Selling Below Prevailing Retail Market," under "House brand", on the date January 18, the figure 649 appears. What does that mean?

A. That means that there were 649 stations that were selling below the prevailing retail market or house brand gasoline as posted by the service stations.

Q. On the same line, but under the general column "Third Grade," there is a figure 149. Do you find that? It is to the left.

A. Yes.

3336 Q. What does that mean?

A. That means that there were 149 stations selling below the prevailing price on third grade gasoline.

Q. Now, will you drop down to February 15, 1938, and under "House Brand" in the sub-column "Number of Stations Selling Below 'Prevailing Price", there is the figure 913. To shorten this, does that mean that on that date there were that many stations observed in your survey selling House Brand below the generally prevailing retail price.

A. That is right.

Mr. Hanley: We offer the exhibit in evidence your Honor.

Trial Examiner Ballinger: Any objection?

Mr. Austin: Yes, your Honor.

Examination on Voir Dire by Mr. Austin.

Q. How did you determine the number of service stations selling below what you call the prevailing retail price, Mr. Raupagh, at any date?

A. By the price postings at each individual service station.

Q. Well, did you make any check as to whether they were selling at the price posted?

A. No, sir.

Q. And who made those checks on the postings?

3337 A. Our representatives. By that, I mean, our agents of bulk plants and salesmen.

Q. And did they report it to your office?

A. Yes, sir.

Mr. Austin: Your Honor, I don't think this is worth anything at all. In the first place, it has got all sorts of service stations mixed up together with Joy and Zip and other grades, and there is some sort of a prevailing retail price here which isn't the major prevailing price.

Mr. Hanley: What was that last?

Mr. Austin: Which is not the major prevailing price. And it is perfectly obvious when you get a prevailing retail price in that way and then go through all the stations selling at various prices throughout the city, you are going to find a large number that sell below this particular price, and it doesn't prove or indicate anything one way or the other as far as I can see. And, furthermore, the average retail price, as Mr. Raupagh has described it on all sorts of companies and branded and unbranded and major and non-major companies is compared with the Standard Oil Company tank wagon price, and their price to the dealers, and their other prices, and that is given as between prevailing retail prices, which is an average. I think this is just such a mix up of information that it can have no

probative value, and, furthermore, if you want a
3338 technical objection, and I think I should, in view of the character of it, I don't think Mr. Raupagh has any full knowledge of the accuracy of the number of service stations selling below retail market or whether any one of them, unless he visited them himself, was selling below the retail price, and I think that the exhibit should be excluded as incompetent, irrelevant, and immaterial.

Mr. Hanley: If there is any doubt in your Honor's mind, I want to be heard on this matter.

Trial Examiner Ballinger: For the purpose of the record, you may ask him further questions.

By Mr. Hanley:

Q. Mr. Raupagh, there is one other question I should like to ask you about this. If you will turn again to page 60-B, under the line January 18, 1938, you have explained two of those figures, namely, 149, under "Third Brand" and the figure 649 under "House Brand" as being the number of stations selling those brands below the prevailing price on that date. The same would be true of premium grade, which, on that day, shows 183 stations; is that right?

A. Yes.

Q. Now, what I want to inquire about is if a station were selling all three brands of gasoline and selling all three of them below the prevailing price on that grade of gasoline, that one should be, one station would be re-
3339 flected in each one of these columns, would it not?

A. It would.

Q. So it doesn't follow from this exhibit that you could add up the number of stations under third grade and house brand and premium brand and be numerically correct as to the individual units about the city that were cutting the price?

A. That is right.

Mr. Hanley: Now, is there any doubt in your Honor's mind about the propriety of this exhibit? I don't want to make an argument.

Trial Examiner Ballinger: No. The objection is overruled. Respondent's Exhibits 60-A, B, C, and D, for identification, are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 60-A, B, C, and D," were received in evidence.)

By Mr. Hanley:

Q. Referring to the list of 12 major brands that you have re-named this morning, are the companies, refiners, and suppliers, and operators selling those brands of gasoline in competition with Standard Oil Company in Detroit now, and have they been so since 1936?

A. They have.

Q. And referring now to the gasoline business primarily?

3340 A. Yes; sir.

Q. It is true that they have been in competition in connection with all other petroleum products, also, is it not, Mr. Raupagh?

A. Yes.

Mr. Austin: Which companies are you referring to now?

Mr. Hanley: The list of 12.

By Mr. Hanley:

Q. Now, in addition to those 12 companies, what other companies in Detroit have been, since 1936, in competition in gasoline commerce with the Standard Oil Company?

A. Puritan Stations, Incorporated; Globe Oil and Refining Company; Duro; Keystone; Aurora Gasoline Company; Leonard Refining Company; Roosevelt Refining Company, and, since 1938, that is, February 28, 1938, Charles E. Austin, Incorporated, and, I don't know the exact date, but, between 1936 and the present time, Speedway Petroleum entered the field as a gasoline marketer, and there are many others also.

Q. Did you name the Argo Oil Company?

A. No, I did not, but I should have.

Q. What is the fact with respect to that company?

A. They are definitely in competition with Standard Oil Company of Indiana and other companies handling a 3341 major brand gasoline, secured from the Ohio Oil Company.

Q. Did you name the Aurora Gasoline Company?

A. Yes, I did.

Q. And how about the National Refining Company? I never can keep that company straight.

A. The National Refining Company has no distribution here in Detroit, but it has four or five jobbers in the southern part of the State of Michigan, and it has distribution in other states.

Q. Has it, to your knowledge, undertaken to get into your field?

A. It has.

Q. And invaded this market, your market?

A. It has.

Q. And obtained certain of your customers?

A. It has.

Mr. Austin: I object to that, your Honor.

Trial Examiner Ballinger: How is it material?

Mr. Hanley: To show the competition. As a matter of fact, two of these jobbers have testified to offers from the National Refining Company, competitive offers with our company.

Mr. Austin: I don't recall any such testimony.

Mr. Hanley: I am told that it is in just one. I beg your pardon.

3342 Mr. Austin: But in any event, anything the witness knows on that would be hearsay unless he was present at the time the conversation was held when the offer was made by these people from the National Refining Company to the jobbers.

Trial Examiner Ballinger: Objection sustained. The answer may be stricken out.

By Mr. Hanley:

Q. There has been some discussion here about a gasoline with a trade name Silver Flash, which, I think, was said by some witness was made by Shell. Were you familiar with that gasoline, Mr. Raupagh?

A. I am.

Q. What is the fact as to whether it is comparable with what are commonly termed house brand gasolines?

A. It was comparable to our then house brand gasolines, and, in addition to the house brand gasoline, they had a third brand gasoline which they called "Target" gasoline. T-a-r-g-e-t. I do not recall in regard to their premium brand, whether they had a premium brand.

Q. Well, we will get that.

Now, some mention was made of a trade name Golden Shell, I think inadvertently, by Mr. Austin, leaving the inference that it was a gasoline. Now, what is it, Mr. Raupagh?

3343 A. Golden Shell is the trade mark of the Shell Petroleum Company's motor oil.

Trial Examiner Ballinger: Judge, it would be helpful if you could have in the record a statement of the brands sold by each of the respective companies.

Mr. Hanley: I will put it in. There will be a place where that will come in very well, and I will put it in.

By Mr. Hanley:

Q. Mr. Raupagh, I wish you would please refer to Exhibits 38-A to 38-E, 55-A and 55-B, 57-A and 57-B, and tell us if 55-A and 55-B and 57-A and 57-B, on the one hand, and Exhibits 38-A to 38-E, on the other hand, which was provided by the State Taxing Authorities, do not generally reflect the names of the same distributors?

A. They do.

Q. Now, please take all three of these exhibits and any memoranda you have and go through the list giving the following information: That is, the name of the company, the supplier of that company, and the brand name of the gasoline, wherever they have one and you know it, such as you have as to whether that company operate retail stations or bulk plants or both, and in that connection state your knowledge as to whether the company is supplied
3344 by tank car or by truck.

Mr. Austin: Your Honor, why shouldn't—if we are going to have that, why shouldn't he go through the whole list for Wayne County instead of a list that was hand-picked by the Standard Oil Company?

Mr. Hanley: This list wasn't hand-picked by the Standard Oil Company, Judge. I don't know why counsel insists on making statements like that.

Mr. Austin: Because your witness so testified.

Mr. Hanley: I heard Mr. Griswold say he picked out this list of companies because he was requested to by the Standard Oil Company. Now, what he was requested to do was pick out a list of distributors in Detroit where we are being tried, and it is the area that is being tried, that is comparable to that of Ned's and Citrin-Kolb. We have been trying to prove in this record that there are comparable situations all over the United States. Why should counsel say: Why didn't we take all of Wayne County? We can take the whole State of Michigan, and are perfectly willing to do it, and have proved it by opinion evidence.

Mr. Austin: All I know is what the witness said, that those were the names you said to put on there.

Mr. Hanley: They were, because they were the kind of operation we knew, and we told him we wanted their information as to their kind of operation.

3345 If you want it for all of Wayne County, we can get it; get it the same way we got this. We would be glad to have it in the record. We are trying to prove there are many, many comparable operations like this. We stuck to Detroit, because that is the area we are charged with in the Complaint.

Mr. Austin: I wasn't thinking of any part of Wayne County outside of Detroit. I wasn't thinking of it from a geographical standpoint.

Trial Examiner Ballinger: Is there an objection pending?

Mr. Austin: No, I don't believe so. I will wait until the witness—

The Witness: Is it O. K.?

Mr. Austin: I don't know what foundation there is for the witness testifying as to whether any particular jobbers buy by tank wagon or operate bulk plants.

Mr. Hanley: I am asking him to state his knowledge.

Trial Examiner Ballinger: That is the question.

Mr. Hanley: I anticipate there may be places where he would say he doesn't know. If he doesn't, I want him to say just that.

The Witness: Ready?

Trial Examiner Ballinger. You may proceed.

A. Starting with Exhibits 55-A and 55-B, Exhibit 3346 of the Respondent, which is a list of distributors who are handling branded gasoline, we start with the Highland Oil Corporation, which is a jobber for Hickok Oil Corporation, and handles Pure Oil gasoline.

By Mr. Hanley:

Q. Now, what is the brand name?

A. Hi-Speed is the brand name used by that distributor.

Trial Examiner Ballinger: Is the Hicock Oil Company a refiner? Do they refine?

The Witness: No, I don't believe they refine, your Honor.

Trial Examiner Ballinger: Where do they get their gasoline?

The Witness: From the Pure Oil Company, who is a refiner and a marketer also, and markets directly also; the Pure Oil Company does.

A. (Continuing.) They had a very substantial gallonage in the Detroit area in 1940, amounting to 27,872,000 gallons, according to the Gasoline Tax records.

They operate quite a number of service stations directly. They supply other dealers. They operate their own tank trucks. They have several bulk storage plants.

Wilson Oil Corporation: this is another jobber of the Pure Oil-Hicock set-up. Handle Pure Oil Company's gasoline through the Hicock Oil Corporation. Have a
3347 very substantial gallonage in the Detroit area, amounting to 14,774,377 gallons.

Q. In 1940?

A. In 1940.

They operate a number of service stations directly. They lease out some company-owned stations; quite a number of them. They supply other dealers with gasoline. They operate their own tank trucks. They have a bulk storage plant.

Bulk Stations, Incorporated: location 1900 Gratiot Avenue:

Gallonage in 1940, 483,229. The gallonage has been over the million mark in 1937 and 1938.

Q. Who supplies them?

A. They are supplied by the Pure Oil-Hicock combination.

They are supplied by tank wagon from the Wilson Oil Corporation.

They operate no tank trucks of their own. The only bulk storage they have is at their service station at 1900 Gratiot Avenue. The Wilson Oil Company makes the delivery direct to them.

They buy on a basis than less than the prevailing tank wagon price.

Mr. Austin: How do you know that?

The Witness: I know that, because I have solicited their business personally, and I have known this
3348 party for quite a number of years, Mr. Austin.

A. (Continuing.) This operation is, in my judgment, similar to the operation of Ned's Auto Supply, although he stated that he does not operate this service station himself at the present time. I know that during the period of 1936 to 1940, inclusive, for a year or two he did operate the service station himself. The proposition there—

Mr. Austin: Now, your Honor, I object and move everything be stricken that the witness has said since I questioned him, as giving an opinion, and not responsive to anything asked, and I further move to strike his previous testimony regarding the price which this station pays which, as I understand it, is admittedly hearsay.

Mr. Hanley: It would be if the witness' statement were stricken, but the witness has stated how he knows, in response to counsel's question.

Mr. Austin: He has explained it was hearsay. That's why I asked him. I suggest your Honor question him if you have any doubt about it.

Trial Examiner Ballinger: I don't understand it was hearsay. What is the source of your information?

The Witness: The source of my information is that I personally solicited Mr. Koidan's business, and during that course of solicitation and experience for the past ten
years, I know that he buys at a price less than the
3349 prevailing tank wagon price.

Trial Examiner Ballinger: The objection is overruled and the motion to strike is denied.

Mr. Austin: Well, if your Honor please, I just don't understand these rulings; I really don't. But the motion to strike is entirely on a different ground than hearsay. I think that should be ruled upon separately, if your Honor please.

I am not contesting the ruling, if it is the same ruling, but I think it is two different grounds.

Trial Examiner Ballinger: I understood you based it upon the one ground.

Mr. Austin: No, I first moved to strike out the latter part, about what the witness said about this being a comparable situation to Ned's, as opinion.

Then I made a motion to strike out the previous testimony about the price, upon the ground it was hearsay. Your Honor has ruled on that.

Trial Examiner Ballinger: What the witness said with reference to it being a comparable situation to Ned's is stricken.

By Mr. Hanley:

Q. I will now ask you if in your judgment and opinion and knowledge of both the operation you have just described and your knowledge of Ned's operation, they are comparable?

3350 A. They are comparable, because they buy gasoline at less than the prevailing tank wagon price.

They sell gasoline to the public.

They operate a service station and it is quite a large service station. From that angle, they are comparable.

Q. Now, will you proceed with the list, Mr. Raupagh, please?

A. Dixie Fuel and Supply Company is a jobber having a wholesale distributor's license, supplied by Mid-Continent Petroleum through the Thiesen-Clemens Company, who are the distributors of Mid-Continent in Michigan. Their gallonage in 1940 amounted to 1,346,533 gallons.

Q. Now, Mr. Raupagh, just as a suggestion, when you give that gallonage, just give it in round numbers, please. Just say in excess of—

A. All right.

In addition to the Mid-Continent Petroleum being their supplier, they are also supplied some gasoline by the Aurora Gasoline Company.

They operate, directly, two service stations. They supply other dealer service stations. They operate tank trucks of their own. They have their own bulk storage. They are what I term a normal gasoline or petroleum jobber. They are comparable to Citrin-Kolb and the other jobbers mentioned in this hearing.

3351 Q. What brand of gasoline do they sell, or under what brand?

A. I just don't recall all of the—that's D. X. gasoline.

Trial Examiner Ballinger: What is D. S. gasoline?

The Witness: D. X. They just use the D. X., and that is the brand of the Mid-Continent Petroleum Corporation.

A. (Continuing.) The Lincoln Oil Company is a jobber supplied by Mid-Continent Petroleum through the Thiesen-Clemens Company.

Their gallonage during 1940 was about 900,000.

They operate, directly, service stations of their own. They supply other dealers. They operate their own tank trucks. They have their own bulk storage.

They are on a comparable basis with Citrin-Kolb and Wayne Oil Company.

National Garages, Incorporated: they are being supplied and have been supplied since 1936 and previous to that time by Mid-Continent Petroleum, Thiesen-Clemens.

Company, handling the brand of gasoline known as D. X. and selling under that brand.

Their gallonage in 1940 amounted to a little over a million gallons.

They operate and sell gasoline at their 13 garages
3352 located in the City of Detroit. Some of these garages
have drive-in service station facilities. Their gasoline is being delivered to them by a contract carrier, directly from the marine storage of Thiesen-Clemens. They don't operate any bulk storage themselves. Theirs is an operation which is identical to the Ned's Auto Supply Company's operation.

Mr. Austin: Your Honor, I don't understand this witness was asked in each case to express his opinion about whether this was identical with Ned's Auto Supply Company or not. I am sure it wasn't in the question by counsel.

Mr. Hanley: I said I was going to add that later to my question, when you moved to strike something from the testimony.

By Mr. Hanley:

Q. If it isn't clear, I will ask you to add, Mr. Raupagh, in each instance, in your judgment and observation and knowledge of these observations, whether they are comparable to the operations of any of the jobbers involved in this action.

A. Yes, I will.

Red Indian Oil Company: supplier, Standard Oil of Ohio Brand, Fleet-Wing.

Their gallonage in 1940 was about 8,900,000.

They received their general distributor's license on
3353 January 4, 1932, or previous to that time.
They operate service stations directly in the City of Detroit.

They supply to other dealers. They operate their own tank trucks. They have bulk storage. They also supply other wholesalers. They also load trucks at their bulk plant—I mean trucks of other companies.

Victor Oil Company: received a wholesale distributor's license—

Q. You don't need to bother about the date when they became licensed, Mr. Raupagh.

A. All right.

Victor Oil Company: supplied by Standard Oil of Ohio. Market the Fleet-Wing brand.

Their sales of gasoline in 1940 amounted to 689,000. It has run up as high as a little over a million gallons per year.

In addition to the gasoline that is being supplied to them by Standard Oil Company of Ohio, they also secure supplies from Thiesen-Clemens Company.

They do not operate stations of their own at the present time, but during the period from 1936 to 1940 they have operated service stations of their own, directly.

They supply other dealers. They operate tank trucks of their own. They have bulk storage. They sell 3354 gasoline to other suppliers. By that I mean other people who may have wholesale distributor's licenses. They sell gasoline to non-brand marketers who come to their bulk plant with their own trucks.

Mr. Austin: Your Honor, this apparently is all being read into the record. I would like to have it appear that the witness is not stating this except by reading from some document which has not been identified. I suggest that the document be marked, for identification, and so request.

Mr. Hanley: In the first place, I know the witness isn't reading. I want to say to the record, your Honor, that this witness has been carefully prepared. There isn't any question about that. He has been sitting here for weeks and we have asked him to check his knowledge of these various things and to hunt up any material he could find to refresh his recollection, and he has made certain memoranda, a number of them, and he has been asked to refer to anything he has got. He has been asked, also, to state his knowledge. A man can't remember all this detail without referring to something.

Trial Examiner Ballinger: It is apparent to the Examiner that the witness has not been reading from any manuscript. He has been using notes, evidently prepared by him, the notes being plainly visible to the examiner.

3355 The Witness: Shall I proceed?

Mr. Hanley: Yes, please continue.

A. Terminal Oil Company: supplied by Standard Oil Company of Ohio, market Fleet-Wing gasoline. During 1940 handled, sold 334,000 gallons of gasoline.

They are also being supplied by the Thiesen-Clemens Company, who also handles D. X. gasoline.

They operate a service station directly and they supply other dealers. They operate their own tank trucks. They have bulk storage right at their service station. It is an operation that in a small measure only would be comparable to some of the jobbers that we have.

Argo Oil Corporation: This is a company that is being operated by the Ohio Oil Company; the brand of gasoline they handle is Marathon, which is the brand of the Ohio Oil Company.

The amount of gasoline handled in 1940 amounted to 1,930,000 gallons. Their gallonage has been much higher than during some of the years between 1936 and 1940, reaching a total of a little over 4,000,000 in 1939.

They also purchased from other companies, and supply non-brand gasoline to other dealers. They operate some service stations of their own directly. They supply other dealers. They operate their own tank trucks, and they have a bulk plant.

3356 Trial Examiner Ballinger: We will take a recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

You may continue.

By Mr. Hanley:

Q. I think, Mr. Raupagh, you had concluded your answer about the Argo Oil Corporation, had you?

A. Yes, sir.

Q. Please continue.

A. Plymouth Oil Company: their 1940 gallonage was 4,900,000. They are supplied by the Ohio Oil Company and they sell under the Dixie Brand, instead of the Marathon Brand. They also are being supplied by Aurora Gasoline Company, Bay Refining Company, and Reliable. They operate service stations directly and they supply other dealers, and they operate their own tank trucks, and they have their own bulk plant. Their operation is somewhat similar to jobber Stikeman and Citrin-Kolb.

Firestone Tire & Rubber Company: their gallonage amounted to about 1,700,000 in 1940.

They are supplied by the Gulf Oil Corporation and the Texas Oil Company.

They operate service stations directly of their own.

They do not supply other dealers; they operate their
3357 own tank trucks. They have bulk storage.

It is an operation that is similar to the operation of Ned's Auto Supply Company in almost every respect.

B. F. Goodrich: They are being supplied by the Gulf Company and the Texas Company on a tank car basis.

Their gallonage for 1940 was 3,700,000.

They operate stations of their own directly. They supply other dealers. They employ a contract carrier. They have bulk storage. There is another operation that can be favorably compared with Ned's Auto Supply Company inasmuch as they are strictly a retailer.

Petroleum Service, Incorporated: Their supplier is the Cities Service Oil Company, and their gallonage for 1940 was 8,800,000.

They engage in the general jobbing business of petroleum. They also secure supplies from the Aurora Gasoline Company.

They do not operate service stations of their own. They supply other dealers, and they operate their own tank trucks, and have their own bulk plant.

An operation similar to that of Stikeman Oil Company.

Benzol Stations, Incorporated: Their supplier is Sinclair, and the Ford Motor Company. The Ford Motor Company supplies them with their Benzol blend and the Sinclair Oil and Refining Company supplies them
3358 with their trade mark brand of Sinclair Gasoline.

Their gallonage for 1940 was 12,500,000.

They operate service stations directly, and they supply other dealers, and they operate their own tank trucks. They do not have any bulk storage; this, for the reason that they haul their Benzol blend directly from the Ford Motor Company and they haul their gasoline directly from the Sinclair Oil and Refining Company bulk plant. They buy on a basis, as far as Sinclair is concerned, of less than the tank wagon dealer price. I would say it was strictly a jobber operation.

Do you wish me to go on other exhibits now, Mr. Hanley?

Q. Yes, please. Are you now referring to a list of companies itemized on Exhibit 57-A and B, Mr. Raupagh?

A. Yes.

Q. Now, before you start on that list, you will recall that the descriptive word in the title "Cut-rate" was eliminated from that exhibit, and I will ask you what the fact is, based on your experience in Detroit, as to whether or not all of these companies of this exhibit, on this exhibit, do sell at cut-rate, in fact, in the sense that they continuously sell below the usual prevailing retail price in Detroit?

Mr. Austin: Does that refer to retailers?

3359 Mr. Hanley: In any of their retail operations.

Mr. Austin: Because the word at the top is "Jobbers and Distributors."

Mr. Hanley: But they are all in the retail business. I am asking about their retail operations.

The Witness: Shall I continue?

Mr. Hanley: Yes, please.

A. The firms or distributors mentioned on Respondent's Exhibits 57-A and B do sell at retail and less than the prevailing price practically at all times during the period from 1936 to 1940. I don't recall of a single instance when they did not sell less than the prevailing retail price. They are what is generally known as cut-price marketers.

By Mr. Hanley:

Q. Now, I notice on that first one "All American Aviation." They apparently were in business only in 1939.

A. That is right.

Q. What was the nature of their operation at that time?

A. Well, the method of their operation was that they were trying to go into the petroleum jobbing business, and they worked up a little business supplying other dealers, and consumer accounts, sold wherever they could on a cut-price basis.

Q. All right. Now, go right ahead beginning with Apex.

3360 A. The Apex Oil Company gallonage for 1940 amounted to a little over 2,000,000 gallons.

Their supplier was the Plymouth Oil Company and the Mid-West Refining Company, which is a Michigan refinery. The Plymouth Oil Company is a jobber or distributor for the Ohio Oil Company.

They operate a service station of their own and they do not supply other dealers. They operate no tank trucks.

They have no bulk plant. They simply operate a cut-price service station.

Q. With the exception that they do not supply their own storage and their own distribution facilities, are they comparable to Ned's operation?

A. Yes, they are comparable to Ned's operation.

Charles E. Austin, Incorporated: the gallonage for 1940 was 17,900,000 gallons.

The suppliers of gasoline to this company are the Mid West Refinery, Roosevelt Oil Company, Producers Gas Corporation, and many others during the period of time of 1936 to 1940.

He operates a chain of strictly cut-price stations in Detroit and this is the second chain of cut-price service stations that he has founded in Detroit, the first chain being founded prior to 1936, and is now known as Puritan Stations, Incorporated, or Sunny Service Oil Company.

3361 His present chain of stations markets the brand of gasoline known as Joy gasoline, his entire business.

3362 Q. As what?

A. Premium gasoline.

Q. Were you referring to the brand of Austin or the Sunny Service and Puritan?

A. I am referring to the brand of Charles E. Austin. The stations he operates at the present time handle the brand of gasoline known as the Joy gasoline.

Q. Now what brand does his first chain, which later became Sunny Service and Puritan stations, sell?

A. He sold at that time as under the Puritan stations, incorporated, or Sunny Service Oil Company, the brand known as Zip, Z-i-p.

Q. To keep that straight: Is that brand of gasoline still marketed under that name?

A. Yes, it is marketed under that name. In other words, as far as competition is concerned, instead of having one string of cut-price service stations, we now have two from that combination. He operates about 24 service stations and operates them directly and his operations have always been on a direct operation. He has a marine terminal and his entire business is founded upon a cut-price basis.

I think I testified yesterday as to his gallonage in 1938, when he first started his business, and in ten months it came up over fourteen million gallons. It is perhaps the

most severe competition that we and other oil com-
3363 panies have in the City of Detroit, as far as the re-
tail market is concerned.

Now his operations are somewhat similar to Ned's, in this respect: That as far as the purchase of gasoline, that Charles E. Austin does, and marketing his gasoline entirely at retail, the only difference is he markets under his own brand and he is continually below the price of major brand gasolines.

I believe I testified yesterday that during the period of 1938 he was, for two or three months, as much as six cents below, as far as his retail price was concerned, compared to the retail price of third grade gasoline, the cheapest gasoline of other major oil companies.

Benz Oil Company: They secure their supplies from Aurora Gasoline Company.

Their gallonage in 1940 was 1,500,000.

They operate a number of service stations, directly, of their own. They supply other dealers. They operate their own tank trucks. They have no bulk storage, their supplies being all to them either by the supplying company or by transport truck.

They have always sold their gasoline at a cut-price basis. Their business is founded on that kind of a basis.

As far as their marketing is concerned, as far as their
buying of gasoline is concerned, they are comparable
3364 to many other cut-price marketers in this area.

Buffalo Grey Auto Stations, Incorporated, sometimes known as Detroit Grey Auto Stations, Incorporated—they are both the same: Their gallonage for 1940 was 538,000.

They are being supplied at present from the Aurora Gasoline Company.

They operate retail stations, directly.

They do not supply other dealers.

They do not operate any tank trucks. They have no bulk plant.

Here is an operation that is again similar, as far as the buying of gasoline is concerned and retail marketing, similar to Ned's and other cut-price marketers that I have referred to in this testimony.

Bulldog Oil Company: Suppliers, Petroleum Service Company, Argo Oil Company, Victor Oil Company, Red Indian Oil Company, and Texas Oil Company. These are all major suppliers or they are companies handling major brand gasolines.

The gallonage of the Bulldog Oil Company for 1940 was about 740,000 gallons.

They operate stations of their own. They don't supply other dealers. They don't operate tank trucks.

They have bulk storage.

A. W. Collins: Their gallonage for 1940 was 661,000. They operate service stations, directly, of their own.

3365 They supply no other dealers.

They operate no tank trucks of their own.

They have bulk storage. Their suppliers are Globe Oil and Refining Company, Peerless Distributing Company, and Victor Oil Company. Victor Oil Company is a jobber for the Ohio Oil Company.

They have always operated a cut-price retail service station business. Their business is founded upon the cut-price basis, entirely.

Duro Oil Corporation: Their gallonage for 1940 was a little over eight million gallons.

Their suppliers are the Aurora Gasoline Company, Globe Oil and Refining Company and Trans-American Petroleum Corporation, Trans-American Petroleum Corporation being a broker out of Chicago.

They are principally a chain of cut-price service stations. They have always operated as a cut-price chain of service stations.

They operate, directly, their stations.

They supply no other dealers.

They do operate their own tank trucks to their stations.

They have no bulk storage.

They buy on a tank car basis as to price, or below that.

Filco Oil Company, sometimes known as Falcon Oil
3366 Company: Their gallonage for 1940 is 495,000 gallons.

Their suppliers are the Aurora Gasoline Company and the Trans-American Company.

They operate their own service station. They supply other dealers.

They operate their own tank trucks and they have bulk storage.

This is also a cut-price service station operation. It is built upon that basis.

Great American Oil and Refining Company: Their gallonage for 1940 was 209,000 gallons; a small operation.

Their supplier is the Aurora Gasoline Company and the Trans-American Company.

They operate a service station of their own.

They buy on a wholesale basis, tank car basis. They supply other dealers.

They operate their own tank trucks. They have bulk storage.

Great Lakes Oil Company: Their supplier is the Plymouth Oil Company, a jobber of the Ohio Oil Company, and Reliable Oil Company.

Their gallonage for 1940 was 144,000 gallons.

They operate no service stations of their own. They supply other dealers. They operate their own tank trucks. They have no bulk storage. It is strictly a jobber operation.

3367 Jefferson Company: Supplier, Petroleum Service, Plymouth Oil Company and Cities Service Oil Company.

The Petroleum Service and Plymouth Oil Company are jobbers for major oil companies.

Their gallonage for 1940 was 632,000 gallons.

They operate two service stations. They supply no other dealer. They operate no tank trucks. They have no bulk storage.

This is strictly a retail operation, buying gasoline on a tank car, a wholesale basis, and selling it cut-price; at cut-prices.

Meurer Brothers: Supplier, Argo Oil Corporation.

Their gallonage for 1940 was 369,900 gallons.

The reason there is no gallonage from 1936 up to 1940 is that at that time they were a dealer for Sinclair Oil and Refining Company.

They operate one service station of their own. They supply no other dealers.

They have no tank trucks, no bulk storage.

This is strictly a retail operation, purchasing at below the dealer tank wagon price from Argo Oil Corporation.

Miller Tank Car, Incorporated: Supplier is Argo Oil Corporation, which is a jobber for Ohio Oil Company, and Globe Oil and Refining Company.

Their gallonage for 1940 was 239,000.

3368 They operate a service station of their own; supply no other dealers. They have no bulk storage.

Strictly a retail price operation. Purchasing gasoline at tank car quantities at tank car prices.

Montgomery Ward: Their gallonage for 1940 was 1,088,000.

Their supplier is Argo Oil Corporation, handling Ohio Oil Company gasoline. They market their own brand; Ward's Ethyl and two other brands of their own.

They operate their own service stations at their stores. They supply no other dealers.

They do not operate any tank trucks. They have no bulk storage.

It is an operation that is very similar, as far as the purchase of gasoline is concerned, to the Ned's Auto Supply Company's operation.

O'Connor and O'Connor: Supplier, Leanord Refining Company, which is a Michigan refiner.

These people have two trucks and do their own hauling.

Their gallonage for 1940 was 47,000 gallons.

They operate a service station. They supply a few other dealers. They operate tank trucks of their own. They have no bulk plant.

Peerless Distributing Company: Suppliers, Producers Lakeside Natural Gas, Barrett Benzol Company.

Their gallonage for 1940 was 739,000 gallons.

3369 They have, during the period of time from 1936 to 1940, had a gallonage up as high as 2,600,000 gallons.

They are strictly a cut-price jobber, selling to anybody whom they can, at any price they can.

They own no service stations nor operate any service stations of their own. They supply other dealers.

They operate their own tank trucks and they have a bulk plant.

Premier Tank Car Stations: Their gallonage for 1940 was 441,000.

They operate service stations of their own. They supply no other dealers.

They operate no tank trucks. They have bulk storage.

This is strictly a chain service station operation. Always sell at cut-price.

Sunny Service Oil Company; Puritan Oil Stations, Incorporated. Their gallonage for 1940 was 12,495,000.

This is the company I previously testified was founded by Charles E. Austin; is now owned by Hickock Oil Corporation who handle or sell the Hi-Speed brands in this city and elsewhere.

This is a chain of cut-price service stations and they have always sold at a cut-price. Business is founded upon a cut-price basis. They have a marine terminal.

Previous to 1936 this is the company that imported
3370 gasoline from Roumania.

Their posted selling price has been all the way from 1¢ to 6¢ below the price posted by Standard Oil Company and other dealers on third brand gasoline.

~~It is real competition, in any man's language.~~

Red Seal Oil Company. This is a very small operation. They are principally engaged in the selling of kerosene and lube oils.

Reliable Oil Company: Their gallonage for 1940 was 1,285,000.

Their suppliers are the Plymouth Oil Company, the Argo Oil Corporation, the Aurora Gasoline Company, and various Michigan refineries.

They operate four stations of their own, directly. They supply other dealers.

They operate tank trucks and they have a bulk plant.

Their operations are on a strictly cut-price basis.

Royal Petroleum: Their gallonage for 1940 was 669,000.

Their suppliers are Argo Oil Corporation and Plymouth Oil Company, both jobbers of major brand gasolines. They operate two service stations.

They sell at cut-prices.

They supply other dealers. They operate their own tank trucks. They have no bulk storage.

Speedway Petroleum: Their gallonage for 1940 was a little over seven million gallons.

3371 Their suppliers are the Aurora and the Trans-American Company. They operate a chain of cut-price service stations, started in 1938. They always sell below the prevailing retail price of major brand dealers. Their business is founded upon a strictly cut-price basis. They have been very successful in that field.

Star Coal and Oil Products: Their gallonage for 1940 was a little over three million.

Their suppliers are the Plymouth Oil Company, Aurora Gasoline Company, and Trans-American Company.

I again call your attention to the fact that the Plymouth Oil Company is a jobber for Ohio Oil Corporation.

They operate service stations of their own, directly. They do not supply their dealers.

They do not operate tank trucks. They have no bulk plant.

They have always been known as a cut-price marketer and have always bought on a tank car basis, as far as price is concerned.

3372 Tank Car Stations, Incorporated: The gallonage for 1940 was 2,120,000.

The supplier is the Globe Oil and Refining Company.

They operate service stations of their own directly. They do not supply other dealers. They operate no tank trucks and have no bulk plant.

It is strictly a retail cut-price operation and has always been so.

Paul I. Taylor: In 1940 the gallonage was 642,000.

Their suppliers are Argo and Victor, who are jobbers for major brand gasolines.

They operate one service station of their own, and do supply some other dealers and operate—he operates his own tank truck and has no bulk storage.

It is strictly a cut-price operation.

Texas Gas and Oil: In 1940 their gallonage was 677,000.

They operate service stations of their own directly and their suppliers are the Victor Oil Company, who is a jobber for the Standard Oil Company, and also another jobber, another supplier of theirs is the Plymouth Oil Company, who is a jobber for the Ohio Oil Company.

They operate no tank truck and supply no other dealer. They have no storage tank and it is strictly a cut-price business.

3373 Wings Petroleum is a similar operation.

In 1940 their gallonage was 104,000 and their supplier is the Red Indian Oil Company and Aurora Gasoline Company. The Red Indian is a jobber for Standard Oil Company of Ohio, handling the Fleet-Wing brand. They operate service stations of their own directly, and they supply other dealers and operate their own tank trucks. They have no bulk plant.

It is strictly a retail price and a cut-price operation.

Zieve Oil Company: Their 1940 gallonage was 235,000 gallons.

Their supplier is the Petroleum Service and Gasoline, Oil, and Refining Company. The Petroleum Service is a jobber for Cities Service Oil Company.

They operate a station of their own directly, and supply other dealers and operate their own tank trucks. They have no bulk storage.

They are strictly a cut-price operation.

Q. Now, in some instances, Mr. Raupagh, you have indicated, in referring to the companies listed on both exhibits 55-A and B and 57-A and B that the operations of those companies were comparable to operations of one or more of the jobbers involved in this action. By way of summary, I will ask you if the operation of all of these companies listed on the exhibits just named are comparable to the operation of one or more of the jobbers listed
3374 in this action?

A. They are.

Q. Do all of the companies listed on these two exhibits, within your knowledge, and by that I mean from your experience, as well as any individual personal knowledge that you have, purchase gasoline substantially below the prevailing tank wagon prices?

A. Every one of them.

Q. As a matter of fact, do not many of them purchase below the prevailing tank car price?

A. They do.

Q. Now, again, by way of summary, some of them do own and maintain their own bulk storage and their own trucks?

A. Yes.

Q. Some of them do not?

A That is right.

Q. They all, however, get the benefit of these lower prices?

A. They do.

Q. Is the Standard Oil Company in competition with all of the companies listed on both of these exhibits?

A. Every one of them.

Q. Is the Standard Oil Company in competition with them now?

A. They are.

3375 Q. Has it been so since 1936 during the period when any of them were in business here in Detroit?

A. It has been so.

Q. Now, referring to Exhibit 55-B, there are five gallonage totals under the years appearing on that exhibit. Can you see them there?

A. Yes, sir.

Q. Will you now refer to Exhibit 58, and tell us where the same totals appear on that exhibit.

A. They appear under column 6, the heading of the column is "Sales of Licensed Wholesale Jobbers and Distributors of Branded Gasoline Exclusively."

Q. Referring you to 57-B, there is a similar group of totals. Where do they appear on Exhibit 58?

Mr. Austin: May I have Exhibit 58, please?

(The exhibit was handed to Mr. Austin.)

The Witness: They appear under column 7.

Trial Examiner Ballinger: What was the last question?

(The last question was read.)

By Mr. Hanley:

Q. Before we leave Exhibits 55 and 57, Mr. Raupagh, there has been some evidence given by you concerning them to the effect that certain of these companies did not have bulk storage and did not have distribution systems of their own or may have had trucks, but did not have the storage. There has been some testimony concerning Commission agency arrangements also somewhere in the evidence, the term yard hauler has been used. Will you briefly explain for the Court what the nature of the operation is when a jobber buyer obtains gasoline without having a bulk storage plant of his own? 3376

A. The nature of the operation is—when the receiver of the gasoline has no storage of his own is two-fold, may be two-fold. One is that he employs a transport hauler and has the gasoline hauled to him directly from the supplier's storage to his own storage, or, he may use tank trucks of his own to haul the gasoline directly from the supplier's storage.

Q. Are the terms "yard haulers" and "commission agency arrangement" applied in the industry to those operations?

A. Yes, they are.

Q. Now, that arrangement would give such a supplier an advantage, other things being equal, over a supplier who maintained his own bulk storage, would it not?

A. Yes.

Q. And that advantage would be to the extent of the cost of maintaining bulk storage; is that right?

A. Yes, that is right.

Q. Now, the Respondent, the Standard Oil Com-
3377 pany has never gone into that kind of an operation, has it, of these jobber dealers, has it?

A. They never have.

Q. Now, referring you, Mr. Raupagh, to Exhibit No. 58, I call your attention to column 6, which you have just said was transposed from Exhibit 55-A and B, and will ask you if the figures following the year 1936 mean that that class of distributors handling branded gasoline in the year 1936 sold 89,850,578 gallons?

A. It does.

Mr. Austin: Which exhibit are you referring to?

Mr. Hanley: Exhibit 58.

By Mr. Hanley:

Q. And that for the year 1940, that same class of distributors sold 90,122,875 gallons?

A. That is right, sir.

Q. Now, referring you to column 7, which you have stated was transposed as to gallonage figures from Exhibits 57-A and B, I will ask you if, for the year 1936, the wholesale distributors handling non-brand gasoline or as now classified by you as cut-price jobbers, did not sell in that year 24,679,904 gallons?

A. They did sell that much.

Q. And referring in the same column for 1940, does the exhibit reflect and mean that in that year, that same class of distributors sold 64,716,210 gallons?

3378 A. That is right, sir.

Q. Now, there are certain figures below the gallonage figures on each of these columns, and I think you have said that that represents a percentage of the gallonage figure to the total consumption in the Detroit area?

A. It does.

Q. Referring you to the year 1936, for the so-called non-brand jobbers, I note the figure 6.8. Does that mean that in 1936 that class of jobbers enjoyed 6.8% of the total volume of business in Detroit?

A. It does.

Q. Referring you to the same figures in 1940, I note that the figure there is 13.9. Does that mean that that same class of jobbers in 1940 enjoyed 13.9% of the total gasoline business in Detroit?

A. Yes, sir; that is what it means.

Q. And does the difference between those percentages represent an increase in the business or represent a trend and increase in business for this class of non-brand jobbers from the year 1936 to 1940?

A. It represents a trend and a material increase in their business.

Q. Now, taking the columns 3, 4, and 5, which all refer to Standard Oil Company's sales, through either the tank wagon or jobber channel, does it appear from this
3379 exhibit that the business, generally speaking, as reflected in those three columns, has remained about the same from 1936 to 1940?

A. Yes.

Q. The specified percentage for any given year in any given channel appears on the exhibit, doesn't it, Mr. Raupagh?

A. Yes, it does.

Q. Now, referring you to Column No. 8—

Mr. Austin: I object to the statement that counsel is making that they are about the same when they are not; and the exhibit speaks for itself.

Mr. Hanley: It does, and I just asked the witness if the specific figures weren't there, and to explain the exhibit so if you are interested you can look at it.

Trial Examiner Ballinger: The answer will be considered in the light of the exhibit.

Mr. Hanley: Certainly. I just wanted to get this picture fairly before the Court. This is a picture of the gasoline business in this area, Judge.

Mr. Austin: Well, I would like to state, as long as the other statement has been made on the record, that the exhibit also shows a material increase of Standard Oil Company's jobber sales from 1936 to 1940, and that it is not correct to state that the volume percentage or the percentage of volume for that classification, as shown
3380 in column No. 5 of the exhibit was practically the same for both years.

Mr. Hanley: Well, I will develop that right away.

By Mr. Hanley:

Q. Now, referring first to column No. 5, Mr. Raupagh

A. Yes, sir.

Q. —is it true that the exhibit reflects for 1936 that the Standard Oil Company jobbers had 2.2% of the total business?

A. That is what it reflects.

Q. And for 1940, they had 3%; is that right?

A. That is right.

Q. Or an increase in four years, so far as percentages are concerned, or, rather five years, from 1936 to 1940, of 8/10 of 1%?

A. That is right.

Mr. Austin: I object to that, and move that the answer of the witness be stricken out unless it is clarified and made to appear that that doesn't refer to the percentage of increase.

Mr. Hanley: It refers to the percentage of total consumption which has certainly been explained. We have got another exhibit in here which I am going to develop in a minute.

3381 Mr. Austin: Why doesn't the exhibit speak for itself? This is done just for the purpose of misleading. He says that this column shows that the increase was 8/10 of 1% where, as a matter of fact, it was an increase in the jobber business of about 35%.

Mr. Hanley: Yes, Judge, in just a minute, if I am permitted to, I am going to show that there was an increase of one year of 71% of these very jobbers.

Trial Examiner Ballinger: That is all shown by the exhibit.

Mr. Hanley: It is, but they made some explanation, I take it, so that anyone reading the record and looking at the exhibit will have some guide. I would like to explain why this witness—what he put on this paper. It is right here in a picture.

Trial Examiner Ballinger: If the witness will confine his answer now strictly to the figures as portrayed by the exhibit, he may proceed.

Mr. Hanley: Did you get that on the record that these percentages refer to the total consumption, Mr. Reporter?

The Reporter: Yes.

Mr. Austin: I don't believe there was any ruling on the objection that I made. There is an objection pending.

Trial Examiner Ballinger: The Examiner ruled
3382 that this line of examination might continue, conditioned only upon the answers being confined to the figures portrayed on the exhibit.

By Mr. Hanley:

Q. Now, Mr. Raupagh, the percentages, I think you have already stated, that appear on Exhibit 58, refer to percentages of the total consumption in the respective years?

A. That is right.

Q. I have been trying to get over column No. 8. Now, that includes all the jobbers, does it not, Mr. Raupagh?

A. It does.

Q. And the first percentage in 1936 was 33.7 and that means that all the jobbers, taken together, of all classes, including Standard Oil Company jobbers had 33.7% of the total consumption that year?

A. Yes, sir.

Q. And the figure 36.5 in the column for 1940 mean that the jobbers had, in that year, 36.5% of the total consumption in that year; is that right?

A. That is right.

Q. And the same thing is true in column No. 9 with reference to other companies; is that right?

A. That is right.

Q. Now, Mr. Raupagh, I wish you would take 3383 this exhibit and tell the Court, by reference to column number and the figure, where on there, where or in what class of dealers it shows that there has been the greatest percentage of increase, percentage being calculated on the yearly consumption.

A. The greatest increase—

Mr. Austin: Your Honor, I object to that. The exhibit speaks for itself, and it goes beyond what the ruling permitted him to explain. I understood this was to be limited to an explanation of the figures on the exhibit.

Trial Examiner Ballinger: The witness may answer the question.

The Witness: The greatest increase is on column 7, sales of licensed wholesale jobbers and distributors of non-brand gasoline. They had in 1936 a percentage of 6.8% of the total consumption in the area, and in 1940 a percentage of 13.9% of the total gasoline consumption in the area.

By Mr. Hanley:

Q. Can you determine from this exhibit the total amount in gallons of gasoline sold, as well as the percentage of the total consumption that is done through the medium of jobbers in any of the years involved?

A. Yes.

3384 Q. Explain how that can be done.

A. It can be done by taking the figures of column 5, sales of Standard Oil Company jobbers, by taking the figures of column 6, sales of licensed wholesale jobber distributors of branded gasolines, and taking the figures of column 7, sales of licensed wholesale jobbers, and distributors of non-brand gasoline.

Q. And that total is reflected in column No. 8; is that right?

A. That is right, sir.

Q. Now, will you please look at Exhibit 59, Mr. Raupagh? Is it not a fact that this exhibit—

A. Pardon me. What is Exhibit 59?

Q. That is the one of yearly increases or decreases in gasoline sales.

A. Yes, sir.

Q. Now, is it not a fact that this exhibit discloses just what Mr. Austin seemed to have in mind a moment ago; namely, the increase or decrease by gallons and by percentage in relation to the business, or item that appears in the first column on the left?

A. That's right.

Q. Now, for instance, the item of Standard Oil Company jobbers, being the fourth item, and under the year 1937, I note a percentage figure of 71.4. Do you find that figure?

3385 A. Yes, sir.

Q. What does that represent?

A. It represents the increase in sales by S. O. Company jobbers.

Trial Examiner Ballinger: When you say "S. O." you mean Standard Oil Company?

The Witness: Yes, Standard Oil Company of Indiana.

By Mr. Hanley:

Q. Now, is the same principle applied throughout this exhibit in respect of all of these different classifications?

A. Yes, sir.

Q. I call you attention to the non-brand jobber item under the year 1938 and the figure 61. Do you find it?

A. Yes, sir.

Q. The column in which most of the figures are red.

A. Yes, sir.

Q. Does that indicate that that class of jobbers in that year increased their own business 61%?

A. Yes, that's what it indicates.

Q. And that was the year of the price war, was it not, Mr. Raupagh?

A. Yes, sir.

Q. Now, during that same year, is it not true that the exhibit discloses that the Standard Oil jobbers
3386 increased their business 7.7%?

A. That's what it discloses.

Q. Now, in that year were there added to the outlets of any of the Standard Oil jobbers?

A. Yes, there were considerable outlets added.

Q. Particularly what jobbers expanded a number of their outlets?

A. Citrin-Kolb, Wayne Oil Company, and I don't remember as to Ned's, but they might have added one or two.

Q. Have you made some investigation to determine whether or not in that year the business per outlet of the Standard Oil jobbers did or did not increase?

A. The business per outlet did not increase.

Q. So that increase would be attributable to the addition of outlets, is that true?

A. That is true.

Q. The year following, 1939, shows a red figure "9.5." Does that mean that the business of the Standard Oil jobbers decreased to that extent in that year?

A. Yes, sir.

Q. Referring you to the non-brand jobbers, does the exhibit disclose that there has been a steady increase every year in their business since 1936?

A. That's what it discloses.

3387 Q. I neglected to ask you one question in respect of the gasoline sold by the distributors disclosed on Exhibits 55-A, 55-B, 57-A, and 57-B, Mr. Raupagh. Does that gasoline, so far as Detroit is concerned, does it have a wide and popular public acceptance?

Mr. Austin: Which gasolines are you referring to?

Mr. Hanley: All of them. All the gasolines that these distributors on the two exhibits named distribute.

Mr. Austin: I object to this, your Honor. If it is to be asked, I ask it be asked as to each brand separately.

Mr. Hanley: He has outlined each brand separately.

Mr. Austin: It is obvious you cannot make any answer as to public acceptance. The Government's proof of brands and public acceptance must necessarily differ as to a different brand.

Trial Examiner Ballinger: The figures are already in evidence; the volume of sale and the percentage of increase or decrease annually.

Mr. Austin: Then this question is objectionable as to whether they have a wide and high public acceptance. Public acceptance would necessarily depend upon price, in any event. At least price would influence gallonage, and it is only the gallonage that has been shown. I was just referring to what your Honor said.

3388 Mr. Hanley: I think the real basis of this objection is that we are over-proving our case, and counsel just doesn't like it.

Trial Examiner Ballinger: Objection sustained.

By Mr. Hanley:

Q. I will ask you, Mr. Raupagh, if the gasolines sold by the distributors referred to on Exhibits 55-A and 55-B, and 57-A and 57-B, are represented by the distributors of those gasolines, as comparable in quality and performance with the gasolines sold by the so-called major companies, and particularly the Standard Oil Company?

A. Yes, they are.

Mr. Hanley: There is one of these maps you asked for, Judge. It is your private map, I think.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

3389 Mr. Hanley: May we have this map marked for identification?

Trial Examiner Ballinger: The Reporter will mark the document handed him by counsel for the Respondent as Respondent's Exhibit 61 for identification.

(The document referred to was marked "Respondent's Exhibit 61" for identification.)

Mr. Hanley: I had better lay some foundation.

By Mr. Hanley:

Q. Mr. Raupagh, did you cause that map to be prepared, so far as the colored dots and legend are concerned?

A. Yes, sir, I did.

Q. Does it accurately reflect the location of the stations as indicated by the legend?

A. Yes, it does.

Mr. Hanley: We offer it (handing document referred to counsel for the Commission).

I am informed that this is the type of map your Honor wanted.

Trial Examiner Ballinger: It is; apparently. Is there any objection?

Mr. Austin: No objection.

Trial Examiner Ballinger: There being no objection, Respondent's Exhibit 61 for identification is admitted in evidence.

3390 (The document referred to, heretofore marked for identification "RESPONDENT'S EXHIBIT 61", was received in evidence.)

Examination on Voir Dire by Mr. Austin.

Q. Mr. Raupagh, is this a recent map?

A. Yes.

Q. The title of the map has been covered up. I think I can read through here. It says "Map of Detroit and Environs." I just wondered where you obtained it, or how recent a map it is.

A. I can't tell you just the date of printing of that map, Mr. Austin, but it is a map we continually use in our offices for all of our purposes.

Q. I think it is all right, for this purpose, but I wanted to ask you. As long as it is fairly recent, all right.

A. It is fairly recent.

Trial Examiner Ballinger: And the map referred to is Respondent's Exhibit 61.

Mr. Hanley: May we have this map marked for identification?

Trial Examiner Ballinger: The Reporter will mark the document handed him by counsel for the Respondent as Respondent's Exhibit 62 for identification.

(The document referred to was marked "Respond-
3391 ent's Exhibit 62" for identification.)

By Mr. Hanley:

Q. Were the colored dots and legend placed upon this map in your office and at your direction, Mr. Raupagh?

A. Yes, sir.

Q. And do the dots and stars correctly represent on the map the location of the addresses of service stations that are explained in the legend?

A. Yes.

Mr. Hanley: We offer Respondent's Exhibit 62 for identification (handing document referred to to counsel for the Commission).

Mr. Austin: Well, what is the difference between 61 and 62?

Mr. Hanley: 62 apparently has to do with the testimony that was offered with particular reference to certain of Ned's service stations and certain directly operated service stations of Citrin-Kolb.

Mr. Austin: What is the difference between them? It looks to me like they are just the same.

Mr. Hanley: I don't think there is any difference unless there might be some stations on one that aren't on another. I don't know whether there are, or not.

Mr. Austin: Who does know?

Mr. Hanley: There are many stations—

3392 The Witness: May I explain it?

Mr. Hanley: Surely. Go ahead.

The Witness: Exhibit No. 62 is a map covering the stations of Ned's, all of them, and of the six Citrin-Kolb which have been involved or have been mentioned in this hearing, and the stations—all of the stations of Joy, Zip and Speedway gasoline—I am mentioning the brands of the gasoline.

Exhibit 61 takes all of the stations of Ned's and all of the stations supplied by Citrin-Kolb and all of the stations of Joy, Zip, and Speedway. In one case we just used the six stations of Citrin-Kolb and the six stations of Ned's involved in this hearing and in the other case we took them all.

Mr. Austin: Is the only difference, Mr. Raupagh, in the number of Citrin-Kolb stations shown? Is that the only difference between the two maps?

The Witness: Yes, sir.

Mr. Austin: Well, I see no particular basis for the second map because—I don't know what particular six stations are being referred to of the Citrin-Kolb. I would say that more than that have been referred to and I would object to the map unless—

Mr. Hanley: If your Honor please, I will withdraw—

Mr. Austin: Just a minute, please. I was speak-
3393 ing to the Reporter. I would like to finish my
statement.

Mr. Hanley: I would like to withdraw my offer.

Trial Examiner Ballinger: Counsel for the Commission may complete his statement.

Mr. Hanley: I am going to withdraw the offers of both of them.

Mr. Austin: Continuing what I was about to say: I think that if this second map is to be offered, there should be some explanation as to why these particular six stations of Citrin-Kolb were included and I do not understand that there were only six stations of Citrin-Kolb Oil Company referred to in this case, nor do I understand which six are referred to here.

Trial Examiner Ballinger: That may be easily explained.

Mr. Hanley: Certainly. I withdraw the offers of both of them.

I now reoffer Exhibit 61, because the Court requested us to prepare it and we did so, at the Court's request and it has been established by the witness that it correctly reflects what it purports to reflect.

Trial Examiner Ballinger: That has already been admitted in evidence.

Mr. Hanley: I withdraw it, in view of the statements of counsel and I am reoffering it and have stated the reason.

3394 Trial Examiner Ballinger: It is re-admitted in evidence as Respondent's Exhibit 61.

Mr. Hanley: I now offer Exhibit 62 for the reason that it alludes particularly to certain locations of Ned's service stations and Citrin-Kolb stations which were testified to by witnesses called on behalf of the Government as being stations at which certain reduced prices were, from time to time, in effect.

For the further reason that that testimony has been answered by witnesses called on behalf of the Respondent, being a showing that they were surrounded by certain service stations which were at the time indulging in reducing prices below the then prevailing retail price.

Trial Examiner Ballinger: Is there any objection, in view of the explanation offered by counsel?

Mr. Austin: Yes, your Honor. As I tried to state a moment ago, I think there were more than six stations referred to and I don't see why that should be admitted with simply those particular six stations picked out. There have been references to, I should say, at least a dozen Citrin-Kolb stations in the Commission's case, and evidence regarding certain price-cutting. I don't say there

is anything wrong with the map, of course, but I see no purpose in it. The only difference in that map and the other map is in the number of Citrin-Kolb stations shown
and I don't want to admit it with the statement it
3395 shows the only Citrin-Kolb stations as to which there
has been reference in connection with the issues in this case.

Trial Examiner Ballinger: The map would be considered in the light of the testimony appearing in the record.

The objection is overruled and Respondent's Exhibit 62 for identification is admitted in evidence.

(The document referred to, heretofore marked for identification "RESPONDENT'S EXHIBIT 62," was received in evidence.)

Mr. Hanley: It has been suggested, your Honor, that if it is agreeable to the Court, that we might adjourn at this time.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: I move we adjourn, now, to reconvene at 1:45.

Trial Examiner Ballinger: The motion is granted.

Now, at 12:35 p. m., the hearing stands in recess until 1:45 p. m.

(Whereupon, at 12:35 p. m., a recess was taken until 1:45 p. m.)

3396 Afternoon Session.

1:45 p. m.

Trial Examiner Ballinger: Come to order.

Mr. Hanley: If your Honor please, during the morning session, when your Honor requested that a list of companies be referred to in this proceeding be made that would also show the brand name of the gasoline that they dispensed in Detroit, our people have prepared such an exhibit which I would like to have marked.

Trial Examiner Ballinger: The reporter will mark the exhibit as Respondent's Exhibit 63, for identification.

(The document referred to was marked, for identification, "Respondent's Exhibit 63.")

By Mr. Hanley:

Q. I show you, Mr. Raupagh, what has been marked Respondent's Exhibit 63, and ask you if that was prepared in your office under your supervision?

A. Yes, it was.

Q. What is it?

A. It is a statement showing the various oil companies and the brands that they market, premium, house brand, and the third grade. It shows the name of the brand.

Q. That is in the Detroit area under discussion?

A. Yes, sir.

Mr. Hanley: We offer it in evidence.

3397 *Examination on Voir Dire by Mr. Austin.*

Q. Are these just refiners on here?

A. Just let me look at it again, please.

(The document was handed to the witness.)

A. No, there are others than refiners on there. For instance, starting with Charles E. Austin, Puritan Stations, Speedway, they are not refiners. Globe is a refiner.

Mr. Austin: I just happened to notice one thing here. For instance, on Fleet-Wing, you refer to Standard Oil Company of Ohio, but there is no reference to the distributors of Fleet-Wing in Michigan. As I understand it, the Standard Oil Company of Ohio doesn't do business in Michigan. I was wondering from the testimony we have had, Judge, there is such a thing as the Red Indian Oil Company that sells Fleet-Wing.

The Witness: Yes, sir.

Mr. Austin: And perhaps what the Examiner had in mind may have been to tie up the companies mentioned here with the brands which they sell, and that just occurs to me as one that where this list wouldn't apply. That is just a suggestion.

Trial Examiner Ballinger: That is what the Examiner had in mind.

3398 Mr. Austin: There may be other instances of that. I just happened to think of that one.

Mr. Hanley: We might do this, if it is what is desired: take the list of companies that appear on these exhibits 55-A, 55-B, 57-A, and 57-B, and just list them with the brand name that they sell.

Mr. Austin: Let us put this one in, anyway. I have no objection, if you want to add it.

Mr. Hanley: Many of those jobbers, of course, market under the brand name of the refinery. For instance, the Ohio Oil Company, as such, doesn't do business in Michigan. That company was pointed out by Mr. Austin, but the word Fleet-Wing belongs to them—or Standard Oil of Ohio, I should say—and their jobbers here use the word which is a trade name for the gasoline. That's all.

Mr. Austin: Hasn't Mr. Raupagh been stating in his testimony, or didn't he, rather, this morning state in his testimony the brand name used by each of those companies referred to?

Mr. Raupagh: I didn't mention every company, Mr. Austin. I mentioned that, in a few of them, but I didn't give it for every company.

Mr. Austin: I have no objection to this; except just to bring out the fact it doesn't show the brand name sold by all the alleged competitors that have been mentioned.

3399 Mr. Hanley: We can check it, and make additions to it.

Trial Examiner Ballinger: The Examiner would suggest you withhold the introduction of this in evidence until it is completed.

Mr. Hanley: That is entirely agreeable, and we will check it against the other list and add to it, if there be a need for it.

Now, it has come to my attention, your Honor, that Mr. Warmack, on behalf of the Commission, has asked for some additional information which has been prepared for him, and I now tender to Mr. Austin a list of schedules which have to do with an analysis of cost distribution for the month of March, 1941; the distribution of certain salary and other costs, as between different products and sales' channels (handing document to counsel for the Commission).

Mr. Austin: Thank you again. I assume that this is what Mr. Warmack asked for.

May I say we appreciate the speed with which this apparently has been supplied, because Mr. Warmack is hoping to get started back to Washington, and I know he appreciates having it this noon.

Mr. Hanley: I understood he wanted to get back.

By Mr. Hanley:

3400 Q. Mr. Raupagh, just before the noon recess I was inquiring from you about the methods or claims made by the purveyors of gasoline who are named on Exhibits 55 and 57, and you stated that their gasolines were represented in this market as being comparable to what are commonly called major gasolines, and, particularly, the Standard Oil Company gasoline. How do they do that? What mediums are used by these various companies presenting claims?

A. The mediums that are used are signs at service stations telling of the quality, superior quality of their gasolines. They use large billboards. They use newspaper advertising. They use radio advertising. They use pamphlets, newspapers, booklets, and so on, that they issue.

Q. Are you acquainted with an institution or organization in Detroit known as the Detroit Testing Laboratory?

A. Yes, sir.

Q. Are you acquainted with the reputation of that institution as to whether it is regarded as a reliable laboratory?

A. It is so regarded.

Q. Was there a time, Mr. Raupagh, in the year 1940 when you received copies of a newspaper published by the Charles E. Austin Gasoline Company?

A. Yes, sir.

Q. Are you acquainted with Charles E. Austin yourself?

3401 A. Yes, I know him personally.

Q. Where did you get these newspapers, these papers?

A. One of the magazines was delivered at my home and the others were delivered at my office by various employees of Standard Oil Company of Indiana.

Q. What do you know as to the fact of whether or not these papers were given a general circulation throughout the City of Detroit?

A. I know that they were given a wide circulation throughout Detroit.

Q. Do you know how many different issues there were made during that year?

A. I don't know just how many issues were made, but I know there were at least four issues.

Q. Four issues that came to your particular attention?

A. These four different issues.

Q. Yes, sir. Now, what is the fact as to whether or not you saw many copies of the same issue?

A. The facts are that the industry, generally,—that it is known in the industry, generally, that each one of these issues represented between 100,000 and 200,000 copies.

Mr. Hanley: We ask to have marked, for identification, —there are four different papers, your Honor, and I don't know that they all comprise the same number of sheets.

3402 Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: If you will mark the whole paper, please, Mr. Reporter.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: No, I don't know, Judge. There may be various places throughout the whole paper that I would like to call attention to. I thought we could mark the whole paper with one exhibit number and break it down.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

The reporter will mark the documents as Respondent's Exhibits 64-A to and including 64-H, 65-A to and including 65-H, 66-A to and including 66-H, and 67-A to and including 67-H, for identification.

(The documents referred to were marked, for identification, "Respondent's Exhibits 64-A to H, inclusive, 65-A to H, inclusive, 66-A to H, inclusive, and 67-A to H, inclusive.")

By Mr. Hanley:

Q. I hand you now, Mr. Raupagh, what have been 3403 marked, for identification, Respondent's Exhibits 64-A through H, inclusive; 65-A through H, inclusive; 66-A through H, inclusive, and 67-A through H, inclusive, and will ask you if those are copies of the newspaper published by the Austin Oil Company to which you referred a few moments ago.

A. They are.

Q. I hand you now Exhibit 64 and show you pages 64-D and 64-E, and call your attention to a number of places appearing on the page and quoting the Detroit Testing Laboratory, and then a reproduction of a signature and will ask you if you understand that to be the Detroit Testing Laboratory to which you have just referred in your testimony?

A. I so understand it.

Q. You have made reference to certain claims of comparability or superiority on the part of the Joy people relative to other brands of gasoline, and I show you what is marked Exhibit 64-H, being the last page in this issue, which appears to carry an advertisement, and will ask you if that is the class of claim to which you have made reference.

A. It is.

Q. Is that a picture of Mr. Austin on the front page?

A. Yes, sir. I should say Charles E. Austin.

Trial Examiner Ballinger: By the "front page," do you mean 64-A?

3404 The Witness: Yes, sir.

By Mr. Hanley:

Q. The exhibit which you hold, 64-A, appears to have been published in March, 1940. Does that accord with your recollection when one of these issues came out?

A. Yes, sir.

Q. Exhibit 65 bears the date line of May, 1940. Is that also a date that accords with your recollection when one of these issues came out?

A. Yes, sir.

Q. Exhibit 66 bears the date line August, 1940. Does that accord with your recollection as another date when an issue was made of this paper?

A. It does.

Q. This same exhibit also bears the legend "Circulation: 383,000 copies." Does that accord with your recollection as to what it was understood commonly in the industry was about the amount of circulation given to this paper?

A. Well, I had understood it was between a hundred and two hundred thousand. Now, it may have changed at various times.

Q. As far as you know, it had, at least up to that time?

A. Yes, sir.

Q. Exhibit 67-A bears the date line of November, 1940, and again is that one of the dates that concurs with 3405 your recollection as to when an issue was made?

A. Yes, sir.

Q. This exhibit also bears the legend "Circulation: 400,000 copies." Have you any particular knowledge about this particular exhibit, other than what you have testified to?

A. Nothing except what I have testified to.

Mr. Hanley: Now, I would like to offer at this time all of these exhibits. It is possible, your Honor, that there may be some material in them that will not be regarded as material in this case. There is a great deal of material in them that, aside from the matters to which I have alluded, the claim of comparability on the part of the Joy Company which are material on the general competitive issues, each of the papers—I think I am right about that—yes, each of the papers carries a double-page spread reproducing reports or claiming reports of the Detroit Testing Laboratory in which Joy gasoline is compared with a number of named branded gasolines. I will hand you, Mr. Austin, a couple of those, and your Honor might examine also a couple of them.

Trial Examiner Ballinger: The Examiner suggests that the portion upon which Respondent places reliance should be designated to avoid any possible claim of surprise.

3406 Mr. Hanley: What I would like to—I will be glad to do that, your Honor, but I would like to offer the whole exhibit, although I wouldn't insist on that, that is, as to certain textual matter that may appear in the paper. We do want the date lines, the volume number, and the claimed circulation that had been made.

Trial Examiner Ballinger: That, you plainly indicated.

Mr. Hanley: And these advertisements, I would like to have considered. There is a lot of it, and all of these papers are given over to vituperation of the Oil Trust and violent and excoriating language on the part of Mr. Austin in connection with what villians everybody but himself is, and it goes to the general issue that he is competition and he thinks companies like the Respondent are his competition, and I would like to have that just generally in the record, but I can't designate any particular part of this tirade that he goes into that I would care to incumber the record with.

Trial Examiner Ballinger: Well, all portions pertaining to the matters to which you have made reference may be considered.

Mr. Hanley: Very well. I will call particular attention to the double-page spread which would be Respondent's Exhibit 64-D and E, and 64-H, which latter is an
3407 advertisement testified to or about by the witness.

In respect to Exhibit 65, we shall call particular attention to 65-D and E, double-page spread disclosing the comparison and the advertisements that appear on 65-G and H. And, with respect to 66, I again call attention to the double-page spread setting forth comparisons of Joy gasoline with other gasolines and the advertisements of the Joy company and the same, with regard to Exhibit No. 67, we shall expect to call attention to the volume and the issues numbers, some of them have an issue number on them, the dates, and the claimed circulation, and, possibly, other matter which may appear in the papers and which might be regarded as material by the Commission.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: The Respondent now offers in evidence the Exhibits 64-A to H, inclusive; 65-A to H, inclusive; 66-A to H, inclusive, and 67-A to H, inclusive.

Trial Examiner Ballinger: Is there any objection?

Mr. Austin: May I ask whether these are being offered as any evidence of the quality or content of Joy gasoline or as any evidence of the results of any tests which may have been made by the Detroit Testing Laboratory?

Mr. Hanley: No, they are not being offered for
3408 that purpose, your Honor. They are being offered

simply on that score to establish the claims and representations of the purveyor of Joy gasoline. As a matter of fact, I don't think we have got anybody right here to tell what the difference of gasolines may be. That is a chemical question.

Mr. Austin: With that qualification, I have no objection.

Trial Examiner Ballinger: Respondent's Exhibits 64-A to H, inclusive, for identification; 65-A to H, inclusive, for identification; 66-A to H, inclusive, for identification, and 67-A to H, inclusive, for identification, are admitted in evidence.

(The documents referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBITS 64-A to H, inclusive, 65-A to H, inclusive; 66-A to H, inclusive; 67-A to H, inclusive," were received in evidence.)

By Mr. Hanley:

Q. Mr. Raupagh, I hand you Respondent's Exhibit No. 45, which is a letter from Mr. Gershenson under date of August 27, 1936, and will ask you if you received that letter, and, if so, when, as nearly as you can state?

A. I received that letter in my office either on August 27, 1936, or shortly thereafter.

Q. And upon its receipt, what did you do with the letter?

3409 A. Shortly after its receipt, I forwarded this letter to our Chicago office, addressing my letter to Mr. Amos Ball.

Q. And he was then what?

A. General manager of sales.

Q. I wish you would please tell the Court in detail, Mr. Raupagh, what the circumstances were leading up to your receipt of that letter; what negotiations did you have with Ned's Auto Supply Company?

A. Previous to the receipt of this letter I had negotiations with Charles Gershenson; also with William Gershenson; their advising me that they had received an offer from a competitive company, and they at that time mentioned the Red Indian Oil Company, whereby the Red Indian Oil Company would deliver gasoline to their service stations at a cent and a half below the prevailing dealer tank wagon price.

We had considerable discussion about it back and forth, and they put considerable pressure to bear, that their gallonage had now attained such a volume that they no longer should be obligated to purchase on a tank wagon basis.

They also called my attention to the fact that some years previous to this that they were able to buy through the Firestone Company, Texas gasoline.

3410 At that time Firestone had a contract with the Texas Company and, I believe, also in 1936 they had a contract. I know they did. It got so delicate, as to our holding their business or not, that they suggested going to Chicago—or they asked me if I would be offended if they would talk to our officials in Chicago, and I told them to go ahead. That I would make the arrangements for them, even, and they did talk to our officials in Chicago.

Q. Did they make a trip on this subject to the Chicago office?

A. Yes, they did.

Q. Did you accompany them at the time?

A. No, I didn't accompany them at the time.

Q. Were they there a matter of several days, to your knowledge?

A. Yes.

Q. Was there any part of that time when you were in Chicago?

A. Yes, there was.

Q. And did you personally participate in discussions after your arrival in Chicago?

A. I did.

Q. I mean by that discussions of this subject that you are talking about?

A. Yes, sir.

3411 Q. What were you and the other officials—first, name the officials in Chicago who also participated in the discussions, while you were there.

A. Mr. H. A. Lewis, particularly.

Q. Who was he at that time?

A. Mr. H. A. Lewis was the assistant general manager at large, on sales.

Q. Were there others that you know of?

A. I personally talked about it with Mr. Ball and I don't believe he was in on the discussion with Mr. Gershenson.

Q. That is to say that you advised Mr. Ball what you knew about the situation?

A. Yes, sir.

Q. Now, tell us just what they said. I mean what Mr.

Gershenson said to you and what Mr. Lewis said to you in those Chicago conferences.

A. Well, they advised us that unless we gave them a better price than the regular dealer tank wagon price, that they would discontinue doing business with us, that they could not longer afford to pay the prices that they were paying to us, on account of the competitive offers that they had and have had. As a matter of fact, they pressed us very strongly to place them on a tank car basis, but we compromised on the proposition later on.

3412 Q. Now, did you understand from those conferences—let me ask you this first, did these conferences cover a period of hours on different days, Mr. Raupagh?

A. Yes, they did.

Q. Now, as a result of those conferences, what conclusion did you come to in your own mind as to whether or not you would lose that customer unless you made some price reduction?.

Mr. Austin: I object to that question, your Honor, and any answer to it would be a self-serving statement, and it is further immaterial what conclusion the witness reached in his own mind at that time.

Mr. Hanley: I would like to say this, your Honor, on that objection. I perceived, I think, through the course of the trial, that Mr. Austin, on behalf of the Commission, is going to take a very different attitude as to what the law is about meeting competition than that which is going to be taken by the Respondent. I rather gather from the tenor of this objection and certain expressions that he conceives it to be obligatory on the Respondent in order to justify, under that phase of the statute, that the Respondent has the burden of proving absolutely that some competitor actually made an offer and what it was, and that unless the Respondent can discharge that, as we think, impossible burden, the right of justification is with-
3413 drawn from the Respondent. As we understand the statute, it simply means that if there be a bona fide law, if it appears bona fide, that there is an opportunity on the part of one of our customers to purchase elsewhere, we know about that, we are warned about it, and we know that the competitive situation is such that that offer not only is possible but probable, and all the way through we act in the utmost good faith, that beyond that, we don't have to go, that we are entitled to live in the market place and to protect our business.

Trial Examiner Ballinger: Judge, wouldn't the actions of the parties be the best indication as to what—

Mr. Hanley: I think that is true, your Honor.

Trial Examiner Ballinger: —the parties really thought?

Mr. Hanley: But the actions of the parties might lead your Honor to one conclusion and me to another conclusion, and, after all, it seems to me, on the question of good faith as to what the Respondent thought, that becomes highly material-what these marketers thought who were then representing the Respondent. That is to say, if somebody came to them and said, "We have got a better offer than you are giving us," and they just did not believe that, I don't think that would be fair justification. But if they believe firmly and honestly that they have got to
3414 meet that competition, it seems to me that becomes material. In other words, there is a question of good faith there as to whether or not we are using this phase of the statute on justification as a sword or as a shield, as we used to refer to the old defense rule, and our good faith, it seems to me, is important. In this particular instance, I think the surrounding facts clearly demonstrate that nobody could come to any conclusion other than that we were going to lose the business. We were told that in plain words, but I do think we ought to show that our people believed it. I believe that is material on all of these.

Trial Examiner Ballinger: The objection is overruled and the witness may answer.

The Witness: What was that question, please?

Mr. Hanley: Read the question back, please, Mr. Reporter.

(The last question was read.)

A. I came to the conclusion that we would lose that customer unless we made some price reduction.

By Mr. Hanley:

Q. Were you specifically told that by the Gershensons, or by either one of them?

A. Yes, specifically.

Trial Examiner Ballinger: Off the record.

3415 (A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Did there come a time when you discussed with the Gershensons the willingness of the Standard Oil Company to give them a ½¢ reduction off the tank wagon price?

A. Yes.

Q. And were there extensive discussions in respect of that particular matter?

A. Yes, there were.

Q. What was said by the Gershensons as to their willingness to accept that, or their satisfaction or dissatisfaction with that kind of a price?

A. They said they were not satisfied with that kind of a price, but that they would accept it for the time being; and did so.

Q. After you got into that phase of it, talking about the half cent, did your discussions continue for long periods of time?

A. Yes, they did.

Trial Examiner Ballinger: What do you mean by "long periods of time".

The Witness: Well, I mean that for a period of over a year or more, after that; whenever they came to my office or whenever we had lunch, which we very frequently
3416 did, they always brought up that subject.

By Mr. Hanley:

Q. Now, confining your testimony to just this particular negotiation, the end of August or the first part of September, 1936, when you and the Gershensons and some of the Chicago people were together talking about this. As I understand, you finally reached a point where you suggested you would give them a half cent off the tank wagon price?

A. That's right, sir.

Q. You had further discussion of that subject after that?

A. Yes, sir.

Q. How long, in terms of minutes or hours or days did you have discussion on that subject before an agreement was reached?

A. Oh, I should say that was about four or five days.

Q. And then I think you have already said they said they would take it, for the time being.

A. Yes, sir.

Q. Now, did there come a time shortly thereafter when you began to give them a price of ½c off the dealer tank wagon price?

A. Yes, sir.

Q. Has that continued—or did that continue up until some time in the end of February or early March, 1938?

A. It did.

3417 Q. I think you testified that they then went back on the regular tank wagon basis for a few days and then went on a tank car basis.

A. Yes, sir.

Q. Now, since that tank wagon reduction of ½¢ basis was abandoned, in early 1938, was it ever resumed with Ned's Auto Supply Company?

A. I don't exactly understand the question.

Q. I mean has Ned's ever been on that basis of ½¢ off the tank wagon price since 1938, when you just said it was abandoned?

A. No; never have.

Trial Examiner Battinger: When was the ½¢ reduction allowed?

The Witness: From September 1, 1936, to March 1, 1938.

By Mr. Hanley:

Q. You have told the Court in answer to one of his questions that from time to time after you reached the agreement of September 1, 1936, on the half cent reduction, that you were requested to go to a lower price, or a different basis. I wish you would amplify that a little more, and tell us as much as you can about what took place between you and Ned's Auto Supply Company in relation to the price basis that they desire?

3418 A. Whenever we would meet, the proposition would come up—that is, they would bring it up—that they were dissatisfied with the ½¢ per gallon off the tank wagon price that they were securing. That due to competitive offers which they had and that they knew they could go out in the market and buy comparable gasoline or gasoline satisfactory to them at a much lower price than the ½¢ per gallon off the tank wagon price. There were quite a number of discussions in between that time of September 1, 1936, and up to March 1, 1938.

Q. Can you give any estimate at all about it that you feel might be anywhere near the fact as to how many times you talked that over with one or more of the Gershenson family?

A. Well, it would be at least 12 times.

Mr. Hanley: I think I haven't offered that letter. I will do that now. I believe it has just been marked for identification, your Honor.

I offer in evidence Respondent's Exhibit 45. You are familiar with it, aren't you, Mr. Austin (handing document to counsel for the Commission)?

Mr. Austin: I don't know.

(Counsel for the Commission examined document.)

Mr. Austin: No objection.

3419 Trial Examiner Ballinger: Respondent's Exhibit 45, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 45," was received in evidence.)

By Mr. Hanley:

Q. Did there come a time, Mr. Raupagh, some time in early 1938 when you received a letter from Ned's Auto Supply Company dealing with this same subject of their demand that they be put on a tank car price basis?

A. Yes, sir.

Q. I show you Respondent's Exhibit 46 and will ask you if you received that letter, and if that is the letter or a copy thereof to which you have just referred?

A. That is a copy of the letter which I received.

Q. Have you made a search in the records of your office here in Detroit to find the original of that letter; the signed original, I mean.

A. Yes, I have made such a search.

Q. Have you been able to find it?

A. No, sir.

Q. Now, Mr. Raupagh, what happened, so far as negotiations between Ned's and the Standard Oil Company were concerned, in the early part of 1938 and surrounding this letter, in connection with their going on a tank car basis?

3420 A. Ned's Auto Supply Company, meaning William Gershenson and Charles Gershenson, both negotiated with me, talked to me a number of times, came to my office; to the effect that they did issue a challenge to me that they would either be placed on a tank car basis or they would have to accept some of the competitive offers which had been made to them.

They again referred to a competitive offer of the Red Indian Oil Company whereby they were able to purchase gasoline at 1½¢ below the dealer tank wagon price, said gasoline to be delivered by the supplier into their storage tanks at their service station or if they would haul the gasoline themselves from the supplier, they were to receive 1.7¢ per gallon.

They also told me at that time of the offer they had had in 1936, prior to our placing them on the ½¢ per gallon less the tank wagon price basis, that offer being from the Shell Company, whereby they could purchase gasoline on a tank car basis at about 2¢ per gallon less than the regular dealer tank wagon price.

They definitely threatened to quit purchasing from the Standard Oil Company unless we placed them on a tank car basis at a tank car price.

Q. Now I am going to ask you, in a few minutes, Mr. Raupagh, to tell us as many of the offers that were referred to you, as you can remember, but just now
3421 I would like to know what specific things happened
between you and the Gershensons, or any of them, which resulted in your putting them on the tank car basis on or about March 1, 1938.

A. Well, definitely, in view of the conversations that I had with the Gershensons, I definitely made up my mind that if we wanted to retain the business of the Ned's Auto Supply Company, it would be necessary for us to sell them in tank car quantities at tank car prices. They, of course, would have to equip themselves with a bulk plant, and so on and so forth.

Q. Did you tell them that?

A. Yes, sir, I did.

Q. Do you now have in mind what volume they had at that particular time?

A. I haven't the exact volume in mind. I have the record here somewhere.

Q. It is in evidence. I just thought you might remember, several million gallons.

A. It is between 3,000,000 and 4,000,000 in 1938, as I recall it.

Q. Had you concluded before putting Ned's Auto Supply Company on the tank car basis that if you did not do so, that you would lose that customer?

A. Definitely so. They, themselves, told me that they
could get not only a better price from the Red Indian
3422 Oil Company, but also from other companies at tank

car prices, and, knowing the market as I know it, I was convinced that they could, also.

Mr. Hanley: At this time we offer in evidence Respondent's Exhibit 46, for identification.

Mr. Austin: Does that—this is the letter regarding which you testified?

Mr. Hanley: One of them.

Mr. Austin: No objection.

Trial Examiner Ballinger: Without objection. Respondent's Exhibit 46, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 46," was received in evidence.)

Trial Examiner Ballinger: You may proceed.

By Mr. Hanley:

Q. Now, Mr. Raupagh, I wish you would go ahead and tell the Court of as many instances as you can where some specific offer was referred to you by the Gershensons, or reported to you, as having been made to them to supply them with gasoline by some concern that was competitive to the Standard Oil Company.

A. The first specific offer of such nature that I remember was in 1933 when, through the Firestone Tire &
3423 Rubber Company, Mr. Gershenson—

Mr. Austin: Pardon me, Mr. Raupagh.

If your Honor please, perhaps I ought to say something on the record, just to make it clear that I assume that this testimony is not offered as proof of any offers received by Mr. Gershenson, but only as to the fact of what Mr. Gershenson told Mr. Raupagh. I believe that is correct, isn't it?

Mr. Hanley: Well, yes, I think the probability of the whole record as to whether it is the truth or not is as to whether the offer was actually made. All I have asked of Mr. Raupagh is what offers were reported to him by the Gershensons.

Mr. Austin: That, of course, is not hearsay, and I concede that it is relevant, but I just want to make it clear that I would object to it if it was offered that that was proof of any offers made to Mr. Gershenson.

Trial Examiner Ballinger: It could not be so considered.

By Mr. Hanley:

Q. Which of the Gershensons, if you remember, told you about this?

A. Charles Gershenson.

Q. All right. Go ahead, Mr. Raupagh.

A. As previously stated, I had a conference with
3424 Charles Gershenson, and I remember about it distinctly, because it was about the time that they opened their Jefferson and Manistique service station. In 1933 their gallonage wasn't as large as it is now. He told me that the Firestone Tire & Rubber Company had put some pressure on him, that he ought to get into the gasoline business on the scale that he could or would be expected to in order to be a marketer in Detroit. He advised me that he had had a conversation with a Mr. Jackson of the Firestone Tire & Rubber Company, and that he was willing to make an appointment with Mr. Dodge of the Texas Company. Later on, in 1933, he told me that he had had a conference with Mr. Dodge of the Texas Company and also with the Firestone people, that the offer was definitely much more advantageous than the dealer tank wagon price at which we were selling him at that time and I knew it would take, and it did take quite a lot of salesmanship as far as I was concerned, to retain his business and to keep him satisfied in handling our products.

Q. Did there come another occasion—you have said that Mr. Gershenson told you that there was a more advantageous price offered him. Did you get into any discussion of the figures at that time, as you recall, Mr. Raupagh?

A. Yes, there was some discussion of figures. And he told me that the contract on which he could pur-
3425 chase, namely, the contract of the Firestone Tire & Rubber Company, was 4¢ off the dealer tank wagon price. He also told me that while these same discussions were going on in regard to the Firestone and Texas offer that he had also had an offer from the Red Indian Oil Company where they, at that time, offered to deliver gasoline to Ned's service stations at less than the prevailing dealer tank wagon price, or our tank wagon price.

Q. Did you discuss that price?

A. Yes, we discussed that price. They were about a cent and a half below our dealer tank wagon price, and delivered in their tanks at their service stations, which would make it unnecessary for them to have a bulk plant.

Q. Would it also have been unnecessary for them to have had their own delivery trucks under that arrangement?

A. That would have been unnecessary.

Q. Does that mean, Mr. Raupagh, as you understand it, that they would receive deliveries just the same as they were receiving deliveries from the Standard Oil Company, except they would get them at a cent and a half less per gallon?

A. That is right.

Q. Now, can you recall any other specific offers that were reported to you by Mr. Gershenson, or either one of them?

A. Yes; in 1940, the Gulf Corporation, through
3426 their manager, Mr. Crawford.

Q. If you can, will you follow these through chronologically, if you can do it.

A. Yes. I had a conversation with Mr. Gershenson in 1940, the latter part of 1940, and I received a letter from him later on to the effect that he had received an offer from the Gulf Corporation that they were soliciting him to sell him a tank car quantity of the regular Gulf gasoline, and I believe the price was 6.6, delivered at the bulk plant of Ned's Auto Supply, which was the same price that our tank car price was on that date.

Q. I hand you what has been marked as Respondent's Exhibit No. 48, for identification, and I will ask you if that is the letter that you have just now referred to?

A. Yes, that is the letter.

Q. And did you receive that from Mr. Gershenson?

A. Yes, I did.

Mr. Hanley: We offer in evidence Exhibit 48. I understand the notation on there is really no part of the exhibit.

Mr. Austin: No objection.

Trial Examiner Ballinger: Without objection, Respondent's Exhibit No. 48, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for
3427 identification, "RESPONDENT'S EXHIBIT 48,"
was received in evidence.)

Mr. Austin: I would like to ask the witness one question.

Mr. Hanley: Sure.

Mr. Austin: I believe Mr. Gershenson said that he tried to get some of these offers brought up to date at your request after he knew he was going to have to testify in this lawsuit, and I wondered if this was an instance of a case where you had requested him to notify you regarding any such offer after you received the Complaint in this case?

The Witness: It wasn't, Mr. Austin.

Mr. Austin: What does that 6.6c mean?

The Witness: It means 6.6¢ per gallon for house brand gasoline, delivered in their bulk plant, located at Dearborn.

Trial Examiner Ballinger: How much differential would there have been?

The Witness: A cent and a half differential at that time.

By Mr. Hanley:

Q. Do you have any recollection, Mr. Raupagh, of an offer reported to you by Ned's Auto Supply Company in 1934?

A. Yes, there was such an offer. They reported
3428 to me in 1934 or late in 1939, I am not absolutely sure which of the Shell Company that made them an offer to sell them in tank car quantities at tank car price, at about 2¢ per gallon off the posted dealer tank wagon price.

Q. Did you say 1934 or 1939?

A. I said either in 1934 or the latter part of 1933, that is what I meant to say, rather.

Q. I see. And, was the price discussed at that time?

A. Yes, they stated at that time that the price was about 2¢ below the dealer tank wagon price for deliveries in tank cars, and they would have to supply themselves with a bulk plant.

Q. Now, Mr. Raupagh I had you tell us pretty much in detail as to the conversations that you had with Ned's Auto Supply Company in August and September, 1936, when they went on the half cent basis, and, again, in the spring of 1938, when they went on the 1½¢ tank car basis. I don't know whether or not you stated whether at those times they discussed quite frankly with you the names of companies that were offering gasoline to them, and prices.

A. Yes, they did.

Q. Did they advert to these former offers that they had told you about?

A. Yes.

Q. Did they talk about any opportunities or nego-
3429 tiations, that they hadn't formerly reported to you?

A. I don't quite get that question.

Q. I mean, did they say anything to you at that time as to whether or not they had received offers, that they hadn't, at the time of receiving them, discussed with you?

A. Yes. There is one other offer—well—

Q. All right. What is that, Mr. Raupagh?

A. There is one other offer that they discussed with me—

Mr. Austin: I think he should state when, if he tells about it.

By Mr. Hanley:

Q. Very well. Do that, please, Mr. Raupagh.

A. It was between 1934 and the forepart of 1936, as I recall it, where the Sun Oil Company had continually solicited them through their Mr. Cunningham, who is the local agent, or manager of the local district of the Sun Oil Company.

They stated that the Sun Oil Company had continually approached them over a period of weeks or months, and that the wife, Mrs. Cunningham, had called at the Ned's Auto on Jefferson and Manistique and purchased gasoline for her car and kidded with them, along the line that they ought to be buying from the Sun Oil Company, and the definite offer that Mr. Gershenson told me was made to
them was connected up with the idea of leasing, the
3430 Sun Oil Company leasing stations to the Ned's Auto
Supply Company.

The prsssure was put on me immediately by Charles Gershenson that we ought to lease some of our stations to him or to the Ned's Auto Supply Company, which I declined to do.

Q. Now, have you told us all of the offers that were represented to you that you can remember the specific detail about, Mr. Raupagh, in connection with Ned's?

A. Yes, sir.

Q. I take it that you do not wish to be understood that these were all of the offers that they said from time to time in these many discussions—

A. I know that according to conversations that I have had with them over a period of ten years that they have had many more offers and that many more offers they have told me about, which I wouldn't try to place any specific date on or—it is too vague in my mind at the present time to make anything definite out of it, but there has never been a time since—well, there has never been a time since I have been here that they haven't been able to purchase gasoline at less than the dealer tank wagon price, any time they wanted to take advantage of offers that they had.

Mr. Austin: Your Honor, I think I will move to strike that. That answer goes a little too far, it seems to me, because it is based upon the witness' knowledge of
3431 offers made to Ned's about which he can only know by hearsay.

The first part of his answer was that Ned's could have bought at any time, and I assume he is able to state that of his own knowledge, but whether they could buy pursuant to specific offers, he could only know that through what Ned's told him, and, in order to preserve my position, I think I ought to object to that and ask it be stricken.

Trial Examiner Ballinger: The motion is granted.

By Mr. Hanley:

Q. Mr. Raupagh, what is your opinion, as to whether during any of the time that you have been in Detroit, Ned's could have purchased gasoline at a lesser price than they were buying it from the Standard Oil Company?

A. My opinion, and based upon my knowledge of the market in Detroit ever since I have been here, since January 1, 1930:, there has never been a time but what, according to the Detroit market, Ned's Auto Supply Company could purchase at less than dealer tank wagon price of the Standard Oil Company, on a gasoline comparable to a house brand gasoline.

Q. Mr. Raupagh, I wish you would give the Court your candid opinion, whatever it is, as to how and why you have been able to hold Ned's as a customer at all, under the competitive circumstances as you know them to exist.

3432 A. I am surprised at it myself, as to why we have held Ned's.

When you take into consideration that they have told me a number of times that salesmen for the leading major competitive oil companies in this city have continually called on them prior to their going on anything except the regular tank wagon basis—the way this is told me is that they would inquire: "Well, how much gasoline gallonage are you doing? Now, you are just foolish to be buying at the regular tank wagon price for that amount of gallonage," and they would immediately start soliciting their business.

Now, specifically as to why I have been able to hold them: I believe that in the first place they have handled Standard Oil products since they started in business. It seems to be a sort of tradition with them; that their father started the business. As I understand it, it was a little pump in front of a bicycle shop.

The boys carried on the business after that, and launched into the tire line quite heavily.

Red Crown is just part of the Ned's family, you might say.

There is another reason why I think I have been able to hold them. It is characteristic of the Gershenson family that they place a great deal of stock in their mother. The mother has always been very set in her ways, as far as Standard Oil is concerned, and as far as Red Crown 3433 gasoline is concerned. They listen to what she says. I don't believe that I would have held them if it hadn't been for that, because—maybe I shouldn't say this—but sometimes the relations haven't been as nice as they should be, when these competitive offers would come up.

Q. You mean by that they would get pretty tough with you sometimes?

A. Yes, I can tell you most assuredly that sometimes the air was kind of hot.

Q. No, Mr. Raupagh, have you had from time to time conversations with Mr. Citrin of the Citrin-Kolb Oil Company during which he has advised you of the receipt of competitive offers?

A. Yes, I have.

Q. I wish you would start in and tell the Court in as much detail as you can about any offers that he reported to you.

A. The first offer that I remember was about 1930, just shortly after I came to Detroit.

Mr. Hanley: Your Honor, there is a suggestion I ought to have thought of myself, that Mr. Raupagh, perhaps, ought to have a few minutes recess.

Trial Examiner Ballinger: We will take a few minutes recess.

(A short recess was had.)

3434 Trial Examiner Ballinger: Come to order.

By Mr. Hanley:

Q. I show you Respondent's Exhibit 49-A and B, Mr. Raupagh, and I will ask you if that is a letter and an enclosure, a copy thereof which you received from Mr. Gershenson on or about March 3, 1940?

A. Yes, it is.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. I was about to ask you, Mr. Raupagh, to state to the Court in as great detail as you can, as chronologically as you can, any occasions when Mr. Citrin or anyone else connected with the Citrin-Kolb Oil Company, reported to you that they had received offers from competitors of the Standard Oil Company to sell to Citrin-Kolb its requirements of gasoline.

A. Shortly after I came to Detroit in 1930, Mr. Citrin told me of an offer that he had and negotiations he had with the Wilson Oil Company, and Mr. Hicock, that they were willing to supply him with gasoline and this proposition had been first told to a Mr. Love, who was then sales manager for our company, but later on Citrin talked
3435 to me about that. The offer involved the Hicock Oil Corporation acquiring an interest in the Citrin-Kolb Oil Company. However, from the analysis that I made at that time, I think it was a very advantageous offer, as far as Citrin-Kolb was concerned. I was able to talk him out of it, because I used the argument that they had been in business for quite some time and they had always handled our products, and they had been prosperous in handling our products. I think it was a definite threat of the business of the Citrin-Kolb Oil Company as to a competitor acquiring it.

Q. Did you hear the testimony of Mr. Citrin in respect to certain offers that he had received, or have you read his testimony?

A. I heard his testimony.

Q. Are you now referring to an offer that you heard him testify to about when he was on the stand?

A. No, I am referring to an offer that he told me about himself.

Q. I understand that, but did you hear him testify in this proceeding to having received that same offer?

A. Yes, I heard him say that.

Q. And did you hear his discussion of the figures that were involved?

A. Yes, I believe I did.

3436 Q. Did he report, when he talked to you about it first what those figures were?

A. Yes. They were 6½¢ off the retail price established by the Standard Oil Company, which was a very advantageous figure, because that means about 3¢ below the dealer tank wagon price in 1930.

Q. Now, if I rightly recall, that offer involved a change of some kind in the capital or corporate structure of the Citrin-Kolb Company?

A. Yes, it did.

Q. Was that explained to you at the time?

A. The way it was explained to me at the time was that the Hicock Corporation, or Mr. Hicock himself, would acquire an interest in the Citrin-Kolb Oil Company, and he also testified—this was taken up with Mr. Love. I should have said Mr. Bennett, who was our sales manager at that time.

Q. Did you, in thinking over that offer as it was reported to you, give consideration to all of the factors that you had been told about, in arriving at your conclusion that it was a definite threat to the Standard Oil Company?

A. Definitely so. Definitely so.

Trial Examiner Ballinger: I would like to have you explain your statement. As I understand, the offer required a complete change of the corporate structure, did it not?

3437 The Witness: As the offer was told to me by Mr. Citrin at that time, he simply stated that Hicock or the Hicock Corporation would acquire an interest in his concern and that he would have a margin of 6½¢ and the reason why I say that was a very advantageous offer is because it would be 3¢ below the prevailing tank wagon price.

Trial Examiner Ballinger: So far as the offer was concerned, as to price, that might have been advantageous, but that was conditioned upon a complete change in the corporate structure.

The Witness: That may be according to the testimony of Mr. Citrin, your Honor, but at that time that was the way it was put up to me: that he was to acquire an interest in the company. That is as far as I could testify, as to the conversation with him at that time.

Trial Examiner Ballinger: Did he tell you that they were seriously considering a change in the corporate structure; that it was going to be made?

The Witness: No, he didn't say that, but he said that they were seriously considering the offer. That's what he said at the time.

By Mr. Hanley:

Q. Do you know whether the Highland Oil Company did, in fact, go into a similar proposition?

A. Yes, sir.

3438 Q. And the Highland Oil Company is one of the companies on either Exhibit 55 or 57?

A. That's right.

Q. The condition of which you testified about this morning?

A. That's right.

Q. From your standpoint as a marketer, Mr. Raupagh, what have you to say as to whether you regard a competitive offer as a threat to your business only on these occasions when that offer deals with price alone, or whether you consider it a threat whenever it is of a character that may induce your customer to leave?

A. It—I consider it a threat any time that it is of a character which the customer feels that it is advantageous for him to change and discontinue buying our products.

Q. So from your standpoint, is it or is it not a fact, Mr. Raupagh, that if this change in corporate structure was a satisfactory one to Mr. Citrin and one which he thought would be sufficiently advantageous to him to induce him to leave the Standard Oil Company, you would regard that, as a marketer, as being competition?

A. Yes, I would.

Q. And, in fact, isn't that competition?

A. It is, in my opinion.

Q. Isn't it the competition, the kind of competition you are up against all of the time?

3439 Mr. Austin: Objection to it as being a leading question, your Honor.

Trial Examiner Ballinger: Sustained.

By Mr. Hanley:

Q. Will you please continue, Mr. Raupagh, and tell ~~us~~ what the next incident was that you recall, wherein Mr. Citrin or someone else of that company reported a competitive offer to you?

A. In the early part of 1933, Mr. Citrin reported to me an offer from the Shell Company to sell them gasoline on a tank car basis.

Q. When again did you receive such a report?

A. I ~~had a~~ conversation with Mr. Citrin in the early part of 1936, when ~~he~~ told me that he had received an offer from The Gulf Corporation to sell him gasoline, and that he was to haul it out of their bulk plant or could haul it out of their bulk plant, which made it unnecessary for him to maintain a bulk plant of his own. He gave that quite a ~~lot~~ of consideration because we had several conversations about it. He brought out the fact at that ~~time~~ that in our relations with Citrin-Kolb he had to furnish the equipment for the dealers which he supplies and on this offer, the Gulf Corporation would furnish the equipment for the dealers that he might supply, if he took on their proposition. 3440 Their offer, as I recall it, was a cent and a half or a cent and three-quarters below the prevailing tank wagon dealer price at that time.

Q. And from whom was that offer?

A. From the Gulf Corporation.

Q. When again were you advised, if you were?

A. In the latter part of 1936, I was advised by Mr. Citrin of an offer he got from the Texas Oil Company. The negotiations at that time were over a period of time. He told me about a contract that the Texas Company had offered him. Previous to that time he had been soliciting me to have a contract with the Standard Oil Company, and, from his general conversation, he always made a statement that he felt insecure as to being able to secure his supplies from the Standard Oil Company on account of not having a contract. We had quite a number of conversations about that, even previous to this offer, but he

did definitely tell me about the offer from the Texas Company, and he came into the office and he brought a copy of the contract that he had made, I understand. I did not examine the contract too carefully because I did not want to maintain too much interest from a sales viewpoint, because I knew, by his general attitude, that he considered this contract very seriously, that is, considered severing connections with the Standard Oil Company, and it took quite a lot of persuasion to try to get him to
3441 continue our relations that we had had, as a jobber for the Standard Oil Company.

Q. Did you mention the price?

A. The price, as I remember, was about 2¢ a gallon less than the prevailing—less than the dealer tank wagon price.

Q. Now, at that time, there was being posted a service station price, wasn't there, Mr. Raupagh?

A. Yes.

Q. Now, just to clear up any difficulty that may arise as between the testimony of witnesses, when you say that a price of 2¢ below the dealer tank wagon price then being posted, that would be 5½¢, would it not, below the Standard Oil Company service station price?

A. That is right.

Q. That is to say, that at that time there was a differential of 3½¢ between the service station price posted by the Standard Oil Company and the dealer tank wagon price posted?

A. That is right.

Q. And those were all public postings at the time, were they not?

A. That's right, sir.

Q. Did Mr. Citrin tell you at the time who the individuals were in the Texas Company that had talked with him about this offer?

3442 A. Yes. He said it was a Mr. Murdy, Mr. Germain, and I have forgotten about anybody else, but those two I remember.

Q. Now, on that occasion, or on the occasion of that incident, did you ever have an opportunity to verify in any manner the fact of whether the offer had been made to Citrin?

A. Yes, I did.

Q. Just explain to the Court what that was.

A. Some time later, it must have been maybe three or four months later, in going on the train from Detroit to Chicago it happened that Mr. Murdy was on the train and we had some pleasant conversation and—

Q. You knew him and he knew you?

A. That's right. And the subject was brought up. I brought it up, and he admitted that they had made an offer to the Citrin-Kolb Oil Company.

Trial Examiner Ballinger: Did he tell you what the offer was?

The Witness: No, he didn't definitely go into the details as to what the offer was.

Mr. Hanley: This is just as good a place as any to ask this question:

By Mr. Hanley:

Q. Mr. Raupagh, about this business of confirming a competitive offer with a competitor: state what the
3443 fact is as to whether that just is or isn't done?

A. Well, it isn't done, your Honor, because no competitor likes to admit, especially to his competitor, that he made an offer to some one and what the offer was and didn't secure the business. That just isn't good salesmanship, to overdo that. And it isn't being done.

Q. Now, right in line with that: you have been testifying to a number of reports that were given to you by your customers of competitive offers that they received. I will ask you what the fact is as to whether or not your own customers are reluctant or otherwise, frequently, to tell you that they have competitive offers.

A. Yes, they are reluctant sometimes to tell me that they have had competitive offers, and they are still more reluctant to tell me just exactly what the competitive offer was. That generally develops when they do tell me about a competitive offer, and then the fishing starts. I, on the one hand, to try to sell him to stay with our company, and he, on the other hand, trying to sell me that we ought to give him a bigger margin, or place him on a different basis.

Q. Is it not a fact that there is reluctance on the part of a customer to tell you the individual supplier that may be making the offer, as well as the terms of the offer?

A. Yes, there is—

3444 Mr. Austin: Your Honor, I object to that. I don't know whether Mr. Raupagh can testify as to any more than apparent reluctance. If he wants to testify to that, I don't mind, but whether the reluctance is genuine, perhaps it is something Mr. Raupagh has a very good opinion on, but still it is an opinion.

Trial Examiner Ballinger: The objection is overruled.

A. Yes, there is a reluctance to tell me who the offer is from.

Trial Examiner Ballinger: Is there any reluctance to tell you that they received a competitive offer? Isn't the reluctance with reference to the disclosure of the party from whom the offer came?

The Witness: That is just right; that is just right.

By Mr. Hanley:

Q. You never ask a customer, I assume, in the first instance, if they got competitive offers, do you, Mr. Raupagh?

A. No, I don't.

Q. If he comes and tells you, you had better get on the track on the price?

A. It would be poor salesmanship to lay the foundation to him for going after me for a different proposition.

3445 Q. The high point here, Mr. Raupagh—and I just want to ask you a summarizing question—is it not very difficult, indeed, when you are told by a customer that he has a competitive offer, to find anything about who made it or what it was?

A. Yes. There is a reluctance.

Trial Examiner Ballinger: Now, is there reluctance both ways?

The Witness: The reluctance is, your Honor—let me explain it this way: the customer is glad to come in and tell me that he has got a better offer, but from there on there is a reluctance for him to tell me who it is and just exactly what it is. There is a reluctance until it gets right down to the point until he is serious about it, and then he generally gives you the works.

By Mr. Hanley:

Q. When you say that, is it what you mean you got in respect of these various reports that you are testifying about to Citrin-Kolb's and to Ned's?

A. Yes, sir.

Q. Now, was there a further offer which you learned from Mr. Citrin?

A. I learned of an offer from Mr. Citrin late in 1939, or, I will say about the middle of 1939. Originally, he

didn't tell me about the offer first. He told it to Mr.
3446 Love, who was then our sales manager in Detroit, and Mr. Love told me about it, and later on Mr. Citrin told me about it, too; an offer from the Argo Oil Corporation.

Q. And did you learn from Mr. Citrin what the terms of that offer were?

A. Not definitely. I didn't definitely learn the term of that offer, Mr. Hanley. It was after he had declined the offer, evidently, and was still buying from us and I didn't want to go into it any further in detail with it, because I didn't want to stir him up.

Q. Mr. Love handled that in your absence?

A. That is right.

Q. With Mr. Citrin?

A. That is right.

Q. But Mr. Citrin did personally tell you about it at a later date?

A. Yes, he did.

Q. Were there any other offers of which you were advised?

A. Yes, he told me of an offer in December of 1940 from the Aurora Gasoline Company. The conversation took place in my office. The Aurora Gasoline Company had offered to sell him, I believe it was, 80 octane gasoline at about half a cent a gallon less than he was paying us for house brand gasoline at the time. I had quite a conversation with him about it.

3447 Trial Examiner Ballinger: What is the difference between 80 octane gasoline and house brand?

The Witness: Well, if the octane is produced by the same method, it would mean that it is about four points higher octane than a house brand. It is like an Ethyl gasoline, a regular premium gasoline.

By Mr. Hanley:

Q. Now, are there any other specific offers, the detail of which you can remember, as having been reported to you by Mr. Citrin?

A. There are no other specific offers that I remember. There are some other offers, but I haven't enough knowledge of them now to testify.

Q. Do you frequently have conversations with Mr. Citrin about the amount of differential he is getting and about being solicited by others in the gasoline supplying business?

A. Yes, that comes up quite frequently. As a matter of fact, I generally have lunch with these people, that is, Citrin and Neff's and Wayne Oil Company, Mr. Ledbetter, and Stikeman, at least once or twice a month. Sometimes there are two or three of them together when we are having lunch, and you can rest assured that I generally get the works as to margins and so on.

3448 Q. Referring you for a moment to the offer which you described which Gulf made to Mr. Citrin, do you recall that in connection with that offer he told you anything about an offer on the part of Gulf to paint service stations and furnish equipment, things of that kind? Was that discussed?

A. That was discussed, and I might say it is still being discussed, Mr. Hanley.

Q. Were you asked by Mr. Citrin then or have you ever been asked to do the same thing?

A. I have been asked by—I was asked by him then and I have been asked by him on an average of once a month since.

Q. And you haven't done that?

A. No, sir.

Q. Have you done that for any of these jobbers?

A. No, sir.

Q. Indeed, the doing of that at their own expense is one of the requirements that you have to classify them as a jobber and to qualify to buy on the jobber basis, isn't it, Mr. Raupagh?

A. It is.

Q. To furnish that sort of service and equipment to a business set-up like the Citrin-Kolb Oil Company would run into a very substantial amount of money, would it not?

A. Yes, it would.

3449 Q. Now, did Mr. Ledbetter of the Wayne Oil Company ever tell you of any offers made to him to sell to his company competitors' gasoline?

A. The first conversations that I have had with Mr. Ledbetter along that line—the first conversation was in 1935 previous to him going on a tank car basis with the Standard Oil Company. He told me at that time that he was getting, at one of the stations, at one of his stations, which was being supplied by the Highland Oil Corporation, Hi-Speed jobber, who was giving him 1c per gallon discount off the prevailing [illegible]er tank wagon price, while the stations which we suppl[illegible]ned or operated by Mr. Ledbetter, he was paying the prevailing tank wagon price of the Standard Oil Company at that time. That was the first proposition that I had from him. Then there has not been any definite propositions since that time until the summer of 1940, although it was either in 1938 or 1939, I know, that somebody was pressing him to give them an option on his business, his entire business, and he asked me at that time to find out whether it was one of the major companies that was fishing to purchase his business. I never could find out and did not do anything further about it. The next proposition that Mr. Ledbetter told me about was the one in December, 1940, when he had an offer from the Aurora Gasoline Company and from the National Refining Company. The Aurora Gasoline offer was along the same 3450 line, previously testified to, offering 80 octane gasoline at ½¢ per gallon less than he was paying for house brand gasoline from our company.

Q. That would be 2¢ under the tank wagon price?

A. Yes, sir, the National Refining proposition was in connection with the offer of the Stikeman Oil Company or made at the same time that the offer of the Stikeman Oil Company was, according to the way Mr. Ledbetter told me, and that was on a contract basis because here again these jobbers figured that they would rather have a contract, and it was based on a 6¢ basis, 6¢ price, the 6¢ meaning that any time the market was not below 6¢ per gallon, they would have a cent and a half margin. If it went below 6¢ per gallon, they were both to share the amount below that. If it went above 6¢ per gallon, they were to receive more than the cent and a half margin. They were also to have some territory rights because the National Refining Company is not represented here in Detroit at the present time, and it was to be a contract proposition.

Trial Examiner Ballinger: You mean that it wasn't represented here at that time?

The Witness: Not at that time, that is, in 1940, your Honor.

By Mr. Hanley:

Q. Now, the Aurora Gasoline Company, to which 3451 you have referred, is one of the companies who appears on these exhibits, Respondent's Exhibits 55 and 57, does it not?

A. Yes, sir.

Q. And is it a large supplier of gasoline?

A. Well, in 1940, their gallonage was 40,000,000 or 50,000,000 gallons.

Q. Now, is the National Refining Company a large refinery?

A. Yes, they are a refiner and marketer.

Q. Where do they operate now? Where are they located?

A. Their headquarters is at Cleveland, Ohio, and they have extensive operations in Ohio and have about four or five jobbers in southern Michigan and many other states in which they operate. They even operate in Canada, I believe.

Q. In your judgment, could you easily have supplied all the requirement of the Stikeman Oil Company and the Wayne Oil Company?

A. Yes, sir, and also a few others. They at one time, did market here. They sold some gasoline to somebody that set themselves up as an agency or broker that sold some of the dairy companies here White Rose gasoline.

Q. Have you had any conversations with Mr. Stikeman of the Stikeman Oil Company in respect of any offers that that company has received?

A. Yes, I have.

3452 Q. Will you state what they are?

A. Prior to 1936, I don't recall exactly what the exact date was, we lost them to the White Star Refining Company, I think that must have been about 1932 or 1933, and for a short period of time White Star Refining Company, which is now Socony Vacuum Oil Company, supplied them with their requirements of gasoline. Previous to that, Mr. Stikeman told me that they were solicited by the White Star Refining Company, and he was getting a better proposition than we were giving him at that time. Just how much it was, I don't even recall, but it was at least from a half to one cent per gallon better. Then, it was at a later date he had an offer from Phillips 66. That offer was along the line of a contract offer. That is, they wanted to give him a contract and wanted to tie him up for a certain number of years. Mr. Stikeman and I discussed that at quite some length. It was quite an advantageous offer, advantageous from the standpoint that his margin would have been more than we were allowing him at that time.

The next offer that he told me about was in December of 1940 when he received the offer from the National Refining Company, along the same lines, about which I have testified in regard to the Wayne Oil Company.

Q. Now, was there one of these offers that was made
to, I think, the Citrin-Kolb Company and to which
3453 you have referred that was also made to the Middle-
ton Oil Company which you at that time were supplying?

A. I don't know, Judge Hanley, whether that is at the same time or not, or whether that occurred at about the same time.

We lost the Middleton Oil Company to the Shell Corporation on their Silver Flash Gasoline, and I presume we have the record as to just when we lost them, but I wouldn't say definitely.

Q. Do you have any recollection now as to whether or not it was about that time that Mr. Citrin told you of one of these offers from Shell?

A. It was about that time.

Q. Now, in respect to Mr. Ledbetter and Mr. Stikeman, I will ask you the same question as heretofore asked about Citrin and Ned's. In addition to these offers which you have been able to recall the specific detail about, have they frequently talked to you and told you that they were constantly being solicited to purchase gasoline from some other supplier, or being offered inducements and services that you were not furnishing to them?

A. They have from time to time told me about such offers.

I remember some other offers that they told me about from the Aurora Gasoline Company who had solicited them—.

3454 Q. Do you have conversations with them those
two last named men, Ledbetter, and Stikeman, at intervals, about the same as you do with Citrin and the Gershensons?

A. Yes, sir. I make it a point to keep in very close contact with our jobbers on account of the real competitive activity. That is, they are accounts that you will have to watch very closely at all times.

Q. You have mentioned in your testimony that they have referred to the fact that they did not have a contract with the Standard Oil Company. That is true, isn't it?

A. That is true, sir.

Q. They all buy on the same day ~~to day basis, do they~~ not?

A. Yes, they do.

Q. And they all buy on identically the same terms?

A. Yes, they do.

Q. Now, they could quit the Standard Oil Company any minute they wanted to, couldn't they?

A. They could quit them tomorrow, if they like.

Q. It is just a matter of whether or not they desire to continue their purchases from the Standard Oil Company?

A. That's it, yes, sir.

Q. They are under no obligation, are they, either by any written documents or any oral understanding 3455 in any manner, to continue to buy?

A. No oral understanding or no written documents or no contract. They can quit tomorrow or quit the next minute.

Mr. Hanley: May I have just a minute to see if there is something that will consume just a short time, rather than get into a long subject?

Trial Examiner Ballinger: Certainly. We will take a two minute recess.

(A two minute recess was taken.)

Trial Examiner Ballinger: Come to order.

By Mr. Hanley:

Q. Mr. Raupagh, are you familiar with what is known in this lawsuit as the Taggart survey, cost survey?

A. Yes, sir.

Q. Do you recall the cents per gallon that Mr. Taggart arrived at to be the cost of selling gasoline at retail?

A. 4.8¢.

Q. From your experience as a marketer in Detroit what is your judgment as to whether the actual cost of selling gasoline is more or less than 4.8¢ a gallon?

Mr. Austin: I object to that question, your Honor, as calling for the conclusion of the witness. It hasn't been established that he is competent to answer that question which would necessarily have to be based upon a cost study and would have to be a cost study involving 3456 knowledge of accounting. I think it is obvious the witness isn't qualified to answer.

Trial Examiner Ballinger: The Examiner is of the opinion that the witness isn't sufficiently qualified.

Mr. Hanley: Is not sufficiently qualified?

Trial Examiner Ballinger: Is not sufficiently qualified.

Mr. Hanley: I am not asking him for a figure and I am not going to, Judge, but I will qualify him a little further to ask him the type of question I want.

Trial Examiner Ballinger: You have never engaged in the retail business, have you?

The Witness: No, sir; only so far as it pertains to the Standard Oil Company.

Trial Examiner Ballinger: But you never conducted a retail station, did you?

The Witness: No, sir.

Trial Examiner Ballinger: All your knowledge is what you have observed?

The Witness: What I have observed and what I have seen.

By Mr. Hanley:

Q. Up until September, 1936, the Standard Oil Company was engaged in the retail business of selling gasoline at service stations, were they not?

3457 A. They were.

Q. And that was true all over the territory of the Standard Oil Company and in all of the localities that you testified that you had been connected with the market?

A. It was.

Q. Up until that date, and since 1904, were a part of your duties in the various localities that you worked, to supervise and aid in the supervision of the operation of retail service stations?

A. It was.

Q. I think you have testified that at least on or about that time the margin between the posted service station price and the dealer tank wagon price was 3½c?

A. Yes, sir.

Q. Since September, 1936, you have had supervision of the sales to service station operators in the Detroit area involving many hundreds of service station operators, have you not?

A. Yes, I have.

Q. Do you know of many of those operators that have been in business for many years last past in the Detroit area?

A. Yes.

Q. Now, do you know as a matter of just practical fact
whether or not service station operators, generally
3458 speaking, actually get as much as 4.8¢ margin above
their cost of gasoline?

A. That question isn't quite clear, Judge.

Q. Without any reference to taxes now, just the cost of gasoline, is it true, generally speaking, that service station operators get, when they sell at retail, as much as 4.8¢ a gallon above the price they pay for the gasoline?

3459 A. On gasoline alone?

Q. Yes.

A. They generally do not.

Q. And has that been true for the years last past that you have had experience back to 1904?

A. That is true, it is true.

Q. Now, without attempting to state any figure, unless you know one, Mr. Raupagh, as to what the cents per gallon cost of retailing gasoline is, are you able to say whether it is less than 4.8¢ a gallon in the Detroit vicinity?

Mr. Austin: I object, your Honor, and I would like to point out that the figure being asked and the figure which Dr. Taggart's surveys relate to, was an average cost of small operators, each one being operated by an operator, wherein, if it is intended to use the criterion of the Standard Oil Company, that was an operation by one company of a large group of stations and it was at a previous period and, furthermore, the record shows that what has been just testified to, that the service station retail margin has been for a year and a half or more around 3.3¢ a gallon. I guess now it is a little more than that in the last few weeks. Further, that the determination of the average cost of retail gasoline per gallon involves allocations of various overhead costs and allocations of cost as
between gasoline and other products and I submit
3460 that on all of those grounds, the witness has not shown
to be qualified to answer that question.

Mr. Hanley: Well, I will answer, perhaps, one inquiry of counsel. There is no effort to compare the 3½¢ margin referred to in the price postings by the Standard Oil Company in this matter of cost of selling gasoline at all, Judge. I alluded to that to demonstrate the experience and the qualifications of the evidence. As a matter of fact, it probably cost the Standard Oil Company more to sell gasoline than it costs these small operators and, I think Dr. Taggart's testimony and Dr. Taggart himself is some authority for the proposition that a large company frequently has higher costs in that type of operation.

Trial Examiner Ballinger: Since the Standard Oil Company was engaged in the retail business, the price, the cost structure has undergone change, has it not?

The Witness: You mean the price that we were charging?

Trial Examiner Ballinger: No, I mean the actual cost to the market, wages, everything.

The Witness: Yes, I think there are changes taking place, yes, sir.

Mr. Austin: I would like to further point out, if your Honor please, that even if the Standard Oil Company were to operate service stations now and wanted to prove their cost of operation, it would be necessary to do 3461 so by an expert accountant who would get the cost study so that he could be cross-examined on the method by which he had reached his conclusions and I don't believe Mr. Raupagh is so qualified, even if it were a question of Standard Oil Company costs, and it is certainly not that in this case.

Trial Examiner Ballinger: The Examiner is prepared to rule. Objection sustained.

By Mr. Hanley:

Q. I will just ask you one further question on this subject, Mr. Raupagh. You have said that you have known of many service station operators who have been in business a long time in the Detroit vicinity and you have said that the margin above their cost of gasoline at which they sell gasoline does not generally equal 4.8¢ a gallon. Now, I will ask you as to operators, many of them whom you have known to be in business for a long time in Detroit are still in business, are they not?

A. They are.

Q. Did you ever hear of a service station at which gasoline was sold at a cost of 22.7¢ a gallon?

A. No, I never have.

Q. Did you ever hear of one at which gasoline was sold at a cost of 15.4¢ a gallon?

A. No, I never have.

Q. Referring you to Exhibit No. 58, Mr. Raupagh, 3462 which is the chart, it appears therefrom that in 1940 there were something in excess of 460 million gallons of gasoline sold in Detroit and that of that total, the four jobbers involved in this action sold 3 per cent through all channels, wholesale and retail and any other way they did sell it and that jobbers, generally, and that they sold 13,600,000 odd gallons, and that jobbers of all classes in Detroit sold a total of about 168,500,000 gallons of gasoline and that other companies, including what you have defined as majors, sold about 231,198,000 gallons or, about 50.3 per cent. Now, giving consideration to the facts disclosed by those figures and by all of the figures on chart 58 and bearing in mind that the 3 per cent total gasoline in 1940 that was sold by the jobbers include all that was sold by all of the four jobbers, both at wholesale and through their own retail outlets; from your experience and in your judgment and opinion as an oil marketer and with particular reference to your experience in the Detroit market, what is your opinion as to whether or not the 3 per cent of gasoline or thirteen-odd million gallons of gasoline sold through the four jobbers in Detroit in 1940 was a sufficient amount to have had any appreciable effect upon competition in gasoline commerce in the City of Detroit?

Mr. Austin: Just a minute.

Trial Examiner Ballinger: Do you fully understand that question?

3463 The Witness: Yes, I do, your Honor.

Mr. Austin: The question was whether the volume of these four jobbers is large enough to have any appreciable effect upon the competition. I think that question—

Mr. Hanley: If you don't mind, I think I will add a little to that question.

By Mr. Hanley:

Q. I would like to add to that, Mr. Raupagh, this; that, giving consideration to all of the facts that I have stated and, giving consideration to the manner as you have testified about in which these four jobbers sold gasoline—

A. Pardon me, did you say the method?

Q. The method and the manner; set-up of their business in which they handle this gasoline. What, in your opinion and judgment, is the fact as to whether their volume handled in the manner and method to which you have testified has any appreciable effect on gasoline competition in Detroit or tends to substantially lessen competition or restrain trade or tends to create a monopoly in gasoline competition? Does it have the effect of doing any of those things, in your judgment?

Mr. Austin: Well, as the question is now worded I think it calls for a legal conclusion and it is bad on that ground and, aside from that, the question isn't, in this case, of volume, whether volume affects competition
3464 or whether volume does any of those things. It is a question of price and I think if retail competition were referred to as locally between the jobber station and other stations, the witness' answer might be one thing and if it refers to whether this volume is large enough to affect wholesale competition between these various jobbers listed, or as between refiners, perhaps the answer would be different. I think the answer to the question of competition relating to volume is capable of a definite answer. I think as worded it would be irrelevant and also since it now refers to the effect upon competition in a legal sense, and tendency toward monopoly, I think it calls for a legal conclusion and I object to it on all those grounds.

Mr. Hanley: I may say, your Honor, that the question is not perhaps well framed but it is framed under the ruling of the Federal Trade Commission case in the group of cheese cases which were decided by the Federal Trade Commission, and if I understand those decisions at all, the Federal Trade Commission took exactly the reverse position from that now announced by Mr. Austin when he said that this question isn't in the case and that this is merely a question of price.

In those cases the Commission found a price differential but they found that it did not substantially affect competition and as an expert in the oil business, with particular reference to experience with the competitive situation
3465 in Detroit, I am propounding this question to this witness.

Mr. Austin: If your Honor please, it might very well be in some industries and some commodities that a charge might be made as to price discrimination where such a small portion of that commodity in the stream of commerce was involved that perhaps it might at least be claimed that it couldn't have any appreciable effect, but I think here, I think the Trial Examiner can take judicial knowledge and I think he should do so of the fact that when these four jobbers, selling fifteen million gallons a year which, I believe, is 3 per cent of the business in Detroit and that they operate a considerable number of retail stations; I think the Trial Examiner can take judicial knowledge of the fact that everyone of those retail stations affects competition in the neighborhood of that station and that being true I believe that the answer to the question must necessarily be in the affirmative and if it is a matter which the court can take judicial knowledge of, I see no reason why the witness should be asked to answer.

Trial Examiner Ballinger: The Examiner is of the opinion that the conclusion of the witness is of no greater value than the conclusion of the Commission, or anyone else.

The facts are present and you can arrive at your own conclusion as to whether or not competition is a factor.

3466 Mr. Hanley: Now we will try and get this Exhibit 63 added to, o comply with the requirements of the Court, and I will advise Court and counsel now that Mr. Austin has requested me that I ask Mr. Raupagh to be prepared to testify tomorrow relative to the figures, gallonage, business done by what Mr. Raupagh has described as major companies in Detroit and has requested a certain form E.L.A., I think it is called, and he wants to go into that with Mr. Raupagh. That is material that is not proper cross-examination but I have indicated that we will not only supply the material, but Mr. Austin may examine to the fullest extent he desires, on cross-examination.

Now, your Honor, we have left a long subject and it involves these picture books, again, and I think I have cleaned up practically everything else with this witness. I believe that we ought to recess at this time, if it is agreeable to counsel.

Mr. Abbott: Your Honor, may I suggest I don't think you made a definite ruling on the last objection?

Trial Examiner Ballinger: The Examiner sustains the objection on the ground that it wasn't a question calling for expert opinion.

Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

3467 The motion of counsel for the Respondent is granted and now, at 5:10 p. m., the hearing stands adjourned to be reconvened at 9:30 a. m., May 8, 1941, in Room 859, Federal Building, Detroit, Michigan.

(Whereupon, at 5:10 p. m., May 7, 1941, the hearing in the above-entitled matter was adjourned, to reconvene on May 8, 1941, at 9:30 a. m.)

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Room 859 Federal Building,
Detroit, Michigan.
May 8, 1941.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois, and

Arthur J. Abbott, Esq., of the firm of Abbott, MacMahon, and Roberts, 2230 Buhl Building, Detroit, Michigan, on behalf of the Respondent.

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PROCEEDINGS.

Trial Examiner Ballinger: We will come to order.

This is a reconvening at 9:30 A. M., Eastern Standard Time, May 8, 1941, in Room 859 Federal Building, Detroit, Michigan, in Docket No. 4389, in the case entitled Standard Oil Company.

The last hearing was held in Detroit May 7, 1941.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

P. A. RAUPAGH, having been heretofore duly sworn, resumed the stand, and testified further as follows:

Direct Examination (Continued) by Mr. Hanley.

Q. Mr. Raupagh, there has been a lot of discussion in this case about the prevailing retail service station price of gasoline in Detroit from time to time. I don't know why there should be any mystery or confusion, but there seems to be in the minds of some of us. Tell us, please, just what you mean by the prevailing retail service station price; how you obtain it, and what it is, insofar as it is reflected in records that are kept by your office.

A. I mean by the prevailing retail service station
3470 price the postings of all the service stations in the
area and the prevailing retail price is the postings
of the majority of those dealers in the area.

Q. Now, it is not an average at all, is it, Mr. Raupagh?

A. No, sir.

Q. That is to say, when you make a survey such as you have testified to, you do not take the various service station prices that you find posted at all the 2300 or 2400 service stations in Detroit and then average them up, do you?

A. No, sir.

Q. Is it or is it not a fact that you go about the city and look at price postings on all service stations, and if you find a majority of those service stations—

Mr. Austin: Your Honor, I object to that. I submit that the witness should be allowed to tell how he does it. If it is material I think the witness might just as well—certainly he is as familiar with it as counsel is.

By Mr. Hanley:

Q. Just explain the mechanics of what you do when you undertake to find a prevailing service station price.

A. When we determine the prevailing service station price we take the price posted at all of the stations in the area for each brand of gasoline, and the majority of those postings is considered the prevailing retail price.

By the majority of postings I mean the majority of
3471 postings that are similar or alike. That is the prevailing retail price.

Trial Examiner Ballinger: Now, let me see if I understand you. If a majority of them post it at 17¢, for instance, would that be the prevailing price?

The Witness: Yes, sir.

By Mr. Hanley:

Q. Now, that doesn't involve any computation or figuration at all, does it, Mr. Raupagh, except counting the stations that have a given posting?

A. That's right.

Q. Now, you have said a majority of stations give you your lead as to what you would call the prevailing price. In your experience in Detroit what has the lowest percentage ever been, approximately, constituting the majority which you regarded as establishing the prevailing price?

A. The lowest percentage that we have found would be from 65 to 70%.

Q. Now, is it or is it not a fact that it is upon that basis of determination of prevailing retail price that you have referred to the retail prevailing price when you have used that term in your testimony?

A. It is.

Q. Is it upon that basis and method of determining
prevailing price that you have caused these various
3472 exhibits which reflect a prevailing retail price, to be
prepared in your office?

A. It is.

Q. Now, specifically, is that the basis upon which you caused the prevailing retail price computations to be placed upon the various photographs of filling stations that have been and will be offered in this lawsuit?

A. It is.

Q. Yesterday, in your consideration of the list of companies that were reflected on Exhibits 55 and 57, you referred to a number of them on Exhibit 57 as being cut-price marketers. Do you recall that?

A. Yes, sir.

Q. You also referred to the operations of a number of those operators as being comparable to the operation of Ned's Auto Supply Company. Do you recall that?

A. Yes, sir.

Q. Now, I wish you would state what you mean as to whether or not you regard Ned's Auto Supply Company as a cut-price marketer in Detroit?

A. I do not regard them so.

Q. When you said that the operations of these marketers were comparable to Ned's operations, explain just what you did mean.

A. In my testimony of yesterday, when I made
3473 the statement that operations were comparable to
Ned's, I meant that they were comparable as far as their purchase of gasoline is concerned on a tank car price basis and that they operated, directly operated, retail stations, which is comparable to Ned's.

Mr. Hanley: Now, I will say, your Honor, that we have here three books of photographs that are broken down for each year by the name of the company or brand of gasoline involved. These are photographs of service stations that were taken in each of the years 1939, 1940, and 1941. They contain—maybe your Honor can follow me if I hand you one of these books—they contain divider sheets which indicate the brand of gasoline that is involved in the photographs that immediately follow. There are in the books certain cards, discount cards, and, in some instances, I think, invoice tickets or some indication of price other than a photograph. All of these photographs, or the mounting sheet of the photograph has on it a computation of the prevailing price per gallon, and showing the difference between the price posting reflected in the photograph and the prevailing price in effect at that time. The photographs themselves, ordinarily reflect the date on which they were taken and the location. As to the photographs themselves, and their mounting sheets, I would prefer to make the offer as a bound volume and as 3474 they presently appear. I indicated yesterday that it was not my purpose at all to urge any further argument upon the Court as to any reason why the Court should receive the photographs with the prevailing price computation upon it as it appears. In that regard, I say only this: that I do not think it was said, your Honor, in connection with the former argument on that phase of the offer when certain photographs were formerly offered, that the prevailing price was established on the Government's case, and the Government's case depends upon their establishment of the prevailing price. It was a reduction below the prevailing price that they charge Ned's and made in some instances Citrin-Kolb stations had made. So there became no confusion or mystery or anything unusual about this prevailing price situation until the Respondent began to offer some testimony as to prevailing prices.

In addition, also, and since the matter was before the Court formerly, the evidence of Mr. Raupagh has been adduced which, if there ever was any confusion in this prevailing price matter, it certainly is entirely clarified now. Hence, I propose to make these offers with the photographs as they appear on their mounting sheets, carrying the prevailing price or differential computation. If your Honor is still of the same view that that is of no aid at all and desires to apply the same rule as here- 3475 tofore applied, we will, of course, make a re-offer with the exhibit altered in conformity with the requirement of the Court. We will make no further point of that, but I do think that your Honor, in consideration of these present offers, should give serious consideration, first, to the fact that the Government rested its case on the necessity of establishing a prevailing retail price. When it put on its own testimony it went in without any objection on our part. We agreed, of course, that there was such a thing as a prevailing retail price, and everybody in the oil business in Detroit knows it from time to time and knows what it is, and, secondly, that there has been added, since your Honor last ruled, the testimony of Mr. Raupagh.

Now, that's all I have to say about these notations, your Honor. Anything else in the way of notations that are not explanatory of the exhibit and regarded as being proper, we will take them off, if there are any. I don't know whether there are any.

Now, as to the other material, if there is objection to that, we will either have to lay a further foundation, or abandon the offer. That's all there is to that. I don't know what the attitude of counsel is going to be on this. He has had an opportunity now for many hours to consider not only the question involved here, but to look
3476 at the actual exhibit which we propose to offer, and it would greatly facilitate the thing, I believe, your Honor, if these books which are bound and which will go with the Reporter could be marked as Exhibits in their entirety, with the extraction, perhaps, of any material to which counsel may want to make other than one objection to the exhibit as a whole, which we will offer separately.

I may say, your Honor, that as to the years 1939 and 1940, we have only one volume of these photographs. As to the year 1941 we have a couple, at least, or three. The reason for that is that the years 1939 and 1940 were built up in the ordinary course of the routine business of the office without any contemplation of ever having to use them in this case. They were just a record of the office, the same practice was pursued in 1941, but then we had in contemplation the probable use of this material in this case, and we were able, then, to make additional copies, but we will have no copy of 1939 and 1940, once it goes into this case.

Now, I am prepared to adopt any mechanics that your Honor may suggest to mark these exhibits and facilitate getting to the point where we can make our offers.

Counsel has had the opportunity just alluded to, so he may have a suggestion.

Trial Examiner Ballinger: The Examiner is in 3477 some doubt as to how these exhibits should be marked. They are not securely bound, as is required by the rules of the Commission.

The Examiner would be glad to hear from counsel for the Commission.

Examination on Voir Dire by Mr. Austin:

Q. Mr. Raupagh, I think there was a survey introduced yesterday morning that had a statement of prevailing retail price, and I think you stated that the information in that survey was compiled, including the prevailing retail price information, by a survey of all the service stations, including what you referred to as non-brands and off-brands.

A. Yes.

Q. Now, in so far as there are prevailing price notations on these pictures, were those obtained in the same way?

A. Yes, sir.

Q. And what you stated that your prevailing price is the price charged by the majority of the stations, I believe at the time you made the various computations—

A. Yes, sir.

Q. When you say a majority, you mean a majority of all stations, including what you have referred to as cut-price marketers?

A. Yes.

3478 Q. Now, let me ask you whether the prevailing price that you have arrived at in that manner is the same and has been the same at all times during the period involved in this case as the prevailing retail price on a major brand gasoline?

A. It is the same.

Q. Now, do I understand you to say that in your opinion that not less than 65 to 70% of the stations in Detroit have been charging a price as high or higher than the prevailing price at the time the survey was made?

A. That's right.

Q. Would you say that 65 to 70% had been charging the prevailing price?

A. Yes.

Q. I wasn't sure whether you meant that price or a higher price.

Did you hear Mr. Biber's testimony here the other day when some other pictures and photographs were offered?

A. I don't believe I did.

Q. Well, Mr. Biber testified that—I might say that on those pictures were the notations of the prevailing price, and I think also it is clear that by prevailing price he meant the same thing that you meant by it, that is, in so far as your use of the term in connection with these prices is concerned, but Mr. Biber testified that in his opin-
3479 ion, during 1938 and 1939, the majority of the stations in the neighborhoods where these pictures were taken were not charging the prevailing price, that they were charging less than that.

Mr. Abbott: You mean just around six locations.

Mr. Austin: I said in the neighborhoods where those pictures were taken. However, those neighborhoods were fairly well scattered.

By Mr. Austin:

Q. I want to ask you, Mr. Raupagh, whether you would agree that there were periods during 1938 and 1939 when the majority of service stations in Detroit were not charging a price as high as the prevailing price. I am talking about what they were charging, now, and not what they were posting.

A. I would say I have no way of definitely determining that, Mr. Austin. I believe there are times when service stations charge—I know there are times when service stations charge less than their posted price, but by our surveys, and the prevailing price is based upon what the service stations post in the way of prices, either price signs or the price that is posted right on the pump, when the computing pump is used, and there is the price posted on it.

Q. Suppose there is a price on the pump of 17¢ a gallon and then out in front they have a sign which says: "6 for 96," a big sign, do you use the price on the pump
3480 or the price on the sign?

A. We would use the price on the sign.

Q. So, as to any openly advertised price cutting, such as determined by these pictures, I understand in determining prevailing price, you would take the sign rather than the price on the pump?

A. We would take the price posted on the sign, yes, sir. That refers principally to stations which have no price sign posted, and, in that case, we look at the pumps, if we can.

Q. There has been considerable reference in this case from time to time as to what has been referred to as under-canopy prices. Do you understand what is meant by that?

A. Very much so.

Q. Is it your opinion that leaving that sort of a discount out of consideration, that from 65 to 70% or more of the service stations in Detroit have charged what you have referred to as the prevailing price at all times when you have made a computation of that price?

A. Yes, leaving that out.

Mr. Austin: Well, now, your Honor, I submit there never has been any doubt of the meaning of the term prevailing price, but I think there might be considerable doubt about the meaning of it used on a photograph 3481 if the photograph is offered for the purpose of showing that a particular station was charging the price lower than the majority of stations or lower than the prevailing price, as referred to on the photograph, and, of course, we get back to that same argument we had the other day that unless the price on the photograph is the price charged by the majority of the stations at that time that the photograph means nothing. If all the stations in that neighborhood were charging that price, as shown on the photograph, that wouldn't be considered as price-cutting, and that might not be the prevailing price. Of course, where Mr. Raupagh said that where there are open signs, that has been followed in determining what the prevailing price is. I think it is a very uncertain way of showing price-cutting by particular stations, and I haven't attempted to go through all those figures or all of those books. I looked at the 1938 book and there are a group of sheets in the front of that that I would object to in toto, and also I would make the same objections I made the other day to any reference to any notations on prevailing price or any computation based on prevailing price on any photographs of stations handling non-brand gasoline. Your Honor sustained that objection, and I make the same objection here.

As to the major oil company gasoline, I will also 3482 make the same objection that I made before, and that is that to prevailing price notations on photographs taken in 1938 or 1939 or at any time—well, that runs back to 1936. I don't know how far these (indicating) go.

Mr. Hanley: I don't think we are proposing to offer anything prior to 1939 at all this morning.

Mr. Austin: Well, there is one book there for 1938.

Mr. Hanley: Is there?

Mr. Austin: Yes, there were four books submitted to me.

Mr. Hanley: There is a separate book here that refers to stations surrounding the Ned's service stations, which, I think, is not broken down into years. It is broken down into a locality and is not duplicated in the other books, and I think that book may contain pictures of dates prior to 1939, and even prior to 1938. I am not sure.

Mr. Austin: Well, as to the major brands, the objection only goes up to this, up to January 1, 1940, and that is on the basis of Mr. Biber's testimony, as well as upon the testimony of the Commission's witnesses who showed that there was very prevalent price-cutting during parts of 1938 and 1939 and Mr. Raupagh has not said anything to contradict that, excepting so far as he said that where the signs were shown, that is taken into consideration, 3483 but otherwise, I don't understand Mr. Raupagh to say that at all times during 1938 and 1939 the so-called prevailing price was actually being charged by the majority of stations, although he does say that the majority of stations at all times were posting the prevailing price, as I understand it.

Mr. Hanley: Just to be sure we understand each other when we are referring to the Government's evidence, Mr. Austin, it is my recollection of the gist of that evidence that there was a time in 1938, perhaps a little before or a little after 1938, when the witnesses testified that there was a very prevalent price-cutting situation in Detroit; namely, that they were reducing their price one to 2¢ below what they called the prevailing price. Is that your recollection of the testimony?

Mr. Austin: Yes.

Mr. Hanley: It is my further recollection of the testimony that the witnesses who were called, said that they charged their posted price up until the time they put what they called the sign up; namely, a sign something in substance to the effect: "1¢ off," or "2¢ off." Is that your understanding of the testimony?

Mr. Austin: Yes, it is my understanding. Well, yes, to answer your question.

By Mr. Hanley:

3484 Q. Now; I would like to ask Mr. Raupagh if at that time, or at any time in your surveys, in an effort to find the prevailing price, you came to a service station which had a sign up, "1¢ off," or "2¢ off posted price," would you regard that as a price posting which you would take into consideration in determining whether that station was selling or posting at the regular or prevailing price?

A. No. We would regard that in the light that instead of giving an under-canopy discount, the man had openly posted that he was giving under-canopy discounts.

Q. That's what I am getting at. Would you then regard that individual as selling on the posted price?

A. We would regard that individual as selling at less than the posted price.

Q. Now, in determining the prevailing price which you say you have always found to be a minimum of a 65¢ majority, would that kind of a station fall into the 35% price-cutting group, or into the 65% prevailing price group?

Mr. Austin: I don't think it is clear whether the price on the pump was what has been generally called the prevailing price. At least I am not clear on it.

Mr. Hanley: May Mr. Raupagh answer that question, if he can?

Mr. Austin: I mean, you have got to take a figure. You have got to assume whether it is or isn't.

3485 Trial Examiner Ballinger: Let the witness answer.

Mr. Austin: O. K.

A. It would come within the 35% that were cutting price.

Mr. Hanley: Now, your Honor, it seems to me that answers the quandry that Mr. Austin is in, or confusion, if he is in any, about this prevalent method of reducing price in 1938 about which Mr. Biber was talking. There, of course, has to be a figure a base figure of some kind, if you are going to take 1¢ or 2¢ away from it, to make the actual price. That now appears to be a price-cutting method which would be taken care of in these surveys.

Mr. Austin: Well, I still don't agree with the conclusion reached. I don't think there is any doubt on the facts. I don't want to get into any long argument on this, either. All these points were ruled on the other day, and I simply request that the same rulings be made on these photographs and exhibits as to those notations which were made in connection with the ones offered by Mr. Biber. I see no reason why the ruling should be changed.

Mr. Hanley: With the statements I have made of what we would like to ~~have the Court~~ consider, in view of yesterday's testimony and what was put in on the Government's case, I haven't anything further to say, your Honor,
unless your Honor requests it. I promised I wouldn't
3486 argue these issues again. If your Honor understands
what Mr. Austin's objections are—which I confess I do not—and believes they are well taken and wants to make the same rulings, we will just make the same offers.

Trial Examiner Ballinger: The Examiner understands one of Mr. Austin's objections to be that the explanation offered by the witness of the prevailing price does not appear on the exhibit and that the exhibit, standing alone and disconnected entirely, without the witness' testimony, convey an erroneous impression. Is that correct?

Mr. Austin: Yes your Honor.

Mr. Hanley: Well, is there any dispute now about the prevailing price? I can perceive, your Honor, that if there were a dispute about the prevailing price, that that might be a well-grounded objection. That is, if there were two prevailing prices or if the method were put in question, but if there is only one prevailing price, one method, and it is undisputed in the lawsuit, and certainly I understand it to be undisputed both on the Government's case and on the Respondent's case. Am I right about that, Mr. Austin?

Mr. Austin: What? About what we were talking about on these other exhibits?

Mr. Hanley: About prevailing price; yes.

3487 Mr. Austin: I think that is clear.

Mr. Hanley: If that be true, and there is no dispute on the prevailing price, then I don't see how anybody can be misled. The explanation is a computation which I conceive the Commission could make, but I also know they never would make it. We have to make it somehow for them, if we want to present it, but it is just a convenience.

Trial Examiner Ballinger: The notations on the photographs are placed there merely for convenience, as the Examiner understands it.

Mr. Hanley: That is true. It just avoids the necessity on our part of recomputing the whole thing, maybe in a long series of sheets and indices and relating each one to certain photographs. That is hard to do, in the first place, and it is awfully hard to get any Court to look at it after you have done it, Judge. You know that, from your own experience.

Trial Examiner Ballinger: I realize that the notations on the exhibits would be a convenience and aid probably to both counsel and the Commission, but I am uncertain as to whether they might not, considered separate and apart from the witness' testimony, create some erroneous impression with reference to the prevailing price. Now, that's all that bothers the Examiner.

3488 Mr. Hanley: I would agree, Judge, agree that Mr. Austin's objection would be well-founded and that fear that your Honor has just expressed would have a basis if there were any dispute at all about what the prevailing price were, but if there is no dispute on that subject, and there isn't, then the thing can't be misleading. They just can't be.

Mr. Austin: I feel they might very well be misleading. In the first place, if the only purpose of putting the computation on those pictures is that is the prevailing price, in the way it has been used here, I think the computation is meaningless and it is entirely irrelevant and immaterial to show some Joy or Zip station, for instance, is charging a certain amount below the price charged by the majority of major brand gasoline stations. Therefore, when you put it on there, the natural assumption is it is put on for some purpose, and some purpose which I would respectfully call rather an absurd computation, and there is bound to be some inference that the prevailing price shown on there is the prevailing price for the brand of gasoline shown in the picture, and we know that isn't true at all, because it isn't contended here that the prevailing prices used here are the prevailing prices of any brand of gasoline, much less the cut-price
3489 brands and, secondly, when the cut-price period was prevalent, it now appears that a certain price was posted on the station's pumps that was what was used in obtaining the prevailing price, and I am not saying it shouldn't have been, but if at a considerable time a considerable number of stations in the neighborhood were

selling below that price, why, then, perhaps the cut-price was the prevailing price.

Now, there seems to be a dispute between Mr. Biber and Mr. Raupagh about that. I don't know whether there is any actual dispute, but Mr. Biber's testimony is one way as to certain locations, and Mr. Raupagh's testimony seems to be the other way, as a general situation based on his computations.

Trial Examiner Ballinger: Mr. Raupagh took in the entire district.

Mr. Austin: That's right.

Trial Examiner Ballinger: And Mr. Biber's testimony was confined to a particular locality.

Mr. Austin: That's right. I don't object so much to the annotations, even, as to 1938 and 1939 remaining on the major brands, but you remember you made certain rulings on those pictures, and they went in evidence, and then later on your Honor granted a motion to strike out certain notations as to prevailing price that had previously been admitted on photographs during 1938 and
3490 and 1939, just up to January 1, 1940, and it may be, on the basis of Mr. Raupagh's testimony, that there is more reason now—I will put it this way—some reason for reconsidering the question of the 1938 and 1939 pictures on major brands, but I think all the rulings that were made at the time the other photographs were offered should be adhered to here. I see no reason for changing those.

Mr. Hanley: Irrespective of the ruling, and just to clarify Mr. Raupagh's position:

By Mr. Hanley:

Q. I will ask you, Mr. Raupagh, if you agree that probably the worst price-cutting period in Detroit within recent years was in 1938 and early 1939?

A. Yes, sir.

Q. And Exhibit 60-B, concerning which you testified here yesterday, shows a survey as of February 15, 1938, under house brand gasoline, and indicates there a figure "913"?

A. Yes, sir.

Q. I think you have explained that that means that you found, out of all of the stations in Detroit that you looked at, which would be substantially all of them, would it not?

A. Yes.

Q. And that would be how many, approximately; 3491 all the stations in Detroit?

A. Well, it would be between 2500 and 3,000.

Q. Now, this figure 913 means that out of all those stations you found 913 of them below the prevailing market on house brand?

A. That's right.

Q. And, as you have explained prevailing market?

A. That's right.

Q. And so far as your survey disclosed, all other of those stations were observing the prevailing price?

A. Yes, sir.

Mr. Hanley: I think that covers what your Honor has in mind, too. This is a comprehensive survey.

Trial Examiner Ballinger: Is there any question about the computations appearing on the exhibits, Mr. Austin?

Mr. Austin: The computations?

Trial Examiner Ballinger: Yes.

Mr. Austin: Well, I haven't gone through them and attempted to check each one.

Mr. Hanley: We will vouch for them, your Honor, as far as the mathematics are concerned. They have been gone over and checked and rechecked by the comptometer girls after somebody figured them, in the first instance. I think it would be most unusual if there is any 3492 mathematical error existing.

Trial Examiner Ballinger: Is there any difference of opinion or view on the part of counsel for the Commission or Respondent as to the meaning of the term "prevailing price"?

Mr. Hanley: I hadn't understood so from what our discussion developed this morning.

Trial Examiner Ballinger: I want it to appear definitely on the record.

Mr. Austin: There is no doubt in my mind in the way it was used in the exhibits introduced by the Commission and in the survey introduced yesterday by the Respondent. I think on these photographs, the photograph with descriptive matter, I think that prevailing there might well be understood to mean something else than it means on the survey, for instance.

Trial Examiner Ballinger: Is there any difference between counsel for the Commission and Respondent on the record as to the meaning of the term "prevailing price"?

Mr. Hanley: I don't think so, but I will state my position. That's perhaps the easiest way to get at it, and Mr. Austin can say whether he then has any disagreement.

Trial Examiner Ballinger: You may do so.

Mr. Hanley: The Respondent's understanding of prevailing retail service station price is that which has
3493 been explained by Mr. Raupagh in his testimony
substantially as follows: That the prevailing retail service station price of gasoline in Detroit is ascertained by an actual physical survey of the city by someone who looks at the service stations and reads price signs or price postings that exist at those service stations.

That that survey is made of all or substantially all of the service stations that exist at the time of the survey in the city, and is made without reference to the brand or type of gasoline being sold at the station, or without reference to the company or person who operates the station.

That after that survey is made, those stations are counted which are posting the same or a similar price, and by a similar price I mean within 1/10 of a cent, or something like that, and if the majority of the stations surveyed are found, upon the count, to be posting the same service station price, all irrespective of brands or companies operating the stations, that price is accepted as the prevailing service station price in Detroit as of that time, and, further, it is my understanding of the testimony and of prevailing price that such majority of stations has not been less than 65% of the total stations surveyed, but that in the industry practice a majority of
the stations surveyed, that is, over 50%, if that time
3494 ever came, just as a matter of industry practice such
a majority would be regarded as indicating what the prevailing service station price was at that time. I add that because I want to make my statement complete, your Honor. The evidence does not disclose that that condition ever did exist in Detroit, even in 1938.

Mr. Austin: That what condition? I did not quite understand that last.

Mr. Hanley: That the majority of stations that were depended upon to give the basis for the prevailing price was ever as low as just over 50%, or, indeed, ever lower than 65% of the total surveyed.

Trial Examiner Ballinger: During the period covered by the survey?

Mr. Hanley: Yes, as of the time of the survey.

Trial Examiner Ballinger: Do expressions or statements of the meaning as to the term "prevailing price" made by counsel for Respondent conform to the understanding of counsel for the Commission?

Mr. Austin: Well, I don't know that I want to answer that question, your Honor. I would much prefer to state that later on. I think the testimony speaks for itself. I will say that I have no doubt in my own mind what I think is meant by prevailing price, and I don't think the testimony is uncertain, but whether I will accept the statement just made by counsel for Respondent, I 3495 don't feel called upon to state on the record at this time.

Mr. Hanley: Well, I have just one comment to make on that, your Honor, and I am going to make it. That is, that in view of the request and invitation of the Court and the fact that Counsel for the Respondent made the statement which was made, that Counsel for the Commission is definitely unfair to the Court and certainly unfair to the Respondent.

Mr. Austin: I don't think so at all. I am not bound in any way by the statement that was made by counsel for the Respondent, and, furthermore, your Honor, I think that this is such a fundamental question that really I feel apologetic for spending any argument upon it, because I think it is just simply obvious that none of these notations on any of these exhibits is evidence. So there may be no difference whether I concede that everything on it is 100% correct. It still is not admissible, because it is not evidence. It is only argument, and it is something which the Respondent has ample opportunity to prepare tables on and submit to the Commission later, but it is not—those computations are based upon what is in the record, and I don't think they are evidentiary in themselves, and I only consented to the retention of part of those notations on the previous pictures because I felt it was harmless and it would simply save time, but, in view of the attitude now taken by counsel for the Respondent, I hereby object to all notations on all 3496 these pictures, regardless of the prevailing price on them or whether they are correct or incorrect, and regardless of my understanding whether they conform to my understanding of the testimony of prevailing prices, and I wish to state that I shall certainly insist upon that objection.

Trial Examiner Ballinger: At the time the Examiner ruled upon the previous exhibits, the meaning of the term "prevailing price" as used by the Respondent had not been made definite and certain. It now has.

Mr. Austin: In my opinion, it was just as certain as it is now. At least, I have no doubt about the meaning.

Trial Examiner Ballinger: The statements appearing upon the exhibits, standing alone, could not possibly be considered as evidence, but, if they conform, as apparently they do, with the sworn testimony, then the exhibit will be considered in connection with the testimony, and in so far as the notations appear on the exhibits conform to the testimony given, they may remain.

Mr. Hanley: I think I understand that, your Honor, and I will undertake to lay the foundations in conformity with that ruling.

Mr. Austin: I would like your Honor to state on the record, if you care to do so, as to whether or not you consider any of these notations to be evidence.

3497 Trial Examiner Ballinger: The Examiner has already stated that the notations standing alone are not evidence.

Mr. Hanley: Now, if your Honor please, we are ready to proceed with this.

Mr. Austin: Then, I take it your Honor's ruling is that while they are not evidence, that nevertheless it is proper to use the material which is in evidence in an argumentative manner upon an exhibit which is evidence.

Trial Examiner Ballinger: If they have been established by evidence, then the evidence speaks, and this is but a reproduction of the evidence offered from the witness chair.

Mr. Hanley: There is no misunderstanding on the Respondent's part on that ruling, your Honor, and we will conform in the presentation of evidence. Now, we are ready to go ahead with these, your Honor, if we may have some understanding as to how we shall mark them.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: Come to order.

By Mr. Hanley:

Q. Mr. Raupagh, you have testified that in the course of the regular routine of your office, you frequently take pictures of service stations, get reports as to general 3198 retail competitive conditions by personal inquiry, yourself; by reports from members of your staff whom you send out for that specific purpose; that you build up permanent records in your own office. Do you recall that testimony?

A. Yes, sir.

Q. That is correctly stated?

A. That is correct.

Q. Did you examine your records with respect to certain photographs which you took in the year 1939 of service stations in and about the vicinity of Detroit?

A. We did.

Mr. Hanley: May I have this identified?

Trial Examiner Ballinger: The reporter will mark the documents Respondent's Exhibit 68, pages 1 to 55, for identification.

(The document referred to was marked, for identification, "Respondent's Exhibit 68.")

By Mr. Hanley:

Q. I hand you what has now been marked Respondent's Exhibit 68, for identification, consisting of 55 numbered pages, and will ask you if you have previously examined that group of pages and photographs? For your information, I indicate that that is the 1939 group, or book.

A. Yes, I have.

Q. You have previously done so?

3199 A. Yes, sir.

Q. Were those photographs taken at your instance, under your direct control and supervision?

A. Yes, sir.

Q. Were they taken at or on the dates which they bear?

A. Yes, sir.

Q. And do they correctly represent the location of service stations which they purport to reflect, in and about the City of Detroit?

A. They do.

Q. There appear on these mounting sheets on the photographs or the photographs, certain computations involving the use of the price of gasoline appearing on the photograph, a calculation from that as to the price per gallon as represented by the photograph and the prevailing price per gallon, and the per gallon difference. I will first ask you to explain what is meant by the column "Price" on the picture.

A. The column "price," on the picture, is the prices actually shown at the location of the service station represented by the picture.

Q. Now, that frequently occurs in the nature of what I think you people call a bushel price; something of that kind, so many gallons for a dollar, or so many gallons for so many cents.

3500 A. Yes, sir.

Q. Now I will ask you to explain the next column entitled "Price per Gallon," on the picture.

A. That is the price per single gallon as to the posting on the picture which may be for 7 gallons or 9 gallons at a unit price.

Q. Then, are we correct understanding, Mr. Raupagh, that that second column simply represents a computation to reduce the pictured price to a unit or gallon price?

A. It does.

Q. Now, the next column is entitled "Prevailing Price per Gallon." Does that mean, in every instance, on all of these photographs, the prevailing price as of the time the photograph was taken in Detroit for retail service station prices of gasoline as you have described prevailing price in your testimony?

A. It does.

Q. Now I refer you to the fourth column headed "Per Gallon Difference." Explain that, please.

A. The per gallon difference is the difference between the prevailing retail price and the price shown on the picture or on the second column of the computation.

Q. Now, is that a computation?

A. Yes, sir.

Q. Is it, in fact, just the arithmetical difference 3501 between the prevailing price shown and the price per gallon on the picture?

A. It is.

Q. Did you cause those computations to be made and those notations to be put upon these photographs?

A. I did.

Q. And were they done in your office and under your supervision and direction?

A. They were.

Q. Have they been checked and verified by the bookkeeping department of your office?

A. They have been checked and rechecked.

Q. Are you able to say that they are accurate?

A. Yes, sir.

Q. Is this particular group of photographs the only group that you have in your office; the only copy?

A. Yes; for the year 1939.

Q. Is it a record of the Standard Oil Company in your office?

A. It is.

Q. It was built up and became a part of your records without any contemplation of this lawsuit at all, was it not?

A. That's right.

Q. It was built up in the routine of your office work?

A. It was.

3502 Q. And had that been done for previous years?

A. It has.

Q. And has it been done for 1939 and 1940?

A. Yes, sir.

Q. And 1941?

A. Yes, sir.

Q. So far as you know, it will continue to be done?

A. Yes, sir.

Q. And it is done irrespective of this litigation; is that right?

A. Yes, sir.

Mr. Hanley: Now, if your Honor please, I have endeavored to be meticulous in including nothing in this group except the type of sheet that your Honor has ruled upon and the statement made by your Honor, where there was ever any questionable notation at all in any of these years, which were three or four, I struck it off with a pencil notation or line.

Trial Examiner Ballinger: What have you testified to with reference to page 1, is it, or page 2?

Mr. Hanley: Will you answer that, Mr. Raupagh? I will put a question.

By Mr. Hanley:

Q. You had in your hands page 2 of this exhibit, Mr. Raupagh. Is what you have said in respect of page

3502 is equally true of each of the pages which reflect a photograph with price computations on it?

A. It is.

Mr. Hanley: We now offer Respondent's Exhibit 68 in evidence with the understanding that the reporter, at his convenience, will bind it in a permanent volume (handing documents to counsel for the Commission).

Mr. Austin: What year is this for?

Mr. Hanley: That is all 1939.

Examination on Voir Dire by Mr. Austin.

Q. There seem to be a lot of tabs here, Mr. Raupagh, with the names of different companies on them. Does that mean that the photographs following each tab are stations selling the brand of gas used by the company whose name appears on the tab?

A. Yes, sir.

Q. Are there any Standard Oil stations included here?

A. I would have to look at the exhibit. I am not sure.

(The witness examined the exhibit.)

A. No.

Q. Why were not any photographs included here of stations selling Standard Oil gasoline?

A. Because in our regular routine of business we try to make a survey of what the market is doing, and 3504 we know pretty well what the stations are doing that are handling Standard Oil products and it may be possible that during those times that we took those pictures that there were no Standard Oil stations that were cutting the price. I can't say as to that.

Q. Don't you know that there were some Standard Oil stations in 1939 and 1938 that were selling gasoline below the prevaling retail price?

A. Oh, yes; there were some, yes, sir.

Q. Then, there is no intention here, is there, to intimate that this includes all of the stations that were selling below the price in any locality, or that there were no Standard Oil stations selling at the prices similar to those indicated in these photographs?

A. There is no such intention, Mr. Austin.

Mr. Austin: If your Honor please, I have already made some objections to these photographs which have been overruled, and I also make the additional objection that they are irrelevant and immaterial.

Trial Examiner Ballinger: The objection is overruled. Respondent's Exhibit 68, containing pages 1 to 55, is admitted in evidence.

(The documents referred to heretofore marked, for identification, "RESPONDENT'S EXHIBIT 68," was received in evidence.)

3505 Mr. Hanley: I request to have a group of similar documents marked for identification, your Honor. These deal with the year 1940.

Trial Examiner Ballinger: The reporter will mark the document Respondent's Exhibit 69, containing 50 pages, for identification.

(The document referred to was marked, for identification, "Respondent's Exhibit 69.")

By Mr. Hanley:

Q. Mr. Raupagh, I now hand you Exhibit No. 69, which is a group of photographs of the same appearance, general appearance, as those in 68, but apparently applying to the year 1940, and I will ask you if this exhibit has heretofore been examined by you.

A. Yes, sir.

Q. And are the same things true with respect to how it was made up, both as to the photographs and as to the notations thereon, as you have stated were true with respect to Exhibit No. 68?

A. It is true.

Q. Is this a part of the records of the Standard Oil Company in your office?

A. It is.

Q. Is this the only copy that you have?

A. That is the only copy that we have.

3506 Q. And as in the case of Exhibit 68, was this exhibit prepared without any reference to this lawsuit?

A. It was.

Q. In response to a question of Mr. Austin's, you said Exhibit No. 68 had no Standard Oil photographs in it. That is, photographs of Standard Oil stations.

A. That is right.

Q. What is your practice when you take photographs of this kind with respect to photographing Standard Oil Company stations? Do you ordinarily do so or do you not?

A. We do not.

Q. Do you ordinarily know pretty well what the prices are that are being charged at dealer stations?

A. Yes, we do.

Q. Further, does Exhibit 68 for the year 1939 or Exhibit 69 for the year 1940 purport to represent all of the stations which may have been selling at reduced prices throughout Detroit, irrespective of price?

A. It does not.

Q. Does it fairly represent a cross section of the city?

A. Yes, it is more of a cross section.

Q. Is what you have said about being true of each of the pages on Exhibit 68, equally true in respect to all of the photographs in Exhibit 69, in respect to how they were made and how the computations were made and
3507 gotten upon the mounting sheets?

A. It is.

Mr. Hanley: We offer Exhibit No. 69 in evidence, your Honor.

Mr. Austin: What do you mean when you say that this represents a cross section of the city, Mr. Raupagh?

The Witness: Well, I mean by that it represents the particular stations of whom we take pictures at that time. It does not represent all the stations that may have been cutting prices, but what we take in our usual course of business.

Mr. Austin: The same objection as to Respondent's Exhibit 68, your Honor. I said that I thought these were immaterial and irrelevant, and that is, of course, upon the ground that I contend that prices charged by other retail stations constitute no justification nor defense to what prices, what price discrimination to jobbers and retailers was being made.

Trial Examiner Ballinger: Objection overruled and Respondent's Exhibit, for identification, No. 69, pages 1 to 50, is admitted in evidence.

(The document referred to, heretofore marked, for identification, RESPONDENT'S EXHIBIT 69, was received in evidence.)

Mr. Hanley: Now I ask to have marked, for identification, another book relating to the year 1941, consist-
3508 ing of 115 pages.

Trial Examiner Ballinger: The reporter will mark

the document as Respondent's Exhibit No. 70, pages 1 to 115, for identification.

(The document referred to was marked, for identification, "Respondent's Exhibit 70.")

By Mr. Hanley:

Q. Mr. Raupagh, I now hand you Exhibit No. 70, for identification, which is another book of service station photographs applying to the year 1941, and I will ask you if this book of photographs, together with the computations appearing on the mounting sheets, were made in the same manner and under your supervision and direction as were those concerning which you testified about, Exhibits 68 and 69?

A. They were.

Q. And were made in the year 1941?

A. Yes, sir.

Q. In respect of this group of photographs, Mr. Raupagh, I will ask you if you did anything personally in connection with them that you may or may not have done in connection with the other photographs.

A. Yes, sir.

Q. What was that?

A. I personally visited every station that is represented in the 1941 group, observed the postings.

3509 Q. You saw the service stations?

A. Yes, sir.

Q. Observed the postings yourself?

A. Yes, sir.

Q. What is the fact as to the accurate representation of the situation as disclosed in Exhibit No. 70, for identification?

A. It is accurate.

Q. There is one page here, Mr. Raupagh, I want to call your attention to. That is page No. 76 of this Exhibit No. 70, for identification, which does not have on it a photograph. It is merely a notation of certain addresses with the usual computation of price. Page 75 of the exhibit does have on it a picture of a service station. I hand you both those pages, and will ask you to state if there is any relation between the two of them and what is meant by page 76, if you know.

A. Page 75 is a picture of a station at Davison and Hamilton of the Benz Oil Company, and page 76 represents a tabulation of four stations at various locations of the Benz Oil Company, with the prices posted at these four stations being similar.

Q. Did you look at those four stations yourself?

A. I did not—wait a minute—I looked at two of those stations.

3510 Q. Do you know what the price postings were?

A. Yes, sir.

Q. Did you look at the station that is photographed?

A. At Davison and Hamilton? Yes, I did.

Q. How, can you tell us which stations you looked at that are on page 76?

A. I looked at the Station at Davison and Hamilton, and the station at Stansbury and Fenkell. That would be on this sheet here as 14000 Fenkell.

Q. You did not look at the others?

A. Not the other two, no.

Mr. Hanley: If your Honor please, I am going to strike off of page 76 these three addresses that do not relate to any photographs that appear on the exhibit and which the witness said he did not personally look at.

Trial Examiner Ballinger: You may delete that, the group of addresses, the names, with a red lead pencil.

Mr. Hanley: I am prepared to offer this now, your Honor, but I have been pretty sketchy in my foundation in this, that I have referred back to questions that I asked on Exhibits 68 and 69. If your Honor thinks there is anything deficient in that method of laying a foundation—

Mr. Austin: Where is that sheet you just offered?

Mr. Hanley: I just put it in, No. 76. I can go through all of these, each one, your Honor, but I thought it 3511 was satisfactory—

Trial Examiner Ballinger: Well, unless there is objection on the part of counsel for the Commission, the Examiner will not insist upon further proof.

Mr. Austin: Which one does this refer to (indicating)? Does page 76 refer to the photograph before or after it?

Mr. Hanley: Well, the two together, 75 and 76. They operated as four stations, as I understand, that were looked at. They took a picture of the one, but not the other three. They looked at the other three, and found the price postings the same, so we made that additional sheet, and since there is no photograph on three of the places, I will just delete it. There are five, instead of four stations involved.

Mr. Austin: I can't say that I see that the picture shows everything that is stated there, but I am not going to object on that ground. That may be true in other cases.

I make the same objections that I made to Exhibits 68 and 69.

Mr. Hanley: Did I make the offer?

Mr. Austin: I thought you did.

Mr. Hanley: I offer Exhibit 70 in evidence.

Trial Examiner Ballinger: Does the Examiner 3512 understand that counsel for the Commission interposes the same objections proposed to Respondent's Exhibits 68 and 69?

Mr. Austin: Yes.

Trial Examiner Ballinger: The objection is overruled. Respondent's Exhibit 70, containing page 1 to 115, both inclusive, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 70," was received in evidence.)

Mr. Hanley: I now ask to have the fourth and, I trust, the last book of these photographs, marked, for identification, your Honor.

Trial Examiner Ballinger: The reporter will mark the document Respondent's Exhibit 71, pages 1 to 56, both inclusive, for identification.

(The document referred to was marked, for identification, "Respondent's Exhibit 71.")

By Mr. Hanley:

Q. Mr. Raupagh, I hand you a book now marked Respondent's Exhibit 71, for identification, consisting of 56 pages, and containing certain separator sheets, which appears to be a book of photographs similar to those which you have just testified about, and will ask you what that book is.

A. It represents photographs that have been 3513 taken under my supervision and direction and in the regular course of our business, and these photographs represent stations that are tributory to Ned's Auto Supply Company's stations.

Q. And what do the divider sheets and the tabs on them represent?

A. The divider sheets represent the locations of the Ned's Auto Supply Company stations. The location of each one of their stations.

Q. Now, with respect to the dates of these photographs, what is the fact as to whether that booklet contains photographs that were taken from 1941 back to 1938, and, perhaps, before?

A. That is correct, sir.

Q. And are some of those photographs photostatic copies of photographs which were taken under your supervision and direction?

A. They are.

Q. Did you cause that book to be compiled?

A. I did.

Q. Is what you have said about the photographs, their make-up and compilation, as well as what you have said about the making and entry of the computations in Exhibits 68, 69, and 70 true in respect to Exhibit 71, for identification?

A. It is true, sir.

3514 Q. Did you cause this particular exhibit to be compiled because of the proximity of these particular service stations to the six Ned's service stations in Detroit?

A. I did.

Q. And do the divider tabs which bear the addresses of Ned's stations have behind them, in each instance, the stations which are particularly tributary to that particular Ned's station?

A. They do.

Mr. Hanley: I offer Exhibit 71, for identification, in evidence.

Mr. Austin: Are there any pictures here of Ned's stations?

The Witness: I don't believe so.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: Is there any price on here that is intended to indicate in any way what Ned's was charging at his station on the dates that these photographs were taken?

The Witness: Only the prevailing retail price.

Mr. Austin: Is this intended to indicate that Ned's was charging the prevailing retail price on any date that is given here?

3515 The Witness: No.

Mr. Austin: The same objections, your Honor, I understand there is nothing in here that differs in character from the other exhibit.

Mr. Hanley: That is true, except this book was made up as was testified to and contains pictures of a number of years and the division by company in the proximity of Ned's.

Trial Examiner Ballinger: Same ruling. Respondent's Exhibit 71, containing pages 1 to 56, both inclusive, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 71," was received in evidence.)

Mr. Hanley: Now, if your Honor please, I have extracted, as I indicated to the Court, the other material which we propose to offer as a part of these volumes, and I shall make the offer with such foundation as we think may be necessary, and that, together with a map and some other short exhibits, will conclude this witness, so far as I know, now.

I would like to defer that until after the lunch hour, if it is agreeable to your Honor. I promise everybody I won't take much time on these offers of this additional material.

3516 I might do this, your Honor, before adjournment.

Your Honor will recall that there was requested of the Respondent that we furnish the Court with a list of companies referred to in this lawsuit, together with their brand names, and we did furnish one, I think it was marked Exhibit 63, for identification.

Exhibit 63, offered on May 7th, is withdrawn, and there is now offered by Respondent, in its place, Exhibits 63-A, 63-B, and 63-C, as substitute exhibits.

(The documents referred to were marked, for identification, "Respondent's Exhibits 63-A, 63-B, and 63-C.")

Mr. Hanley: Certain other suggestions were made by the Court, and we took the exhibit home, and we have drafted it now in line with those suggestions, and, if agreeable, we will offer it in evidence at this time.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: What is the division space here supposed to indicate, Mr. Raupagh? There is quite a space there.

Is that intended to indicate a difference between this list and this page?

Trial Examiner Ballinger: Referring to the first page.

3517 Mr. Austin: Yes.

Examination on Voir Dire by Mr. Austin.

Q. Perhaps it is majors and non-majors.

A. No. There is a difference between those. These listed after the space, on the first page, are principally jobbers, but they are major brand gasolines. We had nothing in mind in doing that.

Q. I wondered. Wasn't that space left there—are these all refiners above the space, or is there any reason for that space being there?

A. There is no particular reason for it.

Q. Did it just get there by accident?

A. That's it, as far as I know. They are all refiners up there—

Q. You didn't mean that all these companies listed on all three of these pages are majors, did you?

A. No.

Q. You made a statement just now—

A. The balance of them on this page 1 are majors; on this first page.

Q. By majors, do you mean major brands? Are you referring to the 12 that you listed as major brands?

Mr. Hanley: Judge, I don't think so much of this 3518 cross-examination on this exhibit. We are offering it at the request of the Court to advise the Court for his convenience of the brand names of gasoline offered for sale by the various companies referred to in this action and doing business in the Detroit area. They have all been referred to here and explained by the witness, and all in the world we are seeking to do with this is to comply with the request of the Court that "X" Company calls his gasoline "Y", and we don't want to get back into the discussion of the nature of these various companies in the offer of this exhibit.

It means nothing to us. I would rather withdraw it than have it on the record, but the Court requested it and we are glad to serve, if it will be a convenience. I don't want to get involved or have the witness get involved in any cross-examination of the nature of these oil companies. We have been all over it in detail.

Mr. Austin: I didn't mean to go further. The only thing I meant to ask was on the space; what that meant.

Mr. Hanley: I don't have the faintest idea. Some stenographer had that notion, and that's what happened.

Mr. Austin: And in answering that, Mr. Raupagh said something, perhaps inadvertently, below the space being majors. Unless that is stricken, I wanted to
3519 ask him about that.

Mr. Hanley: I think the whole cross-examination should be stricken. I move to strike all of Mr. Austin's cross-examination on this offer, the entire cross-examination.

Mr. Austin: I consent to that.

Trial Examiner Ballinger: The cross-examination is stricken.

Mr. Austin: The questions I asked were only prompted by the conversation we got into, and I quite agree that the whole thing was probably unnecessary, as long as the arrangement itself has no significance.

Trial Examiner Ballinger: I understand now there is no objection?

Mr. Austin: That's right.

Trial Examiner Ballinger: The document marked Respondent's Exhibit 63-A, B, and C, for identification, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 63-A, B, and C," was received in evidence.)

Mr. Hanley: I now move for an adjournment, if your Honor please.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.
3520 The motion of counsel for the Respondent is granted, and now, at 12:20 P. M., the hearing stands in recess until 2 P. M.

(Whereupon at 12:20 P. M., a recess was taken, to reconvene at 2 o'clock P. M.)

3521 Afternoon Session

2 P. M.

Trial Examiner Ballinger: Come to order. You may proceed.

Mr. Hanley: I would like to have four more booklets marked, if your Honor please.

Trial Examiner Ballinger: The reporter will mark the booklets respectively Respondent's Exhibits 72—

Mr. Hanley: That will consist of 18 pages.

Trial Examiner Ballinger: —pages one to eighteen; Exhibit 73—

Mr. Hanley: That will consist of 17 pages.

Trial Examiner Ballinger: —pages 1 to 17; Respondent's Exhibit 74—

Mr. Hanley: Which consists of pages 1 to 57.

Trial Examiner Ballinger: —pages 1 to 57; Respondent's Exhibit 75—

Mr. Hanley: Will consist of 22 pages.

Trial Examiner Ballinger: —pages 1 to 22, for identification.

(The documents referred to, marked, for identification, "Respondent's Exhibits 72, 73, 74, and 75.")

P. A. RAUPAGH thereupon resumed the stand, and testified further as follows:

3522 *Direct Examination (Resumed) by Mr. Hanley.*

Q. Mr. Raupagh, you are familiar are you not with the books which your office had prepared and from which the photographic exhibits, numbered 68, 69, 70, and 71 were extracted this morning?

A. Yes, sir.

Q. Are you familiar with the material that was left in those books?

A. Yes, sir.

Q. I now hand you what have been marked Exhibits 72, 73, 74, and 75, which are, respectively, the material which was in the books for 1939, being Exhibit 72; for 1940, being Exhibit 73; and for 1941, being Exhibit 74, and for the Ned's Auto Supply Company locations competitive booklet, being Exhibit 75, and will ask you if you have examined all of this material and are familiar with it.

A. I am.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Is it true, Mr. Raupagh, that your office had prepared books, including photographs and other material, for the years 1939, 1940, and 1941, and a fourth book having to do with photographs and other material applying 3523 to service stations in the proximity of Ned's six service stations in Detroit?

A. Yes, sir.

Q. And you were familiar with all of those books?

A. Yes, sir.

Q. It is true, is it not, that there were extracted from these books this morning certain photographs, being now exhibits in evidence as follows: No. 68, covering photographs for the year 1939; No. 69, covering photographs for the year 1940; No. 70, covering photographs for the year 1941, and No. 71, covering photographs for the Ned's book of stations in proximity of Ned's Service stations. Do you recall that?

A. Yes, sir.

Q. Now, are you familiar with the fact that there was additional material in each of those books which was not included in the exhibits, or photographs just referred to, and introduced in evidence?

A. Yes, sir.

Q. I now refer you to Exhibit 72, which is the material that was in the 1939 book; Exhibit 73, which is material which was in the 1940 book; and Exhibit 74, which is material that was in the 1941 book, and Exhibit 75, which was in the so-called Ned's book. Are you familiar with all of this material?

3524 A. Yes, sir.

Q. Have you examined it?

A. Yes, sir.

Q. Have you examined it frequently, Mr. Raupagh?

A. Yes, sir.

Q. Now, with particular reference to Exhibit 72, which is the 1939 material, and Exhibit 73, the 1940 material, I will ask you if that material is the type and kind of material that you and your staff gathered in the regular routine of your business in connection with the retail competitive situation existing in Detroit from time to time?

A. It is.

Q. It is a record of your office?

A. Yes, sir.

Q. Have you personally gathered some of that?

A. Yes, sir.

Q. And has the balance of it come into your office as reported to you by your staff, in the regular course of their duties?

A. Yes, sir.

Q. Has that been gathered by them in the regular discharge of their duties under your supervision and at your direction?

A. It has.

3525 Q. And was it and is it a permanent record of your office?

A. It is.

Q. Was that all gathered prior to any knowledge on your part as to the instigation of this lawsuit?

A. Yes, sir.

Q. Have you gathered that for many years last past?

A. Yes, sir, we have.

Q. So far as you know, it will be the purpose and policy of your office to continue gathering that type of material for your own guidance and information, will it not?

A. It will be.

Q. Now, did you continue in that policy and routine in the year 1941, to date?

A. I did.

Q. And I will ask you if Exhibit 74 is not the material which you have gathered in that connection.

A. It is.

Q. For the year 1941, so far?

A. It is.

Q. I hand you Exhibit 75, and will ask you the same questions in reference to that exhibit, as to whether or not it is material of like character which was gathered by your office from now back at least through 1938; probably earlier, I don't know. It is the exhibit having to do with stations surrounding Ned's service stations.

3526 A. It is.

Q. And is it also a permanent record of your office?

A. Yes, sir.

Q. Is there any duplication in the materials appearing in these several books?

A. There is no duplication.

Mr. Hanley: At this time, your Honor, we offer Exhibits 72, 73, 74, and 75 in evidence, (the same being, in some instances, a photograph, as in the case of the exhibits offered this morning, but carrying some notation other than the Court specifically ruled on this morning; photostats of discount cards; photostats of purchase tickets of gasoline at various service stations, supported by the affidavit of the purchaser; signs or dodgers or handbills, advertising gasoline at various service stations and at various prices; tear sheets from premium catalogs indicating the offer of premiums of various kinds and under various plans by service stations; profit-sharing certificates; lists of premiums offered by various service stations and material of similar character, indicating offers of gasoline at commercial discounts and other discounts obtainable at various service stations in and about the City of Detroit.

I will ask you further, Mr. Raupagh, do these things come to you in the mail, as well as being gathered up 3527 at these stations?

A. They do.

Q. Do they come to your office in the regular order of business?

A. Yes, sir.

Q. Do you have the experience or have you had the experience of obtaining these when they were stuck in your car under the windshield wiper or thrown on the seat?

A. Yes, sir.

Q. Are they obtained by your drivers at the bulk plants and by salesmen who cover the city?

A. Yes, sir.

Q. Is there daily a grist of that kind of material in the normal course of your business that enters your office?

A. Yes, sir.

Q. And you preserve it as a record of business?

A. Yes, sir.

Q. And rely on it for your information, in part, at least, as to the competitive retail situation in Detroit?

A. Yes, sir.

Q. And have done that in the past and are doing it now?

A. Yes, sir.

Mr. Hanley: We offer the exhibits, your Honor.

Trial Examiner Ballinger: For the purposes of the record, please state the offers and the purpose of the
3528 offer.

Mr. Hanley: The purpose of the offer, your Honor, is identical with the purpose for which the photographic exhibits, Nos. 68, 69, 70 and 71 were offered, but this material is of a type which was not regarded as being within the purview of your Honor's ruling this morning, and, consequently, was withdrawn from those offers, and is now being offered as a separate exhibit. It merely supplements the photographic material which was offered this morning, and proves just the same sort of thing.

Trial Examiner Ballinger: Does counsel for the Commission wish to make a statement?

Mr. Austin: I object. In the first place, before looking at each one of these, I object to the whole group of them upon the ground that they have not been properly authenticated and I will object to all of them unless the origin and authenticity of each one was established by competent evidence. I think it is apparent from the questions and answers which you have just heard that this is just what the tide brings in to the Standard Oil Company office, and here it is: some of it may be what it purports to be, and some of it may not be. I don't know. But I object to any blanket offer, both upon the ground that it is not properly authenticated and upon the ground that it is irrelevant and immaterial.

3529 Trial Examiner Ballinger: Objection sustained. Do you desire to be heard more on it?

Mr. Hanley: I do not, your Honor. I do not care to press the matter. I might say that I could authenticate it, in part.

Trial Examiner Ballinger: Objection sustained, and Respondent's Exhibits 72, 73, 74, and 75, for identification, are rejected.

Mr. Hanley: May we have this map (indicating) marked, if your Honor please?

Trial Examiner Ballinger: The reporter will mark the document named by Respondent's counsel as Respondent's Exhibit No. 76, for identification.

(The document referred to was marked, for identification, "Respondent's Exhibit 76.")

By Mr. Hanley:

Q. Mr. Raupagh, I hand you a map of the City of Detroit marked Respondent's Exhibit 76, for identification, upon which appears certain stars and circles, and will ask you if you had that map prepared in your office, or whether it was prepared under your supervision.

A. It was.

Q. Was that prepared in connection and as related to the so-called 1941 book of photographs and other material showing competitive conditions in the retail market in
3530 the City of Detroit?

A. It was.

Q. What do the blue stars represent?

A. The blue stars represent the locations of the six Citrin-Kolb Oil stations, or stations they operate, which have been testified previously about in this hearing.

Q. That is, testified to as having given a reduced retail price?

A. Yes, sir.

Q. What do the gold stars represent?

A. The gold stars represent the six Ned's Auto Supply Company's service stations.

Q. What does the red circle represent?

A. It represents dealers selling at cut price as per the pictures in the 1941 picture book.

Q. And what do the blue circles represent?

A. Dealers with canopy costs, as per photographic evidence and as were represented in the 1941 book.

Q. What do the numbers and representative circles on the map represent?

A. They represent the numbers showing the location of each one of these stations of which a picture or evidence appeared in the 1941 book.

Q. Do I understand that they relate to a page number as the book was originally compiled?

3531 A. Yes, sir.

Q. Now, do those stars and circles correctly represent the location of the stations in the City of Detroit?

A. They do.

Mr. Hanley: At this time we offer Respondent's Exhibit

No. 76 in its entirety as a companion offer to Exhibit, in evidence, No. 70, and our Exhibit, for identification, No. 74.

By Mr. Hanley:

Q. I will ask you, Mr. Raupagh—and may this be understood to be ahead of the proffer, your Honor—if this exhibit, map exhibit, does exclude reference or any visual location symbol on the map of the Joy, Zip, and Speedway stations that are referred to in the 1941 book?

A. It does exclude them.

Q. There is another map that has been received that refers to those stations, is there not?

A. Yes, sir.

Mr. Austin: I am not quite clear, Judge, about these blue ink marks here that say: "Dealers with Under-Canopy Cuts." What is it, as distinguished from dealers selling at cuts?

Mr. Hanley: That is to distingush it from material referred to in the various type of material offered in Exhibit 74, for identification, which exhibit was not received, 3532 as you will recall, in evidence.

Mr. Austin: In that case, your Honor, I will object to the circles here in blue ink, and the reference to them down here, about "Dealers with Under-Canopy Cuts as to photostatic evidence," because there is no such evidence in the record. It has been excluded. So, therefore, I see no basis for such representation on this map.

Mr. Hanley: If your Honor please, I think, as your Honor has ruled, and the record stands, it is probably a good objection, but inasmuch as this map was compiled to be a visual companion to both of these exhibits, 74 and the other one for 1941, I would like to make the offer as I have, and have the ruling, and then, if need be, I will re-offer them on a revised basis.

Trial Examiner Ballinger: The objection is sustained.

Mr. Hanley: The Respondent now offers Exhibit 76 with the blue circles deleted and the legend being a blue circle followed by the words: "Dealer with Under-Canopy Cuts as photostatic evidence," also deleted.

Trial Examiner Ballinger: Any objection?

Mr. Austin: I don't think so.

Perhaps I don't quite see the point, Judge, I don't quite see the difference yet.

Mr. Hanley: Those are the same maps you are
3533 looking at. One is just a copy of the other.

Mr. Austin: I thought this was a new offer.

Mr. Hanley: I am offering it, but I haven't physically deleted it. It is the same map.

Mr. Austin: I have no objection to a map when offered like this one with those things eliminated that you just spoke of. Do you mean that you intend to offer it?

Mr. Hanley: I am offering it now. I haven't gone through the mechanics of rubbing out the circles, but I am offering the exhibit with those deleted.

Trial Examiner Ballinger: Respondent's Exhibit 76, for identification, as re-offered—

Mr. Austin: Pardon me, your Honor. If I may interrupt, I would like to make one other objection that I forgot momentarily, when I was asking about this, and that is an objection I made to another map.

There are six stations whose locations are shown on this map by blue stars, and they purport to be Citrin-Kolb Oil Company station locations, and, as I said before, I don't concede that these six stations have any more importance or relevance than several others that were mentioned, and I think that if a map prepared in this way would more fairly show the locations of not only these six stations, but also five Langer and Cohen stations, and I think there were two others which were mentioned, as receiving
3534 less than the wagon price on their purchases from
Citrin-Kolb. Of course, that doesn't make this inaccurate, as far as it goes, but I think it is incomplete if it purports to show all Citrin-Kolb stations to which reference has been made in connection with the issues of this case, so whether that is a valid objection to the exhibit or not, I again wish to point it out.

Trial Examiner Ballinger: The objection is overruled, and Respondent's Exhibit 76, for identification, as now re-offered, is admitted in evidence.

(The document referred to, heretofore marked, for identification, "RESPONDENT'S EXHIBIT 76," was received in evidence.)

Mr. Hanley: If your Honor please, I would like to have these four magazines marked as exhibits, please.

Trial Examiner Ballinger: The reporter will mark the ~~document~~ Respondent's Exhibits 77, 78, 79, and 80, for identification.

(The documents referred to were marked, for identification, "Respondent's Exhibits 77, 78, 79, 80.")

By Mr. Hanley:

Q. Mr. Raupagh, are you familiar with an organization in Detroit known as the Retail Gasoline Dealers Association?

A. Yes, sir.

3535 Q. Have you been familiar with that organization for some period of time last past?

A. Yes, sir.

Q. Can you tell us about how long?

A. Oh, at least eight or ten years.

Q. Do you know whether or not that organization has an official organ or publication that they get out periodically?

A. Yes, sir.

Q. And do you know the name of that?

A. It is "Retail Gasoline Dealers News."

Q. Do you receive that magazine?

A. Yes, sir.

Q. And have you received it currently, for some years past?

A. Yes, sir.

Q. I call your attention now to Respondent's Exhibit 77, which appears to be a magazine to which you have referred, the issue of September, 1940; Respondent's Exhibit 78, issued of the same magazine for January, 1941; Exhibit 79, issue for March, 1941, and Exhibit 80, issue for April, 1941, and ask you to look at them and state if those are four issues of the magazines to which you have referred and which you have stated is the official organ of the Retail Gasoline Dealers Association.

A. They are.

3536 Q. And were those particular magazines received by you in your office?

A. Yes, sir.

Q. Are you acquainted with a man named Rankin P. Peck?

A. Yes, sir.

Q. Do you know whether he has any official connection with the Gasoline Dealers Association?

A. Yes, sir.

Q. What is that connection?

A. He is Executive Secretary of the Association.

Q. Has he been for some time past?

A. Yes, sir.

Q. Is he at the present time?

A. Yes, sir.

Q. I see.

Mr. Hanley: At this time there is offered by the Respondent Exhibit No. 77, being the Retail Gas Dealers News for September, 1940, with particular reference to page 3 thereof; Exhibit 78, being an issue of the same magazine for January of 1941, with particular reference to page 3 thereof; Exhibit 79, being an issue of the same magazine for March of 1941, with particular reference to page 5, and the last column of page 29 thereof; Exhibit 80 is offered, being an issue of the same magazine for April of 1941, with particular reference to the facing page thereof, carrying the reproduction of a letter directed to gasoline dealers, and purportedly signed by R. P. Peck, and to page 3 thereof. 3537

Trial Examiner Ballinger: Are there any other portions of the documents just described to which you direct attention that you desire introduced in evidence other than those portions which you have designated?

Mr. Hanley: Well, I offer the entire magazine, your Honor. It is a bound volume, but I have no particular interest in directing attention or having in evidence the balance of the magazine. I can't mutilate it very well. I offer the whole thing as a magazine. Those are the parts.

Trial Examiner Ballinger: The Examiner understands that you want the front page, that is, the front of the outside folder of each magazine?

Mr. Hanley: Yes.

Trial Examiner Ballinger: And then the portion of the particular page you described?

Mr. Hanley: Yes, I want that.

Trial Examiner Ballinger: Other than that there is nothing—

Mr. Hanley: Well, no, only I think it should be considered in connection with each magazine or offer—I don't know what you would call it—the data that always appears in any publication, the location, the officers and so on. 3538

Trial Examiner Ballinger: Where is that?

Mr. Hanley: It appears in Exhibit 77 on page 10, the editorial page, I would regard it; on Exhibit 78, it appears on page 12; on Exhibit 79, it appears on page 20; and on Exhibit 80, it appears on page 6. I would like to ask permission that it may be regarded as prior to the offer, I would like to ask this question of Mr. Raupagh.

By Mr. Hanley:

Q. Is this a magazine of some extensive circulation among dealers in gasoline in Detroit?

A. Yes, sir.

Mr. Hanley: I suspect it may take a little time to read these and the portions offered.

Trial Examiner Ballinger: The Examiner will instruct the reporter to mark the first document 77-A, B, and C; the B and C being noted on the pages indicated by counsel. Is that satisfactory?

Mr. Hanley: Yes, sir. That is all we care to call attention to.

Trial Examiner Ballinger: And the reporter will follow the same course in marking Respondent's Exhibit 78, for identification, which will be 78-A, B, and C; 79 will be marked A, B, and C; and 80 will be marked A, B, and C, for identification.

3539 Mr. Austin: Has there been an offer made?

Mr. Hanley: I have offered all those exhibits.

(The documents referred to were marked for identification, "Respondent's Exhibits 77-A, B, C; 78-A, B, C; 79-A, B, C; 80-A, B, C.")

Trial Examiner Ballinger: Any objection?

Mr. Austin: Yes, your Honor. I did not know whether it would be even necessary to object. It seems quite patent that nothing in that publication, seems quite obvious, can be of any materiality or relevancy to this lawsuit. I don't know of any question or issue involved in this lawsuit as to which any of the matters in this newspaper could be relevant and the fact that something was said in there could be of importance, that might be of importance, then it might be necessary to find out what it says.

Trial Examiner Ballinger: The Examiner inquires of counsel for the Respondent the purpose of the offers.

Mr. Hanley: The purpose of the offer, if your Honor please, is one which Respondent regards as being of paramount importance to the Federal Trade Commission, as well as to the Respondent in this action. Counsel for the

Commission must have really clairvoyant power if he can determine that there is nothing in the exhibit that might be material, without having looked at the articles in 3540 question. I trust that your Honor will take the time to examine them before attempting to pass on any objection made by counsel. There are articles or letters in each of the exhibits offered which clearly indicate that much of the promotion of this complaint, as well as similar complaints have been brought at the instance of a minority pressure group. That, in itself, the Respondent does not urge as any reason why the Complaint might not be made or the reasons put on trial. However, an analysis of all of the articles and the background picture exhibited by these exhibits and others which will be offered do very clearly demonstrate what the Respondent does regard as highly material on its case and of paramount interest to the Commission; namely, the question of the public interest that is to be regarded in connection with any determination of this matter that the Commission may make. It is quite apparent that there are articles in these magazines which, in my considered judgment, at least, would constitute a contempt of court if written during the pendency of a trial in a court of law. It predicts the outcome of this proceeding in substantial effect. It outlines a program, a program promoted by Mr. Rankin Peck and to which he refers frequently for the consummation of certain things. I think it is a four-point program.

Mr. Austin: Do these articles appear to be written by Mr. Peck?

3541 Mr. Hanley: I am not undertaking to say that. I am offering the exhibits and the Court has asked me to explain them, and I am attempting to. I am not going to do any discussion on hearsay or of hearsay. As I have stated, these articles suggest the outcome of this action, if, indeed, they do not predict, and they state that there has been success in certain other points of that program which is a clear misrepresentation of the facts as we will demonstrate by other offers of proof. We think that it is proper that the Commission, in considering this case, should consider the real purpose behind the Complaint and the interest that is sought to be subserved, which is not that of the public, as we assert, but is that of a small pressure group which is not interested in competition, but is, on the contrary, interested in raising the price of gasoline to the public, and to their own profit.

Mr. Austin: If your Honor please, I now move that under the rules of the Commission, as heretofore explained by the Examiner, regarding the propriety of placing on the record argument in interest of material which has been objected to, that the statement just made by counsel—that the Respondent has just made through counsel, that the reporter be directed to strike physically from the record the remarks of counsel.

Trial Examiner Ballinger: The motion is denied.
3542 The Examiner is prepared to rule on counsel for Respondent's statement.

Mr. Hanley: Very well.

Trial Examiner Ballinger: The Federal Trade Commission acts only in the public interest.

The Respondent's Exhibits 77-A, B, and C; 78-A, B, and C; 79-A, B, and C; 80-A, B, and C, for identification, are rejected.

Mr. Hanley: May I inquire if the Court has read these proffered exhibits?

Trial Examiner Ballinger: I haven't. The Examiner accepts the statement of counsel for the Respondent. He acted solely upon that statement.

By Mr. Hanley:

Q. Mr. Raupagh, I may have asked you as to some of these companies, but I am not sure. I will ask you about this in one question: Are the following companies, which I will name, competitors of the Standard Oil Company of Indiana at the present time: Red Indian Oil Company?
A. Yes, sir.
Q. Shell Petroleum Company?
A. Yes, sir.
Q. Texas Company?
A. Yes, sir.
Q. Gulf Refining Company?
3543 A. Yes, sir.
Q. Standard Oil Company of Ohio?
A. Yes, sir.
Q. Aurora Gasoline Company?
A. Yes, sir.
Q. National Refining Company?
A. Yes, sir.
Q. Hicock Oil Company?
A. Yes, sir.

Q. Cities Service Company?
A. Yes, sir.

Q. Argo Oil Company?
A. Yes, sir.

Q. And Sun Oil Company?
A. Yes, sir.

Q. Have those companies, and each of them, been competitors of Standard Oil Company of Indiana at all times from at least as far back as January 1, 1930?
A. Yes, sir.

Q. To date?
A. Yes, sir.

Q. And during all of the period from June 30, 1936, on?
A. Yes, sir.

Mr. Hanley: You may take the witness.

Mr. Austin: May we have a five minute recess?

3544 Trial Examiner Ballinger: We will take a five minute recess.

(A short recess was had.)

Trial Examiner Ballinger: Come to order.

Cross-Examination by Mr. Austin.

Q. Mr. Raupagh, did you testify that it is a general practice in Detroit for refiners and, perhaps, other large purveyors of gasoline, to sell by what has been called a dual operation; that is, selling both to jobbers at tank car prices and to retail service stations at tank wagon prices?
A. Yes.

Q. Were you referring only to refiners, when you made that statement? I made a note here "refiners." I am not sure whether I got that correctly, or is that true to some other companies which are not refiners?
A. That is true of other companies, too.

Trial Examiner Ballinger: True of what?

The Witness: Of other companies, too. That is true of other companies.

Trial Examiner Ballinger: It is true both of refiners and other companies?

The Witness: Yes.

Trial Examiner Ballinger: Who are not refiners?

3545 The Witness: Who are not refiners.

By Mr. Austin:

Q. What other companies do you refer to specifically?

A. I refer specifically to Hicock Oil Corporation.

Q. And that is the Highland Oil Corporation here, is it not?

A. Yes.

Q. Are they a subsidiary of Hicock?

A. Yes, sir.

Q. That is, when you refer to the Hicock Oil Corporation, do you mean, in Detroit, the Highland Oil Corporation?

A. Highland and Wilson.

Q. Do Highland and Wilson buy from Hicock?

A. Yes.

Q. Or are they agents of Hicock?

A. They buy from Hicock.

Q. Do you know whether they buy from Hicock at a price which is lower than the tank car price of most of the major companies?

A. I know they did, and I know they have since 1936.

Q. The reason I ask that: if they, as you say, sell to jobbers at tank car prices, it would seem that they would have to obtain their gasoline at lower than tank car price in order to have a margin.

A. They do.

3546 Q. And both Highland Oil Corporation and Wilson Oil Company sell to retail service stations at tank wagon prices by tank wagon delivery, and also sell to jobbers at tank car prices?

A. Yes, sir.

Q. Do you think of anyone else who is not a refiner who engages in both of those operations?

A. Yes. Red Indian Oil Company. There may be some others, too.

Q. Does the Red Indian Oil Company sell direct to retail service stations?

A. Yes, sir.

Q. Do you know how many service stations they have that they supply directly? It may be in the record.

Off the record.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Now, I believe I asked you last about the retail outlets that were served by tank wagon by the Red Indian Oil Company.

A. I would like to have the reporter read the question.

(The question was read.)

A. Six.

Q. And how many jobbers do they supply?

3547. A. The Bulldog Oil Company.

Q. They only supply part of the gasoline purchased by the Bulldog Oil Company, do they not, Mr. Raupagh?

A. That is right, sir.

Q. Do you know how many others; do you know how much of it? I see on Exhibit 38 that there are five different suppliers listed for the Bulldog Oil Company, of which the Red Indian Oil Company is only one.

A. They also supply the Victor Oil Company. Just a minute, and I will answer your other question. They also supply Wing Petroleum Products Company.

Mr. Hanley: I think there may be a misunderstanding between counsel and the witness. If I am wrong, I am willing to be corrected. You asked Mr. Raupagh how many service stations the Red Indian Oil Company supplied.

Mr. Austin: He answered that, and I asked him about jobbers.

Mr. Hanley: He answered that as six. Did you understand that to mean how many service stations they supplied of all classes, Mr. Raupagh, or how many they supplied direct?

The Witness: I understood that to mean how many stations they supplied direct. Is that what you meant?

Mr. Austin: No. I think I asked how many service
stations they supplied by tank wagon, that is, that
3548 they sell gasoline to, deliver by tank wagon price.

What we were discussing in the first instance are companies engaged in the dual operation of selling to retail service stations and selling to jobbers, so that I assumed that in so far as they may operate a retail service station, they are not a competitor of the Standard Oil Company, isn't that right, because the Standard Oil Company operates no retail service stations?

A. Well, they would still be a competitor to the Standard Oil Company dealers.

Q. Well, but I am talking now whether they would be a competitor of the Standard Oil Company to the extent that they operate retail stations.

A. Well, they are a competitor in any language. I just don't understand what you mean.

Q. I am asking you whether you consider the operation—whether you consider any operator of a retail station, a competitor of the Standard Oil Company. Now, I am considering only the business of the retail station: Whether ~~that~~ is a business which is competitifive with the business of the Standard Oil Company in Detroit.

A. I feel that any service station that sells gasoline, other than Standard Oil Company gasoline, is a competitor; some way.

Q. Regardless of whom they sell it to?

3549 A. Regardless of whom he sells it to.

Q. So that your definition of a competitor would include all retail station operators except retail stations which sell Standard gasoline?

A. It would include all retail station operators, because—

Q. I didn't ask you why. I just asked whether that was your answer.

A. I can't answer that unless I can explain it, Mr. Austin. Am I permitted to do that?

Q. I would first like to have you answer whether you consider every operator of a retail service station to be a competitor of the Standard Oil Company.

Trial Examiner Ballinger: You may answer that yes or no and then offer any explanation.

A. Yes. And I consider them a competitor for the reason that they are competitive with our products which are handled by dealers who we supply.

Q. Well, now, getting back to these companies, I would like to have you answer my question—we were on the Red Indian, so I will ask you again how many retail service stations are supplied by the Red Indian Oil Company, and by that I mean how many service stations do they sell to and deliver the gasoline in tank wagon quantities? In other words, how many do they sell to at tank wagon prices and at tank wagon delivery?

3550 A. I can't give you those figures offhand. I have a record of that somewhere, but I can't just pull that out of the air.

Q. Well, is there any place in any of these exhibits which were put in through your testimony where that is shown?

A. No, not that I remember. There are a substantial number.

Q. Well, is it your testimony that the Red Indian Oil Company does sell to retail service stations in the same manner that the Standard Oil Company sells to its retail outlets?

A. Yes, by tank wagon delivery.

Q. Now, you were naming, also, certain jobbers to whom the Red Indian Oil Company sells, and you mentioned the Bulldog Oil Company.

A. Yes, sir.

Q. Victor Oil Company, Wings Petroleum Products Company?

A. That's right.

Q. And I assume from—

A. Sam Hartman, is another one.

Q. Who?

A. Sam Hartman.

Q. Do you have any information regarding that except what was supplied by Mr. Griswold from the Secretary of State's records?

3551 A. Yes.

Q. And do you believe the information stated on Exhibit 38, which is the exhibit prepared by Mr. Griswold, is correct?

A. Yes, I do.

Q. It appears on Exhibit 38 that all of the jobbers that you have named buy only in part from the Red Indian Oil Company. Do you have any knowledge about whether the Red Indian Oil Company supplies the major requirement of any one of those jobbers?

A. No, I haven't.

Q. Now, returning to the Highland Oil Company for a moment: what jobbers are supplied by the Highland Oil Company?

A. Central Service Petroleum or Central Service Oil Company.

Q. Any others?

A. There may be some others, but that is the only one I recall right now.

Q. Does the Central Service Company operate any retail stations?

A. Yes, they do.

Q. Exhibit 38-A has a "No" in that column under "Operating Retail Station."

A. They may not operate any at the present time,
3552 but in last four or five years I know there have been
times that they have operated service stations.

Q. Now, are there any other companies who sell to retail resellers by tank wagon delivery and who also sell to jobbers by tank car or transport truck at tank car prices?

A. Wilson Oil Corporation.

Q. You named that. You named Wilson, Highland, and Red Indian; in addition to refiners.

A. Victor Oil Company.

Q. Well, now, if Victor Oil Company purchases from the Red Indian Oil Company, and then, in turn, sells to other jobbers at tank car prices, let me ask you whether you have any knowledge about—well, isn't that rather unusual, Mr. Rampach? What strikes me is that one jobber sells to a second jobber, and that one sells to the third jobber. Where does the profit come from?

A. The profit comes from the original sale by the original supplier or from the party whom the Victor Oil Company, in this case, purchases from, because he has enough differential so that he can afford to sell some of that gasoline at wholesale and make a profit, and still sell it below the prevailing dealer tank wagon price. I might say that that is nothing unusual in the Detroit area.

Q. Well, as to the named Victor Oil Company, as
3553 a company which both sells to jobbers and to re-
tailers, do you know how many retail stations are served by the Victor Oil Company?

A. I have that information somewhere, but it is not here, and to just rattle off the exact number or about the exact number of stations served by each one of these jobbers, I wouldn't attempt to do that without some memorandum from my office where we have the records, Mr. Austin.

Q. The Victor Oil Company is not primarily a retailer, is it?

A. It started out as primarily a retailer, and I would say that even now it is primarily a retailer. However, it perates in such a varied manner. Its operations are so aried. They sell from their bulk plant to cut-price serv- ce stations that come and haul out of their bulk plant to upply their own cut-price service stations. As a matter f fact, they do and have done just about everything under he sun as far as the oil industry is concerned.

Q. Now, Exhibit 38-D states that the Victor Oil Com- any does not operate retail service stations.

A. No, that is correct.

Q. And didn't you just say that they did operate them?

A. Yes, I did.

Q. You said they were primarily a retailer?

A. Yes, sir, I said they were primarily a retailer, 3554 to start with. They started—

Q. Well, are they a retailer now?

A. No, I don't think they are now, because they have eased out their stations, but their primary business or heir main business is from the stations that they own or ontrol and have leased out.

Q. That is true of the Standard Oil Company, isn't it?

A. I wouldn't say that. I would say that is a fairly ubstantial part of our business.

Q. The majority of your gallonage, in fact, a very great ajority of your gallonage to retail resellers comes from he leased stations, does it not?

A. That is right. And I can further state that since 036, Victor Oil Company have operated their own sta- ons.

Q. Since then, but not necessarily in 1940?

A. Not now.

Q. Have you any other companies in mind that sell oth to jobbers and to retail service stations?

A. Did I mention Argo?

Q. I don't believe so.

A. Argo Oil Company, and the Plymouth Oil Company s another one.

Q. What brand of gasoline does Plymouth handle?

A. They handle the Dixie brand of gasoline, supplied by the Ohio Oil Company.

3555 Q. Is Dixie a local brand of the Plymouth Oil Company?

A. No, it is not a local brand. It is just about a na- ional brand.

Q. Isn't the Argo Oil Company also supplied by the Ohio Oil Company?

A. Yes.

Q. Do they sell Dixie also?

A. They did at one time, but they sell principally Marathon gasoline now under that brand.

Q. What is the difference between Marathon gasoline and Dixie gasoline?

A. Well, as far as the difference in gasoline is concerned, I don't know, but they are two distinct and different brands. The Dixie brand of gasoline was started quite a number of years ago over in the western part of the State by some of the jobbers that got together that wanted a brand of their own, and that spread pretty well over the United States. It was quite extensive at one time. Just how extensive it is now, I am unable to answer, but it does cover a number of states.

Q. Well, that brand does belong to the Ohio Oil Company?

A. No, it does not.

Q. How about Marathon?

A. That belongs to the Ohio Oil Company.

3556 Q. How many customers whose business is that of a retail reseller, whose business is chiefly that of a retail reseller, does the Standard Oil Company sell to in the Detroit area at tank car prices?

Mr. Hanley: Will you read that question, please?

(The question was read.)

Mr. Hanley: Do you understand it, Mr. Raupagh?

The Witness: Yes, I believe I do.

Mr. Hanley: Go ahead and answer it, then.

A. Ned's Auto Supply Company.

By Mr. Austin:

Q. There is just one, isn't there?

A. Just one.

Mr. Hanley: Who is that; just for my enlightenment?

The Witness: Ned's Auto Supply Company.

Mr. Austin: I wouldn't think that would be hard at all.

Mr. Hanley: Well, I just didn't get your question fitted into my head right, I guess.

By Mr. Austin:

Q. Now, if that question has been clarified, I would like to ask the same question as to Texas Company.

A. Will you read the former question, please?

Mr. Hanley: I think that is a very highly technical kind of question.

3557 Mr. Austin: It is a very simple question, what we commonly refer to as tank car customers.

Trial Examiner Ballinger: Will you re-ask the question, please?

By Mr. Austin:

Q. How many tank car customers, tank car customers whose business is chiefly that of a retail reseller, does the Texas Company have in the Detroit area?

A. Well, they have the Firestone Tire & Rubber Company; they have the B. F. Goodrich Company. I know there is one more some place here (referring to documents). Bulldog Oil Company.

Trial Examiner Ballinger: What company?

The Witness: Bulldog Oil Company.

By Mr. Austin:

Q. Is the Bulldog Oil Company entirely a retailer?

A. Predominantly so.

Q. According to Exhibit 38-A, they operate two retail service stations.

A. That's right.

Q. Is that their entire business, or largest part of it? I will leave off the last. Is that their entire business?

A. That isn't their entire business. That is the large part of it.

3558 Q. Now I ask the same question as to Gulf Petroleum Corporation.

Mr. Hanley: Are you trying us or your other cases now, Mr. Austin?

Mr. Austin: No.

A. These same people that I have mentioned, namely, Firestone Tire & Rubber and B. F. Goodrich.

In addition thereto they supply Carnick Oil Company.

By Mr. Austin:

Q. Is Carnick Oil Company a jobber?

A. They are, in my language.

Q. I don't see them on the list of licensed distributors.

A. That's right. They are not on that list.

Trial Examiner Ballinger: What do you mean by your statement?

The Witness: I mean this, your Honor, that they perform all the functions that a jobber of petroleum products generally performs.

However, they are not a licensed distributor because they are handled by the Gulf Oil Corporation as an agent. They haul their gasoline out of the Gulf plant by their own trucks, and when I say "they" I mean the Carnick Oil Company.

They receive a jobber's price.

The Gulf Oil Company furnishes the equipment for the dealers that they supply, and, at times, since 1936, the
3559 Carnick Oil Company has operated service stations of its own, directly operated them, as well as supplied other dealers, and consumer accounts, commercial consumer accounts.

By Mr. Austin:

Q. Mr. Raupagh, this question was directed at jobbers whose business was chiefly that of a retail reseller. I gather from what you just said that the business of the Carnick Oil Company is not chiefly that of a retail reseller.

A. Not in the sense that they operate their own service stations, but their business is chiefly the supplying of dealer stations.

Q. I am not talking about that. I am only asking you about customers whose business is similar to that of Ned's, to be perfectly clear. In other words, whose business is wholly or chiefly that of a retail reseller, and by that I mean they operate their own stations and sell the gasoline.

A. Yes, sir.

Q. Now, with the question again clarified, does the Carnick Oil Company meet that description?

A. No, I wouldn't say it does.

Q. And how about Bulldog Oil Company?

A. Yes, I think they are predominantly a retailer.

Q. Now I ask you the same question again, relating to customers who buy by tank car, whose business is wholly or predominantly that of a retail reseller; the same
3560 question as to Mid-Continent Oil Corporation.

A. Yes, Mid-Continent, or Thiesen-Clemens, which is the same thing.

Q. What do you mean is the same thing?

A. Well, I mean that Thiesen-Clemens is the distributor in Michigan for Mid-Continent Petroleum Company's products.

Q. What is your answer?

A. National Garages.

Q. They are a retailer?

A. They are entirely a retailer; and they buy in tank cars or at tank car price.

Q. Now, any others?

A. No others, as far as Mid-Continent is concerned, that I can recall right now.

Q. I ask you the same question as to Sinclair.

A. Sinclair? They supply J. J. Bright, who is predominantly a retailer. They supply him at tank car prices, and he hauls out of the Sinclair bulk plant.

Q. Why is it, then, on Exhibit 38-A Sinclair Oil Company is not mentioned as a supplier of James J. Bright?

A. That is for the reason that J. J. Bright, as far as the Sinclair Oil Company is concerned, is again considered an agent, hauling out of the Sinclair bulk plant.

As a matter of fact, J. J. Bright has three or four types of service station operations that he all-operates himself.

3561 For instance, at one of the stations, he buys Sun Oil Company gasoline and, I assume, at the dealer tank wagon price.

At two of the stations he purchases gasoline from the Sinclair Refining Company by hauling it out of the bulk plant, and, prior to 1941, before he opened his cut-price stations, he did not require to have a distributor's license.

In late 1940 or '41, he opened up some cut-price stations; I mean, with posted cut prices, and used his own brand.

Q. Is that what he got from Argo?

A. That's what he got from Argo.

Q. Were you here when Mr. Dyer testified for the Respondent?

A. Yes.

Q. Mr. Dyer stated that the Sinclair Oil Company does not sell to retailers and jobbers in the same territory, and said that in Detroit they sold to retailers, but not to jobbers.

A. Well, he may not have considered J. J. Bright a jobber I can't explain his testimony, sir.

Mr. Hanley: I think, in fairness to the witness, counsel should call the witness' attention to the fact that Mr. Dyer testified that that was the policy of his company, and he did not know specifically what might be done and what might be going on in Detroit.

Mr. Austin: Well, he stated that it was against
3562 the policy of the company, and it was his belief
that they did not do it anywhere, and that is my recollection of what he said, and he also said that if they did it here, it was not his knowledge, and he is in charge, I believe, or directs the sales policy of the company. I think that was his testimony, and it also appears from Exhibit 38-A that J. J. Bright did not report the Sinclair Oil Company to the Secretary of State as a supplier.

By Mr. Austin:

Q. Well, let us assume that they do supply J. J. Bright, Mr. Raupagh. Let us assume that the Sinclair Oil Company does supply Bright. I really did not intend to get into an argument on that point. Is there anyone else whom they supply at jobber prices, tank car prices, whose business is that of a retail reseller other than Bright?

A. National Petroleum Products Company.

Q. Well, there again Sinclair is not shown as a supplier on Exhibit 38-C.

A. That is true. And the reason I say National Petroleum Products, is that I know in 1940 or the latter part of 1940 they did supply them. That, again, is a hauling proposition.

Q. Well, the supplier shown on Exhibit 38-C is the National Petroleum Products Company of Toledo, Ohio.

A. Well, the reason for that may be that the
3563 National Petroleum Products also is in the freight
trucking business and they operate service stations and sell to the public at the same time. So, they, no doubt, haul some gasoline from Toledo, and they may be doing that now, but prior to 1941 I know that they purchased from the Sinclair Oil Company.

Q. Is there anyone else, any other retailer whom Sinclair supplies?

A. Not that I know of.

Q. Now, I believe that that exhausts the list of majors that you mentioned in your previous testimony as engaging in this dual function.

A. I believe I mentioned some others. Argo and Plymouth.

Q. Well, you have mentioned several others here now.

That is why I asked you at the beginning whether in mentioning just four, you weren't mentioning refiners only, and you probably were, because you have already given me several others. How about Shell Oil? Do I understand that Shell does not supply both retailers at tank wagon and jobbers at tank car in Detroit?

A. Well, they supply Stark Hickey in Detroit.

Q. Is his business predominantly that of a retailer?

A. All of it.

Q. Do you know whether they supply anyone else at jobber prices in Detroit?

3564 A. No, I don't.

Q. Now, getting back to this list that you gave me awhile ago, without going into their—well, I will just ask you the number first, and may not go any farther. The Highland Oil Company, how many jobber customers do they have, whose business is wholly or predominantly that of a reseller?

A. Central Service Oil Company. That is one that I can think of right offhand.

Q. Any others? If you can give me the number.

A. R. W. Oil Company.

Q. Is that R. W.?

A. Yes; R. W. Oil Company.

Q. They don't appear here as a licensed distributor, or do they?

A. No, they do not.

Q. If a seller of gasoline buys at tank car or jobber price and resells wholly at retail, does he have to take out a distributor's license?

A. I didn't understand that question.

Mr. Austin: Will you repeat the question, please, Mr. Reporter.

(The question was read.)

A. No.

By Mr. Austin:

3565 Q. That, then, explains why this R. W. Company does not appear as a licensed distributor.

A. If he buys gasoline tax paid, he doesn't need to take out a license.

Q. Are there a number of instances where gasoline is purchased that way, that is, tax paid, but in tank car lots? Is that common or not?

A. Well, I think if you stated the tank car price, it would be more prevalent.

Q. In other words, are you referring to the practice which you have mentioned before, of some people getting a tank car price, but hauling their gasoline by tank truck?

A. That is right.

Q. How many retail customers does the Wilson Oil Company have; the same question as to the Wilson Oil Company as I asked about the others.

A. There are two that I know of. They have the Bulk Stations, Incorporated. They have Railroad Oil Company.

Q. Bulk Stations, Incorporated; according to Exhibit 38-A, does not operate retail stations.

A. That is true, but during the time from 1936 they have operated retail stations. They have only one. I think there has been a time when they had two, from 1936 to the present time.

Q. Well, perhaps we had better restrict ourselves
3566 to the last six months, or we might get into so many
changed conditions. Has the Bulk Stations, Incorporated, operated any retail stations during the past six months?

A. I would have to say yes.

Q. Then, you would not agree with the answer of—

A. Yes, I would.

Q. Because this answer, as I understand it, as I understood, Mr. Griswold, those answers on Exhibit 38-A would apply to probably December of 1940. In other words, the condition existing when these applications were filed.

A. Well, my answer as to the operation is this, as to their operating a service station at that time, it would be in October of 1940.

Q. And Central Service Company, that company mentioned a moment ago, it, again, appears on Exhibit 38-A that they do not operate retail service stations.

A. No, Mr. Austin, they do not operate retail service stations at the present time. They have 28 stations that they own or control. They have a bulk plant that they do not use. The bulk plant is used by the Highland Oil Corporation, whenever they feel like using it. Otherwise the gasoline is trucked directly from the Highland Oil Company to the service station of the Central Service Oil Company.

Q. But you say the Central Service Oil Company
3567 does not operate its stations?

A. Not at the present time.

Q. Now, the same question as to Red Indian Oil Company; and, let us restrict it now to customers who were retailers wholly or predominantly, within the last six months.

A. Wings Petroleum. That is all I have on that. Wings Petroleum are predominantly retail.

Q. The same question as to Argo Oil Company.

A. Argo—as previously mentioned, they supplied J. J. Bright, who is predominantly retail. They, in part, supply Bulldog Oil Company, which is predominantly retail. They supply Montgomery Ward, which is absolutely retail.

Q. Are they the sole supplier of Montgomery Ward?

A. Yes, as far as I know.

Q. Do you know anything about that other than what appears on Exhibit 38-A?

A. Yes, I do. Would you like to know it?

Q. That Montgomery Ward's supply?

A. Yes.

Q. Yes.

A. We at one time supplied Montgomery Ward at one of their stores outside of the Detroit area. We sold them on a regular dealer tank wagon basis.

We were given the privilege of selling them, or, at
2568 least, they solicited us to sell them, on a tank car and a tank car basis using their own brands when they received the gasoline.

They had no bulk plant or anything of that kind.

They wanted it delivered into their own storage tanks, and that proposition was taken on by the Argo Oil Corporation at a tank car price.

Q. Why didn't you accept it?

A. We didn't want that business.

Now, let us see. The question is as to who Argo is supplying? People that predominantly retail. Is that the question, now, Mr. Austin?

Q. Yes.

A. Within the past six months they have supplied I. Paul Taylor, who is a retailer.

They are supplying at the present time, Muerer Brothers, who is entirely retail, at tank car prices; and they are furnishing part of the supplies for the Bulldog Oil Company.

Q. One more. The same question as to Plymouth Oil Company.

A. Plymouth Oil Company are supplying Jefferson Company.

They are supplying Texas Coal and Oil Company, or did supply them.

They did supply the Apex Oil Corporation.

They did supply Star Products Coal and Oil Company.

3569 Q. Why do you say "They did supply"? Do they still supply them?

A. Well, I can't say definitely, whether they are supplying them today, but I know that in the latter part of 1940 they did supply those people.

Q. You evidently have some doubt as to whether they still are.

A. No, I haven't any doubt, only I just want to be sure about that, that's all, and, of course, those things are subject to change, too, Mr. Austin.

Q. Was Marathon one of the brands that you mentioned among the 12 that you considered major brands?

A. Yes, sir.

Q. And was the Dixie?

A. Yes, sir. That is the same; Ohio Oil Company.

Q. I asked you about the brand.

A. I don't believe we mentioned Dixie Brand. I think we should have mentioned it.

Q. On the identification advertising of Marathon gasoline, or any stations which advertise that brand, does the name Ohio Oil Company appear, or anything to identify the gasoline as originating from the Ohio Oil Company?

A. I don't believe it does.

Q. And the same question as to Dixie.

A. No. It would never happen on Dixie, for the
3570 simple reason that the very purpose of creating that brand was to get away from any source of supply, but have it distinctly a brand for jobbers. That was the purpose of the Dixie brand.

Q. Referring to the companies which I have mentioned to which I have questioned you particularly—well, I will ask you, first, as to Standard Oil Company. Why does not the Standard Oil Company sell to other dealers than Ned's Auto Supply Company at tank car price?

A. I think we would. We don't always get a chance.

Q. Have you ever offered to sell at tank car prices to any other customer or to any other dealers whose business was primarily that of a retailer?

A. We haven't gone out and made any offers.

Q. You have never done what has been referred to here, that some of the companies have done to Ned's? By that I mean Mr. Gershenson and you also referred to certain offers made by other companies to Ned's?

A. No, we never have.

Q. Have you made similar offers to other dealers?

A. No, sir.

Q. Is it the policy of the Standard Oil Company not to sell to more than one retail reseller in a given area?

A. No.

3571 Q. How do you explain the fact—or do you explain it—that there has been no effort to obtain other retail reseller business at tank car prices?

A. I don't explain it.

Q. Going down this list, I think that you mentioned only two such customers for Sinclair and Gulf; three for Texas, one of which, the Bulldog Oil Company, operates only two stations—oh, let me ask you about Bulldog. Do they sell Texaco gasoline under the Texas Company's brand?

A. I think they do, in one pump.

Q. Are they what is known as divided stations?

A. Yes, very much divided.

Q. I think I started to ask you a question? Why is it that most, if not all of the major companies that engage in the dual function here sell to so few retail customers in tank car lots? It appears from your answers that two or three seems to be the limit for any one company, and yet—

A. I can't explain why the other companies don't Mr. Austin.

Q. Well, in your opinion, would it not be possible for Standard Oil Company or any other company, to get additional tank car business from retailers, if they so desired?

A. Yes, I think it would. Of course, there are some that we can't get, anyway.

3572 Q. Isn't it true that any retailer who could take care of delivery in that quantity, would be glad to get the tank car price?

A. Well, I don't know about that.

Q. What is your opinion?

A. Most of them are not equipped and most of them are not financially able to do anything.

Q. Of course, I realize that. I was assuming the ability:

Now, Mr. Raupagh, you mentioned certain requirements of the Standard Oil Company which you said had to be met as a policy of the company before you would give a tank car deal to a customer.

A. Yes, sir.

Q. One of them was sufficient storage to take care of tank car shipments?

A. Yes.

Q. Does that mean anything more than the ability to unload the car or the transport truck when it arrives, and dispose of the proceeds—I mean of the contents?

A. Oh, I think it does mean perhaps a little more, because you can't very well set up a wholesale proposition with a tank car capacity of 10,000 gallons, which is the average tank car, because he has got to carry enough merchandise to carry him over, and if he sells to other companies or other dealers, he has to have a bulk plant, Mr. Austin: a real bulk plant. He should have.

3573 Q. If someone comes to you and wants a tank car of gasoline and tells you where to deliver it, are you concerned with what he does with it?

A. No, providing he has storage facilities to unload it and take care of it. I would be concerned about that.

Q. You have some interest in the matter of brand in that connection, don't you? I would like to have you explain that a little bit. I assume that you don't just sell gasoline by the tank car load and let the person who buys it go ahead and sell it unbranded or any way he wants to, do you; or do you?

A. No, we don't; not in Detroit. We don't sell gasoline and let the other party sell it as unbranded. At least, we haven't up to this time.

Q. Do you have a tank car spot market here? Do you ever sell gasoline in that way? That is, without the right to retail it as Standard gasoline?

A. Do you mean as to resellers or consumers?

Q. I would have to ask you as to each one. Isn't there a separate market for unbranded gasoline, and does the Standard Oil Company ever participate in it?

A. We do not participate in it.

Q. That is, in this area, at least, you don't, to resellers sell unbranded gasoline?

A. That's right.

3574 Q. If you do to consumers, I am not interested in that. I don't think it has any relevancy here.

Well, regarding the storage, does the requirement of sufficient storage to take care of shipments mean any more than the ability to take care of a single carload? To put it another way: Does the Standard Oil Company offer to sell gas at tank car prices to anyone who orders a tank car of gasoline and who either pays cash or has satisfactory credit?

A. No, I think we have the right to select our customers; and do.

Q. You do, but I asked you if you offer to sell it to anyone who will buy it and pay for it, in tank car lots?

A. We do in some cases. Again you have the consumer and reseller proposition. Are you referring to reseller?

Q. I am just asking, or trying to ask, Mr. Raupagh, whether gasoline is sold by you like a lot of other commodities are sold. The manufacturer makes a commodity and publishes the commodity in his catalog and anybody who wants to comes in and orders a carload lot and can get it simply by ordering it and paying the price.

A. That's right; if his credit responsibility and everything is satisfactory; yes.

Q. Then, is it true that anyone who orders a tank car of gasoline may buy it without being a regular customer?

3575 A. Yes.

Q. In other words, without your expectation that they will buy another tank car tomorrow or next week?

A. Oh, yes.

Q. Wouldn't there be some restriction on what could be done with the gasoline, or would you inquire about that? I am not trying to lead you down any crooked lane here, but it would seem to me perfectly natural that there would have to be some restriction, because, otherwise, a man might take a carload of gasoline away and sell it under some other brand or something—

A. I don't think we would sell it to him if we knew he was going to put it in the lake out here where it would endanger life and limb.

Trial Examiner Ballinger: Did I understand you earlier to testify you only sold in tank car lots to those only who had tank car facilities?

The Witness: Yes, sir.

Trial Examiner Ballinger: Now, do I understand you to say you will sell to anybody who comes to your storage place and wants to buy a tank car?

The Witness: Again the proposition that he must have proper bulk storage facilities; and we would inquire into that.

Trial Examiner Ballinger: Then, anybody who
3576 came there and wanted to buy a tank car, you wouldn't sell it to him, is that correct, unless he had bulk storage facilities?

The Witness: That's right.

Trial Examiner Ballinger: If he merely wanted one tank car, what difference would it make to you whether he had bulk storage facilities?

The Witness: Well, that's our policy, your Honor.

By Mr. Austin:

Q. Suppose a group of retail dealers from your stations should approach you to buy in tank car quantity, a tank car of gasoline, and told you that they had arranged so that they could have that emptied into trucks right at the railroad sidings, and delivered to their stations—

Mr. Hanley: I object to this as repetitious. That was gone into thoroughly on the Government's case, Mr. Raupagh was called as an adverse witness. Most of this examination that has gone in for the last several minutes was thoroughly gone into in the Government's main case with this witness.

Trial Examiner Ballinger: The objection is overruled. You may proceed. It is, to a certain extent, repetitious.

The Witness: Will you please read the last question?

(The question was read.)

3577 By Mr. Austin:

Q. —would you entertain such an offer?

A. No, sir. And I would like to explain the reason why. In the first place, in the City of Detroit and in most other communities, it would be against the law to do that; this is, unloading from a tank car, gasoline, direct into tank trucks.

Secondly, our experience with group buying, my own experience with group buying, has not been good, and I have had that experience.

3578 Q. Well, I will ask you the same question then. Would you, with this same group of dealers in any given locality, if they asked for a delivery by transport truck, delivered into their service station tanks, we will say, five dealers and each one wanted two thousand gallons, would you entertain that sort of an offer?

A. At what?

Q. Tank car price.

A. No, sir.

Q. Then, when you say that one of your requirements for a tank car customer is that he has sufficient storage to take care of shipments, you mean bulk storage and not just any kind of storage?

A. That is right.

Trial Examiner Ballinger: I understand you have other requirements in addition to bulk storage?

The Witness: We have.

By Mr. Austin:

Q. Why do you make the requirement or why does the company make the requirement as a matter of policy that the tank car buyer must have the volume of one million to two million gallons per year?

A. Well, we think that that is a wholesale operation.

Q. What do you mean by a wholesale operation?

A. Well, I mean that it takes on the function and

3579 the quantity requirements. That is one of the rules of our company.

Q. You, I believe, told us several times that you weren't concerned whether he resold at wholesale or retail?

A. That is right.

Q. And is that not, in effect, the restriction, as directed to retailer customers? Is it not in effect a restriction on the tank car price, to large customers?

Mr. Hanley: I don't know whether that is—

Mr. Austin: Well, I will withdraw the question because I understand the witness has already stated that the tank car deal is restricted to customers whose volume is from one million to two million gallons a year or more.

Mr. Hanley: I don't care to object to the question, Mr. Austin, but the witness has repeatedly said that there are a number of elements that go into the selection of the wholesale jobber customer and his characterization as such by the Standard Oil Company and the volume, he has said, is another. But, when you pick out each one and say, is that the thing that differentiates, it is confusing and unfair to the witness. I have tried to tell many times on the former examination by you of him, as well as now, what those things are and why they are.

Mr. Austin: Well, on your direct examination, Mr. Raupagh named five requirements and it is my un-
3580 derstanding that the policy of the company is that the tank car buyer must meet all five of those requirements.

By Mr. Austin:

Q. Is that right, Mr. Raupagh?

A. Yes.

Q. And another was his credit and another was an established business and, I assume that the requirement of an established business answers in part the question that I asked a while ago, as to whether or not you would sell in tank car quantities to an occasional buyer?

A. That is right.

Q. In other words, you would not?

A. No.

Q. Now, another requirement was equipment to handle, and I suppose that that means equipment to handle the gasoline into the bulk plant and out of the bulk plant, is that correct?

A. In and out of the bulk plant and if he is to supply other dealers, truck equipment to make those deliveries.

Q. Suppose he is to supply himself at retail stations?

A. Then it isn't necessary.

Q. Does he still have to have the truck equipment?

A. He would have to still have the truck equipment to supply his own stations.

Trial Examiner Ballinger: It could not be supplied
3581 by leased equipment, could it?

The Witness: Oh, yes, I think it could, as long as they leased it.

By Mr. Austin:

Q. I was just coming to that. I think you stated in that connection that he had to have his own personnel?

A. That is right.

Q. Would there be any objection on the part of your company if, instead of having his own trucks or personnel, that he employed someone, some hauler to transport the gasoline from the bulk plant to the service station?

A. I don't think there would be any objection.

Mr. Hanley: Would you have any objection to the witness having a short recess, Mr. Austin?

Mr. Austin: Not if he desires it.

Trial Examiner Ballinger: A recess will be called.

(A short recess was taken.)

3582 Trial Examiner Ballinger: Come to order.

By Mr. Austin:

Q. We were talking about the requirements of the Standard Oil Company in supplying gasoline in tank car quantities at tank car prices.

Suppose a jobber came to you who was already handling another brand of gasoline and who could satisfy all of these five requirements that you named, and wanted to purchase Standard Oil Company gasoline on a tank car basis and resell it in conjunction with his other brand. Would you entertain such an offer?

A. No, I don't believe I would, Mr. Austin.

Q. Then, is that an additional requirement for a tank car buyer; that he must not also be dealing in any other brand of gasoline?

A. Well, we have found that if a man is a customer of ours—

Q. I would just like to have a yes or no answer to that, and then you can explain, if you wish.

Trial Examiner Ballinger: Read the question.

(The question was read.)

A. Yes. With the exception of Ford Benzol. Most of our jobbers also deal in Ford Benzol.

However, we do not like the operation of split accounts, and if a man is going to be a customer, why, he should be a customer without splitting his business so many

3583 different ways.

Q. You say the majority of your jobbers handle Ford Benzol?

A. Yes.

Q. Does Ned's sell Ford Benzol?

A. Yes, they do.

Q. Citrin-Kolb does not, do they?

A. I really don't know, for sure.

Q. That is my recollection.

A. You may be right on that. I am really not sure.

Q. I am not sure, but it seems to me Mr. Ledbetter said the Wayne Oil did and Citrin-Kolb did not.

A. You may be right. I don't know.

Q. Why do you make an exception with Ford Benzol?

A. Well, that has sort of grown up with the business here, and we have always accepted that.

Q. Is that partly because that is a gasoline which sells at an intermediate price and is not sold at the same price as any of your brands?

~~A. No, that has no connection at all.~~

Q. Ford Benzol is a locally produced and sold gasoline is it not?

A. Yes, sir.

Q. Suppose a man that wanted the tank car deal was
a retail operator such as Ned's, but operated divided
3584 stations where he sold other brands, would your
policy be the same toward that business as you have
just stated in connection with the reseller business?

A. We have never had an opportunity like that.

Q. Are many divided stations in Detroit?

A. No.

Q. Retail stations?

A. No, there are not so many.

Q. Does the Standard Oil Company sell to any retail stations who are divided stations; by tank wagon, now, I am talking about.

A. Divided with Ford Benzol, yes.

Q. Any other?

A. No.

Q. You are acquainted with Marvin Goldberg, are you not?

A. Yes, I am.

Q. Hasn't Marvin Goldberg, within the last year applied to you for a tank car deal?

A. Yes, he has.

Q. Have you granted it to him?

A. No.

Q. Why didn't you grant him that sort of a deal?

A. In the first place, he has no bulk storage. He doesn't come up to the five requirements that you know about.

Q. Is that the only requirement that he doesn't
3585 meet?

A. There are others, too, Mr. Austin, that he doesn't meet; of the five.

Q. What is that?

A. Others of the five.

Q. His volume is big enough, is it not?

A. No, it is not.

Q. Do you know what his volume is on stations which he operates—and I am including now, whether it is Marvin or Lester?

A. Well, it is less than 500,000 gallons a year; of the two stations together.

Q. You say their volume is around a half million a year?

A. Yes—or less than that.

Q. Well, how much less?

A. Well, their volume is not over 350,000 gallons a year; the two stations.

Q. Is their credit satisfactory?

The Witness: (Addressing Mr. Hanley) Am I obliged to answer that?

Mr. Hanley: I don't think so. I object to it, your Honor.

A. I would rather not answer that, Mr. Austin.

Mr. Hanley: This man is at present a customer of the Standard Oil Company on a tank-wagon basis.

Mr. Austin: I will withdraw that question.

3586 By Mr. Austin:

Q. You do supply those stations, do you not, by tank wagon?

A. Yes, sir.

Q. And they are an established business, are they not?

A. Yes, sir.

Q. Is it your opinion that they would have any difficulty getting bulk storage if you granted them the tank car deal?

A. I think they could secure bulk storage, either by building it, or, possibly, finding somebody they could lease it from; yes, sir.

Trial Examiner Ballinger: Is the sale of gas by tank car substantially a cash transaction, or do they have time?

The Witness: It is substantially a cash transaction.

Trial Examiner Ballinger: How often are settlements made?

Mr. Austin: What was that question?

Trial Examiner Ballinger: How often are settlements made?

The Witness: Most of the settlements are made within ten days after purchase.

By Mr. Austin:

Q. That is in order to take advantage of the cash 3587 discount, is it not, Mr. Raupagh?

A. That is one reason, yes, sir.

Q. And does not the fact that a cash discount for payment in ten days is offered, indicate that payment within ten days is not required?

A. That can be construed either way. Do I have to answer yes or no, and then explain?

Q. Well, if payment is required in ten days, I would like to have you say so, and if it isn't, I would like to have you say so.

A. No, it isn't required within ten days. However, our experience has been that gasoline, being a commodity that is turned over very quickly, it runs up the amount on the purchaser's account very rapidly, and it has to be watched very closely, from a credit angle.

Q. Now, you have quite a number of stations whose operators either own the property or lease it from others than Standard Oil Company. I am now referring to what you call the 461 form contract station.

A. Yes, sir.

Q. And I believe that those contracts require those stations to purchase their entire requirements of Standard Oil gasoline from the Standard Oil Company during the term of the contract?

A. Yes, sir.

3588 Q. Do those contracts ordinarily run for a year?

A. Yes, they do, or longer.

Trial Examiner Ballinger: You say "or longer"?

The Witness: Yes, sir.

By Mr. Austin:

Q. Does the original term of any of them run for more than a year? I am not speaking, now, of some isolated or single example.

A. No. The vast majority of them are on a yearly basis, Mr. Austin.

Q. Now, suppose that the Citrin-Kreb Oil Company and the Wayne Oil Company or either one of them should offer to sell Red Crown gasoline to any of those stations upon the expiration of the 461 contract at ½c below the Standard Oil Company posted tank wagon price. In your opinion, would those jobbers take that business away from the Standard Oil Company?

Mr. Hanley: Just a moment. That is objected to as an improper hypothetical question; purely conjectural. It involves the knowledge of the state of mind of somebody else on a state of facts that is not complete.

Mr. Austin: Well, we have had a good many questions here that the witness was asked on direct examination as to what the effect would be of the Standard Oil Company business—

3589 Trial Examiner Ballinger: The objection is overruled.

Mr. Hanley: The Court says you may answer, if you can.

The Witness: Will you repeat that question, please?

(The question was read.)

A. They would take some of the accounts, and some of the accounts they would not. Just how much and how little, it would be impossible for me to say.

By Mr. Austin:

Q. And about the time that one of those stations, that the contract of one of those stations was about to expire with you, if they—let us say they offered a cent off, that would be, or would it be a big inducement to that station?

A. Surely, it would be a big inducement.

Q. Now, assuming that one of those jobbers had adopted the policy of making such offers to the 461 stations, would the Standard Oil Company continue to supply that jobber?

Mr. Hanley: That is objected to as a hypothetical, and is conjectural that involves the determination of the policy on the part of the Standard Oil Company on some state of facts supposed to exist at some time in the future, and there is no showing at all that this witness would have authority either to determine the policy or to apply it if it was determined.

3590 Trial Examiner Ballinger: If the witness cares to express his opinion, he may do so.

By Mr. Austin:

Q. If you don't know, you may say so; if you have an authoritative knowledge of the policy in question, I wish you would tell me that.

A. I haven't, and I don't know.

Q. Do you know of any instance where such an offer has been made by either one of those jobbers?

A. No.

Q. Or by the Stikeman Oil Company?

A. No.

Q. Now, you stated on direct examination, Mr. Raupagh, that the Standard Oil Company would immediately lose the business, that in your opinion the Standard Oil Company would immediately lose the business of any one of the four jobbers who are served by you in Detroit, in the Detroit area, if the Standard Oil Company were to charge them the tank wagon price.

A. Yes, sir.

Q. In your opinion, would the Standard Oil Company lose the business of any of its retail tank wagon service stations if it charged them the tank car price?

A. No.

Mr. Hanley: Will you state that question again, 3591 please? Oh, go ahead and answer the question.

A. No, they wouldn't lose the business.

Trial Examiner Ballinger: May I ask a question? Have any of the stations leased by the Standard Oil Company ever been serviced by any company other than the Standard Oil Company?

The Witness: No, sir.

Mr. Hanley: That is, as to gasoline, you mean?

The Witness: That is right, gasoline.

By Mr. Austin:

Q. And referring to your answer to my last question, would your answer be the same if the margin between the tank wagon price and the tank car price were reduced? Do you understand that?

A. No.

Q. Well, I asked you first whether you would lose any retail stations if you charged them the tank car price, and now I am asking you whether you would lose any retail station if the margin between the tank car and the tank wagon price were reduced?

A. I don't believe so.

~~Q. Now,~~ I am going to ask you to suppose, Mr. Raupagh, that your company should charge the Citrin-Kolb Oil Company and the Wayne Oil Company the tank wagon price only on gasoline purchased by them and resold 3592 by them at their retail operated stations, but continued to charge and give them the tank car price on the gasoline which they resell to dealers and, suppose else that no other major oil company would offer any of them tank car prices on that gasoline which they resell at retail. In your opinion, upon the set of facts, would you lose the business of those jobbers?

A. Yes, sir.

Mr. Hanley: I move that the answer be stricken out, for the purpose of making an objection.

Trial Examiner Ballinger: On what grounds?

Mr. Hanley: Sir?

Trial Examiner Ballinger: Upon what grounds?

Mr. Hanley: Well, I thought I had to clear the record. The question is objected to for the reason that it is a hypothetical, and it requests the witness to assume an impossibility in that it requests an assumption that the gasoline sold on a truck transport or a tank car delivery basis and delivered in bulk into bulk storage of the named customers shall be policed by the seller after such delivery, which is an impossible thing to do physically and factually and legally, and, further, that the question fails to take in a paramount consideration in that it gives no consideration at all to the fact that the said customers supply their
3593 own service stations where they do have any direct retail operation, through the medium of their own storage facilities, delivery trucks, and personnel, which is an item and a consideration that is reflected in the usual tank wagon price charged to tank wagon customers who receive deliveries on the tank wagon basis, and that, consequently, there are no elements of comparability between the hypothetical set-up in which counsel has asked the witness to assume the Wayne Oil Company and Citrin-Kolb and the usual tank wagon retail customer of the Respondent.

Trial Examiner Ballinger: Objection overruled.

Mr. Austin: The witness already answered the question.

Trial Examiner Ballinger: The motion to strike is denied.

By Mr. Austin:

Q. In regard to the possibility of such an arrangement, I might explain for the benefit of the witness what I have in mind is something which I think would be very possible, and that is that it would be entirely possible for either one of the jobbers named, Citrin-Kolb or Wayne Oil, to report to the Standard Oil Company the amount of gasoline that they have resold through their own stations, and the

Standard Oil Company could then bill them at the higher price for that gasoline than for the rest, or the entire amount could be billed at one price and credit be given 3594 for what has been shown to be sold at wholesale, but. I assume there is no—in fact, he does know how much gasoline he sells at his own stations, and how much he sells to other dealers.

Mr. Hanley: Just a moment. That is objected to for all the reasons assigned to the next preceding question, and for the further reason that it is not a question at all; that it is either an argument, in which event it is objected to as argumentative, or it is testimony on the part of counsel, and objectionable for that reason. And, for the additional reason that it calls upon this witness to testify as to the knowledge of the records and books on a hypothetical basis of the Wayne Oil Company and the Citrin-Kolb Oil Company, which, obviously, cannot be within the knowledge of this witness and is not even within the knowledge of the Citrin-Kolb Oil Company or the Wayne Oil Company, on a purely hypothetical basis, predicated upon some future arrangement, which still fails to take into consideration all of the elements necessary to properly frame a hypothetical question.

Trial Examiner Ballinger: Objection sustained.

Mr. Austin: Well, the only part of what I said to the witness that was a question was the last part, and I will restate that, so if there is any further objection to it, it may be made.

By Mr. Austin:

3595 Q. Is it not true, Mr. Raupagh, that the Wayne Oil Company and the Citrin-Kolb Oil Company and every jobber doing a similar business has constant records of the amount of gasoline which it sells through its own operated retail stations?

Mr. Hanley: I object, unless you know.

A. I don't think so.

By Mr. Austin:

Q. How does it find out what to pay the State Sales Tax on, then?

A. I suppose they could figure that up from their station records. However, Mr. Austin, I testified that in the first place, we would lose those customers.

Q. Now, just for a moment I would like to clear this up, if there is any question about it, because there has been a number of dealers who have come in here and told us what their volume was, and do you mean to tell me that Wayne Oil Company and Citrin-Kolb Oil Company don't know how much gasoline they sell at their stations every day or every month?

Mr. Hanley: That is argumentative. The witness has stated he doesn't know whether they know or don't know.

A. I suppose they know.

By Mr. Austin:

Q. Don't they have to pay a sales tax on every 3596 gallon of gasoline that they sell at their retail station?

A. If they operate them directly, yes.

Trial Examiner Ballinger: And conform with the law.

The Witness: That's right.

By Mr. Austin:

Q. Don't you know that they keep records of the amount of gallons of gasoline that they deliver to every station, whether they operate it or whether they sell it?

A. I have no way of knowing, but I assume they do.

Q. Now, if you wish, you can go ahead. You were about to say something about your answer to my question awhile ago about losing the business.

A. The proposition, in the first place, would be entirely not practical.

Visualize the situation like the Citrin-Kolb Oil Company. They have a service station right at their bulk plant.

If the hypothetical proposition that you put up were applied and they had to pay a retail price or had to pay dealer tank wagon price for the gasoline that they sold at their directly operated station, the first proposition would be that while the law—I assume there would be a law that would require them to do it—would be one thing. To make the collection from those companies would be another 3597 thing. I think it would be very difficult of collection.

Q. You don't mean that they wouldn't pay their bill, do you?

A. Yes, I do. I mean that there would be a lot of haggling on that: what is wholesale and what is retail.

Q. Well, I think there is something to Judge Hanley's

comment that when the jobber operates his own station that part of his deal is that he operates his own bulk plant and makes his own delivery, so that in so far as the Standard Oil Company is relieved of that function to a tank car buyer, there is a certain saving to the Standard Oil Company. That is one of the issues in this suit, as a matter of fact, so that I think I would have made a better example, Mr. Raupagh, instead of saying that suppose that the jobber paid the tank wagon price for what he sells through his retail station, let us assume we take a purely arbitrary figure that he were charged for what he sold at retail, 1¢ above the tank car price. In other words, a half a cent lower than the tank wagon price that was charged direct. I think that is a better example, because that would arbitrarily, for the purpose of the example, assume that the Standard Oil Company might very properly sell to him gasoline which he sold at retail for half a cent under tank wagon. Let us assume, instead of tank wagon price, that you were to charge for the gasoline sold at retail by
3598 the jobber 1¢ above tank car price.

Mr. Hanley: I think that is in the direction of improvement of the question, Your Honor. I don't think it escapes the objection yet, and I renew it to the question as amended.

Mr. Austin: The witness answered the previous question, and the motion to strike was denied, and now I would like to have him answer the question as so modified.

Trial Examiner Ballinger: The witness may answer the question.

A. I still think it would not be practical at all.

By Mr. Austin:

Q. Well, is it still your opinion that you would lose the business—I am talking of these two particular jobbers now—that you would lose that business?

A. Yes, sir; it is, definitely so.

Q. You are acquainted with their testimony that the retail operation is to them only a sideline and only done to a small extent where they can't avoid it?

A. Yes, sir.

Q. Then, is it your opinion, Mr. Raupagh, in view of your answer, that they would abandon the purchase of Standard Oil gasoline and transfer their business to a non-major company?

A. Possibly so.

3599 Q. Because you will recall that in asking the question I assumed that they would not get a better deal from another major.

A. Yes, sir, I believe that would be very likely and possible, and my reason for that is, too, who is going to classify the major companies and who is going to classify whether that is a major brand or not, and what is off-brand today may be a major brand tomorrow.

Q. Well, of course, I was accepting present conditions for the question and accepting your own definition of the 12 you named as majors.

A. However, I believe in accepting the present conditions we should take into consideration the conditions that might be possible tomorrow.

Q. I believe you said, Mr. Raupagh, that it was customary for the supplier, or, at least, for the Standard Oil Company, to furnish certain equipment to retail stations?

A. Yes, sir.

Q. And I think you mentioned gas pumps and I think you mentioned underground tanks—or did you?

A. I don't know as I mentioned them, but there have been cases where we furnished underground tanks.

Q. And oil pumps, I think you mentioned?

A. Yes, sir.

Q. And identification advertising.

3600 A. That's right.

Q. Anything else that occurs to you at the moment?

A. Not at the moment.

Q. How?

A. There is nothing at the moment that occurs to me besides those items. There may be a few others.

Q. Is such equipment furnished both to the stations who are lessees of the Standard Oil Company and to those which are not?

A. Yes, sir.

Q. And to the lessee stations, that equipment is rented, is it not?

A. Yes, sir.

Q. And it is listed in the lease, is it not?

A. Well, I don't know whether the underground tanks are listed in the lease or not, because that is something that is stationary and really part of the property.

Q. Even if they are not listed in the lease, is their value included or considered in fixing the value of the rental?

A. Yes, all of that is included.

Q. Now, as to the 461 stations; is it not true that the operators of those stations, in many instances, own their own equipment?

A. In some instances they own their own equipment; yes, sir.

3601 Q. Is any such equipment—before I ask you that: as to the 461 stations which obtain such equipment from the Standard Oil Company, does the Standard Oil Company retain title to that equipment while it is at the station?

A. Yes.

Q. Have you with you one of those forms of equipment loan agreement?

Mr. Hanley: I handed you one this morning, Mr. Austin?

Mr. Austin: Did you? I didn't even see it. I guess it has been lying here all day.

Will you mark this for identification, please, Mr. Reporter?

Trial Examiner Ballinger: The reporter will mark the paper as Commission's Exhibit 80, for identification.

(The document referred to was marked, for identification, "Commission's Exhibit 80.")

By Mr. Austin:

Q. Will you identify that form marked Commission's Exhibit 80, for identification, Mr. Raupagh?

A. Commission's Exhibit 80 is our form 385, that is, Standard Oil Company form 385, Equipment Loan Agreement, Sales Department.

Q. With whom are such agreements executed?

A. With our dealers.

3602 Q. With lessees?

A. 461 dealers.

Q. Only with 461 dealers?

A. Yes.

Q. How many 461 dealers did you have, as of the first of this year?

A. You mean in the Detroit area?

Q. Yes.

A. There was some over a hundred. I don't recall the exact amount. I think I gave that to you in previous testimony.

Q. With how many of those 461 dealers, approximately; or if you know the exact figure, give it, have you entered into these equipment loan agreements?

A. I don't know the exact figure, but I would say that with most of them we have.

Mr. Hanley: If your Honor please, I don't know what the purpose of this line of question is as to the plan of lending equipment to tank wagon resellers, what the purpose of this line is all about; the number of questions that have been asked upon it, and I don't care to make any objection or motion to strike if it is pertinent, but at this time, and for enlightenment, at least of counsel for the Respondent, I would like to know what the purpose is.
3603 If it is what I think it is, I do have an objection and a motion to make. I may be wrong, but I would like to be enlightened.

Mr. Austin: It is cross-examination, your Honor, and my recollection is on direct examination Mr. Raupagh was directly asked about the supplying of equipment to retail stations and stated it wasn't done to jobbers, so I think that opens the way to inquiring into it.

Mr. Hanley: If that is the purpose, your Honor, the Respondent moves to strike all of the questions asked of this witness which have to do with the manner of supplying service station equipment to lessee dealers of the Respondent as distinguished from 461 dealers of the Respondent on the ground and for the reason that it is outside of the issues in the pleadings in this case. There is no allegation of any discrimination in price or otherwise as between the class of tank wagon buyers comprised of both lessees and 461 customers.

Further, that this matter was gone into early in the Government's case in this lawsuit, wherein the Government requested that the Respondent furnish to it certain leases, namely, the Marvin Goldberg leases, I think they were, and that was done.

At that time there was a considerable discussion and a number of questions asked in relation to rental plans
3604 and methods of arriving at rentals of properties loaned or leased and then subleased by the Standard Oil Company, and at that time counsel for the Commission stated that he did not care to go into that subject; that we would not have to meet that issue, and since that time it has been entirely out of the case and it now, or at any time,

under the state of the pleadings, would come into the case improperly.

In making this objection, I assert to the Court that we have no objection to counsel cross-examining on the question of whether equipment is given to jobbers or to service station dealers who are sold by the jobbers as their customers.

Mr. Austin: I think I have a perfect right to find out just exactly how and through what contracts equipment is loaned or supplied to retail service stations. The question has been brought up on direct examination as to the difference in the arrangement between them and the jobbers. It is wide open.

Mr. Hanley: If your Honor please, you will recall we explained and counsel then knew that to arrive at any conclusion at all about the propriety of the charge to any lessee would involve opening every and all the background of it that we have in the Detroit area for all the years in question which is just a superhuman task.
3605 Your Honor will recall that evidence. I still don't
know what the purpose is unless counsel is just simply finishing in the hope that he can find some way of bringing another charge against us as between one group, namely, the tank wagon buyers and that, definitely, is not in this case, and counsel himself has said we don't have to meet that charge; it is outside the issues.

I repeat we have no objection to cross-examination on the question of whether the Standard Oil Company furnishes equipment to either jobbers or other service station operators serviced by the jobbers, or upon the question of whether we do furnish equipment to certain tank wagon customers who are direct customers of the Standard Oil Company, in contrast to that group serviced by the jobbers.

Trial Examiner Ballinger: Let the Examiner see the document.

Mr. Austin: If your Honor please, I can—perhaps if that's all that counsel is afraid of, I can relieve his mind. I am not trying to prove any discrimination between lessee customers and 461 customers, but I do consider this cross-examination material upon the question of the different method of dealing with retail customers, on the one hand, and jobbers, on the other. It is offered on that issue of the case, and, of course, upon which there is direct examination.

3606 Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I am not offering this at all with an attempt to prove discrimination between the two types of retail dealers. I told Judge Hanley that before.

3607 Mr. Hanley: I would like to have the adjournment now, your Honor, in line with your Honor's suggestion. This is a new thing and I want to take a look at this.

Mr. Austin: I especially request, your Honor, that it is not fair to counsel for the Commission to require a break off in the middle of cross examination on a subject when he is examining an employee, an officer of the Respondent.

Trial Examiner Ballinger: How much longer will you be?

Mr. Austin: I won't be much longer on this subject, but I want to go on this subject of equipment, both as to retailers and jobbers, because that is what was discussed on direct examination.

Trial Examiner Ballinger: Are you ready for a ruling on your motion?

Mr. Hanley: I haven't any motion that I know of.

Trial Examiner Ballinger: The motion is to strike all of the witness' testimony with reference to—

Mr. Hanley: Yes, your Honor.

Trial Examiner Ballinger: (Continuing.) to Commission's Exhibit No. 80, for identification.

Mr. Hanley: Has it been offered?

Trial Examiner Ballinger: No, your motion is 3608 to strike.

Mr. Hanley: That is what I understood, the testimony alone.

Trial Examiner Ballinger: The testimony. The motion is overruled in view of counsel's, in view of the statement of counsel for the Commission relative to the purpose for which the examination is being conducted.

By Mr. Austin:

Q. Now, Mr. Raupagh, referring to Commission's Exhibit No. 80, for identification, there is a blank space here toward the upper half of the page and there are some column headings "Serial Number" and also "Description of Equipment" and "Capacity". When one of these forms is executed, what is filled in in that space?

A. A description of the equipment.

Q. You mentioned a moment ago or rather mentioned in your direct examination, gasoline pumps, tanks, gasoline tanks, oil pumps, and identification advertising. And, I believe you said a moment ago that the tanks—well, we were talking about the leasing a moment ago. In these equipment loan agreements, is a tank generally listed or, are tanks ever loaned?

A. There have been cases where we have taken over a
station, a dealer's station and have taken over the tanks
which have been there and have listed them. If we
3609 have ownership of the tanks, we list them.

Trial Examiner Ballinger: They are included in the lease?

The Witness: Yes, sir.

Mr. Austin: I am speaking not of the lease, but of the agreement.

Trial Examiner Ballinger: You are referring to Commission's Exhibit No. 80 for identification?

Mr. Austin: Yes, sir.

By Mr. Austin:

Q. And in the blank space here, just below the middle of the page, of the same exhibit, what is generally listed there?

A. A description of the equipment and the rental to be charged.

Q. When is rental charged for that equipment? Strike that. That, perhaps, is not proper at this time.

Mr. Austin: I will offer the Commission's Exhibit No.
80, for identification, in evidence, and I wish to say that
I was doing so to complete the agreements by the Standard
Oil Company, which the Standard Oil Company has with
the stations here in Detroit, other stations here in Detroit,
and the lease and the 461 agreement were introduced as
Commission's Exhibits 1 and 2 and at that time I was not
familiar with these equipment loan agreements and
3610 they were mentioned, I think, during the course of
Mr. Boatwright's testimony and also, I think, referred
to, at least, if not by name, in Mr. Raupagh's direct examination at least, they refer to the loan of or supplying of equipment to retail stations, which was taken up on direct examination.

Trial Examiner Ballinger: Re-state for the purpose of the record for what purpose the exhibit is offered in evidence.

Mr. Austin: It is offered, your Honor, for the purpose of showing on the record the complete method of dealing and arrangements and contracts between the Standard Oil Company and its retail stations on the one hand as distinguished from its dealings with its jobber customers on the other hand. And, I believe that it is necessary to have the record show fully the dealings with retail stations in order to distinguish between those dealings and the jobber dealings and I can see no reason why they should be objected to in any way.

Mr. Hanley: There is no objection, your Honor, to supplying the Commission or, having offered in evidence, if counsel desires to do so, the blank form 385 to complete, as he says, the agreements or forms of agreement which were referred to in Mr. Boatwright's testimony or schedule of costs. The examination which Mr. Austin has been making of Mr. Raupagh in connection with that 3611 exhibit wherein it goes beyond the testimony of Mr. Raupagh that it is a form executed with said tank wagon dealers, is objected to and motion is made to strike the same and motion is renewed to strike all of the testimony which was heretofore moved to be stricken out on the grounds then stated and on the further grounds that now, in view of the statement of counsel, it has no materiality at all. The only materiality that this question on the furnishing of equipment to any dealers has in this case is on the question of costs in that it has been shown that certain costs were incurred by the Respondent, based upon the fact that it did furnish certain equipment to the class of dealers in Detroit, known as tank wagon dealers, which costs were given consideration by Mr. Boatwright in his testimony as to what Respondent's costs were in servicing tank wagon dealers. It has been testified that there was no equipment furnished by Respondent to the jobber dealers involved in this action, nor to the retail dealers that those jobbers serviced and that the Respondent was relieved of that item of cost in its method of sale and delivery and doing business with the jobber customers. Now, that is all there is to the question and the only materiality is and the only right of cross-examination that exists of this witness is, first, the question [illegible] whether it is the truth that we do not furnish the jobbers of their customers any

3612 equipment and do furnish equipment to that group known as tank wagon buyers. That, I concede is material on this cross-examination.

Secondly, on the question of the cost of furnishing that equipment to the tank wagon dealer group and I concede that this is material because that is a fact that was taken into consideration in the proofs which we have given of our cost. For any other reason or procedure, your Honor, it has no materiality. It just places upon us the burden of refuting implications of different methods of treatment of different persons in this one big group, with which we are not charged and there ought not to be any implications and the cross examination ought to be confined to the things that are material or issue with which we are confined here and as to them, we have no objection and no objection to the exhibit itself as evidence of the form itself, which Mr. Boatwright referred to, being received in evidence and no objection, as has been frequently offered here to the Commission examining all of the figures of cost arising out of this practice of furnishing equipment to tank wagon dealers that Mr. Boatwright took into consideration in his figurations of our costs. They are entitled to that.

Trial Examiner Ballinger: The Examiner is prepared to rule. The Examiner admits in evidence Commission's Exhibit No. 80 for identification, for the sole purpose
3613 of showing the form used and the cross examination with reference to it will be limited to the direct testimony heretofore given.

Mr. Austin: Well, I am not in anyway contesting that, your Honor. It is my contention that the direct testimony permits me to go into this question. Furthermore, as Judge Hanley said, as their contention is and was, on Mr. Raupagh's direct testimony, that they have certain costs in connection with their retail stations that they do not have in connection with their jobbers and that question, I assume, is wide open and therefore, I am entitled to find out what they are.

(The document referred to, heretofore marked for identification "Commission's Exhibit 80" was received in evidence.)

Trial Examiner Ballinger: As to that, you are entitled to cross examine.

Mr. Hanley: We concede that.

Mr. Austin: I assume I am not precluded from finding out how this form is used when it is filled out, since it is furnished to me in blank and I presume I may cross-examine the witness as to what goes in this form when it is filled out.

Trial Examiner Ballinger: You may do that.

Mr. Austin: That is what I was starting to do.

3614 By Mr. Austin:

Q. Now, Mr. Raupagh, if you will look at form 385, Commission's Exhibit No. 80, I started to ask you about this blank space just below the middle of the page. Do I understand the same equipment is filled in there that is filled in in the blank space higher up?

A. Yes, sir.

Q. And in the lower blank, there is a column heading "Monthly Rental Rate" and you stated a moment ago that the amount of rental was filled in there?

A. That is right.

Q. When and under what circumstances is rental paid by the 461 station on the equipment which is included in one of these agreements?

Mr. Hanley: That is objected to for the reason that the exhibit speaks for itself. The answer seeks to elicit.

Trial Examiner Ballinger: Is the time of payment stated in there?

Mr. Austin: Your Honor, as I read it—you can see there (indicating).

Mr. Hanley: There are a dozen conditions. The exhibit states what they are.

Mr. Austin: As I read it, the rent is paid when the equipment isn't used.

3615 Trial Examiner Ballinger: Where is the provision with reference to payment?

Mr. Austin: It is right here (indicating).

Trial Examiner Ballinger: The witness may answer. Objection overruled.

The Witness: What is the question, please?

(The question referred to was read by the Reporter.)

A. I would have to look that up because I hope you appreciate the fact that we have over one thousand different forms and the application of each one of these forms is just a difficult proposition to know the details of. I would be glad to testify on that sometime later, if you will give me a chance to look it up.

3616 By Mr. Austin:

Q. Well, I was just trying to find out whether it was or was not a frequent or usual occurrence that rental is paid on one of these agreements. In other words, the agreement says: "In event dealer shall at any time cease to use any of the items of equipment—" there will be rental. Under what circumstances would your 461 dealers cease to use the equipment that is included in this agreement unless they went out of business and, if they went out of business, I assume the company would take their equipment back.

A. If he changed suppliers.

Q. I assume that is not frequent.

A. Yes, sir, it is frequent.

Mr. Hanley: That is objected to as a misstatement as to what Exhibit 80 is and says. The question deceives the witness. The statement to which counsel alludes is as follows: "In event dealer shall at any time cease to use any of the items of equipment herein mentioned for the handling of petroleum products supplied by Company, it is understood that dealer shall from the date of such discontinuance pay as rental—" There isn't anything mysterious about that, your Honor.

Mr. Austin: Well, I would like to be told.

Trial Examiner Ballinger: He wanted to know.

3617 Mr. Hanley: I say that when counsel says that rent is due only when the dealer goes out of business or quits using the equipment, that that is a misstatement.

Trial Examiner Ballinger: The document is very clear except as to what rental he shall pay.

Mr. Hanley: If your Honor thinks that material, he may answer.

Mr. Austin: He did not make any statement. I asked the witness when such rental would be, and I said: "Would that be when he went out of business?" It seems to me that Mr. Raupagh might be able to tell me. That is all I want to know. I am just an outsider when it comes to the use of your agreement, and I don't intend to make any statement on the subject. I never saw it until five minutes ago, but I was only trying to find out whether this rental clause became effective frequently or whether that is something that is put in there simply to cover an unusual case, and beyond that, I did not intend to go.

Trial Examiner Ballinger: You may ask the witness if he can tell you.

The Witness: I can't tell you.

Trial Examiner Ballinger: If he doesn't know—

Mr. Hanley: If you really wanted to know, you had better come to me. I drew up the form. That is the thing to do in this kind of a situation.

3618 Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

You may proceed.

By Mr. Austin:

Q. Referring to the kinds of equipment which are in practice listed on the equipment loan agreement, I ask you again whether there are any other types beyond what we have mentioned here on a couple of occasions this afternoon.

A. Not that I recall right now.

Q. Is any other such equipment supplied or rented by the Standard Oil Company at any retail stations, which are supplied by the Stikeman Oil Company, the Wayne Oil Company, or the Citrin-Kolb Oil Company?

A. No.

Q. Does that include the stations which they operate as retail stations?

A. Yes, sir.

Q. Does that answer—is your answer the same if directed to the question of identification advertising?

A. Identification advertising, we furnish identification advertising to the stations which the jobbers supplied.

Q. And that is also true of Ned's Auto Supply Company?

A. Yes, just the identification advertising.

3619 Can you state why the Standard Oil Company furnishes the identification advertising to its jobbers, but does not furnish other types of equipment? I assume that has something to do with policy.

A. That is the policy of the company, yes.

Q. Why does the company differentiate between those two types of equipment?

A. I don't know. Most likely it sells one on a tank car basis and one on a tank wagon basis.

Q. Well, the identification advertising is the same type of advertising, isn't it, whether it is supplied to a jobber or a retailer?

A. That is right, but it is always a good plan for us or any oil company to have it at a service station.

Q. Can such advertising with your brand names on it be obtained from any other source except from your company?

A. No.

Q. And is it the policy of the company to retain ownership of all such advertising?

A. Yes.

Mr. Austin: That is all I have on that subject, your Honor.

Trial Examiner Ballinger: It now being 6 o'clock, the hearing is adjourned to ~~be~~ reconvened at—

Off the record.

(A discussion ensued off the record.)

3620 Trial Examiner Ballinger: On the record.

To be reconvened at 9:30 A. M., May 9th, 1941, in Room 859 Federal Building, Detroit, Michigan.

(Thereupon at 6 o'clock P. M., an adjournment was taken, to reconvene at 9:30 o'clock A. M., May 9, 1941.)

3621

Room 859, Federal Building,
Detroit, Michigan,
May 9, 1941.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois, and Arthur J. Abbott, of the firm of Abbott, MacMahon, and Roberts, 2230 Buhl Building, Detroit, Michigan, on behalf of the Respondent.

3622 PROCEEDINGS.

Trial Examiner Ballinger: We will come to order.

This is a reconvening at 9:30 A. M., Eastern Standard Time, May 9, 1941, in Room 859 Federal Building, Detroit, Michigan, in Docket No. 4389, in the case entitled Standard Oil Company.

The last hearing was held in Detroit May 8, 1941.

The Reporter will note counsel for the Commission and Respondent present.

You may proceed.

Mr. Hanley: There appearing to be some confusion in numbering of the Retail Gas Dealers News magazine exhibits, counsel for Respondent re-offers the same as follows:

The issue of September, 1940, being marked Respondent's Exhibit 77-A, the face sheet, 77-B, being page 3, 77-C being page 10 thereof. There is offered the issue of January 1st, 1941, as follows: Exhibit 78-A being the face sheet thereof; 78-B being page 3 thereof; 78-C being page 12 thereof; and the additional pages to be marked 78-D being page 7 thereof, and 78-E, being page 11 thereof. Further, there is offered the issue of March, 1941, being marked Exhibit 79-A, the face page thereof; 79-B, being page 5 thereof; 79-C, being page 29 thereof, and there is offered the additional page as 79-D, being page 20 thereof. The 3623 issue of April, 1941, marked Exhibit 80-A, being the face page thereof; 80-B, being page 3 thereof, 80-C being page 6 thereof, and the additional exhibit 80-D, being page 9 thereof. The foregoing exhibits and the series 77-A, B, C, 78-A to E, inclusive, 79-A to D, inclusive, and 80-A to D, inclusive, are offered in evidence.

(The documents referred to were marked, for identification, "Respondent's Exhibits 78-D and E, 79-D, and 80-D.")

Trial Examiner Ballinger: The Commission acts only in the interest of the public. The source of its information and the reasons for its acts are matters that are not open to inquiry in this proceeding. The tendered documents are rejected.

P. A. RAUPAGH was thereupon recalled to the stand, and having been heretofore duly sworn, testified further as follows:

Cross-Examination (Continued) by Mr. Austin.

Q. Mr. Raupagh, in your direct examination, you enumerated 12 brands of gasoline that you classified as major brands in the Detroit area, but you stated that that classification had no reference to the volume of gasoline sold of those brands in the Detroit area, and you also named
3624 some other non-major brands, and I believe stated
that there was more gallonage of some of those brands sold in Detroit than some of the brands that you classified as majors. Is that correct?

A. That is correct.

Q. With that classification in mind does the volume of gasoline sold in the Detroit area, as between those different brands, both major and non-major, have any reference to the retail price levels at which the different brands are sold?

A. No.

Q. Then, is it your opinion that as between the different brands, the volume sold in the Detroit area is not affected by the retail price at which they are sold?

A. Oh, yes.

Q. That's what I intended to ask you before.

A. If so, it wasn't clear to me.

Q. I phrased the question a little differently the second time, but I will ask you again, then, whether the volume of gasoline sold in the Detroit area at retail, as between different brands that you named, including all of them, major and non-major, is not affected by the price at which the various brands are sold.

A. Yes, I believe that has an effect.

Mr. Hanley: Will you ask him what majors you 3625 are referring to; or he is referring to, in his answer?

Mr. Austin: Yes. The first question I asked him —I think the record is clear on that, unless you want it read back.

Mr. Hanley: I just want to know, Mr. Raupagh, if you are talking about your classification of major marketers in Detroit that you have heretofore given, in your answer to that question.

Mr. Austin: The record so states. I think it is entirely clear.

Mr. Hanley: You used the designation "12 majors." There were more classified by Mr. Raupagh. I want to know whether he is referring to the 12 or to the entire list.

Mr. Austin: My understanding is he referred to 12, which he classified as majors in Detroit.

Mr. Hanley: He classified more than that.

Mr. Austin: As major brands?

Mr. Hanley: Yes, sir, as major marketers.

Mr. Austin: I don't believe that ought to be in the record. I am perfectly willing to stand on the record.

Mr. Hanley: I am trying to avoid any redirect examination. I would like to have it clear as we go along.

Mr. Austin: I am satisfied with the record as it stands. Therefore, I object to any further questions on cross-3626 examination.

Trial Examiner Ballinger: Proceed.

Mr. Austin: My opinion is that the record is clear. If it isn't, it can be brought out later.

By Mr. Austin:

Q. What is the normal price differential, Mr. Raupagh, between major brand and non-major brand gasoline?

A. There is no normal price differential.

Q. Referring to the volume of different brands, I am correct in stating that you classified the Joy and the Zip gasoline as non-brand, am I not?

A. No.

Q. Didn't you say that they were not major brands?

A. No.

Q. Do you say that they are major brands?

A. Yes.

Q. Well, I think that may be contrary to your previous testimony, but, if so, I am sure that—then, I would like to have you make a complete statement at this time of all brands of gasoline which you claim are major brands in Detroit. I think in view of that previous answer, the record may need clarifying.

Mr. Hanley: There isn't anything contrary about it. May I say to your Honor and counsel that I think the
confusion arises here out of the fact that Mr. Raupagh
3627 testified to the names of 12 companies which were
denoted majors in the exhibits which undertook to
differentiate certain classes of gasoline as between jobbers and other companies. Now; Mr. Raupagh testified to those 12 because they were the ones that were used and the gasoline fell into certain groupings in Exhibit 58, for instance, and other marketers' gasoline fell into other groupings in that exhibit, but when Mr. Raupagh was asked what he considered as the major brands marketed in Detroit, he added many other names to that list of 12. I was confused myself for a little while, you may recall, but that is the only place that list of the 12 has in this record or in the testimony of Mr. Raupagh.

Mr. Austin: You mean, just in the exhibits?

Mr. Hanley: To identify the gasoline that was referred to as the major group in those exhibits.

Mr. Austin: Well, I don't pretend to know why it was referred to in the exhibits one way and in the testimony in another way.

Mr. Hanley: Well, the reason for that is, if your Honor please, that some of these marketers, like Zip and Joy, market exclusively in Detroit. The other marketers, like Sinclair and the Standard Oil Company, market all over the State, and the effort was to classify the groups so that
the true picture in Detroit could be portrayed.
3628 Now, have I correctly stated your testimony, Mr.
Raupagh?

The Witness: Yes, sir, you have.

Mr. Austin: Well, we will try to avoid further inquiry into major and non-major, which is beside the point.

Mr. Hanley: We have no objection to asking the witness to recapitulate what he regards as majors.

Mr. Austin: No, but for the purpose of these classifications, we will refer to the classifications on the exhibits which I believe refer to certain brands as major brands and certain brands as non-major or off-major or off-brand gas. Well, it really doesn't make any difference for the present question, anyway, because I am going to ask you specifically about Joy and Zip, and whether that is a major or a non-major brand is immaterial for the purpose of this question.

By Mr. Austin:

Q. And your testimony is that they sell, or did sell in 1940, a volume of about 40,000,000 gallons of gasoline in the Detroit area?

A. Charles E. Austin, selling Joy gasoline, sold in Detroit in 1940, 17,900,000 gallons of gasoline.

Q. Is that just the Joy?

A. That is just the Joy brand.

3629 Q. And how much was sold by the Zip?

A. Sunny Service, Puritan Oil Company, selling the Zip brand of gasoline, sold, in 1940, 12,490,000 gallons.

Q. That is around 30,000,000, for the two of them?

A. That's right, sir.

Q. Is that volume due largely to the price at which that gasoline was sold at?

A. Price and acceptance of the product.

Q. Doesn't—

A. It has been—pardon me, sir.

Q. Isn't the acceptance caused very largely by the price?

A. Partially. However, advertising is also a great feature.

Q. In your opinion, if the Joy and Zip gasoline were never sold for more than 2¢ per gallon below the prevailing major retail price, would they be able to maintain their present volume?

A. I don't know. With their methods of extensive advertising, at times giving premiums, they would maintain a very substantial volume, I am sure of that. Just how much, I can't say.

Q. Your opinion is, then, Mr. Raupagh, if all the brands of gasoline which you named, regardless—well, we will again have to refer to the ones which are classified as majors and non-majors, and I suppose we had again

3630 better refer to those exhibits as a means of framing the question.

In your opinion, if all of those brands, both major and non-major, were sold at the same price, would there not soon be a shift in volume to the major brands and away from the non-major brands?

A. That would depend upon the quality that would be maintained, either by the non-majors, as referred to in the exhibits, or the majors.

Q. Well, I am assuming that it would be the same gasoline that is sold now.

A. Oh, I think that the non-major would always have a place in the picture.

Q. You would be very glad if all the gasolines were sold at the same price, wouldn't you?

A. Oh, I would be delighted, yes, sir.

Q. I believe you testified, Mr. Raupagh, to the fact that times in 1938 were not as good as in 1937 or 1939.

A. That's right.

Q. And I think you said people driving autos didn't have as much money to spend.

A. That's right.

Q. Referring again to the matter of price: In your opinion, was price, or was it not, a bigger factor in influencing retail sales in 1938 than it would be in a more prosperous year? I mean, retail price.

3631 A. I would say that it was quite a large factor, yes.

Q. And would you say that price is a larger factor in influencing retail sales in a year such as 1938 than it would be in a more prosperous year?

A. I believe so.

Q. And isn't it true that the off-brand marketers increased their gallonage in 1938?

A. Very materially.

Q. Now, you recall that there was something of a price war in November of 1939 when both retail prices and wholesale prices were changed quite frequently, and very unstable; is that right?

A. That's right, sir.

Q. And you stated that after November, 1939, or in the latter part of November, 1939, the price-cutting situation corrected itself. I believe those were the words that you used; that is, the words: "Corrected itself" to a large extent. Was that your testimony?

A. Something along that line. I don't recall it exactly.

Q. I will ask you now whether the price-cutting situation in Detroit did correct itself in the latter part of November, 1939, to a large extent?

A. Yes.

Q. Have retail prices been more steady since that time than they were in the year or two years previous?

3632. A. To a degree, yes.

Q. What is the reason for that, in your opinion?

A. Well, one of the main reasons for that is that a smaller dealer margin—I think that is always a big factor.

Q. I don't understand you. I am asking why, in your opinion, the price-cutting situation corrected itself at that time or why prices have been more stable since that time; with reference particularly to why there was a change at that time.

A. You mean—

Q. At the end of November, 1939.

A. One of the main reasons why there was a change at that time, I believe it was in—I believe it was some time in September or October, 1939, when the Sun Company went into a sort of a rampage here and got some of their dealers to sign agreements to the effect that if they would sell at a margin of 2¢ to the dealer, the dealer tank wagon price would be a certain amount, and reduced the tank wagon price. That was followed by the Socony Vacuum Oil Company and the Shell Oil Company, and some of the other oil companies.

Q. That was Sun that you mentioned first?

A. Yes, sir; that was Sun Company.

Also, at that time, the Sun Company introduced a
3633 new gasoline. They started with a new line of advertising; namely, that their regular grade of gasoline was equal to premium or Ethyl brand gasoline. That all broke about the same time.

We never reduced our price, our dealer tank wagon price, to the lowest price to which the Sun Company reduced their price.

The Sun Company also started out and gave that price to certain dealers who would sign this agreement or letter. When we reduced our price, we made it effective to all the dealers in the area.

That went on for a period of three or four weeks or something like that, until finally the price leveled down, and those companies that had those letter agreements with their dealers, withdrew them. We had none. We had no arrangements or agreements with our dealers.

I think that was one of the main factors that caused a very wide demoralization, to start with.

Q. Well, why was the price situation better after the Sun Oil Company and the others raised their tank wagon price back to where it was before?

A. Well, I think they were all sick of it. In plain words, I think that is the case. I think it was a very unfair thing, as it was.

Q. Is it your opinion, then, that that situation had
3634 some effect upon the retail price situation?

A. Oh, absolutely, it had an effect upon the retail price situation.

Q. Well, I think it did affect the retail price situation after the tank wagon price was moved back to 8.1¢.

A. Well, for the reason that the major companies, as well as the dealers, were all sick of it, and they were more willing and ready to go on a more stable basis.

Q. Don't the Sun Oil Company state that it was lowering its tank wagon price in order to enable its dealers to meet the prices charged by the dealers, such as Ned's, who bought in tank car lots from the other companies?

A. They made no such statement publicly. The only thing they did was to write up a letter in their own office and go around to their dealers and try to get their dealers to sign these letters and go on a different retail basis, and, I will repeat, they did introduce their new gasoline, the breaking of new advertising about the same time seemed to all, looked like a pre-arranged proposition.

Q. When was the new gasoline advertising? Was that before or after that cut in the tank wagon price?

A. Just about the same time. It wasn't before, but it may have been a few days later, but it all came about the same time.

Q. Well, that new gasoline and the new adver-
3635 tising was, of course, advertised all over the country,
was it not?

A. I don't know as to that. I can't say to that, because I don't know whether they had it available all over the country.

Q. Well, do you know whether they cut their tank wagon price at that time anywhere else except in Detroit?

A. Oh, they did at various times later than that.

Q. I say at that time did they make the same move on their tank wagon price in any territory that they made here or do you know?

A. What do you mean by territory?

Q. I mean to say just now, referring to some cut in the tank wagon price made by the Sun Oil Company in November of 1939.

A. Yes.

Q. And I assume you were speaking of the Detroit area?

A. Yes, sir.

Q. Do you know whether they made any similar cut in any other area which they made at the same time?

A. Oh, yes, they went clear up to Pontiac and a week or two weeks later in Lansing they did the same thing.

Q. That is in this division?

A. Yes, sir.

Q. And that was all about the same period?

A. Yes, sir.

3636 Q. Do you know whether they did it anywhere else outside of Michigan?

A. I read in the trade journals that they did.

Q. At that time?

A. Yes, sir.

Q. Do you have any personal knowledge of that at all; that is, from any reports to your own company?

A. No.

Q. And is it true, then, that after the Sun Oil Company raised its price back to 8.1¢ a gallon that I believe Standard Oil and Socony did the same, and that after that time the retail prices were more stable?

A. That is right. I don't subscribe exactly to those raises. I don't know who raised first or last.

Q. I wasn't attempting to state who raised first or last, either, but I am sure that the price of 8.1¢ on house brand gasoline is correct.

Do you remember a Mr. McDonald of the Federal Trade Commission?

A. Very well, sir.

Q. Wasn't he in Detroit and didn't he call on you about that same period; that is, during November of 1939?

A. It was the latter part of 1939. I don't remember the exact date.

363 Q. Do you think the fact that Mr. McDonald was here and was known to be investigating the price situation had anything to do with the stabilization of retail prices after November, 1939?

A. I don't think it had a thing to do with it. You wouldn't want me to say, would you, that he was the instigator, would you?

Q. The instigator of what?

A. Of the Sun Oil Company making that move?

Q. Well, do you think that, or do you care to express yourself? I am not pressing you for an answer.

A. Well, I am frank to tell you I don't think he had a thing to do with it.

Q. Do you keep in touch with the posted tank wagon price of other oil companies in Detroit, major oil companies?

A. Oh, yes. That is a matter of necessity and it is a matter of public knowledge.

Q. Are you familiar with the tank wagon price of the Argo Oil Company?

A. Well, when you say familiar—

Q. Can you tell me now whether it is as high or higher than the Standard Oil Company posted price on Red Crown?

A. I don't believe I can tell you for the past ten years whether it was as high or as low, because I think they are all over the map.

Q. Do they have a posted tank wagon price for 368 Marathon gasoline.

A. I believe they have a posted price, but I question whether they follow it.

Q. You mean you question whether they follow it in their sales to retail service stations?

A. Yes, I do.

Q. Well, how about the Red Indiana Oil Company? How does the posted tank wagon price on Fleet-Wing compare with the posted tank wagon price on Red Crown?

A. The same.

Q. Has it been the same during the last three or four years, to your knowledge, for most of the time?

A. Well, yes, I think it has been the same for most of the time. Well, of course, there are dates and so on that don't jibe.

Q. Well, if there is a change up or down of your own tank wagon price, perhaps some other tank wagon company major might not change theirs on the same date. I presume that is what you refer to?

A. Yes.

Q. But your answer is that, first, there is a tank wagon posted price on Fleet-Wing?

A. Yes.

Q. And, secondly, that it is generally, except for perhaps brief intervals, the same as Standard Oil Company tank wagon price on Red Crown?

3639 A. Yes, I believe it is.

Q. Does the identification advertising that the Fleet-Wing service stations show that that gasoline is refined or produced by the Standard Oil Company of Ohio?

A. I don't believe it does.

Q. Is the brand Sohio used in Michigan at all?

A. No.

Q. Did the Standard Oil Company—that is, your company ever take any action to prevent the use of that trade mark in Michigan?

A. Oh, I think there has been times when they have used it on some of their dealers' stations, and they have used it, and I have made a report of it to our legal department.

Q. And has your legal department taken such steps—taken any steps to have that use discontinued?

A. Well, it did discontinue.

Q. You mean they discontinued the use of Sohio?

A. Yes. I think the discontinuance was as to the name of Standard Oil.

Q. Do you consider that your company has the exclusive right to the right—to the use of the name Standard Oil in Michigan, in connection with gasoline?

Mr. Hanley: I don't know what the materiality is. I haven't any objection. If you know, go ahead and answer, Mr. Raupagh.

3640 A. I can't answer from a definite angle, but that has been the understanding.

Mr. Austin: The only purpose, Judge, is I want to bring out if it is material that while Fleet Wing has been referred to as a major brand, because it comes from the Standard Oil Company of Ohio, that it isn't advertised in Michigan as a Standard Oil gasoline which, in my mind, might have some effect upon public acceptance.

Mr. Hanley: There is no objection to counsel pursuing that theory, of course, if he regards it as material, but it may be helpful if I state that the Standard Oil Company of Indiana does claim the right to the name Standard Oil, and any specific use of it applied to petroleum products within the State of Michigan.

Mr. Austin: I so understood, and that was about all I was trying to bring out.

Mr. Hanley: And we resist vigorously the attempted adoption of that name by any competitor; that is, as to petroleum products, of course. There are companies handling other things where they use the name.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

3641 Q. I would like to show you Respondent's Exhibits 58 and 59, Mr. Raupagh, the second column on Exhibit 58 is headed "Total Sales—Detroit Area."

A. Yes, sir.

Q. And the second horizontal column on Exhibit 59 is headed "Consumption—Detroit Area."

Now, is the meaning of "Consumption—Detroit Area," as used in one exhibit, and, "Total Sales—Detroit Area," the same?

A. Yes.

Q. And is it not true that the figures under those titles in the respective exhibits are the same?

A. Yes, sir.

Q. Now, I wanted to ask you, Mr. Raupagh, whether those figures for sales or consumption, as they are called in their respective cases in the Detroit area, include consumption by commercial consumers?

A. Yes, because they operate motor vehicles.

Mr. Austin: I wanted to clarify that, your Honor, simply because I think, on the face of these exhibits, it might naturally be inferred that the 100% totals under the columns I named were 100% of the totals of the other columns. Unless you took the trouble to add up the other columns and see it didn't come out, which I presume it wouldn't.

3642 In other words, I assume the totals of the other columns would not add up to the totals for the Detroit area.

Mr. Hanley: Off the record?

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Take Exhibit 58 again, Mr. Raupagh, and it appears that the total of columns 8, 9, and 4, equals column No. 2.

A. That's right.

Q. Now, that being true, where does the consumer use or the sales to consumers appear; which one of those columns?

A. Well, it appears in the totals, because we took all motor vehicle registrations in the area.

Q. Oh, I see. Then, in your total for Standard Oil Company sales, column 4: "Standard Oil Company sales excluding jobbers," that includes your sales to commercial consumers?

A. Yes.

Mr. Austin: Off the record?

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

3643 Q. I suppose, Mr. Raupagh, that the jobbers also do some consumer business?

A. Yes; a little.

Q. Other than through the retail service stations?

A. Yes, they do; a little.

Q. I should have said commercial consumer business.

A. They do a little, yes.

Q. Did you testify, Mr. Raupagh, that the business of the four Standard Oil Company jobbers per outlet did not increase in 1937 over 1936?

A. I don't remember whether I testified to that or not.

Q. Do you recall being asked about the increase of the volume of the jobbers in 1937 over 1936 and then you were asked whether the Citrin-Kolb Oil Company didn't increase its number of outlets, and then you were asked whether, figuring the amount of gallonage per outlet for the four jobbers, there was an increase in their business in 1937 over 1936, and I think you stated that there was no increase per outlet, although there was an increase in total gallonage.

A. I believe that's right.

Q. Have you got any computation there or figures that you prepared on that?

A. We did have. We checked that with the jobbers.

Q. Well, those figures, of course, for their volume,
3644 appear in the State Gasoline Division reports, do they not?

A. Yes, they do.

Q. And have you those figures with you; that is, have you any computation with you which you made, as to the number of outlets and the gallonage per outlet?

A. I haven't any of that computation with me.

Q. Well, in making that computation as to the total gallonage of the respective jobbers during the four years or, rather, the total gallonage for the four jobbers, I believe is what we referred to, and also the gallonage per outlet, when you testified that the gallonage per outlet did not increase in 1937 over 1936, were you including the four outlets then operated by Ned's Auto Supply Company?

A. As I remember the testimony, I think that was only asked me of the Citrin-Kolb Oil Company.

Mr. Austin: Well, if your Honor please, I have the testimony here and I think perhaps the best thing to do would be to find it and if you give me a moment, I think I can locate it.

The Witness: May we go off the record for just a moment and take a short recess?

Trial Examiner Ballinger: We will take a recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

3645 By Mr. Austin:

Q. Mr. Raupagh, do you recall certain testimony that you gave regarding Charles Gershenson; you stated, I believe, that he at one time, on behalf of the Ned's Auto Supply Company, applied to you or to your company to lease to Ned's certain service stations, the property of which was owned or leased by the Standard Oil Company?

A. Yes, I remember?

Q. And you said that you declined to lease those stations to Ned's Auto Supply Company?

A. Yes?

Q. And Ned's—did Ned's want to operate that station as Standard Oil Company retail stations?

A. Well, they wanted to operate them as Ned's retail stations, I assume.

Q. But they wanted to operate them as Standard Oil Company stations, did they not?

A. Yes, that is what they had in mind.

Q. Did they have in mind, in making that request to you, that the gasoline, that is, if your acceded to that request, to lease them the station, that they would supply the gasoline from their bulk plant, or was it to be supplied by you by tank wagon?

A. Oh, no, that was to be supplied by them from their bulk plant.

3646 Trial Examiner Ballinger: I did not understand that.

The Witness: Oh, no, that was to be supplied by them from their bulk plant.

Mr. Hanley: That is what they told you.

The Witness: Yes.

Mr. Hanley: You are stating what Ned's had in mind.

Trial Examiner Ballinger: That was their understanding?

The Witness: That is what they told me.

By Mr. Austin:

Q. Why did the Standard Oil Company refuse that request?

A. Well, we just did not think that was good business, at least, I did not.

Q. Have you ever leased any of your service station properties, and by your service station properties, I mean those properties which you either own or lease from the owner?

A. Yes.

Q. Did you ever lease any of those properties to anyone except a service station operator under one of your lease, regular lease agreements?

A. Just a service station operator.

Q. And did you ever lease one of those properties to anyone who proposed to obtain his gasoline from any 3647 other source than tank wagon delivery from the Standard Oil Company?

A. I never had anyone propose that, even.

Q. Well, Ned's proposed it this time?

A. Oh, no.

Q. You just said that Ned's proposal was that they would not receive gasoline from those stations by tank wagon, they wanted to supply it from their own bulk plant.

A. That's right.

Q. I am asking you whether you have ever leased service station property to anyone except an operator who was to receive his gasoline by tank wagon purchase from the Standard Oil Company.

A. I don't recall we ever did.

Q. And that is a policy of the company; at least, in the Detroit field?

A. That is my policy.

Trial Examiner Ballinger: Well, your policy is subject to approval or disapproval by the company?

The Witness: That's right.

Trial Examiner Ballinger: Did you act independent of the company?

The Witness: I will answer that by saying that that is a policy of the company, your Honor.

By Mr. Austin:

3648 Q. Isn't the reason for that policy that the company considers it more profitable to sell its gasoline to the service station by tank wagon delivery rather than to supply it to the jobber and let him supply the station from gasoline that he purchases at tank car?

A. I don't know what the reason for the policy is, Mr. Austin.

Q. Well, in your opinion, would your operation in the Detroit area be more profitable if you could lease a large number of your service stations to jobbers so that the service station would be supplied by the jobber, and the gasoline would be sold by you to the jobber at tank car prices rather than direct to the service station by tank wagon?

A. I have no opinion on it. I have never gone into those figures.

Q. Have you a copy of Respondent's Exhibits 60-A to 60-D, Mr. Raupagh?

A. Yes, sir.

Q. Will you turn to the year 1938 on Exhibit 60-B. If you will notice opposite the date February 15, 1938, that Exhibit shows a figure of 913 for the number of service stations selling below the prevailing retail market price on house brand gasoline on that date.

A. Yes, sir.

3649 Q. And then on March 4th shows only 79 stations selling below the prevailing market price?

A. Yes, sir.

Q. What was the reason, in your opinion, for that very great decrease in the number of service stations selling below the prevailing price in such a short time?

A. The reason for that decrease was that I believe about that time there was quite a controversy between the gasoline dealer association and the A. F. of L. Union.

Q. What union would that be?

A. American Federation of Labor.

Q. I mean what class of employees were in that union?

A. Well, they were trying to organize the service station operators and also the helpers, and in that organization activity, they got quite a number of dealers to join their organization and one of their programs was that there should be no price signs posted at service stations, and they would go around, sometimes as many as ten or twenty dealers would go from one dealer to the other, and just about compel him to take his price signs down. I, myself, was threatened on that proposition.

Q. Well, did that happen just at this particular time?

A. I think that is the time it happened and, later on there was some bombing of service stations.

Q. In your opinion, is that the reason for the de-
3650 crease from 913 down to 79 in about two weeks?

A. Yes.

Q. Or about two and one-half weeks?

A. Yes, I think that was the reason.

Q. Now, turning over to Exhibit 60-C, you will find another figure there in the number of service stations selling below prevailing retail market, between November 15, 1938, and December 13, 1938, the figure drops from 869 down to 79 in exactly four weeks. What is the reason for that?

A. You will note that the dealer tank wagon price on November 15, 1938, was 8.8 and on December 13, 1938, it was 7.6. I don't just recall the exact date that there was a price change in the dealer tank wagon price, but whenever there is a price change of that kind—

Q. By "change of that kind" you mean a reduction, do you not?

A. Well, either way, whether it is up or down. Whether it is a reduction or an increase. Whenever that takes place, sometimes it takes a week or two weeks before the dealers will start posting their signs, price signs.

Q. Well, how does that effect a reduction in the number of stations?

A. Well, because they did not have any prices posted.

Q. Well, in that case, how would the prevailing
3651 price be determined for such a period?

A. We determine it the best way we could.

Q. Well, was that reduction in the number of stations cutting due to the fact that a large number of them did not post prices?

A. That is the main reason for it.

Q. And, in your opinion, is there any—was there a prevailing retail price at that time, as you have described it, meaning a price posted by more than 65% of the service stations?

A. Oh, yes.

Q. Well, you just stated that a great many of them did not have a posted price.

A. That is right.

Q. How do you reconcile that by saying that the prevailing price here is the price posted by a great majority of stations or by over 65% of them?

A. Well, we found that there were only 79 stations in this case—that is the date you mentioned?

Q. Yes, December 13, 1938.

A. We found that there were only 79 stations that were selling below, or that were posting a price below the price of house brand, below the prevailing retail price of house brand gasoline.

Q. Well, was that because the prevailing price was reduced?

3652 A. I think that had something to do with it.

Q. I still don't understand why that would result in—it might result in a change in the prevailing price, but I still don't understand why that would result in a decrease of nearly 800 stations out of 869 stations in the number that were selling below the prevailing price.

A. Well, they generally try to make a new start, and they start in, perhaps, most of them at the same price, and from there on, it gets worse and worse as it goes on.

Q. From there on, certain stations start to cut; is that right?

A. Yes.

Q. And then that spreads?

A. Then that spreads.

Q. Now, there is another substantial decrease in the stations selling below prevailing market price between February 24, 1939, and March 17, 1939. Is there any particular reason that you can describe for that? It is on Exhibit 60-D. The first two figures at the top. That is not such a large decrease as the other two.

A. No, I don't know any reason for that particular decrease, except that it was there. Sometimes the activities of the Gasoline Dealers Association has something to do with that.

Q. Would you say that it has been the policy of your
office to have a survey such as this conducted periodi-
3653 cally to determine the number of stations selling be-
low the prevailing retail market price and the
amounts of the price cuts?

A. Yes.

Q. Well, it appears that statistics were made on that very frequently during 1938?

A. That's right.

Q. And then when we get over to 1939, we find that the statistics, at least as shown on this survey, are much less frequent?

A. That's right.

Q. Did you make these surveys as frequently in 1939 as you did in 1938?

A. I don't believe we did. In the first place, to make these surveys is a tremendous task, and it takes a lot of time to do it properly.

You will note, also, that in 1936 and 1937 we didn't show on the survey in regard to the premium grade gasoline, because that involves a lot of work and we didn't think that was necessary.

Q. You did do it in 1938 on all three; very frequently.

A. That's right. We did it in 1938 and we did it for October, November, and December, 1937, and we discon-
tinued that again in June, 1938, as far as showing on pre-
mium or third grade gasoline, because that is only a
3654 small percentage of the business, and we like to cut
down our work and not make it too burdensome.

Q. Let us just stick to the house brand and the third grade. That appears to have been made all the way through these computations.

A. Yes.

Q. Now, why did these surveys stop in 1939 and the next one in June, 1940, and there are only two for 1940?

A. Sometime in that period; I don't recall just when, we had complained to our principals, the Chicago office, that it took too much time to make these surveys, and instructions were changed on them; that it wasn't necessary to make them as often as we had been making them.

Q. Didn't you make any such survey during November or December, 1939?

A. November or December, 1939? No, I don't believe we did.

Q. Does this exhibit, Respondent's Exhibit 60-A to 60-D, show a record of all such surveys that were made by the company from 1937 to date?

A. Yes.

Q. Do you have any records, Mr. Raupagh, or any estimates which you have made for your own benefit and your company's benefit, of the volume of gasoline sold in the Detroit area by the various oil companies, either 3655 majors or non-majors, who do business here?

A. We have some such records, yes. We have some records where we can figure the information off the records of the gasoline tax department reports, but on some of the major companies, that's impossible to do.

Q. Why is that?

A. Because they do not segregate that on the report.

Q. You mean the report shows the business for the entire State?

A. That's right.

Q. Do you have any estimates of the percentage in the Detroit area of the business done by the different major companies?

A. No, I haven't.

Q. Perhaps you can tell me which companies do the greatest volume of business in gallonage of gasoline in the Detroit area.

A. I can give you a pretty close guess, if that is what you would like.

Q. Who is the largest?

A. Who is the largest?

Q. Yes; in gallonage.

A. I think the Standard Oil does the biggest volume, although we may be pretty close—or Sun Oil Company may be pretty close to us, now.

3656 Q. In case you are first, would you name Sun second?

A. I would name either Sun or Socony Vacuum second.

Q. Are those three the largest in volume in Detroit?

A. Yes.

Q. Is Socony Vacuum near Sun, in volume?

A. Yes; they are near Standard Oil.

Q. Do those three stand out? In other words, is there a fourth or a fifth, whose volume approximates the volume of the three you have named?

A. Of course, that is very indefinite. You understand I am guessing, myself.

Q. Well, you would know, wouldn't you, Mr. Raupagh? You certainly have a very good idea, based upon the information that you have available, as to whether or not—the number of companies that do the largest volume. You have stated three, and I am trying to get it, if I can phrase it properly—you have named those three, and then there is a considerable drop before you come to the next one, or is there any other that is almost as large as the three you have named?

A. I think the Hi-Speed brand of gasoline would come next. I think Sinclair would come after that. I am just trying to find that list; to be a little more specific (referring to documents).

Q. How does the volume of the Hi Speed company 3657 in the Detroit area, if you can give me an estimate, compare with that of Sun or Socony Vacuum?

A. It may be about ¼ to ⅓ of the volume of Socony Vacuum or Sun. Shell Corporation comes in there.

Q. I understand you feel you can give me any percentages which would be approximately correct, upon the percentage of the total volume in Detroit that is handled by your company or by Sun or by Socony Vacuum Company. Could you give me that percentage or estimate on the three?

A. I couldn't give it on the three. I can give it to you on ours.

Q. I think that has already been done. It is in one of the exhibits.

A. It is in the exhibit.

Q. I think it is 16.2% for 1940

A. That is right, but I would rather not guess on the others, because that is uncertain.

Q. You mentioned the Socony Vacuum Oil. Does the Socony Vacuum Oil Company sell gasoline at tank car prices to any jobbers in the Detroit area?

A. None that I know of.

Q. I would like to ask you another question, Mr. Raupagh, which I asked you on the Commission's case on direct examination, but I want to check it, and that is as to the number of stations, service stations supplied
3658 by the Standard Oil Company in the Detroit area,
including Dearborn, Hamtramck, and Highland Park, as of January 1, 1941.

Trial Examiner Ballinger: Can you answer that question?

The Witness: What is the question, please?

Trial Examiner Ballinger: Read the question.

(The last question was read.)

By Mr. Austin:

Q. Now, to make that perfectly clear, in view of the terminology we have been using, I will say instead of service station; I will ask you as to retail resellers.

A. Just a minute.

Mr. Hanley: Was there any definite answer given to you, Mr. Austin, on direct?

Mr. Austin: Well, perhaps the question wasn't phrased exactly the same, but I think there was a definite answer in the record.

The Witness: 438. That includes jobber stations and Standard Oil Company stations. Is that the way you want it?

By Mr. Austin:

Q. No. As to the supplier? You don't supply these jobber stations.

A. Oh. In that case there were 332.

Q. I think that the figure you gave me on direct
3659 examination was 336, but that is near enough, but I
was under the impression that there were 400. This figure of 438 includes such stations as supplied by the Citrin-Kolb Oil Company and the Wayne Oil Company?

A. I think you might have been mixed on the phraseology, because 438 stations flying the Standard brand flag.

Q. That is what puzzled me, because the information

I had was that there were over 400 of them. However, that would be a difference of about 110 stations and it has not been my understanding from the testimony in this case that those four jobbers supply 110 retail stations between them.

A. They supply 106.

Q. Do they?

A. Yes.

Q. Well, then, perhaps Stikeman Oil Company has more than I know about.

A. It is in the exhibits.

Q. What exhibit would that be in?

Mr. Hanley: I don't have the number, but here it is, Mr. Austin. It is No. 53. Wait a minute. Is that the one?

Mr. Abbott: Yes.

Mr. Hanley: Here. That (indicating) has the figures.

Mr. Austin: Was this in evidence?

3660 Mr. Hanley: Yes, both of these (indicating) were in evidence.

Mr. Austin: What number is this?

Mr. Hanley: I don't know.

Mr. Austin: This hasn't got the number of the stations.

Mr. Hanley: Well, they are both in evidence.

Mr. Austin: The number of retail outlets supplied, yes, this has it. Thank you, Mr. Raupagh. I never did understand the figure of 336, and now I think it has been explained to me. Perhaps everyone else understood it. I don't know.

By Mr. Austin:

Q. One reason I did not understand that was that in our records which Mr. McDonald compiled, I think his information was about 450 stations that—he may have been mixed up in the same way that I am here, but I think he reported that there were about 450 stations supplied by the Standard Oil Company in 1939, and that about 200 of those were the 461 stations, and the others were lessees. Now, is that figure much too high?

A. He must have gotten his figures from some other source than the Standard Oil Company.

Q. Well, I was under the impression that he got them from you, but I won't state that as a fact.

3661 A. He, no doubt, got them from some other source.

Q. Anyway, it is no secret. The stations are there and anybody can count them, so I am not in any way questioning your answer.

A. As a matter of fact, there are very few secrets in the oil business.

Q. I believe you have six bulk plants in the Detroit area.

A. Yes.

Q. And the deliveries by tank wagon to the retail stations are made from those bulk plants, with the exception of a few near the marine terminal?

A. That's right.

Q. I am just recalling the testimony on that. How many bulk plants do you have in the Detroit field? Do you have any outside the City of Detroit?

A. Yes, surely.

Q. Do you operate them in Lansing or Ann Arbor?

A. Yes.

Q. Are deliveries to service stations in Lansing and Ann Arbor made from bulk plants located there?

A. Yes.

Mr. Austin: I might say, Judge Hanley, this is slightly off your direct, but if you don't object, I would like to ask a couple of questions along this line. I will concede
3662 it wasn't on your direct.

Mr. Hanley: Go ahead.

By Mr. Austin:

Q. Can you tell me where bulk plants are located outside the City of Detroit?

A. We have main plants located at Pontiac, Lansing, Jackson, Monroe.

Q. Is that all in your field?

A. That's all in our field.

Q. Is Pontiac in the Detroit field?

A. Yes. And then we have a large number of small bulk plants that we use to serve the rural communities, and also the resellers and other demand in that territory.

Q. How are those bulk plants supplied?

A. They are supplied either by tank car or tank truck.

Q. And where you use the transport truck or truck-train, you employ haulers for that, do you not?

A. Yes, sir, we employ contract haulers.

Q. And that operation is the same whether it be transportation to a bulk plant outside of the Detroit or whether it be to one in Detroit?

A. Yes.

Q. And in all cases do you use your own trucks to transport gasoline from the bulk plant to the service stations?

A. Yes, sir.

3663 Q. Can you tell me the total number of bulk plants that you have in your field, including the six in Detroit?

A. I would like to get that figure accurately, if you like it.

Mr. Hanley: We can give it to you accurately, if you want it. 99.

By Mr. Austin:

Q. 99 bulk plants?

A. 99.

Q. You have described some of those. How would you describe them; small or big; in size?

A. They are what I term small bulk plants. I mean by that they are bulk plants which have three, possibly four storage tanks, and by storage tanks I mean bulk plants that are located upon foundations above the ground.

Each storage tank holds all the way from ten or 12,000 gallons to seventeen or 18,000 gallons of gasoline.

Q. Are all those bulk plants, regardless of size, supplied the same way, that is, by transport truck or tank car and directly from the marine terminal at River Rouge?

A. Yes, sir.

Mr. Austin: I think that's all I have.

Trial Examiner Ballinger: Judge, before you commence your redirect, if it is agreeable, I would like to ask the witness one or two questions.

3664 Mr. Hanley: Surely.

Examination by the Trial Examiner.

By Examiner Ballinger:

Q. The Examiner is a little hazy with reference to the requirements to obtain gas from the Respondent company in tank car lots. Is there any form of application used by the company?

A. No.

Q. Are the applications submitted in written form or by word of mouth?

A. You mean by the buyer?

Q. Yes.

A. By word of mouth, generally.

Q. Before you act upon them, do you act upon the application yourself, or do you submit the application to the Chicago office?

A. This is tank car purchases?

Q. Yes, sir.

A. Resellers?

Q. Yes.

A. I submit them to the Chicago office with my recommendation.

Mr. Hanley: Pardon me, Judge. May it be understood, which I think is the fact, that you are referring to a new prospective buyer? You are not referring to the purchases made by the jobbers, in this case?

3665 Trial Examiner Ballinger: I am referring to a prospective purchaser.

Mr. Hanley: Yes.

By Trial Examiner Ballinger:

Q. There have been such applications submitted and rejected, have there not?

A. Yes, there have been; in the past.

Q. Do you transmit the application to the Chicago office in writing?

A. Sometimes. Sometimes verbally.

Q. Without disclosing the name of any applicant, would you produce the correspondence; that is, the letter of transmittal, in any case, deleting the name of the applicant?

A. That is up to counsel.

Mr. Hanley: On one of these tank car applications?

Trial Examiner Ballinger: Yes.

Mr. Hanley: For what period of time would you want that?

Trial Examiner Ballinger: Any time during the period they have been furnishing gas in tank car lots.

Mr. Hanley: And do you want all of them; all the correspondence we have?

The Witness: His Honor asked for one.

Mr. Hanley: Oh, you just want one?

Trial Examiner Ballinger: Merely one.

3666 Mr. Hanley: Oh, yes; surely. We will try to do that.

Mr. Austin: I wasn't clear whether your Honor was referring to a letter written by Mr. Raupagh from the

Chicago office or a letter written by the applicant to Mr. Raupagh.

Trial Examiner Ballinger: Well, I understand that none of these applications have been made in writing, but all have been made by word of mouth.

The Witness: As far as the buyer is concerned. That is, within recent years, within two or three years.

Trial Examiner Ballinger: But in some instances, you made a report and submitted the application to the Chicago office in writing?

The Witness: Yes, sir.

By Trial Examiner Ballinger:

Q. In order to clear up the situation, the Examiner would like to have a copy of the letter of transmittal, deleting the name of the applicant.

Mr. Hanley: You will get it if we can find such. As far as the name is concerned, we are not very particular about that. If we can find those Miller letters and correspondence, if there is any, we will give that to your Honor. It has been brought into this case very briefly.

Mr. Austin: That, however, according to your 3667 interpretation of the matter, was not the usual testimony in applications. As I understand it,—well, I guess it was, too, because I was thinking it was at the station, but he did not say that he had a siding, so I guess it was.

Mr. Hanley: I don't know that there was. We will find one.

Mr. Austin: Well, Mr. Raupagh said here, I believe, that Marvin Goldberg very recently made such an application. I don't know whether there was any correspondence on it.

Mr. Hanley: Do you know?

The Witness: Yes, but I did not even submit that to Chicago.

Mr. Hanley: Did not submit that?

The Witness: No.

Mr. Hanley: So there isn't any correspondence?

The Witness: No.

Trial Examiner Ballinger: That is all right. Have you anything further, Mr. Hanley?

Mr. Hanley: I don't think I have any questions, your Honor.

Trial Examiner Ballinger: Mr. Raupagh, you are excused.

(Witness excused.)

Mr. Raupagh: Well, I want to thank you, gentlemen.

3668 Mr. Austin: Thank you, Mr. Raupagh.

Trial Examiner Ballinger: Anything further?

Mr. Hanley: Your Honor, you aren't concerned particularly when we get that for you, are you? We can submit it some time.

Trial Examiner Ballinger: Any time.

Mr. Abbott: I will ask to have these documents, which consists of certified copies of the State records, marked Exhibits 82, 83, and 84, for identification.

Trial Examiner Ballinger: One moment. The last number I have here is 80. What is your last number, Mr. Reporter?

The Reporter: No. 80.

Trial Examiner Ballinger: Then it would be 81.

Mr. Abbott: That is right.

Trial Examiner Ballinger: How many are there?

Mr. Abbott: Three.

Trial Examiner Ballinger: There are several pages. Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

The reporter will mark the documents handed him by counsel for Respondent as Respondent's Exhibit 81, containing nine pages; 82, containing nine pages; and 83,
3669 containing 23 pages, for identification.

(The documents referred to were marked, for identification, "Respondent's Exhibits 81, 82, 83.")

Mr. Abbott: Now, these three exhibits marked 81, 82, and 83, for identification, may be considered together inasmuch as they all relate to the same subject. They are all certified copies of State records.

Exhibit 81, for identification, is an opinion, certified by the County Clerk of Ingham County, in the case entitled *Frens* v. *Prosecuting Attorney of Ingham County*, being Case No. 20171, entered December 22, 1939, by the Circuit Judge of that county, holding Act No. 282, Public Acts of 1937, unconstitutional, particularly with reference to the provisions thereof authorizing the taking of a cost survey, which the Court holds, by this opinion, to be banned by the hearsay rule, and that the so-called cost survey violates the requirements of due process of law as guaranteed by both the State and the Federal Constitutions.

Exhibit 82 is a certified copy of the opinion of Hon.

Donald Van Zile of the Recorders Court of the City of Detroit, certified by the Clerk of said court, in the case entitled *People* v. *Stark Hickey,* No. A-15715, construing the validity of the so-called cost survey provision, which is Section 5 of the Act No. 282, Public Acts of 1937, of the State of Michigan.

3670 Exhibit 83, for identification, is a certified copy of the opinion of Hon. Guy A. Miller, Circuit Judge of Wayne County, Michigan, in the cause entitled *Argo Oil Corporation* v. *Duncan C. McCrea, Prosecutor of Wayne County, and the Retail Gasoline Dealers Association of Michigan, Incorporated, et al.,* being cause No. 274-429 (Chancery) in said court, which opinion holds that the cost survey, so-called, under the provisions of Act 282, Public Acts of 1937, is invalid.

I offer these three exhibits, identified as Exhibits 81, 82, and 83, for identification, in evidence. They are all duly certified by the Clerks of those respective courts.

Mr. Austin: They are objected to, your Honor, as irrelevant and immaterial and not relating to any issue in the case, and they apparently refer to a law known as 282 of the laws of Michigan of 1937 which is not in evidence in this case and it therefore appears that any decisions which interpret or pass upon the constitutionality of that law cannot be relevant. The law itself not being in evidence in the case, and there being no evidence introduced into the case in reliance of that law.

Mr. Abbott: Act No. 282 of Public Acts of 1937 is what has been referred to in this case many times, both by the number of the Act and also as the Fair Trade Standards Act of the State of Michigan, and it has
3671 been referred to by Mr. Austin many times in the
record and also in Dr. Taggart's cost survey, which I think the record shows to be based upon this particular Act, has been testified to in the case, and it seems to me relevant, and there has also been this statement made, as I recall.

The other day Mr. Austin was getting a statement in this hearing, at this particular hearing in the Respondent's case, that there had been at least one case in the courts in this county in which there had been a conviction of some individual under this law, and I think it is relevant upon the question of the reliability of the cost survey, as testified to by the witness Professor Taggart, to show that at least three courts,—and these were all the decisions that I know that have been reduced to opinion form, these three courts have held that the survey is not only unreliable, but is invalid.

Trial Examiner Ballinger: The three Courts referred to are all nisi prius Courts are they not?

Mr. Abbott: They are all Circuit Courts of Wayne County. One is the Circuit Court of Wayne County, one is the Circuit Court at Ingham County at Lansing, and the other is the Records Court of the City of Detroit which I may say is the Court of Original Jurisdiction in the City of Detroit.

Trial Examiner Ballinger: They are Courts of 3672 original jurisdiction?

Mr. Abbott: These are, except the Circuit Court is the Court of Appellate jurisdiction for the Common Pleas Court for the City of Detroit, and of the lower courts of Ingham County.

Trial Examiner Ballinger: None of these decisions are decisions of Appellate Courts, are they?

Mr. Abbott: There is no decision of the Appellate Court with the exception, as I say, the various Circuit Courts of Wayne County have certain Appellate jurisdiction, but these are not Appellate jurisdiction cases which I ask to have admitted in evidence.

Trial Examiner Ballinger: The recollection of the Examiner is that Mr. Austin had the statute marked for identification, but that it was never admitted in evidence.

Mr. Austin: I think it was offered, and the ruling was withheld, and the offer was later withdrawn.

Mr. Abbott: What Exhibit Number is that, for identification, do you know?

Mr. Austin: I don't know.

Mr. Abbott: It must have been referred to.

Trial Examiner Ballinger: The statute has never been admitted in evidence.

Mr. Abbott: If it has been offered for identifica-3673 tion and not formerly offered in evidence, I, at this time, proffer it in evidence on behalf of the Respondent, according to the original offer for identification.

Trial Examiner Ballinger: The recollection of the Examiner is that the Examiner indicated very clearly that he would reject the offer if made, there being nothing in evidence with reference to the statute, there being nothing in evidence that anything offered in evidence was done or made pursuant to the provisions of the statute. The

Examiner can't perceive the applicability of these exhibits.

Mr. Abbott: Of course, the cost survey originally compiled by Professor Taggart was made in pursuance of the statute.

Trial Examiner Ballinger: Irrespective of what it was made under, the cause of the making of the survey, the survey was admitted on its own merits.

The tendered exhibits of Respondent, Respondent's Exhibits 81, 82, and 83, for identification, are rejected.

Mr. Abbott: I now ask to have these documents marked, for identification, as Respondent's Exhibits 84, 85, and 86.

Trial Examiner Ballinger: The reporter will mark the exhibits Respondent's Exhibits 84, 85, and 86, for identification.

3674 (The documents referred to were marked, for identification, "Respondent's Exhibits 84, 85, 86.")

Mr. Abbott: Exhibit 84 consists of seven pages; Exhibit 85 consists of two pages; and Exhibit 85 consists of 38 pages.

These likewise, your Honor, are certified copies of records of certain courts of the State of Michigan, including the Supreme Court of the State of Michigan, and they all relate to the same subject, and I therefore offer them in evidence together, and will state the purpose of the offer.

Exhibit 84, for identification, is a certified copy of the opinion of the Circuit Court of Kent County at Grand Rapids in the case entitled *Sperry and Hutchinson Company, et al., v. the Prosecuting Attorney of Kent County*, being Cause No. 40,728, holding Section 6 of Act 282, Public Acts of 1937 prohibiting the giving of premiums with sales of gasoline and other petroleum products at retail, to be unconstitutional. Also holding with reference to the so-called Fair Trade Act in its entirety that "The Michigan Legislature of 1937, after refusing to pass a General Fair Trade Practices Act to cover all retail business, did succumb to the log-rolling inference of two pressure groups, consisting of certain oil station operators and dealers in baked goods," and that "Through
3675 the influence of this unholy and unnatural alliance,
Act 288 was enacted."

The Court further expressly holding that—

Trial Examiner Ballinger: It is unnecessary to state what the Court held.

Mr. Abbott: I will state generally what the Court held.

Trial Examiner Ballinger: It is unnecessary to state what the Court held. Merely state what the exhibit is.

Mr. Abbott: The exhibit is offered for the purpose of showing that the Circuit Court of Kent County, Michigan, held that the premium section of Act 282 and also the Act in its entirety was unconstitutional and void.

Exhibit 85, for identification, is a certified copy of the opinion of the Supreme Court of Michigan in Cause No. 40,103, affirming the decision of the Circuit Court of Kent County, in the case of *Sperry and Hutchinson v. the Prosecuting Attorney*, which is also referred to in the previous exhibit, whereby the Court held Section 6 of Act 282—

Trial Examiner Ballinger: It is unnecessary to state what the Court held.

Mr. Abbott: Very well.

Exhibit 86, for identification, is a certified copy of the opinion of the Supreme Court of the State of 3676 Michigan filed February 2, 1939, likewise holding that the premium section of Act 282, Public Acts of 1937, forbidding the giving away of premiums with retail sales of gasoline, is unconstitutional.

These all relate to the matter of premium giving with sales of gasoline and other petroleum products and express the last opinion of the Supreme Court of the State; in fact, the only opinions upon that subject.

I think this is something that should be before the Commission, because there has been considerable evidence in this case upon the subject of giving away of premiums, and it appears from these decisions that in the State of Michigan, and there is a contrariety of opinion on this subject in the various states; in Michigan the Supreme Court has held that any statute forbidding the giving away of premiums with the sale of gasoline at retail is invalid, and that such statutes cannot be enforced, being unconstitutional.

Trial Examiner Ballinger: The Examiner is of the opinion, and so holds, the Statutes of the State of Michigan referred to, or the Statute of the State of Michigan referred to, has no application to this proceeding. The tendered exhibits are rejected.

Mr. Abbott: I now ask to have marked Documents 87 and 88, for identification. 87 has seven pages, and 88 has 12 pages.

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Trial Examiner Ballinger: The reporter will rk the documents Respondent's Exhibits 87 and 88, for ntification, respectively.

(The documents referred to were marked, for identifiion, "Respondent's Exhibits 87 and 88.")

Mr. Abbott: These relate to the same subject, your nor, and are, therefore, offered together, referring to hibit 87 for identification and 88 for identification. ey are likewise certified copies of State records.

Trial Examiner Ballinger: Pertaining to the same atter?

Mr. Abbott: These two pertain to the same matter.

Trial Examiner Ballinger: To the same sta ate?

Mr. Abbott: You mean these two exhibits?

Trial Examiner Ballinger: Yes.

Mr. Abbott: These two exhibits do pertain to the same atter.

Trial Examiner Ballinger: The same statute?

Mr. Abbott: Well, they refer to another statute; not one I have been mentioning.

Exhibit 87, for identification, is a certified copy of a ll of Complaint filed in the Circuit Court of Wayne ounty, Michigan, in Cause No. 271,279; 143 Chancery, entitled: *Retail Gasoline Dealers Association of Michigan v. Standard Oil Company, P. A. Raupagh, Samuel N. Gershenson, Charles H. Gershenson, illiam Gershenson, Aaron H. Gershenson, and Rose ershenson*, co-partners doing business as Ned's Auto upply Company, seeking to enjoin Standard Oil Company om selling to Ned's Auto Supply Company gasoline at holesale or tank car prices by the tank car method of livery.

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Exhibit 88, for identification, is a certified copy of the inion of the Circuit Court.

Trial Examiner Ballinger: In that case?

Mr. Abbott: Of Wayne County, dismissing the Bill of omplaint; denying injunctive relief.

Trial Examiner Ballinger: The Examiner is of the inion, and so rules, that the Exhibits have no applicaon to this proceeding, nor any matter in issue in this roceeding, and are rejected.

Mr. Abbott: I wish now to have these documents marked Respondent's Exhibits 89, 90, and 91, for identification.

Trial Examiner Ballinger: The Reporter will mark the documents Respondent's Exhibits 89, 90 and 91, for identification.

(The documents referred to were marked, for identification, "Respondent's Exhibits 89, 90, 91.")

Mr. Abbott: Exhibit 89, for identification, consists 3679 of three pages; 90 consists of nine pages, and 91 consists of five pages.

Exhibits 89, 90, and 91, marked for identification, are likewise certified copies of State records.

Exhibit 89, for identification, is a certified copy of Criminal Complaint filed July 29, 1938, in the Recorders Court of the City of Detroit against Standard Oil Company charging violation of Section 555 of the Michigan Penal Code in selling gasoline at tank car prices to Merchants Supply Company, and permitting said Merchants Supply Company to resell said gasoline at tank car prices to Samuel Gershenson, Charles Gershenson, William Gershenson, Aaron Gershenson, and Rose Gershenson, doing business as Ned's Auto Supply Company, as a retailer of Standard brand gasoline.

Exhibit 90, for identification, is a certified copy of the opinion of the Hon. Arthur E. Gordon, Judge of the Recorders Court of the City of Detroit, dismissing said criminal complaint.

Exhibit 91, for identification, is a certified copy of Criminal Complaint filed February 19, 1938, in Recorders Court of the City of Detroit against Standard Oil Company of Indiana and also against Citrin-Kolb Oil Company, charged as co-Defendant, alleging violation of Section 555 of the Michigan Penal Code in that they had, between February 18, 1936, and February 18, 1938, conspired to destroy the business of competitors and to prevent 3680 competition by selling gasoline to Citrin-Kolb Oil Company at tank car prices and by the tank car method of delivery.

The exhibit also contains a certified copy of the Petition of Paul W. Voorhees, Prosecuting Attorney of Wayne County, praying for an entry of an order of nolle prosequi in said cause; also a certified copy of the order of nolle prosequi entered September 27, 1940, by Hon. John J. Maher, in causes as follows: No. A-16,250 against Standard Oil Company and Citrin-Kolb Oil Company, and other causes.

These exhibits, if your Honor please, are cases in which I personally represented the Standard Oil Company in State Courts involving criminal prosecutions against Standard Oil Company.

Trial Examiner Ballinger: Is that assigned as an additional reason why they should be admitted?

Mr. Abbott: No, I don't assign that as an additional reason why they should be admitted, but I do say that they do involve an identical situation which is involved under State laws, the exhibits showing in one case involving Ned's Auto Supply Company, the Court, after a preliminary examination, dismissed the cause, showing the causes for the dismissal, and I further cite, in that connection, and referring now to Exhibits 89 and 90,
3681 90 being the opinion of the Magistrate, Hon. Arthur
E. Gordon of the Recorders Court of the City of Detroit, it, in my opinion, contains certain holds that are res adjudicata in the present case, particularly with reference to the Court's allusion to the contract between Merchants Supply Company and Ned's Auto Supply Company and Benzol Stations, Incorporated, whereby the latter corporation contracted to haul gasoline from the bulk plant of Ned's Auto Supply Company, which has been testified to, concerning, in this proceeding, a cost of ½¢ per gallon, the Court making a ruling concerning the nature of that contract, and what it concluded in the way of costs and I submit that on that ground, in view of the fact that the opinion is res adjudicata upon some matters which are involved in this present case, that the opinion is not only relevant, but is binding in this proceeding, and should be admitted.

Upon the further ground that these are matters presented by Exhibits 89, 90, and 91, for identification, which the Commission should be apprised of and these being all certified copies of the records of the Court, I think they should be received in evidence.

Trial Examiner Ballinger: The Examiner is of the opinion and so rules that the documents tendered are not relevant to this proceeding or any matter in issue
3682 therein, and, accordingly, Respondent's Exhibits 89,
90, and 91, for identification, are rejected.

Mr. Abbott: At this time, your Honor, I move that we take a recess until whatever time the Court determines.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

The motion of counsel for Respondent is granted and now, at 12:15 P. M., the hearing stands in recess until 1:45.

(Thereupon at 12:15 P. M., a recess was taken until 1:45 o'clock P. M.)

3683 Afternoon Session.

Trial Examiner Ballinger: Come to order.

Mr. Hanley: At this time the Respondent withdraws its objection to the offer of Commission's Exhibit 65, for identification, and offers in evidence Commission's Exhibit No. 65.

Mr. Austin: I think that offer was made by Mr. Abbott this morning, your Honor.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

There is no use to argue about that. You did not offer Commission's Exhibit 65?

Mr. Abbott: Well, I did not recollect that I did.

Trial Examiner Ballinger: You made allusion to it. No tender.

Mr. Austin: The record will show that it is offered.

Mr. Hanley: Well, I am now specifically withdrawing the Respondent's objection to the offer of Commission's Exhibit 65, for identification, and I am now specifically offering it in evidence, consisting of a copy of the Public Act No. 282 of the Acts of 1937 of the State of Michigan.

3684 Trial Examiner Ballinger: The offer is rejected, it having no relation to any matter in this proceeding.

Mr. Hanley: The Respondent now re-offers Exhibits 81 through 91, both inclusive, marked, for identification, as Respondent's Exhibits.

Trial Examiner Ballinger: The tendered offer is rejected for the reason as previously stated.

Mr. Hanley: Now, I think that is the end of our picture at this hearing, Judge.

Trial Examiner Ballinger: Anything further from the Commission?

Mr. Austin: No, your Honor; not at this time. I was only cross-examining at these hearings, anyway, and I have nothing on direct examination, if that is what is referred to at this time—I mean no further cross-examination.

Trial Examiner Ballinger: If counsel has any suggestions to offer with reference to future hearings, he may so state now.

Mr. Hanley: Well, do you want this discussion on the record?

Trial Examiner Ballinger: Just as well.

Mr. Hanley: Well, I understand from Mr. Austin, in informal discussion, that he desired to cross-examine Mr. Boatwright some time the week after next. I don't 3685 know just what the date of that week would be.

Mr. Austin: I don't know, either. I said that I hoped we would be able to take care of it some time during that week.

Trial Examiner Ballinger: Counsel are not prepared at this time to agree on a date for a future hearing?

Mr. Austin: I am not, your Honor.

Trial Examiner Ballinger: Then, at 2 P. M., the hearing stands adjourned subject to a five day notice.

(Whereupon, at 2 o'clock P. M., May 9, 1941, the hearing in the above-entitled matter was adjourned.)

3686

Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Tuesday, June 3, 1941.

Met, pursuant to notice, at 10 a. m.

Before Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., appearing on behalf of the Federal Trade Commission.

Harold R. Hanley, Esq. (910 South Michigan Avenue, Chicago, Ill.), and Arthur J. Abbott, Esq. (Abbott, MacMahon & Roberts, 2230 Buhl Building, Detroit, Mich.), appearing on behalf of the Respondent.

3687 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing in Docket 4389, in the matter of Standard Oil Company, is reconvened pursuant to notice at 10 o'clock a. m., June 3, 1941, in Room 332, Federal Trade Commission Building, Washington, D. C.

The last hearing was held in Detroit, Mich., May 9, 1941.

The Reporter will note Counsel for the Commission and Respondent present.

You may proceed.

Mr. Hanley: Before the cross-examination opens, Your Honor, there is a matter I would like to take up, if I may.

Trial Examiner Ballinger: You may do so.

Mr. Hanley: On my return to Chicago yesterday, I found a letter awaiting me from the Official Reporter which enclosed Respondent's Exhibit No. 47, which is a letter dated April 30, 1941, written by the Red Indian Oil Company, signed I. B. Dworman, and directed to Ned's Auto Supply at Detroit, Mich., and the Official Reporter states in that letter, "Inasmuch as this exhibit was never received in evidence, we are returning same to you for proper disposition."

I was advised in Detroit by my associate, Mr. Abbott, that this letter had been received in evidence. That 3688 occurred when I was in Detroit, and yesterday after looking at this letter I telephoned Mr. Abbott to check on the thing, and he reassured me that it had been introduced in evidence and received.

Trial Examiner Ballinger: If the Examiner may interrupt: The Examiner's record discloses that Respondent's Exhibit 47 was admitted in evidence during the hearing at Detroit.

Mr. Hanley: Well, that was my understanding, and I wrote yesterday to the Official Reporter requesting a recheck of their records, but suggesting that I bring the exhibit with me on this occasion and re-offer it in order to

Trial Examiner Ballinger: That is unnecessary.

The Examiner instructs the Reporter to incorporate the exhibit into the record.

Mr. Hanley: Well, thank you, Your Honor. Should I just now hand the exhibit back to the Reporter?

Mr. Austin: I should think the testimony generally showed. Did you check on the testimony, Judge?

Trial Examiner Ballinger: This is off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

We will take a recess.

(There was a short recess taken.)

3689 Trial Examiner Ballinger: Come to order. Call your witness.

Mr. Austin: All right, Mr. Boatwright.

Trial Examiner Ballinger: Mr. Boatwright, you have been previously sworn?

Mr. Boatwright: That is correct.

JOHN W. BOATWRIGHT, was recalled to the stand and testified further, as follows:

Direct Examination (Resumed).

Mr. Hanley: If your Honor please, before the cross-examination opens, there is one correction question I would like to ask Mr. Boatwright, referring to page 2471, Mr. Austin.

Trial Examiner Ballinger: You may do so.

Mr. Hanley: This is a figure that goes into cost and apparently it was inadvertently transcribed.

Trial Examiner Ballinger: Does it appear in the exhibit?

Mr. Hanley: No. It is in the testimony of Mr. Boatwright.

Trial Examiner Ballinger: Please refer to the date and the page number of the record.

Mr. Hanley: The date and page?

Trial Examiner Ballinger: Yes.

Mr. Hanley: The page is 2471.

Trial Examiner Ballinger: Off the record.

3690 (Discussion off the record.)

Mr. Hanley: The date is April 29, 1941.

By Mr. Hanley:

Q. Mr. Boatwright, I call your attention to the 12th line of the transcript, at page 2471 of the evidence of April 29, 1941, and particularly to the figure appearing in that line ".38 cents" and I will ask you whether or not that is a correct figure and, if not, what the correct figure should be?

A. The correct figure should be .638 cents. That figure appears on Respondent's Exhibit 31-A and Respondent's Exhibit 31-C.

Trial Examiner Ballinger: You may sit down, Mr. Boatwright.

Mr. Hanley: That is all. Thank you, your Honor. You may cross-examine.

Cross-Examination by Mr. Austin.

Q. Mr. Boatwright, you stated on your direct examination that the type of operation engaged in by Ned's Auto Supply Company is one which occurs frequently throughout the United States in the oil industry. By "type of operation" what did you mean?

A. I mean a wholesaler buying and distributing direct.

Q. That is, you mean a retail reseller who purchases in tank car quantities or at tank car prices and resells at retail?

3691 A. Who operates a chain of outlets and does distribute through his own owned and controlled outlets.

Q. You mean retail outlets?

A. Yes, sir.

Q. Can you name examples of that same type of operation elsewhere in the United States, other than Ned's?

A. Yes.

Q. Would you please do so?

A. Cosden Oil Company at Des Moines; Roco Petroleum Company at St. Louis; Waggonner Service Stations at Chicago; Gale-Slone of Chicago; Bailey Oil Company in Kansas City. I am sorry, I don't think of any others at this very moment. However, there are many of them throughout the midwest which—

Q. How many of those which you have named are supplied by the Standard Oil Company?

A. Three of them.

Q. Will you name those?

A. Yes. The Bailey Oil Company was supplied, is no longer supplied by the Standard Oil Company. Roco Petroleum Company was and is supplied by the Standard Oil Company. The Cosden Oil Company of Des Moines was and is supplied by the Standard Oil Company.

Q. Are those three that you have just named all concerns which resell only at retail and which buy at tank car prices?

A. Not only at retail; they operate direct and they
3692 operate through dealers other than direct sale.

Q. Are any of them engaged principally in retail reselling, that is, is that the major part of their business?

A. All of them are.

Q. In other words, I understand you to state that those three all sell the major part of the gasoline which they purchase from the Standard Oil Company at retail?

A. That is correct. They also do some business with the consumers on a wholesale basis and they also, in some cases, supply dealers on a wholesale basis. Principally, however, they are retail operators.

Q. I don't believe that you have named any more than one such account in any one city; is that correct?

A. That is—no. Two in Chicago.

Q. Two in Chicago. But only one of those two was supplied by the Standard Oil Company?

A. Neither of the two in Chicago were supplied by the Standard Oil Company.

Q. Oh, I had perhaps forgot. I thought Roco was Chicago.

A. That is correct. Roco is St. Louis.

Q. Do you know whether the Standard Oil Company supplies any account having a type of operation similar to Ned's? That is, whether the Standard Oil Company supplies more than one such account in any one city?

Now, to clarify—

3695 A. Yes, I—

Q. —that question, of course, in Detroit it has been brought out that Citrin-Kolb and Wayne operate some retail stations incidental to the operation of their wholesale business, or, whether it is incidental or not, at least that their retail operation is small compared with their wholesale operation, so that for the purposes of this question I am referring to Ned's as the only tank car account in Detroit reselling principally at retail.

Now, I am asking you whether the Standard Oil Company has more than one account similar to Ned's in any other one city.

A. I don't know.

Q. Do you know of any city where they have more than one?

A. I don't know.

Q. Well, I say do you know of any place where they have more than one such account?

A. My answer is I do not know whether that condition prevails or whether it does not prevail.

Q. You gave some testimony, Mr. Boatwright, regarding the Zip & Joy Gasoline Stations in Detroit?

A. That is right.

Q. Do you recall that?

A. Yes, sir.

Q. I believe you stated that when the price differ-
3694 ential between their retail prices and the prevailing major gasoline or Standard Oil retail prices narrows, that the Standard Oil Company sells more gasoline and Zip & Joy sell less, and that when the differential between the retail price of Zip & Joy, on the one hand, and Standard Oil, on the other hand, widens, that Zip & Joy sell more gasoline in proportion to—I suppose in proportion to the total volume of the city and Standard Oil sells less; is that correct?

A. That is correct.

Q. Does that price differential change frequently?

A. Does the differential in price between the products merchandised by Zip & Joy and the products merchandised by Standard Oil Company—are the differentials changed frequently?

Q. The Standard Oil Company stations I am talking about, retail stations, of course.

A. I am afraid I am not clear on your question. Does the Standard Oil Company price change or does the differential between Standard Oil prices and these other products?

Q. The differential does change?

A. The differential is what you are interested in?

Q. Yes; that is right.

A. Yes, it does vary from time to time. By "frequently" I don't know what your mean. If it is once a month, that isn't likely, but it does vary from time to time.

Q. What are the causes of such changes in the differential?

3695 A. All of the influences in a market which affect your marketing prices are the causes. It could be the purchasing price in the community; it could be the availability of distress stocks; it could be any of the economic factors having a bearing on price. When you ask the question as to what causes a price change,—

Q. Well, I am asking what causes—

A. —you are asking a very broad question.

3696 Q. Well, I am asking what causes a change in differential, that means that one price changes more than the other.

A. The cause of a change of a differential is that one of the prices moves and the other one does not. Now, the reason for that movement of price on the part of one of the products may be infinite.

Q. Do you know whether over a period of, say, the last 3 years there has been more or less variation or fluctuation in Joy prices than there has been in the prevailing major gasoline price?

A. I do not know.

Q. Do you know the source of supply of the sellers of Zip and Joy gasoline?

A. I do not know from my personal knowledge; no, sir.

Q. Do you know whether they do not buy part of their gasoline from the major gasoline companies or from some of the major oil companies?

A. I do not know.

Trial Examiner Ballinger: Do you know whether they buy from the Standard Oil?

The Witness: I could only answer that by saying I do not recall of a single case where any quantity of gasoline has cleared for either of those distributors; and one of my functions is to control the budget which does give clearance on quantities.

3697 By Mr. Austin:

Q. Standard Oil Company does sell some gasoline unbranded, does it not?

A. We sell some gasoline according to specification of purchaser. Is that your question?

Q. Well, I guess perhaps it is.

A. Yes.

Mr. Hanley: Well, may I inquire if you are referring to Detroit, Mr. Austin?

Mr. Austin: Not in that question, no, Judge, not necessarily.

By Mr. Austin:

Q. Do you know whether Charles E. Austin, or the other concern that sells either Zip or Joy,—I forget now which was sold by Austin and which by someone else, but I think the record shows,—do you know whether either of those concerns is a refiner?

A. I understand that neither of them are. I do not know that neither of them have an interest in some refinery, however.

Q. Well, is it your understanding that they both purchase their gasoline?

A. That is my understanding.

Q. Then, that being the case, any change in price which they have to pay for their gasoline would affect their retail selling price, would it not?

3698 A. It may or may not affect their retail selling price.

Q. Normally, it would, would it not? I am just asking that as a general economic question.

A. I would, depending upon the severity of competition with which they are confronted.

If they secure a lower price for their product, and are content with the gallonage that they are selling, it might not change their price. If, however, they were not content with the gallonage they were doing, and they received a lower price, the probabilities are that it would affect their business.

Q. Or if they have to pay a higher price, that would necessarily, or might—cross that.

I suppose that if the price which they had to pay for their gasoline raised, it might force them to raise their retail price; is that right, in order to maintain a certain margin of profit?

A. That is entirely possible.

Q. I believe you made reference on your direct testimony, Mr. Boatwright, to a publication called the National Petroleum News.

A. That is correct.

Q. Can you state who publishes that magazine, the publication, whatever it is?

6399 A. Warren Platt is the editor.

Q. Well, will you describe it? What is the purpose of the publication?

A. Well, it is a weekly publication. It is merely a trade magazine in the oil industry. It comes out weekly. It presents not only editorials relative to policies of the industry, it presents articles having to do with various phases of marketing, production, or refining. It presents statistics on prices, stocks and other economic factors affecting the petroleum industry.

Q. Do you know who supports it or who owns the publication?

A. No, I do not.

Q. Is it known as an organ of the major oil companies?

A. I do not know.

Q. You stated, Mr. Boatwright, that excise taxes are considered to be a part of the money which passes through the hands of the gasoline retailer for State and governmental purposes. I think that is the substance, at least, of the statement which you made. It may not be word for word a quotation, but that is correct, is it?

A. That is the substance of my statement.

Q. Is money collected by a retail service station for gasoline used for the payment of any tax on the gasoline sold?

A. The price that the retail service station charges for its merchandise must cover the various taxes imposed by different governmental agencies.

3700 Q. Well, I would just like to have you answer that question, whether any of the money which the retail service station collects upon the sale of gasoline is used for the payment of any tax upon that gasoline.

A. The retail service station collects in various States a tax that is used to pay the 3 per cent sales tax. Included in the price of the product that he sells there is a portion which goes to the payment of the federal and State sales and excise taxes.

Q. Well, hasn't the State and federal excise taxes been paid on that gasoline before it is sold by the retailer?

Mr. Hanley: That is objected to, Your Honor, for the reason that it now appears from the last two answers of the witness that there is necessarily in the price at which gasoline is sold at a retail service station a necessary amount to cover and pay the excise and sales taxes irrespective of who pays that tax. The fact is that there is a different law in every State on the sales tax. There is no uniformity.

Mr. Austin: I am talking about federal and State taxes. We are talking about all of them.

Mr. Hanley: Well, so am I. I say there is a different law in every State as to State taxes.

Trial Examiner Ballinger: The objection is overruled. 3701

The witness may answer.

The Witness: Would you repeat your question, please.

Mr. Austin: Would you read the question, please.

(Question read.)

A. It is paid in most cases by the dealer when the gasoline is delivered.

Mr. Hanley: You mean by the retail dealer?

The Witness: The retail dealer.

Trial Examiner Ballinger: Do you mean by that that it is included in the cost price to the retail dealer?

The Witness: It is a part of the cost price to the retail dealer?

Mr. Hanley: May I interrupt for one question?

It is usually billed separately on the invoice as a tax, is it not, Mr. Boatwright?

The Witness: That is correct.

By Mr. Austin:

Q. But when the retail dealer receives the gasoline he never pays any federal or State excise taxes on that gasoline, does he?

A. He is billed separately for the gasoline and the tax; therefore, when he buys he pays a price which includes the cost of the merchandise plus the excise tax. Now, when

he sells he must include as a part of his price, to the
3702 consumer these two portions of the taxes, State and federal.

Q. What do you mean by "must"? He can sell the gasoline for any price he wants to, can't he, Mr. Boatwright?

A. Oh, certainly he could; certainly he could.

Q. Now, I would like to ask you again, and if you can answer the previous question "yes" or "no" I would like to have you do it.

Is any of the money collected by retail service stations for gasoline used for the payment of any tax other than a sales tax upon that gasoline?

Mr. Hanley: That is objected to as repetitious.

Mr. Austin: I do not think the witness has answered the question. That is the question I would like to have a "yes" or "no" answer to, if you can give it, as applied to Detroit or to Michigan.

Mr. Hanley: He has answered it a number of times, Your Honor, and I insist upon the objection. It is repetitious.

Trial Examiner Ballinger: The objection is overruled.

A. I stated that his price includes the tax paid as such. Any money which he collects for the sale of gasoline is in part a collection for the payment of the State and federal taxes.

3703 By Mr. Austin:

Q. Does he pay any of those taxes out of that money? Does he pay any of the taxes on that gasoline from the money which he receives from the sale of it?

A. He certainly does. He certainly has. He has paid in advance.

Q. I ask you, Mr. Boatwright, if he paid any of the excise taxes on the gasoline he sells from the money which he receives upon the sale of it?

A. And my answer was that he had paid the tax upon the receipt of the gasoline. In other words, he has paid prior to the sale of the gasoline.

Q. Can you answer this question—

Your Honor, I do not want to keep repeating this, but the witness, I think, can answer the question "yes" or "no," and I would like to have a "yes" or "no" answer to the question.

Mr. Hanley: If Your Honor please, that is objected to as a quibble, and as trivial, and as frivolous, for this reason: This witness does not know, and no other witness could know whether if when a service station operator sells Your Honor a gallon of gasoline for 17 cents he takes 3 cents of that particular specific money and pays the tax with it. He may have previously borrowed the money from his aunt to pay the tax, but he has paid the tax.

3704 Trial Examiner Ballinger: The Examiner inquires into the materiality of this line of questioning.

Mr. Austin: I think it is very material because this is in connection with questions that were asked about the Taggart survey, and about the question as to whether or not the price which the retailer gets for gasoline includes taxes, or whether it does not, and Mr. Taggart was cross-examined on that, Mr. Boatwright was questioned on it.

Trial Examiner Ballinger: Does your question contemplate the earmarking by the gasoline station of the money received?

Mr. Austin: No, Your Honor.

Trial Examiner Ballinger: For the payment of any tax out of the money.

Mr. Austin: The question is very simple. I simply asked the witness whether or not any of the money which the retailer receives when he sells a gallon of gasoline is used for the payment of any tax on that gasoline.

Mr. Hanley: And if that is the question it is objected to as repetitious, having been answered six times, at least.

Trial Examiner Ballinger: How could this witness have any knowledge as to that?

Mr. Austin: Well, he obviously can, because he knows. If I understand him correctly, what the practice is

3705 in the State of Michigan as to who pays the tax on gasoline.

Trial Examiner Ballinger: The Examiner understands that the witness has testified that when the retail service station operator receives the gas, he pays in addition to the purchase price the excise taxes, both federal and State.

Mr. Austin: I do not understand that, Your Honor.

Trial Examiner Ballinger: Is that correct?

The Witness: I so stated in the testimony.

Trial Examiner Ballinger: I so understood it.

Mr. Austin: Well, may I question him on that?

Trial Examiner Ballinger: You may.

By Mr. Austin:

Q. Does he pay—Who does he pay that tax to?

A. He pays that to the delivering company.

Q. He does not pay it to the taxing authorities, does he?

A. No. He pays that to the supplying company.

Q. Then, doesn't he pay the supplying company simply the amount that is stated on the bill which he receives for gasoline?

A. He pays the supplying company the amount stated on the bill, which is segregated between value of product and retail collections.

Q. But the retailer does not pay the tax?

A. The retailer does pay the tax. The supplying company merely serves as a collector for the State taxing
3706 authorities and transmits those funds to the taxing
authority.

Q. Who is responsible for the payment of the tax, the supplying company or the retailer?

A. The supplying company.

Q. Now, after we pass that step, the retailer then has the gasoline. Then, according to your testimony, he has already paid an amount which if not the tax is at least an amount equal to the tax and covers the tax.

A. He has paid the tax.

Q. All right.

Now, when he collects, therefore, when he sells the gallon of gasoline to the consumer, the tax already having been paid, how can any of the money which he collects again be used for the same tax?

Mr. Hanley: Oh, if Your Honor please, this is objected to as utterly frivolous.

Trial Examiner Ballinger: The objection is sustained.

Mr. Austin: Well, Your Honor, in order to get the thing clearly on the record, I am going to ask this original question again and ask Your Honor either to instruct the witness to give me a "yes" or "no" answer or to overrule my request, and I will pass on, whichever ruling Your Honor makes.

Trial Examiner Ballinger: Proceed.

3707 By Mr. Austin:

Q. Is any of the money collected by a retail service station for gasoline sold by it used for the payment of any tax on the gasoline sold?

A. I must answer that "yes" or "no"?

Mr. Hanley: Not unless you can.

Trial Examiner Ballinger: If you can, you may answer it "yes" or "no," and then offer any explanation.

Mr. Hanley: I am going to object to the question, first, Your Honor, for the reason that the question does not stipulate as to whom the tax is paid. If counsel means does the service station operator pay the tax to the taxing authority, that is one thing. If he means does he pay an amount of money which finds its way into the hands of the taxing authority through some collector, that is another thing.

This difficulty which we are in here now arises out of the fact that the Government agencies have imposed a burden of a tax collecting agency upon the oil companies, which they do at their own expense, but they collect it for the Government authorities. That is all there is to this thing.

Mr. Austin: I think the difficulty is perhaps that I am directing this question to the particular gasoline sold. Of course, that money that is collected may be used to pass along to the oil company for the payment of tax
3708 upon the next gasoline he buys, but all I am trying to get at is that none of the money which is collected by the service station upon selling a gallon of gasoline is used for the payment of tax upon that gasoline because the tax has already been paid.

Trial Examiner Ballinger: The Examiner is in doubt as to the payment of taxes. The Examiner understands that when the wholesaler sells to the retailer there is a tax upon that sale, both State and federal; is that correct?

The Witness: That is correct.

Trial Examiner Ballinger: And that when the gasoline is billed by the wholesaler to the retailer the bill separates the cost of the gasoline and the tax, and that the retailer pays the bill, both the charge for the gasoline and the tax, and pays that to the wholesaler.

Now, it seems to the Examiner it is wholly immaterial whether the retailer transmitted direct to the taxing authorities or whether he paid to the wholesaler and the wholesaler discharged the tax indebtedness.

3709 Mr. Austin: Yes, your Honor, at that point, but I was going to the question of the sale by the retailer to the automobile owner.

Trial Examiner Ballinger: Now, is there a further tax, either state or federal, upon the sale of gasoline by the retailer?

The Witness: Within the state of Michigan?

Trial Examiner Ballinger: Within the state of Michigan.

The Witness: There are three tax levies.

Trial Examiner Ballinger: Is there any further tax upon that gasoline after it reaches the hands of the retailer?

The Witness: There is.

Trial Examiner Ballinger: Will you state what tax that is?

The Witness: That is a 3 per cent tax.

Trial Examiner Ballinger: And that is paid by whom?

The Witness: By the retailer.

Mr. Austin: Thank you. That is ~~really the~~ point I was trying to bring out, in the first place.

By Mr. Austin:

Q. That is the only tax which is paid by the retailer, is it not, Mr. Boatwright?

Trial Examiner Ballinger: Direct?

3710 Mr. Austin: Yes.

A. Direct to state authorities?

By Mr. Austin:

Q. State or federal authorities.

A. Direct to state or federal authorities, that is correct. The other is paid through a second party.

Q. And in referring to the methods used by Dr. Taggart in conducting his survey, Mr. Boatwright, you stated that the inclusion of a disproportionate number of "super service stations" would have increased the resulting cost of distribution per gallon?

A. That is correct.

Q. Will you please explain that statement? That is, I assume that you mean that the cost of—do you mean that the cost of a particular kind of service station is higher or the cost of a larger service station, or what do you mean by the statement that if a larger number of super service stations were included in such a survey that the resulting cost per gallons would be higher?

A. According to my recollection, your reference to the original testimony is not complete. My statement is that frequently you would find different cost levels applicable

to different classifications of outlets. If Professor Taggart had included a disproportionate side—disproportionate number of the super stations and then applied the
3711 constant ratio of gasoline realization to total realization, the resultant per gallon cost would have been high. The reason for that statement is merely this: A super service station usually has employees working in the washrooms, the grease racks, and performing other functions about the stations. The gasoline realization at a super service station normally does not bear the same ratio to total realization as it does to—as it would at a transient station.

In other words, whereas Dr. Taggart has used a cost figure of approximately 80—I am sorry; a realization figure of approximately 80 per cent, that 80 per cent will tend to vary, according to the type of outlets studied.

Q. Do you know what proportion of so-called super service stations were included in the survey?

A. No, I do not.

Q. You used the phrase "a disproportionate number." What would you consider a proportionate number?

A. One that would be representative of the number of super stations in the community studied.

Q. Then that would first require a study of the various types of stations so that you would get—use in your survey a proportionate number of stations of each type?

A. That is correct.

Q. Do you know that that was not done by Dr. Taggart?

A. I do not know. I stated his study is not clear
3712 in that respect.

Q. Now, Mr. Boatwright, the Standard Oil Company operated retail service stations in Detroit and other territories for a number of years; did it not?

A. We operated service stations prior to leasing them out, I think, which program was completed in 1936.

Q. Did the company operate its own service stations for a number of years prior to 1936?

A. It did.

Q. I suppose that during that period the company kept records of the cost of retail distribution of gasoline through its own service stations?

A. That is correct.

Q. How was that done? Did you have—for instance, as an accounting matter, did you have an additional column on form 189, then, referring to Commission's Exhibit 32?

Mr. Hanley: May I—

By Mr. Austin:

Q. Pardon me. That is Respondent's Exhibit 32.

Mr. Hanley: May I inquire as to the materiality of this? I recall at the hearings in Detroit when it appeared that some question was asked as to the experience of Mr. Raupagh on costs of company operated stations, there was a vigorous objection on the part of the government as to its materiality. It has no bearing on this case

3713 as to what it cost the Standard Oil Company or how they ascertained their costs prior to 1936. I object to this question for the same reasons that the government objected to a similar question on the last hearing, its materiality and relevancy.

Trial Examiner Ballinger: The objection is overruled.

The Witness: Would you read the last question, please?

(Question read.)

By Mr. Austin:

Q. That is the blank form 189.

A. Prior to 1936 we did have a separate column on the 189.

Q. And on that column were the retail distribution costs inserted or the retail distribution expenses inserted in a similar manner as the other channels were taken care of on 189, now?

Mr. Hanley: That is objected to as immaterial, not the best evidence, wholly irrelevant to any of the issues in this case, already having been excluded by the Trial Examiner when attempted to be developed by the respondent as a qualification of Mr. Raupagh in the matter of the cost of selling gasoline in Detroit.

Mr. Austin: Well, if the—

Mr. Hanley: And prior in point of time to the adoption of the Robinson-Patman Act and wholly outside of the

3714 issues in this law suit.

Trial Examiner Ballinger: Objection is overruled.

Mr. Austin: If your Honor please, I don't—

Mr. Hanley: May I understand, your Honor, what this is about, please? I just can't get the picture here at all.

Mr. Austin: If your Honor please, I don't intend to pursue this line of questioning if counsel for respondent objects to it upon those grounds, except, however, I think that the objections which might have been made to Mr. Raupagh testifying on accounting matters obviously would not be good to questions of Mr. Boatwright, but so that—

Trial Examiner Ballinger: The Examiner understands this witness previously testified that a certain survey made in Oklahoma presented the only then available records of the Standard Oil Company, or the best records of the Standard Oil Company, with reference to the cost of marketing. This line of examination now—

Mr. Hanley: Well, if your Honor please, I would like for the record—

Trial Examiner Ballinger: —is directed, I take it, to ascertain whether or not the Standard Oil had some other.

Mr. Hanley: That is a misapprehension, your Honor. The survey in Oklahoma was a survey directed specifically to the ascertainment of the cost of selling gasoline to jobbers.

3715 Trial Examiner Ballinger: That is correct.

Mr. Hanley: Not at all through service stations. Indeed, we didn't operate service stations or the tank wagon business in Oklahoma but did operate through jobbers, and that survey was entirely directed to that one proposition.

Trial Examiner Ballinger: You are correct.

Mr. Austin: Well, I don't intend to and didn't intend to proceed further on that point, anyway, beyond simply bringing out the fact—rather, inquiring into the fact of the operation of the stations at that time. I am inclined to agree with Judge Hanley that perhaps the cost of operation by the company prior to 1936 might not have a great deal of materiality, but—

Trial Examiner Ballinger: The Examiner doesn't perceive,—

Mr. Austin: —in any event—

Trial Examiner Ballinger: —unless identical stations were shown or to what extent cost conditions had changed, the materiality of the evidence.

Mr. Austin: In any event, I don't recall that the company has offered to prove the company cost of operation of retail service stations in Detroit at that time, although I will confess that I haven't read recently Mr. Raupagh's testimony, and I don't recall, Judge Hanley, just to what exten. the objections went to which you referred.

3716 Mr. Hanley: I don't recall it either. I know we attempted to prove, in a general way, something about it and we were precluded from proving as much as we would like to prove, and I don't know how far it went. I haven't read it either lately.

By Mr. Austin:

Q. Mr. Boatwright, you referred to the fact that Dr. Taggart's survey indicated a cost of 4.8 cents per gallon for retail distribution of gasoline in Detroit, whereas the retail dealer's margin on major brand gasolines during 1940 and early 1941 was—3.63 cents is the figure I have here. I am not sure whether that was more recent or whether that was in 1940. There has been some—I believe some recent increase.

Mr. Hanley: That is objected to as a misstatement of this witness' testimony. I think the fact is that Dr. Taggart's testimony and survey showed a cost of 4.8 cents.

Mr. Austin: Yes.

Mr. Hanley: And that he testified that from his figurations he found the actual margin to be 3.63 cents.

Mr. Austin: I believe that is right.

Mr. Hanley: Is that your Honor's recollection?

Trial Examiner Ballinger: My recollection—

Mr. Austin: I accept the correction, Judge. I am sure that is right. It was a misreading of my own notes. In other words, that was what Dr. Taggart found to be 3717 the dealer's margin when the made the survey of 3.63 rather than the margin of 1941.

The Witness: I see.

By Mr. Austin:

Q. Now, you said that these figures, if they were correct, demonstrated a loss to the service station operator?

A. That would be correct.

Q. You would there be referring to gasoline only, would you not, Mr. Boatwright?

A. Yes, sir.

Q. And might it not be that even though the retail cost of operation of selling gasoline was 4.8 cents per gallon and that the dealer only received 3.63 cents per gallon for it above the price he paid, that he still might conceivably be making money on his entire business, including things other than gasoline?

A. That isn't very likely. The margin of profit which accrues to a retail dealer on other merchandise will normally run less than the difference between 3.6 and 4.8.

Q. You understand, do you not, that the cost of 4.8 cents per gallon included an allowance for salary or labor to the station operator?

A. That is correct.

Q. And also the interest on his investment if he owns his service station?

3718 A. That is correct.

Q. And, of course, there were other things included which I won't attempt to repeat now because I think they appear in the survey.

You also referred to the inclusion in Dr. Taggart's survey of data for certain service stations which you described as sport cases. Did you determine how many of such service stations which were included which you would call sport cases?

A. That was impossible to determine from the study. The only source that that could be obtained from would be the detail work sheets upon which the study was based.

Q. Well, from what data did you reach your conclusion that sport cases were included?

A. I reached by conclusion upon the strength of the fact that he had included some service stations with a cost per gallon of 22 cents as contrasted with a reported realization of 18.2 cents, and I know from my practical experience that if you encounter a station which incurs a cost of 22.8 cents per gallon you are not talking about a typical or representative outlet in a given community.

Q. Well, are those the only stations that you referred to as sport cases, that is, those that were extreme at one end or the other in their cost?

A. Your sport cases will normally be at your extremes.
It is entirely possible, however, that a sport case may
3719 exist other than at the extremes if there are some
unusual conditions surrounding that.

Q. Did you attempt to make any computation by eliminating the sport cases which you found to be apparent upon the face of the survey?

A. I couldn't make such a calculation, not having the work sheets of the individual statements.

Mr. Austin: Your Honor, may we have about a five-minute recess?

Trial Examiner Ballinger: Take a recess for five minutes.

(A short recess was taken.)

3720 Trial Examiner Ballinger: Come to order, gentlemen.

Proceed.

By Mr. Austin:

Q. Mr. Boatwright, I will now direct my questions to Respondent's Exhibit 31-A to Q.

Trial Examiner Ballinger: Have you those exhibits?

The Witness: I do.

Mr. Austin: Has the Trial Examiner a copy of this exhibit?

Trial Examiner Ballinger: No.

The Witness: I do not have an extra copy, Judge.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Turning to Respondent's Exhibit 31-B, which is headed "Explanation and Procedure Used in Determining Differences in Marketing Cost Incurred by the Standard Oil Company of Indiana in Serving Ned's Auto Supply Units with Our Equipment—September, 1936, Through February, 1938." The first heading is entitled, "Delivery Cost Differences," and the subheading under that is, "Labor Cost Differences," and then subtitle "A. 1."

On that exhibit is reference to Form 018 showing 3721 the size of dump and time for delivery by truck Nos. 34270 and 29525, year 1940.

Subheading A.-2 on Exhibit 31-C refers to tank truck efficiency report maintained in the Detroit division for the months of December, 1939, and March, June, and September, 1940, and there is a statement that those tank truck efficiency reports were compiled on a quarterly basis.

Does that mean that the report for each of those months covered a period of 3 months,—that is a full quarter,—or do the tank truck efficiency report cover only one month?

A. It covers the one month.

Q. Then, by a quarterly basis, you meant there simply that the report is compiled for one month every three months?

A. That is correct.

Q. Tank truck efficiency reports are not the same as Form 018, are they, Mr. Boatwright?

A. They are based upon the Form 018.

Q. Are they prepared from Forms 018?

A. That is correct.

Q. Who prepares the tank truck efficiency report?

A. Members of the accounting department.

Q. They are not prepared by the truck drivers, then?

A. They are not.

Q. Who prepares the Form 018?

3722 A. 018 is prepared by the tank gauger, a clerk working in the warehouse who times the truck in and out and gauges the tanks before they pull out of the yard with a load.

Trial Examiner Ballinger: When you say prepares the form, do you mean fills out the form?

Mr. Austin: Yes.

Mr. Hanley: That is what you mean, too, isn't it?

The Witness: That is correct; yes, sir.

By Mr. Austin:

Q. Will you describe what you mean, or explain what you mean by time in and out; that is, what time is included?

A. Yes. The truck comes into the yard empty, and the time of the arrival of that empty truck into the yard is entered on the Form 018. It goes to the loading rack and is loaded for the next deliveries. The loading time is entered on Form 018 as well as the merchandise with which the truck is loaded.

Upon return to the yard again the time back in the yard is again entered so that we know the exact amount of time that is taken to load and deliver each of the different loads the truck handles.

Q. Well, that is really, then, time in to time in, is it not?

A. That is right.

Q. And is the driver paid for all of that time?
3723 That is, is he paid for the period during which the truck is in and being loaded as well as the time—

A. The drivers work on a regular union contract, and they are paid for all of the time that they are on the job. Now, where possible, we load the trucks prior to the arrival of the drivers so that we may have the load all ready and waiting by the time the driver gets it, but the driver is paid for every hour that he is on the job.

Trial Examiner Ballinger: Now, when you say "on the job," do you mean while he is on the truck?

The Witness: It may be that he is standing by the truck while it is being loaded. He may be helping to load the truck. He is paid for that time.

By Mr. Austin:

Q. Will you explain the difference between Form 018 and the tank truck efficiency report?

A. Form 018 gives truck number, compartment, product loaded by compartment, deliveries made, ticket numbers, quantities on each ticket number, and the time in, the loading time, and the time back to the yard; that is signed by the driver and by the gauger. The truck efficiency report—

Mr. Hanley: Just a moment, Mr. Boatwright.

This may be off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

3724 Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Now, will you go on about the tank truck efficiency.

A. The tank truck efficiency report is not concerned with individual deliveries, but it is a recapitulation of the hours of truck operation and the gallonage through put on that truck which is then associated with cost to determine a cost per gallon of delivery of labor, and at the end of the year we study, then, the cost of the through put on the equipment. That is not done on a quarterly basis. Labor is done on a quarterly basis.

Q. I do not quite understand the tank truck efficiency report—are on a quarterly basis, you say?

A. That is correct, and the salary cost of the driver is reduced to a per-gallon cost each quarter. At the end of a year when we know the operation, the maintenance, and all of the other cost of the operation of the truck, we can recapitulate these and get both a driver's cost and equipment cost so that we can study our costs of operation of each individual unit.

Q. And that is only on the basis of those four months, is it not?

A. That is correct.

Q. Do you use those as representative of the year?

A. That is correct.

3725 Q. Does the tank truck efficiency report show the delivery time for each truck; that is, the total for the month concerned as shown, or as arrived at from the total of the 018 for the truck?

A. It shows the complete hours of operation of each individual unit.

Q. Does it show the time for each trip or per day, or just for the entire month?

A. No, it is a recapitulation of the individual trips and shows it for the entire month.

Q. And it is also a recapitulation as to the gallons delivered by the truck?

A. That is correct.

Q. Are all truck drivers operating out of the Scotten Avenue, Lycaste, and North Detroit plants paid on a regular per-hour basis?

A. All truck drivers operating out of these respective plants are union drivers operating on a union contract, so many hours per week, and their hourly rate is as given in this report.

Q. That was 95.2 cents?

A. That is correct.

Q. Per hour?

A. That is correct.

Q. Are any of those drivers paid on a commission basis?

3726 A. We have a separate classification of drivers.

Mr. Hanley: Well, just a moment, Mr. Boatwright. You are referring to the same drivers at the Lycaste, Scotten Avenue—

Mr. Austin: The three plants, yes.

Mr. Hanley: —Scotten Avenue and North Detroit?

Mr. Austin: Scotten Avenue and North Detroit, yes.

Mr. Hanley: The question is, are any of those paid.

The Witness: In making deliveries to the re-seller trade. We have a class of drivers which we call commission drivers operating out of each of these plants who deliver fuel oil, range oil, and refined oil on a commission basis, peddler routes.

By Mr. Austin:

Q. Do you mean to consumers?

A. That is correct.

Q. You stated on your direct examination that some drivers were paid on a commission basis, and I believe you referred to Dearborn, perhaps, and some other localities. Can you state where in the Detroit area drivers are paid on a commission basis, or what drivers are paid on a commission basis, referring now to re-seller gasoline business?

A. The Detroit area is composed of ninety-some station points, as we classify them. At each of these station points we have a bulk plant and do make deliveries
3727 from these respective stations.

I do not recall all of the names of the stations at which there are sellers and at which there are commission drivers.

Dearborn is an illustration of the commission type of delivery.

I would say that in Detroit there were approximately 78 of these stations which were operated by commission employees.

Mr. Hanley: Do you mean by "Detroit" the Detroit division?

The Witness: The Detroit division; that is correct.

By Mr. Austin:

Q. Do you know how many of those stations are located in the Metropolitan Detroit area?

A. It would depend upon your classification of the Metropolitan Detroit area.

Q. Well, we have referred to it here as including the City of Detroit, Highland Park, Dearborn, and Hamtramck.

A. I would have to consult the record to know just how the different plants were operated.

Mr. Hanley: I believe it to be a fact, Mr. Austin, that there is only one, and that is the Dearborn plant. If it is important, we will develop that information for
3728 you, but I am quite sure that is the fact.

Mr. Austin: Well, these computations on Exhibits 31-B and C are made on the basis of the drivers' salary of 95.2 cents per hour, and I want to find out to what extent that may be affected by the fact that some drivers are on commission basis, not on salary basis.

Mr. Hanley: Would you like to have us determine—I am quite sure of my information on that, but of course I would want to check it before I would be certain about it.

Mr. Austin: I thought perhaps that should be brought out. I do not know whether it is material or not. It may be.

Mr. Hanley: Well, I can obtain that for you. I think I am right about it, but we will be glad to ascertain it.

By Mr. Austin:

Q. I call attention particularly to the fact that one of the Ned's Auto Supply stores is in Dearborn, and would it necessarily follow, Mr. Boatwright, that this estimate of labor cost of delivery to Ned's stations would be correct based entirely upon a 95.2 cents per hour basis if some of those drivers were operating upon another basis?

A. Was that one outlet of Ned's located at Dearborn in operation in 1937?

Q. Well, that is a question we ought to know by this time.

3729 Mr. Hanley: We ought to.

Mr. Austin: I am sorry to say I cannot answer that offhand.

The Witness: I can answer this question, Your Honor. The four outlets existing operated by Ned's Auto Supply in 1937 were served entirely out of our Scotten Avenue, our North Detroit, and our Lycaste plants; during the year 1937 there was no Ned's Auto Supply outlet served by a commission driver in the City of Detroit.

Mr. Hanley: Doesn't that settle the whole thing, Mr. Austin?

Mr. Austin: I think so.

3730 By Mr. Austin:

Q. I might ask, however, whether any of those three plants that you named serve Dearborn.

A. They do not.

Q. I wasn't familiar with that.

A. Yes. They do not. That is right.

Mr. Hanley: I assume I am relieved of the obligation of getting this information when this develops.

Mr. Austin: Yes, subject to the check as to whether the Dearborn station was in operation, and that is in the record. The record shows whether the Dearborn station was in operation in 1937. I am assuming from Mr. Boatwright's testimony now that it was not but, as I say, that can be very easily checked with the facts in the record.

Mr. Hanley: Oh, all right.

By Mr. Austin:

Q. That was probably one of the two that has been put into operation since that time?

A. That may be.

Q. Then, I understand your testimony to be, Mr. Boatwright, that you are positive that all gasoline delivered by tank truck to tank wagon resellers—well, delivered by tank truck to Ned's Auto Supply Company outlets in 1937 was delivered by drivers who were working on a salary basis?

A. That is correct.

3731 Q. Now, that would not be true, however, would it, as to the total deliveries in the Detroit metropolitan area in 1937?

A. No, it would not, if Dearborn be included as a part of the Detroit metropolitan area.

Mr. Austin: I think, Judge Hanley, we might—it might still be well to develop to what extent drivers working on a commission basis were used in the Detroit metropolitan area in 1937.

Mr. Hanley: That is including Detroit, Dearborn, Wayne County and Highland Park?

Mr. Austin: For this particular computation I don't think it is necessary to go through the entire Detroit field because for Exhibit 31 other computations were used.

By Mr. Austin:

Q. As I understand it, 31-A and B—rather, 31-B, C, D and E are intended to apply only to a comparison of costs in the metropolitan area; is that right, Mr. Boatwright?

A. That is right. That is correct.

The Witness: May I ask a question off the record, your Honor?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

3732 Q. Is delivery to tank wagon consumers made by drivers operating on a commission basis in metropolitan Detroit?

A. Deliveries to tank wagon consumers would be made by a commissioned driver at Dearborn.

Q. I am not going to pursue that. I just wondered whether the tank wagon consumer business was handled differently than the tank wagon reseller business or by different drivers.

A. It is not. It is not.

Q. While we are on this subject, can you state, Mr. Boatwright, what is the amount of the commission that is paid truck drivers by operating—or working on a commission basis in delivering gasoline, or how that commission is computed?

A. That varies in different communities. Your commission rates are not uniform for all of the different communities served by commissioned drivers.

Q. That would be true as to the Detroit field?

A. That is correct.

Q. Do you know what the rate is for Dearborn?

A. It would be a guess. I have a faint recollection, but I do not recall the exact figure.

Q. Where the driver operates on a—or is paid on a salary basis, is that his entire compensation?

A. The driver may participate in some of the plans that the company offers to its various employees. In the past that may have been a stock purchase plan. At the present it may be a joint participation in insurance plan.

3733 Q. Well, I am really talking about direct compensation. In other words, does the same driver operate, or may he operate, partially on a salary basis and partially on a commission basis?

A. Oh, no. Oh, no. If a man is on a commission, he is on a commission basis. If he is on a salary, he is on a salary basis.

Mr. Hanley: You are referring now generally to the operation, not particularly to Detroit?

Mr. Austin: I am referring to Detroit.

Mr. Hanley: Well, to clarify it, may I ask a question?

What you have just stated is true throughout the territory in which the Standard Oil Company operates, is it, Mr. Boatwright?

The Witness: Yes.

Mr. Hanley: It will be true of Detroit or Indiana or any other community?

The Witness: That is correct.

Mr. Hanley: Assuming there are commissioned drivers in Detroit.

By Mr. Austin:

Q. Have you with you a copy of the Detroit form 189 for 1940?

A. I have.

Q. Would you mind referring to it?

3734 A. I have it now.

Q. That, by the way, is the same form that was introduced in evidence in blank as Respondent's Exhibit 32; is it not?

A. That is correct.

Q. Now, will you look under the column headed "tank wagon reseller," first, on the line "account 006, salaries, drivers," and, secondly, on the line for "account 021, commissions," and will you state which figure under the tank wagon reseller column is the larger?

Mr. Hanley: Off the record.

(Discussion off the record.)

A. You want only which figure is the larger?

Q. That is all.

A. The payment of commissions was $110,000 and the payment of salaries to drivers was $55,481.

Q. Then the commissions paid on tank wagon reseller gasoline business were approximately twice the amount of drivers' salaries on tank wagon reseller business?

A. That is correct.

Q. How do you account for the preponderance of commissions as related to salaries?

A. Why, there was just additional marketing expense incurred there.

Q. Well, what I mean is, Mr. Boatwright, you stated in metropolitan Detroit that, so far as you know, Dear-
3735 born is the only place where the tank wagon reseller drivers operate on a commission basis, so at least that would seem to indicate that there would be a great deal more paid to drivers by way of salary than by way of commissions on that type of business. Now, your form shows that the reverse is true.

A. This is a Detroit field—

Q. Yes.

A. —including, as I stated, approximately 90 stations of which 9 are located in Detroit proper, one at Dearborn, or 10 of the 90 would be included in the salary—or 9 of the stations in Detroit are operated by salaried drivers. Dearborn is operated by a commission. In addition, I think I.

stated there were 70 plus stations operated by commissioned drivers in the area outlined, Detroit proper.

Q. Well, I didn't understand that.

Is it the practice of the comapny to pay their drivers on a commission basis throughout the territory outside of Detroit, in the Detroit field, and I am talking now strictly about trucks delivering gasoline to tank wagon resellers.

A. That is correct in a smaller community. Where we have a bulk plant the commissioned driver will deliver to reseller business and he will also deliver in the rural consuming business. He is a representative of the Standard Oil Company in that community and does effect deliveries both to reseller and consumer channels.

3736 Q. Then is it your testimony that the payment of salaries to the tank truck drivers serving tank wagon resellers is something that is restricted chiefly to the city of Detroit in the Detroit field?

A. Again I would have to state that I do not recall the individual stations in Detroit that are on a salary; not only the city of Detroit. In addition, I know Lansing is served by salaried drivers; Ann Arbor is served by salaried drivers, but I would have to consult either a Van Dyke of the territory which, I think, was placed in evidence at the Detroit hearing, which indicates that the stations served by salaried drivers differ from those served by commissioned drivers, or I would have to see the list of the stations in Detroit to segregate the salaried from the commissioned drivers.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Is it your opinion, based upon the figures which you have read from the Detroit form 189, 1940, that approximately twice the amount of gasoline sold tank wagon resellers in the Detroit field, is delivered by drivers who are paid by commission—twice the amount is delivered by drivers paid on a commission basis as compared with the amount delivered by drivers paid on a salary basis?

3737 A. No, that need not follow. Naturally, any company is going to adopt a more economical means of distribution. If we can operate in one given area at a lower unit cost by having a driver on a salary, the station will be operated on a salary basis. If, on the other hand, we can operate in a given community more economically on a commission basis, we will place that station on a commission basis, and the overall efficiency can not be judged by an individual channel. It must be judged from your sales activity, not only in your reseller but in your consumer channel as well. So, as to the ratio of these expenses depicting exactly the ratio of gallonage, that should not be anticipated.

Q. Well, it would not be very far off, would it, Mr. Boatwright?

A. I don't know. In the Detroit field I wouldn't—I wouldn't know exactly.

Q. Well, what is your opinion as to the relative economy of delivering gasoline by drivers who are paid salaries?

A. Each year we analyzed these stations and their costs to determine whether it is advantageous for us to continue to operate a given outlet on a salary basis or upon a commission basis. An opinion formulated today on any given outlet may be changed a year from now. They switch back and forth from salary to commission. Now, the trend in recent years has been away from salary operation to commission.

3738 Mr. Austin: Off the record.

(Discussion off the record.)

3739 Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. What do you mean by "commission agent," Mr. Boatwright?

A. Our territory is divided into many subdivisions surrounding the establishment of bulk plants. An agent is in charge of that territory and works on a commission which is determined by his sales and he has the exclusive representation of the company in that area for the tank wagon sales of our products.

Q. Who operates the bulk plant in that territory?

A. The agent does.

Q. Is the bulk plant owned by the company?

A. The bulk plant is owned by the company.

Q. Who pays for the labor at the bulk plant?

A. The agent performs that.

Trial Examiner Ballinger: Performs, or hires and pays?

The Witness: That is right. Except for maybe a painting job, or something of that kind. The company maintains the property; but the agent performs the warehousing, the unloading, and the labor of that type, or hires and pays for that labor.

Mr. Hanley: May I ask a question to further develop this.

Mr. Boatwright, in addition to handling gasoline, is
3740 it or is it not a fact that that bulk plant agent also
handles or may handle kerosene and fuel oils, and tractor fuels and distillates, and tires, and automobile accessories, and greases, and insect spray, and separator oils, and specialties of many, many different kinds.

The Witness: The agent handles all products which you enumerated with the exception of automobile supplies. Those are shipped directly out of our salaried stations.

Mr. Hanley: And he receives his commission,—his commission compensation, in other words, is predicated on the handling of all of these products, is it not?

The Witness: That is right, with the exception of the automobile supplies.

Mr. Hanley: Yes, sir.

By Mr. Austin:

Q. Well, of course, the commissions paid covering all those products are prorated between your various channels on Form 189, are they not, Mr. Boatwright?

A. Commissions are chargeable direct.

Q. Then, the commissions which would be entered in the tank wagon re-seller column would be for what products?

A. For the delivery of gasolines, for refined oils to our re-seller outlets.

Q. Would you look at the Detroit Form 189 for 1937 and state the figures entered in the tank wagon re-seller column
on that form for commissions and for driver salaries.

3741 A. Salaries to drivers in re-seller channels, 1937,
$67,366.70; commissions to commission employees, tank wagon re-seller channel, $117,676.44.

Q. You said there commissions to company employees.

A. To commission employees.

Q. To commission employees?

A. Yes.

Q. The form in evidence here just says commissions. Is there any change in it?

A. Only in the terminology.

Q. No change in what goes into that account?

A. No.

Q. You referred a moment ago to, I believe you said, about twenty stations in Detroit in the metropolitan area, or did you say that?

A. No, I did not. I said we had nine stations in the City of Detroit proper, which includes Ferndale, purely a commission station for the delivery of fuel oil; eight salaried stations for the delivery of our regular merchandise.

Q. Were there that many bulk plants in the Detroit Metropolitan area in 1937?

A. Yes, there were.

Q. My recollection of the testimony is that it was six, but I may be in error; I mean at the present time.

37[illegible] Mr. Hanley: No, I think it has always been eight or nine.

Mr. Austin: Perhaps my recollection is in error.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:.

Q. Do I understand you to say that the Dearborn bulk plant is operated by a commission agent?

A. That is correct.

Q. Have you made any study to determine the cost of distribution of tank wagon re-seller gasoline per gallon in the Dearborn area?

A. Not in connection with this lawsuit.

Q. Have you made such a computation for any area served by a commission agent since 1936 in Detroit?

Mr. Hanley: Well, may I inquire as to the materiality of that?

You see, Your Honor, one reason I am raising these questions, the half-cent discount accorded to Ned's Auto Supply Company came to an end in the spring—I think it was about the end of February, 1938. It has never been in effect since, either Ned's or any place else. It is a closed book so far as its operation is concerned.

On the matter of costs in justifying it, if there 3743 was no Ned's station served by a commission driver in 1937, then all of this examination relative to cost by commission drivers is immaterial.

As to the question of cost of delivery to Ned's since, that is, delivery to Ned's on this half-cent basis, subsequent to, I think, February, last, 1938,—is equally immaterial no matter where the stations are located because that was completely abandoned at that time, and Ned's went on to a cent and a half discount, or differential basis, so I believe, Your Honor, that we are just wasting time on this question until we determine whether Ned's had this Dearborn station or was served out of the Dearborn station in 1937. It might be possibly material if that were true, but certainly not otherwise, and I think—I have not the record with me, I am sorry. You have that.

Mr. Austin: That can be determined very easily.

Mr. Hanley: But I would like to request that it be determined whether or not that Dearborn station served any of Ned's stations in 1937.

Mr. Austin: Whether it did or not—

Trial Examiner Ballinger: If it should be determined that that Dearborn station did not serve Ned's stations in 1937 and up to February, 1938, then is this line of testimony material?

Mr. Austin: I think it is, Your Honor. I would not
3744 want to concede that no service station located at
Dearborn was in competition in the sale of gasoline with anyone of Ned's other stations in view of the fact that people drive in and out of the city upon highways.

Trial Examiner Ballinger: How does the question of competition enter into it? Isn't it solely a question of what the costs are?

Mr. Austin: Yes, but costs are only material as between stations which are in competition with each other. In other words, the question here, first, is what did it cost the Standard Oil Company to deliver gasoline to Ned's; second what did it cost them to deliver gasoline to other stations who were in competition with Ned's. Now, that is a comparison, and that is being made here. It is an attempt to show the difference in labor cost, cost of delivery of gasoline to Ned's station, on the one hand, and to all of the other re-seller stations generally in the Detroit area, and in some other statistics; the whole Detroit field is used.

Trial Examiner Ballinger: The question of cost of delivery to Ned's relates only to a period of about one year, does it not?

Mr. Austin: The delivery to the other stations relate to the same period; and what is attempted to be shown here is the cost of delivery, the average to other stations as compared with the cost of delivery to Ned's.

3745 Trial Examiner Ballinger: If it should develop that Ned's was supplied during that year on a wage basis and not upon a commission basis,—that is, salaries paid to the deliverer,—how does it become material?

Mr. Austin: Why, because, Your Honor, it now appears that at least Dearborn was handled by a commission agent, and the company's cost of delivering gasoline to retail service stations in Dearborn may have been, and probably was, quite different than its cost of—than its labor cost of delivering gasoline to stations elsewhere in the City of Detroit.

Now, the comparison that is attempted to be made here is the cost of delivery between Ned's and the others. Now, you can't make that comparison unless you find out how much it costs to deliver gasoline to other retail gasoline stations competing with Ned's.

Trial Examiner Ballinger: Suppose delivery was made to all on the same basis.

Mr. Austin: Well, if it was, then there would not be any question of commissions, but we now know at least Dearborn was delivered on another basis.

Mr. Hanley: Well, may I suggest this, Your Honor: I apprehend that there was no legal obligation upon the Respondent to undertake a justification of this one-half cent discount at all in this lawsuit for the reason that that operation was abandoned in the spring of 1938,
3746 and having been stopped there is no obligation upon the Respondent to do anything about attempting a justification of it.

The Commission would be performing or trying a moot question, and performing a fruitless act even if it were to enter an order to cease and desist something that had ceased and from which we had desisted in the spring of 1938.

The only reason, Your Honor, that we are justifying that operation as of that time is to endeavor to keep the utmost good faith with the Commission and to demonstrate that there were justifiable reasons for having done that operation in order to give, as I have so frequently said to Your Honor in trying to introduce evidence of one sort or another, a full background picture of the whole situation.

Now, Your Honor, we have shown that it does cost a certain amount to deliver gasoline out of the stations, and by the means with which Ned's stations were served as contrasted with delivering to other service stations out of those same bulk plants, and with the same facilities, and in the same competitive neighborhood.

Now, it just seems that we are going far afield and getting thoroughly metaphysical when they try to extend this thing clear out into the far reaches of all possible conception of competition with Ned's, which hasn't anything to do with it. It is a question of our costs of delivering this stuff to Ned's Service Stations as contrasted
3747 with driving the same trucks out of the same plants
to the contiguous service stations around the ones at which we were dumping gasoline in Ned's stations. It is just too burdensome, Judge. I do not see why they should pursue that course at all.

Suppose we did not justify that half cent, what could be done about that in this proceeding?

3748 Trial Examiner Ballinger: The Examiner is of the opinion that that is a matter that is before the Commission. In the absence of a stipulation that you would not engage in that practice in the future, notwithstanding the fact that you had discontinued it, the Commission might issue an order. My recollection is that the Circuit Courts of Appeals are divided upon that point.

Mr. Hanley: Well, I make no issue of that, Judge. I just simply say that I don't know that we are under any legal obligation to do it, but we have assumed the obligation, in any event, but why should we be required to assume a much greater obligation of cost justification than is clearly apparent on the face of this thing?

Trial Examiner Ballinger: I don't know that it is necessary to have this on the record. I would like to hear from counsel for the Commission further as to the precise reasons why he thinks such testimony is material.

Do you want this on the record or off the record?

Mr. Austin: It can be off, as far as I am concerned.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

(Discussion off the record.)

Trial Examiner Ballinger: Let us proceed.

By Mr. Austin:

3749 Q. Does the company employ any salesmen on a commission basis?

A. Only with—

Q. Gasoline salesmen?

A. No.

Q. So then the commissions paid salesmen would not be found in the tank wagon reseller allocation on form 189?

A. That is correct; there are no commissions paid salesmen on gasoline in the Detroit area.

Q. How about refined oil?

A. None on refined oils.

Q. Then are all of the commissions which are assigned by the company to the tank wagon reseller channel under its code of accounts, are all of those commissions, agents' commissions? That is, I would like to carry that a little farther. Are those commissions all commissions of the type that you have described as being paid to a selling agent to operate a bulk plant?

A. They are all agents' commissions.

Q. Are there any other kinds of agents than the kind that you have described—

A. I have described—

Q. —who receive commissions?

A. —in my testimony the existence of a commissioned
driver, he operating out of a station or a point, op-
3750 erating the peddler routes. In outlying areas it is
entirely possible that a commissioned driver may
make a delivery to a—

Trial Examiner Ballinger: Confine your statement to the Detroit area.

The Witness: In Detroit city?

Trial Examiner Ballinger: Yes.

By Mr. Austin:

Q. Including Dearborn and the others?

A. There would be no commissions paid to drivers in Detroit city for deliveries of resellers—reseller gasoline. In Dearborn it would be all commissioned agent payment.

Q. Then if Judge Hanley were to furnish me with a list of the bulk plants operated by commissioned agents, would the agents represented by those bulk plants include all—that is, would they be the persons to whom all of the —would they account for all of the commissions entered in the tank wagon reseller column opposite account 021 on form 189?

A. They would.

Mr. Austin: That is the only request I wish to make,
then, Judge Hanley, would be simply a—now that I under-
stand this method of operation, which I didn't before, I
would like to have a list of all commissioned agents or
bulk plants operated by commissioned agents in the De-
troit metropolitan area. I understand Mr. Boatwright's
testimony to be that a commissioned agent is a man
3751 who acts as the company's agent in operating a bulk
plant and delivering to tank wagon resellers served
from that bulk plant and that the commissions paid him
for that agency operation are what is included and all that
is included in the commissions opposite account 021, com-
missions, tank wagon reseller, excepting, possibly, some
small amount paid to these drivers who operate out of—

By Mr. Austin:

Q. Well, will you complete that exception, Mr. Boatwright?

A. The exception applies primarily out of a city like Monroe, Michigan, where you will have some salaried driver taking care of the inner circuit of business. Your commissioned driver will serve out of Monroe salaried stations, delivering to consumers and what we refer to as circuit point resellers where the distance from the plant is such that a smaller truck and taking smaller dumps will serve that as part of his regular route.

Mr. Austin: I am speaking now of Detroit.

Mr. Hanley: Including these four places, Detroit, Highland Park, Hamtramck and Dearborn?

Mr. Austin: That is right.

Mr. Hanley: And what you want me to give you is what stations or plants in those four municipalities are commissioned plants?

Mr. Austin: Commissioned plants and the territory served from each one of those plants.

3752 Mr. Hanley: That is all you want?

Mr. Austin: That is all I want.

Mr. Hanley: We will get that for you.

Trial Examiner Bailinger: Off the record.

(Discussion off the record.)

Mr. Austin: Would it be possible, conveniently, also to supply in that connection—of course, there may be only one—

Mr. Hanley: That is my understanding.

Mr. Austin: —to state in that connection also the amount of commissions paid that agent and the amount of tank wagon reseller gallonage moving from that bulk plant?

Mr. Hanley: If you get into that, we got to know when, where and the amount.

Mr. Austin: For 19—

Mr. Hanley: I don't know.

Mr. Austin: Well, I would like to have it for 1937 and 1940, not more than that, or either one or both. That is, I would like both if you have it. It will be just total figure for commissions and total figure for gallonage. I don't know. Let us don't go into that. If we decide we need that we can—I don't think it will—it probably will not be important. Just leave it the way we have it, Judge.

Mr. Hanley: All right. We will get you this. We will answer your first request. We can do that very readily.

3753 Mr. Austin: Yes.

Mr. Hanley: We can telephone and get that for you.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Let us proceed.

Mr. Austin: Let us go to lunch, if your Honor please.

(Discussion off the record.)

Trial Examiner Ballinger: Now, at 12:50 p. m., the hearing stands in recess until 2 p. m.

(Whereupon, at 12:50 p. m. a recess was taken until 2 p. m.)

3754 Afternoon Session, 2 P. M.

Trial Examiner Ballinger: Come to order, gentlemen, please.

We will be in recess while Mr. Hanley answers the long distance telephone.

(There was a short recess taken.)

Trial Examiner Ballinger: We will resume, gentlemen. By reason of the serious illness in Judge Hanley's family, the hearing is now adjourned subject to being reset upon five days' notice.

(Whereupon, at 2:35 o'clock p. m., June 3, 1941, the hearing in the above-entitled matter was adjourned.)

3755 Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Monday, June 16, 1941.

Met, pursuant to notice, at 10 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., appearing on behalf of the Federal Trade Commission.

Harold R. Hanley, Esq. (910 South Michigan Avenue, Chicago, Ill.), appearing on behalf of the Respondent.

3756 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing in Docket No. 4389, the matter of Standard Oil Company, is reconvened pursuant to agreement of counsel at 10 a. m., June 16, 1941, in Room 332, Federal Trade Commission Building, Washington, D. C. The last hearing was held in Washington, D. C., June 10, 1941.

The Reporter will note Counsel for the Commission and Respondent present.

You may proceed.

Mr. Austin: At this time, I would like to offer in evidence Commission's Exhibit 78-A to E, inclusive, for identification. This is a statement of miscellaneous expenses of the Citron-Kolb Oil Company. It was identified by Mr. Byber and was not offered in evidence at that time because Your Honor's ruling upon the Respondent's Exhibits 7 to 16 was still pending. Now, those exhibits were later received in evidence and it was my intention to offer this exhibit in evidence if Respondent's Exhibits 7 to 16 were received, but after they were received I overlooked this exhibit until I found it in my file recently, so I believe it has been fully identified, and I would like to offer it at this time.

(Mr. Austin hands document to Mr. Hanley.)

Trial Examiner Ballinger: Is there any objection?

Mr. Hanley: May we go off the record a minute, if 3757 the Examiner please.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: For the record, if Your Honor please, I may state further that Commission's Exhibit 78-A to E, for identification, which is now offered, is a breakdown which was produced by Mr. Byber from the files of the Citron-Kolb Oil Company or copied from those files, a breakdown of the item entitled "Miscellaneous" on Respondent's Exhibit 8, for the year 1940.

Mr. Hanley: Well, perhaps in answer to Your Honor's query as to whether there is any objection, Counsel for the Respondent should state upon the statement of counsel that the exhibit was identified by Mr. Byber, and is merely a breakdown of an item in an exhibit already received in evidence, there is no objection on the part of the Respondent.

Trial Examiner Ballinger: The document will be admitted in evidence as Commission's Exhibit 78-A to E.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT 78-A TO 78-E," was received in evidence.)

Mr. Austin: Will you take the stand, please, Mr. Boatwright.

3758 JOHN W. BOATWRIGHT was thereupon recalled as a witness for the Respondent, and, having been previously sworn, testified further as follows:

Trial Examiner Ballinger: Mr. Boatwright, you have been previously sworn?

The Witness: Yes, sir.

Cross-Examination by Mr. Austin (Continued).

Q. Mr. Boatwright, on your direct examination you referred to "The accepted tank car spot market" in a given community. What is the tank car spot market?

A. It is the prevailing price at which tank car sales of gasoline are made by various supplying companies.

Q. Then there is a prevailing price or a spot market price which applies to more than one company?

A. Yes, there is an accepted price.

Q. Well, what is that price? That is, I am not familiar with the operation of such a market. I wish you would explain just how gasoline is sold on a tank car market. Does that refer to unbranded gas or branded gas? Is it a market where or in the sense that there is a market price and different companies sell their gasoline through the same agents or brokers, or anything of that sort, or is it something that each company handles separately? I wish you would just explain that a little bit.

3759 A. Each company handles it separately. It may be sales on specifications, unbranded, or it may be sales of branded gasoline.

Q. Does the tank car spot market refer to branded gasoline in the case of the Standard Oil Company, for instance? Would branded gasoline be sold on what you would call a spot market?

A. It may or it may not.

Q. What is the meaning of the term "tank car spot market"? Does that just refer to a price?

A. It refers to the price level at which the merchandise is sold by tank car quantities.

Q. Does that have anything to do with the price at which gasoline is sold to jobbers?

A. No. It may be unrelated and they may be related, depending upon the type of contractual agreement that is drawn.

Q. Would purchases made by the four jobbers in Detroit that we have been referring to in this case—would those be purchases on spot markets or would they be so considered?

A. I don't think that any of the four jobbers were sold on the open spot market quotation.

Q. Then what determines whether a purchaser buys at spot market or whether he buys on some other basis?

A. The purchaser's policies.

3760 Q. The purchaser's or the seller's?

A. The purchaser's policies.

Q. Well, how can the purchaser determine that?

A. Well, if the purchaser is buying on the spot market, he determines whether he is going to be a distributor of gasoline so secured or whether he is going to be the distributor of gasoline of a branded type. A spot market buyer may buy from one source today and another source tomorrow. He exercises the decision as to whether he will buy open market or whether he will become associated with and distribute regularly a given brand of gasoline.

Q. What difference does it make whether he becomes associated with and sells regularly branded gasoline? Why couldn't he continue to buy that same brand if he wanted to on the spot market?

A. He could. He could buy regularly on the spot market.

Q. You see, I am bearing in mind, Mr. Boatwright, that it has been brought out in this case that there is no contractual relationship between Standard Oil and Citrin-Kolb or Ned's or the other two in that each one orders a tank-carload at a time and either party can stop at any time they please. I want to know what the difference is between that relationship and the relationship of buyer and seller on tank car markets.

A. Generally speaking, we think of the man who buys and participates, secures his supplies regularly on
3761 the open market as being non-affiliated with a particular type or brand of gasoline. He is what we refer to as an open market buyer, and he secures such gasoline as he can at any given time at whatsoever the prevailing tank car price may be.

Trial Examiner Ballinger: Without regard to branded?

The Witness: That is correct, generally speaking. Now, frequently, open market buyers do buy on specifications, Judge, but it is their own specifications that they buy under.

By Mr. Austin:

Q. If such a buyer obtained a tank car of Red Crown gasoline, whether or not it had the brand on the car or the truck when it was delivered to him, he wouldn't be able to resell that as Red Crown gasoline, would he, through Red Crown pumps, for instance, if he was operating at retail?

A. If he buys on open market, and according to specifications, it would not be sold under the brand name "Standard Red Crown."

Q. Well, that is one important distinction, is it not, between such a relationship as we have here with these regular buyers, on the one hand, and the tank car buyer, on the other hand?

A. That is a distinction.

Q. On direct examination, Mr. Boatwright, you made the following statement, at page 2413 of the record:

3762 "He would have taken his expense items and classified them according to functions performed." (There you were referring to Dr. Taggart.) "And then expressed each of his various expense items as a proportion of realization for comparison with such reports as are published by Dun and Bradstreet, or other similar reporting commercial organizations."

What are the reports published by Dun and Bradstreet to which you referred in making that statement?

Mr. Hanley: Perhaps Mr. Boatwright should have the whole answer before him, Mr. Austin.

Mr. Austin: All right, I will be glad to let him have it.

Mr. Hanley: The question and the entire answer, so we will know what you are both talking about.

Trial Examiner Ballinger: The question and answer appear on what page of the transcript?

Mr. Austin: This was a part of a long answer that Dr. Boatwright gave to a question which appears at page 2413 of the record, and my question now is: What reports published by Dun and Bradstreet were referred to there?

A. Dun and Bradstreet publish annually statements, operating expense and profits, by classifications of retail outlets. It is such a report that I referred to.

By Mr. Austin:

3763 Q. Well, does that refer to retail gasoline stations, or what is it a study of?

A. It is a study of filling station operations.

Q. Filling station operations?

A. Yes.

Q. Do they make those studies just for the oil industry or for various industries?

A. They make them for various industries.

Q. And have they made studies of the distribution expense of gasoline retail filling stations?

A. They have made studies of the distribution and operation of service stations, and have taken the various expense items and classified them and expressed those expense items as a percentage of the gross realization of the outlet. Their study is not so much a study of the costs of a particular product as it is the cost of the operation of this class of retail outlet.

Q. Well, haven't they, as far as you know, reached any conclusion in any reports as to the average cost per gallon of distribution of gasoline by a retail service station?

A. I do not recall whether Dun and Bradstreet translate it to a cents-per-gallon basis or not, but annually they put out these reports; and whether or not they reduce it to a gallon of one particular product, I could not tell you.

Q. Well, when you talked about a portion of
3764 realization in reference to expense items, was it your
suggestion that Dr. Taggart might have taken the total or average of any particular expense of the service station and compared it with the total realization; in other words, was it your opinion that the Dun and Bradstreet report would have been any basis of comparison of a check against Dr. Taggart's figures?

A. Oh, yes.

Q. You think it would?

A. Yes.

Q. Has Dun and Bradstreet ever made a check covering the Detroit area?

A. Well, they classify the country into regions. They have a north central region in which Detroit is included. The study is based on a scale that is national in its scope, and then they classify the outlets according to regions, although they do not classify it as to individual city, but they do have a region which does encompass and include Detroit.

Q. Well, do you know whether Dr. Taggart did or did not make such a check?

A. No, I do not know. I merely enumerated that as one of the checks that could have been made.

Q. And you do not know, do you, whether or not the check was favorable or unfavorable to his report if it had been made?

A. I do not.

Q. Now, we will turn back to Respondent's Ex-
3765 hibit 31-A to Q, Mr. Boatwright.

Now, on June 3, we were having some discussion about the commission agent type of distribution of gasoline, and you stated "The four outlets existing operated by Ned's Auto Supply Company in 1937 were served entirely out of our Scotten Avenue, our North Detroit, and our Lycast plants; during the year 1937 there was no Ned's Auto Supply outlet served by a commission driver in the City of Detroit," and you stated further that none of those three named plants served Dearborn, and that you were positive that all gasoline delivered by tank truck to Ned's Auto Supply Company outlets in 1937 was delivered by drivers who were working on a salary basis. It appears from Mr. Gershenson's testimony in the record that the Ned's Michigan Avenue store in Dearborn was the second store established by Ned's Auto Supply Company, and that this store was selling the Standard Oil gasoline in 1936. You probably checked that since you were here.

In view of that fact, do you wish to change any of the statements which I have just quoted from the record?

A. Each of the statements quoted from the record were accurate. The difficulty lies in the fact that our station, geographical territories, do not coincide exactly with the municipal territories. Thus in spite of the fact that one station was located at Dearborn and in the municipal area of Dearborn, that part of Dearborn is and was
3766 served out of the Scotten Avenue plant. The statement remains exactly as given.

Mr. Hanley: If Your Honor please, if I might be permitted to examine a moment on voir dire, I think that I can clarify this whole thing and do so by a map.

Mr. Austin: I will be glad to have the map.

Trial Examiner Ballinger: Since there is no objection, you may do so.

Mr. Hanley: I would like to have this map marked as Respondent's Exhibit No. 92, for identification.

(The map was marked for identification "Respondent's Exhibit No. 92.")

Examination on Voir Dire by Mr. Hanley.

Q. Dr. Boatwright, I show you what purports to be a map of Detroit with certain red lines superimposed thereon with certain names given the territories enclosed by such lines, and I will ask you if you prepared the portion of the map having to do with the superimposition of the red lines and names?

A. I did not prepare it personally. It was prepared at my request.

Q. Did you supervise the preparation of it?

A. I did.

Q. First, what do the names represent that appear in red letters?

A. Each of these names indicate one of the 3767 station territories served out of our various bulk plants.

Q. And what is the fact as to whether or not the bulk plants in Detroit are referred to by the various names that appear in the red letters?

A. That is correct.

Q. Now, which of those several bulk plants serve Ned's stations and all of Ned's stations during 1937?

A. Scotten Avenue bulk plant.

Q. Just a moment.

A. Excuse me.

Q. Let me reframe that question.

Which of those stations, by name, served all of Ned's service stations from September of 1936 until late February, 1938?

A. Scotten Avenue served two; North Detroit served one, Lycast served one.

Q. Now, Mr. Boatwright, it appears that there are on the map certain red dots encircled by a green line. What do those markings represent?

A. Those markings represent the street intersections, or the locations of the four outlets of Ned's Auto Supply Company.

Q. At what period?

A. During the year 1937, the period that you refer to.

Q. Now, is that the period during which this half-cent reduction off tank wagon price was allowed to Ned's Auto Supply?

3768 A. It is.

Q. I call your attention particularly to a red outline area marked "Dearborn." Does that or does it not coincide with the geographical limits of the municipality of Dearborn?

A. It does not.

Q. I call your attention to one of the points in red encircled by a green line, which you have said refers to the location of Ned's Auto Supply stations which appears just to the right of the area marked "Dearborn," and I will ask you if that station is in fact within the geographical limits of the city of Dearborn?

A. That is my understanding.

Q. As a matter of fact, is that station also within the area as indicated on the map served by the Scotten Avenue bulk plant?

A. It is.

Q. And was it in fact served by the Scotten Avenue bulk plant?

A. It was.

Q. I direct your attention to an area just south of the Ned's Auto Station in Dearborn which we have been discussing marked "Ford Motor Company," and to an area to the left or the west thereof which is comparatively blank on the map, and will ask you if you know what is the situation with reference to whether that area is built 3769 up and what occupies it in the City of Dearborn?

A. Well, it is largely the area in which the various Ford interests are located. It includes the Ford golf course, and Greenfield Village, Ford proving grounds, the Ford Motor Company's plant, the Dearborn plant, and so forth.

Q. What is the fact as to whether or not there are a great many open fields and open country in that vicinity in which there are no business places, residences, or service stations of any kind?

A. There are many open places in that area.

Q. Have you verified your testimony to the effect that throughout the period from the fall of 1936 until the end of February, 1938, all of the existing Ned's Auto Supply service stations to which deliveries were made by the Respondent were made by salaried drivers only out of the Scotten, Lycaste, and North Dearborn bulk plants of the Respondent?

A. There was an error in your statement. It was the North Detroit plant instead of North Dearborn.

Q. I am sorry. North Detroit.

A. I have checked and have verified; all of the plants were served entirely form these three bulk plants, all of which are salary operations.

Mr. Austin: Judge, I don't want to interrupt you, but I think you are getting pretty far afield. If you want to put this map in for that purpose, I will be glad to 3770 have it, and I don't mind identifying anything on the map and explaining about the territory of the map, but—

Mr. Hanley: All right. I will just ask one further question.

By Mr. Hanley:

Q. Are any of the plants indicated by the red-lettered names on the map commission plants except that designated as Dearborn?

A. No, sir.

Q. And Dearborn, as I understand your testimony, did not at any time during this period, fall of 1936 to the spring of 1938, serve any of Ned's stations?

A. It did not.

Mr. Hanley: We offer the exhibit, Your Honor, No. 92.

Trial Examiner Ballinger: Any objection?

Mr. Austin: No objection.

Trial Examiner Ballinger: Without objection, Respondent's Exhibit for identification, No. 92, is admitted in evidence.

(The map heretofore marked for identification "RESPONDENT'S EXHIBIT No. 92." was received in evidence.)

Cross-Examination by Mr. Austin (Continued).

3771 Q. On this map, Exhibit 92, there are seven areas marked out in red. What are those areas? What do the areas represent? Is each one an area served from a particular bulk plant; is that right?

A. That is correct.

Q. And of the seven, how many of them are in the City of Detroit?

A. Well, they don't exactly correspond with the lines of municipal areas. Dearborn is outside of the City of Detroit (indicating). Lycaste, Clay, Bellview, Scotten, Strathmoor, and North Detroit are almost entirely in the City of Detroit.

Q. On June 3d, you referred to nine or ten stations, and I believe you used the word "station" as meaning a bulk plant station.

A. That is right.

Q. Nine or ten stations in the Detroit area. Where are the others that are not shown on the map? Seven are shown here.

A. Well, there is seven. I referred to Ferndale, which makes eight. Ferndale is a commission station delivering only fuel oil.

Q. Where does Ferndale get its gasoline?

A. It doesn't distribute gasoline.

Q. Aren't there any customers in Ferndale who buy gasoline?

A. Oh, yes.

Q. Standard Oil?

3772 A. Yes.

Q. Where do they get it?

A. It would come from one of the adjacent stations. It might come out of Royal Oak.

Q. Is Royal Oak a commission station, or a—

A. Royal Oak is a salaried station.

Q. A salaried station?

A. Yes.

Q. Is Hamtramck and Highland Park shown on here?

A. Yes, here is Hamtramck and here is Highland Park right here (indicating).

Q. Oh, those are both in the area served by the Clay bulk plant?

A. Not entirely.

Q. But largely?

A. I would say in part. You see, the names as indicated on here—actually the areas represented by these respective names may encompass a wider zone, part of which may be in North Detroit and part in Hamtramck, even, maybe in Bellview or Lycaste. I can't tell you the exact geographical boundaries of those two areas.

Q. I stated on June 3d that it was my recollection that Mr. Raupagh had stated there were six bulk plants in the City of Detroit, and I find that that was correct. I believe that this map bears out that statement rather 3773 than your statement of nine or ten. That is, I assume, Mr. Raupagh was referring to the six stations shown here exclusive of Dearborn.

A. That is correct.

Mr. Austin: I believe that is a fair statement.

Mr. Hanley: That may be true.

The Witness: Yes, that is correct.

Mr. Hanley: I wouldn't take issue with it at all.

By Mr. Austin:

Q. If there were any other bulk plants serving the Detroit area, I wanted to find out where they were. You state there is Ferndale and this Dearborn station, that makes eight. Ferndale, however, as I understand you, does not sell or supply gasoline.

A. It does not.

Q. Are there any others?

A. No, sir.

Q. You referred to a certain area here which is not very heavily settled; is that what you stated, to the west of the Ford plant?

A. That is correct.

Q. On Respondent's Exhibit 92.

Ned's Auto Supply station in Dearborn is located on Michigan Avenue; is it not?

A. Yes, sir.

Q. And Michigan Avenue, I believe, runs all the
3774 way through Dearborn, does it not, and over into the
territory to the west of Dearborn, as shown on the map?

A. I think that is correct.

Q. Is the territory within the Dearborn commission agent territory, as shown on this map—I might refer in general to the western part of the Dearborn territory which it is shown as divided up into streets—that is all settled residential territory, is it not?

A. That is residential territory. The western part of the area.

Q. And is it not true that a great many people drive back and forth from that territory into Detroit every day, on Michigan Avenue?

A. Oh, yes.

Mr. Austin: If Your Honor please, I would like to ask a number of further questions on the operation of the commission agent territory and the method in which commission agents operate, not solely in connection with Exhibit 31, but also in connection with the testimony and exhibits in relation to the 1939 and 1940 cost differences as between jobbers and retail operators.

I would like to point out that it is shown here that while the Ned's Dearborn station was served by salaried drivers, that the major territory in Dearborn, including
considerable residential portions, were served by a
3775 commission agent, and I think it is quite clear that
retail gasoline stations located in Dearborn and served by a commission agent must be considered as in competition with Ned's Dearborn store. So that perhaps it is unnecessary for me to make this preliminary statement, but I am just doing so in case there is any claim

that testimony on this point is in any way immaterial. And the commission agent method of operation is one with which I am not familiar, and about which very little, if anything, has been said in this case. I wasn't aware of such a method of operation until the testimony here on June 3d. Consequently, I would like to go into it a little further.

By Mr. Austin:

Q. Have you made any separate computation of the Standard Oil Company's costs of sale and delivery of gasoline to tank wagon resellers supplied by commission agents?

Mr. Hanley: Now, just a moment. Counsel having asked the question in line with his statement, Your Honor, I wish to make this objection and statement:

First, the Respondent has no objection to counsel's examination on the question of how commission drivers or agents are paid, or the commission system of distributing petroleum products in so far as the same relates to differences in cost as set up by the Respondent between deliveries to the reseller channel, on the one hand, by tank wagon and the jobbers or tank car buyer distributor, on the 3776 other hand, because there definitely is in the computation of cost supplied, Your Honor, in this case, by the Respondent, a recognition of both costs arising out of commission compensation paid agents and distributors for the company, as well as salaried drivers. That is a matter we were able to take directly from the books without making any calculations pointed to this lawsuit at all. It was just a matter of taking what the books showed irrespective of any questions involved in this litigation.

However, as respects the computation relative to the one-half cent deduction of tank wagon accorded Ned's Auto Supply Company in 1937, there is an entirely different situation. Let me say again that under our system of keeping books, which is by channel cost, there was a set-up, and has been for many years, a cost set up on the books referring to the reseller channel, and another referring to the tank car channel of sales. So we had no difficulties there. We could go right to the books and establish the costs as between those two channels of distribution. However, in connection with the one-half cent off-tank wagon on deliveries to Ned's, we were there confronted with the necessity of establishing the difference in cost of delivery to a group of stations in the reseller channel as distinguished from other stations in the reseller channel. We don't keep the books that way. There is no effort made by the company—indeed, it would be an impossibility from an accounting standpoint—to undertake to keep costs 3777 on every individual station in the reseller channel, but it became necessary to break down the costs as between this group of Ned's stations, on the one hand, in the reseller channel, and served by the same trucks and out of the same plants as certain other reseller accounts were served in the same general area. Now, we have done that. It appears from the testimony now that all of those stations were served out of three plants in Detroit by salaried drivers, as were all of the other reseller accounts in that general area.

Now, this is a question of cost, Your Honor, cost to the Respondent to serve these various accounts. We have demonstrated a cost out of these three plants to serve Ned's, on the one hand, and all other stations in that territory, on the other hand. As to that feature of cost, we do object to any consideration of commission method of compensation, for the specific reason that it has nothing to do with it; it would merely complicate the situation as having absolutely nothing to do with the cost to the Respondent. The only cost we had so far as delivery was concerned was predicated on a salary basis.

Just to recapitulate and make it clear: We do not have any objection to counsel examining and to the court considering this question of salaried cost and commission cost of delivery on the broad question of the reseller channel as distinguished from the tank car channel, be- 3778 cause there is included in the reseller channel two different kinds of delivery cost.

We do, however, object to any inquiry on the part of counsel on the question of commission selling or any consideration by the court of that question as it relates to the question of cost concerning the one-half cent difference allowed to Ned's Service Stations, for the reason that it is utterly immaterial and irrelevant to that issue, and is of no aid and would simply be an immaterial complication.

3779 Trial Examiner Ballinger: The Examiner would like to hear from counsel for the Commission with reference to the relevancy of the examination as to whether the sales made to Ned's during the period the one-half cent differential was effective, was it on a straight salary basis or upon a Commission basis?

Mr. Austin: Yes. If your Honor please, of course I might say in the first place that since it is conceded that this testimony may be relevant in one phase of the case, that I assume that questions might be asked regardless of what they might be intended to refer to, but I would certainly not want to concede that such testimony has no relevancy to the 1937 situation of the one-half cent differential.

On the question of labor costs and delivery costs differences, Respondent's Exhibit 31-B purports to use a method of selling in 1940 on full dump deliveries to determine the estimate, I suppose you would have to call it, of labor cost delivery to Ned's stations in 1937.

Respondent's Exhibit 31-B refers to a procedure to obtain the drivers' salary cost per gallon for delivering gasoline to the average reseller in Detroit. Now, that is in paragraph B on Exhibit 31-C, first the average reseller in Detroit. Now, that means the Detroit area and I am simply, I think it is certainly relevant to determine whether or not a computation based entirely on drivers' salaries is a proper means of showing the cost of delivering
3780 to the average reseller when certain resellers may
have, I mean certain commission agents may have a different cost of delivery.

In other words, the same thing is carried out on equipment cost differences.

If your Honor will turn to Exhibit 31-F, it refers to equipment costs per gallon for delivery to the rank and file of retail outlets.' Well, now, this may not be terribly important here, but I think it is unquestionably relevant, and the theory is that it costs the Standard Oil Company a certain amount to deliver gasoline to Ned's and it costs them a different amount to deliver their gasoline to other retail stations, but in estimating the cost to other retail stations they do not include any of these commission stations, and the commission stations were, the commission stations in Dearborn were I think undoubtedly in competition in the sale of gasoline with Ned's Dearborn station, possibly with some of the other stations.

So that I do not know whether there is any great—I suppose if the testimony goes in the record with the 1939 and 1940 situation it would be there anyhow, but I would certainly hope for the reasons I have just stated that your Honor would not rule that it is not material in connection with 1937.

Trial Examiner Ballinger: Is there any question but what Ned's company has been served throughout, commencing in the fall of 1936 and on down to the present
3781 time by tank cars operated by salaried employees?

Mr. Austin: Tank trucks.

Trial Examiner Ballinger: Tank trucks operated by salaried employees.

Mr. Austin: No, there is no question about the method of delivery to them.

Trial Examiner Ballinger: Well, that goes back and includes the period when the one-half cent differential was in effect.

Mr. Austin: Yes.

Trial Examiner Ballinger: Then, how does it become material to inquire with reference to what might have been the cost if it had been operated on a commission basis?

Mr. Austin: Well, if your Honor please, Ned's is only half the picture. It is a comparison between Ned's on the one hand and retail stations on the other. Now, these retail stations were served by a commission agent, but the computation here is a computation for retail stations based on salaried drivers.

Mr. Hanley: If your Honor please, I think it will be more clear if your Honor just glances at this map. Now, all of Detroit, your Honor, according to the testimony disclosed here on the map is served by salaried drivers including all of Ned's stations except this portion here marked Dearborn.

3782 Now, in point of fact Dearborn actually, the actual boundary line is over here some place. I know the Ford Motor Company is in Dearborn, which appears on the map, and this station is in the geographical limits of Dearborn but that portion of Dearborn bounded by the red line was served by the Scotten station, which is a salaried station, and consequently all of the territory on this map and all of the service stations in it with the exception of this portion over here, there was no service station in this proving ground and golf course, and Mr. Ford's farming country, which appears as a blank space on the map. The only stations served by the commission agent would be over here.

Trial Examiner Ballinger: Would that be outside of the Detroit area?

Mr. Hanley: Well, I think it would be generally in the Detroit area. Dearborn is a separate municipality, but we have considered it for the purpose of this lawsuit as within the environs of Detroit, as we have Hamtramck, which you see here is right in the heart of the great metropolitan area of Detroit, but all of these stations, all over the city, with the possible exception of what few might be in here were served by salaried drivers, all of the existing stations of Ned's included. Now, the only way in the world we could make a comparison was to compare what it cost us to serve Ned's in the salary area with what
3783 it cost us to serve all the rest of these stations in the salary area.

Mr. Austin: Well, you see, there are service stations out here on Michigan Avenue, running through all these service stations, in competition with Ned's, without question. Now, the question is, what is the difference of serving Ned's and these stations here; these stations are just as material to the case, in other words, as these stations over here.

Trial Examiner Ballinger: The Examiner will permit the evidence to be received subject to motion to strike.

Mr. Austin: Well, if your Honor please, it has been conceded that this testimony would be relevant in connection with 1939 and 1940 part of the case anyhow, and I am offering it in connection with both dates.

Trial Examiner Ballinger: Well, I understand.

Mr. Austin: So if its relevancy is conceded for one purpose, I assume it would not be subject to motion to strike.

Trial Examiner Ballinger: Well, motion to strike as to its relevancy to another period.

Mr. Austin: Well, if such motion is in order, but I just wanted to be sure I understood your ruling.

I might state that I might postpone this until cross-examination upon Exhibit 33, but I would prefer to go ahead with it at this time, and since we have taken
3784 the subject up and we are already in it, I think perhaps it might make the record a little more orderly to go ahead now. That is the only reason I want to do it at this time.

Trial Examiner Ballinger: Proceed.

Mr. Austin: Is there a question pending?

Will you please read the question?

(Question read, as follows:

"Q. Have you made a separate computation of the andard Oil Company's costs of sale and delivery of gasone to tank wagon resellers supplied by Commissic gents?")

The Witness: Is your question limited to the Detroit ea and to this lawsuit?

y Mr. Austin:

Q. It is limited to the Detroit area but not to this lawit.

A. I have made no separate computation.

Q. Have you made any such computation for any other mmission agent area in the Detroit field?

Mr. Hanley: Well, now, that is objected to as repetious. Dr. Boatwright testified on June 3rd that the queson of whether a station would be continued or placed on ther a commission or a salary basis was a matter of almost early consideration, and that the economies of the situation governed at any given time, and they might switch 785 back and forth in any given area, which testimony has already been given by this witness.

Mr. Austin: Well, my question was whether he made ny study of the cost of sale and delivery, or cost of deliv-y by commission agents in the Detroit area. Now, I think r. Boatwright has been using the word "area" as synonmous with "field" a number of time, and I would like to sk you, Mr. Boatwright, to try to refer to the Detroit rea only when you are referring to the city of Detroit, nd Dearborn, Hamtramck and Highland Park, and use the hrase "Detroit field," when you are referring to the larger rritory. I rather suspect that your answer which you ave me a minute ago was directed to the Detroit field, but ou said Detroit area. That is why I asked you the same uestion again as to the field. I do not quite understand udge Hanley's objection, because I was only being sure f the territorial limits of the answer that Mr. Boatwright ave.

Mr. Hanley: Well, it might aid us if the question and e objection were read.

Trial Examiner Ballinger: The question may be repetiious but some time has intervened since he previously tesfied, and the objection is now overruled.

Mr. Hanley: Will you please read Mr. Boatwright the question?

(Question read.)

3786 A. Your question is so broad that it is difficult—

By Mr. Austin:

Q. Then, please, Mr. Boatwright, I asked you first whether your had made any computation of cost of sale or delivery of gasoline to tank wagon resellers supplied by commission agents, and limiting your answer to the Detroit area, you said no. Will you tell me, by your answer were you limiting your answer to the city of Detroit or the whole Detroit field?

A. At that time I was referring to the four areas considered as Detroit metropolitan market, Detroit, Dearborn, Hamtramck and Highland Park.

Q. Well, now, can you enlarge that answer to say, so that I will be asking you whether you made any study of commission agent costs in the Detroit field since 1936?

A. Yes. Analyses are made of commission agent's cost and are reviewed annually; that would apply to the Detroit field as well as any other of our sales fields.

Q. And those reports, I suppose, are available?

A. Those studies.

Q. Analyses, I believe you called them.

A. Those studies are part of general records of the company, and the analyses are conducted annually to insure that we can maintain our distribution on as efficient a basis as possible.

Q. Would such analyses include Dearborn, or would 3787 there be one covering Dearborn?

A. Every year we receive from each of our stations complete statements on through put and costs. Each of those are analyzed to ascertain whether costs incurred at that station are comparable with costs that would be incurred under another mode of competition. Dearborn, of course, is included.

Q. Of course, there are some costs of operation of stations in—I should not say "cost of operation"—cost of distribution to service stations located in commission agent territory which would be the same whether the station was served by salary or by commission agents, isn't that correct? I mean by that, many costs, perhaps you call them overhead costs or—

A. Yes, there are many costs.

Q. There are certain costs appearing on 189, I suppose, which would not be affected?

A. There are many costs which you can not segregate or differentiate between whether that cost be incurred on volume sold through a commission agent or whether they be incurred on volume sold by a salaried delivery function.

Q. And then on the other hand I assume that there are other costs that would differ as between the commission agent method of distribution and the salary agent method?

A. Yes, sir.

Q. What are the duties of a commission agent?

Mr. Hanley: Well, that is—I do not have any 3788 particular objection, but it is repetitious.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: Well, I will withdraw the objection, if there is any question.

Mr. Austin: Let me proceed with specific questions, and perhaps the general one—I will withdraw that question.

By Mr. Austin:

Q. Does the Standard Oil Company furnish the trucks used by the commission agent for delivery of gasoline to tank wagon resellers?

A. It does not.

Q. Those trucks are furnished by the commission agents themselves?

A. Yes, sir. The company furnishes only the tank mounted on the truck.

Q. Oh, the company furnishes the tank mounted on the truck?

A. That is correct. The chassis is owned by the agent. The company furnishes the tank.

Q. Does the title to the tank remain in the company or does the company simply sell that to the commission agent?

A. The title to the tank remains in the company.

Q. Are the expenses of maintenance and operation of these vehicles paid by the commission agent?

3789 A. They are.

Trial Examiner Ballinger: How about the expense of the maintenance of the tank?

The Witness: They are assumed and maintained by the company:

By Mr. Austin:

Q. Well; there [illegible] maintenance of tanks, that would be almost nil, would it, Mr. Boatwright?

A. It would be very light, yes.

Q. And when you said paid by commission agents you did not mean that that is reimbursed to them by the Standard Oil Company, did you, except insofar as he receives his commission?

A. I am sorry. Your question is not clear.

Q. I asked you, for instance, whether maintenance of operation of vehicles was paid by the commission agent, and you said yes. Are those expenses reimbursed to the commission agent by the company?

A. They are not.

Q. As such?

A. They are not.

By Mr. Hanley:

Q. They pay a rental in many instances, is that not so, Mr. Boatwright?

A. A rental is paid on the chassis but the repairs and maintenance of the chassis itself is an obligation of the agent.

3790 By Mr. Austin:

Q. What do you mean by a payment of rental on the chassis?

A. The company pays a rental to the agent for the utilization of the truck in the distribution of its products on a monthly basis.

Q. Is that in addition to the agent's commission?

A. Yes. He receives a base commission rate plus a truck rental.

Q. Does he receive any other remuneration or payment from the company?

A. No, he does not, except as he participates in the various plans that I enumerated in the testimony.

Q. Well, that is—

A. That is available to any employee, that is understood.

Q. Yes.

You stated on June 3 that the commission agent is the exclusive sales-representative of the company in his territory for tank wagon sales, that is correct?

A. That is correct.

Q. Does the commission agent perform selling services in his territory?

A. Oh, yes.

Q. Does he employ salesmen?

A. Not as a rule.

3791 Q. Does he attend to the sales promotion in his territory, in driveway training stations, that sort of thing, if any?

A. Naturally, inasmuch as the commission agent receives a commission on the delivery of products to the reseller outlet located in his territory, he has a direct personal interest in the maintenance of proper Standard service at the respective outlets.

The actual training of the employees depends largely upon the sales personnel. Actually, we find in many cases that the station agent is a nimportant force in seeing that the resellers in that area come up to those standards.

3792 Q. By the "station agent" you mean the commission agent?

A. The commission agent. You can't say that it is a regular part of his duty except that it is a regular part of his duty in maintaining his earnings through delivery to the outlet.

Q. Well, does the company do any sales promotion work in the commission agent territory?

A. Yes, sir.

Q. Are there salesmen employed by the division office assigned to territory supplied to commission agents?

A. Yes, sir.

Q. Are the duties of those salesmen the same as they are in the territory served by the salaried drivers?

A. Yes, sir.

Q. Does the company spend less sales effort—by sales effort I mean in number of salesmen employed and time spent—does the company spend less sales effort per—that is, in comparison with volume of gasoline sold and territory served by commission agents than in territory served through salaried stations? And let me state further, in connection with that question, that since you have stated that the commission agent does perform some selling services, and do some work of his own in his own territory, that leads me to ask you whether it is necessary for the company to do as much work through its own salaried salesmen?

Trial Examiner Ballinger: Now, answer the first 3793 question, will you, please?

A. In answer to the first question, I cannot differentiate between the selling effort exerted at stations served by salaried drivers from the effort exerted at stations served by commission agents.

Does that take care of both of your questions, or was there a—

By Mr. Austin:

Q. I think so.

Is it your opinion, then, that if you had to apportion salesmen's salaries on a per-gallon basis in those two types of territories, that, in other words, taking one territory and taking the other, you wouldn't arrive at any great difference in the amount of selling expense per gallon? Now, that is a very general question, Mr. Boatwright. I am not referring to any particular two territories but just as a general question.

A. Well, it is because you are assuming a unit of distribution for your costs. As you are aware, we use the time allocation on salesmen, but if I were using the per-gallon unit of distribution, I couldn't differentiate.

Q. May I interrupt, please? I am not trying to get away from that part of it, but after you use your time at the distribution, you arrive at a certain selling expense.

Now, after you have arrived at the expense you still 3794 divide the gallons into it, don't you, to get the cost?

A. Yes, sir; and I could not differentiate between them.

Q. Well, that is the answer:

A. Yes, sir.

Q. To whom does the commission agent report; that is, who is his immediate superior?

A. His immediate superior is the consumer salesman.

Q. The consumer salesman?

A. Yes.

Q. Who is he?

A. We have a class of salesmen which we designate as consumer salesmen, who have under their jurisdiction varying numbers of commission agents ranging from eight to perhaps as high as twelve stations in the Detroit field that have as their principal duties the supervision and training and direction of the efforts of the commissioned agent.

Q. You say there would be about how many of those in a field like Detroit, about how many consumer agents?

A. How many consumer salesmen?

Q. Consumer salesmen.

A. I don't recall, but in a field of that size it would normally carry nine or ten.

Q. Are they well paid employees?

A. Just about the same as the reseller salesmen. They rank on a basis of equality.

3795 Q. Where are their salaries included? In the expense accounts listed on the Form 189?

A. Under the item of salaries to salesmen.

Q. And they are treated, then, for the purpose of your accounting, as salesmen?

A. They are salesmen.

Q. I believe you testified two weeks ago, Mr. Boatwright, that the commission agent employs and pays the drivers of the trucks who deliver gasoline in his territory.

A. Yes, if he is operating more than one truck, he owns the second truck and employs the driver thereof.

Q. You say if he is operating more than one. You mean that the first one he would probably operate himself?

A. That frequently is the case.

Q. On the other hand, if he operates a number of them, I suppose he might employ the drivers for all.

A. That is correct.

Q. Did the Standard Oil Company operate any retail service stations prior to 1936; that is, prior to the Iowa plan, in territory now served through commission agents, and you may limit your answer to the Detroit field, if you wish, or—

Mr. Hanley: May I have that question, please? I am sorry.

(Question read.)

A. The answer is "Yes."

3796 By Mr. Austin:

Q. Then, do any tank wagon reseller customers in territory now served by commission agents lease their service stations from the Standard Oil Company?

A. Yes, sir.

Q. In other words, you have lessee stations in commission agent territory as well as in salaried driver territory.

A. Yes, sir.

Q. And is the percentage of leased stations in commission agent territory, in general, as great as in territory served directly by the company?

Mr. Hanley: Just a moment, Mr. Boatwright.

I have no particular objection to this line of testimony, Your Honor, except that it is wholly immaterial. Just for the record, I want to preserve that objection. It has nothing to do with the lawsuit in any phase so far as I am able to ascertain, costs or otherwise. I just want to preserve that objection on the record.

Mr. Austin: Well, I think it has relevancy, but that is the last question on this question of leased stations.

By Mr. Austin:

Q. I would like to know whether there is any different proportion of leased stations in commission agent territory, as a rule, than in territory served by salaried stations.

Trial Examiner Ballinger: The objection is overruled.

3797 A. Is the answer to be limited to the Detroit field again?

By Mr. Austin:

Q. Well, it is more or less a general question, Mr. Boatwright. If you think that there is any difference there or you can answer the question at all, then you may limit your answer, if you wish.

A. May I give you a general answer, then? Stations are built according to potential. Where there is a good potential the company has erected in the past years its retail outlets. If that potential happens to be served by a commission agent, that station is now operated by a lessee. If it happens to be served by a salaried driver out of salary-operated stations, it would now be served by salary. But the distribution of stations is determined on the basis of potential and not on the basis of whether the station is served by a salaried or a commission driver.

Q. I see. What I had in mind was that I thought that perhaps commission driver territory might have grown up differently and perhaps that that might have always been commission driver territory and perhaps the Standard Oil

Company never operated stations in such territories, as a general rule. Further than that, I believe it is true, and I would like to have you tell me if I am wrong in this, that the great majority of the lessee stations are now stations which were formerly operated by the company.

3798 A. The great majority of lessee stations are those which were formerly operated by the company.

Q. Now, that being true, I thought it was entirely possible that the percentage of lessee stations in commission agent territory might be very small compared with other territory.

A. No, that would not be true.

Mr. Hanley: May I ask one question, if Your Honor please?

Examination on Voir Dire by Mr. Hanley.

Q. Is there any relation at all, Mr. Boatwright, between the fact of whether a retail outlet is operated by a lessee or otherwise than the fact that it may be served by a commission or bulk plant agent or a salaried bulk plant driver?

A. There is no relationship.

Q. Anywhere in the territory?

A. No.

Cross-Examination by Mr. Austin (Resumed).

Q. Is a commission agent paid on a gallonage basis for the gasoline sold and delivered by him?

A. Yes, sir.

Q. What is the amount per gallon of the commission paid the commission agents in the Detroit field?

A. It varies.

3799 Q. Does the company enter into written contracts with its commission agents?

A. It does.

Q. Are those contracts made by the Detroit field manager or are they made through the Chicago office?

A. Made by the Detroit field manager.

Q. Would they be on file in Detroit?

A. I am quite sure they are. I am not—I don't know whether they are then forwarded to the general office.

but I am sure there would be at least a copy on file at Detroit.

Trial Examiner Ballinger: Is the final approval in Detroit or in Chicago?

The Witness: Final approval is in Detroit.

By Mr. Austin:

Q. In Detroit?

A. The Detroit manager makes the contract.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. When you were last here, Mr. Boatwright, we were discussing to some extent the Form 018.

A. Yes, sir.

Q. And tank truck efficiency reports.

3800 A. Yes, sir.

Q. The Form 018 you stated shows the time of the truck on the rack for loading, I believe, until it comes back empty again after having delivered the load, and also, I believe, shows the amount of the delivery. And does it also show the names of the customers to whom—

A. No, it does not show that. It shows the sales ticket numbers which identifies the delivery with the customer.

Q. I think you said that the tank truck efficiency reports were made out one month each quarter by the accounting clerks. They were prepared by the accounting department, I believe you said, from the Forms 018?

A. That is correct.

Q. Is that correct?

Are they prepared, for instance, for the Detroit field—would they be prepared in Detroit or Chicago?

A. They are prepared on each truck at the bulk plant out of which that truck operates.

Q. I see. You have, in other words, accounting clerks assigned to the bulk plants, either permanently or they go there for that purpose.

A. No. Each bulk plant out of which salaried drivers operate has a small accounting personnel.

Q. Is the total delivery time shown on a tank truck

efficiency report the total of the out-in time reported
3801 on Forms 018 for that truck for the period covered
by the efficiency report?

A. I am satisfied the answer is "Yes," although your question is not entirely clear.

Is the time of each truck a recapitulation of the time of the operating of that truck as shown by 018?

Q. Yes, the time shown on the tank truck efficiency report, which I understand covers a month.

A. That is correct.

Q. Is that the total of the time shown on 018 for that truck for that month?

A. Yes, plus if it be necessary for that truck to go to the garage for any repairs or maintenance or anything of that that time would be included on the total time of the truck.

Q. Then is the driver paid for the total time which is entered on the tank truck efficiency report?

A. He may not be paid for the total time for a particular truck, as shown on the truck efficiency report, but if it becomes necessary for a truck to go to the garage and the driver is available, he will then operate another truck until the return of the one from the garage.

Q. Well, he won't be paid for the time truck is in the garage?

A. He wouldn't be paid for operating that truck while it is in the garage, but he will be paid for operating a truck.

Q. No, but the time that he is paid for operating
3802 a truck will be shown on the tank truck efficiency re-
port, for the other truck, will it not? In other words, you are going to have a report for both of those trucks in which only one of those trucks is being operated by a driver for the time the other one is in the garage?

A. That is correct.

Q. On what basis are drivers' salaries computed? If that is a little too broad, I am interested in time basis; that is, do they have a certain number of hours a day and how is that time computed?

Mr. Hanley: It is repetitious. It has already been gone into thoroughly by Mr. Boatwright in his examination on June 3d. It is contracts with the union. We haven't anything to do with it except sign on the dotted line.

By Mr. Austin:

Q. Well, accepting that suggestion, I believe that the statement was this: A union contract provides that they get a certain amount per hour, and I suppose they work a certain number of hours per day; is that right, or a maximum per day?

A. I do not know whether this particular contract specifies an hourly rate or a monthly rate, but it is a union—we have a contract with the union and the rate per hour is determined upon the pay scale that we are paying them, the drivers, which figures out to 95.2 cents per hour.

Q. I think it is rather important to know whether 3803 the drivers are paid on an hourly basis or some other basis, because the company has got to figure up the number of hours he worked if he is paid on an hourly basis.

A. Well, I am sorry. I do not know the terms of that contract, whether he be on a monthly basis or an hourly basis. I cannot testify.

Q. For the purpose of this exhibit, Exhibit 31-B and C, and D, E, and F, also, the driver's salary is referred to as 95.2 cents per hour?

A. Yes.

Q. But what I am interested in is how you determine how many hours the driver has worked or what hours he is paid for.

A. We don't determine it; the union tells us how many hours he works.

Q. You certainly keep time records, don't you?

A. Absolutely.

Q. And you don't pay a driver for time that he isn't there, do you?

A. No.

Q. Then the company must have some means, either from the 018's or otherwise to find out how much to pay the driver?

A. We do. We have a pay roll record.

Q. The pay roll record has to be made up from something?

A. That is right. We have a time record on every salary driver out of each of the plants.

3804 Q. Well, my next question is going to be: Are the drivers' salaries figured upon the time shown on the Forms 018?

A. They are not.

Q. Then how is the time computed upon which the driver is paid?

A. Well, time in and time out. He comes to work at a certain hour during the day and he works a certain number of hours, and then he is checked out in the evening.

Q. Well, suppose he is standing around while a truck is being loaded. Is he paid for that time?

A. He is if we permit him to stand around while the truck is being loaded; yes, sir. It is our obligation, however, to see that our employees have something to do.

Trial Examiner Ballinger: The Examiner understands the object of the examination by Counsel for the Commission to ascertain the basis upon which you arrived at 95.2 cents per hour.

Mr. Austin: Not the basis upon which he arrived at it, but I want to know—

Trial Examiner Ballinger: The facts from which

Mr. Austin: For what time the driver is paid. I assume he is paid 95.2 cents per hour, but I want to know what work he is paid for.

Now, if Your Honor doesn't just at the moment see the relevancy of that, I think if you will study these 3805 exhibits as much as I have, why, perhaps it would be obvious that there is a comparison here of labor costs and that is the comparison of drivers' salaries, and I think that the—I won't go into that further now unless you have some question.

Mr. Hanley: I might call Your Honor's attention to this fact: That whether the cost per hour of the salaried driver is 95 cents an hour or $95 an hour, and irrespective of the basis on which it is reached, the important thing here is not how much it is as the comparison of time used in actually making deliveries as between two classes of receivers of gasoline.

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. You stated, I think, Mr. Boatwright, just now, that the out-in time on the 018 has nothing to do with the computation of time for which the driver is paid?

A. No.

Q. Suppose the driver goes out, as he sometimes does, with the truck and comes back, and the time reported on the 018 is a period which might include a lunch period. Is the driver paid a salary for the total time on which he was out, or how is the lunch period ended?

A. The driver reports the time that he took out for his lunch.

Q. But that is not shown on the 018?

3806 A. No, no, it is not.

Q. Do I understand you to say that the driver reports the time taken out for lunch but that that time is not taken out on the 018?

A. It is not.

Q. Then does it follow that the driver does not report that lunch time to the clerk who makes out the 018 but reports it to someone else?

A. I don't know to whom he reports. It may be a small station at which the only clerk on the job is the one that he reports his time in and his time out. On the other hand, he may be operating out of a larger station where there may be several clerks. I don't know the individual and it wouldn't be the same in each of the stations.

Q. On Respondent's Exhibit 31-B, it is stated that only 018 tickets were used for deliveries on which time consumed for delivery could be determined accurately, and that any questionable time periods such as those which might include a lunch period were omitted.

A. That is correct.

Q. So I was wondering why those tickets were omitted or whether the lunch period would or would not be included in the 018.

A. The ticket might show a total time of three hours and, let us assume that he drove out of the plant 3807 at 11 o'clock and returned at 2. Now, part of that time was utilized by the driver in getting his lunch. Therefore, the actual time as shown on the 018 includes both the delivery time and a period of inactivity while the driver was eating his lunch. It would not have been a fair comparison to have included that ticket in the analysis.

Q. Well, not if the lunch period might be in there, but it would seem reasonable that if the driver was not paid for the lunch period, that it shouldn't have been in the 018, and that is the purpose for this line of questioning.

A. Unfortunately, the lunch period was in there.

Q. But I will say that the driver was not paid for the lunch period.

A. No, the driver isn't paid for the lunch period.

3808 Q. Now, are lunch periods and other time reported on Form 018 but not actually spent by the driver in making deliveries included in truck delivery time shown on the tank truck efficiency reports? In other words, I have been talking about the 018. Now, you say the lunch period is in there, it does not get out, stays in. Now, when tank truck delivery report is made, tank truck efficiency report is made on Form 018, does the lunch time still stay in?

A. No, sir.

Q. How is such time eliminated?

A. It must be reported to one of the accounting clerks at the bulk plant.

Q. Then, is your answer that the tank truck efficiency report, any time which they say, which you have referred to here as total delivery time for that truck, is it your testimony that the total delivery time shown by the tank truck efficiency report does not include any lunch periods?

A. It does not.

Q. Were the 018's all included where there is a lunch period?

A. I think the 018's are included, but the reduction is made for the reported time taken by the driver for his lunch period. I think that is the process followed.

Q. You mean that the reduction is made when the tank truck efficiency report is made out?

3809 A. Yes, sir.

Q. Do you know how that is accomplished?

A. I do not know the minute details, no, sir.

Q. Well, your testimony was that the tank truck efficiency report was made out on the forms 018. Now, you say some 018's include the lunch period, you say, where the lunch time gets in the tank truck efficiency report.

A. I also stated the tank truck efficiency report is made out in part from 018, but not solely 018, but that they used other records as well. Thus, it would be entirely possible that they would take the gallonage from 018 only. They could take the time from the 018 and deduct the lunch hour.

Q. Do I understand that you are not sure at the moment as to how the time, delivery time shown on the tank truck efficiency report is arrived at?

A. Well, the delivery time is the actual time that the driver, or the truck was in operation. I do not have the specific instructions for the compilation of the truck efficiency report.

Q. You stated a moment ago that it includes time in which the truck goes to the garage for repairs. That is not actual delivery time, is it?

A. No, no, it is not.

Q. Is there any other time included on the tank truck efficiency report, which is not actual delivery time?

3840 A. No, I think not.

Q. Referring to Respondent's Exhibit 31-B, a sample of 018 tickets for full load deliveries in 1940 by truck numbers 34270 and 29525 are used for the calculation. Those were 1,500 gallon truck, were they not, Mr. Boatwright?

A. That is true.

Q. Out of what bulk plant did those trucks operate?

A. Scotten Avenue.

Q. Both of them.

A. Yes, sir.

Q. Were these two trucks used for the delivery of gasoline only?

A. Yes, sir.

Q. Were these two trucks used in 1940 for the delivery of gasoline to tank wagon resellers?

A. They were.

Q. Were they used exclusively for delivery to tank wagon resellers or did they make some delivery to tank wagon consumers?

A. They made some to tank wagon consumers.

Q. Do you know what portion of the deliveries were to tank wagon consumers?

A. A very small portion.

Q. Were the 018 tickets used for the computation on Respondent's Exhibit 31-B tickets for delivery to tank
3841 wagon resellers?

A. They were.

Q. Is it your opinion that the proportion of full load deliveries to total deliveries made to tank wagon resellers in 1937 in the Detroit area was about the same as in 1940?

A. I do not know.

Q. Well, you have here made a computation based upon the performance of two trucks in 1940, and you have used that as an indication of labor and equipment costs in 1937, is that right?

A. That is correct.

Q. And you have made a differentiation here as to the cost of full dump deliveries and partial dump deliveries?

A. Yes, sir.

Q. But you do not know whether the proportion of the full load deliveries to partial load deliveries from salary stations in the Detroit area was approximately the same in 1937 as in 1940?

A. Well, I know of no reason for a change, but you are asking me a question that I can not answer, for the simple reason that the form 018 tickets are not maintained except for the past 12 months. We do not have that record.

Q. Well, I asked you in your opinion, I did not ask you the fact because I realize you could not state whether they were the same. I asked you in your opinion the pro-
3812 portion of full load deliveries and total deliveries to tank wagon resellers in the Detroit area, if it would be approximately the same in 1937 as it was in 1940.

A. Yes.

Mr. Hanley: That is objected to as immaterial for any purpose, whether they were or whether they were not.

Trial Examiner Ballinger: The Examiner has understood the witness to answer that he does not know.

Mr. Austin: No, I do not think he has, your Honor. He just stated that, as I understand, that in his opinion there was the—he just stated there was no reason why they should differ, and I believe that he has stated that he does not know as to the actual fact in comparison by number because he could not make it.

Trial Examiner Ballinger: Well, the question may be one that may have some materiality.

The objection is overruled.

You may answer.

Mr. Austin: Will you read the question, please, Mr. Reporter?

(Question read.)

A. As I stated, I know of no reason why it should not be the same. There has been an increase in volume in the Detroit area since 1937, which may have some reflection on that, but in my judgment they would be approximately
3813 the same proportion.

By Mr. Austin:

Q. What is the meaning of the figures on Respondent's Exhibit 31-C appearing right after the word "hours" in the first column of the computation there, the figures being 1006-2006?

A. Those are the account numbers from which the record was taken.

Q. Well, now, those account numbers are expense account numbers, are they not?

A. Marketing expense account.

3814 Q. And this is a statement of hours?

A. Certainly.

Q. How is the number of hours arrived at from the expense account?

A. Well, hours are a marketing cost to the company, so many hours at so much per hour.

Q. The hours shown here are hours for trucks delivering gasoline only from three plants; is that right?

A. That is correct.

Q. Will you explain at how you arrived at those numbers of hours through the use of the expense account?

A. Accounts 1006-2006 are not, in my interpretation, an expense account similar to what an individual would submit following a trip.

Q. Oh, no.

A. But they are the record of the hours devoted to specific purposes on the part of the drivers.

Now, in this particular case the record of the utilization of the driver's time for delivery of gasoline as charged to 1006 and 2006 for the three plants is shown as being 7,993 hours total.

Q. Well; is that the total hours for deliveries from the three plants?

A. No, that is the total hours for delivery of gasoline at the three plants.

3815 Q. Well, are those hours—one method, it seems to me, of arriving at that would be to take the total of the delivery time from the tank truck efficiency report up at the top, where it is "information tank truck efficiency report maintained, Detroit Division, for months December, 1939, March, June, and September, 1940." Now, I would therefore have assumed in the absence of those two numbers that the numbers of hours stated, from the top line of the computation, were totals taken from the total time shown on the tank truck efficiency report for those trucks, and that would not involve the use of any information from those accounts at all, would it, Mr. Boatwright?

A. Oh, yes, the hours on your tank efficiency report have to tie up with your account number to which you are going to assign your cost.

Q. Well, how did you arrive at these hours? Are these totals taken from the tank truck efficiency reports or were they arrived at in some other way through the expense account figures?

A. Well, our official record upon which our marketing expense statement is predicated and including the allocation of the hours of the driver are designated to account Nos. 1006 and 2006, the actual hours were taken from those respective reports, those respective accounts.

3816 Q. Well, then, is it—am I to understand that these figures for hours appearing on Respondent's Exhibit 31-C, are those figures which reflect only the hours shown on the tank truck efficiency reports for these particular trucks used in this computation and they are not merely a division of total expense by driver's salary to determine hours in that way? You might have—for instance, you could have figured a certain amount you paid a driver, and you might divide that by 95.2 to find out the number of hours, that would be one way to tell; another way would be to go direct to your tank truck efficiency report and take the hours from that.

I want to know which way it was done.

A. I could not answer you positively whether we took this form from the tank truck efficiency report or direct from the account numbers. The number of hours would be the same in either case.

Q. Were consumer deliveries included in computing "driver's salary cost per gallon for delivering gasoline to the average reseller" on Respondent's Exhibit 31-C?

A. I am afraid that I do not have the reference that you are referring to. Will you give it to me again?

Mr. Austin: Exhibit 31-C.

May we go off the record?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

3817 A. Yes, sir.

Mr. Hanley: May I ask, while Mr. Austin is examining these papers, Mr. Boatwright, whether it would make any difference in cost whether a given amount of gasoline were delivered out of a given truck to a consumer or to a reseller?

The Witness: No, it would not.

Mr. Austin: Now, may I go off the record a moment, please?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Mr. Boatwright, do you know of your own knowledge obtained from company records how many separate deliveries of gasoline were made to Ned's Auto Supply Company stores in 1937?

A. I do not.

Q. Do you know what percentage of the gasoline deliveries made to Ned's in 1937 were full load deliveries?

A. I do not.

Q. Do you know how many partial load deliveries of gasoline including deliveries of Solite with Ethyl were made to Ed's Auto Supply Company in 1937?

A. There are no actual records of the individual time tickets on the deliveries to Ned's Auto Supply in the
3818 year 1937 in existence.

Q. Then, you do not know, do you, that there were no partial load deliveries made to Ned's in 1937?

A. I know that the most of them were on the full load basis except as when it became necessary for our truck to operate out of our plants to make deliveries to stations in the nearby neighborhood they were privileged at any time upon the report to the plant to dump one or two compartments in the Ned's tanks. That responsibility of keeping the tanks filled enabled us to operate our trucks on a full load basis to a greater extent than they could have been operated in serving other retailer accounts had it not been for the Ned's outlets.

Q. Do I understand, then, that sometimes partial dumps were made at Ned's on their way to or from serving other stations?

A. Yes, sir. If we had an order, let us say, for three compartments of our truck to some station in the vicinity of Ned's, rather than pulling out of the yard with only three compartments filled we would fill the five of them, dump the three on per order and then dump the other two at Ned's, putting back to the yard empty.

Q. That would be a partial dump delivery in the case of Ned's?

A. That is correct.

Q. As well as in the case of the other stations?

A. That is correct.

3819 Q. Have you made any computation of the distance from the bulk plant to the customers, to whom the deliveries were made which were used in the computation on Respondent's Exhibit 31-B?

A. No, sir.

Q. Did you make any comparison of the distances traveled by 34270 and 29525 in making full load deliveries used in Exhibit 31-B, and average distances traveled by truck making deliveries from Scotten, Lycaste, and North Detroit plants?

A. I did not.

Q. In making your computations on Exhibits 31-B and C, you have used the factors of gallons delivered, time consumed for delivery, and driver's salary cost; that is correct, is it not?

A. Yes, sir.

Q. Is it not true that for any single delivery of gasoline by tank truck from a bulk plant the time consumed and the labor costs are directly affected by and will depend in part upon the distance which the truck has traveled in making the delivery?

A. Certainly.

Q. The figure .114 cents appearing on Respondent's Exhibit 31-C purports to be the average driver's salary cost per gallon of the Standard Oil Company for delivery of gasoline to tank wagon resellers from the Scotten, 3820 Lycaste, and North Detroit plants; is that correct?

A. Yes, sir.

Q. Does this figure purport to be the labor cost of delivery to any one customer?

A. No, sir.

Q. Is it not true that the per gallon labor cost of delivery of gasoline to different tank wagon reseller customers will vary according to the number of deliveries, the gallons delivered per trip and the time consumed in making deliveries?

A. Those factors do influence the cost of delivery to individual customers; yes, sir.

Q. Do you know how many tank wagon reseller customers of the Standard Oil Company in Detroit other than Ned's received some full load deliveries of gasoline in 1937?

A. I do not.

Mr. Hanley: That is objected to as immaterial.

I move that the answer be stricken.

Trial Examiner Ballinger: What materiality do you attach to that?

Mr. Austin: I think it is a very material question, although perhaps it is only carrying on a little further some of the questions I asked before.

The materiality is, this is a comparison of cost of 1937, Your Honor, between full load deliveries and partial dump deliveries.

3821 Mr. Hanley: No, it is nothing of the kind, Your Honor; and that is objected to as a misstatement on the part of counsel.

Mr. Austin: Well, it is a comparison for deliveries between full dump and partial dump in 1940, but that is presented here as indicating the same figures for 1937 and 1940 as used here, merely as a means of arriving at the cost in 1937, because those tickets are no longer in existence for 1937.

Mr. Hanley: That is objected to as a misstatement, Your Honor, 1937. The statement here is a statement contrasting the cost of delivery of gasoline to Ned's Service Stations, on the one hand, as against other reseller stations, on the other hand, and all this complication and mystery and legerdemain that is sought to be injected in here to complicate this thing is not helpful to court or Commission.

Now, there may be other full load deliveries in this other group other than Ned's. We do not say that they are not, but we have broken out of the reseller channel what it costs us to sell to Ned's. Now, it may have cost us less to sell to X, Y, Z, than it did to sell Ned's, but we are not on trial for selling to X, Y, Z. We are demonstrating the difference in cost between Ned's, on the one hand, and the rest of the classification, on the other hand.

Mr. Austin: That, Your Honor, I would like to 3822 point out, is the fallacy of the Respondent's position. Under the Robinson-Patman Act there is absolutely no sanction for using an average of all customers as against one customer, if the Commission can prove that.

If the Commission could prove that for any substantial number of customers or, technically, even for one customer the cost was no greater than the cost of delivering to Ned's, it would be sufficient upon which to base the issuance of an order, and the Respondent's position that they may try to show the cost of delivering to Ned's, which, by the way, there are no deliveries to Ned's included here at all, but this exhibit is on the assumption that Ned's took full dump deliveries in 1937—now, if what has been done here is to compare the delivery cost of certain full dump deliveries with the average cost of all deliveries, and including full dump deliveries was incorrect in referring to partial dumps, because it is an average of all and contrasted with the full dump deliveries.

There are certain cases where the average cost is the only method on which you can use for comparison. It is my contention that that is clearly not true here, and that it is just as easy to determine the cost to anyone or to several large customers as it is to take the entire average, and it could be done from these same tickets and on the same information. Consequently, I think that the position of
3823 using an average here is no justification under the Robinson-Patman Act.

Trial Examiner Ballinger: If that is your contention, the objection is overruled and the motion to strike is overruled.

Mr. Hanley: What was the question, please?

Mr. Austin: The question and answer.

(Question and answer read as follows:

"Q. Do you know how many tank wagon reseller customers of the Standard Oil Company in Detroit other than Ned's received some full load deliveries of gasoline in 1937?

"A. I do not.")

Mr. Austin: I would like to point out, Your Honor, that it appears here that Ned's received some partial load deliveries in 1938 but what is much more important, it appears definitely that there were other stations who received full load deliveries and probably a great many of them. I don't care whether the same station got a full load delivery every time it bought gasoline or whether it did not, but whenever there was a full load delivery made, the cost of that full load delivery by the very showing on this exhibit was the same as the cost of delivery to Ned's.

Mr. Hanley: If Your Honor please, inasmuch as counsel has pursued the argument and distorted the effect of the witness' testimony, I wish to make this statement: 3824 First, I do not understand it to be the law, and if it is the contention of the Commission I would like to so learn, that, in the first place, no vendor is required as a manner of law to pass on savings that that vendor may make by the method of sale or delivery; but I do understand it to be the law and a law which cannot be legislated out of existence by a theory of trial counsel, that a vendor has a right to pass on to a customer savings in method of sale or delivery.

Hence, if there was a general cost to Respondent in the matter of selling in the reseller channel by tank wagon, a general over-all cost, and, of course, there was—we have established what it was—and there was a saving as against that cost in delivery to Ned's, then counsel is not permitted to say and the Commission is not entitled to legislate our defense away from us by saying that it may be, just that it may be on some speculative theory, that examination, some other customer of ours receiving by tank wagon may have received deliveries at a cost to us as low or even less than Ned's received deliveries. Our obligation, if we have any on this one-half cent thing at all, is to establish that we made a certain saving as between Ned's and our over-all reseller channel.

I said a moment ago that counsel distorted the statement of the witness. I mean by that this: He says it now appears that there were other full load deliveries, for 3825 one thing. It does not so appear. It simply appears that the witness doesn't know whether there were any full load deliveries or not.

Secondly, he says it appears that there were partial deliveries to Ned's, thereby drawing the inference that the cost incident to partial deliveries, which is greater, attached to Ned's. What the witness did say was that the fact that Ned's gave the privilege to the Respondent of keeping Ned's tanks full gave to the Respondent the opportunity, not to make just partial deliveries in the sense that counsel uses the term, but if we had to make a partial delivery to John Jones of three compartments, we had the right instead of sending a truck out with three compartments full to send it out with five compartments full and leave two of them on the way home, at Ned's, which instead of being a burden was a benefit. And to say that we were making partial deliveries to Ned's, and infer that we were burdened with the cost of partial deliveries is a pure distortion of what the witness said.

Trial Examiner Ballinger: As this is a leading case, the Examiner prefers that the leading question presented should be determined by the Commission and, accordingly, the Examiner overrules the objection and the motion to strike.

The answer stands.

You may proceed.

3826 By Mr. Austin:

Q. Have you preserved on the 018 tickets for trucks 34270 and 29525 for 1940?

A. Yes, sir.

3827 Q. Have you segregated the tickets used for the computation on Respondent's Exhibit 31-B?

A. Segregation was made at the time of the computation. They do not remain segregated?

Q. They do not remain segregated?

A. No, sir.

Q. Didn't you anticipate that some check might be desired to be made upon Respondent's Exhibit 31-B?

A. The tickets 018 are bound in books, 100 copies, 100 tickets per volume. Therefore, they were not removed from their binding but remained in the binding, so that an actual segregation of one class versus another could not be made without destroying the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Have you made a computation of the average driver salary cost per gallon of gasoline for all deliveries made by these two trucks in 1940?

Mr. Hanley: Will you read that question, please?

(Question read.)

A. No, sir.

By Mr. Austin:

Q. That could be done, could it not?

3828 A. It could.

Q. Have you computed the average driver's salary cost per gallon of deliveries made to any one customer served by either of these two trucks?

A. No, sir.

Q. That could also be done from the 018 tickets, could it not?

A. It would be difficult. You would have to take your 018 tickets, determine the serial number of your sales ticket, then pull your sales tickets, observe your location of your individual customer, and trace a sufficient number of these individual tickets through your records to establish a representative cost on a given account.

Q. The difficulty, as I understand it, Mr. Boatwright, is due to the fact that the 018 tickets do not show the customers?

A. It does not show the customer's name.

Q. Only the—

A. It shows the serial number of sales tickets. It would be a very difficult operation.

Q. It is true, is it not, that the same customers are generally served by the same truck?

A. No.

Q. Or isn't it?

A. That need not follow at all.

3829 Q. We have had some testimony about the trucks having routes.

A. That is correct, but a given truck may take a route, a certain route this morning and a different truck may take that route tomorrow morning.

Q. I see. Well, just so as not to leave that too open, although that is a question which I think I asked Raupaugh more fully, I believe that I will put it this way:

My understanding from his testimony is that, in general, the truck has a route and gets to know the needs of the drivers and from that I assume generally follows the same route, so I will just ask you whether this change of trucks on a route is usual or is that more infrequent?

A. Well, I think that what you meant in your statement was not the needs of the drivers but the needs of the customers.

Q. That is what I meant to say, the needs of the customers are known by the driver.

A. It is just a practical operating desire to serve given customers with given drivers and we do try to but—

Q. Oh, it may be a different truck but the same driver?

A. It may be a different truck, or it may be in many cases even different drivers, but, as a general tendency we try to serve given customers with the same personnel be-
cause of a friendship, because of an understanding,
3830 common understanding of needs, requirements, and so
forth.

Mr. Austin: I move, your Honor, that we adjourn until 2 o'clock.

Trial Examiner Ballinger: The motion is granted, and now, at 12:30 p. m., the hearing stands in recess until 2 o'clock.

(Whereupon, at 12:30 p. m. a recess was taken until 2 p. m.)

3831 Afternoon Session.

Trial Examiner Ballinger: Come to order. 2 P. M. You may proceed.

By Mr. Austin:

Q. I asked you this morning, Mr. Boatwright, certain questions about the time included in the tank truck efficiency reports and about the method of computation of time upon which the drivers are paid.

Do you wish to make any further statement on that point at this time?

A. I could only add that on Respondent's Exhibit 31-B, wherein the calculations of the cost involved for delivery on a full dump basis was explained, each hour the truck was in actual operation we calculated at a labor cost of 95.2 cents per hour for the identical period that the truck was in operation.

On Respondent's Exhibit 31-C, where the second reference was made, hours as shown are the total hours out of these respective bulk plant areas devoted to the delivery of gasoline and the cost of 95.2 cents per hour was again applied to the total hours of operation for gasoline delivery out of each of these three plants. In each calculation, it is the identical hours of operation in delivery of gasoline only.

Q. You just stated that on 31-C, the total gasoline
3832 delivery time from these three bulk plants was used.
Do you mean that or don't you mean the total gaso-

line delivery time of trucks which were used only for the delivery of gasoline?

A. The hours as shown on 31-C are the identical hours during which time period drivers were delivering gasoline.

Q. All trucks or just trucks which were used only for gasoline?

A. It is all trucks. During the time they were used for gasoline. Now, a truck might be used both for fuel oil and gasoline. This is the segregation of the time devoted to the delivery of gasoline only.

Q. Then when it is stated—

Mr. Hanley: Excuse me, Mr. Austin.

Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. On Respondent's Exhibit 31-C there is a reference to the total delivery time of trucks used for gasoline only out of three named bulk plants. That does not mean then that only the time of trucks which were used for gasoline only is included; in other words, as I read that statement, it meant to me that you had taken certain trucks, all of the trucks operating out of those three plants which were
3833 used only for gasoline and that you had eliminated all
time of all trucks which had been used partly for some other product?

A. No. The difficulty in our understanding is due to the fact that one truck may be delivering gasoline during the summer months. As your demand for gasoline declines and as your demand for fuel oil appreciates a truck may be diverted from a gasoline truck to a fuel oil truck using the same equipment, you see.

Now, the hours as indicated on Respondent's Exhibit 31-C are the same total number of the hours spent in delivering gasoline only irrespective of the truck that may have been used. It is a segregation of the time of the drivers used on a particular product.

By Mr. Hanley:

Q. Namely, gasoline?

A. Namely, gasoline, yes, sir.

By Mr. Austin:

Q. It covers all trucks operating out of that station?

A. It covers all trucks operating out of those three stations.

Q. Now, you will understand perhaps my questions regarding the hours because I was under the impression you were not including all gasoline hours.

A. Well, I am sorry that I misunderstood your question. This is all gasoline hours at each of these three plants.

3834 Q. But you did say this morning that the tank truck efficiency reports contained certain hours in their showing of total delivery time which were not hours actually employed by the trucks in delivering gasoline.

A. No, that is not quite the statement. I did not state that they showed hours for delivery time that was not delivery time. I did state that the tank truck efficiency reports which are an operating statement to judge the efficiency of operation of the various units of our fleet, recognized hours other than operating hours, but that is not delivery time.

Is that distinction clear?

Q. Well, it was my understanding and is still from the statement on the exhibit that the total hours shown here are the total hours shown on the tank truck efficiency report for those trucks. The statement is that the source of information is the tank truck efficiency reports, Detroit division, for certain months. If those efficiency reports contain hours other than hours spent on delivery of gasoline, how were those hours eliminated, or were they eliminated?

A. They were eliminated from any calculations. This is the actual hours expended by these respective plants in delivery of gasoline as reported on Respondent's Exhibit 31-C.

Mr. Hanley: Mr. Austin, I do not want to ask a 3835 question in view of your request, and I think the answer makes it clear, but will you ask a question as to whether or not these hours on Respondent's Exhibit 31-C apply to delivery hours only so that that clearly appears in the record if it is a fact?

Mr. Austin: Well, I prefer to state that, try to get at that this morning as to how these hours were computed, and I will ask the witness the question directly whether any of the hours shown on the first line of the computation here include any hours during which the trucks were at a garage repair shop.

Trial Examiner Ballinger: What computation do you refer to?

By Mr. Austin:

Q. On the first line of the computation on Respondent's Exhibit 31-C, opposite the word "hours."

A. There are no hours included in that computation on Respondent's Exhibit 31-C while a truck was in a garage or other than in operation.

Q. Well, then, isn't it true, Mr. Boatwright, isn't it indicated by the use of those account number figures there, 1006 and 2006, that those hour figures were arrived at not by taking the total from tank truck efficiency reports or any from tank truck efficiency reports, but weren't they arrived at by taking tank wagon driver salaries for
3836 these three plants and dividing it by 95.2 cents?

A. These figures were arrived at by taking from the plant operating records the actual hours spent in delivery of gasoline and then extending those hours by the prevailing rate of 95.2 cents per hour.

Q. Well, there is no extension on this first line. It is simply the number of hours.

A. Well, your extension is in the third line where you come to your costs.

Q. I am just referring to the first line, just referring to where you got these figures with hours.

A. We got them from the plant record in the actual hours spent on delivery of gasoline by all trucks operating out of those plants.

Q. And on what forms, or where is that shown?

A. I think it is shown in two forms, I think it is shown on—we took them from the account numbers 1006 and 2006 which ties up with our marketing cost statement. Those are the actual hours assigned to the delivery of gasoline.

Q. Does each bulk plant keep a separate account of the expenses by your code of account numbers?

A. Each bulk plant assigns the number of hours to 1006 or 2006 according to the number of hours actually spent.

Q. Now, do you know where the bulk plants, in getting that assignment, where they get the data from?

3837 A. I am not certain as to just what supporting form that comes from.

Q. Doesn't this exhibit indicate that they get it from the tank truck efficiency reports?

A. Yes, sir, I think that it does except for that one item. You will notice that at the top, source of information, gives tank truck efficiency reports maintained in the Detroit division. Now, hours 1006-2006, were taken directly from the account records. Now, the tank truck efficiency report as I have stated previously is merely a means of checking the efficiency of the operation of our fleet of trucks. It is an operating statement. As such it is not tied up with and balanced with the account record, although the account record may coincide exactly, I could not state that they took the 1006 or 2006 accounts from the efficiency reports.

Q. And if they did take them from the tank truck efficiency reports, then they would include hours at which the trucks were at the garage, is not that true?

A. There are no hours included in this when the truck was at the garage.

Q. Well, you have said that, Mr. Boatwright, but you have stated you are not positive of what source the bulk plants obtained the number of hours assigned to those accounts.

Now, if they take the hours from the tank truck efficiency report, first let me ask you whether they may not do
3838 that. Do you know that they do not do it?

A. I have stated I do not know the underlying form number from which they take the exact number of hours for different channels, no, sir.

Q. Then, how can you state positively that the hours included here which you have taken from those accounts, which are the hours assigned to those accounts of the three stations do not include any time not spent on actual delivery?

A. I can state that positively because in taking this information from the records I made sure that there was nothing in there except the time actually spent on delivery.

Q. And what did you do to make sure of that?

A. I checked with the agent in charge of the supervisions of the drivers.

Q. And is that a separate agent for each station, or do you have one agent?

A. No, we have a separate agent for each station.

Q. Did you check with all three of them?

A. No, sir. I checked with the tank wagon superintendent for the Detroit division, and I checked with the agent at Lycaste and the agent at Scotten Avenue. I did not check with the agent at North Detroit.

Q. What did you do, just ask him that question?

A. No. They have instructions they have to follow, and in following those instructions they would not include
3839 hours which were not assigned to the delivery of this particular product, gasoline.

Q. I do not want to pursue this much further, but I will just ask you one more question:

Do you know that in preparing these figures or assigning the hours to the different accounts that the men you have just referred to do not consider the time of the trucks at the garage to be part of the time assignable to the delivery of gasoline?

A. Yes, I do know that.

3840 Q. Then it is your belief that some way or other any such time has been eliminated in preparing this statement; is that correct?

A. It isn't my belief; it is my knowledge that it was.

Mr. Austin: Unless Your Honor has some further question, I will proceed.

Trial Examiner Ballinger: Have you finished, now, your examination?

Mr. Austin: Yes.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Mr. Boatwright, your statement is that the hour figures on Respondent's Exhibit 32-C do not include any time other than actual time of delivery operation. Just pursuing that a little further, you stated that you knew that only actual delivery time was included there. That is based, is it not, upon the statement made to you by these employees whom you have just mentioned of the different bulk plants?

A. It is based upon the instructions and the statements of the employees to the effect that they were following those instructions. Naturally, I couldn't audit the individual time allocations of individual drivers.

Q. I am still not quite clear whether you are in any
3841 way correcting the statement made here that the tank truck efficiency reports maintained in the Detroit divi-

sion for these four months was the source of this information, and if I understand you correctly—well, tell me again, were those tank truck efficiency reports the source of the information given you by these accountants at the bulk plant, or was it some other source, or do you know?.

A. The actual hours were taken from the hours shown on our pay roll records, accounts 1006 and 2006.

Q. Yes; now—.

A. Now, they may have been based on the truck efficiency reports, but I cannot testify that they were.

Q. You thought they were when you wrote this page of the exhibit, did you not?

A. Frankly, I don't think the thought entered my mind until you raised it because we regard our account number—our final account number as the final authority. The underlying form, the supporting forms making up those individual accounts I didn't think of as to which one it was coming from.

Q. What did you mean, then, by stating that your source of information was the tank truck efficiency reports?

A. We stated at the beginning of each of these exhibits the general source of information. Then if there is any particular item which comes from a form with a different form number, we so indicate, and accounts 1006 and
3842 2006 are the only accounts on our marketing expense statement. The allocation of effort has been made to those accounts, and we took it from the final source, which goes to make up our marketing expense statement.

Q. I see. That is clear.

Now, will you tell me among these other lines here below "Hours" what information, if any, there came from the tank truck efficiency reports?.

Trial Examiner Ballinger: To what do you refer?

Mr. Austin: We are still referring to Exhibit 31-C.

A. Well, the only other item that had to be secured from and form was your gallons delivered. That is taken from the tank truck efficiency reports, while the line preceding that, "Cost of Total Time" is merely an extension; the line following that, "Cost Per Gallon" is merely a division.

By Mr. Austin:

Q. Let us turn to Respondent's Exhibits 31-D, E, and F, referring to equipment cost difference. The source here is stated to be maintenance cost obtained from machine shop records. If you will turn to Exhibit 31-E, please, on that page you have made perhaps not a complicated but at least an extended computation on the sample method to arrive at a conclusion of the total hours employed by truck Nos. 34270 and 29525, in 1940, in the delivery of gasoline.

3843 That is the computation, is it not? That is, I have correctly stated what the result of the computation is?

A: I think that is correct; yes, sir.

Q. Why was it necessary to use this sampling method to obtain the total number of hours' operation for these two trucks for 1940? Why was not the actual total time of operation used?

Mr. Hanley: Just a moment, Mr. Boatwright. I don't know whether I have any objection to that or not. I don't know what the latter part of the question refers to.

Mr. Austin: It explains the first part.

Mr. Hanley: The year 1937?

Mr. Austin: No, 1940.

As I understand it, on Exhibit 31 certain sample tickets have been taken to the extent of 294 single dump tickets and 340 multiple dump tickets; that is, the total for the two trucks, and on the basis of that and the time consumed, why, a time per delivery has been arrived at, and that has been multiplied by the total number of deliveries for the year, to get the total time of operation for those trucks.

Mr. Hanley: I see.

Mr. Austin: My question is—

Mr. Hanley: With your explanation, may I have the question again?

(Question read.)

3844 Mr. Hanley: May I inquire, Mr. Austin, if you mean by total time of actual operation the time used in the actual deliveries to Ned's and to others?

Mr. Austin: No. I mean total time of these two trucks in 1940, which is the thing that has been arrived at at the bottom of this page.

Mr. Hanley: I see. Instead of the sampling method?

Mr. Austin: Yes. In other words, instead of taking some 294—well, take for truck 34270, instead of taking 94 tickets out of 190 for single dump and some 130 out of 1172, and then taking an average, and then multiplying by the total, it wouldn't have been much more difficult to take just add up all the tickets.

Mr. Hanley: I think that is a proper question, Your Honor. No objection.

Trial Examiner Ballinger: Proceed.

A. The difficulty was that some of the tickets overlapped the noon hour, as I explained before. Therefore, it was necessary that we exclude those tickets to get a fair measurement of the time of operation of the truck. It was necessary to do it on a sampling basis to exclude non-representative tickets which were in the total group of tickets.

By Mr. Austin:

Q. How do you know which tickets include a lunch hour and which tickets do not?

3845 A. It is very easy to detect from the tickets. Depending upon the time of the departure from the yard and upon the return to the yard, an unusual, unreasonable, let me say, amount of time over the noon hour indicates that the driver has taken a luncheon period during that stand when the truck was out of the yard.

Now, as I explained earlier in the testimony, we completely excluded those tickets that overlapped the noon hour period so that we could get a fair measurement on the time of actual operation for delivery purposes.

Q. That is more or less of a guess, isn't it, as to which tickets include lunch hours and which ones do not?

A. No, it is a very obvious thing. If he goes out of the yard at 11:30 and comes back at 3, there is a lunch hour in there.

Q. How long is the driver's lunch hour?

A. It may be an hour.

Q. You said a while ago that the driver reports that to somebody.

A. That is correct.

Q. But—.

A. It isn't jotted down on the individual tickets, Mr. Austin.

Q. Then, as I understand your procedure, whenever you found a ticket that happened to have a particularly
3846 long time on it, you just eliminated that ticket?

A. That is not a correct statement. Whenever we found a ticket that overlapped the noon hour, that ticket was excluded.

Q. I should have made that qualification as to the noon hour.

A. Yes, sir.

Q. Would it not have been more accurate to take the total time of all the tickets, and as for those noon hours simply to have deducted an hour from each one?

A. No, I don't think so. If in each case each driver took exactly an hour then that procedure would have been quite acceptable. We had no assurance, however, that on each of those tickets the time was exactly an hour as applied to that particular ticket. That procedure was discussed and we felt that the fair thing to do was to take all those cases where there was no other activity intervening in the delivery, but that it was a straight delivery, and to use those as a sample. Now, this sample was predicated upon segments. We would take 12 tickets, full-dump delivery, and we would take a second twelve, and a third, and so on, and so on, so that our sampling reached the stability level which it had in both cases. The sample is truly representative, and I believe it is fairer representation of the actual operations than it would have been had we tried to
3847 associate individual noon hour periods of individual
drivers with tickets when the ticket does not associate those noon periods with them.

Q. Is there much variation to the time of the various 018 tickets of the same truck?

A. Yes, they do vary.

Q. Then what precaution did you take in using this sample to determine that the average time of the sample used was representative of the average time of all tickets?

A. The process that I just outlined, wherein we would take these tickets and we started them in groups of twelve. Then we calculated an average time for 12 tickets. We charted that. Then we would take a second twelve and we would chart that. Then we would chart the accumulative for the 24, and then we would take a third 12, giving us a time on each individual segment, and in total as we moved across our chart.

Q. Were those 12's just taken at random?

A. Purely at random, and in that process the statistician says we reached a stability level, and having reached the stability level we doubled our sample to see whether our stability level would be influenced in the slightest, and it remained at the same level. The sample is truly representative.

Q. Well, in that case, Mr. Boatwright, in figuring average time consumed on multiple dump trips, why were 24
percent of the tickets used for truck 29525 and only
3848 11 percent for truck 34270?

Mr. Hanley: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Have you the question?

The Witness: I have, sir.

A. In each case it was not so much the calculation of the percentage of the total tickets that was used in the sampling. In each case by working your problem in segments and having determined a stability level for each truck, for each type of operation, and then having extended that sample beyond what we knew to be necessary to provide us with reasonable measurement, it was just an unnecessary continuation; having established an adequate sample, then we used that adequate sample.

3849 By Mr. Austin:

Q. Then, is it your testimony in the one case you had to use more tickets to establish what you considered an adequate sample than in the other case?

A. No. Frankly I do not think it was my testimony to that effect because in working these, the actual time measurement was allocated among a group of different comptometer operators and I was checking on one truck, and by the time I had succeeded in checking my sample on the other truck they merely had more tickets, and so we just used more tickets. I could have established a perfect defendible sample on a much smaller sample, on the second truck that was actually used.

Q. Will you turn to Respondent's Exhibit 31-F, please, Mr. Boatwright?

Beginning 7 lines from the bottom of the page, this statement appears: "To secure the equipment costs per gallon for delivery to the rank and file of retail outlets the annual cost for the two trucks was divided by the total annual output."

Do you consider that the per gallon equipment costs for these two trucks in 1940 is closely representative of the per gallon equipment cost of delivery "to the rank and file of retail outlets" in 1940?

A. I do.

Q. Do you consider that it is equally representa-3850 tive of the per gallon equipment cost of delivery to the rank and file of retail outlets in 1937?

A. Yes, I think it is.

Q. Then, if that is true, why was not the same method used on Respondent's Exhibit 31-C to determine the average driver's salary cost per gallon for delivering gasoline to the retail outlets?

Mr. Hanley: Well, that is objected to as argumentative inasmuch as the question does not disclose what counsel means by the "same method."

Mr. Austin: Well, if the witness understands, why I would like to have him answer it. If he does not understand, I will very gladly explain.

Mr. Hanley: Well, I am sure I do not understand, and if the witness does, I wish he would make the explanation in his answer.

Trial Examiner Ballinger: Well, the record should portray whether both counsel and witness understand the same thing.

By Mr. Austin:

Q. Let me ask the question then more specifically:

In other words, Mr. Boatwright, you have on Exhibit 31-C gone through the process of going to your hours and going through your bulk plants to obtain something which you have obtained on Exhibit 31-E merely by taking 3851 the average cost of two trucks, and those are the same two trucks which you used on Respondent's Exhibit 31-C.

Now, would it not have been much easier to divide the total salaries paid the drivers of these two trucks in 1940 by the total gallons delivered by those trucks than to make the computation of all gasoline trucks operating out of Scotten, Lycaste and North Detroit plants for four months?

Mr. Hanley: I do not suppose it is a very sound objection, your Honor, to state that I object to that on the ground that counsel does not understand. If the witness does, I have no objection to his answering it. I will confess I do not know what the question means. If the witness does, he is at liberty to answer.

Trial Examiner Ballinger: That objection is overruled.

By Mr. Austin:

Q. You do, don't you, Mr. Boatwright?

Trial Examiner Ballinger: If the witness understands, he may answer.

A. Well, I think the difficulty is one of a lack of common understanding.

Trial Examiner Ballinger: Lack of what?

The Witness: Lack of common understanding.

In the first case I had available a complete record of every hour devoted to the delivery of gasoline out of
3852 these plants serving not only Ned's outlets but all other reseller outlets in plant area. To get the full time of truck operation on an individual unit, an individual truck, it was necessary for me to take the total tickets that that truck had issued during the year.

By Mr. Austin:

Q. You mean what sort of tickets?

A. These 018 tickets, and having the total number of tickets that the truck issued I computed the actual truck operating time excluding any time that it may have been in shop. Now, I could not do that on all trucks unless I brought into our picture and our calculations deliveries of fuel oil and other products that the truck might be used for during the winter months. Therefore, the reason I could not follow their same procedure was merely the necessity of including from our individual delivery record the sum total of the operating hour of a truck unit. Now, a truck need not follow a driver. Is that clear? For instance, these trucks you will notice work more than 40 hours a week. If the driver works 40 hours, then there will be two or three drivers. Now, we allocate driver time that is recorded under summaries in 1006 and 2006.

However, we do not allocate the time of the individual truck where it is used for multiple purposes, these two trucks were used solely for the delivery of gasoline. Other trucks were used for the delivery of gasoline, delivery
3853 of fuel oil and other items. Therefore I had to calculate the actual number of hours of operation of that truck, and did so calculate, but I had no comparable record on the actual number of hours of operation of all trucks out of each of these three plants for the purpose of delivering gasoline.

Q. Mr. Boatwright, you have rather answered my question in reverse, I may say. I understand your answer clearly. You have explained to me why you did not use the 31-F, on Respondent's Exhibit 31-F the same method you used on Respondent's Exhibit 31-C.

A. I thought that was your question.

Q. My question was really the reverse of that, rather, why did you not use on Respondent's Exhibit 31-C the same method you used on Respondent's Exhibit 31-F?

A. The same answer applies.

Q. And it would have been perfectly easy for you to have obtained the average labor cost of these two trucks, would it not, by simply dividing the total drivers' salaries by the total gallons delivered, in other words, you have done that for equipment costs on Respondent's Exhibit 31-F. You have divided the total equipment cost of two trucks by the total time of the two trucks, or rather by the total gallons of the two trucks?

A. You are quite correct. It could have been done. I
felt that it would be more representative to give you
3854 the average of the prevailing conditions in the area.
I would have preferred the process used in Respondent's Exhibit 31-C had it been possible in Exhibit 31-F. It was impossible; therefore, I had to do the only alternate open to me.

Q. That explains your reason, although I am frank to say that I differ with you as to the relative accuracy for the purposes of this case, my opinion is that your method used on Exhibit 31-C, but that is purely a matter of argument. I am only explaining why I ask you the question the way I did.

Mr. Hanley: Well, just a moment.

Will you read that statement of counsel, please?

(Statement read.)

Mr. Hanley: I take it that is just counsel's opinion. I haven't anything to say about that.

By Mr. Austin:

Q. Turning to Respondent's Exhibit 31-E, does not the figure 4254, which is the last figure on the page, represent the total hours spent by these two trucks on the delivery of gasoline in 1940?

A. It does.

Q. The average driver's salary paid was 95.2 cents per gallon, is that correct?

A. That is correct.

Q. I mean per hour.

3855 A. Per hour.

Q. Turning to Exhibit 31-F, we find near the bottom of the page a figure for total annual output of these two trucks of 4,228,839 gallons; correct?

A. That is correct.

Q. Suppose we multiply the total hours figure which is

4254 by 95.2 cents, and divide the product by 4,228,839, would the resulting figure be the average driver's salary cost per gallon for these two trucks for 1940?

A. Yes, on an over-all basis it would be.

Q. Wouldn't that method of computation of average driver's salary cost per gallon for delivery of gasoline to Detroit tank wagon resellers be just as accurate as the method of computation used for equipment cost at the bottom of Exhibit 31-F?

A. Yes, it would.

Q. Let us turn to Respondent's Exhibit 31-G, please.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I suggest that we take a five-minute recess, your Honor.

Trial Examiner Ballinger: All right.

We will take a short recess.

(A short recess was taken.)

3856 Trial Examiner Ballinger: Come to order.

Mr. Austin: During the recess, Your Honor, I have made the computation which has been referred to in the previous questions and answers, for the purpose of determining the driver's salary cost per gallon for gasoline deliveries by truck 34270 and 29525 for 1940, and computed in the method which has been stated the average driver's salary cost per gallon for those two trucks as .096 cents. Referring to Respondent's Exhibit 31-C, the driver's salary cost per gallon, which is used there for the average for the Detroit area, is given as .114 cents. There is a difference, therefore, of .018 cents, the resulting difference as between the two methods of computation.

The Witness: Did you include a tax of 3 percent in your calculations?

Mr. Austin: No, I did not. Thank you, Mr. Boatwright.

Mr. Hanley: May I inquire of counsel as to how to figure the tax?

Mr. Austin: Yes. It is the same as on Respondent's Exhibit 31. The tax there is given as .003 cents, and I will use the same figure in the computation I have just made. In other words, that is the nearest thousandth of a cent in both cases, so that the total will be instead of .096, Your Honor, .099, and the resulting difference would be

3857 .015 cents between the two different methods of computation.

Mr. Hanley: Now, if Your Honor please—

Mr. Austin: Thanks, Mr. Boatwright. I forgot about that.

Mr. Hanley: Now, the computation just referred to and injected into the record by counsel is objected to and its consideration by the court is objected to, for the reason that it constitutes the unconfirmed and unsworn testimony of counsel, who is totally unfamiliar with the cost records and figures of the Respondent, which are the only cost records and figures which are material in the present action, and is an attempt on the part of counsel to substitute cost figures for the business of the Respondent, which are not the cost figures as developed by the accountants for Respondent, and as reflected by the records and accounts of the Respondent, and are speculative, hypothetical, and theoretical, and have no relation to the actual costs that are under consideration. The only cost involved here is the costs of the Respondent in respect of the varying methods of sale and delivery as between the respective customers involved in this action. Further, no cost, no matter how figured or by whom figured, nor how competently figured are material in this action except the costs of the Respondent, whether those costs be predicated on efficient or inefficient operation.

Trial Examiner Ballinger: The objection is over-
3858 ruled. The statement made by Counsel for the Commission will stand subject to check, to verification.

By Mr. Austin:

Q. Now, turn, please, Mr. Boatwright, to Respondent's Exhibit 31-G.

Account 1002 appearing on that page refers or includes the salaries of the sales manager and assistant sales manager of the Detroit division, or, rather, includes a portion of their salaries allocated to the tank wagon reseller channel for 1937; is that correct?

A. That and others.

Q. My recollection of your direct testimony is, without looking it up at the moment, that only those salaries were included in the accounts 002.

A. No, I think my testimony indicated it was the sales managers, promoters, and assistants.

Q. Aren't the assistants included in 003?

A. No, sales promotion and others, being clerks, stenographers, office boys, and so forth, working in the department. By "assistants," I mean assistants to help in the supervision of the activity of the sales force, not the clerical assistance.

Trial Examiner Ballinger: Now, so that it may be definite and certain, will you please state what the first item on Respondent's Exhibit 32-G represents?

3859 The Witness: The first item on Respondent's Exhibit 31-G represents the salaries of the sales managers, promoters, and assistants in the sales promotion department.

By Mr. Austin:

Q. You used "managers" in the plural; if I understood you correctly. Is there more than one sales manager?

A. Yes. We have the sales manager, consumer, and a sales manager, reseller, in the Detroit division.

Q. Well, this account here includes only the salary of the sales manager, reseller, does it not?

A. It may include a small percentage of the time of the sales manager, wholesale, provided he devotes some time to reseller activity.

Q. Do you know whether he does or not?

A. I don't recall whether in Detroit there is any specific allocation, but it is possible. You see, the sales manager, wholesale, is in charge of the "B" station salesmen, the consumer salesmen I discussed this morning. The consumer salesman supervises and directs the efforts of the Commission agents. The commission agents serve both reseller and consumer business. The reseller accounts located at commission points are responsible to reseller salesmen, but there are times when an emergency or something of that nature arises where the consumer department may have to pay a part. If so, that portion of his time
3860 directly directed to the reseller channel only is included in this item.

Q. Does the sales manager, wholesale, also have charge of the regular consumer business from all stations?

A. Yes.

Q. He isn't just merely in charge of the commission agents?

A. He is the wholesale—he is sales manager, wholesale, as the title portrays.

Q. I suppose what you have said about the sales manager, wholesale, also refers to the sales manager, reseller, if any of his time happens to be put on consumer business? That is all allocated to that channel?

A. That is correct.

Q. How many assistants does the sales manager, reseller, have whose salaries are included in this account?

A. Each of them have assistants, in Detroit.

3861 Mr. Hanley: You were referring to Detroit, Mr. Austin?

Mr. Austin: Yes.

By Mr. Austin:

Q. So we have a sales manager reseller and an assistant sales manager reseller?

A. Yes.

Q. Now, leaving out of consideration for the moment any of the overlapping from the wholesale managers, that makes two men whose salaries are included here, is there any other?

A. I think not.

Q. So that this is all a division office again, is it not?

A. That is correct.

Q. Does the sales manager reseller, or do the sales manager reseller and his assistant—strike that.

Will you tell me what their duties are?

A. Well, their duties are to manage the sales in the reseller channel of distribution.

Q. Does that include supervision of salesmen?

A. Definitely.

Q. That includes what you have called sales promotion work?

A. Yes, sir.

Q. Which for the benefit of the record, I believe is largely what you call driveway training.

A. That is an important part of it, yes, sir.

3862 Q. But wouldn't the larger part of their work be supervision of salesmen?

A. I—

Q. I can see where that question may be a little confusing. Who does the sales promotion work, driveway training, for instance?

A. The salesman.

Q. And he is also the fellow who devotes time to the selling of gasoline.

A. That is correct.

Q. And is there any division made on the time basis between the salesman's activities in promotional work and in actually selling work?

A. It is not possible to make such a segregation.

Q. Well, I did not know whether it was or not.

A. Because when you are training someone in proper merchandising methods you are selling.

Q. So that the salesman's time and the salary for that time, rather, are included under salesmen's salary in your account, regardless of whether the time was spent on driveway training or on something else; is that right?

A. Yes, sir.

Q. Do the sales manager reseller and his assistant spend part of their time on supervision and training of salesmen, or is that their principal duty?

3863 A. Yes. They work with salesmen.

Q. Do you have certain training courses for salesmen?

A. Yes, sir.

Q. And are those courses in the charge of these sales managers?

A. Yes, sir.

Q. Is Mr. Blau's salary included in this account 002?

A. No.

Q. What account number does Mr. Blau's salary come under?

A. Salary supervision, 1,000 account.

Q. Mr. Blau was in charge of reseller sales in 1937, was he not; wasn't his title manager in charge of reseller sales?

A. I think that is correct.

Q. Was he over the sales manager reseller?

A. Yes, ~~sir~~.

Q. Why is not any of Mr. Blau's salary charged to sales promotion?

A. I think that—

Mr. Hanley: I do not know whether I have an objection to that. It seems to me it assumes a fact not in evidence, your Honor. I object on that ground. I have no objection to counsel asking if any of his salary is so charged.

Mr. Austin: Well, I think he has already stated that it is not.

The Witness: I have stated it was not.

3864 Mr. Hanley: I will withdraw the objection.

Mr. Austin: I will withdraw the question aside from the objection. I want to go into it more generally, not just as to Mr. Blau, and for that reason I see no point in asking the question as to him.

Mr. Hanley: I have no objection to your developing the fact.

By Mr. Austin:

Q. I do understand, Mr. Boatwright, that all of Mr. Blau's salary is included in account 000. Would it be all in account 1000, or would there be an allocation?

Trial Examiner Ballinger: What exhibit now are you referring to?

The Witness: 31-Q.

By Mr. Austin:

Q. I am referring really to Respondent's Exhibit 32, as to the account, which is the blank form 189.

Would Mr. Blau's salary, for instance, and this other apply also to Mr. Raupaugh's salary, those salaries are allocated between the different channels, are they not?

A. Yes, sir.

Q. Now, all the other salaries, do you know whether they are included under account 000, is that not right, on Respondent's Exhibit 32?

A. That is right. It is the 1000 account.

3865 Q. Well, it is 1000, 2000, and—

A. That is right.

Q. Whatever the other number is.

A. All right.

Q. And is it true that all of these salaries of the sales manager reseller and the assistant sales manager reseller are included on form 189 in account 002?

A. Yes, sir.

Q. Referring now to those salaries in account 002, that sales manager reseller and assistant sales manager reseller are in charge of and supervise salesmen who call upon Ned's Auto Supply Company, is that right?

A. Yes, sir.

Q. And as you have stated here that none of that expense is allocable or chargeable to Ned's Auto Supply Company.

A. That is right.

Q. Will you explain that?

A. Yes, sir. Because that salesman that called on Ned's Auto Supply had absolutely no responsibility for driveway training. He had no responsibility for the supervision of the operations of the plant; he had no responsibility such as he normally incurs at regular reseller outlets. He did the leg work in conjunction with a contract.

Q. It is indicated, is it not, by this exhibit, that there was certain selling expense in connection with Ned's
3866 Auto Supply Company?

A. Yes, sir. And I said he did certain leg work.

Mr. Hanley: If your Honor please, at this time I object to the question of counsel insofar as it implies any activity for allocation of time or effort on the part of either the manager of the Detroit field, Mr. Raupaugh, or the assistant manager, Mr. Blau, concerning whom the witness has just been questioned, inasmuch as it appears from Exhibit 31-Q that the amounts allocated to the reseller channel including the salaries of those individuals, were not included in allocation of expense against the reseller's channel in computing the saving accruing to the respondent in respect of selling to Ned's Auto Supply Company as distinguished from the balance of the reseller channel.

The objection goes only to any implication that there may be in counsel's questions relative to the efforts and supervision of the managerial staff, namely Messrs. Raupaugh, the manager, and the assistant manager, Mr. Blau.

I have no objection to any questions of counsel respecting any efforts that were directed to the servicing of Ned's account by any of the sales staff other than those two individuals.

Mr. Austin: I think my last question was directed specifically to the sales manager reseller and assistant sales manager reseller, and this does not include Mr.
3867 Raupaugh and Mr. Blau.

Mr. Hanley: I may be tardy, your Honor, but I just want it clear on the record.

Trial Examiner Ballinger: Now, as I understand your objection does not apply to the pending question.

Mr. Hanley: I have no objection to counsel questioning as to the efforts that were directed toward that station in connection with any of this staff who do have anything to do with Ned's station.

By Mr. Austin:

Q. Now, Mr. Boatwright, when you talk about driveway training and sales promotional work, what sales are promoted, Standard Oil Company sales or retail sales?

A. Retail sales.

Q. And on the other hand, in the training of salesmen and general supervision of salesmen, that is that work of these two managers or the manager and his assistant, is directed to the promotion of Standard Oil Company sales, is it not?

A. You are attempting to segregate there what I regard as an impossible segregation. This is to promote—

Q. Well, will you—I am not trying to segregate any figures. I just would like to have you answer that question.

A. Well, your question as you asked it differentiates between trying to promote sales of Standard Oil Company and trying to promote sales, reseller sales. When you
3868 do one you do both. You can not segregate them.

Q. All right. Your testimony is that you cannot segregate, if you wanted to segregate the amount of time spent on one and the amount of time spent on the other, but assuming that, is it still not true that these men devote their time to the promotion of both classes of sales, in other words, they are promoting sales of gasoline by Standard Oil Company and are promoting the sale of gasoline by the retailer, isn't that so?

A. Yes.

Q. And I believe you also said, did you not, that in promoting the sale of gasoline by the retailer you are incidentally promoting the sale of gasoline by the Standard Oil Company?

A. That is correct.

3869 Q. That being true, why is no portion of the salaries of the sales manager, reseller~~, and assistant~~ sales manager, reseller, allocated to selling expense? In other words, you have here on 31-L referred to sales promotion; further, over on Exhibit 31-J you get into selling costs. Now, why is not a part of the time included in the account 002 a proper selling cost rather than a sales promotion cost? Or I will strike the last part of it. Why is part of it not a selling cost which should be used in computing selling cost rather than place it over here separately under sales promotion?

Mr. Hanley: If Your Honor please, that is objected to as a misstatement of the purport of the exhibit. All of the items and accounts in Exhibit 31-A through 31-Q are offered and represented by the Respondent as being sales costs. If the purport of the question goes to the matter of why certain of these items, and, specifically, the one on 31-G, account No. 1002, is not allocated to Ned's station, there is no objection to a question which asks for an explanation of why it is not so allocated. There is an objection to any statement or question on the part of counsel which assumes that which is not the fact; namely, that every item in the entire Exhibit No. 31 is marketing cost of the Respondent.

Trial Examiner Ballinger: Does counsel desire to be heard?

Mr. Austin: I don't think so. I think that is an
3870 answer which could have been made equally well by
the witness, but if Your Honor please, I would like to rephrase that, because I think I have asked a question which was based upon the assumption—

Trial Examiner Ballinger: The question is withdrawn?

Mr. Austin: Yes.

By Mr. Austin:

Q. The question was based on an assumption about which I had some doubt prior to testimony, that there was more of an actual distinction than there appears to be between sales promotion and what I would call selling; in other words, what you have included under selling costs. I think that is clear now from your testimony, that the two go hand and hand, and are handled by the same men both in the field and as to supervision; is that correct?

A. That is right. You can't segregate them.

Q. That being true, is it not true that the salaries of the sales manager, reseller, and assistant sales manager, reseller are the same type of expense as what are called salesmen' salaries, which is included in acount 004?

Trial Examiner Ballinger: What exhibit do you refer to?

Mr. Austin: All acount numbers, your Honor, referred
to in Respondent's Exhibit 32, and also wherever
3871 they are mentioned, to the subheads of Repondent's
Exhibit 31. In this case, 004 is referred to the reseller channel part of it, which is 1004, as referred to on Respondent's Exhibit 31-M.

The Witness: By the same type of an expense, I am not just certain what you mean by that phraseology. It is a part of our general marketing cost. Does that answer your question?

By Mr. Martin:

Q. I am not going to ask you why you have one account number for sales promotion salaries and another account for salesmen's salaries. That is an arbitrary matter, and there is no reason for asking why it is done. But it is a fact that salaries, sales promotion, are included under one account and salesmen's salaries under a different account; isn't it?

A. That is correct.

Q. And that is your common practice?

A. Yes, sir.

Q. But on Exhibit 31-G, we find salaries, sales promotion, included as an item which is not influenced by Ned's Auto Supply Company.

A. That is correct.

Q. Under 31-J, K, L, and M, we find selling expense which is conceded to be an item which is influenced to some extent by Ned's Auto Supply Company. Now, my
3872 question, which I have been trying very hard to
phrase here so that it will be understandable is: Why is it that the salaries included in account 1002 are considered by you to be in no part allocable to Ned's business, whereas the salaries included in account 1004 are considered to be a part allocable to Ned's business? If you have made a complete answer to that already you may so state.

A. I think the question was asked and answered when I stated that the transaction which Standard Oil Company had with Ned's Auto Supply was such that we had no responsibility for driveway training, for displays on the driveway, for merchandizing practices followed by the respective efforts of Ned's Auto Supply, or on any of the other usual promotional activities incident to the operation of a reseller salesman.

Q. Well, this figure of $6,597.25 appearing on Respondent's Exhibit 31-G, that is taken bodily from the account Detroit Form 189 for 1937?

A. Yes, sir.

Q. How is the total of those sales for account 002 allocated as between different channels on Form 189?

A. That is allocated on a distribution of time report prepared by the individuals working in that department.

Q. Are all of the figures in the righthand column of the computation 31-G, which are opposite, that is, all the figures down as far as the total,—are all of those figures taken directly from the Detroit Form 189 for 1937?

3873 A. Well, there is one that is not. That is the 3 percent.

Q. Oh, yes.

A. But I can check the others to ascertain whether that is correct.

(Pause.)

With the exception of that one case, they are all taken directly from Form 189 for the Detroit field for the year 1937.

Q. That is, all of those figures except the one for the insurance and unemployment?

A. That is correct.

Q. Will you turn to Exhibit 31-H, please, Mr. Boatwright? This exhibit is entitled "Certain Other Marketing Expense Items of an Overhead Nature Not Influenced by Ned's Auto Supply Business."

Will you state whether all of the figures in the right hand column on Exhibit 31-H other than the total are these figures entered on the Detroit Form 189 opposite the respective accounts listed; that is, for 1937?

A. Account 1001 is taken directly from the Form 189; the same applies to account 1215; the same would not apply to the federal insurance unemployment tax. Account 1054, taken direct; account 1066, miscellaneous operating expense, taken direct; account 1084, taken direct; account 1025, taken direct; account 1216, taken direct; the

3874 same applies to 1217; likewise applies to 1220; and applies to 1107.

Therefore, each of the items on Respondent's Exhibit 31-H was taken direct from the Form 189 for the Detroit field, the year 1937, tank wagon reseller channel only, with the exception of the federal insurance and unemployment insurance taxes, which is a direct application of the 3 percent of the salary items listed, and is the item of $403.87.

3875 By Mr. Austin:

Q. I noticed in answering that question, Mr. Boatwright, you made certain comparison of figures. Were you determining whether the amounts here are the same as the amounts on Detroit form 189, or were you finding out whether or not in making up this exhibit, Detroit form 189 was used?

A. Well, I was comparing it with the form 189 for the Detroit field to be sure that there was an exact repetition of the dollar value represented for these respective items on that form. It has been checked and rechecked, but you asked me a direct question and as a precaution I was checking the last time to ascertain that the amounts were identical.

Q. Then, when this exhibit was made up, was 189 the direct source of this information and the only source, I mean by this information, I should say all these figures?

A. The 189 was the direct source of these figures used in this calculation. However, it was not the only source in the fact that we discussed each individual account with the men and whose expenses were itemized in those accounts as to their contacts and relationship with Ned's Auto Supply business.

Q. Well, I was not referring to that, but what I meant was whether any check was made or whether these figures were arrived at from original records, or whether this merely was lifted from 189 on the assumption that the
3876 form 189 and the figures contained thereon are correct.

A. They are correct, and they were taken direct from the form 189.

Q. Without going back to the original records?

A. To go back to the original records would have had us pulling the vouchers and going back to the warehouse and reconstructing the vouchers for 1937 and would have meant much labor.

Q. I can realize that.

A. They were taken from our final form of marketing expense.

Q. Referring to the account 001, entitled salaries—supervision. Is the major portion of this expense item pro rated on a straight gallonage basis among channels on company form 189?

A. The major portion of that expense item is allocated among channels on an all gallonage basis.

Q. Was the tank wagon gallonage delivered to Ned's Auto Supply Company included in the tank wagon reseller gallonage used in making that proration for 1937?

A. It was.

Q. Turning to account 215 entitled "Expense—Salaries—Others."

Mr. Hanley: 1215.

Mr. Austin: No, just 215.

The Witness: It is 1215.

Mr. Austin: Well, I leave off the first one because
3877 the figure used on Respondent's Exhibit 32, the blank
form 189, does not have the figure "1" in front, and when I am talking about allocation between channels, I believe Mr. Boatwright will agree that it is proper to leave off the first number because the first number refers to the channel.

Mr. Hanley: All right. You fellows make up your own minds about that.

A. That is correct.

By Mr. Austin:

Q. Referring to account No. 215, expense—salaries—others. Is the major portion of that expense item prorated on a straight gallonage basis among channels on form 189?

A. The major portion is allocated on an all-gallonage basis among the channels.

Q. You seem to prefer the word "all" rather than "straight," and in using the word "straight gallonage basis" I am quoting your language on Respondent's Exhibit 31-I, if you will look at the top.

A. I did not know that it makes a bit of difference.

Q. As long as we both mean the same thing.

A. All right.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

3878 Q. Referring to account 084, entitled "Station
Safety Expense—Salaries and all other expenses," is the major portion of that expense item prorated on an all-gallonage basis among channels on company form 189?

A. Yes, sir.

Q. In prorating that expense was the Ned's Auto Supply Gallonage included in the tank wagon reseller gallonage used in making that allocation?

A. Yes, sir.

Q. And is the same true as to acount 215, I believe I neglected to ask you that for 215.

A. I think you did ask me and I think the record will indicate that I answered that it was, it was an all-gallonage basis.

Q. Now, I think you answered it as to 001, but not as to 215.

A. It is true as of 215.

Q. Turning to account 220, expenses—employment department—salaries and all other expenses. Is the major portion of that expense item prorated on a straight gallonage basis among channels on form 189?

A. Yes, sir.

Q. And was the tank wagon gallonage delivered to Ned's Auto Supply Company included in the tank wagon reseller gallonage used in making that proration for 1937?

3879 A. Yes, sir.

Q. If none of the expense of these accounts is chargeable or was chargeable to Ned's business, why was Ned's gallonage included in the tank wagon reseller gallonage for the purpose of making the allocation of channels on form 189?

A. Because the sales of gasoline to Ned's Auto Supply was a part of the tank wagon channel of distribution. Being a part of the tank wagon channel of distribution we did not change our entire accounting instruction merely because of that incident, but allocated our costs on the same rules and the same instructions that we had throughout our experience prior to, during and subsequent to the period of time during which Ned's were supplied gasoline one-half cent per gallon less.

Q. Well, in your opinion were any of these expenses chargeable to Ned's business in the first half of 1936 before Ned's got the half-cent differential?

A. In my opinion, none of these items of expense were influenced by the Ned's Auto Supply business.

Q. Any more so after he got the one-half cent differential than before?

A. I can not testify that prior to the time when we had the agreement to supply him at one-half cent a gallon less, that we were operating on the identical contractual
or verbal agreement relative to promotion and other
3880 activities. I can state that during this period of
time at which the half-cent was involved that these items of cost were not influenced up or down by the prevalence of Ned's Auto Supply business.

Q. What do you mean by influenced?

A. That our marketing expense remains the same for these respective items with or without the Ned's Auto Supply business.

Q. Well, was Exhibit 31 prepared on the theory that the only expense allocable or chargeable to Ned's business are those which would be eliminated if that business were lost?

A. No, the exhibit was prepared upon the basis of costs in one method of marketing direct by tank wagon to resellers as constrasted with another method of marketing through Ned's Auto Supply. Now, our arrangement and our business transaction with Ned's was different from our business transactions with our other reseller accounts. It was a large volume distributor, having four outlets. The other tank wagon resellers were only individual outlets, and so our entire transaction with this organization was not comparable with the other outlets, but we could not establish separate accounting procedures and costs on individual accounts.

Q. Perhaps you could not, Mr. Boatwright, but you used the same method of delivering to Ned's as to the others, isn't that right, tank wagon delivery?

A. Yes, sir.

3881 Q. And Ned's was a larger account, bought more gasoline from you, of course.

You stated that by inference you meant that these expenses would all have continued even in the absence of Ned's business.

A. That is correct.

Q. In your opinion is that any reason why some part of these expenses should not be charged to Ned's business, as long as the company has that business?

A. I certainly think that no part of any of these expenses should be charged to the Ned's account.

Q. You were asked a somewhat similar question by me during the course of your direct examination, or perhaps I should say interpolating the direct examination.

Mr. Hanley: Give the page, please.

By Mr. Austin:

Q. At page 2484 of the record; and you stated: "Certainly the draftsmen in our construction department who work on designs and layout of proposed remodeling of company owned stations or of remodeling of other plant facilities, having done nothing of that nature in connection with Ned's Auto Supply, could not be logically charged as any cost incurred because of the Ned's business, nor would the clerk and the stenographer in the construction department be regarded as cost against doing business to Ned's Auto Supply."

3882 A. Aren't you referring now to a specific account, rather than this entire exhibit?

3883 Q. Yes, I am, Mr. Boatwright. I am now referring to account 001 or 1001.

A. Yes.

Q. As it is here, which I believe you—yes, this particular item, I am quoting your testimony, "Is made up of a secretary to the manager, clerk draftsman in the construction department, and the stenographer in the construction department."

A. Yes, sir.

Q. Now, turning again to the quotation which I made from pages 2484 and 2485—do you have that in mind, or perhaps Judge Hanley has an extra copy there.

Mr. Hanley: Yes.

(A transcript was handed to the witness by Mr. Hanley.)

A. Yes, I have in mind the section referred to.

Q. Just referring to that one paragraph, Mr. Boatwright, would not what you there said as to Ned's Auto Supply Company be equally true as to any other tank wagon reseller customer in the Detroit area who does not lease his service station from the Standard Oil Company?

A. No.

Q. Will you explain why?

A. Absolutely not.

Q. Direct your answer, please, to that statement which appears at the bottom of page 2484 and the top of 2485.

3884 A. Why, certainly. An individual may own an outlet; he may own a corner; he is going to build a service station on that corner. He avails himself for discussion purposes of our drafting department. He comes in and reviews the plans that we have for service stations. He talks with our draftsmen. Our construction superintendent may counsel with him and help him to escape some of the mistakes of the inexperienced. And in every respect we incur costs on that type of operation through consultation, assistance, and so forth.

Q. Perhaps you are aware of the fact that Ned's Auto Supply Company built two new stations in 1938. I have no doubt that those stations were started during the time or certainly planned during the time that Ned's was getting the one-half cent differential. Is it your opinion that Ned's obtained no assistance of that kind from the Standard Oil Company?

A. It certainly is.

Q. Then why do you think that no such help would be given to Ned's who was one of your best customers, when such similar help would be given to the little fellow?

A. Probably he didn't ask for it. When Ned's build they just don't build a service station, they build a store with a driveway in front of it and their units are not at all comparable with the type of units that we construct.

Q. In other words, your construction department wouldn't be competent to help design a station such as Ned's?

3885 A. That is not what I stated.

Q. I am asking you.

A. I think that they would be competent: yes, sir.

Q. Isn't it true that there are—strike that.

Do you have any idea how many of the 461 contract service stations now doing business with the company in Detroit obtained assistance from your construction department in the construction of their service stations?

A. I do not, because that is something that there is a flow of that type of requests and that type of information. For me to attempt to guess at the number that they have discussed different problems, asked for different plans or lay-outs, would be a ridiculous guess.

Q. Don't you know that there are a number of those 461 contract stations who owned and operated their stations before they became customers of the Standard Oil Company?

A. Yes, sir.

Q. And as to any of those stations, is it not definite that they never obtained any assistance from your construction department?

A. No, that would not follow, because frequently they had a stall or they remodeled or they changed their driveways or they relocated the pump islands, or they relocated the tanks. There are many problems of construction incident to the operation of a service station which 3886 arise after the station is completed during the course of years. Then even though they may have operated before many years, they still may avail themselves of this assistance after they become our dealer.

Q. Then isn't your statement as given here on page 2484 and 2485, your explanation of that statement now based upon the theory that the services of your construction department are available to all of these service stations?

A. The answer as given in the testimony, both this afternoon and as of the date of the previous testimony being taken, was to the effect that the construction department is called upon for these services with one class of outlet while it was not called upon for these services with the other class of outlets.

Q. Now, what do you mean by "classes of outlets"?

A. With the one class of outlets calling for this service being the 461's, the P. O. S. S. L.'s and lease service stations, while Ned's Auto Supply did not call for this assistance.

Q. Do you know how many of these service stations other than Ned's ever called for that assistance at any time during 1936, '37, or '38?

A. No, I do not know how many actually did. I know that it is a continuous type of service.

Q. Did you make any effort to find out as to how many of them did or which ones did?

A. No sir; I did not, because if that construction 3887 department isn't busy and isn't in operation, why, we have an opportunity to cut our marketing costs.

Q. Well, the construction department is available to Ned's if they want to use it, or if they wanted to use it; wasn't it?

A. It is available, but it is considerably out of the line of their usual activities and their usual work, and we would not have taken the trouble to lay out a store unit for Ned's Auto Supply as just a part of regular service. We couldn't have done that.

Q. Why not?

A. Didn't have time.

Q. Ned's is a rather unusual sort of a customer, isn't it?

A. Yes.

Q. As far as the amount of gasoline bought.

A. Yes, sir.

Q. And yet it is your opinion that the Standard Oil Company would not have rendered him any service of that kind if he wanted it for the purpose of erecting another one of his superservice stations?

A. That is very definitely my opinion.

Q. It is true, is it not, that the Standard Oil Company was ready to give and would have given the same service to Ned's, that is, the services of its construction department, that it would have given to any other service station operator who was its customer?

3888 A. Well, I don't know how far they would have gone in that respect because there wasn't a call for it, so I just can't answer you.

Q. And there were probably many other service stations who made no call upon that department during 1937; isn't that right?

A. Many individual stations probably did not.

Q. Now, turning to page 2485 of the record, I again quote another paragraph of the same answer previously referred to:

"The manager's stenographer, representing the salary of the stenographer of one individual working for Mr. Rampaugh, is not a marketing expense item that could be influenced by the acquisition or the loss of any such account as Ned's Auto Supply. That has remained constant except as they have been influenced by increases because of service over a period of years."

Would that statement be equally true if instead of referring to Ned's Auto Supply you had used the name of any other single tank wagon reseller customer of the Standard Oil Company in the Detroit area?

A. It might have been.

Q. Wouldn't it be? The statement here was that was not a marketing expense item that could be influenced by the acquisition or the loss of any such account as Ned's Auto Supply. Now, isn't it true that if it is an item

3889 of expense that wouldn't be influenced by the acquisition or loss of an account as large as Ned's, it certainly would not be influenced by the acquisition or loss of any single smaller account?

A. Yes.

Q. Is a portion of the expense going into account 1001 allocated to the consumer channel on the Form 189?

A. Yes, sir.

Q. And a part of it is allocated to the other methods channel; is that right?

A. Yes, sir.

Q. Turning now to account 1215, the account is entitled "Expenses—Salaries—Others."

I believe you stated on direct examination that the figure for this account comprises the salaries of employees in the real estate and tax departments.

A. That is correct.

Q. And I should, I suppose, qualify that by stating that it is a portion of those salaries which is allocated on Form 189 to the tank wagon reseller channel.

A. Yes, sir.

Q. What taxes are involved in so far as the activities of the tax department are concerned?

A. Real estate, personal property, are the primary considerations.

3890 Q. How about the automobile licenses?

A. That comes as a part of maintenance, operation and maintenance.

Q. Is a part of the time of the tax department given to attending to those registrations and the obtaining of those licenses when the time of the year comes around?

A. I don't know whether the tax man has anything to do with that or not.

Q. Is there any question of license to operate in the City of Detroit?

A. Yes, there may be.

Q. Or in the State of Michigan?

A. There may be that.

Q. Requiring licensing of outlets or size of tanks. Those requirements vary from one municipality to another.

A. Yes.

Q. That would apply to the tanks at your bulk plant, would it not?

A. Yes, sir.

Q. Would it also apply to the marine terminal?

A. No sir. No. No cost of the marine terminal is included in any way, shape, or form in the marketing expense statement.

Q. I see. It is not included in the costs of the Detroit field anywhere?

A. No, sir.

3891 Q. I was going to ask you that later on, but

A. That is all right.

Q. Well, what are the duties of the employees in the real estate and tax departments? Can you give me a further description of that?

A. Taking care of all the company's interest as its affects any problem of taxation, or any problem of real estate ownership, title to locations, and so forth. A large part of the real estate man's activity is devoted to real estate problems incident to company-owned service stations leased. He likewise spends a considerable amount of time on privately owned service stations leased, and he spends some of his time on any property acquisition by the company for our marketing operations, seeing that the title is clear, description of the lot, and all factors influencing the company's investment in that real estate.

Q. That would include the bulk plants?

A. It would.

Q. Would it include other company-owned property such as the main office?

A. It probably would if there was any problem involved there of an expansion or acquisition of property incident thereto.

Q. Does the company own its building in Detroit where the main office is located?

3892 Mr. Hanley: I did not hear that question. I am sorry.

By Mr. Austin:

Q. Does the company own the building in Detroit where the main office is located?

A. Yes, sir.

Q. Does the real estate and tax department have anything to do with the operation or maintenance of that building?

A. Only as it affects any problem of real estate or taxing on the building.

Q. They would have that—

A. That is correct.

Q. —in charge.

A. Yes.

Q. How much of that building is occupied by the company?

A. All of it with the exception of a small portion of the fore part, which is used as service station headquarters for the service station that is right in front of the building. You have seen the building, have you not?

Q. At a distance.

A. Well, the building is a combination office building and service station. Now, the service station is leased; that is a driveway and one room with such enclosed stalls as may be necessary on the first floor. Aside from that the company occupies the entire building.

3893 Q. You refer to privately owned service stations leased, and to company owned stations leased. Do the employees in this department spend any time in connection with the business of the contract stations, the non-lessees?

A. Oh, they might spend some time with—the 461 accounts you are talking about?

Q. Yes.

A. They might spend some time with 461 accounts, if he encounters any difficulty with his tax problems or title to his property, or anything of that kind.

Q. Do you know of any instance where one of those operators has come to you for advice of that kind?

Mr. Hanley: Just a moment, Mr. Boatwright.

If your Honor please, I want to make a record objection here which I think is of some importance.

Your Honor called us to the bench this noon to pose a question of procedure or law, and it seems to me that the trend of the examination as epitomized by this last question, and by many of the questions that have been asked this afternoon bears directly upon the question which Your Honor posed to counsel in the informal conference this noon. It must be quite apparent that the whole direction, the whole tenor, the whole purpose of the cross-examination during the entire day has been directed to the proposition that certain of these cost items that have been set up
3894 by the Respondent as a group may not be more applicable in some particular instance to some particular service station in that group than they are to Ned's Station. That surely is apparent from the trend of these questions, Your Honor.

Now, I have not objected to the individual questions because it seemed more appropriate to wait until there was a clear definition of the issue here, if there is that issue in Your Honor's mind, but now it seems after a day's taking of the testimony that it has been sufficiently demonstrated what the purpose of Counsel for the Commission is.

Counsel for the Commission is not, and has not, during the course of the cross-examination, questioned the propriety or the accuracy of the account, or the costs of the Respondent in selling at a certain cost which Respondent says is its cost to the reseller channel. That has not been developed any place. There has been no question raised about it. The only question that counsel has sought to raise, and the only attack that is being made is whether or not all of these costs in these various accounts as set up in the Form 189 as applying to the reseller channel apply to each and every of the service stations in the group other than Ned's.

Now, if Your Honor please, I certainly think that the Government has the right to test the accuracy of our cost accounting, and it seems to me that just is fundamental
here, that they have the right, that if there is anything
3895 wrong with our cost accounting they have the right
to test it and determine whether we are accurate, whether we are fair, whether we are sound in our methods. They just have not done that. They have assumed that we are sound enough apparently, but they have attacked our method of distinguishing between Ned's, on the one hand, and the reseller channel, as such, on the other hand, and they are attacking not the difference in cost as between Ned's and the reseller channel as a whole, but they are attacking the proposition that it may be true. It has not been established as true, but they are raising the question that it may be true, that certain of these other reseller channel costs do not apply to some of these three hundred odd service stations other than Ned's in the City of Detroit.

Now, if Your Honor please, it seems to me that that very definitely raises the identical question that was in Your Honor's mind when you spoke informally to counsel this noon as to whether or not we have met that kind of an issue, or whether we have to meet the issue of a justification as between our cost, the Respondent's cost in selling and marketing through the reseller channel as a whole, on the one hand, and the cost of marketing to Ned's as distinguished from that general reseller channel.

Now, there can be no question, it seems to me, viewing the trend of these accounts, but that is the whole case of

the Government, so far as can be determined from the
3896 cross-examination to date, and every question that
has been asked almost would be objectionable if the law is determined that all we have to do is to justify on the basis of the reseller channel on the one hand, and Ned's, on the other hand.

Now, if the law is different than that, Your Honor, then I do not know what the law is, and I think Your Honor was entirely right in the suggestion that we ought to get a determination of it. This last question is objectionable on the ground that it is absolutely immaterial, Your Honor, whether any 461 account sought the aid of the real estate or tax department, if we are entitled to justify on the basis of the reseller channel, on the one hand, as distinguished from Ned's Auto Supply Company, on the other hand. If, however, that is not the law, if we are required to justify as between the highest cost station in this three hundred group or the lowest cost station in this three hundred group, and Ned's, then this might be a material question. I do not know. But if that is the law, Your Honor, it is just simply an absurdity. It would mean that we would have to try to make an individual account of costs,—I do not know how it could be done,—with three or four hundred individual services, and I just earnestly object to this question on that broad basis, Your Honor, that we are not held to a
justification on the basis of Ned's against some other
3897 single service station, but that we are entitled to
justify as between the reseller channel generally, of which Ned's was a part, but segregate Ned's out and show where he gave us certain breaks and advantages that permitted us to make a saving in serving him that we did not have in this general course of business through the reseller channel.

Trial Examiner Ballinger: The Examiner is of the opinion that this line of examination is a little nearer to proper line of examination than that which the Examiner expressed some doubt about this morning.

There is a peculiar situation existing. We have retail stores that are owned and leased by the Respondent Company. We have another class of stations that are owned by the operators but are supplied by the Respondent. Now, the cost of delivering, supplying both the company-owned outlets and the outlets that are owned by the operator are in one classification, and a question arises as to whether or not certain costs are allocated to that entire group or some portion of the expenses should not be allocated to Ned's.

The Examiner overrules the objection.

Mr. Hanley: Well, if Your Honor please, I do not hold to the ruling; understand that I except to it; but I would be glad—I would be awfully glad to learn if I could what we can do, what the Respondent can do that is at all feasible or practical to aid in this determination of cost. Now,
3898 we have a cost, there isn't any doubt about that, we have a cost, and anyway that we can allocate it or can demonstrate it that will be of aid to the Commission we are very anxious to do. If I have not made that abundantly clear, I have certainly failed miserably in my intention.

Trial Examiner Ballinger: There are certain elements of cost that apply equally to both the stations that are owned by the Respondent Company and which are supplied by it, and those which are owned by the operators which the Respondent Company services.

Mr. Hanley: That is true, and certain costs that we recognize as applying to Ned's as well.

Trial Examiner Ballinger: Now, as to certain of those costs: There is no question in the mind of the Examiner but what they equally apply. Now, when you get to other questions of cost, such as your real estate department and architectural department there arises a question that I think Counsel for the Commission is entitled to inquire into.

Mr. Austin: I just would like to say to Your Honor, if I may, that I think I am entitled to very broad latitude on cross-examination of this witness as to his methods of procedure and as to why he did certain things even though the particular item is inconsequential. I understand Your Honor's remarks this noon to be directed more possibly to the introduction of affirmative evidence on the part of
3899 the Commission than I did as any limitation upon cross-examination, and so that I have no reason to apprehend that I will be so restricted, but in view of the objection made I just want to urge that I think I should have very wide latitude on cross-examination of all points, important and unimportant, as to the methods of accounting procedure used as to whether an item applies to certain stations, or all stations. I think that if it got to the point of redirect examination and the introduction of a lot of costs of our own, why, that, I can see, would be something different, and it might be something which would have to

be passed upon and decided and undoubtedly should be before we ever attempted to obtain such evidence, if we should. I am not saying that we will or we won't.

3900 Trial Examiner Ballinger: In order that the rights of both the Commission and the Respondent may be fully preserved and protected, the Examiner will reserve to counsel for Respondent the right to strike evidence such as he has objected to in his last objection, and at the conclusion of the cross-examination or at the conclusion of the case, he may renew the motion, the Examiner will then pass upon it; that will afford the Commission, counsel for the Commission, an opportunity in the event the Examiner sustained the motion to strike an opportunity to appeal to the Commission, and in the event the Examiner overrules the motion to strike, will afford counsel for the respondent an opportunity to appeal to the Commission, and before the Examiner's report is prepared, you may take it to the Commission and settle the question so far as the Commission is concerned, if you so desire.

It is understood that this entire line of cross-examination is admitted, subject to objection and a motion to strike.

Mr. Hanley: Your Honor, I am sure that that is appreciated on the part of the respondent, so far as it goes, and it may be under the Commission's procedure, it goes sufficiently far. The only thing that troubles me is the same thing that troubled me at the conclusion of offering our testimony on costs, at which time I made the offer on behalf of the respondent that any of our books or any records
3901 or any information that was desired on the part of the Commission, counsel for the Commission, we would gladly furnish. I did that because, of course, the respondent doesn't want to be foreclosed on the merits because of some procedural situation. We assume that we have proceeded rightly in trying to demonstrate our costs. Now, if we are in error as a matter of procedure, we don't want to be mulish and insist we are right when the Commission says we are wrong as a matter of procedure. We are willing to demonstrate costs on the theory that the Commission says is the law that we should demonstrate the costs, and the only fear I have, if your Honor please, is that of maybe being foreclosed of an opportunity and a right to demonstrate our costs insofar as the merits permit us to comply with the law as the Commission finds it.

Trial Examiner Ballinger: Judge, if the question is raised on a motion to strike, the Examiner rules on it, you will be afforded before this record is closed an opportunity—either side will be afforded an opportunity to take the matter to the Commission and let the Commission pass on it, and you may then be governed accordingly.

Mr. Hanley: Well, I think, of course, that is as far as your Honor can go.

Trial Examiner Ballinger: That is as far as I can go.

Mr. Austin: Yes, I quite agree and concur, again
3902 urging, however, that the question of propriety and
relevancy on cross-examination is, naturally, as your Honor knows better than I, much broader than on direct, and I am confident that—

Trial Examiner Ballinger: Well, it is a question of whether it is cross-examination on material or immaterial matters, and the Examiner would prefer to wait until the examination is concluded before he expresses his opinion.

Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Read the question.

The Reporter (reading): "Do you know of any instance where one of those operators has come around to you for advice at that time?"

Mr. Hanley: Do you mean to the witness or to the company?

Mr. Austin: To the company.

A. I do know of cases where real estate men have told me or tax men have told me that they were working on a problem related with 461 accounts. Such accounts always approach the man in charge of those particular operations in the field and in no way did I personally play any part in it except as I have—except in discussion with the men, they have informed me that they were working on something in that connection.

By Mr. Austin:

Q. That would be distinctly a very small part of
3903 the business of the real estate and tax department,
would it not, Mr. Boatwright?

A. I don't know that it would.

Q. Referring now to the 481 stations.

A. That is my point. I don't know that it would be a small part.

Q. You don't know that it would not be?

A. I do not.

Mr. Austin: I was going to state a moment ago that it is not my intention, Judge Hanley, certainly not my present intention and I don't believe it will ever be, to attempt to make a cost study on any one single station or two or three single stations for the purpose of comparing it with Ned's, but neither do I agree at all that the average is the only basis, and I think that this examination may bring out from time to time that certain of these costs don't apply to all stations and may apply to some and not to others, and that is quite a different thing, as your Honor pointed out, than talking about single stations.

Trial Examiner Ballinger: What is in the mind of the Examiner is this: I don't know to what extent this cross-examination may develop differences. That is why the Examiner has reserved an opinion or a ruling.

Mr. Austin: Yes. I don't know either, your Honor, I am
trying to get something here which will be a basis for
3904 your Honor and the Commission to draw conclusions
upon, and also which may be a basis for affirmative
testimony on rebuttal in behalf of the Commission.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Mr. Austin: I move we adjourn for the day, your Honor.

Trial Examiner Ballinger: Motion of counsel for the Commission is granted and now, at 5 o'clock p. m., the hearing stands adjourned, to reconvene at 10 a. m., eastern standard time, July 17, 1941, in Room 332, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 5 o'clock p. m. the hearing was adjourned to Tuesday, June 17, 1941, at 10 a. m.)

3905 Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Tuesday, June 17, 1941.

Met, pursuant to adjournment, at 10 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., appearing on behalf of the Federal Trade Commission.

Harold R. Hanley, Esq. (910 South Michigan Avenue, Chicago, Ill.), appearing on behalf of the Respondent.

3906 PROCEEDINGS.

Trial Examiner Ballinger: Come to order, gentlemen. You may proceed.

JOHN W. BOATWRIGHT resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Austin.

Q. We were yesterday discussing some of the items on Respondent's Exhibit 31-H, and particularly the item opposite account No. 1215, which includes expenses of the real estate and tax departments of the Detroit division which were allocated to the tank wagon reseller channel on the company's accounting form 189; is that correct, Mr. Boatwright?

A. Yes, sir.

Q. I believe you testified that part of the services of the employees in the real estate and tax departments are devoted to real estate and tax problems in connection with company-owned property other than service station property, that is bulk plant properties, the company's office building, and so forth.

A. That is correct.

Mr. Hanley: Judge, may my objection to this general line of testimony stand without repetition?

Trial Examiner Ballinger: Your objection stands
3907 without objection.

Mr. Hanley: Thank you.

Trial Examiner Ballinger: And your right to move to strike at the conclusion.

Mr. Hanley: Thank you.

By Mr. Austin:

Q. Why is it that expenses of this nature, that is, expenses of the real estate and tax departments other than expenses in connection with service station properties are not an expense of doing business with Ned's Auto Supply Company to as great an extent as they are an expense of doing business with any other tank wagon reseller customer?

A. The activities of the real estate and tax departments incident of the operation of bulk plants is an insignificant portion of the total, total responsibilities of this department. These bulk plants have all been in operation; their titles are all cleared. Their descriptions of the properties, their complete lay-out has been completed; there has been no responsibility in the Detroit division incident to the operation of these plants for a period of years, many years.

Q. Well, they have some duties in connection with the company office building, do they not,—the employees in this department?

A. Yes, but is a very, very small part because again this office building has been completed, the taxes on
3908 it are pretty well established, and have been studied and reviewed, and the responsibilities in connection with their bulk plants and main office building is an insignificant and negligible portion of their total duties.

Q. What is the principal part of their total duties?

A. The principal part of their total duties is incident to the retail operation.

Q. Well, will you explain what those duties are.

A. In connection with all problems of taxation of real estate of the three classes of retail outlets previously described as encompassing company-owned service stations, leased, privately owned service stations, leased, and the 461 contracts.

Q. And as to those three classifications, where are most of the services of the real estate and tax departments required?

A. I am sorry, your question is not clear.

Q. Is the time of the employees of the real estate and tax departments devoted principally to real estate and tax problems in connection with company-owned stations or P. O. S. S. L. stations, or the third classification, or can you answer that question?

A. Well, their time is devoted to the three, principally to the three classes of retail outlets; which one may take a greater portion of their time this year may not be the same class which will take the greater portion of 3909 of their time next year. I could not say that any one customer takes a greater portion than another.

Q. Well, isn't it true that a large part of the time of the real estate and tax departments is taken up in connection with the leasing of company-owned service stations and the subleasing of the privately owned service stations leased?

A. No, that is not true. They are all involved in that operation, but the finding of a lessee, the interviewing of lessees, the induction of lessees into the operation of different stations is primarily a responsibility of the salesmen in charge of that territory, who is assisted in interviewing by the personnel man, likewise, in interviewing by the manager, assistant manager, and other people responsibility for the welfare of the company in that area, but the real estate or the tax men have very little obligation in connection with leasing of the service station.

Q. Where—I am trying to find out or get some better picture than I have now as to just what their principal activities are. If you could give me some specific examples rather than the general description, perhaps we could bring that out. You say very little part of it is in connection with bulk plants, or office building, and they have very little to do with the lease. Well, what are their activities that account for this expense?

Trial Examiner Ballinger: Mr. Austin, what item?

3910 Mr. Austin: Account 1215 on the Exhibit 31-H, Your Honor, which is approximately some $9,000.

Mr. Hanley: Office expense.

Trial Examiner Ballinger: Expense-salaries-and others, salaries.

Mr. Austin: Yes, that is expenses of the real estate and tax departments, so we have been told.

The Witness: That is correct, and it includes supervision, clerical, and stenographic work charged to those departments.

A. Well, their principal duties, I find it difficult to make clear my testimony of yesterday. The real estate man is charged with the responsibility of negotiating for the exchange of properties, for seeing that the title to properties is clear, that the description of the properties for tax purposes is accurate and complete.

By Mr. Austin:

Q. Now, what property would that be?

A. Those would be owned properties except as he works in conjunction with other reseller outlets to assist them in a similar manner, which de does. Now, that is the real estate man's functions. I think his title primarily tell his obligations.

Now, the tax man, in his turn, is responsible for reviewing tax paid on different pieces of property, seeing 3911 the taxes in a given area are in line with taxes in other areas, if it is in his power to do so. He is to assist in any problem of taxation that the 461 operator or the P. O. S. S. L. operator may encounter. And he works on questions of real estate, personal property tax, and contacting, and so forth, in conjunction with the tax problem of the organization.

Q. And are there any tax problems on property other than company-owned property?

A. Oh, yes.

Q. Will you explain that.

A. The testimony yesterday, I think, brought that ought to the effect that if an owner of a privately-owned service station, that is leased to the company, incurs any tax problem in conjunction with the operation of his outlet, it is a most natural thing in the world that he should turn to his friend, the supplier, and to seek any assistance that he could from an expert working for that organization in a taxing capacity.

Q. Well, yes, you stated something of that sort in connection with real estate problems. I did not recall it, but the tax problem.

A. Well, it is the same thing exactly. This is a service which is rendered.

Q. Now, such advice or help or service may be given in that way to the contract or privately owned service station

at their request. Do you consider the expenses rep-
3912 resented by such service to be a cost of sale and delivery of gasoline?

A. Oh, I certainly do. Definitely it is. The sale of gasoline cannot be covered by the salary item of salesmen. I am in the general office and yet my salary and the expenses of my department, research, is purely a selling cost.

Selling does not start or stop when a salesman is hired. Selling is an over-all function. We regard in our company every individual on the pay roll as a salesman, and it is our duty to sell the merchandise that our company is producing.

Now, a tax man can be an excellent salesman; a tank wagon superintendent is an excellent salesman; an equipment man is an excellent salesman. True, their salaries do not show up on marketing expense under the classification of salesmen's salary, but they are excellent salesmen because they secure business and secure accounts and keep those accounts merchandising our product.

Selling is a broad function.

Q. Well, would you go so far as to say that your real estate or tax employees were employed because of their value in performing selling functions?

3913 A. I certainly would say that their selling function is an important consideration in their selection, quite certainly, because a real estate man or a tax man has many opportunities to befriend a retail outlet, the operator of a retail outlet. Having these opportunities to befriend and to help him in his problems, he can cement the relationship of the supplier of the distributor in that manner and is an important adjunct to the direct efforts of a salesman covering that territory. Therefore, their personalities, their way of handling and meeting people, their way of meeting their problems, is an important factor in their selection.

Q. I see.

There is one question that I intend to ask you in regard to the expenses of the construction department, Mr. Boatwright, which I believe is account 0001 on Respondent's Exhibit 31-H, or at least that construction department is included in that account.

A. Well, the draftsman, or the stenographer in the construction department, the clerical help in the construction department, is included, that is correct.

Q. Well, what else is there in the construction department besides those employees?

A. Well, the superintendent of those employees is included in account 1000.

Q. Is that so?

3914 A. Yes.

Mr. Hanley: Judge—just a minute, Mr. Boatwright. I do not want to object to individual questions, your Honor. May it be understood the objection which I made to this line of questioning may stand to all this line of questioning, so I may not have to repeat the objection?

Trial Examiner Ballinger: It is so understood.

By Mr. Austin:

Q. Should not the costs of those construction department employees, or rather, expenses is a better word, be capitalized in the costs of the property and depreciated over the life of the properties; in other words, where they are involved in working out construction plans on a thing in the nature of company-owned property, isn't that an expense of construction?

A. May I restate your question to be sure that I understand?

Q. Yes.

A. Should the cost of the construction department be capitalized as a part of the capital outlay of the company?

Q. Yes, where the services are performed in connection with company-owned property.

A. They are not so capitalized.

Q. Why should they not be?

A. It is a reoccurring expense, maintaining of full time individuals. Now, this is not the payment to an architect, or anything of that type. This is a construction 3915 man on our payroll, as a regular part and he is maintained on our payroll constantly. Therefore, we do not capitalize his salary more than we would capitalize the real estate man's or the tax man's. It has not seemed advisable to us to do so, and I think in that respect that our judgment is sounder inasmuch as this is a continuing expense, and the responsibilities of the construction superintendent are not allocated between individual jobs, but it is retained as a continuing expense on the books of the company and is not capitalized. I do not feel that it would be in this particular case advantageous to capitalize that expense.

Q. You regard that as a selling expense then and not as a capital investment?

A. I do, I do quite definitely because I have known accounts personally where the activity and the help and the assistance of the construction superintendent and the construction department in suggesting revised layouts, in addition to properties, in changing pump islands, in making your driveways more attractive, and incidents of that type, where he has worked with a distributor perhaps of a competitive product and as a result of the friendly help and advice of the construction man, has become a representative and a distributor of our products. He is a salesman.

Mr. Hanley: If your Honor please, I just want to make a record objection.

3916 I have really no objection to the questions of counsel or to the answers of the witness, but I do object to any question which goes to the matter of the efficiency or inefficiency, or the rightness or wrongness of the methods of accounting adopted by the respondent. Whatever they are, there they are, whether they are efficient or inefficient is not a matter of inquiry in this proceeding. The matter of inquiry here is whether or not those costs are greater or less as between the customers involved in this proceeding.

I just make that, your Honor, as a matter of record objection. I do not care about the inquiry. I am perfectly willing that counsel go on and make the inquiry, but I do want to assert that it does not make any difference what his views of what our accounting ought to be are.

Trial Examiner Ballinger: The Examiner would like to hear from counsel for the Commission with reference to the question just raised by counsel for the respondent.

Mr. Austin: Well, I do not think any question has been raised, your Honor, because I have not questioned the accounting method used by the respondent. My questions have been directed to finding out what the accounting method are, rather than to questioning their correctness, and at least I so intended, and perhaps that is the explanation that is desired.

3917 I think it certainly is relevant that we find out what was done, and as to any criticism as to how it was done, or any opinions on that, of course I can not express an opinion. I do not know that I would be competent to have one. At least the purpose of the question is to bring out what was done, and it may be a matter for argument later on as to whether what was done was correct, but I do not think that is involved now.

Mr. Hanley: Well, your Honor, we certainly can't have any reasonable objection to counsel developing what was done, how we developed our account, certainly there is no objection to that. I want to be clear on that position.

Mr. Austin: I assume also that there is no objection to finding out what Mr. Boatwright's opinion is as to certain principles, or as to why he did certain things.

Mr. Hanley: That is right. I have no objection to developing Mr. Boatwright's opinion.

Trial Examiner Ballinger: Proceed.

Mr. Austin: There is a long distance call awaiting me. Perhaps we might have a few minutes recess, your Honor, to find out what it is.

Trial Examiner Ballinger: The hearing will stand in recess for 5 minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.
3918 You may proceed.
Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.
Proceed.

By Mr. Austin:

Q. Mr. Boatwright, you do have certain real estate and tax activities in connection with company owned or leased service station properties?

A. Yes, sir.

Q. Isn't that an expense which is directly allocable or can be directly allocated to those service station properties as distinguished from service stations which are not leased from the company?

Perhaps I can clarify that by recalling that you stated that expenses of this kind are directly allocated where possible. Why is not expense in connection with company owned properties directly allocable to those properties as a class if not to the particular service station involved?

A. Well, I presume that it would involve the inauguration of separate system of breakdown costs, probably establishing a complete record of the distribution of time of these individuals, and it is an item of expense which has not appeared to justify them in establishing our expense controls. It is primarily made up, as you can see, 3919 it is relatively a small item of expense, it is primarily salaries and expenses of the department, which is small. It is spread over the outlets of the three classes described, and it would involve an additional accounting cost and function which does not appear to merit that additional work.

Mr. Hanley: Just a moment, please:

Just as a matter of record, Judge, I move to strike the answer of the witness and I object to the question on all of the grounds alleged at the close of the hearing last evening, and may I have that objection to all this line of questioning, and I won't bother anybody with objections, if I may have that on the record.

Trial Examiner Ballinger: You may. The objection, although rather late, is overruled, not on that ground, and the motion to strike is overruled subject to renewal.

By Mr. Austin:

Q. What sort of services do the real estate and tax department perform in connection with the business of consumer customers, tank wagon consumers?

A. Their functions in connection with the individual consumer are very limited. Their functions in connection with the bulk plant operation, the other company property, such as the main office and so forth, are the causative factor in determining our metho of allocation on an all-gallonage basis. The consumer channel does carry 3920 a portion of the expense of these departments because of our method of allocation.

Q. That is the same reason that Ned's carries a part of the expense of those departments, isn't it?

Mr. Hanley: That is objected to as argumentative, your Honor; assuming a fact not in evidence.

Trial Examiner Ballinger: The objection is overruled.

Mr. Hanley: Answer, if you know.

A. Well, I know only that Ned's gallonage was used as a part of the gallonage for the allocation of these particular expense items during 1937. It was so used because we do not keep a record of the costs by customer but by channel.

To exclude that gallonage would have involved the establishment of a set of records on an individual customer basis which in terms of cost of maintaining records would have been a prohibitive expense to the company, and we could not exclude individual customers.

By Mr. Austin:

Q. Well, will you explain why this real estate tax expense is more properly chargeable to tank wagon consumer business than it is to Ned's Auto Supply business?

A. I think that throughout the discussion of this item that I have emphasized that fact throughout, that the real estate and tax departments' principal responsibilities
3921 have been in connection with the retail outlets operated by our company. The operation of the outlets of the Ned's Auto Supply at this time, four principal outlets, our real estate men have nothing to do with the layout, had nothing to do with the supervision, seeing that the titles were clear, that the description of the property was accurate. He had nothing to do with the tax problems of the customer, or to any of their functions which follow regularly as a part of the responsibilities of these departments, whereas he did and continuously was called upon to perform in these like functions with respect to other outlets, therefore properly speaking—

Q. What do you mean by "other outlets"?

A. The other retail outlets.

Q. You did not mean consumers, do you, by "outlets"?

A. I mean the company owned service stations leased, the P. O. S. S. L. and the 461 accounts; we are discussing the tank wagon reseller channel and as—

Q. My question was, why this expense was chargeable, more properly chargeable to tank wagon consumer accounts than it is chargeable to Ned's Auto Supply Company.

Mr. Hanley: Would you read that question, please?

(Question read.)

Mr. Hanley: Well, your Honor, I do not care to object to individual questions if it may be understood that my general objection to this line of questioning may
3922 stand? That is the objection I made last evening.

Trial Examiner Ballinger: It is so understood.

A. Your question now stands, is why is this expense more properly chargeable to tank wagon consumer's channel than it is to Ned's Auto Supply.

3923 By Mr. Austin:

Q. Yes, since it appears that this expense was allocated between channels on a gallonage basis. You now say that Ned's gallonage was included only because it was general accounting practice to do so, and not because it was properly a part of the gallonage to which the expense was chargeable, but nevertheless a proportionate part of the expense is charged to the entire channel of tank wagon consumer business.

Now, if the charge to Ned's business only happened to get in there because you did not want to segregate one customer, that certainly is not true of the tank wagon consumer channel which could have been segregated very easily, and I want to know why any of this expense was charged to tank wagon consumer channel if none of it is chargeable to Ned's?

Trial Examiner Ballinger: Now, before you answer that question, will you state whether or not it could have been easily and conveniently segregated?

The Witness: It could not. It would have required a rewriting of our accounting instructions and establishing a separate set of instructions for the Detroit division as distinct from the code of accounts and the accounting practices maintained in the other sales divisions of the company.

The problem of isolating an individual customer and handling your accounting costs separately for that particular customer usually involves an expense and a 3924 time factor which does not merit for any purposes of cost control or setting up a system of accounting on which a sound operating statement can be predicated the additional costs involved.

Mr. Austin: Your Honor, the question was not whether Ned's could be eliminated. It was whether the consumer channel could have been eliminated, and it is true, isn't it, Mr. Boatwright, that if no expense is chargeable to the consumer channel, why, it is very easy to eliminate that channel from the allocation. I do not think that—well, yes, I will ask that question, not suggesting that it should have been done, but in view of the Examiner's question I am saying that if that expense was chargeable only to the tank wagon reseller channel, that it could be so charged directly, could it, without any difficulty, in eliminating either of the other channels?

Mr. Hanley: Well, if Your Honor please, I have no objection to the witness answering the question along tha line, but I do think that counsel ought to ask a specifi question so that the witness will know what he is talkin about.

Mr. Austin: I think the witness knows what he is talking about very well, but I think we are getting a littl far afield, and I will withdraw that question, Your Honor unless there is something that you desire to have cleane up.

By Mr. Austin:

3925 Q. Would you wish to make any further explanation, Mr. Boatwright, as to why this expense of rea estate and tax departments is allocated in part to the tan wagon consumer channel—I mean, part to other methods but, nevertheless, is not properly chargeable to Ned's Aut Supply Company?

Mr. Hanley: You are referring now to what, Mr. Austin? What is it?

Mr. Austin: The expenses under account 1215, real estate and tax departments.

Mr. Hanley: You so understood, Mr. Boatwright?

The Witness: Yes, I so understand, and my answer i that as a process, or as a means of spreading our costs o these departments, the all-gallonage basis has appeare the more equitable means of allocation to our particula accountants and our company.

In any of these allocations that may be established ther may be other ways which could be suggested, which migh appear at the moment to be a more equitable means o distribution. In turn, they would have their questions Now, it is entirely possible, as you suggested, that w might have established a time record on this departmen and allocated costs on a time record basis as we do wit some of our other costs. It has not appeared advisabl to us, as I say, primarily because the cost element is comparatively small. Another record would have to b
3926 established, additional accounting costs would be incurred, and it just has not seemed to merit that typ of an analysis as yet for a purpose of controlling our expense.

Trial Examiner Ballinger: Mr. Boatwright, is any portion of the expense-salaries-others, as designated in Re spondent's Exhibit 31-H, and amounting to $8,912.32, incurred in connection with Ned's Auto Supply Company?

The Witness: In my judgment and in discussion with the accountants and the personnel of the Detroit field, and the individuals in charge of the real estate and tax departments, no part of their expense during the year 1937 was incurred because of any contact with Ned's Auto Supply.

Trial Examiner Ballinger: Nor in connection with any services rendered?

The Witness: Nor in connection with any services rendered to Ned's Auto Supply.

Trial Examiner Ballinger: Nor in connection with any services that inured to the benefit of Ned's?

The Witness: That is correct.

By Mr. Austin:

Q. And yet you did include Ned's gallonage in making the allocation of expense between channels on Form 189, did you not?

A. Yes, sir; for the reasons as explained that we cannot isolate individual customers as a regular accounting procedure.

3927 Mr. Hanley: Judge, I think it must appear clearly on the record, our position that—we are taking the position of Ned's, on the one hand, and the average of the reseller channel on the other hand, as the comparison here, and I just do not want to make individual objections, if it may be understood to be taking that position, and if Your Honor will understand that is our position I won't make individual objections.

Trial Examiner Ballinger: I think the record is thoroughly clear now on that point.

Mr. Hanley: So do I, Your Honor.

By Mr. Austin:

Q. I was about to read one of the answers which you gave on direct examination, Mr. Boatwright, which I see is somewhat along the lines of the statements you have just made to the Trial Examiner, but I will still quote this answer, page 2498 of the record.

Mr. Hanley: Page 2498?

Mr. Austin: Yes.

By Mr. Austin:

Q. I ask you why the items opposite account 1215 are not in any part allocated to Ned's, and you replied, "The

tax and real estate activities as conducted by employees of the Standard Oil Company were not in any way involved in the tax and real estate problems of Ned's Auto
3928 Supply, who own all of their own outlets, and who took care of all of their tax problems. We had nothing to do with their real estate and tax problems.''

Wouldn't that statement be equally true as to any tank wagon reseller customer who did not receive any services from the tax and real estate departments in 1937?

Mr. Hanley: To which question the Respondent makes the general objection.

Mr. Austin: I thought we were not going to have this general objection repeated after every question.

Mr. Hanley: Well, perhaps I do not need to, Judge. I do not know. I would rather not do it if it may be clearly understood that I have—

Trial Examiner Ballinger: It is understood that your general objection is a continuing objection.

Mr. Hanley: All right. I won't interrupt the proceedings with that objection any further.

Trial Examiner Ballinger: The objection is overruled subject to renewal at a later date.

By Mr. Austin:

Q. Can you answer that question "yes" or "no," Mr. Boatwright?

A. Well, it is not—

Q. I only asked that because I think we have had so many explanations, I think it is more or less covered.

3929 A. Well, it is not a question that could be answered "yes" or "no." It is a question that should be explained, at least to this extent, certainly any company, any retail outlet that did not have any call for these services during the year 1937 naturally we incurred no expenses incident thereto. However, we may have incurred an expense on that identical outlet in December, 1937, and when you have four hundred plus accounts, and you have these four hundred plus accounts coming to the company for assistance in respect to their various problems, all 400 are not going to come in in any 12 months' period, but we maintain these services of the tax and real estate man, and they are subject to call for any account at any time when needed.

Trial Examiner Ballinger: Now, Mr. Boatwright, so that the record may be clear, state the number of retail service stations owned by the Standard Oil Company and leased.

The Witness: I am sorry, Your Honor, I do not have the exact number in mind. It is in the testimony and was put in the testimony by Mr. Raupaugh when he was discussing it, and I think that an exhibit was offered listing the individual outlets.

Is that not correct, Mr. Austin? Was not an exhibit put in the record showing each individual outlet of the Standard Oil Company?

Mr. Austin: No, I have such a list for 1937,
3930 however.

The Witness: I see, but it is not an exhibit?

Mr. Austin: It may get into the record eventually, but it has not been offered yet.

Mr. Hanley: Well, if it is important in Your Honor's view, we can develop that. We will give you a list of what are the leased stations and what are the so-called contract stations.

Trial Examiner Ballinger: The Examiner would like to know, and I would like to have had it inserted in the record at this point, the total number of stations owned by the Standard Oil Company and leased, and also serviced by the Standard Oil Company, also the total number of stations owned by the individual operators and serviced by the Standard Oil Company.

Mr. Hanley: Now, we will get that, Your Honor. Do you mean by that in the territory of Detroit, Hamtramck?

Trial Examiner Ballinger: That is right.

Mr. Hanley: Highland Park, and Dearborn?

Trial Examiner Ballinger: The Detroit area, yes, that is right.

Mr. Hanley: We have to give the field —

Trial Examiner Ballinger: That is correct.

Mr. Hanley: A definition of the territory when we
3931 make the request, but we will get the information for you.

Mr. Austin: I think that Raupaugh's testimony on the first day of the hearings gives figures for the total number of service stations, total number of lessees, and the total number of contract stations.

Mr. Hanley: Well, it may be so, but we will get it again. We will get it in the form that the Examiner desires.

Trial Examiner Ballinger: It seemed to the Examiner that it would be appropriate at this point to clarify the record with reference to the number of these stations which you are now making inquiry about, namely, those that are owned by the operators as compared with the total number owned by the Respondent and leased.

Mr. Hanley: Well, we will make no distinction, Your Honor. We will get that information for you, anyhow. I think we can get it by telephone within the day.

Mr. Austin: I would like to call attention, though, to Your Honor that these costs that we have been discussing here now apply to the entire Detroit field, they are costs for the entire Detroit field, not merely for the Detroit area, for 1937.

Now, in the Detroit area I think Mr. Raupaugh's testimony was that there were about 200 lessee stations which would leave about 136 privately owned stations. I am somewhat puzzled by that figure because other figures
3932 that I have obtained from other sources indicate that the company had over 400 stations, but nevertheless Mr. Raupaugh's testimony must be correct for at least a certain area.

Mr. Hanley: Well, if Your Honor please, if I may suggest, Dr. Boatwright has used certain bases for this computation, and they are subject to inquiry on the part of the Government, and it does not make any difference what Mr. Raupaugh testified to, whatever Mr. Boatwright did is the basis of this computation.

The Witness: Well, may I state here, Your Honor, that the calculations are predicated on the Detroit field, which includes an area outside of the four municipalities that you have been discussing; therefore, may I suggest that if you get the stations, if you get them for the Detroit field, segregated between those located in these four municipalities and those outside the four municipalities, would that meet the requirements?

Trial Examiner Ballinger: That would be satisfactory.

Mr. Austin: And further along that point, Mr. Boatwright, you might state from your Form 189 for 1937 what the total tank wagon gallonage was for the Detroit field, and what the total gallonage was for the lessee stations which would, of course, by subtraction, show the remaining gallonage for the privately owned stations.

3933 Trial Examiner Ballinger: Can that be ascertained without difficulty?

Mr. Hanley: Well, that figure is in the record, Your Honor, in the exhibit.

Mr. Austin: Yes, that is in the exhibit now.

Mr. Hanley: That is, the first figure is in the record. I am not sure about the second figure. I do not think it is. I do not think there was any segregation. If you want it we will try and segregate it.

Mr. Austin: Well, he can read it right now from Form 189, is what I was requesting.

Mr. Hanley: Well, maybe he can; I don't know.

The Witness: Well, if I understand your question, I cannot. I cannot segregate the gallonage other than between company-owned service stations and all other outlets, that is the only segregation I can read.

Now, if you wish a segregation between 461 and P. O. S. S. L., why that would require a recapitulation of the sales records of the individual outlets. I have not that figure.

By Mr. Austin:

Q. Mr. Boatwright, doesn't the 189 form show the total gallonage for all stations which are leased from the Standard Oil Company?

A. It does.

3934 Q. Well, then, if we have that and the total, then isn't the difference the gallonage for the other stations that are not leased from the company?

A. Well, state that—

Q. I understood that was the distinction the Examiner was making between leased stations and stations which are not leased.

A. The P. O. S. S. L. outlets are first leased from the private owner.

Q. Yes.

A. Then they are sublet to a third party. Now, stations leased from the Standard Oil Company therefore include stations which we owned and stations which we leased.

Q. That is right.

A. Therefore, I cannot give you the total gallonage of stations leased from the Standard Oil Company.

Q. Well, the P. O. S. S. L. stations and the company-owned stations are all included in your column "Leased

Service Stations" under 189, are they not, the gallonage figure at the bottom of that column indicates the gallonage for all stations which are leased from the company whether the company owns them or whether the company leases them in the first instance?

A. I would have to check that.

Q. The form so indicates.

A. Speaking from memory, I could not answer.

Mr. Hanley: If Your Honor please, if there is
3935 any issue on the question that counsel is now develop-
ing, the Respondent will give any facts that are pertinent and are requested. I have not understood there was a question of the classification of the different kinds of customers that—this is on the record—I had not understood that there was any difference about the classification of the different kinds of customers that existed in the reseller channel. If there is any difference, that is regarded by the court as material, we will be glad to furnish any facts relevant thereto.

Trial Examiner Ballinger: The Examiner is not certain at all that it is material.

The matter has been inquired into, and I thought that if, in order to determine whether or not it was material, that we ought to have the fullest information.

Mr. Hanley: Well, Judge, we are just not prepared to give it because we did not think it was material. Now, if Your Honor thinks it is we will get the facts, but we just did not think it was material.

Trial Examiner Ballinger: Here is what was in the Examiner's mind:

Questions have been asked here with reference to the allocations of any part of this item of $8,000 to service stations owned by the operators. Now, those are apparently in a different class in the mind of Counsel for the
Commission from these stations that are owned by
3936 the Standard Oil Company and leased, and also from
those stations that are leased by the Standard Oil Company and sublet.

What the Examiner had in mind was to ascertain if he could, and include it in the record at this point, the number of stations that fell within the two or three separate classes:

Mr. Hanley: Judge, I don't know.

Trial Examiner Ballinger: I don't know that it is material.

Mr. Hanley: I don't know whether it will do any good or not, but if I could go off the record for about two or three minutes maybe I could clarify some of this.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Mr. Ballinger: On the record.

Let us proceed.

By Mr. Austin:

Q. Will you read into the record, Mr. Boarwright, from the Form 189, Detroit, for 1937, the total gallonage of gasoline sold by the company to lessees' service stations if such figure appears on that report.

A. Yes. The figure does appear and it is 40,070,330.3 gallonage. That is the sum total of the volume moving through service stations owned by the company and leased to individuals, service station buildings constructed 3937 on leased ground, the building being owned by the company, the location site leased, in turn the unit is leased to a lessee for operation, and, thirdly, the volume of outlets which are privately owned, entirely leased to the company and sublet to individual operators.

Q. Now, the total gallonage which, of course, appears here, but just so that it will appear alongside the figure, the total tank wagon reseller gallonage for the Detroit field for 1937, was what?

A. 70,629,026 gallons.

Q. At the bottom of page 2485 in the record, Mr. Boatwright, you referred to the "code of accounts," of the Standard Oil Company.

I would like to say parenthetically that the transcript that I have reference to refers to "code of ethics," which I assume was a typographical error.

Is that right, Judge Hanley?

Mr. Hanley: I would assume so. I do not know, but I would just assume so. I am willing to ride with you on the correction. I cannot think of a code of accounts being a code of ethics.

By Mr. Austin:

Q. Well, you did intend to say "code of accounts," did you not, Mr. Boatwright?

A. I did so state.

3938 Q. Now, is that code of accounts used as a guide by the company's accountants in preparing the annual "Comparative Statement of Expense," which is known as Form 189, and which has been introduced in evidence as Respondent's Exhibit 32?

A. The code of accounts is used in the preparation of the comparative statement of expense, Form 189. In addition, it deals with each of the other expense items in great detail, explains just how they should be assigned and allocated.

Q. What do you mean by "each of the other expense items"?

A. All of the underlying forms and individual expense items going to make up the classifications of costs such as are reflected on the Form 189.

Q. That is, you mean certain accounting methods or certain accounting steps which are taken prior to the arrival of the items which go into the 189?

A. Yes.

To illustrate, there may be a description of how different typical expense items would be classified or allocated. Thus we may hold a dealers' meeting. There will be instructions issued in the code of accounts how the expense is incurred in holding a dealers' meeting, will be treated, or there may be a complete explanation of how the time of the selling force shall be allocated upon the different channels of distribution. It is a detailed explanation, illustrating and
describing the method whereby each of the principal
3939 typical expenses of the company will be treated and
classified in making up its comparative statement of expense.

Q. By "comparative statement of expense," you mean—

A. Form 189.

Q. Form 189?

A. That is correct.

Q. Again to Respondent's Exhibit 31-H, account 1066, miscellaneous operating expense, $40,142.68.

Mr. Austin: I would like to have this paper marked for identification at this time.

Trial Examiner Ballinger: The Reporter will mark the paper Commission's Exhibit No. 81, for identification.

(The document was marked for identification "Commission's Exhibit No. 81.")

By Mr. Austin:

Q. Are you familiar with this paper which has just been marked for identification Commission's Exhibit No. 81, Mr. Boatwright?

A. I am.

Q. Will you state what information it contains?

A. This paper, Commission's Exhibit No. 81, purports to be an approximate breakdown of the account 1066, miscellaneous expense, for the year 1937, in the Detroit field, classifying the various items of expense as just it was possible, according to the principal typical types of miscellaneous expense.

2940 Q. Who prepared that statement?

A. It was prepared under my supervision, and in part personally, certainly under my supervision.

Q. From the records in the Detroit office or in the Chicago office?

A. A combination. You will recall when that expense was requested, and in the original testimony I explained the tremendous task of attempting to pull the expense vouchers, analyze them, and reconstruct the figure for the year 1937.

Q. Yes.

A. You probably will recall the discussion. At that time I stated that to completely classify and reconstruct that item in its entirety would involve a tremendous task. I did suggest, however, that it would be possible for us by general discussion with the man in charge of the accounting department in the Chicago office to review such analyses and breakdown on this expense item as we had made in the past in an effort to control that expense item and to provide you with an approximate breakdown which would represent a high percentage of accuracy, and would have the endorsement of men who are experienced in handling the account, and such analyses as we have been able in the past to take care of in connection with our expense control activity. This paper represents the result of that analyses of the different men in the general office in charge of the accounting department. It is supplemented by 2941 periodic and occasional studies made not only in Detroit but in other fields, to get the principal expense items entering therein, and was checked further in the Detroit office by a partial pulling of actual vouchers and information to determine whether the ratios were representative of the account. They are representative of the account.

Q. Then do I understand that the column under percentage was arived at first, and the dollar column arrived at from the percentages?

A. That is correct.

Q. Those amounts in the percentage column, then, do represent estimates to some extent, do they not?

A. They are estimates ~~checked~~ to a pretty high degree of accuracy. They are estimates that I can support with a great deal of conviction as truly representing a closer approximation of the breakdown of this item.

Trial Examiner Ballinger: We will take a short recess.

(There was a short recess taken.)

Trial Examiner Ballinger: Come to order.

You may proceed, Mr. Austin.

Mr. Austin: I offer in evidence Commission's Exhibit No. 81, for identification (handing the document to Mr. Hanley.)

Mr. Hanley: Off the record a minute.

3942 Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: I have no objection.

Trial Examiner Ballinger: Commission's Exhibit No. 81, for identification, is admitted in evidence.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT No. 81," were received in evidence.)

By Mr. Austin:

Q. Referring now to the Form 189, Respondent's Exhibit 32, and taking up the first item on Commission's Exhibit No. 81, which is entitled "Junked Pumps and Tanks," was that expense charged directly to the tank wagon reseller channel?

A. I think I explained the allocation of this item of 1066 as being either charged direct or allocated on a tank wagon gallonage basis. This particular item of expense would be one that would be charged direct, junked pumps and tanks.

Q. And the tank wagon reseller channel?

A. Yes.

Q. Are there any other of the items listed on Commissions Exhibit 81 which were charged direct to the tank wagon reseller channel?

A. Yes. There are others, yes. Dealers conference,
3943 the second item, being $6,429, is a direct charge.

I think the item "Charges for 1941—Repairs to Equipment, Dealers' Signs, Meeting Equipment, Etc.," $2,700. The item "Construction Items Allocated to 1066 by General Office," $1,667, as I recall, is a direct charge.

Q. What sort of construction items are included there?

A. Construction items of retail outlets.

Q. Company-owned properties?

A. Yes.

Q. There would be no construction items in connection with privately owned stations, would there?

A. I do not know. I do not know whether there would be any in this or not.

Q. Do you know whether the company ever does any construction work on property that they neither own nor lease?

A. Your question is so broad that I have to answer I don't know whether they do any work. I could not answer that. Generally speaking, the work is done on properties which we own or lease, but there may be exceptions.

Q. Are there any others that are charged?

A. I am reviewing them as to the present time.

Q. I do not think it is really necessary to go below the items that are $1,000.00 or more.

A. Well, it is not only a question as to the item, the amount of the items, as it is a question of the recalling
3944 of the recalling of the exact instructions on each of these details, which is so difficult.

Now, your code of accounts, which treat with each of these items separately, and explain the exact procedure of allocation.

Q. Would you describe what is included in the expense item? It is entitled "Junked Pumps and Tanks."

A. Just exactly that. Junked pumps and tanks which have become obsolete and are written off as a marketing expense as being junked, no longer worthy of continued use.

Q. Where were those pumps and tanks used?

A. At retail outlets.

Q. Were they pumps and tanks which had been loaned under equipment loan agreements, or were they pumps and tanks which had been leased to lessee stations?

A. Both.

Q. And do I understand that no part of that charge is prorated to the consumer channel?

A. No, no part is prorated.

Q. Nor to other methods?

A. No. This is a direct tank wagon reseller charge.

Q. I believe you have stated your general opinion that no part of these expense items is properly allocable to the business of Ned's Auto Supply Company:

A. That is correct.

3945 Q. Will you explain that as to the junked pumps and tanks?

A. Surely. There were no junked pumps or tanks at Ned's Auto Supply Company. When we changed our contract during the spring of 1938 the few pumps which we had at the Ned's outlet were sold to them. There were no junked pumps or tanks incident to the operation of Ned's.

Q. Well, during 1937, did not the Standard Oil Company supply any of the pumps and tanks used at Ned's stations?

A. Yes; we did supply some. That is shown in Respondent's Exhibit 31-P, which is above the number of signs the number of pumps; we supplied no tanks.

Q. Well, is that Exhibit 31-P; or isn't that—there is an Exhibit 31-P enumerates that equipment as you will notice in connection with the jewelled globes.

Q. Yes.

A. And above that we list that we had four standard service signs of one size, and one of another. Well, now, wait.

Q. Junked pumps and tanks item does not have anything to do with signs, does it, Mr. Boatwright?

A. It does not. I stand corrected on the number of pumps, all of those pumps for which we furnished jewelled globes may not have been company owned. You referred to another page.

Q. 31-M.

A. 31-M.

3946 Q. The lower part of the page.

A. That is correct. It gives on that page the total amount of investment in equipment to Ned's Auto Supply.

Q. Is it your theory, then, that except for junked pumps and tanks on Commission's Exhibit 81, is allocable to Ned's because none of the pumps or tanks at Ned's were junked during that year?

A. Well it is my theory that junked pumps and tanks as a marketing cost were incurred in the reseller channel,—no such similar item of cost was incurred at this particular customer for which we were asked to isolate the costs, therefore, properly speaking, no part of this charge could be allocated to that account.

Trial Examiner Ballinger: And you refer to Ned's account?

The Witness: Ned's Auto Suply.

By Mr. Austin:

Q. Might that not have been true to a large extent of other stations during the same year?

A. Again we come to the general question—it might well have been true of any one station.

Q. In other words, isn't this an expense which could be directly charged to individual service stations, and isn't that your theory in saying that none of it was chargeable to Ned's?

3947 A. It could be charged to individual accounts providing you are maintaining a marketing cost analysis by individual accounts.

I have stated I feel—several times—that such task would be prohibitive.

Q. I am not urging that you should have done it, Mr. Boatwright.

A. It would be possible, but it would be impracticable.

Q. But my question is whether you are not inconsistent in spreading this charge on a gallonage basis between all stations other than Ned's, and that excluding Ned's from any charge, whereas there were undoubtedly many other stations which I believe you have admitted, which—

Mr. Hanley: Just a moment.

Q. —which also were not responsible during the year for any part of this charge?

Mr. Hanley: Just a moment, Mr. Boatwright.

As I understand, Your Honor, my general objection goes to all of this line of questioning.

Trial Examiner Ballinger: It is a continuing objection to this entire line.

Mr. Hanley: I wish to add to that objection to this particular question that it is argumentive, seeks to elicit a controversial answer from the witness.

Trial Examiner Ballinger: Read the question.

3948 (Question read.)

Trial Examiner Ballinger: The objection is overruled.

A. There is no inconsistency in the procedure followed. We do not allocate this particular item of expense on a gallonage basis, but as I explained previously it is a direct charge to a channel of distribution.

By Mr. Austin:

Q. Well, you have here allocated it on a gallonage basis in Respondent's Exhibit 31 as between all stations other than Ned's, have you not, for the purpose of obtaining a cost per gallon?

A. Yes, we have taken from the Form 189 the exact charge which is allocated under account 1066, and have stated that that account is not applicable to Ned's Auto Supply, one part of account 1066 being junked pumps and tanks to the extent of $9,625, was an item of cost incurred in the tank wagon reseller channel and represents a direct charge to that channel. Now, the request of the Government, as I interpret it, is that we isolate our costs through the reseller channel as distinct from a particular customer. In this particular customer's case there was no item of expense incurred nor is there any likelihood that such item of expense would have occurred unless this relationship had been maintained over an extended period.

3949 Q. You stated that you did not maintain any account of individual service station costs or any similar customer distribution costs; is that correct?

A. We do not maintain costs by customer.

Q. Yes. Now, accepting for the purpose of this question your statement of your understanding of what the government was asking you to do, or perhaps you didn't mean exactly that, but at least accept in your statement of what you considered the Standard Oil cost burden to be in this case—you will accept that as correct?

A. Yes.

Q. Let's assume that instead of Ned's Auto Supply Company, it was some other single tank wagon customer who was to be segregated, then following the same method, Ned's would be grouped with all the others, would it not, for the purpose of making this segregation of expense?

Mr. Hanley: That is objected to as—I will withdraw the objection.

Go ahead and answer the question.

A. Certainly if the lawsuit had or if the complaint had questioned any price difference between any other customer and the reseller channels, I would have followed an identical procedure.

Q. Then, if I understand the method pursued, it was to
determine for this item whether there was any
3950 expense of that nature directly chargeable to Ned's
during 1937. You found that there was no such expense directly chargeable. Therefore, you charged none of that expense to Ned's but charged the entire expense on a gallonage basis between all other stations regardless of whether any other particular station was responsible for incurring any of that expense?

A. The charge was—

Q. Will you state whether I am correct, and, if you like, the reporter will re-read the question.

A. Well, the difficulty is, your question is a prolonged citation of your interpretation and if it could be boiled down, it would be much easier for me to state whether you are correct or not correct.

Q. Do you wish to have the question re-read?

A. Yes.

Trial Examiner Ballinger: Read the question.

The Reporter: (Reading) "Then, if I understand the method pursued, it was to determine for this item whether there was any expense of that nature directly chargeable to Ned's during 1937."

The Witness: (interrupting) May I ask what is referred to by "this item"?

By Mr. Austin:

Q. Junked pumps and tanks.

A. My inquiry was directed, first, as to whether
3951 or not there was any miscellaneous operating costs
assignable to the business of Ned's Auto Supply. In the discussion of that particular item of expense, I recall discussing with the personnel in the Detroit area questions of dealer conferences, the item of junked pumps and tanks, and the broad classification as enumerated here as to whether any of those were involved in Ned's Auto Supply, and upon learning that they were not affected by this particular customer, the charge of miscellaneous operating expense, tank wagon reseller channel was assignable to the regular tank wagon reseller business in total.

Q. Was there any effort made to determine how many customers were responsible for this charge in the year 1937?

A. That would be a practical impossibility short of an extended period of time.

Mr. Hanley: May I inquire, Mr. Austin, what charge you are talking about?

Mr. Austin: Junked pumps and tanks.

Mr. Hanley: O. K. Do you so understand?

By Mr. Austin:

Q. Is your answer to that question "no"?

A. My answer to the question was that it would have been a practical impossibility to have traced that particular item to individual accounts.

Q. That doesn't answer it. You are stating why you didn't do it, but I wish you would just answer the
3952 question, first, as I am not really asking for the reason or asking you to justify why you did not do it.

Mr. Hanley: May I ask your Honor to instruct the witness that he does not have to answer any question yes or no unless he can answer the question yes or no fully and truthfully.

Trial Examiner Ballinger: He may answer it yes or no and then offer any explanation of his answer, if he desires.

Mr. Austin: Of course, I object a little to that, your Honor. If I can ask a question of the witness whether he did or did not do a certain thing and he can answer that yes or no, I don't know that it is always necessary for him to explain why he did or why he didn't.

Trial Examiner Ballinger: The Examiner will afford the witness an opportunity to offer an explanation.

Mr. Austin: Because, frequently, I am not interested in that, nor am I questioning the propriety of what he did or didn't do. I am simply trying to find out—I know of no reason for encumbering the record with reasons unless either I or Judge Hanley see fit to ask for them.

Mr. Hanley: Judge, I haven't any objection to the witness answering yes or no, if that is a full answer and it is a truthful answer, but I don't want the witness put in position of having to answer yes or no if it isn't
3953 an honest answer.

Mr. Austin: Neither do I.

Mr. Hanley: That is all I want.

Trial Examiner Ballinger: Will you answer the question?

Read the question.

The Reporter: (Reading) "Was there any effort made to determine how many customers were responsible for this charge in the year 1937?"

A. There was not, for the reasons stated.

By Mr. Austin:

Q. The next item on this list, Commission's Exhibit 81, is "dealer conferences, $6,429."

Will you explain what is included there?

A. Yes. Periodically dealer training conferences are held either at one central location or at several locations throughout the field. The pattern of a dealer conference does not remain constant, year to year, but it varied from time to time in an effort to secure increased effectiveness in the training of our dealers in merchandising procedure. They may have one conference a year held at a central point; they may have two conferences a year, one in the spring and one in the fall, or they may have a series of conferences held at principal points throughout the division. These conferences are called for the purposes of bringing to the dealers and the dealer helpers 3954 and to present a sales story to them outlining the advertising efforts for the forthcoming advertising campaigns, to explain carefully and thoroughly any product improvement or changes, to explain carefully and thoroughly ways that have been tried and developed for improving the profits of dealers, and other factors influencing their profit results.

The expenses of this item include, among other things, generally, a room for which the meeting is held, certain signs or promotional material used as a stage setting for the conference, light refreshments, and so forth.

Q. Those dealer conferences were open to Ned's Auto Supply Company, were they not?

A. Ned's Auto Supply would not have been refused admission, certainly, nor would any of his helpers, but I did ask whether they did participate or attend the dealer conferences and the answer was that they did not.

Q. Did you ask for any list of the dealers that did attend the various conferences?

A. No, I did not. No such list is maintained.

Q. It is your opinion that the dealer conference cost is only chargeable to the dealers who attend the conferences?

A. It is my opinion that the dealer conference cost is chargeable to the tank wagon, reseller channel, and that in an effort to isolate a particular account in which 3955 we were requested not to assume any promotional activity or driveway training activity, and this particular account refrained and did not attend, nor did its helpers or driveway merchandising men, attend those conferences, and certainly I don't think that any part of that is chargeable to that account.

Q. The next item under accounts 1066, on Commission's Exhibit 81, is entitled "Forms 187—Sample Bottles and Cans—Replacement Packages. General Supply Items Under 5 cents, and so forth." The total is $3,857. Will you explain what is meant by that title?

A. The title, as you will note from the reading, is an extremely broad and comprehensive title and covers a broad range of miscellaneous knick-knack items for which small expenses were incurred, thrown together under one general total.

Q. What is form 187?

A. Form 187 is an underlying form for the allocation of charges used in constructing the form 189. This particular item, Mr. Austin, as you can see, is just an extremely broad classification of knick-knacks.

Q. For what purpose are those knick-knacks used? Where are they used, or can you answer that?

A. In the operation of retail outlets.

Q. What retail outlets?

A. The three classifications of retail outlets we have been discussing: Privately owned, leased; 461 ac-3956 counts; company owned service stations, leased.

Q. Did you mention privately owned service stations as one of those classes?

A. Yes, privately owned.

Q. That would include Ned's, would it not?

A. I said privately owned service stations, leased.

Mr. Austin: Perhaps, Mr. Reporter, you would read back the witness' answer.

The Reporter: (Reading) "The three classifications of retail outlets we have been discussing: Privately owned, leased; 461 accounts; company owned service stations, leased."

By Mr. Austin:

Q. The 461 accounts would include Ned's, would it not?

A. I don't know. I don't know whether Ned's was on a 461 agreement in '37 or not.

Q. Didn't you intend by those three classifications to cover all tank wagon reseller customers?

A. These items are incurred pretty generally on all reseller customers. Now, I did discuss this particular item in the compilation of this information which we furnished to you with the men who allocate the costs on form 187, and I asked them to review some part of the charges therein and express in their judgment whether or not those items would have been incurred in Ned's Auto Supply, and in their judgment they said no, they would not be—that, if so, to a very small extent.
3957 That is the best answer I could give under that particular item.

Q. Was the total expense of the company of the nature represented by this item pro rated between the three channels on form 189?

Mr. Hanley: What items?

Mr. Austin: The ones that we are discussing here opposite form 187.

Mr. Hanley: May we not have it identified specifically?

Mr. Austin: Oh, I have quoted it on the record when we started the discussion and we are still talking about it until we come to the next one. The title begins "Form 187—Sample Bottles and Cans" and there are a number of other things included.

Mr. Hanley: All right.

A. I am not certain that this item is allocated on an all-gallonage basis among the different channels, or whether it is allocated only to tank wagon gallonage between the tank wagon resellers as distinguished from the tank wagon consumer. I am sorry. I can't answer your question.

Q. Do you know what part of it is allocated to tank wagon reseller and consumer business? Is that what you—

A. Yes, part of this item is allocated to tank wagon and consumer business.

3958 Mr. Hanley: If your Honor please, I ask that counsel designate whether he means by that question the part of this particular amount—

Mr. Austin: Oh, I mean—

Mr. Hanley: Whether it is allocated to the consumer.

Mr. Austin: I mean part of the expense of the nature stated here.

Mr. Hanley: All right.

Mr. Austin: In other words, the amount allocated to the consumer channel is in addition to this $3,857.

The Witness: That is correct.

Mr. Hanley: That is all right.

By Mr. Austin:

Q. Was that allocation as between tank wagon reseller and tank wagon consumer made on a gallonage basis?

A. If the allocation was only between the tank wagon reseller and the tank wagon consumer channels, it was on a gallonage basis. If the allocation of this particular classification of expense was between the tank wagon consumer, the tank wagon reseller, and the other methods channel, it was on an all-gallonage basis.

Q. Was the gallonage of Ned's Auto Supply Company included in the tank wagon reseller gallonage for the purpose of making the allocation?

A. Yes, sir.

3959 Q. Is that true of all of the items on Commission's Exhibit 81 except those which were charged directly to the tank wagon reseller channel?

A. Yes, sir.

Q. The next item shown here is "charges from account 9944—gauging tanks—transfer equipment, cleaning and rearranging equipment, checking equipment—and so forth."

Will you please explain your reasons for stating that no part of this expense is chargeable to Ned's business?

A. Well, the cost for this function is incurred primarily in your reseller channel of distribution, your gauging of tanks being a broad function and includes many tanks, most of which in terms of numbers are at reseller outlets. Transferring equipment from one outlet to another, cleaning and rearranging of equipment, would be the cleaning of—I don't know how to state it in other words. It would be the cleaning of the equipment which we make available to reseller outlets and rearranging them, and so forth.

Now, a small part of that might have been incurred with Ned's Auto Supply, or you might state that the gauging of the tank out of which the gasoline was hauled to Ned's Auto Supply from the bulk plant was in part a proper charge to Ned's as well as to other tank wagon gallonage, but the part that is so chargeable to Ned's is small and would be impossible to isolate out of there.

3960 These items that are enumerated there that would apply to tank wagon and—tank wagon reseller and tank wagon consumer are so allocated on a gallonage basis, and those items which are a direct charge against the reseller outlet would probably be a direct charge to that channel of distribution.

Q. Referring to these last two items we have discussed, the one beginning with "forms 187" and the next one "charges from account 9944," suppose you were asked to allocate or prorate those total charges as between individual service stations. Would you consider that that would be possible?

Mr. Hanley: That is—well, I won't object. If you can, answer it. Go ahead.

By Mr. Austin:

Q. I want to know if it could be done as a practical matter from an accounting standpoint.

Mr. Hanley: O. K. Go ahead and answer, if you can.

A. It could not be done with a high degree of accuracy between individual accounts. It is a physical impossibility.

Trial Examiner Ballinger: Well, would it be practical?

The Witness: No, it would not be.

By Mr. Austin:

Q. In other words, are not those two accounts charges of such a general nature that it would be impossible

3961 to allocate them between service stations?

A. Between individual outlets?

Q. Yes.

A. It would just be an impractical thing to attempt.

Q. What is meant by "charges from 9941, repairs to equipment—dealer signs, meeting equipment, and so forth?" That is one of the items which you stated to be a direct charge to the tank wagon reseller channel, and the amount is $2,700.

Mr. Hanley: And Exhibit what number?

Mr. Austin: Commission's Exhibit 81.

A. I stated that according to my recollection this was a direct charge, and the major portion of it would be a direct charge. In any of these items, as you will notice, there are classifications of expense which are made up in prorated items. Now, the charges from 9941: 9941 is merely an account number. Following the account number I have listed thereunder "repairs to equipment—dealer signs—meeting equipment, and so forth," the principal items making up the total of that account number.

"Repairs to equipment" I think is obvious.

"Dealer signs" is a question of maintaining and repairing the Standard Service signs and other type of signs that we put up at our reseller outlets.

Q. Including Ned's?

3962 A. Yes. If we had any repairs on the signs at Ned's outlet, I assume it would be in that title.

"Meeting equipment" is the principal item. As I explained before, the reseller meetings require equipment for—

Q. Does that have anything to do with dealer conferences mentioned up above?

A. Yes, sir. That is the equipment that we make available for the holding of these conferences. It may be electric signs; it may be a certain amount of painting; and it may be—it is providing the props for the presentation of the show. It is the props that we provide.

Q. Would it also be your opinion that it is not practical to allocate those charges between individual service stations?

A. It would not be practical to so allocate the charges.

Mr. Hanley: I have no objection, but may we understand what charges you are talking about?

Mr. Austin: Yes, the ones that the witness has just described.

Mr. Hanley: Namely, what?

Mr. Austin: Repairs to equipment, dealer signs, meeting equipment, and other items which he states are included in this charge of $2,700.

Mr. Hanley: All right.

By Mr. Austin:

Q. The next item shown here is an item of $2,186

3963 for "non-capital expense from appropriations—rearranging loading facilities at bulk stations, and so forth."

Is the total expenses coming under that heading allocated between reseller and consumer channels and other methods on form 189?

A. Part of it is a direct charge and part of it is allocated between the tank wagon channels, and a part of it may be allocated even to all channels on an all-gallonage basis.

Q. Was the gallonage of Ned's Auto Supply Company included in the tank wagon reseller gallonage for the purpose of making that allocation?

A. It was.

Q. Will you explain why an expense of rearranging loading facilities at bulk stations would not be in any part chargeable to Ned's business?

A. Well, undoubtedly the rearranging of the loading facilities at a bulk plant would have been undertaken to increase the efficiency of our operation. Whether or not Ned's Auto Supply had been served out of that bulk plant, expenditures of that type are predicated upon the efficiency of the operation of the unit and are undertaken to increase the efficiency and to cut down our costs. It would be extremely difficult to state that that charge was in any sense associated with the supplying of Ned's Auto Supply.

Q. It would be equally difficult to show that it was
3964 associated with the business of any other single reseller, would it not?

A. That is correct, and that it why it is allocated on a gallonage basis, and the part that we are attributing to the reseller channel is limited to that portion which the gallonage determines.

Q. And, as you have said, Ned's Auto Supply is included in the reseller channel gallonage?

A. Yes.

Q. And Ned's Auto Supply Company was served in 1937 from the Standard Oil Company bulk plants, was it not?

A. Yes, sir.

Q. All of Ned's Stations were so served?

A. Yes, sir.

Q. What is meant by "non-capital expense from appropriations"?

A. An appropriation may be made to modernize an outlet or to rearrange the facilities at a retail outlet. Prior to the construction it may be necessary to undertake some work at that outlet that can not logically be capitalized as a part of the expenses—capitalized as a part of the property investment. That particular type of an expense would be charged off to marketing costs.

Q. Does that expense mean one which arises only in connection with the lessee service stations?

3965 A. It would arise largely in connection with lessee service stations, yes, sir.

Q. Now, dropping down to an item here entitled—this being still from Commission's Exhibit 81—"club dues—chamber of commerce—subscriptions, and so forth," an item of $1,286.

Will you explain how that item can be allocated upon other than an all-gallonage basis between all customers?

A. It is allocated on an all-gallonage basis.

Q. Between the three channels on form 189?

A. Between the three channels on form 189.

Q. And is Ned's Auto Supply gallonage included in the tank wagon reseller gallonage used for the allocation?

A. Yes, sir.

Q. Upon what theory do you state that none of that charge is properly chargeable to Ned's Auto Supply Company as a cost of sale or delivery?

Mr. Hanley: That is objected to, assuming a fact not in evidence.

Mr. Austin: Well, strike the question.

By Mr. Austin:

Q. You have included this expense among other expenses which you have stated are not influenced by Ned's Auto Supply Company. Will you explain why or how that expense of club dues, chamber of commerce, and so forth, is influenced more by the sale of gasoline to any other service station than it is to the sale and distribution
3966 of gasoline to Ned's Auto Supply Company?

Mr. Hanley: That is objectionable, but I won't object.

If you can make the answer to it, go ahead.

A. Well, I am not exactly certain that I can. In the first place, I am not exactly certain that I have a complete understanding of the question just phrased.

May the question be reread?

Trial Examiner Ballinger: Read the question?

Mr. Austin: May I restate it?

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Austin:

Q. I am asking why all of this expense is charged to tank wagon reseller stations exclusive of Ned's Auto Supply and none of it is charged to Ned's Auto Supply Company on Respondent's Exhibit 31-H.

A. As stated, Respondent's Exhibit 31-H states marketing costs uninfluenced by Ned's Auto Supply. These expense items were and are of a continuous nature, and remained uninfluenced by the Ned's Auto Supply business an' would continue and would remain uninfluenced if Ned's Auto Supply business was lost. It it non—it is just not associated with that particular account.

Q. Is it associated with any particular account?

A. It is not associated with any particular account, but is associated with the Standard Oil Company's business in the Detroit area and contacts and business done in that community. Do you consider payment of such dues and subscriptions a cost of sale or delivery of gasoline? 3967

A. I most certainly do.

Mr. Hanley: Just a moment. That is objected to as calling for a conclusion and opinion of the witness and on an ultimate issue in the case.

Trial Examiner Ballinger: Read the objection.

(The objection was read.)

Mr. Austin: I suggest the question be reread.

Trial Examiner Ballinger: Read the question.

Mr. Hanley: May I inquire, was it dues and subscriptions you were referring to? I may have overlooked it.

Mr. Austin: The item of $1,286 listed on Commission's Exhibit 81.

Mr. Hanley: I withdraw the objection. The question may stand.

Mr. Austin: He already answered it, didn't he?

The Reporter: "I most certainly did". was the answer.

Mr. Austin: I move for adjournment, if your Honor please.

Trial Examiner Ballinger: The motion is granted and the hearing stands in recess until 2 p. m.

(Whereupon, at 12:45 p. m. a recess was taken until 2 p. m.)

3968 Afternoon Session. 2 P. M.

Trial Examiner Ballinger: Come to order. You may proceed.

JOHN W. BOATWRIGHT thereupon resumed the stand and testified further as follows:

Cross-Examination (Resumed) by Mr. Austin.

Q. While we are on this Commission's Exhibit 81, which is a breakdown of the miscellaneous item of expense of $40,000 entered for account 1066 on Respondent's Exhibit 31-H, will you state briefly, Mr. Boatwright, what is included in the item of $1,929 for general supplies used?

A. Yes. I think that item is self-explanatory. Those are general supplies used in the operation of our retail outlets and our bulk plants making delivery to those outlets.

Mr. Hanley: Mr. Austin, are you now referring to 31-H?

Mr. Austin: No, Commission's Exhibit 81 which, in turn, refers to 31-H.

Trial Examiner Ballinger: Which is a breakdown of the fifth item on Respondent's Exhibit 31-H; is that correct?

Mr. Austin: That is right.

Mr. Hanley: Commission's Exhibit—

Trial Examiner Ballinger: Respondent's exhibit.

3969 Mr. Austin: I think that is already stated.

By Mr. Austin:

Q. What is the nature of those supplies as distinguished from the supplies which you have described under other items? It does not include station operating tools and equipment?

A. No, it does not. I don't recall the specific items entering into that. They are just the general supplies used in the conduct of the business.

Q. May they be used anywhere, either at the main office, for instance? Would they include paper and stenographic materials, and so forth, at the main office?

A. It does not include stationery in the usual sense of the word, no.

Q. Might it include rubber bands and clips and waste baskets, and a lot of stuff like that used in the office building?

A. It might, but, frankly, I can't tell you the exact items going into this classification.

Q. Does the expense which is entered under general supplies—is that allocated on an all-gallonage basis between tank wagon consumer and other methods channel on Form 189?

A. I think that item is allocated on an all-gallonage basis among the three channels.

Q. You are not sure?

A. The very nature of the item would indicate that it was.

3970 Q. And in making that allocation for 1937 was Ned's gallonage included—

A. It was included in the tank wagon reseller gallonage channel.

Q. Will you give a brief description of the nature of the expense included under the item "Cleaning Bulk Station Driveways, Office, and so forth," which is $1,672?

A. Well, the cleaning of our bulk station driveways may include such expense item as snow removal, cleaning of other refuse that might be on the driveways, cleaning office might include, likewise, snow removal from sidewalks, and items of that nature. They do not include the regular janitor service in conjunction with the building.

Q. They do not?

A. It does not.

Q. Why is that not included?

A. That is included in operation and maintenance.

Q. Of company-owned buildings?

A. Yes.

Q. Or plants? Which?

A. Our Form 189, janitor services are included. In just a moment I will give you the exact reference of that item.

Q. Getting off the track for just a moment, but—

A. It is not in this account at all.

Q. No. I was just asking whether the building was called plant, or is it included anywhere as the buildings come in just through operation and maintenance, in what account in 189.

3971

I assume it would be either 060, Mr. Boatwright, or somewhere under the 200 accounts and those office expense accounts seem to be a little more specific.

A. No, I think that you are referring to the field office, are you not?

Q. 206 perhaps is where it would be, or water, light, fuel, and so forth.

A. Yes, 206 does cover janitor service and maintenance of our office building. Janitor service, however, because of that classification, is not included in this item at all.

Q. And there is one more item here which I think requires some explanation and that is entitled "Construction Items Allocated to Account 1066 by General Office." The amount is $1,667.

A. Those expense items are incurred when we close out appropriations for particular remodeling or reconstruction jobs. They are expense items not anticipated or covered by the original appropriation on the part of the board of directors for constructing or making this particular improvement, but they are minor items which are closed out when the general appropriation is closed out.

Q. What sort of construction items are they, did you say?

A. Minor items.

3972 Q. Where would they be?

A. Those would be incurred largely at company-owned service stations operating by lessees.

Trial Examiner Ballinger: What is the amount of that item?

The Witness: The amount of that item is $1,667.

By Mr. Austin:

Q. Referring again to the item of cleaning bulk station driveways, office, and so forth, $1,672, will you state your reasons for not charging any of that expense to Ned's Auto Supply Company business?

A. That question has arisen several times in conjunction with this particular breakdown of expense. Throughout this discussion I have admitted at times that there were minor portions of these expense items incurred at bulk plants which were, in turn, serving the tank wagon which were serving the Ned's Auto Supply outlets. It was impossible from our records to isolate and break these costs down by individual customers. Therefore, in the preparation of Respondent's Exhibit 31, we included the sum total as being an item of expense not influenced by Ned's Auto Supply gallonage, and then, to be conservative, although part of

these expenses are charged direct, part of them all go allocated on a gallonage basis, are primarily incurred on the reseller channel. Nonetheless, to be as conservative as possible, we used the total gallonage including Ned's
3973 as a divisor, which tends in its total effect—

Q. I would like to interrupt, Mr. Boatwright.

Mr. Hanley: Well—

Mr. Austin: I think you are getting—

Trial Examiner Ballinger: Let the witness finish.

Mr. Austin: You Honor, I object—

Mr. Hanley: Your Honor, I object to the interruption of the witness. He is entitled to make his answer.

Mr. Austin: I think I am entitled to interrupt the witness, and I object to further continuation of the answer because it is unresponsive to the question.

Mr. Hanley: Then I object to the question and the entire answer unless the witness is permitted to answer in full.

Mr. Austin: I am perfectly willing to have the full answer stricken.

Trial Examiner Ballinger: Let the witness finish the answer.

Mr. Hanley: You may proceed.

Mr. Austin: Yes.

Trial Examiner Ballinger: And the Examiner will then determine whether it is responsive. If it is not, it will be stricken.

A. (Continuing) Well, as I stated, these various detailed expense items could not be allocated to indi-
3974 vidual accounts. Therefore, in our calculations we have taken the sum total of the direct charges, of charges which though they may be allocated on a gallonage basis may be incurred primarily in the reseller channel, and then we have divided by the sum total of all gallonage which moved through that channel, according to the books, including Ned's Auto Supply Company, which tends in its effect to understate the true differential which exists because the use of the larger divisor on any direct charge tends to give a per-gallon cost which is less than the actual differential, while the use of the larger divisor on all costs which are allocated on a total gallonage basis, in which Ned's Auto Supply Company was used, tends to reproduce exactly the same per-gallon cost used in the allocation. Therefore, the sum total of the allocation which we have made of these individual items, recognizing that some small

part of this is a bulk plant charge, is an understanding of the true differential in our calculations and as presented in Respondent's Exhibit 31-A, B, through Q.

Trial Examiner Ballinger: Will the Reporter read the question?

Is there a motion to strike?

Mr. Austin: I move to strike the entire answer.

Trial Examiner Ballinger: Read the question.

(Question read as follows:

"Q. Referring again to the item of cleaning bulk
3975 station driveways, office, and so forth, $1,672, will
you state your reasons for not charging any of that
expense to Ned's Auto Supply business?")

Trial Examiner Ballinger: The motion is overruled.

Mr. Austin: I fail to—I am completely at a loss to know how much of that answer is directed to the question of cleaning bulk station driveways and office. It seems to me that the witness' answer was directed to the general question of division of gallonage of Ned's Auto Supply and the sum of all these items.

Mr. Hanley: The question of counsel is testimony, if it is anything. It is not a question, Your Honor.

Trial Examiner Ballinger: The Examiner has ruled on the motion.

Mr. Austin: I would like to ask the same question again and have the Reporter re-read it, if Your Honor would permit.

Mr. Hanley: Objection is made to a restatement of the question. The question has been asked; it has been answered; the court has ruled upon it.

Trial Examiner Ballinger: Counsel for the Commission is entitled to have the question re-read and the Reporter will so do.

(Question re-read.)

Trial Examiner Ballinger: That question was a
3976 broad question and asked him for his reasons for not
charging any portion of the expense to Ned's Auto
Supply business.

Mr. Austin: Yes.

Trial Examiner Ballinger: And his answer was likewise quite broad.

Mr. Austin: I thought his answer was directed to a great many more items than this one.

Trial Examiner Ballinger: He probably encompassed a little more territory.

By Mr. Austin:

Q. Is there any part of that item, cleaning the bulk station driveways and office, which could properly be directly charged to any service station?

A. I don't think so.

Trial Examiner Ballinger: Is there any way under your present accounting system by which it could be done?

The Witness: There is none, Your Honor, nor do I think that it would be advisable or practical to attempt to devise an accounting system that would do so.

Trial Examiner Ballinger: Would the cost be prohibitive?

The Witness: Well, it is just an item of a general nature and it is your guess on an allocation which would be as good as mine if you attempt to put it on an individual unit basis. Better, I feel it would be to follow the practice
3977 which we follow and to allocate that cost on the basis of the gallons moving through the channel.

By Mr. Austin:

Q. You allocated it on a gallonage basis between channels. Now, supposing, Mr. Boatwright, that you were required to make a study of the costs of the distribution of the various individual tank wagon reseller customers. In so doing, when you reached an account such as this account we are talking about, cleaning bulk station driveways and office, or the previous one of general supplies used, would you not allocate that account between the different service stations on an all-gallonage basis, or would you use some other method?

Mr. Hanley: That is objected to as a thoroughly ununderstandable and unintelligible question.

Trial Examiner Ballinger: The Examiner inquires of the witness: Do you understand the question?

The Witness: Well, the question as stated is in such broad terms, Your Honor, that it would be impossible for me to answer it. He is proposing a proposition here which is asking what I would do under an assumed condition. I do not know because I would have to study the limitations of the assignment before I could lay down a course of the procedure to meet the requirements of the assignment.

Mr. Austin: I would like to point out that the assignment which the witness has undertaken here in these

3978 exhibits is just that assignment on a lesser scale. Here he has attempted to allocate costs of one particular customer, Ned's Auto Supply Company. Now, I am simply asking him if he had to do the same thing for all of his customers instead of doing it just for one, how he would divide some of these items.

Trial Examiner Ballinger: But the particular customer to which you make reference is a large purchaser.

Mr. Austin: Yes.

Trial Examiner Ballinger: The others are purchasing in much smaller volume.

Mr. Austin: Yes.

Trial Examiner Ballinger: And what might be done in the case of the purchaser of large quantities might be wholly impracticable in the case of small purchasers.

By Mr. Austin:

Q. Would it be more difficult, Mr. Boatwright, to make a segregation of costs for a smaller station than it has been here to make it for Ned's?

Mr. Hanley: That is objected to, Your Honor, if you please. We get back always to the very sound position which Your Honor took on the occasion of the informal conference at the bench on the question of what the law is in this case. Either we have a responsibility to justify on a cash basis as against an average on our reseller channel cost as against Ned's, or we have the obligation, as Mr. Austin has, on the basis of the lowest single sta-
3979 tion among three or four hundred.

Now, I don't know what the law is. I say the law is this, Your Honor, that we have a right to justify on the basis of the average channel cost, but if that is not the law, then we are entitled to have an interpretation of the law.

3980 Trial Examiner Ballinger: The Examiner has admitted other evidence along this line reserving to counsel for respondent his objection and that at the appropriate time to move to strike.

The objection is overruled with the right of counsel to renew the objection and later to move to strike.

You may answer.

Mr. Austin: Will you read the question again, please?

Mr. Hanley: It is perfectly agreeable to me to have you repeat the question, Mr. Austin, if you want to.

Trial Examiner Ballinger: Let the reporter read the question.

(Question read.)

A. I do not know. One thing that I had learned in repeated research on various problems is that your approach to the solution of a problem must give recognition to the conditions of the problem.

If we were to attempt to isolate out of these costs the absolute expense of doing business to a station, let us assume that it is 2,000 gallons per month, I would have to start again with the function, the responsibility, the assignment of marketing costs and again go through each individual item to ascertain the weight of that particular account in determining that expense item.

3981 Trial Examiner Ballinger: Could it be done with any degree of accuracy?

The Witness: I do not think so, your Honor. I think it would be something that we would have to compute and check and make many arbitrary decisions which in and of themselves would be subject to challenge. I do not think it could be done practically.

By Mr. Austin:

Q. Isn't everything you have just said, Mr. Boatwright, equally applicable to this study you have made here of cost of doing business with Ned's Auto Supply Company?

A. Not by a considerable measure, no, sir. Here is one large account. The entire process of selling that account resulted from a discussion with our field manager and the executive of the large account. It was possible to isolate individual charges incurred or influenced by the account in many cases, and where it was not possible but in the judgment of the man with whom I was working and who was handling these questions consistently and throughout the contract with the account, we adopted the more conservative method of using the larger divisor, so if we erred in any factor we have understated the differential. That condition I think differs widely from attempting to determine the marketing cost of some one small account whose association with the company is on a vastly different basis.

3982 By Mr. Austin:

Q. Referring again to the—well, I will take as an example three items here. The item of $2,186 on Commis-

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sion's Exhibit 81, and to avoid re-reading the titles I will just give you the dollar amount, $2,186.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Well, referring to the item of non-capital expense from appropriations rearranging loading facilities at bulk stations, the item of general supplies used and the item of cleaning bulk stations, driveway and office, and so forth, all three of which are listed on Commission's Exhibit 81, if your problem or assignment was to allocate those expenses as between individual tank wagon reseller customers of the Standard Oil Company in Detroit, can you suggest any method other than an all gallonage basis upon which to make such allocation?

Mr. Hanley: Just a moment.

Will you please read that question.

(Question read.)

Mr. Hanley: That is objected to, your Honor, for the reason that it suggests on the part of the government a supposition that there should be some other method of accounting than used by the respondent.

3983 The law is, and the respondent is entitled to the benefit of the law to the extent that its accounting method, its costs are paramount as distinguished from any theoretical or hypothetical cost that may be suggested by counsel for the government.

The paramount question is what are the costs of the respondent. The question of its efficiency of operation is not on trial. Whatever costs may be there, they are its costs, and that is the only question that is involved in the action, not any theoretical costs that may be evolved by counsel for the government.

Trial Examiner Ballinger: The Examiner is a little perplexed to know what benefit the expression of opinion will be to this case in the final disposition of this case.

Mr. Austin: It is directed to the question of what is the proper method of allocation of these expenses, and that is a question which goes to practically all of these items, because as I think your Honor said this morning, that is the matter that I am chiefly inquiring into. ~~is accepting at~~ least for the purpose of this cross-examination, that these

figures are correct, as the actual figures that were, the expenses of the company, and without conceding that I am not entitled to go into the propriety of the expenses. Nevertheless, at the present time I am accepting these fig-
ures but simply trying to find out whether they have
3984 been properly allocated, whether there is any basis.

Trial Examiner Ballinger: Well, your question is as to whether or not he can suggest any other method. Now, that is a pretty broad question.

Mr. Austin: Any other proper method or practicable method.

Trial Examiner Ballinger: Well, now, if you will qualify that to any practicable method by which he could arrive at a more accurate conclusion, why the Examiner will overrule the objection.

Mr. Austin: Definitely, that is what I meant, your Honor.

Mr. Hanley: Judge, may I say there are a thousand other methods, I have no doubt there are a thousand other methods of accounting that might be used. Are we to be criticized here because we apportion a cost to taking care of the employees of the company on a pension basis, so that they may have a—

Trial Examiner Ballinger: I think counsel for the respondent misconceives what the Commission is apparently after. He is trying to ascertain from this witness whether there is some other method that can be used, and I take it that he may resort to that method to see whether the conclusion arrived at, or whether recourse to that method
would produce the same result as the method which
3985 the witness has employed.

Mr. Austin: No, on the contrary—

Mr. Hanley: That is the difficulty I have been having all day. I concede there are other methods, there are many other methods, I have no doubt of that, but it is not important here.

Trial Examiner Ballinger. I do not know.

Mr. Hanley: We have used a method. Our company has used a method. Now, isn't that the only test, as to whether or not on the basis of the method that we have used and spent our money on the one hand serving Ned's, and on the other hand serving the other reseller channel, ~~isn't that the test?~~

Trial Examiner Ballinger: Judge, that is a question that is reserved, and you have an objection, a continuous objection to this line of examination with the right to move to strike.

Mr. Hanley: All right.

I apologize, your Honor. I am sorry to have imposed again, but I just feel very keenly about this thing.

Trial Examiner Ballinger: Will you read the question?

(Question read.)

Mr. Hanley: If your Honor please, I think the
3986 witness ought to be advised that he is being just
now asked for an opinion on a matter of accounting. He is entitled to do what he pleases about the expression of opinion.

Trial Examiner Ballinger: That is all he is asked for.

The Witness: Shall I answer the question?

Trial Examiner Ballinger: You may.

A. There are other means which could have been adopted. In my judgment the best means, practical, of allocating this small item of expense is to use the all-gallonage method. That is for the distribution of this cost among channels. Please understand, your Honor, we make no allocation of cost to individual outlets, and if we were asked and had to do so, my answer would not apply equally because I do not know what would be the best allocation on an account basis. Among channels my answer stands as given.

By Mr. Austin:

Q. Now, you say "among channels." The question was among service stations. Did your answer apply to my question as asked?

A. I think it does. My answer is to the effect that there are other means of allocating other than gallonage. Many accountants could suggest others; that I accept and approve in this case the use of gallonage as a factor in determining the allocation among channels.
3987 I stated further that I did not know whether it
was the only or the best means of allocating if a company were required to keep expenses on individual accounts. I just do not know.

By Mr. Austin:

Q. Well, in your opinion is the all-gallonage method a proper method of allocating these expenses between—

Mr. Hanley: That is objected to on the ground—

Mr. Austin: I can never finish. We will be three weeks, Judge, on this, because I am going through it question by question.

Mr. Hanley: I will withdraw the objection. Just go ahead and ask your question.

Trial Examiner Ballinger: Read the question.

(Question read as far as asked.)

Mr. Hanley: You are entitled to answer when you understand the question.

Mr. Austin: I have not finished. Now, I will have to start over again.

By Mr. Austin:

Q. Referring again to the item of cleaning bulk stations, driveways, office, and so forth in the amount of $1,672, which appears on Commission's Exhibit 81 under account number 1066, being a breakdown of the miscellaneous item account number 1066 on Respondent's Exhibit 31-H: If that item of expense were to be pro-
3988 rated or divided as between all of the tank wagon
reseller customers of the Standard Oil Company in the Detroit area, what in your opinion would be the most proper method of allocation to use from an accounting standpoint?

Trial Examiner Ballinger: Read that question, please, Mr. Reporter.

(Question read.)

Mr. Hanley: If your Honor please, I must object to that on the ground that, first, it is a complex question. It assumes a fact not in evidence, and it is confusing to both the witness, the court and counsel.

I have no objection, at all, your Honor, to interrogation of this witness as to how and why there was an allocation of this particular item to this particular account, but as to this question I have the objection, as stated.

Trial Examiner Ballinger: Read that question again.

(Question read.)

Mr. Austin: And I would like to change that instead of "most proper method of allocation", I will simply ask the witness what method of allocation he would advise using, if he has more than one method, which he thinks might be used, he can state what they are.

3989 Mr. Hanley: Of course, your Honor, that changes the whole question, and I object to that question as changed.

Trial Examiner Ballinger: Mr. Austin, if that could be determined with absolute accuracy, how could it be of assistance in determining any issue in this proceeding?

Mr. Austin: What I am trying to find out is what method of allocation, whether such an allocation should be made on a gallonage basis, and if not, why not, and what method could be used.

Trial Examiner Ballinger: Well, suppose it could be determined on any kind of a basis, what assistance would it be in deciding any question in this case.

Mr. Austin: The assistance comes from the determining from the answer of the witness, not from any use I intend to make of it in the future.

Trial Examiner Ballinger: But if you could determine the actual proportion of this sum chargeable to any particular station, what assistance would that be?

Mr. Austin: I do not want to find that out.

Trial Examiner Ballinger: Well, then, what is the objection and purpose of the question?

Mr. Austin: To find out the basis for the charging of these expenses on an all-gallonage basis to all the stations for Ned's and leaving Ned's out.

Trial Examiner Ballinger: Well, that is not your 3990 question, is it?

Mr. Austin: Yes. It is directed to that.

Trial Examiner Ballinger: Read the question again.

(Question read.)

Mr. Hanley: Please add to my objection that the question is argumentative.

Judge, may I just say this, please. We have introduced these exhibits, 31-A to Q, and 33-A to some number, I do not remember what. They are Mr. Boatwright's analysis of our costs. Now, there can be no point at all, your Honor, in arguing with Mr. Boatwright about those things. We concede the right of the government to test and analyze his basis for arriving at those costs, but we do not concede that there is any place in this proceeding for arguing with him about whether he is right about his theory of costs.

Trial Examiner Ballinger: The Examiner understands the position of counsel for respondent, but either the Examiner does not understand the question or counsel who propounded it does not fully understand the question.

Now, read the last portion of the question, division between whom. Read the last portion of the question.

(Question read, as follows:

"If that item of expense were to be prorated or divided as between all of the tank wagon reseller customers of the Standard Oil Company in the Detroit area.")

3991 Trial Examiner Ballinger: Now, that means a division between each one of the four or five hundred?

Mr. Austin: What I am asking is as to every one of these expenses this whole thing involves.

Trial Examiner Ballinger: This is off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

The witness may answer, if he can.

Mr. Hanley: May I have that ruling of the court?

(The ruling was read.)

Mr. Hanley: And what is the question? Do you know it, Mr. Boatwright?

The Witness: Well, I think I have an understanding of Mr. Austin's question.

Mr. Hanley: Will you please read the question to the witness with the ruling of the court?

(Question read as follows:

"Q. Referring again to the item of cleaning bulk stations, driveways, office, and so forth, in the amount of $1,672, which appears on Commission's Exhibit 81 under account No. 1066, being a breakdown of the miscellaneous item account No. 1066 on Respondent's Exhibit 31-H. If that item of expense were to be prorated or divided as between all of the tank wagon reseller customers of

3992 the Standard Oil Company in the Detroit area, what, in your opinion, would be the most proper method of allocation to use from an accounting standpoint?")

Mr. Hanley: Now, I wish to add to the objection that the question is hypothetical asked of a witness unqualified by the asking attorney to answer the question, thoroughly theoretical and hypothetical, immaterial, not pertinent to the issues in the case and not applicable to any issue involved in the litigation.

Trial Examiner Ballinger: The Examiner sustains the objection.

Mr. Austin: Are you reversing your ruling now?

Trial Examiner Ballinger: If this is a reversal, I am reversing my previous ruling.

Mr. Austin: You just ruled on the record that the witness could answer.

Trial Examiner Ballinger: I understand, but the Examiner cannot understand how this is material to any issue in this proceeding.

Mr. Austin: I won't press the matter any further at this time, Your Honor, but I may have other similar questions on various other accounts.

Trial Examiner Ballinger: The Examiner will pass on them when they arise.

By Mr. Austin:

3993 Q. Turn to Exhibit 31-I, please, Mr. Boatwright. At the top of Exhibit 31-I you use the total Detroit field tank wagon reseller gallonage, including Ned's gallonage for a divisor in arriving at a cost per gallon for the expense items listed on Respondent's Exhibit 31-H; is that correct?

A. That is correct.

Q. Does this division not result in a cost of .084 cents per gallon for Ned's Auto Company's gallonage as well as for the gasoline sold to the other tank wagon resellers?

A. Inasmuch as the 70,629,000 gallons was used as a divisor for the total expenses incurred, I have explained that the 70,000,000 was adopted as a conservative procedure so that if I erred in any way, shape, or form, the .084 would be an understatement of the different rather than an overstatement of the difference.

Q. Isn't the purpose here to arrive at an accurate result rather than either an overstatement or understatement?

A. That is right.

Mr. Hanley: Just a moment. Read that question.

(Question read.)

Mr. Hanley: Of course, Your Honor, that is objected to. You may answer. I won't interpose the objection.

Trial Examiner Ballinger: The witness may answer.

3994 A. As stated, that is correct, but as also stated as we have discussed the various component parts making up the expense items, I have stated that it was impractical time and again to break down items of a general nature other than on the gallonage basis used in the allocation.

Being impractical to attempt an isolation of actual costs by individual outlets, it seemed my obligation that if I could not get the true absolute figure, which is an impractical and an impossible objective, then when making choices, I should adopt those figures which would lead to a conservative statement rather than attempting in any way, shape, or form to magnify the difference in marketing costs. Absolutely, the true figure is the objective, but what is the true? I don't know.

Q. Well, in using the total gallonage here, the total tank wagon reseller gallonage of 70,629,027 gallons, what happens then to the portion of the expenses listed on Respondent's Exhibit 31-H, which would be represented by a figure obtained by multiplying .084 cents per gallon by Ned's gallonage?

Mr. Hanley: Now, I don't know whether I want to object to that or not.

Trial Examiner Ballinger: One moment, Judge.

Read the question.

(Question read.)

Trial Examiner Ballinger: Are you including in that
question all of the various items listed on Respond-
3995 ent's Exhibit 31-H?

Mr. Austin: That is right, yes.

Mr. Hanley: I make an objection at this time, that counsel does not understand the question. I object on the ground that it is unintelligible. If the witness knows what counsel is talking about, I have no objection at all to his answering.

Trial Examiner Ballinger: That is a matter for the witness to determine.

Mr. Hanley: I think so.

You may answer.

The Witness: Well, I am not sure that I do understand what he is referring to, Your Honor.

Mr. Hanley: I am very sure I don't.

By Mr. Austin:

Q. Well, you have taken the figure of $59,186.15.

~~A. That is correct.~~

~~Q. Which appears on Respondent's Exhibit 31-H.~~

Trial Examiner Ballinger: That is the total of all the items?

Mr. Austin: Yes.

The Witness: Yes, sir.

By Mr. Austin:

Q. And you have divided that by this 70,000,000 gallons, which is the total reseller gallonage including
3996 Ned's Auto Supply gallonage?

A. Yes, sir.

Q. In 1937.

Now, turning to Exhibit 31-A, it will appear that there is—

Trial Examiner Ballinger: One moment.

Mr. Hanley: 31-A?

Trial Examiner Ballinger: Read the question.

(Record read.)

By Mr. Austin:

Q. (Continuing.) —it will appear that there is no expense charged to Ned's Auto Supply Company opposite the item 2-B, but that there is—

Mr. Hanley: I am sorry to interrupt, but what do you mean by 2-B?

Mr. Austin: If you will look at Exhibit 31-A.

Mr. Hanley: Yes, I have it before me.

By Mr. Austin:

Q. But that there is—

Mr. Hanley: Oh, I see.

Q. —an expense per gallon of .084 cents charged opposite item 2-B to regular reseller business.

Now, turning back to Respondent's Exhibit 31-H and I, the charge of .084 cents to regular reseller business as shown on Exhibits 31-H and I accounts for only a
3997 portion of the sum total of $59,186 appearing on Respondent's Exhibit 31-H. In other words, the portion of it which would result from a multiplication of .084 cents by the tank wagon reseller gallonage other than the gallonage of Ned's Auto Supply Company, so that leaves unaccounted for a portion of this total expense on 31-H which would be represented by multiplying Ned's gallonage by the sum of .084 cents per gallon.

Mr. Hanley: That is objected to as testimony and argument of counsel.

Trial Examiner Ballinger: Is that a question or a statement?

Mr. Hanley: I don't know whether that is a question or not. I haven't any objection to the witness explaining the exhibits.

Mr. Austin: The question is: What happens to the rest of that expense shown on Respondent's Exhibit 31-H, and how is it accounted for?

Trial Examiner Ballinger: Do you understand the question?

The Witness: Well, Your Honor, I don't think we are much closer to an understanding of the question than we were before.

Trial Examiner Ballinger: Well, do you understand what Mr. Austin desires?

3998 The Witness: I fail to understand why he has stated that the division of $59,186.15 by 70,629,027 gallons does not result in .084 cents per gallon.

By Mr. Austin:

Q. It does. I didn't say that it doesn't.

A. Oh, it does? That is correct.

Q. Yes.

A. Now, your question is, because we had used the larger divisor of 70,000,000 gallons what becomes of some part of this $69,000?

Q. By using that divisor, Mr. Boatwright, your result is a cost of .084 cents per gallon for every gallon of that 70,000,000 gallons; isn't that right?

A. Yes.

Q. And that 70,000,000 gallons includes Ned's gallonage?

A. That is right.

Q. So that when you charge .084 cents per gallon to all of the other reseller gallonage you still have got .084 cents per gallon for Ned's gallonage, which you haven't entered anywhere because there is nothing in Ned's column on Exhibit 31-A.

A. No, but I haven't—

Q. That is what I want you to explain.

A. That is a misapprehension.

Trial Examiner Ballinger: That is what?

The Witness: A misapprehension.

3999 A. This calculation throughout 31-A through Q is predicated upon individual items of your marketing expense statement. It is not a balanced item in the sense that you could take each of the different gallonages and extend it and secure thereby our sum total of marketing expense, tank wagon reseller channel, in the Detroit field.

We stated on direct testimony that there were certain items of expense which in our judgment could not be allocated and, hence, were not allocated. We stated there were other items of expense which were not even given considerations in terms of the inclusion in the analysis because of their remoteness.

Now, I stated the explanation of .084 and the use of the 70,000,000 gallons. I stated that these items of the expenditure enumerated as making up the sum total of $79,186.15 were, in my judgment, an expense item or items which were uninfluenced by Ned's Supply business. In discussion of the individual items making up that total, I admitted in cases that there were some expense items incurred which were associated with the bulk plant. In describing the allocation of certain of the different items, I stated that some of them were charged direct, some of them were charged to the tank wagon reseller plus consumer channel, and some were charged on a basis of an all-gallonage divisor. I further stated in the testimony this afternoon that if it were possible each of these could have been divided by the gallonage specifically applicable to the specific expense—if it were possible—it was not possible. Therefore, rather than understand—rather than overstate the differential, I used the larger divisor so that, if anything, I am penalizing the differential between Ned's Auto Supply gallonage and tank wagon reseller gallonage. There is no lost expense. It is all in the field expense.

Q. Then is it my understanding that there is no reason for using this larger divisor except just the desire upon your part to understate the expense rather than overstate it?

A. I would go so far as to inform you, sir, that I first made the calculation on the basis of the smaller gallonage and I revised the sheet thinking that I would rather err on the conservative side of the picture than on the other.

Q. Then you reached the conclusion that you would have some margin of error in using either figure; did you not?

A. I reached the conclusion that there is a small possibility of a margin of error, perhaps amounting to thousandths of a cent, and if it came to a choice I would prefer to err on an understatement of the difference than an overstatement I revised the work sheet so I could use the larger figure.

Q. And the larger figure is the same figure which was used by your accountants wherever an all-gallonage allocation was made to the tank wagon reseller channel on Form 189; is that correct?

A. Yes, sir.

4001 Trial Examiner Ballinger: Take a five-minute recess.

(There was a short recess taken.)

Trial Examiner Ballinger: Come to order.

By Mr. Austin:

Q. I will now refer to Respondent's Exhibit No. 31-I, entitled "Semi-direct expense items not incurred in handling the volume of Ned's Auto Supply Company," referring to account No. 1087, general supplies used, in the sum of $1,258.94.

Will you please distinguish that account, Mr. Boatwright, from the item listed on Commission's Exhibit 81, which has exactly the same title, general supplies used, the amount on Commission's Exhibit 81, being $1,929.

A. Well, general supplies used in account 087 is made up largely of rope, brooms, towels, soap, drinking water, bottles, and first aid kits, flashlights, labor, and mailing costs, and are incurred primarily at bulk plants.

Q. And where is the item similarly entitled appearing on Commission's Exhibit 81 primarily incurred?

A. Primarily in the reseller account.

Q. Is it your opinion that this item of expense appearing opposite account No. 1087, which is incurred primarily at bulk plants is in no part incurred in handling the volume of Ned's Auto Supply Company?

Mr. Hanley: That is objected to on the basis that 4002 it calls for an opinion.

Well, Judge, I will withdraw the objection. I am perfectly willing to let that question be answered. I just automatically object sometimes.

Mr. Austin: He has already stated that; and it is in the exhibit itself.

Mr. Hanley: I am perfectly willing to withdraw the objection.

A. Well, the answer is completely in keeping with the exhibit. This item of expense is not influenced by the Ned's Auto Supply business.

By Mr. Austin:

Q. Why not?

A. Because we would not buy any more ropes, any more drinking—bottles of drinking water, we would not buy any more of the items of this nature with that account or without that account.

Q. Is this expense influenced any more than by any other single tank wagon reseller account than it is by Ned's Auto Supply business?

A. Yes, it is, because the other accounts do not buy in the quantities and do not take similar size dumps, and I would say that the rank and file of reseller outlets would probably have a greater influence on it because it requires more personnel per gallon to handle those accounts 4003 than it does to handle an account the size of Ned's.

Q. Well, this is an expense, as you say, of rope, brooms, towels, soap, and so forth, first-aid kits, flashlights; do I understand you to say now that that item of expense is not directly chargeable to Ned's, but is more properly chargeable to any other single tank wagon reseller account?

A. Well, I think that the Ned's business could be added to or detracted, and that expense item would remain unnoticeably—would not be changed noticeably. I do not think that you could find the influence of Ned's gallonage upon that expense item at all.

Q. And in your opinion is that a proper test as to whether to charge any expense item to Ned's business?

A. Well, if this expense item were of such nature that the existence of this account has no bearing on the magnitude of the expense, it certainly becomes a test.

Q. Wouldn't the same thing be true if you should pick out any other single tank wagon reseller account and take an account—I was trying to think of one, I remember Marvin Goldberg, who has a service station; suppose we take Marvin Goldberg's service station, which I believe handles, Mr. Raupaugh said, about 300,000 gallons a year, would not it also be true that these expenses would not be influenced by that account, whether it was retained or lost?

Mr. Hanley: If Your Honor please, may we have 4004 another reassurance on the record, all of this line of testimony is subject to the original—

Trial Examiner Ballinger: Judge, it is not unnecessary for you to repeat that objection. It is reserved to you.

A. Well, I am not acquainted with the Marvin Goldberg account referred to, but your position is correct in that if we were to isolate any one of the regular resellers accounts, that the influence of the withdrawal of that account could not be detected in this item. It is not true to the same extent as it would be true with the withdrawal of Ned's, for the reasons mentioned.

By Mr. Austin:

Q. Is the total of the expenses which are entered under account 087 allocated between channels on Form 189?

A. Yes, sir.

Q. Is the allocation made on an all-gallonage basis?

A. Part of the expenses in 087 are allocated on the basis of total tank wagon gallons, the residual is allocated on the basis of all gallonage.

Q. And the part that is allocated on the basis of tank wagon gallonage, is that allocated on an all-gallonage basis, on an all-tank wagon gallonage basis as between reseller and consumer?

A. Let's phrase the answer this way, that part which is allocated on tank wagon gallonage basis is allo-
4005 cated on the basis of ratio of tank wagon reseller gallonage and tank wagon consumer gallonage to total.

Mr. Hanley: Judge, may I violate the promise I made Mr. Austin, and ask permission to inquire first as to what account they are talking about?

Mr. Austin: The account entitled "General Supplies Used," which has the generic number 087.

Mr. Hanley: And on what exhibit does that appear?

Mr. Austin: Respondent's Exhibit 31-I.

Mr. Hanley: Now, second—087 on 31-I.

Secondly, may I have permission to inquire of the witness as to whether or not this item applies only to gasoline.

Trial Examiner Ballinger: You may.

The Witness: It does not apply only to gasoline.

Mr. Hanley: What does it apply to, Mr. Boatwright?

The Witness: It applies to your operations through your plant. Now, part of your expenses might apply only to your tank wagon products. We refer to them as products moving through faucets, and any expense of that nature which apply to that classification of products which

would include our gasoline, refined oils, fuels, tractor fuels, et cetera, would be allocated on the basis of tank wagon gallonage; other items of a general nature which we could not associate with any particular channel of distribu-
4006 tion is allocated among the channels on an all gallon-
age basis.

Mr. Hanley: Judge, may I inquire if the witness has a knowledge as to the approximate percentage of gasoline to other products that are represented by this item?

Trial Examiner Ballinger: You may inquire of the witness.

Mr. Hanley: Is that a sufficient statement to constitute a question, Mr. Boatwright?

The Witness: But I have a knowledge as to the reseller channel.

Mr. Hanley: That is what I mean, of course.

The Witness: Well, gasoline through the reseller channel represents approximately 98 percent of the volume in the field of Detroit.

Mr. Hanley: That was all, and thank you.

By Mr. Austin:

Q. The figure of \$1,258.94 opposite account 1087 on Respondent's Exhibit 31-I represents only an expense which has been allocated to the tank wagon reseller channel; is that correct?

A. That is correct.

Q. So that that figure, as I understand it, does represent an expense which has been allocated to that channel, and, therefore, only to the products included in that channel?

A. That is correct.

Q. Is that right?

4007 A. That is right.

Q. That the products included in that channel are, as I understand it, gasoline and refined oil, and some tractor fuel, perhaps?

A. Well, I think there was a little burning oil. I think the quantity is a little less than a thousand gallons in the Detroit field, it is a negligible—it can be forgotten. The rest is division between gasoline and refined oil.

Q. Is it not true that all of the expense figures which appear opposite account numbers—in Respondent's Exhibit 31, and all the various letters, and wherever those expense figures have been lifted from Form 189 as they have in the case of Respondent's Exhibit 31-I, those figures included expense for refined oil, tractor fuel, and burning oil, as well as for gasoline; is that correct?

A. Wherever a total figure has been lifted from the 189, we have taken it from the tank wagon reseller channel except for those particular items of property investment, which I enumerated under the service station channel, but in the main, your statement is factual, and wherever the charge is made direct or upon an allocation of time basis, it is allocated to the channel wherever an allocation is made by the usage of gallons, the allocation is determined upon the ratio of gallons among the channels. Having determined the ratio of gallons among the channels, any suit cost going to make up that total is a unit 4008 of a gallon of any product, in the exception of that to reach the total it is extended largely by gasoline gallonage because I say about 98 percent of the volume through this channel is gasoline.

Is that a clarification?

Q. Yes. I wanted to bring out, though, that any expenses here which are based upon tank wagon channel allocations, whether the allocation is made on a gallonage basis or on a time basis, that any expense figure here which results from the use of your allocation to the tank wagon reseller channel does include a portion of about 2 percent, which is not a charge of the sale or delivery of gasoline?

A. That is correct. That is why we have to divide it by the total of the gasoline and the refined oil to get a unit cost. I think that is clear throughout the exhibit and throughout the testimony.

Mr. Hanley: Well, if Your Honor please—I do not know whether this need be on the record or not.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

By Mr. Austin:

Q. And you referred a moment ago to the method used for allocating this 087 account expense between channels on Form 189, and when such an allocation was 4009 made as between all three channels, or as between tank wagon consumer and reseller channels, was the gallonage on Ned's Auto Supply Company in each case included in the tank wagon reseller gallonage for the purposes of making the allocation?

A. Yes, sir.

4010 Q. Now, this item which is comprised of numerous and sundry items such as drinking water, bottles, ropes, brooms, towels, soaps, first aid kits, flashlights, labor in handling mailing items, and so forth; As you stated on direct examination, "defying classification of the usual expense items," were these supplies used by the company and its employees, or were they used by service station operators?

Mr. Hanley: That is objected to, your Honor. It calls for a conclusion on the part of the witness—what somebody else thought.

Well, I will withdraw the objection again, Judge. I want this witness to testify fully.

By Mr. Austin:

Q. You have already stated, Mr. Boatwright, that these items were used chiefly at the bulk plants?

A. That is right.

Q. It would follow, would it not, they were used by the company and not by service stations?

A. Well, they are used primarily by the company employees of the plant.

Q. Is there any reason in your opinion why the expense of labor in handling mailing items is not equally chargeable to Ned's gallonage as to the other gallonage; that is, other tank wagon reseller gallonage?

A. Oh, yes, there would be no mailing of items to
4011 Ned's Auto Supply Company. You see, we made the delivery to Ned's Auto Supply; the driver didn't even collect. The recipient of the product just signed a receipt; we billed them once a month; and there wasn't the usual knick-knack mailing and handling constant back-and-forth transactions between that distributor and the rank and file of our distributors. Even in the collection of the account, it was simplified to the nth degree, where all we did was submit a monthly statement and we got a check.

Q. Is your answer then that this particular mailing expense would not be allocable to Ned's because you had less mail, less correspondence with Ned's, or does not that item refer to general mailing expense entirely aside from service station correspondence?

A. Now you are referring to the itemization of expense items making up account 087, are you not?

Q. Yes. I don't want to waste much time on that because it is, no doubt, a very tiny thing, but one of the many things going into that account, and it struck me as a rather difficult item of expense to attempt to allocate upon anything but an all-gallonage basis.

A. Well, I just can't conceive as I sit here now of there being any mailing from the bulk plant to Ned's Auto Supply unless to correct an error or something like that. They would be an insignificant number and I can't think
4012 of that expense being incurred in any way, shape or form in connection with Ned's.

Q. That expense, of course, is not one which relates to bulk plants, is that right, or does it relate to bulk plants?

A. Well, it may relate to bulk plants. In other words, we have a mailing cost at our bulk plant as well as from the general office.

Q. Well, perhaps the general office would be included in your office expenses somewhere else.

A. Well, we have a separate classification of expense here having to do with mailing cost. I don't see it just this minute.

Q. Well, if you have any difficulty there, let's just drop the question.

A. I don't see the particular enumeration of expense and mailing cost of the general office. It is included in one of these items but would require review of my notes to determine the exact item in which it is included, but we do have a cost at bulk plants and at the Detroit field office for mailing.

Q. I am curious what is meant by "labor in handling mailing items."

A. Probably it involves the question of wrapping or packing of any item of a packaged nature that may have been mailed from the bulk plant.

4013 Q. Referring now to account 088, station operating tools and equipment, in the sum of $6,013.23. It appears on Respondent's Exhibit 31-I. You have enumerated the principal items going into that account at pages 2519 and 2520 of the record. Do not the majority of the items enumerated by you as being included in account 088 constitute articles which are used at the bulk plant offices and other properties operated by the company?

A. The majority of the items enumerated are used in the operation of the bulk plants.

Q. Will you explain as to those items, why they are not chargeable equally to each gallon of gasoline sold?

A. Well, again it is a question that this classification of expense items was uninfluenced by the tank wagon gallonage sold to Ned's Auto Supply. I don't see how these expense items would have been influenced one way or another by this volume, and again because this item has been allocated on a gallonage basis, I think you will find that my divisor in this case was a divisor which included Ned's again. In discussing this item with the accountants who actually made the allocations of the cost, it was their opinion in which I shared, that it could not properly be charged to the volume of Ned's Auto Supply.

Q. Does this account 1088 include any station operating tools and equipment furnished to service stations?

4014 A. No, those are in a separate account.

Q. Is it not true that such tools—

A. May I check that just a moment? For 1937. We change these classifications at times between years and I would have to check to see whether that split was made during '37 or not.

During the year 1937 account 1088 was an allocation of station operating tools and equipment employed at the bulk plants and at reseller outlets operated—or leased by lessees and operated by those individuals. Since that date, namely, in 1940, we have segregated out of the composite account 088 a subdivision identified as 088-A having to do with station operating tools and equipment, service station owned properties complete; 088-B, station operating tools and equipment, service station owned buildings on leased ground; and 088-C, station operating tools and equipment, P. O. S. S. L. properties, leased out during the year 1937. Therefore, station operating tools and equipment was a broader classification and included such tools and equipment as may have been utilized by facilities in addition to the bulk plant operation.

Q. What is the total of the station operating tools and equipment items for tank wagon reseller channel and tank wagon reseller channel on form 189 for 1937?

A. Account 088, station operating tools and equip-
4015 ment, portion allocated tank wagon reseller channel, $6,013.23.

Q. Do you have an account 088-A or 088-B or 088-C on your form 189 for 1937?

A. No, that segregation of cost is made at a later date.

Q. Then do you have any expense entered for station operating tools and equipment in the leased service station column?

A. In 1937?

Q. Yes.

A. No, sir, that is included in the general classification and was allocated.

Q. Was the allocation between channels on form 181 for 1937 for account 088 made on an all-gallonage basis?

A. It was made on either one of two allocations. You see, the individual items of expense entering into this total would have been allocated to our form for the distribution of costs to these individual expense classifications on the basis of one of two procedures. Such items as were chargeable to tank wagon business were allocated according to the ration of the volume moving through tank wagon reseller channel and tank wagon consumer channel. That part of the expense which could not be associated solely with tank wagon business would be allocated on the basis of an all-gallonage basis.

Q. And was Ned's gallonage included in the tank wagon reseller gallonage used in both instances in prorating
4016 this expense?

A. Yes. Yes, it was.

Q. Do you know the portion of this item of $6,013.23 which was an expense incurred by the supplying of tools and equipment to leased service stations, and what portion represents the balance incurred principally at the bulk plants?

A. Oh, no. No one knows that, because we did not have a separation of that account at that time. It would mean a going back and determining the items entering into the total and then allocating them on the basis of our present allocation, which not only is impractical but I am afraid it would be impossible.

Q. Are not the station operating tools and equipment furnished to 461 contract service stations account for as an E. L. A. expense under account 070?

A. No.

Q. Does account 088 include for 1937 any station operating tools and equipment furnished to the 461 contract service stations?

A. If there were any station operating tools made available to these accounts, it is in 088.

Q. Do you know whether there was any made available to them?

A. I think the likelihood is that they would be limited, if any.

4017 Q. But it is your opinion that there was a substantial amount of such tools and equipment used at the leased service stations?

A. Both at the leased service stations and the P. O. S. S. L.'s, if you are including that in your statement.

Q. I do.

A. Yes.

Q. I might say, Mr. Boatwright, just for facility, whenever I refer to leased service stations, I mean a service station that is leased from the company regardless of whether the company was the owner or the lessee of the property.

A. I see. Well, if the different ones using these terms have been using them differently, and I just want to be sure that we are using the terms and implying the same meaning.

Q. Yes. I think for the benefit of the Examiner and counsel it would be convenient to make that distinction between 461 stations and leased stations as two broad classes, which I believe will include on that basis all tank wagon reseller stations.

A. I shall try to observe that in any discussions.

4018 Q. And any time, of course, that you feel that some further expression should be made, you are always at liberty to make it, but that is what I mean unless I indicate to the contrary.

A. All right. I just wanted to be sure we were operating under a common understanding.

Q. And is it your opinion that none of this expense of station operating tools and equipment, in so far as that expense is incurred at the bulk plant, is properly allocable to the expense of sale and delivery of gasoline to Ned's Auto Supply Company?

A. Well, I do not think that it is.

Mr. Hanley: Will you inquire as to what time you mean, Mr. Austin?

Mr. Austin: 1937.

Mr. Hanley: Is that your understanding?

The Witness: Yes, sir.

By Mr. Austin:

Q. Referring now to the last item at the bottom of Respondent's Exhibit 31-I, which is account No. 1204, office expense exchange, $6,181.50. On page 2521 of the record, you stated: "Account 1204, entitled 'Office Expense Exchange,' is in reality the sum total of the cost of performing the banking function which is incurred in conjunction with the distribution of gasoline. Thus our driver may deliver gasoline to a reseller outlet. That reseller may
have cashed several checks for his customers, and in
4019 turn in payment of his account to our driver or to the
company he endorses those checks. Those checks then
are handled individually through our account and proceed with any clearance or fee incident thereto being charged." By the last two words, "being charged," do you mean being charged to this account?

A. Yes, any fee for the cashing of checks or performing the banking function or transmitting of funds is chargeable to this account.

Q. Now, did you state a moment ago that Ned's did not pay for gasoline delivered to other service stations in the same way as other service station operators paid?

A. Yes, I did.

Q. Will you explain that, please?

A. Yes. Deliveries to Ned's Service Station were made on a complete dump basis except as per our convenience as outlined in testimony yesterday. Ned's Auto Supply Company were anxious to keep their driveways open at all times. The driver dumped the load, he pulled the truck off the driveway, and the attendant at the outlet signed for the receipt of the product. The receipt of the product being acknowledged, Ned's Auto Supply Company's account would be billed once a month for this merchandise rather than making a settlement with each delivery.

Q. Was any other customer extended that privi-
4020 lege of credit and payment in that manner?

A. I do not think any other reseller was on that basis. I would say our general policy is that the distribution of gasoline is the payment upon receipt basis.

Q. Gasoline is generally sold for cash, is it not?

A. That is correct.

Q. And collection made by the driver?

A. Yes, sir.

Q. But you say that Ned's was billed on a monthly basis.

A. Yes. It was a convenience to us to do it in that manner as well as a convenience to them to do it in that manner.

Q. But you stated a moment ago in your answer to the previous question that deliveries to Ned's were all full dump deliveries except where some partial dump delivery was made for convenience.

A. At our convenience.

Q. Do you know that as a fact, or is that based upon hearsay from other employees of the company?

A. Where hearsay stops and factual information begins is never clear to me in testimony of this type. I talked to drivers, I talked to the tank wagon superintendents, I talked to the men who operated the plant making deliveries to this account. These men individually told me that they were full tank deliveries with the exception of where, for our conveni-
ence in cutting our costs, we could make partial dump
4021 deliveries on return trips rather than pulling back to
the yard with maybe two compartments filled.

Now, I can say this, it was impossible to examine the individual tickets because those have ceased to exist. They are only retained a year.

Mr. Austin: Well, I would like to state, Your Honor, that I make no objection or motion to strike any of that because I think it is proper in so far as it states the witness' reasons for the conclusion he has reached as an accountant and an economist in preparing these statements.

Trial Examiner Ballinger: And the sources of his information.

Mr. Austin: Yes. However, I do wish to make a notation upon the record that I object to such testimony as hearsay in so far as it might be considered proof of the method of delivery to Ned's or of the number of full dump deliveries which Ned's received, because as proof of that fact it is purely hearsay. As a basis for the witness' act in preparing these exhibits, of course it is a proper answer, as Your Honor has just stated, but I think that perhaps something should appear on the record to indicate that the answer, as given by the witness, not in answer to—well, I would, my question to the witness, I believe, was as to the source of his information on that point, and I think it appears that is hearsay.

4022 Now, I am a little at a loss to know how to express the objection, but I do not want to receive that as proof.

Trial Examiner Ballinger: Well, the Examiner is strongly of the opinion that it rises to higher dignity than mere hearsay. Here is an employee of the company whose business it is to know about these things.

Mr. Austin: Well, he does not know what happened in 1937, and the only people who do know where the people in charge of the deliveries to Ned's at that time, or the information, of course, could be obtained from the records, but they do not exist.

Trial Examiner Ballinger: Well, he has made an investigation by inquiry of those in the employ of the company that know.

Mr. Austin: Yes.

Trial Examiner Ballinger: And I think that rises to higher dignity than mere hearsay, and that if it is to be questioned that the employees of the company should be called.

Mr. Austin: Well, of course, if the Respondent should offer testimony upon the question of full dump deliveries to Ned's in 1937 obviously they could not call Mr. Boatwright for that purpose, and I believe if they did—they might call him, but if they did I believe Your Honor would exclude such testimony on the ground it was hearsay, and that they should call the employee who was in charge of those deliveries.

4023 Now, as I said before, I am not in any way questioning the competency and relevancy of this testimony in connection with these cost studies, but I feel that it is no proof of the fact of the size and quantities of deliveries made to Ned's in 1937.

Trial Examiner Ballinger: Didn't Mr. Raupaugh testify with reference to the deliveries?

Mr. Austin: Not to 1937, no, I do not think Mr. Raupaugh gave any testimony regarding deliveries to Ned's when Ned's was on a tank wagon basis. I did not want to go any further with it except to make my own notation on the record to preserve a position, that is all.

Mr. Hanley: I do not know what these notations on the record mean. After all, this argument between Counsel for the Government and the Court, the Respondent has this to say, that the Government asked a question and they got an answer, and I think they are bound by it. It does not make any difference whether it is hearsay on some theoretical rule, or whether it is not. It is the testimony in the record, and counsel ought not to be entitled after he gets an answer that he has asked for to make a long statement to qualify a witness's answer. The answer is the witness' answer. It is not a matter of qualification for counsel. He asked for it. He got it. Now, that is all, and that is all there is to it.

Trial Examiner Ballinger: Proceed.

4024 Mr. Austin: I was satisfied with the witness' answer to the question I asked, but the question I asked was as to the source of the information and the answer discloses the source of the information which I think is clearly hearsay.

Mr. Hanley: Well, everything is hearsay, in the last analysis.

Mr. Austin: It is perfectly competent, as I said before, for Mr. Boatwright to use that, and even not as good evidence, for his opinions on cost study, so perhaps this is—maybe I am trying to make a distinction which is unnecessary, now.

I will proceed.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Proceed.

By Mr. Austin:

Q. Do you know whether any cash discount was allowed Ned's Auto Supply Company for payments promptly or within a certain length of time after the first of the month on bills submitted to them?

Mr. Hanley: I am sorry. I did not hear that.

Will you read that question, please, Mr. Reporter?

(Question read.)

4025 A. No cash discount is applicable to tank wagon sales of gasoline. There is no such thing.

By Mr. Austin:

Q. Well, what is your answer to that question?

A. That is the answer to the question. There just is not any such thing as cash discount on tank wagon sales of gasoline to any customer.

Q. You mean no such discount was allowed to Ned's in 1937?

A. No such discount was allowed to Ned's, or any other customer.

Q. Why is not the expense entered in this account No. 1204 allocable to all gallonage equally as much as the expense listed in the accounts stated in Exhibit 31-Q?

A. Why is not office expense exchange, being account No. 1204, synonymous with expense items enumerated in 31-Q?

Q. Yes.

A. Because it is definitely of a different nature. This item of expense was not involved at all with Ned's Auto Supply business. His billing and his payment of the account to the Standard Oil Company was not comparable with, in any way, shape, or form, our regular means of settling accounts with resellers. It remains an item of marketing cost on the statement, and no part of that cost can be attributed to Ned's.

It has by no means any justification of being considered in the same classification of items of expense at all as was enumerated under 31-Q.

4026 Q. And just one more question: Consider accounts 1087 and 1088 on Respondent's Exhibit 31-I, and consider account number 1000 on Respondent's Exhibit 31-Q—and I might ask this question regarding a number of different accounts, but I think we will use this—

Mr. Hanley: If your Honor please, that sounds awfully complicated. I think if we are going to adjourn, we ought to adjourn; if we are not, we ought to keep on, one of the two.

Mr. Austin: I haven't even stated the question. I simply referred to three account numbers.

Mr. Hanley: Yes, but the accounts are so complicated that whatever the question is, it is still complicated.

I have no objection to the question, your Honor, except to his asking it, if we are going to adjourn. I don't care which it is.

By Mr. Austin:

Q. Will you explain why it was more difficult to make a division of expense under account No. 1000 between

Ned's and other stations than it was to make a division of expenses on 1087 and 1088?

Trial Examiner Ballinger: Read the question.

(Question read.)

A. Yes. I think honestly that a small part of the account 1000 should be chargeable to Ned's Auto Supply and to that gallonage. It is a fact that Mr. Raupaugh and the assistant, Mr. Blau, made a business agreement with these gentlemen; they discussed it; it took part of their time; and they worked with this account. Now, as such a part of that, and I must confess that I gave serious consideration as to including the account 1000 as an item which is influenced to a negligible extent by Ned's, but I thought it would be better to put that in the back part under Exhibit 31-Q, because in all honesty it is influenced by Ned's and should receive in part a charge for expenses of that gallonage. In the same consideration and honesty, I don't see how it would be physically possible for the item of office expense exchange to be influenced by a magnitude in excess— 4027

Q. No, please, Mr. Boatwright. I am referring to 1087 and 1088.

A. I will go all through the three of them.

Q. I didn't refer to 1204 in the question. I just wanted to relieve you of that.

A. Well, looking into account 1088, station operating tools and equipment, the amount being in total $6,013.23, I don't believe that the insignificant proportion of that item that could be attributed to Ned's Auto Supply business—

Trial Examiner Ballinger: Which item are you referring to?

The Witness: Account 1088, station operating tools and equipment, shown on Respondent's Exhibit 31-I. 4028

Trial Examiner Ballinger: All right.

A. —is comparable with the account 1000, where I know that the supervision function of the Detroit field did spend time and did incur costs in handling the Ned's Auto Supply outlet.

Now, referring to account 1087, general supplies used, a small part of that may be attributed to Ned's gallonage. I enumerated the items and I don't believe that we would have purchased any more rope or any more of these little items with the account or without the account. I think that honestly there is a difference in the classification I have employed and I have stated in one case that I can't allocate supervisory costs between this account and this account, although I know from my experience that it is incurred to a greater extent on the rank and file of reseller accounts than it is on the gallonage of Ned's Auto Supply. Therefore, I have just put it in a classification of conservative items on 31-Q and I think that is where it belongs.

By Mr. Martin:

Q. Would Mr. Raupaugh's salary have been any less if the Standard Oil Company had lost Ned's business?

Mr. Hanley: Just a moment. Read that question.

(Question read.)

Mr. Hanley: Well, Judge, I just haven't made any objections at all to this cross-examination, and I don't
4029 know whether I ought to object to this or not, but your Honor can certainly see how thoroughly objectionable that kind of a question is.

If you can answer it, go ahead.

A. Well, there is only one answer I can give to that. I don't know. I have no control over Mr. Raupaugh's salary.

Mr. Hanley: It doesn't seem to me the government ought to ask that kind of a question, Judge.

Mr. Austin: I don't want to continue this further. I intended that would be the last question.

Trial Examiner Ballinger: Are you through?

Mr. Austin: I move we adjourn, your Honor.

Trial Examiner Ballinger: The motion is granted, and now, at 4:40 p. m., the hearing stands adjourned, to be reconvened at 10 a. m., June 18, 1941, in Room 332, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 4:40 o'clock p m. the hearing was adjourned to Wednesday, June 18, 1940, at 10 o'clock a. m. in Room 332, Federal Trade Commission Building, Washington, D. C.)

4030

Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Wednesday, June 18, 1941.

Met, pursuant to adjournment, at 10 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., appearing on behalf of the Federal Trade Commission.

Harold R. Hanley, Esq. (910 South Michigan Avenue, Chicago, Ill.), appearing on behalf of the Respondent.

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

This is a reconvening pursuant to notice of Docket 4389, in the matter of Standard Oil Company, at 10 o'clock a. m., Eastern Standard Time, June 18, 1941, in Room 332, Federal Trade Commission Building.

The last hearing was held in Washington, D. C., on June 17, 1941.

The Reporter will not Counsel for the Commission and for the Respondent present.

You may proceed.

JOHN W. BOATWRIGHT thereupon resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Austin.

Q. Mr. Boatwright, will you turn to Respondent's Exhibit 31-Q, the second item on that page, account No. 1008, salaries—warehouse labor.

What is meant by warehouse labor?

A. Those are the regular employees working in a warehouse, handling merchandise, inventories, and stocks, and so forth, of the company.

Q. What do you mean by warehouse and merchandise and stocks?

A. We refer to a bulk plant as being a warehouse, 4032 and classify the labor employed at that bulk plant as warehouse labor.

Q. Then, is that mostly labor at the bulk plants or entirely labor at the bulk plants?

A. Yes.

Q. The expense shown for that account in the tank wagon reseller channel is $21,913.13. Is that correct?

A. That is correct.

Q. In your opinion, is that expense chargeable equally to each gallon of gasoline moving through those bulk plants?

A. No. It is not chargeable equally because the amount of labor and the amount of time spent in connection with an account such as Ned's Auto Supply would not involve an equal amount of the time of these individuals as would volume being distributed to accounts of a smaller nature.

Q. You mean not as much time per gallon of gasoline sold?

A. Not as much time per gallon of gasoline sold.

Q. Why is that?

A. For the reason that deliveries to Ned's Auto Supply were larger deliveries; the checking, the measuring of the tanks involved for full time deliveries takes a lesser amount of time than would the per-gallon cost for deliveries of a smaller nature.

Q. Well, do you mean by that that some trucks go out only partially filled?

4033 A. Some do.

Q. Or isn't it generally a matter of a full truck stopping in several stations?

A. We attempt at all times to get our trucks to operate on routes so that we can avoid partial truckloads moving out of the plant. That is merely an effort directed to secure the maximum efficiency from the operation of our tank wagons. There are times, however, when trucks do go out with partial loads. In addition to that, there are some smaller trucks than the trucks of the 1,500-gallon capacity, which are utilized on the smaller reseller outlets, moving out of the yard perhaps with a full load, but that full load comprising maybe a 600-gallon capacity rather than a 1,500.

Q. How many of those small trucks do you have?

A. I don't know.

Q. Are there not many of them compared with the larger gallonage?

A. That is not correct. There are not many, but there are some.

Q. Do you not also have some 2,000-gallon trucks?

A. We have some 2,000-gallon trucks which load at a loading rack at River Rouge and pull out of there. We did not have the 2,000-gallon trucks operating out of any of these plants in 1937.

Q. Is it not true that when the truck is loaded
4034 fully, that the loading expense is the same whether
that truck is destined to stop at several stations or
to make a full dump delivery?

A. That need not follow. It may be the case. The reason it need not follow is because when you are making a series of stops you will load quite frequently your truck. Let us say having five compartments, you will load perhaps three different products, maybe one compartment of Solite, and then the truck will be moved and maybe the three compartments will have Red Crown and maybe the fifth compartment of Standard. It takes a little more time and a little more effort to make such a load as it would if we were able to pull under the loading pipes for Standard Red Crown and drop on a load of 1,500 gallons and pull out.

Q. Have you ever made any test to determine what proportion of the deliveries made to Ned's Auto Supply Company in 1937 were deliveries of full truckloads of Red Crown gasoline?

A. No. Such a check is not necessary for the reason that Ned's Auto Supply did not at that time, and do not today, sell our third grade gasoline. The only products that they merchandise are Solite and Standard Red Crown. Standard Red Crown will run in the neighborhood of 85 percent of the requirements of Ned's Auto Supply. Running in that neighborhood, the deliveries of Solite were comparatively few relative to the deliveries of Red Crown.

Q. Well, you have five compartments in the truck,
4035 do you not?

A. Yes.

Q. Are those compartments of equal size or are they of varying sizes?

A. They are of varying sizes.

Q. Then there are some compartments which do not contain more than 15 percent of the entire truckload?

A. No, that would not be the correct way to look at the problem.

Q. Isn't that true? If they were all equal, each one would be 20 percent. Therefore, if they are not equal there would be some that had 15 percent or less of the entire capacity of the truck?

A. Well, the difficulty—

Q. I am just asking you that now as a physical question regarding the truck.

A. And as a physical question it must be answered in the same manner.

A tank is divided into compartments by placing bulkheads in the tank. Now, the very mechanical task of placing these bulkheads in the tank many result in one compartment when calibrated indicating a capacity of 263 gallons. The adjacent tank may have a capacity of 310 gallons. As a rule, it is desirable, when you have a truck
of 1,500-gallon capacity, to have at least two com-
4036 partments with larger capacity than an equal divi-
sion of your tank, an exact equal division.

I have never seen in any tank that has been divided into compartments. I just never have seen any tickets indicating an equal apportionment of the space.

Q. Isn't it true that if Ned's business were 15 percent Solite Ethyl and if they took their deliveries proportionately in equal amounts from time to time which, of course, they would not do exactly, but assuming that they did, every truck that went there could have one compartment filled with Solite Ethyl and still no more than satisfy Ned's requirements for that product; isn't that correct?

A. Physically—.

Trial Examiner Ballinger: Unless—one moment.

Mr. Austin, how could you assume a condition that didn't exist?

Mr. Austin: Assume what condition?

Trial Examiner Ballinger: Read the question.

(Question read.)

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

A. In reply to your question, if we assume the hypothetical conditions which you enumerated, it would have been possible for Ned's to have taken one compartment of Solite with each delivery of gasoline, but it would 4037 have been impractical in terms of cost of doing business.' The fill pipes leading into the tanks underground on the driveway are not the same. To drop four compartments of the Standard Red Crown, and then to move—the driver get in the truck, move the truck, make a second hose connection with a second fill pipe, and to drop one compartment of Solite would have been undesirable from the point of view of the purchaser and from one point of view of the supplier. It is undesirable from the point of view of the purchaser because Ned's Auto Supply Company were constantly eager to insure that their driveways were left open for customers rather than be partially clogged with a truck. Every delivery to those outlets was made in the shortest possible time and our truck was then driven off of the driveway. Now, if we had to stop and make two connections, it would have been undesirable from their point of view; it would have been undesirable from our point of view, in terms of cost, because the time of making the movement of the truck, the connection of the hose, unlocking the fill pipe, and other operations incident thereto, is the equivalent of the time necessary to drop a compartment of gasoline in the tank.

Trial Examiner Ballinger: Let me interrupt just a minute.

Would you permit a statement that I overlooked at the convening of the session?

The Examiner overlooked stating when the hearing 4038 convened that Counsel for the Respondent has a continuing objection to this line of examination, and that there is reserved to him at the conclusion of the witness' testimony, or at any time prior to the closing of the record, the right to move to strike.

Mr. Hanley: Thank you.

Trial Examiner Ballinger: And this will continue throughout the remainder of the examination of the witness.

By Mr. Austin:

Q. Is your assumption that it was not customary in 1937 to make single compartment deliveries of Solite Ethyl to Ned's Auto Supply Company based upon the reason which you have just stated?

A. Is that a question?

Q. Yes.

Mr. Austin: Would you read it, please, Mr. Reporter.

(Question read.)

Mr. Hanley: Well, if Your Honor please, I object on the ground that it assumes an assumption on the part of the witness. If the witness understands the question and is willing to answer I do not persist in the objection.

Mr. Austin: I will carry it further.

Mr. Hanley: If he does, I think it is objectionable as to form.

Trial Examiner Ballinger: Do you understand the 4039 question?

The Witness: I do not.

Mr. Hanley: I did not think he had assumed anything. I thought Mr. Austin had made the assumption.

The Witness: I do not understand the question, and would request you to rephrase it, if you can.

By Mr. Austin:

Q. Well, you have stated reasons why it would not be practicable or desirable for—strike out "practicable"—desirable either to the Standard Oil Company or to Ned's Auto Supply Company to take deliveries of Solite Ethyl at the time, along with deliveries of Red Crown. As a result of that reasoning, have you assumed that they did not engage in that practice, and by "they" I mean Ned's or the company.

Mr. Hanley: If Your Honor please, that is objected to for the reason that it is not the best evidence even on cross-examination.

Dr. Boatwright made an investigation of the actual delivery tickets which outlined the deliveries of each kind of gasoline to Ned's over a period of time. Now, in line with the consistent policy of the Respondent, we are willing to make those actual tickets available to the Government so that they can see on what day and when, and how much gasoline was delivered to Ned's.

Mr. Austin: I understand those tickets are de-4040 stroyed, Judge.

Mr. Hanley: Well, they were, as I understand, for 1937, but the calculations made on the basis of 1940, and those tickets do exist.

Mr. Austin: Those were not deliveries to Ned's.

Mr. Hanley: Yes.
The Witness: No.
Mr. Hanley: Weren't they?
The Witness: No.
Mr. Hanley: Well, perhaps I am wrong about this. May I ask a question on voir dire, Your Honor?
Trial Examiner Ballinger: You may.

Examination on Voir Dire by Mr. Hanley.

Q. What tickets did you use, Mr. Boatwright, in determining this particular question?

A. We used the tickets on two trucks in their operation to reseller outlets during the year 1940. The 018 tickets for the year 1937 have long since been destroyed. Starting in the early part of 1938 Ned's became a tank car buyer, and thereafter there are no tank wagon deliveries for delivery to that distributor.

Q. But there are tickets in existence for 1940 applicable to these particular two units, to trucks?

A. Yes, but there are no tickets for 1940 applicable
4041 for delivery to Ned's. They are deliveries to other resellers.

Mr. Hanley: Well, Judge, I think perhaps I am wrong in my objection; but I still want to make the offer to the Government that we do have the tickets for 1940 applicable to these trucks that Mr. Boatwright used, and we offer them, if the Government desires, for examination, but I withdraw my objection to the question.

Trial Examiner Ballinger: Do you understand the question?

The Witness: I understand the question.

Cross-Examination (Continued) by Mr. Austin.

Q. Let me put another question, please, and then you can perhaps answer both together. I do not want to pursue this at any length, but have you made or has it been possible for you to make any check as to the actual number of full time deliveries made to Ned's in 1937 either of Red Crown or Solite-Ethyl, or the actual number or percentage of partial dump deliveries which were made during that year?

Can you answer this latter question?

A. Certainly.

Such an analysis would be a physical impossibility as the tickets have been destroyed.

In 1936 I did make a study of deliveries, not to Ned's, and in connection with this study I made a study of 4042 the tickets of full dump deliveries. I know that it is the desire and it is the effort of the company when full dump deliveries are made to deliver one product unless a full dump delivery be taken by a dealer whose total tank capacity and sales volume does not permit him to take any tank truckloads of one product.

Q. Well, the only thing I was trying to bring out, Mr. Boatwright, is that your statement of assumption or opinion, whichever it may be, that Ned's did not customarily take partial dump deliveries either of Solite-Ethyl in 1937—well, I will cross that, because I do not know whether you have said that or not. But hasn't your answer to this question regarding the quantity and methods of deliveries to Ned's been based upon your knowledge of the business rather than upon any factual study of what happened in 1937?

A. It is definitely based upon my analysis of the business, and the analysis upon thousands and thousands of these delivery tickets, and upon time studies of truck operations, time studies of dumps of gasoline. We have standards established for all of these things. We know how long a truck should be at a driveway dumping 1,500-gallon load.

Q. I am not questioning your knowledge of the business. I am simply bringing out for the record the facts and the answer.

A. That is absolutely correct. It is based upon my knowledge of the business.

4043 Q. Now, we have been talking about warehouse labor, and that is included in Respondent's Exhibit 31-Q, account 1008. Turning now to Commission's Exhibit 81, an item of expense is included there, several of them, I believe, referring to bulk plants, but we will refer particularly to the item of cleaning bulk stations, driveways, office, and so forth, which is $1,672.

Will you explain how you differentiate between the treatment of the expense salaries-warehouse labor on Exhibit 31-Q and the treatment of the bulk station item of $1,672 on account 1066, for the purpose of this cost study?

Mr. Hanley: Now, just a minute.

This may be off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Do you have the question?

The Witness: I have the question.

A. The item of warehouse labor, as shown on Respondent's Exhibit 31-Q, when it was directly concerned with the distribution of gasoline from a bulk plant as the item of warehouse labor, as shown on Commission's Exhibit 81. I know from the nature, the function performed by warehouse labor as classified on Respondent's Exhibit 31-Q, that a large part of that warehouse labor has to do
4044 with warehousing functions incident to Atlas tires, motor oil, cleaning barrels, painting barrels, and movements of stock in addition to unloading of cars of gasolines, checking tanks, and other operations of that type. Knowing that, and knowing the manner in which this particular account is allocated on our books, it did not seem fair to me to include this item of warehouse labor because the allocations do not accurately reflect costs incident to gasoline; therefore, rather including it in any calculation of a cost differential applicable to gasoline it seemed to me the better course of procedure to place this item of cost in a classification having to do with the conservative feature of the calculation rather than making an attempt to break that item down where so much of arbitrary judgment would be necessary. We have no accurate record of time of this class of employees working on gasoline.

4045 Q. Now, how about the other item here? How does that differ, what you have just said, from this item of cleaning driveways, offices and so forth?

A. The second item does not have to do with the items other than gasoline to the same extent, cleaning of driveways so that our trucks can get in and out with their loads of petroleum products. It is more directly associated with these faucet products because the majority of our loads moving out of the plants are of that nature. Secondly, I think I stated in the testimony yesterday that a small part of that item in my mind is attributable to other than gasoline, and you will recall my discussion wherein I stated to be on the conservative side I used total gallonage to provide an offsetting influence to any small portion of that item that may have not been truly assignable to gasoline.

Q. For the purpose of allocation of this expense to the gallonage passing through the bulk plants, is there any difference in your opinion between these two items insofar as both of them relate to gasoline only?

A. I think I have explained that difference, sir.

Q. Well, I think that you explained the difference as to products but that you thought that the items of warehouse labor perhaps involved to some extent other products more than the item on Commission's Exhibit 81, but I am asking you now whether insofar as the expense in each of
4046 those accounts is attributable to gasoline, the account should be treated similarly in this cost study.

A. If it were possible for me to have felt the same degree of assurance of the true reflection of gasoline cost in the item of salaries warehouse labor account No. 1008 as I felt applied to the account 1066, miscellaneous expense, I would have treated the account 1008 differently. I don't believe it is possible to get out of that figure at this remote date the portion of time that could be attributed to gasolines and refined oils. If the question were one of current operations, obviously a study and distribution of time could be made. I couldn't go back four years and make that distribution.

Q. I realize you couldn't do it, Mr. Boatwright. I simply asked you whether if you could do it, you would have treated that portion of the account 1008 in the same manner that you have treated the bulk plant items entering into account 1066.

A. Well, may I state, sir, that had it been possible to have broken these various items listed in Respondent's Exhibit 31-Q down, I would have done so, but it would not have been possible to do it four years after the time when the incident occurred.

Q. I realize that. My question is one directed to accounting principles rather than to any figuring of actual amounts.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

4047 (Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin.

Q. Will you turn to Respondent's Exhibit 31-J? At the top of the page, certain items which are stated to be of a semi-direct nature are charged against the business of the retail service stations served by the Standard Oil Company other than Ned's. There are several account numbers listed: Account 1510, losses by bad debts, $2,078.73. There is also account 1511, a small amount for expense of collecting bad debts, current year, and 1512, the sum of $437.31 for expense of collecting bad debts, prior years; and there is also a figure in red for bad debts collected which had been written off in prior years. That latter figure is for account 1400. And it appears that the figure for bad debts collected has been set off against the charges so that there is a profit to the company shown of $1,541. Perhaps "profit" isn't exactly the right word but, at least, it is a credit rather than a charge when it is figured net.

Were these expenses listed opposite the account 1510, 1511, and 1512 charged direct to the various sales channels on form 189?

A. They are.

Q. What sort of indebtedness is included in these bad debts?

4048 A. Why indebtedness which has been incurred on the part of the purchaser, failure to pay his account with the company.

Q. Does that mean tank wagon reseller customers?

A. Yes.

Q. Entirely?

A. Yes, sir.

Q. For what products were the debts incurred? Or if [illegible] was for something besides a product, state that. Was any of it for gasoline?

A. Yes. Yes.

Q. Isn't gasoline sold for cash?

A. Yes, sir, pretty generally. There are times, however, when deliveries are necessary; the station will be in charge of a helper. It is sometimes necessary for us to carry a retail outlet for a one-dump basis. As a rule, however, the delivery is made and the collection is made on the following delivery.

Q. You stated yesterday that Ned's was the only customer who had the privilege of paying monthly for gasoline and receiving it on credit.

A. That is correct.

Q. What portion of these bad debts here are for gasoline?

A. I don't know.

Q. Might some of them be for non-payment of rentals?

4049 A. That is a possibility. Uncollected rent is written off as a bad debt.

Q. Did you make any effort to determine what proportion of these bad debts were debts for gasoline sold?

A. I did not.

Q. These figures were lifted directly from form 189, were they not?

A. Yes, sir.

Q. In your opinion have they any place in this cost study if they do not relate to gasoline?

A. They do relate to gasoline and, in my opinion, they have a definite place in this study.

Q. In other words, your opinion is, you say, that they relate to gasoline, even though they were not debts for payment for gasoline sold.

A. I said that they would encompass in part any unpaid obligation for gasoline. Then I explained the occasions where such an obligation may arise. In addition, there is a source of bad debt charges, as you mentioned, on rents. Should not some part of that be charged to gasoline when that is the principal product that is distributed and sold to the reseller?

Q. These are direct charges, are they not, Mr. Boatwright?

A. Yes, sir.

Q. Then it would be possible, would it not, to charge—not only possible but proper to charge any bad debts marked off to the customer who failed to pay the debt?

4050 A. It would be possible—

Mr. Hanley: Just a moment, Mr. Boatwright. Will you read that question, please?

(Question read.)

By Mr. Austin:

Q. To rephrase that question, is not a loss from a bad debt an expense which can be charged directly to the debtor's business?

A. It could be.

Q. And isn't that what is actually done by the Standard

Oil Company in assigning these bad debts directly to the different channels?

A. We do not maintain costs by accounts. If a bad debt be incurred in the tank wagon reseller channel, the charge is entered against the channel. It is not entered against an individual account because we do not maintain marketing costs on the basis of individual accounts.

Q. If a debt were marked off, which was an indebtedness of a tank wagon reseller customer for motor oil, which channel would it be charged to?

A. Other methods.

Q. And if it were an indebtedness for gasoline, which channel would it be charged to?

A. Tank wagon reseller channel.

Q. If it were an indebtedness for rent, which chan-
4051 nel would it be charged to, in a leased service station?

A. It might be distributed on an all-gallonage basis.

4052 Q. Or would it appear in your leased service station column?

A. That portion which was allocable to the leased service station column would there appear in that column.

Q. Isn't it true that where there are items in the leased service station column, Form 189, that no such expense is entered in any of the other columns; that is, any of the three channel columns?

A. Yes, that is correct.

Q. Then—

Mr. Hanley: If Your Honor please, if this is important—and it apparently is not entirely clear in the witness' mind, we will find out.

Mr. Austin: The witness knows. He has answered.

Trial Examiner Ballinger: The witness has answered.

Mr. Hanley: Well, he says he is not entirely sure.

Mr. Austin: I think he is sure.

Mr. Hanley: And we want it definite on the record, whatever the fact is, and we will find out if it is regarded as important.

The Witness: I have, in further answer to your question, I have before me the 189 for the year 1937. A charge is not made to the service station channel, but the charge is made to tank wagon reseller channel. The items separately enumerated in the service station channel are items of property.

4053 By Mr. Austin:

Q. Yes, and the item of bad debts is allocated between the three channels, is it not?

A. Yes, sir.

Q. On a direct charge basis?

A. On a direct charge basis wherever it can be charged direct. There are cases of bad debts where it is necessary to allocate the bad debts on a gallonage basis among channels.

Trial Examiner Ballinger: Such as what?

The Witness: An allocation, Your Honor?

Trial Examiner Ballinger: Yes.

The Witness: Well, I am satisfied that a rental bad debt would be allocated on a gallonage basis because a lessee pays us a rent on the retail operating unit, which is used not only in the sale of gasoline but other products including motor oils and other lubricating products as well. It would be unjust to charge the sum total of a bad debt so incurred to one product; therefore, that would be thrown in the classification to be allocated on a gallonage basis.

By Mr. Austin:

Q. Mr. Boatwright, this is not a large figure, but isn't it true that bad debts for gasoline are practically nonexistent?

Mr. Hanley: Answer that, if you can.

A. I can't answer that.

By Mr. Austin:

4054 Q. Isn't it true that a very small proportion of gasoline is delivered on credit to retail service stations?

A. You asked me a moment ago if I had made an analysis of the products on which the bad debts were incurred. I answered that I had not, and I just could not answer your question other than guess.

Q. In so far as any of these losses by bad debts may involve rentals, they would have no application to a nonlessee service station, would they?

A. The 461 type account?

Q. Yes.

A. They would not.

Trial Examiner Ballinger: We will take a five-minute recess.

(There was a short recess taken.)

Trial Examiner Ballinger: Come to order.

You may proceed.

By Mr. Austin:

Q. Do I understand from this exhibit that it is your opinion that none of the company's losses by bad debts in the year 1937 are chargeable to distribution of gasoline to Ned's Auto Supply Company?

A. Definitely no part of these losses by bad debts were chargeable to Ned's Auto Supply Company.

Q. Is that because Ned's did not fail to pay any of
4055 their obligations during the year?

A. Ned's did not fail to pay any of their obligations. All obligations were met promptly.

Q. Is that the reason why you consider none of this expense chargeable to Ned's?

A. I suppose in part, would have to be your answer. There was not a credit risk in the true sense of the word involved with Ned's Auto Supply Company.

Q. Well, isn't that based upon the fact that they paid their debts promptly?

A. Yes, sir.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Why are these expenses listed here, accounts 1510, 1511, and 1512, charged to any service stations not having defaulted on a debt if not to Ned's?

A. These accounts are charges made to the channel. Our effort was to determine the cost of serving an individual account, which means that we attempted to pull out of our general record of marketing expenses those expenses incident to this particular account. There were none of these expenses listed on Respondent's Exhibit 31-J, applicable in any sense of the word to Ned's Auto Supply, and therefore they should not have been included as a cost of doing business through this particular account.

4065 Q. Isn't that equally true as to any other service station who did not default in payment of any obligation during that year?

Mr. Hanley: Just a moment. It seems to me, your Honor, that calls for a conclusion of the witness, that it goes to the ultimate issue on the fundamental difference as between the theory of law on which the government is proceeding and on the theory on which the respondent is defending. I have no objection to the witness stating the fact as to whether or not certain bad debts are created as to X station and not created as to Y station.

Trial Examiner Ballinger: Well, the witness may go further and express an opinion. The objection is overruled.

The Witness: Would you read the question?

(Question read.)

A. The question can be answered rather briefly. I feel, however, that I should offer in conjunction with the answer a certain explanation. Credit for a purchaser is an infinitesimal graduation of differences. The man who has excellent credit, as a rule, doesn't need it; the man who needs it, doesn't have it. Between these two extremes there are different gradations of satisfactory or unsatisfactory credit risks. Ned's Auto Supply was a satisfactory credit risk in every sense of the word. An individually operated service station by a lessee involves a credit risk not 4057 backed by physical assets to anywhere near the extent that would a large organization like Ned's Auto Supply be. Therefore, even though an individual station, if you select one of this four hundred some, may not have defaulted on any obligation in a given year, the risk is greater and his default may come immediately after or prior to the year in question. And an insurance element requirement on the small individually operated outlet against the credit losses is greater than it is against an organization the size of Ned's Auto Supply.

Q. Well, this account has nothing to do with the credit expense, does it, Mr. Boatwright, or credit information?

A. This account has to do with the losses by bad debts, collections current year and prior years, and bad debts collected.

Q. Loss by bad debt means just what it says, doesn't it, the actual debt which has been marked off as a loss?

A. Yes.

Do you mean, however, that bad debts are not associated with credit function?

Q. I mean that losses by bad debts have nothing to do with any credit expense. Isn't it true that a loss by a bad debt is the exact amount of money that was not paid and nothing added and nothing subtracted from that?

A. Losses by bad debts are the exact amounts of money not paid. In my mind losses by bad debt are directly associated with credit function.

4058 Q. They may be, but as a cost or expense listed in this account, the only thing listed in this account is the actual amount of the bad debt; isn't that right?

A. That is correct.

Q. And your credit information and expense is listed under another account, is it not?

A. That is correct.

Q. Now, at the bottom of page 2525 of the record, at the top of page 2526, you were questioned regarding the use on Exhibit 31-J of the gallonage divisor of 66,388,527; which excludes Ned's gallonage. That is what you have referred to as the lower divisor?

A. That is correct.

Mr. Hanley: Page 2526?

Mr. Austin: Yes.

By Mr. Austin:

Q. You said in answering that question that you used that divisor "because we had no bad debt losses. We had no expenses of collecting bad debts prior years or no credit cost function involved on Ned's account. Therefore, the credit function in the reseller channel was incurred on reseller accounts other than Ned's."

A. That is right.

Q. "Therefore, I should use the gallonage excluding Ned's."

A. Correct.

4059 Q. Could you not more properly have ascertained the number of service stations who were responsible for these bad debts and then have excluded the gallonage of all other service stations including Ned's who were not responsible for any of those bad debts?

A. No.

Q. Why not?

A. Because it would have resulted in a figure of cost that was higher and was not representative of the continuing and prevailing cost for bad debt losses through our tank-wagon reseller channel. It would have been a false and improper representation of that cost item in the cost analysis.

Q. That would have resulted in a segregation of tank—or, rather, a division of the tank car reseller service stations into two classes: Those which were responsible for bad debts for those years and those which were not; is that right?

A. It would have.

Q. And since that is a direct charge, is there any reason why any station—

A. Your statement is not accurate as being a direct charge to an outlet. It is a direct charge to a channel.

Q. Well, that is your accounting procedure.

A. Yes, sir. It is our accounting procedure. We do not maintain marketing costs by individual outlets. It is a practical impossibility from terms of cost of doing business.

4060 Q. Well, what I am getting at is this: Is there any reason why any loss by bad debts should be charged to any service station who was not responsible for any such bad debts? You have said that as to Ned's no part of this expense should be charged to Ned's because they weren't responsible for any part of it. Now, isn't that equally true as to any other service station that was not responsible?

A. That is why I gave you the explanation that I did, the differences—

Mr. Hanley: Just a moment, Mr. Boatwright.

Judge, may we have added to the general objection which your Honor has accorded the respondent, that to all this line of testimony the further ground that there now appears to be an effort on the part of the government to dictate to the respondent the type of accounting that the respondent should use in the operation of its business, and that there is no authorization in either the Robinson-Patman Act, Clayton Act, or the anti-trust laws, or any other laws which authorizes any such activity on the part of the government.

Mr. Austin: I am only suggesting, your Honor, not that a different method of accounting might have been used by the respondent in the conduct of its business, but only that a better method of accounting might have been used in the preparation of this cost study.

Trial Examiner Ballinger: That is what the
4061 Examiner—

Mr. Austin: By "better" I mean more accurate.

Trial Examiner Ballinger: That is what the Examiner understands. If counsel for respondent desires to reserve the objection, it will be reserved for him.

Mr. Hanley: I just ask, your Honor, that that may be considered as part of the objection which your Honor has reserved to us.

Trial Examiner Ballinger: It will be so considered.

4062 Q. Did you have anything further to say on that point, Mr. Boatwright?

A. The question was not answered.

May the question be read?

Trial Examiner Ballinger: The Reporter will read the question.

(Question read.)

The Witness: Read as much of the answer as I gave, will you please.

(Answer read.)

A. That is why I gave you the answer that I did of the differences in types of credit risk. Had the procedure been employed that you suggest, it would have resulted, as I previously stated, in a false and untrue representation of our typical or representative cost incurred by bad debts. This is the representative—the anticipated, the normal bad debt losses.

By Mr. Austin:

Q. Perhaps I did not catch all of that. You just stated that this is the anticipated and normal bad debt loss.

A. That is correct. It is more truly representative of a cost of bad debts in the Detroit field for one year than would be the case had I isolated the service stations first as to those where bad debts were incurred, and those which were not, and then had I isolated the accounts where 4063 we collected bad debts previously written off, and those that were not, and then had I divided the bad debt loss by the volume of the stations involved upon which bad debts were incurred. My per gallon cost would not have been representative of the bad debt losses that could logically be charged against a channel of distribution. It would have been unfair procedure in calculating the cost.

Q. Of course, if you had done that Mr. Boatwright, you would have been able to state as against your larger bad debt loss for the stations responsible for them, you would have had also a gallonage larger than Ned's gallonage, which was responsible for none; is that right?

A. We had no stations larger than Ned's stations.

Q. No, gallonage, total gallonage for all stations which were not responsible for bad debts, you would have been left with two classes, those two, which were responsible for bad debts and those which were not. Here you have taken Ned's alone, and then charged your bad debts to all of those. My suggestion was that the other method, while it would have resulted in a larger bad debt cost for the station gallonage included there, it also would have resulted in a certain amount of gallonage over and above Ned's which would have been charged with no bad debts.

Trial Examiner Ballinger: Do you know whether or
not it would have amounted to the total gallonage,
4064 lower than Ned's?

The Witness: Your Honor, this whole line of questioning leaves many uncertainties in my mind. I do not know what the Counsel for the Government would have done with the bad debt recovery. How are you going to classify that? Those organizations are no longer in existence.

Now, if I am going to classify the accounts on which we lost money, what am I going to do with the recovery? Am I going to classify those, and throw them out, or am I going to say that our total bad debt cases resulted in "X" cost for channel distribution. In previous years we charged off "Y" amount. We had a recovery. Here is our cost. Take from it our recovery, it leaves us a net credit. What am I going to do with the recovery, I do not understand the line of questioning at all.

By Mr. Austin:

Q. Will you explain, Mr. Boatwright, how can bad debts for previous years, or any expense incurred in connection therewith, or the collection of bad debts written off in former years, influence the cost of the current year?

A. Bad debts and our collection for former years, a bad debt written off in 1937 is predicated upon sales actually made in 1936. We write off our bad debts when they are uncollected at the end of 12 months, so the bad debt loss
charged off in 1937 represents the sum total of the
4065 charge off to bad debts on sales made during 1936.
Recovery from bad debts written off in prior years, our collection made after, in the judgment of the credit men, and the accounting men, we assume that the money was lost; that, too, is on sales made prior to the year 1937.

Now, bad debts written off and collections of bad debts previously written off are a continuous item of expense, and it becomes a practical impossibility of going back and altering your books for previous years when you collect a bad debt previously written off after you have submitted your operating statement, your income tax reports, and every other type. This, I think, is completely acceptable to the Department of Internal Revenue as a regular means of handling our accounting.

Q. I have no doubt of that, but that is a different purpose, Mr. Boatwright.

A. Well, it is a statement, it involves a statement of our profits and our operating costs.

Q. I must ask you one final question on this subject, and that is in your opinion are losses by bad debts occurring in prior years an expense of sale or delivery of gasoline in the current year?

A. I think that question has been answered.

Trial Examiner Ballinger: You may answer it.

By Mr. Austin:

4066 Q. Is your answer "yes"?

A. Well, I say, sir, that a bad debt written off in this year is predicated on sales made the preceding year, I think that is the answer to your question.

Q. I am asking you whether you consider the expense resulting from the writing off of that debt an expense of cost of the sale of or delivery of gasoline in the current year?

A. Our business is a going organization. It is a flow. Costs incurred are of a—likewise of a flow nature. Therefore, we regard it as being a logical charge against current business when we write off bad debts incurred on sales made in previous time periods.

Trial Examiner Ballinger: Mr. Boatwright, in the light of your explanation, will you answer the question "yes" or "no."

Read the question.

(Question read.)

Mr. Hanley: Well, just a moment, please.

May I have the ruling of the Trial Examiner read?

(Record read.)

Mr. Hanley: Can you do that, Mr. Boatwright?

The Witness: Yes, I can answer it "yes" or "no." The sale was made in the prior year, the cost was incurred with the write-off of the obligation. It is a cost against current business operation.

4067 By Mr. Austin:

Q. And your answer is "yes"?

A. Yes.

Q. Will you turn now to Respondent's Exhibit 31-J, item 4, that is the Roman numeral, selling cost, and that analysis of selling cost continues through Respondent's Exhibit 31-K, L, and M.

Mr. Hanley: Is that a statement or a question?

Mr. Austin: It is a statement.

Mr. Hanley: Do you verify it?

Mr. Austin: Yes, here it is.

Mr. Hanley: I know, but does the witness verify it? Will you read it, please?

Trial Examiner Ballinger: The statement was testified to by the witness when he was first called.

Mr. Hanley: I am not sure if the witness is clear on it. I am perfectly satisfied.

Mr. Austin: I am just trying to refer to the pages of the exhibit, Judge.

Mr. Hanley: All right.

By Mr. Austin:

Q. On Respondent's Exhibit 31-L, it is stated, "It was estimated by Mr. Raupaugh and Mr. Blau that Robinson spent 35 percent of his time at Ned's, of which 7 percent was on gasoline; Meulenberg spent 25 percent, of which 5 percent was on gasoline; Couchie spent 25 percent, of
which 5 percent was on gasoline." I believe that you
4068 testified that these percentages were secured by
you in 1941, or possibly late in 1940, and that they
represent the estimates of these three salesmen's time applicable to the Ned's Auto Supply Company account for the year 1937?

A. That is correct.

Q. What was the basis of these estimates?

A. Knowledge of the operation of the men covering the account; knowledge of the negotiations conducted between the Standard Oil Company and Ned's Auto Supply.

Q. Were they prepared from any factual or objective cost studies?

A. Your statement is broad. We have a factual study on the allocation of time of different salesmen. These naturally were used in preparing estimates. That, however, is an estimate as to the channel allocation of the time, as

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you are aware, the estimate as to the product proportion of the channel allocation of time was not based on factual records brought into existence in 1937; but were based upon the knowledge of the responsibilities of the salesmen.

4069 Q. Did you have available any reports prepared by the salesmen in 1937 which would have enabled you to check these estimates?

A. Such reports are not available.

Q. Are they no longer in existence?

A. I don't know the exact time period that we retain that particular report in our files. The retention of the different reports are for different time periods. Some we keep to eternity; some we retain six months; some a year; some three years; and some five years; and I don't recall the exact time period for which we retain the time breakdown by individual men.

Q. Are the salesmen's quarterly estimates for 1937 still available, do you know? Or is that what you were just referring to?

A. Yes, that is the report I was referring to, but I do not know whether the quarterly reports of the salesmen for 1937 are still available.

Q. Are the daily time reports still available?

A. I don't know.

Q. The quarterly time estimates are for product estimates, are they not?

A. The quarterly time estimates are channel estimates with a memorandum showing product estimates ignoring channels of distribution.

4070 Q. Did you make any effort to determine whether these reports and estimates of these salesmen could be located when you were preparing this exhibit?

A. No, I did not.

Mr. Hanley: If your Honor please, at this time the respondent offers to the government the opportunity to investigate any of these records that may be in existence, that we still have. We will furnish them upon request, if they are available, for examination in any way the government desires.

By Mr. Austin:

Q. You stated on direct examination, Mr. Boatwright, that each of these three salesmen, Robinson, Meulenberg and Coutchie has territory, or, rather, has territory which encompassed about 40 reseller outlets.

A. That is correct.

Q. And it appears from Respondent's Exhibit 31-L, that Robinson spent 35 percent of his time at Ned's, Meulenberg and Coutchie each spent 25 percent of their time at Ned's. That would indicate, would it not, that Ned's was considered an important account which justified a large amount of selling effort?

A. Yes, sir.

Q. Were you present when Mr. Raupaugh testified that in 1937 and early 1938 the Gershenson boys told him of receiving offers from other oil companies to sell them gasoline on a tank car basis and that they threatened 4071 on more than one occasion to transfer their gasoline patronage?

A. I was not in court when that testimony was taken.

Q. Are you familiar with the facts indicated by what I have just said?

A. I have not read the testimony of the other witnesses.

Q. Well, I think that counsel for respondent will not object if I ask you to assume that Mr. Raupaugh did give such testimony.

Mr. Hanley: I haven't been objecting to anything. Go right ahead and assume it, if you want to.

By Mr. Austin:

Q. Now, isn't that a situation which in the case of a customer having the volume of Ned's that might well be considered as calling for a more than average amount of selling effort in order to hold the customer?

A. Not on the part of the salesman.

Q. On whose part?

A. That would be on the part of Mr. Raupaugh and Mr. Blau. The salesman calling on Ned's account, as I have stated, primarily did the leg work involved. Upon discussing and analyzing this time allocation as best we could, it was the opinion, first, that the amount of time spent on gasoline by our salesman was an insignificant time and perhaps could be better stated at zero.

4072 A man on a driveway looking into sales of Quaker State Motor Oil, Iso Vis Motor Oil, Polarine and Stanolin, however, is bound to do some selling directly or indirectly on the product gasoline. It seemed fair, therefore, to allocate after a careful discussion and consideration what we regarded as the maximum chargeable time that could be allocated to this product, which was 7 per cent in the case of Robinson, and 5 per cent in the case each of Meulenberg and Coutchie.

Q. When were those estimates made?

A. When I undertook the collection of this data, which was either in the closing weeks of 1940 or the opening weeks of 1941.

Q. And these estimates are estimates relating to the activities of the salesmen in 1937?

A. That is correct.

Q. Respondent's Exhibit 31-L states that the total selling expense for covering Ned's outlets was $241 for 1937; is that correct?

A. That is correct.

Q. Do you really believe, Mr. Boatwright, that the Standard Oil Company in 1937 spent only $200 in selling its largest tank wagon reseller account in Detroit, an account that purchased over $400,000 worth of gasoline during that year?

A. Do I really believe it?

Q. Yes.

4073 A. I think it is high.

Q. You do?

A. I do, for this reason: That salesman did not make the agreement with the customer. The agreement with the customer was made and the contact was made by Mr. Raupaugh, Mr. Blau, and others of the supervisory force, whose costs and whose expenses were not allocated to this. The only item that is allocated, as you will note, is the item of salesmen's salaries, and the salesmen primarily worked on the sale and distribution of products allied to gasoline such as the various motor oils and the other specialty products that we may have sold to Ned's Auto Supply Company. I think in all fairness that it is a high charge against gasoline.

Q. Don't you know that in 1937 and early 1938 the Detroit division was trying to hold Ned's Auto Supply Company as a tank wagon gasoline customer in the face of repeated demands by Ned's for a tank car deal?

A. I know we are trying to hold in Detroit and any other field every possible customer all the time, and an opportunity to purchase from another supplier is just as frequent as comes the dawn, if you have got an alert buyer.

4074 Q. That isn't true as to the operator of the lessee service station, is it, Mr. Boatwright?

A. Yes, sir. We have no control over the merchandise sold to a leased service station. Not only do we not have control but lessees do sell other merchandise.

Q. Other gasoline?

A. Yes, sir.

Q. On properties leased from the Standard Oil Company?

A. Yes, sir.

Mr. Hanley: If Your Honor please, may I inquire what the materiality of this line of questioning is?

Mr. Austin: I will concede that the last two questions have no—

Mr. Hanley: Are you trying to find the basis for another complaint?

Mr. Austin: No. I am only—

Mr. Hanley: Well, I move that the last three answers be stricken. We object to the questions on the ground that they are not material or relevant to the issues in this case.

Mr. Austin: I think they were suggested by the answers of the witness, and I am simply bringing out the fact that there is a customer which purchased something over $400,000 worth of gasoline from the Standard Oil Company as shown from the figures on the exhibit, and who was, according to the Respondent's testimony,
4075 threatening to leave or, at least, suggesting that it should have a better deal from the company and yet it is suggested here that so little selling effort was needed that only $200 was assigned to that account for 1937 for selling expense.

Trial Examiner Ballinger: The answer is in no wise prejudicial to the case of the Respondent. The motion to strike is denied.

By Mr. Austin:

Q. Mr. Boatwright, why is it that Robinson is estimated to have spent 35 percent of his time at Ned's while the other two salesmen are said to have spent only 25 percent of their time there?

A. You get no uniform estimate of time between the

different salesman for the different accounts. Robinson may have been an individual who actually did spend more time at Ned's. He may have helped in checking inventories. The actual control of a salesman is something that the company strives at all times to see that his efforts are directed in the most profitable manner possible. Actually, we know that some salesmen like to sell certain products and to devote a major portion of their time to those products. Also, we know that certain salesmen like to call on certain accounts. You can take their call record reports and you can find that frequently salesmen who like to call on
4076 certain accounts will spend the major portion of their time with those accounts, not in the most profitable way, perhaps, but it is a human tendency.

Now, Robinson may have within the knowledge of the men who supervised his efforts have spent more time with these accounts than did the two men subsequently covering the territory.

Q. Have you ascertained since your direct examination whether these three salesmen were assigned to the same territory or to different territories in 1937?

A. I have not.

Q. Do you know how many of Ned's stores were visited by these men in the course of their duties?

A. I do not.

Q. Do you know whether it was the duty of more than one of these salesmen to call on Ned's during any part of 1937?

A. I am afraid your question isn't clear.

Q. I mean whether, say, during the same month or during any similar period two of these salesmen were calling on Ned's?

A. Simultaneously?

Q. Well, not necessarily the same day or same hour, but whether it was their duty to do so during the same period.

A. Well, the difficulty with your question—my interpretation, I am afraid—do you mean by your question that during the same time period two salesmen may have been contacting the same customer?

4077 Q. Yes.

A. The answer would be "No."

Q. That is true even though Ned's had four outlets?

A. Yes.

Q. Do you know whether any salesman other than Robinson, Meulenberg and Coutchie called at any of Ned's outlets in the course of his duties during 1937?

A. They did not.

Q. How do you know that?

A. Because I inquired and if they called at any of Ned's outlets they did not do so in the conduct of their regular duties.

Q. Did these three salesmen spend all of their time on tank wagon reseller customers?

A. When you say "all of their time" it is difficult. There were tank wagon reseller salesmen—any reseller salesman who, if he hears of a lead on the part of a tank wagon consumer or if he has a personal contact that is a tank wagon consumer will use his personal influence to attempt to secure the business for the company. Predominantly, they were tank wagon reseller salesmen, but no man is limited to a channel as such. We all work to secure customers irrespective of channels.

Q. Well, was their duty as outlined to them by their superiors to call upon tank wagon reseller customers?

A. As stated, that was their principal duty. Our 4078 duty is to get customers. It is my duty to get customers.

Q. Well, but there are other salesmen assigned to tank wagon consumer business?

A. To different classes of customers, but you said all.

Q. Well, that is—

A. By stating all, that meant exclusive.

Q. Yes.

A. And no one works exclusively in a channel.

Q. Well—

A. Predominantly, my answer was they were tank wagon reseller salesmen.

Q. Mr. Boatwright, since Ned's has been buying on a tank car basis, did the change affect the amount of salesman's time devoted to that business? In other words, now Ned's is still operating retail stations, and do the company salesmen still call on those stations?

A. I don't think so in the normal course of their business. The contact with Ned's is with the home office of that purchasing company.

Q. They still buy other products from the company, I assume?

A. They do. They do.

Q. While perhaps it is not as directly involved, do they buy those other products in the same manner that they did in 1937, or are they on a jobber basis for other things than gasoline?

A. I don't know the purchasing arrangements
4079 on products other than gasoline.

Q. I believe you just stated that you do not think that these three salesmen, or any other salesmen, are assigned to Ned's now. If you don't know, please say so. I would like to get a positive answer or no answer on that, as to whether or not there is selling expense incurred now in connection with Ned's in the same manner as in 1937, and by that I mean salesmen assigned to a territory, including Ned's, who call there in the course of their duties.

A. There is still a selling expense incurred on handling any jobber account. The actual selling time will differ compared with what it was, when he was perhaps not—when he was not on the jobber arrangement.

Q. Of course, you are aware that Ned's business differs from that of other jobbers in Detroit in the respect that it is principally a retail business. Now, is it nevertheless your understanding that the fact that the gasoline is delivered now at Ned's bulk plant instead of being delivered directly to the service station affects the selling effort expended on the account?

Mr. Hanley: Now, just a moment.

Mr. Austin: Perhaps it does, Judge. I don't know. If the witness doesn't know, I will abandon it. We can find out from Mr. Raupaugh.

Mr. Hanley: Maybe the witness does know, and I
4080 am perfectly willing that he answer, but I am not willing that the witness answer any question qualified by a speech on the part of counsel. If you ask the question, I am perfectly willing that the witness answer, but with all the qualifications involved in your prologue, the question—I am just not willing that the witness attempt to answer it.

Mr. Austin: I will withdraw it because I think I would rather ask the question, if it becomes material, from one of the men directly in charge.

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Austin:

Q. On page 2538 of the record, you made this statement, Mr. Boatwright, as a part of an answer to a question asked by the Trial Examiner:

"In this particular case these salesmen each had a territory which encompassed approximately 40 reseller outlets, four of which were Ned's."

Is that a correct statement?

A. This is a correct statement: "In this particular case, these salesmen each had a territory which encompassed approximately 40 reseller outlets, four of which were Ned's."

4081 Mr. Austin: I would like to have a document marked for identification as Commission's Exhibit.

Trial Examiner Ballinger: The reporter will mark the document as Commission's Exhibit No. 82-A and 82-B for identification.

(The document was thereupon marked "Commission's Exhibit 82-A and 82-B," for identification.)

Mr. Hanley: Off the record, please, Mr. Examiner.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Proceed.

By Mr. Austin:

Q. I show you Commission's Exhibit 82-A and B for identification and ask you if you will please describe the contents of that document.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

A. Your request was for a description of the Commission's Exhibit?

By Mr. Austin:

Q. Yes.

A. Commission's Exhibit 82-A and B describes in a condensed manner the accounting procedure followed 4082 in allocating selling costs in terms of salesmen's salaries only in the Detroit field for the month of June, 1937.

Q. Did you describe both Commission's Exhibit 82-A and Commission's Exhibit 82-B?

A. Commission's Exhibit 82-A and 82-B is in total what I have described the Commission's exhibit to be.

Mr. Austin: Well, I offer Commission's Exhibit 82-A and B in evidence.

Mr. Hanley: No objection.

Trial Examiner Ballinger: Without objection, Commission's Exhibit 82-A and B is admitted in evidence.

(The document heretofore marked "COMMISSION'S EXHIBIT 82-A and B," for identification, was received in evidence.)

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I will move, Mr. Examiner, that the hearing stand in recess until 1:45 p. m.

Trial Examiner Ballinger: The motion of counsel for the Commission is granted and we will now, at 12:25 p. m., stand in recess until 1:45 p. m.

(Whereupon, at 12:25 o'clock p. m. a recess was taken until 1:45 o'clock p. m.)

4083 Afternoon Session.

Trial Examiner Ballinger: Come to order.

You may proceed.

JOHN W. BOATWRIGHT thereupon resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Austin.

Q. It appears from Respondent's Exhibit 31-L that 20 percent of the time spent by each of these three salesmen at Ned's was spent on the sale of gasoline; is that correct, Mr. Boatwright?

A. Yes, sir.

Q. How many hours does a salesmen put in per day?

A. I don't know. There is no hourly restriction on salesmen would be probably a better way to answer your question.

Q. How are they paid?

A. They are paid on a monthly basis.

Q. Do you know what the customary amount of time is for salesmen to put in, in his territory during the day?

A. There is no customary amount. He has the responsibility for the sales of our merchandise in a definitely indicated geographic area. He spends the amount of time necessary to do what in his judgment is a sound job in that respect.

Q. Is the salesmen's job a full time job?

A. Yes, sir.

4084 Q. Would you say he puts in on the average of eight hours per day?

A. Yes, sir; plus.

Q. Would it then be correct to state that these three salesmen spent on the average two hours or more a day at Ned's, of which about 25 minutes was devoted to the sale of gasoline?

Mr. Hanley: I just don't like to object to this line of questioning or any line of questioning, but we are just getting into a hypothetical situation here that just really doesn't make sense. I want to object to that as utterly immaterial. The exhibit speaks for itself.

Trial Examiner Ballinger: The Examiner understands that he is trying to ascertain the basis of computation used by the witness.

Mr. Hanley: Judge, I just don't have any objection to his attempt to ascertain that, but when he asks the witness whether or not John Jones or John Doe spent 25 minutes or 23 minutes talking about gasoline in 1937, of course, it just doesn't make any sense. No witness can answer that question.

Mr. Austin: May I say, Your Honor, that I am afraid if I said the same thing about these estimates made in 1941, which were used as a basis for these exhibits, an estimate of the time spent in 1937, there probably would be a lot of objections from the Respondent. As a matter of fact, 4085 an estimate has been made here three years later that one salesman spent 35 percent of his time at Ned's and two others spent 25 percent each.

Mr. Hanley: I will withdraw the objection. If the witness can answer it, O. K. I will just withdraw the objection.

Trial Examiner Ballinger: You have a continuing objection to this line of examination.

Mr. Austin: This whole thing is based on estimate, and I am asking for estimates from Mr. Boatwright right now.

The Witness: Would you read the question?

(Question read as follows:

"Q. Would it then be correct to state that these three salesmen spent on the average two hours or more a day at Ned's, of which about 25 minutes was devoted to the sale of gasoline?")

A. No, I don't think that would be quite the correct way to state it. You don't call on every account every day. That is a physical impossibility. You call on an account and you conduct your business or your affairs with that account, and you cover as many accounts as you can and do a thorough job on each call in a day's time. Twenty-five minutes' stops would be primarily order taking; it wouldn't be selling.

By Mr. Austin:

Q. Isn't order taking selling?

4086 A. Oh, order taking is the ultimate result of selling.

Q. It is a selling expense, isn't it?

A. Oh, definitely.

Q. I wasn't attempting to state how much time any salesman spent at Ned's on any day, but there is an estimate here of 35 percent for one salesman and 25 percent for each of two others, so that covering the total time there there is an average of more than one-fourth of their time at Ned's. That is stated right on the face of the exhibit. I am just asking you to translate that into hours instead of percentages. In other words, how much time is 25 percent or 35 percent of the salesman's time and how much is 20 percent of that? That is just an arithmetical computation, I believe.

A. My difficulty is that I have stated that we have no limitation on hours. Now, if you state the limitation of hours as an assumption as being eight, then the application of the 25 percent in the case of Mr. Coutchie would be that he would spend on an average two out of eight hours in dealing with this customer. Then if 20 per cent of that time were allocated to gasoline, then 20 percent of 120 minutes would be chargeable to gasoline.

Q. Well, that is all I was trying to bring out, Mr. Boatwright.

A. It is merely an application of the percentages which appear in the exhibit.

4087 Q. Is 20 percent about the average proportion of a salesman's time which is spent on gasoline at retail reseller service stations?

A. No, it is slightly under the average amount of time spent on gasoline at retail service stations.

Q. On Commission's Exhibit 82-B, there is a memorandum entitled "Distribution of Time by Product, Not Reflected on Comparative Statement of Expense Form 189." The percentage of salesman's time there shown for naphtha and gasoline is 29.6 percent. Does that indicate that the average salesman spends 29.6 percent of his time or did in 1937 spend that much of his time on gasoline or, if not, will you please explain?

A. It indicates that for the salesman on the pay rolls indicated in Commission's Exhibits 81 and 82, as explained on that exhibit, that 29.6 percent of the time of the salesman was allocated to gasoline in all channels of distribution, not 29.6 percent in any given channel of distribution.

Q. Well, I think you said in the previous answer that slightly more than 20 per cent would be an average for a retail reseller salesman, so that that would fit in rather nicely with 29.6, but I don't know whether you were referring to 29.6 at all or whether it just happens that that is also more than 20 percent.

Mr. Hanley: Now, just a moment. Is that a question?

Mr. Austin: It suggests that the witness may make
some further explanation, which he may do if he
4088 pleases, I assume. It doesn't demand an answer. It
explains my previous question.

Mr. Hanley: All right. If you care to make any further statement, go ahead.

Trial Examiner Ballinger: Do you care to make any further observation? If you do, you may do so.

A. Why, I think I should explain, first, that the 29.6 percent referred to on Commission's Exhibit 82-B is a coincidence with the statement that I previously made. The reason for my previous statement was the knowledge of the manner in which our salesmen work when selling gasolines and other products on our driveways. Their function is not so much to get the product in stock of the reseller but to aid the reseller in adopting proper merchandising methods, to see that that stock is moved. The retail salesman in selling gasoline devotes a large part of his time to the training of the attendants in the proper merchandising procedure. Therefore, with the rank and file of our reseller business, the percentage of time devoted by a salesman would be greater than would be devoted in handling the business of Ned's auto account, because our salesman was requested not to assume the responsibility of training.

4089 By Mr. Austin:

Q. Did you ask Mr. Raupaugh or Mr. Blau or any of the other officers of the company that you talked with in this connection to make a similar estimate of the proportion of salesman's time spent on gasoline of any other customers served by them, that is other than Ned's?

A. No, I did not.

Q. If they were able to make such an estimate as to the time of these salesmen spent at Ned's Auto Supply Company, could they not, in your opinion, or would they not, in your opinion, be equally qualified to make such an estimate for any other single customer?

Mr. Hanley: Oh, Judge—well, I won't make the objection.

Answer it, if you can.

A. Really, I can't answer it. I don't know.

Mr. Austin: I will withdraw that—or, let it stand. The witness has answered it.

By Mr. Austin:

Q. But I will ask you whether you know of any reason why a similar estimate might not be made with equal accuracy for any other single tank wagon reseller station served by these three salesmen?

A. Oh, yes, with 400 approximately reseller outlets, no one of these 400 would be as clearly and indelibly im-
4090 pressed upon the minds of the supervisory force as would an account being in the neighborhood of 4,000,000 gallons per year, so that it would require quite a different degree of ability to estimate time devoted to gasoline at any other given individual little reseller outlet than would be with an account of this size.

Trial Examiner Ballinger: Would it be possible to allocate the cost of servicing a small station separately?

The Witness: I do not know, your Honor, that it would be possible. I would think that it would be a highly impractical effort.

Trial Examiner Ballinger: Well, does the Examiner understand from your testimony a truck might be loaded with gas, and a small portion of the load dumped at an individual station, the truck goes on and unloads at other stations. Now, how would it be possible to compute the exact cost of the transportation and delivery of the gas that was dumped at the small station?

The Witness: I do not know, your Honor, short of a special time study, which even if conducted would require the exercise of judgment on the fairness of the allocation even after the time study were made.

Trial Examiner Ballinger: Well, could there be any possible approximation?

The Witness: I just don't know, your Honor. It does not seem possible to me, nor practical.

4091 By Mr. Austin:

Q. Well, hasn't that actually been done here, Mr. Boatwright? You have these 018 tickets, and as I understand it a record is kept of the time spent by a truck on every trip and the amount of gallons delivered, and if you know the number of stops made would it not, and the gallons delivered, would it not be possible to make the same sort of computation you have done here in these labor cost studies?

A. No, it is not. What has been done, the comparison that we have made in the labor cost part of the delivery function is predicated upon the knowledge that one type of outlet purchased in full load quantity with the exception of where a partial load were dumped for our convenience.

On the other hand, we compare that with the deliveries to the rank and file of other reseller outlets in attempting to break down the cost of any given load or loads among the different retail outlets that may have been served by the same truck while on one route. It is not what we have done.

Q. It may not be exactly what you have done, but you do know for every truck that goes out and comes back, the amount of time spent on that, do you not?

A. We do.

Q. And you know the number of gallons delivered?

A. Yes, but the assumption is that the number of gallons delivered determines the allocation of time which 4092 should be charged to any one of the outlets served while on the route. I do not know that that is the condition.

Q. Well, that might be arguable, whether you make the cost the same per outlet regardless of gallons, which I do not agree with.

A. Yes, whether or not the outlet basis would be the better, if it was to be done, whether it should be done on a per outlet basis or per dump basis or per gallon basis, I do not know.

Trial Examiner Ballinger: Does the distance of the stations enter into a computation?

The Witness: Oh, yes.

Mr. Austin: Yes, they should, your Honor. I do not believe that was used in this exhibit.

Mr. Hanley: Just a moment. May I have the Court's statement?

(Trial Examiner's statement and the answer of the witness read.)

Mr. Hanley: May I say, your Honor, that this does enter into the computation and is reflected in the matter of time and cost as reflected by these various exhibits, even though distance itself is not a specific item of cost and treated as such. It is definitely reflected.

Trial Examiner Ballinger: Distance does enter into the cost of the operation.

Mr. Hanley: Surely.

4093 Trial Examiner Ballinger: Of the cost, it enters into the cost of the driver's salary, the portion of the driver's salary, and also the quantity dumped at each station, and considering all of these various elements, the Examiner was in doubt as to whether any computation was possible.

Mr. Hanley: Well, Judge, to answer your first question, distance very definitely does enter into the picture, and if there can be any question about that I think the obligation is upon counsel to develop it. It certainly is in the picture.

Secondly, the question that is now propounded is should our company, respondent, have kept records pertinent to every one of the single individual filling stations. We just did not do it.

Trial Examiner Ballinger: Proceed.

Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. What is the normal or average proportion of a tank wagon reseller salesman's time which is devoted to the sale of gasoline?

A. I do not know. The allocation is by product and ignores channels.

Q. Can you tell me, Mr. Boatwright, on what prod-
4094 ucts did these three salesmen here spend the other 80 per cent of their time at Ned's?

A. On other products that were sold to the Ned's Auto Supply Company.

Q. What were they?

A. I do not know all of the products but I do know that they bought Quaker State Motor Oil, they bought Iso Vis Motor Oil, Polarline, and Stanolin Motor Oil from our company, and they may have put in many other articles.

Q. Are the salaries shown on Exhibit 31-K the total salaries of these salesmen?

A. Are you referring to the salaries shown including the 3 per cent insurance and unemployment cash item enumerated on 31-K?

Q. Yes, salaries including 3 per cent insurance and unemployment tax.

A. That is the total compensation of these salesmen during the time that they were calling on Ned's Auto Supply.

4095 By Mr. Austin:

Q. On Commission's Exhibit 82-B, there is a statement of distribution of time by products relating to salesmen's time. Would the list there include all of the products which might have been sold to Ned's by these salesmen?

A. These are all product classifications, and I think that it would encompass the total of the products that were sold to Ned's.

Q. You stated that there were tank wagon reseller salesmen. However, it slipped my mind at the moment, I was not trying to catch you here, but just as I asked this question I recalled that statement.

Now, tank wagon reseller salesmen, I thought his duties were to sell gasoline and refined oil.

A. And other products.

Q. Oh, he sells everything that is sold to the tank wagon reseller?

A. Yes.

Q. Then where his time is spent upon motor oils, and so forth, that portion is allocated to the other methods?

A. That is correct.

Q. I see. I was afraid I had gotten confused there for a moment.

A. Your understanding is correct.

Q. However, none of the time of these salesmen
4096 would be devoted to automobile supplies, would it, in so far as that time is reflected in these exhibits?

A. No, in so far as the time is reflected in these exhibits our process is that the salesmen provide the sales promotion department with their estimates of breakdown among the channels, and their estimate of the amount of time devoted to automobile supplies as a separate channel; then to distribute our costs to petroleum products, the amount of time spent on automobile supplies is taken out of the total and the residual ratios are translated upon a basis of 100 percent time devoted to petroleum products. The time effort of the sales personnel devoted to non-petroleum products is not in these exhibits, or these calculations at any point, to the best of my recollection.

Q. Then, that means that none of these three salesmen named here devoted any part of their time to the sale of automobile supplies?

A. We do not sell Ned's Auto Supply tires, tubes, batteries and accessories. They are Firestone distributors.

Q. Well, you do sell them some things, don't you, other than gasoline, oils—I do not recall now. I do not know that it is material. I thought there had been some mention of that.

A. Well, we do sell them specialty products. Special byproduct is a product classification which we give to petroleum items packeged usually in smaller packages, and
4097 things of that type, but we do not.

Q. Like anti-freeze, things of that sort?

A. Well, if we sold Ned's any antifreeze. This Permaguard is an anti-freeze packaged. Now, in our allocation of time, Permaguard is secured through the Atlas Supply Company, and it is classified as an automobile supplies item; and I am thinking of such an article as fine oil, or some small packages of lubricating oil to be sold for household purposes, things of that sort. They may have sold that to them, I do not know.

Q. On direct examination you were asked the following question by Counsel for the Respondent:

"As a result of your study, Mr. Boatwright"—

Mr. Harley: The page number, please?

Mr. Austin: Page 2534.

By Mr. Austin:

Q. "As a result of your study, Mr. Boatwright, and without respect to any particular individual salesman, do you or do you not know what the usual percentage of time is that is spent by the salesmen on the various allocations of his duties?" and you answered that question in the affirmative, your answer was as follows: "That is an important part of our regular annual studies of profit by product, by channels, by fields, and the result of this analysis results in the sales promotion department frequently redirecting their selling efforts according to the variation of operations; thus we may find an individual or individuals who are on the pay roll as sales-
4098 men that are devoting themselves primarily to some function which could be better performed by an office boy, or something like that, and not devoting their time and attention to the job of selling merchandise. Therefore, those analyses bring out annually the different ratio of effort in different fields by channels; yes, sir."

Can you not tell us, then, Mr. Boatwright, the percentage of time spent by the average reseller salesmen on gasoline, motor oils, and refined oils?

Mr. Hanley. Now, just a moment, Mr. Boatwright.

In the first place, that question is objected to on the ground that counsel has undertaken to make an argument in his question, and then he said that the witness had answered the question affirmatively. I move that that be stricken; the answer speaks for itself.

I object, Your Honor, to counsel making an argument on law and fact when he asks a question of the witness.

Furthermore, I object to the specific question as now propounded for the reason that it has no relation at all to the answer given by the witness on page 2535, to the question there propounded to him. I have no objection to the question as such if counsel cares to propound it as an independent question.

Trial Examiner Ballinger: Was the answer given
4099 by the witness as stated by Counsel for the Commission?

Mr. Austin: I read it from the record, Your Honor, and the answer shows itself that the question was answered in the affirmative.

Trial Examiner Ballinger: The objection is overruled.

The Witness: May the question be re-read?

(Record read.)

4100 The Witness: May the question be re-read, please?

Trial Examiner Ballinger: Read the question.

(Question read.)

By Mr. Austin:

Q. I mean each one of those separately. I will also add lubricating oils for the fourth.

A. I can't tell you that from memory. Once a year we attempt to determine the manner in which our salesmen spend their time in the promotion of our products in an effort to determine whether the promotional efforts or the sales effort is allocated approximately in keeping with the profit importance of the different items. There are 28 fields—no, 27 fields. Each of these fields provide us with different estimates of time used in the different channels on different products, and from my own memory, without consulting records, I am sorry, I can't give the product ratio breakdown from memory in the Detroit field by products. It is just too many figures to depend upon accurately for your memory to recall.

Q. Could you give us the figures after consulting your records as applied to reseller salesmen?

Mr. Hanley: Just a moment. May I have that question, please?

(Question read.)

A. I could give you the estimate of the supervisory force in the Detroit field on gasolines and naphthas, 4101 refined oils and motor oil after consultation with my records. I do not have those records with me in the courtroom. I may have such a study with me, although I am not certain that I do, in Washington.

Mr. Hanley: The question and the answer are objected to, your Honor, as immaterial because of its generality, but if the court deems it material at all, respondent now offers to develop any records respondent has as to the figures concerning which counsel is questioning.

Trial Examiner Ballinger: The witness has only been asked whether such records exist, as I understand.

The Witness: They do not exist, your Honor, as a part of our official accounting procedure but, as I say, once a year we attempt to determine whether the sales effort is allocated in the manner conducive to best profitable operations and we seek estimates of supervisory staffs in different fields.

By Mr. Austin:

Q. I would like to have such a statement of distribution of time, Mr. Boatwright, if you could furnish one which you believe to be reasonably accurate.

Mr. Hanley: Let the record show that we are willing to furnish any figures that are desired by the Commission, but let the record also show that we want a specific request so we know exactly what we are supposed to furnish.

4102 Mr. Austin: I will call attention again to the question which I previously quoted on the record, which was asked by Judge Hanley on direct, and that was whether Mr. Boatwright knows what the usual percentage of time is that is spent by a salesman on the various allocations of his duties. That is exactly what we have been talking about and that is the question that was asked on direct.

Trial Examiner Ballinger: What is the answer?

Mr. Austin: The answer was what I read into the record, your Honor.

Mr. Hanley: Well, it is a long answer, Judge, and there isn't any use going into this argument. If counsel will make his request, we will undertake to furnish the material.

Mr. Austin: The last two words of the answer were "yes, sir." But if you will bear with me a moment, I only referred to that again because I now wish to refer again to Commission's Exhibit 82-B.

By Mr. Austin:

Q. And it is true, is it not, Mr. Boatwright, that the answer to that question as applied to salesmen generally and without restriction to any one channel appears on Commission's Exhibit 82-B?

Mr. Hanley: Do you understand that question, Mr. Boatwright?

The Witness: I am not certain that I do.

4103 Will you read it?

(Question read.)

A. I think my answer is already in the testimony. We make no allocation by products, by channels in our official set of books and our official accounting activities.

By Mr. Austin:

Q. Can you answer that question yes or no, Mr. Boatwright?

A. I can not.

Q. Because I am referring here specifically to this list of percentages under the heading "memorandum" on the bottom of the end of Commission's Exhibit 82-B.

I think your Honor has a copy of it there.

And I am simply asking you if that is not a breakdown by percentages of the time spent by salesmen generally without the restriction to any particular channel.

A. Then I didn't understand your question.

Mr. Hanley: Now, just a moment. Is that a question?

Mr. Austin: Yes.

Mr. Hanley: Your Honor—

Mr. Austin: He says he didn't understand my question, so now I think I made it clear.

Mr. Hanley: All right.

A. If that be the case, Commission's Exhibit 82-B, the memorandum figure at the bottom of the page, is a
4104 distribution of time by product which ignores channels.

By Mr. Austin:

Q. Now, what I have asked you to produce, if you can, is simply a similar breakdown for the tank wagon reseller channel. You have produced here in general, as I understand it, for all salesmen in all channels. I would like to have it for the tank wagon reseller channel, if it can be done.

Mr. Hanley: Mr. Austin, we have produced it for the tank wagon reseller channel. You have that.

The Witness: No, Judge. That is all channels, that memorandum figure.

Mr. Hanley: It is on the bottom of 82-B, to be sure, but now you are asking us, as I understand you, to break out of that the tank wagon reseller channel.

Mr. Austin: Well, this is a percentage list, Judge. The percentages would not necessarily be the same and, in fact, would probably be different for the tank wagon reseller channel.

Isn't that right, Mr. Boatwright?

Mr. Hanley: Certainly, they will be different.

The Witness: Yes.

Mr. Hanley: There is no question about that.

Mr. Austin: Yes.

Mr. Hanley: But, Judge, I wonder if your Honor understands what this is about?

4105 Trial Examiner Ballinger: Yes, I think I understand.

Mr. Hanley: On the bottom of 82-B is a percentage allocation by products. Now, that isn't the way we keep our books.

Trial Examiner Ballinger: I appreciate that.

Mr. Hanley: In naphtha and gasoline, for instance, on the first item, that applies to the sale of naphtha and gasoline through tank wagon reseller channels and through tank car and consumer channels and what have you. It is an arbitrary classification.

Trial Examiner Ballinger: Well, he is asking for another arbitrary breakdown.

Mr. Hanley: He is asking us now for tank wagon reseller classification and, as a matter of fact, that is what he has got. That is what Exhibit 31, Exhibit 33 and all the rest of the exhibits that we have put in here are. I just don't understand the request.

Mr. Austin: No, this is a distribution of time by product for all salesmen, and I want a similar distribution of time by product for tank wagon reseller salesmen.

I think you understand it, do you not, Mr. Boatwright?

Trial Examiner Ballinger: I think the witness understands the request.

4106 The Witness: Well, I understand your request. The question in my mind is whether you understand the difference in the figures that you have requested and these figures as shown on Respondent's Exhibit 82-B. These figures as indicated on Respondent's Exhibit 82-B are a result of the time distribution as furnished by the individual salesmen and are used in the allocation of our costs. Once a year we attempt to get an estimate of the supervisory group over these reseller salesmen to ascertain whether we can get a product breakdown within channels. It is not a part of any of our regular accounting functions, nor is it a part of any of the means whereby we spread our costs.

By Mr. Austin:

Q. I realize that.

A. It is merely an effort to evaluate the effort of our men and it is not predicated upon the reports of the individual salesmen. I can't duplicate exactly the distribution of time by products within any channel of distribution.

Mr. Hanley: May we go off the record, Judge?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

We will have a recess.

(A short recess was taken.)

4107 Trial Examiner Ballinger: Come to order.

You may proceed, Mr. Austin.

Mr. Austin: I would like to have this paper marked as an exhibit, for identification.

Trial Examiner Ballinger: The Reporter will mark the paper as Commission's Exhibit No. 83, for identification.

(The document was marked for identification "Commission's Exhibit 83.")

By Mr. Austin:

Q. I show you Commission's Exhibit 83, for identification, and ask you if you are familiar with that document.

A. I am familiar with this document in a general way. I did not prepare the document.

Q. Will you describe the information shown therein.

A. Commission's Exhibit 83, for identification, illustrates the distribution of time by classes of salesmen among channels and by class of products ignoring channels.

Mr. Austin: May it be stipulated that that exhibit, Commission's Exhibit No. 83, for identification, was supplied to the Commission by the Respondent during the course of hearings in Detroit at the Commission's request, and was prepared by the accounting staff in the Detroit division office.

Mr. Hanley: It may be so understood, Your Honor.

May I reserve, however Your Honor, any objection to its materiality if it is offered.

4108 Trial Examiner Ballinger: This comes within your general objection.

It is reserved.

By Mr. Austin:

Q. What period does this compilation or for what period was this compilation made?

A. The period is indicated in the upper righthand corner. As I recall, it was during the month of March, was it not, 1941—and would be the distribution of time among channels and among products ignoring channels for the first quarter of 1941.

Q. Have you any reason to believe that the distribution of time shown here for reseller salesmen would be substantially different in 1941 than it was in 1937?

A. I do not know.

Q. Do you know of any factors as to change in the method of doing business of the company or change in salesmen's duty which would result in a difference in the relative time spent by salesmen on different products in 1941 than in 1937, referring now to reseller salesmen?

A. I know of no major change in the company's policies or sales practices between the years mentioned that would cause, to the best of my knowledge, any marked deviation.

Q. In your opinion, would a computation made from
this Commission's Exhibit 83, for identification, of
4109 the percentages of time spent by reseller salesmen
upon different products regardless of channels be as
accurate as any estimate which now could be made of the
same distribution of time for 1937?

Mr. Hanley: Just a moment.

Will you read that question, please?

(Question read.)

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Proceed.

Read the question again, please.

(Question read.)

A. Do you mean by your question that a calculation of the proportion of time devoted to different products by the reseller salesmen during the first quarter of 1941, that the ratios so derived would be representative of the distribution of time by the reseller salesmen during the year 1937?

By Mr. Austin: Q. Yes.

A. I do not know for this reason: Our sales of merchandise varies by seasons, thus during the first quarter considerable effort is devoted to the sale of motor oil and to the sale of automobile supplies which might reflect a seasonal influence as compared with the proportionate

time of these two products on an annual basis; there-
4110 fore, I can't state that a calculation predicated upon
one quarter would be completely representative, even
barring any changes of sales policy that might have taken place during that time period without checking.

Q. I assume, Mr. Boatwright, that these distribution of time reports similar to Commission's Exhibit 83, for identification, are available for the last nine months of 1940?

A. I am quite sure that they are.

Q. And if the three reports covering those nine months were added to this report we would have the coverage for a full year, would we not?

A. Yes, sir.

Mr. Austin: I would then like to call upon the Respondent to produce the similar report entitled "Schedule No. 4, Detroit Field Distribution of Time—Salesmen—Method—Class of Product," for the months of June, September, and December, 1940.

Mr. Hanley: Let's see, June, September, and December, 1940?

By Mr. Austin:

Q. Those are the correct months, are they not, Mr. Boatwright?

A. Yes, sir.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

4111 Mr. Austin: And pending the receipt of those
other time reports, I will not offer this report in evidence at this time.

By Mr. Austin:

Q. Are you familiar with Mr. Gershenson's testimony about his conversation with Mr. Raupaugh and the salesmanship used by Mr. Raupaugh in persuading Ned's Auto Supply Company not to leave the Standard Oil Company?

A. No, I am not.

Q. You did make some reference today to the fact that Mr. Raupaugh and Mr. Blau were the men who really were responsible for selling gasoline to Ned's Auto Supply Company, did you not?

A. I did state today that the contract of sale, or the agreement of sale was undoubtedly made by Mr. Raupaugh or Mr. Blau and Mr. Gershenson.

Q. And do you know that when any question arose as to better contract, or a different contract between Standard Oil Company and Ned's Auto Supply Company—I mean, when such question was raised by Ned's, that those matters were discussed with Mr. Raupaugh and Mr. Blau by the Gershenson Brothers?

Mr. Hanley: If you know.

A. Do you mean if I know from my personal knowledge? I do not.

By Mr. Austin:

4112 Q. Well, do you know from your discussions with these men whom you talked to in connection with this report?

A. I do not know whether all discussions were better deals, were held only with Mr. Raupaugh and Mr. Blau.

Q. Who else might they have been held with?

A. I do not know.

4113 Q. Have you heard the references made today by the Trial Examiner and I believe by counsel for respondent as to certain sales talks and discussions of contracts between Mr. Raupaugh and Mr. Blau, on one hand, and Mr. Gershenson, on the other?

A. I have.

Q. Have you charged any of Mr. Raupaugh's or Mr. Blau's salary as an expense of selling to Ned's Auto Supply Company?

Mr. Hanley: That is objected to, your Honor, as repetitious, already having been asked and answered, and already being disclosed by the Exhibit 31-Q wherein it appears that those salaries were definitely not charged to the cost of selling Ned's or not charged to the other reseller channel, either.

Trial Examiner Ballinger: It is simpler to let the witness answer.

Have you the question?

The Witness: I would prefer to have the question reread, your Honor.

Trial Examiner Ballinger: Read the question.

(Question read.)

A. I have not.

Mr. Austin: May is be stipulated on the record, in view of the fact that the witness has not read the testimony, and in order to save the time of going back and referring to it now, that is, reading it now, that Mr. Raupaugh's 4114 testimony and Mr. Gershenson's testimony show that numerous conversations were had between Mr. Gershenson and Mr. Raupaugh and Mr. Blau during 1936 and 1937 regarding the sale of gasoline by the Standard Oil Company to Ned's Auto Supply Company and that, according to that testimony, those conversations involved discussions of a better gasoline deal desired from time to time by Ned's Auto Supply Company, and that Ned's Auto Supply Company was retained as a tank wagon reseller customer until the spring of 1938?

Mr. Hanley: The respondent will agree.

By Mr. Austin:

Q. Mr. Boatwright, don't you think that Mr. Raupaugh's conversations with Mr. Gershenson at that time had as much value to the Standard Oil Company as a selling service as the time spent at Ned's on gasoline by these three salesmen mentioned in Respondent's Exhibits 31-K and L?

Mr. Hanley: If your Honor please, that is objected to as calling for the conclusion and opinion of the witness as to a matter relative to the value of the service of an employee of respondent. It must be perfectly obvious that sometimes an employee may do a splendid job and sometimes he doesn't do such a good job.

Trial Examiner Ballinger: This is off the record.

(Discussion off the record.)

Mr. Austin: On the record:

4115 I will withdraw the question, if your Honor please.

Trial Examiner Ballinger: All right. The question is withdrawn.

By Mr. Austin:

Q. In preparing Respondent's Exhibit 31-A to P, Mr. Boatwright, particularly in connection with Respondent's Exhibits J, K, and L, and M, under the title "selling costs" did you attempt to obtain any estimate from Mr. Raupaugh or from Mr. Blau as to the amount of time that they spent during 1937 in conversations, correspondence, and other contacts with Ned's Auto Supply Company?

A. I did attempt. In discussing in their office, the question was raised and they emphasized that it would be a guess. I did not get such an estimate. Frankly, I was seeking a way to allocate the salary account of 1000. I am satisfied that the salary account of 1900 which if it could have been allocated would have favored the cause of the respondent by enlarging the differential shown, for this reason: Approximately 7 per cent of the gallonage shown in tank wagon reseller business was done through the Ned's Auto Supply Company. I was satisfied that Mr. Raupaugh and Mr. Blau did not spend 7 per cent of their time with that account.

Q. That, of course, might well be, but would that be conclusive, Mr. Boatwright? Might it not be that upon sound accounting principles, that the time of Mr. 4116 Raupaugh and Mr. Blau which was spent on their regular and usual duties other than these special contracts for the purpose of computation of selling costs in Respondent's Exhibits 31-J to M, inclusive, have been allocated on an equal gallonage basis between all stations but that the time that they spent in selling effort on Ned's should be charged to Ned's in addition to the per gallon expense which would be arrived at from a general all gallonage allocation.

Mr. Hanley: Just a moment, Mr. Boatwright.

That question is objected to as being unintelligible and for the further reason that Exhibit 31-Q, inclusive of the salary of Mr. Raupaugh and Mr. Blau, is an allocation of expense that was not allocated to either the reseller channel or to Ned's Auto Supply Company in the breakdown of expense set out in Respondent's Exhibit 31-A to Q, inclusive, and that if there be any breakdown of expense as set out in 31-Q, that the same should be set up on the basis of a proportionate gallonage as between Ned's, on the one hand, and the reseller channel, on the other hand, and it now appears from the testimony of the witness that such an allocation would be inaccurate for the reason that approximately 7 per cent of the gallonage was handled by Ned's Service Station but that not 7 per cent of the time was used by Messrs. Raupaugh and Blau in servicing Ned's account; and, consequently, any such allocation would be unfair and would be an overburden on the Ned's Auto 4117 Supply Company.

Trial Examiner Ballinger: Do you understand the question?

The Witness: I would ask that the question be read.

(Question read.)

4118 Mr. Hanley: Counsel has revised his question. I have an objection to it, that it is argumentative.

Mr. Austin: Please, Judge, I did not want to interrupt you, but I wanted to get the question straight, please.

Just read the last part of that, please.

Trial Examiner Ballinger: Off the record:

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Do you understand the question?

The Witness: No, sir.

Trial Examiner Ballinger: Does Counsel desire to reframe the question?

Mr. Austin: I shall try.

Mr. Hanley: Just a minute.

Off the record, please, Mr. Examiner.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: All right. On the record.

Proceed.

By Mr. Austin:

Q. I will try and rephrase it, Mr. Boatwright.

Suppose you had set out to make an allocation of Mr. Raupaugh's salary upon the assumption that the time he spent with Mr. Gershenson was a selling expense 4119 chargeable to Ned's Auto Supply Company, in your opinion would it have been unsound from an accounting standpoint to have segregated that portion of Mr. Raupaugh's time as a selling expense chargeable to Ned's Auto Supply Company business and then to have made an allocation of the balance of Mr. Raupaugh's time between all accounts on all gallonage basis?

When I asked you if you had set out to do that, I meant if you had set out to do that in connection with the preparation of this cost study which has been received in evidence. I am not referring to any method of accounting employed by the Standard Oil Company for its own benefit.

Mr. Hanley: Judge, I just have difficulty in restraining myself from objecting—if you can answer the question, if you understand the question and can answer, go ahead.

Trial Examiner Ballinger: Do you understand the question?

The Witness: I am not certain that I do.

If I understand properly, your question breaks down first, assuming a possible allocation of the salary item of supervision, would I have charged to, one, Ned's Auto Supply a given amount which would then have been divided by the gallonage of Ned's Auto Supply, and, two, have charged to the remainder of the tank wagon reseller account the residual—

By Mr. Austin:

4120 Q. Including Ned's Auto Supply.

A. Well, I am sure I do not understand it now, because it would not have been sound for me to have included as well as excluded in the same calculation, would it?

Q. I think so, because of the fact that this was an unusual situation which led to these conversations.

Now, it may be that in every other year but in 1936 and 1937, it may be in 1939 that the only way that Mr. Raupaugh's and Mr. Blau's salary could be allocated would be on an all-gallonage basis, that may be true for 1937 for as much as any other year except for this special situation which was covered by these conversations, so that I am asking you whether in your opinion it would have been unsound from an accounting standpoint to have first segregated the time spent on Ned's on this particular selling situation and charged that to Ned's, and then to have charged the balance of the time of all stations including Ned's on an all-gallonage basis?

Mr. Hanley: That is objected to as thoroughly argumentative. It is just a speech in support of an attempted conviction of the Respondent for not doing what counsel thinks Respondent ought to have done.

Mr. Austin: I asked for his opinion as an accountant, Your Honor.

Trial Examiner Ballinger: The objection is over-

4121 ruled.

A. Well, Your Honor, I don't know whether—the question would I have taken the proportion of the cost incident to Mr. Raupaugh's and Mr. Blau's testimony with Mr. Gershenson and charged that off to discussion?

Trial Examiner Ballinger: If that could have been ascertained.

The Witness: Yes, and then would I have taken the rest of their cost and divided it by all gallonage tank wagon resellers, including Ned's, or would I have taken the sum total of the selling effort of the supervision force if it had been possible to ascertain, devoted to Ned's Auto Supply, and state this is the cost of supervision incident to Ned's to be divided by Ned's gallonage while on the other hand the remainder of the supervision time is to be divided by the rest of the gallonage and get a per-gallon cost. I do not know what I am to charge this discussion to even if it had been possible to ascertain. I cannot answer the question as phrased.

By Mr. Austin:

Q. You could have obtained an estimate from Mr. Raupaugh, could you not, as to the amount of the time he spent with Mr. Gershenson on these conversations about Ned's deal with Standard Oil Company?

Mr. Hanley: Oh, that is objected to as a conclusion, Your Honor. I have no objection to his asking whether or not he attempted to obtain any estimate or not, 4122 whether he could have obtained it or not is something that is in Mr. Raupaugh's mind.

Trial Examiner Ballinger: That objection is sustained.

By Mr. Austin:

Q. I believe you already said you made no effort to do that, Mr. Boatwright?

A. That is not true. You asked me previously if I had attempted, and the testimony will show that I raised the question while in discussion in Mr. Raupaugh's office, and we did not feel that an honest calculation could be made based on that memorandum.

Q. And did you obtain any such estimate of the time spent?

A. I did not.

Q. But you did obtain from Mr. Raupaugh and Mr. Blau an estimate of the time spent by Mr. Robinson and Mr. Meulenberg and Mr. Contelie in 1937 with Ned's Auto Supply Company?

A. I did.

Q. When one of your salesmen, reseller salesmen, happens to take an order for one of these products, that is classified as automobile supplies, in what channel is his time prorated for that sale?

A. When an order is taken it is not taken for a product; it is taken for products.

Q. Well, let's don't be technical about that. I 4123 want to know whether some of the time of the tank wagon reseller salesmen is charged to the other methods channel?

A. Some of the time of the tank wagon reseller salesman is charged to other methods channel.

Q. And is some of it ever charged to automobile supplies channel?

A. Yes.

Q. And didn't you say that he does not ordinarily sell automobile supplies, or did you?

A. No, I did not. I said that ordinarily he did sell automobile supplies, and that was a part of his regular responsibilities. The tank wagon reseller salesman does regularly sell automobile supplies, and does submit quarterly an estimate of his time devoted to the sale of that line of products.

Q. Well, perhaps I am recalling some testimony about this canned materials. Didn't you say that they do not sell tires?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Well, if you cannot answer the question I asked you a moment ago, Mr. Boatwright, can you answer this question: For the purpose of the comparison of selling expense made in your Exhibits 31-K, L, and M, in your opinion would it be improper to include Mr. Raupaugh's salary for the time spent by him with Mr. 4124 Gershenson in 1937 as an expense of sale for Ned's Auto Supply Company?

Mr. Hanley: Well, now, in the first place that is objected to because it assumes that the witness could not answer a question previously put to him, and that is unfair to the witness.

I object to the form of the question.

Mr. Austin: The witness said he could not answer it.

Mr. Hanley: It is unfair to the witness.

Mr. Austin: The witness said he could not answer it.

Mr. Hanley: If counsel has a question to ask he should propound the question and not say to the witness if you cannot answer such and such a question I will ask you this question.

Trial Examiner Ballinger: The objection is sustained on the form in which the question was asked.

Counsel may reform it.

By Mr. Austin:

Q. Did you not state, Mr. Boatwright, that you could not answer a question I asked a moment ago?

A. You have asked so many—I did state in the course of the afternoon I could not answer a specific question. I do not recall which question.

4125 Mr. Austin: I would like, if Your Honor please, for the stenographer to go back, and I would like to re-ask the question to which I have reference.

Mr. Hanley: Is it important, Your Honor? If counsel has a question may he not just ask the question?

Mr. Austin: I have not that written out.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. For the purpose of the comparison of selling expense made in this Respondent's Exhibit 31-K, L, and M, in your opinion would it be improper to include Mr. Raupaugh's salary for the time spent by him with Charles Gershenson in 1937 as an expense of sales to Ned's Auto Supply Company?

A. It would not have been improper had I been able to determine the cost so incurred.

Mr. Austin: That is all.

I will now move to adjourn, Your Honor, until we can read the record of what has been said.

Trial Examiner Ballinger: The motion of counsel for the Commission is granted, and now at 4:40 p. m. the hearing stands adjourned to be reconvened at 10 a. m., June 19, 1941, at Room 332, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 4:40 p. m., June 18, 1941, the hearing was adjourned.)

4126 Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Thursday, June 19, 1941.

Met, pursuant to adjournment, at 10 a. m.

Before: Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., appearing on behalf of the Federal Trade Commission.

Harold R. Hanley, Esq. (910 South Michigan Avenue, Chicago, Ill.), appearing on behalf of the Respondent.

4127 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

This is a reconvening pursuant to notice. Docket No. 4389, in the matter of Standard Oil Company, at 10 a. m., June 19, 1941, Room 332, Federal Trade Commission Building, Washington, D. C. The last hearing was held in Washington, D. C., June 18, 1941.

The Reporter will note Counsel for the Commission and Respondent present.

You may proceed.

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: I just want to make an offer of proof on the record.

It has been suggested by Counsel for the Commission that there should have been an allocation of Mr. Raupaugh's time to sales cost in connection with Ned's Auto Supply Company, and other costs, including Mr. Blau's salary, the assistant manager, and the other items which appear in Exhibit 31-Q, all of which were in the Respondent's calculation of cost.

It appears from the testimony of the present witness that had those costs been included, that it would have had the effect of widening the differential as between the
4128 cost of selling through the reseller channel and sell-

ing to Ned's Auto Supply Company. It further appears from the witness' testimony that in the interest of conservatism and because he could not find an accurate means of allocation, he excluded all of the items which appear in Exhibit 31-Q from any calculation of costs. Further, it appears from the testimony of the witness that if any allocation be made in respect of the items appearing in 31-Q on the basis of gallonage, that on that basis approximately 7 percent of that cost would be chargeable to Ned's Auto Supply Company, and the witness has stated as a part of his testimony that he knows of his own knowledge that there was not 7 percent of the time or effort of Mr. Rampaugh or Mr. Blau or the other individuals involved in 31-Q applied to sales effort on Ned's Auto Supply Company. Further, that however it is figured and assuming its inclusion, it amounts to somewhere in the neighborhood of 43 1000ths of a cent per gallon, which is an infinitesimal amount when we are considering the question of cost.

Trial Examiner Ballinger: I do not recall any testimony of the witness as to what it would result in if included.

Mr. Hanley: I think Your Honor is right about that, but all the basic figures are in the record, Judge; the exhibits are in and the gallonage is in, and it is just a matter of mathematics.

4129 However, I want to make this offer now: That if in the judgment of the court or the Commission the Respondent has been in error in excluding Exhibit 31-Q from a computation of cost, we now offer, Your Honor, to include on any basis, any basis at all, that in the judgment of the Commission is fair and reasonable.

Mr. Austin: That statement has been taken down. I don't understand that it is going into the record, Your Honor.

Mr. Hanley: It is in the record. I certainly want it in the record. I am making the offer.

Mr. Austin: I move to strike it completely, Your Honor. It is absolutely nothing but an argumentative statement. I was amazed when I saw the Reporter taking it down. I see no possible excuse for it.

Trial Examiner Ballinger: The motion to strike is denied.

Mr. Austin: I would like to have it reread because if it is the kind of a statement I think it is, I shall have to appeal on it; if not, why, then—

Trial Examiner Ballinger: Read the statement.

(Record read.)

Mr. Austin: I amend the motion to strike, Your Honor, to apply to all but the last sentence.

Trial Examiner Ballinger: The amended motion is denied.

4130 Mr. Austin: Now, I strongly urge, Your Honor, that such statements should not be permitted on the record in any case tried before the Commission.

Trial Examiner Ballinger: Well, that, Mr. Austin, is undoubtedly the opinion of counsel. It is not the opinion of the Trial Examiner. Similar statements have been permitted in this case and I see no reason why an exception should be made in this instance.

You may proceed.

Mr. Austin: Off the record. May I, for a moment? May we go off the record?

Trial Examiner Ballinger: Certainly. Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Let us proceed. On the record.

JOHN W. BOATWRIGHT thereupon resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Austin.

Q. I will ask you just one more question about the subject we were on yesterday, Mr. Boatwright.

In your opinion did the time of Mr. Raupaugh spent in
conversations with Mr. Gershenson which were re-
4131 ferred to yesterday represent a selling expense or
constitute a selling expense of the company as much
of the time spent at Ned's on gasoline by these three salesmen mentioned on Respondent's Exhibit 31-L, and by "as much" I mean from an accounting standpoint, was the time spent by Mr. Raupaugh as much a selling expense as the time spent by these salesmen? I am not speaking about amount.

A. Ignoring amount or per gallon cost, Mr. Raupaugh's time negotiating with the Ned's Auto Supply Company was assuredly a selling cost of retaining the Ned's Auto Supply outlet.

Q. Now, will you please turn to Respondent's Exhibits 31-L and M, the subheading "Selling Expense Incurred on Reseller Gallonage Other Than Ned's."

Are the expense items listed opposite the account numbers at the top of Exhibit 31-M lifted from the Detroit Form 189 for 1937?

A. They are, with the exception that we have added the 3 percent Social Security and Unemployment Tax to the salary item.

Q. That is account 1004?

A. That is correct.

Q. The salesmen whose salaries and expenses are listed in those accounts sold some products other than gasoline, did they not?

A. Yes, sir.

Q. What products did they sell?

4132 A. Any of the products of the Standard Oil Company that we distribute through reseller outlets, or if opportunity presented itself any of the commodities that we sell through any outlet.

Q. What allocation of the salaries and expenses of these salesmen has been made as between products?

A. The allocation is made between channels—the allocation which you see of account 1004 is a channel allocation to the reseller channel.

Q. Is the allocation to which you refer the allocation shown on Commission's Exhibit 82-B, the top two divisions on that page?

A. The top part of Exhibit 82-B is an illustration of the means of allocation employed in making the allocation in 1937.

Q. And was the allocation to which you refer an allocation between channels—that is, between tank wagon reseller, tank wagon consumer, and other methods?

Well, that is not complete because I suppose as shown on Commission's Exhibit 82-B there may have been also some allocation to non-petroleum merchandise.

A. That is entirely possible.

Q. But the question I am trying to ask is whether,—referring to Commission's Exhibit 82-B, in the middle of the page, there is a statement headed "Percentages Used

in Distributing of Salaries, Salesmen, for June, 1937,
4133 as to Method of Delivery and Products." Then appear the figures "Tank Wagon Reseller, 20.5 Percent; Tank Wagon Consumer, 21.2 Percent; Other methods, 58.3 Percent." The total is 100 percent.

Were those the figures used for the allocation of the salesmen's salaries and other expenses to the tank wagon reseller channel on Respondent's Exhibit 31-M?

A. They were the ratios of time that were used in allocating these expenses for the quarter following June of 1937. You will recall that I explained that we make a direct time distribution once a quarter. The quarterly distribution of time for the second quarter of the year becomes the basis of distribution of costs during the third quarter of the year. Likewise, the distribution of time during the third quarter is used as a basis for the distribution of time in the fourth quarter.

I am afraid that the top part of Commission's Exhibit 82-B is not entirely clear. May I explain it?

Q. Yes.

A. Just a moment?

You will notice under point No. 1, salaries of the salesmen, pay roll No. 5, an amount of $15,551. Now, the first act in allocating that is to remove the influence of non-petroleum products, which is the second item shown as $793.10. Now, the salaries charged directly to sub account 7004, which is petroleum products, is $14,757.90,
4134 which is the residual after taking out the non-petroleum products. After taking out non-petroleum products, we add that portion of the time of agents and agent salesmen who are in charge of salaried stations devoted to selling according to their time allocation, giving us a total direct selling charge which is shown as $15,979.14. That amount is directly chargeable to petroleum products only. That amount is the amount which is spread among the three channels, and during the third quarter of the year, the ratios as shown, referred to in the middle of the page, were used in spreading subsequently monthly direct selling costs on Form 189, the marketing expense statement of the company.

I wasn't certain that you understood that we had taken out the non-petroleum products.

Q. Yes.

A. I just wasn't clear that you had.

Q. Well, I am glad to have the explanation.

The selling expenses listed at the top of Respondent's Exhibit 31-M includes expenses of sale of what products?

A. All of the products, petroleum products.

Q. Well, the selling expenses at the top of Respondent's Exhibit 31-M include the sale of all petroleum products?

A. The selling expenses at the top of 31-M is that portion of the direct selling charges allocated to the reseller
channel, of which approximately 98 percent com-
4135 prised gasoline. The residual 2 percent comprised
refined oils.

Your will recall that in the testimony yesterday, I stated that any time devoted to the sale of motor oil and the other products were allocated to the other methods channel.

Q. Yes.

A. That is why on Commission's Exhibit 82-B the other methods channel receives 58.3 percent of the selling cost.

Q. Well, these figures would be the figures, at the top of Respondent's Exhibit 31-M, that would result after applying these percentages stated for the channels, in the middle of Commission's Exhibit 82-B, would they not? At least for the quarter covered?

A. If this were a quarterly figure, your statement would be correct. This is a composite of four such similar allocations.

Q. Now, in addition to gasoline and refined oils, did those figures at the top of Respondent's Exhibit 31-M also include some small amount of tractor fuel?

A. I think it included less than 1,000 gallons of tractor fuel.

Q. Was there any other product included therein?

A. No.

Q. Have you stated for the record just what are refined oils?

A. I think I have. I should be glad to do it again,
4136 if there is any question about it.

Mr. Hanley: You have answered it. Go ahead again.

A. Our refined oils classification includes Perfection Kerosene, Eosene, Neosene, Fortnight Long Time Burning Oil, and Long Time Burning Oil. All of the products named, after naming Perfection Kerosene, are of a similar nature but used for rather specialized purposes, some of which enter into insecticides, some of which are sold to railroads for the torches used for thawing out switches, some are used for torches placed on the streets as warning signs, and so forth. That is our refined oils classification.

Mr. Hanley: Judge, may I ask one question as a matter of clarification?

Trial Examiner Ballinger: You may.

Mr. Hanley: All of these refined oils to which you have referred, Mr. Boatwright, like Neosene and Eosene and Perfection are just kerosene and coal oil in layman's language, are they not?

The Witness: They are submitted to slightly different refining processes. They are, in the layman's language, a part of the family of kerosene. None of the products other than kerosene would be found in the reseller channel at all.

By Mr. Austin:

Q. Mr. Boatwright, the computation of selling expense on Respondent's Exhibit 31-L has apparently been
4137 made for gasoline only. Why has not a similar segregation of expense been made for reseller gallonage generally on Respondent's Exhibit 31-M? In other words, even if there may be 2 percent of the kerosene included on 31-M, why should that not have been eliminated if it was eliminated in the computation of selling expense for Ned's?

Mr. Hanley: I don't understand that question. Do you, Mr. Boatwright? If you do, go ahead and answer it. I don't understand it.

The Witness: Yes, I understand.

A. And again I would merely have to point out that the process of dividing—I have divided by the total gallonage excluding Ned's gallonage, which results in a unit cost, and the unit cost on gasoline and refined oil to the reseller channel is the same. I could have taken out 2 percent of the cost, 2 percent of the volume. I would have gotten the identical unit cost.

By Mr. Austin:

Q. Isn't that on the assumption, Mr. Boatwright, that the cost is the same amount to sell a gallon of kerosene as it does to sell a gallon of gasoline?

A. It is an assumption, but it is not an assumption

without a pretty good foundation of fact, because the same tank wagon delivers the same product, frequently at the same time, by side rack delivery, in barrels, or if
4138 he buys a slightly larger quantity, then they have one compartment of kerosene. They are loaded the same, they are gauged the same, they are dumped the same, they are handled the same, they are delivered at the same time by the same unit.

Q. Now, aren't you off the track there a little? You are talking about handling and delivering, and what we are concerned with here is selling. In other words, I didn't ask you that question in connection with labor costs, but we are talking here now about salaries of salesmen.

A. I see.

Q. And salaries and expenses of salesmen, and I would like to call your attention to Commission's Exhibit 82-B, which contains a distribution of time by product, and shows 29.6 percent for naphtha and gasoline and 13 percent for refined oils. In other words, nearly half as much time, on the average, the salesman spent for refined oil as for gasoline.

Now, I realize that that statement of distribution of time on Commission's Exhibit 82-B is not applicable to any one channel, but, nevertheless, I think that calls for some explanation.

A. I should be glad to give it.

Mr. Hanley: Let me interpose an objection first, Mr. Boatwright.

The question is objected to because it seeks to develop costs as applied to products, whereas the Respondent
4139 does not keep its books in connection with costs as applied to products and is not seeking to make any justification in the present hearing on the basis of costs by product. Further, that that fact is recognized by the question of counsel wherein he says he understands that his question has nothing to do with allocation through channels. Further, that this memorandum on Commission's Exhibit 82-B, which was furnished at the request of the Government, and believed not to be material by the Respondent, has to do with all kinds of channels, be it tank car or tank wagon or other methods, or what not, and there just is no basis at all of comparison of costs as between the memorandum on Commission's Exhibit 82-B

and any figure allocable to selling gasoline through the reseller channel as such.

Trial Examiner Ballinger: The objection is overruled.

Mr. Austin: Your Honor, I feel I must object to statements of that sort by counsel on the record which are really an answer to the question. I know Judge Hanley doesn't feel it necessary to make any suggestions for Mr. Boatwright, but I don't think that counsel should answer questions addressed to the witness. If he wants to make a legal objection, all right.

Mr. Hanley: That is all I am making, Judge.

Mr. Austin: The last half of that objection was
4040 directed to the facts and accounting practices of the company, which is a matter that the witness is fully qualified to discuss.

Mr. Hanley: Judge, may I suggest that we take a recess?

Trial Examiner Ballinger: Take a recess.

Mr. Austin: Your Honor, I think the question is pending and it should be answered before the recess.

Trial Examiner Ballinger: You may answer the question.

Mr. Austin: Just as a matter of continuity, and we will remember what it is all about.

Trial Examiner Ballinger: You may answer the question.

The Witness: Will you read the question?

(Question read.)

Mr. Hanley: If you understand that, go ahead and answer it.

A. I am afraid I shall have to answer the question in probably three parts.

No. 1. I can understand that where it would seem to you that we were off the track, my difficulty constantly in speaking of selling costs is to limit it to a concept of one expense item. We honestly and sincerely regard any individual working on the pay roll as a salesman. Sal-
4141 aries to drivers is an expense item. Drivers are excellent salesmen, and they are important to us as salesmen.

Passing from that point to No. 2: Our greatest difficulty in the distribution of kerosene through the tank wagon reseller channel is to get our salesmen to devote some time to the product. I don't understand really why that is, but it is a product for which there is a potential far wider than our sales to tank wagon resellers indicates. In almost any metropolitan area there still remains a tremendous kerosene market for lamps, space heaters, garage heaters, and other appliances utilizing the product in that manner. The consumer purchases in small quantities. We try sincerely to get our salesmen to devote the amount of time to the product that they should. I don't think we have succeeded.

No. 3. In reply to your inquiry as to why refined oils constitute 13 percent of the total time, I would explain that it is due almost entirely to the influence of the consumer salesmen classification, wherein a preponderance of our sales in the rural channel and in the non-contract consuming channel are made up of the classification of products, refined oils.

Now, in this particular allocation, I feel I should add one further explanatory note to the previous designation of products included as refined oils. For this allocation we classify also standard tractor fuel and Stanolex furnace oil in the refined oils classification rather than giving
4142 them a separate classification.

Q. You mean in the distribution of time by product?

A. Yes. So you see the sum total of our tractor fuel sales, our furnace oil sales, and our kerosene sales made in the tank wagon consuming channel causes this item to appear as large as the 13 percent indicated. It is not a result of the reseller channel.

Q. Who are the consumers in general that account for this 13 percent of salesman's time; I mean, just as in a general way, I do not mean any names.

A. Certainly.

Our entire company sales and promotion effort is directed towards two fold classification of customers. I think I said primarily in that answer. Those customers are, first, the reseller customers; secondly, there is a broad classification which we call non-contract customers. Third, individuals who buy direct from tank wagon. The greatest single portion of that class of customers is the rural buyer.

You will recall in the testimony I stated there were in the neighborhod of 70 stations operated by commission agents in the Detroit field. Now, these commission agents serve our reseller customers, and in addition to that they load their wagon and operate regular routes direct to the farms. These are in the main the non-contract customers that I refer to.

4143 Does that help?

Q. Yes.

I am not still quite clear whether this 13 percent of salesmen's time which is assigned, or was assigned in 1937, to refined oils, how much of that goes into various channels. I do not know whether you know how much goes into the various channels, but it would not appear that you have very much difficulty having salesmen put time on kerosene, at least as to the consumer salesmen. Somebody spends that time. I do not know who it is.

A. Don't you see the market—

Mr. Hanley: Just a minute.

That is objected to as argumentative and a statement, just testimony on the part of counsel. If counsel wants to ask a question there is no objection, but a long argumentative statement is not a question.

Trial Examiner Ballinger: Do you understand the question?

Mr. Hanley: Well, is there a question?

Mr. Austin: I am sorry if it was argumentative, Judge. I am just trying to bring out the facts.

The Witness: Would you rephrase your question?

Mr. Austin: Yes.

By Mr. Austin:

Q. Have you any knowledge, or have you made any
4144 estimate of the percentage of reseller salesmen's time which is devoted to the sale of refined oils?

A. No, I have not.

Mr. Hanley: Now, Judge, while nothing is pending on the record, may I again suggest that we might have a recess?

Trial Examiner Ballinger: We will take a recess for five minutes.

(There was a short recess taken.)

Trial Examiner Ballinger: Come to order.

You may proceed, Mr. Austin.

Mr. Austin: Will you read the last question and the answer, please.

(Question and answer read.)

By Mr. Austin:

Q. Turning to Respondent's Exhibit 31-L, it is stated there that Mr. Robinson spent 7 percent of his time at

Ned's on gasoline, and Meulenberg spent 5 percent on gasoline and Coutchie spent 5 percent on gasoline. That is not quite accurate. I would like to correct. The 7 percent and the 5 percent and the 5 percent are percentages of the total time of the salesman which was spent at Ned's on gasoline; is that correct?

A. Yes.

Well, now, may I restate it? I am not certain that that would be interpreted properly. The proportion of time spent at Ned's first was estimated, then, of that time, 4145 using the same date for the calculation of the ratio seven, five, and five, were used, which in turn represent 20 percent of the time devoted to a particular product at Ned's.

Q. Now, in stating those percentages, what was the time which those salesmen spent at Ned's on the sale of refined oils included?

A. No, not in the seven, five, and five.

Q. And if the time spent on the sale of refined oils had been included, would not that have resulted in a higher cost figure per gallon of selling expense to Ned's?

A. I do not know. I do not even know that we sell refined oil to Ned's Auto Supply.

Q. You do not know whether that is sold?

A. I do not know whether that is one of the products that they buy from us.

Q. If refined oils are sold to Ned's Auto Supply Company, or were sold in 1937, should not the time expense on the sale of that classification of products have been included here for the purpose of making the cost comparisons shown on Respondent's Exhibits 31-L and M?

A. Only if I had included that same volume in the divisor. You will recall that the divisor was 4,250,000 gallons, approximately. That is purely gasoline sales.

Q. Is that purely gasoline?

A. Yes, that is purely gasoline, and had the cost 4146 of refined oil been included it would have been necessary for me to have included the refined oil volume to get a unit cost comparable with the other figure.

Q. Is that figure, 66,388,527 gallons, used on Respondent's Exhibit 31-M, gasoline gallonage only, or does it include refined oil?

A. No, that includes refined oils, that divisor included refined oil, the cost included refined oil costs.

Q. Now, that figure of 66,000,000 odd gallons was obtained, was it not, by deducting from the total gasoline and refined oil gallonage for the reseller channel in 1937 of gasoline gallonage to Ned's Auto Supply Company?

A. Yes, sir.

Q. So that if any refined oils were sold to Ned's, those refined oils are included in the 66,000,000 gallon figure used for other stations?

A. Yes, as well as the cost of selling that is included in the selling cost, you see. The only cost that we deducted was the cost allocable to gasoline to Ned's. That cost was divided by Ned's gasoline volume. The residual cost we divided by the residual gallonage, therefore my unit cost in this comparison is strictly a valid comparison.

Q. Well, isn't the net result, Mr. Boatwright, that if there was any expense of selling refined oil to Ned's that both that expense and also Ned's refined oil gallonage
4147 is included in the computation made for the reseller cost generally at the top of Respondent's Exhibit 31-M?

Mr. Hanley: Well, just a moment. That is objected to in the first place because it assumes a fact not in evidence, it not appearing that there was any refined oil sold to Ned's.

Your Honor, I am willing that the witness answer the question subject to the objection.

Trial Examiner Ballinger: You may do so.

The Witness: Would you read the question, please?

(Question read.)

Trial Examiner Ballinger: The Examiner will sustain the objection to the question.

Mr. Austin, there is no proof here of any sale to Ned's, and we are indulging in an assumption, and there is nothing to support it.

Mr. Austin: Well, Your Honor, that can be brought out later, but the witness has stated he does not know whether any refined oils were sold to Ned's or not. Now, may I not ask the witness that question, and if it turns out later that no refined oils were sold to Ned's, of course, then, the question would have no value; on the other hand, if it turns out that Ned's did buy substantial quantities of refined oils it may have some importance.

4148 Mr. Hanley: Judge, there just isn't any objection to counsel interrogating the witness about any item that appears on these exhibits at all if he wants to analyze those items. There is an objection to counsel injecting something into the record that hasn't been proved. That is all we are undertaking to do here.

Mr. Austin: There may have been refined oil sales—

Trial Examiner Ballinger: In view of counsel's statement, the question may be answered subject to the limitation—

Mr. Hanley: Answer it if you can.

Trial Examiner Ballinger: Within the objection, the limitation of the objection.

By Mr. Austin:

Q. Can you answer that yes or no, Mr. Boatwright? I intended it to be a very simple question.

A. I can answer it yes or no; it wouldn't be fair to do so. The answer is yes, but a further explanatory comment should be made, and that is that both the cost and the gallonage—in other words, if there was any refined oil cost incident to sale of kerosene to Ned's, if any were made, that cost is in the calculation. Likewise, the gallonage is in the calculation. And if it errs, it is because we have assigned or assumed an assumption of the identical unit cost to
Ned's that prevails with all of the rest of the tank
4149 wagon reseller business.

I think actually that we have—if the hypothetical conditions exist, we have leaned over backward in the process of calculation on the side of conservatism.

Q. Didn't you consider it important to determine the amounts of refined oil sold to Ned's for the purpose of making this comparison of selling expense of gasoline?

A. Frankly, I did not; I do not still regard it as important. If refined oil was sold to Ned's, it was sold on the identical price basis that it was sold to other tank wagon resellers. It is not to my knowledge any question of controversy.

Q. Did you testify yesterday, Mr. Boatwright, that it is not the practice of the company to have more than one salesman assigned to one customer at one time?

A. I think that was the gist of my testimony. Whether it was given yesterday or at an earlier date, I don't know.

Q. I asked you whether you had checked to ascertain whether or not any two of these three salesmen were calling on Ned's outlets during any one period.

A. I think you are correct. That was during the discussion yesterday.

Q. I think that your answer was that that is not done, that the practice is not to have more than one salesman assigned to one customer at one time.

4150 A. That is correct.

Q. And that it was your belief that that was true as to Ned's in 1937?

A. Yes. The only exception that I can think of in an account of that nature might be in case a reseller salesman calling on an outlet thought there was an opportunity to sell some specialty product in which his knowledge of the sales values and features of the product was not as good as he thought it should be. He might invite one of the specialists to go out with him but it is pretty generally at his invitation.

Q. Referring to Respondent's Exhibits 31-K and L, did you compute the selling cost to any other tank wagon reseller or resellers?

A. You mean other than Ned's?

Q. Other than Ned's, by the same method used for the computation of cost of sale to Ned's.

A. No, I did not.

Q. Is there any reason why this could not have been done?

A. Only to repeat an answer as given to similar questions under similar conditions in previous testimony, the principal reason being that here was an account of large magnitude in which our business relationships were not the same as were our responsibilities, services and relationships to other accounts. It would have been extremely difficult to have isolated the cost of any other tank 4150-A wagon reseller account because of these differences.

Mr. Hanley: At this point, your Honor, I call attention to the fact that at the request of the government, respondent furnished to Mr. Austin at his request a list of all of the reseller service stations supplied by the respondent in the Detroit area, no one of which had more than one outlet except Ned's, and I think the total was upward of 300. Respondent now requests that the government offer that list in evidence and if the government does not care to do so, respondent now, as a part of the cross-examination of the present witness and in connection with this question, offers that list in evidence.

Mr. Austin: I don't know. I won't object to any ruling your Honor makes on that. I don't propose to offer it at this time, and it is quite possible that I may decide to do so later, but if the respondent desires to interrupt the cross-examination to offer that list of service stations in evidence now, I have no objection to it going in evidence.

Mr. Hanley: I do so offer it. I have just done so.

Trial Examiner Ballinger: Produce the paper, the document.

Mr. Austin: I don't think I have it right here at the moment. I will be glad to get it and bring it down after lunch, Judge, if that is agreeable to you.

Mr. Hanley: Sure.

4151 Mr. Austin: I am quite sure I haven't it here.

Mr. Hanley: All right.

Trial Examiner Ballinger: When the paper is offered, it will be admitted, there being no objection.

Mr. Austin: It is my intention to offer it at some later date but it had not occurred to me right at the moment.

By Mr. Austin:

Q. What difficulties would there have been, if any, Mr. Boatwright, in making a computation of selling costs for certain other individual retail service station customers other than the difficulty of obtaining an estimate of the time spent by the salesman on gasoline at such stations?

Mr. Hanley: Just a moment.

I understand that I have a general objection, your Honor, but this is specifically objected to because it does not specify what other stations counsel has in mind, and it does not specify what particular costs he refers to as being allocated to those unspecified stations.

Mr. Austin: I am referring to computation of selling costs such as was made for Ned's Auto Supply Company in Respondent's Exhibit 31-J, K, and L, and this question simply carries on a question which was asked and answered yesterday. I asked the witness at that time if an estimate of time spent on gasoline could not have just as well been made for other stations than Ned's and he stated, in
4152 substance, what he has just stated today, that it was
easier for Mr. Raupaugh and Mr. Blau to make an estimate on Ned's because it was a bigger account and because they had a better recollection of what happened three years ago as to Ned's and were better able, as I believe

he said, to make an estimate on Ned's than the other stations.

May I pause there to ask you whether I have made a substantially correct resume of your testimony, Mr. Boatwright?

Mr. Hanley: Well, just a moment. Don't answer that yet.

The statement of counsel may be explanatory of the theory in his mind but it does not improve the question at all, your Honor. There has now been offered in evidence a list of all of the service stations supplied by the Standard Oil Company in the Detroit area. If counsel desires to ascertain whether or not a cost analysis could have been made as to any one of them, we have no objection to his asking that question, but we do object to the generality of this particular question because there is no norm, no basis on which the witness can predicate an answer.

Trial Examiner Ballinger: Read the question.

The Reporter: (Reading.) "What difficulties would there have been, if any, Mr. Boatwright, in making a computation of selling costs for certain other individual retail service station customers other than the difficulty of
4153 obtaining an estimate of the time spent by the salesmen on gasoline at such stations?

Trial Examiner Ballinger: Do you understand that question?

The Witness: Well, it is a—

Trial Examiner Ballinger: What information is desired?

The Witness: It is a hypothetical question, your Honor, that if I were given some assignment different than the one I was given, would I encounter greater or lesser difficulties in preparing an answer.

Trial Examiner Ballinger: Is that the gist of the question?

4154 Mr. Austin: The witness has already stated that it would be more difficult for him to make an estimate of time spent on gasoline at some other station than it would at Ned's. I am asking him whether that is the only additional difficulty he would encounter in making a similar computation for other stations.

Trial Examiner Ballinger: You may answer the question, if you can.

A. I do not recall the testimony exactly as you have paraphrased it in your last speech, but it is difficult, Your Honor, to answer a question as to whether greater or less difficulty would be encountered, assuming a different problem than the one you have worked out without examining the problem.

Now, there are many reasons that I could explain briefly, a few of them why the problem would assume quite a different significance.

Early in the testimony I stated that we had no driveway training responsibility for Ned's Auto Supply outlets. There is a question in my mind as to whether driveway training is incident to unit of operation or is incident to number of employees on the driveway. Some of my colleagues tell me that in their judgment it is better to allocate on a unit basis, being the number of outlets. Others have stated that it would be better to allocate on a gallonage basis. Still others, that it might be better to allocate on the number of employees at the outlet. Now,
4155 obviously, inasmuch as a salesman's duties are partially training and supervision to the extent that it is training, it is a question of personnel. That raises a question of personnel turnover, the number of helpers on the driveway, the manner in which the helpers are paid, for the simple reason that if a helper is paid on a commission basis he follows his training better than if he is paid $60 a month by the reseller, and you see the variables that enter into the picture under this hypothetical problem propounded to me are quite different than the variables which entered into the picture upon which I actually made a computation.

It is all hypothetical, you understand that, but I just don't know of anything else that I could add to that.

Q. You made a computation here of selling expense to Ned's Auto Supply Company, and that was based upon the time the salesman spent there and the salaries of the salesman; is that right, and certain other things, including such as the maintenance of the salesmen's automobiles and incidental expenses?

A. That is correct.

Q. Traveling expenses.

A. Yes, sir.

Q. Would it not have been possible to, by using the same method, to have compared the selling expense of Ned's Auto Supply Company with the selling expense of several other representative gasoline stations located near Ned's outlets?

4156 Mr. Hanley: That assumes, Your Honor, a conclusion on the part of the witness as to what are other representative stations, and I object to it, therefore.

Mr. Austin: If there is an objection upon that ground, "representative," I would have meant any stations which the Standard Oil Company might have picked out as representative; in other words, I am talking about an accounting question here, not about what was representative.

Trial Examiner Ballinger: Now, when you ask him whether any would have been possible, do you mean possible on the existing records?

Mr. Austin: Yes, Your Honor. I mean could the same method used for computing selling costs to Ned's in 1937 have been used to obtain a similar cost figure for some individual station, and I was simply trying to find out if there was any reason why that could not have been done.

Trial Examiner Ballinger: If the witness knows—

Mr. Hanley: If Counsel will state his question just the way he now has done it, I withdraw the question.

Trial Examiner Ballinger: The witness may answer it.

Mr. Austin: That is all right.

A. Now, to be sure that I have the question in mind as stated by the counsel upon revision, would you read that question?

(Question read as follows:

4157 "Your Honor, I mean could the same method used for computing selling costs to Ned's in 1937 have been used to obtain a similar cost figure for some individual station, and I was simply trying to find out if there was any reason why that could not have been done.")

Trial Examiner Ballinger: Answer the question.

A. Well, it is not so much a question of method, it is a question of the validity of your logic. In making your estimate, the estimate as such could have been used. I would not have been able to defend the method as vigorously as I am able to defend the calculation made unless I had had the opportunity to first look into the logic upon which the estimate was predicated, these various factors which I have enumerated to you in answer to your preceding question. Method itself could have been used, would the logic employed have been equally valid? I do not know.

By Mr. Austin:

Q. You mean that the same method you used here in computing the cost to Ned's might not have been as accurate method if used for some other station?

A. That is exactly what I mean.

Q. Well, let us proceed to dispensing equipment loaned. The subject is treated beginning on Respondent's Exhibit 31-N. Were the figures for the three accounts, Nos. 4158 1070, 1111, and 1513 listed on Respondent's Exhibit 31-N lifted directly from Detroit Form 189 for 1937?

A. The items under account Nos. 1070, 1111, 1513, being the following amounts: $17,144.69, $4,305.86, $672.31, were lifted direct from the form 189, tank wagon reseller channel for the year 1937, the item which is not given an account number being identified as personal property taxes on dispensing equipment loaned; may I quote the title, Personal Property Taxes, $107,646.50 at $3,0146, amounting to $3,245.11 this last item was not lifted from Form 189 for the year 1937, but is an application of the tax rate to the personal property tax value on this equipment.

Q. It is an application of the tax rate to the sum of the preceding three items, is it not?

A. It is an application of the tax rate of the taxable value of the equipment actually loaned, you see, it is not an application of the rate to the above items. The above items are expenses. It is an application of the rate to the taxable value of the property.

Q. The taxable value of the property, according to Respondent's Exhibit 31-N was obtained by expanding the depreciation expense of $4,305 to a hundred percent.

Mr. Hanley: That is objected to, Your Honor, as a statement of a fact not in evidence at all.

4159 Mr. Austin: It is right in the exhibit.

Mr. Hanley: If it is desired to elicit how the figure of personal property value was obtained, there is no objection to that kind of a question. We do object to counsel constantly testifying as a prelude to his questions.

Mr. Austin: I was reading from the exhibit, your Honor.

Trial Examiner Ballinger: Counsel may reframe his question.

Mr. Austin: I don't think it is necessary. I read from the exhibit. This exhibit is in evidence.

Trial Examiner Ballinger: But you have made a statement to the witness.

Mr. Austin: Which is a statement—

Trial Examiner Ballinger: It is not a question.

Mr. Austin: It is a statement which is in the exhibit.

Mr. Hanley: In 31-X?

Mr. Austin: Yes. I have to refer to the exhibits for all of these questions.

Trial Examiner Ballinger: Read the question, will you, please?

The Reporter: (Reading.) "The taxable value of the property, according to Respondent's Exhibit 31-X was obtained by expanding the depreciation expense of 4160 $4,365 to a hundred per cent."

Trial Examiner Ballinger: That doesn't ask him whether or not that is a fact.

Mr. Hanley: I will withdraw the objection, to iron the thing out. Go ahead and answer it.

By Mr. Austin:

Q. How was the investment in E. L. A. equipment arrived at for the purpose of computing the personal property tax actually paid by the company for 1937?

Mr. Hanley: May it be understood, Judge, that E. L. A. means "equipment loan account"?

Trial Examiner Ballinger: It is so understood.

A. Yes, the value was calculated by taking the depreciation rate on its equipment at the 4 per cent and expanding the total of the depreciation by the rate of 4 per cent to a full value as indicated, $107,646.50.

Q. You have to have the full value before you get the depreciation rate, don't you, Mr. Boatwright?

A. Yes, sir.

Q. Now, here it looks as if we started with the tail and went forward. I am trying to find out whether this figure of $107,646.50 is a more or less theoretical figure or whether the personal property tax was actually paid upon that figure in 1937.

A. Oh, yes, it was.

4161 Q. Wasn't it possible for you to obtain your personal property tax on E. L. A. equipment from some actual figure of taxes paid, or was this the only way that it could be arrived at?

A. No. The difficulty had we attempted the approach that you suggested—we have the full value of the pumps and the equipment and so forth that we calculate the 4 per cent upon. We do not have an account on each piece of equipment. In other words, let us assume that one part of the E. L. A. equipment happened to be a gasoline pump. This year that gasoline pump is at a reseller outlet. As such, the charge is to the reseller channel. The next year we may lose that account and the gasoline pump will be pulled, and its next utilization may be found in some farmyard or some large consumer with a sunken tank. To maintain an accurate record on the current location of each piece of this property by channel would involve an expense which is not practical or necessary.

Q. How is the depreciation expense of $4,305.86, Detroit form 189, 1937, arrived at? That is, from what source was it originally calculated?

A. It was calculated on the basis of the value of the equipment at reseller outlets, but that is quite different than for me taking the value of each of these pieces of property and classifying them individually and recapitulating the value of each of these pieces of property purchased at different levels.

4162 I see now what I believe to be the difficulty. In our accounting procedure on form 189, taxes, real estate and personal property, sub-account 086, is broader than on any separate group of items. It is a total. It was necessary to break that down. We had two alternatives: The one which is in your mind, which would have involved literally months of work, or the other one, taking the full value of the property, which personal property tax was paid, and we have the approval of the Internal Revenue Department of the United States of 4 per cent on that class of merchandise. So we could take the amount of the value or the amount of the depreciation charged on equipment loan agreement, expand that to 100 per cent and apply the cash rate.

Q. Was the figure $107,646.50 taken from your books or does that appear on the books of the company anywhere other than in connection with the preparation of this statement?

A. No, but the $4,305.86, which is a depreciation on this class of equipment, does appear on the books.

Q. Well, the difficulty I am having is how you could obtain that figure of $4,305.86 without first having had your total investment in E. L. A. equipment.

A. We have the total investment in E. L. A. equipment, but my memory is that investment in E. L. A. equipment is both reseller and consumer. The depreciation is charged direct to the channel. Therefore, we took the channel 4163 amount of depreciation and expanded it to get the value upon which that depreciation was predicated.

Q. I think that clarifies it. Well, in other words, did you have a total investment on E. L. A. equipment, Mr. Boatwright, and obtained a total depreciation, and then allocated the depreciation between channels.

A. The allocation is made in the preparation of form 189. It was not necessary for me to do the allocating. That was done.

Q. I mean, it was done by the company?

A. Yes.

Q. In other words, if I understand you correctly, the depreciation was figured on such equipment, for all such equipment, and then after the total depreciation figure is obtained, that figure is allocated? If that is the fact, it would explain to me what I didn't understand here.

A. I think that is true but to be absolutely certain, I would have to consult the code of accounts. We have gotten into a detail that my memory just does not support.

Q. Can you state how the annual expense for depreciation on E. L. A. equipment is allocated between channels on form 189?

A. I am afraid I would again have to consult the code of accounts. I am quite sure I know but I would want to be certain in answer to your question.

4164 Mr. Hanley: I don't know how important that is, Judge, but if it is regarded as important we will get it.

Trial Examiner Ballinger: Off the record.

(A discussion ensued off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: I will offer, on the record, your Honor, that if it is regarded as important by the court, we will find out how this allocation was made. Apparently, it is just a matter of formal code of account allocation, and we can find out, if it is regarded as of sufficient importance to warrant that effort.

Mr. Austin: I don't know that it is important enough for further investigation by the respondent, but I feel that the method of arriving at this total investment in E. L. A. equipment was not satifactorily explained on these exhibits, and I simply wish to try to get a more full explanation. As far as I am concerned, I am not asking the respondent to do anything further on it.

Trial Examiner Ballinger: The Examiner would suggest to counsel for the respondent, that he has no power to pass on questions as to whether or not it is important, and he would suggest to counsel that he cover in redirect every—

Mr. Hanley: We just will, in view of the expression of counsel. We certainly will cover it. If he is not satisfied, why, we want to be sure it is clearly expressed and we 4165 will cover it.

Mr. Austin: I would suggest that we adjourn for lunch, your Honor. I have just noticed it is 12:30.

Trial Examiner Ballinger: The motion is granted, and now, at 12:35 p. m., the hearing stands at recess, to be reconvened at 2 p. m.

(Whereupon, at 12:35 p. m. a recess was taken until 2 p. m.)

4166 Afternoon Session.

2 P. M.

Trial Examiner Ballinger: Come to order. You may proceed.

JOHN W. BOATWRIGHT resumed the stand and testified further as follows:

Cross-Examination (continued) by Mr. Austin.

Q. We are now discussing the subject of dispensing equipment loaned under which there is an attempt made on Respondent's Exhibit 31-M and N to differentiate in the expenses of doing business with Ned's Auto Supply Company with the expense of doing business with other service stations. In determining the tank wagon reseller expense of equipment loaned both to Ned's and to other service stations on those exhibits was any separation of this expense made between different products?

A. No, only as the expense item is allocated among the different channels. I can clarify that further to inform that E. L. A. expense, account 070 is a direct charge, gasoline and refined oil being in the tank wagon reseller account.

Q. Some equipment loaned is used for dispensing products other than gasoline, is it not, Mr. Boatwright?

A. Yes, some equipment may be loaned for dispensing motor oils, as an illustration, that will be found in your other methods.

4167 Q. That would not be included in any of these three account numbers?

A. No.

Q. Listed on Respondent's Exhibit 31-N?

A. No.

Q. When you refer to total capital investment in equipment of Ned's, the figure being $2,878.87, does that include all equipment loaned to Ned's, or does it include only equipment loaned for the dispensing of gasoline and refined oil?

A. It includes only equipment loaned to Ned's which would fall within the same classification as the account 070. A sign which may be installed at Ned's would be classified as an advertising cost, but classification of equipment is identical.

Q. Well, we are referring only to E. L. A. equipment. Now, signs are not considered loaned equipment, are they, at least for the purposes of the E. L. A. account?

A. That is correct, they are not in the classification, and the classification of items going to make up the total investment of equipment loaned to Ned's is exactly the same as the equipment loaned agreement classification on the tank wagon reseller channel.

Q. Does the expense for equipment loaned going into the tank wagon reseller channel include any expense for equipment used in connection with the sale of refined oil?

4168 A. It might, but it would be a very insignificant part. The refined oil equipment that might be loaned to a reseller account would be limited to the loan of what we classify as an old "Lubster". If you will recall on my direct examination I explained what was meant by that term, being a tank with a small hand pump mounted on the top, holding in the neighborhood of 50 gallons. Any other dispensing equipment for refined products is usually limited to an old barrel on which there has been a hand operated faucet installed. In practically every case the old barrel hand faucets are the property of the operator but not the property of the supplier.

Q. How was the figure $2,878.60 obtained representing "total capital investment in equipment at Ned's?"

A. We have a property account maintained upon the property owned by the company at every outlet. From this record we took the actual equipment loaned to that account and calculated the actual value of said equipment.

Q. What is the Detroit office form 16?

A. That is a record of the equipment installed at different individual outlets.

Q. Then is the same information available for equipment loaned to other service stations in 1937?

A. It is.

Q. This charge of .016 cents per gallon for dispensing equipment loaned to Ned's in 1937 is made here as 4169 a direct charge, is it not?

Mr. Harley: Referring to Exhibit what, please?

Mr. Austin: Exhibit 31 M and N. It is at the top of N.

A. Yes, that is a direct charge against doing business through Ned's Auto Supply outlets.

By Mr. Austin:

Q. Was a similar direct computation made for any other service station in connection with this study?

A. No, there was not.

Q. Couldn't such a computation be made for other individual service stations in this same manner as made on Respondent's Exhibit 31 M and N for Ned's?

A. Yes, it could.

Q. Do all service stations signed on No. 461 agreements borrow dispensing equipment from the Standard Oil Company?

A. Your question is quite inclusive. I would say that the major portion of them do. There are cases, however, within my personal knowledge where individuals do not borrow such equipment.

Q. Do you have any knowledge based upon the company's records as to the number of 461 contract service stations in Detroit or the percentage of them who borrowed dispensing equipment from the Standard Oil Company in 1937?

A. I couldn't give you a percentage. I don't have
4170 any direct personal knowledge. I know of illustrations of both types but they are individual illustrations.

Q. Insofar as your knowledge will cover the subject, Mr. Boatwright, may it not be that there are some stations who did not in 1937 borrow any dispensing equipment from the company?

A. I think that is entirely possible.

Q. Borrowing of such equipment is optional with the reseller, is it not?

A. Yes. It depends primarily upon what equipment the reseller owns.

Q. In other words, whether he needs it or not?

A. That is right.

Q. I suppose it also follows that some service stations borrow more equipment than others.

A. I would think that would be expected, yes.

Q. Then it is correct to state that the cost per gallon of .092 cents stated on Respondent's Exhibit 31-X is an average only and does not purport to be the actual cost of the loaning of dispensing equipment to any particular service station?

Mr. Hanley: Just a moment. Will you please read that question?

(Question read.)

Mr. Hanley: No objection, your Honor.

Mr. Boatwright, if you understand that, go ahead
4171 and answer it.

By Mr. Austin:

Q. Can you answer that yes or no?

A. Yes, I can answer the question. The cost as reported is an average cost and may not represent the actual cost at any one given outlet in the entire field.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: Any facts or figures that the respondent has are available to the Commission, and we not only are willing but anxious to supply those figures if we know just what figures the Commission wants.

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. It is stated on Respondent's Exhibit 31-N that "this expense was incurred on accounts signed on agreement numbers 461 and 385" and the "net total expense" is divided by the gallonage distributed by these outlets.

Does it follow that none of this expense of $24,708.35 is charged to service stations leased from the Standard Oil Company?

A. It follows that this particular expense classification is limited to the 461 accounts. As you recall, on direct testimony, a similar question was raised wherein I
4172 explained that the expenses of a similar nature on the leased stations were included in another account.

Q. I think you did, Mr. Boatwright.

A. Yes.

Q. Can you just give me a yes or no for that.

A. Yes, I can. This cost of $24,708 is limited to the 461 accounts.

Q. You stated on direct examination, at page 2571, that the company has about six different reseller contracts and that you would have to review them. Have you done that?

A. No, I have not.

Q. Can you describe the different contracts to which you referred other than forms 461 and 385?

A. To describe would mean to include the principal provisions of the contract, would it not?

Q. And state what they are used for, what sort of contracts they are.

A. I don't believe that I could do that without consulting the contracts.

Q. I thought perhaps you might have done that since the direct examination.

A. No, I have not.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

4173 Mr. Austin: May we have a five minute recess, your Honor?

Trial Examiner Ballinger: The hearing will stand in recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

You may proced.

By Mr. Austin:

Q. The first item of expense stated on Respondent's Exhibit 31-O is account number 1005, salaries—advertising. The total for that item after the addition of 3 per cent for federal insurance, and so forth, is $3,637.34.

Trial Examiner Ballinger: How much did you say?

Mr. Austin: $3,637.34.

Mr. Hanley: That is your calculation.

Mr Austin: No. It is right there.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

By Mr. Austin:

Q. What salaries are included in that figure?

A. Members of the field advertising department. In each of the fields we maintain an advertising representative. In some fields and especially in the Detroit field, 4174 we would have an advertising clerk. Some time of either a full time stenographer or some time of the stenographic department predicated upon the amount of the work done for the advertising would be in that figure.

Q. What are the duties of the—what did you call them, advertising representatives?

A. Yes, sir.

Q. And his assistants.

A. The advertising representative is charged with the responsibility of merchandising our advertising efforts to secure the maximum results for our expenditures. He is charged with the responsibility of seeing that our signs are in presentable order. He appears at dealer meetings and has a part on that program in explaining and outlining advertising efforts of coming campaigns and doing all things incident to attempting to secure the maximum benefits for our advertising expenditures in the field in which he is located. The clerks obviously are intended and do maintain such physical records as may be necessary for the proper conduct of his office.

Q. Does he have the responsibility of preparing the advertising material itself, such as copy for newspaper advertising, the content of posters and signs, and so forth?

A. No, no. Not at all.

Q. Who does that?

That is done in the general office and is done in
4175 cooperation between our advertising department
which is under the general manager of sales and our advertising agency.

Q. Then, are the signs, posters and printed matter, newspaper advertising, the advertising material which requires either literary or art work in its preparation prepared by the Chicago office, and is their dissemination directed from the Chicago office?

A. Creative work in advertising is done in the Chicago office. Distribution of that creative work among the different field divisions is controlled by the Chicago office. The advertising representative's creative work would be limited to providing the advertising signs and props incident to the conduct of dealer meetings, sales meetings of our B station agency, and that type. It is very limited, but you can't say that he does not. It is strictly limited to such local meetings.

Q. Does he have charge of the posting of outdoor posters, the locations where they are to be posted, the maintenance and installation and withdrawal of the signs at the service stations, and so forth?

A. He is consulted about the distribution of posters but he does not have charge of it. That is generally handled by general office and is handled on an arrangement through the advertising agency which makes plans for the actual
posting. Now, if there are certain billboards in given
4176 areas, let us say in Detroit suburbs where there has
been an unusual population growth that are not being utilized, the adverstising representative in the field and he write to the general office asking that billboards at certain locations be used if at all possible, and his advice is naturally given consideration, but the general office fundamentally makes the allocation.

Q. Is there an advertising agency in Detroit that handles that work for the Detroit field?

A. No, the advertising agency that handles our account is the McCann-Errickson Agency, headquarters in New York. The branch that handles our particular account is in Chicago That agency also handles or also has a branch office in Detroit, but the Detroit branch does not work on our account. Our account is assigned to the Chicago office.

Q. Does the advertising representative have charge of keeping records of advertising matter at service stations, and supervising or—well, supervising the installation, maintenance and withdrawal of signs at service stations?

A. The advertising department in the field is responsible for knowing where the different signs are located. A clerk in the advertising department will maintain a record of point of sale, installations. I do not think the physical installation of signs is made by the advertising department but that is under the jurisdiction of the construction

4177 department.

Q. Are the expenses stated opposite accounts numbers 1033, 1048 and 1103 on Respondent's Exhibit 31-O expenses incurred by the persons whose salaries make up account 1005 including operation, maintenance and depreciation of vehicles used by them?

A. May I be certain I have your question clear?

Mr. Austin: All right. Will you read the question, please?

(Question read.)

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

A. Account 1033, traveling expense, advertising, are the traveling expenses for the individuals whose salaries are shown in sub-account 1005. Account—

By Mr. Austin:

Q. Can you answer the question yes or no? I do not want you to if you can not.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

A. Accounts 1048 and 1103 are the operation and

4178 maintenance of vehicles and the depreciation expense of the vehicles used by the individuals whose salaries are in account 1005.

By Mr. Austin:

Q. Which of the figures in the right hand column on Exhibit 31-O are listed directly from Detroit form 189 for 1937?

A. All of them with the exception of the top figure which includes the 3 per cent as you stated in the early part of your discussion of this exhibit.

Q. And as to the top figure, is it the fact that the sum of $2,637.34 is the figure appearing on Detroit form 189?

A. That is correct.

Q. For account 1005?

A. Yes, sir.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

A. The figures in the right hand side of Respondent's Exhibit 31-O, following account numbers 1033, 1048, 1103, 1075, are taken direct from form 189, tank wagon reseller channel, Detroit field, 1937. The figure to the right of account 1005 includes 3 per cent unemployment and old age insurance on the salary item of $3,637.34, which amount is taken direct from form 189, Detroit field, year 1937, tank wagon reseller channel.

4179 By Mr. Austin:

Q. At the top of the page, Exhibit 31-O, you state that the advertising expense incurred at Ned's outlets was deducted from cost figures. What deductions were made and from what figures?

A. The amount deducted as a cost of advertising at Ned's Auto Supply outlets is $1,085.42, which is deducted from the total shown immediately above on Respondent's Exhibit 31-O reading $159,096.17.

Q. Then the deduction of $1,065.42 is the only deduction made from any of those figures lifted from form 189, is it not?

A. It is.

Q. And that figure of $1,065.42 is the figure for expenses shown on Respondent's Exhibit 31-P?

A. Yes, sir.

Q. And the cost figure for Ned's of $1,065.42 was arrived at as shown on Respondent's Exhibit 31-P, was not?

A. Yes, sir.

Q. Referring to the expenses shown on Respondent's Exhibit 31-P, and which make up the total of $1,065.42, all of those expenses are expenses which would be and were included on Detroit form 189 for 1937 in account 075; is that right?

A. Yes.

Q. Does it not follow, then, Mr. Boatwright, that

4180 the deduction of $1,065.42 on Respondent's Exhibit 31-O is in reality a deduction only from the figure of expense for account 1075 and not a deduction from any of the figures listed from form 189 for the other four accounts?

A. Yes, that is true.

Q. In your opinion is none of the expense listed on Respondent's Exhibit 31-O for account numbers 1005, 1033, 1048, and 1103 properly allocable to Ned's business?

A. Well, sir, there might actually be some part that would be assignable to Ned's but it is so small that I couldn't find it. You see, the sum total of these items we are discussing, anyhow, are small. Now, maybe the advertising representative did in going out on some trip or something circle out of his way a little bit to see whether the signs of Ned's outlets were all right, but the signs were up and there were no changes made. It is just such a small portion that I couldn't isolate it.

Q. Is a portion of the total expense for account 005 allocated to the consumer channel and a portion to the other methods channel on form 189?

A. Yes.

Q. Is that also true for the expenses entering into accounts 033, 048, and 103?

A. They are all allocated on the same basis.

Q. And what basis is that?

4181 A. An all-gallonage basis.

Q. Did the gallonage of Ned's Auto Supply Company in 1937 enter into the tank wagon gallonage which was used for the purpose of those allocations?

A. It did.

Q. You stated on direct examination, Mr. Boatwright, "Our advertising representative in any given field is charged with the responsibility of maintaining records on every piece of advertising equipment that is in existence in the area. Thus, he has a list at any given time of every sign, where that sign is installed, and so forth."

And again you testified that "on that (number) is the estimate of the advertising representative in the Detroit division, who had charge of the distribution. We do not keep a record for four years on the exact number of maps per outlet."

And again: "Q. Is he the same man that has charge of the distribution of the games and displays and other advertising material of that sort?

"A. Yes, sir."

Now, Mr. Boatwright, in view of the fact that Respondent's Exhibit 31-P shows that the company did have a certain number of signs and jewel globes installed at Ned's outlets in 1937, and that an estimate of 2,000 maps were
supplied to Ned's and that certain banners, games
4182 and displays were supplied to Ned's, and it appearing
from your previous testimony that all of this was done by and kept account of by the advertising representative, is it still your opinion that no part of the expenses entering into accounts 1005, 1033, 1048, and 1103 as shown on Respondent's Exhibit 31-O should be assigned to Ned's?

Mr. Hanley: Just a moment. Judge, I think I will not make the objection. I believe the witness ought to explain perhaps what these items are that counsel has referred to as distinguished from the accounts named. I just won't make the objection.

Trial Examiner Ballinger: I assume the witness is thoroughly familiar with them.

Mr. Hanley: If you can answer them, Mr. Boatwright, do so, please.

The Witness: Yes, I can answer it.

A. The allocation of maps takes an insignificant part of the time of the advertising representative.

I would like to correct one statement that you made in posing your question, if I may, before I continue my answer. You asked "are you still of the opinion that no part of this cost is attributable to Ned's?"

Q. I accept the correction because you did say that some part of it might be.

A. My statement was that there might be a part.
4183 It is so insignificant that I could not find it.

Now, to continue with the answer: Whenever our product goes into the station, it becomes automatic that a jewel globe goes on the distributing pump, be those pumps owned by the distributor or be they owned by the operator. That is automatic. That doesn't take any time of the advertising department, nor thought. All that amounts to is that when the report comes in, "five Jewel Globes installed at its location." Write it down.

The allocation of the maps, as I have stated, is set up once a year predicated on the previous year's gallonage. Series of ratios are established. When the supply of maps is secured, the ratios are applied. The entire scheme for the distribution of maps can be handled efficiently in less than one-half day by the advertising department, one-half day a year.

Q. Pardon me. Who did you say distributes those maps physically?

A. The salesmen do it physically, the physical distribution. It is just a process of allocations made with the advertising department.

What other items was your question referring to?

Q. It was the question of banners, games, and displays, and also—

A. Oh yes. The same ratios are used for the
4184 distribution of banners, games, displays, and so forth, as is used for the distribution of maps.

4185 Q. And there is also the fact that you testified to both this afternoon and on direct that the advertising representative keeps a record of all point of sale advertising for every service station which I should think would —well, stop there.

A. I think that that is a broader statement than I had made. If I have made the statement that broad, I erred. I stated that he kept a record of all of the advertising signs, but not all point of sale.

For instance, a point of sale may well be a temporary banner suspended across a driveway. He would make no book entry of that. It would be only the temporary type of signs used at stations that a record is maintained of.

Mr. Hanley: Judge, may I ask a question on voir dire, just a matter of qualification?

Trial Examiner Ballinger: Wait until the witness has completed his answer to the question.

Have you finished?

The Witness: I have.

Trial Examiner Ballinger: You may, Judge.

Mr. Hanley: I think the witness probably has answered the entire question, but as it was asked, the question was asked of you, Mr. Boatwright, reference was made to 1005, 1033, and 1048, and 1103 and perhaps 1075.

The Witness: The question did not apply to 1075.

Mr. Hanley: Well, all right, eliminate 1075.

4186 Now, with reference to these specific account numbers, will you please answer counsel's question.

Mr. Austin: Well, I think he has already answered.

Mr. Hanley: I think he has, but I just wanted it to be applicable to these account numbers, because that is the way the question was propounded.

Trial Examiner Ballinger: Do you care to make any further answer?

The Witness: Well, before making any further statement, may I ask that the record be read; and then I will say I will confirm the previous answer, or make any modification that is necessary in the light of the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: Let's put this on the record.

I have just asked Mr. Austin if we may have the understanding that the questions which he has asked, and the answers which the witness has given refer to the items of account on Exhibit 31-O, with the exception of Item 1075. As I understand it, Mr. Austin says "Yes."

Mr. Austin: Yes.

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

4187 Q. What you did refer to on your previous direct examination was, all items of advertising equipment, Mr. Boatwright, and then you referred to signs specifically, so I assume that advertising equipment, while perhaps not as broad a term as point of sale, advertising may include something besides signs.

Do you wish to clarify that?

A. Advertising equipment, as I used that term on my direct examination, did refer to signs which advertised our products. I am afraid my lack of clarity will be due to a distinction that is not made, to the best of my knowledge, any place on the record. A warning sign is not an advertising sign for a given property.

Q. That comes under safety expense, does it not?

A. Yes, and that is the distinction I had in mind at that time. I think of no records maintained at the present time by the advertising representative that would not come under the classification of signs of a permanent nature or jewelled globes at outlets.

Q. He does keep a record of signs and jewelled globes, does he not, covering each separate service station in his area?

A. He does.

Q. Now, referring to that same practice of keeping rec-

ords of advertising signs, but in another connection: Referring to Respondent's Exhibit 31-P, would it not have been possible to have made a direct computation of
4188 advertising expense of this nature, that is, of the nature of the items shown on Respondent's Exhibit 31-P at any other single service station in the same manner that you have made it here for Ned's?

A. It would have been possible.

Q. Was this done for any other service station selling more than an average annual gallonage of gasoline?

A. It was not done for any other service station.

Q. And may I assume that the records are still available from which this computation was made?

A. They are.

Mr. Hanley: And in view of the statement of counsel, we offer them, if they are desired.

The Witness: The only difficulty would be in those cases where the exhibit is clear that an estimate has been used. Any place reference is made to a record it is still available.

Mr. Austin: Well, we are still on 37, that is the only reason I had for asking at all, and I assumed, of course, Judge Hanley, if you have them that they will be available.

Mr. Hanley: Yes, that is what I mean to say. I do not know what these boys down in the accounting department have, but anything they have I can give you, you may be sure of that.

Judge, I am just sure that the continuing objection goes on here, but—

4189 Trial Examiner Bailinger: Your objection continues on throughout this entire line of examination.

By Mr. Austin:

Q. If Exhibit 31-P sets forth a complete and, as you have said in the exhibit, perhaps an overstatement of advertising expense incurred by the company which is chargeable to Ned's business in 1937, then would not a similar computation of like expenses for any other individual reseller service station give an equally correct result?

Mr. Hanley: Just a minute.

Would you please read that.

(Question read.)

Mr. Hanley: Judge, that is just objected to for a thousand reasons.

I do not think I will object to it. If you can, answer the question, Mr. Boatwright.

Trial Examiner Ballinger: Proceed, if you can; answer the question.

Mr. Hanley: Can you do it? Do you know what it means?

Mr. Austin: Your Honor, I really hate to get up and
make these objections directed to the remarks of counsel
because I feel entirely friendly towards counsel for the
Respondent, and I do not think there should be repeated
objections and statements simply "I have no objec-
4190 tion, but the witness will answer if he can." The
witness won't answer any question if he cannot, and I
think those remarks encumber the record and delay time,
and I think the witness should have entire freedom to
proceed and not have the suggestion, however well in good
faith it is made, that he should answer if he can. It certainly implies a suggestion that maybe he cannot. Now, I do not see why anyone except the witness, himself, would suggest whether or not he can answer the question.

Mr. Hanley: Well, Judge, I want to direct those remarks entirely to the Court and not to the witness and not to Counsel.

I have undertaken in the utmost good faith to accord with Counsel's request that I do not ask my own witness any questions on his cross-examination, and I have not done so for three days since he has made that request. But, Your Honor, I just do think that I am entitled to call attention of the Court to the character of the questions that are asked by counsel, and if I do not want to make the objection I just do not have to make it, and if the witness can answer I think I am entitled to ask him to answer over an objection.

I do not understand the comment of counsel, I just do not understand it.

Trial Examiner Ballinger: The witness on the stand
is one of unusual intelligence and thoroughly familiar with
the subject matter about which inquiry is being made,
4191 and I am sure that the witness would not attempt to
answer any questions that he did not understand.

Mr. Hanley: Judge, I certainly subscribe to that. I can't tell this fellow anything about arithmetic or accounting. He knows so much more about it than I do.

Trial Examiner Ballinger: If Counsel for the Respondent desires to object to a question on other and different grounds than that reason embraced in his general objection, he may do so, but otherwise the Examiner would suggest that he permit the witness to determine whether or not he understands the question.

Mr. Hanley: Well, I think perhaps that I owe Your Honor and Counsel an apology because I just automatically start to object to some of these questions, and then withdrew it.

Trial Examiner Ballinger: Proceed.

The Witness: May the question be read?

Trial Examiner Ballinger: Read the question.

(Question read.)

A. Not quite. I am facing a little difficulty in the answer to that question.

Let me state that if all of the advertising signs at Ned's corresponded with advertising signs at other outlets, your question would be answered "Yes." It would be an overcharge in the case of any other reseller outlet as
4192 well as it is truly an overcharge of the advertising
expenditure allocated to Ned's for these items because I think you will recall that on direct testimony I brought out that "The normal Standard Service Sign" has an average life of approximately 7 years, and I have charged the sign off in this calculation on a one-year basis.

By Mr. Austin:

Q. Nineteen months, did you not?

A. No. That was a special sign.

Q. Yes. You are right. I see.

A. Do you recall my pointing that out?

Q. Yes.

A. The Standard Service signs I charged off on a one-year basis, and to that extent this is an overstatement of these expense items chargeable to Ned's.

Q. Well, if a similar computation were made for other service stations, and the sign; the actual cost of the signs there were charged on an annual basis just as they are here, would not the result be equally correct?

Mr. Hanley: That is objected to until other service stations are designated specifically.

Trial Examiner Ballinger: The objection is sustained.

Mr. Hanley: What do you mean by other service stations?

4193 Mr. Austin: I mean other tank wagon reseller stations, the ones who are referred to in the exhibit.

Trial Examiner Ballinger: The question is amended with the inclusion of the last statement of Counsel for the Commission.

The witness may answer.

The Witness: May the question be read with the amendment.

(Question read as follows:

"Q. Well, if a similar computation were made for other service stations, and the signs, the actual cost of the signs there were charged on an annual basis just as they are here, would not the result be equally correct? I mean other tank wagon reseller stations, the ones who are referred to in the exhibit.")

A. Well, the number of signs at the Ned's Auto Supply outlets, and other outlets, would differ. The responsibility of the advertising man and his time in teaching the proper merchandising of our advertising effort on the part of the other tank wagon reseller outlets would differ in terms of the specific items as enumerated on 31-P. Barring the difference in number of signs, the calculation for any other one service station would be as accurate as the Exhibit 31-P.

By Mr. Austin:

4194 Q. As far as numbers are concerned, is that important, Mr. Boatwright, because this being a direct allocation the expense for each station would depend upon the exact actual expense there, would it not, whether it be one sign or three?

Mr. Hanley: Just a moment.

That is objected to for the reason that it does not specify the—the Respondent, at the request of the Government, has furnished the Government with a list of all of its service stations supplied in the Detroit area, and that list has now been offered in evidence by the Respondent.

Trial Examiner Ballinger: It has not been received.

Mr. Hanley: Whether or not it has been received, I do not know, but it has been offered and there has been no objection.

If there is any desire to determine the cost of advertising, or any other expense of any service station service other than Ned's, it ought to be made specific, and it can be made specific because the list has been offered in evidence.

4195 Trial Examiner Ballinger: The objection is overruled.

The Witness: Will you read the question?

(Question read.)

A. Well, I don't think the numbers would make a great deal of difference. I answered you as I did because I thought you were placing so much emphasis upon the burdensome task of keeping a record of the numbers.

Q. No.

A. But—in your previous examination. No, I don't think the numbers would make much difference.

Q. If such a computation made separately for each retail reseller outlet in the Detroit district took into account only expenses of signs, globes, and point-of-sale advertising such as is included in Exhibit 31-P, it would leave unaccounted for the major advertising expenses of the company; would it not?

A. It would leave unaccounted for the major advertising expenses as classified under Account 1075.

Q. Then I would like to ask, Mr. Boatwright, how you justify Exhibit 31-P as a complete statement of advertising expense chargeable to Ned's business.

A. Because I have charged to Ned's business all of the advertising assignable to that account that I could isolate. I think said twice this afternoon in the testimony that as far as the advertising department in the Detroit

4196 field and the expenses incident to the operation of that department, that there was an insignificant amount, if it could be isolated, but I can't.

If that answer doesn't meet your question, could you either rephrase or break your thought down?

Q. Yes, I will.

A. Into other questions?

Q. To take a particular and substantial item going into the account number 1075, you stated on direct examination that in your judgment metropolitan newspaper advertising is a reseller advertising cost. Why then have you charged no part of the Detroit reseller newspaper advertising cost for 1937 to Ned's business?

A. There are many reasons for it.

First, we received a reciprocal benefit in advertising from Ned's Auto Supply. Whereas our advertisement does call attention to the general public of the merits of our merchandise, Ned's Auto Supply likewise insert newspaper advertisements which not only advertise our products but name them as such. For that the Standard Oil Company pays nothing.

Second, a study of advertising allocation—and may I state at this point that I am a member of the advertising committee of the company and follow this all the time in my regular work?—a study of advertising allocation leaves
the merchandiser at any time faced with the quan-
4197 dry: "Should advertising be allocated on the basis of
potential or on the basis of my sales?". There is one school of thought which would advocate that an advertising budget should bear a fixed relationship to accomplishment. There is another school of thought which would advocate that an advertising expenditure should bear a relationship to the potential that the supplier hopes to achieve. In our advertising we allocate among the sales, the 27 sales fields, and among newspapers in an effort to give recognition to both potential and sales. Any advertising that is allocated on the basis of potential I think you will concede would be impossible to allocate to a given outlet in that community. Any advertising allocation which is predicated upon a sales volume could be allocated to definite outlets on the basis of the gallonage moving through those outlets, but an advertising expenditure recognizing potential does not recognize any individual outlets. Of the total expenditures of the Standard Oil Company, the field in which it is most under-spending, according to a normal relationship with the potential, is Detroit.

Trial Examiner Ballinger: Is what?

The Witness: Detroit.

A. (continuing) We are spending less in the Detroit community in view of the potential than we would be
spending on similar calculations in any of the 27
4198 fields.

Three. Our advertising expenditures for newspapers in Detroit would not be increased nor would they be decreased if this account be lost.

Number four. Our advertising effort is similar to our sales effort in that it is an effort to get customers. Customers are associated with company and brand. That is the object. Therefore, it is not an outlet allocation.

Fifth. Because the Ned's Auto Supply outlets were large distributors of many other lines of products hauling and resulting in a heavy traffic across the driveways of their outlets, the very presence of our merchandise on those driveways resulted in a derived advertising benefit to the popular brands of our gasolines and motor oils in the Detroit area, which has a value, the calculation of which would be impossible to prepare.

As I have been giving this testimony there seems that there were other reasons in my mind. I think I have enumerated the principal ones which led to the conclusion which is expressed in the exhibit.

Mr. Hanley: No. 31-Q.

The Witness: Yes.

By Mr. Austin:

Q. You stated that the loss of Ned's business would not have affected the advertising expenditure for the Detroit field; did you not?

4199 A. I did.

Q. Then you don't think that the benefit from that advertising displayed at Ned's was so great that if they had ceased the company would have had to expend in Detroit something greater than it does now?

A. It is possible that we might have.

Q. Would the loss of the business of any other single tank wagon reseller customer in Detroit have affected this advertising expenditure?

A. No, because, relatively speaking, they don't—they are not of that importance.

Q. And the loss of Ned's account would have affected it, if at all, more than the loss of any other station, would it not?

A. Yes.

Mr. Austin: If your Honor please, I would like to have a paper marked for identification.

Trial Examiner Ballinger: The reporter will mark the document Commission's Exhibit 84-A, B, and C.

(The document was thereupon marked "Commission's Exhibit 84-A, B, and C," for identification.)

By Mr. Austin:

Q. I show you Commission's Exhibit 84-A, B, and C, for identification, Mr. Boatwright. Will you describe what is contained therein?

4200 A. Commission's Exhibit 84-A, B and C presents an analysis of the advertising expenditures by media chargeable to the reseller channel in the Detroit field for the year 1937, segregating the cost as shown on form 189 according to the principle of component parts.

Starting in the middle part of Commission's Exhibit 84-A and continuing on 84-B and 84-C are explanatory notes explaining the treatment of advertising costs in our accounting setup.

Mr. Austin: I offer the exhibit in evidence.

Mr. Hanley: No objection.

Trial Examiner Ballinger: Without objection, Commission's Exhibit 84-A, B and C is admitted in evidence.

(The document heretofore marked "COMMISSION'S EXHIBIT 84-A, B and C," for identification, was received in evidence.)

By Mr. Austin:

Q. It is stated on Commission's Exhibit 84-B that "advertising expenditures are allocated to sales channels, form 189, according to the ratio of gallons sold through each channel to the total gallons sold;"

Is that the accounting practice of the Standard Oil Company as to newspaper advertising?

A. It is.

Q. Is it the accounting practice of the Standard
4201 Oil Company as to printed matter and direct mail advertising?

A. It is.

Q. Is it the company's accounting practice as to motion picture advertising?

A. It is, unless there be a rare exception of a picture preparation on a particular product by the technical department. I don't think that such an exception would be included in account 1075, but the answer generally is "yes."

Q. Is the same true as to outdoor posters?

A. Yes, sir.

Q. Is the same true as to dealer trade papers and magazines? I assume that means advertising in dealer trade papers and magazines.

A. That is right, and it is true.

Q. Is the same true as to the method of accounting for expense of signs and dealer outlets?

A. It is.

Q. Is the same true for the sum total of the miscellaneous items which are included in making up the expense figure of $26,558.31 on Commission's Exhibit 84-A?

A. I can't speak of the general classification. In making up our account 1075, advertising costs, some charges are direct by channel, some are allocated upon a tank wagon gallonage basis only, and some are allocated on an all-gallonage basis. There may be included in the
4202 miscellaneous items which were too small to classify
some direct charges or there may have been some that were charged only to the tank wagon reseller and tank wagon consumer channel and allocated among those. Likewise, if we carried across in the allocation of the account 1075, I am satisfied we would find several direct charges in the other method channel for specialty displays, let us say on canned goods, motor oils, and things of that type.

Q. Is that under miscellaneous?

A. It would be under the miscellaneous classification in another channel, Mr. Austin.

Q. Yes.

A. And that is why I say I can't give a general answer to this last item, which is a miscellaneous classification of individual items or media too small to give separate classification to.

Q. Why are not these signs at dealer outlets charged direct to channels other than on an all-gallonage basis?

A. Oh, they advertise our products. They advertise our products to those who see it. Those who see the signs may be a tank wagon consumer or they may be a tank wagon seller customer. Advertising is not according to where a particular sign may be physically posted. The effect of the advertising is on the consumer's mind.

Q. Nevertheless, you have on Respondent's Exhibit
4203 31-B attempted to charge the expense of certain
signs directly to the stations where they were located; have you not?

A. Yes, because I was attempting to isolate an advertising charge to Ned's Auto Supply outlet in compliance with the request and, as I have stated, I have overcharged the advertising to that account.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Proceed.

By Mr. Austin:

Q. Taking the cue from Judge Hanley, it is true, is it not, Mr. Boatwright, that the sums which you have charged directly to cost of doing business with Ned's Auto Supply Company on Exhibit 31-P is the actual cost to the company of the signs there listed?

A. It is.

Q. May it not well be possible in view of your testimony regarding the number of people that drive past Ned's, that the value to the company of those signs is much larger than their cost?

Mr. Hanley: Well, I guess I opened that.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

4204 Proceed.

The Witness: Your question was phrased, may it not be possible.

By Mr. Austin:

Q. Yes.

A. It may be possible, is the answer.

Q. We have been referring to an allocation of advertising expenses between the tank wagon reseller, the tank wagon consumer and the other method channels on form 189; and you stated that such ~~an~~ allocation was made on an all-gallonage basis for the items newspaper advertising and so forth listed on Commission's Exhibit 84 except as to miscellaneous items, as to which you did not state definitely what part was allocated in that manner. Is that a correct statement? I am just trying to tie up what we have been over.

A. Yes. I think that is a correct statement. The only qualification I should like to see in the record in that connection is there may be some part of some one of these items that is allocated, but I think it is a small part.

Q. In making this allocation of advertising expenses between channels for 1937 was Ned's gallonage included in the tank wagon reseller gallonage used for the allocation.

A. It was.

Q. On Commission's Exhibit 84-B it is further stated that in July, 1937, tank wagon reseller gallons repre-
4205 sented 78.8 per cent of the total gallonage. What is referred to by total gallonage?

A. I see the statement. The total gallonage is the sum total in the gallonage used in making allocations. It excludes direct shipments to customers.

Q. What do you mean by direct shipments?

A. Just exactly what it states, shipments which do not move to our bulk plants. Thus we may supply General Motors with the gasoline purchased on specification and they may purchase several trainloads. That volume is not used in the allocation of costs. We also supply many other large purchasers over there on that basis. Where it is shipped direct, not moving through our plants that volume is not used in allocating costs.

Q. Is it your opinion that advertising such as newspaper advertising, outdoor posters and signs at dealer outlets have no advertising value in connection with the business of customers who purchase by direct shipment?

Mr. Haniey: May we go off the record a moment?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

A. No. Advertising has little influence, if any, on sales of that type. Such sales result purely in price buying, producing a commodity for the specifications as out-
4206 lined by the purchaser. They are not shipments of our usual products sold under our usual brand names.

By Mr. Austin:

Q. Was the Citron Kolb Oil Company and the Wayne Oil Company direct shipment purchasers in 1937?

A. I stand corrected to the effect of the Citron Kolb Oil Company, the Wayne Oil Company, what is the other?

Q. Steickman Oil Company.

A. And the Steickman Oil Company, I stand corrected to that extent. They are included in direct shipments.

Q. And was none of this advertising expense allocated to their business in 1937?

A. My answer stated, I am afraid somewhat in reverse to your question. Their volume was not used in the allocation of our advertising costs. Is that what you had in mind?

Q. Yes.

A. That is correct.

Q. Because obviously no specific allocation of costs was made, of any costs was made to their business?

A. That is right, that is right.

Q. Unless you had some occasion to do it that I know nothing about.

A. That is correct.

Q. The business of those three companies depended directly upon the amount of gasoline sold by the retail

4207 outlets served by them, did it not?

A. I thought those three companies had some consumer business also. Hasn't the testimony of the witnesses called indicated they did have a tank wagon consumer business?

Q. They may have possibly some, but I think the testimony shows that the majority of the gasoline purchased by them was resold to tank wagon reseller stations.

Mr. Hanley: We will concede that, Mr. Austin.

The Witness: All right. Upon conceding that point.

Mr. Hanley: We will concede that. Most of their business is either sales to leased stations or sales by themselves through a service station.

By Mr. Austin:

Q. Well, they did some retail, I think most of it was wholesale business to the service stations.

A. Now, may I have the exact wording of the question, please?

(Question read.)

A. I think counsel for the respondent conceded your statement.

Mr. Austin: Yes.

The Witness: That takes care of the answer, doesn't it?

Mr. Hanley: That is the answer.

The Witness: That is the answer, yes.

4208 By Mr. Austin:

Q. That being true, why was no part of the gallonage of those three jobbers included in the gallonage used for the allocation of these advertising expenses in 1937?

Mr. Hanley: Off the record.

(Discussion off the record.)

Mr. Austin: On the record. I am referring to the expense as to which you stated allocation was made on an all-gallonage basis.

The Witness: That is correct.

Mr. Hanley: Well, go ahead, Mr. Boatwright. Answer the question, just be sure—

Trial Examiner Ballinger: What is your answer?

The Witness: It is correct, is an answer given to the question raised by counsel for the respondent. I have not answered the question as put by counsel for the government, and before attempting to do so I should like to have the question read.

(Question read.)

A. It was not used in the allocation of advertising expenses, 1937, prior thereto or subsequent thereto.

The reason we do not use direct shipments in allocating costs, such as advertising, is because it would result in a meaningless figure. Now, it is possible that may be
4209 we should use part of direct shipment and exclude part of direct shipment in an allocation. That is subject to discussion. Our business, Standard Oil Company, is set up primarily to serve a tank wagon market. Our expenses are incurred primarily in a tank wagon market. For a proper expense control I think it is the underlying thing that we allocate our costs primarily on the basis of the volume for which those costs were fundamentally incurred. It has been the policy and is the system upon which our system of bookkeeping is established.

By Mr. Austin:

Q. Does that total gallonage referred to on Respondent's Exhibit 84-B—well, I understand that it does not include tank car or transport truck shipments, is that correct? In other words, are tank car and transport truck shipments synonymous with direct shipment?

A. Yes.

Q. It does include oils and greases, does it not?

A. What are you referring to by the use of the word "it"?

Q. The phrase "total gallonage" on Respondent's Exhibit 84-B, about which I asked you a moment ago and you stated that it included the gallonage in the three channels but did not include direct shipments. Now, since that time we have been discussing direct shipments. I now am asking you as to products whether it includes all products sold by the company.

4210 A. Well, I did not know whether by "it" you mean direct shipments.

Q. I mean total gallonage as used on this exhibit.

A. I understand the question.

The total gallonage as used in the preparation of what is now Commission's Exhibit 84-B would have included greases or motor oils, provided they were not direct shipments of these products. Again we come to a case where the large industrial organizations in this particular area buy large quantities of what we refer to as formula oils. They are made to their specifications, and it would be an unjust thing to use the volume of those products in allocating advertising costs.

Q. Would that come under direct shipment?

A. If it is made direct, shipped direct it would, and we do not have storage facilities for formula oil as a general practice at any of our bulk plants.

Q. Referring now to the total sales of all products sold by the company in the Detroit area.

A. Yes.

Q. Does this total gallonage as referred to on Exhibit 84-B include the total of all petroleum products except direct shipments?

A. Yes, it does.

Mr. Austin: Your Honor, may I have this paper 4211 marked for identification?

Trial Examiner Ballinger: The reporter will mark the paper "Commission's Exhibit 85," for identification.

(The document was thereupon marked "Commission's Exhibit No. 85," for identification.)

By Mr. Austin:

Q. Are you familiar with this exhibit, Mr. Boatwright?

A. I am.

Q. Will you please state what it is?

Mr. Hanley: May I see it, please?

Mr. Austin: It is a newspaper advertisement.

(Commission's Exhibit 85, for identification, was handed to Mr. Hanley.)

Mr. Hanley: All right.

A. This is a copy of a newspaper advertisement that was run in various newspapers throughout the midwest during the summer of 1937 by the Standard Oil Company of Indiana.

Q. Is this advertisement characteristic of the Standard Oil Company's newspaper advertising in the Detroit field for 1937?

A. Characteristic—

Mr. Hanley: Judge, I don't know what that question means.

Mr. Austin: Neither do I. I would like to have the witness answer. Maybe he can tell me.

4212 Trial Examiner Ballinger: Does the witness understand the question?

The Witness: Counsel for the respondent merely beat me to the same question. I didn't know what was meant by "characteristic."

By Mr. Austin:

Q. Well, is this advertisement an unusual example of advertising or is it merely representative of general product advertising of the company? I say "general product" because it appears on the face of this advertisement that it refers to other things than gasoline, and I believe that it is—correct me if I am wrong—intended to advertise—

Mr. Hanley: Judge, I don't know what counsel is getting at but the fact is, and we will agree to it, that in 1937 and every year since the respondent, Standard Oil Company, has advertised in newspapers, metropolitan newspapers and local newspapers, farm newspapers. As to whether or not this is representative, I wouldn't undertake to say, but we have made advertisements of our petroleum products, primarily our gasoline and our motor oils.

Trial Examiner Ballinger: Would you say whether or not it is illustrative of the advertising?

Mr. Hanley: I don't think it makes any difference, does it, Mr. Austin, whether it is one kind of an advertisement or another? The fact is we do do that advertising and 4213 we have done it in 1937 and since.

Mr. Austin: I think I used the word "characteristic."

Would it make the question easier for you to answer if I asked you if it is representative of the newspaper advertising in the Detroit area in 1937?

The Witness: No, it doesn't help. If you mean representative in terms of theme in our advertising appeal, if you mean representative in terms of products having a part of the ad, if you mean representative in terms of whether it is broadside to all of the papers, if you mean whether it is representative of both advertising in metropolitan papers and farm papers—"representative" is too broad.

Mr. Austin: May it be stipulated on the record that this advertisement was supplied to the Commission by counsel for the Standard Oil Company in response to a request for an example of representative advertising in the Detroit area? Because that request was made and this advertisement was given.

The Witness: Not in that manner.

Mr. Hanley: No. We will agree to this, your Honor: That we supplied this ad as having been an advertisement offered or made by the Standard Oil Company. I don't know what counsel means by this term "representative."

I am willing to concede, Judge, that our company
4214 advertises in the newspapers. I just don't know what
this thing "representative" means at all. We do advertise. We try to sell our gasoline, and we advertise it, and I am willing to concede that fact.

Trial Examiner Ballinger: Now, off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: In any event, I offer this in evidence.

Mr. Hanley: We have no objection to it, Judge. We are perfectly willing that it go into evidence.

Trial Examiner Ballinger: Commission's Exhibit 85, for identification, is admitted in evidence.

(The document heretofore marked "COMMISSION'S EXHIBIT 85," for identification, was received in evidence.)

Mr. Austin: Your Honor, I move that we adjourn until 1:30 p. m. tomorrow afternoon.

Trial Examiner Ballinger: Without objection, the motion is granted, and now, at 4:40 p. m., the hearing stands adjourned, to reconvene at 1:30 p. m., June 20, 1941, in Room 332, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 4:40 o'clock p. m. the hearing was adjourned to Friday, June 20, 1941, at 1:30 o'clock, p. m.)

4245

Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Friday, June 20, 1941.

Met, pursuant to adjournment, at 1:30 p. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., appearing on behalf of the Federal Trade Commission.

Harold R. Hanley, Esq. (910 South Michigan Avenue, Chicago, Ill.), appearing on behalf of the Respondent.

4246

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing of Docket No. 4389 in the matter of Standard Oil Company is reconvened, at 1:30 p. m., June 20, 1941, in Room 332, Federal Trade Commission Building, Washington, D. C. The last hearing was held in Washington, D. C., June 19, 1941.

The Reporter will note Counsel for the Commission and Respondent present.

You may proceed.

Mr. Austin: An offer was made by Counsel for the Respondent yesterday, I believe, to introduce in evidence a list of reseller accounts in the Detroit field for the year 1937, such a list having been supplied by the Respondent to the Commission at the Commission's request. I have that list here now and will be glad to offer it.

Trial Examiner Ballinger: It was agreed yesterday that it should be admitted in evidence. The document will be marked Commission's Exhibit 86, for identification, and as so marked is admitted in evidence.

(The document was marked "COMMISSION'S EXHIBIT 86-A to 86-R," both inclusive, and received in evidence.)

JOHN W. BOATWRIGHT thereupon resumed the
4217 stand and testified further as follows:

Cross-Examination (Continued) by Mr. Austin.

Q. At the close of the hearing yesterday, Commission's Exhibit 85 was admitted, being an advertisement that was published in certain newspapers in Detroit in the summer of 1937. Do you know in what papers this advertisement was published, Mr. Boatwright?

A. In all of the papers in the Detroit area in which we carry newspaper advertisements.

Q. What papers are those?

A. I thought I might have a record of all newspapers used in the Detroit field. I find I do not have, but the Detroit Free Press would be an illustration of a newspaper in Detroit in which that ad did appear.

Mr. Hanley: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. My recollection is that there are three newspapers in Detroit. Would all of those have been used, at least, the three major newspapers? One is the "Times," one is the "Free Press."

Mr. Austin: Do you recall the other one, Your Honor?

4218 Trial Examiner Ballinger: The "News."

The Witness: The Detroit "News."

By Mr. Austin:

Q. Oh, yes.

A. The Detroit "News," I am sure, and I think all three papers are used.

Q. You referred a moment ago to the Detroit area. Did you mean to say the Detroit field, or would this advertisment also be advertised in papers, in local papers in Lansing or Ann Arbor, or other cities?

A. That insertion would be published in papers other than in the Detroit metropolitan area.

Q. Does the name of any Standard Oil dealer appear in this advertisement?

A. The name of no individual dealer appears in this newspaper insertion. The ad, however, is signed according to Standard Oil dealers, in the plural.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: The advertisement is signed "More than 23,000 Standard Oil Dealers are at your service."

By Mr. Austin:

Q. That refers to the total number of Standard Oil
dealers in the entire territory served by the company,
4219 does it not, Mr. Boatwright?

A. Yes, sir.

Q. Does this advertisement in form represent the practice of the company as to naming or not naming individual dealers in the advertising?

A. It represents a practice of the company. Frequently, however, dealers at their own expense will buy space adjacent to our newspaper advertisement and will put in their small ads adjacent to our larger ad over their own signature as individuals.

Q. Does any of the newspaper advertising inserted in newspapers by the company ever refer to any particular dealers by name?

A. No.

Q. Are some of the newspaper advertisements used by the Standard Oil Company advertisements for gasoline only?

A. Your statement is too broad, or, if I may correct, your question is too conclusive. We seldom put an ad in the paper that is meant for one product and one product only. We do have ads in which gasoline will receive the major portion of the space devoted. However, even such ads will carry a block on our motor oils or perhaps advertising to the public our credit card convenience, and things of that type.

Q. This advertisement which is in evidence as Commis-
sion's Exhibit 85 advertises a number of products and
4220 services, does it not?

A. It does.

Q. Would what you have said about gasoline advertisements apply to other products such as motor oils or lubricating oils; that is, does the company purchase advertising space or use advertisements restricted to motor oils or lubricating oils or greases?

A. Well, again, a motor oil campaign in the sense of which you appear to have it in mind and the various newspaper insertions incident to the campaign may give motor oil the more prominent place in the ad. However, in their turn they will carry a block or plug on our fine gasoline or on the credit card services.

Q. I had nothing particular in mind. I just wanted, having answered the question as to gasoline, to find out as to the other products.

A. Yes. Well, you see, the reason that we adhere to the belief is that the object of an advertisement is to do a mass selling job and to attract customers toward the driveways of our dealers. Some customers are attracted primarily to the driveways because of their belief in the quality of gasoline. Some are attracted primarily because of their belief in the quality of motor oils. Some are attracted because of the unusual services, they feel, but the end object of any is to get the customer on the drive.

4221 Q. Is any effort made by the company in its accounting practice to allocate advertising expense as between different channels on Form 189 according to the product advertised in the respective advertisements?

A. An allocation by product by channels; is that your question?

Q. Is the allocation by channels made in the case of any advertisements according to the product advertised? In other words, is the expense of any advertising allocated other than on an all-gallonage basis between channels?

A. Within a channel, no.

Q. Well, I mean as between channels.

For instance, to make clear what I am getting at, if an advertisement was, at least as to space and display, directed chiefly to motor oils, would any more of the expense of that advertisement be allocated to the other methods channel, than would an advertisement, the expense of an advertisement directed chiefly to gasoline?

A. Not in our regular accounting practice in allocation of costs in the 189; no, sir.

Q. And that for the reason you have just stated, that the purpose of the advertising is to get customers into the driveway?

A. It is. That subject you are discussing has been one concerning which there has been more discussion and controversy as to how we might be able to accomplish 4222 an accurate and valid allocation among products within a channel. It is a very difficult problem of accurate solution.

Q. What is the general purpose of this general class of newspaper advertising which you described, I might say as represented by Commission's Exhibit 85?

A. The purpose of any newspaper insertion or any other advertising effort is to do a mass selling job.

Q. You mean selling to the consumer.

A. Yes.

Q. And is the purpose of such advertising to create consumer acceptance for Standard Oil products.

A. Definitely.

Q. Will you describe what is meant by printed matter and direct mail advertising?

A. Yes.

Mr. Hanley: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

A. Printed matter and direct mail I think is completely descriptive of what the expense item actually represents. Perhaps I can clarify the question in your mind better with an illustration:

By Mr. Austin:

Q. Yes. I want a description of the nature of the 4223 advertising matter itself.

A. Yes.

We introduced an improved Stanolin gasoline and the octane rating of the product was increased so that it would give better performance in the motors. Incident to the introduction of this new product, different advertising media were used to announce to the public the improvement that had been made. In that campaign was a considerable amount of printed matter which was furnished which was mailed direct to consumers. It may have been a folder describing the improvements of the product; it may have been a description of the improvements made; or it may merely have called to the consumer's attention the fact that an improvement in the product had been made and the greater satisfaction would result from its use; or again we might have a mailing piece that would be furnished to the dealer for the dealer to forward to his customers.

Another illustration would be the insertion of little folders at the end of the month when a statement is presented to credit card purchasers. It is items of this nature going to make up that classification of expense.

Q. When you used the word "consumer" were you referring to consumers who purchase from tank wagon resellers, or were you referring to what is known as a tank wagon consumer?

A. I was referring to both, tank wagon resellers—consumers who purchase from tank wagon resellers as
4224 well as consumers who purchase direct from the tankwagon.

Q. You used the phrase in the exhibit "printed matter" and "direct mail." Does that refer to the same thing or to two things, or does "direct mail" apply only when the printed matter is mailed and not delivered or distributed by some other method?

A. It refers to two different types of advertising expenditures, in a sense.

Now; to illustrate the type of printed matter, as a part of the educational program of a reseller operating an outlet, it is folly for a company to introduce and make available an improved product without educating their reseller customers on the quality characteristics of the product. It likewise has seemed advisable to us over a period of the past several years to keep our dealers thoroughly informed of the plans of the company relative to future advertising campaigns. An advertising campaign may be laid out in its entirety over a period of four months. Prior to the insertion of the first ad a brochure will be forwarded to each and every dealer selling our products, in which ads will be reproduced on a miniature basis, or a tear sheet, or something of that type, so they can be used for window posting.

You see, that type of an expense is unrelated to a direct mail classification to consumers, but it is a printed
4225 matter pure and simple.

Therefore, the term was used, "printed matter" and "direct mail" to illustrate that this expense classification is a sum total of our expenditures of that type allocated to the Detroit field.

Q. The circulars, for instance, that you said might be sent to customers with—did you say with credit cards or with receipts for payments? Maybe you will repeat that?

But I want to know whether that would be printed matter or direct mail, just as an illustration.

A. That would be printed matter.

Mr. Austin: Well, off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: A credit card holder in our company, as well in most companies, indicates a continuity of purchasing on the part of the individual who is establishing his credit with the company. In a sense he is a preferred customer, as we recognize the value of the continuity of your association with our company as a supplier of your petroleum and other automobile needs. At the end of each month, if we assume you to be the holder of a credit card in our company, we would forward you a monthly statement on your account. The monthly mailing makes possible at no direct mailing cost to the company an
4226 opportunity to advertise to you different products or services that we have available by enclosing in that letter, which carries a statement on your account, small circulars advertising our products. Such a procedure is frequently followed just prior to the Christmas season, when a folder might be inserted in the credit card statement on Christmas candles. We know by experience that such a folder has produced remarkable sales results. Or, again, if you have made application for a credit card, your credit has been investigated and approved by the credit department, upon forwarding to you your first credit card a folder is included in the mailing explaining to you the services and conveniences and the quality of the products which we have available.

Now, it is these insertions which illustrate a part of the advertising expense which we classify as printed matter.

By Mr. Austin:

Q. Were holders of credit cards able to buy on credit at Ned's Auto Supply outlets in 1937?

A. Only if Ned's Auto Supply outlets honored the credit card. You see, the credit card is a credit to a customer extended by the Standard Oil Company. A dealer to accept or honor that credit card assigns the sales ticket to the supplying company and is reimbursed therefor.

Most of our dealers do as a practical business application
honor credit card accounts, for the simple reason
4227 that it brings customers on to their driveway, from
which they make a margin of profit.

I could not tell you whether any one reseller in the Detroit area, or, in particular, whether Ned's Auto Supply did or did not honor credit cards and assign sales tickets to the company at that time.

Q. Is there any disadvantage to a dealer in honoring a credit card?

A. Well, I think not. It seems to me a short-sighted policy when they do not honor, but there are some who will not do it.

Q. Would a concern like Ned's, itself having credit with the Standard Oil Company in paying its bills monthly—would not the credit given by Ned's to credit card holders be merely offset at the end of the month against the bill sent to Ned's for gasoline?

A. I don't know how the credit card tickets were handled at Ned's Auto Supply outlets, if such credit tickets were made. I would think it would be a logical thing that at the end of each month any credit card ticket that had been made out by Ned's Auto Supply Company would be forwarded with their payment of their account as a partial offset of that account.

Q. Isn't it true that a smaller dealer who buys his gasoline for cash, if he gives credit on the strength of the credit card, that he cannot—can he or may he not use that charge in part payment to the driver for gasoline delivery?

4228 A. A sales ticket made to a credit card customer
and assigned by a dealer to the company becomes
for all practical purposes equivalent to cash in the com-
pensation to the company for products purchased.

Q. If there is a failure to pay the bill, that is, the credit card holder fails to pay a bill, who takes the loss?

A. The Standard Oil Company. The dealer loses nothig.

Q. And when any such debts are unpaid is that marked off by the company as a bad debt? I do not mean to get into the question as to when it is marked off, Mr. Boatwright, but—let me strike that and phrase it in another way.

Would bad debts or losses by bad debts incurred by credit card holders be included in the bad debts expenses which we have discussed in connection with Respondent's Exhibit 31-J, account No. 1510?

A. Yes. I think we might clarify the series of questions for you slightly if I stated that the extension of a credit card is wholly the supplying company's responsibility. All credits incident thereto, all costs of maintaining records, all costs of billing, and all bad debt losses incurred are purely the supplying company's obligation.

Q. In what account are the expenses of issuing credit cards, maintaining those accounts included?

A. Under accounting.

Q. Under accounting?

4229 A. Yes. You see, it is primarily an accounting function. The maintenance of a record in your credit card accounting, the tabulation or classification of the sales tickets, it is all done by the accounting department.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. What is the purpose of printed matter and direct mail advertising?

A. To secure customers. That is the purpose of any advertisement.

Q. Then you would say the purpose of printed matter and direct mail advertising is the same as the purpose of the newspaper advertising?

A. Yes, merely a different media, which we hope will accomplish the same objectives, perhaps in even a little better manner.

Q. Will you please describe what is meant by motion pictures advertising?

A. Oh, yes. We hold annual meetings of our sales staff, from field managers down through the people who contact the public in an effort to sell our merchandise, early in each year, and frequently in these meetings we will show a motion picture designed to sell our merchandise thoroughly and completely to our own employees.

4230 After the annual meetings in the early part of the year this same motion picture is frequently shown at the dealer meetings, which are held throughout the field for their educational and institutional value.

Subsequent to the showing of the pictures, first, to our own employees, second, to our dealer tank wagon customers, the films become a part of the local library and are then shown to Kiwanis clubs, meetings of the Lion clubs, chambers of commerce, church socials, and what will you, likewise in an effort to sell our merchandise.

Frequently these pictures have to do primarily with the service rendered on the driveway of our reseller outlets. It is a glorification of the dealer function and the glorification of the driveway courtesy.

Q. Then, would it be correct to say that this expense for motion pictures is in part—the purpose of it is in part dealer acceptance and in part consumer acceptance?

A. Yes. I think that would be a correct statement, although the emphasis on a motion picture of that type is not the same as the emphasis on a newspaper advertisement. The primary object, let us say, of a motion picture training film will be directed to educating the dealer and his helpers as to the type of services and conveniences that the rank and file of the American public wants and desires when they come on to his driveway—the 4231 cleanliness of his outlets, the courtesy of his service, the availability and ease of entry, and all other factors having to do with the desire of the purchasing public as that desire is increased or decreased according to its reaction to the courtesy extended to the customer by the dealer. Because of this a motion picture, you see, is more directly assignable to a channel than is a newspaper insertion. I think—I hope the distinction will be—has been clarified by a description of the different emphases that we attempt to get in the motion picture as distinguished from a newspaper insertion.

Q. You say that it is more directly allocable to a channel?

A. I think that it is, yes. Yes, I think it is.

Q. Well, is any allocation to channels of that expense made other than on that basis?

A. No. We allocate that item the same as we allocate newspaper insertion. It is a question of degree, Mr. Austin.

Q. The aspects of the motion picture advertising as you have described are directed, then, toward increasing dealer sales; is that correct? I am trying—

A. Definitely.

4232 Mr. Hanley: Just a minute. What is that question?

(Question read.)

The Witness: May I continue with the answer of that?

Trial Examiner Ballinger: If you haven't finished it, you may.

A. I have one further thought. In the direct testimony which was taken at Detroit, I recall great emphasis being placed on the significance of price as a determinate of consumer patronage. It is. Service on the driveway, as you all know from your personal observation, is likewise a very important determinate of patronage. For that reason we attempt continuously to keep our service standards, to keep the standards of our dealers on a sufficiently high rank that it becomes an important competitive asset.

By Mr. Austin:

Q. Are the dealer meetings at which those motion pictures are shown meetings of Standard Oil service station operators?

A. In the main, plus their helpers, individuals who may work either on the driveway or in greasing stalls or wash racks, frequently the families or wives of the dealers are present, while not infrequently we find that dealers of competitive oil companies have a fairly good representation at some of the meetings. It is an important means of selling a dealer on the advantages of the company.

4233 Some competitive dealers are invited to attend; others come without the invitation and are gladly admitted.

Q. I suppose all of the Standard Oil service stations are notified of these meetings?

A. Oh, yes.

Q. I don't mean of every meeting but—

A. They are notified of the dealer meeting which will be held in their community or their area.

Q. That is what I mean.

A. But, they wouldn't follow the troupe about the sales field and attend all of the meetings because the meetings themselves are repetitions.

Q. What is the purpose of outdoor poster advertising?

A. The purpose of an outdoor poster again is to do a mass selling job to the motorist or public.

Q. Does that again mean creation of consumer acceptance?

A. Definitely so.

Q. What is the nature of advertising in dealer trade papers and magazines?

A. I do not know whether you are acquainted with illustrations of magazines or papers which are published to the dealer trade or not. We have and maintain in our company what is known as "Standard Service News." That is the equivalent of a house organ which is published by the company and is distributed, I think it is on
4234 an every-two-week basis to all the dealers throughout
our territory. The principal contact of the little organ is to bring to our dealers as a class various merchandising efforts which have been found by some one or more of our dealers to be quite successful. It may be a means of selling tires, it may be an unusual sales approach on gasoline, it may be an unusual sales approach on motor oil, but it is a success story of a dealer or dealers.

Now, that is one type of publication referred to.

Q. While you are on that, is the entire expense of printing and publishing that paper included in this advertising expense?

A. Yes. Yes.

Q. I assumed so, but I just wanted to bring out that this doesn't refer to advertising in that paper; it refers to the paper itself.

A. No. It is the paper itself because the paper itself is purely an advertising article.

Q. All right.

A. Then are you acquainted with such magazines as "Super Service Station"? The name of the magazine?

Q. No.

A. Well, that is a magazine which has a circulation primarily among operators of service stations. Now, operators of service stations are potential customers for the distribution of our brands of merchandise. It is ad-
4235 vantageous to attempt to sell through such media our
products. It is such a classification of advertising effort that is reflected under the item "dealer trade papers and magazines."

Now, there is still a broader inclusion under that which should be mentioned, and that would be advertisements of some of our specialty products in the magazine classification on industrial oils, wherein the major emphasis of advertising is given to a particular industrial product.

That illustrates I think adequately the content or the type of expenditures included under that classification.

Q. Now, will you describe the purpose of that advertising?

A. I think I would have to use the same words that I have used in the description of the purpose of any advertising: The development of consumer acceptance and the effort to acquire customers.

Q. There is some distinction between those two things, is there not? For instance, the advertising in this magazine that you referred to that has a distribution among service station operators, the purpose of that would be—or it would have as its purpose consumer acceptance, or would it be chiefly a matter of dealer acceptance?

A. The first step in securing a sound consumer acceptance is to have a complete acceptance on the part of the individuals who meet consumers. A dealer who isn't thoroughly sold on his product isn't any good.

4236 Q. Then your feeling is that any work or advertising—well, leave out "work." That might be something else.

A. Yes.

Q. But any advertising that the company does or circularization of its dealers in the manner which you have described has as its ultimate end the increase of sales to the consumer?

A. Surely. It avails nothing to a company to fill the stock or shelves of the retailers. The supplying company is only successful which helps the retailers to move that merchandise off of its shelves at a profit.

Mr. Hanley: Judge, is this line of examination helpful at all? I don't want to interrupt and I haven't. I haven't said a word all during the hearing. But we advertise and we advertise for the same reason that the Pepsodent Tooth Paste Company advertises or any other company advertises its product. It just seems to me we are building up a lot of record here. It just doesn't make very good sense. Of course we advertise, and we do it to sell our products. That is all there is to that.

Trial Examiner ~~Ballinger: Well,~~ counsel for the Commission is within his rights.

Mr. Hanley: I think he is if he wants to pursue it.

By Mr. Austin:

Can you name some of the principal items entering
4237 into the item on Commission's Exhibit 84-A of $26,-
558.31 entitled ''miscellaneous items too small to show
by separate classification''?

A. If I could I would have done so in preparing the information requested by you and now embodied in Commission's Exhibit 84-A, B and C.

You will notice that we carried the individual breakdown, down to an item as small as $2,920.89 out of a total of $154,000. Therefore, we have carried it down to a point where it represents less than 2 per cent of the expenditure. The miscellaneous items which were too small to classify would have required the study of an infinite number of expense items. I don't know as there is any so called principal items of the miscellaneous classification. Certainly, there is no item that would be more than 2 per cent of the total.

Q. 2 per cent of what total?

A. Out of the $154,635.04 shown as a total for the tank wagon reseller channel under account 1075 for the Detroit field for 1937.

Q. How about the cost of maps? Is that included in the miscellaneous items?

A. Maps are included in printed matter. I am sorry. I should have mentioned that.

Q. That is a rather substantial part of the printed matter expense, is it not?

4238 A. Oh, it is, yes, definitely so. Games, give-aways and things like that would be there to.

Q. How about jewel globes?

A. I don't recall whether that is included under signs or whether that would be a part of the miscellaneous items.

Q. That is a rather substantial item, isn't it, Mr. Boatwright?

A. Not so great. It used to be but it no longer is because processes have been found now whereby a jewel globe gets renewed life merely by a rebaking process. It used to be because the enameling would grow dim after a year or two and the globe became useless. Now those globes are returned and the luster and brilliancy is added to the old globe by a processing process. It no longer is a major item. It was once.

Q. I notice that on Respondent's Exhibit 31-P, the jewel globes are figured at $5.23 per globe, and since there are likely to be several of those at one service station, I would have assumed that for the entire Detroit area that that expense would have amounted to several thousand dollars.

A. It would be, Mr. Austin, if we followed the same practice of writing off the full original cost of every jewel globe in the Detroit field every year, but, you see, that isn't necessary. It is of a continuous nature and the only part of the jewel globe expense which enters into your current advertising effort is either a reprocessing or 4239 a replacement of breakage. You see, in the Exhibit 31-P, as I stated, as we were explaining the exhibit, we wrote off all of that equipment on an annual basis, a one-year basis, and a jewel globe may last 10 years.

Q. Then that item, whatever the amount is, for 1937, is included in the miscellaneous?

A. Well, as I stated.

Q. Or under signs? You are not sure, I take it?

A. I am just not sure but it is in this total item.

Q. What is the meaning of the term "point of sale advertising"?

A. It is largely advertising which is in terms of location at the tank wagon reseller outlets.

Q. What does it consist of?

A. It may consist of banners suspended across the driveway; it may consist of give-aways, games, or it may consist of maps, or hats for youngsters, 28 by 44 signs which are furnished to the dealer outlets and are mounted by the dealer outlets in standard size frames which are placed near the curb of the outlet; any type of an advertising effort which is incident to or associated with the point at which parts are distributed.

Q. Have you named the principal kinds of advertising of that nature? Is the jewel globe, for instance, considered a point of sale advertisement?

4240 A. I would certainly so classify it, in my thinking. The term is a general term and no two men would give the same definition perhaps of point-of-sale advertising.

Q. Well, I would like to know what the definition is for it.

A. I have so given it.

Q. And that is your definition insofar as the term has been used in any of these cost studies?

Mr. Hanley: The witness has so stated, Judge. Do we have to go over it three or four times?

Mr. Austin: I want to be sure it is inclusive, and he has mentioned certain things.

Trial Examiner Ballinger: The witness may answer.

Mr. Austin: And the witness ought to go into it.

A. I have stated in a general way what I regard point-of-sale advertising to be. I can not stand here and take every individual item of advertising expenditure on the part of the Standard Oil Company and place it in pigeon holes as to whether I would or would not classify that particular item as a point-of-sale ad. I just can't do it without having before me a rank and file of every single advertising effort we exerted in the year 1937, but I think that my answer relative to the general meaning of the term is clear on the record.

By Mr. Austin:

Q. Can you state what portion of the total expense 4241 of $154,633.04 shown on Respondent's Exhibit 31-O for account 1075 represents point-of-sale advertising?

Mr. Hanley: Just a minute. All right, no objection.

A. No, I couldn't answer that question. You see, I have already testified and I couldn't give you a complete classification. If I can't do that, then I can't give you an estimate of the proportion which such a classification would result in.

Q. Would all point-of-sale advertising be included in the two items on Commission's Exhibit 84-A entitled "signs at dealer outlets and miscellaneous items"?

A. Not necessarily. There might be some point-of-sale advertising under the item of outdoor posters. There may be in some of our Detroit stations retaining walls, sides of buildings, fences, or other unsightly objects near the confines of a service station property where such conditions exist. It is infinitely better for the company to utilize that space for the poster purposes, whether it be a posting of bulletins or whether it be a painted sign. There may be some of that.

Q. Perhaps I should have asked you which items on Commission's Exhibit 84-A include point-of-sale advertising. I didn't mean to assume that miscellaneous included it or not. I assumed it did. But will you answer the general question?

4242 A. If you will rephrase your question and ask which ones are not likely to be included, I could answer it much easier.

Q. Well, then, which items on Commission's Exhibit 84-A probably do not include point-of-sale advertising?

A. Newspaper advertising and motion pictures are the two which quite likely do not contain any point of sale advertising. You see, printed matter will have a good deal of point of sale advertising.

Q. How?

A. Among the illustrations that I mentioned to you, give-aways, maps, products of that type are given away at point of sale.

Q. You would consider maps point-of-sale advertising?

A. Oh, definitely, yes.

Q. Outdoor posters would probably include very little in the nature of posters at point of sale?

A. I couldn't estimate accurately the ratio. It would be my expectation that the major part of the item on outdoor posters would be other than point-of-sale advertising.

Q. Would dealers' trade-papers and magazines exclude any point-of-sale advertising?

A. Yes. What is a house organ that you send direct to your dealer and which carries nothing but a sales story to your dealer?. Would it be other than a point-of-sale advertising, as your effort is to get that dealer to properly merchandise the true merits of your products? Yes,

4243 I think that is a point-of-sale advertising.

Mr. Austin, now that I think about it, a motion picture after it has been shown to our managers' meetings, our sales people, and our dealers is frequently utilized by dealers who borrow the films and display it on their own premises. You see, it starts as other than a point-of-sale advertising but a part of its use is and does become point-of-sale advertising.

Q. I don't know whether it is possible to draw a line or whether there is any particular point to the distinction between the one and the other, but I wanted to bring it out as far as I could.

A. I understand perfectly.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Will you turn to Respondent's Exhibit 31-P? There is an item there for banners, games, and displays.

A. Yes.

Q. Of $143,393.52 for what is called "total field." What do you mean by "total field"?

A. Standard Oil Company of Indiana territory.

Q. You don't mean the Detroit field?

A. No.

4244 Q. Then that figure is the total expense of the company for banners, games, and displays in 1937?

A. Yes, sir.

Q. What part of that expense was allocated to the Detroit field?

A. I don't know.

Q. Would it be the figure of $6.33 multiplied by the number of outlets in the Detroit field?

A. I have to answer that: I don't know.

Q. Well, if you had divided that figure here by the total outlets of the company, wouldn't you have reached the result of $6.33 per outlet?

A. That is correct.

Q. Would it not follow that the portion of that expense allocated to these Detroit fields would be the number of outlets in the Detroit field multiplied by $6.33?

A. Not necessarily complete concurrence. This was an effort to isolate that part of this item of expenditure which could be assignable and honestly attributable to Ned's. Now, the number of banners which are assigned to a given field depends upon the number of driveways. The number of games depends, to a large extent, upon the number of driveways and the number of outlets. Therefore, in an effort to isolate that part which would be assignable out of this total to four outlets, we used that process of allocation.

4245 Q. Well, this expense of $143,393 was pro rated among the different fields of the company, was it not, in 1937?

A. There is no question about that.

Q. And you do not know how that was done?

A. I am sorry, I can't tell you how that was done.

Q. Where would that expense be included among the items on Commission's Exhibit 84-A?

A. Most of that would be included under the classification of printed matter and direct mail.

Q. Are banners printed matter?

A. I don't know whether they are so classified for the purposes of this expense classification or not.

Q. And games, would they be printed matter?

A. A great many of them are, yes.

Q. You mean it depends on the type of game?

A. That is possible. If we give away checkers, why, then, that isn't printed matter, but if we give away games which are printed or kites which have a picture or sales story on the kite, that is printed matter.

Q. Where did you obtain this figure of $143,393?

A. Off the general office books.

Q. It is carried there as a separate item?

A. Yes, sir.

Q. Then why is it that it is not shown as a separate item in Commission's Exhibit 84-A unless it can all 4246 be included in miscellaneous, which you say is not the case?

A. Well, it would be rather difficult—

Mr. Hanley: Just a moment.

Will you please read that?

(Question read.)

Mr. Hanley: Go ahead and answer it.

A. It would be difficult to include an item of $143,000 in a total of $26,000. The $143,000 is a general office expense. The general office expenditure is made through its advertising department and its advertising agency. The general office expenditures is shown on our books in a lump sum. It is then allocated to the various fields. That part of the $143,000 which is allocated to the Detroit field is included in the $154,635.04 shown on Commission's Exhibit 84-A and the breakdown of the account 1075.

By Mr. Austin:

Q. From what records was this breakdown of figures on Commission's Exhibit 84-A obtained?

A. General office records.

Q. Chicago?

A. Yes, sir.

Q. I am still not clear, Mr. Boatwright, why the general office has a separate record apparently for its expenditures for banners, games, and displays, and yet no separate statement is made of that expense on Commission's 4247 Exhibit 84-A, which is taken from the same records.

Mr. Hanley: That is assuming a fact not in evidence and objected to for that reason, your Honor. It is not a question, it is a statement on the part of counsel.

Trial Examiner Ballinger: If the statement is incorrect, the witness can correct it.

The Witness: Will ~~you read the~~ question?

(Question read.)

Mr. Austin: From the same records?

The Reporter: Yes, "which is taken from the same records."

A. Well, the only difficulty with the question is the statement that they are taken from the same records. It is an assumption on the part of the lawyer. I do not know whether they were taken from the same records or not.

By Mr. Austin:

Q. I was relying on your statement that you got both of these statements from the records in the Chicago office. That is all I meant by "taken from the same records."

A. I did get both of them from the general office. One of them may have been obtained from that record; one of them may have been obtained from the actual payment or from the vouchers.

Q. Is there any separation of advertising expenses in
the general office between newspaper advertising,
4248 printed matter, direct mail, motion pictures, and so
forth, on Exhibit 31-P?

A. I think I see a difficulty. The breakdown of 1075 and these classifications are not maintained consistently and regularly. This was an effort to dig out of the record on 1075 a breakdown as per your request and Mr. Wormack's request while in Detroit to attempt to help you in your evaluation of 1075. We did not maintain this classification and this grouping of costs as a regular accounting procedure. It is neither needed nor do I think practical to undertake such a constant classification. Therefore, when we got the item of newspaper advertising we had to go behind the form on which our advertising records are maintained to make up those items equally, too.

Q. Do I understand you do have on your books in Chicago a separate statement of the company's expense for banners, games, and displays?

A. Well, that is a very easy thing to get. Banners, games, and displays are in each case a part of the advertising campaign, and we can get that direct from the billing.

from the advertising agency of the company. Just pull that off. I guess that is easy to get.

Q. Now, when you assumed this task of preparing Commission's Exhibit 84-A and obtained your figures and you came to the expense for banners, games, and displays, where did you put it on Commission's Exhibit 84-A?

4249 Mr. Hanley: Where?

Mr. Austin: Yes.

Mr. Hanley: That is objected to, because the exhibit speaks for itself. We furnished it at the request of the government, and here it is. It has been offered and received in evidence.

Trial Examiner Ballinger: Does it appear on that record?

Mr. Austin: No, it does not. That is why I am asking.

Mr. Hanley: Will you read the question?

Trial Examiner Ballinger: Was it included in that exhibit?

The Witness: Yes, sir.

Mr. Austin: But not separately. The witness says it may be mixed up in several places, yet when he goes to construe Respondent's Exhibit 31-B he has it all separated.

Trial Examiner Ballinger: Can you explain what counsel desires to obtain?

Mr. Austin: I would like to have the question re-read, if your Honor please.

(Question read.)

The Witness: Your Honor, if I may, I would like to read from a memorandum given to me in Detroit relative to account 1075. I shall not read the entire paper,

4250 but I should like to point out the principal request.

Trial Examiner Ballinger: Who furnished you the paper?

The Witness: This was the request as made by the counsel for the Commission and Mr. Wormack for a breakdown of the account 1075 prior to my departure from Detroit.

Trial Examiner Ballinger: You may read it.

The Witness: (Reading.) "No. 1. Account 1075; year, 1937:

(a). Show total amount of newspaper advertising allocated to gasoline and refined oil tank wagon reseller channel for the Detroit field for the year 1937. If possible, take an individual ad for the same year and state exactly how that ad was allocated to certain field on a circular basis.

"(b). Billboards. Give total expenditure computed in 4075 for outdoor posting during the year 1937 and a brief explanatory notation of any allocations that have been made in establishing our booking records.

"(c). Radio advertising—total, if any, as well as including an explanatory notation on the method of cost allocation employed with this type of medium.

"(d). Signs. Under this caption attempt to give the entire funds expended during the year 1937 for signs, various types, put up at reseller outlets.

"(e). If possible, give total charges for transpor-
4251 tation of advertising material in the forms of postage, freight, express, and so forth.

"(f). If there are any other major items entering into this total expenditure, if at all possible, isolate, classify, and explain the allocation."

That is the request, and that is what we attempted to comply with in supplying what is now Commission's Exhibit 84-A, B and C, and we have attempted to break down by pulling out our various expense items and classifying them as nearly as possible according to the request of the counsel for the Commission, and although no mention was made of dealer trade papers and magazines in some of those other items, it seemed advisable, because of their significance, to give them a separate classification. It was so done.

By Mr. Austin:

Q. Well, Mr. Boatwright, you say you do not know what portion of the expense of the company for banners, games, and displays was charged to the Detroit field in 1937; is that right?

A. That is what I have said, but I have said that whatsoever amount was charged to the Detroit field is included in this item.

Q. Then, did you have in preparing Commission's Exhibit 84-A the amount of the company's expense for banners, games and displays charged to the Detroit field for 1937?

4252 Mr. Hanley: Just a moment.

May I ask your Honor, is there some complaint by this Commission of the accuracy of this breakdown or the extent to which it goes? Are there more figures that you want?

Mr. Austin: I want to find out the amount of the Detroit—expense assigned by the company to Detroit for banners, games and displays for 1937, and I am also asking the witness where he put that expense. Since he says that it was a separate expense, where did he put it on Commission's Exhibit 84-A?

Mr. Hanley: The respondent at this time offers to get for the Commission the cost of banners and whatever else was indicated in counsel's statement allocated to the Detroit field. We will get it as accurately as it is shown, your Honor.

By Mr. Austin:

Q. Now, Mr. Boatwright; can you—

The Witness: There is one statement on the record that I should like to have reread as it merits a correction. It was not what the witness said. May I request a reading of it?

Trial Examiner Ballinger: You may. The reporter will read it.

(The record was read.)

Trial Examiner Ballinger: Off the record.

4253. (Discussion off the record.)

Trial Examiner Ballinger: Now, you may correct that statement on the record.

The Witness: Now, will you read that again?

(The reporter read as follows:

"Mr. Austin: I want to find out the amount of the Detroit—expense assigned by the company to Detroit for banners, games and displays for 1937, and I am also asking the witness where he put that expense. Since he says that it was a separate expense, where did he put it on Commission's Exhibit 84-A?")

The Witness: On reading the question I feel that the record should reveal that in the testimony given banners, games and displays were indicated as being easy to secure from billings on the part of our advertising agency, but that I did not testify that a separate expense classification of these particular types of advertising was carried as a regular part of our bookkeeping procedure.

By Mr. Austin:

Q. Was the total expense of the company for 1937 for banners, games and displays as such allocated between the different fields?

A. It was.

Q. Does it follow from that that the total expense for each field does appear on the company's books as well
4254 as the total?

A. It does not appear on the company's books as a separate item under these classifications. The allocation is probably made on the basis of total billing, these items referred to representing a component part of the total billing.

Mr. Austin: May we have a recess, your Honor?

Trial Examiner Ballinger: The hearing will stand in recess for five minutes.

(A short recess was taken.)

4255 Trial Examiner Ballinger: Come to order.
You may proceed.

By Mr. Austin:

Q. We will now turn, if you please, to Respondent's Exhibit 33-A to E.

Respondent's Exhibit 33-B states: "The total tank wagon reseller expense for 1940" amounting to $1,145,399.13. Is this figure taken from the Detroit Form 189 for 1940?

A. It was.

Q. Form 189 is the form which was introduced in evidence as Respondent's Exhibit 32, is it not?

A. I can't tell you whether that was Respondent's exhibit number.

Mr. Hanley: We concede it, Judge. That is right.

Q. What does "total tank wagon reseller expense" as here used mean?

A. That means the sum total of the marketing expense assigned on our expense statement Form 189 to the tank wagon reseller channel for the year 1940 in the Detroit field.

Q. Is that figure the grand total of all expenses included in the column marked "tank wagon—reseller" on Form 189 for Detroit in 1940?

A. It is under the broad classification listed as petroeum products. You see, the column that you gave the heading was the subdivision under a broader caption.

4256 Q. Do the expenses entered in that column include expenses of distribution of gasoline, refined oils, and tractor fuel?

A. The expenses entered in that column includes the expenses of gasoline, refined oil, and tractor fuels to the extent that less than a thousand gallons bears to 70,000,000 gallons, plus, or 69,000,000 gallons.

Mr. Austin: Will you read that?

(Answer read.)

Q. I don't understand that statement, Mr. Boatwright, since it includes gasoline.

A. I shall see if I can rephrase it.

The total expense referred to represents marketing cost of gasoline through the tank wagon reseller channel plus marketing cost of refined oil through the tank wagon reseller channel, plus any cost for marketing an amount in the neighborhood of 1,000 gallons of Standard tractor fuel.

Q. Are the expenses of distribution of any other product included in that channel?

A. The distribution of cost on Form 189 is a channel distribution. It is not a distribution of costs by products within a channel.

Q. I still don't think that answers my question, Mr. Boatwright.

Trial Examiner Ballinger: Read the question.

(Question read.)

4257 By Mr. Austin:

Q. Now, that question emphasizes products, any other product.

A. Well, would you illustrate, please?

Q. Yes. You have stated that the expenses entered in that channel include the expenses of distribution of gasoline, refined oils, and tractor fuel through the tank wagon reseller channel. Are the expenses of distribution of any other product through the tank wagon reseller channel included in that column?

A. Well, by an illustration do you mean are expenses that may be incident to the distribution of the motor oil—

Q. Yes.

A. —as an illustration in that column?

Q. Yes, that is correct.

A. No.

Q. That as far as products are concerned, the only products the expense of which or any expenses of which are included in that column are gasoline, refined oils, and tractor fuels?

A. Yes, sir.

Q. Does that column set forth the total expenses charged by the company,—total of all expenses charged by the company,—to the distribution of gasoline, refined oil, and tractor fuels to tank wagon reseller customers in the Detroit field?

A. That column represents the total marketing 4258 cost charged to the customers in this particular charge for the products enumerated.

Q. Are there any other expenses of marketing such products to such customers?

A. No, there are not.

Q. Which are not included in this column?

A. No other marketing costs; no.

Q. What do you mean by "marketing costs"?

A. Exactly what the term designates. In other words, this does not include any manufacturing cost, or does not include transportation cost that we would pay common carriers to get the product to our bulk plants.

Q. Well, by marketing costs, you mean all costs of sale and delivery?

A. Yes, sir.

Q. As far as transportation which you have just mentioned, I will take up more specifically later.

Respondent's Exhibit 32, Form 189, is entitled "Comparative statement of expense"; is that correct?

A. Yes, sir.

Q. Is this form prepared for each field?

A. It is.

Q. Where is this form prepared for the Detroit field?

A. Do you have before you a copy of the form? Those items which are enumerated under the broad heading 4259 "Direct Field Expense" are prepared and allocated in the Detroit field office. That part which is encompassed under the caption "All Other Expense" approximately half way down your statement?

Q. Yes.

A. Are prepared and allocated to the field by the general office.

Q. Is the general office located in Chicago?

A. It is.

Q. And where is the data appearing on Form 189 when it is filled out assembled? In other words, does the Detroit office forward its figures to Chicago and is the whole form completed there or does Chicago forward its figures to Detroit and is the whole form completed there?

A. The Detroit field forwards to Chicago the form completed under the caption "Direct Field Expense." The lower part of the form "All Other Expense" is added thereto in the Chicago office to comprise the total marketing cost for the Detroit field. The form is completed in the general office in Chicago.

Q. Then I assume that all the totals and the percentages are computed in the Chicago office?

A. You question is too broad.

Q. Well, it is—

A. When you say "all" I don't know which item, of course, you are referring to.

4260 Q. I mean totals and percentages which apply to the entire group of figures prepared as you have stated at both places. In other words, the final completion of the form, all of the separate figures which are available which go opposite the various account numbers.

A. The final completion of the form is in the Chicago office.

Q. Perhaps I could be more specific.

A. I don't know what more I can say to answer.

Q. The computations which appear on the last nine lines on Respondent's Exhibit 32—

A. The Form 189?

Q. Yes.

—are computed and entered in the Chicago office, beginning with the line "Total All Other Expense"?

A. Well, that line obviously has to be considered in the Chicago office.

The next line "Average Per Unit This Year" likewise would have to be computed in the Chicago office.

The following line "Average Per Unit Last Year" is taken from the comparable form for the identical month, the preceding year.

The grand total, "all expense," is a Chicago computation.

"Total Units Including Direct Shipments" I think 4261 would have to be a Chicago calculation in its very nature.

The following line would be a Chicago calculation.

The same would be true of the "Total Units" item 1 less item 2.

Yes, I think all of the last eight lines would be prepared in their final form by the Chicago division with such information as would be needed for their preparation and calculation secured direct from the Detroit office.

Q. Is not one exception to the statement you made regarding the accounts listed under the general title "All other Expense," Account No. 106? Is not that account expense computed in the Detroit office?

A. No. The depreciation expense, vehicles, trucks, motors, and so forth?

Q. Yes.

A. No, that is computed in the Chicago office.

Q. I see.

A. Yes.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. What is Form 439, Mr. Boatwright?

A. Form 439 is a record of sales by products through types of customers.

4262 Q. Can you elaborate that a little?

A. I think I could elaborate it enough to clarify the question that may be in counsel's mind.

We have used this form in connection with the leased service station tank wagon gallons, and we have taken the report of sales to this class of outlets to break down the total gallonage between gasoline and motor oil.

Q. Did you say that was used only in connection with lessee service stations, or did I misunderstand you?

A. I can't tell you. I said that the Form 439 is used in connection with lessee service stations; whether it is used only in that connection, I couldn't tell you.

Q. Is that a field form or is it a general office form?

A. It is a form that is filled out in the field and submitted to the general office.

Q. Is it prepared annually or on what basis?

A. The time period covered by the form would have to be determined from the instructions. I don't recall.

Q. You don't know how often it is prepared?

A. I don't know sufficiently accurate that I could testify under oath.

Q. Well, is it a form which is used in every field?

A. It is a form used in every field. It is used currently;
it is prepared currently, but whether it be a form that is
used only for purposes of control such as it might well
4263 be in connection with leased service stations, or
whether it is used as a sales promotion form, I don't
at the moment recall. My impression is that it is an operating form.

Q. Respondent's Exhibit 33-B refers to Form 439 for the year 1940. Does that indicate that the form was prepared on an annual basis?

A. Not at all. Many forms prepared on a monthly basis or on a quarterly basis are recapitulated at the end of the year for an annual picture. All this means was that it was a form upon which a recapitulation had been made for the calendar year of 1940.

Q. Have you a copy of that form with you?

A. I do not.

Q. Can you state little more in detail as to just what data appears on that form?

A. I am sorry. I cannot. We have thousands of forms and I can't at this moment give you complete detail of the heading of that particular form.

Q. I suppose that those forms for 1940 are available in case we desire to see them?

A. Yes, sir.

Mr. Hanley: I am just not clear as to what that means. Is there a request on the part of the Commission? If there is we will comply with it.

Trial Examiner Ballinger: Off the record.

4264 (Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I will ask the Respondent to produce form or forms 439 for the Detroit field for 1940.

Mr. Hanley: You want the records of the company? You just don't want the form? You want the record?

Mr. Austin: No, I want the completed form, the record, yes.

Mr. Hanley: I see.

Mr. Austin: As it has been completed for the year 1940.

Mr. Hanley: All right.

Mr. Austin: In the company records.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Let us proceed. On the record.

Mr. Austin: I would also like to have Respondent supply the Commission with a blank form No. 439, if possible.

Mr. Hanley: We will comply with the request, Your Honor.

By Mr. Austin:

Q. Can you state how Form No. 439 was used in the preparation of Respondent's Exhibit 33-B?

A. Yes. From this form we determined the pro-
4265 portion of gallonage which moves through the leased
service station channel. That would be gasoline or that would be motor oils and greases. Having determined this ratio of 98.44, which appears upon Respondent's Exhibit 33-B, that ratio was applied to the $48,506.44, which is the net cost assignable to the column on Form 189 for the Detroit field for the year 1940 under the broad caption "Petroleum Products, Subdivision:, Income and Expense, Leased Service Stations." The application of the 98.44 percent resulted in a charge of $47,749.74 applicable to the over-all tank wagon reseller channel. The $47,749.74 was added to the totals shown on Form 189 for the Detroit field in 1940, the reseller tank wagon, $1,145,399.13 giving us a grand total of expense assignable to the reseller channel, including such property expenses as may be incident to the operation of leased service stations of $1,193,148.87.

Q. Does Form 189 for the Detroit field show all of the company's expenses of sale and delivery of all products to all customers in that field?

A. No, sir.

Q. What expenses of that nature are not shown on Form 189?

A. All expenses are shown. All expenses, however, are not allocated on the basis of all customers.

Q. I didn't ask anything about allocations.

A. I am sorry. I misinterpreted your question.

All expenses of marketing assignable to the Detroit
4266 field on all products is shown on the Detroit comparative statement of expense, Form 189.

Does that answer your question?

Q. Yes. That also includes all customers in the Detroit field, does it not?

A. Expenses incident to all customers are included; yes, sir.

Q. Does Form 189 include all general office expenses allocated to the Detroit field?

A. Form 189 does include all general office expenses allocated to the Detroit field.

Q. Does it include all other expenses of the company?

A. What do you mean by "all other"?

Q. Expenses which are not considered a direct field expense. Does it include all other expenses of the company allocated to the company's business in the Detroit field? Now, in explanation of that question, an expense which was purely a Detroit field expense presumably would not be allocated between fields; it would be a direct expense so far as the field is concerned.

A. That is right.

Q. I am asking you whether all other expenses than direct field expenses of the Detroit field—does Form 189 include all other expenses of the company allocated to the company's business in the Detroit field?

4267 Mr. Hanley: Mr. Austin, do you mind qualifying that by saying "marketing expense"?

Mr. Austin: Yes, I mean marketing expense.

A. Yes. The Form 189 is the sum total of the marketing expense in the Detroit field, all marketing expense.

By Mr. Austin:

Q. Whether the expense originates in the Detroit field or in the general office or wherever it may originate?

A. Yes. Point of origin has no bearing. It is the grand total of the marketing expense for the Detroit field.

Q. By "for the Detroit field" you mean charged by the company to the Detroit field?

A. Yes, sir.

Q. Do the expenses entered on Form 189 include any expenses of sale or delivery to any customer not located in the Detroit field?

A. Yes.

Q. Will you explain, please?

A. Yes. Frequently accounts are sold at the headquarters of an account. It may be what is regarded as a cross-country account. General Motors may buy and delivery may be made at Detroit, at Indianapolis, or other branches. The sale and expenses incident to the sale are a part of the expenses incurred in the general office. The allocation is made on the basis of the part of the total gallonage 4268 that is sold in the Detroit field.

Q. Do you mean sold or do you mean delivered?

A. Delivered in the Detroit field.

Q. Because I think you stated that the sale was made at Detroit.

A. Yes.

Q. But the delivery might be made in several places; is that correct?

A. That is correct.

Q. And in such a case is the only expense allocated to the Detroit field the expense of the delivery of the products delivered in the Detroit field?

A. Well, the actual delivery cost would be handled as a part of the upper half of your Form 189.

Would you give me the exhibit number, please?

Q. Respondent's Exhibit 32.

A. Respondent's Exhibit 32. And would be shown as a delivery cost. The part of marketing expense that I was referring to would be in the allocation of the expenses of the refined oils and gasoline, bulk sales division, in the Chicago office, which made the actual transaction with the headquarters of the purchaser.

Now, the expenses of the refined oils and gasoline department would be allocated among the various fields on an all-gallonage basis.

4269 Q. Might not the sale be made in Detroit rather than by the general office?

A. It is, entirely.

Q. Assuming General Motors was concerned.

A. It is entirely possible. On the other hand, some other field with another customer might make a sale to some company having a branch in Detroit. Now, the contact is done by the field representatives, in most cases. Sometimes a specialist from the Chicago office will go to headquarters and help the fields consummate the sale. That frequently happens with highly specialized industrial products where the ordinary field salesman doesn't feel quite qualified to handle the deal.

Q. Do the expenses entered in Form 189 for a given field include any expenses of delivery of any product delivered anywhere else than in that field?

A. No.

Q. And even as to the example that you put where the sale is made to a customer for delivery in more than one field, do I understand that only a portion of the selling expenses of such a sale is allocated to the field where delivery is made, to each field where delivery is made?

A. That is correct. It is an extremely small item.

Trial Examiner Ballinger: The Examiner would like to ask a question at this point.

4270 Did I understand you to say that the item appearing on Respondent's Exhibit 33-B of $1,193,148.87 represented the total marketing costs in the Detroit area, or did I understand that it represented the costs that could be properly allocated to that field, that there were other costs which could not be properly broken down and included in that amount?

The Witness: No. The understanding should be clarified. Form 189 represents the sum total of the costs for marketing all of our various products in the Detroit field where such costs are included in the Detroit field, plus the allocation of all other marketing costs among the various fields, so that the sum total as reported on the bottom of Form 189 represents the complete marketing cost either directly incurred or allocated to the Detroit division, and the sum total of all 189's for the various fields represents the sum total of the cost of marketing our products for the Standard Oil Company.

Now, the item that you specifically read, being $1,193,148.87, is the sum total of all costs of doing business to the tank wagon reseller channel, plus an item of $47,749.74, which represents 98.44 percent of the total cost for income and expense, leased service stations, as shown on the Detroit field Form 189 for the year 1940.

Trial Examiner Ballinger: The reason for my question is, and I direct your attention to Respondent's Exhibit 31-Q—

4271 The Witness: Yes.

Trial Examiner Ballinger: —that purports to set out a list of expenses, some portion of which probably should have been allocated to the field but which it was impossible to do?

The Witness: The problem we were confronted with in preparing Respondent's Exhibits 31-A through Q was quite a different problem than the one we were confronted with in preparing Respondent's Exhibit 33-A through E. The problem on the first part as set forth in 31-A through Q was a justification of a one-half cent differential between reseller accounts, both of whom were served by tank wagon deliveries from our bulk plants. As such we took only those expense items which we could with definiteness and honesty assign to the different customers within a channel. Here we are confronted with the problem of showing a differential between our total reseller marketing costs and marketing costs on direct shipments to jobbers, which is not carried as a separate channel of distribution on our marketing expense statements. In other words, the direct cost incurred in serving jobber accounts is included in our Form 189, but is not allocated to a separate channel.

Mr. Austin: I move that we adjourn, Your Honor.

Trial Examiner Ballinger: Motion of Counsel for the Commission is granted, and now at 4:45 o'clock p. m., the hearing stands adjourned to reconvene at 9:30 a. m., June 21, 1941, in Room 332, Federal Trade Commission
4272 Building, Washington, D. C.

(Whereupon, at 4:45 o'clock p. m., June 20, 1941, the hearing in the above-entitled matter was adjourned.)

4273

Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Saturday, June 21, 1941.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., appearing o[illegible]half of the Federal Trade Commission.

Harold R. Hanley, Esq. (910 South Michigan Avenue, Chicago, Ill.) appearing on behalf of the Respondent.

4274 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

This is a reconvening of Docket No. 4389, in the matter of Standard Oil Company, at 9:30 a. m., June 21, 1941, in Room 332, Federal Trade Commission, Washington, D. C. The last hearing was held in Washington, D. C., June 20, 1941.

The Reporter will note Counsel for the Commission and Respondent present.

You may proceed.

JOHN W. BOATWRIGHT thereupon resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Austin.

Q. At what points do the expenses in the Detroit field commence, Mr. Boatwright?

A. The marketing expenses?

Q. Yes. Do they include transportation by tanker to the marine terminal?

A. I see.

Q. At River Rouge.

A. The marketing expense does not include the transportation by tanker to River Rouge.

Q. Do they include the expenses of operation and maintenance of the marine terminal?

4275 A. They do not.

Q. Do the Detroit field expenses include transportation from the marine terminal to the company's bulk plants?

A. They do not.

Q. That transportation takes place in Detroit, or, at least, in Michigan; doesn't it?

A. That is correct. It takes place in the field actually, but it is an expense which is incurred not in a true marketing sense. It is a cost of getting our products to the market and, accordingly, we do not regard it as a marketing expense subject to allocation on Form 189.

Q. Where and how is the expense of transportation from the marine terminal at River Rouge to the company's bulk plants accounted for? You say it is not an expense of the Detroit field. How is it treated by the company?

A. Well, it is transportation to our bulk plant carried in the records in the general office and enters on our general books from which the operating statement is made up at the end of the year.

Q. Is any part of that expense allocated to the Detroit field?

A. Any part of the transportation cost?

Q. Yes.

A. Well, naturally, we have a breakdown of freight
costs incurred so that we can follow them and study
4276 them. No part is allocated to the Detroit field on
the marketing expense statement 189. In other
words, our only purpose—

Mr. Hanley: Just a moment.

Judge, if that is regarded as important, we will supply information in so far as we can, but we are now getting into a manufacturing cost which I understood was entirely out of this picture, that we weren't supposed to regard at all.

That is what it is, Mr. Austin, so far as our records are concerned. It is a manufacturing cost.

Mr. Austin: I certainly wouldn't consider it such, Judge. Now, maybe you do, but I don't.

Mr. Hanley: Maybe you wouldn't, but that is just the way they keep the books. We will develop that information but we are just going to get into an awful complicated situation, Judge, here.

Trial Examiner Ballinger: Counsel for the Commission has the offer to furnish the information if desired. If he desires it he will advise you.

By Mr. Austin:

Q. That transportation expense of gasoline from the terminal at River Rouge is a cost of delivery, is it not, Mr. Boatwright?

A. It is not so regarded in our marketing expense. The transportation leg from the refinery or terminal to our bulk plants is not an expense of marketing subject to the control of the field manager. It is carried
4277 as a classification of expense other than marketing cost chargeable to the marketing department of our company.

Q. Well, that is based upon the company's accounting procedure, is it not?

A. Certainly.

Q. Now, aside from that, just in your opinion as an economist and an accountant, you would not say that the cost of transportation from the marine terminal is a manufacturing cost; would you?

A. No, I don't classify that as a manufacturing cost. Our marine terminal is merely a relay point and is operated by the manufacturing department. Therefore, whether the stock be produced and stored by the manufacturing department at Whiting or whether the stock—the inventory be carried at some relay point would make no difference in my thinking. Up to the delivery to the public carrier, it is manufactured. That brief leg in the process of product movement where it is carried by either rail or motor truck transport by some hauler I do not regard as manufacturing, nor do I regard it as marketing. I regard it as purely a transportation cost subject both to a better control and better follow-through if it is given a separate classification, which we do.

Q. You stated, I believe, that manufacturing ends when the product is delivered from the refinery to the
4278 tanker or carrier, which transports it from Whiting; is that correct?

A. No, that isn't correct.

Q. Pardon me. Is the refinery at Whiting?

A. Yes.

Q. I wanted to be sure I was right on that.

A. In my thinking, the manufacturing function and costs terminate with the delivery of the product to the common carrier.

Q. What common carrier?

A. Railroad.

Q. Rather, where? Whiting?

A. At River Rouge.

Q. Oh.

A. In other words, the manufacturing process involves the sum total of the production and inventory of those quantities required by the sales department. Now, whether they maintain that as a part of their inventory in a tank at Whiting or whether their inventory be Whiting plus River Rouge plus other terminals, I am not concerned with that, but the manufacturing department's responsibilities end with the delivery of a specified product to the common carrier at River Rouge, in this particular case.

Q. Who owns and operates the tankers to transport the gasoline from Whiting to River Rouge?

A. The Standard Oil Company of Indiana.

4279 Q. Those are your own tankers?

A. Yes.

Q. I see.

A. Yes.

Q. Is the transportation from the River Rouge terminal to the company's bulk plants accomplished by transport truck hauling?

A. Most of the time. Occasionally an emergency may arise and a carload be moved onto the siding at our bulk plants and unloaded.

Q. Was it formerly accomplished by tank car shipments by rail?

A. I am sure it was.

Q. Can you state when the change took place from tank car shipments to transport truck?

A. No, I cannot. I have only been with the company 8 years.

Q. Well, as recently as 1937 weren't shipments made by tank car? I think there is some testimony in the record on that, and I was under the impression that the transport truck hauling commenced quite recently, within the last couple of years.

A. No.

Mr. Hanley: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Off the record.

4280 Mr. Hanley: I now offer, if it is regarded as important, the information, of course, as to when the Detroit field went on the basis of delivering gasoline by truck transport as distinguished from delivery by railroad tank cars.

Mr. Austin: It appears that the change from tank car delivery to transport truck delivery to the bulk plants and now, including for the purpose of this statement, the bulk plants of the company and also the jobber bulk plants, may not have taken place at the same time, so that I would like to find out when the change in method of transportation was made, both in regard to the various bulk plants of the company in the Detroit area and also as to the bulk plants of customers to whom delivery was made.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I would like to have the information requested as to all of the seven bulk plants shown on Respondent's Exhibit 92 in red letters.

Mr. Hanley: The map, Respondent's Exhibit 92, indicates the bulk plants as being Strathmoor, North Detroit, Clay, Lycaste, Bellview, Scotten, and Dearborn.

By Mr. Austin:

Q. From an accounting standpoint, Mr. Boat-
4281 wright, is it correct to state that there are two general classifications of costs, production costs and distribution costs?

A. Well, I think that some accountants classify a third group as transportation costs; production, transportation, and marketing.

Q. Have you made up a third classification for the purpose of segregating these costs of transportation from terminals to bulk plants which we have been discussing?

A. Well, our calculations do not include the leg from the terminal to the bulk plants at all.

Q. Is that transportation cost treated by you as a production cost?

A. Given a separate classification in our bookkeeping process? Separate from both production and from marketing?

Q. Yes.

A. Yes, sir.

Q. Then you do treat it as a separate class of costs?

A. Yes.

Q. Is the practice of the company in connection with the transportation costs in any of the fields from the terminals to the bulk plants to assign or prorate or allocate those costs as between any different customers or different classes of business or different channels of distribution?

A. Why, no. Your transportation cost in reaching your bulk plant is going to be the same irrespective 4282 of the channel of distribution at which that gallon of gasoline might be sold.

Q. It is true, isn't it, Mr. Boatwright—we will get into that more directly—that some gasoline is sold in an area without going through the bulk plants? In other words, gasoline that is sold by direct shipment from the marine terminal?

A. That is right.

Q. So that it wouldn't be true that all of the gasoline sold in the field goes through the company's bulk plants?

A. Yes, that is correct. Any gasoline going through our bulk plants, however, is broken down through the channels. I thought your question was, do we allocate them among the channels, and the answer was "No."

Q. No. My question was: Are the transportation expenses, total transportation expense of transportation from the marine terminal regardless as to what bulk plant it goes, allocated between channels or between any different divisions of gallonage?

A. There is no allocation made.

Q. You don't attempt, then, to allocate that transportation expense as between, for instance, tank wagon business and jobber business?

A. No.

Mr. Hanley: We haven't put that in as a cost. I don't understand the materiality.

I am sorry. Go ahead.

4283 By Mr. Austin:

Q. Then I understand, do I not, Mr. Boatwright, that no expense of transportation from the marine terminal at River Rouge to any bulk plant, either the bulk plant of the company or the bulk plant of the customer, is included in the expenses entered on Form 189?

A. Your understanding is correct.

Q. Does the company incur expense in the loading of the transport trucks at the marine terminal?

A. There is always a loading expense; any time that you move a product, you have a cost. Loading expense at a terminal is a part of the cost to the manufacturing department.

Q. You charge the cost of operation of the marine terminal to the manufacturing department?

A. They do so operate it. The sales department does not operate the marine terminal at all. That is purely a manufacturing department operation.

Q. And the expense of loading trucks is treated as a part of that operation?

A. Yes.

Q. How is gasoline transported from the marine terminal at River Rouge to bulk plants in Lansing, Ann Arbor, and Pontiac?

A. If you are asking about specific terminals, I cannot answer. I can say that the majority of gasoline served to the bulk plants in the Detroit area—

4284 Q. Detroit area?

A. Detroit field. I am sorry.

—is handled by truck transports. The movement of a product at any time is a selection of the most economical means of movement. If your truck rate gives you an advantage over your rail rate, your truck rate will be used; if your rail rate gives you an advantage over your truck rate, your rail rate will be used. It is merely a selection of the lowest cost means of movement.

Q. Are all of the bulk plants of the company in the Detroit field served directly from the marine terminal at River Rouge?

A. I think that is correct. There is a possibility that one of them might be served out of the marine terminal at Muskegon. I could say that 99 per cent of the volume in the Detroit field is moved directly from the River Rouge terminal, and any movement out of the Muskegon terminal would be in the magnitude of one percent or under.

Q. Are you familiar with the terms of the contracts with the transport truck haulers pursuant to which gasoline is transported from the marine terminal to the various bulk plants?

A. No, I am not.

Mr. Austin: I would like to have those contracts produced for the years 1939 and 1940.

Mr. Hanley: We will produce them, Your Honor. 1939 and 1940. I haven't the vaguest idea of what their 4285 materiality is, if any, but we will produce them if the Commission wants them.

By Mr. Austin:

Q. Is the transport truck transportation paid for on a gallonage basis or on a mileage basis?

A. Not being familiar with the provisions of the contract, that would be a difficult question to answer. I happen to know what the transportation cost figures out at some few stations, but I do not know whether that is the result of a division or whether it is stated in that manner in the contract.

Trial Examiner Ballinger: The information desired will be obtainable when the contracts are produced?

The Witness: That is correct.

Mr. Hanley: Your Honor understands this is not in our cost at all.

Trial Examiner Ballinger: I understand.

Mr. Austin: Well, perhaps it should be. That is the purpose for the examination.

Mr. Hanley: If you are willing that we add to our cost, then it would be very nice.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

By Mr. Austin:

Q. Did you state, Mr. Boatwright—I believe you 4286 did—the number of fields that you have such as the Detroit field?

A. Yes; 27.

Q. Have you made any studies, or do you annually make a study to determine the cost and profits in each field?

A. Total field?

Q. Yes.

Mr. Hanley: You mean of gasoline?

Mr. Austin: Well, I will restrict it to gasoline. I was making the question broader first, or perhaps such a study has been made as to all products.

A. Well, naturally, the profitability of the products are followed by the management of the company.

By Mr. Austin:

Q. Well, in any such study, Mr. Boatwright, are production costs or transportation costs assigned to the various fields?

A. I am not acquainted with any such study.

Q. I suppose, Mr. Boatwright, you are not familiar now either with the variations, if any, in the cost of transportation of gasoline as to whether there is a difference between one bulk plant and another bulk plant?

A. Well, usually there is a difference unless they are approximately the same distance from your point of loading. That is true whether you adopt the rail means of transportation or motor truck transport. It is just common sense that there is a difference.

4287 Mr. Hanley: May I inquire what the purpose is of all this examination about transportation costs in view of the fact that they are not included in the Respondent's computation of costs?

Mr. Austin: Well, in my opinion, it is a matter that we must inquire into. All this gasoline starts from the marine terminal at River Rouge, and the first step to getting that to the customer is the transportation of it to the various bulk plants, and, therefore, in my opinion, all costs incurred from the time the gasoline leaves the terminal at River Rouge are costs of delivery within the meaning of the Robinson-Patman Act.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Let us proceed.

By Mr. Austin:

Q. Turning again, Mr. Boatwright, to Respondent's Exhibit 32, Form 189.

A. Yes.

Q. Please state the products covered by the distribution expenses which are listed under the heading "Tank Wagon-Consumer" when the form is filled out.

Mr. Hanley: That has been asked many, many times. If Your Honor is still in doubt as to what the answer is, I just do not care to make the objection. It is certainly
4288 repetitious. It has been answered.

Mr. Austin: Perhaps you are under some misapprehension, Judge Hanley. The question now is as to tank wagon consumer. Previously the question has been asked as to tank wagon reseller.

A. It will take hours to enumerate the products in answer to that question.

By Mr. Austin:

Q. It will?

A. Yes; and I could not recall 5 percent of it.

Q. Well, that is of interest, Mr. Boatwright. I was under the impression that the tank wagon consumer column, for instance, there were expenses of gasoline and refined oils; in other words, that they are the same products as to which expenses are entered in the tank wagon reseller.

A. I am sorry. The long list would be included in the other method channel.

The principal products entered under tank wagon consumer channel are the three brands of motor gasoline. If there is any cleaning naphtha, or anything like that, in small quantities sold, that would likewise be in there. That is gasolines and naphthas. There would be kerosene, Standard tractor fuel, Stanolex furnace oil, Standard heater oil, Stanolex Diesel fuel, and Standard Diesel fuel. Now, that would represent the great bulk of it. There may be
4289 some little quantities of some specialized type of product.

Q. Do all of those oils that you have just mentioned fall within the classification of refined oils?

A. Well, gasolines and naphthas we give one classification, and in the remainder of the products they would be classified as either refined oils or at times we make a breakdown within the refined oils classification of distillates. The products which were enumerated starting with Standard tractor fuel are all distillates.

Q. Including the Stanolex—

A. Yes.

Q. —and the various fuel oils that you mentioned? Diesel fuel?

A. Yes. Those are all distillates, and we sometimes regard those as just a little separate classification within the refined oils classification.

Q. Do the columns headed "Tank Wagon Reseller" and "Tank Wagon Consumer" in the completed Form 189 contain a statement of all expenses of sale and delivery to these two classes of customers, or do they contain expenses of sale and delivery of only certain products to these classes of customers.

Mr. Hanley: I don't understand that question.

The Witness: Will you break your question down into the component parts and let me answer them? It would be much easier to take care of it on a simplified basis.

4290 Mr. Austin: All right. Will you read back the first part now? Let Mr. Fincum take it down but you read it back.

(Record read as follows:

"Q. Do the columns headed 'Tank Wagon Reseller' and 'Tank Wagon Consumer' in the completed Form 189 contain a statement of all expenses of sale and delivery to these two classes of customers?")

A. Yes.

By Mr. Austin:

Q. Well, isn't the answer to that question "No," Mr. Boatwright?

Mr. Hanley: Well, he said "Yes."

Mr. Austin: Well, I—

The Witness: Well, here is the trouble. You are asking me if this is a cost to a class of customers. Yes, it is a cost to a class of customers on gasolines and refined oils, and this first column "Tank Wagon Reseller Business." Now, those same customers may buy other products.

By Mr. Austin:

Q. Yes.

A. And the cost of the other products will be found in the "Other Methods Channel."

Q. Well, that was my question, Mr. Boatwright, and that is why I put it in the conjunctive, in the first

4291 instance. The question was whether these two columns contained all expenses of sale and delivery to these two classes of customers or do they only contain the expenses of sale and delivery of certain products to these classes of customers?

A. There is no need for repetition of my answer inasmuch as I was on the record.

Q. I don't think so.

Mr. Austin: Will you read it back.

(Record read as follows:

"The Witness: Well, here is the trouble. You are asking me if this is a cost to a class of customers. Yes, it is a cost to a class of customers on gasolines and refined oils, and this first column "Tank Wagon Reseller Business." Now, those same customers may buy other products.")

By Mr. Austin:

Q. What expenses of distribution to tank wagon reseller customers are not included in the tank wagon reseller column?

Mr. Hanley: Just a moment, please, Mr. Austin. That just assumes a fact that is not in evidence at all, Your Honor, that there is something excluded.

Mr. Austin: He just said that there was, in the previous answer, as I understand it.

Mr. Hanley: As between different classes of customers. You are now asking him, if I understand your question, what costs to the reseller channel are excluded in 189 under the reseller column. 4292

Mr. Austin: That is correct. He has stated that the costs of certain products to tank wagon reseller customers do not appear in the tank wagon reseller column, Form 189.

Mr. Hanley: Then the question is objected to because it now appears, by the explanation of counsel, that he is referring to a difference in products and not a difference in costs.

Trial Examiner Ballinger: Read the question.

(Question read.)

Trial Examiner Ballinger: The objection is overruled.

Mr. Hanley: Judge, may I ask the witness if he understands the question?

If you do, I withdraw the objection, and you can go ahead and answer it.

The Witness: Well, I think I understand what the desire is.

Trial Examiner Ballinger: If there is any doubt in your mind as to the question, will you state what you understand the question to be and then answer it?

Mr. Austin: Your Honor, I insist upon an answer to the question as asked unless the witness must answer that he doesn't know or if he says he does not understand 4293 the question I would like to have him say so.

Trial Examiner Ballinger: If the witness is in doubt as to the question, he may state what he understands it to be, and answer it.

Mr. Austin: If he states what he understands it to be, then I have the right to say that is what I have asked him.

Trial Examiner Ballinger: Of course. You may then rephrase your question.

Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

A. It is my understanding that your question inquires if, in fact, a part of the reseller salesman's time, as an illustration, is included in some channel other than the tank wagon reseller channel. I used "salesman" merely because it was an obvious illustration. If that be the content of your question there are costs incurred in the marketing through tank wagon reseller channel which are found allocated to a channel other than the tank wagon reseller channel.

By Mr. Austin:

Q. The question was, what expenses of distribution from tank wagon reseller customers are not included in the tank wagon reseller column, 189. I don't know whether you can give me a list of such expenses or not.

4294 A. Well, it would require starting at the top of our Form 189 and again reviewing every allocation as we have done in the past week. I used salesmen's salaries as an illustration. Now, there are many others, commissions. The only commissions that are shown in the tank wagon reseller channel are on the products that I have enumerated repeatedly as being in that channel for the actual delivery. A commission paid for the delivery of motor oil would be in Other Methods.

Trial Examiner Ballinger: Mr. Austin, do you desire him to start at the top of the list and enumerate each and every item?

By Mr. Austin:

Q. Can't a general statement be made as to products, Mr. Boatwright? Would it be correct to state that all expenses in distribution of products other than those which you have enumerated for the tank wagon reseller channel, that is, gasoline, refined oils, and tractor fuels, are included elsewhere than in the tank wagon reseller column?

A. Yes. That would be a statement that would not be subject to very much question. Of course, as long as you include tractor fuel, I trust that the record is clear that the quantity of tractor fuel in this field to the tank wagon reseller channel is maybe one truckload in a year, a basis like that. It is just insignificant. But, predominantly, you will find your motor oils, specialty products in the Other Methods Channel. That is where all of the
4295 gallonage is shown.

Q. Are all of the distribution expenses to tank wagon reseller customers in connection with the sale and delivery of products other than gasoline and refined oils and a small amount of tractor fuel included in the Other Methods column on Form 189?

A. May I ask that question be re-read, please?

Trial Examiner Ballinger: The Reporter will read the question.

(Question read.)

A. Well, with the exception of the auto supplies—the petroleum marketing cost?

By Mr. Austin:

Q. Yes.

A. Would be in the Other Methods. Auto supplies is shown as a separate column. You understand that.

Q. Yes.

A. Yes.

Q. I forgot about supplies temporarily in asking the question.

A. Yes.

Q. Turning now to the column on Form 189 headed "Other Methods," the distribution expenses of what products are included in that column.

A. Well, I will name a few and then you stop me. Isoviz motor oil, grades 10 through 50; Polarine,
4296 similar grade classification; all of the different grades of Stanolin motor oil.

Q. Well, can't you just cover those by just saying motor oil, Mr. Boatwright, or refined oils or lubricating oils or greases, and give me a few broad classifications like that?

A. I can certainly give you some broad classifications. All the motor oils, the industrial oils, the specialty oils, cold spray oils, industrial fuels, specialty items such as auto polish, furniture polish, liquid gloss, floor glaze, material of that type, greases, both of an industrial nature and of the type that is packaged and sold to the reseller outlets. And then I am sure there are others that I have given you of the big major classifications.

Q. Are any marketing expenses of gasoline included in the Other Methods column? Perhaps I should say entered in the Other Methods column since we are talking about a blank form.

A. I don't know whether there would be any in the Detroit field, but there is a possibility that there might be some. Iron barrel shipments of specialty naphthas or packaged gasolines out of our bulk plants might be in there. It is a very insignificant amount, if any.

Q. Are any expenses of distribution of gasoline to the jobber accounts included in the expenses entered in the Other Methods column?

4297 A. The expenses of distribution to jobber accounts are not segregated according to any channel. The gallonage of jobbers is not used in the allocation among the channels. It exists throughout the entire statement of marketing expense.

Q. Well, for instance, does the accounting expense incident to the jobber business appear on Form 189?

A. Well, accounting expense incident to jobber business is allocated among the channels. The total accounting expense is allocated among the channels on a distribution of time basis, and this distribution of time recognizes only the tank wagon reseller, the tank wagon consumer, and the other method, and the auto supplies channel. We make no separate allocation at all on the accounting that might be incident to the jobber operation.

Q. How about expenses that are allocated on a time basis such as salesmen's expense? Do any salesmen call upon any of the jobber accounts?

A. Why, they might do some calling upon jobber accounts at the request of the office. There is a selling cost incident to jobber operation.

Is that an answer to your question?

Q. Yes. And where does it appear on Form 189?

A. Well, again, we don't have a separate channel. It is again based on the time allocation among the four channels that I mentioned. Now, if a salesman called on a jobber account, the presumption is that it would be a 4298 reseller salesman that would make the call. That is the likely event.

Q. But on his time estimate, where would that be estimated between channels?

A. You are really asking me to give an answer on what some other man would do in making an estimate. I know what I would do but whether or not each of the salesmen have actually done that, I don't know.

Q. Have they not instructions on that subject?

A. Well, we have no instructions on the jobber channel. Our instructions apply to the four channels I have named.

Q. What classes of business are embraced by the expenses entered in the Other Methods column?

Mr. Hanley: Judge, the witness has just answered that question. I object to it as repetition. I think I have exercised a great deal of restraint in the last two days on this examination. That has just been answered so many times I now interpose the objection and insist upon it.

Trial Examiner Ballinger: Is it a repetition of your question?

Mr. Austin: I don't so understand. I previously asked the witness as to products. Now I am asking him as to classes of business, by which I mean I have more reference to customers than products.

Mr. Hanley: Well, all right. If you clarify your 4299 question I will withdraw the objection.

Trial Examiner Ballinger: You may answer.

A. Well, our classification is predicated upon the method of delivery, the channel to which the delivery is made. Now, what class of customers is represented by other methods—

By Mr. Austin:

Q. For instance, I would call jobber business a class of business; I would call perhaps a tank car consumer a class of business. I believe that you ship some of the motor companies such as General Motors in tank car lots; do you not?

A. I think so.

Q. And those would be tank car consumers. Perhaps there are other types of customers of others of these numerous products, and I am referring to classes of business in that respect. Perhaps when I phrased this question originally I had in mind a classification such as the jobber business; tank car consumer and so forth.

A. I think perhaps that your whole situation may be clarified slightly if we go back a number of years in the accounting procedure. We made two primary distinctions: The first was what we regarded as faucet merchandise.

Trial Examiner Ballinger: What kind of merchandise?

The Witness: Faucet.

A. (Continuing) The lighter products which were distributed by tank wagon and were handled through the
faucets. Now, the other broad classification was all
4300 merchandise of a petroleum nature that didn't move
through the faucets. That was all barreled goods,
no matter to what customer the shipment was made. That was the origin of the breakdown which has been carried on through a period of years, has been refined and has been modified. Now, the other methods refers primarily to a system, a method of delivery.

Q. Well, that was going to be my next question. After asking you about classes of business, I was going to ask you what methods of delivery were included.

A. Because it represents this method of delivery to any class of customer.

Q. You see, as I see it, there are three things that might be divided, products, classes of business, and methods of delivery.

Now, if it is easier for you to talk about classes of business and methods of delivery at the same time, please do so.

A. Well, you see, by the very fact that merchandise in that channel, the other methods channel, is not faucet merchandise, nor the costs thereon, in my calculations I have just excluded consideration of that because this involved only a question of the price of gasoline.

Q. I suppose, I don't know whether there would be any point to the question as to whether all expenses of delivery
of gasoline by tank car are included in the other
4301 methods channel, because you have stated that the
expense of the delivery itself to the bulk plant is not
included. So perhaps you can tell me whether that ques-

tion would have any meaning or whether there are any expenses of delivery to tank car customers which are included in the other methods channel, in Form 189?

Mr. Hanley: Just a moment, Mr. Boatwright.

I would like to have the Reporter read that question, and, if Your Honor please, I would like to have you listen to that question. I have an objection to make to it.

(Question read.)

Mr. Hanley: Now, this is objected to, Your Honor, as calling for the conclusion and opinion of the witness. It propounds a question to the witness by counsel which places upon the witness an obligation to tell counsel whether counsel's question makes sense or not. It just is not a proper type of question to ask of any witness.

Trial Examiner Ballinger: Do you understand the question?

The Witness: I can answer the question. The question means nothing to me in its present form.

Trial Examiner Ballinger: Well, in answer, please state what you understand the question to mean so that the record may portray what answer you are conveying.

The Witness: Your Honor, that statement includes, 4302 first, a question, then a review of what I am reported to have previously testified, and then a question as to whether the question has any meaning, and then ultimately a question. Now, what is it that I am to answer? The conglomeration—

Trial Examiner Ballinger: Now, if you are in doubt about it, the Examiner requests counsel to rephrase the question.

Mr. Austin: Will you read the last part of the question?

(Record read as follows:

"* * * whether there are any expenses of delivery to tank car customers which are included in the other methods channel, in Form 189?")

By Mr. Austin:

Q. Can you answer that, Mr. Boatwright?

A. The delivery from the River Rouge terminal to the bulk plant, you mean?

Q. Or any expenses in connection therewith. I am talking about delivery to tank car customers.

A. You understand that I have stated we maintain a separate classification of transportation cost?

Q. Yes.

A. Therefore, none of that is in the 189 at all. Now, any expenses incident to that transportation, I assume you mean any records that we maintain on our movement 4303 of goods will be found in the conglomerate of the 189, as we do not carry any separate channel on that class of business. Part of it will be in other methods, part of it will be in tank wagon consumer, part of it will be in tank wagon reseller.

Q. What portion, if any, of the company's gasoline sales in a given field such as the Detroit field is used or included in "Other Methods" gallonage for the purpose of allocating expenses between channels when the allocation is made on a gallonage basis?

A. Well, the proportion that the gasoline gallonage that is included in the other methods channel would represent to the total.

Q. Well, the question is, what gasoline gallonage is included in other methods gallonage for the purpose of making an all gallonage allocation of expense?

A. That question has been answered on the record when I stated at your request whether there was any gasoline in there, and I enumerated the expenses that would be in there: Packaged lines, steel barrel movements, naphthas.

Q. Who buys gasoline in steel barrels?

A. Customers. I don't know.

Q. This is the first time I have heard it intimated that gasoline has ever been sold in steel barrels. I was just curious.

A. Oh, yes. We have many barrels of gasoline sold a year.

4304 Q. Are those sold to reseller or consumers?

A. Consumers. It is special cuts. It isn't the motor gasoline. It is the product classified as gasoline and naphthas. Now, naphthas include a wide range of special cuts, but it is gasolines, and it would quite likely be in the other methods channel.

Does that clarify it?

Q. That explains it, yes.

Mr. Hanley: As a matter of fact, gasoline is naphtha. That is just a trade name.

By Mr. Austin:

Q. Is any of the gasoline purchased by jobbers in the Detroit area included in the other methods gallonage used for the purpose of making an allocation of expense between channels on an all-gallonage basis?

A. It is not.

Q. Then do I correctly understand that gasoline sold to jobbers is not included in prorating the expense for any account between channels on an all-gallonage basis?

Mr. Hanley: Just a minute.

Would you read that, please?

(Question read.)

Mr. Hanley: That is objected to as a misstatement of the witness' testimony. He has repeatedly said that that gallonage is included in the four channels somewhere.

4305 Trial Examiner Ballinger: Objection overruled. The witness may answer.

A. It was in the testimony of yesterday when we were discussing Ned's Auto Supply, that I testified that that volume was used in allocation. The shipment of gasoline to jobbers is regarded as a direct shipment and is not used in making any expense allocation on Form 189. That is made by the field offices, direct field expenses. In allocating some of the administrative expense of the company on direct shipments may be made to allocate to fields as a part of the gallonage. Having allocated the field, the allocation within a field is made on a basis excluding jobber direct shipments.

By Mr. Austin:

Q. I would like to ask the question again, then, Mr. Boatwright, and ask you if you will please answer it "yes" or "no," if you can, so that I will have the answer next to the question without the intervening material.

Do I correctly understand that gasoline sold to jobbers is not included in prorating the expense for any account between channels on Form 189 on an all gallonage basis?

A. Gasoline sales to jobbers—

Q. Can you answer the question "yes" or "no"?

A. Why, no. I told you of an exception where I said that in the allocation of an administrative expense of the company—

4306 Q. Between fields.

A. Among fields.

Q. Yes.

A. After allocated to a field, no direct shipment is included in allocating among the four channels.

Q. Form 189 is only a field form, is it not?

A. Form 189 represents a composite of our marketing cost for given geographical areas. The upper part is prepared in the field; the lower part is an allocation of costs to the field by the general office.

Q. Well, your exception is one which applies, if I understand you correctly, only to an allocation or proration as between fields?

A. Among fields.

Q. Yes.

A. That is right.

Q. But my question is directed only to expenses which are prorated to the prorating of expenses between channels in a field.

A. To the extent of the proration among the channels within a field, direct shipments or gasoline sales to jobbers are not used.

Q. For any account?

A. I don't think of a single exception.

Q. And is that answer the same whether the ex- 4307 pense in the particular account is prorated between channels on an all-gallonage basis or on some other basis?

A. Such as the distribution of time, you mean?

Q. Yes.

A. I think it is the same. The answer would remain the same.

Q. What is the nature of the figures which are entered on the line at the bottom of Form 189 opposite the words "Total Units (Item 1 less Item 2)," in the reseller and consumer columns?

A. There is no deduction made following that. Item 3, total unit Item 1 (less Item 2) does not reflect a subtraction under the tank wagon reseller channel at all.

Mr. Austin: I didn't hear that answer. Will you read it back?

(Answer read.)

A. Maybe my answer would be clearer to you if I just said that the 69,361,586 gallons is just the total units of gallonage of the products that we have discussed moving through the tank wagon reseller channel.

By Mr. Austin:

Q. My question was: What was the nature of the figures on that line, and—

A. Shall I continue across on the 189, you mean?

4308 Q. I just asked you for the two columns, the reseller and consumer channels.

A. Those are the exact gallons that have been sold through those channels of the products that we have discussed, gasoline, refined oils and the small quantity of the tractor fuel in the reseller channel plus other distillates in the tank wagon consumer channel that have been used in our allocation of cost.

Q. Then do these figures represent the annual gallonage for these two channels?

A. They do.

Q. And that, in turn, would mean, would it not, the annual gallonage for these classes of customers for the products which you have enumerated as going into those channels?

A. For these classes of customers served by this method of delivery.

Q. Yes. Well, the words "tank wagon" at the top covers that, doesn't it, which appear over both of those channels?

A. Except that we have one tank wagon which delivers motor oil. You see, there is pretty nearly always some minor exception to these inclusive questions.

Q. Does this gallonage include the same products for which you have stated that the expenses in these two columns are computed?

A. It does.

4309 Q. What are the figures entered in this line about which we have been speaking on Detroit Form 189 for 1941 in the columns, first, tank wagon reseller? Can you answer that?

A. Tank wagon reseller shows a gallonage of 69,301,586.

Q. Next, tank wagon consumer.

A. 32,265,489.3 gallonage.

Q. Third, leased service stations.

A. 54,255,291 gallons.

Mr. Austin: I am just at a breaking point, Your Honor, before starting on another subject. Perhaps it would be better not to attempt to use five minutes on something that I probably can't finish in less than a half hour. So I will move that we adjourn until Monday morning at 10 o'clock.

Trial Examiner Ballinger: Motion of Counsel for the Commission is granted, and now at 11:25 a. m., the hearing stands adjourned to be reconvened June 23, 1941, in Room 332, Federal Trade Commission Building, Washington, D. C., at the hour of 10 a. m.

(Whereupon, at 11:25 o'clock a. m., June 21, 1941, the hearing in the above-entitled matter was adjourned.)

4310

Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Monday, June 23, 1941.

Met, pursuant to adjournment, at 10 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., appearing on behalf of the Federal Trade Commission.

Harold R. Hanley, Esq. (910 South Michigan Avenue, Chicago, Ill.), appearing on behalf of the Respondent.

4311 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

This is a reconvening pursuant to notice, Docket No. 4389, in the matter of Standard Oil Company, at 10 a. m., June 23, 1941, in Room 332, Federal Trade Commission Building, Washington, D. C. The last hearing was held in Washington, D. C., June 21, 1941.

The reporter will note counsel for the Commission and the Respondent present.

You may proceed.

JOHN W. BOATWRIGHT resumed the stand and testified further as follows:

Cross-Examination by Mr. Austin (Resumed).

Q. Perhaps there is one point that needs a little clarification, Mr. Boatwright.

I believe that you said on Saturday the expense of transporting gasoline from the marine terminal at River Rouge to the company's bulk plants in the Detroit field is not included in the expenses entered on form 189.

A. I did so testify and that is correct.

Q. Is the same true as to the expense of transporting gasoline from the marine terminal at River Rouge to bulk plants where gasoline is received by jobber customers?

A. That would be true.

4312 Q. I don't know that that was covered. The Standard Oil Company does pay the expense of transportation from the marine terminal to the bulk plant on tank car shipments to tank car customers; is that correct?

A. Yes, sir.

Q. In other words, do tank car buyers such as the four jobbers concerned in this suit purchase f.o.b. their own bulk plants?

A. Yes.

Q. Will you please turn again to form 189, which is in evidence as Respondent's Exhibit 32?

A. For the year 1940?

Q. Well, Respondent's Exhibit 32 is a blank form.

A. I see.

Q. I believe that you have before you a copy of form 189 completed for the Detroit field for the year 1940.

A. I do.

Q. What figures are entered on Detroit form 189 for 1940, in the Other Methods column on the lines numbered (1), (2) and (3) at the bottom of the form?

A. Those are gallonage figures under the Other Methods channel of distribution. The first line referred to is 51,391,592.6 gallons. Line 2 referred to represents direct shipments in the amount of 46,471,455.6 gallons. And the difference between those two figures is shown on line 4313 3, being 4,920,137 gallons.

Q. What is the meaning of the figure 51,391,592? I believe you said it was gallons, but what gallons is it?

A. Well, that is the gallons of all products used in allocating cost to that channel plus all gallonage units of petroleum products used or sold, rather, by direct shipments.

Q. What is the meaning of the term "direct shipments"?

A. That has been previously testified to as being shipments which do not pass through the bulk plants of the company. They are shipments direct to the purchaser.

Trial Examiner Ballinger: From the refinery?

The Witness: From the refinery or terminal, sir.

By Mr. Austin:

Q. How are the shipments made to the four jobbers or jobber accounts classified? Are they classified as direct shipments?

A. They are.

Q. Are those shipments all made directly from the terminal at River Rouge?

A. Yes.

Q. Mr. Boatwright, I don't want to use that word "all" too comprehensively. I believe there is some testimony that there are isolated cases where shipments have come from Whiting, Indiana, so I really intended to ask you the question as to the general practice, and would your answer still apply?

A. It would.

4314 Q. Does the figure that you have read 46,471,455 represent direct shipments to customers in the Detroit field in 1940?

A. It does.

Q. Is it true that none of this gallonage is used for the purpose of allocating expenses among channels on what you have referred to as an all-gallonage basis?

A. That is correct.

Q. Does the gallonage represented by this figure, that is, the 46,000,000 figure—

A. Yes.

Q. —include shipments made from Whiting, Indiana, or other points outside the Detroit field?

A. If any shipments were made from Whiting, Indiana, or any other point outside of the Detroit field, to the customer, it would be in the figure of 46,471,455 gallons.

Q. Then in determining the gallonage that goes into the direct shipment figure, would it be correct to state that the destination of the shipment rather than the origin determines the inclusion of that gallonage in the Detroit field?

A. It is the destination which determines the magnitude of that figure.

Q. If shipments were made to any of the four jobbers in Detroit from the marine terminal at Muskegon, Michigan, would those shipments be included in the direct shipment gallonage shown on the Detroit form 189?

4315 A. They would.

Q. Would it be possible for you to state what products are included in the gallonage represented by the direct shipment figure?

A. Do you mean what products?

Q. Yes.

A. Why, I could enumerate the products which were principally responsible [illegible] that figure as being gasolines, motor oils, special naphthas, refined oils, distillates, and some gas oils, and fuel oils. Those would be the principal ones.

Q. Did you mention motor oils or greases?

A. I did.

Q. Are there any classes of customers which are principally included in the direct shipment gallonage?

A. Well, it is all customers who buy in quantities or who receive by direct shipment method. Such customers are predominantly large industrial organizations buying in large quantities or are jobbers of the type of the four we are discussing.

Q. And as to methods of delivery, we have already mentioned tank car and transport truck shipments as being direct shipments. Are there any other methods of delivery that are involved in direct shipments to any extent?

A. Well, if your term "tank car" is broad enough to include carloads of barreled merchandise, you have 4316 enumerated the principal types of products movement which enter into direct shipment. However, there are times when customers buy carloads of barrels filled with specific merchandise. That might be indirect shipments.

Q. Referring now to the figure of 4,920,137, which you stated was the difference between the total Other Methods gallonage and the direct shipment gallonage, are the products included in the gallonage figure of 4,920,137 for 1940 the products you described on Saturday in stating what expenses go into the Other Methods column?

A. I don't recall the testimony of Saturday in connection with the question as worded. The 4,920,137 gallons is made up predominantly of motor oils and greases.

Q. Oh, it is?

A. Yes.

Q. I recall on Saturday that you said that there were so many products going into the Other Methods column that it would be difficult to give a complete list of them.

A. That is correct.

Q. I wondered if that were true as to this figure.

A. Yes, but in terms of gallonage those other products aside from motor oils and greases constitute a small part.

Q. I see.

A. Of the gallonage. But if there is any Semdac
liquid gloss, floor glaze, or furniture polish and
4317 articles of that type, it will be in the Other Methods
gallonage, but it is a comparatively small percentage
of the total.

Q. You have just stated that the figure of 4,920,137 gallons is predominantly motor oils and greases. Is that also true or is that not true of the figure of 46,000,000 odd gallons of direct shipments?

A. No, that would not be true to anywhere near the extent. The 46,000,000 plus gallons would be made up to a much larger extent of gasolines and refined oils than would the proportion of these products be that is included in the 4,920,000 plus gallons.

Q. I suppose that is true, isn't it, Mr. Boatwright, because direct shipments of gasoline are included in your direct shipment figure in the Other Methods column, whereas, tank wagon shipments of gasoline are all over in the tank wagon reseller and tank wagon consumer columns and, therefore, would not fall into the 4,000,000 figure under the Other Methods column.

A. If you would change your words instead of "tank wagon shipments" to "tank wagon deliveries" I would concur. As I stated Saturday, practically the only gasoline which finds its way into the Other Methods column is a very insignificant proportion of the packaged merchandise.

Q. You don't mean that strictly, do you, as to the Other Methods column? You mean the 4,000,000—

A. I mean in allocating cost.

4318 Q. Yes.

A. Yes. In the 46,000,000, the direct shipments of gasoline are included.

Q. But aside from that, it is only these—what did you call them—packaged—

A. Yes, I call them packaged specialty gasolines, maybe a special naphtha or something of that type, and that would represent a comparatively small proportion of the 4,920,000 gallons, while gasoline as a part of direct shipments would represent a substantial proportion.

Trial Examiner Ballinger: Mr. Boatwright, your use of the term "comparatively small proportion" is rather indefinite. Could you more clearly define what you mean? In other words, 5 per cent might be a small proportion.

The Witness: Well, I would say that gasoline would represent less than 5 per cent of the 4,920,000, but I would expect in the Detroit area that gasoline would represent over 50 per cent of the figure 46,471,000 gallons.

Does that help clarify it?

Trial Examiner Ballinger: That helps to clarify it.

By Mr. Austin:

Q. Does the figure of 4,920,137 include gallonage of any oils or greases shipped direct from the marine terminal?

A. We don't have bulk storage for motor oils or 4319 greases at River Rouge. Motor oils and greases are supplied direct from our refinery plants located at either Whiting or at Wood River, which is just east of St. Louis.

Q. Referring to oils and motor oils and greases shipped in steel barrels, is that the frequent method of shipment?

A. Except for unusually large purchasers, large purchasers sometimes—well, in fact, quite frequently order oils made according to certain formulas and buy those oils by tank car quantities.

Q. Are shipments regularly made or frequently made to customers in the Detroit field of motor oils and greases direct from Whiting, Indiana, or some other refinery?

A. Yes, that would be particularly true of the Detroit field because of the large automobile units producing and operating in that area.

Q. Would those shipments be included in your direct shipment figure or in your 4,000,000 gallon figure in the Other Methods column?

A. Those figures would be included in the direct shipments but would not be included in the 4,900,000 gallons.

Q. Where are the deliveries made from or what sort of deliveries are included in the 4,000,000 gallon figure referring to motor oils and greases?

A. All of that merchandise is delivered out of our bulk plant.

4320 Q. Then you do keep a supply of motor oils and greases at the bulk plants?

A. Oh, yes. You see, we ship our leading brands of motor oils to a select point in a given field by tank car quantity, and then we do our barreling in the field. It is a means of providing for more economical transportation of the merchandise, because your tank car shipment will include so many more barrels than would be possible if we were to take a box car and load it with barrels filled with motor oil at the refinery. So we make our first shipment in a tank car; that is unloaded through special storage facilities; and then we barrel right in the field and deliver by our stake trucks operating out of our bulk plants.

Q. If I understand you correctly, those shipments in tank cars are made directly to the bulk plants rather than going through River Rouge and being repackaged there?

A. Yes, your understanding is correct.

Q. Are motor oils sold by the gallon?

A. Yes, at times. Now, certainly, the answer to that would be yes if you are referring now to the reseller sales to the customer. The answer is still yes, but to a much lesser degree if you are referring to the sale by the company to the reseller distributor. In most of those cases the resellers buy by barreled quantities. Now, even a large part of the farmers buy either in barreled packages
4321 or in half barrel packages, but, of course, if any
farmer or any customer who might be served by our tank wagons wishes is a five-gallon delivery of motor oil, as an illustration, we are delighted to accommodate him.

Q. Well, greases are sold by the pound, are they not?

A. Greases usually are sold by the pound. I think it is the exception—in fact, I do not recall an exception at the present time where greases are sold by the gallon unless it be a formula product.

I wonder if you are clear in your mind when I speak of formula products?

Q. No. But what I was leading up to was simply to ask you how oils and greases were transformed into the gallonage figures which we have just been discussing in the Other Methods column.

A. I see. Oils, although they may be delivered in barrels, each sale represents so many gallons. That is an easy figure to transcribe into a gallonage unit. Greases are transcribed into gallons on the basis of 8 pounds to the gallon. So if we sell greases by the pound, each 8 pounds represents a gallon of grease.

Q. Eight pounds to the gallon?

A. Yes, sir.

Q. How is that figure of 8 pounds to a gallon arrived at, Mr. Boatwright? Is that an arbitrary figure or
4322 is that the result of measurements or is it an average for various sorts of greases, or what is it?

A. Well, it is an average for various sorts of greases. I don't know that every single grease would weigh out exactly 8 pounds to the gallon, but based on the flow of merchandise that we have out of our refineries, 8 pounds to the gallon is a good representative means of converting, as it represents about the average of the different brands of greases.

Q. Do the expense figures entered in the Other Methods column on form 189 include all of the company's expenses of sale and distribution incurred in connection with direct shipment business?

A. No.

Q. I think there was some discussion of that jobber business the other day, but I just wanted to ask the question at this time.

A. The answer is definitely no. I shall attempt a clarification of that point again.

The total cost of the Standard Oil Company for marketing in the Detroit field in the year 1940 was $2,675,896.51. That is what it cost us to do business through all channels by all methods. That is the sum total of all of our marketing costs. Now, in breaking that down, we first take out the costs that are assignable to automobile supplies. Then
the residual we spread between these three channels
4323 of distribution indicated as tank wagon reseller, which
includes the 461's, the P. O. S. S. L.'s, and the company owned service stations, leased; the tank wagon consumer; and the other methods.

Now, the allocation of our costs of the different items are either, first, a direct charge; or, second, they may be allocated upon a time basis; or, third, particular items of expense may be allocated only between the channels, tank wagon reseller and tank wagon consumer; or, fourth, particular items of expense may be allocated on the basis of all gallonage, excluding direct shipment, between the channels, tank wagon reseller, tank wagon consumer, and other methods, because we do not recognize direct shipments as a channel. We do not have any separate allocation of costs on that. Any small costs that may be incurred incident to a direct shipment will be found scattered among the other channels wherever the employees have had to provide a breakdown of their time upon which we made the allocation. Likewise, if you have an item such as your salaries—supervision, which is allocated upon an all-gallonage basis, excluding direct shipments, you may whatsoever small cost incurred by the supervisory function truly distribute among the three channels. You see, the cost of direct shipments in practically all of our fields is very small. We have very few fields where direct shipments amount to the magnitude that they do in Detroit because of the large quantities shipped to the General Motors Company, the
4324 Ford Motor Company, and the Chrysler Corporation.

These large customers frequently buy in trainload lots and that figure for direct shipment mounts very rapidly, and yet the actual negotiation of a sale of a large quantity of that type involves very little either bookkeeping or supervision on behalf of the company. It is primarily a price proposition.

Does that clarify your understanding?

Q. Yes, the first part of your answer is directly responsive.

Are any direct shipments made to tank wagon resellers or the consumers?

A. I don't think there would be any direct shipments to this class of buyers. I would say this, that if there are any, it would be less than a fraction of one-half of one per cent.

Q. So far as you know, is any gasoline shipped directly to tank wagon resellers or consumers?

A. I don't think—well, to consumers, yes.

Q. Tank wagon consumers?

A. Well, there may be some tank wagon consumer who buys a predominant proportion of his requirement from tank wagon and yet during a certain season of the year might have an adequate demand for a short time period to receive a direct shipment, but again we are talking of a very small part of the total.

Q. Even if there were such shipments, they wouldn't be entered in the tank wagon reseller or consumer 4325 column; would they?

A. They would not. Your direct shipment is always treated separately.

Q. Does that not explain the fact that no entry is made in lines 1 and 2 in the tank wagon reseller and consumer columns at the bottom of form 189?

A. Yes, there are no direct shipments to be deducted there. Any direct shipments will be found in the figure 46,471,000 plus gallons.

Q. Referring again to form 189, Respondent's Exhibit 32, will you please explain the purpose or use of the last line on the form headed "Average Per Unit on (3) above"?

A. Yes, the purpose of the last line, which for the purpose of the court, if I may explain, is a per gallon cost, is so that we may watch our expense of distribution on an unit basis and control our expenses and look into any unusual deviation of expenses.

Q. Will you please state what figures are entered on this line on each of these four petroleum product channel columns on the Detroit form 189 for 1940?

A. Do you wish the comparison of the average cost per unit last year and this year as well?

Q. I don't think so. I just asked for the figures in each of these four petroleum products channels. In other words, tank wagon reseller, tank wagon consumer, leased 4326 service station, and other methods.

A. Certainly.

The gallonage cost tank wagon reseller channel, 1.65 cents per gallon; tank wagon consumer, 2.62 cents; leased service stations, .09; other methods, 11.55 cents.

Q. In the second line from the bottom on form 189, Detroit, 1940, what figure is entered on the Other Methods column?

A. The second line from the bottom, the average per unit on (1) above?

Q. Yes.

A. 1.7 cents per gallon.

Q. What does that figure represent?

A. That figure represents the unit cost of distribution, where the cost of the Other Methods channel, being $568,-226.56 is divided by the grand total units, including direct shipments of 51,391,592.6 gallons.

Q. By "grand total units" you mean only grand total units in the Other Methods channel; do you not?

A. Yes, sir. Yes, sir.

Q. And does the word "unit" as you here use it include both gasoline and greases and, in the case of greases, it means greases converted to gallonage?

A. Yes, units in this sense refers to gallonage whether it originally be shipped and sold as pounds or whether it originally be sold and shipped as gallons. All pounds 4327 are converted to gallons, in deriving the total units figure as entered.

Mr. Austin: I suggest we have a five-minute recess, your Honor.

Trial Examiner Ballinger: We will stand in recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

By Mr. Austin:

Q. Respondent's Exhibit 33-B refers to "direct leased service station expense." One of the columns on form 189, Respondent's Exhibit 32, is entitled "Income and Expense—Leased Service Stations."

Does this column contain expenses which the company charges directly to service-station properties and buildings which are leased to tank wagon resellers?

A. Yes.

Q. Would it be correct to state that those expenses entered in that column are expenses which the company charges direct to the sale and delivery of gasoline to tank wagon resellers who lease their service station properties and buildings from the company as distinguished from tank wagon reseller business generally?

A: Well, in the first place, you are clear in the fact that it is both gasoline and refined oil? You stated only 4328 gasoline. There will be a small quantity of refined oil there. Secondly, this net amount, being $48,506.44, is really a property account under class of service stations.

It is the expenses incident to the properties offset by the rental income of those properties.

Q. Is the rent revenue from leased service station properties deducted by the company from the expenses listed under this column on form 189, for the purpose of determining the net expense or profit from the service station leasing operations of the company?

A. The rent revenue is deducted from the expense for purposes of determination of the net expense of this class of reseller items.

Q. I suppose if the rent revenue is in excess of the expense, then there would be a resulting profit? In other words, you referred only to expense and, as I understand it, there is a net expense shown on form 189 for 1940, but that might be different for other years; might it not?

A. Let us merely state that the income from the properties under the assumed conditions that you have mentioned would be greater than the expenses of maintaining those properties, and if that were true, there would be a profit resulting to the company from the landlord functions; that is, not profit on the merchandise sold. That is profit from the landlord function. In that sense, yes,
4329 it would be an indication of profit.

Q. Is the net expense figure of $48,506.44, shown at the foot of the leased service station column, on Detroit form 189 for 1940, exclusive of any cost or revenue from the sale and delivery of gasoline?

A. The figure of $48,506.44 is an expense item giving no recognition to the expense of the merchandise sold through that class of outlets in terms of manufacturing cost. Now, I am not certain that that answers your question, but that is the way I interpreted your question.

Q. There is no revenue from gasoline included as a setoff in that column, either?

A. There is not.

Q. Is any portion of the expenses classified by the account numbers having entries in the leased service station column charged to tank wagon reseller business generally? Now, I would like to perhaps clarify that question a little bit by stating that what I mean is where an item of expense is entered in the leased service station column, is there any item of expense entered for the same account in the tank wagon reseller column?

A. There is not.

Q. In your opinion, is this a correct method of accounting for leased service station income and expense, and by

“leased service station income and expense” I mean
4330 the income and expenses which you have just described as going into this column.

A. Well, in my opinion, this is strictly a proper form of accounting, for maintaining a record on our properties separately and distinct from the other reseller business.

Q. Turning again to form 189 and referring to accounts 065-A, 065-B, and 065-C, do the figures entered opposite these accounts in the leased service station column include the so called gallonage rental collection by the company, which is usually one-half cent per gallon, according to previous testimony, on gasoline sold and delivered to service station lessees of the Standard Oil Company?

A. The figures entered opposite those account numbers do include the gallonage rental as well as any flat cash rental. That is the rent income from the properties.

Q. They do include both, then, and not merely flat rentals?

A. They include both.

Q. What is included in the expenses charged on form 189 to accounts 061-B and 061-C?

A. 061-B is a rental expense where we lease the site from an individual and build thereon our own buildings. It is a rental paid for the site only. The building is a property of the company.

061-C is a rental expense that the company pays when they lease a service station from some private
4331 individual who owns the property outright.

Both of those are rental payments.

Q. By rental expense, do you mean rents which the company pays as lessee of the property to the lessor?

A. Yes, sir.

Q. Do you consider this rental expense a cost of sale or delivery of gasoline where as here the service station properties are not operated or used by the company?

A. Why, I certainly do when we show just below the rent income as an offset. Any net there is either an income or an expense and that net is a cost of the sale and delivery of gasoline.

Q. What expenses are entered in account 066-A?

A. 066-A are miscellaneous operating expenses incurred at service station owned properties where we own both the building and the land.

Q. Are these expenses, expenses of the same character as those which you described for account 066 listed in Respondent's Exhibit 31-H? And before answering that question, I will recall to your attention, Mr. Boatwright, that there is an exhibit, Commission's Exhibit 81, which contains a breakdown of account 1066 as listed on Respondent's Exhibit 31-H.

A. The class of expense items which is now shown under account 066, 066-A, 066-B, and 066-C are the same type of expenditures that were previously shown together
4332 under the account 066. It seemed advisable following
the year 1937 that we break the expense item 066 down to a greater degree for purposes of expense control.

Q. Then for 1937, is it true that all of those miscellaneous operating expenses, including those in connection with leased service stations, were included in account 1066?

A. Yes, sir.

Q. What expenses are entered in account 088-A, and again in this connection I might ask whether these expenses are of the same character which you described for account 088, when we were discussing Respondent's Exhibit 31-J.

A. Again the same explanation applies. Subsequent to 1937, account 088-A, 088-B, and 088-C merely represents a further breakdown of the same class of expenditures which in 1937 was included in account 088.

Q. Would any expense be included in account 088 or 088-A, B or C for tools and equipment supplied to non-lessee service stations, or would tools and equipment supplied to those stations be included under account 070 E.L.A. expense?

A. No, we classify separately our tools and equipment from our E.L.A. expenditure. Thus 088, station operating tools and equipment, as shown on the 189 for the year 1940 would be the tools and equipment made available to the 461 type of outlet.

Q. I believe you did state in discussing that ac-
4333 count, however, Mr. Boatwright, that that is chiefly an
expense of tools and equipment used as bulk plants? I think your testimony was to that effect, if I recall correct.

A. Well, I see I should enlarge upon the answer just given. I stated that 088 is a station operating tools and equipment to the 461 accounts plus an allocation of the tools and equipment at bulk plants between the channels, tank wagon reseller and tank wagon consumer.

Q. Will you describe what expenses are entered into account 112-A? That account, I might state for the record, is entitled "Depreciation Expense—Real Estate Improvements (Service Station Owned Properties Complete)."

Trial Examiner Ballinger: And appearing on—

Mr. Austin: Appearing on Respondent's Exhibit 32.

A. Well, do I understand your account number correctly? Was it 112 or 112-A?

Q. 112-A.

A. 112-A?

Well, that is the depreciation expense on the service station—real estate improvement of buildings, and so forth, which is charged direct to that channel.

Q. Does that mean real estate improvements constructed by the company on service station properties which it owns and leases out?

A. Yes.

4334 Q. I would like to go back to another subject which we have discussed at some length before, but I would like to ask a few questions at this time so that the matter may appear in a little different context. That is the matter of commissions.

Referring specifically to account 021 on Respondent's Exhibit 32, which is form 189, what commissions are included in that account, Mr. Boatwright?

A. Commissions to commissioned employees.

Q. Does that mean principally commissions paid so called commission agents who are in charge of bulk plant operation and delivery?

A. Yes, sir.

Q. Does each one of those commissioned agents have a separate territory?

A. Yes.

Q. Are the services performed by them those which you previously described as performed by commission agents?

A. Yes. They haven't changed since the other day. I may not have been all-inclusive in the answer but I recall naming several of them.

Q. I simply wanted it to appear on the record here that the services have been described elsewhere in the record.

A. Yes.

Q. On what products are commissions paid to commission agents?

4335 A. Well, again I think that is clear in the record.

As you will recall, I testified that we pay commissions on all products sold by commission agents with the exception of the automobile supplies.

Q. Well, do commission agents sell gasoline, motor oils, refined oils, and greases?

A. Yes, they do.

Q. And lubricating oils?

A. Yes, sir. And commissions are paid on all of those products wheresoever the agent makes a sale and delivery of the merchandise.

Q. Are their selling activities restricted to their respective territories?

A. Well, their selling activities upon which they receive compensation are restricted to given territories. Now, frequently an agent may do something or attempt while he is on his own time and his own effort to help a colleague in an adjacent territory, but the selling effort for which he receives the compensation is within a restricted territory.

Q. Now, turning to form 189, I would like to have you go through the list of accounts listed on that form, which is Respondent's Exhibit 32, and state what items of expense listed on forms 189 are not incurred in the tank wagon reseller channel in connection with the distribution of gasoline to resellers served by commission agents.

4336 Mr. Hanley: Read that question, please.

(Question read.)

Mr. Hanley: I don't understand it. Do you, Mr. Boatwright?

Mr. Austin: I could give an example by which I may clarify it.

The Witness: I wish you would. It would help.

By Mr. Austin:

Q. For instance, would not the expense entered in account 006, "salaries—drivers" be an expense which is not incurred in the tank wagon reseller channel in connection with distribution of gasoline by commission agents?

A. I see. I will answer your last question. You are correct, in that no part of account 006 "salaries—drivers" would be included on that volume delivered to resellers by commission agents.

Now, do you wish me to take each of these expense item classifications and state whether any part thereof would be incurred on tank wagon reseller business served by commission agents?

Q. Yes.

A. The first item would be 006 "salaries—drivers."

Mr. Hanley: You are referring now to what is not incurred?

Mr. Austin: That is right.

4337 The Witness: What is not incurred on reseller business served by commission agents.

A. (Continuing.) Account 008 "salaries—warehouse labor" would not be involved on gasoline and refined oil but would be involved in the motor oil sales in the Other Methods channel. The only case where warehouse labor, as shown under account 008 would be influenced at all by deliveries by commission agents to reseller accounts would be, first, small reseller outlets that may be served out of a salaried bulk plant by a commission peddler. A very small proportion.

Second, in case a commission agent at some adjacent station for some reason or other ran out of the needed merchandise to supply his reseller outlets, he might make a trip to an adjacent salaried station to secure supplies out of that station until the tank car reached his plant and could be unloaded.

Q. Would that refer to gasoline, possibly?

A. It could refer to gasoline, yes. There is some of that. But account 008 is largely incurred on volume done through salaried areas.

Trial Examiner Ballinger: You used the word "largely." Could you break that down?

The Witness: Well, it involves making an estimate, your Honor, which I could probably make all right on a general basis, but to make an estimate for a given

4338 plant would be extremely difficult. I would say that salaries to warehouse labor under the Other Methods channel would be difficult to differentiate between deliveries made to commission served reseller outlets from a salaried served reseller outlet, but under the gasoline and refined oils which are shown under the tank wagon reseller column, I would think that largely would apply to as high as 95 per cent.

By Mr. Austin:

Q. Mr. Boatwright, the question is restricted to the tank wagon reseller channel, so that you don't need to concern yourself as to whether or not there would be any elimination of expense in the Other Methods channel.

A. Thank you.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

A. Accounts 053, being the operation and maintenance of vehicles—trucks, motor and horse drawn; excluding advertising, is the expense incurred by the company in operating and maintaining the fleet of trucks which is handled by the salaried drivers whose expenses or salary are shown under account 006.

The only other item meeting the question as posed is account 106, "depreciation expense—vehicles, trucks, motor and horse drawn (including vehicle tanks and
4339 excluding advertising trucks):" This item is a depreciation expense on the trucks used out of salary points driven by salaried drivers.

Q. Are those the only accounts where the expense entered therein is not incurred in commission agent distribution?

A. Yes, sir. By "commission agent distribution" you are limiting it to the reseller channel?

Q. Yes, that is right.

A. Yes, the answer stands: Yes, sir.

Q. Is it not true, Mr. Boatwright, that there are certain other expense accounts listed on form 189, the expense of which in the tank wagon reseller channel may be different on a per gallon basis as to gasoline and refined oil sold through commission agents than as to gasoline and refined oil sold through salaried stations?

A. Yes.

Q. Referring now to account 094 "salaries—salesmen," I believe you previously were asked about that, and will you state again whether the same sales contact and sales supervision is maintained by the company in commission agent territory as in territory served from salaried stations?

A. Yes, it is. I couldn't differentiate between a commission gallon and a gallon served originally by a salaried driver with respect to the item 004, being "salaries—salesmen."

4340 Q. Would the same answer apply to account 632 "traveling expense—salesmen"?

A. It would.

Q. How about account 047 "operation and maintenance of vehicles—salesmen"?

A. I think it would apply there equally as well. The Detroit field, as you know, is a concentrated market and salesmen's territories even out of the city of Detroit are relatively almost as concentrated as they are in Detroit. I have attempted at times in other studies to differentiate between salesmen's salaries, expenses, and operation, and maintenance, between the salaried stations and the areas served normally by commission agents, and you can not do it unless you are in some area such as North and South Dakota, where you may have one salesman and one salaried station, and the rest of them are all commission, with the distances traveled very long, but in an area like Detroit, you couldn't possibly differentiate.

Q. Might not the salesman's traveling expense and the operation and maintenance expense of his vehicle be considerably higher in rural territory served by commission agents in the Detroit field than the similar expense would be in the salary station territory in the city of Detroit?

A. No, I don't think so. That is the reason for my answer as given. If you take an area—if you take a
4341 field such as North Dakota area where the distance
traveled is very great, then there is a difference, but
in Detroit, no. That is a concentrated market and the area
traveled by a salesman in the commission station area is
still quite small and actually the expense on their cars for
operation and maintenance are almost identical with cars
operated by salesmen in the metropolitan area of Detroit.

Q. What is the nature of the expense going into account 204 "office expense—exchange"?

A. Well, that was explained while I was on direct testimony as being all of the costs incident to performance of the banking function resulting from the sale of merchandise, transfer of funds from one station to the other, the fees charged for clearing checks, and other costs of a similar nature.

Q. Would that expense be involved insofar as it ap plies to the handling of checks, and so forth, in territory or as to customers served by commission agents?

A. It may, but more likely it will be involved in the clearance of funds from a commission station to the main office and the central deposit bank. There is a charge incurred and a cost incurred which may not be incurred because of a customer, although it may very well be, but it could be incurred both in terms of clearing customers' checks or in making effective the exchange or transfer 4342 of funds from one station to a central station.

Q. Is there any distinction to be made in connection with the per gallon costs of marketing gasoline as between these two types of distribution in connection with the account 660 "plant maintenance"?

A. I don't know how that would figure out. You see, we have a plant maintenance at the "B" station points. The plant is smaller, the through-put is smaller. The maintenance charge at one of our big salaried stations is larger but the through-put is so much larger. I just couldn't testify whether that would figure out the same in the commission area as it would in the salary area or not.

Q. You gave some testimony, and I am frank to say I don't recall now the exact nature of it, regarding the maintenance of the bulk plants operated by commission agents. Does the company maintain those plants?

A. Yes, that is company property, and the expense of maintenance of that plant is a company expense. The agent does not maintain it, although your best agent keeps the weeds mowed, and things like that, but the actual maintenance of your property in terms of painting, minor repairs, and things of that type—that is really done by the company.

Q. Mr. Wormack suggests that perhaps the driveways are cleaned by the commission agent. That is a pertinent question because you will recall that there was an 4343 expense of cleaning driveways at bulk plants that we discussed in connection with one of the other accounts.

A. Well, that was a subdivision of an expense classification.

Q. Yes.

A. But the driveways of the reseller outlets are not cleared by the commission agent, and at the commission bulk plant usually the driveway is merely a gravel driveway into which the agent can pull his truck into the station for loading or for storing it in the garage provided for him and I am quite sure if he wanted to get his truck out after a snow storm, he would clear the drive, yes, but we are talking about infinitesimal items.

Q. Account 062 entitled "water, light, fuel (other than main office)"—what expenses go into that account?

A. I think that is on the record in the previous testimony. However, the name itself clarifies the type of expense items which are referred to at each of these bulk plants. We have connections with the water system, certain requirements of water; we have public utility connections and certain expenses incurred thereon; and we have fuel expenses, and that is for heating purposes, and that would be incurred at different bulk plants.

Q. Are those expenses incurred equally at bulk plants operated by commission agents as they are at salaried stations? By "equally" I have no reference to dollar
4344 amounts, but rather to the performance of the service.

A. Per unit cost?

Q. Yes.

A. Well, I think so, but again that would involve quite a detailed analysis of the individual payments of different plants, the expenses—

Q. I didn't even mean the per gallon cost, Mr. Boatwright. I simply meant whether the company pays for all the water, light, fuel, and so forth, that is used at the commission agent plants just as they do at the other plants, or does the commission agent pay for the expense?

A. No. That question is easy to answer. The company stands the water, light, and fuel cost at both type of station.

Q. Does the company have E.L.A. expense in commission agent territory?

A. Oh, yes.

Q. What personal injury expense for company employees could there be in commission agent territory?

A. Well, the commission agent himself might receive some personal injury.

Q. Wouldn't he be the only man in that territory that could be classified as a company employee?

A. Well, the salesman that supervises these "B"
agents might be so classified. I am not sure if an injury
occurred to a "B" agent, obviously, that would be
4345 the cost of a personal injury resulting from commis-
sion delivery. Now, if a salesman supervising the
function of "B" agents received a personal injury, I
would personally classify that as a personal injury cost
incident to commission delivery. You see, we don't make
that classification in our regular procedure of maintaining
records, so my answer is purely a personal one.

Q. Isn't personal injury expense incurred by the company chiefly—well, ordinarily or in large part relating to such expense in connection with truck drivers of the company? Or can you answer that question? I don't know.

A. Well, the answer would have to be "no". Individuals are injured handling barrels, ruptures occur, a barrel slips and a foot is mashed, or something of that type. It isn't only truck drivers. It is other individuals working in the bulk plants or even driving company cars. It may be an office manager has an automobile wreck, or something happens, suffering a personal injury.

Q. Is the expense of station operating tools and equipment, account 088, incurred to the same extent in commission agent territory as it is in salaried station territory?

A. It is incurred at both types of outlets. I would anticipate that station operating tools and equipment incurred at bulk plants would be slightly higher on a per unit basis than it would be at salaried stations. It is incurred, however, at both types of outlets.

4346 Q. Referring to account 055 "vehicle tank
expense—other than mounted on company chassis,"
will you explain the type of expense there referred to?

A. Yes, the expense of maintaining the tanks which the company owns and are mounted upon the chassis of trucks which are owned by the commission drivers. It may involve repairing, calibrating, painting, and so forth.

Q. Is not that an expense which is incurred only in connection agent distribution of gasoline?

A. Well, I broadened that a little bit. I said commission drivers, because, as I have stated in the previous testimony, you will recall I said that frequently out of a salaried station there would be a commission driver serving peddler routes. Now, it would be limited to the commission class of employees. It would be largely the commission agent, but it would be also a small part incurred by commission drivers operating out of salaried stations.

Q. Referring to account 025 "truck rental expense," will you explain what type of expense is entered in that account?

A. Yes, the commission driver owns the truck chassis and the company pays a rental on that truck for its use in the distribution of all products.

Q. Then is that also an expense which is incurred only in connection with the commission agent or commission driver type of distribution?

4347 A. Yes, sir.

Q. Are there any other accounts on form 189, the expense of which is incurred only in connection with the distribution of gasoline and refined oils through commission agents or commission drivers, referring only to the tank wagon reseller channel?

A. That will again require a review of each of those items before I can answer that.

Mr. Austin: I move we adjourn, your Honor, to 1:30.

Trial Examiner Ballinger: The motion is granted and now, at 12:20 p. m., the hearing stands in recess until 1:30 p. m.

(Whereupon, at 12:20 p. m. a recess was taken to 1:30 p. m.)

4348 Afternoon Session.

1:30 p. m.

Trial Examiner Ballinger: Come to order.

JOHN W. BOATWRIGHT resumed the stand and testified further as follows:

Cross-Examination (Continued).

The Witness: Just prior to the court adjournment the question was raised as to what expense classifications shown on form 189 for the Detroit field for the year 1940 were incurred only on the tank wagon commissioned type of delivery to the reseller channel.

By Mr. Austin:

Q. Yes.

A. In answer to your question, account 021, commissions; 025, truck rental expense; 055, vehicle tank expense—other than mounted on company chassis. That is the answer to the question as posed.

I should like at this time to make a modification of an answer given this morning in response to your question as to what expense classifications are incurred only on tank wagon deliveries to the reseller channel by salaried drivers.

The modification I wish to make is that this morning I pointed out that account 106, being depreciation expense, vehicles, trucks, motor and horse drawn, was indicated as applying only to salaried deliveries.

I now note that the depreciation expense on vehicle
4349 tanks that may be mounted on chassis owned by commissioned agents is likewise included in that account. Therefore, account 106 would be incurred in part on commissioned deliveries to tank wagon reseller customers.

Q. Referring now to account 004, which is entitled, "salaries—salesmen" on Detroit form 189 "comparative statement of expense" for 1940.

Is a portion of the total expense for that account assigned to the tank wagon reseller channel?

A. Yes.

Q. Is a portion of the total expense for that account assigned to the tank wagon consumer channel?

A. Yes.

Q. Is a portion of the total expense for that account assigned to the column entitled "other methods"?

A. Yes.

Q. Which of the expense figures entered in this account reflects or includes any expenses of sale to the four tank car reseller-customers?

A. The expenses of sale to the four jobber accounts may be included in part in any one of the three, inasmuch as the total is allocated to the respective channels on a basis of an estimate of time devoted by channels submitted by the salesman.

Q. Would not any time devoted by the salesman 4350 to a jobber account be assigned by him to the Other Methods channel?

A. I think in most cases that probably would be the case.

Q. What do you mean by "in most cases"?

A. Well, I think it is merely—it might be a natural tendency on the part of the salesman preparing his estimates of time, if he spends any time with the jobber account, to include that in the Other Methods channel. I can not state in each case that that has accurately been followed.

Q. Has the salesman received any instructions in that regard as to the making out of his time report?

A. Not to my knowledge.

Q. Do you know what is the amount of salesman's salary expense for those four jobber customers for 1940?

A. No, I do not.

Q. Do you know for any of the accounts listed on form 189, Respondent's Exhibit 32, the amount of expense in 1940 in the Detroit field which is chargeable to the sale or delivery of gasoline to the four jobber customers or to any one of them?

A. We make no charge in the allocation of cost. That is understood, is it not?

Q. Yes.

A. I do not know the exact amount of time devoted by any salesman to any one of these four jobber accounts.

Q. Now, the question I just asked was a little broader.

Mr. Boatwright, applying to all accounts, not merely 4351 to time accounts.

A. In other words, do I know the exact amount of time that a salesman may have spent with any given reseller account?

Q. No, I did not mean that.

Perhaps if the reporter will re-read the question—

(Question read.)

A. I see. You mean all of these expense classifications.

By Mr. Austin:

Q. All or any of them.

A. No, I do not.

Q. Would your answer be the same if the same question were asked you as to the year 1939?

A. It would.

Q. Has any such allocation of the expense in the Detroit field been made by the Standard Oil Company for any year since 1936?

A. No.

Mr. Hanley: You mean no, you do not know, or no, it has not?

The Witness: It has not.

By Mr. Austin:

Q. On your direct examination at page 2402 of the record you testified as follows:

> "I stated that one of the six principal classifications of my duties had to do with the preparing of an
> 4352 analysis of profits and expenses by products, by sales divisions, and by individual channels of distribution. These studies covered the principal products distributed by the Standard Oil Company."

In making such studies as you referred to there, particularly with reference to "analysis of profits and expenses by products," do you mean separate products such as gasoline, lubricating oil, greases, and so forth?

A. Yes.

Q. Will you please describe the methods employed by you in assigning costs to each product?

A. It would be a physical impossibility for me to describe every account classification on the form 189 from memory.

Q. Well, I did not intend to direct you to separate accounts, Mr. Boatwright, but the question is one which

I would like to have a general answer to as to the methods used, if that can be done.

A. Yes. I think I could give you a general answer by stating that we by sampling process attempt to determine various allocations to products within a channel. These are special studies. Frequently we must resort to estimates as furnished by the management and other individuals acquainted with the particular function that we are attempting to analyze. They are studies made in an effort to determine whether the expenditure of our effort is directed to the best end. They are not a
4353 part of our official books, nor do they constitute an allocation which is sufficiently accurate in all of the details to represent the official expenses of our company.

Q. Were any time studies involved in making those analyses?

A. We do not ourselves make time studies in connection with those particular studies. We do secure estimates, however, of the supervisory function.

Mr. Austin: Off the record, please.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

By Mr. Austin:

Q. Have you ever made such an analysis of profits and expenses by products for the products sold in the Detroit area?

A. Yes.

Q. Perhaps that question is not very accurately stated. I meant whether you had ever made such a study for the Detroit area. Of course, the products sold in the Detroit area I assume will be the same as the products sold in other areas.

A. They are the same; and Detroit is always one of the fields included in our studies.

Q. Well, what is the result of the studies of which you are now speaking, including the Detroit area? Do you have reports covering those studies in your files, or what happens when you make such studies?

4354 A. Well, these analyses are made. The results are presented to the board of directors for their consideration, and any change of policy that may result from the study constitutes a recommendation for their consideration. It reveals differences among fields. It leads to inquiry as to why certain costs are out of line in one field as compared with another. It may reveal weaknesses in methods in one field as distinct from another.

Q. When was an analysis of profits and expenses by products last made for the Detroit area?

A. For the year ending June 30, 1940.

Q. Is such a study made annually?

A. Yes.

Q. Would the cost studies to which you have just referred be made by fields, or are you referring to one study covering the entire company's territory?

A. One study covering the entire territory.

Q. Do those studies result in the determination or estimate, if you wish, of a cost per gallon marketing each of the various products sold by the company?

A. Yes, they result in estimates of the cost per gallon of different products.

Q. By fields or by total?

A. By fields.

4355 Q. Well, in such a cost study would gasoline, for instance, be separated from refined oils?

A. To the best of our ability.

Q. And motor oils would be treated separately also?

A. Yes, sir.

Q. You further stated, Mr. Boatwright, in the quotation which I have read into the record a moment ago that you make analyses of profits and expenses by individual channels of distribution. Are sales through jobbers regarded as a channel of distribution?

A. No. No. We have not made a study of the profits of sales through jobbers, except the one referred to in our analysis, and that is the expense of distribution to the Oklahoma jobbers.

Trial Examiner Ballinger: To the what?

The Witness: The Oklahoma jobbers.

By Mr. Austin:

Q. These analyses of profits and expenses by products you just stated result in the separation of products, including separation of gasoline from other products. I am referring now to your statement a moment ago that gasoline would be shown separately from refined oils, or at least that you had made some estimate of the cost of marketing gasoline separately; that is correct, isn't it?

A. Yes, sir.

Q. Do you recall whether your estimate for the
4356 Detroit field of the cost of marketing gasoline was
higher or lower on a gallon basis than the marketing
of refined oil?

A. Through the tank wagon reseller channel?

Q. Yes.

A. It is practically the same. One year it may vary a hundredth of a cent above or below, but the differentiation between them is negligible.

Q. Is there more difference between the respective costs of marketing gasolines and motor oils and lubricating oils and greases?

A. To be sure I understand your question, may I restate it?

Q. Yes.

A. Is there a wider difference in marketing cost between gasolines and refined oils, on the one hand, as compared with motor oils and greases, on the other?

Q. No. I mean is there a wider difference comparing gasoline with motor oil, gasoline with lubricating oil, gasoline with greases, or taking each of those four products and considering them separately.

To further clarify, you stated that there was very little difference between the cost of marketing gasoline and the cost of marketing refined oil. Now, instead of those two products I am taking four products, gasoline, lubricating oils, motor oils, and greases.

A. We never make any effort to analyze the ex-
4357 penses and profits in the distribution of greases. We
do, however, on motor oils, and your marketing cost
and your other cost incident to your distribution of motor
oils is higher than the cost incident to a gallon of gasoline or refined oil.

Q. How about lubricating oil? Have you covered that?

A. Industrial lubricating oils?

Q. Well, whatever is meant by "lubricating oils."

A. No, on industrial lubricating oils we do not make a periodic study. We have made only one study on that in the period of time that I have been with the company.

Q. What are the products that are included in these periodic studies?

A. Gasolines, refined oils, and motor oils.

Q. Those three only?

A. Yes.

Q. Did your study of jobber operation in Oklahoma for 1939 include an analysis of all costs of distribution to those jobbers?

A. Yes.

Q. Respondent's Exhibit 33-C states that your department made the time and cost analysis to determine the profitability of the jobber operation in the state of Oklahoma in 1939. Was the purpose of that study to determine the amount of the company's entire distribution cost allo-
cable to that jobber business, or was it to determine
4358 the amount of the costs of handling that business
which would be eliminated if that business was discontinued?

A. No. The object of that study was broader than just the determination of marketing cost. The objective of the study was to start with total realization received for the sale of the merchandise with the jobbers and deduct from that realization the cost imputed to those outlets in terms of sales effort, or marketing cost, transportation cost, manufacturing cost, to ascertain whether it was profitable for us to continue to market in that specific area.

Q. Well, would not the determination of the question whether it was profitable to continue marketing in that area involve a determination merely of the expenses that will be eliminated by discontinuing the market operations in that area as contrasted with the realization received from sales effort?

A. Well, our approach to a problem of that nature is not predicated on apparently what you have in mind as an increment. Our approach is, first, does it carry it full cost, overhead, and so forth, as a part of those costs. Then, secondly, having answered that question, does it carry incremental cost; and, thirdly, does it contribute to the overhead. Now, if a particular operation contributes to overhead, the company is better off with that volume than they
would be to discontinue it entirely as it makes a
4359 contribution to your fixed cost. Our analysis, there-
fore, on that particular study had to do, first, with whether or not that business carried its full cost.

The question you raised was secondary or third in our mind. It was answered, but we answered the first one first.

Q. Do the jobber marketing costs shown on Respondent's Exhibit 33-C, D and E include all of the costs of distribution of gasoline to the Oklahoma jobbers in 1939?

A. It does cover the marketing costs.

Q. How did you happen to select the Oklahoma area for this jobber study?

A. There were two reasons:

First, because realization in the southwest on petroleum products was low. We had been operating in that area for quite a period of time. I think it is a natural question for any alert executive when realization declines to attempt the ascertainment of the value of continued operation in that territory. That is number one.

Number two, it is the only area in our territory where we market only through jobbers. Jobber operation throughout the main part of our territory is a comparatively small part of our sales. In Oklahoma it is only jobber operation. We have no direct tank wagon distribution.

Q. And you used the word "increment" and re-
4360 ferred to incremental costs, I believe, in the answer you gave to my previous question.

A. Yes.

Q. Will you explain what you meant by "increment"?

A. Well, I think of incremental costs as being those costs which are directly associated with the unit sold that would be discontinued if that unit—if that business was no longer secured. Many accountants refer to an out-of-pocket cost in a similar manner.

Q. Did you have any commission agent distribution in this territory in which these Oklahoma jobbers were located?

A. No.

Q. The only gasoline sold in that territory during the time of this study was sold through these jobbers?

A. Yes, sir.

Q. And does the territory cover the entire state of Oklahoma so far as you market gasoline within that state?

A. As far as we market gasoline in that state, yes.

Q. In other words, there is no portion of Oklahoma where you sell both to jobbers and to other types of customers?

A. No, there is no such territory.

Q. But, as I recall it, this Oklahoma territory was served in part from the Kansas City field and in part from the Wichita field.

A. It was at the time this study was made. Since
4361 that date it has been consolidated.

Q. Is the method of sale and delivery to jobbers the same in the Detroit field as it is in Oklahoma?

A. Yes, except that there are more tank car deliveries to an Oklahoma jobber than there are in Detroit. It is merely a case of using truck transports in one area to a greater extent than in another.

Q. Well, I believe we are going to establish in the record when the tank car deliveries were discontinued in Detroit and the tank truck deliveries commenced.

A. Yes.

Q. I believe that is one thing Judge Hanley said he would ~~find out~~ for us.

A. There is one differentiation that I think should be mentioned. Our selling cost in Oklahoma is far higher than our selling cost to jobbers in Detroit. In other words, the selling cost that I have in Respondent's Exhibit 33 is high for a jobber selling cost.

Q. Well, you stated a moment ago, Mr. Boatwright, that you did not know what the amount of selling cost was in Detroit.

A. I do know that, although I do not have an exact per gallon cost. The reason I know it, our selling cost was high in Oklahoma; therefore, if our costs were high, we have consolidated them in that field. And whereas we were at that time using two salesmen, we are covering the same ground with one salesman. 4362

4363 Q. That statement that the selling costs to jobbers were higher in Oklahoma than in Detroit is not based on any cost study of selling costs in Detroit?

A. That is correct. It is merely a common sense answer.

Q. I think you have already answered the next question I have here, which was if salesmen were employed for the purpose of selling to jobbers in Oklahoma.

A. Yes, they were. At that time there were two salesmen, and now we are doing the same thing with one.

Q. How are the orders for gasoline given by the jobbers in Oklahoma?

A. Do you mean—

Q. Just a moment. I think I must have missed something here. I am sorry.

Mr. Austin: May we go off the record, please?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

By Mr. Austin:

Q. Will you please describe how motor oils and greases are sold to jobber accounts by the Standard Oil Company?

A. I don't know by all accounts how they are sold, nor do I know that motor oil is sold in exactly the same way to jobber accounts in different fields.

Q. Do you know how it is sold in Oklahoma?

4364 A. Yes, I do. In Oklahoma we have a warehousing-arrangement with a distributor there, and this distributor—

Q. What distributor?

A. A distributor in Oklahoma, who distributes motor oil to jobbers, and he distributes out of this warehouse.

Q. Do you know how motor oils are sold to jobbers in Detroit?

A. No.

Q. How are motor oils shipped to jobbers in Oklahoma? You say the distributor delivers them out of the warehouse?

A. Yes.

Q. Well, how are they shipped?

A. In carloads of barrels or carloads of crated cans of motor oil.

Q. Does the jobber buy motor oil only in carload lots?

A. No, no; he may buy in smaller quantities but then it would go at an L.C.L. rate.

Q. What do you mean by L.C.L.?

A. Less than carload.

Mr. Hanley: It isn't clear, your Honor, what the materiality of this is. It does appear, I think, that transportation cost of gasoline is paid by the respondent company in Detroit. It appeared both on direct and cross examination as to what sales effort is expended. This is a gasoline case, and I don't know how this is material on the 4365 question of costs or anything else. May we know what the purpose of this examination is?

Mr. Austin: I think that will become apparent, your Honor. I would like to proceed with this line of questioning and I believe that its relevancy will be apparent before I finish this line of questioning.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Do the four jobbers in Detroit purchase motor oils and greases from the Standard Oil Company?

A. Some of them purchase some of their motor oils from the Standard Oil Company; I do not know that they purchase their motor oils exclusively from our company.

Q. Do they all purchase some motor oils from the Standard Oil Company?

A. I couldn't even testify that they all do purchase some motor oils.

Q. Do you know whether all of them purchase lubricating oils and greases from the Standard Oil Company?

A. No, I do not.

Q. Did I ask you, Mr. Boatwright, how motor oils and greases are sold to the four jobbers in Detroit?

A. No, you did not.

4366 Q. Well, I will put that question, then. I wasn't sure whether I had.

A. Well, if motor oils and greases are sold to the jobbers in Detroit, I would assume that they are either sold by the sales manager or by the salesmen calling on those accounts.

Q. Are motor oils sold in carload lots to the Detroit jobbers or might they also be sold in less than carload lots?

Trial Examiner Ballinger: You are speaking about sales now by the respondent company?

Mr. Austin: That is right.

A. Well, I don't know. The reason I can't answer your question is that I do not know whether all four of these jobbers buy motor oils, and if they do buy motor oils, whether they buy only one grade or all grades, and if they buy all grades whether they buy in a sufficient quantity to take carload lots.

Q. From what point is direct shipments of motor oils and greases made to customers in the Detroit area?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Where is the distributor located who makes deliveries of motor oils to the Oklahoma jobbers?

A. In Oklahoma.

4367 Q. Does that distributor act as an agent of the Standard Oil Company in making those deliveries?

A. Well, he is not an agent in the sense that he is a commission agent.

Q. Well, is the title to the motor oil delivered in the distributor or is it in the Standard Oil Company?

A. The title to the property would be in the distributor.

Q. In other words, do you mean that the distributor purchases motor oil from the Standard Oil Company and resells it to other jobbers?

A. [illegible] think that is correct.

Q. Then does it follow that none of the Oklahoma jobbers purchase motor oils or greases from the Standard Oil Company?

A. I think I should—

Q. I mean, other than this distributor.

A. Well, this distributor was in that part of the Oklahoma field that was in Wichita, and I think that our arrangement with that distributor was that he received a warehousing fee. I do know that sales made to these jobbers are on our books, but there is a warehousing fee to the distributor for warehousing in making the deliveries to the jobbers. So the product would remain the product of the company, which is a modification of the previous answer.

Q. But there would be a warehousing fee in connection
with the deliveries resulting from the fact that the
4368 distributor is used, you might say, as a bulk plant?

A. Yes.

Q. The question I intended to ask you a while ago, when I said that your answer was directed to the question which I didn't intend to ask, is: The method of sale and delivery of motor oils and greases is the same in the Detroit field as it is in Oklahoma? Perhaps your answers have already indicated that you are not sure about that.

A. Well, if there is motor oils and greases sold to all jobbers in the Detroit field, then it is the same with the exception of the warehousing function which I previously explained in connection with the jobbers in the western part of Oklahoma, a field which was at that time in the Wichita fields.

Q. Do I understand you that the jobbers in the Kansas City field were not served by this distributor?

A. No, they were not.

Q. How did they receive their shipments of motor oils?

A. From the company, either in truck transport or in carloads of barrels or in quantities less than carload at L.C.L. rates.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

4369 By Mr. Austin:

Q. From what point was gasoline shipped to the jobbers in Oklahoma?

A. The Neodsha Refinery.

Q. Where is that?

A. At Neodsha, Kansas.

Q. Was the gasoline shipped from that refinery to the Kansas City and Witchita field jobbers?

A. Yes, sir.

Q. Are motor oils and greases delivered in the steel barrels and containers owned by the company?

Mr. Hanley: To whom, under what circumstances, and when?

Mr. Austin: I will limit it to jobbers. I assume that the same would be true of all customers.

Mr. Hanley: If your Honor please, the respondent now moves to strike all of the testimony of the witness on the question beginning at the point where counsel for respondent first requested that the materiality of this line of questioning be indicated, for the reason that it now appears that counsel has gone back into the question of gasoline and has made no tie-up between motor oil and any issue in this case. The attempted cost comparison which has been made here was a cost comparison in relation to gasoline. It has nothing to do with motor oils or greases. There was no obligation or reason upon the re-
4370 spondent why there should be any attempt to distinguish between its cost of selling motor oils and greases, and none was attempted, and there just is not any materiality in this line of questioning, and it doesn't make any difference whether the Detroit jobbers handled motor oils and greases or not. As a matter of fact, some of them did handle some, and the record so shows, but we are not charged with discriminating on motor oils and greases,

and the cost comparisons are purely on gasoline. That has been repeatedly explained.

Trial Examiner Ballinger: Counsel for the Commission has stated that he intends to couple this up, and at this time the motion to strike is overruled, subject to renewal at a later date.

Mr. Hanley: May we not have it coupled up, then, Judge? I don't like to have to go back over these four or five thousand pages of record and try to find this. If counsel is going to couple it up, let him do so.

Trial Examiner Ballinger: I don't know how he is going to couple it up or when he is going to couple it up, but he is at liberty to do so at any time before the case is closed.

Mr. Austin: I do intend to couple it up, your Honor.

Mr. Hanley: May we have it understood whether 4371 or not counsel is going to couple it up on the question of the costs and the cost figures that the respondent has provided here?

Mr. Austin: Yes; in my opinion, I shall certainly do so.

Mr. Hanley: Are you proposing to attack these figures in some way in this coupling up that you refer to?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Take a five-minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

You may proceed.

Mr. Austin: Will you read the question?

The Reporter (reading): "Are motor oils and greases delivered in steel barrels and containers owned by the company? I will limit it to jobbers."

By Mr. Austin:

Q. In the Oklahoma field.

A. Yes.

Q. Does the company pay for the transportation?

A. Yes.

Q. Is the company's cost of sale of motor oils and greases to jobbers in Oklahoma per unit greater or 4372 less than the cost per gallon on the sale of gasoline to jobbers?

A. It would be greater.

Q. Is the company's cost of delivery of motor oils and greases to jobbers in Oklahoma per unit greater or less than the cost per gallon of delivery of gasoline to jobbers?

A. Well, we don't have a delivery cost on gasoline to jobbers in our marketing costs. You see, that is a separate freight classification.

Trial Examiner Ballinger: What is that question?

(Question and answer read.)

By Mr. Austin:

Q. Well, you nevertheless do have a cost of delivery, do you not, Mr. Boatwright, both of oils and gasolines?

A. We have a freight charge on both products but we do not include a freight charge as a marketing cost.

Q. I would still like to have you answer the question, if you can answer it, regardless of whether you consider the marketing cost or not.

A. Well, I can't answer it.

Q. You don't know?

A. I do not.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Does the cost of delivery depend upon the distance
4373 of the products to be transported?

The Witness: It depends both upon distance and upon method of product movement. Where motor oil is shipped in carloads of barrels, the per unit cost is higher than the per unit cost for a tank car of gasoline because of the different gallonage content.

Trial Examiner Ballinger: That depends upon both the distance and the quantity.

The Witness: Yes.

Trial Examiner Ballinger: And mode of delivery.

The Witness: Yes.

By Mr. Austin:

Q. I would like to point out that the distance would be the same for the purpose of my question as intended because I was referring, naturally, to comparison of costs of delivery of motor oil, on the one hand, and gasoline, on the other hand, to the same customer.

A. Yes, but your products may be supplied from different points of origin.

Q. Oh, I see.

A. Therefore, the distance need not be the same.

Q. As a matter of fact, these products are supplied from different points of origin in the Oklahoma territory, are they not?

A. Well, your motor oils are supplied from different points of origin than your gasoline. 4374

Q. That is what I mean.

A. You see, our Isovis is made at Wood River and it would be shipped from Wood River to the field storage point, where it would be barreled and then supplied out of the fields to the point where the barreling takes place, to the Oklahoma jobbers.

Q. Where is the gasoline shipped from?

A. The gasoline would be shipped from Neodsha.

Trial Examiner Ballinger: From where?

The Witness: Neodsha, Kansas.

By Mr. Austin:

Q. You stated that the company's costs of sale in motor oils and greases to jobbers in Oklahoma per unit would be greater than the cost per gallon of sale of gasoline to jobbers. Assuming that the Detroit jobbers purchase motor oils and greases from the company, would your answer to the question be the same if asked for the Detroit field?

Mr. Hanley: Just a moment.

That is objected to, your Honor, for the reason that it is totally immaterial, incompetent, irrelevant, does not point to any of the issues in this case, being entirely irrelevant what the cost of selling to jobbers or other re-sellers may be in connection with motor oils. Assume the correctness of the witness' answer and that the
4375 cost of selling a unit, that is, a gallon of motor oil, were many, many times as great as the cost of selling a gallon of gasoline, it would still be totally immaterial, for the reason that the cost comparisons deal solely with differences in the cost of sale of gasoline and are not tied to and are not related to cost of selling motor oils, either in Oklahoma or in Detroit.

There is no issue in this case in connection with motor oil, and its only applicability could be on the question of costs, and then only if the attempted justification of the differentials in cost as submitted by respondent were affected by or influenced by costs of sale of motor oils and greases, which they are not, and which abundantly appears in the record and in the exhibits.

Further, that if the thing points to freights charges, again it appears from the record and from the exhibits that freight charges, while they may be a cost to the company just as a crude oil cost is a cost to the company or a pipeline cost of getting the crude oil to the refinery is a cost, none the less, these costs start with f.o.b. delivery setup: First, at a reseller service station and, secondly, and on the other hand, at the bulk plant of the jobber. Hence, the question of freight has no applicability to gasoline. The motor oil freight as has been indicated by the witness is arrived at by an inclusion of price no matter how sold or to whom and would be, therefore, on the same basis as 4376 gasoline freight, assuming that motor oil had any applicability to the question of costs, which it has not, as heretofore pointed out.

Mr. Austin: If your Honor please, while I do not concur in the objection and would also like to point out that the question is restricted to costs of sale and not costs of delivery, I would nevertheless like to withdraw the question at this time with the right to possibly ask a similar question later after the situation in the Detroit field has been more fully developed.

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Austin:

Q. In your opinion, Mr. Boatwright, does the cost per gallon of sale and delivery of gasoline to a single jobber account increase or decrease with an increase or decrease of the gallonage purchased by that customer in a given period of time?

A. Now, when you use the term "selling" are you doing as I am, referring to the marketing costs, or are you referring to salesmen's salaries?

Q. In this question I refer to cost per gallon of sale and delivery, which I believe means the same thing as the term "marketing costs" or "distribution costs" as 4377 you mention it.

A. Well, I would anticipate that with increased volume, your unit cost of marketing would decline.

Q. And with the decrease in volume, would the marketing cost increase?

A. That would be the natural expectancy.

Q. Would the same be true as to an increase or decrease in the amount of oils and greases purchased, referring now to the marketing cost of oils and greases?

A. Yes.

Q. And in referring to an increase or decrease in marketing costs, that would include, would it not, selling costs, advertising costs, and accounting costs?

A. It would include all of those expense classifications and others.

Q. Will you now turn, please, to Respondent's Exhibit 33-D? The heading is "supervision and selling costs." Are these costs as shown on Respondent's Exhibit 33-D computed for Oklahoma jobbers only?

A. Yes, sir.

4378 Q. Reference is made to "actual time expended by management, expenses as shown on form 028, Respondent's Exhibit 35, plus salesman's salaries," and so forth. And the next sentence commences "This total expense."

What total expense is referred to there? In other words, is that total expense for jobbers only, or the total expense for the Kansas City and Wichita fields?

A. Total expense for jobbers only.

Q. Will you explain in detail what expenses are included when you refer to "actual time expended by management, expenses, as shown on form 028, plus salesmen's salaries, car and traveling expenses"?

A. Yes; from the form 028, which is an expense account statement by days, you can get the time of your supervisional group in a given area. Thus the form 028 for the managers and the assistant managers and other supervisors would be analyzed to determine what actual time they had spent in conducting the business through the Oklahoma jobbers; that is, particularly with reference to trips down to Oklahoma.

In addition to that, the assistant manager, the sales promotor, the special reseller, the special—any other special salesman that may have been down there would be included from that analysis. That would include the salary or the payroll cost allocated to this portion of the time of the men who worked on these accounts. It would include 4379 the sum total of their traveling expense, and it would include the depreciation on the salesman's car that was used in that territory.

Q. Mr. Boatwright, you have stated that sales to jobbers are not considered a separate channel for distribution for the purpose of computing marketing cost. Will you explain how the selling expenses or the time expended on sales to jobbers in the Oklahoma area could be determined from form 028?

A. Yes. That is comparatively easy.

Respondent's Exhibit 35, form 028, is a daily record of expenditures on the part of any individual traveling being out in the field. Each line is numbered from 1 through 31. If the field manager's report indicated that he had spent a certain day in Tulsa, Oklahoma, his expenses incurred that day in Tulsa, Oklahoma, would be indicated on the line indicating the date of the month. His expenditures would be broken down according to his meals, his lodging, his telephone and telegraph, his other miscellaneous expenses which are detailed in transportation, or the automobile expense incident to that particular day. Therefore, by taking these forms and going through we could find the time of the supervisional group, the special salesmen, and others who had moved out of our field offices to handle the business of the Oklahoma jobbers. The salesmen that were covering the territory covered only jobbers. Therefore, it was
4380 a simple thing to throw their expense against this class of business.

Q. These jobbers were served by salesmen who had no other duties?

A. Yes.

Q. Would it not be true that the time expended by the management, and so forth in Kansas, including operation of vehicles, and so forth, on the way to Oklahoma should have been included? If I understood you correctly, you said that it was only time in Oklahoma that was included. I assume they had to get down from Wichita to the Oklahoma border.

A. Well, we would isolate the trips by the use of the form 028. Then we would take the automobile expense and the time expense for making that trip. Thus, if it was necessary for the manager to furnish gasoline at Pittsburg, Kansas, on the way down to Oklahoma, it was charged to that trip in which his business was dealing with Oklahoma jobbers.

Q. Didn't the manager sometimes make trips in which he transacted various kinds of business? For instance, calling on other customers in addition to the Oklahoma jobbers in the course of his trip through the field.

A. Well, any manager when he drives out of a main office will, of course, observe and comment and discuss any problems incident to the route that he is following through the field.

You are acquainted with the proximity of Wichita to Oklahoma, are you not?

4381 Q. I am not.

A. It is very close. That distance is a negligible function. And the chances are when the Wichita manager went to Oklahoma he went on some special business, and he went to Oklahoma and conducted that business. Now, that likewise is pretty generally true of both the Wichita manager and the Kansas City manager.

Q. Do the salesmen who call on the jobbers in the Detroit area call on jobbers only, or do they have other points of call?

A. They would have other points of call.

Mr. Hanley: Isn't your recollection of the record, Mr. Austin, that no gasoline salesmen did call on Detroit jobbers?

Mr. Austin: I am not sure. I think the testimony is—

Trial Examiner Ballinger: Do you want this on the record?

Mr. Austin: Yes, if the question is on the record. My recollection of the testimony is that the witness said that there probably are some selling expenses in connection with the Detroit jobbers, although he did not attempt to say how much; but certainly this schedule for Oklahoma as offered is indicative of the expenses in Detroit. That is the purpose for which it is offered.

4382 Mr. Hanley: Well, I merely call it to your attention, because I have a clear recollection of the testimony by Mr. Boatwright, more likely by the jobbers themselves, that a gasoline salesman does not call on either them or their reseller customers, and the sales expense by salesmen incident to selling Detroit jobbers was this managerial expense the witness has now been discussing—luncheon engagements with Mr. Raupagh, and such things. I think your Honor will recall the testimony.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Do you know, Mr. Boatwright, whether gasoline salesmen in the Detroit area call on Ned's Auto Supply Company outlets, or any of them, in the course of their duties?

A. I know that they do not call on the individual outlets. The only contact that a salesman has, if any, under the present operating conditions is with the home office of the Ned's Auto Supply Company.

Q. Do you know whether there is some salesman's salary expense in connection with calls on Ned's Auto Supply?

Trial Examiner Ballinger: In connection with gasoline?

Mr. Austin. Yes.

4383 A. I do not know that there is any gasoline selling cost in connection with salesman's salary in serving the Ned's Auto Supply.

By Mr. Austin:

Q. Do you know that there is not?

A. I do not know that there is not. That constitutes no part of my testimony.

Q. Does form 028, Respondent's Exhibit 35, as filled out by the company employee, cover expenses in connection with the marketing of both gasoline and motor oils?

A. Yes.

Q. For the purpose of the computation on Respondent's Exhibit 33-D, and referring to the first sentence under "supervision and selling cost," are the expenses there referred to assigned directly to Oklahoma jobbers only?

A. They were in this study. They are not assigned separately as a part of our regular accounting procedure.

Q. But they were so assigned just for the purposes of this study?

A. Yes, sir.

Q. Referring to Respondent's Exhibit 32, form 189, can you state the accounts opposite which the supervision and selling costs shown on Respondent's Exhibit 33-D were entered on form 189 for the Kansas City and Wichita fields for 1939?

A. You will again limit the question to gasoline 4384 and refined oil, will you not?

Q. Yes—well, just a minute on that. No, I don't think so, Mr. Boatwright, because the expenses are on 028, which you just stated covered motor oils as well as gasoline, and the larger gallonage figure was used on Respondent's Exhibit 33-D.

Mr. Austin: Off the record, please.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Mr. Hanley: If counsel refuses to limit the question, I object to it, for the reason that Respondent's Exhibit 33-D on its face shows that it has to do solely with gasoline and refined oil.

Mr. Austin: May we postpone the answer to the question and the ruling on the objection, your Honor?

(Further discussion off the record.)

Mr. Austin: I will withdraw the question.

Trial Examiner Ballinger: All right; the question is withdrawn.

By Mr. Austin:

Q. It is stated on Respondent's Exhibit 33-D that "this total expense was allocated according to the field estimates of time devoted to each product."

Between what products was this allocation made?

A. Between gasolines and refined oils and other merchandise sold.

4385 Q. You mean gasolines and refined oils, on the one hand, and other merchandise, on the other?

A. Yes.

Q. Has any such allocation been made for the Detroit field in connection with the jobber business there?

A. No, we have no separate time study of jobber operation in Detroit. As you will recall, on direct testimony, the time period of the conduct of this study was stretched out to approximately three months, counting tickets, going back through the records, and getting all time devoted to this class of business, it would have required a similar function for operation in Detroit. I think I should add to that the statement that even had we attempted it, because the expense accounts in Detroit would not have revealed the location as being outside of the city or outside of the main portion of the field, I could not have gone as far in determining the actual jobber cost in Detroit even had an attempt been made as we could in this particular case, where we are faced with jobber operation only.

Q. You said that the study took three months. Were you referring to the Oklahoma study?

A. Yes.

Q. On Respondent's Exhibit 33-D, in the computation, you figure a 15 per cent figure for the Kansas City field and a figure of 32 per cent for the Wichita field. What 4386 do those percentage figures mean?

A. That means that 15 per cent of the selling time of the sales efforts in the Kansas City field were devoted to the sale of gasoline and refined oil. The 32 per cent following the Wichita field cost indicates that that portion of time and effort was devoted to gasoline and refined oil products.

Trial Examiner Ballinger: What percentage of time was that?

The Witness: In one case, it was 15 per cent of the time; in the other case, it was 32 per cent of the time.

By Mr. Austin:

Q. At page 2666 of the record, Mr. Boatwright, I asked you about the difference between the gallonage figure used on Respondent's Exhibit 33-D under "supervision and selling cost," which is 4,206,686 gallons, and the smaller figure of 2,166,168 gallons used on Respondent's Exhibit 33-C and at the top of Respondent's Exhibit 33-D, and you stated that the difference was "refined oils, tractor fuels, fuel oils, motor oils, greases, and so forth."

Your answer to that question indicates that the gallonage figure used on Respondent's Exhibit 33-D under "selling cost" included fuel oils, motor oils, and greases.

A. My answer was in error. The smaller figure of 2,166,168 gallons is gasoline and refined oil only. The 4,206,668 gallons is, likewise, gasoline and refined oils only. 4387 The difference being due to the fact that two of the accounts upon which there have been indicated bad credit losses were not included in the calculation of doing accounting and credit because both accountants and credit men spent an unusual amount of time with these two accounts attempting to salvage what appeared to be a certain bad debt loss.

Q. That does not appear upon Respondent's Exhibit 33-C and D, does it?

A. It does not, and my testimony was in error. I am sorry.

Q. Are not the exhibits themselves in error?

A. No.

Q. Isn't it true that the exhibit on its face purports to apply to all Oklahoma jobbers as to the computation under the heading "accounting cost" and also the computation under the heading "credit cost"?

A. It does purport to be the accounting cost of doing business through jobbers. It is just exactly what it purports to be. There were two accounts which during 1939 our accounting and credit men attempted to salvage what appeared to be an obvious credit loss. Those are not regarded as normal accounting or credit charges in any sense of the word.

Q. On Respondent's Exhibit 33-C, you refer to "total accounting cost in Kansas City and Wichita fields for the year 1939."

As a matter of fact, that is not the total account-
4388 ing cost even for all of the jobbers, is it?

A. It is a total accounting cost figured out for each jobber separately and then it is consolidated for all jobbers except these two.

Q. And that does not appear on Respondent's Exhibit 33-C, does it?

A. No, that does not appear. It should have appeared when I first gave my answer as to the difference in the gallonage divisor.

Q. When did you make that segregation of the accounting costs and credit costs by eliminating the costs incident to the business of these two jobbers?

A. When the exhibit was prepared.

Q. Did you make that segregation when you prepared the cost study for the company?

A. Yes, sir, both separately, and we even went to the individual jobbers as we analyzed the profitability and the expenses incident to the individual jobber operation.

Q. Then it was necessary to do that in order to find out there was excessive cost through the jobbers, was it not?

A. Well, it was necessary to do that to find out that question. An anticipated credit loss or a bad debt loss of the magnitude that was incurred certainly could not be a means of evaluating the profitability of all jobber accounts. These two were obviously unprofitable; the
4389 others were found to be profitable.

Q. These two jobbers which you eliminated were two of the largest jobbers in the Oklahoma field?

A. They were two large jobbers.

Q. As a matter of fact, the gallonage of those two jobbers was approximately half of the total gasoline and refined oil gallonage in the Oklahoma field in 1939, was it not?

A. Yes, sir.

Q. Then is it your testimony now that the accounting cost computation and the credit cost computation on Respondent's Exhibits 33-C and D were made for 10 jobbers out of the 12 in the Oklahoma field?

A. Yes, sir.

Q. And those 10 jobbers purchased during 1929 only 2,166,168 gallons of gasoline and refined oil?

A. Yes, sir.

Q. What was the average per unit of the accounting cost per gallon for the entire 12 Oklahoma jobbers?

A. I don't know.

Q. You did compute that, did you not?

A. It was computed in the study.

Q. It was in excess of 10/100 of a cent per gallon, was it not?

A. I don't know.

Q. Didn't you state that the costs for the two
4390 jobbers eliminated was greater than the average for the others?

A. Yes, I think they were.

Q. Isn't that the reason they were eliminated?

A. No, ~~sir.~~ They were eliminated because they were non-representative of the accounting costs incident to jobber distribution.

Q. They were non-representative because they were higher, weren't they?

A. Certainly.

Q. You have on Respondent's Exhibit 33-D a figure of 15 per cent for the Kansas City field for time expended by management and salesmen in connection with gasoline and refined oils; is that correct?

A. Yes, sir.

Q. And for the Wichita field, the figure is 32 per cent?

A. Yes, sir.

Q. To what products were the remaining percentages assigned?

A. To other products distributed by these respective jobbers, be they motor oils, tractor fuels, gas oils, and distillates, and other products.

Q. Were those estimates based upon any time reports or other records of the company or are they entirely estimates of the field manager?

A. They were the estimates of the field manager made
in discussion and in conjunction with specialized
4391 salesmen or promoters who had gone down into Okla
homa and given their time to this class of business.
You see, a time record is not maintained by the field manager or assistant field manager.

Q. The time record is maintained by the salesman, isn't it?

A. The time record is maintained by the salesman, which was reviewed in making these estimates.

Q. Do the same salesmen sell gasoline, motor oils, lubricating oils, and automobile supplies?

A. The Oklahoma jobbers?

Q. Yes.

A. Yes, sir.

Q. Do you know whether these percentages are the same for the Detroit field or were the same in 1939?

A. I do not know that they were the same for the Detroit field for the year 1939. I think they would be high.

Q. Has any study been made in the Detroit field of the time allocated to respective products by salesmen calling on jobber accounts?

A. Not to my knowledge.

Q. Commission's Exhibit 82-B contains a memorandum entitled "Distribution of time by products not reflected on comparative statement of expense, form 189."

The percentage of time there shown as devoted to the
sale of gasolines and refined oils covering all chan-
4392 nels is 42.6 per cent, is that correct?

A. Yes, sir.

Q. Respondent's Exhibit 33-D shows a variation in time spent in connection with supervision and selling of gasolines and refined oils between the Kansas City and Wichita fields of more than 100 per cent. In other words, the percentage for Kansas City is 15 per cent, Wichita, 32 per cent, which is more than twice 15 per cent. Have you any knowledge which would permit you to state that the variation between either of these fields and the Detroit field may not be equally as great?

A. Would you mind reading that question?

(Question read.)

A. Well, the question is not one that is easy of interpretation because of its compound nature. I think it would be advisable, first, to point out why there is a difference between the field of Kansas City and Wichita. I explained to you that our motor oil in the Wichita field was served through a warehousing agreement. The man in charge of that warehouse was a previous salesman for the Standard Oil Company. The Wichita field did not have the problem and the worries incident to the distribution of motor oil as did Kansas City. Accordingly, their salesman was free to spend the greater proportion of his time on gasolines and did so spend a greater proportion of his time on gasoline. Now, the Kansas City field 4393 did not have this same kind of assistance. Accordingly, a greater amount of their salesmen's time had of necessity to be devoted to motor oil. Therefore, his proportion of time devoted to gasoline and refined oils was reduced.

I have stated in the record previously that knowing the different types of operation, both in Oklahoma and in Detroit, the actual proportion of the time devoted for the sale of gasoline and refined oil in Detroit would be less than the proportion indicated for the Oklahoma jobbers. I know this because I know that the Oklahoma salesmen first called on the jobber and then helped in the merchandising procedure. That is different from our operations in Detroit where our salesmen had no responsibility to call on the reseller outlets. Accordingly, their time was devoted to the sale of gasoline and refined oils and, hence, our marketing costs for any selling time assignable to the Detroit jobbers would be less than the marketing cost we have assigned to selling and supervision as indicated on Respondent's Exhibit 33-A through E.

Q. Is that opinion based upon any study made in the Detroit area?

A. It is based on the knowledge of customers and types of operation. It is not based on an analysis which is an accurate allocation of time in Detroit, for the simple reason that it couldn't be done.

4394 Q. In any event, it has not been done, has it?

A. Well, it hasn't been done and I am afraid you will just have to take my word as to the difficulties.

Q. Do you know the total gallonage of petroleum products other than gasoline and refined oils sold to the Oklahoma jobbers in 1939?

A. Yes. The total gallonage is 4,502,263 gallons, which includes refined oil, naphtha, and gasoline, lubricating oil and other miscellaneous petroleum products.

Q. That is the total, including gasoline?

A. That is the grand total of petroleum products distributed through the Oklahoma jobbers.

Q. Then could you answer my question by making a subtraction?

A. The total gallonage of lubricating oil—petroleum products other than gasolines and refined oils amounted to 295,577 gallons.

Mr. Austin: I would like to have this paper marked, for identification.

Trial Examiner Ballinger: The reporter will mark the paper Commission's Exhibit 87, for identification.

(The document was thereupon marked "Commission's Exhibit No. 87," for identification.)

By Mr. Austin:

Q. Commission Exhibit 87, for identification, is a statement which was supplied to me by counsel for
4395 the respondent by mail in response to a request
made in Detroit and contains a statement of certain gallonage both as to gasolines and as to motor oils and greases in the Detroit field for 1940, including 1940 sales of motor oils and greases to four named jobbers.

Mr. Austin: I offer Commission's Exhibit 87, for identification, in evidence.

Trial Examiner Ballinger: Any objection?

Mr. Hanley: I object to it for the reason, your Honor, that it is entirely immaterial. Quite true, we furnished it and we haven't any question about its accuracy and we don't raise any objection in that respect, but it deals with deliveries of sales of motor oils and greases to the four named jobbers. It also deals with an item of motor oil reseller sales; none of which is material and all of which is immaterial.

Furthermore, after the information was furnished, the Commission couldn't figure it out and they asked us for an explanation of it, and we gave the explanation and the exhibit is probably unintelligible without the explanation.

Trial Examiner Ballinger: I will hear from counsel for the Commission.

Mr. Hanley: I want to add to my objection this statement, your Honor: That this material was furnished at

the request of the Commission, and at the time with
4396 the statement that it was not regarded as material and would not be countenanced without objection by respondent of any attempted use to be made of it, but in line with the offer of respondent to furnish anything that the Commission wanted, it was furnished, notwithstanding its immateriality.

Mr. Austin: I might say, in the first place, your Honor, that it answers the question which there was raised a while ago as to whether or not any motor oils and greases were purchased by the Detroit jobbers in 1940. It appears there that there were, and it gives the amounts.

Furthermore, it gives certain other useful information which perhaps is contained in part on other exhibits. I didn't offer the explanation which Judge Hanley refers to because that explanation was a reconciliation with certain figures on Detroit form 189 which I was going to say are not in evidence. I believe they now are in evidence.

If counsel for the respondent desires to have his letter also introduced containing his explanation, I have no objection.

Mr. Hanley: I am just making the objection, your Honor.

I think one of our difficulties here is that we have given the Commission so much stuff, they don't know what to do with it. I made the objection that it is not intelligible in its present form, and it was furnished in this form
4397 because the Commission asked for it in that way.

Trial Examiner Ballinger: The exhibit plainly establishes the fact that the four jobbers in the Detroit field purchased motor oil and grease from the respondent. Is it offered for that purpose only?

Mr. Austin: Chiefly for that purpose and for the additional purpose that it shows the amounts that I have already introduced into the record through testimony of the witness, the amount of motor oils and greases purchased by the Oklahoma jobbers and the amounts of gasoline purchased both in Oklahoma and in Detroit, also being in evidence, and by means of this exhibit it may be shown that the proportions of gasoline and motor oils in Oklahoma and in Detroit were different, and since there has been an allocation of costs in Oklahoma based upon percentage of time spent on products, I think that the gallonage of the different products is material.

Mr. Hanley: Your Honor, that is a misstatement. There was no consideration given in Detroit or in Oklahoma to motor oils and greases except to eliminate them. Now, do we have to go on trial for something different every time we have a hearing, Judge?

Trial Examiner Ballinger: This runs to the question of your elimination.

Mr. Austin: Exactly.

Trial Examiner Ballinger: The objection is over-4398 ruled. The document is admitted in evidence as Commission's Exhibit 87.

(The document heretofore marked "COMMISSION'S EXHIBIT No. 87," for identification, was received in evidence.)

Mr. Austin: Your Honor please, I am making a motion to adjourn because, in the first place, it is 4:30, and, in the second place, I think I may have to do a little rearranging of material in order to proceed expeditiously.

Trial Examiner Ballinger: The motion of counsel for the Commission is granted and now, at 4:30 p. m., the hearing stands adjourned to be reconvened June 24, 1941, in Room 332, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 4:30 p. m. the hearing was adjourned to Tuesday, June 24, 1941, at 10 a. m.)

4399

Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Tuesday, June 24, 1941.

Met, pursuant to adjournment, at 10 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., appearing on behalf of the Federal Trade Commission.

Harold R. Hanley, Esq. (910 South Michigan Avenue, Chicago, Ill.), appearing on behalf of the Respondent.

4400

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

This is a reconvening pursuant to notice of Docket 4389, in the matter of Standard Oil Company, at 10 a. m., Eastern Standard Time, June 24, 1941, in Room 332, Federal Trade Commission Building, Washington, D. C.

The last hearing was held in Washington, D. C., on June 23, 1941.

The reporter will note counsel for the Commission and respondent present.

You may proceed.

Mr. Hanley: Off the record.

(Discussion off the record.)

JOHN W. BOATWRIGHT resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Austin.

Q. We were discussing supervision and selling cost in connection with Respondent's Exhibit 33-D. Reference is made on that exhibit to "actual time expended by management." You may have stated this yesterday, I am not sure, Mr. Boatwright, but what is meant by the word "management"?

A. The entire supervision function, including the manager, the assistant manager, the special salesmen, the sales manager, or any of the supervisory force operating out of these fields.

4401 Q. When you say the manager and the assistant manager, do you mean the division manager?

A. Yes.

Q. And the assistant division manager?

A. Yes, sir.

Q. Where is the expense involved in their services shown on form 189?

A. It is shown in account 1000.

Q. If it was proper to include the salary value of this time here as a selling expense, would it not have been equally proper to have included the value of the time Mr. Raupaugh and Mr. Blau spent with Ned's Auto Supply Company in 1937 as a selling expense chargeable to Ned's business in that year?

A. It would have been entirely proper if it had been possible to segregate.

You will recall, however, that the account 1000 in the year 1937 was listed on Respondent's Exhibit 31-Q—

Q. That is right.

A. —as a charge against neither, or as a charge against both, whichever way you wish to interpret it.

Q. That is so. But is it not true that the services of Mr. Raupaugh and Mr. Blau differed in no respect as a selling service from the services rendered by the managers and assistant managers of the Kansas City and Wichita fields in dealing with the Oklahoma jobbers?

4402 A. I would say that the functions performed by the respective field managers were the same.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Let us proceed.

What is the last on the record?

(Question and answer read.)

By Mr. Austin:

Q. Do the supervision and selling costs shown on Respondent's Exhibit 33-D include any federal insurance contributions or any unemployment insurance?

A. Yes, sir.

Q. Do they include any advertising expense?

A. Not in terms of supervision. Advertising expense is shown as a separate item in the calculation.

Q. Well, I was referring only to the supervision and selling cost figures on Respondent's Exhibit 33-D.

A. They do not include any advertising, advertising being included as a separate classification of expense.

Q. Can you state as a fact that the supervision and selling cost for the jobbers in the Detroit area in 1939 was 6/100 of a cent per gallon?

A. I can state for a fact that the supervision and selling cost for the jobbers in the Detroit area would be less than 6/100 of a cent, if anything.

Q. I would like to have a yes or no answer to the question.

Mr. Hanley: That is objected to as not a proper request on the part of counsel. The witness has answered the question. No witness has to answer a question yes or no.

Trial Examiner Ballinger: Read the question.

(Question and answer read.)

Trial Examiner Ballinger: The Examiner considers the answer full and complete.

Mr. Austin: I would like to know, your Honor, whether or not the witness knows whether the selling and supervision costs in connection with jobber business in Detroit was not the sum of 6/100 of a cent per gallon. He said it was less. He still has not answered whether or not it is or is not 6/100 of a cent.

Mr. Hanley: The yes or no answer is apparent in the answer the witness gave.

Trial Examiner Ballinger: The witness may answer the question.

The Witness: Your Honor, I could not answer the question in any other than the manner in which it was answered. I know, because of my knowledge of contracting and dealing with accounts throughout our various territory, that a problem of contacting four jobbers, on one hand, doing 13,000,000 gallons, as contrasted with contacting twelve, on the other, doing 4,000,000 gallons, that the per gallon cost of the supervision and selling cost in the first case must of necessity, if anything, be less than the calculation as indicated in our exhibit, as showing 6/100 of a cent.

Trial Examiner Ballinger: As the Examiner understands, counsel wants to know whether or not the computation—what is it, 6/10 of a cent?

The Witness: 6/100.

Trial Examiner Ballinger: ~~—6/100 of a cent is absolutely accurate.~~

The Witness: Judge, there is nothing absolutely accurate about accounting when there is an allocation involved.

By Mr. Austin:

Q. Your answer, Mr. Boatwright, is that, in your opinion, the figure for Detroit would be less than 6/100 of a cent?

A. My answer is that it would be 6/100 or less.

Q. Have you made any similar study to determine the actual cost per gallon of selling supervision costs in connection with jobber business in Detroit in either 1939 or 1940?

A. No, that was explained completely earlier in the testimony as being almost a physical impossibility inasmuch as the expense accounts of the supervision in Detroit would not show the time period when they had worked on the specific accounts involved as would the expense accounts of the Wichita and Kansas City managers show their time spent in Oklahoma.

Q. Will you turn to Respondent's Exhibit 33-C, 4405 "accounting costs"?

This exhibit refers to "total accounting cost in the Kansas City and Wichita fields for the year 1939." Does this mean the total accounting cost for 1939 for these fields or the total accounting cost for jobbers only?

A. That is the total accounting cost for the jobbers only.

Q. Was this cost assigned directly to the marketing of gasoline to the jobbers or was an apportionment and allocation made of the total accounting cost?

Mr. Hanley: That is objected to as repetitious, having been gone into fully and answered a dozen times yesterday.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

The objection is overruled.

The Witness: Read the question, please.

(Question read.)

A. The accounting cost was a total accounting cost for all products. The divisor of 2,166,168 is a divisor which is made up of the total of refined oils, naphtha, and gasoline, lubricating oil and other products. It excludes the Gibson Oil Company and the Kramer Oil Company.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

4406 Trial Examiner Ballinger: On the record.

Mr. Austin: Will you read the answer, please?

(Answer read.)

Mr. Hanley: Let me understand it. I will ask this question. Does that include products other than refined oil and gasoline?

The Witness: Both the cost and the divisor does include products other than gasoline.

Mr. Hanley: I see.

The Witness: The accounting cost is on an all-gallonage basis through specific accounts.

By Mr. Austin:

Q. You mean it includes motor oils?

A. Yes, sir.

Mr. Austin: Now; I am completely confused.

Will you read the previous answer?

The Reporter (reading): "The accounting cost was a total accounting cost for all products. The divisor of 2,166,168 is a divisor which is made up of the total of refined oils, naphtha, and gasoline, lubricating oil and other products. It excludes the Gibson Oil Company and the Kramer Oil Company."

By Mr. Austin:

Q. I certainly understood your testimony yesterday to be, Mr. Boatwright, that the 2,166,168 gallon figure 4407 was only gasolines and refined oils.

A. I don't think so. I think that my explanation of the difference between the 2,166,168 gallons, on the one hand, and the 4,206,668 was brought about by excluding two jobbers in both the accounting and credit costs, while their total volume of gasolines and refined oils was included in the second item of 4,206,000, when we applied the ratio of time devoted to those particular products.

If there is any question in anyone's mind, I should like to restate so that could be clearly understood.

Q. Well, will you state, first, whether the figure of

4,206,686 gallons, which appears on Respondent's Exhibit 33-D and again on 33-E is gasoline and refined oils only or does that include other products?

A. The 4,206,686 is gasolines and refined oils only. You will recall in the testimony of yesterday I pointed out that the total of all products was 4,502,263.

Q. Yes.

A. Then you asked me to perform the arithmetic of deducting so that you could get the volume of the other products.

Q. Yes.

A. Now, after applying the time ratio devoted to gasolines and refined oils, obviously our divisor must be limited to those two products. I think you will agree on that.

Q. Yes, that is right, the 4,000,000 figure. I understand that. 4408

A. Yes. Now, when we are dealing with accounting and credit costs, we took the accounting and credit costs incident to particular accounts and we divided the accounting and credit costs on those particular accounts by the volume moving through those costs to get an accounting and credit cost for handling jobber business.

Q. And that is for volume of all products moving through those accounts?

A. Yes, sir. Yes, sir.

Q. Do you know the amounts of the 1939 gallonage of the ten jobbers referred to under the accounting and credit cost headings in Respondent's Exhibit 31-C?

A. Yes, I have that. The refined oil gallonage was 22,000—it is either a 5 or a 3; I can't tell from the carbon—I think it is 22,521 gallons. The naphtha and gasoline is 1,922,015.

Q. That is refined oil and gasoline? Is the balance of the 2,166,000 figure motor oils?

A. Well, it is made up of motor oils or other products. Motor oil represents 195,513; other products, 26,119. These other products, in most cases were either Diesel or tractor fuels.

Q. I don't believe you stated in answer to my last question, Mr. Boatwright, how these accounting costs in the Kansas City and Wichita fields were divided or apportioned as between jobber business and the other business in the field. 4409

A. I don't think that question has been asked.

Q. Well, I do ask it now.

A. Well, what was done was in each field a study was made of the sales tickets, the various reports received or compiled on this business through jobbers, correspondence files were reviewed, and all other expense items such as credit information reports were analyzed for each of the departments. Estimates of the total time of the accounting department in handling these tickets, reports, correspondence, and so forth, were made by the department heads. These estimates were then checked with the office manager in each field to make certain that they were a fair and reasonable estimate of time involved for this class of customer. From these estimates of time a cost per gallon was determined and applied to the sale of the respective products.

Q. I believe you have already stated that you had no business in Oklahoma, the company had no business in Oklahoma except jobbers insofar as the sale of gasoline was concerned.

A. Yes, sir.

Q. Did it have any business in Oklahoma in regard to any other products?

A. No. All of our Oklahoma business is done through jobbers.

4410 Q. I see. So that the other accounting costs would be costs in connection with business in Kansas, probably?

A. You mean all other accounting costs incurred by the Wichita and Kansas City fields?

Q. Yes. You have to make an allocation or an apportionment there.

A. Yes.

Q. And I assumed, naturally, that was at the head office and involved the entire costs of the field and it was necessary to segregate or apportion in some way the accounting cost allocable to Oklahoma business.

A. All other accounting costs incurred in these two fields were incurred in handling the business in the state of Kansas or in the state of Missouri, where part of the Kansas City field lies.

Q. Does the figure of $2,226.36 represent the total accounting cost of distribution to jobbers in the Kansas City or Wichita fields or the total for Oklahoma jobbers only? In other words, were there other jobbers in the Kansas

City and Wichita fields besides those included in this survey?

A. Yes, there were. The $2,226.32 representing the total accounting cost is applicable only to jobbers in the state of Oklahoma and excludes the Gibson Oil Company, at Tulsa, and the Kramer Oil Company, at Oklahoma City. It is the cost directly applicable to the residual 4411 number of jobbers in the state of Oklahoma.

Q. Did you make any study or has the company made any study of marketing costs as to all of the jobbers as a whole in the Kansas City or Wichita fields or any cost study including the jobbers other than the Oklahoma jobbers?

A. It has not. Again we are confronted with the identical difficulty that I have enumerated in the Detroit field, the impossibility of breaking down the costs that may be represented by going to lunch with a jobber, or something of that type. Now, when the expense account reveals the location of the expenditure and the manager and his assistants are in Oklahoma, it is an easy task to isolate time and cost. It would be very difficult to isolate time and cost of the Kansas City manager in handling the jobbing business of a jobber located in Kansas City proper.

Q. I can understand that as to selling costs, Mr. Boatwright, but isn't the matter of sales accounting, keeping track of shipments and payments and routings, and all that sort of thing, very much the same whether the jobber be located in Oklahoma or whether he be located in Kansas City or Wichita?

A. Well, in terms of accounting or credit cost, the study would be possible. It has not been made. The difficulty, as you state, is incident to the supervision and selling cost, but we have had no study or have made 4412 no study of the accounting costs separately for the jobbers located in Kansas City proper.

Mr. Hanley: Is it contended that we should, your Honor?

Trial Examiner Ballinger: The Examiner is unable to answer the question.

Mr. Hanley: I am trying to propound it through your Honor, and I am hopeful of getting an answer out of the Commission.

Trial Examiner Ballinger: You may possibly inquire of counsel for the Commission and thus elicit the information you desire.

Mr. Austin: Counsel for the Commission is of the opinion that it will be very necessary for the respondent to make such a study in the Detroit field if it is to sustain its burden of proof in any attempted cost justification in this case.

Mr. Hanley: Of course, that is the opinion of counsel again. I was just wondering whether he thought we ought to have done it in Kansas City. We haven't computed the distance from here to the moon, either, but I didn't understand that just because counsel thought we ought to, that we had to.

By Mr. Austin:

Q. You referred to "a separate analysis of sales 4413 tickets and time estimates." Does this mean sales tickets and time estimates expended only for the jobber business or does it mean sales tickets and time expended for the entire business of the field?

A. It means sales tickets and time expended on the jobber business only.

Q. You see, my question, Mr. Boatwright, refers to a separate analysis of sales tickets and time estimates. Now, I don't know whether that meant analysis of all the accounting costs or whether there was a previous separation before that was made.

A. No, this had to do with the jobber business, pure and simple.

Q. I believe you already stated that the figure of $2,226.32 represents the total accounting cost for the jobbers for all products and not merely for gasoline and refined oils.

A. I have so stated and I have eliminated in that answer again the Gibson Oil Company and the Kramer Oil Company.

Q. You will pardon me if I have not referred to that elimination each time because these questions were prepared upon the assumption that all of the jobbers were included.

A. Yes.

Q. Why did you make this study of accounting and credit costs for all products instead of eliminating or segregating it to gasoline and refined oils?

4414 A. The difficulty there is that the sales ticket comes in and it includes many products. Therefore, the accounting is for a transaction, and to segregate the time among products on the part of the accountant would be quite difficult. Likewise, when an investigation is made into the credit rating of a particular customer, that credit rating is evaluated not in terms of the sale of one product but in the sale of all products. Therefore, the allocation had to be predicated upon an all-gallonage basis.

Q. Might not the accounting cost per gallon differ as between gasoline and refined oils, on the one hand, and motor oils and greases, on the other? Or have you any opinion on that?

A. It isn't likely to differ.

Q. I assume that the cost of handling a ticket in the office would be the same whether it included one product or several products, or regardless of the quantities of each product; or is that true?

A. Well, it depends upon the number of entries that must be made from that ticket. Pretty generally, however, a ticket—the handling of a thousand tickets tends to uniformity. Any one ticket may take a little longer than any other one, but then when you deal with a number beyond a thousand you begin to strike a stability level.

Q. Still an entry of 5,000 or 10,000 gallons of gaso-
4415 line could be handled with as much facility as an
entry for a few pounds of grease or a few barrels
of motor oil, could it not?

A. Yes, sir.

Q. And that being true, might it not well be that the accounting costs per unit on motor oil and greases might be substantially higher than on gasoline?

A. Well, it might be higher. Just what is meant by "substantially" I don't know.

Q. Well, I don't, either.

A. Yes. But it was impossible to segregate the time among the products when the first credit cost, the credit investigation is an all-gallonage investigation. I think you will concede that, because we are attempting to determine the credit of the customer who buys many products. The credit risk on gasoline may be just as great as the credit risk on motor oil, but to differentiate that credit risk among products can't be done.

Now, it so happens that the accounting department were unable to segregate their accounting costs among products, but it cost them so much to handle this group of so many thousand tickets. It cost them that much to handle that many thousand tickets. Therefore, the divisor must be the products represented on those tickets.

Q. I only asked that question, Mr. Boatwright, because I believe you stated that at the time you had pre-
4416 pared this—well, you answered at least yesterday that you were not sure whether the Detroit jobbers purchased motor oils from the company, and yet when you prepared this statement, you grouped them all together, so that I felt that in order to justify that you ought to be fairly confident in your opinion that the accounting cost does not vary much as between motor oils, on the one hand, and gasoline, on the other.

Mr. Hanley: Well, is that a question or an argument, your Honor? What is the witness supposed to do?

Trial Examiner Ballinger: Read the—

Mr. Austin: If there is a motion to strike, I won't oppose it.

Mr. Hanley: There is a motion to strike, if you invite it.

Trial Examiner Ballinger: The motion is granted.

Mr. Austin: It is simply explaining to the witness what I meant, as I do frequently, in case he desires to make any further explanation, which he may do or not, as he chooses.

By Mr. Austin:

Q. Has any analysis or computation been made by the Standard Oil Company of the amount of the total accounting costs in the Detroit field for 1939 which is allocable to the business of the four jobber accounts in the Detroit area?

A. No such calculation has been made.

Q. Has any such analysis or computation been made for the year 1940?

4417 A. No.

Q. Do you know whether the amount of such accounting cost was $2,226?

A. In Detroit?

Q. Yes.

A. No, I do not. There is an entirely different volume involved. I do know this: I know our accounting constructions are identical in both Kansas City and Detroit. They both work on the same code of accounts. The time for handling a group of tickets is the same among the different fields. Therefore, the accounting cost in Detroit should be accurately represented by accounting costs incurred on jobber business in any other field.

Q. Is it not a fact that the amount of gasoline purchased in 1939 and also in 1940 by Ned's Auto Supply Company alone was 4,230,000, whereas the total gasoline and refined oil gallonage of the 10 jobbers used in computing the accounting costs in Oklahoma was less than 2,000,000 gallons?

A. I do not have the exact figure of Ned's Auto Supply sales before me. However, the figure you mentioned is in the neighborhood, as I recall it. It is quite true that sales to jobbers in Detroit have been considerably in excess of sales to jobbers in Oklahoma. That is why throughout my direct testimony and throughout this testimony I have taken the position that similar costs, if calculated 4418 on Detroit, would either be equal to or less than the calculations we have attributed to jobbers business in our cost comparison. The Oklahoma jobber costs of accounting and of credit I know to be higher than would be similar costs incurred in doing the business with jobbers in Detroit.

Q. Can you state as a fact that the accounting costs of handling the four Detroit jobbers accounts in 1939 per gallon of gasoline moving through those accounts was 10/100 of a cent?

A. It could be 10/100 of a cent or less.

Mr. Austin: May we have a five minute recess, your Honor?

Trial Examiner Ballinger: The hearing will stand in recess for 4 or 5 minutes.

(A recess was had.)

Trial Examiner Ballinger: Come to order. You may proceed.

By Mr. Austin:

Q. Turning to Respondent's Exhibit 33-E, there is a title "general office expense" under which there is a computation resulting in an estimated cost of 1/100 of a cent per gallon for general office expenses charged to the marketing costs of marketing or selling and delivering gasoline to the Oklahoma jobbers; is that correct, Mr. Boatwright?

4419 A. Yes, sir.

Q. What is meant by "sales promotion—tank car sales—refined oil and gasoline department of the general office"?

A. Well, we maintained a tank car sales department whose duties were the sale of refined oils and gasolines. That department is classified as a part of the general manager's office and is in the classification of sales promotion. Its duties are the sale of tank cars of gasoline.

Q. Did the costs of that department as reflected on this exhibit include any general office accounting department expense?

A. No.

Q. Any advertising expense?

A. No. I should state this relative to the accounting: That department did make out the bills of lading and information of that kind and recapitulated its sales for the report on tank car sales.

Q. Is the cost of that function included here?

A. It is.

Q. The next question I was going to ask was whether these costs shown under this heading on Respondent's Exhibit 33-E are sales promotion costs only. Now, I assume that to the extent that you have just referred to the accounting department, that would not be a sales promotion cost, but would you give an answer to the question?

4420— A. Well, this is the cost of operating the bulk sales department in the general office and performing all of the functions incident to that department. As I say, it is classified in our company as a division of the sales promotion department. It would mean contact with the vice-president in charge of sales by the department heads to secure approval or lack of approval, which may happen once a year on some accounts, or once in five years on others, and it would include the making of the forms, reporting the sales accomplishments of the department; it would include the making of the bills of lading; it would cover telephone calls and telegraph expense and information of that type in contacting customers.

Q. Is this phrase here "sales promotion—tank car sales—refined oil and gasoline department of the general office"—does that refer to one thing or three things? In other words, is that all one department, all of the title, or does that mean more than one department?

A. Well, the tank car sales department handling refined oil and gasoline are a part of the sales promotion. All of that is one department.

Q. And is that department concerned solely with tank car sales?

A. It was at the time this study was made.

Q. What does the figure 190,845,750 represent?

4421 A. It represents the gross sales of refined oils and gasolines by that department during the year 1939.

Q. Then does that figure represent the total tank car sales of the company only? In other words, does that include only tank car gallonage?

A. Yes.

Q. And if there were any transport truck operations—of course, I am including that under the term "tank car" for this purpose, and I assume that you are.

A. Yes, I understand this totally excludes any tank wagon delivery. This is a tank car business of the company, in 1939.

Q. Does it include other products than gasoline and refined oils?

A. No. Other products such as lubricants are handled through our lubricating department.

Q. That figure of [illegible]0,000,000 is the total for the entire territory of the company, is it not?

A. It is.

Q. Why were not figures for sales promotion tank car sales available from the refined oil, tractor fuel and gasoline price department for the last six months of 1939?

A. In the first six months we maintained two departments. One department was the tank car sales department and the other one was the price department. Effective
July 1st, these two departments were consolidated
4422 under one head and it seemed better for us to extend
the cost for the six months to a year basis than it
would be to attempt to allocate among the time of a consolidated unit.

Q. Then similar figures were not kept separately by the consolidated department?

A. No. After the departments were consolidated, which was purely an economy move, our records then maintained the cost on this consolidated department.

Q. The consolidated department still apparently was concerned only with refined oil, tractor fuel, and gasoline, is that right?

A. But prices as well, tank wagon prices.

Q. The next heading on Respondent's Exhibit 33-E is "point of sale advertising." Do the expenses here shown include the cost of advertising signs, jewel globes, and maps supplied to all of the Oklahoma jobbers in 1939?

A. They do.

Q. Is that the only advertising expenses charged to the jobbers in this exhibit?

A. Yes, sir. I might add, that is all the advertising expense we had.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

4423 By Mr. Austin:

Q. Was this advertising cost assigned directly to each account?

A. By individual account?

Q. Yes, by the individual jobber?

A. Well, what we did was this: We got from the advertising department a record of all of the signs and the jewel globes and any other properties that we had installed at the outlets of these various jobbers. The very process of computation led to a computation by outlets. You see, it had to be done on that basis because our properties are listed according to the outlet.

Q. What do you mean by "your properties"?

A. Signs.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Will you explain what you mean by the term "signs"?

The Witness: Certainly. Although all of these signs may not be in existence at every individual outlet, we normally expect to find a Standard Service sign, which is the hanging sign or the sign which is in the frame. It is a large enamel sign identifying the outlet as a dispensor of Standard Oil products. Usually we find an Isovis
4424 sign. That is an enameled sign which is fastened, as a rule, on the side of the station at some point. Then we may find a credit card sign indicating to the passing tourist that the credit card is honored at that outlet. Then there is at some outlets a sign which reads "Standard Oil Products" which is an enamel sign fastened across the front of the station.

Those are the signs which we normally expect to find at an outlet. Now, if that distributor also handles Atlas tires, there may be an Atlas tire sign at that outlet, which would be included in the cost of merchandising of automobile supplies.

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Would not the amount of the advertising material supplied differ as to each account?

A. Well, there would be a difference especially in the unit cost, if the through-put varied. Now, as I have enumerated these signs, I would expect to find that each of these outlets had the Standard Service sign. Well, now, the Standard Service sign will last an average of about 7 years. If the through-put at one outlet was 10 times the through-put of another outlet, the cost on a per gallon basis for signs would be greater at one that at another. The same thing would apply to jewel globes. As a rule, you will find three pumps at most outlets calling for three jewel globes.

4425 Naturally, if the output at any one station was double the output of any other station, the write-off of the jewel globe advertising cost on a per unit basis would be just double in the one case compared with the other.

Q. It is true, is it not, that there was a great variation in the through-put for the gasoline sold through these various jobber accounts?

A. There was a variation. That is always the case.

Q. My recollection is that the two accounts that you have specified as not being included under the estimate of accounting and credit costs or the computation and accounting of credit costs had a total gallonage of practically as much as the other 10 jobbers combined?

A. They may have.

Q. Is that correct?

A. They have had more outlets. You see, we sell to a jobber and the jobber may have 1 or may have 2 or 25 outlets, so I can't speak on the through-put for each point of installation of a point of sale advertising.

Q. There is not—

A. There is bound to be a difference in the through-put at different stations. That is just conceded.

Q. You stated that you had to, in making this computation on Respondent's Exhibit 33-E, first determine the amount of such advertising material supplied to each outlet?

4426 A. Yes, but when I refer to an outlet, I refer to a reseller outlet, not the jobber, because, you see, we wouldn't have on our records that so many signs were installed at the outlets controlled by the Gibson Oil Company, but we would have on our records a given sign at a given outlet served by the Gibson Oil Company. In other words, our signs are identified according to the actual physical location of the installation.

Q. And the number of outlets operated by each of these jobbers and the number of signs and jewel globes supplied to each outlet is not shown in Exhibits 33-C, D and E, is it, Mr. Boatwright?

Trial Examiner Ballinger: Do the jobbers operate the outlets?

The Witness: The jobbers serve the outlets, your Honor.

By Mr. Austin:

Q. I will accept the correction. I wasn't clear on that point as to whether these signs were supplied to outlets operated by the jobbers or merely served by them.

A. The jobbers bought the merchandise from the Standard Oil Company and, in turn, effected delivery to reseller outlets for which they served even as Wayne Oil Company does in Detroit.

Now, I am not certain I have your question clear.
4427 I wonder if it might be re-read.

Trial Examiner Ballinger: Read the question.

The Reporter (reading): "And the number of outlets operated by each of these jobbers and the number of signs and jewel globes furnished to each outlet is not shown in Exhibits 33-C, D and E, is it, Mr. Boatwright?"

A. No, it is not.

By Mr. Austin:

Q. Is it the practice of the company in Detroit to furnish signs and jewel globes which are installed at the retail service stations who purchase their gasoline from Citrin-Kolb Oil Company, Wayne Oil Company and Stikeman Oil Company?

A. Yes.

Q. You have just referred to the variation in unit cost of point of sale advertising which might exist as between different outlets. Would it not follow that the cost per gallon of point of sale advertising would differ for each jobber?

A. That is entirely possible.

Q. And would not the same probably be true as to each of the four Detroit jobber accounts?

A. Yes, sir.

Q. Do you know how much point of sale advertising was supplied in 1939 or in 1940 to any one of the Detroit jobbers, and by "Detroit jobbers" I mean to include outlets supplied by the particular jobber?

4428 A. No, sir, I do not.

Q. Do you know whether the total cost of such materials supplied to the four Detroit jobbers in 1939 was $2,010.92?

A. No, I would not expect that it would be. I would expect it to be greater than $2,010.92. You have got an entirely different number of outlets and you have got an entirely different through-put of your outlets. I would expect to be able to testify on the per unit cost, however.

Q. But you do not know the exact amount?

A. I do not know the exact dollar value.

Q. Has an computation been made?

A. No.

Q. Of the amount of point of sale advertising supplied to the Detroit jobbers in 1939 or in 1940?

A. No, sir.

Q. Have you a record of the number of gallons of gasoline purchased by each of the Oklahoma jobbers in 1939, and if you wish, you may include refined oils, if you have those figures.

A. I do have such records.

Q. Have you it with you?

A. Yes.

Q. Will you read that into the record, please?

A. I have two columns, one showing refined oil and the adjacent column showing naphtha and gasoline. I

4429 shall read the refined oil first, the naphtha and gasoline figure secondly.

Atlas Oil Company, 424 gallons, refined oil; 216,849 gallons, naphthas and gasoline.

J. G. Brown, no refined oil; 85,405 gallons naphtha and gasoline.

Harry T. David, no refined oil; 372,960, naphtha and gasoline.

W. H. Elliot, 106 gallons refined oil; 12,740, gasoline.

Hugo Oil Company, no refined oil; 222,428, gasoline.

C. R. Peck, no refined oil; 124,917 gallons, naphtha and gasoline.

Petroleum Products Company, 15,419 or refined oil, 165,175 gallons, gasoline.

Ark Filling Station, no refined oil; 6,549 gallons, gasoline.

Davis Oil Company, no refined oil; 18,393 gallons, gasoline.

W. H. Elliot, in the Wichita field—you recall I mentioned the W. H. Elliot above—5 gallons, refined oil; 54,843 gallons, naphthas and gasolines.

Faulkner Petroleum Company, 704 gallons, refined oil; no gasoline.

Field Brothers, no refined oil; 105,197 gallons,
4430 gasoline.

J. H. Jimmerson, no refined oil, 26,646 gallons of gasoline.

Love Petroleum Company, 5,863 gallons, refined oil; 143,872 gallons, gasoline.

H. R. Potter, no refined oil; 109,469 gallons of gasoline.

Schroeder Babcock, no refined oil; 25,939 gallons, gasoline.

Swart Oil Company, no refined oil; 225,533 gallons, gasoline.

Whaley Oil Company, no refined oil; 5,108 gallons of gasoline.

Gibson Oil Company, 18,489 gallons refined oil; 1,285,631 gallons, gasoline.

Kramer Oil Company, 9,115, refined oil; 948,915, gasoline.

Mr. Hanley: Will you please read the question to which this was an answer?

(Record read.)

Mr. Hanley: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Mr. Boatwright, is it not a fact that there are
4431 many tank wagon reseller customers of the Standard
Oil Company in Detroit who buy more gasoline per year than a number of the individual jobbers you have referred to, and also more than the average of all of them?

A. There are many tank wagon customers in Detroit who buy more than some of these individual jobbers.

Q. Do you know that the amounts of gasoline purchased from the Standard Oil Company by the respective Detroit jobbers in any one year differs substantially?

A. From the gallonage that I have just read?

Q. No, as between each other in the amounts purchased by the Detroit jobbers.

A. In other words, do the purchases of Ned's Auto Supply differ substantially from the purchases of Wayne Oil Company?

Q. Yes.

A. There is a difference in the volume of each of these accounts. Whether you would regard it as substantial or not would depend upon your use of the word.

Q. Is it a fact that the four Detroit jobbers purchased in 1940 more than three times as much gasoline as was purchased by the twelve Oklahoma jobbers in 1939?

A. May I see the exhibit that was introduced yesterday? You are asking me to say three times and I don't know whether it is three times.

Q. Which exhibit is it?

4432 A. The one you introduced yesterday.

Q. Yes. The witness refers to Commission's Exhibit 87.

A. It is a fact that the gasoline sales of the four Detroit jobbers was in excess of three times the sales of gasoline to the Oklahoma jobbers.

Q. It is also a fact, is it not, Mr. Boatwright, that you have included in making your computations on Respondent's Exhibits 33-C, D and E the marketing expenses of the Standard Oil Company in connection with its business with the jobber who purchased no gasoline in 1939?

A. That is not quite an accurate statement.

Q. Will you correct it?

A. Certainly. The Faulkner Petroleum Company, which is the one you are referring to as having purchased no gasoline, was the account that I mentioned existing in the Wichita field performing a warehousing function for our company. ~~Now, in~~ investigating the credit of the Faulker Petroleum Company and in doing the bookkeeping of the jobber in Oklahoma, the credit investigation and the bookkeeping cost of that company was included as was his gallonage included in figuring both accounting and credit costs. When we come to supervision and selling, we apply our ratio of time distribution to get to a gasoline and refined oil cost. The application of this ratio excludes that account in the calculation of that unit cost of 6/100 of a cent a gallon.

4433 On Respondent's Exhibit No. 33-E, the subject "general office expense, Faulker Petroleum Company" would be automatically excluded because, as I have previously testified, the motor oil sales are handled by another department.

Now, in Respondent's Exhibit 33-E, we would have no Standard Service sign; we wouldn't have the signs available at the warehouse. They are at the point of sale. Therefore, the only place where a jobber has been included, which does not handle gasoline, is in the case of the accounting and credit cost and in determining the unit costs, volume was included as a part of the volume to secure those restricted unit costs.

Q. Do you know that the per gallon cost of point of sale advertising supplied to any one of the Detroit jobbers in 1939 was 5/100 of a cent?

A. I know it was 5/100 of a cent or less.

Q. Have you made any cost study for the Detroit area to determine the unit cost of point of sale advertising in 1939 or 1940 to any jobber customer?

A. We have not. I think there is a difficulty there that should be explained. We could determine our investment cost at an individual reseller outlet served by a jobber. We could not determine the per gallon cost of this point of sale advertising at that outlet because the jobber maintains all records of the distribution of his product among the different outlets, you see. So

4434 whereas we would have a record of the actual installations at the point of sale, we would not have the through-put of those outlets except in the aggregate of our sales to jobbers. Then if the jobber does both a business through reseller outlets and through a consumer, it would be an unfair thing to do to divide it by his total gallonage. That would require that we have a distribution of his sales by channels, which would correspond with our sales by channels. Do you see the difficulty incident to the question?

Q. Well, I don't quite understand it to this extent: that is, doesn't everything that you have just said apply equally to the Oklahoma jobbers? In other words, couldn't you have made this computation on the Detroit jobbers in the same manner that you made one for the Oklahoma field?

A. We could have in total by each jobbers in Detroit.

Q. Yes.

A. As we did. But we could not have made it by individual outlets served by the jobber unless that jobber would have supplied us with the through-put.

Q. Well, I was only asking you as to the jobbers, not as to their individual outlets.

A. I am sorry. I thought you said of any individual outlet supplied by any jobber.

Q. No.

A. I am sorry, my misinterpretation of the question.

4435 Q. What salaries are paid salesmen who are employed by the Standard Oil Company in the Kansas City and Wichita fields?

A. Oh, approximately $200 a month.

Q. Do you know what was paid the two salesmen who served the Oklahoma jobbers in 1939?

A. I have the salesmen's salary, including payroll cost, which would include the tax which I mentioned yesterday, plus the traveling expense, plus depreciation of salesman's car. I can give you the cost of a unit of operation.

Q. Well, do you know what the actual salesman's salary was? What he received?

A. No, I do not.

Q. Per month?

A. I do not have that record with me, the exact salary that the salesman received.

Q. Do you know whether the salaries paid those salesmen were lower than salaries paid salesmen in the Detroit field?

A. No, I would say that they were approximately the same. A reseller normally makes between two hundred and two hundred and—oh, probably $35. Salary scales in Kansas City and salary scales in Detroit are on just about the same basis.

Q. And was that true in 1939?

A. Yes, sir. The difference in a salary scale will come
when you are in a territory such as the Dakotas, but
4436 where you have two fields, both of which have a large
metropolitan area, there is a great similarity of salary scales.

Q. Well, these salesmen working through Oklahoma were not working in a metropolitan area, were they?

A. No, they were not working in a metropolitan area the size of Kansas City. But there are some pretty good sized cities covered by these salesmen. Oklahoma City and Tulsa, and so forth, are quite different than living up in some small town in North Dakota.

Q. You have no figures there that show what the salesmen were paid?

A. I do not. I have as I say, I have it in total but that would include depreciation on his car and his traveling expense, and so forth.

Q. Yes. Well, those items I assume would be approximately the same in the different fields.

A. They would be.

Q. So I don't think that figure would help.

A. Your assumption, in all fairness, may be applied also to salaries.

Q. How do salaries of accountants and other employees in Kansas City, in the Kansas City and Wichita offices, compare with salaries paid employees doing similar work in the Detroit office?

A. Very similar.

4437 Q. Will you turn to Respondent's Exhibit 32, form 189, Mr. Boatwright? Account 075 is entitled "advertising—other costs (including E.L.A.)." What is meant by "other costs"?

A. Other advertising costs.

Q. Does the whole item refer to advertising?

A. Yes, it does. I think that must have been adopted originally to differentiate between expenditures in newspapers and other advertising costs.

Q. Newspaper advertising expense is now included in that account, is it not?

A. It is.

Q. What E.L.A. expenses are included in that account which are not included under account 070?

A. Well, 070 is for dispensing equipment loaned, which I have explained previously, while the account which has borrowed and is utilizing this equipment incurs certain advertising costs, because of furnishing certain advertising signs, and so forth. Therefore, including E.L.A. would mean including the signs and the advertising expenditures on the part of the company made at outlets on an E.L.A. basis.

Q. Does that mean that signs which are supplied to a service station under an equipment loan agreement are included in advertising costs rather than in account 070, E.L.A. cost?

A. Yes.

Q. Commission's Exhibit 84-A contains a figure 4438 of $76,000 for newspaper advertising in the Detroit field in 1937. Did the company incur expenses for newspaper advertising in the Detroit field in 1939 and in 1940?

A. Yes.

Q. And were such expenses incurred in Wichita and Kansas City fields in 1939 and in 1940?

A. They were incurred in the Wichita and Kansas City fields. No newspaper advertising is done in Oklahoma.

Q. Does the company incur expense for outdoor posters in Oklahoma?

A. No.

Q. Does it have any expenses which are incurred in connection with the distribution of petroleum products in Oklahoma of—that is, expenses of printed matter and direct mail advertising?

A. No, we do not furnish that to jobbers.

Q. How about motion pictures?

A. No. You see, the motion pictures—as you will recall, I explained that that is used primarily in connection with the dealer meetings. We do not hold dealer meetings in Oklahoma for the Oklahoma jobbers.

Q. Then it is true, is it not, Mr. Boatwright, that there are many substantial advertising expenses which the company incurs in the Detroit area which it does not incur in the Oklahoma area?

4439 Mr. Hanley: What does counsel mean by "substantial"?

Mr. Austin: I mean, specifically, the expenses listed on Commission's Exhibit 34-A; but since the figures there are different from 1937, naturally, they would not be the same for other years. Nevertheless, I am referring to expenses of that nature and in approximately those amounts.

Trial Examiner Ballinger: Are the amounts large or small?

Mr. Austin: $76,000 for newspaper advertising, $18,000 for printed matter and direct mail, $12,000 for motion pictures, $11,000 for outdoor posters. Those are the four largest items.

Now, what is the question?

(Question read.)

Mr. Austin: I would like to say "some" instead of "many": some advertising expenses.

Mr. Hanley: That is objected to unless counsel indicates chargeable to what operation.

Mr. Austin: That would be a matter of expert opinion. I am asking a question of fact as to expenses incurred by the company in Detroit which are not incurred in Oklahoma.

Trial Examiner Ballinger: In connection with the sale of gasoline?

Mr. Austin: Yes.

4440 Trial Examiner Ballinger: The objection is overruled.

A. There are expense items incurred in Detroit or in any other field in advertising that are not incurred in Oklahoma. These expenses are incurred on the tank wagon channel of distribution.

Mr. Hanley: Which does not exist in Oklahoma?

The Witness: Which does not exist in Oklahoma.

By Mr. Austin:

Q. By that you mean, do you not, Mr. Boatwright, that you have allocated these advertising expenses to the tank wagon channel of distribution as a company accounting practice?

A. Well, it is more than a company accounting practice. What you say is true, that we have allocated them to that, but actually they are tank wagon channel costs.

You will recall that I explained that our advertising allocation to given areas, we attempt to balance our expenditures by giving consideration to potential and to our sales. Now, the balancing effort results in an appropriation of funds for a given district. The objective of that advertising is to secure customers affiliated with the regular use of our brand of merchandise. The customer affiliation is a tank wagon affiliation.

Q. Will you explain why that is any more true of customers who buy at tank wagon reseller stations than 4441 those who buy at Ned's Auto Supply Company stations?

A. The customer association is an association with the brand.

Q. Well, the Standard Oil brand appears at Ned's as well as at the reseller stations, does it not?

A. Yes, sir, it does. I think I explained in connection with Ned's a typical benefit which we received from that advertising.

Q. Turning to page 2616 of the record, in your direct examination you testified:

"If, on the other hand, we run an advertisement in one of the Detroit metropolitan papers, in our judgment, and I think rightly, that is primarily an advertisement to consumers buying from resellers, and is, therefore, a reseller advertisement cost."

Is that still your opinion?

A. Yes.

Q. Do you consider Ned's Auto Supply Company a reseller?

A. Not in terms of our property transactions. Ned's Auto Supply Company are a wholesaler.

Q. Ned's resells gasoline at retail, does it not?

A. They do.

Q. Commission's Exhibit 84-A lists six separate types of advertising expense incurred in the Detroit field in 1937, plus an additional item of business expenses which
4442 are stated to be too small to show as separate classi-
fications. Was advertising expense of all the types shown on the upper half of Commission's Exhibit 84-A, including the types of expense included under "miscellaneous" incurred by the Standard Oil Company in the Detroit field in 1939 and 1940?

A. Yes.

Q. Turning to Respondent's Exhibit 32 again, Mr. Boatwright, form 189, I wish to direct your attention to account 060 entitled "plant maintenance" and account 110 entitled "depreciation expense—plant (building, machinery, equipment, furniture, and fixtures)."

Do the total amounts of the expenses for these two accounts as entered in the Detroit form 189 include any cost of sale or delivery to jobbers?

A. I don't think so. If there is any there at all, it would be in connection with plant maintenance and perhaps of the garage unit which might be used for maintaining the cars of the individuals who called on the jobbers. It would be an indirect—

Q. How about maintenance and depreciation of buildings such as the company's office building?

A. Is any of that chargeable to a jobber?

Q. Well, first, is it included in these accounts?

A. Well, maintenance of an office building—

Q. Is that included in plant maintenance and
4443 would depreciation of the office building be included

in plant depreciation in the two accounts we are referring to?

A. Just a minute. I will have to check that. Depreciation expense on the building of the main office is included in account 110.

Q. And maintenance is included in account 060?

A. I think that is correct. I do not have in my notes so indicated, but I think that is correct.

Q. Does the company have similar expenses in the Kansas City and Wichita fields?

A. Yes.

Q. Maintenance and depreciation in those accounts would also include maintenance and depreciation of office building, furniture and fixtures, and equipment, would it not?

A. Yes.

Q. Have you made any charge of such expenses to the marketing expense of doing business with the jobbers in Oklahoma on Respondent's Exhibits 33-C, D and E?

A. No, for one simple reason: Our entire company, our field layout and our office buildings are predicated upon the tank wagon business. You couldn't find that cost on a unit basis. We are fundamentally a tank wagon distributor of merchandise.

Q. Nevertheless, you do serve the jobber accounts through these same office facilities, do you not?

4444 A. We do.

Q. Account 206 entitled "office expense—all other—water, light, fuel, rent, and so forth"—does any portion of the expense entered in that account represent a cost of distribution in the Detroit field to the Detroit jobber accounts?

A. Well, there is obviously a small part because the Detroit office does maintain whatsoever accounting records are maintained on these jobbers.

Q. Is any such expense charged to the Oklahoma jobber business, on Respondent's Exhibit 33-C, D, and E?

A. It is not.

Q. Turning to account 070, 111—perhaps I should read the titles—070 is the E.L.A. expense; 111 is the depreciation expense, plant, E.L.A.; and 513 is also an E.L.A. account referring to losses by dismantling—out of pocket expense.

Trial Examiner Ballinger: E.L.A. refers to what?

Mr. Austin: Equipment loan agreement.

By Mr. Austin:

Q. And that, in turn, refers to dispensing equipment loaned; is that correct, Mr. Boatwright?

A. Yes, sir.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

4445 Q. Does the expense entered opposite the account numbers on Detroit form 189 for 1940 under the tank wagon reseller channel include any expense of sale or delivery of gasoline to leased service stations?

A. Company owned leased service stations?

Q. Service stations which are lessee service stations.

A. No, it does not.

Q. Is this expense incurred in connection with the sale of gasoline to any service station not having equipment installed under equipment loan agreement?

A. May the question be re-read?

Trial Examiner Ballinger: Read the question.

(Question read.)

A. Well, a separate expense classification is not incurred, naturally, on any account not having the equipment loan agreement. You will recall that on my direct testimony I brought out that similar expenses are incurred at company owned leased service stations, as an illustration, but there we lease the unit as a whole ball of wax.

By Mr. Austin:

Q. I am only referring now to the expenses included in these three accounts and, as I understand it, any similar expense at a leased service station is not included in those three accounts.

A. It is not included in those three accounts.

4446 Q. On Respondent's Exhibit 31-N, these expenses for 1937 were divided only by the gallonage of the 461 contract stations, whereas, if I read Respondent's Exhibit 33-B correctly, the expenses, the similar expenses in the Detroit field for 1940 are divided by the total reseller gallonage to obtain unit cost per gallon.

Are not Respondent's Exhibit 31-N and Respondent's Exhibit 33-B inconsistent in that respect?

A. Not at all. 31-N brings out a particular classification of expenses and divides that particular classification of expense by the volume moving through those outlets. In the calculation of Respondent's Exhibit 31, you will recall we were taking certain items. I stated that similar costs were incurred by the company at other outlets, but that because we had a rental income on that as a part of the property outlayed at the outlet. The division by the gallonage moving through the 461 type outlet was necessary. Now, when I got to 33-B, Respondent's Exhibit 33-B, I just take the sum total of all of the costs in that channel and divide it by the sum total of all of the gallons in that channel. There is no need for a segregation of individual items. All of the costs are in 33-B, and all of the gallonage is the natural divisor.

Q. Doesn't the method used on 33-B result in spreading this E.L.A. expense among all of the tank wagon reseller customers instead of just among those in connection
4447 with which it is incurred?

A. Why, naturally, but, you see, the costs incurred not classified as E.L.A. costs on the form 189 are also in there and what you are assuming is that there is a difference of E.L.A. actual costs through one channel as distinct from similar costs incurred by the company through another class of outlets. Actually, that may not be true at all. You see, I have got the actual cost on 33-B. My divisor must be my total gallonage.

Q. It would be quite easy in the Detroit form—I don't like the word "easy"—but it would be quite practicable from the Detroit form 1940, Mr. Boatwright, would it not, to determine the E.L.A. expense per gallon upon the gallonage sold to the 461 contract stations in the same manner that you did it on Respondent's Exhibit 31-N and then also to determine the leased service station expense which upon a gallon is sold to leased service—

A. There you are getting into trouble.

Mr. Hanley: Just a moment.

Mr. Austin: I would like to withdraw the question because it is obviously getting too complicated.

Trial Examiner Ballinger: Question withdrawn.

Mr. Austin: I suggest we adjourn for lunch, your Honor, until 2 o'clock.

Trial Examiner Ballinger: The motion is granted
4448 and now, at 12:35 p. m., the hearing stands in recess until 2 p. m.

(Whereupon, at 12:35 p. m. a recess was taken until 2 p. m.)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of Volume III of the printed transcript of the record, filed in this office on July 12, 1948, in:

Cause No. 9215.

Standard Oil Company,
Petitioner,
vs.
Federal Trade Commission,
Respondent,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 25th day of May, A. D. 1949.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

VOL. IV, pp. 2587 to 3454.

TRANSCRIPT OF RECORD

IN THE

Supreme Court of the United States

October Term, 1[redacted] 1957

No. 24

STANDARD OIL COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

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In the

United States Circuit Court of Appeals

For the Seventh Circuit

No. 9215

STANDARD OIL COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

U. S. C. A.-7
FILED
JUL 12 1948
KENNETH J. CARRICK
CLERK

Petition for Review of Order of the Federal Trade Commission.

TRANSCRIPT OF RECORD FILED NOV. 7, 1946.
PRINTED RECORD.

In the

United States Circuit Court of Appeals

For the Seventh Circuit

No. 9215

STANDARD OIL COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

Petition for Review of Order of the Federal Trade Commission.

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12 schedules giving account numbers and explanations as to each:

1. Salesmen and Sales Promotion Expense.
2. Advertising Costs.
3. Delivery and Warehouse Cost.
4. Income and Expense Incurred at Leased Retail Outlets Served by Tank Wagon.
5. Marketing Expense Items Incurred at Privately Owned Stations Not Leased But Engaged in the Distribution of Our Products.
6. Credit Information—Bad Debts and Recovery.
7. Field Office and Accounting Cost.
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4449 Afternoon Session.

2 P. M.

Trial Examiner Ballinger: Come to order. You may proceed.

JOHN W. BOATWRIGHT resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Austin.

Q. Account No. 208 on Respondent's Exhibit 32, form 189, is entitled "credit for expense." Will you explain the nature of that expense in connection with tank wagon reseller business?

A. Why, certainly. That is the information that is obtained by the credit department on reseller accounts.

Q. What credits are extended to tank wagon reseller customers in connection with the purchase of gasoline?

A. Well, that has been explained in the record, that primarily gasoline is sold for cash. There are times when the owner of the station is out and it is necessary for the driver to leave one dump. If some collection is made on the subsequent stop, the credit expense of gasoline is of short time duration when actually involved.

Q. Does that credit or expense represent the expenses of any particular department or any particular employees of the company?

A. Well, it represents to a large extent, reports 4450 that are necessary on individuals prior to the extension of credit.

To illustrate: If you made an application for a credit card with our company, there would be an investigation of your credit. Probably our credit man would appeal to some financial reporting organization such as Dun & Bradstreet for a report on your credit standing. For that report there would be a charge. There would be certain time of the credit men; there would be certain postage, correspondence, and other expenses incurred in securing the credit information.

Q. Is credit information also obtained regarding prospective lessees and present lessees of the company?

A. Yes, it is. Pretty generally, however, when a prospective lessee is brought into the office by the salesman in charge of a territory, he brings in an individual who, in most cases, is capable of buying the original inventory necessary for the operation of the outlet. Now, the credit man is charged with the responsibility of following the credit risk of that lessee, once on the job. So that from time to time if it becomes necessary to extend credit to that individual, he has an evaluation of his credit standing, his payment habits, and so forth.

Q. Is the majority of the expense going into that account expense of obtaining credit information upon applicants for credit cards?

4451 A. I don't know that the majority of it would be. I just couldn't break down. It is the cost of obtaining credit information of our entire operations in that area.

Q. Does the expense entered in that account on Detroit form 189 for 1940 include credit information expense incurred as a result of the business of the four Detroit jobbers?

A. Well, if there is any credit information expense incident to those four jobbers, that would be the account that the expense would be in. You are cognizant of the fact that these four jobbers have been our jobbers over an extended period of years, have a credit rating which does not require the close follow up and supervision that would be necessary in the case of a small independent distributor.

Q. I understand from your testimony that any credit on gasoline is the exception to the rule, anyway, and occurs, you might say, on the spur of the moment where the owner is out and the driver can't collect cash. So is it not true that so far as credit information in connection with the sale of gasoline is concerned, it is practically non-existant because the company could not obtain credit information in advance in connection with the allowance of one day's credit by a driver, where there was no advance notice that the credit would be asked for?

Mr. Hanley: If your Honor please, that is an argu-
mentative question and is objectionable, but respond-
4452 ent will not object to it, but will request the indulgence

of the court to permit the witness to make a full and complete answer as to this whole question on gasoline sales.

Just go into it fully, Mr. Boatwright, as to all of the functions that have to be performed.

A. Well, I enumerated different operations of the credit man and the credit department which result in this charge on our marketing expense statement. Credit information expense is not obtained on a business, it is obtained on a customer. Credit information expense is necessary even if we are doing business practically on a cash basis on gasoline because if said customer becomes financially involved, it becomes a lost customer and lost gasoline sales. It is to our interest at all times to do anything in our power to see that our retail customers do not become involved and become poor credit risks, whether they become poor credit risks on gasoline, motor oils, tires, other merchandise that they sell through their outlets which are not purchased from the company or for any other reason.

In addition, credit information expense may be incurred upon credit card accounts. Credit card accounts buy gasoline, motor oil, and other merchandise that the Standard Oil Company has to offer for sale. It is a composite of objectives which simmer down to the soundness of doing business with an individual customer, not on one 4453 product but on all products.

Trial Examiner Ballinger: Isn't it necessary to have a rating of practically all retail operators with whom you are doing business?

The Witness: It is, your Honor, and that retail rating is secured at regular periods so that we can at all times test the soundness of the financial responsibility of the customer.

Trial Examiner Ballinger: Payments for gasoline are not always made in cash, are they?

The Witness: Not always. It is the design and the intention of the company—

Trial Examiner Ballinger: What I mean is, in currency? Payments are frequently made by check, are they not?

The Witness: Oh, yes.

Trial Examiner Ballinger: Isn't it necessary to know the financial responsibility of those who are giving you checks?

The Witness: It is, your Honor. We must know that.

Trial Examiner Ballinger: That is all.

By Mr. Austin:

Q. Is that the fact, Mr. Boatwright? Are the drivers permitted to accept checks from tank wagon reseller
4454 customers in payment for deliveries of gasoline?

A. Oh, yes.

Q. And they do so customarily?

A. And they do so.

Mr. Hanley: May I ask one question in clarification, your Honor?

Trial Examiner Ballinger: You may.

Mr. Hanley: You do not mean by that, I take it, Mr. Boatwright, that the driver of the truck has any responsibility, discretion, or judgment that he may exercise in connection with extending credit? He just acts as a medium through which the payment is made; is that right?

The Witness: The driver exercises no discretion in that respect. However, if the customer desires to make payment to the driver by the personal check of the customer, the driver accepts that check or frequently what is the case, the customer serves in a small manner as a banker for much of his clientele. He cashes checks for his customers and, in turn, endorses those checks for payment of gasoline when delivery is made, and the driver is authorized and can accept an endorsed check as a partial payment or as complete payment for a load of merchandise.

By Mr. Austin:

Q. In Respondent's Exhibit 33-B was the total tank wagon reseller expense entered opposite the account
4455 208 on Detroit form 189 for 1940 included in the figure of $1,145,399.13?

A. The total for account 208, which is limited to the reseller channel was included in the total cost for the tank wagon reseller channel for the Detroit division, 1940.

Q. But when credit costs were computed for the jobber business as represented in the Oklahoma field, the credit cost in connection with only 10 of the 12 Oklahoma jobbers was included on Respondent's Exhibits 33-C and D; is that correct?

A. That is correct, for the reasons that I explained yesterday. It would not have been a fair representation of credit cost had I included the other two jobbers in which we anticipated bad debt losses in the subsequent year, and the credit man made extended trips and went down and worked with the accounts to see if there was anything that we could do to place the business affairs of the organization in such a state that we would not encounter a bad debt loss.

Q. Did you investigate the credit man in the Detroit field to determine whether he spent any unusual amount of time with any of the tank wagon reseller accounts on credit risks?

A. Tank wagon reseller accounts?

Q. Yes.

A. No, I did not. I inquired as to the time of the credit man and the credit department working on the credit ratings of the jobbers, but not of each individual reseller account?

Q. Then you do not know whether or not there
4456 may be some credit expense included in the figure on Respondent's Exhibit 33-B which represents an unusual expenditure of time in connection with the credit risks of a single customer?

Mr. Hanley: That is objected to, your Honor, because the witness has distinctly and clearly explained that he analyzed the 12 jobbers and did exclude 2 because he found an unusual situation which was not representative.

Trial Examiner Ballinger: Read the question.

(Question read.)

Mr. Austin: That refers, of course, to tank wagon customers in Detroit, 33-B. The figure there is the total figure for tank wagon expense in Detroit. My question is directed at this, in connection with the credit costs for the Oklahoma jobbers, two jobber accounts were eliminated because there was a high credit cost which the witness states was not representative, yet when that is compared with the tank wagon reseller expense in Detroit, there has been no effort to find out whether there was not some unusual expense also in that account.

Mr. Hanley: If your Honor please, if that is the sense of the question, then the same objective is made that was discussed some days ago as to propriety of examination on the part of the Commission relative to the respondent having made a separate analysis of each of the units of the reseller channel group, and your Honor will recall, I am
4457 sure, an informal conference which your Honor called
at the bench with counsel in connection with that subject. If that type of examination is to be continuously persisted in, as it has been up until the present time, it seems most important that your Honor's suggestion is certainly pertinent; that both parties to this litigation should have the benefit of a ruling of the Commission on that question. That is a fundamental question, Judge, as to whether or not the respondent is right in having treated the reseller group, on the one hand, as a group or whether as counsel insists we should have done what we say is an impossibility, namely, ascertain individual costs on each one of some three or four hundred stations in the same channel served identically the same way. Now, if that is the law, and, of course, we insist that it can not be the law, but if it is going to be determined to be the law, then it is important that we all know it at an early time.

Mr. Austin: I think counsel for Respondent does not quite grasp the point of my question. The point is this: That the respondent has treated all of the tank wagon reseller customers as a class, on the one hand, where he has not treated all of the Oklahoma jobbers as a class, on the other, but has eliminated two of them where the costs were high. My questioning was directed to bring that fact out,
and the fact that no similar effort was made to find
4458 out whether there was not equal reason for elimi-
nating certain tank wagon customers from the class.

Trial Examiner Ballinger: The objection now interposed is included in the original objection reserved to counsel. The Examiner is in serious doubt as to whether or not a ruling on this question would enable you to obtain a decision from the Commission on the precise point you desire. The objection is overruled, with the right of renewal.

Mr. Austin: Will you read the question, please?

Mr. Hanley: The ruling is accepted, your Honor, but for the advice of court and counsel at this time, I would like to say this: I assume that your Honor proposes to take this class of testimony subject to the general objection and to permit its introduction into the testimony hereafter as heretofore, but while it may not be in line with any known procedure, and I am not at all sure of that because, as you know, I am rather unfamiliar with the Commission's precedure, I do wish at the close of this examination on costs, if the procedure is at all permissible, to in whatever manner may be appropriate promptly submit an interrogatory or a statement of the question to the Commission for a ruling on this proposition. We can not go on intelligently trying this lawsuit, Judge, on the two different theories, that is all.

Trial Examiner Ballinger: The Examiner would
4459 suggest that probably the most appropriate way to
present the matter to the Commission and the way in which it would appear in all of its different aspects would be for counsel to move at an appropriate time to strike the testimony, such testimony as he believes should be excluded from the record, designating with particularity the pages on which the testimony appears. The Examiner can then make a ruling, and from that ruling either side can prosecute an appeal and you can then—

Mr. Hanley: Can that be done in an interlocutory fashion, your Honor?

Trial Examiner Ballinger: It can be done at any stage of the case.

Mr. Hanley: And from that ruling alone?

Trial Examiner Ballinger: And that would be in the nature of a special appeal.

Mr. Hanley: I see.

Trial Examiner Ballinger: Which would not require allowance by the Commission.

Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: If your Honor please, the respondents would like to add to the last foregoing objection by respondent a request that that objection may be regarded as
standard to all future questions of this character
4460 which go to the theory of Commission counsel, that
the grouping of channels is an improper method of cost accounting, and that the general objection heretofore made to the same class of questions may, in addition to

this objection, stand to all future questions, and that this objection may retroactively apply to all questions of a similar character heretofore asked.

I make this request in view of your Honor's suggestion that perhaps the only feasible way of presenting this matter to the Commission as a special question would be on the basis of a motion to strike, in which event unless the general objection may be understood to stand throughout, it would be incumbent upon respondent to object individually to each separate question which would greatly encumber the record and be an obvious waste of time.

Trial Examiner Ballinger: The request is granted.

Off the record.

(Discussion off the record.)

Mr. Austin: May the witness now answer the question?

Trial Examiner Ballinger: Read the question.

The Reporter. (Reading.) "Then you do not know whether or not there may be some credit expense included in the figure on Respondent's Exhibit 33-B which represents an unusual expenditure of time, in connection with the credit risks of a single customer?"

4461 A. Yes, I know whether there were any unusual time in connection with tank wagon reseller customers in the Detroit area because the credit man tells the reseller salesman he had better get out to a certain account and straighten it up. The credit man in the tank wagon reseller channel does not go out and work on the books, the reseller salesman does. You see, it just isn't necessary to inquire whether the credit man spent an unusual amount of time on any given tank wagon reseller account. The credit man, any time an account becomes in danger, will notify the sales promoter who, in turn, will notify the salesman. The salesman goes to that reseller outlet and does all within his power to straighten up the books.

By Mr. Austin:

Q. And that time is charged to salesmen's salaries?

A. Yes. You see, our salesmen are supposed to work along the primary objective of making the reseller distributors better business men. That is their ace object: Better business men in terms of keeping books, in terms of moving the merchandise off the shelves, in terms of extending credit information, and information of that type.

Q. Account 240 is entitled "donations". What is included under this heading?

A. Just exactly what it says.

Q. To whom are these donations made?

4462 A. Oh, Red Cross seals, money gifts to organizations, Community Chest drives, and organizations of that nature.

Q. Is any part of that amount chargeable to the business of the four Detroit jobber accounts?

A. No.

Q. Why is such an expense not chargeable to jobber business equally as much as to the tank wagon reseller business?

A. Well, I just don't think you could find it, in the first place. In the second place, whether we had a single jobber or whether we have a single jobber in some other field, that still makes donations. It is just an inescapable—it is almost as inevitable as taxes.

Q. Isn't that a good reason why it should be charged equally to every gallon of gas sold?

A. I certainly don't think so. You recall that that expense item is classified on an all-gallonage basis excluding direct shipments, don't you?

Q. I was just going to come to that, and ask you how donation expense is allocated between tank wagon reseller, tank wagon consumer, and Other Methods channels.

A. They are allocated among the three channels on the basis of all gallons excluding direct shipments.

Q. And direct shipments includes the shipments to the jobbers, does it not?

A. Yes, it does.

4463 Q. Are these donations included here donations made by the Detroit field office directly, or is this an allocation of expense from the general office?

A. No, those are made directly in Detroit.

Q. Is any part of such donations allocated to production?

A. No part made by the field. There are donations made by the company which may be allocated to production. In other words, it is entirely possible, although it is completely beyond the pale of any marketing cost statement—you may have a producing unit with headquarters in Tulsa, Oklahoma, and I imagine that they do not escape the solicitation that the field forces escape. Therefore, there would be charges against production, because there are certain worthy causes that any company must make contribution to and should and desire to.

Q. Does the field office--

Mr. Hanley: Do you mean crude oil production in your question, Mr. Austin?

Mr. Austin: I meant gasoline production but as distinguished from distribution. In other words, production, as I use it, might include crude oil, it might include the refining of gasoline in any of those expenses. I just wondered whether any of this donation expense was so assigned, but since these are donations made by the field office, I really don't intend to pursue the matter at all further.

4464 Mr. Hanley: Just to clarify the thing, because the witness has clearly answered on the theory that we are talking about crude oil production, and that is what production means in the oil business, crude oil production, and what you apparently referred to as gasoline production is manufacturing.

Mr. Austin: Refining.

Mr. Hanley: Or manufacturing in the oil industry. And we will concede if there be necessity for it, that there is a whole list of costs applicable to each of those activities or functions, including donations that are not referred to here, that are not included here and have nothing to do with marketing costs.

Mr. Austin: I was only interested in whether any of the total donation expense incurred in the Detroit field was allocated to refining and, if so, it would have been interesting to find out why refining would have borne part of that while jobbers did not, but since the witness has said that none of it is allocated to production, the second question doesn't follow.

By Mr. Austin:

Q. Account No. 525 is entitled "death benefit." That is the account at the bottom of form 189, Respondent's Exhibit 32.

What is meant by "death benefits"?

4465 A. Well, that item is an item of declining cost significance. Over a period of years the company has been a self insurer of its employees. A short time back a plan of handling the insurance of the employees was transferred, was placed upon an actuarial basis and contracted with, with an insurance company. There are, however, still cases where an individual's death may merit, in the opinion of the board of directors, a benefit payment to the family of the deceased. Those benefits are voted individually by the board of directors whensoever incurred.

Q. In your opinion are expenditures of that nature a cost of sale and delivery of gasoline?

A. Oh, definitely. My goodness, there is nothing in the world that creates as much good will as to have a company take care of the dependents of some individual who has been on the payroll. Why, that spreads like fire. It is one of the best forms of word of mouth advertising you can get. It sells merchandise, and even if it didn't, it should be paid.

Q. All right, Mr. Boatwright. Then if it is a cost in the sale and delivery of gasoline, are such expenses, in your opinion properly a basis of differentiation between the cost of marketing gasoline to tank wagon resellers, on the one hand, and to jobbers, on the other?

A. I most certainly think so.

Q. Why so?

4466 A: As representing a component part of our tank wagon reseller marketing cost in any field. Those items of cost should be included as an expense.

Q. Weren't those death benefits available to employees at the main field office?

A. Oh, no. They may have been.

Q. Wherever available?

A. No.

Mr. Hanley: What do you mean by "mail field office"?

Mr. Austin: I mean your head office of the field.

The Witness: Oh, they are available to the Detroit employees. No, it isn't limited to the main office, death benefits.

By Mr. Austin:

Q. Main field office, I said.

A. No, it isn't limited to the main field office. It may be a commission agent; it may be a tank wagon driver; it may be any employee of the company.

Q. Those benefits were available, where they were available at all, to all employees of the company?

A. Were they not available to all employees?

Q. Yes, or was it only within certain salary brackets? How were they available?

A. Well, each case is handled individually by the
4467 board of directors. I can't tell you the motivating decisions which prevail in the minds of each member of the board of directors deciding whether this or that individual's death merits a contribution on the part of the company for the welfare of his dependents.

Q. How is the death benefit expense ascertained which goes into the form 189 for the Detroit field? Is that an allocation of expense from the general office or is the death benefit actually paid on account of the death of employees in the Detroit field?

A. Well, the death benefits are allocated upon an all-gallonage basis among the channels.

Q. Yes, but how is the total for the Detroit field arrived at? Where does that come from?

A. I don't have the instructions on that particular account with me. I will tell you what I think it is done upon, and then we can confirm that, but I think that the death benefit assignment to any given field is predicated upon the ratio of the salaries or commissions as distributed among the total sales.

Q. Then this expense of death benefits does not represent payments made upon the death of employees in the Detroit field only?

A. I shall have to clarify that. I can't answer beyond what I have.

4468 Q. I would like to ask you a question regarding account No. 112 on form 189. The account is entitled "depreciation expense—real estate improvements." Will you please differentiate that expense from the expense included in account No. 110, which is "plant depreciation"?

A. Well, it is merely a classification of your depreciation expense on different types of buildings.

Q. What class of expense goes into the account 112?

A. The depreciation expense on real estate improvements. Now, do you mean what particular type of improvements?

Q. What are real estate improvements, yes, as distinguished from plant improvements?

A. Well, a real estate improvement would be the drives of the service station or the installation of a sewerage system or any type of improvement of a piece of real estate.

Q. Of course, real estate includes buildings as well as land, and I assume since this is depreciation expense, that it refers to buildings.

A. Well, depreciation doesn't apply to land.

Q. No.

A. But it can apply to the improvements made on that land.

Q. Well, it would apply to buildings, and I assume that this was buildings. If it is not buildings, I would like to know what it is.

A. It may well be buildings, but I can't tell you 4469 just what type of a building is in this classification and which is in this. Is that your request?

Q. Yes. Your item for plants includes buildings, machinery, equipment, furniture and fixtures. Now you have a separate account for real estate improvements, and since that can not apply to the land, because it is a depreciation expense, I wanted to know what the difference is between 112, on the one hand, and 110, on the other.

A. Well, your 110 applies primarily to your bulk plant and your main office building. It is a classification of the types of real estate utilization and the depreciation on the improvements made on those types of real estate improvements. Now, the other is merely a different classification of types of real estate improvements.

Q. Yes. It would appear that certain particular type—that the depreciation on certain particular types of real estate improvements is put in a separate account No. 112, and I am simply trying to find out what it is that it depreciated in that account.

A. Well, I will just have to defer answer until I can contact the office or a code of accounts to get a delineation.

Q. You don't have it on your—

A. No, I do not have it in either my notes or in my mind. In fact, it didn't occur to me that it would be necessary.

Mr. Hanley: May I ask a question on voir dire, 4470 your Honor?

Trial Examiner Ballinger: You may.

Examination on Voir Dire by Mr. Hanley.

Q. Is 110, on the one hand, and 112, on the other, merely a breakdown of a depreciation account as between two accounts that might have been included in one account; if you know, Mr. Boatwright?

A. Yes, it is a breakdown merely for the purpose of controlling and watching our expense.

Q. All right. One other question, if you know. If a depreciation account or a property depreciated is included in account 110, is it ever included again in 112, and vice versa?

A. Oh, no. Those are absolutely separate classifications because this becomes a basis in which our costs and our profits are reported to the Internal Revenue Department. There is absolutely no overlapping.

Q. So, as a matter of fact, you haven't rigged this 189 statement to charge up depreciation twice to the reseller channel or differentiate it between selling to a jobber account?

A. Absolutely not, these are the books of the company upon which our income reports are predicated. There is no overlapping.

4471 Mr. Hanley: That is all.

Cross-Examination by Mr. Austin (Resumed).

Q. Well, the question, of course, is not as to overlapping; it is a question of finding out what goes into some of these accounts. The question would even be more evident as between 110-A, B, and C, and 112-A, because 110-A, B, and C cover buildings and machinery, and equipment, furniture and fixtures, on all three types of the lessee stations, and yet there is a separate account 112-A for depreciation on real estate improvements on lessee stations. So that there is evidently a distinction between the four accounts under 110, on one hand, and two accounts, under 112, on the other, and, apparently, you have not got that information with you, so we will pass it up and go on to something else.

A. Well, now, is there a request that I get that information?

Q. I don't want to make a formal request for it, but you might. I don't know that I will ever want to refer to it again. I may want to ask the same question at some future time, if we ever get back on this same subject. I don't know that we ever will.

Mr. Hanley: Your Honor, this is a very good place to again make a statement on behalf of the respondent,

that if there is anything the government wants that
4472 we can furnish, we will furnish it. The statement just now made by counsel places the respondent at an obvious disadvantage. We do not know whether the government attaches any importance at all to this trivial amount that is reflected against any one of these referred to accounts or all of them in total, and counsel has just said he may never refer to it again. That very statement infers the implication that he may not only refer to it but argue it assiduously before the Commission. Now, we don't know whether he wants the information or not. We can get it, if the Commission wants it, and we will get it if the Commission wants it, but if they think it is as unimportant as counsel may have suggested and as we think it is, it is not worth our while to clutter up this record with a lot of technical instructions as to how the accountants are to break down these accounts when they make up this form. We will get it if they want it, or anything else they want, and we are entitled to know and have the opportunity to furnish it, Judge, if they do regard it as important.

Mr. Austin: Of course, the respondent may put that information in the record if it wishes. At present I don't see that there is anything in the record to—well, there is just no information there on that question and if I want it again I will certainly ask for it. I will ask for it from one of the respondent witnesses where it can be produced, in other words, in Detroit.

4473 Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Take a recess for five minutes.

(A short recess was had.)

Trial Examiner Ballinger: Come to order. You may proceed.

By Mr. Austin:

Q. Referring again to form 189, Mr. Boatwright, account No. 086, taxes, real estate and personal property, is any part of the total amount listed in the total petroleum products channel on Detroit form 189 for 1940 allocable to the marketing of gasoline to jobber customers?

A. Well, that account includes all of the property except service stations and P.O.S.S.L.'s. Now, to the extent that there are some records maintained in the general office having to do with jobbers, to that limited extent there may be some part of that expense item which would be associated with the jobber business. It is so infinitesimal in its nature that I could not isolate it.

Q. Does that account include the amount of taxes paid on the main office building in Detroit?

A. That account covers all property except service stations and P.O.S.S.L.'s.

Q. Does it include personal property taxes on 4474 property at the main office building?

A. It does.

Q. Is any such expense charged to the jobber business on Respondent's Exhibit 33-C, D and E?

A. No, it is not.

Q. Account No. 245 is also a tax account and that is entitled "taxes—all other."

What taxes are included in that account?

A. Chain store, gross income tax, franchises, capital stock tax.

Q. What do you mean by gross income tax? Do you mean the tax of the Standard Oil Company, federal income tax of the Standard Oil Company?

A. No, there are some states which have a gross income tax calculated against sales.

Q. That is a Michigan tax?

A. No, that is not. In the state of Michigan I am not acquainted with any gross income tax. The state of Indiana would have, but I was just reading to you the types of taxes that would be classified under that heading.

Q. Can you restrict the answer to the Detroit field, since we are now referring to form 189 for the Detroit field?

A. Yes, that would be largely franchises and capital stock.

Q. Is there another classification which you mentioned?

A. Well, I mentioned chain store, but the state of 4475 Michigan does not have a chain store tax law, to my knowledge.

Mr. Hanley: That is right.

The Witness: Is that not correct?

Mr. Hanley: Not now. It has not had for several years.

By Mr. Austin:

Q. And it also has no gross income tax?

A. No.

Q. What is meant by franchise and capital stock taxes? Can you describe those a little more fully?

A. Well, the capital stock tax, which is a tax incident upon capital structure of the company—

Q. Is that a state tax?

A. There are state taxes on capital stock of an organization.

Q. Well, I want to know what the expenses are that are entered on the Detroit field in that account. I don't know, I am sure, what—

A. Well, I have mentioned the classes. Now, whether or not that tax in the state of Michigan would be as a result of a state law, I couldn't testify this afternoon.

Mr. Hanley: I am sure that it is. There is a tax of that nature in the state; in order to domesticate or get the right of operation in a state, we have to pay a state tax which is based either on the entire capital or on some 4476 pro rata basis or on the business done in the state. There are different laws in different states. I wouldn't be able to give you the detail of the Michigan law, but that is the nature of the tax.

Mr. Austin: Yes, Judge Hanley. I, however, thought that that was probably what the witness was referring to when he said "franchise."

The Witness: No. The principal costs entering into franchises would be for installation of tanks. Many areas have a fee of a certain amount for each thousand gallon or each five-hundred gallon tank entered below the surface, and if a tank be installed at a leased service station or a P.O.S.S.L., there frequently is a fee of varying sizes, varying by municipalities and varying among different states. The average would be quite different—

Trial Examiner Ballinger: It is necessary to obtain a permit, isn't it?

The Witness: That is correct. It is necessary to obtain a permit.

Trial Examiner Ballinger: For which there is a charge?

The Witness: Yes, sir. And even after the obtaining of the permit, Judge, in many municipalities it is necessary to pay an annual fee.

Trial Examiner Ballinger: Well, that is customary.

4477 The Witness: Yes.

By Mr. Austin:

Q. Does this account include the fee for the Michigan distributors' license?

A. Yes, I think it would.

Trial Examiner Ballinger: Those permits have to be renewed annually, don't they?

The Witness: Oh, yes. In most cases they do, your Honor.

By Mr. Austin:

Q. Has any tax expense been charged to the jobber business in the computations shown on Respondent's Exhibits 33-C, D or E?

A. No. They would have been had we been paying the tax. The jobber paid the tax, if any taxes were incident to their operation.

Q. You mean that if there were any taxes in Oklahoma, the jobbers paid them?

A. If there were any tax incident to the operation of retail outlets or operating jobber outlets.

Q. How about capital stock tax? Shouldn't you have to pay that sort of a tax in Oklahoma?

A. I can't state that we did or that we didn't. I don't know.

Q. In any event, it was paid in Michigan.

478 A. It was.

Q. In your opinion, is a capital stock an expense which is chargeable equally to each gallon of gas sold by the company in the state where the tax is paid?

A. No, I don't think so.

Would you contend that your capital stock tax should be assessed equally upon a gallon sold for direct shipment, when you sell a trainload on a price basis on pure bid and asked proposition, as you would if you sold that trainload equally among a tremendous number of individual customers and at a different price basis entirely?

Q. Well, I don't know, Mr. Boatwright. I am asking you and I will ask you now what you think the proper method of allocation is.

A. Well, I have answered. I said I didn't think it was allocable equally on an all gallonage basis.

Q. Do you think any part of the capital stock tax expense is properly chargeable to the jobber business?

A. A small part of it would be, but it would be small.

Q. If you state that possibly a small part of that expense is allocable to the jobber business, can you state any method by which the expense might be pro rated?

A. I hadn't give it any thought.

Q. Will you turn, please, to account numbers 290 and 295 on form 189? 290 is entitled "general office
4479 expense—pro rata general administrative."

Account 295 is entitled "general office expense—law expense."

Has any of the expense for these accounts charged on form 189 to the Detroit field been allocated to jobber business?

A. No, sir.

Q. What is the method of allocation which is used in the Detroit field for pro rating this expense between the three petroleum product channels?

A. Both account No. 290 and account 295 is allocated on an all-gallonage basis excluding direct shipments.

Q. Why was not direct shipment gallonage included in making this allocation for those two accounts?

A. Direct shipment gallonage is not used in the allocation of expense among channels in any of these varying expense accounts allocated upon that basis, for this reason: The amount of time involved in signing a contract with the jobber is so infinitesimal relative to the amount of time involved in dealing constantly and continuously with problems incident to tank wagon reseller distribution, that it is just not regarded by our accountants, experienced in this field, as being possible of a segregation with any degree of accuracy. Certainly, it could not be included on a gallon for gallon basis.

4480 Q. You say it could not?

A: Well, it could, but it would be illogical.

Q. What is meant by "law expense"?

A. That is the expense allocated to the Detroit field of maintaining a law department and attempting to supply answers to the government on the various problems incident to continued business operation.

Mr. Hanley: It will be a high figure in 1941.

The Witness: It will be higher than it was in 1940.

By Mr. Austin:

Q. Are the expenses going into accounts 290 and 295 expenses which are incurred in their entirety at the general office in Chicago? I perhaps ought to qualify that by saying that I refer to expenses either incurred there or payments to employees or officers who are employed there. I realize that Judge Hanley is not in Chicago now.

A. Expenses under these two accounts are incurred almost entirely by the main office and are allocated among the various fields on an all-gallonage basis.

Q. What expenses go into the account 290 "pro rata—general administrative"? Is that salaries, or what is it?

A. Largely salaries. In the administration of any company of the magnitude of ours, you have certain central administrative officers, including the expenses of your board of directors, and your top supervisory per-
4481 sonnel in the main office. The top supervisory personnel is pro rated between the manufacturing department and the sales department on approximately a fifty-fifty basis. That portion which is allocated to the sales department is then pro rated to the fields, and then it is pro rated among the channels within a field upon an all-gallonage basis in that field.

Q. Is tank car gallonage included in the gallonage used for allocation on an all-gallonage basis between fields?

A. No. No allocation of costs recognize direct shipments.

Q. That is true as to the allocation between channels in a field?

A. Yes.

Q. This next subject may have been covered partly but I don't think it was covered completely Mr. Boatwright.

By what method or methods was gasoline delivered to jobbers in Oklahoma in 1939 and in 1940?

A. Tank car or truck transport.

Q. Was any part of the gasoline sold to any of these jobbers delivered by tank wagon?

A. No. No we have no tank wagon operation in that area at all.

~~Q. Were any company operated vehicles used for the delivery of that gasoline?~~

A. No sir. No sir. The jobbers made their own
4482 delivery with their own equipment.

Q. I am talking about delivery to the jobber.

A. Well I have stated that no company equipment was used for delivery to jobbers. The products moved from our refinery either by tank car which it did in most cases or there may have been one or two in the near proximity which were served by truck transport. In case it is served by truck transport it was not served by a company truck.

Q. Do you know the size of deliveries made to the jobbers in Oklahoma?

A. Well, pretty generally I know that any gasoline and refined oil was delivered in tank car quantities, which would run either a 6,000 gallon tank, eight or a ten. Most deliveries are in 8,000 or 10,000 gallon units.

Q. You mentioned one jobber this morning who bought only 5,000 odd gallons of gasoline during 1939.

A. He went out of business.

Q. When did he go out of business?

A. Just a minute. I think you have reference to the Ark Filling Station, doing 6,549 gallons.

Q. Don't you have one there with five thousand and some?

A. Yes, I have. I have one for 5,108.

Q. Which one is that?

A. The Whaley Oil Company.

The Ark Filling Station went out of business in
4483 February, in 1939. The Whaley Oil Company, I do not have the duration of the time period that that particular company made purchases from us.

Q. Do you know how many tank cars of gasoline the Whaley Oil Company bought during 1939?

A. Well, quite obviously, inasmuch as they only have 5,108 gallons, they bought less than one full carload.

Q. Then, does it follow that gasoline was at times shipped to these jobbers in Oklahoma in less than full carload lots?

A. No. A delivery of that type would probably be made truck transport.

Q. What is the minimum delivery by truck transport?

A. Depending upon the capacity of your truck transport.

Q. Well, do you know what the minimum is?

A. No, no, they vary. Each state has a different law on the size of the tanks that can be operated in those states.

Q. You don't know what it is in Oklahoma?

A. No, I do not. I do know this: I know that any transport as a pure economy function will move a truck having a capacity as large as he can and conform to the law. That is just common sense.

Q. Do you know whether deliveries were not sometimes made to these jobbers in less than full transport truck or carload lots?

A. I know that some deliveries were not made by
4484 the Standard Oil Company to their jobbers in less than unit capacity.

Mr. Hanley: If your Honor please, all of these questions in connection with mode of delivery or quantity of delivery per delivery to Oklahoma jobbers it is moved be stricken on the ground and for the reason that the method of delivery is not in question in this case, either in Oklahoma or in Detroit, either as to reseller purchases or as to jobber purchases, and it becomes entirely immaterial how the deliveries were made in Oklahoma or in what quantities. Your Honor will recall that there is no question of cost involved in this action.

Trial Examiner Ballinger: Isn't this objection embraced in your general objection?

Mr. Hanley: I don't know that it is. Questions like this have been asked on motor oil, which we thought was not material in the case, and I did make an objection to similar questions involving motor oil, and referred to the fact that these costs of delivery on gasoline were not a part of the case, but I don't recall any question of the particular type as this.

Trial Examiner Ballinger: The Examiner will continue as part of your objection reserved all of this testimony, and at this time the motion is denied, with the right reserved to counsel to renew it at a later time.

4485 Mr. Austin: I would like to say that I consider
cost of delivery very much a part of this case. I think it is as material as any other single expense.

Trial Examiner Ballinger: As the appropriate—

Mr. Austin: That has been brought in.

Trial Examiner Ballinger: At the appropriate time, when the motion comes up, you will be heard fully, both of you.

Mr. Austin: All right.

Mr. Hanley: At this time respondent states to the record that if the Commission considers cost of delivery from refineries or terminals a proper consideration in a cost determination, such as is being conducted here, that the respondent stands ready to supply schedules or figures portraying such cost of delivery of gasoline to the city of Detroit as between the reseller channel and to the jobbers from the River Rouge Terminal. Heretofore and up until this examination there has never been any suggestion on the part of the government that they wanted to go behind the arrival of the gasoline in Detroit. If we are to go behind that, then we might logically go to the refinery, and through the refinery, and back through the pipe line, and down into the well to the crude oil.

Trial Examiner Ballinger: Judge, that description will be very appropriate at a later date.

4486 Mr. Hanley: Then, Judge, why isn't it appropriate now? Why should we take all this time?

Trial Examiner Ballinger: Your motion has been ruled upon with the right reserved to you to renew it.

Mr. Hanley: Counsel has made the statement that he regards this as very appropriate. Now, your Honor, if he does he should demand those figures from us. We say it isn't. Now, if he says it is, he should ask us what our figures are. I don't know how far he wants to go. I don't know whether he wants a refining cost or not. We furnished certain costs. Now he says we should have furnished certain other costs. If we furnish them, then he says we should furnish refining costs. Then he says we should furnish production costs. How do we know what the Commission wants. We say we are ready to give you the figures if you will just once tell us what you really want.

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. I don't know whether I can quote the name of that oil company correctly or that jobber. Was it the Whaley Oil Company you were talking about?

A. Yes.

Q. How do you spell it?

A. W-h-a-l-e-y.

Q. Is it your opinion, based upon the fact that
4487 that jobber purchased only 5,100 gallons of gasoline from the Standard Oil Company in 1939, that it received only one delivery of gasoline during the year?

Mr. Hanley: Answer, if you know.

A. I don't know. I do know this: I know the Standard Oil Company does not ship out carloads of gasoline only partially filled. It is a public danger and we just don't do it.

By Mr. Austin:

Q. You mentioned another jobber named the Ark—

A. Ark Filling Station.

Q. —Ark Filling Station which purchased something over 6,000 gallons of gasoline during 1939 and went out of business I believe you said in February; is that correct?

A. Yes, sir.

Trial Examiner Ballinger: February of what year?

The Witness: 1939.

By Mr. Austin:

Q. Is that Ark Filling Station one of the 12 jobbers used for the computation of costs on Respondent's Exhibit 31-C, D and E?

A. Yes, sir.

Q. Was there another jobber who purchased 12,740 gallons of gasoline during 1939?

A. Yes, sir.

Q. Do you know the number of deliveries that 4488 were made to that jobber in any year?

A. No.

Q. If that jobber purchased in tank car lots, there were at most two carloads delivered, is that correct?

A. Yes, sir.

Q. Was there another jobber who purchased something over 18,000 gallons of gasoline during 1939?

A. Yes, the Davis Oil Company. He was in business only part of the year. He was bought out by the W. H. Elliot Company.

Q. Are there any other of those jobbers besides the two you have mentioned who were not customers of the Standard Oil Company for the full year?

A. No, no, the rest of them are full year business.

Q. Was the cost of delivery of gasoline from the refinery to each of these jobber accounts in Oklahoma paid by the company regardless of whether the delivery was made by transfer truck or by tank car?

Trial Examiner Ballinger: Read the question.

(Question read.)

A. Yes.

Mr. Austin: Your Honor, I would like to read into the record at this point, so that it may be easily connected with the preceding testimony, a statement of the volume of gasoline in gallons of Standard Oil Company jobbers in Detroit. 4489

Trial Examiner Ballinger: Shown by what?

Mr. Austin: For 1939 and 1940, as shown by Respondent's Exhibit No. 54.

Mr. Hanley: That is objected to as encumbering the record. It is in the exhibit and it is in the evidence and the record a dozen times by four or five witnesses.

Mr. Austin: If your Honor please, I recall that I made strenuous objection to the inclusion in the record of certain notations which were made upon photographs offered by the respondent, because all of those notations were taken from other exhibits in the record, but those were admitted in evidence. Now, I think that under the ruling I am entitled to make a statement which is also taken from the exhibit.

Mr. Hanley: The ruling hasn't a thing in the world to do with it, but I will withdraw the objection, your Honor. Read the whole exhibit if you want.

Trial Examiner Ballinger: Proceed.

Mr. Austin: It will be just eight figures.

Stikeman Oil Company, 1939, 1,822,960 gallons; 1940, 1,772,911 gallons.

Wayne Oil Company, 1939, 2,226,177 gallons; 1940, 2,341,394 gallons.

Citrin-Kolb Oil Company, 1939, 5,144,675 gallons; 1940, 5,226,130.

4490 Ned's Auto Supply Company, 1939, 4,336,308; 1940, 4,320,672.

I now move that we adjourn.

Trial Examiner Ballinger: That is designed to show what, Mr. Austin?

Mr. Austin: It is designed to show the contrast and dissimilarity of the jobber business in the Oklahoma territory with the jobber business in the Detroit territory, a survey for Oklahoma having been introduced into this case in an effort to prove cost of selling to jobbers in Detroit.

Mr. Hanley: If your Honor please, that being the announced purpose of the insertion of the exhibit in the record, for the same reason and because it is opposite in relation to the preceding record and the statement of counsel just made, I would like to have the record at this point show again the repeated evidence of the witness to the effect that the lesser deliveries and the smaller volumes incident to the jobber operation in Oklahoma would involve higher costs than the larger volume and fewer jobbers operations in Detroit.

Trial Examiner Ballinger: Is there a motion pending?

Mr. Austin: I move we adjourn, your Honor, until tomorrow morning. I think that I have finished my questioning of the witness but I may desire to make certain motions or statements on the record before resting.

4491 Trial Examiner Ballinger: The motion of counsel is granted and now, at 4:25 p. m., the hearing is adjourned to be reconvened June 25, 1941, at the hour of 11 o'clock, in Room 332, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 4:25 p. m., the hearing was adjourned to Wednesday, June 25, 1941, at 11 a. m., in Room 332, Federal Trade Commission Building, Washington, D. C.)

4492

Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Wednesday, June 25, 1941.

Met, pursuant to adjournment, at 11 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., appearing on behalf of the Federal Trade Commission.

Harold R. Hanley, Esq. (910 South Michigan Avenue, Chicago, Ill.), appearing on behalf of the Respondent.

4493 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

This is a reconvening pursuant to notice of Docket 4389, in the matter of Standard Oil Company, at 11 a. m., Eastern Standard Time, June 25, 1941, in Room 332, Federal Trade Commission Building, Washington, D. C.

The last hearing was held in Washington, D. C., on June 24, 1941.

The reporter will note counsel for the Commission and respondent present.

You may proceed.

Mr. Austin: It was my intention to submit certain motions this morning, but I realize that they would probably be premature, and should be made at the conclusion of the redirect examination; therefore, I am not prepared to proceed further at this time, the cross-examination having been fully completed.

Mr. Hanley: In view of the announcement of counsel for the Commission, I move an adjournment until ten o'clock, Thursday, June 26, 1941.

Trial Examiner Ballinger: The motion of counsel for the respondent is granted, and the hearing is adjourned to be reconvened at 10 o'clock a. m., June 26, 1941, in Room 332, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 11:10 a. m. the hearing was adjourned to Thursday, June 26, 1941, at 10 a. m., in Room 332, Federal Trade Commission Building, Washington, D. C.) 4494

4495

Room 532, Federal Trade
Commission Building,
Washington, D. C.,
Thursday, June 26, 1941.

Met, pursuant to adjournment, at 10 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., appearing on behalf of the Federal Trade Commission.

Harold R. Hanley, Esq. (910 South Michigan Avenue, Chicago, Ill.), appearing on behalf of the Respondent.

4496

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

This is a reconvening of Docket No. 4389, in the matter of Standard Oil Company, at 10 a. m., June 26, 1941, in Room 532, Federal Trade Commission Building, Washington, D. C. The last hearing was held in Washington, D. C., June 25, 1941.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

Mr. Hanley: Your Honor, before opening the questioning of this witness, and the government having concluded its examination of this witness, the respondent desires to renew its motion to strike certain testimony which respondent moved to strike on page 4369 of the record having to do with questions and answers concerning motor oils and greases in Oklahoma and in Detroit. At the time the motion was made—indeed, several motions were made, and this is a renewal of any and all of them—but at the time the evidence was first started and at the time that the motions were made, it was announced by counsel for the Commission that he would tie it up, and your Honor admitted the testimony subject to that understanding that it would be tied up.

Trial Examiner Ballinger: I didn't understand that counsel for the Commission was going to tie it up 4497 on cross-examination but was to tie it up by later testimony. Am I correct in my conclusion?

Mr. Austin: I would rather take the position that it has already been tied up, your Honor, and I really did mean on cross-examination of this witness, and it appears that costs of marketing oils and greases have been used in more than one place in arriving at the figures in Respondent's Exhibit 33-C, D and E, in connection with the Oklahoma cost study. The cost figure and the gallonage figure used on Respondent's Exhibit 33-C, accounting costs and also 33-C and D, credit costs, include both the costs and gallonage for motor oils and greases, and in Respondent's Exhibit 33-D, supervision and selling costs, there was an allocation made which had to be gone into as to the method of allocation of costs between the products. Motor oils and greases were involved there.

Those are the reasons why I believe that the testimony was relevant.

Mr. Hanley: That under the testimony of the witness, if your Honor please, does not, as clearly shown tie into the costs in Detroit other than to demonstrate, if it demonstrates anything, that the calculation of the Oklahoma jobber study as applied to Detroit is over conservative as to Detroit, and we take the position that there has been no tie-up with the Detroit costs of such a nature as entitles that very complicated and at times ununderstandable examination in the record.

4498 Trial Examiner Ballinger: The motion to strike is denied.

JOHN W. BOATWRIGHT resumed the stand and testified further as follows:

Redirect Examination by Mr. Hanley.

Q. Mr. Boatwright, I believe that at some point in your testimony on cross-examination you were asked concerning the method of converting greases into gallons, and you answered that a ratio factor of 8 pounds to the gallon was used generally. Have you verified that and do you wish to make any modification of that answer?

A. Yes. I found that the conversion factor on greases alone was 7.5 pounds per gallon. It varies on other products but on greases alone it is 7.5.

Mr. Hanley: I don't know that that is important, your Honor.

By Mr. Hanley:

Q. Mr. Boatwright, in your examination on June 3rd, in Washington, and beginning about page 3690 of the transcript, you were asked by Commission's counsel to give the names, if you could, of examples of the same type of operation elsewhere in the United States; that is, the same type as Ned's, and you did make answer as to a number which you at the time recalled. Do you at this time recall that testimony?

4499 A. I do.

Mr. Hanley: I ask to have this document marked.

(The document was thereupon marked "Respondent's Exhibit 94-A to S," inclusive, for identification.)

By Mr. Hanley:

Q. Mr. Boatwright, I hand you a file of documents consisting of a number of pages, which group of documents have been marked Respondent's Exhibit 94-A to S, both inclusive, entitled "Organizations buying branded gasoline on tank car basis and selling under the supplier's brand name through their own directly operated retail outlets only."

I will ask you to look at it and state whether or not it was prepared under your direction and supervision and state what it represents.

A. It was prepared under my direction and supervision. This represents a partial list of all of the tank car buyers in the states enumerated at the top of the various pages which buy gasoline on a tank car basis and sell that gasoline under the supplier's brand name to their own directly operated retail outlets only.

Q. Are those organizations which are named on the exhibit conducting a business operation comparable to Ned's?

A. Yes.

Q. And is that list a further and more complete answer to the questions which Mr. Austin propounded to you and to which I have called your attention?

4500 A. It is.

Mr. Hanley: We offer the exhibit in evidence.

Examination on Voir Dire by Mr. Austin.

Q. When was this prepared, Mr. Boatwright?

A. Within the past month.

Q. Prior to the time you came to Washington on this trip?

A. Yes.

Q. Didn't you have this with you when you were being cross-examined?

A. I did not.

Mr. Hanley: You mean on June 3rd?

Mr. Austin: Yes. Whenever it was that I asked him that question.

Mr. Hanley: That was on June 3rd.

The Witness: June 3rd.

By Mr. Austin:

Q. Had this been prepared prior to that time?

A. It had not.

Q. Can you state from what records it was prepared and how it came to be prepared?

A. Surely. Upon return to the Chicago office, I contacted each of the field managers and secured a list from
each of the field managers throughout our 27 sales
4501 divisions of accounts which, within their knowledge,
met the specifications as enumerated at the top of each
of the pages.

Mr. Austin: It appears, your Honor, that this is, therefore, only a compilation of information received from some 27 sales managers about which the witness has no personal knowledge, and inasmuch as this is offered to show the large number of organizations allegedly doing business in the same method as Ned's, and since that is a matter which might involve considerable difference of opinion and there might be greatly varying facts as to the numerous concerns listed here, I submit that this exhibit, Respondent's Exhibit 94-A to S, for identification, should be excluded as hearsay, and on the ground that no proper foundation was laid for them, and on the ground that it would not be fair nor truly representative of the facts alleged therein, to permit this evidence without any opportunity to determine the actual method of operation of the hundreds of stations listed here.

Mr. Hanley: Just a moment. May I ask a question?

Trial Examiner Ballinger: You may.

Redirect Examination (Resumed) by Mr. Hanley.

Q. Mr. Boatwright, when you received these several lists from the several fields, did you of your own recollection remember certain of these organizations that were listed that you had not recalled when you were asked on June 3rd?

4502 A. Yes, sir.

Q. A considerable number of them?

A. Quite a number.

Q. Some you did have personal knowledge of as to operations when their names were called to your attention?

A. Yes, sir.

Q. You prepared this or had it prepared in good faith and as a further and more complete answer to the question which Mr. Austin addressed to you; did you not?

A. I did.

Q. With the intention of giving him as full information as you could?

A. Yes, sir.

Mr. Hanley: If your Honor please, in response to the objection made by counsel, we say that this is an effort consistent with the efforts that we have been making throughout this proceeding to furnish information when we could and when we had it, and this is information that was elicited by the Government, not by us. We are not seeking to put this in as affirmative evidence, in the first instance. The Government has opened the door by the questions it asked. This is no more hearsay than practically everything in this lawsuit on both sides. I am just without power to understand the theory of the objections that are made by the Government on the ground of hearsay in this lawsuit. In any event, it is not a valid objection in this instance because the Government itself opened the door and asked the question. It is no more hearsay than was the recollection of Mr. Boatwright in the first instance. He learned about those instances in the same way, of course, that he learned about these instances, and I just submit, Judge, that an objection now on the part of the Government after they have opened the door is just an obstructionist tactic. 4503

Trial Examiner Ballinger: The Examiner has no doubt but that the exhibit was prepared in the utmost good faith and to supply information inquired for by counsel for the

Commission, but the document is plainly inadmissible and the objection is sustained.

Mr. Hanley: I just submit, your Honor, that in fairness, the Government ought to withdraw that objection, and I wish that to appear emphatically upon the record.

Mr. Austin: If your Honor please, when the witness states that certainly on his direct examination that there are certain customers, or, rather, he stated on direct examination that it was a usual method of doing business which was encountered in many places, a method which is employed by Ned's, in order to test the witness' knowledge, I asked him to give many specific examples for the purpose of testing whether he did or did not know what he had stated on direct examination. That is not opening
4504 the door, as counsel for the respondent says, to the
introduction of a list of hundreds of stations. It is purely testing the knowledge of the witness to see upon what basis he made the general statement that that method of doing business was common, and that is as far as the cross-examination went.

I hope that explains my—

Mr. Hanley: It may be explained to your satsifaction. Of course, it doesn't explain it to the Respondent's satisfaction. We are trying to present the facts to the Commission.

Trial Examiner Ballinger: If the contents of this document is material as evidence in the case, it can be proven probably at very heavy expense to the respondent.

Mr. Hanley: We can't prove it except by calling a hundred or two hundred people, of course.

Mr. Austin: I don't think it is material, anyway, but I have no objection, Judge Hanley, to Mr. Boatwright on the witness stand stating the names of the stations which he has just said he recalls personally or has personal knowledge of, if you desire to have him do it. I am not suggesting that you do that or not. If he wants to add to the answer he made before, I say, of course, that is perfectly proper redirect.

Mr. Hanley: That is all we are doing, whether he reads it or whether he puts it in in written form.
4505 I shall adopt the suggestion of counsel for the
Commission, because I am forced to, your Honor, in view of the court's ruling, but without in any wise waiving respondent's position on the right to introduce the exhibit.

By Mr. Hanley:

Q. Mr. Boatwright, will you look at Exhibit 94-A to S, inclusive, and state the names of each of the organizations which you recognize as operating a business comparable to Ned's?

Mr. Austin: I assume now that the witness will be testifying from his own knowledge of the operation of the companies which he names.

Mr. Hanley: I assume he will.

A. The Interstate Petroleum Company (Gale & Sloan), Chicago, supplied by Socony Vacuum.

Piper's Service Station, in Chicago, Socony Vacuum.

The Goodrich Tire Company, Chicago, Socony Vacuum.

Porter Brothers, Chicago, Standard Oil Company.

Firestone Tire & Rubber Company, Chicago, the Texas Company.

Mr. Austin: May I interrupt, please? I wonder if the witness would be kind enough to check the ones on that list that he reads since I haven't got a copy of it and I may want to cross-examine upon this testimony, so I would like to know which ones he is reading and which ones he is not reading.

4506 Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

A. (Continuing.) Hayer & Springborn, Napersville, Mid-Continent.

Goodrich Tire Company, at Gary, Indiana, Texas Company.

A. & P. Filling Station, Indiana Harbor, Indiana, Standard Oil Company.

Indianapolis Motor Inn, at Indianapolis, Pure Oil Company.

Firestone Tire & Rubber Company, Indianapolis, Texas Company and Mid-Continent.

Goodrich Tire & Rubber Company, Indianapolis, Texas Company and Gulf.

Firestone Tire & Rubber Company at Bloomington, Indiana, Texas Company, Mid-Continent.

Gafill Oil Company, South Bend, Indiana, Mid-Continent.

Beattie Garage, Des Moines, Iowa, Phillips Petroleum Company.

B. F. Goodrich, at Sioux City. I do not have the supplying company.

Weiderman Oil Company, at Lawrence, Kansas, Socony Vacuum.

4507 Carter Oil Company, Lawrence, Kansas, Socony Vacuum.

Firestone Tire Company, at Wichita, Kansas.

National Garages, Incorporated, Detroit, Michigan, Mid-Continent.

B. F. Goodrich, Detroit, Michigan, Gulf & Texas Company.

Firestone Tire & Rubber Company, at Detroit, Michigan, Gulf & Texas Company.

U. S. Government Post Exchange, Mount Clemens, Michigan, Socony Vacuum, Socony Vacuum.

Miller Auto Supply Company, Detroit, Michigan, Cities Service.

And Ned's Auto Supply Company; Detroit, Michigan, Standard Oil.

Firestone Tire & Rubber Company, at Austin and Rochester, Minnesota, Tidewater.

Firestone Tire & Rubber Company, Minneapolis, Texaco and Mid-Continent.

U-Smile Camp, Kansas City, Missouri, Socony Vacuum.

Roy Gustanson, at Wausauke, Wisconsin, Standard Oil Company.

Those are the companies which I personally am acquainted with. There was an additional check made 4508 upon receipt of the advice from the various field managers. The personnel in my department is made up of individuals transferred from the various field offices. Each of these individuals was asked to go over the list and from their personal knowledge of the companies check the field report, which was done.

Trial Examiner Ballinger: Mr. Boatwright, how many companies are listed in the exhibit?

The Witness: There must be a magnitude of 400, sir.

By Mr. Hanley:

Q. Mr. Boatwright, I direct your attention to form 189 which has been given Exhibit No. 32, which has been discussed so much in this case. I think that the forms that have been filled out are for the years 1939 and 1940, which have been discussed in this case. That is true, isn't it?

A. Yes, sir.

Q. Is the form 189 a regular company bookkeeping record?

A. It is.

Q. How long, to your knowledge, has it been such?

A. To my personal knowledge, it has been in existence since 1932, when I started working for the company..

Q. Have you had occasion to see the record even prior to that time?

A. I have.

4509 Q. I wish you would please explain briefly but explicitly exactly what this record is designed to reflect.

A. This record is designed to reflect the marketing expense of the Standard Oil Company in each of its sales divisions. It represents a total expense and represents a breakdown of those marketing expense items to the best of our ability among the different channels of distribution.

Q. You have referred to channels of distribation. As I state this—you correct me if I am wrong; I am trying to save time—the channels of distribution are the reseller channel, the consumer channel, both of which are tank wagon delivery channels, as I understand it; that is true?

A. Yes, sir.

Q. The income and expense of leased service station channel?

A. Yes, sir.

Q. That, as I understand it, is purely a property record on rental of leased properties?

A. That is correct, and a special channel is given to it for the purposes of evaluating the landlord function of our operation.

Q. There is a fourth channel denominated as Other Methods?

A. Yes, sir.

Q. I am not sure, but there is still confusion as to what Other Methods means. Will you briefly but completely explain what is the purpose of Other Methods channel?

4510 A. Well, the Other Methods channel includes a cost of marketing for products delivered other than through the faucets of our tank wagon.

Q. For instance?

A. Motor oils is the outstanding illustration of the type of a commodity which would be found in the Other Methods channel, candles, waxes, petralatums, lubricating oils, industrial lubricating oils, and other products sold in barrel containers. The expenses for that type of marketing will be found in the Other Methods channel.

Q. But those products are, as a rule, delivered by tank wagon, are they not?

A. Yes, they are delivered by tank wagon, either by side rack delivery or by stake truck delivery. A side rack delivery is merely a smaller delivery that is made on the side rack of a tank wagon carrying a load of lighter products. A stake truck delivery is just what the name implies.

Q. Well, generically, they are all tank wagons, aren't they?

A. Yes.

Q. Mr. Boatwright?

A. Yes.

Q. There isn't any such thing any more physically as a tank wagon in use, is there?

A. That is correct.

4511 Q. On form 189, do any gallonage figures appear at all except in the calculation on the last five lines of the form?

A. Those are the only gallonage figures which appear on the form.

Q. They refer to certain direct shipments which I think you have defined as being shipments of the nature made to the four jobbers in this action, to large tank wagon buyers who may be resellers or large tank cars consumers; that is, shipments which do not go through the bulk plant facilities of the company; is that true?

A. Yes, sir.

Q. Isn't it also true that there is no separate channel assigned to the so called direct shipments on form 189?

A. There is no separate channel.

Q. Mr. Boatwright, what is the fact as to whether or not the Standard Oil Company is set up primarily and fundamentally on a tank wagon distribution basis?

A. Well, the company is set up primarily to market through the tank wagon method of distribution. The location of our field offices, our personnel, our facilities, are largely gauged on that basis entirely.

Q. Is it not a fact that form 189 accurately and effectively reflects for the accountants and management of the company the operation of a business set up on that fundamental basis?

A. It does.

4512 Q. With respect to the so called direct shipments, what is the fact within your knowledge as to whether or not that is a class of business which has grown up in more recent years?

A. Well, it is a type of business which has come into existence with the tremendous expansion that has taken place in the market for petroleum products in recent years.

Trial Examiner Ballinger: Read the last question, please.

(Question read.)

By Mr. Hanley:

Q. Will you explain, please, if you know, Mr. Boatwright, why there is not assigned to the so called direct shipments a separate channel on the form 189?

A. Yes. Direct shipments originate with a sales contract, as a rule, with some major buyer. Most of these sales contracts are made by the general office on a bid basis. A price is submitted and we either get the business or we don't get the business. That applies to the greatest proportion of our direct shipments, to figure a marketing cost on a direct shipment of several trainloads of gasoline per year to a given customer where all you do is submit a bid in a sealed envelope, would be an impossibility within the realm of which you could carry your decimal points and costs. The cost is so small that it has not appeared either advisable or desirable to incur the additional cost of
4513 attempting to isolate the costs of that particular channel.

Q. Do you regard it as impossible or, at least, highly impracticable to attempt time allocations and cost allocations to the direct type of business after the fashion that you make such allocations in the other channels reflected on form 189?

A. I regard it as a highly impracticable matter.

Q. I would like to have you give some attention to this channel shown as the leased service station channel, Mr. Boatwright. You were asked many questions about that. You have stated that that is primarily a property account.

A. Yes, sir.

Q. That means, does it not, that it shows rentals and would show a profit or loss arising out of rentals due the company?

A. It does.

Q. Supposing that in a year's business that column showed a loss on the so called landlord function; that is, in receipt of rentals. What would be the effect of that loss on the unit cost of selling a gallon of gasoline as reflected in the reseller channel?

A. Well, it becomes an increase of our cost of doing business in the total reseller channel.

Q. Suppose that the converse were true and that the properties as such showed a profit arising out of the rentals. What would be the effect in the reseller channel?

4514 A. It shows a decrease of marketing cost in the reseller channel. That condition exists in some of our fields.

Q. That may vary from place to place?

A. It does.

Q. All of the results of the factors that enter into the leased channel find their way into the reseller channel, do they not, ultimately, Mr. Boatwright?

A. They do.

Q. Do forms 189 for 1939 and 1940 for Detroit accurately portray the cost of the Standard Oil Company of its marketing operations of petroleum products in that field for those respective years?

A. They certainly do.

Q. And, particularly, does the reseller channel column accurately portray the cost to the company of marketing its gasoline and refined oils in Detroit for the respective years?

A. It does.

Q. Does the form 189 give any consideration to freight or barge rates or tanker rates or transportation costs other than the transportation costs that may be incurred out of bulk plants?

A. No, it does not.

Q. Of course, it does give consideration to the delivery cost out of bulk plants?

4515 A. Yes, but it does not reflect that leg of the product movement from the terminal or refinery supply point to the bulk plant.

Q. That is to say, it is simply a reflection of the marketing cost of gasoline once the gasoline has arrived at the location under consideration; is that true?

Mr. Austin: I object to that question, your Honor, on the ground that it is leading. It is putting opinion evidence in the mouth of the witness.

Trial Examiner Ballinger: Read the question.

(Question read.)

Trial Examiner Ballinger: The objection is overruled. It has been testified to a half a dozen times during the progress of this case.

Mr. Austin: If it has been testified to a half a dozen times, it is repetitious, isn't it?

Trial Examiner Ballinger: If the objection is on the ground of repetition, that is overruled.

A. Yes, sir.

By Mr. Hanley:

Q. Mr. Boatwright, you have been examined at great length on pretty nearly every one of these numerous accounts designated on 189. I will ask you if there is any duplication of an entry of a charge of cost as between any two or more of any of these accounts.

4516 A. There is no such duplication of any cost.

Q. There has been considerable questioning of you relative to the possibility, and sometimes it has been remarked relative to the ease with which you could allocate cost to any one or each of the individual 430 or thereabouts service stations in the Detroit metropolitan area. What have you to say as to your ability to do that or as to the possibility or practicability of doing it?

A. Well, I think, in the first place, it just isn't practical within the realm of common sense to attempt such a problem as that because you would incur such a cost that you wouldn't any longer have to worry about business problems because your competitor would be able to take your business away from you very easily as his costs would be much lower, firstly. Therefore, it is not practical. Secondly, it would be an extremely difficult allocation to make, which would involve much of a purely arbitrary nature. Thirdly, it could only be done by our company by a complete change of all of our system of bookkeeping and controlling costs.

Q. Now, at that point, let me ask you another question, Mr. Boatwright. You may not have fully completed your answer, but this will help you.

There are a number of different types of reseller stations served by the Standard Oil Company, are there not?

A. There are.

4517 Q. Please name them.

A. Reseller stations served by the Standard Oil Company fall into certain broad classifications. First, 461 accounts.

Would you like a description of each of the types?

Q. I think it is pretty well understood on the record what that is. Briefly describe it. We will get this story in some form once.

Mr. Austin: Have the question read, please.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

A. The 461 accounts, the outlet is owned by an individual and we have only a sales contract with the individual operating that outlet.

The second broad classification is what we regard as a P. O. S. S. L., which is a privately owned service station which is leased to the Standard Oil Company and is sublet by the Standard Oil Company to an operator.

A third but much smaller classification of reseller outlets is the P. O. S. S. L., which is where the land only is leased and the company, having leased this location site for a period of years has constructed thereon its own building. That represents a comparatively small part of the retail outlets.

The fourth general grouping would be stations
4518 which are owned entirely by the company and are leased to individuals for operation.

Those are the four broad classes.

By Mr. Hanley:

Q. Now, adverting to the other question I asked you as to the possibility of allocating to each individual station of the 430 odd, what have you to say as to the practicability or possibility of allocating to each of these four groups that you have named, and if your answer should be the same, continue with your reasons.

A. Well, the answer to that question must be of necessity a continuation of the difficulties enumerated in attempting to establish a system of cost accounting, recognizing the individual outlets. That continuation is based upon the difficulties incident to the method of selling and supervision. A salesman will be given a territory which will encompass, in many cases, some of each of these four

classes of outlets. The acquisition of the original contract with the 461 account is a sale which requires the effort of the salesman to convince the operator of that outlet that his profits could be increased by selling our merchandise instead of some others. With the 461 account, the salesman's obligations include, among other things, the convincing of the owner of that station that it would be to his advantage to lease to the company. Then he must find a lessee for subletting the outlet. With
4519 the company owned station, the salesman must find a desirable lessee, train him, supervise his operation, and it would require a further detailed breakdown of the salesman's time over any records that we now maintain to even approximate the cost, and such a breakdown would be extremely difficult to maintain.

Q. Mr. Boatwright, is it or is it not a fact that the supervising personnel and the sales personnel, and to a very considerable extent, the accounting personnel of the field and of the company generally is set up on the basis of handling all of these reseller outlets as of a kind, that is, as of one kind, I mean?

A. That is true.

Q. For example, to be sure that we understand this, suppose that a salesman and a reseller salesman undertaking to sell gasoline for this company starts out in the morning. What is that salesman apt to do during the day in relation, of course, now, I am asking you, as to members of these four groups of resellers?

A. Well, his responsibility is to secure sales of our products through all of these classes of outlets. His responsibility is just as keenly assigned on any one class as on any other. As he starts out in the morning, he may decide that an operator of a 461 account needs some training in driveway operation. He may work on that
4520 driveway all day, with either a 461, a P. O. S. S. L., or a lessee of a company owned station indiscriminately as to the class of the outlet. There is no differentiation.

Q. May he call on members of each of the four groups in the course of a day?

A. Yes.

Q. Is it or is it not true that he might perform the various functions that a salesman has to perform and different functions with members of each of those groups in the same day?

A. That is correct.

Q. Is there any attempt at all made to allocate his time as between the groups or as between the individual stations?

A. There is none.

Q. Is that all allocated to reseller channel so far as the accounting and records of the company is concerned?

A. It is.

Q. Mr. Boatwright, assuming that it was necessary or possible to ascertain the reseller outlet in the city of Detroit supplied by this company to which the company was supplying at the lowest marketing cost, what would be necessary in order to ascertain that fact in respect of analyzing the business of all of the stations?

A. Well, I would have to answer your question by an illustration, which I will take from a question
4521 previously put to me on cross-examination.

Let us use just the expense item of delivery cost, to illustrate what would be necessary. It would be necessary to trace the individual sales tickets made to a given station, time the operation, and then attempt to make an allocation of the cost provided that station be one which was served on a route among the different stations served on that route, and then assuming that the station route remained constant all of the time, set up a standard to a proper portion of the delivery, salary expense involved for that station. Then having traced it through on one station, for me to know whether that was the lowest cost station, I would have to perform an identical function on all other stations. Then I would have to classify all other stations in array to determine which was the lowest cost. Such an operation would literally be attempting to unscramble an egg and would require a staff working for months and months to approximate it, and then there would be much of an arbitrary nature in the allocation.

Trial Examiner Ballinger: Would there be any portion of it that could be determined with exactitude?

The Witness: I don't think so, your Honor.

Mr. Hanley: Another general question on this form 189, Mr. Boatwright. You have been interrogated for days on the methods of depreciation and on the E. L. A. items of account, and on whether a truck driver is paid a
4522 salary or whether he works on a commission.

What is the fact as to whether or not all of the expense which is allocable to the reseller channel of gasoline and refined oil, whatever be its nature, ultimately finds its way into and is reflected once in the reseller channel?

A. Well, all actual expense items are reflect only once on our statement, form 189. Whatever it is possible, the objective of the company is to charge direct to the channel those costs which are of a direct nature. Where the cost is not incurred directly on a single channel, it is allocated to the channel. Therefore, we regard our reseller costs as shown on our form 189 as our cost of doing business in that channel in a given field.

By Mr. Hanley:

Q. You were asked at great length yesterday or all through this hearing questions about commission drivers or "B" station agents, more accurately. Just briefly explain what is a "B" station agent.

A. Well, a "B" station agent is an employee of the company in charge of the direct distribution of our petroleum products in a definitely designated geographical area. His compensation is made up of a commission on the products actually delivered. He owns the chassis of the truck; the company owns the tank on the truck.
4523 The company pays him a rental for the use of that chassis in the delivery of our products.

Q. In the case of the salaried driver, the company owns the truck, doesn't it?

A. Oh, yes.

Q. And the company stands the maintenance and the depreciation cost on that truck?

A. Yes.

Q. In the case of the commission driver, the company simply rents a chassis?

A. Yes, sir.

Q. Instead of owning one and maintaining it and taking the depreciation off of it; isn't that the fact?

A. Yes. The only depreciation we take on a truck operated by a "B" station agent is the depreciation on the tank which remains there.

Q. Well, we own that, don't we?

A. That remains the property of the company. The maintenance of the chassis, the goods used, and depreciation, is a cost to the "B" agent.

Q. In respect, first, of the property involved, namely, the truck, is not the only difference between salaried drivers and a commission agent the difference between renting property and owning and maintaining it?

Mr. Austin: I object to that question, your 4524 Honor. It is leading. He can ask him what the difference is.

Trial Examiner Ballinger: The objection is overruled.

A. Well, that is the only difference.

Mr. Austin: Your Honor, I would like to ask, if I may, on the record, the extent to which counsel for respondent is entitled to ask the respondent's officer leading questions on direct examination.

Trial Examiner Ballinger: Well, if it elicits the facts quicker than going around and coming in the back way, the Examiner will permit it.

Mr. Austin: I accept the ruling, your Honor.

Trial Examiner Ballinger: What we are after are the facts.

Mr. Austin: I just want to urge that I think it is going in the back way too much.

By Mr. Hanley:

Q. I will try and correct this particular question as a corollary to the other.

As between getting deliveries of gasoline made by a salaried driver who is paid a wage or a salary and getting deliveries of gasoline made by a commission agent or driver employee who is paid on the basis of how much he delivers, what difference, if any, so far as the econo-
4525 mics of the situation is concerned?

A. Well the company is eager to make the delivery by either of these two forms of delivery. As far as the cost is concerned, the tendency is for your commission delivery to a reseller outlet to be slightly higher than your salaried delivery, because your "B" agent performs additional functions which are classified separately at both plants out of which salaried operators are employed.

Q. I understand that but, Mr. Boatwright, what I want to know is if there is any essential difference from the standpoint of the company as to whether it pays for a service on the basis of a salary or whether it pays for a service on the basis of a commission.

A. No difference at all. No difference at all. We pay for the service performed irrespective.

Q. Then we have to pay for it, do we not, irrespective of how it is performed?

A. Certainly.

Q. There seems to be some mystery about the fact, Mr. Boatwright, that there was a larger figure in the reseller channel on form 189 applicable to commissions than there was to salaried drivers. I think you gave some testimony, which I do not recall in detail, as to the ratio between commissioned drivers and salaried drivers in Detroit. Is there any relation between the number of the one class and 4526 the other class that explains to your mind the difference in the figures in the reseller channel?

A. There isn't a relationship between the number of salaried salesmen and the number of commissioned drivers. The difficulty with the comparison of the actual amount paid salaried drivers with commissions, is that the commission item is a concentration on an all-gallonage basis for the performance of a broader function than would be performed by the salaried drivers. To illustrate: The salaried driver's expense 006 is limited entirely to the time that he is driving the truck making deliveries. If he comes into the yard and performs one function other than truck driving—let us say he moves some inventory in a warehouse, then that part of his time is charged to warehouse labor. Likewise, at the salary stations there is an accounting cost incurred in filling out the forms and making a report to the company. That is a separate classification. There is an unloading of tank cars or other trucks by warehouse labor. That is, all of these functions are performed by your "B" agent at his plant for which he receives a compensation in the form of a commission on his actual deliveries. He performs a broader function, that is, merely a broader classification of expense items than is the item of salaried drivers.

Q. Mr. Boatwright, you have explained that there 4527 are the four channels reflected on 189 and that there is no channel for direct shipments on form 189. You have testified concerning Exhibit 33-A to E, inclusive, and have indicated that there would be a cost of doing the jobber business in Detroit of approximately 25/100 of a cent. I think you have testified that whatever cost there is, which you have indicated as being too small to be advisable to set up separately, applied to the marketing operation in selling the jobber, would be scattered through the four, or maybe only three of the channels that do appear on 189; namely, the reseller, the consumer, and other methods.

I am not sure whether any would appear in leased stations or not.

A. There would be none in that channel.

Q. And as to those three channels only, Mr. Boatwright?

A. Those three channels only.

Q. Assuming that it does cost a quarter of a cent a gallon to market gasoline to the jobbers in Detroit, have you made any computation to determine what portion of that has been allocated or has found its way into the reseller channel?

A. I have.

Q. And what is it?

A. Well, if we assume the complete jobber cost in the Detroit area of 25/100 of a cent a gallon, and I should like to remind you that my testimony was in each case

4528 repeatedly, it was 25/100 or less with the emphasis repeatedly on the fact that it was less.

Q. Well, for the purposes of this question we are assuming arguendo that it amounts to 25/100 of a cent, Mr. Boatwright.

A. All right.

On that basis the 13,661,407 gallons which has been shown in one of these exhibits as being the volume of these four jobbers would have resulted in a total marketing cost of $34,152.77. Now, if that cost be spread among the channels on the ratio of gallonage indicated in the tank wagon reseller to the Other Methods products channels, that would mean that this would be a total cost, maximum in the tank wagon reseller channel of $22,540.83, which we divide by the gallonage of 69,301,000, would give a cost of .032 cents per gallon, or 32/1000 of a cent.

Trial Examiner Ballinger: The hearing will stand in recess for five minutes.

(A short recess was taken.)

4529 Trial Examiner Ballinger: Come to order. You may proceed.

By Mr. Hanley:

Q. Mr. Boatwright, you gave a figure in your last answer. I will ask you if you arrived at that figure by a distribution of gallonage through the several channels on form 189 in the same manner as you have stated that the cost such as they are incident to direct shipments are distributed through the form 189.

A. Yes. I do not know where the sum total of the cost is to be found, so I took the gallonage in the tank wagon reseller channel, being 69,301,586, as a proportion of the total gallonage used in allocating the cost of 106,487,212 gallons.

Q. Mr. Boatwright, beginning on page 4461 of the record, you were asked a series of questions relative to five different acounts. I will call your attention to them: No. 240, dealing with donations; 525, dealing with death benefits; 086, dealing with taxes; 290, dealing with general office expense-administrative, I think; and 295, dealing with office expense-law. The substance of the questions was: Was any of the expense indicated in those accounts allocated to the jobber business in Detroit? And substantially, your answer was that they were not.

And I refer you to an answer to one of those
4530 questions, which you gave on page 4479 of the record, in which you stated the following:

"Direct shipment gallonage is not used in the allocation of expenses among channels in any of these varying expense accounts allocated upon that basis, for this reason: The amount of time involved in signing a contract with the jobber is so infinitesimal relative to the amount of time involved in dealing constantly and continuously with problems incident to tank wagon reseller distribution, that it is just not regarded by our accountants, experienced in this field, as being possible of a segregation with any degree of accuracy. Certainly, it could not be included on a gallon for gallon basis."

I wish to—well, first, do you recall that answer?

A. I do.

Q. I wish to direct your attention particularly to the last sentence, as follows: "Certainly, it could not be included on a gallon for gallon basis." That I take it is your view.

A. It is.

Q. Yet and has been continuously, Mr. Boatwright?

A. It is.

Q. Now, you have made another answer from time to time in answering similar questions in which you have
4531 said the cost was so low that you could not find it, in refering to these cost allocations to jobber gallons.

What did you mean by the term "could not find it"?

A. Well, I could not find or isolate a cost for the various expense classifications being discussed as assignable or attributable to direct shipments.

Q. Now, will you please look at 189, and the account 240, donations.

A. Yes, sir.

Q. I am speaking of 1940.

A. Yes, I have it.

Q. In the first two numbered columns, entitled "average per unit," there appears no figure following that item. What does that mean?

A. Well, that merely indicates that the cost for that classification of expense when divided by the petroleum gallonage, including direct shipments, would result in a figure of less than .005, or 5/1000 of a cent. It is not found to a calculation of 1/100,000 of a cent.

Q. Now, that means, does it not, Mr. Boatwright, that taking all of the gallons of the reseller channel and any additional expense that might have been allocated—or, not allocated, but just found its way into that channel from direct sales, none of that gallonage was burdened with any cost on donations, so far as that analysis is concerned?

4532 The Witness: Would you read the latter part of that?

Mr. Hanley: Well, I will withdraw the question. It is badly stated.

By Mr. Hanley:

Q. Does that or does it not mean that from an accounting standpoint that item is so trivial, as it was in that year, that taking into consideration all of the gallons in the reseller channel plus the handling of any jobber business or direct sales you did not regard it as worth while from an accounting standpoint to make the insertion of any figure in column "average per unit"?

A. Yes. It merely means that we would have to extend our system of cost comparison among different years to a point beyond two decimal points to find it. You see, those first two columns give a comparison of this year and last year, and in neither of the two years did donations amount to an item large enough to reduce the gallonage cost to one hundred thousandth of a cent per gallon.

Q. Now, at my request, Mr. Boatwright, did you make any computation as to what difference it would make in the cost of sales to jobbers, Detroit jobbers, if those five accounts were allocated on a gallon for gallon basis?

A. Well, I have a longhand calculation here. May I check the figures to be sure that there is—

4533 Q. Surely.

A. I have a transposition of the figures here. If I may, I will make a correction on that before continuing with this.

(After figuring.) I have the result of that calculation, which I would like to give you subject to check.

Q. Will you please indicate what your conclusion is and how you arrived at it, Mr. Boatwright?

A. Well, if we take the total for petroleum products of account 240, being donations, of $2,252.51; 086, taxes—real estate and personal property, being $54,722.28; account 290, being general office expense—pro rated general administration, $74,288.83; 295, general office expense—law expense, $35,164.66; 525, death benefits, $6,950.00, it would give you the sum total of these expense classifications, which, when divided by the gallonage figure of 106,487,212, which excludes direct shipments, would result in a cost per gallon of .162 cents per gallon.

Now, if you will take the figure used as the divisor of 106,487,000 plus gallons and add the gallonage of 13,661,000, which is the sales of gasolines to jobbers, you get a resultant figure of .144 or a difference between the two means of calculation of 18/1000 of a cent.

Q. Now, is it not true, Mr. Boatwright, that that calculation is based on a ballon for gallon basis?

A. Yes, it is based on a gallon for gallon basis.

4534 Q. And the answer which I read you from your testimony at page 4479 indicates that it can not be properly done on a gallon for gallon basis?

A. Well, I do not think that it can be.

Q. And, in your opinion, this is not a proper allocation?

A. It is not.

Q. And why do you think so?

A. Well, for the reasons previously and many times enumerated, that the time involved and the effort involved in selling a gallon of gasoline or any other product through a jobber in terms of these expense items is simply not comparable with the time and the effort involved in selling gallons of gasoline and other products through other marketing outlets.

Q. Now, adverting to the calculation which you previously put in as to the allocation to the jobbers or the distribution of jobbers of expense that might be scattered through the form 189, do you regard that as a proper allocation to the jobber operation?

A. Well, I don't.

Q. Or a proper elimination?

A. I do not.

Q. And for the same reason?

A. Yes. It is—I just don't know where you could find it—the true cost.

Q. Is it or is it not a similar type of calculation,
4535 the attempt to determine?

A. Yes, it is merely an attempt to show the magnitude of the item under discussion. I do not feel that it is a proper elimination on a strictly accounting—good accounting basis.

Q. Is it not true, Mr. Boatwright, that if those costs were added to the jobber operation, which is largely on a gallon for gallon basis, that, in your judgment, it would be an improper and overburdening charge against the jobber operation?

A. Yes, sir.

Q. We will get into a different subject, Mr. Boatwright. I direct your attention to Exhibit 31-A and following sheets.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Mr. Hanley: I move that we adjourn to 1:30.

Trial Examiner Ballinger: Motion is granted. The hearing stands in recess until 1:30 p. m.

(Whereupon, at 12:30 p. m. a recess was taken until 1:30 p. m.)

4536 Afternoon Session.

1:30 P. M.

Trial Examiner Ballinger: Come to order. Proceed.

JOHN W. BOATWRIGHT resumed the stand and testified further as follows:

Redirect Examination (Continued) by Mr. Hanley.

Q. At the recess we were about to enter into a discussion of Exhibit 31-A and the following pages, Mr. Boatwright.

Mr. Hanley: I will ask the reporter to mark this document, for identification.

(The document was thereupon marked "Respondent's Exhibit No. 95," for identification.)

By Mr. Hanley:

Q. Mr. Boatwright, I show you what has now been marked Respondent's Exhibit 95, and I will ask you what it is?

A. This is a blank form 474 of the Standard Oil Company which sets up an analysis of tank truck deliveries by salary drivers. It shows the dates of the month and the various types of deliveries broken down between transfers among bulk plants, sales of heating, Diesel, tractor fuels, naphthas, and gasoline, bucket deliveries, total sales, number of forms 018 covering the delivery of these products, side rack deliveries, miles traveled, time driving truck, and time other than driving truck.

4537 Mr. Hanley: I will say, your Honor, that this is one of the documents which at times has been referred to as a truck efficiency report which was requested by counsel for the Commission that the respondent produce, and we are now producing it and offer it in evidence.

Trial Examiner Ballinger: Any objection?

Mr. Austin: This is what is called the tank truck efficiency report?

The Witness: Yes, that and the recapitulation of that form.

Mr. Austin: I have no objection. I was wondering if you would mind asking him, Judge Hanley, how long this form was made out.

Mr. Hanley: I will ask him that. I am going into a full explanation of that, Mr. Austin.

Trial Examiner Ballinger: Without objection, the document is introduced in evidence as Respondent's Exhibit 95.

(The document heretofore marked "RESPONDENT'S EXHIBIT NO. 95," for identification, was received in evidence.)

By Mr. Hanley:

Q. Mr. Boatwright, there has been a considerable discussion during your cross examination of what has been referred to as the truck efficiency report, the method
4538 of deriving truck hour time from the report, and the extension of a labor charge item of 95.2 cents which appears from time to time in the exhibits and calculations which have been made. I wish you would from that report and from any information that you may have in mind or in memo form just discuss the method, explain the method that you used in deriving the truck time that you employed in the preparation of Exhibit 31-A and following pages.

A. Yes. Respondent's Exhibit 95 is a form which is posted daily by the driver of the truck. You will recall referring me to Mr. Raupaugh's testimony wherein he stated that where possible we tried to have the same truck serve a given route. I agreed with that testimony. Now, where it is possible, the same driver will operate a given truck on a given route making, let us say, gasoline deliveries. If the driver operates two trucks part of the time on gasoline, deliveries to resellers, let us say, and part of the time on other products, he makes out a separate form 474 for his time.

Now, the driver at the end of the day from his 018, which you will recall has been introduced as an exhibit, enters on this form the types of deliveries made, the number of 018 tickets, and from the 018 tickets his actual driving time. What we did was that we took these forms for the three stations of Scotten Avenue, Lycaste and North Detroit, and we recapitulated the gallonage of gasoline trucks
4539 only operating out of those three stations and the driving time incident to making those deliveries. The gasoline so secured was entered on Respondent's 31-C and the driving time is entered on that same exhibit. Now,

I should explain that the driving time only constitutes accounts 1006 or 2006. Therefore, the actual hours used in making deliveries of gasoline are the actual hours chargeable against that product in our accounts 1006 and 2006.

Q. You were asked many questions about what happened to a possible lunch hour of these drivers, Mr. Boatwright. Can you clarify that?

A. Well, any possible lunch hour would be excluded by the driver in making up his report of the actual driving time in making the delivery.

Q. Are accounts 1006 and 2006 to which you have referred regular company accounting records?

A. They are, and refer respectively to salaries, drivers, tank wagon reseller and tank wagon consumer channels.

Q. Are records of the exact time of the trucks available for the year 1937?

A. I don't think so.

Q. I mean, time of deliveries used in making deliveries to Ned's and other dealers?

A. No.

Q. As I understand it, in making up Exhibit 31-A 4540 and following pages, do you use the 1940 records?

A. Well, the months are indicated right in the exhibit as being December, '39, March, June and September of 1940.

Q. If I correctly understand your testimony heretofore given, you did that because they were the available records and the only available records to give you—

A. Yes, and then for a second reason: These are the respective months which these forms are recapitulated, just the one month not accumulated, but for these respective months, and then we compare the accomplishments of the different trucks with standards or anticipated performance to evaluate the comparative efficiency among plants.

Q. Are the records for 1940 which you did use comparable, to your knowledge, with the operations of 1937 which were unavailable records?

A. Well, they were comparable with the exception that I pointed out in my direct testimony, the closer follow through that we have introduced on our trucks has increased the efficiency of operation and reduced the unit cost.

Q. On your cross examination you were asked in-

connection with this subject whether you gave consideration to distances traveled by these trucks. I will ask you now if distance traveled irrespective of whether it be short or long comparatively would not necessarily be
inherent in the calculations which you did make?

4541 A. Yes, because we took the total gasoline deliveries throughout the station territory for all deliveries of gasoline only, so that the location of the plant is in the average time that is used in the calculations. Distances are reflected in the calculations on the Respondent's Exhibits 31 and following.

Q. Will you please refer to Exhibit 31-Q? As I understand it, Mr. Boatwright, 31-Q is a list of expense items that were not added to either the cost of doing business through the regular reseller business channel or with Ned's Auto Supply Company as reflected on 31-A.

A. That is correct.

Q. I understand that you have testified that your reason for not including the costs reflected in 31-Q on either side of that computation lies in the fact that it was impossible, in your view, to allocate it fairly as between gallons sold to Ned's and gallons sold to the balance of the reseller channel.

A. Yes, my reason and my belief based on my knowledge of the functions for which these expenses are incurred is that it would be an unfair charge to allocate these items on a straight gallon basis both to Ned's and to the regular reseller gallonage.

Q. Directing your attention to account No. 1000, "salaries—supervision," amount $33,760.06 on Exhibit 31-Q—

A. Yes.

4542 Q. Would that item include any portions of Mr. Raupaugh's salary and Mr. Blau's salary that was allocated to the reseller channel on form 189?

A. It would.

Q. You were interrogated at great length about the allocation of a portion of the salary of both of those gentlemen to the cost of gasoline to Ned's. Do you recall many questions along that line?

A. I do.

Q. Are you familiar personally with the testimony of Mr. Raupaugh as to the time that he expended and the nature of his contacts with Ned's Auto Supply Company?

A. I am not familiar with all of Mr. Raupaugh's testimony in that respect.

Q. It is my understanding that Mr. Raupaugh testified that he would have lunch with Ned's, one of them, oh, maybe once a month; he would have a visit in his office every few weeks or from month to month; I think he said that he would have either lunch or a visit with them at least once a month; from time to time a telephone call; from time to time a letter, and that was the extent of his efforts and expenditure of time. Further Mr. Raupaugh testified that in his efforts in connection with Ned's it was not a matter of selling gasoline but a matter of attempting to hold the customer against competitive offers or
4543 restrain him from being too belligerent about a failure to get a reduction in price.

Assuming—

Trial Examiner Ballinger: Judge, before you assume, as the Examiner recalls, Mr. Raupagh testified that he made a trip to Chicago.

By Mr. Hanley:

Q. Mr. Raupaugh testified that in the fall of 1946, some time in September, I believe, he made a trip to Chicago on an occasion when two of the Gershenson brothers were in Chicago and spent about a day, as I recall the testimony, in Chicago, and we must assume that it was in connection with that business, whether it all was or not.

Assuming all of those facts to be true, is there any way that you can think of that you could make any fair and reasonable allocation or that Mr. Raupaugh could make any fair and reasonable allocation of time actually spent on Ned's account; and, if so, what, in your judgment, would it amount to on a unit basis of sales, assuming sales to be, as I believe the evidence shows them to be, somewhere in the neighborhood of 4,000,000 gallons a year?

A. Well, I don't see how we could make from that description a comparative estimate of the time of Mr. Raupaugh in dealing with that account. Would a lunch hour in which Mr. Raupaugh had as company a member of Ned's Auto Supply be a charge? He would eat lunch
4544 anyhow. Is that one time, or what is it? Or—

Q. Well, I just assume Mr. Raupaugh paid the check.

A. Well, I would assume so, too. Or when he comes to Chicago—you say we assume that it was on account of Ned's Auto Supply business. Knowing the responsibilities of field managers, they never come into the office but what they have many other problems to deal with. Or how much time did it take to write a few letters or to talk on the telephone? I don't see how we could estimate that accurately.

Trial Examiner Ballinger: Would there be any approximation?

The witness: I don't see how it could be a very accurate approximation at this date, your Honor.

Trial Examiner Ballinger: Couldn't there even be a rough approximation?

The Witness: I wouldn't think so.

By Mr. Hanley:

Q. Suppose, Mr. Boatwright, that you arbitrarily assumed that he had lunch twice a month and spent as much as two hours on each occasion, and throw in another conference each month of an hour. That would be 5 hours a month spent with Ned's, and bearing in mind that you are dealing with a devisor of 4,000,000 gallons of gasoline or thereabouts, what, in your judgment, would the allocation amount to, assuming that you are arbitrarily deter-
4545 mining that there was that much time used.

Trial Examiner Ballinger: During what period of time?

Mr. Hanley: Each of the years since 1936.

A. Judge, you would have to have the value of the lunch tickets if Mr. Raupaugh paid the tickets to add to that.

By Mr. Hanley:

Q. All right. You assume a good lunch.

A. And when we get through, even with those assumptions, it wouldn't amount to over $125 a year, I don't think. I don't know. I don't know what the lunch would be. I don't know what Mr. Raupaugh's hourly cost would be. It might be considerably higher than that. I just couldn't answer.

Trial Examiner Ballinger: Do you know what his salary is?

The Witness: No, I do not.

By Mr. Hanley:

Q. Would that be in thousands or the tens of thousands, or where would it be in relation to 4,000,000 gallons of gasoline a year?

A. Well, at a thousandth of a cent per gallon on 4,000,000 plus gallons it would be a little over $400.

Q. Do you think from your knowledge of the business that $400 a year time allocation would pay for 12 lunches or thereabouts and the time of an hour or two con-
4546 ference, we will say 12 times a year?

A. I think it would.

Q. As I understand, you left 31-Q out of the calculation because in your judgment, to add it on the gallon for gallon basis, it would unfairly overburden Ned's gallons as compared to the other reseller channel stations; is that right?

A. Yes, sir.

Q. Let me direct your attention to the largest item on the list which appears to be "office expense—salaries." That is account No. 1200.

What have you to say as to the relative cost, gallon for gallon, of going into that account as between Ned's, on the one hand, and the balance of the reseller channel?

A. Well, it doesn't take a clerk much longer to write down the volume of a full truck load than it does to write down the volume of a partial truck load. Therefore, if the entries, Ned's Auto Supply, were primarily for truck loads, and they were, then the time factor in making the book entries incident to those deliveries would be almost identical with the time factors used in making a similar number of book entries with a tank wagon reseller account, which may be one of our company owned stations operated by a lessee. The difference would come from your divisor because when you take your time for making the entries, extend that by your salary factor, in one case you
4547 have a divisor which is perhaps double the other and, as a consequence, it just automatically follows that your cost per gallon for the record maintenance of an account of the type of Ned's Auto Supply was less than our cost per gallon for accounting in our regular tank wagon reseller business.

Q. Let me direct your attention to Account No. 1208, "credit information expense." In your judgment, how much credit information expense is attached to the handling of Ned's account?

A. Well, I would assume that the credit man probably got a credit rating on Ned's once a year. He may have gotten a credit rating on a six-month basis, but a report on the financial status of an organization of that size could be obtained for a dollar or two, so that actually there may be a total charge for credit information expense of around $5 as a maximum for the Ned's business.

Trial Examiner Ballinger: Where you have an established customer in good standing, do you obtain annually, or semi-annually, credit ratings?

The Witness: Not always, your Honor. In an account of that size and with that credit standing in the community, probably all that was actually needed would be a telephone call by our credit man to a credit exchange organization as the Chamber of Commerce, or something like that, but I assumed even the most extreme source of credit cost, and it would probably still be under $5 a year.

4548 By Mr. Hanley:

Q. You have explained your reason, Mr. Boatwright, why you think it would be unfair to charge the .42 of a cent per gallon which this account amounts to, including Ned's gallonage; that is, to charge it on a gallon for gallon basis as between Ned's and the balance of the reseller channels. If, however, you were to add .42 of a cent per gallon to column 1, regular reseller business, on 31-A, and .42 of a cent per gallon to column 2, Ned's Auto Supply Company, that would have the effect, would it not, of not only allocating any share of Mr. Raupaugh's salary as well as any share of these other accounts appearing on 31-Q on any allocated basis to Ned's gallonage, but it would have the effect, would it not, of allocating on an overall gallonage basis to Ned's gallons equally with all the other gallons in the reseller channel?

A. Well, it would have that effect. If you add the .42 of a cent per gallon to both columns, it is the equivalent of using gallonage for an allocation factor. It could be done. It would be a very unfair thing to do.

Q. You think it would be unfair but—

A. It could be done.

Q. —it could be done?

A. Yes, it would have been an unfair thing to do.

Mr. Hanley: I call attention, your Honor, to the
fact that in discussing this matter of allocation of Mr.
4549 Raupaugh's salary, considerable heat was demon-
strated by counsel for the Commission on the theory
that we had failed to attempt any allocation of the time
involved. It now appears from the testimony of the witness

that while he thinks it unfair to Ned's gallonage, that it would be a gallon for gallon allocation of all of the items on 31-Q, including Raupaugh's salary and Mr. Blau's salary, if the item .42 of a cent per gallon were added to the cost of Ned's business as well as to the regular reseller channel business. The effect of that calculation would in no wise modify in any particular the difference in the marketing cost, of course; it would simply be a wash-out transaction, but it would completely and does completely answer the contentions of counsel for the Commission, and while we think it an unfair thing to do and an improper thing to do, of course, we haven't any objection to the Commission taking that view of it, if they think that a proper thing to do. It in no wise changes the differential. We just think it isn't fair to do as a matter of proper accounting.

I made an offer of proof of this kind on the record some days ago, and I am now trying to qualify on that and simply offering that calculation may be done without objection on our part, but without waiving our position that we think it improper and unfair, and still maintaining our contention that we were conservative and fair in excluding 4550 31-Q from the calculation.

By Mr. Hanley:

Q. Mr. Boatwright, there has been a great deal of evidence elicited from you in connection with the question of advertising and the cost thereof in relation to the Exhibit 31-A and following pages, with particular reference to the matter of newspaper and billboard and general advertising; that is, advertising other than point of sale advertising.

I will ask you if you have made a computation which excludes from consideration that type of advertising?

A. I have.

Mr. Hanley: I will ask to have this document, which consists of four sheets, marked for identification.

Trial Examiner Ballinger: The reporter will mark the document Respondent's Exhibit 96-A, B, C and D, for identification.

(The document was thereupon marked "Respondent's Exhibit 96-A, B, C and D," for identification.)

By Mr. Hanley:

Q. I hand you what has now been marked Respondent's Exhibit 96-A, B, C and D, and I will ask you what it is, Mr. Boatwright?

A. Respondent's Exhibit 96-A is the same as Respondent's Exhibit 31-A with the exception that the marketing expense items of newspaper advertising and billboard
4551 advertising have been excluded from the calculation in figuring the differential and marketing cost between regular reseller business and Ned's Auto Supply Company. During that year in question there was an expenditure of $87,377.33 spent on newspapers and posters. There was no radio expenditure in the year 1937. Taking that out of the marketing cost incident to advertising for the tank wagon reseller channel, the differential for advertising cost between the regular reseller business and Ned's Auto Supply business is reduced from .213 cents per gallon as shown on Respondent's Exhibit 31-A to .081 for this same item, as is now shown on Respondent's Exhibit 96-A. The sum total of a differential in marketing cost, between the regular reseller business and Ned's Auto Supply, as is shown on Schedule A, Respondent's Exhibit 31-A, is .529 cents per gallon, excluding the newspaper and billboard advertising as is shown on Respondent's Exhibit 96-A; the total differential in marketing costs between the regular reseller business and Ned's Auto Supply Company amounts to .397 cents per gallon.

You will recall my testimony when I was on cross examination as to the reasons why such an elimination does not seem fair to me; do you not?

Q. Yes. Have you set that up, Mr. Boatwright, in this Exhibit 96-A, B, C and D?

A. Yes. The reasons why such a procedure does
4552 not seem fair is set forward in Respondent's Exhibit 96-B and 96-C, for identification. These are a condensation of the testimony offered in reply to a question on cross-examination, plus one reason which has occurred to me that did not occur to me when I was on the witness stand the other day.

Q. I will ask you specifically now, Mr. Boatwright, if you think it proper or a fair calculation to exclude the advertising cost in the manner in which you have done on 96-A, B, C and E.

A. Well, I don't think that is fair.

Q. Have you stated your reasons therefor in your explanation of the computation?

A. I have.

Trial Examiner Ballinger: When you use the word "fair" what do you mean? Proper?

The Witness: Proper is a good synonym.

Mr. Hanley: The Respondent offers Exhibit 96-A, B, C and D, for identification, in evidence.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: The hearing stands in recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Any objection?

4553 Mr. Austin: May I ask a question, your Honor?

Trial Examiner Ballinger: You may.

Examination on Voir Dire by Mr. Austin.

Q. On Respondent's Exhibit 96-B, for identification, that exhibit is entitled Respondent's Exhibit 31-A, modified to exclude the influence of newspaper and billboard advertising. I would like to ask why only newspaper and billboard advertising were excluded among the various items making up the total of $154,635 on Commission's Exhibit 84-A for the purposes of Respondent's Exhibit 96-B?

A. Yes. I feel that motion pictures, the use of which I explained in direct testimony, as you will recall, and printed matter and direct mail and dealers' trade papers and magazines, signs at the outlets, the miscellaneous items of expense, are more closely associated and incident to the point of sale advertising than is your newspaper advertising and your outdoor posters. You see, these two types of advertising expenditures which have been eliminated are those two which are primarily directed to the public in general, not associated in any way with particular outlets. It is merely in keeping with the questioning—the line of questioning that was put to me on cross-examination.

Frankly, I feel that the original treatment was a proper treatment to give; because of the extended series of 4554 questions on these, I thought I would show the significance of the amount under discussion, and that is exactly what that modified schedule A now indicated as Respondent's Exhibit 96-A does.

Q. Are not there some items in the miscellaneous group totaling $46,558 which are of a similar character to the newspaper and outdoor posters?

A. I couldn't testify that there was or that there was not. As you will recall, I stated that in compiling that breakdown, we took all of the leading items and did classify them. That was a special breakdown that was made at your request.

Mr. Austin: Your Honor, I have no objection to this going in subject to check as to the accuracy of the figures, which I have not made, and, furthermore, I assume that this would go in as a written statement of testimony that the witness would make if he were asked the question. I believe he has so testified.

Mr. Hanley: He has.

The Witness: Yes.

Mr. Hanley: And if you object on that ground, I would just ask him over again.

Mr. Austin: I don't object on that ground. I am just bringing it out, that it is simply a preparation in writing that might otherwise be given as oral testimony. 4555 Subject to check as to its accuracy, I have no objection.

Trial Examiner Ballinger: The Examiner does not understand that this would be offered as a modification of your prior exhibit.

Mr. Hanley: I had a statement to make on that, but I would like to ask the witness one other question, Judge.

Trial Examiner Ballinger: Do you have a statement to make?

Mr. Hanley: I do, as to the introduction of the exhibit, which will clarify that matter in your Honor's mind, but I wanted to ask the witness one other question suggested by the Voir Dire.

Trial Examiner Ballinger: Proceed.

Redirect Examination (Resumed) by Mr. Hanley.

Q. The type of advertising to which Mr. Austin's questions have alluded as being on 84-A, Exhibit 84-A, were left in this calculation and given consideration on both Ned's figures and on the reseller channel figures; were they not?

A. Well, not in terms of the motion picture, in terms of signs, you will recall, and in jewel globes and maps, they were left in and appear on both sides of the ledger. In terms of the motion picture, you will recall the explanation of the justification and reasoning for motion pictures 4556 used primarily at our dealer conferences and our sales meetings, which is purely a tank wagon reseller function, until it has disseminated out to the point where the dealers are borrowing the film from our library and perhaps showing it to their friends or their little social groups. That charge is primarily—well, it is incurred solely for purposes of training and proper merchandising procedure and then after it has served that purpose, we are glad to loan it to any dealer or Rotary Club or what will you for the free publicity that we get from it, that is all.

Mr. Hanley: If your Honor please, this offer is made for the reason that the question of the inclusion of this advertising item has been developed very extensively on cross-examination. We do not offer it as a modification of the Exhibit 31-A. We stand on 31-A as being the proper and fair and reasonable and most accurate computation of differential and cost that it is possible to devise. However, since the question was raised and since we had the figures which would indicate what the effect would be if the criticized items of advertising were eliminated, just consistently with our attempted position here to supply all that we can when we know what is desired, we are offering this exhibit merely for the information of the court and the Commission without in any wise waiving our position that 31-A as originally received and offered is the correct and proper computation.

4557 Trial Examiner Ballinger: Respondent's Exhibit 96-A, B, C and D, for identification, is admitted in evidence, subject, however, to check by counsel for the Commission as to the accuracy of the figures.

(The documents heretofore marked "RESPONDENT'S EXHIBIT 96-A, B, C and D," for identification, were received in evidence.)

By Mr. Hanley:

Q. Mr. Boatwright, in the compilation of Exhibit 31-A and following sheets, as well as in the compilation of Exhibit 96-A, B, C and D, all of the figures used in those computations were drawn from the regular and usual records and accounts of the Standard Oil Company?

A. Yes, they were drawn from the usual books of the company.

Q. Mr. Boatwright, we are about to advert to the Exhibit 33 series, and before doing so I want to ask you to distinguish between the type of computation attempted in the 31 series of exhibits and the 33 series of exhibits. That may be a broad question and not very easy to understand. I will try to explain. If I correctly understand, in 31-A, and so forth, you undertook to segregate out of the reseller group a purchaser or reseller of gasoline and distinguish the operation of sales to him from the sales to all of the balance of the reseller groups; is that correct?

A. Yes, sir. It was an effort to determine the
4558 marketing cost incident to a unit within a channel.

Q. Now, with reference to the 33 series of exhibits, am I correct in the understanding that in that instance there was no effort to segregate a unit out of any group, but an effort was made to distinguish the cost of marketing as between one group and another group; mainly, as between the whole reseller channel group, on the one hand, and the jobber group, consisting of these four jobbers, on the other hand?

A. That is a correct statement.

Q. Advertising to the 33 series of exhibits, Mr. Boatwright, which is the Oklahoma jobber cost survey, I will ask you first if that was made without any reference at all to this particular suit?

A. It was. That was made based upon actual operations in the year 1939 and was submitted in the early part of the year 1940.

Q. Suppose that you were to undertake a similar survey of the cost of sales to jobbers in the city of Detroit. Can you give us any idea at all about the length of time that would be necessary and the amount of work that would be involved?

A. Well, the study that was actually used encompassed about three months' time on the part of one of my analysts, several clerks in the Chicago office, and a substantial amount of time on the part of the clerical staff in the fields. Now, as you will
4559 recall, in my discussion of that study, I pointed
out the comparative simplicity of studying jobber operation costs at Kansas City and Wichita fields because the expense accounts of the manager would indicate the location of the expenditures, so that we could break down the supervision time devoted to Oklahoma jobber operations.

Thus, when the manager of our Kansas City field submitted an expense account incurred at Tulsa, Oklahoma, there was just one reason for him being down there, that was jobber business.

Now, if Mr. Raupaugh or Mr. Blau submitted expense accounts on luncheon in Detroit, I don't know who that luncheon was for or what it was about. So that it becomes practically a physical impossibility to look back in Detroit and get as dependable a breakdown as it was possible to do it in the Kansas City and Wichita fields, in the first place. And in the second place, the contacts are more frequent because of the proximity; the telephone contacts, and things of that type, and barring those, even if we could find a way to isolate such expense items, it would take a staff in the neighborhood of four months to count tickets, measure time, go through correspondence files, go through the different expense accounts to see if we could find expense that was incident to this type of operation, and so on, as we did in making the jobber study in Oklahoma.

Trial Examiner Ballinger: Judge, when a differ-
4569 ential is granted, isn't the question of justification
then present and then considered?

Mr. Hanley: It certainly is, Judge, very definitely.

Trial Examiner Ballinger: And doesn't the company granting the differential assume responsibility to take the chance of whatever costs and effort may be incurred in establishing the justification?

Mr. Hanley: If your Honor please, in answer to that question, I think I can make a very practical answer. If the question arose, to make it concrete, as to whether or not a differential of one and a half cents, for instance, would be granted a jobber in Detroit, in the first place, there might not be the experience upon which to base a study of the kind that Mr. Boatwright is talking about; and, in the second place, if there were, the cost of making it, in order to establish whether or not it could be proved with the certainty that you can prove that two and two equal four, would be so prohibitive that it would just involve turning down the business. The fact of the business is, from a practical standpoint, that these differentials, as has appeared in this case, both as respects the respondent and as respects customers throughout the country, turn on more or less round numbers.

We just know that we save approximately a cent and

4561 a half by doing this kind of business. Now, we just know that, know it by the experience of doing the business, that we would ever have to prove it as meticulously as we have undertaken to prove it here—I will say, frankly, I never dreamed, but I knew, as far as my individual opinion, for whatever it is worth, may be concerned, that any time any differential might have to be sustained, if it were complained against, but our marketing people know that in a general way what these things cost and what they can save by volume selling and by handling business in a certain way as distinguished from another way. So that question is considered, considered along with even the competition that it is necessary to meet, and oftentimes we don't meet competition fully. We lose business before we meet it fully, although I don't think costs have any relation to competition at all under this statute, or at all, but the clear answer to your question is that, of course, it is considered, but it can't be considered in the detail of thousandths of a cent. That would be utterly prohibitive, to do the things that the government says we ought to have done here and it would put us out of business. It would put anybody out of business.

By Mr. Hanley:

Q. Mr. Boatwright, do you think from your knowledge of all of the operations of this company and, particularly, with refence to the operations in selling jobbers in

4562 Oklahoma and in selling jobbers in Detroit, that the Oklahoma study, Exhibit 33 and following pages is entirely comparable with the costs in the Detroit area, in the sense that the Oklahoma costs as portrayed in that exhibit are as great or greater than in the Detroit vicinity?

A. My testimony has repeatedly brought out that because our accounting practices are the same, the identical code of accounts used is the same, the only difference being that in our jobber operations in Oklahoma we have one man or two men at the time this study was made devoting their time entirely to selling, but they sell in the same manner that our other salesmen sell. They have the same general instructions that I know without any question that .25 cents per gallon is high for jobber operation costs in the Detroit area.

4563 Q. As a matter of fact, don't you know that many jobbers operate on a margin of petroleum brokers?

A. Petroleum brokers as a rule try to get a quarter of a cent, and with that quarter of a cent they defray their various and sundry expenses. Many a petroleum transaction is handled by petroleum brokers on an eighth of a cent, and I have heard of cases where they have even shaved that.

Mr. Austin: Your Honor, I ask to strike out all this matter relating to petroleum brokers on the grounds of irrelevancy and immateriality. We do not know what the expenses of petroleum brokers are. We do not know what their duties are, and how they function, whether their functions are in any way comparable to the functions of the Standard Oil Company. I think we have introduced an extraneous issue.

Trial Examiner Ballinger: I will hear from you, Judge.

Mr. Hanley: I think it is entirely competent, Your Honor, for this reason, that the Standard Oil Company in selling these jobbers and using the facilities of the office in Detroit to handle that business is really brokering carload lots to these jobbers. That is really all it amounts to. It is loaded at the refinery and then brokered right through to the—ultimately to the jobber. Of course, it stops in the terminal, but from there on, as it is picked up by the Detroit office, it is really a brokerage operation. Mr. Lead-
better picks up his phone and calls Raupaugh, "I want
4564 a carload or two carloads of gasoline." Raupaugh
relays the call to the terminal, and ultimately there is
a billing and a check comes in. And that is just all there is to it. That is all a broker does. We have brokers in Chicago who haven't anything but a telephone, Judge, and that is the only operation we have up there, really.

Trial Examiner Ballinger: Read the question.

(Question and answer read.)

Trial Examiner Ballinger: The objection is overruled.

Mr. Austin: Your Honor, that is going to necessitate my going into examination and possibly calling petroleum brokers and going at great length possibly to find out what these are. I won't say at great length, because I don't know, but I think it is quite obvious that a broker who takes an order and passes it along to a seller and collects a commission has no advertising expenses, has no delivery expenses. He does nothing more than what brokers generally do. He takes an order, passes it along, and brings the customer and seller together. That is the broker's business.

Now, that is certainly not the function of the Standard

Oil Company. The attempt here is to compare the Standard Oil Company's expenses, the marketing expenses of a seller, with the expenses of a broker bringing customers and sellers together, and it seems to me that those func-
4565 tions are entirely different, and unless the similarity
of a broker to the Standard Oil Company is shown, why, the testimony has no bearing. Certainly from what I know about brokers, a broker and the Standard Oil Company are entirely two different sorts of people. One is a seller, the other is merely a middle man, and I can't see how the expenses of a broker can in any way be material, or how his functions can in any way be similar.

Trial Examiner Ballinger: The Examiner does not understand or appreciate the materiality of the question or the answer.

Mr. Hanley: Well, I do not want to complicate the thing. I just want to demonstrate fairly what this company really does.

Trial Examiner Ballinger: Well, they do more than act as a broker.

Mr. Hanley: Yes. They make the gasoline. Ultimately they make the gasoline, I appreciate that, Judge, but we are dealing here with a marketing cost and a marketing operation.

Trial Examiner Ballinger: Well, they do more than a brokerage business. A broker ordinarily receives and transmits an order.

Mr. Hanley: Well, I do not want any controversy about the thing. I am willing to concede Counsel's motion as to the brokerage feature.

4566 Trial Examiner Ballinger: Well, that portion of the question and answer pertaining to brokerage is stricken.

By Mr. Hanley:

Q. Now, Mr. Boatwright, from your knowledge of the situation relative to the marketing to the jobbers in Detroit and your knowledge of the petroleum business generally, would you personally be willing to assume all of the marketing obligations and expense assumed by the Standard Oil Company for a quarter of a cent a gallon in sales for Detroit jobbers?

Mr. Austin: I object to that question, Your Honor. It is irrelevant and immaterial, and I think it is also probably incompetent.

Trial Examiner Ballinger: Read the question, please.

(Question read.)

Trial Examiner Ballinger: The objection is sustained.

By Mr. Hanley:

Q. I will add to that question, Mr. Boatwright, if you would be willing to do what I had suggested in the former question, and meaning by that that you assume the credit risk, pay all of the bills, perform all of the marketing functions, keep the books, do the accounting, run your own office, just do everything and pay all of the expenses that are now assumed and paid by the Standard Oil Company for a quarter of a cent a gallon.

4567 A. I certainly would.

Mr. Austin: The same objection, Your Honor.

Trial Examiner Ballinger: Is that question subject to the same objection?

Mr. Austin: Well, he is asking the witness if he would be willing to do certain things for a certain amount of money.

The Witness: My answer is certainly "Yes."

Trial Examiner Ballinger: The objection is overruled.

By Mr. Hanley:

Q. Do you think, Mr. Boatwright, candidly and honestly, based on your knowledge and experience, that it costs the Standard Oil Company a quarter of a cent a gallon to market gasoline to these jobbers in Detroit?

A. I do not.

Q. Now, you have said that there is a considerably higher volume sold these jobbers in Detroit yearly than was sold the Oklahoma jobbers, the volume being approximately three times as high in Detroit.

A. Yes, sir.

Q. Is there any question at all in your mind, having in mind your knowledge and basing your answer on your knowledge of the operations in both instances, that that
higher volume in Detroit, your jobbers in Detroit,
4568 would reduce the cost incident to the greater number
of jobbers and the lower volume in Oklahoma?

A. There is no question in my mind but what the unit cost of operation in Detroit would be substantially lower than the unit cost of complete operation in Oklahoma, where a greater number of jobbers existed doing a lesser volume.

Q. Now, give consideration, please, to another element of difference.

In Detroit the jobbers are all within the city or immediate metropolitan area, as is the office of the Standard Oil Company.

A. That is correct.

Q. In Oklahoma you have testified that the jobbers were in Oklahoma and the supervising officers were in Wichita and in Kansas City.

A. Yes, sir.

Q. Furthermore, there was some distance between the jobbers, themselves, in Oklahoma, as I understand it.

A. Yes. The jobbers in Oklahoma are scattered fairly well throughout the central part of the State, extending not quite down to the southern border of the State of Oklahoma.

Q. Now, giving consideration to that fact, what effect, if any, would it have in raising the cost of marketing to jobbers in Oklahoma as contrasted with the marketing to the jobbers in Detroit?

4569 A. Well, giving consideration to the question of distance, alone, in terms of time, the cost of the supervisory staff incurred by traveling in Oklahoma would be higher than would a similar cost of contacting your accounts be in Detroit, where your accounts are all concentrated in the Detroit metropolitan area.

Q. Mr. Boatwright, will you please refer to your copy of Exhibit 33-A.

A. Yes, sir.

Q. Directing your attention first to Item (a) under Item 2, entitled "Accounting Cost," a tenth of a cent.

A. Yes, sir.

Q. With respect to that specific item, what is your judgment as to whether that cost is higher than the same item of cost would be in Detroit?

A. I am convinced that it is higher than a similar accounting cost would be in Detroit, primarily because of the differences in the unit of sale to the jobbers in Oklahoma and jobbers in the Detroit area.

Q. What have you to say as to the same question directed to Item (b), credit cost, three-hundredths of a cent?

A. The same answer would apply.

Q. During your testimony it was developed, Mr. Boatwright, that you had excluded from your computation of accounting and credit cost two of the bad debt jobbers 4570 because of the fact that they required special attention, going bad financially, something of that sort. Do you recall that?

A. I do.

Q. Do you think it was proper and reasonable and sound accounting to exclude them?

A. I do, definitely.

Q. Have you made a computation to determine what influence it would have had on the items (a) and (b), respectively, accounting cost and credit cost, had you not excluded them?

A. Yes.

Q. Will you tell us what that was?

A. Yes. The two companies excluded from the computation were the Gibson Oil Company and the Kramer Oil Company. Had the accounting cost incident to those two accounts and their volume been included in the computation, the cost of accounting would have been reduced from .10 to .078.

On the other hand, credit cost would have been changed upward from .03 to .058.

Adding the accounting and the credit cost as reported in Respondent's Exhibit 33-A, it would amount, as calculated, to thirteen-hundredths of a cent. The accounting and credit cost including these two accounts which were eliminated would amount to .136, or a difference of six-thousands of a cent.

Mr. Hanley: Again, if Your Honor please, this 4571 evidence is offered, not because we think there should be any modification of the Exhibit 33-A; we feel that 33-A is sound as it was calculated, and we stand on it. We offer the testimony and this calculation for the reason that there has been criticism of the method employed in excluding the two bad debt jobbers, and this evidence is merely offered for the information of the Commission, to show that the influence of the method employed or suggested by the Government would have the trivial effect of six-thousands of a cent.

By Mr. Hanley:

Q. Directing your attention, Mr. Boatwright, to item (e) on 33-A, "Supervision and Selling Cost of six-hundredths of a cent," going into that item, as I understood your testimony, were the expenses of two salesmen who were exclu sively employed in servicing the jobbers in Oklahoma; is that correct?

A. Yes. Under the item of six-hundredths of a cent is limited to that portion of their time devoted to refined oils and gasoline.

Q. Yes, I understand.

A. Yes.

Q. Since that time has there been any change in the method of selling in Oklahoma?

A. Well, the object of the study as originally assigned was to ascertain whether economies of operation were available. One of the results of the study was that all of
4572 the jobbers in Oklahoma were placed under one field
manager, first, to reduce our supervision cost; secondly, we have since the study was made handled this entire group of jobbers with equally good success in terms of sales volume with one salesman, which approximately reduces that under current-day conditions, provided a second study could be made, to something slightly in excess of one-half of the six-hundredths. That action has been completed. We are now operating with one salesman.

Q. Are your personally familiar with the fact of whether or not gasoline salesmen call on the jobbers in Detroit?

A. Well, I understand that they do certain work in connection with the agreements.

Q. Now, I am not sure whether it is in Mr. Raupaugh's testimony or that of the jobbers, or both, but assuming that there is testimony to the effect that gasoline salesmen do not call on these jobbers for the purposes of selling gasoline and perform no services in that direction, assuming that to be a fact what have you to say as to whether or not that would tend to make the cost of selling lower or higher in Detroit than in Oklahoma, either at the time you made this study or since the staff was reduced to one salesman in Oklahoma?

A. Well, it should tend to reduce your selling cost to the Detroit jobbers below that currently incurred in Oklahoma, because your selling function would then be
4573 limited largely to the proportion of the costs I have
referred to as supervisory costs in the Oklahoma analysis. It would be lower than even current operations in Oklahoma.

Q. Now, assuming again, Mr. Boatwright, that even if a salesman, or salesmen, called on the Detroit jobbers in connection with gasoline matters, and giving consideration to the differences in distance from the headquarters of the respective salesmen in Detroit and in Oklahoma, what would be your judgment as to whether the cost in Detroit would be greater or less than the cost in Oklahoma?

A. Well, distances mean greater operating and maintenance cost on your vehicle which a salesman drives. It means more expense accounts for the salesman's meals and his lodgings. Therefore, the very existence of greater distances in Oklahoma would tend to increase the company's cost of doing business over what our costs are when they are incurred in a condensed metropolitan market.

Q. Now, with reference to items (b) and (c), which you have already discussed, and (d), general office expense, appearing on 33-A, what have you to say as to your judgment as to whether each of those items of cost is as great or greater in Oklahoma than it would be and is in Detroit?

A. Well, as each of these items have been discussed previous days, I have pointed out that I was convinced that each of these per-gallon cost figures were high for the
4574 application in the metropolitan market of Detroit. I
do not think that there would be any difference as far as item (d), general office expense. I think that would probably apply just about as well to Detroit as it would in the case of Oklahoma jobbers, with the exception that you have a larger divisor, and you are already down to a hundredth of a cent, and in each case it would involve the getting clearance of price, perhaps telephone calls or telegraph, expenses of that nature, which, when divided by the larger volume, would naturally reduce your per-unit cost. But we are down to a very low cost now. The larger volume would likewise be an important factor in reducing the unit cost as far as credit, supervision, and selling expense is concerned.

Q. Referring you to item (e), advertising (point of sale) on 33-A, do you recall having been examined at length on that item, Mr. Boatwright, as to displays and signs of various service stations?

A. I do recall.

Q. From your experience and knowledge, do you know approximately what the average service station in the vicinity served by the Oklahoma jobbers does in the matter of oil gallonage?

A. It would be in the neighborhood of 50,000 gallons per year.

Q. And there was handling somewhere in the neighborhood of 4 million gallons, plus, a year by the jobbers, was there not?

4575 A. Yes.

Q. Well, assuming that they served average stations, that would involve serving how many stations?

A. Well, it would be approximately 80 stations.

Q. Now, assuming that it is just half that number, Mr. Boatwright:

A. Forty?

Q. Just assuming for the purposes of this question that it is just half that number, forty, the evidence shows in this case that the Detroit jobbers are serving approximately 105 or 106 service stations, and doing 14 million gallons of business, approximately.

Now, as to cost of point of sale advertising, what have you to say as to whether it would be less in Detroit per unit of cost, that is, per unit of gallon, than it would be in Oklahoma, giving consideration to the 4 million gallons in Oklahoma, and the 14 million gallons in Detroit.

A. And assuming 40 units in Oklahoma and 106 in Detroit?

Q. Just arbitrarily assume 40 units, just half of what you may reasonably assume, I take it.

A. That on the basis of your assumptions, your point of sale advertising cost in Detroit would be lower than it is in Oklahoma, because your through-put of each unit of operation would be greater in increasing your divisor for the point of sale cost incurred at that outlet.

4576 Q. Are you satisfied that item (e), advertising (point of sale), on Exhibit 33, indicates as great or greater a cost than the same item in Detroit?

A. Well, I am satisfied that the five-hundredths of a cent reported under item (e) is as great or greater than any advertising costs incurred incident to the jobber operations in Detroit.

Mr. Hanley: May we have this document marked for identification?

Trial Examiner Ballinger: The Reporter will mark the document Respondent's Exhibit 97, for identification.

(The document was marked for identification "Respondent's Exhibit 97," for identification.)

By Mr. Hanley:

Q. Mr. Boatwright, I hand you what has been marked Respondent's Exhibit 97, for identification, and ask you what it is.

A. Respondent's Exhibit 97, for identification, is a statement of the sales of the Standard Oil Company according to the classification of leased service stations. It shows the refined oils, tractor fuel, naphthas, and gasoline, motor oils, motor greases, total all products sold through this channel of distribution, on a current month and on a to-date basis. In addition, at the lower part of the exhibit there is a space indicating the transporation of leased station,
4577 segregated among company-owned, company-owned on leased ground, the consolidation of those two, the P.O.S.S.L.'s formerly operated by the company and the P.O.S.S.L.'s acquired since company-operated outlets, and a total for the P.O.S.S.L. type outlets.

Mr. Austin: For what period is that, Mr. Boatwright?

The Witness: This is a blank form.

Mr. Austin: Oh, a blank form?

The Witness: Yes.

By Mr. Hanley:

Q. Is that such a form, Mr. Boatwright, as was used in preparing the calculation appearing in Item No. 1 on Exhibit 33-B?

A. That is the form which was used in preparing the calculation following the caption "Leased Service Station, Tank Wagon Gallons, Excluding Motor Oil and Grease Gallonage, Form 439."

Mr. Hanley: If Your Honor please, this is one of the documents which was requested by the Government some days ago, and we now produce it and offer it in evidence.

Trial Examiner Ballinger: It is merely a form, is it?

Mr. Hanley: Yes; sir.

The Witness: That is right.

Trial Examiner Ballinger: Any objection?

4578 Mr. Austin: I would just like to ask who fills out this form and for what period is it filled out?

The Witness: In the explanation of the form I stated it was filled out both monthly and to date. It is filled out and prepared entirely by the accounting department.

Mr. Austin: What do you mean by "monthly and to date"? I understand "monthly" but I do not understand the "to date."

The Witness: Well, you will notice the segregation in the form. Here is your current month (indicating). Here is the current year (indicating). As we move through the year, we add and carry the accumulative to date accomplishment through this channel. So when the report is received we have the year in total on the lower half of the sheet.

Mr. Austin: It is a monthly and annual form?

The Witness: Monthly and annual form, but as we move through the year we carry it on a to date basis for each of the months.

Mr. Austin: No objection.

Trial Examiner Ballinger: Without objection, Respondent's Exhibit 97, for identification, is admitted in evidence.

4579 (The document heretofore marked for identification "RESPONDENT'S EXHIBIT NO. 97," was received in evidence.

By Mr. Hanley:

Q. Will you look at your copy of Exhibit 33-D, Mr. Boatwright.

A. Yes, sir.

Q. You observe that the bottom of the page, the calculation showing percentages of time having to do with the Kansas City and Wichita offices, supervision and selling cost of gasoline and refined oils?

A. I do.

Q. Do you recall having been asked a number of questions on cross-examination as to why there should be a variation in time as between motor oils and gasoline sales effort on the part of salesmen who are dealing with both?

A. I do recall that series of questions.

Q. State the fact as to whether or not there is a great variation in various places and at various times as between the effort expended by a salesman and different salesmen between motor oils and greases, on the one hand, and refined oils and gasoline, on the other hand, and explain the reason for it if such be the fact.

A. Well, let me say first that there is a wide difference of the proportion of time that different salesmen devote to given products. I think you will recall my testimony a few days ago when I pointed out that certain sales-4580 men like to sell certain products, and do sell them, and devote an unusual amount of time to that product. It is not what we wish them to do, but it is a human tendency. Therefore, there is a difference in that respect. There is likewise a difference in the ratio of time devoted to selling a product at different periods of the year. As a rule, a salesman will devote his time to a heavier grade of motor oil in the forepart of the year than subsequently. Then there is the difference in the proportion of time devoted by salesmen to motor oil among our various sales fields. A salesman's efforts may in part reflect the management's emphasis, and again may in part reflect the management's emphasis as that manager reflects the general office emphasis; so we have variations among fields. And then we have variations within a field at the same time among a group of men.

Further, you will recall that in connection with the Wichita estimate I pointed out the condition which existed in motor oil distribution in that area, where it is handled through a warehousing arrangement, the warehouse being run by a former salesman of the Standard Oil Company. The Wichita management just doesn't have to worry as much about servicing jobbers with motor oil as does the Kansas City management.

Q. Just to give us an example, what usually happens in our company if the reports from some given field 4581 show motor oil sales falling off badly, for instance?

A. There is an immediate follow-up to see what has happened to our motor oil sales in that community.

Q. And usually what reflection, if any, is there in the ratio of time the salesmen use in connection with motor oil as compared with gasoline?

A. Salesmen spend their time selling motor oil.

Q. Now, that sort of thing is going on all the time, isn't it, Mr. Boatwright?

A. Yes, it is. Yes.

Mr. Hanley: May I have this document, one sheet, Your Honor, marked for identification?

Trial Examiner Ballinger: The Reporter will mark the document "Respondent's Exhibit 98," for identification.

(The document was marked for identification "Respondent's Exhibit 98.")

By Mr. Hanley:

Q. Mr. Boatwright, in your preparation of Exhibit 33 A, you have indicated under item (e) tank wagon reseller marketing cost, for the year 1940, 1.72 cents, and for the year 1939 1.81 cents. Do you find that?

A. I do.

Q. Is there included in that item of cost newspaper advertising and billboard advertising and possibly radio advertising?

4582 A. Yes, those three forms of advertising are included to the extent that they are allocated to the tank wagon reseller sales for the respective years as a cost of doing business through the tank wagon reseller channel.

Q. Now, have you prepared a calculation which excludes for each of the years 1939 and 1940 the items of newspaper, billboard, and radio advertising as a part of the cost of tank wagon reseller channel?

A. I did.

Q. I show you Exhibit 98, for identification, and will ask you if that is the calculation which you referred to.

A. It is.

Q. Do you regard the deduction of the items of advertising referred to from the tank wagon reseller marketing cost, as appears on Exhibit 33-A, as a proper and sound accounting practice to determine the differential between selling tank wagon reseller channel and through the jobber outlet in Detroit?

A. I regard the procedure followed in preparing 33-A as being the proper procedure.

Q. Are your reasons for that the same as the reasons which you have assigned in Exhibits 96 A, B, C, and D?

A. They are.

Mr. Hanley: We offer the exhibit in evidence, Your Honor.

4583 Trial Examiner Ballinger: Mr. Boatwright, you personally made these computations?

The Witness: I did, sir.

Trial Examiner Ballinger: Any objection?

Mr. Austin: I have no objection, Your Honor, subject to check as to the accuracy of the figures, which I have not had an opportunity to do.

Trial Examiner Ballinger: Subject to check by Counsel for the Commission, Respondent's Exhibit 98, for identification, is admitted in evidence.

(The document heretofore marked for identification "RESPONDENT'S EXHIBIT NO. 98," was received in evidence.)

Mr. Hanley: If Your Honor please, I wish that there may apply to the offer of this exhibit the statement similar to that which Respondent made in connection with the offer of Exhibit 96-A, namely, that we do not offer this exhibit as a modification of 33-A, but we stand upon Exhibit 33-A and assert that to be the proper and the accurate computation of the cost differential. We offer this exhibit merely for the purpose of informing the Commission as to what the defect would be if the advertising which has been criticized by counsel in the cross-examination were eliminated from the calculation.

By Mr. Hanley:

4584 Q. Mr. Boatwright, during your cross-examination you were requested to obtain certain information in connection with what is known as E.L.A. expense, or equipment loan agreement cost expense, and it was agreed on your behalf that you would be prepared to give some explanation, at least amplify the one you did give, at this time. Would you please tell us what that is, and what is done with it?

A. Well, upon cross-examination I was asked relative to the depreciation account of E.L.A. expense entered into the tank wagon reseller channel. I requested the privilege of ascertaining how that was determined before testifying in final form on that matter.

Let me say first that the amount of the capital investment represented by this class of dispensing equipment is not carried on our books by channel or by the kind of equipment. It is a classification of equipment for all channels. Now, because no differentiation is made between channels, or type of equipment, the account of depreciation is figured first on this general class of investment. After the depreciation costs have been determined it is then allocated among the channels on an all-gallonage basis, excluding direct shipments. For this reason the four thousand plus dollars, which was the depreciation amount shown in the tank wagon reseller channel for the Detroit field, was not a direct charge to the reseller channel, but 4585 was rather an allocated amount.

Our purpose in expanding the depreciation figure was to arrive at a total E.L.A. investment cost for the reseller channel only, so that an application of the tax rate in Detroit to this amount would determine the proportion of the taxes incident to the ownership of this class of property.

Mr. Austin: Judge Hanley, do you mind if I ask a question on that point?

Mr. Hanley: Go ahead.

Trial Examiner Ballinger: Proceed.

Mr. Austin: Was not the tank wagon reseller channel expense of dispensing equipment loan opposite account 070 on Form 189 very much larger for 1940 than for 1937 for the Detroit field?

The Witness: The yearly expense as shown opposite account 070 was smaller in 1940 than in 1937.

Mr. Austin: The figure of $4,305 on Respondent's Exhibit 31-N I believe is the depreciation figure and not the E.L.A. expense figure.

The Witness: Then you are referring to the account 111, are you not?

Mr. Austin: In other words, is the figure $4,305.66 on Respondent's Exhibit 31-N taken from account 111 or from account 070?

The Witness: That is taken from account 111.

4586 Mr. Austin: That is all.

The Witness: And, again, the depreciation amount in 1940 is less than the depreciation amount in 1937.

By Mr. Hanley:

Q. A few more general questions on purely accounting features here, Mr. Boatwright. I would like now to advert to an instance appearing on page 3855 and 3856 of the record, where Counsellor Austin seems to have taken off his hat and turned Accountant Austin and testified to some extent.

Have you read this record which has to do with the extension of time for making truck deliveries?

A. I have, yes.

Q. Let me call—

Mr. Austin: What is that in connection with, Judge?

Mr. Hanley: A calculation which you made and put in the record in connection with the extension of truck-hours by an hourly labor rate, I think.

Mr. Austin: Well, I simply asked the witness what would happen if certain figures were multiplied and divided and whether that would give a certain result. I do not believe I gave or attempted to give any opinion evidence of any kind.

Mr. Hanley: Well, assuming that your addition and multiplication and division is correct, I want now to demonstrate that it does not make any sense, anyhow.

4587 By Mr. Hanley:

Q. If you will look at 31-C, please, Mr. Boatwright, and your attention is invited to the calculation at the bottom of that page, which indicates a unit item of salaries to drivers of .114 cents. Do you find that?

A. Yes, sir.

Q. And also to Exhibit 31-E, and particularly the last line thereof, total hours, and then a series of figures following that. Do you find that?

A. I do.

Q. So this may be understood on the record, I will read the statement made by Mr. Austin:

"During the recess, Your Honor, I have made the computation which has been referred to in the previous questions and answers, for the purpose of determining the driver's salary cost per gallon for gasoline deliveries by truck 34270 and 29525 for 1940, and computed in the method which has been stated the average driver's salary cost per gallon for those two trucks as .096 cents. Referring to Respondent's Exhibit 31-C, the driver's salary cost per gallon, which is used there for the average for the Detroit area, is given as .114 cents. There is a difference, therefore, of .018 cents, the resulting difference as between the two methods of computation."

Then it was determined that there should be a tax added,
which Mr. Austin conceded, and that raised the com-
4588 putation that he made to .099 cents, with the resulting
difference of .015 cents between the two different
methods of computation.

Trial Examiner Ballinger: Did you mean that Mr. Austin conceded or that Mr. Boatwright conceded?

Mr. Hanley: No. I am reading the record. Mr. Boatwright asked if the tax of 3 percent had been included by Mr. Austin, and Mr. Austin said, "No, I did not. Thank you, Mr. Boatwright."

And I inquired, "May I inquire of counsel as to how to figure the tax?"

Mr. Austin said, "Yes. It is the same as on Respondent's Exhibit 31. The tax there is given as .003 cents, and I will use the same figure in the computation I have just made. In other words, that is the nearest thousandth of a cent in both cases, so that the total will be instead of .096, Your Honor, .099, and the resulting difference would be .015 cents between the two different methods of computation."

By Mr. Hanley:

Q. Now, Mr. Boatwright, you have that in mind?

A. I do.

Q. If you have it in mind, I wish you would please tell us why you think your computation of .114 cents per gallon is correct as contrasted with Mr. Austin's calculation of .099 cents per gallon.

A. Well, our calculation is, as I have explained,
4589 merely a recapitulation of the time of gasoline trucks
used out of te Scotten Avenue, Lycaste, and North Detroit plants for delivering gasoline only against the time for which those trucks were used for gasoline only. It represents the sum total of the trucks that were used for gasoline only during the time analyzed.

Now, we have some 600-gallon trucks, we have some 900-gallon capacity trucks, some in the neghborhood of ten or eleven, and some in the neighborhood of fifteen and slightly over fifteen, 1,523, or something like that neighborhood. Therefore, with some of the smaller retail outlets served by smaller trucks to cut down our heavy equipment cost in moving a large unit to take care of those accounts, we will have a slightly higher per-gallon labor cost of delivery. That is one reason.

The second reason is that these two trucks, as you will notice, operated a total of 4,254 hours during the year. That is an average of better than 40 hours per week per truck or practically constant operating efficiency. That just is not maintained on an entire fleet of trucks. But we will find instead where trucks must be in the warehouse for emergency calls, and when the emergency calls come in they must be utilized to make those deliveries.

Therefore, I feel that the calculation of the actual ex-
perience of the company, which is purely a recapitu-
4590 lation of the actual gallons and the actual time for
all of the trucks delivering gasoline out of these three plants, represents the best and in fact the only real standard that we can compare that.

Q. Is it not a fact, Mr. Boatwright, that the time calculation on 31-C is a picture of the general truck delivery situation?

A. Oh, it is definitely a picture of our general operation because it recapitulates the gasoline deliveries and the time for gasoline deliveries of all the trucks when they were used exclusively for gasoline.

Q. Whereas, is it not true that on 31-E you were dealing with two particular trucks which you have described in your explanation of the entire Exhibit 31?

A. Yes, Exhibit 31-E, we were dealing with two trucks which were representative of the type of trucks used in serving such an account as Ned's Auto Supply.

Q. So if Mr. Austin's calculation were adopted, would it not have the effect of applying to the entire reseller channel delivery expense, the result of the calculation based upon non-representative truck units?

A. Well, it would be non-representative for delivery to the rank and file of all outlets. These two truck units are simply representative of cost incident to the delivery to
an account of the size of Ned's Auto Supply or other
4591 large reseller accounts.

Q. I understand that, Mr. Boatwright, but you are endeavoring to contrast Ned's operation with the rank and file?

A. That is correct.

Q. That is exactly what you were trying to do?

A. And for that purpose the over-all actual cost of the company for serving our tank wagon reseller accounts out of these three plants is a truly representative figure.

Q. And Mr. Austin's calculation, as I understand you, would then fail in that objective?

A. I think it does.

Q. While I am on that subject, Mr. Boatwright, and referring now to page 3855 of the record—

Mr. Austin: If Your Honor please, I would just like to make at this point a brief statement in response to the statements made by counsel, that I was attempting to be an accountant and that I had offered some statement. I offered no statement as being any better or more accurate than M. Boatwright's statement. I think there should appear in connection with the testimony that has just been given.

The question I asked Mr. Boatwright was one regarding inconsistencies in his method of computation of two different exhibits wherein he used one method in one case and another method in another case, and I merely asked
him whether the method of computation I suggested,
4592 if used on Exhibit 31-C, would not have been equally
as accurate and would have been, in fact, exactly similar to the method which Mr. Boatwright, himself, used on Exhibit No. 31-F, and his answer was in the af-

firmative, and I was not proposing a more accurate method but merely showing an inconsistency between two different methods in this same group of computations.

Mr. Hanley: I am just going to go into that affirmative answer now, Mr. Austin:

I may say there isn't anything ill-natured about your being an accountant, if you want to be.

By Mr. Hanley:

Q. Referring to page 3855, I will have to read you a couple of questions. You were asked this question:

"Suppose we multiply the total hour figure, which is 4,254, by 95.2 cents, and divide the product by 4,228,839. Would the resulting figure be the average driver's salary cost per gallon for these two trucks for 1940?

"A. Yes, on an over-all basis, it would be.

"Q. Wouldn't that method of computation of average driver's salary cost per gallon for delivery of gasoline to Detroit tank wagon resellers be just as accurate as the method of computation used for the equipment cost at the bottom of Exhibit 31-F?

"A. Yes, it would."

Do you care to make any modification or correction 4593 in that last answer "Yes, it would"?

A. Yes, I feel that that should be modified. I see now that my interpretation of the question was too narrow in response to the first question. The question was limited to the two trucks. The answer to that first question was correct. In answer to the second question, apparently I carried over the interpretation still to the two trucks, whereas actually I see an intent now which was broader than my answer should be, and the answer should be that it is not as representative of the labor cost for delivery to the rank and file of reseller outlets in the Detroit area.

Trial Examiner Ballinger: Do you care to offer any explanation?

The Witness: Well, the explanation appears in the record, Your Honor, just preceding the reading of the questions on the part of Judge Hanley.

By Mr. Hanley:

Q. You mean by that that the explanation you gave as to the fallacy that you think exists in Mr. Austin's computation is your reason for desiring to amplify your present answer?

A. That is correct.

Trial Examiner Ballinger: Where does that appear in the record?

Mr. Hanley: Just immediately preceding.

Trial Examiner Ballinger: Have you put the
4594 record page in?

Mr. Hanley: No. It is in this record, just a discussion about the computation.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Mr. Boatwright, directing your attention to Exhibit 31-F and asking you to have in mind the answer to which you have modified on page 3855 of the record, will you please tell us, first, if you used the two trucks with which you were dealing in the Exhibit 31 series to determine an over-all equipment cost for the reseller channel?

A. I did.

Q. Will you explain what reason you may have for using those two trucks as an over-all equipment cost figure or to arrive at an over-all equipment cost figure, whereas you think it an improper procedure to use the two trucks to arrive at a driver cost per gallon over-all or relative to the entire reseller channel?

A. Yes. In preparing the calculations in Respondent's Exhibits 31-E and 31-F, it was necessary that we use trucks which were used for the delivery of gasoline only throughout the entire year. The difficulty we were
confronted with was that most of our trucks are used
4595 for delivery of gasolines during the summer period,
and as we come into the fall and winter period they are diverted gradually, one after another, to the servicing of fuel oil accounts. To transfer a gasoline truck to a fuel oil truck requires cleaning and expense to the company. Likewise, the equipment cost of delivery of fuel oil differs from the equipment cost of delivery to the tank wagon reseller account. Therefore, it became necessary in our very processes of calculation of the equipment cost of serving tank wagon reseller, that we limit ourselves to the trucks that were used only for that purpose the year around, which is what we have done in the adoption of these two trucks for the equipment cost comparison.

Trial Examiner Ballinger: Take a recess for three or four minutes.

(There was a short recess taken.)

Trial Examiner Ballinger: Come to order.

By Mr. Hanley:

Q. Mr. Boatwright, I don't think I asked you this:—I may have—as to what would have been the effect had you included Dearborn commission delivery costs along with the drivers' salaries, which you did use in computing the costs set up in Exhibit 31-A and the following pages.

A. Well, it would have tended to increase the cost of serving our regular reseller outlets above the costs actually used. The Dearborn commission costs above 4596 the tank wagon salary driver costs, and if we had included that in the average it would have tended to increase the differential that we show on Respondent's Exhibit 31-A.

Mr. Hanley: For the convenience of counsel, I might say that this clarification question is asked in connection with a statement by Mr. Austin on page 3779 of the record. While we are correcting some of these items on the record, I would like to refer to page 3776 of the record in connection with a statement by myself which I know could be very easily misunderstood and misconstrued to mean that there was a channel of distribution set-up known as the jobber channel or the direct sales channel, which might be interpreted to mean a channel on the Form 189. I think the record is now entirely clear that there is no such independent channel on the 189.

By Mr. Hanley:

Q. Mr. Boatwright, I want to ask you a general question or two.

With the exception of the breaking out of Ned's Auto Supply Company from the reseller channel as was done in Exhibit 31-A and following pages, has there been any build-up or arbitrary computation employed at all in connection with the figures that have been supplied in this lawsuit on the part of the Respondent?

4597 A. No. In every case we have supplied our record as per books.

Q. And in connection with 31-A, that is, the segregation of Ned's from the balance of the reseller channel, I believe you have already said that that is tied directly to the books and records of the company as they existed?

A. Yes. The exception there was a build-up where it was necessary for us to use delivery tickets for 1940 because delivery tickets for the year 1937 no longer exist. With that exception I think that we went through item after item. We checked them and I pointed out every exception to the rule that they were taken direct from the books.

Q. Mr. Boatwright, have any figures at all been prepared or designed for use in this lawsuit except this analysis in 31-A and following pages?

A. No, except as representatives of the Commission have asked for breakdowns of the figures as per our books, to get the underlying expenses entering into particular classifications. Those are the only exceptions to your statement.

Q. Has there been any arbitrary set-up of figures in an effort to establish a cost differential which departed in any wise from the records and current accounts of the company?

A. No, sir.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

4598 Mr. Hanley: A request was made, Your Honor, by counsel for the Commission that we supply him with copies of transportation contracts had with contract haulers from River Rouge to points in Detroit for 1939 and 1940. The office, in response to our request, has supplied us with certain original contracts and riders, applying to 1939, being a contract entered into May 20, 1939, between the Standard Oil Company and the L. A. Smith Company, which is a common carrier, which contract is an original contract and executed on behalf of the Standard Oil Company by Allen Jackson, its vice-president, and by the L. A. Smith Company, by Geo. R. Wheeler, president, and a contract dated November 22, 1939, between the Standard Oil Company and the L. A. Smith Company, executed on behalf of the Standard Oil Company by Allen Jackson, its vice-president, and on behalf of the L. A. Smith Company by Geo. R. Wheeler, its president, to which contract is attached a rider entitled "Rider No. 2," executed by the two companies by their same respective officers, which is dated January 16, 1940, and covers shipments to Dearborn and points in Detroit indicated at Lantz Avenue, 7-Mile Road, Lycaste Avenue, Scotten Avenue, Stansbury-Intervale.

We produce these contracts and hand them to counsel in response to his request, but they being original contracts, Your Honor, and containing much matter that is not pertinent to the inquiry here, and just being originals
anyway, we would like the privilege of substituting
4599 copies after they have been examined by counsel.

Trial Examiner Ballinger: If counsel desires to use them, he may have them offered and the copies may be offered in evidence in lieu of the originals, subject to check.

Mr. Hanley: If Your Honor please, in connection with this proffer, in response to the request of counsel, and having for the first time had an opportunity to examine the contracts in question, I think that in fairness to the court, Commission, and to counsel, that I, at least, should make a statement, for the reason that I have constantly had it in mind from our people, no doubt, some of them, that the transportation rates as between River Rouge and all of the distribution points of the Standard Oil Company in Detroit and between River Rouge and the bulk storage of the four jobbers was identical: that is, that there was absolutely no difference in cost of transportation from River Rouge to any point in Detroit, and it is possible—I don't know that it is true—but having had it in mind that way, it is possible that some are in the record, in the discussions I may have made a statement to that effect. I know that we have on occasions debated the question of the propriety of giving any considerations to those rates at all, and just in the last few days that has come to the
forefront and, as far as I know, for the first time it
4600 came to the forefront, the first time I thought it
had any possibility of being an issue, I found as a matter of fact that that is not true.

As to two of our bulk stations in Detroit, the rate is, according to the contract, .123 cents per gallon. In respect to all other points of delivery of the companies in Detroit, and in respect to all of the four jobbers, bulk storage, in Detroit, the rate is identically the same, namely, .155 cents per gallon.

I think it is perhaps important to call this to the attention of the court for the reason that I have given; namely, that we have led the court to believe in some statements that we were asserting these to be equal rates throughout.

Trial Examiner Ballinger: Uniform?

Mr. Hanley: Uniform. And I just felt in necessary fairness to court and counsel that I should clarify that.

I understand from the comments of counsel for the Commission that he views it as material, that a difference in rate might have some relevancy on the question of cost in this litigation. We have taken the position that that is not true. We have not given consideration to any of these freight costs at all. Our Form 189 from which the chief figures in these cost exhibits were drawn, does not give any consideration to freight rates at all. Our position here has been that we rely entirely upon a cost 4601 justification as between what the cost is to us as a company to supply the reseller channel after gasoline arrives at our Boston plant as contrasted with what it costs to service the account of the jobber without reference to our cost in getting the gasoline to it. In other words, he gets his delivery f.o.b. Detroit and we get our delivery f.o.b. Detroit, and it is from there on out that we are contrasting the costs as between serving the jobbers and the reseller channel, and we are not relying on anything behind that. In other words, we are not seeking to justify on the basis of any difference in manufacturing costs or anything behind the market costs which is cut off in Detroit. We take the position, Your Honor, that there must be a cut-off some place, that is, there must be a base line, a starting point. We could go back to River Rouge and from there through the barges and to the refinery at Whiting, or elsewhere, and then go through the manufacturing process and back through the pipe line and clear down to the actual production of the crude oil out of the wells. All of that has an influence, but, of course, a thing of that kind gets so cumbersome as to be unwieldy and impossible of determination, and in our view this thing has to be kept sane. There has to be some starting point where everybody can start from scratch and work from there on out. We have chosen in this instance to start with the situation where the gasoline is in Detroit, irrespective of what it cost up as gasoline in Detroit, 4602 but we are viewing this thing simply as a matter of how much does it cost us to market that gasoline, whether we are making a profit on it, whether we are taking a loss on it, whether it costs a lot or a little, to just own the gasoline in Detroit.

Trial Examiner Ballinger: Judge, I understand you pursue the same policy with reference to every other field.

Mr. Hanley: We are doing that, Judge, and we are doing it for the reason I have given, that we have to have this cut-off point and we are willing to rely and are relying on the marketing cost justification, not freight or transportation or manufacturing or any other cost justification. Certainly, it has a bearing and everybody knows that it is a general economic principle that volume aids in reducing cost, and it certainly has an influence on the economies that we are able to effect at River Rouge in the terminal that we have this additional volume. It makes a difference in the economies that we are able to effect in the use of tankers on the lakes. It at times make a difference in the operation of the refinery to our economical advantage.

But those are things that we have chosen not to go into at all, so we are going to take the position, if it be asserted by the Government, that we are entitled to rely on just such justification.

Trial Examiner Ballinger: The policy that you 4603 have outlined is a uniform policy of the company, is it not?

Mr. Hanley: It is. It is. But in view—

Trial Examiner Ballinger: It does not apply merely to the Detroit field?

Mr. Hanley: Sir?

Trial Examiner Ballinger: It does not apply merely to the Detroit field?

4604 Mr. Hanley: Sir?

Trial Examiner Ballinger: It does not apply merely to the Detroit field?

Mr. Hanley: Oh, in this 189, for instance, it is developed in every field we have, every year, Judge, every one of them, right along, currently. We just took that as the basis of our starting point and figured the cost of distributing this gasoline through these different media from that point out, and we say that if we rely on that cost justification, that then everything behind that and the cost of the gasoline to us is out of the picture and immaterial. However, in view of the announcement of counsel and in view of what I thought may have been my own error on the record, it was certainly an error in my mind, because I firmly believed that these rates were uniform, I thought that it was proper that I should make this statement and that I should go even further, your Honor, and, at least, advise the court and counsel what the effect of this difference would be, on the theory advanced by counsel for the Commission with which we thoroughly disagree, as I have indicated, but we have the figures, and if he wants them he is entitled to have them, and we will be glad to give them to him and we can thrash out the question of the materiality.

We have got them right here, and I will just take about
three minutes to put them in, by Mr. Boatwright,
4605 subject, of course, to this statement which I have
made. I don't wish to be bound by these as offering
them on our case beyond the purpose indicated.

By Mr. Hanley:

Q. Mr. Boatwright, when you and I yesterday discovered that there were two of these bulk plants that were served in Detroit by truck hauler at a cost of .123 cents as opposed to the uniform rate for all other points, including the jobbers in Detroit, which was done in an effort to determine what effect, if any, that would have on the cost as indicated on 33-A by us at that time?

A. Well, we immediately wired Detroit and asked them to wire back the tank wagon reseller gallonage delivered out of each of the seven bulk plants in the Detroit metropolitan area. So that that gallonage could be associated with the cost per gallon according to the contract, so that a weighted average freight cost for serving the Detroit metropolitan area by truck transport could be calculated. Would you like me to read—

Q. Did you get the reseller gallonage from each of the plants?

A. I did.

Q. Will you please just read that into the record and the rate on each of the plants?

A. Clay Avenue, 9,911,056, cost per gallon .123
4606 cents. Bellview, 4,539,990; cost per gallon, .123.

Scotten, 11,258,274; cost per gallon, .155. North Detroit, 3,621,654; cost per gallon, .155. Lycaste, 5,211,822; cost per gallon, .155. Dearborn, 1,319,589; cost per gallon .155. Strathmoor, 3,671,813; cost per gallon, .155.

Q. And what is the rate to the plants of each of the four jobbers involved in this action?

A. All jobber accounts are served by truck transport at a flat rate of .155 cents per gallon.

Q. Mr. Boatwright, did you undertake to make the weighted average cost per gallon of supplying all of the bulk plants of the companies named above?

A. Yes, I did. The weighted average cost per gallon to the Standard Oil Company of serving the seven named bulk plants in the Detroit metropolitan area was .147.

Q. Assuming, Mr. Boatwright, that the difference in cost of .155 to the jobber accounts and .147 weighted average cost to all of the bulk plants of the respondent were to be regarded as a cost, what would be the effect on the tank wagon reseller marketing cost as indicated on 33-A? How much, if any, would it reduce it or increase it?

A. Do you mean the tank wagon reseller marketing cost or do you mean the comparison of the tank wagon versus the jobber marketing cost?

4607 Q. Well, I think I stand corrected, because the figure here on 33-A is necessarily from form 189, which does not give consideration to freight.

A. Yes.

Q. So it would be, I take it, Mr. Boatwright, a difference in cost of doing business on the part of the Standard Oil, on the one hand, with resellers, and the costs of the jobbers, on the other?

A. Well, will this answer the question you have in mind? If transportation to our bulk plants and transportation costs to jobber bulk plants had been included in our calculations, preparing Respondent's Exhibit 33-A and subsequent pages, the differential as shown on Respondent's Exhibit 33-A would have been reduced by .008 of a cent.

Is that a complete answer?

Q. I think that is clear. Now, to fully clarify it, the figure following differential cost for the year 1940 on 33-A is presently 1.47?

A. Yes.

Q. If this freight differential had been given the consideration to which you have referred, that figure would be reduced to 1.462?

A. Yes, sir.

Q. And the same in relation to 1939?

A. Yes, sir.

4608 Mr. Hanley: At this time, your Honor, and in response to a request made some days ago by counsel for the Commission, I herewith hand him a statement of types of reseller service station accounts, setting forth the company owned service stations leased out, 229, and service stations leased by Standard Oil Company and re-leased to individuals, 9; form 461 accounts, 192. Total: 430.

There was also made a request, your Honor, that we submit to the Commission the agreement between the company and truck drivers. Your Honor may recall that there was some discussion of that which brought about this .952. We are advised that since early in 1937 until recent date, wages paid to tank wagon drivers have been on the basis of $165 per month or 1,980 per year. Their work schedule calls for 40 hours per week or 2,080 hours per year. The hourly rate on this basis is $.952 per hour.

The Commission also requested that we supply data as to when each of the four jobbers began to be served by truck transport out of River Rouge. I now hand counsel a statement indicating that information as to each of the four jobbers.

Counsel also made a request that we supply information as to when each of the bulk plants of the company began receiving shipments by truck transport. I hand counsel a statement furnishing that information but with the
4609 qualification that I do not know whether any substantial part of the shipments received by said bulk plants were received by that method as early as the time they first began to receive some shipments.

Oh, I am informed now that that service station record is for the year 1937, your Honor. We have just found correspondence, so that may be indicated.

Mr. Austin: That is for 1937?

Mr. Hanley: For 1937.

Trial Examiner Ballinger: The several documents produced by counsel for respondent and tendered to counsel for the Commission, the substance of some of which has been read into the record, are not to be considered as evidence in the case until formally admitted.

Mr. Hanley: So far as I know, just one other request was made by counsel for the Commission; namely, for distribution of time as salesmen—method—class of products for the month of June, September and December, 1940, which statements are now supplied to counsel.

Mr. Austin: Your Honor, I offer in evidence Commission's Exhibit 83, for identification, which is a sheet marked "Schedule No. 4, distribution of time—salesmen for Detroit field, March, 1941."

Trial Examiner Ballinger: Commission's Exhibit 83, for identification, is admitted in evidence.

4610 Mr. Hanley: There is no objection to the offer or admission of the exhibit except that of materiality, it not appearing that the same has any bearing on any issue in the case.

(The document heretofore marked "COMMISSION'S EXHIBIT NO. 83," for identification, was received in evidence.)

Mr. Austin: I would like to have these papers marked, for identification.

Trial Examiner Ballinger: The reporter will mark them, for identification.

(The documents were thereupon marked "Commission's Exhibits 88, 89 and 90," for identification.)

Mr. Austin: I also offer in evidence Commission's Exhibits 88, 89, and 90, for identification, which are sheets similar to Commission's Exhibit 83, but being for the months of June, 1940, September, 1940, and December, 1940, respectively.

Mr. Hanley: The same objection.

Trial Examiner Ballinger: The objection is overruled and Commission's Exhibits 88, 89, and 90, for identification, are admitted in evidence.

(The documents heretofore marked "COMMISSION'S EXHIBITS 88, 89 and 90," for identification, were received in evidence.)

4611 Mr. Hanley: You may take the witness.

Mr. Austin: I move we adjourn, your Honor, until 10 o'clock tomorrow morning.

Trial Examiner Ballinger: Motion of counsel for the Commission granted, and now, at 5:15 p. m., the hearing is adjourned to be reconvened June 27, 1941, at the hour of 10 a. m. in a hearing room, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 5:15 p. m. the hearing was adjourned to Friday, June 27, 1941, at 10 a. m.)

4612

Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Friday, June 27, 1941.

Met, pursuant to adjournment, at 10 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., appearing on behalf of the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Ill.) appearing on behalf of the Respondent.

4613

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

This is a reconvening in Docket 4389, in the matter of Standard Oil Company, at 10 o'clock a. m., June 27, 1941, in Room 332, Federal Trade Commission Building, Washington, D. C.

The last hearing was held in Washington, D. C., June 26, 1941.

The reporter will note counsel for the Commission and the respondent present.

You may proceed.

JOHN W. BOATWRIGHT resumed the stand and testified further as follows:

Mr. Hanley: If your Honor please, there is one correction question I would like to ask the witness, and there is one other question on cross examination I would like to ask before the witness is excused.

Trial Examiner Ballinger: You may do so.

Redirect Examination (Continued) by Mr. Hanley.

Q. Mr. Boatwright, on page 4580 of the transcript in the second paragraph, this sentence appears: "'As a rule a salesman will devote his time to a heavier grade of motor oil in the forepart of the year than subsequently."

Is that as you wish to have the statement appear?

4614 A. No. The statement should be that in the fore-
part of the year the salesman will spend a greater
proportion of his time on motor oil than in the subsequent
part of the year.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Now, Mr. Boatwright, you have testified at various times during the course of your examination that any costs incidental to the handling of direct shipments and to the jobber business in Detroit would be distributed through channels appearing on the form 189, Exhibit 32. You also testified in connection with certain accounts appearing on form 189, which testimony was given yesterday and which was originally given on your cross-examination beginning at page 4461 of the record, which items of expense were not allocated to the jobber business.

You have also testified that in your opinion and judgment and in instances within your knowledge that the costs for handling the jobber business in Detroit of a quarter of a cent a gallon were in your judgment high.

Mr. Boatwright, basing your answer on your knowledge
of the business of the respondent company, the actual con-
ditions in Oklahoma and in Detroit, and your knowledge of
the records and accounts of the respondent company,
4615 please state whether or not in your judgment and opin-
ion the overstatement of costs attributable to the job-
ber business in Detroit as set up in Exhibit 33-A, and fol-
lowing pages, completely offsets any of the distribution of
costs incidental to the jobber business distributed through
form 189, and in addition to any items of cost appearing in
the reseller channel on 189 that were not directly allocated
to the jobber business.

Mr. Austin: I object to that question, your Honor. In the first place, it is asking the witness his opinion on a point on which his opinion is immaterial and upon which it is admitted it has nothing to be based on, because as I understand, it is admitted that there has been no cost study made in Detroit.

Now, the witness has testified that he considers the costs in Oklahoma, if any, an overstatement of the costs in Detroit.

Now, he is asked to say whether or not the amount of that overstatement is more than the amount of something else which he also has not computed, and I think it is quite obvious that any such testimony is worthless, to the Commission, in tracing costs differences; and especially now since whether one overstatement is greater than something else which has not been computed, that is the statement upon which an opinion has no value whatever. It is
4616 simply a comparison of figures, and the figures are not in evidence.

Mr. Hanley: It is a summary question, your Honor. The witness has in effect answered throughout the record but I would like to sew it up in a summary question.

Trial Examiner Ballinger: It is the opinion of the Examiner that the question has been asked in its various forms and aspects by this witness.

The objection is overruled, and the witness may answer.

Mr. Austin: I would like to say on the record not in regard to your Honor's ruling, but I am distinctly of the opinion that no such question has been asked either in its component parts, one component part of the question has been asked, that is, the witness has been asked whether or not he considers the costs an overstatement of the costs in Detroit. I do not think there has ever been any objection to his answering that. I do not believe he has ever been asked to compare the am~~ount of an un~~known overstatement with any of the figures which he brought out yesterday because the computation, if such it can be called, which was made upon an assumption of certain figures in Detroit, first appeared in the record yesterday, and that I am sure has not been compared with this.

By Mr. Hanley:

Q. The court says you may answer, Mr. Boatwright.

4617 A. Well, in my judgment the overstatement of the unit cost of distribution through jobbers would be adequate to offset any influence of the jobber's cost in

Detroit that may be allocated to the tank wagon reseller channel on our form 189.

Mr. Hanley: You may take the witness.

Mr. Austin: I would like to have two or three minutes to try and find something in this record.

Trial Examiner Ballinger: Do you desire a recess for a few minutes?

Mr. Austin: I would like to have a short recess.

Trial Examiner Ballinger: A short recess will be taken.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

You may proceed, Mr. Austin.

Mr. Austin: I would like to have the reporter mark a document for identification as Commission's Exhibit.

Trial Examiner Ballinger: The reporter will mark the document Commission's Exhibit No. 91 for identification.

(The document was thereupon marked "Commission's Exhibit No. 91," for identification.)

Recross Examination by Mr. Austin.

Q. Will you state whether you are familiar with that document, Mr. Boatwright, and state what it is.

4618 A. I am familiar with it.

This is a classification of types of reseller outlets served by the Standard Oil Company in the Detroit area in the year 1937, and by "Detroit area" here I am referring to the metropolitan market.

Q. Including what?

A. Detroit, Hamtramck, Highland Park and Dearborn.

Mr. Austin: I offer Commission's Exhibit No. 91 for identification in evidence.

Mr. Hanley: No objection.

Trial Examiner Ballinger: Commission's Exhibit No. 91 for identification is admitted in evidence.

(The document heretofore marked "COMMISSION'S EXHIBIT NO. 91," for identification, was received in evidence.)

Mr. Hanley: I would like to reserve the objection of materiality. I do not think it is immaterial.

By Mr. Austin:

Q. Mr. Boatwright, what changes, if any, have been incorporated in the Standard Oil Company's accounting form 189 since 1936?

A. Oh, that would be an extremely difficult question to answer from memory.

We have made comparatively few changes except as we have changed to provide a greater breakdown on some 4619 of the expense items.

Q. Have there been any new channel columns added or removed since 1936 when the Iowa plan went into effect?

A. Well, prior to the Iowa plan we maintained a column on company operated service stations. I think we maintained a separate column on that.

Q. I mean, since that was eliminated has there been any other change in channel, of channel distribution as shown on the form?

A. Yes, I think so. May I compare the 1937 and 1940 copies which I have, which will really indicate the difference.

Mr. Austin: I may say that the witness has already stated on the record that there were certain changes in breakdown regarding some of the items going into the leased service station column so that I do not believe it is necessary to repeat that.

Trial Examiner Ballinger: If you could have a comprehensive statement of all of it at one point in the record instead of scattered through the record it would be helpful.

The Witness: No. The channel distribution as indicated by the form 189 for the year 1937 is exactly the same as the channel distribution on the 1940 form 189.

By Mr. Austin:

Q. But do I understand that there have been cer-4620 tain changes in the breakdown of certain accounts?

A. There have been.

Trial Examiner Ballinger: Can you briefly state the changes?

The Witness: Yes. I think I can state most of the changes, your Honor, just by a comparison of the forms.

In the year 1937 account 060, plant maintenance, covered all classes of reseller outlets, while in the year 1940 this same account is broken down between four different types of reseller outlets which have been described in the testimony.

Account 066—I am sorry. May I have that answer read?

(Answer read.)

The Witness: That last account number should be changed, 088.

Account 088 being station operating tools and equipment in 1937 was carried on our form 189 for all classes of reseller outlets, while in the 1940 form this account is broken down according to the four classifications of outlets. Those are the two accounts which have been broken down to provide greater detail, and that account 530 entitled "Employee stock purchasing plan company 50 per cent deposited," has been eliminated from subsequent marketing expense statements with the discontinuation of the stock purchasing plan.

4621 Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Proceed, Mr. Austin.

By Mr. Austin:

Q. Mr. Boatwright, did you state that the Standard Oil Company's marketing business was set up primarily to deal with tank wagon deliveries and the accounting end of the company was also set up on that basis primarily?

A. Yes.

Q. What was the total gallonage of petroleum products marketed by the Standard Oil Company in the Detroit area in 1940?

A. 152,958,667.9 gallons.

Q. And out of that total what proportion represented direct shipments?

A. Direct shipments represented 46,471,455.6 gallons which would be approximately 30 per cent.

Q. There are no tank wagon shipments or deliveries included in direct shipments, is there?

A. There is not.

Q. And yet do I understand that there is no separate column for accounting for direct shipments on form 189?

A. There is no separate column for direct shipment.

Q. And is form 189 designed to show the marketing costs in connection with direct shipments as compared to costs of any other channels or other methods of delivery?

4622

A. It ~~is not~~ so designed.

Q. Did you not state that no computation had been made of the costs of distribution of petroleum products to jobbers or other direct shipment customers in the Detroit area because those costs were infinitesimal or because you "could not find them"?

A. I did.

Q. It is true, is it not, that the company in 1939 had a total volume of tank car sales of 190,845,750 gallons?

A. Yes, sir.

Q. Now, on form 189, Respondent's Exhibit 32, I will direct your attention to certain accounts numbered from 250 to 295. I may say that that does not mean that all of the intervening numbers are included, but there are eight accounts containing numbers within that range on form 189.

Trial Examiner Ballinger: Would it not be well to state the numbers if you have them?

Mr. Austin: Well, they run consecutively on the form, your Honor, from 250 to 295. I would be glad to state the individual numbers and the titles of them, if you wish, but I was going to ask the witness a general question.

Trial Examiner Ballinger: Well, if it is directed to
those eight numbers, would it not be well to advise
4623 the witness so he may take a look at them?
You are familiar with them?

The Witness: Yes. I have them right here, sir.

Trial Examiner Ballinger: Then proceed.

Mr. Hanley: Where do you start?

Mr. Austin: The account numbers are 250, 255, 260, 265, 270, 280, 290 and 295.

By Mr. Austin:

Q. What is the nature of the expenses going into those accounts in a general way, Mr. Boatwright?

A. Those are all general office expenses.

Q. Are those expenses what might be termed expenses of a general or overhead nature?

A. Yes.

Q. Was part of the total expense of the nature indicated by those accounts charged by the company to production and manufacturing?

A. Well, not of the amounts shown on form 189. On the original total it is allocated between the manufacturing department and the marketing department. These quantities shown on form 189 being that portion assigned to the marketing department.

Q. Now, do you know approximately only what portion
of those total expenses were, total general office expenses,
are assigned to production and manufacturing as dis-
4624 tinguished from marketing?

A. Yes, that is in the testimony as being approximately 50 per cent.

Q. And would you say that the portion of those general office expenses allocated to the manufacture and production of the 190,000,000 gallons of gasoline sold through direct shipment would be infinitesimal?

Mr. Hanley: Before you answer—Mr. Reporter, will you read that question, please?

(Question read.)

Mr. Hanley: That is objected to, if your Honor please, as immaterial and as having no bearing at all on the issues in this case, there being no issue raised as to the cost of manufacturing and no issue raised in fact as to the cost of anything other than a marketing cost.

Trial Examiner Ballinger: Would you read the question, please?

(Question read.)

Mr. Hanley: How could that be material, your Honor? We are not in manufacturing costs at all. If the government keeps insisting on it we may get into it.

Trial Examiner Ballinger: I will hear from counsel for the Commission.

Mr. Austin: If your Honor please, I just brought out
that the witness has stated that he could not find the
4625 direct shipment costs in the Detroit area, and that
they were infinitesimal although the direct shipment
gallonage constituted about 30 per cent of the total gallonage in that area.

Now, I think that if the costs of a large portion of gasoline represented by those shipments could be determined for production and manufacture, it could also be determined for marketing, and I am just trying to find out whether or not the same treatment was made of that business, or that portion of the business as to manufacturing production that was made here in connection with marketing costs.

Mr. Hanley: Judge, that statement contains a fallacy of fact. The statement of counsel assumes that there could have been and was an allocation of manufacturing expense to the particular gasoline that went into direct shipment, and there wasn't anything of the kind. There has been no testimony of that kind, and it does not follow at all that there would be any relationship in manufacturing costs as between a gallon of gasoline that went into the reseller channel and a gallon of gasoline that went into the direct shipment channel from the standpoint of marketing. We are talking about marketing costs.

Trial Examiner Ballinger: Well, there was an allocation, was there not, of the overhead costs between manufacturing and marketing?

Mr. Hanley: Yes, sir, that is true. But it does
4626 not follow, your Honor, that the gasoline as manufactured and the cost of manufacturing is segregated between that gasoline which goes into a reseller channel and that gasoline which may be sold by direct shipment. It costs a certain amount of money to run a refinery and to make gasoline.

Then you have got your gasoline, then it becomes the problem of the refinery to dispose of it, and from there on out he has got a transportation cost and a marketing cost. Now, we say that it costs much less to market the gasoline through this direct shipment method of distribution than it does through the tank wagon or reseller channel method of distribution, and there is absolutely no relation between the method of distribution and marketing and the cost of manufacturing, absolutely none.

Trial Examiner Ballinger: But there is a segregation here of the overhead costs between manufacture and sale.

Mr. Hanley: Well, there has to be, to be a segregation of overhead cost between the marketing department and its functions and the manufacturing department and its functions because the supervising force, the executive force and the general office force operate both for manufacturing and marketing.

Trial Examiner Ballinger: Isn't that the information that is elicited by this question?

Mr. Hanley: No, sir, it is not.

4627 Mr. Austin: I do not intend to—

Mr. Hanley: What counsel here has stated is a question to the witness, if you say it is an infinitesimal marketing that it is an infinitesimal cost to manufacture the gasoline cost to market through direct shipments, can you also say that you sold through a direct marketing distribution, and I say, your Honor, it is just so plain on its face it is its own answer, that there is not any relation between the two at all.

Mr. Austin: I do not intend to go into the amount of every production or manufacturing cost, your Honor.

Trial Examiner Ballinger: The objection is overruled, subject to renewal at a later date.

The Witness: Now, may I have the question, please?

(Question read.)

A. Well, I must state first, that my knowledge of the practices of the accounting function of the manufacturing department is that of only a general nature. I do not know how they allocate their costs.

I would state this, however, that irrespective of the manner in which they treat their allocation of costs I have testified as to the differences of work in the general office, in the sales promotional aspect of doing our tank wagon reseller as designated from the sales promotional
aspect incident to any direct shipment because direct
4628 shipment on bids, and we get the business or we do
not get the business. It may be a bid to the government, it may be a bid to the city of Detroit; it may be a bid to some other large purchaser. There is no sales promotional department that exercises any great amount of true sales promotion. They do not buy on sales promotion. They buy on price.

By Mr. Austin:

Q. That is all a little aside from the question, isn't it, Mr. Boatwright?

A. I do not think so, because you have asked me a question which I have first testified that I could not answer, to the manufacturing department's method of allocating cost; secondly, irrespective of the manner in which they do allocate it, it would not be a guiding or ruling function as far as the marketing department is concerned.

Q. Well, my question was directed only to general office expenses.

A. I understand; but the general office expenses incident to tank wagon operation in the marketing department are far greater and far different than general administrative costs incident to direct shipment in the marketing department.

Q. Do you know whether your company or the departments thereof concerned with manufacturing and the production costs compute each year the cost per gallon of manufacturing or the cost per gallon of production on gasoline sold by the company?

4629 Mr. Hanley: Now, if your Honor please, that is objected to as immaterial and outside the issues of this case, and outside the bounds of any testimony that this witness has given on direct examination.

We are now not only manufacturing but we are into production. Are we going to try to market these direct shipments while they are still crude oil?

Mr. Austin: Well, I will eliminate the production part; manufacturing is entirely, manufacturing is enough if that is what you mean by refining.

Mr. Hanley: Well, will you reframe your question so we will know what the question is now?

Mr. Austin: I do not know whether those are both sold separately or handled as one thing, production and manufacturing, in your accounting system.

Trial Examiner Ballinger: Read the question.

(Question read.)

Trial Examiner Ballinger: Is there an objection to that question?

Mr. Hanley: In the first place, it assumes a fact not a fact, your Honor, the respondent company does not produce a pint of oil.

Trial Examiner Ballinger: The objection is sustained.

Mr. Austin: Will you read that question again?

4630 I would like to rephrase it. I did not know that it had anything in it about oil.

(Question read.)

Mr. Austin: There is nothing in there about oil.

Mr. Hanley: What do you mean by "production?" It was explained here the other day "production" referred to crude oil; manufacturing or refining referred to gasoline. Whenever you say "production," Mr. Austin, it just means to me crude oil, that is all. We may be misunderstanding.

Trial Examiner Ballinger: The objection is sustained. Do you desire to reframe your question?

Mr. Austin: Yes.

By Mr. Austin:

Q. Mr. Boatwright, do you know whether the company computes its annual cost per gallon or refining the gasoline which it sells in its entire territory?

Mr. Hanley: Now, will you read that question, please? (Question read.)

Mr. Hanley: Well, that is objected to as immaterial. It goes to the cost of gasoline, not to a marketing cost in any particular.

Mr. Austin: That is the first of three questions 4631 I intended to ask, your Honor. I think the motion should be directed to all of them, because this is merely leading up to the next question. I think if there is to be a motion or the objection, or motion to strike—

Mr. Hanley: I do not know what the other two questions are, but I insist on the objection to this as being immaterial.

Trial Examiner Ballinger: Mr. Austin, first, is the cross-examination?

Mr. Austin: Yes, your Honor, it certainly is, because it is directed to the statement of the witness that he could not determine jobber costs, and they did not make any separate computation of them for Detroit, and they have made no channel for direct shipments on their form 189, because they could not segregate them because they were too infinitesimal or too small to find.

Trial Examiner Ballinger: Well, now, that related to that portion of the costs that had been segregated and allocated to sales, marketing, did it not?

Mr. Austin: Well, I admit that the direct shipment gallonage of the company is just as big proportion of sales as it is manufacturing, if 30 per cent of the gallonage of the company is direct shipment in sales, then it is 30 per cent of what is manufactured, it is the same gasoline.

Mr. Hanley: If your Honor please, the fallacy will 4632 appear immediately by an illustration.

Suppose that a gallon of gasoline costs the respondent company a dollar, and it is, the gasoline in a bulk plant in Detroit. Now, that is an absurd cost. We will just assume that it costs us a dollar on Monday, and assume that on Tuesday we have got a gallon of gasoline there at a cost to us of 6 cents.

Now, we sell those two gallons of gasoline. We get the best price we can through whatever channel we can sell it. It costs us a certain amount to effect the sale. The fact that one of those gallon costs us one dollar to make and get to Detroit, and the other one costs us only 6 cents has absolutely nothing to do with the cost to us of effecting the sale of those two gallons of gasoline.

We may sell them for identically the same price, or we may sell them through different media at different prices and at different costs of sale, but that has no relation and nothing whatever to do with what the gasoline costs us. We may be inefficient or efficient refiners. That hasn't anything to do with what our marketing costs are.

Trial Examiner Ballinger: What is bothering the Examiner is this: There must be a point at which you commence to compute marketing costs. There must be a point at which manufacturing costs stop.

Now, the company has set up its account. It has
4633 delineated the line of demarcation between the two.

Now, are you at liberty to go back into the manufacturing costs?

Mr. Austin: I do not intend to, your Honor. I have no desire to do that. These questions are directed to a comparison of accounting methods. This is a question of accounting practice, not a question of any amounts of cost.

Trial Examiner Ballinger: Do you think that would entitle you to go back and inquire into the accounting methods with reference to manufacturing costs of manufacturing?

Mr. Austin: Only briefly here for the purpose of comparison.

Mr. Hanley: No matter how brief it is, your Honor, it is a question of its competency and materiality.

You might ask Mr. Boatwright questions about the propriety of accounting in a millinery store, it is comparable, just as comparable as giving accounting costs.

Mr. Austin: Well, your Honor, these general office expenses which are included right here as cost of marketing have been divided, they are general overhead costs. There has been an allocation of those costs as between marketing and manufacturing and production, and as to those costs, I think it would be entirely relevant if we wanted to do it, to go into the method of allocation of those costs between
manufacturing and production on the one hand and
4634 marketing on the other, because we are certainly not
bound to accept the statement of the company as to the amount of those expenses that may be charged as marketing.

Mr. Hanley: May we clarify this, Judge, with this statement?

Mr. Boatwright says he has testified it is approximately

50 per cent of the overhead in the general office that was allocated to the marketing department for its expense, and 50 per cent to manufacturing. Now, suppose he had 75 per cent to manufacturing and 25 per cent to marketing, or suppose it was the reverse of that. Suppose it was in allocation, that the general office accountants make. What difference does it make? What we are interested in here is whatever the allocation was that was made to the marketing department, whether it be 10 per cent or 90 per cent, we are concerned here with the breakdown of that allocation as between sales through the reseller channel and direct shipments sales. Now, what difference does it make other than that?

Trial Examiner Ballinger: The Examiner will overrule the objection, reserving to you a motion to strike at the conclusion of this line of examination, so that the record may portray the true situation.

Mr. Hanley: I wish to add to the objection that this is improper cross examination, not having been touched upon in direct examination in any of its phases.

4635 Trial Examiner Ballinger: At the conclusion of this line of examination the Examiner will entertain a motion to strike.

Mr. Austin: Will you read the question?

(Question read, as follows:

"Q. Mr. Boatwright, do you know whether the company computes its annual cost per gallon on refining the gasoline which it sells in its entire territory?"

A. Your honor, I am not the individual in our company that should testify on manufacturing costs.

Trial Examiner Ballinger: Have you sufficient information to enable you to testify?

The Witness: No, I do not think that I have.

I do know that they have certain standards, and that they make certain checks, but I do not know just the detail they go through in their cost calculations. See, my department is sales research department. I am concerned with marketing and I can not answer your question with a feeling of assurance.

By Mr. Austin:

Q. Well, don't you know, Mr. Boatwright, whether the company does or does not compute its cost of production or its cost of refining—we will restrict it to refining in deference to Judge Hanley and—on a per gallon basis.

4636 A. My difficulty—

Q. I am not asking you to give the amount. I want to know whether they do.

A. Well, my difficulty in answering your question is as to the calculation of cost for all individual products made by the company. I do not know whether they do it or not.

Q. Well, this was restricted to gasoline.

A. I know, but it all comes out of one barrel, you see, and I just can not answer your question fully and intelligently.

Q. Well, I was going to ask you whether the direct shipment gallonage was included in the gallonage used for the computation of per gallon costs of refining.

Mr. Hanley: That is objected for all the reasons heretofore given.

Trial Examiner Ballinger: The same reservation.

The Witness: Well, I should think so, but I do not know.

By Mr. Austin:

Q. Do you know of any way in which it could be segregated for such a computation?

A. Well, I do not think that the manufacturing department would be able to segregate, as they do not know where the gallon of gasoline they make today is going to ultimately be sold.

Q. If that gallonage were included in the computa-
4637 tion of per gallon refining costs, then some cost would
be assigned to each gallon of that 190,000,000 gallons, would it not?

A. If, yes.

Q. As I understand it, you assign no cost to that gallonage in your method of accounting for marketing expenses?

A. That is correct. We allocate the costs on direct shipments among the three channels we have discussed here repeatedly.

Mr. Austin: That is all I have on that line.

Mr. Hanley: Now, if your Honor please, the respondent moves to strike all of the testimony on this line of examination which counsel has announced he has just closed, for all of the reasons stated in the respondent's objection.

Trial Examiner Ballinger: The motion is granted.

Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed, Mr. Austin.

By Mr. Austin:

Q. Mr. Boatwright, did you say that if you were required to determine the cost of marketing gasoline to individual tank wagon reseller customers that it would involve a revamping or changing of the company's accounting system?

A. Why, certainly.

Trial Examiner Ballinger: What was your answer?

4638 (Answer read.)

By Mr. Austin:

Q. Is it not true that a special study of costs of marketing to a number of identified individual service stations could be made without in any way affecting the company's general accounting procedure.

A. Oh, a specialized study could be made, but I thought your question implied as a regular accounting procedure, should we step up our books to keep a P. and L. on individual outlets.

Q. No, I would assume that the special study for the purpose of a proceeding such as this would not involve any change in the company's accounting system, even though the special study were directed to the cost of certain individual stations; is that correct?

A. Well, that question has been answered in the testimony wherein I stated that there were some costs which a person might be able to allocate directly, but that it would become an extremely difficult problem to allocate costs which are incurred jointly and I used as an illustration of that the very problem of delivery where a truck will operate on a route, pointing out the difficulties of first establishing a time factor, then what part of the distance to the first dump would be allocated to each of the respective stations, and so forth.

Q. It would be less difficult to make a special study 4639 of costs to individual groups of stations, would it not, such as lessee and non-lessee, or stations served from commission station served from salaried stations, and so forth?

A. Well, you are asking me comparatively the difficulties on two assumed studies that I have not looked into, and I do not know which would be the more difficult until I got into it. Your question really can't be answered.

Q. You have stated several times, Mr. Boatwright, that you are quite sure that the costs of marketing gasoline to jobbers in Oklahoma as shown by Respondent's Exhibit 33-A to E are at least as high, and in your opinion are probably higher than the costs of marketing to jobbers in Detroit; is that correct?

A. That is correct.

Q. Is it not true, Mr. Boatwright, that that opinion as stated by you in numerous places in the record has wherever given applied only to the marketing costs of the type referred to under jobber marketing costs in respondent's exhibit 33-C, D and E?

A. Reference is made specifically to those classification of costs, yes, sir.

Q. And those classifications of costs are (a) accounting costs, (b) credit costs; (c) supervision and selling cost; (d) general office expense; and (e) advertising (point of sale).

Is it correct, Mr. Boatwright, that those are the
4640 five headings of cost which are discussed and computed on Respondent's Exhibit 33-C to E?

A. Yes, sir.

Q. And do I understand that you have made no cost study of marketing cost allocable to the sale and delivery of gasoline to jobbers in Detroit?

A. I have not.

Q. Beginning at page 4527 of the record you gave some testimony regarding a computation which was made upon the assumption purely for the purpose of the computation that the marketing expense of the Detroit jobber business was .25 of a cent per gallon, and spreading that cost among the different channels on Respondent's Exhibit 189 for Detroit for 1940, you reached the result that there would be a jobber cost entering into the tank wagon reseller channel of .032 cents per gallon, is that correct?

A. That is correct; yes, sir.

Q. And was the purpose of your computation to indicate that the result of such computation would be to reduce the average cost per unit in the tank wagon reseller channel in Detroit for 1940 by .032?

A. No, I think the purpose of that computation was explained when the testimony was given. I do not yield from the accounting that has been followed in preparing the exhibits, but I think it was pointed out clearly that the only object of making that calculation was to
4641 show the magniture of the item when reduced to a
unit basis.

Q. Yes, I understand that, Mr. Boatwright, but if there is a jobber cost of .032 of a cent in the total costs in the tank wagon reseller channel solely upon the assumption, which I understand you do not agree with, that that jobber cost in Detroit was .25 of a cent a gallon, then that would mean, would it not, that the tank wagon reseller cost as shown on form 189 for 1940 would be reduced by .032 of a cent?

A. Yes, that is what it would mean provided that the assumption of spreading that cost among the channels is accurate.

Q. I am just trying to get a statement of facts for the purpose of further questions, that is all.

A. Yes, but I just want you to recall that in my testimony of yesterday I said I do not know where this jobber cost is.

Q. Yes, I have your testimony.

A. I just don't know where it is. I merely said now, that if it be spread on the basis of gallonage—

Q. Now, in making that computation, what figure did you use for jobber gallonage in Detroit?

A. I used the gasoline gallonage.

Q. That was 13,661,107 gallons, was it not?

A. As I recall.

Q. I will be sure that I am right on it. That is on an exhibit here somewhere.

4642 Mr. Hanley: It is in the record, page 4528.

By Mr. Austin:

Q. Referring to Commission's Exhibit 87.

A. That is correct.

4643 Q. And that gallonage did not include refined oils, did it?

A. I do not know whether we sell these jobbers refined oils.

Q. But you do know, do you not, that refined oils are included in the gallonage entering the tank wagon reseller channel on Form 189?

A. Yes, I do.

Q. Did you make any similar computation assigning any costs to the remainder of the direct shipment gallonage for the Detroit field for 1940?

A. No.

Q. What was the total direct shipment gallonage for the Detroit field in 1940?

A. 46,471,455.6 gallons.

Q. Then, referring again to the figure for gasoline gallonage for Detroit jobbers in 1940, is it not correct that there is a balance of some 32,800,000 gallons of direct shipments of petroleum products over and above the amount sold to the jobbers?

A. It is in that magnitude; yes, sir.

Q. And have you made any computation assigning any cost to that volume of 32,800,000 gallons?

A. No, I have not. A large part of the costs of the direct shipment gallonage, especially a cross-country account, is handled in Chicago.

Q. You mean the accounting? Is that what you
4644 call it?

A. On a cross-country account, yes.

Q. Delivery is made from Detroit?

A. Delivery is made from Detroit. But I have made no separate calculation of the cost on that class of business.

Q. Assuming, Mr. Boatwright, that there is some cost of marketing of the 32,800,000 gallons gasoline represented by direct shipments in the Detroit area other than shipments to jobbers, is it not true that a portion of such marketing expense is included in the expense shown in that tank wagon reseller column on Form 189?

A. That is entirely possible, on your assumptions.

Q. At page 4532 of the record a further computation was introduced by you on your direct examination in relation to accounts Nos. 240, 525, 086, 290, and 295, the numbers referring to Form 189, Respondent's Exhibit 32. Do you recall that computation?

A. I do.

Q. Now, I would like to state what I understand the computation to have been, and then if I am not correct you may make any correction.

As I understand it, you totaled the expenses under total petroleum products on Form 189 for these five accounts and divided that total expense by the total gallonage in the Detroit area, less direct shipments, to which you added the gallonage sold to the Detroit jobbers. Am I correct that far?

4645 A. I made two divisions, and you have only indicated one. You are correct in that I totaled the marketing expense items. Then my first division was by the total ~~p~~etroleum gallonage excluding direct shipment; then the identical marketing cost total was divided by total petroleum gallonage excluding direct shipments plus sales to jobbers.

Q. And your computation resulted in a difference of .018 cents in the result?

A. As I recall, that is correct. It is in the testimony.

Q. That I can read from page 4533 of the record. The division, using gallonage excluding direct shipments, resulted in a quotient of .162 cents per gallon; when the jobber shipments were included the resulting figure was .144 cents per gallon, making a difference of .018 cents.

Now, when an all-gallonage allocation is made, is it not true that no cost differential is afforded as between the gallons included in making the allocation?

Mr. Hanley: May I hear the question?

(Question read.)

Mr. Hanley: I do not understand that, Mr. Austin. Is it that on a gallonage basis every gallon has an equal weight in the computation?

Mr. Austin: That is right.

A. You are correct in your statement.

By Mr. Austin:

4646 Q. So that using the second method of computation, or division, which you stated in your direct testimony just referred to, Mr. Boatwright, would it not result in a cost for those five accounts of .144 cents per gallon to the tank wagon reseller gallonage in Detroit in 1940 and also the same cost per gallon for the jobber gallonage?

A. .144?

Q. That is right.

A. It would. The very fact that we have thrown the two gallonages together.

Q. Then, assuming that that method of treating those expenses in those five accounts were correct, would that not result in eliminating from the per-gallon expense now shown in the tank gallon reseller column on Form 189 for 1940 the sum of .162 cents per gallon?

Mr. Austin: I will strike that question, please. That would not be correct, because it would be only one-half of it.

Off the record.

(Discussion off the record.)

Mr. Austin: I would like to have two documents marked for identification, if Your Honor please.

Trial Examiner Ballinger: The Reporter will mark the first document Commissioner's Exhibit No. 92A- B, C, and D, for identification; the second document Commission's Exhibit 93 A, B, C, D, and E, for
4647 identification.

(The documents were marked for identification "Commission's Exhibits 92-A, 92-B, 92-C, 92-D, and 93-A, 93-B, 93-C, 93-D, and 93-E.")

By Mr. Austin:

Q. I show you Commission's Exhibit 92-A, B, C, and D, for identification, and ask you if you can identify that document.

A. I can, it being a contract or agreement between the Standard Oil Company, on the one hand, and L. A. Smith Company, on the other; L. A. Smith Company being the carrier making deliveries to the plants enumerated in the contract.

Q. Deliveries of what?

A. Deliveries of gasoline, refined oils, tractor fuels, and other distillates.

Q. Where are those deliveries made from?

A. The River Rouge bulk plant.

Q. Can you also describe the contents of Commission's Exhibit 93-A, B, C, D, and E, for identification?

A. Commission's Exhibit 93-B, C, D, and E represent a contract between the Standard Oil Company of Indiana and the L. A. Smith Company, common carrier, on the 22d day of November, 1939, for the purpose of an agreement relative to the transport of our petroleum products from River Rouge to the individual bulk plants
4648 designated in the contract, these petroleum products again being gasolines, refined oils, standard tractor fuels, and distillates.

Commission's Exhibit 93-A is a rider, designated as Rider No. 2, between the same parties modifying the rates as provided for in the original contract, 93-B and following, for certain designated destination points, being Dearborn—

Q. Just say "as shown."

A. —as shown in the rider.

Q. Do you know, Mr. Boatwright, whether these two contracts that you have just described and the rider to the second one constitute the entire agreement between the Standard Oil Company and the L. A. Smith Company covering transportation of Standard Oil products in existence during 1940 and after May 20, 1939?

A. That is correct, to the best of my knowledge; yes, sir.

Q. Well, have you made any investigation to determine whether there was any other agreement made subsequent to these agreements, or whether these agreements set forth the entire agreement between the parties?

Mr. Hanley: I do not think the witness ought to be requested to answer that question, if Your Honor please. The facts are that Counsel for the Commission asked us since we have been in Washington to get contracts for transportation between the company and any haulers.

What we did was transmit that request to our people
4649 in Chicago and in Detroit and told them what we
want, and this is what we got. We are producing it. It looks as though that is all there is, but neither Mr. Boatwright nor I know with any positiveness or testimonial knowledge that there may not be something else. We are producing what we got on the request of counsel, and we faithfully transmitted that request to Chicago and to Detroit.

Mr. Austin: Thank you, Judge Hanley. That is just what I wanted to bring out, because I rather assumed that neither you nor Mr. Boatwright had the opportunity. You simply asked for certain documents and submitted them here, and, of course, I appreciate your doing so.

Trial Examiner Ballinger: Mr. Boatwright, you heard the statement of Judge Hanley?

The Witness: I did.

Trial Examiner Ballinger: And that is correct?

The Witness: His statement is correct of the conditions.

By Mr. Austin:

Q. Do you know, Mr. Boatwright, whether there was a rider No. 1, since Commission's Exhibit 93-A is entitled "Rider No. 2 to the contract of November 22, 1939"?

A. I can only assume that there was a rider No. 1.

Mr. Hanley: If Your Honor please, I can enlighten the court and counsel on that. I think there was not only a rider No. 1, but there were six or seven, or eight, 4650 maybe, and I took them off for the reason that they referred to plants entirely outside of Detroit and did not comply with your request. Rider No. 2 did, and I gave you everything that applied to points in Detroit and rates in Detroit.

Mr. Austin: I offer these documents, marked Commission's Exhibits 92-A to D and 93-A to E, in evidence.

Mr. Hanley: The offers are objected to, for the reason that the exhibits are immaterial, do not have any bearing on any issue in this case; that they do not go to the issue of marketing cost as set up in pleadings as a justification on the part of the Respondent; that the burden of justifying against the charge of violation of the Robinson-Patman Act on the basis of a cost differential making only due allowance for saving is upon the accused, and the accused has the right to determine whether or not, first, he will undertake a justification at all; and, second, upon what kind of a differential of cost he will base his justification; that the effort on the part of the accused to undertake an investigation does not owe an examination into costs that are unrelated to the proceeding and concerning which the Respondent accused has undertaken no explanation and no justification; that the Commission is without jurisdiction to, first, either compel a justification on the part of the accused; and, second, if the accused undertakes an investigation, the Commission is without jurisdiction to enlarge the scope of its inquiry and force 4651 further justification in a different field upon the Respondent; that any use that might be made of the contracts in question now offered in evidence would have the effect of entering into an inquiry into the costs of the Respondent relating to matters other than marketing, and opens a limitless field into which the Commission has in this action no jurisdiction to go, and which the Respondent has not chosen to open, and that field might extend not only back to the refinery, but through the manufacturing process, and through further back to the crude lines and the wells where the crude oil was produced, and all the ramifications of the entire integrated oil production, transportation, manufacturing, and marketing business.

For these reasons, and the general reasons of immateriality, irrelevancy, and incompetency, these exhibits are objected to.

Trial Examiner Ballinger: The Examiner has not been fully advised as to exactly what transportation these contracts relate to.

Mr. Austin: They relate to transportation from the marine terminal at River Rouge to the company's bulk plants, which is a step in the delivery of gasoline by the company to the reseller stations.

Trial Examiner Ballinger: The cost accounting of the company commences at the—

4652 Mr. Hanley: Bulk plants.

Trial Examiner Ballinger: —bulk plants—

Mr. Hanley: In Detroit.

Trial Examiner Ballinger: —in Detroit, and not at the marine terminal; is that correct?

Mr. Austin: Well, that may be correct, Your Honor; but, of course, the cost accounting of the company is entirely immaterial in determining what costs are relevant and material under the Robinson-Patman Act in a proceeding before the Federal Trade Commission; otherwise, the Respondent could determine what costs to show the Commission. If Counsel for the Respondent is correct, he would furnish to the Commission such costs as would reflect favorably toward its defense and keep from the Commission a comparison of costs as reflect unfavorably toward its defense.

Furthermore, there is a perfectly logical place to start your comparison of delivery costs, and that is in all the gasoline stations. Now, the majority of the gasoline in the Detroit area comes all commingled in tank shipment from the River Rouge plant.

Mr. Hanley: Are you talking about the interstate commerce contention now?

Mr. Austin: No. I am talking about the delivery of gasoline. The gasoline comes in the tank cars, and I do not think the commingling has anything to do with
4653 the interstate commerce part; but obviously, Your Honor, the delivery costs which we must consider

are the delivery costs from River Rouge, because that is where the difference in the method of delivery starts, and then the differences in the cost of delivery resulting from the different methods of delivery, which are directly referred to in the Robinson-Patman Act. So there is no doubt where we are going to start. It is not a matter of going back to the production; it is a matter of starting at River Rouge.

Trial Examiner Ballinger: With the factual statement on the record, the objection is overruled, and Commission's Exhibits 92-A, B, C, and D, and 93-A, B, C, D, and E, for identification, are admitted in evidence.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS 92-A, 92-B, 92-C, 92-D, and 93-A, 93-B, 93-C, 93-D, and 93-E," were received in evidence.)

Mr. Austin: I would like to make this further statement, Your Honor, in view of the statement that I have just made in the record, in case it might be misunderstood.

There were certain direct shipments to jobbers shown in this case from Whiting, Ind. Now, if there were any substantial amount of direct shipments from Whiting, then I should say for the same reason the delivery costs from Whiting were material; but since those ship-
4654 ments were few in number compared to the total
shipments of the company, I do not make an attempt, and I do not intend to make an attempt—that is, assuming that my information is correct that those shipments were few in number, I do not intend to make an attempt to show freight costs from Whiting to River Rouge in order to compare it with the direct shipment cost from Whiting to the jobber. I think, however, that that would be material, and I did not want to say anything to indicate that I thought that that would not be material, if it were the practice of the company to ship directly to its jobbers from Whiting, Ind. I understand it is not the practice of the company so to do and that has only been done in some instances.

Trial Examiner Ballinger: Such is the testimony. Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Referring to page 4606 of the record, you gave a list of the bulk plants in the Detroit area with the charge made per gallon by the transport hauler for transportation of gasoline from the River Rouge terminal to the respective bulk plants.

Now, the contracts introduced in evidence as Commission's Exhibits 92 and 93 use a slightly different terminology in referring to the bulk plants, Mr. Boatwright, and I would like to get them identified.

4655 Will you state, referring to Commission's Exhibit 93-A, which location there refers or indicates the Strathmoor bulk plant?

A. Well, I am speaking from memory, but I think it is Stanbury and Intervale. The location of each of those plants is Mr. Raupaugh's testimony, and my memory can be checked against him, but I think it is Stanbury and Intervale.

Q. Do you know which location there is for the North Detroit bulk plant?

A. Seven-Mile Road.

Q. Is there a bulk plant at Lance Avenue?

A. That is the Ferndale plant.

Q. That is the bulk plant indicated on the map as being located in Ferndale?

A. Yes.

Q. That being Respondent's Exhibit—I do not know which one it is.

A. It does not distribute gasoline, Mr. Austin. That is the Ferndale plant that I referred to as serving only the fuel oil and distillates.

Q. Well, I think that will relate the exhibits with previous testimony.

A. Yes.

Mr. Austin: Off the record, please, Your Honor.

(Discussion off the record.)

4656 By Mr. Austin:

Q. Now, Mr. Boatwright, as I read these contracts, Commission's Exhibit 92 and 93, there is nothing in them concerning the transportation of gasoline from the marine terminal at River Rouge to the bulk plants of the company's jobber companies. Is that your understanding?

A. Yes. The hauling to the jobber customers is handled by the Ogden and Moffet Transportation Company.

Q. And were you able to obtain the contract between the company and the Ogden and Moffet Transportation Company?

Mr. Hanley: I will say in that respect, Your Honor, that we did undertake to obtain it. We were advised by the traffic department in the Chicago office that they did not have it, and efforts were made through Detroit, and I do not undertake to say why they could not dig up a copy between the two offices, but they could not, and we were advised that they had telephoned to the Ogden and Moffet Company itself and they were to send us directly the contract. We have not received it. But they did assure us of the fact that the rate was as Mr. Boatwright has testified, .155 to each of the jobbers.

Mr. Austin: Cents per gallon—.155 cents per gallon.

Mr. Hanley: Yes, .155 cents per gallon to each of the jobber bulk plants. If you want to see that contract when we get hold of it—

4657 Mr. Austin: Well, when we are next in Detroit, Judge Hanley, if we are there on rebuttal testimony, I would appreciate it if I might see that contract.

Mr. Hanley: Yes, surely.

By Mr. Austin:

Q. Mr. Boatwright, have all of the company's bulk plants in the City of Detroit and Dearborn been supplied by transport truck from the marine terminal since 1936?

A. Yes, all of the plants in the Detroit metropolitan area operated by the Standard Oil Company have been served by truck transport since 1936.

Q. Now, will you state for the record when each of the four jobber customers of the Standard Oil Company in the City of Detroit began to receive delivery by transport truck?

A. Ned's Auto Supply started February 9, 1940.

The Wayne Oil Company, January 31, 1940.

The Sykeman Oil Company, January 31, 1940?

Citrin and Kolb, February 3, 1940.

Q. And prior to those dates, how was delivery made by the company to jobber companies?

A. I would assume that it was handled by railroad switching.

Q. Tank car shipments?

A. Yes.

Q. Do you know the freight rate which the company paid for tank car shipments of gasoline from its River 4658 Rouge terminal to the plants of its four jobbers in 1939?

A. No, I don't.

Mr. Austin: I have certain papers here which I would like to have marked for identificaiton, if Your Honor please.

Trial Examiner Ballinger: How many sheets are there?

Mr. Austin: There are six of them, and perhaps since they are separate papers they should be marked as separate exhibits.

Trial Examiner Ballinger: Well, is there more than one page on each?

Mr. Austin: Just one page on each.

Trial Examiner Ballinger: The Reporter will mark the documents Commission's Exhibits 94, 95, 96, 97, 98, and 99, for identification.

(The documents were marked for identification "Commission's Exhibits 94, 95, 96, 97, 98, and 99.")

Mr. Austin: These papers which are marked for identification as Commission's Exhibits 94 to 99, inclusive, are original papers which were delivered to Mr. McDonald, the Commission's examiner, by the Standard Oil Company office in Chicago in the course of an interview with Mr. Buell Jones, chief counsel for the Standard Oil Company, on December 5, 1939.

4659 By Mr. Austin:

Q. I would like to show these to the witness, and ask you, Mr. Boatwright, whether you can identify the forms there shown.

A. I have never seen these particular forms before. I can identify the blank upon which these entries are made. I have seen that.

Q. Will you do so?

A. Yes. This is merely a stenciled acknowledgment of orders which is transmitted to the Chicago office by the various field offices for tank car sales of gasoline.

Trial Examiner Ballinger: Is that the first one?

Mr. Austin: They are all the same.

The Witness: I understand they are all the same.

Trial Examiner Ballinger: All the same?

The Witness: Yes, sir.

Mr. Austin: Your Honor, I am sure that the record shows that these papers, or others which are similar in all respects except possibly as to some of the figures, were identified by Mr. Raupaugh in Detroit. Certain invoices to which these forms are attached—in other words, one of these forms was attached to each invoice—certain of the invoices with the forms attached were offered in evidence, and, upon the objection of Counsel for the Respondent, the forms were detached, but the invoices were received in evidence. And I can give the exhibit numbers just
4660 for the purpose of reference.

Mr. Hanley: We are not going to object to the authenticity of the form.

Mr. Austin: These papers, Commission's Exhibit 94 to 99, inclusive, are not the identical forms which were attached to the invoices in evidence, although some of them may be, but they are, as I say, similar in all material respects, except possibly as to some of the figures, to those which were identified here.

Trial Examiner Ballinger: These papers that have been identified are filled out. Are you now seeking to introduce merely the form without the figures appearing in it, or do you want the entire document?

Mr. Austin: Well, I now offer Commission's Exhibits 94 to 99, for identification, in evidence, and I understand that the authenticity of the documents is not disputed by counsel.

Mr. Hanley: Well, just a moment until I look at them. I have got an objection.

May I inquire the purpose?

Mr. Austin: Yes. The purpose of the offer is to show the freight rate per gallon paid by the company in 1939 on tank car shipments to its four jobbers in Detroit. Four of the exhibits, that is, Commission's Exhibits, for identification, 94, 95, 96, and 97, represent shipments to each of
4661 the four, one shipment to each of the four—

Trial Examiner Ballinger: From what points?

Mr. Austin: From River Rouge to the bulk plant in Detroit.

Exhibits 98 and 99 indicate tank car shipments from Muskegon, Mich., to the bulk plants of two of the jobbers and show the freight rate for that shipment.

And in that connection I would like to point out that the contracts introduced in evidence as Commission's Exhibits 92 and 93 set forth a freight rate from Muskegon, Mich., to Detroit, and I therefore assume that the shipments from Muskegon, while perhaps not as frequent as those from River Rouge, are at least made to some extent in the regular course of business, and I do not believe there is any testimony to the contrary. So that I am offering the Muskegon invoices, or whatever those papers may be called, for the purpose of showing that freight rate if it does turn out to have materiality in a material number of shipments.

Mr. Hanley: That, as I understand it, is the purpose of these exhibits.

Mr. Austin: Yes, that is right.

Mr. Hanley: Commission's Exhibits, for identification, 94 to 99, inclusive, are objected to for all of the reasons assigned to the objection to the introduction of Commission's Exhibits 92-A to D, inclusive, and 93-A to E.,
4662 inclusive; and for the further reason that upon the
announced purpose for the offer of Commission's Exhibits 94 to 99, inclusive, are not the best evidence. They are on their face the Standard Oil Company form by which counsel states that he undertakes to establish a freight rate. This particular reason in this objection, Your Honor, is insisted upon vigorously and urged earnestly. The best evidence would be the freight bills.

In that connection, if we have freight bills, we will have no hesitancy in supplying them, but we want to supply the best evidence in this instance if any is to be regarded as material, or if this issue is to be regarded as material.

Further, these exhibits are objected to for the reason that they refer to specific shipments to several of the jobbers involved in this action, and on specific dates, and the announced purpose of the offer is to establish, according to counsel, the freight tariffs paid by the Respondent company in the year 1939; whereas, there is nothing in the exhibit, and can be nothing in the exhibit, to establish that such a rate was effective for any period of time in 1939 except on the date that may be indicated on the exhibit and that again is not the best evidence of the freight rate on that date, or on any other date.

Further, counsel states that he assumes that ship-
4663 ments may have been made with regularity to jobbers
in Detroit from Muskegon, and that he seeks to prove that that may be the fact, or assume without challenge that

that may be the fact, through the medium of these exhibits, and that such exhibits are utterly immaterial and irrelevant and incompetent for such purpose, inasmuch as there is an invoice referred to in one of the exhibits only relative to a Muskegon shipment, and that, to say the least, the assumption of counsel is a violent assumption, absolutely untrue, and a matter of fact, if material at all, which the Government has the burden of sustaining in the first instance.

I am very serious about this objection, Your Honor.

If you want freight rates we will get them for you, but there is no reason on earth why the Government should undertake to back into this thing with a bunch of just random papers.

Trial Examiner Ballinger: Let me see one of those.

Mr. Austin: These are Standard Oil Company forms handed to the Commission's examiner by the chief counsel of the Standard Oil Company, Your Honor.

Trial Examiner Ballinger: Well, there is no evidence other than your own statement.

Mr. Austin: Well, I will bring Mr. McDonald here.

Mr. Hanley: I do not deny the statement that it was given to Mr. McDonald. We gave you a bushel basket
4664 of stuff, which you still have. I am not objecting on that ground. But it is hearsay as to the Standard Oil Company. That is our statement of what the freight rates are. I have been objecting through all this proceeding on the ground of hearsay.

We will get you the freight rates from the bills that were paid.

(Further discussion off the record.)

By Mr. Austin:

Q. Mr. Boatwright, will you state just what this form, marked in evidence as Commission's Exhibit 94, for identification, is used for by the company?

A. Why, it is an acknowledgment of orders; just a form statement.

Q. Well, does the company customarily enter the freight charge per gallon which it has to pay in shipping the order?

A. The form is filled out by the company, the Standard Oil Company.

Q. Yes. Where is it filled out?

A. I do not know whether it is filled out in the Chicago office or the Detroit office.

Q. Do your know that it is filled out in one place or the other?

A. Well, this particular form would be, yes.

Q. And is it the customary procedure of the company 4665 to enter on the form the f. o. b. price charged the customer for gasoline and as component parts of that price the federal gasoline tax, the freight to destination, and the net price after those deductions at River Rouge?

A. Well, this form is filled out, as is the custom of the company, in completing these forms.

Mr. Hanley: May I ask one question on voir dire?

Trial Examiner Ballinger: You may.

Examination on Voir Dire by Mr. Hanley.

Q. Mr. Boatwright, you have been looking at Commission's Exhibit, for identification, 94, which has an item on it .22 freight to destination. The exhibit is dated April 6, 1939. Assuming that that was the freight rate on April 6, 1939, and that on his order the freight rate changed on April 7, 1939, what would the company pay, the freight that some traffic clerk put on this form, or would they pay the freight bill rendered by the railroad?

A. They would pay the freight bill.

Mr. Hanley: Doesn't that demonstrate the fallacy of this thing, Your Honor, when we offer to give you the best evidence?

Mr. Austin: If the Court please, it has been proven here that these are forms filled out according to the company's accounting procedure. They purport to show 4666 the freight rate. The exhibits range in date form April 4, 1939, to October 25, 1939. The freight rate shown on all is the same. It is not disputed, as I understand it, that these exhibits were handed to the Commission's examiner in connection with invoices showing shipments to the company's jobbers. It is my contention that therefore these papers constitute admissions on the part of the company of the freight rate paid for the purposes of this investigation, and I think they should be received in evidence, subject to the right of the company to correct them if the freight rate was different on any shipment or at any time not covered by these exhibits.

Mr. Hanley: May I inquire, your Honor, why counsel declines to receive the best evidence, which we are perfectly willing to give. We want to check these freight rates ourselves. And what do we do? We go to the freight bills that were paid. We will give them to the Commission.

Now, we have been up against technical objections on hearsay and everything of the kind in this proceeding. Now, we are entitled, I think, to have the best evidence when we, ourselves, offer to give it to you.

Mr. Austin: I am not rejecting the best evidence, Judge Hanley, but I think I am entitled to put these in now since they were supplied by the company. You will have a perfect right to correct them.

Trial Examiner Ballinger: The Examiner has
4667 heard enough discussion.

The documents tendered are plainly not the best evidence. They were, however, furnished by the Respondent to the Commission. For what use it does not appear. The circumstances under which they were furnished does not appear. As the law and the rules of evidence require the best evidence, and as the best evidence is available, the tendered documents are rejected.

Mr. Hanley: If you will give us a list, Mr. Austin, of those shipments, we will supply you with the original freight bills, as in point of fact you may already have with the bunch of stuff that was given you.

(Further discussion off the record.)

Trial Examiner Ballinger: Mr. Austin, those portray the charge made by the company, but they do not portray the charge made by the transportation company.

Mr. Austin: By the railroad.

Trial Examiner Ballinger: That is right.

Mr. Austin: Well, I think it is an admission by the company of the freight they paid.

Mr. Hanley: May we get along, Your Honor?

Trial Examiner Ballinger: Let us proceed.

Mr. Austin: The ruling has been made.

Trial Examiner Ballinger: I will say frankly to you
that if the best evidence is not produced or is not
4668 furnished to you, or you cannot obtain it, the Ex-
aminer will then entertain a renewal of these offers.

Mr. Austin: Off the record.

(Discussion off the record.)

Mr. Austin: That is all the questioning I have, Your Honor.

I have a motion I would like to make.

Mr. Hanley: I would like to take about five minutes to ask a few questions.

Trial Examiner Ballinger: You may.

One moment. Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

Redirect Examination by Mr. Hanley.

Q. Mr. Boatwright, you were asked to compare the 1937 and the 1940 189 forms to point out any differences, and you did indicate that there were some differences in the two forms in that there were breakdowns in certain accounts as between the four types of stations in the later 189 form.

A. Yes, sir.

Q. You also testified a number of times that it would be highly impracticable, if not impossible, to make cost allocations, not only to individual stations in the reseller channel in any numbers, but also as between groups.
4669 Do you recall that testimony?

A. I do.

Q. Would this breakdown of accounts to which you have testified aid at all in that respect?

A. Well, it would aid only to the extent that two of the accounts which I gave in my testimony were segregated as to particular types of expenses only among classes. It would help in the part as to the cost differential or similarity which may exist between the four different classes of resale outlets, but it would not help in the breakdown as among individual units of anyone of the four classes.

Q. And to what extent would it help in the groups?

A. It would be of very minor significance in the entire problem.

Q. Your attention was called to the amount of direct shipment volume in Detroit as compared with the reseller channel and consumer channel volumes. Has Detroit any peculiar attribute in reference to whether or not it is a high or a low percentage of direct shipments to tank wagon shipments as compared to other points in the Indiana territory?

A. Well, direct shipments in the Detroit field constitute about 25 percent of the total direct shipments made by the

Standard Oil Company throughout our entire midwestern area. This one field is responsible, therefore, for a higher ratio of direct shipments to tank wagon sales than 4670 the other fields are. That is because of the location of these tremendous producing units of automobiles, the tremendous activity of aviation, plus the fact that we have secured in times past some sales to governmental agencies in the Detroit area.

Q. You were asked in reference to Exhibit 33-A if the only costs you had allocated to the jobber sales were the itemized costs I think, A to E, inclusive.

A. Yes.

Q. Do you recall that?

A. Yes.

Q. I do not know what the inference of counsel is on that, Mr. Boatwright, but I want to ask you this:

Are these the only costs that in your judgment are properly allocable to the cost of selling jobbers in Detroit?

A. I think they are.

Q. You were asked what the effect might be, something substantial to that, if you had undertaken to make a calculation as to the amount of expense attributable to that proportion of direct shipments less shipments to jobbers in relation to the scattering of expense through 189 form. Do you recall that?

A. I recall the question.

Q. You made the calculation, which you testified about yesterday, on the basis of an assumption of a quarter of a cent a gallon cost on a jobber gallonage, did you not?

A. I did.

4671 Q. If you were to make a calculation involving the thirty-odd million other direct shipments, would you assume any such cost as a quarter of a cent?

A. Definitely not. Certainly not.

Q. So that would be an entirely different type of calculation, would it not?

A. It would be entirely different. And I do not know how I can illustrate it better. When the City of Detroit calls for bids—and the City of Detroit uses a million gallons of gasoline in a month, and all in the world we do is submit a bid. Now, there isn't any sales promotion or anything that you can do. You submit a bid in a sealed envelope, and you get the business or you don't get it. Now, what

~~is the cost of submitting a bid when you divide it by maybe~~ 10 million gallons.

Q. Mr. Boatwright, you were asked if certain bulk plants had been served by truck transports since 1936, and you said they had been.

A. Yes, sir.

Q. Do you know to what degree they were served?

A. Well, I do not know whether 100 percent of their receipts were truck transport.

Q. That is what I mean.

A. I know. I do not know.

Q. You were asked if you could make a special study of any of the reseller stations in Detroit, and you said
4672 that you like to make such a special study. In fact, you did make a special study of Ned's, did you not?

A. Yes.

Q. Which is reflected in 31-A and following pages?

A. Yes.

Q. Now, I want to ask you this:

Were there any characteristics attributable to Ned's operation that made it more feasible to make a special study of that situation with accuracy than attached to the ordinary rank and file reseller station involved in the reseller channel, Form 189.

Mr. Austin: I think that question has previously been asked and answered, Your Honor. I object to it as repetitious.

Trial Examiner Ballinger: There has been a good deal of repetition in this case.

The objection is overruled.

Mr. Austin: Or perhaps Counsel has forgotten it.

A. The question has been answered.

There are marked differences. In brief, these differences have to do with, first, the volume; second, the method of serving; third, the method of sales; fourth, the lack of any responsibility for sales promotion and driveway training, and so forth; fifth, the resultant fewer contacts necessary because of these different arrangements
4673 than we have with the ordinary reseller account.

The salesman's contact with Ned's is of necessity much less frequent than it would have been with a regular reseller account because of our different business relationship.

By Mr. Hanley:

Q. Now, Mr. Boatwright, you are familiar with the set-up of the Detroit office of the Standard Oil Company, the size, the number of personnel, and so on?

A. Oh, yes.

Q. It employs, I think, Mr. Raupaugh said, around 260 people, something like that?

A. I would expect the pay roll to be in that neighborhood in that office.

Q. Assuming that the direct gallonage in Detroit were eliminated, in your judgment what difference would it make in the operation of the Detroit office in the matter of amount of space necessary to be used, hours of work, the amount of fuel, light, heat, taxes—

A. I just don't think there would be—

Mr. Austin: Just a moment.

I object to the question, Your Honor, because it is irrelevant and immaterial. It is along the lines of certain statements that have been made previously regarding
4674 whether or not the elimination of customer would
result in the elimination of cost. That is entirely immaterial. The customer is there and the cost is there, and if you took the customers one by one and eliminated them, ultimately you will eliminate all cost.

Mr. Hanley: Not eliminating the customer; we are eliminating the whole standard group system method of doing business, concerning which counsel suggests we ought to have a special column.

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

The Witness: Would you read the question, please?

(Question read.)

By Mr. Austin:

Q. —and so forth?

Trial Examiner Ballinger: Particularly consider that "and so forth."

A. There are so many additional items enumerated one would have to.

There would be a very slight effect upon our pay roll. The office space needed would not change, because we are crowded in the Detroit office now; and the water, light, fuel, and so forth, I can't see how that would be materially affected at all.

Q. Any particular change in personnel that you 4675 can think of?

A. Well, there might be a reduction of a clerk in the accounting department.

Q. There are some 260 employees.

A. And there might be some time saved in the stenographic department; there might be some time saved in the auditing department; there would be time saved in the different departments, although the time saved itself would not be adequate to eliminate from these respective departments one of the members of the department. In the aggregate there might be a reduction of the accounting staff by three people, something of that type.

Mr. Hanley: That is all, Your Honor.

Trial Examiner Ballinger: Anything further?

Mr. Austin: May we adjourn for lunch, Your Honor?

Trial Examiner Ballinger: The motion is granted, and now at 12:45 p. m. the hearing stands in recess until 2 p. m.

(Whereupon, at 12:45 o'clock p. m., a recess was taken until 2 o'clock p. m., of the same day.)

4676 Afternoon Session.

2 P. M.

Trial Examiner Ballinger: Come to order.

You may proceed.

Mr. Austin: Your Honor, I now move to strike from the record Respondent's Exhibit 33-A, 33-B, 33-C, 33-D and 33-E, being the exhibits, the first page of which is entitled "Costs justification of a jobber differential price 1.5 cents below tank wagon dealer price Detroit."

These exhibits have been offered by the respondent in an effort to establish that the difference in the prices for gasoline charged by the respondent in the Detroit area to reseller customers who purchase in tank car quantities, on the one hand, and those who purchase by tank wagon delivery, on the other hand, makes only due allowance for differences in cost of sale or delivery resulting from the differing methods and quantities in which the gasoline is sold and delivered.

It is contended that these exhibits are defective and insufficient for the purpose of establishing cost justification of respondent's price differentials, for the following reasons:

1. Respondent's cost of marketing gasoline and refined oils to tank wagon reseller customers in the entire Detroit field in 1940 are submitted in one total figure of
4677 $1,145,399.13, plus an additional total figure of $47,479.74 described as "direct leased service station expense." These total figures are comprised of numerous smaller items of costs and expenses of a widely varying nature, including expenses of sale, expenses of delivery, and expenses of a general or overhead nature, as indicated by respondent's account form 189, which is in evidence as respondent's exhibit 32. The separate amounts of expense for each of the more than 100 expense accounts listed on Form 189 are not shown, either for tank wagon reseller customers or for jobbers, and the exhibits afford no means by which the Commission can appraise the nature and extent of the cost differences or whether or not such differences in cost of sale or delivery result from the differing methods or quantities in which the gasoline is sold or delivered.

2. It is admitted that in separating and allocating its total marketing costs in the Detroit field between different products and different channels of distribution, the respondent did not take into account the volume of its sales of petroleum products to its four so-called jobber customers nor the volume of its products sold to other customers purchasing by direct shipment from respondent's
4678 marine terminal. It therefore appears that some undisclosed portion of the expenses of this direct shipment business is included in the very figure of $1,145,399.13 which respondent here submits as tank wagon reseller expense only. The method of accounting used by the respondent in setting up its marketing expenses for the Detroit field on form 189 makes the total expense figures, and many of the individual account figures, worthless for the purpose of establishing the cost differences here sought to be proved.

I would like to say there, too, that I do not think that that objection is at all cured by the computation which Mr. Boatwright made on the record upon the assumption that the jobber costs in Detroit amounted to .25 of a cent per gallon. He showed that upon such assumption there would be a deduction from the tank wagon reseller costs as shown on this exhibit, but the assumption was merely an assumption. It is not based on any fact and no allowance was made at all for the total amount of direct gallonage. In other words, the testimony is that the expenses shown on form 189 included all of the expenses in the Detroit field, including the jobber expense, and that the witness just does not know where the jobber expenses are, but they are in there some place, and part of them were right in the tank wagon reseller column.

4679 3. The price discrimination charged and proved in this case has been limited to price discrimination by the respondent between its customers in the Detroit area, including the cities of Detroit, Dearborn, Hamtramck and Highland Park. The total cost figures submitted by respondent on its Exhibit 33-B are total figures for the entire Detroit field which includes Lansing, Ann Arbor, Pontiac and intervening rural territory. It appears that most of the territory in the Detroit field outside urban areas is served from bulk stations of the company which are operated by commission agents. Respondent's tank wagon reseller customers in the Detroit area, with the exception of certain outlying parts of Dearborn, are supplied from bulk plants operated directly by the company referred to herein as salaried stations. It appears that there are substantial differences in methods and expenses of sale and delivery of gasoline as between territories served by commission agents and territories supplied from salaried stations. In Respondent's Exhibit 33-B all tank wagon reseller expenses have been thrown together, whereas respondent's marketing costs outside of the Detroit area, particularly its costs of marketing through some 78 commission stations, have no relevancy in this proceeding and the inclusion of such costs may, for
4680 all that appears, have produced an inaccurate result.

4. Certain marketing expenses have been included in the totals given on respondent's Exhibit 33-B for tank wagon reseller sales, although it is admitted that such costs, for example, leased service station expenses and expenses in connection with dispensing equipment loaned, are chargeable only to certain phases of respondent's gasoline business and are not costs of sale and delivery which should be charged on an equal per gallon basis to all tank wagon reseller customers.

5. There are certain marketing expenses incurred by

the respondent in the Detroit field, or allocated by it to the Detroit field, such as taxes, field office expenses, plant maintenance and general office expense, which are admittedly chargeable in some part to the marketing of gasoline to tank car reseller customers, and no similar expenses have been included in the statement of alleged cost of sale and delivery to this class of customers as shown on respondent's exhibits 33-C, D and E.

6. Respondent's exhibits 33-C, D and E are devoted to a cost analysis stated to have been made by the respondent for the purpose of determining the profitability of jobber operation in the State of Oklahoma in 1939. This 4681 cost analysis is offered as proof of the cost of sale and delivery of gasoline to tank car reseller customers in the Detroit area in 1939 and 1940. The testimony shows that the marketing conditions and quantities of gasoline sold in Oklahoma to jobbers differ so greatly from the marketing conditions and quantities of gasoline sold to tank car reseller customers in Detroit that the Oklahoma cost study is worthless and should be refused as an offer of proof of Detroit costs. In the Oklahoma territory the company's only distribution of petroleum products was to 11 or 12 widely scattered jobbers, whereas in Detroit the company's distribution is in a thickly populated urban area and many of its costs are joint costs resulting from sales to many different classes of customers. Ten of the 12 jobbers located in Oklahoma purchased a total of less than 1,950,000 gallons of gasoline, naptha and refined oils in 1939, and 5 of them purchased less than 20,000 gallons each during the year. Citrin-Kolb Oil Company and Ned's Auto Supply Company each purchased more gasoline from the respondent in 1939 than the entire purchases of all of the Oklahoma jobbers. Certain large marketing expenses of the company, such as advertising, which were incurred in the Detroit area, were not incurred by the company in Oklahoma. For some purposes, products other than 4682 gasoline and refined oils have been included in making the cost computations for Oklahoma. It is submitted that the company's cost of doing business with jobber customers in Oklahoma is not the best evidence, and should not be accepted as proof of its cost of doing business with tank car reseller customers in Detroit, since it does not appear that a proper cost study producing more accurate results can not be made in the Detroit area.

7. Respondent has attempted to support the Oklahoma ~~cost study as an offer of proof of cost differences in Detroit~~ by testimony to the effect that while Oklahoma cost may not be the same as Detroit costs, the opinion of its cost expert is that the cost of sale and delivery to tank car reseller customers in Detroit is lower than in Oklahoma. Cost justification of price differences is a question of fact, not an opinion. To determine whether the respondent's price differentials are justified, the Commission must know the facts as to differences in distribution costs, if any, as between customers where the price discrimination exists, and not in some other remote area, whether the costs in that area be higher or lower. The opinion of respondent's witness that the company's costs of distribution to jobbers in Oklahoma are higher than similar costs in Detroit, 4683 is wholly insufficient to support respondent's Exhibits 33-C, D and E, or to provide the Commission with a means of determining the extent and nature of differences in cost of sale and delivery of gasoline to different customers in Detroit.

For all of these reasons, your Honor, I move that these five sheets constituting the Respondent's cost justification for its price differentials in Detroit in 1939 and 1940 be stricken from the record. I think it is clearly insufficient to sustain Respondent's burden of proof, but in addition to that I do not really believe it is proper evidence in support of the purposes for which it was submitted.

Trial Examiner Ballinger: I will hear from counsel for respondent.

Mr. Hanley: I shall not offer a long argument in resistance to the motion at this time unless the court cares to hear from me.

I think a complete answer to the motion lies in the fact that the issues as delineated by the pleadings in this case assert on the part of the respondent a cost differential justification.

We assert emphatically that the proof offered by the respondent has amply sustained the burden that is imposed by the statute upon the respondent, but irrespective of the merits of that contention, your Honor, this motion is inapposite and improvident at this time because as 4684 long as the issues stand framed as they do under the pleadings, if the proof of the respondent proved nothing except that it had failed in its proof, it is competent evidence to remain in the record and to be considered by the Commission. If it be purely negative on the affirmative assertion in the answer pleading of the respondent, it is proof and it is entitled to be considered.

Trial Examiner Ballinger: The Examiner is of the opinion and so rules, that the exhibits were tendered by the respondent as proof of its justification, that they are entitled to consideration by the Commission for whatever they are worth, and the motion to strike is denied

Mr. Austin: Now, if your Honor please, I renew the motion to strike, but restrict it at this time to Respondent's Exhibit 33-C, D and E, upon all of the grounds previously stated for the five exhibits, and for the additional ground that they, those exhibits, since they are directed to Oklahoma, and since it is not known that the cost study could not have been made for Detroit, are irrelevant and because the issues of this case do not include any question immaterial, and are not directed to the issues of this case of respondent's costs in Oklahoma.

I therefore move that Respondent's Exhibit 33-C, D and E, and also the material on Respondent's Exhibit 33-A,
below the first item numbered 1, in other words
4685 everything opposite the items numbered 2 and 3 on
Respondent's Exhibit 33-A be stricken from the record.

Trial Examiner Ballinger: Does counsel for the respondent desire to be heard?

Mr. Hanley: If the court please, I do not think that changes the main issue as defined by the motion at all. This is a part of the whole, as I understand counsel's present motion, and the tail would normally go with the dog, I assume.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

The exhibits embraced within the motion to strike were taken from the company's records. They form a part of the evidence tendered by the respondent in justification for the price discrimination.

The Examiner is of the opinion and so rules that the evidence shall be considered by the Commission for whatever it is worth, and the motion to strike is denied.

Mr. Austin: I now would like to make a statement on the record for the benefit of counsel for the respondent, if I may.

Trial Examiner Ballinger: Proceed.

Mr. Austin: Regardless of the ruling on the motions to strike and accepting for the purpose of argument
4686 the statement made by counsel for the respondent that these exhibits, Respondent's Exhibits 33-A to E are respondent's attempt at cost justification and are entitled to consideration by the Commission, counsel for the Commission intends to take the position before the Commission and before the courts, if necessary, that the respondent has not sustained its burden of proof in submitting, rather by introduction of the material contained in Respondent's Exhibit 33-A to E.

It may be that the material there submitted is some evidence, and therefore entitled to consideration; at the same time it may be insufficient evidence to sustain the burden of proof, and counsel for the Commission's position will be that of a party in a private suit who demurs to certain evidence submitted.

Now, I think it is therefore incumbent upon the Respondent to decide whether or not it wishes to stand upon the testimony which it has offered and the exhibits which it has offered, or whether it desires to introduce further proof of cost justification while it has the opportunity to do so in its case.

I do not think that the respondent may properly put in as little as it thinks is absolutely necessary with the assurance that when the case is finally submitted to the Commission, if the Commission rules against it it may then have the opportunity to go back and submit additional
4687 evidence.

If counsel for the respondent should desire to present this question to the Commission at the present time before it closes its case, as to whether it has sustained its burden of proof, I will not oppose any such attempt to submit the question, and in fact will gladly join in such submission.

On the other hand, if counsel for the respondent decides to stand upon the proof now in the record, counsel for the Commission can not state at this time whether he will make a formal motion to the Commission for the purpose of obtaining some ruling, or whether he will await final presentation of the case, but I am merely stating that if counsel for respondent desires the question submitted and determined now, I will certainly be glad to join in such a request, and facilitate the procedure of bringing the matter before the Commission.

I do not know of any usual procedure in such a case, but I should think if counsel joined in the request the Commission would make the decision, if it were desired by counsel.

Further, to clarify the position of Commission's counsel, it is my opinion that a proper attempt at cost justification and one ~~which~~ would satisfy respondent's burden of proof must at least include a comparison of the costs in the Detroit area, cost of sale and delivery as to the jobber
4688 customers on the one hand, and the tank wagon reseller customers in the Detroit area on the other hand, and I think that starting out with form 189 as a basis of respondent's cost accounting that it would be necessary, and this is not intended as a comprehensive statement because I do not intend to set forth how such an accounting study should be presented in detail at this time, but merely as a suggestion. I think that such a cost study should at least contain a statement of the expense for each one of the accounts on form 189, which it is claimed afford a cost differential as between the jobber and the tank wagon reseller business setting forth the total expense going into each account, the nature and type of expenses going into the account, and then a breakdown of that total expense, first by eliminating products other than gasoline, or at most gasoline and refined oils; then a further breakdown to show the tank wagon reseller expense, the jobber expense going into that account, and the total of all other, and finally a breakdown of the tank wagon reseller costs to the costs for the Detroit area, or if that be not entirely practicable, then a segregation of the tank wagon reseller costs and the cost of selling and delivering gasoline to tank wagon reseller stations served from salaried bulk plants, since it is my understanding based upon Mr. Boatwright's testimony that the entire Detroit area with the exception of some remote portion of Dearborn is served by
4689 salaried bulk plants.

Let me say again that this statement which I have just made is intended merely to state my own ideas and not specific methods of procedure or accounting practice, but if a study is made, the Commission's chief accountant, Mr. Lindyall and Mr. Warmack have sat in on the hearings here in Washington and are familiar with this proceeding, and are now available and will be available at any time to discuss with the company's accountant the specific methods to be followed in proceeding toward such a special study in Detroit if the respondent decides that it desires to make such a study.

It may be that some suggestions I have made are not practicable, but it is my opinion based upon consultation with our accountants that any such study should go at least as far as I have indicated regardless of the method of procedure that is used.

Mr. Hanley: Well, of course, your Honor, I should be remiss if I did not express appreciation to counsel for his forewarning of position he proposes to take, although I have apprehended that it would be the attitude of counsel for the Commission that he would attack the applicability of the Oklahoma survey as applied to the Detroit situation.

Before I express any views on the suggested method of legal procedure in this action, it just strikes me, your Honor, that as to the accounting procedure that has
4690 been suggested, if I have been able to gain any grasp of it at all, in the course of the study that I have been required to make in the course of this litigation, rather than to indulge in the type of accounting that has been suggested, if I understand it, the executives and employees and stockholders of the respondent might better close up the shop and get a job on WPA. It just is not in the cards.

It simply is not a practical thing to do, but that is entirely apart, I take it, from the immediate consideration.

Counsel has suggested that it is his position that he will attack the applicablity of the Oklahoma survey to teh Detroit situation, and suggests a willingness to join with the respondents in getting a determination of that fact or to the submission of the case finally on its entire merits.

Inherent in that method, I take it, is the inference that there may be a foreclosure of the respondent if it does not do something in the interim and elects to rely on the cost evidence as presently in the record.

Frankly, I am now at some loss to understand how counsel for the Commission might join with us in getting a determination of that fact. I can see how the converse of that might be true. The evidence is in the record. Counsel for the Commission has moved that it be stricken and your Honor has denied that motion. That leaves nothing for

the respondent to do on this motion. It does appear
4691 that the Commission might, and counsel for the Commission
might take an affirmative action in view of the ruling of the court; an action that respondent can not take. There just is not anything for respondent to do, and certainly I would have this view of it, and I have expressed it many, many times during the course of the trial, your Honor, that if there is any way that we can learn what the attitude of the Commission is and what they demand in the way of a showing on the part of the respondent, we are desireous of learning that. Indeed, we have been avid in our desire to know how we might present the facts in such form as would be most acceptable to the Commission.

I do not know that it would be possible to get any determination on the merits on any other kind of a motion whether made independently by counsel for the Commission or by counsel for the respondent, or jointly, because a determination on the merits of this showing would essentially be a determination of the case if that determination should be that the respondent had made a cost justification. If that should be the determination, your Honor, that would end the case. Of course, it would not end the case if the Commission should simply say this is not sufficient. It might eliminate the cost feature of the case but there would still be other matters of defense for consideration, but this might be entirely possible and certainly the respondent would welcome this, as to whether or not
4692 the attitude of the Commission would simply be to
say, well, we just won't consider any attempt at cost analysis in Oklahoma as applicable to Detroit. It does not make any difference what the cost analysis is in Oklahoma, how sound it may be, or what the opinion of those who know may be as to its applicability to the situation in Detroit, just on the face of it we refuse to consider anything except a Detroit survey.

Now, if that be the attitude of the Commission, then, of course, it automatically eliminates the Oklahoma survey, and would impose upon the Respondent the burden of making such a survey in Detroit as Respondent might be able to make.

To that extent certainly I think the Commission could properly go, and certainly to that extent the respondent is most anxious to be advised.

I have expressed many times, as your Honor will recall, a fear that we might be foreclosed on some procedural matter and I am most anxious to avoid that. We do feel justified in this method of establishing these costs because we did it all on a basis that had no relation to this lawsuit. We think it is as free from prejudice and from colorization by involvement in litigation as it is possible to advance figures. Every figure in here in respect of our justification as between the resellers on the one hand and the jobbers on the other hand is a figure that was developed not
4693 to convince anybody of anything, but to enlighten our own accountants and our own management as to what the facts are. Of course, they do not want to be fooled. They wanted to know that the accountants that made these surveys were not trying to convince anybody of anything. They were trying to develop the facts, and we thought that that might be more persuasive, might give a more convincing completion of an effort to develop the truth of factual background and situation than any attempted special study pointed directly to this lawsuit in an effort to convince in this particular lawsuit the particular issues involved here.

Now, I assure your Honor and counsel that if there is any way that we can learn what is necessary for Respondent to do beyond that which it has done to present this thing acceptably to the Commission, we are most anxious to do it.

We feel that we have proved our case on this particular issue but procedurally it may be true that the Commission will adopt counsel's theory that no matter what it proves as a fact, the Oklahoma survey just perforce can not be used in a Detroit situation. We think otherwise, but the Commission may adopt the view of counsel for the Commission, and if that be true, of course, we would want the opportunity at least to determine whether or not to simply abandon our business to a substantial extent in De-
4694 troit, or whether to go ahead and make a survey.

This much is certain, that if that were done it would take a very substantial amount of time. Mr. Boatwright was asked and did indicate that it would take a number of months with a staff. I know Mr. Boatwright is very conservative; the way things go, it would take twice as long to get the thing into form, at least for presentation in a lawsuit.

Trial Examiner Ballinger: Well, Judge, in ruling upon the motion of counsel for the Commission the Examiner did not undertake to consider, and did not consider the weight of the evidence, but one thing he considered, and that was whether or not these documents had any evidentiary value. If they have evidentiary value, then the Examiner has no right to strike them from the record, and he is of the opinion that they may have evidentiary value, that they have evidentiary value, and upon that ground and on that ground alone he based his rulings.

Now, the Examiner would be delighted to see an appeal prosecuted to the Commission, but if an appeal is prosecuted the Commission would only pass upon the question as to whether or not these documents have evidentiary value, as to whether the Examiner was right or wrong in his ruling, and you would be in practically the same position you are now in. Therefore, I can not perceive how an appeal would be of any substantial value.

4695 Mr. Austin: I quite agree, your Honor and I was going to say that if I had decided to take the matter to the Commission on my own account it would not be in the nature of an appeal from your Honor's ruling; it would have to be in the nature of something like a demurrer to the affirmative defense, and we have no exact procedure of that kind, and that is why it seemed to me that either side could present the question. It is just a matter whether either of us wanted to do it.

Trial Examiner Ballinger: The Examiner would suggest, although he knows of no precedent, that something in the nature of a joint petition to the Commission to consider these documents that have been offered by respondent and the related testimony, with a request that the Commission express its opinion as to whether or not they form a sufficient basis to justify the acts of the respondent. Allowance or disallowance of the petition is a matter solely in the discretion of the Commission, but in view of the fact that respondent still places reliance upon the survey, the evidence that is offered as justification, the Commission might consider the matter and afford, in the event it found the evidence insufficient, respondent an opportunity to make a further survey.

I doubt if the case goes to final hearing whether the Commission thereafter would extend such an opportunity to the respondent.

Mr. Hanley: Well, surely, your Honor, if such pro-
4696 cedure is feasible, I know that the respondent will
be happy to join in the presentation of such a petition.

The respondent certainly does not want to get into a position of being foreclosed of its rights and if mere locality of this survey is to be the controlling factor, then I think that there ought to be a determination, indeed I felt all along, your Honor, that the respondent has been in the position of being forced to work more or less in the dark because we have not been able to get a glimmer for five or six years as to just what we were supposed to do.

Trial Examiner Ballinger: Certainly, Judge, counsel for the Commission has endeavored to be very helpful and to afford you the fullest opportunity.

Mr. Hanley: I appreciate that and right now he is suggesting some method, and your Honor is likewise endeavoring to be helpful, and I am trying to fit into that suggestion. I do not know how to do it.

I am willing on behalf of the respondent to join in such petition as your Honor suggests, or to follow the procedure suggested by Mr. Austin, of a demurrer to the defense, to raise the issue.

I am right now in this quandary, and placed there by the remarks of your Honor and by those of Mr. Austin, that while we feel, I feel primarily because of the attitude of
our own cost accounting people that our case is ade-
4697 quately proved on the costs, nonetheless I would feel
something more than foolish if it were found that because we used Oklahoma instead of a Detroit survey that our evidence was not worthy of consideration.

On the other hand, if the Commission feels that a consideration of the survey in Oklahoma and an analysis of it, the determination of whether or not it shows the differential is tantamount to an analysis of a similar survey, that we might make in Detroit, certainly under those circumstances I would not want to ask for a six-month continuance of this lawsuit and put my client to the very substantial—and when I say "substantial," I mean very substantial—expense of conducting a survey in the city of Detroit.

Now, Judge, if there is any way at all that this very fair attitude of Mr. Austin's in an effort to determine this question may be taken advantage of by the respondent, certainly I am prepared to do it. I do not care what the method is, or what the procedure, or how novel, or anything about that. I stand on no technicality at all. We can learn whether or not we have proceeded rightly. I want to learn it. If we have not done so, of course we want to do so That is just all there is to it in my mind, Judge. I am ready to do anything that can be devised here.

Trial Examiner Ballinger: Well, the Examiner would suggest that counsel confer and if they can agree 4698 upon a course that they think would be productive of results, that it be adopted.

Mr. Austin: Yes.

I would like to say this, your Honor, that I do not think Judge Hanley was quite correct in saying that if the matter were presented to the Commission now and they decided that the proof offered were sufficient to satisfy Respondent's burden of proof that that would decide the case. I do not know whether he intended to say exactly that, but if the Commission decided that the proof was not sufficient, of course that would be then up to the respondent to proceed to present more proof. If the Commission decided that the proof already introduced was sufficient to satisfy the respondent's burden of proof, why then it would be up to counsel for the Commission if he could do so to introduce such evidence on rebuttal as to break down the proof offered. In other words, I do not think it will decide it either way. It will just decide whether you have to go ahead or whether I have to go ahead.

Mr. Hanley: It might only decide who had the burden of proof of going forward.

Mr. Austin: That is right.

Trial Examiner Ballinger: The Commission in view of the heavy expense that a new survey would impose would, I am sure, give very serious consideration to a peti-
4699 tion for an expression of its opinion.

Mr. Austin: And I think the Trial Examiner's suggestion as to a joint petition is probably the best way to present the matter if it is desired to present it.

It seems to me that the respondent must determine whether or not it desires to make a further cost study or introduce additional evidence in the event the Commission should decide that the proof already introduced is insufficient to satisfy the burden of proof. If the respondent does so wish, why then it seems to me that it is desirable that the matter be presented. Of course, if counsel does not intend to do it anyway, and intends to stand on this point, then there would be no point in submitting the matter.

Mr. Hanley: Well, if the Commission should take the position that this was an insufficient method of sustaining the burden, it would be my view that the respondent would want to do something in the way of adducing additional proof. I just feel there is no doubt about that.

Trial Examiner Ballinger: Judge, I doubt very much whether the Commission at this stage—although I am comparatively new here—would do anything more than express its opinion as to the method employed by respondent.

Mr. Hanley: Well, I think that would be perhaps very enlightening, as far as the respondent is concerned.

Mr. Austin: I think so, too.

4700 Mr. Hanley: In answer to Mr. Austin's apparent quandary, the respondent proposes to try its case and defend it to the utmost. If we have not proceeded properly, why then we want to get on the right side. That is all there is to that; and so far as I know, unless I am called off, that is just what we would do, and hence I will say this, and I am certainly authorized to go to this extent, that we will be happy to join in such petition as has been suggested and get whatever enlightenment the Commission in its wisdom and power deems to give to us.

Trial Examiner Ballinger: In view of the cooperative attitude of the respondent in this case throughout, the Examiner would be not only willing but very glad to approve and endorse a petition recommending that it be considered.

Mr. Hanley: Well, we can try it, Mr. Austin. That is the way proceedings grow, somebody starts one. It becomes an accepted method of procedure.

Trial Examiner Ballinger: Well, that is a matter that counsel can confer about later.

Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: Respondent moves that this hearing may be adjourned, to be reconvened on five days' notice given at the pleasure of the Trial Examiner to counsel for both sides. 4701

Trial Examiner Ballinger: The motion is granted; and now, at 3:30 p. m., the hearing stands adjourned, to be reconvened upon five days' notice to respective counsel.

(Whereupon, at 3:30 p. m., Friday, June 27, 1941, the hearing was adjourned, subject to five days' notice.)

4702 Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Monday, November 17, 1941.

Met, pursuant to notice, at 10 a. m.
Before: Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., appearing on behalf of the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Ill.) appearing on behalf of the Respondent.

4703

PROCEEDINGS.

Trial Examiner Ballinger: Come to order. Hearing on Docket No. 4389, in the matter of Standard Oil Company, is reconvened pursuant to notice at 10 a. m., November 17, 1941, in Room 332 Federal Trade Commission Building, Washington, D. C. The last hearing was held in Washington, D. C., June 27, 1941.

Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: You may proceed.

Mr. Hanley: Your Honor will recall that subsequent to the last hearing that we had it was determined that respondent would make a detailed cost survey applicable to the Detroit field, and a continuance was granted by the Commission until this date in order to provide the necessary time to complete that survey. Prior to undertaking the work, Mr. Boatwright came to Washington and conferred with Messrs. Lundvall and Warmack of the accounting staff of the Commission and with Mr. Austin as counsel for the Commission, and certain procedures were worked out at that time which the respondent has endeavored to follow insofar as it was possible to follow them.

Now, that work was completed by Mr. Boatwright and his staff some time last week, in the early part of last
week, and Messrs. Lundvall and Warmack came to
4704 Chicago on Monday last and spent the better part of
three days in conference with Mr. Boatwright and some of his staff, and I attended those conferences also.

Now, the work involved in making this survey has been a task of just very great magnitude. We realized that it would be that when it was undertaken, but I doubt if any of us, with the possible exception of Mr. Boatwright, recognized just how extensive a job it was. It involved the analysis of many, many thousands of individual documents, and Mr. Boatwright personally and members of his staff—many of his staff, Mr. Boatwright's staff, have been working continuously since, I think it is the 11th of August, if I am not mistaken in the date, right up until last week, and they were aided by any of the staff that could give them aid as to Detroit. They built up work sheets in the course of their study which number into the many, many hundreds, if not actually thousands—I don't know; there is a stack of them two feet high, and they are great long things, and as a result of that study Mr. Boatwright prepared certain conclusions and built a 189 form applicable to Detroit field for the year 1940 which breaks out the jobber cost.

Now, it appeared from our conferences in Chicago with Messrs. Lundvall and Warmack that they desired some additional supporting data other than appear in the con-
clusions that we have prepared—which Mr. Boat-
4705 wright has prepared. We recognized that in all
probability we should, as a matter of safety, put in certain supporting data that did not appear in the conclusions themselves. I will say quite frankly, your Honor, that I was in doubt after reading the conclusions prepared by Mr. Boatwright, as to just what procedure to pursue, and just how far to go in the matter of supplying the court with additional and supporting detail and data. Your Honor will probably recall that I at least have been in something of a quandary throughout the course of our hearing relative to the extent of the burden that was placed upon the respondent. The statute requires that in the matter of justification, if it is pled, the burden is on

the respondent to rebut a prima facie case of discrimination, if that is shown, and in this case it is admitted. I have thought it was the law, and I believe it is the law, that the extent to which the respondent is required to go is no more than that of establishing a case of justification which, if unassailed or if not demonstrated to be fallacious, should prevail; in other words, the burden of going forward with the proof after the prima facie case of discrimination has been established.

There are, of course, two kinds of burden of proof: that is one. The other is the burden of convincing the trier of the fact.

I believe it to be the law that the burden is on the Commission ultimately to prove its case on the
4706 whole record. I believe it to be true in a proceeding of this kind, as in any case where an infraction of law is charged, that he who accuses has the burden of proving guilt before a conviction can be sustained, as in the case of a man charged with a crime and he undertakes to defend on the basis of an alibi, for instance, there is a period during the trial when he who asserts the alibi has some burden to go forward and show what he seeks to show in respect of his alibi; but the burden on the whole case never shifts away from the State. They must still prove guilt on the whole record.

Now, I refer to that, your Honor, because I believe that technically we would have the right to put in these conclusions which do establish our justification and rest, and that the burden would then shift to the Commission to demonstrate the fallacy of those conclusions, if they can. However, respondent has just concluded that even though we are right in that view of the law, that we desire, and I am [illegible] the Commission also desires, that we should go further and it was a question in my mind as to how we should go further and how far we should go.

Messrs. Warmack and Lundvall very aptly said that we were in a better position to supply the supporting data than the Commission was to delve into our records and get. Of course, that is true. Our accountants are familiar with the books and familiar with the work
4707 they have done, and while the Commission certainly has a right and the facilities for following our tracks in this study and making any study of their own that they desire, certainly I think it is true that our people can, in

the first instance, at least provide the Commission with supporting data with a great deal more facility and speed than even the very competent accountants for the Commission, who are unfamiliar with our records, could go into our office and dig it out for themselves.

Now, the ordinary method, I assume, of going forward, in view of this decision that I reached that we were going to waive any technical position that we thought might be right on the question of burden of proof—I suppose the ordinary method would be to develop the foundation by a witness who is qualified, namely, in this instance, Mr. Boatwright, by question and answer. It early became apparent that to do it in that manner would result in what I think would just be weeks of examination. It would involve preparation on our part of an examination based on these very voluminous work sheets, and then we would have to go through the very difficult task of asking questions and eliciting answers that would explain the various procedures and the various accounts, how they had been handled, what had been done in the matter of building up this new 189. That procedure has the distinct disadvantage of consuming a very large amount of time for every one, which it was desirable to avoid, I have no doubt.
4708 But it also has another serious disadvantage to my mind. It would result in a long record that might or might not be very consecutive in its continuity with reference to a clear and concise build-up of supporting data which in turn would impose the task upon all counsel and the court of worrying through that tremendously long record and building up for themselves a narrative story in consecutive form as to each of the several accounts that were involved.

It also has another disadvantage in that if it were done that way it would be extremely difficult to distinguish between those accounts that might appear of importance to the accountants for the Commission and to the Examiner and the Commission and those which were relatively trivial in character. It might easily result—and I fear would if I did it as thoroughly as I think I should do it perhaps, I pursued that course—in filling the record with what might be a large amount of undesirable detail.

As a result of all of these conclusions—and I will say, your Honor, that when Messrs. Lundvall and Warmack were in Chicago we did consider them all over a period of three days—and as a result of it a plan was evolved. It was not born all at one time but it just worked out as we considered these various possible methods of procedure, and that boils down to this: I explained to both of the accountants for the Commission that we were going 4709 to forget all about any legal question that might be involved as to where the obligation lay to proceed from this time on and that we might all consider it on the basis of just practical fact and a basis of what would most speedily and readily facilitate the work of everybody who is concerned in the matter. It finally resulted in a suggestion that Mr. Boatwright and his staff should undertake the work of writing up in narrative form and consecutively a detailed explanation of each of the important features of this study. After that is done—and it will be done by Mr. Boatwright and he will use his judgment as to what he thinks is important to put into it—then there will be a discussion again with Messrs. Lundvall and Warmack with this thought in mind: That if Mr. Boatwright shall have included too much detail in any particular that is regarded as unimportant and not of sufficient interest to remain, that can be eliminated down to a point where it suits everybody, or if, on the other hand, in some particular the explanation isn't sufficiently clear to satisfy everyone concerned, any deficiency can be supplied and further amplification made of the explanation. After it is thus revised, if it needs that revision, our thought was to offer that as an additional exhibit supporting the conclusions which we are now prepared to offer.

In respect of all of this program, your Honor, I explained to Messrs. Lundvall and Warmack that we, of course, reserved a right, which undoubtedly we have, to put 4710 in anything in addition to what they might think was sufficient explanation.

Having reached the conclusion that I have undertaken to explain, that we will assume the burden of going forward now and presenting this additional data, I want to make it very clear that what the respondent desires to do is to put in sufficient material so that any reasonable person examining it will be forced to the conclusion that it, taken by itself, is a complete and a sufficient explanation and justification of the position of the respondent, and that it is sufficient to warrant the respondent prevailing in its position unless and until it or some feature of it is—some important feature of it is demonstrated to be entirely fallacious.

So we desire to go that far.

Now, I believe that all of us in Chicago, including Mr. Lundvall and Mr. Warmack, reached a perfect accord in respect of this program, and I believe that we should be permitted to pursue it. I don't know how extensively it may have been discussed by Mr. Lundvall and Mr. Warmack with Mr. Austin or others here, but I am sure as they left Chicago they felt that this was a proper method of procedure and one that would greatly facilitate their work and that of all of the rest of us. I felt that we were under an obligation at this time to offer to the court the material that we do have prepared, for two reasons:

First, we were granted this continuance and we
4711 have prepared our conclusions and we have them,
and I just think we are under an obligation to produce them at this time. Secondly, I believe that it may aid Mr. Austin and his accounting staff if they have an opportunity now to begin their study of those conclusions. If we do offer them I just suggest, your Honor, that I shall not on direct examination undertake to develop much by way of foundation because that, it is anticipated, will be done by the additional material which Mr. Boatwright will prepare, and I suggest further that I do not believe that it would be proper to extensively cross examine Mr. Boatwright on these conclusions at this time, for the reason, among others, that many of the questions that would doubtless be suggested to a cross examiner will be answered by the exhibit which will later be prepared, and it would be a duplication of effort. One of the primary purposes of this program is to avoid as much direct and cross examination as we can. We do not want to duplicate the effort.

Trial Examiner Ballinger: Well, if your plan should be adopted, the right of cross examination would be reserved to a future date?

Mr. Hanley: Oh, of course. Of course. Understand, there is no disposition here to restrict cross examination, Judge. It is just a matter of how it can be done to the best advantage and with the least effort and by making the smallest record possible.

4712 Now, we would like to go forward on that basis, your Honor. I told these gentlemen in Chicago that, of course, this was a matter that had to be passed on by the Examiner and by counsel for the Commission, and that I felt under an obligation as a lawyer to come down here prepared to go ahead on any basis that might be suggested to me by the court, but that I did feel that we had arrived at something that was certainly very worth while in the matter of saving time and effort for everyone and we would like to go forward on that basis.

Now, I have taken the pulling oar here in the matter of explaining this thing as it occurred in Chicago, Judge, and I think I have accurately stated the results of our conference there. If I have not done so or if I have left out any important thing or inadvertently misstated anything, I believe that your Honor ought to hear Mr. Lundvall and Mr. Warmack.

Trial Examiner Ballinger: As this is a matter with which the Examiner is wholly unfamiliar, except upon your statement this morning, the Examiner will hear Mr. Austin or the representatives of the Commission.

Mr. Austin: If your Honor please, I have no objection to proceeding in general as outlined by Judge Hanley, which I understand will mean some further and reasonable amount of time being allowed the respondent to pre-
4713 pare the supporting data which has been referred to, and my conversations with Mr. Warmack and Mr. Lundvall are fully in accord as to what—as to the conferences held and so forth, with what Judge Hanley has said. I understand that the Commission has not been committed in any way to any procedure or any method of treatment in connection with this survey or in connection with the defense of cost justification, but I believe all that is necessary for me to say now is that I shall be very glad, of course, to have the supporting data for the conclusions reached put in to such an extent as may be desirable to the respondent and desired by our accountants, because, as Judge Hanley has pointed out, the preparation of that data is something which Mr. Boatwright and his staff can no doubt do more efficiently and more easily than our accountants could do it, and apparently, from what has been said, why, such data will be necessary for the consideration of the Commission one way or another. So that I am prepared to concur as to all that Judge Hanley has said regarding the desirability of that method of procedure.

Trial Examiner Ballinger: It occurs to the Examiner that it is a very desirable method to adopt, and we will proceed with the understanding that the respondents will be accorded further opportunity to submit supporting data.

Mr. Austin: That, I assume, will be made specifically

when respondent is through with what it has to pre-
4714 sent now. I assume that some request will be made
for further extension of time for that purpose, and
that would be a matter then for the Examiner to rule upon,
so that—

Trial Examiner Ballinger: You may proceed.

JOHN W. BOATWRIGHT was thereupon recalled as a witness for the respondent, and, having previously been duly sworn, testified as follows:

Trial Examiner Ballinger: Mr. Boatwright, you have been previously sworn?

The Witness: Yes, sir.

Trial Examiner Ballinger: Recalled as a witness for respondent.

Direct Examination by Mr. Hanley.

Q. Mr. Boatwright, subsequent to the last hearing in this matter did you undertake a cost survey and study of costs for the Detroit field for the year 1940?

A. I did.

Q. Why did you choose particularly the year 1940?

A. In the first discussion—

Trial Examiner Ballinger: Just a moment. We will suspend a moment.

(A short interruption occurred.)

A. (continuing) In the first discussion on the task
of making this special study of distribution costs held
4715 in Washington, I discussed the availability of records
upon which such a cost could be predicated, outlined
to Messrs. Lundvall and Austin—Lundvall, Austin and
Warmack—the various records which we now have, and it
was agreed that we should make the test upon the year
of 1940.

By Mr. Hanley:

Q. And did you have a discussion with the gentlemen you have named in Washington, Mr. Boatwright?

A. Yes, I did.

Q. And about when did that happen?

A. It was in the early part of August, some time prior to August 11th. The exact dates I do not recall. I came down here and was here for two days covering the—discussing with these gentlemen procedures which seemed advisable.

Q. And was it not understood, Mr. Boatwright, at the close of the last hearing, or some time prior to your coming to Washington, that you would come to Washington and that you would have such a discussion with a view to outlining, as best you could agree, a method of procedure for conducting this study?

A. Yes. That offer was made—I do not know whether it was made on the record, but the offer was made on the part of Mr. Austin to make available for complete discussion and consultation the services of examiners for the Commission and that we did adopt that offer and did consult with said accountants.

4716 Q. Subsequent to that discussion did you proceed with the survey?

A. Yes, sir.

Q. And was there any given date when it was started?

A. Yes. We started on August the 11th.

Q. And since that time have you been continuously engaged in conducting the study?

A. I have.

Q. Did you, insofar as you found it possible and feasible, pursue the procedures that had been suggested by the Examiners or accountants for the Commission in conducting your survey?

A. Wherever I found it possible I did so.

Q. I wish you would very briefly give us just some idea of the extent of the work that was involved in preparing your conclusions and conducting this survey, Mr. Boatwright, as to the number of people engaged and just some idea of the records that had to be examined and their number, and so on.

A. Well, there were between 7—either 7 or 8 accountants and clerks assigned to the task for a period of slightly over 3 months. These men worked directly on the survey with no other duties. In addition to the staff, we called upon the regular accounting staff and the regular field sales staff for many analyses that they could provide us with the source of our data. The number of forms analyzed is difficult to estimate, but it would surpass 50,000 4717 which, if anything errs on the side of an understatement rather than an overstatement. This work was all done in Detroit, except that part which was necessary—incident to the general office portion of the expenses.

In addition to conferences held here, we held weekly conferences with the accounting staff of our own organization, discussing in complete detail each step of the procedure and determining what appeared to be the most logical method of handling individual problems and individual data. The 7 people have informed me of much night work, while we worked through all holidays and week-ends. It was a continuous job.

Does that adequately—

Q. Yes, sir.

A. —cover your question?

Trial Examiner Ballinger: You referred to 50,000 forms. Do you mean accounting forms?

The Witness: Not 50,000 different forms in the sense that each of the forms would be a—separate and unique, but each would represent a separate transaction in many cases, thus in a sample sale of tickets on credit cards we used over 11,000 sales to determine our standards.

By Mr. Hanley:

Q. Did you personally participate in this work, Mr. Boatwright?

A. Oh, yes, from start to finish.

Q. Was it all done under your direction and supervision?

4718 A. It was

Q. Is it not a fact that your first assistant in your office participated personally and almost continuously in this work?

A. He did participate personally, and it was continuously throughout the entire assignment.

Q. As a result of the studies did you prepare certain conclusions relative to the costs of doing business with jobbers in the Detroit field as distinguished from the cost of doing business with reseller retailers?

A. I did.

Q. And did you prepare those conclusions yourself?

A. I did.

Q. And you have those conclusions here?

A. Yes, sir.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Mr. Hanley: May we have this document marked for identification, your Honor?

Trial Examiner Ballinger: You may. Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: The hearing will stand in recess for 5 minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order. You may proceed. ~~The~~ reporter will mark the document handed him by counsel for respondents Respondents' Exhibit 4719 100 for identification.

(The document was thereupon marked "Respondents' Exhibit No. 100," for identification.)

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. I show you now, Mr. Boatwright, what has been marked Respondents' Exhibit No. 100 for identification and will ask you if those are the conclusions ~~to~~ which you have just referred as being conclusions prepared by you and based on your cost survey in Detroit?

A. They are.

Q. I notice that your conclusions in Exhibit 100 are related to certain groupings of accounts. Is that true?

A. Yes, sir.

Q. And do those various groups of accounts, in your judgment, fall into the same category?

A. Yes. That was the object of classifying them in the form 189 which was discussed at a previous hearing. There would be a sub-account on salesmen's salary, and then subsequently on the form 189 there would be an account, traveling expense, salesman. Further down in the 189 would be a third account having to do purely with salesmen, such as operation and maintenance of salesmen's cars, 4720 while there would be still a fourth sub-account in the lower part of the sheet having to do with depreciation on salesmen's cars. In stating my conclusions, as outlined in Respondents' Exhibit 100, I have merely grouped accounts of a similar nature to facilitate the description and the understanding of the conclusions drawn.

Q. Now, Mr. Boatwright, was there a conference in

Chicago on November—beginning on November the 10th attended by Messrs. Lundvall and Warmack, accountants for the Federal Trade Commission, and yourself?

A. Yes, that conference started on the 10th, continued all that day, the second day, the 11th, and throughout the morning of the 12th. We were in discussion on ~~this~~ statement of the conclusions.

Q. Who attended that conference?

A. Those in attendance were Messrs. Lundvall, Warmack, Judge Hanley, Mr. Houghton, who is my direct assistant, and Mr. Russell, a cost accountant in my department, and myself.

Q. Is Mr. Houghton to whom you have just referred the gentleman whom you had in mind when I asked you a question a moment ago as to whether or not your first assistant had given his time continuously to this study?

A. Yes. Mr. Houghton is a cost accountant and office manager in my department, working—spending all of his time on analyses of this nature.

4721 Q. On the occasion of that conference did you have prepared a draft of what is now marked Respondents' Exhibit 100?

A. Yes. In the main it was a draft of what is now Respondents' Exhibit 100, although there were individual sentences or word changes made to clarify thought where the original manuscript did not give the exact interpretation that it was desired.

Q. Well, is it true that the draft that you then had in respect to the conclusions themselves was the same as Exhibit 100 is now?

A. Yes.

Q. Was there a copy of that draft exhibited to Messrs. Lundvall and Warmack at that time?

A. Yes. I had copies prepared, and a copy was furnished to all members participating in the discussion. It was read aloud and discussed, each of the gentlemen referred to having a copy to which they could refer.

Q. Indeed, Mr. Boatwright, is it not true that the procedure during that discussion largely followed the course of taking this draft of your conclusions and reading it aloud and then discussing the subject matter of each paragraph or sentence or conclusion, as the case might be?

A. That is exactly the procedure followed.

Q. You have heard the statement of counsel for the

respondent as to the determination reached in that conference as to what would be the best program of pro-
4722 cedure in preparing supporting data and presenting it in respect of these conclusions; have you not?

A. I have.

Q. And does that concur with your recollections as to the procedure that was outlined as a result of those discussions with the accountants for the Commission?

A. It does.

Q. In this grouping that you have used, Mr. Boatwright, in your conclusions, Exhibit 100, did you do that just as a matter of convenience to try and get the accounts that were of a similar character under one explanation or heading?

A. Primarily as a matter of convenience, although, if you take as an illustration, the various accounts having to do with salesmen, the salaries, the operation and maintenance of their vehicles, the depreciation on their vehicles, and their expense accounts, you have a similar allocation factor which applies, and rather than to explain the allocation four times, by grouping these you can explain the allocation only once and it is equally applicable to all four, so it was both a matter of convenience and a matter of brevity which prompted me to that end.

Q. I direct your attention particularly to page No. 55 of the Exhibit 100 entitled "Recapitulation of All Marketing Costs Schedules—Detroit Field—1940." Will
4723 you explain, please, just what that page represents?

A. Yes. You will notice at the extreme left of the page a numbering of the underlying schedules, the totals of which are brought forward to this page. The title of the schedule is given and then the marketing costs in dollars and cents by channels is shown. The channels selected are the tank wagon reseller, tank wagon consumer, the other method channel, jobber naphtha and gasoline, jobbers other products, the other direct shipment customers; then the sum total of these six channels represents the total petroleum marketing cost in the Detroit field. Automobile suppliers are then shown. Then our total cost for the entire field is shown in the last column. Adding up the various amounts shown under each of these columns gives the sum total expense of distributing our products in the Detroit field for 1940.

The recapitulation of this form ties in and checks with

the grand total of moneys expended in Detroit, as shown on the form 189, for the year 1940. The volume moving through each channel is shown in the third from the last line. A division of the volume into the moneys expended gives the cost per unit for marketing our various products by channels. That cost per unit indicated below "tank wagon reseller" is 1.67 cents per gallon. The various other channels, I think, would be of no immediate concern in the complaint until we reached the "jobber
naphtha and gasoline" column, which shows a unit
4724 cost of .16 per gallon. The difference between the
tank wagon reseller and the jobber naphtha and gasoline unit cost is shown on the last line of the page, being a net cost differential 1.51 cents.

Q. Mr. Boatwright, after your study of these costs and preparation of your conclusions, did you prepare a revised form 189 for the Detroit field for 1940?

A. Yes, I did.

Mr. Hanley: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: The reporter will mark the document handed him by counsel for respondent Respondents' Exhibit 101 for identification.

(The document was thereupon marked "Respondents' Exhibit No. 101," for identification.)

By Mr. Hanley:

Q. I hand you what has now been marked Respondents' Exhibit No. 101 for identification and will ask you what that is?

A. Respondents' Exhibit 101 is our usual form 189, comparative statement of marketing expense as far as the account designation and the account title is concerned in the first two columns in the left hand side of the exhibit. The channels in which our various marketing costs have been distributed differ from our usual form 189 for the reason that in our regular costs of accounting we do not
isolate the marketing expenses incident to that class
4725 of business referred to as direct shipments. In this
exhibit, however, we show the usual channel designation, tank wagon reseller, tank wagon consumer, other method, and then we isolate and set out separately those costs incident to direct shipment customers segregated among jobbers naphtha and gasoline, jobbers other prod-

ucts, and other customers. The figures shown on this exhibit appear in the order that they would on our usual marketing expense statement. Exactly the same figures appearing on this exhibit appear classified under schedules presented in the Respondents' Exhibit 100.

Q. Do the totals in respect of money expended for cost of marketing on Exhibit 101 for identification agree with the totals on the form 189 for 1940 covering the Detroit field, already in evidence in this case?

A. They do.

Q. Now, I think you have explained that in your conclusions, Exhibit 100, you have discussed each of the items of expense that appear on Exhibit 101 for identification?

A. Yes; the only difference being that the accounts are shown under schedules classified according to similar nature of cost incurred in the Respondents' Exhibit 100, while in the Respondent's Exhibit 101 the costs and the sub-account designations are in the order that the company maintains its regular distribution cost reports.

4726 Q. Directing your attention again to page 55 of Exhibit 100, and particularly to the last four lines of figures appearing on the page and across the page at the foot thereof, I will ask you if those same figures appear anywhere on Exhibit 101, and if so, where?

A. The line fourth from the bottom designated as "total expense" on page 55 of Respondent's Exhibit 100 appears opposite the title "grand total all expense" on Respondent's Exhibit 101. The total volume appearing on page 55, Respondent's Exhibit 100, appears opposite "total units" on Respondent's Exhibit 101, while the cost per unit of marketing shown on page 55, Exhibit 100, appears opposite "total units" on Respondent's Exhibit 101, while the cost per unit of marketing shown on page 55, Exhibit 100, appears opposite the title "average per unit" on Respondent's Exhibit 101.

Q. I note that the net cost differential of 1.51 cents appearing on page 55 in the last line thereof of Exhibit 100 does not appear on Exhibit 101. Is that correct?

A. It does not.

Q. I will ask you if it is not true that that figure 1.51 is simply a calculation—or the result of a calculation resulting in subtracting .16 cents appearing at the foot of the fourth column of figures on Exhibit 101 from 1.67

cents appearing at the foot of the first column of figures on 101?

A. Yes. It is merely the difference between those two figures.

Q. In other words, Mr. Boatwright, it is the dif-
4727 ference, as you have found it, between the costs incurred by the respondent in selling gasoline through the reseller tank wagon channel to retailers of gasoline and filling stations and the cost of the respondent of selling gasoline by tank car or tank truck to the jobber class of trade in the Detroit area?

A. That is correct.

Q. I will now direct your attention, Mr. Boatwright, to Respondent's Exhibit 33-A in evidence in this case.

A. Yes, sir.

Q. Exhibit 33-A and following pages are the schedules, as I understand it, which you prepared reflecting the results of a study which you made of the costs of serving jobber business in Oklahoma; is that correct?

A. Yes. Point No. 2 on page 33-A—on Exhibit 33-A does indicate the jobber marketing cost in the state of Oklahoma.

Q. And that, as reflected by 33-A, is .25 cents; is that correct?

A. Yes, sir.

Q. Is that the figure, Mr. Boatwright, on 33-A which would compare with the figure .16 cents on both page 55 of Exhibit 100 and Exhibit 101 under the column entitled "direct shipment customers, jobbers," column "naphtha and gasoline"?

A. Yes. The 25 hundredths, as indicated as a jobber marketing cost in the state of Oklahoma, is comparable with the figure of 16 hundredths cents per gallon as indi-
4728 cated by the special cost study in the Detroit field.

Q. Do you recall testifying as to your opinion and judgment relative to whether or not the cost of the respondent in serving jobber business in Detroit would be greater or less than the respondent's cost of serving jobbers in Oklahoma?

A. Yes. That is in the record several times, both as to the total of 25 hundredths, and as to individual components thereof.

Q. Do you recall testifying substantially that the cost of serving jobbers, as reflected on Exhibit 33-A, being .25

cents, was at least as great or greater than the cost to respondent of serving jobbers in the Detroit area?

Mr. Austin: Your Honor, unless it is leading up to something, I think I should object to mere repetition of the questions and answers appearing elsewhere in the record. I don't know what the purpose of it is here, but the record speaks for itself, unless counsel is leading up to some fresh question.

Mr. Hanley: I am not leading up to anything particularly, Judge, at all, to be quite frank about it. I just wanted to get the contrast in the record with a question or two.

Will you read the question, please, Mr. Reporter?

(Question read.)

Mr. Austin: Did you rule on the objection, your
4729 Honor?

Trial Examiner Ballinger: Yes. The Examiner overrules the objection. The Examiner will state this doesn't appear important to the Examiner but may be of assistance in final analysis.

Mr. Hanley: That is all; just summarizing. It is in the record.

A. I do not recall such testimony.

By Mr. Hanley:

Q. Now, I will ask you, Mr. Boatwright, if these exhibits, referring particularly to 33-A, on the one hand, and Exhibit 100 and 101, on the other hand, mean that it costs the respondent less to serve jobbers in the Detroit area than in the Oklahoma by the difference between .25 cents and .16 cents?

Mr. Austin: Object, your Honor, on the ground that it is immaterial now what the jobber cost is in Oklahoma. I think I should be consistent to have contended that before, that if it is now, certainly in view of this new survey, immaterial as to what the cost was in Oklahoma, then it is immaterial what the comparison is between the Oklahoma cost and the Detroit cost.

Mr. Hanley: We will still rely on the Oklahoma survey. We are not abandoning any evidence we put in here.

Mr. Austin: It seems to me that this is merely bring-
ing out that this result now reached in the Detroit
4730 survey confirms testimony previously given, and if
it does it seems to me that that appears on the record
and is really a matter of argument, if it is of any benefit to

argue, that the witness' previous testimony has been confirmed by what he now states.

Mr. Hanley: I agree, now, Judge, I offer this merely in explanation of the exhibits that we all understand it.

Trial Examiner Ballinger: The Examiner is of the opinion that the effect is as stated by counsel for the Commission, but it may be of assistance later on and the Examiner will permit some limited examination.

Mr. Hanley: This is the last question I have on it.

Trial Examiner Ballinger: Objection is overruled.

The Witness: Would you read the question?

(Question read.)

A. Yes, that is the difference. The reasons for that difference, I am sure, will appear in many cases in the previous testimony given.

Mr. Hanley: At this time, if your Honor please, the respondent offers in evidence Respondent's Exhibits 100 and 101 for identification, with the reservation, as heretofore explained, that it is entirely probable that the respondent will desire later to adduce further direct testimony
4731 in connection with both of these exhibits on the occasion of offering the exhibit relative to supporting data which has been discussed in connection with our program of procedure.

Trial Examiner Ballinger: The Examiner understands that—the Examiner understands that it is your intention and that you will so request opportunity to offer further supporting data.

Mr. Hanley: That is right; and I will desire, I think, to amplify this examination. I am simply now undertaking to put in enough testimony by the witness to form a formal foundation for the offer of these two exhibits so that the Examiner and counsel and the Commission may have the opportunity to have them available right now, but will want to examine at greater length, I am sure, when the proper time comes.

Trial Examiner Ballinger: Any objection?

Mr. Austin: I have no objection, your Honor.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Respondent's Exhibits 100 and 101, for identification, are admitted in evidence, subject, however, to the right reserved counsel for the Commission to at a later date move to strike both exhibits.

(The documents heretofore marked "RESPONDENT'S EXHIBITS 100 and 101," for identification, were 4732 received in evidence.)

Mr. Hanley: Now, if your Honor please, I think I shall have some additional testimony to offer on the part of Mr. Boatwright, particularly in connection with certain studies that he has made in Detroit in connection with jobbers' advertising costs. I feel that I am in a position to go forward with that testimony, but if Mr. Austin is in a position to indicate at this time and is willing so to do, as to whether or not he is going to conduct any further hearings in Detroit, it would be more convenient, I think, to offer that testimony on that occasion. Mr. Boatwright obviously has to appear further in this case, and I would rather defer that testimony until that time, if you are going to hold hearings in Detroit anyhow, Mr. Austin. I say that because it will just make it easier for us all if we bunch our work as much as possible.

Mr. Austin: I do expect to be in Detroit again in rebuttal after the respondent has closed its case. I think it will be necessary, your Honor, to hold some further hearings in Detroit. That is my present intention.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Now, at 11:55 a. m., the hearing will stand in recess until 1:30 p. m.

(Whereupon, at 11:55 a. m. a recess was taken to 1:30 p. m.)

4733 Afternoon Session. 1:30 P. M.

Trial Examiner Ballinger: Come to order, at 1:30 P. M. You may proceed.

Mr. Hanley: If your Honor please, just before the noon recess it was suggested by your Honor that respondents should proceed to introduce everything that was ready at this time, and respecting that admonition of the Court we are prepared at this time to go forward with the introduction of certain evidence which Mr. Boatwright and his staff have accumulated in connection with the advertising expenditures of the various jobbers involved in this case.

I think I should make a completely frank statement of our position in reference to this evidence.

Mr. Boatwright and his staff, of course, with the aid of the bookkeeping departments of the various jobbers, have compiled figures which reflect the expenditures during the year 1940 for the several jobbers involved.

We propose to prove the amounts of money and the cents per gallon that the jobbers have expended in advertising. We propose to do that because it ties in with the whole question of advertising cost as it has been set up by Mr. Boatwright in his conclusions and in his allocations in this new form 189, which is now Exhibit 101.

This has been done by Mr. Boatwright personally 4734 in part and by members of his staff, aided by members of the bookkeeping and accounting departments of various jobbers. It has been done under the direction and supervision of Mr. Boatwright. He has outlined the procedure which should be followed, prepared the forms which should be used, and which were used, and all of it finally came into his hands as a finished product so far as the work sheets were concerned, and he then prepared the conclusions based on that method of procedure, and the work that was developed by himself, his own staff, and those who assisted from the offices of the various jobbers.

Now, I may say that, informally, I am advised that Mr. Austin deems this type of proof immaterial. I don't question that now. I mean to say I don't argue about that now, your Honor. Suffice it to say just now that we propose to introduce it and to rely upon it as important evidence in the case. When Messrs. Lundvall and Warmack were in Chicago we discussed this question.

I want to say now that both of those gentlemen advised us, and we thoroughly understood that they could not and did not attempt to bind the Commission in any wise through any method of procedure that we may have used. So we recognize fully that the Commission is at liberty, and these gentlemen individually as accountants are at liberty, to question any method of procedure or any plan of 4735 allocation that we may have used.

However, in our discussions of the subject, and as we made disclosures to these gentlemen from the Commission as to what we had found to be the facts in connection with the advertising done by the jobbers, they did state, and I assume unofficially, because they were not undertaking to bind the Commission, that in their judgment there was necessarily some substantial reciprocal benefit from the advertising done by both parties, namely, the respondent on the one hand, and the jobbers in Detroit on the other hand.

Now, we are not able to prove, and we shall not be able to prove, in my judgment, the dollars and cents value of the respondents' advertising to the jobber gallon sold, nor, conversely, do we expect to be able to prove the value to the respondent in its business generally in dollars and cents, that is to say, of the advertising that has been done and paid for independently by the jobbers.

Trial Examiner Ballinger: Do you expect to establish any approximation?

Mr. Hanley: Not as to that. I think it is an utter impossibility, Judge. We can do this, and we propose to do this: We can establish in dollars and cents, and by gallon unit, the amount of money that has been expended by the respondent in advertising and, likewise, the amount of money and the amount per gallon unit that has been expended
4736 by the jobbers.

Now, as to just what reciprocal benefit in dollars and cents may accrue, we have no yardstick. There just isn't any way to do it, at least we know of no way. The advertising which was done by the respondent we concede may have induced John Doe, or somebody, to stop in at a service station that was supplied by the jobbers. Likewise, some advertisement that the jobbers bought and paid for may have induced John Doe, or his companion, to stop in at a station and buy Standard gasoline that was supplied by our company directly to some reseller, and with which the jobbers had no concern.

Now, of course, we have no means of telling just what the effect of those advertisements may be in terms of dollars and cents. The best we can do is to establish the expenditures of our own company, and the expenditures of the jobbers, which we can do, and, as I say, and again I wish to qualify it because I don't want to create any false impression as to anything that was said to us by Mr. Lundvall or Mr. Warmack, that while they reserved the position that they were not able in any measure to bind the Commission, they did tell us that they recognized that there was some reciprocal benefit accruing as a result of that joint advertising effort, and I think I may say with reason, your Honor, that a man need not be a distribution cost accountant, or accountant of any kind, it is just common

sense that that naturally would result, and I think it
4737 is just apparent on the face of it.

Now, the purpose of this examination of Mr. Boatwright is to establish what he found as the result of his investigation and examination of the accounts and records of the jobbers.

I am making this statement now, your Honor, because of the suggestion your Honor made that we should proceed. Frankly, I am perfectly willing to defer this until Mr. Boatwright makes up his statement which he is going to make up, because he will treat this subject in that statement any way, and, however I need to support it at that time, I can do it. We have the figures now, and I think we are entitled to prove them by Mr. Boatwright, if your Honor desires us to proceed just the same as we would be entitled to prove the results and conclusions that any expert accountant found upon his examination of another man's books, and, as your Honor well knows, that happens hourly in the courts of the United States. That has been the kind of an examination that has been made. These are not our records; they are the jobbers' records. That is where this material came from; but I may say that an expert accountant has analyzed those records and reached the conclusions, and that we are entitled to prove those conclusions on the basis of his examination just the same as your Honor would be entitled to receive the evidence of a certified public accountant who had gone into the
records of the Standard Oil Company and examined
4738 them and reached certain conclusions and was pre-
pared to testify.

Trial Examiner Ballinger: These were the books and records regularly kept by the jobbers?

Mr. Hanley: Yes, sir, they were.

Now, I want to say further, your Honor, that I am ready and prepared to prove those conclusions right now. I just want to make this statement, your Honor, so you will know what the character of the evidence is, and I am perfectly willing to defer it and prove it any way that may be suggested to you. I do not want to quarrel a minute about a hearsay objection, and I won't, if there is any; but we are ready to go ahead and establish this proof right now if your Honor thinks it proper that we should do so.

Trial Examiner Ballinger: I will be glad to hear from counsel for the Commission.

Mr. Austin: Well, your Honor, I would object to the admission of any testimony regarding the advertising costs of any of these jobbers, because we are not concerned with that here at all, and I think it is entirely irrelevant and immaterial.

We are here concerned with the costs of the Standard Oil Company, and the question here is differences in costs of sale and delivery of the Standard Oil Company as between its different classes of customers.

4739 I do not dispute that advertising is a cost of sale,
but the question here is only as to the allocation of the advertising costs of the Standard Oil Company, and whether there is any basis for charging those costs to different customers or different classes of business on other than a gallonage basis.

I can not see how the amount spent by jobbers for advertising has any bearing whatever upon the allocation of the costs of the Standard Oil Company, and I think that the cost of the Standard Oil Company—that that is the only thing that is being allocated, and is the only thing that is material. Whether or not there is some reciprocal benefit, as stated by counsel for the respondent, resulting as from the jobber advertising to the Standard Oil Company, or from the Standard Oil Company advertising to the jobber, I think is immaterial. Whether there be such benefit, reciprocal benefit, or not, I don't know, but even conceding for the purpose of argument that there might be some reciprocal benefit, we are not talking about reciprocal benefits here at all,—we are talking about an allocation of the Standard Oil Company's costs. Whether or not any benefit was received by them from somebody else's benefit, in my opinion can have no relevancy as to the allocation of the money spent by the Standard Oil Company.

Trial Examiner Ballinger: Mr. Austin, see if I understand the situation, have it clearly in my mind. When
4740 evidence was offered with reference to the cost of
sale to the retail outlets, the question was raised as to whether or not the jobbers, and those that they supplied, did not derive some benefits, and that there should not be some allocation of that cost to the jobbers.

That question is present, is it not?

Mr. Austin: Yes, if it was not raised directly it was at least raised inferentially by the cross-examination.

4741 Trial Examiner Ballinger: Now, such being the case, isn't it proper for the Respondents here to show that likewise reciprocal benefits inured to the benefit of the retail outlet trade served by the Respondent?

Mr. Austin: I don't think so, because that isn't the question. I don't care how much benefit the Respondent got from somebody else's advertising. We are only concerned with an allocation of certain marketing expenses of the Standard Oil Company. Now, how much benefit they got from someone else it seems to me is beside the point.

Trial Examiner Ballinger: Do you—

Mr. Austin: Let me say further, if you please, that I don't understand that it is claimed that any advertising done by the jobbers was done under any agreement with the Standard Oil Company that they would spend any particular amount of money or that it was any part of the agreement or contract, if any, between the company and the jobber. I believe there was no contract, so that any advertising that was done by either party was done voluntarily and not under any obligation as to amount or as to character. If there was some benefit received by the company, some additional consumer acceptance created by the jobber advertising, that is an incidental benefit the company received, but I contend that is entirely beside the question of an allocation of the money spent by the company.

4742 Trial Examiner Ballinger: If it is, or is intended to be later claimed by counsel for the Commission that some portion of the advertising cost inured to the benefit of the jobbers and their trade and that, therefore, there should be a deduction from the amounts claimed by the Respondent for advertising purposes, then the Examiner is of the opinion that this evidence is proper.

Mr. Austin: Well, I think, Your Honor, that it would be very—it would be a fallacious argument—and I think that the argument made by counsel is fallacious—in contending that there is any—that there may be a set-off against any such benefit. If the jobber gets some benefit from the advertising of the company, that is certainly relevant and material, as Your Honor has just stated; however, I would not concede that there could be any set-off against that by any benefit the company might get from the jobber advertising, because we are concerned here only with the allocation of a certain amount of dollars and cents spent by the Standard Oil Company and not concerned with any allocation of any amount of money spent by anyone else, so all I can do is make my position on the record clear on that point.

Trial Examiner Ballinger: The reciprocal benefits both ways were intangible; weren't they? They were not susceptible of determination?

Mr. Austin: In one way, but it is the very subject 4743 we are inquiring into, which means benefits or costs which were received by the various classes of customers. The other matter of any benefits of the company received from any benefits to the jobbers, I contend is entirely outside the case.

Trial Examiner Ballinger: Let me see if I understand your position. It is that the company was under no contractual obligation to render any advertising services for the benefit of the jobbers?

Mr. Austin: And that the advertising was not directed to any particular customer. I think that is conceded.

Trial Examiner Ballinger: And, therefore, as the jobbers did derive some benefit, that then some portion of the advertising cost of the Respondent should be allocated to the jobbers. That is correct, isn't it?

Mr. Austin: Yes.

Trial Examiner Ballinger: Now, wouldn't it be likewise true if the jobbers who are under no contractual obligation to render any advertising service to the company did, as the result of their advertising, render services that inured to the benefit of the company; wouldn't they be entitled to an offset—

Mr. Austin: No, because they—

Trial Examiner Ballinger: —so far as the two could be ascertained or offset?

Mr. Austin: I should think not, because I should 4744 think that the company's cost of advertising remains the same, remains exactly what it was, regardless of how much advertising the jobbers did and whether the company did any less advertising because the jobbers did some or not, it seems to me is beside the point because all we have is the actual amount of money the company spent.

May I just make one more suggestion on that point: That if it were true that such reciprocal benefits were material and could be taken into account, then that would be equally true of ~~any~~ advertising that could be done by any ~~other~~ service station, whether it was a jobber or whether it was one of these resellers to whom the company delivers in tank wagon. According to that, if any one of those service stations put an advertisement in the newspaper with their name on it, then ~~that~~ would justify a lower price for the gasoline bought from the Standard Oil Company. Maybe they put out an advertisement of their own; at ~~least~~ these companies have the sign that the Standard Oil Company puts up. It seems to me impossible to give consideration to anything of that sort in an allocation of the company's cost.

Trial Examiner Ballinger: Let us assume that the jobbers were out of the picture entirely. Is it your contention that the cost of advertising would have been reduced?

Mr. Austin: I don't know. That would be entirely up
to the company to decide how much advertising it
4745 wanted to purchase under any set of conditions as
to its customers, but it seems to me when it has purchased a certain amount of advertising you can certainly look at the amount expended for advertising and see how that is to be allocated and you can't say that because a certain customer put in an advertisement in its own paper that that affects the nature of the Standard Oil advertising or the allocation of that cost, because we start out knowing that the advertisement of the company didn't contain any customer's name, was not directed to any particular customer, and the effect of that was customer acceptance generally. Of course, that may be getting into an argument on allocation, which is beside the point here, but however it has to be allocated. It seems to me you have got to consider the cost of the advertising, the nature of the advertising, and who benefited by it; and, therefore, considering those things, you make your allocation and what advertising one of the customers did on its own, it seems to me cannot affect either the amount of cost or the proper allocation of the cost of the company.

Trial Examiner Ballinger: The Examiner is of the opinion the matter presents a question that should be passed on by the Commission, that he would not care to assume responsibility. Therefore, the Examiner will let in the evidence.

Mr. Austin: Well, if Your Honor please, that was
4746 just one objection which Your Honor has just passed
on.

I would there in addition on the—like to object to the introduction of testimony through Mr. Boatwright such as was described by Judge Hanley. He spoke of it being the usual practice to put in the evidence the contents of another man's books by a qualified accountant who has examined the books. Now, if the question is material as to what is in the books, I quite agree that Mr. Boatwright would be well qualified to testify as to what is in the jobber's books. Here it is not what is in the jobber's books that is material. It is a question of what the jobbers actually did, and if this type of testimony is to be admitted I would prefer that it be admitted through the jobbers themselves so that I would have full opportunity to cross-examine them concerning the nature of the advertising and all questions concerning it, whereas Mr. Boatwright could only testify that he found certain figures in their books showing what they had spent. He would not know anything as to the accuracy of those figures, wouldn't purport to. All he would know would be what he saw there.

Now, of course, I think what Judge Hanley referred to is that in many cases an accountant may be put on to testify to what was in another man's books because that may be material to rebut or to answer testimony of the person himself or contradict it, but here we are interested in what
was actually done and not merely what the books say
4747 was done, and I think on that ground Mr. Boatwright
would be incompetent to testify to any more than what the books actually show, and, since I believe that what was actually done is material, I would prefer to have the jobbers placed on the stand, if that testimony is to be allowed, and I here, therefore, object to the testimony of Mr. Boatwright if the testimony is directed to the question of the actual advertising expense and the nature of the advertising of the jobbers.

Mr. Hanley: I can clarify that, Judge, to assist the court in the ruling which may be made. The evidence that I now seek to offer does go to the fact of what these jobbers actually did and how much money they actually spent in 1940 in advertising the products of the Standard Oil Company; so there can be no misunderstanding about what we are trying to show. We are trying to show what they spent, really, actually spent in advertising their products, as reflected by their own records and as analyzed and examined by Mr. Boatwright and members of his staff. Now, Judge, just to clarify this thing—I don't want to argue the objection which Mr. Austin has made on the hearsay question or on the materiality question at this time unless Your Honor wants us to thresh it out completely at this time. However, I do want to say this: That, first, on the materiality and value of this type of testimony in this case, Mr. Austin made the statement in substance that it didn't make any difference how much the jobbers 4748 spent on advertising, we would have spent the same amount; and he reasons apparently from that that anything the jobbers did in the way of advertising our product is immaterial.

Now, I think he is right in his statement that, irrespective of what the jobbers did, we would have spent the same amount of money. I believe that is true; and, as far as that goes, Judge, I am not only willing to rest this advertising question on that statement if we can depend on that as being the decision of the Commission, I am willing to rest this whole cost proposition on the proposition that it would have cost us just as much to market our gasoline in Detroit if we didn't have a gallon of jobber business with any one of these four jobbers. Now, if we can depend upon that attitude on the part of the Commission we can quit putting in any cost testimony at all, if that is the way it is going to be, because it just doesn't cost us anything to sell gasoline to these jobbers, and this .16 that we have put in through the medium of Exhibits 100 and 101 at the end of this laborious cost study is a gross overstatement of our cost of selling to the jobbers; but we do say this, Judge: As long as you are going to take the position in the Commission that it costs us something, then we say we are entitled to a credit for what they do for us. After all, one of our cost justifications here is the fact that these jobbers assume a burden of which we are relieved by them which we have to assume and carry on the reseller 4749 channel.

Trial Examiner Ballinger: Judge, the Examiner has indicated very clearly, I think, his views with reference to that. Now, this question, however, as to proof by the jobbers of the actual expenditure of the money presents an entirely different question. Now,—

Mr. Hanley: As I say, Judge,—

Trial Examiner Ballinger: —if the evidence you now propose to offer today is admitted, of course it will necessitate, in the opinion of the Examiner, the calling of the jobbers so that counsel for the Commission may at least have an opportunity to cross-examine them and ascertain the actual expenditures made and the purposes for which they were made.

Mr. Hanley: Well, I reassert, Judge, that we are offering this now in line with Your Honor's suggestion to me before the noon recess that I should proceed as far as I could go at this time, and we have this evidence ready.

Trial Examiner Ballinger: I so understood, and I also understood that the foundation evidence was to be later offered and that we are merely utilizing the time now available to admit probably the cart before the horse.

Mr. Hanley: Possibly so. It will appear undoubtedly in Mr. Boatwright's analysis of this supporting data what he has done in connection with this analysis of the 4750 jobber advertising effort. If this objection is persisted in and if Your Honor takes the same view of it then as now, I apprehend that it will be necessary for us to call these jobbers in order to support and to offer that portion of the analysis that we then offer as prepared by Mr. Boatwright, and that is perfectly all right, Judge. We are willing to do that. I don't want to argue the hearsay phase of this thing at all. We are willing to do that. I am just offering this now, and I am making this explanation now before making a lot of question-and-answer record, so that both counsel and the Examiner will know what this type of evidence is.

Trial Examiner Ballinger: That is what the Examiner—

Mr. Hanley: I am perfectly willing to defer it.

Trial Examiner Ballinger: That is what the Examiner had in mind when he made the suggestion. In other words, this is merely informative to counsel for the Commission, and unless counsel desire to proceed differently the Examiner will suggest that you proceed, and the Examiner states at this time that when the—if there are exhibits that are offered in evidence the Examiner will withhold his ruling on their admissibility until the foundation evidence is introduced.

Mr. Austin: If Your Honor please, perhaps I should say that I don't think the record—I think the record will show that I didn't say that the Standard Oil Company 4751 would have spent the same amount on advertising even if they had no jobber business. I think I stated, in answer to Your Honor's question, that I didn't know what they would have spent, that they might have spent the same amount, or in any event would have spent what they wanted to spend although I don't think it would make a bit of difference if it were conceded, which it isn't, but even if it were conceded that they would have spent the same amount because these customers are here and have to be considered, and what they would have spent if they did not have these customers is, to my mind, likewise immaterial. Furthermore—perhaps this is unnecessary, but in view of my objection on the ground of hearsay Your Honor will recall that Mr. Gershenson of Ned's Auto Supply Company produced a voluminous file of advertising covering a period of about four years at the hearing in Detroit, and I don't believe any of that was introduced in evidence, but at page 245 of the record Mr. Gershenson testified that that file of advertising was 99 percent other ads, not gasoline. So that I think it already appears on the record that 99 percent of Ned's advertising was not directed to gasoline but to other products which they sell. Perhaps that 1 percent may amount to a few dollars; I don't know.

Trial Examiner Ballinger: The Examiner has stated that unless proper supporting evidence is adduced, any conclusions in the form of exhibits will be excluded.

4752 Mr. Hanley: Well, we accept that ruling of the court; Your Honor, and I will just say in connection with this testimony counsel is at liberty to use it as impeachment if he so desires, but we have measured the ads. We know what is in them. Now,—

Trial Examiner Ballinger: Let us proceed.

Mr. Hanley: That is all we have, Judge. You may take the witness.

Mr. Austin: Well, I don't intend to do any cross-examination now, but just one or two brief questions occurred to me this morning I would like to ask Mr. Boatwright at this time.

By Mr. Austin:

Q. Is this form here similar to the old Form 189, Exhibit 101?

A. The first two columns, as I mentioned this morning, are—

Q. No; just give the exhibit number.

A. Well, I was going to explain the similarity and the dissimilarity.

Q. Well, pardon me. All I wanted to know was the number of this so that I could refer to it.

A. That is not an official form of the company.

Q. No; the exhibit number, please, Mr. Reporter.

Mr. Hanley: 101.

Trial Examiner Ballinger: 101.

4753 By Mr. Austin:

Q. 101; that—

A. That is right.

Q. Now, on Respondent's Exhibit No. 101, Mr. Boatwright, I notice that there is no column headed "Income and Expense, Leased Service Stations." There was such a column on Form 189, Respondent's Exhibit 32. Will you state what has happened to the expenses that appeared in the leased service station column on the Form 189 for 1940, or where those expenses have been included in Respondent's Exhibit 101?

A. Both the income and expense items previously under the channels so designated on the 189 have been allocated between tank wagon reseller and other method channels following the title of each such subaccount.

Q. And in the column on Exhibit 101 entitled "Other Method," the total gallonage for that column is 4,920,137. That is the same figure, is it not, which appeared on line (3) at the bottom of the page of Form 189 for 1940?

A. I don't have the 189.

Mr. Austin: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Read the question, will you, please.

(Question read.)

By Mr. Austin:

4754 Q. Will you let me add to that question that you just finished reading: Under the column entitled "Other Method"?

A. The figure is the identical one in both cases.

Q. Mr. Boatwright, in Respondent's Exhibit 101, the column we were just speaking of entitled "Other Methods," which appears under "distribution through company bulk plants," do the expenses in that column include any expense for the sale of gasoline, naphthas, or refined oil?

A. No.

Q. And on Respondent's Exhibit 101 I note that the total of all expense for automobile supplies is slightly smaller than on Form 189 for 1940, and the total of all expense for petroleum products is larger. What is the cause of that difference?

A. Actual count of the calls of the salesmen resulted in a slight difference in the allocation of calls among petroleum products and non-petroleum products. Therein lies the entire difference.

Q. In other words, is that a correction—would you call it a correction, or would you say that this form is more accurate in that respect?

A. That form is one of the most accurate things that I can conceive of being prepared.

Trial Examiner Ballinger: You mean—.

The Witness: Respondent's Exhibit 101.

4755 Q. Well, in that respect you consider that your present allocation of expense as between total petroleum products and automobile supplies is—that Exhibit 101 is the accurate figure rather than the old figure?

A. Yes.

Mr. Austin: I don't believe I have anything further, Your Honor.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

After informal discussion off the record, the Examiner now, at 2:40 p. m., adjourns the hearing to be reconvened in Washington, D. C., January 6, 1942, at the hour of 10 o'clock a. m., in the Federal Trade Commission Building, the hearing room to be later announced.

(Whereupon, at 2:40 o'clock p. m., November 17, 1941, the hearing in the above-entitled matter was adjourned.)

4756

Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Tuesday, January 6, 1942.

Met, pursuant to notice, at 10 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., appearing on behalf of the Federal Trade Commission.

Harold R. Hanley, Esq. (910 South Michigan Avenue, Chicago, Ill.), appearing on behalf of the Respondent.

4757

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

Hearing of Docket No. 4389, case entitled "In the matter of Standard Oil Company," is reconvened pursuant to notice at 10 a. m., Eastern Standard Time, January 6, 1942, Room 332, Federal Trade Commission Building, Washington, D. C.

The last hearing was held in Washington, D. C., November 17, 1941.

You may proceed.

Mr. Hanley: This is off the record, Judge.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

JOHN W. BOATWRIGHT was thereupon recalled as a witness for the Respondent, and, having been previously sworn, testified further as follows:

Trial Examiner Ballinger: Mr. Boatwright, you have been previously sworn.

The Witness: I have.

Direct Examination by Mr. Hanley.

Q. Mr. Boatwright, do you recall the hearing in this matter held in Washington on November 17, 1941?

A. I do.

4758 Q. Do you recall at that time the introduction into evidence of exhibits known as Exhibit No. 100, which was a rider with certain conclusions which you made in connection with the cost survey in Detroit, and Exhibit 101, a revised Form 189 for the year 1940 in Detroit?

A. I recall both exhibits.

Q. Do you recall that on the occasion of that proceeding it was agreed between counsel for the Commission and counsel for the Respondent and the accounting staff of the Commission that certain additional and explanatory material should be prepared by you and your associates to further amplify Exhibit No. 100?

A. I recall the discussion of that subject.

Q. And do you recall that that arrangement was approved by the court, and it was arranged that we should adjourn this hearing until a future time to give you opportunity to make that amplification?

A. I do.

Q. Mr. Boatwright, do you recall that as a part of that arrangement it was agreed that when you had proceeded to a point where you were prepared to cast it into final form that a conference should be had with counsel for the Commission and the accounting staff of the Commission to discuss the new set-up of conclusions and explanatory material?

A. Yes, sir.

4759 Q. Was there a time when such conference was held, and, if so, where was it held, when, and who was present?

A. Such a conference was held in the Federal Trade Commission Building in Washington. Those present represented the attorney for the Commission, Mr. Austin, Mr. Lundvall, and Mr. Warmack, and for the Respondent, Judge H. R. Hanley and myself. It was held, I think it was the 22d and 23rd.

Trial Examiner Ballinger: Of December?

The Witness: Yes, sir.

By Mr. Hanley:

Q. December, 1941?

A. That is correct.

Q. And during those two days of conference, please explain to the Court just what the course of the conference was, Mr. Boatwright, what took place.

A. Well, it seemed advisable to all present that the best understanding of the work and of the summary of that work could be obtained by jointly reading and discussing the material that had been prepared. I had with me at the time preliminary copies of all cost schedules, explanation of such schedules, completely documented as to origin of figures and adjustment of our original costing procedure in this one bound volume. Copies were given to each member present, and we proceeded to read the report point by point. That reading covered practically 90 percent, I would estimate roughly, of the total volume,

4760 there being some points where the material in the report was not relevant to the case, such as information on barreling, and so forth, which is merely inserted in there for purposes of reconciliation, where we did not read but skipped over it and went to points where there was likely to be some controversy or lack of complete understanding.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed. On the record.

By Mr. Hanley:

Q. Now, Mr. Boatwright, if I understand correctly, the exhibit that was being there discussed was primarily your conclusions as to how you had segregated out costs allocable to jobber business in Detroit for the year 1940; is that correct?

A. Well, the material discussed was the procedure followed, first, in segregating; then the segregation and the conclusions which resulted from that work.

Q. Yes, sir.

A. Yes.

Q. But is it not true that the figures and the explanatory material had primarily to do with the segregation out of jobber costs from the old form 189?

A. Yes.

(Discussion off the record.)

4761 Mr. Hanley: On the record.

By Mr. Hanley:

Q. Mr. Boatwright, during the course of that conference did it develop that the accountants for the Commission and counsel for the Commission raised certain questions as to how allocations were originally made—

A. Yes, they—

Q. —on the old Form 189 as between the various channels of business that appeared on Form 189?

A. Yes, that question was raised by both the accountants, and, I think, the attorney for the Commission. Toward the close of the conference wherein we had discussed the process of determining the jobber cost and the method of correction of the original 189 they then raised the question as to the procedure for determining the original allocation on our distribution cost procedure.

Q. Now, Mr. Boatwright, as a result of that discussion, was there any agreement reached in the conference as to how the Respondent should proceed in the manner of making some explanation of that original allocation?

A. There was.

Q. And will you please tell the court just what developed?

A. Well, in brief, a request was first made for an understanding of our code of accounts and a reconciliation of the original cost figures on our distribution cost 4762 analysis as shown by our comparative statement of expense. Our comparative statement of expense in each field is built monthly with various allocation ratios changing from month to month. The annual statement is merely a recapitulation of the monthly statements. I explained the difficulty of offering a complete reconciliation of each figure on our comparative statement of expense, and it was agreed that I should prepare a narrative type description of a regular costing procedure for each account on our comparative statement of expense, offering illustrations of typical types of expenses and how those typical types of expenses were allocated among the channels as reflected on our comparative statement of expense.

I think that summarizes, briefly, my recollection of the entire discussion on that point.

Q. Subsequent to that conference did you prepare, or cause to be prepared under your direction such an explanation of the allocation of cost as it appears in the regular Form 189 of the Respondent?

A. Yes. Following the conference I returned to the office in Chicago and did prepare, in conjunction with members of my staff, a supplement to our original explanation of the Detroit jobber cost analysis, this supplement being an explanation of the distribution cost procedure as followed by the company regularly, and is illustrated by types of expenses showing how they are allocated
4763 among the different channels of our distribution.

Mr. Hanley: Now, off the record, Judge.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

By Mr. Hanley:

Q. I now hand you, Mr. Boatwright, a document entitled "Supplement to Standard Oil Company, Indiana, Distribution Cost Analysis—Tank Wagon Reseller Channel versus Jobber Gasoline Sales—Explaining Regular Costing Procedure—Detroit Field, 1940," consisting of 33 pages in a folder—

Trial Examiner Ballinger: It is a bound statement?

Q. —which is a bound volume, and will ask you if that is the explanation of the regular allocation of cost distribution employed by Respondent in making up the regular Form 189, to which you have been referring?

Trial Examiner Ballinger: The document referred to will be marked Respondent's Exhibit 99, for identification.

(The document referred to was marked for identification "Respondent's Exhibit No. 99.")

A. That volume is the explanation of our regular costing procedure digested and illustrated.

By Mr. Hanley:

Q. As I understand it, Mr. Boatwright, you undertook in the analysis reflected by Exhibit No. 99—

Trial Examiner Ballinger: For identification.

4764 Q. —for identification, to explain by explanatory comment and by illustration the method of allocation of the cost under each of the numbered accounts which appear on Respondent's Accounting Form 189.

A. Yes, sir.

Q. Mr. Boatwright, you have, as I understand it, frequently in your testimony explained the method of accounting as reflected by the regular Form 189. Is that not true?

A. I think my explanation is to be found in the record in many cases on many individual accounts.

Q. Is it not true that such a Form 189 is prepared by each of the 27 sales fields or divisions of the Respondent by months each year?

A. That is true.

Q. And has that been true over a considerable number of years past?

A. It has.

Q. And it is true?

A. Yes, sir.

Q. Indeed, is it not the current method of cost accounting employed by the Respondent in its marketing business?

A. Yes, sir.

Q. In your cost survey in the Detroit field, whereby you undertook to segregate out of the regular Form 189 those costs which might be applicable to jobber business, did you take out those costs by the method and by months as those costs were originally put into Form 189?
4765

A. Yes. That was absolutely essential to result in a balanced piece of work.

Q. Adverting to the regular Form 189, I will ask you if it is not true, Mr. Boatwright, that as these Forms 189 are prepared by the various fields or division offices they are prepared cumulatively by months, that is to say, there will be one prepared at the end of January in a given year and one at the end of February in that year, and the one at the end of February will include both January and February business? 7

A. Yes, sir.

Q. And does that follow through during the course of the year?

A. That follows through during the entire year.

Q. Is the result of the method such as to disclose in the December 31 Form 189 the whole of the year's business?

A. It discloses in the December 189 the whole of the year's business in terms of volume as well as a complete statement of all expenses incident to doing that volume.

Q. Is it not true that because the Form 189 is built up from month to month, as you have just explained, that in order to segregate out any particular item of cost it is necessary to analyze the source of material and accounts month by month?

4766 A. Oh, yes.

Q. And did you do that—

A. That was done.

Q. —in preparing your jobber costs?

A. Yes, sir.

Q. I believe you have stated, Mr. Boatwright, that what has now been marked Respondent's Exhibit 99, for identification, being the explanation of allocations in the regular Form 189, was prepared under your supervision and direction by yourself and by your associates and members of your staff.

A. Yes, sir.

Q. And it was prepared, as I understand it, in conformity with the views expressed and the agreements reached at the informal conference in Washington with counsel and accountant for the Commission.

A. Yes, to the best of my understanding of the agreement. To a certain extent, of course, I am attempting to guess what is needed for someone not thoroughly acquainted with the accounting procedure, but I have attempted a digest of our accounting instructions which will clarify an understanding of our regular costing procedure.

Q. I think you have said that it covers an explanation both of comments and narrative story as well as by illustration of each of the accounts that go into Form 189.

A. Yes. I should say that by illustration, if you 4767 have three accounts, let us say, that were handled in an identical manner I did not give three separate illustrations, but I would give one illustration that would typify all three of those accounts, so that the procedure is illustrated quite well throughout the entire treatment.

Mr. Hanley: The Respondent offers in evidence exhibit marked Respondent's Exhibit No. 99, for identification.

Mr. Austin: No objection.

Trial Examiner Batfinger: Respondent's Exhibit No. 99, for identification, is admitted in evidence.

(The document heretofore marked for identification "RESPONDENT'S EXHIBIT NO. 99," was received in evidence.)

By Mr. Hanley:

Q. Mr. Boatwright, on the occasion of the hearing on November 17 you had with you a prepared statement of conclusions in the matter of the Detroit field cost survey, which was received in evidence as Respondent's Exhibit No. 100. Do you recall that?

A. I do.

Q. You have explained the result of a conference with counsel and accountants for the Commission in which it was indicated that some further explanation of those conclusions was desired.

4768 A. Yes, sir.

Q. And you have indicated that you undertook to make such further amplification.

A. Yes, sir.

Q. Did you find it expedient to simply enlarge and amplify the original Exhibit No. 100 in order to meet the requirements as you understood them of this further amplification?

A. Well, I should explain that the further amplification was first written as a separate document, and then I attempted to place myself in the position of the accountant for the Commission and traced through, following the explanation of various accounts, and I found constant reference back and forth between two bound volumes, making it very difficult for an individual to follow the explanation consistently throughout. Rather than leaving it in that manner, it seemed much more convenient for all parties concerned if following each cost schedule the complete explanation, documented and illustrated, be placed in the same binder immediately following the schedule. Accordingly, I followed that procedure in writing the explanation of the Detroit jobber cost analysis.

Q. You recall the fact, do you not, Mr. Boatwright, that there was considerable testimony elicited from you on the occasion of the hearing November 17 in connection with the introduction of the original Exhibit No. 100?

A. Yes.

4769 Q. Does all of the material in the original Exhibit No. 100 appear in the new document to which you have just now been referring, and which is entitled "Standard Oil Company (Indiana) Distribution Cost Analysis—Tank Wagon Reseller Channel versus Jobber Gasoline Sales—Detroit Field—1940?"

A. All of the material originally appearing in the conclusions as originally presented as Respondent's Exhibit No. 100 does appear in the bound volume to which you have just referred.

Q. In addition to all of the material appearing in the original Exhibit No. 100, does there now appear in the document which I have just identified by its title the additional explanatory material and schedules to which you have referred?

A. Yes, sir.

Q. Do all of the questions and answers appearing in the transcript of the testimony for November 17, 1941, in connection with Exhibit No. 100 apply now to the document just above identified by title?

A. Yes, sir.

Mr. Hanley: Off the record, please.

(Discussion off the record.)

Mr. Hanley: On the record, if you please, Mr. Reporter.

Trial Examiner Ballinger: On the record.

4770 By Mr. Hanley:

Q. Do you recall, Mr. Boatwright, that on the occasion of the hearing on November 17, 1941, there was introduced an exhibit known as Respondent's Exhibit No. 101, which was a revised Form 189, based on your cost study in Detroit and upon the conclusions which you had reached as reflected by what was then marked Exhibit No. 100?

A. I do so recall.

Q. In connection with the new document which you have prepared, and which was identified above by title, being an amplification of what was marked originally Exhibit 100, did you revise and correct any errors that may have existed in the revised Form 189, being Exhibit 101?

A. Yes, sir.

Q. Did those errors amount to any substantial amount?

A. No.

Q. Did they in any particular change the differentials in cost as appeared?

A. No. They neither changed the differential nor did they change the unit cost in a given channel.

Q. As I understand it, Mr. Boatwright, they were trivial, mechanical errors in calculation?

A. That is correct. In spite of the fact that the other work had been completely checked by second operators, there were minor human element—human errors 4771 found in the original which were corrected.

Q. In view of that discovery, have you prepared new and corrected Forms 189 revised on the basis of your latest calculation and on the basis of this expanded report of your study?

A. I have.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: The Respondent now desires to physically withdraw from the record Respondent's Exhibit No. 100 and to substitute therefor as Respondent's Exhibit No. 100 the bound document, consisting of 133 pages, and entitled "Standard Oil Company (Indiana) Distribution Cost Analysis—Tank Wagon Reseller Channel versus Jobber Gasoline Sales—Detroit Field—1940."

Trial Examiner Ballinger: Any objection?

Mr. Austin: No objection.

Mr. Hanley: Further—

Trial Examiner Ballinger: Off the record

(Discussion off the record.)

Trial Examiner Ballinger: The motion is granted and leave is granted counsel to withdraw Respondent's Exhibit 100, heretofore admitted in evidence, and substitute therefor the document now numbered Respondent's Ex- 4772 hibit 100.

(The document heretofore received in evidence as "Respondent's Exhibit No. 100," was withdrawn from evidence and a new document, consisting of 133 pages, was marked "RESPONDENT'S EXHIBIT NO. 100," and received in evidence.)

Mr. Hanley: At this time Respondent requests permission to withdraw physically from the record what is marked on the record as Respondent's Exhibit No. 101, being a revised accounting Form 189 for the Detroit field for the year 1940, and to substitute physically therefor a revised Form 189 for the Detroit field for the year 1940, which revised form reflects a correction of the trivial errors to which the Witness Boatwright has just referred. It is further requested that the substituted exhibit may be identifed as Respondent's Exhibit No. 101.

Trial Examiner Ballinger: Motion is granted. Substitution may be made. The Reporter will mark the document Respondent's Exhibit No. 101.

(The document heretofore received in evidence as "Respondent's Exhibit No. 101," was withdrawn from evidence, and a new document was marked "RESPONDENT'S EXHIBIT NO. 101," and received in evidence.)

Mr. Hanley: I just have a very few more questions: I think I will be through, Mr. Austin.

By Mr. Hanley:

4773 Q. Mr. Boatwright, I think on the occasion of your examination on November 17, 1941, you explained in some detail the method which you had pursued in conducting the cost study in Detroit.

I desire now to ask you if, in your judgment as an economist and cost accountant, that study was conservatively conducted and has resulted in the allocation of all or more than the actual cost incurred by the Respondent in handling the jobber business in Detroit?

A. You are correct in that I did give statements relative to the procedure followed in determining the jobber cost. Throughout this study we have attempted at every possible case to measure as accurately as it is physically possible the cost incident to a particular type of sales. Likewise, we have attempted, wherever an allocation of costs was found to be necessary, to accept what we regarded as being the most logical method of cost allocation. In any detailed cost study you go down to certain points where it is a matter of judgment. In the exercise of this judgment we have attempted to adopt procedures which would throw all possible costs against the jobber. To illustrate: I think of four accounts in particular—one of them being the payment of a federal capital stock tax, the experimental development and research work, the pro rata general administration, and the law expense—to which accounts we gave considerable thought and study as to the best means and the most equitable means of allocating a just portion to the jobber volume. I have found illustrations where certain cost accountants would advocate an allocation on a gross margin basis. Others advocate a unit of sales basis. Others on a realization basis, and various and sundry methods of allocation. 4774

Now, in these four accounts it seemed to us that we should not claim that these accounts of an over-all nature afforded a basis of a cost differential, and accepted as our allocation procedure, therefore, the per gallon of sales through jobber and other direct shipments as well as through tank wagon.

Now, from my knowledge of the company, I know that, in terms of effort, it costs our company less effort and hence less cost for law expense, as an illustration, or for pro rata general administration, as an illustration, to do business through jobbers than it does through tank wagon outlets, but I had no accurate means of measurement of the distribution of effort, not being available. That shows the per gallon method of allocation.

Now, these four items alone result in a charge of jobber gasoline in excess of $12,000 out of the total assessable to those outlets of slightly over $24,000. In other words, 50 percent of the total jobber cost, as revealed by 4775 this analysis, is in there on a per-gallon basis, not feeling that we could justify, in the absence of more detailed time study, any other method of allocation. I feel that that is a most conservative method of handling that particular group of accounts.

Now,—

Q. Well, just permit me to interrupt you a moment, Mr. Boatwright, so we can get that into language that any layman can understand.

Does what you have said mean this: That, in your judgment, from your knowledge of the business and from your experience and training as an economist and accountant, that it costs the Respondent less per jobber gallon in connection with these various accounts to which you have just referred than it costs per reseller channel gallon?

A. Definitely.

Q. Does it follow that when you have allocated on the per-gallon basis, as you have done in this study, that you have, in your judgment, added a burden of cost to the jobber gallon to which it is not entitled?

A. Yes; except that I have no other measure by which to allocate.

Q. I understand that you have done that because you have not been able to determine upon any measure—

A. Yes.

4776 Q. —of division; but I want this very clearly before the Court, if it is true: Is it definitely your judgment that the method that you have used overburdens the jobber gallon as contrasted with the reseller channel gallon?

A. That is true.

Q. All right.

A. Now, the second thing that—carrying out on your previous question as to the conservative nature, there were several positions and accounts which, had I been asked when I was on the stand at the previous hearing, I would have stated were absolutely unrelated to any jobber business. I found, however, from a careful and thorough search of our files, that maybe some of these individuals spent a half hour or an hour or a substation auditor loaned his car to a salesman for a month. There are many little cases of that type throughout the analysis which, I think, indicates the degree of care to which we went in the analysis of each position by month throughout the entire year to result in every possible charge to the jobber business.

Thirdly, all of the members on the payroll were assumed to work only a 40-hour week. We know this is not true of salesmen and people in a supervisory capacity. Having determined the amount of time devoted to jobber business, the 40-hour week was used as a divisor, which resulted in a ratio of effort which overstates, if any, the proportionate share of the effort, and hence the cost of a par-
4777 ticular position that is applicable to jobber business.

I think I would call attention only to one-fourth factor. Practically all of the supervisory selling expense —because practically all of the gasoline is sold by members of the supervisory group—is across the luncheon table. In spite of this fact, and in spite of the fact that our supervisor would eat lunch anyhow, we charge the time value against the cost of this business.

I think those are the four principal things that I could recall at the present time indicating the conservative nature of the cost as presented against jobber gasolines.

Mr. Austin: May I interpose a question?

Mr. Hanley: Surely.

By Mr. Austin:

Q. Mr. Boatwright, when you just said that most gasoline is sold across the luncheon table, referring to your sales supervisory force, will you explain that a little as contrasted with your account 004, Salary—Salesmen, because I have always assumed that the biggest part of selling expense was under Salary—Salesmen.

A. It is for tank wagon business. You will recall, I am sure, from previous testimony, that there is no contract between the Respondent and any one of the four jobbers. The contact with these accounts is largely that of the manager of the Detroit field. He is the individual 4778 in the Detroit field with whom the jobbers wish to deal and do deal practically all of the time.

Q. Then, you were referring to jobber sales of gasoline when you said that most sales were over the luncheon table?

A. Yes, sir.

Q. I do not think it appeared clearly in the record, and I wanted to straighten that out.

A. Thank you for your question, because that is what my reference was.

Q. May I ask, too, on that point: Account 002, Sales Promotion, does that include the salaries of the men who supervise and have control over the salesmen?

A. Yes, that includes the salaries of the individuals who supervise the day-to-day activity of your sales group.

Q. And are they in turn under the officials whose salaries are included in the account entitled "Salary—Supervision"?

A. Yes, sir.

By Mr. Hanley:

Q. Mr. Boatwright, do you feel that in this cost analysis that you have discovered and allocated every possible cost to which the Respondent has been put in conducting its sales business with the jobbers in the Detroit field?

A. I know I have.

Q. Basing you answer on your knowledge of the 4779 Respondent's business, on your training and knowledge as an economist and accountant, do you believe that it actually costs the Respondent as much as .16 of a cent a gallon to sell gasoline to the Detroit jobbers?

A. I know that is the outside top figure.

You will recall my testimony that there are certain accounts where I had to use a gallonage factor in allocation, which my judgment tells me is an overcharge, but concerning which I had little alternate but to adopt that procedure. Therefore, that is why I said I know that that is the outside top figure.

Mr. Hanley: Judge, barring some inadvertent oversight—of course, I would like to reserve the opportunity to correct at some future time, if necessary—I think that is all that we have to offer at this time.

As I understand it, Mr. Austin proposes to conduct the cross-examination after he has taken some time to study this matter and proposes to do that in Detroit, and possibly put on further testimony.

Trial Examiner Ballinger: If upon reflection you find that you overlooked any questions, you may submit them when we will reconvene.

Mr. Hanley: Now, off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

4780 Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Referring to Respondent's Exhibit 99, Mr. Boatwright, you stated that that was an explanation of the regular costing procedure of the Standard Oil Company which it uses and has used, I believe, for a number of years past in the preparation of its "Comparative Statement of Expense" Form 189; is that correct?

A. Yes, sir.

Q. We have now introduced as Respondent's Exhibit 101 a new comparative statement of expense for the year 1940, which is not Form 189, but is a form containing different channels of cost allocation and a form which was prepared for the purposes of this proceeding. Is that correct?

A. Yes, sir.

Q. And in making an allocation of the expense in any of the acounts shown on Form 189, or in Respondent's Exhibit 101, I assume, Mr. Boatwright, that it is necessary to start out with the expense itself, that is, the first thing you have is the amount of the expense which comes in, and before you do anything with it as an accountant you first obtain the number of dollars that the company has spent; is that right?

A. Yes.

Q. There has been reference made several times to the withdrawal of the direct shipment expenses from the

4781 channels of expense listed on 189 and in the same manner as the direct shipment expense went into those channels.

A. Yes, sir.

Q. For the purpose of this proceeding and of an understanding of the Respondent's Exhibit 101, would it not be correct to state that, starting out with the total expense for petroleum products listed in that column, then the first step was to determine the direct shipment marketing expense in the manner shown in Respondent's Exhibit 100, and that that expense was then deducted from the total of petroleum products marketing expense?

A. I am quite sure as I followed your statement that you have stated it correctly. However, so that the record is clear—

Q. Yes, restate it.

A. The first process was to determine the direct shipment cost. Having determined the direct shipment cost, this was then taken out of the original cost for marketing in Detroit, according to the method that that same cost had previously been allocated to the different channels of sale.

Q. But would it not be equally correct, Mr. Boatwright, to say that that direct shipment expense was deducted from the total expense for all petroleum products in each column?

A. No, not quite, for this reason: I found that where expenses had been allocated on a time ratio basis—

4782 you will recall the salesmen account 004 is allocated on the basis of estimates of time. Now, if you are going to take a hundred dollars out of that, the direct shipment cost—as representing the direct shipment cost, then that hundred dollars is spread throughout all channels, and so there will even be found a small part of it to be assigned originally to automobile supplies. Therefore, it was necessary to take that small portion out of the automobile supplies, the same as the total petroleum products. Therefore, instead of making my deduction from the total petroleum products channel, I made my deduction from the total marketing expense for each subaccount.

Now, any allocation that was on a time basis I found direct shipments, because that very application of a ratio of time resulted in a charge to automobile supplies, which was taken out. Aside from that—

Q. Even though that expense was not an automobile supply expense?

A. That is correct.

Q. Well, I was—

A. You asked me a question at the previous meeting and you followed that question with the statement "In your judgment, then, is there a more accurate method?" And I confirmed that it was just—it was a more detailed
analysis, is a better way of putting it.

4783 Q. I am just leading up to one thing here, and for
the purpose of simplicity I was just ignoring automobile supplies entirely.

A. I see.

Q. What I wanted to establish was this: Ignoring automobile supplies, with the reservation that you have just explained—

A. Yes, sir.

Q. —Is it not correct to state that the figures for marketing expense on Respondent's Exhibit 101 are arrived at in this way, that the direct shipment expense is deducted from the expense of total petroleum products, that is step 1; step 2—and each of these steps may include several things—step 2, direct shipment expense has been divided between jobber expense-gasoline and naphthas, jobber expense—other products, and direct shipment expense—other customers?

A. Yes, sir.

Q. Step 3, the remainder of the total petroleum products' expense, after deducting direct shipments, has been allocated between tank wagon reseller, tank wagon consumer, and other methods?

A. Yes, sir.

Q. Now, just one more question.

Is it, then, true that the costing procedure described in Respondent's Exhibit 99 is the costing procedure which was
followed in allocating the total petroleum products
4784 expense, after deducting direct shipments expense,
between tank wagon reseller, tank wagon consumer,
and other methods on Respondent's Exhibit 101?

A. Yes, for this reason: The costing procedures you have outlined in 99 is a method by which these costs were originally spread to the channels including direct shipments.

Now, inasmuch as I took direct shipment cost out, according to the identical method of entry, then your residual amount is allocated between tank wagon reseller, tank wagon consumer, and other methods, and in some cases automobile supplies are explained there also, according to the procedure outlined in Respondent's Exhibit 99.

Q. Yes.

A. Yes.

Mr. Austin: Off the record, please.

(Discussion off the record.)

Mr. Hanley: In view of this line of examination, I would like to ask just two or three more questions.

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Mr. Boatwright, Exhibit No. 99 explains, as I understand it, the method of allocating costs as costs are set up in the regular 189 accounting form of the company—of the Respondent; is that true?

A. Yes.

4785 Q. When you made your cost study in Detroit for the year 1940, as I understand it, you extracted and segregated from the cost allocations in the regular Form 189 all of the costs that were attributable to jobber business; is that true?

A. Yes, sir.

Q. As I understand it, you extracted those costs from whatever allocation they happened to be in in the original or regular Form 189?

A. Yes, sir.

Q. Furthermore, you took them out as of the time they went in, that is, month by month?

A. Yes, sir.

Q. Did that have the result of leaving a residual amount in each of the channels of cost on the original regular 189, exclusive of jobber costs, which residual amount was distributed on the basis of the company's regular accounting procedure, as explained in Exhibit 99?

A. Yes. Your question is correct, provided you will add to your jobber cost your other direct shipments, which were also taken.

Q. I mean my question to include direct shipments, all direct shipments, inclusive of jobber costs—of jobber shipments.

A. Then your statement is correct.

Mr. Hanley: Is that what you had—

4786 Mr. Austin: Yes. You put it the other way, Judge, but it comes out of the same way.

(Discussion off the record.)

Mr. Austin: May I ask whether the records and facilities of the company in Detroit or in Chicago either will be available to the Commission's accountants in the event we desire to make some check of—or—some check of any of the material in Respondent's Exhibits 99, 100, or 101, or desire to perhaps conduct some study of our own in the event that we should differ from any of the Respondent's theories?

Mr. Hanley: If Your Honor please, the records and accounts, files, of the Respondent, whether they be in Detroit or Chicago, or both, having any bearing at all on this matter are and will continue to be available to the Commission and its counsel and accountants and examiners at any time that they desire to make the examination. Furthermore, the records are not only available, but if it is desired on the part of the Commission's representatives at any time to make any examination, Respondent will undertake to supply any facilities or aid that may be helpful in that direction and do anything that we can to facilitate the efforts of such representatives. Just in connection with that, if it is desired to make such an examination, if we may have, oh, a few days' notice so we can make help and space, and so on,—

Mr. Austin: Yes.

4787 Mr. Hanley: —available, we would appreciate it if we might have that few days' notice.

Mr. Austin: I believe counsel for the Respondent has in the past at various times upon the record expressed his company's willingness to cooperate with the Commission—

Mr. Hanley: Yes, at any time.

Mr. Austin: —if we want to make a cost study or any examination which we wish to make.

Mr. Hanley: That is true.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Mr. Austin: I would like to postpone cross-examination of the witness, Your Honor, pending an opportunity to study the rather exhaustive cost study which has been presented.

Trial Examiner Ballinger: That privilege will be granted you.

Mr. Austin: And I now move that the hearing be adjourned subject to reconvene upon five days' notice.

(Discussion off the record.)

Mr. Austin: In connection with the motion to adjourn, I would like to state that the exhibits just introduced by the Respondent involve the results of extended cost study, which it took some three months to make in the City of Detroit, and that it is, at least from my standpoint, a
4788 rather complicated marketing study which will require some considerable application on my part before I am able to determine either the subject matter or the extent of cross-examination of this witness which may seem desirable. Also it seems probable—in fact, it is at present planned—or it is the present plan—that the Commission's accountant be assigned to the study and analysis of some matters in connection with the Respondent's accounting study, which assignment will require his traveling to Detroit or Chicago, or both, and the extent of which study as to time cannot now be determined. Furthermore, when the hearings are proceeded with it is the intention of the Commission's counsel to produce certain additional evidence in Detroit in rebuttal upon the question or relating to the—to Respondent's defense of charging of—well, just Respondent's defense of meeting competition. Perhaps that is enough. I was trying to avoid a technical statement.

Trial Examiner Ballinger: The Examiner understands that when we do reconvene that counsel for Respondent will conclude or close his case and that it is then the intention of counsel for the Commission to proceed with any evidence of rebuttal that it may have and close its case: is that correct?

Mr. Austin: Will you read that again, please?

(Statement read.)

Mr. Hanley: If your Honor please, that is the
4789 Respondent's understanding, assuming that we do reconvene in Detroit and assuming, further, that it may be necessary to conduct some short further direct examination of the Witness Boatwright in connection with the advertising evidence of the jobbers.

Trial Examiner Ballinger: Certainly. Certainly.

Mr. Austin: Well, in view of the statement which I have just made, Your Honor, I do not feel that it is possible at the present time to set a definite date for resumption of hearings or that it would be advisable to try to do so, because it is impossible for me to know now just when I will be prepared.

Trial Examiner Ballinger: I am not questioning you as to a date for resumption of hearings, but when we do reconvene can we proceed to take all the testimony that the Respondent has and all the testimony that the Commission may have and close the case?

Mr. Austin: On that point, Your Honor, I will be prepared, on behalf of the Commission, to complete the case, so far as testimony in Detroit is concerned, if the next hearing is held there, as we now anticipate. However, I may also desire to hold a further hearing in Washington for the purpose of taking the testimony of — taking expert testimony in rebuttal on the question of costs.

(Discussion off the record.)

4790 Trial Examiner Ballinger: The motion of counsel for the Commission is granted, and now, at 12:40 p. m., the hearing stands adjourned to be reconvened upon five days' notice to respective counsel.

(Whereupon, at 12:40 o'clock p. m., January 6, 1942, the hearing in the above-entitled matter was adjourned.)

4791 Room 859, Federal Building,
Detroit, Michigan,
February 16, 1942.

Met, pursuant to notice at 10:00 a. m., War time

Before: Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois; and

Arthur J. Abbott, Esq., of the firm of MacMahon, Abbott & Roberts, 2230 Buhl Building, Detroit, Michigan; appearing for the Respondent.

4792 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing of Docket No. 4389, case entitled in re Standard Oil Company of Indiana is reconvened at 10:00 a. m. pursuant to notice, February 16, 1942, in room 859 Federal Building, Detroit, Michigan. The last hearing was held in Washington, D. C., January 6, 1942.

You may proceed. Off the record.

(Discussion off the record.)

Mr. Hanley: On the record, if your Honor please.

This being the first reconvening of hearings in this action under the present state of the law, the Respondent would like to take this first opportunity to make a motion, if I have your Honor's permission.

Trial Examiner Ballinger: Proceed.

Mr. Hanley: Now comes the Respondent and moves the Federal Trade Commission and Trial Examiner for a dismissal of this action, and of the original and amended Complaint herein, upon the following grounds and for the following reasons:

First, that the Congress of the United States has passed a law, being formally House Bill No. 5990, now designated Public Law 421, 77th Congress, Chapter 26, Second Session, and cited as "Emergency Price Control Act of 1942," ap-

proved January 30, 1942; that such law and sub para-
4793 graph D of Section 205 thereof provides, among other
things, as follows:

"No person shall be held liable for damages or penalties in any Federal, State, or Territorial Court on any grounds for or in respect of anything done or omitted to be done in good faith, pursuant to any provision of this Act, or any regulation, order, price schedule, requirement or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the administration of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid * * *."

That the Emergency Price Control Act referred to supersedes and abrogates the applicability of the Clayton Act as amended by the Robinson-Patman Act as said amended Clayton Act is thought to be applied in this proceeding.

That orders of the Office of Price Administration (formerly Office of Price Administration and Civilian Supply) have been heretofore made and are now in effect, which orders have frozen and fixed the prices at which Respondent may sell gasoline and certain other commodities, in Detroit, Michigan, and elsewhere in the United States.

That any voluntary change in said prices on the
4794 part of Respondent or any change in said prices that
might ensue as a result of any orders issued in this proceeding would result in a derogation of and violation of the orders of the Office of Price Administration and a violation of the Emergency Price Control Act of 1942, and would make Respondent amenable to severe criminal penalties involving heavy fines or penitentiary sentences or both.

That in view of the action of Congress and the existence of present law, and in view of the delegation of executive authority under congressional sanction, continuation of this proceeding is without authority, becomes moot and of no effect or validity, and cannot be legally further maintained, and no orders herein can be legally issued or enforced except an order of dismissal.

That the Federal Trade Commission is without power to inflict any penalties for claimed past infractions of any law but in any instance has authority only to provide for the future conduct of a convicted Respondent through the medium of a cease and desist order, which of necessity is prospective in character, and that any such cease and desist order in this proceeding would necessarily lie with existing orders of the Office of Price Administration and/or with any such orders being currently issued or to be issued in the future by that governmental agency.

4795 That any result in the present action other than complete dismissal thereof would result in irreconcilable conflict and would result in a situation which would make it impossible for the Respondent to comply with the orders of both the Office of Price Administration and the Federal Trade Commission and would be in derogation of the entire spirit and the letter of the law passed by the National Congress, and of the executive authority as exercized by the President of the United States in the furtherance of the war effort of the United States in its National defense.

4796 (Mr. Hanley continuing.)

That any effort of Respondent to comply with, obey or to disobey or avoid any order herein except an order of dismissal, would of necessity subject the Respondent to severe damage and penalties in violation and derogation of the Emergency Price Control Act.

2. That heretofore and within a short time after the organization of the Office of Price Administration and Civilian Supply and repeatedly since, there has been brought to the attention of responsible officials and the legal department of the Office of Price Administration and Civilian Supply and latterly to officials of its successor the Office of Price Administration the fact of the existence of not only the Robinson-Patman Act but of numerous anti-price discrimination laws effective in the several states in which the Respondent conducts marketing operations and elsewhere in the United States. This subject has been discussed on numerous occasions with said officials through the medium of correspondence and personal conferences. The officials and the legal department of the Office of Price Administration have taken and presently take the position that the authority of the Office of Price Administration has and does supersede, invalidate, abrogate and suspend the application of not only the Robinson-Patman law but any and all state anti-price discrimination laws.

4797 It is the position of the officials and of the legal department of the Office of Price Administration that Respondent is required and obligated to respect each and all of the orders of the office of Price Administration, irrespective of the fact that the same may be offensive to, violative or in derogation of and in direct collision with the mandates of any one or all of the several state anti-price discrimination laws and/or of the Robinson-Patman Act, wherever applicable, and it has been pointed out to said officials that the Federal Trade Commission claims and asserts jurisdiction over, and applicability of the Robinson-Patman Act to substantially all situations concerning which the Office of Price Administration undertook and continues to undertake, the freezing, ceiling and fixation of prices.

The substantial effect of the position of the officials of the Office of Price Administration thus requires that which is tantamount to a violation of what the Federal Trade Commission claims to be the mandate of the Robinson-Patman Act and is so claiming in this proceeding and said orders of the Office of Price Administration direct and require what would in substantial effect constitute a violation of any order in this proceeding that might be issued by the Federal Trade Commission, other than an order of dismissal.

That is the announced and obvious intention of the
4798 Office of Price Administration to proceed vigorously with rigorous enforcement of its price fixing orders heretofore made and hereafter to be made and to do so irrespective of claimed applicability or effect of the Robinson-Patman Act or any state anti-price discrimination law.

That this situation obviously renders the further continuance of this proceeding or the issuance of any orders hereunder, except an order of dismissal, a proceeding in violation of law, and a purely moot proceeding without force, effect or validity, and the continuance of such proceeding and the issuance of any orders herein, except an order of dismissal, is without authority, creates an intolerable and impossible situation for the Respondent, dissipates its resources and energies, results in its harassment and is derogatory of the discharge of its obligation as a citizen to participate in and further the war efforts of the United States, and to meet the demands of its Government to participate in and further such war efforts.

3. That the United States Department of Justice has recognized the emergent character of the need of the United States to defend its existence under circumstances of desperate necessity; has agreed to cooperate with government agencies and orders in meeting the exigencies of the situation; has suspended or agreed to refrain from
4799 the institution of actions under the Federal Anti-Trust Laws in circumstances that would otherwise give rise to the institution of such actions, all as is in part clearly epitomized in numerous public pronouncements and letters published by the United States Attorney General and more particularly and basically in letters of the Attorney General to John Lord O'Brien, General Counsel for Office of Production Management and to Leon Henderson, Administrator, Office of Price Administration, dated April 29, 1941, and published in the "Federal Register."

That the determination of the issues in this case have now only a slight academic importance if any importance at all, even if such issues could be validly and legally determined which they cannot be under existing law and circumstances; and that the determination of such issues would not and do not further the public interest and would not and do not contribute to the effectiveness and progress of the national defense efforts, on the contrary the continued prosecution of this action creates chaos and uncertainty and retards and hampers the efficient operation of the established governmental war program.

That in the circumstances it is wasteful of time, effort and money and is detrimental and antagonistic to the governmentally planned commercial and industrial economy of the Nation during the war effort, for the
4800 Federal Trade Commission to even seek a judicial determination or confirmation of the clear provisions of, and mandates implicit in, existing laws and governmental authority which abrogate and nullify the applicability of the Robinson-Patman Act as it is sought to be applied in this action.

4. At this time the Respondent renews each and all of its several motions for dismissal of this action heretofore made in the proceeding.

Trial Examiner Ballinger: Judge, the Trial Examiner is not clear with reference to the last portion of the motion. Can you briefly recapitulate the grounds upon which you have previously moved to dismiss this case?

Mr. Hanley: Judge, I can't.

Off the record.

(A discussion was had off the record.)

Trial Examiner Ballinger: On the record.

Both motions submitted by Counsel for Respondent are addressed to the sound discretion of the Commission and over which the Trial Examiner has no jurisdiction nor power to rule upon, other than to deny. Both motions are accordingly denied.

Mr. Hanley: Off the record please.

Trial Examiner Ballinger: Off the record.

(A discussion was had off the record.)

4801 Trial Examiner Ballinger: On the record.

Trial Examiner Ballinger: Let's proceed. Call your witness.

Mr. Abbott: In that connection I wish to say that we are prepared this morning to proceed along that line with the jobber, Ned's Auto Supply Company. In the case of Wayne Oil Company and the Citrin-Kolb Oil Company, the persons we were to testify, Mr. Ledbetter on behalf of the Wayne Oil Company and Mr. Manning on behalf of the Citrin-Kolb Oil Company, are both sick this morning. Mr. Ledbetter has phoned in that he will be available shortly but he is still at home and unable to get out, and Mr. Manning, I am told, will not be able to be here presently but will make some arrangements about testimony on behalf of the Citrin-Kolb Oil Company, I believe.

I am prepared at this time, however, to proceed with the testimony of Mr. B. S. Kott of the Ned's Auto Supply Company.

Mr. Kott, will you take that stand?

B. S. KOTT was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Abbott.

Q. Witness, will you state on the record your full name?

4802 A. My full name is Benjamin S. Kott, K-o-t-t.

Q. Where do you reside, Mr. Kott?

A. In Detroit, Michigan.

Q. What is your residence address?

A. 3046 Calvert Avenue.

Q. What is your business?

A. I am office manager for Ned's Auto Supply Company.

Q. How long have you been identified with Ned's Auto Supply Company?

A. A little over ten years.

Q. During all that period what has been your duty? What have been your duties in that organization?

A. I have been in charge of their office.

Q. In that connection, has it been one of your duties to supervise the keeping of their books?

A. Yes, it has.

Q. What is the nature of the records kept for the year 1940 concerning advertising costs? I mean by that, what kind of books are they kept in?

A. Well, we keep complete books in our office. We have a disbursement journal showing who we paid the money to, and we have a ledger that compiles all this information.

Q. Are those books kept on a fiscal basis or a calendar or yearly basis?

A. Our company keeps their books on a fiscal year basis.

4803 Q. What is the fiscal year for Ned's Auto Supply Company?

A. Our year ends on August the 31st.

Mr. Austin: If your Honor please, I would like to ask what the purpose of this testimony is regarding the advertising expenses of jobbers.

Mr. Abbott: The purpose is to substantiate the tabulation which appears in Exhibit 100, on page 34, which has already ben received in evidence subject to Judge Hanley's offer to substantiate it, lay a foundation for it by testimony of the jobbers themselves.

Mr. Austin: Is that in connection with the claim that the Respondent may take into account some reciprocal benefits obtained from jobbers' advertising?

Mr. Abbott: That is correct.

Mr. Austin: In connection with the allocation of its own advertising costs?

Mr. Abbott: Well, the record already shows the purpose, Mr. Austin. We offered, as I understand, although I was not present, to substantiate the table on page 34 of

Exhibit 100, and that is the purpose of this testimony, nothing else.

Mr. Austin: Your Honor, I would like to renew my objection to this line of testimony upon the ground that it is entirely irrelevant and immaterial; that the Robinson-Patman Act provides only for a cost justification
4804 based upon differences in the Respondent's cost and makes no reference whatsoever to any justification based upon costs of the customer of the Respondent.

I further call attention to the fact, or, rather, wish to submit, that even if there had been a contract between the Respondent and the customer providing for an advertising allowance of a certain amount of money,—I think it is claimed here that the advertising amounted to about a fifth of a cent a gallon expenditure both for Respondent and jobbers—even if there had been a contract allowing the jobber a fifth of a cent per gallon advertising allowance and it had been used for that purpose, such an arrangement would be illegal and prohibited under Section 2(d) of the Robinson-Patman Act. Certainly, such an arrangement becomes no better when the fifth of a cent is given without any strings attached to it at all and without any contract, merely because the customer happens to expend it for advertising.

I think that if it would be illegal if it was under contract that it should be so spent, unless a similar allowance were made to all customers—unless a similar allowance were made to all the customers, then a fortiori the allowance of a price difference which may be used for advertising is immaterial on the question of cost justification.

4805 Mr. Abbott: Is that all?

Mr. Austin: That is all.

Mr. Abbott: I wish to say, your Honor, that this matter was already interposed in connection with the introduction of Exhibit 100, and the same reasons, as I recall from reading the transcript, were put forward at that time and your Honor overruled the objection to Exhibit 100, which was introduced in connection with the testimony of Dr. Boatwright, and that exhibit is already in evidence, including page 34 of the exhibit upon which page these advertising costs of the jobbers appear in tabulated form. Therefore, the Examiner has already ruled on the objection.

Trial Examiner Ballinger: Was not the previous testimony and the exhibit admitted subject to motion later to be submitted to strike?

Mr. Austin: Yes, your Honor. That was admitted subject to motion to strike unless it was supported by the evidence, which I believe, Mr. Abbott proposes to put in now.

Mr. Abbott: That is what I am just now doing.

Mr. Austin: But I wish to renew the objection I made previously even though your Honor did rule on it before adversely to me. I am simply urging again at this time the objection I made previously, and I should add to that objection a motion to strike from the record pages 34, 35, 36, and 37 of Respondent's Exhibit 100. That is the purpose of my motion. I should have stated that at 4806 the outset.

Trial Examiner Ballinger: Pages what?

Mr. Austin: Pages 34, 35, 36, and 37, Respondent's Exhibit 100.

Mr. Abbott: Well, 37 is a chart. Do you mean to include the chart?

Mr. Austin: Yes, the chart is part of this particular point.

Mr. Abbott: Mr. Boatwright advises me that page 37 has nothing to do with reciprocal benefits from jobbing advertising and, therefore, should not be included in your pending motion. That has to do only with advertising expenditures of the Respondent.

Mr. Austin: Well, as I understand it, it is tied right up with the other, isn't it?

May we be off the record?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: The motion at this time is overruled, likewise the objection, subject, however, to renewal at the conclusion of the testimony.

Mr. Abbott: Very well.

Mr. Reporter, did you take the last question and answer?

The Reporter: (Reading.) "What is the fiscal year for Ned's Auto Supply Company? Answer: Our 4807 year ends on August the 31st."

By Mr. Abbott:

Q. And are the books and records of the company kept on the fiscal year basis from that date in one year to the same date in the next year?

A. That's right.

Q. Now, are the books substantiating advertising costs for 1940 in court; that is to say, did you bring them with you?

A. Yes, they are. They are here.

Q. Prior to bringing the books into Court, were you requested as a part of your duties as office manager for Ned's Auto Supply Company to prepare for the purpose of this hearing a chart or statement summarizing the books, the book entries bearing upon and reflecting advertising costs of your company for the calendar year 1940?

A. Yes, I was.

Q. Have you prepared a synthesis or summary of such book entries?

A. Yes, sir.

Q. For the purpose of this hearing?

A. Yes.

Mr. Abbott: We offer, for identification, this exhibit.

4808 Trial Examiner Ballinger: The Reporter will mark the document Respondent's Exhibit 102, for identification.

(The document referred to was marked "Respondent's Exhibit 102" for identification.)

By Mr. Abbott:

Q. I now show you, Mr. Kott, Respondent's Exhibit 102, for identification, and ask you to identify that and state what it represents?

A. This the same letter that I prepared, and it represents the amount of money the company spent for advertising in the year 1940, the calendar year 1940.

Q. And that was taken by you from the books of the company which are, as you say, in court?

A. Yes, sir.

Mr. Abbott: I will say that the government asked us to have the books in court in order that we might verify these figures if it was required.

By Mr. Abbott:

Q. Now, these items on the chart that you prepared, Respondent's Exhibit 102, itemize the expenditures for advertising in different categories?

A. Yes, it does.

Trial Examiner Ballinger: Now, one moment. What do you mean by different categories?

The Witness: It is types of advertising, your Honor.

4809 By Mr. Abbott:

Q. And in what categories are they classified?

A. Newspaper advertising, radio advertising, outdoor advertising, magazines, engravings, art work, telephone directory, newspapers—that is, handbills, by that I mean handbills—donations, theater and club program advertising, outdoor sign maintenance, and sales promotion material.

Q. Opposite each one of those categories do you have placed the amount which was expended by Ned's Auto Supply Company as disclosed by the books for each of those items; is that correct?

A. Yes, sir.

Q. You have also placed on the exhibit the total for the year 1940, is that correct?

A. That's right.

Q. And are the figures that are placed opposite each one of those classifications or categories true and correct?

A. Yes, they are.

Q. And do they accurately reflect the condition of the books of Ned's Auto Supply Company touching those items for the year 1940?

A. Yes, they do.

Q. Now, further, referring to the Exhibit 102, for identification, were you asked to supply as a part of this chart or statement a breakdown of the amount and percentage of sales of all classes of merchandise that you sell in 4810 order to ascertain the amount allocable to gasoline?

A. Yes, I was.

Q. Will you state in what way that has been presented upon the exhibit, in what classifications?

A. It was broken down into two main classifications: "store sales" and "service station sales" and under "store sales" it was broken down further.

Q. Yes. And what is the breakdown under each one of those classifications?

A. Under "store sales" we have it broken down to "tires and tubes, automotive accessories, small home accessories and home appliances."

Q. And under the other, "store sales" how is it broken down?

A. You mean "service stations."

Q. "Service station sales." Yes.

A. Gas island, lubrication, brake work, and other service items.

Q. What is the meaning of gas island?

A. That means merchandise sold on the gas island.

Trial Examiner Ballinger: What does gas island mean?

The Witness: That means—

Trial Examiner Ballinger: Or what does it refer to?

4811 The Witness: It is referred to the location where the car drives on to purchase gasoline.

By Mr. Abbott:

Q. In other words, you call that an island in the service station, do you?

A. That's right, yes.

Q. Do you have in most of your stations more than one of such islands?

A. No, just one.

Q. Just one island in each station?

A. That's right.

Q. The gasoline sales are designated by reference to an island?

A. That's right.

Q. Is that right?

A. Yes.

Q. Now, opposite each one of these classifications, both of "store sales" and "service station sales" have you placed the gross amount of the realization from each of such sales for each of the items included in the exhibit?

A. Yes, I have.

Q. In dollars?

A. In dollars and cents.

Q. Were those figures secured by you from examination of the books of account?

4812 A. It was made up under my supervision, my direct supervision.

Q. And it was made by people who are subordinate to you in the organization?

A. Yes, sir; yes.

Q. But all under your supervision?

A. Yes.

Q. And those figures are reflected there in dollars for each one of the items that you testified concerning?

A. Yes.

Q. And that is all the merchandise that you sell?

A. That's right.

Q. Now, the totals are brought down covering both "store sales" and "service station sales", are they not?

A. Yes, sir.

Q. For the year 1940?

A. Yes.

Q. The calendar year. Then in the second column, what do the percentage figures represent?

A. That is the percentage that the particular department sale bears to the total sales.

Q. And the total of all those percentages adds up to 100 per cent, does it not?

A. Yes, sir.

Q. And that reflects, as I understand it, a total picture
of your operations showing the amount of sales in
4813 dollars and also the amount of sales in percentages?

A. Yes, sir.

Q. For each item of merchandise, and shows gasoline sales separately from the others, does it not?

A. Yes.

Q. Futher, Exhibit 102 shows something with reference to gasoline gallonage tax, does it not?

A. Yes. We have removed all gasoline taxes from our figures to make it on a comparable basis.

Q. Does that include both the Michigan state gallonage tax of three cents a gallon and also the Federal excise tax on gasoline?

A. Yes, it does.

Q. It includes both of those items for the year 1940?

A. Yes.

Q. So that the figures showing total sales for 1940 are not exclusive of tax, is that correct?

A. The only tax it includes and it is included in all the figures is sales tax, Michigan sales tax.

Q. And they are included in the sales figures?

A. Yes, sir.

Q. And they were not excluded?

A. They were not excluded from any of the figures.

Q. Now, Mr. Kott, do these figures as shown on Exhibit
102 correctly state the items of advertising expense
4814 of your company for the calendar year of 1940?

A. Yes, they do.

Mr. Abbott: Respondent offers this exhibit in evidence.

Trial Examiner Ballinger: Any objection?

Mr. Austin: Yes. I object to it, your Honor, on the ground that it is irrelevant and immaterial and, in addition to the previous objection, which I assume applies to all of this, that this is offered for the purpose of attempting to prove some alleged benefit received by the Standard Oil Company from advertising of jobbers. The fact that the jobber spent certain amount of money for advertising of various kinds it seems to me is entirely beside the point and has no probative value whatsoever for the purpose for which it is offered. In other words, unless the advertising was advertising of Standard Oil Company products and so stated, there could be no benefit to the Standard Oil Company from such advertising.

Furthermore, if it is claimed that the advertising was advertising of Standard Oil Company products, the only way to determine that would be by putting in evidence the testimony or the advertising copy itself; otherwise— because that is the best evidence, and, otherwise, it will be just like trying to say what is in a contract without producing the contract. So that I object to any evidence of advertising unless the advertising is produced 4815 in evidence, either the advertising itself or competent evidence is produced to show the nature of the advertising, so that the Commission may be in a position to determine whether or not any of the alleged reciprocal benefits could have been received.

4816 Mr. Abbott: On that point, if you are through, Mr. Austin, I think it is already in evidence that the Standard Oil Company, the Respondent here, furnishes all the gasoline that is sold by Ned's Auto Supply Company. If it is not already in evidence I will ask the witness the question, but I think it sufficiently appears from the record already that all the gasoline that is sold at the gas islands of the Ned's Auto Supply Company is furnished by the Respondent.

Mr. Hanley: Perhaps, your Honor, it would save some time—

Trial Examiner Ballinger: That may be, at the present time; but the testimony is that they also sold, I believe it is, Ford Benzol.

Mr. Abbott: Well, I will ask the witness a question.

By Mr. Abbott:

Q. Mr. Kott, there appears on this exhibit as the realization from gas island sales a figure in an amount disclosed by the exhibit. Now, will you state whether that is the realization, explicitly from gasoline, furnished by the Respondent, Standard Oil Company of Indiana? Do you wish to look at the Exhibit (handing document to witness)?

Trial Examiner Ballinger: Read the question to the witness.

Do you fully understand it?

4817 Witness: I would like to hear it again.

(The question referred to was read by the Reporter.)

Trial Examiner Ballinger: You understand that doesn't include any cost of advertisement in connection with Ford Benzol or any other gas?

Witness: It does include Ford Benzol.

Trial Examiner Ballinger: It does include that?

Witness: Yes.

Mr. Austin: May I say this: I think, your Honor, you referred to cost of advertising and counsel is referring to sales of products. I believe what the witness said was that the sales of gasoline, there, included Ford Benzol, is that correct?

Witness: Yes.

Mr. Austin: I wanted to be sure of that.

I would like to say further, Your Honor, that my objection isn't limited to that, anyway. Ned's Auto Supply sells tires and a lot of other things, as appears here, and my contention is advertising is spent on tires and automobile accessories cannot be claimed to be of any benefit to the Standard Oil Company for the purposes of this case.

Mr. Abbott: That is broken down, your Honor, on the exhibit. In other words, we allocate 19.3 percent of the advertising only to gasoline and the exhibit shows 4818 that the accounting basis for that is this: That we take the amount of gas island sales, which is 19.3—I think you have a copy of the exhibit here—that's the amount of gasoline sales to total sales.

Exhibit 100, page 34, shows that 19.3 percent is applied to the total of advertising costs, resulting in a figure of $22,851.31. You have Respondent's Exhibit 100 here, and refer to page 34. You will see that the amount which is allocated to gasoline advertising for Ned's Auto Supply is $22,851.31. That has been applied to the number of gallons sold by Ned's Auto Supply in the year 1940, which is already in evidence, on the testimony of Mr. Citrin—or Mr. Charles Gershenson, and that shows the amount per gallon for each gallon of gasoline sold in the year of 1940.

Trial Examiner Ballinger: May I inquire of the witness whether this is based upon—and when I say "this", I refer to Respondent's Exhibit 102 for identification—is based upon advertisements actually appearing in newspapers, periodicals, hand bills and otherwise?

Witness: Yes, sir.

Trial Examiner Ballinger: Now do not various products appear in the same advertisement?

Witness: Yes, they do.

Trial Examiner Ballinger: Now upon what basis 4819 did you segregate the amounts that were allocable to each item or each product?

Witness: On the basis of proportionate sales.

Trial Examiner Ballinger: On the basis of proportionate sales.

Witness: Yes.

Trial Examiner Ballinger: That is highly speculative, isn't it?

Mr. Hanley: Just a moment. The Respondent objects to the Trial Examiner's question on the ground that it is highly speculative and conjectural. I am sorry, Judge, but I think it is.

Trial Examiner Ballinger: I am asking the witness.

Witness: Do you want me to answer?

Trial Examiner Ballinger: (Addressing Mr. Hanley.) Your objection is overruled.

Mr. Hanley: All right.

Trial Examiner Ballinger: You may answer.

Witness: It is impossible to directly allocate the value that we get out of our advertising to any particular department. The value—an ad that is run on one particular product will bring benefits to all the products that we sell. Therefore, the most logical method of determining the percentage applicable to a given department is by taking 4820 the percentage of sales that the particular department bears, to the total sales.

Trial Examiner Ballinger: In your advertisements aren't the products other than gasoline, more prominently displayed?

Witness: On some ads they are, and on some, they aren't.

Trial Examiner Ballinger: Have you any advertisements where gasoline is the conspicuous item included in the advertisement, or where it appears in equal space and in equal sized letters with other products?

Mr. Austin: Your Honor, if there is such advertising, it should be produced.

Mr. Hanley: Well, may not the witness answer the question?

Witness: I believe I have.

Trial Examiner Ballinger: Can you produce it?

Witness: Yes, sir. Do you want me to get it?

Trial Examiner Ballinger: Have you it here?

Witness: Yes, I have.

Mr. Abbott: Yes, I asked him to bring the portfolio of advertising for the year 1940. I think that's what the Commission wanted.

Mr. Austin: I believe there is a book that Ned's produced the last time. I would like to have that brought back.

4821 Mr. Hanley: I just suggest, your Honor, that if the Government wants anything he had better ask for it. This witness is not the Respondent, he is a witness. We called him. If they want something, ask for it.

Mr. Austin: I shall do that all right in good time, but, your Honor, at this point I would like to call your attention to Page 245 of the record where Mr. Gershenson testified that his advertising, which was submitted for, I think a period of three years, was 90 percent other than gasoline. Since that is on the record I think any such evidence that is proposed, here, is inadmissible until such evidence is overcome.

Mr. Hanley: If your Honor please, I object to counsel arguing his case before the Commissioner, on the examination of the Trial Examiner, before the witness. If he wants to make an objection, it is his privilege, and your Honor may rule. If he wants records, he has the power to get them.

Trial Examiner Ballinger: Will you comply with the Trial Examiner's request?

(Thereupon the witness left the witness stand and procured some documents.)

Mr. Abbott: I understand the Trial Examiner wishes to have a proffer of the advertising which appeared in the year 1940, showing the nature of the advertising?

4822 (No response.)

Witness: (Handing two photographs to the Trial Examiner.)

This is outdoor advertising.

By Mr. Abbott:

Q. Have you got the newspaper clippings also?

A. Yes; I have.

Mr. Abbott: Well, I suppose if those are to be considered, they ought to be marked in some way; at least for identification.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: If your Honor please, the objection pending is to the introduction of this exhibit which, on its face, has nothing but the advertising expenditures of Ned's Auto Supply Company and the amount of their sales. Now specifically, I think, I would like to elaborate the objection to this extent: That it is perfectly obvious that the sales of gasoline or petroleum products by Ned's Auto Supply Company have no relation to the amount, if any, spent on advertising. Ned's might have sold a certain amount of gasoline, there, and at the same time not spent five cents on any advertising that mentioned any Standard Oil Company products. If Ned's advertising were devoted entirely to refrigerators and bicycles there would be
4823 no doubt that they would nevertheless sell some
gasoline to people coming in there because there is a lot of point-of-sale advertising at the station. We are not talking about that here, now. We are talking about other kinds of advertising.

Trial Examiner Ballinger: The Trial Examiner has heard enough. The objection to the exhibit is sustained and the exhibit is denied. The exhibit is rejected.

(Thereupon, pursuant to the ruling of the Trial Examiner, Respondent's Exhibit 102, for identification, was rejected.)

Mr. Abbott: I understand the basis of the denial, your Honor, is that the relation between the amount expended—

Trial Examiner Ballinger: No proper basis has been laid for its admission.

By Mr. Abbott:—

Q. Mr. Kott, it appears from the exhibit 102, for identification that there were newspapers to the extent of several thousand dollars which were included in that exhibit. Just in what connection were those newspapers used?

A. They are given to customers that make purchases at our company.

Q. Are they given to persons who purchase gasoline on the gas islands?

A. Yes, sir.

Q. Or to persons who visit the store and purchase
4824 other merchandise?

A. A person that visits the store may get a newspaper if he asks for it but they are usually presented to a customer that comes on our gas island with a car.

Q. And it is the custom of your company, and has been for some time, is it not, to give every person who drives up in a car to the gas island a copy of a Detroit Newspaper?

A. That's right.

Q. And it that done every day?

A. Yes, sir.

Q. How long has it been the custom to do that?

A. From about three to four years back.

Q. And is it being done at the present time?

A. Yes, it is.

Q. Was it being done in 1940?

A. Yes, it was.

Q. The figure which appears opposite the designation "newspapers" on Exhibit 34, then, is the amount paid for newspapers distributed to customers of Ned's Auto Supply Company; primarily gasoline customers?

A. Yes, sir.

Mr. Austin: Your Honor, now I move to strike out the answer of the witness and the preceding testimony regarding giving away newspapers at stations on the ground that it has nothing to do with the advertising of Standard
4825 Oil Company's products as such and that on its face such testimony does not tend to prove the point which the Respondent is offering this evidence for, according to Mr. Abbott's own statement.

Mr. Abbott: If your Honor please, here is a very large item amounting to several thousand dollars, as disclosed by Exhibit 34 which, according to the testimony of this witness, is expended for the purchasing of Detroit newspapers, which are given to all customers who come upon the gas island to make purchases at Ned's Auto Supply, at all the stations. Now that is very definitely an item of expense which can be designated by the jobber as advertising expense. It is one means of creating good will of the customer and one way of getting him to come in and purchase gasoline and other merchandise.

Now the witness has testified that this is primarily one of the inducements to purchase gasoline at Ned's Auto Supply Stations and I respectfully urge it is important to go into the matter of this expenditure of newspapers, because it does relate primarily to gasoline sales.

Mr. Hanley: If your Honor please, I would like to make just one inquiry, for my own information, before your Honor rules on this objection, and on these arguments.

I understood that it was clearly in the record that Ned's Auto Supply Company sold the branded gasoline of the Standard Oil Company of Indiana, the Respondent in
4826 in this action. If it is not, then I think that we have
been most remiss but I think it is clearly in the record that that is true. If it is true, then it doesn't make any difference whether Standard Oil Company is registered in the advertisement or whether it is the brand name of the gasoline; they are synonymous, and I submit, your Honor, that your Honor may not exclude, properly, an advertisement that advertises a branded product of the Standard Oil Company, even though the Standard Oil Company isn't named anywhere in the advertisement.

Trial Examiner Ballinger: To a consumer of gasoline other than one which has been regularly patronizing Ned's store would an advertisement advertising Ned's Firestone tires import the sale at Ned's of Standard Oil Company gasoline?

Mr. Hanley: Yes, your Honor.

Trial Examiner Ballinger: How could it?

Mr. Hanley: I say "yes." If a patron of Ned's goes to Ned's because he is drawn there by virtue of any advertising, and becomes a user and a devotee of the Standard Oil Company's products, then anything that brings a customer to Ned's adds to the benefit for the—

Trial Examiner Ballinger: But it doesn't bring a customer to Ned's to obtain Standard Oil Gasoline.

Mr. Hanley: What difference?

Trial Examiner Ballinger: But after he gets there
4827 he then discovers that Ned's is selling Standard Oil gasoline.

Mr. Hanley: And he goes back and continues to use Standard Oil gasoline. What difference does it make how you get a customer, if you get him and keep him. That is the essential point of this business of merchandising. I don't know much about selling but I know that is the answer to it.

They put Standard products on some of our advertising, Judge. They actually place it right in their ads. There is a picture of the billboard where they put Red Crown on. That is not Standard Oil Company. I know that.

Trial Examiner Ballinger: Let us proceed.

By Mr. Abbott:

Q. Mr. Kott—

Trial Examiner Ballinger: Is there a pending motion? Wil you read it.

"Mr. Austin: Your Honor, now I move to strike out the answer of the witness and the preceding testimony regarding giving away newspapers at stations on the ground that it has nothing to do with the advertising of Standard Oil Company's products as such and that on its face such testimony does not tend to prove the point which the Respondent is offering this evidence for, according to Mr. Abbott's own statement."

Trial Examiner Ballinger: The motion is granted and the testimony referred to is stricken.

4828 By Mr. Abbott:

Q. Mr. Kott, in the company's advertising relating to gasoline during the year 1940, to your knowledge state the fact as to whether any distinction was made between Standard Oil products, gasoline products, and Ford Benzol, in the gasoline advertising? Was there any distinction made as between those two products?

A. In some advertising where we might have inserted the Standard Red Crown it was definitely just Standard Oil advertising.

Q. Now, was there any designation made in the advertising of Ford Benzol in your advertising copy?

A. No.

Q. In other words, you never issued any advertising, to your knowledge, in which there was ever any reference made to Ford Benzol?

A. Not to my knowledge.

Q. In all cases, according to your definite knowledge, of gasoline advertising, if there was any tie-up between the gasoline and the name of the supplier, it was Standard Oil, is that correct?

A. Yes, it was.

Q. Now, Mr. Kott, I show you Respondent's Exhibit 100 in this case and refer particularly to page 34 of that Exhibit. This Exhibit is already in evidence. I wish
4829 you to take the exhibit and I want to ask you one or two things concerning some figures in it. There appears in this exhibit identified as Respondent's Exhibit 100, as amended, a summary of reciprocal advertising benefits in the case of Ned's Auto Supply, which is in paragraph 3 or line 3, rather, of Exhibit 100, and it includes a percentage figure of 19.3 percent. What does that figure refer to, if you know?

A. I believe that is the figure, that is the percentage of our gas island sales to the total sales of our company.

Q. Is that same figure as appears on Exhibit 102, for identification, opposite the figure of total sales of gas island products for the year 1940?

A. I believe it is.

Q. 19.3 percent, is that correct?

A. Yes.

Q. Now, do you know as a fact, and of your own knowledge, or from the examination of the books of your company, that that percentage figure is correct?

A. Yes, sir.

Mr. Austin: Your Honor, I am perhaps a little slow in gathering what was going on here; the purport of it; but I believe that the questions and answers regarding Page 34 have been for the purposes of comparing that with an exhibit which your Honor ruled should not be admitted in evidence and since a comparison of this exhibit with
4830 a paper not in evidence is not material, I therefore, move to strike all questions and answers in regard to the exhibit on Page 34.

Mr. Abbott: We are making a record, here, which we have a right to do, regardless of the ruling of your Honor, in regard to the proposal in Exhibit 102. We have to make a record to show what the picture is, here, because otherwise it would be incomplete, which we have a right to do.

Mr. Austin: It is quite incomplete and the point is Exhibit 102 for identification was offered for the purpose of substantiating these figures on Page 34 and the Trial Examiner has ruled that a mere repetition of these figures on a letter or on any other form does not substantiate them.

Trial Examiner Ballinger: Is there a motion pending? Will you read it?

"Mr. Austin: Your Honor, I am perhaps a little slow in gathering what was going on here; the purport of it; but I believe that the questions and answers regarding Page 34 have been for the purposes of comparing that with an exhibit which your Honor ruled should not be admitted in evidence and since a comparison of this exhibit with a paper not in evidence is not material, I therefore, move to strike all questions and answers in regard to the Exhibit on Page 34."

Trial Examiner Ballinger: The motion is granted and the questions and answers are stricken.

By Mr. Abbott:

4831 Q. There also appears on page 34 of Exhibit 100, in the detailing advertising costs of Ned's Auto Supply, which is the third column, the figure $22,851.31. What, according to your knowledge, does that represent?

Mr. Austin: I object to that question, your Honor, on the ground it is likewise immaterial what that figure represents. It is stated in this exhibit itself what it represents and I believe that all that is intended here is to have the witness say that that is the figure that is on Ned's books.

Now my objection goes to the point that testimony should not be admitted regarding the advertising expenditures made by Ned's Auto Supply unless it is shown that those advertising expenditures were for advertising of Standard Oil Company products or advertising some way related to the creation of customer acceptance on Standard Oil Company products, and I believe—

Trial Examiner Ballinger: The Trial Examiner is ready to rule.

Mr. Austin: I was just going to say: I believe that the mere showing of what is on Ned's books is immaterial unless that is tied up in some way to evidence from which the Commission may determine whether there is reciprocal benefit.

Trial Examiner Ballinger: The objection is sustained.

Mr. Abbott: In order to make a record here, if the Court please, I would like to have the Trial Examiner 4832 permit the witness to state the answer to the last question, because otherwise, the record will be incomplete.

Trial Examiner Ballinger: The record is fairly complete. It is, I take it, conceded that all of the figures appearing on Page 34 of Respondent's Exhibit 102 for identification which has been rejected, am I right.

Mr. Abbott: That is correct.

Trial Examiner Ballinger: That being the case, the record discloses exactly the situation.

By Mr. Abbott:

Q. There also appears, witness, on the same page of Exhibit 100; namely 34; the statement and figure: "Gallons—4,310,465." What, to your knowledge, does that represent?

Mr. Austin: Your Honor, I object to further questioning of this nature. I think it is taking up time and encumbering the record.

This exhibit—or, rather, these pages of Exhibit 100, pages 34 to 37, inclusive, were admitted over a general objection as to the relevancy of this testimony but subject to being supported by evidence of the nature of the advertising expenditures and my understanding certainly was that this was to be supported by testimony which would be of —would have probative value in establishing the fact that the advertising referred to here was of some 4833 advertising benefit in creating customer acceptance for Standard Oil Company products; and in the absence of any production of evidence of that kind, I don't think it is material to continue with a mere attempt to show that these figures here were taken from Ned's books. I believe that's all that is being done at the present time.

Mr. Abbott: The question that is now propounded merely relates to the gasoline gallonage for the year 1940 and if this witness knows what the gallonage was why, of course, he is competent to answer the question.

Trial Examiner Ballinger: That appears numerous places in the record; on the gallonage.

Mr. Abbott: Well, if it will be conceded that it does so appear, then, of course, this question is merely cumulative.

By Mr. Abbott:

Q. But, do you know?

A. I believe that is the number of gallons of gasoline sold on our gas islands during the year 1940.

Trial Examiner Ballinger: That's your six stations?

Witness: Yes.

By Mr. Abbott:

Q. There also appears on the same page of Exhibit 100 the statement, and a figure "53¢" opposite or under the name "Ned's Auto Supply Company." What does that represent?

4834 A. That is the proportion of advertising expense to each gallon of gasoline sold.

4835 Q. I see. That is the expense after applying the figure or the percentage figure 19.3 per cent, is it not?

A. That's right.

Q. Now, witness, referring again to Exhibit 100, on page 34, we find that the breakdown of the advertising cost shown there includes several items: First, direct mail. What is the nature of that kind of advertising, if you know? I don't mean the amount, but what is the nature of it?

A. Direct mail, I presume means—

Q. Not what you presume but what you know, if you do.

Mr. Austin: There is none of that on there for Ned's Auto Supply.

Mr. Abbott: Oh, yes.

By Mr. Abbott:

Q. That is blank. The next item is newspapers.

Trial Examiner Ballinger: One moment.

Q. What does that include, if you know.

Trial Examiner Ballinger: Will you read the last two questions and answers and the comment?

(The record was read.)

By Mr. Abbott:

Q. The question is this: "What does the item opposite the word "newspapers" include?

A. That includes actual ads run in the Detroit newspapers during the year 1940.

4836 Q. Does it also include anything in the way of newspapers handed out to customers who came upon your gas islands at any of the stations?

A. No, it does not.

Q. Is that included in another item on the exhibit?

A. Yes, it is.

Q. Now, the second is "posters." If you know, what does that item include?

A. That includes billboards posted on the streets and highways of the City of Detroit and its surroundings.

Q. Do you have any photographs of any such billboards?

A. Yes, I have.

Trial Examiner Ballinger: One moment. The Examiner desires to ask the witness a question.

By Trial Examiner Ballinger:

Q. Are all of these figures appearing on Respondent's Exhibit 100, at page 34, taken from Respondent's Exhibit 102, for identification, which was rejected?

A. I do not know where this was taken from, your Honor. This is the first time I have seen this particular paper.

Q. Well, do they correspond directly with—

A. I don't remember all of the figures but some of them seem to be the same.

Trial Examiner Ballinger: Let me have Respondent's Exhibit 102, for identification.

Mr. Abbott: Yes, sir.

4837 (The Exhibit referred to was handed to the Trial Examiner.)

By Trial Examiner Ballinger:

Q. Will you take and compare the two and state whether or not they are identical?

A. They don't seem to be identical, your Honor.

Q. In what respect.

A. Some of the figures are different.

Q. Point out wherein they are different.

A. On No. 102 it says "newspaper advertising, $66,000" and on page 34 it says "newspapers, $77,000."

Q. Can you explain the variation?

A. That is what I am trying to see right now.

Mr. Austin: Is your total of $118,000 the same on both?

The Witness: Yes, it is. The total is the same.

Mr. Abbott: There seems to be a difference in the classification.

Trial Examiner Ballinger: Merely a difference in classification of advertisement, is it?

The Witness: I believe so.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: It is conceded by the Respondent that Exhibit 100, page 34, which contains a tabulation of
4838 advertising expense for the different jobbers is in the case of Ned's Auto Supply Company substantially a copy of the figures which appear on Exhibit 102, for identification, which latter exhibit relates only to the advertising costs of Ned's Auto Supply Company.

Trial Examiner Ballinger: Such being admitted, the Examiner rules that no further examination on Respondent's Exhibit 100, page 34, is permissible.

Mr. Abbott: Do I understand also that the Examiner rules that the witness cannot be asked any questions along that line, in order to make the record?

Trial Examiner Ballinger: You may make a proffer of testimony only, what you intend to prove by it.

Mr. Abbott: Well, first, the proffer has already been made by the questions which have been asked of the witness. In so far as we expect to make it in the future along this line, it would consist in this: We proffer in evidence a portfolio showing newspaper clippings and also photographs of posters and billboard advertising and also samples of all other advertising used by Ned's Auto Supply Company in the year 1940, in order to substantiate our position that those were advertising costs which, to the extent of 193 per cent, are properly allocable to advertising costs for gasoline, that being the percentage which is used in Exhibit 100, page 34, based upon the percentage
4839 between gasoline sales and total sales for the year 1940.

Now, I will agree with your Honor that this is an arbitrary allocation as between gasoline sales and total sales, applying that same percentage to the total cost of advertising. We contend, however, that that is a proper allocation based as it is on the testimony in the record to the effect that that is the only way in which it can be gotten at for the purpose of determining with any degree of certainty what is the proper amount of the advertising costs of Ned's Auto Supply Company which is to be allocated to gasoline sales.

Trial Examiner Ballinger: You also have the further discrepancy in that the witness hasn't testified that that represents the allocable cost of the sale of gasoline, and that within the gasoline is included Ford Benzol. That hasn't been excluded.

Mr. Abbott: Along that line, if the Court please, there will be further evidence showing that this is a proper allocation to gasoline even though it does include Ford Benzol.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Abbott:

Q. I want to ask you this further question based on your knowledge of the bookkeeping methods of Ned's Auto

4840 Supply Company. Is it possible to segregate in the figure of total gasoline sales in the year of 1940 either by gallons or by dollars the sales as between Standard Oil gasoline and Ford Benzol?

A. It is possible.

Q. Have you the books here upon which that segregation can be made?

A. I believe I have.

Q. How long would it take you to make them?

A. Possibly about ten minutes.

Mr. Abbott: I will ask for an adjournment at this time. It may be possible for us—

Trial Examiner Ballinger: Before we take an adjournment, upon what basis can you make that segregation?

The Witness: Well, we know exactly how much gasoline we sold, how much we bought from Standard Oil, and how much we bought from Ford Benzol.

Trial Examiner Ballinger: And you could only make it upon the basis of gallonage?

The Witness: That's what the question was, your Honor.

Trial Examiner Ballinger: Well, the Examiner states in advance that if segregation was made upon that basis, the Examiner would reject it.

Mr. Abbott: Can you also make it on the basis of dollars of realization as between Ford Benzol and gasoline?

4841 The Witness: I think I can. I know what the cost of a gallon would be and what it sold for, and if I know the gallonage, I can determine the value of it.

Mr. Abbott: Very well. May we take a recess at this time? It is 12:00 o'clock. I mean, just—

Trial Examiner Ballinger: Does counsel for the Commission want to make any objection to that line of testimony?

Mr. Abbott: Well, we haven't propounded any question yet.

Mr. Austin: If your Honor please, I would like to state my position on the record here a little more fully, apart from the general objection which went to all of this testimony including the admission of pages 34 to 37 of Respondent's Exhibit 100.

My position is this, that if it is the contention of Respondent that certain of Ned's advertising and the other jobbers' advertising was of value to the Respondent in creating consumer acceptance for Respondent's products, that the Respondent should offer the advertising copy or photographs or other evidence, competent evidence of the advertising itself, from which they claim this benefit is received. Then Examiner and the Commission can determine by looking at the advertising whether there is any substance to the argument of material benefit, and
4842 you can't do it unless you see the advertising.

Now, if the Respondent wants to offer actual advertising copy and there is any basis at all for the claim that that advertising copy might create some consumer acceptance for Standard Oil Company products, I won't object to the admission of it, and then it can be shown how much money was spent on that type of advertising. But my objection as to the admission of all these figures simply showing that the jobber spent a certain amount of money on advertising and they sold a certain amount of gasoline, without showing that any of the advertising was advertising of a type which might create consumer acceptance for the Respondent's product—.

Trial Examiner Ballinger: The Examiner is of the opinion that counsel for the Commission has outlined the proper course to be pursued. If this line of testimony is considered desirable by Respondent, he has outlined it.

The Examiner has overruled the Commission on at least one or two occasions in an effort to permit the Respondent to make a showing along the lines the Respondent is now attempting to do, but before the Examiner can admit such testimony in evidence, some substantial basis must be laid, which has not been, in the opinion of the Examiner.

If you will go back, bring in your advertisements, let us see what they are, then establish or offer some 4843 testimony here as to what value they have, the Examiner would be disposed to admit it, but the Examiner must of necessity exclude this class or kind and character of evidence.

Mr. Abbott: I see. It is after 12:00 o'clock. May we have a recess at this time? I don't know whether you intend to take a recess or not, but I would like to—

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The hearing stands in recess for ten minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Abbott: You may take the witness.

Mr. Austin: I have no cross-examination.

Mr. Abbott: That is all, then, Mr. Kott.

Trial Examiner Ballinger: One moment. Off the record.

(There was a discussion off the record.)

Mr. Austin: If I may withdraw my former statement, I think perhaps I would like to ask the witness one or two questions.

Trial Examiner Ballinger: You may.

Cross-Examination by Mr. Austin.

Q. Are you familiar with the various types of ad-4844 vertising which Ned's Auto Supply Company has used in the last three or four years?

A. No, I am not.

Q. Have you seen any copies of the advertising used, the individual advertisements?

A. Just by looking through the papers.

Q. Have you seen any such file kept by Ned's Auto Supply Company?

A. I know there is one in the office.

Q. Have you examined it?

A. Just as a matter of course, I have looked at it once in a while.

Q. Do you know whether it is a fact that a large part of the newspaper advertising which Ned's Auto Supply Company has used or purchased during the past three or four years has been advertising of products other than gasoline? And before you answer that I would like to explain that I am referring to individual advertisements. I am asking you whether you do not know that many of the individual advertisements inserted by Ned's Auto Supply Company in newspapers have made no reference to gasoline or petroleum products?

A. I don't think I am qualified to answer that question.

Q. Have you got here a book which is kept by Ned's Auto Supply Company, a thick volume, pertaining to copies of newspaper advertising?

4845 A. I believe it is here. One of the other men with our organization is present and he and I came down together, and he is the one that is responsible for that end of the testimony.

Q. Do you think that book is here now?

A. Yes.

Mr. Austin: That is all.

Mr. Abbott: That is all, Mr. Kott.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Mr. Hanley: Off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Mr. Hanley: In response to the request of the Examiner in respect to the question which is in his mind, as he has expressed it, relative to the brand of products and the amounts thereof that were furnished to several jobbers mentioned in the Complaint, the Respondent will supply information disclosing the following facts: The purchases in gallons of each branded product of the Respondent furnished to each of the jobbers, each of the jobbers named in the Complaint, for the years 1937 to 1940, inclusive.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

4846 Mr. Abbott: If the Court please, at this time, the witnesses for the Wayne Oil Company and Citrin-Kolb Oil Company are not available on account of illness, and we shall have to defer their testimony. At this point, it being now 12:35, I move that we adjourn until 1:30 or 2:00 o'clock.

Trial Examiner Ballinger: You reserve the right to offer further testimony on behalf of the Respondent?

Mr. Abbott: We do.

Trial Examiner Ballinger: Is counsel for the Commission ready to proceed with the cross-examination of Mr. Boatwright?

Mr. Austin: Yes.

Are you planning to go ahead after lunch to put in some more testimony now or—

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Motion for counsel for Respondent is granted and now, at 12:35 p. m., the hearing stands in recess until 1:45 p. m.

(Whereupon, at 12:35 p. m., a recess was taken until 1:45 p. m.)

4847 Afternoon Session.

2:00 P. M.

Trial Examiner Ballinger: You may come to order. You may proceed.

JOHN W. BOATWRIGHT, resumed the stand, having been previously first duly sworn, and testified further as follows:

Trial Examiner Ballinger: Mr. Boatwright, you have been previously sworn?

Witness: Yes, sir.

Mr. Austin: On January 24th last I addressed a letter to counsel for the Respondent requesting that certain statements and information be produced at the time of this hearing, and one of those statements was mentioned this morning. I would like to ask counsel if he has a statement showing the number of gallons of gasoline of each grade sold to each of the four Detroit jobbers in each year from 1937 to 1940.

Mr. Hanley: Just a moment.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: Well, if it is addressed to me, I think the witness has prepared such a statement and I think the witness should answer as to what has been pre-

4848 pared in response to that request.

Cross-Examination by Mr. Austin.

Q. Have you such a statement, Mr. Boatwright?

A. I do have such a statement.

Q. Will you produce it, please?

A. Sure.

Mr. Hanley: I may say at this time that I think this is the information that your Honor was requesting this morning and about which we said we would produce at the appropriate time.

(A paper was handed to Mr. Austin by the witness.)

Mr. Austin: I would like to mark this paper for identification.

Trial Examiner Ballinger: The Reporter will mark this paper "Commission's Exhibit No. 100," for identification.

(The letter referred to was marked "Commission's Exhibit No. 100," for identification.)

Q. Mr. Boatwright, does this Commission's Exhibit 100 for identification, show the number of gallons of gasoline of each grade, that is, of Solite with Ethyl, Red Crown and Stanolind sold by the Standard Oil Company to each of the four jobbers who are named in the complaint in this action during the years 1937, 1938, 1939, and 1940?

A. Yes, sir.

4849 Mr. Austin: I offer the statement in evidence.

Trial Examiner Ballinger: Any objection?

Mr. Hanley: No objection.

Trial Examiner Ballinger: Commission's Exhibit No. 100 is admitted in evidence.

(The statement referred to, heretofore marked for identification as COMMISSION'S EXHIBIT NO. 100, was received in evidence.)

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: At the request of the Court, it is stated that the differential accorded the four jobbers named in the complaint in this action amounted to one and one-half cents off the dealers' tank wagon price for Standard Red Crown gasoline for the years 1937, 1938, 1939, and 1940. The difference in respect to Solite with Ethyl or otherwise known as premium gasoline was one and three-quarters cents off the dealers' tank wagon price for Solite with Ethyl gasoline.

The differential accorded in connection with the Standard Oil Company brand known as Stanolind or third grade gasoline has been one cent off the posted dealer tank wagon price for Stanolind gasoline.

This statement is made with the qualification that
4850 there may possibly have been short and temporary periods when there was some difference in this differential, but it is made by the Respondent with the understanding that in the main these have been and are now the differentials in force.

These prices refer to prices given to tank car and transport truck dealers as distinguished from tank wagon dealers.

In connection with this inquiry by the Court, reference is made to Respondent's Exhibit No. 52-B and succeeding pages which details the dates and prices effective in connection with regular or house-brand gasoline differ-
4851 entials.

Mr. Austin: Now, Judge, were you also going to make a statement with regard to the differential during 1937 and part of '36 and '38, as to whether it was a half a cent on Ethyl as well as on regular?

Mr. Hanley: You mean in respect of Ned's service stations?

Trial Examiner Ballinger: Yes.

Mr. Austin: Yes, that was the question the Trial Examiner asked this morning and I thought that it was in the record but I can't swear that it is.

Mr. Hanley: I think it is. May I have another moment, Judge?

Trial Examiner Ballinger: Yes. It is not clear on the record.

The record fixes the date as March 7th, 1938; from September, 1936, to March 7.

Mr. Raupagh: No. Your Honor, the date was September 1, 1936, to March 1, 1938. However, that didn't go on a tank car basis until I think it was March 7th or 8th.

Mr. Hanley: That's right. There was a week when they went back on a tank wagon basis. How many deliveries they got, I don't know.

Trial Examiner Ballinger: The record isn't clear as to that but I assumed that that half a cent—and
4852 I don't think it is material at all—

Mr. Hanley: Well, it comes back to my mind now and I don't undertake to state the reason for it but the fact is they were on the half cent on March 1st and went back on the regular basis; the half cent allowance was eliminated for about a week and then they went on a tank car basis and whether they got deliveries during that week, I don't know.

Trial Examiner Ballinger: Is that material to anything in the case?

Mr. Hanley: I don't think it would make the slightest difference, Judge.

Trial Examiner Ballinger: The only thing I wanted to call your attention to is your exhibits, those letters written by Mr. Raupagh, which preclude your going on that, on the basis of that letter, on March 1st, so that the time they went on it was March 7.

Mr. Hanley: Well, I can take care of that.

At the request of the Trial Examiner it is stated by the Respondent that from September 1, 1936, until on or about March 1, 1938, the one half cent discount off tank wagon price which has been heretofore testified to and appears of record in this case, as accorded to Ned's Auto Supply Company, was also accorded to Ned's Auto Supply Company in connection with Solite with Ethyl gasoline or premium brand. That is to say; that Ned's Auto Supply Company received a discount of one half cent during 4853 said period on Solite with Ethyl gasoline off dealer tank wagon price of Solite with Ethyl gasoline. Ned's Auto Supply Company did not, during said period, handle or purchase Respondent's Stanolind brand or third grade gasoline.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: It is understood that the record discloses, and it is now conceded by the Respondent, that during said period Ned's Auto Supply Company was accorded a discount of one half cent off the dealer tank wagon price of Standard Red Crown gasoline, which gasoline was the house brand gasoline of the Respondent.

By Mr. Austin:

Q. Mr. Boatwright, do you recall that on November 17 1941, at a hearing in this matter in Washington, that sheet of figures was introduced by the Respondent throug yourself which was then marked Respondent's Exhibi 101 and admitted in evidence? That sheet was entitled "Comparative Statement of Expense—Detroit field, year 1940." It is the large sheet on somewhat similar form a same information given on the substituted Exhibit 101 on November 17th. Do you recall that, Mr. Boatwright?

A. I do so recall.

4854 Q. And on January 6th the sheet was withdrawn and another similar sheet was substituted for that first sheet as Respondent's Exhibit 101. Do you recall that, Mr. Boatwright?

A. I do so recall.

Q. And am I correct in stating that the former Exhibit 101 covered the same scope and purported to give the same information given on the substituted Exhibit 101?

A. That is correct.

Q. Turning to page 4754 of the record you stated, Mr. Boatwright, referring to the former Exhibit 101:

"That form is one of the most accurate things that I can conceive of being prepared."

Do you recall that testimony?

A. I do.

Q. Now, I have made some comparison of the former exhibit 101 with the present exhibit 101 and according to my count on former exhibit 101, in the three columns setting forth what is stated to be direct shipment expense, that is, the three columns under the heading direct shipment customers, there are a total of 187 expense entries, and further comparing those forms, and comparing the expense entries in the direct shipment columns with the corresponding entries on present Exhibit 101, I find that 56 entries on the substituted exhibit, or 30 per cent of the total entries, are different from the corresponding entries on the former exhibit. Now, I would like to ask you,
4855 Mr. Boatwright, assuming that my count is correct,
whether that means that 30 per cent of the figures for

direct shipment on the former exhibit 101 were inaccurate, or does it mean that between November 17th and January 6th you changed your decision as to method of allocation ~~to be applied to certain accounts?~~

Mr. Hanley: Just a minute. That is objected to as incompetent, irrelevant, and immaterial. What counsel refers to as former Exhibit 101 is no longer a part of the record in this lawsuit and counsel has no right to examine in connection with it. It is a quibble and querulous and an entirely fictitious attempt to demonstrate bad arithmetic on the part of the witness, if indeed there ever was any bad arithmetic on the part of the witness, which, if it existed has now been corrected by the substituted exhibit 101.

Trial Examiner Ballinger: May I inquire of counsel for the Commission the object and purpose of this line of examination?

Mr. Austin: It has two purposes your Honor. In the first place I assume that in all good faith of course the witness when he introduced this former exhibit said it was so accurate—he said, in fact, he thought it was one of the most accurate things he could conceive of. Now it turned out 30 per cent of those figures were changed between
November and January and I think that that in itself
4856 is important to demonstrate the extent of accuracy
going into the preparation of these forms and the extent of errors that are likely to occur in a form of this kind and, secondly, I am not sure whether they were errors in arithmetic, or not, and that's what I have asked the witness because if there were changes in method of allocation used and if the Standard Oil decided certain accounts should be allocated certain ways on November 17th and certain other ways on January 6th, I think we are entitled to find out and see why they were so used or changed.

Mr. Hanley: On the statement of counsel the question is further objected to on the ground that there is no point of direction, indicated in counsel's question as referred to in the witness' answer that it was the most accurate thing he could conceive of in respect of whether it alluded to the arithmetical calculation or the method of accounting allocation and the question is unfair to the witness and he cannot answer it unless and until he know what the question of counsel means and unless and unti he has an opportunity to review his own testimony in al of its connotations in connection with his answer the given.

Mr. Austin: There wasn't a contest at that point.

Mr. Hanley: I think this is most unfair, Judge. It just isn't fair.

Trial Examiner Ballinger: Mr. Austin, shouldn't 4857 this line of examination, if it was to be pursued, have been pressed at the time counsel for Respondent moved to withdraw the original exhibit and to substitute in lieu thereof the present exhibit? That motion having been allowed without opposition from counsel for the Commission, that exhibit, that is, the original exhibit, was withdrawn from the record and is no longer a part of it.

Mr. Austin: That's right.

Trial Examiner Ballinger: I am a little bit in doubt as to—

Mr. Austin: I couldn't make the comparison, your Honor, until I had them both. I couldn't do it then.

Trial Examiner Ballinger: But the original is no longer a part of the record and how can you make a comparison unless it is put back into the record?

Mr. Austin: If that's your feeling on it perhaps I had better have it marked for identification and, perhaps, offer it in evidence; but I think where the Respondent has put in two different statements purporting to set forth the same information and there is that much difference in a month and a half's time, that I am certainly entitled to find out what the differences were. If they were errors in arithmetic, all right; if they were different methods of computation in certain accounts, I would like to know that.

Mr. Hanley: Judge, we withdraw that statement 4858 with a fair statement that there were errors in it, that the comptometer girls made.

Trial Examiner Ballinger: My recollection is that in connection with the request to withdraw the exhibit the witness made a statement of the reason why it was so desired. Now if it is the object and purpose of this examination to assail and attack the reasons then assigned, it might be proper. I would like to be advised with reference to that.

Mr. Austin: Will you give me just a moment, your Honor?

Trial Examiner Ballinger: I will.

Mr. Austin: I will find that testimony. Page 4770 of the record on January 6th, at the time this exhibit was substituted—does your Honor desire to read it on the record?

Trial Examiner Ballinger: You may include it in the record.

Mr. Austin: "Q. In connection with the new document which you have prepared and which was identified above by title, being an amplification of what was marked originally Exhibit 100, did you revise and correct any errors that may have existed in the revised form 189, being Exhibit 101?

"A. Yes, sir.

"Q. Did those errors amount to any substantial amount?

"A. No.

4859 "Q. Did they in any particular change the differentials in cost as appeared?

"A. No. They neither changed the differential nor did they change the unit cost in a given channel.

"Q. As I understand it, Mr. Boatwright, they were trivial, mechanical errors in calculation?

"A. That is correct. In spite of the fact that the other work had been completely checked by second operators there were minor human elements—human errors found in the original which were corrected.

"Q. In view of that discovery have you prepared new and correct forms 189 revised on the basis of your latest calculation and on the basis of this expanded report of your study?

"A. I have."

Now in connection with that, your Honor, you will note that it states that those errors did not amount to any substantial amount. It says—the testimony is that they did not in any particular change the differentials in cost and did not change the differential or the unit cost in a given channel, all of which statements, I believe, are incorrect, on the basis of these forms.

Trial Examiner Ballinger: If this examination is designed to intend to show that those answers were incorrect, the Trial Examiner will permit them.

4860 Mr. Austin: That is the purpose.

Mr. Hanley: If your Honor please, we admitted they were incorrect when we withdrew the exhibit. Now we are not entitled to be examined on an exhibit that is withdrawn from this lawsuit. That's withdrawn from this lawsuit. It is not in the case at all.

Mr. Austin: I am challenging these answers that were given.

Trial Examiner Ballinger: Read the question.

4861 Mr. Hanley: That question is further objected to as argumentative and calling for a conclusion of the witness and a calculation on the part of the witness. It is complex, intricate and incapable of a direct answer and I would like to ask the Commission to hand me, now, the official exhibit; former 101 and present 101.

Trial Examiner Ballinger: The Trial Examiner hasn't the original.

Mr. Hanley: Who has, your Honor?

Mr. Austin: You have got them, haven't you; copies of of all of them?

Mr. Hanley: No, you have them. They are in evidence.

Mr. Austin: All right.

Mr. Hanley: You have them. We haven't anything except what you have got in your books.

Mr. Austin: You have copies of the present Exhibit 101.

Mr. Hanley: I am not sure I have copies of what you are talking about, at all. I am asking for the official record of former 101 and present 101.

There isn't any thirty percent error, Mr. Austin, in those exhibits and I know it and I want to see the original exhibits.

Trial Examiner Ballinger: Mr. Boatwright, without

Exhibit 101; and opportunity to compare it with 4862 the existing exhibit; could you answer that question?

Witness: That question—

Mr. Hanley: And, if your Honor please, we will ask to defer this question until we have had that opportunity, if it will expedite the trial.

Mr. Austin: I think the witness can answer now as to whether or not there were any different methods of allocation used in the November 17th exhibit and in the January 6th exhibit.

Trial Examiner Ballinger: He stated in his original examination it was withdrawn because of inaccuracies.

Mr. Austin: I want to show your Honor that all of these answers that I read are not correct. That is my contention.

Trial Examiner Ballinger: Suppose you take up the particular answers and ask him with reference to those.

Mr. Austin: There is a question pending, first, as to whether or not any of the changes between those two forms resulted in any difference in allocation.

Mr. Hanley: There is no objection to the question as to whether there was any difference in allocation.

Witness: I don't recall a single case where any change in the allocation procedure was adopted.

Mr. Hanley: I wish to make it clear now, your Honor—I think it is appropriate at this time—but the Commission will not get another figure from the Respondent in 4863 this law suit. It will, as we have always offered their records, but if we are to be subjected to this kind of an examination because some comptometer girl stumbled over a key, we are just not going to give you any figures.

Trial Examiner Ballinger: Judge, you haven't been subjected to any unfair rulings up to the present time, in the knowledge of the Trial Examiner.

Mr. Hanley: Judge, you must concede to me that this is a most unfair type of examination. We withdrew this exhibit because we admitted that there were mechanical errors in it.

Trial Examiner Ballinger: This line of examination is designed and intended to test the accuracy of the witness' statement as a grounds for the withdrawal. It is proper cross examination.

Mr. Austin: Now, a question was asked about the original exhibit. Well, the original exhibit was one of several copies of the same comparative statement of expense which were all handed to myself, Mr. Warmack and the Trial Examiner and one of them went in the record in Washington. That being the case, and assuming that everybody here had copies, I didn't bring the original exhibit over here with me because it would make that much more to get in my brief case.

4864 Mr. Hanley: Do I understand that you do not have the Commission's exhibits here, Mr. Austin?

Mr. Austin: I have got them all here except these two. Well, wait a minute. Yes, excepting 99, 100 and 101 because I knew that you all had identical copies that were made by you and I didn't bother to bring them here. I had enough bulk.

Trial Examiner Ballinger: Mr. Austin, you have a copy of the original exhibit furnished you by counsel for Respondent at the time it was offered, have you not?

Mr. Austin: Yes, both of the present exhibit and former exhibit.

Trial Examiner Ballinger: Well, that may serve the purposes of any examination at this time, subject, however, to check.

By Mr. Austin:

Q. Now, Mr. Boatwright—

Mr. Austin. Pardon me. Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I would like to mark this paper for identification.

Trial Examiner Ballinger: The Reporter will mark the document "Commission's Exhibit 101" for identification.

4865 (The document referred to was marked "Commission's Exhibit 101" for identification.)

By Mr. Austin:

Q. Mr. Boatwright, is this Commission's Exhibit 101, for identification a copy as prepared in your office of the former Respondent's Exhibit 101?

Mr. Hanley: That is objected to because the term "Former Exhibit 101" is not properly identified.

By Mr. Austin:

Q. Does it appear to you to be a copy of the comparative statement of expense.

Trial Examiner Ballinger: The objection will be overruled.

Witness: Do I answer?

Trial Examiner Ballinger: You may answer.

A. It does appear to be.

Q. Now, I won't pretend to go through all of these figures, Mr. Boatwright, but, in the first place, I call attention to the answer given by you on January 6th, in which you said that—

Mr. Abbott: What page?

Mr. Austin: Page 4770.

Q. (continuing) where you said that these errors were trivial and that they did not amount to any substantial amount. And I ask you to read the total expense 4866 first on Commission's Exhibit 101, for identification, and second, on Respondent's Exhibit 101, the total expense under the column "Direct Shipment—other customers."

Mr. Hanley: That is objected to for the reason that what counsel refers to as Respondent's Former Exhibit 101 has been withdrawn from the testimony and is no longer in the record, no longer a part of the evidence, was conceded to be erroneous in the matter of calculation, and that it is now improper to examine by way of impeachment in connection with an exhibit which the Court has permitted to be withdrawn on the conceded theory that the same was erroneous in its conclusions.

Trial Examiner Ballinger: The objection is overruled.

Mr. Austin: I would like to say now, if I may, that we are passed the point of it being error. I am simply showing that in certain instances the amount of the errors which existed because it was stated previously that the errors were trivial and were substantial in extent so—

Mr. Hanley: If your Honor please, may I inquire what it all amounts to?

Trial Examiner Ballinger: Did I understand that to mean that they were trivial as to the difference in each item or trivial as to the aggregate?

Mr. Austin: Well, now, the question before the witness is as to an aggregate figure.

4867 Trial Examiner Ballinger: The Examiner has ruled that the witness may answer.

Witness: The amount as shown under "Direct Shipment—other customers" on Respondent's Exhibit 101 aggregates $60,476.29. On Commission's Exhibit 101, for identification, under the column "Direct Shipments—other customers" that totals $62,967.92.

Trial Examiner Ballinger: How many items enter into that, Mr. Boatwright?

Witness: Where?

Trial Examiner Ballinger: Into that total?

Witness: I would have to count them. I don't know.

Trial Examiner Ballinger: You may.

Witness: Is your question directed only to the grand total number of expense classifications?

Trial Examiner Ballinger: No. How many items enter into that total, make up that total.

(Witness counts as requested.)

Witness: I count sixty items of expense classifications.

Trial Examiner Ballinger: The Examiner understands counsel for the Commission to state that there are variations in thirty of those items, is that correct, Mr. Austin?

Mr. Austin: No. On that we were only talking about one column just now, your Honor. In three columns, that is, all the "Direct Shipments" columns, I said there
4868 were 187 items, of which there were 56 were changed.

Mr. Hanley: If your Honor please, the Respondent objects to the counsel for the Commission testifying that there are differences in 30 of the items between what is called former exhibit 101 and present exhibit 101 and, particularly because former exhibit 101 has been withdrawn from the record.

Trial Examiner Ballinger: Objection is sustained as to any testimony if it can't be agreed upon between counsel.

Mr. Hanley: It certainly hasn't been agreed upon, and I won't agree to anything about that exhibit.

Mr. Austin: Commission's Exhibit 101 is only for identification at the present time, your Honor.

Trial Examiner Ballinger: Now, off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Mr. Boatwright, on Commission's Exhibit 101, for identification, what is the unit cost or expense per gallon assigned to "Direct Shipments—other customers"?

Mr. Hanley: May it be understood, your Honor, that counsel is now talking about Exhibit 101 in evidence?

Mr. Austin: No, Commission's Exhibit 101, for identification, is what I said.

Mr. Hanley: Well, does that mean what you have
4869 referred to as the former?

Mr. Austin: Yes.

Mr. Hanley: Then that question is objected to as immaterial, incompetent, and irrelevant, because what counsel calls former exhibit 101 has been withdrawn from the testimony and is no longer a part of the record, concededly erroneous and counsel is not entitled to examine concerning it.

Trial Examiner Ballinger: The objection is overruled and exception allowed counsel for Respondent, and it will be understood that the same objection is made to any similar questions and the same ruling and an exception.

Mr. Hanley: Well, if I am not to be permitted to make objections to these questions that are asked, Judge, I would like to amplify my objection and have it stand, if I may be permitted.

Trial Examiner Ballinger: You may, if you desire, interpose an objection to each one.

Mr. Hanley: All right.

In addition to the objection already made, the Respondent objects to any examination concerning what counsel now refers to as exhibit 101 or former exhibit 101, not a part of the record, for the reason that such exhibit while compared was voluntarily withdrawn by Respondents by permission of the Court and without an objection by
4870 the prosecution, and that the same was conceded to
be erroneous in certain mechanical particulars; that Respondent's witnesses have testified that there is no difference in the method of allocation used in the preparation of either of the two exhibits namely, the so-called former exhibit 101 withdrawn from evidence by permission of the Court and the existing exhibit in evidence numbered 101; that examination on the part of the Commission of this witness or any witness as to differences between said two exhibits is immaterial, irrelevant and incompetent, encumbers the record, wastes the time of the Court and is a harassment to both the Government and the Respondent in that it has been conceded by the Respondent that there were certain errors in calculation appearing in what is

known as former exhibit 101, and the examination of counsel for the Commission is now simply a capricious attempt to take the Respondent to task for errors that may have been made by comptometer girls or bookkeepers in computing the results as they appear on the exhibit which has been withdrawn and which has been conceded to be erroneous in its conclusions.

Trial Examiner Ballinger: Off the record.

(There was a discussion had off the record.)

Trial Examiner Ballinger: The objection is overruled.

Mr. Austin: There is a question pending.

Reporter (Reading) "Mr. Boatwright, on Commission's Exhibit 101, for identification, what is the unit
4871 cost or expense per gallon assigned to 'Direct Shipment—other customers?' "

A. The unit cost for "Direct Shipment—other customers" was 20/100 of a cent.

Q. And what is the cost for that class of business shown on Respondent's Exhibit 101?

Mr. Hanley: That is objected to because the exhibit is the best evidence.

Trial Examiner Ballinger: The objection is overruled.

Mr. Hanley: Well, your Honor, they are in evidence. Must we go through the whole thing?

Trial Examiner Ballinger: Merely to save time of going and looking up exhibits, the witness may answer.

A. On Respondent's Exhibit 101, the comparable figure is 19/100 of a cent per gallon.

By Mr. Austin:

Q. Then, Mr. Boatwright, referring to your previous testimony: "They neither changed in differential nor do they change the unit cost in a given channel"—is it now your opinion that that statement is correct or do you wish to change it?

A. I am afraid when that question was asked that I was thinking of the matter of litigation or the matter of this complaint. Throughout my thinking, as I have been on the stand, all questions and all defense calculations
4872 have been predicated on the tank wagon reseller channel gasoline cost on the one hand, a jobber gasoline cost on the other hand.

May I ask, did either of those figures change?

Q. I concede they did not between the two forms.

A. That was the basis of my answer.

Mr. Hanley: From the concession of counsel it is moved by the Respondent that all this line of examination be stricken.

Trial Examiner Ballinger: The motion is denied.

By Mr. Austin:

Q. One more question, Mr. Boatwright, as to a particular cost. Will you state the expense charged under account 250 "General Office Expense, Accounting Department to Jobbers, Naphtha, and Gasoline" on Commission's Exhibit 101, for identification, and the same figure, or, rather, the corresponding figure on Respondent's Exhibit 101?

Mr. Hanley: That is objected to because the exhibit is not identified.

Trial Examiner Ballinger: One moment Judge. Read the question.

(The question was read.)

Mr. Hanley: That is objected to because the exhibit is not identified, and if the answer is in the exhibit, the exhibit is the best evidence.

Trial Examiner Ballinger: The objection is over-
4873 ruled.

A. I think you stated 205.

Mr. Austin: 250.

Witness: Did you mean 250?

Mr. Hanley: May we know, if your Honor please, what counsel is talking about?

Mr. Austin: What did I say?

(The record was read.)

Mr. Hanley: May I understand if Commission's Exhibit, for identification, now 101, is what you have heretofore called former exhibit 101?

Mr. Austin: That's right. By strange coincidence the number is the same.

Witness: Now on the Commission's Exhibit 101, marked for identification, "Direct Shipments—other customers, naphtha and gasoline, jobbers" shows an entry of $1,266.25.

Q. All right.

A. The corresponding figure on Respondent's Exhibit 101 "Direct Shipment—other customers, jobbers, naphtha and gasoline," is $364.71.

Q. That indicates, does it not, Mr. Boatwright that—

or rather, that shows that approximately $900 was deducted from that account in the jobbers, naphtha and gasoline column between November 17th and January 6th?

A. Let us say that it was not deducted but that there was an error in the calculations which when cor-
4874 rected reflects that magnitude.

Q. Now, will you look at these two sheets again, again referring to Commission's Exhibit 101, for identification, and Respondent's Exhibit 101, and tell me whether it is not true that the figure for that same account, that is, account number 250 in the tank wagon reseller channel is approximately $800 larger in Respondent's Exhibit 101 than it is in the former exhibit, which is now Commission's Exhibit 101, for identification?

A. The statement of the counsel—

Mr. Hanley: Just a moment. Respondent adds to the general objection that that calls for an arithmetical calculation by the witness is apparent on the face of the exhibits.

Mr. Austin: It is only apparent after the witness looked at them, which he has now done.

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

A. The statement of the counsel for the Commission is correct. It is an approximate item of $800 difference in the tank wagon reseller channel.

By Mr. Austin:

Q. Mr. Boatwright, in allocating that account number 250 between channels, was the same method of allocation used in the former exhibit which is now Commission's
4875 Exhibit 101, for identification, and the present exhibit, Respondent's Exhibit 101?

A. To the best of my memory, yes, sir.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Well, put this on the record.

Mr. Austin: I was going to say it seems to me we are getting into more properly redirect, but I don't object if they want to put it in now.

Trial Examiner Ballinger: That will come in on redirect.

Mr. Austin: It makes no difference to me.

Mr. Hanley: Well, it is going in here on cross-examination. We better have it on the record, Judge. I would like to have this on the record because there is going to be something predicated on this cross-examination.

Trial Examiner Ballinger: If there is no objection, the witness may make an explanation.

Mr. Hanley: May he make it on the record, your Honor?

Trial Examiner Ballinger: Certainly.

Mr. Hanley: Thank you.

Witness: Well, the counsel for the Commission called to my attention the number of individual entries changed between the Commission's Exhibit 101 and Respondent's Exhibit 101. I would like to call attention to the Court
that the very fact that there are a large number of
4876 individual expense items changed is an indication
of thoroughness in tracing through each individual
error through all of these ramifications, because these expense items influence one another.

To illustrate this condition, assume that an error has been made in the application of a percentage on a painter doing decorating work. Not only would it change the three entries under the three respective channels in Account 075, Advertising, it would change the allocation in— and the entries in the accounts having to do with Federal Insurance, three more; in the accounts having to do with Social Insurance, three more; tracing that change through to the influence upon supervision, would change each of those by penny amounts; and tracing it to the supervisor of the painters, it would change that group. Therefore, it is in the tracing through of the number of accounts influenced that results in the accounts which you got of the large number of changes. Actually there were but few basic changes. The ramifications of that resulted in the amount that you derived.

Mr. Hanley. And may I ask you Mr. Boatwright, what, if any, was the change in the differential?

Witness: There was no change in the differential. I think the counsel for the Commission agreed or admitted that there was no change in those columns.

Mr. Austin: You mean as between the jobber gasoline and the tank wagon reseller?

4877 A. That's correct. That is my understanding as being the subject of this complaint.

By Mr. Austin:

Q. But, of course, that might well be, might it not, that one change would offset another change and there might be a number of errors and yet your differential might remain the same because some errors might be one way and some the other?

Mr. Hanley: That is objected to as argumentative and speculative.

Trial Examiner Ballinger: The objection is overruled. The witness may answer, if he can.

A. Well, naturally, no impartial group of operators are going to make errors on just one side. Of course, if there are errors they are offsetting errors, and that is why in the magnitude of the sum total of the change it didn't change the differential. There were errors, human errors.

By Mr. Austin:

Q. Mr. Boatwright, you have said at page 4622 of the record and at page 4530 and at 4531, and perhaps at other places that—

Mr. Hanley: Well, that is objected to as too indefinite. If you want to specify, please specify.

Mr. Austin: I think he said it other times, but I am giving you those two specific references.

4878 Trial Examiner Ballinger: The Examiner requests counsel to withhold any objections until the question has been completed.

Mr. Hanley: I will be glad to do that, Judge.

By Mr. Austin:

Q. You said, Mr. Boatwright, that the cost of selling the Standard Oil Company's products to direct shipment customers was infinitesimal and that you couldn't find it and could not isolate it. Do you recall giving that testimony?

A. I do.

Q. You have now found those costs in this cost study, have you not?

Mr. Hanley: That is objected to as calling for a conclusion and opinion of the witness. The cost study has been submitted. It has been submitted on the basis of a study which does not even pretend to reflect the facts that that much cost is involved in selling jobber customers.

Trial Examiner Ballinger: The objection is overruled.

By Mr. Austin:

Q. And this cost study represented by Respondent's Exhibit 101 does purport to isolate the direct shipment expense, does it not?

A. When you speak of direct shipment expense, will you clarify as distinguished between jobbers and other customers, or, are you speaking from the general—

4879 Q. General—

A. —general classification?

Q. I am speaking of all three columns, yes.

A. It does isolate the direct shipment expense, which causes me to raise the question as to whether the previous answer in its context referred only to "direct shipment—other customers". I am not certain as to the answer in that respect. It seems to me that it applied to the direct shipment—other customers, as I have admitted on the stand throughout a selling cost to jobbers.

Could you tell me from the context as to whether we were talking at that time of jobbers only or were we talking of direct shipment customers?

Trial Examiner Ballinger: Would you like to see the transcript?

Witness: I would like to have that phase of the question clarified for me because throughout the entire period that I have been on the stand, I have admitted to a selling cost to jobbers. I have stated that it was practically an impossibility to determine the selling cost, other direct shipment customers in particular with reference to gasoline which we have so frequently raised the question about.

(There was a discussion off the record.)

4880 Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Now, that is just the question that I am raising now, Mr. Boatwright, and in response to your statement I would now like to call your attention to testimony given at page 4622 of the record, the following question and answer:

"Q. Did you not state that no computation had been made of the costs of distribution of petroleum products to jobbers or other direct shipment customers in the Detroit area because those costs were infinitesimal or because you could not find them"?

"A. I did."

A. Is there a question pending that I should answer?

Q. There is not. Mr. Boatwright, you have just attempted to distinguish between the feasibility, if I may put it that way, of computing market costs per gallon for jobber gasoline business for direct shipment other customers' business. Is it not true, Mr. Boatwright, that on Respondent's Exhibit 101 the cost of marketing petroleum products to direct shipment other customers is shown to be .19 of a cent per gallon whereas the marketing cost for naphtha and gasoline to jobbers is shown to be only .16 of a cent?

Mr. Hanley: That is objected to. The exhibit is the best evidence. The question merely asks the witness to read from the exhibit.

4881 Trial Examiner Ballinger: Overruled.

A. The unit costs as read by the counsel for the Commission are a correct statement.

Q. And with regard to the total marketing costs of direct shipment business all three channels, as segregated by the Respondent on its Exhibit 101 and which have heretofore been referred to as infinitesimal, will you state the total amount of the expense now allocated to direct shipment business?

Mr. Hanley: That's objected to as already appearing in the exhibit.

May I say to your Honor that we will be here for weeks if everything has to be testified to that appears on exhibits?

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Mr. Hanley: That is further objected to as argumentative.

Trial Examiner Ballinger: The objection is overruled.

A. The total amount of marketing costs allocated to the three direct shipment channels read as follows: Jobber naphtha and gasoline, $24,389.05; jobber other products, $1,658.65; other direct shipment customers, $60,476.29.

Mr. Hanley: I move to strike the answer as a repetition of an exhibit already in evidence and as an encumbrance on the record.

4882 Trial Examiner Ballinger: Motion is denied.

By Mr. Austin:

Q. And that's a total of about $86,000, is it not, Mr. Boatwright?

Mr. Hanley: That's objected to as already in evidence.

Mr. Austin: It isn't in evidence.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Trial Examiner Ballinger: Was there an objection to that?

Mr. Hanley: Yes, there was, your Honor.

Trial Examiner Ballinger: The objection is overruled.

A. The total is slightly in excess of $86,000.

By Mr. Austin:

Q. Now again turning to the record at page 4512 and 4513, reading from the record:

"Q. (By Mr. Hanley.) Will you explain, please, if you know, Mr. Boatwright, why there isn't assigned to the so-called direct shipments a separate channel on form 189?

"A. Yes. Direct shipments originate with the sales contract, as a rule, with some major buyer. Most of these sales contracts are made by the general office on a bid basis. A price is submitted and we either get the 4883 business or we don't get the business. That applies to the greatest proportion of our direct shipments. To figure a marketing cost on a direct shipment of several train loads of gasoline per year to a given customer where all you do is submit a bid in a sealed envelope would be an impossibility within a realm in which you could carry your decimal points and costs. The cost is so small that it has not appeared advisable or desirable to attempt to isolate the costs of that particular channel."

Now in that testimony, Mr. Boatwright, in referring to bids were you referring to direct shipment consumer business?

A. I must have been because I know of no bid that has been made on these four jobbers for a year.

Q. Yes. I assumed you were referring in that testimony to direct consumer shipment business.

A. And I must have been referring to gasoline, also, although you read one question and one answer. I notice that in the answer I made reference to gasoline business. Is that not correct?

Q. Yes.

A. That's right.

Q. Do I gather from that, Mr. Boatwright, that there is a substantial amount of business with direct shipment customers other than gasoline?

4884 A. Well, we sell them motor oils and industrial lubricants and that take a large part of your industrial salesmen and your lubricating salesmen's time. These products are problem products; where an individual will have a particular unit requiring a product with definite specifications to offset, maybe, ice formation, maybe salt, maybe corrosion or one thing ~~and~~ another. One industrial engineer will go out and work with that buyer and they will devise or prepare a formula for an oil which meets that specific need and, as such, that costs money. That's time. But when the actual sale is made, after drawing up the formula, it may be with some large industrial organization; it may be a direct shipment of the carload of the material, but time has been incurred in devising the formula.

Q. It isn't true, is it, Mr. Boatwright, that direct shipment business, even as to gasoline, is obtained merely by submitting a bid in a sealed envelope?

A. No, it isn't—

Mr. Hanley: May I have the question?

(The question referred to was read by the Reporter.)

Mr. Austin: He said, "No, it isn't."

The Witness: I think that is an incomplete answer and I should complete the answer.

Trial Examiner Ballinger: Complete the answer.

A. It isn't entirely true that we get a calculation
4885 merely by submitting a bid. There is, of course, a certain amount of leg work. It is my judgment, based on my acquaintance with the volume that moves in this area, that a major portion of the gasoline is secured on that basis.

Q. In what column do the marketing expenses ~~now~~ charged to that business appear on Respondent's Exhibit 101?

A. They appear in the column "Direct Shipments Customers, Other Customers."

Q. And is it ~~true, Mr. Boat~~wright, again referring to Respondent's Exhibit 101, in that direct shipment other customer channel, is it not true that more than $13,000 in salesmen's salaries alone are now charged to that class of business?

A. That is a true statement, the exact figures being $13,312.69.

Q. And is it not also true that a total expense of more than $60,000 is charged to that channel?

Mr. Hanley: Just a moment. That is objected to as a continuation of a line of questioning that simply asks for a repetition of that which already appears in an exhibit admitted in evidence.

Trial Examiner Ballinger: The objection is overruled.

A. It is a true statement that slightly in excess of $60,000 is now chargeable to that channel.

4886 Q. Do you know what proportion of the gallonage charged to that channel is gasoline?

A. I do not recall from memory.

Q. You said here on page 4512, "A price is submitted and we either get the business or we don't get the business. That applies to the greatest proportion of our direct shipments."

A. I still think that is entirely true.

Q. And the business to which you were there referring is business which is included in this direct shipment other customer channel, is it not?

A. Yes, sir, but also included in that direct shipment other customer's channel is asphalt, candles, motor oil, industrial oil, greases, requiring a tremendous amount of time, effort and cost on the part of our lubricating salesmen and lubricating engineers, this channel never having been a subject of controversy in the complaint during my entire period on the stand, I did not attempt to segregate according to individual products; that is, total direct shipments, all products; direct shipment, customers.

Q. Yes, I understand that, Mr. Boatwright.

A. I just wanted that to be clear.

Q. I did not understand and do not now understand—and you may correct me, if I am wrong—that in so far as getting business on sealed bid, that that applied only

4887 to gasoline. Is it or is it not true that the business in those other products is also obtained upon bids and with the same customers to whom the gasoline is sold?

A. Sometimes it is. However, your large industrial buyers usually buy on specifications. The product on which they state the specifications are quite likely to be the products in which there is a standard of uniformity that can be used for those products. The purchase of an industrial lubricant is quite frequently a formula purchase in which the representative of the industry and the representative of the Standard Oil Company will concur on the specific formula needed for a specific purpose. After a concurrence is reached, then we place our price quotation on that particular formula but it is in the working out of the formula that the time is involved ~~and it is~~ in working out with the ~~industrial~~ representative the needs of the particular unit and being sure that we can satisfy them, that takes the time.

There is, of course, some bidding by envelope on industrial oils, motor oils, but relative to gasoline, we are talking of a minor portion.

Mr. Austin: Your Honor, I move we adjourn at this time for five minutes.

Trial Examiner Ballinger: We will have a recess for five minutes.

(A short recess was taken.)

4888 Trial Examiner Ballinger: We will come to order.

Mr. Austin: If your Honor will turn to Respondent's Exhibit 99, page 1, I am going to refer to that.

By Mr. Austin:

Q. That page is headed "Schedule No. 1. Salesmen and sales promotion expense."

The first sentence of the text reads as follows: "A memorandum is maintained by each salesman showing the amount of time spent in selling products applicable to each channel of distribution during the last month of each quarter."

Have you a copy of any of those forms, Mr. Boatwright, with you?

A. They are not forms.

Q. Well, they are described here as memoranda. Would it be possible for you to produce those salesmen's memoranda for any quarter of 1940?

A. I don't think that it would be, because they wouldn't be retained.

Q. What is the practice in making them out and what is done with them?

A. Well, as a rule what is done is that the salesman will make his observations and he will call his distribution of time to the sales promoter, which will formulate in a discussion on the distribution of time between the sales-
4889 man and the sales promoter which, in turn, becomes
a basis of segregation on the part of the accounting department; little notes and notations and efforts, and so forth.

Q. This says: "A memorandum is maintained by each salesman showing the amount of time spent in selling products applicable to each channel of distribution during the last month of each quarter." If such memoranda are maintained I would like to know whether they can be produced?

A. And I don't know that they can be produced.

Q. Well, do you have those memoranda, or does the company have them, for December, 1941?

A. I don't know. I doubt it.

Q. What happens to them?

A. Well, they are just notations or memoranda that the salesmen make and may keep for purposes of discussion with the sales promoter in allocating the time or effort of a group of salesmen. I don't know what happens to them; whether the sales promoter keeps them or whether the sales promoter calls for them or—I know there is no official form.

Q. There is no official form?

A. No, sir.

Q. Does each salesman make such a memoranda and turn it in?

A. I am not sure each salesman does. Instructions
4890 state the salesman should make the estimates of time.
I am not sure that they do, in each case.

Q. Well, according to this first schedule under Exhibit 99, those memoranda are the basis for the method of allocation described, is that not so?

A. The memorandum and the discussion with the sales promoter results in the allocation ratios to be used in spreading the salesmen's salaries and expenses.

Q. This second sentence, here, refers to those memoranda as time records. It says, "This time record is reviewed and approved by the Sales Manager, Assistant Field Manager or Field Manager."

A. The time record—

Mr. Hanley: Just a moment until he finishes the question.

By Mr. Austin:

Q. The question is if it is a time record why can it not be produced?

A. The time record that I was referring to at that moment is the time record that is made up following discussion and consultation with the sales manager which becomes the basis of allocation of these costs to our various sales channels. I think, in fact, you have copies of most of these time estimates as so prepared.

Q. You are now referring to the quarterly distribu-
4891 tion of time report; are you not?

A. That is correct.

Trial Examiner Ballinger: Mr. Boatwright, you probably stated it but I would like to have you repeat it, if necessary: State exactly what steps are taken to finally formulate this record. Commence at the inception and trace it through.

The Witness: Well, I don't have the letter of instructions on it. I shall give it to you as best I can from memory in the sequence of events.

The instructions provide that the allocation of effort among channels should be prepared by a salesman; the salesman and the sales manager, previously referred to as sales promotor. Then, at the end of the last month of each quarter, in discussion, determine the ratio—

Trial Examiner Ballinger: Discussion between who?

The Witness: Sales promoter and salesman; determine the ratios to be used in the allocation of the salesmen's salaries and expenses.

Trial Examiner Ballinger: Is that carried through to the books?

The Witness: It is.

Trial Examiner Ballinger: To a record; each month?

4892 The Witness: No, that is the last month of each quarter.

Then these ratios go to the accounting department.

The accounting department is then—I am sorry, I skipped a step there. From the sales promoter they go to the manager or assistant manager.

Trial Examiner Ballinger: Of the district?

The Witness: Of the district, who reviews and approves. They then go to the accounting department whose—

Trial Examiner Ballinger: Where is the accounting department; in Chicago?

The Witness: In Detroit.

Trial Examiner Ballinger: In Detroit.

The Witness: Yes; which has the privilege and frequently do review these estimates with various people involved, being either the sales promoter or salesman of the individual classifications of salesmen.

These figures are then used in the allocation of selling costs among the various channels. They are reported to

Chicago and a record is maintained in Chicago dating back for a period of five years on each of the different fields by class of employees.

When a change of marked significance takes place, Chicago asks of the field a letter of explanation as to why the change. The field provides Chicago with the basis
4893 justifying the change of the ratios among the different channels.

That, I think, is the complete sequence.

By Mr. Austin:

Q. Is it your testimony now, Mr. Boatwright, that a memorandum is not maintained by each salesman for the last month of each quarter showing the time spent in selling the various products?

A. It is my testimony that some individual salesman may not. Many of them do.

4894 Q. But do I understand that you are not able to produce any of those memoranda here referred to even for the last quarter of 1941?

A. Oh, a person could produce memoranda on some salesmen but not all of them. You could take your automotive engineers; you could take your lubricating—your industrial salesmen; you could take your lubricating salesmen. Some of those memoranda are in existence, sir.

Q. When you said that this time record is reviewed and approved by the sales manager, assistant field manager or field manager, were you referring to the salesmen's memoranda?

A. No, I am referring to the composite memoranda which is prepared by the sales promoter by groups of salesmen.

Q. That isn't referred to here on the first page of exhibit 4, is it?

Mr. Hanley: Excuse me, will you read that?

(The question was read.)

Mr. Hanley: Have you finished, Mr. Austin?

Mr. Austin: Yes.

Mr. Hanley: That is objected to as not being a question and just an argumentative statement of counsel.

Mr. Austin: It is not argumentative. I am referring to the quarterly—

Trial Examiner Ballinger: The objection is overruled.

Mr. Hanley: Just a moment. I submit your
4895 Honor, there isn't anything that the witness can answer.

Trial Examiner Ballinger: Read the question.

(The question was read.)

A. I don't know whether it is or isn't without reading the page, but even if it is not referred to inasmuch as you had copies which we had furnished, I probably have erred in not including direct reference to copies which you already have, but that is—I just thought it would be understood.

By Mr. Austin:

Q. Well, this memorandum I assumed was put in for not only for the benefit of counsel but for the Examiner and for the Commission, and I see no reference in—on pages 1 and 2 to the quarterly distribution of time reports which you now say is the basis for allocation of salesmen's salaries.

Mr. Hanley: That is objected to as a statement of counsel and not a question, and there is nothing for the witness to answer.

Trial Examiner Ballinger: Read that.

Mr. Austin: I wanted to find out, your Honor, whether or not this statement here is or is not correct. The very first line says "a memorandum is maintained by each salesman." Now we are told that that isn't so. And in the next sentence says: "This time record is reviewed by so and so," which on its face refers to the
4896 memorandum, but now we are told that it is not the salesman's memoranda at all, but a quarterly distribution of time report which is referred to, and no mention is made here of a quarterly distribution of time reports.

Trial Examiner Ballinger: Do you understand the question?

Mr. Hanley: If your Honor please, the statement of counsel is objected to because there is no question. I ask for the record.

Trial Examiner Ballinger: Read the question.

(The record was read.)

By Mr. Austin:

Q. Then let me ask you this, Mr. Boatwright: What is it that is used for allocating field expenses to the various sales channels on your comparative statement of expense from 189, and before you answer that, I am referring to the third sentence on page 1 of this exhibit which you have before you, Exhibit 99: "Upon approval, it is used in allocating field expenses to the various sales channels on our comparative statement of expense from 189 for the succeeding three months."

Now, as I read this, the pronoun "it" in the sentence just quoted refers back to the salesmen's memorandum. If that is not so, I wish you would explain what is used for that purpose.

4897 Q. The quarterly statement of allocation of time is used for allocating the expenses of salesmen among channels and was intended as the report referred to while this was being written.

Q. Will you state again, although I believe you did state to the Examiner as part of a longer statement that you made, how that quarterly distribution of time report is prepared, and who prepared it, what is used as a basis for the time allocations contained therein?

A. Do you want me to repeat that entire series that was just—

Q. No. I am just referring to the preparation of the quarterly distribution and time report; not what is done with it but the preparation of it.

A. The actual preparation is, I think, in all cases made between the members of the sales promotion department and the salesmen. That is the first step in the process.

Q. Does the sales promotion manager call in each salesman, or what does he do?

A. Oh, he need not call in all salesmen. He may call in a few. He may discuss it with one, two, three—I don't know the numbers—but he is in direct charge of their work and their efforts, and is supposed and is being paid to know what they do and is in consultation with them at all times.

Mr. Austin: Perhaps before going further it 4898 should appear on the record that the quarterly distribution of time reports which we have been referring to are those reports which are introduced—four of which have been introduced in evidence as Commission's Exhibit 83 and Commission's Exhibits 88 to 90.

Trial Examiner Ballinger: Is that correct?

Mr. Austin: I will show them to you if you want to check them.

Witness: I don't know the numbers, your Honor.

Trial Examiner Ballinger: Let the witness examine them.

Witness: The quarterly reports were supplied. However—(witness examines a paper indicated by Mr. Austin). That is correct.

Mr. Hanley: If your Honor please, it seems to me appropriate to suggest at this time that the accountants for the Commission have been for many weeks investigating the records of the Respondent and checking the exhibits offered by the Respondent, being Exhibits 99 to 101, both inclusive, and have had access to the work sheets, and while I do not question at all the propriety of this line of cross examination, if it be directed to any discrepancies, I do suggest that it is a waste of time unless the accountants for the Commission have developed something that is out of line with the conclusions that have been reached in the exhibits.

Trial Examiner Ballinger: The Examiner assumes 4899 that this line of cross examination is the result of the investigations made by the Commission accountants.

Mr. Hanley: Judge, I really don't know what it is about. I don't question the propriety of the examination if there is something that counsel thinks is wrong about the mode of procedure, but if he is just now following up in testimony what has been done by the Respondent, and doesn't find any fault with the conclusions—you may find fault in ultimate argument with the method of allocations; I am not arguing about that—but if he is just following the method of procedure, then I think it just encumbers the record because it has all been explained in detail in the exhibits and it is just repetitious to go through it again.

Trial Examiner Ballinger: The Examiner has no idea of the ultimate objective of this line of cross examination. Counsel may proceed.

Mr. Austin: I would like to say in response to the statement that has just been made that one reason for these particular questions about this alleged salesmen's memorandum prepared quarterly is that the Commission's accountants, who as Judge Hanley says, has had access to Respondent's books and records, and who says that very fine cooperation has been given him, nevertheless was unable to see or be shown any such memorandum as is referred to in the first sentence of this first page. If 4900 we had been able to see it, we wouldn't have to ask about it.

By Mr. Austin:

Q. Mr. Boatwright, the quarterly distribution of time reports which you just referred to for salesmen's salaries, as you have just described its preparation—that represents the estimate of the sales promoter and the sales manager of the allocation of the salesmen's hours during the quarter, does it not?

A. When you speak of hours, I am not sure what you mean by hours—if you will change it to a ratio thought, it is correct.

Q. Well, yes, distribution of time, but it is an estimate of time, is it not?

A. Yes, it is an estimate that is prepared in the manner that I have indicated.

Q. And it is not based upon any actual showing or record of the time spent by each individual salesman on each channel during the month?

A. It is not. The exception to that being in your case of industrial engineers where they keep an actual time record. That is mentioned in the exhibit where actual columns appear by time.

Q. You do have in your accounting department in the Detroit field, and I assume in other fields, a form entitled "Distribution of Time by Method of Delivery"?

4901 A. That is correct.

Q. And is that form filled out and carried out by each employee in the accounting department for the last month of each quarter?

A. I think it is carried—it is filled out by each member of the accounting department that is not in a supervisory capacity. I think that the stop-off in the upper level is at that range. I am not sure about that, however.

Q. Simply using that for an example, is that same form or any similar form filled out by each salesman during the last month of each quarter?

A. No form is filled out by the salesman.

Mr. Austin: I believe that the Respondent was good enough to obtain copies today of the quarterly distribution of time reports for salesmen's salaries for December, 1939, and March, 1940, Detroit field; and if so, I would be glad to have those produced at this time.

Mr. Hanley: Well, just a moment. Are those records of the Detroit office?

Mr. Austin: Yes.

Mr. Hanley: Well, until I can look at them, Mr. Austin, we don't care to produce anything.

Mr. Austin: Do you mind letting me have them now?

Mr. Hanley: No. I am sorry.

Mr. Austin: Can you look at them now?

4902 Mr. Hanley: I can't look at them now.

Trial Examiner Ballinger: If we take a ten minute recess?

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: We will take a recess of ten minutes.

Mr. Austin: I would like to say on the record that these are, as I understand it, the same reports, four of which are now in evidence but only two of those in evidence are for the year 1940, and I want to get the other two that were used for allocation of salesmen's salaries in 1940.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: We will take a five minute recess.

(A short recess was had.)

Trial Examiner Ballinger: Come to order. Proceed.

Mr. Austin: Judge Hanley, have you had a chance to check those distribution of time reports for December, 1939, and March, 1940, which I asked for?

Mr. Hanley: If your Honor please, the Respondent is now prepared to comply with the request of counsel for the Commission to supply to him copies of distribution of time for salesmen for December, 1939, and March, 1940,

4903 and in so doing I wish to state for the record that these are simply copies made by stenographers from the original records of the company and we do not vouch for their accuracy but we think they are accurate.

Mr. Austin: Thank you.

Well, counsel has just handed me the quarterly distribution of time reports for salesmen for December, 1939, and March, 1940, which was what I asked for. He has also handed me the quarterly distribution of time reports for the accounting department, Detroit field, for December, 1939 and March, 1940. I didn't ask for those accounting reports at this time but I did—

Mr. Hanley: I am sorry. I will take them back, if you don't want them.

Mr. Austin: I will return them because I expect later to ask for those two and also the two for June and September, 1940. In other words, I hope to be able to get all four of those. I only asked for two in connection with the salesmen's time because the other two for 1940 are already in the record.

Mr. Hanley: Forgive me for giving you too much.

Mr. Austin: I would rather get the four altogether, Judge, if I may have them at all.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

4904 Mr. Austin: I would like to have these two papers marked for identification.

Trial Examiner Ballinger: The reporter may mark these two documents as Commission's Exhibits 102 and 103, for identification.

(The documents referred to were marked "Commission's Exhibits 102 and 103.")

By Mr. Austin:

Q. I show you these two documents just marked for identification, Mr. Boatwright, and ask if you will state what they are?

Trial Examiner Ballinger: Indicate the exhibits you are referring to.

A. Commission's Exhibits 102 and 103, marked for identification, are the distribution of time reports of salesmen by method and by class of product for the months of December, 1939, March, of 1940, for the Detroit field.

Q. Were the originals of these two reports and the percentages shown thereon or some of the percentages shown thereon used for the allocation of salesmen's salaries to channels on company form 189 for the Detroit field for 1940 as shown in Respondent's Exhibits 99 and 101?

A. The originals from which those two exhibits have been copied constitute the basis of allocation of salesmen's salaries among channels on the original form 189

4905 for the three months period immediately following the months indicated on these respective exhibits. That allocation ratio changes by quarters for each quarter.

Q. And do these two exhibits, for identification, 102 and

103, plus Commission's Exhibits 88 and 89 constitute the four quarterly distribution of time reports which were used for the allocation of salesmen's salaries in the Detroit field for the four quarters of 1940?

A. I am not sure that your reference to the exhibit numbers are correct. If they are correct, that is the true statement.

Q. I would rather have you see them (indicating).

A. Reference to the exhibit numbers was correct. And the statement is correct.

Mr. Austin: I offer these two time reports, Commission's Exhibits 102 and 103, for identification, in evidence.

Mr. Hanley: No objection, subject to correction if the typewriting girls made any errors.

Trial Examiner Ballinger: Commission's Exhibits 102 and 103, for identification, are admitted in evidence, subject to check.

(The documents referred to, heretofore marked for identification "COMMISSION'S EXHIBITS 102 and 103" were received in evidence.)

By Mr. Austin:

Q. Mr. Boatwright, showing you Commission's
4906 Exhibit 102, I note that the next-to-the-last line is
entitled "percentage" and the last line is entitled
"distribution of percentage."

Will you explain the use of the figures in those two lines in allocating salesmen's salaries in the regular accounting procedure of the company?

A. The next-to-the-last line which is indicated as "percentage" is the percentage of time of the salesman devoted to tank wagon reseller, tank wagon consumer, other methods, and automobile supplies, and is used for the allocation of the salaries of individuals in the salesmen's classification to the respective trade channels. The distribution of percentage is a restatement of the first three of those ratios, namely, the tank wagon reseller, the tank wagon consumer, and the other methods, so as to add to one hundred percent, which excludes that portion originally allocated to automobile supplies of 4.8 percent.

I am afraid I would have to refresh my memory from the instructions as to the use of that last line.

Q. Are the figures or ratios, as I believe you called them, stated opposite the heading: "percentages" applies to the salaries of all salesmen in the Detroit field in allocating those salaries to channels on form 189?

A. Yes, sir.

Q. Is it not true that the ratios on the last line opposite "Distribution of percentage" are used for an alloca-4907 tion of the amount of salaries charged to Account 7004, general pro rata, for the purpose of allocating any salary expense falling within that account?

A. Well, your Honor, I think that is true, but I cannot testify without consultation with the instructions on the last line. To the best of my knowledge and recollection, your statement is a true statement.

Does that meet your question?

Mr. Hanley: If your Honor please, if it is important, may we have the opportunity to investigate it?

Trial Examiner Ballinger: I was going to suggest that if this is important, then the witness should have an opportunity to consult the other records.

The Witness: Well, there are two men here, right here, if I could just have a minute with either Mr. Houghton, or Mr. Otterbeek who could just give me this right now, but I can't—

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: You may take Mr. Austin's statement that he doesn't know that it is important.

Mr. Austin: I might perhaps refresh the recollection of the witness or he might confer with the gentlemen here, which would be much better, but for the present line of questions, I doubt if it makes any difference in view of the fact—

4908 By Mr. Austin:

Q. —and is this not true, Mr. Boatwright, that the same result would be reached whether the bottom line ratios or the next-to-the-bottom line ratios were applied to the salesmen's salaries? Meaning by that that the automobile supplies do not go into account 7400 anyway?

A. That's right. The automobile supplies do not go into 7004, and that I thought was taken care of when I stated that the first three were restated to total 100.

Q. My recollection is that somewhere here in one of your exhibits it is explained that there were certain statements from the Chicago office which are added on to your 7004 account and allocated under that bottom line of ratios?

A. That's right.

Q. But I don't care about looking that up, and I could even be wrong whether it is this account or whether it is in the accounting department or both that that happens?

A. Yes, sir.

Trial Examiner Ballinger: If that is material, it should be definitely gone into at this time.

Mr. Austin: I don't think so, your Honor.

May this be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

4909 Mr. Austin: Pursuing this line of questioning I will refer only to the ratios stated on the next-to-the last line of these reports opposite the heading "percentage" and to which the witness has given a definite answer and unless I find that the bottom line again becomes material, why, I think—

Trial Examiner Ballinger: That may be wholly disregarded.

Mr. Austin: Yes.

By Mr. Austin:

Q. Have you still that exhibit, Mr. Boatwright, that is Commission's Exhibit 102?

A. I do.

Q. Now, the answers that you just gave me only referred to the percentage ratios, or rather, at the bottom of the first four figure columns, is that correct?

A. Yes sir.

Q. Will you tell me whether any use is made of the percentage ratios in either of the last two lines on the other half of the form; that is, under the columns which are headed "Refined oils, naphtha, and gasoline," and so forth, the products columns, any use of those percentages under those product columns made in allocating expenses to Form 189?

A. Not to Form 189.

4910 Q. And was any use made of those percentages in allocating salesmen's salaries to tank wagon reseller, tank wagon consumers or other methods channels on Respondent's Exhibit 101?

A. No.

Q. Now, Mr. Boatwright, will you please turn to page two of Respondent's Exhibit 99. The first sentence in the text, there, "total salaries paid to salesmen in the months of January and July were distributed to the various channels as follows:—" and then there is an example, is that correct?

A. Yes, sir.

Q. Does that sentence which I have just read mean that the percentages under the column "per cent of effort" in the example, where applied to salaries of all field salesmen in charging that expense to account 004 on form 189 for the months in the first and third quarters of 1940?

A. Yes, sir.

Q. And were those percentage figures under January and July, respectively, taken from Commission's—or, rather, from the original of Commission's Exhibit 102 and Commission's Exhibit 88, respectively?

A. Again my only question is to refer to 88. If that number is correct for the July report, that is—

Q. 88 and 89.

4911 A. Yes. That is correct.

Q. And the same is true, is it not, Mr. Boatwright, as to the percentage ratios shown on the next to the last line of Commission's Exhibit 103, those percentages being applied for the second quarter of 1940 and the ratios shown in the same place on Commission's Exhibit 89, those percentages being applied to the last quarter of 1940?

A. That is correct.

Q. And those percentages were applied to all salesmen's salaries for those respective quarters?

A. Yes, sir.

Q. Now I would like to have you state on the record at this point the percentage of salesmen's salaries in the Detroit field which were charged to the tank wagon reseller channel on form 189 in each of the four quarters.

Mr. Hanley: May I ask a question, if your Honor please?

Trial Examiner Ballinger: You may.

Mr. Hanley: Mr. Boatwright, are the figures as now requested, reflected anywhere in Respondent's Exhibit 99 or in any other exhibit?

The Witness: Yes. The figure which he has requested is to be found on either Commission's Exhibit 102, 103, 88 or 89.

4912 Mr. Hanley: If your Honor please, the Respondent objects to the question for the reason that the answer is to be found on several of the exhibits as enumerated by the witness, which exhibits are already in evidence and the answer will simply be repetitious and cumulative on the record.

Trial Examiner Ballinger: It is merely for convenience. Although it is cumulative, the witness may answer.

Mr. Hanley: The Court says you may answer.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

A. The percentage charge of the tank-wagon reseller channel for the first three months of the year; namely, January, February, and March; amounted to 29.7 per cent. The ratio charged for April, May and June was 29.1 per cent. The ratio charged July, August and September was 27.8 per cent while the ratio charged the last quarter of the year was 27.4 per cent.

By Mr. Austin:

Q. To digress just a moment, Mr. Boatwright: On page 2 of Respondent's Exhibit 99, the example that we were just looking at in the middle of the page, we have been referring to two columns which are headed: "Per cent of effort." What do you mean by "effort"?

4913 A. The distribution of effort of the selling staff.

Q. Does that mean hours or does it mean salaries in dollars?

A. Well, your distribution of hours becomes the distribution of salaries.

Q. Well, are those percentages percentages of time or were they weighted according to the different salaries paid?

A. They are percentages of time.

Q. And wherever you have referred to distribution of effort, or per cent of effort throughout Respondent's Exhibit 99 and Respondent's Exhibit 100, as is frequently done, have you referred to hours rather than dollars?

A. That has been my intent and I think that is a perfectly true statement. You are asking, however, for throughout an entire exhibit. I would say yes.

Q. Well, for instance where a supervisory employee's salary has been allocated according to distribution of effort of employees working under him, you were referring, there, to distribution of hours worked by the employees under him and not necessarily to distribution of their salaries?

A. Yes.

Q. I thought it would be well to clear that up now because, frankly, when I first read these exhibits "effort" meant salary to me and I arrived later at the conclusion it meant hours.

4914 A. Yes, your statement is correct.

Q. Now if you please, Mr. Boatwright, will you turn to Respondent's Exhibit 100, Schedule 1-B, which is on page 18, or it commences on page 18. The first column of dollar figures in that schedule, under the heading "Annual direct shipment cost" states, among other things, the amount of the salaries of the various classes of salesmen assigned to direct shipments, is that correct?

A. Yes, sir.

Q. Those salaries being shown on the first—rather, the top line of figures opposite each salesmen's classification?

A. It is opposite the designation "account 004—salaries" yes, sir.

Q. Thank you. Were the percentages which you have read into the record from the four quarterly distribution of time reports applied to the time of salaries of reseller salesmen used in Exhibit 1-B to determine the amount of these salaries allocated to direct shipments to be deducted from the tank wagon reseller channel on form 189 in compiling Exhibit 101?

A. The component parts of the percentages as read in the record have been used in determining the ratios used on subschedule 1-B, yes, sir.

Q. What do you mean by the component parts?

4915 A. Well, here I am dealing with individual classes of salesmen. The figures which we read in the record was for all classes of salesmen.

Q. Well, did you not state that the percentages shown in the next to the last line of the quarterly distribution of time reports were applied to the salaries of all salesmen in allocating those salaries to form 189?

A. Yes, sir.

Q. Then if they were applied to the salaries of all salesmen, were they not applied to all of the salary included in these charges to direct shipments in the first column on Schedule 1-B?

A. No. In the first column on 1-B, that is a direct measurement of the effort on the part of the salesman for direct shipment business. That does not involve the application of the ratios read into the record for the simple reason that the ratios read into the record do not give consideration to time spent on direct shipments and, as we stated, our original form 189 has any direct shipment charge scattered throughout all of the channels on the original 189. Therefore, we had to measure the effort involved in direct shipment, which was done, which led to the first column of figures on sub-schedule 1-B.

Q. I understand that that is the way that those figures
opposite account 004 on schedule 1-B were arrived at
4916 but I believe the method of arriving at them is
shown on Schedule 1-A. Now I recognize, also, that
those are direct charges to direct shipment business; direct allocations, at least; but now Schedule 1-B is compared with the method of adjustment used in withdrawing those amounts from the former channels on form 189.

A. Yes, sir.

Q. And is it true that all of the salaries, including this portion of the salaries shown on Schedule 1-B, was allocated on form 189 according to the ratios which you have read into the record from the quarterly distribution of time reports?

A. The salaries originally charged for salesmen were allocated for the amount in question as read into the record according to those percentages in total.

Q. And these figures on schedule 1-B in the first column opposite account 004 are a part of the total salesmen's salaries, are they not?

A. Yes, sir.

Q. Now, if you will turn to page 19, which is a continuation of schedule 1-B, at the bottom of that page there are some summaries and the total of salesmen's salaries allocated to direct shipment costs is shown as $13,639.17 is that correct?

A. Yes, sir.

4917 Q. Now in withdrawing that expense from the
channels on form 189 for the purpose of allocating
it and charging it to direct shipments, what per cent of

that $13,639 was withdrawn from the tank wagon reseller channel?

A. 2.67 per cent.

Q. And it is not true, is it, Mr. Boatwright, that those salaries or the salaries of any of the salesmen concerned there, were allocated to the tank wagon reseller channel by any such figure in the original allocation of expense on form 189?

Mr. Hanley: I don't understand the question, your Honor. If the witness does, I have no objection to his answering.

Trial Examiner Ballinger: Do you understand the question?

Mr. Austin: May I withdraw it, and I will start over again?

Trial Examiner Ballinger: Yes. The question is withdrawn.

By Mr. Austin:

Q. You have read into the record, Mr. Boatwright, certain figures which were used in the preparation of form 189 for 1940; certain percentage ratios which were used in charging to the tank wagon reseller channel salesmen's salaries in the Detroit field in 1940 by quarters and those percentages were for the first quarter—I am just 4918 repeating, now, what is in the record—29.7 per cent; for the second quarter, 29.1 per cent; third quarter, 27.8 per cent; and for the last quarter, 27.4 per cent. Now my question was whether, in deducting on Schedule 1-B only 2.67 per cent of those schedules, you have withdrawn those salaries from the 189 channels to the direct shipment channels in the same manner in which they went into the 189 channel?

A. The only difference being that in withdrawing we had to work by class of salesmen. You will notice that this entire exhibit is set up by classes of salesmen.

Trial Examiner Ballinger: You say this entire exhibit.

The Witness: I am sorry. Sub-section 1-B.

By Mr. Austin:

Q. On Respondent's Exhibit 100.

A. As referred to. It was necessary to work by classes of salesmen and, accordingly, we took that expense out by class of salesmen.

The reason for the difference in the ratios that you are referring to is the fact that many reseller salesmen didn't call at all upon a jobber account. Maybe two—I don't recall the exact number—would call upon a jobber. Therefore, when we take just those that were affected by direct shipments, we did so remove, in each case, according to the grouping of the salesmen.

Q. But you took these—so you say, now, that you
4919 took the salesmen's salaries assigned to direct shipment out of the 189 channels by classes of salesmen, is that correct?

A. That is correct

Q. But you did not, Mr. Boatwright, charge the salaries, these same salaries, to the 189, originally, by classes of salesmen, did you?

A. No, they were allocated in total, originally.

Q. So is it or is it not true that the salesmen's salaries charged to direct shipment in Respondent's Exhibit 100 were removed from the 189 channels in exactly the same way that they went in?

A. They are removed in the way that they went in except that it was necessary, in attempting to segregate the cost of direct shipment, to deal with parts of the total. For instance, we had one or two reseller salesmen out of the entire group—

Q. Mr. Boatwright, if I may interrupt,—

Mr. Hanley: Just a moment. If your Honor please, I think the witness ought to be permitted to complete his answer.

Mr. Austin: I would like to interpose an objection to further answering because of the fact it is not responsive to my question. I am only trying to find what was done and not why it was done. I am directing my question to the method used, which he has explained, and I am asking whether—

4920 Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Mr. Austin: Now I would like to get an answer to that question without an explanation.

Trial Examiner Ballinger: Read the answer.

(The answer referred to was read by the Reporter.)

Mr. Austin: Beginning with "for instance," I submit the answer be stricken.

Mr. Hanley: I submit it is a fair answer to the question and the only way the witness can answer truthfully.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: If there is any doubt in the Examiner's mind, I withdraw the objection.

Go ahead, Mr. Boatwright.

A. (Continuing.) I was about to illustrate—

Trial Examiner Ballinger: Will you just state what was in fact done?

The Witness: That's what I was doing.

Trial Examiner Ballinger: Proceed.

The Witness: Now may I have the answer as far as I went?

The Reporter: "A. They are removed in the way that
they went in except that it was necessary, in attempt-
4921 ing to segregate the cost of direct shipment, to deal
with parts of the total. For instance, we had one or
two reseller salesmen out of the entire group—"

A. (Continuing.) —making any calls on jobber accounts. The time of these particular reseller salesmen was removed from the form 189 on the basis of the ratios of the time of the reseller salesmen.

On the other hand, a salesman in another classification other than reseller salesman may be only one of a family of salesmen, would have made calls. Therefore we removed his time from the original 189 on the basis of the ratios for that class of salesman. Does that meet your question, Mr. Austin?

By Mr. Austin:

Q. Yes, I think I understand that Mr. Boatwright, but now let me ask you again whether you charged the salesmen's salaries directly to channels on form 189 according to the allocation of time of the particular class of salesman?

A. Each of the particular class represents a part of the component total; represents a component part of the total; the ratios which have been read into the record.

Q. And in reaching those ratios they are a composite percentage, are they not, of all salesmen?

A. Yes, sir.

Q. And those ratios were applied to the salaries of all salesmen, were they not?

4922 A. Yes.

Q. And in deducting the part of the salaries of these various salesmen you did not apply those figures, did you?

A. I did not. I applied it by individual families of salesmen.

Q. In that connection I would like to recall to you, Mr. Boatwright, the testimony given on page 4784 of the record, as follows:

"Now inasmuch as I took direct shipment cost out, according to the identical method of entry, then your residual amount is allocated by the tank wagon reseller, tank wagon consumer and other methods and in some cases automobile supplies are explained, there, also, according to the procedure outlined in Respondent's Exhibit 99."

In your opinion were the salaries of salesmen which were allocated to direct shipment removed from the channels on form 189 for 1940 in the identical method of entry to which they were entered in those channels?

Mr. Hanley: Now, just a minute, if your Honor please. That question is objected to because it is unfair to the witness in view of the line of cross-examination that counsel has been pursuing for some considerable time past, in this: That counsel has requested and received from the Respondent certain quarterly reports of time distribution of salaries, which are made currently in the accounting procedure of the Respondent. The Respondent, in
4923 connection with this case, has, at the instance of the
Government and the prosecuting authorities in this case, made a special cost study in connection with selling gasoline to jobbers in the Detroit area and the witness has testified in connection with that special cost study that costs were taken out of the reseller channel on Respondent's form 189 in the manner in which such costs were put into form 189. The application and the intention, and the unfair intention of the prosecution now is to tie the Respondent to taking out costs of form 189 in the reseller channel in its special study on the same basis that the Respondent in its ordinary course of business keeps its account and ratios and allocates salary expenses, the inference being, on the part of the Government, first: that the Respondent was remiss in not keeping expense accounts in connection with jobber business and, secondly: that the Respondent having made a special study to determine a

cost of doing jobber business, which the Respondent contends is a loaded and exorbitant cost, as presented, the Respondent is now criticized for having made such a cost on a different basis than that upon which the original distribution of cost was made, without reference to jobber business.

Trial Examiner Ballinger: The objection is overruled. The question doesn't call for a statement of fact but calls for the witness' opinion, which is proper.

Mr. Hanley: If your Honor please, I then object to the question because it does not call for a question of
4924 fact.

Trial Examiner Ballinger: Will you read the question?

(The question referred to was read by the Reporter.)

Trial Examiner Ballinger: The objection is overruled.

A. I think that is an entirely correct answer, because each of the component parts was used in making up the total and we took it out according to the way—and the data taken directly from these time reports—

By Mr. Austin:

Q. The salaries went in, Mr. Boatwright, according to the percentage on these four exhibits, quarterly distribution of time reports. You have testified to that, have you not?

A. Yes.

Q. And they came out by application of the different percentages, did they not?

A. Yes, sir; because we had to measure by individual man.

Q. That's what you did; whether you had, or not?

A. That's what we did; after a consultation by you and the accountants for the Commission, we used the cost of the man.

Mr. Austin: I would like to say, with reference to what Judge Hanley said on the record, I certainly concede that the only method of bringing out inconsistent methods of allocation, that inconsistent results follow. The in-
4925 consisten ies themselves don't follow and I don't think in the case of these separate accounts, it is important and, therefore, I do wish to emphasize that I think where an inconsistent method of allocation has been used, it is being brought out because we believe that it may have led and, in fact, has led, to inconsistent results and in so

far as the special cost study is concerned, I was going to say my contention—it may not be of importance, but answering Judge Hanley, I feel that not only that the Respondent should have made a special cost study but that where a particular method of allocation to direct shipments is used, that the same method of allocation should have been used to the other channels as well, instead of simply leaving the other channels as they were before and in attempting to vary from the accounting procedure used by the company for its own purposes but which is conceded was never gotten up or planned for a purpose of a cost study under the Robinson-Patman Act.

I just have two more questions on this point which, I think, will bring out what I have in mind, here.

By Mr. Austin:

Q. Will you turn to Schedule 1-A in Respondent's Exhibit 100, page 45? What does that schedule show, Mr. Boatwright, very generally?

A. That schedule shows the direct shipment cost for salaries of salesmen, their traveling expense, the op-
4926 eration and maintenance of their vehicles and the depreciation of their vehicles as an allocation among the channels jobber, naphtha and gasoline jobbers, other product and direct shipment other customers.

Q. Now restricting your attention to the first column under account 604—salaries. That column shows, does it not, the amount of salaries of each class of salesman which was charged to direct shipment business in each of the three direct shipment columns that you just mention?

A. Yes, sir.

Q. And is it not true that the portion of each class of salesmen's salaries charged to direct shipments is charged directly to direct shipment channels by dollars?

A. It is, sir.

Q. And have you made any computation charging the salaries of each salesman, or of each class of salesman, to bulk plant channels directly by dollars, according to the distribution of effort as shown for each class on the quarterly distribution of time reports?

A. Not by salesmen, no.

Q. And you haven't done it by classes of salesmen, have you?

A. No. That is done in total.

Q. And is it not true that the percentages, or the per-

centage ratios, as I believe you have called them, at
4927 the bottom of the quarterly distribution of time reports, are not weighted according to the salary value of the time distributed?

A. They are not.

Mr. Hanley: That is objected to and it is requested that the answer be stricken because it is immaterial.

Trial Examiner Ballinger: The objection is overruled.

Mr. Austin: If your Honor please, I will move that we now adjourn until 10:00 o'clock tomorrow morning.

Trial Examiner Ballinger: The motion is granted.

Now, at 5:30 p. m. the hearing stands adjourned until 10:00 o'clock a. m., Tuesday, February 17, 1942, in Room 859 Federal Building, Detroit, Michigan.

(Whereupon, at 5:30 p. m. the hearing was adjourned to reconvene on Tuesday, February 17, 1942, at 10:00 a. m.)

4928

Room 859, Federal Building,
Detroit, Michigan,
February 17, 1942.

Met, pursuant to adjournment at 10:00 a. m., War time.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois; and

Arthur J. Abbott, Esq., of the firm of MacMahon, Abbott & Roberts, 2230 Buhl Building, Detroit, Michigan; appearing for the Respondent.

4929 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing of docket No. 4389, in the matter of Standard Oil Company, is reconvened in room 859 Federal Building, Detroit, Michigan, at 10:00 a. m., Eastern Standard Time, February 17, 1942. The last hearing was in the same room in the same city, February 16, 1942.

You may proceed.

JOHN W. BOATWRIGHT resumed the stand and testified further as follows:

Cross-Examination by Mr. Austin.

Q. Mr. Boatwright, I think you said that schedules 1-A and 1-B in Respondent's Exhibit 100 are arranged by listing the various classes of salesmen operating in the Detroit field.

A. That's correct.

Q. You will note that one of the classifications mentioned on those two schedules, part of the expense of which group is charged to direct shipments, is agent salesmen.

A. Yes, sir.

Q. On the quarterly distribution of time reports, two of which were introduced in evidence yesterday as Commission's Exhibits 102 and 103, covering salesmen's salaries, I see no classification of agent salesmen, and I wonder 4930 if you would explain or tell us where agent salesmen are included, if at all, in the quarterly distribution of time reports.

A. Yes, they are included. The agent salesman is an individual who operates one of the large bulk plants. His efforts are divided between selling and operating the plant as the operating head of that unit.

Q. Did you say that he operates one of the large bulk plants?

A. Yes.

Q. Do you mean the salaried stations, "A" stations?

A. Yes. He maintains a time card showing the split between his operating function and his selling function. That portion of his salary as a result of this time card maintenance which would be assignabl eto selling is included with salesmen's salaries. The other portion of his salary is included in another expense classification. That part which is included with salesmen I think is to be found in either the tank wagon reseller salesmen or tank wagon consumer salesmen; just exactly the classification, I couldn't tell you, in one or the other, however.

Trial Examiner Ballinger: Mr. Boatwright, when you refer to the bulk plant, do you refer to one of the six bulk plants in the Detroit area?

The Witness: It might be one of those or it might be the plant at Pontiac.

4931 Trial Examiner Ballinger: Oh, yes.

The Witness: Or some other—Lansing is another illustration, Jackson, and so forth.

Trial Examiner Ballinger: I understand.

The Witness: Yes.

4932 By Mr. Austin:

Q. Mr. Boatwright, I will show you here what is a copy of Commission's Exhibit 82 and please glance at that for the purpose of refreshing your recollection on that exhibit (handing document to witness).

Referring to Commission's Exhibit 82, Mr. Boatwright, are not agent salesmen salesmen whose salary so far as it is charged to account 004, is charged on what is known as payroll number six?

A. Yes, sir.

Q. And can you tell me whether that salary—I guess I asked you this before but I will ask you again—whether that salary is included in any of the classifications listed on the quarterly distribution of time reports or whether it is added in account 7004 for the purpose of distribution in that account?

A. May I check that?

Trial Examiner Ballinger: Yes. Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Now, Mr. Boatwright, turning to Commission's Exhibit 82B, does the tabulation there set forth not indicate that the salaries of agent salesmen and agents are charged to account 7004 and allocated according to the bottom
4933 row of percentages on the quarterly distribution of time sheets rather than included in any of the salesmen classifications on those quarterly reports?

A. Yes, that is correct. The agent salesman's time, which is charged to selling expense, is allocated according to the average distribution of time of all salesmen charged entirely to 004.

Q. And that is indicated, is it not, Mr. Boatwright, on Schedule 1-B of Respondent's Exhibit 100, on Page 19?

A. Yes, sir.

Q. In the row of figures opposite agent salesmen certain percentages are given showing the percentage of the agent salesman's salary which is allocated to the tank wagon reseller, tank wagon consumer, and other methods channels and, I take it, that those percentages are the average annual percentages applied to the salesmen's salaries on the quarterly distribution of time reports.

A. Yes, sir.

Q. And by average I mean the composite of percent on the four reports?

A. Except there is a slight exception to that statement. You will recall the work we had to pursue in deriving these respective ratios as shown on 1-B; that this entire allocation was carried through on a monthly basis by individual salesmen.

4934 Q. Yes.

A. Therefore, you may not find that these identical percentage figures on a quarterly time distribution report as these are a composite for the year based on the application of the percentage shown on the quarterly time distribution report by month, for each quarter.

Then we recapitalated to get the year figure, which is, in fact, an average of four. With that exception, your statement is true.

Q. You were just talking, now, about the figures opposite agent salesmen, weren't you?

A. Yes, sir. However, that is true of the figures opposite any of these classifications. Each of them had to be built up by individual men by individual months because our ratios change throughout the year. Therefore, the figures that you find opposite any of these salary classifications on page 18 and 19 of Respondent's Exhibit 100 represent, in fact, an averaging process because we had to build it on a monthly basis as the ratios change throughout the years.

Q. Well, the percentages applied in charging salaries of all salesmen to 189 were constant throughout each quarter, were they not?

A. Constant for a quarter but when you bring the four quarters together, the figures you will find, for any class of salesmen on sub-schedule 1-B, pages 18 and 19
4935 just referred to, are averages that derive from the application of these quarterly figures through the year.

Q. I think that that was explained yesterday and I was only trying to find out, now, about the agent salesmen and I presume that the percentage figures opposite agent salesmen on account 004 are the average of the four quarterly percentages in the similar columns on the quarterly distribution of time sheets in the lowest column, is that not right?

A. They are averages. They are not an arithmetic average.

Q. Wouldn't they be for the agent salesman, since each time sheet covered takes three months?

A. A straight arithmetic average would be getting the four figures and dividing by four. Actually this is more the equivalent of a weighted average but it is an average in that sense, yes sir.

Q. I think I see. In other words, if there were some difference in the amount of salary paid the agent salesman in the different quarters—

A. It would deviate from an arithmetic average or there might be an agent salesman who, let us say, in a given month estimates 50 percent of his time, and, hence, fifty percent of his salary should be charged to selling activity. The following month he might estimate 30 percent of his time, so you would give recognition to that variation.

4936 Q. That would affect the amount of salary showing through account 004?

A. That is correct. I just wanted that exception understood.

4937 Q. Referring again to Commission's Exhibit 82, in your opinion, Mr. Boatwright, does not that exhibit present a more complete and accurate picture of the company's regular method of handling salesmen's costs in allocation between channels on 189 than the statement on the first two pages of Respondent's Exhibit 99?

Mr. Hanley: May I have that read, please?

(The question referred to was read by the Reporter.)

Mr. Hanley: Judge, I am sorry, but that is objected to because it is not an opinion question. There is no objection to the witness testifying as to what the facts are with reference to the company's method of allocating salesmen's costs but—

Trial Examiner Ballinger: You are objecting to it on the ground that it calls for an opinion?

Mr. Hanley: It calls for an opinion on a question of pure fact and the witness is qualified to testify to fact. He doesn't need to express an opinion and shouldn't be permitted to express an opinion.

Trial Examiner Ballinger: The objection is overruled.

A. No, I don't know that it is any more complete or any better explanation. It seems to me they are entirely consistent with each other, the only difference being that in this Commission's Exhibit referred to, 82, we have
shown that a small part of the salaries of salesmen
4938 that result from selling effort of agent salesmen,
whereas in the pages 1 and 2 of Respondent's Exhibit No. 99 do not break down the explanation by individual classes of salesmen.

Q. Well, I see, Mr. Boatwright, that as a matter of fact Commission's Exhibit 82 does not set forth the procedure used in the compilation of the quarterly distribution of time reports any more fully than Commission's Exhibit 99, and I think I will ask the Court, with leave of counsel for Respondent, just to strike out beginning with this last question because I don't believe that it accomplishes anything. I was under the impression previous to asking the question that perhaps Commission's Exhibit 82 should be mentioned here by way of reference because I thought it added to or perhaps was a little more complete than Respondent's Exhibit 99 in this respect. I don't know whether that is true or not. The witness says they are consistent and I think that I perhaps overlooked the omission of material regarding—

Mr. Hanley: If your Honor please, counsel for the Respondent is entirely agreeable to striking any part or the whole of counsel for the Commission's examination.

Trial Examiner Ballinger: From what point does your motion run?

Mr. Austin: From the last question I asked the
4939 witness.

Trial Examiner Ballinger: Calling for an opinion?

Mr. Austin: Yes, that is right.

Trial Examiner Ballinger: Will you read back?

(The record was read.)

Trial Examiner Ballinger: Mr. Reporter, you will note commencing with "referring again to Commission's Exhibit 82, in your opinion, Mr. Boatwright, does not that exhibit present a more complete and accurate—" are stricken from the record.

By Mr. Austin:

Q. Mr. Boatwright, as Commission's Exhibit 102 and 103 certain percentage ratios are entered for the time of "Specialty Salesmen—Heating Oil" and "Domestic Heating Oil Salesmen."

Will you explain where the time or salaries of these salesmen is included in sub-schedules 1-A and 1-B of Respondent's Exhibit 100?

Mr. Hanley: Just a moment, please. Your Honor, I believe I am right. I want to be sure that my general objection stands to the continued use by counsel of these time distribution reports in connection with our special study in Detroit. I made a general objection to the use of the words "quarterly time reports."

4940 Trial Examiner Ballinger: It is understood that you have a general objection running to all this line of examination.

Mr. Hanley: Very well.

A. These particular salesmen mentioned on Commission's Exhibit 102 "Specialty Salesmen—Heating Oil" and "Domestic Heating Oil Salesmen" are not shown on Respondent's Exhibit 100 on pages either 18 or 19 as they have no connection in any way with direct shipment business.

By Mr. Austin:

Q. Are they shown on pages 15 or 16 either?

Trial Examiner Ballinger: Pages 15 or 16 of Respondent's Exhibit 100.

A. No, sir.

Would you like a clarification of what these men do for your understanding?

By Mr. Austin:

Q. I don't know that that is strictly necessary. It is true, isn't it, that the same is true, is it not, of various

"A" and "B" schedules throughout Respondent's Exhibit 100, that they do not necessarily include a listing of all of the expense in the schedule of that number on form 189?

Mr. Hanley: I suggest to you, Mr. Boatwright, that in your answer you may make whatever explanation you
think is necessary. Counsel has asked a question
4941 and you may answer and make whatever expla-
nation you care to.

The Witness: I only thought in explanation—

Mr. Austin: Your honor, I object to that. I think that is for the Examiner to rule upon. I think when I ask the witness a question I have a perfect right to ask for a "Yes" or "No" answer, and if counsel wishes to object, he should address his objection to the Examiner and not to the witness.

Mr. Hanley: I am not objecting; I am just telling my witness that he may answer the question.

Trial Examiner Ballinger: We are discussing a matter that is not entirely clear to the Examiner. If the witness desires to make an explanatory statement, he may do so, in order to clear up the situation.

The Witness: Well, there are places, your Honor, where questions are raised and I merely wonder whether it wouldn't be of help to either the Commission or to the Court if I gave an explanation.

Mr. Hanley: Just go ahead and do it. Just go ahead and make your explanation.

Trial Examiner Ballinger: You may make your explanation.

The Witness: Well, the reason—

Mr. Austin: Your Honor, I again object on the record
to any remarks directly by counsel for the Respon-
4942 dent to his witness under cross examination as to
how the witness should answer a question, and I request the Examiner to instruct counsel for Respondent that such remarks are improper.

Trial Examiner Ballinger: The witness has been instructed and he may offer his explanation.

Mr. Austin: I am referring to remarks by counsel, and I believe that it is improper for counsel whose witness is under cross-examination to give any instructions or directions to the witness as to how he should answer questions on cross-examination.

Mr. Hanley: I will state to the Court and counsel that I haven't the vaguest idea what the explanation will be. I don't understand this thing at all myself.

Trial Examiner Ballinger: The matter has been disposed of. It is unnecessary for the Examiner to rule on the motion and the witness will proceed to offer any explanation he may desire.

The Witness: Well, I was merely going to explain that these fuel oil salesmen are individuals who sell heating oil requirements for domestic home owners. It is entirely a tank wagon type of business. Now, the special salesman indicated on Commission's Exhibits 102 and 103 is a man who supervises the activity of the domestic fuel oil salesmen. All of this business is purely tank wagon. All of it moves entirely through our bulk
4943 plant and has no connection whatsoever with the complaint that we are discussing. Therefore, they do not appear on the Respondent's Exhibit 100, on sub-schedules either 1-A or 1-B, on pages 15 or 16, 18 or 19.

Mr. Hanley: Of what exhibit?

The Witness: That was identified.

Mr. Hanley: Of exhibit what?

The Witness: 100.

Trial Examiner Ballinger: Respondent's Exhibit 100.

The Witness: Now, throughout Respondent's Exhibit 100 we will come to places where expenses incurred purely of a tank wagon nature are not shown in the sub-schedules for the simple reason that they have no bearing and are absolutely irrelevant to costs incident to direct shipment business.

I think that answers both of your questions.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

4944 Trial Examiner Ballinger: On the record.

Mr. Austin: May I suggest we take a five minute recess, your Honor?

Trial Examiner Ballinger: The hearing will stand in recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: We will come to order.

By Mr. Austin:

Q. Will you turn to Respondent's Exhibit 99, page 17, Mr. Boatwright?

A. Yes, sir.

5 Q. That refers to the expenses of the Field Office Accounting Department going into account number 800?

A. Yes, sir. May I add: And supplementary classifications incident thereto.

Q. Is it the company's regular accounting procedure to allocate the salaries of employes in the Accounting Department between the channels on Form 189 by the percentage ratios shown on quarterly distribution of time reports prepared for accounting employes?

A. Yes, sir.

Q. Have you the quarterly distribution of time reports used for the allocations of these expenses, salary expenses for 1940, as referred to in the first sentence on Page 17?

A. Do I have them personally, do you mean?

4945 Q. Do you have them here?

A. I do not have them here.

Q. Well, I think they are here because Judge Hanley handed me two of them yesterday and I gave them back to him.

A. He may have them, sir. I do not have them.

Mr. Abbott: As soon as Judge Hanley comes in, we will furnish those, if he has them.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Will you refer to page 17 on Respondent's Exhibit 99 again, Mr. Boatwright?

At the bottom of that page there is an example of the allocation of expense in Account 200 for January, 1940.

A. That is correct.

Q. And were the percentage figures shown opposite the title "Percent of Time Spent" applied to all salaries for that month going into Account 209 in the preparation of Form 189?

A. The percentage shown there in the illustration offered on page 17 of Respondent's Exhibit 99 are applied to the salaries carried on the Field Office payroll. The first three of these percentages are restated to equal 100 percent and are then applied to the salaries of the general office members of the payroll.

4946 Q. By general office members of the payroll do you mean certain employes in the Detroit Field whose salaries are paid from the general office?

A. I do.

Q. And what employes are those?

A. The office manager, the assistant office manager and the credit manager.

Mr. Austin: Off the record please.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Were those three employes who you just mentioned as being paid from the Chicago Office, supervisory employes?

A. They were.

Q. And they supervise the activities of the other employes in the Accounting Department who are paid in the field?

A. They do.

Q. It appears from the example on Page 17 of Respondent's Exhibit 99 that a certain percent; in this case, for January, 1940, 9.9% of the salaries of the employes paid to the field was charged to automobile supplies.

A. That is correct.

4947 Q. In the second line of dollar figures in that example the heading for that is "General Office." Do the figures in that line refer to the salaries for January, 1940, for the three supervisory employes that you have named?

A. Yes sir.

Q. And will you explain why none of the salaries of those three employes were charged to automobile supplies?

A. There are several reasons. First, the General Office has never regarded that the weight of effort required on the part of these three men because of automobile supplies merited an allocation to those particular products.

Secondly, the magnitude of the charge is such that it did not, in its turn, appear to merit an allocation of expense to the automobile supplies.

Thirdly, the expense was the same nature, remained the same nature prior to and after starting to deal with automobile supplies and remains of the same magnitude, now that we cannot sell these respective products.

Because of that line of thinking the accountants in the General Office have never allocated that part of the office accounting payroll carried in the General Office to automobile supplies.

4948 Q. Do those supervisory employees supervise the activities of the employees under them with respect to automobile supplies?

A. They do.

Q. And when a portion of the salaries of the supervisory employees was charged to direct shipment business for the purpose of this cost study, is it not true that the allocation of those supervisory salaries followed the allocation to direct shipments of the salaries or the time of the individuals working under them?

A. Your statement is correct.

Mr. Austin: Judge Hanley, have you got those quarterly distribution of time sheets for the accounting department, two of which you offered me yesterday?

Mr. Hanley: Yes, I have them, and I decline to produce them, if your Honor please. We will produce any records of the company, but I will not produce any transcripts, any take-offs or reproductions of any records of our company in view of our experience yesterday, February 16th. The records are available. Mr. Austin may have them in court if he wants them; he may have them in the office in Detroit or in Chicago or wherever they are. We will produce them on your Honor's direction any place you say, but we will not produce anything from here on out in the way of a transcript of any of our records.

4949 Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Examiner requests counsel for Respondent to produce the original records requested by counsel for the Commission.

Mr. Hanley: Now, on the record. If your Honor will do so, will you please specify exactly what records you want?

Trial Examiner Ballinger: Can counsel for the Commission designate with particularity the records he desires?

Mr. Austin: Yes. I would like the quarterly distribution of time reports for the accounting department, Detroit field, 1940; that is, the four reports which were used for the allocation of accounting salaries in 1940, those forms being those referred to in the first sentence on page 17 of Respondent's Exhibit 99.

Trial Examiner Ballinger: Is that a sufficient designation?

Mr. Hanley: Judge, may I go off the record for just a moment?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

4950 The records requested will be produced at this afternoon's session.

Mr. Austin: I would like to say on the record, Judge, that there has never been any question raised by the Commission in this case as to the accuracy or, at least, as to the honesty and truth of the expense figures of the company. We never questioned as to whether any item of expense on any of these cost studies was actually incurred, never have doubted that it was, but the questions yesterday went to the point of determining whether certain changes between the previous cost study and the present cost study were errors or whether they were changes in methods of allocation.

Mr. Hanley: Is this on the record?

Trial Examiner Ballinger: It is on the record.

Mr. Hanley: All right, you can put this on the record, too. I learn the hard way, and I learned something yesterday and from here on out in this lawsuit, if the Commission wants records, the records are available but Respondent will not do arithmetic for the Commission.

Trial Examiner Ballinger: Proceed.

Mr. Austin: Well, your Honor, that will require an adjournment, and I am afraid there will be frequent adjournments unless I can make up a list of the things I

want and ask for them at once because I wish to
4951 proceed with the cross-examination in the order that
I have it and I can't proceed further now until I get those records.

Trial Examiner Ballinger: In order to enable counsel for Commission to make up a list of documents he desires produced, the hearing will stand in recess for ten minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Austin, can you now designate the documents you desire Respondent to produce?

Mr. Austin: I would like to ask Judge Hanley to produce the original letter which I addressed to him under date of January 24 requesting the production of certain documents and information upon this hearing.

Mr. Hanley: Just a moment. I think I can find it, your Honor.

In answer to that, your Honor, I have the letter, but I don't think I should be requested to produce it. Mr. Austin wrote it and I assume he has copies.

Trial Examiner Ballinger: The Examiner understands that you received the letter described?

Mr. Hanley: That is right.

Trial Examiner Ballinger: And that you now have in your hand either the original or a true copy thereof?

Mr. Hanley: I have in my hand a letter which I
4952 received from Mr. Austin under date January 24th.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: It being conceded that the letter under date of January 24th requesting certain information and statements and records was addressed to Judge Hanley by me and received by him, I now offer in evidence what purports to be a carbon copy, and what I can positively identify of my own knowledge as a carbon copy of that letter.

Mr. Hanley: If you say it is, that is perfectly satisfactory.

Trial Examiner Ballinger: The document will be marked "Commission's Exhibit 104-A, 104-B, and 104-C."

(The document referred to was marked "Commission's Exhibit 104-A, 104-B, and 104-C" for identification.)

Mr. Hanley: And the offer of these exhibits?

Trial Examiner Ballinger: It hasn't been offered yet.

Mr. Austin: I did offer it on the record, your Honor, and I think the objection now ought to be to the offer.

Trial Examiner Ballinger: All right.

Mr. Hanley: The objection is, any letter that counsel for the Commission writes is not evidence in the case.

Trial Examiner Ballinger: It is evidence of a re-
4953 quest having been submitted.

Mr. Hanley: It is self-serving and of no probative value. It may be evidence, to be sure, of a request.

Trial Examiner Ballinger: It is only for that purpose that the letter is offered.

Mr. Hanley: Well, if that is the only purpose, there is no objection.

Trial Examiner Ballinger: Commission's Exhibit No. 104-A, B, and C, for identification, is admitted in evidence.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT 104-A, 104-B, and 104-C," was received in evidence.)

Mr. Austin: Judge Hanley, have you an original letter written by me to you under date of January 27, 1942?

Mr. Hanley: Yes, your Honor, I have the letter.

Trial Examiner Ballinger: You have the original?

Mr. Hanley: Under date of January 27, 1942, from Mr. Austin.

Mr. Austin: May I have that original?

Mr. Hanley: Well, you may look at it but you can't have it. I am sure of that.

Mr. Austin: I would like to have that marked for identification.

Mr. Hanley: No, you can't do that.

4954 Trial Examiner Ballinger: Have you a copy, Mr. Austin?

Mr. Austin: I have my file copy.

Mr. Hanley: You may look at it.

Trial Examiner Ballinger: Can you use your file copy?

Mr. Austin: I probably can.

Do I understand that the Respondent refuses to produce that letter of January 27th for the purpose of being identified in the record?

Mr. Hanley: Judge, we don't refuse to produce anything that we have. That is a matter of record. If Mr. Austin writes us a letter, are we to be hanged because we don't produce the letter?

Trial Examiner Ballinger: Judge, you have been asked a direct question. Will you or will you not produce the letter?

Mr. Hanley: I have it here.

Trial Examiner Ballinger: Will you produce it?

Mr. Hanley: Yes. I produced it in court, but I do not want to—

Trial Examiner Ballinger: Will you deliver it to the Examiner?

Mr. Hanley: —to strip my file. I think that a copy
should be introduced, if the letter itself is material,
4955 which I do not think it is.

Trial Examiner Ballinger: Have you a copy available, Mr. Austin?

Mr. Austin: Yes.

In view of the fact that the original is not made available by counsel for the Respondent I, therefore, request that this copy of the letter of January 27, 1942, from myself to Judge Hanley be marked for identification.

Trial Examiner Ballinger: The Reporter will mark the document "Commission's Exhibit 105," for identification.

(The letter referred to was marked "Commission's Exhibit 105" for identification.)

Mr. Austin: I understand there is no question about this letter having been received, your Honor, and I, therefore, offer it in evidence for the purpose of showing certain explanations which this letter contains making more definite and certain the requests contained in the previous exhibit, Commission's Exhibit 104.

Mr. Hanley: May I see it?

("Commission's Exhibit 105" for identification, was handed to Mr. Hanley.)

Mr. Hanley: If your Honor please, there is no objection to the exhibit on the basis of its accuracy. It is conceded that it is a copy of a letter which was sent under
date January 27th to the Respondent. Its introduc-
4956 tion into evidence is objected to for the reason that
counsel is not entitled to put in his correspondence in evidence as evidentiary of any fact in the lawsuit. It is a self serving declaration. It has no probative value. If counsel desires to make demand upon the Respondent for any records, counsel should make them in court.

Trial Examiner Ballinger: The document is only being offered in evidence as showing a previous request for production and is limited to that purpose only.

Mr. Hanley: Do you receive that in evidence?

Trial Examiner Ballinger: I haven't yet. It hasn't been admitted in evidence. I am waiting the conclusion of your objection.

Mr. Hanley: I finished, your Honor.

Trial Examiner Ballinger: The objection is overruled. The document is admitted in evidence as "Commission's Exhibit 105."

(The letter referred to, heretofore marked for identification "COMMISSION'S EXHIBIT 105," was received in evidence.)

Mr. Austin: Now, your Honor, in view of the refusal of Respondent to produce certain statements requested in my letters, Commission's Exhibit 104, as further explained by Commission's Exhibit 105, I would like at this time to request the production of certain records of
4957 the Respondent at this hearing and continuations thereof in Detroit.

Mr. Hanley: If your Honor please—

Trial Examiner Ballinger: Do you refer now to the documents referred to and designated in the two letters?

Mr. Austin: Well, some of them. I was going to now going to make certain specific requests.

Trial Examiner Ballinger: Will you please make your requests at this time.

Mr. Hanley: If your Honor please, I desire to place something on the record at this time. Counsel for the Commission has said "in view of the refusal of the Respondent" to do certain things, he wishes something else to be done. I say to your Honor there is no refusal and there never has been any refusal on the part of the Respondent to produce any records that the Respondent has that are pertinent to this case. We will produce them. We will produce them any place, any time that your Honor directs. We have always taken that position.

Trial Examiner Ballinger: Counsel will please designate the records he desires to be produced.

Mr. Austin: The records I will now endeavor to describe are in addition to the request which previously has been made on the record for the quarterly distribution of time reports, and I don't want to say that will be a com-

plete list of everything I may ask for, but it will be
4958 what I have in mind from time to time. If I should
desire later that more records are desired—

Mr. Hanley: Do we have to have a speech every time counsel wants to make a request, your Honor?

Trial Examiner Ballinger: Mr. Austin, please designate the records you now want produced.

Mr. Austin: All right.

Complete form 189 for the Detroit Field for the years 1939 and '40.

Next, all contracts for the sale of gasoline entered into between the Respondent and Ned's Auto Supply Company covering the years 1936, 1937, and 1938 or any parts thereof, together with any riders or amendments thereto and copies of any correspondence relating to or modifying the terms of these contracts.

Mr. Hanley: Well, we can wash that No. 2 out right now. There are none and never have been.

Trial Examiner Ballinger: Judge, when the time comes for return, you may make an explanation.

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I would also like to have the documents
requested in paragraph No. 4 in Commission's Exhibit
104, also the books and records requested in para-
4959 graph numbered 5 in Commission's Exhibit 104.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: Perhaps it would be better to say 104-A. Books, records, and accounts showing the total amounts of salaries of the employees assigned to each of the persons whose salaries are charged to account 000 for the purpose of allocation to all channels on Respondent's Exhibit 101. By that I mean that it is my understanding—

Mr. Hanley: That is objected to, any explanation.

Trial Examiner Ballinger: The objection is overruled.

Mr. Austin: By that I mean that it is my understanding that the employees' salaries going into Account 001 were allocated to direct shipment channels on Respondent's Exhibit 101, according to the percentage of their respective supervisors which were allocated to direct shipments, so that I would like to know the total salaries for the employee or employees under such supervisory employee whose salary is included in Account 000.

Mr. Hanley: Your Honor, what Mr. Austin would like to know and what he is going to get is very different. He is going to get the records.

4960 Mr. Austin: I will explain what records I want so that can be shown and from the records which are produced.

Request is made for books, records, and files of Respondent showing the territory in the City of Detroit and the Detroit metropolitan area serviced by each of the Respondent's tank wagon reseller salesmen in that area in 1937, and the names and addresses of the customers of the tank wagon reseller customers located in the territory of each salesman.

Next, request is made for the production of the completed company Form 189 for each of the company's 27 fields for the year 1940.

Mr. Boatwright, is that the correct number of fields? 27?

The Witness: Yes, sir.

Trial Examiner Ballinger: You mean by that 27 fields scattered throughout the United States?

Mr. Austin: Throughout the territory of the Standard Oil Company.

Mr. Abbott: It covers 14 states.

Mr. Austin: That is correct.

Mr. Abbott: That is for 27.

Mr. Hanley: No. Just a moment.

Mr. Austin: 1940.

Mr. Hanley: Just for a matter of record, will you 4961 please note an objection? That is objected to by the Respondent as entirely immaterial.

Trial Examiner Ballinger: The objection is overruled. Off the record.

(There was a discussion off the record.)

4962 By Mr. Austin:

Q. Where is the advertising copy for newspaper and billboard advertising of the Respondent in the Detroit area kept; or does the company have such copy in its file?

A. An official copy is maintained in the file in the Chicago office.

Mr. Austin: In that event I would like to have advertising copy for all newspaper and billboard advertising used by the Respondent in the Detroit area in 1940.

Request is made for the production of books, records and files showing the gallonage of sales of the Respondent in the Detroit Field in 1940 of each product sold through commission agents or by commission drivers, the commissions for which were charged to the tank wagon reseller and tank wagon consumer channels, respectively, on Respondent's Form 189.

Mr. Hanley: That specific request is objected to for the reason that an exhibit has been offered and received in evidence disclosing the information with respect of the amount of gallonage of different brands delivered to the different jobbers named in the Complaint.

Trial Examiner Ballinger: Off the record.

4963 (There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The objection is overruled.

Mr. Austin: Further amplifying that request:

What I want is the gallonage represented by the commission salaries in the tank wagon reseller and tank wagon consumer channels, by products.

Mr. Abbott: That is for 1940?

Mr. Austin: 1940, Detroit Field.

Trial Examiner Ballinger: Is that all?

Mr. Austin: That's all your Honor; except I would like to say that the letter which went in evidence, which is Commission's Exhibit 104-A, 104-B and 104-C, requests some of that information by statement and the Commission is perfectly willing to accept a statement of whatever of this information can be so produced and assembled, and willing to have it put in the record over the testimony of Respondent's witness without producing the books and records, if the Respondent so desires.

Trial Examiner Ballinger: Counsel for the Respondent is requested to produce the documents indicated and the Trial Examiner now requests the counsel for the Respondent to indicate when they can be produced.

4964 Mr. Hanley: If your Honor please, the request made by counsel for the Commission will be responded to as quickly as it is possible to do so. Some of the records, I think, are in Chicago; some may be in Detroit; but wherever they are, they will be produced. They will be crated and shipped to your Honor, this building, care of this room.

Trial Examiner Ballinger: Such of them as are in Detroit should be produced at the afternoon session.

Mr. Hanley: I am not sure of that, Judge. I don't know. Maybe they can. If they can, okay, but I just don't know. I can't say that.

Trial Examiner Ballinger: In order to afford counsel for the Respondent ample time, the hearing will now stand in recess until 2:20 p. m.

(Whereupon, at 12:30 p. m., a recess was taken until 2:20 p. m.)

1965 Afternoon Session.

2:20 P. M.

Trial Examiner Ballinger: We will come to order. Counsel for the Commission may proceed.

JOHN W. BOATWRIGHT resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Austin.

Q. Mr. Boatwright, I wish to quote on the record from your testimony at page 4305:

"The shipment of gasoline to jobbers is regarded as a direct shipment and is not used in making any expense allocation on Form 189, that is made by the field offices, direct field expenses. In allocating some of the administrative expense of the company on direct shipments may be made to allocate to fields as a part of the gallonage. Having allocated the fields, the allocation within a field is made on a basis excluding jobber direct shipments."

I have particular reference to the second sentence read, Mr. Boatwright, which refers to the use of some of the administrative expense of the company on direct shipments to allocate to fields as a part of the gallonage, will you explain how and in what accounts and as to what
1966 expenses direct shipments are used by the company
in making allocations of expense to fields?

A. At the time that answer was given I worded it "may be made" intentionally as I was not entirely certain at that particular time. I can answer, now, that direct shipments are not used in allocation of expenses either to the fields or within the fields.

Q. That is true, is it, as to the expense of all the departments of the general manager's department going into Account 255; referring, now, to the method used in allocating between company channels where that is done prior to allocation to fields as well as to allocation to fields?

A. Direct shipments are not a part of gallonage used in allocating expenses of the general office, general manager's department, either to the fields or to channels within a field.

Q. When I said "company channels", Mr. Boatwright, I understand that in some of those accounts the expense is allocated by the general office to the tank wagon reseller, tank wagon consumer and other methods channels on the basis of the entire company's expense and then a portion of the expense in each channel is allocated to the field.

A. There are some general office expenses that it is necessary to allocate first between departments.

Q. By departments, you mean manufacturing—

4967 A. On the one hand; marketing on the other.

There are some divisions of the general manager's department; let us say the reseller sales promotion department, which is charged to a channel and then prorated to the fields as a charge to that channel. Direct shipments are not a part of any gallonage used in any such proration.

Q. When an expense is allocated to channels in the general office before allocation to fields, and where that expense is not allocated to channels on a gallonage basis but is allocated directly, are direct shipment expenses subject to the direct allocation in such a case?

A. I don't think of any department which has a direct channel allocation in which direct shipments enter.

Q. How about the gasoline refined oil department?

A. Direct shipments are a part of that departmental expense. That department, as you will recall my explanation, is, in that sense, a bulk sales department. It also controls the prices, tank wagon prices and tank wagon reseller prices through all of these four thousand odd points. That departmental expense is allocated to fields on the basis of gallonage, excluding direct shipments.

Q. I am going to have some further questions on that particular account, I think, a little later, so that I won't pursue that further and I am satisfied, now, with the answer that direct shipments are not used in any gallon-4968 age allocation either to fields or to channels by the general office.

A. That is correct.

Q. How many jobbers are there in the Detroit Field outside of the City of Detroit?

A. Three.

Q. Where are they located?

A. I would have to consult the record. I don't know the individual towns.

Mr. Abbott: I will make a note of that and bring it to your attention so you can give that information tomorrow morning.

Just a moment; I want to ask you this additional question. What period do you want, that you refer to?

Mr. Austin: 1939 and 1940; that is, the period covered in the cost study.

By Mr. Austin:

Q. Did your answer relate to the years 1939 and 1940, Mr. Boatwright?

A. I was thinking of 1940.

Q. Is the expense of marketing gasoline to those other three jobbers included in this cost study, as well as the expense of marketing to the four jobbers in Detroit?

A. It is.

Q. Turning to Page 26 on Respondent's Exhibit 4969 100 you will notice at the bottom of that page it refers to a charge per outlet to jobber outlets.

A. Yes, sir.

Q. And according to my computation, dividing the sum of $5.44 into the sum of $636.48, there are 117 jobber outlets in the Detroit Field—or perhaps I should say, there was that many during the period covered by this cost study. Will you verify that computation?

A. (After making computation.) Yes, sir.

Q. And does that 117 jobber outlets include the outlets of the jobbers outside of the City of Detroit as well as the outlets in the City of Detroit?

A. Yes.

Q. Do you know the number of those 117 outlets which are outside of the Detroit metropolitan area?

A. I do not recall the number. I have it. It is not with me at the present time.

Mr. Austin: I think it is on the record, if your Honor please. That is, I think the number of the outlets of the four Detroit jobbers is on the record.

Mr. Abbott: That is true.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

4970 By Mr. Austin:

Q. We have been referring to jobber outlets, Mr. Boatwright. Will you state what you mean by a jobber outlet as distinguished from a jobber?

A. Yes. A jobber outlet, as I have used it, refers to a reseller outlet that receives its supplies from a jobber supplying company.

Q. And by reseller outlets you mean a retail service station, do you not?

A. Either a retail service station or a parking lot—well, let us phrase it this way: An outlet that sells direct to the customer at retail price; that is, the ultimate supplier.

Q. Will you turn to page 92 on Respondent's Exhibit 100, please?

A. Yes, sir.

Mr. Austin: I will withdraw that, Mr. Boatwright.

There is another matter here that I passed over thinking that I had to wait for the record but I believe I can take it up and I would rather do it now.

Trial Examiner Ballinger: The question is withdrawn.

Mr. Austin: I would like to have this paper marked for identification, your Honor.

Trial Examiner Ballinger: The Reporter will 4971 mark the document Commission's Exhibit 106, for identification.

(The document referred to was marked "Commission's Exhibit 106", for identification.)

By Mr. Austin:

Q. I show you this paper, Mr. Boatwright, and ask you if you can identify it? (handing document to witness.)

A. This is a report showing the distribution of time by method of delivery by individual employes by months by specific positions. It instructs the employes to post in columns that actual number of hours and on the fractional parts of hours spent each day by that employee according to method of delivery.

It then states that the tank wagon method of delivery includes only deliveries of naphtha, gasoline, and refined oil through tank truck compartments. Other method of delivery includes all other deliveries excepting automobile supplies.

Q. This Exhibit 106, for identification is a blank form, is it not, Mr. Boatwright?

A. It is.

Q. You said a moment ago it is a report and I wanted to make it clear that—

A. It is a blank form.

Trial Examiner Ballinger: Issued by the Stand-
4972 ard Oil Company?

Witness: Yes, sir.

By Mr. Austin:

Q. That is what I was about to ask.

And is this form the form that you referred to yesterday as being used by each of the employes in the accounting department except the supervisory employes during the last month of each quarter for the purpose of making their distribution of time reports?

A. May I check to see whether there are exceptions to that? You say by each member. It is entirely possible that there are specific members whose sole duty will fall in a particular channel. I would like to check to ascertain whether they, in their turn, do maintain this form or—

Q. Do the supervisory employes use it?

A. The supervisory employes do not use it. Let me check that.

Mr. Austin: Please. Just a minute.

Mr. Abbott: If the Court please, why can't the witness check it, if he wants to?

Mr. Austin: It doesn't have to be done at this exact moment, does it?

Mr. Abbott: Why not?

Mr. Austin: Why does the witness have to check it at this particular instant?

4973 Mr. Abbott: I think it is reasonable to check it if he wants to.

Trial Examiner Ballinger: The question has been asked the witness and only partially answered by the witness who had stated it will be necessary, in order to complete the answer, to make certain checks.

Mr. Austin: If your Honor please, I have tried to get a word in here to explain to you and to the witness that my question was not what the witness was attempting to answer. My question was whether this was the form that the witness referred to in his testimony yesterday and that is the only answer I wish. Now, if the witness, upon reviewing his testimony of yesterday, finds it is inaccurate. I wish he would check it, but at the moment I am only trying to identify the form that he testified to yesterday that was kept at the end of each month by some, and I understood you to say all, of the accounting department employes and I do not wish his answer to that question to mean that to answer the question itself as determining how many employes keep the form.

Witness: Under those conditions your question can be answered. That is the form I referred to. In your statement of the question you stated it is a more comprehensive manner than I used the description yesterday and that is why I wanted to check whether it was used as comprehensively as your question stated. It is the form referred to. 4974

Mr. Austin: And I wish to have it understood that the witness' answer is only that this is the form I referred to yesterday and I have not attempted to state correctly what he testified to yesterday.

Trial Examiner Ballinger: It is so understood.

Mr. Abbott: Do you still wish to make an examination of your records?

Witness: As to the position of the counsel for the Commission, as now stated on the record, I see no need for any inquiry on my behalf.

Mr. Austin: Mr. Abbott, I have no objection, if you have something to ask the witness.

Mr. Abbott: Doctor Boatwright, I simply wanted to ask you whether this is a form which is in use in the office of the Standard Oil Company in its accounting division?

Witness: It is.

Trial Examiner Ballinger: And has been in use for a period of a couple years, is that right?

Witness: It is.

Mr. Abbott: And I understand from your testi-
4975 mony it is the form you referred to in your testimony yesterday?

Witness: It is.

Mr. Abbott: That's all. I have no objections.

Trial Examiner Ballinger: Without objections, Commission's Exhibit 106, for identification, is admitted in evidence.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT 106, was received in evidence.)

By Mr. Austin:

Q. Have you determined, Mr. Boatwright, what employes of the field accounting office use and fill out and turn in a form similar to Commission's Exhibit 106 at the end of the last month—or during the last month of each quarter?

A. All members of the accounting department payroll, with the exceptions mentioned yesterday; namely, the office manager and the assistant office manager and the credit man; all others do maintain that form.

Q. And is the information entered on these forms—or, perhaps, I might more correctly ask whether the forms themselves as filled out and turned in at the end of each quarter are used for the compilation of the quarterly distribution of time report for the accounting department, which is used, in turn, to allocate the salaries of the
4976 staff between channels during the following quarter?

A. Those forms are the basis which are summarized and the over-all ratio of the distribution of effort of the accounting department derived therefrom, which is then used in the allocation of the "office expense—salaries"—accounting" among the channels on Form 189.

Q. You say that the information on these forms is summarized. By that do you mean that the quarterly distribution of time report is a composite obtained by totalling the information on these forms as to time spent in channels?

A. It is.

Q. I note that there is one tank wagon channel here and there are not separate tank wagon reseller and tank wagon consumer channels. Will you state how the time percentages entered under tank wagon consumer and tank wagon reseller channels on the quarterly distribution of time report obtained from the figures on this report?

Mr. Abbott: Do you want to see the Exhibit?

Witness: That is not necessary.

A. Yes, I will explain that.

There is only one tank wagon channel shown. That is then charged to the clearing account we have referred to in the past, in this testimony yesterday, three thousand series. Having charged to the three thousand series, it
is then allocated between tank wagon reseller, and
4977 tank wagon consumer on the basis of the gallonage
through those respective channels.

Q. Then as I understand it, time which the employee spends on both tank wagon reseller and tank wagon consumer accounts, is entered on the column on the form, Commission's Exhibit 106, in the tank wagon column?

A. In the tank wagon column, yes, sir.

Q. I suppose it is hardly correct to call them channels on this form.

A. That's right.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

4978 Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Is the entire time of the employees using this form, Commission's Exhibit 106, during the last month of each quarter accounted for on this form?

A. Yes, sir.

Q. In other words, each employee, if I understand you correctly, enters on this form in one column or another all of the time which he devotes to company business during the last month of the quarter.

A. That's correct.

Q. Will you turn to Respondent's Exhibit 100, schedule 7-A—

Mr. Abbott: Pardon me just a minute, Mr. Austin. What page?

Mr. Austin: Which appears on page 76.

Mr. Abbott: That last question, when you said "employees," didn't you mean to restrict that to the accounting department employees?

Mr. Austin: I said all employees using this form.

Mr. Abbott: Well, I think it ought to—

Mr. Austin: That perhaps is incorrect if the form is used by other departments but I did mean accounting employees, yes.

Mr. Abbott: Well, I wanted that to appear defi-
4979 nitely on the record.

Mr. Austin: We had been discussing that department.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Have you that schedule before you, Mr. Boatwright?

A. I do.

Q. Are the various sub-departments in the accounting department listed on that page, Mr. Boatwright?

A. Several of them are.

Q. What is the first department listed?

A. The "Accounts Receivable" department.

Q. Now, just taking that sub-department as an example, will you state the amount of the salaries in that department which in this cost study have been charged to the "jobber, naphtha, and gasoline" business?

A. The charge to "jobber, naphtha, and gasoline" for the Accounts Receivable Department is $547.42.

Q. Can you tell me in what column or columns on the distribution of time form, Commission's Exhibit 106, that charge here to jobber, naphtha, and gasoline was entered by the employees in the Accounts Receivable Department at the time the expense was incurred?

A. It would be entered as a part of the tank wagon column on Commission's Exhibit 106.

4980 Your Honor, may I amplify that just a moment?

Trial Examiner Ballinger: You may.

The Witness: I think you will recall and I think that the attorney for the Commission will recall that I have stated that any of the direct shipment channel costs as we have now segregated it were spread throughout the various channels on our Form 189.

You ask me now whether that entire estimate may have been in any one channel. I don't know in fact that it was all in the tank wagon channel. A part of it may even have been in Other Methods. The reason I add that additional statement is that the time ratios as established based on the compilation resulting from maintaining what is now Commission's Exhibit 106 is that the time is distributed among the channels ignoring this particular jobber, naphtha, and gasoline as a separate component part of the allocation of time of the individual.

By Mr. Austin:

Q. Well, I asked you about, taking as an example the Accounts Receivable Department, and your first answer was that the expense of that department which has here been charged to jobber, naphtha, and gasoline was originally entered in the tank wagon column on Commission's Exhibit 106. Now, is that still your answer or do I understand you now to ~~qualify~~ that answer?

4981 Mr. Abbott: Just a moment, Mr. Austin. You don't mean that it is entirely charged to naphtha, gasoline, do you?

Mr. Austin: He said that it was charged on this form, Commission's Exhibit 106, at the time the expense was incurred. We are talking about where that expense was originally entered before there was any thought of a cost study or lawsuit.

The Witness: And as I recall your question, it was, do I wish to amplify the answer?

By Mr. Austin:

Q. No. I am not clear whether your subsequent explanation applied to your answer to my original question which was directed only to the Accounts Receivable department. Your original answer was that that expense went into the tank wagon column on the distribution of time form. Then you made an explanation which I understood to be more or less general. So I would like to ask you again whether that jobber expense which has been taken from the salaries of the Accounts Receivable Department and charged to jobber, naphtha, and gasoline in the cost study was originally charged to tank wagon column on this form?

A. I would answer that it may be in part in the tank wagon channel and in part in the Other Methods channel.

Q. Have you any way of determining what part went into which channel without getting out all of these forms and reviewing them or could you tell it even then?

4982 A. No, you couldn't tell it even then because, you see, the form as it is now set up and as you have a copy there in blank does not provide for a separate time factor. Therefore, I couldn't tell even then.

Q. This is a time form, isn't it (indicating)?

A. It is.

Q. And when the employee enters a certain amount of time in one of these columns, does he say what kind of a customer that time was spent on?

A. No, he does not.

Mr. Abbott: When you say "this" you mean Exhibit 106?

Mr. Austin: 106, yes.

Trial Examiner Ballinger: Mr. Boatwright, are the entries appearing on Respondent's Exhibit 100, page 76, actually taken from records or are they the result of some arbitrary allocation?

The Witness: No, neither is quite a correct statement, your Honor.

Trial Examiner Ballinger: Clear it up, please.

The Witness: In the first conference that I had with the accountants for the Commission, during which Mr. Austin was present, the question of the allocation of this account was discussed at quite some detail. We are looking at a problem in retrospect as we were trying to isolate it
4983 from the composite those expenses incident to a particular class of customer. I explained that the records in their then present form did not lend to a complete isolation. I did explain, however, that we had the number of tickets by these various classes of customers, and that we could establish a standard time performance for different parts of the accounting work. It was suggested that I establish a standard time for a period of two weeks.

At the end of the two weeks period we found that the first and second week standard time per ticket was almost the same. We feared that it might vary slightly if we took in the month and closing inasmuch as we started maintaining this record on the 11th. Therefore, we continued this record for a complete month to get the complete cycle of business.

Having determined the standard of time by these various types of tickets, we then counted the tickets and determined by the application of this standard the time for each of the various departments according to the standards established in the actual conduct of the work. Now, those standards are predicated upon the time period, as I recall, the dates from August the 11th through September 10th so as to give us a complete month.

That was outlined and discussed and, to the best of my knowledge and recollection, it was concurred in as being perhaps the best procedure that we could adopt.

4984 Mr. Abbott: Your testimony refers to 1941 when you say September and August?

The Witness: The establishment of the standards was based upon August 11-September 10, 1941. It was necessary because we could not go back and establish standards based on the prior year.

Trial Examiner Ballinger: Then this is not mathematically absolutely accurate but it is the best approximation that could be made; is that correct?

The Witness: Your Honor, I know of nothing in accounting that is absolute. Most anything that we do in distribution-cost accounting is the best that can be done when done conscientiously. I would say that this is the best approximation that we could prepare in such an analysis.

By Mr. Austin:

Q. Mr. Boatwright, in referring to certain conferences, particularly, I believe you referred to a conference in December, last December, you didn't mean to intimate, did you, that the procedure used in allocating the expenses of the accounting department or of any other department to the seven channels on Respondent's Exhibit 101 was approved or indorsed by any of the Commission representatives?

A. I did not mean that anybody told me that if we did
it in this specific way it would be acceptable. Following
the preceding hearings, you generously offered to
4985 consult with and to make available the services of
the accountants for the Commission. I merely utilized those conferences so that our work could be as completely in conformity with the desires of this particular complaint as possible and at the same time further enrich my own experience as to the procedure to be used.

I think it should be clearly understood, your Honor, that it was stated in all of these conferences that there was nothing done in any of them that was in any way binding upon any member of the Commission or upon the Commission. That was clearly stated and I would like it to be clearly understood at this point. But I did do this: I got all of the help I could while I was in those conferences.

Q. Well, it is also true, is it not, Mr. Boatwright, that at the conference in December, that was the first time that any of us at the Commission had seen Respondent's Exhibit 100?

A. Well, frankly, even at that time you hadn't seen Respondent's Exhibit 100 because at that committee meeting I had it in its preliminary form.

Q. Yes.

A. And I had it in the preliminary form so that if there were some points that the accountants would want or that you would want, that we could modify it; in placing
it in final form, Respondent's Exhibit 100 was in a
4986 practically complete form at that time but the copy
you have before you is changed in some few points in
keeping with the results of that conference.

Q. Now, it is also true, isn't it, Mr. Boatwright, that at the time of that conference the conclusions of the cost study had previously been offered in evidence and were then in evidence as of November 17th referring now to the ones that were withdrawn after the conference?

A. The conclusions were in evidence. The reason for the change was that in one of the conferences the request was made that we show the method of reconciliation, or I think the terminology as used was that we spell out the procedure. It was the spelling out of the procedure which resulted in the draft which is now Respondent's Exhibit 100, a copy of which you are referring to.

Q. And it was the spelling out of the procedure which led to the conference in December, was it not?

A. Yes. Following the spelling out of the procedure, which was left largely to my discretion or interpretation of what would be needed by the Commission and its accountants, I redrafted the conclusions and then in the conference which followed that I explained in detail the preliminary draft of the report which is now Respondent's Exhibit 100, so that we might all have an understanding
and at each schedule I was alert as to whether my
4987 concept of spelling out was adequate to meet the
needs of the Commission and its accountants.

Q. Wasn't the main purpose of that conference in December, as you understood it, Mr. Boatwright, to determine and talk over whether the spelling out had been done in sufficient detail rather than to discuss the correctness or incorrectness of any methods of allocation used?

A. Yes, it was to determine whether or not what we intended to introduce as Respondent's Exhibit was in sufficient clarity to make known to the Commission all details of the special cost analysis. We did not ask nor did the Commission accountants state at any point that this procedure or that procedure used is acceptable and, therefore, binding. That was not asked or requested nor was it ever stated. They were strictly informal conferences.

I might even add, your Honor, that I greatly appreciate the privilege of the discussion we had.

Q. Getting back to this quarterly distribution of time of accounting employees, do I understand that the portions of the salaries of those employees charged to direct shipment channels on sub-schedule 7-A of Respondent's Exhibit 100 were determined as a result of a time record which was kept for a month during August and September, 1947?

A. Yes, sir.

Q. And when that time record was kept, did the employees separate the portion of their time spent upon direct shipment account business? Perhaps I should say
4988 direct shipment accounts since we are talking about the accounting department.

A. Yes, they did maintain a record of the exact amount of time devoted to direct shipment business.

Q. Did the employee keep or was he asked to keep at that time any record of the column where he would have entered that direct shipment expense normally?

A. No.

Q. And if he had shown that, it would have been possible to remove the direct shipment expense directly from these channels, would it not?

Mr. Abbott: I object to that upon the ground it is purely hypothetical. The question is—

Mr. Austin: Well, unless the witness is of the opinion that that was something which was not practical to do, I think the question should be answered.

Trial Examiner Ballinger: The objection is overruled.

The Witness: I don't think it is practical.

By Mr. Austin:

Q. Don't you think that the employee knew where he would have put the expense of that time?

Mr. Abbott: I object to that.

Q. If he hadn't been keeping this separate account?

Mr. Abbott: Object to that on the ground that the witness couldn't know what the employee knew or 4989 thought at the time. That is what the question asks.

Mr. Austin: Well, the question involves the question of whether the employees of the company have a definite accounting procedure under company instructions. This is something in connection with the company books.

Mr. Abbott: Repeat the question and answer objected to.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Trial Examiner Ballinger: Objection is sustained, what the witness thinks.

Mr. Austin: All right.

By Mr. Austin:

Q. Mr. Boatwright, you have already stated that the entire time of the employee is entered on the distribution of time form, Commission's Exhibit 106?

A. Yes, sir.

Q. During the last month of each quarter?

A. Yes, sir.

Q. During each month in which this form is kept, the employees keeping it have to enter on the form the time spent by them on direct shipment accounts; is that correct?

A. The time spent on direct shipment—

Q. Pardon me.

Mr. Austin: Will the Reporter read the question?

4990 Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

A. Their time is on the report but not by separate classification.

Q. But they do have to enter that time on this report, do they not?

A. Yes, sir.

Q. Now, do not the accounting instructions of the company cover that question and direct or instruct the employee as to where that time is to be entered?

Mr. Abbott: Now just a moment. Object to that upon the ground that the instructions are themselves the best evidence of what they contain.

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

A. Not to my knowledge, sir.

By Mr. Austin:

Q. Then do you mean that whenever an accounting employee is keeping one of these reports during the last month of the quarter and he spends some time on a direct shipment account that he just enters it wherever he chooses?

A. That's to the best of my knowledge, yes, sir.

Q. Then is it your testimony that the accounting employees in dealing with such expenses have no instructions as to what to do with them when they enter that time on these reports?

4991 A. It is my testimony that I recall reading no such instructions. You are asking me, however, as to details of six volumes about two inches thick, and if that has to be answered accurately, your Honor, then I must reread those instructions. I recall no such instruction.

Mr. Abbott: Well, I renew the motion, if the Court please, to move to strike out all of the testimony relating to these instructions upon the ground that it now appears that the instructions are in writing, in a volume, and that it is inadmissible for counsel for the Commission to ask this witness to state what they are. If he wishes to do so, he may ask us to produce the book of instructions which is the best evidence.

Mr. Austin: I would like to recall—.

Trial Examiner Ballinger: The witness has disposed of the matter by stating that he has not the instructions before him and does not recall them with sufficient particularity to enable him to answer the question.

Mr. Austin: I would like to recall to your Honor and to Mr. Abbott that last Spring we were told by Mr. Boatwright and Judge Hanley here that they preferred not to produce the company's code of accounts and I certainly have no desire to ask to have the code of accounts produced and put into the record if it isn't absolutely necessary.

Mr. Abbott: You mean the instruction book?

4992 Mr. Austin: Yes, that is the code of accounts, as far as I know.

Mr. Abbott: Well, it is different terminology than I understood it to be.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Mr. Boatwright, if you are not familiar with the general practice of the company regarding the entry of direct shipment time on the accounting division quarterly reports, can you tell me what the practice in that respect is in the Detroit Field?

A. Well, our practice in that respect is uniform in all fields, Mr. Austin. I can tell you this, that we make no accounting as a regular cost procedure of time devoted to direct shipments. Inasmuch as we make no such accounting for the sales, our instructions are silent on that subject, to the best of my memory, not only in Detroit but in all fields.

Q. Going back to the example that we were considering, which is the sum of $547 charged to jobber, naphtha, and gasoline from the salaries of the Accounts Receivable—

Trial Examiner Ballinger: And appearing in Respondent's Exhibit 100, page 76.

4993 Q. —would any of that expense have been entered in the Automobile Supplies channel under the accounting practice of the company?

A. No, not to my knowledge.

Q. And is it your opinion that the greatest part of it was entered in the tank wagon column?

A. I can't say that. Our practice is just this: We have a group of clerks. These sales tickets go through and the clerks handle the tickets. They do not know whether this ticket represents a sale to a direct shipment customer, a jobber, a tank wagon reseller, or a tank wagon consumer, nor do they care; it is a ticket. And as it is a ticket, I don't know whether they would enter the most of it in a tank wagon channel or the most of it in the Other Methods channel, but it is just a ticket.

Q. Turning to Schedule 7-B on page 79 of Respondent's Exhibit 100, will you explain, Mr. Boatwright, why if none of the Accounts Receivable direct shipment expense was entered in the Automobile Supplies column part of that expense was deducted from that column in making adjustment of 189 channel.

A. Then a part must have been entered in Automobile Supplies channel.

Q. Well, Mr. Boatwright, weren't those deducted from the respective channels on 189 and made according to

4994 —made by quarters according to the quarterly percentages on the accounting department quarterly distribution time report?

A. Were the adjustments from the 189 made on a monthly basis based on the quarterly estimates of the accounting department?

Q. Yes. That is, when you decided how much of the direct shipment charge in the first column on Exhibit 7-B was to be deducted from each of the four channels including Automobile Supplies on Form 189, did you not apply the percentage, the ratio percentages for the same class of employees on the quarterly distribution of time sheets?

A. Yes, sir.

Q. In other words, for the accounts receivable you took the ratio of time in the various channels for accounts receivable on the quarterly distribution of time report—

A. We took the distribution of time for the accounting department and removed this determined direct shipment cost from the original 189 on the basis of its original inclusion in that form.

Q. Now, from that, it would follow that part of the time the accounts receivable department was spent on Automobile Supplies, is that right?

A. It does.

Q. But would it follow that any of the time of that department devoted to direct shipments was originally
4995 charged to Automobile Supplies?

A. I think that it might, for this reason: The Accounts Receivable or any of these other departments distribute the sum total of their time to these various channels on the Form 189, ignoring that portion devoted to direct shipments. Therefore, in the formulation of their time allocation, this small amount devoted to direct shipment may be absorbed in their record as to tank wagons, may be absorbed in part in Other Methods, may be absorbed in part in Automobile Supplies.

Q. How can the employee ignore time spent on direct shipment business if it is his duty to enter all of his time on this report?

A. He enters all of it on that report but that employee is not instructed to maintain a separate estimate of the time devoted to direct shipments. It represents such a small part of his total effort that it has not been deemed advisable or worthwhile to establish a set of records to maintain that cost separately in the past. It would cost us as much to maintain the records as would be shown on the records once maintained.

Q. Well, I wasn't suggesting that any separate records are kept or should be kept from the standpoint of the company or making any suggestion on that at all, but what I have in mind is a very practical question, it seems to me, Mr. Boatwright, and it is just this: That when 4996 one of your accounting employees spends so much of his time handling slips or accounts or whatever it may be in connection with the direct shipment customer and it happens to be the last month of the quarter, it seems to me that it is very natural to suppose that he will have to enter—in fact, you have testified that that time will have to be entered somewhere on this form, and it seems to me very natural to suppose that he might ask and receive instructions as to what to do with it.

A. He has no instructions as to what to do with it.

Mr. Abbott: May we take a recess at this time, your Honor? A five minute recess? May we have a recess for five minutes at this time?

Mr. Austin: I think so, yes.

Trial Examiner Ballinger: The hearing stands in recess for five minutes.

(A short recess was taken.)

4997 Q. Mr. Boatwright, the time of the asphalt products salesmen is devoted entirely to direct shipment business, is it not?

A. Yes, sir.

Q. And that is shown to be the fact on sub-schedule 1-B on page 18 of Respondent's Exhibit 100, is it not?

A. Yes, sir.

Q. The same is true of the candle salesmen and the white oil salesmen, is it not?

A. Yes, sir.

Q. And does it not also appear from schedule 1-B, Respondent's Exhibit 100, that all of the time of these salesmen was entered in the other methods channel in the preparation of the quarterly distribution of time report for salesmen?

Mr. Abbott: I object to that upon the ground that it merely asks that the exhibit be read and it is already in evidence.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Trial Examiner Ballinger: The objection is overruled.

Mr. Abbott: It appears right in column 4 of the exhibit.

Trial Examiner Ballinger: He may answer.

4998 A. The time of these sales representatives is charged one hundred percent to the other methods channel.

Q. So there are instances, are these not, Mr. Boatwright, in the accounting procedure of the company where direct shipment time is charged directly to certain of the channels on Form 189?

A. Now we are switching, aren't we, Mr. Austin? You say "in the accounting procedure". We are speaking, here, purely of salesmen and these salesmen do spend their time on other method products and their expenses for salary and other incidental expenses are charged to the other method. That does not mean that members of the accounting department separately keep records and books of sales of these individuals. Your question has to be answered no. It does not follow from one premise to the second.

Q. Well, I wasn't attempting to go to the second premise. I was simply asking whether where time or expenses are charged directly to channels, whether there is an accounting practice of the company as to the entry of direct shipment expenses in a particular channel.

A. There is an accounting practice and accounting instruction—I am sorry there are not accounting instructions. There are practices in the company where an individual spends his entire time on direct shipments and in his preparation of the distribution of his time by
4999 channels he indicates it a 100% in a given channel.
That is particularly applicable to these three classes of salesmen.

Q. Will you turn, please, to Respondent's Exhibit 99, Page 13? That page—or rather, the upper part of that page, refers to Account 070 E. L. A. Expense?

A. Yes, sir.

Q. Quoting from that page: "Equipment loan agreement expense is charged directly to the channels to which the cost is applicable * * * because no general prorata account is provided for this type of expense, no proration is made at the end of the month."

Does that mean, Mr. Boatwright, that all equipment loan agreement expense is charged directly to the Form 189 channels in the regular accounting practice of the company?

Mr. Abbott: Just a moment, if the Court please.

I think that where Mr. Austin put in the asterisks, that it separates the text so as to change the meaning of the quoted part and requires that the omitted part be included in the question.

Wouldn't you just as soon reframe that so as not to leave out the two sentences that are omitted?

Mr. Austin: I don't agree with you, Mr. Abbott, but I will take the witness' opinion on that.

Trial Examiner Ballinger: The Witness, in answering the question, may take into consideration, the entire text.

5000 Mr. Abbott: That is satisfactory.

A. E. L. A. expense is charged direct.

Q. Now will you turn, please, Mr. Boatwright, to Page 52 of Respondent's Exhibit 100 and will you state the amount of E. L. A. salary expense charged to jobbers, naphtha and gasoline?

A. The amount requested is $8.95.

Q. Now will you turn to Page 53, Sub-schedule 5-B, and can you tell me from that schedule where that direct shipment expense charged to jobbers, naphtha and gasoline, was originally charged in the regular accounting procedure of the company?

Mr. Abbott: You mean the item of $8.95?

Mr. Austin: Yes.

Mr. Abbott: I object to that question upon the ground, that the exhibit speaks for itself and is already in evidence.

Trial Examiner Ballinger: Objection is overruled.

Mr. Abbott: The figure appears on there and is not ambiguous.

Trial Examiner Ballinger: The objection is overruled.

A. I would refer you to the following page; namely 54, where you find the item of $8.95, the identical amount, under the tank wagon reseller channel. Therefore,—

5001 It also appears on Page 53, doesn't it?

A. Yes, sir. In both cases.

Mr. Austin: Now will you read my previous question?

Reporter: "Q. Now will you turn to Page 53, Subschedule 5-B, and can you tell me from that schedule where that direct shipment expense charged to jobbers, naphtha and gasoline, was originally charged in the regular accounting procedure of the company?"

A. The answer is it was charged originally to the tank wagon resellers channel.

Q. And can you state from the exhibit the amount of E. L. A. expense, salary expense, which was in this cost study charged to direct shipment other customers?

Mr. Abbott: I object to that upon the ground that the exhibit speaks for itself and is already in evidence.

Trial Examiner Ballinger: The objection is overruled.

A. $133.53.

Q. And can you tell me where that expense was originally charged in the regular accounting procedure?

A. In the original accounting procedure that account was originally charged to the tank wagon consumer channel.

Q. And what was the amount of salary expense
5002 E. L. A. which is now charged to jobbers other
products?

Mr. Abbott: Same objection; that it already appears on the exhibit.

Trial Examiner Ballinger: The objection is overruled.

A. $2.89.

Q. And where was that $2.89 originally charged in the regular accounting procedure?

A. Originally charged in the regular accounting procedure to the other methods channel.

Trial Examiner Ballinger: Mr. Boatwright, if you have any explanation that you care to offer, you may do so.

Witness: There is no explanation needed, your Honor.

By Mr. Austin:

Q. You have already testified that these E. L. A. salary expenses are direct entries to channels in the regular accounting procedure of the company, is that right?

A. Yes, sir.

Q. And bearing that in mind do not these figures which you have just read and as to the original allocation of which you have just testified indicate that the company's regular accounting practice where accounting instructions

call for a direct allocation of time or expense to
5003 channels is to charge time and expense in connection
with jobber gasoline, naphtha and refined oil business
to the tank wagon reseller channel, time and expense in connection with direct shipment consumer gasoline, naphtha and refined oil business to the tank wagon consumer channel, and time and expense in connection with direct shipment business in other products to the other methods channel?"

Mr. Abbott: Do you want the question read? Is that intelligible?

Witness: I think I got the import of the question.

Trial Examiner Ballinger: First you may state if you understand the question.

Witness: I understand the question to be do the accounting instructions provide that any E. L. A. expense incurred on jobber naphtha and gasoline should be charged to the regular tank wagon reseller channel.

Mr. Austin: No, that isn't exactly it, Mr. Boatwright. In the first place I asked you about the regular accounting practice, rather than accounting instructions and, in the second place, I referred, as the question shows, generally to accounts where there is a direct allocation of time or expense, the E. L. A. being only an example.

Mr. Abbott: I object to the question as originally propounded on the ground it is so long that it is unintelligible
and does not convey any interrogation which the wit-
5004 ness can be expected to answer.

Trial Examiner Ballinger: Does the witness now, in view of the explanation, understand the question?

Witness: I am afraid I do not. As I heard the question originally posed, and as I listened to its re-reading, it seemed to me that this statement was that the accounting practice and instructions—

Trial Examiner Ballinger: The objection is sustained. Counsel may restate the question.

Mr. Austin: Your Honor, my contention is that that question, at least when written out, is strictly intelligible to Mr. Boatwright and to every accountant in this room and I see no reason why it shouldn't be answered. I can't make it any clearer. I took some time to write that question out at length, which I don't generally do. To me it is perfectly clear and I don't know as much about the accounting procedure of the company as Mr. Boatwright.

When I said I think it is clear, I mean when written out and when Mr. Boatwright has a chance to read it. I am not saying Mr. Boatwright doesn't understand it—

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The question is withdrawn.

By Mr. Austin:

5005 Q. Is it not the company's regular accounting practice wherever time or expense is allocated directly to channels, to charge time and expense in connection with jobber gasoline, naphtha and refined oil business to the tank wagon reseller channel?

A. I don't know. I don't think that there is a regular practice in that respect, inasmuch as there is such a small amount of equipment furnished; not only in Detroit, but in any field; to any jobber account. I cannot testify that there is a general, accepted practice.

Q. Well, it does appear, Mr. Boatwright, in this E. L. A. account that the jobber gasoline and naphtha expense was allocated direct to the tank wagon reseller channel in Detroit, does it not?

A. Yes, that is indicated by this for these particular expense items and we ascertained that by tracing each expense item clear through the books and we know that in this particular case they were charged to these particular channels, but I couldn't testify that that is a general practice based on a sample of this magnitude. I just don't know.

Q. That was my question; as to whether your practice, which was evidently followed as to these direct shipment expenses in the E. L. A. account in Detroit, represent the general practice of the company in allocating time and expense direct to channels.

5006 A. I would say that my uncertainty as to that particular question would be such that if I were making a similar study in any other field in our territory and encountered any other E. L. A. expense, I would insist in that study, that we do exactly what we did in this study, namely, that we traced that particular expenditure clear through our books to find out where it was originally charged. In other words, I do not feel that there is a general practice sufficiently to accept it and base my actions accordingly. I would trace them, Mr. Austin.

Mr. Austin: I would like to ask now, whether the Respondent is prepared to produce the quarterly distribution of time reports for the accounting department used for allocation of time in 1940?

Mr. Abbott: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

We will have a recess for five minutes.

(A short recess was taken.)

5007 Mr. Hanley: If your Honor please, there having been offered and received in evidence a letter written by Mr. Austin to counsel for the Respondent dated January 24, 1942, the Respondent at this time offers in evidence what has now been marked, for identification, Respondent's Exhibit 103-A to C, both inclusive, which is the answer to Mr. Austin's letter.

(The letter referred to was marked "Respondent's Exhibit 103-A to C" for identification.)

Mr. Hanley: May I say, your Honor, that copies of that letter were sent to the Trial Examiner in this lawsuit.

Trial Examiner Ballinger: Any objection?

Mr. Austin: I object to it, your Honor, because the letters that I introduced were in the nature of a notice to produce, and any reply that the Respondent may have made prior to the hearing I think is immaterial, notice to produce being in effect at the time of the hearing, and I think that any reply to that should be and has been made on the record here.

Trial Examiner Ballinger: Well, in order that the record may be complete, the objections are overruled. Respondent's Exhibits 103-A, B, and C, for identifiction, are admitted in evidence.

5008 (The letter referred to, heretofore marked for identification "RESPONDENT'S EXHIBIT 103-A to C", was received in evidence.)

Mr. Austin: I move, your Honor, that we adjourn this hearing until, let's say, 9:45 tomorrow morning.

Trial Examiner Ballinger: The motion is granted and now, at 4:50 p. m., the hearing stands adjourned, to be reconvened at 9:45 o'clock, February 18, 1942, in Room 859 Federal Building, Detroit, Michigan.

(Whereupon, at 4:50 p. m. the hearing was adjourned to reconvene on Wednesday, February 18, 1942, at 9:45 a. m.)

5009

Room 859 Federal Building,
Detroit, Michigan,
February 18, 1942.

Met, pursuant to adjournment at 10.00 a. m., War time.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois; and Arthur J. Abbott, Esq., of the firm of MacMahon, Abbott & Roberts, 2230 Buhl Building, Detroit, Michigan; appearing for the Respondent.

5010

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing of docket No. 4389, in the matter of Standard Oil Company, is reconvened in room 859 Federal Building, Detroit, Michigan, at 10:00 a. m., Eastern Standard Time, February 18, 1942. The last hearing was in the same room in the same city, February 17, 1942.

You may proceed.

JOHN W. BOATWRIGHT resumed the stand and testified further as follows:

Cross-Examination by Mr. Austin.

Q. Mr. Boatwright, is there a tax known as the Michigan Privilege Fee?

A. Yes.

Q. Will you state generally what sort of a tax that is?

A. That is in the exhibits here. I will have to get the exhibit and refer to it.

Q. Have you any knowledge on that subject beyond what is stated in the exhibit?

A. No.

Q. If not, then I suggest that you refer to the page in the exhibit.

A. I shall.

5011 Q. That is at the bottom of page 93, Mr. Boatwright, I think.

A. I have that part of Respondent's Exhibit 100, page 93, referring to the Michigan Privilege Fee Tax. This tax represents a charge to the company for doing business in the State of Michigan and is based on the assets held in the State of Michigan.

Q. Is a part of that privilege fee charged upon the value of the River Rouge terminal?

A. Yes.

Q. Is any part of that portion of the tax charged to the Detroit Field?

A. Not in the marketing expense, no, sir.

Q. Not in this cost study or on Form 189?

A. It is not. That is purely a charge to the manufacturing department.

Q. In other words, the company makes a split with those taxes in such a case?

A. Yes, sir.

Q. And charge part to manufacturing?

A. Yes, sir.

Q. I would like to ask you a few questions about Commission's Exhibit 21, Mr. Boatwright; it is a card headed "National Credit Identification Card, Standard Oil Company, Indiana," and quoting from the exhibit:

5012 "This card may be used by customer whose name and vehicle license number are shown on face hereof in purchasing on credit merchandise manufactured or distributed by Standard Oil Company (Indiana) or by any of the within named companies, at any place of business reselling such merchandise; also for purchase of tire repairs, lubrication, battery service, and washing."

That portion of the printing on the card is read with particular reference to the statement that the card may be used by the customer in purchasing merchandise on credit at any place of business of the Standard Oil Company or any of the "within named companies."

A. Was your statement completed, Mr. Austin?

Q. Yes, except I would like to ask you to state on the record from the exhibit, if you can, what companies in your opinion are meant by the words on the front of the exhibit "the within named companies."

Trial Examiner Ballinger: Have you two questions?

Mr. Austin: This is the only question.

Mr. Hanley: If your Honor please—

Trial Examiner Ballinger: Haven't you two separate questions?

Mr. Austin: I don't think so. I think this is the only question I asked. I was just making a statement previous-
ly so as to direct the witness' attention to the sub-
5013 ject matter that I wanted to question him on.

Mr. Hanley: If your Honor please, that question is objected to because the exhibit is the best evidence of what the exhibit says.

Trial Examiner Ballinger: That objection is overruled.

By Mr. Austin:

Q. Subject to the notation on the front of the card, Mr. Boatwright, that "distributors may honor this card at their option" may these credit cards be used by the holders to obtain credit in purchasing petroleum products, automobile supplies, in any of the states listed on the back of the card at the outlet of any of the companies there listed?

A. Yes, provided the operators of the individual outlets honor credit cards.

Q. And if the operators of the individual outlets do choose to honor the card, does the Standard Oil Company of Indiana assume the responsibility for collection of the credit?

A. Yes, sir

5014 Q. Now, will you please explain what happens,
then, when a resident of Detroit is, say, in Chicago and purchases gasoline there, or where the same man may be in the east and purchases gasoline at one of the American Oil Company stations, say, in Washington or Maryland? How is that credit slip handled?

A. Well, the credit slip goes from the reseller outlet, the point at which the purchase was made, to the office of the respective supplying company, either Pan-Am, in the one case, or to the office of the Chicago Sales Division of the Standard Oil Company of Indiana, in the other.

If the owner of the car is a resident of Detroit and his account is held in the Detroit Office, the clearance of the ticket for that particular transaction is handled by interfield billing between the Chicago Office and the Detroit Office.

If the holder of the credit sales ticket is a supplier other than the Standard Oil Company, it is handled by an intercompany billing and forwarding of sales tickets to the original extender of credit.

Q. By the original extender of credit you would mean Standard Oil of Indiana?

A. Standard Oil of Indiana, yes sir.

Q. And where the ticket is held by a resident of Detroit
would the credit slip come back to the Detroit Office
5015 for collection?

A. It would.

Q. And is the expense of handling and collecting those credit slip charges incurred in territories outside the Detroit Field included in Account 208 or Account 200 in this cost study? I will broaden that question and ask you whether it is included and, if so, where?

A. It is a part of so many accounts, Mr. Austin, all of which are clearly explained in the manuscript of Respondent's Exhibit 100. A part of it is in Account 208 "Credit Information Expense."

Another part is in the Account 200, "Office Expense—Salaries" accounting.

Still another part of the total credit charge—or cost, rather, to the company, will be found in expenses of collection of bad debts, bad debts written off, and so forth. Any credit charge is likely to be a component part of several of the expense classifications.

Q. Does the Detroit Field also have some expense in handling and forwarding credit slips issued here on credit cards which are held by transients who reside in places outside the Detroit Field?

A. The only expense incident to credit card sales made by Standard Oil of Indiana outlets to holders of credit
cards issued originally by the supplying companies
5016 is the mailing expense of the credit sales tickets to
the original supplying company issuing credit.

Q. Does that also apply to Standard Oil Company credit cards where the holder of the card resides in Chicago or some other territory of the company? In your previous answer you referred to another supplying company.

A. That is the manner in which I understood your question. When you used the word "that", does that also apply—what is your antecedent of "that"?

Q. I mean that your only expense is for mailing expense of forwarding the card of the other supplying company. I asked you if that was also true where the credit card is also a Standard Oil Company credit card held by a resident, or presented by a resident of another field?

A. Do you mean does the only expense entering on the Detroit marketing cost statement incident to the credit card issued, let us say, by the Chicago Sales Division—

A. And honored here.

A. —and honored here in Detroit, amount to the postage of sending the sales ticket to the Chicago Division? That is the only expense incident to the credit transaction.

Q. Well, is there any other expense which is given rise to by the use of the credit card?

A. That's what caused my pause. Naturally, the vol-
ume that was sold constitutes a part of the volume of
5017 the Detroit Division and would be represented in
its regular bookkeeping functions, but expense incident to credit itself is limited to that postage expense.

Q. Yes. Well, I was really only referring to credit.

A. That's what I thought. That's why I answered as I did.

Q. Of course I understand that the expense of selling gasoline in Detroit through an outlet here, is an expense of the company. As a matter of fact, the expense of selling the gasoline to a credit card customer is an expense of the service station, isn't it?

A. Your statement is correct.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. I would like you to devote your attention for a moment, Mr. Boatwright, to the question of point-of-sale advertising, particularly signs, globes, banners, maps, display cards, and so forth, displayed or distributed at reseller outlets.

I think that you previously testified during these hearings that that sort of point-of-sale advertising including globes, and so forth, is supplied by the company to reseller outlets of its jobbers as well as to the reseller outlets served directly by the company, is that correct?

5018 A. I did so testify.

Q. And are the jobber outlets, meaning service stations, either supplied by the jobber or operated by the jobber, either one; are jobber outlets treated the same as to the distribution of the point-of-sale advertising by the company including identification advertising as service stations purchasing direct from the Standard Oil Company?

A. I know of no discrimination between the two types of outlets with respect to point-of-sale advertising.

Q. Are the globes, signs, maps, and so forth installed at the station or delivered by the company to the station direct, or is this type of advertising simply supplied to the jobber in a certain amount for his stations and then either distributed or installed by the jobber?

A. I couldn't answer that question. I could with respect to some parts of point-of-sale advertising, but as to all parts, I don't know.

Q. Well, the globes and service station signs are installed directly by the company, are they not, at the station?

A. Yes sir.

Q. And I suppose that if you say you can't answer the previous question in its entirety, perhaps you will as to certain things like maps and display cards of various kinds which, perhaps, might reach the station through the office of the jobber or might reach it directly; is 5019 that what you mean?

A. Yes. There might be a certain part of this point-of-sale advertising that would be furnished in total to the jobber supplying company who, in turn, might make the distribution. I don't know.

Q. But in any event, it is true, is it not, that advertising of the sort that we have just been discussing, is supplied to jobber outlets in substantially the same manner and quantities as it would be to retail outlets? Now perhaps I shouldn't insert the word "quantities," Mr. Boatwright, but the question is this: Does it make any difference whether it is a jobber outlet or a direct outlet in the supplying of this advertising? Would the treatment of the station be the same whether it be independently operated or supplied through a jobber?

A. I think the treatment would be the same whether served by tank wagon from one of the bulk plants of the Standard Oil Company, or whether served with Standard Oil products through a jobber distributor.

Q. That's a better way to put it. Thank you. I didn' think of the tank wagon, tank car description, for a moment.

And is it the duty of the advertising manager to supervise and direct the installation of point-of-sale advertising?

A. That comes under his jurisdiction, yes, sir.

5020 Q. And the maintenance of it; like replacing a globe or repairing a sign?

A. Yes, although your reseller salesman will report to your advertising manager any adjustment tha need be made on replacing a broken globe and the probabilities are that it will not even move through the advertising representative. The reseller salesman will merely report a broken globe at such and such a location. Tha report goes immediately to the Maintenance Departmen and a new globe is installed automatically.

Q. Nevertheless the installation and maintenance o that material is under the general charge of the advertising manager, is it not?

A. Oh, yes. It is his responsibility.

Q. And does he have the same duties with respect t advertising at the outlet supplied with Standard Oil gasoline by jobbers, as he does by the outlets served directl by tank wagon?

A. Practically the same responsibility. There is a slight difference. That is, his follow-up is not as close He anticipates and expects jobbers to report to him neede adjustments and they do so do. Having the report onc on his desk, he then follows through to see that the necessary maintenance is taken care of.

5021 Q. But aside from the question of the information reaching him or request reaching him for nev equipment or replacements, are his duties the same as t the installation and maintenance at both types of outlets

A. I think they are the same.

Q. Mr. Boatwright, will you turn to page 94 of Respondent's Exhibit 106.

A. I have the page.

Q. On the subject of death benefits, Account 525, th statement on that page is:

"This company makes payments to beneficiaries of active employees and employees who have been retired o annuity at the time of death of the employee."

Is it and and has it been the policy of the company to make a death benefit payment to every active employee or retired employee who dies?

A. It is and has been the policy of the company to make a death benefit payment to employees, either active or retired, on an annuity during the time period that I have been with the company. That dates from 1932, Mr. Austin. This plan was explained to me as I joined the employment of the Standard Oil Company in 1932. It was not new then. I just do not know how far back it was extended.

Q. You stated on pages 4466 and 4467 of the record that these benefits were not available to all employees and that each case is handled individually by the board of directors. 5022

A. The actual payment is subject to the approval of the board of directors.

Mr. Hanley: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: Would you like that statement on the record?

Mr. Austin: Yes.

Trial Examiner Ballinger: Then you had better ask a question.

Mr. Austin: Well, the question was asked by Judge Hanley. I don't remember what it was exactly.

Mr. Hanley: Do you desire that on the record?

Mr. Austin: I would like to have the witness repeat his statement.

Mr. Hanley: I asked him the question as to what the board of directors determined. I think I asked him if it was the amount.

Mr. Austin: Yes, I think that was it.

Mr. Hanley: And then he made his statement as to how this thing was done.

What counsel wants is to have you repeat that explanation.

The Witness: If you want in brief the scope of the plan, that can be stated briefly— 5023

Mr. Austin: Well, I would like to have you repeat just what you stated off the record.

The Witness: I shall. —namely, that the plan for death benefit compensation is printed and prepared in booklet form which is in the possession of the personnel director in various sales fields, and a copy of that plan is given to each employee of the company.

Now, the full benefits of the various plans the company has for its employees, including the death benefits plan, becomes applicable after one full year of service, and after that full year of service the plan is operative on all individuals.

By Mr. Austin:

Q. Well, what do you mean then when you said that each case is handled individually by the board of directors?

A. I mean that the funds are voted by the board of directors in each case. A death benefit payment is voted individually by the company and payment made thereafter.

Q. Does the amount of the payment depend upon merely the amount of the salary or annuity of the employee?

A. No. The amount of the payment is stated in the plan. The board—

Q. Well, I realize the length of service might also 5024 enter into it.

A. It does.

Q. But what I mean is, does the board of directors have some accepted or published, if it is, formula which it uses, or does it determine for each employee the amount of death benefit according to its feeling toward the employee?

A. Oh, no. It has a published formula which is stated in printed form, a copy of which is given to each employee when they become eligible to participate in the plan, but upon death the funds are voted individually by the board in keeping with the plan as announced.

Q. Is it your understanding, then, that all employees within the classification that you have mentioned here as active employees or employees on annuity who die during 1940 received—that is, that their beneficiaries received the death benefit payment voted by the board of directors?

A. That is my understanding.

Q. I would appreciate it if you could produce one of those books that you have just referred to, if those are in fact used and available here in Detroit.

Mr. Hanley: Do you mean the outline of the plan, Mr. Austin?

Mr. Austin: The outline that is distributed to the employees as Mr. Boatwright has described.

Mr. Hanley: On death benefits?

Mr. Austin: Whether it includes other things or
5025 not, I don't know.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Mr. Hanley: Well, on the record.

If your Honor please, we will be glad to supply what counsel has requested, but it seems to me that we are getting into a good deal of detail about it. Concededly the company does pay death benefits; concededly, they are a cost of doing business. As I understand it, the only question here is whether or not there is a proper allocation of those costs.

It just strikes me, your Honor, that it doesn't make much difference what the detail is; what the plan is or what it amounts to does, or, rather, are we right in the method of allocating that we have presented here.

We will furnish the information. We will do that.

Trial Examiner Ballinger: Well, that is desired by counsel for the Commission.

Mr. Austin: Yes. I don't concede that that is a proper cost of sale to the company. Unless I know the details, I think, at least, the details as to the method of payment would be important, Judge Hanley, to determine whether or not it is purely an additional form of compensation.

Mr. Hanley: We will get that information. I am not just sure at the moment whether it is available in Detroit
or whether we will have to ask for it from Chicago,
5026 but we will get it for you just as quickly as we can.

Mr. Austin: Well, of course, if some of them are distributed to the employees here and handed out right along, I suppose then that it would be easy—

Trial Examiner Ballinger: Further discussion is off the record.

(There was a discussion off the record.)

By Mr. Austin:

Q. Mr. Boatwright, at a previous hearing discussing the question of death benefits, I asked you how the amount of death benefit payments allocated to the Detroit field is determined by the general office, and you stated that you did not have that information, and would have to look up the instructions on that particular account. I wondered if you had done that, and if you can now tell me how death benefit expense is allocated between fields.

A. A death benefit charge in the Detroit Field is a direct charge for any employee in the Detroit Field. If the death benefit payment is made on an employee of the general office, it becomes a charge against that individual department, and then is allocated to the field as are the expenses of that department allocated.

Q. Well, would an expense of that type, that is, a death benefit paid upon death of an employee in the Chicago
office—you say that that is distributed to the fields
5027 on the same basis as the expense of the department
in which the employee worked, but when that expense is distributed to the field, would it appear in the death benefit account or would it appear in the expense of the general office account?

A. It would appear in the death benefit account.

Q. Then simply the method of distribution would be the same?

A. Yes.

Q. And if a retired employee of the Detroit Field dies after having been on an annuity basis for several years and his beneficiaries are paid a death benefit, is that death benefit charged to the Detroit Field?

A. May I simply restate your assumption to be sure that it is clear?

Q. Yes.

A. Assuming an annuitant based on years of experience in Detroit retires in Florida or California and spends the remaining years of his life there and then upon his death—

Q. Well, regardless of where he lives as long as he works here.

A. My point is he lives out of the Detroit area.

Q. Oh.

A. In some other area, his expense for death benefits would be charged to the Detroit division.

Q. And, of course, if he still lived in Detroit, the
5028 same would be true?

A. Oh, yes. Yes, the death benefit charge is predicated upon the point of his experience.

Q. Do you have any record here of what the death benefits were charged to the Detroit Field in 1940, how many payments there were and whether the deceased employees were active employees or annuitants?

A. We would have that on our worksheets. I do not have them with me. We have the dollar value. Would that be of interest?

Q. The dollar value is on the Form-189, isn't it?

A. Yes, but I understood your question to be the number of individual cases.

Q. Yes. Have you got that?

A. I do not have that with me, no.

Mr. Abbott: If your Honor please, I submit that that is wholly immaterial. It is a question of whether the allocation is proper, as I understand it.

Mr. Austin: Well, the question, Mr. Abbott, was only directed to determine if the witness knows it readily as to whether or not these deceased employees were annuitants or were they active employees?

Mr. Abbott: What difference would it make?

Mr. Austin: At the time they died.

Mr. Abbott: What difference does it make whether—

Trial Examiner Ballinger: The witness can't answer the question, so that is the end of it.

5029–30 Mr. Abbott: Well, I raise the objection that it is immaterial. I can't see how it is in any way material.

Trial Examiner Ballinger: Unless it is further insisted upon the question of materiality doesn't arise.

By Mr. Austin:

Q. Will you turn to page 92 of Respondent's Exhibit 100? You will note on page 92, Mr. Boatwright, a figure on the third line of $3,635.34 which is described as total salary charges to the jobber-gasoline and refined oil channel.

A. I observe the figure.

Q. How was that figure arrived at?

A. By a recapitulation of all salary items chargeable to jobber, naphtha, and gasoline, having first measured the proportion of that employee's time devoted to such sales activity.

Q. Have you the various items of salary which went into that item of $3,635.34?

A. Yes, sir.

Q. Can you state the amounts in various accounts going into that?

A. I could from my worksheet, sir. I could do that this afternoon. I couldn't do it right now. I don't have those worksheets with me.

Q. Where are they?

A. They are in the Detroit office.

5031 Mr. Abbott: Do I understand that you want him to do the mathematics whereby he gets the result of $37.45, Mr. Austin?

Mr. Austin: No, it is $3,635.34, which is the total of salary items going into various accounts and I want to know what the individual salary items are which were added up to make that total.

Witness: Mr. Austin, if that is to be requested in just that form would it be in keeping with your request if we didn't show the amounts by months?

Mr. Austin: I don't want them by months, Mr. Boatwright.

Witness: You will recall that all of this work had to be done by months.

Mr. Austin: Yes. At least it was done by months.

Witness: It had to be done by months, to do it accurately. Therefore, if your request is for an itemized breakdown of each component, contributing part of the amount $3,635.34 referred to, it would be of some assistance if we could furnish that either by years or by departments or in some recapitulated form rather than give—

By Mr. Austin:

Q. I thought that was the sum of—for instance, we are only talking about the jobber refined oil and gasoline column?

5032 A. Yes.

Q. And I thought that this was a sum of certain total annual salary figures going in the various accounts in that column, various items in that column.

For instance, up at the top it would be just the entire item or a number of accounts.

A. That part is easy. The more difficult part comes in the pulling out of the salary items of such accounts as E. L. A. Safety, Real Estate, and Tax, where we have both salaries and other operating costs thrown in the same account.

We have them segregated on our work sheets and they were segregated in recapitulating to get the total.

Q. So that I really didn't want it unless there was something you actually had on your work sheets.

A. We have it in total.

Mr. Abbott: How much of a job would it be to do it the way he wants it?

Witness: I don't know, without going back and looking at the work sheets, Mr. Abbott.

Trial Examiner Ballinger: Can't you pass this over, temporarily?

Mr. Austin: There may be other questions, your Honor. I assumed that the work sheets would be here. I think, in fact, without any request on my part, I think naturally 5033 in examining on the cost study it would be handy for the witness to have it at hand and, furthermore, I didn't leave it to conjecture; I asked in one of my letters, I think that is in evidence, to counsel for Respondent, that the work sheets be here and be available so the witness could refer to them.

Trial Examiner Ballinger: Mr. Austin, you hardly expected them to have work sheets on all of Respondent's Exhibit 100 in here, did you?

Mr. Austin: I don't know how voluminous they are.

Witness: Your Honor, I brought a suitcase and two portfolios full.

Mr. Hanley: If your Honor please, I think I may state, your Honor, that we do have the work sheets here. Am I right about that?

Witness: You are correct. I brought a suitcase and two large brief cases.

Mr. Hanley: They are at the office. They are very voluminous, Judge.

Trial Examiner Ballinger: You mean you have them in Detroit?

Mr. Hanley: Yes, sir, and we can produce them in the Court Room after the luncheon recess if—

Mr. Austin: Let us proceed. It is a little difficult to get this stuff back in its proper order but maybe 5034 we can find out what is needed and pass up a few of these things. If there gets to be too much of this, we may have to suspend, but I can go ahead at this moment. I don't think all of this is terribly important but—

Witness: May I point out that a work sheet will show a recapitulation but that it is made by comptometer operators who thumb through the work sheets and pick up items. It is not an itemization. If you request an itemization of the component parts, that has to be drawn off. It is not in the work sheets in any particular form.

By Mr. Austin:

Q. I don't know what you mean by component parts.

A. Stating the individual people who devoted some part of their time and their salary.

Q. No, I just wanted the salary figure in each account, Mr. Boatwright. Every account on Exhibit 101 has a number.

A. Yes, sir.

Q. And in certain of these accounts there are entries in the jobber naphtha and gasoline channels?

A. Yes, sir.

Q. And some are entirely salary and others aren't.

A. Yes, sir.

Q. All I want is the amount of salary entry in each one of those accounts in the jobber naphtha and gasoline channel. Just the amount in dollars.

5035 A. It could be furnished on some accounts with practically no effort. On other accounts it would require a segregation.

Q. But that segregation was made, was it not, for the purpose of arriving at this figure?

A. It was made.

Q. I don't want anybody's name or any division by months, or anything else; simply the amount in each account for the year 1940.

A. So that I may be clear: Is that a request that we do get such information?

Q. I would like to have it if it is readily available. By "readily available," I mean if the figures are actually in existence and do not require any computation; simply a matter of finding them on your work sheet. If that is ~~true, I would like to have them.~~

~~Mr. Hanley: Judge, may we go off the record just~~ a moment?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Could you take Exhibit 101, Mr. Boatwright, and by going through the accounts, the account titles on that exhibit, state by accounts whether all or a part of the expense entries in that account represent salary charges?

5036 A. All or a part.

Q. Yes. I would like to know what accounts are all salaries and what accounts are part salaries.

A. Yes, sir. I shall read, first, the account numbers and then I shall designate whether expense items entered thereunder are entirely salaries or included, as a part thereof, salary charges.

Account 000, salaries; 001, salaries; 002, salaries; 003, salaries; 004, salaries; 005, salaries; 006, salaries; 008, salaries; 021, purely compensation paid on a commission basis.

Q. I would like to interrupt to say that I really intended to include all compensation in my question. While I only asked you about salaries, I intended to include commissions, so if you will carry your answer along on that basis, I will appreciate it.

A. I shall continue on that basis.

Resuming: Account 024, compensation paid largely on a commission basis, although there is a small component part incurred in the form of salaries at salaried stations.

Q. What is the nature of the expense going into Account 024, Mr. Boatwright?

A. 024 is incurred where a station runs out of some given piece of merchandise. Let us say it runs out temporarily of Stanolind gasoline. Now it may be with-

5037 out stock there, for any number of reasons. At least once a year it will run out because they are cleaning the tanks.

During that period when the agent does not possess stocks of that particular merchandise he will haul from an adjacent station. For that hauling the company compensates him on the basis—in most cases, in Detroit, it would be .4 of a cent a gallon for actually hauling from the adjacent station.

On the other hand, we would compensate the agent at the bulk plant from which he received his supplies a small amount for loading the other agent's truck.

Q. Are those "B" agents, you are talking about now?

A. They may be "B" agents and that is why I say this is largely commissions.

There is, however, some of this expense incurred among salaried stations but because the tanks are larger—just a moment. That is in the exhibit. I will have to check it.

Trial Examiner Ballinger: While we are checking this, we will take a recess for five minutes.

(A short recess was taken.)

5038 Trial Examiner Ballinger: Proceed.

The Witness: I think at the adjournment we had just been discussing account 024. Is that not in keeping with your recollection?

By Mr. Austin:

Q. Yes, and I think the question was, or if not, I will ask it now: How much, if any, of the expense in that account represents other than payments to commission agents or commission drivers?

A. A very small portion of it.

Q. 1 per cent?

Mr. Abbott: If the Court please, I don't think that it is fair to ask him to guess at the percentage. I object to the question on that basis.

Trial Examiner Ballinger: If he has information that will enable him to fix approximately some percentage, the witness may do so; if he hasn't, he may so state.

The Witness: Well, I would say that it would be approximately 1 per cent, with the expectation it would be under rather than over.

Does that meet your request?

Mr. Hanley: If your Honor please, may the Respondent reserve the right to check if this thing is of any importance at all?

Trial Examiner Ballinger: You may.

5039 Mr. Hanley: May we have the right to check?

Trial Examiner Ballinger: You may and offer any corrective testimony.

Mr. Hanley: Thanks.

A. (Continuing.) Account 025: This is a rental paid to the owners of truck chasses compensated on a commission basis. It is not a salary item but it is a payment to employees for equipment furnished.

030: There is a small item of salary expense entering into this account which results from compensation paid to a driver of the manager's car.

031: No part salary.

032: No portion salary.

033: No portion salary.

045: Part salary.

046: Part salary.

047: Part salary.
048: Part salary.
053: Part salary.
054: Part salary.

Q. Would you pause there, Mr. Boatwright, and tell me whether the salaries going into those operation and maintenance of vehicle accounts are the salaries of the employees working under the superintendent of equipment?

A. They are the salaries of the mechanics working 5040 in the garage.

Q. And the machine shop?

A. It is possible that the machine shop might be called on to aid one of the mechanics on particular jobs and, if so, it would be in there.

Account 055: Part salary.
060: Part salary.

Q. Will you pause a minute, Mr. Boatwright?

A. Surely.

Q. On Account 055, what is the nature of those payments? That is a payment to commission agents, is it not?

A. Vehicle tank expense other than mounted on company chasses are expenses incurred by the company in maintaining a tank mounted on a chassis owned by the commission agent. We paint that tank; we maintain it as we do tanks on our own equipment. Therefore, salaries thus incurred would be entered in this expense account.

Q. I see. Then that is an expense, I believe, which you previously described as incurred only in connection with commission stations, but it is also true, judging from your present description, that the payments going into the accounts are not made to—they are not commissions or payments to the commission agent?

A. Your statement is correct, they are not.

Q. If you will restate that, if you can, you can do it better, I am sure, than I can.

5041 A. Yes. The items of expense entering into this account are incurred by and paid by the company and do not form any part of the compensation of the commissioned driver or employee.

Q. But they are an expense which is incurred only with the operation of commission stations or deliveries by commission agents; is that not true?

A. Yes, sir.

Account 060: Part salary.

Account 060A: Part salary.

060B: Part salary.

060C: Part salary.

061: No salary item included.

In future discussion of the individual accounts, the statement "none" will mean that no salary or commission cost is included in the account referred to.

061B: None.

061C: None.

062: None.

063: None.

064: Part salary.

065: None.

065A: None.

065B: None.

065C: None.

5042 066: Part salary.

066A: Part salary.

066B: Part salary.

066C: Part salary.

070: Part salary.

077: None.

078: None.

079: None.

080: No charge to this account was incurred in the Detroit Field during the year 1940. However that expens had it been incurred would have been possible to hav included there in a part for salary compensation.

Account 081: None.

082: Part salary.

083: None.

084: Part salary.

087: None.

088: None.

088A: None.

088B: None.

088C: None.

200: All salary.

209: Expense not incurred in the Detroit Field durin 1940.

5043 201: None.

202: None.

203: None.

204: None.

205: Part salary.
206: Part salary.
207: None.
208: None.
215: All salary.
216: None.
217: Part salary.
220: Part salary.
225: All salary.
226: None.
227: Part salary.
240. None.
400: None.
410: None.
431: None.
500: Part salary.
501: Part salary.
502: Could be part salary.
507: None.
508: None.
510: None.

511: None with respect to salaries of company 5044 employees: that is, compensation to non-employees in the form of fees.

512: Explanation given under 511 applies.

Account 075: Part salary.

5045 Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

A. (Continuing.) Salaries do not constitute any part of the following expense classifications: Accounts 100, 101, 102, 103, 106, 107, 228, 110, 110A, 110B, 110C, 111, 112, 112A, 115, 116, 086, 086A, 086B, 086C.

Account 243, Federal Insurance Contributions, are payments on salaries and commissions and represent, therefore, a component of the compensation of the employes of the company.

Q. Are those contributions under 243 and 244 deductions from salaries or are they contributions by the company over and above the salaries paid? I am not requesting, now, whether they are compensations; just the nature of the expense.

A. This represents the portion paid by the company; not that which is deducted from the salary of the individual.

Q. Is a part of the salary of the individual deducted for Federal Insurance contributions or for State Unemployment Insurance?

A. Yes, sir.

Q. And is that portion which is deducted included in these accounts or is that included in the salary accounts?

5046 A. That portion which is deducted does not appear in any place on the form 189 as an expense to the company.

Q. Well, if it is deducted the company pays it to somebody, doesn't it?

Mr. Hanley: Judge, if your Honor please, we have refrained from making objections to any of these questions but this question is just too argumentative.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The objection is overruled. You may answer that question.

A. As an individual my total salary would be shown in the proper account. As an individual I receive that amount of salary minus the proper deduction. The Form 189 reflects my full salary compensation.

The 1% that is deducted is forwarded to a tax-collecting agency.

I fear I misinterpreted your question as to whether that one per cent would then be entered in Account 243. No. It is in the salary account in which my compensation is entered because it is a cost to the company and, as such, should be classified with my salary.

Q. Thank you.

5047 A. Account 244, the same explanation as was given for Account 243, applies.

245: None.

235: None.

The following accounts include, in part, salary compensation:

250, 255, 260, 265, 270, 280, 290, 295, 503, 505, 506, 513, 514, 515.

Account 520: This is an additional form of compensation expended to the employee of the company, both those members on the salary payroll and those on commission compensation basis: 525, the explanation given above under Account 520, likewise applies.

526: None incurred in the Detroit Field during 1940 under present day conditions. This would represent a combination of salary and commission allowances.

Q. In connection, again, with Accounts 243 and 244, is the company required to pay the contribution to Federal Insurance or to Unemployment Insurance on the payments made to commission agents?

A. Oh, yes.

Q. Are those treated as salaries for the purpose of the laws under which these two types of payment are made, represented by Accounts 243 and 244, if you know?

A. Do you mean are the commissions treated as 5048 salaries in the company's thinking, or—

Q. No. Those are payments that you have to make under the law to the tax authorities?

A. That's right.

Q. Are those payments figured on commissions as well as on salaries?

Mr. Hanley: I was wondering if we might not save a little bit of time: We will concede, Mr. Austin, that the "B" station agents are employes of the company and we pay everything that we are obligated to pay by virtue of either state or federal law in connection with employes, and we pay that on "B" station agents.

Mr. Austin: Thank you, Judge. I wasn't clear whether the law covered a compensation paid in the form of a commission or whether the law applied only to employes on a salary basis.

Mr. Hanley: No. It does, Mr. Austin. A commission basis is just simply a different method of figuring compensation for an employee.

By Mr. Austin:

Q. That completes your answer on the various accounts as to inclusion of salaries?

A. It does.

Q. Will you turn, please, to Respondent's Exhibit 99, Page 20?

5049 A. I have the page referred to.

Q. At the bottom of that page there is a reference to accounts 243, 244 and 520. Account 520 is entitled what, Mr. Boatwright?

A. "Annuities and Retirement Plan Expense."

Q. And is it the company's regular accounting procedure to distribute the amount of expense going into this account for the Detroit Field, as between the channels on company's Form 189, according to the percent or proportion of the salaries in each channel, in the other accounts on Form 189, to total salaries?

A. Your statement was not quite complete, Mr. Austin. You said only salaries. We include salaries and commissions.

Q. Pardon me.

A. With that modification your statement is correct.

Q. And that appears in the text at the bottom of Page 20, does it not, in Respondent's Exhibit 99?

A. It does.

Q. Now turning to Page 92 of Respondent's Exhibit 100, does the last paragraph on that page state the method used to allocate a portion of the expense in Account 52(to direct shipment channels?

Mr. Hanley: Just off the record, please.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5050 Trial Examiner Ballinger: On the record.

A. It does.

Q. Why were not the total salaries in each channel or Exhibit 101 used as a basis for the allocation of the tota expense in Account 520 to channels on that exhibit?

A. That would have been an improper allocation, as I see it, in this particular case.

Now you will recall that we had different ratios applicable to different portions of the salaries. These ratios were applied to the salaries of the individual whose time had been measured. Then the percentage of time devoted to these particular channels was then applied to that portion of expense so determined.

Had we taken the sum-total of the salaries as our allocating factor, the probabilities are we would have reached a result which closely approximated that which is reported. I am not sure it would have been exact, however, because a part of the total salary would have been included at different percentage rates; thus, a man in a lower salary bracket would have applicable the two percent covering his entire income. A man in the bracket above that would have a different percentage factor applicable to his income and the application of these rates had to be based on the individual salaries and then because we had a distribution of effort of individuals receiving the salary, 5051 we applied that distribution of effort so that we could secure the allocation of this expense in keeping with the manner in which the expense was incurred.

You raise a question. I am not sure that it would change by any appreciable amount had the suggested means of allocation been adopted but the one that was adopted is an extremely accurate one.

5052 Q. Well, on the original allocation in the regular accounting procedure as shown on page 20 of Respondent's Exhibit 99, you state that you allocated this expense to channels on the basis of all salaries and commissions in each channel?

A. Yes.

Q. Now, my question was, if that is a proper method of allocation there and sufficiently accurate, it would have seemed that, if I may make this comment—correct me if it is not so—but it would have seemed to me that the same method could have been used for Exhibit 101, in fact, with a great deal more ease and perhaps a more accurate method than which you have described. My question was simply why was the one method used for the original accounting procedure and the second method used for Exhibit 101?

Mr. Hanley: Just a moment. I am sorry, your Honor, but I just do object to that question. It is argumentative.

Trial Examiner Ballinger: The objection is overruled.

A. Well, your statement that it could be done with a great deal more ease is your stumbling block, as far as I am concerned. The process by which we worked this out led to an automatic allocation which I contend was entirely proper.

Q. Is it true, Mr. Boatwright, that the method used 5053 for Form 189 in allocating this account between channels as described on page 20 of Respondent's Exhibit 99 was not used in the present cost study in making the allocation to direct shipment channel?

A. In allocating among the three direct shipment channels, the procedure was used not exactly the same procedure as is used in the allocation among the tank wagon reseller, tank wagon consumer, and the Other Methods channel on our Form 189.

Q. Now, referring again to the paragraph at the bottom of page 20 on Respondent's Exhibit 99 and to the statement that the charges in Account 243, 244, and 520 are allocated to channel on the basis of all salaries and commissions in each channel to total salaries and commissions for the corresponding month, can you tell me, Mr. Boatwright, what was the total of all salaries and commissions in each of the channels on Form 189 for 1940?

A. I can secure that. I do not have it with me.

Q. Well, that I would like to have.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. I would like to have the witness state whether
5054 those figures were not necessarily used in making the
computation which is described at the bottom of page 20.

Mr. Hanley: Is that something that doesn't appear in 189?

Mr. Austin: No, it does not.

The Witness: Is there a question pending?

(The question referred to was read by the Reporter.)

A. Yes, they were used, and in our illustration we used those which applied to the month of January.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Now, in your worksheets, Mr. Boatwright, do you have the figures for the total amount of salaries and commissions in each of the channels on Respondent's Exhibit 101? And before you answer that, I can recall your attention to the fact that as to the three direct shipment channels, those figures are already in the record. So now I am only asking you whether you have the total salary figures for the tank wagon reseller, tank wagon consumer, and the Other Methods, and Automobile Supplies channels on Exhibit 101.

If you are not clear as to what I am referring to: A moment ago I asked you for the total salary figures in

the various channels on Form 189. On Exhibit 101
5055 certain salaries were removed from the 189 channels into the direct shipment channels. We know the amounts that were removed. That is already stated in Exhibit 100, but I wondered whether the total remaining salaries in the original 189 channels were available or are available.

A. My only question is whether I have the dollar value or the ratio among channels. I couldn't answer that at the present time.

Q. Well, if you have that, I would like it; if you haven't, I will be satisfied with the totals on the original 189 channels which were the measuring factors in reaching the computations on Account 520.

A. I am sorry. Your antecedent again is not clear to me. By that do you mean ratios or do you mean the total salary items by channel use in our regular accounting procedure, to allocate these accounts among the three channels, tank wagon reseller, tank wagon consumer, and Other Methods.

Q. Yes. I mean the total salaries.

A. You mean the dollar value of salaries?

Q. That is right. The allocation is made upon dollar value, is it not?

A. Yes, sir. And by salaries, now, we both understand we are still including commissions?

Q. Salaries and commissions.

A. Thank you.

5056 Q. Mr. Boatwright, while we are on that, I understand you are going to look up those figures, and you just indicated that you might also be able to tell me the ratios or percentages of removal from the 189 channel to the direct shipment channel, so that perhaps if I had those by applying it myself we could find out how much salary is left. Is that a correct summary of what you intended to say a minute ago?

A. Well, I merely stated I wasn't certain which of the two I had in my worksheet. Naturally if we have the total dollar value, ratios are simply a process of calculation. You may have either then.

Q. Well, if you have the total dollar value of the salaries on the 189 channels, then the next thing would be to find out how much of those has been taken out so we would know what is left in the original 189 channels.

A. Oh, yes.

Q. So—

A. And that is clear in our Exhibit 100.

Q. Yes. Well, I don't know. Is it?

A. Yes, it is.

Q. Well, you know what I have in mind, anyway, right at the moment?

A. Yes.

Q. So I will pass over it.

A. Yes, I think I understand exactly.

5057 Q. Did I ask you for the total of all salaries and commissions in the Detroit Field for 1940?

A. I don't recall any such request.

Q. That is the other measuring factor mentioned at the bottom of page 20 on Respondent's Exhibit 99, is it not?

A. That is correct.

Q. So that I would like to have the total as well as the component parts that we have just discussed?

A. May I ask to be sure—

Mr. Hanley: May I clearly understand this? Is this a request now, Mr. Austin?

Mr. Austin: Yes, it is a request for certain material that I understand is in worksheets.

The Witness: I merely want to be certain that by your request you mean charged to the Detroit Field or you mean incurred in the Detroit Field. That is my uncertainty.

By Mr. Austin:

Q. I thought I meant incurred in the Detroit Field, Mr. Boatwright, regardless of whether it was paid from the general office or not but—

A. Well, that would still be an easy problem, but your question is for the sum total of salaries by channel, which would include in part my salary. I am on the general office pay roll.

Q. Well, in the allocations made for Account 5058 520 and 243 and 244, are any of the salaries included in the general office accounts used? Isn't this allocation one which we are here discussing made upon the basis of all salaries and commissions in the Detroit Field to all salaries in each channel or all salaries and commissions for the corresponding month?

A. I think that is entirely correct.

Q. I am glad you mentioned that because I see that it is not stated on page 20 of Respondent's Exhibit 99 as to what salaries are referred to; the exhibit simply says "all salaries and commissions in each channel to total of all salaries and commissions for the corresponding month." So I would like to have you state now what salaries and commissions are referred to.

A. That I shall have to get. I would have to check that. I can't answer that from memory.

Q. Well, do you know whether salaries and commissions paid to employees in Chicago and then allocated to the Detroit Field in part are included in the reference on this page as to which we are referring?

A. Again I should have to check.

Q. I think somewhere, Mr. Boatwright, in the exhibit —I won't attempt to turn to it at the moment—I think you stated that wherever general office expenses, which include all salaries, are charged to a field that that salary expense includes everything added on to it in the 5059 nature of insurance contributions, unemployment insurance, or annuities, and also such expenses as traveling expenses, depreciation of vehicles, everything assigned to or due to the work of that employee I understood was added in at the time the expense of that department was allocated to the Detroit Field. Can you tell me whether that is true as a general rule?

A. Your statement is substantially correct. Whether that conforms exactly with the terminology I used, I don't recall.

Q. Yes.

A. But I accept your statement.

Q. Wouldn't it follow from that, that none of the salaries of employees in the general office would be used as a basis for allocation of annuities and retirement plan expense in the Detroit Field?

A. Yes, Mr. Austin, it would, but when you stated your question you placed emphasis on the "all" salaries. That is very comprehensive.

Q. Well, "all salaries" is the term used on page 20 of Respondent's Exhibit 99. Now, I use it in the same sense that you used it in the exhibit. If that will clarify that—

Mr. Hanley: Is that a question?

Mr. Austin: It is an explanation, Judge, to the witness, in view of what I am asking him for.

The Witness: Well, the allocation factor on these accounts is determined upon the salary items as reflected on
the Form 189, but the mechanic who spends part of
5060 his time in E.L.A., part of his time in some other,
and part of his time in still another channel, we
won't allocate and follow each of those segments of his time to determine the allocation factor. The allocation factors are based upon the salary and commission expense classifications as revealed by the 189.

Q. And that is what you would be able to supply me, isn't it?

A. Yes, we would be able to.

Q. Why was none of the expense in Accounts 243, 244, and 520 charged to Automobile Supplies?

A. I don't know.

Q. All of the expense going into those accounts is determined by the amount of salaries or commissions paid company employees; is that correct?

A. Yes, sir.

Q. And is it not true that many of the employees of the company whose salaries are involved in determining the payments to be made in Accounts 243, 244, and 520 spend a part of their time on Automobile Supplies?

A. They do.

Q. Then do I understand that you have no explanation as to why none of the expense in those accounts is charged to Automobile Supplies?

A. The only explanation—

Q. Pardon me—following the distribution of sal-
5061 aries of the employees involved?

A. The only explanation that I could offer is that the general accounting department has not deemed that the salaries—the salary items chargeable against Automobile Supplies are of sufficient magnitude to change their allocation procedures.

Q. At the bottom of page 20 again on Exhibit 99, when the statement is there made that the charges in these three accounts are allocated to channel on the basis of all salaries and commissions in each channel to total of all salaries and commissions for the corresponding month, the channels referred to there do not include the automobile supplies channel?

A. No, I was referring to the petroleum products channels.

Q. Still referring to Account 520, annuities and retirement plan expense, page 92 of Respondent's Exhibit 100, we find a statement that under the annuities and retirement plan "2 per cent is applicable to the first $250 per month salary and 5 per cent is applicable to any income over that amount."

Are those amounts of 2 per cent and 5 per cent company contributions or are they deducted from the employee's salary?

A. They are company contributions.

Q. Is there any deduction from the employee's salary for the purpose of annuity and retirement plan similar to the deduction which you described a while ago for the payment of taxing authorities, Federal and unemployment insurance?

5062 A. Oh, no.

Mr. Hanley: If your Honor please, off the record.

The Witness: Wait a minute. I beg your pardon. I would like to correct that statement. There is a deduction from my salary as a contribution. You see, this is all handled through an insurance company, and the company pays part and I pay part. So there is a deduction from my salary.

By Mr. Austin:

Q. But is that deduction from your salary nevertheless included as a part of your salary on the accounting forms?

A. It certainly is.

Mr. Hanley: Judge, how is all of this line of examination material? May I inquire? What difference does all of this make?

Mr. Austin: It is directed to an inquiry into the propriety of using the expense in Account 520 as a basis for cost justification or a difference in cost between jobber customers and between marketing to jobber customers and tank wagon customers.

Mr. Hanley: So, if your Honor please, are we now to understand that the attack of the Government has shifted to an attack upon the primary method of the Respondent in keeping its books as reflected by the Form 189 which is kept and made up by each of the 27 fields of the Respondent? Is that the situation now?

5063 Trial Examiner Ballinger: Judge, I take it, that is a question—

Mr. Austin: Why, yes, Judge. I only object to the word "shifted" because I think that we are here confronted with Exhibit 101, a cost study, which involves seven different channels, four of which were on the 189 and three of which were not. I am just as much interested in what methods of allocation were used by the company as described in its Exhibit 99 as I am with those that you are describing in Exhibit 100.

Mr. Hanley: All right: I think I understand. The bait now centers on a three or four week study by the Commission of the oil business as against fifty odd years in the oil business by the Respondent.

Mr. Austin: Well, at the moment I am not attacking anybody. I am just trying to find out what these expenses are.

Mr. Hanley: This whole attack goes to 189, does it not, Mr. Austin? Let's just get it down so we know what we are talking about, please.

Mr. Austin: It goes to that equally as much as it goes to the allocation shown in Exhibit 100.

Mr. Hanley: Yes.

Mr. Austin: In other words, the two combined result in Respondent's Exhibit 101.

5064 Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Then, Mr. Boatwright, do I understand that the amount of $26,226.38 as referred to in that paragraph is entirely a company contribution over and above and aside from the salaries to the employees?

A. It is.

5065 It is what you have referred to here as a field expense, is it not?

A. That's right, but a field expense of that nature would be reported to the General Office and if paid to the General Office, this one receiver could be paid and then charged back to the field. I don't know who writes the check.

Q. I don't care who pays for it, either. The idea of it being a field expense—

A. It is a field expense.

Q. You also refer to a figure of $130,787.89.

A. Yes, sir.

Q. As a ‘‘General Office payment of past annuities and accumulation for future reserves’’?

A. Yes, sir.

Q. That figure is the amount charged to the Detroit Field only, is it not?

A. Yes sir.

Q. Will you explain what is meant by ‘‘payment of past annuities and accumulation for future reserves’’?

A. It is difficult for me to select terminology to more adequately describe that.

The company, in an annuity plan or death benefit plan, in part, and the employes in part, are accumulating toward a reserve for past services of employes of the company and we make payments into the fund of the insurance company to take care of the requirements the same
5066 as any insurance policy that I am acquainted with.

Q. Well, the two percent applicable to the first $250 and the five percent applicable to income over that amount is the company contribution which is determined by the amount of the company contribution which is determined by the amount of the salaries of the Detroit Field, is that right?

A. Yes.

Q. So that we have, there, a company contribution to the retirement and annuity fund of the company?

A. Yes sir.

Q. Now, in addition to that $26,226 which the company has paid into the fund, there is here described a much larger amount of $130,787.89. I would like to have you explain the difference between the so-called field cost and the so-called general office payment, and I would like to know what determines the amount of the general office payment?

Mr. Hanley: Judge, I am just wondering, while listening to this line of examination, if it would be of any interest to your Honor and to the Commission if you were fully informed as to what the— I don't know whether you call it the pension plan or retirement annuity plan or what it maybe—that is used by our company, and the method that is used in determining the annuities for the various individual employees?

Trial Examiner Ballinger: The Examiner does not
5067 understand for what reason the questions are being asked but I assume that they are being asked for

the purpose of establishing some basis for some attack upon the report submitted; that is, the survey submitted; and this is cross examination and if there is an objection, it is overruled.

Mr. Hanley: I am not objecting to the question at all, Judge. I am just hoping that I might be helpful. If that is important I would be glad to produce that sort of information. I am not objecting to this question.

Trial Examiner Ballinger: The witness hasn't yet stated whether he can give it now or whether it will be necessary for him to look it up.

Witness: Well, Mr. Austin's question, as I recall it, was what determines the magnitude of the general office portion of this account, is that correct?

Mr. Austin: Yes, that's right. I want to know all about, as Judge Hanley put it.

A. I couldn't give that to you and I think, as Judge Hanley has suggested, that it would be very much better for me to have at least available a copy of the plan so that I could make references thereto, as I do not recall all of the details thereof.

Q. Yes. That is simply stated here in this exhibit as a company contribution for past annuities and accumulation of future reserves and that doesn't indicate to
5068 me whether or not it is an expense which properly can
be used as a basis for this cost justification.

Trial Examiner Ballinger: Does counsel for the Commission desire that information?

Mr. Austin: Yes, I most certainly do. It is a large item and I don't know what it is.

Trial Examiner Ballinger: Can you look it up?

Witness: I don't know whether there would be a copy of the plan in the Detroit office, or not. I think there is. I could find out during the noon recess.

Mr. Hanley: I assure your Honor we can get it; whether it is in Detroit or Chicago. We will get it if it is desired.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: May I state that the Respondent expects to call Mr. Warmack on the Respondent's case and I assume he will be here. I just don't want to have to issue a subpoena. I would just as soon he be here.

Mr. Austin: He will be here when Mr. Boatwright gets through and I don't assume you will want him until Mr. Boatwright gets through.

Mr. Hanley: Oh, no. I want him when we reach him.

5069 Trial Examiner Ballinger: He will be available.

Mr. Hanley: Thank you.

Mr. Austin: I move that we adjourn until 2:30, your Honor.

Trial Examiner Ballinger: The motion is granted and now, at 12:45 P. M., the hearing stands in recess to be reconvened at 2:30 P. M.

(Whereupon, at 12:45 P. M., a recess was taken until 2:30 P. M.)

5070 Afternoon Session.

2:30 P. M.

Trial Examiner Ballinger: Come to order.

Mr. Hanley: If your Honor please, may I have the permission of the Court, and Mr. Austin, to interrupt? There are a number of requests for records and files that the Respondent has been requested for and I would like to supply those which we have ready at this time, if your Honor will allow me. I am just fearful if we wait too long we may overlook something.

May I proceed?

Trial Examiner Ballinger: You may.

Mr. Hanley: Just before the lunch hour it was requested the Respondent supply the formula for employees' death benefits plan and the formula for the retirement plan. I now produce the two documents referred to.

Yesterday there were requested by Mr. Austin completed forms of 189 for the Detroit Field for the years 1939 and 1940. If your Honor please, we are prepared to furnish those forms. However, it may be in your Honor's recollection that we did request that they not be made part of the record unless counsel for the Commission feels that it is essential that they be introduced in evidence. We have them and they may be examined by counsel but unless it is felt that they should be a part of the record, we

5071 just prefer not to have them as part of the record.

Trial Examiner Ballinger: The Examiner will pass upon that question when it arises, both as to the introduction of the forms or any of the contents of the forms.

Mr. Austin: 189?

Mr. Hanley: Yes. Your first request, Mr. Austin.

Mr. Austin: Yes, 189's for the Detroit Field.

Mr. Hanley: Detroit Field for 1939 and 1940.

Mr. Austin: I think it will be necessary to offer the 1940 form 189 and all the material on that form is in Respondent's Exhibit 101 and 100 at the present time, although not exactly so arranged.

As to the form for 1939, my present intention is or was simply to mark it for identification but subject to examination. I did not intend to introduce it in evidence. In other words, I didn't intend to offer it until after I had a chance to see it, and I think probably not then.

Mr. Hanley: Well, if your Honor please, we now produce and hand to counsel for the Commission the forms 189 for the years 1939 and '40, and I don't care to reargue the thing.

Trial Examiner Ballinger: Mr. Austin, will you step up here, and you, Judge?

(The Trial Examiner and counsel confer out of the hearing of the Reporter.)

5072 Mr. Hanley: Now, on the record.

Trial Examiner Ballinger: On the record.

Mr. Hanley: Request No. 2 by Mr. Austin refers to all contracts for the sale of gasoline entered into between the Respondent and Ned's Auto Supply Company covering the years 1936, '37, and '38 or any parts thereof together with any riders or amendments thereto, and copies of any correspondence relating to or modifying the terms of these contracts.

We are unable, your Honor, to furnish anything in response to that request for the reason that there were no contracts, so far as we know. I am told that there may have been what we call a Form 461, which is nothing except a requirements contract for gasoline, and if there was any such contract, I am told that it had no modifications in it at all. It just meant the sale of gasoline at the tank wagon price. The half cent off business which you are concerned with here was a purely oral arrangement, and we just don't have any written contracts and we just haven't anything that we can give in that respect.

Mr. Austin: May I ask whether the Form 461 contract with Ned's is available, if there was one?

Mr. Hanley: I don't know whether there was one or not, Mr. Austin. If it would be helpful, I would be happy to furnish a copy of the Form 461.

Mr. Austin: That is in evidence.

5073 Mr. Hanley: I am rather inclined to think it is.

Mr. Austin: But I rather assumed that if there was a contract it might have been on that form, when I made the request. Ned's at that time was a tank wagon station.

Mr. Hanley: Will you accord me the privilege of investigating the thing a little further? I just made the inquiry this noon.

The Witness: Judge, contracts of the 461 type after no longer effective are not retained in the files for any period of the magnitude of five years. We clean our files periodically. I don't know the exact accepted time in the Detroit area, but it would be very unusual to find the usual [illegible] contract of that type five years after its termination.

Mr. Hanley: If your Honor please, I will make further inquiry and if there is anything in existence in the way of a written contract with Ned's, the Respondent will produce it.

Trial Examiner Ballinger: Isn't it sufficient for the purposes of counsel for the Commission to understand that, if there was a written contract, it was on that form?

Mr. Austin: Perhaps so. If I can establish that, I think I ought to and I will try to establish that by testimony or by someone who would be familiar with it. I take it that Judge Hanley has made an inquiry but that he isn't

5074 too sure himself right now whether even the 461 contract existed, so that, of course, I would like to find out definitely, but I am perfectly satisfied with what Judge Hanley has said for the time being.

Mr. Hanley: I am just repeating, Your Honor, exactly what I was told at the office.

Mr. Austin: Yes.

Mr. Hanley: I just don't know any more about it than that.

Now, off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5075 Trial Examiner Ballinger: On the record.

Mr. Hanley: In response to the Commission's request number 3 relative to transportation contracts, the Respondent is now prepared to produce and does produce all contracts in connection with the request which have not been heretofore produced and received in evidence.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: In respect of Commission's request number 4 having to do with books, records and accounts showing the total amounts of the salaries of the employees assigned to each of the persons whose salaries are charged to Account 000 for the purpose of allocation to all channels on Respondent's Exhibit 101; in respect to that demand, your Honor, we, of course, do have the records of the salaries of individual persons, which salaries were used by Mr. Boatwright and his associates in making the allocation.

Our people just feel very reluctant to make these salaries a matter of public record. I have no objection at all to Mr. Austin or Mr. Warmack or anybody for the Commission checking the use that was made of those figures but it just does seem to me that every purpose in this suit could be served if these gentlemen would look at the figures and check them, without the necessity being imposed 5076 upon us of actually putting them into the record.

Trial Examiner Ballinger: Hasn't Mr. Warmack checked these accounts?

Mr. Austin: He has seen the figures used and, I think, checked the methods used and the account allocation on some of the accounts but I wouldn't want to put in any salaries through Mr. Warmack unless I could put them in through the Respondent's witnesses.

Trial Examiner Ballinger: Without putting in individual salaries could you not lump these three or four salaries and would that be objectionable, if introduced in that form?

Mr. Hanley: No, Judge, I have no objection at all to, say, putting in a total item of salaries and the factoring percentage which Mr. Boatwright used in the allocation. There is no objection to that.

I assume that the dispute, if there is any, here, arises on the question of how we allocated; not on how much any particular individual was paid; and we are perfectly willing to disclose to Mr. Austin or your Honor or anybody designated by the Commission, all of the figures that were used, but we just would very much prefer not to make it a matter of public record. The figures are all available.

Trial Examiner Ballinger: These salaries approach a
trade secret and if counsel for the Commission can
5077 obtain what he is after, without including in the rec-
ord the individual salaries, the Trial Examiner would
suggest that course be adopted.

Mr. Austin: I can't obtain what I am after, your Honor, nor can I properly analyze the account without knowing the amount of the salaries that go in it.

Trial Examiner Ballinger: Can't you, if you know the total amount of the salaries of the Detroit Field?

Mr. Austin: No.

Mr. Hanley: I am just afraid I haven't made myself clear—at least to Mr. Austin. There isn't any objection to Mr. Austin, Mr. Warmack and your Honor, or anybody from the Commission, looking at these individual salaries. If you want to know Mr. Raupagh's salary, or John Doe, or whoever it is, it is there. We will show you that. All I hope to succeed in doing is having that thing kept off a public record. The figures are there. Each individual salary is there and we will disclose those to you.

Trial Examiner Ballinger: Pass that item over, temporarily.

Mr. Austin: Well, your Honor, Judge Hanley was speak-
ing of Account 101 and that was not a request for indi-
vidual salaries, even though we have been discussing indi-
vidual salaries. The request in connection with ac-
5078 count 101 was for a grouping of salaries. In other
words, as I understand it, that the Account 101 in-
volves stenographic and clerical assistance to the employes
whose salaries are included in Account 000 and I asked for
a grouping of the salaries in 101 as they were assigned to
the supervisory employes for the purpose of allocation in
Account 101.

Mr. Hanley: That's another question and, if your Honor please, may I advert to that a little later because I am going to have help from Mr. Boatwright on that?

Trial Examiner Ballinger: You may pass that over.

Mr. Hanley: Number 5: a request has been made for information relative to the area served by the various tank wagon reseller salesmen in the Detroit area for the year 1937. I am just wondering, Mr. Austin, if you meant just what you said, there, or are you just concerned about these three—

Mr. Austin: Concerned about the three, but in asking for records I know of no way of getting information about the three without asking for all the records, but that's all I am interested in, in just these three salesmen.

Mr. Hanley: We are able to give you a very general picture of all of the records but we do have pretty specific information in relation to the three particular salesmen.

Mr. Austin: I much prefer that, Judge.

5079 Mr. Hanley: Then we are prepared to supply that.

In response to that request, your Honor, I now hand counsel a map of the Detroit Area which has on it certain red dots representing retail outlets upon which these three salesmen called and appended to the map is a list of the addresses of such outlets and a statement to the effect that in addition to calling on those outlets, they called on certain competitor stations.

Mr. Austin: That's very helpful, Judge. This, of course, is in connection with the 1937 cost study, Respondent's Exhibit 31-A to 31-Q.

Mr. Hanley: Number 6 is a request for the production of the Respondent's company Form 189 for each of the company's fields for the year 1940.

If your Honor please, we are prepared to produce that. That is a part of the company's records. Every month from every field, of which there are 27, a Form 189 is prepared. It is prepared just cumulatively through the years, so that December reflects the year's business in a particular field.

Trial Examiner Ballinger: The Trial Examiner understood that counsel for the Commission—correct me, if I am wrong in this—that all counsel desired was one item from each one of those forms. Is that correct?

Mr. Austin: That is correct, as stated in the letter 5080 of January 4th, which was put in evidence yesterday.

Mr. Hanley: If I may proceed, your Honor, I think we have it in that form. We have prepared a map showing the area in which our company, under its marketing operations, broken down into the areas of the 27 fields, and we have indicated on that map the particular figure which is the reseller channel cost of selling gasoline in each of those fields for the year 1940. We are prepared to supply that to the Commission, your Honor, and in so doing I wish to say that I think it is wholly immaterial and do not believe that it is pertinent at all, but—

Trial Examiner Ballinger: That question will arise when it is offered.

Mr. Hanley: —it has been requested and we are prepared to supply it.

The Respondent now hands to counsel for the Commission a map which reflects the total cents per gallon marketing cost for tank wagon reseller channel of the Respondent for the years 1939 and 1940 and attention is called to the fact that as reflected by this statement the lowest cost in cents per gallon for marketing under the reseller channel is the cost in the Detroit area, out of 27 fields.

A request was made for the advertising copy for newspaper and billboard advertising of the Respondent,
5081 your Honor.

We are prepared to supply the scratch sheets, or whatever they call them, copies at least, of whatever we used in the way of advertising. In supplying this file, if your Honor please, I request that we may have the opportunity to have Mr. Boatwright explain just what it means. I understand that everything we used in the way of an advertisement is here but I am not personally familiar with just how it may have been used.

Trial Examiner Ballinger: Is that the official file?

Mr. Hanley: I so understand, your Honor, that it is our office copy and our official file.

Witness: It is, your Honor.

Trial Examiner Ballinger: It will be understood that no portion of this file will be physically offered in evidence. Copies or photostats may be made and introduced. The original file will be returned to the Respondent.

Mr. Hanley: We greatly appreciate that, Judge. It is our official file. We don't want to strip it.

Now, your Honor, I reserved a question for Mr. Boatwright on this request number 4, relating to a breakdown of salaries, and before taking up the last request may I ask Mr. Boatwright to please explain what our position is in connection with that request?

5082 Mr. Austin: What request is that?

Mr. Hanley: Number four.

Trial Examiner Ballinger: Off the record.

(There was discussion off the record.)

5083 Mr. Hanley: On the record, please.

Trial Examiner Ballinger: On the record.

Mr. Hanley: It is now understood by counsel for the Respondent that the second portion of request No. 3 made by Mr. Austin has to do with certain freight bills for shipments made to jobbers named in the Complaint, and bulk stations in Detroit.

Am I right about that, Mr. Austin?

Mr. Austin: It relates only to tank car shipments to the four jobbers, because at that time the bulk stations of the company were being supplied by transport truck. This refers to 1939.

Mr. Hanley: If your Honor please, in respect to that particular request, I have to report that upon receiving it I made inquiry of our people as to what we could do in response to it; and just at the time we were talking we were in an office about 25 feet square, and the accountants told me that the records involved would fill one side of that office. I had in mind and I asked if we could not ship our freight bill records up here to Detroit so that Mr. Austin or whoever wanted to could take a look at them. I had a couple of trunkfuls in mind but they told me it would fill one side of the 25 foot office. The fact is, as it is reported to me, that our manufacturing and accounting department keep these freight records. They are kept by days;
5084 they are not segregated by customers or by locations but every day's freight bills throughout the entire territory in which we market come in for that day and may be three inches high or four or five or sometimes a foot high, and they just keep those in that way for the entire year. We just haven't any means of finding out what freight bills apply to any particular customer unless and until a detailed study is made of that whole group of bills.

Now, they are available and the Respondent makes them available to the Commission, but we haven't segregated them. We are unable to segregate them. We don't know exactly what Mr. Austin wants, but all of the freight bills are available.

Trial Examiner Ballinger: The Examiner recalls that counsel for the Commission offered in evidence purported copies of certain freight bills with a statement that they had been furnished by a representative or representatives of the Respondent to a representative of the Commission. Objection was made to their introduction by counsel for Respondent and the documents were at that time rejected subject to further proof.

Do these documents that have been called for or requested relate to the same transactions?

Mr. Austin: Yes, your Honor. At the time that I pro-

duced certain sheets which were attached to invoices origi-
nally and which was to be furnished by the Respond-
5085 ent, those were objected to by counsel for the Re-
spondent on the ground that they were not the best evidence, and I have got the references to that testimony right here.

In any event, counsel for the Respondent offered to get what he considered better evidence and produce it, and the purpose of the request was simply to call that to his attention and to ask the Respondent to produce evidence of the freight rates which they pay, which would be from their records and which would be satisfactory to them.

Mr. Hanley: Well, now, Judge, I am not just exactly sure what Mr. Austin wants, but if he were to specify them, I can assure you of this—I am repeating now what I have been told by my own accounting people—that it would take several clerks many weeks to extract those particular items from this great accumulation of records.

Trial Examiner Ballinger: The copies or purported copies which Mr. Austin offered in evidence indicate the date of the transactions, the dates of the transactions, and I assume that it wouldn't require a great amount of work to run those down.

Mr. Hanley: That is just a shipment or two, just one or two shipments.

Trial Examiner Ballinger: My recollection was it was five or six. Is that right?

Mr. Hanley: Well, there may have been.

5086 Mr. Austin: I think I offered six or seven of them,
and, furthermore, according to those forms the freight rate paid was the same, and I was under the impression, and just from those forms, from the group—I have a whole thick bunch of them—incidentally, I only offered six but Respondent gave us a whole book of them—that the freight rate was the same. If the freight rate was the same for the whole year, why, I don't see that it is necessary to go through so many records or to bring them, if there are sample freight bills for five months of the year, particularly if they show the same rates would be amply sufficient.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Mr. Hanley: May we go on the record, Judge?

Trial Examiner Ballinger: On the record.

Mr. Hanley: I think Mr. Boatwright has solved the quandary for us here. He tells me that it would be possible without too great an amount of labor, by tracing certain shipments through by invoice numbers, to pull certain sample freight bills out of this vast number that I have told your Honor about, and that that could be done in some reasonable length of time without the necessity of reviewing the entire volume of freight bills, and that it will serve as a check test of what we agreed to tell you are the freight rates that we paid. If that will be satisfactory, we will undertake that, your Honor.

5087 Trial Examiner Ballinger: Will that be satisfactory, Mr. Austin?

Mr. Austin: Yes, and then I can examine on those. I would like to have something before me when I put them in.

The Witness: Now, may I ask: You said you would want a sample. Would you designate the nature of the sample that you would like?

Mr. Austin: That would depend partly, Mr. Boatwright, on whether the rate varies. If the rate is the same or of very infrequent variation as to each one of the four jobbers, then the sample could be relatively small, and the least I would like to have would be some bills for each one—in other words, bills showing the rate on shipments to each one of the four jobbers and a bill showing each rate, if there was more than one rate charged to each jobber during the year. Now, if the same rate was charged for all four jobbers, during the entire year, that would only involve the bringing in of four freight bills, one of each jobber, and upon your testimony that those are representative of the entire year and that there was no change in the rate, I would accept it. If there were changes in the rate, then I would want different bills showing the different rates.

Mr. Boatwright: I see. So you want the sample to be representative in two ways: First, among the different receivers of the merchandise; second, over a period of time so as to detect any change in the published freight
5088 rate that may have been made effective during the
year '39. Now, that request is limited to the year '39; am I correct in my understanding of that?

Mr. Austin: That is correct. It is the year '39 but it includes all charges paid to railroads in connection with either the shipment of gasoline to the jobber or the return of empty tank cars, if there was a charge on that.

The Witness: There is no charge on that, Mr. Austin. It is just the shipment that has the charge.

Well, then, in keeping with that we shall select, let us say, two tank cars to each jobber on approximately the 15th of each month during the year and trace those particular units through, and by taking it at the 15th, you will notice that there is no bias. I am just taking any arbitrary date. Would that meet your purpose?

Mr. Austin: Yes, even one tank car on the 15th of each month.

The Witness: That's better.

Mr. Austin: However, there is this additional consideration: There are three kinds of gasoline and there are different types of tank cars. I don't believe that makes any difference in the freight rate, but I don't know.

The Witness: It does not.

Mr. Austin: I would like to have that checked so that whoever is on the stand when you introduce those can answer questions along those various lines of variation:
5089 the different grades of gasoline, and so forth.

The Witness: The different grades of gasoline go at the same rate. However, that will be completely checked and verified.

Mr. Austin: I have a lot of those other acknowledgments and invoices that relate, some to Stanolind, and some to Ethyl, and some to Red Crown, and they were divided up that way when given to us and divided for each period in the year according to price changes, meaning gasoline price changes.

The Witness: Yes.

Mr. Austin: And the ones that I introduced before were picked out at random to represent as many different situations as possible, so you might bear that in mind in following these through or, at least, be ready to testify as to any variations in rates due to different size of tank car or for any other reason of that sort.

The Witness: Yes, sir.

Trial Examiner Ballinger: Can't you pass on to the next item?

Mr. Hanley: I am not sure that it is clear before the Court, Mr. Boatwright, as to this request in connection with salaries, Account 000 and 001, if there is something that we are required to furnish there that I haven't sufficiently offered. I would like to have that explained.

The Witness: Well, frankly, I am not entirely
5090 certain on the question, as I read it, as expressed there,

and as I read the question as expressed in Mr. Austin's letter which is now Exhibit 104, because the statement in the letter, Commission's Exhibit 104, differs from this. Whether it is intentional that there should be a deviation or whether in the spoken language we didn't state it exactly—

Mr. Austin: There was an error, either typographical error or I made a slip of the tongue. I don't know which it was, but in the transcript you showed me a minute ago, where it says 000 it should say 001.

Mr. Hanley: They are both here.

Mr. Austin: In dictating to that transcript I did not intend to mention Account 000 at all.

Mr. Hanley: Oh, I see. Then it is a mistake.

Mr. Austin: This says "by that I mean." This is supposed to be an amplification of that first sentence, and where Account 000 appears here, it should be Account 001.

Mr. Hanley: Well, that may clarify a great deal. I don't know.

Mr. Austin: I explained that to Mr. Boatwright a minute ago.

Mr. Hanley: With that correction in mind, Mr. Boatwright, what have you to say about our ability to comply with item No. 4?

Mr. Austin: And also if Mr. Boatwright says that
5091 the request on the record is different from the request
under point seven of Commission's Exhibit 104, I would be glad to have him state where the difference lies or what he doesn't understand about it, if anything, because no difference was intended.

The Witness: Well, the difference was in the reference to the account numbers.

Mr. Austin: I see.

The Witness: Which do not correspond with those given in your letter, and that was my difficulty. I don't—or didn't know whether that was an intentional change of account designation or whether there was an error somewhere.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: In respect of request No. 4 as now modified to refer to Account No. 001, I am informed that our accountants are able to group certain salaries in line with the request without distinguishing any particular individual salary. The Respondent is prepared to make such a grouping and a disclosure not only of the grouping but of the individual salaries to counsel or accountants for the Commission, but would like the privilege of doing that without putting the individual salaries in the record.

Mr. Austin: Do you object to putting the group-
5092 ings in the record?

Mr. Hanley: No, we will put the groupings in.

Mr. Austin: May I ask a question of Mr. Boatwright?

Mr. Hanley: Surely.

By Mr. Austin:

Q. Mr. Boatwright, was it necessary for you to have that information about those groupings, segregations of those groups in Account 001 for the purpose of allocating the salaries or a part of the salaries in Account 001 to direct shipment channels in making your cost study?

A. It was necessary, yes.

Q. So that you have those groupings in your worksheet somewhere?

A. Yes, sir.

Q. And you can give me the groupings assigned to the supervisory official in each case whose salary was used as a basis for allocating the salaries of the employees under him?

A. May I alter your terminology?

Q. Yes.

A. Only to this extent: Where you say "whose salary was used"—"whose distribution of effort" so that we will be consistent throughout.

Q. Yes.

A. That can be done, yes, sir.

5093 Q. Well, may I ask you there: Just as an example, take Mr. Raupagh and assume a certain percentage of his salary appears in each one of these six petroleum product channels on Respondent's Exhibit 101. Now, would the salary of his stenographer be allocated between those channels according to the percentages of Mr. Raupagh's salary in the various channels or according to the hours of Mr. Raupagh, or would it make any difference?

A. It wouldn't make any difference.

Q. It would be the same thing?

A. When you are referring to salary, you are referring to the end. When I refer to the effort, I am referring to the means of arriving at that end, that's all.

Q. I see. Now, it is the same thing in this particular instance because of the fact that these salaries were probably uniform and in most cases only—well, I won't continue that except to ask you whether you agree whether these salaries or hours for this particular purpose would be material in the result reached?

A. The only object of my comment was so that the record would be consistent throughout and clearly understood in terms of the terminology used in the exhibits.

Q. Yes. Thank you.

Mr. Hanley: Now, if your Honor please, the only remaining request here, so far as I know, is that in relation to a demand that the Respondent produce books and 5094 records and files showing the gallonage of sales of Respondent in 1940 of each product sold through commission agents or by commission drivers, and so forth.

The answer, your Honor, to that inquiry, is contained in this group of files we sent up here (indicating). I frankly don't know whether there is any way we can give it to Mr. Austin other than to just let him struggle with the records that we have to struggle with. I just don't know. I just think it is good education for Mr. Austin to take a look at what we have been doing for two years.

I didn't do this thing in order to be dramatic at all, Judge, but that's what we have to do to answer these questions, and I don't know whether we can make any better answer or not. It is there. Those are the original records.

Trial Examiner Ballinger: Now, you refer to four large truckloads?

Mr. Hanley: Yes. I think I should say on the record that I am now referring to at least two truckloads of original records which Respondent has furnished.

Trial Examiner Ballinger: How about these over here (indicating)?

Mr. Austin: Mr. Boatwright, on that point, don't you have any existing records which show the amount of gallonage going into the tank wagon channels upon which commissions were paid to "B" station agents and drivers?

The Witness: We have records which do sum-
5095 marize and bring together the results of this group
of employees. We do not have the records quite
as in the form that you ask for them.

Mr. Austin: Did you know that the request on the record yesterday modified the request on Commission's Exhibit 104 to the extent that I did not now ask for the commissions paid on the per gallon basis on the various products? I only asked for the total gallons now.

The Witness: Frankly, I don't recall at the present moment the modified meaning of that.

May I go off the record for just a moment?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5096 Trial Examiner Ballinger: On the record.

We will have a recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Hanley: If your Honor please, in the statement I am about now to make, I wish to state by way of preface that I understand that Mr. Austin is going to make a modified request, but so far as the request itself is concerned now on the record the Respondent is unable to comply any further than the Respondent has complied by furnishing the original records that are here, physically present in the Court.

Trial Examiner Ballinger: Does counsel for the Commission desire to modify his request?

Mr. Austin: I would rather say explain it, than modify it, but I will restate the request, your Honor.

By Mr. Austin:

Q. Can you supply, Mr. Boatwright, the total gallonage of the various classifications of products sold through "B" stations or commission drivers entering into and accounting for the total commissions entered in Account 021 in the tank wagon reseller and tank wagon consumer channels and by classification of products I mean gasoline, naphthas, refined oils and tractor fuels. If there are any other classifications of products in those channels, I wish you would so state. Otherwise, that is the extent of the request.

5097 Trial Examiner Ballinger: Is this limited to the Detroit district?

By Mr. Austin:

Q. To the Detroit Field for 1940 and I am only asking for annual total gallonage in channels, not the gallonage by individual stations or by months.

A. The gasolines and naphthas would be a consolidated figure of the two classifications. Will that still meet your request? In other words, there may be some stove and lighting gasoline sold to a farmer to use in a gasoline burning lamp. That will be in the classification of gasolines and naphthas without showing separately.

Q. Before answering that may I ask you what percentage of the gasoline and naphtha classification would be naphthas in the gasoline tank wagon reseller?

A. It has always been small enough so that in our analysis and thinking on this subject it has been ignored. Does that meet your question.

Q. Yes.

A. Because that answer is true on a territorial basis. I think it is true of Detroit, specifically, although I couldn't testify to that extent but in our thinking the naphtha part of the tank wagon reseller channel is usually quite small and is so regarded.

Now in reply to your request, we can give you from 5098 the records of the company a summary of the volume which moved through tank wagon commission agents and drivers in the Detroit Field for 1940 by class of products for the full year, classified according to the channels of delivery.

Q. Can you, with equal facility, give the same figures for the tank wagon consumer channel and would any other products be involved if you did?

A. Well, in my thinking thus far I have not included the product Stanolex furnace oil which should be added in any consideration of the consumer channel. Likewise, a separate treatment of Standard tractor fuel should be given in that channel.

That information can be supplied from the record I have in mind.

Mr. Hanley: May I make an inquiry, your Honor?

Trial Examiner Ballinger: You may.

Mr. Hanley: Mr. Boatwright, would it be necessary to go into the detail of, say, Stanolex fuel oil and tractor fuel and these other products in order to make a clear picture of what Mr. Austin has requested?

Witness: I am just not sure how much Stanolex furnace oil or Standard tractor fuel may have been delivered by commission drivers to reseller outlets in the Detroit area which I infer from his comment to be one of the basic reasons for the request. It is quite small.

5099 Mr. Hanley: If your Honor please, I can explain both to the Court and to the witness what I have in mind.

Trial Examiner Ballinger: We will wait for the attention of counsel for the Commission.

Mr. Austin: How is that?

Trial Examiner Ballinger: We are waiting for your attention.

Mr. Hanley: If I correctly understand, counsel is not primarily concerned with tractor fuels and fuel oil and that sort of thing. I just am not sure, Judge, whether or not this computation or calculation or reflection of figures, whatever it is we are expected to furnish, can be done without giving consideration to those products. If it can be so done, I think that is the way we should furnish it. If it cannot be so done, I would just like to know.

Mr. Austin: May I ask the witness another question?

Trial Examiner Ballinger: You may.

By Mr. Austin:

Q. Mr. Boatwright, how is the gallonage distributed for the purposes of reaching the figures on your Form 189, the commission gallonage between tank wagon consumer and tank wagon reseller? Is that all a direct allocation based upon the reports of the commission agent as to the type of customer to whom he made the sales or is there at any point, either as to gallonage or as to dollars, any-
5100 thing other than a direct charge made as between those two channels?

A. No. Commissions are charged direct between those two channels which are predicated upon the compensation paid to the agent.

Q. And is the compensation paid to the agent between these two channels divided between channels at any time on a gallonage basis or on any other basis than the direct separation made by the commission agent himself?

A. No, the commission agent in making out the ticket and the sale automatically makes a separation between the channels.

Q. Then is there any point at which you reach the total amount of commission paid which would be partly in both channels and then you, in some method, or in which you determine, you allocate that charge between the two channels?

A. Not to my knowledge, there is no such point.

Q. In other words, do you determine what gallonage goes into each of those channels from the report of the commission agent himself and then figure your commissions from that point on?

A. Yes, sir.

Q. In the event I will withdraw my request as to the tank wagon consumer channel.

A. You want only, then, if I understand you correctly,
the breakdown of the volume by class of products
5101 delivered by commission agents and drivers as repre-
sented by the tank wagon reseller channel.

Q. Yes. The total for Detroit for 1940.

A. Yes sir. That can be furnished, sir.

Mr. Hanley: If your Honor please, I would just like to recapitulate and see if we know what our chores are, now.

As I understand it we are to furnish a check test on the freight bills, jobbers, in Detroit?

Mr. Austin: Yes.

Mr. Hanley: We are also to furnish certain figures in relation to commission sales which I will not undertake to restate, it having been stated by the witness and, so far as I know, that's all that the Respondent is now expected to furnish.

Mr. Austin: Wasn't that grouping of salaries in Account 001—

Mr. Hanley: Is that a different thing?

Witness: Yes, it is quite different.

Mr. Hanley: All right. Then there are three things; the two I mentioned and the grouping of salaries in Account 001.

Mr. Austin: Yes.

Mr. Hanley: Now may I inquire, Mr. Austin, just what
it is you want in the way of these transportation con-
5102 tracts? I have here a file which was procured in
response to your request and sent to Mr. Boatwright
by our Traffic Department and included in it is a group of exhibits that were photostated and introduced in evidence

in Washington. I don't know what else you want. If you can tell me, I will be glad to give it to you, but I just don't know what you want in addition to what you have.

Mr. Austin: I want the contracts with the transport truck haulers who delivered gasoline for you from your Marine Terminal to the jobbers' bulk plants. That was with a concern, I believe, called Ogden & Moffett.

Witness: I think it was introduced.

Mr. Austin: You asked for it at the time, according to your statement, from Chicago, and weren't able to get it.

Mr. Hanley: If your Honor please, may I ask the indulgence of the Court to take this file with us tonight and look to see what is deficient, here, and we will try to supply it.

Mr. Austin: My understanding is from what was put in evidence, those photostats were contracts which covered only the delivery of gasoline from your own terminal to your own bulk plant.

Mr. Hanley: You may be right, Mr. Austin. I don't know. If you will just give us over night to look at
5103 them, we will see.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: There was one more thing, Judge Hanley, that I don't believe you have handed me this afternoon, and that is those four quarterly distribution of time reports for the Accounting Department.

Mr. Hanley: I think we have them here. We got them out of Chicago last night.

Exactly what time distribution records did you request, Mr. Austin?

Mr. Austin: The reports used for allocation of the accounting employes' time in 1940, and that means the quarterly distribution of time reports for the Accounting Department, December, 1939; March, 1940; June, 1940, and September, 1940.

Mr. Hanley: That's exactly what we have, I guess.

If your Honor please, in response to the request of counsel for the Commission there is now produced by the Respondent and handed counsel for the Commission copies of distribution of time accounting method company schedule number 2 for the Detroit Field for December, 1939; March, 1940; June, 1940, and September, 1940 (handing documents to counsel).

5104 These are supplied as transcripts and are believed by the Respondent to be accurate but are offered subject to check.

Witness. May I modify that statement, Judge?

Mr. Hanley: Yes.

Witness: Those are the official records. That is not a transcript. These are official file copies.

Mr. Hanley: Well, I am just wrong, then, your Honor. I withdraw my remarks and qualify them by saying this is the official record of the company.

Mr. Austin: Now that the official record is here and Respondent has an opportunity to check it, if the Respondent has copies of these here, as we believe it has, perhaps the Respondent, having checked the copies and being sure of their accuracy, will be willing to supply copies for the purpose of offering them in evidence.

Mr. Hanley: If you let me have them over night, I will do that, Mr. Austin.

Mr. Austin: All right.

Mr. Hanley: I will be glad to do that.

5105 Mr. Austin: I would be perfectly willing, of course, to offer those, but Mr. Boatwright says they are original records and I assume that you would prefer to have copies made.

Mr. Hanley: I would just prefer to hand you copies if I may be permitted to do so.

Mr. Austin: Of course, as to any original records, if they should be offered in evidence, the Commission is perfectly willing to have photostats made in Washington and we would have them photostated and return the originals. I don't know whether that question will arise, but that is our usual procedure and I believe the Examiner will confirm that. We are always willing to do it upon agreement that a photostat may be substituted.

Mr. Hanley: We will supply copies of this:

Trial Examiner Ballinger: The Examiner has already announced the Commission's position with reference to that matter.

You may proceed.

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: Respondent has supplied counsel for the Commission with certain advertising copy which was used by the Respondent in the year 1940. Respondent is perfectly willing that counsel for the Commission shall
5106 examine the file of tear sheets and copies of whatever may appear in the file, and if the need arises, the same may be received in evidence, but it is the desire of the Respondent to keep that material out of evidence simply because it is thought it will encumber the record.

Now, off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: On the statement of counsel for the Commission that, in order to accommodate the witness Blaugh, he desires to examine him out of turn and before the Respondent has closed its case, counsel for the Respondent now states to the Court that there will be no objection to the examination of the witness Blaugh out of turn and that no advantage of any kind will be taken of the fact that said witness is examined out of turn.

Does that cover it, Mr. Austin?

Mr. Austin: Well, I don't think it does completely, Judge, because I have also called some other witnesses, and let's leave Mr. Blaugh out of it for the moment. I will stick to my word on him, in any event. If I don't put him on tomorrow, why, he can go and I will use somebody else.

Maybe this ought to be off the record, your Honor.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5107 Trial Examiner Ballinger: On the record.

Mr. Hanley: At the request of the Court the Respondent now states that the Respondent does not expect to put in any further testimony in connection with any phase of this case except possibly on the matter of cost accounting.

Trial Examiner Ballinger: And with that reservation your case is now closed?

Mr. Hanley: And Respondent expects to rest its case as soon as the Respondent has concluded its cost accounting testimony.

Will that serve the purpose, Mr. Austin?

Mr. Austin: Yes, I think it will.

(To the Reporter:) Will you read that statement back?

(The record was read by the Reporter.)

Mr. Austin: Then, Judge, it is my understanding from what you have stated that the Respondent will not offer any further direct evidence or redirect examination on any issue except that of cost justification until the Commission has concluded its rebuttal testimony?

Mr. Hanley: Yes, that is my present understanding.

Mr. Austin: In other words, you are reserving all rights of the Respondent to offer testimony in surrebuttal if the Examiner rules that the introduction of any such testimony is then proper.

5108 Mr. Hanley: If the Examiner thinks it is proper, we want to offer it. Of course, I am reserving that right, but I don't propose to call any witnesses, Mr. Austin, except—

Trial Examiner Ballinger: That question hasn't yet arisen.

Mr. Hanley: Except these jobbers on the advertising costs, and Mr. Warmack whom I will examine on the question of costs.

Mr. Austin: That is perfectly satisfactory, your Honor. Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: In view of the state of the record at noon, your Honor, I might clean up one or two odds and ends before we adjourn, if it is agreeable with you.

Trial Examiner Ballinger: I would be very happy to have you do it.

Mr. Austin: I would like to have these two booklets marked, for identification.

Trial Examiner Ballinger: The Reporter will mark the documents "Commission's Exhibits 107 and 108," for identification.

5109 (The booklets referred to were marked "Commission's Exhibit 107 and 108" for identification.)

By Mr. Austin:

Q. Will you please identify these two booklets which have just been marked for identification, Mr. Boatwright?

A. They are booklets.

Q. Take each one by number.

A. Yes, sir. Commission's Exhibit 108, for identification, is a statement of the retirement plan for the employees of the Standard Oil Company of Indiana, while Commission's Exhibit 107, for identification, is a statement of the employees' death benefits plan issued by the Standard Oil Company of Indiana.

Q. Do those booklets correctly state the practice and procedure of the company in connection with the payment of death benefits and retirement and annuity benefits, and do they also show—well, I will stop there and ask the first question before I add to it.

A. In answer to that question, each booklet in its turn explains the plan in detail under the title of the booklet.

Trial Examiner Ballinger: During what period of time were they effective?

The Witness: The revision date I think is on each of them; thus, retirement plan for employees of Standard Oil Company of Indiana became effective January 1, 1939, was revised September 1, 1939, and it remains effec-
5110 tive today.

The death benefits plan as outlined in Commission's Exhibit 107, for identification, was revised September 17, 1928, and remains in effect at the present time.

By Mr. Austin:

Q. Do these booklets contain information sufficient to permit a determination of the amount of benefits that would accrue to an employee under the one plan or to his beneficiary under the other plan in the case of death or retirement?

A. The Commission's Exhibit 107, for identification, does include a table on page 6 explaining the amounts by which the death benefits accruing to the credit to any individual employee with the passage of additional years of service is outlined.

Commission's Exhibit 108, marked for identification, explains the plan and the method of build-up of annuities for any participant of said plan.

Q. I notice in Exhibit 108, for identification, there are two pages here containing examples of how the plan operates and they are marked "Cancelled." Does that indicate that there has been some change in the method of operation of the plan since this book was issued?

A. I presume it does. I shall have to check whether those pages marked "Cancelled" are a cancellation of the example or whether they are a cancellation of any part of the plan. That I cannot testify to at the present time.

5111 Mr. Austin: I offer both of these exhibits in evidence, your Honor, as explanations of the nature of expense going into Accounts 520, and I think it is 521—no, 520 and 525 on Respondent's Exhibit 161.

Mr. Hanley: Both exhibits are objected to as immaterial and as encumbering the record, not properly directed in point of time within the issues in the pleadings and now being demonstrated to be inaccurate in so far as the ability of the witness is concerned to identify them.

Mr. Austin: I don't quite get what you mean about point of time.

Mr. Hanley: Well, he said one of them didn't fit except from January, 1939. Your suit is in 1937.

Mr. Austin: No, I don't think he did. If you recall, I think the Complaint was filed in December, 1940, and the cost study, in any event, is for 1940.

Mr. Hanley: You are right. I am thinking about a different lawsuit.

Mr. Austin: However, the witness did say that he wasn't sure about two of these pages that are marked "Cancelled." But I still would like to offer them in evidence subject to the right to correct them if the Respondent finds that any of the information contained here is not proper.

Trial Examiner Ballinger: The objection to Commission's Exhibit 107, for identification, is overruled, and

5112 the document is admitted in evidence.

(The booklet referred to, heretofore marked for identification "Commission's Exhibit 107", was received in evidence.)

Trial Examiner Ballinger: The Examiner withholds his ruling as to Commission's Exhibit 108, for identification, until the witness has an opportunity to check, at which time the offer may be renewed.

By Mr. Austin:

Q. Mr. Boatwright, there was one other question that was hanging fire this noon, and that was an explanation of the general office payment of $130,787 to past annuities and an accumulation of future reserves.

Have you had an opportunity to determine the nature of that payment and the way that the annual amounts of such payment are arrived at?

A. No, I have not. My entire period during the noon recess was taken in compilation of the other requests.

Q. Well, there will be, apparently, a period of probably rom now until Saturday, at least, during which you will not be on the stand and perhaps you will have an opportunity to get some information on those points in the neantime.

A. I am sure I shall.

Trial Examiner Ballinger: Is it necessary to have this on the record?

5113 Mr. Austin: I don't want it there particularly, your Honor, no.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: Your Honor, I move that the hearing be adjourned until 10:00 o'clock tomorrow morning.

Trial Examiner Ballinger: The motion is granted and, now, at 5:10 p. m., the hearing is adjourned to reconvene February 19, 1942, at 10:00 o'clock a. m., room 859 Federal Building, Detroit, Michigan.

(Whereupon, at 5:10 p. m. the hearing was adjourned to reconvene on Thursday, February 19, 1942, at 10:00 a. m.)

5114 Room 859 Federal Building,
Detroit, Michigan,
February 19, 1942.

Met, pursuant to adjournment at 10:00 a. m., war time.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois; and

Arthur J. Abbott, Esq., of the firm of MacMahon, Abbott & Roberts, 2230 Buhl Building, Detroit, Michigan; appearing for the Respondent.

5115 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing of docket No. 4389, in the matter of Standard Oil Company, is reconvened in room 859 Federal Building, Detroit, Michigan, at 10:00 a. m., Eastern Standard Time, February 19, 1942. The last hearing was in the same room in the same city, February 18, 1942.

You may proceed.

Mr. Austin: Mr. Blough.

Mr. Hanley: If your Honor please, before the witness is sworn, may I now offer to counsel the statement of the distribution of time reports which were requested yesterday? This has been verified now and we think it is accurate, Mr. Austin, and if you want to introduce it, if you will do so and get an exhibit number, I will hand it to our people because I have a copy here and I would like to get it into our record of exhibits.

Mr. Austin: Well, off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: There is only one other thing I would like to do, your Honor: I have here a chart which has been repared by Mr. Boatwright and his associates, which shows in graphic form the organization of our sales 116 department set up and also shows our accounting set up for the Detroit Field and all other fields.

I don't care to offer this in evidence particularly, if there s any objection. I am just perfectly willing to hand it o counsel and to the Examiner on the theory that it may e of some assistance in following what our organization is.

Mr. Austin: It might be of some use to me now in alking with Mr. Blough.

Trial Examiner Ballinger: Judge, if it is of use for the urposes that you have indicated, it may be of use to oth counsel, Examiner, and the Commission later.

Mr. Hanley: Well, that is my thought, Judge. I just lon't care to introduce it in evidence unless it is desired n evidence. I am just getting a little bit alarmed about the ize of the record, Judge, but I am glad to let you have it.

Trial Examiner Ballinger: Any of these exhibits that end to throw some light and clarification on the situation hould be introduced in evidence.

Mr. Austin: Well, are we on the record?

Trial Examiner Ballinger: On the record.

Mr. Austin: There is nothing pending. I don't see why we can't go off the record.

Trial Examiner Ballinger: Off the record.

5117 (There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

F. McK. BLOUGH was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. Will you state your full name and address to the Reporter, Mr. Blough?

A. F. McK. Blough, 138 Kirby Road, Grosse Pointe Farms.

Q. And what is your business, Mr. Blough?

A. Assistant Manager of the Detroit Division of Standard Oil Company.

Q. The Detroit Division is the division with its main office here in the City of Detroit?

A. That's right.

Q. Who is the manager of the Detroit Division?

A. P. A. Raupagh.

Q. How long have you been in the oil business?

A. October 1, 1922.

Q. And will you state what your experience has been since that time and what positions you have held?

Trial Examiner Ballinger: Have you been continuously employed by the Standard Oil Company?

5118 Witness: Yes.

Mr. Austin: He didn't say that he was employed by the Standard Oil Company in 1922, your Honor. At least I hadn't asked him that, up to the present time.

By Mr. Austin:

Q. Were you employed by the Standard Oil Company in 1922?

A. Yes.

Q. Then that was your first connection with the oil business?

A. Yes.

Q. And will you now tell us something of your experience since that time?

A. In the first five years I was with Standard Oil Company I was Superintendent of service stations and general salesman.

Q. Where, Mr. Blough?

A. Mankato, Minnesota.

A member of the sales promotion department, principally concerned with the promotion of sales of motor oil, refined oil, and gasoline.

For three years following July, 1928, I was sales manager of the Sioux City Division. For about three and a half years following 1931, assistant manager of the Huron Division.

Q. Where is that located?

A. Huron, South Dakota; and for slightly more 5119 than one and one half years, assistant manager of the Des Moines Division in Des Moines, Iowa.

From October, 1936, to date, an assistant manager in the Detroit Division.

Q. What was your title in the Detroit Division when you first came, in 1936? You said assistant manager, but was it assistant manager—

A. Reseller.

Q. Reseller.

A. Yes.

Q. And how long did you continue to serve the company in that capacity?

A. Until November 15, 1938.

Q. And did you then become assistant field Manager—wholesale?

A. Right.

Q. And is that your present position?

A. Right.

Q. Will you describe the duties of the assistant field manager—reseller?

A. My duties as assistant manager—reseller, in the Detroit Division, consisted of sales promotion, supervision of the sales promotion department pertaining to reseller operations, promotion of securing new business, super-
vision of reseller salesmen and such activities as
5120 would preserve the business we had in an orderly
fashion and to get new business in that channel.

5121 Q. Well, what is reseller business as distinguished
from other types of business?

A. Reseller business is business where we make a sale which is presumed to be for resale.

Q. What types of customers did you have to deal with when you just spoke about getting new business?

A. Dealers.

Q. Does that mean service stations, retail service stations?

A. Right.

Q. And what other classes of dealers?

A. Such other outlets as sell gasoline.

Q. Does that include the jobbers? They sell gasoline.

A. Yes.

Q. But it does not include the industrial consumers?

A. No.

Q. In other words, the reseller department has to do with sale to all resellers whether they be wholesalers or retailers?

A. In a measure, yes. That is particularly true in the sales of motor oil or greases; not so plain as that in the sale of gasoline because there are many units in the reseller department of our selling organization who make no contact whatever with the jobbers.

Q. But do the sales to jobbers come generally under the head of the reseller department's business?

A. Yes, they do.

5122. Q. Now, I will get into the question of salesmen a little later.

What are the duties of the assistant field manager, wholesale, as distinguished from the assistant field manager, reseller?

A. Well, the duties of an assistant manager, wholesale, consist primarily of the promotion of sales of our merchandise to accounts which, as the title describes, consume the products they buy. The assistant manager, wholesale, is not concerned with the sale of products which will be offered for resale. In addition to that, the supervision of personnel, policing of policy, such other general assistance as an assistant could give to the manager of the division within the channel which the title describes.

Q. What classes of business fall under the jurisdiction of the assistant field manager, wholesale?

A. Manufacturing, agriculture, are the two principal businesses, I presume which furnish our field for sales work.

Q. You said agriculture. Will you explain that?

A. The farmer is an important customer of the Standard Oil Company.

Q. Does the business through the "B" station fall under the assistant field manager, wholesale, or the assistant field manager, reseller?

A. The Assistant Field Manager, wholesale.

5123 Q. Well, that is at least in part a reseller business, is it not?

A. Yes. Yes, I presume that's true.

Q. In other words, there are reseller stations in the commission agents' territory?

A. That's right.

Q. But, nevertheless, does all of the commission agent business fall under the wholesale department?

A. The supervision of the "B" station agent is the function of the assistant manager, wholesale.

Q. That is your present position, is it?

A. That's right.

Q. In the position which you held in 1937 which was assistant field manager, reseller, what employees or classifications of employees fell under your supervision?

A. That portion of the sales promotion department which was regularly assigned to the promotion of sales and keeping of sales records for the reselling accounts.

Those salesmen known as reseller salesmen who called on that class of business. That's all.

Q. You mentioned reseller salesmen. The company has various classes of salesmen, does it not, such as industrial salesmen, and city salesmen, and agent salesmen, reseller salesmen, and so forth?

A. That's right.

5124 Q. And was the reseller salesmen the only class of salesmen under the jurisdiction of the assistant field manager, reseller?

A. Yes.

Q. Then do the other classes of salesmen which I mentioned, including "B" station salesmen, city salesmen, and agent salesmen fall under your supervision in your present capacity of assistant field manager, wholesale?

A. Yes.

Q. I would like you to give me in as much detail as you can a description of the duties of a reseller salesman.

A. A reseller salesman is charged with the responsibility for maintaining what our sales promotion department considers to be a reasonable sales record. Production based on quotas which are predetermined by the sales promotion department as being a reasonable estimate of what he can do in the immediate future for any given period.

Q. Is that what you refer to sometimes as "potential"?

A. Oh, no, no. No, that is a fond dream when you get the potential. We are talking about quotas.

He is expected through his customers to assist them in developing selling methods that may be valuable to them. He is charged with the responsibility of securing new outlets for our products. And I think that briefly describes the work of a reseller salesman.

5125 Q. What customers do they call on—or, I will change that question: What customers and what other people do they call on?

A. They call upon those accounts which lie within geographical limits which have been set up as being their territory. Those are people who are selling our goods. They also call on customers who are selling the products of other companies with a view toward soliciting their business in behalf of this company. In other words, inducing them if we find that account to be desirable in our set up—to induce them to take on the sale of our products.

Q. Would it be correct to say that they call on reseller customers of the company and prospective reseller customers of the company?

A. That's better stated than I did.

Q. I just wanted to be sure I understood you.

What class of salesmen call on tank wagon consumer customers?

A. Outside of—

Q. In the City of Detroit.

A. In the City of Detroit? City salesmen.

5126 Mr. Hanley: If your Honor please, may we have an objection to any questions relating to consumer purchases or consumer salesmen which will be general so I won't need to interrupt counsel in his examination. I object to that as being immaterial.

Trial Examiner Ballinger: A continuing objection to that line of examination is reserved to counsel for the Respondent.

By Mr. Austin:

Q. Does the reseller salesman spend any of his time calling on consumer customers?

A. No.

Q. I am perfectly willing to except, if there is such an exception, a case where an individual salesman may be directed to make a particular call at some time for a particular purpose, but I am talking about the regular course of—

A. The regular course of events—I answered with a little hesitation because some one might have a friend he would go to see, but in the regular assignments, the answer is no.

Trial Examiner Ballinger: In the ordinary course of business that is true, is it not?

Witness: Yes, sir.

By Mr. Austin:

5127 Q. You mentioned the city salesman. What type of customers does he call on and what products does he sell?

A. He sells gasoline, motor oil, greases, diesel fuel, calls on public improvement contractors; calls on transport haulers of various kinds, truckers; calls on some fleet accounts, "fleet" meaning fleets of trucks—

Q. You previously mentioned tank wagon consumer accounts, Mr. Blough, a moment ago, I think, you said that city salesmen call on them, too, is that correct?

A. That's right. These are tank wagon consumer accounts which I am listing now.

Q. Oh; I thought they were probably direct shipment accounts.

A. Some of them are.

Q. And some are tank wagon?

A. Yes.

Q. Did you complete your answer?

A. I don't know:

Witness: Maybe I had better hear it again.

Trial Examiner Ballinger: Read the answer.

Reporter: "A. He sells gasoline, motor oil, greases, diesel fuel, calls on public improvement contractors, calls on transport haulers of various kinds, truckers; calls on some fleet accounts, 'fleet' meaning fleets of trucks—"

A. (Continuing)—and any other consuming ac-
5128 count who has any use for our products.

Q. What are the duties of the "B" station salesmen?

A. First, to sell goods to the consuming accounts lying within his geographically outlined territory and, second, to supervise and direct the efforts and activities of those "B" station agents whose points lie within his territory.

Trial Examiner Ballinger: What do you mean by "B" station?

By Mr. Austin:

Q. You mean a commission agent, don't you, Mr. Blough?

A. Right.

Mr. Austin: I am only suggesting the answer because we have been talking in a certain terminology, here, that—

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Does the "B" station salesman then supervise the commission agent?

A. He does.

Q. And does the "B" station salesman call directly also on the accounts in the commission agent's territory?

A. I don't know what you mean by "accounts."

Q. Accounts; customers.

5129 A. He calls on the consuming customers.

Q. I see. And does he have to do with the sale of all of the petroleum products sold by the company? In other words, is his activity limited to particular products or what products does he sell.

A. He is responsible for the sale of any products which can be used in channels other than industrial or products for resale.

Q. Isn't it true, Mr. Blough, that you really have a greater range of products purchased by consumers than you do by resellers?

Mr. Hanley: Just a moment, Mr. Blough, please.

May it be understood, if your Honor please, that the general objection of Respondent to the materiality of this line of examination may apply particularly to "B" station agents. The fact is, Judge, that "B" station agents are concerned primarily with selling to consumers which hasn't a thing in the world to do with this law-suit.

Trial Examiner Ballinger: The objection runs to this entire line.

Mr. Austin: I am a little surprised at that statement due to the fact that there is quite a large entry in the tank wagon reseller column in the cost reports.

Mr. Hanley: Undoubtedly. Perhaps I should, in fairness to the Court and counsel, in view of my objection,
5130 say that the "B" station agent does supply the reseller accounts in his geographical territory but his job also encompasses really what amounts to a daily trip out, soliciting farmers to buy axle grease and insecticides, gasoline, and what have you. It is a consumer business job.

By Mr. Austin:

Q. Well, Mr. Blough, I was just trying to find out what the general duties of the "B" station salesmen were, as to the types of customers and types of products which he sells.

Now, the "B" station salesman is a consumer salesman, isn't he?

A. Right.

Q. And without going into how many products, he sells, all products which the company sells and which the consumer wants to buy, doesn't he?

A. With the exceptions I have noted.

Q. He has nothing to do with industrial accounts?

A. He doesn't call on industrial accounts nor does he call on reselling accounts.

Q. What salesmen call on the reseller outlets in "B" station territory?

A. The reseller salesman.

Q. Are there certain reseller salesmen assigned to certain "B" station territory?

A. Right. Let me qualify that: He is not assigned
5131 to a certain "B" station territory. He is assigned
to his own territory. It may overlap that of one, two or more "B" station salesmen. You asked the question whether he was assigned to a "B" station territory. He is not. He is assigned to a certain number of reselling accounts.

Q. Let us put it this way: Does he always work out of a salaried station or do these reseller salesmen who call on reseller outlets in "B" station territory work out of the "B" station itself, or—I know that wouldn't be true because the "B" station is a bulk plant. What I am trying to find out is who supervises the salesmen who call on the reseller accounts in the "B" station territory?

A. Their immediate supervisor is a man designated as a specialized salesman. He is a supervising salesman who works them under the reseller sales sales promotion department.

Q. In the Detroit Field office?

A. In the Detroit Field office.

Q. Take the reseller salesman in the City of Detroit. Would you say that they have headquarters in the Field Office or does the salesman have any headquarters at all besides sending in his reports?

A. I am not conscious he has any headquarters anywhere.

Q. That's what was troubling me. I assumed they were
under the direct supervision of the Field Office here
5132 in Detroit and I was wondering who the salesman
who worked around in the commission territory reported to, or where they reported, but perhaps they don't have to report?

A. They make identical reports with those men who operate in the city.

Q. I didn't mean written reports. I meant personal reports. I don't suppose they have to come in every day, or do they? Just try to tell me how these salesmen work who call on the reseller outlets in the "B" territory?

A. They have no springboard from which they have to take off every morning. They operate as a traveling salesman.

They are furnished an automobile. They go through the country from town to town calling on such accounts as come on their route, which is laid out for that week, that month.

They make a written report daily on their calls and sales.

They are supervised, as I said, by this specialized salesman who, in turn, is supervised by the sales manager—reseller, and his staff.

Q. And as far as reseller outlets are concerned, is the entire territory of the company divided up into salesmen's territory so that a salesman has his own territory
and own outlets to call on, whether it be in the city or
5133 in the country?

A. That is true.

Q. Could you give me any idea of the size of the territory covered by the salesman calling on the reseller accounts in "B" station territory?

A. By miles, or—

Q. Well, yes; if you can.

A. All right. I am guessing. Let us say a forty mile square; sixteen hundred square miles.

That could vary from something to something, but that is a good guess.

Q. And I suppose that that territory is very much larger than the territory assigned to a salesman in the city?

A. In mileage, yes.

Q. Is that true because the reseller outlets are more widely scattered in the commission agent's territory?

A. Yes.

Q. In other words, is each salesman given approximately the same number of outlets to call on, whether it be in the country or in the city, or does that vary, too?

A. That's the presumption, yes.

Q. Do any salesmen, other than reseller salesmen, call on reseller accounts in the Detroit metropolitan area?

A. You mean as to regular policy or regular assignment or could an accidental call or special—

Q. Regular assignment.

5134 A. No.

Q. Then, now going back to 1937, Mr. Blough, you will recall that Ned's Auto Supply Company was then a tank wagon reseller customer?

A. Yes.

Q. And at that time the salesmen calling on Ned's Auto Supply Company were under your supervision?

A. Yes.

Q. There has been some testimony put in this record referring to three salesmen named Robinson, Meulenberg, and Coutchie, who have, the testimony shows, called upon Ned's Auto Supply at different times during 1937. Do you recall those salesmen?

A. Yes.

Q. And were they the only salesmen who called on—whose duty it was to call on Ned's Auto Supply Company's stations in 1937?

A. Yes.

5135 Mr. Austin: I wonder if your Honor would permit a ten minute adjournment? I intended to bring with me that map and list of customers which counsel for Respondent handed me yesterday and I see that I haven't got it here. I think I will have to go and get it.

Trial Examiner Ballinger: The hearing will stand in recess for ten minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Austin: I would like to have this sheet marked for identification, please.

Trial Examiner Ballinger: The Reporter will mark the documents as Commission's Exhibit 109-A and B, for identification.

(The map referred to was marked "Commission's Exhibit 109-A" and the document referred to was marked "Commission's Exhibit 109-B" for identification.)

By Mr. Austin:

Q. Mr. Blough, I show you Commission's Exhibits 109-A and B, for identification. 109-A appears to be a map of the City of Detroit with certain marks on it and 109-B is entitled "reseller accounts in territory No. 65, Detroit, 1937."

I wish you would take these two exhibits, for identification, and explain the markings on the map and the
5136 relation of the list to the map and state what the list contains.

A. This map of Detroit has an outline of our 1937 reseller salesmen's territory No. 65, on which in red are spotted the accounts within that territory and the outlets of Ned's Auto Supply in the metropolitan area; and the attached list, 109-B, is a list of the reseller accounts in territory No. 65 called upon by the salesmen in 1937 assigned to territory 65, reseller.

Q. Were the five outlets of Ned's Auto Supply Company in 1937 outlets which were assigned to salesmen's territory No. 65?

A. Yes.

Q. And did the salesmen who were assigned to territory No. 65 during 1937 have the duty of calling on Ned's outlet?

A. Calling on Ned's.

Q. Without going into what their duties were, I simply want to know whether those salesmen were the salesmen that had the duty of calling on Ned's?

A. Right.

Mr. Austin: I offer this map and sheet marked Commission's Exhibits 109-A and B, for identification, in evidence.

Trial Examiner Ballinger: Without objection, it will be admitted in evidence.

5137 Mr. Hanley: There is no objection, your Honor, so far as the exhibit applies to Respondent's Exhibit 31 series. As to any other purpose the exhibit is objected to as being immaterial.

Trial Examiner Ballinger: Can it be limited to the purpose indicated by counsel for Respondent?

Mr. Austin: Well, it is offered as being material to the issue of cost justification in 1937. In other words, at the time that Ned's was a tank wagon reseller station and had a half cent differential is the point.

Mr. Hanley: Upon the statement of counsel the entire exhibit is objected to for the reason that it is not material in the case whether or not a half cent differential was given to Ned's or otherwise inasmuch as the same has been discontinued and any order the Commission may make would necessarily be prospective and not retrospective.

Trial Examiner Ballinger: The objection is overruled. ~~The documents are admitted in~~ evidence as Commission's Exhibit 109-A and B.

(The map referred to, heretofore marked for identification "COMMISSION'S EXHIBIT 109-A" and the document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT 109-B," were received in evidence.)

5138 Mr. Austin: Of course, I should think that if counsel for the Respondent contended that the issue of the one half cent differential in 1937 were immaterial, that then there would be no necessity for the Exhibits 31-A to 31-Q in the record.

Mr. Hanley: I don't think there is. To be quite honest with you, I just don't think that there is any necessity for them, but you changed us with them and I thought we would explain them to you. I don't think it makes any difference at all.

Mr. Austin: Of course the Commission feels it is encumbent upon it to meet the defense interposed upon that issue.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Mr. Blough, does this list of names and locations appearing on Commission's Exhibit 109-B represent entirely a list of reseller customers of the Standard Oil Company in 1937?

A. Those were all reseller accounts served by the Standard Oil Company in 1937.

Q. Does that list contain a list of all the reseller accounts which were assigned to Robinson, Meulenberg and

5139 Contchie, or any one of them during the year 1937?

A. Yes.

Q. There, again, I am speaking of the regular course of their duties.

A. Yes.

Mr. Hanley: Just a moment, please. Would you mind reading me the second question back?

Reporter: "Q. Does that list contain a list of all the reseller accounts which were assigned to Robinson, Meulenberg and Coutchie, or any one of them during the year 1937?"

By Mr. Austin:

Q. Was it the duty of any other salesman of the Standard Oil Company, reseller salesman, or otherwise, to call upon any of these customers?

A. Yes, the T. B. A. man may have called.

Q. What is the T. B. A. man?

A. A man who supervises the sale of tires and batteries. I think he is the only one I haven't named who might have called on those, although that was not a definite and regular assignment, that he should. He may have called.

Q. Was it the duty of any other salesman, or do you know of any time spent of any other salesman, in calling on any of these stations listed in Commission's Exhibit 109-B for the purpose of selling or promoting the sale of petroleum products?

5140 A. No.

Q. Mr. Blough, how does a reseller salesman spend his time at a tank wagon reseller service station selling Standard Oil products?

A. Well, he makes his call on the given station operator. On that day he may have a list of special duties, and probably does have. As he calls, it can open with the introduction of some new advertising material or thoughts.

Q. Would that be a list that he prepared himself or would it be a list given to him by a superior official?

A. It would be program which had been developed by sales promotion.

His first responsibility there, of course, is to get an order for some merchandise but—

Q. When you say "merchandise" do you include gasoline?

A. No. No; our salesmen don't sell gasoline, once an account has been established. They sell the idea of selling gasoline but as to continuing replenishment, our salesmen probably wouldn't mention that.

Q. What do you mean by "the idea"?

A. When he is soliciting a new account he sells the idea to that man of taking on our products, but once our products have made their entry into a reselling account, a reseller salesman spends little or no time talking about continuing deliveries of gasoline.

5141 Q. Well, what time does he spend in connection with sales promotion of gasoline, and—

A. That comes in in the promotion that he gives that dealer, that better use of our advertising and his tie-up with his actions by the advertising that we are currently running. Also with better service that he may give the customer, designed to sell that customer more gasoline; designed to make that customer come back when he might go elsewhere.

Q. When you say customer, now, you are speaking of the man who drives in?

A. I am speaking of the man in the car.

Q. Yes.

A. He may have seasonal programs to sell to a reseller customer, such as spring and fall change-overs.

He may be giving a man a sales talk stimulating him to more service which will get for him, and then for us, the sale of more greases, anti-freeze, motor oil—

Q. Try to direct your thoughts to gasoline as much as possible, although I don't want to exclude these other things.

A. I misunderstood your question, then.

Q. No, the question was as broad as you have answered it. That is all right. But in elaborating any further, I just want to keep your attention directed to gasoline, 5142 particularly as to sales promotional work.

A. Almost everything he does would tend to promote the sale of gasoline because if he was having a discussion with this reseller as to the advantages to the reseller in keeping a spick-and-span station, he presumes that that will have some indirect influence, at least, on the sales of gasoline.

Q. Are you familiar with what is called driveway training?

A. Oh, yes.

Q. Will you describe that, or have you already intended to cover it in what you have said? If not, you might give us a little more description of what is meant.

A. We have used a variety of driveway training. That, under the direction of a good salesman, goes on constantly, driveway training. Sometimes it is more formalized than that, however, by calling a number of dealers, asking them if they want to attend a driveway training school which may be given at some central point from anywhere from an hour to three or four days.

Q. Does the salesman conduct such a school when it is given?

A. The salesman ordinarily does not conduct the school but acts in the capacity of assisting whoever would conduct the school.

5143 Q. Who would be likely to conduct it?

A. It has been conducted by a wide variety of types of people; sometimes people from our general office, people from our sales promotion office, sometimes management of the field.

Q. I don't want to get too far afield on that. Let us get back, now, to the salesman when he is at the gasoline station. What do you mean by driveway training at the service station?

A. Driveway training is a program to develop a better selling technique on the driveway among the dealers.

Q. You mean their approach to and contact with the customers who come into the service station?

A. Exactly.

Q. Did these three salesmen, Robinson, Meulenberg, and Coutchie, in calling on Ned's Auto Supply outlets, in 1937, engage in any sales promotional activities at Ned's outlets?

A. Are you confining me, now, to any one product?

Q. No. You can state what their duties were in calling on Ned's stations; as far as you can recall them.

Let me ask you, first: Were their duties in calling at Ned's stations any different than when calling on any other reseller customers?

A. Yes, somewhat different, in that their work at Ned's
Auto Supply was almost entirely confined to the sale
of motor oils and motor greases. Their sales pro-
5144 motion on Ned's driveways was almost entirely con-
fined to the promotion of the sale of their motor oils
over Ned's driveways. All of those men worked very hard
at that.

Q. Is it your opinion, then, that these salesmen gave more time to motor oils and greases at Ned's than they did at other reseller stations?

A. Yes, I think so, for the reason—

Q. But in time, I mean, a greater portion of the time spent at the station?

A. I know that. That's right.

5145 Q. What sales promotional activities, if any, did these salesmen engage in, in calling on Ned's stations in 1937? Perhaps I should say there that it might have any connection with the sale of gasoline because you have already described certain activities in connection with motor oils.

A. I don't feel that they did anything to warrant the belief that they helped the sale of gasoline on Ned's driveways, not anything.

Q. Why was it that that sales promotional work was not done at Ned's and was done at other stations?

A. I think the principal reason for that was that Ned's felt that such driveway technique as they had, the difference between theirs and ours is not just clear to me, but they felt they were getting along all right on gasoline, didn't need our men to handle that, and the reason for the preponderance of time on motor oil was because we were so vitally interested in raising our ratio of motor oil at those stations, raising the ratio of our motor oil.

Q. You mean at Ned's stations?

A. Yes.

Q. Were there any other reseller customers of the Standard Oil Company here in Detroit in 1937 where the salesmen did not give driveway training?

A. Oh, yes. In the first place, driveway training was voluntary on the part of the dealer. Some don't yield very readily to direction as to their driveway work.

5146 Q. Is that optional then with any reseller station as to whether or not they will have the company salesmen give driveway training instruction?

A. Oh, yes.

Q. Do some of them say that they don't want it?

A. No, some of them don't come close.

Q. What do you mean by "don't come close"?

A. If they are invited to a clinic or a school or a program of driveway training and they object to taking it, there is no need for any fuss about it, they just don't come.

Q. I am referring to the work done with the salesmen. I thought we were talking about the activities of the salesman when he calls at the station.

A. I see. There is quite a difference in my experience in calling with salesmen on work of this kind to the reception given by the dealer. Some of them are very anxious to have their work guided; others are somewhat reluctant to take up new practice. Those who don't take it up, don't take it up.

Q. Does the company insist upon their submitting to the guidance, as you call it, of the sales representative calling on them?

A. No. We urge but we can't—there is a limit beyond which we can't insist.

Q. Well, does it ever happen that the station oper-
ator says that he doesn't want the salesman doing
5147 sales promotional work at his station?

Mr. Hanley: Is that a question?

Mr. Austin: Yes. I am asking if he knows of instances of that. He says it isn't done at Ned's. I want to know whether there are other places also where it isn't done.

Mr. Hanley: Will you read that, please?

(The statement was read.)

Mr. Hanley: Do you understand that, Mr. Blough?

The Witness: Yes.

Mr. Hanley: You may answer.

The Witness: You are asking me for an instance. I can't name an instance but I am sure that there are such instances. In other words, I know people who don't accept this but to set a date on which they refused it, I can't do that.

By Mr. Austin:

Q. I wasn't asking for the date, Mr. Blough, but I wanted to get a general picture of the practice in that respect.

Do you know of any reseller stations now where the company salesman does not engage in sales promotional work in connection with the sale of gasoline?

A. I am not that close to the reseller problem today.

Q. I see. And in 1937 if Ned's Auto Supply Com-
pany had desired the salesmen to engage in driveway
5148 training work at their stations or other sales promo-
tional work in connection with the sale of gasoline,
was that service available to them?

A. Through these men.

Q. You mean through Robinson, Meulenberg, and Coutchie?

A. That's right.

Q. So that if such work was not done, or, at least, if done at all, as I understand you to say—well, strike that.

Did I understand you to say there was little, if any, sales promotional work done by these men at Ned's stations in 1937?

A. I said on gasoline.

Q. On gasoline. And was that because Ned's Auto Supply Company didn't want it?

A. Ned's Auto Supply had their own routine and technique for the sale of gasoline and for filling motorists' automobiles and any help from us apparently was felt to be unnecessary. It was never solicited and in some approaches that were made by salesmen was rather discouraged.

Q. Just so that I am perfectly clear on that point, Mr. Blough, is it true that in 1937 it was the policy of the company to give through its salesmen sales promotional assistance at certain stations in connection with the sale of gasoline, but that at Ned's stations, and some other
stations, such sales promotional service was not de-
5149 sired and in those cases it was not given?

A. Right.

Q. Did Ned's various stores in 1937 each order gasoline direct from the Standard Oil Company?

A. Yes.

Q. Those orders were not then always submitted from the Grand River main office?

A. No.

Q. Then so far as the orders for and delivery of gasoline was concerned, those four stations were treated as separate tank wagon reseller customers?

A. No. No. That isn't the situation. The manager of the store or someone to whom he delegated that chore, if they needed gasoline at Jefferson and Manistique would call the Lycaste plant.

Q. And the Lycaste plant would then deliver—

A. The Lycaste plant delivered to Jefferson and Manistique but there—

Q. Well, that is ordering and delivering, is it not?

A. No?

Q. That is ordering and delivering, is it not?

A. They ordered and we delivered.

Mr. Hanley: If your Honor please—just a moment,
Mr. Blough—Respondent has no objection to the witness
answering as to the fact of how deliveries were made,
5150 but we do object to counsel trying to have the wit-
ness make conclusions as to law and facts on what
kind of deliveries were made. I repeat, we have no ob-

jection to the witness testifying as to how the deliveries were made or how the orders were given.

Mr. Austin: Well, that is all that was asked.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Mr. Austin: I am perfectly willing to withdraw the question.

Trial Examiner Ballinger: The question is withdrawn.

Mr. Austin: Will you read the previous question and answer?

(The record was read by the Reporter.)

By Mr. Austin:

Q. Do you have any further on that?

A. No.

Q. Did Robinson and Meulenberg and Coutchie during the respective periods in 1937, when they were assigned to this sales territory, call at all four of Ned's stores from time to time?

A. Yes.

Q. Turning to Commission's Exhibit 31-L, it is stated
that Robinson when he was assigned to this territory
5151 spent 35 per cent of his time at Ned's; Meulenberg
spent 25 per cent; and Coutchie spent 25 per cent.
Why did Robinson spend more time at Ned's than the
other two salesmen?

A. That's a difference of—

Mr. Hanley: Just a moment. May the witness see that exhibit, please? I don't think he ever saw it in his life until now.

Mr. Austin: Yes.

Trial Examiner Ballinger: The exhibit will be shown to the witness.

(A paper was handed to the witness.)

Mr. Austin: Well, let's see. That one is marked up a bit. I don't think there is anything there that—maybe I ought to give you the original, then, there won't be any question (indicating).

There it is right there (indicating). "Robinson spent 35 per cent at Ned's and Coutchie 25 and Meulenberg 25."

By Mr. Austin:

Q. Are you prepared to answer?

Mr. Hanley: Just a moment. May we have the question?

(The question referred to was read by the Reporter.)

Mr. Hanley: That is objected to because it does not appear the witness has ever testified to or determined 5152 any percentages of time that any salesman spent at Ned's and he cannot distinguish between percentages as between one or the other until and unless he has determined basic percentages which it does not appear in the record that he has ever done.

Mr. Austin: In answer to that, your Honor I will just quote from the exhibit itself, where it says:

"It was estimated by Mr. Raupagh and Mr. Blough that Robinson spent 35% of his time at Ned's, of which 7% was on gasoline. Meulenberg spent 25%, on which 5% was on gasoline. Coutchie spent 25%, of which 5% was on gasoline."

Mr. Hanley: If your Honor please, Mr. Austin, I am sure, is quoting correctly from the exhibit which the Respondent has offered and we did offer it and we are bound by it.

Mr. Boatwright and his associates prepared it and the Respondent is bound by it.

I do, however, submit that an individual witness like Mr. Blough, who never saw this exhibit before in his life, is not entitled to be interrogated about those percentages.

We haven't any objection at all to Mr. Austin's inquiring as to what Mr. Blough knows about the amount of time that these salesmen spent at Ned's Auto Supply 5153 company but it is just obviously unfair to ask Mr. Blough whether 25% or 30% of their time is a proper allocation. He just doesn't. That's obvious, of course.

Mr. Austin: If I could accept that, your Honor, I would move to strike the entire exhibit from the record but I am afraid I can't accept it unless Judge Hanley wishes to bind the Respondent on that statement, because these estimates having been made by Mr. Blough, it is beyond my comprehension why I can't question on them.

Mr. Hanley: I don't know who they were made by.

Trial Examiner Ballinger: The report, apparently, is predicated on a report made by Mr. Blough and Mr. Raupagh.

Mr. Austin: Not a report, your Honor; an estimate.

Trial Examiner Ballinger: An estimate; by those tw gentlemen, and the Examiner will ask the witness: Did you make such an estimate, or did you participate in the making of such an estimate?

Witness: I was—I recall being in a discussion with Mr. Raupagh and Mr. Boatwright and there may hav been others, at the time this subject was discussed.

Trial Examiner Ballinger: Do you recall having indi- vidually or in connection with others, having made suc an estimate of time?

Witness: Not having seen this estimate, I couldn't have recalled the figures as they are here; from that

5154 very faint recollection of that discussion.

Trial Examiner Ballinger: Have you any knowledge as to the time these three salesmen spent at Ned's

Witness: I would assume that division of time from my knowledge of their activities, there, to be correct, yes

Trial Examiner Ballinger: And it is your present impression that the statement appearing in the exhibit was predicated upon some estimate made in which you joined

Witness: Yes, I joined in this; that is, with respect to that part which gives the percentages referred to by Mr. Austin; 35, 25, and 25.

Trial Examiner Ballinger: The objection is overruled. You may answer the question.

Read the question.

Reporter: "Q. Turning to Commission's Exhibit 31-L, it is stated that Robinson, when he was assigned to this territory, spent 35% of his time at Ned's Auto Supply; Meulenberg spent 25% and Coutchie spent 25%. Why did Robinson spend more time at Ned's than the other two salesmen?"

Mr. Hanley: That is objected to, further, as immaterial.

Trial Examiner Ballinger: The objection is overruled.

5155 A. I am unable to answer the question. I just don't know.

By Mr. Austin:

Q. You say that you recall conferring with Mr. Raupagh and Mr. Boatwright at the time the—at about the time this exhibit was prepared, upon the question of the time spent by these three salesmen at Ned's stations?

A. I never knew—

Trial Examiner Ballinger: When you say "this exhibit," what do you mean?

Mr. Austin: Respondent's Exhibit 31; particularly, 31-L, is the page referred to.

Mr. Hanley: May I ask a question?

Trial Examiner Ballinger: You may.

Mr. Hanley: Do you know when that exhibit was prepared?

Witness: I never knew it was prepared. Here it is.

Mr. Hanley: Then it is objected to as assuming a fact not in evidence.

By Mr. Austin:

Q. Well, do you recall having a conference with Mr. Raupagh and Mr. Boatwright upon the question of the time spent by these three salesmen at Ned's Auto Supply stations in 1937?

A. I recall that in a talk or a discussion or a visit we were having, this subject was brought up and we did talk about it.

5156 Q. Who brought it up?

A. Mr. Boatwright, I believe.

Q. Do you remember when that was?

A. No, I don't.

Q. Well, was it last year or was it two years ago? When was it?

A. It could have been last year. It could have been two years ago. It wasn't brought up with the idea that it was anything I had to do anything further with and—

Q. How much time did you spend on the subject in this conversation?

A. It must have been entirely finished within the half day in which it took place or I would have attached more importance to it than I have.

Q. Did it last a half day?

A. No, I don't mean to say that.

Q. You definitely recall such a conversation, don't you?

A. I recall being asked certain questions about this subject covered in this exhibit.

Q. Do you remember how much time was spent in the discussion of this subject?

A. No.

Q. Was it an hour or two hours?

Mr. Hanley: That is objected to as immaterial.

A. I can't answer.

5157 Trial Examiner Ballinger: The witness doesn't recall.

By Mr. Austin:

Q. Do you recall what opinions or estimates you were asked to make at the time of that conference?

A. Yes, I do. I think it was at that same time that I was asked—

Mr. Hanley: Just a moment. You have answered the question.

Trial Examiner Ballinger. You have answered the question.

By Mr. Austin:

Q. Well, I wish you would state what estimates or opinions you were asked to make and what estimates or opinions you did express?

Mr. Hanley: That is objected to unless the time, place and persons present are indicated, and then it is objected to as immaterial.

Mr. Austin: The persons present have been indicated by the witness when asked about the time, and I can't make it any more definite.

Trial Examiner Ballinger: The objection is overruled.

Mr. Hanley: It is still objected to as immaterial, if
your Honor please, because it is all incorporated, now,
5158 in the Respondent's Exhibit 31 series.

Trial Examiner Ballinger: According to the memory of the Examiner he has answered much of this line of examination, but if counsel for the Commission desires to pursue it and will limit the extent further, he may do so.

The objection is overruled.

Read the question.

Reporter: "Q. Well, I wish you would state what estimates or opinions you were asked to make and what estimates or opinions you did express?"

By Mr. Austin:

Q. At that conference.

A. Referring to this exhibit, I must have been in agreement, approximately, with those estimates.

It is also probable that I—

Q. Well, don't tell us what is probable, Mr. Blough. I want to know what you remember about the conference; not what you conclude from reading the exhibit.

A. I am sorry.

I agreed to these estimates.

Q. Did you take any part in making them?

A. Yes.

Q. Do you reach that conclusion from reading the exhibit or is it your independent recollection at this time?

Mr. Hanley: That is objected to as an impeach- 5159 ment of the Government's own witness.

Mr. Austin: I don't think so, because the witness stated a moment ago—

Trial Examiner Ballinger: The objection is overruled.

(The last question was read by the Reporter.)

Mr. Hanley: It is further objected to as calling for a conclusion and an opinion of the witness.

Trial Examiner Ballinger: The objection is overruled.

Mr. Hanley: Do you understand the question, Mr. Blough? If you don't understand the question, you may ask it be read again.

Trial Examiner Ballinger: Read the question.

(The last question was again read by the Reporter.)

Trial Examiner Ballinger: Now what he means by your independent recollection at this time; is your recollection of what transpired refreshed by any matters that may have been brought to your attention this morning?

Witness: Reading the exhibit has been quite refreshing on the subject but—

Trial Examiner Ballinger: Now have you now any independent recollection?

Witness: Yes.

Trial Examiner Ballinger: Will you answer the 5160 question?

Witness: Yes.

A. My recollection is that the figures in this exhibit are correct; or were my opinion at that time.

By Mr. Austin:

Q. And did you also, at that conference, attempt to estimate the amount of time which each of these three salesmen spent at Ned's on gasoline?

A. That, I remember; yes.

Q. Will you tell me just what you remember about the estimates made and the manner of making them? In the first place, did you make such estimates?

A. Yes.

Q. And upon what were they based?

A. Knowledge of the work done by the reseller salesmen assigned to the territory in soliciting and selling Ned's Auto Supply.

Q. Could you have made a similar estimate at that time as to the time spent by these salesmen at any other service station in their territory?

A. I think so.

Q. But you don't remember why you estimated that Robinson spent more time at Ned's during the time of the year that he was in the territory than the other two salesmen spent?

A. There is a difference in salesmen. Robinson's
5161 methods varied somewhat from those methods used
by the other two and whether there was any advantage to us, or not, is debatable, but his methods of approach are slower; not necessarily more thorough.

Q. Would the season have had anything to do with it?

A. I have been trying to recollect that very thing; whether or not the season—as I remember it, Robinson was the salesman in the first part of the year, maybe about four months, four and a half.

Q. Yes: He was assigned from January first to April 16th, which would be three and a half months (referring to Commission's Exhibit 109-B).

A. That would bring him into the period known as the spring change-over period.

Q. Would that affect the amount of time—that is, the percentage of his total time, that he would spend at Ned's?

A. It could.

Q. You still don't recall any definite reason for that estimate?

A. No, I don't.

Q. Now you have estimated—or so it is stated on Respondent's Exhibit 31-L—that each of these three salesmen spent one fifth of their time at Ned's on gasoline. Can you give me an estimate of what part of their time
at other reseller stations they spent on gasoline?

5162 Mr Hanley: If your Honor please, it now being
12:35, and counsel having asked a question which involves a calculation, assumes a calculation will be made,

it is moved that we adjourn for the luncheon hour, and if the calculation can be made which had been asked for, Respondent will furnish the information at the conclusion of the luncheon hour.

Mr. Austin: I haven't asked for a calculation. We are dealing, here, entirely with estimates, your Honor.

Mr. Hanley: May we have a ruling on the motion, Judge?

Trial Examiner Ballinger: The Examiner understands there is nothing here that requires a calculation. If the witness has any data, records which he desires to consult to refresh his recollection that will enable him to more accurately answer the question, you may have that opportunity. Are there any records that you desire to consult?

Witness: Yes.

By Mr. Austin:

Q. Have you got records, now, going back to the activities of these salesmen in 1937?

A. I am not sure. That's something I would like to learn.

Q. Well, what records did you have before you for the purpose of making these estimates that I referred to

5163 on Respondent's Exhibit 31-L?

A. I had the opportunity to ask questions from immediate staff and an opportunity to examine daily sales reports by the salesmen involved.

Q. Will you look at Respondent's Exhibit 31-L again for the purpose of answering this next question?

(The witness referred to document.)

Q. You will note there, Mr. Blough, that, as I said a moment ago, it is stated that you and Mr. Raupagh estimated that one fifth of the time of each of these salesmen at Ned's Auto Supply Company was spent on Gasoline. Are you following that from the exhibit?

A. Yes.

Q. Would it have been possible for you at that time, with equal facility, to have estimated the time spent by the salesmen on various products at other stations?

A. Yes.

Trial Examiner Ballinger: No such estimate as that was made of the other stations, was it?

Witness: I beg your pardon?

Trial Examiner Ballinger: No such estimate was made with reference to the other stations, was it?

Witness: No.

Trial Examiner Ballinger: So that you didn't examine the records ~~nor~~ consult with any one with reference 5164 to the other stations?

Witness: No.

Mr. Austin: That's just the point, your Honor.

Mr. Hanley: And it is suggested, your Honor, that it is entirely immaterial whether it was or wasn't.

Mr. Austin: Counsel for the Respondent having suggested an adjournment for lunch, I will be glad to comply and, therefore, suggest that we adjourn until 2:00 o'clock.

Mr. Hanley: Counsel for the Respondent withdraws his motion because there was included in it some suggestion that we look up records.

I concur entirely in the motion made by Counsel for the Commission as to the adjournment.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The motion is granted and now, at 12:40 P. M., the hearing stands in recess until 2:00 P. M.

(Whereupon, at 12:40 P. M., February 19, 1942, the hearing in the above-entitled matter was adjourned.)

5165 Afternoon Session.

2:00 p.m.

Trial Examiner Ballinger: Come to order.

F. McK. BLOUGH, resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Austin.

Q. Mr. Blough, are you familiar with all of the activities of the Detroit Field office?

A. No.

Q. Well, if that is too broad you, at least, know what those activities are, do you not, even though you don't know how they may all of them be carried on?

A. Generally, yes.

Q. You have been employed in the Detroit office since 1936?

A. Right.

Mr. Austin: I would like to have these two sheets marked, for identification.

Trial Examiner Ballinger: The Reporter will mark the documents Commission's Exhibit 110 and 111, for identification.

(The documents referred to were marked "Commission's Exhibits 110 and 111" for identification.)

Mr. Austin: Off the record.

5166 Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: In view of the fact that these two charts were submitted by counsel for the Respondent, I suggest that I read the title of each of them and that it may then be proper to offer them without going through the procedure of having the witness identify them.

Trial Examiner Ballinger: You may omit the formal proof.

Mr. Austin: Commission's Exhibit 110, for identification, is entitled "Organization Chart of Sales Department, Detroit Field, October 23, 1941." Commission's Exhibit 111, for identification, is entitled "Organization Chart, Accounting Department, Detroit, Michigan."

May I ask, Judge, if there is any significance to the fact that the date of October 23, 1941, appears on one and no date on the other?

Mr. Hanley: No. I would just like to state that the date on Commission's Exhibit 110 is entirely immaterial. The chart is indicative of the general set up of the organization in the sales accounting departments for several years last past, so the date on that particular exhibit is not of any significance.

Mr. Austin: I offer these two charts in evidence.

5167 Trial Examiner Ballinger: Without objection, the documents are admitted in evidence as Commission's Exhibits 110 and 111.

(The documents referred to, heretofore marked for identification "COMMISSION'S EXHIBITS 110 and 111", were received in evidence.)

By Mr. Austin:

Q. Showing you these two exhibits, Mr. Blough, Commission's Exhibit 110 and Commission's Exhibit 111, Commission's Exhibit 111 is the organization chart for the accounting department and the top employee shown on that chart is the office manager.

You see it here (indicating)?

A. Yes.

Q. The top employee or official on the organization chart for the sales department, Commission's Exhibit 110, is the manager.

Will you tell me whether the office manager is accountable to the manager and under the supervision of the manager?

Trial Examiner Ballinger: If you know.

A. I have never been a manager nor an office manager. I don't know.

Q. Well, don't you know—if you don't, say so, and there are plenty of people here that do; it was just
5168 to clarify these charts—I wondered whether Mr.
Raupagh who, as I understand, is the field manager,
is in charge of all of the work in the office including the accounting department and the office manager. Would you rather not answer that?

A. I don't know.

Mr. Austin: I thought—off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5169 Trial Examiner Ballinger: On the record.

At this time the witness is withdrawn and Mr. Raupagh will be called.

(Witness excused.)

P. A. RAUPAGH was thereupon recalled as a witness for the Commission and, having been previously first duly sworn, testified further as follows:

Direct Examination by Mr. Austin.

Q. Mr. Raupagh, are the office manager and the other employes of the accounting department in the Detroit Field under your supervision?

A. Generally speaking, yes.

Q. And what do you mean by generally speaking?

A. Well, I mean by that that there is quite a distinction between the accounting department and the sales department but the answer would be, generally speaking, yes.

Q. Well, is your authority over the accounting department as full and complete as it is over the sales department?

A. I don't think it is quite as full and complete.

Q. I suppose, Mr. Raupagh, that that is because the accounting department naturally get some instructions as to their method of accounting from the sales research
department which, of course—well, is that correct?
5170 Is that what you have in mind? It didn't occur to
me when I asked the question but I can understand
that it might be true?

A: Well, it is true.

Trial Examiner Ballinger: That's merely method of accounting, is it?

Witness: That's right.

By Mr. Austin:

Q. I just wanted to find out whether you were the person responsible for all of the activities—responsible to the company for all the activities in the Detroit Field, including the accounting department as well as the other departments.

A: I am.

Mr. Austin: That's all.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

F. McK. BLOUGH, was thereupon recalled as a witness for the Commission and, having been previously first duly sworn, testified further as follows:

Direct Examination by Mr. Austin.

Q. Mr. Blough, the Standard Oil Company has a Marine Terminal at River Rouge, does it not?

A. Yes.

5171–5172 Q. Are you familiar with the method of
operation of the Marine Terminal, generally?

A. Only in a general way.

Q. Who is in charge of that operation?

A. A man by the name of Ed. Mercer.

Q. Do you know whether Mr. Raupagh has any responsibility in connection with the work at the River Rouge terminal?

A. He does not.

Q. Do you know whether the personnel manager in the Field Office has anything to do with the employment of the Marine Terminal personnel?

A. He does not.

Q. Does the Detroit Field Office have any responsibility with regard to the transportation of gasoline from the Marine Terminal to the company's bulk plants?

A. Yes. Yes; we place the orders for those deliveries from the Detroit Office.

Q. Those deliveries are made by contract haulers, are they not?

A. In some instances, and in some instances by railroad tank car.

Q. When the deliveries are made by transport truck haulers are the contracts for that hauling made and handled in the Field Office?

A. No. Those are made in the general office.

5173 Q. In other words, we have a delivery where it starts at the Terminal and ends up at Field Office territory and I wanted to know which branch of the company's organization, if either, arranged the details and entered into the contracts for that.

A. That is not done here.

Trial Examiner Ballinger: Does the Marine Terminal come under the general manager of this district or is that entirely controlled by the Chicago Office, or do you know?

Witness: That is under the control—

Mr. Hanley: Judge, if your Honor please, I perhaps can clarify this whole thing by saying that the Marine Terminals including the River Rouge Terminal in Michigan is handled by the manufacturing department of our company. The sales department has nothing at all to do with it. If that's important at all in the consideration of this question, of course, we can develop it further, but just for the moment I will say that Mr. Raupagh and his organization in Detroit, or the Chicago sales department, has nothing at all to do with the operation of the Marine Terminal.

Mr. Austin: Well, this latter question, Judge Hanley, was more on the question of transportation from the terminal to the bulk plants. Does your answer go that far or—

Mr. Hanley: I think the witness has made—

5174 Mr. Austin: He says the general office handles those contracts.

Mr. Hanley: Whenever Detroit wants gasoline out of the River Rouge Terminal they make the order and the order is filled and shipment is made, but the Terminal itself is operated by the manufacturing department and they keep the records. That, indeed, is where we are getting these freight bill records that we discussed here in the last day or two.

Mr. Austin: Is that where you got those transport truck contracts that were put into evidence?

Mr. Hanley: No, sir. I got those from the Traffic Department.

Mr. Austin: Chicago?

Mr. Hanley: Yes, sir.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Mr. Blough, at one time when Mr. Boatwright was testifying he made the statement: "We have about six different reseller contracts and I don't recall the terms of each of them." That was at Page 2571 of the record. Are there that many different reseller contracts in use in the Detroit Field?

5175 A. I am no longer directly connected with the reseller function of our business. Anything that I said now would be an opinion. I don't know.

Q. Well, you were formerly in that capacity and I thought you might know what contracts were in use. However, if you don't feel qualified to answer that, I will ask some one else. Do you feel that you don't know just what contracts are in use, now, in the reseller department?

A. I don't know.

5176 Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Incidentally, Mr. Blough, do you have any recollection sufficient to tell us what contracts and types of contracts were in use in 1937 for the tank wagon reseller customers when you were in charge of that business?

A. Well, I am aware of the usual sales agreement, which is the form 461. I recall the Form No. 385 as being a record of any equipment on loan to a reseller customer. To my recollection, that is all of the usual sales agreements.

Q. Of course, you recognize that the lease is a contract; whether or not it is a sales contract, at least, it is a contract which the company enters into with tank wagon reseller operators; is that correct? Are not a number of tank wagon operators lessees?

A. Yes, but I didn't consider that a sales contract in my answer.

Q. Still referring back to your knowledge of the reseller business in 1937, in what quantities was gasoline delivered to tank wagon reseller customers?

A. In the largest quantity which we could urge them to take at any one time, limited only by their amount
5177 of storage or ability to pay.

Q. I am referring to single deliveries.

A. So am I.

Q. What would be the maximum single delivery?

A. The maximum single delivery would be the capacity of the truck.

Q. And what is that capacity?

A. Well, the usual capacity is 1500. However, I don't guarantee that we didn't make deliveries with some 1600 or 1800-gallon trucks.

Trial Examiner Ballinger: The testimony in the record is that your tank wagons or tank trucks had a capacity of from 800 to 1500 gallons. Have you larger tanks than that?

The Witness: His question was predicated on 1937. We have 3,000-gallon tanks now.

Trial Examiner Ballinger: At that time what did you have?

The Witness: 1500 was the high.

Trial Examiner Ballinger: Maximum?

The Witness: Yes.

Trial Examiner Ballinger: How long have you had 3,000-gallon tanks?

The Witness: Since July 7, 1941.

By Mr. Austin:

Q. What determines the quantity of gasoline to be 5178 delivered at a reseller station by the company's truck, at a single stop?

A. Didn't I answer that?

Q. Well, I am asking you now what determines the amount, and by that I mean is it the amount of the order or is it the amount that the driver decides he wants to leave at that time, or what determines that?

A. Well, we are—

Mr. Hanley: If your Honor please—just a moment, Mr. Blough—this is objected to as not proper rebuttal, having been thoroughly tried out by the Government on its case in chief, and the same is now repetitious and not proper rebuttal testimony. I suggest, your Honor, that this has been gone into in most minute detail by counsel in his case in chief.

Trial Examiner Ballinger: What have you to say to the objection?

Mr. Austin: The testimony now being elicited is in connection with the delivery cost schedules of Respondent's Exhibit 31-A. It may be that some of the testimony at the start of the case would answer some of the questions I am asking now. Frankly, I haven't had an opportunity to go back through all of that testimony to determine whether or not all of these questions are necessary, but I am not going into this at any great length. Unless it is previously answered, it is certainly proper rebuttal.

5179 Mr. Hanley: I withdraw my objection. If counsel does not intend to pursue it at great length, I will be glad to withdraw the objection.

Trial Examiner Ballinger: The objection is withdrawn.

Mr. Austin: It is true, your Honor, that these questions are directed, certainly, to a different purpose and subject than those previously. It is not repetition of my direct. I would like to explain that so that the Examiner and counsel following them, that these questions are directed to rebuttal, to the cost study for 1937, whereas, I must have had a different purpose for my original questions of Mr. Raupagh.

Trial Examiner Ballinger: Read the question.

The Reporter: (Reading) "I am asking you now what determines the amount, and by that I mean is it the amount of the order or is it the amount that the driver decides he wants to leave at that time, or what determines that?"

A. The amount of the order.

By Mr. Austin:

Q. Then is it the practice of the company to deliver to the service station in one delivery the full amount ordered; that is, up to a full tank truckload, or does the practice on that vary?

A. I don't think I understand the question.

Q. Well, I will try and reframe it.
5180 I just wanted to know whether it is the practice of the company to deliver, say, a full truckload of gasoline where the order is for that much gasoline or whether the driver may at his option leave a part of a load in order to leave some more gasoline at another station on his route, and thus give several stations some gasoline on one trip and perhaps come back the next time and deliver another additional load at the same station.

If that is still not clear, it is directed to whether the driver at his option may not, in order to deliver gasoline to several places on one trip, deliver less than a full order at a single station?

The driver would have that option in case of emergency handling, but other than that he delivers such orders as he has when he leaves the plant.

Q. That is getting to the point, Mr. Blough, that I had in mind. Where orders are on hand before the driver starts out, is he given instructions regarding the filling of those existing orders?

A. As to place and quantity.

Q. But it is also true, is it not, and I am sure that this is in the record, that the drivers call on many stations on their route and determine their needs upon the call and don't always know before they start out how much they are going to deliver at a station?

I think in fairness I will say to the witness before
5181 he answers that, when I said that was in the record,
I don't know what the answer is, but I remember there was testimony about it. I am not trying to say that Mr. Raupagh or anybody else testified to anything.

You just tell us what you know about it.

A. Fix a time for that and I think I could answer it much better than I can without a time fixed.

Q. Well, in '37.

A. In '37? Yes, there were certain accounts where a delivery was made every day at stations which had a large volume, where the driver knew that he could leave a considerable amount of gasoline each day when he went there. In that case he wouldn't know whether the delivery would be 750 or 850. It would be to bring that storage up to capacity. And each of our "A" stations and—some drivers out of each "A" station had customers of that type. That was in 1937.

Q. Still referring now to 1937, because I understand that that is when your knowledge is most complete, could any service station serviced by the company obtain a full delivery of a tank truck of gasoline by ordering that amount?

A. If he had storage room and the money to pay for it.

Trial Examiner Ballinger: Were there any of them that had sufficient storage room to take that much?

The Witness: To take 1500 gallons?

Trial Examiner Ballinger: Yes.

The Witness: Yes, sir.

5182 By Mr. Austin:

Q. Most of them have that much storage, don't they, Mr. Blough?

A. They have all of them that much—I don't mean that. I was thinking in terms of our company owned stations. They all in the company owned classifications, leased out, have storage for more than 1500 gallons. However, there are three brands of gasoline involved, so that adding the capacity of their tanks doesn't necessarily mean that you could put in a full load of Red Crown gasoline at any given time.

Q. You meant available storage?

A. That's right.

Q. Empty storage?

A. That's right.

Q. Then I understand that it was the policy of the company when a station ordered as much as a truckload of gasoline and had the space to put it and the cash to pay for it, that it was the policy of the company to deliver that full amount in one delivery?

A. We would have done so, yes.

Q. In other words, to deliver a full truckload rather than to make more than one trip to that station and deliver the order in parts?

A. Unless there were emergency orders which would make it seem to the station agent or some of his staff, if
they would get the idea that it would be better and
5183 time saving for a number of people to make two deliveries out of that, that would have been done.

Q. That was the exception rather than the rule?

A. I would say yes.

5184 Trial Examiner Ballinger: How does this become material?

Mr. Austin: May I ask one or two questions more, your Honor?

Trial Examiner Ballinger: Certainly.

By Mr. Austin:

Q. Was any better or lower price offered to service stations taking full load deliveries?

A. No.

Q. Referring, now, to tank wagon resellers; than to stations taking smaller deliveries?

Mr. Hanley: Just a moment, Mr. Blough.

Trial Examiner Ballinger: He has answered the question.

Mr. Hanley: I know he said "no" but may we have it made clear by counsel what he means by a smaller or a larger delivery? The implications in this thing, Judge, are just—

Mr. Austin: I really should have said partial load instead of smaller. I think that's the way you understood it, did you not, Mr. Blough? If not, you may re-answer.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

By Mr. Austin:

5185 Q. Now by smaller deliveries I mean partial load.

A. No.

Mr. Hanley: Now may it be understood, Judge, that counsel is talking about a tank wagon truck which has a capacity of 1500 gallons, or thereabouts?

Trial Examiner Ballinger: It is so understood. The Examiner intended to make that statement on the record.

Mr. Hanley: Of course, as I understand the law suit, we are talking about the deliveries between tank car deliveries with a minimum of 6,000 gallons as against tank wagon deliveries.

Mr. Austin: Yes, but in 1937 we were talking about Ned's Auto Supply Company and, also, other stations all of whom received deliveries by tank truck. That is correct, I believe.

Trial Examiner Ballinger: That is correct.

By Mr. Austin:

Q. We were speaking this morning about sales promotional activities of reseller salesmen. Where such promotional work is done by a salesman at a service station is any charge made to the service station by the company for that assistance?

A. No.

Q. Are you familiar with the employee in the Detroit Field office known as the safety representative?

A. I know him.

5186 Q. Would you be able to give a description of his services in connection with safety signs, and so forth?

A. You mean his functions and—

Q. Yes. Incidentally, he comes under you, now, doesn't he; as assistant manager—wholesale; or does he?

A. Oh, yes. Adams is known as our safety service adviser and is primarily concerned with the job of preventing accidents among our personnel and to our property in the Detroit Division.

Q. What are his duties in so far as they are connected with, or in so far as they involve expenditure of time or activity at reseller service stations? There has been some reference, here, to safety signs, if that will give you any sort of a lead to what I have in mind.

A. Well, of course, he is in charge of the task of carrying out the activities of a general office safety department. If they specify that a certain type of yellow sign saying "watch out" or words to that effect should be put next to an air compressor, then Adams would do the office part of the work or some girl under his supervision would, which eventually got a little yellow sign sent out to each reseller who had an air compressor.

Adams is concerned with general safety practices at reseller locations but as to the time that our safety supervisor would put in actually in the inspection of re-

5187 selling properties; just practically nothing.

Q. Well, I didn't refer to that. I rather referred to the activities of his department.

Now, to clarify that a little further: Do the activities of his department relate to service stations, reseller outlets; in other words; that is, one classification? Another possibility would be that he and his staff spent their time in connection with company-owned property, such as the bulk plants—by the company-owned property, I don't mean station, I mean bulk plant; the third possibility he spends a good part of his time in connection with consumer customers—so will you state whether this safety work is a reseller outlet proposition or is it something that relates to company owned property or consumers, or where does it take place?

A. In the first place the safety supervisor in the Detroit Division has his first duty to perform inside our own organization, our own personnel and our own property, and when he goes outside of that, that would account for a very small part of his time because he has so much to do with promoting safety among our own people. That is the first place where he is charged with promoting safety, and having got that done, then to look out there on properties from an angle of safety—now I want to get this right—and generally to inquire into equipment from a safety standpoint if we have that in the hands of a 5188 dealer.

Probably 95% or more of his time is taken up internally with our own personnel and with our own properties inside our organization.

Q. And by your own properties are you including company-owned properties leased out?

A. No, you excluded those.

Q. I intended to, yes. I wanted to be sure you were also excluding them.

In so far as the safety representative has any responsibility or performs any service in connection with reseller outlets, such as installation of safety signs, and so forth, are such services or activities engaged in only at the service stations' request, or does the safety department supervise all Standard Oil Company service stations as a matter of company policy?

Mr. Austin: That's all I have. You may have the witness, Judge Hanley.

Trial Examiner Ballinger: Is there any cross-examination?

Mr. Hanley: If your Honor please, I think we have no cross-examination at this time.

My associate asks, however, I move for a recess, if 5189 your Honor please, if that is agreeable.

Mr. Abbott: We would like to discuss whether we desire to cross-examine or not.

Trial Examiner Ballinger: We will stand in recess for ten minutes.

(A short recess was taken.)

5190 Trial Examiner Ballinger: Come to order.

Mr. Austin: May I ask the witness one more question?

Trial Examiner Ballinger: You may.

Mr. Austin: It just occurred to me while I was out.

Mr. Blough, I asked you some questions about the ordering and delivery of gasoline in truckload lots. It is true, isn't it, that in 1937 there were many tank wagon reseller stations other than Ned's Auto Supply stations which ordered and received full load deliveries of gasoline?

The Witness: Yes.

Mr. Austin: That is all.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Mr. Hanley: If your Honor please there are no questions on cross-examination, but the Respondent at this time desires to make a motion in respect to this witness' testimony:

At this time the Respondent moves to strike the entire testimony of the witness, Mr. Blough, upon the grounds and for the reasons that appear hereafter in the motion. The testimony of the witness falls into two general classifications:

First, testimony in respect to the method of allocation of time of salesmen; and, secondly, in respect of amounts 5191 of deliveries to reseller customers.

The Respondent moves that the entire testimony be eliminated from the record, for the reason:

First, that as respects allocation of salaries, it is trivial and capricious and frivolous, in that: First, it refers to the one-half cent differential which was accorded to Ned's Auto Supply Company in 1936 to 1938, which differential was eliminated in 1938 and is no longer a matter of issue in this case. Second, that even if it were a matter at issue, it involves in its entirety only .005 cents per gallon, which is so small an amount as to constitute an imposition upon the time of the Trial Examiner and the Commission.

In so far as the second portion of the examination is concerned, it is objected to for the reason that it was fully covered in the main case of the Government and is improper rebuttal.

Trial Examiner Ballinger: I will hear from counsel for the Commission.

Mr. Austin: Well, your Honor, the question of the one-half cent differential in 1936 to 1938 which was accorded to Ned's Auto Supply Company is made an issue by the Complaint, and the defense to that issue has been interposed by the Respondent and a cost justification has been attempted, and unless the Respondent abandons that justification and
also moves to strike from the record Respondent's
5192 Exhibit 31-A to Q, I don't think that the motion is well
taken.

On the second point that I explained at the time the testimony was elicited, the questions regarding delivery of gasoline were directed to the Respondent's Exhibit 31-B to F, inclusive, and I think that testimony was properly elicited in rebuttal to the cost justification attempted on these pages of Exhibit No. 31.

Mr. Hanley: Judge, may I add to the motion? I should have done so before.

In respect of this motion, particular reference is made to page 11, Exhibit 31-L of Respondent's Exhibit No. 31 series of Exhibits.

Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The motion is denied.

Mr. Austin: In view of counsel's statement I would, if your Honor please, like to make a statement on the record.

Counsel for the Respondent has stated that the amount of the matter in controversy on the question of cost justification based upon difference in selling costs as set forth in Respondent's Exhibit 31 amounted to only five-thousandths
of a cent. Actually, as is shown by Exhibit 31-A,
5193 the differential in selling cost between Ned's Auto
Supply Company and other reseller stations in 1937,

is claimed to be .074¢. The figure of five-thousandths was simply the amount of selling-cost charged to Ned's but the importance, here, is the differential as between Ned's and other stations.

Mr. Hanley: I assume, your Honor, that having ruled you don't care for any argument on this.

Trial Examiner Ballinger: It is unnecessary. Is there anything farther, gentlemen?

Mr. Hanley: If counsel has nothing further, I want to respond to some requests that were made, your Honor; particularly with reference to the retirement plan that was offered. I have forgotten the exhibit number. Perhaps you have it, Mr. Austin.

Mr. Austin: 108 for identification.

Mr. Hanley: If your Honor please, there was requested some explanation of a cancellation of certain pages in Exhibit 108. I am now informed—

Trial Examiner Ballinger: The cancellation appears only on one page?

Mr. Austin: Two pages.

Mr. Hanley: Pages 19 and 20.

Trial Examiner Ballinger: Yes: 19 and 20.

Mr. Hanley: I am now informed that the reason for that cancellation is certain provisions in the Federal Social
Security Act that made it imperative that the Re-
5194 spondent cancel those various portions of its retire-
ment plan and that such cancellation was made in conformity with Federal law.

Mr. Austin: May I ask a question?

Trial Examiner Ballinger: Yes.

Mr. Austin: Judge Hanley, those two pages marked cancelled, as I read them, showed an example of the application of the plan. Now if the example is out, how much does that affect the plan itself? You stated that that portion of the plan was cancelled. Does that mean that the cancellation of the example indicates that certain of the text is no longer in use?

Mr. Hanley: I don't know. I just assume that whatever those pages portrayed was something that wasn't quite in conformity with the Federal law. All I have, Mr. Austin, is what the treasurer of our company has given us as we offered these things yesterday and he says the reason for this cancellation was because we had to conform to the Federal Social Security Act and that is just all I am trying to tell you. I don't profess to understand just exactly what the reasons are.

Mr. Austin: Thank you, and I suggest, your Honor, that that not be introduced at this time. I would like to have an opportunity to read it and see if I can, upon reading it,
determine whether the cancellation of the example on
5195 those pages indicates a cancellation of some application of the plan itself and if there is any question about that, then I think that that question should be cleared up before that booklet is introduced as stating what the plan is.

Trial Examiner Ballinger: The Examiner will withhold any ruling on the admission of Commission's Exhibit 108 for identification.

Mr. Hanley: If your Honor please, I think it appropriate at this time to indicate that it really is not material what the specific terms of any annuity or retirement or pension policy of the Respondent may be. I concede that it is probably material as to how an allocation of the expense of any such pension or retirement plan may be made but I just suggest to your Honor that it is not material at all as to what the detail of any such plan may be.

Mr. Austin: I would agree with that except to the extent that we are concerned with certain payments made by the general office and certain other expense known as a field contribution and the only purpose in offering the exhibit in the first place was to attempt to throw some light on the nature of the different types of payment paid into the plan by the company.

Trial Examiner Ballinger: Mr. Austin, it is conceded some payments were made, is it not?

Mr. Austin: Oh, yes.

5196 Trial Examiner Ballinger: And that they were made under the plan indicated or set out in Commission's Exhibit 108. That is conceded, isn't it?

Mr. Austin: I can't concede the last part because I am not familiar with that exhibit 108, for identification.

Trial Examiner Ballinger: Well, the testimony in the case plainly indicates or establishes that the payments were made under the plan set forth in Commission's Exhibit 108.

Mr. Austin: Provided that's correct.

Trial Examiner Ballinger: Assuming that the plan here outlined is totally invalid, wouldn't they be entitled to allowance for the amounts paid in?

Mr. Austin: Well, my only question with regard to that booklet is, is there anything stated in that booklet regarding contribution by the company which is no longer followed by the company itself? I want to know what the company's actual practice is.

Trial Examiner Ballinger: You are still following this, according to the testimony.

Mr. Austin: Let us have it in evidence then, your Honor.

Trial Examiner Ballinger: And we certainly, in this proceeding, are not going to try to determine the validity or invalidity of this plan.

5197 Mr. Austin: I agree with that. I want to know the nature of the expense and not whether or not the plan itself is a good plan or a bad plan.

Trial Examiner Ballinger: The Examiner will withhold ruling on the admission of Commission's Exhibit 108 until he hears further from counsel for the Commission.

Mr. Hanley: Very well, your Honor.

Now, there is one other request. I am trying to clean up these requests as fast as I can, Judge.

In Washington requests were made by Mr. Austin in behalf of the Commission for certain common carrier contracts for haulage of gasoline between River Rouge and points in Detroit. There were furnished at that time what were subsequently marked Commission's Exhibits 92-A to 92-D, inclusive, and Commission's Exhibits 93-A to 93-E, inclusive. Just lately Mr. Austin has requested further information in connection with these contracts and has directed particular attention to the Ogden & Moffett Company. I now have a contract under date of December 9, 1939, of the Ogden & Moffett Company. We have examined it, and it doesn't have any point in it that is involved in this lawsuit.

I produce it because I have been asked to, your Honor, but I object to it as entirely immaterial.

Trial Examiner Ballinger: It hasn't been offered yet

Mr. Hanley: Well, I am producing it, Judge.

5198 Mr. Austin: Your Honor, I was only mentioning Ogden & Moffett because you asked me if I could give you any line on what I knew about it and Ogden & Moffett was simply a name that one of Respondent's counsel or witnesses mentioned on the record previously. Now what I actually wanted was the contracts under which gasoline deliveries were made to jobbers in 1940. If they weren't made under an Ogden & Moffett contract, then they must have been made under some other contract.

5199 Mr. Hanley: Well, Mr. Austin, I think we gave you that in Washington. I don't know anything else we have. I think we gave you all of that.

Mr. Austin: The company certainly knows how it got gasoline to its jobbers in 1940.

Mr. Hanley: Yes. Yes. These contracts indicate that. The contracts I gave you in Washington indicate how it is shipped——

Mr. Austin: Not according to what is in the record, they don't, Judge, the way I read it.

Mr. Hanley: I am just awfully sorry.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: If your Honor please, there seems to be some confusion about the understanding relative to the request of counsel for the Commission in connection with common carrier contracts of gasoline from River Rouge to Detroit.

In response to the letter request of Mr. Austin an effort was made by counsel for the respondent to obtain from the traffic department of the respondent all of the contracts that had any pertinence in the entire Detroit area. A number of them are available here in court, including certain writings many of which obviously indicate on their
5200 face are not pertinent to this case, but if I may be permitted to do so, I am perfectly willing to submit this file to Mr. Austin and let him choose whatever he thinks may be pertinent, reserving to the respondent the right to object to anything that he offers that we think is not pertinent to the case.

I may say that this file includes certain contracts which were heretofore furnished to the Commission and which have been received in evidence.

Trial Examiner Ballinger: The file may be delivered to counsel for the Commission for examination.

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: Your Honor, I move that we adjourn until 10:00 o'clock tomorrow morning.

Trial Examiner Ballinger: Motion is granted and now, at 4:05 p. m., the hearing is adjourned to reconvene at 10:00 a. m., Thursday, February 20, 1942, in Room 859 Federal Building, Detroit, Michigan.

(Whereupon, at 4:05 p. m. the hearing was adjourned to reconvene on Friday, February 20, 1942, at 10:00 a.m.)

5201

Room 859 Federal Building,
Detroit, Michigan,
February 20, 1942.

Met, pursuant to adjournment at 10:00 A. M., War Time.

Before: Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois; and,

Arthur J. Abbott, Esq., of the firm of MacMahon, Abbott & Roberts, 2230 Buhl Building, Detroit, Michigan; appearing for the Respondent.

5202

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing of docket No. 4389, in the matter of Standard Oil Company, is reconvened in room 859 Federal Building, Detroit, Michigan, at 10:00 a. m., Eastern Standard Time, February 20, 1942. The last hearing was in the same room in the same city, February 19, 1942.

You may proceed.

Mr. Austin: Will you take the stand, Mr. Feinberg?

CHARLES EVAN FEINBERG was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination.

Trial Examiner Ballinger: What is your full name?

Witness: Charles Evan Feinberg.

By Mr. Austin:

Q. And where do you reside?

A. 2215 West Boston Boulevard, Detroit.

Q. And what is your business?

A. Petroleum products.

Q. How long have you been in the oil business?

A. 14 years.

Q. Are you an officer of the Argo Oil Corporation?

A. Vice President.

5203 Q. When was Argo Oil Corporation incorporated?

A. 1922.

Q. And how long have you been with that company?

A. Since 1928.

Q. Will you describe, generally, the business of the Argo Oil Corporation; the products handled and the nature of the business?

A. At the present time? It has varied, at different times. We have been tank car operators, gasoline distributors, fuel oil distributors.

Q. How long has the company been engaged in the gasoline business? By that I mean the business of selling gasoline?

A. In the wholesale business it has been engaged, for, I would say, fifteen or sixteen years; in the wholesale gasoline business. In the retail gasoline business, since about 1930.

Q. Is the company's business, or has its business in the past ten years been predominantly fuel oil or gasoline?

A. Predominantly fuel oil.

Q. What was the volume of the Argo Oil Corporation sales of gasoline in 1939 and 1940?

Mr. Abbott: That is reflected by Respondent's Exhibits 55-A and 55-B. The exact figures are given.

Trial Examiner Ballinger: The witness may answer.

A. I would appreciate the exact figures. My guess 5204 would be approximately four million in 1939 and about seven million, seven to seven and a half million in 1940.

Trial Examiner Ballinger: You may insert the figures as shown by the record at this point if you—

Mr. Austin: I object, your Honor. That is Respondent's evidence and I don't think we are bound by that.

Mr. Abbott: I just wanted to interpolate that we have some figures on that in the exhibit, already.

Mr. Austin: Of course, I assume those are taken from the State gasoline reports but, nevertheless, I don't think that precludes me from inquiring from this witness.

Trial Examiner Ballinger: It does not.

By Mr. Austin:

Q. Most of the gasoline sold by Argo Oil Company in 1939 and 1940 was purchased from the Ohio Oil Corporation?

A. Yes, it was.

Q. Was the gasoline purchased by Argo from the Ohio Oil Corporation purchased by Argo and sold by it under a brand name?

A. Well, some of it, of course, was. Most of it was unbranded. That is, the customers could put any brand on it they wanted. Some of it was sold as Marathon.

Q. Marathon?

A. Marathon, which is the trade name of the Ohio Oil Company.

5205 Q. Was any of it sold as Linco?

A. In the beginning there was a transitional period of the trade names, that they were changing.

Q. When was that?

A. Early part of 1939.

Q. Was Linco then abandoned and did Marathon replace it as the brand name?

A. Yes.

Q. Did Argo Oil Company have a contract with the Ohio Oil Corporation for the purchase of gasoline?

A. Well, it had at that time. It hasn't, as of today.

Q. At that time, do you mean 1939 and 1940?

A. 1939 and 1940 there was a contract with the Ohio Oil Company.

Q. You say that contract is not now in force?

A. No.

Q. When was it terminated?

A. Actually terminated about March 1, 1941.

Q. And since March, 1941, has the Argo Oil Corporation sold Ohio Oil Company gasoline?

A. None.

Q. What is the extent of the business, the gasoline business of the Argo Oil Corporation now?

Mr. Abbott: I object to that upon ground that it is immaterial as rebuttal testimony, there being nothing 5206 in the testimony thus far as to the sales of the company in the year 1941.

Mr. Austin: Well, your Honor, there was testimony regarding the status of these companies and what they were doing in 1941. I will change that question, however.

By Mr. Austin:

Q. Instead of asking you now, I will ask you whether your gasoline business dropped off in 1941 after you discontinued the Ohio Oil Company gasoline?

Mr. Abbott: Same objection. It is not proper rebuttal testimony.

Trial Examiner Ballinger: The objection is overruled.

A. Yes, it did drop off.

5207 Trial Examiner Ballinger: Was there a marked decrease?

The Witness: Well, we are practically out of the gasoline business.

By Mr. Austin:

Q. Did the Argo Oil Corporation in the Spring of 1941 decide to abandon the gasoline business of the company? By abandoning it, I understand that you still have some business, but what I am getting at is, was there a definite change in the policy of the company regarding its gasoline business in the Spring of 1941?

Mr. Abbott: I object to that on the ground it is not proper rebuttal testimony.

Trial Examiner Ballinger: The objection is overruled.

A. With the cancellation of the contract, we had no alternative but to practically discontinue the business.

Q. Well, I won't pursue that, Mr. Feinberg. I just thought the fact that you ceased to buy from Ohio wouldn't necessarily preclude the company from continuing?

A. No, it didn't.

Q. Is Marathon gasoline now sold in Detroit?

A. No, it isn't.

Q. Will you explain how the Argo Oil Corporation obtained its gasoline from the Ohio Oil Company in 1939 and 1940?

5208 A. What do you mean "obtain"?

Q. I mean—

A. The method of delivery?

Q. The method of delivery and supply.

A. The Ohio Oil Company would have the gasoline delivered either to our bulk plant or to any of our designated dealers by truck train.

Q. Where did the delivery start?

A. Well, it would either start from their storage in the Rouge or from any firm that they had made some trade with.

Q. Does the Ohio Oil Company have a marine terminal here in Detroit?

A. Yes, it has.

Q. Do I understand that when you purchased gasoline from them for delivery to a customer, it was in some cases delivered from the marine terminal to your customer?

A. That's right, sir.

Q. Upon your order?

A. On our order. Instead of delivering to our bulk plant, it was delivered direct to the consumer.

Q. The condition we are discussing existed in 1939 and '40?

A. Yes, sir.

5219 Q. When you say direct to the consumer, you mean direct to the purchaser?

A. Direct to the man who would resell it. I don't mean the consumer. Pardon me.

Q. Was that transportation from the marine terminal to the purchaser made by transport truck?

A. By truck train, yes, sir.

Q. Who paid for the transportation?

A. Ohio Oil Company.

Q. Did they bill you for the cost of transportation or was that included in the price?

A. It was included in the price, though occasionally if we billed, credit would be given for the billing.

Q. If you purchased gasoline from Ohio Oil Company for delivery to your own bulk plant, was the gasoline delivered F. O. B. your bulk plant?

A. F. O. B. our bulk plant.

Q. So that if you instead directed the Ohio Oil Company to deliver a transport truckload of gasoline to one of your customers, the arrangement with the Ohio Oil Company was the same as if it had been a delivery to your bulk plant?

A. Exactly the same.

Mr. Abbott: Your Honor, may I have a continuing objection to all this line of testimony on the ground that it is not proper rebuttal?

Trial Examiner Ballinger: You may.

5210 Mr. Abbott: I fail to see how this in any way can be considered as rebuttal testimony.

Trial Examiner Ballinger: What is the capacity of the transport truck used?

The Witness: On an average of about 8,000 gallons.

By Mr. Austin:

Q. Did the Argo Oil Corporation ever import any gasoline into Detroit in boat loads or ship loads?

Mr. Abbott: The same objection.

A. No, it did not.

Trial Examiner Ballinger: The objection is overruled.

By Mr. Austin:

Q. Did Argo ever own or operate a marine terminal?

A. No, it did not.

Mr. Abbott: The same objection.

Trial Examiner Ballinger: You have a continuing objection.

Mr. Abbott: Yes, sir. Very well.

Trial Examiner Ballinger: So it is unnecessary to repeat it to each question.

By Mr. Austin:

Q. Did the Ohio Oil Company in 1939 and 1940 restrict or limit the amount of Marathon Gasoline it would sell to Argo Oil Corporation per month?

5211 Mr. Abbott: Just a moment.

I object to that question upon the ground that even if it did, it would be entirely immaterial in this case, not in any way binding upon any party involved in the case and wholly irrelevant to the issues in this case.

Mr. Austin: Your Honor, I might explain that these questions are leading up to the question as to whether or not Argo Oil Corporation ever did supply or offer to supply or was in a position to supply the Citrin-Kolb Oil Company. There was testimony by Mr. Citrin regarding certain alleged offers and negotiations with a representative of the Argo Oil Corporation.

Trial Examiner Ballinger: The Examiner understands these are merely preliminary questions.

Mr. Austin: Yes. And I want to call your Honor's attention to the fact that it appears on the record that the business of the Citrin-Kolb Oil Company was I think over five million gallons in 1939.

Trial Examiner Ballinger: The objection is overruled.

Mr. Austin: It will become material as to whether this corporation was in a position and could supply Citrin Kolb.

The Witness: Will you read the question?

Trial Examiner Ballinger: The Reporter will read

5212 the question.

The Reporter: (Reading.) "Did the Ohio Oil Company in 1939 and 1940 restrict or limit the amount of Marathon gasoline it would sell to Argo Oil Corporation per month?"

A. Yes, there were definite schedules attached to our contract.

Mr. Austin: I would like to have this paper marked for identification.

Trial Examiner Ballinger: The Reporter will mark the document for identification "Commission's Exhibit 112."

(The documents referred to were marked "Commission's Exhibit 112-A, B, C, and D" for identification.)

By Mr. Austin:

Q. I show you this document marked Commission's Exhibits 112-A, B, C, and D, and ask you if you can identify it?

A. Yes, sir, I can. This is a contract, copy of a contract between the Argo Oil Corporation and the Ohio Oil Company for the delivery of gasoline.

Q. Is that an original contract or is it a copy?

A. It is a photostatic copy of the original contract.

Q. Where did you obtain this photostat?

A. We had to obtain it from the Ohio Oil Company.

Q. Have you read it, and do you recognize it as being a true copy of the original contract?

A. Yes, I do. Yes, I have and do.

5213 Mr. Austin: I offer the contract in evidence, your Honor.

Mr. Abbott: Just a moment. I want to see it.

(Commission's Exhibit 112-A, B, C, and D, for identification, was handed to Mr. Abbott.)

Mr. Abbott: This is objected to upon several grounds: First, that no proper foundation has been laid for the introduction of a photostatic copy, it not having been shown that the original is not available.

Second, upon the ground that it refers to the period between March 1, 1940, through March 1, 1941, which is a period outside the date of the competitive offer made to the Citrin-Kolb Oil Company.

Third, upon the general ground that it is immaterial and not proper rebuttal testimony in this case.

The principal ground is, of course, that it relates to a period which is not within the time covered by the competitive offer which is in evidence in the case.

By Mr. Austin:

Q. Mr. Feinberg, did you search your files for an original copy of the contract?

A. Yes, we did.

Q. And were you able to find it?

A. We were not able to find a copy of our original contract.

5214 Q. Did you ask the Ohio Oil Company then to send you this photostat?

A. We did.

Mr. Austin: Now, in response to the objection, your Honor, as to the period, it does appear from the testimony that sometime in 1939, I think late in '39, but sometime in '39, the alleged offer was made, but my recollection is that those offers were understood to have been continuing and the witness has so testified in many cases.

However, I will ask the witness, if I may, before your Honor rules on the objection.

By Mr. Austin:

Q. What is the date of this contract?

A. The duration of the contract is from March the 1st of 1940 to March the 1st, '41.

Trial Examiner Ballinger: What is the date of the contract?

The Witness: There is no date on it, sir.

By Mr. Austin:

Q. This is it right here, isn't it (indicating)?

A. No. Well, that is March the 1st of '41. It was a renewal contract, sir.

Q. Did the Argo Oil Corporation, to your knowledge have a contract with Ohio Oil Company during the preceding year?

5215 A. Yes, it did.

Q. Was that contract in substantially the same form and did it have—I will ask you at this time whether as to the last page, Commission's Exhibit 112-B, the same figures appear?

Mr. Abbott: Just a moment, now, if the Court please. The question is objected to upon the ground that it is not the best evidence as to the contents of any prior contract, it not having been shown here that the prior contract, if there was any such, could not be produced, and I object to it upon the ground that we have a right to see, if this evidence is to go in, the contract which is now referred to in this last question.

Mr. Austin: I will withdraw the preceding question, in any event, but I would like to ask you this, Mr. Feinberg:

By Mr. Austin:

Q. Was the method of doing business between Argo Oil Corporation and Ohio Oil Company in 1939 substantially the same as in 1940?

Mr. Abbott: I object to that. Just a moment. I object to that upon the ground that it calls for a conclusion of fact which can be supplied by the proper agreement, it having been testified by this witness that there was an agreement covering the year 1939 in writing, which we demand you produce.

5216 Trial Examiner Ballinger: Objection is sustained as to that question.

Mr. Austin: Oh; as to that question. At the present time, I am only interested, your Honor, in putting this contract in evidence and as to the existence of a contract and the method of doing business as shown by this contract between Argo and Ohio during this period, I still offer the contract.

Trial Examiner Ballinger: The Examiner is prepared to rule with reference to the admission of that contract covering the period named in the contract.

Does counsel desire to be heard further?

Mr. Abbott: We merely say that the contract now proposed to be introduced in evidence does not cover the period of the competitive offer which I understand this testimony is intended to rebut.

Trial Examiner Ballinger: The period covered by the contract that this is intended to rebut? What contract do you refer to?

Mr. Abbott: I don't refer to any contract. I refer to a competitive offer which, according to the testimony on page

2149 of the record, was made by Argo Oil Company to Citrin-Kolb Oil Company, which offer, according to the record was made in 1939.

Trial Examiner Ballinger: Doesn't the record dis-
5217 close that that was a continuing offer?

Mr. Abbott: I don't think so. It does show that prior to 1939 there had been continuing solicitations by an official of the Argo Oil Company, but I don't think there is anything to show that the offer was made continuing after 1939.

Mr. Austin: In any event, your Honor, this is offered to show the nature of the business of the Argo Oil Company and the arrangement with the Ohio Oil Corporation, and I think it is entirely material for the period covered by the contract.

Mr. Abbott: It might be material for that period, but that period is not in issue here.

Mr. Austin: Well, I think it is. I think that the whole business—as a matter of fact, there is plenty of testimony in the record by Mr. Raupagh as to the business of the Argo Oil Corporation in 1941, let alone 1940.

Trial Examiner Ballinger: The objection is overruled. Commission's Exhibit 112-A, B, C, and D, for identification, is admitted in evidence and limited to the period named in the contract.

Mr. Abbott: Which is 1940 to '41?

Trial Examiner Ballinger: Whatever that period is.

(The documents referred to, heretofore marked for identification "COMMISSION'S EXHIBIT 112-A, B, C,
5218 and D", were received in evidence.)

By Mr. Austin:

Q. I believe you just stated, Mr. Feinberg, that there was some limitation upon the amount of gasoline that the Argo Oil Corporation could purchase from the Ohio Oil Company in each month under its contract?

A. Yes, I did.

5219 By Mr. Austin:

Q. Will you look at this contract, Commission's Exhibit 112, and tell us where in that contract there is any reference to the amount of gasoline which the contract covers?

A. We have a regular schedule, here, of the monthly gallonage of regular and Ethyl for each month.

Trial Examiner Ballinger: That appears on the last page, does it?

Witness: On the last page of the contract, which is part of the contract, sir.

By Mr. Austin:

Q. And what is the meaning of that schedule?

Mr. Abbott: I object to that upon the ground that the instrument speaks for itself. It is not ambiguous and requires no explanation.

Mr. Austin: I think it is ambiguous and requires an explanation.

I suggest that the Trial Examiner look at the contract, if there is any doubt about that.

Trial Examiner Ballinger: Let me see the contract.

(The document referred to was handed to the Trial Examiner by the witness.)

Mr. Austin: I don't believe any one can tell, from looking at that list of figures, how they apply as limitations on monthly gallonage, except from the testimony of
5220 the witness.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

In order to remove any question as to the meaning of the contract, the objection is overruled, and the witness may answer.

Mr. Abbott: What is the question, Mr. Reporter?

(The question referred to was read by the Reporter.)

A. The schedule, as outlined, stated a definite amount of gallons to be delivered of regular and Ethyl gasoline during each month of the contract. For the month of March, 1940, 500,000 gallons of regular—

By Mr. Austin:

Q. You don't have to read that into the record, Mr. Feinberg. That will appear, as far as the figures are concerned. I wasn't clear though, as to whether those were definite monthly requirements or whether the contract showed that there was a certain variation permitted.

A. We are permitted a leeway of ten percent more or less of the figures as stated in the schedule.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

5221 Q. Have there been any instances or were there any instances during 1939 or 1940 where you tried to obtain from the Ohio Oil Corporation, or requested the Ohio Oil Corporation, to sell you quantities of gasoline in excess of your contract schedule?

A. Yes.

Mr. Abbott: I object to any further testimony along this line upon the ground that it is not proper rebuttal testimony.

Mr. Austin: I thought you had a continuing objection.

Trial Examiner Ballinger: You have a continuing objection.

By Mr. Austin:

Q. Can you refer to any particular instance of that kind, and state what happened?

A. There have been occasions when we would require more gasoline and were not able to get it from the Ohio Oil Corporation. There have been others when we were in excess of the amount mentioned.

Q. Well, did a request for additional gallonage have to be made direct to the company or could that be simply ordered at the Marine Terminal and passed upon there?

A. No, it would have to be made direct to the company.

Q. In advance of placing your order?

5222 A. In advance of shipment, yes, sir.

Q. Did the Argo Oil Corporation operate any retail gasoline stations in 1939 and 1940?

A. Yes, it did.

Q. How many?

A. In 1939, three. In 1940, three. That is, part of the year 1940, three. We sold one. I am trying to think of the exact period but I think it was during the early part of 1941.

Q. To how many service stations, if any, did Argo Oil Company sell Marathon gasoline by tank truck delivery in 1939 and 1940?

A. In addition to our own stations?

Q. You didn't sell to your own stations. I am talking about sales, now, to retail gasoline stations.

A. Under the name of Marathon?

Q. Yes.

A. Not more than two or three.

Q. And what price was charged to such retail service stations for delivery of Marathon gasoline in tank car quantities; that is, 1500 gallons or less?

Mr. Abbott: I will ask that the question be deferred until we are given the names of the retail service stations so served.

Mr. Austin: That is entirely improper, your Hon-
5223 or. I don't think the witness can be requested to give
the names of any of his customers and I think it would
be entirely immaterial. I think it would be also improper
on cross-examination in the case if the question arises later.

Mr. Abbott: Is there anything secret about it?

Mr. Austin: It is against the policy of the Federal Trade Commission to require witnesses to put names into the record and the statute specifically prohibits us from making the names public.

Mr. Abbott: They are already in Exhibit 38-A to E, inclusive.

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

Mr. Austin: Your Honor ruling that a witness which I called here, who is not a party to the case, may be asked the names of his customers?

Trial Examiner Ballinger: I am overruling the objection interposed by counsel for the Respondent at this time. Read the objection.

Reporter: "Mr. Abbott: I will ask that the question be deferred until we are given the names of the retail service stations so served."

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5224 Trial Examiner Ballinger: On the record.
Now read the last question.

Reporter: "Q. And what price was charged to such retail service stations for delivery of Marathon gasoline in tank truck quantities; that is, 1500 gallons or less?"

By Mr. Austin:

Q. The question is, just as to the price.

A. Tank wagon price was possibly, in one or two cases, a half a cent less to the smaller service station than the posted tank wagon price at that time.

Q. Whose posted tank wagon price?

A. I would probably say Standard Oil Company's posted tank wagon price.

Q. Are you referring to the prevailing major tank wagon price?

A. That's right, if you are talking about small retail establishments taking 1500 gallons or less.

Q. You said you served two or three of that type of customers.

A. That's right.

Q. Are you familiar with the Red Crown brand, Mr. Feinberg?

A. I am.

Q. And with Blue Sunoco?

A. I am.

Q. And with White Star, Texaco?

5225 A. Yes.

Q. Taking those as examples, would you state that those are major brands in Detroit?

A. Yes, I would.

Q. In your opinion did Marathon gasoline have as high a public acceptance in Detroit in 1939 and 1940 as the major brands just named?

Mr. Abbott: If the Court please, I object to that upon the ground that it is irrelevant and improper; no proper foundation laid for any opinion to be stated by this witness as to the relative values of gasolines as compared with Marathon brand which is company-marketed in the year 1939.

We are getting into the realm, now, of expert testimony and opinion as to the relative value and quality of gasolines and this witness, upon the record, is not qualified by any of his testimony thus far to answer that question.

Trial Examiner Ballinger: Isn't it more a question of public acceptance?

Mr. Austin: Of course, your Honor, that's just what it is and we have had all sorts of testimony in the record on that point but—

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

5226 Witness: May I have the question again?

Trial Examiner Ballinger: Read the question.

Reporter: "Q. In your opinion did Marathon gasoline have as high a public acceptance in Detroit in 1939 and 1940 as the major brands just named?"

A. No.

By Mr. Austin:

Q. Did you consider, in those years, Marathon to be a major brand in Detroit?

Mr. Abbott: Just a moment, if the Court please.

I object to that upon the ground that it calls for the opinion of the witness, no proper foundation laid, this witness not being qualified upon the record to answer that question and there farther being nothing in the record to indicate what is the meaning of the question now propounded.

Trial Examiner Ballinger: Merely the witness' opinion.

The objection is overruled. The witness may answer.

Mr. Austin: The witness has been in the oil business, here, for ten or twelve years, at least; sold its own brand of gasoline.

Witness: May I have the question?

Trial Examiner Ballinger: Read the question, please.

Reporter: "Q. Did you consider in those years,
5227 Marathon to be a major brand in Detroit?"

A. Not in Detroit. Marathon was a newcomer in Detroit and we were introducing it. There are other places, of course, where Marathon, being a product of a major oil company, is considered a major brand, but not in Detroit.

Trial Examiner Ballinger: It hadn't received the public acceptance, then?

Witness: It wasn't known, sir. We were just beginning to distribute it.

By Mr. Austin:

Q. Was there a Mr. Roy Fisher associated with the Argo Oil Corporation in 1939?

A. Yes, there was.

Q. What was his position with the Argo Oil Corporation?

A. He was president of the corporation.

Q. Is he still with the Argo Oil Corporation?

A. No, he is not.

Q. When did his connection with the company cease?

A. October 28, 1941.

Q. Do you know where he is now?

A. No I don't, sir.

Q. Is he in Detroit, to the best of your knowledge?

A. Not that I know of.

Q. Did Mr. Fisher, in 1939, have authority to quote prices or make offers to sell gasoline on behalf of the
5228 Argo Oil Corporation?

Mr. Abbott: Just a moment. I object.

A. Yes, sir, he did.

Mr. Abbott: I'll withdraw that objection.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. And in 1939 were you an officer of the Argo Oil Corporation?

A. Yes, I was.

Q. What was your position then?

A. Vice President.

Q. Was it customary at that time for Mr. Fisher to discuss or talk over with the other officers of the company any proposed deal which he might have, or have in prospect, for the sale of gasoline to a customer whose requirements were in excess of a million gallons a year?

Mr. Abbott: If the Court please, I object to that, as to what the customer was. It is in evidence, here, that Mr. Roy Fisher did make a competitive offer to one of the witnesses whose testimony was adduced by the Respondent and I don't understand that you can rebut an interview on the part of Mr. Fisher, as President of the Argo Oil Company, with Mr. Citrin, by asking a witness if it was
5229 the custom of Mr. Fisher to discuss such offers.

Mr. Austin: Your Honor, I—

Mr. Abbott: I object to the question, upon that ground.

Mr. Austin: The purpose is to put in certain circumstantial evidence, here, which I think I have a right to do, to throw doubt upon the—not necessarily upon the conversation which Mr. Fisher is alleged to have had with Mr. Citrin, but let me point out that we are concerned here, under the statute, with the price of a competitor. That doesn't mean a lot of talk. That means a competitor's price.

It is not contended Mr. Fisher was selling gasoline; it was the Argo Oil Corporation. Therefore, I think it is quite material to determine whether or not the statement, if any, that Mr. Fisher made to Mr. Citrin, or any one else in this case, was simply talk or whether it really did represent an offer of the Argo Oil Corporation or whether the Argo Oil Corporation could have carried out such an offer if accepted, whether or not the price quoted was a price which the Argo Oil Corporation was in a position to give.

I think we are entitled to go into those things regarding the company who is alleged to have made the offer and we certainly are not bound simply to accept the testimony of one Respondent's witness as to what somebody else 5230 said to him and then accept that as a bona fide offer.

Trial Examiner Ballinger: Is it your contention that you can rebut definite testimony to the effect that an offer was made by showing the ordinary course of business or what was done in the ordinary course of business?

Mr. Austin: Well, yes, because, your Honor is assuming, in asking that question, that an offer was made. Now the fact that an officer of the corporation quoted a price to somebody, doesn't necessarily mean that that could ever have ripened into a contract and I think that when a dealer comes in here and says John Jones came up to me and said, well, he would sell me gas for so much, that we have a right to inquire into the circumstances surrounding that and the position of the company supposed to be represented, and its ability to supply, and in order to throw some light upon whether or not there was anything that amounted to a substantial offer.

Trial Examiner Ballinger: Are you an officer of the Ohio Corporation?

Witness: No, I am an officer of the Argo Oil Corporation.

Trial Examiner Ballinger: And did the testimony relate to some offer from the Argo Oil Corporation to—

Mr. Austin: That's right; a conversation alleged to have been said by Mr. Fisher, and it was at the time when 5231 Mr. Fisher was supposed to have called to get a contribution to some campaign and, at the same time, talked over gasoline.

Trial Examiner Ballinger: Where is Mr. Fisher now?

Mr. Austin: The witness says he doesn't know where he is and he is no longer connected with the company.

Trial Examiner Ballinger: You were an officer of the corporation at that time?

Witness: Yes, sir; I have been an officer for 14 years.

Trial Examiner Ballinger: And it would have been necessary for you to have passed upon such an offer?

Witness: No sir, but it would have been necessary to have been discussed with either myself or some other officer of the corporation. It would have been common knowledge.

Trial Examiner Ballinger: Did Mr. Fisher have the power to make such a contract?

Witness: Yes, sir.

Mr. Austin: You see, your Honor, circumstantial evidence in various parts, may not have much weight and altogether it may have considerable weight. This is one question leading to a line of questions which I simply intend to ask to find out what record there is, either in the minds of the officer or in the records of the company regarding any such deal. That may, in itself, amount to very little. I
5232 still think it is competent for whatever weight it may have in building up a picture.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The objection is overruled.

At the conclusion of the testimony, if counsel for the Respondent so desires, I will entertain a motion to strike unless it does develop something substantial, and unless it does, the Trial Examiner will strike the testimony.

Read the question.

Reporter: "Q. Was it customary at that time for Mr. Fisher to discuss or talk over with the other officers of the company any proposed deal which he might have, or have in prospect, for the sale of gasoline to a customer whose requirements were in excess of a million gallons a year?"

A. Yes, sir.

5233 By Mr. Austin:

Q. Did Mr. Fisher ever tell you at any time during 1939 or 1940 that he had had any conversation or negotiations with the Citrin-Kolb Oil Company or with Mr. Jacob Citrin regarding the sale of gasoline by Argo to Citrin-Kolb?

A. No, sir.

Mr. Abbott: Objected to under the same grounds.

Trial Examiner Ballinger: Well, you have a continuing objection.

Mr. Abbott: Yes.

By Mr. Austin:

Q. Mr. Feinberg, have you searched the books and files of your company for any reference or record of an offer to the Citrin-Kolb Company?

A. Yes, we have.

Q. Did you find any record of any such offer?

A. No, sir, we found nothing.

Q. Do the Argo Oil Corporation's files contain any rec-
rd of any correspondence with the Ohio Oil Company re-
erring to any offer to or negotiations with the Citrin-Kolb
il Company for the sale of gasoline?

A. There is nothing in our files.

Q. It appears on the record, Mr. Feinberg, that the gaso-
ine volume of the Citrin-Kolb Oil Company in '39 and 1940
amounted to about five million gallons annually. Sup-
234 posing, Mr. Feinberg, that the Argo Oil Corporation
in 1939 had found a prospective customer who was
eady and willing to purchase five million gallons of Mara-
hon gasoline a year, in carload lots, at a price acceptable
o Argo. Was Argo in a position to obtain and sell Mara-
hon gasoline to a single customer in that quantity without
irst obtaining the approval of the Ohio Oil Company?

Mr. Abbott: Now, just a moment. If it please the Court,
his is objected to upon the ground, first, that it assumes a
act not in evidence, that the supply was to be entirely
Marathon gasoline, or that it was to emanate entirely from
he Ohio Oil Company; and, secondly, that the question
sked is purely suppositious and speculative and is, there-
ore, incompetent.

Trial Examiner Ballinger: The objection is overruled.
The witness may answer.

A. According to our schedule of deliveries we would
ot have been able to deliver. We couldn't have made the
eliveries without first receiving the approval of the Ohio
il Company.

By Mr. Austin:

Q. Did the Argo Oil Corporation ever sell gasoline on
commission basis?

A. No, sir.

Q. Did you ever have any arrangement with the Ohio
Oil Company whereby the Ohio Oil Company paid
235 Argo a commission or brokerage based upon the
amount of gasoline sold by Ohio Oil Company to a
ustomer obtained by Argo?

A. None that I know of, sir.

Q. Well, do you know whether you ever did?

A. We never did.

Q. Whether you ever obtained a commission or broker-
ge from the Ohio Oil Company?

A. No, sir.

Q. Did your company have authority from Ohio Oil Company to enter into any such arrangement on behalf of the Ohio Oil Company?

A. No, sir.

Mr. Abbott: Just a moment, before you answer that question.

I object to that upon the ground that it is incompetent and immaterial as to whether the Ohio Oil Company ever authorized the making of any such contract as the one now discussed.

Mr. Austin: Your Honor, I think it is now appropriate to call attention to the fact at that point that Mr. Citrin's testimony was that Argo was to act as a broker or commission agent on this proposed deal and were to receive a percentage or commission per gallon.

Trial Examiner Ballinger: The objection is overruled.

The Witness: The answer is "No, sir."

5236 By Mr. Austin:

Q. There is some testimony on the record here, Mr. Feinberg, about a conversation which Mr. Fisher is alleged to have had with Mr. Citrin in 1939 in which Mr. Fisher is related to have told Mr. Citrin about some big deals that he was contemplating in gasoline to be obtained from the Mexican government. To your knowledge was Mr. Fisher at any time contemplating the purchase of gasoline from the Mexican government and importing it into Detroit?

Mr. Abbott: Just a moment. Just a moment.

That is objected to upon the ground that this witness cannot know what was in the mind of Mr. Fisher or what he was contemplating in 1939.

Mr. Austin: I think he can, your Honor. He was a business associate, and I am only asking him to tell me what he knows. If Mr. Fisher talked to him about it, then he certainly knows whether Mr. Fisher was contemplating it, but I don't want to go into specific conversation.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Mr. Abbott: I object on the further ground that any such testimony would be hearsay.

Trial Examiner Ballinger: The objection is overruled.

A. Our first intimation of any deal—.

5237 Q. Well, just answer the question, if you can, yes or no.

A. Yes.

Q. Do you know whether Mr. Fisher ever went to Mexico for the purpose of completing any such deal?

A. According to the newspapers, he did. That is as much as we know about it.

Trial Examiner Ballinger: You mean according to the newspapers printed at the time he went to Mexico?

The Witness: I don't know how to answer that. Off the record, your Honor.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Will you please tell us what you know about Mr. Roy Fisher's adventure in Mexican petroleum, Mr. Feinberg?

Mr. Abbott: Just a moment. I object to that upon the ground it is wholly immaterial. The only testimony in the record here is that Mr. Fisher told Mr. Citrin that he was having some negotiations with the Mexican government. Now, as to whether those negotiations were gone through with, or whether they were actually bona fide is wholly immaterial upon the record in this case.

The only testimony is that Mr. Fisher mentioned that to Mr. Citrin, just in passing, and it is at the bottom
5238 of page 2152 of the record, and that is the only reference made to it.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The objection is sustained.

Mr. Austin: Your Honor, as long as it is being read, I further refer to page 2253.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Did Roy Fisher ever bring into the United States for the Argo Oil Corporation any gasoline from Mexico?

A. None.

Q. Did you at my request examine and bring some information with you, Mr. Feinberg, regarding the prices paid by Argo Oil Corporation for Marathon gasoline in '39 and '40?

A. Yes, we did.

Q. I would like to ask you to state the prices paid, and if the price varies, the times at which different prices were paid?

Mr. Abbott: I object to any testimony as to any period outside of the date of the competitive offer, which is in 1939, and object on the ground that there is no relevancy
between the prices paid in 1940 by the Argo Oil Com-
5239 pany to its supplier, the Ohio Oil Company, for gaso-
line.

Trial Examiner Ballinger: What is the importance of prices in 1940, Mr. Austin?

Mr. Austin: Well, you have got to start sometime, your Honor, and I think that in view of a great deal of the testimony, not only of Mr. Citrin, but the testimony put in by the Standard Oil Company through Mr. Raupagh and others, of the ability of certain competitors, alleged competitors to compete with the Standard Oil Company, and Mr. Raupagh, for instance, named in his testimony a large number of customers that he claims are competitors, and we have had some testimony as to the nature of their business, but relating it particularly to the alleged offer from Mr. Citrin, the offer was supposed to have been to sell at two cents below the prevailing tank wagon price. Now, if I can show, and I propose to show, that Argo Oil Corporation paid that much to Ohio Oil Company, I think that it certainly may be inferred that Ohio Oil Company was in no position, in fact, couldn't have made the offer alleged to Mr. Citrin unless they were going to sell gasoline at a loss.

Mr. Abbott: Well, the Court asked you what was the relevancy of the price paid in 1940.

Mr. Austin: Oh, in 1940? Because of the fact that there is so much testimony in here about this company and others that I think that as to the way they do business,
the amount they sold, and all that, I think that the
5240 price they paid and the price they sold it for is of
some importance in indicating the nature and extent
of their competition with the Respondent, if any.

Mr. Abbott: Well, you still didn't answer the question. I am wondering what is the relevancy of the 1940 prices.

Mr. Austin: I think 1940 and I think 1937 would be relevant, anything since 1936. I have only asked the witness to bring in two years. Mr. Raupagh's testimony about these various companies and other records put in here from people up-state were not confined to any one year. Mr. Raupagh's testimony was related to the existing situation last year, when we were taking testimony, which was 1941. I can turn to that.

Trial Examiner Ballinger: The objection is overruled. The witness may answer both as to '39 and '40.

The Witness: You wanted to know what was paid for oil—for gasoline in 1939?

By Mr. Austin:

Q. Yes. And you may restrict your answer to the so called house brand. Was Marathon the so called house brand of the Ohio Oil Company?

A. In '39 it was Linco, in the early part of '39. It later became Marathon, the same grade.

Q. You don't need to give us the prices on Ethyl.

5241 That is what I meant.

A. All right. On January the 3rd of January, 1939, we were paying 5.85.

Q. Does that mean 5.85 cents?

A. 5.85 per gallon.

Q. Cents?

A. Cents, yes, sir.

For any other period? I mean, do you want various dates for various months or what?

Q. How long did you pay that price and when did you pay a different price?

A. We brought the records for the first six months of January and first six months of February of 1940—rather of '39 and '40, to give you any comparison. I don't know how much further down we went on that.

Q. How long were you selling Linco, and when did you change to Marathon?

A. I think we were notified of the change in the latter months of 1939. The actual change took place following that. I would assume it was the early part of 1940.

Q. Weren't you selling Marathon part of '39?

A. Yes, we were. As far as the—we were selling both brands for a while until the change-over was made completely Marathon. The Linco was entirely eliminated. I

can show the transition of the brands very easily, 'th
even in 1939 both brands were imprinted on tha
5242 invoices, both Linco and Marathon.

Q. Was the price the same for both brands wh
they were both being used.

A. The price was the same, oh, yes.

Q. You started out with the figure of 5.85 early in '3
How long did that continue and when was there a chang

A. It continued most of '39. I haven't the exact dat
of any changes.

Q. Well, did that continue during the six months
to which you have records there?

A. Yes, I did.

Q. Now, turn to 1940 and tell us what price you pa
for Marathon gasoline and Linco, if any, in 1940?

A. We paid .061 per gallon on the same date in 194

Q. What is 6.1¢?

A. That is 6.1¢.

Q. Did you pay that same price during all of 1940?

A. It would vary as conditions varied in 1940. L
me look over the first six months and I can tell you tha

Q. Yes.

A. For the first six months of 1940 the price prevaile
I don't know about the last six months.

Q. Uniformly 6.1¢ per gallon?

A. That's right.

There is some reference to price to be paid in th
5243 contract which is in evidence as Commission's Exl
bit 112, is there not?

A. Yes, there is.

Q. Will you take that exhibit and state whether th
contract fixes a definite price to be paid at any time by th
Argo Oil Company?

A. It fixes a price with variations depending on othe
market factors.

Q. Is your answer that there is no definite price fixe
in the contract?

A. There is a margin of $1\frac{3}{4}$¢.

Q. Is that a minimum margin?

A. Based on various factors which fluctuate, so that o
average margin would be about two cents.

Q. Was your average margin in fact two cents pe
gallon under the prevailing tank wagon price?

A. Not exactly. There were times it varied from to 1.90, two cents. It wouldn't exactly be two cents, but it averages about two cents per gallon.

Q. At what prices did Argo Oil Corporation sell Marathon gasoline by transport truck delivery, and that means—

A. Under the Marathon brand?

Q. Just a moment.—by transport truck delivery to reseller customers in 1939 and 1940, and I am speaking about Marathon brand, yes.

Mr. Abbott: Just a moment. You are asking for the 5244 prices of Ohio Oil Company?

Mr. Austin: No, the prices of Argo, at which Argo sold to their distributor or jobber customers, and I refer back to the testimony a while ago that those deliveries were frequently made direct from the marine terminal in the same manner that delivery was made to you.

A. The prices varied. I would say prices ranged anywhere from—

Q. Well, just a minute. I would rather have you state—

A. Exactly?

Q. —specific prices and the number of customers and the period at which you sold at a certain price.

A. Well, that is rather difficult to give you, sir. I would have to break down all the books. We had no stated definite price.

Q. Well, what I mean is, did you, say, in January, 1939—you sold so many customers at one price or so many at another. If you can't give us the number of customers, can you at least give us the prices.

A. The prices would vary anywhere from 6.3 to 6.6 per gallon.

Q. During what period?

A. Periods in '39. I can give you the exact dates of different shipments sold to—

Q. Will you do that?

A. —to different dealers, yes. All I got to do is give you the invoices, but there was no fixed price, unfortunately.

5245 This one here, for instance, is the 16th of August of '39, .067.

This one is 29th of August, .066 to another customer.

Here is one for .063 to another customer.

Q. Did you sell to any customer below 6.3¢ per gallon?

A. I think 6.3 would be about the lowest price at that time.

Q. Have you any record or statement there for 1939 or 1940 by months or showing the number of customers which you sold at different prices?

A. No. It would require an exhaustive study of the records to determine the gallons and the prices delivered to different people in those periods. It could be compiled but, frankly, it would be a lot of work.

Q. Can you state—

A. I think we can give you the same thing you are asking for by simply picking out different invoices at different periods.

Mr. Abbott: I want the record to show that the witness is refreshing himself from a large sheet of invoices, and I would like to inquire whether the accountants for the Respondent will be permitted to examine these for the purpose of cross examination of the witness.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5246 Trial Examiner Ballinger: On the record.

Mr. Abbott: I think we ought to be permitted to have some check on this matter of price quotations, and if they are not going to introduce in evidence the invoices, then we certainly ought to see the basis of the witness' recollection, if he is going to use those for refreshing his recollection.

Trial Examiner Ballinger: Have you any objection to permitting counsel for Respondent to examine the invoices you are now referring to in giving your testimony?

The Witness: No, I haven't, sir. I think it is perfectly all right.

Trial Examiner Ballinger: Will you kindly lay those aside?

Mr. Austin: Yes, just the ones that you used.

The Witness: Yes, I understand.

Mr. Austin: And try and pick out a representative group, because I want you to be able to tell me that you are—well, I want to know the range of prices, Mr. Feinberg. That is what I am trying to get, whether it be from 6.3 to 6.7.

The Witness: Is this on the record or off the record?

Trial Examiner Ballinger: It is on the record.

The Witness: The only way to determine that, of course,
would be to go through our invoices and have either
5247 one or both of you pick out whatever you want to
look at. You don't want all of our records.

By Mr. Austin:

Q. No. I thought perhaps you had already made a schedule.

A. We haven't. I mean, we just picked out invoices at random over those periods.

Q. Can you tell me whether you sold to any customer below 6.3¢ per gallon, talking about Marathon gasoline in 1939 or 1940?

A. I think 6.3 was our lowest price.

Q. Would the period of the price war at the end of 1939 have any effect upon that?

A. No, it didn't. As a matter of fact, our prices—here is one in September of 1939 at 6.6. Here is one in November of '39 at 6.6. Here is one of February of 1940 at 6.3 (indicating). I am perfectly willing to have them look and choose anyone of these.

Trial Examiner Ballinger: Are you willing that counsel may—

The Witness: Yes, I am. I am only too glad to let him look at it.

Trial Examiner Ballinger: The invoices referred to by the witness are now tendered to counsel for Respondent.

By Mr. Austin:

Q. Was the gasoline to which you have been referring in stating these prices sold F. O. B. the buyer's tanks?

5248 A. Yes.

Q. Do you know how many customers you had in 1939 who purchased Marathon gasoline for resale?

A. As Marathon?

Q. Yes.

A. Very few.

Q. What do you mean by very few?

A. Three or four.

Q. Has the Argo Oil Corporation ever been in a position since January 1, 1939, to sell Marathon gasoline to any purchaser in Detroit at two cents or more below the prevailing major tank wagon price and makes a profit?

Mr. Abbott: Now, just a moment, if the Court please. The question is, has the Argo Oil Company been in a position to sell at two cents less than the tank wagon price. I object to the form of the question as to whether it has been in a position to do so. Does that mean financial position or what is the meaning of the question? I object

to it upon the ground that the question is ambiguous a
unintelligible.

Mr. Austin: I think that the word "position" in bu
ness is pretty well settled and, of course, it means
view of the entire business relationships of the busine

Trial Examiner Ballinger: The objection is sustai
Reframe your question so as to remove any doubt.

By Mr. Austin:

5249 Q. If the Argo Oil Corporation at any time si
January, 1939, had entered into an agreement
sell gasoline in tank car or transport truck quantities
a jobber in Detroit, at two cents or more below the p
vailing major tank wagon price, could it have carried
such a contract profitably?

A: No.

Trial Examiner Ballinger: Could it have carried
such a contract without a loss?

The Witness: No.

Mr. Austin: That is all I have.

Mr. Abbott: All right. May we take a recess at t
time?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: Your Honor, I move we adjourn until 1
o'clock.

Trial Examiner Ballinger: Motion of counsel
Respondent is granted and now, at 12:05 p. m., the hear
stands in recess until 1:00 p. m.

(Whereupon at 12:05 p. m. a recess was taken u
1:00 p. m.)

5250 Afternoon Session.

1:00 P. M.

Trial Examiner Ballinger: We are now reconvened, at 1:00 p. m.

You may proceed.

Mr. Abbott: Mr. Austin, are you through with the direct examination of this witness?

Mr. Austin: Yes.

Cross-Examination by Mr. Abbott.

Q. Mr. Feinberg, where is Mr. Roy Fisher at the present time?

A. We have no knowledge, sir. We don't know where he is.

Q. Isn't he in California?

A. It has been rumored that he was in Florida and then in California, and, as a matter of fact, we don't know. They are looking for him. I mean he is involved in some legal action where they are looking for him and I frankly don't know where he is.

Q. That isn't any criminal matter, is it?

A. It involves bankruptcy I think; involuntary bankruptcy I think.

Q. Well, of your own knowledge do you know whether Roy Fisher of the Argo Oil Company made this offer in question to the Citrin Kolb Oil Company in 1939?

5251 A. No, I don't, sir.

Q. You don't know.

A. Of my own knowledge, no sir.

Q. You don't know.

Trial Examiner Ballinger: Do you know whether or not he made it—such an offer—for and on behalf of your company?

The Witness: No sir. May I add just a word to that?

Mr. Abbott: You answered the question.

Trial Examiner Ballinger: The witness may explain his answer.

Mr. Abbott: If the Court please, this is cross examination of the witness. If they wish to bring out anything on redirect examination, why, that is all right, but of course, if your Honor wishes to have him explain the answer why, I will have to submit to that.

The Witness: It isn't necessary.

Trial Examiner Ballinger: You may explain th answer, if you desire.

5252 A. Naturally, it is quite possible that Mr. Fishe may have made a number of offers in the course o business.

Mr. Austin: We want to know what the witness— asked him those same questions on direct and he gave th same answers.

The Witness: That's right. The answer is "no."

By Mr. Abbott:

Q. That you don't know?

A. That's right. I don't know, sir.

Q. Now, Mr. Feinberg, you had, according to th records of the Michigan Gasoline Tax Department, number of customers in the year 1940 and 1939, in additio to those that you have mentioned in your testimony, and want to ask you whether these were some of your customer in those years. J. J. Bright & Son. I mean the customer of the Argo Oil Company.

A. I understand, sir. Without referring to our offic records I would hesitate to answer either way because frankly, I am not familiar with the individual accounts At one time or another Bright's have been a customer o the Argo Oil Corporation but whether in that exact period I am reluctant to answer without referring to our records.

Q. They were at one time, though, a customer of the Argo Oil Corporation?

A. Yes, sir.

Q. Bull Dog Oil Company?

A. Yes, sir.

5253 Q. Were they a customer of yours in 1939 and '40?

A. I would have to give you the same answer. They have been a customer of ours. In what particular period I wouldn't know without referring to records.

Q. Great American Oil and Refining Company?

A. That isn't familiar to me.

Q. Meurer Brothers Company?

A. Yes, sir, they were in that period. I definitely know that.

Q. Now, Meurer Brothers have a station out on Gratiot Avenue, haven't they?

A. Yes, sir.

Q. Were they a customer of yours?

A. Yes, sir, they were in 1939 and 1940.

Q. Do you know whether you supplied them with their requirements of gasoline or did they buy it from other sources also?

A. I think we were supplying their entire requirements.

Q. Miller Tank Car Company? Did you suply them?

A. Yes, we did.

Q. Did you supply their entire requirements of gasoline in those years '39 and '40?

A. I can't answer that of my own knowledge.

Q. Montgomery Ward & Company?

Mr. Austin: Your Honor, I don't know whether this is proper cross examination. I think I will object to it on that ground because I asked the witness no question 5254 about any jobber customers except all I asked him was prices charged. Now, I did ask him about a number of retail stations buying in small quantities. On that branch I think this would be correct, but I didn't ask him anything about the names of any customers or as to the number of customers that he had on jobber quantities.

Mr. Abbott: The pertinency of this is, if the Court please, to show the volume of their business in gallons of gasoline, because there already is in evidence the volume of gasoline of some of these customers from the records of the Gasoline Tax Department, and I am asking this for the purpose of—they have attempted to show that they didn't have a large enough volume of business to fulfill any contract that might have been made with Citrin-Kolb Oil Company. I wish to show by this that the volume of their business in those two years with reference to customers that they served—

Mr. Austin: Well, on that point, as counsel for Respondent stated this morning, the volume of the Argo Oil Company business as shown by the State Tax reports is in the record, and it was put in by the Respondent. So I fail to see the relevancy of this in trying to build up a volume when we already know what the volume was, and the Respondent itself has put in evidence on that point.

Trial Examiner Ballinger: The evidence in the record is evidently the best evidence.

5255 Mr. Austin: Evidently the best evidence and, furthermore, the fact that volume was made up of sales to a certain number of main customers would not show at all that additional volume equal to Citrin-Kolb's could have been taken off. If counsel means that they might have taken on Citrin-Kolb and robbed some of their other customers, why, I would concede that their total volume was what is shown in the record.

Mr. Abbott: I want to show that they had such customers as Montgomery Ward & Company, and to ask the witness to submit some invoices showing at what price they sold the Montgomery Ward Company.

Trial Examiner Ballinger: Do you propose now to impeach your own testimony?

Mr. Abbott: No, I am attempting to cross examine this witness.

Mr. Austin: Well, if it is on the question of total volume, that is in the record, the best evidence.

Trial Examiner Ballinger: This witness did testify with reference to total volume, did he not?

Mr. Abbott: Yes, he did, and he also testified with reference to the price charged, which I have a right to go into.

Trial Examiner Ballinger: You have a perfect right to go into the question of the price charged.

Mr. Abbott: Yes.

Now, in order to get that, I have to know the names 5256 of the customers in order to lay a foundation to ask him what price was charged to those customers.

Trial Examiner Ballinger: The objection is overruled, subject to renewal and a motion to strike.

Q. The last question asked you was this—

A. The answer is "yes."

Q. Montgomery Ward & Company?

A. Yes.

Q. And they have a number of large retail outlets?

A. Yes.

Q. At the various Montgomery Ward stores, don't they?

A. Yes.

Q. One on Grand River?

A. Yes, sir.

Q. How many stations do they have altogether that you supplied their gasoline with?

A. We supplied all their gasoline requirements. I don't know how many stations.

Q. They had also a station on Gratiot Avenue, didn't they?

A. That is the one you asked about, on Gratiot.

Q. Also one on Grand River?

A. Yes, sir.

Q. Have you any invoices here showing the price charged Montgomery Ward & Company for their gasoline in the years 1939 and 1940?

5257 A. These invoices are not in alphabetical order. It may be a little difficult to find the exact ones.

Trial Examiner Ballinger: Take your time and find them.

(Pause.)

Trial Examiner Ballinger: Are you ready to answer?

The Witness: Ready to answer, sir.

A. On the 23rd of August, 1939, .0685 per gallon.

5258 Mr. Abbott: May we see those?

Witness: Oh, yes. I have any number of those of various dates.

Trial Examiner Ballinger: The witness hands the invoices to counsel for the Respondent as he testifies to them.

Witness: September, October, November, 1939.

By Mr. Abbott:

Q. May I see those?

A. There are any number of those.

Mr. Austin: Your Honor, I think if the invoices are being produced, shouldn't the testimony be put in the record regarding them?

Mr. Abbott: You didn't do that this morning.

Mr. Austin: I think I did; all he withdrew.

Trial Examiner Ballinger: If he testifies with reference to the price, and that's all that's desired, but if you want them in more concise form on the record, then they should be identified.

Witness: I gave him an invoice dated, I think it is August, 1939, showing sales to Montgomery Ward at .0685.

By Mr. Abbott:

Q. The bills that you have given me—

Mr. Austin: Mr. Feinberg, will you state these prices in cents?

5259 A. 6.85¢ per gallon.

In April of 1940—I gave Mr. Abbott an invoice showing delivered price of 6.6¢ per gallon.

By Mr. Abbott:

Q. That was on April 19, 1940?

A. Yes, sir.

Q. And that price was 6.75¢ per gallon.

A. No. 6.6¢ per gallon.

Q. 6.6. Oh, yes. That was for delivered gasoline?

A. That's right, yes, sir. I have a subsequent delivery here in July at 6.3¢ per gallon.

Q. What year?

A. 1940.

Q. Now this one of August 23, 1939 is 6.85¢ a gallon?

A. Yes, sir; 6.85¢.

Q. That is for transport truck deliveries direct to Montgomery Ward Company, Montgomery Ward Company's service station?

A. Yes, sir.

Q. In other words, they don't operate a bulk plant?

A. No, they don't.

Q. And they were not required, under this, to do any hauling of their own?

A. No, they weren't. That was delivered.

5260 Q. And all these other prices that you have testified about this morning were for delivered gasoline, also, were they not?

A. All delivered, sir.

Q. Direct to the service station?

A. That's right, sir.

Q. And not to the bulk plant?

A. Not to the bulk plant.

Q. So they were, in effect, transport truck prices?

A. I don't know how to answer that. When you say transport truck prices; those were our prices delivered to the dealers or the distributors' storage. They were delivered direct, in many cases, by the truck transport.

Q. Did it make any difference to you whether you delivered it to the service station or to the storage of the customer?

A. No. In many cases we have delivered, ourselves, to that customer.

Q. Were any of those orders delivered by tank car?

A. None.

Trial Examiner Ballinger: When you refer to delivery by transport truck you mean the same as tank wagon?

Witness: Well, tank wagon is a smaller amount. Tank wagon, I think, could definitely be construed in deliveries less than 3000 gallons, or 2500 gallons. Truck transport, as a rule, is about 6000 gallons or more.

By Mr. Abbott:

5261 Q. And these prices referred, then, to truck transport deliveries, did they?

A. They referred to quantity deliveries. Let me give you the exact amounts. On the invoices you have, there, what is the amount delivered at that time.

Q. You can check these, if you wish. They were approximately 4600 gallons—

Trial Examiner Ballinger: What delivery was that?

Mr. Abbott: That is the one of April 19, 1940, to Montgomery Ward and Company.

By Mr. Abbott:

Q. And the other one which I have, August 23, 1939, was approximately 4500 gallons.

A. That's right, sir.

Q. Did you make any deliveries, Mr. Feinberg, at those prices that you have testified about this afternoon or this morning, involving deliveries of 500 gallons or less?

Mr. Austin: Just a moment. Your Honor, that question is not sufficiently certain because the witness testified this morning that in small deliveries to retail stations they sold at a half a cent under the major price whereas they sold at lower prices by transport truck delivery, so I think Mr. Abbott's question, when he mentions any prices, I think it should be specified.

Mr. Abbott: I think the witness can clear that up 5262 if there is any question about it.

Trial Examiner Ballinger: Suppose you ask him with reference to the two kinds of delivery?

Mr. Abbott: Yes.

By Mr. Abbott:

Q. Now this morning you testified as to certain prices and I have here a price of 6.1¢ a gallon which you mentioned in connection with one delivery.

Trial Examiner Ballinger: 6 and what?

Mr. Abbott: 6.1¢ a gallon.

Mr. Austin: I don't think the witness ever testified to that. That's what they paid; not what they sold for.

Trial Examiner Ballinger: The witness testified that the lowest price was 6.3¢.

Mr. Abbott: Yes, that's right.

By Mr. Abbott:

Q. Did those prices that you testified to, this morning, relate to tank wagon deliveries?

A. They would be larger deliveries than tank wagon.

Q. They were, then, transport truck, or—

A. Truck transport, truck train, and only in cases of an emergency would a delivery be made by tank wagon.

Q. And you didn't use tank cars, in any case?

A. No, sir.

5263 Q. Now where were those deliveries made from? Where was the bulk storage that you took them out from?

A. The bulk storage would either be the storage of the Ohio Oil Company at the Rouge, or one of the other oil companies with whom the Ohio Oil Company had made a trade.

Q. I see. In other words they would arrange to get the gasoline from some other company to fill the order?

A. No. Ohio Oil Company could have made—let us say the White Star Refining Company, which was an actual case in point.

The gasoline would be taken from White Star and charged to Ohio, and Ohio, in turn, would charge us, as Ohio Oil. It made no difference to us as to the source from where that came.

Q. It made no difference to you who manufactured the gasoline?

A. None.

Q. Now as a matter of fact you got your supply of gasoline during the years 1939 and 1940 from other sources than the Ohio Oil Company, didn't you?

A. We did, some.

Q. Did you get any from the Thiesen-Clemens?

Mr. Austin: Your Honor, I object to any questioning on another source of supply because Mr. Citrin's testimony specifically says that the gasoline which he talked
5264 about with Mr. Fisher was the gasoline supplied by the Ohio Oil Company and there is no basis on the direct examination for going into other suppliers of the Argo Oil Company.

My question on direct was did they get the major portion of their gasoline from the Ohio Oil Company and all of the direct examination related to that Ohio Oil Company gasoline.

Mr. Abbott: There was nothing in the testimony of Mr. Citrin that the offer was made limited to Marathon or Linco gasoline and I wish to show that the Argo got their supply of gasoline from other sources than the Ohio Oil Company, because the Court has admitted in evidence a contract, here, which has certain limitations as to the supply.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The objection is sustained.

Mr. Abbott: Now, if the Court please, we would have the right to show, of course, that they were getting their supply of gasoline from other companies with which to furnish their customers even though they would wish to furnish the product of the Ohio Oil Company to the Citrin Kolb Oil Company. We have a right to show the capacity they had under the proof this morning which attempted to show a limited supply which they could rely upon to fill their orders.

5265 Trial Examiner Ballinger. Yes, but the question here is whether or not this offer was limited to the product of the Ohio Oil Company.

Mr. Abbott: My question wasn't that, that I asked of the witness. I asked him whether they got any gasoline from the Thiesen-Clemens Oil Company, for the purpose of showing they got supplies from other companies than the Ohio Oil, with which they could supply their customers.

Mr. Austin: That involves a conclusion the other customers would be willing to change over. All the questions I asked him were limited to the Ohio Oil Company.

Trial Examiner Ballinger: The Examiner considers that it is speculative. The objection is sustained.

By Mr. Abbott:

Q. Did you also secure a part of your supply from the Roosevelt Oil Company?

Mr. Austin: Same objection.

Trial Examiner Ballinger: Objection sustained.

By Mr. Abbott:

Q. Did you secure a part of your supply from any other company besides the two mentioned?

Mr. Austin: I object. I don't see why I should have to continue.

Trial Examiner Ballinger: Sustained.

By Mr. Abbott:

5266 Q. Now there was a witness who testified in this case by the name of Roman Miller. Do you know him?

A. No, I don't, sir.

Q. Did your company ever have any dealings with him?

Mr. Austin: I object to that, your Honor, on the ground that it is immaterial and not a proper cross examination. It has no connection with any previous testimony about the Argo Oil Company in this case and if it is intended to be on the Respondent's case, in answer to any testimony given by Roman Miller on behalf of the Commission, then the witness should be called by the Respondent as its own witness.

Mr. Abbott: It relates to the question of price, if the Court please. This man Miller, himself, testified in this case, in the record.

Trial Examiner Ballinger: What did Miller testify to?

Mr. Abbott: That he left Standard Oil and began to get his supply from the witness' company because they were willing to deliver to him in transport truck at a price considerably under the Standard Oil tank wagon price.

Trial Examiner Ballinger: As to the price, the Examiner considers the evidence proper.

Mr. Austin: That, your Honor, is entirely consistent with all of the prices he has named for tank car deliveries which were, concededly, from around 1½c. at least, 5267 under the Standard Oil tank wagon price.

Mr. Abbott: Do I understand you to say, then, that you consider that the differential of one and one half cents between the tank car and tank wagon price to be justified?

Mr. Austin: No. I said not only your tank car price but also Argo's is a cent and a half below the Standard tank wagon price. That is true of your jobber prices and also true as to the prices that Mr. Feinberg testified to, but I have no objection Mr. Abbott, if you want to ask him what price he charged Roman Miller. Go ahead.

Mr. Abbott: Then as I understand it, Mr. Austin, it is your summarization of the evidence, here, that the truck transport price of the Argo Oil Company was approximately a cent and a half under the posted tank wagon price, at the same time?

Mr. Austin: The prices which Mr. Feinberg mentioned were, some of them, a cent and a half under, and some a little more. 6.6¢ is 1½c under.

5268 By Mr. Abbott:

Q. Now, witness, is it not a fact that in the year 1939, to which this offer refers, the offer of Mr. Citrin, that your company made a contract with the Titan Refining Company of Stark, Michigan? Do you have any knowledge about that contract?

A. Yes, I have. I have and they did.

Q. How is that?

A. I have, and they did.

Mr. Austin: I object to further questions regarding the contract unless there is some indication as to its materiality here. I don't know of any question direct regarding the Titan Refining Company.

Trial Examiner Ballinger: How does this become material?

Mr. Abbott: I will have to ask the witness a question unless you want me to go off the record and have me state what the materiality is.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

You may make a proffer of proof.

Mr. Abbott: The purpose of asking questions relative to the Titan Refining Company contract is to show that in 1939 the Argo Oil Company agreed to furnish the 5269 Titan Refining Company 4,000 barrels of crude oil daily for refining purposes, and that the contract further provided that in this deal the Argo Oil Company would have a further source of supply of gasoline which would enable it to fulfill its contract or engagements with persons with whom it had agreed to furnish gasoline, and the purpose of it is to show that they really did have in contemplation avenues and sources of supply other than the Ohio Oil Company.

Trial Examiner Ballinger: The proffer of proof is rejected.

By Mr. Abbott:

Q. Now, you testified this morning, witness, that in your opinion if Mr. Roy Fisher of the Argo Oil Company did make an offer to Citrin-Kolb Oil Company to furnish their requirements of gasoline at the price which was stated this morning, that it would show a loss to your company?

A. That's right, sir.

Q. Isn't it a fact that if you had a contract to supply Citrin-Kolb Oil Company with five million gallons of gasoline per year, which I think was the testimony or the figure used this morning, that you could purchase gasoline at less than the price which you were in 1939 paying to the Ohio Oil Company for your supply of gasoline for a larger quantity?

Trial Examiner Ballinger: Before you answer that, it is the recollection of the Examiner that the witness used the figure four million, not five.

5270 Mr. Austin: No, I stated that the volume of the Citrin-Kolb Oil Company was five million gallons, your Honor, on the record.

Mr. Abbott: And we agreed to that.

Mr. Austin: Yes, I object to that question unless it is restricted to the purchase of gasoline from the Ohio Oil Company.

Mr. Abbott: Under the ruling of the Court I think I am required to do that. It is restricted to the Ohio Oil Company.

Trial Examiner Ballinger: Do you understand the question?

The Witness: Yes, I do.

Trial Examiner Ballinger: As restricted.

The Witness: Yes, I do.

Trial Examiner Ballinger: You may answer.

The Witness: The answer is "We could not."

By Mr. Abbott:

Q. How do you know that?

A. We were always trying to get a better price from the Ohio Oil Company and the price that we had did not permit us to make—would not have permitted us to make a profit.

Q. Well, I mean, if you had increased the volume by five million gallons per year.

A. The Ohio Oil Company would not permit us to increase the volume other than the figures that had 5271 already been set up on the schedule.

Q. That, then, is the basis for your answer is it?

A. Not the basis. That is supplementary.

Q. That is the reason for your answer?

A. That's right, sir.

Q. Your answer is then predicated—

A. The increased volume would not bring a better price.

Q. Your answer is then predicated upon your assumption that they wouldn't give you the increased volume?

A. That's right.

Q. Is that right?

A. An increased volume would not bring a better price.

Q. There was nothing to prevent you from going out in the open market and buying that from some other source, would there, the increase of five million gallons per year?

A. None that I know of.

Mr. Austin: I object to that question, your Honor, on the ground that there is no indication that the Citrin-Kolb Oil Company would have accepted gasoline from any other source.

Trial Examiner Ballinger: Objection sustained.

By Mr. Abbott:

Q. Where is the Marathon brand of gasoline or where was it manufactured in 1939, if you know?

5272 A. I do know.

Q. Was it in Findlay, Ohio?

A. The brand itself was manufactured in Findlay but a lot of the gasoline supplied to us by the Ohio Oil Company was never manufactured in Findlay.

Q. Was it traded with other companies?

A. Yes, sir.

Q. Didn't it make any difference to you where it came from?

A. No, sir.

Q. Then was it Marathon gasoline?

A. We called it Marathon.

Q. That was just a name applied to any brand of gasoline that you might get?

A. No, it was a brand name that belongs to the Ohio Oil Company. It was used, with their permission.

Q. I believe you stated that the Argo Oil Company at the present time is virtually out of the gasoline business; is that right?

A. Yes, sir.

Q. At the present time you emphasize the fuel oil business?

A. Yes, sir.

Q. In supplying this gasoline at the prices you have quoted, both this afternoon and this morning, you sometimes sent the shipment by transport truck direct from the marine terminal to the customer, without going through your own bulk plant?

5273 A. Yes, sir.

Q. And that affected a saving, did it not?

A. Yes, sir.

Q. If you didn't have to load it into your own bulk plant but could send it—route it around?

A. That's right.

Q. From the Ohio Oil Company marine terminal t the customer?

A. That's right, sir.

Q. In large quantities?

A. That's right, sir.

Mr. Abbott: That is all.

Trial Examiner Ballinger: Any redirect?

Mr. Austin: Why, just one question.

Redirect Examination by Mr. Austin.

Q. You have given some testimony regarding the so-called exchange of gasoline between your supplier and some other supplier for the purpose of filling your orders.

A. Yes, sir.

Q. Now, when you ordered Marathon gasoline from the Ohio Oil Company—you did, did you not?

A. Yes, sir.

Q. And when you ordered it, did you know from what source it was to be supplied to you?

A. Not altogether, no, sir.

5274 Q. In other words, if you order so many thousand gallons of gasoline for delivery to your bulk plant, was the gasoline delivered to your bulk plant by the Ohio Oil Company? Answer that, first.

A. Yes, it was.

Q. And when it was delivered, did the Ohio Oil Company notify you whether they brought it from their own terminal or from the White Star terminal?

A. Yes, their invoices would show where it came from.

Q. But did they ask your consent as to which place it should come from?

A. No. No.

Q. In each case the gasoline was furnished you from them as Marathon gasoline?

A. That's right, sir.

Q. Therefore, you relied upon the Ohio Oil Company to furnish you gasoline of a standard quality?

A. That's right, sir.

Q. And by standard quality I mean only as respect to—

A. Specification.

Q. —as to what source it might come from.

A. That's right, sir, up to specifications regardless of the source.

Mr. Austin: That is all.

Mr. Abbott: The witness is excused.

(Witness excused.)

5275 Mr. Austin: May we have a five-minute recess?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Mr. Abbott: May we go on the record a minute?

Trial Examiner Ballinger: On the record.

Mr. Abbott: I want to make a motion at this time to strike the testimony introduced this morning as to the custom which was testified to of talking over with Mr. Roy Fisher any offers which were made by him on the ground that is purely speculation and any testimony as to custom is surely irrelevant, and the Court, if you will recall, allowed the evidence to go in subject to a motion to strike.

Trial Examiner Ballinger: The Examiner rules that the question presented relates solely to the weight of the evidence, which may have some weight. The Examiner is not prepared to rule upon that point. Upon that ground the Examiner overrules the motion.

Mr. Abbott: Do you want a five-minute recess?
Mr. Austin: Yes. Off the record.
Trial Examiner Ballinger: Off the record.
(There was a discussion off the record.)
Trial Examiner Ballinger: On the record.
The hearing will stand in recess for five minutes.
(A short recess was taken.)
5276 Trial Examiner Ballinger: Come to order.
Mr. Austin: I will call Mr. Slaughter.

WILLIAM E. SLAUGHTER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:.

Direct Examination by Mr. Austin.

Q. Will you state your name, please?
A. William E. Slaughter.

Q. Where do you reside, Mr. Slaughter?
A. Birmingham, Michigan.

Q. And what is your business?
A. With the Aurora Gasoline Company.

Q. What is your position with that company?
A. President.

Q. And in what business is the Aurora Gasoline Company engaged?
A. The Aurora Gasoline Company is a petroleum refiner and marketer.

Q. Is it a corporation?
A. It is; a Michigan corporation.

Q. You say that the Aurora Gasoline Company is a petroleum refiner and marketer. Where are its refiners located?

A. We have one refinery Elsie, Michigan that is 5277 under contract, or under lease to us, a long term lease. We have another refinery in Detroit, Michigan that is operated by the owner of that company under a joint venture contract with the Aurora and we have a third plant which is owned by Aurora Gasoline Company which is the Dubb's process cracking plant.
Trial Examiner Ballinger: Where is that located?
Witness: Detroit, Michigan.

By Mr. Austin:

Q. And what company did you refer to as engaged in a joint venture contract?

A. The Keystone Oil Refining Company.

Q. Where is that located?

A. Detroit, Michigan.

Q. Does the Aurora Gasoline Company sell branded or unbranded gasoline?

A. Unbranded gasoline.

Q. Entirely?

A. Entirely. We have no brand of our own.

Q. From what refinery do you obtain the gasoline, or from what source do you obtain the gasoline which you sell in the Detroit metropolitan area?

A. The majority of that gasoline comes from the Keystone Oil Refining Company and the Aurora cracking plant operation. That is, today.

5278 Q. Well, let us direct your answers to the year 1940.

A. The Aurora cracking plant was only completed in October, 1940, and for the first part of 1940 we purchased considerable gasoline on the seaboard, eastern coast, and brought it in to Detroit to augment the Keystone Oil Refining Company production which was not adequate to take care of our sales.

Q. How did you bring it in?

A. It came in by small tanker, or barge lots.

Q. And was that also unbranded gasoline?

A. That was also unbranded gasoline.

Q. Was it sold by you as unbranded gasoline?

A. That's right.

Q. Did you sell any gasoline other than Ethyl gasoline under a brand in 1940; under a brand name?

A. No. Our regular grade was unbranded.

Q. Has the Aurora Gasoline Company, during the past three years, done any advertising such as newspaper or billboard advertising or radio advertising, in Detroit?

A. No, they haven't.

Q. Have you done any advertising of any kind?

A. No. The only time our name would appear would be in some charity publication where we were asked to contribute.

Q. I should have limited that question to consumer advertising. Would your answer be the same if I do so limit it?

A. Yes. We have no advertising program at all.

5279 Q. To what classes of customers does the Aurora Gasoline sell, very generally?

A. Gasoline?

Q. Yes, gasoline; and restricting it to the Detroit metropolitan area and you can direct all your answers to these questions to the year 1940, if it would be any different than from the present time.

A. We sell the independent gasoline job trade and independent gasoline retailing trade, all of whom, upon buying our gasoline, adopt their own trade name for their own group of stations or accounts and resell under their own names. Other than that, we bid on City of Detroit business and various road commissions.

Q. That's consumer business, isn't it?

A. Yes.

Q. I really was thinking chiefly of reseller accounts.

A. Well, that would be the independent jobbing trade.

Q. Does the Aurora Gasoline Company sell on what is commonly known as the spot market?

A. Yes. We don't make any long term contracts on gasoline. Our prices fluctuate depending on the demand and supply and based on competitive conditions as of the day of sale.

Q. How are your prices determined from day to day?

A. By those same competitive conditions; supply and demand and competition from other suppliers in
5280 this market.

Q. Do you refer to supply and demand and other suppliers of unbranded gasoline?

A. Yes.

Q. I understood you to say that the company does not enter into any long term contracts for sale of gasoline to jobbers or distributors. What is the longest period of time at which you will agree to maintain a price?

A. 30 days from date of commencement.

Q. And is that the usual way you do business, or under what conditions will you guarantee a price for 30 days?

A. Usually a quotation from us will be good on a spot basis subject to change without notice but if the account desires to contract on a 30-day basis, or shorter time, we are willing to reach an agreed upon price for that time and will supply and protect that price for that agreed time.

Q. Did you in 1940 make any sales to retail service stations by so-called tank wagon or tank truck in quantities of 3000 gallons or less?

A. No, our business is limited to full tank transport and tank car business and our smallest unit, company-owned unit is around 3200 gallons or over and the smallest unit which we can hire from any public carriers is around 4500 gallons. From there, those sizes range up to 10,000 gallons. We usually specify that it has to be a full load for us to deliver. We don't deliver the so-called

5281 tank wagon group; that is the small station-to-station partial load business.

5282 Q. You don't do any of that?

A. No.

Q. Did the Aurora Gasoline Company operate any retail service stations in 1940?

A. They did not.

Q. Now, does the company employ salesmen?

A. Yes, we have salesmen.

Q. What are the duties of the salesmen as regards to obtaining of new accounts?

A. Well, the salesmen operate under the supervision of our sales manager or assistant sales manager and it is their job to develop any new accounts, prospective accounts, and to contact established accounts, to get as much of their gallonage as we can hold and supply.

Q. What authority has the salesman got regarding the quotation of prices?

A. Well, the salesmen in our type of business has a price for his product which is more or less agreed upon daily, in the morning.

Q. What do you mean "more or less"?

A. Well, it is agreed upon daily to the extent that competitive conditions might change that price in any given day or even during the day. The salesmen can state a price at which the company is generally offering its gasoline as of that time on the spot market basis, and if he can develop any deal or any proposition from a customer involving any quantity, any substantial quantity or—

5283 Q. What do you mean by a substantial quantity, Mr. Slaughter?

A. Well, I would say a substantial quantity might be 50,000 gallons or over, to take an arbitrary figure.

Q. 50,000 gallons for what period of time?

A. For immediate shipment.

Q. For immediate shipment?

A. Yes. That—of course, the quantity, of course, would be subject to a definite understanding reached that day depending on our supply of gasoline available for sale that day. Any proposition the salesman can develop that is tangible in any quantity such as I mentioned, say over 50,000 gallons, or over a period of time up to thirty days is reported back to the office and confirmation is obtained from the sales manager, and, if acceptable to us on price, the quantity, and the period as suggested, then we confirm the same. We only have a limited amount of gasoline to sell. Today it is based on our production. In 1940 it was based on our purchases and our production, and we have to require that the salesmen check back with the home office before closing any substantial quantity. Otherwise, we would be selling the same gasoline maybe two or three times.

Q. Do you have any procedure regarding obtaining a credit rating on new customers?

A. Any new account that the salesman develops to the point where he believes that it is a tangible account and there is a possibility of closing a deal, he reports
5284 that to my particular attention and we draw our
credit report and the salesman is held in status until the credit is approved on that particular account.

Q. Has the salesman any authority to make a binding offer to a new customer until the approvals which you have just described as to credit and as to availability of gasoline have been passed upon by your office?

Mr. Abbott: Just a moment, now. If the Court please, I object to that upon the ground that it is not proper rebuttal testimony in this case.

Mr. Austin: It is a preliminary question, your Honor.

Trial Examiner Ballinger: The objection is overruled.

A. The salesman cannot bind the company until the credit—

Q. Would you like to have the question reread?

A. I believe so, yes.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

A. He cannot bind the company until the credit has been approved, although there have been occasions when he has made small spot sales, that is, spot market sales, in limited quantities on C. O. D. basis.

Q. What do you mean by limited quantities? Well, I will withdraw that.

5285 You said on C.O.D. basis?

A. Yes.

Q. Now, I guess you had better state what you meant by limited quantities.

A. Well, if the salesman has specific instructions that day that he has available or should attempt to move twenty, thirty, forty thousand gallons; he could accept a spot sale at that moment for that quantity subject to credit approval. He couldn't bind the company for any large quantity or over any period of time.

Q. Who has the responsibility of obtaining credit ratings on prospective customers?

A. That is my specific department.

Q. That is your specific department?

A. Yes.

Q. Were you ever asked to pass in 1940—to pass upon the credit of the Citrin-Kolb Oil Company?

A. No, I was not.

Q. Have you examined the records of your company to determine whether or not the credit of the Citrin-Kolb Oil Company ever has been investigated by your company?

A. I have examined the records and I find no record of Citrin-Kolb ever being a subject of inquiry in my department.

Q. Is that credit inquiry made of any and all new

5286 customers regardless of what your general knowledge or opinion may be of them in Detroit?

A. I draw a credit report on every company we sell before we sell them.

Q. Now, I would like to take up for a moment the method of the Aurora Gasoline Company's sales and deliveries to jobbers of gasoline in metropolitan Detroit.

I would like to know when a jobber orders gasoline from you and you decide to sell to him, accept the order, where does the gasoline originate and how is it delivered for the purpose of filling an order?

A. I presume you are referring to regular grade.

Q. Regular grade gas.

A. Well, the regular grade of gasoline for Detroit sales originates at the refinery of the Keystone Oil Refining Company under this joint venture contract.

Trial Examiner Ballinger: You are speaking of the present time?

The Witness: During 1940 also.

Trial Examiner Ballinger: The entire year 1940?

The Witness: Yes. There were a few occasions where we purchased gasoline elsewhere on exchange arrangements but they were very limited, and the great majority, in fact, I would say 95 per cent of our sales were filled from the Keystone Oil Refining Company plant.

5287 By Mr. Austin:

Q. When you sell to a jobber in Detroit, is that F.O.B. the Keystone plant or is it F.O.B. the jobber's bulk plant?

A. Well, there are two classes of sales: If the jobber has his own delivery equipment and chooses to pick up gasoline, he can pick it up F.O.B. the Keystone plant at the price quoted F.O.B. that plant. If it is a delivered account where they have no pick-up equipment, then we either use one of our own trucks or we hire a common carrier or contract carrier to deliver the gasoline and the price is quoted his plant or station.

Q. Is the delivered price higher than—I mean, at any one time any particular day or particular hour is your delivered price higher than the price F.O.B. the Keystone plant?

A. Yes, it is usually higher by the same margin as we have to pay for the hauling.

Q. In other words, you just add your hauling charge on to your plant price?

A. That's right. That hauling charge will vary to the different sections of the city.

Q. Who does the hauling?

A. We either use our own equipment in rare cases or contract haulers for those cases where they want larger amounts than our trucks can haul. That depends upon availability of equipment at the time of delivery.

Q. Do you know what the average or the usual 5288 cost was to you of gasoline delivered within the metropolitan area of Detroit by contract haulers in 1940?

A. It will range from fifteen hundredths of a cent a gallon to sometimes as high as twenty-five hundredths of a cent. The breaking point is usually whether it is east or west side.

Trial Examiner Ballinger: What do you mean by the east or west side?

The Witness: We are located—

Trial Examiner Ballinger: Where is the division line?

The Witness: Well, we are located on the west side out by the Ford Motor Company, which is quite a distance from Detroit's east side, and most of the carrier companies make their breaking point in hauling, if you cross Woodward Avenue, they call it the east side and charge more for such a haul.

Trial Examiner Ballinger: Woodward Avenue is then really the dividing line?

The Witness: Yes, as a general rule.

Trial Examiner Ballinger: As a general rule.

By Mr. Austin:

Q. Referring to your reseller customers in the Detroit metropolitan area, what percentage of those customers are steady customers purchasing all or part of their re-
5289 quirements of gasoline from you from week to week and month to month?

A. You have my list there. Can I see that list?

Mr. Abbott: How do you mean, on a gallonage basis or on a customer basis by the name of the customer?

Mr. Austin: Well, I said—

Trial Examiner Ballinger: Read the question.

Mr. Austin: —steady customers.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Mr. Austin: I am not referring to gallons or names; I am purely referring to the class of business, having in mind the fact that it is well established on the record that the Standard Oil Company and other major companies supply branded gasoline to stations who buy it regularly throughout the year and sell it under that brand. This is directed to whether the Aurora Gasoline Company has any of that sort of business.

Mr. Abbott: I object to this line of questioning on the ground it is not proper rebuttal. It is my understanding that this rebuttal is on the question of competitive offer, is it not?

Mr. Austin: It is on the general question of meeting competition but meeting competition brings in a great deal of testimony put in by the Respondent regarding the nature of the competition it encounters. I have in
5290 mind particularly the long list of companies that Mr. Raupagh described as being comparable in

operation to the Standard Oil-Ned's Auto Supply Company arrangement.

Trial Examiner Ballinger: The objection is overruled. Now, before you answer do you desire to consult something?

The Witness: Yes, if I may.

Trial Examiner Ballinger: Some memoranda that you have?

Mr. Austin: I hand the witness a statement which the witness handed me prior to the hearing and which, so far as I know, was prepared entirely by the witness; at least, there is nothing on there I have added.

Trial Examiner Ballinger: That memorandum was prepared by yourself, was it?

The Witness: Yes, from our company records, the sales records.

Trial Examiner Ballinger: Have you the question clearly in mind?

The Witness: Yes, I have.

A. I would say roughly 50 per cent of the accounts shown on this sheet bought from us every month consistently. The other 50 per cent were more or less spot market purchasers, that when our proposition was as good
5291 or better than the next man's or they desired our particular quality and service, we were favored with the business, and during the other times, the other months when they didn't purchase from us, they bought from competitive sources.

By Mr. Austin:

Q. Out of that 50 per cent that you say bought from you every month, do you know how many of those customers purchased their entire requirements from you, if any?

A. To the best of my knowledge, there is one customer on this list that purchased his entire requirements from us. That covers a range of 16 accounts.

Q. Does that list, which I understand you are using to refresh your recollection refer to the year 1940?

A. July through December, 1940, the last half of the year.

Mr. Austin: I would like to have this sheet marked for identification, your Honor.

Trial Examiner Ballinger: The Reporter will mark

the document "Commission's Exhibit 113," for identification.

(The document referred to was marked "Commission's Exhibit 113" for identification.)

By Mr. Austin:

Q. I show this paper marked "Commission's Exhibit 113" for identification and ask you if you will describe it. I don't want you to read what is on it. I want you to tell us what it is and where it was prepared, and so forth.

A. This is a schedule of the prices charged by 5292 Aurora Gasoline Company to various accounts in the City of Detroit for the period July, 1940, through December, 1940, and is divided into two parts. The first part of the schedule are the prices charged F.O.B. the Keystone Oil Refining Company plant and are the prices applicable to pick ups and customer own equipment or equipment that they hire; and the second part of the schedule is the prices we charged for delivered quantities on which we assume the delivery charge to customers in the City of Detroit area. This schedule is broken down into monthly periods for the six months.

5293 Q. And does it show the prices to all of your customers on regular gasoline in the City of Detroit during the last half of 1940?

A. Yes, it does.

Q. Does this list include prices to consumers or is it restricted to reseller customers?

A. Well, the reseller customers shown there would be both—let me ask: What do you call a consumer?

Q. A man, a person like a commercial account who uses the gasoline themselves and does not sell it.

A. No, this is the reseller group.

Q. The consumer would also include a large manufacturing company; anybody who buys it for use in their own vehicles or for their own purpose.

A. I question that, Mr. Austin, because some of these people buy gasoline from us and also use some of it in their own equipment.

Q. If they resell part of it I would still call them a reseller, for the purposes of this question.

A. A reseller.

Mr. Austin: I will offer this sheet in evidence.

Mr. Abbott: May we see it?

Trial Examiner Ballinger: Let counsel for the Respondent see it.

Document handed to counsel for Respondent by 5294 counsel for the Commission.

Mr. Abbott: May I ask the witness a question?

Trial Examiner Ballinger: You may.

Voir Dire Examination by Mr. Abbott.

Q. Mr. Slaughter, you say that you yourself, personally, took these prices off your books from account sales?

A. No, I supervised them being taken off of sales records. I didn't personally write them down, if that's what you mean.

Q. And you have invoices, I suppose, substantiating these prices?

A. I didn't bring them to Court, no.

Q. You have them, though, have you?

A. Yes.

Q. And you can produce those, if necessary?

A. From the standpoint of the fact that each of these accounts shown are current accounts, I would not like to produce the names of the account in court because that is information that we feel is available to competitors.

Mr. Austin: We don't have to decide that at this moment. The question now is the production of this paper.

By Mr. Abbott:

Q. Are these figures, here,—do they relate to deliveries made east and west of Woodward Avenue?

5295 A. On the delivered part of the schedule on the bottom, the delivery charge would give some indication to where the delivery was made. You will find on there delivery charge and it will show some fifteen points, some twenty points.

Q. They are 6.25¢ a gallon, excepting a few that are 6.3 and one is 6.5 and 6.3 indicate that the lower price was applicable to deliveries made on the west side of Woodward avenue; the lower price?

A. I have the delivery charge set forth on the sheet.

Q. Is that in addition to the price of the gasoline?

A. No, that's included therein.

Q. That's included.

Mr. Abbott: Well, your Honor, we object to this tran script of a record on the ground that it is not the best evidence.

This witness is not in the position of an accountant who is permitted in these proceedings to take a tabulation from an available record. He is a lay witness; President of the corporation he represents; and we insist that we are entitled to see the books of the company or the original invoices substantiating these prices, if the evidences as to prices is to be put into the record.

Trial Examiner Ballinger: To do that would enable you to ascertain the names of the customers, would
5296 it not?

Mr. Abbott: That's right. That's a matter of public record. It is already in evidence. We have exhibits, here,—here is one right here, that shows the people who file gasoline tax reports, have to show who supplies their gasoline.

Mr. Austin: It don't show who they sell to, does it, Mr. Abbott? It doesn't show prices charged to any customers certainly.

Mr. Abbott: We have an exhibit in evidence with at least a dozen or fifteen cases which are supplied by the Aurora Gasoline Company in the City of Detroit. That's a matter of a public record.

Mr. Austin: In so far as it is a matter of public record, it is available to the Respondent.

Mr. Abbott: However, the record of the price charged is not available to the Respondent and there is nothing to connect these prices up with the individual customer.

We have a right, if your Honor please, if we wish to, to put in surrebuttal on this in order to show that it is not reliable. I don't say it is not, but we have that right and how can we do that unless we know to whom the price pertains? It would be absolutely impossible.

Mr. Austin: Your Honor, these prices are copies
5297 by the witness or under his supervision, from the company's books. He has testified to them. They are no different than the testimony which Commission introduced on its case in chief from numerous service stations' operators stating the number of gallons of gasoline that they sold in each month during certain periods. We have a lot of those in the record and, of course, this witness is the President of the company and he is entitled to state the prices which they charge and he has on that exhibit referred to customers by code numbers, or numbers.

Those numbers, each one, as I understand it, represent a customer. Is that correct, Mr. Slaughter?

Witness: Yes, sir.

Mr. Austin: Certainly a witness should not be compelled to state the names of his customers to a competitor. That will in no way prove any more fully the price charged.

Trial Examiner Ballinger: Well, the only thing that would then appear in this record would be the naked statement of this witness that he took the items appearing on this exhibit from his books.

Mr. Austin: Yes.

Trial Examiner Ballinger: Certainly the respondents are entitled to examine the original documents to see whether or not the statement is true.

Mr. Austin: The witness knows the prices that
5298 were charged and he has that record in his office.
How else can one prove the prices charged?

Trial Examiner Ballinger: It is perfectly proper for him to testify to that but if there is a question raised as to the accuracy of the testimony is it not necessary to produce the original documents? How else could the testimony of any witness be disproved if it was in error and the error shown?

Mr. Austin: Well, I assume that your Honor doesn't mean that that's any ground for questioning the testimony of this witness now, as far as allowing it in the record. It's his sworn testimony and I assume it is admissible.

If the Respondent wants to subpoena these records and have them bring them here, why, I think then we would have the question as to whether or not we could disclose the names of customers in the record in order to prove prices?

Trial Examiner Ballinger: The Commission itself has brought this question into the case.

Mr. Austin: Yes.

Trial Examiner Ballinger: The records are certainly the best evidence.

Mr. Austin: I think if this witness knows the prices
he charged, of his own knowledge, and he is entitled
5299 to use any paper he has, to refresh his recollection;
he is entitled to testify to them.

Trial Examiner Ballinger: If he knows of his own personal knowledge, independent of any record, he may so testify.

Mr. Austin: And he may use any statement he has to refresh his recollection, may he not?

Trial Examiner Ballinger: Yes, but not if that statement was prepared from the records.

Mr. Austin: Your Honor has previously ruled that there is no limit upon what a witness may use to refresh his recollection.

Trial Examiner Ballinger: That's true, but here the basis ground for his testimony is the records; not his independent recollection.

Mr. Austin: Well, but, he can refresh his recollection, can he not, by looking at any memorandum that he may have prepared when he had the record before him?

Trial Examiner Ballinger: Yes, he may refresh his recollection and then if, independent of the records themselves, he has a distinct recollection as to the facts, he may so testify. If it is challenged, he can be required to produce the records.

Off the record.

(There was a discussion off the record.)

5300 Trial Examiner Ballinger: On the record.

Mr. Austin: Mr. Abbott, is your objection to this exhibit for identification upon the ground that you don't think that these records were correctly copied or prices correctly copied from the books of the witness?

Mr. Abbott: I assume they are, but I am not sure of it. I don't have any reason to believe that Mr. Slaughter wouldn't take off the correct prices but we have a right to call sur-rebuttal witnesses and I don't know who to call. If we have any idea that some of these weren't correct, we wouldn't have any way of calling them to substantiate that.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: If it is the ruling of the Trial Examiner that this witness may not testify regarding the prices charged by his company as shown on his books without being subject to cross-examination by the Respondent as to the names of individual customers and prices charged, then the Commission will not press further the introduction of the prices charged by the Aurora Gasoline Company.

Trial Examiner Ballinger: The Examiner rules that in order to render the exhibit admissible it would be necessary for the Commission to at least produce the records

from which the exhibit was made for examination by
5301 counsel for Respondent, or in lieu thereof, to advise counsel for the Respondent of a list of the customers who are charged the amount set forth in the list. In the absence of that, the Trial Examiner sustains the objection.

Mr. Austin: I am not clear as to that ruling, your Honor, whether it means the witness must both produce the records and disclose the names of customers, or, is it in the alternative.

Trial Examiner Ballinger: It is in the alternative.

Mr. Austin: I don't quite understand why the record need be produced in one case and not the other; at least so far as the authenticity of the prices stated here, are concerned.

Trial Examiner Ballinger: The Examiner has ruled that if the witness will produce his records, he need go no further. If he declines to produce his records, then, in order to make this exhibit admissible, he should state the name of the customers and the amounts charged each customer. Otherwise, the Respondent is disabled from challenging or making any inquiry into the correctness of the testimony of the witness.

By Mr. Austin:

Q. Well, I understand, Mr. Slaughter, that you prefer not to disclose to the Respondent the prices charged particular customers in 1940?

5302 A. I can see no harm, if they want to make specific inquiry.

Q. It is entirely up to you. I won't ask you to do it if you don't care to. I assume that the inquiry will be limited to the individual sales reflected on this schedule.

Trial Examiner Ballinger: Would there be any objection to that?

Witness: I can't see any. It's 1940. If they would like to question me about any one of those, I would have to refer to records, your Honor. I don't have six months' quotations for 16 people in my memory.

Trial Examiner Ballinger: Will you bring those records into the hearing room so that you can refresh your recollection?

Witness: I can refresh my mind right here because I have a list of the names.

Trial Examiner Ballinger: You don't have—

Mr. Austin: If he has the information requested and can refresh his recollection from a document, there, that is certainly admissible, if he knows that's taken from the records of the company. Your Honor said he didn't need to produce the records if he could answer the questions.

Witness: I have here the original work sheets from which we made this up.

Trial Examiner Ballinger: That will answer the purposes. Off the record.

5303 (There was a discussion off the record.)

Trial Examiner Ballinger: On the record. You make a formal tender of it.

Mr. Austin: I tender Commission's Exhibit 113, for identification, in evidence.

Mr. Abbott: I object to it. I think I have already stated the grounds of my objection. The first is—

Trial Examiner Ballinger: The grounds of the objection have been fully stated. The Examiner withholds his ruling on the admissibility of the document, pending cross examination.

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Has it been the practice of the Aurora Gasoline Company at any time during the past three years to sell to any customer for or agree to sell to any customer for a period of thirty days or any period of time at a fixed margin below the major oil company prevailing tank wagon price in Detroit?

A. No, we don't base any of our sales on the major tank wagon price.

Q. Have any of your salesmen ever been authorized to quote prices in any other manner than a definite price in cents and fractions of a cent according to the company's price at the particular time?

5304 A. No. They are given a specific price to quote in cents and hundredths of a cent but these prices are not contingent upon any other factors than our stating of that price for that period.

Mr. Austin: That is all.

Cross-Examination by Mr. Abbott.

Q. Now, Mr. Slaughter, you say that you have two refineries in Michigan, one at Elsie and one down here at Oakwood and Dix?

A. We don't own the two that you mention. We own one refinery.

Q. Which one do you own?

A. That is at the rear of 1215 South Dix. That is a cracking plant and not a complete refinery as such. The plant that is adjoining that is a joint venture.

Q. That is the Keystone?

A. That is the Keystone. That is the joint venture plant.

Q. The one at Elsie, that is under—

A. A long term lease.

Q. That is a lease from the Handlers, isn't it?

A. Yes.

Q. What is the name of the people up there that lease it to you?

5305 A. The Handlers Oil Company.

Q. That lease expires next year, doesn't it?

Trial Examiner Ballinger: Mr. Abbott, how is that material?

Mr. Abbott: All right. I will withdraw the question if there is any question about its materiality.

By Mr. Abbott:

Q. What is the capacity of the refinery at Elsie?

A. 3,000 barrels of crude per day.

Q. And translated into gallons of refined gasoline based on output, can you state what the capacity is?

Mr. Austin: May I ask what the relevancy of that question is?

Mr. Abbott: I want to show by the witness what the volume of his refining facilities is at all the plants operated by the Aurora Gasoline Company.

Mr. Austin: I will concede on the record, Mr. Abbott, that the Aurora Gasoline Company had a large enough volume either of its own gas or gas which it could have purchased in 1940 to supply the Citrin-Kolb Oil Company if it had had the Citrin-Kolb Oil Company business.

Mr. Abbott: I think there is testimony in the record that this offer was made also to the Wayne Oil Company, so—

Mr. Austin: That testimony was stricken from the record.

5306 Mr. Abbott: Well, I insist on the question for the purposes of showing the capacity in the year 1940 of the refineries operated or leased under a joint venture operation by the witness.

Trial Examiner Ballinger: The purpose of this line of examination is to establish that the company could have filled all the requirements of the Citrin-Kolb Company?

Mr. Abbott: And the Wayne Oil Company. That amounted to something like eight million gallons a year, the combined gallonage.

Trial Examiner Ballinger: The testimony with reference to the Wayne Oil Company was stricken from the record. Is the Examiner correct?

Mr. Abbott: I think your Honor on his own motion did that, as I recollect. I don't think there was any motion made by the Commission.

Mr. Austin: Yes, I made a motion.

Trial Examiner Ballinger: In view of the admission on the part of counsel for the Commission, further examination along this line will not be permitted.

By Mr. Abbott:

Q. Do you have any knowledge, Mr. Slaughter, any personal knowledge of any negotiations or offers between Mr. McGrady of your company, and Citrin-Kolb Company and Wayne Oil Company in the year 1940? I mean, knowledge not based on hearsay, but on 5307 your own knowledge.

Mr. Austin: May I have that question read?

(The question referred to was read by the Reporter.)

Mr. Austin: I object to the question so far as it relates to the Wayne Oil Company. I have no objection to the rest of it.

Trial Examiner Ballinger: Objection sustained.

Mr. Abbott: Then as to the Citrin-Kolb Oil Company, the question remains?

Trial Examiner Ballinger: You may answer as to the Citrin-Kolb Company.

A. The question of selling the Citrin-Kolb Company was never brought to me for examination as to credit.

Mr. Abbott: That is not my question. I move to strike the answer on the ground it is not responsive.

Trial Examiner Ballinger: The motion is granted.

By Mr. Abbott:

Q. Do you have any personal knowledge of any negotiations having been conducted between your Mr. McGrady and Jacob Citrin of the Citrin-Kolb Oil Company relative to the sale of gasoline to the latter company in the year 1940?

A. No.

Mr. Abbott: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5308 Mr. Abbott: Let's go on the record on this because I want to have this on the record.

Trial Examiner Ballinger: You may make your statement. I don't care about anticipating the situation.

Mr. Abbott: All right. I will make a statement, then, with reference to it.

Commission's Exhibit 113, marked for identification which the attorney for the Commission has offered in evidence, it is the position of the Respondent that prices charged by the Aurora Gasoline Company from July to December, inclusive, of 1940, both for gasoline F.O.B. its refinery or for delivered gasoline is inadmissible unless Respondent can have access to the original books or records from which this compilation is made, and in view of that position of the Respondent, the Respondent at this time elects not to cross examine upon this proposed exhibit.

Trial Examiner Ballinger: The Examiner understands the witness to have tendered to you the records upon which Commission's Exhibit 113, for identification, is predicated, if you desire to examine them.

Mr. Abbott: I don't understand—

Trial Examiner Ballinger: Am I correct?

The Witness: Yes, the worksheet from which the typewritten copy was made.

Trial Examiner Ballinger: Are you willing that the Respondent may go to your office and make an 5309 examination of the original records from which this document, Commission's Exhibit 113, for identification, has been compiled?

Mr. Austin: Your Honor, I will have to object to that on the record. I don't think that the Respondent has any right to do that or that that condition can be properly imposed upon the witness from the standpoint of counsel for the Commission on the question of admission here. If the witness testifies under oath that these figures were prepared from his records under his supervision and that they are correct figures and is willing to be cross examined upon them, I think the cross-examination as to who copied them and the method in which it was done may be proper, but unless the inaccuracy of the figures is established, I don't believe that the Respondent has the right on cross examination or as a condition to having the exhibit go in, to go and see the original books. I think that is no different from any other testimony, than a witness makes on the stand, and which he makes under oath, and if it is desired to prove that the witness has perjured himself, his testimony is not correct, that is outside I think the province of cross-examination in the case and I don't believe that when a man comes into a Commission hearing—I think it would be a very dangerous precedent to say that people coming in here, business men, as they do everyday in our hearings, and testify that they have made entries from their books, and
5310 then say that that cannot go in evidence until the Respondent has a right to go to their office and look into those records. I don't believe that that ruling in any respect should prevail. I think it goes merely to the question of whether or not the witness has testified correctly under oath and whether or not he has told the truth on the stand, and whether or not these figures were actually copied from the books of the company.

Trial Examiner Ballinger: Here is a document, Commission's Exhibit 113, offered in evidence by the Commission. It is admitted by the witness that the exhibit reflects the results shown by the books and records of his company; that it was compiled not by him but by an accountant who prepared it in the form in which he directed. The witness did not check the computations, and there is no possible way by which the Respondent can conduct any cross-examination based upon this document without opportunity to examine the documents. And the Examiner has asked the witness whether there is any objection on the part of his company to such an examination being made by counsel for Respondent if counsel so desires.

Now, if there is no objection on his part—

Mr. Austin: Well, I have objection. I will not submit the exhibit in evidence. I will withdraw it before—

5311 Trial Examiner Ballinger: Do I understand that counsel for the Commission makes an objection to divulging names which the witness is perfectly willing to divulge and will not be prejudicial to his business?

Mr. Austin: I do object to calling a witness here and having him asked whether the Respondent may go to his office and examine his books. I believe that just on common knowledge that is distasteful to a business man, to have a competitor do that and, therefore, I think that and request your Honor that you pass one way or the other on the admissibility of this exhibit upon the qualifications that have already been presented and that if it is not admissible on what appears here, that it be not admitted in evidence, but I will not offer the exhibit in evidence upon the condition, that is, if it is a question of the witness permitting a competitor to come and examine his books at his office.

Trial Examiner Ballinger: Well, if the witness—

Mr. Austin: If that is necessary as a foundation, then I don't want to offer the exhibit.

Trial Examiner Ballinger: If the witness has no objection to that, in order that counsel may test the accuracy of his testimony, and also the accuracy of the exhibit, do I understand that you are interposing an objection independent of the wishes of the witness?

Mr. Austin: Well, I think that if the Respondent 5312 is entitled to see the books, they are entitled to have them brought here. I don't think they are entitled—I don't see how the admissibility of this paper can depend upon the right of the Respondent to make a trip to the witness' office.

Trial Examiner Ballinger: The witness has testified that the records are very voluminous, as I understood, probably two truckloads. Is that correct?

The Witness: Well, there were quite a sizeable quantity, yes.

Trial Examiner Ballinger: Which would be impractical to bring into the hearing room. Will the witness answer the question of the Examiner? Have you any objections?

The Witness: If necessary, your Honor, I would bring the necessary documents to the court, but I would prefer to do that than to throw our office records open to the accountants of the competitor.

Trial Examiner Ballinger: Have you any objection to such an examination being made by counsel for Respondent as to enable them to examine you as to the correctness of this exhibit?

Mr. Austin: I would like to say—

The Witness: You mean at my office?

Trial Examiner Ballinger: Yes, at your office.

The Witness: I would rather bring the records and submit them to the Court.

5313 Trial Examiner Ballinger: Have you any objection to doing that?

The Witness: To bring the invoices here?

Trial Examiner Ballinger: Yes. If you have, say so; if you haven't—

The Witness: I would prefer not to. I can bring the invoices to the Court, if the Court desires but—

Trial Examiner Ballinger: The Court will not require you to do it.

The Witness: "Desires."

Trial Examiner Ballinger: Well, I say the Examiner will not require you to do it if you don't want to.

5314 Trial Examiner Ballinger: On the record.

Mr. Austin: May I ask a question on the record?

Trial Examiner Ballinger: You may.

Mr. Austin: Would your Honor's ruling be any different it the man was produced here who actually copied the exhibit from the records?

Trial Examiner Ballinger: I think that would strengthen the exhibit but still it wouldn't afford Counsel for the Respondent any basis for cross-examination.

Mr. Austin: We are interested in prices and if the prices were the actual record in the course of business and were proved by sworn testimony to be entries made in the usual course of business—

Trial Examiner Ballinger: We are interested in the establishment of prices.

Mr. Austin: Yes sir.

Trial Examiner Ballinger: But they cannot be established upon ex parte testimony and that is virtually what is being attempted here.

Mr. Austin: Your Honor, suppose the records were produced? Who would know that they were accurate? It is the same thing.

Mr. Abbott: You can't go behind the records.

Mr. Austin: And you can't go behind sworn testimony as to what is in them.

5315 Trial Examiner Ballinger: Are you willing to pro-
duce the records here?

Mr. Austin: I don't want him to, your Honor.

Trial Examiner Ballinger: Then the objection to the exhibit is sustained.

Mr. Abbott: No further questions.

Trial Examiner Ballinger: Commission's Exhibit 113 is excluded.

(Thereupon, Commission's Exhibit 113 for identification, was rejected.)

Mr. Austin: I would like my exception to that ruling to appear on the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. I hand the witness Commission's Exhibit 113, for identification. Mr. Slaughter, can you state the prices which you company charged for gasoline sold in the City of Detroit to reseller customers during the last half of 1940, and in answering that question you may refresh your recollection from any notes or documents that you may have at hand.

Mr. Abbott: Just a moment, if the Court please. I would
like to ask the witness: Did you make that memo-
5316 randum that you have in your hand?

Mr. Austin: I object to that, your Honor.

Mr. Abbott: I have a right to ask the witness what he has in his hand.

Mr. Austin: I don't think you have. The witness hasn't said he has anything in his hand.

Mr. Abbott: ou said "I hand you Commission's Exhibit 113," as I remember.

Mr. Austin: All right. Nevertheless, the witness hasn't answered the question yet or looked at anything and I think that there should be a chance to answer the question and if the witness uses certain documents to answer the question, I think that after that happens the counsel may ask about them or have them marked for identification.

Mr. Abbott: You said to him, "I hand you Commission's Exhibit 113, for identification."

Mr. Austin: All right.

Mr. Abbott: And now you are asking him to testify what is on the exhibit without putting the exhibit in evidence.

Mr. Austin: No, I am not. I didn't ask him that at all. He has got other papers in his hands besides those exhibits.

Mr. Abbott: I have a right to ask him what he is using to refresh his recollection.

Mr. Austin: Not at this time.

5317 Trial Examiner Ballinger: The objection is overruled. The counsel may ask witness what papers he has in his hands.

Mr. Austin: The witness hasn't made any answer from any papers. Maybe the witness can make an answer without looking at any papers.

Trial Examiner Ballinger: Can you answer the question independent of any papers or documents?

Witness: Yes, having refreshed my memory during the period when these prices were made up. That is, when our schedule was made up.

Trial Examiner Ballinger: That would enable you now to answer based solely upon your own independent recollection, refreshed by examination of the documents, would it?

Witness: Yes. I know what prices were charged during that period.

Trial Examiner Ballinger: You may answer the question.

A. During the last half of 1940 our price on regular gasoline, charged f. o. b. our Keystone plant in Detroit, ranged from 6c to 6.35c per gallon.

By Mr. Austin:

Q. That was f. o. b. Keystone plant?

A. F. O. B. Keystone.

Q. And what were your prices on gasoline delivered f. o. b. the buyer's tanks?

5318 A. As I recall, prices f. o. b.—or delivered to the buyer's plant, ranged from 6.25 to 6.35 delivered.

Mr. Austin: That's all I have.

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Recross Examination by Mr. Abbott.

Q. What do you mean, Mr. Slaughter, by "regular gasoline"?

A. Regular gasoline is our grade that would be, during this period of 1940, classified as our 80-octane gasoline. It's the competitive grade to other so-called regular gasolines in this area.

Q. You say that the f. o. b. price Keystone refinery was 6c to 6.3; per gallon. You mean that that is a range over a period of months?

A. It is a range over a period of six months; the price fluctuating up and down, depending on supply and demand and our competitive conditions.

Q. Do you have any independent recollection of what the price was during the December month of 1940?

A. As I recall it our price ranged in that month from 6c to 6.1c.

Q. That is to say, a minimum of 6c f. o. b. Keystone, and a maximum of 6.1c per gallon, f. o. b. Keystone?

A. Yes. Can I refresh my memory on that?

Q. You are testifying now without any refreshing as I understand it. 531

A. All right.

Q. The delivered price, as I understand it from your testimony, would depend on whether it was delivered east or west of Woodward Avenue, is that correct?

A. And also competitive factors, other than the price charged by these hauling companies.

Q. In other words, if there was a competitive situation which requires you to sell for less, would your price be less?

A. Yes, and I will explain that in this respect: A refinery operating in the northern part of the state, or central part of the state, can deliver from their refinery to Detroit without charging an extra five points for the east side of town, because their hauling, coming from up north, consists of several hundred miles, approximately, or 150 miles, and the difference coming into town from up north creates no hardship on them to deliver either east or west, whereas we have a condition that occasionally we have to absorb the differential charged by the hauling company because of competitive conditions and prices quoted by competition from up north.

Q. I understand that these prices that you have quoted are all based on quantity deliveries of the minimum of how many thousand gallons?

5320 A. The smallest unit in our particular fleet, in the Aurora fleet, is 3,200 gallons. We only use our own equipment in the City of Detroit hauls, when it is more—well, when one of our particular units is available at that moment, and that won't interrupt its regular schedule.

When our units are not available and they are not based at Detroit, we use hired carriers and I believe the smallest hired carrier unit we can get is over 4,000 gallons.

Q. Now I understand also from your testimony that you would make a lesser price for delivered gasoline in large quantities of 3,200 gallons or more to a bulk plant located in Dearborn, than you would to a bulk plant located on the east side of Woodward Avenue, other things being equal and eliminating the element of competitive situations that you have mentioned. Isn't that correct?

A. You are limiting the quotation to an exact time for both quotations?

Q. In December, 1940?

A. No, I mean for an exact time for both quotations? Because our prices can fluctuate from day to day.

Q. I mean on the average situation.

A. At a given instance, you mean?

Q. Yes.

A. At a given instant, all other conditions being equal, it will cost you five points less to deliver on the west side than it will on the east side and, as a general custom, that allowance is given to the customer. 5321

Q. When you say five points, do you mean .05 of a cent?

A. Yes.

Q. And when you say west side, would it make any difference whether the delivery were made in Dearborn or on Linwood Avenue in the City of Detroit?

A. I don't believe the hired carriers differentiate for the haul into Dearborn, but the differentiation in freight charged is based more on the time involved and the distance traveled and, as a general rule, nearby Dearborn is, in fact, closer to our plant than Woodward Avenue; all being on the west side of Detroit.

Q. When you say freight, now, you are delivering not tank car deliveries but truck transport deliveries?

A. That's right.

Q. And that is the way you deliver all your gasoline, I believe you said?

A. Yes. We didn't make, during 1940, any tank car shipments of gasoline to any resellers in the City of Detroit.

Q. And I believe you stated that you made no deliveries to retail stations—or did you?

A. I didn't make that statement, no.

Q. It makes no difference, then, to you, whether the delivery is made to a retail station or to a bulk plant,
5322 is that right?

A. That is correct.

Q. Just as long as the delivery is more than 3,200 gallons?

A. Several of our customers are exclusively retail stations.

Q. So you do deliver at these prices that you have testified concerning by transport truck deliveries in quantities of 3,200 gallons or over, to retail service stations where they retail it to the consumer?

A. Yes.

Q. And it makes no difference to you, then, whether the sale and delivery are made to a customer's bulk plant or to the customer's retail service station?

A. No.

Q. Where he retails to the ultimate consumer?

A. No.

Q. You don't, then, police your sales after they are made to the customer?

A. We have no interest whatsoever in what the consumer does with the gasoline after we have sold it to him.

Q. If he wants to, he can dump it down the sewer, as far as you are concerned?

A. Absolutely.

Mr. Abbott: That's all.

Redirect Examination by Mr. Austin.

5323 Q. Mr. Slaughter, you said you made some deliveries to customers who are entirely retailers. Do those customers have bulk plants or are the deliveries made in storage tanks at the station itself? In other words, storage tanks under the pumps?

A. A number of retail accounts among the independent accounts have large storage tanks under their driveways or adjoining property and in several instances among the independents, rail facilities are also available and they must have at least have ten thousand gallons' storage in order to unload rail shipments.

Q. Well, I am talking about, now, the—

A. In shipping to those same accounts by truck transport we deliver direct into their tanks and whether or not their pump is hooked up direct to that tank, or to a small marketing tank from which they draw on their main storage, we have no knowledge whatsoever, but we deliver directly into the tanks, on occasion, at the retail outlet.

Q. Are there a number of retail outlets in Detroit, to your knowledge, including those which you supply, which have storage tanks at their stations of 6000 or more?

A. Yes, among the independents.

Q. I am talking about storage tanks under the driveway, now.

A. Among the independents I know there are a
5324 number of stations. I wouldn't know about the companies to whom we have never sold.

Q. I am just asking whether that is done and whether it is practical to do it in Detroit?

A. Yes, it is.

Q. And does your price to the customers in the City of Detroit on regular gasoline at the same time vary as between customers having bulk plant facilities and those who do not?

A. We don't make any differentiation because of that reason. Our prices are set by competition; supply and demand.

Mr. Austin: That is all.

Recross Examination by Mr. Abbott.

Q. Is Howard J. MacGrady of your company, in the Court Room?

A. Yes, he is.

Mr. Abbott: That's all.

Mr. Austin: That's all.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I will call Mr. MacGrady.

5325 HOWARD J. MacGRADY was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. What is your name, please?

A. Howard J. MacGrady.

Q. What is your business, Mr. MacGrady?

A. Salesman for the Aurora Gasoline Company.

Q. And how long have you acted in that capacity?

A. For the Aurora Gasoline Company?

Q. Yes.

A. Seven years.

Q. Will you state briefly what your duties are as salesman for the Aurora Gasoline Company?

A. Sell gasoline; tank car and truck train.

Q. And do you try to obtain new accounts for the company?

A. Yes.

Q. Did you ever meet Mr. Jacob Citrin, of the Citrin Kolb Oil Company?

A. Yes, sir.

5326 Q. Do you recall having a conversation with him at the time of a convention in the Detroit Leland Hotel in, I think it was December, 1940?

A. Yes.

Q. Is that the correct month?

A. Well, I have seen him several times in the Detroit
eland.

Trial Examiner Ballinger: About that time do you
ecal having a conversation with him?

The Witness: Yes.

Trial Examiner Ballinger: At the hotel.

y Mr. Austin:

Q. Do you recall a conversation with him at that hotel
which the subject of the price charged by the Aurora
asoline Company for gasoline at that time was men-
oned?

A. Do you know what month it was?

Q. I think the testimony shows it in the record Decem
r 10, 1940.

A. I had lunch with him on December 10, 1940.

Q. Where was that?

A. At the Leland.

Q. Can you relate any conversation that you had with
im so far as it related to or had any relation to the pur
hase of gasoline by him from the Aurora Gasoline Com
any?

A. As far as I can remember, he just asked me
327 what the price on our gasoline was.

Q. Did you tell him?

A. Yes.

Q. Did you have any conversation with him for the
urpose of persuading him to become a customer of the
urora Gasoline Company?

Mr. Abbott: Now, just a moment. Objected to upon the
rounds that that question asks for a conclusion of the
itness as to what the conversation was for. All that he
an ask the witness is to state what the conversation was.

Mr. Austin: That is what I want him to say, if there
as any such conversation.

Mr. Abbott: Well, I object to the form of the question
ecause it rather seeks to interpret the purpose of the
onversation.

Mr. Austin: I will withdraw the question.

Mr. Abbott: I don't want you to lead the witness, Mr.
ustin. I think that question is very leading.

Trial Examiner Ballinger: After the witness has
nswered with reference to the first question "State what
he conversation was" if he has omitted any portion,

counsel then may ask him specifically with reference to any particular matter.

Mr. Abbott: He can ask him whether there was
5328 any further conversation between the parties.

Mr. Austin: I would like to withdraw the question.

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Austin:

Q. Did you have any further conversation with Mr. Citrin at that time beyond his asking you what your price was and your quoting him?

A. Oh, we discussed the general gasoline business.

Q. Was there any discussion, further discussion regarding the purchase of gasoline by Mr. Citrin from the Aurora Gasoline Company?

A. As far as I can remember, he just asked me what our price was.

Q. Do you know what price you quoted?

A. Oh, yes.

Q. What price did you quote him?

A. "Six-ten" F. O. B. our refinery.

Q. Was that the price communicated to you by your office as Aurora's price at that time?

A. Yes, sir.

Trial Examiner Ballinger: By "six-ten" you mean 6.1¢?

The Witness: 6.1¢.

By Mr. Austin:

Q. Did you tell Mr. Citrin that Aurora Gasoline
5329 would sell him gasoline at two cents below the prevailing or tank wagon price?

A. No.

Mr. Austin: That is all.

Cross-Examination by Mr. Abbott.

Q. Do you know that that price actually was two cents below the tank wagon price at that time?

A. It may be.

Q. Now, you did mention that the Detroit Leland Hotel price of 6.1 for what you call regular gasoline?

A. That's right.

Q. Is that right?

A. Yes.

Q. And that did not include any taxes, of course?

A. No, sir.

Q. Was that for delivery by transport truck or how?

A. For F. O. B. our refinery.

Q. In transport truck?

A. Yes.

Q. What difference would it make if it was F. O. B. your refinery how they took it out?

A. If they took it out in a transport truck, you would have to pay the freight on it. If he took it out in his own truck it didn't make any difference to me.

5330 Q. In other words, the customer could get the gasoline in his own trucks at the price of 6.1¢ per gallon?

A. That's right.

Q. That would be regardless of how much he took?

A. No, there would have to be a specified amount.

Q. Did you tell him anything about that?

A. He didn't go any further.

Q. He didn't say anything about that?

A. All he was interested in was how much our price was F. O. B. our refinery.

Q. Well, you talked to him several times before this, hadn't you?

A. Oh, on and off.

Q. Do you remember who else was present at the time of this conversation?

A. I think Elmer Ledbetter.

Q. And he is the proprietor or one of the officers of the Wayne Oil Company, is he not?

A. That's right.

Q. Anyone else?

A. No, I don't think so.

Q. Do you recall that sometime after the meeting you arranged for them to go down and see the refinery?

A. Not Mr. Citrin, no.

Q. Whom did you have go down and see the refinery?

5331 Mr. Austin: Wait a minute. He hasn't said he had anybody go down.

Mr. Abbott: He said "Not Mr. Citrin."

Q. Whom did you have go down and see the refinery?

A. Mr. Ledbetter.

Q. How long was that after this meeting?

A. That was before this meeting.

Q. Before the meeting?

A. Yes.

Q. That happened before the conversation between you and these parties?

A. Yes.

Q. How long before, in days or weeks?

Mr. Austin: What parties?

Mr. Abbott: Any of the parties who have been referred to.

The Witness: Well, I think the first call I had from Mr. Ledbetter was about a year before that.

Q. Well, you say the first call—

Mr. Austin: Your Honor, I object to any questioning regarding what happened to Mr. Ledbetter. If I understand the last two answers of the witness, they referred only to Mr. Ledbetter and not to Mr. Citrin.

Mr. Abbott: Now, if the Court please, here is the
situation. The ruling of your Honor as to Mr.
5332 Ledbetter's testimony was based upon the fact that
the offer was received after the filing of this Complaint. Now if it appears from the testimony as it now seems to appear that there were some negotiations a year before December 10th, 1940, which would be at a time prior to the issuance of the Complaint, that would be a matter that we ought to go into. If this witness as he now says had negotiations with Ledbetter going back to December, 1939—

Trial Examiner Ballinger: The negotiations hadn't culminated in any offer or price.

Mr. Abbott: According to the testimony of the witness it did culminate in an offer by the witness, at least—

Mr. Austin: Your Honor—

Mr. Abbott: —of a price F. O. B. the refinery. And that was true whether the customer hauled it or whether they hauled it by transport truck.

Mr. Austin: I am amazed at the facility at which Mr. Abbott with the testimony we have just taken concludes there was an offer, but aside from that, this is entirely outside of cross examination.

If it is now the purpose of the Respondent to attempt to show an offer to Mr. Ledbetter, why, that is a matter for them to call witnesses in their own behalf.

Mr. Abbott: There was testimony that Mr. Mc 5333 Grady arranged for someone to go down and look at the plant which they had down there.

By Mr. Abbott:

Q. Was that the Lincoln Park plant or Elsie or the Keystone?

Mr. Austin: I object to the questioning except in so far as it relates to the conversation at the Detroit Leland Hotel, which is the only thing that I asked the witness about on cross examination—on direct examination.

Trial Examiner Ballinger: The objection is sustained.

By Mr. Abbott:

Q. What kind of a meeting was this at the Detroit Leland Hotel?

A. It was a luncheon.

Q. Oil Men's Club?

A. Yes.

Q. Were you gentlemen all members of that club?

A. Yes.

Q. Mr. Citrin, yourself, and Mr. Ledbetter?

A. Yes.

Q. Did you all sit at the same table when the conversation took place?

A. Yes.

Q. Was anything said to you at the time as to the kind of gasoline to which this price pertained?

A. As I told you before, he just asked me what the 5334 price of our gasoline was and I told him we are selling it at six-ten F. O. B. our refinery, our regular gasoline.

Q. By regular gasoline you refer to what?

A. 80 octane.

Q. Previous to going to the stand, did you discuss this matter with Mr. Austin, the attorney for the Commission?

A. In what way?

Q. Have you talked this over with him, discussed the nature of your testimony?

A. No, not the nature of my testimony.

Q. What I mean to say is this: You told him previous to going on the stand what you remembered about the conversation at the Detroit Leland Hotel?

A. Well, he didn't ask me any questions.

Q. What did he ask you?

A. He was talking to Mr. Slaughter.

Q. Oh, the conversation was with Mr. Slaughter?
A. Well, Mr. Slaughter, yes.
Q. Was Mr. Slaughter down at the Detroit Leland Hotel?
A. No, he was not.
Q. On the 10th of December, 1940?
A. No.
Q. Mr. MacGrady, do you want to sell your gasoline?
A. Yes.
Mr. Abbott: That is all.
5335 Mr. Austin: That is all.
(Witness excused.)

Mr. Austin: May we have a five-minute recess, your Honor.

Trial Examiner Ballinger: The hearing stands in recess for five minutes.

(A short recess was taken.)

IRVING B. DWORMAN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows;

Direct Examination by Mr. Austin.

Q. Did you state your name to the Reporter?
A. Irving B. Dworman.
Q. Where do you reside?
A. At 19545 Shrewsbury, Detroit.
Q. What is your business Mr. Dworman?
A. I am engaged in the petroleum business as president of the Red Indian Oil Company.
Q. Is the Red Indian Oil Company a corporation?
A. It is a Michigan corporation.
Q. When was it incorporated?
A. 1923.
Q. How long have you been with the Red Indian Oil Company?
5336 A. Since 1928.
Q. What is your position with that company now?
A. I am president and general manager.
Q. You personally supervise the business of the company?
A. I do.

5337 Q. And how long has that been true?

A. That has been for the last 15 or 16 years,—14 years.

Q. Where is the Red Indian Oil Company engaged in business?

A. In metropolitan Detroit, including parts of Oakland County, Nacomb, Washtenaw, Monroe and all of Wayne.

Q. Does the Red Indian Oil Company sell gasoline?

A. They do.

Q. What brand of gasoline, if any, does the Red Indian Oil Company sell.

A. The Fleet Wing brand.

Q. How long have they sold Fleet Wing gasoline?

A. My memory says about seven or eight years; between seven or eight years.

Q. What brand did you sell before that?

A. Phillips Petroleum Company brand, Phillips' 66.

Q. And from whom do you purchase Fleet Wing gasoline?

A. From the Fleet Wing Corporation.

Q. Is the Fleet Wing Corporation a subsidiary of the Standard Oil of Ohio?

A. They are.

Q. And where is the main office of the Fleet Wing Corporation?

A. Cleveland, Ohio, in the Republic Building.

Q. Is the gasoline purchased by Red Indian Oil Company from the Fleet Wing Corporation shipped to it direct from Ohio or from the refinery of the Fleet Wing
5338 Company or from the refinery of the Standard Oil of Ohio or does the Red Indian Oil Company obtain its gasoline from a terminal or some other source in Detroit?

A. Generally most all of it comes from a terminal in Detroit. However, on occasions, when they, for reasons best known to themselves, they may ship us gasoline from their Toledo refinery.

Q. If shipped from Toledo, how is it shipped?

A. By transport and sometimes by tank car.

Q. Does the Red Indian Oil Company have its own tank storage in Detroit?

A. We do.

Q. What is the address?

A. 12402 Cloverdale Avenue.

Q. Is that the same address as the main office of the company?

A. It is.

Q. When your gasoline is obtained from the Pure Oil terminal in Detroit—

Mr. Abbott: Pure Oil?

By Mr. Austin:

Q. That is the terminal of the Pure Oil Company?

A. Pure Oil uses that terminal. I believe it is owned by the Pure Oil, yes.

5339 Q. And does the Fleet Wing have storage facilities at that terminal?

A. I understand they have one tank there.

Q. Since 1938 has part of the business of the Red Indiana Oil Company been in the supplying of retail gasoline service stations in metropolitan Detroit?

A. It has.

Q. How many retail service stations were supplied by the Red Indian Company with Fleet Wing gasoline in 1938?

A. Roughly, it would be around 28 to 30 accounts; varying at the time of the year. We would lose an account, maybe one, two or three, and might pick one or two up, but the number would vary from month to month.

Q. And about how many retail stations did you supply in 1940?

A. About 17 or 18.

Q. Does that include any stations operated by the Red Indian Oil Company?

A. We did not operate any stations ourselves at that time so it would include all types of outlets, retail outlets.

Q. Retail outlets to whom you sold gasoline?

A. That's right, sir.

Q. Does the Red Indian Oil Company, and did it, since 1938, supply any jobber or distributors?

A. We have one jobber who is supplied by our transport from the Pure Oil terminal.

5340 I want to correct that. We have two. One we supply and the other one picks up his own gasoline.

Q. Where does he pick it up?

A. At the Pure Oil Terminal, or Toledo.

Q. One of those is the Victor Oil Company, is it not?

A. Yes sir.

Q. Is that the one that picks up its own gas or—

A. That's the one that picks up its own gas.

Q. Does the Fleet Wing Corporation sell Fleet Wing gasoline through any other supplier in Detroit, other than the Red Indian Oil Company?

A. They do not.

Q. Does the Red Indian Oil Company at any of its stations or in any advertising, use the name Standard or Standard of Ohio?

A. We do not.

Q. Are you permitted by the Fleet Wing Corporation to use the name Standard or to advertise in any way that Fleet Wing gasoline is a product of the Standard Oil Company of Ohio?

A. We were told not to.

Q. Do these retail stations that you referred to sell their gasoline under the brand Fleet Wing?

A. Generally, yes.

Q. And do these two jobbers sell their gasoline under the Fleet Wing brand?

5341 A. They do in their own service stations.

Q. Have you had occasion to drive around and visit these service stations at any time?

A. Yes.

Q. Both the ones you supply and the ones supplied by the jobbers?

A. Not the one supplied by the jobbers, except our own company operation.

Q. I mean, you have seen those?

A. Yes.

Q. Can you state whether there is any advertising or signs or globes at any of these service stations that indicates that the gasoline is a product of the Standard Oil Company of Ohio?

Mr. Abbott: I object to this on the ground it is wholly immaterial and not proper rebuttal testimony.

Trial Examiner Ballinger: What does counsel for the Commission say?

Mr. Austin: There is testimony in the record that Ned's Auto Supply Company was considering the purchasing of gasoline from the Red Indian Oil Company because they felt that they could still say it was Standard Gasoline coming from the Standard Oil Company of Ohio, and that, therefore, they wouldn't hurt their patronage as much as if they switched to some other company.

5342 Trial Examiner Ballinger: The Examiner recalls the testimony.

The objection is overruled.

A. I think on several occasions, in years gone by, some of our dealers did make an effort to display a sign that Fleet Wing was a brand of the Standard Oil of Ohio and we were asked to get our dealers to remove the signs, which was subsequently done.

By Mr. Austin:

Q. Well, in getting the dealers to remove the signs, what did you do to accomplish that?

A. We either called up or sent one of our own men out; either a salesman or repair truck; to remove the sign; insisted that there were objections made to the use of the sign and we insisted that the sign must come down.

Q. Since that time has it been the policy of the company to refuse to sell to any customer who advertises that the gasoline is the product of the Standard Oil of Ohio?

A. I don't believe we have had occasion to do that because I do not believe any of our customers were advertising that way.

Q. Does the Red Indian Oil Company advertise, or has it, since 1938, advertised in any way that the gasoline it sells is a product of the Standard Oil of Ohio?

5343 A. I think, in some methods, it has been done. I think certain handbills were printed up at one time that carried that but I believe those handbills, or most all of them were destroyed before they were distributed.

Q. How long ago was that?

A. I would say about three years ago.

Q. And since that time has there been any such advertising?

A. There had not; to my knowledge.

Q. Red Crown gasoline is a major brand in Detroit, is it not?

Mr. Abbott: Now just a moment, if the Court please. I object to this upon the ground that it is wholly incompetent and immaterial and the witness is being asked his opinion as to whether Red Crown, so-called, is a major gasoline. It makes no difference, your Honor. The purpose of the competitive offers of the Standard Oil Company of Indiana is competing in the Detroit area with gasoline. We emphasized that on the record time and again. The question of this kind being addressed to the situation as to which constitute major gasolines and which are not major, are not material because, as I say, we feel that the record shows that we are in Detroit competing with gasolines and we have to meet that competition.

Trial Examiner Ballinger: The objection is overruled.

5344 A. I would say that Red Crown was considered to be a major brand gasoline in the City of Detroit.

By Mr. Austin:

Q. How about White Star?

Mr. Abbott: Same objection.

Trial Examiner Ballinger: The objection is overruled.

A. I would say White Star is also a major brand gasoline.

Trial Examiner Ballinger: Generally accepted as such?

Witness: Yes, it is.

By Mr. Austin:

Q. How about Texaco?

Mr. Abbott: Same objection.

Trial Examiner Ballinger: The objection is overruled.

A. That would also be considered as a major brand gasoline.

Q. And how about Blue Sonoco?

Mr. Abbott: Same objection.

Trial Examiner Ballinger: The objection is overruled.

A. That would also be considered a major brand gasoline.

By Mr. Austin:

Q. Now I want to ask you whether, now, and during the past three years, the Fleet Wing brand gaso-
5345 line has had as high a public acceptance in Detroit as the four major brands you have just named?

Mr. Abbott: If the Court please, I object to that on the same grounds; namely that Fleet Wing gasoline, whether it is named Fleet Wing or by any other name, is a Standard Oil Company of Ohio product and that it is in competition with Red Crown and other brands produced by the Respondents and does constitute upon this record competition which we have a right to meet under the Robinson-Patman Act.

Trial Examiner Ballinger: The objection is overruled.

A. My opinion is that Fleet Wing could not or is not considered a major brand gasoline and does not have the public acceptance of the four major brands previously mentioned.

By Mr. Austin:

Q. Does the Red Indian Oil Company have a contract with the Fleet Wing Corporation?

A. We do not have a contract.

Q. I am, of course, referring to the contract for the sale of gasoline.

A. I understand.

Trial Examiner Ballinger: In what period of time are you referring to?

Mr. Austin: Well, I will make it clearer.

5346 By Mr. Austin:

Q. Well, have you had a contract for the purchase of gasoline from Fleet Wing Corporation since January 1, 1938?

A. We have not.

Q. How is the price fixed at which you purchase gasoline from the Fleet Wing Corporation?

A. Generally by mutual understanding between a representative of the Fleet Wing Corporation; namely, Mr. Laufman, and myself.

Q. Do you generally buy your gasoline at a certain margin below the prevailing major tank wagon price in Detroit?

Before you answer that, I mean is your price generally quoted as a marginal price or is it quoted as so many cents per gallon?

Mr. Abbott: I object to that upon the ground that the question is unintelligible. It starts out by asking: Do you buy your gasoline and, as I understand, it winds up with asking the witness the basis upon which he sells it.

Mr. Austin: No.

Trial Examiner Ballinger: He is asking whether he buys it one of two different ways.

Mr. Austin: That's right.

By Mr. Austin:

Q. I am asking how the price is fixed. How it is
5347 quoted really.

A. That is a difficult question to answer and I can only answer by saying that it is a matter of negotiation and while the discussion of margin or, rather, the marginal discussion enters into the discussion, definitely does, yet our cost is based upon so much per gallon rather than so much below the tank wagon price.

Q. During the past three years can you say that your price, the price which you have paid for Fleet Wing gasoline, has normally been a certain amount below the major, prevailing tank wagon price in Detroit?

A. It has been below their tank wagon price but not a fixed amount.

Trial Examiner Ballinger: Has it fluctuated from time to time?

Witness: It has fluctuated, on several occasions.

Trial Examiner Ballinger: Approximately what has been the fluctuation?

Witness: About five eighths of a cent. No; I would say about three eighths of a cent.

By Mr. Austin:

Q. You mean the fluctuation?

A. Yes. In the margin.

Q. But what has the margin been?

A. Between one and five eighths cents and two cents a gallon.

5348 Q. Has it been two cents a gallon most of the time?

A. It has.

Q. And when has it not been?

A. When the tank wagon price was at a lower level or the net back to the refinery was under 6.5c per gallon.

Q. Would that be during a price war?

A. That would be during a price war, yes.

Q. During normal periods of competition in the Detroit market, has your price been two cents below the market; that is, the tank wagon?

A. It has, in recent years.

Q. Now turning to the prices at which you sell, at which the Red Indian Oil Company sells gasoline to retail service stations in the City of Detroit. At any one time do your prices vary to different customers?

A. They do.

Q. And what are the causes of such variation as exists?

A. There are a group of circumstances that enter into it. Of course it is a matter of determining whether or not we want the business, the amount of money that's generally required to invest in the dealer's place of business; his volume of business; his credit; the amount he will purchase at one delivery, as well as competition.

5349 Q. Have you, during the past week, at my request, examined your record, to determine the prices charged by you to retail service stations in Detroit?

A. I have.

Q. For regular gasoline during 1938 and 1940?

A. I have.

Q. And as a result of that examination of your records, and based upon your recollection and refreshing your recollection with any notes that you may wish to refer to, can you state for the record what prices were charged by Red Indian Oil Company for house brand, Fleetwing gas, to retail stations in Detroit in 1938 and 1940?

Mr. Abbott: Just a moment. I object to that upon the ground that the records themselves are the best evidence. We have a right to know what they are.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Trial Examiner Ballinger: Have you any independent recollection?

The Witness: There has been such a wide fluctuation of prices that an independent recollection, to my mind, would be inconceivable, without referring to notes or to records.

Trial Examiner Ballinger: After you referred to your records or the notes, would that enable you to recall with certainty these prices?

The Witness: No, because there is a great fluc-
5350 tuation, there of ten-thousandths of a cent a gallon and it would not be—if I should refer to my memory, I know it would not be correct.

By Mr. Austin:

Q. Could you testify to the prices charged by looking at notes made from your records and from the examination of your records which you say you personally made?

~~A. Yes, by the use of my notes, I can.~~

Mr. Abbott: We demand the privilege of looking at the records upon which these notes are based for the purpose of surrebuttal, if the Respondent wishes to make any.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: It follows that this witness has already testified that his prices have variations between customers depending upon volume, depending upon how much he wants the business, depending upon competition and that being the case I think we have a right to know on what basis these variations have existed and to what customers they pertain.

Now, if he just tells us the prices, that doesn't tell us anything.

Mr. Austin: The prices show the variation and I don't think you have any right to know what the customers' names are they were sold to.

5351 Mr. Abbott: He says it depends upon the volume, how much he wants the business and competition and a number of other factors. If that's the kind of competition we have to make I think we ought to know what it is. I think the Commission ought to know what the situation is.

Trial Examiner Ballinger: Read the question again.

The Reporter: "Q. And as a result of that examination of your records, and based upon your recollection and refreshing your recollection with any notes that you may wish to refer to, can you state for the record what prices were charged by Red Indian Oil Company for house brand, Fleetwing gas, to retail stations in Detroit in 1938 and 1940?"

Trial Examiner Ballinger: Are these records voluminous?

The Witness: They are.

Q. Have you any objection to counsel for the Respondent examining your records?

The Witness: I definitely do.

Trial Examiner Ballinger: Have you any objection to disclosing to counsel for the Respondent your customers?

The Witness: I do.

Trial Examiner Ballinger: The objection is sustained.

By Mr. Austin:

Q. May I have that paper?

(A document was handed to counsel by the witness.)

5352 Mr. Austin: I would like to have this paper marked for identification, if your Honor please.

Trial Examiner Ballinger: The Reporter will mark the paper for identification as Commission's Exhibit 114-A and 114-B.

(The paper referred to was marked "Commission's Exhibit 114-A and 114-B" for identification.)

By Mr. Austin:

Q. I show these two sheets, marked Commission's Exhibit 114-A and 114-B, for identification, and ask you if you will tell me what they are?

A. They are recapitulations on prices on which we sold gasoline to retail service station's accounts in Detroit proper during the year 1938 and 1940.

Q. Do they show the names of the service stations?

A. They do not.

Q. Do they show the prices charged during each month and the number of stations to which each price was charged?

A. They do.

Q. And how were those sheets prepared?

A. They were taken from our records.

Q. Records of the Red Indian Oil Company?

A. Yes, sir.

Q. Are those records the regular records kept in the usual course of your business from year to year?

5353 A. They are.

Q. And who prepared those two sheets?

A. I directed them to be prepared and they were done by two employes in the office.

Q. Did you personally take the records and point out to the employees, yourself, exactly what you wanted them to copy?

A. I did.

Trial Examiner Ballinger: Is there anything copied on there from the records?

The Witness: Pardon me, your Honor? Did you ask me a question?

Trial Examiner Ballinger: Read my question.

(The record was read by the Reporter.)

~~The Witness: Everything that's on there is copied~~
rom the records.

y Mr. Austin:

Q. The numbers of service stations are not copied from e records, are they?

Trial Examiner Ballinger: Isn't that a compilation?

The Witness: That is a compilation, yes, sir.

Trial Examiner Ballinger: Then it isn't a copy of a ecord, is it?

Mr. Austin: Well, just a minute.

y Mr. Austin:

Q. What is this top column, here; the figures in this top column opposite the word "month"?

354 A. That is the prices for which gasoline was sold during that month.

Q. And were those prices copied from the records?

A. They were.

Q. Now what do these other figures down here in the quare refer to?

A. They were the number of service stations who purhased at those particular prices; underneath the figures.

Q. And were those figures, those numbers obtained by dding up the number of service stations to whom you old at a certain price during a certain month?

A. They were.

Q. And was that done from the records under your upervision?

A. It was.

Q. Do these prices on the top line on each sheet repesent dollars or cents?

A. Cents.

Q. Will your look, please, and—

A. That's fractions of a dollar.

Q. Fractions of a dollar?

A. Yes.

Q. Are those the prices charged which you say were opied from the records?

A. They were.

Q. Do those prices include taxes, or not?

355 A. They include the State and Federal tax.

Q. Do they include the Michigan Sales Tax?

A. They do not.

Mr. Austin: I offer these two sheets, Commission's Exhibit 114-A and 114-B, in evidence.

Mr. Abbott: I have already objected. I don't think the examination recently adduced adds anything to the situation.

Before I make the objection, I want to ask just one question: Is that proposed exhibit in your handwriting?

The Witness: It is not.

By Mr. Austin:

Q. It is typewritten, isn't it?

A. It is typewritten.

Mr. Abbott: And did you do the typewriting?

The Witness: I did not.

Mr. Abbott: Did you yourself personally inspect all the book entries that are compiled in that exhibit?

The Witness: Not all of them.

Trial Examiner Ballinger: You delegated that to two other people, I understand.

The Witness: That's right; I did.

Mr. Abbott: And the work, then, was done partly by one person and partly by another person?

The Witness: That's right.

5356 Mr. Abbott: That is correct?

The Witness: Yes.

Mr. Abbott: And not by yourself?

The Witness: That's right, ~~sir~~.

Mr. Abbott: Well, I object to the exhibit, your Honor; first, upon the ground that it is incompetent for the reason that it is not the best evidence, the witness having stated that he is unwilling to have the Respondent inspect the books, the books being the best evidence. The compilation is not competent to be introduced as an exhibit.

Secondly, upon the ground that, as appears from the statement of the witness, the compilation is not the product of his own investigation and compilation but is the product of two persons neither of which did all the work but it is a result of the efforts of two different persons and is not the work of the witness, even though it was done under his supervision, he having stated that he has no— that he did not make the entries and did not do the work himself.

Upon those two grounds, therefore, I object to the introduction of the exhibit.

5357 Trial Examiner Ballinger: The Examiner sustains the objection; also on the further ground that without the production of the original entries there is no opportunity afforded counsel for Respondent to cross-examine.

Mr. Abbott: I think that is included in the first ground of objection. If I didn't, I adopt that as part of the objection.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: May I ask the witness a couple of additional questions to qualify the proposed exhibit?

Trial Examiner Ballinger: You may.

Mr. Austin:

Q. Mr. Dworman, you said that you personally instructed one of your employees regarding the preparation of these two sheets? I am referring to Commission's Exhibit 114-A and B. And when the first list of prices was presented to you, did you go over it and personally make any check of any part of it with the original records?

A. Yes, I did.

Q. Did you find any errors?

A. I did.

Q. What did you do about that?

A. I had the girl bring the original records and to determine how she got those figures and apparently
5358 she did make some errors and had them corrected, the subsequent list corrected.

Q. Did you explain to the second girl what the errors were and what should be corrected?

A. The second girl was more familiar with the work and the handling of records and I did explain to her the errors I found and then the two girls together compiled this particular list.

Q. After this particular list was presented to you, did you then make any further check personally of any of these items with the original records?

A. I did check a few of them.

Q. Did you find any errors?

A. Not on this particular list.

Q. What do you mean by that? This is the only list that we have produced here, is it not?

A. That's right. Well, this was the third copy. In other words, there were two that were in error.

Q. I am referring to this one.

A. There was no error that I could determine on that list.

Q. Were there any errors in the first two lists prepared and corrected as a result of your personal knowledge of the business and your personal comparison of these figures with the records?

A. There were some corrections made by checking and because some of the figures of my personal knowledge 5359 showed could not be true.

Q. Did you do that checking yourself?

A. Yes.

Trial Examiner Ballinger: That is only as to a part of it, is it not?

The Witness: That's to a part of it, yes, sir.

By Mr. Austin:

Q. But you did make a test check of some of the figures appearing on these sheets here after they were in this form?

A. I did.

Q. Were they found to be correct?

A. They were.

Q. And is it your belief that these two sheets accurately show the prices charged and the number of customers to which those were charged during each month in 1938 and 1940?

A. I believe they are correct.

Mr. Austin: Your Honor, I now again offer these two sheets, Commission's Exhibits 114 A and B, for identification, in evidence.

Mr. Abbott: Your Honor, upon the same grounds as previously stated, I object to their introduction for the reasons stated. I don't think I need to repeat them, but the questions that have now been asked, I submit, do not 5360 change the basis upon which the objections were made.

Trial Examiner Ballinger: Objection sustained. The exhibits are excluded.

By Mr. Austin:

Q. I would like to show you a letter which is in evidence in this case as Respondent's exhibit 47, Mr. Dworman.

Is that letter on the stationery of the Red Indian Oil Company?

A. It is.

Q. Did you write it?

A. I did.

Q. Is that your signature?

A. It is my signature. I dictated the letter.

Q. That is a letter which is addressed to Ned's Auto Supply Company under date of April 30, 1941. Does it refer to a price which you quoted Ned's Auto Supply Company in the Fall of 1940?

A. To the best of my knowledge, it does.

Q. In the third paragraph of that letter, there is a statement that the offer in 1940 included an advertising allowance of ".25 points per gallon on all regular and ethyl gasoline purchased from us."

Would you explain what is meant by ".25 points"?

A. That is intended to be a quarter of a cent per gallon.

Q. Will you explain what was meant by an advertising allowance of a quarter of a cent per gallon?

5361 A. The advertising allowance as it is utilized by the Fleetwing Corporation makes it necessary for the jobber to spend the money and submit paid bills that he has spent that money for advertising and they reimburse them on the basis of a quarter of a cent per gallon for that work.

Q. Does he receive that additional discount of a quarter of a cent a gallon unless he has shown that he has spent the money for advertising?

A. He does not.

Q. What sort of advertising does he have to spend it on?

A. Anything he chooses. He can use it for radio, newspapers.

Q. Does it have to be gasoline advertising?

A. It has to specify "Fleetwing" in the gasoline advertisement.

Q. In other words, he can't use it for advertising of the products that have no connection with the Fleetwing Corporation?

A. He cannot. It has to be definitely for the Fleetwing brand.

Trial Examiner Ballinger: Does it have to be an advertisement devoted entirely to Fleetwing?

The Witness: If the—the Fleetwing would only pay that portion which is devoted to Fleetwing or allow credit for that portion.

By Mr. Austin:

5362 Q. At the time you quoted that price referred to in the letter to Ned's Auto Supply Company, had you previously obtained the approval of the Fleetwing Corporation for such a deal in case it was accepted by Ned's?

A. I did.

Mr. Austin: That is all.

Cross Examination by Mr. Abbott.

Q. Under this offer it was not necessary for Ned's to operate a bulk plant, was it, unless they wanted to?

A. That's right.

Q. They could haul it out of your pipe line terminal?

A. Yes.

Trial Examiner Ballinger: You refer to the offer contained in what? Commission's exhibit what?

Mr. Abbott: That is Respondent's exhibit 47.

By Mr. Abbott:

Q. Is that right?

A. That's right.

Q. In that event you allowed them what amount per gallon for the hauling?

A. It was a tenth of a cent a gallon.

Q. In addition to the—

A. That was to cover their hauling, the hauling cost, a tenth of a cent a gallon, from the Detroit terminal and four tenths of a cent it it were hauled from
5363 Toledo.

Q. I see. Then as I understand it, the price that you offered them in this letter contemplated that you would deliver the gasoline but if they hauled it out of your pipe line terminal, then you gave them an allowance for their additional work in doing the hauling; is that right?

A. That's right.

Q. You had for a great many years sold Ned's Auto Supply Company motor oil; hadn't you?

A. I have.

Q. One time you sold them their requirements of Quaker State motor oil, didn't you?

A. I did.

Q. In doing that you called at their place of business quite often; didn't you?

Mr. Austin: Your Honor, I object to general questioning on previous calls at Ned's since on direct examination I did not bring up any question of any offer of Ned's Auto Supply Company except as shown by that letter which relates to this specific time, and I don't think that the Respondent at this time should be attempting to use my witness for putting in further direct testimony of any previous call.

Mr. Abbott: I won't go any further with that.

Trial Examiner Ballinger: Objection sustained.

By Mr. Abbott:

5364 Q. You mentioned the fact in your testimony that you had two jobbers. You mentioned the Victor Oil Company. What was the other one?

A. There was one, Bath City Service, in Mount Clemens. That is still in effect. It slipped my mind that Fleetwing with our consent had another one for a short period of time and that was Terminal Oil Company.

Q. I understood you also to say that ordinarily the margin on Fleetwing brand gasoline between the tank wagon and the tank car or truck transport prices was from 1 5/8 to two cents a gallon; is that correct?

Mr. Austin: I object to that because the witness didn't testify to that.

Mr. Abbott: If I am mistaken, why, I want to be corrected, but that is what I understood him to say.

Mr. Austin: Your margin is right but the record shows he referred to the prevailing major tank wagon price.

By Mr. Abbott:

Q. All right. What is your testimony as to that?

A. My testimony as I recollect it, I said that the invoice price would show a differential of approximately 1 5/8 to two cents below the existing tank wagon price in the City of Detroit at the time of shipment.

Q. Independent of the existing tank wagon price did you have a prevailing tank wagon price of your own?

vertises refrigerators and bicycles, do you consider that the Standard Oil Company obtains a reciprocal benefit from that advertising?

A. I not only consider, I know we do receive a benefit from that advertising.

Q. What is that opinion based on; will you explain it a little?

A. It is as old as the problem of merchandising. If the Wayne Oil Company decides to advertise Camel cigarettes at ten cents a pack distributed at their outlets and lose money on every package of cigarettes they sold, there would be a beautiful derivative benefit to the Standard Oil Company in the sale of gasoline because that is the object.

5390 Now, if Ned's Auto Supply Company advertises refrigerators, many of those refrigerators are paid on time payment plans. Let us assume that they advertise Firestone tires; they are put on a budget plan. You or I as a purchaser drive in to make a payment on that tire; we drive across that driveway from ten to twenty times; we stop our car by the pump island. There is a man on the car as soon as the car comes to a stop, and they are selling gasoline and motor oil. We derive a tremendous benefit from it.

I might even add that most large distributors grant an advertising allowance for partial payment of the ad insertion upon the theory that they do derive the benefit. We do not. We make no advertising allowance whatsoever.

Trial Examiner Ballinger: How is that susceptible of computation?

The Witness: Your Honor, I venture that there has been at least five national organizations employing some of the most astute minds in the country attempting to measure advertising influences. I have yet to find a measurement that is all inclusive or that will be accepted by all readers of the analysis made. Advertising as a selling effort is a tremendously difficult expenditure to measure the benefit therefrom. Many times selling results from a pleasant word and entertainment, an invitation to dinner, an inquiry as to the health of a sick child, but a sale is made, and it is in
5391 the aggregate of all of these influences that the selling weight and pressure of an organization is felt in a given community.

Trial Examiner Ballinger: What I had in mind is, how is it possible to approximate the benefits.

5365 A. Yes, sir.

Q. What was ordinarily the margin in 1938, '39, and '40 between your tank wagon price and your track transport price?

Mr. Austin: Do you need to refresh your recollection on that, Mr. Dworman?

A. I don't believe I can answer that.

Mr. Abbott: I didn't ask the witness to refresh his recollection from anything. I just asked him if he knows from his knowledge.

A. I do not. I believe that is a question that has too many answers.

Trial Examiner Ballinger: You may explain your answer further, if you desire.

The Witness: Well, transport prices have fluctuated without regard to tank wagon price.

By Mr. Abbott:

Q. That is dependent on a lot of factors, isn't it?

A. That is right.

Q. And you are not prepared at this time to testify definitely on that point?

A. I am not.

Mr. Austin: Now—

Mr. Abbott: Now, just a moment. This is my witness. I am asking him these questions. If yor want to re-direct him—

5366 Mr. Austin: Well, all right, but there was a misunderstanding.

Mr. Abbott: That is all.

Mr. Austin: Will you go back and read the question asked by counsel about three questions back?

(The record was read by the Reporter.)

Mr. Austin: I have no more questions.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Mr. Abbott: I move now that we adjourn until 10:00 o'clock tomorrow morning.

Trial Examiner Ballinger: The motion of counsel for Respondent is granted, and now, at 5:40 p. m., the hearing is adjourned to reconvene at 10:00 a. m. February 21, 1942, in room 859 Federal Building, Detroit, Michigan.

(Whereupon, at 5:40 p. m. the hearing was adjourned to reconvene on Saturday, February 21, 1942, at 10:00 a. m.)

The Witness: It is just as possible to approximate the benefits of advertising as it is to approximate the benefits of an addition or of the elimination of salesmen to your sales organization.

Trial Examiner Ballinger: Wouldn't that be determined by the volume prior to his employment and then after he had been in your employ for a while?

The Witness: I have tried that, your Honor, and whenever I attempt such a measurement as that, the individual on the other side who perhaps has opposed the addition of the salesman will say, "How do you know that gain was due to volume? Actually we had to introduce a subnormal price in that community," or, "A year ago there was ice on the ground and now there is no ice on the ground," or "We got a new account over here by the effort of the manager of the division who stopped in and signed a contract."

There are so many variables, your Honor, in measuring the influence of selling expenditure on your cash register that I have yet to see the accurate measurement thereof of either advertising or direct personal selling, and there is only one difference between them. When you spend a thousand dollars on advertising, you are attempting
5302 a mass selling job; when you spend a thousand dollars for the salary of a salesman, you are just gambling that you make a little bit more money by spending that thousand dollars on personal selling than you would if you spent it on mass selling, and there is your sum total difference. It is a tremendous problem of balancing those two types of expenditures in any market, and we none of us know whether we have the right combination at any time, but we vary them, we watch, and we do what we think is the best.

Trial Examiner Ballinger: Of necessity, don't you adopt some arbitrary figure?

The Witness: In connection with advertising?

Trial Examiner Ballinger: Yes.

The Witness: No, I don't think that is quite a fair statement. To illustrate, your sales in a given community may be reacting adversely because of some new competitive influence. You will decide that you have to take more positive steps in that community. Now, the step that you do take, the particular step is arbitrary as to the magnitude of the steps, yes, sir, but as to whether a step should

5367 Room 859 Federal Building,
Detroit, Michigan,
February 21, 1942.

Met, pursuant to adjournment at 10:00 a. m., war time.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois; and

Arthur J. Abbott, Esq., of the firm of MacMahon, Abbott & Roberts, 2230 Buhl Building, Detroit, Michigan; appearing for the Respondent.

5368 PROCEEDINGS

Trial Examiner Ballinger: Come to order.

The hearing of Docket No. 4389, in the matter of the Standard Oil Company of Indiana, is reconvened in room 859 Federal Building, Detroit, Michigan, at 10:00 a. m., Eastern Standard Time, February 21, 1942. The last hearing was in the same room in the same city, February 20, 1942.

Counsel for the Commission and Respondent are present.

You may proceed.

Mr. Hanley: If your Honor please, before a witness is called this morning, I wish to call the Court and counsel's attention to the fact that the Respondent is prepared to respond to several requests for information. I mentioned it informally last evening. Mr. Austin, at that time wasn't ready for the proffer but if it is desired, we are ready to do it now. We are not insisting upon it, at all.

Trial Examiner Ballinger: Apparently this is an opportune time. Let's dispose of it.

Mr. Hanley: A request was made, if your Honor please, in connection with Account number 520 in respect to the general office payments into the fund represented by that or should not be taken is not arbitrary. That is competitively compelled.

Trial Examiner Ballinger: Without a measurement of the gallonage sale before a step is taken and after the step is taken, is there any possible way by
5393 which the benefits could be even approximated.

The Witness: Well, we do know the gallonage sale before and after, and all that we can do in the field of assigning results to efforts is to observe the trends that take place in a given market. Now, that is what we have to do here in Detroit as well as elsewhere. We have some markets where we probably should add a jobber or two to have a greater flexibility of action and take over certain of the function which normally the company performs, and it would probably be a distinct benefit to our accomplishments in that community.

By Mr. Austin:

Q. Mr. Boatwright, is it your opinion that the Standard Oil Company obtains some benefit from the advertising of non-petroleum products by jobbers based upon the theory that the advertising of other products brings the customer to the jobber's station and that after he gets there he sees the Standard Oil pumps and is subjected to selling effort by the jobber salesman?

A. Well, anything that a jobber does to win a friend to the products of the Standard Oil Company is to our advantage. I think you would concede that.

Q. I would like you to answer the question, though, whether your opinion is not based in such a case primarily on the fact that the advertising brings the customer there in search of something else although after he gets
5394 there he then is in a position to buy gasoline?

A. Oh, yes. The jobber may advertise, as I illustrated, cigarettes. I merely took that out of the air; I know of no such advertisement on the part of the jobbers in this area, but they might do it. And that would merely be a means of attracting customers to their outlet.

Now, a customer is not won or lost on one sale in very many cases. A customer that is really important to any supplier is one that would classify himself as a regular user, and it is in the regularity of use that we build or that we slip in a market position. And it is the first contact that we want. We must have that first contact before we

account. It is now stated by the Respondent that this item of expense represents the payment by the Standard
5369 Oil Company to set up the trust fund covering retirement credits for employes' service prior to January 1, 1939. The total to be contributed to the fund by the Company (and such of its subsidiaries as are participants in the plan) is determined by the Board of Directors each year prior to December 31st. The total amount contributed in any year cannot exceed ten percent of the consolidated net earnings of the company and its subsidiaries for the year after all taxes but before deducting the amount contributed to the annuity trust fund during the year.

The allocation of the total contribution to the trust fund among the companies participating in the plan is based on actuarial studies of the amounts that would be required by each company to completely cover the future payments of annuities for service prior to January 1, 1939.

The Indiana company's contribution is allocated to the various departments on the basis of the company's current cost payments to the insurance company for the purchase of annuities for service since January 1, 1939.

The company's contributions to the trust fund are recognized by the Bureau of Internal Revenue as proper deductions from taxable income.

A request was made for some information in respect to Account number 001 which is a salary account and at this time the Respondent produces and hands to counsel a statement in respect to that account entitled: "Basis
5370 used to Allocate Salaries Charged Account 001—Salaries Supervision Others—to Direct Shipment Channels."

A request was made for certain information in respect to the amount of gallonage handled by commissioned agents and drivers. In response to that request there ~~is~~ now produced by the Respondent and handed to counsel for the Commission a statement entitled: "Standard Oil Company Detroit Field 1940. Recapitulation of Tank Wagon Reseller Volume Delivered by Commissioned Agents and Drivers."

As I recall I handed you, Mr. Austin, certain of those freight hauling contracts.

Mr. Austin: Yes.

Mr. Hanley: And I assume you are not yet prepared to say what you ~~may~~ want.

Mr. Austin: I haven't had a chance to go through them.

Mr. Hanley: Very well, but just now I wish to call our Honor's attention to the fact that those have been upplied to counsel.

Mr. Austin: On that point, that transportation is being andled right along and paid for, so I assume there
houldn't be any difficulty in finding what contracts cover
e transportation from the Marine Terminal of the com-
pany to the bulk plants of the jobbers, since that is a
371 continuous business relationship under which the com-
pany is making payment.

Mr. Hanley: I believe it is there, Mr. Austin, and I lieve we gave them to you. I just don't know what additions you think you want.

372 Your Honor will recall that a considerable discussion was had about certain freight bills that had been equested by the Commission, and it was finally suggested Mr. Austin and agreed that we would undertake to tract a freight bill for each month for the year 1939 repesenting a shipment to each of the following: Citrin-olb, Ned's Auto Supply, Stikeman Oil Company, and ayne Oil Company, the same to be as of the 15th of each onth in the year or as near to that date as we could find e bill. That has been done and we now are ready to oduce and do produce the freight bills referred to.

We have prepared a list of each of these freight bills dicating a date and the number and certain identifying formation and the amount. If agreeable to Court and unsel, we would like to have that list used after it has en compared by counsel and his staff and would like to ave back the freight bills which we made.

Trial Examiner Ballinger: Copies?

Mr. Hanley: Well, it would be necessary for us to oto-stat all of these, and I believe it will just encumber e record to do that, your Honor. It may be that counsel ill be perfectly willing to grant us this request for the bstitution of the information after he has looked them er.

I am handing him, of course, the original bills
373 together with this statement referred to.

Mr. Austin: Thank you.

Mr. Hanley: The next and the last request has to do th certain classifications of salaries and accounts to hich they are allocated.

I may say, your Honor, that this is not the request concerning which your Honor spoke to me and asked me to consult with Mr. Austin about. This is a different classification than Mr. Austin has requested.

In response to that request I now produce on behalf of the Respondent and hand to counsel a statement of certain salaries or salary accounts entitled "Detroit Salaries and Commissions for the Year 1940."

Mr. Austin: Off the record, please.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: Now, if your Honor please, so far as I am aware, that complies fully with all of the requests made by the Commission for records, data, and information.

Mr. Austin: Well, there was one other request about which there was some discussion, and that was regarding whether there was a 461 contract of Ned's Auto Supply Company in 1937 covering any of the time when Ned's had the half cent differential. I would like to be able to ask
Mr. Boatwright or somebody whether a search has
5374 been made for such a contract.

Mr. Hanley: There was some such discussion. I didn't understand it was in the nature of a request for that contract, but if there is any such record and we have it, we will produce it.

Mr. Austin: I think you said that there is no contract except that there might have been a form 461. That appeared on the record.

Mr. Hanley: I am not sure. My understanding is that there were not any written contracts with Ned's. I did qualify it by saying that there was a possibility that there might have been this Form 461. We will look. If we have any such record, we will produce it, Mr. Austin.

Mr. Austin: I think there was also some doubt expressed as to whether it would still be here if there had been such a contract.

Mr. Hanley: That is the reason I say if we have any such record, we will produce it. My understanding is that those records are not kept indefinitely.

Mr. Austin: One of those is in the record.

And on those freight bills, this statement which counsel has produced, I see no figures either on the freight bill or the statement to indicate the number of gallons of gasoline shipped in each car of the amount per gallon of the freight charge.

5375 Mr. Hanley: If your Honor please, in connection with that suggestion of counsel, I am informed that it doesn't make any difference in the charge as to the amount of gasoline in the car. It is a switching charge made by the railroad company.

Trial Examiner Ballinger: Per car?

Mr. Hanley: Per car, and applies to any sized car, that is, anything from 6,000 gallons up to, say, a maximum of 12,500.

Mr. Austin: Well, the exhibits, or, rather, the records, whatever they were—I don't know what they are called in the language of the company—but the records that I offered in Washington which we got from the files of the company show a freight charge per gallon. Now, it is going to be necessary for me to go into that, whether I have to call someone from the railroads or how, I will do it, but I don't know. That is a matter which, naturally, it will be necessary to clear up.

Mr. Hanley: I think we are talking about different things, your Honor. These represent shipments from the company's River Rouge terminal to points in Detroit. The freight bills that counsel is talking about in Washington represented interstate shipments from the Whiting Refinery, as I recall it, to points in Detroit, and what I said about these representing a switching charge, of course, wouldn't apply to such a shipment as counsel has
5376 in mind. That would be a regular freight charge.

Mr. Austin: Well, these sheets that I have here are based upon shipments from River Rouge, I think. I would have to examine them. I guess there is no point in putting anything more in the record about it now, but it is a question which will have to be gone into to establish the freight charge.

Trial Examiner Ballinger: Counsel may examine them and after examination if there is any question, he will bring it to the attention of counsel for the Respondent.

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: Mr. Boatwright.

JOHN W. BOATWRIGHT resumed the stand and testified further as follows:

Redirect Examination by Mr. Abbott.

Q. Dr. Boatwright, I show you Exhibit 100 and direct your attention to page 34 thereof, particularly to the table of figures appearing on page 34 and ask you whether it is a fact that you prepared that table?

A. Yes.

5377 Q. You have already testified in this case that the Respondent secures a reciprocal advertising advantage from jobber distribution based on the amount expended in advertising by three of the Detroit jobbers.

I will ask you whether the table on page 34 of Exhibit 100 in any way reflects Form 189, Commission's Exhibit 101 in this case?

A. Do you mean the dollar values reflected therein?

Q. Yes.

A. No, they are not.

Mr. Austin: Which dollar values are you referring to on page 34?

Mr. Abbott: Referring to the amount which appears to have been expended after applying the percentage which appears on the bottom of the page.

By Mr. Abbott:

Q. It is stated on the next page, at the bottom of page 35, that the company does have an advertising advantage which is referred to as reciprocal from the amount expended by the jobbers in advertising in the Detroit metropolitan area.

Would you state—would you just elaborate on that to some extent?

Trial Examiner Ballinger: Before you answer, what particular item or items do you refer to on page 34, Respondent's Exhibit 100?

5378 Mr. Abbott: Well, when you say "that we refer to" do you mean in reference to the advantage advertising? Advertising advantage?

Trial Examiner Ballinger: Yes.

Mr. Abbott: To the items on the third line from the bottom of the page. That is what I refer to. Is that what you refer to, Dr. Boatwright?

Trial Examiner Ballinger: Costs; opposite the word "costs"?

Mr. Abbott: Is that what you refer to?

The Witness: None of the dollar values indicated in the table on the bottom of page 24 appear at all or are a component part of any expense classification on Form 189.

By Mr. Abbott:

Q. When you said page 24, you meant 34?

A. I thought I said 34. Yes, that's right.

5379 By Mr. Abbott:

Q. Now the last question, Doctor Boatwright, asked you to elaborate on the statement made on the bottom of page 35 relative to advertising value to the company, the Respondent Company, of the expense which is laid out by the jobbers in the Detroit metropolitan area as of the year 1940, or any other year.

Mr. Austin: If your Honor please, that matter was gone into at length at Washington and I think all of the Respondent's reasons or intentions regarding reciprocal benefit were stated at length on the record at that time by counsel for the Respondent. I suggest it is not necessary to state that same argument again on the record, it having been very completely referred to, there.

Mr. Abbott: Will you refer to the page of the record where that does appear?

Mr. Austin: I think I can, with very little delay. I think Judge Hanley would probably recall having made that statement.

Mr. Hanley: I recall, if your Honor please, that there was some testimony about it on the part of Mr. Boatwright. I don't know that whatever occurred in Washington is responsive to what Mr. Abbott is now undertaking to develop.

Trial Examiner Ballinger: It is desired, of course, to avoid unnecessary duplication.

5380 Mr. Abbott: We will take more time, possibly, in objections than we will by having the testimony.

Trial Examiner Ballinger: The Examiner hasn't a distinct recollection with reference to the matter and if it was gone into at some length at Washington it might be well to refer to the record.

We will take a recess for three minutes.

(Whereupon a short recess taken.)

Trial Examiner Ballinger: Come to order.

Mr. Abbott: Will you repeat the question?

(The question referred to was read by the Reporter.)

A. You are undoubtedly referring to that part of page 35 bringing out the reciprocal benefits incident to advertising.

Q. Yes; bottom of page 35 and top of page 36.

A. Yes: Well, in brief, the objective of any supplying company is to bring the full weight of selling organization into any given market that will produce, in their judgment, the best composite results. In one market that might mean a large proportion of direct selling, a smaller proportion of advertising. In a second market it might mean a smaller portion of direct selling, a larger proportion of advertising; while in the third market it may be a combination of direct selling through reseller outlets supported by advertising, supplemented by a jobber distribution, likewise with their advertising, while still having your
5381 own advertising effort.

It has seemed to us that our best results are obtained in the Detroit potential by the combination we have maintained in this area.

We recognize that the jobbers in this area do advertise. We recognize that they advertise to promote the sales through their outlets of our products.

We recognize, also, that the jobbers in this community derive a benefit from our advertising but we also recognize that we, in turn, derive a benefit from their advertising. Because of this reciprocal relationship of benefits derived we regard our advertising expenditures in this Detroit area, other than that which we have isolated and associated with the point-of-sale, as being an entire tank wagon charge, tank wagon reseller charge, and we do not regard our advertising expenditures in this area as an appropriate charge against jobber business because of the reciprocal benefits we receive from their expenditures.

Q. Now I direct your attention—

Mr. Austin: If your Honor please, now I move to strike the testimony of the witness in answer to that question upon the ground that it is a conclusion and the basis of the conclusion does not appear and that the witness having stated that the company considers that it obtains a reciprocal benefit from jobber advertising
5382 that that opinion is worthless unless the advertising itself and the nature of the advertising appears.

Mr. Abbott: This witness, your Honor, is asked to state his opinion as an economist and upon that basis it is not a lay opinion but the opinion of an expert and we, therefore, submit that it is proper in this record.

Trial Examiner Ballinger: That's true, but there must be some evidentiary basis upon which the opinion could rest.

Mr. Austin: The witness has based his opinion upon jobber advertising and we don't know what the jobber advertising is.

The Witness: Is it desirable, your Honor, that I amplify my reasons for arriving at that opinion?

Mr. Abbott: I want to ask the witness this question:—

Mr. Austin: There is a motion pending.

Mr. Abbott: I would like to ask this further question before the objection is ruled upon.

By Mr. Abbott:

Q. Doctor Boatwright, do you state your answer to that question based upon any knowledge that you have of the nature of the advertising done by the jobbers in the Detroit area?

A. It so happens that I have a general knowledge of the advertising done by the jobbers.

5383 Q. And what is the basis of that knowledge?

A. I have gone over their advertising, have reviewed it, not entirely, but in part. My answer would have been the same even without that knowledge.

Q. What particular investigation have you made of the nature of the advertising of the jobbers and when did you make it? What were the circumstances of making it?

A. Why, I spent three days in the offices of the various jobbers going over with the jobbers their various forms of advertising, expenditures and their methods of keeping books on those expenditures, so I have seen both the advertising itself, I have seen the bills that they have paid thereon, and the method of entry and charging those expenses to the proper accounts.

Q. And that's the basis of your answer that you made?

A. Yes.

Q. To which there is now an objection interposed?

A. Yes, sir.

Trial Examiner Ballinger: Do you care to be heard further on the motion?

Mr. Abbott: No, your Honor.

Trial Examiner Ballinger: The motion is sustained. The testimony is stricken.

By Mr. Abbott:

5384 Q. Now referring to the tabulation, then, appearing on page 34 of Exhibit 100, I will ask you, first, what was and is the source of the data appearing on that tabulation?

A. That information was furnished by the respective jobbers; namely, the Wayne Oil Company, Citrin Kolb Oil Company, Ned's Auto Supply Company.

Q. And, secondly, what was and is the source of the percentage figure appearing opposite the words: "Gasoline Percentage Realization"?

A. That was furnished by the respective jobbers.

Q. And, if you know, what does it represent?

A. It represents the realization from the sale of gasoline, excluding Federal and State Tax, expressed as a proportion of total realization from sales; likewise excluding tax, with the exception of the three percent State Tax, which is included on other products and on gasoline.

Q. And what is the relationship between the total amount as appears on that page 34 of Exhibit 100, between the percentage and the total amount spent by each jobber on advertising in the year 1940, as appears in the Exhibit?

Mr. Austin: I would like to have that question read.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Mr. Abbott: I will reframe the question, thus:

By Mr. Abbott:

5385 Q. What is the relationship between the total amount as is shown by the exhibit as having been spent by the jobber in the year 1940 and the amount which appears in the third line from the bottom of page 34 of Exhibit 100?

Mr. Austin: Doesn't that appear on the Exhibit itself?

Mr. Abbott: I don't think so.

The Witness: Yes, I think it does.

A. The grand total advertising expenditure shown at the footing of each of the jobber's advertising expenditures. To this grand total was applied the percentages of realization resulting in the third line from the bottom referred to as cost.

By Mr. Abbott:

Q. In other words, there was applied to the total, the gasoline percentage of realization?

A. Yes, sir.

Q. ~~Now~~ state whether or not it is an accepted practice in cost accounting to allocate advertising expense in cases where several products are advertised, based upon the percent of realization in dollars' worth of sales?

A. It is.

Q. In your opinion is it or is it not the proper method of ascertaining advertising cost, justified on any scientific basis of accounting theory and practice?

5386 A. I think it is a completely proper method of allocation.

Q. State whether in your opinion any other method would be possible, under the circumstances?

A. Well, there are other methods used. I have seen studies where they have used some part of the gross realization, such as gross margin by products, but, as a rule, I think I am correct in stating that the realization is used more frequently than are the gross margins, but, at times, gross margins are used.

5387 Q. Well, where several products are advertised by a person such as these jobbers, is there an accounting problem which is susceptible of any method of treatment upon any sound accounting basis and have you applied that method to this exhibit, page 34 of Exhibit 100?

Trial Examiner Ballinger: You have two questions. Answer the first one.

A. In answer to the first one, there is, of course, a problem of allocation. It does not present a particularly serious problem. There have been many practices adopted by distribution cost accountants for different classifications of expense. One that is frequently adopted and frequently used in distributing advertising costs is percentage of realization, and I have used that.

Does that meet your question?

Q. Yes, and the second part of my question I think you answered in the last clause of your answer; namely, that you have used it in this study.

A. Yes, sir.

Q. Now, what was and is the source of the figures appearing on page 34 of Exhibit 100 opposite the word "gallon" in next to the last line of the exhibit on that page?

A. Those were likewise furnished by the jobbers.

Q. And they represent what?

A. They represent their gasoline sales.

5388 Q. In what year?

A. 1934.

Q. Nineteen what?

A. 1940. I am sorry.

Q. When you said '34, you were referring to the page?

A. I was looking at the page.

Q. What was and is the source of the figures appearing on page 34 of Exhibit 100 opposite the words "cents gallon" in the last line of the exhibit on that page?

A. That is merely the result of a division of the cost of advertising attributed to gasoline divided by the gasoline volume resulting in the unit cost.

Mr. Abbott: Take the witness.

Recross Examination by Mr. Austin.

Q. Mr. Boatwright, I believe you said a minute ago that you treated the advertising expenditures of the company aside from point of sale advertising as chargeable only to the tank wagon reseller channel?

A. No, tank wagon reseller, tank wagon consumer and other methods. I think you are stating correctly that I did mention only the reseller channel.

Q. Do you wish to correct that?

A. I do. The advertising of the company was applicable to the tank wagon reseller, the tank wagon consumer
5389 and the Other Methods channel as reflected on our regular Form 189.

Q. And you said your opinion regarding the reciprocal benefits to the company of jobber advertising would have been the same even if you had had no knowledge of the nature of the advertising itself or had not seen the advertisements?

A. It would have been, sir.

Q. Then do I understand it to be your opinion that the company obtained some reciprocal benefit from jobber advertising even though the jobber advertising contains no reference to any products which the jobber purchases from the Standard Oil Company?

A. Certainly.

Q. In other words, if Ned's Auto Supply Company ad-have a chance to become the possessor of a regular customer.

Q. Would you say that the cigarette advertisement itself created any consumer acceptance for the Standard Oil products?

A. No, not necessarily; no.

Q. And isn't it consumer acceptance if it does result in acceptance after the customer arrives there and then by the efforts of the salesman and by the signs on the pump and other point of sale advertising—

A. Mr. Austin, consumer acceptance is an extremely broad term and encompasses the end results of an infinite number of factors. Advertising as a rule does not result in consumer acceptance of anything. That isn't the 5295 primary object. Consumer acceptance is based largely upon the accomplishments of the products when it is applied to the end that the customer purchased the product for.

You can overadvertise as well as you can underadvertise. There are many cases where claims have been made for a product in advertising that the product hasn't lived up to. The customer tried it once. That isn't a customer; that is just a unique event. The customer is the repeat man. That is where our value and that is where all of our effort must be directed.

Q. Well, you believe, do you not, that the Standard Oil Company's advertising does create consumer acceptance and that the expenditures are made chiefly for that purpose?

A. I don't agree with you that they are made chiefly for that purpose.

Q. Isn't it what is commonly called consumer advertising?

A. It is consumer advertising, that's right.

Q. And it is for the purpose of influencing consumers to believe that the Standard Oil products are good products, [illegible]'t it?

A. But it is for the purpose of convincing the consumer to get on our driveways, and then we know that the quality characteristics of our merchandise will retain that customer in many cases. You can't sell your man until you get him on your driveway, and it is after you get him on your driveway that your important merchandising 5296 starts. You can read all the newspapers in the City of Detroit and see a full page ad of the Standard Oil Company in every one of them and it wouldn't make you a regular user of Standard Oil gasoline unless you make a purchase and try it, and the quality of the merchandise and the selling and the service and everything else lives up to your expectation, then consumer acceptance starts.

Q. Don't you think that a customer is influenced to buy a product and to go to the driveway for the purpose of buying it by ideas he gets from reading the advertisements?

A. Yes, sir, in part. He goes there to buy it; his continued use is dependent upon the satisfaction of the accomplishments of the product.

Q. Now, on page 34 of Respondent's Exhibit 100, third line from the bottom, I believe you said that those figures are reached by applying the percentages in the line immediately above to the figures opposite the heading "Grand Total" in the next line above that?

A. Yes, sir.

Q. In other words, the figures opposite "Costs" are reached by applying the percentages opposite the heading "Per Cent Realization" to the total advertising expenditures opposite the heading "Grand Total"?

A. Yes, sir.

5397 Q. Does that mean that you have treated the figures opposite—or on the line headed "Costs" as the advertising expenditures of the respective jobbers on gasoline regardless of the nature or content of the advertising itself?

A. Yes, sir.

Mr. Austin: That is all I have.

Redirect Examination by Mr. Abbott.

Q. Referring to your last answer, Dr. Boatwright, I understand that you take the percentage of gasoline realization and apply that to the grand total which appears opposite the words "Grand Total" in the exhibit on page 34 of Exhibit 100, and applying that to the grand total you get the result, and the figure opposite the word "Cost" in the third line from the bottom of the exhibit; is that correct?

A. That is correct.

Mr. Abbott: That is all.

Trial Examiner Ballinger: One moment.
Was there any express provision in the contracts with the four jobbers for an advertising allowance?
The Witness: There is no advertising allowance granted by the Standard Oil Company to any jobber.
Mr. Austin: There is no contract, either?
The Witness: And there is no contract at all in the sale to these respective jobbers.
5398 Mr. Abbott: That is all.
Trial Examiner Ballinger: That is all. The witness is excused.
(Witness excused.)
Mr. Abbott: Mr. Ledbetter.

ELMER E. LEDBETTER was thereupon recalled as a witness for the Respondent and, having been previously first duly sworn, testified as follows:

Direct Examination—by Mr. Abbott:

Q. Mr. Ledbetter, you have already testified in this case, I believe, last Spring?
A. Yes, I believe I did.
Q. You testified that you were president of the Wayne Oil Company?
A. That's right.
Q. And you still are?
A. Still am.
Q. What is the nature of the records kept by your company for the year 1940 on the subject of advertising costs? What records do you keep and did you keep?
A. Why, I should say the usual bookkeeping records.
Q. Were they kept on a fiscal year or calendar year basis?
A. Calendar year.
5399 Q. And who kept them?
A. Our bookkeeper.
Q. Was that done under anyone's supervision in your organization?
A. Yes, it was under mine.
Q. You were the one that supervised the keeping of those records, were you?
Mr. Austin: Your Honor, I don't remember, but I think

I have a continuing objection to all of this line of testimony.

Trial Examiner Ballinger: You have.

Mr. Austin: On the ground that no evidence of reciprocal benefits is material, whether or not any such benefits exist.

Mr. Abbott: I think that is true, but I intend to pursue this until the Court rules that I can't. If that time appears, why, of course, I will act upon it.

By Mr. Abbott:

Q. Were you requested to prepare for the purpose of this hearing a chart or a statement summarizing your book entries bearing upon and reflecting advertising costs of your company for the calendar year 1940?

A. Yes.

Q. Have you prepared a summary of such book entries reflecting such advertising costs?

5400 A. We have.

Mr. Abbott: I would like to have this marked, for identification.

Trial Examiner Ballinger: The Reporter will mark the document Respondent's Exhibit 104-A to H inclusive.

(The documents referred to were marked "Respondent's Exhibits 104-A to H, inclusive" for identification.)

By Mr. Abbott:

Q. Mr. Ledbetter, I now show you Respondent's Exhibit 104-A to H, inclusive, and ask you to identify it and state what it represents?

A. If you don't mind my taking a little time to compare it with the bookkeeper's actual work.

Q. Yes.

A. It seems to be a copy of the statement or chart that our bookkeeper prepared.

Q. Do you have the original from which that typewritten copy was taken?

A. I have a carbon copy of the original. I presume you would call that an original.

Q. Do you have a recollection of the fact that Dr. Boatwright, who was last on the stand, and someone else from the Standard Oil Company office came to your place of business and made a study of your advertising costs in that connection?

A. Yes, I remember that.

5401 Q. Were you present at that time when the study was being made?

A. Part of the time, at least; my recollection is all the time.

Q. I now ask you if you can answer the question as to what Exhibit 104-A to H, for identification, is and what it represents?

A. I haven't compared it item for item, but, as I stated before, it seems to be a copy of the chart that our bookkeeper made from our books.

5402 Q. On what subject?

A. On the subject of advertising expense for Wayne Oil Company in 1940.

Q. And do the figures which appear on that exhibit, referring to Exhibit 104-A to 104-H, inclusive, correctly, to your knowledge, state the items of advertising expense of your company for the calendar year of 1940?

A. They do.

Q. And are those figures, as appearing on that exhibit, correct, to the best of your knowledge and belief?

A. They are.

Q. Showing a total—I believe the totals are classified, are they not, by media which were used by your company during the year 1940?

A. Yes.

Q. And I refer you to the fact that there is also a classification there of Blue Ribbon expenses, or something to that effect. What is the significance of that, as appears—

A. That is part of our advertising cost.

Q. That appears on the next to the last page of the exhibit. Just what is the significance of that classification?

A. We had two methods of charging advertising in our books. One class of advertising called the Blue Ribbon balances, in this chart—

5403 Trial Examiner Ballinger: Explain what that means, will you?

Witness: Blue Ribbon balances?

Trial Examiner Ballinger: Yes.

A. (Continuing.)—Our method of handling that was to enter all of the charges for advertising in that particular classification throughout the month and at the end of the month we would charge them to Blue Ribbon Stations.

Trial Examiner Ballinger: That included all your advertising?

Witness: No. Certain types of advertising. Certain kinds of advertising only.

Trial Examiner Ballinger: What types, for instance?

Witness: Well, more or less arbitrary, I would say.

By Mr. Abbott:

Q. What is a Blue Ribbon station?

A. Blue Ribbon Stations is a non-profit corporation organized by a number of Wayne Oil Company dealers.

Q. Are they outlets of your company?

A. That's right.

Q. And what is the reason for keeping the advertising costs on the last two pages of that exhibit separate from the advertising costs on the preceding pages of the exhibit?

A. At the time the Wayne Oil Company had a contract with Blue Ribbon Stations which was a corporation. In consideration of our agreeing to spend at least a thousand dollars a year advertising Blue Ribbon Stations, advertising for Blue Ribbon Stations, we were, in turn, to have certain controls over the use of the Blue Ribbon Stations emblem and the membership of the Blue Ribbon Stations corporation.

5404

Q. And in pursuance of that did you do advertising for the Blue Ribbon Stations, in addition to the other advertising expense you incurred?

A. We did.

Q. Do the last two pages of the exhibit reflect that advertising cost?

A. That's right.

Q. Does that exhibit, on the last page thereof, show the total of the advertising cost of the Wayne Oil Company for the year 1940? I am not asking you for the figures but I am asking whether it shows the total?

A. Yes. I am trying to find out whether I can answer it, or not.

Q. I will ask it this way, Mr. Ledbetter: On Exhibit 1-4-F—

Mr. Austin: For identification.

Mr. Abbott: Yes, for identification.

By Mr. Abbott:

Q. (Continuing.) —is there a total of advertising
5405 costs for the year 1940, inclusive, of the charge of the
Blue Ribbon balances?

A. There is.

Q. I don't ask you for what the total is but I will ask you further is there a figure on Page 104-H of the exhibit showing the grand total of the advertising expense on these Blue Ribbon Stations?

A. There is.

Q. And is the total of the advertising costs for Wayne Oil Company for the year 1940 the total of these two totals as appearing on Exhibit 104-F and as appearing on Exhibit 104-H?

Do you want to make a computation before you answer that question?

A. Yes.

(The witness made computation.)

Witness: Now may I hear the question?

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Trial Examiner Ballinger: They are for identification.

Mr. Abbott: Yes.

A. I can't answer the question at the present time without doing considerable figuring.

Mr. Abbott: Well, let us have a five minute re-
5406 cess then, if the Court please, to enable Mr. Ledbetter
to answer that question.

Trial Examiner Ballinger: We will take a recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Abbott: I will withdraw the last question and ask this:

By Mr. Abbott:

Q. Do you know of your own knowledge the amount that you spent, that the Wayne Oil Company spent on advertising costs in the year 1940?

A. I do.

Q. And what is that figure?

Mr. Austin: Just a moment. Do you know that of your own knowledge, Mr. Ledbetter, or is it something you looked up from the record, or what?

Mr. Abbott: He testified he knew of his own knowledge. I object to this having the Attorney for the Commission go into that because he stated of his own knowledge in answer to my question.

Trial Examiner Ballinger: Yes, but the attention of the witness has been called to the question more directly. If he cares to make any explanation, he may do so.

Witness: I will have to have a little explanation 5407 as to what is meant by do I know of my own knowledge. I think I do know of my own knowledge.

Mr. Austin: Did you obtain that knowledge from your records?

Witness: Yes.

Mr. Austin: Do you have any personal recollection of what was spent?

Witness: In a great many cases, yes, but not, of course, in every instance.

Trial Examiner Ballinger: Not in the aggregate?

Witness: I beg your pardon?

Trial Examiner Ballinger: Not in the aggregate?

Witness: No, only by addition of the various items would I get the total.

Trial Examiner Ballinger: He can state what he knows of his own knowledge but if that knowledge is derived 5408 from his books, then his books are the best evidence.

By Mr. Abbott:

Q. You say you can state that of your own knowledge?

A. I beg your pardon?

Q. I understand you to say you can state the amount of your advertising costs for 1940 of your own knowledge.

A. I thought it was of my own knowledge.

Q. What is that amount?

Mr. Austin: Your Honor, I object.

Trial Examiner Ballinger: The witness has stated in answer to a question by the Trial Examiner that his knowledge of the cost of advertising in connection with his business is based upon the records kept in his office and not upon any independent recollection.

Mr. Abbott: Well, I don't think the record exactly shows that, but I will—

Trial Examiner Ballinger: Have I correctly stated the substance of your testimony, Mr. Ledbetter?

Witness: Yes, I think you have—and I think I have correctly answered the question. I know that these figures are right, just as well as the party who made them knows.

Mr. Abbott: I insist on the question, your Honor.

Mr. Austin: I object to the question further upon the ground that it is immaterial what the total advertising expenditures of the Wayne Oil Company were, in the 5409 absence of any showing that the advertising referred to was consumer advertising or advertising which in any way related to the sale or to the products sold at Wayne Oil Company stations, or related to any products at all.

Trial Examiner Ballinger: The objection is sustained.

By Mr. Abbott:

Q. Now then, referring to the original question based on Exhibit 104-A to H, inclusive, I will ask you, Mr. Ledbetter, if the exhibit on Page 104-H contains any figure as to the total amount spent by the Wayne Oil Company on advertising for the year 1940?

A. It does.

Q. That's in the penciled notation at the bottom of the—

A. That is the penciled total.

Q: At the bottom of page 8 of Exhibit 104?

A. That's right.

Trial Examiner Ballinger: For identification.

Mr. Abbott: Yes.

I offer the ~~exhibit~~ in evidence.

Mr. Austin: In the first column on these exhibits, Mr. Ledbetter, is headed "Supplied" and it has a lot of names. What are those names?

Witness: Can I see it?

Mr. Austin: Yes. (Handing document to witness.)

Witness: That is the name, or part of the name 5410 of the company from whom was purchased the supplies, or service, or whatever it was that we spent our money for.

For instance, on the first one, Stockwell & Marcus, 1/31; "Retail Gas Dealers News," $26. That means that Stockwell & Marcus, who are advertising agents, placed an ad for us and billed us for $26, which we paid.

5411 Q. Well, are these names under the column headed "Supplier" the names of the advertising agents or the people whom you paid for the advertising?

A. That's right. They are our suppliers.

Q. Suppliers of advertising?

A. Of whatever it is that we classed as advertising there. It wouldn't necessarily be advertising in their minds. It might be a package of paper that we went out and had handbills printed on. We would charge that to advertising if that is what it was used for.

Q. It might be rubber stamps or stencils or tire wrapping paper?

A. Right; all kinds of things that we got to be used for advertising purposes.

Q. It includes a good many materials used at the service station, does it not, for passing out to customers there or—well, wrapping tires or—I see one article here for spray varnish for old wrapped tires. What would that be used for?

A. That was a tire display made out of junk tires wrapped up with new tire paper and sprayed with lacquer so that when they set out in the weather, the rain wouldn't spoil the paper. It was a display of old tires wrapped up to look like new tires and set out in a rack all the time. They didn't have to bring them in at night; they just let them sit.

Q. There is an item here "Knives and Christmas Cards." What would that represent or how were they used?

5412 A. Knives and Christmas cards? Let's see what it looks like there. That is Brown & Bigelow, who were our suppliers on that. They are manufacturers of advertising novelties. I will just have to testify to the best of my recollection on that without going back and looking up the invoice itself.

Trial Examiner Ballinger: You may do so.

A. For instance, there is an advertising novelty, a knife. My recollection is that we got a few of those for some of the dealers, some of the Blue Ribbon dealers, gave them to them, or paid half of it and charged a half to the Blue Ribbon stations, whichever it was. I don't remember at this time, but I can tell by looking at the invoice.

Trial Examiner Ballinger: Can you get those off the records at the station?

The Witness: Well, I don't—before I could answer that question, I would have to look at that invoice and see exactly what it covered. I am just guessing at it.

By Mr. Austin:

Q. Here is one for 19 cases of clothes pins, Mr. Ledbetter. What was that for?

A. We bought a whole lot more clothes pins than that. We had a method of distributing handbills at that time by folding them up and sticking them in a clothes pin and throwing them on the porch, for two reasons: One, so that they wouldn't be blown away in the first gust of wind; and, second, the housewife would be more likely to pick 5413 the thing up and look at it because she got a free clothes pin. It was a very good stunt, and we bought those clothes pins by the gross.

Q. How about the thousand aluminum thimbles?

A. The same kind of a proposition, advertising novelty, that we bought for some of the stations; either paid half or all of it and gave it to them to distribute with Blue Ribbon advertising on this thimble.

Q. Part of these costs as shown here involve advertisement in dealer publications such as the publication of the retail gasoline dealers' association?

A. Yes.

Q. Was that advertising directed to the sale of products or was it direct to obtain dealers?

A. It was all directed to obtaining members of Blue Ribbon stations, new members. Primarily, that was it. Secondary advertising value would be to sell products that the stations had for sale.

Q. There are a number of rather large items here called "Blue Ribbon Balance." What does that mean?

A. That is explained this way. All of the expenses that we charged to Blue Ribbon stations during any one calendar month at the end—were during the month charged directly to Blue Ribbon stations. A bill was sent. Then at the end of the month we would credit Blue Ribbon stations with the entire total for the month and charge that 5414 total to advertising.

Q. I don't quite get that. For instance, here on April 30th, 1940, there is an item of $245.47, Blue Ribbon balance. How does that become charged to Wayne Oil Company advertising?

Trial Examiner Ballinger: That is on sheet what?

Mr. Austin: Sheet 104-E. There are other similar items.

A. That if our program or custom was carried out represents the total charges to Blue Ribbon stations made during the month of April.

Q. What were those charges made for, advertising expenditures?

A. They were.

Q. Well, what is the distinction between those entries and the entries over here under chart of Blue Ribbon balances? In other words, this item I referred to on 104-E under Wayne Oil Company advertising is entitled "Blue Ribbon Balance" and now on pages G and H there is a chart of Blue Ribbon balances. What is the relation between the Blue Ribbon balances on the first pages of the exhibit and the chart of Blue Ribbon balances on the last two pages?

A. Now, read the question.

(The question referred to was read by the Reporter.)

A. I didn't make this. I have got to see what it really is.

I can't answer that question without doing some more figuring.

5415 Q. Well, did I understand you to testify that the two last sheets here, G and H, which are entitled "Chart of Blue Ribbon Balances" set forth the expenditures of the Wayne Oil Company for the Blue Ribbon stations?

A. Right.

Q. Don't these Blue Ribbon balances on the previous sheets also represent the same kind of expenditures?

A. It might represent the same kind.

Q. Wasn't this item of $245.47 on April 30, 1940, a Blue Ribbon station expenditure or a total of Blue Ribbon expenditures?

A. I think it was a total of the Blue Ribbon station expenditures for advertising for the month of April.

Q. Aren't those same expenditures shown over here on these last two sheets?

A. That is the thing I can't tell you without some additional figuring.

Mr. Abbott: Your Honor, the witness has stated that in order to answer Mr. Austin's question, it will be necessary for him to do some more research, and I wish at this time, therefore, to withdraw this witness and permit him to do that.

Mr. Austin: Before that is done, your Honor, I would like to ask the witness one or two further questions and

perhaps elaborate my objection to the exhibit, and there will be no need of his figuring up the answer
5416 to the pending question if some other objection should be granted.

By Mr. Austin:

Q. What is that sheaf of paper that you have in your hands, Mr. Ledbetter, while you were talking on direct examination?

A. That is a carbon copy of the chart that my bookkeeper made up on the advertising expenses for the year 1940.

Q. And from what source were the sheets, marked, for identification, as Respondent's Exhibit 104-A to H, compiled?

A. I presume from the same source, that is, from the original of that carbon copy.

Q. Did you furnish the original of that carbon copy to the Respondent?

A. I did.

Mr. Austin: Your Honor, I object further to the production of these sheets, for identification, upon the same ground that was passed upon yesterday; in other words, that the—

Mr. Abbott: You mean yesterday?

Mr. Austin: Yes.

Mr. Abbott: Oh, I see.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

5417 Mr. Austin: I object upon the same ground which was discussed at some length here yesterday, and that is that the records are the best evidence and that these sheets are merely copied from the records of the company and they are not the records themselves, and the witness has no knowledge of the facts purported to be set forth on the exhibit offered except in so far as those facts are set forth in his records.

Mr. Abbott: Now, upon that, if the Court please, I wish to state, in line with what was stated yesterday, that the Respondent is perfectly willing and I think Mr. Ledbetter is also willing to have the accountant for the Commission examine the books of the Wayne Oil Company to ascertain the correctness of these things.

Your Honor, you recall, asked yesterday if the witness would be willing to have us examine their books and in each case the witness stated he would not be willing to have that done.

Are you willing to have that done, Mr. Ledbetter?

The Witness: Yes.

Mr. Austin: I think that makes no difference. I don't believe that Respondent is under any obligation to examine the books of the witnesses I had yesterday, nor do I believe that I am under any obligation to examine Mr. Ledbetter's books. I think the sheets offered in evidence are either admissible or they are not. If they are
5418 not the best evidence and are not themselves the
records of the company, they should not be admitted and the burden put on the other party to go to the place where the records are and make his own comparison.

Mr. Abbott: If you are not satisfied with that, then we offer to bring the books into court and introduce those in evidence.

That can be done, can it not, Mr. Ledbetter?

The Witness: Yes. We have got the books that that was copied from.

Mr. Abbott: All right. We make that offer.

I will say, your Honor, that we will have them here first thing Monday morning ready to put them in evidence.

Trial Examiner Ballinger: Does counsel for the Commission have anything further to say?

Mr. Austin: No, except to urge both grounds of objection. Well, I guess I didn't make any objection previously. I asked the witness some questions and he asked for time to be permitted to obtain an answer to them. So there was no objection made as to the content of the exhibit.

However, I will make an objection entirely aside from any answer to the question I asked the witness a while ago. I object to the introduction of those papers upon the ground that on their face they indicate that they include a great conglomeration of all kinds and types of
5419 advertising, the nature of some of which is not stated,
and other types of advertising shown there are expenditures for all types of articles and merchandise and other things used at the station, and I think on its face the exhibit shows that a great many of the items included could not be treated as offering any reciprocal benefit, advertising benefit to the Standard Oil Company of the nature of

the benefits claimed by the company in its proposed cost justification.

Mr. Abbott: I will say on that point, Mr. Examiner, which I understand is an entirely different ground than the one urged previously, that that was the purpose this morning of introducing testimony on behalf of the Respondent in the examination of Dr. Boatwright, to qualify the admission of this class of testimony by showing that there was a reciprocal benefit to the respondent whether the advertisement related to gasoline or to other products. I wish further to say in that connection, that the tabulation on exhibit 100 reduces the amount of total advertising expenditures by the gasoline percentage of realization which in the case of the Wayne Oil Company was 70.1 per cent; in the case of the Citrin Kolb Oil Company, 81.6 per cent; and in the case of Ned's Auto Supply Company, 19.3 per cent.

Dr. Boatwright has stated that that is a scientific method of allocation supported both by theory and
5420 practice in accounting. I, therefore, upon the basis of that testimony, submit that the testimony is admissible.

Trial Examiner Ballinger: The objection to Respondent's exhibit A to H, inclusive, is sustained. No proper basis has been laid for its admission.

Mr. Abbott: In view of the ruling of the Court, I wish to say that we wish to make an offer of proof in connection with this advertising cost and also in connection with the claimed advertising cost of Ned's Auto Supply Company, which will be done sometime during the day on Monday.

That is all, Mr. Ledbetter.

(Witness excused.)

Mr. Abbott: Mr. Biber, take the stand.

MAX BIBER was thereupon recalled as a witness for the Respondent and, having been previously first duly sworn, testified further as follows:

Direct Examination by Mr. Abbott.

Q. Mr. Biber, you have already been sworn and have testified in this case.

In the year 1940 what was your occupation? I believe you may have already stated it, but I ask it again.

A. Office manager of the Citrin Kolb Oil Company.

Q. As office manager was it a part of your duties 5421 to supervise the books of the company?

A. Yes, it was.

Q. Were the records of the Citrin Kolb Oil Company for the year 1940 on a fiscal year basis or on a calendar year basis?

A. Calendar year basis.

Q. Have you been requested for the purpose of this hearing to prepare a summary of book entries bearing upon and reflecting advertising costs of the Citrin Kolb Oil Company for the year 1940?

A. Yes, I was.

5422 Q. Have you prepared such a summary?

A. Yes, I have.

Q. Have you it with you?

Mr. Abbott: Well, I will use this copy.

I would like to have this paper marked for identification.

Trial Examiner Ballinger: The Reporter will mark the paper Respondent's Exhibit 105-A, 105-B, 105-C for identification.

(The document referred to was marked "Respondent's Exhibit 105-A, 105-B, 105-C", for identification.)

By Mr. Abbott:

Q. Mr. Biber, I show you Respondent's Exhibit 105-A, 105-B, 105-C, for identification, and ask you to state what that is?

A. That is a copy of a compilation of the advertising charges taken from the books of the Citrin-Kolb Oil Company.

Q. Showing what?

A. Showing the date of each charge to the advertising account; the amount of that charge and a description of the advertising.

Q. Does it also show the total of advertising costs for the year 1940, on Exhibit 105-C of the paper?

A. It shows the total of the advertising costs and also a total of each description of advertising.

5423 Q. In other words, I understand that the exhibit has an itemization of advertising costs by categories of advertising media, is that right.

A. That's right, it has.

Q. Do these figures, as appearing on the exhibit, correctly, of your knowledge, state the items of advertising expense of Citrin-Kolb Oil Company for the calendar year of 1940?

A. Yes, they do.

Mr. Abbott: The exhibit is offered in evidence.

Trial Examiner Ballinger: Mr. Biber, when you said that they correctly reflected the cost of advertising during the period covered, that statement was based upon the records in your office, was it not?

Witness: That's right.

Trial Examiner Ballinger: And not from your independent recollection?

Witness: No. I checked each item with the books of the company.

By Mr. Abbott:

Q. You did that personally, didn't you?

A. Yes.

Q. I mean, you didn't delegate it to anybody else?

A. No. This was made personally. We checked every entry of advertising in 1940 and created this record.

Trial Examiner Ballinger: Have you a copy of that?

5424 Witness: Yes, sir.

(Handing document to the Examiner.)

Trial Examiner Ballinger: I will return it to you.

Mr. Austin: Was that a copy of this Exhibit 105 you handed to the Examiner?

Witness: Yes.

Mr. Austin: What is meant by "donations and memberships;" the second column on this sheet?

Witness: Those are items of donations to charitable organizations or civic organizations, or memberships in such charitable or civic organizations. Possibly memberships in trade organizations.

Mr. Austin: Do the records of the company set forth more in detail the nature of these expenditures?

Witness: No. Most of these items are taken directly from the check record or check journal and the check stub is made out almost identical with this item. In other words, it gives the payee's name, the amount, and the notation as to what it is; donation, membership, newspaper; whatever it happens to be.

Mr. Austin: I object to the introduction of the exhibit, your Honor, first upon the ground that the records themselves are the best evidence. This is only a copy from the record.

5425 Secondly, upon the ground that there are many items of advertising shown on the face hereof as to which I do not believe Mr. Boatwright's testimony was broad enough to cover, as having stated the opinion that there would be reciprocal benefit from such types of advertising.

Mr. Abbott: What specific items do you refer to?

Mr. Austin: "Donations and memberships" is one thing. I think Mr. Boatwright testified only as to advertising of products. Consumer advertising, I believe, was the subject of his opinion.

Mr. Abbott: I want to ask the witness a question.

By Mr. Abbott:

Q. Mr. Biber, during all the time that you were with the Citrin-Kolb Company did that company allocate memberships and donations to charity, to the advertising expense?

A. We have always carried it as an advertising expense.

Q. That has been the custom of the company all the time that you were identified with it?

A. Yes, it has been.

Mr. Abbott: Now I understand that this motion is made partly on the ground that the original books themselves are the best evidence. In that connection I wish to make the same observation and offer as I made in connection with the testimony of Mr. Ledbetter; namely, first, that the Respondent is willing to have the ac-
5426 countants for the Commission—and I think the witness will concur in this offer—examine the books of account of the Citrin-Kolb Oil Company for the year 1940 to ascertain the authenticity of these entries on the exhibit now under consideration.

By Mr. Abbott:

Q. Is that true, Mr. Biber?

A. I wouldn't be able to say whether the books were available at this time, or not.

Q. The reason for that being what?

A. I am no longer associated with Citrin-Kolb Oil Company.

Q. So you can't answer for them?

A. No.

Mr. Abbott: And in the second place, the Respondent offers in connection with the objection, that if the exhibit is not the best evidence, to bring the books, themselves, in to Court and to introduce the books in lieu of the exhibit now offered in evidence.

As far as the other objection is concerned, if the Court please, the Respondent takes the position that under the testimony of Doctor Boatwright and the other testimony in this case, the fact that some of these entries on the exhibit appear to be entries for the advertising of products other than gasoline, is compensated by the fact that on Page 34 of Exhibit 100 a percentage of 81.6% is applied to the total of advertising expenditures of the Citrin-
5427 Kolb Oil Company for year 1940 and only the balance, to which, the sum of $3,211.10 is taken as the advertising expense for gasoline.

Trial Examiner Ballinger: What page are you referring to?

Mr. Abbott: That is Page 34 of Exhibit 100.

Trial Examiner Ballinger: Is there any statement there as to the basis for the allocation?

Mr. Abbott: Doctor Boatwright supplied that in his testimony.

Mr. Austin: What percent did you say was allocated to gasoline?

Mr. Abbott: 81.6%. In other words, the balance of the 19-plus percent was allocated to other products than gasoline.

Trial Examiner Ballinger: The Examiner is prepared to rule.

Mr. Abbott: I want to ask the witness just one more question before your Honor rules on that.

By Mr. Abbott:

Q. As a matter of fact, Mr. Biber, will you state of your own knowledge what you know as to whether the advertising of the Citrin-Kolb Oil Company in 1940 was devoted to advertising of Standard Oil gasoline, and if so, what approximate percent, if you know of your own knowledge?

A. Well, my recollection—

5428 Mr. Austin: I object to that, your Honor. The advertising copy itself is the best evidence of that and not the witness' recollection.

Trial Examiner Ballinger: The objection is sustained.

Mr. Abbott: I have no further observation to make.

Trial Examiner Ballinger: Passing over the first grounds of objection; namely, the failure to produce the original records; and resting the ruling entirely upon the second grounds of objection, Respondent Exhibit 105-A, 105-B, and 105-C is rejected.

(Thereupon Respondent's Exhibit 105-A, 105-B, and 105-C were rejected.)

Mr. Abbott: Now, I want to ask this for the record, also:

Do I understand that the basis of your Honor's ruling with reference to the exhibit offered in evidence in connection with Mr. Ledbetter's testimony; namely, Exhibit 104-A to 104-H, inclusive, was rejected on the same ground and not on the ground of the failure to bring in the original records?

Trial Examiner Ballinger: Yes.

Mr. Abbott: That is correct, is it?

Trial Examiner Ballinger: That is correct.

Mr. Abbott: In view of the ruling of the Examiner
5429 the Respondent at this time wishes to state on the record that Respondent will ask to make an offer of proof in connection with the advertising costs of the Citrin-Kolb Oil Company for the year 1940, which offer to proof will be submitted on Monday.

That's all Mr. Biber.

(Witness excused.)

Mr. Abbott: We have no further testimony for today.

Trial Examiner Ballinger: Is counsel for the Commission prepared to go on?

Mr. Austin: It is nearly 1:00 o'clock, your Honor, and I would like to adjourn until Monday.

Mr. Abbott: Then I move that we stand adjourned until Monday, February 23rd, at 10:00 o'clock, a. m.

Trial Examiner Ballinger: The motion is granted and now, at 12:45 P. M., the hearing stands adjourned, to be reconvened in Room 859, Federal Building, Detroit, Michigan; February 23rd, 1942, at the hour of 10:00 A. M.

(Whereupon, at 12:45 P. M. the hearing was adjourned to reconvene on Monday, February 23, 1942, at 10:00 A. M.)

5430

Room 859 Federal Building,
Detroit, Michigan,
February 23, 1942.

Met, pursuant to adjournment at 10:00 A. M., War Time.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq.: Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois; and

Arthur J. Abbott, Esq., of the firm of MacMahon, Abbott & Roberts, 2230 Buhl Building, Detroit, Michigan; appearing for the Respondent.

5431

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing of Docket No. 4389, in the matter of the Standard Oil Company of Indiana, is reconvened in room 859 Federal Building, Detroit, Michigan, at 10:00 a. m., Eastern Standard Time, February 23, 1942. The last hearing was in the same room in the same city, February 21, 1942.

Counsel for the Commission and Respondent are present.

Gentlemen, this is a legal holiday and this proceeding will continue today conditioned upon their being no objection on the part of the respective parties. Is there any objection?

Mr. Hanley: The Respondent makes no objection.

Mr. Austin: No objection.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I would like to request a five-minute recess before we proceed.

Trial Examiner Ballinger: We will have a five-minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order. You may proceed.

5432 Mr. Austin: Commission's Exhibit 86 is a list supplied by the Respondent of the reseller service stations supplied in the Detroit Field in 1937.

Commission's Exhibit 109-B, also supplied by the Respondent, is a list of reseller service stations served by the Respondent in 1937 which were in the territory of the salesmen Robinson, Meulenberg and Coutchie. I have asked Mr. Warmack to make a check of the list in Commission's Exhibit 109-B against the larger list, that is, the complete 1937 list in Commission's Exhibit 86, and there are four or five dealers listed on Exhibit 109-B which, apparently, do not check with the list in Commission's Exhibit 86. The name of G. Scanlon, 19906 Fenkell appears on Commission's Exhibit 109-B and we have not been able to locate it on Commission's Exhibit 86.

J. R. Dudley is listed on Commission's Exhibit 109-B at 20300 Grand River. There is a dealer named G. W. Butler on Commission's Exhibit 86 listed at the same address but the name of J. R. Dudley does not appear on Commission's Exhibit 86.

The next name is A. J. Ginella, which appears on Commission's Exhibit 109-B and has not been found on Commission's Exhibit 86. However, at the address given, which is Fenkell and Welland, a dealer named W. M. C. Engler is listed on Commission's Exhibit 86. There is an-
5433 other place, here, where the address coincides but the name given is different, the name W. Sokol appears on Commission's Exhibit 109-B, 9442 Wyoming. The name given for that address on Commission's Exhibit 86 is F. E. Hughes.

Further, on Commission's Exhibit 109-B there appears the name of a dealer listed as C. A. and W. J. Walsh, at Grand River and Rutherford. Commission's Exhibit 86 lists a Charles E. Walsh at 16000 Grand River.

I would like to ask whether the Respondent would be willing to recheck the five dealers that I have just named from Commission's Exhibit 109-B and in the event that those names are correctly listed would the Respondent please supply the gallonage figures; that is, of gasoline purchased from the Respondent by those five dealers in 1937, because it is not clear that the gallonage for those five dealers can be taken from Commission's Exhibit 86.

I might say further that in asking for the list for Robinson, Meulenberg and Coutchie I did not ask for gallonage figures because we already had those figures on Commission's Exhibit 86 and I assumed we could merely copy them off the other list and, consequently, as to these five I am not sure that we have the gallonage figures and I would like to have them.

Mr. Hanley: May I see them?

(Documents handed to counsel for Respondent by
5434 counsel for the Commission.)

Mr. Hanley: We shall, of course, check, in response to this request, your Honor.

May I inquire what the pertinency of this is? I don't understand what difference it makes what the gallonage figures of some reseller operator may have been served by Mr. Coutchie or the other salesmen.

Mr. Austin: This is in connection with Respondent's Exhibit 31-A to 31-Q where the computation of selling expense for Ned's Auto Supply Company was shown as alleged by the Respondent by way of comparison with its general selling expense for its stations in Detroit in 1937 and the purpose for asking for these figures is so that we may be enabled to make certain computations which we may desire to offer in rebuttal on the 1937 cost study.

Will you take the stand, Mr. Boatwright?

JOHN W. BOATWRIGHT was thereupon recalled as a witness for the Respondent and, having been previously first duly sworn, testified further as follows:

Direct Examination by Mr. Austin:

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Mr. Austin: I would like to have this paper
5435 marked for identification, please.

Trial Examiner Ballinger: The Reporter will mark the paper Commission's Exhibit 115 for identification.

(The document referred to was marked "Commission's Exhibit 115" for identification.)

By Mr. Austin:

Q. Mr. Boatwright, I show you Commission's Exhibit 115 for identification entitled "Standard Oil Company Acknowledgment of Orders" and ask you if you are familiar with that form (handing document to witness)?

A. Yes, I have seen this form several places.

Q. That particular form that I have handed you is in respect to a shipment from where to where?

A. It is with respect to a shipment from Whiting, Indiana, to Ned's Auto Supply Company.

Q. In Detroit?

A. In Detroit.

Q. Now have you seen similar forms prepared for shipments from the River Rouge terminal of the Respondent to Ned's Auto Supply Company and other jobbers in Detroit?

A. Yes, I have.

Q. And referring, now, to the similar form in respect to shipments from the River Rouge terminal do you know where those forms are made out; filled out?

A. Yes, they are made out here in the Detroit 5436 office.

Q. What department of the company handles the shipments from the River Rouge terminal to jobber bulk plants and, also, handles the payments for freight or cartage for such shipments?

A. Well, the orders for delivery to jobbers move through the gasoline and refined oils department of the general office. The payment of freight is by the manufacturing department.

Q. When you say the orders for jobbers move through the gasoline and refined oil department of the general office that doesn't mean, does it, when a jobber wants a carload or truckload of gasoline that in order to get it the order has to go through the general office in Chicago?

A. They place the order with the Detroit division and the Detroit division places that order. The account memoranda submitted to Chicago moves through the gasoline and refined oil department and the freight bill goes to the manufacturing department.

Q. And where is the freight bill made out?

A. I don't know.

Q. I suppose it is made out by the railroad but—I didn't mean that. What I wanted to ask you was whether the River Rouge terminal makes a record of shipments and the charges on those shipments and submits that to Chicago on shipments from the River Rouge terminal?

A. I don't know. I couldn't answer your ques-
5437 tion.

Q. Do you know whether the original bills from the trucking companies or from the railroads are submitted in the first instance to the company's representatives at the River Rouge Terminal, or whether they are submitted in the first instance to Chicago?

A. No.

Q. Your answer is that you don't know.

A. I don't know.

Mr. Austin: Well, in view of the uncertainty that appears to exist as to both charges which the Respondent pays for freight and/or switching to the railroads and also in view of the uncertainty which exists as to just what contract haulers covering shipments of gasoline from the River Rouge Terminal to jobber bulk plants and the rates charged, I feel that I should call a witness or witnesses who can testify directly as to the cost to the Respondent on these various types of transportation.

If there is some one at the River Rouge Terminal whose business it is to keep track of the shipments, and of the charges, I would like to have such employee produced but I don't know who it would be; and it seems to me the best way to prove this matter would be to put some one on the stand and have produced, as to the truck charges, actual receipted bills. And as to the freight charges,
5438 I am perfectly satisfied to use the freight bills which were submitted by the Respondent the other day. But I think that some explanation is also required on the record of freight charges appearing on these acknowledgements similar to Exhibit 115, for identification.

So that—I don't want to pursue this matter further now, but I would like to know if the Respondent will be good enough to ascertain and advise me whether or not there is some employee of the Respondent here in Detroit, or at the River Rouge Terminal who can testify and produce records on these questions.

Mr. Hanley: Well, I am not sure whether there is or not, and I would have to ascertain that, myself, before I could make any statement about it. I am not at all clear on just what this witness is going to need to know. We have supplied you with the contracts. We did that in Washington, with the exception of one, and you now have that. We supplied you with the freight bills and there was testimony on the part of Mr. Raupagh as to how this thing works; also testimony on the part of Mr. Boatwright relative to the charges which were introduced in Washington and indeed, he made a computation which was put in the record based on those transportation costs.

Now, I don't know of anybody who can testify as to what an actual freight rate was on a given day with-
5439 out just—reference to a tariff. I really don't know how far you want this man to go and what you are trying to prove that isn't already proven.

Mr. Austin: Well, I have decided not to go back to ~~1939.~~ The original offer of these acknowledgements last June in Washington was at the time you were offering them in 1939 and 1940, but it appears from the freight bills that you have just given me that the charges were uniform during the entire year of 1939 for each of the various jobbers. So as to your charges I will be glad to use the freight bills for December, 1939, as evidence of what the freight charges were for tank car shipments to jobbers during January, 1940. Of course, we are willing to be corrected on that if it is found there are any changes during the month of January, 1940, but the charge was the same during all of 1939 and probably continued.

It also appears from the evidence already in the record that about the end of January, 1940, shipments to jobbers were commenced by transport truck and that tank car shipments were discontinued so that what I would desire would be to have a witness who could testify to, first: The extent of the period of tank car shipments to jobbers from the River Rouge Terminal in 1940. I may say parenthetically that I am not questioning the dates already put in by Mr. Boatwright representing in-
5440 formation given to him from either Detroit or Chicago when these jobbers were getting deliveries by transport truck, but, nevertheless, I would like to find out a little more definitely when tank car shipments stopped, on one date, and the other method of shipment exclusively used from then on.

Then I would like to be able to question the witness regarding any freight charges and switching charges on tank car shipments—a matter which is not at all clear now from the matter which we have and which has been supplied by the Respondent.

We have some acknowledgements similar to Exhibit 115, for identification, to indicate the freight charges and a number of bills which indicate the switching charges and I am very uncertain at the present time as to which kind of charges were used or whether there wasn't both charges; and then, going into the transport truck situation, it seems to me that instead of putting these contracts in, which are rather difficult of interpretation as related to the transport truck hauling to jobbers, it would be much better to put in the record a sampling of invoices similar to freight bills produced for 1939, which would show the trucking charge per gallon on shipments from the River Route plant to jobbers' bulk plants during the various months of 1940.

The contract with the Smith Company for trucking,
5441 which is now in evidence is, of course, useful for the
purpose of showing transport hauling to the Respondent's own bulk plants, but it would require the introduction of, I think, some additional riders and also the introduction of other contracts to attempt to show just what the contracts were with respect to jobbers' hauling and I think that the introduction of actual paid bills showing the payments made by the Respondent for the hauling of a certain number of gallons in various months of 1940 would be much more useful and better evidence because it would not call for conclusions as to how the terms of contract applied.

I am just trying to explain what I have in mind. It seems to me it is a rather simple matter provided we can call a witness from the department of the Respondent that handles those matters.

Mr. Hanley: Well, there may be some witness to whom it might sound simple, but it doesn't sound simple to me. I will just have to take that request and analyze it and see what we can do with it. I don't know what you are getting at.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5442 Trial Examiner Ballinger: On the record.

Mr. Hanley: I am now informed that we will not be able to comply with the modified request made by Mr. Austin, which I think may not have been made on the record, but which in substance was that we furnish an invoice or bill paid for hauling cost and having to do with a shipment to each of the four jobbers for each month of 1940. The reason we cannot do so is because the haulers make up a bill at the end of the month and it has to do with many, many places where they haul for us, in Detroit and elsewhere, and they just cumulate the things and we have to check back in our own records and identify the amount of gallonage that actually moved and extend it by what they charge us to see if we have been charging the right unit amount.

If the testimony of Mr. Boatwright is not acceptable when he says that this charge is .155 cents per gallon for the year 1940 for all gallons hauled by truckers into the Detroit metropolitan area, irrespective of whether that gallonage goes to jobber bulk plants or to Respondent's bulk plants, with the exception of two Respondent's bulk plants which figures are in the record, then all I can offer to do is to comply with the request of Mr. Austin to find out the witness that knows. Doubtless, somebody in the Detroit office writes a check to these haulers on the basis of .155 cents, and if you don't accept the testimony of Mr.
5443 Boatwright as supported by all of the rest of the gentlemen here who know, we will just have to give you the name of somebody whom you may believe. That's all I can do.

Mr. Austin: Well, I would like to get the record evidence on this, if possible, just because I think it is a better way to prove a case when you are involved in these sort of charges; and, furthermore, I think I am correct in saying that this part of the business of the company is not within Mr. Boatwright's province, and that Mr. Boatwright's knowledge is second hand, even though I know that whatever he has stated has only been stated after thorough inquiry, and I have no reason to doubt that the inquiries he has made have been thorough.

Trial Examiner Ballinger: Mr. Austin, in view of Judge Hanley's statement, aren't you now relegated to the contract?

Mr. Austin: I don't think so because I don't know what the contract is or what it provides. It is rather difficult to understand.

Trial Examiner Ballinger: Well, apparently, the production of the bills Judge Hanley has described are not going to throw any light on the matter you desire information upon.

Mr. Austin: Your Honor, I think we had better pass this matter over now temporarily. We have accomplished
5444 something in regard to the freight on the tank car, and I am going to suggest that Mr. Warmack be permitted to look over the records of the Detroit office that have been referred to here regarding jobber shipments and payment for jobber shipments and, perhaps, after he does that with the Respondent's accountants, it will be possible to make some better request or one which can be practicably complied with, but until we know what sort of records are available, it is rather difficult now to make any request which is intelligible to the Respondent, and, consequently, I suggest we just let the matter drop until Mr. Warmack has an opportunity to determine what records are available and then we will know what, if anything, to ask for.

Mr. Hanley: If your Honor please, now I understand that the only request left on the record is that Mr. Warmack be given an opportunity to examine such records as he may want to look at.

Mr. Austin: That's right.

Mr. Hanley: Of course, that request has been complied with long since. Mr. Warmack has been looking at them for weeks. Of course, they are all available to him all the time, anytime he wants to go at them.

Trial Examiner Ballinger: Proceed, Mr. Austin.

Before we start, Mr. Austin, if you desire Mr. Boatwright to produce his worksheets, I understand that they are
5445 quite voluminous. You haven't any objection to some representative of the company who is familiar with those worksheets sitting over here so as to save him the time of digging them out?

Mr. Austin: Not a bit. Not a bit.

By Mr. Austin:

Q. Mr. Boatwright, I hand you Commission's Exhibit 108, for identification, which is a booklet entitled "Retirement Plan for the Employees of the Standard Oil Company."

Have you made any further inquiry or check upon which you can now state whether the retirement plans set forth in this booklet are the retirement plans which are now adopted and being carried out by the company and which have been in effect since January 1, 1939?

A. This is an outline of the plan which is now in effect and is being carried out by the company.

5446 Q. There is more than one plan listed in that book, is there not?

A. Plans.

Q. And did you find that the cancellation of those two examples, or three examples, on pages 19 and 20 does not mean that any part of the plans as described in the booklet are withdrawn or changed?

Mr. Hanley: Just a moment, Mr. Boatwright.

That is objected to by the Respondent as immaterial. The same objection might have been made to the preceding four or five questions. There can be no issue, here, as to what the plans, the detail of the plans used by Respondent in connection with this annuity system may be. The only thing in issue, here; the only thing that the Commission is entitled in this proceeding to inquire into is the method used by the Respondent in allocating the expense to which it was put by virtue of any plan that it may have had in effect, irrespective of the detail of that plan.

I concede the right of the Commission to inquire into the propriety of the allocations but deny the right of the Commission to investigate the detail of any of the plans of the Respondent.

Mr. Austin: I think the details of the plans are material only in so far as to determine the nature of the pay-
5447 ments made which are claimed by the company as expenses in connection with the marketing of gasoline, in 1940 and the only purpose of the present question is to establish this exhibit so that I can offer it in evidence. I don't see how I can offer it in evidence if part of what is in here is not at the present time in force.

Mr. Hanley: Are you going to offer that in evidence?

Mr. Austin: It was offered the other day and I believe there was no objection to it except upon the question that there were two pages cancelled.

Mr. Hanley: I made an objection to the production of it.

Mr. Austin: They were offered the other day. I forget whether you were here the other day, or not. The death benefit was introduced and this one was held up because of the two pages that were cancelled.

Mr. Hanley: Was that other matter received in evidence?

Mr. Austin: The death benefit plan was received in evidence.

Mr. Hanley: Do you remember the number of it?

Mr. Austin: Commission's Exhibit 107.

Mr. Hanley: Respondent at this time moves to have Commission's Exhibit 107 stricken from the record for
5448 all of the reasons explained in the objection just made
to the question to the witness.

Mr. Austin: There is a previous objection pending but—I don't know what the proper procedure is.

Trial Examiner Ballinger: As to the last motion, the Trial Examiner denies it.

Now with reference to the question propounded to the witness: Doesn't that run to the method adopted by the company?

Mr. Hanley: It does not, your Honor. I don't know how many different kinds of plans there may be in existence in the United States by various companies, all having, in principle, the same objective; namely, some plan of retirement protection, annuity or pension or insurance for their employes. I apprehend there are many, many different types of plans. They all involve expenses to whatever company uses such a plan. That expense is a cost of selling, if it is a merchandising company.

If the Respondent undertakes to make allocations of cost as between its different methods of distributing its products, then we concede that the Commission, in this type of a proceeding, has a right to inquire into the propriety of our allocation. To just put it as bluntly as I can, I will say it is just none of the Commission's business as to what the
type of plan is. We are not inquiring into that in this
5449 law suit. There isn't any question raised about the
propriety of the plan itself. It isn't a secret. We are rather proud of it, in fact.

Mr. Austin: It isn't a method of allocation, your Honor, but there is a question that arises all through this cost study whether certain items are of such a nature that they may afford any basis for a cost differential under the terms of it.

Of course, we have to know the nature of the expenses and in order to know them, why, the purpose for which they are made is extremely important. It isn't just any payment that the Standard Oil Company makes in connection with the marketing of gasoline that it can take advantage of under the Robinson-Patman Act; or, at least, that's my contention.

Trial Examiner Ballinger: The witness has testified that the booklet marked Commission's Exhibit 108, for identification, contains the plans of the Respondent with reference to insurance.

Mr. Austin: Retirement benefits and annuities.

Trial Examiner Ballinger: Retirement benefits.

Now on Page 19, under the heading: "How the Plan Operates" is, apparently, an illustration. That page and the succeeding page relating to the same matter is stamped "cancelled". That doesn't in any wise affect the probative value of the document if you desire to offer it in evidence.

5450 Mr. Austin: Well, that was my question to the witness: how—in it did affect what was in the rest of the book.

Trial Examiner Ballinger: The objection to the question is sustained.

By Mr. Austin:

Q. Mr. Boatwright, is the plan described in Part I of this booklet entitled "Annuities for Service before January 1, 1939," still in force and has it been in force since January 1, 1939?

A. It is still in force and has been in force since January 1, 1939.

Mr. Austin: I offer this booklet in evidence.

Trial Examiner Ballinger: Is there any objection?

Mr. Hanley: We make the same objection.

Trial Examiner Ballinger: The objection is overruled, and Commission's Exhibit 108 for identification is admitted in evidence.

(The booklet referred to, heretofore marked for identification as "COMMISSION'S EXHIBIT 108" was received in evidence.)

By Mr. Austin:

Q. Will you now turn to Page 92 of Respondent's Exhibit 100, please? In the last paragraph on that page, Mr. Boatwright, do you note a statement regarding a "General Office Payments of Past Annuities and Accumulation for Future Reserves," amounting to "$130,787.89"? 5451

A. I notice the statement.

Q. Are you familiar with the nature of that payment and the purposes for which it was made?

A. Again I would have to repeat the testimony that the statement, I think, itself, is self-explanatory as to the payment of services prior to January 1 in the building of a reserve.

Mr. Austin: Just a minute, please. Will the Reporter please read the question?

(The question referred to was read by the Reporter.)

A. Yes sir.

By Mr. Austin:

Q. Now, showing you Commission's Exhibit 108, and referring to Page 4 of that exhibit, will you state whether the General Office payment of $130,787.89 just referred to was a payment made into the annuity trust referred to in Paragraph "A" on Page 4 of Exhibit 108 and whether that payment was made for the purposes stated in said Paragraph "A" on Page 4?

A. It was made to meet the trust requirements as stated in Paragraph "A".

Q. It was a payment of the nature described and referred to in Paragraph "A" on Page 4?

A. May I check my work sheets on that?

5452 Mr. Austin: Yes.

Trial Examiner Ballinger: You may.

A. I have before me the work sheet which gives the breakdown of the $130,000 under discussion and I find that it is made up of two parts. Of the total, 108,500-plus dollars is a payment to the trust fund in keeping with Paragraph "A". The remaining portion are the amount that is paid to the insurance company representing annuities of present annuitants.

5453 By Mr. Austin:

Q. What present annuities do you refer to?

A. People who are now on and are receiving annuities for past services with the company.

Q. Are they receiving those annuities under either plan set forth in Commission's Exhibit 108?

A. May I have the question again, please?

(The question referred to was read by the Reporter.)

A. I would have to answer that subject to check. I am under the impression that when the plan that you have outlined before you in Commission's Exhibit 108 was made effective that the insurance company took over the annuities then being paid by the company for past service. Therefore, if I may answer subject to checking, I would say that it is in accordance with that plan.

Q. In the last pages of Commission's Exhibit 108, beginning with page 21, there is a copy of a trust agreement. Is that the trust agreement covering the trust into which the payment of $108,000 odd was made? It is my understanding that that is the same trust that is referred to in paragraph 4 (a) that we were looking at a while ago?

A. Yes.

Mr. Hanley: There is only one man in the company that I know of that really knows the answer to that, and he is the treasurer.

5454 By Mr. Austin:

Q. Well, is there any difficulty about this present question as to identifying that trust agreement as being the one referred to on page 4, paragraph A?

A. Mr. Austin, you are asking me a series of questions on a phase of our operations that I have been primarily concerned with for personal interests, but it has not been a part of my regular duties and I have made no study or no analysis. Therefore, my knowledge on the retirement plans and the details of the plans and the details of the trust as established under those plans is quite limited.

Q. I just wanted to identify that trust as being the trust referred to in paragraph 4 at the moment. I don't intend to ask you anything about the effect of the trust agreement or any detail. In fact, I am not interested in that.

A. Well, I could answer that by saying that I think it is an outline of the trust referred to on page 4, paragraph A, Commission's Exhibit 108.

Q. Do you know, Mr. Boatwright, whether the balance of the sum $22,000—is it?—that you say was paid to the insurance company for the payment of past annuities—was that your testimony?

A. Yes, sir.

Q. —whether that is a continuation of annuity payments which were already being made by the company at the time these new plans went into effect on

5455 January 1st, 1939, and which annuities were not taken over into the plans described in Commission's Exhibit 108?

Mr. Austin: I would like to have that reread.

(The question referred to was read by the Reporter.)

Mr. Hanley: Well, that is assuming a fact not in evidence.

Mr. Austin: I am not assuming.

Mr. Hanley: Read the last phrase of that question.

Trial Examiner Ballinger: Read the entire question.

(The question referred to was read by the Reporter.)

Mr. Hanley: Has the witness testified there were any annuities that were not paid that were cut out of the plan?

Mr. Austin: That is what I am asking him.

Mr. Hanley: You are assuming that.

Mr. Austin: I will try to reframe my question.

By Mr. Austin:

Q. In the first place, it is conceded, is it not, Mr. Boatwright, that there was an annuity plan in force prior to January 1, 1939?

A. There was.

Q. And the company prior to January 1st, 1939, was and had been paying annuities to certain employees who had retired prior to that time; is that correct?

A. Yes, sir.

5456 Q. Now, my question is: Whether this payment of some $22,000—which the witness has described—was made for a continuation of those annuity payments to annuitants who were already on the annuity list prior to January, 1939, and—well, I will stop there. Is that correct or do you know?

A. Yes, it is correct.

Q. Now, if that is correct, does it follow or is it a fact that the payment of those annuities which were—if that is a fact, were the annuities upon which payments were being made prior to January 1, 1939, included from that date on in the new plants or was the payment of those past annuities continued separately by the company?

Mr. Austin: I will withdraw the question. Your Honor, I think it is giving the witness some difficulty and I believe that is as far as it is—

Trial Examiner Ballinger: The question is withdrawn.

Mr. Austin: —material at this time. The previous questions and answers define the annuities effective, and I don't know that I care to go any farther now about how they are being handled.

G

Upon review of the record, if we find that further questioning about these plans appears to be material, perhaps we will be able to ask such questions at a future date.

I move we take a five-minute recess, your Honor.

Trial Examiner Ballinger: Motion is granted.
5457 The hearing stands in recess for five minutes.

(A short recess was taken.)

By Mr. Austin:

Q. Mr. Boatwright, I call your attention to Respondent's Exhibit 99, page 20, the lower part of that page referring to Accounts 243, 244, and 520.

A. I have the page referred to.

Q. The statement appears there that the charges to those accounts are allocated to channel on the basis of all salaries and commissions in each channel to total all salaries and commission for the corresponding month. Is that statement correct?

A. That part which you read is correct. You omitted the phrase "representing additional salary consideration."

Q. Yes. Is it strictly true that the total of all salaries and commissions in each channel and the total of all salaries and commissions for the corresponding month were used for the purpose of allocating the charges to those accounts?

A. It is true that the salary accounts—now, if you are challenging the statement because we had not isolated that part of the miscellaneous operating expense that might be represented by wages or salaries or something like that as a component part of our allocation factor, your statement is correct.

Q. Well, I haven't made a statement. I am asking you.

5458 A. I say, if you challenge on that basis, that is correct. We have not isolated the part of salaries or wages which are not isolated in the expense classification shown on our Form 189.

Q. And that applies, does it not, to the numerous accounts which you have listed the other day which included part salaries and part other expenses?

A. It does.

Mr. Austin: I would like to have this sheet marked for identification.

Trial Examiner Ballinger: The Reporter will mar the paper Commission's Exhibit 116, for identification.

(The document referred to was marked "Commission' Exhibit 116" for identification.)

By Mr. Austin:

Q. I show you Commission's Exhibit 116, for identification, Mr. Boatwright, and ask you if you can describe th nature of the material appearing on that sheet?

A. The material on that sheet represents the salarie and commissions incurred in the Detroit Field for variou salary account classifications on our regular Form 18 which are recapitulated to provide a basis for allocatio of the account 520, Annuities and Retirement Plan Expense, on Form 189.

Q. Is it your understanding that Commission's Exhibit 116, for identification, sets forth all of the sa
5459 ary charges which were used as a basis for the allo
cation of Accounts 243, 244, and 520, in the company
regular accounting procedure?

A. It is.

Mr. Austin: I offer this sheet in evidence.

Trial Examiner Ballinger: Any objection?

Mr. Hanley: None except as to its materiality.

Trial Examiner Ballinger: The objection is overrule Commission's Exhibit 116, for identification, is admitte in evidence.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT 116", was receive in evidence.)

By Mr. Austin:

Q. Is it your opinion, Mr. Boatwright, that the salari included in the accounts listed on Commission's Exhib 116 in the tank wagon reseller, tank wagon consumer, a Other Methods channels are sufficiently representative a substantially representative of the total distribution salaries in those channels to provide a proper basis f allocation of the expenses in Accounts 243, 244, and 520 the Form 189?

A. Certainly.

5460 Q. Without questioning that answer, Mr. Bo
wright, I have had certain computations made of t
percentage to the total of Account 520 on Form 189 f

1940 represented by the divisions of the expense on that account in the three channels. I don't know whether you can answer this question without doing some checking but Commission's Exhibit 116 indicates that 34.8 percent of the total salaries in the accounts listed fall into the tank wagon reseller channel; 36.4% in the tank wagon consumer channel and 28.8% in the other methods channel. It appears from Form 189 for 1940, according to our computation, that 34.26% of the expense to Account 520 was entered in the tank wagon reseller channel—

A. Will you compare them as you go through them, please, so that I may have them in mind?

Q. Yes. The percentage for the tank wagon reseller channel, Commission's Exhibit 116 is 34.8%.

A. Yes.

Q. The percentage for Account 520 in the tank wagon reseller channel is 34.26%.

A. Yes.

Q. In the tank wagon consumer channel the percentage on Commission's Exhibit 116, based on total salaries, is 38.4%. The percentage of Account 520 in the tank wagon consumer channel on Form 189 is 37.01%.

A. Yes, sir.

5461 Q. The percentage on Commission's Exhibit 116 for the other methods channel is 28.8%. The percentage for Account 520 in the other methods channel is 28.73%.

A. Yes sir.

Q. Assuming that the percentages stated are correct—and I will give you an opportunity to check them, if you wish to do so—would that indicate to you that the list on Commission's Exhibit 116 is not, perhaps, an entirely complete or correct list of salaries used, or that there may have been some other salaries?

A. No, that doesn't indicate that. What you are referring to, here, are insignificant differences which grow out of making an allocation of a salary on a montnly basis. These salaries that are indicated on Commission's Exhibit 116 are annual. We prepare the allocation factors for the accounts under discussion; namely, 243, 244 and 520, each month.

The application of the ratios on a monthly basis are then enumerated for each succeeding month so that at the end of the year we have had a series of twelve different per-

centage factors applied to twelve different base salar
amounts so that when we take the ultimate, the enumera
tion you have on Commission's Exhibit 116, the ratios ma
not agree exactly because those ratios that you see on Con
mission's Exhibit 116 are a weighted average for an an
nual basis and may not have been used in any o
5462 month.

Q. Then those variations of percentages is n
reason for questioning the completeness of the salari
listed on Commission's Exhibit 116 as the basis for alloca
tion of the three accounts referred to?

A. The differences of the percentages does not give ri
to a question of the determination of the allocation.

Q. Will you turn now, please, to Page 96 of Respon
dent's Exhibit 100, which is Sub-schedule 9 "A".
You will note on that page, Mr. Boatwright, under A
count 243, there is a line headed: "Total Salary."
similar entry line, under Account 244: "Total Salary".
similar line under Account 520. Do you see those lines th
I am referring to?

A. Yes sir.

Q. Now, on each one of these three lines there are thr
figures, the figures being identical in each line. The fir
figure under "Jobber Naphtha and Gasoline" is $3,635.3
The second figure is $669.30, under "Jobbers, Oth
Products", and the third figure is $19,831.82 under "Dir
Shipments Other Customers."

A. Yes sir.

Q. Do those figures represent the total salaries in t
Detroit Field, 1940, allocated to those respective dire
shipment channels, or do they represent only the po
5463 tion of the salaries listed in the accounts enumerat
on Commission's Exhibit 116 which were allocated
direct shipment channel.

A. The salaries included in the figures by the Attorn
for the Commission are the total salary charges which w
found assignable to direct shipment business and is slight
broader in its scope than the accounts enumerated on Co
mission's Exhibit 116.

Q. Then do I understand your testimony to be th
taking the figure $3,635.34, that that represents the porti
of all salary expense in the Detroit Field for 1940 whi
was allocated to the "Jobber, Naphtha and Gasoline" cha
nel and that the computation of that figure was not

stricted to a computation of the salaries in the accounts listed on Commission's 116 which were allocated to that same channel.

Mr. Hanley: If your Honor please, that question is objected to for the reason that it contains a statement by counsel to the effect that the figures appearing on Commission's Exhibit 116 were allocated to the same channels as certain allocations to direct shipments were made in the special Form 189, Exhibit 101, prepared by Mr. Boatwright when, as a matter of fact, there never was any allocation of the figures on Exhibit 116 in direct shipment channels. They are entirely different sets of figures; 116.

Mr. Austin: I don't think my question involved any assumption but I would be glad to have it read again.

5464 Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Mr. Austin: I will withdraw the question, if your Honor please. It is a little complicated.

By Mr. Austin:

Q. Perhaps I can ask you that more briefly and clearly, Mr. Boatwright.

Does the figure of $3,635.34 on Page 96 of Respondent's Exhibit 100 represent the total salary expense charged by you to the "Jobber, Naphtha and Gasoline" channel, or does it represent only the portion of that expense entering into the accounts listed on Commission's Exhibit 116?

A. Well, the accounts listed on 116 include therein certain expense classifications which have nothing to do with jobbers.

Q. Yes.

A. Therefore, as an illustration, we could not use commission payments as an allocation factor with any reasonable degree of accuracy in allocating cost to direct shipments.

Likewise, in Commission's Exhibit 116, you have drivers' salaries for drivers operating out of our bulk plant. That could not be included in those.

Therefore, what we had to take in determining the allocation factor was those salary classifications which were the same in both the direct shipment channels and the tank wagon channels, plus such other salary determination

5465 as we could measure in other accounts supplementing

these which remained applicable to both direct shi
ment and the tank wagon channel.

Q. Now I realize that there were some accounts on Co
mission's Exhibit 116 as to which there is no allocation
direct shipments but that still doesn't affect my questio
I don't believe, and I don't believe you have answered
and I would like to have the Reporter read it again.
would like to have a direct answer to it, if possible.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

By Mr. Austin:

Q. In other words, I want to know whether that figure
restricted to a total of allocations to jobber, naphtha a
gasoline on Commission's Exhibit 116. Conceding th
there may be some accounts there as to which there w
none.

A. Well, plus certain other accounts in which we h
determined the salary allocation to direct shipment.

Q. Can you state what other accounts are covered
that figure of $3,635.34, in addition to the accounts listed
Commission's Exhibit 116 and, if you will, Mr. Boatwrig
before you attempt to answer that question, I would li
to have you, if you have not already done so, total the e
tries under jobbers, naphtha and gasoline in the accou
listed on Commission's Exhibit 116, and that will sh
you how close the total in those accounts comes
5466 the total of $3,635.34, and will show how much th
is left over for you to look for.

Mr. Austin: I have the figures, but I prefer to have t
witness do it.

5467 Trial Examiner Ballinger: You have asked t
witness a question, also called his attention to cert
other matters. I will permit him to answer the question
he can.

A. I am prepared to answer your question at this ti
In addition to the salary items enumerated on Comm
sion's Exhibit 116, recognition was given to the sal
items included in Account 070, being E.L.A. expense; 0
being safety expense; and 220, being employment depa
ment.

By Mr. Austin:

Q. And that is true for all three direct shipment c
umns as well as for jobber, naphtha, and gasoline?

A. Yes, sir.

Q. Does it follow, Mr. Boatwright, that the computation described in the last paragraph on page 92 of Respondent's Exhibit 100 was not applied to the salary expense in certain other accounts, a portion of which salary expense was allocated to direct shipment business, for the purpose of making a transfer to direct shipment channels of expense in Account 520?

A. I am sorry. We will have to break that down some way; either that or else maybe we can read the question back and I can get all of it. I was trying to follow you in your references.

5468 Q. I think it permits a yes or no answer, but you will have to determine that after you hear the question.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

A. I am afraid I don't understand your question.

Q. Well, the accounts listed on Commission's Exhibit 116, plus the three accounts which you have just referred to as being given recognition in these direct shipment salary figures—

A. Yes.

Q. —are not all of the accounts on Respondent's Exhibit 101 which contain salary expense, a part of which was allocated to direct shipment channels.

A. That is correct. No, they are not 100 per cent of every salary item that would be a component part of some of these accounts which represent both salary and other expenses.

Q. Then does it not follow that there are some salary expenses on Respondent's Exhibit 101 which were allocated to direct shipment channels in part but which were not given recognition in making the allocation to direct shipment channels for Account 520?

A. That is a correct statement.

Mr. Hanley: May I see if I understand this by asking a question?

Trial Examiner Ballinger: You may.

5469 Mr. Hanley: Would the result of what you have just said, Mr. Boatwright, be to reduce the allocation in any appreciable amount in connection with Account 520?

The Witness: I am afraid that there is a lack of understanding throughout. In the following of the question, confess to great difficulty myself. I can well illustrate—

Trial Examiner Ballinger: Mr. Austin, I suggest yo pay attention to this.

The Witness: I can well illustrate the difficulties. you assume an account like, oh, miscellaneous operatin expenses, there are certain salary items included in then Now, if we were to go through our worksheets and pick u every penny of salary, it would result in the determinatio of three figures. These three figures would be used t determine an allocation ratio, which is used in the allocatio of Account 520. Now, actually, we picked up those mai accounts which itemize the salary, for the purpose of dete mining the allocation ratio between channels.

Mr. Hanley: I wonder, if your Honor please, if I migh inquire from Mr. Austin as to just how much he is talkin about in money in this controversy between Exhibit 1 and Respondent's Exhibit 101?

Mr. Austin: I don't know, Judge Hanley. I am simpl trying to find out where the methods used and the figur that were used in these various accounts where I think tha
it may result in some inconsistency, perhaps, or ina
5470 curacy in the account, and I have not in all cas
attempted to make any computation to determi what the effect would be. I don't know that I ever wi I may in some cases. I think this is a case where it ca be done. If that is your question, it can be done qui easily but I haven't done it.

Mr. Hanley: It seems to me to be very trivial, ju looking at the exhibit here.

Mr. Austin: Well, it may be. Of course, there is the I don't know whether this should be on the record.

Trial Examiner Ballinger: This is on the record.

Mr. Austin: All right. I was going to say, wheth the amount should be allocated to automobile supplies think is arguable. That is another question that aris But I can't tell you now what effect the argument I a inferentially making might lead to. As a matter of fa I can't tell you really for anything that I am asking rig now.

The Witness: I wonder if I might make a statem which would contribute to clarity in some respect?

Trial Examiner Ballinger: You may.

The Witness: In making our study of the special

analysis of direct shipment expenses, as I am sure Mr. Warmack has had adequate opportunity to examine the work-sheets to date, we carried this through by individual employees, by individual months, and every place that we incurred a salary item, we charged the appropriate
5471 cost for the various insurance items under discussion.

That would be true even if it would be the labor of a painter. He still has a charge against him for the salary and for the insurance cost to the company, and then we recap those to get our charges to these various insurance items.

Now, when the Commission accountants suggested it would be easier for them to follow the accuracy of our work if they had a spelling out of the processes used in the entire calculation, you may recall that I pointed out that we would recap these and that we would calculate a ratio based on a recap of the twelve months.

To illustrate, you will notice that on page 96 of Respondent's Exhibit 100, Account 243, Taxes-Old Age Benefits, we have a charge of $37.45 accumulated. Now, picking up the various salary items where we can isolate those salary items without a complete recapitulation of every small charge, we come to $3,635.34. Now, the charge against 243 is $37.45, which represents 1.03 per cent of these salary items that we pick up. Therefore, there are additional little increments in there, but that this sheet was prepared to illustrate the methodology followed throughout, and I thought that was clearly understood when we explained our method of keeping books and determining those ratios on a monthly basis, and the annual figure may not concur to a hundredth of a per cent with the monthly figures.

5472 By Mr. Austin:

Q. Well, yes, I notice that all the way through for each instance you can't follow down. You wouldn't get the same annual percentages. Just as an example, for the salaries in, say, Account 005, advertising manager, and in the Accounts controlled by 005, such as traveling expense or depreciation of vehicles or operation of maintenance, advertising—now, as I understand it, each month the same figures are used for the allocation of all of those accounts and yet at the end of the year, due to the fact that the expense varies in each month in the various accounts, you will get a different annual percentage. That is a fair example, is it not?

A. Well, yes. And there are many where the application of monthly ratios build up so that the annual ratio will not coincide with any one of the monthly ratios, and that is why, Mr. Austin, we found it necessary to work this on a monthly basis. Frankly, from our system of keeping books and distributing costs, I don't think that an accurate piece of work could have been done any ~~other~~ basis. But I just wanted to point this out. I wanted to point out that the actual charges to these accounts are complete, that is, recapitulated direct from the allocation of effort of the individual involved.

Q. Then referring again to page 96, take for instance the figure of $88.99, under Account 520 in jobber, naphtha, and gasoline column, the figure of $88.99 appearing
5473 directly over the figure $3,635.34. And, as I understand it, the $88.99 is shown to be 2.45 percent of $3,635.34; is that correct?

A. Yes.

Q. Now, was not the figure of $88.99 reached by applying the method of computation described in the last paragraph on page 92 to the salary expense making up the total of $3,635.34?

Do you want that read?

A. I think I had better.

(The question referred to was read by the Reporter.)

A. The method described in the last paragraph of page 92 was followed on the $3,635.34, plus the similar application of the identical method to any minor salary charges incurred and isolated separately in other individual accounts which were in part salary.

Q. Then that percentage figure of 2.45 has no particular significance at all, does it?

A. The percentage figure of 2.45 is an illustration which is an approximation based on those salary items that could be isolated and used in the spelling out process which was offered for complete clarification for the Commission's accountants in following the work.

Mr. Austin: Will the Reporter please mark these sheets for identification?

Trial Examiner Ballinger: The Reporter will
5474 mark the documents Commission's Exhibits 117-A, B, C, and D.

(The documents referred to were marked "Commission's Exhibits 117-A, B, C, and D" for identification.)

By Mr. Austin:

Q. Can you identify these Commission's Exhibits 117-A, B, C, and D?

A. Commission's Exhibits 117-A, B, C, and D represent the distribution of time of the accounting department for the channels: tank wagon reseller, tank wagon consumer, Other Methods, and automobile supplies, and total by sub departments of the accounting department and represent, respectively, the months of December, '39, March, '40, June, '40, and September '40.

Q. Are these exhibits, for identification, what are commonly called the quarterly distribution of time reports for the accounting department?

A. They are.

Q. And are they the reports which we have referred to before in your testimony as being prepared from and representing a compilation of the information recorded during the last month of each quarter by the accounting employees on the form introduced in evidence as Commission's Exhibit 106?

A. Commission's Exhibits 117-A, B, C, and D are recapitulations made during the respective months of the individual reports submitted by Commission's Exhibit 106.

5475 Mr. Austin: I offer these four distribution of time reports in evidence.

Trial Examiner Ballinger: Is there any objection?

Mr. Hanley: What is the purpose? I see no materiality, yet.

Mr. Austin: The purpose is to show the percentages used in allocating the expense of the field office accounting department in Account 200 to the various channels on company form 189 as described in Respondent's Exhibit 99.

Mr. Hanley: Well, will you tell us, Mr. Austin, if you are challenging any of this stuff? Is there any point to all this examination?

Mr. Austin: We intend to question a number of accounts in expense allocations which appear in the cost study on Exhibit 101 and the various forms and figures I am asking for are forms and figures which we believe is necessary to form a basis for computations which we expect to make, or for arguments which we expect to make and present upon our rebuttal.

Mr. Hanley: I object to it on the ground it is not material.

Mr. Austin examined on this quarterly form for a day in Washington and we have got exactly nowhere.

Trial Examiner Ballinger: The objection is overruled
and Commission's Exhibit 117-A, 117-B, 117-C, and
5476 117-D are admitted in evidence.

(The documents referred to, heretofore marked for identification "COMMISSION'S EXHIBITS 117-A, 117-B, 117-C, and 117-D," were received in evidence.)

Mr. Hanley: Had you finished for the moment with your examination on that Exhibit 116?

Mr. Austin: Yes, I had.

Mr. Hanley: Well, counsel having stated he has finished with his questions—

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: Counsel having stated that he has concluded his examination on Commission's Exhibit 116, Respondent now moves to strike the exhibit from the record and all of the testimony submitted in connection with it for the reason that it is now apparent that the purpose counsel had in mind in using the exhibit was to make comparisons of certain figures on it with figures on Respondent's Exhibit 100 and 101 and it further appearing from the testimony now that no such comparisons can be made because the two exhibits are not comparable, in that one is built up on a monthly basis and the other is built up on an annual basis, and there is nothing in the record
asserted by the Respondent and upon which the Re-
5477 spondent has undertaken to justify salary figures on
the basis of the annual build-up, but only on the basis of the study as represented by Exhibit 100 and 101.

Trial Examiner Ballinger: Counsel for the Commission?

Mr. Austin: Well, I hardly know how to answer that because I don't feel like making any attempt to argue objections to the various expense entries and allocations in the Respondent's Exhibits 100 and 101 at this time, but I desire the salary figures upon which the Account 520 was based, and also a statement of salaries entering into a number of accounts in various channels, for the basis of being able to analyze and present testimony on rebuttal in connection with the cost study and that will be true of practically everything I am putting in.

I don't expect that the purpose of most of the testimony that I am obtaining at this time will appear, if by purpose is meant the entire use that the Commission intends to make of it. I think we are entitled to get in here any basic figures which were used in the preparation of this cost study and which do not appear upon the face of the cost study and, of course, we didn't want the Respondent to put in all of his work sheets and we feel that there is a great deal of material in the work sheets we don't want and, on the other hand, there are some
5478 things we do need, and I understood it was sort of a practical compromise that the Respondent would, through exhibits 100 and 99, explain in a general way and with the use of some examples the methods of allocation that were used and the nature of the expense distributed and then we could ask, on cross examination, for such additional figures entering into those computations and cost analyses as we might feel were necessary in order to enable us to analyze them properly so that while, from time to time, certain accounts are used as a basis for questioning the use of figures elicited from the witness in connection with one account, doesn't mean necessarily that the Commission will not desire to use those figures in other ways, or that those figures did not also enter into the building up of other accounts than the one which the witness is being questioned upon at the time.

Mr. Hanley: As I understand Exhibit 116, the basis of my objection was that it is not a basic figure which was used in making this cost study. Counsel has just said he thinks he is entitled to put in basic figures. That is the whole purpose of the objection. It doesn't prove anything.

Mr. Austin: Well, Judge Hanley, I think now you are just thinking of Exhibits 101 and 100. The witness I am sure, will agree with me that the Exhibit 116 does set forth basic figures which were used in allocation of Account
5479 520, company form 189—

Witness: No. The figures set forth in Commission's Exhibit 116 were in response to your specific request, whereas I asked you whether you wanted that data by individual months or whether the annual total would be used, and explained that we determined the allocation figures on a monthly basis.

You then stated that you would be satisfied to have the annual recapitulation although in our work sheets the annual figure will not be found any place. That is done entirely on a monthly basis.

Mr. Austin: Those are still the accounts and total salaries that were used in charging—making your charges to Account 520. I am not attempting to say you used those figures in the total form in which you gave them to me.

Witness: Let me state it this way: Those are the accounts and those are the annual totals in those accounts by channels but the ratios that might be determined from those totals may not be found in the allocation of any single month.

Mr. Austin: I have nothing further, your Honor, except as I said before all of these figures are necessary. If we don't put them in one way, I will have to put them in another.

They are figures which are involved in these cost studies. I mean, I will be at a complete loss if I have to
5480 explain the purpose that I want to use every figure
that I want to put in, which will mean that I have to go back over my entire preparation for cross examination and we will be here three weeks from now, I will promise you that.

Mr. Hanley: We will be here three months from now if counsel just keeps on aimlessly on these fishing expeditions.

Mr. Austin: I know exactly what I am hunting for, Judge, and I know exactly the purpose I want to make use of of these, but I don't want to state it on the record at this time.

Mr. Hanley: I think he should be required to state the purpose, Judge. I object to this sort of examination.

Trial Examiner Ballinger: The exhibit has been fully explained on the record. It is not clear to the Trial Examiner the exact purpose for which it has been offered, or was offered, and admitted in evidence, but it is in evidence and the Examiner at this time declines to strike it.

The motion is overruled.

Off the record.

(There is a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I move that we adjourn for lunch until 2:15.

Trial Examiner Ballinger: In the absence of objection the motion is granted. Now, at 1:15 p. m., the hearing
5481 stands in recess until 2:15 p. m.

(Whereupon, at 1:15 p. m., a recess was taken until 2:15 p. m.)

5482 Afternoon Session.

2:15 P. M.

Trial Examiner Ballinger: Come to order.

By Mr. Austin:

Q. From Commission's Exhibits 117-A to B, which I now hand you, Mr. Boatwright, can you state what portion of the salaries of the Detroit Field Office accounting employees, exclusive of the general office pay roll and casual help was charged to Account 200, tank wagon reseller channel, on company Form 189 for each quarter in 1940?

A. Yes, I can.

Q. Will you do so, please?

A. For the first three months of 1940, 29.9 per cent of the accounting salaries was charged to Account 200; the following quarter, 31.3 per cent; the following quarter, 39.9 per cent; in the last quarter, it was 39.1 per cent.

Q. Were the same percentages for each quarter applied to the part of these salaries allocated to direct shipment business in Respondent's Exhibit 100 and 101 to determine what adjustment should be made in the tank wagon reseller charge to Account 200 for the purpose of this cost study?

A. Yes. Any direct shipment time was taken out of the original Form 189 on the basis of the ratios for the respective channels as read.

Q. Weren't the direct shipment charges taken out
5483 of Form 189 on the basis of the percentage ratios for each class of employees separately rather than on the basis of the composite percentages which you read?

A. You are correct; that was taken out by individual departments of the total accounting department.

Q. And those percentages which you read as applied in the distribution on Form 189 were composite percentages for the entire department, were they not?

A. Yes, sir.

Mr. Austin: I have two documents here I would like to have marked for identification, if your Honor please.

Trial Examiner Ballinger: The Reporter will mark the documents Commission's Exhibits 118 and 119, for identification.

(The documents referred to were marked "Commission's Exhibits 118 and 119" for identification.)

By Mr. Austin:

Q. I show you Commission's Exhibit 118, for identification, and ask you, if you will please, to identify that document, if you can?

A. Commission's Exhibit 118, marked for identification, is a Standard Oil Company sales department comparative statement of expenses and referred to throughout these hearings as Form 189 for the Detroit Field for the year 1939.

5484 Q. Will you identify this document, Commission's Exhibit 119, for identification?

A. Commission's Exhibit 119, for identification, is a Standard Oil Company sales department comparative statement of expense for the Detroit Field, year 1940, again the form referred throughout these hearings as Form 189.

Mr. Austin: Your Honor, I offer in evidence Commission's Exhibit 119, for identification, the completed Form 189 for the Detroit Field, 1940. This form has been referred to so constantly throughout the cost testimony that I think the form itself as filled in showing the method of the company's statement of accounts for each year and particularly for 1940 is desirable. Furthermore, it is introduced for the specific reason that this form sets forth in a separate column the income and expense from the operation of leased service stations, which is not set forth separately in a separate column on Respondent's Exhibit 101, and this form shows the segregation of those items in the regular accounting procedure with respect thereto.

Trial Examiner Ballinger: Any objection?

Mr. Hanley: I don't believe I will make any objection, your Honor. We had hoped this thing could be done without the introduction of these exhibits.

Trial Examiner Ballinger: Commission's Exhibit 119, for identification, is admitted in evidence.

5485 (The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT 119," was received in evidence.)

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I have another paper here which I would like to have marked, for identification, your Honor.

Trial Examiner Ballinger: The Reporter will mark the paper "Commission's Exhibit 120," for identification.

(The document referred to was marked "Commission's Exhibit 120" for identification.)

By Mr. Austin:

Q. Will you please look at this paper, Commission's Exhibit 120, for identification, and identify it if you can? A. Commission's Exhibit 120 is a recapitulation of the tank wagon reseller volume delivered by commission agents and drivers according to product classification in the Detroit Field for the year 1940. This data was prepared, taken directly from the records of the company in response to your request the other day.

Mr. Austin: I offer this exhibit just as identified by the witness, your Honor. It relates to commission gallonage, and there has been a contention from the inception of this cost study and as far back as last June, when we first discussed it, that there is a natural division in the
5486 types of business and types of customers between those served in commission territory and those served through "A" station territory or salaried station territory. This exhibit is merely offered now for the purpose of having the record of the commission gallonage so that in the event the Commission attempts to make any distinction or comparison between the two types of cost, that is, between commission stations and salaried stations, we will have a statement of the gallonage as a starting point.

Trial Examiner Ballinger: Is there an objection?

Mr. Hanley: Only as to its materiality.

Trial Examiner Ballinger: The objection is overruled. Commission's Exhibit 120, for identification, is admitted in evidence.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT 120," was received in evidence.)

By Mr. Austin:

Q. Mr. Boatwright, do you recall last June in Washington being asked to date what accounts on the list used on Form 189 and also on Respondent's Exhibit 101— should say parenthetically Exhibit 101 wasn't in existenc at that time but the reference is made because the accounts listed are the same on both Form 189 and on Exhibit 101—is that correct?

5487 A. Yes, the itemization of the accounts is th same.

Q. Now, reframing the question, do you recall bein asked to state what accounts contain expenses which wer incurred in connection with the marketing of the companies products through "A" stations only, and one o the accounts which you mentioned in reply to that question was Account No. 106, which is entitled "Depreciatio Expense Vehicle-Trucks, Motor, Horsedrawn (includin vehicle tanks and excluding advertising trucks)."

Then at that same hearing you later corrected that testimony, Mr. Boatwright, to state that there was a certai depreciation expense going into that account on vehicl tanks amounted on other than company owned chasses, s that to the extent the expense in 106 was incurred a depreciation on vehicle tanks mounted on other than company owned chasses, that portion of the expense is "B" station expense. Do you recall that?

A. Well, either a "B" station expense or an expens incurred on commission drivers operating out of "A stations.

Q. Yes.

A. I think must have been the way the statement wa made.

Q. Well, it is a—

A. It is a commission cost.

Q. A commission cost. But you did not at that time attempt to make any division of the expense as betwee

5488 the commission cost and salaried cost for 1940.

Mr. Austin: I have asked Mr. Warmack to chec if he could the figures of the company here to determin the portion of the expense going into Account 106, whic represents depreciation on vehicle tanks mounted on othe than company owned chasses, and on Respondent's Exhibit 101 the figure which Mr. Warmack has given m which I believe was obtained with the assistance of you accountants was $4,544.86, leaving a balance of $11,710.0 for the portion of that account chargeable to the salarie driver business.

I wanted to ask counsel for Respondent whether would be willing to stipulate that that division of expense in Account 106 in the tank wagon reseller channel on Respondent's Exhibit 101 is correct subject to the right of Respondent, of course, to check those figures and if they are incorrect in any respect to subsequently make a change. I am just doing this because I have the figure here and I didn't want to ask you to go and look it up before putting it in.

5489 Mr. Hanley: I can't, Mr. Austin. We don't know whether they are right or not.

Mr. Austin: Well, I thought maybe you would accept my statement that those are the figures Mr. Warmack got and could check them yourself at your leisure.

Mr. Hanley: We will be glad to check them but we don't know whether our people gave them to Mr. Warmack or whether Mr. Warmack obtained them from the records.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Have you been able to make any check on that figure, Mr. Boatwright?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Reporter, will you go back and read the last two questions and answer?

(Thereupon the record was read as requested.)

Trial Examiner Ballinger: Judge Hanley has an objection pending.

Mr. Austin: There was no question asked the witness, your Honor.

Trial Examiner Ballinger: There is a question

5490 before that, unanswered, and then there is an explanation of the question. Isn't that the situation?

Mr. Austin: I don't think so.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Reporter: "But you did not at that time attempt to make any division of the expense as between the commission cost and salaried cost for 1940?"

Trial Examiner Ballinger: Now there is no answer
that question.

Mr. Austin: I didn't intend that as a question. Th
was just a statement by me as to the record.

Trial Examiner Ballinger: Then proceed.

Mr. Austin: The record shows that.

Trial Examiner Ballinger: Counsel for Responde
as I understand, has declined to enter into the stipulati
requested.

Mr. Austin: Well, I have just asked the witness no
since that time, whether he has had an opportunity
make any further check and, if so, I would like to ren
the request for a stipulation.

Witness: I haven't made any further check becau
I didn't understand that it was desired.

5491 Mr. Austin: I mean right now, Mr. Boatwrig
since I asked the question. I have seen you ta
ing it over with Mr. Houghton.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Will you turn to Exhibit 99, Page 19, please?
You have stated, in the middle of that page, an examp
of employes whose expenses are allocated or charged
account 000 and there are four employes named the
That is not a complete list of the employes whose salari
are charged to Account 000, is it?

A. No, it is not.

Q. Could you state a complete list of those employes
not by names, but by titles?

A. I shall enumerate the various individual positio
entering into Account 000: The field manager; the assis
ant field manager; the superintendent of construction; t
assistant superintendent of construction; the superinten
ent of maintenance; the superintendent of equipment; t
superintendent of tank wagon and warehouses; the pla
superintendent; a part of the time of the agent superi
tendent or salesmen; the plant supervisor. Those are t
positions.

Now, of those, many are in there only in part as th
are split on a time card basis but you asked for a-

5492 Q. Which ones are only in there in part?

A. The superintendent of maintenance—I a sorry, I have before me the 1940 and the instructions were changed during that year. The superintendent of maintenance is not entirely in that account.

Q. I am referring to 1940, Mr. Boatwright.

A. The superintendent of maintenance is carried entirely in that account for the months after the accounting instructions were changed. Prior to that time it's in another account. All of your plant superintendents. There was a change of instruction on your plant superintendents, also, and again I find that what I have before me is only the latter part of the year when, after the change of instructions, they were entered entirely in this account. Again, prior to the change of instructions. They were in another account.

Q. Were you referring, then, to plant superintendents?

A. Superintendent of plant.

Q. And how about plant supervisor? Is the same true as to them?

A. Plant supervisors maintain time cards representing a split of their salaries and that part which has to do with supervision of plant is allocated direct to this.

Q. In the case where there is a split on a time card basis is the theory of the split only part of the time is in a supervisory capacity and that part, only, is assigned
5493 to Account 000?

A. Yes sir. I don't know about the rest of them; whether they are on a time card basis or whether on a change of accounting instructions. I would have to check.

Q. Is there a distinction between superintendent of plant and plant superintendent and a plant supervisor? I don't mean in the method of accounting, now. I just want to know about the position.

A. About the position?

Q. Yes.

A. Your superintendent of plant is the individual in charge of the plant and is held fully responsible for all functions of the plant.

The plant supervisor is now regarded as the chief clerk and is in charge of the clerical work at the plant, coming under the superintendent of the plant.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Witness: Your superintendent of plant and your plant superintendent are the same thing.

By Mr. Austin:

Q. When did the change in accounting procedure tak place which you just mentioned affecting the superintend ents of maintenance and the plant superintendents

5494 A. I will have to consult the work sheets.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5495 A. I can answer your question positively fro the worksheet as far as the position of superintend ent of maintenance, that change becoming effective N vember 1, 1940.

Q. Where was the salary expense of superintendent maintenance charged prior to November 1, 1940?

A. Prior to November 1 salary of the superintende of maintenance was charged to Account 9944 as a part the construction men's time.

Q. What is Account 9944, Mr. Boatwright? I don think we ever went any higher than the 7000 number b fore.

A. 9944 is a clearing account which is used to distri ute the costs to various sub-account classifications on o Form 189.

Q. Well, did the salary of the superintendent of mai tenance and of the men working under him find its wa into more than one account on Form 189?

A. Prior to November 1st?

Q. Yes.

A. Yes, sir.

Q. And would that still be true after November 1s 1940, as to the construction men, and so forth, workin under the superintendent of maintenance?

A. It would still be true as to the mechanics. Th superintendent of maintenance himself, his salary, woul be wholly in 000.

5496 Q: Now, did you complete your list of employee going into Account—whose salaries go into Accou 000 or whose salaries were charged to Account 000 durin any time in 1940?

A. Yes, in whole or in part. You understand that some of these there is a split prior to entering into th account.

Q. Yes. And in making a distribution of the expens in Account 000 to direct shipments channels for the pu pose of this cost study, was it necessary for you to have the individual salaries and to use the individual salaries of the employees charged to Account 000?

A. It was necessary for us to have and to use the salaries of individuals whose functions in any way touched upon or whose time was absorbed in part by direct shipment business.

Q. Which of the employees whose salaries are charged to Account 000 were concerned in part with direct shipment business?

A. Salaries of the manager, the assistant managers, the superintendent of construction, the assistant superintendent of construction, superintendent of maintenance, superintendent of equipment, and then that part of the salary of those individuals whose salaries were split on a time card basis which was charged to this account where selling or calls were made on any jobber or direct shipment accounts.

Q. Aren't there some employees there that are excluded?

A. Yes, there are.

5497 I would like to correct that last statement which I made. Where the time was devoted to calling on jobbers, the entry is in 004, selling cost, not in this, so in the allocation of Account 000, the superintendent of plant was not needed. That is wholly a tank wagon charge.

Q. How about plant supervisors?

A. That is wholly a tank wagon charge.

Q. Were there any others there whose salaries were treated as wholly a bulk plant charge?

A. Plant superintendent.

Q. Tank wagon superintendent?

A. There is a tank wagon superintendent—or there is a superintendent of tank wagon and warehouses, which is wholly a tank wagon charge.

Q. On page 84 of Respondent's Exhibit 100 there is a table which is stated to be "Ratios of Time Devoted to Direct Shipment Business for Each Individual Whose Salary and Expense are Included Under Supervision Costs, Determined According to the Above Outline."

Why is not the superintendent of maintenance included in that list?

A. Well, the answer to your question is to be found on page 83 of Respondent's Exhibit 100, in the explanatio there. The superintendent of equipment—

Q. Maintenance.

5498 A. Superintendent of equipment.

Q. I asked you about superintendent of maintenance.

A. It is superintendent of equipment on page 84.

Q. At the bottom of page 83 is a statement on that.

A. Well, just—on the bottom of page 83 is a statemen on that, that his time was allocated on the basis of th analysis of all work orders maintained on the variou pieces of equipment having any contact with direct shi ment business. Therefore, in keeping with the paragrap at the bottom of page 83, the superintendent of maintenanc is not allocated as are the other positions enumerate because his time is not only based upon the ratio of tim of the mechanics but time and equipment on the vehicle as a ratio to total operation and maintenance of thos vehicles.

Q. Well, it says at the bottom of page 83, Mr. Boa wright, that the salary of the superintendent of mainte nance was spread on the basis of the allocation of effort o men working under his supervision. Now, doesn't tha mean that definite percentages were applied to the portio of the superintendent of maintenance's salary which goe into Account 000? And I will refer you also to the firs paragraph on page 83 in which a somewhat similar metho was used for the purpose of construction, and since th percentages applied to these salaries for allocation of dire shipments is stated for the purpose of constructio 5499 and superintendent of equipment, I would also lik to have the percentages for the superintendent o maintenance.

Trial Examiner Ballinger: We will take a recess fo five minutes.

(A short recess was taken.)

5500 Trial Examiner Ballinger: Come to order. Is there any question pending?

Mr. Austin: Yes.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

A. The statement that percentages were used to alloca the salary of the superintendent of maintenance for th months of November and December when included in expense classification 000, is correct:

Q. And have you been able to ascertain those percentages?

We are speaking only, of course, of the percentages used for allocation to the three direct shipments channels similar to the percentages given on page 84 for other employes whose salaries are included in Account 000?

A. That is my understanding of the question and of the answer.

Based on a hasty calculation, bringing the months together, I read the percentages as follows as applicable to each channel: Jobber, naphtha, gasoline and refined oil, the last two months, 80%.

Mr. Hanley: The last two months of 1940.

The Witness: Yes, sir.

A. (Continuing.) Jobber other products, 25%. Other direct shipment customers, 26%.

Mr. Austin: I am not sure whether it was on or
5501 off the record a few days ago but counsel for the
Respondent expressed a desire that the individual salaries of the supervisory employes whose salaries are charged to Account 000 in Respondent's Exhibit 101 be not spread upon the record. I would like to ask counsel for Respondent whether he still objects or whether the Respondent still objects to spreading on the record the individual salaries of the individual supervisory employes going into that account?

Mr. Hanley: If your Honor please, the Respondent does still object to the individual salaries of an employee going into the record. Mr. Austin has asked that I briefly indicate the reason for that. They are, primarily, twofold. One is that it has just been found desirable to keep that class of information as confidential as possible, which is true for a number of reasons which I am sure the Commission will appreciate and, I believe, counsel has already recognized and, secondly, it is the position of the Respondent that the individual salary of any particular employee is in no wise material. That the only material thing in this inquiry is the method of allocating that salary, whatever it may be, as to any particular employee.

Mr. Austin: Aside from the question of materiality do I understand that the Respondent would be reluctant to disclose individual salaries of its top supervisory employes?

Mr. Hanley: That's right, Mr. Austin, and we 5502 wish just not to do it and I wish to state further if there is any question about my former statement being on the record that all of the individual salaries of individual employes have, in fact, been disclosed to Mr Warmack, and I believe it to be true that that information has been passed on to Mr. Austin. At least there is no objection to having that done. We haven't objected at all to the accountants for the Commission knowing, for their own purposes of calculation, in test checking our arithmetic what the actual salaries are. Our objection goes to the matter of making it a public record.

Mr. Austin: In view of that objection I would like to ask the witness just one or two questions on salaries.

By Mr. Austin:

Q. In the first place, Mr. Boatwright, are the entire salaries of the field manager and two assistant field managers charged to Account 000 on Respondent's Exhibit 101 referring now, to 1940?

A. They are.

Q. And can you te[illegible] whether the total of the salaries of the field manager and two assistant managers amount to more than half of the total salary charge of $51,360.21 which is made to salaries, supervision account 000 on Respondent's Exhibit 101?

A. The salaries paid to the field manager and to the holders of the position assistant field managers 5503 inasmuch as there was a transfer during the year 1940, but the sum total of the salaries for those three positions exceed 50% of the total amount of Account 000 as shown on Form 189 for the year 1940, being—

Q. And as shown on Respondent's Exhibit 101?

A. Yes, sir.

Q. Now turning to Page 84—

Mr. Hanley: May I ask a clarifying question, if you are through with that particular examination, Mr. Austin

As I understand your testimony, Mr. Boatwright, there may be a considerable number of employes whose salaries in part are allocated to Account 000?

The Witness: That's correct.

Mr. Hanley: The salaries of all of these three positions manager and two assistant managers are allocated to Account 000?

The Witness: The entire salary of those three positions goes into this account.

Mr. Hanley: Did you understand Mr. Austin's question to inquire as to whether or not the salaries of these three positions was something in excess of 50% of the amount of the allocated portion of salaries to Account 000?

The Witness: Yes. I think that was his statement inasmuch as he quoted, the actual figure being $51,360.21. In other words the salary for these three positions

5504 is in excess of 50% of that particular figure.

Mr. Hanley: One further question:

When you made the study which is reflected in Respondent's Exhibit 100, as I understand it you made an analysis of the actual time spent by these three officers in so far as you were able to do that; which time went to work on jobber accounts.

The Witness: Jobber and other direct shipment accounts.

Mr. Hanley: And that you then allocated that direct shipment expense to direct shipments?

The Witness: Yes, sir.

Mr. Hanley: As a direct charge, Mr. Boatwright.

The Witness: Yes, sir.

Mr. Hanley: After having done that, as I understand your study, you took the remaining portion of those salaries and allocated them on a basis of a factor which you had determined relative to the effort expended by the office.

The Witness: Predicated upon the sum total of the effort expended by people under these three supervisory positions.

Mr. Hanley: Yes.

The Witness: Yes.

Mr. Hanley: Expended on the jobber or direct shipment business.

The Witness: Yes.

5505 Mr. Hanley: And that's all disclosed and explained in Exhibit 100, is it not?

The Witness: Yes, that's clearly stated there.

Mr. Hanley: That's all.

Mr. Austin: Well, I was just coming to that.

By Mr. Austin:

Q. Turning to page 84 of Respondent's Exhibit 100 there are certain percentage figures given which, I believe, represent the percentages of time of each of the supervisory officials there named, which is allocated to each of the three direct shipment columns on the basis of salary value of such time, is that correct?

A. Salary or hours, either one. It would be the same.

Q. As just explained in response to Judge Hanley's questions, and also as described on Page 82 of Respondent's Exhibit 100, I understand that a part of the field manager's time was charged direct to jobber operations, is that correct?

A. Yes, sir.

Q. Does that reference to jobber operations mean that none of the field manager's time was charged direct to direct shipment other customer's?

A. The only direct selling time found on behalf of the field manager was incident to jobber direct shipments.

Q. And is it a fact that the time covered by that direct charge is in included in the time represented by the 5506 percentage 1.73% and .06% on Page 84?

A. Yes, that is correct.

Q. But it is also correct, is it not, to state that the percentage of the field manager's time represented by that direct charge is not shown separately anywhere?

A. No, it is not shown separately in this exhibit.

Q. I wonder if you would have any objection to stating the portion of the field manager's salary, or perhaps it would be better to state the percentage of his total hours which was assigned directly to the two jobber columns. In other words, separating, if you have already done so, as I believe you have, in the preparation of your cost study separating the two figures 1.73% and .06% so that it wil appear what portion of those percentages represent a direct charge and what percentage represent a charge based upon the allocation of time of other employes.

A. All direct selling time to jobbers on the part of th field manager is charged against jobber, naphtha and gasoline. Mr. Rampagh does the selling on that produc almost entirely. That represents 1.355%, which is included in the 1.73%.

Q: Now still referring to those three percentage figure opposite the field manager's position on page 84 of Respondent's Exhibit 100, let us first deduct the 1.355 from 1.73%, and what is the balance?

A. .375%.

5507 Q. Will you explain how the three percentag figures, .375 per cent, .06 per cent, and 1.23 per cen were computed? With particular reference to what employes' hours were used in determining those percentages and in what accounts the employes' hours fall?

A. The figure .375 was secured by taking the sum total hours of all employees in the Detroit Field as the base.

Q. Excepting Mr. Raupagh?

A. Excepting Mr. Raupagh—as the base and then taking the sum total of the hours devoted to jobber, naphtha, gasoline, and refined oil of all employee's in the Detroit Field touching upon that business in anyway, and expressing that as a percentage of the base which is made up of the total effort in the field excepting Mr. Raupagh.

Q. Was the same method used for the other two percentages in the jobber or other products channel and other direct shipment customers?

A. Yes, sir.

Q. And in using as one part of that measuring factor the total hours of the other employees in the Field which were allocated to the respective direct shipment channels, did you use the hours of all employees even where their time was buried as a part of the expense in these various accounts that are only in part salary and in part other, or did you use only the hours of the employees enter-
5508 ing into those accounts on Commission's Exhibit 116?

A. All hours; grand total devoted to direct shipments.

Q. Did that involve the separation of salary hours from the expense of each of those accounts where the expense is only in part salary?

A. Well, it involved a separation of hours. When you say salary, again the only difference being that we worked on an hourly unit basis instead of a dollar basis, but we segregated the time, and that was segregated even for the painters, the mechanics, the pipefitters and everybody else right on through.

Q. That is the direct shipment time?

A. Yes, sir.

Q. Now, turning to the assistant manager, wholesale, percentages of his time allocated to the direct shipment channels as shown on page 84, was there any of his time which was charged directly to any direct shipment channel in the same manner that the 1.35 per cent to Mr. Raupagh's was charged directly?

A. There was no direct shipment time either the assistant manager, wholesale, or the assistant manager resale. Oh, assistant manager, wholesale.

Q. Is the same true as to the assistant manager, resale

A. He did have some direct selling time.

Q. Was that time all included in the .59 per cen
5509 on the jobber, naphtha, and gasoline?

A. It was.

Q. Can you give me that figure for the direct allocation

A. .220 was the direct selling time.

Q. Leaving .73 per cent allocated according to the tim of the employees working under him?

A. That's correct

Q. Will you now explain as to the assistant manage wholesale, what employees' hours and the portion thereo charged to direct shipment were used to obtain the percentages .41, .04, and 1.36?

A. I wonder if I might give you the answer to you question that would not enumerate all individuals on th payroll by answering you generally in this manner There are certain employees directly responsible to th assistant manager, reseller. There are certain employee directly responsible to the assistant manager, wholesal In determining the allocation factor to use on the assistar manager, wholesale, we took out of the total all thos individuals directly responsible to the assistant manage reseller, and regarded the remainder as providing th basis for recapitulating the distribution of effort of individuals working under the assistant manager, wholesale. O the other hand, when we are determining the ratios fo the assistant manager, reseller, we took out the grou
5510 of individuals responsible only to the assistant manager, of course, and determined the ratio for th assistant manager, reseller, upon the residual of employe in the Detroit Field.

Q. Then as to all of those employees who do not wor directly under either one of those two superintendent I understand that the ratio of their hours charged to dire shipment was used for both the assistant manager, wholesale, and the assistant manager, reseller?

A. Yes.

Q. Do you know how many employees are assigned o did you treat as working directly for each of the tw assistant managers?

A. Yes, I have that right here on the worksheet.

Q. Will you state it?

A. Well, it varied by months. Those working exclusively for Mr. Hamer were either 38 or 39.

Q. He is the assistant manager, resale?

A. Yes, sir.

Those working exclusively under Mr. Blough varied from 56 to 58.

Q. How many employees are there in the Detroit Field?

A. That likewise varies by months; but it varies from 500 to as high as 540.

Q. Does that include commission agents?

A. Yes.

5511 Q. Were they treated as employees working directly under the assistant manager, wholesale, or were they treated as part of the residue coming partly under both?

A. Partly under both.

Q. And since in the group of employees whose time was used for making the charge to direct shipments, for the time of each of the assistant sales managers, there was included a large group under the supervision, at least, in part, of both assistant managers plus, in each case, a separate group charged— or, rather, working directly under the particular assistant manager, was the time in each case of the employees working directly under the particular assistant manager multiplied by two or was other adjustment made so that there would be no undue waiting of the time of the groups working under both? I will try to explain that, Mr. Boatwright.

A. I am afraid that will be necessary, sir.

Q. If you used for a large group of employees somewhere around 450, or in that neighborhood, used their time and their direct shipment ratios for distributing the time of one assistant manager and added to that you used a single group of employees working directly for that field manager, and they were all combined in one group, were they not for the purpose of that allocation?

A. That's right, as a component part of his group.

5512 Q. Isn't it true that theoretically, at least, only a portion of the time of the large group should be assigned or used in allocating the time of the assistant field manager, since if that large group works for both, probably only part of their time or part of their functions are they working for one and in part for another?

A. Not if you are going to apply your residual percentage to the total base salary of your employee supervisor. If you are going to do that, then you have to divide your salary of your supervisor by two. You come to the same end, Mr. Austin, whether in one case you multiply by two or in the other case you divide by two. But if I have got to multiply one by two then—

Q. Well, I don't want to get into an argument about it. It just occurred to me that as to each of the groups of employees who work directly for the respective assistant managers you used each of those groups only once and as to the rest of the employees you have used it twice, and I was just raising the question whether in your opinion that makes any difference in the allocations?

A. Not as long as I apply the ratios so determined to the total salary of the individual in the supervisory capacity.

Q. In determining the portion of the assistant manager's time to be charged to direct shipment channels, you used ratios which were based upon a distribution of
5513 hours and not of salaries of the employees working under them; is that correct?

A. Yes, sir, distribution of hours we used.

Q. And does that not mean that the time of all employees working under these two assistant managers was given equal weight regardless of the salaries of the various employees?

A. It does.

Q. And is there not a wide variation in the salaries of the various employees working under the two assistant managers and under the field manager?

A. That is a variation, sir.

Mr. Hanley: I am sure I understand what this is about. May I ask a question, your Honor?

Trial Examiner Ballinger: You may.

Mr. Hanley: As I understand your study, Mr. Boatwright, you took accomplishment and effort in time of all the employees and then on the basis of the ratio of that time to total time effort by those employees, you used that as a factor against the salary of the supervising manager?

The Witness: Of the employee, taking first the distribution of effort of an individual employee. We then allocated the salary on the basis of the allocation of hours. Now, to allocate the salary of a supervisor, we would take the distribution of time of employees working under 5514 his supervision.

Mr. Hanley: That is what I am getting at.

The Witness: Yes.

Mr. Hanley: You acquired the actual time factor so far as the individual employee is concerned against his individual compensation?

The Witness: Yes, sir.

Mr. Hanley: Then when you came to allocating supervising personnel, you took the total time effort of jobber or direct shipment accounts as to total time effort in the office and applied that ratio against supervising officers' salaries?

The Witness: Yes, sir, except that it was broader than just in the office; it was the sum total of employees.

Mr. Hanley: Yes; I understand that.

The Witness: Yes, sir.

Mr. Hanley: Now, the thing that isn't clear to me is this: If the suggestion of Mr. Austin is true, and I understand it is, you gave no consideration to the salary of an employee when you used his time against the salary of his supervisory officer; you just used effort?

The Witness: That is a true statement.

Mr. Hanley: Consequently, if an employee were getting a thousand dollars a month and another one was getting a hundred dollars a month, and they both used an equal 5515 amount of time effort on jobber business, you gave in your allocation of the supervisor's salary equal weight to the supervision of the hundred dollar employee as with the thousand dollar employee; is that now the effect of what you did?

The Witness: That is correct.

Mr. Hanley: So the net effect of your system of allocating here would be on the basis of the value of the highest paid employee that the field manager, for instance, supervised?

Mr. Austin: I object to that question, your Honor. I didn't object to Judge Hanley interpolating certain questions here for the purpose of bringing out the facts as to what was done, but I don't believe that this is the time to ask for further opinions on redirect, and I think that question would probably lead to further controversy or questioning.

I object to it upon the ground that it is not a proper interpolation of cross examination.

Trial Examiner Ballinger: The objection is overruled. The question has been asked and the Examiner would like to hear an answer.

Mr. Hanley: Is it clear to you, Mr. Boatwright?

The Witness: No. I would like to have it read, please.

(The question referred to was read by the Reporter.)

5516 Mr. Austin: I further object to it on the ground that it is a leading question.

Trial Examiner Ballinger: The objection is overruled.

The Witness: Well, the net effect is that what we state in fact as the factor determining the allocation of supervision is manpower, whether he is making $100 a month, $250, or even greater amounts, but it is a composite of the difference. It is neither on the basis of the highest paid man nor on the basis of the lowest paid man. It is on a cross section of the men.

Mr. Hanley: I may not have made myself clear. The allocation which you have made to the jobber business is a cost, which cost is based on Mr. Raupagh's salary, for instance, exactly the same as it would be if every employee in the Detroit Field were getting what the highest paid employee is getting supervised by Mr. Raupagh.

The Witness: Oh, yes. In answer to that question, as I now interpret it, if every employee in the Detroit Field had been making a salary equal to the highest under Mr. Raupagh's supervision, the allocation factor used would have remained exactly the same.

Mr. Hanley: That is all.

By Mr. Austin:

Q. That is also true, isn't it, Mr. Boatwright, if
5517 every employee in the Field were making an equal salary regardless of whether it was equal to the highest or equal to the lowest?

A. Yes, that would be true.

Q. It would have been possible, would it not, Mr. Boatwright, to have computed the ratios to be applied to the salaries of the Field managers for the purpose of distributing them to direct shipment channels by using the salaries of the employees working under them instead of the hours?

A. Well, it would have been possible. It would have just extended the work.

Q. Well, what I was just leading up to was this question: Did you make any calculation as to the effect that the use of salary of employees would have had as contrasted with the results you arrived at by using hours?

A. No such calculation was made because hours are a more acceptable means of allocation.

Q. In your opinion?

A. In my opinion.

Q. You have referred to the fact that certain employees were treated as working directly under each one of these two assistant managers and that the balance of the employees were treated as working partly under the supervision of both. Is there any division of accounts which it is practical to make or which you can make in that connection? For instance, are there any accounts here,
5518 salary accounts, which include salaries of employees assigned only to one or only to the other of the two field managers?

A. I would have to review the Form 189 to see if there is such a classification possible, for the simple reason that our accounts just are not set up on the basis of what the two assistant supervisors are doing.

5519 Q. Well, I didn't mean whether it was possible, Mr. Boatwright. I meant whether you actually—you actually did group certain employes, whether it was 38 or 40, to one of your field managers and you group fifty-odd, I believe, to the other. I am just asking you as a matter of fact whether or not either one of those groups go into his account or whether there is any one account here which includes only the salaries of employes of one or the other of those groups.

Let me ask you a specific question. Just as an example, Take Account 005, "Salaries—Advertising." Would the salaries in that account fall into the large group where the employes are partly under both field managers or would those salaries be all salaries of employes working directly for one of the managers?

A. You are asking a question directly.

Q. I am asking that as an example and if the whole question is not practical, you can tell me so.

A. The salary of the advertising representative is considered as being under the supervision of both the field managers.

Q. I suppose that their seller salesmen will be a group which are assigned as working directly for the assistant manager reseller?

A. Yes, sir.

Q. And would city salesmen be a group assigned directly to the assistant manager wholesale?

5520 A. Yes, sir.

Q. "B" station salesmen would be assigned to assistant manager wholesale?

A. Yes, sir.

Q. Asphalt salesmen?

A. Yes, sir.

Q. Industrial salesmen?

A. Yes, sir.

Q. Can you carry that along any farther along any of the classifications we already have?

A. Heating oil salesmen—

Q. You are speaking, now, of assistant manager wholesale?

A. Yes, sir. Special salesmen, heating oil. Tank wagon superintendent. The "A" station agents. The automotive engineer and the sales promoter and assistant sales promoter wholesale would be under the assistant manager wholesale.

The specialized reseller salesman. The T. B. A. representative. The sales promoter reseller; the assistant sales promoter reseller and certain clerks working for these promoters would be exclusively under the assistant manager reseller.

Q. Does that cover by general classifications the employes who were treated as working directly for one or the other of the assistant managers?

A. Yes, sir.

5521 Q. Were the employes whose salaries make up the salaries of expense, Account 200, all treated as employes in part under both managers?

A. Yes.

Q. And were the employes whose salaries who make up the expense entering into Accounts 006 and 008 treated as employes whose time was under the supervision of both the assistant managers?

A. Yes, sir.

Mr. Austin: May we be off the record a moment?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I move that we adjourn until 9:00 o'clock tomorrow morning, your Honor.

Trial Examiner Ballinger: The motion is granted, and now, at 5:10 p. m., the hearing is adjourned, to be reconvened at 9:00 a. m., February 24, 1942, in Room 859, Federal Building, Detroit, Michigan.

(Whereupon, at 5:10 p. m., February 23, 1942, the hearing in the above-entitled matter was adjourned.)

5522

Room 859 Federal Building,
Detroit, Michigan,
February 23, 1942.

Met, pursuant to adjournment at 10:00 A. M., War Time.

Before: Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission;

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois; and

Arthur J. Abbott, Esq., of the firm of MacMahon, Abbott & Roberts, 2230 Buhl Building, Detroit, Michigan; appearing for the Respondent.

5523 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing of Docket No. 4389, in the matter of the Standard Oil Company of Indiana, is reconvened in Room 859 Federal Building, Detroit, Michigan, at 9:00 a. m., Eastern Standard Time, February 24, 1942. The last hearing was in the same room in the same city, February 23, 1942.

You may proceed.

JOHN W. BOATWRIGHT was thereupon recalled as a witness for the Respondent and, having been previously first duly sworn, testified further, as follows:

Direct Examination (Resumed) by Mr. Austin.

Q. One or two more questions about the superintendent of maintenance, Mr. Boatwright.

For the first ten months of 1940 was the time of the superintendent of maintenance allocated to direct shipment channels on Respondent's Exhibit 101 on the basis of the ratio of direct shipment efforts of the employes working under him, to the total effort of those employes?

Trial Examiner Ballinger: Do you understand the question?

Witness: Yes.

A. It amounts to that, in fact, although it isn't 5524 exactly put that way; as about as well as I can express it.

During the first ten months the superintendent's of maintenance time was included with other employes in that department in the calculation of a number of hours of effort reduced to a productive hour rate. Is that clear; to that point?

Q. Yes.

A. Then measuring the number of hours devoted to direct shipment effort this productive hour rate was applied, which automatically allocated the expense incident to the superintendent's of maintenance position.

Q. Well, yes, but the point in which I am interested in is when you state the number of hours your direct shipment was estimated.

A. No, no.

Q. I didn't mean estimated, but calculated.

A. It was taken direct from the work sheets.

Q. I don't know what word you used; whether you said estimated, or what, but you determined it anyway.

A. We determined the exact number of hours devoted to direct shipment.

Q. As to the superintendent, were his hours determined as a proportion of his total hours based upon the number of hours of the employes to their total hours?

A. That wasn't necessary because his hours and 5525 his salary was in the total cost of this department: Therefore, by extending the number of hours actually worked on equipment having to do with direct shipment, and extending that by the composite average productive hourly rate, then we have automatically allocated his expense as well as the expense of the mechanics—

Q. How did you find the number of hours on direct shipment?

A. By a complete review of the work orders.

Q. Did that include the time of the superintendent as well as the others?

A. No, that included the time of the construction men. Then, inasmuch as his salary was included in the productive hourly rate calculated at the end of each month for this division of our company's operation, we estimated the hours of time of the construction men by this overall average salary which included the superintendent's of maintenance salary.

Q Then perhaps my question is refuting the productive hourly rate, using the salary of the entire department for that purpose, as I understand you have just explained it—

A. Yes, sir.

Q. (Continuing.)—but while you used the entire salaries, did you use the entire hours or did you use the hours of the superintendent for the purpose of obtaining the productive rate per hour?

5526 A. It was entire hours.

Q. What I was trying to get at was whether or not the salary of the superintendent of maintenance was treated the same way in the first ten months as it was in the last two, even though it was charged to different channels in the last two months.

A. No. I understand your question. It was not treated in the same way for the simple reason it couldn't be.

Q. And the direct shipment charge for that department was spread among various accounts for the first ten months and, as a matter of fact, with the exception of the superintendent himself, also during the last two months, is that right?

A. Yes, sir.

Q. Are the construction men and mechanics working on installation and maintenance of E. L. A. equipment under the supervision of the superintendent of maintenance?

A. Yes, sir.

Q. And are the construction men or mechanics who install and maintain equipment at leased service stations also under the superintendent of maintenance?

A. Yes, sir.

Q. Are the employes who install and repair advertising signs at dealer outlets under the superintendent of maintenance?

A. Yes, sir.

Q. Now I have one or two questions regarding the
5527 responsibilities of the field manager.

Is the Field Manager, Mr. Raupagh, charged with supervision of all marketing activities in the Detroit Field?

A. Yes, sir.

Q. Does he supervise all employes of the sales department working in that field?

A. Yes, sir.

Q. And does his responsibility cover the sale of all products sold by the Standard Oil Company in the Detroit Field?

A. Yes, sir.

Q. And does his responsibility cover sales to all classes of customers to whom the company sells in this field?

A. Yes, sir.

Q. In short is not Mr. Raupagh responsible to the company for the success or failure of the company's business in the Detroit Field?

A. Certainly.

Q. The field managers and the organizations under them in the respective fields are a part of what you call the sales department of your company? Are there not two departments; sales and manufacturing?

A. Yes, there is a sales department and a manufacturing department. I am not sure just what you mean, though.

Q. I wondered whether—isn't it true that the
5528 various fields that we have been treating here, as we
have been treating them, are sales fields; part of the sales department headed by the field manager?

A. That is true.

Q. And you are the head of the sales research department, are you not?

A. Yes, sir.

Q. And I wonder if you could state, in your opinion, how the success of the company's business in a given field is measured or upon what does it principally depend?

A. There are many factors taken into consideration. Obviously, one: Our accomplishments—

Mr. Hanley: I wonder if that is a pertinent question, your Honor.

Trial Examiner Ballinger: The Examiner doesn't understand the materiality of it. Counsel for the Commission must have some object.

Mr. Hanley: There are a thousand ways you can measure it. You can write a book on that.

Mr. Austin: I don't know that that is so. At least I didn't when I asked the question, but I am just going into, generally, the responsibility of the field manager and the fact he is responsible for the success of the business and now I am asking the witness how the success of the business is measured or if he could give any answer 5529 that would set forth the principal factor or factors which would measure the success of the business.

Mr. Hanley: I will withdraw the objection, your Honor, but I would like to have the witness, in answering the question, indicate what kind of success he is talking about when he refers to "success".

Witness: All right.

A. As I think I started, I pointed out that there were many factors taken into consideration in evaluation of the accomplishments of the sales field. Naturally, I shall name only a few of the more prominent ones.

Number one is the trend of sales accomplishments by products and by channels of distribution.

By Mr. Austin:

Q. What do you mean by "trend"?

A. The direction of our sales trend; be it up or whether it is down. That, alone, is inadequate and, therefore, we attempt an evaluation of the trend of sales by product and channel, according to the potential as reflected by the best indication we can get on total consumption for the field.

Next, the analysis of the success or the failure of the manager and the assistant managers' in dealing with their personnel problems, in handling men, in getting the utmost out of their men and the cooperation and the follow-through that is a component part of the effort of the sales force.

5530 Q. Would that be in connection with keeping down unit costs of operation?

A. In part, and also in part in terms of sales accomplishment because we may talk at great length on many other factors but when all is said and done the manager who has his entire personnel with him to the man, is the man who is going to produce the best results.

Another standard that is followed constantly is the analysis of marketing costs in the 27 different fields and the control of expenses in the respective fields.

Now I think those four or five that I may have mentioned are those most commonly used, although you will find different men in the executive positions who lean more heavily on one or the other, but these four or five things are pretty generally followed.

Q. Then judging from your first two that you mentioned, would you say that volume of sales, compared with the potential market, was the most important measure of success?

A. Your term "success" is so terribly broad. A man might be a very poor business man and yet be able to accomplish a very good sales result relative to potential but ignoring the question of realization received for a price.

Q. What do you mean by "realization?"

A. The price that we get for it.

Q. Does the field manager have anything to do
5531 with fixing the prices at which products are sold?

A. He recommends that we meet or do not meet competitive prices in given local markets.

Now a manager who is extremely price concious will recommend and will advocate, on the part of the company, through the general office, that we meet competitive prices right and left. Now that manager may get unusually good sales results in terms of volume.

Q. You mean provided the company permits him to follow out his price theories?

A. Yes; provided the company follows his recommendation.

Q. On price recommendations?

A. That's right.

Now if the company does follow his price recommendations he can get a very high volume and we can do quite well, let us say, in respect to potential but that might not be good business.

Q. Volume, I suppose, and realization naturally go together and neither one—rather, volume alone isn't of much benefit to the company without proportionate realization, is it?

A. That is correct, and we can't get anything on the dollar value of potential. There just is no such figure as that that is available. You are aware of the fact, I am sure it has been brought out in this trial, that throughout we
are the high seller. It is unfortunate, but it is just
5532 one of the penalties of size.

Mr. Austin: May we pause off the record for a moment?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

We will have a recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Hanley: It has been requested, off the record, by counsel for the Commission, that the work sheets prepared by and under the direction of Mr. Boatwright, which are very voluminous and which underlie the conclusions expressed in Respondent's Exhibits 100 and 101, be delivered to accountants for the Commission and removed to Washington, there to be further examined by the accountants for the Commission and perhaps copies to be made of the whole or a part of such work sheets.

I have now consulted with Messrs. Boatwright and Houghton, whose work sheets these are and have had the benefit of the advice of the Office Manager of the Detroit Office, as well, and am informed that it is the only copy of such work sheets in existence and that these gentlemen have been so careful of them that they have declined to ship
them between Detroit and Chicago by express but
5533 have always carried them and have never let them
out of their possession and custody. I find them definitely opposed to permitting the work sheets to be removed from their immediate custody at any time and in explanation of this I will say that the Respondent would be absolutely helpless in the matter of explaining its work in

the event even one of the series of these work sheets was lost. In order to replace it it would simply mean a re-doing of several months of original work which was accomplished in the summer and fall of last year, here in Detroit, by many accountants.

During the past several weeks Mr. Warmack of the accounting staff of the Commission has had an opportunity to examine and, has examined the work sheets, together with many other records of the Respondent in the Detroit Office and has been assisted in that effort by Mr. Houghton of the Chicago Office and by others in the Detroit Office.

I am informed that in all probability it would be most difficult if not, indeed, impossible for any accountant, no matter how competent, to take the work sheets and from an independent examination of them and without some explanation of those who made them and understood them and understood the underlying records, that such effort would probably and we think most likely result in erroneous conclusions.

For that reason, when it was learned that Mr. Warmack
was going to make his studies here, it was arranged by
5534 the Respondent that Mr. Houghton, who is very
familiar with the work sheets, should be relieved of his duties in the Chicago Office and remain in Detroit, which he has done.

The Respondent is perfectly willing to either continue that arrangement or make such other arrangement for the aid of Mr. Warmack's examination of the work sheets as may be feasible but for all of these reasons indicated the Respondent feels it is imperative that we should decline to permit the work sheets to leave the custody of the Respondent's officials whose property they are and who want to be certain that they have continuous personal custody
of them.

5535 Mr. Austin: Well, do I understand that there is
no objection to our having some of these sheets photostated here if we so desire so that we can take these photostats back? I don't understand that we want to get all of them by any means, but I think Mr. Warmack wants copies of some that he has been over.

Mr. Hanley: Your Honor, and Mr. Austin: I am rather inclined to the view that these work sheets are not records of the company in the usual sense and in the sense that entitles the Commission to obtain them at all unless the Respondent voluntarily exhibits them. Now, we make no point of that; we haven't. As I have said, Mr. Warmack has had complete access to them and, so far as I am concerned, I haven't any objection to Mr. Warmack making photostats or other copies of these worksheets here, provided and conditioned upon the proposition that before he does so he understands thoroughly what such worksheets mean with the aid of Mr. Boatwright or Mr. Houghton. I don't want any long conclusion being drawn from some independent examination and later application of a work sheet; and I don't know just how the mechanics of that might be devised, but I would want to be thoroughly assured that that would not happen.

Mr. Austin: Mr. Warmack and Mr. Houghton have been working together on this and I see no difficulty if it be left
up to them for them to determine what is wanted and
5536 what copies are wanted and there is no—if it is
agreeable to you to leave it to the accountants, why, I think Mr. Warmack would just like to know whether he can, since he can't take them back to Washington—whether he can make arrangements within some limited expense figure which probably will be applied to have some copies made here. Of course, any copies that are made would be with the knowledge and under the direction of Mr. Houghton and Mr. Boatwright, I assume.

Mr. Hanley: I am perfectly willing that Mr. Warmack and our people discuss it and arrive at what they think is a proper conclusion. Indeed, I don't think I can go any further in the matter until that happens.

Trial Examiner Ballinger: That is sufficient for the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Referring to Account 001, Mr. Boatwright, it is stated on page 85 of Respondent's Exhibit 100 that salaries shown in this account represent the stenographic and clerical assistance afforded to the men working in a supervisory capacity?

A. Yes, sir.

Q. Are all of the salaries entering into this account the salaries of the stenographers and clerks?

5537 A. All individuals whose salaries are in that account are stenographers or clerks with the exception of part of the salary of one employee.

Q. Who is that? The asphalt representative?

A. Yes, sir.

Q. And are the employees with the exception of the asphalt representatives whose salaries or a part of whose salaries are charged to Account 001 stenographers and clerks to supervisory employees who are grouped in Account 000 or may some of the employees in Account 001 be assistants or stenographers or clerks to employees in Accounts other than Account 000?

A. The only exception to your statement that all employees whose salaries are shown in Account 001, being under the supervision of individuals whose salaries are shown in 000 is in the case of stenographic assistance furnished to the supervisor of personnel whose salary is not included in Account 000.

Q. Where is the salary of the supervisor of personnel charged?

A. In Account 220, expense, employment department salaries and all other expense.

Q. Is the salary of the stenographer to the supervisor of personnel allocated to direct shipments upon the basis of the ratio of the personnel supervisor's time to direct shipment against his total time?

5538 A. Yes, sir.

Q. And is that explained under Account 220 in Respondent's Exhibit 100?

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Is the method of allocation to direct shipments of the time of employees in the employment department stated on page 110 of Respondent's Exhibit 100?

A. It is.

Q. And is the method of allocation used there the same method which was applied to Mr. Raupagh's salary as described by you yesterday?

A. Yes, it is the same.

Q. I suppose, of course, with the exception that Mr.

Raupagh's salary would also be included here where it would not be in determining the allocation for his own salary?

A. It wouldn't make any difference whether Mr. Raupagh was included here or not as much as they are the same ratios, you see.

Q. That is right. I see. I was trying to be technically accurate in my—

A. Yes, it would make no difference.

5539 Q. I believe you already stated that the entire salary of the stenographer to the supervisor of personnel follows the method of allocation applied to the employees in the employment department?

A. Yes, sir.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. How much in dollars are the salaries of the stenographer to the supervisor of personnel as charged to Account 001, for 1940?

A. $960.

Q. Does that represent all of the time of that stenographer assigned to the supervisor of personnel or does it represent the time of that employee for a certain number of months?

A. That represents a certain number of months.

Q. And what is the reason for the division?

A. It was a change of the accounting instructions during the year.

Q. During the first part of the year—do you know when the change took place? I don't know whether that is material but—well, I will ask the question I started to:

Before the change took place where was the salary of this stenographer charged?

5540 A. It was in Account 220.

Q. Did the salary of the supervisor of personnel remain in Account 220 for the entire year?

Mr. Hanley: If your Honor please, the Respondent at this time moves to strike the answer to the last question that was answered, and objects to that question and objects to the present question, for the reason that it is entirely immaterial and irrelevant and has no probative value, and, in any event, is repetitious and cumulative and encumbers the record.

The examination that has been conducted by counsel for the Commission in a great deal of his questioning in respect of these salaries has been subject to the same objection which I have made and propose to amplify, although there seems to be a serious contention on the part of counsel for the Commission that it has some materiality.

The basic objection here, your Honor, is founded on this: Mr. Austin is talking about a stenographer's salary which was in part charged to Account 001 and in part charged to Account No. 220. I think there is some indication that there was some change in the accounting instructions during the year 1940 but in either event, the salary was during that year sometimes split between those accounts.

Now, first, if that salary of that stenographer were entirely eliminated from the entire consideration or put 5541 entirely in another channel, it wouldn't make the differential that is here thought to be justified. Secondly, whether that is true or whether it isn't and whether that is material or whether it isn't, the fact is that the salary whether it be in 001 or Account 220 is in the total cost in the reseller channel and it is utterly immaterial where we have put the portion of this girls' salary allocable to reseller. It might be spread through these many, many accounts in the reseller channel or it might all be put in one account, or our accounting people might change a dozen times in the course of the year.

We say it is of absolutely no importance at all which of these accounts it is in because it necessarily appears in the total, anyway.

The entire attack, and this is another basis for our objection to the continuation of this type of examination—the entire attack of the Government has again shifted. Instead of attacking the cost study make by the Respondent and attacking the existence of a differential justification, there has been throughout this entire cost examination merely an attack upon the basic accounting system of the Respondent, namely, the use of its Form 189. While we concede the right of the Commission to cross-examine on the Exhibits 100 and 101 and 99, all of which were put into the record by the Respondent subsequently to the time when Mr. Boatwright was formerly 5542 cross-examined, we do not concede, your Honor, that counsel of this cross-examination has any right to again go into the detail of the basic accounting system of the Respondent as reflected by Form 189 beyond the point necessary to a cross-examination on the exhibits put in.

Your Honor will recall that Mr. Boatwright was cross examined for at least ten days and I think longer in Washington on this Form [illegible] and related accounting subjects. It has been extremely difficult to differentiate and I haven't tried to differentiate in my objection between that which was a purely repetitious question already asked in substance in the former cross-examination and a question which was not just purely repetition but might have some bearing on one of these exhibits. As to the latter, I wouldn't want to object; as to the former, I think the Respondent is entitled to some protection for itself and for the witness on the stand, that he shall not be subjected to a repetitious cross-examination and, certainly, not an examination on the matter that just can't become material.

Trial Examiner Ballinger: The materiality of this line of examination hasn't been entirely clear to the Examiner, but the Examiner has formed the opinion this line of examination possibly became necessary because of a change in the accounting method employed by the Respondent as to part of the salaries without carrying the same prin-
4543 ciple through on the entire list.
Is that correct, Mr. Austin? Your contention?

Mr. Austin: In order to make an analysis of these salaries, your Honor, it is necessary to know where they fall. Different methods of allocation are applied to different accounts, and if a salary is in one account, another salary is in another, they are handled differently. Now, if the same salary is a part of the year in one and the other part of the year in another account, that means that that same salary by the same employee doing the same job was perhaps handled differently in allocating it between channels in one part of the year than if was in another part of the year, and we have to know where the expense falls in order to apply Exhibit 99 and Exhibit 190 to see how it was handled.

Trial Examiner Ballinger: Is it your contention that when these salaries are properly allocated that it is going to make a material change in the final result.

Mr. Austin: Oh, yes; I think so, in the aggregate. These salaries go in groups. One salary goes with something.

else, and you have supervisors and you have a stenographer and you have other accounts in connection with his traveling expenses. You have groups of them that go together all on the same basis or on the same method of allocation being applied.

Trial Examiner Ballinger: If that is your conten-
5544 tion, you are entitled to establish it if you can. Objection is overruled.

By Mr. Austin:

Q. Was there a construction department stenographer assigned to the superintendent of maintenance, the salary being entered in Account 001?

A. Yes, sir.

Q. Was all or a part of the salary of that clerk assigned to Account 001?

A. Only part.

5545 Q. And how much was that part?

A. $661.65.

Q. And what part of that $661.65 was allocated to direct shipment channels on the same basis as the salary of the superintendent of maintenance for the last two months of 1940?

A. The entire time and cost of this stenographer was predicated upon the distribution of effort between direct shipments and other than direct shipments of the superintendent of maintenance for the full year; not just the last two months.

Q. Oh, I see. Then was a composite percentage applied or ratio applied to this salary based upon the year's activities, or the year's hourly efforts of the superintendent of maintenance; that is, combining his last two months with the previous ten?

A. To secure the allocation factor of this $661.65 we took the entire time of the construction men by months as a percentage of the total hours of that class of employes and used it for the allocation of this $661.65 as it was spread by months throughout the year.

Q. In other words, the same allocation factors were applied to this as were applied to the superintendent of maintenance?

A. Yes sir.

Q. I think that is still correct, because we are only talking about allocation in direct shipment channels, 5546 now.

A. Yes sir.

Q. Now turning to the superintendent of construction; what part of the salary of charges to Account 001 represents the salaries of draftsmen and construction clerks assigned to the superintendent of construction?

A. Well, the salaries of the draftsmen assigned to the superintendent of construction is $4,160.04.

Salaries of the construction clerks assigned to the superintendent of construction was $2,815.

Q. Does that make a total of $6,975.04?

A. Yes sir.

Q. And was that total expense of $6,975.04 allocated to and between direct shipment channels on Respondent's Exhibit 101 by the application of the percentages set forth for the construction superintendent on Page 84 of Respondent's Exhibit 101?

A. Your statement is correct.

Q. Are the salaries of stenographers serving the Field Manager and Assistant Field Managers charged to Account 001?

A. Yes sir.

Q. What is the amount of the salaries so charged?

A. $3,646.41.

Q. Can you state what part of that represents stenographic assistance to the Field Manager and what 5547 part to the Assistant Field Manager?

A. No. I could not.

Q. Is there any such division made on your records?

A. No. The stenographic time for the employes subject to the call of the Manager and the two Assistant Managers is all carried together.

Q. Then when you reach the problem of allocating a portion of the time of these stenographers to direct shipment channels, how did you handle that problem?

A. Handled it on the basis of the distribution of the effort devoted to direct shipments and other than direct shipments as indicated by Mr. P. A. Raupagh's time distribution.

Q. Well, Mr. Raupagh's time distribution to direct shipment channels is not the same as that of either of the two Assistant Managers, is it?

A. That is correct.

Q. But you did not apply or use the direct shipment ratio of the time of the two Assistants in allocating the time of these stenographers to direct shipments?

A. No. We took the larger of the three percentages, which was Mr. Raupagh's, so that if error, error on the side of conservatism and overcharged direct shipments.

You see, we simply couldn't split the hours of these particular stenographers as to when they were answering
5548 a call from Mr. Blough, or Mr. Raupagh, or Mr. Hamer.

Q. No, I realize that.

A. We couldn't do it, and so it became necessary to exercise our best judgment and we took that one with the greatest proportion of time.

Q. Do I understand by that, Mr. Boatwright, that you applied the percentages of Mr. Raupagh's time charged to direct shipment channels, including the direct charge to jobber, naphtha and gasoline? You will recall that it was explained yesterday that 1.355 percent of Mr. Raupagh's time was directly charged to jobber, naphtha and gasoline.

A. It included the supervision time; not the direct selling.

Q. And comparing the supervision time of the Field Manager and the two Assistant Managers, is it not shown on Page 84—well, it is not shown there, but did not your testimony yesterday show that .375 percent of the Field Manager's time was charged to jobber, naphtha, and gasoline; .41 percent of the Assistant Manager, wholesale, and .37 percent of the Assistant Manager, reseller.

A. You are right.

Q. So that so far as jobber, naphtha and gasoline is concerned, it is not correct, is it, Mr. Boatwright, that more of the time of the Field Manager was assigned to that channel than of either of his assistants?

A. No sir, Based on supervision, you are correct.

5549 Q. I might say that when you said that they are quite near together—and I am not challenging the use of that—merely your statement that it was perhaps an overloading.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. I think that covers everything in Account 001 except the asphalt representative, does it not, Mr. Boatwright?

A. I think we have sir; yes sir.

Q. Now you said that the asphalt representative is not a stenographer or clerk. Is all or only a part of his salary charged to Account 001?

A. Only a part of his salary is charged to Account 001.

Q. And why is that split made in his salary; do you wish to make a further answer to the previous question?

A. What is your question?

Q. I hadn't finished it.

Trial Examiner Ballinger: Read the question.

(The partial question referred to was read by the Reporter.)

By Mr. Austin:

Q. Why is that split made in his salary between Account 001 and Account 004, if that is where the rest of it goes?

A. No, it does not go into Account 004. This individual is the asphalt representative covering several
5550 fields and as he covers several fields his salary will
be found in Form 189. This is 100 percent of the amount for this man's time and effort devoted to the Detroit Field.

Q. Then this man is not the same man as the asphalt salesman?

A. No.

Q. In allocation to direct shipments the entire salary of the asphalt representative charged in Account 001 was removed from the Form 189 channels and charged directly to direct shipments, other customers, is that correct?

A. Yes, sir.

Q. I don't believe I asked you the amount of the asphalt representative's salary charged to Account 001.

A. The amount is $776.53.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. I would like now to consider Account 250, Mr. Boatwright, which has to do with the General Office accounting department.

Was any expense of the General Office accounting department charged to the manufacturing department of the company under the company's regular accounting procedure?

A. None of Account 250 represents manufacturing accounting costs.

5551 The General Office accounting function is divided
in that a manufacturing department accounting staff is maintained and a sales department accounting staff is maintained. Expenses represented by Account 250 are limited to the sales department.

Q. I realize, being in Account 250 they would be limited to the sales department but the question is really in reverse: whether any of the salary of the accounting office or accounting staff whose salaries make up the charge to Account 250 was originally charged to manufacturing. I understand your statement to be now that there are two different accounting staffs or accounting departments there so that none of the salaries of the employes in the sales department accounting group is assigned to manufacturing?

A. That's right. I think of no partion thereof that would be assignable to manufacturing.

Q. I believe there is a statement to Respondent's Exhibit 99, Page 28, which says that all of this expense is charged to Account 7250. All of the expense of the General Office accounting department, but it does not explain that there are two accounting departments, so I was wondering where the manufacturing accounting expense came in.

A. I see your difficulty. The seven thousand series is the sales department series and anything charged to 7250
would be the sales department but we maintain
5552 completely separate units, each of whom works under
the head of a separate supervisor so that there is a complete segregation of the accounting cost incurred in the General Office between sales, on the one hand, and manufacturing, on the other.

Q. Now will you please turn to Page 127, and also 122, of Respondent's Exhibit 100?

A. I have the respective pages.

Q. I direct your attention to the percentage figures in the direct shipment columns opposite the Account 250. There are percentages given for credit and collection and percentages given for accounting in each of the three direct channels.

A. Yes sir.

Q. And on Page 122 it is stated that "it was considered logical to allocate this expense to classes of direct shipment customer and product on the same ratios as used for field expense of these departments." I wish you would explain what you mean by "field expense of thes departments" and explain how the percentages referred to on Page 127 were arrived at?

5553 A. We took the number of employees in the field credit and collection department and the number of hours worked by these employees on direct shipments by month and expressed that as a percentage of the total hours worked by these employees during those months. Having thus secured a ratio of the distribution of their effort, that ratio was then applied to the general office portion of the Account 250, which is under the heading of credit and collections.

We then deducted from the total field office accounting these particular employees represented by credit and collection, again worked through to a distribution of effort for the direct shipment channels for the residual number of employees in the accounting department; expressed that in terms as a proportion of the effort expended in total by these employees to secure a monthly ratio of the distribution of effort; applied these monthly ratios, in their turn, to that portion of Account 250 under the general heading of accounting.

Q. What is the credit and collection department? Is that the department that is classified under the heading "Credit" on page 76?

A. The parallel accounts in the fields would be made up by that portion shown on page 76 following "Credit" plus accounts receivable.

Q. Credit plus accounts receivable?

5554 A. Yes.

Q. I still have a little difficulty with that because of the fact that the percentage on page 76 for allocation of the accounts receivable time to jobber, naphtha, and gas oline is 3.38 per cent, for credit it is 1.83 per cent, whereas the percentage for credit and collection from the general accounting office is 4.119 per cent. Unless I don't understand the method of application, it would seem to me that the percentages ought to check.

A. I can't explain without doing some checking as to why these figures do vary.

Q. I rather thought in reading on page 122 that you were referring to the field office accounting department but I had some difficulty checking the percentages. For instance, under the larger portion, the accounting portion from the general office account 250, the percentage for jobber, naphtha, and gasoline on page 127 is 1.070, the percentage for direct shipment other customers is 1.529. Those two bear a quite different ratio to each other than the percentages of 1.39 and 1.55 at the bottom of page 76. The variance isn't so wide but it is wide enough to have raised the question as to what figures were used, that is, what Detroit figures were used for the allocation of this general office expense.

Now, I don't want to take the time for you to check
those, provided your answer is definite regarding
5555 the hourly ratios in the Detroit Field which were
applied to the general office expense?

A. My answer in that respect is definite. You recall, of course, the percentage figures that are found throughout Respondent's Exhibit 100 on sub-schedules indicated as "A", schedules are resultants of the monthly application.

Q. Yes.

A. And sometimes those ratios do not check out exactly as would be expected when the ratios are applied to different bases, but I couldn't explain.

Q. As I said yesterday, I am not trying to check arithmetic now, but I am trying to find the methods that were used. Now, if that is definite—

A. Yes, but I just can't explain at present why those per cents vary slightly.

Q. Mr. Boatwright, if the effort of the general accounting office follows the effort of the field office accounting department, and if that premise is used and was followed by you in determining your method of allocating the general accounting office expense to direct shipment channels in the Detroit Field, then why for this cost study was not the entire amount of this general office expense reallocated throughout all channels in the Detroit Field including Auto Supplies, according to the distribution of effort in the field office department?

5556 A. Well, the quarterly time cards are on a basis of distribution of effort. I am afraid I don't follow your entire question through.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

A. May I ask, is your question largely limited to why was not a portion of the general office accounting charged to Automobile Supplies?

Q. No, it isn't limited to that, Mr. Boatwright. I can state it more specifically.

The expense, salary expense of the Detroit Field accounting department is allocated in your regular accounting procedure throughout the three petroleum channels on Form 189 and also to Automobile Supplies on the basis of distribution of time reports; is that correct?

A. Yes, sir.

Q. Then for the purposes of this cost study, you charged a part of that expense in Account 200 to direct shipment channels also on the basis of the time study, is that correct?

A. Yes, sir.

Q. Now, when you bring in this expense to Account 250, general office expense, charged to the Detroit Field, and you wish to allocate a part of that to direct shipments, you have followed the distribution of effort of the

5557 field accounting office but—

A. Yes, sir.

Q. —you have not, have you, in the 189 channels on Exhibit 101 followed the distribution of effort of the field accounting office, nor have you applied to the general office expense any factor for the distribution of effort of the field office going into Automobile Supplies.

A. I see your problem. The office expense for accounting in the general office includes therein and is made up of in part a great many departments that are not carried in the field at all. For instance, we have the plant investment department which keeps track of all of the investments, figures all of the depreciation, and so forth. There is no parallelism for that department in the field. Then we have—

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Take a recess for five minutes.

(A short recess was taken.)

5558 Trial Examiner Ballinger: Come to order.

Witness: Your Honor, to refresh my memory, may we have the record for the discussion just prior to the recess, read?

Trial Examiner Ballinger: Read such portion of the record as the witness desires.

(Thereupon the record was read.)

A. Continuing the answer: We have a voucher department in the General Office for which there isn't an exact parallelism in the field.

The mailing department in the General Office is broader in its scope and in its functions than it is in the field.

The stationery department in the General office is likewise concerned with many problems of purchase, layout of forms, and many expenses are incurred by that department which are not comparable with the functions of the stationery department in the field.

The stock record and inventory control department of the General Office is concerned with broader and different functions than is the stock record department in the fields.

In view of these large component parts of the General Office accounting department, which differ from the functions of the field accounting department, it occurs to the Respondent in our regular accounting practice that the most equitable means of allocation is to use gallonage
5559 as the factor in allocating among channels.

Now the reason that we did not use gallonage in making an assignment of General Office accounting expense to direct shipments is because we learned from our special study in Detroit that gallonage would not be a fair factor in allocating cost. Having a complete allocation factor predicated upon effort, the only allocation that we could make giving any recognition at all to expenses of the General Office accounting department assignable to direct shipments was the effort factor which is a more equitable means of allocation than would be gallonage because throughout this study, both in the exhibits and in the testimony throughout, to date, I think you will concur that the gallons sold by direct shipments require quite a different effort and quite a different cost than the gallonage sold through the tank wagon channels.

Does that meet your question, sir?

Q. You are referring now, in this latter part of your answer, to the accounting department of the Field Office?

A. Well, it so happens that I was, but I would ~~not~~ limit it to the accounting department because, as you will recall, in the sales function and in other operations, throughout the operations of the field, we found that a gallon sold by direct shipments carries quite a different expense weight than a gallon sold through the tank wagon channels.

Q. In distributing a portion of the expense in 5560 Account 250 for the Detroit Field to direct shipment channels you did follow the distribution effort of the Field Office accounting department as heretofore explained, did you not?

A. Yes, sir.

Q. And in your regular accounting procedure in allocating the expense in Account 250 between petroleum product channels on Form 189 you did not follow the distribution of effort in the field accounting department, did you?

A. Except as gallonage is a reflection of the distribution of effort.

Q. Well, you just said the gallonage was not a reflection of the distribution of effort in the field accounting department, or did you say that, as to the Form 189 channels?

A. No, I said that gallonage sold direct shipment and gallonage sold tank wagon method represented respectively different effort and different cost.

Q. Well, does a distribution of expense, of accounting expense on a gallonage basis, referring now, to the distribution of the expense in Account 250, follow the distribution of effort between the Form 189 channels of the Field accounting department?

A. That, I couldn't answer, without checking, sir.

Q. Can't you check that by looking at the distribution on Form 189 or on Form 191 of the accounting Field and accounting Office expense between channels?

5561 A. Yes, I could check it but it would take a calculation.

Q. Well, let me put it this way: The distribution between tank wagon reseller, tank wagon consumer and other methods channels in the Detroit Field on a gallonage basis throws the largest part of the expense into the tank wagon reseller channel, does it not?

A. Yes, I think it would.

Q. Well, it does, doesn't it?

A. May I have the Form 189 that you have offered as an exhibit?

Q. Yes (handing document to witness.)

A. It does.

Q. And the ratio between expense allocated on a gallonage basis to the tank wagon reseller channel and the other methods channel is approximately 69 to 5, is it not; on Form 189? In explanation of that question, Mr. Boatwright, I am just looking at the gallonage figures at the bottom of Form 189 for the tank wagon reseller channel and for the other methods channel.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. When you allocate expense on a gallonage basis 5562 between those three channels isn't the ratio of the expense—I don't care what expense it is, or what account—isn't the ratio in the tank wagon reseller channel to the expense in the other methods channel approximately 69 to 5?

A. My only difficulty is in your division when you say "69". 69 is a slight overstatement of the charge that is assignable to the tank wagon reseller channel because you have taken the gallonage factor of sixty-nine million and you have, in deriving your percentage of 69, assumed that 69 represented 69 of 106.

Q. I am not talking about percentage. I said isn't the ratio 69 to 5; just like you have a ratio of 2 to 1?

A. I thought you were talking now, of the ratio in terms of proportions of the total and on a percentage basis.

Q. No, not on a percentage basis.

I will ask you again:—

When expense, such as the expense in Account 250, is allocated between 189 channels, petroleum products' channels on a gallonage basis, does not the expense entered in the tank wagon reseller channel bear a ratio of 69 to 5 to the expense entered in the other methods channel?

A. That's approximately correct, sir.

Q. Now turning to Account 200, what is the ratio between the expense entered in that account in the tank wagon reseller channel and the expense in that account in 5563 the other methods channel?

Are you referring to the original Form 189?

Q. Well, I think the ratio is the same, is it not? Do you mean by exactly the same—

Mr. Austin: Strike that.

By Mr. Austin:

Q. You may refer to either Form 189 or Respondent's Exhibit 101, since we are talking about the regular accounting procedure. I suggest you refer to Form 189, which is Commission's Exhibit 119.

A. Referring to Commission's Exhibit 119, the ratio of the distribution of office expense—salaries, accounting, between the tank wagon reseller and the other methods channel is as 84 is to 93.

Q. And the same method of distribution of the expenses in Accounts 200 and 250, respectively, used in the compilation of Form 189, was retained in distributing expense between those same channels on Respondent's Exhibit 101, was it not?

A. Yes, sir.

Q. Now in the regular accounting procedure of the company is a part of the expense of the Field Office accounting department charged to automobile supplies?

Mr. Hanley: What account?

Mr. Austin: 200.

A. It is.

5564 By Mr. Austin:

Q. And is any portion of the expense of the General Office accounting department assigned to the Detroit Field as shown in Account 250, charged to automobile supplies?

A. It is not.

Mr. Hanley: Do you have any further questions on that automobile column?

Mr. Austin: I have no further questions at the moment on Account 250, which was what I was discussing.

Mr. Hanley: No further questions on that subject?

Mr. Austin: Not in this connection, no. Not at this time.

Mr. Hanley: If your Honor please, the Respondent moves to strike the answer to the last question and objects to the same as being immaterial. Moves to strike, in fact, all testimony in respect of distribution of accounts or expenses to automotive supplies as immaterial for the reason that the Respondent is entirely out of the automotive supply business. This column is largely represented by tires and there just isn't any expense.

5565 Trial Examiner Ballinger: There was such expense during the period covered by the Complaint, was there not?

Mr. Hanley: No, only where it is included. The only place where there was any real expense is where it is included as explained by the witness' answer sometime ago, and in connection with the subsequent questions asked by Mr. Austin about it on the automotive supplies and on these ratios between reseller and other methods. It has been found as a matter of accounting, Mr. Boatwright said, that it is more desirable and more fair, more reasonably calculable to allocate ~~on~~ the general office expense on a gallonage basis. It has always been true where there is a real expense or has been in the past allocated to Automobile Supplies as appears on several 189's.

Trial Examiner Ballinger: The motion to strike is denied.

By Mr. Austin:

Q. I would like to call your attention now to the Account 255, Mr. Boatwright, general manager's department. That is a general office expense, is it not?

A. Yes, sir.

Q. And is not the Account 255 really a group of separate accounts?

A. It is a group of separate departments.

Q. ~~But~~ are not those departments quite different and
are not different methods of allocation used in dis-
5566 tributing the expense thereof to direct shipment
channels?

A. Yes, and the difference in the method of treatment of the different departments is explained in Respondent's Exhibit 99 and 100.

Q. The different departments are also charged to channels in the various fields and, particularly, in the Detroit

Field, according to different methods of allocation; is that so?

A. Yes, sir.

Q. Schedule 12-B on page 129 of Respondent's Exhibit 100 does not show by sub-accounts or by departments in the general manager's department the percentages and methods of deduction of direct shipment expense of the Form 189 channels. Now, in Schedule 1-B which relates to the Account 004, salesmen's salaries, and Schedule 7-B, relating to the accounting department, you carried your breakdown through from Schedules 1-A and 7-A, respectively, and showed the method of deduction from 189 channels by the various sub-departments in the sales department and the accounting department.

Why was not that same method followed in Schedule 12-B in Respondent's Exhibit 100?

A. Well, we have it by departments in our worksheets and it could have been placed on the same basis. We get down to some awfully small figures when we get down to individual component parts of the Account 255, and it
just didn't seem that it would be necessary in the
5567 spelling out process. Had there ever been expressed
a request in any of our reviews, we would have been delighted to have done so.

Q. Your Schedule 12-A on pages 127 and 128, particularly 127, referring to Account 255, does show the various sub-departments which make up the general manager's department, is that correct?

A. That is right.

Q. That is in the middle of page 127?

A. I have the page referred to.

Your statement is correct.

Q. And Schedule 12-B on page 129 does not show separately the amount of the direct shipment expense for each of those sub-departments which is deducted from the Form 189 channels?

A. Page 129, Respondent's Exhibit 100, does not show separately for the different component parts of the general manager's department the amounts taken out of the respective channels on Form 189. Again I state that is in our woorksheets. We will be delighted to let the Commission review it.

Q. Well, I am not making a request in that respect but, frankly, I don't know whether it is material now and—

A. I don't, either.

Q. I want to bring out the fact in case we should desire to analyze that.

A. I don't either, Mr. Austin. You will recall that 5568 the detail to which we went in explaining methodology was largely left to my discretion of what I thought might be needed. I wrote the Respondent's Exhibit 100 with that in mind, and in a subsequent discussion I felt that if additional explanatory information is needed, it would be requested, and I just didn't feel that this account merited time and space to spell it out to that extent.

Q. Well, the amounts are not large but the sub-departments are of widely varying nature; isn't that so?

A. Yes, that is so, yes.

Q. Now, getting down to the particular departments, I would like to have you describe with as much detail as you can the activities of the following departments:

First—these are sub-departments of the general manager's department—first, supervision. I would like to know the titles of the employees or in the case of a group, what the employees are, too.

A. That is what we are now getting from our work-sheets.

Supervision represents expenses incident to the positions as follows: Mr. Amos Hall, vice president in charge of the sales department; Mr. R. F. McConnel, who is general manager of sales; Mr. W. H. Tell, who is in charge of the operating function of the sales department; Mr. H. E. Hanson, assistant general manager of sales; four assistant general managers. Do you wish their names?

5569 Q. I don't think so.

A. They are representatives traveling out of the main office each, in turn, contacting the managers of from six to seven fields.

Then the clerical staff: Stenographers, clerical staff assigned to these respective individuals.

Q. Would it require you any great thought and investigation to tell us the duties and composition of the sales research department?

A. No, I don't think that would—if I may give you a general answer, I don't think that that would be an unreasonable expectation.

The sales research department is responsible direct to the president and the executive vice president of the company. Our function is divided between conducting what might be called contingency problem studies for management, on the one hand; conducting research in advertising, another; conducting consumer studies of wants, needs, buying habits and desires of consumers; conducting various studies of prices and competitive conditions in different markets; as well as preparing budgets, estimates of sales, product movement, movement from various terminals and supply points.

We report direct to the chief executive of the company and an appointed committee which reviews our findings, recommendations, and so forth.

5570 Does that meet your question?

Q. I am sure it does.

You are the head of the sales research department. Is Mr. Houghton your assistant?

A. Mr. Houghton is the office manager of the sales research department.

Q. How large a personnel do you have in that department?

A. Approximately 20. It varies from time to time with the flow of assignments. If there is an unusual flow of assignments calling for additional personnel, recognition is given to that, but we carry a normal staff of about 20.

Q. What are the duties and what is the composition of the statistical and personnel department?

A. The statistical and personnel department—there is no question in my mind relative to the personnel portion of that account which represents the personnel office in the Chicago division—or in the Chicago general office. There is a question, however, as to the exact individuals included in the statistical portion, and I will have to check that. I don't have that record here.

Q. Do you know what the duties and functions of the statistical department are?

A. I could tell that with a greater degree of accuracy if I knew the exact individuals so classified. Actually, a large part of my own department is statistical work.

5571 Q. Well, is it possible for you at this hearing to give any definition or story as to the statistical department?

A. Oh, yes. I could secure that information by telephone and advise.

Q. How about the personnel portion of this department which, incidentally, for the record, is not the statistical departmen, it is the statistical-personnel department—but as to the personnel portion, what is their function?

A. Well, largely it is interviewing individuals for positions and clerical capacity in the general office, secretarial help, comptometer help, mail boys, clerks, etcetera.

Q. I don't think it is necessary for you to make a call to Chicago on the statistical portion, Mr. Boatwright, at this time.

A. Well, you see, my problem is just the individuals' names that are so classified on the pay roll, and I don't have that here. Undoubtedly, they compile these various and sundry sales records and comparisons, and things of that type.

Q. Can you describe the duties and functions of the gasoline and refined oil department?

There was some explanation of that but not very complete on the record at the time we were discussing the Oklahoma survey; and at that time, I think in 1937, there had been a combination of two departments, and the discussion was in that connection, but I would like to have you describe it now as to the whole department and
5572 describe the various functions.

Mr. Hanley: If your Honor please, the manager of that department, Mr. J. C. Marshall, was on the stand in this case and gave a full explanation and exposition of the functions of the department and his duties.

5573 Mr. Austin: What was his name?

Mr. Hanley: J. C. Marshall.

Mr. Austin: Was he in charge of the gasoline and refined oils department?

Witness: Yes.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Witness: The gasoline and refined oil department is under the direct supervision of Mr. J. C. Marshall and the duties of that department fall broadly into two main classifications. One: it serves as a bulk sales department for the distribution of tank car quantities of gasoline, naphthas and refined oils.

Secondly: it has charge of the prices maintained on our various products in the same classification of the gasoline, naphthas and refined oils distributed by tank wagon through the same four thousand stations operated by the Standard Oil Company.

By Mr. Austin:

Q. Do the functions of that department relate solely to gasolines, naphthas, and refined oils?

A. Well, as far as products are concerned, the answer would be yes.

5574 Q. Could you explain in a little more detail the duties and activities of the gasoline and refined oil department in relation to direct shipment? In other words, the half which you described first?

A. I didn't state "half". I said two component parts.

Q. I wasn't trying to be exact but I believe you said that they were partly engaged in duties with relation to direct shipment business and partly in relation to fixing prices on tank wagon business and I wanted you to give me a little more complete description about the direct shipment part; just what they do?

A. Well, there are individuals in this department whose obligation it is to contact and sell large tank car accounts with the necessary requirements for their particlar uses of the various products enumerated.

In addition, tank car sales made by fields result in orders which clear through that department.

Q. Is that department the gasoline and refined oil department, concerned with tank car consumer sales as well as tank car reseller sales?

A. Oh, yes.

Q. And is it a selling department. Is this the department that goes out and makes contact and tries to get customers, or is it concerned with the records of sale and an analysis of the business, or anything of that sort. I am trying to find out what the function is:

5575 Mr. Hanley: Off the record.

Trial examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Q. Your question is rather difficult to answer because the dividing line between the functions named is never clear and distinct.

I would say as a general practice that members of this department are concerned primarily with the contracts and the terms of contracts of the sales but do not, in many cases, actually do the selling work direct. You understand that that is a general statement of the functions.

Q. Do you know whether the expenses of that department are separated or is a separation of such expenses capable, from the records of the company, as between the direct shipment activities of the department and the bulk plant pricing activities of the department?

A. I don't believe that it would be possible to prepare currently an accurate segregation of expenses between these two component parts, between the functions of that department.

Q. Would it be possible to do so on the basis of a time study?

A. Well, I don't know whether it would, or not. You asked me whether it would be possible by a particular study. I am encountered, now, with the same difficulty that I was encountered with when questioned of a study
5576 of that nature in Washington.

Until I have made an analysis of what the different members in each department do, whether their time would be susceptible to breaking down, I don't know.

Q. In asking the question I had in mind the two departments separately, which were consolidated. I had in mind, perhaps, the departments, putting them under one head; say under Mr. Marshall; and under one name, that the activities might still be separate and carried on as they were before.

A. Any time that two departments are consolidated the object of the consolidation is broader than just to place them under one supervisory head. The object is so that you can coordinate the entire work of those two departments with increased efficiency and decreased expense. It was broader than just putting two groups under one head.

We find now that many of these individuals work in part on one base and in part on another.

Q. Does this department have control and have charge of the fixing of prices charged in direct shipment business, as well as prices charged in bulk plant business?

A. All prices on direct shipments to consumer accounts, tank car quantities, are first recommended by this particular department; the gasoline and refined oil department.

Q. Recommended to whom?

A. Well, many of these direct shipment customers purchased in a magniture that the price will be rec-
5577 ommended to the Vice President in charge of sale for his review and his consideration and if it is of a magnitude such that it is necessary for him to consult with his associates I would assume that he would do so but the prices are first fixed and started in this department.

Q. You refer in that answer to direct shipments, consumer business. Does this department also have charge of determining prices for direct shipment reseller business, such as jobber business?

A. That, as a rule, originates with the selling function in the field. The manager, assistant managers, or the supervisory personnel of a field may advise the general office and this department, specifically, that such and such a jobber account could be secured in their judgment for "X" price.

This department would then discuss with the heads of the sales department the desirability of that account at that particular price. It may or may not appear desirable on the price level indicated.

Q. The company's price to the four jobbers in Detroit has been the same at all times covered by the evidence in this case. Is that the general practice of the company to have only one jobber price in a given field?

A. Yes sir.

Q. That being true, I am a little puzzled at, and perhaps you can explain your answer regarding the
5578 submission of the question as to whether a particular account should be taken on at a particular price. Doesn't the gasoline and refined oil department either alone or in connection with other company officials determine a tank car price for the jobbers in a given field?

A. Some jobbers in others areas are on contracts. It so happens that the four subject in this Complaint are not on contract. They are accounts which have grown up with the Standard Oil Company, in the main. Our—

Q. Is it the practice of the company to decide on each jobber price separately, as to each customer, or is a jobber price a matter which is determined for a field?

A. Mr. Austin, we have a very few jobbers throughout our entire territory.

We may have a jobber, let us say, in the Twin Cities but it will be a jobber.

Now that particular jobber may be on a contract with our company. It is a jobber account which, perhaps, has left some competitive distributor and starts distributing our product.

Such an account would request, in many cases, a contract from the new supplying company stating the terms of the exchange.

That contract would have to be reviewed and approved in the General Office.

5579 Q. By the gasoline and refined oil department?

A. It would come to that department first, yes, sir.

That's why I made the statement as I did, that with new jobber contracts originating, it comes to this department first.

The proportion of our sales represented by jobber outlets, is quite small.

Q. Do I understand, then, that there is no company policy about either having contracts with jobbers or not having contracts with jobbers, generally?

A. I don't know of such a policy.

Q. I don't know whether you are familiar with the testimony given in this case but at least one of the jobbers that I recall definitely, said that he, on various occasions, tried to persuade Mr. Raupagh that they should have a contract and that request was never granted, here.

A. I presume that we have reached a point where the Field Manager, in his expression of his responsibilities, decides upon the advisable policy that we pursued in each case.

Q. What are the duties and functions and activities of the sales promotion reseller and sales promotion wholesale sub-departments?

A. Their names are, in reality, descriptive of their functions.

5580 The sales promotion reseller department aids, suggests in drawing up plans to promote sales through our reseller channel while the sales promotion wholesale department serves in an identical capacity with the sales channel designated as wholesale sales.

Q. What are some of the principal means or types of sales promotion?

A. They are infinite, Mr. Austin; even as the means of selling goods, are infinite.

They will vary all the way from a suggested terminology to a complete plan for a sales campaign.

Frequently it is not so much a plan as it may be to attempt to secure the adoption of a specific form of terminology which will have very advantageous influence on sales; advocating and promoting the idea of cleanliness, good housekeeping, in its broad concept and so forth, would represent the activity of the reseller promoter.

Q. Wholesale means consumer business, doesn't it, in the terminology of the company, when applied to an employee such as sales promoter wholesale—

A: Yes.

Q. (continuing)—or sales manager, wholesale?

A. Yes sir, that's right.

Q. And since wholesale refers to consumer business why was any portion of the time or expense of the sales promotion wholesale department charged to jobber
5581 gasoline and naphtha?

A. A small part of the sales promotion wholesale is allocated to jobber naphtha and gaselone because the sales promoter wholesale is the supervisor of the city salesmen and the plant agents who, in their turn, do make a few calls on jobber accounts, as was reflected in summation of effort of the testimony of the assistant manager, wholesale; namely, Mr. Blough.

Q. And is that reflected back to the sales promotion wholesale department of the General Manager's department? That is, was it the reflection of those duties from the field that resulted in a portion of the expense of the sales promotion wholesale department, general manager's office, being charged to jobber naphtha and gasoline?

A. Yes, because you see, Mr. Blough's responsibilities are the fulfillment of the promotional efforts not only emanating in Detroit but emanating with this particular group of specialists in the Chicago office and they are concerned with the operation of this city salesman and of the plant agent, who may devote part of his time to selling.

Q. The plant agent; is that the "B" station agent?

A. No, in this case I am speaking of the agent at one of the salaried stations who maintains a time card and splits his time between the operation, on the one hand, and selling functions on the other.

5582 Q. Is that what you call the agent salesman, in the cost study?

A. Yes.

Q. I wasn't aware of the fact that the city salesmen ever called on jobbers. I knew they were under Mr. Blough. In what capacity would they call on jobber accounts?

A. I am not sure that these particular city salesmen did.

5583 Q. Can you answer the question?

A. I have checked the worksheets and I find that one city salesman did actually make some calls on these jobbers, and we took those calls so made direct from his call record report, so we do find a very small part of his time was actually spent on calling on jobbers.

Q. Those particular calls by that one salesman would not be the cause of this $20 item because in jobber, naphtha, and gasoline from the sales promotion, wholesale, department in Chicago—would that account for it?

A. Well, the calls of this particular city salesman plus the distribution of effort resulting from their agent salesmen plus the supervision time, wholesale, which makes up Mr. Blough's component distribution of effort, and Mr. Blough as the field representation of this same department in the general office, therefore influences in the aggregate and adds up to the $20 that you refer to.

Q. Do you know what the reasons were for the calls by the city salesmen on jobber accounts? And I would like to ask you the same question regarding agent salesmen. You said they made some calls on jobbers. I am just wondering whether those salesmen have any particular function to perform or any particular duties in calling on jobbers which are not common to reseller salesmen.

A. Well, I would assume, sir, that they were carrying out their responsibilities as assigned to them by the assistant manager, wholesale.

5584 Q. In other words, if there was some reason for sending a salesman to a jobber account, they wouldn't necessarily send a reseller salesman, they might pick out an agent or a city salesman if it were a particular task; is that what you mean?

A. Well, it is entirely possible that given calls may be made by these two classes of salesmen referred to, agent salesmen or city salesmen on jobber accounts, in fulfillment of their regular line of duties. That would be particularly true if a jobber were located at one of the smaller "A" station markets where the direct selling function is performed in a large measure by the agent salesmen.

Q. Well, that isn't true in Detroit, is it?

A. Not as far as the Detroit area is concerned, no.

Q. Well, I am not interested in the amounts here because they are very small, but I am interested in the reasons for any charge.

A. The reason, sir, is again an illustration of a statement that I have made to you before. Had I conducted this study purely on the basis of my understanding of the theoretical functions of several individual employees, there would have been no charge, but an actual examination of the records revealed that they did make the calls. Having made the calls, the business is charged with those calls.

5585 Q. I would like to ask you one more question before exhausting this particular thought. Why is a part of the time of the sales promoter, industrial, in Detroit charged to jobber gasoline business? I was under the impression from your description of the industrial salesmen the other day that none of their time was charged to gasoline or, at least, none of it in the reseller channel.

A. In the Detroit area, the sales promoter, industrial, based on a time card maintained on that position was found to have expended ten minutes during the month the time card was maintained, and we charged jobber gasoline business for that amount.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Mr. Boatwright, you say some ten minutes of time was devoted to jobbers. Actually, as I see it here, there is 2 11/100 per cent of his total time charged to jobber, naphtha, and gasoline, totalling $161.48; and 15 per cent or $1,196 charged to direct shipment to other customers.

A. What page are you on?

Q. I am on page 16 of Respondent's Exhibit 100.

There is a total of $1,357.68 on that time charged to direct shipments.

5586 A. Our difficulty in reference to page 16 is because the sales promotion, industrial, that you were reading is broader than just the industrial sales promoter. This includes the time of the clerk working under the supervision of Mr. Roth, who makes up these tank car orders and who clears these various orders, and they do have a greater amount than does Mr. Roth in particular, who had 13/100 of one per cent of his time.

Q. Then there is a substantial amount of time of the clerk here apparently on jobber business?

A. There is some portion of that time, yes, sir, in the clearing of the orders.

Q. What functions of the sales promotion, industrial, department in the Detroit Field relates to direct shipment jobber business?

A. Well, the only connection that I recall the clerks working under the supervision of the sales promoter, industrial, is in clearing orders from jobber—for jobber gasoline.

Q. In other words, if the jobber calls up and orders a carload of gasoline, does that go through the sales promotion, industrial, department?

A. Yes, sir.

Q. Well, that is a point I don't think we have ever brought out as to what part of the Detroit office handles jobber orders.

What department or is it this department that
5587 relays those orders to the River Rouge terminal and
sees that they are filled?

A. May I check that?

Q. Yes.

A. Having checked, I would now state that the order from a jobber for gasoline would go, first, to a clerk who works directly under the supervision of the sales promoter, industrial, who would start that order, filling out the necessary forms, on its path to River Rouge for delivery.

Q. And what department keeps the records of the shipments made from River Rouge and the orders which are sent to it and filled? Is that part of it done in the accounting department or is that done in this department?

A. Well, the records maintained on the actual shipments is maintained in the accounting department.

Mr. Austin: If agreeable to your Honor, I move we adjourn for lunch until 1:30.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The motion is granted and now, at 12:32 p. m., the hearing stands in recess until 1:45 o'clock p. m.

(Whereupon, at 12:32 p. m., a recess was taken until 1:45 p. m.)

5588 Afternoon Session—1:45 p. m.

Trial Examiner Ballinger: Come to order.

Mr. Hanley: May we proceed, your Honor?

Trial Examiner Ballinger: Proceed.

Mr. Hanley: Your Honor, at this time the Respondent will comply with a request for records of the Respondent made by counsel for the Commission. I do this at this time because I thought possibly counsel might want to ask Mr. Boatwright some questions inasmuch as the request was made through Mr. Boatwright. All else that we have in connection with our case we proposed to defer until Mr. Boatwright's testimony is concluded.

I now hand back to counsel for the Commission Commission's Exhibits, for identification, 94 to 99, both inclusive, which were lent to the Respondent for the purpose of identifying certain original freight bills which are now produced and handed to counsel for the Commission. As in the case of the production of former demanded freight bills, we are producing the original and are also handing counsel a statement of the contents of the freight bills for ready reference and with the hope and request that after counsel has made comparison that he may find the statement adequate to serve his every purpose and we may have the return of the original records.

5589 Trial Examiner Ballinger: The original records will be returned to you.

Mr. Hanley: It might be well to note, if your Honor please, that this demand includes several freight bills. All except two of them, however, are identical in type with that group of freight bills that were demanded and furnished the other day. Those two have to do with regular freight charges from Muskegon, Michigan.'

Mr. Austin: There appear to be more than six bills here. Maybe some of these orders were for more than one car, or something like that. I don't know.

Mr. Hanley: I know one was for four cars, if I am not mistaken.

The Witness: That is the explanation.

Mr. Hanley: I believe that is the explanation.

Mr. Austin: Is that all you had to say?

Mr. Hanley: That is all.

Trial Examined Ballinger: You may proceed.

By Mr. Austin.

Q. To what account or accounts are the salaries of the top officials of the Standard Oil Company charged such as the president and any other of the—well, the various vice presidents. I think you mentioned one vice president in charge of sales as being in charge of the general manager's department.

5590 Where would the salary of the president, for instance, be charged?

A. The salaries of the top administrative officers of the companies is segregated between manufacturing and sales department. That part which is assignable to the sales department is included in the account "Pro Rata General Administration."

Q. What department of the general office maintains and compiles the records of direct shipments and direct shipment transportation charges, payments for direct shipments coming from the field?

A. I know of no such record of the nature that you refer to.

Q. Well, let's leave out transportation. I will just ask the question with regard to the records that come from the fields regarding direct shipment business both as to the amount of it and the realization from it?

A. With respect to the realization mentioned in your question, a separate record of realization resulting from direct shipment is not maintained. With respect to the volume moving through the direct shipment channel, that is a part of the total volume as far as the accounting department records are concerned. The only record being maintained separately is a transcript or statement of direct shipment volume by fields that is prepared in the field accounting department and forwarded and compiled in the general office.

Q. Isn't there any record kept in the general office of the number of orders and the amount in gallonage
5591 of different products sold to direct shipment customers in each field or to specific customers in each field and the prices charged, and so forth?

A. No, I know of no such record.

Q. Well, that is all kept in the field office?

A. Yes, it is.

Q. What department of the company has charge of negotiations and contract with transport truck haulers and with any necessary business in connection with—or business with the railroads in connection with freight rates and with the audit and payment of tank car and tank truck charges? If that isn't all done in the general office, why, say so.

A. It isn't all done in the general office. You will recall the testimony of yesterday was to the effect that the checking and the payment for truck transport movement is made in the field. The traffic department in the general office does check and does maintain contacts with railroads on rail movement. The actual payment of the freight bills is in the manufacturing accounting department.

Trial Examiner Ballinger: How about your transport truck bills?

The Witness: Those bills and the checking of those bills and the records thereon are handled in the field
5592 office.

Trial Examiner Ballinger: Are they paid in the field office?

The Witness: They are paid in the field office.

5593 Mr. Austin: Mr. Reporter, would you read the previous answer of the witness to my last question?

(The question referred to was read by the Reporter.)

By Mr. Austin:

Q. And who takes care of the negotiations and the executions of contracts between the company and the transport truck haulers?

A. I don't know.

Q. There are two of those contracts in evidence and I think they are signed by a vice president. That wouldn't prove, necessarily, that the vice president did anything more than sign them.

A. No. In fact you will find that a vice president in charge of sales has signed part of those; a vice president in charge of production has signed others. It merely is a vice president's signature binding the company but the actual negotiations on any one of those contracts, I couldn't tell you who had conducted those negotiations.

Q. Have you made any study to determine how much of the time of the manufacturing department is devoted to the auditing and payment of bills and any other duties in connection with or arising out of the shipment of gasoline or of direct shipments of gasoline to jobber customers?

A. No, I have made no such study.

Q. Will you turn to Respondent's Exhibit 99, page 29, and the following pages? Have you that page?

5594 A. I do.

Q. If you will note, under Account 255, General Manager's Department, there are some figures there which are referred to as "Detroit Field Cost—Year 1941," and on the subsequent pages the year 1941 appears in several places.

Now, checking those figures with Respondent's Exhibit 100, Schedule 12-A, it appears that those are, in reality, the 1940 figures?

A. That's right. That's merely a typographical error, Mr. Austin.

Q. I wonder if you would permit that exhibit to be changed physically so that it appears that those figures are 1940 figures. In other words, changing the figures to 1940 instead of 1941?

A. Certainly I would.

Mr. Austin: Is that agreeable to counsel?

Mr. Hanley: Yes.

Trial Examiner Ballinger: The Examiner authorizes the witness to make the change on the original exhibit.

Mr. Austin: I will have to bring the original over for that purpose, your Honor. I am sorry. I don't have it here today.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5595 Trial Examiner Ballinger: On the record.

Mr. Austin: Unless you want the original exhibit brought over here, I will make the changes.

Mr. Hanley: That's all right. Just go ahead and make them.

Mr. Austin: I wanted to clear ap that error.

By Mr. Austin:

Q. Page 30 on Respondent's Exhibit 99, Mr. Boatwright, the second sentence from the top of the page refers to an allocation of channel expense to fields based on proportion of sales of these products by fields, and so forth. I just wanted to ask as to the meaning of the words "proportion of sales." Does that mean in gallons or does it mean in dollars?

A. Proportion of sales in gallons.

Q. I wasn't sure, although I noticed that in the preceding sentence you did refer to basis of total sales in gallons.

A. Yes, sir.

Q. I assumed you meant the same thing but since I wasn't sure of this particular account, I just wanted to be sure.

A. Gallonage is the factor, sir.

Q. Now, at the top of Page 30, the first sentence which reads as follows: "The proportion charged to the sales department is first allocated to the tank wagon reseller, tank wagon consumer, and other method channels on the
basis of total sales in gallons, excluding direct ship-
5596 ments of refined oils, tractor fuels, naphthas, and
gasoline, in each channel." And it should appear that that refers to the gasoline and refined oil sub-department of the general manager's department?

Will you explain the allocation to the other methods channel of expense in connection with refined oils, naphthas, and gasoline? I believe that for the most part throughout this case we have understood that the other methods channel included motor oils and other specialty products and I note, here, that a portion of this expense, which I understand is totally an expense of marketing gasoline, naphthas, and refined oils, is charged to the other methods channel.

A. The only reason for giving recognition to the other methods channel at all in the allocation of this departmental expense is because other methods would include barreled sales of naphthas or gasolines as a part of other methods. Not a moving through the tank wagon faucet.

Therefore, a component part of the volume in the other method channel of distribution is made up of barreled sales, aviation gasolines; barreled sales of naphthas, and so forth, and it is, we believe, more accurate to recognize in our allocation factor that there is a component part of that channel responsible and assignable to this department then it would be to ignore this factor.

5597 . Then the expense in this department, as I understand it, is allocated in the General Office, and before allocation to fields, to tank wagon reseller, tank wagon consumer and other methods channels?

A. Yes, sir.

Q. And would it follow from your description of the other methods channel business in gasoline and refined oils, that the portion of the expense of the gasoline and refined oil department which is charged by the General Office to the other methods channel, would be relatively small?

A. It is very small. In fact we have here on our work sheet the magnitude of that charge, if you would like it.

Q. Yes, but I would like to know what the figures are that you—

A. The charge to other methods is $41 for the year.

Q. Is that for the General Office, or what charge is it?

A. Yes. The charge for this department to the other method channel in the Detroit Field for 1940 represents $41.31.

Q. I see. And that $41 was the amount charged to the Detroit Field by the General Office from the total amount for the company allocated to the other methods channel.

A. For this particular department.

Q. Yes, but I mean there is a segregation between channels before there is a distribution between fields?

A. Yes, sir.

5598 . Q. In this particular account.

A. Yes sir.

Q. Would you mind reading the figures charged to the Detroit Field for the other two channels, as long as you read the $41?

A. Tank wagon reseller amounts to $2,643.32. Tank wagon consumer, $1,239.90.

5599 - Q. And you stated this morning that the gasoline refined oil department is directly concerned as to part of its duties with direct shipment business?

A. Yes, sir.

Q. And yet, do I understand that in making an allocation of the expense of that department between the three petroleum channels, that direct shipment gallonage is not considered?

A. In our regular cost accounting procedure, it is not.

Q. We will now turn, please, to pages 122 and 123 of Respondent's Exhibit 100.

I am still referring to Account 255, general manager's department. At the bottom of page 122 reference is made to the supervision sub-department. It says: Research sub-department and the statistical and personnel sub-departments. These three are grouped together for the purpose of description of the method of allocation of general expense to direct shipment channels, and it is stated that the allocation to those channels "was based on ratios representing the effort in the Detroit Field chargeable to jobbers by product and to other direct shipment customers."

Now, turning to page 123 under the gasoline and refined oil department, the second sentence under that department states "The allocation of expense to classes of direct shipment customers and product was based on ratios representing the combined selling efforts of the Detroit 5600 Field, excluding any charges on jobbers' other products."

You will note that in describing the method of allocation for the three sub-departments of the general manager's department and also in describing the method of allocation used for the gasoline and refined oil department expense, the effort in the Detroit Field is referred to. Were the same percentages used or was the same method of allocation applied in distributing the expense of those four sub-departments to direct shipment channels for the purposes of this cost study?

A. Will you read the question, please?

(The question referred to was read by the Reporter.)

Q. You are bearing in mind, of course, that the first three are grouped together so it is really a question of one against the other, one group of three against the other one.

A. Upon checking the worksheets, the allocation in the case of the gasoline and the refined oil department differs slightly from the allocation used on the other three departments, for two reasons: First—

Q. Well, that is an answer to the question, Mr. Boatwright. The answer is "No"; is that right? The same method of allocation was not used?

A. The answer is "No."

Q. I will give you a chance to tell me what was done, but I would rather ask you that as I come to it. That
5601 is just so that the record may be clear, and I would like to ask you the direct question, which I will do now:

What method of allocation was used and what Detroit employees' hours were used to determine the ratios applied for allocation to direct shipment channels of the expense shown under the first group of sub-departments of the general manager's department under Account 255 as shown on page 127 of Respondent's Exhibit 100?

A. The three sub-departments in the general manager's department referred to, being supervision, sales, research, and statistical personnel have to do with the over-all function of the field operation and encompasses problems of all of the operations within a field. Therefore, in determining the proper allocation procedure for the particular sub-departments of the general manager's department, the distribution of effort for the entire field personnel was employed.

Q. And is that the same method that was used in distributing a part of the personnel supervisor's time to direct shipments in the Detroit Field and also part of Mr. Raupagh's time?

A. Yes, part of Mr. Raupagh's time ~~would~~ correspond with the ratios used in allocating ~~these~~ particular accounts.

Q. I think you said this morning that the same method was used for the personnel supervisor?

A. Yes, sir. Yes, sir.

Q. Will you explain, Mr. Boatwright, what ratios
5602 were used to obtain the percentages shown opposite gasoline and refined oil department on page 127 and what employees' hours in the Detroit Field were used for the purpose of obtaining those ratios?

A. The ratios used in the allocation of the gasoline and refined oil department, first, excluded jobbers and Other Products which, as you will recall, was the motor oil portion of their sales. Then—

Q. Well, may we stop there just a moment?

A. Yes.

Q. I was a little uncertain as to the meaning of that. I assumed that that meant you simply applied no ratio for the purpose of transferring any expense to that column, but that perhaps did not affect the ratios which were applied for transferring a part of the expense to jobber, naphtha, and gasoline, and to direct shipment to other customers, for each instance might have three ratios, but you simply just left the other one out and didn't do anything with it when you got to the second column?

A. That is correct. And I just wanted that to be clear on the record that we do not use that particular ratio. Then to get the ratio for the allocation of that part of the expense which would be assignable to jobber, naphtha, and gasoline, we took the combined hours of Mr. Raupagh, Mr.
Blough, and Mr. Hamer, and added the three in the
5603 top supervision classification in the Detroit Field and
expressed that ratio as a percentage of their total time, to determine the proper allocation of this particular sub-account.

Q. Can you explain your reasoning as to why you used those top three supervisory employees for that purpose?

A. Yes, I can explain our reasoning for that. The gasoline selling function to these accounts is performed by these individuals named.

Q. In the field?

A. In the field, yes. It didn't seem quite an equitable thing to do, to bring in all of the personnel in the field in determining the proper allocation ratio.

Q. Were those ratios obtained by using the direct shipment ratios of the field manager and two assistant field managers applied to the total expense of the gasoline and refined oil departments assigned to the Detroit Field?

A. They were.

5604 Q. I note that on Page 127, 5.242% of the ex-
pense of the gasoline and refined oil department assigned to the Detroit Field is allocated to direct shipment other customers. That is a rather large percentage compared to most of the allocations to that channel for departments not involving motor oils or other specialty products and also it seems to be a considerably larger expense than is indicated for either the field manager's or either of the assistant managers' in the Detroit Field

for that channel. Can you explain the reason why that figure of 5.242% is as large as it is, Mr. Boatwright?

A. Yes, I think I can explain that.

Mr. Blough, being one of the three men used in the determination of the ratio, is directly responsible for the sales effort to direct shipment customers of the group of engineers and industrial salesmen and because we base the allocation factor for all three of these direct shipment channels based on the direct selling effort, there is no inclusion of other personnel in the field to bring that average down.

You see, these engineers and the industrial salesmen, of necessity, devote a large part of their selling time to the direct shipment other customers and because in determining Mr. Blough's ratio we did not include the "B" station agents and the "B" station salesmen, and so 5605 forth, for your direct shipment allocation ratio, there is no other classification of personnel to weight that average down.

Q. Well, in determining the ratios used for distribution to direct shipment channels of Mr. Blough's salary expense, you used all of those classes of employees and, in fact, all the others down through the list, including the accounting department and others, did you not, in reaching the percentages which are shown on Page 84?

A. That's as pertaining to Mr. Blough's salary, yes sir.

Q. Yes. Now am I to understand that in applying the distribution of Mr. Blough's time as between direct shipment channels and other channels to the gasoline and refined oil department expense, you did not use the same distribution of time which was applied on Page 84?

A. You are to understand that, yes sir.

Q. That, you had not explained. When you said a moment ago that you used the direct shipment time of the manager and assistant field managers as related to their total time for the purpose of making your distribution of the expense for gasoline and refined oil, I assumed, of course, that you were referring to the distribution of time which was obtained as a result of the time of all employees, as you explained either this morning or yesterday.

A. No. I don't think that would be an equitable treatment, Mr. Austin.

5606 Q. I don't say it was. I just want to find out what it was, Mr. Boatwright.

A. And I think the explanation is clear because on the record I have stated that we took that part of these three supervisors which was based on direct selling effort.

You will recall in our discussion yesterday I pointed out that there were some fifty-eight or fifty-nine members who worked under Blough only, and that there were, I think it was thirty-six worked directly under Mr. Hamer, without overlapping responsibilities.

I also pointed out that Mr. Raupagh spent his time directly in selling jobber accounts.

Now what we did was that we took the efforts of these direct individuals under—

Q. You mean the direct efforts of these individuals?

A. The direct effort of these individuals under each, Mr. Hamer, Mr. Blough, and Mr. Raupagh direct, because these are the individuals that sell the gasoline and we excluded, in determining that ratio, the "S" agents and the broad, miscellaneous classifications of these employes which would have to be given consideration in a pure supervisory function.

Q. Do I understand, then, that you used only that direct selling effort; that is, the time represented by that direct selling effort, for the purpose of this allocation, arriving at the percentages shown on Page 127 for the gasoline and refined oil department?

5607 A. For this particular department, yes sir.

Q. That makes it necessary to go back to Page 84, again, on Respondent's Exhibit 100. Will you do that?

A. Yes sir. I have the page referred to.

Q. Now yesterday I only asked you about the jobber naphtha and gasoline volume and you told me that out of 1.73 percent shown there in that column for the field manager, 1.355 percent was a direct allocation. That there was no direct allocation or direct charge made of the time of the assistant manager wholesale in that column and that for the assistant manager reseller .22 percent was the direct charge. I didn't ask you any questions about the other two columns.

Will you tell me whether for the field manager and assistant manager wholesale and assistant manager reseller any time was charged directly and is reflected as a part of the percentage shown opposite those respective individuals in the last two columns?

A. Having checked the work sheets, I can testify that the direct selling effort chargeable to Mr. P. A. Kaupagh was incident to jobber naphtha and gasoline only.

Direct selling effort of the assistant manager wholesale, there was none assignable to any one of the three direct shipment channels.

The direct shipment incident to the activities of the
5608 assistant manager resale amounted to the .22 referred
to and is assignable only to the jobber naphtha and
gasoline channel.

Q. Well, I don't think that the percentage of 5.242 on Page 127 is yet fully explained, Mr. Boatwright, but again I am only asking you whether you are confident and certain from an examination of your work sheets, that you have fully described the method of allocation applied to that account. If you have, I am not interested in checking out the percentage at this time.

A. I am confident and I am certain that that is explained.

Mr. Hanley: May I inquire if you have now answered satisfactorily to yourself the differences and the reason for any differences between the allocation of the three accounts referred to on Page 122 and the gasoline and refined oils account referred to on Page 123? You were not permitted to answer, except by a "no" answer, by counsel. You had started to give some explanation. Have you given it now, to suit yourself?

Witness: Yes, I have.

By Mr. Austin:

Q. Is there any way in which your work sheet on the gasoline and refined oil department under Account 255 could be identified for future reference?

A. Could we identify the work sheet?

5609 Q. Yes.

A. Why certainly. Do you wish it identified, sir?

Q. If it is convenient. If you have a number or any other way to do it.

A. Well, the complete work on 255 will be on several work sheets. Do you want the entire series?

Mr. Austin: May we go off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Witness: The work sheets attached to schedule 12 numbering from 1 through 11, inclusive, represent the series encompassing the treatment of this account.

Mr. Austin: Thank you.

By Mr. Austin:

Q. Now referring again to Page 127 of Respondent's Exhibit 100, the next two sub-departments under Account 255 are sales promotion wholesale and sales promotion resale, is that right?

A. Yes sir.

Q. And I would like to have you explain as to those accounts, also, how the allocation to direct shipment channels was made of the costs for those two sub-departments assigned by the general office to the Detroit Field.

A. Do you wish an amplification of the explanation that appears on Page 123 of Respondent's Exhibit 5610 100 with respect to these two accounts?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5611 Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Yes, Mr. Boatwright, on page 123, as I now recall it, it is stated that the allocation to direct shipment channels of the time of the two sub-departments of the general manager's department follows the efforts of the wholesale department in one case and the reseller department in the other case, in the Detroit Field. I would like to have you explain just to what extent the total hourly effort or what part thereof was used for the Detroit Field in working out these percentages for the general office.

You gave us a chart which is in evidence—I think I have it here, somewhere; I don't recall the exact number—but, anyhow, it was an organization chart, and one question that would arise would be whether all of the employees shown under the assistant manager, wholesale, would be used in the one case and all of the employees under the assistant manager, resale, in the other. If not, then some further explanation is necessary.

A. The answer is no.

Do you wish a further explanation?

Q. Yes. Then I would like to have an explanation stated.

A. In the case of the allocation factor used in allocating sales promotion wholesale expense chargeable to the Detroit Field, the ration was predicated upon the distribution of effort of the approximately 56 individuals
5612 working directly under Mr. Blough, assistant manager, wholesale, and engaged in direct selling work. With respect to the sales promotion-reseller, a similar procedure was followed using as the determinative of the ratios the 36 individuals directly responsible to Mr. Hamer, and, likewise, engaged in direct selling work.

You see, in each case it would have been unfair to have included all of the rest of the individuals as it would have brought the ratios down so low that it would not have been a proper allocation.

Q. Was that a separate computation made for the purpose of working out these ratios to be applied to these two general office charges or were those same ratios applied anywhere else in the cost study?

A: Well, you will recall that throughout our testimony we have indicated that our study was predicated upon individual positions. That being the case, a recapitulation was made to determine the proper allocations for those particular sub-departments of the general manager's department.

Q. There are some ratios used in several places, that is, applied to several different accounts on your exhibit 101?

A. Oh, yes.

Q. You can spot them as you go along, whether there might be one to three or one to five, or approximately what it is, and you can spot them by comparison?

5613 A. Yes, sir.

Q. I just wondered whether this is one of those or whether this is the only place where this particular ratio based upon employees working directly under the assistant managers was used?

A. I think this is the only place where these respective factors were used in the allocation.

Q. Was that calculation made by the month or on an annual basis using to obtain the hour ratios of those employees assigned directly to the assistant managers?

A. On a monthly basis.

Q. Then the ratios was applied on a monthly basis to the monthly charges from these two general office departments?

A. That is correct.

Q. Have you your worksheets available on Accounts 506 and 514 which are referred to on page 93 of Respondent's Exhibit 100? Perhaps that question is out of order. There may not be any worksheets on those.

A. There would be no worksheets on those two accounts as they are entirely a tank wagon expense.

Q. Have you any data from which you could explain the nature of the expense going into those two accounts, particularly Account No. 506. Perhaps the nature of it can be stated from your own general knowledge.

5614 A. If I may state the nature of it without having to rely upon data, then I can do that.

Q. Yes.

A. Losses by dismantling abnormal other than E. L. A. under Account 506 are dismantling charges when a capital asset is dismantled prior to its complete depreciation on the books of the company. To illustrate, a bulk plant may be dismantled and yet that bulk plant, according to the depreciation rates applicable, might be only 50 per cent written off. Another illustration might be the reconstruction of the service station and the original plant be, let us assume, only 70 per cent depreciated at the time it is dismantled. Now, the items entering into this account is the difference between the original cost and the depreciated value, which would represent the book value of the capital asset at the time of dismantling.

Q. By depreciated value, as you used there, you mean the amount of depreciation previously taken, don't you?

A. I do.

Q. Would the records of the Detroit office show the nature of the individual items of expense going into Account 506 for 1940?

A. That would have to be obtained from the Chicago records. The Detroit books would show the location of different dismantling activities which would then have to be traced through the Chicago books to find where the particular charges were incurred.

5615 Q. Well, I am interested in the nature of the expense. In other words, not so much the location as what kind of property it was that was dismantled. Would the Detroit Field books show that in connection with the location? Wouldn't they show what was dismantled?

A. They would show the particular pieces of property where dismantling occurred, but they will not show whether on that particular dismantling job there was or was not a cost which would be assignable to Account 506. That would have to be traced in the Chicago office on the Chicago books.

Q. You mean there might have been some dismantling where there was no charge to Account 506?

A. Oh, yes. If the property had been fully depreciated, there would be no charge to 506.

Q. Well, I would like to know the major items entering into that account which, of course, would mean the amount of expense charged to the particular dismantling and also what was dismantled from that property. If that is available here, why, I would be glad to know what those are. It is just a matter of looking at the books and copying them down. Otherwise, I won't make any request at this time.

Mr. Austin: So I will make a request now, if your Honor please, that a look be taken at the books in Detroit, and if you can, give me the major items going into
5616 this account from your books here; which I would be glad to know.

Mr. Hanley: If your Honor please, that request is resisted for two reasons:

First, it appears from the Exhibit 100 and has not been contradicted, that the Account in question, namely, 506, has no relation at all to jobber business.

Secondly, the nature of the charge or charges that are made to Account 506 have been explained by the witness and have not been challenged by the Commission as a proper cost to the reseller channel or wherever they get or in whatever channel they get into Account 506. Hence, the charges so made can have no materiality, and the request ought not to be imposed upon the Respondent.

I say to your Honor some day we just have got to come to an end with these requests. We have to close the record even if we can't close the case sometime.

Trial Examiner Ballinger: Mr. Austin, how does this become material?

Mr. Austin: Why, of course, you have got an expense here of some $14,000 and a considerable portion of it more than half of it, is charged to the—just a moment—well, no, it is a total expense of $24,000 of which $14,000 is charged to tank wagon reseller.

How can we possibly know whether that is a proper charge to the tank wagon reseller channel until we
5617 know the nature of the expense? It is perfectly material and a perfectly material question.

The Witness: May I make a statement off the record to my counsel?

Trial Examiner Ballinger: You may.

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: Upon looking at the actual Account 506 on Respondent's Exhibit 101, it appears that in the reseller channel there is something in excess of $14,000 charged, and in the consumer channel something in excess of $9,000 charged.

I will say to the record in prefacing my further remarks that that ratio does an injustice to the—perhaps I might say the differential sought to be established here, for the reason that a great deal more of the total of those two figures should be charged into the reseller channel than is charged into the reseller channel and, thus, the reseller channel cost would be increased, the reason for that being primarily that in this there was a great predominance of dismantling of service stations which are reseller outlets.

Now, I say that just because I am going to remark that if advantage is taken of the offer that I am going to make, I am satisfied that that will be the result that
5618 is found. I stand on the resistance originally made and on the grounds therefor. The Respondent will not produce any transcripts of any of its records. All that the Respondent will do is make whatever books we have available for the examination of the Commission's representatives.

5619 Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: I would like to add on the record, if you please, to the grounds for my resistance to the request originally made, the further ground that it appearing from statements by counsel for the Commission made off the record that he regards that he is entitled to ascertain a complete breakdown of the item 506, that any such breakdown is immaterial on any issue in this case. That all that counsel is entitled to—and he is not entitled to that until there is a challenge of the propriety of the account—is the nature of the account and the expense.

You recognize, I am sure, Judge, that if the position of Mr. Austin is sound on this item 506, it would be equally sound on every one of these items and that means just going into the Detroit Office and the Chicago Office with a crew of accountants and following through every individual voucher that is drawn through the Detroit Office for the year 1940. That's just exactly what it means.

Mr. Austin: Well, I think that the Commission is entitled to cross-examine on any one of these accounts in Respondent's Exhibit 101 as to the nature of the items making up the total expense and where there is any division of expense in an account between different
5620 classes of business of different classes of customers, to determine the nature of expense and the amount going into each class.

Now as far as this particular account is concerned it has already been indicated by the witness that some of the expense may be for dismantling of service stations and some of the expense may be for dismantling of bulk plants.

I am contending that those two classes of expenses should be treated differently. We have here a total of $14,000 all treated in the same way. Therefore, it is necessary to be able to determine the sources of these expense items making up a total of this kind so that we can analyze them and be in a position to determine whether or not the Respondent is correct and justified in claiming a cost differential upon the basis of such an account.

May I go off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The hearing will stand in recess for five minutes.

(A short recess was taken.)

5621 Trial Examiner Ballinger: Come to order.

By Mr. Austin:

Q. Mr. Boatwright, has there been any change in the company's regular procedure in allocating advertising costs going into Account 075 since 1937?

A. I just don't know. There may have been some minor changes but I couldn't answer you positively.

Q. I will direct my questions to some portions of the exhibits in the record.

Turning to page 5 of Respondent's Exhibit 99, under Account 075, the first sentence is: "When allocating charges to Account 075, distribution is made directly to each channel when possible." And then an example is stated which refers to costs involved in installing jewel globes and advertising signs. I take it that those costs of the nature referred to in the example are costs which you here state is the practice of the company to charge directly to channels on Form 189?

A. Yes, sir.

Q. And turning to Respondent's Exhibit 100, the bottom of page 25 and the top of page 26, there is a description of the method used in charging certain of the time of the construction men spending their time on making repairs on advertising signs to direct shipment channels. Do I understand that that sort of expense such as is described at the bottom of page 25 and the top of page 5622 26 is charged directly to channels as a part of the company's accounting procedure?

Mr. Austin: May I withdraw the question, your Honor?

Trial Examiner Bellinger: The question is withdrawn.

By Mr. Austin:

Q. In explanation of the withdrawal, I would like to go a little further and call your attention to various things I have in mind so you can give one answer rather than to call your attention to one thing and later to something else which I think may be inconsistent. I will call your attention to all of them and then if there is any inconsistency, you can explain it.

So that I just referred to the bottom of page 25 and the top of page 26 as illustrating as what appears to me to be a direct charge, at least, to direct shipment business.

Turning next to page 27 on Respondent's Exhibit 100, there is a charge to direct shipment channels there, particularly to jobber channels for signs, frames, and globes, on the basis of an amortization except as to Standard service signs which are charged at their entire value; is that correct?

A. Yes, sir.

Q. I take it that that is also a direct charge to channel, at least for the purpose of charging to direct shipment channels?

5623 A. Yes. The items enumerated on the bottom of page 27 were charged direct to the direct shipment channels.

Q. Now, what gives rise to the question is that previously an exhibit was put in the record, Commission's Exhibit 84, which related to 1937, which on page 84-B reads as follows:

"Dealer sign expense. As stated above, distribution to the sales channel is made on the basis of gallonage sold through that channel and, therefore, expenses incurred in advertising through these media are spread to channel on this basis."

And on page 84-C there is a summary of what is called "Other major items." And it is stated there:

"Other items of advertising expenditure are spread on a gallonage ratio basis to sales channels shown on Form 189 as outlined for newspapers."

So that as I read Commission's Exhibit 84, dealer signs which I would assume included globes, although that is one of the things you can explain, would be charged on a gallonage basis, and as I read your Exhibit 92 and 100 those similar items are charged on a direct basis.

A. Well, I would have to answer you, sir, that accounting instructions do change from time to time. Frequently in our testimony, you will recall that we have indicated a change of account classification, and for me to answer that there had or had not been a change in the accounting
5624 instructions on this particular account in the treatment of this particular type of expenditure in a five-year period, I just couldn't do it without checking the instructions.

5625 Q. Is it true that the portion of the time of construction men working on advertising signs and globes which has been charged to direct shipment channels in this cost study was determined on a time basis and charged directly to the direct shipment channels?

A. That is true.

Q. And the charge to jobber channels for signs, frames and globes, installed at jobber outlets, was made on the basis of actual signs, frames and globes installed at jobber outlets were through actual value or amortization and not upon the basis of any allocation of total expense, is that correct?

A. Yes, sir. It was predicated upon an inventory of signs taken at the outlet.

Q. Have you any record of the total expense in 1940 of the nature described at the bottom of Page 25 and top of Page 26 on Respondent's Exhibit 100?

A. And by that do I understand you by to mean the total expense incurred by the company as reflected our forms 0133, the work orders of these particular parties?

Q. Yes. That is the form referred to here and I was referring to the expense of the nature stated at the bottom of Page 25 which refers to construction men making repairs on advertising signs at retail outlets for sign installations.

A. No, we do not have a total on that because we
5626 were concerned only with cost of that nature incurred on direct shipment accounts. Each of the work orders was reviewed but we did not pick up those that were not involved in any way in the complaint.

Q. Well—"in the Complaint?"

A. Yes. There was no need of picking up these work orders having to do with the tank wagon reseller channel. They were already in that account.

Therefore, what we did was to pick out those having to do with the direct shipment channels so we could pull that part of the expense out and segregate it to the proper channel.

Mr. Austin: Well, in fairness to the Respondent I would like to call attention to this consideration: That we all know there is considerable dispute about some of the costs going into Account 075.

If the Commission should decide that certain of those costs did not afford the basis for a cost justification but that these costs here referred to at the bottom of page 25 and 26 are properly allocated, the Commission, as the record stands now, would have no basis of determining what amount of Account 075 was properly allocated because the total amount of expense of this is not shown; only the part to direct shipment expense is shown.

I simply call attention to that in the event that
5627 the Respondent should desire, on its own behalf, to introduce the total amount of that expense.

By Mr. Austin:

Q. Turning to Page 27 of Respondent's Exhibit 100, Mr. Boatwright, there is a total expense there shown which is charged to the direct shipment jobber channels on Exhibit 101 of $1,358.48, is that correct?

A. Yes, sir.

Q. Have you any record of the total expense for 1940 for the Detroit Field for signs, frames and globes of the nature shown on Page 27?

A. No, I do not.

Mr. Austin: Well, the observation that I made on the record with respect to the expense described at the bottom of Page 25 would also apply to any effort to segregate the total amount of sign, frame and globe expense in the event that some other portion of Account 075 was disproved.

Mr. Hanley: May I ask a question so I will be sure I understand the point counsel is making?

Trial Examiner Ballinger: You may.

Voir Dire Examination by Mr. Hanley.

Q. Mr. Boatwright, in respect of the items of expense that are referred to on the bottom of page 25 and on
5628 page 27, that counsel has been asking you about, is
it or is it not a fact that in the regular form 189 all of that expense would be in the reseller channel, or would there be any in any other channel?

A. Your construction men's expenses would be charged to Account 7000 and prorated back on a gallonage basis.

Q. Between what channels?

A. Tank wagon reseller, tank wagon consumer and other methods.

Q. Is that the only one of the items of expense referred to on those two pages that wouldn't go into the reseller channel on the regular 189?

A. Well, I think all of the other items enumerated at the bottom of page 27 would go into the one-thousand series; namely, the reseller channel.

Q. Then as the result, Mr. Boatwright, this: That on the construction figures the total of what you have pulled out and allocated to direct shipments, taken together with the balance of that account as it is distributed among the three channels, would equal the total of that particular expense item for the year?

A. Yes, that is true.

Q. Is it not also true that with respect to all of the other figures that counsel has been talking about, that the
amount of those figures that you have set up in Exhib-
5629 it 100, taken together with the balance of the items
under those expense accounts as appeared in Respondent's Exhibit 101, would make a total which would be equal to the total amount of such expense accounts for the year?

A. Yes.

5630 Mr. Hanley: Mr. Austin, in view of what the witness
has said, I am at a loss to understand what you mean by your statement that these figures are not anywhere disclosed.

Mr. Austin: I can explain that very easily.

Mr. Boatwright, the total figure for signs, frames, and globes, for instance, of all of the expenses of the nature described on page 27 is not set forth anywhere on Exhibit 101, is it, except as it is included in a much larger figure for Account 075?

The Witness: That is correct. It is included in a larger figure.

Mr. Austin: That is the point.

Mr. Hanley: Maybe I understand your question or your suggestion now, Mr. Austin. Let me make sure. Is it your thought, referring to page 27, for example, that you might take the position and the Commission might agree with you that the Standard service signs item is a proper item to go into the reseller channel?

Mr. Austin: No.

Mr. Hanley: That the following item "Standard Oil Product signs" might not be a proper item?

Mr. Austin: No. I am treating that as a group which is a total there of $1,358.48. Now, that sum—or, rather 99.465/1000 of a cent of it, ~~as~~ you will see on page 28, is
charged to jobber, naphtha, and gasoline, so that you
5631 have a sum of something less than $1,358, which is
included in the item of $3,275 on Respondent's Exhibit 101.

If you will turn to Respondent's Exhibit 101, Judge Hanley, and look at Account 075, I think you can see it very plainly. That is the first account down there in the lower half.

Mr. Hanley: Yes, I have found it.

Mr. Austin: All right. Under jobber, naphtha, and gasoline, there is a total of $3,275. and some cents. We know from Respondent's Exhibit 100 that $1,358 of that less a small amount which you could compute is a charge for signs, frames, and globes—but now turn to the tank wagon reseller channel, you see a charge there of $126,225.

We do not know and it cannot be computed from anything in the record as to what portion of that $126,000 is the tank wagon expense for signs, frames, and globes. So that while it is possible from Respondent's Exhibit 100 to separate the portion of the direct shipment expense to jobbers which is allocable to signs, frames, and globes, you can't do the same thing over here in the tank wagon reseller channel from anything that we have. And if that type of expense was to be allowed, it would have to be allowed in both channels.

Mr. Hanley: Well, I won't take any more time now, your Honor, to discuss this.

Trial Examiner Ballinger: Off the record.

5632 (There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Direct Examination (Resumed) by Mr. Austin.

Q. Mr. Boatwright, in answer to questions asked by Judge Hanley, did I understand you to state that the expense for the time of construction men as described at the bottom of page 25 and the top of page 26 is charged between channels on Form 189 in the company's regular accounting procedure on a gallonage basis?

A. That statement is correct and it is stated on page 4 of Respondent's Exhibit 99 under the example from which I quote:

"Other painting expense and other advertising salaries not directly chargeable to the automobile supplies channel are prorated to the tank wagon reseller, tank wagon consumer, and Other Methods on a gallonage basis."

Q. That explanation on page 4 does not refer to Account 075, does it?

A. Well, the construction men would be handled in the same way as the painters, Mr. Austin.

Q. But the construction men go into Account 075, do they not?

A. For such of their work as is on advertising signs, yes, it would be handled the same way.

Q. Now, Judge Hanley further asked you about 5633 the expense of the signs, frames and globes on page 27, and that was in effect the same question I asked you a while ago when I referred to Commission's Exhibit 84. I understood at that time that you were not certain of the answer to what appears to me to be an inconsistency between the two exhibits. In answer to Judge Hanley's question now, I understood you to say that these charges for signs, frames and globes are direct charges to the reseller channel, and I wondered if you had now resolved your uncertainty on that point?

A. Well, I answered Judge Hanley as I did because his question, as I interpreted it, was limited to the year 1934.

Q. 1940.

A. Or 1940. I am sorry! And your question was, has there been a change of accounting instructions between 1937 and 1940. Now, I assume there has, Mr. Austin, but you ask me from my own knowledge if I know that there has been one and I would have to check that. I am sure you see the reasonableness of that position.

Q. Do I understand that you are not prepared to state definitely now what the company's regular accounting procedure is and was in 1940 with respect to the allocation between channels of expense for signs, frames, and globes installed at reseller outlets?

A. Why, I think the exhibit—Respondent's Exhibit 99 is clear on that point and that was checked against 5634 the accounting instructions for the year 1940.

Q. When you say that Exhibit 99 is clear, are you referring to page 5, because I am referring now to signs frames and globes themselves, not to the time of the construction men.

A. I am referring to page 5 of Respondent's Exhibit 99 and, particularly, the first sentence of the first example wherein the exhibit states:

"Costs involved in installing jewel globes on gasoline pumps and reseller outlets and costs of advertising signs installed at reseller outlets which refer to a particular brand of gasoline are charged direct to the tank wagon reseller channel (1075)."

Q. And would it not follow from that explanation that the cost of installing the globes and signs and the cost of the globes and signs themselves are both charged directly to the reseller channel? If you are not sure, Mr. Boatwright, let's not try to answer it because I don't expect anyone to remember all of these details, even anyone who is as well informed as you are.

A. I don't know.

Q. I don't feel that I expect you to know all the answers.

A. I don't know. However, we all appreciate, do we not, that the cost of installing a jewel globe is a very small item?

5635 Q. Well, I wondered if there might not be a distinction between the signs and perhaps installing jewel globes, which is unimportant, but between the signs themselves and the time of the construction men on the other hand.

A. It is such a small item, Mr. Austin, that I couldn't answer you with accuracy.

Q. You are now referring to just the installation costs?

A. Yes, sir.

Q. The repairing and upkeep and maintenance is more substantial, is it not?

A. I would expect it to be more substantial, yes, sir.

Q. There is one other point there, Mr. Boatwright, that occurs to me may not be very important but if you will notice on page 28 of Respondent's Exhibit 100, the charge to jobbers for point-of sale of material, station signs, and road maps is allocated between jobber, naphtha, and gasoline, and jobber and other products, according to the percentage of total jobber purchases, which was naphtha and gasoline as against Other Products. Would it not follow from that, that if the balance of the expense of the types listed here is chargeable to tank wagon reseller customers, that the expense would, in turn, be allocated between the tank wagon reseller channel and the Other Methods channel on the basis of the gasoline and naphtha purchases of the tank wagon reseller customers as against the purchases of motor oil and other company products by
5636 tank wagon reseller customers?

A. Well, there is an item there, Mr. Austin, of $16 that should be in the gasoline column.

Q. What do you refer to now as to the $16?

A. On page 27.

Trial Examiner Ballinger: Of what exhibit?

The Witness: Respondent's Exhibit 100.

By Mr. Austin:

Q. You mean that 535/1000 of a per cent?

A. Yes, sir.

Q. Well, I was assuming that this allocation on page 28 was correct, but you will concede that the portion of the tank wagon reseller customer purchases which is other than gasoline and naphtha, amounts to a great deal more than any 535/1000 of a percent; it amounts to a substantial figure, doesn't it?

A. No, not a large figure.

Q. Don't they purchase a lot of motor oils, greases, and other things?

A. Well, expressed as a percentage of the total volume, it would not be a large percentage.

Q. But in terms of gallonage it would still be much more substantial than this 535/1000 that you have given recognition to for jobbers?

A. It would. It would.

Q. My only point is that if that 535/1000 or a per
5637 cent or $16 is given recognition between the jobber
channels, I wondered whether you had given similar
recognition to the admittedly larger percentage of other
products purchased by tank wagon reseller customers?

A. Well, the admittedly larger ratio that you are referring to is still an awfully small ratio. I don't know the exact ratio but I would estimate it as under two per cent.

Q. Well, I just asked you whether recognition had been given to it?

A. I would have to check that, too.

5638 Mr. Austin: Now, your Honor, in response to
a request which I made to Respondent's counsel, the
Respondent has produced a file of advertising copy used
by it in Detroit in 1940 and from that file I have selected
six or seven advertisements which I believe are fairly
representative of the material in the file and I would like to
offer these advertisements in evidence. If the Respondent
doesn't think they are sufficiently representative and wants
to put in more, I won't object to that, but I tried to keep
the number down ~~and~~ just get representative samples.

Mr. Hanley: Is that the purpose of just selecting a few out of the file?

Mr. Austin: Yes.

Mr. Hanley: Just for the purpose of not encumbering the record?

Mr. Austin: Surely.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

We will have a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Austin: I would like to have these advertising copies marked for identification.

Trial Examiner Ballinger: The Reporter will 5639 mark the documents Commission's Exhibits 121-A to 121-G both inclusive, for identification.

The documents referred to were marked "Commission's Exhibits 121-A to 121-G", both inclusive, for identification.

By Mr. Austin:

Q. I will hand you Commission's Exhibits 121-A to 121-G, for identification and ask you if you can describe what they are, Mr. Boatwright?

A. Yes, I can explain these exhibits I think, with reasonable brevity.

Commission's Exhibit 121-A is the first ad that appeared of a particular campaign that was conducted in the Detroit area on the theory that Red Crown leads other gasoline two to one.

Trial Examiner Ballinger: When was that ad?

The Witness: This particular ad which we have is the final proof dated 5/20/40.

A. (Continuing.) Commission's Exhibit 121-B illustrates one ad of the "10 Star Spring Tune-Up" campaign which was conducted in the spring of 1940.

Commission's Exhibit 121-C is an ad which is on Iso-Vis Motor Oil, predominantly, which was run in the summer of 1940.

Commission's Exhibit 121-D is one of a series of ads which developed the theme "Laugh at Winter with 5640 Red Crown," which was run in the winter of 1940.

Commision's Exhibit 121-E is one of a series of ad announcing the improvement in the quality of our Red Crown gasoline, run in the early part of 1940.

Commission's Exhibit 121-F illustrates the nearest approach that we make to the so-called department store type advertisement, of which we would run approximately four ads a year listing various products available at our outlets, while Commission's Exhibit 121-G is not one of a series of ads or a campaign, in the true sense, but is a good illustration of an institutional type ad declaring the policy of our company in product leadership.

Mr. Austin: I offer these advertisements in evidence, your Honor, with the understanding that the Respondent will advise me if they find that they do not have duplicate copies of any of them, in which case the Commission will have photostats made and substitute the photostats for the original as an exhibit and return the original.

Mr. Hanley: The offer is objected to as immaterial and irrelevant, it not appearing that there would be any probative value at all in the demonstration to the Commission of the specific copy or phraseology of general newspaper advertising, the only material issue being the fact of whether the Respondent did general newspaper advertising and the cost thereof and the offer, if
5641 received, encumbers the record.

Trial Examiner Ballinger: The objection is overruled.

Commission's Exhibits 121-A to 121-G, inclusive, are admitted in evidence.

(The documents referred to, heretofore marked for identification "COMMISSION'S EXHIBITS 121-A to 121-G", inclusive, were received in evidence.)

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Mr. Boatwright, I show you Commission's Exhibits 94 and 95 for identification. I asked you the other day, I think yesterday, whether you were familiar with that form. Have you made any further investigation so that you can now state what the form is and where it is made out?

5642 A. This form is an acknowledgment of orders, and it is prepared in the Detroit office by one of the clerks in the sales department.

Q. And what is done with it when it is prepared?

A. It is sent to the general offices.

Q. You say it is prepared by one of the clerks in the sales department?

A. Yes, sir.

Q. In what account does this time of the clerk appear in Respondent's Exhibit 101, Form 189?

A. In Account 003.

Q. Was the time of the clerk or clerks devoted to the handling of invoices and in making and forwarding of acknowledgments of jobber orders charged to the jobber, naphtha, and gasoline, and Other Products channel on Respondent's Exhibit 101?

A. Yes, sir.

Q. Now, on these two exhibits which I have shown you, Commission's Exhibit 94 and 95, for identification, there is one line opposite the wording "Freight to destination" and on each of the exhibits appears the figure .22 cents. Does that mean .22 cents per gallon?

A. Yes, sir.

Q. Will you explain whether or not that figure .22 cents represents the freight charge per gallon paid by the Respondent for the shipment of gasoline referred on 5643 these respective forms from the River Rouge terminal to the jobbers named?

A. It may not represent exactly the freight per gallon as the rate of .22 cents per gallon is used for all shipments from River Rouge to the Detroit metropolitan area in which only a switching charge is involved.

Q. How is the figure .22 cents arrived at?

A. Why, it is an average based upon the switching charges incurred in serving various jobbers and other tank car buyers in the metropolitan area.

Q. Did the Respondent pay any transportation charge for gasoline shipped from River Rouge to the four Detroit jobbers in 1940 determined on the basis of a certain amount per gallon of gasoline transported by tank car?

A. As long as the jobbers were served by tank car, our only payment of freight was a switching charge which was on a per car basis rather than upon a gallon basis.

Q. Was the switching charge the same for all shipments to particular jobbers regardless of the size of the car being shipped?

A. It was.

Q. Did the switching charge vary as between different jobbers to whom gasoline was shipped by tank car in 1939 and 1940?

A. The switching charge did vary among the different jobbers.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

644 Trial Examiner Ballinger: On the record.

Mr. Austin: I would like to have this document arked, for identification.

Trial Examiner Ballinger: The Reporter will mark he documents Commission's Exhibits 122-A, B, C, and D.

(The documents referred to were marked "Commission's xhibits 122-A, B, C, and D" for identification.)

y Mr. Austin:

Q. I now hand you Commission's Exhibit 122-A, to D, or identification, and ask you if you can give an identifiation of these documents?

A. Commission's Exhibit 122-A is a freight bill for the hipment of a tank car of gasoline from River Rouge to ed's Auto Supply.

Commission's Exhibit 122-B is a freight bill showing ost for shipment of a tank car of gasoline from River ouge to Citrin-Kolb Oil Company.

Commission's Exhibit 122-C is a freight bill representing he shipment of one carload of gasoline from River Rouge o Stikeman Oil Company.

Commission's Exhibit 122-D is a freight bill representing a shipment of one tank car of gasoline from River Rouge o the Wayne Oil Company.

All of these respective exhibits, A, B, C, and D, represent shipments during the month of December, 1939.

645 Q. And are those bills indicative that payment was made by the Standard Oil Company to the raiload?

A. The bills do so indicate.

Q. Is it your testimony that the charges shown on these ills are the only transportation charges or were the only ransportation charges incurred by the Standard Oil Comany with respect to the transportation of gasoline referred to in the respective bills from the River Rouge terminal to the bulk plants of the respective jobbers?

A. I do so testify.

Mr. Austin: ~~I offer these four freight bills in evidence,~~ your Honor, with the understanding that photostats will be made and the originals returned promptly to the Respondent in Chicago.

Mr. Hanley: The exhibits and each of them is objected to as immaterial and for all of the reasons stated by the Respondent in its objection to the offer of exhibits 94-99 in the hearing in Washington concerning the proof or attempt to prove any freight charges paid by the Respondent on gasoline into Detroit.

Trial Examiner Ballinger: The objection is overruled and upon the conditions stated by counsel for the Commission, the exhibits, for identification, are admitted in evidence as Commission's Exhibits 122-A, B, C, and D.

(The documents referred to, heretofore marked
5646 for identification "COMMISSION'S EXHIBITS
122-A, B, C, and D", were received in evidence.)

Mr. Austin: Do I understand that the Respondent is prepared to stipulate that the transportation charge shown as a switching charge of $24.20 on Commission's Exhibit 122-A was the charge made to and paid by the Respondent on each carload of gasoline shipped from the River Rouge terminal to Ned's Auto Supply Company from January 1 to February 15, 1940; that the charge of $26.40 shown on Commission's Exhibit 122-B was the charge made to and paid by the Respondent for each carload of gasoline shipped from the River Rouge terminal to Citein-Kolb Oil Company from January 1 to February 15, 1940; that the charge of $17.60 as shown on Commission's Exhibit 122-C was the charge made to and paid by the Respondent on each carload of gasoline shipped by it from its River Rouge terminal to the bulk plant of the Stikeman Oil Company between January 1 and February 15, 1940; and that the charge of $24.20 shown on Commission's Exhibit 122-D was the same charge made to and paid by the Respondent upon each carload of gasoline shipped by the Respondent from its River Rouge terminal to the Wayne Oil Company from January 1 to February 15, 1940?

Mr. Hanley: If your Honor please, the Respondent
will stipulate to the fact as expressed in the request of
counsel for the Commission but Respondent pre-
5647 serves its objection to the reception of the fact in
evidence or the use thereof as already stated.

Mr. Austin: I hereby return the balance of those freight bills, Judge Hanley.

Mr. Hanley: Thank you.

Mr. Austin: I also hand you those supplied except for December, 1939.

Mr. Hanley: That is all of the two batches that we supplied to you?

Mr. Austin: No, that is the first batch. I think you gave me some this morning.

Mr. Hanley: Yes, I gave you a lot of the freight bills.

Mr. Austin: I also return to you herewith the ones which you gave me this morning.

Mr. Hanley: So that cleans it all up. Thank you.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I think it appears on the record that counsel for Respondent handed me a few days ago several contracts between the Standard Oil Company and contract haulers of gasoline in Detroit or in the Detroit Field. One of the contracts handed me was an agreement between 5648 the Standard Oil Company and the Stiproe Company with certain riders and with a notice of cancellation attached. The contract in question is dated December 15, 1932, and, according to the notice of the cancellation, the parties made and executed a new contract for hauling to replace this old contract, the new contract being dated March 1, 1939, but no copy of the new contract was supplied to me by the Respondent. I don't know whether counsel for the Respondent—

Mr. Hanley: It just occurred to me, your Honor, if I may make inquiry of Mr. Austin—I am wondering if the Commission is interested in pursuing this contract feature any further. It has been expressed by Mr. Austin that they are not a very understandable thing to him, and it has now been arranged that Mr. Warmack will consult the records of the Respondent to verify the fact of our payments of certain sums to these contract haulers, and I can really see no reason why we should struggle along with that contract business any more.

Mr. Austin: I am not going farther with that except that I just wanted it to appear that there was one contract that I hadn't seen because it also appears on the record that a lot of them were handed to me.

Mr. Hanley: Well, I am just sorry—

Mr. Austin: I am dropping it at the present.

Mr. Hanley: I haven't got those contracts and 5649 haven't had them since we were in Washington.

Mr. Austin: Well, I assumed, that you hadn't noticed that reference.

Mr. Hanley: I gave you what the traffic department gave us.

Do you care to have those contracts introduced in Washington any longer?

Mr. Austin: Well, I do certainly at the present time until we determine whether we can obtain some other evidence of charges made.

Mr. Hanley: I see. All right. All right.

Mr. Austin: May I go off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I have here a sheet which is one of the sheets in the file of contracts handed to me by Judge Hanley the other day and which has just been referred to on the record. This particular sheet is entitled "Rider No. 3" and is an original sheet bearing signature of a vice president of the Standard Oil Company and of the president of the L. A. Smith Company, the latter company being the contract hauler with whom the contract was made, and being a rider to a contract of November [illegible], 1939, between the
Standard Oil Company and the L. A. Smith Company,
5650 a photostatic copy of the original contract, and also
of rider No. 2 are now in evidence as Commission's Exhibit 93-A to E, inclusive. Rider No. 2 to the contract is in evidence as Commission's Exhibit 93-A.

I would like to offer Rider No. 3 and request if it can be done, without violating any established procedure, that it be inserted as Commission's Exhibit 93-A-1 immediately following Commission's Exhibit 93-A.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I offer this rider which has been handed to me by counsel for Respondent, after removing the same from the original contract file to be admitted as Commission's Exhibit 93-F, and will request that it be inserted in the record following Respondent's Exhibit 93-E so that its connection and relevancy to the original contract may appear, further, with the understanding that this sheet will be photostated and the original returned to Respondent.

Mr. Hanley: The offer is objected to for the reason the same is immaterial, for all of the reasons heretofore made to offers to prove by exhibit or by testimony any freight charges paid by Respondent on delivery of gasoline into Detroit, and on the grounds of all the objections made at the time of their reception in evidence to Commission's

Exhibits 92 and 93-A to E, and sub letters, if any be
5651 added, and for all of the reasons discussed and assigned by the Respondent in the arguments and discussions having to do with Respondent's Exhibits 94 to 99, both inclusive, for identification, when the same were first offered in evidence in the hearing in Washington.

Trial Examiner Ballinger: The objection is overruled. Commission's Exhibit 93-F is admitted in evidence. The Reporter and the docket room of the Federal Trade Commission are instructed to insert the document in the Commission's Exhibit immediately following Commission's Exhibit 93-E.

The document will be photographed and a photographic copy inserted in the exhibits and the original returned to the Respondent.

(The document referred to was marked "COMMISSION'S EXHIBIT 93-F" for identification, and received in evidence.)

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

5652 Mr. Austin: At this point, if your Honor please,
I would like to make Mr. Boatwright my witness. I think this is a subject which is more properly rebuttal than cross-examination.

Trial Examiner Ballinger: The witness is now a witness for the Commission.

Mr. Austin: I would like to have this sheet marked for identification, please.

Trial Examiner Ballinger: The Reporter will mark the document Commission's Exhibit 123, for identification.

(The document referred to was marked "Commission's Exhibit 123", for identification.)

By Mr. Austin:

Q. I show you this sheet marked Commission's Exhibit 123, for identification, and ask you if you can identify it?

A. I can, sir. Commission's Exhibit 123 marked for identification was prepared under my direct supervision. It represents an outline map of the various sales divisions of the Standard Oil Company and typed thereon for each of the sales' fields are the total cents per gallon marketing cost tank reseller channel for the years 1939 and 1940, including therein the income and expense of the leased service stations as a part of the reseller cost.

Mr. Austin: I want to offer this Commission's Exhibit 123, for identification, in evidence.

5653 Trial Examiner Ballinger: Is there any objection?

Mr. Hanley: May I see the exhibit?

(Counsel for Commission handed counsel for Respondent a document.)

Mr. Hanley: No objection.

Trial Examiner Ballinger: The document is admitted in evidence as Commission's Exhibit 123.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT 123" was received in evidence.)

By Mr. Austin:

Q. Mr. Boatwright, referring to Commission's Exhibit 123, I believe you stated that that exhibit shows the unit cost of the Standard Oil Company for marketing its products through the tank wagon reseller channel in its various fields?

A. Yes, sir.

Q. Is that unit cost for the tank wagon reseller channel; that is, unit marketing cost; the same in each field?

A. No, sir.

Q. And as shown by this exhibit the Detroit Field and the Chicago Field are the fields having the lowest marketing cost in the tank wagon reseller channel, in that order?

A. Yes, sir.

Q. Now it appears from this exhibit that as you go westward the company's marketing costs in the tank wagon reseller channel increase.

5654 A. Yes, sir.

Q. And is it a fact that in the western territory of the company, particularly in the Dakotas, Montana, Wyoming, Colorado, Kansas and Missouri, that the tank wagon reseller cost per unit of marketing its products is substantially higher to the company than it is in the Detroit and Chicago fields?

A. The marketing costs in the states mentioned are higher than in either the Detroit or the Chicago fields.

Q. And the amount as to which they are higher is shown on the exhibit, is it not?

A. Yes, sir.

Q. Now is it part of your duty and a part of your functions as head of the sales research department of the Respondent to study marketing conditions in various fields nd the costs of marketing and the reasons for variation in osts of marketing in different fields?

A. We have studies assigned to us which bear on those questions.

Q. And as a result of your experience with the company an you state the reason for the higher marketing costs in he western territories of the company and particularly in he states named than in the Detroit and Chicago fields?

Mr. Hanley: That is objected to as immaterial.
5655 There are reasons for it, of course, but what is the materiality of that?

Mr. Austin: Well, I think that the different costs in the different territories of the company may be of some materiality and I would like to have the witness answer. If it does not appear, after I finish this line, that the testimony is material, why, it will be subject to a motion to strike.

Mr. Hanley: Oh, that “subject to a motion to strike” doesn't work at all, you know, Mr. Austin. I would have objected, if your Honor please, to the introduction of this exhibit on the ground of materiality except for the fact that it shows the marketing cost of the Respondent to be lower in the area under consideration in this law suit than any place else in which we market in the United States, covering fourteen entire states, and that's the only materiality it has. There isn't any question of differential between any prices in this law suit and any of these other prices at all. Unquestionably I believe the reason Mr. Austin asked for this information in the first place was because he thought perhaps, and maybe he hoped, it would appear that the marketing cost in Detroit was higher, comparatively, than elsewhere and that there was an undue loading of the
189 reseller channel. I submit, your Honor, the only
5656 probative value that the exhibit has and the only materiality that it has—and I think it does have materiality for that purpose—is, namely, to establish that the Respondent in this action has certainly not loaded its reseller channel cost, being the lowest in the entire territory.

Trial Examiner Ballinger: Do you consider this material to your case?

Mr. Austin: I do, your Honor. I don't know that I can be called upon to make argument on evidence before I get the evidence but I think it is material.

Trial Examiner Ballinger: The Examiner overrules the objection, reserving to the counsel for Respondent the right to renew the objection and motion to strike, until we see what it is.

Witness: May I have the question, please.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

A. To state all of the reasons for a differential of that nature would be impossible from the witness stand, your Honor. The markets simply are not comparable in terms of size of outlets, in terms of distance between outlets, in terms of cost of the original construction, your representation, and in many other respects.

By Mr. Austin:

Q. Well, can't you state certain of the chief differences which account for the differences in marketing costs? 5657

A. I have. In that answer I stated several.

Mr. Austin: May I have the answer read.

(The answer referred to was read by the Reporter.)

By Mr. Austin:

Q. Well, isn't the chief difference between the western territory and the Detroit and Chicago territory the fact that the western territory is largely a rural territory whereas the Detroit and Chicago fields contain large metropolitan areas?

A. Well, there can be no question but what your statement is inherent in the answer that I gave.

Q. Is that a correct statement?

A. That is a contributing factor. There is no question about it.

Q. And has it been your experience in a study of the company's costs, that the company's costs are generally higher in fields which are comprised principally of rural areas than in fields which contain large metropolitan areas?

A. No, I wouldn't say that that were true.

Q. Well, where is the exception to that rule?

A. Well, you have asked for a very general statement. I am of the opinion that we will find the costs in the Minneapolis Field quite high and yet there is a large metropolitan area in that field.

5658 Kansas City is a good-sized metropolitan market and yet those costs are high.

St. Louis is a large metropolitan center and yet its costs are high.

Q. Aren't the higher costs in Kansas City and St. Louis due largely to cut-rate competition from the Oklahoma oil fields nearby?

A. I couldn't testify that that was true, at all.

Q. Aren't your prices lower for the prices which you receive for your products through the same methods of distribution—are they not lower in those fields than they are in other fields of the company farther removed from Oklahoma?

Mr. Hanley: If your Honor please, if it were two hours earlier I wouldn't renew my objection but I am going to renew it.

It is not material and has no probative value in this case.

Trial Examiner Ballinger: The Examiner is unable to perceive its value.

Mr. Austin: Well, if your honor please, the witness—

5659 Trial Examiner Ballinger: Unless you intend to take up conditions existing in each one of these separate divisions, it wouldn't be productive of any good and then, when you get through with that, I can't see that it would have any—

Mr. Austin: Well, I don't propose to that but—

Trial Examiner Ballinger: (Continuing) —effect upon this case.

Mr. Austin: (Continuing) —the purpose of the exhibit, I have no doubt, as is easily perceived, is that the company has submitted in support of its price differentials in the City of Detroit a cost justification based upon its costs in the entire Detroit Field which is composed of a very considerable amount of rural territory plus a very considerable amount of metropolitan territory.

I think from this exhibit it appears that the company's costs are generally higher in rural territory than they are in metropolitan territory and if that be true, then I think it may be fairly inferred that the company's costs of marketing gasoline are higher in its rural territory in the Detroit Field than the costs are in the City of Detroit.

Trial Examiner Ballinger: Mr. Austin, isn't it self apparent that there may be many contributing factors?

Mr. Austin: There may be, but this exhibit indicates a generally higher cost throughout the large areas.

5660 Trial Examiner Ballinger: Hasn't the witness already conceded that the cost is higher in the rural sections than it is in the more thickly populated?

Mr. Hanley: If your Honor please, in answer to counsel's statement of "yes," I submit that the witness has not stated anytime during this record that the costs in that portion of the Detroit Field, outside of the metropolitan field, is any higher—

Mr. Austin: He hasn't.

Mr. Hanley: (Continuing) —than it is in Detroit and there isn't any proof on that question.

Trial Examiner Ballinger: There is no contention he has but he is speaking generally about rural sections.

Mr. Hanley: If he is speaking generally about rural sections we submit that that is totally immaterial.

Mr. Austin: Well, I have no further questioning on that point—

Trial Examiner Ballinger: If you will confine it strictly to this district, you may proceed.

By Mr. Austin:

Q. Has any cost study been made by the Standard Oil Company to determine the per gallon cost of marketing gasoline to tank wagon reseller customers in the Detroit metropolitan area only?

A. No, sir.

5661 Q. Has any cost study been made by the Standard Oil Company to determine the per gallon cost of marketing gasoline to tank wagon reseller customers served by "A" stations in the Detroit Field?

A. No, sir.

Q. Or has any such a cost study been made to determine the cost to the company of marketing gasoline to tank wagon reseller customers by "B" stations in the Detroit Field?

A. No, sir.

Q. Has the company made any cost study, the results of which furnish or provide a comparison of unit marketing costs between "A" stations in metropolitan areas and "B" stations in surrounding territory?

A. Not to my knowledge.

Mr. Austin: That's all.

Mr. Hanley: I have a little cross examination, Judge. It is very short.

Trial Examiner Ballinger: Proceed.

Cross-Examination by Mr. Hanley.

Q. Mr. Boatwright, on the series of questions that you have just been asked by counsel concerning whether or not you or the Respondent has made any studies relative to certain costs, one distinguished from another, is it or is it not true that you have testified fully in this case as 5662 to your views of the possibility and feasibility of making all and any one of such costs?

A. It is my recollection that I have testified at considerable length on the feasibility of any one of the three types of cost studies enumerated by the counsel for the Commission.

Q. And just so we may have it definite, now: I won't ask you the reasons, but is it your considered opinion and judgment that it is impossible to make any accurate cost studies of that kind or even a reasonably accurate one and entirely infeasible and impracticable to attempt any such cost study?

A. Well, I don't see how we could make a cost study of that nature; in retrospect. I don't believe it would be practicable from any records that we have or now maintain.

Q. Is it or is it not your judgment and opinion that if any such study were attempted that it would involve the use of so many arbitraries and, literally, so much guesswork, as to render the results of it entirely valueless for any purpose?

A. I fear that it would.

Mr. Hanley: That's all.

Trial Examiner Ballinger: Is there anything further?

Mr. Austin: No.

Trial Examiner Ballinger: Mr. Boatwright, you are excused.

(Witness excused.)

Mr. Austin: I move that we adjourn until ten 5663 o'clock tomorrow morning.

Trial Examiner Ballinger: The motion is granted and now, at 6:20 p. m., the hearing is adjourned to reconvene at 10:00 a. m. February 25, 1942, in room 859, Federal Building, Detroit, Michigan.

(Whereupon, at 6:20 p. m., the hearing was adjourned to reconvene on Wednesday, February 25, 1942, at 10:00 a. m.)

5664 Room 859 Federal Building,
Detroit, Michigan,
February 25, 1942.

Met, pursuant to adjournment at 10:00 A. M.; War Time.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois; and Arthur J. Abbott, Esq., of the firm of MacMahon, Abbott & Roberts, 2230 Buhl Building, Detroit, Michigan; appearing for the Respondent.

5665 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing of Docket No. 4389, in the matter of the Standard Oil Company of Indiana, is reconvened in Room 859 Federal Building, Detroit, Michigan, at 10:00 a. m., Eastern Standard Time, February 25, 1942. The last hearing was in the same room in the same city, February 24, 1942.

You may proceed.

Mr. Hanley: You may take the stand, Mr. Boatwright.

JOHN W. BOATWRIGHT was thereupon recalled as a witness for the respondent and, having been previously first duly sworn, testified further, as follows:

Direct Examination (Recalled) by Mr. Hanley.

Q. Mr. Boatwright: I call your attention to the word "legal" in the second line of the transcript at page 4885 in your testimony and will ask you if that is the word that should be there?

A. The word that should be there is leg.

Q. Instead of legal?

A. Instead of legal.

Mr. Hanley: We ask permission to have the transcript so corrected. It is an error that changes the sense, somewhat, so I thought it necessary to ask the witness to correct it.

5666 Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. I call your attention to the second line of the transcript of your testimony at Page 5100 and will ask you if there is any correction you care to make in that answer, Mr. Boatwright?

A. Yes. There should be a period after the word "no". A new sentence starting with the word "Commissions".

Mr. Hanley: That's all. You may be excused, Mr. Boatwright.

Trial Examiner Ballinger: The witness is excused.

(Witness excused.)

Mr. Hanley: The Respondent was requested to produce if it had and could locate any form 461, gasoline contracts with Ned's Auto Supply Company.

A search has been made and we are unable to find any such contracts.

The Respondent was requested to make an explanation of certain differences that counsel for the Commission thought existed between Commission's Exhibit 86 and 109. That explanation has been obtained and is now produced by the Respondent.

I am going to ask, if I may, your Honor, that the 5667 Reporter take this sheet and just copy it into the record. It has a lot of proper names and street addresses and one thing and another.

I will say for your Honor's benefit that the discrepancies that counsel thought existed arose, as we suggested at the time might be, out of the fact that between the time that the two exhibits were supplied there had been changes of operators at certain addresses so different names appeared on the exhibits. There is no difference in the outlets.

Trial Examiner Ballinger: The Reporter will copy the contents of the paper into the record at this point.

"G. Scanlon, 19906 Fenkel succeeded M. Joiner during

1937 as the operator of this Station and the sales for this location are included on Exhibit 86 under the name of H. Joiner. They are tabulated on Page 7 of Exhibit 86, 16th item from the top of the page.

J. Dudley, 20300 Grand River did not start the operation of this Station until 2-7-38. Prior to that time (November 1937 to February 1938) it was operated by B. P. Burbank and the sales for same are shown on Page 7 of Exhibit 86, fourth item from the bottom. Mr. G. W. Butler also
5668 operated this station until May 1937 at which time we lost the business to a competitor until Mr. Burbank took it over in November 1937. The sales while Mr. Butler was operating same are tabulated on Exhibit 86, Page 8, 29th item from the top.

A. J. Ginella, Fenkel and Welland, was succeeded by Wm. C. Engler on May 26, 1937. Sales for this location are all shown under Mr. Engler's name on Page 3 of Exhibit 86, 25th item from the bottom.

W. Sokol, 9442 Wyoming, was succeeded by F. E. Hughes on 2-12-37. Sales for this location are all shown under the name of F. E. Hughes on Page 4 of Exhibit 86, first item.

C. A. & W. J. Walsh, Grand River & Rutherford, started dual operation of this station on 12-1-37. Prior to that time it was operated by C. E. Walsh. Sales for the year 1937 are listed under the name of Chas. E. Walsh, Exhibit 86, Page 4, 12th item from top of page."

5669 Mr. Hanley: If your Honor please, that completes compliance with all of the requests that have been made by the Commission at this time so far as the Respondent is aware.

Mr. Austin: If I may say so, there was just one thing that was somewhat in the nature of a request, although not particularly specific, and that was in regard to the number of contracts used between the company and tank wagon reseller outlets. I think on at least two occasions I questioned Mr. Boatwright about that and Mr. Blough the other day also, and that has never been answered definitely, and I think I suggested to you, Judge Hanley, yesterday that I might ask a couple of questions of that kind of Mr. Raupagh before we leave.

Mr. Hanley: I have asked Mr. Raupagh to be available tomorrow morning as you suggested.

Mr. Austin: I would like to have him be able to give some definite statement about contracts that are used or were used during 1937 to 1940 with tank wagon reseller outlets in the Detroit Field.

Mr. Hanley: You mean you want the number of the contracts that were in effect?

Mr. Austin: No, the different forms of the contracts that were used.

Mr. Hanley: I see. For what period of time?

5670 Mr. Austin: Well, 1937 through 1940.

Mr. Hanley: You are talking about sales contracts?

Mr. Austin: What?

Mr. Hanley. Gasoline sales contracts?

Mr. Austin: Anything that has to do with the cost of sale of gasoline. For instance, the equipment loan agreement contract is a contract between the company and the reseller customer and a copy of that is already in the record. We also have the 461 in the record, and we have the lease.

Mr. Hanley: Mr. Austin, I believe you have everything in the record that existed.

Mr. Austin: Well, perhaps. The question was raised by, as you know, Mr. Boatwright's testimony that he thought there were about six different reseller contracts.

Mr. Hanley: Well, Mr. Boatwright, I have just learned, had in mind the Form 461, Form 385, and four different forms of service station leases. They are all Form 342, the only difference being the manner of paying rent as to whether it is gasoline rental or part gasoline and part cash or all cash. You have already in the record forms of the lease. You have the 385, which is the equipment loan agreement, and you have a copy of the 461.

Mr. Austin: Yes.

Mr. Hanley: So those are all the forms that we have.

5671 Mr. Austin: Then I am perfectly satisfied with that statement, so that takes care of that request.

Mr. Hanley: I call Mr. Warmack.

WILLIAM J. WARMACK was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Hanley.

Q. Mr. Warmack, will you please give your name, residence, and occupation to the Reporter?

A. William J. Warmack.

Trial Examiner Ballinger: Speak a little louder, please.

A. William J. Warmack, 5025 42nd Street, NW, Washington, D. C.

I am employed as accountant by the Federal Trade Commission in Washington, D. C.

Q. How long have you been an accountant, Mr. Warmack?

A. Oh, I would say since about 1925.

Q. And for what length of time have you worked with the Federal Trade Commission in that capacity?

A. About twelve years.

Q. Mr. Warmack, since the inception of the cost features
of this present lawsuit, at least, you have been rep-
5672 resenting the Federal Trade Commission as an ac-
countant in this case, have you not?

A. Yes, sir.

Q. And have had an intimate connection with the progress of the case and the events that have taken place in it with reference to the cost phases?

A. Well, I have followed it for the Commission. There is some parts that I may not have had exactly what you might term an intimate knowledge of step by step procedure but I followed it at least in a general way.

Q. Did you attend hearings in the case late in June which were terminated on June 27, 1941, in Washington?

A. Yes, I attended the hearings in June, 1941, in Washington.

Q. Do you recall that at that time an arrangement was made by counsel representing the parties for discussions between the accounting staff of the Commission and the accounting staff of the Respondent with a view to outlining some method of presenting cost figures?

A. I remember that a discussion was made, I believe, on the record at that time and, if my memory serves me,—of course, the record will show—the Commission's attorney I believe volunteered—

Mr. Austin: Well, I object to the witness answering that question any further, your Honor, on the ground
5673 that the record shows what is there.

Mr. Hanley: I submit to the objection.

By Mr. Hanley:

Q. All I want to know, Mr. Warmack, is if some arrangement was made at that time?

A. Well, I remember about the—if you want to come right down to the point of an arrangement, Judge, I don't know what that might mean specifically from the arrangement standpoint, but I do remember that it was discussed and we were available for any further discussions.

Q. Well, that is all. I am not asking you what the arangement was in detail.

Now, subsequently to that time did the accountants for the Commission and the Respondent meet and discuss cost features of this lawsuit?

A. Yes, sir.

Q. And when was the first of those conferences held?

Mr. Austin: Your Honor, if it is proposed to go into any discussions or statements made or matters talked over at any of these conferences, I object upon the ground that it is immaterial and irrelevant because it has already been admitted on the stand by Mr. Boatwright in response to questions by his own counsel that those were informal conferences and that nothing was said on behalf of any—or nothing was said by any of the Commission represen-
5674 tatives at those conferences which was in anyway binding upon the Commission, and that being true and conceded by the Respondent, I don't believe that testimony in detail as to discussion at those conferences is material.

Mr. Hanley: That isn't the purpose. There isn't going to be any evidence to alter that position. We understand that, and I am going to make that statement again. That isn't the purpose.

Mr. Austin: Well, may I inquire, then, as to what the materiality is or would you prefer to ask questions?

Mr. Hanley: I would rather ask the questions, and I think it will be apparent what it is.

Mr. Austin: All right. I won't press the objection at this time.

By Mr. Hanley: Q. Are you prepared to answer what date that first meeting was held, Mr. Warmack?

A. I believe that was on August the 12th, 1941, Judge, and went over—

Q. Where was it held?

A. In my office in Washington, room 252 of the Federal Trade Commission Building.

Q. Who was present at that time?

A. Mr. Boatwright of the Standard Oil Company, and
Mr. Lundvall from the Federal Trade Commission,
5675 and Mr. Austin of the Federal Trade Commission, and
myself. Now, I won't say that Mr. Austin and Mr.
Lundvall were in there all of the time. The conference was held in my office and I am sure Mr. Boatwright and I were there.

Q. That isn't important. Did it last two days, as you recall?

A. I believe that's true.

Q. At that conference was there a discussion as to the time period that could be agreed upon that would be used if the Respondent undertook to make a cost study?

A. Will you explain just what you mean by time period?

Q. I mean the period of time which would be contemplated by the study if the Respondent undertook that task.

A. I remember this, and that is my ideas as to the time. Now, whether there was consensus of opinion—

Mr. Austin: Just a minute. May I ask, Judge Hanley, that you explain whether you mean the period during which the costs would be—

Mr. Hanley: Don't bother. I will make it very simple.

Mr. Austin: Or do you mean a period to be covered by time studies or anything of that sort?

Mr. Hanley: I will make it very simple.

By Mr. Hanley:

Q. At that meeting was there a common under-
5676 standing between you people as accountants that if a
cost study were undertaken by the Respondent that it
should cover the year 1940?

A. To answer that question yes or no, Judge, would not be a complete answer.

Q. Well, was there a concurrence of thinking among you that that would be a satisfactory and a proper period of time to be used?

A. I might ask you in answer to that, and I don't mean to be presuming, how could you make a study for 1940 when it was already 1941 when the conference was held?

5677 Q. Well, I can't answer that. I don't know. I just am asking you if there was a concurrence of thinking on the part of your people in that conference that the year 1940 be used as a basis for a cost study if the Respondent undertook such a cost study.

Witness: Your Honor, may I make a statement for the record as to what my feeling was, then, with reference to this cost study?

Trial Examiner Ballinger: Can't you answer the question, Mr. Warmack?

Witness: Will you read it?

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

A. As I previously explained, there could not be a concurrence of opinion as far as I would be concerned to use wholly and only costs for 1940 in the making of the study, Judge, for the reason that measuring factors would have to be established. They couldn't be established on something that was passed and gone unless they were established during the year 1940.

By Mr. Hanley:

Q. I don't want to be technical about it. You understand, certainly, that the cost study as reflected in Exhibit 100, Respondent's Exhibit 100, covers the year 1940?

A. Yes.

5678 Q. Is based upon and reflects Exhibit 101, which is a special Form 189 for the year 1940. You have seen these many times.

A. Yes, sir.

Q. Now all I am asking you, Mr. Warmack: If there wasn't a concurrence of thinking that it would be upon that time period that the Respondent might center its efforts? There had to be some kind of a time period, however they might measure; either former years or later.

A. If I may answer your question, which was my opinion then, and which is my opinion now, and then it might be judged whether it was—

Mr. Austin: Well, your Honor, I object to that question. I don't think this is a question of opinion, it is a question of fact. It is simply what was said or what was agreed upon at the time.

Mr. Hanley: Really, that's all I am asking. I wish Mr. Warmack could answer.

Trial Examiner Ballinger: You can answer whether there was or wasn't.

Witness: Consensus of opinion?

Trial Examiner Ballinger: Yes. That's all he has asked for.

Read the last question.

(The question referred to was read by the Reporter.)

5679 Trial Examiner Ballinger: Can't you answer that yes or no?

Mr. Hanley: I will make it easier for Mr. Warmack.

By Mr. Hanley:

Q. Was it your understanding that there was a concurrence of thinking to that effect?

A. Well, I don't know how to answer your question, Judge. I will tell you what was my understanding.

Q. That's what I have now asked you. If it was not your understanding that there was a concurrence of thinking to the effect indicated?

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

By Mr. Hanley:

Q. You know that, Mr. Warmack. There isn't any mystery about this or any other question I am going to ask you. You needn't be a bit scared.

A. Judge, I am not frightened, I don't think, but I want to state this: That I have never agreed to picking up the costs for 1940 and making any separation or segregation or using the allocations as made unless the factors for those allocations were properly proven. The only way they could be proven, if there was no information available with which to prove them, would be on a current cost study and after that, factors secured and obtained by some facts and
5680 objective cost study at the current time which would mean following this conference because factors could then be related back to the costs of 1940, assuming that conditions remained the same, and measure 1940. Now if that was consensus of opinion, there is my answer.

Q. That's what you thought?

A. That was my opinion then and that's my opinion now.

Q. But you were willing that the time period that was used as a reflection of the costs, however, they might be arrived at by the Respondent, could be the year 1940?

Mr. Austin: Well, your Honor—

Mr. Hanley: I am not asking Mr. Warmack to agree, at all.

Mr. Austin: Judge Hanley, will this help any—

Mr. Hanley: I don't know. I wish somebody would help us.

Mr. Austin: I remember stating on the record telling Mr. Boatwright that I thought the year 1940 would be a sufficient period for use for the cost study, if one was made.

Mr. Hanley: I know it is in the record a hundred times by your admission and just by the whole force of the record. All I want to get is just this preliminary answer. I don't want to argue the technicalities of our cost study.

Trial Examiner Ballinger: Off the record.

5681 (There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

A. I believe that it was stated at the conference that the Respondent would establish measuring factors and apply them to the costs of the year 1940.

By Mr. Hanley:

Q. There was a good deal of discussion about, Oh, just accounting questions, wasn't there?

A. That is correct.

Q. And at that time was there not some discussion as to the method of handling the individual expense classification on Respondent's Form 189?

Trial Examiner Ballinger: He asked you if there was some discussion.

By Mr. Hanley:

Q. That's all. I am asking you if there was a discussion, not what it was or your opinion about it?

A. Yes sir.

Q. Did you discuss the items of expense that are reflected on Form 189?

A. I answered "yes sir."

Q. Do you have knowledge of the fact that the Respondent did undertake making a cost study shortly after that conference?

A. Yes sir.

5682 Q. And did you come to Detroit during the period that that cost study was under way?

A. Yes, sir, I did.

Q. And what time was that?

A. I was in Detroit on another assignment and I was directed by office—

Trial Examiner Ballinger: What time was it?

A. (Continuing.) —on October 2, 1941, to call at your office.

By Mr. Hanley:

Q. And at that time did you have a conference with Messrs. Boatwright and Houghton?

A. I did.

Q. And was that in connection with the cost study that was being undertaken by the Respondent?

A. Yes, sir.

Q. And did you at that time discuss possible methods of procedure that might be used in connection with making up the cost study?

A. May I have that question?

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Trial Examiner Ballinger: All he is asking you is whether or not you discussed methods of procedure in making up the cost study.

5683 A. We did.

By Mr. Hanley:

Q. And at that time did Messrs. Boatwright and Houghton present and review the procedure followed in allocating field expense accounts?

A. They did.

Q. There was a conference following that, was there not?

A. Yes, sir.

Q. And when and where did that occur?

A. I believe that was on November the 10th in Chicago in the offices of the Standard Oil Company and it carried on to the 11th and part of the 12th.

Q. And who was present at that conference?

A. Mr. Boatwright, Mr. Houghton, Mr. Russell, Judge Hanley for the Respondent, Mr. Landvall, and Mr. Warmack for the Commission.

Q. Now at that time did the Respondent have a cost study prepared which was exhibited to you?

A. Yes, sir.

Q. And was it reviewed and discussed by the persons present?

A. At great length sir; yes, sir.

Q. You recall that shortly thereafter, I think on or about November 17th, there was another hearing in Washington?

A. Yes.

Q. And that cost study was then presented by the

5684 Respondent. Do you recall that fact?

A. That is correct.

Q. Now at the Chicago conference to which you have referred was it not pointed out that some further detailed explanation would be of assistance to you and your staff and the Commission in following the procedure used and in the analysis of many of the accounts?

The Witness: May I have the question?

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

A. Yes, sir.

Q. And that was pointed out by you and Mr. Lundvall, was it not?

A. That is correct.

Q. And is it not true that the representatives of the Respondent indicated that they would make some further detailed explanation but that it would be determined as to the manner after further conference and after the hearing in Washington?

A. Yes, sir.

Q. Now was there a subsequent conference held after the Washington hearing and, if so, when and where was that, and who was present?

A. That was held in Washington in my office on December 22nd and 23rd.

5685 Mr. Boatwright, I remember, for the company, was there. I think that Judge Hanley, for the company, was also there.

Q. At least a part of the time?

A. Mr. Lundvall, Mr. Austin, Mr. Warmack, for the Commission.

Q. At that time was there a general discussion and review of the results of the special cost study made by the Respondent in Detroit relative to this year, 1940?

A. Yes, sir.

Q. And was that an amplified or revised form of the cost study report or conclusions that you had seen in Chicago?

A. I believe that's true, yes, sir.

Q. Was it not, in fact, what has now become Respondent's Exhibits 100 and 101?

A. I believe that is correct.

Q. Now was it your understanding at that time that that revision of the report of the cost study had been made at the request of yourself and Mr. Lundvall to supply the additional detail that you pointed out as being of probable assistance to you as early as the Chicago meeting in November?

The Witness: May I have that question again?

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

A. I would rather say, Judge, that we suggested that we could understand it a little better if there was a little
5686 bit more detail in the report and, in accordance with that, why, that additional detail was added.

Q. I will put it this way: After you asked for the additional detail, or suggested it would be helpful to you if you had more additional detail, were not the present exhibits 100, and 101, the results?

A. That is correct.

Q. You got that, didn't you?

A. Yes.

Q. Did you come to Detroit some time in January of this year, Mr. Warmack?

A. Yes, sir.

Q. What date?

A. January 12th, I believe.

Q. And what was the purpose of your visit here?

A. It was to make a review and study, to some extent, of the cost data that had been put in by the Respondent in Respondent's Exhibits 99, 100 and 101.

Mr. Austin: Your Honor, I still fail to see the materiality of this line of questions.

Mr. Hanley: It may be a little difficult to explain the purpose. I propose to use it in a motion in Washington which I am going to have to make directly to the Commission.

Mr. Austin: I would like to have my objection recorded and passed upon.

5687 Trial Examiner Ballinger: The objection at this time is overruled with the right reserved to counsel for the Commission later to renew the objection and move to strike.

Mr. Hanley: I don't believe Mr. Warmack had an opportunity to finish his answer.

By Mr. Hanley:

Q. Had you, Mr. Warmack?

Trial Examiner Ballinger: Read the answer.

(The last answer referred to was read by the Reporter.)

By Mr. Hanley:

Q. Have you been in Detroit ever since the 12th of January?

A. Yes, sir.

Q. And working on this assignment?

A. That is correct; except, of course, the time I have been attending these hearings?

Q. But your time has all been spent in connection with this case, hasn't it?

A. Practically so, Judge. I had to call on one company but that was for practically a half day.

Q. Now you have, since your sojourn in Detroit, examined many books and records and data in the office of the Respondent, located here, haven't you, Mr. Warmack?

A. Yes.

Q. And you have examined the work sheets that 5688 were prepared in connection with the Respondent's cost study as reported in Exhibit 100, haven't you?

A. I have examined several of them, not all of them, Judge.

Mr. Austin: I understand I have a continuing objection to this line, now?

Trial Examiner Ballinger: You have.

By Mr. Hanley:

Q. Has the Respondent made available to you all records and files, data, accounts, work sheets of any nature that you wanted, since you have been here?

A. Everything that I have requested has been made available to me in the way of records.

Q. Has the Respondent made available to you qualified accountants to facilitate your work?

A. Yes, sir.

Q. And have the personnel that has from time to time been furnished for your use facilitated your work since you have been here?

A. They certainly have and they have been most cooperative.

Q. Has there ever been a time when you have been denied or refused access to any record that you wanted?

A. No, sir.

Q. Are you still engaged in the assignment of examining the records and books, accounts, work sheets, and 5689 anything else you want to look at, belonging to the Respondent?

A. Yes, sir, I am still engaged in the study; I might say, as soon as we can get through with these hearings.

Mr. Hanley: You may take the witness.

5690 *Cross-Examination by Mr. Austin.*

Q. Mr. Warmack, was any outline of the procedure proposed to be followed by the Respondent in its cost study which it was considering making last Summer submitted to you either at the conference in Washington last August or at any other time prior to the commencement of the cost study?

A. No, sir.

Q. Did you ever approve any outline of procedure for such a study of the Respondent's costs for the year 1940?

Trial Examiner Ballinger: Mr. Austin, there is no claim that he did.

Mr. Austin: Well, I think it is proper cross-examination because the question was asked whether these various matters were discussed, so I want to be sure that the record is clear that none of them were shown in advance.

Mr. Hanley. If your Honor please, I think I made a promise to restate this.

Trial Examiner Ballinger: Mr. Boatwright's statement is very definite and certain with reference to that.

Mr. Hanley: I will state it on the record as a statement of the Respondent, if it is desired. We make no claim that the Commission is bound by anything said at these conferences as to whether our work was right or wrong.

Mr. Austin: I will withdraw the last question.

5691 By Mr. Austin:

Q. When did you first become aware of or obtain information as to the method of procedure being used by the Respondent for its cost study covering the year 1940?

A. I believe that was October the 2nd, 1941.

Q. Was the cost study already under way at that time?

A. Yes, sir.

Q. Did you both in June of last year in Washington and also at the conference in August which you have referred to make certain suggestions to Mr. Boatwright regarding the advisability of making a separation of the costs for the purpose of the cost study as between Commission business and "A" station business?

A. I did, and I urged that that be done.

Q. Did you specifically make that suggestion at the conference in August before the cost study was started?

A. Yes, sir.

Mr. Austin: That is all.

Mr. Hanley: That is all.

Trial Examiner Ballinger: That is all. You may be excused.

(Witness excused.)

Mr. Abbott: At this time, the Respondent makes offers of proof as follows: Offer of proof No. 1. Respondent's Exhibit 102 having been offered in evidence and having been excluded by the Examiner upon objection interposed by the attorney for the Commission, Respondent therefore now offers to prove as follows: That the amount expended by Ned's Auto Supply Company for all classes of advertising in the calendar year, 1940, was as follows: 5692

A. Newspaper advertising, $66,877.69.

B. Radio advertising, $16,280.

C. Outdoor advertising, $5,580.

D. Magazines, engraving, art work, and telephone directory, $9,208.

Mr. Austin: If your Honor please, I object to reading in the amounts. I think for the purpose of an offer of proof it is sufficient if counsel states that he offers to prove the nature and amount of advertising and, certainly, if he reads the types of advertising, it is unnecessary to put in the dollar amounts for the purpose of an offer of proof.

Mr. Abbott: I have to, if the Court please, in order to make the offer complete. I have a right to show the amount which was expended for each class of advertising; otherwise, there is no offer of proof. That is what we offer to prove.

Trial Examiner Ballinger: You can offer to prove the

aggregate. It is unnecesary to include the separate
5693 items.

I state to counsel that the Examiner would be very glad to have somewhere in this record the advertising expense account but he knows of no way by which that can be included in the record, so the Commission may see it.

Mr. Austin: I don't object to the statement of the items but I thought that encumbering the record with the amounts. individual amounts is unnecessary. The total amount, perhaps, at the end—

Trial Examiner Ballinger: The Examiner thinks it would be very helpful to the Commission if they could see the complete itemized statement, and if there was any way by which the Examiner could include that in the record, the Examiner would do so, but the Examiner sustains the objection with reference to including in this statement the separate items that make up the total amount.

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Abbott: At this time, then, the Respondent offers Respondent's Exhibit 102, for identification.

Trial Examiner Ballinger: All right, Mr. Austin. Any objection?

Mr. Austin: I object to the introduction in evidence of Respondent's Exhibit 102, for identification, upon
5694 the ground that no sufficient basis or measuring factor has been established by which the measure of benefit, if any, received by the Respondent from this sort of jobber advertising can be determined, and upon the ground that the amount, if any, of such benefit accruing to the Respondent from miscellaneous advertising by jobbers is so uncertain and so speculative and so incapable of computation that it renders the exhibit void of any evidentiary value.

Trial Examiner Ballinger: The objection is sustained. The exhibit is again rejected.

Mr. Abbott: The Respondent reoffers Respondent's Exhibit 104-A, B, C, D, E, F, G, and H, in evidence.

Mr. Austin: As to Respondent's Exhibit 104-A to H, inclusive, for identification, I believe that these same exhibits were previously offered by the Respondent, at which time I objected to their introduction into the record upon the ground, among others, that they were not the best evidence and that the original records were the best evidence and should be produced. The Examiner, however, sustained the objection upon other grounds but did not rule upon the objection based upon the non-production of the original records. Therefore, in order to facilitate the offer of proof which the Respondent is now making and also to facilitate further rulings by the Examiner, I have decided to withdraw my objection both to this exhibit and to 5695 any other similar advertising figures of jobbers similarly identified based upon the contention that the said exhibits were not the best evidence and that the original records should be produced, and, of course, will not renew that objection either to Respondent's Exhibit 104 or to Respondent's Exhibit 105, or any other such exhibit which may be offered upon similar identification.

Of course, I do not waive any right of cross examination in the event that any of these exhibits should be admitted in evidence.

Trial Examiner Ballinger: But the Examiner understands that you do now expressly waive the production of the original documents?

Mr. Austin: I do.

Trial Examiner Ballinger: And also that you insist upon all of your other objections?

Mr. Austin: That is right, your Honor, and I waive the production of the original documents, as I said, in connection with the Respondent's exhibits now being offered and any others similarly identified.

Trial Examiner Ballinger: For the same reasons upon which the previous ruling is based, the exhibit is rejected.

Mr. Abbott: Respondent at this time reoffers Respondent's Exhibit 105-A, 105-B, and 105-C, for identification.

5696 Mr. Austin: I also object to the introduction of these exhibits, your Honor, and everything that I have stated on the record with regard to Exhibit 104 may be read as also applying to Respondent's Exhibit 105, for identification.

Trial Examiner Ballinger: The same ruling.

Mr. Austin: And so that it is perfectly clear, I made an objection on the record to Respondent's Exhibit 102, for identification, this morning which I intend now to renew as to Respondent's Exhibits 104 and 105, for identification. I did not previously state that objection in connection with the offer of Respondent's Exhibits 104 and 105.

~~Trial Examiner Ballinger: It is upon~~ the grounds stated by counsel that the Examiner ruled on the admissibility of the documents and excluded them.

Mr. Abbott: Now, the Respondent was proceeding to dictate an offer of proof with reference to Ned's Auto Supply Company when I was interrupted and objection made to the reading of the amounts as to classes of advertising for which Ned's Auto Supply Company expended money in the calendar year 1940, and I understand that the Examiner takes the position that it is not admissible to read the amounts so spent?

Trial Examiner Ballinger: No. That would have the same effect as though the exhibit had been included in the record.

5697 Mr. Abbott: That being my understanding of you Honor's ruling, I would like to have a recess for five minutes at this time.

Trial Examiner Ballinger: Take a recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Abbott: The Reporter advises me that the statement I made taking an exception to the ruling of the Court on the refusal to receive these three exhibits, Respondent's Exhibit 102, 105-A to C, inclusive, and Exhibit 104-A to H, inclusive, is not in the record, namely, with reference to the exception taken. I understand that is covered by a general stipulation.

Trial Examiner Ballinger: To every ruling made by the Examiner there is an automatic exception reserved to both counsel for the Commission and the Respondent and that applies to every ruling made since the inception of this case.

Mr. Abbott: That is what I understood.

Now, off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5698 Trial Examiner Ballinger: On the record.

Mr. Abbott: I ask to have this marked as an exhibit for identification on behalf of the Respondent.

Trial Examiner Ballinger: The Reporter will mark

these documents Respondent's Exhibit 106-A and B, for identification.

(The documents referred to were marked "Respondent's Exhibits 106-A and 106-B," for identification.)

Mr. Abbott: I ask to have the paper just handed to your Honor also marked for identification as a Respondent's exhibit.

Trial Examiner Ballinger: The Reporter will mark the documents Respondent's Exhibits 107-A and 107-B, for identification.

(The documents referred to were marked "Respondent's Exhibits 107-A and 107-B," for identification.)

Mr. Abbott: Next I ask to have this single sheet marked as a Respondent's exhibit, for identification.

Trial Examiner Ballinger: The Reporter will mark the document Respondent's Exhibit 108, for identification.)

(The document referred to was marked "Respondent's Exhibit 108," for identification.)

Mr. Abbott: Now the Respondent's Exhibits 106-A and B, 107-A and B, and 108 are the offers of proof in question, number 106-A and B being the offer of proof
5699 proposed to be made on behalf of the Respondent
with respect to advertising costs of Ned's Auto Supply Company in the year 1940; number 107-A and 107-B being the proposed offer of proof with reference to advertising costs of Wayne Oil Company in the year 1940, and Respondent's Exhibit 108 being the proposed offer of proof with respect to the advertising cost of the Citrin-Kolb Oil Company in the year 1940.

In order to have these offers of proof on the record, the Respondent now offers them in evidence.

Mr. Austin: May I ask how that is different from Respondent's Exhibit 102, 104 and 105?

Mr. Abbott: They are substantially the same with just a few additions.

Trial Examiner Ballinger: Point out the additions.

Mr. Abbott: The only addition on Respondent's Exhibit 106-B, which is identified as paragraph 5, that being in connection with the advertising costs of Ned's Auto Supply Company in the year 1940. Otherwise, I understand they are the same as Respondent's Exhibits 105-A, 105-B, 105-C, 104-A to 104-H, inclusive, and 102.

Mr. Austin: Is this Exhibti 106-A and 106-B the one you started to read this morning before I entered an objection?

Mr. Abbott: That's right.

5700 Mr. Austin: Now, your Honor, these papers which have been marked for identification as exhibits are really offers of proof. They include material in the three rejected exhibits but these are really statements which have been typed up apparently in form for reading into the record as an offer of proof and that is indicated by the fact that Mr. Abbott did start to read the one regarding Ned's Auto Supply Company, that is, Respondent's Exhibits 106-A and 106-B, for identification, this morning.

If the Respondent desires to make an offer of proof I have no objection to stating the offer of proof so that it will appear on the record as to what it is that is offered to be proved without going into details as to dollar amounts, and so forth. In other words, I think that perhaps it should appear on the record that the Respondent is offering to prove the advertising expenditures of each of these three jobbers and to also prove an analysis of their sales showing the proportion of their sales which represent sales of gasoline and refined oils or whatever it is that the Respondent offers to prove. I am not trying to make the offer but I would object to admission of Respondent's Exhibit 106-A, 106-B, 107-A, 107-B, and 108 for identification, as exhibits, and also as offers of proof, because I think for an offer of proof to be made, it should be made orally and within such limitation as the Examiner may impose 5701 regarding the extent of detail that ought to go into such an offer so that if, as is now proposed, these three exhibits for identification are offered as exhibits, I object to them on the ground that they are objectionable for the same reasons which I stated in objecting to Respondent's Exhibits 102, 104 and 105.

Mr. Abbott: The only purpose of this, your Honor, is to have the offers of proof on the record so that the Commission will know what they are and I might suggest, also, just repeating what I said a moment ago, that it might be gotten in this way—because I know that neither Mr. Austin nor your Honor wants to be technical—to have them read into the record and then have a motion to strike made, in which event if the motion were granted the offers would still remain in the record.

Mr. Austin: I object to those exhibits as exhibits for the reasons before stated and as offers of proof, because I think if they were put in as offers of proof they are going into unnecessary detail and would, in effect, amount to putting in the exhibits themselves and the statement of the detail is unnecessary for the purpose of making a complete and sufficient offer.

Trial Examiner Ballinger: The Examiner is ready to rule, unless you desire to be heard further.

Mr. Abbott: No, we have nothing further to say.

5702 Trial Examiner Ballinger: Respondent's Exhibits 106-A, 106-B, 107-A, 107-B, and 108 for identification are rejected both as exhibits and as offers of proof.

(Thereupon Respondent's Exhibits 106-A, 106-B, 107-A, 107-B, and 108, for identification, were rejected.)

Mr. Hanley: At this time, if your Honor please, the Respondent being about ready to rest its case, renews each and all of the several motions pertaining to a dismissal of this case or to any other matter which the Respondent has made during the course of the trial.

Trial Examiner Ballinger: As previously announced by the Examiner, he has no power other than to deny the motion.

Mr. Hanley: The Respondent rests and again renews all of its motions for dismissal and ~~for other~~ purposes heretofore made; any of which have been denied.

Trial Examiner Ballinger: The renewal of the motions is addressed to the Commission and not to the Trial Examiner.

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: Your Honor will recall that you admitted pages 34 to 37, inclusive, of Respondent's Exhibit 100 at the hearing in Washington in January, subject to the 5703 material on those pages being substantiated by additional evidence which was to be subsequently introduced in Detroit by the Respondent and that you reserved to me the right to move to strike those pages from the record in the event that the material therein was not substantiated or if, in the light of evidence subsequently offered, the material therein did not appear to be competent, relevant, or material.

I now move to strike from the record pages 4 to 37, inclusive, of Respondent's Exhibit 100, all of the testimony of Mr. B. S. Kott, appearing at pages 4801 to 4888, inclusive; the testimony of Mr. Elmer E. Ledbetter, appearing at pages 5398 to 5420, inclusive, and all of the testimony of Mr. Max Biber, appearing at pages 5420 to 5429, inclusive of the record.

The motion is made upon the ground that it does not appear that any of the testimony in question has been sufficient to support and justify the retention in the record of the matter set forth on pages 34 to 37, inclusive, of Respondent's Exhibit 100, and that in view of all of the testimony so far received in evidence upon the question of advertising expenditures of jobbers it does not appear that the material on pages 34 to 37, inclusive, of Respondent's Exhibit 100, is relevant or material or has any evidentiary value.

Mr. Abbott: Does this motion include the graphic
5704 matter on the last page referred to?

Mr. Austin: Yes. That is on the aadvertising.

Mr. Abbott: I understand that that relates, however, to other cities than Detroit?

Trial Examiner Ballinger: Page 37 of Respondent's Exhibit; is that included in your motion?

Mr. Austin: Oh, yes. That has no relevancy whatever except in connection with pages 34, 35, and 36, and the arguments based thereon.

Mr. Hanley: I might say this is all Boatwright's opinion and has to do mostly with our advertising: except certain figures in here which are obtained from the jobbers. This is our cost study you are trying to strike, now. We have a right to put in our cost study.

Mr. Austin: Well, this follows—you are right as to the first paragraph on 34. I had better go over this again a little bit more carefully.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5705 Mr. Austin: May I go on the record?

Trial Examiner Ballinger: On the record.

Mr. Austin: The foregoing motion is now modified to the extent that the motion was for the striking of pages 34 to 37, inclusive, of Respondent's Exhibit 100. With respect to Respondent's Exhibit 100, I move to strike all of page 34 after the first paragraph ending with the word "reasons:".

I move to strike all of page 35, the material on page 36 through the end of the paragraph at the top of that page and ending with the word "market." The motion does not apply to the last two paragraphs on page 36. And I move to strike the graph which constitutes page 37.

Trial Examiner Ballinger: The ruling on the motion of counsel for the Commission will be deferred until counsel for Respondent has opportunity to carefully inquire into the matter embraced in the motion and can be heard fully with reference thereto.

Mr. Austin: Now, your Honor, I move that we adjourn until 10:00 o'clock tomorrow, Thursday morning.

Trial Examiner Ballinger: In the absence of objection, the motion is granted and now, at 12:30 o'clock p. m., February 25, 1942, the hearing is adjourned to reconvene at 10:00 a. m., February 26, in room 859, Federal Building, Detroit, Michigan.

5706 (Whereupon, at 12:30 p. m., the hearing was adjourned to reconvene on Thursday, February 26, 1942, at 10:00 a. m.)

5707

Room 859 Federal Building,
Detroit, Michigan,
February 26, 1942.

Met, pursuant to adjournment at 10:00 a. m., War Time.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois; and

Arthur J. Abbott, Esq., of the firm of MacMahon, Abbott & Roberts, 2230 Buhl Building, Detroit, Michigan; appearing for the Respondent.

5708

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing of Docket No. 4389, in the matter of the Standard Oil Company of Indiana, is reconvened in Room 859 Federal Building, Detroit, Michigan, at 10:00 a. m., Eastern Standard Time, February 26, 1942. The last hearing was in the same room in the same city, February 25, 1942.

You may proceed.

Mr. Hanley: While we were making copies of the exhibits which were loaned to us, we discovered that in Commission's Exhibit No. 76, which is the Taggart survey, that there exists no page 16. It is a bound volume. This is the first we have known of it and I thought I should call the attention of the Court to that fact. I think I should object, perhaps. At any rate, we wouldn't want any so valuable and precious a document as that to be lacking in any respect.

Mr. Austin: What is Commission's Exhibit 75? Is there any such thing?

Mr. Hanley: I don't know.

Mr. Austin: That is your survey, according to this, and 76 is also a survey. I don't see any 75 here in this binder. Maybe that is one of those that is being photostated. Apparently there are two surveys and I don't know the difference between them at the moment.

5709 Mr. Hanley: Well, there was one for Detroit and one for some larger territory.

Mr. Austin: They are both in evidence, are they?

Mr. Hanley: I think they are.

Mr. Austin: You say there is no page 17 in this?

Mr. Hanley: 16.

Mr. Austin: Yes, 16. Whether there ever was one or not, I don't know. I can check it with our copies.

Trial Examiner Ballinger: Does it read along connectively?

Mr. Austin: There are tables on both of these pages, and the whole page is taken up by a table so that you can't tell.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I would like to know whether the Respondent has certain records regarding the rates charged by transport truck haulers for hauling gasoline from the River Rouge terminal to jobber bulk plants in 1940.

I understand that Commission's accountant after looking at the records in Respondent's office requested that certain of the records be copied and produced.

Mr. Hanley: The Respondent now produces and hands to counsel for the Commission four files chosen by Mr.

Warmack after an investigation of many files which 5710 files represent bills to the Standard Oil Company by tank truckers for deliveries of gasoline to the four jobbers named in this action and to certain other customers of the Respondent, consumer customers at locations other than in Detroit. The reason for that latter is that the method used by Ogden & Moffett is to group their charges in one bill no matter what the destination may have been. In connection with proffers to counsel I would like to make the same statement heretofore made in connection with freight bills. These are original records and our people have gone to the trouble of making a recapitulation and breakdown of them which shows all of the essential information that the bills themselves show. After they have been compared we would like to have that recapitulation used in place of the original bills and the originals returned to us.

Mr. Austin: Yes, I am sure that will be satisfactory, Judge Hanley.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5711 Trial Examiner Ballinger: On the record. We will have a short recess.

(A short recess was taken.)

Mr. Austin: If your Honor please, Respondent has handed me certain original bills from their records which were submitted by Ogden & Moffett, heavy hauling contractors, of Port Huron, Michigan.

These bills indicate that Ogden & Moffett, during 1940, transported gasoline for the Standard Oil Company from the River Rouge terminal to the respective bulk plants of the four jobbers concerned in this case and the bills show various shipments made and the amounts charged during four different periods during 1940.

In addition to the bill showing the dates of the shipments and the amounts of the individual shipments, there is a recapitulation covering either the first half or the last half of the month, as the case may be, showing the total amount of the gallonage hauled from the River Rouge plant to the bulk plants of each of the four jobbers by name, giving the total and indicating the price per gallon charged for the hauling.

If it is agreeable to counsel for the Respondent the reca

pitulation and not the itemized statement will be sufficient
for the Commission's purposes and copies having been made
of the original record—rather, the original recapi-
5712 tulated bills, it is my proposal to offer the copies in
evidence rather than the bills so that the bills need
not be separated from the Respondent's records.

Will the Respondent waive the formal identification of these documents by the witness?

Mr. Hanley: Oh, yes.

Mr. Austin: That is, the Respondent is familiar with them?

Mr. Hanley: Oh, yes.

Mr. Austin: And do you understand that my description is correct?

Mr. Hanley: I so understand.

Mr. Austin: I will offer in evidence at this time, your Honor, a typewritten statement which I understand will be stipulated is a copy of a bill submitted by Ogden & Moffett dated July 16, 1940, covering hauling charges on gasoline shipped from the River Rouge Terminal to the four jobbers during the period from July 1 to July 15, 1940, and the original bill containing stamps which indicate that the bill was paid.

There is a notation on the sheet I am offering in evidence that the original bill was stamped paid July 24, 1940, and I therefore, offer this sheet as evidence of the gasoline hauled from River Rouge to the respective bulk plants of
the four jobbers from July 1 to July 15, 1940, and
5713 showing the price per gallon which the hauler, Ogden
& Moffett charged the Standard Oil Company.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Four documents will be marked "Commission's Exhibits 124, 125, 126 and 127, for identification."

(The documents referred to were marked "Commission's Exhibits 124, 125, 126 and 127," for identification.)

Mr. Austin: I have already indicated the nature and contents of Commission's Exhibit 124, for identification.

Commission's Exhibit 125 is a similar copy of a recapitulated bill covering shipments of gasoline hauled by Ogden & Moffett from the River Rouge Terminal to the bulk plants of the respective jobbers during the period August 1 to August 15, 1940.

Commission's Exhibit 126, for identification, is a similar recapitulation of the Ogden & Moffett bill for similar services for the period September 16 to September 30, 1940.

Commission's Exhibit 127, for identification, is a similar bill covering hauling charges for the period October 15 to October 31, 1940.

I now offer all four of these papers in evidence, being Commission's Exhibits 124 to 127, for identification, 5714 inclusive.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5715 Trial Examiner Ballinger: On the record.

Mr. Austin: I am offering these bills or true copies thereof in evidence to show the cost to the Respondent of transporting gasoline from the River Rouge terminal to the bulk plants of the four jobbers during 1940 or such period of 1940 during which the hauling was done by transport truck.

Furthermore, I note that on these four bills there are certain items which represent charges for hauling from the River Rouge terminal to points other than the bulk plants of the four jobbers, and in so far as there is any material on these four exhibits, for identification, which refers to the transportation of gasoline to destinations other than the bulk plants of the four jobbers, that material is not considered to be of any relevancy and is not included in the offer of proof.

Trial Examiner Ballinger: Any objection?

Mr. Hanley: The Respondent objects to each of the four exhibits, 124, 125, 126, and 127, for all of the reasons heretofore assigned in objections to freight bills introduced in this hearing and for the reasons assigned in objections made upon the offer of Commission's Exhibits, for identification, 94 to 99, inclusive, at the Washington hearings.

Trial Examiner Ballinger: The objection is over- 5716 ruled. The documents are admitted in evidence.

(The documents referred to, heretofore marked for identification "COMMISSION'S EXHIBITS 124, 125, 126, and 127," were received in evidence.)

Mr. Austin: I am now returning to Respondent the original bills together with the copies of each of the exhibits.

Mr. Hanley: Thank you

P. A. RAUPAGH was thereupon recalled as a witness for the Commission, and having been previously first duly sworn, testified further as follows:

Direct Examination by Mr. Austin.

Q. Mr. Raupagh, Commission's Exhibit 91 is a statement of the number of reseller service stations accounts of the Standard Oil Company in the Detroit metropolitan area in 1937 by types of outlets. This exhibit shows 229 company owned service stations leased out, nine service stations leased by Standard Oil Company and re-leased to individuals, and 192 form 461 accounts, making a total of 430 reseller service station accounts of the Standard Oil Company in 1937.

Now, on March 10th of last year, when you testified in this proceeding, I asked you how many retail stations
5717 there were in the Detroit area at that time to which
the Standard Oil Company sold gasoline, and your answer was that there were 336 including both contract stations and leased stations, and then you further said that there were—that is, on page 10 of the record—there were about 200 leased stations and about 136 owned by the operators or leased by them from some other source, which I assume would mean 461 stations. But you further stated at that time that the number of stations in 1941 was about the same as it was, say, two years previously, quoting exactly from the answer.

Now, if there was, as indicated by the record, 430 stations in the Detroit area which were reseller accounts of the Standard Oil Company in 1937 and only 336 in 1941, I would like to have you explain that difference and state whether it is a fact that the Standard Oil Company lost 94 outlets; that is, whether the total outlets served by the company declined to that amount between 1937 and 1941?

A. I am unable to give you any explanation as to the difference in those figures. The figures given in any testimony is correct.

You also I believe in your question asked whether or not we may have lost about 100 accounts during that period. I doubt very much if we did, Mr. Austin. That would be very unusual.

Q. Do the records of your office here in Detroit 5718 show the number of reseller outlets to which the Standard Oil Company sold gasoline in 1940?

A. Yes.

Q. In the Detroit area?

A. Yes. You said 1940?

Q. 1940.

A. Yes, sir.

Mr. Austin: If your Honor please, this is a matter which I think ought to be cleared up. The testimony is not entirely consistent, and if there was a loss of between twenty and twenty-five per cent of reseller outlets to the Respondent in Detroit between 1937 and 1940, I think that, as now appears from the record, that might be a material fact in view of the large amount of testimony in this case regarding the business of not only the Respondent but of its competitors and alleged competitors. Since we have a list of names and addresses of service stations in 1937 in the record, I would like to have the Respondent prepare a similar list for 1940 so that we can have an accurate check of the condition of the Standard Oil Company and the extent of its operations in the Detroit Field or in the Detroit area in 1940.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

5719 Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. There was one other point that you testified on briefly last year, Mr. Raupagh, that I would like to get a little more information on. You stated at Pages 22 and 23 of the record that some deliveries are made directly from the River Rouge Terminal and not over ten or fifteen percent of your deliveries to dealers were being made from the River Rouge Terminal at that time. I suppose by "dealers" you refer to tank wagon reseller outlets?

A. Yes sir.

Q. And were those deliveries direct from the River Rouge Terminal made by company-owned tank truck?

A. Yes sir.

Q. Do you know how many service stations were served directly from the River Rouge Terminal?

A. I can't say, offhand, how many were but my estimate was ten to fifteen percent of the dealer business that we were serving in that territory; from all sources.

Q. Do you mean by "that territory" in the City of Detroit?

A. Yes sir.

Q. And when you say ten to fifteen percent of the dealer business, do you mean the number of dealers, or by gallonage?

A. I mean by gallonage.

Trial Examiner Ballinger: Does that practice still 5720 continue?

Witness: No, that's entirely changed, your Honor.

By Mr. Austin:

Q. That's what?

A. That's changed.

Q. Well, what change has been made?

A. Well, we are making more extensive deliveries direct from River Rouge to the dealers than we did at that time.

Q. And by that time do you mean when you testified last year?

A. Yes sir.

Q. And how would that practice be if you went, say, into 1939 and 1940? Was it about the same then as when you testified last year?

A. Yes, it was about the same then.

Q. And you would say that at that time about ten to fifteen percent of the tank wagon reseller gallonage was delivered directly from River Rouge?

A. Yes sir.

Trial Examiner Ballinger: Approximately what percentage today?

Witness: Well, it is somewhat of a guess, but I would judge about thirty-five to forty percent, today.

By Mr. Austin:

Q. Does that mean that correspondingly less of 5721 the gallonage going to the tank wagon reseller outlets, goes through the bulk plants, today?

A. Yes sir.

Trial Examiner Ballinger: Was the capacity of your tank wagons increased during that period?

Witness: Yes, we have increased the capacity of the tank trucks, or tank wagons that make deliveries from the Rouge direct to the dealers.

By Mr. Austin:

Q. Do they run up to about three thousand gallons, now?

A. Yes sir.

Trial Examiner Ballinger: Is that the primary reason for the increased deliveries direct to the retail outlets from the Rouge plant?

Witness: That, and we supply more dealers, also.

By Mr. Austin:

Q. You mean you supply more dealers from the River Rouge plant?

A. Yes sir.

Trial Examiner Ballinger: Are all the deliveries to the four jobbers made direct from the River Rouge terminal storage?

Witness: Yes, your Honor, with the few exceptions which have been given in the previous testimony.

Trial Examiner Ballinger: And that condition has 5722 existed throughout the entire period since 1937?

Witness: Yes sir.

By Mr. Austin:

Q. By the exceptions, you mean those few direct shipments from Whiting or from Muskegon, is that right?

A. That's right, sir.

Q. Do you know just when you put in that change regarding the direct deliveries from the River Rouge Terminal; that is, when you increased the amount of gasoline delivered directly?

A. I don't know the dates, definitely, on that.

Q. I wondered whether it was just recently or whether it was a year ago?

A. Well, it has been comparatively recent.

Q. Would you say three months, six months?

A. About six months?

Q. During 1941?

A. Yes.

Mr. Austin: That's all.

Cross-Examination by Mr. Hanley.

Q. I think your last examination requires me to ask one question just as a clarification question.

Did you say, Mr. Raupagh, that the jobbers had been supplied out of River Rouge since 1937, in answer 5723 to some question Mr. Austin just asked you?

A. Yes.

Q. I call your attention to the fact that Ned's was on a tank wagon basis of delivery up until the beginning of 1938.

You did not mean by your answer to indicate, I presume, that there was any change in the situation as it is reflected by the record in that connection.

A. No, I did not.

Q. The fact is that the gasoline delivered to Ned's, as well as to the other jobbers, all originated at the Rouge, isn't that right?

A. That's right.

Redirect Examination by Mr. Austin.

Q. Of course, Ned's wasn't considered a jobber while he was on a tank wagon delivery basis, was he, Mr. Raupagh?

A. No.

Q. But during 1937 and up until March of 1938, do you know whether the deliveries to Ned's at that time were made directly from the River Rouge Terminal or were they made from a bulk plant?

A. They were made from the bulk plants.

Mr. Austin: That's all.

Trial Examiner Ballinger: Mr. Raupagh, during the period from September, 1936, to March 7, 1938, when 5724 Ned was receiving one-half cent differential, was that allowed him both on Ethyl and Red Crown?

Witness: ~~Yes sir.~~

Trial Examiner Ballinger: Or, was there a greater differential on Ethyl?

Witness: No, just one-half cent and the time is from September 6, 1936 to March 1, 1938. I think you said March 7.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Is there anything farther, gentlemen?

Mr. Hanley: At the close of the hearing yesterday, Mr. Austin made a motion to strike from the Respondent's Exhibit 100, pages 34 to 37, inclusive, and all of the testimony of Mr. B. S. Kott appearing at pages 4801 to page 4888; Mr. Elmer E. Ledbetter, appearing at pages 5398 to 5420, inclusive, and Mr. Max Biber, appearing at pages 5420 to 5429, inclusive, which motion was later modified to the extent of limiting its attack on pages 34 to 37, inclusive, to certain paragraphs specified by Mr. Austin on page 5705 of the record.

In respect of Mr. Kott's testimony, the record discloses
that that testimony only runs from page 4801 to the
middle of page 4845 when the witness was finally
5725 excused and, I assume, that it was just an error to
include the additional pages. Do you agree, Mr.
Austin, that the testimony to which you were referring,
the Kott testimony, is that which appears from Page 4801
to the middle of Page 4845?

Mr. Austin: I do so agree and my motion may be considered as amended in that respect.

5726 Trial Examiner Ballinger: The motion as now amended strikes all of his testimony, does it?

Mr. Hanley: Yes, sir.

Mr. Austin: Yes, it still does. It is merely a restriction of the pages, that is, a correction of the description of the pages where the testimony appears.

Mr. Hanley: The motion as it now stands, your Honor, attacks all of the testimony of each of these three named witnesses. These witnesses testified to the fact, first, that the jobbers did do advertising. They explained how it was done, where it was done, what media was used, what the different types of advertising were and testified further that this advertising was paid for by the jobbers in full, and they then identified in each instance the exhibits which were excluded by your Honor which exhibits were statements prepared by the jobbers indicating in detail the amounts expended for the various types of advertising which these witnesses said had been done by the various jobbers.

Now, your Honor, there are no figures in the testimony of the witnesses with the one possible exception, there may be some reference to one figure or one figure may be stated in Ledbetter's testimony, but because the exhibits were relied upon for the figures, there was no oral testimony naming the figures.

If your Honor please, this testimony as well as
5727 the portion of Exhibit 100 sought to be stricken is a
basic and primary defense so far as the Respondent

is concerned. Your Honor, unfortunately, of course, from our standpoint, elected to disbelieve our experience and our evidence and our witnesses in respect to this advertising question, and your Honor excluded the exhibits prepared by the jobbers on the theory that they included a number of things that were not directly gasoline advertising or Standard Oil Company advertising, and I think I understood your Honor to make some indication in a ruling that they were not readily measurable. Am I right in that last statement?

Trial Examiner Ballinger: Counsel is correct in his statement of the position of the Examiner.

Mr. Hanley: I submit, your Honor, that it is a very different thing, indeed, to exclude as evidence an exhibit such as these exhibits were than it is to strike a primary and basic defense, and that is what this testimony amounts to. It is a definite contention in this case on the part of the Respondent that this advertising was done, that it was done by the jobbers at their own expense, and with no contribution from the Respondent, that a definite value was received from that advertising. So far as the Exhibit 100 portion of the matter is concerned, that is not an exhibit prepared by some other party; that is a record and a prepared exhibit by the Respondent itself, and 5728 we believe our jobbers when they say they spent this money. Indeed, we know it. We follow what they are doing and know what kind of advertising they do from time to time. We know that there is a definite value in that advertising and take it into account as a part of our basic defense on this cost proposition.

One of the reasons for the differential that is accorded a jobber in Detroit or any place else lies in the fact that he assumes to do and does perform certain functions that otherwise would have to be performed by and at the expense of the supplying company. That is the reason for the one and a half cent differential in Detroit. Among those functions, of which there are a number, consideration is given to the fact that they do take over a part of the burden of distributing by advertising. That I think your Honor must have clearly in mind is one of the primary contentions of the Respondent in this case. Those differentials differ in different localities. I think the record discloses here that the usual one is two cents in most parts of the middle west. In the Rocky Mountain district —I believe I am right when I say that; the record discloses

that although I may be in error in the latter—the fact is that it is as much as two and a half and higher in that Rocky Mountain area. Those differentials find their competitive and economic levels. They don't just happen.
5729 It is a cent and a half in Detroit because time and experience and function as performed by the jobber and all of the circumstances and conditions make it appear from experience that that is the right place for it to be. Likewise, where it is two cents, the same competitive and economic factors bear upon it and they just find their levels. They are not arbitrary and guesswork. The reason they find that level is because of these things that I have been talking about, namely, the function that is performed of which the supplier is relieved.

Now, this is definitely a basic thing, this evidence, which we have taken into account in our Exhibit 100. That is a defense. That isn't a matter of evidence primarily; that is a contention and a defense in this case. That is what we say justifies the charge of violation of the Robinson-Patman Act. It may be that your Honor in listening to the long cross examination of Mr. Boatwright on Form 189 that has transpired here has concluded that perhaps there is a better way to make certain allocation than Mr. Boatwright made; it may be that that is Mr. Austin's viewpoint. But it would be in these circumstances just as logical, for Mr. Austin to make a motion to strike all of the testimony relative to the accounting system used by the Standard Oil Company as to make this motion.

We come into court and we say we keep accounts a certain way, as we have now demonstrated; these accounts
5730 show that we were justified in making differentials of which you complain. Just as much of our defense lies in what we have prepared in this cost study in Detroit and which is supported except for the figures which your Honor excluded from the exhibit, which is supported by the testimony of these jobber witnesses who were called.

It is absolutely essential that we have that contention before the Commission. It is just no answer to say to us that "If I strike this, you have a right to go and make a motion to the Commission." This isn't just purely an evidentiary matter; this is one of the issues in the lawsuit, and we can't try the case piecemeal on many, many motions. We would just be frittered away in little pieces after awhile and we would just have to make motion after motion to present the merits and the issues in the case.

Your Honor has excluded the figures in the exhibit but the basic offer we are making to justify our action is a thing that is a definite primary contention and defense in the case and may not be excluded. Your Honor has told me many times when I have made motion to dismiss the whole or some part of the case or some party in the action, that your Honor was not authorized to rule on such action other than to deny it inasmuch as it was necessarily directed to the Commission. This is exactly the same type of motion.

5731 This motion seeks to dismiss and eliminate from this lawsuit a definite contention and defense of the Respondent. I submit, your Honor, that it should remain in the record as a foundation for our presentation of the case to the Commission so that we may not be subjected to the necessity of trying the merits of the case piecemeal and on motion before the Commission.

Trial Examiner Ballinger: If the Examiner should sustain the action, the physical pages embraced in the motion would still remain in the record and be before the Commission for examination to the same extent as if the Examiner overruled the motion.

Mr. Hanley: Suppose this, your Honor. Supposing you sustain this motion and suppose that we do not appeal to the Commission for a ruling admitting the rejected exhibits, or suppose that we do and that the Commission agrees with your Honor that there was a sufficient reason of some sort for excluding those exhibits as exhibits. It would still be our purpose to urge this defense. You prove a defense in many, many ways; it may be one piece of evidence or another or it may be many kinds of evidence. Issues in a case while they are ultimately dependent upon the evidence for determination, the evidence may flow: Some gets in, some is rejected, but that doesn't mean that a court prior to the time that the whole case is submitted on its merit is deciding anything on the merits
5732 by rejecting or accepting any evidence. In either of the suppositious cases that I have indicated as to those exhibits, you would certainly not relinquish the contention which we propose to make to the Commission. Mr. Boatwright's exhibit is our exhibit; it is our figures. We believe them. We get them someplace else, that is true, but we

believe these figures and we assert to the Commission that we derive this much benefit or that there was this much money spent. We don't undertake to measure; we can't measure. We have always conceded that we can't measure the reciprocal benefits that may flow from this advertising. It was well explained by the economists testifying, an advertiser can't even measure the benefits of his own advertising, that for which he pays. But we want the foundation in the record that will permit us to urge our contention.

The figures are gone so far as the jobbers are concerned if these exhibits are rejected, and they may continue to be rejected, but even so we are still entitled to present our defense, the Standard Oil Company's conception of what we believe to be the benefits which we have received from this class of advertising; and in order to do that, we are still dependent upon the evidence of these three witnesses, all of which even their names the motion seeks to strike from the record.

Trial Examiner Ballinger: Judge, the Trial Ex- 5733 aminer has attempted to put you in exactly the position you indicate you would like to be in. When Respondent's Exhibit 100 was offered in evidence, the question arose as to the admissibility of certain portions of it. The Examiner admitted the exhibit in evidence upon the distinct understanding that factual foundation to support certain pages would be later supplied. Now, an attempt has been made to supply that factual foundation, and the Examiner has ruled that it was inadequate and has denied the admission of certain documents purporting to show the result of the books of four jobbers.

The Examiner having sustained motions or sustained objections to the admission of those documents in evidence, it would be utterly inconsistent to overrule this motion and leave the matter in the exhibit which was admitted upon the distinct understanding that it was to be properly supported.

Mr. Hanley: Do you think even that goes beyond the figures themselves?

Mr. Boatwright has used in Exhibit 100 at page 34 the figures which were derived from the exhibits which have been rejected, but Mr. Austin's motion goes much further than to strike that. He seeks to strike all of page

7

35 which has to do with our advertising and the figures on our advertising. He seeks to strike all except the latter two paragraphs on page 36 and he seeks to strike page 37 of our exhibit which is an advertising graph which our company keeps currently and has kept for years and
5734 relies upon in its analysis of advertising.

Trial Examiner Ballinger: Does page 35 relate to advertising by the Respondent company?

Mr. Hanley: Surely. During the same period, total advertising expenditures in the Detroit Field, tank wagon reseller channel by Standard Oil Company, including subaccounts, and then they are set out, and then the amount of money is set out, and the cents per gallon is set out, of the Respondent, not the jobbers.

Mr. Austin: Those figures appear elsewhere, Judge.

Mr. Hanley: If your Honor thinks that it is inconsistent to leave in the figures that Mr. Boatwright drew from the exhibits of the jobber, or I will say from the books of the jobbers because that is where they came from, then your Honor might strike that on the theory of consistency but I don't think your Honor can strike properly any of the other material that we have asserted by way of defense here in our exhibit, nor can your Honor properly strike, in my judgment, the testimony of the witnesses who have testified that the jobbers, in fact, did this advertising of various kinds.

We are still entitled to the defense irrespective of whether we can show the exact figures or whether we can't.

5735 Trial Examiner Ballinger: For presentation to the Commission, it is wholly immaterial whether the motion should be sustained or rejected with reference to the striking of the testimony, for the reason that if it should be stricken it will still be in the record and subject to examination by the Commission to the same extent as though the motion was overruled.

Mr. Hanley: But that is subject to the examination of the Commission on motion.

Trial Examiner Ballinger: Yes.

Mr. Hanley: Not on final presentation of the case.

Trial Examiner Ballinger: But unless the Examiner completely reversed all of his rulings with reference to this evidence, it would be necessary for you to file a motion with the Commission.

5736 Mr. Hanley: Well, I will say to your Honor it is my present purpose to request the Commission to receive those exhibits and to receive our exhibits where it recites those figures, but my primary point in trying to illustrate this thing is to suggest that we might decide not to do that, or if we did do it, the Commission might rule against us on the admission of those exhibits. That wouldn't mean that the Commission was ruling against our defense—

Trial Examiner Ballinger: Oh, no.

Mr. Hanley: —and there won't be anything in this record to permit us to urge that defense.

Trial Examiner Ballinger: I would like to hear from Mr. Austin with reference to the extent of his motion to strike from Respondent's Exhibit 100. Why the necessity of striking beyond the first paragraph on Page 35?

Mr. Austin: Because, your Honor, as far as the second paragraph on Page 35 is concerned, its account numbers, the titles of the accounts and the amount of expense in the accounts all appears on Respondent's Exhibit 101 and also appears elsewhere in Respondent's Exhibit 100 so that that is mere repetition in so far as its relation to the Respondent's figures and the only purpose of it here is to make a comparison as appeared below the list of accounts.
This Page 35 says: "The per gallon advertising
5737 expenditures on the part of the jobber, therefore,
are almost identical," and so forth, and the whole purpose and purport of that paragraph and the one at the top of Page 36 is to claim that the benefit from advertising expenditure—the benefit to the Respondent from advertising expenditures of the jobbers, the nature of which does not appear, was the same as the similar expediture per gallon by the Respondent. That's material on the bottom of Page 35 and top of Page 36; nothing but supporting argument by comparison of the per gallon expenditures of the jobbers which is here allocated to gasoline as compared to the total advertising expenditures of the Respondent and the figures on Page 34 not having been supported by any showing of any sort of an advertising expense, or any sort of advertising similar to the Respondent's advertising, or any advertising of the Respondent's products and it being—it now appearing that these expenditures cover everything from radio advertising down to contributions to community chests and aluminum thimbles, I think it is exceed-

ing everything that was testified to by Mr. Boatwright on this subject and certainly recognizing that the Respondent claims that they did obtain some reciprocal benefits from this sort of advertising to jobbers, there is absolutely nothing in the record on which the amount of such reciprocal benefit can be computed or to indicate that it was in any
respect substantial as to the large part of the adver-
5738 tising included in these expense figures shown on
Page 34.

Trial Examiner Ballinger: Now about Page 37, the chart?

Mr. Austin: I would have no objection to 37 staying in, in general, if it was offered for any other purpose than this, but it is in here as a part of the arguments—or, rather, in support of the argument that the Respondent probably spends less money for advertising in the Detroit Field than it would if these jobbers were not also doing some advertising here.

Trial Examiner Ballinger: Is that the primary purpose of the exhibit?

Mr. Austin: If your Honor will look at the bottom of Page 35 and top of Page 36 there is a reference there to what advertising expenditures would be required in Detroit if it were not for the benefit of the advertising on the part of the jobbers, and at the top of Page 36 there is a comparison of the advertising expenditures of the Detroit and Denver Fields, compared with similar expenditures in other fields and as related to the total gallonage of the company in the respective fields and I think that the chart on Page 37 is introduced simply for the purpose of illustrating that argument on Page 36 which certainly
relates directly to the claim of the effect of the job-
5739 bers' advertising on the advertising expenditures
of the company. That is the purpose of the chart.

Trial Examiner Ballinger: Is that the purpose, Judge?

Mr. Hanley: It is my judgment that that is the purpose. May I have just a moment more, your Honor, and then I will be prepared to accept whatever ruling the Court makes?

Trial Examiner Ballinger: You may.

Mr. Hanley: I think the remarks of Mr. Austin, just made clearly demonstrate the fallacy in his motion. He is undertaking to set himself up, here, and make it stick by using the power your Honor has as the arbiter of the sufficiency and the adequacy of a defense which this Respondent is putting in. Now I think we just all understand that the Trial Examiner admits evidence that will—I will say admits all evidence that he doesn't regard as palpably inadmissible as a fact-finding inquiry and that he does not undertake at the time to pass upon the adequacy or sufficiency of that evidence, nor does he at the time undertake to determine ultimate issues in the case. Mr. Austin's motion seeks to do that.

Mr. Austin says of Page 38 that it is an argument in favor of our contention, and it is. That is the reason
5740 we put it in there.

Now he is undertaking to have your Honor kick it out because he doesn't think it is adequate or sufficient for the purpose. Your Honor's power to do that, as I understand it, even though it is a very slight bit of evidence, if it supports a contention in a case; that is, such a contention as is an issue; then the evidence, the weight of the evidence is not for your Honor on a question of whether it is retained in the case or not. It may be, ultimately, when you review the whole case and are concerning yourself with merits, but not on the question of admissibility or inadmissibility.

Mr. Austin: If your Honor please, I don't think it is quite correct for Judge Hanley to state that—rather, I don't think he was quite correct in stating that I am attempting to obtain a ruling striking the chart on Page 37 because, in my opinion, it simply doesn't have weight or it doesn't prove what the Respondent contends for it. The point, there, is that the chart on Page 37 is concededly put in in support of an argument based upon the figures on Page 34. All I say is if the figures on Page 34 are stricken, that then the pages 36 and 37 fall with it. If 34 stayed in, then we would have the question as to how much weight there was on the argument on pages 36 and 37.

I am simply saying the chart on 37 and the argument
5741 on 36 falls with the figures on page 34, if they are excluded.

One more point: What Respondent is attempting to do, here, is to create a sort of a set-off against advertising expense. It is trying to charge the benefits which it claims it received from the jobber advertising against its own advertising expense and I think it is very similar to a case where a party goes into Court on a damage suit and has to prove the measure of damages and if the plaintiff or the defendant on a counter-claim, claiming damages against the other party, is unable to prove his measure of damages, the Court will then dismiss the complaint or the counter-claim, as the case may be and it doesn't go to the jury. It is a case for the Court to decide whether or not a proper basis for computation of damages has been established but I think it is the same sort of a question here and one which the Trial Examiner may very properly determine.

Mr. Hanley: Let me ask one question: Does your Honor regard this law suit and the Robinson-Patman Act administration in the same light as you would regard a case at law where damages were being sued for and a fixed amount of money had to be proved?

Trial Examiner Ballinger: No, but in this kind of a proceeding there must be some reasonable approximation for costs claimed and unless there is some sufficient foundation laid so as to take it out of the realm of
5742 pure speculation, why, the evidence should be excluded.

In passing upon this question the Trial Examiner is only performing the usual duties he is called upon to perform and among those duties is the question of ruling upon the admissibility of evidence. The Trial Examiner wishes that the matter be as easy as learned counsel for the Respondent has pointed out. It would make it much easier upon the Trial Examiner.

The Trial Examiner sustains the motion to strike the testimony of the witnesses indicated in the motion and also that portion of Page 34 commencing with the paragraph reading: "The Respondent's supplying company secures a reciprocal advertising advantage from jobbers," etcetera. All the remainder of Page 34 and all of page 35, all of Page 36 down to and including the first paragraph, ending on that page and all of Page 37 of Respondent's Exhibit 100.

Is there anything further, gentlemen?

Mr. Austin: I have nothing further.

Mr. Hanley: No.

Mr. Austin: I now move, your Honor, that the hearings in this matter be adjourned to convene again at the Federal Trade Commission Building in Washington on March 31, 1942.

Mr. Hanley: May we go off the record a moment?

5743 Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: The Respondent resists the motion to adjourn until March 31st and objects to any adjournment in this case for the reason that it is not justified, would add onerous burdens to the Respondent which are unnecessary and unjust.

Informally, in Washington, it was indicated by counsel for the Commission that he intended to close his case in Detroit and it is indicated by counsel for the Respondent that Respondent would close his case, and Respondent has done so.

Had both cases been closed it would have finished the taking of testimony and have placed the case in such condition as to permit either of its being more conveniently and readily handled or for postponing without prejudice to either party or their counsel.

Since arriving in Detroit, counsel for the Commission has indicated that he proposes to use an accounting witness, presumably Mr. Warmack of the Commission's accounting staff. Mr. Warmack has been in contact with this litigation substantially ever since the cost phases of the case were initiated and for most of the time those contacts have been intimate ones. Mr. Warmack
5744 attended conferences for many days in the months of August, October, November and December of 1941, which were also attended by accountants and representatives of the Respondent, all for the purpose of outlining and discussing the costing procedures and discussing the character of bookkeeping records of the Respondent.

Since the 12th of January, 1942, Mr. Warmack has been continuously in Detroit and has devoted his time to an examination of the books and records of Respondent in so far as he may regard them pertinent to this litigation.

In addition to the various conferences referred to and the independant studies made by Mr. Warmack on his trip to Detroit, in January, 1942, and his trip to Detroit in October, 1941, he has attended most of the hearings in this litigation at which evidence was being received on the cost phases of the case and on many occasions has attended such hearings in company of Mr. Lundvall whom Respondent understands to be the Chief of the Commission's accounting staff.

Mr. Boatwright, the accounting witness of the Respondent used in this case, has testified at hearings held in both Washington and Detroit during the months of April, June, November and December, 1941, and during the month of February, 1942, and at said hearings, most of which were attended by Mr. Warmack, Mr. Boatwright was on the stand for a period of some twenty-three 5745 days and during that period of time practically all of the same was consumed in cross-examination on the part of the Commission, only some three days, or thereabouts, being used on direct examination.

5746 And in addition to that, the Commission was given the opportunity to cross examine by interpolation during the direct examination conducted by Respondent and during such period of time almost, if not as many questions were asked by counsel for the Commission as by counsel for the Respondent.

The accounting features of this case have been receiving the consideration of all parties; at least, since April, 1941. All parties are fully informed concerning the same. The Respondent has supplied to the Commission or its representatives all records, books, figures, data, files, reports, etcetera, of every kind and character requested by the Commission and the Commission has always had access to any records of the Respondent which they desired to examine or inquire into. In addition thereto the Respondent has supplied and continues to supply to the Commission both personnel and facilities to aid the Commission representatives in their investigations.

Both counsel for the Commission and accountants for the Commission have had more than ample time to prepare for any testimony that the Commission may desire to offer. The Respondent requests that if the Commission has a witness to be used in this hearing that such witness be called forthwith without any adjournment and that the proceeding be conducted to a close as rapidly as continuous taking of testimony will permit. To do other- 5747 wise will add burdens and expense in the matter of time, effort, and money to Respondent which are out of all proportion to either the necessities of the situation or to the importance of this litigation, all as is more particularly referred to in a motion for dismissal of this case made by Respondent on February 16.

The Respondent appeals to the Commission and the Trial Examiner to promptly speed this case and the taking of testimony therein to a close by either denying the motion for a continuance made by counsel for the Commission and requiring the Commission to continue with its witnesses or to declare that the taking of testimony in this case is now concluded. It is urged that to do otherwise is not necessary and would inflict injustice upon the Respondent.

Trial Examiner Ballinger: Does counsel care to make any explanation of his motion?

Mr. Austin: Yes, if your Honor please.

First, as to the facts, Mr. Warmack didn't make any cost studies on this case out here last October and, as a matter of fact, the present cost studies of the Respondent were not in existence at that time, although I believe they were being prepared. Of course, there was a conference held here and one in Chicago at that time.

Trial Examiner Ballinger: What is the purpose of the delay, Mr. Austin? To enable the Commission to do what?

Mr. Austin: Well, the next point I am going to
5748 mention is that the Respondent consumed about four
and a half months on this cost study which greatly delayed the case and has been the chief cause of delay up to the present time. The evidence was practically concluded last June except for rebuttal evidence on costs on behalf of the Commission, and I presume at that time it would have been necessary to take the small amount of additional testimony on the question of injury to competition or meeting competition which we have taken here now, but in any event the case was as far along last June as it was in January, and the delay from August until January was due to the request of the Respondent which was granted by the Commission that it be allowed several months to prepare this cost study, and there is no question at all but what it needed all the time that it was allowed for the purpose of the cost study and that they worked very hard during that period. Nevertheless, that was and is the cause why the hearings have covered as long a period as they have, and the very complicated cost study having been made, it just wouldn't be practical for us to go right ahead and attempt to study it and answer it and rebut it within the period which has elapsed between the time it was introduced in January and the present time.

Mr. Warmack hasn't quite completed the cost study

that he is making and if it had been intended to use him at
this hearing, this hearing would have had to be
5749 scheduled for a later date than it was.

However, I don't think that Judge Hanley is correct in stating that I have indicated an intention to close the Commission's case here in Detroit. He undoubtedly has that impression and I don't know whether there is anything in the record on it.

Mr. Hanley: I said informally that I checked with Mr. Boatwright, and we both had that distinct impression.

Mr. Austin: I know that I never had any such intention and I can't believe that I would have ever said so in response to any question asked either by yourself or by the Examiner. I recall the Examiner asking me—

Trial Examiner Ballinger: Evidently, that was a misunderstanding.

Mr. Hanley: It isn't important, anyway.

Trial Examiner Ballinger: It isn't important.

Mr. Austin: No. For the very good reason that I expect to call not only Mr. Warmack but at least one or two other witnesses on the same subject and it certainly was never my intention of bringing them out here to Detroit. I always intended to call them in Washington. Now, getting down to the present moment, I have also understood that it will be impossible to call our witnesses in rebuttal until after I have cross examined Mr. Boat-
wright and had time to study the Respondent's
5750 Exhibits 99, 100, and 101 in the light of the facts
adduced upon Mr. Boatwright's cross examination.
We think we know what is wrong with the cost study, and I can say this, that I personally put a great deal of time on it, all the time I could possibly put on it since it was introduced in January and, as Judge Hanley says, Mr. Warmack has been here most of the time working also. I don't believe the Commission has wasted a minute in attempting to analyze this thing and to prepare to answer it. We just will have to have some time to take the record as it stands now and the exhibits and figures adduced on Mr. Boatwright's cross examination, to have an opportunity to prepare rebuttal testimony. You can't put a witness on the stand or you can't ask questions of a witness on this kind of a technical matter without thorough preparation, and I think Judge Hanley knows that perfectly well because he has had intimate connection with the cost study too.

If·it would help counsel for the Respondent any to
t this forward a week and make it the 24th instead of the
st, possibly we could meet it. I prefer the 31st unless
it makes some material difference to counsel for the
espondent. But I don't see how it is at all possible to get
ady any sooner than that and I don't think we have
sted any time since this cost study has been available
January.

Mr. Hanley: Judge, I should have added some
51 other thing to that objection that, seemingly, I have
omitted. Mr. Austin has alluded to the time that
was necessary to prepare the cost study made by the
espondent and which resulted in some delay by us. It
n't a question of time, Judge, that we are concerned
th about this motion. Indeed, if we could be rid of
is burden entirely for a year or two years or the duration
the war, the delay in getting an ultimate final result
not what is concerning us. It is the terrific burden of
e continuing effort while the record is open and while
ere are hearings being scheduled and while investiga-
ons are being made and demands made—they are inter-
inable, these demands for documents and other data
hich we have to build up. So it isn't a question of time
the matter of getting the ultimate result or a final con-
usion in the case at all. As I say, we think the case
ould be suspended. That is really what I think should
appen to it. I think it should be suspended for some
ery long period of time until there can be a readjust-
ent in such a way as to make the burden somewhat
asier to carry but if it is necessary to close the record
a preliminary to anything of that kind, then I feel it is
st as essential in the interests of my client to insist
at we do not have this continuation of the taking of
stimony any longer than we have got to, to get rid
all of these investigations and all of these demands.

We have got to get our own accountants back in
752 their own offices and at their own desks doing their
own jobs, and we are just beaten down now to a
oint where we have got to do some of our work. That is
e way we feel about that.

Trial Examiner Ballinger: The case is a very import-
t one. It is what may be termed a leading case. The
tion taken by the Commission in this case may effect
e marketing situation throughout the entire oil industry.

In view of the importance of the case, the Examiner does not feel that the request of counsel for the Commission is unreasonable. The Examiner has endeavored to afford ample opportunity to counsel on both sides to present fully all of the facts pertaining to the matter obtainable. The motion is granted and now, at 12:25 p. m., the hearing is adjourned to reconvene March 31, 1942, at 10:00 a. m., in the hearing room of the Federal Trade Commission, Washington, D. C.

(Whereupon, at 12:25 p. m., the hearing was adjourned to reconvene March 31, 1942, at 10:00 a. m., in the hearing room of the Federal Trade Commission, Washington, D. C.)

5753

Room 532, Federal Trade
Commission Building
Washington, D. C.,
Tuesday, June 30, 1942.

Met, pursuant to notice, at 10:00 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Ill., appearing for the Respondent.

5754 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

Pursuant to notice, hearing of Docket 4389, case entitled "In the Matter of Standard Oil Company of Indiana," is reconvened at 10:06 a. m., Eastern Standard Time, June 30, 1942 in Room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held February 26, 1942, in Detroit, Michigan.

The Reporter will note counsel for the Commission and respondent present.

You may proceed.

Mr. Austin: If your Honor please, I have here a letter dated March 18, 1942, from counsel for the respondent which states the number of retail outlets served by the respondent and by respondent's jobbers in Detroit in 1937 and in 1940, as of December 31 of each of those years.

Judge Hanley suggested in this letter that it might be considered on the record, and I assume that therefore he will have no objection to introducing it as evidnce for the purpose of clearing up the question of the number of outlets served by the Company in those years in Detroit:

I therefore would like to offer this letter of March 18, addressed to the Federal Trade Commission from H. R. Hanley, attorney for the respondent, as evidence.

5755 Mr. Hanley: There is no objection to that, your Honor.

Trial Examiner Ballinger: The Reporter will mark the document Commission's Exhibit 128, and the same is, without objection, admitted in evidence.

(The document referred to was marked COMMISSION'S EXHIBIT No. 128-A and 128-B; for identification, and received in evidence.)

Mr. Hanley: I take it, your Honor, that in offering no objection to this letter, which is a clarification of Commission's Exhibits Nos. 91 and 96, that if respondent made any objection to those exhibits, the same will pertain to this clarification letter.

Trial Examiner Ballinger: It is so understood.

WILLIAM J. WARMACK was thereupon called as a witness for the Commission in rebuttal, and, being first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. What is your present employment, Mr. Warmack?

A. Accountant for the Federal Trade Commission.

Q. How long have you been on the staff of the Commission?

A. Since May, 1929.

Q. Will you outline your—before I ask you that, are you a certified public accountant?

5756 A. Yes, sir.

Q. What state?

A. Florida.

Q. And when were you certified as a public accountant there?

A. In June, 1933.

Q. Will you outline your training and experience as an accountant, with particular reference to distribution cost accounting?

A. In 1922 I attended the Walton Business College in Lakeland, Florida.

From 1924 to 1930 I studied and completed the accounting courses prescribed by the Walton School of Commerce, Chicago, Illinois.

From 1937 up to the present day, and especially up to 1941, I did considerable research work in the field of distribution cost accounting.

Of course, I stated that in June, 1933, why, I successfully passed the accountant examination of the Florida State Board, which is also the American Institute of Accountancy examination, and was issued the certificate of Certified Public Accountant by the Florida State Board.

From 1935 to 1940, why, I completed most of the courses of law as prescribed by the Blackstone College of Law, Chicago.

5757 It might be noted that my studies in this connection were also—I studied at the Walton School of Commerce, just enumerated above. These accounting studies were home study courses.

I believe that covers the educational qualifications, Mr. Austin.

Q. Where did you have your first employment as an accountant?

A. In Florida.

Q. And will you carry on from there and tell us what your training and experience has been?

A. Back in 1924, why, I entered accounting work in Florida, and during 1924, '25, why, I did some public work. In 1926, 1927, why, I was on a public accounting staff in Jacksonville, Florida.

Trial Examiner Ballinger: Is that connected with the state?

The Witness: No, sir. I worked for the firm of Cooper, Goodrich and Forney, a firm of certified public accountants, and I was engaged during that time in a supervisory capacity as public accountant.

In 1929, I entered the employment of the Federal Trade Commission, and since that time I have been continuously engaged in accounting work for the Commission.

During the period from about the middle of 1929
3758 up until about the end of 1935 I was engaged almost
wholly and entirely in accounting work in connection with the investigation of utility companies natural gas companies. There was an investigation made by the Federal Trade Commission pursuant to a Senate resolution.

By Mr. Austin:

Q. What was the nature of your work in that investigation?

A. Supervising accountant.

Q. I mean what sort of accounting work?

A. Accounting work in connection with the study of corporate structures, capital assets, capital liabilities, surplus, and various other matters which would naturally be involved in an accounting investigation.

I think we made a rather thorough accounting and economic investigation of the principal utility groups in the entire country.

I in 1934 and 1935 had full charge of the investigation of a large natural gas company. I would say that was the Lone Star Gas Corporation and its subsidiary companies, mostly in the State of Texas. I had general charge of the engagement and worked under no field supervisor. I was charged with the responsibility and duty of organizing, planning, directing, and conducting the investigation, prepared reports on that, which I put into the record in the latter part of 1935, and one of the reports went in in January,
1936. I would say at least one or more of those
3759 reports were prepared by another examiner working
under my direction and supervision, because he put his own report into the record.

From January, 1936, up to December, 1936, I was engaged to some extent in several of the investigations made by the Trade Commission. One of them is the Agricultural Income Investigation, and that involved securing of information with respect to costs from records of various manufacturers and dealers in farm products, such as tobacco companies, packers, milk products producers, millers, bakers, and several other industries.

At the end of the year I was appointed examiner in charge of the textile inquiry, which was just being wound up at that time by the Federal Trade Commission.

Following that, in December, 1936, I was assigned to accounting work in connection with the administration of the Robinson-Patman Act of the Federal Trade Commission, and my duties since that time have been on the lines of accounting work in connection with the administration of that Act.

Q. What was the first case which the Commission had, do you know, in which the questions of distribution cost accounting arose as to cost justification of price differentials?

A. You mean Robinson-Patman case?

Q. Yes.

A. This was the Bird-Ward case.

5760 Q. And did you have anything to do with that case?

A. Yes, sir. I handled the accounting work for the Commission on that case.

Q. And has it been part of your duties to keep in touch with Robinson-Patman accounting questions as they have arisen for the Commission?

A. Yes, sir.

Q. Have you been constantly familiar with the accounting questions as they have arisen in the cases that have been heard before the Commission involving cost accounting under the Robinson-Patman Act?

A. I have. Most of them I am sure I have.

Q. I do not mean that you worked on all of them personally, but have you been familiar with the accounting questions that have arisen before the Commission under the Robinson-Patman Act?

A. Yes, sir.

Q. And what cases have you personally taken part in in either making an analysis of cost accounting problems or in testifying as a witness, or preparing reports, or anything of that sort?

A. Well, in testifying as a witness the Bird-Ward case was the first, and next, which I believe was the largest cost case to come before the Commission as a Robinson-

Patman case in which cost was involved, was the Standard Brands case.

5761 Q. What do mean by the largest? You mean from the standpoint of cost accounting problems?

A. That is right; cost accounting problems. Various and sundry—

Q. What work did you do on the Standard Brands case?

A. Various and sundry questions of separation of costs. I made the field study—at least it was made under my supervision and direction—following the putting in of the company's cost exhibit, after which I prepared a report which went into the record, and I testified in that case.

There was another case that I might call to your attention, the Curtis case up in Rochester, New York. I do not remember the exact name of the company. That was a cost case which came before the Commission. There was no testimony made on that case. It was handled almost wholly and entirely between the company's accountants and the Commission's accountants, although the Commission had issued a complaint, and we covered the cost situation.

Trial Examiner Ballinger: In what business were they engaged?

The Witness: They were engaged in the canning business, your Honor.

By Mr. Austin:

Q. Is distribution cost accounting a subject which has been developed more in recent years, since the Robinson-Patman Act came into existence, then previously?

5762 A. Yes, sir. It is still in the pioneering stage of development.

Q. Have you read any books or treatises on that subject?

A. Many.

Q. Can you name some of them?

A. I can name several. I may leave out the most important ones when I start out to name them, because we have endless ones in the library.

Q. Well, are they mostly new works, because you said it was more or less a recent development?

A. New, yes.

Q. I am surprised to hear there are so many of them.

Trial Examiner Ballinger: Mr. Warmack, it is a simple question. He has asked you if you have read them and, if so, what?

The Witness: Would you like the names of the authors, sir?

By Mr. Austin:

Q. Yes, if you can give them.

A. I have covered with great interest the work of the Department of Commerce, especially under Dr. Wrue Alderson. There was a considerable amount of that. I could not go into every bit of it. There are many, many publications.

Dr. Taggart has gone into questions of distribu-
5763 tion costs, and I have read what Dr. Taggart had to say about that.

Albert Sawyer has gone into distribution cost accounting. I have read what he had to say.

Our Dr. Walker who is former chief economist, went into it to some extent. I have read what he had to say about it.

Dr. W. H. S. Stevens, who used to be with this Commission, has gone into distribution cost accounting. I have read what he had to say about it.

I attended a forum in Chicago in 1938 where Robinson-Patman matters were discussed at considerable length, and, of course, I have read what was published on that meeting by the National Association of Cost Accountants, and there were several papers put in at that meeting which dealt particularly with Robinson-Patman matters.

I have read work by English accountants. I was rather impressed by an article by a Mr. Magee, which came out prior to the passage of our Robinson-Patman Act; still it went into the question of distribution cost accounting. I have also read others of the British accountants.

Is that as many as you desire, or do you want me to go on?

Q. I think that will be enough.

A. I could probably be all morning on that question.

Q. There is a pamphlet entitled "Distribution Cost Accounting," which was issued by the Federal Trade
5764 Commission. Who is responsible for the preparation of that?

A. Well, the Chief Economist, of course, was responsible for the preparation of it. We on the staff of the Chief Economist had something to do with parts of it.

Q. Did you contribute in any way to the material going into that publication?

A. I did to some extent.

I might call your attention to this, Mr. Austin. As I said at the outset, in the ones that I named I am afraid that I have left out maybe some that had gone into distribution cost accounting to a much greater extent maybe than those that I have named. Many of the accounting schools have gone into distribution cost accounting in one degree or another, and I have covered considerable of the literature.

Trial Examiner Ballinger: Is there substantial difference between the different authors?

The Witness: That would be a pretty hard question to answer, Judge. Generally, one man will talk much about one point: for instance, selling cost or salesman's salaries. Another will deal or maybe devote most of his time to advertising cost. Another man will talk more about some other part of distribution cost accounting which he may be more or less particularly interested in. So it might be said that since this is a field of cost accounting that up to relatively recent years had not been explored to
5765 any great extent by accountants, why, one man would
be more interested in one thing than another.

Way back in 1925 Mr. Kastenholtz went into distribution cost accounting to some extent, and some of the British accountants did.

Trial Examiner Ballinger: Have any two of them focussed on the same subject matter?

The Witness: Yes, sir; I think they have.

Trial Examiner Ballinger: Is there substantial disagreement between them on the same subject?

The Witness: I think that, looking at the situation broadly, that they all are—I would not say all, but a good number of them went to the same feelings.

Trial Examiner Ballinger: They are in agreement, substantially?

The Witness: Reasonably.

By Mr. Austin:

Q. Well, they have not all covered the same points?

A. No. No. But we are talking about a general situation.

Q. Now, Mr. Warmack, you have been present at a great many of the hearings, I believe all the hearings at which Mr. Boatwright has testified in this case, have you not?

A. Well, not all of them, but most of them. It was at
the Detroit hearing there that I did not attend a few of
the hearings. I was working at the company's office.
5766 But I have read the testimony.

Q. Well, my recollection is that you were present at the time Mr. Boatwright testified in Detroit?

A. Most of the time.

Q. And are you familiar with the Respondent's Exhibit 31-A to Q and with the Respondent's Exhibits 99, 100, and 101?

A. Yes, sir.

Q. You read and studied all those exhibits?

A. Yes, sir.

Q. And also Commission's Exhibit 119, which is form 189 for 1940?

A. Yes, sir.

Q. And have you had occasion to read parts of Mr. Boatwright's testimony from time to time and had that testimony available before you in recent months?

A. Yes, sir.

Q. And have you since the first of this year made a study of the Respondent's exhibits which I have just mentioned from the standpoint of analyzing the material which is contained in those exhibits, and which was offered to support cost differentials set forth in those exhibits?

A. Yes, sir.

I would like to qualify that a little. I did not cover in
my studies every single account. I did make a study
5767 of the underlying material in many of the accounts.

Q. Did you not spend a considerable amount of time in the company offices in Detroit and Chicago in January and February?

A. Yes, sir.

Q. And what was the purpose of the time that you spent there?

A. To study the records of the company and review the methods that the company had employed in the separation of its costs as set forth in Respondent's Exhibit 101 and Respondent's Exhibit 100 and Commission's Exhibit 119.

Q. I would like to call your attention now to Respondent's Exhibit 31, particularly to page 31-H. On that exhibit there are listed certain items of expense which, it is stated, are expense items of an overhead nature not influenced by Ned's Auto Supply Company business. Are you familiar with the nature of the business of Ned's Auto Supply Company in 1937 as brought out in the testimony?

A. Yes, sir.

Q. And with the general nature of the company's business in Detroit in that year as disclosed by the testimony, with particular regard to the fact that Ned's Auto Supply Company was a so-called tank wagon station?

A. Yes, sir.

Q. The first item listed on Respondent's Exhibit 31-H is an item of $4,550.06 in account 1001, the title of 5768 that being "Salaries—Supervision—Others." Have you read the testimony of Mr. Boatwright regarding the nature of the expense going into that account?

A. Yes, sir.

Q. What is your opinion as to whether any of the expense going into that account in 1937 was properly chargeable to the cost of sale of gasoline in Ned's Auto Supply Company?

Mr. Hanley: Just a moment.

If your Honor please, may I ask the witness a few questions on his qualifications?

Trial Examiner Ballinger: You may.

Voir Dire Examination by Mr. Hanley.

Q. Mr. Warmack, I do not care to go into the question of general qualifications at all at this time, but I wish you would answer this question on that phase: Up until 1936 were you engaged at all in distribution cost accounting? If you had any experience up until that time, please just briefly state what it was.

A. Practically none.

Q. All right.

Subsequently to 1936, which is the year in which the Robinson-Patman Act went into effect, you have stated that you worked on certain cases that were under consideration by the Commission. You recall that testi-5769 mony?

A. Yes, sir.

Q. Will you please state briefly just what those cases were, what you did in connection with them, and whether or not they involved any question of distribution cost accounting?

A. If I understand your question, Judge—

Mr. Hanley: Will you read it, please?

(Question read.)

The Witness: May I ask that the previous question be read?

(Record read.)

Mr. Austin: Now, the witness has already referred to the Bird-Ward case and to the Standard Brands case and stated that they involved such questions. Do I understand counsel wants some more complete statement? I have no objection, but—

Mr. Hanley: I think the witness did say that he worked on those cases. As to what extent he worked on them, and as to whether they did involve questions of cost distribution, and whether or not this witness worked on those particular questions, I am not at all clear. I just want to have him summarize exactly what he did on distribution cost accounting.

By Mr. Hanley:

Q. I may help you a little, Mr. Warmack, by stating that I wanted as briefly as you can give it exactly 5770 what your experience as a distribution cost accountant has been.

Mr. Austin: Just start out with the Bird case, Mr. Warmack, what the case involved, and what you did, and any other cases.

The Witness: I might call your attention, Mr. Austin and Judge Hanley, to this: I worked on the Bird case in December, 1936, and January, 1937. As to one single particular item of cost, or how the company kept its records, if you will give me time to go get the record, I can go into each one of them and tell you exactly what I did on those things.

By Mr. Hanley:

Q. Well, I do not require that degree of specification, Mr. Warmack. Just give us the best you can out of your recollection.

A. I took the cost exhibit which was put into the record by the Bird Company and I went to the company's office in East Walpole, Massachusetts, and I picked up each item of cost that had been used by the respondent company to arrive at a cost differential, and I made an analysis of each of these items of cost, as to what went into the item and as to how it had been separated for the purpose of arriving at the cost differential.

Mr. Austin: Well, it was distribution cost accounting, was it not? 5771

The Witness: Yes, sir.

I might state that there was no item of manufacturing cost involved in that cost justification.

That is the Bird case. Is that sufficient on the Bird case?

Mr. Hanley: I think so, if that is generally what you did, Mr. Warmack.

The Witness: Yes, sir; that is right.

Mr. Austin: Did you make a report on it?

The Witness: I did, but that report did not go into the record. It was my opinion that the company had justified its price differences, and my opinion went into the record.

Trial Examiner Ballinger: Did or did not go into the record?

The Witness: It did go into the record, your Honor.

Trial Examiner Ballinger: What is the next case?

The Witness: Well, the next case on which I testified was the Standard Brands case, which I believe was the principal cost case that came before the Commission at that time.

Mr. Austin: Did you work on any other cases in the meantime?

5772 The Witness: Oh a great number.

Mr. Austin: Can you mention some of those?

The Witness: I might call your attention, Mr. Austin, to this. You are talking about cases. We make investigations in many instances which never develops into a case, and I am prohibited from disclosing the names of any of those investigations.

By Mr. Hanley:

Q. I won't ask you to do so, Mr. Warmack, but just tell us, please, whether in the interim between the Bird case and the Standard Brands case, which you did try, you were engaged on studies involving distribution cost accounting, and, if you were, to what extent you were using your time in that line of work.

A. I was engaged continuously in the studying of distribution costs arising in various investigations which were being made by the Commission, studies of distribution cost statements that were submitted by companies, possibly at the suggestion of the Commission, or maybe of their own free will, to ask this Commission if we could offer any suggestion as to further developments of distribution cost accounting that they might go into—well, just various questions, Judge, of distribution cost, especially salesmen's salaries and expenses, warehousing cost, advertising cost, and—well, all costs involved in distribution of a company's products; sometimes explored to 5773 some extent the possibility of using manufacturing costs or certain parts of manufacturing costs for the purpose of proving a cost differential, but it was mostly the distribution cost.

In the Standard Brands case the company followed the similar procedure as just outlined in the Bird case. They had three principal broad classifications under which they placed their distribution costs, the costs which they urged in their cost differential.

Q. Did you have charge of the accounting work for the Commission in that case?

A. Yes, sir.

Q. And likewise in the Bird case?

A. Yes, sir.

Mr. Hanley: You may proceed.

Trial Examiner Ballinger: Now, read the question pending.

(The question referred to was read as follows: "Q. What is your opinion as to whether any of the expense going into that account in 1937 was properly chargeable to the cost of sale of gasoline to Ned's Auto Supply Company?")

Mr. Hanley: Now, I would like to ask counsel, if I may, your Honor, if the purpose of the inquiry as to the propriety of Respondent's Exhibit No. 31 is by way of 5774 getting an opinion from this witness?

Mr. Austin: Yes, as to the propriety of the charges shown on 31-L and other matters which we will get to.

At the present time the question is devoted to determine whether or not Exhibits 31-H properly establishes differentials between Neds' Auto Supply and other stations.

Mr. Hanley: I would like to ask one further general question and then some specific questions, your Honor.

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. Have any of your studies or investigations relative to distribution cost accounting involved the sale and distribution of petroleum products of oil companies other than this one now on trial?

A. Not in any particular case, Judge, that is, a case before this Commission. There was none.

Q. I am referring either to a case that actually came before the Commission or an investigation which has not ripened into a case but which you may have studied, anything of that kind?

A. Yes. I do remember of an investigation of an oil company. I do remember that we in making our distribution cost survey, that is, generally over the country, that we contacted and I think maybe studied some of the oil companies.

Q. I see.

5775 A. I do not know just how extensive that was, and of course, I would not be permitted to give the names of the companies.

Q. I am not asking that.

Now, adverting to the question which Mr. Austin has asked you, and referring you to Exhibit 31-H, have you at any time made a study of all of the figures, records, data, and information of the respondent company which either go into these accounts or is omitted from these accounts?

A. Judge, may I inquire as to your question this: Do you mean did I review every voucher, every item of cost that entered each one of these accounts during the year 1940?

Q. Yes.

The Witness: During 1937?

I did not, and I might call your attention that, according to the record, I believe the record will show that Mr. Boatwright did not either.

By Mr. Hanley:

Q. Well, did you review everything that he did?

A. I could not answer that, sir.

Q. Well, if you did not review everything that he reviewed, are you willing to express an opinion as to the propriety of the results that he found?

A. In connection with account 1001 that has just been—

5776 Q. Or anything else in the entire exhibit.

A. I am willing to express an opinion with reference to the propriety of—may I change that?—with reference to the way the separations have been made of many of the accounts by the respondent.

Q. Did you review all classes of accounts as reflected by the record, data, figures, and information of the respondent company that are treated in Exhibit 31?

A. No.

Q. You did not?

A. I did not.

Q. Then you do not know, Mr. Warmack, what went in and what was left out, first, in connection with specific vouchers, and, secondly, in connection with classes of accounts.

A. I have the testimony to go by, what is in this record to go by, and I made certain test checks as to what went into these sufficient to satisfy myself reasonably as to what went into most of these accounts, and that is particularly true for the year 1940.

Q. We are talking about Exhibit 31, which treats the year 1937.

Now, are you willing to say that you reviewed vouchers and classes of accounts that were either included or omitted in Exhibit 31 and upon which inclusions and omissions Mr. Boatwright expressed the conclusions as reflected
5777 by Exhibit 31?

A. I did not review every voucher; no sir.

Q. All right. One more question.

Have you discussed with any person connected with the Federal Trade Commission, other than Mr. Austin, or Mr. Lundvall, your conclusions relative to any studies that you have made in connection with any of the accounting procedures of the respondent company?

A. I have discussed with my chief—

Q. Well, who is he?

A. —Col. W. H. England, chief economist, many points in connection with the accounting in this case. I have also—

Q. Is that the only other person?

A. I have also discussed with the chief statistician.

Q. Anyone else.

A. Mr. Lundvall; and, of course, I have the privilege to discuss with any of the accountants questions. I do not remember any particular discussion. However, I may have had discussions on some points with other accountants.

Q. Is that all?

A. That is all, sir.

Q. Did you make any test check of respondents' accounting in 1937? I want to emphasize 1937, Mr. Warmack. That is the period covered by Exhibit 31.

A. The test checks that I made I believe were for the year 1940.

5778 Q. Well, then, is it true that you did not make any for the year 1937?

Mr. Austin: If your Honor, please, I do not know whether this is alone the line of the objection to the question or whether—

Mr. Hanley: I have not made any objection yet.

Trial Examiner Ballinger: He is merely leading up to one.

Mr. Hanley: Yes. I propose to make an objection to the question as soon as I get through.

Mr. Austin: On voir dire I do not object to it, although I think it is immaterial as far as the question is concerned.

Trial Examiner Ballinger: Is there a pending question? Read it.

(Last question read.)

A. I would not say that I did not make any test check for the year 1937. I would say this, Judge, that my study of the company's records went almost entirely into questions of cost, the separations of those costs, in the Detroit field for the year 1940, for the reason that I believe that it has been admitted in evidence in this case that practically the same methods were used for the separation of these costs in 1937 that were used in 1940 and practically the same items of cost went into the respective accounts in

5779 1937 as in 1940.

By Mr. Hanley:

Q. Mr. Warmack, I will just ask you this one question, and I wish you would give me a definite answer, and then I am through.

Did you or did you not make any test check of the matter underlying Respondent's Exhibit 31 for the year 1937?

A. Well, Judge, you ask me did I make any, or did I make none, or did I make one, or did I make a hundred. I don't know whether I made one or made a hundred. I say that I went into this matter, and I don't know if I made test checks for 1937 positively as such. In our studies we made hundreds of test checks.

Q. Just answer my question. Perhaps you have. You said you don't know. Have you any work sheets on 1937?

Mr. Austin: The witness said his studies were chiefly on 1940, but he has investigated—

Mr. Hanley: Well, let the witness testify, please, Mr. Austin:

By Mr. Hanley:

Q. Have you any work sheets on 1937?

A. Judge, I don't think that we have. I would just have to look and see if we have.

Mr. Hanley: The questions propounded to the witness in connection with Item 1001 on Exhibit 31-H is objected to for the reason that the witness has now shown
5780 himself not qualified to express any opinion relative to that specific item of cost distribution and, in fact, not qualified to express any opinion as to the propriety of any cost separations and distributions appearing in the entire exhibit 31.

The objection does not go to the general qualifications of the witness as an accountant. It goes specifically to the fact that the witness by his testimony has demonstrated that he has not made any sufficient study of Exhibit 31 reflecting matters arising out of the year 1937 to warrant the expression of an opinion by him or to give any opinion that he might express any value.

Trial Examiner Ballinger: I will hear from counsel for the Commission.

Mr. Austin: Well, I do not think the objection is well taken, your Honor. Each one of these accounts and each

one of these expense items was gone into on cross-examination of Mr. Boatwright. The nature of the expense items was brought out in the testimony and to some extent in Respondent's Exhibits 99 and 100. Any differences in the quoted accounts between 1937 and 1940 are in the record. The expense items are the same, as Mr. Warmack says, and the methods of allocation used by the respondents have been developed in the testimony and in Exhibit 99, the methods used in 1937. The testimony and the opinions which the witness will be asked to give will be based upon—
5781 certainly as in 1937, I think, they will be based very
largely, if not entirely, upon what is in the record. I won't say entirely because the witness did make studies in Detroit and he knows the nature of many of these expense items from his 1940 examination, and he knows how they are handled, and they were handled the same way in 1937. The testimony shows that.

Trial Examiner Ballinger: The Examiner will ask counsel a question.

Was Respondent's Exhibit 31 used as a basis for any of the computations or conclusions reached in respondent's Exhibit 100 or 101?

Mr. Hanley: No, your Honor.

I just wanted to add to my objection this further statement, which will answer your Honor's question.

The testimony sought to be elicited is further objected to for the reason that it appears from the statements of the witness and laterally by the statements of counsel that the witness concentrated his studies largely on the year 1940 and the separation and distribution of cost as set up by the respondent for the year 1940 in this case, which is reflected, I think, in Respondent's Exhibits 99, 110 and 101, if these are the right numbers.

The fact of the matter is that the 1937 cost study, Exhibit 31, was designed to separate out of the reseller group
5782 of customers and the reseller channel one individual
reseller buyer, namely, Neil's Auto Supply Company, which was receiving deliveries under the general plan of the company in distributing its petroleum products through the reseller channel.

In 1940, and in connection with the studies that have been made, there was a cost distribution as between, not members of the same genesis or group, but between members of one group and members of a distinctly different group, namely, retail resellers, on the one hand, and jobber or wholesale jobbers, on the other hand. Consequently, there was not any consideration given in our study based on 1940 to the figures reflected in Exhibit 31. It was for a distinctly different purpose and based on an entirely different type of study. Hence, anything that the witness may attempt to relate to Exhibit 31 by his studies in 1940 just doesn't fit, and we insist, your Honor, that, unless this witness has made a definite study of the underlying data upon which Exhibit 31 is based, he is not entitled to express an opinion.

I wish to repeat, of course, that this goes specifically to his knowledge of this subject, and it is not a general objection to his qualifications as an accountant.

Mr. Austin: If your Honor please, even if the witness had not made any studies in Detroit at all, he would still be perfectly capable to testify as an accountant to the 5783 conclusions reached and the methods used in respondent's Exhibit 31. The nature of all these expenses has been brought out in the record through Mr. Boatwright's testimony, and the regular accounting procedure of the company is brought out in Exhibit 99, which is the regular procedure, not the 1940 cost study. Mr. Boatwright's testimony shows just how these accounts were handled and how the differentials were arrived at. Now, Mr. Warmack, I think, amply qualified as an accountant to testify as to whether the methods used were correct, and as to whether the results reached were correct as shown in Respon[illegible]nt's Exhibit 31, based on testimony in the record. He will give the opinion; he will give the basis for his opinion, and I think in every case he will support his opinion by facts which appear in the record.

Trial Examiner Ballinger: The objection is overruled with the right reserved to counsel for the respondent to renew the objection at a later date.

Just off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

Direct Examination (Resumed)

Mr. Austin: Now, go back and read this question. Do you remember it?

Trial Examiner Ballinger: Read the question.

5784 (The question referred to was read as follows:

"What is your opinion as to whether any of the expenses going into that account in 1937 was properly chargeable to the cost of sale of gasoline to Ned's Auto Supply Company?")

The Witness: Shall I answer that question?

Trial Examiner Ballinger: Answer the question.

Mr. Austin: Yes. It is account 1001.

Trial Examiner Ballinger: 1001, Commission's Exhibit 31-H.

A. In my opinion, a part of that cost is properly applicable to serving all customers. Of course, Ned's is one of those customers.

By Mr. Austin:

Q. What is the basis for your opinion in that regard?

Mr. Hanley: Just a moment.

Your Honor, may it be understood that respondent's objection stands to all of the inquiry in connection with Exhibit 31?

Trial Examiner Ballinger: Continuing objection.

A. Under the Company's code of account, the account in question, 1001, which is "Salaries—Supervision—Others," that portion of those salaries which is allocated to tank wagon reseller channels in the company under the code of account, why this total class of expense is shown to be separated between tank wagon reseller 5785 channel, tank wagon consumer channel, other methods channel, on the basis of a ratio of gallons sold by each method to total gallons sold for all methods; in other words, on a gallonage basis. It seems to me that that recognizes the fact that this is a class of cost that is applicable to each channel on a gallonage basis, and I don't see any particular reason why part of it is not applicable to Ned's when Ned's gallonage is a part of the gallonage used here.

Mr. Hanley: The respondent moves to strike that portion of the witness' answer beginning "it seems to me that that is a recognition," on the ground that it is not responsive. It is not an expression of his opinion, as he was requested for an opinion, and because—

Trial Examiner Ballinger: The motion is granted.

Mr. Hanley: The respondent now moves to strike the entire answer of the witness on the ground that it appears from his statement that he is basing his conclusion and opinion on something that he sees in the company's code of accounts and is not something based on his study of Exhibit No. 31, and the actualities, as to what may have transpired in the company's costs in serving Ned's Auto Supply Company as distinguished from the company's costs in serving other reseller buyers.

Mr. Austin: Did your Honor grant the motion to 5786 strike out the last answer of the witness?

Trial Examiner Ballinger: Not the answer.

Mr. Austin: What was stricken out?

Trial Examiner Ballinger: Read the record, please.

(Record read.)

Mr. Austin: Now, do I understand the last part of that is stricken?

Trial Examiner Ballinger: After listening to the entire answer, the Examiner reverses himself and overrules the motion to strike.

By Mr. Austin:

Q. Mr. Warmack, what is the—

Trial Examiner Ballinger: One moment.

There is also, I believe, another motion pending to strike the entire answer. That motion is denied.

By Mr. Austin:

Q. What is the nature of the expense going into this account 1001 as shown by the testimony?

Mr. Hanley: What testimony, if your Honor please?

Mr. Austin: Well, Mr. Boatwright's testimony.

Mr. Hanley: Well, that is objected to as calling for the conclusion and opinion of the witness.

Trial Examiner Ballinger: Well, the witness will undoubtedly refer to the particular testimony of Mr. Boatwright.

5787 The Witness: I don't have that particular testimony before me. I believe it has been testified to, however, that this is largely expenses of a clerical nature, the stenographers of the supervisors, and some—

Mr. Austin: Haven't you any notes, Mr. Warmack, to which you can refer which will help you in some way to take up these questions? I think it is a great deal to attempt to rely on your memory, unless you do have some notes. I was under the impression you did have some.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: The testimony shows that this account—

Trial Examiner Ballinger: Now, what testimony are you referring to?

The Witness: The testimony of Mr. Boatwright in connection with this account 1001, your Honor.

Trial Examiner Ballinger: Can you give any citation in the record of it?

Mr. Austin: We can't do that off hand. It will take an awful lot of time and encumber the record. I can look it up at any time. I believe that most of these general statements will be questioned.

Mr. Hanley: The question is general, if your Honor please, and we do object to that method of examining this witness. He has made studies. He says he has
5788 read the record. He ought to be able to say from
his knowledge what goes into account 1001 or into any other account on which he is going to express an opinion. Your Honor has said, over our objection, that he is entitled to express that opinion on his study of the record, but the respondent is entitled to have this witness testify from his own knowledge, however acquired, and not make some broad, wild guess as to what the testimony shows on the part of Mr. Boatwright or anybody else.

By Mr. Austin:

Q. Well, you can state, Mr. Warmack, what you know what goes into these accounts, whether you have acquired the knowledge from Mr. Boatwright's testimony, or otherwise.

Trial Examiner Ballinger: He should state the source of his knowledge.

Mr. Hanley: Surely we are entitled to that, at least, Judge.

A. Well, as I started to say, the testimony shows that this account is made up chiefly of salaries of clerks and stenographers of the supervisory officials, whose salaries are entered in account 000, and that was also the information given me from my inquiry into this account for the year 1940.

5789 The Witness: In the Detroit office.

Trial Examiner Ballinger: You mean the Detroit office of the respondent?

The Witness: Yes, sir.

By Mr. Austin:

Q. What is the regular accounting procedure of the respondent in allocating salaries of these clerks and stenographers in preparing their regular form 189 for the various fields?

A. The allocation of these salaries of clerks and stenographers follows the same allocation of the salaries of the respective supervisory officials for whom they work.

Q. And in response to Exhibit 31, referring particularly to Respondent's Exhibit 31-Q, were part of the salaries in account 000 treated as being chargeable to Ned's Auto Supply Company?

A. Yes, sir.

Trial Examiner Ballinger: Will you read that last question?

(Last question and answer read.)

By Mr. Austin:

Q. Then, what is your opinion, Mr. Warmack, as to whether the expense in Account 1001 should not follow the expense in Account 1000?

Mr. Warmack, it is going to be very difficult unless 5790 you go ahead and give the reasons for your opinion. I am trying to ask you questions to lead you to state your reasons for your opinion which you gave in the first place, and if you have any further reasons for that opinion, why, I would like to have them; if you have not, why, we will go on to something else.

The Witness: May I have that question?

(Question read.)

A. Well, I think that the expenses in account 001 follow the expense in the 000 account, and, in my opinion, in view of the fact that the expenses in the 000 account are in some parts applicable to the serving of Ned's then surely the expenses in the 001 account, which under the company's regular methods of allocation are allocated on the basis of the 000 account, are properly chargeable in part to the serving of Ned's.

Q. Do I understand that that is the company's regular accounting procedure, that the expense going into the account 001 follows the distribution of the account in the 000 account?

A. That is correct.

Q. What is your opinion as to whether from an accounting standpoint there is any basis for a distinction or separation of the expenses in accounts 000 and 001 as between gallonage sold to Ned's Auto Supply Company
5791 and gallonage sold to other reseller outlets in 1937?

A. In my opinion, from an accounting standpoint no distinction or separation can be made as to the expenses entered by respondent in its accounts 000 and 001 between gallonage sold to Ned's Auto Supply Company and gallonage sold to other reseller outlets in 1937 which would afford a cost differential.

Trial Examiner Ballinger: Can you state your reasons for that conclusion?

The Witness: Yes, sir. Respondent's Exhibit 31-Q shows account 1000, what we have been referring to as the 000 account. There is a statement at the top of that page which reads "Schedule of Marketing Expense Items Incurred on both Ned's Auto Supply Volume and Regular Reseller Channel, but to a Lesser Extent on Ned's Volume than on Regular Tank Wagon Reseller Business."

The 000 account is one of the expenses shown there to which that statement applies. Inasmuch as in the company's regular accounting procedure account 001 is treated in the identical manner that the 000 account is treated, then I see no reason why it does not follow the 000 account in its allocation both as to Ned's and to other customers.

By Mr. Martin:

Q. This is a supervisory account, isn't it?

A. Yes.

5792 Q. 001 as well as 000.

A. Yes, sir. That is correct. The 001 represents the clerical assistants to supervisors.

Q. Does Respondent's Exhibit 31 or does the record anywhere contain any evidence of any cost study for the purpose of distributing the amount of expenses in those accounts between Ned's, on the one hand, and other stations, on the other hand?

The Witness: May I have that question read?

Mr. Austin: Read it.

(Question read.)

A. No, sir.

By Mr. Austin:

Q. What, in your opinion, would be necessary to arrive at a separation of the expense going into such a supervisory account in ascertaining the cost chargeable to a particular customer?

A. To separate that account would require a thorough cost study, what you might call a factual and objective cost study to determine where the cost falls.

Q. Can that be done with a supervisory account of this kind?

A. Well, there is always a question in my mind as to whether it can. If it can, that is I believe the only way it can be; otherwise it would, in my opinion, have to be on a gallonage basis.

5793 Mr. Austin: May we take a few minutes recess?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: We will recess for five minutes.

(Whereupon a short recess was taken.)

Trial Examiner Ballinger: Come to order.

By Mr. Austin:

Q. On Respondent's Exhibit 31-H, Mr. Warmack, the second item of expense listed there as not influenced by Ned's Auto Supply business, there is an item of $8,912.32 for account 1215 which is entitled "Expense—Salaries—Others." The testimony shows that the expense in that account, and also in accounts 1216 and 1217 listed farther down on that page, are the expenses of the real estate and tax department of the respondent in the Detroit field. What is your opinion as to whether those three items of expense are properly chargeable in their entirety to the tank wagon reseller business of the company other than that of Ned's Auto Supply Company?

A. My opinion is that they are chargeable to all of the business of the company including Ned's business.

Trial Examiner Ballinger: Will you state your reasons for that conclusion?

Mr. Austin: May I ask, Your Honor, whether the 5794 witness makes any differentiation as to any different parts of the expense going into that account?

Trial Examiner Ballinger: Answer Mr. Austin's question.

By Mr. Austin:

Q. If I may clarify that, Mr. Warmack, it appears from Mr. Boatwright's testimony that a large part of the expense going into that account is expense incurred in the operation of leased service station properties of the company.

In your opinion, is the portion of the expense of the real estate and tax department in connection with leased service station properties properly chargeable to tank wagon reseller stations?

A. No, sir. I think that it should be separated, and the part chargeable to the leased service station group should be so charged, which would be applicable to the gallonage sold through leased service stations, to operators of leased service stations, sir.

Q. Are you familiar with the fact that the lessees of the leased service stations pay rentals to the company?

A. Yes, sir.

Q. In determining what portion of this expense and other leased service station expense is chargeable to leased service stations is it necessary to offset the rentals received against the expense to determine whether there 5795 is a net expense?

A. Oh, sure, that is necessary.

Q. Has that been done here?

A. No, sir. There is no recognition given here to the question of leased service stations at all.

Q. And what is your opinion as to whether it is proper to include on Respondent's Exhibit 31-H the portion of the expense in accounts 1215, 1216 and 1217 arising from the leasing operation as chargeable to non-lessee stations as well as to lessee stations?

A. I don't think it is proper to make any such charge as that. I think that the portion applicable to the leased service station should be so charged to the leased service station business, and that portion applicable to serving nonleased service station business should be so charged. In other words, I think the two should be separated.

Q. Might that not result in a different per gallonage charge on expense in this account to non-lessee stations than would result in being charged to lessee stations?

A. It might.

Mr. Hanley: Just a moment, please.

That is objected to in that it calls for a conclusion of the witness on a matter of fact concerning which the witness has testified he has made no special study. Further, that he has now testified that in his opinion leased service 5796 stations as distinguished from other service stations should be separated as groups for distribution cost purposes, and it appears from the record that Ned's Auto Supply Company is not a leased service station, and the Exhibit 31-H excludes from cost against Ned's the item which is allocable to leased service stations, which is in exact conformity with the expressed opinion of the witness, notwithstanding he says that account 1215 ought to be in part allocated to Ned's Service Station.

Trial Examiner Ballinger: The objection is overruled.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. First, Mr. Warmack, let me ask you whether the portion of the expense in accounts 1215, 1216, and 1217 which is leased service station expense is properly chargeable to the gallonage going through non-lessee service stations?

A. In my opinion, it is not.

Q. So, do I understand you to say that that part of the expense would not be chargeable to Ned's or to any other non-lessee.

A. It should not.

5797 Q. Now, as to the balance of the expense in that account, is it your understanding—first, I would like to ask whether in your investigation in Detroit in the spring of this year you made any investigation as to the nature of the expense going into the account 215 and as to where that expense arises.

A. Yes, sir; I made an investigation of that account, and I believe that I have a worksheet that will show the complete analysis of that account for the entire year; that is, account 215.

Q. The year 1940?

A. For the year 1940.

Q. Now, Mr. Warmack, assuming that the nature of the expense going into this account was the same in 1937 as in 1940, was a part of the expense going into that account incurred in connection with the company's bulk plant properties and the main office building?

A. Yes, sir.

Q. In your opinion, would a part of that expense be chargeable to Ned's Auto Supply Company?

A. In 1937, you mean?

Q. Any year, yes.

A. Yes, sir.

I would like to explain that. In 1940 Ned's was not served through bulk plants; therefore that portion
5798 applicable to bulk plants in 1940 surely should not
be charged to Ned's—

Q. Yes.

A. —in 1940.

Q. I believe my question was directed to Ned's.

A. In 1937 Ned's was served through bulk plants; then the cost of operating the bulk plant is in part, some part, applicable to the serving of Ned's.

Q. Is there anything in this exhibit, or from the testimony which you found as the result of your study which indicates which portion of that expense is chargeable to Ned's Auto Supply Company?

A. No, sir; I don't believe that there is.

Mr. Hanley: In view of the witness' answer just made, it is moved by the respondent that his testimony in connection with account 1215 be stricken inasmuch as, since he is unable to answer as to the factual result, his conclusions as to the propriety of accounting are rendered valueless.

Mr. Austin: Well, if Your Honor please, the respondent has the burden of proof here, and if the witness has testified that some of this expense is chargeable to Ned's, and there is no showing in the cost study made as to what part is chargeable to Ned's, that I think is as far as the
Commission has to go. I think the burden is on the
5799 respondent, if they claim that no part of this ac-
count or an insignificant part is chargeable to Ned's,
to establish that. In any event, I have simply brought

out by that question the fact that there has been no proof of that as far as the accountant is able to determine in the record.

Mr. Hanley: If Your Honor please, the fallacy of counsel's statement is clearly obvious in this, that he says the respondent has the burden of proof. We brought into court Exhibit 31. Now, the Commission puts Mr. Warmack on the stand and he says, "I don't think you have proceeded properly in your accounting of account 1215. Part of that ought to go to Ned's." And counsel says the burden is upon us to undertake to enlighten the court as to what theory, or plan, or program, or notion, or view Mr. Warmack has in his head as to what part he thinks ought to be allocated to Ned's. That is an impossible burden, Judge. We do not know what Mr. Warmack thinks about it unless he testifies to it. And I assert that there are some obligations on the part of the Commission. When they criticize this account they should enlighten the court.

Trial Examiner Ballinger: The witness' testimony is of no greater value than the reasons assigned to support it.

The motion to strike is overruled.

By Mr. Austin:

5800 Q. Now, Mr. Warmack, bearing in mind the nature of expense going into account 1215, and referring now only to the portion of that incurred in connection with the company's properties through which Ned's as well as other tank wagon stations were served in 1937, is that expense an expense of such a nature as to afford a cost differential, in your opinion, as between Ned's on the one hand, and other tank wagon reseller stations, on the other hand?

Trial Examiner Ballinger: Read that question, will you please?

(Question read.)

Mr. Hanley: That is objected to as unintelligible.

Trial Examiner Ballinger: Do you understand the question?

The Witness: Yes, sir; I understand the question.

Trial Examiner Ballinger: You may answer it.

You may answer it.

Mr. Hanley: I do not make the inquiry if the court understands the question. I confess I don't.

Mr. Austin: Well, I want the witness to state whether or not the expense in this account is of such a nature as to afford a cost differential, and, if so, what is necessary to establish such a differential.

Mr. Hanley: Well, if that is the question, then go ahead.

5801 Trial Examiner Ballinger: You may answer it.

A: There is a question in my mind as to whether or not this expense is proper expense to be used in the establishing of a cost differential. If it is to be used, the only way to separate it would be through a factual and objective cost study, if it could be separated at all, and if it could not be separated on such a basis it would of necessity have to be separated on a gallonage basis, and that would not afford a cost differential, Mr. Austin.

Mr. Austin: I think we better have an adjournment for lunch, Your Honor, before taking up this next account, which is Account 1066, and which may take some time.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger. The motion of counsel for the Commission is granted, and now at 12:30 p. m. the hearing stands in recess until 2 p. m.

(Whereupon a recess was taken at 12:30 p. m. until 2:00 p. m. of the same day.)

5802 Afternoon Session.

2:00 P. M.
Room 388.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination (Resumed).

Trial Examiner Ballinger: Come to order. Off the record.

(Discussion off the record.)

By Mr. Austin:

Q. One more question regarding the account 215, Mr. Warmack, and also 216 and 217 which appear on Respondent's Exhibit 31-H. It was brought out in your testimony this morning the fact that part of the expense going into those accounts is expense incurred by the company in connection with the operation of leased service station properties. Is there indicated on Respondent's Exhibit 31-H or elsewhere in the exhibits or testimony the amount of the expense going into accounts 1215, 1216, and 1217 for 1937 which was incurred otherwise than in connection with leased service station properties?

A. No, sir.

Q. Mr. Warmack, the third item on Respondent's Exhibit 31-H is expense from accounts 1243 and 1244, Federal Insurance and Unemployment Taxes. What is the nature of that expense as related to the two accounts above it?

A. That is portions of Federal Insurance and Unemployment Taxes that the company pays to the respec-
5803 tive government agencies with respect to the salaries of the employees, including—

Q. And is that item of $403.87 the Federal Insurance and Unemployment Taxes on the two amounts above, two top amounts in the column?

A. I believe that is true, yes, sir.

Q. Does everything that you have said with regard to accounts 1001 and 1215 apply equally to that item for Insurance and Unemployment Taxes?

A. The item of $403.87 is Federal Insurance and Unemployment Taxes paid by the company on the amounts shown in Respondent's Exhibit 31-H as being applicable to account 1001 and account 1215, and what has been said with respect to those two accounts applies equally to the item of $403.87.

Q. Will you now, please, direct your attention to account 1066, as shown on Respondent's Exhibit 31-H entitled "Miscellaneous Operating Expense," the amount being $40,142.68?

Commission's Exhibit 81 gives a breakdown of the various types of expense or various classes or expense entering into this account. Are you familiar with that exhibit and with the testimony regarding this account?

A. Yes, sir.

Q. I would like to call your attention also to Respondent's Exhibit 99, pages 24 and 25, where a list of some of the typical items of expense going into account 066 are listed.

5804 Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Q. (Continuing) In your opinion, are the items of expense making up the miscellaneous account 066, as illustrated by these two exhibits and described by Mr. Boatwright's testimony, of such a nature as to afford a cost differential as between Ned's Auto Supply Company and other tank wagon stations in 1937?

A. For the most part these items are of a very general nature, and, in the absence of specific information which a factual cost study may afford on some of the items, it appears to me, and it is my opinion, that account 1066 could be separated only on a basis of gallonage which, of course, would afford no cost differential.

Mr. Hanley: Now, off the record.

(Discussion off the record.)

By Mr. Austin:

Q. Well, what is your opinion as to whether all of the expense of this various nature going into account 066, as shown by these exhibits, is properly chargeable to the tank wagon reseller business or the company in 1937, excluding the business of Ned's Auto Supply Company?

A. Oh, in my opinion, surely some part of this expense applies to Ned's—serving of Ned's Auto Supply Company.

Q. And why do you say that?

5865 A. For the reason I have just stated, that, for the most part, this expense is of a very general nature applicable to all of the tank wagon reseller gallonage.

Q. And was Ned's gallonage a part of the tank wagon reseller gallonage in 1937?

A. It was.

Q. And if there is any part of the expense going into this account which is susceptible of allocation on other than a gallonage basis, how would such an allocation have to be made?

A. It would have to be made on the basis of measuring factors which could only be established by a factual and objective cost study.

Q. And has any such study been made insofar as is shown by the record in this case?

Mr. Hanley: That is objected to as a conclusion and opinion of the witness which he is not qualified to give. There is no objection to the witness testifying as to whether or not he made any such factual and objective cost study.

Trial Examiner Ballinger: The Judge is confined to what the record in this case shows.

Mr. Hanley: Well, Judge, it is still a conclusion. We insist that the witness is not permitted to say from the record in this case as to whether anybody in the world has or has not made a factual and objective cost study. 5806 That is a pure conclusion which the witness is not qualified to make. We have no objection to the witness testifying as to whether or not he made such a study.

Mr. Austin: Well, the question is whether or not the proof or explanation of the alleged differential which has been put in this record constitutes a factual or objective cost study, in his opinion; whether this differential, as shown on Exhibit 31-H, is supported by a factual or any kind of a cost study within the meaning of Mr. Warmack's previous answer.

Mr. Hanley: Judge, that is objected to for the reason that it still constitutes a conclusion and opinion of the witness which he is not competent to answer. How may this witness know what was done by Mr. Boatwright and/or his associates—

Trial Examiner Ballinger: Objection sustained.

Mr. Hanley: —that went into this study?

Trial Examiner Ballinger: Objection sustained.

Mr. Austin: Let me answer what Judge Hanley has just said. It is entirely immaterial to the Commission itself what Mr. Boatwright did except as shown on this record. I have asked this witness whether the differential is supported by any factual and objective cost study. Now, I don't care and the Commission doesn't care what Mr. Boatwright has done. It is only what is shown here that is 5807 important. Now, Mr. Warmack has said that in order to determine whether any part of this expense going into this account can be allocated on other than a gallonage basis you have to have a factual and objective cost study. I am asking whether that has been shown by any factual or objective cost study.

Mr. Hanley: Well, Judge, it is most embarrassing—

Trial Examiner Ballinger: Was any question asked Mr. Boatwright when he was on the witness stand as to whether or not a cost study had been made to determine that question?

Mr. Austin: This is what the respondent has introduced. We are only concerned with their proof, not what they may have done on their own account or somewhere else.

Mr. Hanley: Judge—

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Trial Examiner Ballinger: Their proof goes no further than the factual background supporting it.

Mr. Austin: That is right.

Trial Examiner Ballinger: And if there is no evidence that it is predicated upon a cost study, it would have but very little weight.

Mr. Austin: Well, I am not entitled to have that brought out by a qualified accountant, that their conclusions are not based upon a cost study?

Trial Examiner Ballinger: How can you do that?

Mr. Hanley: How do you know?

5808 Mr. Austin: I think Mr. Warmack knows, don't you, Mr. Warmack?

Trial Examiner Ballinger: Could that be determined in any possible way other than by calling Mr. Boatwright and asking him?

Mr. Austin: Why, of course, the result—the thing shows for itself.

Mr. Hanley: Judge, if Mr. Warmack is willing to answer the question which Mr. Austin just now propounded, I am not going to make any objection to it, and that question was: "Mr. Warmack, do you know whether or not Mr. Boatwright and his associates—" that is the implication—"made any factual and objective study before they made this report?"

Now, if Mr. Warmack wants to take the responsibility of answering that question, I am not going to make any objection to it.

Mr. Austin: Well, I don't think that is the question, Judge. Let us have the question reread.

Mr. Hanley: All right. You read it.

Mr. Austin: If that is what it is, I will change it.

Trial Examiner Ballinger: That is the purport of the question as the Examiner understood it.

(Previous record read by the Reporter.)

Mr. Hanley: Now, that is the point, Judge. He is 5809 asking this witness whether this conclusion of Mr. Boatwright's is supported by a factual and objective study, and I am saying to Your Honor if Mr. Warmack wants to answer that, there is no objection on my part. I can take that—

Trial Examiner Ballinger: The witness may answer.

Mr. Austin: Well, I want the witness' answer directed to the question which I asked, which is directed solely to what this record shows. We just reread it a minute ago. I would like to have the question reread again before the witness answers.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Mr. Warmack, have you read and are you familiar with Mr. Boatwright's testimony as to the method in which his conclusions as to the alleged cost differential based upon respondent's Exhibit 31-H was arrived at?

A. Yes, sir.

Q. And are you familiar with the methods of allocation used or method of separation of expense used in arrived at the figures on Respondent's Exhibit 31-H, as testified to by Mr. Boatwright?

A. Yes, sir.

Mr. Austin: Does that answer Your Honor's 5810 question as to whether this was gone into?

Trial Examiner Ballinger: Now, this is still off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record. You may ask the question.

Voir Dire Examination by Mr. Hanley.

Q. Mr. Warmack, you have used the term "factual and objective cost study" a number of times in the course of your testimony. What do you mean when you use the term "factual and objective cost study"?

A. I mean a cost study made with a definite objective in mind, arrived at by an analysis in accordance with sound and accepted accounting principles and procedure in order to arrive at that objective.

Q. One other question: When you say "sound and accepted accounting procedures" do you mean sound and accepted accounting procedures, in your opinion, or, if not, in whose opinion?

A. In the opinion of accountants, generally.

Mr. Hanley: That is all, Your Honor. I would like the question again.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

5811 (Previous question read as follows by the Reporter:

"Q. And has any such study been made insofar as is shown by the record in this case?")

Mr. Hanley: Now, respondent will add to the objection to that question that it is not only a conclusion of the witness as to whether any study was made by Mr. Boatwright and his associates, but it now becomes a conclusion of the witness as to whether any such study was made by the witness' own definition of what he means by a factual and objective cost study.

Trial Examiner Ballinger: Objection sustained.

By Mr. Austin:

Q. Mr. Warmack, you said you had read Mr. Boatwright's testimony regarding account 066. Did Mr. Boatwright's testimony show that the differential shown on Respondent's Exhibit 31-H and I was not the result of any factual or objective cost study?

Mr. Hanley: That is objected to as calling for the conclusion and opinion of the witness. The testimony of Mr. Boatwright is in the record, Your Honor. It shows what it shows.

Mr. Austin: That is just the point, Your Honor.

Mr. Hanley: This witness is not entitled to testify as to what Mr. Boatwright testified to.

Mr. Austin: I think the witness is entitled, cer-
5812 tainly, to testify as to his opinion of the methods used.

Mr. Hanley: If Your Honor please,—

Trial Examiner Ballinger: That is—

Mr. Hanley: This may be off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

By Mr. Austin:

Q. Well, Mr. Warmack, will you state in your own words just what methods were employed in the preparation of Respondent's Exhibits 31-H and I whereby all of the expense in the accounts listed on 31-H was charged to tank wagon stations other than Ned's Auto Supply?

Mr. Hanley: That is objected to as calling for a conclusion of the witness. He is now asked to state what methods were employed. In the first place, insofar as the record discloses, the methods employed are outlined in Mr. Boatwright's testimony. The present witness has testified that he did not make a check of the underlying and basic data, records, and facts which went into the conclusions reflected by Mr. Boatwright in Exhibit No. 31, and we insist that the record speaks for itself on the testimony of Mr. Boatwright as to what he did and his conclusions as reflected in Exhibit 31.

Mr. Austin: Well, I think I am entitled to have the witness comment—if he has read Mr. Boatwright's
5813 testimony, to have him comment as to the nature of the method used. I don't think the record speaks for itself.

Mr. Hanley: Suppose you ask him a question of that kind, Mr. Austin?

Trial Examiner Ballinger: Unquestionably you are.

Mr. Austin: That is just what I asked him.

Trial Examiner Ballinger: I don't so understand your question.

Mr. Austin: Well, I suggest that Your Honor question Mr. Warmack. I am sure I can't do it any better. We have talked this over for weeks.

Trial Examiner Ballinger: Mr. Warmack, are you familiar from the record with the method, accounting method, adopted and used by Mr. Boatwright? Are you familiar with that?

The Witness: Yes, sir.

Trial Examiner Ballinger: Now, in your opinion, was that the correct method to have adopted, and if not in what respects is it erroneous?

The Witness: In my opinion, this Exhibit 31-H—and the result is shown at the top of the exhibit, that is, Respondent's Exhibit 31-I—has not been arrived at in accordance with sound and accepted accounting principles, and most certainly the record will show that it has not been arrived at by any factual and objective cost study.

5814 Trial Examiner Ballinger: Well, what is the basis used in arriving at it? And wherein was it in error, in your opinion?

Off the record.

(Discussion off the record.)

Mr. Hanley: The respondent moves that that portion of the answer of the witness beginning "and most certainly the record shows" be stricken as a conclusion of the witness, a voluntary statement, and a sheer attempt to read the mind of the economists and the accountants of the respondent who have positively testified that they did make a factual and objective cost statement, and the—

Trial Examiner Ballinger: Cost study, you mean.

Mr. Hanley: Cost study. —and the answer of the witness and the voluntary statement therein included is an argumentative denial of the positive sworn testimony of the witnesses for the respondent.

Mr. Austin: I object to—or I would like to oppose that.

Trial Examiner Ballinger: Well, now, just a moment. Let me get this.

Mr. Hanley: Will you please read what Mr. Warmack said?

Trial Examiner Ballinger: Yes. Read Mr. Warmack's answer.

3815 (Previous answer read by the Reporter.)

Trial Examiner Ballinger: Motion is granted.

Mr. Austin: Now, Your Honor—

Trial Examiner Ballinger: Just a minute. Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Now, go ahead. Point out.

The Witness: May I inquire, Your Honor, is it your desire that I pick up these items, account by account, and point out what I think should have been done in order to make a proper separation?

Trial Examiner Ballinger: You have testified with reference to those various items on Commission's Exhibit 31-H. You were then asked the question as to whether or not from the record you are familiar with the accounting method employed by Mr. Boatwright. You answered that you were. The Examiner now asks you if you disagree with that method to point out wherein error was made by Mr. Boatwright.

The Witness: Well, let us take, for example, in answer to that, account 1066, miscellaneous expense, $40,142.68, as shown by Respondent's Exhibit 31-H. That was put into the record as Respondent's Exhibit 31-H without one bit of explanation whatsoever here. As a result of a

request for information, talking about information,
5816 we have got—respondent supplied the Commission
with information set forth on Commission's Exhibit
81 which represents a whole multitude of different charges,
many of which are of a very general nature, Your Honor,
which go to make up this account.

Now, there are some of these charges in this account—many of them—which I don't see how in the world under any theory of probabilities could be applied except on a gallonage basis.

I will call your attention to an item called "Club dues, Chamber of Commerce, Subscriptions, and so forth," $1,286 is shown by this exhibit, and here it said right at the top of this exhibit "There are certain other marketing expense items of an overhead nature not influenced by Ned's Auto Supply business."

Trial Examiner Ballinger: Reading from Respondent's Exhibit 31-H.

Now, Mr. Warmack, does the Examiner understand that your main objection to the conclusions reached by Dr. Boatwright is that he didn't predicate his accounting upon a gallonage basis?

The Witness: Not necessarily, no, sir. No, sir. My contention is, Your Honor, that if a study were properly made of each of these accounts, if they were properly analyzed, and we knew for a fact what studies they were,
what costs they were, what influenced those costs,
5817 then we would know where to apply them, and of
those costs—for instance, this item of Club dues,
Chamber of Commerce, subscriptions and so forth, had—

Trial Examiner Ballinger: What item does that form a part—

Mr. Austin: I would like to have the witness—if he is on the record there—finish his answer.

The Witness: (Continuing.) —which are a part of this item of $40,142.68, as shown by Respondent's Exhibit 31-H which Mr. Boatwright says does not apply or is not influenced by Ned's business, how is it influenced by any business? It applies in the absence of a showing to every gallon of gasoline that is sold by this respondent and should be so applied in a factual and objective cost study if it is going to be used.

I have given you now an example, only one.

Mr. Hanley: If Your Honor please, at this time—

Trial Examiner Ballinger: Well, now, just a moment, and you can interpose your objection to all of it. Will you point out the various items entering into the item opposite account No. 106 that you think are improperly included in making up the total of that item?

Mr. Austin: I object to that question, Your Honor, because I don't think it is—I think your would have to modify it in order to say what you intended to say, 5818 if I may be at liberty to say so. Do you mean for Mr. Warmack to point out items which he considers were not properly chargeable in toto to Ned's account, or which—I don't know exactly, but it isn't a question of what is included in this account 066 in the regular accounting procedure. It is a question of how it is allocated here, and I assume that is what you were referring to.

Trial Examiner Ballinger: Now, there was an allocation of $40,142.68 in expense to the company in connection with the sale of gasoline to Ned's; is that correct?

Mr. Hanley: No. Just the reverse of that, I think, Judge.

Trial Examiner Ballinger: Well, I was in doubt.

Mr. Austin: That $40,142.68 is a figure taken from the form 189 for 1937 tank wagon reseller channel. It is charged in the company's regular accounting procedure to all tank wagon reseller gallonage including Ned's. On this account the figure—on this exhibit the figure is divided by the total tank wagon reseller gallonage, and the resulting cost per gallon is charged to all stations but Ned's, and none of that expense is charged to Ned's in this cost study.

Mr. Hanley: No, if Your Honor please, I would like to make just a record motion.

Trial Examiner Ballinger: Proceed.

Mr. Hanley: The witness now on the stand has 5819 undertaken to testify as to the propriety of certain accounting procedures used by respondent in connection with respondent's Exhibit 31. The witness has indicated that, in his opinion, the procedures used by the respondent and the results thereof as reflected in Exhibit 31 are erroneous. The witness has refused to disclose in what particulars he believes the procedures to be wrong and to what degree the results would be modified if his recommended procedures, if any, were used as distinguished from the procedures used by the respondent.

In view of the fact that the witness refuses to disclose what sort of a division or allocation or distribution of cost he would make, in his opinion, as an accountant as distinguished from the procedures used by the respondent, the respondent moves that any testimony relative to Exhibit 31 given on the part of this witness be stricken wherein such testimony is directed to any account wherein the witness has failed, neglected, or refused to indicate what procedure should have been used and what amount should have been allocated differently than that used and allocated respectively by the respondent.

For the attention of the court it is indicated that this entire examination is directed to an exhibit offered by the respondent to justify a differential offered to Ned's Auto Supply Company for the period from the fall of 1936 to the spring of 1938, which differential and the practice of 5820 offering the same or granting the same, was abandoned in the spring of 1938, has never been resumed, and is not now in use.

Further that the total amount of money involved on Respondent's Exhibit 31-H, which has been under discussion in the examination since the convening of the court this morning, amounts in terms per gallon of gasoline sold to .084 cents as against a differential sought to be justified on the part of the respondent of .529 cents.

Trial Examiner Ballinger: Mr. Austin, do you care to be heard?

Mr. Austin: Now, where do we stand? Is there an objection or—

Trial Examiner Ballinger: There is a motion.

Mr. Austin: What is the motion?

Trial Examiner Ballinger: Read the motion.

(Motion read by the Reporter.)

Mr. Austin: Well, I don't think the witness has refused to do anything, so I think that the motion is baseless because the premise of it is that the witness has refused to explain something or give something. I don't quite follow it but—

Mr. Hanley: Well, I have in mind this—this may be off the record if it isn't desired on.

Trial Examiner Ballinger: Off the record.

5821 (Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I move we adjourn until 9:30 Wednesday morning.

Trial Examiner Ballinger: The motion is granted, and now at 3:50 p. m. the hearing stands adjourned to be reconvened at Washington, D. C., in Room 388, Federal Trade Commission Building, July 1, 1942, at the hour of 9:30 a. m.

(Whereupon, at 3:50 o'clock p. m., June 30, 1942, the hearing in the above entitled matter was adjourn[illegible])

5822

Room 388, Federal Trade
Commission Building,
Washington, D. C.,
Wednesday, July 1, 1942.

Met, pursuant to adjournment, at 10 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Ill., appearing for the Respondent.

5823

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

Hearing of Docket 4389, entitled "In the Matter of Standard Oil Company of Indiana," is reconvened pursuant to adjournment, at 9:30 a. m., July 1, 1942, in Room 388, Federal Trade Commission Building, Washington, D. C.

The last hearing was held June 30, 1942, in the city of Washington, District of Columbia.

You may proceed.

Mr. Hanley: If your Honor please, toward the close of yesterday afternoon's session, respondent made a motion, beginning at page 5818 of the record, and running to the middle of page 5820.

It is respectfully requested that the Court make disposition of such motion.

Trial Examiner Ballinger: The Court reserves ruling on the motion until counsel for the Commission is afforded further opportunity to examine the witness, particularly on the matters embraced within the motion.

Proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination (Resumed) by Mr. Austin.

5824 Q. For the purpose of predicating an opinion, Mr. Warmack, will you describe the method used by the respondent in allocating the expenses listed on Respondent's Exhibit 31-H, as between Ned's Auto Supply Company gallonage and the gallonage of other tank wagon reseller stations in 1937?

A. Yes, sir. The items listed on Respondent's Exhibit 31-H, aggregating $59,186.15, were taken from the reseller channel of Respondent's Form 189 in the Detroit field for the year 1937, and this total of $59,486.15 was divided by the total gallonage, reseller gallonage, in the Detroit field for 1937, the total gallonage amounting to 70,629,027 gallons, whereby a cost figure of .084 cents per gallon was arrived at.

Q. Was that resulting figure .084 cents per gallon charged to all of the gallons used as a divisor?

A. No, sir; that is regarded as being applicable only to the gallons of all tank wagon resellers, excluding Ned's.

Q. And how much, or what part, of this expense, if any, was charged to Ned's gallonage?

A. None.

Q. Is that a complete statement of the method used in apportioning these expenses?

Mr. Hanley: Objected to as calling for the conclusion and opinion of the witness as to whether or not it is a complete statement. The exhibit speaks for itself.

5825 Mr. Austin: I will withdraw it.

By Mr. Austin:

Q. Did that complete your answer as to the method used by respondent?

A. Well, I could amplify that a little if you like. It seems to me that it is—

Q. Well, just a minute. Is that a description of the method used?

A. I believe it is, yes, sir.

Q. Now, in your opinion, Mr. Warmack, from the standpoint of sound accounting practice, is that method which you have described sufficient to establish, or does it establish the differential of .084 cents per gallon, as stated on Respondent's Exhibit 31-I as existing between the expense chargeable to Ned's and the expense chargeable to other gallonage?

The Witness: I would like to have that question read, please.

(The question referred to was read by the reporter.)

Mr. Hanley: If your Honor please, the respondent objects to that question for the reason that the witness has discussed only accounts 1001, 1213, and 1066, and has not discussed any of the many other accounts which appear on Exhibit 31-H; and as to the accounts referred to specifically by number which the witness has discussed, he has said that in his opinion only certain of the expense—
5826 without specifying the amount of such allocation—should be made to Ned's Auto Supply Company.

Trial Examiner Ballinger: Before ruling on the motion, counsel for the Commission may propound further questions to the witness.

By Mr. Austin:

Q. Was the same method of apportionment of expenses which you have described used for apportioning the expense entering into all of the accounts listed on Respondent's Exhibit 31-H?

A. In order to arrive at the .084 figure you are speaking of?

Q. Yes.

A. That is correct. They were used.

Q. You mean the same method was used?

A. The same method was used.

Trial Examiner Ballinger: The objection is overruled.

By Mr. Austin:

Q. Now will you answer the question? The question was whether the same treatment which you have described is sufficient, from the standpoint of sound accounting principles, to establish the differential of .084 cents for these accounts?

A. From the standpoint of sound accounting, in my opinion it is not sufficient to establish a cost differential.

5827 Q. Any cost differential?

A. Any cost differential.

Q. In your opinion do the method which was used by the respondent in apportioning these expenses, and the result reached by that method, establish that no substantial portion of the expense going into these accounts is chargeable to Ned's Auto Supply Company gallonage?

Mr. Hailey: Just a moment. Objected to for the reason that the question is not confined to any particular accounts. If counsel is talking about Exhibit 31-H and the accounts that thereon appear, that is one thing; if counsel is talking about the differential sought to be supported by the respondent in the entire Exhibit 31-A to Q, that is a distinguishable thing.

Mr. Austin: Yes, I am referring only to the differential of .084 cents, which we have just been discussing, and the expense items listed on Respondent's Exhibit 31-H.

Trial Examiner Ballinger: Confining your answer now to Respondent's Exhibit 31-H, you may answer, and the objection is overruled.

A. In my opinion it does not.

By Mr. Austin:

Q. Will you state your reasons for the opinion that you have given, that the method used is not sufficient to establish either the differential or the fact that no 5828 substantial part of these expenses is chargeable to Ned's?

A. Yes, sir. In the first place, all the costs were taken as a whole, as I have previously explained, from the tank wagon reseller channel on Form 189 in the Detroit field for the year 1937, and divided by the total gallonage, including Ned's gallonage, and arriving at .084 cents per gallon, as shown by the Respondent's Exhibit 31-I.

In my opinion, from the standpoint of sound accounting, that is or could be considered a rough estimate, and in Mr. Boatwright's own testimony he has stated in many instances, with respect to many of these accounts, that some parts of those accounts, some costs included in those accounts, are applicable to the serving of Ned's business.

In view of the fact that a part of these costs are applicable to Ned's business—and whatever part that is, has not been so segregated—then in my opinion a thorough cost analysis would be required to show what parts are applicable to Ned's and what parts are applicable to other tank wagon reseller business before any cost differential between the two could be established.

Further, in my opinion, I do not believe it is sound accounting to pick up all of the costs in this tank wagon reseller channel—that is, those costs as shown on Respondent's Exhibit 31-H—and divide them by the total gallonage, including Ned's gallonage, to arrive at a figure which purports to be the difference between what it
5829 costs to serve Ned's station and what it costs to serve the other tank wagon resellers; and carrying that further, on Respondent's Exhibit 31-A we have—

Mr. Hanley: Just a minute. That is objected to as not responsive to the question. He was asked about 31-H.

A. Well, I am only carrying—

Mr. Hanley: Just a minute—let the Court rule, please.

Mr. Austin: 31-A, your Honor, is simply a summary of the figures from 31-H carried over to 31-A. If you will just look at it, you will see he is not taking up any new subject.

Trial Examiner Ballinger: Objection overruled.

A. That estimate cost figure of .084 cents per gallon, as shown on Respondent's Exhibit 31-I, is carried over to Respondent's Exhibit 31-A and shown under the column entitled "Regular Reseller Business," and which means, as I interpret Respondent's Exhibit 31-A, that this particular class of expense is applied wholly and entirely to the regular reseller business, inasmuch as the column entitled "Ned's Auto Supply Company" carries none of that cost.

From the standpoint of sound accounting, it is my opinion that the cost of serving regular reseller business, excluding Ned's, should, for this particular class of expense, have the cost calculated for the same class
5830 of costs. It should be calculated for the serving of Ned's. Taking one of those costs from the other would show the difference between what it costs to serve Ned's per gallon and what it costs to serve the other reseller business per gallon.

Mr. Hanley: Have you finished?

The Witness: I have.

Mr. Hanley: Your Honor, the witness now having finished his answer the respondent objects to the question and moves that the answer thereto be stricken for the following reasons:

First, it is objected to unless and until the witness discloses what testimony he refers to, and unless and until the witness fairly discloses the conservative features of Exhibit 31 which are disclosed primarily on page 31-Q;

For the further reason that the witness has alluded to the rough estimate without defining what he means by a rough estimate, and without defining what "rough estimate" may be;

Further that the witness has argumentatively denied the factual existence of a cost study as the same appears in the affirmative testimony of the respondent;

Further that the witness by his own admission has indicated that he himself has made no factual or objective cost study concerning the underlying facts and figures
supporting Exhibit 31-A, whereas it appears affirma-
5831 tively on the record that the respondent did make a
factual and objective study of the actualities of cost in respect to Ned's Auto Supply Company;

Further that the witness declines, refuses, and neglects to disclose what kind of allocations he thinks in his opinion as an expert accounting witness should be made to Ned's Auto Supply Company out of the accounts appearing on Exhibit 31-H;

Further that the Court refuses and declines to compel the witness to testify in that respect. That such being the fact there is no basis in fact for the allocation or any determination of the influences upon the differential established by Respondent's Exhibit 31 resulting from any testimony of the witness heretofore given in connection with Exhibit 31, or given in the answer to the present question.

Trial Examiner Ballinger: By Respondent's Exhibit 31 I take it you mean Respondent's Exhibit 31-A to 31-Q, both inclusive.

The objection is overruled. The principal grounds of objection are proper questions for cross examination.

By Mr. Austin:

Q. Mr. Warmack, perhaps you can tell us just what you meant by using the words "rough estimate" in referring to the method used in allocating the expenses listed on Exhibit 31-H. You do not need to go over again 5832 what you have said before, but maybe you can tell us just what you meant by the phrase "rough estimate"?

A. From an accounting standpoint a rough estimate of a figure, or a figure which would be considered as a rough estimate is a figure arrived at by calculation, the calculations of which have never been proven from the standpoint of sound accounting.

It might be regarded as a guess figure. Naturally, in this instance you have a certain figure as a denominator—

Q. (Interposing.) Meaning what?

A. —or a divisor—meaning the total gallonage in the reseller channel at 70,000,000 plus gallons in 1937. And that is divided into the total cost, divided into knickknacks and what have you and what not. I use the word knickknacks because it was called "knickknacks" by Mr. Boatwright, never having been positively analyzed as to what this figure is, or what it is or where it goes.

In one or two instances Mr. Boatwright's testimony—to go a little further with that—Mr. Boatwright did not know what was in this figure, and in one or two instances he did not know where they were allocated and—

Mr. Hanley: (Interposing.) Just one moment—

The Witness: (Interposing.) And furthermore—

Mr. Hanley: (Interposing.) Just one moment, please, Mr. Witness. I want to make an objection.

5833 The Witness: Excuse me. I did not hear you.

Mr. Hanley: That is objected to as calling for a conclusion of the witness as to what Mr. Boatwright meant and as to what Mr. Boatwright testified to. In fact, the witness has now gone far beyond what Mr. Boatwright testified to, and now assumes to say what Mr. Boatwright was thinking and did not testify to.

Mr. Austin: Is there a motion to strike?

Mr. Hanley: I am objecting to and move to strike out the entire answer of the witness.

Mr. Austin: I would like to hear the answer of the witness read.

Trial Examiner Ballinger: Read the answer of the witness.

(The answer referred to was read by the reporter.)

Mr. Hanley: I am objecting and move to strike the entire answer of the witness.

Mr. Austin: I will consent to a motion to strike the last characterization of Mr. Boatwright's testimony.

Trial Examiner Ballinger: Commencing at what point?

Mr. Hanley: You understand my motion is to strike the entire answer of the witness.

Trial Examiner Ballinger: Yes. There is a consent to strike part of the answer. That I desire to dispose of at this time. 5834

Mr. Austin: Commencing with the words "in one or two instances in Mr. Boatwright's testimony."

Trial Examiner Ballinger: That portion of the answer beginning with the words "in one or two instances in Mr. Boatwright's testimony" and continuing to the end is stricken.

The motion as to the remainder is overruled.

Mr. Hanley: I would like to add to my motion to strike that the respondent moves that the remaining answer of the witness be stricken on the grounds and for the reasons that he assumes that Exhibit 31-H is what he defines in his opinion as a "rough estimate" when in point of fact the positive testimony in the record is that it is a careful, factual, and objective cost study;

Further that he refers to testimony of Mr. Boatwright—or less than that, merely refers to his statement attributed to Mr. Boatwright—that Mr. Boatwright said "knick-kacks" were included in items of expense, not identified by the witness Warmack, and the entire answer is too indefinite, uncertain, obscure, and unclear to stand for any value if permitted to stand, and if permitted to stand, furthermore, results in unfairness and prejudice to the respondent, and particularly to the witness Boatwright.

Trial Examiner Ballinger: The objection is overruled. 5835

By Mr. Austin:

Q. One more question regarding your rough and ready estimate, Mr. Warmack. When you referred to a rough and ready estimate, when referring to any of the figures on Respondent's Exhibit 31-H or when referring to the differential .084 cents were you referring to the figures appearing on Respondent's Exhibit 31-H or 31-I?

A. I was referring to the figure .084 on Respondent's Exhibit 31-I resulting in the calculations and amounts on the top of Exhibit 31-H.

Q. What does that figure of .084 cents purport to be? Is it a differential, or just what is it?

A. Well, it purports to be, in my opinion, the difference between what it cost to serve Ned's and what it cost to serve any of the others, but it is shown to be—

Q. (interposing) Just a minute. I only asked you what it is.

A. I thought you asked me what it was and I was going to tell you that.

Mr. Austin: So the record will be clear as to what the witness is answering I will ask that the question be read.

Trial Examiner Ballinger: Read the question last put.

5836 (The question referred to was read by the reporter.)

The Witness: It is shown to be other marketing expense items not influenced by Ned's Auto Supply Company.

By Mr. Austin.

Q. I would like to call your attention now, Mr. Warmack, to certain testimony of Mr. Boatwright appearing on pages 3960 and 3961 of the record as follows:

"Q. Referring to these last two items we have discussed, the one beginning with 'Forms 187' and the next one 'Charges from Account 9944' suppose you were asked to allocate or prorate those total charges as between individual service stations, would you consider that would be possible?"

Before reading the answer to that it is necessary to identify the subject matter of that question for the benefit of the record and of the witness. The question is, as appears from the preceding pages of the record, refers to Commission's Exhibit 81, which is a breakdown of the items of expense by classification entering into Account 1066 Detroit field 1937.

The two classifications referred to in the question just read are, first, "Forms 187 and sample bottles and cans, replacement packages, general supply items under five cents, etc."

5837 The second classification of expense referred to in the question just read from page 3960 of the record is, "Charges from Account 9944—gauging tanks—transfer equipment, cleaning and rearranging, checking equipment—etc."

Now, the answer to the question, again quoting from page 3960 of the record, is as follows:

"A. It could not be done with a high degree of accuracy between individual accounts. It is a physical impossibility.

"Trial Examiner Ballinger: Well, would it be practical?

"The Witness: No. It would not be.

"By Mr. Austin:

"Q. In other words, are not those two accounts charges of such a general nature that it would be impossible to allocate them between servicings?

"A. Between individual outlets?

"Q. Yes.

"A. It would just be an impractical thing to attempt."

Now Mr. Warmack, will you turn to Respondent's Exhibit 99—

Mr. Hanley: (interposing) Your Honor—is this the same question, still the same question, Mr. Austin?

Mr. Austin: It is.

5838 Mr. Hanley: Go ahead.

By Mr. Austin:

Q. Turning to Exhibit 99, and to pages 24 and 25, I direct your attention to the last group or list of items at the bottom of page 24 and the list at the top of page 25 which—and I believe there will be no objection if I state that those are listed as examples or types of expense going into Account 1066 in the respondent's regular accounting procedure—

The question now is this: Mr. Warmack, bearing in mind Mr. Boatwright's testimony assuming that if all of those items of expense; that is, expenses of the nature of the items listed at the bottom of page 24 and listed at the top of page 25, that it would not be practical to attempt to allocate expenses of that nature to single service stations, or to allocate the expense between service stations, and that such an allocation could not be made with a high degree of accuracy, as testified to by Mr. Boatwright—and Mr. Boatwright's testimony did not go to all of these items here, he was referring to two specific classifications which I checked from Exhibit 31—

Mr. Hanley: (interposing) I object to that further addition to the question. You are now trying to recite what the testimony was, if your Honor please, without referring to it.

5839 Trial Examiner Ballinger: Just a moment. Let counsel finish his question. Then you can object to any portion of it.

Mr. Austin: I will start the question over again.

By Mr. Austin:

Q. I have called your attention to the fact, Mr. Warmack, that Mr. Boatwright testified as to certain general classifications of expense going into Account 1066, that it was impracticable to make an allocation of that expense between certain servic stations.

A. Yes.

Q. Assuming that that is true as to all expenses ~~such~~ as those listed at the bottom of page 24 and the top of page 25 of Respondent's Exhibit 99, how their are such expenses to be allocated as between service stations? In other words, if it is not practical to make such an allocation of expense between individual stations, then what alternative is open to the accountant in attempting to allocate such expense in a cost study such as attempted by respondent in its Exhibit 31?

Mr. Hanley: Have you finished, Mr. Austin?

Mr. Austin: Yes.

Mr. Hanley: If your Honor please, the respondent desires to make a short objection first to that question and accept the ruling of the Court.

The question is objected to as utterly unintelli-5840 gible, as confusing, as bemusing, as befogged to such a degree as to prevent anyone from understanding the question, and no witness can make a responsible answer thereto; and if one was made no one would know what it was after the answer were attempted.

If your Honor disagrees with that viewpoint the respondent would then like to have the question re-read and make a further specific objection to it.

Trial Examiner Ballinger: The reporter will re-read the question.

The Reporter: "Q. I would like to call your attention now, Mr. Warmack"—

Mr. Austin: One moment. The question was prefaced with a recitation of certain parts of the record.

Trial Examiner Ballinger: I understand that is merely a recital.

Mr. Austin: That is correct. The actual question begins at the end of that recital.

Mr. Hanley: If your Honor please, am I to understand that counsel can make a recital without it being a part of the question? I am objecting to the question in its entirety. Counsel has been talking for ten minutes. I am objecting to the whole recital.

Trial Examiner Ballinger: The question is based upon the recital?

5841. Mr. Austin: That is right.

Trial Examiner Ballinger: Read the question.

(The Reporter read beginning with the words, "I have called your attention to the fact, Mr. Warmack" and continuing to the end thereof.)

Mr. Hanley: Respondent reiterates its objection that the question, having been read in part, and not in full, but so much thereof as was read is self-serving, and that the reading of a part of it has served only to confuse further and that now no witness can fairly answer such a compound and involved question; furthermore, that the question assumes testimony on the part of Mr. Boatwright which is not referred to specifically, and which assumes things that Mr. Boatwright did not testify to.

Trial Examiner Ballinger: The preface to the question was read from the record with citations to the record.

The Examiner now inquires of the witness: Do you understand the question?

The Witness: Yes, sir. I believe that I do.

Trial Examiner Ballinger: Not that you believe you do, do you know that you do? Is it clear to you?

The Witness: I can endeavor to interpolate it.

Trial Examiner Ballinger: No, the Examiner does not desire that. Do you understand the question sufficiently to answer it?

5842. The Witness: In my opinion I do, your Honor.

Trial Examiner Ballinger: The objection is overruled. You may proceed.

5843. A. On the assumption that these costs as enumerated by counsel for the Commission, it would not be.

Mr. Hanley: While he is looking, I will make an objection, if your Honor please. It now appearing from the answer of the witness that thus far he is proposing to answer the question on an assumption of his own not stated in the question, the answer is objected to.

Mr. Austin: The question did state the assumption definitely.

Mr. Hanley: What assumption?

Mr. Austin: The assumption that, as testified by Mr. Boatwright, it is not practical to allocate expenses of this nature between individual service stations with any degree of accuracy.

Trial Examiner Ballinger: The objection is overruled, preserving to counsel the right to renew the objection, and motion to strike, after the answer is in.

By Mr. Austin:

Q. Will you start your answer again?

A. On the basis of that assumption, I see no other way to allocate these costs as between tank-wagon resellers except on a basis of gallons.

Q. When you say on a basis of gallons, do you mean all gallonage?

Mr. Hanley: Just a minute, Mr. Warmack, may 5844 I make my motion, please, if you have finished your answer?

The respondent moves to strike the answer of the witness for all of the reasons set forth in the objection to the question, and for the further reason that the witness could not possibly know what question he was answering.

Trial Examiner Ballinger: The motion is overruled.

The Witness: Was there a question?

Mr. Austin: I will ask you a question now, Mr. Warmack.

By Mr. Austin:

Q. In describing the method used by respondent in allocating these expenses, you pointed out that on respondent's Exhibit 31-I there is a computation by which the total expense listed on Exhibit 31-H is divided by total tank wagon reseller gallonage in 1937?

A. Yes, sir.

Q. Is that what you mean by allocation on a gallonage basis that you just referred to?

A. Yes, sir.

Q. When you referred in your answer just a moment ago to an allocation on a gallonage basis, did you mean an allocation of expense on a gallonage basis to all tank-wagon gallonage or to all gallonage excluding Ned's?

A. I should like to explain that in this way—.

Q. I would like to get an answer to that. Just 5845 a minute, I would like to be sure that the witness understands my question.

Trial Examiner Ballinger: Read the question.

Mr. Austin: No, I would like to explain it. May I, your Honor?

By Mr. Austin:

Q. A moment ago you said that where there is no other —in effect—I am not trying to paraphrase what you have said—but in your answer a moment ago you said it might be necessary, on the assumption made in my previous question, to make an allocation on a gallonage basis.

A. Yes, sir.

Q. Did you mean an allocation to all gallons, or did you mean such an allocation as was made by the respondent here?

A. I mean an allocation in this manner, Mr. Austin: the total tank-wagon gallonage for 1937 was 70,629,027, consisting of the gallons sold to a large number of customers.

An allocation on a gallonage basis means that the pro-rata part of that total gallonage purchased by any one customer, as related to these costs, would be assigned to that one customer, irrespective of whether he was Ned's or somebody else, in the absence or on the assumption that those costs could not be analyzed.

Q. Would such an allocation, then, result in an allocation of part of this expense to Ned's Auto Supply Company?

5846 A. It most certainly would.

Trial Examiner Ballinger: The hearing will stand in recess for five minutes.

(Whereupon a short recess was taken.)

Trial Examiner Ballinger: Come to order.

By Mr. Austin:

Q. I refer to Mr. Boatwright's testimony to the effect that the respondent's regular accounting procedure was changed between 1937 and 1940—in that in 1937 miscellaneous operating expenses incurred in connection with leased service stations were included in Account 066, whereas in 1940 the portion of the miscellaneous operating expense incurred in connection with the leased service stations was entered in the leased service station column on Form 189 opposite Account 066-A, 066-B and 066-C.

Will you turn to Commission's Exhibit 119, Mr. Warmack, and state the amount of expense listed under this Account 066 in the Tank-Wagon Reseller channel?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

(The question referred to was read by the Reporter.)

A. $21,281.63.

Q. What is the total leased service expense entered on Commission's Exhibit 119 in Accounts 066-A, -B and -C? You can state it approximately, if you wish?

5847 A. Approximately $50,430.00.

Q. Does it follow that in 1940 that more than two-thirds of the miscellaneous operating expense in the Detroit field entering into these accounts was a leased service station expense?

A. Yes, sir.

Q. Now, turning to Respondent's Exhibit 31-H, Mr. Warmack, and assuming that approximately the same proportion, or, at least, a large proportion of the expense of $40,142.68 there listed for Account 1066 was leased service station expense, in your opinion is the respondent correct in charging all of that leased service station expense, or, rather, equally to the gallonage of all service stations, both lessees and non-lessees, other than Ned's Auto Supply Company?

Mr. Hanley: Just a moment. That question is objected to as an improper hypothetical question because it does not include the factual feature testified to and evidenced by the record in this case, that both income and outlay on the part of the respondent in connection with the leased services are closed into and given consideration in the so-called Reseller channel on Respondent's Form 189, being Commission's Exhibit No. 119.

Mr. Austin: That is just the point or one of the points. I would like to say, your Honor, that, as I see it, no recognition is given here to any rental offset. This

5848 is just an expense item as treated in Respondent's Exhibit 31-H.

Trial Examiner Ballinger: Proceeding on that theory, the objection is overruled and the witness may answer.

The Witness: May I have the question read?

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

A. In my opinion, the answer is no.

Q. How should the leased service station expense entering into Account 066 in 1937 have been treated in your opinion?

A. It should have been applied to leased service station business—the gallonage of leased service station business—and offset by the revenues received by the company, the net revenues received by the company in its landlord activities.

Q. Has any such treatment been made by the respondent anywhere in this Exhibit 31?

A. I have seen none.

Q. In order to determine whether there is a leased service station expense which would enter into Account 066 or any other account, is it or is it not necessary to determine first whether there was a net expense of leased service station operation, after crediting rentals?

A. It would be so necessary.

Q. And if there is such a net expense, should it be charged only to the gallonage on the leased service stations or might it be charged to the gallonage of both lessee 5840 and non-lessee stations?

A. It would be charged only to the leased-service-station business.

Q. And on Respondent's Exhibit 31-H, is the expense opposite Account 066 charged to non-lessee stations as well as to lessee stations?

A. Yes, sir, it is charged to all of them combined.

Q. Now, will you turn to Respondent's Exhibit 31, pages J, K, L and M, referring to Schedule 4 of Exhibit 31, which is entitled "Selling Costs" on Respondent's Exhibit 31-L, a computation is made of the alleged selling cost of the respondent in connection with the sale of gasoline to Ned's Auto Supply Company in 1937. In making this computation, the salary and expenses of the three salesmen who called upon Ned's outlets in 1937 are used. The cost is arrived at through estimates stated to have been made by Mr. Raupagh and Mr. Blough of the portion of their time which these salesmen spent at Ned's outlets on gasoline.

Are you familiar with the contents of this exhibit and the testimony of Mr. Boatwright and Mr. Blough in relation thereto?

A. Yes, sir; I am.

Q. What is your opinion as to the method used in arriving at this cost figure, particularly the estimates of 5850 time spent on gasoline by these three salesmen at Ned's and as to the soundness and reliability of such an estimate from an accounting standpoint?

A. In my opinion the method is unsound and unreliable.

Q. Will you state the reasons for that opinion upon which you base it?

A. The computation is an estimate which is not supported by any basis of fact; in other words, it is guesswork. No tests have been made of any kind, as far as I have been able to find out, which may support the guess figures.

Q. You say it is guesswork. Will you explain that or explain what was done, as you understand the testimony? Let me ask you this, Mr. Warmack, if it will help you get started; Were estimates made of all of the activities of these salesmen or of all salesmen, or just tell us what was done and what is wrong with it, if anything?

A. The statement as to what was done is shown in Respondent's Exhibit 31-L.

One of the principal things wrong was the failure of making estimates for all of the activities of the salesmen covering their selling activities in connection with every product or group of products.

I am speaking about these three salesmen that are in question: Mr. Meulenberg, Mr. Robinson and Mr. Coutchie, as shown on Respondent's Exhibit 31-L.

5851 In my opinion, before an estimate can be of a great deal of use in a situation of this kind, the total time of the individual concerned must be accounted for by the use of estimates and, even in an instance of that kind, I would still think that no accurate figure could be arrived at by the use of estimates made two or three years after the fact.

Trial Examiner Ballinger: You mean after the occurrence?

The Witness: Yes, sir. Does that cover your question?

Mr. Austin: If you think so, I think so.

Mr. Hanley: Have you finished, Mr. Warmack?

The Witness: Yes, sir.

Mr. Hanley: The respondent moves to strike the answer of the witness to the question just propounded on the ground that the witness has heretofore testified that he has made no study and no analysis of the inclusions or omissions of records, facts, data, and figures which went into Respondent's Exhibit No. 31-L or 31 as a whole, and that the witness is not qualified to testify as to anything in the way of a conclusion as expressed in Respondent's Exhibit 31, particularly in view of the fact that the positive testimony uncontradicted in the record is that there was a detailed, factual and objective cost study made as a preliminary to Respondent's Exhibit 31 and the results of which Respondent's Exhibit 31 reflect.

5852 Trial Examiner Ballinger: Respondent's Exhibit 31-L shows on its face that the results therein portrayed with reference to the time of the three salesmen is merely an estimate. The motion to strike is denied.

By Mr. Austin:

Q. At the top of Respondent's Exhibit 31-M there is a computation of the Respondent's selling expense in 1937 for reseller gallonage in the Detroit field exclusive of Ned's Auto Supply Company, or what is alleged to be that.

The entries for selling expense are taken directly from Respondent's Form 189 for 1937, according to Mr. Boatwright's testimony.

In your opinion, are these expense figures, which total $52,491.09, proper expense figures to be used for this purpose of comparing selling expense of tank-wagon stations generally with the selling expense to Ned's?

Mr. Hanley: An objection is made on the same grounds as the motion was made to the last question.

Trial Examiner Ballinger: Read the question, will you please?

(The question referred to was read by the reporter.)

Trial Examiner Ballinger: The objection is overruled.

The Witness: In my opinion, these expense figures
5853 are not the proper figures which should be used in
this instance.

By Mr. Austin:

Q. When you say "in this instance," do you mean for this purpose?

A. That is correct.

Q. What are your reasons for that opinion?

A. Mr. Austin, there are several reasons which I could enumerate, if you desire.

The figures opposite each of the four accounts listed on Respondent's Exhibit 31-M represent total figures from the tank-wagon reseller channel in Respondent's regular accounting Form 189.

These figures are arrived at by applying the composite percentages from the salesmen's quarterly distribution sheets or time schedules to salesmen's expenses during each month.

The salaries of all salesmen are included in the figures, such as industrial salesmen, lubricating engineers, automotive engineers, city salesmen, reseller salesmen, B-station salesmen, heating-oil salesmen, and others.

I believe that it has been testified that only the reseller salesmen called on Ned's Auto Supply Company during 1937 in the course of their regular duties, therefore it is the salaries and expenses of these reseller salesmen
which should be used in determining the cost differ-
5854 ential of this class of expense and not the salaries
and expenses of all of the other salesmen on a composite of the estimate of time of the salesmen.

That is one reason, Mr. Austin. Do you want others?

Q. Yes.

Trial Examiner Ballinger: State all the reasons that you have.

A. I question the manner in which the salesmen's salaries and expenses are assigned to the reseller channel, as well as to all of the other channels in the company's regular accounting procedure.

Trial Examiner Ballinger: Upon what basis is your challenge?

The Witness: Because of the fact that these allocations are made on a composite basis and not upon the basis of the time spent by any individual group of salesmen, your Honor.

Trial Examiner Ballinger: Were time records kept?

The Witness: Not that I have ever been able to find out.

Trial Examiner Ballinger: Did you make inquiries for them?

The Witness: It is stated here in Respondents' Exhibit 99—

5855 Mr. Hanley: May we have an answer to the Examiner's question?

Trial Examiner Ballinger: Did you make inquiry for the records?

The Witness: Yes, sir.

Trial Examiner Ballinger: Were they furnished you?

The Witness: It was stated to me by officials or competent people in the Detroit office, that no such animal existed.

Trial Examiner Ballinger: You mean any such record?

The Witness: That is correct.

Mr. Hanley: May we interpolate, your Honor, as to whether he made such inquiry relative to 1937?

The Witness: I did. As a matter of fact, I asked if any had ever been made at any time.

By Mr. Hanley:

Q. Who did you ask about 1937?

A. I asked Mr. Houghton, I asked Mr. Hamer, I asked Mr. Bath, and I rather think that I discussed it with several others.

Q. You are talking about 1937?

A. I am talking about all the years.

Q. Are you talking about 1937?

5856 A. I am talking about 1937 and every other year.

Q. All right. Did you ask Mr. Raupagh and Mr. Blough?

A. Yes, sir.

Q. Did you?

A. I discussed it with Mr. Raupagh and of course he sent me in to see Mr. Hamer. As for Mr. Blough, I don't remember having discussed it with Mr. Blough.

Mr. Hanley: All right.

By Mr. Austin:

Q. Continue your answer Mr. Warmack. I think that you mentioned something about composite calculations of time.

A. Starting there, in this connection I might refer to Commission's Exhibit 88, which shows the composite calculations of time for all of the salesmen. I believe that it has been testified to that this is a representative form of the composite used for a separation of salesmen's salaries and expenses for the year 1937.

The composite figures arrived at in Commission's Exhibit 88 represent estimates and do not represent daily tabulations of time by the respective salesmen. The estimates do not actually represent these salesmen's estimates, but they represent the estimates made by the salesmen's supervisors, and there was no documentary evidence of any kind in the company's records in Detroit, as far as I was able to find out, which would support this calculation of the salesmen's time, or any other calcu-

5857 lations of salesmen's time.

Another reason—

Trial Examiner Ballinger: Before you go any farther, when you say there were no records, do you mean to say that there was no record in their office showing the time of each of the salesmen when he visited Ned's or these other places, and how often they visited them?

The Witness: That is what I am saying. They have some records back to a certain date.

Mr. Hanley: What date, Mr. Warmack?

Mr. Austin: Let's let the witness finish his answer.

Mr. Hanley: May I ask that question, your Honor?

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. What date? You looked at the records, I understand.

A. Judge Hanley, I think I could answer your question by referring to my working papers and if I may do that, or have that done, maybe I could answer your question. I don't remember in my mind what date.

Trial Examiner Ballinger: You may proceed and answer the question now, and at a later time examine your work sheets and advise Judge Hanley for the record of the time.

5858 Mr. Austin: I would like to have the Trial Examiner's question read back and see whether that was answered. I think the witness was in the process of answering that.

(The question and answer referred to were read by the Reporter.)

By Mr. Austin:

Q. Continue that, will you? Did you finish that answer to the Trial Examiner?

A. Yes, sir.

Q. Before you go on with the other, I would like to ask you this, whether or not the salesmen do have records which you did see showing the calls on Ned's and other stations, that is, the customers called on and, if your answer to that is yes, do those records show the amount of time spent at each place?

A. I examined many—

Q. Just answer my question. Are there any such records showing what calls are made on particular customers?

A. Yes.

Q. Do those records show the amount of time spent?

A. No.

Q. Do those records show the apportionment of the time of salesmen as between channels of distribution?

A. As to time, no.

5859 Trial Examiner Ballinger: When you speak of those records, you mean daily records, do you?

The Witness: Yes, sir. Your Honor, they show the name of the customer called on.

Trial Examiner Ballinger: Only?

The Witness: They have several columns in which the salesmen enter information with respect to tank-wagon reseller, tank-wagon consumer, other methods or other information, and there is nothing with respect to time spent with any one customer or on any one product.

By Mr. Austin:

Q. Now, will you continue? You said you had another reason why the figures at the top of Respondent's Exhibit 31-M were not proper for use?

A. Yes.

Q. For the purpose for which they are there used?

A. Respondent's Exhibit 31-M not only includes a portion of the expenses and salaries of the various classes of salesmen, but also ~~includes a~~ portion of the salaries and expenses of reseller salesmen operating in commission agent territory as well as in the metropolitan area of Detroit.

A valid comparison of this class of expense in my opinion would require a comparison between the selling costs at Ned's and the selling costs in connection with the sale of gasoline to other reseller outlets in Detroit, since 5860 the time and expenses of Detroit reseller salesmen only were used in computing the selling expense applicable to Ned's.

I still have a further objection. Commission's Exhibit 109-B shows that the territory assigned to the salesmen who called on Ned's Auto Supply Company outlets in 1937 included also some 27 other service stations which were assigned to these salesmen; that in addition thereto it was the duty of these salesmen to call upon some 50 service stations supplied by competitors of the respondent.

The testimony further shows that one of the regular duties of respondent's reseller salesmen is to call upon outlets in their territory served by competitors.

All of the time of the three salesmen who called upon Ned's, and all of the other salesmen which was spent in soliciting business from outlets which were not customers of the respondent is included in the time represented by the salaries and expenses charged to reseller gallonage, exclusive of Ned's.

None of this time spent at outlets which were not customers of the respondent is charged against selling cost to Ned's.

In my opinion the cost comparison made on Respondent's Exhibit 31-L and 31-M is incorrect and invalid, for
the reason that this time was not eliminated or that
5861 it was not charged equally to Ned's as well as the
other customers on a gallonage basis.

I have one other objection.

Q. Well, now, before you go any farther, Mr. Warmack—

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Mr. Austin: I would like to have the reporter mark this sheet for identification.

Trial Examiner Ballinger: The reporter will mark the document handed up by counsel for the Commission as Commission's Exhibit 129 for identification.

(The document referred to was marked Commission's Exhibit 129 for identification.)

By Mr. Austin:

Q. Now, Mr. Warmack, will you turn to Commission's Exhibit 109-A and -B. I call your attention to the fact that that exhibit shows the name of reseller outlets included in the same territory with Ned's Auto Supply Company outlets in 1937. I believe 109-A is the map showing the territory and 109-B gives the list of other reseller outlets

~~in the same~~ territory and also refers to the fact that ~~these same three salesmen called upon approximately 50~~ other reseller accounts handling petroleum products?

A. Yes, sir.

Q. Taking from Commission's Exhibit 86 the 5862 gallonage for those outlets listed on Exhibit 109-B, is it possible to make a computation of the selling cost per gallon of gasoline to the stations other than Ned's in the same territory, using the same method of computation that was used by the respondent in Exhibit 31?

A. It is.

Q. Have you made such a computation?

A. I have.

Q. I show you Commission's Exhibit 129 for identification and ask if you will state what that exhibit represents.

Mr. Hanley: Did you make copies for the respondent?

Mr. Austin: Yes (Handing exhibit to Mr. Hanley).

Mr. Hanley: Thank you.

By Mr. Austin:

~~Q. Will you just state generally what that is, first, Mr.~~ Warmack?

A. It is a calculation which shows average salesmen cost per gallon other than Ned's.

Q. And will you now explain how that computation was made?

A. Yes, sir.

From Commission's Exhibit 109-B I took the names of the reseller outlets included in the same territory with Ned's outlets in 1937, and which were called upon by the same salesmen who were assigned to call on Ned's. 5863 I took the gallonage for each of these outlets from Commission's Exhibit 86, salaries and expenses of the three salesmen on Respondent's Exhibit 31-L, and the percentages shown on Respondent's Exhibit 31-L were related thereto to determine the time spent on business other than Ned's business.

Calculations made from Commission's Exhibits 88, 89, 102 and 103 show that approximately 52.8 per cent of reseller salesmen's time was devoted to naphtha and gasoline, and by relating this percentage to the time other than time spent on Ned's business produces a cost applicable to the sale of gasoline which amounted to $1,384.77, according to my calculation.

By relating this figure to the total gallonage of gasoline sold to stations other than Ned's served by the three salesmen produces a figure of .06¢ per gallon. This figure of .06¢ per gallon, of course, may be compared with the figure of .079¢ per gallon as shown in the middle—

Mr. Hanley: Do you mean .079?

The Witness: Yes, sir, I believe so.

Mr. Hanley: Yes, surely, I am sorry.

The Witness: In the middle of Respondent's Exhibit 31-M.

By Mr. Austin:

Q. In computing the amount of these three salesmen's time spent at stations other than Ned's, would you 5864 accept for the purpose of that computation the estimates made by Mr. Raupagh and Mr. Blough of the time spent at Ned's as shown on Respondent's Exhibit 31-L?

Just refer to Respondent's Exhibit 31-L.

My question is in effect, Mr. Warmack, on this exhibit for identification, how did you arrive at these percentages of 65 per cent, 75 per cent and 75 per cent?

A. I made use of the estimates made by Messrs. Blough and Raupagh in arriving at those percentages.

Q. So you did accept their percentages?

A. I had no alternative. I had to accept them.

Q. In determining the amount of time spent by the salesmen on gasoline at the other stations, did I understand you to say that you used the quarterly distribution of time reports for the year 1940?

A. Yes, sir.

Q. And did you use the percentage of time of reseller salesmen only spent on gasoline as shown on those reports?

A. Yes, sir.

Q. Are you familiar with Mr. Boatwright's testimony regarding the distribution of time reports, salesmen's distribution of time reports, which are in evidence for 1940, and as to whether those distribution of time reports indicate a distribution of time varying substantially from 1937?

Mr. Hanley: Just a moment, Mr. Austin, please. I 5865 didn't object to the questions relative to the contents of Commission's Exhibit 129, on the supposition that counsel was going to offer it. He seems to be leaving the subject now.

Mr. Austin: Oh, no.

Mr. Hanley: And I now move to strike the testimony of the witness relative to the contents of an exhibit which has not been offered in evidence.

Mr. Austin: I am going to offer it in evidence, but I am still referring to it.

Trial Examiner Ballinger: The ruling on the motion to strike is reserved until counsel for the Commission concludes his testimony with reference to the exhibit marked for identification.

By Mr. Austin:

Q. Bearing in mind Mr. Boatwright's testimony just referred to, I call your attention to the fact that on Respondent's Exhibit 31-L the proportion of time spent by these three salesmen on gasoline at Ned's is arrived at by an estimate as previously testified to by you?

A. Yes, sir.

Q. Whereas in your computation on Commission's Exhibit 129 for identification you used the percentage of reseller salesmen's time spent on gasoline in 1940, which you have also stated to be an estimate?

A. That is correct.

5866 Q. Both estimates were, I believe, made in 1940. Which in your opinion is the more accurate, or can you express an opinion on that?

Mr. Hanley: That is objected to for the reason that the witness has stated in his testimony that he has made no analysis or study of the inclusions or omissions of records, facts, data and figures pertaining to the year 1937 and is consequently unqualified to make any comparison between 1937 and any other year.

Mr. Austin: The question is, your Honor, as to what estimate, both made by the respondent in 1940, that is, in 1940 Mr. Raupagh and Mr. Blough got together and estimated how much time these salesmen spent on gasoline at Ned's in 1937; then in 1940 the quarterly distribution of time reports were made up for that year purporting to show how much time was spent on gasoline by reseller salesmen generally. I am asking Mr. Warmack which is the more reliable for the purpose of this 1937 computation.

Trial Examiner Ballinger: The objection is overruled.

The Witness: Mr. Austin, I question both estimates, but naturally an estimate made nearer the fact or the closest time after the facts in my opinion is more reliable than an estimate made two or three or four or any years after the facts.

5867 Trial Examiner Ballinger: When you use the word "fact" you mean occurrence, don't you?

The Witness: That is correct, yes, sir.

Mr. Hanley: Respondent moves to strike the answer of the witness on the ground and for the reason that he is now expressing an opinion as to the reliability of the memory of men and not as to a question of any fact concerning the records, data, figures and accounts of the respondent company.

Trial Examiner Ballinger: Motion is denied.

Mr. Austin: I now offer in evidence Commission's Exhibit 129 for identification.

Mr. Hanley: The exhibit is objected to on the ground that it is an attempt on the part of the witness to make an independent calculation of a segregated and independent part of a whole which was considered by the respondent's accountants in compiling Respondent's Exhibit No. 31 and is totally unreliable as an independent segregated computation, for the reason that it fails to give consideration to all of the facts, circumstances, data and records that were considered by the accountants of respondent in compiling Exhibit No. 31, and further that the witness who now asserts that he made the calculation reflected on Commission's Exhibit for Identification 129 says that he did not make a factual and objective study of the facts, 5868 records, data, and figures underlying Respondent's Exhibit No. 31.

Trial Examiner Ballinger: The objection is overruled and Commission's Exhibit No. 129 is admitted in evidence.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 129 was received in evidence.)

Mr. Austin: I would like to say, perhaps I should have said in offering this exhibit, that this exhibit is offered, as probably appears on its face, to show the respondent's cost of sale to other reseller customers in the territory served by salesmen who called on Ned's Auto Supply Company in

1937, whereas Respondent's Exhibit 31-M purports to show selling cost for reseller stations other than Ned's in the entire Detroit field. It is submitted that the cost of selling to stations nearby to Ned's in Detroit in 1937 is more reliable and more material to this case than a computation made for the entire Detroit field.

Mr. Hanley: Upon the statement of counsel, there is added an objection, that there is now an attempt on the part of the Government, through the introduction of Exhibit 129 to arbitrarily limit geographically the area which this case involves, and no effort is made on the part of the Government to define or indicate what such geographic limits are; and there is no basis in fact or law to so
5869 limit the inquiry in this examination; further, that all of the records of the respondent and its evidence in justification of cost differential are based upon a field expense known as the Detroit field and that any effort to segregate any part of such expense out of such field is improper and unfair until and unless it be demonstrated that consideration has been given to every element which would make such segregation a proper and equitable one.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Mr. Hanley: The foregoing is now added to the objection made to the introduction of Exhibit 129, and the foregoing plus the objection, is now made as a motion to strike Exhibit 129.

Trial Examiner Ballinger: The motion is denied.

By Mr. Austin:

Q. Mr. Warmack, in preparing Commission's Exhibit 129, did you make any segregation or allocation of the time spent between these three salesmen in calling on 50 outlets which were not customers of the Standard Oil Company?

A. The answer is yes, for the reason that I do not know how much time was so devoted and therefore I couldn't eliminate it.

Q. I asked you whether you made any segregation or allocation of the time spent by them in calling on the
5870 other stations or non-customers?

A. Made any what?

Q. Segregation or allocation of their time as between Ned's and other stations?

A. No, I didn't make any segregation of it. I included it.

Q. Was all of that time devoted by these salesmen in calling on 50 non-customers of the Standard Oil Company included in the time which you have charged to customers other than Ned's in this exhibit?

The Witness: May I have that read?

(The question referred to was read by the reporter.)

The Witness: Mr. Austin, I don't understand that.

By Mr. Austin:

Q. Well, in obtaining the amount of time spent on business other than Ned's, in the second column there where you have percentages—

A. Yes, sir.

Q. —you first took the total hours of the salesmen, did you not, and deducted a certain percentage?

A. Yes, sir.

Q. And in arriving at the time which you used for the purpose of this exhibit, what time did you deduct?

A. I only deducted the estimated time that had been made of what these men spent at Ned's.

5871 Trial Examiner Ballinger: You say the estimated time. What estimated time are you referring to? Who was the estimate made by?

The Witness: The estimates, your Honor, as shown in Respondent's Exhibit 31-L.

By Mr. Austin:

Q. Those were the estimates made by the respondent, were they not?

A. Yes, sir.

Q. Does it follow, therefore, Mr. Warmack, or does it not—tell me whether or not all of the time spent by these salesmen in calling on customers other than Standard Oil Company customers is included in the time which you have apportioned in Commission's Exhibit 129?

A. Yes, sir, it is.

Q. In your opinion, should any portion of that time be charged to Ned's Auto Supply Company?

A. Surely it should, if we know how much it is.

Q. What is the result, then, as affecting your figure of .06¢ per gallon shown at the bottom of Commission's Exhibit 129?

A. It means that it is overstated.

Trial Examiner Ballinger: Overstated where?

By Mr. Austin:

5872 Q. What is overstated?

A. The average salesman's cost per gallon other than Ned's amounting to .06¢ per gallon, as shown by Commission's Exhibit 129 is an overstated figure; in other words, it is too high, too large.

Mr. Hanley: What is, Mr. Warmack? I still don't understand.

The Witness: This thing right here, Judge, (indicating) .06¢ per gallon on Commission's Exhibit No. 129 is too high.

By Mr. Austin:

Q. You may again state why it is too high, so as to make it clear. Apparently there is some doubt.

A. The reason that it is too high is because all of the promotional activities, the time spent by these salesmen in calling on prospective customers, customers of other oil companies, is not accounted for in the calculation as applying to all of the rest of the time that they have.

The calculations were made by Messrs. Raupagh and Blough to show the time they estimated that these men spent in calling on Ned's. They didn't include in this any portion of the promotional activities, as far as I have been able to learn; therefore, inasmuch as a considerable amount of time appears to have been spent in pro- 5873 motional activities, I see no reason from an accounting standpoint that that should not be applied in part to Ned's as well as in part to the other customers called upon.

Inasmuch as all of that time is assigned to customers other than Ned's and we had no means of taking it out, the calculation of .06¢ per gallon representing average salesmen's cost per gallon other than Ned's is in my opinion overstated.

Mr. Hanley: May I ask a question, Judge, to clarify in my own mind the meaning of this exhibit?

Trial Examiner Ballinger: You may.

By Mr. **Hanley**:

Q. Did you arrive at the figure on Exhibit 129 of .06¢? Is that your calculation, Mr. Warmack?

A. Yes, sir.

Mr. Hanley: The respondent now again moves to strike Exhibit 129 from the record, for the reason that the witness now states that he has made an independent calculation reflected on Exhibit 129 which in his judgment is an overstatement of fact and which reflection of figures has never been testified to or reflected in the evidence offered by the respondent.

Trial Examiner Ballinger: The motion is denied.

Mr. Austin: Your Honor, I move [illegible] for lunch until 2 o'clock.

5874 Trial Examiner Ballinger: Without objection, the motion is granted, and now at 12:47 p. m. the hearing stands in recess until 2 p. m.

(Whereupon, at 12:47 p. m., a recess was taken until 2 p. m. this day.)

5875 Afternoon Session.

2 p. m.

Trial Examiner Ballinger: We will come to order. You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination (resumed) by Mr. Austin.

Q. Will you turn to Respondent's Exhibit 31-M, Schedule 5, Dispensing Equipment Loaned. On Respondent's Exhibits 31-M and N the company maintenance, depreciation and tax expenses in connection with ELA equipment at Ned's Auto Supply outlet in 1937 are compared with what is called the "Average Reseller's Equipment Costs" of the company at stations other than Ned's. The expense figure used in obtaining the average cost are taken from Respondent's Form 189, Accounts No. 1070, 1111, and 1513. Is the comparison of equipment costs which is here made a correct or valid comparison, in your opinion?

A. I rather think it is not.

Trial Examiner Ballinger: What do you mean by that?

The Witness: In my opinion, Judge, it is not a valid comparison.

5876 By Mr. Austin:

Q. Now you will note, Mr. Warmack, and no doubt have noted, that the total expense taken from Form 189 for 1937, for the three accounts listed at the top of Respondent's Exhibit 31-N, after deducting the expense charged directly to Ned's, is divided by the gallonage of gasoline moving only to the non-lessee group of service stations. Do you see that, Mr. Warmack, at the middle of Respondent's Exhibit 31—rather, at the lower part of that page?

A. Yes, sir.

Q. The exhibit says: "This expense was incurred on accounts signed on agreement numbers 461 and 385."

A. Yes, sir.

Q. Which are non-lessee outlets. And what is the gallonage figure which was used for a divisor into the cost of $24,674?

A. 26,987,652 gallons.

Q. And what is the differential which is claimed by the respondent on Exhibit 31-N, as between ELA cost for Ned's, and ELA cost for other stations?

A. .076 cents per gallon.

Q. Is that the differential carried over to Respondent's Exhibit 31-A?

A. Yes, sir.

5877 Q. Now, I want to ask you whether that differential is claimed by the respondent on Exhibit 31-A to exist as between all reseller stations, exclusive of Ned's, and Ned's on the other hand, or is it claimed only to exist between the 461 service stations and Ned's?

Trial Examiner Ballinger: Does that complete your question?

Mr. Austin: Yes.

Mr. Hanley: Now I ask to make objection, if your Honor please, that the question inquires of the witness as to the claims of the respondent, and that the witness is not entitled to answer by way of opinion, factually or otherwise, inasmuch as he has not, by his own admission, made any study or analysis of the facts, data, figures and information underlying Exhibit No. 31, and particularly that he is not entitled to assume to testify as to what the claims of the respondent are, the same being recorded in the pleadings of this case, and in the testimony of the respondent's witnesses.

Trial Examiner Ballinger: Objection overruled.

Mr. Austin: If your Honor please, if I may, I think I will withdraw that question. I would like to clarify it.

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Austin:

5878 Q. Now, Mr. Warmack, on Respondent's Exhibit 31-A there is a differential of .076 cents shown opposite "Dispensing Equipment Loaned," which is included in the total differential of .529 cents, stated to be the differential in marketing expense items incurred by distributing through regular reseller outlets, versus distributing through Ned's. In view of the fact that the ELA cost shown on page 31-N is divided only by the non-reseller gallonage other than Ned's, is it proper or consistent, in your opinion, to claim that resulting differential as existing for—rather, to claim that resulting differential as applying to all stations, including lessee service stations?

A. In my opinion, that should not be done.

Q. And how should that expense be treated?

A. That expense should be allocated to all stations other than lessee stations; and to follow that, all other expenses should be so separated between lease stations and non-lease stations, in order to be consistent.

Trial Examiner Ballinger: Is that your only reason, consistency?

The Witness: I rather think that is the principal reason, Judge. It is my contention that lease station expense applicable to lease stations should be assigned to lease station gallonage completely and entirely, and that expense, of course, should be offset by revenues received from the lessee. 5879

Trial Examiner Ballinger: That is a rather different reason than the one you stated, "to be consistent."

The Witness: I rather think that is an explanation of it, sir.

By Mr. Austin:

Q. In these three accounts listed on Exhibit 31-N, is there any expense incurred in connection with the operation of leased service stations?

A. The document shows that there was none.

Q. And if the expense of $24,708.35 were divided by the total reseller gallonage, excluding Ned's Auto Supply Company, would that give you—wouldn't that result in large or smaller differentials than the sum of .076 cents, shown at the bottom of the page?

A. Of course, that would mean the divisor would be larger, and the resulting figure would be smaller.

Q. The answer is it would be smaller?

A. Oh, sure.

Q. I am not suggesting, Mr. Warmack, that that is the correct way to do it. I am just bringing out the difference that would result if that were used.

In computing the respondent's ELA cost for Ned's outlet, Exhibit 31-M charges depreciation at 4 per cent of the actual capital investment in ELA equipment for
5880 gasoline at Ned's. I will ask you whether the depreciation charge of $4,305.86, charged under "Average Reseller Equipment Costs" on Exhibit 31-N, is based upon actual investment in ELA equipment at tank wagon reseller stations?

Mr. Hanley: That is objected to, if your Honor please, for the reason that calls for a conclusion of this witness as to the method and factual data used by those who prepared and calculated the results reflected in Exhibit 31, and this witness has testified that he does not know what the factual data is underlying Exhibit 31, and particularly he can not know what was taken into consideration by the accountants who prepared Exhibit 31.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

Trial Examiner Ballinger: Has there been any testimony introduced in the record that it was?

Mr. Austin: There has been testimony introduced in the record as to where these figures came from and as to how the expense in these accounts is allocated in the respondent's regular accounting procedure.

Trial Examiner Ballinger: Are you familiar with that testimony?

The Witness: Yes. And I have made quite a little study of this account, and I was just looking up my notes on that.

5881 The Witness: May I take the time to read my notes on this, your Honor?

Trial Examiner Ballinger: You may.

The Witness: Thank you.

(The witness refers to his notes.)

Trial Examiner Ballinger: The objection is overruled.

Mr. Hanley: As I understand it, if your Honor please, the witness is now testifying as to what was in the minds of the accountants who prepared Exhibit 31.

Trial Examiner Ballinger: The Examiner does not so understand.

Mr. Hanley: Well perhaps I am mistaken. I am sorry if I am, but I understand that to be what the question means.

Mr. Austin: I do not understand it, Judge Hanley, to be that way.

Mr. Hanley: The question has gone so perhaps it would be just as well to pass it. Let us pass it and I will accept the ruling of the Examiner.

The Witness: The depreciation charge of $4,305.86 as shown on Respondent's Exhibit No. 31-X is not based upon an actual investment in ELA equipment used for gasoline only at tank wagon reseller stations.

Trial Examiner Ballinger: Now do you know what 5882 it was based on?

Mr. Austin: I will bring that out, your Honor, if I may proceed. Thank you.

Trial Examiner Ballinger: You may disregard the Examiner's question, Mr. Witness.

The Witness: Yes, sir.

By Mr. Austin:

Q. Where did that item of $4,305.86 come from, according to Mr. Boatwright's testimony, if you know, Mr. Warmack?

A. It was taken from Farm 189, Detroit field for the year 1937.

Q. What does that figure of $4,308.86 represent?

A. It represents that portion of this class of expense which the respondent company assigned to the tank wagon reseller channel in the Detroit field for the year 1937.

Trial Examiner Ballinger: In one instance you said $4,305.86 and in another instance you said $4,308.86.

Mr. Austin: I will clear that up.

By Mr. Austin:

Q. First, you say it was assigned; how was it assigned as between channels?

A. On a gallonage basis.

Q. Incidentally, what is this account, Mr. Warmack? What kind of expense are we talking about here?

A. May I refer to Commission's Exhibit No. 119?

5883 Trial Examiner Ballinger: You may.

By Mr. Austin:

Q. Here, I have a carbon. I think this will be easier for you to use than the one in the docket. I assume there is no objection to his using that?

Mr. Hanley: No.

The Witness: Yes.

By Mr. Austin:

Q. I am asking you what type of expense that is, Mr. Warmack, not the amounts.

A. Depreciation of equipment loaned, according to these records.

Q. Now, you stated that this item of $4,308.86 is a tank wagon reseller entry on Form 189 for 1937, and that the disposition of the depreciation expense going into this account is allocated between channels on a gallonage basis.

A. That is correct.

Q. Does the amount of that expense entered in any one of the three channels on Form 189—

Mr. Hanley: (Interposing.) May I hear that read?

Mr. Austin: I will change that from "does" to "is."

By Mr. Austin:

Q. Is the amount of that expense entered in any one of the three channels on Form 189 computed on the
5884 basis of capital investment in ELA equipment allocable to the channel?

The Witness: May I review my notes, your Honor?

Trial Examiner Ballinger: You may.

Mr. Austin: Perhaps it would be more precise to say "to the respective channel."

Mr. Hanley: I would like to have the question read as it has been amended.

Trial Examiner Ballinger: Read the amended question.

(The reporter read the amended question as follows:)

"Q. Is the amount of that expense entered in any one of the three channels on Form 189 computed on the basis of capital investment in ELA equipment allocable to the respective channel?"

Mr. Hanley: The question is objected to as being unintelligible, compound, and confusing, furthermore unanswerable by the witness intelligently.

Trial Examiner Ballinger: The Examiner is of the opinon that the question can be clarified by dividing it.

Mr. Austin: I can not divide it, but I will try to restate it.

By Mr. Austin:

Q. Is the amount of that expense which is entered in any one of the three channels on Form 189 computed 5885 on the basis of capital investment in ELA equipment allocable to the respective channel?

Mr. Hanley: I think I want to restate the objection. It is the same objection and on the further ground or perhaps I should say further objection that the witness is not competent to answer the question, in view of the fact that he himself has testified that he did not make an analysis and study of the underlying bases of Exhibit 31.

Trial Examiner Ballinger: The objection is overruled.

By Mr. Austin:

Q. Do you have an answer to that question, Mr. Warmack?

A. Yes, sir. The answer to the question is "no." The answer is fully set forth on page 13 of Respondent's Exhibit 99 under Account 111, Depreciation Expense, Plant, ELA.

Mr. Hanley: If your Honor please, may I ask one question?

Trial Examiner Ballinger: You may.

Mr. Hanley. Do you regard the reference to Respondent's Exhibit No. 99 as a proper answer to the question which was just propounded to you, Mr. Warmack?

Mr. Austin: I object to that question, your Honor. I do not think that the witness is properly being asked whether his answers to my questions are proper. I do not think that is a proper form of examination by counsel 5886 for the respondent.

Mr. Hanley: He has certainly been giving a great mass of conclusions here, and it seems to me this would be a proper line of interrogation.

Trial Examiner Ballinger: I will direct the reporter to read the question and answer.

(The question and answer referred to were read by the reporter.)

Trial Examiner Ballinger: This part of the Exhibit, Mr. Warmack, to which you make reference, is your answer, is it?

The Witness: It is a full and complete answer, yes; and the answer is "no."

Trial Examiner Ballinger: These parts of the Exhibit to which you have made reference constitute your answer as expanded?

The Witness: That is correct.

Mr. Hanley: That calls upon me to ask further questions along that line.

Trial Examiner Ballinger: You may ask a few more questions.

Mr. Hanley: Do you realize, Mr. Warmack, that the answer which you have given to the question propounded by counsel for the Commission only relates to 1937, and this document is an answer prepared by the respondent
5887 in connection with operations for the year 1937?

The Witness: I would like to hear that again, please.

Trial Examiner Ballinger: Read the question again.

(The question referred to was read by the reporter.)

The Witness: Yes, sir.

Mr. Hanley: You understand that?

The Witness: Yes, sir.

Mr. Hanley: Do you also understand that there was a change in the accounting methods between 1937 and 1940?

Mr. Austin: I object to that your Honor, unless the respondent is willing to concede or claim that there was a change in the accounting method of the company in connection with this account.

Mr. Hanley: The respondent relies on the record so far as that testimony is concerned.

Trial Examiner Ballinger: The witness has testified from the record what the record discloses. His testimony is based largely upon that?

Mr. Austin: That is right.

Trial Examiner Ballinger: The witness can now testify as to whether or not that record discloses if there was a change in the accounting system during that period.

Mr. Hanley: If he knows.

Mr. Austin: I think that should be reserved on
5888 cross-examination. I do not know on what basis these questions are coming in, without my consent.

Trial Examiner Ballinger: The question has been propounded, and the Examiner will allow the witness to answer it. Then there will be no further interruption.

Mr. Austin: I object to it further upon the ground that I think it is improper at this time, if the purpose is to test the witness' knowledge of changes made by the respondent, unless the respondent is willing to concede that there has been a change.

Trial Examiner Ballinger: The question is merely informative and affords the witness an opportunity to make an explanation of his testimony at this time.

Any objection is overruled to the question and the witness may answer.

What is the question now? Read the question, Mr. Reporter.

(The question referred to was read by the reporter.)

The Witness: Yes, sir. There were also changes during 1940.

Trial Examiner Ballinger: Proceed, Mr. Austin.

By Mr. Austin:

Q. In view of the fact, Mr. Warmack, as I understand your testimony that the depreciation charge to Ned's on Exhibit 31-M is computed at 4 per cent of actual 5889 capital investment, whereas the depreciation expense charged to other stations on Exhibit 31-N is based upon a gallonage allocation to tank wagon channel, is the depreciation figure on Exhibit 31-N properly comparable with the depreciation figure for Ned's on 31-M for the purpose of arriving at the cost differential, Mr. Warmack?

A. In my opinion it is not.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

Mr. Austin: I wish to refer to the depreciation expense [illegible]ceding Account 1111 on 31-N and on 31-M, I wish to refer to the item $115.14, which does not come from any account.

Mr. Hanley: Thank you. My trouble was that I could not find out what you were speaking of.

Mr. Austin: The item of $115.14 being computed at 4 per cent of the figure of $2,878.60 and stated to represent capital investment in equipment at Ned's.

Mr. Hanley: If your Honor please, the respondent moves to strike the answer of the witness on the ground that the comparison asked for in the question by counsel for the Commission is between two accounts apparently, but in fact is erroneous essentially in view of the fact that one of the compared accounts does not exist as now 5890 evidenced by the statement of counsel.

Mr. Austin: I do not think I said anything about any two accounts. I talked about two different figures here, Judge Hanley, if that will clarify matters any.

Mr. Hanley: If the record may be read I think it will clarify it.

Trial Examiner Ballinger: Read the question and answer and the colloquy which followed it.

(The reporter read the question and answer and colloquy referred to.)

Trial Examiner Ballinger: Mr. Austin, what do you mean by your statement in reference to the fact that one of these items did not come from any account?

Mr. Austin: It is shown on Exhibit 31-M, which is what we are talking about.

Trial Examiner Ballinger: That is an account, is it not?

Mr. Austin: No, one of the accounts on Form 189, that is what we have been referring to here as the accounts of the company, one of these numbered accounts on Form 189. This one to which I refer does not appear on one of those.

Trial Examiner Ballinger: It was not one of the items regularly carried on the books of the company?

Mr. Austin: That is right.

Trial Examiner Ballinger: In different accounts?

5891 Mr. Austin: That is right. It is an item computed here from some figures for Ned's Auto Supply Company.

Trial Examiner Ballinger: The motion is denied.

By Mr. Austin:

Q. Mr. Warmack, please look at the bottom of the page 31-N, Respondent's Exhibit. There is a figure there in the lower paragraph of $107,646.50 which is the result of expanding the depreciation figure of $4,305.86 which we have just been discussing, to 100 per cent.

On Exhibit 31-N you will see that this figure of $107,646.50 is again used for the purpose of computing personal property taxes on ELA equipment which are charged to stations other than Ned's.

A. Yes, sir.

Q. Does or does not that figure of $107,646.50 represent the respondent's investment in ELA equipment at tank wagon reseller outlets?

A. In my opinion it does not.

Q. Will you explain why it does not?

A. Because that figure was arrived at by expanding the amount of $4,305.86 which purports to represent 4 per cent of the investment in the tank wagon reseller column.

Inasmuch as this class of expense is separated between the three channels; tank wagon reseller, tank consumer, and other methods, on the basis of gallonage it was 5892 necessary to take the amount that had been thus assigned to the tank wagon reseller channel and expand that on the assumption that that would afford a figure which would be the exact figure of the capital investment in the equipment being used by the tank wagon reseller.

Q. What do you mean that it was necessary when you say that it was necessary?

A. Well, if you are going to arrive at it then it would be necessary; if you had to have a figure that it would be necessary to expand this.

Trial Examiner Ballinger: Do you mean that would be the correct method?

The Witness: It would be the only method if you did not have a figure on your records.

It would probably entail quite a bit of work to run out and separate these properties by channels and, of course, this would be a quick method of arriving at the figure.

By Mr. Austin:

Q. Mr. Warmack, is it a correct method for the purpose of the use which is made of it here?

A. It is a good method to make a guess.

Trial Examiner Ballinger: Well now, Mr. Warmack, what do you mean by the statement that it is a good method to make a guess?

The Witness: Well, Judge—

5893 Trial Examiner Ballinger: (Interposing.) Do you mean that it affords some basis for an approximation?

The Witness: Yes, sir. It forms a basis, Judge, for making an estimate.

By Mr. Austin:

Q. That is not the point. I am not so much interested, Mr. Warmack, in that, as to whether it forms a basis for estimate as to whether or not it is proper to use it as a proper basis to make calculations as they have been made here.

A. Mr. Austin, it is my opinion that it is not sound accounting to use this actual figure in one case on which to arrive at a depreciation and use an estimated figure in another case on which to arrive at a figure and then compare the two figures for the purpose of arriving at a price differential or cost differential.

Q. Referring specifically to Exhibit 31-N, the expanded figure of $107,646.50 is used for the purpose of determining personal property taxes?

A. Yes, sir.

Q. Do you see that?

A. Yes, sir.

Q. Does that figure of $3,245.11 represent, in your opinion—what does it represent, in your opinion?

A. $3,245.11?

Q. Yes.

5894 A. It represents an estimate of how much the personal property tax was applicable to reseller stations in the Detroit field other than lessee stations, and on the other hand Ned's stations for 1940—1937.

Q. Do you know where their personal property tax is entered in Form 189?

Trial Examiner Ballinger: When you refer to that, to what particular exhibit are you referring?

Mr. Austin: Commission's Exhibit No. 119.

Trial Examiner Ballinger: Proceed.

The Witness: Not right offhand. I suppose I could locate it.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

The Witness: I think it is in Account 086.

By Mr. Austin:

Q. What is the title of that account?

A. Taxes, real estate, and the personal property.

Q. Are the taxes entered in 086—answer this if you can based on your study of the company's regular accounting procedure—are the taxes entered in 086 actually taxes paid, or are they based on a percentage of an expanded depreciation figure?

5895 A. They are actual taxes paid.

Q. They are actual taxes paid?

A. Yes, sir.

Mr. Hanley: May I have that question and answer read?

Trial Examiner Ballinger: Read the question and answer.

(The reporter read the question and answer.)

Mr. Hanley: May I ask a question of the witness?

Trial Examiner Ballinger: You may.

Mr. Hanley: As I understand the question and answer you have made to it, Mr. Warmack, you are now assuming to say without limitation as to time the taxes, as you have defined them, going into and are paid as you have indicated under Account 086 on Form 189 of the Standard Oil Company—am I right in that understanding of your answer?

The Witness: May I have the question read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Judge, I did not review the tax bills for the year 1937.

As a matter I did not review them for any year. I did not look up the checks to see just exactly when you paid the taxes, or how the taxes were paid. These taxes
could be accruals of taxes, but it is my understanding
5896 that these represent taxes actually paid or should be
paid for the periods or the years designated by the account on these forms 189.

Trial Examiner Ballinger: By the way, on what is that understanding based?

Mr. Austin: Your Honor, I think we are entirely justified in assuming that the expenses entered on Form 189 are actual expenses and not assumed expenses, and if there is any contention that they are estimates we are interested in knowing it, if there are any expenses not actual expenses I would not know the basis for them. On the other hand, if they are actual expenses I see no basis for this question.

Trial Examiner Ballinger: The witness may answer the Examiner's question.

Mr. Austin: I was not objecting to your question, your Honor.

Trial Examiner Ballinger: Mr. Witness, what is your basis? Upon what is your understanding based?

The Witness: What?

Trial Examiner Ballinger: Do you understand the Examiner's question?

The Witness: Yes, sir.

Trial Examiner Ballinger: Then tell us upon what is your understanding based? What is the answer?

The Witness: From a general knowledge which I obtained in the Detroit office as to the methods employed 5897 by the company in accounting for its costs in the Detroit field.

Trial Examiner Ballinger: Do you mean, what you were told there?

The Witness: Yes, sir, what I was told, and also as a result of a review of many, many actual vouchers covering expenses and payments therefor.

As I say, I did not review any tax bills, and I did not review any checks or vouchers showing where the taxes had been paid, or when they had been paid. I certainly did not question the fact that they were taxes and were paid or had to be paid.

Trial Examiner Ballinger: Proceed, Mr. Austin.

By Mr. Austin:

Q. Mr. Warmack, I will refer you to Mr. Boatwright's testimony with which you say you are familiar, regarding the method used by the respondent in loaning dispensing equipment to non-lessee service stations, and also to the fact, as shown by Respondent's Exhibit 31-M, that some twenty-eight hundred dollars worth of such equipment was at Ned's outlets in 1937.

Remembering or keeping those matters in mind, is it your opinion that the amount of respondent's capital investment in dispensing equipment loaned to any service station or group of service stations depended upon or resulted from differing methods or quantities in which gasoline was sold or delivered to those stations.

5898 Mr. Hanley: That is objected to for the reason that it calls for a pure conclusion of the witness. There is nothing in Exhibit 31 that answers that.

Trial Examiner Ballinger: Objection is overruled.

The Witness: May I have that question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: You are referring there to a reference to Mr. Boatwright's testimony.

Mr. Austin: Yes. I called your attention to the subject generally, that was all.

Mr. Hanley: In view of the question by the witness to the examiner it is requested that the specific testimony of Mr. Boatwright be referred to.

Mr. Austin: I will be glad to do that. I was referring to testimony at pages 2570 to 2574, 2157 to 4172, 4444 to 4446.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. If it will help you any, Mr. Warmack, you might take up first whether the capital investment in different stations depended upon different methods, and second, as to quantity.

5899 Mr. Hanley: Now I ask what question is being answered? We apparently have about three.

Trial Examiner Ballinger: Read the entire question so we will be clear.

(The reporter read the entire question.)

The Witness: I will try to answer that. I think that I am sufficiently familiar with this situation to answer it. I believe that the testimony will show that some stations may have a certain quantity of equipment, other similar stations may have a different quantity of equipment, other stations may have no equipment.

By Mr. Austin:

Q. Do you mean has no loaned equipment?

A. That is what I am referring to.

Some stations, according to my understanding, I believe according to the testimony, may borrow all or almost all of their equipment from the respondent company, while other stations may borrow relatively little or none. That would indicate to me that on the basis of quantity sold, why, at least there would be a question as to whether quantity would be an influencing or definitely influencing factor or basis for that.

Q. What is your opinion? Have you got an opinion on the subject? We know there is a question, at least I hope there is or I would not have asked you about it.

5900 Trial Examiner Ballinger: What is your opinion on that, Mr. Warmack?

The Witness: Well, you are asking an accountant for an opinion which is a legal or economic question. I may be able to give you an answer, I can tell you what I think about it, but I want to call that to your attention.

Trial Examiner Ballinger: You do not care to express an opinion then?

The Witness: My opinion is that there is a question. It is a question in my mind about it.

Mr. Hanley: I certainly do not want that to stand.

Mr. Austin: The respondent feels it should go out?

Mr. Hanley: The respondent moves to strike the entire question and the entire answer on the ground that it is improper, Mr. Examiner.

Trial Examiner Ballinger: Referring to the last question?

Mr. Hanley: Strike the entire question and entire answer to the question just propounded, inasmuch as the witness is unwilling to express any opinion to the question.

Mr. Austin: I will not oppose that. The witness has said he does not think he is competent to answer that.

Trial Examiner Ballinger: The motion is granted and the question and answer is stricken.

We will now take a recess for five minutes.

5901 Trial Examiner Ballinger: Come to order.

By Mr. Austin:

Q. Will you now, please, refer to Respondent's Exhibit 31-O and 31-P dealing with advertising costs for the year 1937. What was the total amount of advertising costs applicable to the tank-wagon reseller channel in Detroit for 1937 as shown by Respondent's Form 189 for that year?

A. $159,096.17.

Q. What portion of that expense is assigned to the cost of sale to Ned's Auto Supply Company on Respondent's Exhibits 31-O and -P?

A. $1,065.42.

Q. Subtracting that from the total expense, what is the remainder?

A. $158,030.75.

Q. Is that deduction shown on Respondent's Exhibit 31-O?

A. Yes, sir.

Q. Now, referring to the first four items of expense at the top of the list on 31-O, those four items are stated to be the expenses of the advertising department in the Detroit field, and they total $4,461.13. Is any part of that expense assigned to the cost of sale to Ned's Auto Supply Company in this cost study?

A. The respondents did not assign any part of the salaries or expenses of the advertising manager in the Detroit field to Ned's business in this study.

5902 Q. Is it your opinion that no part of that expense of the advertising department is allocable to Ned's business?

A. What is the question?

Trial Examiner Ballinger: Read the question.

(The previous question was read.)

The Witness: No, sir, that is not my opinion. It is my opinion that some part of it is properly assignable to Ned's business.

By Mr. Austin:

Q. And on what is your opinion based?

A. My opinion is based on the fact that it has been shown, I believe, in the testimony that the advertising manager's responsibility in the broad sense runs to the selling of gasoline, especially at reseller stations. Of course, this company sells gasoline to Ned's and, in view of that, I have seen nothing to convince me that a part of this expense, some part of it, should not be assigned to Ned's.

Trial Examiner Ballinger: You think some portion is incurred as a result of Ned's?

The Witness: Yes, sir, I think that.

I would like to add to that that I think some portion of it is assignable to any station that is served if advertising activities are carried on through and by that station and advertising material is furnished to that station,
5903 for which this manager is responsible, which he has some say-so over.

I believe that the cost should be thought of in that manner.

By Mr. Austin:

Q. There is considerable testimony in the record to the effect that the advertising manager in the Detroit field had charge of installation and maintenance of point-of-sale advertising at tank-wagon reseller stations. The point-of-sale advertising, of course, includes signs, globes, displays, banners, maps, and so forth.

It is also shown on Respondent's Exhibit 31-P that point-of-sale advertising was supplied to Ned's Auto Supply outlets in 1937.

In your opinion, what portion of the advertising department expense should be assigned to Ned's business, if any

A. Mr. Austin, I couldn't tell you what portion should be assigned to Ned's business without making an independent cost study and analysis.

Q. Do you refer to any particular kind of a cost study?

A. I have used the term "factual and objective cost study," and that is what I mean in this instance, and I don't mean to use the term loosely. I mean make an analysis of your costs and a study of what influences them.

5904 Q. In your opinion, would such a cost study result in the charging of a part of this expense of the advertising department to Ned's Auto Supply business?

Mr. Hanley: That is objected to, unless it is shown as a matter of foundation that the witness made such a study and knows whether or not such a factual and objective cost study as he is talking about would have an influence on the figures.

Mr. Austin: Well, I withdraw that question, You Honor, because I expect that it is based on a wrong premise. I assume that the purpose of making the cost study would be to determine the amount and, therefore, perhaps the witness's previous answer covers the subject.

Trial Examiner Ballinger: The question is withdraw

By Mr. Austin:

Q. Will you now refer to Account No. 1075 on Respondent's Exhibit 31-O marked "Advertising Costs – Othe Costs (including E. L. A.)" Was any part of that item of $154,635.04 charged as a cost of serving Ned's outlets

A. Yes, sir.

Q. How much?

A. $1,065.42.

Q. Will you now refer to Commission's Exhibit 84-A which I believe shows a separation of classes of costs going to make up that item of $154,035.04?

5905 A. Yes, sir, I have that before me.

Q. How much of that amount of $154,000.00 represents newspaper advertising?

A. $76,120.34.

Q. Are you familiar with the testimony in this case by Mr. Boatwright setting forth the reason for respondent's not assigning any portion of that newspaper advertising cost to Ned's business?

A. Yes, sir.

Q. What is the nature of that newspaper advertising?

A. General newspaper advertising, sir. That is for the most part amounts paid to newspapers for general advertising of respondent's petroleum products.

Q. What was the nature of the advertising for which this expense was incurred?

A. For consumer acceptance of the company's products.

Q. And what do you mean by "consumer acceptance"?

A. I mean bringing to the attention of the consuming public the fact that the Standard Oil Company has gasoline and various other petroleum products for sale, is manufacturing them, and that it has good products and it wants to sell them to the public and wants them to know that they have the products available, I suppose in hopes that they will come in and buy them.

That is rather a rough statement but—

5906 Q. From the standpoint of sound accounting practice and procedure, what, in your opinion, is the effect or significance of the respondent's failure to assign any portion of this advertising to Ned's business?

A. It is my opinion that the failure to assign any portion of this cost to Ned's business is wholly and entirely erroneous from the standpoint of sound accounting.

Q. If any part of it were to be assigned Ned's business, what portion of such advertising costs—still referring to newspaper advertising—should be assigned?

A. I know of no other measuring factor that could be used, other than a per gallon unit factor.

Q. If such a method of apportionment were used, would that afford any cost differential between the gallonage moving through Ned's stations and the gallonage moving through other stations?

A. No, sir, it would not.

Q. What is the next item on Commission's Exhibit 84-A?

A. Printed matter and direct mail, $18,937.87.

Q. Have you read Mr. Boatwright's testimony dealing with that item of expense?

A. Yes, sir, I have.

Q. What is your opinion with regard to the charging o all of that expense to business other than that of Ned' Auto Supply Company?

5907 A. It appears to me that this is still advertising for consumer acceptance. The only way that I believe it could be properly separated, from the standpoint of accounting, would be on the gallonage basis.

Q. And would that basis result in assigning part of that expense to the business of Ned's Auto Supply Company?

A. Yes, sir, it most certainly would.

Q. Would your opinion be any different as to the next item on Commission's Exhibit 84-A which is "Motion Pictures, $12,371.72"?

A. The same opinion would hold true in that instanc that is, in connection with that item.

Q. Would your opinion be the same as to the item o "Outdoor posters, $11,256.99"?

A. Yes, sir, it would.

Q. And how about "Dealer trade papers and magazines $6,468.92"?

A. The same opinion would hold true with respect t that item.

Q. What would your opinion be as to signs at deale outlets, $2,920.89?

A. That item of cost in my opinion is susceptible t separation, possibly based upon cost of signs or the proportion of cost of signs of each dealer's outlet to the tota cost of such signs.

5908 In the absence, of course, of specific information naturally gallonage would have to be used, as I se it, but if more specific information were available or coul be developed, if a more accurate measuring factor coul be established, then that more accurate measuring facto should be used by all means.

Q. What is your opinion with regard to the last iten on Commission's Exhibit 84-A, "Miscellaneous Items too small to show by separate classifications," the amount o which is $26,558.31, and I wish to call attention to the fact that that item may contain some point-of-sale advertising, according to Mr. Boatwright's testimony.

A. If it is point-of-sale advertising, why, that portion that is point-of-sale advertising could be studied and allocated in accordance with the finding of such study.

Q. And what is the nature of the expense in that item?

A. You mean that Miscellaneous Expense item?

Q. Yes.

A. It just looks like a grand group of small miscellaneous items.

Q. Are you familiar with the testimony regarding it?

A. Yes, sir, I have read it.

Q. And, in your opinion, how should a separation of that expense be made as between different tank wagon reseller stations, if other than on a gallonage basis?

5909 A. Well, taking out the point-of-sale advertising that is shown in there, or any advertising that could be directly applied, then the remainder would have to either be separated on the basis of gallonage or else on the basis of the previous separation of all other items of cost. It might be an alternative. Or it might be—

Q. You mean other items of advertising cost?

A. Yes, sir.

That follows the scheme of letting the indirect follow the direct in accounting, which is, I believe, generally accepted in many instances, maybe in most instances.

If you can find out what direct costs you could follow—it is a rather difficult problem in a situation of this kind, because which are direct? That is the question.

Q. Is one advertising cost more direct than another, leaving out point-of-sale advertising?

A. I certainly couldn't hardly say. I would rather think that most of those costs would turn largely to what you might call or what we have just termed advertising for consumer acceptance, and I don't think that could be considered as direct costs.

You see, Mr. Austin, just to amplify that just a bit, we have direct costs and indirect costs in manufacturing, but in distribution cost accounting sometimes you have a problem finding out what the direct costs are—many problems.

5910 If you can find out what they are in one particular group, like this advertising, then your indirect cost might follow, assuming that the direct costs are not of a small amount and the indirect costs of a very large amount.

Q. In other words, you wouldn't want the tail to wag the dog?

A. No, sir.

Q. Do signs and banners at a service station have some general consumer acceptance value?

A. I should hope so, if I were in the place of respondent.

Q. Would it be your opinion that the total expense of point of sale advertising would be a cost which could be assigned directly?

A. Point-of-sale advertising?

Q. Bearing in mind the consumer acceptance value of banners and signs which other people see as they drive by.

A. You are going into fine technicalities. If you can establish what portion of that cost is consumer acceptance and what portion isn't, then I might go along with that idea of making a separation, but first you have to make that separation, and I doubt if it could be made, Mr. Austin.

Q. Giving effect to the opinions that you have just stated regarding the portion of the expense going into this account 675 and also the expenses of the advertising department, and if all of that advertising expense 5911 other than point-of-sale advertising were allocated between tank-wagon reseller gallonage on a gallonage basis, how would that affect the cost differential of .213¢ per gallon shown at the bottom of Respondent's Exhibit 31-P?

A. Well, sir, I think that that cost differential would be reduced materially. I have not made that calculation, but I would rather think that it would be reduced almost to nil.

Q. You mean by that—

Mr. Hanley: Just a moment. Respondent moves to strike the answer of the witness, unless the witness is prepared to state in figures what he means by "Material Reduction." I may say to your Honor that I think that the respondent is entitled to have some figurative basis upon which to analyze the testimony of this witness.

Trial Examiner Ballinger: The reporter will read the latter portion of the witness' statement.

(Whereupon the last part of the witness' answer was read.)

Trial Examiner Ballinger: What do you mean as a statement that you think it would be? Is that your best judgment?

The Witness: Yes, sir.

By Mr. Austin:

Q. Don't you know, Mr. Warmack, approximately what percentage of the differential would be eliminated 5912 if this advertising that you have described as consumer acceptance advertising were allocated on a gallonage basis?

A. I know of my own knowledge that if this were done, this figure of .213 cents per gallon would be almost wiped out.

Trial Examiner Ballinger: In view of the witness's subsequent answers, the motion to strike is overruled.

Mr. Hanley: May I ask one further question, your Honor, to clarify the answer of the witness?

By Mr. Hanley:

Q. Do I understand your answer now to be, Mr. Warmack, that you say that the differential or "saving on advertising expense" equalling .213 cents as appears on the bottom of Exhibit 31-P would be wiped out, in your judgment, if a proper allocation, as you determine a proper allocation, of expense were made?

A. In my opinion it would be almost entirely wiped out, yes, sir.

Q. Then, Mr. Warmack, what did you mean by your answer when you said that the differential asserted by the respondent would be reduced to nil, inasmuch as the differential asserted by the respondent is .529 cents?

A. Judge, I wasn't referring to that differential as shown on Respondent's Exhibit 31-A. I was referring to the differential in advertising costs as set forth on Respondent's Exhibit 31-P, which is .213 cents per gallon.

5913 Q. All right, then, your thought is that there is a part of that .213 cent that is properly allocable to other business than Ned's. Is that true?

Let me say this to you before you answer: I am trying to find out what you mean by reducing the differential to nil, which to my mind means nothing, Mr. Warmack.

A. Yes, sir. Let me try to explain that, Judge Hanley. If you were to take these classes of advertising costs, the most of them which make up the $154,635.14 on Respondent's Exhibit 31-O and allocate them to all tank wagon reseller stations, including Ned's, on the basis of gallonage sold to each of those stations, including Ned's, the cost of serving Ned's—

Trial Examiner Ballinger: Alone.

A. (Continuing.) —alone, would be materially increased, and the cost of serving other tank wagon reseller stations, speaking of advertising costs entirely as shown on Respondent's Exhibit 31-O, would be materially decreased. The difference between those figures would not be .213, but would be a very, very much smaller figure.

Mr. Hanley: Just one more question, Judge, and then I think from there on it is properly cross-examination.

By Mr. Hanley:

Q. Is it your position, Mr. Warmack, that under your theory of allocation of these expenses that there 5914 would be a figure, some figure, replacing .213 cent on Respondent's Exhibit 31-P.

A. Oh, I have no doubt that there would be some figure.

Q. Have you made that calculation?

A. I have not.

Mr. Hanley: I see. That is all, thank you.

By Mr. Austin:

Q. In order to make such a calculation, Mr. Warmack, would it be necessary to know the expense of point-of-sale advertising of the respondent in 1937 at stations other than Ned's?

A. Yes, sir, it would be necessary to have that information and, if that information is not shown on these sheets, it would be a little difficult to make the calculation.

Q. Do you know whether, if these advertising costs were reallocated, as you have stated they should be, that there would be any resulting differential in favor of Ned's Auto Supply Company?

A. I don't know it to be a fact, Mr. Austin. I haven't made the calculation. I couldn't know it, but there might be, but I am certain of one thing that if you take the greater portion of those costs and allocate them on a gallonage basis, bearing in mind that any allocation on a gallonage basis affords no cost differential, that this difference of .213 cent per gallon would be reduced not only 5915 materially but would be almost wiped out.

Mr. Hanley: The respondent moves to strike the volunteer answer of the witness beginning with "of one thing I am certain" for the reason that it is a volunteered statement and not responsive, and for the further reason that it is apparent from the statement itself that it is a pure guess and not based upon any calculation by the witness.

Trial Examiner Ballinger: The motion is denied.

(There was a discussion off the record.)

Mr. Austin: I move that we adjourn until Thursday morning at 9:30.

Trial Examiner Ballinger: The motion is granted. It is now 4:25 p. m. The hearing stands adjourned, to be reconvened in Room 388, Federal Trade Commission Building, at 9:30 a. m. July 2, 1942.

(Whereupon, at 4:25 p. m., July 1, 1942, the hearing in the above-entitled matter was adjourned.)

5916

Room 388, Federal Trade
Commission Building,
Washington, D. C.,
Thursday, July 2, 1942

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Ill., appearing for the Respondent.

5917

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

This is a reconvening of Docket No. 4389 of the case entitled In the Matter of Standard Oil Company of Indiana, at 9:30 a. m., July 2, 1942, in Room 388, Federal Trade Commission Building, Washington, D. C.

The last hearing was held in Washington, D. C., July 1, 1942.

The reporter will note counsel for the Commission and respondent present.

You may proceed.

(There was a discussion off the record.)

Mr. Hanley: Counsel for the Commission having indicated that he has concluded his examination of the witness in relation to Respondent's Exhibit 31, the respondent now moves to strike all of the testimony of the witness in respect of said Exhibit 31, for the reasons and upon the grounds as follows:

Exhibit 31 is responsive on the part of the respondent company to that charge in the complaint which complains relative to a differential of one-half cent according to Ned's Auto Supply Company. At the time that such one-half cent differential was accorded, as admitted by the respondent's answer herein, Ned's Auto Supply Company was receiving delivery by tank wagon, as were
many other service station resellers. The differ-
5918 ential of one-half cent was granted to Ned's Auto
Supply Company for a fixed and determined period, as is disclosed specifically in the record, from some time in the fall of 1936 to the spring of 1938, at which later date the practice of according such differential was abandoned; that the abandonment of such practice occurred prior to the time that the Federal Trade Commission filed any complaint against the respondent in respect of a claim of unlawful price discrimination in the Detroit metropolitan area; that any order issued by the Commission must of necessity be prospective in character rather than retrospective; with the result that the inquiry into the question of the one-half cent differential accorded Ned's Auto Supply Company is a purely moot question, the same having been abandoned in the spring of 1938; that since such question is a moot question any inquiry into it at this time is entirely immaterial and irrelevant and no order could be predicated upon any testimony in relation thereto.

Further, the respondent, being in duty bound to reply to the complaint of the Commission, answered the charge relative to the one-half cent differential accorded Ned's Auto Supply Company, and in support of respondent's position, respondent made a cost study of a factual and objective character which was introduced in evidence in

this case and is now in the record as Respondent's
5919 Exhibit No. 31, composed of a number of pages.

That all of the testimony offered by the Government in rebuttal against said Exhibit No. 31 has been vague, indefinite and uncertain, in that the witness Warmack has indicated positively in his testimony that he never did make a study of the records, data, and facts relative to respondent's business in connection with the year 1937, upon which year respondent's Exhibit No. 31 is based.

Further, that the witness Warmack has consistently failed, neglected, refused to and refrained from indicating in figures or in dollars and cents the effect of any procedure of accounting which he might have recommended as distinguished from the system of accounting that was employed by the respondent. Further, the witness moreover has merely complained about and criticized indefinitely and without specification the accounting procedures employed by the respondent, and the effect of the witness' testimony is merely a quarrel and a complaint without specification as to result, influence, or effect, in connection with the results reached by respondent's accountants.

Further, that the Court over and against the objection of respondent has failed, refused and neglected to and refrained from compelling the witness, after request by the respondent, to specify in figures and in dollars and
cents the influence of his recommended accounting
5920 procedure, if any, as distinguished from that used
by the respondent. It is urged by the respondent that the effect of the testimony of the witness Warmack in connection with Exhibit 31 in its entirety is of no probative value and can not be fairly considered by this Court or by the Federal Trade Commission, for the reason that there is nothing in the testimony of the witness which would enable any person, and specifically this Court and the Federal Trade Commission, to determine from such testimony what influence, if any, his criticisms of the accounting procedures of the respondent would have upon the asserted differentials in cost as reflected by Respondent's Exhibit 31.

Trial Examiner Ballinger: With reference to the first portion of the motion dealing with the discontinuance of the practice of according Ned's Auto Supply Company a differential of one-half cent per gallon under the price accorded to the tank-wagon customers of the respondent, the record is clear that such differential was accorded Ned's Auto Supply Company from some time in September, 1936 to about March 1, 1938; that it was then discontinued and has not been resorted to since.

At this point the Examiner pauses to inquire of counsel whether he can give the Commission any assurance that such practice has been and will be permanently discontinued by the Standard Oil Company.

5921 Mr. Hanley: You are referring to Ned's Auto Supply Company, I understand, your Honor?

Trial Examiner Ballinger: Yes.

Mr. Hanley: Yes, your Honor, counsel for the respondent is willing to assure the Examiner that the practice of giving Ned's Auto Supply Company a one-half cent differential off the regular tank-wagon price and serving Ned's under the regular tank-wagon system of delivery has been discontinued as of the spring of 1938 and will not be resumed by the respondent company.

Trial Examiner Ballinger: The Examiner has made the inquiry of counsel solely for the purpose of the record.

The portion of the motion thus far dealt with is a matter over which the Examiner has no discretion, but addresses itself to the sound discretion of the Commission. Accordingly, that portion of the motion is overruled.

As to the remainder of the motion, the Examiner is of the opinion that it also presents a matter which should be passed upon by the Commission, and accordingly overrules the motion.

Mr. Hanley: In view of the statements of the Trial Examiner subsequent to the answer of counsel for the respondent as to the past and proposed practice of according a one-half cent differential to Ned's Auto Supply
Company, counsel for respondent now desires to
5922 withdraw all statements made by counsel for the
respondent in connection with the matter except the
statement that respondent did in fact discontinue the
practice of according a one-half cent differential off tank-wagon price to Ned's Auto Supply Company in the spring of 1938.

This statement is made in view of the fact that the Examiner has in effect denied the entire motion made by the respondent in connection with the testimony of the witness Warmack concerning Exhibit No. 31, and respondent now declines to be bound by any statement heretofore made by counsel for respondent—and all such statements by counsel are now withdrawn—except the statement of fact relative to the discontinuance of the allowance of the differential in the spring of 1938.

Trial Examiner Ballinger: In view of the statement of counsel, the motion in its entirety is overruled without any reservation.

You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination by Mr. Austin.

Q. Mr. Warmack, you spent a considerable amount of time in the offices of the Standard Oil Company in Detroit in January and February, did you not?

5923 A. Yes, sir, of this year.

Q. What were you engaged in doing at that time?

A. I was making a study of the records of the company which supported Respondent's Exhibits 100 and 101 and making a study of the methods employed by the respondent in separating its costs as set forth in those exhibits.

Q. You spent about how much time in Detroit and Chicago on that work?

A. Right close to two months, Mr. Austin.

Q. Did you make a study of the company's regular accounting procedure which they used in allocating their marketing costs on their field Forms 189?

A. Yes, sir.

Q. By "Field Forms" I didn't mean the form only used in the field. I mean a form which is prepared for each field.

A. Yes, sir.

Q. Are you generally familiar with the methods used by the company in its regular cost accounting procedure which are used in arriving at the results portrayed on Form 189?

A. Yes, sir.

Q. I would like to have you describe generally the methods used by the respondent in its regular allocation of its marketing costs, referring now to the allocations which are briefly described in Respondent's Exhibit 99 and which result in the distribution of expense made on the Company's Form 189, a copy of which is in 5924 evidence as Commission's Exhibit 32, and I don't ask you to go minutely into the cost procedure of the company.

What I have in mind is that since the regular accounting procedure of the company has been referred to repeatedly in both Respondent's Exhibits 99 and 100, particularly in 99, and is in part a basis for the cost study, the results of which are shown on Respondent's Exhibit 101, I would like you to describe the Respondent's regular accounting procedure sufficiently and only in so far as you consider that an understanding of that procedure is relevant in connection with and necessary to a discussion of the cost study made by the respondent last summer for the purposes of this case.

Mr. Hanley: The question is objected to, for the reason that no proper foundation has been laid, and for the further reason that the question inquires of the witness as to his conclusion relative to the legal relevancy of his answer, leaving it within the judgment of the witness as to what is relevant and what is not.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

Mr. Hanley: I would like to add to the objection on the part of the respondent that the question is compound and too long to be understandable and intelligible 5925 to any witness.

Mr. Austin: If your Honor please, the regular accounting procedure of the company is involved in the 1940 cost study, which we are about to take up, and the witness is prepared to testify upon it, and that being true, I am only asking him to describe the regular accounting procedure of the company in so far as in his opinion it is necessary to an understanding of Respondent's Exhibits 99, 100 and 101. I think that the witness should be allowed to give the general background for the testimony which he is about to give, factual testimony—it won't be entirely factual. I will withdraw that. It would naturally be his opinion in large part.

Trial Examiner Ballinger: The witness has previously testified that he has examined the testimony of Mr. Boatwright appearing in the record; that in addition thereto he has spent much time in the office of the respondent examining its books and records. In the opinion of the Examiner the question is understandable and proper, and the objection is overruled. You may answer.

5926 A. The form used in the respondent company's regular accounting procedure in the Detroit field used in the preparation of this accounting form 189, which purports to include all distribution costs in connection with the sale of petroleum products, automobile supplies, was prepared—the sheet, Form 189, which is a columnar sheet accounting for costs involved in distribution channels named on the sheet as "tank wagon reseller channels, tank wagon consumer channels, other methods channels, automobile supply channels"—and there is a column in addition to those provided on the sheet, entitled "Income and Expense, leased service station."

Trial Examiner Ballinger: Mr. Warmack, you refer to form 189. What is the exhibit number?

Mr. Austin: Respondent's Exhibit 32, your Honor.

Mr. Hanley: Respondent now moves to strike the answer of the witness.

The Witness: I haven't even started.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Mr. Hanley: If I may now be permitted, your Honor, I would like to resume the objection to the question asked the witness and to the answer which it is now apparent the witness is giving, the grounds for which are that the witness' answer to the question is simply a re-hash and a reading from exhibits which already appear in the
5927 record, and the answer of the witness has no probative value that the exhibits themselves do not disclose.

Trial Examiner Ballinger: The witness has not finished his answer, and the objection will be stricken from the record, not physically. The witness may proceed to give his answer.

A. In the left column of Form 189, which is Commission's Exhibit 119 and Respondent's Exhibit 32, it shows the expense classification or expense items, with their respective account numbers. Respondent company prepared one of these forms each month. I received each of these forms made for these various months in 1940 in the Detroit office.

By Mr. Austin:

Q. You are speaking now of the Detroit field only?

A. The Detroit field only. The forms were prepared on a cumulative basis, that is, the first form is prepared as of January 31st, the next is the last of February, and that includes the business for the two months. The next is at the end of March, and that includes the business for three months, and so on through the year, so that the form at December 31st shows the business for the full year, and that is Commission's Exhibit 119 for the year 1940. The first item of cost as shown on the form is numbered 000, and entitled "Salaries supervision."

Trial Examiner Ballinger: Off the record.

5928 (Discussion off the record.)

Mr. Hanley: The respondent now objects to the witness reading into the record the contents of exhibits which have heretofore been admitted in this case.

Trial Examiner Ballinger: The witness has not completed his answer. The Examiner thus far is unable to determine whether the witness is merely making a preliminary statement on which he will rely for the subsequent portion of his answer. The Examiner considers the motion premature, accordingly, overrules it, reserving to counsel the right to renew the motion when the witness has completed his answer.

The Witness: May I have the answer read down to where I was?

(The reporter read the answer of the witness as follows:)

"The first item of cost, as shown on the form, is numbered 000 and entitled 'Salaries supervision'."

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Go ahead.

A. I am reciting this, or explaining this as an example, your Honor. This particular account is spread then across the sheet in the channels, a part into the tank wagon reseller channel, a part into the tank wagon consumer
channel, no part into income and expense, leased
5929 stations column, or channels, as shown; a part into
another methods channel, and no part into automobile supplies channel.

I went into that particular item rather thoroughly in my field study.

Mr. Hanley: Now, this is Exhibit triple naught?

The Witness: Yes, sir.

Mr. Hanley: And you went into that thoroughly?

The Witness: Yes, sir. And I found from my studies, the methods employed in the allocation of those accounts between channels. What I am saying is that I actually took some of the costs and traced them out, as to how they had moved across and been allocated to the channels, and those allocations were made on a gallonage basis.

Trial Examiner Ballinger: Throughout?

The Witness: All of the allocations were made on a gallonage basis.

By Mr. Austin:

Q. You are referring now to Account triple naught?

A. Triple naught, yes. I would like to call attention now to Account 004, Salesman's salaries. I am only speaking of a few of the larger accounts.

Mr. Hanley: This is objected to as not responsive to the question.

By Mr. Austin:

Q. Are you illustrating some general character-
5930 ization of the accounting procedure?

A. Yes, sir.

Q. Well, I think you ought to make your general statements first, perhaps, and then give your illustrations. You are now going to specific accounts without telling what it is that you are showing, or illustrating. I don't want you to take up each one of these accounts separately as such, but I am very glad to have you take them up to illustrate any general point that you care to make regarding them.

Trial Examiner Ballinger: The objection of counsel for respondent is sustained. The witness will confine his answer to a general statement.

A. Very well. As explained, the respondent company, in accounting for its field costs in Detroit, prepared Form 189, on which there are five separate columns which are designated by the respondent as "Distribution channels."

Trial Examiner Ballinger: What exhibit does that form appear in?

A. Commission's Exhibit 110. And the channels are recited on page 2 of Respondent's Exhibit 100. And along the left side of the Form 189 there appears the separate accounts of the company, Account numbers and the names of the accounts, and each of these accounts is then spread across these channels according to various methods of allocation.

That brings us back to what I explained with
5931 respect to the triple naught account. There are
several accounts here representing rather large amounts, and I believe that, in view of the fact that there are various and sundry methods of allocation, in order to answer the question properly it would be well to give two or three examples. There are a few examples of the larger accounts which are spread on different methods.

By Mr. Austin:

Q. Examples of what, Mr. Warmack? If you are going to give an illustration you have got to have something to illustrate. You haven't told us what it is.

A. Didn't I illustrate with "Salaries supervision," the triple naught account?

Q. That isn't what I mean. I didn't ask you for any particular accounts. I asked for a general statement. If you have some general opinion to give or statement to make regarding the accounting procedure you can illustrate that, if you wish, by certain accounts.

A. I think I have given an illustration of the accounting procedure. Form 189, which is a columnar sheet, sets the accounts over on the side and distributes the items that go through the columns. Now, if you want to know how they distribute them through the columns, that follows carrying through the procedure.

Q. I don't want to know that now as to specific
5932 accounts. I thought you wanted to make some description of the accounting procedure as a whole. Perhaps you have finished that.

A. I have done so, but I should like again to call attention to—

Mr. Hanley: Objected to, if your Honor please, as no longer responsive.

Trial Examiner Ballinger: Objection sustained.

By Mr. Austin:

Q. You refer to Account 000, Mr. Warmack?

A. Yes, sir.

Q. As being allocated between channels on a gallonage basis?

A. Yes, sir.

Q. Are there other accounts—rather, are there other accounts on Form 189, besides 000 that are allocated on a gallonage basis?

A. Yes, sir; many of them.

Q. And you say various methods of allocation were used for the various accounts. Can you state what some of those methods of allocation are, other than the gallonage method?

A. Yes, sir.

Q. And again, I wish you would refer to the present method used, rather than going down through the entire accounts. You may refer to the accounts if you wish.

Mr. Hanley: May I say this off the record?

5933 Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: May it go on the record that—well, Judge, I think perhaps you had better state it on the record, if you grant me the objection.

Trial Examiner Ballinger: Continuing objection is reserved to counsel for respondent, to the entire examination of the witness. Is that sufficient?

Mr. Hanley: I think so. It goes to the qualifications specifically on these particular subjects, not general qualifications.

Mr. Austin: Is there a question pending?

Trial Examiner Ballinger: Read the question.

(The reporter read the pending question.)

Mr. Austin: I will withdraw the pending question.

By Mr. Austin:

Q. Mr. Warmack, you stated that a very considerable amount of the expense going into the various accounts on Form 189 was allocated between channels on a gallonage basis. Is that correct?

A. That is correct.

Q. When you referred specifically to Account 000 as being one of those accounts which was allocated between tank wagon reseller and tank wagon consumer and
5934 other methods channels on a gallonage basis, refer-
ring to that account as an example for the purpose

of this question, what report or substantiation did you find in your studies of that account for the gallonage allocation of the expense going into it?

Mr. Hanley: Objected to as not the best evidence.

Trial Examiner Ballinger: Objection overruled.

A. That was one of the things, Mr. Austin, that I asked for specifically in the Detroit office.

Mr. Hanley: Objected to as not responsive.

Trial Examiner Ballinger: Objection overruled.

A. (Continuing.) And I did not get any information of any kind. As a matter of fact, I was told in the Detroit office, especially by Mr. Gillis, that as far as he knew, no study had ever been made to support this method or the accuracy of figures obtained by using this method. Mr. Houghton from the Chicago office was there. I asked Mr. Houghton to furnish me with any and all information that had ever been developed through a cost study to support his gallonage allocation of this account and all other accounts that are allocated on a gallonage basis, and the company had none—or at least, that is what I was told.

Mr. Hanley: Have you finished?

The Witness: Not quite.

Mr. Hanley: I was afraid of that. Go ahead and finish. I have a motion when you get through with your answer.

5935 Trial Examiner Ballinger: Proceed with your answer if you have not completed it.

The Witness: Yes, sir.

By Mr. Austin:

Q. You did want to add something further?

A. Yes, sir.

Q. Proceed.

A. This is a part of the same answer. In requesting separate data, in fact, any kind of data, but supporting data to support these methods used in the allocation of all other accounts, this was requested, and with the exception of Account No. 200 of the company, all the other accounts which were allocated on the basis of measuring factors; that is, except Account No. 200 of the company.

Trial Examiner Ballinger: What is that, the gallonage?

Mr. Austin: No; Account No. 200 is the advertising department.

Mr. Hanley: No, it is not the advertising department.

Mr. Austin: Pardon me. I mean the accounting, the field—the accounting of field work. I can look it up if you wish.

Trial Examiner Ballinger: Go ahead, Mr. Witness.

The Witness: I was not given any information of
5936 any kind; that is, documentary information, in the Detroit field, to support the accuracy of these methods or the results to be obtained from the use of these methods.

And that goes to all of the accounts accounted for in Form 189 in the Detroit field.

Trial Examiner Ballinger: You say you were not furnished any information to support?

The Witness: Yes, sir.

Trial Examiner Ballinger: Do you mean that you were not furnished any information either documentary or oral?

The Witness: I was not. I would get a lot of arguments, Judge, but what I wanted to know was if the gallonage allocation is sufficient, either gallonage between tank wagon reseller, tank wagon consumer, and other methods or if a part of the costs are allocated in them what part of them between tank wagon reseller and tank wagon consumer, which I believe will be the case of this triple naught account.

"Well, why?"

"Well, why? We do it that way."

"Well, why? What did you ever do to prove that that is the right way to do it, from a cost accounting standpoint?"

Mr. Hanley: Prove it to you.

The Witness: "And if you did do anything where is the documentary evidence of what you did?"

5937 And I got nothing.

By Mr. Austin:

Q. Have you finished your answer?

A. I believe so.

Mr. Hanley: You have finished your answer now?

The Witness: Yes, sir.

Mr. Hanley: At this time the respondent moves to strike the entire answer of the witness to the last question on the following grounds.

First, on the ground that it is argumentative, and a vague, wandering and unsupported diatribe against the respondent.

Further, that it is hearsay in that it appears from the answer by the witness that he bases his conclusion upon what two named men namely, Mr. Gillis and Mr. Houghton told him. And the respondent in this case is not entitled to be bound by some remark that may have been made by somebody, inasmuch as the witness himself, by his own testimony has indicated that he spent two months at least in an independent, personal investigation into the records, data, and accounts of respondent company.

Further, that despite the study which the witness says he made, he does not offer in this answer and he has not offered in any answer any calculation which would en-
lighten this Court, or the Commission, or any court
5938 relative to the nature of his theories, if any, as op-
posed to the actuality of respondent's accounting.

At this time, and as a part of this motion to strike, and also independently thereof, the respondent requests this Court to compel the witness or the Commission to divulge facts and figures relative to the opinions upon the differentials in question wherever this witness questions the propriety of the accounting procedures of the respondent company.

Further, the respondent objects to the unconscionable waste of the time of the Court, the Commission, and the respondent in an examination which does not enlighten or elucidate any issue in the lawsuit.

Trial Examiner Ballinger: The motion is denied. The matters with which counsel is dealing and which counsel has requested the Examiner to strike the testimony of this witness are matters which may properly be inquired into on cross-examination.

The hearing will stand in recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order. Proceed.

By Mr. Austin:

Q. As a result of your study and investigation of the respondent's accounting methods, Mr. Warmack, is it your
opinion that none of the expenses which are allocated
5939 between channels in the various accounts on Form
189 on a gallonage basis, or rather as to those instances, that none of those gallonage applications is supported by any factual study or analysis?

Mr. Hanley: That is objected to as too general a question, and no answer that may be given by the witness will be illuminative to the Court, or to the Commission, unless and until the witness is asked specifically in relation to what accounts he is testifying to.

Mr. Austin: The witness stated that there are many accounts on Form 189 where the factor of expense was allocated between channels on a gallonage basis.

He said that he asked for and was unable to obtain any statement of any study or analysis of the expense in that account which justified the gallonage allocation. I am asking him whether in his opinion the gallonage allocation in these accounts is made without any such study or analysis.

Trial Examiner Ballinger: Objection is overruled, but the witness in his answer may specify the particular accounts for the benefit of counsel for the respondent, although that is a matter that may properly be inquired into on cross-examination.

The Witness: In my opinion the gallonage basis is unsupported in every instance by any factual or objective cost analysis.

5940 Mr. Hanley: May I have the reporter read the question, please?

Trial Examiner Ballinger: Read the question which the witness has just answered.

(The reporter read the question referred to.)

Mr. Hanley: The respondent objects to the question upon the ground that it does not specify in the question as to whose factual study, if any, is referred to in the question.

Further, that if any factual study was made, it is not shown that the witness has knowledge thereof.

Mr. Austin: Mr. Examiner, the witness has already answered the question, and as I understand it the Examiner asked something in regard to it and then Mr. Hanley asked that the question be read, and I also explained it a little further.

Trial Examiner Ballinger: It is not necessary to encumber the record with any further statements. The objection is overruled.

The Witness: Your Honor, may I explain my answer?

Trial Examiner Ballinger: Read the witness' answer.

(The reporter read the answer referred to.)

By Mr. Austin:

Q. Do you wish to make any further amplification
5941 of your statement?

A. I wish to state this, that the reason for my opinion is this: that I requested the people that I contacted in the Detroit office for information which would support any such measuring factor; that is, the gallonage measuring factor, and I received none, and I was told that there was none.

Q. That being true, Mr. Warmack, does it follow that in connection with some accounts and expenses that the gallonage basis may not be the best available method of allocation?

A. It may not be.

Q. It may not be?

A. It may not be, or it may be.

Q. Can you name or give us an example of an expense of a nature which may, in your opinion, properly be allocated on a gallonage basis between channels for the purpose of a cost study such as that prepared by respondent in this case, covering 1940?

Mr. Hanley: May I have the question read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Mr. Hanley: That is objected to as speculative and entirely outside of the issues in this case. There is enough involved in this case without going outside of it.

Trial Examiner Ballinger: Objection overruled.

Mr. Austin: I am referring to this cost study.

5942 The Witness: Certain classes of managerial cost may be allocated there; they may be. Certain classes of advertising cost may be allocated there, properly, and it may be the very best allocation that you can arrive at regardless of how many studies you may make.

By Mr. Austin:

Q. What I wanted to bring out, Mr. Warmack, if it is a fact, that in describing the gallonage method of allocation, and the lack of support for it, which you have stated to be the case, are you or are you not necessarily attacking the use of a gallonage basis in every instance in accounts where that basis was used in the compilation of Respondent's Exhibit 101?

A. I most certainly am not.

I would like to add to that that what I question is the support for the use of the gallonage as a measuring factor. If we have a study, a time study made of men's time, and the result of that intensive study shows that it comes out the same as the gallonage basis would come out; that is, the figures would result the same, I certainly would say then the gallonage factor was supported at least at that time.

Trial Examiner Ballinger: Mr. Warmack, as I understand your testimony is to the effect that your investigation failed to disclose any inquiry to determine any proper measuring factor; is that correct?

5943 The Witness: Not any one, Judge; I did say that in Account No. 200 the company does go to a good extent in establishing the measuring factor, but there are some of these measuring factors such as the gallonage measuring factor which is just a figure that is used.

And what I am trying to say is that I want to see some support somewhere by some study that will support the usage of that factor.

Mr. Hanley: If your Honor please, in view of the answer of the witness just now made the respondent at this time again offers, as it has offered many, many times during the course of this litigation, all of its data, facts, accounts, and records.

It was understood by the respondent that Mr. Warmack, the witness now testifying, had made available to him all of the record, facts, and data of the respondent company. Indeed, there was a man sent from Chicago to Detroit with the specific assignment of aiding Mr. Warmack in his study of such respondent records.

The implication and the inference in the testimony of this witness is that he was unable to find any supporting documentary evidence or data underlying the exhibits which this respondent has offered in evidence. It appears on this record that this witness himself has spent at least two months in Detroit, and the respondent's informa-
5944 tion is that he spent more time than that in Detroit with nothing at all to do except to analyze the records and accounts of the respondent company. What he did the respondent is of course unable to say. But the respondent does say that he was given every opportunity to examine every record that this company had. And in order that it may not be misunderstood by anybody, any

time, the respondent now reiterates this offer of any record, data, or account, or fact relative to any of the cost accounting exhibits involved in this case.

Trial Examiner Ballinger: Well, is it contended by counsel for the respondent that prior to the adoption of the factors used by respondent in its accounting system that the respondent made a careful study or investigation to determine that the factor used was the best method of arriving at a correct calculation?

Mr. Hanley: Your Honor, the respondent contends that its method of accounting and that its offers of exhibits in this case are the soundest methods of accounting that may be applied to the issues in this case.

The respondent is objecting to and is disturbed by your Honor's rulings in permitting this witness to testify to what he states is a fact that there is no supporting data for the conclusions reached by the respondent.

The respondent does not object specifically to this witness testifying as to the propriety of accounting 5945 methods used by the respondent company except that the respondent preserves its objection that this witness does not know anything about the underlying figures, facts, data, and records going into its exhibit 31 and 119. But the point is this, if your Honor please, this witness is just categorically saying that we did not keep books. Now, we object to your Honor permitting this witness to make a record of that kind.

If he objects to or differs with us in our methods of keeping books, as I understand your Honor's ruling, over our objections, you are prepared to permit this witness to testify to his divergent view. But we do insist, your Honor, that he is not entitled to testify to the fact categorically that there are no records that support the contentions as advanced by the respondent in this case.

Trial Examiner Ballinger: The Examiner understands—

Mr. Hanley (interposing): Well, it is the witness—

Trial Examiner Ballinger: Wait a minute. The Examiner understands the testimony of the witness to be to the effect that the books and records of account were kept by the company, but that so far as he can ascertain from both an examination of the records available and inquiry of the officers of the company to whom he was referred that he can find no evidence of any study or investigation by the company before the adoption of the factors used

in and for determining the result, and his testimony,
5946 as I understand it, goes no further than that.

Mr. Austin: May I make a statement, your Honor?

Trial Examiner Ballinger: You may.

Mr. Austin: I just want to say that the Commission is not concerned with the respondent's accounting methods, procedure, or allocation—

Mr. Hanley (interposing): I wish we believed that.

Mr. Austin: —in so far as the respondent does that for its own purposes, your Honor, for its own enlightenment and information, but we do contend that many of those methods of application and distribution of expense are not sufficient for the purpose of proving the cost differential such as is attempted to be proved by the cost study put in evidence as Exhibit 100 and 101, and we will say that as to the various accounts, I just want to make it clear that we are not trying to tell the respondent how to keep its books or information, but that Mr. Warmack has gone into the respondent's accounting procedure for the purpose of being able to determine whether the differentials built up in these various accounts of Respondent's Exhibit 101 are properly separated.

Mr. Hanley: Judge, there probably is no point to arguing the matter, a matter which may be properly arguable before the Commission or any court, but I do want to
make it clear now, which I am sure is clear in my
5947 mind but which I am not sure is clear, in view of
what Mr. Warmack is saying, that any record, any account that the respondent has has always been and is now available to the Commission and to this particular witness. And if he did not look at them, that is something over which we do not have any control.

Trial Examiner Ballinger: There is no question presently nor has there been at any time about the respondent having failed or refused to furnish every document that has been requested, or to make it available to the officers and agents of the Commission.

Mr. Hanley: So long as that is distinctly understood by the Court and the Commission I am satisfied.

Trial Examiner Ballinger: There is no question about that.

Mr. Hanley: There seems to be, from the testimony of the witness.

Trial Examiner Ballinger: The Examiner is under the impression that you have been laboring under a misapprehension.

Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. I would like now to have you direct your attention to Respondent's Exhibits 99, 100, and 101, which may be referred to as the 1940 cost study.

5948 A. Yes, I have that.

Q. I assume that you are familiar with those exhibits?

A. Yes, sir.

Q. Have you analyzed those exhibits to determine the accounting methods, and the methods of allocation used in preparing them?

A. Yes, sir.

Q. Can you describe the underlying method of procedure, or the premise upon which Respondent's Exhibits 100 and 101 are prepared?

Mr. Hanley: That is objected to as a conclusion of the witness. The exhibits speak for themselves, and the witness is not entitled to testify as to what operations of mind took place in the witnesses of the respondent who have testified, and whose testimony is in the record of this case.

Trial Examiner Ballinger: Objection is overruled.

The Witness: Respondent's cost analysis and survey in the Detroit field for the year 1940 as set forth in Respondent's Exhibit 100, and the ultimate results thereof as set forth in Respondent's Exhibit 101 were based primarily upon the premise that the respondent's regular accounting procedure is sufficiently accurate and thorough to afford information sufficient to prove cost differentials.

The study is based primarily upon the premise that
5949 this respondent's Form 189 for the year 1940, which is Commission's Exhibit 119, had been prepared in accordance with sound and accepted accounting principles and afforded information therein without any further study as far as cost of serving tank wagon resellers was concerned, to afford a cost differential between the cost of serving resellers and the cost of serving jobbers, which

costs had to be pulled out of the cost as originally placed in Form 189 for the year 1940.

Mr. Hanley: Have you finished your answer, Mr. Warmack?

The Witness: Just a minute.

Mr. Hanley: Then respondent moves—

The Witness: Just a minute.

Trial Examiner Ballinger: Just a minute. The witness has not finished his answer.

Mr. Hanley: I am sorry. I thought he said he had.

Trial Examiner Ballinger: He said “Just a minute.”

The Witness: In respondent's cost surveys studies were made for the purpose of isolating costs of serving the direct shipment business and classes of customers thereto, that latter part of the term meaning jobbers of naphtha and gasoline, and jobbers of other products and other customers; and the remaining costs previously assigned to the distribution channels were left intact for the most part
in the exact manner in which they had been previ-
5950 ously assigned to channels in respondent's regular
accounting procedure in its preparation of its Form 189.

I believe that covers that.

Mr. Hanley: The respondent now moves to strike the entire answer of the witness just made on the ground and for the reason that the witness assumes to say that in cost studies, or rather that no cost studies have ever been made by the respondent company supporting its accounting procedure as reflected by respondent company's Form 189, which accounting procedures have been in substantial effect and in use for upwards of fifty years, longer than this witness has been alive, and the witness can not possibly know what studies have been made which go into the formulation of the respondent's accounting procedures.

Further, the answer of the witness is not specifically in figures and in dollars and in cents and is merely a vague generalization in the way of a criticism of the accounting procedures of respondent company which have been in use upwards of fifty years, without any specific indication as to how such accounting procedures should be changed, if indeed the witness in his opinion believes they should be changed.

Trial Examiner Ballinger: If the accounting system of

the respondent has been used for fifty years un-
5951 changed, it appears that some inquiry with reference
to the system probably is very appropriate.

The motion of counsel for the respondent is overruled.

Mr. Hanley: For the purpose of the record, if your Honor please, it appears on this very record this morning that it was changed between 1937 and 1940. It is constantly undergoing a change to meet the current conditions. That testimony came out on yesterday.

I also object to the witness' answer with regard to the isolating of cost of serving direct shipment business on the ground that it is so confused that it does not mean anything, and can not serve any useful purpose on this record, but can only serve to confuse. I listened to it carefully and it simply does not mean anything.

By Mr. Austin:

Q. Mr. Warmack, I assume that you are familiar with the fact that the differentials sought to be justified by the respondent through its cost study is a differential between the cost of selling and delivering gasoline to so-called jobbers in the Detroit metropolitan area and to tank wagon reseller and service stations in the metropolitan, Detroit metropolitan area?

A. Yes.

Q. In order to support that differential, and to estab-
lish differences in the cost of sale and delivery to
5952 these two classes of customers the respondent has
offered in evidence and has introduced into evidence Exhibits 99, 100, and 101 which set forth and use the respondent's costs in the entire Detroit field, including rural areas and other cities than Detroit.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

Mr. Austin: I would like to have the question read so far as it has been stated.

Trial Examiner Ballinger: Read it.

(The reporter read the question.)

Mr. Austin: I will proceed.

My Mr. Austin:

Q. In your opinion, Mr. Warmack, are the respondent's costs in the entire Detroit field sufficiently representative of the costs in the Detroit metropolitan area to be used for the purpose of establishing a cost differential in that Detroit metropolitan area in the absence of any showing that the respondent's marketing costs in the area outside of Detroit are not greater than in Detroit?

Mr. Hanley: Just a minute. That is objected to by the respondent as a compound question, and as assuming facts not in evidence.

5953 For the further reason that there is no foundation laid for an answer to the question in that it is not shown that this witness has ever made any study of the marketing costs of the respondent as to what counsel for the Commission calls the "Detroit field."

Furthermore, the question is silent in respect of any definition as to what is meant by the "metropolitan area of Detroit."

Furthermore, there is no indication and no foundation has been laid in respect of the fact as to whether or not this witness has ever made any cost study in connection with any territory which he or anybody else denominates as the "metropolitan area of Detroit," and he could not possibly know what counsel means by such a statement unless and until the same is defined.

Mr. Austin: Well the metropolitan area has been defined repeatedly throughout this record as the city of Detroit, Dearborn, Hamtramck, and Highland Park.

Mr. Hanley: If that is what you are asking him, ask it so it will show in the record, Mr. Austin.

Mr. Austin: It has been stated so many times on the record that I think it would be unnecessarily encumbering the record to put it on it. In my opinion it would be repetitious.

5954 Trial Examiner Ballinger: Do you understand the question?

Mr. Austin: I would like to—

Mr. Hanley: What is the ruling on the objection, if Your Honor please?

Trial Examiner Ballinger: There is an objection. What is the ruling?

(The statement made by the Trial Examiner was read by the reporter.)

Trial Examiner Ballinger: There was an explanation by Mr. Austin and no ruling. I understand now the question is going to be withdrawn?

Mr. Austin: No, but I would like to say this, after hearing the question read: I am not asking the witness whether he knows the costs in commission territory are or are not greater than the costs in the metropolitan area as a result of any cost study. I am asking him whether those costs may properly be used, that is, the costs for the whole field may properly be used, from an accounting standpoint, as representative of costs in the Detroit area or as a basis for establishing a cost differential in the Detroit area.

Mr. Hanley: Respondent adds to its objection, in view of the statement of counsel, that any answer given by the witness would be utterly valueless, in view of the fact that the statement of counsel assumes that no cost studies
5955 were made of the field as a whole and what counsel now denominates as the metropolitan area, and no distinguishing features are indicated in the question.

Trial Examiner Ballinger: The objection to the question, as clarified by the subsequent statement of counsel for the Commission, is overruled.

By Mr. Austin:

Q. And, Mr. Warmack, I want you to answer that question in view of the testimony, of which there is a considerable amount in the record, and with which I assume you are familiar, regarding the nature of so-called A station business and B station business, and the nature of the territory and the conditions in which and under which those respective classes of business are conducted.

Mr. Hanley: The respondent objects to that statement of counsel as to telling the witness how he shall answer the question. If counsel desires to testify, he should take the stand, and the respondent is entitled to have the witness testify in response to the questions that are propounded to him.

Mr. Austin: I might very well have asked him, for example, whether he had read that testimony, Judge Hanley.

Mr. Hanley: You may have been talking to him about it for six months, that is all right, but don't put it on the record.

5956 Trial Examiner Ballinger: There is considerable substance to the objection of counsel for the respondent to the statement made by counsel for the Commission to the witness, but it is present. Apparently no good can be accomplished by sustaining the motion.

You may proceed.

Mr. Hanley: I think you are right, Judge.

The Witness: I believe that the area of the Detroit field has been shown in the record at least once or more than once, and it covers the territory including Detroit, Michigan, and environs, up to Lansing, Michigan, I believe about 100 miles away.

By Mr. Austin:

Q. The record will show that.

A. I appreciate that, Mr. Austin, but that is coming to what I am fixing to say.

Q. Go ahead.

A. That area includes a large amount of rural territory. That rural territory, Mr. Austin, is served for the most part by commission agents.

Q. May I interrupt just a minute? Can you give me an answer to my question, and then state the reasons for your opinion, if you have an opinion. I don't believe you have answered the question, and I would rather have you answer the question first.

5957 Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

The Witness: In my opinion they can not.

By Mr. Austin:

Q. Now, if you will go ahead and, if you wish to state the reasons upon which that opinion is based, we will be glad to have you do so.

A. That is, at least 40 per cent, I believe, of the company's tank-wagon business in the Detroit Field is carried on through commission agents of the company, that is, for the most part employees of the company who operate small bulk stations, usually in rural communities, and who perform for the most part the same services in the distribution of the respondent company's products as are performed by the company's regular salaried stations in cities or rather densely populated areas such as Detroit.

The commission agents are compensated on the basis of quantities distributed by them and, of course, that is based upon classes of customers served—different pay gallons to different classes and groups. For example, deliveries of gasoline to retail service stations carry a smaller commission per gallon distributed than deliveries of gasoline or other petroleum products to various rural consumers, that is, consumer-customers.

As far as I have been able to determine in the
5958 company's recent cost survey, no effort was made to
segregate the commission agent business from the other business in the Detroit field. If any effort was made, why, I didn't find any information with respect to it while on my studies in Detroit. For this reason, it would appear to me that if costs of serving in areas outside of Detroit are going to be used right along and combined with the cost of serving in the Detroit field, then it would be necessary to make a study to see if those costs were identical.

Mr. Hanley: Have you finished?

The Witness: I believe that is sufficient.

Mr. Hanley: May I ask one question, if your Honor please.

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. Mr. Warmack, did you make any objective, factual cost study of costs in the metropolitan area of Detroit as distinguished from the rest of the Detroit field?

A. I didn't, but I should like to amplify that.

Mr. Hanley: That is sufficient. If you didn't, that is all I want to know.

I now move to strike the answer of the witness for the reason that he has indicated that he is incompetent to express the opinion which was expressed in his answer,
inasmuch as he has never made any cost study relative
5959 to the Detroit metropolitan area as distinguishd from
that portion of the Detroit field outside the metropolitan area.

Trial Examiner Ballinger: The motion is denied.

By Mr. Austin:

Q. Mr. Warmack, when you were in Detroit in January and February, did you ask the respondent's accountants who assisted you and with whom you conferred in the Detroit office whether the respondent had made any cost study to determine costs in the area surveyed by the commission agents or to determine the relative amount of its costs in commission agent territory and in A-station territory?

Mr. Hanley: Just a minute. I don't often request it, Judge, but may I have a yes or no answer to that question, please?

Trial Examiner Ballinger: You may.

The Witness: May I have the question read, please?

(The question referred to was read by the reporter.)

Trial Examiner Ballinger: You can answer that yes or no and then explain your answer if it is necessary.

The Witness: Thank you. The answer is that I did ask, yes, is the answer, and then I would like to amplify that a little, if I may.

Trial Examiner Ballinger: You may.

The Witness: I asked Mr. Houghton, accountant for
the Standard Oil Company who was sent to Detroit
5960 to confer and assist me, as far as he could, in making
the study, and he certainly did do a good job. I
appreciated it very much. He expedited the work plenty.
I asked Mr. Houghton to furnish me any information, all information the company had developed, if they had any, in determining what the cost was to serve customers through commission agents as distinguished from what it cost to serve customers through the regular salaried stations.

Mr. Houghton had no information to furnish, so he stated to me, and he furnished none.

I would like to state this, that Mr. Houghton and I borrowed Mr. Gillis' car one day and went out and saw two or three of the stations.

By Mr. Austin:

Q. I was going to ask you that.

A. And we also went and saw this Scotten Avenue Station.

Trial Examiner Ballinger: What position does Mr. Houghton hold, if any, with the respondent company?

Mr. Hanley: In response to the Examiner's question—

Trial Examiner Ballinger: The Examiner would like to have it in the record.

Mr. Hanley: Let it appear on the record that at the time that the witness now refers to, namely in the spring or early part of the year 1931, Mr. Len Houghton was
the office manager of the sales research department
5961 of the respondent company and stationed at Chicago.
In that capacity he was among the chief assistants
of Mr. Boatwright, who was manager of the sales research
department of the respondent company.

In order to facilitate the work and the investigations of the Commission, Mr. Houghton was assigned the task of going to Detroit and working with and aiding any accountants or investigators that the Commission might assign to investigate the records of the respondent company in the Detroit office.

The Witness: Could I say a word about Mr. Houghton?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

By Mr. Austin:

Q. What is the nature of the territory in the Detroit field served by commission agents, Mr. Warmack? Is it metropolitan territory or is it rural territory?

A. It is largely rural territory, Mr. Austin.

Q. Do you know whether the volume of the company's sales in that territory, say, per square mile of territory, is as large as it is in the City of Detroit?

A. In square miles?

Q. I am asking you whether in the same amount of territory, in the commission agent territory, does the company sell more or less gasoline than in Detroit?

5962 A. It sells a little less than it does through all of the rest of the salaried stations. I don't know just—

Q. I am not talking about the total. I am talking about whether per square mile of territory the volume is greater or less in commission agent territory; in other words, if you take a square mile in the city and a square mile in the country, where do you sell the most gasoline?

A. Oh, surely in Detroit.

Q. Then, is there a greater volume of business in the City of Detroit compared with the amount of territory served?

A. Oh, sure.

Q. Do you know whether deliveries to individual customers would average higher in the metropolitan area than in the commission area?

Mr. Hanley: That is objected to, as no proper foundation having been laid, not having been shown that any study was made at all in either territory.

Trial Examiner Ballinger: If the witness knows, he can answer.

Mr. Hanley: If he knows, he can answer, I quite agree.

The Witness: That information may be in the records. I don't have it in my mind.

Trial Examiner Ballinger: You don't know, do you?

The Witness: No, I couldn't answer that question
5963 without looking.

By Mr. Austin:

Q. You haven't examined, then, to determine whether or not the deliveries to tank-wagon stations by commission agents will average as great as in the city, or as to whether the trucks used are of the same capacity, or anything of that sort?

A. I have not examined into that. At one of the commission agent stations which I called on with Mr. Houghton, I couldn't tell you the size of the truck he had, but just by looking at it I could see it certainly was not nearly as large as some of the trucks that I saw at the Scotten Avenue Station, which is a salaried station.

Q. Can you state whether normally and based upon the experience of cost accountants generally, and not referring specifically to gasoline or any other particular product, but can you state whether distribution costs in a territory where volume is smaller, compared with the area served, are greater or less than in a metropolitan area where you have a larger volume over a smaller territory?

Mr. Hanley: Just a minute. It is objected to as immaterial and, if regarded as material, it is a question that is susceptible of accurate ascertainment in respect of differentials in delivery of gasoline, which is in question
in this case. The respondent is not entitled to be
5964 bound by any generalization as to other products,
inasmuch as it is possible to accurately ascertain the facts in connection with gasoline deliveries in rural and metropolitan areas, if that be material.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

Mr. Austin: I would like to strike that question, your Honor.

Trial Examiner Ballinger: The question is withdrawn.

Mr. Austin: I can restate it, I think, much more effectively and shorter.

By Mr. Austin:

Q. Mr. Warmack, is it normally to be expected that the distribution of a small quantity of a product throughout a large territory will cost more per unit than the distribution of a larger quantity of the same product in a smaller territory?

Mr. Hanley: That is objected to as calling for the conclusion and opinion of the witness on a matter that is entirely immaterial and irrelevant to the inquiry. The inquiry is concerned with the justification of factual and actual costs in a limited area. As to the esoteric nuances of cost accounting in some rural community unrelated to
the territory involved in this lawsuit, there can be
5965 no interest on the part of the Court or the Commission.

Trial Examiner Ballinger: The objection is overruled.

Mr. Austin: Read the question.

(The question referred to was read by the reporter.)

The Witness: That always has been my feeling about it, Mr. Austin, and I think that—

Trial Examiner Ballinger: What do you mean by your feeling about it?

Mr. Hanley: The answer is as good as the question, and that may go on the record.

By Mr. Austin:

Q. I want to know what your opinion is, if you have one, and whether you can support that opinion by any authorities or—

A. That is my opinion. That is a controverted question, I might say, and in some instances it may move back the other way, but I believe that we could show by certain studies that that had been the case in some instances.

I think some cases coming before this Commission might show that, for instance, in the Rocky Mountain area of the country, which is a rather sparsely populated section, or certain sections are at least, as I understand it, where the costs per unit of goods sold would be greater
than they would be, we will say, in the metropolitan
5966 areas such as New York City, Philadelphia, Chicago,
Detroit, or some such cities as that.

Mr. Hanley: The respondent now moves to strike the answer to the question, inasmuch as the witness has stated that it is a controverted question and he is unable to state any definite opinion as to whether or not the conditions set forth in the question are or are not true.

Trial Examiner Ballinger: The motion to strike is granted.

By Mr. Austin:

Q. Do I understand, Mr. Warmack, that there is no opinion or that you can cite no authorities to the effect hat the distribution costs of smaller quantities in larger erritories are greater than larger quantities in a smaller erritory?

A. Mr. Austin, the Department of Commerce has made studies of those things, and they would swear up and down that it costs more in a rural territory than in a metropolitan territory. I haven't covered those things.

Mr. Hanley: Just a minute, I move to strike the answer of the witness as an attempt to say what somebody else would attempt to swear to.

Trial Examiner Ballinger: The motion is granted.

Mr. Austin: We will come to Detroit.

Mr. Hanley: Off the record.

967 (There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Mr. Warmack, you have visited some of the company's distributing stations, both in the metropolitan area of Detroit and in commission agent territory?

A. Yes, sir.

Q. I think you testified to that. And have you personally observed the nature of the respective territories just referred to and had an opportunity to observe the methods of distribution used by the company in metropolitan Detroit as well as in commission territory?

A. Yes, sir.

Q. As a result of that observation, can you express any opinion, or do you have an opinion as to whether the respondent's cost per gallon of distributing gasoline in commission agent territory would normally be larger than in the City of Detroit?

Mr. Hanley: Just a minute. That is objected to for the eason that it includes a lot of assumptions which it is not shown are true in the experience of the witness. It is not shown that the witness has made any study of any particular territory as distinguished from any other territory. It is not shown that the witness knows what is commission territory and what is something other than commission territory. 968 It is not shown that he knows anything about the costs in relation to any method of delivery used by the respondent company. The only thing that so far has been shown is that the witness took an automobile ride and visited two or three bulk stations.

Trial Examiner Ballinger. The objection is overruled.

The Witness: May I have the question read?

(The question referred to was read by the reporter.)

The Witness: Mr. Austin, I would just have to guess on that, the same as the guess work that has gone on here, that it isn't. If you don't make a study, you don't know, that is all. If you make a study, you know, and if you don't make a study you don't know. That is the whole thing.

(At this point a statement by Mr. Austin and an objection to it by Mr. Hanley were physically stricken from the record by direction of Trial Examiner Ballinger.)

(There was a discussion off the record.)

By Mr. Austin:

Q. Mr. Warmack, you stated awhile ago that you did not think that the use of the costs for the entire Detroit field was proper for the purpose of determining the cost differential in the Detroit metropolitan area, and that you inquired whether the company had made any study to determine the cost of distribution through B—station agents, and that you were unable to find that any such study had been made. I don't think that you stated why you asked for such a study and why you felt that the costs for the entire Detroit field should not be used for the purpose of determining costs in the city alone. 5969

Mr. Hanley: Just a minute; that is objected to as a compound question and calls for the conclusion and opinion of the witness, in that it asks him why he did something that he did. The objection does not go to the question of fact as to whether he did or did not do something, but as to the question of why he did this or that the respondent objects.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

Trial Examiner Ballinger: The objection is sustained.

Mr. Austin: Upon what ground, your Honor?

Trial Examiner Ballinger: Upon the ground that it calls for the reasons which motivated the witness in calling for the records, and not for any fact.

By Mr. Austin:

Q. What is the basis of your opinion, Mr. Warmack, that a separate study of costs in commission-agent 5970 territory would be necessary to determine whether those costs may properly be used to determine costs in the Detroit metropolitan area.

Mr. Hanley: May I have that question?

(The question referred to was read by the reporter.)

Mr. Hanley: That is objected to, in that it assumes facts not in evidence, it not being established that the witness knows or that it is the fact whether the witness knows it or not that there is a particular territory that is just commission-agent territory as distinguished from the salaried-driver territory, if that is what is meant by the question—in the metropolitan area of Detroit.

Trial Examiner Ballinger: The record abundantly establishes that there are two areas. There is the Detroit district, which has been well defined and delineated by maps introduced into the record. There is also the Detroit area, which has likewise been well defined and delineated by maps in the record. The witness must know the exact territory embraced in both descriptive terms.

The objection is overruled.

Mr. Hanley: If your Honor please, the objection does not go merely to geographical delineations but goes to the question of what is commission-driver area as distinguished from something else not indicated in the question. It does not appear that it is the fact or the witness knows anything about the fact of whether or not the geographical ter- 5971 ritory out of the metropolitan area of Detroit is solely or only in part commission territory.

Trial Examiner Ballinger: The portion of the Detroit district in which the commission merchants operate has been, as the Examiner recalls, clearly defined by the testimony of Mr. Boatwright, and the Examiner thinks that the question is proper and the objection is overruled.

The Witness: In my opinion the respondent company employs two separate and distinct methods of operation, as far as the serving of customers is concerned. They are very closely related, it is true, but they are still separate.

It seems to me, as I read the evidence and the testimony in this case, that to call these commission agents commission drivers, as I see it, is a kind of a misnomer.

I understand that there are commission drivers who operate out of some of the stations in Detroit, but I am not talking about that. I am looking over that. I am comparing A-station business with B-station business.

A stations are the large bulk plants generally in the metropolitan areas. The drivers of the trucks, as I understand it, are paid on a salary basis. Various and sundry personnel are paid to operate those large plants; while at a B-station there may be one man running it, he is the whole thing, he does it all, and his compensation is based upon how many gallons of the company's product he delivers to
5972 customers.

Of course, there is, I think, a certain amount that he will have to earn. If he doesn't earn that much, he will get that much, see, but it is essentially a commission-agent business. What he does depends upon how much money he gets and, even if he were paid on a salary basis, I would wonder if that could be comparable, when twenty miles away from a large city, in a small rural area, with his plant clear out of sight of the town—or we will call it a plant—it is a spot on the side of a railroad track, with a couple of tanks setting up there, as compared with a large bulk plant that is really doing business and where a large personnel is employed which maybe dispenses many, many times more units of the company's product than this one little plant that I have just spoken of.

Now, when we take all of these little plants together and throw them together and set them up against the costs of serving, that is, the costs of the little plant against the costs of serving through the big plants and then to say arbitrarily, in my opinion, that the costs of serving here are the same as the costs of serving here, that is, the A plants and the B plants, to me that is conjecture, Mr. Austin.

You can find that out, if you make a study, and it can be done.

5973 Mr. Hanley: Are you through?

The Witness: That is the reason for my opinion.

Mr. Hanley: I move to strike the entire answer of the witness on the ground that it is unresponsive to the question, that it is conjectural, that it has nothing to do factually with the metropolitan area of Detroit or the Detroit field, that it is simply a wandering statement on the part of the witness in which he theorizes on conjectural costs based upon hypothetical situations, none of which have been established as existing in fact in this lawsuit.

Trial Examiner Ballinger: Do you desire to say anything, Mr. Austin?

Mr. Austin: Yes. I think the question is very responsive and it brings out the difference between the methods of distribution.

(There was a discussion off the record.)

Mr. Austin: The answer, in my opinion, is wholly responsive and it brings out the differences, as seen by the witness, between the A-station business and the B-station business of the company in the Detroit field and the reasons why the witness is of the opinion that a cost study based on the territory of the entire field may not be representative of the costs in the Detroit metropolitan area.

Trial Examiner Ballinger: Read that answer, please.

5974 (The answer referred to was read by the reporter.)

Mr. Hanley: May I make a statement?

Trial Examiner Ballinger: The Examiner doesn't care to hear anything further from counsel for respondent. Is there anything from Mr. Austin?

Mr. Hanley: If you are going to overrule the objection—

Trial Examiner Ballinger: I don't care to hear anything further from counsel for respondent. I will hear from Mr. Austin if he has anything.

Mr. Austin: I think that is a graphic description based upon the personal investigation of the witness who visited these plants and which brings out the difference in nature of distribution, the main point being that there are two widely differing methods of distribution, and that is the basis for the witness' opinion that the cost of one method is not proper to be combined with the cost of another method to show costs in the territory where only one method is used.

Trial Examiner Ballinger: The motion is granted. The testimony is stricken.

(There was a discussion off the record.)

Mr. Austin: I move that we adjourn for lunch until 2:30.

Trial Examiner Ballinger: The motion is granted 5975 and now at 1 p. m. the hearing stands in recess until 2:30 p. m.

(Whereupon, at 1 p. m., a recess was taken until 2:30 p. m. this day.)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of Volume IV of the printed transcript of the record, filed in this office on July 12, 1948, in:

Cause No. 9215

Standard Oil Company,
Petitioner,

vs.

Federal Trade Commission,
Respondent,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 25th day of May, A. D. 1949.

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

VOL. V, pp. 3455 to 4298.

TRANSCRIPT OF RECORD

IN THE

Supreme Court of the United States

October Term, 19[redacted] 1957

No. 24

STANDARD OIL COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.

STANDARD OIL COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 9215

STANDARD OIL COMPANY,
Petitioner,
vs.
FEDERAL TRADE COMMISSION,
Respondent.

U. S. C. A.-7
FILED
JUL 12 1948
KENNETH J. CARRICK
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Petition for Review of Order of the Federal Trade Commission.

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TRANSCRIPT OF RECORD FILED NOV. 7, 1946.
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No. 53—Chart showing total gasoline sales volume in gallons and ratio of retail and wholesale sales to total sales of each of the four Standard Oil jobbers for the years 1936 to 1940, inc. 4873

No. 54—Chart showing volume of gasoline in gallons of the four Standard Oil jobbers for the years 1936 to 1940 with number of retail outlets supplied by each 4874

No. 55-A & B—Gasoline sales in the Detroit area of wholesale licensed jobbers and distributors of branded gasoline, being a 2 page statement for the years 1936 to 1940, inc., showing the name of the jobber, when he received his wholesale distributor license, his supplier and his gallonage for each of said years 4875

No. 57-A & B—Two page statement showing the gasoline sales in gallons in the Detroit area of licensed wholesale jobbers and distributors handling non-brand gas for the years 1936 to 1940. This is substantially the same type as Ex. 55-A & B, except it covers non-brand instead of branded gas and does not show the source of supply nor the year when the distributor became a licensed distributor...... 4877

No. 58—Chart showing for the years 1936 to 1940, inc., the total sales in the Detroit area, the total Standard Oil in said area and its percentage of total sales, Standard Oil sales exclusive of jobbers and percentage, Standard Oil jobber sales and percentage, sales of licensed jobbers other than Standard Oil handling branded gas and percentage, sales of licensed jobbers handling non-branded and percentage, sales of all licensed jobbers and percentage and sales of all other companies and percentage 4879

No. 59—Table showing yearly increase or decrease in gasoline sales for the years 1937 to 1940, inc., for the State of Michigan and the Detroit area, showing total Standard Oil sales, Standard Oil jobbers, branded jobbers, non-branded jobbers, all jobbers, and all others 4881

No. 60-A to D—Four page statement, each page marked alphabetically in the 60 series, showing continuous record from June, 1936 to November, 1940, of the retail gasoline price situation in Detroit as reflected by Standard Oil Co., surveys in the dates indicated on each of premium, house brand and third grade gasolines, showing for each the prevailing retail service station price, the dealer tank wagon price, the margin, the number of service stations selling below prevailing retail price and the average amount below the prevailing retail market price.... 4883

No. 63-A, B & C—Three page list, each page alphabetically marked as an exhibit in the 63 series, showing the brand names for gasoline marketed in the Detroit area for premium, house brand and third grade by the various companies.................. 4885

No. 96-A—Modification of Ex. 31-A to exclude newspaper and billboard advertising..................... 4886

No. 96-B, C & D—A three page explanation of this modification 4887

No. 99—Supplement to distribution cost analysis, tank wagon reseller channel versus jobber gasoline sales; explaining regular costing procedure in the Detroit field for 1940. This exhibit contains 33 typed pages, explaining and giving examples of the company's regular accounting procedure and method of allocating costs between channels under the following

12 schedules giving account numbers and explanations as to each:

1. Salesmen and Sales Promotion Expense.
2. Advertising Costs.
3. Delivery and Warehouse Cost.
4. Income and Expense Incurred at Leased Retail Outlets Served by Tank Wagon.
5. Marketing Expense Items Incurred at Privately Owned Stations Not Leased But Engaged in the Distribution of Our Products.
6. Credit Information—Bad Debts and Recovery.
7. Field Office and Accounting Cost.
8. Supervision Cost Incurred in Sales Field.
9. Losses—Taxes—Insurance and Additional Salary Considerations.
10. Miscellaneous Marketing Expense Items.
11. Marketing Expense Items on Lubricating Oils.
12. General Office Marketing Costs. 4889

No. 100—Distribution cost analysis, tank wagon reseller channel versus gasoline sales, Detroit field, 1940. This exhibit contains 133 pages showing the actual allocations and figures in carrying out the work explained in Ex. 99 under each of the 12 schedules referred to therein, with numerous sub-schedules under each and explaining exactly what was done in each case 4914

No. 101—Standard Oil Company Form G. O. 189 Long, being the Sales Department Comparative Statement of Expense, Detroit field, year 1940, completely filled out and reflecting the results and processes set forth in Ex. 99 and 100 5043

No. 103-A, B, & C—Letter Feb. 2, 1942, Mr. Hanley of Standard Oil to Mr. Austin of FTC 5045

Trial Examiner's Report, dated June 25, 1943 5047

Exceptions of Commission to Trial Examiner's Report, dated July 12, 1943 5128

Exceptions of Standard Oil Co. to Trial Examiner's Report 5135

Finding as to Facts and Conclusions, filed Oct. 9, 1945 5161

Order to cease and desist, entered Oct. 9, 1945 5183

Motion of Commission to modify Order to Cease and Desist, dated Jan. 21, 1946 5185

Order to show cause, entered Jan. 23, 1946 5188

Motion of Standard Oil Co., for rehearing and for reconsideration of Order to Cease and Desist 5189

Answer and Brief on order to show cause 5221

Respondent's Answer and Brief in opposition to second proposed modification of Order to Cease and Desist 5232

Petition of the National Council of Independent Petroleum Associations for leave to Intervene, filed Apr. 8, 1946 5249

Order modifying Order to Cease and Desist issued Oct. 9, 1945, and denying certain other motions, entered Aug. 9, 1946 5253

Modified Order to Cease and Desist, entered Aug. 9, 1946 5254

Dissenting opinion to modified Order to Cease and Desist, dated Aug. 9, 1946 5257

Vol. I, pages 1 to 850; Vol. II, pages 851 to 1736; Vol. III, pages 1737 to 2586; Vol. IV, pages 2587 to 3454; Vol. V, pages 3455 to 4298; Vol. VI, pages 4299 to 5046; Vol. VII, pages 5047 to 5288.

Petition for Review, filed Oct. 4, 1946 5270
    Statement of Points 5276
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Stipulation re Exhibits, etc. 5281
Designation of Record 5285
Respondent's Designation of Record 5287

5976 Afternoon Session.

2:30 p. m.

Trial Examiner Ballinger: You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination (Resumed) by Mr. Austin.

Q. I asked you this morning, Mr. Warmack, the following question:

"What is the basis of your opinion, Mr. Warmack, that a separate study of costs in commission agent territory would be necessary to determine whether those costs may properly be used to determine costs in the Detroit metropolitan area?"

Now, instead of referring to the Detroit metropolitan area, perhaps I should refer to "A" station territory, because there are certain salaried station areas outside of the Detroit metropolitan area, but it is true, is it not, that the majority of the territory outside of the Detroit metropolitan area is commission agent territory?

Mr. Hanley: That is objected to, if your Honor please, until and unless the foundation is laid indicating that this witness has made an investigation which informs him as to what is commission territory and what is salaried station territory, and as to what is "A" station territory and "B" station territory. 5977

I will say to the Court that after some years in the service of the respondent company I myself am not always sure what is an "A" station and what is a "B" station, and I think it is very essential indeed to the Court that it be distinctly understood what the witness is talking about when he refers to an "A" station and when he refers to a "B" station.

Trial Examiner Ballinger: Do you care to examine the witness any further before I rule?

Mr. Austin: It is stated further in the record, your Honor, that there are some 78 "B" stations operated by the commission agents in the Detroit field, and that practically all of the territory in the field outside of metropolitan Detroit, Ann Arbor, Pontiac and Lansing, is served by commission agents through these "B" stations.

By Mr. Austin:

Q. Now, Mr. Warmack, assume for the purpose of my question, first, that the only issue of cost justification in this case relates to costs in the metropolitan area of Detroit; secondly, that the costs which are set forth in this cost study are the costs of the entire field, including the territory served by these 78 "B" station agents. If those assumptions are not supported by the record, the rec-
5978 ord will so show that I want the witness to answer the question on those assumptions, and I now will read the question again as it appears on the record and as I quoted it a moment ago:

"What is the basis of your opinion, Mr. Warmack, that a separate study of costs in commission agent territory would be necessary to determine whether those costs may properly be used to determine costs in the Detroit metropolitan area?"

Mr. Hanley: Now, Judge, if we may go off the record a moment?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Mr. Hanley: Now, let this be on the record. The respondent is perfectly willing to accept the professional statement of counsel for the Commission as to what the record shows in relation to the statement concerning the 78 "B" stations, but counsel for the respondent objects to the question on the ground that and for the reason that it does not appear that the witness has made any study concerning such "B" stations, as defined, or as the term is used by counsel for the Commission, and is incompetent to answer the question as propounded.

Trial Examiner Ballinger: Objection overruled.

A. My opinion was based upon the fact that the company, the respondent company, employed two separate
5979 and distinct methods of operation, that is, between the "A" station on the one hand and the "B" station on the other hand, the "A" station being operated by salaried personnel in the larger cities, and the "B" stations being operated by commission agents in the rural territory of the Detroit field.

In view of the fact that these are two separate and distinct methods of operation; in view of the fact that the

nployees of the two separate classes of stations are com
ensated on entirely different bases, it is my opinion that
efore it could be said that the costs of operating the "B"
tation were the same as the costs of operating the "A"
tations, it would be necessary to make a study to deter
ine the same. By "study" I mean a cost study and anal
sis.

Mr. Hanley: The respondent moves to strike the answer
f the witness, for the reason that the witness has assumed
is own definition of an "A" station and a "B" station,
hich definitions are not supported by anything in the
ecord of testimony in the case; further, that the witness
ssumes that there would be a difference in cost if an analy
is were made, presuming that such analysis would show
difference in cost, if any; that such an analysis has not
een made by the witness, and that the witness does not
now whether or not there is any difference in cost, and
s answer is a matter of pure conjecture and speculation.

Trial Examiner Ballinger: The motion is denied.

5980 By Mr. Austin:

Q. Now, Mr. Warmack, I would like to ask you to
look at Commission's Exhibit 119, which is the respondent's
Form 189 for the year 1940 in the Detroit field. You pre
viously referred to the column on that form entitled "In
come and Expense, leased service stations."

A. Yes, sir.

Q. Will you describe briefly the nature of these expenses
which are listed in that column?

A. The expenses appearing in that column represent
the cost in the column entitled "Income and Expense,
leased service stations" on Form 189, which is Commis
sion's Exhibit 119.

The expenses appearing in that column represent sundry expenses incident to the landlord operation of the company in connection with maintaining service stations leased, and rent paid for the leased service stations which are leased from others and then sub-leased to lessees by the company; taxes on sub-stations, depreciation on properties at the sub-stations and the like.

Is that sufficient, or would you like some detail of it?

Q. Do I understand, Mr. Warmack, that those are ex
penses incurred by the respondent in connection with the
operation of service station properties which are either

owned or leased by the company and sub-leased to the service station outright?

5981 A. That is correct.

Q. And are there certain red figures in that column?

A. Yes, sir.

Q. What are those?

A. They represent rent, revenues received from lessees.

Q. At the bottom of the form, the line entitled "Grand Total, all expense," what is the figure given there?

A. $48,506.44.

Q. That is the figure at the bottom of the leased service station column?

A. Yes, sir.

Q. Does that figure represent—well, is that a black figure or a red figure?

A. A black figure.

Q. And what does that indicate?

A. That represents the excess of the expense of operating the service stations over the revenues received from the leasing of the station.

Mr. Hanley: Judge, may the respondent have a continuing objection to the witness testifying to the contents of exhibits, on the ground that the exhibits speak for themselves? I don't care to make a specific objection to these various questions, if I may have that as a continuing one.

Trial Examiner Ballinger: Objection is reserved to respondent.

5982 By Mr. Austin:

Q. Now, Mr. Warmack, you will notice below that expense figure of $48,000 there is another figure of 54,255,291, which represents the "Total Units" of the company's petroleum products marketed through the leased service stations in 1940, and on the last line of the form there is a figure .09 cents, which is arrived at by dividing the total units in the expense items. Do you follow me?

A. Yes, sir.

Mr. Hanley: Just a moment—have you finished?

Mr. Austin: No. I want to explain the basis for the question.

By Mr. Austin:

Q. Now, turn to Respondent's Exhibit 101. Is there any column on Respondent's Exhibit 101, entitled "Income and Expense, leased service stations"?

Mr. Hanley: Just a minute—had you finished your question?

Trial Examiner Ballinger: It is a question within a question.

Mr. Austin: I don't know how to answer that.

Mr. Hanley: I am just trying to make the record here, Judge.

Trial Examiner Ballinger: This is off the record.

(Discussion off the record.)

5983 Trial Examiner Ballinger: Proceed with your question.

Mr. Hanley: The question is objected to because the exhibit is the best evidence of what it shows.

Trial Examiner Ballinger: Objection overruled.

By Mr. Austin:

Q. You may answer.

A. There is not.

Q. Can you state, Mr. Warmack, whether the expenses entered in the leased service station column on Respondent's Form 189 for 1940 are included anywhere on Respondent's Exhibit 101?

A. Yes, sir. They are.

Q. Where are they included?

A. Part of them are included in the column entitled "Tank wagon reseller" on Respondent's Exhibit 101, and part of them are in the column entitled "Other method" on Respondent's Exhibit 101.

Q. Can you state what proportion of those leased service station expenses are included in the tank wagon reseller column on Respondent's Exhibit 101, and what proportion are entered in the "Other methods" channel?

A. Yes, sir.

Q. Please do so.

A. In the tank wagon reseller column there is 5984 $47,724.53, and in the "Other methods" column $781.91.

Mr. Hanley: Now just a minute, if your Honor please. From what exhibit is the witness testifying?

The Witness: This is from page 47, Judge, of Respondent's Exhibit No. 100, Judge Hanley.

By Mr. Austin:

Q. Mr. Warmack, now turn to the bottom of Respondent's Exhibit 101, the line entitled "Total units."

A. Yes.

Mr. Hanley: Total what?

Mr. Austin: Total units.

By Mr. Austin:

Q. You will note that the figure entered in that column of 69,301,586. You will further note that that gallonage figure is divided by the total expense in that same column. I am referring now to the tank wagon reseller column.

A. Yes, sir.

Q. To obtain the per unit cost of 1.67 cents.

A. Yes, sir.

Q. Now if you will refer back to Commission's Exhibit 119, I have already called your attention to the gallonage figure of 54,000,000-odd gallons at the foot of that column.

A. Yes.

Q. As against 69,000,000 gallons in the tank wagon
5985 reseller column on Commission's Exhibit 101.

A. Yes, sir.

Q. Will you tell me first whether the leased service station expense entered in the tank wagon reseller column on Respondent's Exhibit 101; that is, $47,000 is, as you have just stated, is that expense charged in this cost study to the entire tank wagon gallonage of 69,000,000 gallons?

A. It has been so—

Mr. Hanley: (Interposing.) Just a minute. If your Honor please, may I ask a question foundationally?

Trial Examiner Ballinger: You may.

Mr. Hanley: Do you understand it to be the fact, Mr. Warmack, that Mr. Boatwright has testified that the leased station account or landlord and tenant account, or rental account, or whatever you may choose to term it, has been closed into the tank wagon reseller account, on the regular accounting form, Form 189 of the respondent company?

The Witness: Yes, sir. I understand that.

Mr. Hanley: And if you find that to be the fact so far as you have investigated the accounts of the company, or I will ask you have you found that to be the fact so far as you have investigated the account for the company—

Mr. Austin: (Interposing.) I would like to know what period of time you are referring to, Judge Hanley.

Mr. Hanley: I refer to 1940, that is the period
5986 which these expenses appertain to, so I will refer to 1940.

Mr. Austin: Well the form for 1940 has that separated from the leased service station column. Do you mean it does not exist in 1941?

Mr. Hanley: I do not mean that the same figure would exist in 1941, but perhaps I should ask the witness.

The Witness: I will be glad to explain what I have in mind.

Mr. Hanley: What I am trying to learn from you, Mr. Warmack, is: If there is real estate profit and loss, or a real estate profit, or a real estate loss, perhaps we should say, is that reflected in the cost of marketing as cost of marketing is set up in the reseller channel of Respondent's Form 189, whatever year may be involved?

The Witness: It is set up as a separate column in the regular form 189.

In the preparation of Respondent's Exhibit 101 that particular item was omitted in the form 101, or Respondent's Exhibit 101, and separated and placed into—part of it going—placed into the "tank wagon reseller" column and the "other methods" column; does that answer your question?

Mr. Hanley: I am not sure that it does.

Will you please tell the court this, if it is your understanding that it is a fact that any real estate profit or loss on this, whatever it may have been, in the year
5987 1940 was closed into and given consideration in Respondent's Exhibit 101 on the reseller channel, the selling cost.

The Witness: That is correct with this one exception of $781.91, and that item went into "other methods", your Honor.

Mr. Hanley: All right. All right. I will give you that $781.91.

Mr. Austin: That is the matter to which I have been alluding.

Mr. Hanley: I see.

Mr. Austin: Now, Judge, that part that went into the tank wagon reseller column on Exhibit 101 is just the point that I am talking about. I think there is a question pending to which there has been no answer. I will ask that that question now be read.

Trial Examiner Ballinger: Read the question.

(The reporter read the following question:)

"Will you tell me first whether the leased service station expense entered in the tank wagon reseller column on Respondent's Exhibit 101; that is, $47,000 is, as you have just stated, is that expense charged in this cost study to the entire tank wagon gallonage of 69,000,000 gallons?"

The Witness: I thought I started an answer to that.

Trial Examiner Ballinger: Read the answer as far 5988 as has been stated.

(The reporter read the answer as follows: "It has been so—")

The Witness: It has been so charged.

By Mr. Austin:

Q. And in the company's regular accounting procedure on Form 189 to what gallonage is the leased service station expense charged?

A. As shown on Respondent's Exhibit 119, which is the company's form 189, the total gallonage of 54,255,291 gallons in the column marked "Income and Expense, leased service stations."

Q. What is the difference—I do not mean in figures now, but in description—what is the difference between the 54,000,000-gallon figure in the leased service station column on Form 189 for 1940, and the 69,000,000 figure in the tank wagon reseller on Respondent's Exhibit 101?

Mr. Hanley: That is objected to as an arithmetical calculation.

Mr. Austin: I said I did not mean in calculations, I want him to tell us what the difference is; what it results from, Judge Hanley.

Trial Examiner Ballinger: The objection is overruled.

The Witness: Well—

5989 By Mr. Austin:

Q. Here is the point, why is the gallonage figure for the leased service station on Form 189 a smaller figure than the figure for the tank wagon reseller channel in Respondent's Exhibit 101?

Mr. Hanley: That calls for a conclusion of the witness on a matter to which he is not entitled to testify.

The Witness: Why is it a smaller figure?

Mr. Hanley: One moment. I would like to have a ruling on my objection.

Trial Examiner Ballinger: One moment.

Mr. Hanley: These are forms prepared by the respondent and they are submitted in evidence and they speak for themselves, they are accounting forms. Now, Mr. Examiner, as to why they do not add up is for the Court and not for the witness—if they do not.

Trial Examiner Ballinger: That is your answer to the question?

The Witness: I have not answered the question as yet, your Honor. I was just going to answer it as to why it was a smaller figure.

Trial Examiner Ballinger: There have been two questions asked here. The first one has not been answered. There is now a second question. Is it desired to have the witness answer the first question or the second question, or to consider them together?

5990 Mr. Austin: The second query that I made was really an elaboration or explanation of my first question.

Trial Examiner Ballinger: The objection will be overruled. You may answer.

The Witness: This is the answer to the whole thing; in the company's Form 189 for the year 1940 for the Detroit field, the item of 54,255,291 gallons appearing in the income and leased—income and expense, leased service station column—

Trial Examiner Ballinger: (Interposing.) On Form what?

The Witness: On Form 189—is a memorandum figure and is not used in the addition on the gallonage when you arrive at the total tank wagon gallonage. And of course inasmuch as it is a memorandum figure on that Form 189 naturally it is not shown on Respondent's Exhibit 101.

By Mr. Austin:

Q. That does not answer my question, Mr. Warmack, it seems to me.

Mr. Hanley: Well, I have a motion I would like to make but I would like to ask one question; perhaps in that way I may be able to shorten this, Judge, I am sure, if you will give me permission to ask one question.

Trial Examiner Ballinger: You may proceed to do so.

5991 Mr. Hanley: Mr. Warmack, whatever method is employed, whatever the method used, is it not a fact, as developed by your investigation of the records of the respondent company that the profit and loss, whichever it may have been, in leased service stations was closed into marketing expense through the reseller channel for the year 1940 and every other year, wasn't that the usual, general, consistent practice?

The Witness: Well—

Mr. Hanley: (Interposing.) Do you know?

The Witness: Well, Judge, in the preparation of Form 189 you do not put it there—you do not physically put it over in the reseller channel.

Mr. Hanley: I am not asking you that, I am not asking that you tell me about anything in connection with technical forms. I am asking you about accounting principles. Is the profit and loss resulting from the company's ownership of service stations and leased service stations closed into marketing expense in the year 1940 and every other year?

Trial Examiner Ballinger: On the records of the company?

Mr. Hanley: On the records of the company.

The Witness: It is.

Mr. Hanley: Does not that settle it?

5992 Mr. Austin: I do not know, I move to strike both the question and the answer as improperly imposed; and having no relation to anything which I have asked the witness.

Trial Examiner Ballinger: The motion is denied. You may proceed.

By Mr. Austin:

Q. Mr. Warmack, the gallonage figure of 69,301,000 gallons at the foot of the tank wagon reseller channels on Respondent's Exhibit 101 is the total tank wagon gallonage for the Detroit field for 1940; that is my understanding.

A. That is my understanding.

Q. The figure of 54,255,000 at the foot of the leased service station column on Commission's Exhibit 119 is the petroleum products gallonage passing through or sold to leased service stations?

A. That is my understanding, sir.

Q. This 54,000,000 gallon figure does not include the gallonage of the non-lessee service stations?

A. That is my understanding, sir.

Q. But I think the record shows further therefore that the difference between the 69,000,000 gallon figure and the 54,000,000 figure is the non-lessee service station gallonage?

A. (There was no answer.)

Trial Examiner Ballinger: What is your answer?

5993 The Witness: I did not say anything, sir.

Mr. Austin: I did not ask him anything as yet.

Mr. Hanley: Counsel is testifying. Counsel is doing the testifying, the witness does not need to answer.

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Now, Mr. Warmack, I want to know whether in your opinion for the purposes of this cost study the expense or income of leased service station operation, in this case the expense, should be charged against the total tank wagon gallonage of 69,000,000 as is shown on Respondent's Exhibit 101, or should it be charged against only 54,000,000 gallons of leased service station gallonage, as shown on Respondent's Exhibit or rather Commission's Exhibit 119?

Mr. Hanley: Just a minute.

I am going to face this thing right now.

It has got to be done.

The question is objected to by the respondent for the reason that, apparently, this question and numerous previous questions, as disclosed by the record, indicate that counsel for the government is concerned about the distinction between leased service stations and owned service stations. The record discloses that both groups of stations were treated as one group and the marketing cost incident to serving the same was closed into the reseller channel on respondent's accounting form 189. 5994

The issue in this case is that of the right of respondent to make a differential in price between a group buying on the basis of tank wagon deliveries including both operators running a station owned by the respondent and stations owned by the operator himself, as distinguished from a group of buyers who receive tank car or truck transport deliveries into their own storage.

The question of a difference in cost, if there be any, incident to the operations of the respondent company in respect of serving retail operators who run leased stations and retail operators who own their own stations is entirely and utterly immaterial to any issue made in this case.

If there be any question of law violation by reason of the fact that respondent has not kept its books in accordance with the views of accountants for the Commission, it becomes the incumbent duty of the Commission to specifically charge such dereliction. No such charge has been made in this case, and the only charge to which the respondent is answerable is that of a claimed improper differential as between a so-called jobber group or tank car buyer group on the one hand, as assumed from a tank wagon reseller group on the other hand.

And the effort of the government to break down and differentiate individually between the members of either 5995 of said two groups is outside of the pleadings, is not within the issues of this case, and the respondent is not required and is not obligated to respond to any such attack, and any such attack is immaterial and irrelevant.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

Mr. Hanley: If there be anything wrong in the accounting practices of the respondent—which is not conceded by the respondent—in respect of keeping the accounts of leased service stations and owned service stations as one group, rather than as two, two distinguishable groups, it does not appear from any testimony in this record that such error in sound accounting, if any there be, is not a completely compensating error, and it does not appear from anything in this record that there would be any influence at all upon the figures reflected in the exhibits offered in this case by the respondent if there had been a different method of bookkeeping used by the respondent, and if the respondent had kept books separately in respect of the leased service stations and owned service stations.

Trial Examiner Ballinger: Objection is overruled.

I believe there is a question pending. The reporter will now read it.

5996 (The reporter read the pending question as follows:

"Now, Mr. Warmack, I want to know whether in your opinion for the purposes of this cost study the expense or income of leased service station operation, in this case the expense, should be charged against the total tank wagon gallonage of 69,000,000 as is shown on Respondent's Exhibit 101, or should it be charged against only 54,000,000 gallons of leased service station gallonage, as shown on Respondent's Exhibit or rather Commission's Exhibit 119."

The Witness: The leased service station expense, that is, this $48,000 together with all other costs incident to the servicing of commission agent business—

By Mr. Austin:

Q. (interposing) Do you mean "commission agents?"

A. Not commission agents—of leased service stations customers, should be assigned to the gallonage of that class of business and from that there should be deducted the rent revenue received in order to come to a cost figure for that particular gallonage, and that answer is based upon this, if this landlord expense is to be used in the cost study or in establishing the cost differential; that is, it is my opinion that that is what should be done.

Q. You say if it should be used in establishing the
5997 cost differential?

A. Yes, sir.

Q. And I notice that Judge Hanley referred to it as a real estate profit and loss a few minutes ago.

A. Yes.

Q. Is there any question in your mind, or perhaps I should ask you what is your opinion as to whether or not this expense or profit arising from the leased service station operation as an expense or profit is an expense or profit properly chargeable to the sale of petroleum products by the company?

A. The only way I can answer that, Mr. Austin, is to say that there is some question in my mind as to whether this landlord expense should be used.

Mr. Hanley: In view of the answer of the witness indicating that he is in doubt as to what should be done with the real estate expense or profit or loss items, or whatever it may be termed, the respondent moves that the answer of the witness be stricken.

Mr. Austin: May I say a word?

Trial Examiner Ballinger: You may.

Mr. Austin: Of course, the witness says that his answer is in effect that, testifying as an accounting, or as an expert, I assume that he says that there is some question, from an accounting standpoint as to whether this class of
5998 expense is properly chargeable to the costs of sale.

Now, it may not be helpful to the Commission's case, but nevertheless it expresses the doubtful nature of this type of expense as a cost of sale. I see no reason why this should not be allowed to remain in the record. I do not see that it is harmful. Of course, the witness has not expressed himself positively and has expressed no doubt as to how it should be handled if it is used, on the other hand, and simply says that he does not know whether it should be used at all. I wish to make that clear. That is the substance of his testimony.

Mr. Hanley: Of course, we have repeatedly requested during this litigation that your Honor entertain evidence that your Honor may have had some doubt about as to its weight and value and propriety on exactly the same theory that counsel now offers, namely, that if it can do no good it can do no harm, and that if it is not any good it can be kicked out at the proper time. Your Honor has consistently ruled against the respondent on every request of that kind that the respondent has made.

I say to your Honor now that this witness says that he feels that this is a doubtful thing and he does not know what should be done with it.

Trial Examiner Ballinger: The testimony is to the effect that he is in doubt as to whether or not it should
5999 or should not be used in computing the costs.

Mr. Austin: The witness is testifying as an expert. I asked his opinion. This is his opinion. This is entirely different from asking a witness a question of fact on which he may say that he is in doubt. I do not think it is the same thing at all.

Trial Examiner Ballinger: The motion to strike is denied.

The hearing will stand in recess for five minutes.

(A short recess was taken.)

6000 Trial Examiner Ballinger: Come to order.

By Mr. Austin:

Mr. Warmack, your testimony immediately preceding has related to expenses of the respondent in the sum of some 47,000 odd dollars which were property expenses incurred in the operation of leased service stations, and which appear now in the tank wagon reseller column on Respondent's Exhibit 101.

Are all of those expenses entered in accounts which have the letters A, B or C, after the numbers in the left-hand column on Exhibit 101?

A. Yes, sir.

Q. Are there any other expenses entered in the tank-wagon reseller channel on Respondent's Exhibit 101 which in your opinion are property expenses incurred in connection with the operation of leased service stations and which should be treated in the same manner as the leased service station expenses just referred to?

A. Yes, sir, there are some other expenses.

Q. You say there are some other expenses?

A. Yes, sir.

Q. Will you state what those expenses are and in what accounts they are entered?

A. There are expenses in the 000 account which I think
in part are applicable to leased service stations. That
6001 would be a part of the salary and expense of the
superintendent of construction and the superintendent of maintenance. Of course, a part of the clerical assistants of these people, that is, these two superintendents, which appear in the 001 account are properly allocable to leased service stations. In Account 215, entitled "Expense, Salaries, Others," that is, the real estate and tax department, a good part of that goes over there according—

Q. What do you mean "over there"?

A. It goes over into the leased service station expense?

Q. Do you mean that it is a leased service station expense?

A. I mean it is there and it is not so shown on the company's regular form 189 and Mr. Boatwright's testimony was to the effect that these men were concerned with real estate and tax problems—at least to some extent, maybe largely, with the leased service station properties of the company.

Q. By "these men", do you mean the men in the real estate and tax department?

A. Yes, whose salaries are shown in Account 215. Now, there is a cost in Account 506 entitled "Losses by dismantling, abnormal, other than E. L. A." I believe that that is an expense that is properly assignable to leased service stations.

Trial Examiner Ballinger: All of it?

6002 The Witness: At least for the most part.

Account 514, the account entitled, "Losses by Dismantling—out of pocket expense—other than E. L. A.," I think that is also an expense which is applicable at least for the most part to the leased service stations of the company. That is probably the most of them, Mr. Austin. What I mean by the most of them is that I believe that those expenses are incident to the landlord activities, that is, of operating or maintaining and leasing this property.

By Mr. Austin:

Q. Are those expenses to which you have referred in accounts 000, 001, 215, 506 and 514 expenses of the same nature in your opinion as the expenses entered in the leased service station column on respondent's regular accounting form 189?

A. The same or very similar, sir.

Q. What do you mean by very similar?

A. Taxes couldn't be identical to salaries.

Q. We haven't discussed taxes, have we?

A. No. We have an item on here of taxes, and I just made that as an illustration when you asked me what I meant by "similar."

Q. Oh, I see.

A. Taxes wouldn't be identical with salaries.

Q. Are those expenses which you have referred to in the five accounts just enumerated expenses which in 6003 your opinion are incurred in connection with the real estate operation of the leased service station properties by the respondent?

A. Yes, sir, I believe that Mr. Boatwright's testimony will bear out that fact.

Q. And let me ask you further whether in your opinion, Mr. Warmack that portion of the five accounts just enumerated, which you have stated to be a leased service-station expense and which is entered in the tank-wagon reseller channel on Respondent's Exhibit 101 is properly chargeable for the purposes of this cost study to the entire 69,301,000 gallons of gasoline in the tank-wagon reseller channel?

A. In my opinion they are not properly applicable to all of that gallonage, no, sir.

Q. To what part of that gallonage, if any, are they applicable?

A. They are applicable only to that part of the gasoline which is sold to leased service stations.

Q. And is any of those expenses properly chargeable in your opinion to the non-leasee service station gallonage?

A. That portion which is properly assignable to the leased service station is not properly assignable to the non-lessee service station business.

Mr. Austin: I would like to have this paper marked for identification, please.

Trial Examiner Ballinger: The reporter will mark 6004 the paper Commission's Exhibit 130 for identification.

(The document referred to was marked Commission's Exhibit 130 for identification.)

By Mr. Austin:

Q. Mr. Warmack, can you identify the contents of Commission's Exhibit 130 for identification? First let me ask you whether you prepared that exhibit?

A. Yes, sir, I had this prepared.

Q. And will you state what it is?

A. It represents or it is a statement showing analysis of charges to marketing expense account of losses by dismantling (other than E. L. A.) for the Detroit field for the year 1940.

Q. I wish you would state with some particularity just how you obtained those figures and what they represent, where they came from?

A. These figures were secured in my field investigation earlier this year in the company's offices, and show the respondent company's designated number of its filling stations in the first column, the location of the filling station in the second column, the original cost of the capital investment which was dismantled in the third column, the amount of depreciation which had been charged off by the company previous to the date of dismantling in the fourth column, the net difference 6005 between the original capital investment and the amount of depreciation charged off is shown in the last column, which is marked "Net Loss to Marketing Expense," the column aggregating $24,156.57, which is the same figure as shown in the column entitled "Total Petroleum Products" on Respondent's Form 189 in the Detroit field for the year 1940 opposite the account marked Account 506, entitled "Losses by Dismantling—Abnormal—other than E. L. A.".

Trial Examiner Ballinger: Commission's Exhibit 130 for identification covers the year 1940, does it?

The Witness: Yes, sir.

(There was a discussion off the record.)

By Mr. Austin:

Q. What is the nature of this expense which is described on the forms as "Losses by Dismantling—Abnormal—Other than E. L. A.," Mr. Warmack?

A. Various costs of properties at these service stations which were dismantled and replaced in the year 1940, or maybe not replaced.

Q. How was the expense incurred? Tell us what happens? What gives rise to it? What does the company do when they incur that type of expense, if you know and have ascertained that from the result of your investigation?

A. I think that is properly shown at the bottom of the exhibit which reads: "This loss represents loss sus-
6006 tained on Capital Assets at service stations which were entirely dismantled and rebuilt into combination service and greasing stations during the year 1940."

Q. Where do you obtain that information?

A. I obtained that information from the company's office in my field study.

Trial Examiner Ballinger: You mean from the company's books and records?

The Witness: Or from people that I contacted in the office, your Honor. I don't know that I saw this statement on any book. Some of them told me that.

By Mr. Austin:

Q. Did you discuss that expense with some of the company's employees?

A. Sure.

Q. Do you know with whom you discussed it?

A. I can probably tell from my records on this Account 506, Mr. Austin:

Q. Just—

A. I don't have it in my mind. I discussed these things with many, many people—or several people. Mr. Houghton was the principal contact man—Mr. Bath in the Detroit office, Mr. Houghton also in the Chicago office.

Q. Where did the figures in the column entitled "Original Costs of Capital Investment" come from?

6007 A. They came from the records of the company.

Q. Where?

A. Detroit.

Q. And where did the figures come from in the next column which is entitled "Amount of Depreciation Charged Off"?

A. From the company's regards in Detroit.

Q. And the last column entitled "Net Loss to Marketing Expense," how are those figures arrived at?

A. By deducting the amount of depreciation charged off up to the time of dismantling from the original cost of the capital investment in each instance.

Q. Is the Total Net Loss to Marketing Expense shown on Exhibit 130 for identification in the sum of $24,156.57 shown on Respondent's Exhibit 101?

A. Yes, sir.

Q. Where does that appear on Respondent's Exhibit 101?

A. In the column entitled "Total Petroleum Products," opposite Account No. 506 entitled "Losses by Dismantling—Abnormal—Other than E. L. A."

Mr. Austin: I offer in evidence Commission's Exhibit 130 for identification.

Mr. Hanley: If your Honor please, the exhibit is objected to because it is now apparent that it is immaterial. The result of the exhibit, as testified to by the witness, is shown on Respondent's Exhibit 101. It now
6008 appears from the testimony of the witness that Commission's Exhibit for Identification 130 is merely a breakdown of the items which make up a total which go into a figure on Respondent's Exhibit 101, and such breakdown has no probative value of any kind or character so far as is disclosed by any testimony so far in the record.

(There was a discussion off the record.)

Mr. Austin: The witness has testified that in his opinion the expense going into Account 506 is wholly or largely a leased service station expense. The purpose of this exhibit is to show that the expense in that account is entirely a leased service station expense and therefore should have been so treated, instead of being spread between bulk plant channels on a different basis on Respondent's Exhibit 101.

The importance of the exhibit is not in the figures as much as it is in the description of the expense itself and the showing that these expenses were all incurred at service stations, the numbers and locations of which are listed on the exhibit.

Mr. Hanley: To that objection made by the respondent, the respondent now adds the further objection after the statement of counsel for the Commission that Commission's proffered Exhibit for Identification No. 130 merely encumbers the record, that it discloses
6009 nothing except a detailed breakdown of Item 506

appearing on Respondent's Exhibit 101, and the statement of counsel for the Government simply discloses that he is attacking the method of accounting, and Exhibit 130 adds nothing by way of probative value to the factual matter already in the record.

The witness does not indicate and the Government does not undertake to prove the influence in figures and dollars and cents that any different allocation, if any different allocation is recommended by the Government, would have on the differential established in Respondent's Exhibits 101, 99 and 100.

Trial Examiner Ballinger: Objection is overruled and Commission's Exhibit 130 is admitted in evidence.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 130 was received in evidence.)

By Mr. Austin:

Q. Now, Mr. Warmack, you referred a moment ago to Account No. 514 as also containing expense incurred by the company in connection with its real estate operation of leased service stations?

A. Yes, sir.

Q. What relation has the expense in Account 514 to the expense in Account 506, if any?

6010 A. The record shows that those two accounts are very closely related to each other. They are both incident to the dismantling of these properties that we have described.

Q. Is the expense in Account 514, the cash expenditure of the company in connection with the dismantling operations, listed on Commission's Exhibit 130?

A. That is my understanding, Mr. Austin.

Q. In other words, is it a fact that the expense listed on Commission's Exhibit 130 and entered in Account 506 is a write-off of depreciation, whereas the expense in Account 514 is a cash expense, cash outlay?

A. The latter is correct. I wouldn't say the account in 506 is a writeoff of depreciation.

Q. You describe it.

A. It is a writeoff of the excess of the capital investment of the properties dismantled over the depreciation that had previously been taken.

Q. Yes, thank you for the correction.

And, in your opinion, should the expense entered in Account 514 be or be not handled in the same way as the expense entered in Account 506?

A. In my opinion it should.

Q. And should that expense in both accounts 506 and 514 in tank-wagon reseller channel on Respondent's
Exhibit 101 be treated in the same manner as you
6011 have stated that leased service station expenses be
treated?

A. Yes, sir, it is my understanding that they are leased service station expenses, or expense incident to leased service stations.

There is one other point that I might add to that. This very class of expense, if the company so desired, might be capitalized into the new service stations; otherwise—

Q. Has that been done?

A. No, sir. Otherwise it would move over to the leased service station expense, in my opinion.

Q. If such an expense were capitalized, would it be treated as a cost of sale?

A. No, sir, but the depreciation of the property subsequent to the time of its completion would be a marketing expense.

(There was a discussion off the record.)

Mr. Austin: I move, your Honor, that we adjourn until 9:30 a. m.

Trial Examiner Ballinger: The motion is granted, and now at 5 p. m. the hearing stands adjourned, to be reconvened at 9:30 a. m., July 3, 1942, in Room 388, Federal Trade Commission Building, Washington, D. C.

(Whereupon at 5 p. m., July 2, 1942, the hearing in the above-entitled matter was adjourned.)

6012

Room 388, Federal Trade
Commission Building,
Washington, D. C.,
Friday, July 3, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Ill., appearing for the Respondent.

6013

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

This is a reconvening pursuant to notice of Docket 4389 case entitled "In the Matter of Standard Oil Company" at 9:30 a. m., Eastern Standard Time, July 3, 1942, in Room 388, Federal Trade Commission Building, Washington, D. C.

The last hearing was held at the same place July 2, 1942.

The reporter will note counsel for the Commission and respondent present.

You may proceed, Mr. Austin.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination (continued) by Mr. Austin.

Q. The first account on Respondent's Exhibit 101 is the Account 900 entitled "Salaries—Supervision."

The total amount of costs entered in that account is $51,360.21, and the testimony shows that more than one half of that expense is made up of the salaries of the field manager and the two assistant field managers in the Detroit field.

Mr. Warmack, will you state how the salaries of the

field manager and the two assistant field managers
6014 are allocated between the various channels on Respondent's Exhibit 101? Before you answer that question let me ask you whether you went into this subject during your stay in Detroit?

A. Yes, sir.

Q. In January and February?

A. Yes, sir, I did.

Trial Examiner Ballinger: By "going into it" do you mean that you made an investigation?

The Witness: Yes, sir.

By Mr. Austin:

Q. Did you prepare an outline or description of the methods of allocation used, of these salaries, in collaboration with Mr. Houghton, or did you discuss the matter with him and prepare the outline?

A. I did.

Q. And have you a copy of the outline which was prepared in Detroit?

A. I do.

Q. Was the outline or description approved by Mr. Houghton?

A. It was.

Q. I suggest, then, that your answer to my question, to my previous question as to the method of allocating these salaries, that your answer from your notes or read your notes which you say Mr. Houghton approved.

6015 Trial Examiner Ballinger: If the paper was approved by Mr. Houghton it may be either introduced as an exhibit or the witness may read it into the record.

Mr. Hanley: Of course, your Honor, we object to any offer of the notes which the witness says Mr. Houghton approved, as hearsay as to the respondent.

There is no objection, of course, to the witness using any notes that he may have to make any answer that he may want to make.

Trial Examiner Ballinger: Mr. Houghton was the representative of the respondent assigned to assist Mr. Warmack in his investigation—

Mr. Hanley: (Interposing.) Well—

Trial Examiner Ballinger: —and if Mr. Houghton approved this memoranda it would seem to be proper.

Mr. Hanley: If your Honor please, if it is Mr. Houghton's memoranda I have no objection, but if it is Mr. Warmack's memoranda I do.

Trial Examiner Ballinger: If this is Mr. Warmack's memorandum and if that memorandum was approved by Mr. Houghton, it is of equal dignity as though it had been made by Mr. Houghton?

Mr. Hanley: I agree, Judge. May I ask the witness a question?

Trial Examiner Ballinger: You may.

6016 Mr. Hanley: Did Mr. Houghton approve what you have on these typewritten sheets?

The Witness: He did.

Mr. Hanley: Will you just tell me when and where and how, Mr. Warmack?

The Witness: This document was prepared, Judge Hanley, in the Detroit office during my examination of the office records there in the month of February, 1941, and it was prepared by me, read by Mr. Houghton, and approved by him as being correct.

Mr. Hanley: Just how? Just tell us how it was approved by Mr. Houghton.

The Witness: He took the document and read it, and stated to me that the document as prepared stated the true facts:

Mr. Hanley: In view of the statement of the witness, Judge, I just have no objection.

Mr. Austin: I have not offered anything.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

The Witness: I would like to call attention to this with respect to the document that it encompasses both the methods employed in the respondent company's regular accounting practice, and also methods employed in 6017 the segregation of costs in the late cost survey, and the first paragraph having to do wholly with the regular accounting procedure of the company; now, is it desired to have it read into the record with respect to both?

Mr. Austin: I think we are all getting away from the point here which was involved in the question. I simply brought out that he had notes that he might use. I have not asked him to read any document.

Trial Examiner Ballinger: Very well. Point that out to the witness.

By Mr. Austin:

Q. Mr. Warmack, I think you are getting a little away from the point here that was included in my question to you. As stated before, I simply brought out that you had notes that you might use but I have not asked you to read any document into the record. I want you to use those notes to answer my question, which the reporter may re-read.

A. I can answer the question.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Mr. Warmack, the method of allocation used in the first three expense channels of Respondent's Exhibit 101 is the same as that used by respondent in its regular 6018 accounting procedure, is it not?

A. Yes, sir.

Q. Then, if your answer to my question involves a statement of the regular accounting procedure of respondent, in your opinion is that necessary to describe the allocation between channels on Respondent's Exhibit 101?

Mr. Hanley: Just a moment. May we be off the record?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. In other words, do you have to describe the regular accounting procedure in order to describe the allocation procedure on Exhibit 101?

A. Yes, sir. I do.

Q. Well now, can you go ahead and describe how the managers and assistant managers' expenses are allocated between channels on Respondent's Exhibit 101?

A. Yes, sir.

Q. Mentioning the regular accounting procedure if you think it is relevant.

A. Yes, sir.

Trial Examiner Ballinger: Are you confining your answer to the memorandum which you prepared and 6019 had approved by Mr. Houghton?

The Witness: Yes, sir.

Trial Examiner Ballinger: Proceed.

The Witness: Reading:

Standard Oil Company of Indiana, Docket 4389.

Allocation of Manager's compensation and expenses in the Detroit Field.

In the regular accounting procedure of the company, the compensation paid to the manager is included in Account 000, together with the compensation of other supervisors in the field, and the total amount is then proportioned between the tank wagon reseller channel, tank wagon consumer channel, and other methods channel, on company's Account Form 189 at the end of each month on the basis of tank wagon gallonage sold in the respective channels.

An effort was made to segregate that portion of the manager's cost which was applicable to the direct shipment business for the year 1940. In this connection, the company's accountants made a review of the manager's files and expense book for the year 1940, and, as a result it was their findings that 1.355 per cent of the manager's entire working time was devoted to direct shipment busi-
6020 ness, all of which was shown as applicable to sales of naphtha, gasoline and refined oil to jobbers. The amount arrived at by the use of this percentage was regarded as direct costs or direct time of the manager applicable to said business.

Certain indirect time of the manager in the Detroit field was also regarded by the company as applicable to the direct shipment business, and the costs of this indirect time so applicable were arrived at as follows:

The total number of working hours for all of the employees in the division was determined by multiplying the number of company employees by 2,048 working hours in a year. In addition to this, the number of hours for all of the employees in the division devoted to direct shipment business was determined by time studies and analyses.

This direct shipment time was then expressed as a portion of the total working time according to the three direct shipment channels. By applying this percentage to the residual salary remaining after deducting that portion of the manager's compensation applicable to direct shipment business as explained above, the supervision cost was obtained. The total of these two costs made up the expense of the manager's salaries appli-
6021 cable to direct shipment business by channel.

After deducting the total direct and indirect costs —that portion of manager's compensation which had been pplied to direct shipment business—the residual amount all of the compensation remained in the regular tank agon reseller channel, tank wagon consumer channel nd other methods channel in the manner in which it had een first applied, that is on a tank wagon gallonage basis. he amounts allocated to the direct shipment business in ne company's recent cost survey, were calculated by onths for the reason that the deductions were made from ne various tank wagon channels on a gallonage basis by onths.

y Mr. Austin:

Q. I note from your answer, Mr. Warmack, that you escribed only the method of allocation of the field manaer's salary. My original question was devoted both to the llocation of the salaries of the manager and of the two eld managers, so that in order to clarify that point, Mr. Varmack, was there some difference in the way that the alaries of the assistant field managers were allocated?

A. Yes, sir. There was some difference, but it was long the very lines as just indicated.

Q. Well, I will come to that, but your answer was just he record of the salary of the field manager?

A. That is right. Mr. Raupagh.

022 By Mr. Austin:

Q. Will you describe the method of allocation used or the salaries of the two assistant field managers between he expense channels on Respondent's Exhibit 101?

A. Yes, sir. Each of these managers supervises a sepaate group of employees in the Detroit field. In each nstance the allocations of the salaries and expenses of hese two assistant field managers were made in a manner imilar to that of the field manager. In this connection, however, it will be noted that for the most part the respective salaries and expenses of each assistant field manager applicable to direct shipment business was allocated n the company's recent cost survey on the basis of the ime so spent by the employees immediately under their espective supervision, together with the time of all of the mployees in the Detroit field, that is, the time of employees under the immediate supervision of one assistant sales manager, together with the time of all employees in the field (except those employees under the immediate supervision of the other sales manager) devoted to direct shipment business was used as a basis of allocation.

The salaries and expenses of the assistant sales managers as well as the field managers just described were originally allocated to channels in the company's regular accounting procedure on the basis of gallonage, exclusive of direct shipment gallonage.

6023 Mr. Hanley: May I ask one question, Judge, to tie that up further?

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. Mr. Warmack, the last answer which you have given, as I understand it, is a continuation of your reading of what you say that you and Mr. Houghton agreed to to be the fact in Detroit?

A. Judge Hanley, the last answer was prepared by me. It was prepared, of course, from notes made in Detroit, but I did not prepare this answer in Detroit. I only prepared notes in Detroit. We just did not have time to prepare an answer so that Mr. Houghton could see it after it had been prepared.

Q. What I am trying to learn, Mr. Warmack, is whether or not Mr. Houghton ever approved this?

A. No; sir.

Q. You said he did approve certain things that you have testified to. Now, did he approve the last answer which you have given?

A. He did not ever see the last answer as given.

By Mr. Austin:

Q. In your opinion, are the methods of allocation which you have described as being applied to the salaries of the field manager and assistant field managers for the purpose of distributing their expense between channels
6024 on Respondent's Exhibit 101 proper or consistent methods of allocation, from an accounting standpoint, for the purpose of reaching a comparison of costs as between tank-wagon reseller costs and jobber gasoline costs?

A. In my opinion they are not.

Q. Will you explain your answer?

A. Yes, sir. In the first place, those salaries are distributed between channels in the respondent's regular accounting procedure on the basis of gallonage, exclusive of direct shipment gallonage, while in the respondent's cost study, from which Respondent's Exhibits 101 and 100 were prepared, the portion of the expense which was applied to the direct shipment business was established on a basis of effort; therefore, we have cost applied to the serving of jobbers naphtha and gasoline on the basis of effort, that is, estimated effort of employees working under them, that is under these supervisory officials in the Detroit field, as compared with an allocation of cost which was applied to the tank-wagon reseller business on the basis of gallonage.

Mr. Hanley: If your Honor please, may I ask a question as a basis for a motion.

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. Mr. Warmack, considering the answer which 6025 you have just given, did you make any calculation which resulted in an answer in figures and dollars and cents as to the influence of the calculation as indicated by you as being proper as distinguished from the calculation made and represented by Respondent's Exhibit 101?

A. Judge Hanley, I have endeavored to make calculations of that kind based on the salaries paid to the personnel working under these respective advisory officials. I had no information with respect to the hours worked by the personnel applicable to the respective channels, therefore I could not tell you what effect an apportionment on the basis of hours would have on this exhibit.

Mr. Hanley: The respondent now moves to strike the answer to the next preceding question, for the reason that the witness has now explained that he has made no calculation resulting in a reflection of the influence of his criticism on the claimed differential and is unable to state in figures or in dollars and cents what, if any, influence his criticism would have upon such differential.

Mr. Austin: Will you read the last part of the answer?

(The last part of the answer was read by the reporter.)

Trial Examiner Ballinger: Have you any opinion as to whether or not a computation on a gallonage basis 6026 would result in arriving at a different conclusion?

Mr. Hanley: Just a moment, that is objected to unless it is established that the witness has made a computation.

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

The Witness: Your Honor, I do know this, that if the whole cost of this item were separated—

Trial Examiner Ballinger: Which item?

The Witness: Salaries supervision, the 000 Account in the Detroit field, and more especially the salaries of the field manager and two assistant field managers which are a part of that account.

If these costs were separated as between all channels as shown in Respondent's Exhibit 101 on the basis of all gallonage sold, including direct shipment gallonage, it would materially change the figures as shown.

Trial Examiner Ballinger: The Examiner is prepared to rule.

Mr. Hanley: As shown where? Will you please finish that answer?

The Witness: Yes, as shown under the respective channel columns in the line opposite "Salaries—Supervision" Account 000 on Respondent's Exhibit 101.

Trial Examiner Ballinger: The motion to strike 6027 is denied.

By Mr. Austin:

Q. The Examiner asked you, Mr. Warmack, what the effect would be upon the figures in Account 000 on Respondent's Exhibit 101 if the allocation were made, as I understand it, among all channels on a gallonage basis and you stated in reply that it would materially change the figures. Did you or did you not by that intend to indicate that you would approve the use of a gallonage basis as a method of allocation of this expense?

A. I certainly did not.

Q. Now, will you refer to Commission's Exhibit 119, which is Respondent's Form 189 for 1940, and will you state what percentage of the expense in any single account would be thrown into the tank wagon reseller channel if the allocation of the expense in that account were made between the petroleum products channels on a gallonage basis?

Mr. Hanley: If your Honor please, I am going to object to that question. That assumes a fact which is not in evidence and is unintelligible. The method of allocating on Form 189 has been testified to at great length. What counsel may mean by his question, if it is different than that testimony which has been already put in the record, is objected to as unintelligible. If it means the same thing that has already been testified to, it is objected to as a repetition and an encumbrance of the record.

6028 I want to say to your Honor I just don't understand what counsel means by his question, and I believe I am entitled to understand what these questions mean.

Mr. Austin: Well, the witness has testified that this 000 Account and other accounts are allocated between the three bulk plant channels on a gallonage basis both on Exhibit 101—

Mr. Hanley: There aren't any three bulk plant channels.

Mr. Austin: I would like to have a chance to finish my statement and, if counsel doesn't agree with me, that is something that is beside the point, I think, for the purpose of explanation.

Trial Examiner Ballinger: There will be no further interruption until counsel has concluded.

Mr. Austin: Will you read my statement as far as I went?

(The statement referred to was read by the reporter.)

Mr. Austin: —and in the company's regular accounting procedure, an allocation on a gallonage basis means an allocation of expense according to the number of gallons in each channel, therefore that means on a gallonage basis a certain portion of the expense in any account so allocated would fall into each channel.

6029 My question to the witness was that when a gallonage basis is used on Form 189 for 1940, what percentage of the expense in any account so allocated is thrown into the tank-wagon reseller channel?

Mr. Hanley: May I now refer to counsel's remarks, your Honor?

Trial Examiner Ballinger: You may.

Mr. Hanley: The respondent directs the attention of the Court to the fact that the premise of counsel is entirely erroneous, in that he refers to three bulk plant channels. There are not and never have been in the accounting procedures of the respondent, or reflected on any accounting exhibits of the respondent, any three bulk plant channels. The respondent has offered its Accounting Form No. 189, which divides products and methods of delivery as between different classes of customers, but never has respondent offered any testimony nor is it the fact that there are three or more than one bulk plant channels.

Trial Examiner Ballinger: The objection is overruled.

(There was a discussion off the record.)

Trial Examiner Ballinger: You may proceed. You may answer.

A. The answer is 65.08 per cent.

By Mr. Austin:

6030 Q. Now, is that answer an approximation based upon the gallonage falling into each of the three bulk plant channels on an annual basis as shown by company Form 189?

A. Yes, sir, for the year 1940.

Q. Would it follow that the actual allocation of expense on a gallonage basis would throw exactly that percentage into the tank-wagon reseller channel?

A. No, sir, it would not, for the reason that the company allocates its costs, that is, those costs which it allocates on a basis of gallonage, by the month. That is the monthly gallonage, and sometimes the costs are a little higher in any one month, but the gallonage varies from month to month.

Q. Would that be substantially the amount that would fall into the tank-wagon reseller channel on an annual basis?

A. On an annual basis—

Mr. Hanley: Just a minute, that is objected to as an indefinite question, in that counsel has not stated what figure he is referring to.

Mr. Austin: 65.08 per cent.

Mr. Hanley: And he has not indicated which channel on Respondent's Form 189 he is referring to, and he has erroneously referred to three bulk-plant channels on Form 189 which do not exist and which the testimony does not support.

Mr. Austin: For the benefit of counsel for the 6031 respondent, Respondent's Exhibit 104 has three channels over which appears the title "Distribution Through Company Bulk Plants." One of those is tank-wagon reseller, another is tank-wagon consumer, and the third is the other-method channel and, if I refer to bulk-plant channels hereafter, I will be referring to those three channels under the title just quoted from Respondent's Exhibit 101.

Trial Examiner Ballinger: And you so referred to them in your previous questions?

Mr. Austin: Yes.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed. The objection is overruled.

(The question was read by the reporter as follows: "But would that be substantially the amount that would fall into the tank-wagon-reseller channel on an annual basis?")

The Witness: Yes.

By Mr. Austin:

Q. Will you turn again to Commission's Exhibit 119, Form 189 for the year 1940, Account 004, "Salaries Salesmen"? What portion of the expense in that account is entered in the tank-wagon reseller channel?

A. 29.19 per cent for the year 1940.

6032 Q. And in Account 021, "Commissions," what percentage of the expense in that account is in the tank-wagon-reseller channel?

A. 26.96 per cent for 1940.

Q. In Account 006, "Salaries—Drivers," what per cent of that expense in that account is entered in the tank-wagon reseller channel?

A. 49.32 per cent for 1940.

Q. And what per cent of "Warehouse Labor Expense" is entered in the tank-wagon-reseller channel?

A. 29.46 per cent for 1940.

Q. What percentage of the—

Mr. Hanley: May I ask a question, your Honor?

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. Have you calculated the percentages which you are talking about?

A. They were calculated by employees at the Commission's offices who were working under my supervision and direction, sir.

Q. The percentages that you are testifying to do not appear on the exhibit; is that true?

A. That is true, sir.

Mr. Hanley: That is all.

Trial Examiner Ballinger: Did you check the computations made by your subordinates?

6033 The Witness: Yes, sir; I made checks of them.

By Mr. Austin:

Q. What portion of the expense in Account 206 entitled "Office Expense—Salaries, accounting" is entered in the tank-wagon-reseller channel on Commission's Exhibit 119?

A. 38.68 per cent for the year 1940.

Q. Are those accounts that I have just referred to the principal salary accounts on Respondent's Form 189, other than Accounts 000 and 001?

A. Yes, sir.

Q. Then, Mr. Warmack, if the salary expense of the field manager and assistant field managers and their assistants in Accounts 000 and 001 were allocated between all channels on Respondent's Exhibit 101 on the basis of distribution or effort of the employees supervised, would such an allocation, or would it not, materially reduce the amount of that supervisory salary expense going into the tank-wagon-reseller channel?

Mr. Hanley: That is objected to, for the reason that no proper foundation has been laid. It has not been shown that this witness has ever made any calculation of any kind which would enable him to answer the question.

Trial Examiner Ballinger: The objection is overruled.

The Witness: Read that question, please?

6034 (The question referred to was read by the reporter.)

A. It would materially reduce it. That assumes that the percentages as just given of the salaries would properly represent percentages of effort. We have just been talking about percentages of actual compensation paid to employees, and that assumes that the compensation follows the effort.

By Mr. Austin:

Q. In your opinion, does the distribution of salary expense in the salary accounts which you have just referred to between the channels on Company Form 189 for 1940 indicate approximately the distribution of effort between those channels?

A. I should think that it should, Mr. Austin; in other words, I should think that compensation should follow effort.

Trial Examiner Ballinger: What do you mean by "I should think"? Do you mean that is your best judgment?

The Witness: Yes, sir, that is my best judgment.

By Mr. Austin:

Q. Do you think it does, from your study of the company's accounting procedure?

A. Yes, sir, I think that it does.

By Mr. Austin:

Q. But, as I understand it, your answer to my question regarding the effect of a distribution of effort allocation in the top two accounts was based upon the assumption that the distribution of salaries between the 6035 channels in the regular accounting procedure indicates distribution of effort and that effort would follow salaries; is that correct?

Mr. Hanley: Oh, that calls for a conclusion and opinion of the witness as to what the account shows.

Mr. Austin: I am asking specifically—

Mr. Hanley: Or whether it is based upon compensation for effort or otherwise. The exhibit speaks for itself. It indicates what is allocated to each expense.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

Mr. Hanley: I will add to that objection, if your Honor please, that now the question of counsel assumes by counsel what the witness had in his mind by way of an assumption when he answered the question.

Mr. Austin: Your Honor, I will consent that the question be stricken, because I was simply trying to paraphrase what I understood the witness had already testified to, and I think his previous testimony is sufficient.

Trial Examiner Ballinger: The question is stricken or withdrawn.

6036 Mr. Hanley: You went just a little bit too fast.

Mr. Austin. I would like to move—

Trial Examiner Ballinger: Just a moment. This will be off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: Respondent now moves to strike from the record the testimony of the witness in respect of the several preceding questions, in which the witness has undertaken to indicate the figurative influence of his theories, for the reason that it now appears from the testimony of the witness that he has never made any calculation and has never undertaken to determine what the influence, figuratively, of his theories may be upon the records and accounts of the respondent as offered in evidence.

Trial Examiner Ballinger: The motion is denied. We will take a recess for five minutes.

(Whereupon, at 11:15 a. m. a short recess was taken.)

Trial Examiner Ballinger: We will come to order.

By Mr. Austin:

Q. Mr. Warmack, you have pointed out that the allocation of the salary expense of the field managers and assistant field managers, and their assistants, in Account 000 and 001, on Respondent's Exhibit 101, was allocated to direct shipment channels on the basis of the ratio of the number of hours of all of the employees under 6037 their supervision devoted to direct shipment business, and against the total hours of those employees. Is that correct?

A. Yes, sir.

Q. In your opinion is the use of hours of service of employees supervised a proper basis of allocation of the salaries of these three top supervisory officials?

A. Well, I question this method of allocation to this extent—

Mr. Hanley: Now, Judge, may the witness just answer that question?

Trial Examiner Ballinger: Can you answer the question and then offer any explanation you may desire?

The Witness: I will have to have the question read.

(The reporter read the question as above recorded.)

A. Well, I will just have to answer it in this way, your Honor.

Trial Examiner Ballinger: Can you answer it yes or no?

The Witness: No, sir.

Trial Examiner Ballinger: Then you may answer it in your own way.

A. The allocation based on number of hours of effort of employees working under the respective supervisory officials, in my opinion, should be studied with the thought in mind that some of the employees may be receiving very small salaries, receiving certain amounts of super- 6038 vision directly or indirectly, while other employees receive very large salaries by comparison, receiving greater supervision, and I think that these factors would have to be gone into through some study before it could be said conclusively that the number of hours for all of the employees working under the respective supervisory officials, could be used as allocation factors.

I believe that answers the question.

Mr. Hanley: May I ask a question now, your Honor?

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. Mr. Warmack, did you make any study or analysis of the time and effort, and the salaries involved, of the employees working for the supervisory officials concerning whom you testified in your last answer?

A. I made a review of the record, Judge Hanley, in the Detroit office, to determine what the range of salaries of the various employees was, bearing in mind that equal hours were assigned to each employee in each instance.

Q. In dollars and cents and in figures, will you express your criticism of the accounting of the respondent, as reflected by the Respondent's Exhibit 101?

A. I will not. I can not.

Mr. Hanley: That's all.

6039 In view of the last answer of the witness, respondent now moves to strike the answer of the witness to the third preceding question, in view of the fact that he has not made any study and does not know factually what the results of his theory would be figuratively and in dollars and cents, even assuming that the theory of the witness is an acceptable one to the court.

Mr. Austin: Your Honor, on the question of ruling upon that motion, I would like to ask you to defer your ruling until I ask the witness some more questions.

Trial Examiner Ballinger: The ruling will be deferred.

By Mr. Austin:

Q. Does the allocation of salaries of the field manager and assistant field manager between channels on the basis of time of employees supervised, give the same weight to time of clerks, office boys, janitors and so forth, in the lower salary brackets as is given to the time of higher salaried employees, such as the sales promotion manager and the accounting supervisors, with whom the field manager and assistant field managers work directly?

A. Yes, sir.

Q. In your opinion is an allocation of supervisory expense upon the basis of the allocation of salaries of employees supervised, from an accounting standpoint a more
or a less acceptable method than an allocation of
6040 such expense upon the basis of the time allocation of
the employees supervised?

Mr. Hanley: Just a moment, please. Will you read the question?

(The reporter read the question as above recorded.)

Mr. Hanley: The question is objected to by the respondent as being entirely unintelligible, and if answered would be answered on the basis of whether or not something or other, not clearly expressed in the question, would be more or less something or other.

Trial Examiner Ballinger: Does the witness understand the question?

The Witness: Yes, sir, I understand the question.

Trial Examiner Ballinger: Objection overruled.

A. I can answer the question best by an example, your Honor, if I may recite one.

Mr. Hanley: Respondent objects to the witness reciting any examples, and requests that the witness answer the question.

Trial Examiner Ballinger: You may first answer the question and then, if you desire to illustrate it, you may do so.

The Witness: Very well, sir.

Trial Examiner Ballinger: Have you the question
clearly in mind?

6041 The Witness: I do, yes.

A. Supervisory salaries and expenses, in my opinion, ordinarily should follow the effort of the person supervised. That would mean this, your Honor: Where a salesmanager had a group of salesmen working immediately under him, then it is my feeling and conviction that that salesmanager's salary, expenses, and so forth, should be allocated and apportioned in accordance with the weight that the combined effort of these employees working under him should be apportioned, assuming, of course, that reasonably equal supervision is exercised over the group.

But to carry that one point further in the case of a field manager, who is over every employee, numbering probably hundreds—anywhere from charwomen up to high executives—then I think that a study should be given and weighted factors should be considered in connection with allocating the field manager's costs on the basis of the total hourly effort of every employee in the field.

Therefore it would be necessary, in my opinion, to consider the salary difference of these greatly different classes of employees, that is, salary differences between office boys, charwomen and such classes of employees, as compared with the higher executives, who are working also under the field manager.

By Mr. Austin:

6042 Q. Was any consideration given to differences in salaries of employees supervised, in the allocation to direct shipment channels made of this expense on Respondent's Exhibit 101?

A. I was informed by Mr. Houghton that there was none.

Mr. Hanley: Will you please answer that yes or no, if you know?

Mr. Austin: I object to that, your Honor. I think the answer was responsive.

Trial Examiner Ballinger: The answer, in the opinion of the Examiner, was responsive, the witness stating the source of his knowledge and information.

By Mr. Austin:

Q. One question further, Mr. Warmack. If the expense, salary expense, of the field manager and assistant field manager had been allocated between channels on Respondent's Exhibit 101 on a basis of distribution of the salaries of employees supervised, would that have resulted in a material reduction in the amount of expense going into the tank wagon reseller channel?

Mr. Hanley: That is objected to as no proper foundation having been laid. There is no evidence to the effect that the witness has made any calculation of any kind which would permit him to answer the question.

By Mr. Austin:

Q. Have you made such calculation, Mr. Warmack, 6043 using the principal salary accounts as a basis for the calculation?

A. Yes, we have made a calculation of that kind.

Q. Can you answer thte question—

Mr. Hanley: Just a minute. There is an objection pending.

Trial Examiner Ballinger: Objection overruled.

Mr. Austin: Will you read the question? The second question back.

(The reporter read the question as follows:)

"Q. One question further, Mr. Warmack. If the expense, salary expense, of the field manager and assistant field manager had been allocated between all channels on Respondent's Exhibit 101 on a basis of distribution of the salaries of employees supervised, would that have resulted in a material reduction in the amount of expense going into the tank wagon reseller channel?"

By Mr. Austin:

Q. Can you answer that yes or no?

A. The answer is "Yes."

Trial Examiner Ballinger: Will you read the several questions and answers beginning with Mr. Austin's question on the allocation of supervisory expense?

(The reporter read the questions, answers, and colloquy beginning with:

"Q. In your opinion is an allocation of 6044 supervisory expense upon the basis of the allocation of salaries of employees supervised, * * *" and ending with "would that have resulted in a material reduction in the amount of expense going into the tank wagon reseller channel?"

By Mr. Austin:

Q. Can you answer that yes or no?

A. The answer is "Yes."

Trial Examiner Ballinger: This is off the record.

(Discussion off the record.)

Trial Examiner Ballinger: The motion to strike is denied.

By Mr. Austin:

Q. Mr. Warmack, you have also stated that the supervisory salaries in Accounts 000 and 001 on Respondent's Exhibit 101 is allocated between the three bulk plant channels on a gallonage basis?

A. They were.

Q. Now supposing, Mr. Warmack, that all the gallonage basis including direct shipment gallonage had been used to allocate the expense between the six petroleum products channels on Respondent's Exhibit 101, would such an allocation result in affording any cost differential between the expense going into the tank wagon reseller and the expense going in the jobber naphtha and gasoline account?

6045 Mr. Hanley: That is objected to for the reason that there is no proper foundation laid, it not being indicated that the witness has ever made any calculation which would permit him to answer the question. That is all.

Trial Examiner Ballinger: Have you made any calculation?

The Witness: Sure.

Trial Examiner Ballinger: Objection overruled.

Mr. Hanley: In view of the question of the Court and the answer of the witness thereto, may I ask another question, your Honor?

Trial Examiner Ballinger: You may.

Mr. Hanley: You have just stated, in answer to the question of the Court, that you have made a calculation. Will you please produce it?

The Witness: I do not have such a calculation with me right here. I can produce it in a very short time.

Mr. Austin: Your Honor, this question is whether the gallonage method of allocation would afford a cost differential. I submit that that is a question that the witness can answer as to this account or any other account, without any calculation.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

6046 Trial Examiner Ballinger: Proceed.

Mr. Hanley: Respondent insists that if the witness has made the calculation, as he has now indicated he has done, that the same is the best evidence, and respondent insists upon production of such calculation.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

Mr. Austin: May I add to that question?

Trial Examiner Ballinger: You may.

By Mr. Austin:

Q. By "cost differential" Mr. Warmack, I mean would it afford any difference in the unit cost or per gallon cost as between those two channels?

A. No, sir. You—

Mr. Hanley: (Interposing.) Just a moment.

Trial Examiner Ballinger: Just a moment.

The Witness: I beg your pardon.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

Mr. Hanley: I would appreciate a ruling.

Trial Examiner Ballinger: The request by counsel for respondent for the production at this time of the
6047 calculation, is denied. The Examiner considers it unnecessary to enable the witness to answer the question.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

The Witness: May I hear the question read?

(The reporter read the question as follows:)

"Q. Now supposing, Mr. Warmack, that the all-gallonage basis including direct shipment gallonage had been used to allocate the expense between the six petroleum products channels on Respondent's Exhibit 101, would such an allocation result in affording any cost differential between the expense going into the tank wagon reseller and the expense going into the jobber naphtha and gasoline account?

"By 'cost differential' Mr. Warmack, I mean would it afford any difference in unit cost or per gallon cost as between those two channels?"

The Witness: It certainly would not.

By Mr. Austin:

Q. Does the use of a gallonage, all gallonage method of allocation of any expense, Mr. Warmack, mean that the same amount of expense is assigned to each gallon sold?

A. Yes, sir.

6048 Q. Is it necessary to make a computation of the allocation of any expense between customers, or products, or channels, to determine that such allocation would afford no difference in unit cost per gallon as between different customers, or different products, or different channels?

Mr. Hanley: Just a moment. Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

Mr. Hanley: Do you understand that question, Mr. Warmack?

The Witness: I would like to hear it read again.

Mr. Hanley: First, the question is objected to as unintelligible, asks for a conclusion of the witness as to the necessity of a computation concerning facts, figures, and records, data, and accounts, concerning which he has made no investigation, and assumes to permit the witness to make a conclusion of accounting fact which is without any foundational basis.

Trial Examiner Ballinger: Objection overruled.

The Witness: May I hear the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I will have to ask Mr. Austin to make a little further explanation or to give me a little
6049-50 further information as to just what you want.

By Mr. Austin:

Q. I have asked you that as a general question.

A. I do not understand it.

Mr. Austin: Well, if the witness does not understand the question I will withdraw it.

Trial Examiner Ballinger: The question is withdrawn.

Mr. Austin: I will approach it again.

By Mr. Austin:

Q. Is it necessary for you to make an actual allocation of expense between different classes of customers or products on a gallonage basis in order to determine whether such a computation would result in a difference in cost per gallon?

Mr. Hanley: Just a moment. That is objected to as a question which propounds to a witness an interrogatory as to what is necessary for him to do in some theoretical situation. The inquiry here is concerned with what the respondent did.

Trial Examiner Ballinger: Do you understand the question?

The Witness: Read it to me.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

6051 The Witness: You say "computation" in one place and now you say "allocation" in another. I do not understand the question.

Mr. Austin: I do not care to press that further. I withdraw the question.

Trial Examiner Ballinger: Question withdrawn.

Mr. Austin: If the Examiner please, it is now 12:30. I move the Examiner that, under the circumstances, we stand in recess until 2 o'clock.

Trial Examiner Ballinger: The motion of counsel for the Commission is granted and now at 12:30 o'clock p. m. the hearing stands in recess until 2 p. m.

(Whereupon, at 2 p. m., a recess was taken until 2 p. m. this day.)

6052 Afternoon Session.

2 p. m.

Trial Examiner Ballinger: You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination (continued) by Mr. Austin.

Q. Regardless of what method of allocation or apportionment is applied to the supervision salary expense in Accounts 000 and 001 for the purpose of distributing that expense between the channels on Respondent's Exhibit 101, what is your opinion as to whether the method used should be applied to the entire expense for the purpose of distributing it among the entire six channels?

Trial Examiner Ballinger: Do you understand the question?

The Witness: Yes, sir, I understand the question. In the case of this expense—and if I may, your Honor, I would like to limit it to this expense—

Trial Examiner Ballinger: Answer limiting it to this expense now.

The Witness: To this expense?

Trial Examiner Ballinger: In response to the question.

The Witness: Yes, sir.

6053 I think from the standpoint of sound accounting that there should be a consistency in its allocation to every channel.

That means this, your Honor: if these expenses included in these two accounts are to be assigned and used for the purpose of establishing a cost differential and, if you were going to use, we will say, measuring factors established on a basis of effort, for example, then, that effort factor, that measuring factor based on effort should be applied to the costs in every channel, in order to arrive at a cost differential.

Trial Examiner Ballinger: In other words, if it is used as to one, it should be used as to all?

The Witness: Yes, sir, for consistency's sake, bearing in mind, your Honor, that if you were to use a gallonage factor all the way across, you would have no cost differential and, if a cost differential can be established in this account, then you must follow consistent methods all the way across in every channel in applying the parts or the portions of these classes of expense which should go in each channel.

Mr. Hanley: The respondent moves to strike the answer of the witness on the ground and for the reason that it is immaterial and irrelevant and for the reason that there is nothing in the testimony by this witness or by any witness which indicates that there has been any different 6054 method of accounting employed than that which the witness indicates as in his judgment is a proper method of accounting.

Further, that if the method of accounting indicated by the witness in his testimony is any different than that method employed by the respondent in building its exhibits offered in this case, the differences, if any, are not demonstrated by the testimony of this witness, and his testimony has no probative value.

Trial Examiner Ballinger: The motion to strike is denied.

By Mr. Austin:

Q. Would what you have just said regarding the necessity for applying the same method of allocation to the entire expense of an account in distributing it between channels for the purposes of this cost study apply to all of the other accounts listed on Respondent's Exhibit 101 as well as to Account 000 and 001?

A. Yes, sir.

Mr. Hanley: Just a minute. That is objected to as calling for a conclusion and opinion of the witness, it not appearing that the witness has made any study of the separate accounts referred to in the question, and it not appearing that the several accounts referred to in the question are in the same category even in the judgment of the witness.

6055 Trial Examiner Ballinger: Do you desire to ask any qualifying questions?

Mr. Austin: Well, I think, your Honor, that isn't necessary, because this is a general question which asks him whether, as to any account here distributed between six channels of this cost study, Respondent's Exhibit 101, the same method should be applied to all of the expense in that account in allocating it.

While I recognize that different methods might be used in one account than in another, I am simply asking him here whether the method which is applied to an account should be applied to the entire expense and not merely to part of it.

Trial Examiner Ballinger: And his answer is to be based upon the result of his investigation or inquiry into the accounts of the respondent company.

Mr. Austin: No, his answer is to be based upon his knowledge of sound accounting procedure and his study and examination of Respondent's Exhibit 101 and the supporting data; in other words, I am not asking about any particular figures. I am asking him about sound accounting, as to which I think he is qualified.

Trial Examiner Ballinger: The objection is overruled.

The Witness: Yes, sir, would be the answer to that question, with this explanation, that consistency 6056 should be followed in the allocation and separation in apportioning any account to any customer or product classification in cases where joint costs are involved.

It might be found in the case of an intensive cost study in many accounts where joint costs are involved, that some parts of those costs may bear greater to one class of customers, or to one class of products than they would to other classes of customers and other classes of products, but in order, your Honor, to arrive at a proper basis, in my opinion, it is necessary and will be necessary, in analyzing any account where joint costs are involved, to make a detailed study and analysis of that class of expense, of the factors influencing that cost, how much they are influenced by each class of customers or classes of groups of products, and when that is done you will have made a full accounting for everything in the account.

For example, if your account is $1,000 and you have made these studies as I have just outlined you will have arrived at a measuring factor for the allocation of the total $1,000 into the channels or any groupings that you so desire to separate it, but you must give thought always to the fact that a high degree of consistency must be maintained at all times.

Mr. Hanley: Have you finished, Mr. Warmack?

The Witness: Yes.

6057 Mr. Hanley: The respondent moves to strike the answer of the witness for the reason that he has indicated in his answer that it is necessary to make a detailed cost study in order to determine the accuracy of the allocations as made in any of respondent's exhibits, and for the further reason that it appears that the witness has not made such detailed cost study; further that the witness in his answer uses a hypothetical example which is not related to or predicated upon any factual basis arising out of this lawsuit and which could have, had the witness so desired, been predicated upon actualities and actual figures relative to the business of the respondent; further that the answer of the witness is purely speculative, conjectural, and theoretical, and has no probative value whatsoever in this case.

Trial Examiner Ballinger: The motion to strike is denied.

By Mr. Austin:

Q. You spoke a moment ago about joint costs. Is there a distinction between joint costs and direct costs?

A. Yes, sir.

Q. In your answers to my two previous questions were you referring only to joint costs or were you referring to direct costs as well?

Mr. Hanley: Off the record.

(There was a discussion off the record.)

6058 Mr. Hanley: The question is objected to for the reason that it does not appear on the record that this witness has ever indicated what, in his opinion, is the distinction, if any, between "Joint Costs" and "Direct Costs."

Mr. Austin: I would like to ask the Examiner whether in his opinion the witness should be required to define those terms before he can answer my question, and I would like to call attention in that connection to the fact that in Respondent's Exhibits 99 and 100 there is repeated reference to certain costs being charged directly and other costs being allocated between different channels. I am sure that Respondent's Exhibits 99 and 100 don't define those terms either, but at the same time I have no objection to Mr. Warmack giving a definition.

Trial Examiner Ballinger: For the purposes of clarity of the record, the witness may state what the distinction is between the two terms "Joint" and "Direct"?

The Witness: A direct cost is a cost which can be positively and directly applied to a product or to a class of products or to a customer; that is, the cost of serving one customer and the cost of serving a group of customers.

I am speaking, your Honor, from the standpoint of distribution cost accounting and not manufacturing cost accounting.

6059 A joint cost is a cost which applies in part to two or more customers, that is, the serving of two or more customers, two or more groups of customers, to the merchandizing activities where two or more kinds of classifications of products are merchandized.

The joint costs, when applied to the separate classes as just enumerated, involve and require the establishing of measuring factors for their separation, whereas the direct costs require no such measuring factors. That is the distinction.

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

Read the question.

(The question was read by the reporter as follows: "In your answers to my two previous questions were you referring only to joint costs or were you referring to direct costs as well?")

The Witness: I was referring to joint costs, Mr. Austin.

By Mr. Austin:

Q. May there be direct costs and joint costs in the same expense account, referring to these accounts on Respondent's Exhibit 101?

Mr. Hanley: That is objected to as speculative, inasmuch as the witness has now defined what in his judg-
6060 ment are direct costs and joint costs, and the costs set up on the exhibit referred to by counsel, being Respondent's Exhibit 101, being definite accounts, it is apparent that they are definite costs, and whatever they are, they are either within or without the definition of the witness in respect of direct or joint costs, and the witness presumably can answer within his own definition as to what such costs are.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

Trial Examiner Ballinger: If counsel will change his phraseology by striking the word "may," and asking him whether there is—

Mr. Austin: Yes, your Honor, may I rephrase the question?

Trial Examiner Ballinger; —the Examiner will permit counsel to reframe his question.

By Mr. Austin:

Q. Do some of the expense accounts listed on Respondent's Exhibit 101 contain expenses both of a direct and joint nature?

A. They most certainly do.

Q. And when you referred to the application of methods of allocation to those accounts, were you referring only to the allocation of joint costs, or were you referring also to direct costs?

6061 A. No, sir, I was referring to joint costs. Direct costs are allocated as such, that is, directly.

Q. Now, Mr. Warmack, I will call your attention again to Respondent's Exhibit 101 and to the fact that a portion of the salaries of the sales promotion department in Accounts 002 and 003, the salaries of salesmen in Account 004, the salaries of truck drivers in Account 006, the salaries of warehouse employees in Account 008, and the salaries of accounting clerks in Account 200 are charged to automobile supplies, the automobile supplies column being the next to last column on the right-hand side of Respondent's Exhibit 101. I will call your further attention to the fact that no part of the expense in Account 000 or 001 is charged in the Automobile Supplies column. If the salary expenses of supervisory officials in Accounts 000 and 001 are allocated between petroleum products channels on a basis of effort of the employee supervised, in your opinion should a proportionate part of those salaries also be charged to automobile supplies?

Mr. Hanley: Just a minute. That is objected to for the reason that it is a compound question. The first part of the question is a misstatement of the evidence, in that it assumes that there is no allocation of expense in certain accounts to any other column than that of auto supplies,
and the second part of the question, when related to
6062 the first part of the question, which is upon an im-
proper assumption, becomes an improper assumption and question, and the witness is not entitled to answer the same.

Will you please read that question?

I just request that your Honor give attention to the account numbers and to the columns on Exhibit 101 or Form 189.

Trial Examiner Ballinger: The Examiner had Respondent's Exhibit 101 before him when the question was propounded.

Read the question.

(The question referred to was read by the reporter.)

6063 Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Mr. Hanley: I will add this to the objection; the respondent further objects to the question on the ground that the accounts by number, as designated in the question, do show a charge in channels other than the channel "Automobile Supplies," and that the question of counsel is a misstatement of the evidence and of the exhibit.

Mr. Austin: Well, the question doesn't say that. The uestion says "A portion of the salaries."

Trial Examiner Ballinger: The objection is overruled. 'he witness may answer.

A. In the preparation of Respondent's Exhibit 101, eferring particularly to Account 000, "Salaries Supervision," and 001, "Salaries Supervision—others," no part of he cost of this class of expense is shown in automobile upplies.

Inasmuch as a large portion of this class of expense—hat is, the two expense items, 000 and 001—have been llocated, to some extent, on Respondent's Exhibit 101 on he basis of the effort of the employees working under hese supervisory officials, then it would seem to me, from he standpoint of sound accounting, in arriving at a cost lifferential, that some part of these expenses, salaries and xpenses of these supervisory officials, would be allocated o the automobile supply business of the respondent company.

064 Mr. Hanley: The respondent now moves to strike the answer of the witness, on the ground that the vitness has said that "a large part" of supervision expense ias been allocated to auto supplies, and again, that the vitness has said that "some part" of supervision expense hould be allocated to auto supplies, and that the witness aving failed, neglected and refused to indicate how much, n figures and in dollars and cents, should be allocated, and as used the indeterminate terms of "large amount" and 'some part," that the testimony of the witness is too ndefinite and uncertain to have any probative value.

Further, the respondent now requests that if the Court s going to entertain the testimony of this witness, that he Court compel the witness to specify in figures and in lollars and cents what allocations, in his judgment as an xpert accountant—as he now represents himself to be, as witness—he makes to these various accounts.

Trial Examiner Ballinger: The motion to strike is denied. If consel desires to inquire of the witness on crossxamination as to the amount to be allocated, he may do so.

Will you read the last answer for the benefit of the vitness?

(The reporter read the last answer as above recorded.)

6065 By Mr. Austin:

Q. You said it seems to you, Mr. Warmack. You mean that is your considered opinion?

A. It certainly is.

Q. Heretofore, we have been discussing chiefly the supervisory salaries of the field—that is, salaries of field managers and two assistant field managers, in Accounts 000 and 001. Does the salary of the superintendent of construction and of the construction clerks working under him also find its way into those two accounts, Mr. Wormack?

A. Yes, sir.

Q. Is the salary of the superintendent of maintenance included in Account 000, or part of it?

A. Part of it for the year 1940 is included in that account.

Q. I believe Mr. Boatwright's testimony will also show that there are salaries of a number of other employees of the company included in Account 000 and 001, particularly salaries of a number of plant superintendents and plant supervisors. Referring now to the salaries in Accounts 000 and 001, other than the salaries of the field manager; the two assistant field managers and their clerks and assistants, will you explain how that portion of the expense going into those two accounts is allocated between channels on Respondent's Exhibit 101? You don't need to go into as great detail as you did for the other portions 6066 of the account, but I would like to know what method was applied.

A. The portion that went in the 000 account and Account 001 was separated on the basis of gallonage.

Q. Was separated on the basis of gallonage between all channels on Respondent's Exhibit 101?

May I withdraw that question, your Honor?

Trial Examiner Ballinger: The question is withdrawn.

Mr. Austin: I will break it down, separate it.

By Mr. Austin:

Q. In the first place, Mr. Warmack, how would that expense be allocated between the tank wagon reseller, tank wagon consumer, and other methods channel on Respondent's Exhibit 101?

A. Mr. Austin: It ws separated on the basis of gallonage. Whether some portions of it went between the tank wagon reseller and the tank wagon consumer, and other portions between the tank wagon reseller and tank wagon consumer and other methods, I don't have the notes right before me to tell exactly by proportions.

Q. Well, you say it was separated on the basis of gallonage?

A. Yes, sir.

Q. That is all I wanted. Now, was a portion of that expense allocated to direct shipment channels on Respondent's Exhibit 101?

6067 A. A portion of that class of expense was assigned to direct shipment business.

Trial Examiner Ballinger: Did I understand you to say that there was or was not a portion of it assigned to direct shipment.

The Witness: A portion of it was.

By Mr. Austin:

Q. And upon what basis was the allocation to direct shipment channels made?

A. On the basis of effort of the employee.

Q. Of what employees?

A. In the case of the superintendent of maintenance, it is based upon the employees working under him. In the case of the superintendent of construction, it is based upon what time he spent on direct shipment business during the year 1940.

Trial Examiner Ballinger: When you say "he" you mean the superintendent alone spent?

The Witness: Yes, sir; as explained on page 83 of Respondent's Exhibit 100—I mean also the assistant superintendent.

Trial Examiner Ballinger: When you use the term "superintendent" you refer to both the superintendent of construction and the assistant superintendent?

6068 A. Yes, sir.

By Mr. Austin:

Q. Was the same method of allocation used for both direct shipment channels and bulk plant channels on Respondent's Exhibit 101 in allocating the expense of this account?

A. Applicable to the class of employees you specifically refer to, no, sir.

Q. I would like to also call your attention to the testimony—not the testimony, but to the top of page 84 of Respondent's Exhibit 100, where it appears that no part of the expenses—where it appears that no change from the company's present method of distribution of the expense of tank wagon superintendents and bulk plant superintendents was made for the purpose of this cost study, and ask you what is the present method of distribution of expense of those individuals?

A. Are you speaking of the superintendent of tank wagons?

Q. Tank wagons and bulk plants.

Trial Examiner Ballinger: You ask him what the "present" method is. You mean what is the present method adopted by the respondent company and used?

Mr. Austin: I am asking if he knows what the respondent's present method is. I think I used the words "present method." That is the expression used on page 84, and I am asking Mr. Warmack whether, as a result of his 6069 study, he can amplify and explain what is meant by that.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Mr. Hanley: Respondent has no objection to his answering if the witness knows.

Trial Examiner Ballinger: If the witness does not know of his own personal knowledge, but if he has reliable information from other sources he may state the sources and answer the question.

A. In the case of the tank wagon superintendents—

Trial Examiner Ballinger: What is the source of your information?

The Witness: Page 19 of Respondent's Exhibit 99.

Mr. Hanley: If your Honor please, if the answer is contained in one of Respondent's Exhibits, this question and answer is objected to as repetitious. There is no reason why this witness should read from an exhibit already in the record. We are bound by any exhibit that we have presented.

Trial Examiner Ballinger: Well, the Examiner is in accord with the views expressed by counsel for respondent, but for convenience the witness may answer the question.

Mr. Austin: It is necessary to assemble these facts before I can ask a question based upon them.

Trial Examiner Ballinger: Go ahead.

A. Salaries of tank wagon superintendents are prorated each month by the ratio of tank wagon reseller
6070 gallons to total tank wagon gallons.

By Mr. Austin:

Q. Then, in what channels on Respondent's Exhibit 101 would the salaries of the tank wagon superintendents be distributed?

A. Tank wagon reseller channel, tank wagon consumer channel.

Q. Now, I also ask you how these bulk plant superintendents are allocated?

A. Mr. Austin, we have got notes on all this stuff some place, if I could just get it together.

Trial Examiner Ballinger: Can you answer the question?

The Witness: Not without referring to notes, sir.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

By Mr. Austin:

Q. Mr. Warmack, on page 19 of Respondent's Exhibit 99, it appears that the salary costs entering Accounts 000 and 001, with the exception of the tank wagon superintendents, are allocated or prorated on a gallonage basis to the three petroleum products channels in the company's regular accounting procedure. On page 83 of Respondent's Exhibit 100 it further appears that a portion of the salaries of the members of the construction department included in these two accounts, the superintendent of equipment and the superintendent of maintenance
6071 are allocated to direct shipment channels on Respondent's Exhibit 101 on a distribution of time basis as a result of the cost study made by respondent.

It further appears that at the top of page 84 of Respondent's Exhibit 100, no part of the salaries of the tank wagon superintendents and bulk plant superintendents are assigned to direct shipment channels, but that those salaries remain in the bulk plant channels, as they were placed on Form 189 for 1940.

What is your opinion, as an accountant, as to the consistency and propriety of the method of allocation applied to the expenses referred to in Accounts 000 and 001, for the purpose of distribution between all channels on Respondent's Exhibit 101 for this cost study?

Mr. Hanley: Just a minute. As to all of that portion of counsel's question ~~which is an attempted~~ recital of what is reflected by exhibits already in the record, respondent moves to strike the question of counsel, for the reason that it is an attempted paraphrasing of admitted exhibits, and has no relation to and no bearing upon the question.

As to the question which counsel finally asked, beginning with "In your opinion as an accountant," respondent makes the general objection as to the competence of the witness to answer, and lack of foundation.

Trial Examiner Ballinger: Objection overruled. Read the question.

6072 The Witness: Just read the last part, the part where the question begins.

Mr. Hanley: If your Honor please, if the question is to be read at the request of the witness, the respondent requests that the entire question be read.

Trial Examiner Ballinger: That is within the discretion of the witness. If the witness remembers the recital and desires only the question read, that is all that is necessary. Do you desire the recital preceding the question read?

The Witness: No, sir; just the question.

(The reporter read the question as follows:)

"What is your opinion, as an accountant, as to the consistency and propriety of the method of allocation applied to the expenses referred to in Accounts 000 and 001, for the purpose of distribution between all channels on Respondent's Exhibit 101 for this cost study?"

A. Mr. Austin, you are limiting that question to only these accounts that we have been talking about, or to every ~~account in these~~ accounts?

By Mr. Austin:

Q. I am limiting it to the expenses in those accounts other than the salaries of the field manager and assistant field manager, which we have already covered.

6073 Mr. Hanley: Just a minute. In view of the statement of counsel, respondent further objects to the question on the ground that the particular expenses to which Account 000 and 001 are pointed, are not specified by counsel in his question. He now undertakes to eliminate from the accounts in question certain things that are included in such accounts on Exhibit 101, and until ~~and unless~~ counsel is able to ~~state to the witness~~ exactly what features are involved in the accounts, the witness is not competent to answer.

Mr. Austin: Perhaps the witness knows what salaries are included in those accounts.

Trial Examiner Ballinger: That should be clearly stated in the question.

Mr. Austin: May I then ask a preliminary question of the witness?

Trial Examiner Ballinger: You may.

By Mr. Austin:

Q. What salaries are included?

A. Well—

Mr. Austin: (interposing) Your Honor, of course I can ask that, I can ask these questions, but I can say this, that these are already in the record, but I will put it in again if it is desired.

6074 Trial Examiner Ballinger: Very well.

Mr. Austin: The witness has stated that he is familiar with the record, that he has read Mr. Boatwright's testimony, and Mr. Boatwright has stated and has testified to this before in the record. Therefore, I think it follows that the witness knows the subject of my question without my stating it again.

Trial Examiner Ballinger: I know; but does your question relate to all of the items appearing in the account referred to, or does it relate to only a part of the items? That is what I understand to be the basis, in part, of the objection. Am I correct, Judge?

Mr. Hanley: You are correct, Judge, because I think that counsel has stated that he excluded a part of the accounts.

Trial Examiner Ballinger: That is what I understood.

Mr. Austin: I said that I excluded the salaries of the field manager, and the two assistant field managers, and the question was directed to the remainder of the salaries in that account.

Trial Examiner Ballinger: Do you understand the question?

The Witness: If I could hear the question read again, please.

6075 Trial Examiner Ballinger: Read the question to the witness.

(The reporter read the question as follows:)

"Q. Mr. Warmack, on page 19 of Respondent's Exhibit 99, it appears that the salary costs entering Accounts 000 and 001, with the exception of the tank wagon superintendents, are allocated or prorated on a gallonage basis to the three petroleum products channels in the company's regular accounting procedure. On page 83 of Respondent's Exhibit 100 it further appears that a portion of the salaries of the members of the construction department included in these two accounts, the superintendent of equipment and the superintendent of maintenance are allocated to direct shipment channels on Respondent's Exhibit 101 on a distribution of time basis, as a result of the cost study made by respondent.

"It further appears that at the top of page 84 of Respondent's Exhibit 100, no part of the salaries of the tank wagon superintendents and bulk plant superintendents are assigned to direct shipment channels, but that those salaries remain in the bulk plant channels, as they were placed on Form 189 for 1940.

"What is your opinion, as an accountant, as to the consistency and propriety of the method of allocation 6076 applied to the expenses referred to in Accounts 000 and 001, for the purpose of distribution between all channels on Respondent's Exhibit 101 for this cost study?"

The Witness: Yes, sir. I understand that question.

Trial Examiner Ballinger: You may answer. The objection is overruled:

The Witness: It is my opinion from the standpoint of sound accounting an inconsistency has occurred here in Respondent's separation of at least a part of these costs, your Honor, in the instances where the company's late cost study, which was a basis for Respondent's Exhibit 100, and Respondent's Exhibit 101, respondent's accountants made a study and to their satisfaction determined that part of this class of expense was properly applicable to direct shipment business on a basis of effort either expended by the individuals, or by employees working under them, or a combination of the two.

Trial Examiner Ballinger: What do you mean by "employees working under them"; is this on an hourly basis?

The Witness: On an hourly basis, yes, sir.

Trial Examiner Ballinger: Proceed.

The Witness: The amounts that respondent's accountants determined as being applicable to direct ship-
6077 ment business were then removed from the regular
accounts, or the regular channels, rather—

Trial Examiner Ballinger: (Interposing.) And when you refer to "regular channels" do you refer to the gallonage channel[illegible]

The Witness: I refer to the distribution channels on the respondent's form—regular form 189 for the Detroit field for 1940.

These amounts that respondent's accountants found in their study as being applicable to the direct shipment business were then removed on the basis that the amounts had previously gone into or had been allocated to the regular distribution channels on the regular Form 189.

The reason for the inconsistency, in my opinion, is this: That these expenses had previously been separated between the regular channels on the basis of gallonage. It is that basis, your Honor, that I question.

The inconsistency is this:

The costs are separated between channels on a basis of gallonage, first.

In the respondent's study they desired a greater separation of the costs whereby the direct shipment costs would be shown, so, as a result of a time study; a study of effort they established a figure which they considered proper
for the direct shipment business without carrying that
6078 study through, your Honor, to determine what por-
tion of this class of expense on a basis of effort which should have been properly assigned to the—in my opinion —to the tank wagon reseller column, the tank wagon consumer column, and the other methods column on Respondent's Exhibit 101.

I should be glad to have the record show here that I do not condemn, as an accountant, from the standpoint of sound accounting the gallonage basis as a measuring factor to be used in the separation of some of these costs, if that factor were established as being reasonably correct by a thorough cost study and analysis.

Trial Examiner Ballinger: Mr. Warmack, let me see if I understand you, sir.

The Witness: Yes, sir.

Trial Examiner Ballinger: Is it your position that, first, no basic costs system should be adopted without a thorough study? Is that your first premise?

The Witness: Your Honor, not exactly.

Trial Examiner Ballinger: Please explain.

The Witness: The purpose for which the costs are to be used is the first consideration.

A cost system which may be sufficient, which may afford all of the information that the company, or the officials of the company, the directors, or even the stockholders may
desire, may be considered as one thing. But a figure
6079 which may be desired to be developed, or figures
which may be desired to be developed for another
purpose, that system may not afford those figures.

The management may be quite satisfied with the allocation on a gallonage basis which it considers as proper and sound without ever having gone to the trouble of having a cost study made to determine just how sound it is.

And with respect to my answer to this previous question, if I may add one other thought to that, in the case of some of these accounts that we are speaking about, your Honor, here; that is, the superintendent of maintenance and the superintendent of construction, the company, the respondent company changed its methods during the year 1940 of accounting for these accounts, during a part of the year some of the salaries and expense of these two departments were assigned directly; in November, 1940, the salaries and expenses of the superintendents of these departments were no longer assigned directly, but were assigned to the triple 0 account which was separated on a gallonage basis. That is another reason for my objection to this separation, from the standpoint of consistency.

Trial Examiner Ballinger: Mr. Warmack, what I am trying to find out is this: I understand you now to state that the accounting system or practice to be used must
depend in part upon the objective to be obtained; in
6080 other words, if it is for the use of the respondent
company only, one system may be entirely satisfactory, but if you want to find out the exact costs of marketing of respondent's products then another and different system must be employed; is that correct?

The Witness: Your Honor, exactitude is seldom attained in such a situation as you speak of.

Trial Examiner Ballinger: I am speaking now of an approximation.

Mr. Hanley: I am trying to keep track of this, and now we have three different questions going along side by side.

The Witness: Let us do not call it a "system." I doubt very seriously if this company or any company goes to the refinement of their costs even to the extent that Mr. Boatwright went in his study. This is a study, not a system. They are not keeping all of this detailed information under a system.

Trial Examiner Ballinger: Very well, whatever term you may apply.

The Witness: Yes, sir.

Trial Examiner Ballinger: I am not familiar with the exact term, or the correct term.

The Witness: Yes, sir.

Trial Examiner Ballinger: You may supply it, if you will.

6081 The Witness: The company states—

Trial Examiner Ballinger: (interposing) What would be the proper term to use in connection with that, instead of "system" what would be the correct term?

The Witness: It depends upon what you want to use it for. This is the result of an accounting system, or it may be called a "cost system," I mean this—this sheet, Form 189.

Trial Examiner Ballinger: Then the method employed? Is that the point?

The Witness: That is the method employed by the respondent in keeping its accounts.

Trial Examiner Ballinger: Then the method employed is the base?

The Witness: Now, for the purpose of this Respondent's Exhibit 101, that is not a system at all; that is the result of a study of the company's accounts carrying the separations to a greater refinement than it carried in its regular accounting system.

Trial Examiner Ballinger: Very well. I now understand you object to the accounting submitted by the respondent, certainly to certain items, on the ground that they employed different methods in computing the cost of marketing certain commodities, and employed other and different 6082 methods in computing the costs of other commodities embraced within the same accounting classification?

The Witness: (There was no reply.)

Trial Examiner Ballinger: Do you understand what I mean?

The Witness: I would like for that to be read again. I was just thinking about it.

Trial Examiner Ballinger: Read it.

(The reporter read the matter referred to.)

Trial Examiner Ballinger: Let me make that more specific.

The Witness: Yes, sir.

Trial Examiner Ballinger: In the same item of accounting such as appears on Respondent's Exhibit 101 opposite the figures 000, portions of that, or of the results obtained were ascertained from the gallonage basis, and a part from a computation based upon their effort or hours of time employed; is that correct?

The Witness: That is the way they did it, yes, sir.

Trial Examiner Ballinger: Is it your contention that they should have used either one or the other system, either the gallonage basis or a computation upon effort or hours employed, throughout?

The Witness: That is my opinion that this—with this amplification or clarification, this account triple 0 6083 contains the salaries of the field manager and several different supervisory officials.

One official's salary and expense may be kept separated one way, your Honor, another's possibly kept separated another way.

A thorough cost study would disclose how any one of the separate items contained within that account should be separated, and it would disclose the inconsistency of first separating the whole account on a gallonage basis, and then pulling out of that on the basis of effort a certain amount and setting it up on an effort basis, and then comparing a portion of that set-up on an effort basis with that portion of that total which was set up on a gallonage basis.

Trial Examiner Ballinger: Then, if that system that you have suggested were adopted you would disregard the system of consistency, would you not?

The Witness: (There was no reply.)

Trial Examiner Ballinger: I will put it this way. I understood in your testimony that one of your grounds of complaint was that they were not consistent. Am I correct?

The Witness: That is my opinion, sir.

Trial Examiner Ballinger: Now then if they had resorted to the other practice that you have just outlined they would have been compelled to have abandoned any theory of consistency, would they not?

6084 The Witness: In my opinion, that would be the most consistent thing in the world that could be, it would be the most proper thing they could do. Your Honor, there are three things to be—or at least there are these things to be considered in accounting, first, expense may be separated properly by one method, and another expense may be separated properly by another method, but a cost study properly carried through—cost analysis giving effect to the influencing factors whereby those costs were incurred—

Trial Examiner Ballinger: (interposing) That would have necessitated an examination of the subject matter by various methods, would it not, which you finally said was the whole question?

The Witness: Before you finally arrive at a figure that you can positively stand on and defend anywhere that would have to be done, in my opinion.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

Mr. Hanley: If your Honor please, if your Honor has finished, I would like to make a motion directed to the last answer made by the witness to the last question propounded by counsel for the Commission, Mr. Austin.

Trial Examiner Ballinger: Proceed. Do you recall

6085 the answer of the witness?

Mr. Austin: I do not know to what answer counsel is referring.

Mr. Hanley: Perhaps it would be better to have the reporter read it and then I could make my objection more clearly anyhow.

Trial Examiner Ballinger: Read the answer that counsel has referred to.

(Discussion off the record.)

Mr. Austin: If you are going to object, I think we ought to know of what you are objecting.

Trial Examiner Ballinger: Read the answer that Judge Hanley has in mind.

Mr. Hanley: I think that would be better, and from that I can form my objection more concisely, perhaps.

(The reporter read the following:)

"It is my opinion from the standpoint of sound accounting an inconsistency has occurred here in Respondent's separation of at least a part of these costs, your Honor, in the instances where the company's late cost study, which was a basis for Respondent's Exhibit 100, and Respondent's Exhibit 101, respondent's accountants made a study and to their satisfaction determined that part of this class of expense was properly applicable to direct
shipment business on a basis of effort either expended
6086 by the individuals, or my employees working under
them, or a combination of the two.

"Trial Examiner Ballinger: What do you mean by 'employees working under them'; is this on an hourly basis?

"The Witness: On an hourly basis, yes, sir.

"Trial Examiner Ballinger: Proceed.

"The Witness: The amounts that respondent's accountants determined as being applicable to direct shipment business were then removed from the regular accounts, or the regular channels, rather—

"Trial Examiner Ballinger: (interposing) And when you refer to 'regular channels' do you refer to the gallonage channels?

"The Witness: I refer to the distribution channels on the respondent's form—regular form 189 for the Detroit field for 1940.

"These amounts that respondent's accountants found in their study as being applicable to the direct shipment business were then removed on the basis that the amounts had previously gone into or had been allocated to the regular distribution channels on the regular Form 189.

"The reason for the inconsistency, in my opinion, is this:
That these expenses had previously been separated
6087 between the regular channels on the basis of gallon-
age. It is that basis, your Honor, that I question.

"The inconsistency is this:

"The costs are separated between channels on a basis of gallonage, first.

"In the respondent's study they desired a greater separation of the costs whereby the direct shipment costs would be shown, so, as a result of a time study, a study of effort they established a figure which they considered proper for the direct shipment business without carrying that study through, your Honor, to determine what portion of this class of expense on a basis of effort which should have been properly assigned to the—in my opinion—to the tank wagon reseller column, and the other methods column on Respondent's Exhibit 101.

"I should be glad to have the record show here that I do not condemn, as an accountant, from the standpoint of sound accounting the gallonage basis as a measuring factor to be used in the separation of some of these costs, if that factor were established as being reasonably correct by a thorough cost study and analysis."

6088 Trial Examiner Ballinger: Is what the reporter has just read the material to which you desire to direct your motion?

Mr. Hanley: Yes, sir.

Trial Examiner Ballinger: I believe the record is now clear as to what you have in mind. Proceed.

Mr. Hanley: If your Honor please, respondent moves to strike the answer of the witness as just read to the last question propounded by counsel for the Commission; that is, as it was just read by the reporter, on the ground that for the reason that it does not appear from the answer of the witness that what the witness terms an "inconsistency in accounting" as between the regular procedure of respondent, and Respondent's Exhibit 101 has made one penny of difference in cost and until and unless there is a demonstration that the positive testimony of the respondent is erroneous, the critical testimony of the Commission's accountant witness is without value and the answer of the witness is, in its entirety, an accumulation of words without probative value.

Trial Examiner Ballinger: The answer, standing alone may have but very little evidentiary value, or none, but possibly read in connection with the witness' testimony previously given may have some evidentiary value.

The motion to strike is denied. Proceed.

6089 By Mr. Austin:

Q. Mr. Warmack, in Respondent's Exhibits 99, 100 and 101, and in the testimony given by Mr. Boatwright in regard to these exhibits, and the accounting procedure followed by the respondent in the preparation of them, what is there, if anything, which, in your opinion, supports the use of the gallonage method of allocation of the expenses in accounts 000 and 001 between tank wagon resellers, tank wagon consumers, and other methods channel?

A. I have seen no reference in those exhibits to any study ever having been made to support the reasonable accuracy of gallonage as a measuring factor, or the results to be obtained by the use of that as a measuring factor.

That is my answer to it.

Q. Did you inquire from the respondent's officials and employees in Detroit, during your stay in the Detroit office, whether any such study had been made by the respondent?

Mr. Hanley: That is objected to as pure hearsay. Respondent has been crucified in this case on the hearsay rule, your Honor; unless that is made specific certainly we are entitled not to be bound by it.

Trial Examiner Ballinger: Unless an inquiry was made of an official or properly accredited representative of the respondent company, the witness would not be at liberty to answer.

6090 Mr. Austin: I would inquire further.

By Mr. Austin:

Q. Well, did you make such an inquiry of Mr. Houghton?

A. Yes, sir.

Q. Mr. Houghton was, as I understand it, assigned by the respondent to assist you in your research in connection with this cost study?

A. Yes, sir. He was, and—

Trial Examiner Ballinger: (Interposing.) You need not go into any explanation.

Mr. Hanley: We do not question Mr. Houghton's position, but we do want to know what inquiry was made.

Mr. Austin: Very well.

By Mr. Austin:

Q. State what inquiry you made, and if you made any similar inquiry of anyone else that you can name, you may refer to them.

A. I inquired of Mr. Houghton if the respondent company had ever made any cost study or analysis in which it might, or on which it might base a gallonage allocation, and he advised me that he knew of none.

Mr. Hanley: Now just a minute. What do you mea this gallonage allocation? Please be specific. I want to know exactly what you asked Mr. Houghton.

991 Mr. Austin: I think that is more properly an inquiry for cross examination, but I will inquire it.

y Mr. Austin:

Q. What do you mean by that? I would like to know.

A. Well, I thought we were talking about the very thing am talking about, but I will be glad to say it.

Q. Very well, if Judge Hanley wants to know whether ou are referring to Account 000 and 001, or are you eferring to other accounts? I understood that you were eferring to Accounts 000 and 001, to which my question as addressed. That was the way I understand it. If our answer does not refer to it then I do not understand our answer, or at least I do not believe he understood our answer.

A. I am referring to Account 000 and 001 in that partic lar answer.

Mr. Austin: I think my question was limited to that ut I was perfectly willing to have it cleared up if there as any question about it.

Trial Examiner Ballinger: Proceed.

The Witness: I thought that was what we were talking bout.

y Mr. Austin:

Q. Yes.

A. Now, do you want to know what I asked Mr. Hough on?

Trial Examiner Ballinger: Yes, just state what 992 you asked him.

Mr. Austin: If I may interrupt a moment, he was the middle of his sentence, and was interrupted. I ould like to have it read back to see if he had completed is answer.

Trial Examiner Ballinger: Read the last answer of he witness that is referred to by counsel.

(The reporter read the following answer:)

"A. I inquired of Mr. Houghton if the respondent ompany had ever made any cost study or analysis in hich it might or on which it might base a gallonage alloca ion, and he advised me that he knew of none."

By Mr. Austin:

Q. Do you desire to add anything further to that answer?

A. That is all.

Of course, I asked some other people there.

Q. Who?

A. I asked Mr. Gillis.

Q. What did he say?

A. He said he knew of none.

Q. Who was Mr. Gillis?

A. Mr. Gillis was the office manager in the Detroit office.

Q. Anyone else?

A. I asked Mr. Utterback.

Q. Who was he?

6093 A. Mr. Utterback was the assistant office manager in the Detroit office.

Trial Examiner Ballinger: What was his reply?

The Witness: He said he knew of nothing like that.

By Mr. Austin:

Q. Anything else? Anything else you want to add?

A. I talked to Mr. Bath. I talked to him about it.

Q. What did he say?

A. I am sure that he said he knew about no cost study ever having been made to establish gallonage as a measuring factor.

Mr. Hanley: I would like to request a recess for five minutes, Mr. Examiner.

Trial Examiner Ballinger: The hearing will stand in recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

The Witness: Your Honor, I should like to make one correction.

Trial Examiner Ballinger: Correction in your testimony?

The Witness: Yes, sir.

Trial Examiner Ballinger: Proceed.

The Witness: I stated that during the course of 1940 the company changed its accounting, or its method

6094 of accounting for the salaries of construction superintendent and the superintendent of maintenance, and I would like to correct that to state that it should be superintendents of maintenance only.

Trial Examiner Ballinger: You use the plural term, do you mean plural?

The Witness: I just mean the one man.

Trial Examiner Ballinger: That is you mean the singular?

The Witness: I mean the singular. Of course, if he had an assistant I would have to look that up also, but the construction superintendent and what I said with respect to the change of method in accounting for the construction superintendent and or his assistant, I did not mean to include the superintendent of construction.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Strike the latter part of the witness' answer which is repetitive.

By Mr. Austin:

Q. Mr. Warmack, have you any notes which you made during your study of the respondent's accounting in Detroit which would enable you to state on the record the total amount of the salaries entering into account 6095 000, paid to the tank wagon superintendent, plant superintendents, agent-salesmen, plant supervisors —I think that is all—I would like to know if you can tell me the total amount of the salaries paid to the employees carrying those titles which is charged in Account 000 for the year 1940.

Mr. Hanley: Just a minute. That is objected to, if your Honor please, as immaterial.

It does not go to the question of accounting procedure. It goes to the factual question of salary.

If your Honor will recall, the respondent gave access to our records in connection with the various salaries of employees and officials of the company, and it was the understanding of respondent that that information would be used from the standpoint of determining proper accounting procedure, but would not be divulged or put upon the record as a matter of figures.

I have no objection to an analysis by Mr. Warmack of any accounting procedure in relation to the salaries of any individuals that is, in your Honor's view, pertinent here, but we do object to having salaries, as such, divulged.

If I may be off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

6096 Trial Examiner Ballinger: Proceed. Let me point out, Mr. Hanley, that the question merely inquires if the witness has such notes.

Mr. Hanley: Perhaps I misunderstood the question. May I have it read again?

Mr. Austin: Do you mean the question that I just referred to a moment ago?

Mr. Hanley: Yes.

Trial Examiner Ballinger: Yes. Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: I am sure you will withdraw your objection to that question.

Mr. Hanley: Yes. I withdraw my objection to that particular question.

Trial Examiner Ballinger: The objection is withdrawn. The witness may answer.

The Witness: Yes. I have the notes that I secured from the respondent's office in Detroit, and I can do a little addition here and find out what it is.

By Mr. Austin:

Q. Can you do that with reasonable celerity?

A. Yes.

Q. Please do so.

A. Very well.

(The witness made certain calculations.)

Mr. Austin: Off the record.

6097 Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. What is the amount?

A. $13,529.67.

Q. Mr. Warmack, now, you have given certain testimoney today regarding Accounts 000 and 001 on Respondent's Exhibit 101?

A. Yes.

Q. Does your testimony regarding the methods used by the respondent in apportioning expense on those two accounts on Respondent's Exhibit 101, namely 000 and 001, apply equally to the expenses shown in Accounts 030, 045, and 100 in that exhibit?

Mr. Hanley: I object to that. I do not even know what those accounts are.

Mr. Austin: I will expand my question to indicate precisely as to what they refer.

By Mr. Austin:

Q. 030 (traveling expense—supervision); 045 (operating and maintenance of vehicles—supervision); and Account 100 (depreciation expense—vehicles—supervision), in that exhibit is what I refer to.

Mr. Hanley: Mr. Austin, you have now indicated 6098 the nature of those accounts.

Mr. Austin: Yes.

Mr. Hanley: Have you completed your question?

Mr. Austin: Yes.

Mr. Hanley: That question is objected to, if your Honor please, on the part of the respondent for the reason that it asks of the witness that he relate certain unspecified testimony in connection with certain unspecified accounts to certain other unspecified accounts, and the respondent is entitled to have this witness testify specifically as to any account and not to make general conclusion in respect of respondent's accounts by a mere allusion to some undefined and unspecified testimony that he may have given at some time in this lawsuit.

The respondent is entirely without a basis for cross examination upon any such testimony of this witness.

Trial Examiner Ballinger: The objection is sustained. Counsel for the Commission may restate his question with particularity.

By Mr. Austin:

Q. The record shows that the expense in Account 030 is the traveling expense incurred by individuals whose salaries are listed in Account triple 0.

The record shows further that expense entered in Account 045 on Respondent's Exhibit 101 is the expense 6099 of operation and maintenance of vehicles used by the individuals whose salaries appear in Account triple 0.

The record shows further that the expense entered in Account 100 is depreciation expense on the same vehicles just referred to, for Account 045.

The record further shows that the expense allocated in these three accounts, or rather the expense entered in these three accounts is allocated between channels on Respondent's Exhibit 101.

Mr. Austin: I make that a part of my question.

Mr. Hanley: Off the record, please.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

Mr. Austin: I will strike the question.

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Austin:

Q. I think I can state without fear of contradiction that the purpose of Respondent's Exhibit 101 and the exhibits in support thereof, being Exhibit 99 and Exhibit 100, is to determine the difference in unit cost of selling gasoline to tank wagon reseller customers on the one hand, and to so-called jobber customers on the other.

In its regular accounting procedure, Mr. Warmack,
6100 apart and aside from this cost study, does the respondent attempt to keep its costs and its cost records in such manner as to precisely account for differences in costs to those two classes of customers?

Mr. Hanley: I object to the question. I can elaborate at considerable length if necessary on that because it goes to the very heart of this lawsuit.

Mr. Austin: Off the record, please.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed. Is there objection to the question?

Mr. Austin: I can save some time there. If there is objection to the question I will consent that it be withdrawn.

Mr. Hanley: There is the objection that I have heretofore made.

Mr. Austin: Then I withdraw the question.

Trial Examiner Ballinger: The question is withdrawn.

Mr. Austin: Mr. Examiner, I move that we adjourn until 9:30 o'clock a. m., tomorrow morning.

Trial Examiner Ballinger: The motion is granted. And now at 4:50 o'clock p. m., July 3, 1942, the hearing stands adjourned to be reconvened at 9:30 o'clock a. m., July 4, 1942, in Room 388, Federal Trade Commission Building, Washington, D. C.

6101 (Whereupon, at 4:50 p. m., July 3, 1942, the hearing in the above-entitled matter was adjourned.)

6102

Room 388, Federal Trade
Commission Building,
Washington, D. C.,
Saturday, July 4, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Ill., appearing for the Respondent.

6103

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

This is a reconvening of Docket No. 4389 of the case entitled In the Matter of Standard Oil Company of Indiana, at 9:30 a. m., July 4, 1942, in Room 388, Federal Trade Commission Building, Washington, D. C.

The last hearing was held in the same room in the same city, July 3, 1942.

Before opening the hearing, the Examiner inquires of counsel whether there is any objection to proceeding with this case on the 4th day of July.

Mr. Austin: None by me.

Mr. Hanley: In response to the inquiry of the Examiner, counsel for the respondent states that the respondent waives any objection to proceeding on this day, this day being July 4th.

Trial Examiner Ballinger: And counsel for the Commission likewise makes a similar waiver?

Mr. Austin: Yes.

Trial Examiner Ballinger: The reporter will note counsel for the Commission and respondent present.

You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

6104 *Direct Examination by Mr. Austin.*

Q. Mr. Warmack, you gave a considerable amount of testimony yesterday regarding the methods of allocation applied by the respondent in distributing the expense of salaries of certain of its employees between the various customer and product channels on Respondent's Exhibit 101. Does all of your testimony in that regard apply equally to the treatment made by the respondent of the traveling expenses of these same employees which are entered in Account 030 on Respondent's Exhibit 101?

Mr. Hanley: Just a moment. The question is objected to as calling for a conclusion of the witness as to how the respondent developed its accounts and, further, as a conclusion relative to a study that the witness made which he has now testified to that he just never did make.

(There was a discussion off the record.)

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

Trial Examiner Ballinger: Mr. Austin, do you mean by that question to ask the witness whether he made an investigation to determine that the same method was applied?

Mr. Austin: No. That is already right in the record, your Honor. The respondent's exhibits show that the treatment of the traveling expenses followed the treatment of the salaries.

6105 Trial Examiner Ballinger: The objection is overruled. You may answer the question.

The Witness: The answer is yes, sir.

By Mr. Austin:

Q. And does the testimony which you have given regarding the treatment made by the respondent in this cost study of the salary expense going into accounts 000 and 001 apply equally to the treatment made by the respondent of the expense in Accounts 045 and 100, such expense being the operation and maintenance and depreciation of the vehicles of the individuals whose salaries are entered as an expense in Accounts 000 and 001?

Mr. Hanley: That is objected to for the reason that the testimony of this witness speaks for itself, whatever he has said.

Trial Examiner Ballinger: The objection is overruled.

The Witness: Yes, sir. I should like to call attention to the fact that in Account 030, 045 and Account 100 we are speaking here of only that portion of the expense which was contained in those accounts which applies to each of the separate individuals.

For example, the field manager of the Detroit field, Mr. Raupagh, would have a certain part of each of those expenses and, for example, the other separate supervisory
6106 officials would have a portion of those expenses applicable to them, so to speak, individually; each portion of these accounts following the supervisory officials, and therefore inasmuch as the separations were made of these three accounts, after breaking them down to the separate officials, inasmuch as the separations were made according to the same methods in which the salaries were separated, the same testimony with respect to the separation of the salary would apply equally to the separation of the expense of that particular individual.

By Mr. Austin:

Q. I would now like to refer to Account 004 "Salaries—Salesmen." I think the record shows very fully and at length what the nature of the expense is that is included in that account and the treatment of that expense in the company's regular accounting procedure is described on pages 1 to 3 of Respondent's Exhibit 99. The treatment made of the expense of that account for the purposes of this cost study is described at pages 6 to 22 of Responden's Exhibit 100.

I refer you to page 1 of Respondent's Exhibit 99. The first sentence of that page reads:

"A memorandum is maintained by each salesman showing the amount of time spent in selling products applicable to each channel of distribution during the last month of each quarter."

6107 For what purpose is that memorandum used, Mr. Warmack?

Mr. Hanley: That is objected to as not within the knowledge of the witness, as shown by any testimony heretofore given.

Mr. Austin: I will strike that last sentence of the question.

Trial Examiner Ballinger: The sentence is stricken.

Q. How was that memorandum used in the preparation of Respondent's Cost Study represented by Respondent's Exhibit 101?

A. No such memorandum is maintained and no such memorandum exists, as far as I was able to learn in the course of my examination of the company's records during the early part of this year in Detroit.

Trial Examiner Ballinger: Will you state what your investigation consisted of with reference to this particular item?

The Witness: Yes, sir. With reference to this particular item, inasmuch as here is the statement in Respondent's Exhibit 99 on page 1 that "A memorandum is maintained by each salesman showing the amount of time in selling products applicable to each channel of distribution during the last month of each quarter," that memorandum being, as I understand it, your Honor, the 6108 data on which salesmen's distribution time sheets would be primarily based. Then, in the course of my studies in Detroit, that is, in the office of the respondent in Detroit, I asked to see that memorandum.

Trial Examiner Ballinger: That is the basic memorandum?

The Witness: Yes, sir.

Trial Examiner Ballinger: Whom did you ask?

The Witness: I asked a number of the men in Detroit, in the Detroit office.

Trial Examiner Ballinger: Can you name them?

The Witness: Yes, sir. I asked Mr. Houghton, who was sent to Detroit from the Chicago office to work with me there. I asked Mr. Raupagh, who referred me, of course, to Mr. Hamer, and I asked Mr. Hamer, and I asked Mr. Bath, and I asked Mr. Locke. I was told by each of these gentlemen that no such memoranda existed or, as far as they knew had ever existed.

Carrying that a little further, in my discussions with these gentlemen it was pointed out to me that the distribution time sheets were worked upon the third month in each quarter during the year for the purpose of serving as a basis for the distribution of salesmen's costs during the three ensuing months in each instance.

Trial Examiner Ballinger: Did they explain to you 6109 how they were worked up?

The Witness: Yes, sir, and I asked—

Trial Examiner Ballinger: State what explanation they offered.

The Witness: Your Honor, I have prepared a memorandum on that and I submitted that memorandum to the men named.

Mr. Hanley: Just a moment, what men?

The Witness: I just named the men in the record. Do you want their names again?

Trial Examiner Ballinger: Name them again.

Mr. Austin: Will the reporter read the Examiner's last question, please?

(The question referred to was read by the reporter.)

Mr. Austin: All right.

The Witness: Your Honor, in response to that question I prepared a memorandum which in my opinion was what they stated to me while in Detroit, submitted that memorandum to Mr. Hamer, Mr. Locke, and Mr. Bath, and, of course, Mr. Houghton got a copy of it, setting forth what these gentlemen said was done. I can read the memorandum.

Mr. Austin: We will come to that.

Mr. Hanley: Just a moment.

Trial Examiner Ballinger: Just one moment.

Mr. Hanley: It is moved that the answer of the 6110 witness be stricken on the ground and for the reason that he is referring to some memorandum which he says he prepared but which is not in evidence and which has never been offered to either the Government or the respondent or the Court, and no one knows what may be included in the memorandum referred to by the witness.

Trial Examiner Ballinger: Before ruling on the objection, the Examiner asks the witness a further question. Did the parties you have referred to and to whom you showed the draft that you prepared make any objections to it, or did they approve it as to the factual matters?

The Witness: That memorandum was approved as to factual matters, your Honor. I might call your attention—

Mr. Hanley: Just a minute, that answer is objected to as a conclusion of the witness, whatever memorandum, which does not appear in evidence, never having been offered by the witness, if approved by any employee of the respondent company, is hearsay as to the respondent and the respondent is not bound by any conclusion that may have been made by any employee of the company until and unless it is shown what the memorandum contains and who the employee was and what he said.

Trial Examiner Ballinger: Ruling on the objection is reserved until the Examiner asks the witness further questions.

Have you that memorandum?

6111 The Witness: Yes, sir.

Trial Examiner Ballinger: Is it here?

The Witness: I believe that it is.

Mr. Austin: I have it.

Trial Examiner Ballinger: Will you produce it?

Mr. Austin: I have what I understand is the memorandum of the witness.

Trial Examiner Ballinger: Will you produce it?

Mr. Austin: I propose to offer it in evidence in the course of the testimony this morning, your Honor. I will produce it now, of course, if you ask for it.

By Mr. Austin:

Q. Is that the memorandum your referred to, Mr. Warmack?

Trial Examiner Ballinger: Will it interrupt your examination of the witness if it should be introduced now?

Mr. Austin: I think that I would like to lead up to it, since, as I understand it, the memorandum is a description of the methods used by the respondent in allocating salesmen's salaries in their regular accounting procedure.

Trial Examiner Ballinger: With the assurance of counsel for the Commission that the memorandum referred to will be offered in evidence, the objections of counsel for the respondent are overruled.

Mr. Hanley: Let the record show that the respondent now requests information as to whose memorandum
6112 and what memorandum has been under discussion by the Court and counsel for the Government.

Trial Examiner Ballinger: The record fully portrays what memorandum was under discussion. The request is denied.

By Mr. Austin:

Q. Does the company prepare time schedules during the last month in each quarter which it uses to separate salesmen's salaries between channels in its regular accounting procedure, Mr. Warmack?

A. Yes, sir.

Q. Referring to page 15 of Respondent's Exhibit 100, I call your attention to the list of different classes of salesmen on that page, the list comprising about ten different classifications of salesmen. What is the principal class of salesmen in number of salesmen employed in the Detroit field?

Mr. Hanley: That is objected to as calling for a conclusion and an opinion of the witness as to what is the principal class of salesmen employed in the Detroit field.

Mr. Austin: In numbers, I said.

Mr. Hanley: If your Honor please, there are rules of evidence, and it is just requested that the Commission be required to pay some attention to them.

Trial Examiner Ballinger: The exhibit undoubtedly shows which class are the most numerous. For con-
6113 venience, the objection is overruled. The witness may answer.

A. Reseller salesmen.

Mr. Hanley: If your Honor please, it is moved by the respondent that the answer of the witness be stricken for the reason that the exhibit referred to does not show the classes of salesmen by numbers.

Trial Examiner Ballinger: It does show, does it not, the salaries paid to the classes?

Mr. Austin: Your Honor, that information is shown on Commission's Exhibits 88, 89, 102, 103, and I think one other exhibit for various quarters in 1940; in fact, for the entire year 1940.

Trial Examiner Ballinger: Is the exhibit referred to which the Examiner understands is page 15 of Respondent's Exhibit 100—is the Examiner correct?

Mr. Austin: And I have just referred to other exhibits of the Commission which have that information specifically.

Mr. Hanley: It is objected to.

Trial Examiner Ballinger: Just a moment, Judge. If Exhibit 100, page 15, does not contain factual matter sufficient to enable the witness to answer the objection is sustained. You will have to refer to other exhibits.

Mr. Hanley: That was the purpose of my further ob-
jection, your Honor, and may I make the record? It is
6114 objected to by the respondent, in that counsel for the
Commission has failed to identify any other or different exhibits than Respondent's Exhibit No. 100 to which he refers.

Trial Examiner Ballinger: The objection has been sustained.

Mr. Hanley: I just want to make the record, sir.

Mr. Austin: Do I understand, your Honor, that I can only ask the witness questions about the Respondent's business only when I refer him to certain exhibits, when the witness has spent two months in Detroit getting this information and when he states it within his own knowledge?

Trial Examiner Ballinger: The Examiner requests the reporter to turn back to the question asked by counsel for the Commission and read it.

(The question referred to was read by the reporter.)

Trial Examiner Ballinger: The answer of the witness would of necessity be obtained from an examination of the page of the record referred to. Now, if counsel desires the witness to testify to some matters within his own personal knowledge, he may broaden his question.

Mr. Austin: Yes, your Honor, I think perhaps you mis-
understood the scope of the question: The reference to page
15 of Respondent's Exhibit 100 was merely a convenient
means of calling attention to the different classes of
salesmen, with no reference to numbers. Now, I intended
the next question to be a separate question. May I
6115 again ask the witness a question?

Trial Examiner Ballinger: Proceed.

Mr. Hanley: Just a moment. The statement of counsel is objected to, as it appears that it is an attempt to indicate to the Court a particular instruction as to some portion of the testimony, namely, page 15 of Respondent's Exhibit 100.

Trial Examiner Ballinger: The Examiner will state on the record he will not be influenced by the suggestions offered by counsel for either side.

Mr. Hanley: I am just very sure of that, Judge, but

I want to make my record anyhow, and the respondent objects to the essential inferences in the statements made by counsel for the Commission.

By Mr. Austin:

Q. Can you state from your knowledge of the record and from your investigation in Detroit which class of the various classes of salesmen listed upon page 15 of Respondent's Exhibit 100 is the most numerous in number of salesmen employed?

A. Yes, sir.

Q. Will you so state?

A. Reseller salesmen.

Q. Now, referring to Commission's Exhibit 88, which is the salesmen's quarterly distribution time report for June, 1940, will you state the number of salesmen 6116 of each class employed by the company during that quarter?

A. The total salesmen were 63. Now, do you wish them by classes?

Q. Yes.

A. Industrial salesmen, 11; lubricating engineers, 3; automotive engineer, 1; city salesmen, 6; reseller salesmen, 26; B-station salesmen, 6; asphalt products salesman, 1; special salesmen, reseller, 4; special salesman, heating oil, 1; domestic heating oil salesmen, 4; making a total of 63.

Q. Will you now explain, Mr. Warmack, how the separation of the expenses of these salesmen between the channels on Form 189 is made in the company's regular accounting procedure, and before you answer that question let me ask you whether in answering it you desire to refer to the memorandum which you have described a few moments ago in your testimony?

A. Yes, sir. I think the memorandum states rather clearly and completely what happened.

Mr. Austin: I would like to have this paper marked for identification, please.

Trial Examiner Ballinger: The reporter will mark the paper Commission's Exhibit 131-A, -B and -C.

(The memorandum referred to was marked for identification as Commission's Exhibit 131-A, -B and -C.)

There was a discussion off the record.)

6117 By Mr. Austin:

Q. Mr. Warmack, you testified a few moments ago to having made a memorandum in Detroit, which was shown to and approved by Mr. Houghton and other members of the respondent's accounting staff.

A. Yes.

Q. I show you Commission's Exhibit No. 131-A, B, and C for identification, and ask you if that is the memorandum to which you referred in your testimony?

A. Yes, sir. It is.

Q. And does this memorandum, Commission's Exhibit 131 for identification, set forth the method employed by the respondent in arriving at the percentage factor for reseller salesmen which are set forth on the salesman's quarterly distribution of time reports used by the company in allocating the expenses of reseller salesmen between channels on Form 189 in its regular accounting procedure—

Mr. Hanley: That is objected to—

Mr. Austin: I have not completed my question.

Mr. Hanley: Please do so.

By Mr. Austin:

Q. —as approved by the respondent's accountants formerly testified to by you.

Mr. Hanley: Have you finished?

Mr. Austin: Yes.

6118 Mr. Hanley: That is objected to for the reason that it attempts to recite what is shown by the exhibit, the exhibit being the best evidence and for the further reason that the question assumes to say what the accountants for the respondent company stated, or said, or concluded, which is an assumption by counsel for the commission.

Trial Examiner Ballinger: Objection is overruled.

By Mr. Austin:

Q. What is your answer?

A. I would like to hear the question read.

Trial Examiner Ballinger: Read the question.

(The question was read by the reporter.)

The Witness: Yes, sir.

Mr. Austin: I offer Commission's Exhibit 131 for identification in evidence.

Mr. Hanley: May we be off the record?

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: This is a rather lengthy document. I would like to ask for a short recess in order to go over it.

Trial Examiner Ballinger: The hearing will be in recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

6119 Mr. Hanley: If your Honor please, may the Respondent reserve an objection, if any, to Commission's Exhibit marked for identification 131-A, B, and C?

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: On the record. Commission's Exhibit 131-A, B and C for identification is admitted in evidence, the right being reserved for counsel for respondent to renew his objection, and also to move to strike.

Mr. Hanley: May it be understood that counsel for the respondent may make any objection that counsel for the respondent thinks is impertinent to the exhibit.

Trial Examiner Ballinger: That is correct.

(The document referred to, heretofore marked for identification Commission's Exhibit 131-A, B, and C was received in evidence.)

Mr. Hanley: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Turn to page 2 of Commission's Exhibit 131, the statement appears:

> "In checking and reviewing the percentages, Mr. Hamer has at his disposal certain information obtained from 6120 special salesmen, whose duty it is to travel the field with the regular reseller salesman. It was stated in conference with Mr. Hamer that these special salesmen occasionally make personal notes of the actual time devoted to the separate channels and products by the reseller salesman on those days when they accompany the reseller salesman."

Did you ask Mr. Houghton or Mr. Hamer to be shown any of those personal notes, which I understand from the exhibit Mr. Hamer referred to as being occasionally made by the special salesman?

A. Yes, sir.

Q. And did you see any such notes?

A. No, sir. There was none available I was told by Mr. Hamer and Mr. Houghton.

To amplify that I was told by Mr. Hamer that those notes were not kept as a matter of any continuing record of the respondent company, so, I asked Mr. Hamer to show me the notes if he had any for the last month in which those distribution sheets has been prepared prior to my investigation. That would be for December, 1931.

Q. Do you mean December, 1941?

A. December, 1941. I was told that the company could not produce any of those notes.

Mr. Hanley: May we be off the record?

6121 Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Now, referring to Commission's Exhibit 88, 89, 102, and 103, which are the quarterly distribution of time reports for salesmen used for the allocation of salesmen's salaries for the year 1940, are the composite percentages at the bottom of those time reports, percentages representing the percentages of the time of the respondent's salesmen devoted to different channels and products during the preceding three months?

Mr. Hanley: Have you finished, Mr. Austin?

Mr. Austin: Yes.

Mr. Hanley: That is objected to for the reason that the exhibit speaks for itself, and the question propounded to the witness assumes that the calculations appearing on the exhibit may result ~~in~~ something different from what they appear to show.

The respondent has no objection to the witness testifying to the fact, if it be a fact, that the calculation on the exhibit is a different result from that shown on the exhibit, but the respondent does object to the witness merely reciting what the exhibit shows.

Trial Examiner Ballinger: Objection is overruled.

6122 The Witness: Please read the question.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Those composite percentages represent an estimate of the total time of this class of salesmen which are expected to be used for distribution purposes, or which are to be used for distribution purposes during the next three ensuing months in each instance, Mr. Austin.

They represent the time which is expected to be expended; that is, the composite time giving effect to the estimates of time for each class of salesmen during the next three ensuing months.

By Mr. Austin:

Q. Mr. Warmack, I asked you specifically whether those facilities are used for the allocation of salesmen's salary expenses for the preceding three months; that is, the months appearing on the form plus the preceding two months.

A. No, sir.

Q. Then are those composite percentages—if I understood you correctly, those composite percentages are applied in distributing salesmen's salary expense for the quarter following the time when the distribution of time reports is compiled?

A. Yes, sir. That is correct.

Q. And at the time these reports are compiled—still referring to the same four exhibits—has the expense 6123 to which those facilities are later applied, been incurred?

A. I—

Mr. Hanley: (interposing) Just a minute. That is objected to as pure conclusion of the witness, and not being shown a foundation that the witness knows whether or not the factual matter included in the question of counsel for the Commission was taken into consideration by the accountants for the respondent company when they made Exhibits Nos. 88, 89, 102 and 103.

Trial Examiner Ballinger: Objection is overruled. Answer the question.

The Witness: No, sir.

Mr. Austin: I would like to have the question read.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:)

"And at the time these reports are compiled—still referring to the same four exhibits—had the expense to which those facilities are later applied, been incurred?"

The Witness: Well, I would like to hear it read again.

Trial Examiner Ballinger: Read it again.

(The reporter again read the question.)

6124 The Witness: They are.

By Mr. Austin:

Q. You previously said "No."

A. I did not mean to say "No" in answer to that.

Mr. Hanley: I—

The Witness: (Interposing.) I thought that the question read a little differently.

Mr. Hanley: Inasmuch as the witness has now answered by "Yes," and "No" to the several past succeeding questions respondent moves to strike all of the questions and answers on the ground that the witness has not given any intelligible answer.

Trial Examiner Ballinger: Your last answer is the answer you intended to give in both instances?

The Witness: Yes, sir. If I can only give an answer without being continually interrupted.

Trial Examiner Ballinger: The motion to strike is denied.

Mr. Hanley: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Mr. Warmack, did you spend a considerable amount
of time, and state how much time if you can, which you
spent in Detroit in the office of the company in study-
6125 ing and analyzing the methods used by the respond-
ent in allocating salesmen's salaries between the
various channels in their regular accounting procedure?

A. I spent considerable time, Mr. Austin, on that particular subject during the course of my study of the respondent's records in Detroit during January and February of this year.

Q. Mr. Warmack, did you find that the percentage figures and distribution of time shown on the salesman's quarterly distribution of time reports, examples of which are Commission's Exhibits 88, 89, 102 and 103, are supported by any time schedules or records of the time actually devoted by salesmen to different channels or products, prior to the compilation of the quarterly reports?

Mr. Hanley: Now just a moment. That is objected to as calling for the conclusion and opinion of the witness, and an improper question in that it asks the witness as to what he found in respect of certain exhibits.

There is no objection to the witness stating what he did and what figurative conclusions he reached in connection with his study.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: The objection is overruled.

6126 Mr. Hanley: If your Honor please, I believe we are entitled to have questions and answers which may be made the subject of cross-examination. I do not see how this possibly can be.

Trial Examiner Ballinger: The Examiner has ruled. The witness may answer.

The Witness: May I have the question read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Mr. Hanley: That is further objected to for the reason that there is no foundation laid.

There is not indicated whether or not any request was made, or whether any information was furnished, or whether any information, in fact, exists in the records and accounts and data of the respondent company relative to the fact whether or not any records exist relative to the character of the accounts referred to in the questions.

Trial Examiner Ballinger: The second objection of counsel for the respondent to the question is overruled.

The Witness: May I hear the question again?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I found no documentary evidence of any kind whatsoever in the Detroit office, and was told that none existed which was supported or which would support these time schedules, Commission's Exhibits 88, 89, 102 and 103.

6127 By Mr. Austin:

Q. Told to whom?

A. Told by Mr. Houghton, Mr. Hamer, Mr. Bath, and probably others.

Mr. Austin: I move that we adjourn until 9:30 Monday morning, July 6, 1942, at the same place.

Trial Examiner Ballinger: The motion of counsel for the Commission is granted. And now at 11:30 a. m., July 4, 1942, the hearing is adjourned to be reconvened on July 6, 1942, at the hour of 9:30 a. m., in Room 388, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 11:30 a. m., July 4, 1942, the hearing in the above-entitled matter was adjourned.)

6128

Room 388, Federal Trade
Commission Building,
Washington, D. C.,
Monday, July 6, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois, appearing for the Respondent.

6129 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

This is a reconvening of Docket No. 4389, case entitled "In the Matter of Standard Oil Company of Indiana," at 9:30 a. m., July 6, 1942, in Room 388, Federal Trade Commission Building, Washington, D. C.

The last hearing was held at the same place on July 4, 1942. The reporter will note the counsel for the Commission and Respondent present.

You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination (continued) by Mr. Austin.

Q. Mr. Warmack, will you refer to Commission's Exhibits 88, 89, 102, and 103, please?

A. Yes, sir.

Q. From those exhibits, can you state what percentage of the salesmen's salaries were charged to the tank wagon reseller channel during the year 1940 by the Respondent in this regular accounting procedure?

A. Yes, sir.

Q. Please do so.

A. Yes, sir.

6130 The figure worked up in December, 1939, was 31.7 per cent, which was for the allocation of this expense for the months of January, February, and March, 1940.

The figure worked up in March, 1940, was 30.5 per cent, which was used for the allocation of this class of expense during the months of April, May, and June, 1940.

The percentage worked up in the month of June was 29 per cent, which was used for the distribution of the salesmen's time in July, August and September of that year.

The figure worked up in September, 1940, was 28.6 per cent, which was used for the allocation of time in the months of October, November, and December of 1940.

Q. For the purpose of allocation between the tank wagon reseller, tank wagon consumer, and other method channels, were those percentages that you stated applied to the entire salesmen, or only to salaries of certain classes of salesmen?

A. In the company's regular accounting procedure they were applied for the most part to all of the salesmen's salaries, Mr. Austin.

I might refer you to page 2 of Respondent's Exhibit No. 99, which will give you the method employed, or at least a greater detail of the methods employed. It shows an illustration there of the allocation of costs for the months of January, 1940, and July, 1940.

Q. You just said "for the most part"; that these 6131 percentages were charged to all salaries. Page 2 of Respondent's Exhibit 99 says that total salaries paid to salesmen for the months of January and July were distributed according to the example there given. What did you mean when you said "for the most part"?

A. I meant exactly that, Mr. Austin. There would be some slight adjustments coming in with respect to those salaries. And there would be a few of what we might term "minor allocations" made, even at page 2 of Respondent's Exhibit 99 would not be gone into; but I would not regard that as any material change from the fact that practically all of the expense was allocated on the basis of composite percentages—the total composite percentages as shown by those four respective exhibits for the months stated.

Q. Considering salesmen's salary expense in account 004 as a whole, in the entire exhibit for the year, what percentage of that expense was entered by the Respondent in the tank wagon reseller channel in the Detroit field, Form 189?

A. Approximately 28 per cent, Mr. Austin.

Q. Did you check that percentage?

A. Yes, sir.

Q. I wonder if you would mind checking that Mr. Warmack, now, if it would not take too long, so as to give us the exact percentage?

A. I would be glad to if you will furnish me some paper.

6132 Trial Examiner Ballinger: Here is some paper and a pencil.

(The witness made certain calculations.)

The Witness: The percentage, as shown in the 004 account entitled "Salaries, Salesmen," is 29.19 per cent, for the year 1940.

Trial Examiner Ballinger: 004 account of what exhibit?

The Witness: 004 account of Commission's Exhibit 119, your Honor.

By Mr. Austin:

Q. Now, Mr. Warmack, you have said as shown on, or at least I think you said in your answer just given when you referred to the percentage shown in account 004—does Commission's Exhibit 119 show any percentages?

A. No, sir. That is my calculation, Mr. Austin.

Q. I want to make that clear.

A. Yes, sir.

Q. Will you now turn, please, to Respondent's Exhibit 100, to page 18.

A. Yes, sir.

Q. Also turn to page 19.

A. Yes, sir. I have both pages.

Q. As shown on page 19 of Respondent's Exhibit 100,

the portion of salesmen's salaries in account 004
6133 which were allocated to direct shipment business in this cost study amounted to $13,639.17.

In transferring that expense for the purposes of this cost study from the tank wagon reseller, tank wagon consumer, and other methods channels, to the direct shipment channels on Respondent's Exhibit 101, what portion of this amount of $13,639.17 was removed from, or deducted from the amount of expense entered in the tank wagon reseller channel on company form 189, Commission's Exhibit 119?

A. 2.67 per cent.

Q. Then do I understand that in the company's regular accounting procedure, 29 per cent of the salaries of all salesmen were allocated to the tank wagon reseller channel, whereas only 2.67 per cent, of the amount of salesmen's salaries charged to direct shipments was deducted from the tank wagon reseller channel?

A. That is an correct assumption, sir; as a matter of fact, that is what was done.

Q. What would be the effect on the amount of marketing expense of the Respondent entered in the tank wagon reseller channel for account 004, on Respondent's Exhibit 101, if the same portion of the direct shipment in account 004, as shown on Respondent's Exhibit 101; that is, 29 per cent., had been removed from the tank wagon reseller channel expense for that account, for the purposes of
6134 this cost study, as was originally charged to that account in the company's regular accounting procedure? 7

The Witness: I am afraid I do not quite follow that question.

Mr. Austin: I will withdraw the question and restate it.

Trial Examiner Ballinger: The question is withdrawn and will be restated.

By Mr. Austin:

Q. What would be the effect on the amount of marketing expense of the Respondent entered in the tank wagon reseller channel for account 004, in Respondent's Exhibit 101, if the same portion of the direct shipment charge, namely, 29 per cent. had been removed from the tank wagon reseller channel expense for that account for the purposes of this cost study, as was originally charged to that account in the company's regular accounting procedure?

Do you understand that question, Mr. Warmack?

A. Yes, sir, I do.

Mr. Hanley: That is objected to for the reason that it is immaterial what the effect, as inquired about in the question, would be in cost study prepared by the Respondent as reflected by Respondent's Exhibits 99, 100 and 101, since that cost study which, as stated, was prepared by the Respondent in those four named exhibits, are a
6135 factual study of the costs applicable to direct shipment business, and unless and until it is demonstrated that the factual allocations made by Respondent of the cost of direct shipment business are erroneous, the answer of the witness could have no probative value, but would simply be a hypothetical speculation.

Trial Examiner Ballinger: The objection is overruled.

6136 The Witness: The figures as shown in Respondent's Exhibit 101 on Account 604 in the tank-wagon reseller column would be reduced.

I might add that in this connection I made a study in the Detroit office for the months of July, August, and September, 1940, as a test, your Honor, to see just what the effect would be, during those months, it being observed in my review of the respondent's cost report, Respondent's Exhibit 100, that $13,639.17 of this class had been determined by respondent's accountants as being applicable to the direct shipment business.

In view of the fact that Respondent's cost study did not carry through the analysis of this particular class of expense as between tank-wagon reseller channel, tank-wagon consumer channel, and other methods channel on Respondent's Exhibit 101 for 1940, I had to inquire into how this particular class of expense had been handled with reference to those channels as it had been originally applied.

According to the testimony as given by Mr. Boatwright, this portion of this class of expense which is regarded by Respondent as applicable to the direct shipment business has been removed from the regular distribution channels on Respondent's Form 189 in the exact manner that it had originally been applied to those channels in Respondent's regular accounting procedure in the Detroit
6137 field for the year 1940, which would mean that 29.19

per cent of this class of expense had been assigned by respondent in its regular accounting procedure to the tank-wagon reseller column.

In my studies and analysis of this item, from my review of Respondent's Exhibit 100, I found that only 2.67 per cent of this particular class of expense had been removed from the tank-wagon reseller channel for the year 1940 in respondent's recent cost survey.

Now, in my studies and detailed analysis for the months of July, August and September I found that by removing from the tank-wagon-reseller channel in respondent's regular form 189 only 2.67 per cent of this class of cost which had been in the late study assigned to the direct shipments, instead of removing 29.19 per cent as an item had originally gone into that tank-wagon reseller channel in the regular accounting procedure, I found that for those particular three months the tank-wagon channel in Respondent's Exhibit 101 for Account 004 had been overstated by the amount of $581.42.

Mr. Houghton of the Chicago office of the respondent and I together worked up this figure. I did not make the calculation for the complete year because of the pressure of time. I assumed that this test would be sufficient.

If this $581.42 were projected for one year, it means
that the tank wagon reseller column on Respondent's
6138 Exhibit 101 is overstated by approximately $2,325.68.

Trial Examiner Ballinger: What is the total amount of the account?

Mr. Austin: You mean Account 004?

Trial Examiner Ballinger: Yes.

The Witness: The amount of Account 004—

Trial Examiner Ballinger: As overstated?

The Witness: —as shown in tank wagon reseller column, is $60,181.54. It is that item which includes an overstatement.

By Mr. Austin:

Q. Did you make any study and analysis of salaries paid to industrial salesmen in the Detroit field for the year 1940 during your investigation of this cost study?

A. Yes, sir.

Q. What were the total salaries paid to industrial salesmen employed by the respondent in the Detroit field for the year 1940?

A. $33,924.00.

Q. Referring again to Commission's Exhibit 88, 89, 102 and 103, will you state what the first line of each of those exhibits represents, if you will?

A. It represents the time allocation and product allocation for industrial salesmen. It might be noted that in the case of Exhibit 102 the first line says "Lubricating 6139 Salesmen." I think that is a typographical error. It means industrial salesmen.

Q. On Commission's Exhibit 102, is there any class of salesmen listed as industrial salesmen?

A. No, sir.

Q. And does the classification "Lubricating Salesmen" appear in the same place on Exhibit 102 that "Industrial Salesmen" appears on Exhibits 88, 89, and 103?

A. Yes, sir.

Q. Are the number of lubricating salesmen shown on Commission's Exhibit 102 the same as the number of industrial salesmen shown on Exhibits 88, 89, and 103?

A. It is identical.

Trial Examiner Ballinger: Did you prepare Commission's Exhibit 103?

The Witness: No, sir.

(Discussion off the record.)

Trial Examiner Ballinger: We will take a recess for five minutes.

(A short recess was taken.)

6140 By Mr. Austin:

Q. Then, for the purposes of answering the question which I am about to ask you regarding industrial salesmen, will you assume, Mr. Warmack, that the term "lubricating salesmen" on Respondent's Exhibit 102 refers to the same class of salesmen as is referred to by the term "industrial salesmen" on Commission's Exhibits 88, 89, and 103?

A. Yes, sir.

Q. How many industrial salesmen are shown on those four exhibits?

A. Eleven.

Q. Is the number the same on each of the four exhibits?

A. Yes, sir.

Q. As shown by those four exhibits, do the industrial salesmen spend any part of their time on tank wagon reseller business?

A. No, sir.

Q. How much of their time is shown to be spent on tank wagon consumer business?

A. 12.46 per cent is the time that is spent on tank wagon consumer business, Mr. Austin. It will be noted that these exhibits do not show that identical figure. That means the relation that 137 bears to 1100, which are the figures shown on the respective exhibits, being Commission's Exhibits.

Mr. Hanley: If your Honor please, I would like to
6141 ask a question. May I?

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. Does your answer just given, Mr. Warmack, mean that you have made a calculation yourself which developed this percentage of 12.46?

A. Judge Hanley, I did make the calculation. That is verified by the—

Mr. Hanley: (Interposing) That is all I wanted to know, as to whether or not the 12.46 is your figure.

The Witness: That is correct, and it is verified by Respondent's Exhibit 100, page 18.

By Mr. Austin:

Q. What are the figures shown on Commission's Exhibits 88, 89, 102 and 103 for industrial salesmen for the tank wagon consumer channel, the other methods, and the automobile supplies channel?

A. The figures shown are identical for all exhibits.

Tank wagon consumer channel	137
Other methods channel	958
Automobile supplies channel	5
making a total of	1100.

Q. What is the meaning of the figures 1100 appearing on those four exhibits?

A. That is the number of salesmen, which is 11 multiplied by 100.

6142 Q. Then you referred to the fraction 137 over 1100. Does that fraction indicate the amount of time spent by industrial salesmen on tank wagon consumer business, or does it indicate the percentage or the proportion of salaries of industrial salesmen which was allocated to the tank wagon consumer channel by the Respondent in it regular accounting procedure for the year 1940?

A. It represents the proportion of time which Respondent assumes or estimates will be expended by this class o employees on that distribution channel; that is, the tank wagon consumer business.

Q. What I am trying to get at, Mr. Warmack, is: D those divisions of time of industrial salesmen shown on th four exhibits show or do they purport to show the amoun of time actually spent by industrial salesmen on differen classes of business, or are they merely distribution figure arrived at in the method previously described by you whe you described the method by which the Respondent compiles the quarterly distribution of time reports?

A. They are distribution figures, Mr. Austin. They ar estimates of what the company assumes will be the proportion of time which this class of salesmen will expend o tank wagon consumer business, as I have previously described in connection with the reseller salesmen.

Mr. Austin: Off the record.

6143 Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Now, did I understand you to say, Mr. Warmac that 12.46 per cent of the salaries of industrial salesme was assigned by the company for 1940 to the tank wago consumer channel?

The Witness: Will you read the question, please?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: That is the estimate of time, Mr. Austi that it was expected would be expended by this class o salesmen. That figure was not used, not that identic figure was used for the separation of this class of expens

By Mr. Austin:

Q. What figure was used?

A. A composite figure of all salesmen, of which this i a component part.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

Mr. Hanley: As I understand, the Respondent has a continuing objection to the witness reading simply what already appears in admitted exhibits.

6144 Now, if your Honor please, Respondent objects to the continuation of any examination relative to lubricating or industrial salesmen, assuming that that may be the same class of salesmen, and any allocation of their time or expense incident to their work to the consumer channel as appearing on Respondent's Exhibit 101, as the same appears in the regular No. 189 accounting form of the Respondent, for the reason that none of that classification of salesmen, nor the channel referred to, to wit, consumer channel, has any bearing, effect, or influence whatsoever upon the differential in cost as between the two classes of customers served by the Respondent, and upon which the charge in the complaint filed herein by the Commission is based, and that this entire inquiry is wholly immaterial.

Trial Examiner Ballinger: The objection is overruled.

By Mr. Austin:

Q. Mr. Warmack, what percentage of the salaries of industrial salesmen is assigned in the company's calculation of the company's quarterly distribution of time reports for 1940 (Commission's Exhibits 88, 89, 102, and 103) to other methods business?

A. On each of these 958/1100's percentage of this class of expense, or 87.09 per cent of this class of expense is assigned to other methods, on the exhibits.

6145 Mr. Hanley: Now, if your Honor please, may it be understood that the objection just made by the Respondent may be considered in connection with this particular question, it now appearing that counsel is inquiring as to other methods channel on Respondent's accounting form 189, and I ask to add to that objection that it now appearing that the Respondent's quarterly time distribution estimates are, in fact, estimates only, as now indicated by this witness, and that all of this line of examination as to time distribution and as to accounting in channels other than the reseller channel and the direct channel, are immaterial inasmuch as the differential sought to be justified herein is the differential between the reseller channel and the direct shipment channel, and has no relation to or connection with the various other channels that are now being inquired into by counsel.

If your Honor please, may the Respondent have that objection as a continuing objection to this general line of examination?.

Trial Examiner Ballinger: The objection is overruled. There is reserved to counsel for the Respondent a continuing objection embracing the same grounds.

By Mr. Austin:

Q. What percentage of the salaries of industrial salesmen was assigned by Respondents to automobile supplies in the 1940 quarterly distribution of time reports?

A. 5—1100's or .45 per cent.

6445-a By Mr. Austin:

Q. Is the total of those three percentages that you have named for the tank-wagon consumer and other methods and the automobile-supplies channel 100 per cent?

A. Yes, sir.

Q. Does that mean that no part of the salaries of industrial salesmen in 1940 was assigned by the respondent to the tank-wagon reseller channel?.

A. That means that no part of their time was assigned to the tank-wagon reseller channel on Commission's Exhibits 88, 89, 102 and 103.

Q. Can you state from your investigation whether any of the time of industrial salesmen is spent in connection with tank-wagon reseller business, or do you know that? Well, I will withdraw that question.

Trial Examiner Ballinger: The question is withdrawn.

Mr. Austin: I think that is covered by the testimony.

By Mr. Austin:

Q. Were the percentages which you have just given for the various channels for salaries for industrial salesmen the percentages which were used by respondent in allocating this class of expense (amounting to $33,924.00) in 1940 to the regular channels on Respondent's form 189 shown as Commission's Exhibit 119?

6446 The Witness: May I have that question read, your Honor?

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

The Witness: No, sir.

By Mr. Austin:

Q. What percentages were used by the respondent in allocating salaries of industrial salesmen to tank-wagon reseller, tank-wagon consumer, and other-methods channels in its regular accounting procedure?

A. The composite percentages shown at the bottom of each of the exhibits named, that is, Commission's Exhibits 88, 89, 102 and 103.

Q. What were those percentages for the first quarter of 1940?

A. 29.7 per cent of the total salesmen salaries, which includes industrial salesmen, was assigned to tank-wagon reseller cost; 14.5 per cent was assigned to the tank-wagon consumer column; 51 per cent was assigned to other-methods column; and 4.8 per cent was assigned to automobile supplies column.

Q. Were the same percentages used for the other three quarters of 1940?

A. Did you say were the same percentages used?

6147 Q. Yes.

A. Not the exact percentages.

Q. Were the percentages for the other three quarters approximately the same as the percentages for the first quarter, or was there any substantial variation?

A. There was no substantial variation.

Q. Were these percentages applied to the $33,924.00 Industrial Salesmen's Salaries, in the separation of salesmen's salaries and expenses to channels on Respondent's Form 189?

A. They were not applied to it as such, but to explain the $33,924.00, Industrial Salesmen's Salaries constituted a part of the total of $220,826.71 of salesmen's salaries in the Detroit Field for the year 1940. It is the $220,826.71 to which the percentages were applied to make the allocation. It will be noted, of course, that those allocations were made by the month and were not made on one single annual cost.

Q. Does it or does it not follow from what you have just explained that a portion of the Industrial Salesmen's Salaries were assigned to the tank-wagon reseller channel on Company Form 189 for 1940?

A. In my opinion, yes, sir.

Q. Well, now, I asked you a question which I don't believe is susceptible of a yes or no answer.

6148 Will you read the question again, please?

(The question referred to was read by the reporter.)

The Witness: In my opinion a part of the industrial salesmen's salaries were assigned to the tank-wagon-reseller column in Respondent's Form 189 for the year 1940.

Mr. Hanley: Respondent moves to strike the answer to the question for the reason that the witness has assumed to give an opinion on a pure question of fact. This witness has stated that he has made a detailed study of salary allocations. The question of whether or not respondent did or did not allocate any industrial salesmen expense to the reseller channel is a pure question of fact and, if this witness is qualified to make the answers which he has been undertaking to make during all of the interrogation on this subject, he is qualified assumedly to answer yes or no to a question of fact relative to whether or not the respondent did or did not make the allocation referred to.

Trial Examiner Ballinger: Does counsel for the Commission desire to be heard?

Mr. Austin: Well, the witness has stated that industrial salesmen's salaries were included in the total salesman's salaries and that certain percentages were applied to the total salesmen's salaries to allocate them between channels, so that I think now he is entitled to state that in his opinion it follows from the procedure used that a portion of 6149 salaries of all salesmen were assigned to each channel, since the percentages were applied to total salaries. I don't know that it is a question which can be answered strictly as a question of fact.

Trial Examiner Ballinger: The Examiner is of the opinion that it is factual matter, and the motion is granted and the answer is stricken.

By Mr. Austin:

Q. Were the composite percentages shown at the bottom of the quarterly distribution of time reports, Commission's Exhibits 88, 89, 102 and 103, applied to the total salesmen's salaries in charging a portion of that total to each of the respective channels on Respondent's Form 189 for 1940?

A. The answer is yes, with this little explanation: every month, Mr. Austin, there would be some little minor charge that would have some little adjustment, but for the most part, or I mean all but a very small amount, those composite percentages were used.

Q. Were used for what?

A. Used for the allocation of all of the expense, not any one part, but all of it.

Q. Including the salaries of industrial salesmen?

A. Yes, sir. To explain that, just so the record may be clear, there would be costs from the Chicago office, Mr. Austin, that would be included in this particular class of expense covering somebody's salary that had come
6150 out of Chicago. That small portion of the account may be assigned directly.

Q. I see. Now, so that this may be perfectly clear, Mr. Warmack, will you again refer to Commission's Exhibits 88, 89, 102 and 103 and state whether in the lines of those exhibits marked "Industrial Salesmen" is any part of the time of those salesmen assigned on any of those exhibits to the tank-wagon reseller column?

A. No part of it is assigned to the tank-wagon reseller column.

Q. What composite percentage of the time of all salesmen for the entire year is assigned to the tank-wagon reseller column?

Well, I will strike that question, if you please.

Prefatory to my next question, Mr. Warmack, I believe you have already stated that 29.19 per cent of the total salesmen's salaries for the entire year was assigned to the tank-wagon reseller column. Now, since none of the time of the industrial salesmen is entered in the tank-wagon reseller column on the quarterly distribution of time reports, what effect does the use of the composite percentages in the allocation of total salesmen's expense to the separate channels on Respondent's Form 189 have in your opinion from an accounting standpoint?

6151 A. I believe I could answer it best in this way, Mr. Austin: The use of the composite percentages, bearing in mind all of the facts pertaining to the way they were arrived at, represents in my opinion, from an accounting standpoint, nothing more or less than a rough and ready method of allocating costs.

Q. What do you mean by "rough and ready method," Mr. Warmack, will you give us a little more technical explanation of that?

Trial Examiner Ballinger: Do you mean in effect that it is merely a rough estimate?

The Witness: Yes, sir, that is what I mean.

By Mr. Austin:

Q. Can you state what class of salesmen, if any, spend more of their time on tank-wagon reseller business than on the other classes of the respondent's business?

A. Yes, sir, the reseller salesmen, whose time was estimated by the company as applying over 52 per cent to the tank-wagon reseller business in these distribution cost sheets, Commission's Exhibits 88, 89, 102 and 103.

Q. Did you make any study of the allocation of the salaries of reseller salesmen for the year 1940?

A. Yes, sir.

Q. How many reseller salesmen were engaged in the Detroit field in 1940?

A. Usually about 26 salesmen were engaged, Mr. Austin, the year around.

6152 Q. And what was the average salary paid to each of the various classes of salesmen by the respondent in 1940, if you have any information from which you can state that?

A. I only made an analysis of the salesmen's salary account for the month of January, 1940.

Q. Do you have information from which you can state the average salaries paid to reseller salesmen and to industrial salesmen in January, 1940?

A. Yes, sir. The average salary paid to reseller salesmen in January, 1940, was approximately $215.25 a month. The average salary paid to industrial salesmen for the month of January, 1940 was shown by analysis to be $257.00 per salesman per month.

Q. Were there any salesmen in the Detroit field in 1940 whose salaries were allocated to channels on the basis of composite percentages and whose salaries were in excess of $257.00 per month?

A. Yes, sir, there were several whose salaries were in excess of $257.00 per month.

Q. What were they?

A. You mean what were the amounts of the salaries?

Q. No, what were the salesmen or the groups of salesmen who received more than $257.00 per month?

A. I refer to the analysis, Mr. Austin.

6153 (There was a discussion off the record.)

Mr. Austin: I will withdraw that question.

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Austin:

Q. Can you tell me, Mr. Warmack, what if any effect was given to the difference in the salaries of different salesmen and different classes of salesmen in the preparation of the quarterly distribution of time reports used by the respondent for allocating salesmen's expenses in its regular accounting procedure?

A. As far as I was able to learn in my study in the Detroit office of the respondent, no weighing factors giving effect to salaries of different salesmen or classes of salesmen were used in the preparation of quarterly distribution of time reports for the salesmen—that is, Commission's Exhibits 88, 89, 102 and 103.

Q. Without giving any names, can you tell me the approximate amount of the highest salary paid to salesmen by the respondent in the Detroit field in 1940?

A. You mean the salesmen's salaries whose accounts are kept in Account 004 of the respondent?

Q. That is right.

A. Around $400 per month.

Q. And what was the lowest salary paid to regularly employed salesmen in the Detroit field in 1940?

6154 A. Less than $200.00 per month.

Mr. Hanley: Just to make the record, if your Honor please, the respondent moves to strike the answer to the last question and the several answers given by the witness to questions relative to salesmen's salaries, for the reason that the same is immaterial and has no bearing whatever upon the cost differential, which is the thing in question in this lawsuit.

Trial Examiner Ballinger: The motion is denied.

By Mr. Austin:

Q. In arriving at the composite percentages used for the allocation of salesmen's salary expense between channels in the company's regular accounting procedure, was the time of the salesmen earning as much as $400.00 a month given more or less weight than the time of the salesman being paid $200.00 a month?

A. As far as I was able to learn in my studies of this

particular situation as to how these distribution cost sheet
were prepared in respondent company's offices, the tw
were treated the same.

Trial Examiner Ballinger: Given equal weight?

The Witness: Given equal weight, yes, your Honor.

Mr. Hanley: May I inquire, if your honor pleas
6155 what the witness means by "equal weight." You don'
mean that $400.00 equals $200.00?

Mr. Austin: No, we were speaking of whether the tim
was given equal weight.

Trial Examiner Ballinger: The statement, as the Ex
aminer understands it, is to the effect that they made
computation of time of salesmen without taking into ac
count the question of the amounts of salaries paid to th
salesmen.

Mr. Hanley: Is that your testimony?

The Witness: That is, Judge Hanley.

Trial Examiner Ballinger: In other words, they gav
the same credit to a salesman who was receiving less tha
$200.00 a month that they did to a salesman who was re
ceiving $400.00 a month in their computation, is that cor
rect?

The Witness: It is correct, your Honor, and I shoul
like to call attention to the fact that I inquired specifi
cally into this particular question while in Detroit.

By Mr. Austin:

Q. Now, will you refer to Respondent's Exhibits 10
page 15, and I direct your attention to the line of tha
page marked "Industrial Salesmen," which shows tha
$3,030.26 of Industrial Salesmen's Salaries for 1940 wa
assigned in this cost study to direct shipment business.

Next I refer you to page 48 of the same exhibit an
6156 ask you to note that opposite "Industrial Salesmen
the figure $3,030.26 is again shown, and in the thre
right hand columns on that page there is shown the por
tions of this amount which were removed from the re
spective channels on the Company Form 189 for 1940 fo
the purposes of this cost study.

I now ask you what, if any, amount of the Industria
Salesmen's Salaries were removed from the tank-wago
reseller channel in making the charge of $3,030.26 to dire
shipment channels?

A. No part of this class of expense was removed from the tank-wagon-reseller channel on Respondent's regular form 189.

Q. And what amount was removed from the tank-wagon-consumer channel?

A. $377.59.

Q. What amount was removed from the other-methods channel?

A. $2,639.05.

Q. And from the Automobile Supplies channel?

A. $13.62.

Q. Do those three figures total $3,030.26?

A. They do.

Q. Is that total a part of and included in the 220 odd thousand dollars of salesmen's salaries which were assigned to the four channels on Form 189, Commission's Exhibit 119, for 1940 in the Company's regular accounting procedure?

6157 A. Yes, sir, that $3,030.26 is included in the 220 odd thousand dollars, which represents this total expense for the year 1940.

Q. And when you referred to the four channels, one of those channels was the tank wagon reseller channel, was it not?

A. Yes, sir.

Q. Was any part of the 220 odd thousand dollars assigned to the tank-wagon reseller channel or to any other channel on the company's Form 189 on the basis of the respective ratios applicable to salaries of separate classes of salesmen, as shown on the quarterly distribution of time reports, Commission's Exhibits 88, 89, 102 and 103? I am not talking about the composite percentages at the bottom of those time reports. I am talking about the ratios shown in the separate lines, that is, taking the number in any one line under the channel as a portion of the total salesmen's hours for that class only.

6158 A. The answer is "No."

Q. On this cost study I want to call your attention to the fact that, as shown by Respondent's Exhibit 100 pages 15 and 18, $3,030.26 of the industrial salesmen's salaries was removed from the expense account 004, in the bulk plant channels and assigned to direct shipment channels. On the basis of what percentages was that $3,030.26 taken out of the bulk plant channel?

Mr. Hanley: Meaning reseller channels?

By Mr. Austin:

Q. Meaning tank wagon reseller, tank wagon consumer, and other methods.

A. I was taken out on the basis of percentages estimated as being the time which the industrial salesmen only spent in serving customers falling in the respective bulk plant channels, and was taken out not on the basis of composite percentages.

Q. Did that expense go into the bulk plant channels on the basis of composite percentages?

A. Yes, sir.

Q. Applying the composite charges as shown on the quarterly distribution of time reports for 1940 to the $3,030.26 only (that being the portion of industrial salesmen's salaries assigned in this cost study to direct shipment business) what portion of that amount went into the tank wagon reseller column on company form 189, Commission's Exhibit 119?

6159 A. $863.63.

Q. What portion into the tank wagon consumer column?

A. $469.08.

Q. What portion to the other methods column?

A. $1,562.10.

Q. What portion to the automobile supplies column?

A. $135.45.

Q. Now,

Mr. Hanley: (Interposing.) Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Now, referring again to page 18 of Respondent's Exhibit 101, what portion of this $3,030.26—I believe this is Respondent's Exhibit No. 100—was removed from the tank wagon reseller column for the purposes of Respondent's cost study?

A. None.

Q. What is the effect of that, in your opinion?

A. It indicates to me that for industrial salesmen's salaries the tank wagon reseller column in Respondent's Exhibit 101 is overstated by the amount of $863.63 arising from what I consider to be an erroneous method employed in taking direct shipment costs out of the respective channels on form 189.

6160 Q. In the testimony you have just given, Mr. Warmack, I have directed your attention specifically to industrial salesmen's salaries.

In your opinion, are the methods employed and the allocation of salaries of other salesmen in account 004 for the purposes of this cost study equally erroneous, and before you answer that I would like you to understand that I refer not to the amount; I am referring to the method.

A. As to the method, in my opinion, they are equally erroneous.

Q. But does it follow that in every case; that is, as to every class of salesmen the result may be to overload the tank wagon reseller channel?

A. The ultimate effect, Mr. Austin, as I have previously shown, was to over-state the tank wagon reseller channel. There are some of these salesmen's salaries which will have a little compensating effect.

Q. Do you mean classes of salesmen?

A. Yes, sir, but the ultimate effect was to overstate the reseller channel by two thousand plus odd dollars that I have just testified to.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

6161 Mr. Hanley: I would like to ask for a five minute recess.

Trial Examiner Ballinger: The hearing will stand in recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Austin: I move that the hearing recess until 1:30 o'clock p. m., this afternoon, if the Examiner please.

Trial Examiner Ballinger: The motion is granted.

Now, at 11:46 a. m., the hearing stands in recess until 1:30 p. m.

(Whereupon, at 11:46 a. m., a recess was taken until 1:30 p. m., this day.)

6162 Afternoon Session.

1:30 p. m.

Trial Examiner Ballinger: Come to order.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination.

By Mr. Austin:

Q. I am going to ask you now to refer to Accounts 025 and 055 on Respondent's Exhibit 101. Account 025 is entitled, "Truck Rental Expense," and the amount of expense entered in that account on Respondent's Exhibit 101 is $75,597.79, all of which expense is entered in the tank-wagon reseller and tank-wagon consumer channels. What is the nature of that expense going into that account, Mr. Warmack, and you can answer that generally, since I believe that it has been described elsewhere in the record?

A. Are you speaking of both accounts 025 and 055?

Q. No; my question was directed only to Account 025.

A. To 025?

Q. Yes.

A. The commission agents own their own truck chassis, for which they receive a rental from the respondent, and that is what this item of expense represents.

6163 Q. Are those truck chassis to which you have just referred truck chassis used in the conduct of the company's business, Mr. Warmack?

A. Yes, sir.

Q. Are they used for the delivery of the company's products?

A. They are.

Q. Does that mean products delivered by commission agents from the respondent's bulk plants?

A. Yes, sir.

Q. Now, Mr. Warmack, this account is entitled "Truck Rental Expense" and doesn't say anything about commission agents. Does the expense in that account include solely rental expense paid commission agents, or is there any other kind of expense in there?

A. Mr. Austin, I didn't make a cold analysis of the expense account for the full year. It is my understanding, and I was told by Mr. Houghton and what reviews that I did make in the Detroit office showed that this total expense represents payments to commission agents for the use of their truck chassis as just explained.

Q. I think the testimony shows that, but I wanted to make it clear at this point, as long as I asked you the question at all. I didn't think that this answer specifically limited the expense to commission agents, although I believe Mr. Boatwright's testimony does so.

6164 A. It is my understanding that this is solely commission agents' expense.

Q. And how was that total expense going into that account, in the sum of $75,597.79, allocated between the tank-wagon reseller and the tank-wagon consumer channels in the company's regular accounting procedure on its Form 189?

A. On a basis of gallonage, Mr. Austin, that is, the tank-wagon reseller and the tank-wagon consumer gallonage which was distributed through commission agents in the Detroit field for the year 1940.

Q. Do you have a statement of the amount of gallons of petroleum products distributed through commission agents to tank-wagon consumers and included in the tank-wagon consumer gallonage shown on company Form 189 for 1940?

A. I have a statement which was prepared in the Detroit office showing the tank-wagon reseller gallonage and the tank-wagon consumer gallonage. The statement does not include other-method gallonage.

Q. Commission's Exhibit 120 shows the total tank-wagon reseller volume through commission agents and drivers as 21,267,660 gallons. I would like to have you state the tank-wagon consumer gallonage delivered through commission agents and drivers, if you have that record, Mr. Warmack?

A. 21,461,669 gallons.

Q. What is your opinion, Mr. Warmack, as to whether the respective gallonage figures for the tank-wagon
6165 consumer and the tank-wagon reseller channels delivered through commission agents and drivers are a proper basis, from the standpoint of sound accounting, for allocation of this truck-rental expense between the tank-wagon consumer and tank-wagon reseller channels?

A. From an accounting standpoint, I rather feel that the separation could have been made on a more sound basis.

Mr. Hanley: The respondent moves to strike the answer of the witness, for the reason that his answer is merely a criticism of the methods used by respondent, without offering any alternative method which might be in his opinion a sounder method, and in consequence the answer has no probative value.

Trial Examiner Ballinger: Do you desire to ask the witness any further question, before the Examiner rules?

Mr. Austin: I would like to have my question read, if your Honor please.

(The question referred to was read by the reporter.)

Trial Examiner Ballinger: Read his answer.

Mr. Austin: I will consent that the answer be stricken and also request that the question be stricken.

Trial Examiner Ballinger: Both the question and answer are stricken.

By Mr. Austin:

6166 Q. Mr. Warmack, you have stated that this expense going into Account 025 was allocated between tank-wagon consumer and tank-wagon reseller channels on the basis of commission gallonage and the amounts of commission gallonage have just been placed in the record for each channel.

Do you or do you not consider that the expense in this account was properly and correctly allocated between tank-wagon and consumer channels, for the purpose of this cost study?

A. It is my opinion that a sounder method could have been used than the method used in the separation.

Q. Do you consider that the method used was a sound method?

A. That is an accounting point that some accountants may differ on, Mr. Austin. I do not think that it is the soundest method.

Q. What do you think is the soundest method, or have you an opinion on that point?

A. I think that this particular class of expense, that is, truck-rental expense, should follow the compensation paid to the commission agents for the separation of truck-rental expense between channels. It would appear that the trucks

are used more extensively in supplying consumer customers and that much more cost is incurred in connection therewith than the supplying of reseller customers; therefore, it would appear to me to be more reasonable and equitable to separate the truck-rental expense on the basis of
6167 the compensation paid to the commission station agents, rather than on the basis of total gallonage delivered.

Q. Did you intend also to include commission drivers in that statement, or only commission agents operating bulk plants?

6168 A. Only commission agents operating bulk plants.

Mr. Hanley: Well, just a moment.

The Respondent moves to strike the answer to the second preceding question for the reason that it does not appear that the witness made any study of the allocations which should have been made, and which he says are the sounder accounting methods, and unless and until the witness so testifies, his criticism of the accounting procedure of the Respondent has no probative value.

Trial Examiner Ballinger: Motion of the Respondent is denied.

By Mr. Austin:

Q. What I am trying to find out is, Mr. Warmack, whether in your opinion this expense of this account should be allocated to the actual gallonage delivered, or should the expense be allocated upon the basis of the compensation paid commission agents for the gallonage sold through them.

A. I believe that I have already stated, Mr. Austin, that in my opinion it should be based upon the compensation paid to the commission agent for the reason that commission agents are paid on a basis of so-called pay gallonage.

Where commission agents deliver a truckload of gasoline to a retail filling station they receive generally the lowest pay gallon rate. As a matter of fact, the pay gallon is the same, but they receive the lowest pay gallonage.
6169 If they deliver a truckload of gasoline to a rural customer ten or fifteen miles in the woods from their plant, or away, they receive probably the highest pay gallonage according to the company's method of compensating these agents.

Now, it seems to me that the usage of this truck is going to follow that calculation of pay gallons of gasoline, closer than it is going to follow the gallonage.

Carrying through the same example, the chassis of truck is used in delivering a truckload of gasoline one half mile away from the plant, and the same chassis is used in delivering the truckload of gasoline many miles away from the plant.

In the calculation of the compensation to the agent as just stated, it is based upon the effort that that agent has to expend in delivering the company's product. And it seems to me from the standpoint of sound accounting that this truck rental expense should follow the compensation paid to these commission agents, or the pay gallonage basis, as worked out by the Respondent company for the payment of the compensation.

Q. Then do I understand that one actual gallon of gasoline delivered by a commission agent may actually be credited to him as more than one pay gallon?

A. Oh, yes. It may be credited as five.

6170 Q. Is the compensation paid commission agents as shown opposite account 021 based upon actual gallons or pay gallons?

A. Pay gallons.

Q. As the result of your investigation, can you state whether the ratio of pay gallons to actual gallons is larger for commission agents in the tank-wagon reseller channel or in the tank wagon consumer channel?

A. Oh, by far in the tank wagon consumer channel, Mr. Austin.

Q. Does that account for the fact that the ratio of commissions in the consumer channels and the commissions in the tank wagon reseller channel in account 021 is about two and a half to one, whereas the ratio of gallonage, actual gallons in the two channels is about one-to-one?

A. Yes, sir. That is the reason.

In other words, the commission agent gets more money for delivering the company's products to consumer customers who are at quite a distance from the bulk plant ~~than he receives from delivering to tank wagon reseller~~ customers who are relatively near the bulk plant.

Q. And in your opinion, is the cost of delivery of a gallon to tank wagon consumer customers larger than the cost of delivering, per gallon, to tank wagon reseller customers—again referring now only to commission agents?

A. It is my opinion that it is, Mr. Austin, and I think that it is a fact that it is.

6171 Q. Well, is your opinion based upon a study of the business and the methods used by the company in handling these commission agent payments and allocating these expenses?

A. Yes, sir.

Mr. Hanley: If your Honor please, may the Respondent ask a question for the clarification of the record and for the further purpose of making a motion?

Trial Examiner Ballinger: You may.

Mr. Hanley: What is the influence, Mr. Warmack, of your conclusions relative to a change in the accounting practice of the Respondent, from what you term the "all gallonage basis" to the "following the compensation basis"?

The Witness: Are you talking, Mr. Hanley, with respect to account 025?

Mr. Hanley: Yes, the same one you have been talking about—the truck rental expense.

Mr. Reporter, please, perhaps you should put the words "following the compensation basis" and "all gallonage basis" in quotation marks as those are the terms used by the witness.

Mr. Witness, are you preparing to make some calculations?

The Witness: I am.

Mr. Hanley: I did not think my question called for calculations.

The Witness: Did you not use the word "influence"?

6172 Mr. Hanley: I did.

The Witness: Then it is necessary for me to make a calculation.

(The witness made a calculation.)

The Witness: Judge Hanley, I have calculated that here rapidly, and my calculation has not been checked, but from my calculation the figure shown in tank wagon reseller column for account 025, Respondent's Exhibit 101, is $37,793.36.

If that class of expense were assigned to the tank wagon reseller column on Respondent's Exhibit 101 on the basis of the compensation paid to commission agents, the figure would be approximately $22,500, or a reduction in the tank wagon reseller column of about $15,000.

Mr. Hanley: Have you prepared work sheets during your stay at Detroit, or since you got back here, or at any time, Mr. Warmack, to demonstrate your method of calculating that difference?

The Witness: Yes, sir. I think that we have prepared work sheets. They may be somewhat rough, Mr. Hanley, calculated under pressure of time, but we can produce that information.

Mr. Hanley: The Respondent now requests that the Government so produce the work sheets in connection with this calculation.

Mr. Austin: I object to that at this time.

6173 Trial Examiner Ballinger: Do you desire them at this time?

Mr. Hanley: Oh, no, Judge, but whenever it is convenient. I do not care when it is done just so we may have the opportunity to examine them.

Trial Examiner Ballinger: Do you object to that?

Mr. Austin. If Mr. Warmack has work sheets which form the basis for any computations which he puts in evidence, I am sure that he will have no objection to producing them, and they will be produced for the examination of the Respondent, if the Respondent desires to see them.

The Witness: My answer, your Honor, to the last question, and the first question which was propounded by attorney for the Respondent did not give effect to the possible application of any part of this truck rental expense to the other method channel. If any part were allocated to that, your Honor, the figure stated of $22,500, approximately, that would appear in the tank wagon reseller channel, would be further reduced.

By Mr. Austin:

Q. Do you have any opinion as to whether or not any part of this truck rental expense should be assigned to that other method channel?

A. I have an opinion; yes, sir, and it is my opinion that some of it should be.

6174 Q. Why?

A. For the simple reason that some of the lubricants sold to customers of the commission agents, receive their lubricants delivered by the trucks of the commission agent.

Mr. Hanley: The Respondent moves to strike the answer of the witness unless and until the witness indicates that he has made a study as to the amount of truck rental expense that should be allocated to these various channels including other methods channel, and enlightens the Court as to what those particular figures are; otherwise, the answer of the witness has no probative value.

Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: The motion to strike is denied.

The Witness: I would like to give a little explanation of that, your Honor, of my last statement. May I?

Trial Examiner Ballinger: You may.

The Witness: I visited one or two of these small bulk plants, which are the commission agents' workshops, so to speak, commission stations, and I personally went into the small warehouse that was at one of the stations. And I went to the trouble or took the occasion to see what was
in that warehouse by short observation and dis-
6175 cussion with Mr. Houghton, who was along, and the
agent at the station.

And I was told that those containers in that small warehouse were the various kinds of lubricants of the Respondent company, and that deliveries of these various products were made, from time to time, by trucks of the "B" station agents, but I was further told that the greatest activity of the truck and of the agent himself was in the dispensing of gasoline, fuel oil, heating oil, and such other products of that nature.

Mr. Hanley: In view of the further answer of the witness, the Respondent renews his motion to strike for the reason that the further answer of the witness does not improve the original answer of the witness, and it is now clear from the answer of the witness that he did have an opportunity and in part availed himself of the opportunity to make a study, which he did not make with a view to determine any figures in dollars and cents as to what the influence would be upon the accounting system of the Respondent in his criticisms, if his criticisms were given effect.

Further, that the witness has failed and neglected to offer any alternative accounting system of any kind which demonstrates what, in his judgment as an accountant, would be a better or a sounder, or a more accurate accounting system than that employed by the Respondent.

Trial Examiner Ballinger: The motion to strike is denied.

6176 By Mr. Austin:

Q. In answer to my question a moment ago, Mr. Warmack, you said that your testimony here regarding this Account 025 was directed only to the portion of the expense paid commission agents and not to commission drivers, and by "commission drivers" I am now referring to commission drivers out of salaried bulk plants only, whether or not that is a distinction that is made by the respondent.

In the first place, let me ask you whether commission drivers do not drive trucks for which they receive rental from the company which goes into this account?

A. I certainly don't know. It was my understanding, while in Detroit, and I believe Mr. Boatwright's testimony will bear me out on that point, that the commission drivers operating out of salaried stations were, so to speak, a very, very small part of the company's business, not even a part that would hardly be considered in any cost study. It just wouldn't make any difference much where it went, the costs of that particular class, and I am not including that here or necessarily excluding it. I understand that it is not in these accounts.

Q. What do you mean by "not in these accounts"?

A. I mean Account 025.

Q. I just wanted to be clear on the scope of your testimony, that was all.

6177 A. Yes, sir, that is correct.

Mr. Hanley: If your Honor please, may I at this time ask just one question?

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. Will you state positively, Mr. Warmack, whether the accounts that you have been referring to, or the items of expense which you have been referring to, are or are not in Account 025 on Respondent's Exhibit 101?

A. It is my understanding, Mr. Hanley, that they are not in there.

By Mr. Austin:

Q. Now, I will have to ask what items of expense you are both referring to.

Mr. Hanley: Are you asking the witness or counsel?

Mr. Austin: I want to know to what the witness' last answer was directed.

The Witness: It is my understanding that the expenses covered in Account 025 entitled "Truck-Rental Expense" represents payments made by the respondent company to B-station agents for the use of chassis trucks for the delivery of respondent's petroleum products.

By Mr. Austin:

Q. And is that the expense which you have referred to in answer to my questions since the lunch recess?

6178 A. That is the expense, yes, sir.

Q. All right. Now, as to Account 055, which is entitled "Vehicle-Tank Expense—Other than Mounted on Company Chassis," the total expense in that account on Respondent's Exhibit 101 is $7;807.01, and that expense is like the expense in Account 025, distributed between only the tank-wagon reseller and tank-wagon consumer channels. What method of allocation is used by the respondent in distributing that expense between those two channels, Mr. Warmack?

A. Commission-agent gallonage between the tank-wagon reseller channel and the tank-wagon consumer channel.

Q. Are the vehicle tanks referred to in the heading of that account tanks which are mounted upon the truck chassis which you have been describing in connection with Account 025?

A. Yes, sir.

Q. Will you explain a little further the nature of that expense and how it arises?

A. It is all expense, Mr. Austin, incident to the maintaining of these tanks which the B-station agents use, the company loan him, and which are placed upon his truck chassis.

Q. That is what I am getting at. You said "which the company loans him," but I haven't heard you describe that. I wish you would tell us a little more about it. How does the expense arise? Where are these tanks used?

A. The agent buys the chassis and he enters into

6179 a contract with the company, gets a tank from the company, and he has that tank placed upon his chassis.

Q. Who owns the tank at that time?

A. The company. He owns the chassis and the agent sets out to deliver gasoline and other petroleum products which are loaded in this tank which is a part of the truck at that time. The expense incident to the maintenance of the tank is that class of expense shown in Account 055 on Respondent's Exhibit 101.

Q. Is that expense going into Account 055 the Capital Investment in the tank, is it Depreciation or is it Operation and Maintenance?

A. I just stated it was Maintenance.

Q. That is what I didn't understand you to say.

A. The cost of maintaining that tank, or all of those tanks.

Q. And where, if anywhere, on Respondent's Exhibit 101, is the expense of depreciation of those tanks entered?

A. In Account 106, I believe.

Q. Did you make any investigation of Account 106 while you were in Detroit and Chicago?

A. Yes, sir.

Q. Can you state how the portion of expense going into Account 106 which is depreciation on vehicle tanks mounted on other than company-owned chassis is allocated between channels in the company's regular accounting procedure?

A. Yes, sir.

6180 Q. How is it allocated?

A. The ratio of reseller and consumer tank-wagon gallons sold to the tank-wagon sales.

Q. Does that refer only to commission gallonage, or to all gallonage? I don't know whether you have made any study of that, Mr. Warmack. I am just trying to find out.

A. Yes, sir, I made a study of it and I have the story of the situation here as prepared by Mr. Houghton and myself in Chicago early in this year.

Q. Just devote your attention to the particular question I asked you as to the particular allocation of this particular part of Account 106.

A. Mr. Austin, that account is not separated for its allocation.

Q. I don't know whether it is or not.

A. I will endeavor to tell you how it is done. The investment in this class of property is kept in the Chicago office and it is not separated.

Q. Do you ~~mean as between~~——

A. As between anybody.

Q. Well, as between the vehicle tanks on Commission-Agent Chassis and the other portions of the account?

A. No, sir, they are not separated—that is, and kept such in separate ledgers. You could possibly go down and
make an analysis and spend two or three months and
6181 find out where they were, but it is just not kept that
way.

Q. Just a minute, that is what I wanted to find out. If there has been no separation made by the respondent for the purposes of allocation in Account 106, I will now go back to Account 055 where I was a moment ago. I thought I might include a portion of Account 106 along with the questions on Account 055, but apparently that is not possible.

A. Since we are on that, I should like to make just a little correction, your Honor.

I find that the investment analysis of the tank and truck investment in the Detroit field in December, 1941, was separate. Vehicle tanks used by B-station agents and commission drivers, as shown on the records of the Chicago office, were $58,203.40 investment, but the depreciation on those tanks was not kept separate in the Chicago office.

Q. I believe the last question I asked you about Account 055 was the nature of the expense, and I think you also stated before that that the expense in that account is allocated between tank-wagon reseller and consumer channels on the basis of commission gallonage. In your opinion, is that a correct and proper method of allocation of that expense, referring now to Account 055, having in mind the purposes of this cost study?

A. In my opinion it is not.

Q. Have the reasons for your opinion been already
6182 stated in connection with Account 025, or do you have
any different reasons?

A. The same reasons as stated for Account 025 will be the reasons for Account 055.

Q. Now, one more question with regard to Account 106: You have already stated, Mr. Warmack, that the depreciation on vehicle tanks mounted on trucks operated by commission agents is included in Account 106. You have stated the method by which in your opinion the expense in Accounts 025 and 055 should be allocated between tank-wagon reseller, ~~tank-wagon~~ consumer, and possibly other methods channels. In your opinion, should the same method of allocation be applied to the expense in Account 106 which represents depreciation on these vehicle tanks mounted on trucks owned and operated by commission agents?

Mr. Hanley: That is objected to, for the reason that it now appears from the testimony of the witness that he doesn't know what kind of allocations were made in Account 106.

Mr. Austin: I don't think the witness said that, your Honor.

Mr. Hanley: Just let's have the ruling of the Court.

(There was a discussion off the record.)

Mr. Hanley: It does not appear from the testimony of this witness that he knows what system of allocation
6183 was used, and there is no testimony by this witness as to what system of allocation was in fact used in connection with Account 106.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

Trial Examiner Ballinger: Do you know the method employed by the respondent in the allocation of Account 106?

The Witness: Yes, sir.

Trial Examiner Ballinger: You may answer the question. The objection is overruled.

The Witness: That portion of Account 106 which is applicable to equipment such as vehicle tanks on commission agents' chassis should be separated between channels on Respondent's Exhibit 101, in my opinion, in exactly the same manner as just described for the truck-rental expense, which is Account 025.

Trial Examiner Ballinger: We will take a five-minute recess.

(A short recess was taken.)

6184 Trial Examiner Ballinger: Come to order. You may proceed.

By Mr. Austin:

Q. I want to ask you some questions now, Mr. Warmack, regarding the advertising expense of the Respondent in 1940.

A. Yes, sir.

Q. First, with reference to accounts 005, 033, 048, and 103.

A. Yes.

Q. In these accounts are entered the salary and expenses of the field advertising representative in the Detroit field, and his assistants.

A. Yes, sir.

Q. Is a part of those accounts charged to direct shipment channels on Respondent's Exhibit 101?

A. Yes, sir.

Q. Now, how was the amount of expense of those accounts allocated to jobbers, naphtha and gasoline, and jobber, other products on Respondent's Exhibit 101, determined by the Respondent in this cost study?

A. On a basis of study of this man's time, the advertising representative's time, as described at the top of page 25, Exhibit 100.

Q. How is the remainder of the expense of that account allocated between the three bulk plant channels on Respondent's Exhibit 101, referring to accounts 005, 033, 048, and 103?

6185 A. On a ratio of gallons sold by each channel, total gallons sold by all channels, excluding direct shipments.

Q. Is that stated in one of the exhibits?

A. Yes, sir.

Q. Where?

A. Page 4 of Respondent's Exhibit 99.

Q. And is the method which you have first described just now the method of allocation used by the company in its regular accounting procedure?

A. Yes, sir.

Q. What is your opinion regarding the use of these two different methods of allocation for the purpose of distributing the expense in these four accounts between the channels on Respondent's Exhibit 101?

A. I think it is inconsistent, Mr. Austin, from the standpoint of sound accounting for the purpose of arriving at a cost differential.

On the one hand, we have an allocation made on the basis of time, on the other hand we have an allocation on the basis of ratio of gallons. It seems to me that if we are going to use time, from the standpoint of sound accounting, I think that with this class, the expense might be allocated on the basis of time throughout. If that were done I am sure I would have no objection to it.

When you make a separation on the basis of time
6186 and apply that to some of the channels, and take the
remainder, which is by far the greater part of this
class of expense, and separate it on the basis of gallons,
and then we take the unit cost of serving several of the
customers which we arrived at on a time basis, and compare
that with the unit cost of serving another class of customers
with the cost, a cost which has been arrived at on a
gallonage basis, I think from the standpoint of sound accounting,
why, it is inaccurate.

Trial Examiner Ballinger: Have you any idea as to what extent it would influence the result?

The Witness: Your Honor, the Respondent company did not carry their study through to show what part of the time of the advertising department would or could be assigned to the tank wagon reseller channel. It did make a study as to what time would be assigned—and when I say "time," I mean allocation of the expense on the basis of a time study—would be assigned to the jobber, naphtha and gasoline.

In order to prove the cost, in my opinion, it would be necessary to make a study of time for all of the expenses
rather than for just a little part of it; for this reason
there would of necessity have to be some time that would
be spent, regardless of how thorough the cost study you
made for the purpose of determination of time and, some
portions of the time could not be positively assigned to any
one channel. Therefore, if you did assign through a
6187 cost study proportionate parts of this time to each
of these channels, then the remaining portion that
could not be assigned, that would be of such a nature that
it could not be assigned, so, of necessity, it would have to
be apportioned on the basis of the study and allocation
made. In that way, from the standpoint of sound accounting,
I think that would be a proper method to employ.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

Mr. Hanley: Respondent moves to strike the answer of the witness for the reason that it is unresponsive to the question of the Examiner, the sense of the Examiner's question being, what is the influence, and there being nothing in the answer of the witness which reflects any influence.

Trial Examiner Ballinger: There is considerable substantive weight to counsel for the Respondent's motion to strike but actually it goes to the weight of the answer and the Examiner will permit the witness' answer to stand for what it is worth.

The Witness: You understand, Examiner Ballinger, that I am not saying that these figures are wrong. I am saying that they are not supported by a proper study.

Trial Examiner Ballinger: The Examiner understands from your answer that you stated that while some 6188 difference ~~would~~ result you are not able to even approximate it; is that right?

The Witness: I did not intend to say that some difference would result.

I mean to say, your Honor, that from the standpoint of sound accounting, the basis used or the method used in the allocation is positively unsupported by any accounting study and analysis.

Trial Examiner Ballinger: That is not responsive.

The Witness: Well, how on earth can I say what the figure would be?

By Mr. Austin:

Q. Is it or is it not your opinion, Mr. Warmack, that a different result would be reached if the allocation between the channels on Respondent's Exhibit 101 was a result of a time study?

A. I certainly do not know. I am stating this, that no such time study was made and, in my opinion, it would have to be made before you can come to any definite figure—and it has not been done.

Mr. Hanley: May I ask one question now, if your Honor please?

Trial Examiner Ballinger: You may.

Mr. Hanley: Did you ever make such a study?

The Witness: Certainly—certainly not, and I was 6189 never required by anyone anywhere to do so.

Mr. Hanley: Well, did you or did you not make such a study?

The Witness: I answered that question.

Mr. Hanley: I understand that you did not.

The Witness: Yes, sir, I did not.

Mr. Hanley: The testimony of the witness apparently predicated upon no time study is asserted by the Respondent now to be of no probative value, and the Respondent moves to strike the entire testimony of the witness in connection with the four accounts alluded to by counsel for the Commission in his several preceding questions.

Trial Examiner Balfinger: The motion is denied.

By Mr. Austin:

Q. Mr. Warmack, I understand from your testimony that a portion of the expenses in these four advertising department accounts was apportioned to direct shipment channels on Respondent's Exhibit 101, on the basis of time spent, actually spent by the advertising representative and the employees working under him at jobber outlets.

In making that statement I am referring not only to your testimony, but also to pages 24 and 25 of Respondent's Exhibit 100.

I understand further that all of the residue of that expense is allocated between these three bulk plant 6490 channels on a gallonage basis.

What, in your opinion, is the effect of charging a portion of the expense to two channels on the basis of actual time spent at certain outlets, and then charging all of the residue to three other channels? I am referring, in asking that question, when I say "the effect" I want to know whether or not that method results in overloading the channels charged with the residue, or in overloading the channels charged with direct time, or is there any overloading?

A. And you mean by "residue", what? About 95 per cent of this class of expense?

Q. Regardless of what it is, Mr. Warmack, it appears that a portion of the expense which was determined by the amount of time actually spent by jobber outlets was actually charged to certain channels, and all of the rest was charged to the regular bulk plant channels.

Now, I want to know what the effect of that is upon the proportion of the expense charged to the bulk plant channels on the one hand as opposed to the other channels on the other hand.

Mr. Hanley: Respondent objects to the question because it is apparent from the question of counsel that he is referring to some amount of residue which counsel does

not understand, and it is apparent from the question of
the witness propounded to counsel for the Commis-
6191 sion that the witness does not understand what
amount of residue is involved in the question, and
no answer can properly be given, and any answer would
be improper because no answer could have any proper
probative value, in view of the apparent lack of under-
standing between counsel, and as demonstrated by the
witness.

Mr. Austin: I will be glad to explain that if I may, Mr. Examiner.

Trial Examiner Ballinger: You may.

By Mr. Austin:

Q. Mr. Warmack, by "residue" I mean all of the expense in the four accounts less the amount of that expense charged on Respondent's Exhibit 101 to jobber, naphtha and gasoline, and jobber, other products.

A. Well—

Trial Examiner Ballinger: Do you understand the question?

The Witness: Yes, sir.

Trial Examiner Ballinger: You may answer it.

The objection is overruled.

The Witness: In my opinion, that has the effect of
understanding to some extent the costs applicable to direct
shipment customers, as shown in Respondent's Exhibit
101, for this reason: A cost study was not carried through
to a proper conclusion or completion. Whatever time
6192 that may have been spent by the advertising man-
ager or his department which may have been of a
general nature and which may not have been directly
assignable to either tank wagon reseller business or direct
shipment business, all was included in the residue, and
that residue is then allocated between the three bulk plant
channels on a gallonage basis.

6193 By Mr. Austin:

Q. Mr. Warmack, do you recall when we were discussing a few days ago Respondent's Exhibit 31, which was offered by the respondent to justify the cost differential of one-half cent between Ned's Auto Supply Company and other tank-wagon reseller stations in 1937 I asked you some questions regarding these same four advertising accounts and in addition Account 075, which is the chief advertising expense account of the respondent?

A. Yes, sir, I remember.

Q. And you gave at that time considerable testimony regarding the nature of the advertising expense going into these accounts, with particular reference to Account 075, but also to some extent in connection with the field advertising department, and you stated, I believe, what you considered the nature of the expense in these accounts and the method of allocation which should have been applied to that expense in 1937 as between Ned's Auto Supply Company and other tank-wagon reseller outlets of the company.

A. Mr. Austin, you are speaking of which account number?

Q. I am speaking of 075, 005, 033, 047, and 103.

A. Yes, sir.

Q. If I should ask you the same questions, or if you should be called upon to give the same answers either to my question or to those of the Examiner, if there
6194 were some questions asked by the Examiner, with
regard to the expense in connection with the same accounts for 1940, but assuming that the questions were directed now to the establishment of a cost differential as between all tank-wagon reseller outlets, on the one hand, and all jobber outlets on the other, would your answers be the same as the answers you gave for 1937 when we were concerned with Ned's Auto Supply Company versus other tank wagon reseller stations?

Mr. Hanley: Just a moment. Will you please read the first question that counsel asked and then read the second question or recital that counsel made to the Court?

(The reporter read the last few questions and answers.)

Trial Examiner Ballinger: Any objection, Judge?

Mr. Hanley: Yes, if your Honor please, that is objected to as a compound question unnecessarily confusing to the witness. It assumes to ask the witness if his answer would be the same on a hypothetical state of facts as his answer would have been to another question which was never asked.

Trial Examiner Ballinger: The objection is overruled.

By Mr. Austin:

Q. Do you have the question clearly in mind now, Mr. Warmack?

6195 A. Yes, sir, I have.

I believe that my answers would be exactly the same, Mr. Austin, as the answers given you when you inquired into the 1937 study covered in Respondent's Exhibit 31.

Mr. Hanley: The respondent moves to strike the answer of the witness, since it heretofore appears in the testimony of the witness that he never made any study of the year 1937 and is not qualified to testify concerning it.

Trial Examiner Ballinger: The motion is denied.

By Mr. Austin:

Q. In the discussion of the advertising accounts for 1937 you had before you and were questioned to some extent upon Commission's Exhibit 84, which contains a segregation of various general classifications of expense going into Account 075 for 1937 and states the method used by the respondent in its regular accounting procedure in allocating these various advertising expenses in that account. The record contains no similar exhibit or breakdown of expense for 1940. In stating that your answers for 1940 would be the same as the answers you gave to the advertising questions relating to 1937, do you assume that the respondent's advertising expense going into Account 075 for 1940 was made up of expenses of the same nature as those described in Commission's Exhibit 84?

A. Yes, sir. As a matter of fact, in the Chicago office, when I made inquiry as to this account, it was 6196 suggested to me that that separation might be used, that is, the separation shown on Exhibit 84-A, rather than to have to go to the extent of trying to analyze the costs as shown on Respondent's Account 075 for the year 1940.

Mr. Hanley: The respondent moves to strike the volunteer additional statement of the witness in answer to the question, it not appearing who in the Chicago office made the statement, or specifically what the statement was.

The Witness: Mr. Boatwright told me that.

Mr. Hanley: It is objected to as hearsay.

Trial Examiner Ballinger: The motion to strike is denied and the objection is overruled.

By Mr. Austin:

Q. And in your previous examination, Mr. Warmack, you stated that in your opinion many of the advertising expenses entering into Account 075 for 1937 and described in Commission's Exhibit 84 were advertising expenses for advertising which you then referred to as Advertising for Consumer Acceptance.

In your opinion does the advertising expense which you then stated as being in the nature of a consumer acceptance expense constitute equally a consumer acceptance expense, if incurred and as incurred in 1940, a much as in 1937; in other words, where the advertising expenditure is of the same character, does the difference in time when 6197 the expense was incurred affect in any way the nature of the expense, in your opinion?

A. From the standpoint of consumer acceptance?

Q. Yes.

A. No.

Q. On page 25 of Respondent's Exhibit 100, the lower part of the page, two accounts are listed together. One is Account 240—Donations, and the other is Account 075—Advertising. It appears from the explanation given regarding Account 240 on that page and also from Respondent's Exhibit 101 that no part of the donations in Account 240 is charged to direct shipment business in this cost study.

In your opinion, Mr. Warmack, is the expense going into Account 240 of such a nature as to afford or which can afford, on the basis of sound accounting principle, any cost differential as between the different classes of customers or different channels shown in Respondent's Exhibit 101?

A. I question the use of that kind of an expense item, as to whether or not it could afford any cost differential, if the total of that expense which is $2,252.51 in the Detroit field for 1940, were general donations, as this would show. I made no study of that account, Mr. Austin, but—

Q. You have read the exhibits 99 and 100, have you not?

A. Yes, sir.

Q. And are you familiar with Mr. Boatwright's 6198 testimony regarding the nature of the expense going into that account?

A. Yes, sir, I have read it and I feel that this class of expense has no place in an assigning of cost for the purpose of establishing a cost differential. I just don't think it has a place in there.

Mr. Hanley: I move to strike the answer of the witness, since the witness has now testified that he made no study of Account No. 240—Donations, and does not know what they include.

Trial Examiner Ballinger: The motion is denied.

By Mr. Austin:

Q. If it is necessary to allocate the donation expense between different channels on Respondent's Exhibit 101, how in your opinion should such an allocation be made?

A. General donations, Mr. Austin, in my opinion could only be allocated on the basis of gallonage. If the account were analyzed right down to its finest point, maybe you could find that they had donated to one class of customers in some direct manner, but it is my understanding that this is a general cost. From reading the records and from the information that I have been able to get, without analyzing the account, it seems to me to be of a general nature and I don't think it has any place in a cost study and if it does have a place I don't see how general donations could be separated on any basis other than on a gallonage basis, which of course, would afford no cost differential.

6199 By Mr. Austin:

Q. Is this class of expense an expense which depends upon, or has any relation to differing methods or quantities in which gasoline is sold or delivered to tank wagon reseller customers of Respondent on the one hand, and jobbing customers on the other?

A. I do not see how it could.

Mr. Hanley: The question is objected to because the evidence now shows that the witness made no study and does not know what the account, about which he is talking, includes, and cannot know where, or how, or why it should be allocated. And I move to strike the answer on those grounds.

Trial Examiner Ballinger: The objection is sustained and the motion to strike is granted.

Mr. Austin: For what reason, may I ask?

Trial Examiner Ballinger: For the reasons stated in the statement of counsel.

Mr. Austin: I call your Honor's attention to the fact that the account is described fully in the record, and that the witness said he had read that testimony.

Trial Examiner Ballinger: Read the witness' answer and the motion to strike by counsel.

(The matter referred to was read.)

Trial Examiner Ballinger: The witness testified that
he made no study, and he is purely conjectural as
6200 to what was or what would be the result if this
were done. If the witness wants to correct that,
that is another story.

Mr. Austin: I will ask for a five minute recess.

Trial Examiner Ballinger: We will take a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Mr. Warmack, when you were making your investigation of the Respondent's accounting methods and your investigation of this cost study in Detroit and Chicago in January and February of this year, you made an inquiry regarding the nature of the expense going into account 240—donations?

A. Yes, sir.

Q. When you said a while ago that you had made no analysis of this account, what did you mean by that?

A. I meant that I had not pulled all of the vouchers to see exactly to whom the payments were made, or in what amounts, and so forth.

Q. I now call your attention to Mr. Boatwright's testimony appearing at pages 4461 and 4462 of the record, as follows:

"Q. Account 240 is entitled 'Donations'? What is included under this heading?

"A. Just exactly what it says.

"Q. To whom are those donations made?

6201 "A. Oh, Red Cross seals, money gifts to organizations, community chest drives, and organizations of that nature."

And also at page 4463 of the record, it states:

"Q. Are these donations included here donations made by the Detroit field office directly, or is this an allocation of expenses from the general office?

"A. No, those are made directly in Detroit."

Now, based upon the description of the nature of the expense in that account given by Mr. Boatwright, and based upon your own inquiry as to the nature of that expense, in your own opinion, is the expense of that account 240 an expense of such a nature that it can properly afford a differential between the cost of sale of gasoline in tank wagon reseller, tank wagon customers on the one hand and, to jobber customers on the other hand?

I am limiting that to Detroit, and to the jobber customers whose businesses have been described in this proceeding and who are named in the complaint.

Mr. Hanley: I think that is a proper question now.

The Witness: In my opinion it is not.

By Mr. Austin:

Q. Have you already stated your reasons for that opinion? If not, or if you have any other reasons, you may state them.

A. In my opinion, the quantity of gasoline sold, 6202 methods of delivering gasoline can hardly be considered as influencing factors on this class of expense.

Generally, donations is something by a company for civic welfare, Mr. Austin, to charitable organizations. I just do not see how that expense can be allocated in any way which would afford a cost differential.

Q. Is there any similarity in purpose?

A. I would like to add to my previous answer, your Honor, that in my opinion this class of expense partakes largely or in some instances the nature of a consumer—of advertising for consumer acceptance, creating a feeling in the minds of the consuming public, a good feeling towards the company or its products.

Q. That is what I had in mind in attempting to ask you, Mr. Warmack, as to whether there was any similarity of benefit, if you can call it that, or purpose, between donations and advertising. I had a little difficulty in framing such a question.

A. Well, as I have stated, I think it partakes of the nature of advertising for consumer acceptance, Mr. Austin.

Mr. Austin: Now, your Honor, the witness evidently is suffering somewhat from a cold in its infant stages, and perhaps he would have a better chance to overcome the cold if we adjourned a little earlier so that he could go home and get a good rest and perhaps take some care of himself.

6203 We are already short Mr. Boatwright's presence, which I personally regret, and I am afraid if Mr. Warmack should become incapacitated here that we would find that even more of a major calamity, since it happens to be not Mr. Boatwright that is on the stand, but Mr. Warmack.

Trial Examiner Ballinger: It is apparent that the witness is not feeling well, and that he is threatened with a cold, and the Examiner will entertain any motion counsel desires to make.

Mr. Austin: I move that the hearing adjourn until tomorrow morning, July 7, at 9:30.

Trial Examiner Ballinger: The motion is granted.

And now, at 4:05 p. m., the hearing stands adjourned to be reconvened July 7, 1942, at the hour of 9:30 a. m., in Room 388, Federal Trade Commission, Washington, D. C.

(Whereupon, at 4:05 p. m., July 6, 1942, the hearing in the above-entitled matter was adjourned.)

6204

Room 388, Federal Trade
Commission Building,
Washington, D. C.,
Tuesday, July 7, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Ill., appearing for the Respondent.

6205

PROCEEDINGS.

Trial Examiner Ballinger: Come to order. The hearing in Docket No. 4389, the case entitled In the Matter of the Standard Oil Company of Indiana, is convened at 9:30 a. m., July 7, 1942, in Room 388, Federal Trade Commission Building, Washington, D. C.

The last hearing was held at the same place on July 6, 1942.

The reporter will note counsel for the Commission and respondent present.

You may proceed.

WILLIAM J. WARMACK, resumed the stand and testified further as follows:

Direct Examination by Mr. Austin.

Q. Are you familiar with the nature of the expense in Account 075, Mr. Warmack, Respondent's Exhibit 101?

A. Yes, sir.

Q. I note that on Respondent's Exhibit 101, out of a total of $211,374.32 entered in Account 075, there is a charge of $3,275.24 in the "Jobber—Naphtha and Gasoline" column and a charge of $46.93 in the column headed "Jobber—Other Products." Will you state the nature of those charges in the two jobber columns and the method used by the respondent in allocating that portion of the expense to those two columns?

6206 A. That represents certain point-of-sale advertising, and ~~the company~~'s calculations in arriving at that figure are shown on pages 25 to 28 of Respondent's Exhibit 100.

Q. What is your opinion regarding the methods of allocation used in distributing part of that expense to direct-shipment channels?

(There was a discussion off the record.)

Q. Before you answer that, Mr. Warmack, I will withdraw that question temporarily and ask you another one first, because I don't know whether you stated the nature of the advertising expense which is charged by the respondent to direct shipment business on Exhibit 101.

A. Yes, sir, I stated that it was point-of-sale advertising, Mr. Austin.

Q. Is it entirely point-of-sale advertising? That term "point of sale advertising" I don't believe has been satisfactorily defined, or perhaps I should say definitely defined, during these hearings, and consequently perhaps you could tell us more specifically what the nature of the expense is.

A. Point of sale advertising means advertising or expenses in the nature of advertising incurred at the service stations where gasoline is sold to the public.

Q. Are those expenses incurred by the respondent or incurred by the—

A. It is expense that the respondent company has
6207 to bear. There are various kinds of those things: signs placed at those outlets, certain material that is afforded the outlets, such as road maps, globes furnished the stations, various material of that nature.

Q. At the foot of page 25 and the top of page 26 of Respondent's Exhibit 100 there is a description of certain charges to Account 075 which, if I read the exhibit correctly, are charged in part to direct shipment business on Respondent's Exhibit 101. Is the expense there described what you refer to as point-of-sale advertising?

A. It is a part of the point-of-sale advertising, sir.

Q. What is the nature of the expense referred to there?

A. Costs incurred by construction men making repairs on advertising signs, retail outlets, sign installations, etc.

Q. Was any of that expense charged to direct shipment channels?

A. Yes, sir, part of that makes up this $3,275.24 that we were just talking about that was assigned to "Jobbers Naphtha and Gasoline."

Trial Examiner Ballinger: Is that shown on Respondent's Exhibit 100?

Mr. Austin: Yes, sir, Respondent's Exhibit 100, pages 25 and 26.

By Mr. Austin:

6208 Q. What is your opinion regarding the method of apportionment of that expense involving construction men's costs used by the respondent in distributing that expense between channels on Respondent's Exhibit 101, as described on pages 25 and 26 of Respondent's Exhibit 100?

A. On page 26 of Respondent's Exhibit 100 it is stated that most of the charges could be made direct, either to "Jobber Naphtha and Gasoline" or "Jobber—Other Products."

It is my opinion that any charge that can be made directly should be made in that manner and that that is the proper way to make the charge from the standpoint of sound accounting. The apportionment of charges is where the difficulty arises in the allocations of costs. That means joint costs which must be apportioned on some reasonable and equitable basis.

This particular class of expense was small.

Q. How do you know that it was small, Mr. Warmack?

A. Well, the only thing I have to go by is the information set forth on pages 26, 27 and 28 of Respondent's Exhibit 100.

Q. Can you call attention to any specific information which leads you to believe that the amount of this expense, that is, the construction men's time going into this account was a small expense?

A. I see an item marked "Painters" under Salaries.

Trial Examiner Ballinger: Page what?

6209 The Witness: On page 29 of Respondent's Exhibit 100.

By Mr. Austin:

Q. We are talking about Account 075 now, Mr. Warmack. I think that Painter charge is under Account 005, if you are looking at page 29 of Respondent's Exhibit 100?

A. Yes, sir. I do not see a figure that shows construction men's costs during the year 1940 in a reference at the top of page 26 of Exhibit 100 as to how the allocation was made.

Q. The first sentence at the top of page 26 states that the first step in breaking down this account required a review of all work orders, Form 0133, for the year 1940 to indicate the work done at all jobber outlets, the materials used, and time involved on the part of construction employees.

Was a similar tabulation made by the respondent from these work orders to determine the work done at other classes of outlets than jobber outlets and the time spent at, for instance, tank wagon reseller outlets?

A. In my studies I found nothing to indicate that that was done, Mr. Austin.

Q. And the same paragraph on page 26 of Respondent's Exhibit 100 states that after an allocation of the time found to be spent at jobber outlets as between "Jobber—Naphtha and Gasoline" and "—Other Products" on a gallonage basis and assigning part of the charges directly, the
6240 result was a charge of $270.01 to "Jobber—Naphtha and Gasoline," $30.77 to "Jobber—Other Products."

Is there anything in this exhibit or in the testimony which sets forth the balance of the amount of the charge for construction men's time over and above the sum of $300.78 shown on page 26?

A. No, sir.

Q. And how is the balance of the construction men's time spent on advertising, that is, this same expense about which we have been talking, how was the balance of that time allocated between channels, or how is it treated on Respondent's Exhibit 101?

A. That brings us back to the way that it is allocated in the company's regular accounting procedure. The methods employed there are set forth on pages 5 and 6 of Respondent's Exhibit 99. The exhibit doesn't specifically pick up construction men as such. It gives an example of costs involved in installing jewel globes on gasoline pumps. It states it is possible that those costs were assigned to reseller channels directly. Other costs are assigned to other channels directly, such as the other-methods channel.

6211 Q. You are talking now just about the construction men's time?

A. Mr. Austin, if this means construction, then that is what I am talking about. I don't see a word in here that says "construction." It is an example of cost as set forth and explained on page 5 of Respondent's Exhibit 99. I may answer your question in this way: In a review and study of the respondent's method of allocating the costs of this 075, entitled "Advertising—other costs (including ELA)", in the respondent's regular accounting procedure, wherever it was reasonably possible, costs were assigned direct to the channels; otherwise, they were separated on the basis of gallonage.

Q. Is there anything in either Respondent's Exhibit 99 or Respondent's Exhibit 100, or in the testimony in this case that would indicate how much of the advertising expense resulting from construction men's costs is charged to tank wagon reseller or tank wagon consumer or other methods channels on Respondent's Exhibit 101?

A. No, sir.

Q. Is there anything in the record to indicate how much of that expense was charged directly and how much was charged on a gallonage basis?

A. No, sir.

Q. Now, turning to the lower half of page 26,
6212 Respondent's Exhibit 100, there is a list of expenditures by the respondent in 1940 in the Detroit field, and I will first ask you if those expenditures are what you have heretofore referred to as "point of sale advertising"?

A. Yes, sir; that is a part of the point of sale advertising costs.

Q. How are the costs listed on that page divided between various channels on Respondent's Exhibit 101?

A. On an outlet basis.

Q. What do you mean by an "outlet basis"?

A. An outlet basis is a service station where gasoline is sold for consumption, and this allocation assumes that each outlet will share equally, as far as the allocation of this class of expense is concerned.

Q. Now, you said an outlet is a place where gasoline is sold. What outlets are you referring to, or what outlets are used here by the respondent?

A. Jobber outlets.

Q. Only jobber outlets? I am asking about the allocation of expense to all channels, not merely direct shipment channels.

A. The portion assigned to the direct shipment business was based on the number of jobber outlets.

Q. And how was the question of the portion of expense assigned to the other three channels on Respondent's
6213 Exhibit 101 determined—and by the "other three channels" I am referring to bulk plant channels, because there is also an automobile supply channel which we can not overlook altogether.

Mr. Hanley: If your Honor please, just to keep this record as straight as we can, I wonder if the witness understands and counsel and the Court understand that there would not be any outlet in the consumer channels at all. The outlets exist in the reseller channels or in the jobber channels, and that is all.

Mr. Austin: Well, I assume that the witness will describe that. I asked him how it was allocated to the three channels, and if there is nothing in the consumer channel, I hope the witness will so tell us.

Mr. Hanley: It seems to me that the record is getting pretty badly confused about this thing.

Trial Examiner Ballinger: The Examiner was under the impression that there were but two outlets.

Mr. Hanley: Two classes.

Trial Examiner Ballinger: Two classes of outlets, namely, reseller, retail outlet and the jobber outlet. Now, if there is no other outlet, can it not be so understood?

Mr. Austin: I am quite pleased to have it come from counsel for respondent. I was trying to draw it out of the witness. It facilitates the matter that much.

Trial Examiner Ballinger: I think that can be
6214 considered an established fact.

Mr. Austin: Then do I understand that it is conceded that no part of this expense shown in the lower half of page 26 was charged to the tank wagon consumer channel or the other methods channel on Respondent's Exhibit 101?

Mr. Hanley: No, I don't concede anything of that kind. I am not conceding anything about figures. I am simply stating that there are two classes of outlets. This witness has made his study and he is doing the testifying on the figures now.

Mr. Austin: Well, I think my question was how this expense was charged to the bulk plant channels.

By Mr. Austin:

Q. Mr. Warmack, if you can tell us that there wasn't any charge to certain channels, tell us that, but I just want to know what was done with the expense.

Trial Examiner Ballinger: Can you tell us the particular channels to which it was charged?

The Witness: No, the only thing I had to go by is the record. I have not followed the vouchers. I have not followed every allocation of every one of these little, tiny charges to every one of these outlets. I have the record to go by.

Trial Examiner Ballinger: So far as your investigation disclosed that there is any allocation other than to 6215 the two channels, namely, the reseller and the jobber channel?

The Witness: My understanding is that that is where this expense goes.

By Mr. Austin:

Q. And what part of that point of sale expense as listed on the lower half of page 26 of Respondent's Exhibit 100 is charged to the tank wagon reseller channel on Respondent's Exhibit 101?

A. Which expense are you referring to, Mr. Austin?

Q. The expenses listed on the lower half of page 26 of Respondent's Exhibit 100.

Do you know, Mr. Warmack, or does it appear from this exhibit or anywhere in the record what portion of those expenses is charged to any channel other than the two jobber channels?

Mr. Hanley: The question is objected to, as assuming a fact not in evidence.

Mr. Austin: There are two jobber channels on Respondent's Exhibit 101. I asked him whether the record shows how much of the expense—whether any of it is charged to any of the other channels. I am not trying to restate the question, but simply explain it.

Trial Examiner Ballinger: The witness may answer.

The Witness: Will you read the question?

6216 (The pending question was read as above recorded.)

A. No, sir.

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By Mr. Austin:

Q. At the top of page 27 on Respondent's Exhibit 100 there is an item of expense of $5,578.45 for road maps. How was that expense allocated between channels in Respondent's Exhibit 101?

A. It was allocated between the tank wagon reseller column and the jobber naphtha and gasoline column on the basis of gallonage.

Q. Does such an allocation result in any cost differential in cost of sales between those classes of customers?

A. No, sir; it does not. The same effect is given—or the same effect will be as though the cost had not been used at all, or had not even been considered in the cost studies. Eliminate it and it will come out identically the same differential.

Q. Now, in the lower part of page 27, Respondent's Exhibit 100, there are certain expenses listed which are charged to capital investment in signs at reseller outlets, including both—no, only at jobber reseller outlets. Isn't that correct, my statement as to capital investment?

A. Yes, sir.

Q. Is the expense charged there in the nature of a direct charge, Mr. Warmack?

6217 A. Yes, sir.

Q. There is no allocation of any of that expense between any channels or products, is there?

A. No, sir.

Q. Is that a direct charge made by the respondent to cost of sales through jobber reseller outlets?

A. Yes, sir; it is direct cost. Regular accounting procedure does not provide for separation of these costs, but of course, in the preparation of Respondent's Exhibit 101 there is a column in which this cost is segregated and set apart.

Q. Does the record show, or do Respondent's Exhibits 99 or 100 show the amount of the cost of signs or charges for signs installed at tank wagon reseller stations?

A. No, sir.

Trial Examiner Ballinger: We will take a five minute recess.

(Whereupon, at 10:35 o'clock a. m. a short recess was taken.)

6218 Trial Examiner Ballinger: Come to order.

By Mr. Austin:

Q. We have been discussing certain expenses entering into Account 075 which are described on pages 25, 26, 27 and 28 of Respondent's Exhibit 100. Do those expenses account for the entire amount of the expense charged in that account on Respondent's Exhibit 101 to "Jobber—Naphtha and Gasoline" and "Jobber—Other Products"?

A. No, sir.

Q. What other expenses are included there?

A. Oh, there is a large amount of other expenses, expenses which are in the nature of newspaper advertising—

Q. Well now, just a minute, Mr. Warmack, I think perhaps the reporter better read my question back.

(The reporter read the next to the last question.)

By Mr. Austin:

Q. My question was whether the expenses we have been discussing account for the entire entry in the "Jobber—Naphtha and Gasoline" and "Jobber—Other Products" channels on Respondent's Exhibit 101, the amounts being $3,275.24 in the "Jobber—Naphtha and Gasoline" column, and $46.93 in the "Jobber—Other Products" column.

A. Mr. Austin, I don't just exactly understand. I thought you asked me whether there were any other expenses in Account 075, that is, that went to make 6219 up Account 075, which totals $211,374.32.

Q. No, that wasn't my question.

A. I would like to have the question again.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"We have been discussing certain expenses entering into Account 075 which are described on pages 25, 26, 27 and 28 of Respondent's Exhibit 100. Do those expenses account for the entire amount of the expense charged in that account on Respondent's Exhibit 101 to "Jobber—Naphtha and Gasoline" and "Jobber—Other Products"?)

Trial Examiner Ballinger: If you don't understand the question, say so.

The Witness: I don't understand the question.

Trial Examiner Ballinger: Counsel will rephrase his question.

Mr. Austin: I will try again.

By Mr. Austin:

Q. You are familiar, Mr. Warmack, with the nature of the expenses that are listed on pages 25 to 28, inclusive, of Respondent's Exhibit 100, under Account 075?

A. Yes, sir.

Q. And those are the expenses which I have questioned you about this morning?

A. Yes, sir.

6220 Q. Now, my question is whether those expenses are the expense and all of the expense, a part of which is in the "Jobber—Naphtha and Gasoline" and "Jobber—Other Products" columns of Respondent's Exhibit 101. In other words, referring to those two figures in Account 075 on Respondent's Exhibit 101, I want to know whether we have covered all of the expense that is entered in those two columns.

Trial Examiner Ballinger: Do you understand that question?

The Witness: I believe so, sir.

A summary of the expenses which we have been discussing is shown at the top of page 27, which shows a total of $3,021.39. There is an additional charge in the account of $300.78 marked "Field Charges," as shown on page 29 of Respondent's Exhibit 100.

Q. Referring back to page 26 of Respondent's Exhibit 100, is that expense of $300.78 the same expense referred to at the top of page 26?

A. Yes, sir; that is the same expense, and of course that, then, covers all of the expenses in the 075 Account which were applied to the direct shipment business. Those expenses are shown on page 29 under the caption "075 Advertising—Other Costs", part of which was assigned to "Jobber—Naphtha and Gasoline", and part of 6221 which was assigned to "Jobber—Other Products."

That represents that portion of point-of-sale advertising which was assigned to the direct shipment business of the respondent company.

Q. Are there other advertising expenses of the respondent entered in Account 075, no part of which is charged to direct-shipment channels?

A. Yes, sir.

Q. What is the nature of those expenses?

A. Those expenses for the most part represent what I term and what in my opinion are advertising for consumer acceptance, Mr. Austin.

In other words, we have been discussing here only point-of-sale advertising, and that constitutes only a small part of the total expense included in Account 075.

Q. Does Account 075 include many expenses of the same nature as those which you discussed and called consumer-acceptance advertising when testifying regarding Commission's Exhibit 84, which is a breakdown of Respondent's advertising charges for 1937?

A. It is my understanding that that is correct, sir.

Q. What is your opinion as to whether any of the consumer-acceptance advertising expense in Account 075 should be charged to direct-shipment channels?

A. It is my opinion that advertising costs for consumer acceptance should be apportioned on a gallon-6222 age basis between the channels or the classes of customers for which such advertising is made.

That means that, for example, newspaper advertising for the sale of gasoline to car drivers, a newspaper ad will be run in the local newspapers, the costs of which will fall into Account 075 for advertising respondent company's gasoline. No customer's name is shown in those newspaper cuts, that is, the number that I have reviewed, but it is pure and simple advertising for consumer acceptance, so to speak, inviting the consuming public, the automobile drivers, to drive into the company's retail service stations, or, that is, service stations supplied by the respondent company either directly or through jobbers, and buy their products or their requirements of gasoline, and it is my opinion that such advertising for consumer acceptance could only be separated on a basis of gallonage sold to or through the respective reseller stations, whether served by the company or served through jobbers.

Q. Has such an allocation of that advertising expense been made by the respondent for the purposes of this cost study?

A. No, sir. I think the record should show that advertising costs for consumer acceptance or, as a matter of fact, any other cost which is separated on the basis of gallonage as just described would afford no cost differential whatsoever, and the cost differentials arrived 6223 at on the basis of separation of other costs would not be affected in any way if that particular class of expense were omitted altogether.

Trial Examiner Ballinger: When you say "that particular class of expense," to what expense do you refer?

The Witness: I refer, your Honor, to advertising costs or any other classes of costs which could only be separated on a unit basis, in this case on a per gallon basis.

By Mr. Austin:

Q. When you refer to a cost differential, or when you say there would be no cost differential if an all gallonage allocation was made, as to what channels are you referring?

A. I can answer that best in the way of an example. If we have newspaper advertising for consumer acceptance, as I have just explained, it would apply and would be for the purpose of inviting the consuming public into the service stations supplied by the respondent company or its jobbers.

Q. Now, let me interrupt you there, Mr. Warmack. I don't think that is quite responsive. I was just asking you this: When you referred to the cost differential—a differential refers to a difference between two things, two customers, two classes of customers, or two products, or something of that sort, does it not?

A. Yes, sir.

6224 Q. In your answer to my previous question, when you used the term "cost differential" I want to know what customers or channels you were referring to when you used the word "differential."

A. Oh, I was referring to the tank-wagon reseller channel and the jobber—naphtha and gasoline channel, as shown on Respondent's Exhibit 101, and my answer dealing with the separation on a gallonage basis meant the gallons flowing through those two separate channels.

Q. We will now take up a different subject, and I would like you to refer to the following accounts listed on Respondent's Exhibit 101: Accounts 200, 201, 202, 203, 204, 205, and 206. Account 200 is entitled "Office Expense—Salaries Accounting." Account 205 is entitled "Office Expense—Operation and Maintenance of Vehicles—Office Automobiles." Account 206 is entitled, "Office Expense—All Other—Water, Light, Fuel, Rent, and so forth."

How is the expense entering into those three accounts, at is, 200, 205, and 206 distributed to the various channels n the company Form 189 in the company's regular ac-ounting procedure?

A. On the basis of tabulations of time by employees the Detroit office.

Q. Does that time tabulation result in the preparation f quarterly distribution of time reports by the respondent?

225 A. Yes, sir. Commission's Exhibit 117-A is distribution of time schedules, Accounting Department, repared in the month of December, 1939, and used for the eparation of costs on its regular form 189 for the three en-ning months, January, February and March, 1940.

Q. And are Commission's Exhibits 117-B, C and D imilar reports for the following three quarters?

A. Yes, sir, the following three quarters during 1940.

Q. Was any part of the expense in Account 200 charged o automobile supply?

A. Yes, sir.

Q. What part of it was charged to automobile supply?

A. Approximately 8 per cent of that total class of xpense.

Q. What was the actual amount charged to automobile upply?

A. $19,398.70, out of a total of $237,524.45.

Q. That is Account 200 now, you are referring to?

A. Yes, that is Account 200, entitled "Office Expense alaries-accounting."

Q. And was that charge of 8 per cent of the expense in hat account to automobile supply made according to the ercentage shown on the quarterly distribution of time eports in evidence as Commission's Exhibit 117-A, B, , D?

A. Yes, sir.

Q. Was any of the expense, Account 205 and 206, harged to automobile supply in respondent's Exhibit 101?

226 A. No, sir.

Q. In your opinion, should a part of the expense n Account 205 and 206 have been charged to automobile upply for the purposes of this cost study?

A. Yes, sir; in my opinion, some part of it should have een so charged.

Q. What part?

A. Well, inasmuch as these two accounts are separated in Respondent's regular Accounting Form 189 on the basis of the percentages as shown on the distribution of time reports, which are Commission's Exhibit 117-A, B, C, D, it would follow, it seems to me, that a portion of these two accounts should be assigned to automobile supply.

Q. Well, should the portion of those accounts, 205 and 206, charged to automobile supply—or rather, should the expense in those two accounts be charged to automobile supply in the same proportion and by the same method as the expense in Account 200 was charged to automobile supply?

A. In my opinion they should, unless we can find—unless respondent should show some reason why they should not be. In other words, respondent is using the distribution cost reports as the basis for the allocation to the other accounts, and I see no reason in my studies to show me why the follow-through should not be complete.

Q. I want to know whether, in your opinion, it should
be or should not be; not whether you see some reason
6227 why it should not be. I want to know what you think
about it, Mr. Warmack.

A. Very well. The basis of my opinion that it should or that it should not would not be a complete statement, your Honor. I should like to explain.

Trial Examiner Ballinger: You may do so.

A. (Continuing.) In the case of Account 205, entitled "Office Expense—operating and maintenance of vehicles—office automobiles," that total expense amounted to $592.95 for the year 1940. It was apportioned on respondent's regular accounting form 189 on the basis of the distribution of time reports worked up by the accounting department from the Detroit office, and apportioned on the basis of those reports, excluding what part of the time the accounting department devoted to automobile supply. In my opinion, this is a general class of expense and should be apportioned on the basis of the expense which may be called more nearly the correct expense, which is the expense of the accounting department in the Detroit field and Account 206, entitled "Office Expense—all other—water, light, fuel, rent, etc.", in the amount of $18,688.01 in the Detroit field for the year 1940. The same reasons as set forth for account 205, in my opinion was followed through to account 206.

Does that answer your question, Mr. Austin?

By Mr. Austin:

228 Q. Yes. Now, if you will turn to page 17 of Respondent's Exhibit 99, Mr. Warmack, at the foot of that page there is a table which is given as an example, showing the method used by the respondent in its regular accounting procedure, as applied to the distribution of the expense in Account 200 for January, 1940. The amount of expense in that month in Account 200 being $20,019.36. The example shows certain percentages applied to three classes of expense, the first class of expense being entitled "Field Office," and a part of that expense is apportioned to each of the four channels, including automobile supply. I note that no part of the "general office" expense and "casual help" expense is charged to automobile supply. I would like to know whether, in your opinion, the treatment given those three classes of expense is consistent with respect to the charging of no part of the second and third classes of expense of automobile supply?

A. In my opinion there is a lack of consistency here, Mr. Austin. This charge of $1,130, representing payments by the general office, are, in fact, payments of salaries of the office manager and two assistant office managers, in the Detroit office. It was explained to me in Detroit that this payment of salaries was made through the office in Chicago in order that it might not be common information around the field office, that is, the Detroit office, as to the amount of salaries paid to these executives, to these higher paid employees, therefore, that this amount was paid 229 through the Chicago office for that particular purpose.

Q. Do those employees supervise the other accounting employees in the field office, whose wages and salaries are included in Account 200?

A. Yes, sir.

Q. And in your opinion should the allocation of the general office payroll, that is, the salaries of these higher employees follow the allocation of expense of the rank and file of the employees in the Department?

A. Yes, Mr. Austin, it is my feeling—and I have so testified here before—that in a situation of this kind, the supervisory compensation should be apportioned on the basis of the personnel supervised, especially when there is a close supervision, and those supervised, and their activities are not too remote from the supervisor.

Q. Does the respondent in its regular accounting sheet follow that method of allocation as to all channels except automobile supply? In other words, are the salaries of the head employees in the field accounting department allocated between tank wagon resellers, tank wagon consumers and other methods channels according to the same proportions which are applied to the salaries of the rank and file of the employees in those channels?

A. Yes, sir.

6230 Q. There is also a small item shown there on page 17 of Respondent's Exhibit 99; "Casual help." In your opinion, should part of that expense be charged to automobile supply for the purposes of the cost study? In answering that, if you wish, state the nature of the expense and how it is allocated between other channels.

A. The item of casual help in the Detroit office for the month of January, 1942, amounting to $577.44, is allocated between the tank wagon reseller column, tank wagon consumer column, and other methods column on the company's regular Form 189, on the basis of the time distribution sheet worked up by the field office accounting department for the month of December, 1939. It is generally sound accounting, Mr. Austin, to let this general costs, which would probably be costs of this nature, follow the allocation of the costs which may be separated and regarded to be of more of a direct nature.

Q. Mr. Warmack, is there any difference in the nature of the "casual help" expense and the nature of the expense listed opposite the words "field office"?

A. Well, that is a pretty broad question.

Q. That is a pretty broad question, but is it all expense incurred in the field accounting department in Detroit?

A. Yes, sir.

Q. It is expense of employees that work in that department.

A. Yes, sir.

6231 Q. Did you answer my question, or can you answer it as to whether, in your opinion, the same proportion of the casual help expense should be charged to automobile supplies as is applied to the field office expense?

A. I was starting to answer your question, Mr. Austin

Q. I don't want to spend too much time on this point.

A. (Continuing.) —from the standpoint of sound accounting, but I just can't say yes or no. If I do, without giving the reasons, the answers will be useless, or worthless.

From the standpoint of sound accounting, in general
e costs should follow the cost which is more of a direct
ture, and in view of that it would be my opinion that
is cost might properly follow the cost which is more or
s of a direct nature. There could be a possibility that
should not, but I see no evidence anywhere in my studies
show or convince me that it should not.
Does that answer your question?
Trial Examiner Ballinger: Will you read that question?
(The reporter read the question as follows:)
"Q. Mr. Warmack, is there any difference in the nature
the 'casual help' expense and the nature of the expense
ted opposite the words 'field office?'"

Trial Examiner Ballinger:
Q. Is the field office expense a direct expense?
32 A. Direct as to what, your Honor?
Q. You have been using the term "direct ex-
nse". In the sense in which you have been using it, I
ll ask the question.
A. It is more of a direct nature, and I believe that was
e term I used, than the casual help expense. It could
t be positively stated that it is a direct expense, but it
rtakes more of the nature of a direct expense, your
nor, than casual help expense.
Q. In the nature of first or second cousins?
A. I would say that an accounting department which
performing accounting services and keeping time records
uld be more in the nature of a direct expense, and would
at least susceptible to a separation on some reasonable
d sound accounting basis than a general cost, such as an
ice clerk called in for five days work, and another one
led in for a month's work, or such like would be.
The casual help expense, in my opinion, in the absence
any showing that it should be otherwise allocated, should
allocated on the basis of the allocation of this regular
ounting department expense.

Mr. Austin:
Q. Is any time study or time record kept of the general
ice expense or the casual help expense in Account 200
the respondent in its regular accounting procedure, for
the purpose of allocating those two classes of ex-
33 pense?
A. Yes, time records are kept of the time of the

regular employees in the accounting department for the most part.

Mr. Austin: That was not my question. Read the question.

(The reporter read the question as above recorded.)

A. Which account are you referring to?

Q. I am referring to page 17, Exhibit 99, Account 200, and the two lower classifications there, "General Office" and "Casual Help."

A. No time records are kept of those two particular items.

Q. And how is the expense of these "general office payroll" and "casual help" in Account 200 allocated between the respective channels on Respondent's Form 189?

A. On the basis of the time studies made of the field office, exclusive of those two items of expense, "General Office" and "Casual Help."

6234 Q. Now, in that example on page 17 of Respondent's Exhibit 99 in the first time it says "Per cent of time spent," then there is a row of percentages. Do you follow me, Mr. Warmack?

A. Yes, sir.

Q. The first per cent is for the "tank-wagon-reseller" column, 29.9 per cent; the next, "tank-wagon-consumer," 21.8 per cent; the next, "other method", 38.4 per cent, and "automobile supplies," 9.9 per cent. Is the total of those four percentage figures 100 per cent?

A. Yes, sir.

Q. And taking the first group of expenses, $18,311.92, which is here called "Field Office" expense, are those percentages applied to that $18,311.92 for the purpose of distributing it between the four channels shown?

A. Yes, sir.

Q. Now, take the second line there entitled "General Office," is that the salary expense of the top supervisory officials in the Field Accounting Department that you have just described, or, rather, that you have previously described?

A. Yes, sir.

Q. The total expense in that line for January 1940 is $1,130.00?

A. Yes, sir.

6235 Q. Is 29.9 per cent of that expense entered in the tank-wagon-reseller channel?

A. More than that amount is entered in that channel.

Q. Is 21.8 per cent of that expense entered in the tank-wagon-consumer channel?

A. More than that amount is entered in that channel.

Q. Is 38.4 per cent of that expense entered in the other-method channel?

A. What was the amount?

Q. 38.4 per cent?

A. More than that per cent is entered in that channel.

Q. And is 9.9 per cent of that amount entered in the automobile-supplies channel?

A. No, sir, no part of it is entered in the automobile-supplies channel.

Q. Then, will you explain how, if those percentages listed are not applied, the general office expense is allocated between the first three channels listed in that table?

A. On a basis of the proportionate part of the total field-office expense which had previously been applied to the three channels, after eliminating the charge to automobile-supplies channel.

After eliminating that charge, we would have only 90.1 per cent of the total $18,311.92 as applying in part to tank-
wagon-reseller and in part to tank-wagon-consumer
6236 and in part to other-method. That 90.1 per cent be-
comes 100 per cent and you arrive at, then, the percentage applicable to each of the other respective channels and, after that percentage in each instance is arrived at, you apply the general office expense, that is, the $1,130.00 to the three channels on that basis.

Q. Now, just one more question on this casual help, Mr. Warmack. I note the last sentence on page 17 of Respondent's Exhibit 99—will you turn to the exhibit, please?

A. Yes, sir.

Q. The last sentence on page 17 says:

"Expense for casual help, when possible, is charged directly to channel affected, based on daily record of time maintained by such casual help."

Did you make any inquiry or investigation as to the daily time records there referred to, and do you know what portion of the casual-help expense is charged to channels as a result of such time reports?

A. May I review my papers on that account, sir?

Q. Yes.

(There was a discussion off the record.)

(The question referred to was read by the reporter.)

A. I made a rather complete study of this account in the Detroit office and the records that I reviewed showed that for the purpose of allocating the costs of the accounting
6237 division daily records are made of time by each ~~employee~~ by departments, except casual employees such as extra help, during the months of March, June, September, and December each year.

Q. Did you ascertain whether any time records are kept for casual help?

A. I ascertained that they were not kept for casual help, Mr. Austin.

Mr. Hanley: I am a little confused now, your Honor. May I ask a question, please?

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. Are we to understand from your testimony just now given, Mr. Warmack, that you disagree with the accuracy of the statement on page 17 of Respondent's Exhibit 99 read to you by counsel as follows: "Expense for casual help, when possible, is charged directly to channel affected, based on daily record of time maintained by such casual help"?

(The question referred to was read by the Reporter.)

A. From the information that I received in the Detroit office, Judge Hanley, I can answer this question this way: I made a study of this particular account and I made inquiry of a great number of people in the Detroit Office whom I was directed to contact by Mr. Raupagh and other supervisory officials in the Detroit office and the
6238 information that I gained was to the effect that daily time records were not kept by casual employees, such as extra help.

I have the actual tabulations which were made in the Detroit field for the distribution of time reports for the month of June, 1940 and there is no classification for casual help in those sheets. We have a group for relief, which is two people's time, but in inquiring with respect to the procedure it was stated without reservation, it was stated without reservation to me by Mr. Houghton that daily time records for the purpose of setting up these distribution sheets in the Accounting Department in the Detroit field were not kept by casual employees, such as extra help.

Q. You say "not kept by the casual help." Do you mean by that answer to say that none were kept, whether by them or by someone else in connection with their work?

A. Yes, sir, that is the import of my answer.

Q. So either you are mistaken or this statement on page 17 of Exhibit 99 is mistaken?

Trial Examiner Ballinger: I think the two statements are easily reconciled. As I understand the witness, he has testified that there were no daily time records kept in the office.

Mr. Austin: For casual help.

Trial Examiner Ballinger: For casual help, and the statement appearing in the record is that "Expense 6239 for casual help, when possible, is charged directly to channel affected, based on daily record of time maintained by such casual help." The witness says that there was no record from which such a computation was possible.

Mr. Austin: Yes, exactly, your Honor.

Mr. Hanley: That is the point I am trying to find out, if he directly contradicts this statement.

Trial Examiner Ballinger: This statement says, "when possible."

Mr. Hanley: Yes, and that, I understand, is the fact, but I don't want this record to be anything but factual. If there is a mistake on his part, I want him to correct it. If there is a mistake on our part, we want to correct it.

(There was a discussion off the record.)

Mr. Austin: I move that the hearing adjourn until 2:00 o'clock, if your Honor please.

Trial Examiner Ballinger: The motion is granted and now, at 12:10 p. m., the hearing stands in recess until 2:00 p. m.

(Whereupon, at 12:10 p. m. a recess was taken until 2:00 p. m. this day.)

6240 Afternoon Session.

2 p. m.

Trial Examiner Ballinger: We will come to order.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Austin.

Q. Mr. Warmack, referring to Accounts 202, 203 and 204 on Respondent's Exhibit 101, it does not appear that any portion of the expense in those three accounts is charged to automobile supplies business. Will you state briefly the nature of the expense in those three accounts and whether, in your opinion, an amount of such expense should be charged to automobile supplies for the purposes of this cost study?

A. Account 202 is an account entitled "Office Expense—postage." Account 203 is entitled "Office Expense—telephone and telegraph." Account 204 is entitled "Office Expense—exchange."

I think the names are descriptive of what the accounts are, Mr. Austin, with the possible exception of the item of exchange.

Q. Well, I think the nature of the expense in the account is sufficiently described by Mr. Boatwright. Are you familiar with his testimony in regard to the three accounts?

6241 A. Yes, sir.

Q. What is your opinion as to whether any of the expense of the nature charged to those accounts should be allocated to automobile supplies for the purposes of this cross section?

A. It is my opinion that some part of each of these three expenses should be allocated to automobile supplies in each instance. What I mean by that is, I think that a part of each one of these separate accounts will be influenced to some extent by the automobile supplies business of the respondent company.

Trial Examiner Ballinger: Does this statement appear in Respondent's Exhibit 100, of the allocation of the expenses?

Mr. Austin: It is in Respondent's Exhibit 99 as to the regular accounting procedure.

Trial Examiner Ballinger: Where?

Mr. Austin: The allocation to automobile supplies would be made in the course of the regular accounting procedure, if at all, I believe, because the allocations to direct shipment channels are described in Respondent's Exhibit 100.

The Witness: Pages 73 and 74 of Respondent's Exhibit 100.

(Discussion off the record.)

6241-A Trial Examiner Ballinger: I wanted to find out where the explanatory statement was.

The Witness: The figures showing where the portions of those accounts were applied to direct shipment business are shown on pages 73 and 74 of Respondent's Exhibit 100—the method used in regular accounting procedure.

Mr. Austin: That is on page 18 of Respondent's Exhibit 99. I would suggest that you look at page 18 of Respondent's Exhibit 99. There is a short statement there which I think covers the regular accounting procedure.

By Mr. Austin:

Q. How is the expense in these three accounts allocated to channel in the company's regular accounting procedure?

A. On the basis of gallonage.

Q. What gallonage?

A. Tank wagon gallonage.

Q. Was some of the expense in those accounts allocated to other methods?

A. Yes, that statement should be corrected to read "bulk plant gallonage." That is reseller gallonage, consumer gallonage, and other methods gallonage.

Q. Including or excluding direct shipments?

A. Well, in the regular accounting procedure there is no provision for direct shipments, therefore, whatever the cost would be included in direct shipments would be as-
6242 signed in the regular channels on Form 189, on the basis just stated.

Q. Well, I guess my question was not clear. When you said that the gallonage method was used for allocating this expense between channels, did the gallonage used include or exclude direct shipment gallonage?

A. It does not include direct shipment gallonage.

Q. And is any recognition given by the respondent to automobile supply sales in the gallonage used as a basis for allocating the expense in these three accounts between channels?

I mean by that this: I understand that greases are sold by the pound, but they are converted to a gallonage basis and included in the gallonage used for allocation of expenses, which are distributed on a gallonage basis in the respondent's regular accounting procedure. My question now is whether the same thing is done with automobile supplies. Are they converted to a gallonage figure and included in the gallonage used by the respondent for these gallonage allocations?

A. No, sir. That is the reason, of course, that there is no expense carried in the automobile supply column.

Q. And what are your reasons for stating that a portion of the expense of these three accounts should be charged to automobile supplies for the purposes of this cost study?

A. For the reason that this is a part of the respondent
company's business. It would naturally be assumed,
6243 without making a detailed analysis of the postage ac-
count, that some postage would be involved in this
class of business.

Q. What class of business?

A. Automobile supplies business, inasmuch as automobile supplies are sold in many instances on a budget plan, that is, they are sold to customers on credit. If the customer does not pay, surely the company has to write him a letter, many letters. I assume, and I believe it is reasonable to assume, that postage will be incurred in connection with the purchasing of these supplies by the company, the handling of these supplies, and various other things in connection with the merchandising of this particular class of merchandise that would involve the writing of letters and the incurring of postage costs. That is, for Account 202. In connection with telephone and telegraph, which is Account 203, this is another general expense of the company, and I think it is fair to assume that there would be some class of this particular cost, some calls made or calls received, transactions made over the telephone and the like, that would involve in some way the merchandising of automobile supplies. There is nothing in the record to show that this would not be incurred, Mr. Austin.

In connection with Account 204, which is the item entitled "Exchange," Mr. Boatwright went into that in the record when he was on the stand, and I inquired into 6244 this particular account in my field study in the respondent company's office in Detroit, and I learned that there is a charge for the handling of money by the depositories of the company, and in addition the company employs a company which is known, I believe, as the Brinkley Company, for the picking up of cash and depositing of that cash, and for which the respondent company pays a certain charge. It seems to me, Mr. Austin, that it would be reasonable to assume that some part of that charge would be influenced to some extent by the automobile supplies business of the company, and I believe those constitute sufficient reasons for my answer.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

6245 By Mr. Austin:

Q. Is any explanation made in this record or in the exhibits as to why automobile-supply expense and its equivalent in gallonage was not included by the respondent in allocating this expense between channels on a gallonage basis in its regular accounting procedure?

A. I know of none, Mr. Austin. I might add to that there was some explanation with respect to incremental cost.

Q. Was that in connection with these three accounts, or some other account?

A. I believe that was in connection with some other account.

Q. Did you make any inquiry regarding these accounts when you were in Detroit as to why automobile supplies was not included by the respondent in allocating the expense?

A. Yes, sir, I asked about that.

Q. What information did you receive, if any, and state from whom you received it?

A. I asked Mr. Houghton why some part of this expense wasn't over in the automobile-supplies column, and he stated that it just wasn't over there, and that is all the information I have.

Q. Referring now to Accounts 201, 202, and 204—202 and 204 we have been speaking of, and 201 is entitled "Office Expense—Stationery and Office Supplies." It appears from Respondent's Exhibit 100 that a cost study was 6246 made of the expense going into each of these three accounts for the purpose of determining what portion of the expense in each account should be charged to the respective direct shipment channels on Respondent's Exhibit 101. The explanation of the methods used by the respondent to segregate direct-shipment costs in these accounts is described at pages 72, 73, 74, and 75 of Exhibit 100.

On page 18 of Respondent's Exhibit 99 it appears that the expense in these three accounts is distributed to the various channels other than automobile supplies on the basis of gallonage in the company's regular accounting procedure. Therefore, turning to page 63 of Respondent's Exhibit 100, where those three accounts are listed, it appears that a portion of the expense in those accounts is charged to direct-shipment channels, as explained in Respondent's Exhibit 100, the pages above cited, and the balance of the expense in the three accounts remains in the bulk-plant channels on a gallonage basis.

Will you state, Mr. Warmack, whether I have correctly stated the contents of Respondent's Exhibits 99 and 100 in regard to the distribution of the expense in these three accounts?

Mr. Hanley: Don't the exhibits speak for themselves as to what they contain?

Trial Examiner Ballinger: They do, but if the 6247 witness' subsequent testimony deals with this, it will be considered as on the basis of the statement made now.

The Witness: Will you read the question?

(The question referred to was read by the reporter.)

The Witness: In my opinion, you have stated it correctly, Mr. Austin.

By Mr. Austin:

Q. In your opinion, is that treatment of the expense in these accounts proper and sufficient for the purpose of establishing a cost differential between tank-wagon-reseller differential.

A. In my opinion it is not sufficient to establish a price gasoline and jobber gasoline?

Q. You mean cost differential, don't you?

A. I mean cost differential, I beg your pardon.

Q. And will you state your reasons for that opinion?

A. Yes, sir. In the first place, the costs were separated on the basis of gallonage, exclusive of direct shipment gallonage. In other words, in the company's regular accounting procedure, it made the separations of this class of expense between distribution channels on its regular Form 189 in the Detroit field for the year 1940 on the basis of bulk-plant gallonage.

For the purpose of separating out of the prior distributions of this cost that portion of the cost which applied 6248 to direct shipment business, the respondent made various studies, as enumerated and outlined on pages 72 to 75 of Respondent's Exhibit 100.

It appears to me, or it is my opinion that if the respondent had completed its studies to make a full coverage of this account, rather than just to drag out that portion by a time study which it assumed to be applicable to direct shipment business, it would have been able to make a separation between all of the channels, as shown on Respondent's Exhibit 101, by one full and complete cost study, rather than to have part of the cost allocated on that exhibit on the basis of gallonage and another part of the expense allocated on the exhibit on the basis of a detailed study.

Does that answer your question?

Q. I think so, Mr. Warmack, if you think so.

A. I believe that covers it.

With respect to some of these costs, I have another question with respect to their use in proving a cost differential.

Q. Which cost are your referring to?

A. I am referring to that portion of this class of expense which has to do with credit cards.

Q. There is some credit card expense included in some of these accounts?

A. Yes, sir.

6249 Q. I think we will take that up separately, unless there is something along that line which you think is material in connection with my past question.

A. Following my thought, as previously stated, if a detailed cost study were made to determine the influencing factors of each of these channels completely, rather than only that portion which respondent regards as being applicable to direct shipment business, then all of these questions would be thoroughly and sufficiently developed as to see what the cost is, where it went, and what influenced it, with respect to each channel.

Q. Is the proportion of the salaries in Account 200 charged to the other-method channel by the respondent, as a result of its quarterly time reports previously described by you, larger or smaller than the proportion of respondent's total gallon units sold through the other-method channel in the Detroit field in 1940?

A. The amount of salaries charged in the other-method channel is much larger than the proportion of gallonage in that channel, Mr. Austin, to the total tank-wagon or bulk-plant gallonage.

Q. Does that fact in your opinion, create an inference or indication that the gallonage method of allocation, as applied to Accounts 201, 202, and 204, results in placing too large a portion of the expense in those accounts in the
6250 tank-wagon reseller channel?

The Witness: Read the question, please.

(The question referred to was read by the reporter.)

A. That indicates to me that there would be great need for a study to determine a basis of direct allocation, as far as it could be made, and a reasonably accurate allocation of those expenses which could not be assigned directly, included in the items just mentioned, to the three channels, that is, tank-wagon reseller, tank-wagon consumer, and other-method.

Only a study of that kind, Mr. Austin, would tell or disclose the fact as to where those accounts and in what amounts should be applied to those channels.

There may be a following of this class of expense to effort of employees in these channels. If there is, then, the allocations as shown would appear to be out of line, but whether there is a following or not could only be established by a detailed study, and I am coming there to the study which I have called a factual and objective study, and not speaking of the term loosely.

Mr. Hanley: I don't believe that I understand the last two questions and the answers made thereto. I would like to clarify the situation, if I may, your Honor.

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. Haven't you testified that this Account 200
6251 "Salaries—Accounting" is built up on a time sheet or record of some sort?

A. Yes, Judge Hanley, as the result of tabulations of time in the district office.

Q. And doesn't that time study relate to the amount of effort that goes into any one of these channels by the particular employee?

Trial Examiner Ballinger: What do you mean? Time effort?

Mr. Hanley: Yes, sir.

The Witness: May I inquire, are you speaking with respect, Judge Hanley, of the regular accounting procedure of the company?

Mr. Hanley: Yes.

Mr. Austin: Are you referring only to Account 200?

Mr. Hanley: That is all.

The Witness: Yes, sir.

By Mr. Hanley:

Q. And doesn't that show what effort went into other-method gallons and consumer and reseller channels gallons?

A. In the regular Form 189?

Q. Yes.

A. Yes, sir.

Q. Then, I don't understand this, Mr. Warmack. In some answers you have given to Mr. Austin you have
6252 indicated that there is an overstatement of this account in the other-method channel in relation to gallons. Haven't you so stated?

A. Judge, I think maybe I could explain that this way: there are figures—I will give them in round numbers—$82,000.00 in the tank-wagon-reseller column, $39,000.00 in the consumer column, and $91,000.00 in the other-method column on Respondent's Exhibit 101.

Mr. Austin: Which account, though?

The Witness: For Account 200.

The gallonage, now, for those respective columns?

Mr. Hanley: Yes.

The Witness: Tank-wagon-reseller column is 69,000,000, tank-wagon consumer is 32,000,000; other-method column is 4,900,000.

Now, the point was not necessarily that the account was overstated, but it was in answer to a question where I was asked the relationship of the amounts of Account 200 apportioned to each of those channels, as compared with the relationship of the gallonage appearing in each of those channels.

By Mr. Hanley:

Q. Perhaps we can get it the other way around, in view of your answer just given.

6253 You have indicated the amount of gallonage in each of these channels. On the basis of gallonage, isn't it a fact that this Account 200 is understated in the tank-wagon reseller channel?

A. If Account 200, Judge Hanley, if I may state it in this way, were apportioned on basis of gallonage, then the tank-wagon reseller column would be much larger and the other-method column would be much smaller.

Q. That is what I am getting at.

A. Than the figures as shown for Account 200 on Respondent's Exhibit 101.

Q. And the cost differential relates to the reseller channel and not the other-method channel, does it not?

A. That is correct.

Q. And hence, if the straight-gallonage method of allocation of this account had been used—

A. As between the three channels, you mean?

Q. —as between the three channels, it would have had the effect of increasing the cost differential, wouldn't it?

A. That is correct.

Mr. Hanley: That is all. I think that I see.

(There was a discussion off the record.)

By Mr. Austin:

Q. Now, I wish to call your attention, Mr. Warmack, to Account 203, the heading of which is "Office Expense—Telephone and Telegraphy," and Account 063, the heading of which is "Telephone and Telegraph (other than main office)"?

6254 I am taking up the two accounts together because they are both telephone and telegraph expenses, and I think may be considered at the same time, even though they appear at different places on Respondent's Exhibit 101.

A portion of the expense in Account 203 is charged to direct shipment channels on Respondent's Exhibit 101.

Upon what basis was that expense allocated to direct shipment business?

A. On the basis of total hours devoted to direct shipment business by all employees in the main office as a proportion of the total hours of such employees shown on page 74 of Respondent's Exhibit 100.

Q. And how is the remainder of the expense in this account allocated between the three bulk-plant channels?

A. On the basis of gallonage.

Q. What gallonage, Mr. Warmack?

A. All gallonage, exclusive of direct shipment gallonage.

Q. In your opinion, is the use of these two methods of allocation in distributing the expense in this account a proper one from an accounting standpoint for the purpose of establishing a cost differential?

A. I think they are unsound and inconsistent, and the same answer given to the same question for a separate account previously would apply equally here.

6255 Q. For which account previously? I just don't want to leave that indefinite, if there is any question about what account you are referring to.

A. I think I spoke previously of this particular Account 203.

Q. I don't think so in this connection. You did discuss Accounts ~~201,~~ 202, and 204.

A. I will say it again.

Q. Just a minute. I just want to know what accounts you referred to when you said you had previously expressed the same opinion, and I will ask you whether you were referring to your opinion given in connection with Accounts 201, 202 and 204?

A. Yes, sir.

Q. If the expense of this account were allocated between bulk-plant channels by the use of the same measuring factor that was applied to it in charging a part of it to direct-shipment channels, would the charge to the tank-wagon-reseller channel be affected?

Mr. Hanley: Is that asking for a question of fact or an opinion? I think it asks for a question of fact.

Mr. Austin: Yes.

Mr. Hanley: And that being the case, we object unless and until a foundation is laid showing that the witness has made a study and is able to answer factually.

Trial Examiner Ballinger: The objection is sustained. 6256

By Mr. Austin:

Q. Mr. Warmack, I believe you stated that the expense in this account is in part allocated to direct shipment business on the basis of the ratio of total hours of main-office employees devoted to direct shipment business to their total hours; is that correct?

6257 A. That is correct.

Q. Can you, or have you examined this cost study sufficiently to be able to testify as a fact as to whether, if that same measuring factor were applied to this expense in distributing it among all channels in Respondent's Exhibit 101, the proportion of the expense in the tank wagon reseller channel?

A. I certainly could not tell you.

Q. Then you have no opinion? I understood you to just say you did.

A. Mr. Austin, if we have an account that is separated in two ways: first, on the basis of gallonage, then on the basis of a study, there may be some general costs included here in these alocations as a result of a study, which I will give no effect to as far as the cost applied to the direct shipment is concerned. The remainder of that cost remains in the tank wagon reseller column, tank wagon consumer column, other methods column, on a basis of gallonage. Now there has been no study made that is allocated on the basis of gallonage. Is this what you are asking me, what would a study show?

Q. No.

A. Then I don't understand the question.

Q. What was the measuring factor used by the respondent in this cost study in allocating a part of the expense in Account 203 to direct shipment channels?

6258 A. A portion of the expense in Account 203 is charged to direct shipments channels on Respondent's Exhibit 101, on the basis of total hours devoted to direct shipment business of all employees in the main office, as a proportion of the total hours of such employees.

I believe I understand your question, Mr. Austin, and I am sorry that I did not understand it. I will try to answer it.

Assuming that the hourly effort in the Detroit field of all the employees in the Detroit field follows reasonably the allocation of salaries or other compensation in the Detroit field, as shown in the respective and several salary accounts on Respondent's Exhibit 101, then, if this class of expense were allocated to the separate channels on Respondent's Exhibit 101 in accordance with those salary allocations or compensation allocations to the respective channels, the amount shown in the tank wagon reseller column of Respondent's Exhibit 101 for Account 203 would be materially reduced.

Trial Examiner Ballinger: We will take a recess for five minutes.

(A short recess was taken at 3:10 p. m.)

By Mr. Austin:

Q. Is that your complete answer to that question, Mr. Warmack?

6259 A. No, sir; that answer should be changed to this extent: that if the same methods employed by the respondent in the allocation of this class of expense to direct shipments and between the separate direct shipment channels were applied to that portion of the expense which was allocated to the three bulk plant channels, tank wagon reseller, tank wagon consumer and other methods channels, the amount of expense appearing in Respondent's Exhibit 101 for Account 203 would be materially reduced. That is the correct answer.

Q. Would it be reduced—where would it be reduced, Mr. Warmack?

A. The amount shown in tank wagon reseller channels—that is, the amount of $7,748.07—would be materially reduced.

Q. Now, the other account that I mentioned, involving telephone and telegraph expense, was Account 063 on page 10 of Respondent's Exhibit 99. It appears that the expense in this account is allocated to channels in the company's regular accounting procedure on a gallonage basis, excluding direct shipments. Is a portion of the expense in that account also allocated to automobile supplies on the Detroit Form 189 for 1940?

A. Yes, sir; the amount of $298.04 of that account is allocated to automobile supplies on the regular Account Form 189 of the Detroit field for the year 1940.

Q. Is any part of the expense in that account allocated to direct shipments channels on Respondent's Exhibit 101?

6260

A. No, sir. The allocation as shown in respondent's regular accounting form 189 in the Detroit field for the year 1940 is the same allocation as is shown in Respondent's Exhibit 101.

Q. By the "same allocation" are you referring to the amount entered in the three bulk plant channels?

A. Yes, sir; as well as the automobile supplies channel.

Q. Where is this expense in Account 063 incurred, Mr. Warmack? In that connection, I might refer you to pages 40 and 41 of Respondent's Exhibit 100.

A. At the bulk plants of the company.

Q. What is your opinion as to the propriety of the use of the gallonage method of allocation for the expense of this account between the tank wagon reseller, the tank wagon consumer and other methods channels for the purpose of establishing the tank wagon reseller expense in that account, to be used in turn for establishing a cost differential between tank wagon reseller gasoline and jobber gasoline?

The Witness: Will you read the question?

(The question was read.)

Trial Examiner Ballinger: Do you understand the question?

A. Yes, sir; I understand the question. I question the propriety of this separation, or such a separation for the purpose of establishing cost, and for this reason: 6261 in the separation of Account 203, which is telephone and telegraph expense, of the main office, the separation was made between direct shipment customers and was assigned to direct shipment business on the basis of the effort of employees engaged in the main office. Inasmuch as this class of expense is incurred for bulk plants, it would seem to me that it would be more proper, more in accordance with sound accounting, and would surely be more consistent if the respondent had followed through the separation of this class of expense, which would, of course, require a separation based upon effort at the bulk plant—that is, effort of employees. Consistency there, Mr. Austin, is the main question at issue.

By Mr. Austin:

Q. Would it be possible to apportion that expense in Account 063 between the three bulk plant channels, by making a cost study of the expense and determining in what connection it was incurred?

A. Yes, that might be possible. I rather think that such a study would have to be made in prospect and not in retrospect.

Q. If the expense in Account 063 were allocated between the three bulk plant channels in the same proportion as the salaries of warehouse labor apportioned between channels in Account 008, what would be the 6262 effect, if any, upon the amount of expense in Account 063 which would fall into the tank wagon reseller channel?

Mr. Hanley: Will you please read that question?

(The reporter read the question as above recorded.)

Mr. Hanley: I have an objection to that question, if your Honor please. I would like to ask a question of the witness first.

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. You have been discussing Account 063, which is telegraph and telephone expense other than the main office, which occurs out in the bulk plants.

A. That is correct.

Q. Have you made any investigation at all, Mr. Warmack, to determine specifically how that expense is incurred? For instance, do you know as a fact whether a telephone call from a bulk plant to the main office, ordering gasoline, could possibly be split on any other than a gallonage basis, inasmuch as it is all fungible property, all goes in to the same tank and is all delivered through the same equipment on orders as they prospectively come in? Do you understand that to be the system that is in use?

The Witness: Will you read the question?

(The reporter read the question as above recorded.)

6263 The Witness: Judge Hanley, I don't know that it could. I have not made any cost study, as such, of this, but I have reviewed the accounts of the company to some extent and I have studied respondent's cost reports, particularly Respondent's Exhibits 106 and 99. My question with respect to this account was particularly directed to the one point, consistency.

Mr. Hanley: I think Mr. Austin has a question on the record.

Trial Examiner Ballinger: Do you desire the question read?

The Witness: I can answer the question.

Trial Examiner Ballinger: You can answer it?

The Witness: Yes.

Mr. Hanley: I intended to make an objection, but I think the general objection is sufficient there, in view of the statement of the witness.

The Witness: The figure of $6,777.33, as shown in the tank-wagon reseller column of Respondent's Exhibit 101 for Account 063, would be materially reduced.

By Mr. Austin:

Q. Judge Hanley just asked you a question regarding the method of allocation that should be made of the expense of a telephone call from a bulk plant to the main office ordering gasoline. In your opinion, Mr. War-
6264 mack, should any part of the cost of any such telephone call be charged to the other-method channel for the purpose of this cost study?

A. Mr. Austin, you and Judge Hanley both are going into fine technicalities with respect to this class of expense.

Trial Examiner Ballinger: Answer the question.

The Witness: Judge Hanley posed a question as to if the bulk plant ordered gasoline over the telephone from the main office.

Trial Examiner Ballinger: Well, you may answer Mr. Austin's question first, and then answer it as modified by Judge Hanley.

The Witness: I don't know how it could be done, Mr. Austin. I don't know how you could apply any part of it to the other-method column.

Trial Examiner Ballinger: Now, answer the question as amended.

Mr. Austin: If your Honor please, I would like to have my question read and perhaps the witness can give a more direct answer to it. I don't know.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

Trial Examiner Ballinger: Now read the answer.

(The answer referred to was read by the reporter.)

Mr. Austin: I didn't ask the witness whether it could be done. I asked him whether in his opinion it should
6265 be done.

Mr. Hanley: That is objected to, if your Honor please. If the witness says it can't be done, he can't reasonably say it should be done.

Trial Examiner Ballinger: The objection is sustained.

By Mr. Hanley:

Q. I still have this question on the record: Assuming that in the same telephone call above referred to about gasoline the bulk-plant operator ordered lubricants and axle grease and the things that you found together in other-method channel, and suppose he talked more about a case of axle grease than he talked about a carload of gasoline, how would you make that kind of an allocation in a detailed and factual cost study that you are talking about?

A. I certainly don't know—or if he talked about a ball game.

Q. Exactly. Suppose he did, what would you do with that?

A. Or his wife's cousin or sister or brother or something, just made a nice general family visit over the phone. You two gentlemen have gone into fine technicalities with respect to this little, small account.

Q. It leads back to one thing, and I would like to clarify it, if your Honor will permit me.

Do you know any way that is more reasonable, 6266 in the matter of the allocation of this expense item 063 as between these bulk-plan channels, than on a gallonage basis?

A. Judge Hanley, if I wanted to go to greater refinement than a gallonage basis, I can think of certain tabulations that might be made which would disclose whether or not one class of customers or distribution channel or group of products may influence the use of this service more than another, but my question with respect to the propriety of the allocation of this class of expense, both at the bulk-plant station and at the main office, went to the point of consistency, Judge Hanley.

Trial Examiner Ballinger: Do you think it is practical in a business operation to carry the allocation of this account to the refined extent that you have indicated?

The Witness: Ordinarily not, your Honor.

By Mr. Austin:

Q. Referring to Account 203, which is the same type of expense, Mr. Warmack, did the respondent use the gallonage basis of allocation when it sought to charge a part of the expense in that account to direct-shipment channels?

A. No, sir.

Q. And when you refer to consistency, are you referring to consistency between the method employed in allocating part of the telephone and telegraph expense to direct-shipment channels on the one hand and the rest of
6267 it to the bulk-plant channels on the other hand?

A. On different bases, Mr. Austin, yes.

Q. Returning again to Account 203, which is telephone and telegraph expense at the main office, if all of the expense in that account had been allocated between all channels on Respondent's Exhibit 101 on an all-gallonage basis, including direct-shipment gallonage, would the amount of the expense falling into the direct-shipment channels as a result of that method of allocation be larger than the amounts now entered in those channels for Account 203 on Respondent's Exhibit 101?

A. It would be greater than the amounts shown on Respondent's Exhibit 101, but I think this record should show here that I am not saying that any such allocation should have been made at all.

Trial Examiner Ballinger: If it had been made that way, it would have been a little more refined, would it?

The Witness: That is a matter of conjecture, your Honor.

By Mr. Austin:

Q. Let me ask you this further question, Mr. Warmack, on those two accounts: You have, at previous points in your testimony, referred to the allocation of indirect expense following direct expense, and there are numerous accounts on Respondent's Exhibit 101 where all or a part of the expense in the account is apportioned to the
6268 effort of employees which is accounted for in different accounts.

Is this telephone and telegraph expense an expense which in your opinion can be properly allocated following the effort of the employees where the expense is incurred?

Mr. Hanley: I believe, your Honor, I will object to that as repetitious. The witness has answered that question a number of times.

Trial Examiner Ballinger: Read the question.

Mr. Austin: Before the witness answers that—

Trial Examiner Ballinger: Just a moment, there is an objection pending.

Mr. Austin: I see. Go ahead.

(The question referred to was read by the reporter.)

Trial Examiner Ballinger: Isn't this repetitious? Haven't you asked the witness with reference to this same matter?

Mr. Austin: I will withdraw the question, at any rate.

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Austin:

Q. In your opinion, Mr. Warmack, should the same method of apportionment or allocation be applied to the expense in both Account 063 and Account 203 for distribution between all channels on Respondent's Exhibit
6269 101, for the purposes of this cost study?

Mr. Hanley: That is objected to as already having been asked and answered, and for the further reason that the witness has declined to give any opinion as to how he thinks that might be better done and having stated in answer to one of the Examiner's questions that any different method would be just a conjecture as to whether it was better or otherwise.

Mr. Austin: If your Honor please, I would like to have a chance to express my opinion on that.

Trial Examiner Ballinger: All right.

Mr. Austin: This question is directed specifically as to whether the expense in these two accounts should be treated in the same manner or whether the same method of allocation should be applied to both for all channels. I don't believe I have asked the witness that question before, and the purpose of the question is to make it clear if it is a fact that the expense in these two accounts is of the same nature and should be handled consistently.

Mr. Hanley: If that changes the question any in your Honor's mind, I want to add the further objection that the question as now amplified omits a necessary element in the evidence, in that the question says: should the allocation be made the same for all channels in the one instance and in the other, wherein, as a matter of fact, the Account 063, as explained on pages 40 and 41

6270 of Respondent's Exhibit 100, has no bearing or effect
whatsoever upon direct-shipment gallonage, and it would be improper to attempt to give the same treatment on any basis to an expense account which has no bearing whatsoever on direct shipment gallonage as might be given an expense account which would have a bearing on direct shipment gallonage.

Trial Examiner Ballinger: I will hear from counsel for the commission.

Mr. Austin: I don't think that affects the question because, for instance, if a gallonage method was applied to both accounts, as to Account 063 you naturally would apply only the bulk-plant gallonage, whereas as to Account 203 it would be possible to apply all gallonage, including direct shipments since it is conceded that direct shipments were concerned in Account 203, but it still would be the same method of allocation, which my question contemplated. On the other hand, if the distribution of effort method were used for both accounts, that again would depend upon effort of bulk-plant employees in one case and effort of main-office employees in the other, but again it would be the same method of allocation.

Trial Examiner Ballinger: Hasn't this witness testified with reference to one of these items that he can not say that the method employed by the respondent company was
not the proper method? Now you are including with-
6271 in your question that factor, as well as all others.
How can he express an opinion or answer your question, in view of his statement?

Mr. Austin: He said that he considered the methods in the two accounts were inconsistent.

Trial Examiner Ballinger: Yes.

Mr. Austin: If they are inconsistent, they can not both be right, certainly.

Trial Examiner Ballinger: They might be inconsistent and yet perfectly proper.

Mr. Hanley: Certainly, your Honor.

Mr. Austin: Then, this question is directed to that. The question is whether the same method should have been used for both accounts, which I don't think has been answered.

Trial Examiner Ballinger: That can only be answered on the basis of consistency. If you desire such an answer, you may have it.

The witness may answer the question.

Mr. Hanley: That is objected to now as immaterial; unless it is shown that the inconsistency has some fatal effect upon the validity of this cost study, it doesn't matter whether it is inconsistent or not.

Trial Examiner Ballinger: The objection is overruled, reserving to counsel for respondent the right to move
6272 to strike the question and answer, when received.

Mr. Austin: Are you familiar with the question?

Mr. Ballinger: You may answer the question.

The Witness: I would like to have the question read, your Honor.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"In your opinion, Mr. Warmack, should the method of apportionment or allocation be applied to the expense in both Account 063 and Account 203 for the distribution between all channels on Respondent's Exhibit 101, for the purposes of this cost study?")

Trial Examiner Ballinger: Answer the question.

The Witness: Yes, I feel that some reasonable degree of consistency should be followed in the separation of these accounts, and I think that inasmuch as we have talked so much about this particular expense that I should amplify on that just a little, your Honor, if I may.

Trial Examiner Ballinger: You may.

The Witness: If respondent has established the fact or the point that this class of expense can be separated on the basis of effort, first, as to assigning the cost to one class of business as against another, speaking of direct-shipment business and bulk-plant business, and inasmuch as they have employed that basis for the separation,
6273 then, between the three direct-shipment channels, from the standpoint of consistency it seems to me that that portion of the expense applying to the bulk-plant channels should be separated on a basis of effort, or that information be developed to show why it shouldn't be, your Honor, separated on that basis. That is the question that I raise here with respect to consistency.

In connection with Account 063, that expense is of the same nature as Account 203, Telephone and Telegraph Expense, and if such a great refinement were gone into in the separation of this class of expense at the main office, then, if you are going to follow through from the standpoint of consistency, Account 063 would have to be explored and separated in the same way.

I am just pointing out that one point, your Honor, consistency, in the handling of this item of expense, without saying or intending to say what method should be employed in the separation of expense.

Mr. Austin: May I ask one more question before—

Trial Examiner Ballinger: You may.

By Mr. Austin:

Q. You stated, Mr. Warmack, that a reasonable degree of consistency should be used. In your opinion, has the respondent used a reasonable degree of consistency in apportioning the expense in these two accounts on its Exhibit 101?

6274 Mr. Hanley: Just a minute, the respondent moves to strike the answer of the witness to the last question for all of the reasons urged in the several objections to the question, and for the further reason that it is not responsive and is largely a volunteer statement, and the objection is made to the present question of counsel for all of the reasons made to the preceding question and for all of the reasons assigned to the motion to strike.

Trial Examiner Ballinger: Reserving ruling on the motion made and reserving to counsel for respondent the objection and motion to strike the answer to the pending question, the witness may answer.

By Mr. Austin:

Q. I would like to have a yes or no answer on that, Mr. Warmack, if you can give it.

A. In my opinion, the answer is no.

By Mr. Hanley:

Q. That is to say that there is not a reasonable degree of accuracy in these two accounts?

A. Not accuracy, Judge—consistency.

Mr. Hanley: Consistency, I should have said. I beg your pardon.

Trial Examiner Ballinger: Is the motion renewed as to the last—

Mr. Hanley: All of the motions are renewed in
6275 connection with this line of examination, and there is added to the motion the further ground that the witness has now assumed to say that there is not a rea-

sonable degree of consistency employed in the accounting methods of the respondent in connection with the two telephone accounts under consideration, but he has not indicated what he means by "reasonable," although he definitely indicated that it would be a conjectural matter to undertake any further refinements.

Trial Examiner Ballinger: The objections to both questions are sustained and the motions to strike are sustained. The matter is stricken.

Mr. Austin: But for the reasons stated by counsel?

Trial Examiner Ballinger: For the reasons stated by counsel.

(Discussion off the record.)

Mr. Austin: I move that we adjourn.

Trial Examiner Ballinger: The motion is granted, and now, at 4:25 p. m., the hearing stands adjourned, to reconvene on July 8, 1942, at the hour of 9:30 a. m. in Room 532, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 4:15 p. m., July 7, 1942, the hearing in the above entitled matter was adjourned.)

6276 Room 532, Federal Trade
Commission Building,
Washington, D. C.
Wednesday, July 8, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Ill., appearing for the Respondent.

6277 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing in Docket 4389, of the case entitled In the Matter of Standard Oil Company of Indiana, is convened pursuant to notice at 9:30 a. m., July 8, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held in the Federal Trade Commission Building, Washington, D. C., in Room 388, July 7, 1942.

The reporter will note counsel for the Commission and respondent present.

You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination by Mr. Austin.

Q. Account No. 206 on Respondent's Exhibit 101 is entitled "Office Expense—All Other—Water, Light, Fuel, Rent, etc." That account is referred to at page 75 of Respondent's Exhibit 100 and also at page 17 of Respondent's Exhibit 99.

Will you state how the expense in this account is distributed by the respondent between tank-wagon reseller, tank-wagon consumer, and other-method channels in its regular accounting procedure?

A. This item of expense is distributed to the
6278 three separate channels on company's Form 189 on
the basis of a distribution of time report which is
prepared for all accounting employees in the Detroit
office in the regular accounting procedure.

Q. Is that the quarterly distribution of time report for the accounting department that you referred to yesterday?

A. Yes, sir.

Q. And what is the exhibit number? I believe that several of those were introduced as exhibits.

A. Commission's Exhibits 117-A, -B, -C and -D.

Q. Then, do I understand that the water, light, fuel, and other operating expenses and rental expense of the main office are distributed between channels in the regular accounting procedure according to the same proportions as the salary expense of the accounting department?

A. Yes, sir, they are. You are speaking with reference, of course, to Account 206.

Q. Do the employees in the accounting department constitute the great majority of employees working for the respondent in the main office building?

A. Working in the main office building, yes.

Q. What I mean is, Mr. Warmack, I wanted to know
whether allocation of this office-building expense according
to the distribution of effort of employees in the accounting
department is in effect a distribution of the expense
6279 according to distribution of effort of employees in
the main office building itself.

~~The Witness: May I have the question read.~~

(The question referred to was read by the reporter.)

The Witness: Yes, sir, that is the way the distribution is made on the basis of the time and the effort of the accounting employees in the Detroit office.

By Mr. Austin:

Q. I don't know whether you quite understood my question. This is a building expense. It is not an accounting department expense, is my understanding.

A. Yes, sir.

Q. Is this expense allocated between channels, according to the effort of the employees in the main office building?

A. The information that I have, Mr. Austin, is that it follows the distribution sheets that we have just been talking about, which are Commission's Exhibits 117-A, -B, -C, and -D, and I think that will be substantiated by a statement at the top of page 17 of Respondent's Exhibit 99.

Q. Yes, I understand. I have no question at all as to what was actually done, Mr. Warmack.

A. Yes, sir.

Q. But I want to know whether there are any substantial number of other employees in the main office
building other than those whose effort is accounted
6280 for on the quarterly distribution of time reports
which you have just referred to.

A. There are a good number of other employees in there, yes, sir, but the large majority I think are accounting employees.

Q. You were there for a number of weeks, weren't you?

A. Yes, sir.

Q. So I assume you know something about it?

A. By far the accounting employees in my opinion are the greatest number of employees in the Detroit office, but I have made no count check of the number. I have done nothing so as to state that I know of my own knowledge as to what the number of any of the employees are. I have just observed that there is a large number of accounting employees and, from observation, it appears that they are by far the largest group.

Q. Now, you have stated that the expense in Account 206 is allocated by the respondent between bulk-plant channels in its regular accounting procedure according to the composite percentages of the accounting department distribution of time reports. How is the expense in that account charged to direct-shipment channels on Respondent's Exhibit 101?

A. A portion of the expense in this account 206 is charged to direct-shipment channels following the proportion of effort of main-office employees found to have been
devoted to direct-shipment business.
6281 I might explain that just a little. Respondent
company made a study of the accounting employees in the Detroit office beginning about August 10 or 11 and running for a period of a month to determine, if possible,

by actual tabulation of time and effort of each employee devoted on direct shipment business. As a result of that tabulation, separations were made to show that portion of costs in the Detroit field for 1940, based on these findings in 1941, applicable to direct shipment business, and the same methods employed there were employed in the separation of this Account 206; in other words, the separations in Account 200 served as a basis for the separation of Account 206. Is that sufficient?

Q. Yes, and is that true both as to the bulk-plant channels and to the direct shipment channels, still referring to Account 206?

A. Oh, yes, that is true in the case of both.

Q. Then, do I understand that the expense in Account 206 followed the distribution of the expense in Account 200, both in the Respondent's regular accounting procedure and in this cost study?

A. That is correct, it did.

Q. In your opinion, are these methods of allocation which were applied by respondent to the expense in Account 206 for the purpose of distributing that expense
between all of the various channels on Respondent's
6282 Exhibit 101, other than the automobile-supplies
channel, consistent and proper methods of allocation?

A. Mr. Austin, I rather think that they are. It is my opinion that they should be allocated in some way whereby the general expenses would follow those larger expenses which would be more susceptible to a separation than a small expense of this kind. The only quarrel that would come about in that instance, if any, would be the separation of the larger accounts which they followed. Consistency has prevailed in this instance.

By Mr. Austin:

Q. Now, I would like to call your attention to another group of accounts: Account 060—"Plant Maintenance," Account 161—"Rental Expense," Account 062—"Water, Light, Fuel (other than the main office)," Account 087—"General Supplies Used", Account 088—"Station Operating Tools and Equipment."

It is stated at the foot of page 40 of Respondent's Exhibit 100 that in the main all of these items of expense are incurred at the respondent's bulk plants.

Is the expense charged in these five accounts, Mr. Warmack, an expense of the same general or overhead nature as the expense in Account 206?

A. It is my understanding that they appear to be of a similar nature to the expenses going in Account 206, Mr. Austin.

6283 Q. And has the expense in these five accounts in 1940 been allocated between the bulk-plant channels on Respondent's Exhibit 101 on the basis of distribution of effort of the employees working in or operating the bulk-plants?

A. No, sir.

Q. By what method is the expense in these five accounts allocated between channels on Respondent's Exhibit 101?

A. I understand that some of the charges included in some of these accounts are allocated directly to the channel to which they apply; that the remainder of expenses in the respective accounts are allocated between the three bulk-plant channels on the basis of gallonage.

Q. Is that gallonage allocation an all-gallonage allocation as between the three channels, or is there a different allocation in some instances which does not apply to all three channels?

A. That will require that I look it up.

(Witness refers to papers.)

Some of the charges in each of the accounts as just stated may be allocated directly. The remaining portion of the charge in part may be allocated on the basis of the gallonage in each of the three channels, and a portion may be allocated upon a basis of the gallonage of two channels. That means tank wagon reseller and tank-wagon consumer channels. That is shown on page 9 in detail, that is, 6284 in sufficient detail to satisfy us.

Q. What exhibit?

A. That is Respondent's Exhibit 99.

Q. Now, will you turn to Account 008, Mr. Warmack, the account being entitled "Warehouse Labor"? Is that account a salary account?

A. Yes, sir.

Q. And is the expense going into that account the salaries of bulk-plant employees?

A. It is my understanding, Mr. Austin, that that is correct.

Q. What percentage of the expense in that account is entered in the tank-wagon reseller channel on Respondent's Exhibit 101?

A. 29.46 per cent of the total expense in Account 008, entitled "Warehouse Labor," is shown in tank-wagon-reseller account on Respondent's Exhibit 189 for the year 1940.

Q. And is the same percentage shown on Respondent's Exhibit 101 in that channel?

A. Yes, sir.

Q. Now, what per cent of the expense in Account 060, "Plant Maintenance," is entered in the tank-wagon reseller channel on Respondent's Exhibit 101?

A. 64.41 per cent.

Q. And what percentage of the expense in Account 061 is entered in the tank-wagon-reseller channel on Respondent's Exhibit 101?

A. 65.44 per cent.

Q. What percentage of the expense in Account 062 is charged to the tank-wagon reseller channel on Re-
6285 spondent's Exhibit 101?

A. 61.23 per cent.

Q. And what percentage of the expense in Account 087 is charged to the tank-wagon reseller channel on Respondent's Exhibit 101?

A. 64.99 per cent.

Q. And will you give the same information as to Account 088?

A. Yes, sir, the percentage is 54.39 per cent.

Q. 54?

A. Just one second. (Witness refers to papers.) 54.39 per cent of the expense in Account 088, entitled "Station operating tools and equipment," is shown in the tank-wagon reseller column on Respondent's Exhibit 101.

Q. You may have answered this question before, Mr. Warmack, but I would like to have it again at this point. When the expense in any one of these accounts on Respondent's Exhibit 101 is allocated between the three bulk-plant channels on Respondent's Exhibit 101, or on the Form 189 for 1940, on a gallonage basis, what percentage of the expense in the account enters into the other-method channel?

Now, you may answer that on an annual basis, which I understand would be approximately correct, realizing that actually this expense is allocated by months.

A. Yes, sir, I could give it to you monthily, if you desire it.

6286 On an annual basis, it is 65.08 per cent.

Q. Just a minute. Will you read the question back, please.

(The question referred to was read by the reporter.)

A. I beg your pardon, Mr. Austin, I gave you the percentage for the tank-wagon reseller column.

Q. Yes.

A. The percentage for the column would be 4.62 per cent.

Q. You testified previously, Mr. Warmack, that you made a visit to, I believe it was, the Scotten Avenue bulk plant of the respondent in Detroit?

A. Yes, sir, I did.

Q. Did you visit any other of the bulk plants than the Scotten Avenue?

A. I didn't go through any other, but I went by the Lycaste plant.

Mr. Hanley: Just a moment, I want to be sure this is clear, if your Honor please.

By Mr. Hanley:

Q. Just adverting for a moment to your answer that on all of the accounts appearing on Exhibit 101 the percentage or the total gallons appearing in the bulk-plant channels is expressed by you in terms of percentage. Do you mean by that answer to say that that is the identical percentage that would be allocated to any particular account in any of the three bulk plant channels?

6287 A. No, sir, not necessarily, Judge.

Q. Then, it is true, is it not, that in some instances there was no gallonage allocation in the other-method channel at all?

A. With respect to some particular accounts.

Q. So the entire force of your answer, if I correctly understand it, is that you have just made an arithmetical calculation and expressed the gallons that appear in total in terms of percentage, without referring to any particular account or all of the accounts; is that right?

A. That is true, Judge. I picked up the gallonage shown at the foot of each of those respective channels: tank-wagon-reseller, tank-wagon-consumer, and other method, and the ratio of the gallonage for any one channel as related to the total gallonage would be the percentage for any one channel based on a yearly gallonage.

Q. Do you understand that your percentage, as arrived at by you, has any relation whatsoever to gallonage allocation in the several accounts?

A. I would rather think, Judge Hanley, that it would have some relation somewhere. That is my feeling and I can explain that, if you desire.

Q. Perhaps I am not making myself clear, and I don't want to take too much time, but I want the Court to understand these things as we go along as much as possible.
6288 You have been testifying to a class of accounts,
that class of accounts which appears on page 8 and is explained on pages 8 and 9 of Respondent's Exhibit 99, and you have testified this morning that in some of those accounts there was a gallonage allocation as between tank-wagon reseller and tank-wagon consumer, but no allocation as between either or both of those channels and other-method channel.

Mr. Austin: I don't understand the testimony to be that.

By Mr. Hanley:

Q. What becomes of your four-plus per cent calculation in an account like that?

A. It could only be used in what your company terms an allocation of general prorata costs. That means costs which your company assumes or knows should apply equally per gallon as between the three separate channels, and that allocation is made monthly by the respondent company, and the gallonage of the particular month in question will be the gallonage on which that general prorata expense is allocated, Judge Hanley, now, in probably the same expense account as your Exhibit 99, page 9, shows.

In one account there may be a portion of expense that will be general prorata that will be allocated to each channel on a gallonage basis, and there may be contained in that account a portion of the expense which would
6289 not apply at all to the other-method column and
would apply to the two columns: tank-wagon-reseller and tank-wagon-consumer, and of course, the gallonage of those two channels would govern the allocation and would form the basis on a monthly basis for that allocation.

In addition, Judge, and this probably should have been stated beforehand, in each of these accounts there might be a direct expense that would find its way directly to the proper channel, leaving the residue to be allocated as I have just described.

Q. Isn't what you have just concluded your answer with true as to the class of accounts that you have just been talking about and that are explained on pages 8 and 9 of Respondent's Exhibit 69, namely, that there was a direct charge?

Mr. Austin: That is objected to as repetitious. That has been previously answered this morning by the witness to exactly the same question on direct examination.

Trial Examiner Ballinger: The witness may answer.

The Witness: My answer is based upon what is in the records here, and that shows that there are from time to time direct charges and, as such, they are assigned directly to the channel.

By Mr. Hanley:

Q. As I now understand you, Mr. Warmack, your answer to the question as propounded by Mr. Austin does not mean, as the question stated, that these percentages are applicable to all of the accounts on Exhibit 101? 6290

Mr. Austin: I object to that.

By Mr. Hanley:

Q. (Continuing) But only to those where the ratio of gallonage allocation was made between the bulk-plant channels on the basis of the totals of gallonage for each of those channels, as appears on Exhibit 101?

Mr. Austin: I object to that, your Honor, very strenuously because this is getting out of context. It is strictly cross examination. He is attempting apparently to try to vary the witness' answer. The original question, I think, and the answer to it are perfectly clear. I don't believe that questioning of this scope should be allowed at this time. I haven't objected to questions directed to attempting to clarify what the witness has been talking about, or clarifying questions in the mind of counsel, but I don't think cross-examination should be allowed at this time. I think this is clearly cross examination.

Mr. Hanley: I am going to submit in response to the objection, your Honor, that I am just trying to give him a chance to say what he means.

Mr. Austin: I think he has said what he means. The answer is on the record considerably back of this.

6291 Trial Examiner Ballinger: While the question partakes of the nature of cross-examination, it is enlightening certainly to the Examiner, and the objection is overruled and the witness may answer.

Mr. Austin: Well, your Honor, I wish to note an exception in this case on the record especially, if I may.

Trial Examiner Ballinger: Exception is noted.

Mr. Austin: And may I also make an additional objection, that if the witness is going to answer this question, that the reporter physically again transcribe the original question and answer at this point so that it will appear in connection with the answer to the question.

Trial Examiner Ballinger: If that is desired and you think it would present the matter more clearly, it may be done.

Mr. Austin: In that case, your Honor, I will withdraw my objection to the answer, because it was based primarily on the fact that the two answers were so far apart that I thought the record would be confusing.

Trial Examiner Ballinger: And the exception also goes out?

Mr. Austin: Yes, provided that both come together.

(By instruction of the Trial Examiner and consent of counsel the following question and answer appearing previously in the record were copied in:

6292 "Q. You may have answered this question before, Mr. Warmack, but I would like to have it again at this point. When the expense in any one of these accounts on Respondent's Exhibit 101 is allocated between the three bulk-plant channels on Respondent's Exhibit 101, or on the Form 189 for 1940, on a gallonage basis, what percentage of the expense in the account enters into the other-method channel. Now, you may answer that on an annual basis, which I understand would be approximately correct, realizing that actually this expense is allocated by months.

"A. The percentage for the other-method column would be 4.62 per cent."

Trial Examiner Ballinger: Read Judge Hanley's question.

(The reporter read the last question.)

The Witness: Yes, you will just have to break that a little for me. I don't understand exactly.

By Mr. Hanley:

Q. I will restate the question and withdraw that question.

You recall that there was a discussion, Mr. Warmack, between you and your own counsel about what accounts were meant in the question when he was asking you about the application of your percentage allocations; do you recall that?

6293 A. Let's let her read it.

Q. We are getting the record so badly mixed up that I think we can clarify it best by my asking you just a straight question.

A. Yes, sir.

Q. Irrespective of anything you have heretofore said about this matter, isn't it true that the percentage allocations that you have talked about when you have expressed gallons in per cent apply only to allocations in Accounts where the company made such an allocation on the basis of the ratios of gallons as total gallons appear in the three bulk-plant channels?

The Witness: May I have the question read.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

The Witness: Judge, I am sorry. I don't mean to hedge on your question and I am not hedging on it, but the company's records show where they made their gallonage allocation in each account and in every instance, and I have gone into it and explained as to everything I know about where the allocations were made and what these records show. I can explain any one account to the best of my knowledge.

Mr. Hanley: Can't you answer the question? Don't you understand the question?

Mr. Austin: Your Honor, I would like to interpose 6294 another objection which I think is very pertinent, particularly in view of what the witness has just said.

It is one thing to obtain clarification from the witness at this time about what the witness is talking about, but it is another thing to cross examine him regarding methods of accounting procedure which are undoubtedly best known to the respondent, and it seems to me the witness should not be required to answer questions at this time regarding how the respondent allocates the expense in its own accounts. The respondent ought to know that and consequently, while it may be proper cross examination, I can see no reason for interrogating the witness about factual matters which the respondent knows fully as well as the witness.

Mr. Hanley: I am willing to submit to the objection, your Honor. I do not care to withdraw the question. The witness is now making figures. He has made these percentages. We didn't. If he is willing to let his answer stand, I am.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed with your direct examination, Mr. Austin.

(There was a discussion off the record.)

(A previous question by Mr. Austin and the answer were read by the reporter as follows:

"Q. You may have answered this question before, Mr. Warmack, but I would like to have it again at this
6295 point. When the expense in any one of these accounts on Respondent's Exhibit 101 is allocated between the three bulk plant channels on Respondent's Exhibit 101, or on the Form 189 for 1940, on a gallonage basis, what percentage of the expense in the account enters into the other-method channel. Now, you may answer that on an annual basis, which I understand would be approximately correct, realizing that actually this expense is allocated by months.

"A. The percentage for the other-method column would be 4.62 per cent.")

Trial Examiner Ballinger: Do you want to add to your answer as given previously on the record?

The Witness: Your Honor, I want this record to show what I was testifying to. I was stating that the percentages of bulk-plant gallonage sold in the Detroit field for the year 1940 through the column on company's Form 189 are as there portrayed in that column. The gallonage amounted to 4,920,137 gallons. The total gallonage amounted to about 105,000,000 gallons, and the figure that I gave was the percentage that the 4,920,137 gallons in the other-method channel bore to the total bulk-plant gallonage, and any prorata account that is separated on this whole exhibit, Commission's Exhibit 119, and Respondent's Exhibit 101, between the bulk-plant channels, on the

basis of total bulk-plant gallonage, if made on an
6296 annual basis 4.62 per cent of that prorata charge in
any account would go in the other-method column.
Just one word further: The allocations are made on a monthly basis, and this 4.62 per cent is the percentage of the total other-method gallonage related to the total bulk-plant gallonage on an annual basis.

I believe that is a proper explanation.

6297 Trial Examiner Ballinger: The statement you have
just made is not at variance with the explanations offered by the Respondent in its Exhibit No. 99 and No. 100; is it?

The Witness: I do not think so.

By Mr. Austin:

Q. I am wondering if you have fallen into an unconscious error, in giving this last answer in regard to the bulk plant?

A. Perhaps I have, what is it you have in mind?

Mr. Austin: Perhaps the better way would be to have the answer read. May the answer be read? I think you made a slip of the tongue.

Trial Examiner Ballinger: Let the last answer of the witness be read.

(The last portion of the answer of the witness was read as follows:)

"Just one word further: The allocations are made on a monthly basis, and this 4.62 per cent is the percentage of the total other method gasoline as related of the total bulk plant gasoline on an annual basis. I believe that is a proper explanation."

By Mr. Austin:

Q. I just wanted to call your attention to the phrase in there "other method gasoline" and I wonder if you wanted to say "gasoline."

A. No. Other method gallonage.

6298 Q. Other method gallonage?

A. Yes, sir, "gallonage" is the word.

Mr. Austin: Off the record.

Trial Examiner Ballinger: We will be off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: May we have a recess for five minutes?

Trial Examiner Ballinger: The hearing will be in recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

You may proceed, Mr. Austin.

By Mr. Austin:

Q. I have asked you, Mr. Warmack, whether you visited the Scotten Avenue bulk plant and you said that you had.

A. Yes.

Q. How much of a tour of inspection of that plant did you make?

A. I went through all of the buildings, walked around on the grounds where the storage tanks with gasoline and fuel oil in storage, and dispensed in trucks. I spent some little time, enough time to get around and see what was going on.

Q. Are you able to state as a result of your inspection whether substantially more than 4.62 per cent of the
space and facilities at the Scotten Avenue bulk plant
6299 is devoted to the storage and handling of products
other than gasoline and refined oils?

A. Yes, sir.

Q. Please do so.

A. I had occasion to go through the warehouse where all kinds of packaged products were moving and stored, and although I made no positive surveys as to footage or anything else, I did observe what was going on.

And I am convinced that more than 5 per cent of the space and facilities of the bulk plant were devoted to the activities of the company which we term, and which the company terms "other methods" merchandise.

Q. Now, will you again turn to Respondent's Exhibit No. 101 and state what percentage of the expense in account 060 is charged to the other methods channel?

A. Mr. Austin, you are referring to the total expense as shown on Respondent's Exhibit No. 189 of the Detroit field for 1940?

Q. Well—

Mr. Austin: Will you read the question, please?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

By Mr. Austin:

Q. I am referring to account 060.

6300 A. Excuse me.

Q. Yes.

A. I will examine this document.

Trial Examiner Ballinger: Go ahead and examine the document.

The Witness: Yes, sir.

(The witness examined the document for several moments.)

By Mr. Austin:

Q. Are you ready to proceed?

A. Yes.

Q. What is the figure?

A. 5.49 per cent.

Q. 5.49 per cent?

A. Yes.

Q. Is that the account entitled "Plant Maintenance"?

A. Yes, sir.

Q. And what percentage of the expense in account 061 "Rental Expense" is entered in the "other methods" channel?

A. 4.61 per cent.

Q. What percentage of the expense for 1940 entered in account 062 "Water, Light, Fuel (Other Than Main Office)" is charged to the "other method"?

A. 4.64 per cent.

Q. 4.64 per cent?

A. Yes.

6301 Q. What percentage of the expense in account 087 is entered in the other methods channel on Respondent's Exhibit No. 101?

A. 4.3 per cent.

Mr. Hanley: 4.3?

The Witness: Yes.

By Mr. Austin:

Q. What is the percentage figure for expense entered in the other methods channel in account 088?

A. 088?

Q. Yes.

A. 8.15 per cent.

Mr. Hanley: 8.15?

The Witness: Yes.

By Mr. Austin:

Q. Will you now refer to account 110, Respondent's Exhibit No. 101, entitled "Depreciation Expense—Plant (buildings, machinery, equipment, furniture and fixtures)";

Also account No. 112, "Depreciation expense — real estate improvements";

Also account 086, "Taxes—real estate and personal property"?

A. Yes, sir.

Q. Do you have that?

A. Yes, sir.

Q. What is the total amount of the expense going into these three accounts on Respondent's Exhibit No. 6302 101?

A. I will have to make a calculation.

Q. Before you can give the answer?

A. Yes.

Q. Please do so.

A. I will proceed to make the calculation.

(The witness made certain calculations.)

Q. Are you ready to give your answer?

A. Yes.

The total expense in the Detroit field for Account 110 is $97,102.86.

The same in Account 112 $6,441.81.

The same for Account 086 $54,722.88

making a total for the three accounts of $158,267.55.

Q. That is not a part of the expense in those three accounts charged to direct shipment—or perhaps I had better ask you, is any part of the expense in those three accounts charged to direct shipment channels on Respondent's Exhibit No. 101?

A. Yes, sir. A very small portion of each of the accounts is charged to direct shipment business of the Respondent company on Respondent's Exhibit No. 101.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

6303 Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. How much of the expense in account 110; that is, how much of the total of $97,102.86 in that account is charged to direct shipment business, on Respondent's Exhibit No. 101?

A. $379.17 out of a total of $97,102.86.

Q. What portion of the expense in account 112 is charged to direct shipments, Mr. Warmack?

A. $1.39 of a total of $6,441.81.

Q. What portion of account 086, taxes and real estate and personal property, is charged to direct shipment business on Respondent's Exhibit 101?

A. $242.06 out of a total of $54,722.88.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. What part of the expense in these three accounts is charged to direct shipment channels, Mr. Warmack—devoting your answer now not to the dollar amount but to the nature of the expense?

A. I will have to have you state that again—

The Witness: May I have the question read?

Trial Examiner Ballinger: Read the question.

6304 (The reporter read the question.)

The Witness: I am sorry. I do not understand the question. Will you clarify that for me, Mr. Austin?

By Mr. Austin:

Q. Perhaps if you will turn to the top of page 41 of Respondent's Exhibit 100, that will help you to answer the question.

A. I will find that. I have found it. Now, I would like to hear the question again.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:)

"Q. What part of the expense in these three accounts is charged to direct shipment channels, Mr. Warmack—devoting your answer now not to the dollar amount but to the nature of the expense?")

The Witness: Will you detail your question a little more, please, Mr. Austin?

By Mr. Austin:

Q. We are talking about depreciation and taxes.

A. Certainly. Yes, that is what the accounts are, and the accounts speak for themselves.

Q. Depreciation on these buildings, or taxes on what property is charged to direct shipment expense channels, or any part to direct shipment channels on Respondent's Exhibit No. 101?

6305 A. Well, the taxes on the main office building are apportioned in part to the direct shipment expense of real estate, and real estate—let me get that straight—the taxes on the main office buildings are apportioned in part to direct shipment business on real estate improvements incident to the main office building, and are, of course, included in the main office building as an allocation for that, and that is true also of depreciation.

That is the answer.

Q. What depreciation?

A. On the main office building, and real estate improvements adjacent thereto.

Q. Is that the only part of the expense in accounts 110, 112 and 086, which is allocated in part to direct shipment channels?

A. That is my understanding, Mr. Austin, that that is the fact.

Q. Do I understand correctly that the only part of these three accounts, or rather, the only part of the expense in these three accounts which is charged to direct shipment business is a part of the depreciation and taxes on the main office property and building in Detroit?

A. Yes, sir. That is correct.

Q. What method of allocation or apportionment was used by the respondent in assigning part of the main office building expense in these three accounts to the 6306 direct shipment channels?

A. A basis was used which was the ratio of the man-hours devoted to direct shipment in the main office to the total man-hours in the main office.

Q. You say "main man hours"; what do you mean by that?

A. Well, just call it "man hours in the main office." I was thinking of the main office building man hours.

Q. Now, after deducting the amounts so determined which were charged to direct shipment channels, how was the balance of all of the expense in these three accounts, including both main office building depreciation and taxes, and depreciation and taxes on the other properties of the company, allocated between the three bulk plant channels?

A. The balance of the expense in the three accounts was allocated between bulk plant channels on a gallonag basis; that is, exclusive of direct shipment gallonage.

Q. And when you say "a gallonage basis" was used was that an all-gallonage basis other than direct shipments?

A. Yes, sir.

Q. By using that basis what percentage of the expens was allocated, or so allocated would fall into the respective bulk plant channels, if the allocation were made o an annual basis?

A. (There was no answer.)

6307 Mr. Austin: I would like to strike that questio I withdraw the question.

Trial Examiner Ballinger: The question is withdraw

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. In your opinion, Mr. Warmack, is the method of dis tributing this expense between the channels on Exhibit Respondent's Exhibit No. 101 which you have just de scribed, the correct or proper method of allocation for th purpose of establishing a cost differential between tan wagon reseller gasoline and jobber gasoline?

A. I—

Q. If you wish, you may restrict your answer to th main office operation of that expense assumed to apply t it, or you may apply it as you see fit.

My question covers the whole extent of the expense bu I do not know whether I am asking too broad a question o not. You can give your answer as broad or as narrow a your experience dictates.

The Witness: Shall I answer?

Trial Examiner Ballinger: You may answer.

The Witness: The gallonage basis, in my opinio
6308 is not sufficient in making this allocation for the pu
pose of arriving at a cost differential both as to ma
office building, and also as to the bulk plant.

I might amplify that by saying that unless informatio is at hand to prove the point that the basis is a soun basis; that is, that the gallonage basis is a sound basis-

and the only way that can be arrived at in my opinion is by intensive cost study of this particular class of expense for the purpose of establishing allocation factors.

By Mr. Austin:

Q. Now, first referring specifically to the allocation of the taxes and depreciation on the main office property in Detroit, you stated that part of your expense was charged to direct shipment channel on the basis of distribution of effort of the main office employees, and the balance charged on a gallonage basis to the bulk plant channels.

Is the use of those two methods of allocation as applied to that same expense a sound accounting practice for the purpose of this cost study?

A. An analysis of the account, Mr. Austin, would have to go further than that in my opinion.

Q. Well, just a minute.

A. Yes.

Q. I am not asking a question now about that. I am asking a question now only about the main office

6309 operation of this expense. Can you answer that specifically as to that account?

A. I cannot say "yes" or "no" to any of this stuff.

Mr. Austin: Will you read the question again, Mr. Reporter?

The Witness: I want to say that it is difficult to answer things of this kind very definitely one way or the other. I have to give it as a basis of my opinion. These matters are quite involved.

Mr. Austin: I understand that. I think it would be better to read the question.

Mr. Hanley: There have been two or three questions asked here now. Just what question do you have in mind having the reporter read?

Trial Examiner Ballinger: Read the question referred to by Mr. Austin.

(The reporter read the following question:

"Q. Now, first referring specifically to the allocation of the taxes and depreciation on the main office property in Detroit, you stated that part of your expense was charged to direct shipment channel on the basis of distribution of effort of the main office employees, and the balance charged on a gallonage basis to the bulk plant channels.

"Is the use of these two methods of allocation as applied to that same expense a sound accounting prac-
6310 tice for the purpose of this cost study?")

Mr. Hanley: Is that the question you had in mind?

Mr. Austin: Yes.

Mr. Hanley: I thought you were referring to the latter one.

Mr. Austin: No. That is it.

The Witness: Could I hear the answer I made to that particular question? I also answered another one, too, I believe.

Trial Examiner Ballinger: Read the answer referred to.

(The reporter read the following answer:

"A. An analysis of the account, Mr. Austin, would have to go further than that in my opinion.")

Mr. Hanley: You made another answer there too; did you not?

The Witness: That is the answer I had in mind.

Mr. Austin: In order to make the record clear, read the next question and answer.

Trial Examiner Ballinger: Read the next question and answer.

(The reporter read the question and answer following.)

The Witness: These things will have to be explained, because just to say "yes" or "no," leaves a gap
6311 there which is not filled up.

By Mr. Austin:

Q. I do not want you to say "yes" or "no" in answer to the question.

A. No?

Q. I just wanted to get your answer as to the main office expense as distinguished from the balance of the expense in that account.

A. To take up the main office building, we can just do that very quickly. That is not a very difficult one to work out. In order to get at the main office, all you have got to do is to make a study of the floor space and the people who are involved there, and what their duties are, and then you can make your necessary allocation of all of the main office expense with respect to the taxes or any other expense incident to the mechanics or the operation of the main office, including depreciation, rent, or what expenses you may have incident to the main office.

To resort to a gallonage basis, Mr. Austin, unsupported by any study or survey, or review having not been made, as in this case it was not made—to my opinion is making it on an arbitrary basis and in my opinion an arbitrary basis is not a sufficient basis to be used in a separation of these costs for the purpose of setting up a cross differential.

6312 To properly set up a cost differential it should be supported by a thorough study, review, and survey first having been made which would support the basis used, and it should not be an arbitrary basis.

Q. If the expense in this account is prorated to direct shipment channels on the basis of effort of employees in the main office building, speaking now only of the main office building, taxes and depreciation, in your opinion, and the balance of the main office building taxes and depreciation being allocated through the bulk plant channels also on the basis of distribution of effort, would that be proper? In other words, should the balance of the main office building taxes and depreciation be allocated to the bulk plant channels—or rather, through the bulk plant channels also on the basis of depreciation or of distribution of effort of employees in the main office building?

A. I am sorry. I got mixed up in there somewhere and got lost.

Mr. Austin: It may have been a little involved. I will withdraw the question and ask it again.

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Austin:

Q. If the expense in this account is prorated to direct shipment channels on the basis of effort of employees 6313 in the main office building—speaking now only of the main office building taxes and depreciation, in your opinion should the balance of the main office building taxes and depreciation be allocated through the bulk plant channels also on the basis of distribution of effort of employees in the main office building?

A. Oh, I see what you mean. It would be reasonable to assume that it should.

The only thing in the world that you can do to see how any of that should be allocated would be on a study, as I have just outlined, from the standpoint of sound accounting.

Q. Now, turning to the taxes and depreciation on the bulk plant properties, can you state what in your opinion should be done as to the allocation of expense—of the bulk plant expense, taxes, and depreciation, for the purpose of establishing tank wagon reseller costs to be used in determining the cost differential?

A. Here we have a problem that is different, Mr. Austin, from the one just discussed. That was the main office building.

Here we have properties that are involved wholly and entirely in the dispensing of the company's product through bulk plants and not involved in direct shipment business. And I believe the testimony in this record will show that.

6314 The problem here is to support in an equitable and sound way this class of expense, and to separate it based upon that basically firm foundation, between the three bulk plant channels so that it is separated in a sound and equitable way between the three bulk plant channels. This has been done on a gallonage basis.

Before it could be stated as to exactly what should be done a cost survey would have to be made of the properties in question and that done to the end of ascertaining how the serving of the three separate and distinct groups of customers influenced the incurring of this expense or, as a matter of fact, what portions of each of these plants or parts of the plants are properly applicable to those three classes, but prior to that in the case of this respondent company, it is my opinion that the study would have to be made in order, first, to make what we term a "product segregation" and—

Mr. Hanley: (Interposing.) Just a moment. I do not understand that.

The Witness: No?

Mr. Hanley: Do you mean by all of the seven thousand odd products manufactured and marketed by the Standard Oil Company?

The Witness: No, Judge Hanley, not that at all, for every classification,—for example—a very broad—

Mr. Hanley: (Interposing.) How broad—you
6315 say a very broad classification. That is another general
term.

The Witness: In the case of those other methods column that seems to be separate and distinct, and it seems to me that the classification between other methods costs, or the separation between other methods costs and the costs of the regular tank wagon business would be, in fact, a product segregation.

Mr. Hanley: I see.

Mr. Austin: Have you finished?

Mr. Hanley: Yes.

By Mr. Austin:

Q. Continue with your answer.

The Witness: If I could hear my answer read?

Trial Examiner Ballinger: Read the witness' answer referred to.

(The answer referred to was read by the reporter.)

The Witness: After such a segregation has been made it would then be necessary to separate that part of this class of expense which applies to gasoline, refined oil, and whatever other accounts of the company, or whatever other kinds of the company's products which are dispensed through tank wagons, between the two classes of customers; tank wagon reseller customers, on the one hand and the tank wagon consumer customers on the other hand.

By Mr. Austin:

6316 Q. Is any portion of the expense in accounts 110, 112, 086 charged to automobile supplies on Respondent's Exhibit No. 101?

A. No, sir.

Q. In your opinion, should a portion of the expense in those accounts be charged to automobile supplies for the purposes of this cost study?

A. I should think that they should, Mr. Austin. This is not a part of the company's business that can be left out because this is a part of the company's business and it seems to me like every channel of distribution, every part of the business should bear some share, some equitable share of this general overhead cost.

Q. Is that your opinion?

A. Yes, sir.

Q. What percentage of the salaries of warehouse labor, as is shown in account 008 is chargeable or charged to automobile supplies for the year 1940, in the respondent's regular accounting procedure?

A. Account 008 entitled "Salaries—Warehouse Labor" $6,473.15.

Q. I asked you what percentage of the total of that amount is charged to automobile supplies, just approximately?

A. The relation of $6,473.15 to $58,642.65.

Q. That is considerably more than 10 per cent, is
6317 it not, Mr. Warmack?

A. Yes, sir. It is more than 10 per cent.

Q. And approximately what percentage of the salary expense of the field office accounting department in account 200 is charged to automobile supplies?

A. A total of $19,398.70 is charged to automobile supplies out of a total of $237,524.45, which would be between 8 per cent and 9 per cent.

Q. In determining what measuring factor should be applied to the allocation of taxes and—to the allocation of taxes on bulk plant products for the purpose of this cost study should the use to which the various parts and parcels of real estate are put, be considered?

A. In my opinion, it should.

Q. And as to both taxes and depreciation should the use to which the building is put which is being depreciated, and the taxes, are put to be considered?

A. I do not understand the question.

Mr. Austin: I will withdraw the question. It may be a little awkward.

By Mr. Austin:

Q. And as to both taxes and depreciation, should the use to which the building which is the subject of depreciation, and of taxes, is put, be considered?

A. In my opinion it should.

6318 Q. Would the distribution of time between employees, between different products and different classes of customers,—having in mind the classifications regularly used by the respondent—should they be considered in arriving at a proper measuring factor?

A. It would have to be considered; yes, sir.

All of these would have to be weighted thoroughly in a cost study if you are coming down to figures that would be reasonably accurate, and accurately assigned and supported.

Mr. Hanley: If your Honor please, I want to make a little record here, if your Honor please.

Trial Examiner Ballinger: Yes.

Mr. Hanley: The respondent moves to strike the answer of the witness for the reason that the answer apparently assumes that no cost surveys or studies have been made by the respondent.

It appears that the witness had an opportunity to determine that as a fact, but he declined to indicate as to whether or not he knows whether any cost studies and surveys have been made by the respondent.

Until and unless it appears by the testimony of this witness that in fact such surveys were not made, the witness is not entitled to make an answer that is of the charac-
ter that he has made to the above question. He is
6319 merely assuming that the ~~study~~ should be made, with-
out indicating whether it was or was not, which renders his testimony valueless.

Trial Examiner Ballinger: The ruling of the Trial Examiner on the motion will be suspended while the Examiner asks the witness a question.

Mr. Warmack, did you make any inquiry as to whether cost studies had been made?

The Witness: Yes, sir.

Trial Examiner Ballinger: What were you informed?

The Witness: I was informed that no such studies had ever been made so far as was known around the Detroit office.

Trial Examiner Ballinger: Who were your informants?

The Witness: I inquired of Mr. Houghton in the Detroit office.

I inquired of Mr. Gillis in the Detroit office; that is, during my studies of the records in the Detroit office of this respondent company.

Mr. Hanley: The respondent now moves to strike the answer of the witness unless he clarifies it by stating exactly what he asked Mr. Houghton, or any one else in the Detroit office, and exactly what he referred to, and what the answer was in relation thereto, it being a fact which,
if it is not already proved by the respondent will
6320 be, that many, many cost studies and surveys extend-
ing over many, many years have been in progress and are still in progress, and that there are literally hundreds of qualified accountants constantly working on the question of the propriety of these allocations.

Trial Examiner Ballinger: The motion to strike is denied, reserving to counsel for the Respondent the right to subsequently renew the motion.

Mr. Austin: I think the answer is, your Honor, that these expenses were allocated on a gallonage basis, as is shown by the Respondent's Exhibits, and there is no supporting evidence, there is no support in any of the exhibits or testimony offered by the Respondent for that gallonage allocation.

Trial Examiner Ballinger: The motion has been disposed of temporarily at least.

Mr. Austin: I suggest that we adjourn until, say, half past one or one o'clock.

Mr. Hanley: If I might, I would like to have until half past one, because it is so difficult to attend to any matters during the luncheon hour and get back here, on account of the crowded condition of the city.

Trial Examiner Ballinger: The motion is granted.

And now, at 12 o'clock noon, the hearing stands in recess until 1:30 p. m.

6321 (Whereupon at 12 noon, a recess was taken until 1:30 p. m. this day.)

6322 Afternoon Session.

1:30 p. m.

Trial Examiner Ballinger: Come to order.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination by Mr. Austin.

Q. I believe you previously gave some testimony regarding Accounts 215, 216 and 217. Account 215 is entitled "Expense—Salaries—Others," and Accounts 216 and 217 are the traveling expenses and operation and maintenance of vehicles of the individuals whose salaries are included in Account 215, according to the exhibits 99 and 100 of the respondent.

What is the nature of the expense giving rise to the three accounts, Mr. Warmack? I will restrict that to

Account 215 because the other two, as I have just stated, are incidental expenses.

A. Account 215 covers salaries of individuals in the real estate department and the tax department for the respondent company in its Detroit field.

Q. I note that on Respondent's Exhibit 101 some portion of the expense in the three accounts is allocated to direct-shipment channels. Will you state how that allocation was made by the respondent in this cost study?

A. Yes, sir. A study of the files of the real estate 6323 and tax department was made by respondent's accountants and they found that a small portion of this class of expense on the basis of time was applicable to the direct-shipment business in the Detroit field. Allocations were made on that basis of time to the direct-shipment business.

Trial Examiner Ballinger: Does that appear from Respondent's exhibits?

The Witness: Yes, sir, that is shown on pages 109 and 110 of Respondent's Exhibit 100.

By Mr. Austin:

Q. And except for the amount of expense allocated on a time basis to direct shipment channels, is the balance of the expense in those accounts entered in the three bulk plant channels on Respondent's Exhibit 101?

A. Yes, sir, on the basis of gallonage, exclusive of direct shipment gallonage.

Q. Do I understand you to say that the expense in these three accounts entered in the three bulk-plant channels is allocated between those channels on the basis of all gallonage, including other-methods gallonage, other than direct-shipment gallonage?

A. Yes, sir.

Q. What is your opinion as to whether the methods of allocation applied to the distribution of the expense in these accounts are correct or proper for the purpose 6324 of affording a comparison of costs as between tank-wagon reseller customers and jobber customers?

A. It is my opinion that the costs have not been properly separated from the standpoint of sound accounting for the purpose of determining a cost differential.

Q. And what are the reasons for your opinion?

A. In the first place, if respondent's study to determine the amount of time and effort applicable to channels were to be made from the standpoint of sound accounting, it is my opinion that that study should be carried through to its proper conclusion whereby the time element should be given weight and effect in the establishing of measuring factors for the purpose of assigning the proper proportions of this class of expense to the six channels as set forth on Respondent's Exhibit 101.

That means the three bulk-plant channels known as tank-wagon reseller, tank-wagon consumer, and other-method; and the three direct-shipment channels, known as jobber—naphtha and gasoline, jobber—other products, and jobber—other customers. A separation of that kind would certainly be, of necessity, thorough and complete.

In view of the fact that the study only went to determine how much of this class of expense, on the basis of time, should be applied to the three direct-shipment channels, leaving the residue, which was almost all of the 6325 expense, that is, of this particular class of expense, about 97 per cent of that expense is unexplored and not studied and separated in its entirety between tank-wagon reseller channel, tank-wagon consumer channel, and other-method channel on a basis of gallonage.

I inquired while I was in Detroit of Mr. Houghton and other responsible people in the Detroit office if any studies had been made which would serve as a basis and prove the accuracy or possible inaccuracy of this gallonage separation, and I was told by Mr. Houghton that there were none. Therefore, I feel that the study has not been properly completed from the standpoint of sound accounting.

There is one other point that I should like to call to your attention, Mr. Austin, and that is this: where you make a time-study and you draw out an account for a part of the time of an individual or of a department and assign directly that time to one particular channel of distribution or product and do not carry the time study through until you account for all of the time of that individual, the portion of that individual's or that department's time which is of a general nature will be excluded from any allocation which would be made to the channels or the products to which the direct time afforded by the study or by the partial study could be made: therefore, the residue includes

a considerable part in almost every instance of time
6326 spent on miscellaneous things of a general nature
6327 which, of necessity, would have to be apportioned in some way, if a complete study were carried through on the way that the time was apportioned, or that portion of the time which could be considered as direct time had been apportioned.

6328 Q. Now, as to account No. 220, Mr. Warmack, which is entitled "Expense—Employment Department—Salaries and all Other Expense"— . . .

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

Mr. Austin: Read the question so far as it has gone.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

By Mr. Austin:

Q. Did you make any inquiries or investigation to determine what the duties of the employment department are in the field office beyond what appears in the testimony?

A. Yes, sir. I inquired about that.

Q. What were you told?

A. I was told substantially what is recited in the testimony. There may have been a little amplification on it.

Q. Can you state briefly what the duties of the employment department are? I understand from the testimony that the employment department is headed by a man known as the personnel supervisor. Is that correct?

A. That is right.

Q. What are his duties?

6329 A. General supervision.

Q. Now, just give us a very general answer, if you can state that, or if you do not care to, all right, they are described in the testimony to some extent, but if you can give us a general statement now to serve as a basis for the questions which I intend to ask, it might be helpful.

A. I rather think they are better stated in the testimony than I can state them, Mr. Austin. This particular individual, his duties turn largely on the question of employment of personnel in the Detroit field, and he works up various statistical data, and manages the employment department. He has a multitude of things to do there that he prob ably, and he and he alone could enumerate in total detail, but it turns largely to the employment of personnel in the Detroit field.

Q. Is the expense incident to the duties and activities of that department an expense of such a nature that it may be used, in your opinion, for the purpose of establishing a cost differential between jobbing business in gasoline on the one hand and tank wagon reseller gasoline business on the other hand, by means of any logical method of allocation?

Mr. Hanley: May I have the question read, Mr. Examiner? I have some difficulty in following them.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

6330 Mr. Hanley: Thank you.

That is objected to for the reason that it calls for a conclusion and opinion on the part of the witness as to whether it is possible to logically prove a cost differential.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

Mr. Hanley: The Robinson-Patman Act assumes that there is that possibility, at least.

Mr. Austin: I have been of the opinion, or at least I am assuming that there are some costs of such a general nature that they will not afford any basis for a cost differential, because there is no means of allocating them except on a gallonage basis, and of course a gallonage basis affords no differential.

Trial Examiner Ballinger: I think I understand the situation sufficiently.

The objection is overruled.

The Witness: I am sorry, I have now lost the question. I don't know what question you are referring to.

Mr. Hanley: I am not sure that I do now.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

6331 "Q. Is the expense incident to the duties and activities of that department an expense of such a nature that it may be used, in your opinion, for the purpose of establishing a cost differential between jobbing business in gasoline on the one hand and tank wagon reseller gasoline business on the other hand, by means of any logical method of allocation?")

The Witness: These costs are of a general nature—these costs, which are of a general nature—

Mr. Hanley: (Interposing.) Can we not have an answer directly "yes" or "no", your Honor?

The Witness: I cannot say "yes" or "no" to that or a lot of others.

Mr. Hanley: I dislike, your Honor, to ask any witness to answer "yes" or "no", and seldom do, if he cannot give a truthful answer, but he was asked a specific question as to whether or not it was possible to make any logical allocation for the purpose of arriving at a cost differential by allocating expense in this account.

It seems to me that is a question that can be answered "yes" or "no" as to whether it is possible to do so or not possible to do so.

Mr. Austin: No, he was asked whether in his opinion the account or that type of account would serve as a means for any logical method of allocation.

6332 Mr. Hanley: Well, it still can be answered "yes" or "no."

Trial Examiner Ballinger: Well, if the witness cannot answer "yes" or "no", what good is the explanation?

Mr. Hanley: I do not know.

Mr. Austin: I think that the witness at least, or what I wanted was to have the witness' opinion on that subject. Now, if there is a difference between accountants on the subject, differences of opinion, I think that the witness should be permitted to state them.

Trial Examiner Ballinger: He says he cannot even express an opinion "yes" or "no" on it.

Mr. Austin: I did not understand that he said that. He said that he could not answer "yes" or "no."

Trial Examiner Ballinger: Let us ask him.

Mr. Warmack, can you express an opinion one way or the other in answer to the question?

The Witness: I can only answer the question and give you, your Honor, what accountants generally think about these costs that are of a very, very general nature.

Mr. Hanley: Well, any such answer as that is objected to. In the first place, it is not responsive to the question as asked.

Trial Examiner Ballinger: It is not what accountants generally think. You are asked as to what you think.

6333 The Witness: O. K. I will tell you what I think about the situation.

Trial Examiner Ballinger: Proceed.

The Witness: Costs of a general nature such as this are not susceptible to a separation ordinarily of themselves whereby they can be directly applied as applying to customer classifications or product classification.

If they are used in a cost justification they must of necessity follow the allocations of some other costs which are more or less of a direct nature.

Mr. Hanley: Respondent moves to strike that because it is qualified by the witness with the term "ordinarily," apparently meaning that accounts or expenses of a certain general character cannot ordinarily be made susceptible to cost separation.

The witness was asked about a specific account, about a specific expense as applying in this particular lawsuit, and not as to what in his opinion may ordinarily be true about some indefinite class of accounts.

Trial Examiner Ballinger: The motion to strike is granted.

Mr. Austin: Your Honor, may I ask the witness another question based upon that question?

Trial Examiner Ballinger: You may, and the Examiner will reserve or recall his ruling until the question 6334 is asked and answered.

The Witness: Would you mind reading my previous answer?

Trial Examiner Ballinger: Read the previous answer of the witness.

(The answer referred to was read by the reporter.)

By Mr. Austin:

Q. Mr. Warmack—

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Mr. Warmack, you have given an opinion there of the applicability, you say, ordinarily to costs of this nature and their susceptibility of allocation.

A. Yes.

Q. Is what you have said there about expenses of this nature ordinarily being not susceptible to direct allocation applicable to the specific expenses contained in account 220 being expenses of the employment department?

A. Yes, that is so.

Mr. Hanley: Now, I have the question and the answer read? I am sorry, but I did not follow it.

Trial Examiner Ballinger: Read the question and 6335 answer.

(The question and answer referred to were read by the reporter.)

Mr. Hanley: If your Honor please, I move to strike the question and answer as too indefinite, vague, and uncertain as to serve any purpose in this record.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Mr. Austin: I will withdraw the previous question and ask this question.

Trial Examiner Ballinger: The previous question is withdrawn.

By Mr. Austin:

Q. You gave an opinion, Mr. Warmack, regarding the allocation of certain expense of a general nature, and their susceptibility of allocation on any other basis than following the allocation of expenses or a more direct nature. Is that correct?

A. Yes, sir.

Q. Did your opinion apply, or do you desire to have it apply specifically to expense of the nature of the expense included in the account 220 in this cost study, which is expense of the employment department of the respondent.

A. That was the account I was talking about, Mr. 6336 Austin, when I made the statement.

Mr. Hanley: Again, I move to strike the answer of the witness.

His answer now refers back to another question, not to the present question, and the present question is susceptible of a "yes" or "no" answer as to whether or not this cost differential applies to this specific account.

Trial Examiner Ballinger: The motion to strike is granted.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Do you recall the previous question that I asked you?

A. Well, which one do you mean?

Q. The one in reference to this account 220.

A. Well, there were several of them. I don't know just which one you refer to.

Mr. Hanley: Would it not be better to read the one to him that you have in mind?

Trial Examiner Ballinger: Read the question to which Mr. Austin refers.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

6337. (The reporter read the following question:

"Q. Did your opinion apply, or do you desire to have it apply specifically to expense of the nature of the expense included in the account 220 in this cost study, which is expense of the employment department of the respondent?")

The Witness: Yes, sir. I was under the impression, Judge, that is what we were talking about at the time.

Trial Examiner Ballinger: In view of the witness' answer to the last question, the motion of counsel for the Respondent to strike his answer to the previous question upon which the Examiner ruled, is overruled;

And the previous action of the Examiner is revoked and recalled.

By Mr. Austin:

Q. It appears from Respondent's Exhibit 101 that a portion of the expense in account 220 is charged to direct shipment channels. What was the basis of your distribution of that expense, Mr. Warmack?

A. The expense of this department, that is, the employment department account 220 is allocated upon the basis of direct shipment hours of the Detroit field, expressed as a proportion of the total amount of hours of all employees in the field by months.

That information is shown at page 110 of Respond-
6338 ent's Exhibit 100. That is the basis of the distribu-
tion of that expense as is thereby indicated.

Q. Was that same method of allocation used in distributing the expense of this account as between the three bulk plant channels on Respondent's Exhibit 101?

A. I—

Mr. Hanley: (Interposing.) Before the question is answered, may I ask a question for the purpose of making a motion to strike, if your Honor please?

Trial Examiner Ballinger: You may.

Mr. Hanley: Mr. Warmack, in your answer to the last question indicating the method used of allocating part of the expense in account 220 to the direct shipment channels, have you made a study of the method of which you are talking?

(There was no answer given.)

Mr. Hanley: Have you studied the exhibit prepared by the Respondent from which you are reading in respect of the allocation?

The Witness: Yes, sir. And my answer to your previous question—I was looking at this document—is yes.

Mr. Hanley: Do you dispute the accuracy of the calculations in respect of time allotted in the direct shipment channels in reference to the expense on account 220?

6339 The Witness: I—

Mr. Austin: (Interposing.) I object to that question, your Honor, on the ground that I did not go into the amounts, but simply asked the question of the witness as to the method used. I did not go into the amounts. I simply asked the witness as to the methods used. I think the question is clear.

Trial Examiner Ballinger: The objection is sustained.

Mr. Hanley: If your Honor please, if the witness' answer is "no" then of necessity his opinion as to the impossibility of allocating this particular account on any direct basis cannot still be in his mind, because he admits if he does not dispute the accuracy of this calculation that such an allocation was accurately made, and he stated before he has seen it, and he has studied it. I think we are entitled to have it understood what this witness' opinion is.

Trial Examiner Ballinger: The Examiner understands that this witness is not going into the question of the accuracy of the computations made by the Respondent, that he is dealing only now with methods.

Mr. Hanley: Well, for the purpose of the record, may the witness answer for himself as to whether he is disputing the accuracy of the Respondent's calculations?

6340 I want to make this motion.

Trial Examiner Ballinger: Gentlemen, if you deem that important the Examiner will permit the witness to answer.

The Witness: Now, what must I answer?

Mr. Hanley: I will restate the question, Mr. Warmack.

The Witness: Please.

Mr. Hanley: Do you dispute the accuracy of the computations made by the Respondent appearing in Respondent's Exhibit 100 which are reflected in direct shipment channels on Exhibit 101 opposite account 220?

Now, I think that may be answered "yes" or "no."

The Witness: May I have the question of Judge Hanley read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I do not like the word "dispute", Judge, but I most certainly question their accuracy.

Mr. Hanley: It does not matter whether you like it or not, please, Mr. Warmack. That is what I asked you. Will you please answer that?

Trial Examiner Ballinger: The witness has said that he did not like the word "dispute," but that he questioned the accuracy of the account.

6341 The Witness: I question their accuracy. I question the accuracy of the account.

Mr. Hanley: That is all right.

The Witness: From the standpoint of sound accounting, for the reasons as just previously stated, and as stated in connection with account 215.

Mr. Hanley: That injects an entirely new picture in this lawsuit, then.

6342 Trial Examiner Ballinger: Read the question.

(The question was read by the reporter as follows:

"Q. (By Mr. Austin) Was the same method of allocation used in distributing the expense of this account as between the three bulk-plant channels on Respondent's Exhibit 101"?)

Trial Examiner Ballinger: And read the answer preceding that.

(The answer referred to was read by the reporter.)

The Witness: The answer is no, sir.

By Mr. Austin:

Q. What method of allocation was used for apportioning this expense between the three bulk-plant channels?

A. Gallonage ~~basis, exclusive of direct-shipment gallonage~~.

Q. If ~~the expense in this~~ account were apportioned between all seven channels on Respondent's Exhibit 101 on the basis of total effort of all field employees, what effect would such an allocation have upon the amount of the expense entered in this account in the tank-wagon reseller channel?

A. It would be materially reduced.

Mr. Hanley: Just a second, please, Mr. Austin. Do I understand now that you regard it as a possibility to make such an allocation?

Mr. Austin: I object to that question, your Honor, on the ground that it is not proper interpolation, not
6343 directed toward clarifying.

Trial Examiner Ballinger: The objection is sustained. It is a matter that can be gone into on cross-examination.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. I would like to call your attention to Account 111, Mr. Warmack, on Respondent's Exhibit 101. The account is entitled "Depreciation Expense—Plant—E. L. A." and the expense contained in the account is depreciation expense on dispensing equipment loaned by the respondent to retail service stations. A part of the expense in this account is charged to direct-shipment business on Respondent's Exhibit 101.

Will you please state by what method the respondent made those charges to direct-shipment business in this account?

A. Direct application, Mr. Austin. The respondent company has a record of the equipment that is loaned to jobbers for dispensing its petroleum products, and it just applied the depreciation rate to the investment in that equipment and arrived at a figure which they directly applied to the respective direct-shipment outlet channels.

Trial Examiner Ballinger: Is your answer based
6344 upon some document introduced by the respondent?

The Witness: Yes, sir.

Trial Examiner Ballinger: Please refer to it.

The Witness: Page 51 of Respondent's Exhibit 100 and page 52 of the same exhibit.

By Mr. Austin:

Q. Then, did the respondent use capital investment in actual equipment at jobber outlets for the purpose of applying the depreciation rate which resulted in the direct shipment expense in this account?

A. Yes, sir.

Q. Now, as to the portion of the expense in this account which is entered in the three bulk-plant channels, is the expense entered in each of those channels the result of applying the same depreciation rate to capital investment in E. L. A. equipment chargeable to those respective channels?

A. No, sir.

Q. What method of allocation was used in distributing the expense in this account between the three bulk-plant channels?

A. It was allocated to the three channels, Mr. Austin, on the basis of gallonage, exclusive of direct-shipment gallonage, in the company's regular accounting procedure, and the allocations are made each month.

Q. How is the depreciation expense obtained in the company's regular accounting procedure, and by that I mean, Mr. Warmack, that before you can allocate the depreciation expense between channels on a gallonage basis you have to find out what the depreciation is. Do you know how that is handled?

A. Yes, sir.

Trial Examiner Ballinger: State it, if you know.

The Witness: The respondent company has an investment in all of this class of property loaned, in total, but its records do not show a separation of this equipment, that is, this property we are speaking about, by channels or outlets separately; therefore, in its regular accounting procedure it applies its depreciation rate to its total investment in this class of property and arrives at a depreciation figure which it in turn separates between bulk-plant channels on the basis of gallonage, exclusive of direct-shipment gallonage.

By Mr. Austin:

Q. Then, when respondent made its cost study, did it ascertain from its records the actual capital investment value of equipment loaned to jobbers?

A. Yes, sir.

Q. And did it then apply the depreciation rate of 4 per cent to that capital investment?

A. It did.

Q. Did it also from its records determine the capital investment of dispensing equipment loaned to tank-wagon reseller customers for gasoline and refined oils?

6346 A. No, sir.

Q. Do I understand correctly that respondent did make that determination of capital investment of dispensing equipment loaned to jobbers for gasoline and refined oil, and a similar calculation for its equipment loaned to jobbers and used for other products?

A. Yes, sir, it certainly did, and I know of no more accurate calculations that could possibly be made than that.

Q. You are now referring to the calculation made for the allocation of direct shipment channels?

A. Yes, sir.

Q. In your opinion, was it good or sound accounting to apply the accurate method which you have described for the purpose of arriving at the marketing expense of this equipment to jobber gasoline business, and using the gallonage method for making an allocation of the expense to tank-wagon reseller business, and then comparing the tank-wagon expense arrived at by one method with the jobber expense arrived at by another method?

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the Reporter.)

The Witness: In my opinion, the method is unsound from the standpoint of sound accounting. I can appreciate this, however, in connection with that, that this account is not very large and the work required to 6347 break down this great number of items may have been considered as not being commensurate with the good that respondent would get out of it.

By Mr. Austin:

Q. Does that affect your opinion as to whether or not the methods used were sound from an accounting standpoint?

A. From an accounting standpoint, it does not affect the opinion, except from the standpoint of whether or not it was a practical thing to do.

(There was a discussion off the record.)

Mr. Austin: May we have a five-minute recess now?

Trial Examiner Ballinger: We will take a five-minute recess.

(A short recess was taken.)

6348 Trial Examiner Ballinger: Come to order.

Mr. Austin: If I can have about five minutes, your honor.

Trial Examiner Ballinger: We will be in recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

By Mr. Austin:

Q. Mr. Warmack, do you desire to make any further statement in your opinion—

A. (Interposing.) I beg your pardon. I did not hear you.

Q. Do you desire to make any further statement of your opinion for the purposes of clarification as to the methods used by the Respondent in allocating expense in account 220 between channels on Respondent's Exhibit 101?

A. Yes, sir. I do.

Q. Will you make such a statement?

A. Account 220, entitled "Expense—Employment Department—Salaries and all other expense," is an expense of a general nature, and ordinarily is not susceptible to a separation and allocation to the customer classifications or product classifications in a direct manner—

The Witness: May I have my answer as far as I have given it read?

Trial Examiner Ballinger: Read the answer.

6349 (The reporter read the answer as given.)

By Mr. Austin:

Q. Proceed.

A. It would therefore be necessary to allocate the expense if it were used in determining cost differentials, on a basis of an allocation of an expense of a direct nature.

Inasmuch as the Respondent elected to allocate a portion of that expense on the basis of effort to direct shipment channels, it is my opinion that the same method should be employed in the allocation of that general expense on that basis of effort of employees in the bulk plant channel.

Trial Examiner Ballinger: Mr. Warmack, can you state for the record the total amount of expense dealt with, and to which you have just referred?

The Witness: Yes, sir.

Trial Examiner Ballinger: Please do so.

The Witness: $3,889.23.

Trial Examiner Ballinger: If all of that expense had been placed in any one account, would it have made any perceptible difference in the result?

The Witness: Yes, sir.

Trial Examiner Ballinger: What and how?

The Witness: It would have made a difference if all of it had been placed in the channel marked "jobber, naphtha and gasoline" inasmuch as it would be about 10 per
6350 cent more than the total cost placed in that channel, the total cost of that channel is shown by Respondent's Exhibit 101 as $24,389.05.

Trial Examiner Ballinger: How would it have affected the cost of marketing between the tank wagon reseller channels and the jobbers?

The Witness: Do you mean, your Honor, if it were all placed in that channel?

Trial Examiner Ballinger: Yes.

The Witness: It would have increased the cost shown as .16 cents per gallon at the bottom of channel marked "jobber, naphtha and gasoline."

Trial Examiner Ballinger: Approximately, how much, just roughly?

The Witness: I will make a calculation.

Trial Examiner Ballinger: Proceed.

(The witness made a calculation.)

Trial Examiner Ballinger: Do you have your figure?

The Witness: Yes, sir.

Trial Examiner Ballinger: What is it?

The Witness: It would have increased that cost to a little over .18 cents per gallon.

Mr. Hanley: How much?

Mr. Austin: .18 cents.

Mr. Hanley: .18 cents per gallon?

Mr. Austin: That is right.

6351 Mr. Hanley: Thank you.

Trial Examiner Ballinger: All right.

Mr. Hanley: May I ask one question, Judge, along the same line?

Mr. Austin: I would like to continue this examination.

Trial Examiner Ballinger: I will permit the question by counsel for the Respondent.

Mr. Hanley: Thank you.

If it had all been placed in the tank wagon reseller channel, where approximately two thirds of it already is, would it have perceptibly affected the result?

The Witness: No, sir.

Mr. Hanley: Would it have affected it at all within the two decimal points?

The Witness: I rather think that it would not have affected it within the two decimal points, Judge Hanley.

Trial Examiner Ballinger: Anything further?

Mr. Hanley: No.

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Mr. Warmack, you just referred, in the opinion that you have given, in the allocation of cost of account 220 on the basis of effort; that is, distribution of effort of all employees in the Detroit field, is that correct?

6352 A. Yes.

Mr. Hanley: May I hear that question and answer read?

Trial Examiner Ballinger: Read it.

(The question and answer referred to were read by the reporter.)

Mr. Hanley: It is not clear to me.

By Mr. Austin:

Q. In your opinion, is the distribution of expense representing effort of the employees in that field what you have termed a more direct expense than expense of the nature going into account 220?

A. Yes, sir.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Will you please direct your attention to Schedule six on page 55 of Respondent's Exhibit 100?

A. Yes, sir.

Q. The schedule and the explanation on the pages following is entitled "Credit Information—Bad Debts and Recovery, Detroit Field, 1940." Is that correct?

A. Yes, sir.

6353 Q. What costs are, for the most part, represented in the accounts listed in said Schedule 6?

A. On each portion of those costs, Mr. Austin—well, let me look at this just a minute—

Q. Yes.

A. A large portion of those costs, Mr. Austin, are credit cards. I just wanted to be sure about that.

Q. Will you name the accounts and the total?

A. Yes, sir.

Q. Please do so.

A. Account 208, credit information, expense.

Q. Yes.

A. Account 400, bad debt collection written off prior years. That is a credit account.

Q. A credit account?

A. Yes.

Q. Proceed.

A. Account 431, budget plan, income and expense.

Q. Is that a credit account?

A. That is a credit account.

Q. Next?

A. Account 510, losses by bad debts.

Q. Bad debts?

A. Yes.

Q. Proceed.

6354 A. Account 511, expense collecting bad debts, current year.

Mr. Hanley: Current year?

The Witness: Current year.

By Mr. Austin:

Q. Any others?

A. Yes. Account 512, expense collecting bad debts previous years—prior years it is.

Q. Is that all?

A. Yes.

Q. When you referred to credit cards, Mr. Warmack, are you referring to the Standard Oil Company (Indiana), National Credit identification cards, one of which cards was introduced in evidence as Commission's Exhibit 21, and which I now show you?

A. Yes, sir.

Q. Have you heard the testimony regarding the amounts of or—first, the use which is made of those cards by the Respondent in the nature of the card credit offered through those cards?

A. In the nature of the credit offered through those cards?

Q. Yes.

A. Yes, sir, I have.

Q. Did you make any further investigation of the credit card practices of the company, the Standard
6355 Oil Company, while you were in Detroit?

A. Yes, sir. I did.

Q. Just what did you do in that regard, Mr. Warmack? If you discussed it with anybody, state with whom you discussed it.

A. I did discuss it. I discussed it with Mr. Houghton at length, and he described it to me in virtually the same manner as it is described in the record.

Q. Did you make a study of the records of the company for the purpose of determining the amount of the total credit card expense of the Respondent for 1940, and the methods employed in the separation of those expenses in various accounts where it occurs on Respondent's Exhibit 101?

A. For the Detroit field; yes, sir.

Q. Did you find that other accounts than those listed on Schedule 6 of Respondent's Exhibit 100 were included as credit card expense?

A. Yes, sir.

Q. Will you state the other accounts which are listed on Respondent's Exhibit 101, other than those included in Schedule 6, and which include credit card expense, and for which account; that is, for each account, if you can state the amount of the expense in the account, which is a credit card expense, I will ask you to do so. First, can you do so?

6356 A. Yes, sir.

Q. Please do so.

A. First, account 066 entitled "Miscellaneous Operating Expense," $740.83.

Mr. Hanley: 066?
The Witness: Yes, sir.

By Mr. Austin:

Q. Proceed.
A. Account 200, which is entitled "Office Expense-Salaries Accounting," $6,743.68.
Mr. Hanley: $6,743.68?
The Witness: That is right.

By Mr. Austin:

Q. Next?
A. Account 201 entitled "Stationery"
Mr. Hanley: Stationery?
Mr. Austin: Yes.
The Witness: That is $3,747.03.

By Mr. Austin:

Q. And the next one?
A. Account 202, that is entitled "Postage."
Mr. Hanley: Postage?
The Witness: Postage.
The amount shown there is $3,168.61.

By Mr. Austin:

6357 Q. Any others?
A. Account 204, which is entitled "Exchange," and the amount is shown to be $1,317.21.

Q. Is there anything you desire to call attention to in connection with that?

A. I should like to call your attention with respect to the figures given that only in the case of account 200 does it appear that there is credit card expense applicable to automobile supplies.

I gave a figure of $6,743.68 as shown for credit card expense in account 200, of which $573.90 is shown as applicable to automobile supplies. Mr. Houghton and I, when we worked up this information, did not go to the refinement of determining in every instance what portion of the expense, if any, had been applied to automobile supplies.

Q. You are speaking of credit card expense?
A. Yes, sir.
Q. In giving this last answer?
A. Yes, sir.

6358 By Mr. Austin:

Q. Does any part of the expense that you have just stated for the five accounts you have just referred to apply to automobile supplies other than the amount of $573.90 in Account 200?

A. No, sir, no part of those expenses just stated, except that, applies to automobile supplies.

Q. Now, turning again to the accounts listed on Schedule 6, page 55 of Respondent's Exhibit 100, what portion of the total expense or credit, as the case may be, in those accounts is credit card expense?

A. I can give them separately, Mr. Austin.

Q. All right.

A. Account 208 entitled "Credit Information Expense," is shown on page 55 of Respondent's Exhibit 100 as amounting to $14,111.30, of which $11,960.95 was found to be applicable to the credit-card business or activities.

Account 400, entitled "Bad Debts Collected—Written Off Prior Years," for which a total of $5,481.45 is shown as a credit, of that total $73.82 was found to be a credit applicable to credit card expense. That means bad debts recovered during 1940.

Account 431, for which a total of $1,058.17 is shown on page 55 of Respondent's Exhibit 100, no part of which was found to be applicable to credit-card expense, it 6359 may be that some little part of that was applicable to automobile credit-card expense, but inasmuch as that account applies wholly to the automobile expense, we didn't explore it thoroughly.

Account 510, for which there is shown a total of $7,520.88—

Trial Examiner Ballinger: Losses by bad debts?

The Witness: Yes, sir.

(Continuing)—of that total amount, $3,109.83 were found to be applicable to the credit-card expense.

Account 511, entitled "Expense—Collecting Bad Debts—Current Year," for which there is shown a total of $223.10, only $1.50 of that amount was shown as applicable to credit card expense.

Account 512, entitled "Expense—Collecting Bad Debts—Prior Years," for which a total of $835.35 is shown on page 55 of Respondent's Exhibit 100, only $2.50 of that item was found to be credit-card expense.

Q. Are credit-card holders customers of the respondent, or are they customers of the respondent's customers?

A. They are customers of the respondent's customers.

Q. Are they in some instances customers of companies other than the respondent, engaged in the sale of petroleum products?

I will withdraw that question, if I may.

6360 Trial Examiner Ballinger: You may withdraw it.

(Discussion off the record.)

By Mr. Austin:

Q. In your opinion, Mr. Warmack, is the expense incurred by the respondent in connection with issuing of credit cards, the handling of collection from credit card customers, and all other expense in connection with its credit card practices and activities, that is, activities resulting from the issuance of these cards, an expense which may properly afford a differential in cost as between the respondent's cost of selling and delivering gasoline to jobbers on the one hand and to tank-wagon-reseller customers on the other?

A. It is my opinion that it is a cost which would not properly afford a cost differential.

Q. What is the basis of your opinion?

A. This is an expense or a class of expense which is very comparable in nature to advertising for consumer acceptance. The respondent company has no control over where the customer-consumer, speaking specifically of automobile drivers who own credit cards, purchase their gas. The company is materially concerned, naturally, to the end that this particular customer or group of customers buy Standard Oil gas or Standard Oil products or products of its affiliated companies, but, to state it again, it has no control over where they buy or what they
6361 buy, as long as it is Standard Oil products.

It is my opinion, Mr. Austin, that that class of expense should be separated on the basis of gallonage sold by the respondent company to its customers for ultimate resale to the consuming public, that is, on a gallonage basis. The separation of cost on a gallonage basis affords no cost differential.

Trial Examiner Ballinger: Purchases on credit under the cards are not confined to the products of the Standard Oil Company of Indiana, are they?

The Witness: It was my assumption, Judge, that they were confined to the purchases through stations of the Standard Oil Company of Indiana or some or certain of its affiliated companies, such as the Amoco company.

I rather assume and I believe to be a fact, that if a reseller of gasoline were selling some grade of motor oil or kind of motor oil that wouldn't be Standard Oil, that he could sell it to credit card customers.

Trial Examiner Ballinger: The card, and I refer to Commission's Exhibit 21, states on its face:

"This card may be used by customer whose name and vehicle license number are shown on the face hereof in
purchasing on credit merchandise manufactured or
6362 distributed by Standard Oil Company, Indiana, or
by any of the within named companies at any place
of business reselling such merchandise."

And on the back of the card appears the names of the "within companies":

"American Oil Company
Pan American Petroleum Corporation
Idaho-Utah Oil Company
Utah Refining Company
Standard Oil Company of California
Standard Oil Company of Ohio
Standard Oil Company of Nebraska
Standard Oil Company of Kentucky
Humble Oil & Refining Company
Standard Oil Company of Texas
Standard Oil Company of California
Union Oil Company of California
British Columbia Standard Oil Company, Limited, and
Union Oil Company of Canada, Limited."

Mr. Austin: Are you through?

Trial Examiner Ballinger: Yes.

By Mr. Austin:

Q. Mr. Warmack, whether or not the use of the credit cards by the holder thereof is restricted to the respondent's products or to stations supplied by respondent or by its
affiliates, does that in any way affect your opinion
6363 as to the nature of this expense?

A. No, sir, the holder of the credit card has it wholly within his power and election as to where he is going to exercise the use of that card, according to the limitations as set forth on the card.

Q. Are you referring now to jobber outlets and tank-wagon reseller outlets?

A. Yes, sir, any reseller of gasoline, that is, petroleum products, of this respondent company, to the consuming public. The holder of the card can go to one station and it will be honored, he can go to another station and it will be honored, and it can continue on and on according to his own election.

Trial Examiner Ballinger: And buy the product of any company enumerated on the card?

The Witness: That is correct, your Honor, and that is the reason that, and the reason previously given, why in my opinion I don't see how it is, in my opinion, that it could be only allocated on a basis of gallons sold, either directly or indirectly, to resellers of gasoline to the consuming public.

By Mr. Austin:

Q. Does that include gallonage sold to jobbers for resale to reseller outlets?

A. Yes, sir.

Mr. Hanley: May I ask a question, Mr. Austin?

6364 Mr. Austin: Yes.

By Mr. Hanley:

Q. Mr. Warmack, is the fact that the credit card holder may buy at any Standard Oil station, for instance, or may buy at these other company-supplied stations your reason for your opinion that it is not a proper expense as allocated on the company's records?

A. Judge Hanley, I don't understand your question that it is not a proper expense as allocated. I most certainly agree that it is an expense of the company incurred in its regular course of business.

Q. Well, then, let me ask you this: Does the fact that a credit card holder of a card issued by the Standard Oil Company may buy the products of that company at any station handling them or products of these other companies anywhere he may choose have anything at all to do with the cost and the expense to the Standard Oil Company of issuing the card and servicing the account? I mean "servicing" from an accounting standpoint.

A. Read that to me, please.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

The Witness: If I understand your question, Judge,
it is this, Does the fact that the issuing of the card and
the servicing of the card have any relationship to
6365 where he buys?

Mr. Hanley: Yes, that is right, does it?

The Witness: I don't see how it could have. Your card may be issued in Detroit and he may move immediately to California.

6366 Mr. Hanley: That is true.

The Witness: And he may stay in California.

Mr. Hanley: Right.

The Witness: And that is what I want to know, is how that expense could be allocated.

Mr. Hanley: That is what I am asking you.

The Witness: That is what I have been trying to find out.

Mr. Hanley: The Standard Oil Company is presumed in my question to have issued the card and is continuously servicing it from an accounting standpoint, and guaranteeing the payment on it, to any company that supplies products on the strength of it; you agree, do you not, that that is an expense to the Standard Oil Company?

The Witness: Certainly.

Mr. Hanley: Then, do you not agree that where and how and how much and what kind of products are purchased on that card have nothing whatever to do with the expense to the Standard Oil Company of issuing the card?

The Witness: Of issuing the card?

Mr. Hanley: And servicing it.

The Witness: It may have some minor bearing on the
servicing of the card. I do not know just what the customer
is allowed to buy, and how much he is allowed to buy on
the credit card, but if there is no measuring factor
6367 that could be established other than the gallonage
basis or factor, as I have just discussed, I certainly
would like to know how it can be done from the standpoint
of sound accounting.

Mr. Hanley: Well, I think any further questions I might have would be properly cross-examination. I wanted to understand your theory.

The Witness: I see.

Trial Examiner Ballinger: Proceed, Mr. Austin.

Mr. Austin: May I have this document marked for identification?

Trial Examiner Ballinger: The reporter may mark the document for identification.

(A document entitled "Standard Oil Company, Docket 4389, Credit Card Expense, (including couponbook expense) Detroit Field—1940," was marked Commission's Exhibit 132 for identification.)

By Mr. Austin:

Q. I show you Commission's Exhibit 132 for identification, Mr. Warmack.

A. Yes.

Q. Will you state what the contents of that sheet are?

A. This is a statement prepared by Mr. Houghton and me from the Detroit Field, in the Detroit Field, rather, covering credit card expense including coupon book 6368 expense in the Detroit Field for 1940.

The statement shows the total credit card expense including, possibly, some expense of a credit card nature which would be applicable to automobile supplies.

In that connection, Mr. Houghton and I did not make studies sufficiently to pull out all of the credit card expense which would be applicable to the automobile supplies. We only covered and endeavored to determine the cost of credit card expense applicable to petroleum products. And what I mean by that is that the way that the Respondent company did allocate these expenses as between six petroleum products channels of Respondent's Exhibit 101.

It will be noted that no part of this expense was found as being applicable to the "direct shipments," other customers channel on Respondent's Exhibit 101.

Q. What do you mean by "coupon book expense" referred to on this sheet?

A. There was a time, I understand, probably prior to the inauguration of the credit card or running right along with the time that the credit card method, and the issuance of credit cards was gone into in a big way, maybe we will say, that the company issued coupon books to consumers of gasoline and other petroleum products, which would be honored at the reseller stations, and that since the expense was handled by the company the same as this credit 6369 card expense, we felt that they were very, very closely related.

Q. And in your opinion, was the expense of the company incurred or that the company incurred in connection with the issuance of and servicing of coupon books expense of the same nature as the credit card expense you have described?

A. Yes, sir.

Q. What is that based upon?

A. That is based upon information obtained from Mr. Houghton.

Q. And by "expense of the same nature," I mean the expense in your opinion that should be allocated in the same manner as you have already stated for credit card expense.

A. Yes, sir. It was my understanding that the coupon books could be used at any reseller outlet where the company's products were sold.

Q. Now, on Commission's Exhibit 132 for identification, there are five channels listed entitled as follows:

1. Tank wagon reseller.
2. Tank wagon consumer.
3. Other methods.
4. Jobber, naphtha and gasoline.
5. Jobber, other products.

There are certain dollars and cents figures listed in each of those five columns. Are the figures listed in those columns; that is, in each column for each of the respec-
6370 tive accounts—or rather, do those figures represent the amount of expense in each of those accounts entered by the Respondent in the same channel and for the same account on Respondent's Exhibit 101 in this cost study?

A. Yes, sir. You will have to bear this in mind, in that, though, some of these accounts would be only partly applicable to credit card business.

As a matter of fact, I do not think any one listed on here was wholly applicable to the credit card business. Therefore, Mr. Houghton and I had to go back and calculate what portion of this expense we found was applicable to credit cards that had been assigned to the respective channels.

Q. Yes. I understand that, Mr. Warmack. And what I wanted to find out was whether the amounts entered in those six columns are the amounts that you and Mr. Houghton determined to represent the credit card expense because these accounts actually entered upon by the Respondent in the same amounts and the same channels on Exhibit 101 appear to be similar.

A. Well, I am afraid I do not quite follow your ques-ion there.

Mr. Austin: I will withdraw the question.

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Austin:

Q. What I wanted to find out, Mr. Warmack, was 371 whether the amounts entered in those columns to which I have just referred are the amounts that you ave been told determined to represent the credit card xpense in these accounts actually being entered by the Respondent in the same accounts and in the same channels n Exhibit 101?

A. Yes. That is correct. That is what we did find. They are the sums that Mr. Houghton and I determined epresented the credit card expense, Mr. Austin, and these ccounts actually were entered by the Respondent in these ame accounts, and as far as that is concerned, in the very ame channels of Commission's Exhibit 101—on this Exhibit 101.

Q. So, as I understand it—that is Respondent's Exhibit 01, not Commission's.

A. I beg your pardon. Respondent's Exhibit 101.

Q. So, as I understand it, this exhibit for identification, 32 is a breakdown or analysis of credit card expense in Respondent's Exhibit 101 and does not represent or purport to represent anything not contained—that is, it does not purport to represent any new allocation or any different allocation of expense from that contained in Exhibit 101?

A. Your statement is correct.

Trial Examiner Ballinger: Now, I think we understand t.

Mr. Austin: I offer in evidence Commission's Exhibit No. 132 for identification.

372 Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Any objection to it?

Mr. Hanley: Now, Judge, just a minute please. This s a long and complicated statement. May we be off the ecord again?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Any objection?

Mr. Hanley: I have an objection as to materiality, Judge, that is all. I do not believe it proves anything as to the propriety of the allocation.

Trial Examiner Ballinger: Objection overruled, and Commission's Exhibit No. 132 for identification is admitted in evidence.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 132, was received in evidence.)

Mr. Austin: I wonder whether your Honor would insist on us going ahead? I would like to take an adjournment at this time until tomorrow morning. We have covered quite a little more territory today than usual, this afternoon particularly. I think that a review of

6373 several of the accounts which we still have to cover will greatly facilitate the questioning which I will have to make of the witness, and I believe it would be profitable if I could have an adjournment until tomorrow morning. It is now a quarter after four.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The motion for adjournment of counsel for the Commission is granted.

And now, at 4:15 p. m., on July 8, 1942, the hearing is adjourned to be reconvened in Room 532, Federal Trade Commission Building, Washington, D. C., at 9:30 o'clock a. m., July 9, 1942.

(Whereupon, at 4:15 p. m., July 8, 1942, the hearing in the above-entitled matter was adjourned.)

6374

Room 532, Federal Trade
Commission Building,
Washington, D. C.,
Thursday, July 9, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before: Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Ill., appearing for the Respondent.

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PROCEEDINGS.

Trial Examiner Ballinger: The hearing of Docket No. 4389, case entitled "In the Matter of Standard Oil Company of Indiana" is reconvened pursuant to notice at 9:30 a. m., the 9th day of July, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C. The last hearing was held at the same place July 8, 1942.

The reporter will note counsel for the Commission and counsel for the respondent present.

You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Austin.

Q. Mr. Warmack, I call attention now to Account 520 on Respondent's Exhibit 101, entitled "Annuities and Retirement Plan Expense." The total amount of the expense entered in that account for 1940 is $157,014.35. Is that total expense made up of more than one different class of expenses, Mr. Warmack?

A. Yes, sir.

Q. Have you made some investigation of the nature of that account, and have you read the testimony regarding it, and have you discussed it with some of the company officials?

6376 A. Yes, I have.

Q. I wish you would just tell us in your own words what is in that account, the various kinds of expense going into it. And you may refer, if you wish to any statements made to you by any of the respondents, particularly regarding the nature of the expense in the account.

A. The total amount of $157,014.27 in this account is made up of three parts. The first part is $26,226.38, representing contributions made by the respondent company to match contributions made by employees engaged in the Detroit field during the year 1940.

The next portion is $108,508.83, which represents a portion of trust funds contributed by the respondent company for the retirement of employees in the Detroit field in 1940, to cover services of such employees prior to January 1, 1939.

The next portion is $22,279.06, which represents annuities paid by the respondent company to retired employees in the Detroit field during the year 1940.

Those three separate items make up the total of $157,014.27.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Go ahead, Mr. Austin.

By Mr. Austin:

6377 Q. You referred to a trust fund, Mr. Warmack, in this account. I believe you said $108,000 of the expense in this account for 1940 was paid by the company to a trust fund?

A. That is correct.

Q. Do you refer to the trust fund which is described in the trust agreement on the last page of Commission's Exhibit 108?

A. Yes, sir.

Q. Now, to make the matter a little more clear as to these divisions of this expense, suppose that, prior to January 1, 1939, one of the company's employees had retired, and under the retirement plan then in effect was paid an annuity, and assume that the employee is still living, or was living in 1940, and received annuity payments in that year, which one of these three groups of expenses would cover the payment of that annuity? Perhaps I had better ask you in which one of these groups that annuity payment would appear?

A. That would be included in the group which I explained to be annuities paid to retired employees in the Detroit field for the year 1940. The total amount of such annuities was $22,279.06.

Q. Were the employees to whom those annuities were paid, in the employ of the company in 1940?

A. No, sir; they were retired.

Q. Now, suppose that an employee of the com-
6378 pany was placed on retirement in 1942, and that the employee had been in the employ of the respondent for, we will say, the last ten years, and respondent now pays him an annuity—or at least, he receives an annuity from one or more of these funds—will you state from what fund that annuity will be paid, with respect to the period of service covered?

A. It will be paid from the trust fund retirement plan covering the services prior to January 1, 1939, and he will also receive payments from an insurance arrangement whereby he is to contribute a part of his salary and the company contribute a like amount of his salary—to match his salary. That is my understanding of the arrangement, Mr. Austin.

Q. And would the portion of the annuity or retirement benefits received by such employee for services to the company prior to January 1, 1939, be paid from the trust fund or by the insurance company?

A. It would be paid from the trust fund.

Q. And as to the benefits received by the employee due to service, or based upon services to the company in 1940, from what fund would those expenses be paid?

A. That would be paid by the insurance company from the funds contributed part by the employee and part by the company. That particular amount I have outlined for the year 1940 would be covered by a portion which I stated represented contributions made by the company to
6379 match contributions made by employees engaged in the Detroit field during 1940.

Q. How much is that amount?

A. The company paid during 1940 $26,226.38.

Q. That is to meet the insurance company payments for the plan started in 1939?

A. Yes, sir; that is where the company matched contributions paid by the employee.

6380 By Mr. Austin:

Q. Now, I would like to ask you, Mr. Warmack, as to each one of these three classes of payments which are included in Account 520 for 1940 whether the class of expense or the actual expense in this case may properly be treated in your opinion as a current marketing expense for the year 1940 and, if not, how the expense should be treated.

A. The amount of $26,226.38 representing contributions made by the company to match contributions made by the employees in the Detroit field in 1940 in my opinion should be considered as additional compensation to the employees and treated as a current marketing expense of the company during the year 1940.

The amount of $108,508.83 assigned to the Detroit field as a portion of the trust fund contributed by the company for the retirement of employees in the Detroit field to cover services of such employees prior to January 1, 1939, is in my opinion not a current marketing expense.

The item of $22,279.06 representing annuities paid to retired employees in the Detroit field for the year 1940 is in my opinion not in the nature of a current marketing expense.

I should like for the record to show here, just for the purpose of clarity, that the total amount of those three items is $157,014.27, whereas the total amount for 6381 this account, as shown on page 520 of Respondent's Exhibit 101, is $157,014.35, or a difference in the total of 8 cents.

This is considered trivial and was not reconciled while on the field investigation.

Q. Will you proceed, Mr. Warmack, and state how, in your opinion, these expenses should be treated, if they are not current marketing expense for 1940?

A. They may be treated in the records, of course, in any way that the company elects to treat them. It is the company's business as to how they are going to keep books, but for the purpose of proving a cost differential, it is my opinion that inasmuch as they are not current marketing costs that they should not be given effect in calculations made for determining the cost differential in the Detroit field.

Q. What I meant to ask you, Mr. Warmack, or I assume Judge Hanley will ask you if I don't, that if you do not consider these as current marketing costs, what do you consider them as, from a cost accounting standpoint?

A. In my opinion they are a proper charge against accumulated earnings of the company.

Mr. Hanley: That is objected to, if your Honor please, as not responsive, as to where the blow might fall. The witness was asked—I won't attempt to restate the question. Will you read it, please.

(The question referred to was read by the reporter.)

6382 Trial Examiner Ballinger: Read the answer.

(The answer referred to was read by the reporter.)

Mr. Austin: It sounds responsive to me, your Honor.

Mr. Hanley: May I ask if the witness means that they are not a marketing expense some place?

Trial Examiner Ballinger: You may.

The Witness: It is my opinion, as I have stated, that they are a proper charge against accumulated earnings of the company. If they had been placed on the books at the time that they applied, then they may have been properly charged as an operating expense.

Mr. Hanley: Will you just say whether or not they constitute a proper marketing expense of some kind, irrespective of whether they are charged against accumulated earnings, or some other company funds?

The Witness: Will you tell me for which year you are speaking?

Mr. Hanley: I am asking you.

The Witness: I can not answer unless you tell me the year.

Mr. Austin: I object unless it is limited to 1940.

Trial Examiner Ballinger: There appears to be a difference in the questions. One question is as to whether or not they constitute a marketing expense. The 6383 other is as to whether or not they constitute a current marketing expense.

Mr. Hanley: He has answered the last question. I am now trying to find out if he regards them as a marketing expense.

The Witness: I regard them as a proper charge against accumulated earnings of the company.

Mr. Hanley: May I not have an answer to that question?

Trial Examiner Ballinger: Can't you answer that, as to whether or not they constitute a proper marketing expense, or a proper current marketing expense?

Mr. Austin: Just a moment, your Honor, the witness has stated that he does not consider them a marketing expense for the year 1940. It seems to me that it is immaterial and also indefinite to ask him whether they are a marketing expense when marketing expenses can only be applied, I assume, in accounting to a particular year.

Trial Examiner Ballinger: That is a matter of argument, pure and simple. The witness may answer the question.

The Witness: They are not a current marketing expense for the year 1940 in my opinion.

Mr. Hanley: Judge, I can not make a record unless I can get an answer from the witness. Now, he knows whether or not he regards these as a proper marketing charge. 6384 He has said he doesn't regard them as a proper current marketing charge for the year 1940. All I am asking him is whether he regards them as a proper marketing charge. I don't care whether he thinks the company ought to charge them against the reserves or accumulated earnings or where he thinks they ought to be charged as a bookkeeping matter.

Trial Examiner Ballinger: The Examiner directs the witness to answer the question if he can.

Mr. Austin: Your Honor, I would like to make a further objection, on the ground that very clearly and definitely the only question with which we are concerned here is the year 1940; therefore, the witness having clearly and fully answered the question as in 1940, it is entirely improper for counsel for the respondent to cross-examine at this time upon the general knowledge and qualifications of the witness. This question can go only to the general knowledge and qualifications of the witness as to his accounting experience and accounting opinions. It has positively no relevancy to anything in this lawsuit, which is concerned solely with the year 1940; therefore, I contend the questioning is improper at this time, and that as to whether it is proper cross-examination should be determined when the time for cross-examination arrives.

Trial Examiner Ballinger: There is much force in the objection of counsel for the Commission that it would
6385 properly fall within cross-examination, but the witness may answer the question if he can.

Mr. Austin: If you can, Mr. Warmack.

Trial Examiner Ballinger: If he can.

The Witness: If I am asked, your Honor, what year they would be current marketing expense of, I maybe could answer the question to some extent.

Trial Examiner Ballinger: Would they constitute any part of the marketing expense for the calendar year 1940?

The Witness: I have stated three times, I believe, your Honor, that in my opinion they would not.

Mr. Hanley: You just decline to answer the question I asked you, is that right, Mr. Warmack?

Trial Examiner Ballinger: Judge—

The Witness: If you would make the question where it is proper, I can answer it.

Trial Examiner Ballinger: The Examiner considers that the witness has answered the question so far as relates to the matter under inquiry.

By Mr. Austin:

Q. What amount was paid to the trust fund set up as of January 1, 1939, by the company during 1939 and subsequent years, if you have that information?

A. I have information to the effect that during the year 1940 the company contributed $3,411,014.34 to the trust fund of the whole company, of which $108,
6386 508.83 was considered to be the portion applicable to the Detroit field for the year.

Q. Does the respondent pay a fixed amount each year into that trust fund?

A. No, sir.

Q. How is the amount, if any, which the respondent pays into the trust fund during a particular year determined?

A. It is determined by the Board of Directors. I believe I have a statement here furnished me by Mr. Bergeson as to how that was determined, which was given to me in response to that question, Mr. Austin.

Q. Who is Mr. Bergeson?

A. Mr. Bergeson is the comptroller of the company. I have that statement before me, which I believe is stated better than possibly I could state it, Mr. Austin. I can give you my answer from that statement.

Q. Was the statement prepared by you or by Mr. Bergeson?

A. By Mr. Bergeson in my presence.

Q. Will you read the statement?

A. Yes, sir.

The statement is marked "Memorandum dated March 9, 1942," addressed to W. J. Warmack, and I quote:

"In answer to your question as to the basis or method used by this company in determining amounts contributed towards the annuity trust fund for the years 1939, 1940 and 1941, the following is recited: 6387

"An estimate based on whatever information is available prior to the termination of each calendar year is discussed among the executives and on this basis total contribution is decided upon. Subsequently the distribution of this total amount to subsidiaries and the parent company is allocated, predicated on the actuarial liability of the respective subsidiaries. The controlling feature with regard to the total contribution is that the Board of Directors is restricted and an amount can not be contributed in excess of the 10 per cent of the consolidated net earnings after provision for Federal taxes. The contribution is obviously not considered an expense item before the calculation is made of the net profits.".

That was signed on the typewriter by C. T. Bergeson. Mr. Bergeson is comptroller of the company, and this memorandum was dictated in my presence.

Trial Examiner Ballinger: By him?

The Witness: By him. It is not signed by him, your Honor. It was handed to me immediately after it was typewritten.

Mr. Austin, I have the figures of the contribution for each of the years before me, if you would like them. 6388 That was the question you asked me some few minutes ago when I didn't have that.

By Mr. Austin:

Q. Have you the figures in total for each year?

A. Yes, sir.

Q. You may state them.

A. 1939, $3,422,842.00; 1940, $3,411,014.34; 1941; $4,053,777.60.

That applies only to the Standard Oil Company of Indiana and not to the affiliated companies.

Q. Was any part of the expense in Accounts 243, 244, 520, or 525 charged to automobile supplies on Respondent's Exhibit 101?

A. No, sir.

Q. How is the expense in Account 243, entitled "Taxes—Federal Insurance Contributions" allocated between channels by the respondent in its regular accounting procedure?

A. That is allocated to distribution channels in the company's regular accounting procedure on Form 189 on the basis of all salaries and commissions in each channel as related to total of all salaries and commissions.

Q. What page is that?

A. It is shown on page 20, Respondent's Exhibit 99, and that allocation is made by the month.

Q. How is the expense in Account 244 "Taxes—Unemployment Insurance" allocated between distri-
6389 bution channels in the respondent's regular account-
ing procedure?

A. On the same basis as just stated for Account 243.

Q. And how is the expense in Account 520 "Annuities and Retirement Plan Expense" allocated by the respondent in its regular accounting procedure?

A. In the same manner as just stated for Account 243, and that is shown on page 20 of Respondent's Exhibit 99.

Q. How is the expense in Account 525 "Death Benefits" allocated between channels by the respondent in its regular accounting procedure?

A. That account is allocated between channels in the regular accounting procedure in the preparation of Respondent's Form 189 on the basis of all gallonage, excluding direct-shipment gallonage.

Trial Examiner Ballinger: Is that answer based upon information contained in respondent's exhibits?

The Witness: Yes, sir, on page 21 of Respondent's Exhibit 99, your Honor. Thank you.

By Mr. Austin:

Q. You stated, Mr. Warmack, that the expense in Accounts 243, 244 and 520 is allocated between channels by the respondent in its regular accounting procedure on the basis of the proportion of the salaries of field employees in the respective channels, is that correct?

6390 A. Yes, sir.

Q. Is a substantial part of the salaries of the field employees charged to automobile supplies on Respondent's Exhibit 101?

A. There are considerable amounts of salaries of various employees charged to automobile supplies in Respondent's Exhibit 101.

I direct you to one particular charge in Account 004 entitled "Salaries Salesmen" which is a charge of $13,371.55 for that particular item of expense.

Q. And what is the portion of the expense of the accounting department in Account 200 which is charged to automobile supplies?

A. Account 200 is "Office Expense, Salaries, Accounting Department, in Detroit field for the year 1940," and $19,398.70 of those salaries are charged in the automobile supplies column on Respondent's Exhibit 101.

Q. In your opinion, should any part of the expense in Accounts 243, 244 and 520 be charged to automobile supplies for the purpose of this cost study?

A. Yes, sir, in my opinion they should.

Q. Why so?

A. The reason for that opinion is that respondent has followed the plan of making an allocation of this class of expense on the basis of compensation paid to the employees and, in view of that plan of allocating this 6391 class of expense, which in my opinion is a good plan and proper plan, naturally whatever part or proportionate part of the salaries which appear in any one distribution channel should bear its prorata part of this class of expense as shown in Accounts 243, 244 and 520.

Trial Examiner Ballinger: Would you be a little more specific and state what amount, if any, or whether a substantial part of it should be so charged?

Mr. Austin: Perhaps I can explain there a moment, your Honor. The witness said—

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Mr. Harley: May we have a five-minute recess.

Trial Examiner Ballinger: Yes, sir, you may. We will take a five-minute recess.

(A short recess was taken)

6392 Trial Examiner Ballinger: Come to order. You may proceed.

Mr. Austin: I believe there is a question pending by the Examiner.

Trial Examiner Ballinger: Do you desire the question read?

The Witness: If you please.

(The reporter read the Examiner's question as follows:)

"Would you be a little more specific and state what amount, if any, or whether a substantial part of it, should be so charged?"

By Mr. Austin:

Q. Can you state, in answer to the Examiner's question, Mr. Warmack, what percentage of expense in the main salary account on Respondent's Form 189, being the salary accounts listed on Commission's Exhibit 116, has been allocated by respondent to the automobile supplies channel in its regular accounting procedure?

A. 4.052 per cent.

Q. And in arriving at that percentage, Mr. Warmack, did you charge to automobile supply any part of Accounts 000, 001, 243, 244 or 502? Your testimony in relation to those accounts having been that some parts therof should be charged to automobile supply?

6393 A. No, sir; no part of those accounts was applied by the company to automobile supply account.

Q. Then if a part of those accounts were also charged to automobile supplies, would that increase the percentage of the salary account falling into automobile supplies channel above the figure which you stated?

A. I would have to answer that in this way, Mr. Austin: if a part of Accounts 000 and 001, particularly those two accounts, would change the percentage, the Accounts 243, 244 and 520 would, of course, have to follow the allocation of the salary accounts, in my opinion, and naturally, they would increase the charge also in the automobile supplies account.

Trial Examiner Ballinger: Would that increase be material?

Mr. Austin: May I ask a question, your Honor?

Trial Examiner Ballinger: You may.

By Mr. Austin:

Q. Wouldn't the result be, Mr. Warmack, to enter in the automobile supply channel something in excess of—what was that percent?

A. 4.052 per cent.

Q. 4.052 per cent of the expense in Accounts 243, 244 and 520?

A. Yes, sir.

Trial Examiner Ballinger: Well, would the amount 6394 thrown into that account result in any substantial change in the amount?

Mr. Austin: I should like to call your Honors' attention that after all, we are dealing in hundreds of percents here, and I think, if I may say so, that it would be rather difficult to state what is a substantial change in differential effected by one account. There are many accounts where a change in allocation might make a small or unsubstantial difference in the total differential, but if you add it up it may become substantial.

Trial Examiner Ballinger: But from the witness' answer, it may result in a change of 40 cents or is may result in a change of $1,000, or it may result in a change of $500. Now, I want to know whether it would be some insignificant amount or whether it would be some substantial amount?

By Mr. Austin:

Q. Can you state, Mr. Warmack, in dollars, how much of the expense in 243, 244 and 520 would be thrown into automobile supply if they were allocated to all channels on the basis of the principal salary account?

A. Yes, sir.

Q. Will you state those figures?

A. For Account 243, an amount of $496 would be placed in the automobile supply channel.

6395 For Account 244, an amount of $1,638.63 would be placed in the automobile supply account.

For Account 520, an amount of $6,362.22 would be placed in the automobile supply channel.

There had already been placed in the automobile supply channel by the respondent company—and these figures were taken from Respondent's Exhibit 101—$48,609.98, representing salaries of employees in the Detroit field for the year 1940.

Q. You state that in your opinion part of the expense in Account 520 should be allocated to automobile supply for the purposes of this cost study, Mr. Warmack. Were you referring only to the part of the expense in that account which you described as being a contribution by the company to an insurance fund to match the portion of the salaries of employees paid into that fund, or were you referring to the entire expense in Account 520?

A. The figure that I have of $6,362.22 as falling in automobile supply a few minutes ago on the basis of the percentage of salaries in that account, would be a portion of the total of $157,014.35, as shown on Respondent's Exhibit 101.

With respect to the point as to the portion that should fall in there, eliminating the portions which, in my opinion, are not current marketing expenses in the Detroit field for
the year 1940, we would only have a percentage of
6396 the item of $26,226.38 representing contributions by
the company to match contributions made by the employees engaged in the Detroit field, and not the total of $157,014.26; and if such allocation is made, the item of $6,362.22, based on the total amount appearing in Account 520, would be reduced.

Q. Well, the figures that you give for automobile supply were based upon the actual expense entered in each account by the respondent on its Exhibit 101, as I understand it?

A. That is correct, the actual figures placed in that Account 520.

Q. Now, turning to death benefits, Account 525, it is stated on page 94 of Respondent's Exhibit 100:

"The nature of this expense is similar to the company contribution to the employees' annuity plan. For this reason, the distribution of expense, to the class of direct shipment customer and products was made on the same basis the company contributions to the retirement plan on salaries applicable to direct shipment business bear to total contributions on total all salaries.

It appears from Respondent's Exhibit 99, page 20, that the expense in Account 520 is allocated to channels—that is, bulk plant channels on Respondent's Exhibit 101—also on the basis of salaries and commissions in each channel at a ratio of total all salaries and commissions, and

6397 you have stated, Mr. Warmack, that you considered that a proper method of allocation of the expense in Account 520.

Is the expense in Account 525, "Death Benefits," allocated between plant channels on Respondent's Exhibit 101 in the same method that is used for the allocation of expense in Account 520?

A. No, sir.

Q. How is the expense in Account 525 allocated between bulk plant channels on Respondent's Exhibit 101?

A. It is allocated to channels on the basis of their gallonage, excluding direct shipment gallonage, as stated on page 21 of Respondent's Exhibit 99.

Q. Now, assuming for the purposes of discussion that the death benefit payments are a marketing expense of respondent which may properly be used for the basis of this cost study, what is your opinion regarding the method of allocation used by the respondent, that is, allocating a part of death benefit expense to direct shipments, following the method of allocation applied to the expense in Account 520, but allocating death benefit expense between bulk plant channels on a different method than the supplies to Account 520?

A. In my opinion, from the standpoint of sound accounting, the method employed in the preparation and allocation of Account 525 entitled "Death Benefits", is improper and unsound, for the reason that if it is to 6398 be regarded as additional compensation, the same as the amount shown in Accounts 243, 244, 520, regarded by respondent company as additional compensation, then it should be allocated between all of the channels in exactly the same manner as these accounts have been allocated.

Q. And is that on the basis of the ratio of salaries in each channel to total salaries?

A. Yes, sir.

Q. If the expense of Account 525 were allocated between all channels on Respondent's Exhibit 101 on the basis of th amount of salaries falling into the respective channels, would the amount of expense in Account 525 in the tank wagon reseller channel be materially reduced?

A. Yes, it would.

6399 By Mr. Austin:

Q. What is the nature of the expense charged by the respondent to Account 250 on Respondent's Exhibit 101, "General Office Expense—Accounting Department"?

A. It represents a portion of the expense of the general office in Chicago—general office credit and accounting departments—which have been assigned to the Detroit field for the year 1940.

Q. Did you state that that was the expense of the general office credit and collection department and the general office accounting department?

A. Yes, sir.

Q. Do the expenses included in that account embrace not only salary expenses of employees but also Federal and State insurance contributions, retirement and annuity expense, and traveling expense and other incidental expenses?

A. Yes, sir, they include a portion of all of the costs incident to the operation of the credit and accounting departments in the general office at Chicago. That would even include depreciation on office building and every expense incident to the operation of that office for those particular functions.

Q. Do you mean every expense incident to the operation of that office which is charged to those departments?

A. Yes, sir. Of course, this is the proportionate 6400 part of that expense which the company assigns to the Detroit field.

Q. It appears on page 28 of Respondent's Exhibit 99 that the total monthly expense of these departments is charged to general prorata Sub-Account 7250. This total is allocated to fields on the basis of total gallons, excluding direct shipments, and it in turn is distributed to tank-wagon channels on the same basis.

A. That means in the separate fields and ultimately on the main distribution cost report in the general office on the basis you just stated.

Q. Does that mean that the expense of these departments, assigned to a particular field, is allocated between tank-wagon reseller, tank-wagon consumer and other-method channels in the field upon the basis of field gallonage in those channels?

A. Yes, sir, it does.

Q. Is any part of the expense in that account charged to the Detroit field in 1940 allocated to automobile supplies on Respondent's Exhibit 101?

A. No, sir.

Q. I note on Respondent's Exhibit 101 that a part of the expense in Account 250 is apportioned to direct-shipment channels. Will you state how that apportionment was made?

It was allocated to classes of direct-shipment
6401 customers in Respondent's Exhibit 101 on the same
ratios as used for field expenses of the departments, that is, the accounting department and the credit-collection department.

Incidentally, that is all regarded, for accounting purposes, in the Detroit field, as the accounting department, and that is what we have been referring to as the accounting department in the Detroit field.

Q. I think Mr. Boatwright's testimony was that the expense of the Accounts Receivable and credit sections of the field accounting department was used for the allocation of credit and collection expense from the general office, whereas the balance of the accounting department expense was used as a basis for allocating the expense from the general office accounting department.

A. That is correct, a separate separation was made in the allocation.

Q. Can you refer to the page of the record where that explanation is set forth, Mr. Warmack?

A. The separation is shown on page 127 of Respondent's Exhibit 100.

Q. I would also like to refer to Mr. Boatwright's testimony at page 5553 of the transcript in this connection.

Could you state a little more specifically how that separation was made in the allocation to direct-shipment channels?

6402 A. Yes, sir. The ratio of hours spent by employees in the field credit and accounts receivable departments on direct-shipment business to their total hours was applied to the credit and collection department expense of the general office, that is, that portion of the general office expense which had been assigned to the Detroit field for the purpose of making the separation of this class of expense as between direct shipment customers, and that separation is shown on page 127 of Respondent's Exhibit 100, and a similar ratio was obtained for the balance of the employees in the accounting department.

Q. In which accounting department?

A. In the accounting department in Detroit, and that ratio was applied to the general office accounting department, that portion of the general office expense which was assigned to the Detroit field, in order to make a separation of that class of costs to direct-shipment customers in the Detroit field for the year 1940, and that separation is shown on page 127 of Respondent's Exhibit 100.

Q. Now, on Respondent's Exhibit 101, what happens to the rest of the expense in Account 250 that is not allocated to direct-shipment channels by the methods which you have just described?

A. The remaining part of that expense is apportioned
to the three channels on Respondent's Exhibit 101
6403 on the basis of gallonage, exclusive of direct-shipment
gallonage.

Q. What three channels?

A. Tank-wagon reseller, tank-wagon consumer and the other-method channels, the three channels which we have been referring to as bulk-plant channels.

Q. Is the expense of the field accounting department in Acount 200 allocated between bulk-plant channels on Respondent's Exhibit 101 on a gallonage basis?

The Witness: What is the question?

(The question referred to was read by the reporter.)

The Witness: No, sir, it is allocated on a basis of effort, as established by a tabulation of the time in the Detroit office.

Q. Then, do I understand that in allocating a part of the expense in Account 250 to direct shipment business, the respondent in this cost study followed the allocation of expense in Account 200, but that in allocating the remainder of the expense in Account 250 between bulk-plant channels on Respondent's Exhibit 101 the respondent did not follow the allocation of expense in Account 200?

A. It did not, that is correct.

Q. What is your opinion of that method of separation of the expense in Account 250 for the purposes of this study?

May I amplify that question: In your opinion does such
a method of allocation provide a proper basis of
6404 comparison between costs in the tank-wagon reseller
channel and costs in the jobber-gasoline channel in
Account 250?

A. In my opinion it does not, Mr. Austin, but I think that I should go farther than that with reference to that point.

Q. Well, I will ask you further questions, Mr. Warmack, but I wish you would first devote your attention just now to the methods of allocation just described and you may, if you wish, assume for the purpose of answering this particular question that the method used in allocating the expense in Account 250 to direct-shipment channels, that is, following Account 200, is an acceptable method. Just assume that for the purpose of this question. I think it will facilitate your answer here.

A. Yes, sir. On that assumption, the methods employed in the separation of that portion of expense appearing in Account 250 on Respondent's Exhibit 101 as being applicable to bulk-plant channels were not separated between the three channels in accordance with proper accounting methods.

Q. And if the expense in Account 250 had been allocated between all channels on Respondent's Exhibit 101 following the allocation of the expense of the field-credit, collection, and accounting departments, would the result be to materially decrease the amount of expense in Account 250 entered in the tank-wagon reseller channel?

A. Yes, sir, it would be.

6405 Q. I now wish to refer to pages 5557 to 5559 of the record where Mr. Boatwright stated that the general office accounting department includes many departments that are not carried in the field at all and whose duties do not parallel the duties of the field accounting departments.

Mr. Boatwright there stated that it wouldn't be logical to distribute the general-office accounting expense between bulk-plant channels by following distribution of effort of the field accounting department as between those channels. Assuming that to be true, Mr. Warmack, that is, assuming Mr. Boatwright's testimony to be correct regarding the activities of the field accounting department,—

A. Yes, sir.

Q. —in your opinion, has the respondent followed a correct or acceptable method of allocation in distributing expense in Account 250 to direct-shipment channels on the basis of the distribution of effort in the field-accounting department?

A. On that assumption, Mr. Austin, and based on that statement, it is my opinion that it has not.

Q. What is the reason for that opinion?

A. It is stated in the testimony by Mr. Boatwright at the pages just mentioned by you that the duties of employees in the credit department and the accounting
6406 department in the main office do not parallel the duties of the field office accounting and credit departments.

If they do not parallel the duties, then, in my opinion, it would be necessary to make a study of what influences the costs in the general office to the end of determining what functions in the Detroit field influence those costs, and such a study and ultimate analysis would have to be made in the apportionment of these costs of the general office if they are to be used in determining a cost differential.

In other words, if it is a fact that the general office costs must be applied on a basis of separation in what we have been terming more or less direct application, then it would be necesary to make a study and analysis of those costs as just explained to determine the influencing factors and the extent of influencing factors whereby measuring factors may be established, if that particular class of expense is going to be used for the purpose of proving a cost differential.

Q. Did you inquire whether any study had been made of the functions and expenses of the general office accounting department to determine what portion, if any, of the expense of that department is allocable on other than a gallonage basis between different channels or classes of customers?

A. Yes, sir.

6407 Q. Where did you make such inquiry?

A. I asked Mr. Houghton, and he was not able to furnish me any information with respect to any cost study having been made. At least he stated that he was not.

Q. Is it possible that a cost study of the general office accounting department, based upon its own activities as related to the entire business of the company, might afford some cost differential as between the different classes of customers or products?

A. Yes, sir, it is possible, but I want to call attention to this point: that is one of the most difficult problems that accountants have to face, and that is a separation of general expenses for the purpose of proving a cost differential.

Q. In view of Mr. Boatwright's testimony that the general accounting department includes departments that are not carried in the fields, what is your opinion as to whether a part of the expense of the general office accounting department may properly be apportioned to the Detroit field on a gallonage basis and used for the purpose of establishing a cost differential as between tank-wagon-reseller channel and jobber-gasoline channel?

The Witness: May I have that question?

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

6408 By Mr. Austin:

Q. When I said allocated to the field on a gallonage basis, I am referring to the fact that the expense in that account is allocated between all fields on a gallonage basis, not distributing all of it to a particular field.

A. You mean all gallonage, or all bulk-plant gallonage?

Q. The record shows that the distribution of the expense of the general office accounting department between fields is on an all-gallonage basis, excluding direct-shipment gallonage.

A. Yes.

Q. At that point you get a part of an expense to a particular field. Now I am asking you whether that part of the expense so reaching the Detroit field may properly be used for the establishment of a cost differential.

Mr. Hanley: Off the record.

(Discussion off the record.)

6409 Trial Examiner Ballinger: Do you understand the question?

The Witness: Yes, sir; I believe I do, your Honor. It is not susceptible of a yes or no answer, in my opinion.

A. In the first place it would seem necessary to me that an allocation be made to fields on some basis, that some study made at some time would determine to be equitable and sound and reasonable from an accounting standpoint, and it might be that a study would show that a gallonage allocation would be sound and equitable and reasonable.

Now, Mr. Austin, if that were done, and it were found, as a result of some study as just outlined, that the gallonage allocation to the field were O. K., and satisfactory from an accounting standpoint, then you have another study coming right on top of that, that has to be made if this class of expense is going to be used for the purpose of proving a cost differential, to determine what factors influence that cost and how much they influence it.

By Mr. Austin:

Q. Well, would that study be made on the basis of field activities, or would it be a study of the activities of the department in Chicago?

A. It would be a study of the activities in Chicago, unless you could establish by some reasonable study that the activities in the general office reasonably followed
6410 the activities in the field office.

Q. No, I asked you to assume that that was not the case.

Mr. Hanley: That being the situation, the respondent moves to strike the answer of the witness, on the ground that it obviously is not responsive to the question propounded.

The Witness: Well, I can explain it on that assumption.

Trial Examiner Ballinger: The answer is stricken, and the witness may now proceed with his answer on that assumption.

By Mr. Austin:

Q. I ask you to assume two things, Mr. Warmack: First, that the gallonage basis was used between the field—and I think your answer was responsive on that part, if your Honor please—secondly, that according to Mr. Boatwright's testimony, the general office accounting department performs function and has certain activities which are not performed and that are not present in the field.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

Trial Examiner Ballinger: Read the answer from the point where I asked him "Do you understand the question?"

(The reporter read the record beginning with:)

"A. In the first place, it would seem necessary 6411 to me that an allocation be made to fields on some basis," and ending with the last question as above recorded.

Trial Examiner Ballinger: That portion of the answer of the witness beginning with: "In the first place it would seem necessary to me that an allocation be made" may be stricken.

Mr. Hanley: The record having been re-read, and the Court having ruled that only a portion of the answer should be stricken, the respondent now moves that the entire answer be stricken, since the re-reading of the record disclosed that counsel for the Commission asked the witness in the original question to make an assumption which the re-reading of the record discloses the witness says he did not make in his answer, and that respondent is entitled to have the entire answer stricken, unless the witness says that his answer is responsive and was made on the assumption that he was originally asked to make.

Trial Examiner Ballinger: Motion denied.

By Mr. Austin:

Q. Mr. Warmack, from your study of Chicago, the activities of the accounting department, your discussions with Mr. Houghton, and your reading of this record, in your opinion is there any foundation to support, from an accounting standpoint, the allocation of the expense in Account 250 to bulk plant channels on a gallonage basis?

6412 A. Positively not.

Q. And is there any support for the allocation of this expense in that account between direct shipment channels, following the distribution of the expense in Account 200?

A. In my opinion there is not. We are dealing here with costs of a general nature, and when you are dealing with costs of a general nature it is necessary, very necessary, to make a proper, thorough, sound and complete analysis of the costs and studies of the functions influencing those costs, if you are to establish any measuring factors that are adequate.

As an alternative, if you should make a study of other costs which these costs may reasonably follow, thereby you may establish measuring factors for their separation. Failing either of the two, a separation, in my opinion, goes into wild flights of fancy.

Mr. Austin: I suggest that we now adjourn until two o'clock, your Honor.

Trial Examiner Ballinger: The motion is granted, and now at 12:30 o'clock p. m., the hearing stands in recess until 2 p. m. today.

(Whereupon, at 12:30 o'clock p. m., a recess was taken until 2 p. m. this day.)

6413 Afternoon Session—2:00 p m.

Trial Examiner Ballinger: Come to order. You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination by Mr. Austin.

Q. Turning now to Account 255 on Respondent's Exhibit 101 entitled "General Office Expense—General Manager's Department," it appears from Respondent's Exhibit 100 that this account contains the expenses of a number of departments or sub-departments in the respondent's general office at Chicago. A list of the sub-departments, the expense of which is included in this account, is stated on page 127 of Respondent's Exhibit 100, and it appears on page 122 of Respondent's Exhibit 100 that the expense in this account is the sum of the expense of several departments working under the supervision of the general manager.

The first three sub-departments are grouped together on page 127 of Respondent's Exhibit 100 for the purpose of allocating a part of the expense of those sub-departments to direct-shipment channels. Those three departments are, first, Supervision; second, Sales Research; third, 6414 Statistical—Personnel.

Mr. Boatwright stated on page 5568 of the record that supervision represents expenses incident to the following positions, as follows: The vice president in charge of the sales department, the general manager of sales, the man in charge of operating functions of the sales department, the assistant general manager of sales, and four assistant general managers.

There is also, at pages 5569 to 5571 of the record, some description of the duties and functions of the sales-research department and the statistical-personnel. As a result of your investigation of these departments in Chicago, Mr. Warmack, do you care to make any further statement as to the nature of the functions of the sales-research department or the statistical-personnel department as a basis for testimony regarding the expenses of those departments?

A. While in Chicago, Mr. Austin, I secured a statement showing the functions, given by the company, of the statistical and personnel department. If it is desired, I can give that in the record. It is a part of the statement here.

Q. I wish you would give that description because I believe Mr. Boatwright's description by his own admission at the time was not entirely complete, at least as to the statistical portion of that department.

A. Of course, Mr. Boatwright assisted in working up this, in preparing the whole story of the statistical and personnel department, while I was in Chicago.

6415 The functions of the statistical and personnel department of the general office fall largely under three broad classifications:

(a) Maintaining records, conducting investigations, and following through on problems of personnel for the entire organization, including sales department and other departments.

(b) Serves as the company representative and contact source on all questions of gasoline tax evasion and other rackets in the oil industry and is an active participant in numerous petroleum committees organized for the purpose of proper enforcement of these tax laws.

(c) Under present emergency conditions, members of this department serve as a company liaison representative on all questions of sabotage, espionage, and subversive activities with Army, Navy, Federal Bureau of Investigation, and other defense units.

During the year 1940, functions performed by this department fell almost entirely under (a) and (b) above.

(C) is an emergency condition and represents a portion of the effort under existing conditions.

That is a statement of the statistical and personnel departments.

I also secured a statement in the offices on gaso-
6416 line and refined oil department, but I do not believe
that you have gone into that as yet, have you?

Q. Not as yet.

What is the total amount of the expense of the three sub-departments which is charged to the Detroit field and shown on Respondent's Exhibit 101 for 1940?

A. $26,680.27.

Q. Is a part of the expense of those three sub-departments allocated to direct-shipment business on Respondent's Exhibit 101?

A. Yes, sir.

Q. And how is that allocation made?

A. The allocation to classes of direct-shipment customer and product was based on ratios representing the effort in the Detroit field chargeable to jobbers by products and to other direct-shipment customers.

That statement is shown on page 422 of Respondent's Exhibit 100.

Q. I omitted a question which I should have asked you first, perhaps, and that is: How is a portion of the expense of the sub-departments assigned to the Detroit field?

A. The expense of these departments is allocated to fields on an all-gallonage basis, excluding direct shipments, and is in turn allocated among channels within a field
on the same basis. That is taken from a statement on
6417 page 29 of Respondent's Exhibit 99.

Q. I think that I would like to have you state those methods of allocating a little more fully, Mr. Warmack. In the first place, when you say that there is an allocation to fields on an all-gallonage basis, excluding direct shipments, just what gallonage was used for that purpose?

A. Bulk-plant gallonage.

Q. I mean what gallonage of the company? Just explain what would be done in making such an allocation?

A. The bulk-plant gallonage of each field would be assembled and a prorata part of the total for the respective fields would be allocated to the field.

I don't know if that explains it sufficiently.

We have 27 fields in the company's setup. Each of those fields sell gasoline and other petroleum products. The bulk-plant gallonage of each field is shown separately. The ratio that the bulk-plant gallonage of one field bears to the total for all fields is the ratio applied to this total expense for the allocation of this class of expense to the field.

Is that O. K.?

Q. Yes. Will you proceed now and state what is done with the portion of that expense which is assigned to the Detroit field in distributing it between channels on Respondent's Exhibit 101?

6418 A. The portion of that class of expense which was allocated to the Detroit field was separated between channels in the field, that is, tank-wagon reseller, tank-wagon consumer, and other-method channel on the basis of bulk-plant gallonage, and that excludes direct-shipment gallonage.

Q. Was a part of it assigned to automobile supplies in the regular accounting procedure?

A. No, sir—I beg your pardon, a part of the total expense in Account 255 was assigned to automobile supplies in the regular accounting procedure.

Q. Do you know from what sub-departments that automobile supplies entry comes, or is it a prorata portion of all of them?

A. If I may review for a minute, I can probably answer your question.

It is stated on page 3 of Respondent's Exhibit 99 that a portion of the class of expense entitled "Sales Promotion Reseller."

Q. And there is also a department in the General Manager's Department, is there not, Mr. Warmack, entitled "Sales Promotion—Automobile Supplies." I believe that is referred to on page 31 of Respondent's Exhibit 99.

A. That is correct. Those are the only two references, I believe, to an allocation of costs to automobile supplies. That is the cost appearing in this Account 255.

6419 Q. And is any part of the expense of the sub-departments which we were referring to, that is, the supervision, sales research and statistical-personnel charged to automobile supply business on Respondent's Exhibit 101?

A. No, sir. Of course, you will understand, Mr. Austin, that my answer is based upon what is in this record. I have not made a detailed analysis of this account in the offices of the company.

Q. Now, I believe you described how the expense of these three sub-departments, after being allocated in part to the Detroit field, is charged between tank-wagon reseller, consumer and other-method channels, and you previously testified that there was also an allocation to direct shipment customer and product on the basis of ratios representing the effort in the Detroit field.

Will you explain that a little more fully?

A. Yes, sir. The hours applicable to the direct-shipment business were determined by the respondent's accountants and the ratio that those hours bore to the total hours of employees in the Detroit field for the year 1940 was used to determine what portion of this class of expense respondent's accountants applied to the direct shipment business in the Detroit field.

The separation between the direct shipment channels was made on the same basis.

6420 Q. Is that the same basis that was used for allocating a part of Mr. Raupagh's salary to direct-shipment channels?

A. Yes, sir, for the most part of the salary, that is, that portion of the salary that was not directly assigned to direct shipments.

Q. Referring now only to the supervision sub-department in Account 255, what is your opinion as to whether the expense of that department which is assigned to the Detroit field may properly be allocated between channels in the Detroit field upon the basis of effort of employees in the field for the purpose of establishing a cost differential as between tank-wagon reseller and jobber gasoline.

(The reporter read the question.)

Q. (Continuing) Referring now only to supervision sub-department?

A. Well, I follow that thought, Mr. Austin, with respect to allocation of supervisory costs that they should follow in their allocation the effort of the persons supervised.

That means, of course, that if the person or group of people supervised are in fact supervised and the supervisory official's activities are not too remote from the person supervised, it is my opinion, from the standpoint of sound accounting, that that is a proper method of allocation.

In this particular instance there is, in my opinio
6421 a question as to using the effort of every employe
in the Detroit field. It seems to me that it would i
stretching the imagination to some extent to assume tha
the supervision in the general office went to the office bo
and charwomen or such other minor personnel in a fiel
office, but from the standpoint of sound accounting tha
plan is generally followed, that is, for the supervisor
compensation and expenses to follow the allocation of th
expenses of the persons supervised.

Does that answer your question?

Q. Yes.

Now, let us assume for the purpose of this next que
tion that it is decided that an allocation of the expen
of this sub-department charged to the Detroit field is to b
allocated to and between direct-shipment channels on th
basis of distribution of total effort of employees in th
Detroit field. What is your opinion as to the propriet
for the purposes of this cost study, of allocating the r
mainder of the cost of that sub-department between bul
plant channels on a gallonage basis and not according
distribution of effort of employees in the field.

The Witness: May I have that question?

Trial Examiner Ballinger: Read the question.

(This question referred to was read by the r
porter.)

6422 A. It is my opinion that the allocation on a bu
plant gallonage is incorrect from the standpoint
sound accounting. Effort would seem to be a more re
sonable approach to the solution from the standpoint
sound accounting, and I believe that resort to the measu
ing factors as shown by gallonage might be consider
as a quick, ready measuring factor, without ever havi
established the factor as sound and correct, and that
would be accurate, from the standpoint of sound accoun
ing.

If the measuring factor established on the basis of e
fort is going to be used, then from the standpoint of sou
accounting it is my opinion that it should be used and n
be switched, whereby a portion of the expense will
measured on the basis of effort, and another portion
the expense measured on a basis of gallonage, unless

thorough accounting analysis of what I have termed "factual and objective cost study" were made, whereby it could be proven whether or not a gallonage factor would be the most reasonable and would afford the most accurate figures.

Trial Examiner Ballinger: Am I to understand from your answer that in substance it is that consistency should be adhered to unless there is very good reason disclosed, as a result of investigation, for a difference?

The Witness: Yes, sir; that is a part of it, Judge. Another thing, in my opinion, is what the attorneys 6423 call "best evidence."

Trial Examiner Ballinger: You will have to explain that when you apply it to an accounting proposition.

The Witness: From the accounting standpoint, your Honor, supervisory costs, in my opinion, should follow the costs and expenses of those supervised.

Trial Examiner Ballinger: That is what you would call "consistency", isn't it?

The Witness: I think that is good accounting. That assumes that the person supervised is not so remote from the supervisor that the supervisory activities would lose their identity, so to speak, as it moved down the line.

Resorting to dollar sales, units sold and such like, as a measuring factor, gets away from accounting, in my opinion, completely unless a study is made to determine that those methods are proper and sound, and that the results to be obtained by the use of them are reasonably accurate results.

By Mr. Austin:

Q. Did the respondent in the course of this cost study make a study—

Mr. Hanley: Objected to, unless it is shown that the witness knows.

Mr. Austin: If you will wait 'till I finish the question, Mr. Hanley.

Mr. Hanley: I am sorry. I thought you had finished.

6424 By Mr. Austin:

Q. Did the respondent, in the course of this cost study, make a study of the distribution of effort of the employees in the Detroit field, to determine the portion of such effort spent on the three classes of business represented by the direct shipment channels?

Trial Examiner Ballinger: If you can answer that question of your own knowledge, do so; if you are answering upon information furnished you, so state, and the source of your information.

A. Yes, sir. That information was taken from various places in Respondent's Exhibit 100, and I found that to be a fact in my review of the records of the respondent company in Detroit during the early part of this year.

By Mr. Austin:

Q. In the course of this cost study did the respondent make any study or determination of the proportion of effort of its employees in the Detroit field devoted to the business represented by the respective bulk plant channels?

Mr. Hanley: That is the question I objected to formerly, and is the question counsel asked, instead of the corrected one.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as above recorded.)

Trial Examiner Ballinger: If you know, you may answer.

6425 A. They did not. And that information was furnished me by Mr. Houghton in Detroit.

Trial Examiner Ballinger: Is your answer based solely on what Mr. Houghton advised you?

The Witness: Not solely, Judge. We have a cost report here which is Respondent's Exhibit 100, in which there is a rather complete outline of what the company did do in its cost survey, and there is not one word in this report that states that any study as to the distribution of effort between bulk plant channels was ever made.

Mr. Hanley: Of course, your Honor, I think the respondent has objected to these conclusive statements by the witness as to what the respondent did because Mr. Houghton told him something. Mr. Houghton may have told him something, and we haven't any objection to his saying what Mr. Houghton told him, if he states what he said to Mr. Houghton, but the conclusion of this witness that the respondent did not make the kind of a cost study that this witness has in mind, because Mr. Houghton said they had not made a cost study, is the purest kind of hearsay, and your Honor has ruled extensively against the respondent on hearsay objections in this case. There must have been a meeting of the minds of Warmack and Houghton, and Warmack and Gillis, or whoever he said he talked to, before this evidence is any good at all, or is binding in any way upon the respondent.

6426 This is a serious objection, for the reason that the respondent has continuously, over years of time, made numerous cost studies and is continuously making cost studies, I am sure, of a factual and definitely objective character. It is utterly unfair that we should be bound by what someone else says.

Trial Examiner Ballinger: The witness' answer goes no further than the basis stated for the answer.

Mr. Hanley: If your Honor please, we have asked that the witness be required to state specifically what he said to Mr. Houghton and what Mr. Houghton said to him, and has not been required as yet to specify. He has just given conclusive answers, and it is to that that my objection goes.

Trial Examiner Ballinger: Off the record.

(Discussion off the record.)

By Mr. Austin:

Q. When you were in Detroit, Mr. Warmack, in addition to talking with Mr. Houghton and other officials of the company, did you or did you not have access to the work sheets of Mr. Boatwright and his assistants, which were the basis for the preparation of Respondent's Exhibits 99, 100 and 101, and which outlined the work done by them in the course of this cost study?

A. Yes, sir; I have full access to all the working papers. I also had Mr. Houghton there to help me in my review of them.

6427 Q. Did you make any examination of those working papers; and did you acquaint yourself, according to your belief, with the methods and procedures that were followed by the respondent in the course of his studies?

A. I most certainly did.

Q. Will you now direct your attention to the sales research department and the statistical and personnel department, the activities of which departments have already been referred to, and would you state whether, in your opinion, the expense incurred by the respondent through those departments is an expense of a nature which is susceptible to allocation between customer or product channels in the particular field for the purpose of establishing a cost differential?

A. It is my opinion, Mr. Austin, based upon the functions of these departments, that the costs therein in each instance offer such a resistance to any separation that could possibly be made as between the classes of customers and the cost of serving those classes of customers in the Detroit field, that I don't know how on earth they could be separated on any reasonable or sound basis for the purpose of establishing a cost differential in the Detroit field. They are of such a general nature, is the reason for that answer.

Q. Is it or is it not your opinion that these costs are of such a nature that they may be assigned with a reasonable degree of accuracy to different classes of customers
6428 or products in a particular field?

A. It is my opinion that they can not. As I just stated, they are of such a general nature that I do not see how any separation could be made, from the standpoint of sound accounting, in order to secure a cost differential by the use of these particular costs.

You might consider this in connection with my answer: that if a considerable amount of time of either one of these departments were devoted primarily to one single field during a given period, to the end that they could be considered as current costs of distribution in that field, then I could conceive of a man making some study whereby such costs might be separated on some reasonably sound basis, but looking at them as general costs in the home office of the company at Chicago, I don't see how they could be separated with any reasonable degree of accuracy sufficient to determine a cost differential in one single field.

In further answer to that, if you could establish some class of expenses which could be assigned directly in a single field, and you could establish by proper study that this class of expense would be allocated and assigned on the basis of that expense in a field that was most susceptible to the separation for the purpose of determining cost differential, then a general cost such as this might—and I say "might" advisedly—might follow that allo-
6429 cation. I see no such refinement as that in the separation made by respondent.

Q. Has any such study or separation been made by the respondent of the expense of these sub-departments in distributing that expense among fields on a gallonage basis, and again, distributing it in the particular field on a gallonage basis as between channels?

Trial Examiner Ballinger: As far as you know or could ascertain.

A. Not so far as I know or could ascertain. I made inquiry with reference to this particular item of expense while I was in Chicago, and I was told that no such study had been made. Mr. Houghton told me that.

By Mr. Austin:

Q. If a study or analysis of these general offices, departments were made, Mr. Warmack, from the standpoint of sound accounting could such a study be made of the entire activities of the department, as related to the entire business of the company, or could such a study be made only of the portion of the department expense allocated to the single field on a gallonage basis?

A. It would have to be made of the total expense and all of the activities of the department in order, first, Mr. Austin, to determine what costs of the activities of this particular department in question would be applicable to the field, and then the separation would have to pro- 6430 ceed from that point, that is, to determine how the portion applied to a field should then be apportioned as between customer classification, product classification, or both.

Mr. Hanley: You are expressing that as an opinion?

The Witness: Yes, sir.

By Mr. Austin:

Q. I don't believe I asked you as to the sales research and statistical personnel department, as to the method of allocation used by the respondent in charging a part of that expense to direct shipment channels on Respondent's Exhibit 101. Was the method used the same as the method used for the supervision expense?

A. Yes, sir.

Q. You may have answered that previously. And was the balance of the expense in the sales research and statistical personnel department shown on Respondent's Exhibit 101, assigned to the bulk plant channels in the same way that you stated for the supervision sub-department?

A. Yes, sir.

Q. And that was on a gallonage basis, was it not?

A. Yes, sir. It was assigned to bulk plant channels on Respondent's Exhibit 101 on the basis of bulk plant gallonage, which is exclusive of direct shipment gallonage.

Q. What is your opinion as to the soundness of the methods of allocation applied to the expense of these
6431 two sub-departments on Respondent's Exhibit 101?

A. My opinion in connection with that very point, as given for the supervisory department, is the same as my opinion in answer to your general question.

Q. Well, you gave several expenses chargeable to the supervisory department, some of them based on supervision considerations, and I think you had better state your opinion specifically there for these too, if you can.

6432 A. Very well, sir.

Q. I am referring now to the use of the two methods of allocation which you have just described.

(There was a discussion off the record.)

A. In my opinion they are unsound from the standpoint of sound accounting and for exactly the same reasons given in answer to the identical question of supervisory cost, but I can restate that, if you want.

Q. Perhaps you better, for clarity.

A. In the first place, allocations were made between direct-shipment channels on the basis of effort of employees in the Detroit field, and an allocation of this class of expense was made to bulk-plant business on the basis of bulk-plant gallonage in the Detroit field, which, of course, is exclusive of direct-shipment gallonage.

If a basis of effort is proper and sound in one instance, in my opinion it is certainly proper and sound in the other instance, that is, if a basis depending upon the effort expended in the direct-shipment business is to be used, then, from the standpoint of sound accounting, and in order to be consistent, it seems to me and it is my opinion that the same basis should be used in the distribution of the cost as between bulk-plant channels, and that is especially true, unless a study were made to determine and prove conclusively that the gallonage basis of allo-
6433 cation between the bulk-plant channels were sound and reasonable and would afford an accurate separation of this class of expense.

Q. I wish to refer to one other sub-department, the expense of which appears in Account 255 on Respondent's Exhibit 101. That is the gasoline and refined oil department.

What portion of the expense of this department in the general office is assigned to the selling activities of the respondent?

A. 75 per cent.

Q. And what happens to the other 25 per cent?

A. It is charged to the manufacturing department of the company.

Q. Reference is made in this connection to page 29 of Respondent's Exhibit 99.

Before going further with the question of allocation, will you state briefly what the duties and activities of this department are?

A. I believe, Mr. Austin, that Mr. Boatwright testified to some extent with reference to that and when Mr. Marshall also was on the stand he testified to some extent with respect to the activities of the gasoline and refined oil department.

Q. Who is Mr. Marshall?

A. Mr. J. C. Marshall is the head of the department.

I have a statement here which was prepared in the 6434 Chicago office of the company which will be further enlightening on the activities or functions, if you would like that. It is a short statement.

Trial Examiner Ballinger: You may read it into the record.

Mr. Hanley: Who made it, please?

The Witness: Mr. Boatwright, I think, Judge, had the most to do with the making of the statement.

Mr. Hanley: Don't you know who made it?

The Witness: He handed it to me.

Mr. Harley: Oh.

Trial Examiner Ballinger: You may read it into the record.

The Witness: The functions of this department are outlined on page 5573 of the record and, upon inquiry, find that these functions represent the obligations and responsibilities of this department. The department head, Mr. J. C. Marshall, and his assistant, Mr. H. K. Apel, work in a supervisory function and follow activities both as to tank-car sales and tank-wagon sales. Because of the dual nature of functions performed, inasmuch as these two members do not now or have not in the past maintained a time record, they explained that an effort to split the time between the two functions would be largely arbitrary.

The next two men in the department are Messrs.
6435 E. C. Daly and E. K. Ballard, who work both on
tank-car and tank-wagon sales problems, prices, and contracts, with Mr. Daly giving major, although not exclusive, attention to the consumer side, while Mr. Ballard gives major, although not exclusive, attention to the reseller side of their marketing problems.

These four men in a supervisory capacity are assisted by a staff of ten members working in a clerical or stenographic position. Of these ten, two clerks devote the major part of their time to price problems, and on the other hand, one devotes the major part of his time to tank-car business.

By Mr. Austin:

Q. Is this department concerned directly with direct shipment business of the respondent?

A. Yes, sir.

Q. I call attention to the statement on page 123 of Respondent's Exhibit 100 as follows:

"This department handles all work in connection with bulk-station prices and sales to customers buying in large quantities for shipment direct from our terminals."

Now, Mr. Warmack, will you state first how a part of the 75 per cent of the expense of this department, which is charged to sales, is allocated to the Detroit field?

A. That is shown on page 30 of Respondent's
6436 Exhibit 99. The proportion of this expense which
is charged to the sales department is first allocated to the tank-wagon reseller, tank-wagon consumer and other-method channel on the basis of the total sales in gallons, excluding direct shipments or refined oils, tractor fuels, naphthas and gasoline, in each channel.

Q. What channels are you referring to, Mr. Warmack? Are you referring to channels on Form 189, or are you referring to something else?

A. I am referring to product channels; at least, I am reading here on page 30.

Q. I want to know what page 30 means when it talks about channels. Specifically, does it mean channels within a field, or does it mean channels as applied to the entire business of the company, if you know?

A. I think the next sentence clarifies it.

Q. Just please answer my question, if you can, first. Will you read the question back?

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

The Witness: Mr. Austin, all I have in the world to go by is these exhibits and this thing I have here in the record. I will have to give you my interpretation of them. That is the only thing I can answer from.

By Mr. Austin:

6437 Q. If you don't know any more than is on the exhibit, I don't think there is any point in trying to go beyond the exhibit.

Mr. Hanley: The respondent agrees with counsel's statement in connection with the entire examination of this witness.

Mr. Austin. May we have a five-minute recess?

Trial Examiner Ballinger: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

By Mr. Austin:

Q. You have quoted from Respondent's Exhibit 99, page 30, a statement to the effect that the expense of the gasoline and refined oil department, or 75 per cent of that expense, is allocated to tank-wagon reseller, tank-wagon consumer, and other method channels on the basis of total sales in gallons, excluding direct shipments of refined oils, tractor fuels, naphthas and gasoline in each channel. Will you state further how the expense so allocated to channels is then allocated to fields?

Trial Examiner Ballinger: Also state the source of your knowledge.

The Witness: It is allocated to fields on the basis of the proportion of sales of these products by fields,

6438 that is, the ratio that one field would bear to the total for the company.

Trial Examiner Ballinger: And what is the source of your knowledge?

The Witness: That is shown, your Honor, on page 30 of Respondent's Exhibit 99.

By Mr. Austin:

Q. Now, as a basis for the next question, I would like to refer to Mr. Boatwright's testimony at page 4966 of the record where he says:

"Direct shipments are not a part of the gallonage used in allocating expenses of the general office, general manager's department, either to the fields or to channels within a field."

What is your opinion as to the soundness of the use by the respondent of the gallonage method for distributing the expense of the gasoline and refined oil department between bulk-plant channels, eliminating direct-shipment gallonage from the gallonage used for the allocation?

A. In my opinion it is unsound from the standpoint of sound accounting.

This department is engaged in the handling of work incident to direct-shipment gallonage and also in connection with sales through bulk-plants and, in view of that fact, according to this allocation, the direct-shipment 6439 sales would just take no part of this class of expense; although the records show that this department is concerned with that class of business.

That answer, of course, is directed to the regular accounting procedure of the respondent company.

Q. Have you an opinion as to what procedure should be followed for the purpose of determining what portion of the expense of this department is chargeable to the company's direct-shipment gallonage?

A. You say what procedure should be followed? Is that your question?

Q. That was the question, yes.

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

The Witness: Mr. Austin, I don't know what procedure should be followed in making the allocation, but the proper procedure in my opinion for making the allocation could be established by some reasonable study of the functions and the activities of this particular department.

Q. Would that be for the purpose of determining what part of the expense of this department was incurred in connection with its direct-shipment business activities?

A. Yes, sir, it would be a study to determine what portion of the expense should be assigned to the bulk-plant

business and what portion of the expense should be
6440 assigned to the direct shipment business.

Q. If the portion of the expense which should be assigned to the direct-shipment business were determined, then, in your opinion, should that expense be applied to direct-shipment gallonage for the purpose of determining unit costs for direct shipment gallonage?

A. That is entirely conjectural. A study might disclose that that should be done and it might disclose that that should not be done.

Mr. Hanley: May I ask a question to clarify this, your Honor?

Trial Examiner Ballinger: You may.

Mr. Hanley: As a matter of fact, wasn't that kind of a study just the kind of a study that was made as reflected in Respondent's Exhibit 100, where an allocation of expense of the refined oils department was directly allocated on the unit basis to direct jobber shipments? Isn't that what you mean by a study?

I refer to the study as reflected and explained in Respondent's Exhibit 100 on page 123 and as reflected in the expense items allocated in jobbers—naphtha and gasoline channel, in Account 255 on Respondent's Exhibit 101.

The Witness: Judge Hanley, that is not the kind of a study that I have just been trying to describe, which in my opinion would afford possibly proper methods
6441 for the allocation of this class of expense, if this
class of expense is going to be used in determining cost differentials. The page you refer to states that the allocation of expense to classes of direct-shipment customers and products was based on ratios representing the combined selling effort of the Detroit field, excluding any charges on jobber—other products.

6442 By Mr. Austin:

Q. Mr. Warmack, the allocation referred on page 123, Respondent's Exhibit 100, is an allocation of what part of the expense of the gasoline and refined oil department?

A. That portion of that class of expense which respondent assigned to direct shipment business in the Detroit field.

Q. Does the allocation described on page 123 of Respondent's Exhibit 100 have any reference to the method used by the respondent in determining how much of the expense of that department should be assigned to the Detroit field?

A. No, sir.

Mr. Austin: My previous question, your Honor, was directed to the method of allocation to the field, whereas this exhibit has only to do with the separation of the amount of expense already allocated to the field.

Q. Now, you have just stated, Mr. Warmack, I believe quoting from page 123 of Respondent's Exhibit 100, that the portion of the expense of this department assigned to the Detroit field is allocated to direct shipment channels on Respondent's Exhibit 101, according to ratios representing the combined selling effort in the Detroit field, no charge being made to the jobber-other products channel. In your opinion, does the distribution of effort of the employees in the gasoline and refined oil department, Chicago—referring now to the department as a whole—follow the distribution of effort of employees in the 6443 Detroit field?

A. Of course, without making a study, I could not say yes or no to that, but from the knowledge of what the selling effort is in the Detroit field, what the functions are of this department that I have been able to obtain knowledge of these matters, I should rather doubt that the efforts of this department would follow the efforts in the Detroit field.

Q. Is there any support in this cost study or in this record, in your opinion, for the use of distribution of effort of employees in the Detroit field as a means for allocating the expense of the gasoline and refined oil department assigned from Chicago?

A. I certainly have seen no study that would prove that to be the fact.

Q. Can you answer my question? I don't believe you have answered it.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:)

"Is there any support in this cost study or in this record, in your opinion, for the distribution of effort of employees in the Detroit field as a means for allocating the expense of the gasoline and refined oil department assigned from Chicago?"

Trial Examiner Ballinger: Is there or is there not?

The Witness: Your guess is as good as mine, 6444 Judge. I haven't seen any.

By Mr. Austin:

Q. You have no opinion on that?

A. It is my opinion that there is none.

Q. That is what I asked you in the first place.

A. I beg your pardon.

Q. You stated a while ago that 25 percent of the expense of the gasoline and refined oil department is charged by the respondent to manufacturing, and 75 per cent of it to sales?

A. Yes, sir.

Q. Did you make any inquiry as to the basis or support, if any, which respondent has for such an allocation?

A. Yes, sir; I did.

Q. And would you state what inquiry you made and what you ascertained in that regard?

A. I asked Mr. Houghton where the company got the ratios from, and what the company had done to prove the reasonable accuracy of the ratios—that is, the separation factors—and Mr. Houghton states to me that it was the company's best judgment. As a result of that, I asked for any documentary evidence which would be the result of any possible study that may have been made. Mr. Houghton stated that he knew of no such documentary evidence or further information that he might offer to support this allocation basis.

Q. For the purpose of determining what part of 6445 the expense of the gasoline and refined oil department is chargeable to direct shipment business, what is your opinion of the method used by the respondent here of, first, allocating a part of the expense of that department to channels on a gallonage basis, exclusive of direct shipment gallonage; next, allocating a part of the expense in each channel to the field on a gallonage basis; and, third, then withdrawing from the result of the two previous gallonage allocations an amount which is assigned to direct shipment business on the basis of field effort?

A. In answer to the whole question, it is my opinion that the methods used are unsound and unreliable, and not productive of any accurate results from the standpoint of sound accounting practice and procedure.

Mr. Hanley: If your Honor please, that is a compound question, and was answered before there was an opportunity to object, and I do not care to strike the answer or move to strike the answer if I may ask the witness if he means by that answer that he sees nothing at all right about anything that the respondent did in the handling of the expense of the gasoline and refined oil department.

Trial Examiner Ballinger: You may.

Mr. Austin: I assume that that question is limited to the purposes of this cost study?

Mr. Hanley: It is limited to everything that he had
6446 been testifying about—it includes everything he has
been testifying about in connection with that department's expense.

Mr. Austin: Well, the testimony of the witness has been restricted to the purposes of the cost study.

Mr. Hanley: The answer may not be an answer.

Mr. Austin: I want to object to the question unless it be restricted to the cost study. In other words, the witness' testimony has not been directed to the propriety of what the respondent has done for its own accounting procedure. He has been discussing only what should be done or what has been done for the purposes of the cost study introduced in this case, and if Judge Hanley's question is so limited I have no objection.

Mr. Hanley: All right, I will limit it.

By Mr. Hanley:

Q. You may regard the question as limited, Mr. Warmack, to the discussions of that account in the testimony of Mr. J. C. Marshall, Mr. J. W. Boatwright, Respondent's Exhibit 99, Respondent's Exhibit 100, Respondent's Exhibit 101, and your own investigation, either in Detroit or in Chicago or anywhere else you may have ever made an investigation.

The Witness: May I have the question read?

(The reporter read the record as follows:)

"Mr. Hanley: If your Honor please, that is a compound
question, and was answered before there was an op-
6447 portunity to object, and I do not care to strike the
answer or move to strike the answer if I may ask the witness if he means by that answer that he sees nothing at all right about anything that the respondent did in the handling of the expense of the gasoline and refined oil department.

"Trial Examiner Ballinger: You may.

"Mr. Austin: I assume that that question is limited to the purposes of this cost study?

"Mr. Hanley: It is limited to everything that he has been testifying about—it includes everything he has been testifying about in connection with that department's expense.

Mr. Austin: Well, the testimony of the witness has been restricted to the purposes of the cost study."

A. The answer, in response to Mr. Austin's question, was limited entirely to determining results from the allocation of this particular account for the purpose of proving a cost differential.

Q. Will you please answer my question? You have answered Mr. Austin's question.

A. I shall endeavor to, Judge Hanley.

Q. It is a simple one. If you see anything right about it, the answer is "Yes;" if you see nothing right
6448 about it, the answer is "No."

A. What do you mean by "right"?

Q. That is for you to decide.

A. You are asking the question.

Trial Examiner Ballinger: Answer the question if you can.

A. Your Honor, I stated, in answer to Mr. Austin's question, that I thought the methods employed were not productive of accurate results from the standpoint of sound accounting, and for the purpose of determining a cost differential. There could be a possibility in the various and sundry handlings of an account, the making of calculations, that the calculations would be just as right as rain, but when I am asked a question that nothing is right—

Trial Examiner Ballinger: From the standpoint of proper accounting?

A. Before I could answer that question, I would have to take this account and analyze every item in it, and see every calculation that has been made, before I could answer the question, your Honor. The word "right" is all-inclusive.

Mr. Hanley: I tried to limit the question, your Honor, to those things that this man has studied, and I am asking about the rightness of the procedures, not arithmetical calculations.

The Witness: As far as the rightness of precedure
6449 is concerned, as set forth in Respondent's Exhibit 100, for the purpose of determing the cost differential it is my opinion from the standpoint of sound accounting that the methods employed are not proven as being sufficiently

accurate to prove a cost differential. The methods employed by the respondent, as set forth in Respondent's Exhibit 99, in its regular accounting procedure, which has nothing to do with a cost differential, and which are wholly and entirely for the managerial purposes of the company, I have no objection to, as far as the allocations are concerned, from any accounting standpoint. If they satisfy the management of the company they should satisfy everybody else in the world.

Mr. Austin: I move to strike that answer of the witness on the ground that it is unresponsive; that the witness was directed to the question which referred specifically only to this cost study, and his last answer is about something that he says did not affect the cost study.

Mr. Hanley: If your Honor please, I submit to the motion to strike, on the ground that it is unresponsive, and that the witness has not answered my question, and I will not pursue the matter any further. Of course, in agreeing to the motion to strike, I don't mean physically.

Trial Examiner Ballinger: The motion is granted. It will be stricken.

6450 Proceed, Mr. Austin.

By Mr. Austin:

Q. Is any of the expense of the gasoline and refined oil department, general office, allocated to direct shipment business in the company's regular accounting procedure?

A. No, sir.

Q. Was the company's regular accounting procedure used for the purpose of determining the amount of the expense, that is, the total expense, entered for this department in Account 255 on Respondent's Exhibit 101?

The Witness: Will you read the question?

(The reporter read the question as above recorded.)

Q. Do you understand the question, Mr. Warmack?

A. I would be glad if you would reframe it, Mr. Austin.

Q. I will try and explain it. I want to know how the amount of expense in Account 255, which appears in the total for that account on Respondent's Exhibit 101 was determined? And I can refer you to page 127 of Respondent's Exhibit 100, which gives the total expense for that department used in Exhibit 101, as $3,924.53.

A. That is gasoline and refined oil.

Q. Where did that figure come from, or how was it determined, if you know?

A. That figure represents the portion of the gasoline and refined oil department which was assigned to the Detroit field for the year 1940 in the company's regu-
6451 lar accounting procedure.

Q. Is that expense of $3,924.53 the identical amount of expense which was assigned for this account and department to the Detroit field by the company in its regular accounting procedure?

A. Yes, sir. I would like to clarify that. That is only one of the several parts of the account 255 which is assigned to the Detroit field.

Q. I understand, but I am referring only to the gasoline and refined oil department.

A. A just don't—off the record.

(Discussion off the record.)

Mr. Austin: I would like to ask for a recess, your Honor, and just talk to the witness for a moment and see whether there is anything else we want to take up this afternoon. I am not sure.

Trial Examiner Ballinger: We will take a recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: We will come to order.

Mr. Austin: Your Honor, the witness has had rather a tedious period on the witness stand, and I have concluded the questions which I have prepared. I would like a reasonable period of time to check up what we have gone over, and decide whether there is anything
6452 that has not been covered, and I believe the witness is also preparing an exhibit, which I hope will be of use and may be introduced, and which will require some more work, in view of the fact that the witness was unexpectedly taken ill the day prior to the opening of these hearings. I therefore move that we adjourn until Saturday morning at 9:30.

Trial Examiner Ballinger: The motion is granted. Now, at 4:45 p. m., this hearing will stand adjourned, to be reconvened July 11, 1942, at the hour of 9:30 a. m., in Room 532, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 4:45 o'clock p. m., July 9, 1942, the hearing in the above-entitled matter was adjourned.)

6453

Room 532, Federal Trade
Commission Building,
Washington, D. C.
Saturday, July 11, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., Attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Illinois,) appearing for the Respondent.

6454 PROCEEDINGS.

Trial Examiner Ballinger: Come to order. The hearing of Docket 4389, case entitled "In the Matter of Standard Oil Company of Indiana" is convened pursuant to notice at 9:30 a. m., July 11, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C. The last hearing was held in this same room, same city, July 9, 1942.

The reporter will note counsel for the Commission and the Respondent present.

You may proceed.

Mr. Austin: I will recall Mr. Warmack.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination by Mr. Austin (Continued).

Q. It appears from the testimony and exhibits, Mr. Warmack, that the Respondent has certain employees in the Detroit field which are called "plant supervisors, plant superintendents," and also "tank wagon and warehouse superintendent"; that these supervisors and superintendents have direct charge and supervision of the bulk plant and tank wagon and warehouse activities of the Respondent in the Detroit field.

It further appears that a portion of the salaries 6455 of these individuals entered in account 000 represents a portion of their time spent in a supervisory capacity. What is your opinion as to the method used by the Respondent for the allocation of salaries of these individuals between bulk plant channels on Respondent's Exhibit 101? The method used was the all-gallonage method, excluding direct shipment gallonage, as shown on page 19 of Respondent's Exhibit 99, with the exception of tank wagon superintendent, whose salary is allocated on a gallonage basis between tank wagon reseller and tank wagon consumer channels.

A. It is my opinion that these supervisory officials' time and activities should follow the allocation of the salaries and expense of the persons supervised. There is a possibility that certain parts of this class of expense might be assigned directly based on the activities of the supervisor, but as I have testified previously, it is my opinion that the supervisors' salaries and expense should follow the allocation of the salaries and expenses of the persons supervised, particularly and especially since the persons supervised are not so remote from the supervisor that he would not be really exercising any direct supervision over them.

Q. Is it your understanding that the plant superintendents and supervisors do exercise direct supervision over the bulk plant operations of the company, particularly in metropolitan Detroit?

6456 A. That is my understanding, Mr. Austin.

Q. Referring, now, to account 280, the construction and maintenance department at the general office. According to Respondent's Exhibit 99 the expense of this department is allocated to fields, and to channels on a gallonage basis, excluding direct shipment gallonage. It appears on page 125 of Respondent's Exhibit 100 that a portion of the expense of construction and maintenance which is charged to the Detroit field was in turn allocated in part to direct shipment business on the basis of the ratios as applied to the activities of the Detroit field construction department.

A. Do you mean applied to direct shipments on that basis?

Q. Yes, the allocation between bulk plant channels is on a gallonage basis, according to Respondent's Exhibit 99.

A. But to direct shipments on a basis of effort?

Q. Well, it is except—I am just quoting from the exhibit, Mr. Warmack.

A. Yes, sir.

Q. Does that mean, Mr. Warmack, that the same method of allocation and the same percentages were applied to the expenses in account 280 on Respondent's Exhibit 101 that were applied in allocating the expense of the field construction department entered in accounts 000 and 001?

The Witness: May I hear the question read?

6457 Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Yes, sir.

By Mr. Austin:

Q. You have given some testimony regarding the method of allocations used by the Respondent in distributing expense of the field construction department between channels on Respondent's Exhibit 101. Does your testimony in that respect equally state your opinion as to the method of allocation used for the expense in account 280?

A. Yes, sir. It does. There is one other point that I think should be brought out there.

Q. Yes.

A. I question the measuring factor used by the Respondent in the first place in assigning this class of expense of the general office as between fields. In that instance, a gallonage factor is used, and in my inquiries made at the company's office early this year, I was unable to obtain anything to support such a separation.

If that class of expense is going to be separated between fields and used for the purpose of determining a cost differential, then it is my opinion that every measuring factor all along the line be determined and proven by some cost study or analysis. Otherwise the separation borders largely on the arbitrary.

6458 Does that answer your question, Mr. Austin?

Q. Yes, Mr. Warmack.

Will you now refer to account 260 which contains the expense of the advertising department at the general office in Chicago.

A. Yes, sir.

Q. At page 124 of Respondent's Exhibit 100 is stated that, "Expense of this department applicable to jobber distribution was obtained by applying the ratio of jobber osts in account 075 to total advertising expense in account 075."

You have given considerable testimony regarding the dvertising expenditures of the company charged to acount 075, Mr. Warmack. What is your opinion as to the se by the Respondent in this cost study of the expense f the advertising department in Chicago falling into ccount 260 for the purpose of establishing a cost differntial?

A. It is my opinion, Mr. Austin, that the methods employed in the separation of this account for the purpose f establishing a cost differential, and as set forth in Respondent's Exhibit 100, page 124, are unreliable, unsound, nd not based upon anything which can even be considered s approaching sound accounting procedure.

Q. What is your reason for that opinion, Mr. Warmack? would like to have you go into the matter sufficiently, t least, to tie up with your previous testimony on account 075, if you can.

6459 A. The expense included in this account 260 entitled "Advertising Department" is applicable to all f the expense of the company's advertising department t its home office. This expense is then of necessity separated between fields. That portion of the expense which was assigned to the Detroit field, and which was used in the company's separation of the costs for the purpose of determining a cost differential, was separated in accordance with the separation of account 075 in the Detroit field. Account 075 in the Detroit field turns largely to advertising for consumer acceptance such as newspaper advertising, billboard advertising, and various and sundry classes of advertising which turn largely to that class of advertising which is for consumer acceptance.

Advertising for consumer acceptance was not assigned to jobber business; that is, no part of it was assigned to jobber business.

It is my opinion that that was erroneous and not proper. I have previously testified at length on that. In view of the fact then that you are picking up an expense and using a measuring factor which I consider improper, why, naturally, if your measuring factor is incorrect, whatever is measured by it, the result will be incorrect, unsound, and unreliable.

6460 Q. Are you referring now to the measuring factor applied to account 260?

A. I am referring to the measuring factor applied to account 260 which according to Respondent's Exhibit 100, page 124, the measuring stick of which was taken from account 075.

Mr. Austin: Your Honor, I would like a short adjournment, and I would like to have time for Mr. Warmack to see what progress is being made upon the sheets that we are planning to offer in evidence.

Trial Examiner Ballinger: We will take a recess for five minutes, or such longer time as may be necessary.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Austin: I would like to have this sheet marked for identification, your Honor.

Trial Examiner Ballinger: The reporter will mark the document Commission's Exhibit 133 for identification.

(The document referred to was marked "Commission's Exhibit 133" for identification.)

Mr. Austin: This sheet marked Commission's Exhibit 133 for identification is a sheet which I have asked Mr. Warmack to prepare, and which is now offered in evidence for the purpose of showing the effect of the elimination from Respondent's Exhibit 101 of the accounts and
6461 expenses which it will be the contention of the Commission's attorney have not been sufficiently proved and established by the Respondent to afford a basis for establishing a cost differential in this case.

The accounts and expenses which have been eliminated are those which it will be contended are either improper for use at all for the purposes of this cost study, or which it will be contended have been improperly allocated, or which it will be contended have not been sufficiently proven to justify their acceptance as a part of Respondent's cost justification in this proceeding.

The accounts and expenses listed on this exhibit in many instances are accounts and expenses which, due to the extensive nature of the task which the Commission had in analyzing Respondent's accounting system and cost study, we have not found it practicable to explore or analyze. Therefore, in offering this exhibit it is not conceded that any of the costs and expenses listed thereon are proper expenses for establishing a cost study, nor is it conceded that even if the expense may be proper expenses for that purpose, that the allocations and treatment of those expenses made by the Respondent are correct, or are accepted as establishing the differential shown at the bottom of the sheet.

However, it is not the purpose of the Commission's attorney, for the purpose of this proceeding solely,
6462 to attack the differential shown as the result of the
expenses listed on this sheet beyond perhaps in some instances doing as the Respondent did with its Exhibit 31-Q, and claiming that in some cases the expenses on this sheet are such as to favor the Respondent in so far as they are not separated with entire accuracy.

To sum up again, it is offered solely for the purpose of showing what is attacked by the Commission in this proceeding, and what is not, and not as any offer to show what it is conceded the Respondent has actually established in the way of a differential.

If this is not entirely clear, and Respondent's counsel has any questions as to the purpose, I will be glad to have him ask such questions.

Mr. Hanley: If your Honor please, I will just confess it is about as clear to me as a London fog now.

You are offering this as an exhibit now, are you not?

Mr. Austin: Yes.

Mr. Hanley: May I ask a few questions of the witness?

Trial Examiner Ballinger: You may.

Mr. Austin: Well, I will state, if I may, before you ask any questions, there are a few accounts on here, perhaps
eight or ten accounts, as to which the figures are
6463 not the same as the figures entered in the tank wagon
reseller and the jobber naphtha and gasoline column on Respondent's Exhibit 101.

If this is received in evidence I will question the witness and have it appear on the record as to just how those figures were arrived at. The balance of the figures on this sheet are the actual figures taken from Respondent's Exhibit 101, from the tank wagon reseller and the jobber naphtha and gasoline column; in other words, showing the differential that is shown on Respondent's Exhibit 101 for those accounts.

Mr. Hanley: Mr. Warmack, in the few moments at my disposal since this has been handed to me, I have checked a few of these accounts against the figures appearing on Respondent's Exhibit 101, and I find that the same—from the statement of your counsel just made—indicates that there may be some which are different.

Will you please point out which of these accounts in Commission's Exhibit 133 for identification have figures different from those appearing on Respondent's Exhibit 101?

The Witness: Yes, sir.

(There was a discussion off the record.)

Mr. Hanley: Mr. Warmack, as I understand counsel's explanation of this exhibit, Commission's Exhibit 133 for identification, certain of these accounts have been lifted bodily from Respondent's Exhibit 101 without any
6464 change in figures; is that correct?

The Witness: That is correct.

Mr. Hanley: I understand from what you said a moment ago that some of these accounts in Commission's Exhibit 133 showed different figures from what the same numbered accounts show in Respondent's Exhibit 101.

The Witness: That is correct. They do.

Mr. Hanley: Have you now, Mr. Warmack, placed an "X" mark against the account—which "X" mark appears in the left hand margin of Commission's Exhibit 133 for identification—against each account number which shows different figures in Commission's Exhibit 133 for identification from the same corresponding numbered account shown on Respondent's Exhibit 101?

The Witness: Yes, sir.

Mr. Hanley: Are those particular accounts so identified by an "X" mark the following numbered accounts:

025, entitled "Direct rental expense,"

055, entitled "Vehicle Tank Expense—other than mounted on company chassis";

066, "Miscellaneous Operating Expenses";

200, "Office Expense—Salaries Accounting";

208, "Credit Information Expense";

243, "Taxes, Federal Insurance Contributions";

244, "Taxes, Unemployment Insurance";

6465 255, "General Office Expense—General Manager's Department";

520, "Annuities and Retirement Plan Expense";

525, "Death Benefits"?

The Witness: Yes. Those accounts that you have just called are marked "X" alongside the account numbers and represent the accounts which show a change from figures as shown in your Respondent's Exhibit 101.

Mr. Hanley: Are all other accounts appearing on Commission's Exhibit 133 for identification identical in figures with the figures that appear in the corresponding account number in Respondent's Exhibit 101?

The Witness: Yes, sir. That, of course, is subject to check for some typographical change or error. I have not checked this sheet since it was prepared, Judge Hanley.

Mr. Hanley: Referring to the third line from the bottom on the left entitled "Total Unit Gallons" opposite which in the first column on the right appears the figure 69,301,586. What does that mean, Mr. Warmack?

The Witness: That means the total gallons in the Detroit field for the year 1940 sold through tank wagon reseller channel, and that figure was taken exactly as it appears in the third line from the bottom of the tank wagon reseller column on Respondent's Exhibit 101.

6466 Mr. Hanley: In the same line, and in the last column appears the figure 15,296,828. What does that represent?

The Witness: That represents total gallons as shown in Respondent's Exhibit 101 under the channel and at the foot of the page, representing total gallonage sold through jobbers; that is, gallons of naphtha and gasoline.

Mr. Hanley: Referring you to the dollar totals on Commission's Exhibit 133, I will ask you if those are the total of the respective columns of figures under which they appear?

The Witness: Yes, sir. That is the total of each of the columns.

You will understand, Judge, that I have not checked those since it was prepared.

Mr. Hanley: Well, subject to any arithmetical correction that may be necessary.

Trial Examiner Ballinger: That is what it is intended to represent.

Mr. Hanley: And of course I assume, Mr. Warmack, that those totals give consideration to the changed figures in these various accounts which you indicated as being different from what appears on Respondent's Exhibit 101?

The Witness: Yes, sir.

Mr. Hanley: What does the dollar denominated figures under "Tank wagon reseller" column, as follows: 6467 0.7102 represent?

The Witness: This represents the average per unit cost of the tank wagon reseller business, using the cost of $492,114.20 as shown on Commission's Exhibit 133 for identification, divided by the total units; that is, 69,301,586 for that channel.

Mr. Austin: I move to strike the entire answer on the ground that it is immaterial.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Mr. Hanley: I will reframe the question.

Referring you to the figure at the bottom of tank wagon reseller column on Commission's Exhibit 133, as follows: .7102 cents. What does that mean?

The Witness: That means an average cost per unit of .7102 cents per gallon in the tank wagon reseller column, representing the relationship of total gallons, as shown at the bottom of the column, to the expense as shown on Commission's Exhibit 133 for identification, of tank wagon reseller business amounting to $492,179.20.

Mr. Hanley: And please explain the figure .0318 cents, appearing at the bottom of the jobber, naphtha and gasoline column.

The Witness: It represents the average cost per gallon applicable to jobber, naphtha and gasoline in the
6468 Detroit field for 1940, using only the cost as shown
on Commission's Exhibit 133 for identification, of $4,877.91, divided by the total gallons of jobber, naphtha and gasoline in the Detroit field for 1940.

Mr. Hanley: Now, are we to understand, Mr. Warmack, that these average per unit cost figures of .7102 cents for tank wagon reseller, and .0318 cents for jobbers, naphtha and gasoline represent what you say the Respondent's costs were for the year 1940?

Mr. Austin: I object to that question, your Honor.

Mr. Hanley: Well, I have got to know what this exhibit means.

Mr. Austin: I am not offering this exhibit as representing Mr. Warmack's opinion at all. I am offering it as showing the contention of counsel for Commission. That is why I didn't ask Mr. Warmack any questions myself in offering it in evidence, and consequently, in view of that explanation, I object to any questions directed to Mr. Warmack as to whether this exhibit or any part thereof represents his opinion as to the cost which the Respondent has proved in this proceeding. I don't object to any questions regarding computations on here, because that was done by Mr. Warmack, and I am prepared to show what was done with each of these ten accounts where adjustment has been made. I will do that by questioning the witness.

6469 Mr. Hanley: If your Honor please, it makes no difference what counsel offered this exhibit for. If it, in fact, represents this expert accountant's computation of what he regards as the Respondent's costs, we are entitled to know it before this exhibit is received. He can answer it "yes" or "no". I don't care what he says.

Trial Examiner Ballinger: Not in the opinion of the Examiner. The Examiner understands that Commission's Exhibit 133 for identification has been presented for the sole purpose of displaying those items in Respondent's Exhibit 101 which the Commission does not now nor proposes to assail.

Am I correct?

Mr. Austin: Absolutely correct.

Mr. Hanley: Will you read that statement by the Examiner?

(The reporter read the Examiner's statement as above referred to.)

Mr. Hanley: I will ask you, Mr. Warmack, having heard the statement of the Court, if that is a correct statement and explanation of your position in respect of Commission's Exhibit 133?

Trial Examiner Ballinger: For identification.

Mr. Austin: Well that, I take it, is also objectionable, your Honor. I don't think it is a very clear question.

6470 In any event, I think that the position as to what accounts are to be assailed is one for the Commission to determine, rather than for the witness.

Mr. Hanley: Very well. I will submit to the objection.

Mr. Warmack, as an accountant for the Commission, and testifying on behalf of the Commission in this case, do you find any fault with, complaint about or criticism of the accounting figures or procedures as they appear on Commission's Exhibit 133?

Mr. Austin: I am willing that he should answer that if you can.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

The Witness: There are many figures appearing on

Commission's Exhibit 133 for identification that I would certainly question the accuracy of if they are going to be used for the purpose of proving the cost differential. Many of these figures I just have not gone into, Judge Hanley, in my studies, that is, my review of the record in the company's offices, and the procedure employed in the separation of the costs.

Does that answer your question?

Mr. Hanley: Well, if that is your answer, it answers my question.

6471 The Witness: I might say there are some of these figures that might be proper—

Mr Hanley: Well, now, I think we have gone far enough on this, so I can understand it, Judge. I just want to have this clear: As I understand it, the Commission now states that it will no longer and does not now, will not in the future, assail the accounts of Respondent as they now appear on Commission's Exhibit 133, as to their figures or procedure, which means that now, for the purposes of this trial, the Commission concedes all of the accounts appearing on Commission's Exhibit 133.

Trial Examiner Ballinger: For identification.

Mr. Hanley: And also appearing on Respondent's Exhibit 101 in identical form.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Mr. Hanley: I will state it this way. It is understood that this concession means that it goes to all accounts appearing on Respondent's Exhibit 101 and Commission's Exhibit 133, when the figures are identical, but that such concession on the part of the Commission as to those accounts on Commission's Exhibit 133 which are identified by an "X" mark, are conceded in the amount as it appears on Exhibit 133, and that such "X" marked accounts as the corresponding account appears in Respondent's

6472 Exhibit 101, are not conceded identically as they appear as to amount in Respondent's Exhibit 101.

Is that your position?

Mr. Austin: That statement as to concession is all right, Judge, for the purposes of this proceeding only. I think you did not state that.

Mr. Hanley: I said "this case."

Mr. Austin: Further, with the minor exception that I reserve the right to argue or point out that some of the

differential shown on Commission's Exhibit 133 for identification may favor the Respondent, in so far as they are not entirely accurate. For instance, there are several accounts listed on Commission's Exhibit 133 for identification as to which the witness, Mr. Warmack, testified that part of the expense in such accounts should have been allocated to automobile supply. We have not made such allocation for the purposes of preparing this exhibit. If we had, it would have resulted in a slight reduction from the amount in tank wagon reseller channel for some of these accounts which are listed on Commission's Exhibit 133 for identification; therefore, as to those accounts, there is a slight overstatement on Commission's Exhibit 133, of the amount in the tank wagon reseller channels, according to the testimony of Mr. Warmack, but aside from any such overstatement or understatement which we believe
6473 favor the Respondent, and which we do not intend to attempt to compute or argue, except in the manner I have just stated, your understanding of my purpose in offering this exhibit is correct.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Mr. Hanley: It is not very often, if the Court please, that I am reluctant to refuse what somebody thinks is a concession to me, but this Commission's Exhibit 133 for identification is now objected to for the reason that it is immaterial on the following grounds:

It is immaterial, first, because if the Commission concedes these accounts to be correctly set up by the Respondent, the exhibit is unnecessary, and the testimony either has been or will be developed from the witness Warmack anyway.

Furthermore, the concession, if it be a concession, is in the nature of an Indian gift, in that the witness who prepared it has testified that he does not concede the accuracy of the procedures of the Respondent in preparing the figures that, in part at least, are reflected on Exhibit 133, and that counsel for the Commission reserves the right to argue on the question of the propriety and accuracy of the accounting procedures of the Respondent.

Further, that certain figures appear in the accounts
6474 on Exhibit 133 differently than the same account figures appear on Respondent's Exhibit 101, and there has been no explanation of how such changes were arrived

at, and Respondent is wholly without understanding as t
what the so-called "concession" in that respect, if any
might be, or might entail, or might bind the Responden
to, and Respondent is not entitled to be bound by th
acceptance of any so-called "concession" until it is clea
what such concession may be and to what extent it ma
bind the Respondent.

Further, that the entire exhibit is immaterial and irrelevant, and indeed, useless as a matter of evidence, fo
the reason that if it represents the position of counse
for the Commission in his approach to the argument an
presentation of his case, it simply amounts to an argument
and he may use it or refrain from using it, irrespective o
its existence in the evidence.

Trial Examiner Ballinger: The Examiner will withhol
ruling on the objection until counsel for the Commissio
is afforded an opportunity to offer any testimony he may
desire, explanatory of the difference in the figures appearing on Commission's Exhibit 133 for identification, an
Respondent's Exhibit 101.

Mr. Austin: May I say this, your Honor: Judg
Hanley in his objection made the statement tha
6475 counsel for the Commission reserved the right t
argue the propriety or correctness of the accountin
procedure used by the Respondent in the amount shown o
Commission's Exhibit 133 for identification. I do not reserve any such right and do not propose to devote any tim
or argument to the procedure used as to the accounts liste
on that exhibit for identification, except those account
which are marked with an "X", and where adjustmen
is made.

The only reservation I made as to the accounts wher
the amounts shown are taken directly from Respondent'
Exhibit 101 was that I reserve the right to point out i
it is desirable that the differential shown at the foot o
the exhibit is an overstatement rather than an understatement of what the testimony will show that Responden
has proved.

Of course, when I referred to the differential at th
bottom, I might apply that to any particular account.

Trial Examiner Ballinger: The record sufficiently se
forth—

Mr. Hanley: I think, Judge, I will withdraw my objection and just make an objection on the ground of materia ity. I mean I will withdraw that long objection I made and just object on the ground of materiality. I don't see how this thing can help or hurt either side in this case, really I don't, so I will withdraw it.

Trial Examiner Ballinger: The specific objections
6476 interposed to the introduction of Commission's Exhibit 133 for identification are now withdrawn and the general objection on the ground of immateriality is interposed.

The objection is overruled and Commission's Exhibit 133 for identification is admitted in evidence.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 133 was received in evidence.)

Mr. Austin: With reference to the suggestion previously made by the Examiner, I have drafted a short statement here which I should like to have permission to have typewritten at the bottom of Commission's Exhibit 133—and I will, of course, be glad to have the same thing done on Mr. Hanley's copy. It reads as follows:

"All of the above account figures are taken from the tank wagon reseller and jobber gasoline columns on Respondent's Exhibit 101, except figures opposite accounts marked X, which have just been adjusted.)

It is agreeable that that be typewritten on these exhibits.

Trial Examiner Ballinger: Without objection, the addition will be made to Commission's Exhibit 133.

By Mr. Austin:

Q. Mr. Warmack, will you explain how the expense figure opposite account 025 on Commission's Exhibit
6477 133 was arrived at?

A. Yes, sir. On the same basis that account 021, entitled "Commissions" had been assigned to the tank wagon reseller column. In other words, the ratio that the expense assigned to tank wagon reseller column, representing commissions in account 021, bears to the total amount of commissions, that same ratio was used in assigning truck rental expense to the tank wagon reseller column.

Q. What was the figure for truck rental expense, account 025, on Respondent's Exhibit 101?

A. $37,793.36.

Q. And the figure now entered on Commission's Exhibit 133 is $22,992.31. Is that correct?

A. Yes, sir.

Q: Mr. Warmack, is the expense in account 021 all cated between all three channels, that is, bulk plant cha nels including other methods, on Respondent's Exhibit 10

A. Yes, sir.

Q: I understood you to just state that the percenta applied to account 025 in preparing Commission's Exhib 133 was the percentage reached by taking the ratio commissions in the tank wagon reseller channel to total co missions. Is that correct?

A. No, sir; it was only the commission between ta wagon reseller channels and tank wagon consum 6478 channels which was used in the allocations, the sa as between the two channels. Those two were us in the allocation, that is, the re-allocation as set forth Commission's Exhibit 133 in account 025.

Mr. Hanley: May I ask one question?

Did you adjust account 025 by the same method of a location that is used by Respondent in allocating accou 021?

The Witness: Between the reseller and consumer c umns, as shown on Respondent's Exhibit 101, yes, sir.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Mr. Austin: Your Honor, I move that we adjourn un Monday afternoon at 2:00 o'clock, so that Mr. Warma may have an opportunity to prepare his written sta ment, which may be either introduced as an exhibit read into the record, at your Honor's discretion.

Trial Examiner Ballinger: In the absence of objecti the motion is granted, and now, at twelve o'clock noon t hearing stands adjourned, to be reconvened at 1:00 p. July 13, 1942, in Room 532, Federal Trade Commissi Building, Washington, D. C.

(Whereupon, at 12:00 o'clock noon, July 11, 1942, t hearing in the above-entitled matter was adjourned.)

6479 Room 532, Federal Trade
Commission Building,
Washington, D. C.
Monday, July 13, 1942.

Met, pursuant to adjournment, at 1:00 o'clock p. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Illinois,) appearing for the Respondent.

6480 PROCEEDINGS.

Trial Examiner Ballinger: The hearing of Docket No. 4389, case entitled "In the Matter of Standard Oil Company of Indiana" is reconvened pursuant to notice, at 1:00 p. m., July 13, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held in the same place, July 11, 1942.

The reporter will note counsel for the Commission and Respondent present.

Mr. Austin: I request a recess until two p.m.

Trial Examiner Ballinger: A recess is granted, and the hearing now stands in recess until 2:00 p. m.

(A recess was taken.)

Trial Examiner Ballinger: Reconvened at 2:00 p. m. Proceed.

Mr. Austin: I did not bring up a copy of the record with me, but I believe we were at the point of having introduced in evidence Commission's Exhibit 133, and thereupon Mr. Warmack was about to explain the adjustments made in the figures shown on Respondent's Exhibit 101 for the ten accounts marked "X" on Commission's Exhibit 133 for the purpose of reaching the figures entered on that exhibit in the tank wagon reseller and jobber, naphtha and gasoline columns.

6481 WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Austin.

Q. I would be glad, Mr. Warmack, if you will start i with the first of the ten accounts, which is account 025, and explain what computations or allocations were made fo the purpose of reaching the figures for those accounts show on Commission's Exhibit 133.

A. The allocations of this account on Commission's Exhibit 133 of commissions as shown in account 021, on Respondent's Exhibit 101 were used: that is, the commissions as shown—the commissions shown in the tank wagon reseller column and the tank wagon consumer column on Respondent's Exhibit 101, which amount to a total of $362,661.17, made up of $110,300.46 shown in the tank wagon reseller column of Respondent's Exhibit 101, and $252,360.71 shown in the tank wagon consumer column of Respondent' Exhibit 101.

The $110,300.46 was related to the total of $362,661.17 whereby the percentage of 30.414 per cent was arrived at

This percentage was applied to the total truck renta expense of $75,597.79, shown in account 025 on Respondent's Exhibit 101, whereby the figure of $22,922.31 wa 6482 arrived at, and which appears in the tank wagon re seller column of Commission's Exhibit 133.

In the case of the allocation of account 055, whereby $2,374.42 was assigned to the tank wagon reseller colum on Commission's Exhibit 133, the same methods were use in this instance as was used in the re-allocation of accoun 025, just explained.

Q. Mr. Warmack, in your previous testimony regardin these accounts, I think you said that some part of the expense of these accounts should have been allocated by th Respondent to the other methods channel for the purpos of this cost study due to the fact that some of the othe methods products sold through commission channels ar delivered on side racks of these trucks.

Did you attempt to make any such allocation of th expense in accounts 025 and 055 to the other methods chan nel for the purpose of the preparation of Commission' Exhibit 133?

A. No, sir. I did not, for the reason that I did not know what portion of that class of expense might be applicable to the other methods business. It is my understanding, Mr. Austin, that a considerable part of this other methods business is shipped directly from the terminal or refineries, or other point designated by the Respondent company, to the customers directly in rural territories, and of course, 6483 I would not know from the records at hand, or what I have examined, just what portion of this direct truck rental expense should be applicable or applied to the other methods business—perhaps I should say what portion of this truck rental expense should be applicable or applied to the other methods business.

Also, that portion of account 025 representing other vehicle tank wagon expense other than mounted on company chassis, probably none of that should apply to the other methods business.

Q. I thought your testimony referred only to account 025 ~~not to~~ 055, the latter account, 055, being only the tank expense; is that correct?

A. Yes, sir.

Q. Of course, in asking you that question about account 025, I was referring to other methods products shipped through bulk plants, and not direct shipment business. Anything shipped direct from other places than the bulk plant is classified by the Respondent as direct shipment. I was only referring in my question to products handled through bulk plants.

A. I see. I have not gone into that particular problem.

Q. In any event, you have retained for the purpose of the preparation of Commission's Exhibit 133, as I understand it, the Respondent's regular accounting pro- 6484 cedure of allocating the entire expense of account 025 to the tank wagon reseller and tank wagon consumer channel; is that correct?

The Witness: What is the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Yes, sir. All of that expense is allocated to those two channels on Commission's Exhibit 133, but I have just explained, in different proportions from what Respondent had previously allocated it.

By Mr. Austin:

Q. Will you now proceed, Mr. Warmack, with your explanation of the figure opposite accounts 066, and 200, and also 208, on Commission's Exhibit 133?

A. Yes, sir. In the respective accounts 066, 200, and 208, in Commission's Exhibit 133, credit card charges for each of the accounts as shown in Commission's Exhibit 132 were deducted from charges for the Respondent's account as shown in Respondent's Exhibit 101, the difference between the amounts for the respective accounts shown in Respondent's Exhibit 101 and the amounts of the Respondent's account, Commission's Exhibit 132 appear—

Mr. Hanley: Do you not mean Commission's Exhibit 133?

The Witness: No, sir. Commission's Exhibit 132—appear in the two columns for the respective accounts on 6485 Commission's Exhibit 133.

By Mr. Austin:

Q. Will you now proceed to account 243.

A. Yes, sir. The salary accounts shown on Commission's Exhibit 116 were taken, and the figures applicable to each of the separate salary accounts were tabulated, taking the figures applicable to each from Respondent's Exhibit 101. The ratios of salaries thus determined falling in the tank wagon reseller column and the jobber, naphtha and gasoline column, with the total of such salary accounts were then applied to the total of account 243 in order to determine the amounts to each of the two columns shown in Respondent's Exhibit 133.

The same procedure was used in arriving at the figure for account 525 on Commission's Exhibit 133.

Q. Which account do you wish to take up next?

A. I would take up next account 255, but I should like to call attention first to the fact that although some portions of account 243 and 525 may be applicable to the five salary accounts shown on Commission's Exhibit 116, and included in the total thirteen salary accounts shown thereon, no portions of the total expense of accounts 243 and 525 appearing in Respondent's Exhibit 101 were deducted in making the allocations on Commission's Exhibit 133.

Q. Perhaps I can ask you a question or two, Mr. 6486 Warmack, that will help to clarify that. How many salary accounts are there listed on Commission's Exhibit 116?

A. Thirteen.

Q. How many of those salary accounts are included among the accounts listed on Commission's Exhibit 133?

A. Eight.

Q. Does that leave a balance of five of those salary accounts which are not included on Commission's Exhibit 133?

A. That is correct.

Q. Will you state those accounts by numbers?

A. Yes, sir.

Q. Please do so.

A. Account 000, account 001, account 004, account 005, account 215.

Q. Now, in determining the amounts entered on Commission's Exhibit 133 opposite account 243, did you make any deduction for Federal Social Security or insurance contributions upon the salaries of those five accounts which are not included on Commission's Exhibit 133?

A. No, sir, no deduction was made because those accounts were taken out and whatever portion is applicable to those accounts remains in Commission's Exhibit 133.

Q. Is the same true as to account 525, death benefits?

A. Yes, sir.

6487 Q. Are you now able to proceed with an explanation of account 255?

A. Yes, sir.

Q. I think, perhaps, Mr. Warmack, it would be better to take up 244 first and 520 next; they are more nearly like the two we have been discussing.

A. Very well.

Q. Suppose you proceed with account 244.

A. It involves a little explanation. Of the 13 salary accounts on Commission's Exhibit 116, five of the accounts were not included on Commission's Exhibit 133.

Q. Are those five accounts the ones you have just enumerated a moment ago?

A. Yes, sir.

Q. Proceed.

A. The total of those five accounts in dollars is $305,874. To that figure there was applied 3.03 per cent, the Michigan Unemployment Insurance tax, which gives a figure of $9,267.98. That amount was deducted from a total of $40,439.97, shown for account 244 in Respondent's Exhibit 101, leaving a balance of $31,171.99, which was adjusted or distributed to the tank wagon reseller and the jobber, naphtha and gasoline column on Commission's Exhibit 133 on the basis that the total salaries of the respective columns of the eight salary accounts appearing in Commission's Exhibit 133, bear to the total of such salaries.

6488 In the case of account 520, the total in that account of $157,014.35, as shown on Respondent's Exhibit 101, was not used in making the calculation, and in lieu thereof a figure of $26,226.38 was used representing the contributions by the company to match the contributions by employees for the purposes of annuities and retirement in the Detroit field for the year 1940. Using that figure the same procedure was used in arriving at the figure shown on Commission's Exhibit 133, as just described for account 244.

Q. Now, in saying that the same procedure was used, Mr. Warmack, you explained for account 244 that you applied to the total of the five salary accounts, included in Commission's Exhibit 116, but not included on Commission's Exhibit 116, but not included on Commission's Exhibit 133, the Michigan tax rate of 3.03 per cent.

What figure or what percentage did you apply to the total of those five accounts in making your calculations for account 520?

A. I used two per cent instead of 3.03 per cent figure.

Q. What is that 2 per cent figure? Where did you get it?

A. That figure is shown on or near the center of page 92 of Respondent's Exhibit 100, where it is stated that, under account 520, the rate of 2 per cent is applicable on the first $250 per month, and 5 per cent is applicable to any income over that amount. I only used the two ~~per cent~~ figure because I did not know what amount to apply
6489 the five per cent to, Mr. Austin, so if I was in error, I would just leave it in there. In other words, that was the best I could do.

Q. Then, is any deduction made from the expenses in account 520, in preparing Commission's Exhibit 133, for the additional three per cent applied, as stated on page 92 of Respondent's Exhibit 101, to the portion of salaries in excess of $250 per month?

The Witness: What is the question?

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

The Witness: No, sir. No part of that was deducted, although some of those salaries was not included in Commission's Exhibit 133; those are the five salaries I have just spoken about. I had no figure with which I could make a calculation.

By Mr. Austin:

Q. Account 255 remains to be explained.

A. The figures shown in Commission's Exhibit 133 for account 255 are $7,875.23, as shown in tank wagon reseller column, and $23.16 in the jobber, naphtha and gasoline columns, that figure shown in the tank wagon reseller column is made up of two parts; that is, $6,440.70 and $1,428.53.

In determining the first figure of tank wagon reseller—the tank wagon reseller gallonage in the Detroit field
6490 for 1940 representing 65.8 per cent of the total bulk plant gallonage for the field for the year was related to the item marked "real estate and operating expense" $9,905.81, on Respondent's Exhibit 100, page 127, in arriving at the total of $6,440.70.

Q. What is the regular accounting procedure of the Respondent in allocating their general office and real estate department expense to the fields and to channels?

A. On a basis of bulk plant gallonage by months.

Q. Did you make an allocation by months or on an annual basis?

A. No, sir. I made it on an annual basis. That was the only figure I had available.

Q. May that result in some slight difference in the figure in applying that to this gallonage?

A. I would think it would make very little difference. I made tests on that while I was in Detroit, and I do not think it would make a great deal of difference. I did not find it made a great deal of difference on the other accounts. I did not make tests on this particular account.

In arriving at the other figure of $1,428.53, that is the one just referred to, the percentage of 47.3, as shown in Respondent's Exhibit 99, page 31, as being applicable to the tank wagon reseller business was applied to an item amounting to $3,020.15, representing sales promotion
6491 resale and shown in Respondent's Exhibit 100, page

127. The item of $23.16 as shown in Commission's Exhibit 133 for account 255 representing costs applied by Respondent's accountants to jobber, naphtha and gasoline on Respondent's Exhibit 101, is made up of two parts, the first part is $20.39, representing a portion of sales promotion, wholesale expense, as contrasted with the one just mentioned being the retail resale expense—as shown on page 127 of Respondent's Exhibit 100, and the item of $2.77 representing sales promotion resale as shown on the same page.

Q. Are the component parts of that figure of $23.16 in the jobber, naphtha and gasoline columns opposite account 255 on Commission's Exhibit 133, taken directly from the Respondent's Exhibit 100?

A. Yes, sir. It is on page 127.

Q. Are the two amounts which you have stated the amounts which were charged by the Respondent to jobber naphtha and gasoline for the sales promotion wholesale and sales promotion retail sub-departments of the general manager's department?

A. Yes, sir.

Q. Why was no part of the expense of the sales promotion wholesale sub-department assigned to the tank wagon reseller in the preparation of Commission's Exhibit 133?

A. Because that department is not concerned with tank wagon reseller business.

6492 Q. Did the Respondent in the preparation of its exhibits 100 and 101 charge any part of the expense of that department to the tank wagon reseller channels?

A. No, sir.

Q. I notice once or twice that you have referred to Commission's Exhibit 101, did you not mean Respondent's Exhibit 101?

A. Yes, sir.

Q. And if you referred to Respondent's Exhibit 133, were you referring to Commission's Exhibit 133?

A. Yes, sir. I may have made a slip of the tongue.

Mr. Austin: If your Honor please, I would like to call attention to additional correction that should be made on Commission's Exhibit 133 opposite account 507, the title of that account is shown as "Miscellaneous" and that should be "Losses—Miscellaneous"; and I would like to have permission to correct the title of that account, Trial Examiner Ballinger: Without objection, permission is granted.

Mr. Hanley: It may be corrected.

(There was a discussion off the record.)

Mr. Hanley: If your Honor please, it is suggested that the now revised Commission's Exhibit 133 be retyped to include the explanatory notes, and the marked accounts,
and any changes in account nomenclature on the ac-
6493 counts which they may desire to include, and that
the new Exhibit No. 133 be filed as the official exhibit offered by the Commission.

Trial Examiner Ballinger: Commission's Exhibit 133 may be re-typewritten with proper corrections, may be submitted to counsel for the Respondent, and when approved, will be substituted for Commission's Exhibit 133 heretofore admitted in evidence.

Mr. Hanley: It may be understood now, if your Honor please, that this substitution is a matter of convenience and there will be no objection other than the objections already made to the exhibit.

Trial Examiner Ballinger: On the ground of immateriality?

Mr. Hanley: Yes, sir.

Mr. Austin: I have no further questions of the witness, your Honor.

Trial Examiner Ballinger: I think the Examiner understands that Respondent would prefer to defer cross-examination to commence tomorrow morning; is that correct, Judge Hanley?

Mr. Hanley: Judge, I can go on if you wish, but I would deeply appreciate it if you can give me until tomorrow morning.

(Witness temporarily excused.)

Trial Examiner Ballinger: The hearing will be ad-
6494 journed.

And now, at 3:15 p. m., the hearing stands adjourned to be reconvened July 14, 1942, at the hour of 9:30 a. m., in Room 532, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 3:15 p. m., July 13, 1942, the hearing in the above-entitled matter was adjourned.)

6495

Room 532, Federal Trade
Commission Building,
Washington, D. C.
Tuesday, July 14, 1942.

Met pursuant to adjournment, at 9:30 a. m.

Before: Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Illinois,) appearing for the Respondent.

6496

PROCEEDINGS.

Trial Examiner Ballinger: Come to order. The hearing of Docket No. 4389, case entitled "In the Matter of Standard Oil Company of Indiana," is reconvened pursuant to notice, at 9:30 a. m., July 14, 1942, in Room 532, Federal Trade Commission Building.

The last hearing was held at the same place, July 13, 1942.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

Mr. Hanley: Counsel for the Commission having excused the witness on direct examination, the Respondent now renews all motions both general and specific to strike the testimony as the same may have been objected to, or motions may have been made to strike from time to time.

At this time the Respondent moves to strike all of the testimony of the witness Warmack upon the following grounds and for the following reasons:

Respondent understands that the Robinson-Patman Act permits of a justification of a cost differential and that there necessarily derives therefrom an obligation on the part of the Federal Trade Commission, which is the administrative body of such Robinson-Patman Act, to learn by factual study what are the cost differentials that 6497 may apply in any particular inquiry.

It is understood that an accountant for the Commission, namely, William J. Warmack, was assigned to make a cost study with particular reference to exhibits offered by the Respondent, namely, 99, 100, and 101; it is further understood that Mr. Warmack, as accountant for the Commission, did in fact spend approximately two months in the Detroit office of the Respondent, and thereafter spent some time in the Chicago general office of the Respondent. It appears that the factual study made by Mr. Warmack did not determine any alternative methods of accounting within reasonably calculable limits, or at all, as distinguished from those methods which Mr. Warmack criticized; it does not appear from the evidence of Mr. Warmack that there is any different differential of cost as positively testified to by the witnesses for the Respondent; it does not appear from the testimony of Mr. Warmack that there is any dispute or question raised by him as to the accuracy of the arithmetical calculations or factual statements appearing in Respondent's Exhibits 99, 100, and 101; it does appear that the testimony of the witness Warmack is merely a rehash and a recitation and a reading by him of Respondent's Exhibits 99, 100, and 101.

It appears that the witness Warmack declines and refrains from giving any testimony as to the influence upon the cost differential as may be derived from his de-
6498 sire or inclination to depart from the methods and procedure employed by the Respondent.

Further, the witness Warmack has used vague, indefinite, relative, and indeterminate terms such as: "material"—"large or small reduction"—"rough estimate"—"increase"—"decrease"—"great"—"very great"—"small"—"very small"—"more"—"less."

That until and unless the witness indicates an influence or effect upon the differential positively testified to by the Respondent, the evidence of the witness Warmack is without value, or probative effect, and up until now no such evidence has been given by the witness Warmack.

With specific reference to Respondent's Exhibit No. 31, Respondent moves to strike all of the testimony of the witness Warmack inasmuch as he has testified that he made no specific study of the underlying data, record, and facts which went into Respondent's Exhibit 31, and which dealt with the year 1937.

Further, that any study of the one-half cent differential accorded Ned's Auto Supply Company for 1937 has

become moot and is no longer an issue in this litigation, whereas in the spring of 1938 Ned's Auto Supply Company began to purchase as a jobber, having at that time their own storage facilities, and being able to receive de-
liveries in tank car or tank transport amounts, gaso-
6499 line and other petroleum derivatives.

That the testimony of the witness Warmack is largely predicated upon the premise that there were no studies made by the Respondent company which resulted in the allocations as they appear on Respondent's general accounting form 189, Commission's Exhibit 119.

That in truth and in fact there were and have been and are continuously being studies made by the Respondent, with which the witness Warmack is well familiar, having to do with the propriety of the allocations, cost separation and distribution as it appears on Respondent's accounting form 189, Commission's Exhibit 119.

For the foregoing reasons the Respondent at this time moves that all of the testimony of Commission's witness Warmack be stricken and deleted from the record.

Trial Examiner Ballinger: As the Examiner understands, there are two motions submitted by counsel for the Respondent. The first motion embraces both objections to questions asked by counsel for the Commission, and motions to strike answers of the witness Warmack. There was also a continuing objection with right reserved to counsel to move to strike the testimony of the witness Warmack at its conclusion.

The objection now renewed, and the motion to strike now renewed are denied and overruled.

6500 As to the second motion now submitted, it may more appropriately be addressed to the Commission.

The Examiner, therefore, believing that it should be passed on by the Commission, has no alternative other than to deny the motion.

Mr. Hanley: May Mr. Warmack take the stand?

Trial Examiner Ballinger: William J. Warmack resumed.

Mr. Austin: Before we do that, at this time, your Honor, it may be well for me to offer to have Commission's Exhibit 133 again marked since pursuant to the stipulation on the record yesterday we have had the exhibit recopied, and, if your Honor please, at this time I would like to substitute this sheet for the one before and have it again remarked.

Trial Examiner Ballinger: The document now presented by counsel for the Commission will be marked Commission's Exhibit 133 and substituted for the original Exhibit 133, which may be withdrawn from the record.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination by Mr. Hanley.

Q. Mr. Warmack, you have been engaged for a 6501 good many years as an accountant for the Federal Trade Commission, have you not?

A. Yes, sir.

Q. I do not care to take you over the qualifications that you have already testified to. I am inclined to grant your qualifications.

I wish you would tell us, however, exactly how much time you spent in Detroit, and in Chicago, and in Washington in connection with your study of this particular case.

Mr. Austin: I object to that question so far as it relates to Washington, your Honor. I think that the amount of time that the witness may have spent with the Commission is more or less of a private matter, and the amount of time which he may have spent on this matter or any other particular matter here in the office in consultation and so forth is not a matter which the witness should be called upon to give factual testimony about.

I doubt very much whether he could, anyway, or whether he could make much more than the roughest sort of an estimate. I do not believe I could. I do not object to the question as to Detroit or Chicago, at all.

Trial Examiner Ballinger: Before the Examiner rules, he will ask the witness a question.

(To the Witness): Did you keep any memoranda 6502 as to the time spent on this case?

The Witness: No, sir.

Mr. Hanley: Well, if I may rephrase the question perhaps I can avoid the objection.

Trial Examiner Ballinger: The question is withdrawn?

Mr. Hanley: Yes, sir. I withdraw the question.

By Mr. Hanley:

Q. First, Mr. Warmack, tell us how much time yo spent in Detroit and in Chicago in your study of this particular question.

The Witness: Your Honor, I do not have the exac dates right before me.

A. I can give you approximately what they are, Judge Hanley.

Trial Examiner Ballinger: Answer to the best of your information.

By Mr. Hanley:

Q. That is all I want. I do not want the exact dates.

A. I believe that I went to Detroit around the twelft of January, 1942, and stayed until about the fifth or sixth of March, 1942.

I stayed in Detroit until March 4, or 5, or 6, when I wen to Chicago. And I was in Chicago for five or six or seven days.

6503 Trial Examiner Ballinger: During that time were you continuously engaged on this case?

The Witness: Yes, sir. Practically so. I did cover one little bit of work in Detroit, but it was relatively small.

By Mr. Hanley:

Q. Now, I do not think you have told us how mucl time you spent in Chicago. You did go to Chicago afte you finished your work in Detroit, did you not?

Trial Examiner Ballinger: Read the last portion o the witness' answer to the preceding question.

(The reporter read the following:

"I stayed in Detroit until March 4, or 5, or 6, when I went to Chicago. And I was in Chicago for five or six o seven days.")

Mr. Hanley: I withdraw the question. I find he ha answered it.

The Witness: Yes.

Trial Examiner Ballinger: The question is withdraw

By Mr. Hanley:

Q. As a matter of fact, you were in Chicago, were yo not, Mr. Warmack, on several former occasions befor you went to Detroit at all, you and Mr. Lundball?

A. We were in Chicago around the eleventh, or twelfth, or thirteenth of November, 1941. Mr. Lundball and I were there. At that time I believe that is the only occasion I had to go to Chicago except the other occasion just related in connection with this case. I conferred with Mr. Boatwright in Detroit about October 2, 3, 1941. At that time I was engaged in other work in Detroit and vicinity. I took those days to confer with Mr. Boatwright at his request. 6504

Q. Following that trip on your part to Chicago—you and Mr. Lundball?

A. Yes, sir.

Q. Did Mr. Boatwright make a trip to Washington to confer with you here in Washington?

A. Yes, sir. He conferred with us here—I am speaking from memory, of course, Judge Hanley, and not from any record of time before me. I am sure that he came here and conferred with me on the matter.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Having examined the transcript of evidence, Mr. Warmack, are you able now to make any more specific answer as to the visit of Mr. Boatwright to Washington, and your conference with him?

6505 A. I do not see right here, Judge Hanley, in this record,—(Witness indicates transcript of testimony,)—that you handed me, the place where it is specifically stated what date Mr. Boatwright came to Washington. Would you please show it to me?

Q. Well, I do not think it is very important, Mr. Warmack; did he, as a matter of fact, come to Washington and confer with you?

A. Yes, sir. He most certainly did.

Q. Irrespective of the date, that happened, did it?

A. Yes, sir.

Q. It did?

A. Yes, sir.

Mr. Austin: What is the month, or what is it that you are speaking of? Mr. Warmack does not seem to be able to tell us.

The Witness: I was under the impression that Judge Hanley was speaking with reference to a conference here held subsequent to the conference which was held in November in Chicago. That was the conference, if my memory serves me correctly, just before Christmas. I think that is the right date, but I do not know just the exact date.

Trial Examiner Ballinger: Do you mean Christmas 1941?

6506 The Witness: Yes, sir.

By Mr. Hanley:

Q. But there was a conference?

A. Yes, sir.

Q. And Mr. Boatwright came down here to Washington and talked to you and to Mr. Austin and to Mr. Lundball?

A. Yes, sir.

Q. And subsequent to that, the Respondent's Exhibits numbered 99, 100, and 101 were prepared and introduced in this litigation; is that right, Mr. Warmack?

A. I will have to look at the date. He said subsequently?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: I withdraw the question.

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Hanley:

Q. Mr. Warmack, there came a time when there was introduced into this record Respondent's Exhibits 99, 100, and 101. Do you know that?

A. Yes, sir, I do. They were.

Q. And you have studiously examined each one of those exhibits, have you not?

A. I have, I think, made a pretty fair review of 6507 them, Judge, at least.

Q. Mr. Warmack, do you dispute or question any arithmetical calculation or statement of fact that appears in any one of those three exhibits?

Perhaps I should say to you now that I am not asking you anything about your opinion as to the propriety of the accounting procedure. I am asking you simply as to arithmetical calculations and statements of fact.

The Witness: If I may have the question read?

Trial Examiner Ballinger: Read the question.

(The question referred to was read by the reporter.)

Trial Examiner Ballinger: We will have a recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Hanley: Your Honor, I think there was a pending question.

Trial Examiner Ballinger: Read the pending question to the witness.

(The reporter read the question as follows:

"Q. Mr. Warmack, do you dispute or question any arithmetical calculation or statement of fact that appears in any one of those three exhibits?

"Perhaps I should say to you now that I am not asking you anything about your opinion as to the propriety of the accounting procedure. I am asking you simply 6508 as to arithmetical calculations and statements of fact:")

The Witness: Judge Hanley, I do not question any arithmetical calculation or computation.

I do question the statement of facts, especially or particularly that statement of fact appearing on page 1 of Respondent's Exhibit 99 which reads:

"A memorandum is maintained by each salesman showing the amount of time in selling products applicable to each channel of distribution during the last month of each quarter."

I question that statement.

By Mr. Hanley:

Q. Would you please give us the result of your examination into the question of fact, Mr. Warmack?

A. Yes, sir.

While in Detroit early this year I requested Mr. Houghton, who was assigned by the company to work with me in Detroit, to produce whatever memorandum or memoranda the Respondent company had, which was referred to in that statement. Whereupon, Mr. Houghton advised me that there was no such memoranda available; that is, memoranda which shows the time spent by each salesman. No such memorandum was produced.

Q. Well, Mr. Warmack, is there any memorandum kept by the salesmen which you saw, whether this cor-

6509 rectly expresses the matter which is contained in it or not, was there any memoranda which you saw?

A. Yes, sir. I saw memoranda prepared by salesmen which showed the names of the persons called upon, and which showed the product involved or dealt upon, at each call, but there was no notation or figure or anything on those daily reports which I am referring to and which are referred to here as a time record, which showed the time spent on the separate products or channels of distribution by any one salesman. If there were any such memorandum, I never saw it.

Q. All right, Mr. Warmack, reverting to my question as to whether or not you dispute or question any arithmetical computation or statement of fact appearing in Respondent's Exhibits 99, 100, and 101, is there any other question that you have except as to the first line on page 1 of Respondent's Exhibit 99?

A. There are many questions that I have raised in connection with these three exhibits—.

Q. (Interposing.) Just a minute, Mr. Warmack. You understand I am not asking you now about your opinions as to accounting procedure.

I am asking you simply as to arithmetical computations and factual statements.

A. Yes, sir. And your question is: Are there any other statements or questions of fact—

6510 Q. (Interposing.) Any others than this one that you have just raised pertaining to the first sentence on page 1 of Respondent's Exhibit 99 having to do with memoranda of salesmen's time spent.

A. I do not recall any other, Judge Hanley.

Q. Mr. Warmack, did you investigate the records of all of the different classes of salesmen in connection with this statement—

A. (Interposing.) No, sir.

Q. —in the first sentence on page 1 of Respondent's Exhibit 99—I mean by that the automotive salesmen, lubricating salesmen, and so forth.

A. I requested Mr. Houghton to produce any memorandum or memoranda that was prepared by any salesman whatsoever covered in account 064, and that covers the salesmen which you have just mentioned.

I did not ask for a memorandum with respect to salesmen covered in account 002.

Trial Examiner Ballinger: What class—

By Mr. Hanley:

Q. Did you inquire—

Trial Examiner Ballinger: —of salesmen are covered in account 002?

The Witness: Account 002 entitled "Salaries Sales, Promotion" was not studied in our field study, your 6511 Honor, it being a small account relatively in size and that was one account which I did not cover in my field investigation.

By Mr. Hanley:

Q. Did you take occasion in your studies in Detroit, Mr. Warmack, to examine the instructions that were given to salesmen as to how they should report their time spent?

A. I asked for all information of any kind whatsoever bearing upon that one subject of salesmen.

Q. Well, did you get it?

A. And I got the daily time reports prepared by some of the salesmen.

Q. What salesmen?

Trial Examiner Ballinger: Did they furnish you any instructions issued by the company to the salesmen with reference to daily time reports?

The Witness: No, sir. I have never seen any such data or memoranda.

By Mr. Hanley:

Q. Do you know whether or not any such instructions exist?

A. No, sir.

Q. You never saw any such?

A. No, sir.

Q. But did you see some reports from salesmen indicating their time spent; that is, the allocation of their time as they worked?

6512 A. You speak about time, Judge; I saw nothing that would show anything about time except the men worked that day, and called upon a certain group of customers.

Q. That is what I am talking about.

A. I do not like to call them time reports, because there is no time shown on them except the day's work.

Q. Well, you call them what you like, but will you tell the Court exactly what you did or saw in the way of reports by salesmen as to what they did?

A. I have answered that question, Judge Hanley.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. What salesmen were they, what classes of salesmen were they, Mr. Warmack? Now, that has to do, Mr. Warmack, with any salesman whose records you saw that reported anything in the way of time spent.

A. I am sure that I reviewed some of the time or, let us call it "daily reports of salesmen" covered in account 004. I have no record to show all of the classes of salesmen referred to: that is, the time reports prepared by those salesmen.

I asked for information to be submitted to me for examination showing all time spent on calls as referred
6513 to on page 1 of Respondent's Exhibit 99, and a group
of time reports or daily reports, I might call them, were submitted to me, a large, large stack of them. Judge Hanley, showing all salesmen or all classes of sales—that I am unable to say. I am able to say this, that I ran through these reports, these daily reports and not a single one of them showed any time spent by any salesman any place.

Q. Well, now, in order that we may have this thing entirely clear, Mr. Warmack, your question about the first sentence on page 1 of Respondent's Exhibit 99 has to do with the fact that you were unable to find a time allocation in the activities of Respondent's salesmen; is that true?

A. That is correct. I should like to amplify the statement I just made, however, if I may, Judge Hanley.

Q. Surely, go right ahead.

A. With respect to time spent.

You did make a study of time spent by industrial salesmen during the month of August to establish a portion of their time to the direct shipment business and more particularly to the jobber business. Those were time records kept. That qualifies the statement which I just made.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

6514 Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Now, Mr. Warmack, in the course of your studies in Detroit and Chicago, and latterly in Washington, in which you gave attention to this case, did you determine at any time the influence in figures in dollars and cents upon the cost differential as indicated by Respondent's Exhibit 101 in respect of any of your criticisms of the procedure used by the Respondent?

The Witness: May I have the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: May I have the question again?

Trial Examiner Ballinger: Read it again.

(The reporter again read the question.)

The Witness: I am sure I made calculations, calculations and computations.

By Mr. Hanley:

Q. Mr. Warmack, will you please refer to Respondent's Exhibit 101.

A. Yes, sir.

Q. Under the tank wagon reseller column, which is the first column of figures on the exhibit, there appears the amount 1.67 cents. Do you find that?

A. Yes, sir.

6515 Q. Do you understand that that represents the Respondent's claim that that is the cost of selling gasoline and naphtha through the reseller channels?

A. Yes, sir, the cost per gallon.

Q. Cost per gallon?

A. Yes, sir.

Q. Now, referring to the fourth column under "Direct Shipment Customers—Jobbers, Naphtha and Gasoline," you will note at the bottom of the page .16 cents. Do you find that figure?

A. Yes, sir.

Q. Do you understand that it is the claim of the Respondent that the difference between the figure 1.67 and .16 resulting in 1.51 cents, is the cost differential that exists?

The Witness: May I have the record read?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: I understand that that is the claim of the Respondent, Judge Hanley.

By Mr. Hanley:

Q. Now, adverting to my former question, Mr. Warmack, in your analysis in Detroit and in Chicago and anywhere else that you have made a study of this case,
6516 did you determine what influence in figures in dollars and cents there may have been upon the cost differential by the application of your method as distinguished from the accounting methods used by the Respondent?

The Witness: May I have that question read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Judge Hanley, a study was never made. The procedure was never applied which I was advocating in separating costs for the purpose of proving a cost differential by the Respondent in the Detroit field. Therefore, to come to an exact figure in dollars and cents would be a physical impossibility.

For example, I advocated at the very beginning of this thing—of this study when a conference was held with Mr. Boatwright in August, 1941, that a study to first determine whether the commission agent business should be included with the regular salaried station agent business, and that in my opinion should be the place to begin. As far as I know, no such study has ever been made.

By Mr. Hanley:

Q. Well, we will reach that in due time, Mr. Warmack. I am just asking you now simply a question as to whether or not in the course of your studies you reached any conclusions in figures in dollars and cents that
6517 alter or modify the claimed differential of the Respondent of 1.51 cents?

A. What studies I have made certainly would modify the facts—

Q. (Interposing.) Mr. Warmack, can you answer this do you or do you not?

The Witness: May I have the question read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Surely, I made plenty of computations, Judge, and I came to the conclusion that the claimed differential of 1.51 cents per gallon to tank wagon reseller customers, jobber, naphtha and gasoline customers, had not been properly proved from the standpoint of sound accounting.

By Mr. Hanley:

Q. All right, Mr. Warmack, how much is it in figures in dollars and cents?

A. I have not been required to make any such computation.

Q. I am asking you whether or not you did?

A. I did not.

Q. Do you know how much it is off?

A. I do not.

Q. Do you know whether it is one one-hundredths of a cent or ten one-hundredths of a cent?

A. I certainly do not.

6518 Q. Are you just unable to say whether that 1.51 is a correct figure or whether any other figure is a correct figure?

A. I am unable to say.

Q. Sir?

A. I am unable to say. I do say that from the standpoint of sound accounting it is not properly proven.

Q. Are you unable to say whether from the standpoint of sound accounting, as you understand it, that the figure may be greater or less?

A. No, sir.

Q. You do not know?

A. No, sir.

Q. Is it possible, Mr. Warmack, that assuming your premises of sound accounting as you have explained them in answer to your counsel's questions, that instead of being a differential—a cost differential of 1.51 cents there might result a cost differential of 1.61 cents—do you know that?

A. I could not possibly know it, Judge Hanley; that is conjecture pure and simple.

Q. I know it is conjecture, Mr. Warmack, but do you know it?

A. Do I know what?

Do you know whether or not that could result?

6519 A. No, sir.

Q. Have you made a figuration?

A. No, sir.

Q. What? Why?

A. A figuration would not be a proper thing, you have to make a cost study.

Q. So far as you know that might happen; is that right?

A. I certainly do not know whether it would or not, Judge Hanley.

Q. That is all I am asking, Mr. Warmack, is whether or not you know.

A. Well, I do not know.

Q. Have you made any calculation at all, Mr. Warmack, in Detroit or in Chicago or in Washington, or in any place which reflects your idea of what cost differential is?

A. No, sir.

Q. You never have?

A. I have not.

Q. Are you prepared to say now, as an acountant, and leaving out of the picture the methods and the procedure, are you prepared to say now that the result, the cost differential of 1.51 is erroneous?

A. I certainly am not prepared to say that it is correct or incorrect, but I am prepared to say that it has not been proven—

6520 Q. (Interposing.) Listen: I did not ask you that. You have answered the question.

A. I beg your pardon.

Mr. Hanley: Off the record.

(There was a discusion off the record.)

Mr. Hanley: I move that we adjourn until one-thirty o'clock, p. m.

Trial Examiner Ballinger: The motion is granted.

And now, at 11:30 o'clock a. m., the hearing stands in recess until 1:30 p. m.

(Whereupon, at 11:30 o'clock a. m., a recess was taken until 1:30 o'clock, p. m., of the same day.)

6521 Afternoon Session—1:30 p. m.

Trial Examiner Ballinger: Come to order. Reconvened. You may proceed.

Mr. Warmack, will you resume the stand?

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination (Continued)—by Mr. Hanley.

Q. Mr. Warmack, I believe you have testified that you have participated in the preparation of various studies of the Federal Trade Commission relating to cost accounting; is that true?

A. Well, that is a pretty broad statement, Judge, they have been making cost studies since I was a boy, I am sure that I did not participate in them prior to 1929, or when I came with the Commission.

Q. Well, I will tell you that I have particular reference to a study published by the Federal Trade Commission under date of June 23, 1941, which has to do with a letter of the Acting Chairman of the Federal Trade Commission transmitting a report of the Commission. This is denominated as House Document No. 287 in the 77th Congress, First Session.

Will you look at it, please, Mr. Warmack, you may 6522 be able to recognize it.

A. Yes, sir. I do recognize it.

Q. Did you participate in the preparation of that document?

A. To some extent; yes, sir.

Q. I now call your attention to page 2 of the book just identified, and I will ask you if you agree with the following statement:

"Distribution cost accounting is of comparatively recent date. It is still a developing field and is becoming increasingly important as the part played by the distributing function in the nation's total economy becomes more important."

Do you agree with that statement?

A. Most assuredly; yes, sir.

Q. Quoting from page 12 of the book, I will quote and ask you if you agree with the quoted statement, Mr. Warmack:

"It became evident early in the Commission's inquiry into distribution cost accounting that there is a dearth of good case material. This situation is the result of the fact that until recently little attention had been given to this branch of accounting. The methods that are in use are undergoing change. This evolution is due, in part, to new methods of distribution in industry generally and, more especially, in those industries where a high degree of concentration of an industry has been brought about
6523 and, in part, to a greater social control, as expressed in recent legislation, to comply with which additional accounting information is necessary."

Do you agree with that statement?

A. Yes, sir. I should like to call attention to this with respect to a dearth of good material which you quoted, that statement, of course, must be weighed in the light of what has been done in the way of cost accounting generally.

Q. Go right ahead, Mr. Warmack. Well, what has been done?

A. I beg your pardon?

Q. What has been done?

A. Well, I believe in the last war, why, cost accounting; that is, accounting for production costs reacher a rather high state of development, and it is rather unusual for large manufacturers at the present time to not be able to furnish production costs, but we are talking, why—or you are referring me there to distribution cost accounting, and the point that I wish to make about the dearth of cost material, or case material, should be weighed in the light of the attention that has been given to production cost accounting, we will say, during the past twenty-five or thirty years.

Q. Mr. Warmack, let us advert to your own testimony given at the outset of your direct examination.

I think you testified as follows:

6524 "That distribution cost accounting is still in the pioneer stage of its development."

Did you make that statement?

A. I did.

Q. And just what did you mean by that statement?

A. Well, I meant that as compared with production cost accounting, why, it has not reached the stage of refinement that production cost accounting has.

Q. Now, is it or is it not a fact that competent accountants arrive at serious differences of opinion as to the proper methods of allocation of expenses in arriving at results for distribution cost accounting?

The Witness: What is the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I have heard differences of opinion, Mr. Hanley, expressed by competent accountants.

By Mr. Hanley:

Q. And is it not true, Mr. Warmack, that when such differences exist that each side might have a strong and logical support for their respective positions?

A. Well, if they do not have, they think they have, Judge Hanley, they can put up very good arguments.

Q. Well, Mr. Warmack, all I am asking you is, don't these accountants have just honest differences of opinion as to what they think is the best way to allocate
6525 expenses; that is all in the world I am asking.

A. Yes, sir, I appreciate that, Judge, but you are asking me a very, very broad, all-inclusive, all-exclusive question—that accountants may disagree honestly on one point, but on all of the other points involved there we may agree wholheartedly upon. Now, when you ask me, do we have great differences of opinion, unless we brought down the point at issue, it would be rather hard to generalize on them, Judge Hanley.

Q. Well, now, when that difference exists, and I take it it does exist from time to time—I am right about that, am I not, now?

A. It exists in this case, sir.

Q. Isn't that just a difference of judgment on the part of the accountants who may be handling the account?

A. Well, I am sure I do not impugn the good faith in this case.

Q. I am just asking you now as an expert accountant, Mr. Warmack, is it not true that many expert accountants have and that among expert accountants there is a difference of opinion about the treatment of various types of accounting and distribution, and allocation, and separation of costs?

A. Well, I am sure that all accountants do not agree on every cost separation. The point to be considered
mostly in that is the degree of accuracy that you are
6526 striving for, Judge Hanley.

Q. Well, that does not quite answer the question, Mr. Warmack.

Irrespective of the degree of accuracy, is it or is it not true that accountants differ in their judgment as to how to allocate various types of costs?

A. I think that your statement is perfectly true, as is demonstrated by this case, and the point brought out in this case, but I do not mean to say by that that every accountant in the country disagrees with every other accountant in the country on these various and sundry kinds of separations. I certainly would not object myself to separations for one purpose, and the same separations I would object to strenuously for another purpose.

Q. So far as you know, Mr. Warmack, has there ever been, either by great degree or otherwise, any norm or yardstick established as to what is the proper cost accounting procedure under the Robinson-Patman Act?

A. I do not know if there has been, Judge Hanley.

Q. If there has been you do not know about it; is that what you mean to say?

A. I do not know about it.

Q. You do not?

A. I do not know about it directly as such; that means, that a court or a tribunal would pick up a class of cost and
lay down some ironclad rule for the separation of that
6526-A cost, if I get what you mean, I have heard of no
such thing, and I think it would be very unfortunate
if such a thing were to come to pass.

Q. Now, I call your attention to page 25 of the Federal Trade Commission book referred to a moment ago, and will ask you if you agree with the following statement:

"Manufacturers, as such, have two principal functions, the production of goods and their distribution. The combined costs of performing these two functions may be segregated into the two classes, production and distribution costs. This segregation requires an allocation of all costs jointly incurred for the two functions, such as general and administrative costs. Such allocation, it must be admitted, is sometimes difficult and the result approximate."

Do you agree with that statement, Mr. Warmack?

A. Yes, sir.

Q. I call your attention to page 32 of the same book, and ask you if you agree with the following statement:

"Perhaps the reason that only a limited number of concerns have endeavored to determine selling sales promotion and other distribution costs through special analyses, and only a very few have established continuous distribution cost accounting systems, lies in the difficulty of finding a practical approach to the problem. This particularly
6527 applies to the determination of selling and sales-promotion costs applicable to commodities and customer classes, because the activities giving rise to such costs are of a less routine character than are the other distribution activities and are subject to less direct control. The relationship between the various functions involved in selling and sales-promotion and any quantitative units of measurement thereof is often very elusive. Because of the intangible association of selling and sales-promotion activities and the results accomplished, there is greater need for control of costs, but for the same reason the problem is very complicated."

Do you agree with that statement, Mr. Warmack?

A. I would like to read that statemtnt, Judge, as it is from the book.

(Mr. Hanley hands the document to the witness.)

Q. There it is marked.

A. I agree with the statement as shown, but I think the statement is very misleading if taken all by itself, and not incorporated in this record by reference the fact that the statement taken on page 31—

Q. (Interposing): Well, suppose this—

A. —and the further paragraph after the portion you quoted.

6528 Q. Well, supposing this, you take the statement as read, itself, and just make any comment that you choose to make.

A. I should think that this statement without reading in this, incorporating in the section—that is known as Section 1, "methods of allocating selling and sales-promotion costs" Section 1, introduction, and we are just hitting a few high lights, speaking principally from the basis of a broad view of the situation—

Q. (Interposing): Mr. Warmack, do you mind just taking the question that I asked you, whether or not you agree with that statement, then if you care to make any comment in amendment of your answer, all right; but please don't refer further to the book, just make any comments that you have.

Trial Examiner Ballinger: First.

The Witness: I cannot answer any of his statements picked out like you are picking something out of the Bible, without reading all the book.

Trial Examiner Ballinger: Can you not answer the statement as to whether or not you agree with that statement or disagree with it, and if you agree or disagree you may state your reasons.

The Witness: I agree with the statement if it is read as a continuing part of Section 1 marked "Introduction" on Chapter 2.

By Mr. Hanley:

6529 Q. Mr. Warmack, won't you make any statement that you want to make?

A. I agree with the section—

Q. Do you or do you not agree to that statement?

A. Well, taken in whole, I agree with it, but I do not agree with any paragraph taken alone and separate and apart as being all-inclusive and all-exclusive of the whole story.

Q. I now call your attention to page 38 of the same book and ask you whether or not you agree with the following statement:

"When time studies are conducted through the use of sales representatives' reports or observers to ascertain the time applicable to each commodity-customer cost objective for each salesman who sells a variety of commodities and calls on various classes of customers, it is frequently necessary to make certain more or less rough calculations. In complex situations of that kind, there are often no alternatives except to obtain part of the needed data on an estimated basis."

The question was whether you agreed with that statement?

The Witness: Let me see the book.

Mr. Hanley: There is just the—

Trial Examiner Ballinger: (Interposing): Mr. Warmack, this is a simple question. Cannot you answer?

6530 The Witness: I agree to that, your Honor, if taken with all of the rest of the text in Section 3, beginning with page 35 of this document.

Trial Examiner Ballinger: Mr. Warmack, can you not state what there is in the rest of this chapter that would either detract from or add to, or alter the portion that has been read to you?

The Witness: Judge, I can take this and read it every bit through.

I have not seen these cost studies made by the Commission for a year or two, and when we are taking out little short paragraphs, in the first place—for what was this particular statement made? If you take one single part by itself it is misleading, it is not conclusive of anything that can be accepted or not accepted in itself alone. It has to be taken into account as a whole.

Trial Examiner Ballinger: Mr. Warmack, will you read the portion Judge Hanley handed to you, and see if you can not answer that question.

Mr. Austin: If you do not know whether you agree with the statement without reading all of the text, you may say so.

The Witness: I do not know and I can not know what is in this document without reading the entire section that he is taking these little short sentences out of.

6531 Trial Examiner Ballinger: Let the Examiner see the document, please.

The Witness: It is at page 38.

Trial Examiner Ballinger: Very well.

The Witness: Are we off the record, Judge?

Mr. Hanley: No, we are on the record, Mr. Warmack.

The Witness: This document was not prepared, Judge, for the purpose of showing anybody how to develop costs for the purposes of proving a cost justification. Not at all. It deals with the broad aspects of the problem of cost—of distribution cost accounting. I see nothing in this to tell me where the Commission says to make a separation one way or to make a separation another way for the purpose of proving a cost differential.

Trial Examiner Ballinger: Mr. Warmack, will you read the first sentence in the portion read to you by Judge Hanley which reads as follows:

"When time studies are conducted through the use of sales representatives' reports or observers to ascertain the time applicable to each commodity-customer cost objective for each salesman who sells a variety of commodities and calls on various classes of customers, it is frequently necessary to make certain more or less rough calculations."

Now, do you know that to be a fact or do you not?

6532 The Witness: It may be necessary; in some instances it may not be necessary to, the rough calculations may be quite sufficient in some instances. It all depends, Judge.

Trial Examiner Ballinger: Would it be humanly possible to ascertain with any degree of accuracy a time study—

Mr. Austin: I object to that question.

Trial Examiner Ballinger: The objection is overruled.

Mr. Austin: I believe I have the right to state the grounds for my objection.

Trial Examiner Ballinger: You may.

Mr. Austin: The question is too broad to be intelligible, in my opinion, and is not susceptible to a definite answer because it cannot be answered unless applied to an approximate, at least, set of facts and circumstances.

The Witness: That can be my only answer, as set forth in the objection raised by the Commission's counsel.

Trial Examiner Ballinger: One moment. You are called upon here to state reasons not urged by Commission's counsel, but you are here to state your own reasons, and in your own language.

The Witness: You would have to be more specific, Judge, or I could not answer your question. "Each"—each case must stand by itself, and alone.

6533 By Mr. Hanley:

Q. Mr. Warmack, I do not care to press the question if you do not care to state whether you agree or disagree with the language quoted in my question from page 38.

I will now ask you this, whether or not you agree with the following quoted language, also from page 38, same volume:

"It is obviously very difficult, and frequently impossible, even for observers to ascertain the actual time engaged in each of these direct selling activities applicable to each commodity when the salesman handles numerous items. Perhaps the only basis of ascertaining the estimated time applicable to each commodity would be for the observers or the salesmen to report the approximate segregation of the interview time applicable to each commodity. The balance of the salesmen's time, exclusive of the interview time, would then have to be prorated to commodities on some reasonable basis according to the circumstances, such as the ratio to direct time."

Do you or do you not agree with that statement?

A. Yes, sir; I agree to th t statement, as qualified by the remaining portion of that paragraph of this chapter. That is a statement that is taken out in the middle of a paragraph.

6534 Q. Mr. Warmack, do you agree to the statement as read?

A. Not without qualifying it, Judge.

Q. All right, you make the qualification.

A. The qualification is written here.

Q. No, I am not willing to accept that answer, you can qualify it if there are any. You make the qualifications.

A. I agree to the statement, your Honor, as stated, as set forth completely.

Trial Examiner Ballinger: Now, Mr. Warmack, that answer is not satisfactory.

The Witness: I am sorry, Judge.

Trial Examiner Ballinger: If you do not agree with the portion that has been read by counsel, then please state what there is in that report that would cause you to disagree or to modify it. If you desire time in which to examine it, you may have it.

Mr. Hanley: The Respondent is perfectly willing that the witness may have whatever time he desires in that respect.

The Witness: Judge, in order for me to do that for all of these questions, I would have to read at least a portion of the sections of which these short excerpts are being taken. I cannot just read one little paragraph and come to any opinion that I would care to express upon it.

Trial Examiner Ballinger: Mr. Warmack, you are fairly familiar with that report?

6535 The Witness: I have not seen it for two years.

Trial Examiner Ballinger: The hearing will stand in recess for five minutes to afford the witness an opportunity to examine the section.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Read the pending question.

(The question referred to was read by the reporter.)

Mr. Hanley: Judge, may I start over, please, and restate the question, and present the whole thing over?

Trial Examiner Ballinger: The previous question is withdrawn.

By Mr. Hanley:

Q. I refer you, Mr. Warmack, to the quoted portion of the question, namely, that portion of the book quoted from page 38 as follows:

"It is obviously very difficult, and frequently impossible, even for observers to ascertain the actual time engaged in each of these direct selling activities applicable to each commodity when the salesman handles numerous items. Perhaps the only basis of ascertaining the estimated time applicable to each commodity would be for the observers or the salesmen to report the approximate segregation of the interview time applicable to each commodity. The balance of the salesmen's time, exclusive of the inter- 6536 view time, would then have to be prorated to commodities on some reasonable basis according to the circumstances such as the ratio to direct time."

I now ask you whether or not you agree or disagree with that statement as I have reread it. If there be any disagreement or modification you are, of course, entitled to state whatever it is that you have by way of modification of your opinion, but I am asking you definitely whether or not you agree or disagree with that statement?

A. Yes, sir; I agree with it, or I agree, rather, with the whole context beginning at least at the middle of page 38, beginning, "When time studies are conducted," and reading through to "available for sound judgment" at the top of page 39.

Mr. Hanley: If your Honor please, may I have an answer from the witness as to whether or not he agrees or disagrees with this particular statement without reference to the book?

I have given him every opportunity to state any modifications that he may have in connection with his agreement or disagreement of his. We cannot put in the book this way.

Mr. Austin: I think the witness has answered the ques-

tion. He has stated that he agreed with it qualifying
6537 it only when read in connection with certain specified portions of the text which portions he has definitely referred to.

Trial Examiner Ballinger: The Examiner suggests that the book be marked for identification, and admitted in evidence, so that the portions referred to by the witness may be considered in connection with his answer, if there is anything in the additional matter referred to by the witness that modifies or explains the statements read by counsel that is proper for consideration.

Mr. Hanley: Well, I am sure that I do not know that I care to make any objection to that if counsel desires to offer the book, your Honor, but I do believe I am entitled to an answer from this witness as to what he thinks. He is the expert offered by the Commission.

I just think I am entitled to an answer to that question. Now, whether he gets it out of the book, or out of his head, or out of the air, I do not think it makes much difference to me, but I think I am entitled to an answer.

Mr. Austin: We have no objection to the witness reading the portions that he referred to that he said should be read in connection with the statement, but it seems to me that he gave a very definite answer.

Trial Examiner Ballinger: Off the record.

6538 (There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. I will just ask you this, Mr. Warmack, and see what you have to say to this statement in regard to cost distribution accounting.

A. Will you speak louder, Judge, so I can hear you?

Q. I say, I would like to see if you can answer this, and I would like to see what your answer would be to this statement of cost accounting—cost distribution accounting:

"It is obviously very difficult, and frequently impossible, even for observers to ascertain the actual time engaged in each of these direct selling activities applicable to each commodity when the salesman handles numerous items. Perhaps the only basis of ascertaining the estimated time applicable to each commodity would be for the observers or the salesmen to report the approximate segregation of the interview time applicable to each commodity. The balance of the salesmen's time, exclusive of the interview time, would then have to be prorated to commodities on some reasonable basis according to the circumstances, such as the ratio to direct time."

What have you to say to that statement of cost distribution accounting?

6539 A. With reference to your statement, "It is obviously very difficult, and frequently impossible, even for observers to ascertain the actual time engaged in each of these direct selling activities applicable to each commodity when the salesman handles numerous items," now, you speak of "each"; "each" of what? Each of what activities?

Q. Now, I am asking the question.

A. You will have to tell me what you mean by "each."

Trial Examiner Ballinger: Supposing those conditions.

The Witness: He has to tell me what "each" means that he has referred to.

By Mr. Hanley:

Q. Mr. Warmack, I am not telling you anything. I am asking you a question.

A. Well, Judge, I asked counsel for the Respondent what he means when he was asking me that question by "each."

Q. Well, after all, Mr. Warmack, I did not write this book, you did. I do not know what you mean.

A. It is obviously very apparent that it is an impossibility on my part to make an answer to anything now in connection with this matter of direct selling activities until I know what you mean by "each."

Q. I do not know anything except the question, it is only that I am asking you, Mr. Warmack.

6540 A. Well, I have to know what "each" means, so I cannot answer it otherwise, there are too many possibilities.

Q. Well, do you just decline to answer the question?

A. If you tell me what you mean by "each" in your question, perhaps I could give you an answer to it.

Q. No, no, just tell me, do you decline to answer the question?

A. I cannot answer it unless you tell me what "each" means. Do you want to tell me what "each" means?

Q. Do not ask me questions, please, Mr. Warmack.

Tell me whether or not you care to answer the question.

A. I cannot answer it because it is incomplete.

Q. Or whether you decline to answer.

A. I cannot answer unless you amplify it.

Trial Examiner Ballinger: Mr. Warmack, cannot you find the full and complete explanation of the word "each" in a chapter of the book?

The Witness: Judge, that is just exactly what I have been telling you.

Trial Examiner Ballinger: Will you please turn to it and tell us what the word "each" in the phrase "each of these activities" refers to?

The Witness: Your Honor, I will be happy to do so, but Judge Hanley asked me what each meant and I assumed that he knew what it meant, or he would not have
6541 asked me.

Trial Examiner Ballinger: You state you could not answer the question until he told you what the word "each" refers to. Now, will you please examine the book and see what the word "each" refers to, and answer the question.

Mr. Austin: This question was asked apart from the book, as I understand it.

Trial Examiner Ballinger: It was asked irrespective of the book, but he can answer it by reference to the book.

Mr. Austin: I do not think he can answer that way at all. He is asked the question now with no reference to the book.

Trial Examiner Ballinger: The previous answer he made referred to the book.

The Witness: Counsel for the Respondent asked me with reference to the question "each of these selling activities," I am trying to find out by reading this what the counsel for Respondent meant when he used the words "each of these selling activities" if he has an answer to it.

Mr. Hanley: If your Honor please, my question is as it is. I have asked it. I hope for an answer. If the witness does not care to answer it, or declines to do so, that will be entirely satisfactory to counsel for the Respondent.

Trial Examiner Ballinger: Let us wait and let him
6542 have an opportunity to examine the document—have an examination made of the document by the witness so that he may determine what the word "each" refers to as embraced in the question propounded to him.

The Witness: I am trying to do that by reading from this document.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Mr. Warmack, I asked you a question as to whether or not you agreed with a certain quotation which I made from the bottom of page 38 of the document which we have been discussing, namely, House Document No. 287 of the 77th Congress, First Session.

I now understand that you are in agreement with the statement which I quoted to you if it be read along with that portion of the document beginning on the middle of page 38, with the quotation: "when time studies are conducted," and ending on page 39 with the phrase "available for sound judgment."

Am I right?

A. You are correct, Judge Hanley. I think that should be taken in the light of the statement at the bottom of page 17 of the document you have referred to.

6543 Q. Page 17?

A. Yes, sir. Which is a note at the bottom of the page, and reads as follows:

"As for the accounting processes in the Commission's so-called Robinson-Patman cases, only as a given case with all the detail of conditions and circumstances in which it is set comes before the Commission for study can it render its opinion as to the soundness of the accounting practices and results which may in that case be in question. While it is desired that the results of the inquiry shall be helpful in such cases, it is not intended that any conclusions reached here should forestall fresh examination and consideration of all accounting-analyses involved in any later legal proceeding before the Commission and independent decision in regard thereto."

Mr. Hanley: If your Honor please, in respect of the remarks of the witness in connection with the notation on the foot of page 17 of the document in question, it is moved to strike all of such remarks for the reason that they are a legal conclusion and this witness is being interrogated as an expert accounting witness.

He was asked a question as to his opinion only as an

~~expert accounting witness, relative to an expert accounting~~ matter.

6544 He answered such a question with the aid and advice of adverse counsel as he has just answered it.

I think, if your Honor please, that the Respondent is entitled to have that answer stand as an answer of an expert accounting witness without any complication by way of legal conclusion as to what the effect is in respect of the Robinson-Patman Act, as is the effect of the notation in this footnote.

Mr. Austin: I understand the witness' statement to be that he considers that that note at the bottom of page 17 qualifies general statements in the book as applying to specific cases.

There is no relevancy in any of this examination unless it applies to this specific case, and consequently, when he is asked about statements in the book that have that note obviously qualifying all statements in the book as they are read in relation to specific cases, if it is not read in connection with this specific case it has no relevancy, if it is, then I think this note becomes relevant.

Trial Examiner Ballinger: The Examiner strikes—first, the Examiner will direct the attention of counsel for the Commission to the statement appearing on page 17 in which the note is referred to.

Mr. Austin: Let me see if I can find it.

Trial Examiner Ballinger: Right at the top of the

6545 page.

Mr. Austin: I think, yes, I think that is further explanatory of the purposes of the whole volume, and perhaps the paragraph referred to by the Commissioner should be read in connection with the note.

Trial Examiner Ballinger: Motion to strike is granted. And that reference to the footnote on page 17 is stricken, not physically.

Now, the Examiner understands that the answer to the question propounded by counsel for the Commission is contained in that portion of the document commencing on page 38 with the phrase "When time studies are conducted" and ending with the first paragraph ending on page 39, the last words being "in the light of the statistical data available for sound judgment."

The Examiner directs the reporter to incorporate the matter which the witness adopts as his answer, in the record at this point.

The matter referred to is as follows:

"When time studies are conducted through the use of sales representatives' reports or observers to ascertain the time applicable to each commodity-customer cost objective for each salesman who sells a variety of commodities and calls on various classes of customers, it is
6546 frequently necessary to make certain more or less
rough calculations. In complex situations of that kind, there are often no alternatives except to obtain part of the needed data on an estimated basis. It is conceivable, for instance, that little difficulty would be encountered in obtaining the time consumed in each interview or contact with each customer. The time of these contacts could be accumulated by customer classes and, of course, the balance of the salesmen's time not consumed in actual contacts could be prorated directly, or as an overhead item, to customer classes. This is a fairly simple process.

"It does not, however, provide any data for use in making allocations to the respective commodities. Each commodity sold may, in some cases, be rather directly responsible for a portion of the interview time, and less directly responsible for a portion of the balance of the salesmen's time outside the interview. In other words, during the interview, each commodity may be responsible for a portion of the time spent in writing orders from the 'want book,' the time consumed in selling from samples, the time consumed in selling from printed advertising matter, the time required in checking the customer's stock, the time consumed in demonstrations, the time needed to install
displays, and similar other activities performed to
6547 sell each specific commodity. It is obviously very diffi-
cult, and frequently impossible, even for observers to ascertain the actual time engaged in each of these direct selling activities applicable to each commodity when the salesman handles numerous items. Perhaps the only basis of ascertaining the estimated time applicable to each commodity would be for the observers or the salesmen to report the approximate segregations of the interview time applicable to each commodity. The balance of the salesmen's time exclusive of the interview time, would then have to be prorated to commodities on some reasonable basis ac-

cording to the circumstances, such as the ratio to direct time. This portion of salesmen's time represents time in their own office, in traveling, and in waiting for customers, and other working time not actually consumed in the direct selling activities. The bases for such prorations naturally must be established in accordance with the circumstances of each particular costing problem in the light of the statistical data available for sound judgment."

Mr. Austin: I would like to request at this time that the document which we have been referring to, and which is entitled "Case Studies in Distribution Cost Accounting for Manufacturing and Wholesaling—letter from the 6548 Acting Chairman, Federal Trade Commission transmitting Report of the Commission on Case Studies in Distribution Cost Accounting for Manufacturing and Wholesaling, June 23, 1941.—Referred to the Committee on Interstate and Foreign Commerce;" 77th Congress, 1st Section, House Document No. 287, be marked for identification.

Trial Examiner Ballinger: Request granted, and the document referred to will be marked as Commission's Exhibit 134 for identification.

(The document referred to was marked Commission's Exhibit 134 for identification.)

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Mr. Warmack, I call your attention to page 50 of the same document which has now been marked Commission's Exhibit No. 134 for identification, and ask you if you agree with the following quoted language:

"When advertising is devoted to more than one commodity, its costs may be allocated in proportion to the amount of space allocated to each. When there is no specific allotment of space, any basis of allocation may be in some degree arbitrary and have little relation to the costs, as, for example, the dollar-sales basis. A more satisfactory basis might be the number of units of commodity sold, or the equal distribution of the costs among all of the 6549 commodities handled; or such other bases may be used as are considered more equitable in the judgment of those most familiar with the advertising program."

A. Yes, sir. I certainly agree with that quotation but I must again say, Judge, that means that I agree with the context of this document beginning at the bottom of page 48, with the words, "Bases of allocation," and ends with the words at the end of the first paragraph on page 51 entitled, "promote the sales of each commodity to each customer class."

Mr. Hanley: The respondent moves to strike the answer of the witness beginning "I must again say, Judge," to the end, as a voluntary statement and not responsive to the question.

The question having been fully answered by the witness in his previous statement—

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: The question is withdrawn.

Trial Examiner Ballinger: The question is withdrawn?

Mr. Austin: And the question is out?

Mr. Hanley: Yes.

By Mr. Hanley:

6550 Q. I will ask you, Mr. Warmack, as to your opinion as an expert accountant in connection with the following statement:

"When advertising is devoted to more than one commodity, its costs may be allocated in proportion to the amount of space allocated to each. When there is no specific allotment of space, any basis of allocation may be in some degree arbitrary and have little relation to the costs, as, for example, the dollar-sales basis. A more satisfactory basis might be the number of units of commodity sold, or the equal distribution of the costs among all of the commodities handled; or such other bases may be used as are considered most equitable in the judgment of those most familiar with the advertising program."

Your attention is directed, Mr. Warmack, to the fact that there is no reference to any book or document in that question. I am asking you that as an expert accounting witness.

The Witness: Your Honor, that question simply could not be answered taken by itself. Now, dropping over to page 40—

Trial Examiner Ballinger: (Interposing): Now, one moment, that question is not based upon anything contained in any book. It was being—

The Witness: (Interposing): I cannot answer it 6551 the way it is framed; that is all.

Trial Examiner Ballinger: Your answer is?

The Witness: To answer the question—the answer to the question is, and properly, that I cannot answer the question unless I am allowed to interpolate.

Trial Examiner Ballinger: You may answer the question and make any explanation you desire, but now in doing so, I am going to ask you not to refer to any book.

The Witness: Well, he read the question, reading out of this book at page 50—which is Commissions' Exhibit 134 for identification.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: Will you tell me just what kind of advertising he is referring to?

Trial Examiner Ballinger: No.

The Witness: Then I agree to that especially in view of the fact that your question states after giving a number of measuring factors which would be used, "or such other bases may be used as are considered most equitable."

In other words, you can use those or any of the rest that you want to—I agree to that, that you say are equitable, sound and proper.

By Mr. Hanley:

6552 Q. Is that the answer, Mr. Warmack?

A. That is my answer, to be definite and specific you will have to come down to what kind of advertising you are talking about.

Q. I will ask you now, as an accountant, Mr. Warmack, whether you agree with the following statement:

"Generally, a time basis of allocation is impracticable because of the difficulties involved in ascertaining the time. The number of orders received or handled appears to provide a practicable and satisfactory basis for allocating certain credit and collection costs, and products and groups of products such as the routine costs of approving orders for credit before they are filled; while number of customers or accounts offers a more satisfactory basis for allocating the costs in connection with assembling credit data concerning customers and in collecting accounts."

A. With reference to that point, Judge, what are you talking about, time basis of what?

Q. I do not know.

A. How should I know?

Q. I am asking you as an expert.

A. You are taking this out of a book, you will have to tell me what you mean.

Q. Do you understand the question?

6553 A. The first sentence is predicated upon something that comes ahead in the book from which you are reading.

Trial Examiner Ballinger: Mr. Warmack, disregard the book.

The Witness: That is what I am doing.

Trial Examiner Ballinger: And the question is asked you. Can you answer it or not?

The Witness: Not in the way it is framed, your Honor. I should like for the reporter to read the first sentence, he stated quite a long question.

Mr. Hanley: In other words, you cannot answer the question?

Trial Examiner Ballinger: The question is very clear to the Examiner.

The Witness: O. K. May I inquire then with respect to the sections of the question?

Trial Examiner Ballinger: You may.

Read the first sentence of the question.

(The reporter read as follows:

"Generally, a time basis of allocation is impracticable because of the difficulties involved in ascertaining the time.")

The Witness: There, Judge, I want to know impracticable for what? Time of who? Are we talking about warehouse superintendents, or talking about salesmen, 6554 or is he talking about some other class of employees? I do not know what he is talking about.

Trial Examiner Ballinger: You are dealing with a situation in which generally that condition prevails.

The Witness: For everybody?

Trial Examiner Ballinger: That is his statement.

The Witness: He said "generally."

Mr. Austin: Your Honor, what is the purpose of this line of questioning? Is it to test the knowledge of the witness as an accountant? Is it on his qualifications?

I have rather assumed heretofore that that was what it is.

Mr. Hanley: In part, you are right, Mr. Austin; in part, you are wrong.

I do not seriously question the general qualifications of Mr. Warmack as an accountant. I think I have made that clear on this record.

I do seriously question any offer to regiment cost accountants under the Robinson-Patman Act to a point where you can go beyond reasonably calculable cost differentials, and thus provide a foundation for the issuance of any kind of an order from the Federal Trade Commission other than an order of dismissal.

And I am very, very serious about that.

6555 Mr. Austin: Well, I think there is some question as to the relevancy and materiality of this line of questioning, although I have not previously objected on that ground.

I do not think there is any materiality or relevancy to the direct testimony in asking the witness whether he agrees with accounting statements made by John Smith or somebody else. If the book is brought in here, or the statement is made by another accountant, and Mr. Warmack is asked whether he agrees with that statement, I see nothing to be gained by answers to such qustions.

Mr. Hanley: I would say—

Trial Examiner Ballinger: (Interposing): There is no necessity for protracting the discussion. The question has been propounded. It is very clear to the Examiner.

If it is not clear to this witness and he is unable to answer it, he may so state and this record will portray the situation.

The Witness: Very well, your Honor, if this may be read.

Mr. Austin: I ask to have a ruling to my objection upon the ground of relevancy and materiality.

Trial Examiner Ballinger: Your objection is overruled.

The Witness: Your Honor, if I may have the question read.

6556 Mr. Austin: May I have a continuing objection to further questions of this type on the ground of relevancy and materiality?

Trial Examiner Ballinger: You may have a continuing objection.

Read the entire question to the witness.

(The reporter read the question.)

The Witness: Your Honor, I do agree with the statement; I would agree with it naturally if it were made to cover the situation covered in the Federal Trade Commission cost study of some couple of years ago. I am agreeing with the statement to this extent that any given situation may require consideration, studies, analyses for the purpose of getting a greater refinement in the separation of this class of costs in a given situation if such cost is to be used in establishing cost differentials.

Mr. Hanley: I think I will withdraw any motion at this time, or refrain from making any.

Trial Examiner Ballinger: Very well.

By Mr. Hanley:

Q. Mr. Warmack, as a cost accountant, tell me, please, if you will agree with the following statement:

"The term 'cost' is not self-explanatory. Cost accountants themselves differ widely in their conceptions of cost and it is hardly to be expected that lawyers and judges without accounting training will agree any more
6557 fully, unless definitions and rules for the ascertainment of cost have been set up in advance and unless these definitions and rules are sufficiently precise to be capable of being followed, and sufficiently reasonable so that neither seller nor buyer is injured by being forced to abide by them."

A. It is a fact, Judge, that cost accountants do differ in many questions of cost accounting.

Q. Well, the question is to you, whether or not you agree with that statement.

A. I think the statement is a little broad and I would say that I would agree with the statement merely in principle, but the statement that "it is hardly to be expected that lawyers and judges without accounting training will agree any more fully, unless definitions and rules—"

Mr. Hanley: (Interposing): Well, I think you are quite right, Mr. Warmack, in taking exception to that part of the question.

I do not expect you to know what lawyers and judges will do, so I will really ask you simply: Do you agree with the statement as to the uncertainty of the cost accounting principles?

The Witness: I agree to this part, Judge, if I may state it—"the term 'cost' is not self-explanatory." That is correct.

6558 "Cost accountants themselves differ widely in their conceptions of cost and—" I agree to that.

Q. Do you agree with that?

A. I would say no, I think they differ, but just how much they differ, I do not believe that I am in a position to say.

Q. Well, based on your best judgment.

A. I do not believe I am in a position to state on that point.

Q. Do you think they differ widely?

A. Well,—

Mr. Austin: I object to that question, I think the question as to whether or not cost accountants differ widely is too indefinite because "widely" is subject to such great differences of opinion.

Trial Examiner Ballinger: The witness has stated that he is not in a position to know and if he is not, he cannot answer the question.

The Witness: I do not know just how widely they differ on those things. You may be able to get some study on that point made, or maybe possibly by the American Institute of Accountants or maybe some things like that possibly have been gone into by this Commission at some time, but just what points they differ on, and how widely they differ, is, I rather think, a matter of conjecture.

6559 By Mr. Hanley:

Q. Mr. Warmack, I am just about to ask the Court to recess, and just before I do, I wonder if you could tell me whether this document which I think Mr. Austin has now had marked Commission's Exhibit 134 for identification, was that prepared by the Commission or the accountants for the Commission primarily in connection with the Robinson-Patman Act?

A. I would prefer to take the statement of the Commission in that regard.

Q. Would you like to have time to look into that?

A. Yes.

Trial Examiner Ballinger: We will take a five minute recess in order to give the witness an opportunity to look into the situation referred to.

(A short recess was taken.)

Trial Examiner Ballinger: On the record. Proceed.

Mr. Hanley: I will ask that the question be read to th witness.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Not particularly the Robinson-Patma Act. Of course, the question may be answered properly b the document itself in the first paragraph on page 1 of th document.

May I read it?

By Mr. Hanley:

6560 Q. Please, just please give us your own reaction t it, Mr. Warmack. If it helps you to read from any pa of the book to refresh your recollection, but I would jus like your own testimony about it.

Trial Examiner Ballinger: Aside from the statemen appearing in the book, have you any independent knowledge?

The Witness: Well, Judge, only what is in the book I know that the Commission made a study, and th Commission states in the book why it made the study, an I think that that has been and is a better stated opinion b them than I could offer as stating the reason for makin this study. I would prefer to take the Commission's reaso for making the study rather than my own.

Trial Examiner Ballinger: Have you any independen knowledge of the reason the Commission made this study

The Witness: No more than what I have read in th book itself.

Mr. Hanley: Well, I think that answers the questio Judge.

The Witness: I think that I should state that the answe to the question is in paragraph 1 on page 1 of Commission's Exhibit No. 134 for identification, and on page 1 it goes further and states the origin, the scope, and th method of the inquiry.

6561 By Mr. Hanley:

Q. Mr. Warmack, I do not want to go into it unless it is essential to do so. Now, will you please give m your own independent knowledge?

Mr. Austin: He stated he had none.

Mr. Hanley: Well, perhaps he has not, but if he ha not, I wish he would say so definitely.

By Mr. Hanley:

Q. Did not the Robinson-Patman Act inspire the attack or the approach to the cost distribution accounting on the part of the Federal Trade Commission's accountants, and is not that reflected in what has now been marked Commission's Exhibit 134 for identification?

A. I would not think that that exactly is the reason that caused the Commission to make this study. This Commission has long been very interested in the subject of the inquiry, namely, distribution cost accounting. It states exactly in the document why the study was made, and that is the Commission's statement and I will stand on that statement, Judge.

Q. Mr. Warmack, I do not care about that, if you will tell me what you know about this thing, that is all I am asking.

Trial Examiner Ballinger: Have you any independent knowledge?

The Witness: No, sir. I do not know anything 6562 about it, all I know is what the Commission has said, as it is set forth in the book.

By Mr. Hanley:

Q. That is sufficient. That is all you know?

A. Yes, sir. The Commission was interested, Judge,—

Q. (Interposing): Mr. Warmack, I ask you this question as an expert accounting witness, and ask if you agree to the following statement:

"Once the question as to cost elements have all been answered, however, the cost formulae are only begun. The problem of the application of these elements to particular products and transactions are far more numerous and difficult of solution. At this time we are in the position of a cook who knows only that a cake is composed of flour, eggs, shortening, sugar, salt, leavening agent, milk, and flavoring without having the least idea how much of each ingredient to use or how to commingle or bake them."

Do you agree with that statement?

A. I do not understand it, Judge Hanley. May I read it?

Trial Examiner Ballinger: The witness says he does not understand the question. Read it.

(The reporter read the question.)

The Witness: Do you mean, Judge Hanley, by that state-
ment that we have a very intricate problem of ac-
6563 counting and we are setting that up by analogy with
a person trying to bake a cake?

By Mr. Hanley:

Q. Mr. Warmack, I do not mean anything by my statement. I have just asked you a question. For your information, however, if it will be of any aid to you, I have quoted that statement from page 221 of a book entitled "The Cost Principle in Minimum Price Regulation" by Herbert F. Taggart, which is Commission's Exhibit 77 in this case, and I am just asking you whether or not you agree with that statement.

Mr. Austin: That is Commission's Exhibit 77?

Mr. Hanley: It is.

By Mr. Hanley:

Q. You will understand, Mr. Warmack, that I am referring you to the book. I am asking you the question as an expert accounting witness, and I suggest the book as an aid to you, if it be of any aid, but I am asking the question of you as an expert accounting witness.

Trial Examiner Ballinger: Can you answer the question?

The Witness: I will have to state my understanding of what it states, Judge; that is the only way I can answer it, sir.

Trial Examiner Ballinger: Do you mean that you do not
understand the question or that you want to state your
6564 understanding of the question?

The Witness: My understanding of the question, yes, sir.

Trial Examiner Ballinger: You may do so, and then answer it.

The Witness: The question asked me:

"Once the question as to cost elements have all been answered, however, the cost formulae are only begun. The problem of the application of these elements to particular products and transactions are far more numerous and difficult of solution."

I take that second sentence to mean that the problem of the application of the elements to particular products and transaction are far more numerous than the cost elements involved.

I agree with that statement.

By Mr. Hanley:

Q. Do you agree with it in principle, Mr. Warmack?

A. Yes, sir. It is a difficult problem to make a cost study, an analysis, especially with many classes of customers being served, or many kinds of products being involved, but that is what I understand the question to mean?

Q. Very well. Thank you.

Mr. Warmack, as an accounting expert, do you agree with the following statement:

6565 "Simply put, the fact is that cost accounting does not consist of a set of fixed rules universally recognized and universally applicable. For one thing cost accounting is too new to science—it is a long way from the degree of maturity which partially characterizes certain other branches of accounting. For another and perhaps more important thing, trade and industry are far too complex to be neatly classified for the application of uniform costing rules, even if these could be developed.

"Complexity of industry is the despair of trade association organizers, but it is the life of competition."

The Witness: I would like to answer this in part, if I could.

Trial Examiner Ballinger: The question is a rather long question and if the witness desires he may answer it in fragments.

Mr. Hanley: Surely.

The Witness: I will endeavor to answer that in parts, Judge Hanley.

Mr. Hanley: All right.

The Witness: That portion of your question which read:

"Simply put, the fact is that cost accounting does
6566 not consist of a set of fixed rules universally recognized and universally applicable—or applied."

In my opinion, that is a very broad statement. I subscribe to it in principle. As a matter of fact, we might call attention to that in answer to that, an example which I think is very much in point.

We have the depreciation of machines in manufacturing cost, and there are many ways of depreciating those machines.

We have in manufacturing costs certain manufacturing overhead cost which must be allocated in some manner. Are we going to use machine hours, man hours, or various other methods adopted and used by various manufacturers.

The next part of the question which reads:

"For one thing cost accounting is too new to science—it is a long way from the degree of maturity which partially characterizes certain other branches of accounting."

Trial Examiner Ballinger: Do you agree with that statement?

The Witness: Yes, sir, I agree with that statement, especially with respect to distribution cost accounting, Judge. I think that accounting for manufacturing costs has been developed farther than accounting for distribution.

By Mr. Hanley:

6567. Q. Well, confining your answer primarily to distribution cost accounting and to distribution costs which are concerning us in this litigation, Mr. Warmack, what is your opinion?

A. With respect to that particular part of the question?

Q. Yes, sir. Distribution cost—marketing costs.

A. The statement that it is a lang way from the degree of maturity which partially characterizes certain other branches of accounting, I subscribe to that.

Trial Examiner Ballinger: One hundred per cent?

The Witness: Yes, sir.

The further part of the question reading:

"For another and perhaps more important thing, trade and industry are far too complex to be neatly classified for the application of uniform costing rules, even if these could be developed."

There is no doubt that that question should properly be addressed to the subject of manufacturing costing, but as applied to distribution cost, I certainly agree with it.

By Mr. Hanley:

Q. Well, now, just to make it specific, Mr. Warmack, and bringing to your attention the Respondent's form 189, and putting it into the statement which you have just read, what is your opinion?

A. It is my opinion that that statement just quoted would be proper in comparing your form 189 with, we will say, some other industry's statement.

6568 I rather think that it would be a very, very difficult thing for some company engaged in some other line of business to set up a statement that could be comparable in any way, or any reasonable way at least with Respondent's Exhibit, Form 189—I don't remember the exhibit number at the moment.

Q. Did you ever see anything like it before, Mr. Warmack, in any of your experience as an accountant?

A. Not exactly like it, no, Judge Hanley. I don't think I read all of that quotation when I was answering that question, Judge. I think that the portion that I was answering should have been, "even if these could be developed."

Trial Examiner Ballinger: You read that.

The Witness: Very well.

The next part of the question reads:

"Complexity of industry is the despair of trade association organizers, but it is the life of competition."

I do not believe I am qualified to answer that.

By Mr. Hanley:

Q. If you do not care to do so, Mr. Warmack, I am perfectly willing to withdraw that part of the question.

A. Thank you.

Mr. Hanley: Withdrawn.

6569 Trial Examiner Ballinger: The witness disposed of it by saying that he is not qualified to answer it.

Mr. Hanley: I am just withdrawing that part of the question. I do not think that has anything to do with the particular part of the inquiry anyhow.

By M. Hanley:

Q. Mr. Warmack, I have asked you on the voir dire examination whether you had ever had occasion to make any study of any petroleum company prior to this study, and as I recall your answer you said that you thought in a general survey that some petroleum companies were involved, but that you had not made any individual study of any particular petroleum industry heretofore; is that true?

A. Yes, sir. That is correct. Some may have been covered in this distribution cost study. I do not remember exactly, and if they were I may have had something to do with looking over some of the information gathered.

With respect to the petroleum industry, I have not made any studies. I have reviewed what is in the Commission's files.

Q. Now, I am sure you are familiar with the Robinson-Patman Act, Mr. Warmack?

A. Yes.

Q. Purely from an accounting standpoint, and as an expert accountant, have you ever interpreted the term "cost" as it is used in the Robinson-Patman Act?

6570 The Witness: Will you read that, please?

Trial Examiner Ballinger: Read the question.

(The question was read by the reporter.)

The Witness: No, not as such, no.

By Mr. Hanley:

Q. In your judgment as an expert accountant, does the term "market cost" or the term "average costs by classes of customers" rather, mean "cost"?

A. I am sorry, I do not get your question.

Mr. Austin: I think it is very involved.

Trial Examiner Ballinger: Suppose you restate it.

Mr. Hanley: Very well.

By Mr. Hanley:

Q. In your judgment as an expert accountant, does that term mean "average costs by classes of customers"?

A. It could, yes, sir, it could in some instances.

Q. In your judgment as an accountant, what does it mean?

A. In my judgment as an accountant, in some instances yes, and in some instances no. In some instances it would not be proper to so apply it.

Q. Would your answer mean, Mr. Warmack, that it is maybe yes and maybe no?

A. That is correct, because in particular instances it might, and in other instances it might not. You would have to be governed by the particular facts and cir-
6571 cumstances with which you were dealing.

Q. Could it or does it in your judgment mean—

Mr. Austin: (Interposing): Just a moment. I object to the question as to the form in which it is put, because in the form in which it is put it calls for a legal interpretation, and I do not believe that the witness is qualified to answer those questions.

Now, for example, there may be some questions I think that he will be qualified to answer. The Respondent's counsel would be qualified to ask him if the Robinson-Patman Act used the words "cost of manufacturing, sales, and delivery." That probably is used in connection with the accounting practice to some extent, so that if the witness were asked about the manufacturing cost or about the selling cost, I would not object, but the way the question is framed as to what "cost" means as used in the statute, I do not believe that is an accounting question. I believe it is a legal question.

Mr. Hanly: If your Honor please, I am just going to defer to your Honor's ruling about this because I just very frankly confess I do not know. I do not know whether that is a legal question or whether that is not a legal question.

6572 Trial Examiner Ballinger: The Examiner understands that you are trying to ascertain how this accounting witness understood the term when he made his study.

Mr. Hanley: Right. I am trying to find out what his thinking is about this law and the application of it, Judge. That is what I am trying to find out.

Trial Examiner Ballinger: As it may reflect his opinion and his conclusion.

The Examiner sees the point there.

Mr. Austin: I think in view of that explanation that the question is clearly objectionable because the witness' idea of what the law is is not important, the witness is not called upon to interpret the law in any of his accounting studies.

The witness has to do with cost of sale and cost of delivery, and entirely apart from what the law means.

The law refers to the cost of sale and cost of delivery, and the witness is concerned with cost of sale and cost of delivery, but not as to what the law means, or what his view of the law is.

I want to make my objection perfectly clear, the witness might be asked what is manufacturing cost or what is selling cost, or what is delivery cost, without reference to the law, but the application of the law to this case is a question which is not for an accountant.

6573 Trial Examiner Ballinger: You are correct so far as the question of law is concerned, this witness cannot testify with reference to that, but he can testify as to his understanding of the term "cost."

Mr. Austin: Without reference to the law.

Trial Examiner Ballinger: Yes.

Mr. Hanley: That is why I am asking him, or at least that is what I am intending to ask him.

Trial Examiner Ballinger: Certainly, as he employed it in his work.

Mr. Austin: Then that may be, but your questions were asked based upon the Robinson-Patman Act.

Mr. Hanley: Perhaps I should reframe the question; perhaps counsel is right.

By Mr. Hanley:

Q. Without bothering your head about the applications of the Robinson-Patman Act, Mr. Warmack, please tell us what you think is comprised in the term "market cost"?

A. All expenses incurred directly or indirectly in connection with marketing.

Q. Mr. Warmack, would you regard the interest on the capital investment as a marketing cost, assuming that the capital investment was necessary, a necessary investment to further the marketing activities of the Respondent company?

A. That is a very moot question, Judge Hanley, in
any case, and before I could answer your question
6574 I would have to study the question of interest and
investment, and the interest on investment also.

Q. Well, you are familiar with our form 189?

A. Yes.

Q. Let me offer you as an example the E. L. A. accounts which I think you have already denominated as capital investment.

A. Now, what do you want to know about E. L. A. accounts, Judge?

Q. I do not want to know anything about the E. L. A. accounts, particularly. I am just offering you an example. You asked for an example, and I offered you that. I am just offering you the E. L. A. accounts as a possible illustration. I do not know whether it is a good one or not.

The Witness: May I have the last two questions and the answer I gave to the first one read back?

Trial Examiner Ballinger: Read back the last two questions and the answer.

(The reporter read the last two questions and answer.)

The Witness: Your Honor, before I could answer that question I would have to get—I would have to give some consideration and in order to do that and to answer it properly I would have to then inquire with respect to
6575 points more specifically pointed to the question, and then I maybe could give an opinion on the matter.

Trial Examiner Ballinger: You do not feel qualified to answer the question now?

The Witness: No, sir.

By Mr. Hanley:

Q. Mr. Warmack, before any adjournment is taken by the Court tonight, can I give you any further aid in your investigation of that question? If I can, just tell me what I can do which may be of help to you, if I think I want an answer to it. If I do not, I will withdraw the question in the morning, but I think I want an answer.

The Witness: It is your desire to know if any—if, in my opinion, interest on investment used in marketing are proper costs for the purpose of proving cost differentials? Is that the question, Judge Hanley?

By Mr. Hanley:

Q. If any interest charge may be a proper cost of marketing which is appropriate to calculate the cost differential.

A. Each question with respect to that particular point, your Honor, would have to be stated separately and independently—an answer could not be given from the witness stand without studying the question to arrive at a reasoned answer. I might state that Respondents in this case, in its cost study, have not used interest on invest-
6576 ment for the purpose of determining their cost differential.

Mr. Hanley: Well, if your Honor please, I was under the impression that there was some such item in Respondent's form 189.

I now learn that that is not true, and I think that being the case I should not want to pursue this inquiry further. I am just sorry; I just thought that there was one or two of them in there.

(Witness temporarily excused.)

Mr. Hanley: May I at this time request that we adjourn, if your Honor please, until 9:30 o'clock a. m., tomorrow?

Trial Examiner Ballinger: The motion is granted.

And now, at 4:45 p. m., the hearing stands adjourned to be reconvened in Room 532, Federal Trade Commission Building, at 9:30 a. m., Washington, D. C., July 15, 1942.

(Whereupon, at 4:45 o'clock p. m., July 14, 1942, the hearing in the above-entitled matter was adjourned.)

6577

Room 532, Federal Trade
Commission Building,
Washington, D. C.,
Wednesday, July 15, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Illinois), appearing for the Respondent.

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PROCEEDINGS

Trial Examiner Ballinger: Come to order. The hearing of Docket No. 4389, case entitled "In the Matter of Standard Oil Company of Indiana," is convened pursuant to notice, at 9:30 a.m., July 15, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held in the same place on July 14, 1942.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

Mr. Warmack, will you come around and resume the stand?

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination by Mr. Hanley (Continued).

Q. Mr. Warmack, yesterday I asked you about your studies in Detroit and Chicago, but did not pursue the matter very far.

A. Yes, sir.

Q. Will you please tell us now exactly how much time you spent and how you spent it?

A. In Chicago and Detroit?

6579 Q. In Detroit and Chicago.

Trial Examiner Ballinger: Dealing with them separately.

The Witness: On this particular case?

By Mr. Hanley:

Q. That is right, of course.

A. You understand I have worked in Detroit on other work.

Q. Yes, I understand, Mr. Warmack, but I am talking about this case.

A. I am under the impression, Judge, that I gave that in my testimony in Detroit, but I will be glad to try to give it again.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Just give me your best recollection as to how much time you spent in Detroit, and how much time you spent in Chicago.

A. All told I would say about two months. That covers my best recollection at the moment.

Q. What were you doing?

A. What?

Q. What were you doing?

A. I was reviewing the data underlying the Respondent's Exhibits 99, 100 and 101.

6580 Q. During most of that time were you assiduously engaged in examining the underlying records.

data, information, and accounts of the Respondent company?

A. Yes, sir.

Q. And who, if ayone, assisted you?

A. Mr. Len Houghton.

Q. Who is Mr. Len Houghton, as you understand it?

A. Mr. Len Houghton, as I understand it, was an accountant attached to the sales research division of the company at its Chicago office.

Q. Do you regard Mr. Boatwright and Mr. Houghton as able and competent accountants, Mr. Warmack?

A. I have no reason to question their ability as able and competent accountants, Mr. Hanley.

Q. Did you request of Mr. Houghton information to enable you to make your studies, Mr. Warmack?

A. Well, that is a pretty broad question. I could have made the studies without Mr. Houghton's assistance, but it would have entailed some time.

Trial Examiner Ballinger: Read the question to the witness.

(The reporter read the question as follows:

"Q. Did you request of Mr. Houghton information to enable you to make your studies, Mr. Warmack?")

The Witness: That question is hard to answer.
6581 Surely, I requested that information, but the information was already made available before Mr. Houghton was assigned to assist me, in January.

By Mr. Hanley:

Q. Let me ask you this, Mr. Warmack, did you have certain information from the Respondent company prior to the time you went to Detroit?

A. Oh yes, I had considerable information from the Respondent by virtue of previous contacts and considerable information as set forth in Respondent's Exhibits 99 and 100, as well as other exhibits.

Q. After you went to Detroit and after Mr. Houghton began to work with you, did you get additional information, upon your request?

A. Yes, sir.

Q. Did you ask Mr. Houghton to provide that information?

A. Yes, sir.

Q. From the Detroit office?

A. Yes, sir.

Q. Did he do so?

A. Yes, sir.

Q. How much?

A. He provided me with an abundance of information.

Q. On any occasion, did he fail to provide you with anything that you asked for that existed in the records and data and accounts of the Respondent company?

6582 A. Not as far as I know. He failed to furnish information that I asked for, but it was his statement that such data was not available, and of course, I would not question that point.

Q. Do you recall—

Trial Examiner Ballinger: (Interposing.) When you say "not available," do you mean it did not exist?

The Witness: He stated that some of it that I asked for—Judge Ballinger—did not exist.

By Mr. Hanley:

Q. Do you recall testifying in this case in Detroit on February 25, 1942, Mr. Warmack?

A. Yes, sir.

Q. I will ask you if you were asked the following questions and if you gave the following answers:

"Q. Has the Respondent made available to you all records and files, data, accounts, work sheets of any nature that you wanted since you have been here?

"A. Everything that I have requested has been made available to me in the way of records.

"Q. Has the Respondent made available to you qualified accountants to facilitate your work?

"A. Yes, sir.

"Q. And have the personnel that has from time 6583 to time been furnished for your use facilitated your work since you have been here?

"A. They certainly have and they have been most cooperative.

"Q. Has there ever been a time when you have been denied or refusd access to any record that you wanted?

"A. No, sir."

Were those questions asked you and did you make those answers on February 25, 1942, in Detroit, in this hearing?

A. May I review the record? What is the page? 5688?

Q. It is in the page where that sheet is.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: Yes, sir, I remember that testimony. There is one point that I would like to explain, your Honor?

Trial Examiner Ballinger: You may.

The Witness: The question was asked me by Judge Hanley, as shown by page 5688 of the transcript of the record in this case:

"Has the Respondent made available to you all records and files, data, accounts, work sheets of any nature that you wanted since you have been here?"

To which I made the following answer:

6584 "A. Everything that I have requested has been made available to me in the way of records."

In answering that question, your Honor, I certainly did not intend to convey any meaning that the Respondent had made available any records that were non-existent. They had made available all records that I had requested, which they said they had. Those that they said were non-existent, surely, they could not make available any such data.

Trial Examiner Ballinger: And you accepted their word with reference to the existence or non-existence of records?

The Witness: I did, your Honor. I had no alternative. I certainly did not impugn good faith.

By Mr. Hanley:

Q. Now, Mr. Warmack, I direct your attention to the testimony which you gave July 2, 1942 in this hearing beginning on page 5935, beginning with the question by the Trial Examiner at the bottom of that page:

"Trial Examiner Ballinger: Go ahead, Mr. Witness."

First, I will ask you if these questions were asked you and if you gave these answers:

"The Witness: I was not given any information of any kind; that is, documentary information, in the Detroit field, to support the accuracy of these methods or the results to be obtained from the use of these methods.

6585

"And that goes to all of the accounts accounted for in Form 189 in the Detroit field."

"Trial Examiner Ballinger: You say you were not furnished any information to support?

"The Witness: Yes, sir.

"Trial Examiner Ballinger: Do you mean that you were not furnished any information either documentary or oral?

"The Witness: I was not. I would get a lot of arguments, Judge, but what I wanted to know was if the gallonage allocation is sufficient, either gallonage between tank wagon reseller, tank wagon consumer, and other methods or if a part of the costs are allocated in them what part of them between tank wagon reseller and tank wagon consumer, which I believe will be the case of this triple naught account.

" 'Well, why?' "

" 'Well, why? We do it that way.' "

" 'Well, why? What did you ever do to prove that that is the right way to do it, from a cost accounting standpoint?' "

"Mr. Hanley: Prove it to you.

"The Witness: And if you did do anything
6586 where is the documentary evidence of what you did?'

"And I got nothing."

Now, Mr. Warmack, tell me out of this whole bunch of testimony which you have given here today, which you gave on February 25, in Detroit, and which you gave on July 2, 1942, is the accurate testimony.

Did you or did you not get information from the Respondent company?

A. Yes, sir. I got information from the Respondent company, a large amount of information.

What has been spoken of in the record and which you have just read may not be exactly clear as to what it means, but if you would turn back a little further you will find that we were talking about the use of gallonage factors for the allocations.

And if your company, Judge Hanley, has ever proved that the gallonage factors used in this allocation afford sound and accurate results, then I challenge the Respondent to produce that information.

They have not produced it.

Q. Well, Mr. Warmack—

Mr. Austin: (Interposing): Your Honor, I move t strike the last answer of the witness as not responsive t the question.

Mr. Hanley: I concede the motion.

6587 Trial Examiner Ballinger: The entire answer?

Mr. Austin: I would like to have the answe read. I do not know that it goes to the last sentence, believe I would like to have it read back, in order to mak it more responsive to my motion.

Trial Examiner Ballinger: Read the question and a swer.

(The reporter read the question and answer as above se forth.)

Mr. Austin: I move to strike the answer of the witnes beginning with the words "if your company."

Mr. Hanley: The Respondent will concede the motion.

Trial Examiner Ballinger: Motion is granted.

(The reporter read the question and the present a swer as follows:

"Now, Mr. Warmack, tell me out of this whole bun of testimony which you have given here today, which yo gave on February 25, in Detroit, and which you gave o July 2, 1942, is the accurate testimony.

"Did you or did you not get information from the Re pondent company?

"A. Yes, sir. I got information from the Responde company, a large amount of information.

"What has been spoken of in the record and which yo
have just read may not be exactly clear as to wh
6588 it means, but if you would turn back a little furth
you will find that we were talking about the use
gallonage factors for the allocations.")

By Mr. Hanley:

Q. Irrespective of what you were talking about, M Warmack, when you requested information of Mr. Houg ton or anybody else in the Detroit office, did you get t information if it existed in the records of the Responde company?

A. Of course, Judge Hanley, I had no way of knowi except that they told me that it existed.

Q. What is your opinion?

A. It is my opinion that if it existed I got it.

Q. Is that what you think?

A. Yes, sir.

Q. Do you believe, Mr. Warmack, that you got everything that you desired and requested that existed in the records, files, data, and accounts of the Respondent company?

A. I believe that, Judge Hanley.

Q. I assume, Mr. Warmack, that you requested everything that you thought was necessary to your study and investigation; did you not?

A. I endeavored to, Judge Hanley.

Q. Now, you have used the terms, Mr. Warmack, in reference to a cost study:

"That it was shown to be sound accounting"; or
6589 "It was established to be sound accounting," or
"It was proved to be sound accounting";

Do you remember the use of those terms many times in connection with your testimony?

A. I should be happy if you would show me where they were used.

Q. Do you not remember, Mr. Warmack, and have you not used those statements time and again in connection with your testimony?

A. I have used many terms, Judge Hanley, but if you will refer to any particular page in the record I would be happy to learn of it.

Q. I mean,—I am not referring to any particular page in the testimony, I am just referring to your use of those terms. Do you not remembe. them? What is your best answer?

A. O.K. Read the terms.

Q. I will restate the question. You have repeatedly, for two weeks, used the terms that cost study should show, or should establish, or should prove certain things; now, I am not asking you what it should prove, I am asking you what you meant by the term "show"—"establish"—or "prove"—and I am asking you as to whom it should be shown, established, or proved—you, the Federal Trade Commission, Mr. Lundball, or Mr. Seubert, the president
of the Respondent company, who happens to be a
6590 good accountant, or who—just what do you mean?

A. I mean, proof of the correctness.

Q. To whom? Proof to you?

A. From the standpoint of accounting, proof proved t the world.

Q. Oh, well, Mr. Warmack, let's be reasonable abou this thing, please. To whom—

A. (Interposing): To the world.

Q. —must it be proved?

A. If it is done correctly, it is proven to the world

Q. Yes—

Mr. Hanley: The Respondent moves to strike th answer of the witness as not fairly responsive to the question, and respondent asks the Court to admonish the witness that that kind of an an answer is not helpful an means nothing in this lawsuit.

Trial Examiner Ballinger: The motion is granted. Th witness is directed to answer the question.

The Witness: Judge, I do not know how to answer i any better than that.

(There was a discussion off the record.)

Mr. Austin: Your Honor, I think the whole recor shows and the witness' testimony shows that he is testifying as an expert, and giving his opinion.
6591 Now, obviously, when he states that somethin
is proved or not proved, he is talking about it bein
proved or not proved in his opinion.

Trial Examiner Ballinger: Mr. Austin, I think that i the case, and if that is the case then the witness may s state.

Mr. Hanley: Surely, Judge—.

Mr. Austin: (Interposing): I think it is inherent.

Mr. Hanley: It is just exactly what?

Mr. Austin: Whether the company has a thing to b proved to the satisfaction of the Standard Oil Company' men, or to whoever it is, it is really the witness givin his opinion as to whether in his opinion the thing ha been proved.

Trial Examiner Ballinger: I think that counsel for th Respondent is entitled to a definite answer so that th record may be complete.

By Mr. Hanley:

Q. Can you answer that question, Mr. Warmack?

The Witness: What is the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. I will restate the question. You have repeatedly, for two weeks, used the terms that cost study should show, or should establish, or should prove certain things; now,
I am not asking you what it should prove, I am asking
6592 you what you meant by the term 'show'—'establish'
—or 'prove'— and I am asking you as to whom it should be shown, established, or proved—you, the Federal Trade Commission, Mr. Lundball, or Mr. Seubert, the president of the Respondent Company, who happens to be a good accountant, or who—just what do you mean?")

The Witness: Judge Ballinger, I have used these terms, giving my opinions as to methods and procedures from the standpoint of sound accounting.

Trial Examiner Ballinger: In so doing you were merely expressing your own individual judgment; is that true?

The Witness: Yes, sir. That is correct.

Trial Examiner Ballinger: Well, then, can you answer the question directly?

The Witness: Yes, sir, who was I going to prove it?

By Mr. Hanley:

Q. What I am asking you, Mr. Warmack, is: What do you mean when you say the procedure is proven or shown or established? Proven, shown, or established to whose satisfaction? Now, you tell me, please.

A. In my opinion, when I used those terms I had reference to the use of sound accounting principles and procedures and to the results when speaking of determining costs were meant by me to produce the figures that would
be accurate and sound and as nearly correct as it
6593 could be. In other words, the most correct figure
that could be established.

Q. All right, Mr. Warmack, when you speak of sound accounting, you are speaking, are you not, of your opinion of sound accounting?

A. Well, I do not happen to be different from everybody else in the world.

Mr. Hanley: I object and move to strike the answer.

Trial Examiner Ballinger: The answer is stricken.

Mr. Hanley: I ask that the question be read.

Trial Examiner Ballinger: Read the question.

(The question was read by the reporter.)

By Mr. Hanley:

Q. Please answer the question.

A. Well, surely, Judge, it is my opinion, he knows it is my opinion.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Read the last question.

(The question referred to was read by the reporter as follows:

"Q. All right, Mr. Warmack, when you speak of sound accounting, you are speaking, are you not, of your opinion of sound accounting?")

6594 The Witness: Yes, sir, I am.

By Mr. Hanley:

Q. And no one else?

A. I am only speaking for myself, Judge.

Q. And again, so we will be very sure about it, when you use the words and the terms "shown"—"established"—and "proven" in respect of procedures, you were referring to having those procedures shown, established, and proven to your own individual satisfaction; is that true?

A. That is correct, in accordance with what I consider to be, Judge Ballinger, sound accounting.

Trial Examiner Ballinger: Strike that.

Mr. Austin: I object, your Honor, to it being stricken. I think it is a part of the answer.

Trial Examiner Ballinger: The addition adds nothing to the answer.

The Witness: I think it does.

Mr. Austin: I think it does to some extent, the question was so framed that I think it does.

The Witness: The question is an all-inclusive situation.

Trial Examiner Ballinger: All right, I will let it stand. Off the record.

Mr. Hanley: I will concede, Judge, if it will help 6595 any.

Trial Examiner Ballinger: Very well. Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Judge Ballinger asked you—

Mr. Hanley: Before going on with that, Judge, I wonder if we might have a recess now. I want to go into this 31 thing.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The hearing will stand in recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Hanley: May I proceed, your Honor?

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Mr. Warmack, I now direct your attention to Respondent's Exhibit 31, which has to do with the separation of cost of Ned's Auto Supply Company for the year 1937 from the rest of the same reseller group. I am sure you are familiar with Exhibit 31, are you not?

A. Yes, sir.

6596 Q. Will you please refer to page 5778.

A. Yes, sir.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Now, during your stay in Detroit, or in Chicago, or in Washington, or elsewhere, Mr. Warmack, did you make any study of the underlying data, figures, facts, records, and accounts that went into the Respondent's Exhibit No. 31?

A. Judge Hanley, I would not say that I made none, but I would say that my studies in Detroit and Chicago this year, that to the company's office, that we have been speaking of, were concerned primarily with the year 1940.

Q. May I call you attention, please, Mr. Warmack, to page 5778 of the record.

I will ask you if you were asked the following questions and if you made the following answers. I will take the answer:

"A. I would not say that I did not make any test check for the year 1937. I would say this, Judge, that my

study of the company's records went almost entirely into questions of cost, the separations of those costs, in the Detroit field, for the year 1940, for the reason that I believe
that it has been admitted in evidence in this case
6597 that practically the same methods were used for the
separation of those costs in 1937 that were used in
1940 and practically the same items of cost went into the respective accounts in 1937 as in 1940.

"Judge, you asked me did I make any, or did I make none, or did I make one, or did I make a hundred. I don't know whether I made one or made a hundred. I say that I went into this matter, and I don't know if I made test checks for 1937 positively as such. In our studies we made hundreds of test checks."

Did you make those answers?"

A. Yes, sir, I made those answers.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Can you tell me what you meant by that?

A. The first answer that you read, beginning with the words "I will not say that I did not make any test check for the year 1937." That is the beginning of the answer which you read.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

6598 Trial Examiner Ballinger: On the record.

The Witness: May I hear my answer as far as I have given it, read?

Trial Examiner Ballinger: Read it.

(The reporter read the partial answer as follows:

"The first answer that you read beginning with the word 'I would not say that I did not make any test check for the year 1937.' That is the beginning of the answer which you read.")

The Witness: (Continuing): Refers, as made in the answer, to comparable methods employed for the separation of cost between—or for the years 1937 or 1940, I was referring to the methods of separation employed by Respondents in its form 189; that is, the respective accounts on that form.

Since this question was asked me, I have reviewed my work sheets and papers, and I find that I did ask about information respecting the estimates as set forth on Respondent's Exhibit 31-L.

I believe that that was about the extent, Judge Hanley, to which I went into the 1937 records which furnish underlying information for the preparation of Respondent's Exhibit 31-A through 31-O inclusive.

By Mr. Hanley:

Q. Do you mean by that, Mr. Warmack, that you made a study of 31-L, but not the balance of 31?

6599 Mr. Hanley: 31-L, for the information of the Court, has to do with the time of certain salesmen, namely, L. L. Robinson, T. G. Moulenberg, Paul Coutchie.

By Mr. Hanley:

Q. Did—

A. Does that answer your question?

Q. Not completely. Does your answer mean that the only study that you made of Respondent's Exhibit 31, which includes pages 31-A through 31-Q; that the only study that you had to do with was page 31-L?

A. Oh, no, I have studied the whole exhibit.

Q. Have you studied the whole exhibit?

A. Yes, sir, 31-A to—

Q. (Interposing): Have you studied the whole exhibit?

A. Yes, sir.

Q. Have you studied that carefully, Mr. Warmack?

A. I have studied parts of it carefully.

Q. Well, have you studied all of it carefully?

A. Well, that is a matter of opinion, Judge.

Q. Well, it is your opinion I am asking for. Have you studied it carefully?

A. I particularly studied some parts of it, and I have reviewed it all carefully.

Q. You say that now?

A. What?

6600 Q. You say that now?

A. I have just stated that for the record.

Q. I have asked you—I think I asked you this before, but I am forced to ask you again, Mr. Warmack, were you not asked this question, and did you not make this answer—

"Q. —

Mr. Austin: (Interposing): What is the page?

Mr. Hanley: Page 5778.

Mr. Austin: Thank you.

By Mr. Hanley:

Q. "A. I would not say that I did not make any test check for the year 1937. I would say this, Judge, that my study of the company's record went almost entirely into questions of cost, the separations of those costs, in the Detroit field for the year 1940, for the reason that I believe that it has been admitted in evidence in this case that practically the same methods were used for the separation of those costs in 1937 that were used in 1940, and practically the same items of cost went into the respective accounts in 1937 as in 1940."

Now, to begin with, that is your opinion, is it not, Mr. Warmack?

A. Yes, sir.

Q. Do you know it to be a fact that there was a change in the accounting methods of the Respondent company between 1937 and 1940, and, in fact, in 1940? 6601

A. Yes, sir. I certainly do know that that is a fact, but when you say a change, do you mean a change of one account or do you mean a change in all of the great number of accounts that are on these sheets?

Q. I am asking you what your understanding is?

A. I have stated my understanding.

Q. Was there a change, or wasn't there?

A. Yes, sir. There was a change.

Q. Now, I wish you would tell us just very honestly, please, Mr. Warmack, did you or did you not make a study of the underlying facts, data, records, and accounts which went into Respondent's Exhibit No. 31 for the year 1937?

The Witness: Judge, the record is clear on that.

By Mr Hanley:

Q. Please answer the question, Mr. Warmack.

Trial Examiner Ballinger: Answer the question.

Mr. Austin: I think it is repetitious, your Honor. I think it has already been answered twice this morning.

Trial Examiner Ballinger: Well, this is cross-examination.

Mr. Austin: It was answered, and the questions that were asked by Respondent's attorney—

Mr. Hanley: I never asked that.

6602 Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. The witness may answer.

Read the question to the witness.

(The reporter read the question as follows:

"Q. Now, I wish you would tell us just very honestly, please, Mr. Warmack, did you or did you not make a study of the underlying facts, data, records, and accounts which went into Respondent's Exhibit No. 31 for the year 1937?")

The Witness: Again, I will answer it, Judge Ballinger.

I have studied Respondent's Exhibit 31-A to 31-Q, and I inquired, when I was in Detroit, respecting information as shown on Respondent's Exhibit 31-L, and that I believe is the extent to which my work on Respondent's Exhibit 31-A to 31-Q has gone.

I have studied particularly information in this record dealing—

Trial Examiner Ballinger: (Interposing): Confine it to Exhibit 31-A to Q.

The Witness: What is that last part of my answer?

Trial Examiner Ballinger: Read the witness' answer.

(The reporter read the answer).

6603 The Witness: With advertising costs for the year 1937; that is, information set forth on Respondent's Exhibit 31-O and 31-P, and additional supporting data which are in the record.

By Mr. Hanley:

Q. Will you please state, Mr. Warmack, exactly what you did in Chicago or Detroit or elsewhere in your study of the 1937 costs of the Respondent company, particularly in respect of Exhibit 31, and if you have any work sheets, will you please produce them?

A. I requested information with respect to estimates made on Respondent's Exhibit 31-L, and especially any documentary notes, or evidence underlying those estimates, and I was furnished none.

That, as I have stated, covers—

Q. (Interposing.) Have you any work sheets?

A. —the extent of my work on that study, I believe, in the field.

Q. Have you any work sheets?

A. No, sir.

Q. For the year 1937?

A. No, sir.

Q. You just asked the question, and you did not get an answer, and you quit?

A. Surely, I got an answer.

6604 Q. What was the answer? Tell me first what the question was.

A. The question was, any supporting documentary information underlying the estimates made on Respondent's Exhibit 31-L—that was the question.

Q. Mr. Warmack, I do not want your conclusions about what you asked. Please state exactly what you said.

A. I said:

"Mr. Houghton, will you please furnish me with any documentary evidence which you may have, or documentary information which will support your statement on Respondent's Exhibit 31-L, which reads:

"'However, not all the time of these individuals was spent on calling on Ned's accounts. It was estimated by Mr. Raupagh and Mr. Blough that Robinson spent 35 per cent of his time at Ned's, of which 7 per cent was on gasoline; Moulenberg spent 25 per cent, of which 5 per cent was on gasoline; Coutchie spent 25 per cent, of which 5 per cent was on gasoline.'"

"After calling Mr. Houghton's attention to that, I asked him the question:

"'What do you have in the way of documentary information which will support those estimates?'"

Q. Now, you meant by that, I assume, Mr. Warmack, support to your satisfaction; is that right?

6605 A. Well, Judge,—

Q. Well, you can answer that, Mr. Warmack.

A. I am fixing to give you an answer if you will be quiet.

I asked him for any written statement, any facts, any piece of paper that had writing on it that would support those estimates.

Mr. Hanley: Will you please read the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Mr. Austin: I object to that question. The witness was asked what he said. Now he is about to be asked to answer on something above and beyond what he stated, or what he said. Now, what he said is what he said. What he meant is not material, and should not be permitted unless he explained to Mr. Houghton what he meant.

Mr. Hanley: That is just the point. Did he explain to Mr. Houghton? There must have been a meeting of minds?

Trial Examiner Ballinger: The objection is sustained. The witness has not fully answered the previous question. The matter from where the witness stopped in his answer to the previous question is stricken.

You may go back now and state what Mr. Houghton told you in answer to your question.

The Witness: I was not asked that. I was asked what I asked Houghton.

6606 Mr. Hanley: And then you were asked just prior to that what he said to you and what you said to him.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: I will vacate my previous ruling and permit counsel for the Commission to make a further objection.

Mr. Austin: Now, may I say further, your Honor, in that objection, that what Mr. Warmack meant is immaterial. It seems to me that the meaning of his words must be determined from the words themselves would mean to Mr. Houghton. It is what the words meant to Mr. Houghton that would be important, not what Mr. Warmack meant, otherwise than his expression; otherwise, I do not think the question is proper.

Mr. Hanley: If your Honor please, I heartily agree with counsel that if we can ever get the witness to tell us that, but I have not even been able to do it up to this time.

Will you please read the last question again and I will ask the witness to answer it.

Trial Examiner Ballinger: Read the question.

(The reporter read the following question:

"Now, you meant by that, I assume, Mr. Warmack, support to your satisfaction; is that right?").

Trial Examiner Ballinger: Is that the one you now

6607 desire to address yourself to?

Mr. Hanley: Now, Judge, that does not ask for any conversation.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

The Witness: Not necessarily, to my satisfaction, Judge Hanley.

I just wanted to see what the Respondent company had to support these estimates, whether it would be satisfactory or unsatisfactory.

Trial Examiner Ballinger: In other words, do I understand you merely inquired for facts?

The Witness: Yes, sir.

By Mr. Hanley:

Q. Now, are you undertaking to testify, Mr. Warmack, that there was no support at all for the method used by the Respondent company in making this particular allocation of expense?

A. No, sir.

Q. Is it not a fact that you are just testifying that the support, whatever it may have been, did not satisfy you, as an individual accountant?

A. I did not see any support.

6608 Q. Well, you did not see anything that satisfied you; is that what you are saying?

A. I saw nothing to satisfy or did not satisfy me.

Trial Examiner Ballinger: Judge, the witness has testified that he asked for the basic facts upon which the statements were predicated, and that they were not furnished to him.

Mr. Hanley: All right.

By Mr. Hanley:

Q. Perhaps I can get at it this way, Mr. Warmack.

You spent many weeks in the offices of the Respondent company in Detroit, and some of that time was spent in Chicago.

That is true, is it?

A. That is very true.

Q. Did you see many accountants working in the Detroit office?

A. Yes, sir.

Q. When you went to Chicago, did you meet a Mr. Frank L. King?

A. I believe that I did, Judge Hanley, but I do not recall the name right this moment. My papers would show.

Q. Try and remember this, if you can, Mr. Warmack; I am sure you were introduced to Mr. King, and if you remember it, state, please, who Mr. Frank King was.

6609 A. I certainly do not know.

Q. As you understood it.

A. I certainly do not know.

Q. Were you on the seventeenth floor of the Respondent's building in Chicago?

A. I believe I was.

Q. Do you remember that?

A. Yes, sir.

Q. Do you remember that that was the accounting floor for the marketing accounts?

A. No, sir: I do not remember the floor.

Q. Well, without reference to the number of the floor, were you on the floor which you understood to be the accounting floor?

A. Yes, sir.

Q. For the marketing department?

A. Yes, sir.

Q. And have you any idea how many accountants were there?

A. No, sir, but there was a large group.

Q. Could you make any estimate at all, Mr. Warmack? I frankly will confess to you I do not have a fixed idea how many there were there, so your guess is just as good as mine.

A. I would not hazard a guess.

Q. Well, there were a great many of them?

6610 A. Yes, sir.

Q. Dozens and dozens of them?

A. I think so, yes, sir.

Q. Do I understand it to be a fact that that entire floor filled with these operatives and accountants was given over to the marketing accounting business of the Respondent company?

A. Well, Judge, I did not inquire into that.

Q. Perhaps you did not.

A. I do not know if I was told that or not.

Q. I do not want you to tell me what you do not know.

A. Mr. Houghton may have stated that. He took me to many floors and told me what the operations were, that went on in the home office on those respective floors.

Q. After having had that experience, are you prepared to say that the Respondent has made no effort and no studies in respect of allocations of time and effort put forth by the various salesmen serving Ned's Auto Supply Company during the year 1937?

The Witness: May I have the question read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: No, sir. I am not prepared to say anything concerning that, Judge Hanley.

By Mr. Hanley:

6611 Q. The fact is you are just not prepared to say anything about 1937 so far as the efforts of the Respondent company are concerned; is not that the fact, Mr. Warmack?

A. No, sir.

Q. You just have not made the study?

A. That is not the fact, Judge Hanley.

Q. All right. You tell us.

Mr. Hanley: I wish I could get out of this witness what study he made for the year 1937. I ask the Court to instruct this witness to say exactly what study he made in 1937.

Trial Examiner Ballinger: Mr. Warmack, you may pick up Respondent's Exhibit 31-A to Q, and review it, page by page.

Mr. Austin: I would like to know whether that question is directed to what he did in the field, or what studies he made of the record and the exhibits apart from his field examination.

Mr. Hanley: If your Honor please, I do not care where he did it.

Trial Examiner Ballinger: He may go into any matters that he investigated and touched on that question.

Mr. Austin: Well, as already stated, your Honor, the entire account, and said he studied the entire testimony, and I submit that is a complete answer to the question, 6612 and as long as he has already stated that three times generally and one time this morning, once specifically, I think that is enough.

Trial Examiner Ballinger: That apparently is entirely satisfactory to counsel for the Commission, but this is cross-examination and it may not be entirely satisfactory to counsel for the Respondent.

He is entitled to inquire into it.

Mr. Hanley: If your Honor please, what I really want to know is what this witness did in the matter of an investigation of the underlying data, records, and facts and accounts that went into the preparation of Respondent's Exhibit 31.

That is what I want to know, whether or not this witness knows anything about it.

Trial Examiner Ballinger: Can that be determined in any way that by a review, page by page, of Respondent's Exhibit 31-A to Q?

Mr. Hanley: Perhaps not. I do not care how the question is answered, if I can just get an answer.

Trial Examiner Ballinger: You may answer it in any way you can, now.

Answer it in your own way.

Mr. Hanley: Start with 31-B.

Mr. Austin: Well, now, your Honor, as far as that 6613 is concerned, the direct examination was limited to certain schedules in Exhibit 31. I object to any questions on the balance of Exhibit 31 as not proper cross-examination, they were not touched upon at all either generally or specifically on direct examination.

Mr. Hanley: Oh, if your Honor please, Exhibit 31 is an integral thing. It cannot be broken up into pages.

Mr. Austin: Well, it is broken up, every part of the schedule is treated separately, and separated from the others.

Mr. Hanley: That is an unfair thing, Mr. Austin.

Mr. Austin: I do not consider it unfair.

I started in direct examination on Respondent's Exhibit 31-H.

I do not object to cross-examination on the following, but I do object to cross-examination on the previous portions of that exhibit because we gave no testimony on direct concerning them.

Your Honor will note the first page shows each one of these schedules of differentials listed.

Mr. Hanley: Mr. Austin, do not do that; do not practice law that way.

Mr. Austin: That is the only way I know to practice it, and I consider it proper. He is going to cross-examine on something on which he did not give direct testimony on, and I object to that.

6614 Mr. Hanley: I withdraw those remarks.

Trial Examiner Ballinger: Judge Hanley, do you agree that the direct examination was confined to pages commencing with page H and continuing how far, Mr. Austin?

Mr. Austin: Schedule 2-B, which includes pages H and I, and then schedule 4 which includes pages J, K, L, M, N, O, P, everything down to Q, and there may have been something regarding Q.

Trial Examiner Ballinger: Page 7, and extending to page 16 of Respondent's Exhibit 31? Is that correct?

Mr. Austin: Yes, sir.

Mr. Hanley: If your Honor please, I am not sure exactly what pages on Respondent's Exhibit 31 were examined upon by Commission's counsel in the direct examination of this witness.

I represent to the Court, on behalf of the Respondent company, that Exhibit 31 is respondent's justification of the one half cent differential accorded to Ned's Auto Supply Company, that that exhibit is an integral unit, and the mere fact that it may be composed of a number of pages is utterly immaterial.

The thing is a whole within itself, and no part of it can be examined without a resulting influence on the result of the exhibit itself, which is contained in what hap-
3615 pens to be page 31-A.

It is a justification, so far as the Respondent is concerned, of that one half cent differential.

I do not care how many pages counsel may have asked about, if he went into Exhibit 31, the Respondent is entitled to go into Exhibit 31 in its entirety.

Trial Examiner Ballinger: Respondent's Exhibit 31-A portrays the result of cost computations on various items; the totals being portrayed at the foot of the columns.

Counsel for the Commission has inquired into only certain of the items that entered into the totals and which the exhibit portrays in detail, commencing with page 7 and extending to the end of the exhibit.

The Examiner rules that the cross examination should be confined to the particular integral portions inquired into by counsel for the Commission.

Mr. Hanley: All right. Now, am I to understand just what portions those are, if your Honor please, as—

Mr. Austin: (Interposing): May I state that, your Honor?

Trial Examiner Ballinger: The exhibit, commencing with page 7, I believe.

Mr. Hanley: I suppose you may, you are doing most of it:

Mr. Austin: The record will show it.

6616 Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

On the first page of Exhibit 31, opposite item No. 2, is marked "Market Expense Item Not Influenced by Ned's Auto Supply Company." That is dealt with commencing on page 6 of the exhibit, which is also—

Mr. Hanley: (Interposing): Do you mean that we cannot go into this exhibit in its entirety; is that what your ruling means?

Trial Examiner Ballinger: That is what I am ruling—considered on page 7, which is the commencement of that portion of the exhibit dealing with Commission's direct examination.

Counsel for Respondent is at liberty to inquire into anything appearing in the exhibit commencing with page 7 and extending to the end of the exhibit.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

By Mr. Hanley:

Q. Mr. Warmack, did you examine Respondent's Exhibit No. 33?

Trial Examiner Ballinger: Off the record.

6617 (There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Perhaps I had better reframe the question. Did you examine Respondent's Exhibit 33-A through 33-E?

A. Yes, sir.

Q. Did you make any study of the underlying data, facts, figures, and records which went into the preparation of Respondent's Exhibit 33?

A. Is not that the Oklahoma study?

Q. That is what it is, but you ought to know if you studied it.

A. Well, I am looking at it, at this moment, Judge. I am sure that I did not examine into any of the facts, figures, which are the underlying figures and data and so forth which went in to make up Respondent's Exhibit 33-A to 33-E, inclusive.

Q. That being the fact, are you prepared to express any opinion as an expert accountant relative to the conclusion reached in Respondent's Exhibit 33?

Mr. Austin: I object to that.

I did not know just what the purpose was of bringing in this exhibit at this time, and I do not know yet, but there is no direct examination on it, so I think the exhibit becomes immaterial in any event.

I am considering a motion to strike the exhibit
6618 from the record at some later date. However, in any
event, I do not think it is proper cross-examination now.

Mr. Hanley: I concede the fact, if your Honor please, that the statement of counsel is accurate, that there was no mention made of it in his direct examination.

Trial Examiner Ballinger: Well, does that in any wise pertain to any item appearing on Respondent's Exhibit 31-A to 31-Q, inclusive?

Mr. Hanley: 33 has not anything to do with it, Judge, it is an entirely separate question.

Trial Examiner Ballinger: The objection is sustained.

By Mr. Hanley:

Q. Now, Mr. Warmack, directing your attention to that portion of Respondent's Exhibit 31, beginning on page H, which I think is page 7—

Trial Examiner Ballinger: Page 7.

By Mr. Hanley:

Q. —to which the Court has limited this examination.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Directing your attention, Mr. Warmack, to account
001 on page 7 of Respondent's Exhibit 31-H; you
6619 testified on page 5784 of the record that a part of
that cost was properly applicable to serving the
customers and that, of course, Ned's was one of those customers.

I will ask you now, if you know, were the Respondent company's records in 1937 set up on a customer basis?

A. Kindly explain what you mean by "customer basis," Judge?

Q. I do not know. What do you think?

A. If you do not know what you are asking, I do not know how to answer it.

Trial Examiner Ballinger: The Examiner directs that the answer and the colloquy between counsel for the Respondent and the witness be stricken.

The witness is directed to answer the question as propounded.

Mr. Austin: If he can, I assume.

Trial Examiner Ballinger: The direction presupposes that he will answer only as to his knowledge.

Mr. Hanley: Counsel for the Respondent also agrees to that.

The Witness: Judge, may I ask you off the record—

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

6620 Q. Do I understand that you do not understand the question, Mr. Warmack?

A. Yes, sir. I ask that you amplify it, please.

Q. As an accountant, do you understand what the term setting up accounts on a "customer basis" means?

A. Setting up accounts on a customer basis?

Trial Examiner Ballinger: Read the question.

(The reporter read the question originally propounded, as follows:

"Q. Directing your attention, Mr. Warmack, to account 001 on page 7 of Respondent's Exhibit 31-H, you testified on page 5784 of the record that a part of that cost was properly applicable to serving the customers and that, of course, Ned's was one of those customers.

"I will ask you now, if you know, were the Respondent company's records in 1937 set up on a customer basis?")

The Witness: You would have to amplify that before I can answer that.

By Mr. Hanley:

Q. As a matter of fact, Mr. Warmack, in the entire accounting form 189, were not the marketing expense items of the Respondent company set up on a customer basis?

A. Individual customer; is that what you mean?

Q. I am asking you the question, Mr. Warmack, if you do not understand the question, just say so, and

6621 decline to answer.

A. I do not understand the question as put. That is why I inquired, for that reason, and I did not get an answer.

Q. Now, assuming for your information that accounts set upon a customer basis means a costing system which applies to individual customers, assuming that, or rather, assuming the absence of it—if I make myself clear—do I, now, Mr. Warmack?

A. Well, I will have to get this straight.

Q. If that were not done, and—would not a schedule analysis of the duties of the individuals whose salaries enter into the salesmen's accounts be necessary to determine whether any particular costs were incurred on any particular customer?

The Witness: Judge, may I have the question?

Trial Examiner Ballinger: Do you understand the question?

The Witness: I do not understand the question.

Mr. Hanley: I will reframe the question.

Trial Examiner Ballinger: That is a rather involved question.

Mr. Hanley: I will withdraw it.

Trial Examiner Ballinger: Question withdrawn.

By Mr. Hanley:

Q. Let me first refer you to account 001.

6622 A. Yes.

Q. Now, you have testified, Mr. Warmack, as follows:

"That a part of that cost is properly applicable to serving all customers."

Now, you say further that Ned's is one of those customers. Do you remember that testimony? It is at page 5784.

A. Yes, sir.

Q. Then, I asked you if the company records in 1937

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were set up on a customer basis, and you declined to answer that question; that is true, is it?

A. I can answer the question if you explain what you mean by "customer basis." I can.

Q. Well, I am just asking you what happened. You did not answer that question; did you?

A. No, I did not.

Q. Did you?

A. I did not for the reasons stated, Judge. I think the record will show that.

Q. Then I suggested to you that the "customer basis" meant an individual customer.

And now I ask you this question.

If the records are not set up on an individual customer basis, would not a schedule analysis of the duties of the
individuals whose salaries enter into this account—
6623 being account 001—be necessary to determine
whether any costs incurred on any particular
customers?

A. May I have the question read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Judge, I can state what I think the question means and answer it.

Trial Examiner Ballinger: You may do so.

The Witness: I think the question means:

For costing purposes if costs are not kept separately; that is, costs serving separate customers; that is, would it be necessary to make an analysis of each of the classes of costs incurred or involved in the serving of that individual customer.

Is that what you mean, Judge?

By Mr. Hanley:

Q. Well, is that what you mean; is that your idea?

~~A. Yes, sir; that is what I understand what you meant. I did not understand your question.~~

Q. I am sorry. If you do not understand the question, I do not want you to attempt to answer, Mr. Warmack.

A. I see.

Q. I am satisfied with your answer.

A. Well, I have not answered, I have just stated what
I thought you meant, if that is all right I will try to
6624 answer the question as I have just recited it.

Q. All right. You answer it as you understand it.

A. It is my opinion that a study and analysis would have to be made of each of the separate groups of cost incurred in connection with the functions involved in the serving of one customer, but that is not complete without stating that the whole function would have to be studied, and an accounting would have to be made, your Honor, whereby the whole cost of that function would be properly and thouroughly analyzed, and not just to make a study to determine if one single customer were being served as the result of one or more functions what the cost was to serve him, because it would be incomplete if the full coverage were not made of the total cost with respect to each function.

Mr. Hanley: I ask to have the answer read.

Trial Examiner Ballinger: Read the answer.

(The reporter read the answer.)

Mr. Hanley: The Respondent now moves to strike the answer of the witness beginning with the words "one thing further." Is that where you began your explanation?

The Witness: That is part of the answer.

Mr. Hanley: I now make a motion to strike from there on.

Off the record.

Trial Examiner Ballinger: Off the record.

6625 (There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: I withdraw the motion to strike just made and will make this motion:

Respondent moves to strike the answer of the witness beginning "but the function" on the ground that it was a voluntary statement, that it is unresponsive, that it is not relevant to the question, or the rest of the answer, and is unexplained and is not understandable, standing alone, and that the answer is, as it appears, is a complete answer to the question as propounded.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. The motion to strike is granted.

Mr. Austin: I would like to ask the witness a question.

Trial Examiner Ballinger: You may.

Mr. Austin: Was your answer directed solely to account 001, Mr. Warmack?

The Witness: No, sir.

Mr. Austin: Well, it is my understanding that the question was limited to account 001, and I request that the question be reread.

Trial Examiner Ballinger: Well, the Examiner, 6626 in view of the witness' answer, directs that the entire answer be stricken, and the question reread to the witness, and that he answer it.

The Witness: I cannot answer it as read, your Honor; I have stated my understanding of the question and I can answer that.

Trial Examiner Ballinger: Answer it in the light of your understanding.

Mr. Hanley: Of course, that is the best we can hope for anyhow.

Will you please reread the question to the witness?

Trial Examiner Ballinger: Reread the question to the witness. You had better read his understanding of it also.

Mr. Hanley: I do not know what his understanding is and do not care.

Trial Examiner Ballinger: His answer must be limited to this one account.

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: Now read his understanding.

6627 (The reporter read the answer.)

Mr. Hanley: May he not now reread it, just the ~~question alone? May he not restate it, your Honor, or perhaps I should better restate it if he does not under~~stand it.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: Your Honor, I will just have to call this to the Respondent's attorney's attention in connection with that question which reads:

"If the records are not set up on an individual customer basis would not a schedule analysis of the duties of an individual whose salaries enter into this account"—do you mean right there for the purpose of determining cost of serving that customer?

By Mr. Hanley:

Q. Mr. Warmack, I mean just exactly what the question says. You say you have made a study of the Respondent's records, you should know better than I know. I just mean what my question says. If you cannot answer it, please just say so.

Trial Examiner Ballinger: Judge, the inquiry made by the witness of counsel appears to the Examiner to be a fair one. Cannot you throw some light on it?

6628 Mr. Hanley: Judge, I do not know. I want this on the record, if your Honor please. There has been considerable discussion about the meaning of the question just propounded by Respondent's counsel, and I would like to have all of that discussion appear on the record.

Trial Examiner Ballinger: Very well.

Mr. Hanley: And not be taken from it.

Trial Examiner Ballinger: Very well.

Mr. Hanley: The purpose of the question and certain ensuing examination will be also designed to test the knowledge of the present witness in respect of the cost of the Respondent in serving Ned's Auto Supply Company as distinguished from other members of the tank wagon reseller group of the Respondent's customers.

So far as the Respondent is concerned, there is no mystery asked of the witness.

It is simply designed to ascertain what the witness knows, if anything, about the method of the Respondent of keeping costs in respect of individual members of the reseller tank wagon customers group or in the alternative, what would be necessary in the matter of a cost study to determine costs in respect of any single customer in that group, as distinguished from the rest, if the company records were not set up on a customer basis.

Trial Examiner Ballinger: Now, in the light of
6629 the statement just made by counsel for the Respondent, do you understand the question and can you answer it?

The Witness: Well, if you please, ask him to read that question and let me write it down, I can tell you. I do not understand it, but I think I understand what the Judge wants, what he means.

Mr. Hanley: Judge, may we have our noon recess while Mr. Warmack looks at it?

Trial Examiner Ballinger: The request of counsel for the Respondent is granted.

And now, at 12:17 p. m., the hearing stands in recess until 2:00 p. m.

(Whereupon, at 12:17 o'clock p. m., the hearing was recessed to reconvene at 2:00 o'clock p. m.)

6630 Afternoon Session.

2:00 P. M.

Trial Examiner Ballinger: Come to order. You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination (Continued).

Mr. Hanley: If your Honor please, I believe there was a question on the record that the witness wanted to study during the noon recess.

Trial Examiner Ballinger: Are you prepared to answer the question?

The Witness: Yes, sir. I think so.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. Then I suggested to you that the 'customer basis' meant an individual customer.

"And I now ask you this question:

"If the records are not set up on an individual customer basis would not a schedule analysis of the duties of the individuals whose salaries enter into this account—being account 001—be necessary to determine whether any costs were incurred on any particular customers?")

6631 Trial Examiner Ballinger: Proceed.

The Witness: I do not know whether it would be necesary to determine whether any costs were incurred in account 001 on any particular customer.

It is my understanding that the costs in 001 represent clerical costs of supervisory officials.

It is my opinion that according to Respondent's accounting procedure, these clerical costs follow the costs of the supervisory officials.

By Mr. Hanley:

Q. Mr. Warmack, in connection with the 1937 year, and Respondent's Exhibit 31, did you make any analysis of acount 001?

A. No, sir.

Q. Do you know the influence, if any, of any criticisms that you may have of the treatment of 001 on Respondent's Exhibit 31?

The Witness: May I have the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: How would I know, Judge. I could not tell you.

6632 By Mr. Hanley;

Q. Is that your answer, Mr. Warmack?

The Witness: Read it.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. Do you know the influence, if any, of any criticisms that you may have of the treatment of 001 on Respondent's Exhibit 31?")

Trial Examiner Ballinger: Do you know it?

The Witness: Yes, sir. I know this, Judge Ballinger. I know that a portion of the costs included in account 001 is properly applicable in some part to the serving of Ned's Auto Supply Company.

By Mr. Hanley:

Q. All right. Tell us, Mr. Warmack, what part?

A. I do not know. I have not made an analysis, and the only way you could know, Judge Hanley, would be to make an analysis.

Q. And you did not make it?

A. I did not make it.

Q. Very well. Did the files, records, correspondence maintained by the employees of the Respondent company, whose salaries are entered into account 001, have anything to do with Ned's Auto Supply Company in 1937?

The Witness: I will have to have that read.

6633 Trial Examiner Ballinger: Read the question.

Mr. Hanley: I will repeat it.

By Mr. Hanley:

Q. Did the files, records, and correspondence maintained by the employees of the Respondent company, whose salaries are entered into account 001, have anything to do with Ned's Auto Supply Company, in 1937?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Mr. Warmack, do you know—before you answer the last question on the record, I will ask you this:

If, as a matter of fact, you did or did not investigate the underlying data, files, records, and correspondence maintained by the employees whose salaries are entered into account 001 during 1937 in connection with your study—if you made any study—of Respondent's Exhibit 31 having to do with the year 1937?

The Witness: What is the question?

Trial Examiner Ballinger: Read the question.

(The reporter read so much of the question as follows:

"Q. Mr. Warmack, do you know—before you answer the last question on the record, I will ask you
6634 this:

"If, as a matter of fact, you did or did not investigate the underlying data, files, records, and correspondence maintained by employees"—)

The Witness: I did not investigate such data.

Mr. Hanley: Will you please finish the question.

(The reporter read the remaining part of the question as follows:

"whose salaries are entered into account 001 during 1937 in connection with your study—if you made any study—of Respondent's Exhibit 31, having to do with the year 1937?")

The Witness: I gave an answer to that.

By Mr. Hanley:

Q. Have you any further answer, Mr. Warmack?

A. I answered your second question, Judge Hanley, right there.

Q. Now, will you please answer the next preceding question?

A. What is it?

Mr. Hanley: Will the reporter please read it.

Trial Examiner Ballinger: Read the question.

(The reporter read the following question:

"Very well. Did the files, records and correspondence
maintained by the employees of the Respondent com-
6635 pany, whose salaries are entered into account 001,
have anything to do with Ned's Auto Supply Com-
pany in 1937?")

The Witness: I certainly do not know.

By Mr. Hanley:

Q. What duties did you find were performed by these employees which gave rise to any cost of serving Ned's Auto Supply Company in 1937?

A. I made no study of that point.

Q. Who actually handled Ned's account in 1937, among the various supervisors of the sales force, or among the salesmen in the sales force?

The Witness: Did you ask the men's name?

Mr. Hanley: Read the question.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

By Mr. Hanley:

Q. I just asked you the question—

The Witness: I would like to have the question again, please.

Trial Examiner Ballinger: Please read it again.

(The reporter again read the question.)

The Witness: As to supervisors, I do not know: as to salesmen, it is my understanding that Messrs. Robinson, Moulenberg, and Coutchie served as salesmen in calling on Ned's business during 1937.

6636 By Mr. Hanley:

Q. And that information is derived, is it not, Mr. Warmack, from Respondent's Exhibit 31?

A. 31-L; yes, sir.

Q. 31-L?

A. Yes, sir.

Q. And that is the only source of your information; is it not?

A. Well, I have read the testimony that was given, Judge Hanley, with respect to this particular point.

Q. Well, just answer my question.

A. Well—no.

Q. Have you any other information—I am asking you for it, Mr. Warmack.

A. I stated, your Honor, that I read the testimony.

Mr. Hanley: May I ask that that question be read again?

Trial Examiner Ballinger: Read the question again.

(The reporter read the question as follows:

"Q. Who actually handled Ned's account in 1937, among the various supervisors of the sales force or among the salesmen in the sales force?")

By Mr. Hanley:

Q. Have you any other information, Mr. Warmack, other than that which you have derived from Respondent's Exhibit No. 31, if so, please state what it is, and what the source of it is. 6637

A. The only information I have, Judge Hanley, is what secured from reading the testimony given us in this case.

Q. By whom?

A. By witnesses for the Respondent—I remember testimony on that point by Mr. Blough.

Mr. Austin: Mr. Blough was the witness for the Commission.

The Witness: That is right.

By Mr. Hanley:

Q. Mr. Warmack, is account No. 001 related to salesmen's salaries?

A. I will have to inquire, Judge Hanley: Do you mean salesmen's salaries as shown in 004, or which salesmen's salaries do you mean?

Q. Mr. Warmack, I wish you would please not ask me questions. I am just asking you what you know.

Trial Examiner Ballinger: Is it related to any salesmen's salaries?

By Mr. Hanley:

Q. You have made some kind of a study of this thing. Now, please just answer the question on that basis of whatever study you have made. If you do not know, why, say it, Mr. Warmack; that is perfectly satisfactory to me.

6638 A. I think I have stated that I made no analysis of this account 001 for the year 1937, and it is my understanding that the expenses which were concerned in account 001, account entitled "Salaries—Supervision—Others" represents compensation paid to office clerks, and costs of that nature of the supervisory officials of the company.

And it is further my understanding that the supervisory officials of the company included Mr. Hamer, who is an assistant manager in the Detroit field, for reseller; and Mr. Blough, assistant manager in the Detroit field, for wholesale business; if those two gentlemen are to be considered as salesmen, then this account relates to salesmen; if those two gentlemen are not to be considered as salesmen, then this account does not relate to salesmen; your Honor, that is the best answer I can give.

Q. Very well.

Did you ascertain whether Mr. Rupagh spent any time on this account in 1937?

A. No.

Q. And at the outset, may I inquire if you know who Mr. Rupagh is?

A. Yes, sir.

Q. Just for the sake of the record, state who he is.

A. Mr. Rupagh is the manager of the Detroit field.

Q. Now, your answer is that you did not make any investigation as to whether or not he spent any time?

6639 A. No, sir.

Q. Now, supposing, Mr. Warmack, that Mr. Rupagh did—and I state to you, and I think I am right, that the record discloses that Mr. Rupagh did spend some direct time in connection with Ned's Auto Supply Company—is there not a logical basis for considering account 000 and 001 on a different basis in Respondent's cost analysis as reflected by Exhibit No. 31?

Trial Examiner Ballinger: Are you familiar with that account?

The Witness: Yes, sir. I would like the question if ou please, your Honor.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: In my opinion, there is, most assuredly s, but that answer does not go particularly to Rupagh's ccount, it goes to the premise from which the cost analysis s made, as reflected by Respondent's Exhibit 31-A to Q.

Trial Examiner Ballinger: Well, you agree, then, there as a logical basis for a distinction in computing that acount; do you?

Mr. Austin: May I have the question read?

Trial Examiner Ballinger: No, I want him to answer my question.

640 Mr. Austin: It is your question that I would like to have read.

Trial Examiner Ballinger: Certainly, read it.

(The reporter read the question.)

Mr. Austin: I was not sure whether you said "for the istinction" or "for a distinction."

Trial Examiner Ballinger: "For a distinction."

Mr. Austin: Thank you.

The Witness: Now may I have the question.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: There may be, Judge.

Trial Examiner Ballinger: Do you agree or not that here was?

The Witness: I do agree that there could have been a roper separation made of this particular class of cost.

3y Mr. Hanley:

Q. Mr. Warmack, of course, Mr. Warmack, I suppose I an swim up Niagara Falls backwards; but that does not nswer any questions.

Did you make a study of this account? Are you preared to say from any study that you made what your pinion is?

A. With respect to what, please?

Q. With respect to the allocation of this particular account.

641 I will make it more specific, Mr. Warmack, did you or did you not determine whether or not M. Rupagh,

individually, spent any time on Ned's Auto Supply Company in the year 1937?

A. I did not individually determine that to be a fact.

Q. Do you know whether or not it is a fact?

A. I certainly do not know.

Q. Well, I think that settles it.

A. Yes.

Q. If he did spend direct time, Mr. Warmack, according to your theory of accounting, account 001 would not necessarily follow 000, would it, in so far as Mr. Rupagh's salary is concerned?

A. Part of it would.

Q. What part?

A. I am certain I could not give you a figure, Judge, as to what part it would follow.

Q. I am not asking for a figure. If you can just tell me in any kind of language what part of that, would you please?

A. I could answer your question, Judge Hanley, by an example.

Q. All right. You may answer the question.

A. Mr. Rupagh has stenographic assistants and other clerical assistants incident to his work, as well as other supervisory officials in the Detroit office.
6642 It is entirely possible that his activities influence the activities of those clerical assistants. And in view of that, it is a reasonable assumption, in my opinion, that the cost of such assistants should logically follow the allocations of the supervisor's time.

Q. Mr. Warmack, is not that purely conjectural on your part?

A. In this particular case?

Q. You say you had made no study of what Mr. Rupagh did.

A. In this particular case you ask if it is conjectural?

Q. Yes.

A. I am certain that I do not know if any stenographer or any clerical assistants worked for Mr. Rupagh's office in 1937, of my own knowledge.

Q. Apparently you do not know, Mr. Warmack, but assuming the fact to be—and I think it is a fact on the record—that Mr. Rupagh did lunch, and had conferences in his office with members of the Ned's Auto Supply Company from time to time during 1937—and during other years, as a matter of fact—what have you to say as an expert accountant as to whether or not account 001 would follow in any degree to the extent of a direct effort of Mr. Rupagh in connection with Ned's Auto Supply?

A. I certainly do not, and I could not know, without going into this matter further.

6643 Q. Well, did you make any investigation of that at all while you were in Detroit?

A. I certainly did not.

Q. Did you discuss the matter at all with Mr. Rupagh or with anybody else?

A. No, sir. You see, that includes—I may have discussed that with Mr. Houghton—I would not say that I did not, but I do not recall just now.

Q. Now, do you know from anything that you did, whether or not the Respondent's accountants analyzed, studied, or examined the files of the employees of the Respondent concerning account 061 to ascertain whether or not any cost was incurred in connection with Ned's Auto Supply?

A. Do I know that of my own knowledge?

Mr. Hanley: Will you just please read the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Well, may we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Back on the record.

The Witness: May I hear the question again?

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

6644 "Q. Now, do you know from anything that you did, whether or not the Respondent's accountants analyzed, studied, or examined the files of the employees of the Respondent concerning account 001 to ascertain whether or not any cost was incurred in connection with Ned's Auto Suppy?")

The Witness: I certainly do not know of my own knowledge whether the Respondent's accountants made any studies or not, and I could not know.

By Mr. Hanley:

Q. What?

A. And I could not know.

Q. Did you undertake to learn, Mr. Warmack?

A. No, sir. I think that was testified to by Mr. Boatwright, Mr. Boatwright told us about it on his examination by Mr. Austin.

Q. Mr. Warmack, do you thoroughly understand that the Respondent's Exhibit No. 31 is an effort to segregate one member or one customer in the tank wagon reseller group from the rest of the tank wagon reseller group?

A. Yes, sir. I understand that, Judge Hanley.

Q. Did you make any effort at all, while you were in Detroit, to determine the cost of the Respondent in serving the members of that particular group?

The Witness: May I hear the question again?

6645 Trial Examiner Ballinger: Do you mean individual members?

By Mr. Hanley:

Q. Yes, I mean individual members, Mr. Warmack.

A. No, sir.

Q. I am sure I asked you this before, Mr. Warmack, perhaps you will tel us again just how much of a study did you make about the year 1937?

Mr. Austin: Objected to as repetitious.

Mr. Hanley: I agree it is, Judge. I am sure I asked that question before.

Trial Examiner Ballinger: The matter has been fully gone into. Objection sustained.

Mr. Hanley: I am just trying to find out how much this witness did.

By Mr. Hanley:

Q. Mr. Warmack, who was in charge of the real estate and tax department in the Detroit field in 1937, if you know?

A. I do not know.

Q. Did you talk with anybody in Detroit in connection with that matter?

A. No, sir.

Q. Did any one tell you anything about ant contacts that may have been made by the real estate department of the respondent company with Ned's Auto Supply Company during the year 1937?.

6646 A. I do not remember them discussing that question, Judge Hanley.

Q. Did you make any inquiry?

A. I do not recall that I did; I rather think that I did not.

Q. Do you know whether the company aided Ned's in the acquisition of any pieces of property during the year 1937?

A. I certainly do not.

Q. Do you know whether or not the files of the real estate and tax department of the Respondent company indicate anything in relation to any contract with Ned's Auto Supply Company during the year 1937?

A. I do not know.

Q. Do you know, as a matter of fact, whether Ned's Auto Supply, itself, had a real estate and tax man, and other officials who handled their tax and real estate problems?

Mr. Austin: Objected to as irrelevant and immaterial, and the witness would not know what Ned's Auto Supply Company did since we are concerned only with the Respondent in this case.

Trial Examiner Ballinger: Objection sustained.

By Mr. Hanley:

Q. Based upon what you have said about your knowledge, or lack of it, concerning the real estate and tax records of the Respondent company, I want to ask you this, Mr. Warmack. 6647

A. Yes, sir.

Q. Did you make a factual and objective study to determine whether the accountants for the Respondent company made an examination of the files, correspondence, data, and records of the real estate and tax department of the Respondent company for the year 1937 and were correct and accurate in their treatment of the cost entered in the three accounts, numbers 1215, 1216, and 1217?

Trial Examiner Ballinger: Judge, it appears to the Examiner that you have about three questions embraced in that one omnibus question.

Mr. Hanley: Well, Judge, if you think that, I will split it up.

Trial Examiner Ballinger: I think it would be better to split it up.

Mr. Hanley: I will be glad to withdraw the question and restate it, if your Honor thinks I should do so.

Trial Examiner Ballinger: Question withdrawn.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Read the previous question.

(The reporter read the question.)

Mr. Hanley: May it be understood that I withdraw the question?

6648 Trial Examiner Ballinger: Question withdrawn.

By Mr. Hanley:

Q. I will restate this question, Mr. Warmack:

Did you make a factual and objective study to determine whether the accountants for the Respondents had made an examination of the files, correspondence, records, and data of the real estate and tax department of the Respondent company for the year 1937?

A. Your Honor, the answer to that question would have to be, No, but I should like to explain that I do not understand the terms "factual"—"objective study"—to determine what their accountants had done; that is not my understanding of what those terms, as previously used have meant in this record.

I did not look into that matter, so the answer to the question would be—No.

Q. You have stated several times, Mr. Warmack, that in your opinion many of these accounts including 001, 215, 216, 217, were not handled on the basis of sound accounting.

You have now stated that you did not make any particular study of the data, records, facts, and accounts underlying an analysis of those accounts as they are reflected in Respondent's Exhibit 31.

I ask you now upon what do you base your opinion that the conclusions of the Respondent are not sound ~~account~~ing?

6649 A. With respect to each account—which accounts, will you please, Judge?

Q. 001, 215, 216, and 217.

A. Yes. I shall be glad to.

Q. Please do so.

A. It is my understanding account 001 entitled "Salaries—Supervision—Others" shown on Respondent's Exhibit 31-H in the amount of $4,550.06 represents that part of clerical assistants and similar expense incurred in the Detroit field for the year 1937 incident to supervisory activities and that that figure of $4,550.06 was separated on the company's regular accounting form 189 for the Detroit field on the basis of gallonage including Ned's gallonage and—

Q. (Interposing.) Mr. Warmack,—

A. I have not answered the question, Judge.

Q. I am sorry. Go ahead.

Trial Examiner Ballinger: Proceed.

The Witness: My first question, then, goes to the amount of $4,550.06, which was allocated on a gallonage basis, and I have never as yet been able to look at any documentary evidence which would show me that a study had ever been made by the Respondent company to support such an allocation factor as was used here in the regular accounting procedure.

Inasmuch as Ned's gallonage is used for the allocation
of this particular class of expense, in the absence of
6650 a study, which has not been made in my opinion thor-
oughly and properly, this figure of $4,550.06 must be
questioned from the standpoint of sound accounting. To my satisfaction, it seems demonstrated by the allocations made that a part of this expense is properly applicable to Ned's inasmuch as supervisors in the Detroit field must, to some extent, supervise the general activities of the field.

That answers your question with respect to 001 account.

Now, we will take up the 215 account entitled "Expenses—Salaries—Others"; for which there is shown on Respondent's Exhibit 31-H—

Q. (Interposing.) Well, just a moment, if you please.

Do you know whether there were any other expenses incident to the handling of Ned's business from any other study that you did or did not make?

A. I could not know that.

I have not answered your original question.

Q. In connection with account 1215?

A. Do I know?

Q. Now, listen, Mr. Warmack. I do not want you to testify to anything you do not know. You have said you did not make a study for the year 1937.

A. I have studied this document (indicating Exhibit 31).

Q. I am not asking you questions now about the
6651 general accounting procedure of the Respondent com-
pany in connection with its form 189. We will get to that in due course. I am not asking you that now.

I am asking you what you know.

A. Of my own knowledge?

Q. As a matter of fact, of your own knowledge about the facts relative to 1937.

The Witness: Your Honor, I know nothing with respect to the activities—

Trial Examiner Ballinger: (Interposing.) Judge, the witness has stated repeatedly that he has no personal knowledge of what had actually been done by the company, and that his testimony was based upon the statements of the company either appearing in the records or statements of representatives of the company to him in the office.

Mr. Hanley: Well, there were very, very few statements made about 1937.

Trial Examiner Ballinger: That is true with reference to 1937.

Mr. Hanley: 1937 was pretty sparse.

Mr. Austin: There is a good deal of testimony in the record about 1937, upon which the witness is entitled to rely.

Mr. Hanley: On the other hand,—well, there is only one way that I can handle it, in view of the attitude of
6652 the witness.

The Witness: Your Honor, I have not answered the first part of the former question. I have only answered a part of it.

Trial Examiner Ballinger: The witness has stated that he has not finished the answer to the original question.

Turn back to the question. Do you desire it reread?

The Witness: Yes, sir.

Trial Examiner Ballinger: Read the question.

Mr. Austin: The reporter is now going to read the question?

Trial Examiner Ballinger: Yes.

Mr. Austin: I would like to have that read on the record, because it is a long way back.

Trial Examiner Ballinger: That will be done.

(The reporter read the question as follows:

"Q. You have stated several times, Mr. Warmack, that in your opinion many of these accounts including 001, 215, 216, 217, were not handled on the basis of sound accounting.

"You have now stated you did not make any particular study of the data, records, facts, and accounts underlying an analysis of those accounts as they are reflected in Respondent's Exhibit 31.

6653 "I ask you now upon what do you base your opinion that the conclusions of the Respondent are not sound accounting?")

Mr. Hanley: I would like to have a recess at this time.

Trial Examiner Ballinger: We will recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Austin: If your Honor please, I suppose the witness has forgotten the question now that he was addressing himself to. Also, I understand he gave an answer to it.

In order that the record may be clear at this point, I am going to ask particularly that the question and everything that followed it up until the conclusion of his answer so far as he has given it be placed on the record so that the record will be complete in that regard.

The reporter will know where that is.

Trial Examiner Ballinger: The reporter will now read beginning with the question down to the point where the witness says he was cut off, and that will be spread on the record so that it will be clear.

(The reporter read the following:

"Q. You have stated several times, Mr. Warmack, that in your opinion many of these accounts including 6654 001, 215, 216, 217, were not handled on the basis of sound accounting.

"You have now stated that you did not make any particular study of the data, records, facts, and accounts underlying an analysis of those accounts as they are reflected in Respondent's Exhibit 31.

"I ask you now upon what do you base your opinion that the conclusions of the Respondent are not sound accounting?

"A. With respect to each account—which accounts, will you please, Judge?

"Q. 001, 215, 216, and 217.

"A. Yes, I shall be glad to.

"Q. Please do so.

"A. It is my understanding account 001 entitled 'Salaries—Supervision—Others' shown on Respondent's Exhibit 31-H in the amount of $4,550.06 represents that part of clerical assistants and similar expense incurred in the Detroit field for the year 1937 incident to supervisory activities and that that figure of $4,550.06 was separated on the company's regular accounting form 189 for the Detroit field on the basis of gallonage including Ned's gallonage and—

"Q. (Interposing.) Mr. Warmack,—

"A. I have not answered the question, Judge.

"Q. I am sorry. Go ahead.

6655 "Trial Examiner Ballinger: Proceed.

"The Witness: My first question, then, goes to the amount of $4,550.06, which was allocated on a gallonage basis, and I have never as yet been able to look at any documentary evidence which would show me that a study had ever been made by the Respondent company to support such an allocation factor as was used here in the regular accounting procedure.

"Inasmuch as Ned's gallonage is used for the allocation of this particular class of expense, in the absence of a study, which has not been made in my opinion thoroughly and properly, this figure of $4,550.06 must be questioned from the standpoint of sound accounting. To my satisfaction, it seems demonstrated by the allocations made that a part of this expense is properly applicable to Ned's inasmuch as supervisors in the Detroit field must, to some extent, supervise the general activities of the field.

"That answers your question with respect to 901 account.

"Now, we will take up the 215 account entitled 'Expenses—Salaries—Others'; for which there is shown on Respondent's Exhibit 31-H—.")

The Witness: For which there is shown for account 215 on Respondent's Exhibit 31-H the amount of $8,912.32.

6656 The expenses in that account cover and include expenses of the tax department and expenses of the real estate department in Respondent's Detroit field.

I first question the accuracy of the amount of $8,912.32 as shown on Respondent's Exhibit 31-H for this account. That figure was taken from the tank wagon-reseller column on Respondent's form 189, the Detroit field, for the year 1937.

That account was separated in 1937 on the basis of gallonage sold by the Respondent in the Detroit field for the year 1937. I question the accuracy of that allocation factor; that is, the gallonage basis, or the results to be obtained by the use of that allocation factor, as I have never seen any documentary evidence or figures of any kind which would support such an allocation factor, or prove the reasonable accuracy of the results of the use of the factor.

These employees, as I understand it, covered in account 215 entitled "Expense—Salaries—Others"; their duties

covered tax problems of the Respondent company and real estate problems of the Respondent company; and they at least included those activities in connection with the tax department, and the activities of the indivduals in that department have to do with taxes paid by the respondent company in the Detroit field and other general activities in the Detroit field such as taxes on bulk plants, taxes on
6657 office building.

And from the standpoint of sound accounting, your Honor, I certainly cannot see how some part of this class of expense could be considered as not being applicable to the serving of gasoline to the largest customer in the Detroit field.

By Mr. Hanley:

Q. When you have finished, let me know, please.

A. That answer will apply to accounts 216 and 217, inasmuch as the expenses shown on Respondent's Exhibit 31-H of those two accounts, which were arrived at, as I understand it, in the same manner as the expense was arrived at in the case of account 215, but inasmuch as the expenses of those two accounts follow the expenses in the account 215, the same objection raised with respect to the separation of account 215, and the fact that some part of that expense surely must apply to each and every gallon of gasoline sold in the field.

Trial Examiner Ballinger: Does that finish your answer?

The Witness: Yes, sir.

By Mr. Hanley:

Q. As a matter of fact, Mr. Warmack, the total gallonage in the field including Ned's gallonage was used as a divisor, was it not, in connection with these accounts, concerning which you have testified?

6658 A. Yes, sir.

Q. Does that make any difference in your answer at all?

A. That adds to the fact, to my conviction that inasmuch as Respondent company saw fit to use the gallonage, it certainly realized the fact that that gallonage should be charged to some extent with this class of expense.

Q. You saw Ned's outlets when you were in Detroit, did you not, Mr. Warmack?

A. I drove by two or three of them, Judge.

Q. What is your candid opinion as an accountant and as a layman as to whether or not those are unusual gasoline outlets, from the standpoint of volume?

A. Well, Judge Hanley, they are certainly large, beautiful stations.

Q. What is your candid opinion as an accountant and as a layman, as to whether or not the Respondent company could serve those outlets at a less per unit cost than it could serve the ordinary service or filling station?

Trial Examiner Ballinger: Per gallon?

By Mr. Hanley:

Q. Per gallon, per unit cost?

A. It is my opinion, Judge Hanley, that with gallonage increase; that is, sales per unit, the per unit of sales increases correspondingly the cost per unit decreases.

6659 Q. Well, you are familiar with the gallonage, are you not, Mr. Warmack, in connection with sales to Ned's Auto Supply Company?

A. I believe that that is shown in this record, Judge. I was just looking for it. I believe the record will show that for the year 1937 something over four million gallons were sold to Ned's Auto Supply Company by the Respondent company.

Q. In your judgment, is that a very,—very much more than is ordinarily sold to a service station, Mr. Warmack; that is, any single service station?

A. In my judgment, Judge, it is. I understand that that covers sales to several stations.

Q. Yes. What is your judgment as an accountant as to whether or not it would reasonably cost Respondent less per unit to sell to Ned's than it would cost the Respondent to sell to the ordinary service station?

A. I should think that it should cost sales per unit to sell to Ned's less, without making any independent study.

Q. Have you made any calculation as to how much less it might cost to sell to Ned's than to the average station.

A. No, sir.

Q. To the ordinary service stations?

A. No, sir.

6660 Q. Are you prepared to say what the influence in figures in dollars and cents is upon Respondent's Exhibit 31 as based upon your criticisms of the methods of accounting and procedures used by the Respondent?

A. Not at this moment I cannot, Judge Hanley.

Q. The Exhibit shows 0.529 cents differential. Are you prepared to say what difference you think there should be in that differential, if any, as the result of your criticisms of the accounting procedures used by the Respondent?

A. In dollars?

Q. In figures in dollars and cents.

A. No, sir.

Q. Would it be greater or less, or do you know?

A. From my studies of this set of exhibits, Respondent's Exhibit 31-A to 31-Q, inclusive, it would be my opinion, based upon the facts as set forth in these exhibits, that it would be less.

Q. But you have not figured that out, have you?

A. I have not made any independent study as to the effect or the change studies which I would consider proper and appropriate would make.

Q. Would it be one-tenth of a cent, or would it be ten one-hundredths of a cent, or would it be one cent, or what?

A. I certainly do not know.

Q. And advertising to the four accounts previously discussed by you, namely, 001, 215, 216, and 217, in your
6661 opinion as an accountant, Mr. Warmack, is there any means other than that of a gallonage allocation that is more proper from an accounting standpoint to use to allocate expenses on these accounts?

A. Addressing yourself specifically to Respondent's Exhibit 31-H?

Q. Yes, I am talking about the accounts that I indicated.

A. I certainly do not know. In other words, to answer your question properly would mean that a study would have to be made, and methods employed, and you would have to determine the logic of your methods, and your procedure, and I just could not answer your question, sir.

Q. Well, I am asking you, do you know any better method—I do not care what kind of procedure you have to go through, Mr. Warmack, to find the answer. I am asking you, do you know now of any better method, right now, this minute?

A. I know this, that the method that the Respondent has used is certainly questionable, and a proper study may develop a better method.

Q. Now, when you say that it is questionable, does not that mean that you just do not know any better method?

A. I know that any method—

Mr. Hanley: (Interposing.) Now, if your Honor please, may I have an answer to that question?

Trial Examiner Ballinger: Yes.

The Witness: May I have the question read?

6662 Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Yes. I know a better method.

By Mr. Hanley:

Q. All right. State it.

A. A method whereby a portion of this cost is allocated to the preferred customer, Ned's Service stations.

Q. All right. Follow it out, how do you do it?

A. Make a study.

Q. Is that a study (indicating)?

A. Yes. It is a study, after a fashion.

Q. Just what is the matter with it, Mr. Warmack; what would you do?

A. You have set up, Judge Hanley, an isolated cost of serving one single customer, and all of these costs which you say or which we all know would offer a great resistance to a separation as between customers, you just arbitrarily say that they do not apply in any part to Ned's, and I criticize that from the standpoint of sound accounting.

Q. I understand that you do, Mr. Warmack.

Now, please tell me this: We are trying to find out what it costs to serve Ned's.

A. You want to find out from this study?

Q. On behalf of the Respondent, you tell us what would
you do as an expert accountant as distinguished from
6663 what the Respondent's accountants have done in an
effort to segregate those costs.

Now, just start right in and go right down the line and tell us what would you do as an accountant.

A. I would first make a study of the factors influencing each class of expense.

Q. Did you do that?

A. I was not called upon to do it.

Q. Did you do it?

A. I did not.

Q. Why?

A. Because I was not called upon to do it.

Q. You were sent to Detroit for two months, were you not, Mr. Warmack, to make a cost study; is that not true?

A. No, to review the facts underlying these documents.

Q. Is that not true?

A. No, it is not true.

Q. Were you not sent to Detroit to make a cost study?

A. If you will tell me what you mean by "cost study" because that is a very elusive term.

I was sent to Detroit to study the records of the Respondent which underlie these data which the Respondent has submitted to the Commission.

Q. And in making that statement, the data are Respondent's Exhibit 31; is that no true?

6664 A. 31-A to Q.

Q. And you did not make any study of the underlying data, did you, Mr. Warmack?

A. Relatively none. I did not go into these matters particularly, Judge Hanley.

Q. Tell us, will you not, please, Mr. Warmack, is it not true that you have no idea at all what it costs the Respondent company to serve Ned's Auto Supply Company as distinguished from any other customer, from any study that you ever have made any time, any place; now, is that not the fact?

The Witness: May I have that question read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I certainly could not know what it cost to serve Ned's, or what it cost to serve any other customer served by the company in 1937.

By Mr. Hanley:

Q. I think that is what we have been trying to find out all of this time.

A. I see.

Q. Now, Mr. Warmack, you are familiar, I assume, with the evidence to the effect that this one-half cent differential was accorded to Ned's from about the fall of 1936 until the spring of 1938, and that at that time it was discontinued and that approximately thirty days later, in the spring
6665 of 1938, Ned's went on a tank wagon or jobber basis of buying?

Mr. Austin: Tank car.

By Mr. Hanley:

Q. Tank car—I am sorry—is that your understanding of the testimony, Mr. Warmack?

A. Yes, sir. I do not remember those exact dates, Judge, but it is my understanding that that is substantially what happened; I think that is about correct with reference to the dates.

Q. Now, you have criticized the study made by Mr. Boatwright and his assistants as reflected by Respondent's Exhibit 31 as to the cost to the Respondent of serving Ned's during that period from the fall of 1936 to the spring of 1938. You are aware, I assume, that that study was made some time in 1940, late 1940; is that your understanding?

A. It is my understanding, Judge, that this study was made either late 1940 or early 1941.

Q. Can you suggest any better method of cost separation or segregation to be applied as of late 1940 or 1941 to determine the cost to the Respondent of serving Ned's than was employed by the Respondent as exemplified in Respondent's Exhibit 31?

A. I believe that I can.

Q. Well, what would you do?

A. I will have to answer that generally—

6666 Q. (Interposing): I do not want you to answer it generally.

I would like to have your answer specifically, if you will, please, Mr. Warmack.

A. Well, to answer it specifically, Judge, I would have to study the functions involved much more thoroughly than this record will appraise them, but I can give you a general answer to that.

Q. Well, Mr. Warmack, until and unless you have made a specific study of the problems involved, which you have stated you did not do, do you feel your self competent and are you willing to assume the responsibility as an expert accountant to say that the methods employed by the Respondent's accountants are not sound, fair, and acceptable accounting methods?

Mr. Hanley: Now, just a moment, I would like to have you read that question to the witness before he answers it.

Trial Examiner Ballinger: Read the westion.

(The reporter read the question.)

The Witness: I will answer that this way: In my opinion, the methods employed are not productive of true and correct results.

Trial Examiner Ballinger: One moment. The answer is not responsive to the question.

6667 Mr. Hanley: Of course, it is not, Judge.

Trial Examiner Ballinger: Read the question again to the witness.

(The question was again read by the reporter.)

Trial Examiner Ballinger: You can answer that question "yes" or "no."

By Mr. Hanley:

Q. You can answer that "yes" or "no."

Trial Examiner Ballinger: And then offer an explanation.

The Witness: I do not know if it is susceptible to a "yes" or "no" answer or not.

Judge Ballinger, in the first instance, I have made a study, I have studied this record, I have studied this document, and as a result of that study I can answer the rest of the question.

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Is that your answer to the question?

A. I will answer the rest of it now. Read the rest of it.

Trial Examiner Ballinger: Read the entire question again.

(The reporter read the question as follows:

"Q. Well, Mr. Warmack, until and unless you have made a specific study of the problem involved, which
6668 you have stated you did not do, do you feel yourself
competent and are you willing to assume the responsibility as an expert accountant to say that the methods employed by the Respondent's accountants are not sound, fair, and acceptable accounting methods?")

The Witness: The answer is "no," based upon the studies I have made in these matters and my knowledge, the answer is "no" is that the methods employed are not productive of accurate results sufficient to prove the cost differential.

Trail Examiner Ballinger: Mr. Warmack, you have testified many times to the effect that no conclusion could be arrived at until a study, careful study was made to determine which method of accounting should be adopted, have you not?

The Witness: That is correct, Judge.

Trial Examiner Ballinger: Now, did you make any study or investigation to determine what particular method of accounting should be adopted to ascertain the facts here desired?

The Witness: No, sir.

Mr. Hanley: I move to strike the answer of the witness in view of the question of the Trial Examiner, and the answer of the witness made thereto.

In view of the fact that it now appears that the 6669 witness again repeats his former testimony that he did not make a study of the facts, data, information, and records for 1937 underlying Respondent's Exhibit 31, and he is not entitled to testify as an expert or otherwise in connection therewith until and unless a proper foundation is laid, which this witness has failed to lay.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. I will hear from counsel for the Commission.

Mr. Austin: I think it is perfectly simple. The witness says he made a study of this exhibit, and he is able to testify as an accountant that in his opinion the methods of accounting used were unsound and not productive of correct results, and it would not be necessary for him, in order to form that opinion, to make a study on his own account to determine just what other methods should be used.

In other words, his testimony that the methods used here are incorrect is apart from and does not depend upon his having made some other study of his own to determine what better methods should be used.

And I think it is perfectly consistent. He may very well have studied the method that has been used and know that it is wrong without attempting to say exactly 6670 what should have been done. The man may know that one method is wrong and another method would be better without having gone into a study to determine what the better method is.

Mr. Hanley: I do not care to argue it, but if I may ask the witness another question, I would like to get a question of fact definitely developed. I think it is in the record but I will try to get an answer.

Trial Examiner Ballinger: Before the Examiner rules?

Mr. Hanley: If I may.

Trial Examiner Ballinger: The Examiner withholds his ruling.

By Mr. Hanley:

Q. Mr Warmack, I am going to ask you this question, and it is not a question about your opinion—I do not care what your opinion is—I want a factual answer, and I want it "yes" or "no";

Did you or did you not make any factual and objective study of the Respondent's records for 1937 underlying and supporting Respondent's Exhibit 31?

Now, answer that "yes" or "no", Mr. Warmack, please.

A. I did not.

Mr. Hanley: If your Honor please, I think that indicates the ruling of the Court. He says he just did not make the study.

6671 Trial Examiner Ballinger: The Examiner was prepared to rule on the matter before the last question.

The Examiner sustains the motion, and the matter is stricken. It will remain in the record, so it will be available.

Mr. Austin: Is the record clear as to what is stricken?

Trial Examiner Ballinger: The ruling of the Examiner is that the answer the witness gave to Judge Hanley's question which reads as follows:

"Q. Well, Mr. Warmack, until and unless you have made a specific study of the problems involved, which you have stated you did not do, do you feel yourself competent and are you willing to assume the responsibility as an expert accountant to say that the methods employed by the Respondent's accountants are not sound, fair, and acceptable accounting methods?"

The answer to that question is stricken.

The Witness: There were two answers to that, Judge.

Trial Examiner Ballinger: If there are two answers they are both stricken.

Mr. Hanley: I move that we adjourn until tomorrow morning at 9:30 a. m., July 16.

Trial Examiner Ballinger: The motion is granted.

6672 And now, at 4:10 p. m., July 15, 1942, the hearing stands adjourned to reconvene at 9:30 a. m., July 16, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 4:10 p. m., July 15, 1942, the hearing in the above-entitled matter was adjourned.)

6673

Room 532, Federal Trade
Commission Building,
Washington, D. C.
Thursday, July 16, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Illinois,) appearing for the Respondent.

6674

PROCEEDINGS.

Trial Examiner Ballinger: Come to order. The hearing in Docket No. 4389, case entitled "In the Matter of Standard Oil Company of Indiana," is reconvened pursuant to notice, at 9:30 a. m., July 16, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held at the same place, July 15, 1942.

The reporter will note counsel for the Commission and the Respondent present.

You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Hanley.

Q. Mr. Warmack, I wish you would please refer to Respondent's Exhibit 101.

A. Yes, sir.

Q. Starting with the top account 006, please state as breifly as you can, and still make what you regard as a complete answer, what your objection is to the methods used by the Respondent in allocating expenses. I want to summarize this thing. Some day some lawyer is going to have to write a brief.

6675 Trial Examiner Ballinger: Are you familiar with the question?

The Witness: Yes, sir. I have put all of that information in the record at previous times.

Mr. Austin: I am a little doubtful about that, myself; the witness has testified on those matters.

Is it proper cross-examination just to ask the same questions over again?

Trial Examiner Ballinger: Yes, sir.

Mr. Austin: Is that proper cross-examination to ask the same questions that he was asked on direct, and have him repeat his testimony?

Trial Examiner Ballinger: In the opinion of the Examiner, it is within the province of the counsel for the Respondent.

Mr. Austin: Have you your notes, Mr. Warmack, that you used on your direct examination?

The Witness: Yes, sir. I think I can find them. May we be off the record, Judge?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. I do not care to have you indicate, Mr. Warmack what already appears in Respondent's Exhibits. All
6676 I am asking you is for your objection in what the Respondent did—not what the Respondent did, but your own objection.

Trial Examiner Ballinger: That is, your objections to the methods employed.

The Witness: I will have to call attention to the method to object to it, I believe, your Honor.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

The Witness: In the first place, I question the accuracy of the figures as set forth on Respondent's regular accounting form 189 in the seperate distribution channels for this particular account, inasmuch as those allocations were made on a basis of gallonage. The gallonage measuring factor, as far as I have been able to learn in my studies, and the accuracy to be derived from the use of it, has never been proven by this Respondent for the year 1940, or for any year.

That is my first objection to it.

The next objection would be: No part of this class of expense is assigned to automobile expense, it being my understanding that this covers managerial salaries, the salaries of supervisors in the Detroit field, some part of which salaries, in the absence of sufficient information to
prove that those supervisors did not supervise in any
6677 way any activities in the sale of automobile supplies,
or of that class of expense, in my opinion should be, some of it, applied to automobile supplies. Respondent's cost study has not gone into that point as far as I have been able to learn.

In the separation of the account between channels, as set forth on Respondent's Exhibit 101, the cost study made by the Respondent from which it obtained information for the preparation of Respondent's Exhibit 101 at its very outset was begun on the wrong premise.

It started with the assumption that the gallonage allocations were correct, that they had been properly proven, and that the amount allocated to the tank wagon reseller business of the Respondent in the Detroit field for the year 1940, in the Respondent's regular accounting procedure, was accurate and correct.

As far as I have been able to learn from my studies, that figure has never been proven to be accurate and correct by any factual and objective cost study in 1940 or at any time.

Starting with that premise, Respondent's accountants made a study in which or by which they endeavored to determine what portion of cost incurred in the Detroit field for the year 1940 could be considered as applicable to direct shipment business, that information not being
6678 kept in the regular accounting procedure.

To determine that information, Respondent's accountants did not go to the extent to determine what portion of the cost would be applicable to the tank wagon reseller column on the basis of their study, but they did leave a figure in that column allocated on a gallonage basis which had never been proven as accurate and correct, and they set up costs in the jobber, naphtha and gasoline column, which were to be compared with the costs in the reseller column in determining the cost differential on the basis of effort of employees in the field.

Therefore, in this triple naught account entitled "Salaries—Supervision" on Respondent's Exhibit 101, we have a figure in the tank wagon reseller column of $31,114.25 which Respondent contends represents the cost of this class of expense applicable to tank wagon reseller business; whereas, in the jobber, naphtha and gasoline column, we have $320.20, which Respondents contend is all of the supervisory costs incurred in connection with this direct shipment business, and which was arrived at—the latter figure of $320.20—on a basis of effort as compared with the figure of $31,114.25 in the reseller being arrived at on a basis of bulk plant gallonage.

By Mr. Hanley:

Q. When and if you get to the end of your answer, 6679 you tell me, if you please, Mr. Warmack.

A. Yes, sir. I shall be happy to.

Therefore, in summary, the methods employed are inconsistent, unsound, and are not productive of proper and correct results.

Q. Have you finished?

A. Yes, sir.

Q. You have twice used the words that the methods of allocation employed by the Respondent were not proven. What do you mean by that—proven to whom?

A. Proven to anybody in the world.

Q. Mr. Warmack, is that your answer to that question?

A. Yes, sir. That is my answer to that question and I would like to explain that answer.

Mr. Hanley: (Interposing.) The Respondent moves to strike the answer of the witness as a purely unfair answer to the question, a question to the witness as an expert witness, and when he says the matter is not proven as a matter of accounting he should be able to state, and should state what he means by "proven" as an accounting matter: If I may get off the record just a moment, Judge?

Trial Examiner Ballinger: All right. Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

6680 The motion is granted and the answer is stricken.

By Mr. Hanley:

Q. Mr. Warmack, before you answer the question, may I direct your attention to the fact that you spent a day testifying to the fact that all accountants were not in agreement about cost distribution?

That is true, is it not? I refer particularly to distribution cost accounting.

A. I do not know if I spent an hour or a day.

Q. Do you not remember, Mr. Warmack?

Trial Examiner Ballinger: Is it true that accountants are not always in agreement?

The Witness: That is very true, Judge—Judge Ballinger. He asked me if I spent a day.

By Mr. Hanley:

Q. I advert to the question I asked you; you have twice used the word in connection with the answer to the question as to account 000, that it is not proven—I would ask you now "proven" to whom?

A. Well, it is not proven to my satisfaction, Judge Hanley, as being accurate and supported by any documentary evidence representing any study of any kind at any time. I asked specifically for that information—

Q. (Interposing.) Now, just answer the question, Mr. Warmack. There are 126 of these accounts and I am
6681 going to go over every single one of them.

A. That is all right with me.

Q. Do you mean that it was not proven to your satisfaction?

A. I mean that you did not give me anything to show it—no documentary evidence.

Q. Well,—

Mr. Hanley: May I have an answer to these questions?

Trial Examiner Ballinger: One moment. Read the question to the witness.

(The reporter read the question.)

The Witness: It was not proven at all. You just did not have anything to support it.

By Mr. Hanley:

Q. Mr. Warmack, it was or was not proven to your satisfaction, is that what you mean when you say it was not proven?

Mr. Austin: I think the witness has stated twice what he meant.

The Witness: Judge, they did not have a single thing to prove anything with.

Trial Examiner Ballinger: One moment. Is that your opinion, is it?

The Witness: Judge, I prayed to them to give it to me.

Trial Examiner Ballinger: One moment. Was that your opinion, that they did not have anything to prove it?

6682 The Witness: That is what they told me.

Trial Examiner Ballinger: Was that your opinion?

The Witness: Yes, sir, that has to be my opinion—the answer—and of course I do not impung the good faith of these people, and I believe that they told me the truth, and I believed what they told me.

By Mr. Hanley:

Q. Now, do you disagree with the gallonage method of allocation in account 000, Mr. Warmack?

A. No, sir.

Q. I thought you criticized that. Did you or did you not?

A. I can state this, Judge Hanley, which will apply to that, and I believe it will be an answer to your question: I do not know if the gallonage method is proper or improper, and I could not know unless it were proven and established as a proper method by some cost study analysis.

Q. Again meaning proven to you; is that right?

A. (There was no answer.)

Q. Do not look at your counsel. Just answer the question, please, Mr. Warmack, it is a simple one.

Mr. Hanley: Will you please read the question to the witness.

Mr. Austin: I think proven means proven in his opinion, does it not?

Mr. Hanley: I suppose so, Mr. Austin, but the 6683 witness will have to answer.

The Witness: It certainly was not proven to me and I did not and do not see—if no figures could be offered to support it that it could be proven to anyone.

Mr. Hanley: Judge, I am sorry, but I will have to move to strike that answer of the witness.

Trial Examiner Ballinger: The last portion of the answer is stricken.

The Witness: Well, Judge, we want the facts in this record, do we not?

Trial Examiner Ballinger: Mr. Warmack, you are on the witness stand and you will answer the questions propounded to you.

The Witness: I want to tell the truth, and I am going to tell the truth.

Trial Examiner Ballinger: The Examiner inquires exactly what you mean by that.

The Witness: He asked me if this were proven to my satisfaction, and I stated that it was not proven to my satisfaction, that I had requested not once but many times that the Respondent's accountants furnish me with any documentary evidence, any paper with writing on it which the Respondents may have as a result of any cost study and analysis ever made by the Respondents even in the Detroit
field or elsewhere that would support the gallonage
6684 factors and they did not give them to me, and they
told me that they did not have them, and I think that the record will show that.

Trial Examiner Ballinger: Therefore, it was not proven to your satisfaction?

The Witness: That is correct, your Honor?

By Mr. Hanley:

Q. All right, now, Mr. Warmack, I hope that we can get along a lot faster on each of these single accounts from here on, but in view of your statement I think that it would be well to lay some foundation.

You are familiar with this Respondent's regular accounting form 189?

A. Yes, sir.

Q. You were in the Detroit office for about two months?

A. Yes, sir.

Q. That is true, is it?

A. A little less than two months.

Q. You were in the Chicago office for at least a number of days?

A. Yes, sir. Probably less than a week.

Q. You met Mr. King, the chief accountant in charge of marketing operations, did you not?

A. Yes, sir. I met Mr. King.

Q. You saw I think perhaps hundreds of account-
6685 ants working on the marketing accounts of the Re-
spondent company; is that not true?

A. I do not know.

Q. Well, in your judgment, how many did you see?

A. I have no idea how many I saw, and I do not know if all the people I saw were accountants.

Q. Well, all right, Mr. Warmack. Did you see people working covering the entire seventeenth floor of the general office of the Respondent company, which people were working on the marketing accounts of the Respondent, or did you not?

A. I would like to answer your question but I can not answer that question.

Q. Well, if you can not answer it, say so.

A. I was on the seventeenth floor, I was on the eighteenth floor, I was on the fifteenth floor, and the other floors, and saw many people working.

Q. Well, answer the question, if you don't know that is all right, Mr. Warmack.

A. Very well.

Q. But please answer these questions, Mr. Warmack.

A. Very well.

Q. Now I ask you if you assume to say that there is no basis in studies or accounting practice for the allocation of accounting account 000 as made by the Respondent on Exhibit 100.

6686 A. No, sir. I do not say that there is no basis. I just say you did not give it to me if you had one.

Q. That is to say, you did not get anything that satisfied you?

A. I did not get anything.

Q. That is all.

A. I did not get anything.

Q. Mr. Warmack, you spent two months there, didn't you?

A. Yes, and on many days of that time I asked for this material, which was never furnished to me.

Q. Just answer my question. You spent two months in the Detroit office?

A. I believe the record will show that I went to Detroit January 11 and I left there around March 5: I think that is correct, and I believe that is about the time I put in on this case.

Q. I think that is. Now, just exactly what were you doing?

Were you not investigating, Mr. Warmack, the very basis of this system of accounting that is employed by the Respondent?

Is not that what you were assigned to do by the Commission?

A. Well.

The Witness: I would like to hear the question read, your Honor.

6687 Trial Examiner Ballinger: Read the question.

(The reporter read as follows:

"Q. I think that is. Now, just exactly what were you doing?")

The Witness: In answer to your first question, just what was I doing, I was making or endeavoring to make a study of the underlying data of the company from which Respondent's Exhibits 100 and 101 were prepared, and a good portion of that time I spent just trying to get this kind of information; that is, support for these gallonage figures which I have never gotten.

May I have the second part of that question read?

Trial Examiner Ballinger: Read it.

(The reporter read the following:

"Were you not investigating, Mr. Warmack, the very basis of this system of accounting that is employed by the Respondent?")

The Witness: I was making a study of that—in answer to the second part of your question.

May I hear the third part of the question read?

Trial Examiner Ballinger: Read it.

(The reporter read the following:

"Is not that what you were assigned to do by the Commission?")

Mr. Austin: Well, I do not think that the witness 6688 needs to answer that, it is, your Honor, what he was assigned to do by the Commission, and that is of no concern to the Respondent, it seems to me.

Mr. Hanley: It seems to me that it is. He is put on here as a witness against the Respondent.

Mr. Austin: Those instructions are confidential.

Trial Examiner Ballinger: The Examiner does not consider it proper to go into instructions given the witness by the Commission.

Mr. Hanley: Very well. I will confine myself to just what you did, Mr. Warmack.

By Mr. Hanley:

Q. Let me ask you this, just writing stories about the way they make their accounts, is that the way they do it; and is it not a fact that they just make the figures from the original data, the vouchers, and so forth?

A. They are supposed to write the truth, and any stories they write they are supposed to give the figures.

Q. I—

Trial Examiner Ballinger: Where do they get the figures from?

The Witness: From the original records, your Honor.

By Mr. Hanley:

6689 Q. Now, Mr. Warmack, did you see or did you look for the original records for the underlying account or that underlie account Triple Zero?

A. Part of them.

Q. Well, what part in fact was it that you got that you have in mind when you are criticizing this account?

A. Well, I certainly know what I am talking about, Judge Hanley.

Q. How many did you look at?

A. How many what?

Q. Original documents and vouchers?

A. Why, I have a whole book of copies of them right here, if you would want to look at them. I do not know how many I looked at.

Q. I am just asking you to tell me, Mr. Warmack, please.

A. I—

Q. (Interposing.) I want to know what you did at Detroit:

A. I made a regular accounting study to determine just what Respondent company does in its regular accounting procedure in the Detroit field and to what greater refinement than that, if any, that it went to in its late—as you know—cost study of which Respondent's Exhibit 101 was the result.

Q. All right. You made that kind of a study, that is right.

A. I made a study of that account, just a short study.

Q. All right, Mr. Warmack. Just tell us please what the influence is in figures in dollars and cents on
6690 the cost differential as the result of your study and

your criticism of account 000 on Respondent's Exhibit 101.

A. I do not know.

Q. Well, we will see how much of a study you made.

A. I did not make a study to determine any proper method of allocation.

I made a study to determine if you had followed sound accounting principles, and in my opinion you have not, and that has been my study only, and I cannot give you a figure as you have just asked.

Q. Well, this applies to account—pass please to account 001.

A. Yes.

Q. Did you examine into that account?

A. To some extent, yes, sir.

Q. In your studies in Detroit?

A. To some extent, yes, sir.

Q. Well, what is the matter with it, in your view as an expert accountant?

A. The same comments given with respect to account 000 entitled "Salaries—Supervision" will apply equally to this account 001 entitled "Salaries—Supervision—Others" except for the figures I quoted.

Q. Very well. What is the influence in figures in dollars and cents of your criticism of account 001 of 6691 the differential 1.51?

A. The same answer—

Q. (Interposing.) Asserted by the Respondent as the cost differential in this case?

A. The same answer with respect to account 000 will apply to account 001, inasmuch as account 001 follows the Triple Naught account in its allocations.

Q. Having made no calculations, Mr. Warmack, do you know whether or not it would increase or decrease or alter the differential?

Mr. Hanley: Just a moment. Will you please read that question to the witness, and listen to it please, Mr. Warmack.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I could not know that.

By Mr. Hanley:

Q. Please pass now to account 002.

Did you make a study of that account, Mr. Warmack?

A. No, sir.

Q. Did you make any study at all of that?

A. No, sir. You are speaking, Judge Hanley, of your underlying records in the Detroit and Chicago office; I made no studies there of that account.

Q. I am asking you what you did now.

A. I have studied our records, these records and 6692 these particular accounts, and these reports.

Trial Examiner Ballinger: Do you mean exhibits?

The Witness: Yes, sir, exhibits, Respondent's Exhibits 99, 100, and 101.

By Mr. Hanley:

Q. Well, I understand it to be true, just to be entirely fair to you, Mr. Warmack, that you have read Respondent's Exhibits 99, 100, and 101, which exhibits treat all of the accounting or account numbers as they appear on Respondent's Exhibit 101?

A. Yes, sir.

Q. That part is true, is it?

A. Yes, sir.

Q. Now, my question goes into your study of the underlying data, facts, records, and accounts.

A. Yes, sir.

Q. In respect of account 002.

A. Yes, sir.

Q. While you were in Detroit for two months and in Chicago for approximately a week?

A. Well, I was away from Washington a little less than two months all together.

Mr. Austin: Your Honor, perhaps I had better make objection at this time, which, if sustained, may save a little time.

6693 Commission's Exhibit 133 lists certain accounts, and aside from those that are marked with an asterisk, the figures are taken from Respondent's Exhibit 101, and the differential produced by those figures for those respective accounts of differentials are not attacked for the purpose of this proceeding.

Consequently, I object to any questioning upon any of the accounts listed on Commission's Exhibit 133, except the ten marked with the asterisk, upon the ground that there is nothing to be accomplished by such an examination, and that it would simply encumber the record, and in many cases result in questioning the witness upon matters upon which he was not questioned on direct examination, and there is no issue as to those accounts, and therefore no necessity for testimony.

Trial Examiner Ballinger: Were they inquired into on direct examination?

Mr. Hanley: All of them.

Mr. Austin: Some of them were, a few of them; the majority were not.

Mr. Hanley: If your Honor please, I submit that the Respondent is not bound by Commission's Exhibit 133.

I propose to ask this witness as to his views in connection with each of these accounts, if he approves them, as he may do, in view of the concession in Commission's
6694 Exhibit 133 that will finish the inquiry into that
particular account; but the Respondent is by no means bound by any exhibit which the Commission may put in here.

Trial Examiner Ballinger: Judge, if the Commission does not controvert certain items in the account appearing as Respondent's Exhibit 101, there is no issue of fact.

Mr. Hanley: There is no issue of fact, if your Honor please—

Trial Examiner Ballinger: Not as to that account, as to that item.

Mr. Hanley: There is no issue? I admit that was a weasel-worded, Indian gift, and I just cannot be bound by it. I am perfectly willing to have the witness say that he approves the account, and if he does, that ends the inquiry at that one question, Judge, but I want to know what he thinks about every one of these accounts.

Trial Examiner Ballinger: The Commission has conceded for the purpose of this case the accuracy of certain items appearing in Respondent's Exhibit 101, as portrayed in Commission's Exhibit 133. Now, as to those items there can be no issue of fact. They are conceded for the purposes of this case.

Mr. Hanley: Well, if they are conceded, Judge, I am not sure that they are conceded, however.

Trial Examiner Ballinger: They have been, and
6695 the Examiner now so states on the record, and if the
Examiner is not correct counsel for the Commission will correct me.

Mr. Hanley: Will you, please, Mr. Austin?

Mr. Austin: They are conceded for the purposes of this case. As I said before, we do not intend to claim that the Respondent is not entitled in this proceeding to claim the differential shown in this exhibit—

Trial Examiner Ballinger: And you refer to Commission's Exhibit 133?

Mr. Austin: That is right.

Mr. Hanley: All right. May it be conceded that account 002 entitled "Sales Promotion" Respondent's Exhibit 101 is conceded as accurate by the Commission as indicated by its Exhibit 133?

Trial Examiner Ballinger: For the purposes of this case.

Mr. Hanley: Yes, sir, of course, that is all we are interested in.

Mr. Austin: If you will limit your concession to the figures entered—in the amount of expense entered in the tank wagon reseller and jobber, naphtha and gasoline columns, respectively, I might concede it, but I would rather make the concession as to the amount of expense which is the only thing we are concerned with, than to say that the account, as a whole, is correct.

6696 Mr. Hanley: Well, Judge, do you see that that is the whole trouble as far as the Respondent is concerned, there is no concession, because he is always attaching too many strings to it.

Trial Examiner Ballinger: Judge, the only question in this case goes to the accuracy of the figures in tank wagon and the direct shipment columns.

Mr. Hanley: That is right and I have been objecting on that basis all through the case.

Trial Examiner Ballinger: Now, those figures for the purposes of this case are conceded to be correct?

Mr. Austin: That is correct.

Mr. Hanley: All right, if we may depend upon that, but I just never got a concession like that before.

Trial Examiner Ballinger: You may depend upon that statement.

By Mr. Hanley:

Q. Now, Mr. Warmack, I ask you now about account 003; what, if anything, is wrong with that, in your judgment as an accountant?

Mr. Austin: That is one of those we were just talking about.

Mr. Hanley: If it is in here I want to ask about it.

Trial Examiner Ballinger: The figures appear in the tank wagon and direct shipment columns on Respondent's Exhibit 101 and they are the figures which are conceded to be correct, for the purposes of this case. 6697

Mr. Austin: For the purposes of this case. I hope we do not have to go into all of these accounts.

Mr. Hanley: Well, I am going to go into every single one of them.

Mr. Austin: I made my concession to save time. If it is not going to save time, which was the sole reason for it, I think I will withdraw the concession—I think I will withdraw the concession and I will stand on the concession as it is stated at the time the exhibit was offered.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The objection of counsel for the Commission is, in part only, sustained.

Prior to the admission of Commission's Exhibit 133 in the record, counsel for the Commission stated that for the purpose of this case only, the differentials between the figures appearing in the tank wagon and direct shipment columns on Respondent's Exhibit 101 in so far as they were portrayed on Commission's Exhibit 133, were conceded, but that counsel for the Commission reserved the right at the final hearing to argue the question as to the correctness of the accounting methods employed by the Respondent. 6698

Mr. Austin: Your Honor, perhaps I should interrupt—

Trial Examiner Ballinger: Just a moment.

Mr. Austin: I do not think that is quite correct.

Trial Examiner Ballinger: Now, if it is not, I want it corrected, Mr. Austin.

Mr. Hanley: That is the whole trouble here, Mr. Austin, you have not made a concession.

Trial Examiner Ballinger: If you will turn back to it, and let us see what the record shows at that point. That may take a little time.

We will take a five minute recess for that purpose.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Read my statement as it was stated before the recess, and I will ask Mr. Austin and Mr. Hanley to listen to it.

in the light of the examination of the record made during the recess.

(The reporter read the statement of the Examiner as follows:

"The objection of counsel for the Commission is, in part only, sustained.

"Prior to the admission of Commission's Exhibit 133 in the record, counsel for the Commission stated that for
the purpose of this case only, the differentials
6699 between the figures appearing in the tank wagon
and direct shipment columns on Respondent's Exhibit 101 in so far as they were portrayed on Commission's Exhibit 133, were conceded, but that counsel for the Commission reserved the right at the final hearing to argue the question as to the correctness of the accounting methods employed by the Respondent.")

Trial Examiner Ballinger: Mr. Austin, so far as I have had it read by the Reporter, is that correct?

Mr. Austin: Yes, sir. That is correct.

Trial Examiner Ballinger: Then I will proceed.

The Examiner refers to the record commencing at page 6460 for the factual basis of the statement just made. In view of the concession of counsel for the Commission, the examination of this witness on all items of account appearing on Commission's Exhibit 133 will be limited to the method of accounting employed—

Mr. Austin: (Interposing.) Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

—except the accounts marked with an asterisk relative to which counsel is at liberty to go fully into the matter if he cares to do so.

Mr. Hanley: Off the record.

6700 Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

Mr. Austin: In view of the fact that my objection has not been sustained in full, and in view of the fact that at the bottom of page 6460 of the record, or on that page, the purposes of the limitations of Commission's Exhibit 133 are explained fully, and the position of counsel for the Commission is also explained fully on those pages of the record beginning with page 6460, I notice, and continuing thereafter, I prefer to withdraw any concessions as to the correctness of the figures or otherwise which I have made this morning in connection with the discussion of the objection and prefer to stand upon the statements made in connection with the offering of Commission's Exhibit 133 at pages 6460 and following on the record.

Trial Examiner Ballinger: Notwithstanding the withdrawal of the concession, the Examiner will confine the cross examination within the limits above defined.

Mr. Hanley: The Respondent now requests that the Court grant permission to the Respondent to examine in connection with each account appearing on Respondent's Exhibit 101 irrespective of Commission's Exhibit 133 as to the two following propositions:

First: The propriety of the accounting procedures
6701 in the judgment of the expert witness on the stand:

Second: The influence in figures and dollars and cents upon the cost differential as disclosed by Respondent's Exhibit 101.

This request is made on the basis of the fact that the alleged concession made by the Commission by its Exhibit 133 is a misnomer and is not a concession at all, but is so hedged with reservations as to constitute no admission of the accuracy of any of the evidence offered by the Respondent.

Trial Examiner Ballinger: The first request comes clearly within the scope of the Examiner's previous ruling, and would be permissible.

The second request is probably outside of the scope, but if counsel for the Respondent deems it material to his case, he may ask questions along the line indicated in his request.

Mr. Hanley: Very well.

By Mr. Hanley:

Q. I think we had reached, Mr. Warmack, account No. 003, and if you approve, that is all that is necessary to say in view of this discussion about Commission's Exhibit 133—if you do not approve, please state briefly what your criticisms are.

Trial Examiner Ballinger: Now, when you use the word "prove" do you mean just the proof of the differen-
6702 tial, or is it the proof of the method of accounting?

Mr. Hanley: Proof of the method of accounting, if your Honor please. As I understand it, the witness has already testified that he does not question or dispute the arithmetical calculations and the figures that appear on the several exhibits of the Respondent; so, when I say "Do you approve," I mean do you approve the accounting methods.

By Mr. Hanley:

Q. Of course, Mr. Warmack, if you disapprove of the arithmetical calculations, I want you to say so at any time —I just understand that you did not do so from your former testimony.

A. That particular account—that is account 003 entitled "Salaries — Sales Promotion — Others" — was not studied by me in my field examination in Detroit and Chicago when I spent a little less than two months investigating the data underlying Respondent's Exhibit 101 and Respondent's Exhibit 100 earlier this year. Therefore, I do not approve and I do not disapprove this.

I do not know anything about it.

Q. I call your attention to Commission's Exhibit 133 on which that particular account appears identical as it appears on Respondent's Exhibit 101. Do you agree or do you disagree that that is an accurate calculation?

A. I know nothing about it.

6703 Mr. Hanley: Off the record, Judge.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. I now call your attention, Mr. Warmack, to account 004 entitled "Salaries—Salesmen"—

Mr. Hanley: I withdraw that.

By Mr. Hanley:

Q. Please advert to 003 for a moment.

A. Yes, sir.

Q. Is there or is there not in your view any influence in dollars and cents in figures on the differential, the cost differential, as indicated by Respondent's Exhibit 101, as the result of your study of account 003?

A. Judge, there could not be.

I stated I did not study the account. I do notice that in that particular account there is some portion of that expense assigned to automobile supplies. That is a little interesting.

Q. Well, what is the effect on the differential?

A. I do not know.

Q. What?

A. I do not know.

Q. You do not know?

6704 A. I do not know.

Q. Would it increase or decrease it?

A. I do not know, I—

Q. (Interposing): Averting—

The Witness: What would increase or decrease? You say, would it increase or decrease? What?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Do you understand the previous question, Mr. Witness?

The Witness: I am afraid I do not, Judge.

Trial Examiner Ballinger: You may answer it.

The Witness: May I have it read, please?

Trial Examiner Ballinger: Read the question referred to.

(The reporter read the following question:

"Q. Well, what is the effect on the differential?")

The Witness: I just do not understand what he is talking about.

Mr. Hanley: May I ask a question?

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. Mr. Warmack, the differential as disclosed by Respondent's Exhibit 101 is 1.51 cents, as between the cost of selling to tank wagon reseller customers and to

6705 jobber or tank wagon customers.

I am now asking you if any study that you made in respect of account 003 results in any influence in figures in dollars and cents upon that differential of 1.51 cents, as to whether or not it increases it or decreases it, and if so, how much.

A. The answer is "No, sir"; for the reason that we did not study the underlying records of account 003.

Trial Examiner Ballinger: You say "we"; whom do you refer to?

The Witness: I refer to:

Trial Examiner Ballinger: Yes.

The Witness: Myself and any other members of the Commission's staff that might have occasion to study it.

By Mr. Hanley:

Q. Well, did any other study it?

A. I stated that it was not studied by me nor by any other member of the Commission that I knew, therefore I could not answer your question, Judge Hanley, except by "no."

Q. Now, adverting to account 004, "Salaries—Salesmen"; did you study that account?

A. Yes, sir.

Q. Well, what is wrong with that account in your view as an accountant?

6706 A. It would be easier to say what is not wrong with it.

Trial Examiner Ballinger: Answer the question.

The Witness: Judge, this account—what?

Trial Examiner Ballinger: Answer the question.

The Witness: Very well.

By Mr. Hanley:

Q. Just as briefly as you can, please.

A. This will not be brief, I assure you, Judge Hanley. This class of expense entitled "Salaries—Salesmen", which is Respondent's account 004 is made up of a large group of salesmen who are classified or separated by the company into several sub-groups.

The salaries of these salesmen range from below two hundred dollars per month to around four hundred dollars per month.

In Respondent's regular accounting procedure in the separation of this class of expense between distribution channels no effect is given to this large spread in difference of salaries. I do not object to that from the standpoint of the company's regular accounting procedure, but most assuredly object to it from the standpoint of proving a cost differential.

Q. Will you explain that and explain also what you mean by proving—proving to whom?

A. Respondent prepares during the third month of each quarter during the year, distribution sheets, which 6707 show proportions of the respective sub-groups of salesmen included in this account 004, and those distribution sheets are used for the separation of this class of expense to distribution channels during the next three ensuing months, but the estimated time or estimated proportions of time which each of the sub-groups of salesmen are expected to spend in the serving of customers falling in the separate channels during the next three ensuing months in each instance are all added together irrespective of the salary range within the groups, or as between groups, and so forth, and composite percentages are arrived at, and those composite percentages are then applied, by months, to the expense in this account and separated according to channels.

There is much more detail than I have gone into here in connection with this, or as is shown on Respondent's Exhibit 100—

Q. (Interposing): Please do not read from Respondent's Exhibit—

A. —page 2.

Q. —I am just asking you what your criticisms are, Mr. Warmack.

A. —page 2, and cost of those other and various factors and I could take one month item by item and show you just how wrong it is.

6708 Q. Did you?

A. I certainly did.

Q. All right. Show us.

A. I will get the working sheets, Judge.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: Perhaps this would answer the situation, Judge.

By Mr. Hanley:

Q. I think you have testified to this, Mr. Warmack—

A. Yes, sir.

Q. —would it suit you by way of an answer if you refer to your former testimony on the subject, if it is not or if it is in here—if it does not, why, do not concede that.

A. I would suggest that that should have been done at the outset here.

Mr. Austin: Just answer the question, and do not volunteer anything.

Mr. Hanley: Just answer if that is sufficient to satisfy you, if not—

The Witness: Quite sufficient to me, but I can give you the whole story if you wish.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

6709 Trial Examiner Ballinger: On the record.

The previous testimony of the witness will be found on pages which will be stated by counsel when they locate it.

By Mr. Hanley:

Q. Mr. Warmack, what is the effect in figures in dollars and cents of your ideas as to the way that account 004 ought to have been handled on the cost differential of 1.51 cents resulting from Respondent's Exhibit 101?

A. I do not know.

Q. Did you make any calculation?

A. No, sir.

Q. Did you calculate that one month you talked about?

A. I have made a thorough analysis of one month and—

Trial Examiner Ballinger: One moment.

Read the question.

(The reporter read the question.)

The Witness: Tell me what you mean by "calculation", "calculate one month," I would like to know "I talked about" and I will answer it.

Mr. Hanley: Will you please go back to the answer of the witness? I am sorry, Judge, to have to take this time.

Trial Examiner Ballinger: Very well. The reporter will read the answer of the witness, the last long answer 6710 given by the witness, and everything following that.

(The reporter read the material referred to.)

Trial Examiner Ballinger: Proceed.

The Witness: May I hear the question now?

By Mr. Hanley:

Q. Did you calculate that one month you talked about?

A. I have made a thorough analysis of one month from the standpoint of determining just how the accounts were handled, how this cost moved through and was placed in the separate channels; not an analysis and study made independently by me to determine what the cost differential was or should be for that month.

This analysis goes to the point of exactly what the company did, and I could not say in dollars and cents what effect any separate separation of costs would make on the cost differential of 1.51 cents claimed by Respondents in Respondent's Exhibit 101.

Q. Well, did your analysis go to what, in your judgment, as an accountant, you think the company ought to have done, Mr. Warmack?

A. I could never tell what that ought to be, I could never tell what they ought to have done, Judge, without making a study of their whole situation, myself, to determine what methods would have to be employed, and then employ those methods or in determining if they were workable.

6711 Q. Well, did you ever make such a study?

A. No, sir.

Q. Did you make it during the two months that you were in Detroit—

A. (Interposing): No, sir—and I do not think it could be made—

Q. —or while you were in Chicago?

A. No, sir.

Q. Have you ever made it?

A. No, not for this company—

Q. (Interposing): All right. Now, tell me if you will, please, and if you know, whether or not your criticism of the Respondent's handling of account 004 "Salaries—Salesmen" has any effect one way or another upon the differential, the cost differential of 1.51 cents as indicated by Respondent's Exhibit 101?

The Witness: May I hear the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I do not know what a thorough study and analysis of this class of expense and the functions involved would show, Judge Hanley.

Mr. Austin: If your Honor please, the witness I think was interrupted a moment ago at the end of a statement he was making, just now, on the record, and I do not think the state of the record now is to state that the 6712 witness intended, and I think he should be given an opportunity to complete or correct what he said if he did not do so. I would like to go back about two or three questions and answers in order to do that.

Trial Examiner Ballinger: Read the question referred to.

(The reporter read the following question and answer:

"Q. Did you make it during the two months that you were in Detroit—

"A. No sir—and I do not think it could be made—")

Trial Examiner Ballinger: Do you desire to amplify that answer?

The Witness: What I was trying to say is in the absence of a thorough cost analysis—I would be glad if that might be added.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Now, do you desire to correct any of the testimony that has been reread to you off the record?

The Witness: I desire to complete my statement which was stopped when I was interrupted, Judge.

6713 Trial Examiner Ballinger: Proceed.

The Witness: My answer was—

Trial Examiner Ballinger: The reporter will repeat at this time the question and answer so far as given to which the witness wishes to make an addition.

(The reporter read the following:

"Q. Did you make it during the two months that you were in Detroit—

"A. No, sir,—and I do not think it could be made—")

The Witness: No, sir, I do not think it can be made by me or any other accountant in such a short time.

By Mr. Hanley:

Q. Is that the conclusion of your answer?

A. Yes, sir.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Do I understand that the proper method of accounting could not be arrived at or determined on Respondent's account 004 appearing on Respondent's Exhibit 161, in a two months' effort?

The Witness: It is my opinion it could, Judge.

Trial Examiner Ballinger: I understood you to 6714 just state on the record that it could not be ascertained and determined within a two months' period—

The Witness: (Interposing.) No, sir.

Trial Examiner Ballinger: —or did you say that it could not be determined and computed within the two months' period?

The Witness: I do not believe I stated that either, Judge.

Trial Examiner Ballinger: Read what the witness did say.

(The reporter read the following:

"A. No, sir, I do not think it can be made by me or any other accountant in such a short time.")

The Witness: I had outlined in that answer, your Honor, briefly the procedure—

Mr. Hanley: Just one moment. I would like to have that read, the question of the Trial Examiner to the witness and his reply.

Trial Examiner Ballinger: Read it.

(The reporter read the material referred to.)

Mr. Hanley: Now, do I understand that the witness is attempting to answer any pending question? I do not believe there is any pending question.

Mr. Austin: That is a question by the Examiner.

Trial Examiner Ballinger: Do you care to make 6745 any further statement in answer to the Examiner's last question?

The Witness: Yes, sir, I shall be glad to tell you what I meant, Judge Ballinger.

Trial Examiner Ballinger: You may do so.

The Witness: In my previous answer.

Trial Examiner Ballinger: Please do so.

The Witness: Previously, I answered that, to determine properly from the standpoint of sound accounting what separation should be made, it would be necessary to employ the methods in the separation of this class of expense which in fact would be measuring factors developed by thorough cost studies and analysis.

Mr. Hanley: Well, just a moment, Mr. Warmack, that is not responsive.

The Witness: Well, can I finish my answer?

Mr. Hanley: No, not until I make my motion, please.

Trial Examiner Ballinger: Let the witness finish.

Mr. Hanley: May I make the motion?

Trial Examiner Ballinger: Not until the witness finishes his answer.

The Witness: Will you please read it to me as far as I have gone?

Trial Examiner Ballinger: Read it to the witness as far as it has been stated.

(The reporter read the answer so far as given, as 6716 follows:

"The Witness: Previously, I answered that, to determine properly from the standpoint of sound accounting what separation should be made, it would be necessary to employ the methods in the separation of this class of expense which in fact would be measuring factors developed by thorough cost studies and analysis.")

The Witness: (Continuing.) I have not made such a study, your Honor, and in my opinion, in order to determine a cost differential I doubt if such a study could be made to cover this particular account, and the other accounts which would have to be separated in Respondent's Exhibit 101 for the purpose of determining a cost differential within the space of a two months' period.

That is what I intended to answer, your Honor.

Trial Examiner Ballinger: What the Examiner had in mind was some idea of the approximate time and effort it would require to make a study which you have suggested should be made with reference to each item appearing on Respondent's Exhibit 101.

The Witness: Your Honor, you see, studies could be made of all these, could be made more or less together. What I had particular reference to was in this particular account—

Mr. Hanley: Off the record.

6717 Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: I move that we adjourn until 1:30.

Trial Examiner Ballinger: The motion is granted. And now, at 12:10 p. m., the hearing stands in recess until 1:30 p. m.

(Whereupon, at 12:10 o'clock, p. m., a recess was taken until 1:30 o'clock p. m., the same day.)

6718 Afternoon Session.

1:30 p. m.

Trial Examiner Ballinger: Come to order.

WILLIAM J. WARMACK, resumed the stand and testified further as follows:

Cross-Examination by Mr. Hanley (continued).

Q. Directing your attention, Mr. Warmack, to account No. 005 "Salaries—Advertising", please state as briefly as you can, what you think is wrong with the way that the Respondent has handled that account, and what you think ought to be done with it.

A. That account is allocated between channels on Respondent's form 189 on a basis of gallonage exclusive of a portion of the account which may have been allocated directly, if any.

The same objection that I have raised in this regard with respect to the usage of the gallonage factor; that is, bulk plant gallonage as a measuring factor before thorough accounting study which would support the usage of the gallonage factor as a measuring stick, so to speak, for the separation of its costs.

In addition to that, Respondent's accountants in the late cost study reflected in Respondent's Exhibit 100 and Respondent's Exhibit 101 endeavor to isolate out of
6719 charges which had been regularly allocated to distribution channels on Respondent's regular form 189 for the year 1940, endeavor to isolate out of those costs a portion of costs which they considered applicable to direct shipment business on a basis of effort.

There again we come to the point—

Q. (interposing.) "We" do not come to it. You state what you come to, please, Mr. Warmack.

A. I come to it, if you will just be quiet and give me time to answer I will answer your question.

Mr. Austin: He was using the "we" editorially.

The Witness: That a portion of the cost is separated on the basis of a partial study, and a portion of it is separated on the basis of gallonage, and then the one part that is separated on the basis of gallonage is to be compared with the part of that which is separated on the basis of time, and for the purpose of determining the cost differential, and in my opinion that is not sound cost accounting.

Mr. Hanley: I would like to have that last part read back. It does not mean anything to me.

Trial Examiner Ballinger: Read back the part referred to.

(The reporter read the answer referred to by counsel.)

6720 Trial Examiner Ballinger: Is that the way you want it?

The Witness: Yes, sir.

Trial Examiner Ballinger: Proceed:

By Mr. Hanley:

Q. Now, you made a partial time study, did you, Mr. Warmack, of what?

A. Well, I meant a partial time study by the Respondent.

Q. Do you know what kind of a study Respondent has made?

A. I am fairly familiar with the study that was made, Judge Hanley.

Q. Will you please just tell us what you know about the studies made by the Respondent, if you know, in respect of allocations in Respondent's regular accounting form 189, if you know, Mr. Warmack?

A. Well, I certainly know.

The charges to—

Q. (Interposing.) Now, just a moment, if your Honor please—

Mr. Hanley: I will address this to your Honor: If your Honor please, the Respondent objects to the witness answering the question of Respondent's counsel by reading form any exhibits presented in this case by the Respondent. The witness has said that he knows, and it is requested that the witness answer out of his own

6721 information, and not by reading from any exhibits presented herein by the Respondent.

Trial Examiner Ballinger: The objection is sustained. The witness may make answer without any reference to any exhibit offered by Respondent.

Mr. Austin: If your Honor please, the objection was that he not be permitted to read from the exhibit; now, if your Honor please, your Honor is saying that he cannot refer to it.

Trial Examiner Ballinger: If the witness knows, it is not necessary to make any reference to any document.

Mr. Austin: Yes, sir, I am not objecting to the ruling except that I think your ruling was a little broader than the objection. I wondered if you intended that.

Trial Examiner Ballinger: I intended the ruling to be just what it was.

Mr. Austin: In other words, the witness may refer to an exhibit in answering the question, it seems to me ordinarily—it seems to me he is entitled to do that because he is talking about this cost study.

Trial Examiner Ballinger: If he desires to testify with reference to figures he may go to exhibits and find the computation, but this is something that is of his own personal knowledge. He can testify to that without reference to any documents.

Mr. Hanley: Of course he can if he knows.

6722 Trial Examiner Ballinger: If he knows it himself.

The Witness: Your Honor, my knowledge comes from the records that have been presented and the information gathered in my studies. I have certainly not examined into the supporting vouchers, the supporting payrolls that went into this.

I accepted for the purpose of my study the total cost of this particular item, and went into the methods of separation, and I can tell you in response to the question of counsel for the Respondent—the answer as to the methods employed by Respondent as to the separation of these costs, and they are already in the record, but I will be glad to endeavor to tell you them again.

Trial Examiner Ballinger: Well, you can state that without reference to any document.

Mr. Hanley: Just answer the question, Mr. Warmack. That is all that you are now to do, please.

The Witness: May I hear the question again, please?

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. Will you please just tell us what you know about the studies made by the Respondent, if you know, in respect of allocations in Respondent's regular accounting form 189, if you know, Mr. Warmack?")

Trial Examiner Ballinger: Off the record.

6723 (There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

The Witness: The only thing that I knew is what is reflected in the records, Judge. I cannot know anything beyond that of my own personal knowledge, if you have ever made any.

By Mr. Hanley:

Q. Mr. Warmack, in your judgment as an expert witness, and an accountant who has testified for two weeks and some days, do you think that you have contributed any factual matters to this record other than as exhibited in Respondent's Exhibits No. 99, 100, and 101?

Mr. Austin: I object to that question, your Honor, what the witness thinks he has contributed is immaterial.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The objection is sustained.

By Mr. Hanley:

Q. Adverting to the same account, Mr. Warmack, 005, "Salesmen—Advertising," please state for the record what, if any calculation you made that modifies or alters the cost differential of 1.51 cents offered by the Respondent on Respondent's Exhibit 101?

A. May I hear the question?

6724 Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: As again—what account?

By Mr. Hanley:

Q. I specified the account.

A. Account 005 entitled "Salaries—Advertising" and not "Salesmen—Advertising" I have studied, but I have made no calculations similar to the one to which you refer.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

By Mr. Hanley:

Q. I direct your attention, Mr. Warmack, to account 006, "Salesmen—Drivers," please state as briefly as you can what your objection if any is to that account as set up by the Respondent on its form—Exhibit 101.

A. Your Honor, I do not object to the allocations made by the company to this particular account. I have not examined into those accounts, into the allocations, or into the figures; but because of the fact that each of the employees maintained time cards and those time cards are used in the distribution of their salaries among channels I just do not know how they can do it better. I think that is all right.

Q. Is there any effect one way or the other either by way of increase or decrease, and if so, how much upon the differential of 1.51 cents as disclosed in Respond-
6725 ent's Exhibit 101?

Trial Examiner Ballinger: Judge, he says he approves that method. What is there to be gained by going further into that?

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. The question is withdrawn.

By Mr. Hanley:

Q. I will ask you to advert to account 008, "Warehouse Labor." Do you have any objection to that?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: Do you mean by that as to the method of accounting employed?

Mr. Hanley: That is right, or any other objection as to the allocation or the method used by the Respondent in preparing its form 189.

Trial Examiner Ballinger: Proceed.

The Witness: I have reviewed the records, Judge Hanley, dealing with account 008 entitled "Salaries—
6726 Warehouse Labor" Respondent's Exhibit 99, Respondent's Exhibit 100, and Respondent's Exhibit 101—

Trial Examiner Ballinger: (Interposing): Do you find any objection to the method employed; that is, the accounting employed?

The Witness: Yes, sir, I do find objection to it but not a serious objection, your Honor, not to the extent of having caused us to make a study of the account and the accounts which are related to account 008 in the company's offices in the field study which was made earlier this year at which time I—

Trial Examiner Ballinger: (Interposing.) Now, just what are your objections?

The Witness: —studied their accounts.

The account is separated in part in the company's regular accounting procedure on the basis of gallonage; that is, reseller gallonage, and consumer gallonage. I do not know if that measuring stick is correct or if it is not correct.

Trial Examiner Ballinger: Is that your sole basis of your objection?

By Mr. Hanley:

Q. Did you get the question?

A. Most assuredly, I cannot know the measuring factor used in the separation of costs and I question any measur-
ing factor used in the separation of costs where those
6727 costs ~~and~~ those separations go to determine a cost
differential. I do not subscribe to guess work.

Mr. Hanley: The Respondent now moves to strike from the record Commission's Exhibit 133 inasmuch as the expert accounting witness advanced by the Commission has repudiated the concession in respect of account 008 on Commission's Exhibit 133 which is there conceded in its entirety as extracted from Respondent's Exhibit 101.

Trial Examiner Ballinger: The motion to strike is denied.

We will take a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

By Mr. Hanley:

Q. Mr. Warmack, I have been asking you to state specifically about individual accounts as they appear on Respondent's Exhibit 101; in the hope that we may shorten this examination, I would like to ask you, now, generally, if you have examined every single account on Respondent's Exhibit 101?

Now, just answer that "yes" or "no" if you can, please.

A. I cannot, Judge Hanley.

Trial Examiner Ballinger: What do you mean by "examine"?

The Witness: That is what I mean.

6728 By Mr. Hanley:

Q. Well, have you made any study of the accounts on Respondent's Exhibit 101?

A. May I inquire, your Honor? Judge Hanley, do you mean study of the records or these studies made in the company's offices of the underlying data?

Q. Well, let me put it this way—have you made a study as reflected by Respondent's Exhibits 99, 100, and 101, and by your own study of the underlying data when you were in Detroit and in Chicago for a period of approximately two months—

A. (Interposing.) I have made a study of each account as they are shown in Respondent's Exhibits 99 and 100, the data that is in those exhibits, and any other data that is in those records pertaining to each of those accounts. I have not studied the underlying data in the company's offices on which each of the accounts is based.

Q. Are you able to say, Mr. Warmack, what the influence in figures in dollars and cents may be as to any accounts on Respondent's Exhibit 101 in reference to the cost differential of 1.51 cents, or the cumulative effect in dollars and cents upon that differential in respect of your criticism of any of the accounts on Respondent's Exhibit 101?

The Witness: May I hear the question?

Trial Examiner Ballinger: Read the question.

6729 (The reporter read the question.)

The Witness: May I hear it again?

Trial Examiner Ballinger: Read it again.

(The reporter again read the question.)

The Witness: I have not made a calculation showing in dollars and cents the accumulative effect of any possible changes in figures as they are now set forth in Respondent's Exhibit 101 with respect to—

By Mr. Hanley:

Q. (Interposing.) You have—

A. —cost differential. I have endeavored to make calculations, showing in dollars and cents what effect there would be with respect to changes of figures in a few of the accounts on Respondent's Exhibit 101, and the effect that those changes would have on the cost differential of 1.51 cents per gallon claimed by the Respondent—

The Witness: May I hear my answer read?

Trial Examiner Ballinger: Read the answer.

(The reporter read the answer.)

The Witness: Does that answer your question?

By Mr. Hanley:

Q. No, it does not as yet, unless you have finished.

A. Well, I have finished.

Q. Very well, Mr. Warmack.

What is the difference that you have determined 6730 as the result of your calculation?

A. The result would be a reduction of the 1.51 cent per gallon cost differential, and that would be based primarily upon the elimination of account 075 and a part of account 520 from the tank wagon reseller column on Respondent's Exhibit 101.

Q. How much reduction?

A. Are you speaking, Judge, relative to the accounts or relative to the 1.51?

Q. 1.51.

A. I do not have that calculation before me.

Q. Have you ever made it?

A. Yes, sir.

Q. Well, if you have made it, Mr. Warmack, can you get it? Can you tell us how much?

A. I can make the calculation now, Judge Hanley, if you so desire.

Q. Mr. Warmack, I do not particularly desire—I am just asking you the question if you can answer it:

How much do you think the claim of the Respondent of the cost differential of 1.51 is reduced?

A. Upon the two accounts I spoke of?

Q. No, but whatever you say, how much do you think they are reduced in your judgment as an accountant?

A. I certainly could not tell you how much it would 6731 be reduced, giving effect to all of the criticisms with respect to all of the accounts on Exhibit 101. I pointed out two accounts about which—which must come out of there.

Q. Then, as a matter of fact, you have not made a calculation?

A. I have made a calculation.

Q. Well, if you have made a calculation, Mr. Warmack, will you please give us the result of it: How much in your judgment as an accountant should the differential of 1.51 be reduced if at all?

The Witness: Your Honor, if I may have a few minutes, I will make the calculation with respect to those two accounts. I do not have the calculation before me.

Trial Examiner Ballinger: Counsel for the Respondent has asked you to tell him the net result of all deductions that your think should be made, so that in making the calculation you would include with the two accounts you referred to, any other accounts.

We will now take a recess for five minutes in order to permit the witness to make the calculation.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Hanley: I would just like to ask what the state of the record is.

Trial Examiner Ballinger: There is pending a 6732 question that the witness desired time to make a computation that would enable him to answer the question.

Are you prepared to answer the question?

The Witness: Yes, sir. But I should like to hear the question again, please.

Mr. Hanley: Read both my question, the witness' answer, and the request of the Trial Examiner.

Trial Examiner Ballinger: Read those.

(The reporter read as follows:

"Q. Well, if you have made a calculation, Mr. Warmack, will you please give us the result of it: How much in your judgment as an accountant should be differential of 1.51 be reduced if at all?

"The Witness: Your Honor, if I may have a few minutes, I will make the calculation with respect to those two accounts. I do not have the calculation before me.

"Trial Examiner Ballinger: Counsel for the Respondent has asked you to tell him the net result of all deductions that you think should be made, so that in making the calculation you would include with the two accounts you referred to, any other accounts.")

The Witness: Your Honor, I have made a calcula-
tion giving effect to deductions made from the total cost
of serving tank wagon reseller business and jobber, naph-
tha and gasoline business, as is shown on Respond-
6733 ent's Exhibit 101; that is, I have deducted from those
totals the costs in the respective channels columns
on the exhibit for account 075 and the reduction in ac-
count 520.

In the case of account 075 the whole amount has been eliminated as far as figures in that account—in the respective columns are concerned.

Trial Examiner Ballinger: You eliminated the figures both as to tank wagon and direct sales accounts?

The Witness: Yes, sir. And in the case of account 520, that portion was eliminated which represented payment of annuities for prior years; that is, prior to January, 1939, and pensions paid in the Detroit field for the year 1940.

The latter amount was eliminated because of the fact that at the present time the Respondent company has charged in this same account the amounts that it contributes to the retirement plant costs which match the amounts contributed by the employees.

That makes the total deduction in the tank wagon reseller column of $192,425.00 which reduces the total expense as shown of $1,155,379.06 to $962,954.00.

The total expense in jobber, naphtha and gasoline column, as shown in Respondent's Exhibit 101, is reduced by $3,745.00, which reduces the total that is shown to $20,644.00.

I do not agree that that is all the reductions that
6734 can or should be made, but I do feel and it is my
opinion that those reductions; that is, these reduc-
tions which we have made and just explained, should be
made from the costs as shown on this sheet, Respondent's
Exhibit 101.

Trial Examiner Ballinger: What is the differential in cents?

The Witness: The differential in cents is approximately 1.255 cents per gallon after giving effect to those reductions. Instead of—

Mr. Austin: I—

The Witness: —instead of 1.51 cents per gallon as claimed by the Respondent company.

By Mr. Hanley:

Q. Mr. Warmack, you have now given a calculation which you say gives effect to your judgment in respect of account 075 and account 520.

A. Yes.

Q. You have?

A. Yes.

Mr. Hanley: I will now ask the reporter to read the question asked you by the Trial Examiner to which the last answer was given.

Will you please read that question, Mr. Reporter?

Trial Examiner Ballinger: Read the question.

(The reporter read the question of the Trial Examiner.) 6735

By Mr. Hanley:

Q. Now, Mr. Warmack—

The Witness (Interposing): Can I have the answer, after having heard the question read by the reporter?

By Mr. Hanley:

Q. —which are we to understand? Are we to understand that the result of your calculations is your judgment as an accountant as to how the represented cost differential of 1.51 cents on Respondent's Exhibit 101 should be altered in respect of all accounts?

A. No, sir.

The Witness: Your Honor, may I hear the answer to the previous question read, please?

Trial Examiner Ballinger: Read the answer to the previous question.

(The reporter read the answer to the previous question.)

By Mr. Hanley:

Q. Now, Mr. Warmack, you have given an answer as to what you think the influence on the claimed differential of 1.51 cents is in respect of your ideas about accounts 075 and 520.

The Examiner asked you, and I now ask you if that is all of the effect in respect of all the accounts that you think influence the differential of 1.51 cents—

6736 A. (Interposing) No, sir.

Q. —on Respondent's Exhibit 101, and if not, what are the other influences and how much?

Trial Examiner Ballinger: Will you enumerate the amounts?

The Witness: Those are three questions, Judge. Could I have them separately, please, and then I can answer them separately.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I would like to answer it broken up into several questions.

By Mr. Hanley:

Q. Do you not understand the question, Mr. Warmack?

A. No, sir.

Q. It seems to me quite clear, but I will try to rephrase it for you if you desire.

A. Please.

Q. The Examiner asked you to make a calculation as to the influence on the Respondent's claimed cost differential of 1.51 cents, giving consideration to all of the accounts on Respondent's Exhibit 101, which you questioned. You have given the influence, and you have calculated it, of account 075 and account 320, as you have recalculated those accounts, in line with what we understand to
6737 be your theories of accounting.

A. Those are only approximations.

Q. I have not asked you the question yet, Mr. Warmack.

A. Yes, sir.

Q. I now ask you the same question that the Examiner asked you: If those are the only two accounts that influence Respondent's claimed differential of 1.51 cents and if not, what other accounts influence that differential, and how much?

A. Every account in there influences it, Judge.

Q. How much?

A. I certainly do not know. Every account in Respondent's Exhibit 101 influences the differential. It would be possible to determine how much by taking the figures that you have here and relating the gallonage to those figures.

Q. Well, suppose you do it, I ask you to do it.

A. Well, I am not going to do it.

Q. How much? What do you say is the cost defferential of the Respondent as between reseller and tank wagon channel and jobber, naphtha and gasoline channel, how much is that difference?

Trial Examiner Ballinger: The witness has stated that he has not done it, and the request that he should now do it does not appear to the Examiner to be a reasonable request.

6738 Mr. Austin: May I hear that, please, Mr. Examiner?

Trial Examiner Ballinger: I said, the witness has stated that he has not done it heretofore, and the request that he now do it does not appear to the Examiner to be a reasonable request.

The Witness: Judge, if the calculation is all he is asking for with respect to these accounts—the question was, as I understand it, how much influence does each one of these accounts have on the cost differential, without asking whether the accounts are right or wrong—it won't serve anything and it won't mean anything as long as we do not determine whether they are right or wrong.

Mr. Austin: The question was, what was the effect of your criticism on the account.

The Witness: That is not the question.

Mr. Hanley: I am sorry, every one is asking my questions but me, it seems.

The Witness: May I hear the question?

Mr. Hanley: At this time, and in view of the ruling of the Court, the Respondent requests that the accounting expert witness advanced by the Commission, be required to make a calculation in respect of each account on Respondent's Exhibit 101 in relation to its influence, if any, upon the claimed cost differential of 1.51 cents.

Trial Examiner Ballinger: Can you make such a
6739 computation?

The Witness: Yes, sir.

Mr. Austin: Your Honor, that question, as phrased, just like Mr. Warmack has said, does not reflect anything of value because it says, what is the influence of each account on the differential, that would mean just taking each one of the accounts and showing how much each individual account contributes to the total differential, and it would be just a statement, by individual accounts, of showing what is right on here, and would not add to, alter, or subtract from anything that is now on this exhibit.

Trial Examiner Ballinger. And you are referring to Respondent's Exhibit 101 when you say that?

Mr. Austin: That is correct. I was referring to Respondent's Exhibit 101.

Trial Examiner Ballinger: Do you desire him to make a computation as to the effect of each particular account, that it would have upon the final differential?

Mr. Hanley: Exactly, your Honor.

Mr. Austin has been examining for weeks on cross-examination of Mr. Boatwright, and on direct examination of his own witness, and he has repeatedly said to your Honor that we were dealing in hundredths of a cent, and that it was a cumulative effect that he was interested in, in connection with the cost differential as claimed by the 6740 Respondent company.

Now, if your Honor please, I am trying to shorten this examination if I can.

I propose to go down through this line of accounts on Respondent's Exhibit 101 and determine whether or not this witness made any calculation—and I am just sure he has not—in respect of any of these accounts.

I am now requesting that he be required to do the job that he was sent out to Detroit to do, and spent two months in Detroit ostensibly doing.

The Witness: Judge, I can do it in five minutes, or I can hand it to Mr. Munson, and if that is all he wants, why, we can give him that.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I do not think the witness should be required to make such a computation, for the reason that it would be simply a breakdown of the items on Exhibit 101, and will have no evidentiary value, and furthermore, if it is Respondent's desire to have that exhibit broken down so as to show the differential involved in each account, that should be done by the Respondent and not by the Commission.

Trial Examiner Ballinger: The objection is overruled and the witness is instructed to make the computation 6741 for which purpose—based upon the witness' statement as to the time necessary—an adjournment of five minutes will be taken.

The Witness: Judge, after looking at it I fear it is going to take much longer than any five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order. You may proceed.

Mr. Hanley: May we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: The request, as made by the Respondent, means that the expert accounting witness advanced by the Commission shall make a breakdown and arrive at the influence in figures in dollars and cents upon the claimed cost differential of the Respondent of 1.51 cents, all in relation to the criticisms and accounting methods approved by and adopted by the expert witness for the Commission, as distinguished from the accounting methods used by the Respondent and portrayed in Respondent's Exhibit 101, and explained in Respondent's Exhibit 99, and 100.

By Mr. Hanley:

Q. Can you do it, Mr. Warmack?

A. No, sir.

6742 Mr. Hanley: In view of the answer of the witness that he can not give a comprehensive answer relative to the influence of his criticisms of Respondent's accounting methods, it is moved to strike the answer of the witness relative to his testimony in connection with the influence of accounts 075 and 520 on the cost differential as claimed by the Respondent in the sum of 1.51 cents.

Trial Examiner Ballinger: The Examiner understood that the witness had made a computation as to the effect on the differential relative to the two accounts mentioned by him.

Is that correct?

The Witness: That is correct. That is what I made, a calculation or rather an approximation.

Trial Examiner Ballinger: The motion to strike is denied.

By Mr. Hanley:

Q. Did you say a calculation or an approximation?

A. I said both.

Mr. Hanley: In view of the statement by the witness that he now said that the calculation is and or approximation I move to strike the answer of the witness inasmuch as it is necessarily an inaccuracy if it is merely an approximation.

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Trial Examiner Ballinger: The motion to strike is denied.

6743 By Mr. Hanley:

Q. Mr. Warmack, I think the last account that I asked you about was 008. I am not sure whether I asked you whether or not you were able to show what the influence of your ideas of the accounting about account 008 would have been on Respondent's claimed cost differential of 1.51 cents or not. If I asked you that I did not want to repeat it.

Trial Examiner Ballinger: Do you recall whether that question was asked you?

The Witness: I do not recall, Judge Ballinger.

Trial Examiner Ballinger: Well, answer the question, then.

The Witness: Will you read the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I do not know what influence this account, as it stands or as it would be if any changes were made thereon, would have on the cost differential of 1.51 cents per gallon asserted by the Respondent.

By Mr. Hanley:

Q. You do not know, I assume, whether it would increase it or decrease it, Mr. Warmack?

A. I do not know.

Q. And you have never made any calculation?

A. I have not.

6744 Q. I refer you now to account 021 entitled "Commissions"; what is your criticism, if any, of that account?

A. In the first place, it has no place in Respondent's Exhibit 101.

Q. Well, Mr. Warmack, it is just in there. Will you please tell us your criticism?

A. The first criticism is this: that it just should not be in there.

Trial Examiner Ballinger: That is not a sufficient explanation. Explain it.

The Witness: Well, I will be glad to explain my reasons. I have stated my objection, which is what I was asked.

Trial Examiner Ballinger: State your reasons.

The Witness: Account 021 entitled "Commissions" represents, as I understand it, for the most part, commissions paid to B-Station agents who operate small bulk plants for the Respondent company which are located, as I understand it, for the most part, in rural communities in the Detroit field.

The agents who receive these commissions perform the same services in the distribution of Respondent's products as are performed by regular salaried stations in cities, or densely populated areas in the Detroit field; therefore, my criticism goes to this point, Commission station busi-
ness is separate and apart, and for the purpose of de-
6745 termining a cost differential could not be considered
as salaried stations. That represents, your Honor, two separate and distinct methods of operation, and for the purpose of determining a cost differential it would first be necessary to determine that the cost of serving customers through commission agents are relatively the same as the cost of serving customers through the salaried station.

By Mr. Hanley:

Q. Do you know?

A. I most assuredly do not.

Q. Did you try to find out when you were in Detroit?

A. I did, and I should like to call attention to this also that I urged this point upon Respondent's accountant, Boatwright, in the conference in August of 1941 before he started making this study.

Q. Did you try to find out?

A. I made no independent study.

Q. Did you make any study?

A. No, sir.

Q. Mr. Warmack, the territory, as I understand it, that is included in this inquiry as Detroit is Dearborn, Detroit, Hamtrack, and Highland Park.

A. I do not know but the record will show.

Q. As you understand it?

A. Greater Detroit, Judge, I do not know the sep-
6746 arate sub-divisions.

Mr. Austin: That will be conceded, Judge.

Mr. Hanley: That will be conceded?

Mr. Austin: Yes.

Mr. Hanley: Thank you.

By Mr. Hanley:

Q. How many bulk plants or distributing stations does the Respondent company have in that territory which your counsel has now conceded is in contemplation in this inquiry?

A. I think I can look that up in the records. I do not know offhand.

Q. If you do not know can you say approximately?

A. If it is in the record I will be glad to say. I do not care to make any guesses.

Q. Are they all salaried stations?

A. It is my understanding that they are.

Q. Is it not a fact, Mr. Warmack, that the Dearborn station is a commission station and did you not find that out—

A. (Interposing.) The record will show.

Q. —when you were there, in Detroit, or did you try to find out?

A. I did not have to wait until I got to Detroit, it was acknowledged and by one of your own witnesses here three or four times that Dearborn was a commission station.

Trial Examiner Ballinger: When you went to De-
6747 troit to make your investigation, did you then know that the Dearborn station was a commission station?

The Witness: I know that from the testimony, your Honor.

Trial Examiner Ballinger: The testimony of whom?

The Witness: Answers given in the record by Mr. Boatwright.

By Mr. Hanley:

Q. Did you make any comparison or analysis of the Dearborn station in metropolitan Detroit area as compared with salaried stations?

A. No, sir.

Q. Why not?

A. I was not required to.

Q. Do you mean you were not required to by whom, Mr. Warmack?

A. By anybody.

Q. Were you not sent out there to make a study of that nature?

A. I made a study. I made a study, but not of that. I made a study of the entire accounting system which was definitely and positively wrong and erroneous from the standpoint of sound accounting principles and clearly so indicated.

(There was a discussion off the record.)

Mr. Hanley: If your Honor please, if this is an appropriate time, I will make a motion for an adjournment
6748 at this time and therefore I now move that we adjourn until 9:30 tomorrow morning.

(Witness temporarily excused.)

Trial Examiner Ballinger: The motion of counsel for the Respondent is granted.

And now, at 4:10 p. m., the hearing stands adjourned to be reconvened at 9:30 a. m., July 17, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 4:10 p. m., July 16, 1942, the hearing in the above-entitled matter was adjourned.)

6749

Room 532, Federal Trade
Commission Building,
Washington, D. C.
Friday, July 17, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Illinois,) appearing for the Respondent.

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PROCEEDINGS

Trial Examiner Ballinger: Come to order. The hearing of Docket No. 4389, case entitled, "In the Matter of Standard Oil Company (Indiana)" is reconvened pursuant to notice at 9:30 a. m., on the seventeenth day of July, 1942, in Room 532, Federal Trade Commission, Washington, D. C.

The last hearing was held at the same place, July 16, 1942.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

Mr. Hanley: Mr. Warmack, will you resume the stand, please.

Mr. Warmack: Yes.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination by Mr. Hanley (Continued).

Q. Mr. Warmack, I want to ask you just two questions of each of these several accounts on Respondent's Exhibit 101, and my request is that you give as brief an answer as you feel it proper, from your own standpoint, to give.

A. Yes, sir.

Q. The first question is, in each case, what you 6751 think is the trouble from an accounting standpoint with the account as set up by the Respondent.

The second question, in each instance, will be: What influence, if you have made any calculation as to the influence, in figures in dollars and cents upon the Respondent's claimed differential?

Now, I shall go back to certain of these accounts and question you in detail as to certain of them, but just now I want to go right through form 189.

Trial Examiner Ballinger: Judge, when you use the word "trouble" in your first question, you mean the witness' objections?

Mr. Hanley: I would like to hear the question read.

(The reporter read the question.)

Mr. Hanley: Yes, your Honor, that was an ill-advised use of terminology.

Trial Examiner Ballinger: I am merely trying to clarify it so there can be no possible question.

Mr. Hanley: I think your Honor is right, and I would like to qualify it.

Trial Examiner Ballinger: Read the question again.

(The reporter again read the question.)

By Mr. Hanley:

Q. Mr. Warmack, you have now just heard the re-
6752 porter read my explanation of the questions. I said in that explanation that I wanted you to explain what you thought was the trouble in any account. In clarification of that, I mean I want you to explain what in your judgment as an accountant is wrong with the method used by the Respondent company in setting up each of these respective accounts on form 189, or Respondent's Exhibit 101.

A. Do you mean the separation made of them?

Q. Just whatever you think as an accountant is wrong with the method.

A. Yes, sir.

Q. I think the last account that we considered was 021, namely, "Commissions." I now refer you to account 024, "Expense of Transporting Standard Fuels Due to Lack of Storage," and I will ask you first, what in your judgment as an expert accountant is wrong, if anything, with the methods used by the Respondent company in establishing that particular account.

The Witness: Your Honor, can I ask the counsel a question off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

By Mr. Hanley:

6753 Q. Mr. Warmack, do you remember the question?

A. No.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: In the case of account 024 entitled "Expense of Transporting Standard Fuels Due to Lack of Storage," that account has to do primarily with commission agent business, and in view of the fact that it is my contention that commission agent business should be separated from salaried station business, I think that this particular expense should be applied only to the commission agent business, if the expense is going to be used for the purpose of determining a cost differential in this case in the creating of the two classes of expense.

From that standpoint, I see no objection to the separation as shown on Respondent's Exhibit 101, for the reason that I have not studied and explored this account; that is, the records of the company underlying that separation.

By Mr. Hanley:

Q. With reference further—

Trial Examiner Ballinger: (Interposing:) That is one of the items that appears on Commission's Exhibit 133, is it not?

The Witness: Yes, sir.

6754 Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. With further reference to that same account, No. 024, what is the influence in figures and dollars and cents upon the claimed differential of 1.51 cents as reflected by your method of accounting—

A. (Interposing): I do not—

Q. —as distinguished from the Respondent's method of accounting, if you have made the calculation?

A. I do not know.

Trial Examiner Ballinger: Did you make any calculation?

The Witness: No, sir.

By Mr. Hanley:

Q. I now refer you to account No. 025 entitled "Truck Rental Expense" on Respondent's Exhibit 101 and will ask you what, in your judgment as an accountant, is wrong with the methods of accounting used by the Respondent in handling that particular account?

A. Account 025 entitled "Truck Rental Expense" is an expense incurred at least for the most part in connection with the commission agent business; that is the B-Station business.

6755 In my opinion, commission agent business and the salaried station business should be separated if this expense is to be used on these two groups of expenses; that is, the B-Station business and the A-Station business—A-Station business being salaried station—are to be grouped in determining the cost differential, then it is my opinion that the allocations of that particular class of expense as between channels should be separated in a different manner from that shown here.

It is possible that a proper study may show that some separation of that expense would apply to other methods business. Whatever portion of the expense which is applicable to the tank wagon business, it is highly probable that a proper cost study would show that the most of this class of expense is applicable to the tank wagon business.

It is my opinion that this class of expense should be separated on the basis of the commissions paid to the B-Station agents as between tank wagon reseller business and tank wagon consumer business.

Q. Did you make what you refer in your answer as a "proper cost study" in connection with this particular account?

A. No, sir. I did not make it.

Q. Referring you to Commission's Exhibit 133, it appears that you did make a change in the figures in respect
of account 025, "Truck Rental Expense" as they
6756 appear on Respondent's Exhibit 101, which I assume
entails that you made some kind of a study, Mr. Warmack; just what kind of a study did you make?

A. The figures that are shown there are calculations—

Trial Examiner Ballinger: Do you mean by "there" on Commission's Exhibit 133?

The Witness: The figures as shown on Commission's Exhibit 133 represent the reallocation of the total of truck rental expense between tank wagon reseller column and the tank wagon consumer column, on the ratio of the commissions paid to B-Station agent. Between—

By Mr. Hanley:

Q. Will you tell us—

A. (Interposing.) Excuse me, Judge Hanley, please, I had not finished my answer.

Q. Yes, go ahead.

A. I refer to the commissions as shown being paid to B-Station agents.

There is, I understand, some small commissions included there which would be paid, or which were paid to a few drivers operating out of B-Stations, but of course I do not have the information as to how much that may have been. I understood it was small.

Q. Mr. Warmack, in connection with your studies of account 025, did you investigate all of the vouchers, 6757 all of the records, data, and underlying accounts in the office of the Respondent company in Detroit which underlie the establishment of account 025 on Respondent's Exhibit 101?

A. Do you mean for the year 1940?

Q. 1940.

A. No, sir. I did review some of the vouchers.

Q. Is it a fact that your conclusion as to the impropriety of the Respondent's Methods of allocation in account 025 are based on a study of just a few of the vouchers and accounts and underlying records?

A. No, sir. That is not exactly correct.

Q. What is it?

A. I made inquiry with respect to the nature of this expense and did review some of the vouchers.

I found that this account was incurred right along with the commissions paid by the respondent to B-Station agents which are covered in account 021.

I found that the commissions were paid on what the company terms a "pay gallon" basis. That means that a gallon of gasoline delivered to one customer may carry what the company terms "one pay gallon" and a gallon of gasoline delivered to another customer may carry a higher pay gallon; for example, one gallon delivered may carry what we call "one pay gallon" and another one may carry "three pay gallons."

6758 The commissions are paid on the basis of pay gallons.

In view of that fact, in view of the fact that the trucks are used in the delivery of this particular product, and in view of the fact that the varying pay gallons are based to some extent upon the distance of the company's customer from the plant of the B-Station agent, it would seem reasonable and equitable to allocate truck expense also on the basis of pay gallons, in the absence of a study which would prove that to be inequitable.

I did not make such a study.

Q. I think you can answer this briefly, Mr. Warmack. Do you regard it from the standpoint of an accountant, as a proper expense, from a marketing standpoint, that there is a different ratio of cost applicable to some gallons of gasoline sold by the Respondent company as distinguished from some other gallons of gasoline sold by the Respondent company?

A. Yes, sir. I mean, that is speaking generally, Judge Hanley.

Q. Yes.

A. Yes.

Q. Now, in respect of account 025, what is the influence, if any, in figures and dollars and cents upon the claimed cost differential of 1.51 cents as reflected by Respondent's Exhibit 101 that results from your criticisms or changes in method of accounting and as applied to account 025, if you have made the calculation. 6759

A. I do not know. And I have not made that particular calculation. I do know that if the separation is made in this expense in accordance with my statement just made: that is, on the basis of commissions in the reseller and consumer column; the amount of $37,793.36 appearing in tank wagon reseller column on Respondent's Exhibit 101 would be reduced to $22,992.31, as shown on Commission's Exhibit 133.

Q. My question is this, Mr. Warmack: Would the result of your calculation, if you have made any, increase or decrease and if so by how much the claimed differential in cost of 1.51 cents as reflected by Respondent's Exhibit 101?

A. If calculations were made as just outlined it would be decreased. I will have to make the calculation if you want the figure.

Q. Have you made it?

A. No, sir.

Q. That is all I want to know, Mr. Warmack.

A. Yes.

Q. I refer you now to account 030, "Traveling Expense—Supervision" on Respondent company's Exhibit 101 and will ask you, as an accountant, what in your judgment is wrong, if anything, with the Respondent's method of handling that account from an accounting standpoint. 6760

A. The same objections which I raised to account 000 would apply also to this account. If you wish them stated at this point—

Q. (Interposing): No, I do not care to have you restate, if that is your answer.

A. Yes. That is my answer.

Q. What, please, is the result or influence, in figures, in dollars and cents of your views of accounting on that particular account 030, on Respondent's claimed differential of 1.51 cents?

A. I do not know.

Q. I refer you now to account .031—"Traveling Expense—Sales Promotion" and ask you what, in your judgment, as an accountant, is wrong with the Respondent's accounting methods in handling that particular account?

A. I did not make a study of that account, Judge Hanley, in my studies made in the company's office earlier this year, therefore I could not answer your question.

Q. Then, I assume it to be a fact that you have no ideas as to the influence on the differential?

A. No, sir.

Q. As the result of that account?

A. No, sir.

Trial Examiner Ballinger: Before you pass on,
6761 you gave the Respondent full credit in Commission's
Exhibit 133 for the amount it claimed in Respondent's
Exhibit 101 on this item, did you not?

The Witness: Well, it is shown on that exhibit, Judge. I do not subscribe—

Mr. Austin: (Interposing): What item are you talking about? I thought it was 030.

Trial Examiner Ballinger: 031.

The Witness: I do not subscribe—

Trial Examiner Ballinger: (Interposing): Here it is, right up here.

The Witness: —to the fact that this particular account or all of these particular accounts were properly allocated by the Respondent.

Trial Examiner Ballinger: Well, we are dealing now with one particular account.

The Witness: Yes, sir, as stated, your Honor, that I gave them on Commission's Exhibit 133, that is correct, that figure as shown on Respondent's figures on Respondent's Exhibit 101 are the identical figures on this Commission's Exhibit 133, but the fact that it is so shown, as far as I am concerned, is that I just did not make a study of that account in the company's offices.

Trial Examiner Ballinger: But merely conceded it?

The Witness: No, just did not make a study of it.

6762 By Mr. Hanley:

Q. Mr. Warmack, I now refer you to account 032 entitled "Traveling Expense—Salesmen" on Respondent's Exhibit 101, and ask you as an accountant what you think is wrong, if anything, with the accounting methods in respect of the Respondent's handling of that account?

A. The same testimony given for account 004 entitled "Salaries—Salesmen" will apply equally to this account 032 entitled "Traveling Expense—Salesmen."

Q. Now, will you please tell us what the influence of your ideas as an accountant and as to the proper method of handling that account is in figures in dollars and cents upon the cost differential of 1.51 cents as reflected by Respondent's Exhibit 101?

A. I do not know, and the only way that information could be ascertained would be for a study to be made in accordance with the way that I have outlined it—and such study has not been made.

Q. Well, did you ever make such a study?

A. No, sir.

Q. I will now refer you to account—what is the next one—033, entitled "Traveling Expense—Advertising," Respondent's Exhibit 101, and ask you what, in your judgment as an accountant, is wrong with that account, from an accounting standpoint, if anything?

6763 A. Do you mean wrong with the separations made with regard to Respondent's Exhibit 101?

Q. Well, just wrong from an accounting standpoint.

A. Well, there was nothing wrong with the account, it would be with the separations, Judge Hanley. We certainly do not question the fact that the company spent the money and incurred the expense.

The same testimony given for account 005, "Salaries—Advertising" would apply equally to this account; that is, account 033 entitled "Traveling Expense—Advertising."

Q. What is the effect or influence, if any, in figures in dollars and cents of your criticism of the Respondent's method of handling that account upon the claimed cost differential of the Respondent company as reflected in Respondent's Exhibit 101 of 1.51 cents.

A. I do not know. That can only be determined by a thorough cost study.

I have not made such a study.

Q. I refer you now, Mr. Warmack, to account 045 on

Respondent's Exhibit 101, entitled "Operation and Maintenance of Vehicles—Supervision"; please state what, if anything, is wrong in your judgment as an accountant in respect of the accounting methods of the Respondent in handling that account.

A. The same testimony given for account 006 entitled "Salaries—Supervision" will apply equally to 6764 account 045 entitled "Operation and Maintenance of Vehicles—Supervision."

Q. Please state what the effect in dollars and cents is of your ideas of the way that that account should be handled as applied to Respondent's claimed cost differential of 1.51 cents.

A. I do not know.

Q. Have you made any study thereof?

A. I have never made a study to determine what the influence would be on the claimed differential.

Q. I refer you now to account 046 entitled "Operation and Maintenance of Vehicles—Sales Promotion" on Respondent's Exhibit 101, and will ask you what in your judgment as an accountant is wrong, if anything, with the Respondent's method of handling that particular account.

A. Account 046 "Operation and Maintenance of Vehicles—Sales Promotion."

The same testimony given for account 031 entitled "Traveling Expense—Sales Promotion" and for account 002 entitled "Salaries—Sales Promotion" would apply equally to this account; that is, account 046.

Q. Please state what the influence is in figures, in dollars and cents, on your method of handling that account as applied to Respondent's claimed cost differential of 1.51 cents.

6765 A. I have not made a study of that account, Judge Hanley, and I do not know if there would be any changes from the figures shown in the account on Respondent's Exhibit 101. If a study were made—

Q. All right. I refer you to account 047 entitled "Operation and Maintenance of Vehicles—Salesmen"

A. Yes.

Trial Examiner Ballinger: Before you reach that, the same figures appearing in the tank wagon reseller and jobber naphtha and gasoline column on Respondent's Exhibit 101 appears on Commission's Exhibit 133, do they not?

The Witness: Yes, sir.

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. I refer you now to account 047 entitled "Operation and Maintenance of Vehicles—Salesmen" appearing on Respondent's Exhibit 101, Mr. Warmack, and ask you the same question as to what is wrong, in your judgment as an accountant, with Respondent's method of handling that account.

A. Account 047 "Operation and Maintenance of Vehicles—Salesmen".

The same testimony given for account 004 and account 032 will apply equally to account 047.

Q. And what is the influence upon the cost differential of 1.51 cents as claimed by the Respondent?

6766 A. I do not know as no thorough cost accounting analysis has been made of that account.

Q. Have you ever made one?

A. No, sir.

Q. I refer you to account 048 entitled "Operation and Maintenance of Vehicles—Passenger Cars, and Trucks" and ask you the same question; what is wrong with that account?

A. The same testimony would apply—

Mr. Hanley: (Interposing): Just a moment. I do not mean to interrupt you but I think this will save some time. I am wondering if it may shorten this if the witness now understands the questions that I am now asking him in respect of these accounts, if I do not need to repeat them, there is just no occasion for doing so, if the witness understands what I mean, and if your Honor understands.

Trial Examiner Ballinger: I understand perfectly and I see no occasion for repeating the two questions if the witness has them clearly in mind.

Mr. Hanley: I do not care to repeat them if the witness does understand what the questions are.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. We will take a recess for five minutes.

6767 (A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Mr. Hanley: There having come a time in the cross examination when it seemed advisable to prepare definite questions to ask of the witness which fall into a pattern, there were prepared questions now known as Questions

No. 1, 2, and 3, copies of which have been supplied to the witness, to the Examiner, and counsel for the Commission, which are as follows:

"Question No. 1:

Mr. Warmack, in your judgment as an expert accounting witness, what is wrong, if anything, with respondent's method of treatment and handling from an accounting standpoint of account number * * * ?

"Question No. 2:

Mr. Warmack, will you please indicate the influence by way of increase, or decrease, or any influence whatsoever, upon the respondent's claimed differential of 1.51 cents, as reflected by Respondent's Exhibit No. 101, of your comments which you have just made with respect to account number * * * ?

"Question No. 3:

Mr. Warmack, did you or did you not make any detailed study of the underlying data, facts, records, and accounts applying to account number * * * appearing
6768 on Respondent's Exhibit No. 101?"

It is the purpose of the Respondent to ask the witness to answer each of these three questions in respect of each account as it appears upon Respondent's Exhibit 101.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. I refer you, Mr. Warmack, to account No. 048 entitled "Operation and Maintenance of Vehicles—Advertising—Passenger Cars and Trucks" and I ask you the three prepared questions in respect of that account.

Please answer each of those questions separately.

A. Account 048 "Operation and Maintenance of Vehicles—Advertising—Passenger Cars and Trucks."

My answer in connection with that, of course, would be the same in connection with the answer to account 005 entitled "Salaries—Advertising," and therefore that would cover it.

Trial Examiner Ballinger: That is, your answers to the three questions are the same as they were to account 005?

The Witness: Yes, sir.

By Mr. Hanley:

Q. Now, referring to account 053 entitled "Opera-
6769 tion and Maintenance of Vehicles—Trucks, Motor and Horse-Drawn (Excluding Advertising)", Mr. Warmack, will you please answer the three questions separately?

A. Account 053, "Operation and Maintenance of Vehicles—Trucks, Motor and Horse-Drawn (Excluding Advertising)";

The testimony in connection with that account—

Trial Examiner Ballinger: Is that in answer to the first question?

The Witness: This is in answer to all three of them, Judge.

The testimony given by me in connection with account 006 "Salaries—Drivers" will apply equally to account 053.

I might state in connection with that that I have not made any study of account 053 entitled "Operation and Maintenance of Vehicles—Trucks, Motor and Horse-Drawn (Excluding Advertising)", and therefore I would not raise any objection to the methods employed by the Respondent in the allocation of this account.

By Mr. Hanley:

Q. I now refer you to account 054 entitled "Operation and Maintenance of Vehicles—All Other (Other than Office)", Mr. Warmack, and ask you the same three questions.

A. If I may—

Q. (Interposing:) To be answered separately if you can.

6770 The Witness: If I may give just a little further answer to that other question in connection with account 053 entitled "Operation and Maintenance of Vehicles—Trucks, Motor and Horse-Drawn (Excluding Advertising)", when I say I made no study, I made no study of the underlying data in the company's offices from which Respondent's Exhibits 100 and 101 were prepared of account 053.

Now, I can—

By Mr. Hanley:

Q. Please refer now to account 054 entitled "Operation and Maintenance of Vehicles—All Other (Other Than Office)," Mr. Warmack.

I ask you the same three questions.

A. The testimony given in connection with account 000, "Salaries—Supervision" applicable to superintent of maintenance applies equally to account 054 "Operation and Maintenance of Vehicles—All Other (Other Than Office)".

Q. In respect of all these questions?

A. Yes, sir.

Q. Mr. Warmack—.

A. Yes, sir.

Mr. Austin: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: In connection with account 054 en-
6771 titled "Operation and Maintenance of Vehicles—All Other (Other Than Office)", question No. 1 which reads as follows:

"Mr. Warmack, in your judgment as an expert accounting witness, what is wrong, if anything, with respondent's method of treatment and handling from an accounting standpoint of account number:

in Respondent's regular accounting procedure of the class of expense is separated between tank wagon reseller, tank wagon consumer, and other methods, on a gallonage basis excluding direct shipments.

I question the allocation factor; that is, the gallonage as a basis for the separation because of the fact that I have never been able to secure any information which would substantiate the allocation factor; that is, if the Respondent has ever made a study to determine whether or not the usage of gallonage for the allocation factor results in accurate proportions of this account which it has assigned to the respective channels of distribution on company's form 189. Whatever portions of this expense which may have been assigned to the respective channels of Respondent's form 189 by direct application are not objected to.

I would object to allocating a portion of this expense to direct shipment business on the basis of effort, and a portion of the expense to tank wagon reseller, tank wagon consumer, and other methods channel on Respondent's
6772 Exhibit 101 on the basis of gallonage.

The figures are small, however, and I have not made any particular study with respect to this allocation.

By Mr. Hanley:

Q. Mr. Warmack, will you please specifically answer questions Nos. 2 and 3?

A. In answer to question No. 2, reading as follows:

"Mr. Warmack, will you please indicate the influence by way of increase, or decrease, or any influence whatsoever, upon the respondent's claimed differential of 1.51 cents, as reflected by Respondent's Exhibit No. 101, of your comments which you have just made with respect to account number—,"

the answer is I do not know.

In answer to question No. 3, reading as follows:

"Mr. Warmack, did you or did you not make any detailed study of the underlying data, facts, records, and accounts applying to account number 054 appearing on Respondent's Exhibit No. 101,"

the answer is I did review the information shown in Respondent's Exhibits 99 and 100, but I did not make a study of the underlying data of that particular account in Respondent's offices.

Q. I now refer you to account No. 060—

Mr. Austin: Do you not want to take up 055 next?

6773 Mr. Hanley: Yes.

By Mr. Hanley:

Q. I now refer you to account No. 055, entitled "Vehicle Tank Expense—Other Than Mounted on Company Chassis," and will ask you please to answer the three stipulated questions in connection with that account.

A. Account 055, "Vehicle Tank Expense—Other Than Mounted on Company Chassis,"

I object to the usage of that account in determining the company's cost differential for the reason that this class of expense is, as I understand it, expense incurred in connection with commission agent business; that is, B-Station business, as distinguished from salaried station business, or which we call A-Station business, and the testimony given in connection with account 021 entitled "Commissions" will apply in connection with account 055 entitled "Vehicle Tank Expense—Other Than Mounted on Company Chassis."

Trial Examiner Ballinger: Read the answer.

(The reporter read the answer.)

Trial Examiner Ballinger: Are you satisfied with the answer?

The Witness: Yes, sir.

By Mr. Hanley:

Q. Will you now please answer questions Nos. 2 and 3? I just wondered, Mr. Warmack, if you would not state 6774 that you are answering question 1 and question No. 2, and so forth.

A. My previous answer—I am still referring to account 055 "Vehicle Tank Expense—Other Than Mounted on Company Chassis"—my previous answer was to question No. 1.

In answer to question No. 2, the answer is—I do not know. Of course, that answer would presume that Respondent was including this class of expense in determining the cost differential as set forth on page 101—Respondent's Exhibit 101—the testimony—but it is my contention that it should not be so included, and if it is not included I do not know just what influence it would have upon the claimed cost differential.

The Witness: May I have my answer read?

Trial Examiner Ballinger: Read the answer.

(The reporter read the answer.)

The Witness: I guess that is O.K.

In answer to question No. 3—

By Mr. Hanley:

Q. (Interposing.) Just a moment, do you know from any studies that you have made whether or not the Respondent did include the material, accounts, data, and figures in account 055 entitled "Vehicles Tank Expense—Other Than Mounted on Company Chassis"—in its set up of Respondent's Exhibit 101, or any build up of Respondent's Exhibit 101?

A. Yes, sir. It did.

6775 Q. Then, if you know, please state what your conclusions are as an accountant, as I understand your last answer, you stated that there was a question in your mind depending upon whether or not the Respondent included certain material, facts, data, and amounts in account 055. You have now stated that you know that they did.

In view of that statement, will you please answer Question No. 2.

A. Yes, sir. In answer to question No. 2, previously I intended to say that I objected to the use of account 055 entitled "Vehicle Tank Expense—Other Than Mounted on Company Chassis"—in determining Respondent's cost differential.

I do not object to the allocation made between channels on Respondent's Exhibit 101 if it is to be used and if those figures stand in determining the cost differential they would not influence any change on the cost differential.

Trial Examiner Ballinger: That answer wuold be more appropriate to Question No. 1.

Mr. Hanley: Right. I am perfectly content that it stand, if your Honor please, as an answer to question No. 1.

By Mr. Hanley:

Q. And I now ask the witness to please answer question No. 2, and question No. 3.

Mr. Austin: Well, the witness did not give the 6776 answer in answer to question No. 1. It should not be put as an answer to question No. 1 unless he agrees to it.

Trial Examiner Ballinger: It will be treated as an answer to question No. 1.

Mr. Austin: I object to that.

The Witness: It is agreeable to me that it be treated as an answer to question No. 1. I think it is an answer to question No. 1.

I think it can be treated as a proper answer to both questions 1 and 2.

If the account is not used in the determining of the cost differential, I do not know exactly what influence it would have on the claimed cost differential of 1.51 cents per gallon. I have not made a calculation.

In answer to question No. 3, I have reviewed the records in this case, pertaining to account 055, but I have not studied to any worthwhile extent the underlying data of this account in Respondent's offices.

By Mr. Hanley:

Q. Mr. Warmack, you prepared Commission's Exhibit 133, did you not?

A. Yes, sir.

Q. And on Commission's Exhibit 133 you have included account 055; is that not true?

A. It is.

6777 Q. And you have changed the figures on your exhibit, Commission's Exhibit 133, as distinguished from the figures as appearing in that account on Respondent's Exhibit 101?

A. That is correct.

Q. Now, is it then that you did make some calculation in respect of account 055—"Vehicle Tank Expense—Other than Mounted on Company Chassis"?

A. That is correct.

Q. In the light of that calculation, please answer questions No. 2 and No. 3.

A. You are correct, Judge Hanley,—in further reviewing of this account I find that this account was studied probably further than just stated, and inasmuch as the expense shown here follows apparently the truck rental expense, it was re-allocated for the purpose of the preparation of Commission's Exhibit 133 on the same basis and in the same manner as that of account 025 entitled "Truck Rental Expense" was separated for the purpose of Commission's Exhibit 133.

I am sorry that I overlooked that for a second. That is a correction. I stand corrected on the previous statement.

Q. And is your last statement your answer to question No. 2?

A. I believe my last statement would be a proper answer to question No. 2, Judge Hanley.

6778 Q. Now, will you please answer question No. 2 and No. 3 in connection with account numbered 055.

A. In answer to the question No. 2, I have not made a calculation to determine just what effect the re-allocation of this account as shown on Commission's Exhibit 133 would have on the claimed cost differential of 1.51 cents per gallon nor of what effect it would have if the account were not even included in Respondent's cost determination of the claimed differential.

In answer to the question No. 3, I would state I did study the data in the records of this case in connection with this account.

Q. Meaning by that the exhibit, Mr. Warmack?

A. Yes, sir.

Q. And that is all?

A. I did not go into the underlying data in the company's offices to any worthwhile extent in connection with this account.

I believe that answers the question with respect to account 055 of "Vehicle Tank Expense—Other Than Mounted on Company Chassis."

Q. Well, the calculation that you did make as appears from Commission's Exhibit 133 is then based upon the records and facts as they appear in the exhibit admitted in this case; is that true?

6779 A. Yes, sir.

Q. Is that true?

A. That is correct. That is correct.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. I refer now to account 060 entitled—

The Witness: I would like to refer again to the previous question—if the account is to be used in determining the cost differential, it is my opinion that the figures as shown for the account in Commission's Exhibit No. 133 should be used instead of the figures as shown on Respondent's Exhibit 101.

By Mr. Hanley:

Q. As I understand it, you express it as your opinion as an accountant?

A. Yes, sir.

Q. I refer you to account 060 entitled "Plant Maintenance" and ask you the three stipulated questions in connection with that account.

A. Account 060—"Plant Maintenance."

In answer to the question No. 1, with respect to account 060, "plant maintenance," in the company's regular accounting procedure, that portion of the costs included

6780 in this account, when possible, are assigned directly to channels on company's form 1[illegible]0, and in my opinion that is proper and in accordance with sound accounting.

Q. Now, will you just go ahead and answer No. 2 and No. 3.

A. Well, I did not quite finish with No. 1, Judge Hanley.

Q. I thought you had.

Please proceed with your answer to question No. 1.

A. This class of expense is included in account 060—Plant Maintenance''—is understood not to be incurred to any extent whatever in connection with direct shipments, herefore, any questions that can be raised in connection with separations made by Respondent's accountants would be separation made on a gallonage basis; that is, those osts which could not be assigned directly, a gallonage basis may be made and may be the best basis, but I have seen nothing in the way of a study to determine whether or not this allocation factor has been properly substantiated.

In answer to question No. 2, the answer is—I do not know.

I do not know if any other studies that have been made of this account would change the figures at all.

Answering question No. 3, the answer is—I did study and review the information in the records of this case pertaining to account 060, but I did not review or study any underlying data of the account in the company's
6781 office.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Mr. Warmack, I now refer you to account 060-A, entitled "Plant Maintenance—Service Station Owned Properties Complete" and ask you to answer the three stipulated questions in connection with that account.

Mr. Austin: Have you any objection to the witness answering as to A, B, and C.? I think they could be treated as a group.

Mr. Hanley: Well, I do not know if the witness believes them to be a group. I have no objection to the witness answering in any way he believes he ought to. It is up to the witness.

The Witness: Yes, sir. I can answer in connection with them.

Account 060-A, "Plant Maintenance—Service Station Owned Properties Complete";

Account 060-B, "Plant Maintenance (Service Station Owned Buildings on Leased Ground)";

Account 060-C, "Plant Maintenance (Privately Owned Service Station Leased—or P.O.S.S.L. Properties Leased Out)";

6782 In other words, my answer with respect to one will be the same as with respect to the answer to the others.

By Mr. Hanley:

Q. Very well.

A. Those three accounts have to do with that portion of plant maintenance expense which Respondents have determined as being applicable to leased service stations.

It is my contention that a study should be made or should have been made by the Respondent to determine the cost applicable to sales through leased service stations; that is, to operators of service stations who lease their stations from the Respondent company, as against sales to independent operators; that is, customers who do not lease their stations from the Respondent company.

If such a study were made this class of expense would, of course, be applicable only to the lessee stations.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: It could be possible from the standpoint of sound accounting that a study of this account may prove to be impracticable, but at least in my opinion a study should be made to determine if it is practicable to make such a separation.

There is a question in my mind as to whether or not 6783 this class of expense which is offset by rentals received by the Respondent company from the lessees of the station—there is a question in my mind if this class of expense has a place in determining a cost differential. I believe that completes my answer to question No. 1.

By Mr. Hanley:

Q. Go ahead and answer question No. 2 and question No. 3.

A. Answering question No. 2, I have not made a calculation as to the extent of any possible elimination of this or these three accounts—of the costs as set forth in Respondent's Exhibit 101 would have on the claimed cost differential of 1.51 cents per gallon. I have reviewed the data and the records of this case pertaining to these accounts, but I have not studied the underlying data of the same in the company's offices.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

We will be in recess.

(A short recess was taken.)

The Witness: Account 061—Rental Expense.

Answering question No. 1:

Account 061—Rental Expense is separated between distribution channels on Respondent's Exhibit 101, form 189, in Respondent's Regular accounting procedure on a
5784 basis of gallonage excluding direct shipment gallonage.

My objection to the separation of this account on Respondent's regular form 189, which is the exact separation as shown on Respondent's Exhibit 101 is to the usage of a gallonage factor for making the separation. The gallonage factor has never been proved as far as I have been able to determine by cost study or analysis.

Answering question 2:

The answer is—I do not know.

Answering question 3:

The answer is—no, I did not.

Account 061-B—"Rental Expense (Leased Ground Used for Owned Service Station Buildings)";

Account 061-C—Rental Expense (P.O.S.S.L. Properties Leased Out);

Answering question 1:

Answering question 2:

Answering question 3:

My answers given in connection with accounts 060-A and 060-B and 060-C will apply equally to these two accounts, as to all three questions.

Account 062—"Water, Light, Fuel (Other Than Main Office)":

Answering question 1:

Answering question 2:

5785 Answering question 3:

The answers to questions 1, 2, and 3, the answers given to those questions for account 060 apply equally to account 062.

Account 063—"Telephone And Telegraph (Other Than Main Office)":

Answering question 1:

This class of expense is separated to distribution channels on Respondent's form 189 and on Respondent's Exhibit 101 on a basis of gallonage excluding direct shipment gallonage.

This allocation factor has never been proved by any cost study or analysis as far as I have been able to learn in my studies of this account.

Inasmuch as the gallonage factor and the result or the results determined by the use of same have never been determined, I question the separation for this class of expense as shown on Respondent's Exhibit 101.

There is another question that arises in connection with this account: It is my opinion that this class of expense, account 063, entitled "Telephone And Telegraph (Other Than Main Office)" is very similar in nature to expense included in account 203, entitled "Office Expense—Telephone and Telegraph".

In Respondent's separation of account 203, that
6786 portion of expense which was considered applicable
to the direct shipment business was separated between channels on a basis of estimated effort of employees, while that portion of the account which was considered as being applicable to bulk plant business was separated between channels on a basis of bulk plant gallonage.

This would indicate to me that it might be possible to separate each of the two accounts on the basis of effort, and there is at least an inconsistency in the treatment of account 203 in this allocation between channels.

Answering question No. 2:

The answer is: I do not know.

Answering question No. 3:

The answer is: No, except that I have reviewed and studied all information pertaining to this account which is shown in these records.

Account 064, "Maintenance Expense—Rented Out Property (Other Than Service Station)":

Answering question 1;

Answering question 2;

Answering question 3:

There is no expense entered on this account on Respondent's Exhibit 101.

Account 065, "Rent Revenue."

Answering question 1:

6787 Answering question 2:

Answering question 3:

I have made no study of this account.

Account 065-A, "Rent Revenue (Service Station Owned Properties Complete)";

Account 065-B, "Rent Revenue (Service Station Owned Buildings on Leased Ground)"

Account 065-C, "Rent Revenue (P.O.S.S.L. Properties Leased Out)".

Answering question 1:

These accounts represent rent revenues received by the Respondent on service stations leased; the revenue is an offset to expenses incurred in connection with the landlord activities of the Respondent.

It is my opinion that the business of the Respondent which is conducted through leased service stations should be separated from the business of the Respondent whereby sales are made to service station operators that do not rent their stations from the Respondent; or that a study should be made to determine if such separation is possible and practicable, in the absence of such a study it is my opinion that while such a separation has been made as to many types of expense to which this revenue would be applied as an offset, in the absence of a study whereby all expenses could be separated between the leased service station 6788 business and other business, as just outlined, whereby the Respondent has grouped all of the costs; that is, the cost of serving these leased service stations, and the cost of serving other resellers, there is a question in my mind as to whether or not these rent revenues and the expenses incurred in connection with the landlord activities of the company should be used in determining the cost differential.

Answering question 2:

If a separation of cost as between costs of serving lessee stations and cost of serving non-lessee stations, if it were made a unit cost (per gallon cost) could be determined for each of the two classes of business.

Inasmuch as the landlord activities of the Respondent in connection with the leasing of service stations resulted in a net loss in the Detroit field for the year 1940 this would serve to increase the per gallon cost of selling gasoline to lessee stations and reduce the per gallon cost of selling gasoline to the non-lessee stations.

The extent of the influence on Respondent's claimed cost differential of 1.51 cents per gallon has not been determined because of the fact that Respondents have not made a complete separation of the costs of serving these two classes of business.

Answering question No. 3:

I have not made a study whereby a complete sep-
6789 aration of costs of serving lessee stations could be
determined.

I have made a study of all information in these records dealing with the subject of cost of serving lessee stations.

Account 066—"Miscellaneous Operating Expense."

Answering question No. 1:

I have no objection to the allocations of that portion of this class of expense which were made directly to the separate distribution channels on Respondent's Exhibit 101.

There are many items of cost included in this account which, in my opinion, could not under any theory of probabilities be used to determine a cost differential between tank wagon customers and jobber, naphtha and gasoline customers.

However, this account has not been thoroughly studied except to determine a portion of this class of expense which is applicable to credit card costs, and which amount, in my opinion, could not properly be used in determining a cost differential.

Answering question No. 2:

The answer is—I do not know except for that class of expense which is applicable to credit cards and that is reflected in Commission's Exhibit 133.

Answering question 3:

6790 Except for determining the portion of this class
of expense which was applicable to credit cards, no
detailed study has been made of this account for the year
1940.

Account 066-A, "Miscellaneous Operating Expense (Service Station Owned Properties Complete)";

Account 066-B, "Miscellaneous Operating Expense (Service Station Owned Buildings on Leased Ground)";

Account 066-C, "Miscellaneous Operating Expense (P.O.S.S.L., Properties Leased Out)";

Answering question 1:

Answering question 2:

Answering question 3:

Reference is made to answers given for accounts 060-A, -B, and C, and 065-A, B, C, which apply properly to accounts 066-A, -B, -C.

Account 070—"E.L.A. Expense."

Answering question 1:

Answering question 2:

Answering question 3:

In answering questions 1, 2, and 3, I do not raise any objection to Respondent's separation of this class of expense between channels as shown on Respondent's Exhibit 101, for the reason that Respondent's Exhibits 99 and 100 indicate that the expense was allocated to channels by direct application.

6791 I made no study of the underlying data in the company's offices on this account.

Account 076, "Barrel Expense."

Account 077, "Freight on Empty Steel Barrels and Containers."

Account 078, "Losses on Containers—Lost."

Account 079, "Losses on Containers—Junked."

Answering Question 1:

Answering Question 2:

Answering Question 3:

No part of these classes of expense were assigned to tank wagon reseller business or jobber, naphtha and gasoline, as shown on Respondent's Exhibit 101. Therefore, expense have not been studied by me.

Account 080, "Drayage Outside."

Answering Question 1:

Answering Question 2:

Answering Question 3:

No figures appear in this account on Respondent's Exhibit 101.

Account 081, "Demurrage And Railroad Storage."

Answering Question 1:

Answering Question 2:

Answering Question 3:

Due to the fact that the total amount of this ac-
6792 count was only $23.09 for the year 1940, I have made no study of the account.

Account 082, "Personal Injury Expense—Company Employees."

Answering question 1:

Answering question 2:

Answering question 3:

I have made no study of this account.

Account 083—"Samples."

Answering question 1:

Answering question 2:

Answering question 3:

I have not made any study of this account.

Account 084—"Safety Expense—Salaries and All Other Expense."

Answering question 1:

Answering question 2:

Answering question 3:

There is an inconsistency in the separation of the account between channels on Respondent's Exhibit 101.

A small portion of this account is assigned to jobber, naphtha and gasoline business, on the basis of estimated time, while the principal portion of this account is separated between the three bulk plant channels on the basis of bulk plant gallonage.

6793 I object to the usage of estimated time, or estimated effort for the assigning of a portion of the account to one channel, and the usage of a different method in assigning a portion of the account to other channels, in view of the fact that as far as I have been able to determine, neither of the methods employed in the allocation has been properly substantiated by a thorough cost study and analysis.

The account might be more properly allocated as between the channels on a basis of effort of all employees, or any other equitable basis; however, inasmuch as this account is small, a thorough detailed study has not been made of it, and any other separation than separation shown on Respondent's Exhibit 101 would have little if any influence on the cost differential of 1.51 cents per gallon claimed by the Respondent.

Account 087, "General Supplies Used."

Account 088, "Station Operators Tools and Equipment."

Answering question 1:

Answering question 2:

Answering question 3:

The same answers as given for account 060 apply equally to these accounts.

Account 088-A, "Station Operators Tools & Equipment (Service Station Owned Properties Complete)."

6794 Account 088-B, "Station Operators Tools and Equipment (Service Station Owned Buildings on Leased Ground."

Account 088-C, "Station Operators Tools and Equipment (P.O.S.S.L., Properties Leased Out)."

Answering question 1:

Answering question 2:

Answering question 3:

The same answer given for account 060-A, -B, -C, and as further amplified by answers to questions in connection with accounts 065-A, -B, and C, apply equally to these three accounts.

Account 200, "Office Expense—Salaries Accounting."

Answering question 1:

Tabulations were made of time of employees in the accounting department during the entire third month of each quarter of each year, whereby a composite percentage factors are determined for the allocation of this class of expense between channels on Respondent's regular accounting form 189.

In Respondent's late cost study; as reflected in Respondent's Exhibit 100, tabulations were made for one month's period during August and September, of the time which employees in the accounting department devoted to the three separate channels of direct shipment business,
6795 and an estimated portion of the time thus determined
expressed in ratios to the total time of the employees during the month were used in applying a portion of this class of expense to the direct shipment business for the year 1940, as set forth on Respondent's Exhibit 101.

My objection here runs to the point that the tabulations made in August and September, 1940, were not made to cover all of the time of the employees during the month, whereby the time applicable to each channel might be properly determined.

Another objection raised in connection with the separation of this class of expense as between channels on Respondent's Exhibit 101 is that salaries of supervisors, the payments of which are made from the Chicago office, were assigned wholly and entirely to the petroleum products businesses, and no part of same was assigned to the automobile supplies business of the Respondent for the year 1940.

A further objection to the figures as shown in the sep arate columns runs to the question of that portion of the credit card costs which are included in this account?

In my opinion credit card costs cannot be used in determining a cost differential between tank wagon reseller business and jobber, naphtha and gasoline business.

Answering question 2:

Effect has been given to the elimination of that 6796 portion of this account which represents credit card cost in the preparation of Commission's Exhibit 133. As to the influence which any further separation or changes in the figures in this account on Respondent's Exhibit 101 would have on the Respondent's claimed cost differential of 1.51 cents per gallon, I have no information and have made no calculations which would determine same.

Answering question 3:

The answer to question 3 is that—I did.

Account 209, "Office Expense—Tabulating Machines."

Answering question 1:

Answering question 2:

Answering question 3:

No figures for this account appear on Respondent's Exhibit 101.

Account 201, "Office Expense—Stationery and Office Supplies."

Answering question 1:

I object to the allocation made of this class of expense on Respondent's Exhibit 101 in that that portion of the expense considered to be applicable to the bulk plant business was allocated between the three bulk plant channels on a basis of bulk plant gallonage, whereas separations of this class of expense were made between direct shipment channels on the basis of cost studies and analyses. 6797 From the standpoint of sound accounting, in my opinion, this is an inconsistent and improper separation inasmuch as studies have never been made as far as I have been able to ascertain, which would properly support any allocation of this class of expense on the basis of gallonage.

If a cost study and analysis could be made to determine what portion of this class of expense would be properly assignable to the direct shipment channels, it is reasonable to assume that the same study could be made for the separation of the expense as between bulk plant channels.

A further objection to the separations was to the use of the figures as shown on Respondent's Exhibit 101 in the separate channels in connection with credit card costs. A considerable portion of this expense is incurred in connection with the handling of credit cards, and in my opinion, credit card expense cannot be used in determining a cost differential.

Answering question 2:

Answering question 3:

I have made a study to determine or to estimate what portion of this expense represents credit card costs, but I have not made a detailed cost study and analysis to determine what portions of the remaining expense would be applicable to the separate distribution channels as set forth on Respondent's Exhibit 101.

6798 Therefore, the influence that a proper separation of the expense would have on Respondent's claimed cost differential of 1.51 cents per gallon has not been determined.

Account 202, "Office Expense—Postage."

Answering question 1:

Answering question 2:

Answering question 3:

The same answers given for account 201 would apply equally to account 202.

Account 203, "Office Expense—Telephone and Telegraph."

Answering question 1:

Answering question 2:

Answering question 3:

The answers to questions 1, 2, and 3, were given as a part of my answer to questions in connection with account 063.

Account 204, "Office Expense—Exchange."

Answering question 1:

Answering question 2:

Answering question 3:

The same answers given for account 201 apply equally to account 204.

Account 205, "Office Expense—Operation and Maintenance of Vehicles—Office Automobiles."

6799 Answering question 1:

Answering question 2:

Answering question 3:

In answer to questions 1, 2, and 3, the allocations of this expense on Respondent's Exhibit 101 follow the allocation of petroleum products expenses in account 200, and the same answers given in connection therewith are applicable to this account, except that some portion of these two classes of expense may be applicable to credit cards, and any study—in fact, no study was made to determine just what such amounts may be. Inasmuch as these two classes of expense have been assigned to the separate petroleum products channels on Respondent's Exhibit 101, it would appear that some portion of these two items should be assigned to automobile supplies expense following whatever proportion of the expenses in account 200 which should properly be applicable to the automobile supplies business.

Account 206, "Office Expense—All Other—Water, Light, Fuel, Rent, etc."

Answering question 1:

Answering question 2:

Answering question 3:

The answers to these three questions would be the same as those given for account No. 205.

Account 207, "Outside Collection Expense."

6800 Answering question 1:

Answering question 2:

Answering question 3:

In answer to questions 1, 2, and 3, I have made no study of account 207.

Account 208, "Credit Information Expense."

Answering question 1:

The principal portion of this item of expense represents costs incurred in connection with credit cards.

Inasmuch as credit card cost is not a cost which will afford a cost differential, it is my opinion that that portion of this account representing credit card cost should be eliminated from Respondent's Exhibit 101.

Answering question No. 2:

In answer to question No. 2, effect has been given to the elimination of credit card expense contained in account 208 on Commission's Exhibit 133.

Answering question No. 3:

I have studied this account for the purpose of determining what portion of it represented credit card cost.

I have made no further study of this account.

Account No. 215, "Expense—Salaries—Others."

Account No. 216—"Expense—Traveling Expense—Others."

Account No. 217. "Expense—Operation and Maintenance of Vehicles—Automobiles—Others." 6801

Answering question No. 1:

This class of expense was separated between the bulk plant channels on the basis of bulk plant gallonage, and that portion considered to be applicable to direct shipment business was thus determined, and was separated between the direct shipment channels on the basis of estimated effort of the employees. This is an inconsistent and improper separation in my opinion from the standpoint of sound accounting, because of the fact that if a separation of a part of this expense could be made on the basis of effort, it is reasonable to assume that all of the account could be separated between all of the distribution channels on the same basis in the absence of information which would show conclusively that such could not be done.

The gallonage allocation factor used in the separation of a portion of the account between the three bulk plant channels has never been proven as being accurate and sound by any thorough cost study and analysis, as far as I have been able to determine.

It is my understanding that a large portion of the expense included in these three accounts is incurred directly or indirectly in connection with leased service station properties. Therefore, if a separation were made of the expense incurred between the lessee and non-lessee service station properties the answer given in connection with
6802 account 060-A, -B, -C, would apply to the leased service station portion of this expense.

(Witness temporarily excused.)

Trial Examiner Ballinger: And now, at 4:55 o'clock, p. m., July 17, 1942, an adjournment in the above-entitled case is taken to reconvene at 9:30 o'clock, a. m., on Saturday, July 18, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

(Whereupon at 4:55 p. m., July 17, 1942, the hearing in the above-entitled matter was adjourned.)

6803

Room 532, Federal Trade
Commission Building,
Washington, D. C.
Saturday, July 18, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Illinois,) appearing for the Respondent.

6804 PROCEEDINGS.

Trial Examiner Ballinger: Come to order. The hearing of Docket No. 4389, case entitled "In the Matter of Standard Oil Company (Indiana)" is reconvened pursuant to notice at 9:30 a. m., July 18, 1942, in room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held at this same place on July 17, 1942.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination by Mr. Hanley (Continued.)

Q. Mr. Warmack, the last accounts we dealt with were 215, 216, and 217. Please complete your answers to those and then we will now proceed to your answering the three questions relative to each of the succeeding accounts.

A. I have completed my answer to question 1 so far as accounts 215, 216, and 217 are concerned.

Answering question 2: For accounts 215, 216, and 217, the answer is: I do not know.

Answering question 3: I did make a study and
6805 analysis of the underlying data for account 215; I
did not make an analysis of accounts 216 and 217.

Account 220, Expense—Employment Department—Salaries and All Other Expense.

Answering question 1: This class of expense was separated between the bulk plant channels on the basis of bulk plant gallonage, and that portion of the expense considered applicable to direct shipment business was separated between direct shipment channels on the basis of estimated effort of employees. This is an inconsistent and improper separation in my opinion, because of the fact that if a separation of a part of this expense could be made on the basis of effort, it is reasonable to assume that all of that account could be separated between the channels on the same basis.

It may be that this expense being of a general nature would have to be allocated on the basis of other expenses which are more directly allocable to channels than this expense is.

In answer to question 2: I cannot state in dollars and cents what influence a proper separation would have on Respondent's claimed cost differential of 1.51 cents per gallon, but if this total class of expense were separated
on the basis of effort in the Detroit field, it is very
6806 evident that it would serve to reduce the claimed
differential.

Answering question 3. While in Detroit, I made inquiry as to the duties and functions of the employment department, but I did not make a detailed study and analysis of all of the underlying data which goes to make up this account.

Account 225, Expense—Salaries—Sub-Station Auditors.
Account 226, Expense—Traveling Expense—Sub-Station Auditors.
Account 227, Expense—Operation and Maintenance of Vehicles—Sub-Station Auditors.

Answering questions 1, 2, and 3: These accounts were relatively small and I have not made a detailed study of either of the three accounts. It is noted that they were separated on Respondent's Exhibit 101 on the basis of gallonage, which measuring factor has not been established by any cost study and analysis of the Respondent company as far as I have been able to find out. I naturally cannot accept any arbitrary allocation factor which has not been properly proven, but I have made no calculations which would determine what influence—any change in the figures as shown in Respondent's Exhibit 101 these three accounts would have on the differential.

6807 Account 240, Donations.

Answering question 1: In the first place, it is my opinion that this class of expense is not a cost which will afford a cost differential. It is an expense incurred for the purpose of creating good will generally in the community, and generally cannot be considered as being influenced more by one class of customers than another. Therefore, it has no place on Respondent's Exhibit 101.

Answering question No. 2: If this account were not included in the costs as set forth in Respondent's Exhibit 101, it would reduce the differential claimed by the Respondent company by approximately one five-hundredths of a cent.

In answering question 3: I did not make a detailed study and analysis of the underlying data that goes to make up this account.

Account 400, "Bad Debts Collected—Written Off Prior Years."

Answering question 1: This is a credit account, as shown in Respondent's Exhibit 101, and in my opinion it has no place in the exhibit. In my opinion the account would not influence in any way or was not by the operations of the company in the year 1940.

Answering question 2: The removal of this account from Respondent's Exhibit 101 would serve to slightly in-
6808 crease the cost differential.

Answering question No. 3: I have not made any detailed study or analysis of this account.

Account 410, Profit and Loss On Resale Barrels;
Account 431, Budget Plan Income and Expense.

There is no entry in these accounts in the tank wagon reseller column or the jobber, naphtha and gasoline column, and there is nothing to indicate in the record that this class of expense or income would influence the Respondent's claimed cost differential.

Account 500, Losses by Accident—Property and Other Than Company Employees.

Account 501, Losses by Property Damage—Company and Other Than Company Property.

Account 502, Losses by Fire.

Account 507, Losses—Miscellaneous.

Answering questions 1, 2, and 3: These accounts have not been studied. Hence, the figures appearing on Respondent's Exhibit 101 for these separate accounts are not criticized, and it is noted, however, that separations have been made on a gallonage basis which, of course, would be questioned; that is, the allocation factor would be questioned if the accounts were studied.

6809 Account 508, Losses—Uncollected Charges for Stock Losses.

There are no figures in Respondent's Exhibit 101 for this account.

Account 510, Losses by Bad Debts.

Account 511, Expense Collecting Bad Debts—Current Year.

Answering questions 1, 2, and 3: These two accounts have not been studied and analyzed except as to determine what portion of credit card costs are contained therein, as set forth in Commission's Exhibit 132. As previously stated in answer to the questions pertaining to account 208, it is my opinion that credit card costs represent costs which cannot be used in determining a cost differential.

Account 512, Expense Collecting Bad Debts—Prior Years.

Answering questions 1 2, and 3: This account has not been studied, except in connection with my study of credit card costs as set forth in my answers to questions in connection with account 208.

It is my opinion that expense incurred during 1940 in connection with collection of bad debts for prior years is not an expense which can be used in determining a cost differential for the year 1940.

6810 Account 675, Advertising—Other Costs (Including ELA).

Answering question 1: The charges to this account, excluding charges directly applicable to petroleum channels and to automobile supplies, were allocated to channels on Respondent's regular accounting form 189 by a ratio of gallons sold by each channel to total gallons sold by all channels, excluding direct shipment gallonage during each month for the year 1940.

The major portion of costs included in this account is for advertising for consumer acceptance, such as newspaper advertising, poster advertising, and direct mail, and so forth, which in my opinion should be allocated on the basis of gallonage sold through reseller stations whether served by the Respondent directly or indirectly. The purpose of this advertising is to create a demand in the mind of the public for the Respondent's products, and Respondent has no control over the consumer; that is, a driver of an automobile as to where he elects, or what station he elects to buy Standard Oil gasoline from. No part of this advertising cost for consumer expense has been assigned to jobber, naphtha and gasoline column in Respondent's Exhibit 101, which, in my opinion, is erroneous and unsound from the standpoint of sound accounting practice and procedure.

There is the possibility that some small portion of advertising cost included in account 075, which was incurred in connection with point of sale advertising may afford
6811 some cost differential, but that portion of point of sale advertising which is included in the account, has not been separated from the advertising expense incurred for consumer acceptance by the Respondent.

There are separations made on pages 26, 27, and 28 of Respondent's Exhibit 100 which show portions of point of sale advertising which Respondent assigned to direct shipment business, but there is insufficient information on the exhibit as to what portion of this class of advertising would properly be assignable to tank wagon reseller business.

Answering question 2: From the information at hand, that is, information set forth in Respondent's Exhibit 100, as stated in answer to question 1, it is impossible to appraise what if any influence the point of sale advertising would have on Respondent's claimed cost differential of 1.51 cents per gallon. Therefore, if the entire account 075 as set forth on Respondent's Exhibit 101 were removed entirely therefrom it would serve to reduce the cost differential by approximately .16 cents per gallon.

Answering question 3: I have studied all of the information dealing with account 075 which is contained in Respondent's Exhibits 99 and 100 and other records and testimony in this case.

I have not made a detailed study and analysis of the

company's records at the company's offices which
6812 deal with this account.

Account 100, Depreciation Expense—Vehicles—Supervision.

Answering questions 1, 2, and 3: The same testimony given for account 000 applies equally to this account.

Account 101, Depreciation Expense—Vehicles—Sales Promotion.

The same testimony given for account 002 applies to this account.

Account 102, Depreciation Expense—Vehicles—Salesmen.

The testimony given for account 004 applies to this account.

Account 103, Depreciation Expense—Vehicles—Advertising.

The same testimony given in connection with account 005 applies equally to this account.

Account 106, Depreciation Expense—Vehicles—Trucks, Motor & Horse Drawn (Including Vehicle Tanks & Excluding Advertising Trucks).

The same answers given to questions in connection with account 053 apply equally to this account.

6813 Account 107, Depreciation Expense—Vehicles—All Others (Other Than Office).

The same answers given to questions in connection with account 054 apply equally to this account.

Account 228, Depreciation Expense—Vehicles—Office—Others—& Sub-Station Auditors.

In answer to question 1: In the company's regular accounting procedure this class of expense is alocated between distribution channels on all all-gallonage basis excluding direct shipment gallonage, while on Respondent's Exhibit 101 that portion of this class of expense which was considered to be applicable to direct shipment business was assigned thereto and distributed between the direct shipment channels on the basis of effort of the individuals to whom the cars were assigned. In my opinion this is inconsistent and unsound from the standpoint of sound accounting. If allocations can be made to direct shipment channels on the basis of effort of employees, it is reasonable to assume that the whole account could be spread as between all channels on the same basis in the absence of information to the effect that such could not be done. The gallon age allocation in the bulk plant channels has not been proven; that is, the measuring factor has never been proven, as far as I have been able to learn by any cost study and analysis.

6814 Answering question 2: I have not made a calculation as to what effect any changes in the figures on Respondent's Exhibit 101, giving effect to a sound and consistent reallocation of this account between the channels, would have on the Respondent's claimed cost differential of 1.51 cents per gallon.

Answering question 3: Inasmuch as this account, that is, account 228 entitled "Depreciation Expense—Vehicle—Office—Others—& Sub-Station Auditors," amounted to only $618.83 in the Detroit field for the year 1940, I have made no study of the underlying records of the company and have devoted little time to any study of this account.

(Witness temporarily excused.)

Mr. Hanley: I move that we adjourn until Monday morning, July 20, 1942, at 9:30 o'clock, a. m..

Trial Examiner Ballinger: Motion granted.

And now, at 12 o'clock noon, July 18, 1942, the hearing in the above-entitled matter stands adjourned to reconvene in Room 532, Federal Trade Commission Building, Washington, D. C., at 9:30 a. m., July 20, 1942.

(Whereupon, at 12:00 noon, July 18, 1942, the hearing in the above-entitled matter was adjourned.)

6815 Room 532, Federal Trade
Commission Building,
Washington, D. C.
Monday, July 20, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq. (910 South Michigan Avenue, Chicago, Illinois), appearing for the Respondent.

6816 PROCEEDINGS.

Trial Examiner Ballinger: Come to order. The hearing of Docket No. 4389, case entitled "In the Matter of Standard Oil Company (Indiana)" is reconvened pursuant to notice at 9:30 a. m., July 20, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held at this same place on July 18, 1942.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination by Mr. Hanley (Continued).

Q. Mr. Warmack, have you finished answering all three questions with regard to each of the accounts on Respondent's form 189, Respondent's Exhibit 101?

A. No.

Q. Then will you please continue?

A. Account 110, Distribution Expense Plant (Building, Machine, Equipment, Furniture and Fixture).

Answering question 1: This type of expense is allocated to channels in Respondent's regular accounting form 6847 189 on the basis of gallonage excluding direct shipment gallonage. In Respondent's recent cost survey portrayed in Respondent's Exhibit 100, that portion of the expense which was applicable to the main office building was allocated in part to the direct shipment business on the ratio of man hours devoted to direct shipment in the main office to the total man hours of the main office, as set forth on page 41 of Respondent's Exhibit 100.

It was likewise separated between direct shipment channels on the same basis, while that portion representing by far the larger portion of this class of expense remaining after segregating the portion considered to be applicable to direct shipments on the basis of man hours, was allocated to bulk plant channels on Respondent's Exhibit 101, on the basis of gallonage.

In my opinion, it is unsound and not in accordance with sound accounting practice for Respondent to allocate a portion of this expense to one group of channels on the basis of man hours, and to arbitrarily allocate the remaining portion to the other distribution channels on a basis of gallonage, for the purpose of proving a cost differential.

With reference to that portion of this expense which covers depreciation in bulk plants, here we have property either involved wholly and entirely in the dispensing o the company's products through bulk plants, and no 6848 involved in direct shipment business—a separatior was made of this portion of the depreciation on th basis of bulk plant gallonage—in my opinion any allocation factor used in the separation of this expense whicl has not been proved by an intensive cost study and analysis may be considered, at best as, in my opinion, an arbitrary factor arrived at by guess work or some kind of estimates. It means that the figures shown in the tank wagor reseller column are rough estimates not established by an sound accounting study and that these figures are the compared with the figures shown in the jobber, naphtha and gasoline column, in order to determine a cost differential. It is my opinion that such a method is not sound unreliable, and unsatisfactory for the purpose of accuratel establishing a cost differential which this class of expens will, in some part, afford.

Answering question 2: The answer is—I do not know

Answering question 3: The answer is—I made a review and study of the information set forth in the exhibits and testimony of this case. I did not make a study of the underlying data at the company's offices. I inquired in each instance with reference to the gallonage allocation factor and as to whether it had ever been determined by any cost study.

6819 110-A, Depreciation Expense—Plant (Building, Machine and Equipment, Furniture and Fixtures) (Service Station Owned Properties Complete)

110-B, Depreciation Expense—Plant (Building, Machine and Equipment, Furniture and Fixtures) (Service Station Owned Buildings on Leased Ground)

110-C—Depreciation Expense—Plant (Building, Machine and Equipment, Furniture and Fixtures) (P.O.S.S.L. Properties Leased Out)

Answering Questions 1, 2, and 3, the same answers given in connection with account 060-A, 060-B, and 060-C; as amplified by answers given for accounts 065-A, 065-B, and 065-C, will apply equally here.

Account 111, Depreciation Expense—Plant—ELA.

Answering question 1: Respondent's regular accounting procedure has this class of expense separated between distribution channels on the basis of gallonage excluding direct shipment gallonage. That portion of this class of expense appearing in Respondent's Exhibit 101 applicable to bulk plant channels is allocated on the same basis.

In order to determine what portion of this class of expense is applicable to the direct shipment business Respondent determined, in its late cost study, the total amount of its investment in equipment loaned to customers
6820 falling in the three direct shipment channels and related the distribution rate or percentage thereof thus arriving at the proper depreciation chargeable to the three channels. It is my opinion that this is an accurate method of determining this class of expense.

However, as previously stated, the remaining portion of the expense which was applicable to the bulk plant gallonage was separated between the three channels on the basis of bulk plant gallonage. This gallonage factor used for the allocation has never been proven as far as I have been able to learn by an intensive cost study and analysis or review of any kind in the Detroit field. It is, therefore, an unsupported estimate, and in my opinion the resulting figures as shown in the three bulk plant channels on Respondent's Exhibit 101 are arbitrary estimates and are not proven as being sufficiently accurate for the purpose of determining the cost differential.

Answering question 2: The answer is—I do not know.

Answering question 3: The answer is—I made a review and study of the information set forth in the exhibits and testimony of this case.

I did not make a study of the underlying data at the company's offices. I inquired in each instance relative to the gallonage allocation, and as to whether it had
6821 ever been determined by any cost study.

Account 112—Depreciation Expense—Real Estate Improvements.

Answering questions 1, 2, and 3: The same answers given for account 110 apply equally to this account.

Account 112-A, Depreciation Expense—Real Estate Improvements (S.S. Owned Properties Complete)

Answering questions 1, 2, and 3: The same answers given in connection with account 060-A, -B, -C, and 065-A, B, -C, apply equally to this account.

Account 115, Depreciation Expense—Equipment Steel Barrels.

Answering questions 1, 2, and 3: There are no figures in the tank wagon reseller column and the jobber, naphtha and gasoline, for this account on Respondent's Exhibit 101.

The account has not been studied by me.

Account 116, Depreciation Expense—One Gallon Cans.

No figures appear in Respondent's Exhibit 101 for this account.

Account 086, Taxes—Real Estate and Personal Property.

6822 Answering questions 1, 2, and 3: The same answers given for account 110 apply equally to this account except that this 086 deals with taxes and account 110 deals with depreciation.

Account 086-A, Taxes—(Service Station Owned Properties Complete)

Account 086-B, Taxes—(Service Station Owned Buildings on Leased Ground)

Account 086-C, Taxes—(P.O.S.S.L., Properties Leased Out)

Answering questions 1, 2, and 3: The same answers given in connection with 060-A, -B, -C, and 065-A, -B, -C, apply equally to this account.

Account 243, Taxes—Federal Insurance Contributions.

Answering question 1: The principal objection raised in connection with this account is that a portion of the same was not assigned to salaries applicable to the automobile supplies business. In view of the fact that many of the salary allocations as between channels on Respondent's Exhibits 101 have not been properly established by cost studies and analyses, it would naturally follow that at least a portion of this account as assigned to channels is questionable.

Answering question 2: I do not know.

6823 Answering question 3: I made a review and study of the information set forth in the exhibits and testimony of this case; I did not make a study of the underlying data at the company's offices.

Account 244, Taxes Unemployment Insurance.

Answering question 1: The same answer given for account 243 for question 1 applies equally to this case.

Answering question 2: Inasmuch as it was possible to make computations, as explained on page 6487 of the record, of this account in the preparation of Commission's Exhibit 133, the amount $13,739.43 shown in the tank wagon reseller column on Respondent's Exhibit 101 was reduced to $9,917.19.

Likewise, the figure $121.56 appearing in jobber, naphtha and gasoline column, Respondent's Exhibit 101, for this account was reduced to $97.07.

Answering question 3: I made a review and study of the information set forth in the exhibits and testimony of this case.

I did not make a study of the underlying data at the company's offices.

Account 245, Taxes—All Other.

Answering questions 1, 2, and 3: The information shown in the records for this account tabulated in Respondent's Exhibit 99 and Respondent's Exhibit 100, have been reviewed, but no detailed study has been made of this account. 6824

I wish to state, however, that inasmuch as the separations were made on Respondent's Exhibit 101 for the Michigan privilege fee on two bases: that is, a portion of this tax was assigned to direct shipment business on a basis of effort devoted to direct shipments by all employees assigned to the Detroit main office, and all of the remaining portion of that tax regarded as having to do with distribution of the company's products through bulk plants was separated between three bulk plant channels on the basis of gallonage, I question the inconsistency employed in the separation, especially in view of the fact that the gallonage factor, as far as I have been able to learn, has never been properly established by the Respondent. Any influence which any change of allocation would have on the cost differential could not be determined in the absence of a thorough cost study which would be required in order to establish allocation factors for the separation of this account.

Account 235, Insurance.

Answering questions 1, 2, and 3: This account has not been studied by me. The total amount for the account in the year 1940 on Respondent's Exhibit 101 is $980.40.

6825 Account 250, General Office Expense—Accounting Department.

Answering question 1: In Respondent's late cost study, as shown by Respondent's Exhibits 100 and 101, a part of the expense allocated to the Detroit field for account 250 was charged to direct shipment channels by using the same ratios which were applied to the expense of the field credit and collection and accounting departments in allocating the expense of those departments to direct shipment channels. This is explained at page 5553 of the record.

The ratio of hours spent by employees in the field to "credit"-"accounts receivable" departments on direct shipment business to their total hours, was applied to the credit and collection department expense from the general office. A similar ratio was obtained for the balance of the employees in the field accounting department which was applied to the general office accounting department expense, allocated to the field for the purpose of charging a part of that expense on direct shipment channels; the remainder of expense in account 250 not allocated to direct shipment channels remains distributed between bulk plant channels on Respondent's Exhibit 101 on a gallonage basis; that is, bulk plant gallonage. No part of the expense of this account is charged to automobile supplies, on Respondent's Exhibit 101.

There is testimony in the record by Respondent's witness Boatwright that the general office accounting de-
6826 partment includes many departments that are not carried in the field at all, and whose duties do not parallel the duties of the field accounting departments. This being true, it would seem to me that distribution of effort of the field accounting departments could not logically be used for distribution of general office expense to direct shipment channels.

As far as I have been able to learn, no cost study has been made of the functions and expense of the general office accounting department for the purpose of this case to determine what portion of the expense is properly allocable to the separate channels of distribution. It may be that a thorough study would develop that some of the activities of the general office credit and accounting department would properly afford a differential as between tank wagon reseller and jobber business. However, in view of the dissimilarity of the activities of the general office credit and accounting department and the field accounting department, as testified to by Respondent's witness Boatwright, the allocation of expense of the general office credit and accounting department to direct shipment channels on the basis of distribution of effort of the field accounting department is clearly improper, unsound, and is not supported by facts—with the estimated figures arrived at as appearing in Respondent's Exhibit 101 for the separate channels representing estimates only, and are not sufficient for
6827 the purpose of determining a cost differential.

Answering question 2: The answer is—I do not know.

Answering question 3: The answer is—I have reviewed all of the information contained in Exhibits and testimony in this case, and I have reviewed the methods employed in the separation of this class of expense in Respondent's regular accounting procedure.

In further answer to questions in connection with account 250—being General Office Expense—Accounting Department—that portion of which was allocated to the Detroit field for the year 1940 appearing in Respondent's Exhibit 101—it is my opinion that if a thorough and intensive cost study and analysis, giving effect to the separate functions of the department and the manner that they involve the cost were not made, that this class of expense could not be used in determining any cost differential. This class of cost is remote to the sale of gasoline and other petroleum products in the Detroit field, and that fact must be considered in organizing any plan to study in the general office for the purpose of determining a cost differential.

(Witness temporarily excused.)

Trial Examiner Ballinger: And now, at 12:10 o'clock p. m., the hearing will stand in recess for luncheon until 1:30 o'clock p. m.

6828 (Whereupon, at 12:10 p. m., a recess was taken until 1:30 p. m., this day.)

6829 Afternoon Session.

1:30 P. M.

Trial Examiner Ballinger: Come to order. You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination (Continued)

The Witness: Account 255, General Office Expense—General Managers Department.

Answering question 1: This account is separated int several sub-accounts which represent subdivisions of the general managers' Department, and we will first deal with the division known as "Supervision"—"Sales Research" "Statistical—Personnel" Departments or subdivisions.

The expense of these three subdivisions of the genera managers department is distributed between fields on an all-gallonage basis excluding direct shipment gallonage and is, in turn, allocated among channels within a fiel on the same basis.

In respondent's late cost study as set forth in Respondent's Exhibit 100, Respondent's accountants charged a part of the expense of these three sub-accounts, which was allocated to the Detroit field, to direct shipment channel

by using ratios representing the estimated effort of
6830 all employees in the Detroit field charged to direct
shipment business, in the cost study. The remainder
f the expense of these three sub-departments remains in
he three bulk plant channels on Respondent's Exhibit 101,
nd is separated between the three channels on the basis
f bulk plant gallonage.

I question the propriety of the allocation of this class
f expense to fields on a basis of gallonage, and this is
specially true when a portion of the total gallonage (the
irect shipment gallonage) is omitted from the gallonage
actor for the purposes of separation unless the point can
e established by some proper accounting study that a
allonage measuring factor used for the separation will
fford reasonably accurate figures in the separation for the
llocation.

If the gallonage allocation were substantiated as being
ound and accurate, it is my opinion that the costs of
he supervision sub-department might be allocated to all
hannels in the field on the basis of the effort of em-
loyees supervised provided, however, that such super-
ision was not of a nature which might be considered as
oo remote.

In other words, the effort of the employees supervised
r the measuring factors established by a proper study
or an allocation of the compensation of those persons on
a basis of the persons thus supervised, but it could
6831 not be considered in my opinion that an allocation
factor based upon efforts of employees, or groups of
mployees, such as office boys, and so forth, could move
ll the way up the line and become a measuring factor,
hich could properly be used for the allocation of the
ompensation of a supervisory official in a distant gen-
ral office.

In the case of the sales research department and the
tatistical-personnel department, a proper study would be
equired of these particular classes, of the costs of these
articular departments, to determine whether or not such
osts would or would not afford a cost differential in the
articular field. And that is especially true in this case
ecause of the fact that the company maintains 27 sepa-
ate fields of distribution.

It may be said that a study would show, for example,
hat the sales research department devoted much time to

the Detroit field in the years 1941 and 1942 which would not be properly chargeable to other fields, but even when this fact is established, it would be a very difficult problem to establish measuring factors for the further separation of these costs which are applicable to the Detroit field for the purpose of determining a cost differential.

The next department to be dealt with is that of "Gasoline and Refined Oil." The expense of this department
6832 is first split between manufacturing and sales
departments on a twenty-five—seventy-five ratio. The 75 per cent charged the sales department is then allocated between bulk plant channels on the basis of total company sales in gallons (excluding direct shipments) and refining oils, tractor fuels, naphthas, and gasoline in each channel. After allocation to channels of the entire company business, allocation to fields is based on the proportion of sales of these products, by fields, in each channel to total channel sales. During the course of my studies in the Respondent's offices I was not able to secure any substantiation in the way of documentary evidence of these measuring factors; that is, the 25-75 per cent ratio used in splitting this class of expense between the manufacturing and sales departments, as well as information which would substantiate the gallonage allocation.

A part of the expense of this department which was charged to the Detroit field was allocated to direct shipment channels on Respondent's Exhibit 101 by the use of ratios representing the combined selling effort in the Detroit field.

In other words, on Respondent's Exhibit 101 the expense is split between bulk plant business and direct shipment business on the basis of estimated effort in the Detroit field. The separation is further carried through where-
by that portion of the expense allocated to direct
6833 shipment business is allocated between direct ship-
ment channels on the basis of estimated effort while that portion of expense remaining in the bulk plant channels is separated on a basis of gallonage the measuring factors of which have never been established, as far as I have been able to learn, by cost study or analysis.

I would like to call attention to the fact that this department is concerned directly with direct shipment business. However, as previously stated, its expense is sep-ated in the company's regular accounting procedure the basis of bulk plant gallonage, which excludes direct ipment gallonage, for the purpose of allocation.

The expense of this department; that is, the gasoline d refined oil department may afford some cost differtial, but in order to establish that fact as to the extent such cost differential, it will be necessary to make a orough study and analysis of the functions and the cost this department.

I have not made any particular study of the remaing sub-departments of this account.

Answering question 2: The elimination of adjustments ade in the sub-accounts of some of these departments d giving effect to the fact that some of the departments ere not studied to any great extent, and hence no adstments were made thereto, the costs as set forth on Respondent's Exhibit 101 for account 255 in tank
34 wagon reseller column aggregating \$27,009.17 was reduced to \$2,875.23, as shown by Commission's Exbit 133; likewise, the jobber, naphtha and gasoline colnn on Respondent's Exhibit 101, where a portion of this count appears in the amount of \$136.47, was reduced to 3.16.

The influence that this would have on Respondent's aimed cost differential of 1.51 cents would be approxiately three one-hundredths of a cent per gallon.

Answering question 3: I did make a study of the inrmation shown in the exhibits and testimony of this count of the supporting items to sub-departments which included in account 255. I also made a study of some the underlying data of some of the accounts at the espondent's offices in Chicago.

ccount 260, General Office Expense—Advertising Deirtment.

Answering question 1: The methods employed by the espondent in segregating and separating those costs beveen bulk plant channels and direct shipment channels llowed and were based on the amounts of cost which were parated between the two groups on Respondent's Exhibit 01 in account 075; likewise, a portion of the expense hich was thus assigned to the direct shipment business was distributed between the direct shipment channels
35 on Respondent's Exhibit 101 in the same manner.

However, that portion of the expense which was assigned to bulk plant channels on Respondent's Exhibit 101 was separated on a basis of gallonage.

Answering question 2: The answers given in connection with account 075 apply to this account except as to the influence of the elimination of the account from Respondent's Exhibit 101 would have on the claimed cost differential of 1.51 cents per gallon; if this account were eliminated from Respondent's Exhibit 101, naturally the influence would be much less as only $3,529.47 is shown in the tank wagon reseller column and $86.28 is shown in the jobber, naphtha and gasoline column.

Answering question 3: I have reviewed the information as set forth in exhibits and testimony of this case so far as they relate to this particular account. I have made no study of the underlying data in the Respondent's offices.

Account 265, General Office Expense—Lubricating Department.

I have not studied this account.

Account 270, General Office Expense—Asphalt and Fuel Oil Department.

I have not studied this account, but I wish to call
6836 attention to the fact that any figures appearing for
this account in the tank wagon reseller column or the jobber, naphtha and gasoline column, do not show on Respondent's Exhibit 101; in other words, there are no figures for this account in those columns.

Account 280, General Office Expense—Construction & Maintenance Department.

Answering question 1: This class of expense was separated between fields on the basis of gallonage excluding the direct shipment gallonage and that portion of the expense thus allocated to the Detroit field was separated between bulk plant business and direct shipment business on the basis of the ratios applicable to activities of the Detroit field construction department.

The portion thus assigned to the bulk plant business was separated between the three bulk plant channels on a basis of bulk plant gallonage. I question the measuring factor used by the Respondent in the first place in assigning this class of expense of the general office as between fields. The gallonage factor was used in this separation and in my studies in the company's offices I was unable to obtain any information which would support such a separation. Further, it appears to me that if a portion of this class of expense could be assigned to one channel 837 on Respondent's Exhibit 101 on the basis of effort, it would seem reasonable to assume that all of the xpense could be assigned to the separate channels on espondent's Exhibit 101 on the basis of effort:

Answering question 2: I do not know.

Answering question 3: I have studied all of the informa- ion contained in the exhibits and the testimony of this case, nd have made inquiries at the company's offices with re- pect to the methods employed in the separation of this lass of expense. I made no study or analysis of any of he underlying records of this account.

ccount 290, General Office Expense—Pro Rata General dministrative.

ccount 295, General Office Expense—Law Expense.

These two accounts are separated on Respondent's Ex- ibit 101 between all channels on the basis of all gallonage, herefore, this class of expense as shown on Respondent's xhibit 101 affords no cost differential. If the accounts ere eliminated or removed from Respondent's Exhibit 01, it would in no wise influence the claimed cost differ- ntial of 1.51 cents per gallon.

ccount 503, Losses By Storm And Flood.

I have made no study of this account.

838 Account 505, Losses By Dismantling—Abnormal— ELA.

No figures for this account appear on Respondent's Ex- ibit 101.

ccount 506, Losses by Dismantling—Abnormal—Other han ELA.

Answering question 1: This is an expense incurred in onnection with the landlord activities of the Respondent n connection with the remodeling of leased service stations. nswers given to questions in connection with accounts 60-A, -B, -C, and 065-A, -B, -C, apply equally to this ccount.

Answering question 2: The answer is—I do not know.

Answering question 3: I have made a study of the nderlying data, facts, records, and accounts applying to ccount 506 in Respondents' Exhibit 101.

ccount 513, Losses by Dismantling—Out Of Pocket Ex- ense—ELA.

I have made no study of this account.

ccount 514, Losses by Dismantling—Out of Pocket Ex- ense—Other Than ELA.

Answering Questions Nos. 1 and 2: Answers given to questions numbered one and two for account 506 apply
6839 equally to this account.

Answering question 3: I made inquiries relative to this account, but I have made no study of the underlying records of this account in the company's offices.

Account 515, ~~Experimental~~, Development And Research Expense.

The answers given to questions in connection with accounts 290 and 295 apply equally to this account.

Account 520, Annuities And Retirement Plan Expense.

Answering question 1: This account consists of three separate parts as follows:

Part 1, Contributions made by the company to match contributions made by employees engaged in the Detroit field, amount $26,226.38.

Part 2, Portion of trust fund contributed by the company for the retirement of employees in the Detroit field in 1940 to cover services of such employees prior to January 1, 1939, $108,508.83.

Part 3, Annuities paid to retired employees in the Detroit field for the year 1940, $22,279.06.

It is my opinion that parts 2 and 3, as previously defined, are expenses which were not incurred in marketing activities in the Detroit field for the year 1940, hence, they are not costs which can be used in determining cost dif-
6840 ferentials.

It is my opinion that costs of No. 1 as just outlined in the amount of $26,226.38 in the Detroit field for 1940 are proper costs which can be used in establishing a cost differential, but I question the allocation of this part of this expense on Respondent's Exhibit 101 inasmuch as no part of same was applied to employees engaged in the automobile supplies business of the company. It is my opinion that this class of expense should follow the allocations of the compensation of the employees to which it applies.

Answering question 2: The influence of the adjustments and eliminations as just outlined for this class of expense as far as they can be determined from the information at hand are reflected in Commission's Exhibit 133 and reveal roughly that it would amount to about .063 cents per gallon for the claimed differential of 1.51 cents per gallon.

Answering question 3: I did make a detailed study of the underlying data, facts, records, and accounts applying to Account No. 520 as appearing on Respondent's Exhibit 101.

Account 525, Death Benefits.

Answering question No. 1: This account may be considered as additional compensation to employees, and as such should follow the allocations of the compensation
6841 of the employees between channels in establishing a cost differential. The Respondent recognized this fact by allocating a portion of this expense to direct shipment channels on the basis of distribution of compensation between those channels following the percentages applied to the expense account in account 520.

Respondent's allocation of a portion of this expense between bulk plant channels on a gallonage basis, in my opinion, is erroneous.

Answering question No. 2: The influence that this adjustment would have on Respondent's claimed cost differential would be about .0028 cents per gallon, as reflected by the figures on Commission's Exhibit 133; this is on the assumption that the allocations of the salary accounts in Respondent's Exhibit 101 are accurate and correct, a fact which this witness does not admit.

Answering question No. 3: I did make a detailed study of the underlying data, facts, records, and accounts applying to account 525 appearing on Respondent's Exhibit 101.

Account 526, Military Pay Allowances.

No figures appear in this account on Respondent's Exhibit 101.

(Witness temporarily excused.)

6842 Mr. Austin: I move an adjournment until tomorrow morning at 9:30.

Trial Examiner Ballinger: Very well. The motion is granted.

And now, at 4:10 o'clock, p. m., July 20, 1942, the hearing in the above-entitled matter is adjourned to reconvene in Room 532, Federal Trade Commission Building, Washington, D. C., at 9:30 o'clock, a. m., July 21, 1942.

(Whereupon, at 4:10 p. m., July 20, 1942, the hearing in the above-entitled matter was adjourned.)

6843

Room 532, Federal Trad
Commission Building,
Washington, D. C.,
Tuesday, July 21, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federa Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Illinois) appearing for the Respondent.

6844

PROCEEDINGS.

Trial Examiner Ballinger: Come to order. The hearin of Docket No. 4389, case entitled "In the Matter of Standard Oil Company (Indiana)" is reconvened pursuant t notice at 9:30 a. m., July 21, 1942, in Room 532, Federa Trade Commission Building, Washington, D. C.

The last hearing was held at this same place July 20 1942.

The reporter will note counsel for the Commission an Respondent present.

You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination by Mr. Hanley (Continued).

Q. I understand now, Mr. Warmack, that you have completed all of your answers to the three stipulated question in connection with each of the accounts appearing on Respondent's Exhibit 101; is that correct?

A. Yes, sir.

Q. Now, you were asked in connection with each of th accounts on Respondent's Exhibit 101, what the influenc way, if any, in figures in dollars and cents upon the differential of 1.51 cents appearing on Respondent's Exhibit 101.

6845 As I understand your answers you have indicated that you made no calculation and do not know what the influence would be if your accounting methods were applied in respect of any of those accounts with the exception of account 075, having to do with advertising; account 240, having to do with donations; and account 520, having to do with annuities; in respect of those last three accounts I understand you did make a calculation and did testify as to the influence in figures upon the differential of 1.51 cents.

Am I correct in that?

A. Yes, sir. I did make a calculation, or I might say computations giving effect to changes that may occur in those accounts.

With particular reference to account 075—that is the advertising account—there may be some portion of that cost, as I have previously testified, that would afford some cost differential. The information at hand, however, is not sufficient to make a segregation, so, the calculation that I made gave effect to the complete elimination of that account.

Q. I refer you, Mr. Warmack, to page 6733 of your cross-examination, on which page you were discussing accounts 520 and 075. You have indicated the results of certain calculations which you made.

Mr. Austin: What is the page?

6846 Mr. Hanley: 6733.

Mr. Austin: Do you have that, Mr. Warmack?

The Witness: I do not. I think it will be here shortly.

By Mr. Hanley:

Q. You have stated, after explaining that you made a calculation, that that makes a total deduction of the tank wagon reseller column of $192,425; which reduces the total expense as shown of $1,155,379.06 to $962,954.00; and that the total expense in the jobber, naphtha and gasoline, as shown in Respondent's Exhibit 101 is reduced by $3,745, which reduces the total that is shown to $26,644.00.

On the following page, 6734, you indicate that after giving effect to your calculation that the differential would be

1.255 cents instead of 1.51 cents, as claimed by the Respondent company.

Now, do you have your own copy, now, Mr. Warmack, or do you wish to see this?

A. No, sir. I have one of the copies here.

Trial Examiner Ballinger: Do you mean copy of the record?

The Witness: Copy of the record, yes, sir.

By Mr. Hanley:

Q. I am unable to understand your calculation, Mr.
Warmack, both as to the amount of reduction and re-
6847 sulting amounts left in the accounts, and as to how
you arrived at the differential of 1.255 cents, and as
to whether that includes the results of your treatment of both accounts 520 and 075, and if so, what the division is.

At this time, Respondent requests that you supply the Respondent with a copy of the work sheets which are the foundation of this computation. If you do, I think it will perhaps greatly shorten the time necessary to arrive at an understanding on the part of the Respondent as to exactly what you are testifying to.

A. Yes, sir, Judge Hanley, that calculation was the calculation which we made, or which I made while on the witness stand, and yesterday while going over these matters I found that it was subject to a correction. I would like to have the calculation show on the record according to the correction, and if I may have just a few minutes I will recalculate this, and of course hand you the papers on which the calculation is made.

Q. Well, do you think it would save any time if you were to make that calculation, and make any correction you wish to make, during some recess period, Mr. Warmack, and give us a copy so that we can examine it, or do you think that you can do it fast enough right now to give us the information?

A. This may be the place to put it in the record, but I
have not got the calculation in the form that would
6848 be presentable to you; that is, to satisfy me. I only
have some rough notes here. It would only take me
a few minutes to get this in shape.

Trial Examiner Ballinger: We will take a recess for five minutes.

Mr. Hanley: If your Honor please, before recess, I have one other calculation that I will want him to make.

Trial Examiner Ballinger: You may indicate that to the witness during the recess period, and inquire about it on the record later.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order. Proceed.

By Mr. Hanley:

Q. Mr. Warmack, just prior to the recess I asked you for your work sheets dealing with your calculations upon the making of a differential as reflected by your views of the proper treatment of accounts 075, 520, and 240. You, at that time, were not prepared to supply them but thought you could in a few moments; and I understand you are now ready to supply the Respondent the work sheets indicating what your calculations are, have you them ready?

A. Yes, sir.

I should like to put in the record at this moment, if I
may, the figures as calculated on the machine showing
6849 the reduction from the claimed cost differential of
1.51 cents per gallon for each of these three accounts.

Trial Examiner Ballinger: You may do so.

The Witness: In the case of 075, which is the advertising account, the net reduction giving effect to the elimination of that account from Respondent's Exhibit 101, the net reduction is .16073 cents per gallon.

In the case of account 520, the reduction will be .06366 cents per gallon, making a total reduction for those two accounts of .22439 cents per gallon.

In the case of account 240, which is "Donations" account, the reduction will be .00205 cents per gallon.

I have made calculations also, your Honor, with respect to reductions in account 244, which is entitled "Taxes Unemployment Insurance"; I should like to put that figure in inasmuch as I have a sheet here and expect to hand it to Respondent's counsel.

Trial Examiner Ballinger: You may proceed.

The Witness: The reduction in that account will be .0055 cents per gallon.

I also have made a calculation on reduction in account 525, and I should like to put that in at this moment if I may.

Trial Examiner Ballinger: You may. Are those reductions that you refer to reductions shown on Commission's Exhibit 133? 6850

The Witness: Yes, sir; giving effect to this reduction.

Trial Examiner Ballinger: Proceed.

The Witness: The reduction is .003 cents per gallon, the actual figure was .002999 and so forth, so I am giving the figure of .003.

Trial Examiner Ballinger: Do the figures that you have now presented change Commission's Exhibit 133 in any respect?

The Witness: No, sir.

The aggregate of the total reduction just given for each of the separate accounts is .23495 cents per gallon, which would be taken from the claimed differential of 1.51 cents per gallon.

I now hand the sheets on which the calculations are made, to Respondent's counsel.

Mr. Hanley: Read the last answer.

Trial Examiner Ballinger: Read the last answer.

(The reporter read the answer.)

By Mr. Hanley:

Q. Mr. Warmack, you have just now handed me work sheets which you have prepared and just finished testifying from.

A. Yes.

Q. Do these work sheets disclose the method by which you arrived at the several different differentials that you have testified to? 6851

A. Yes, sir. The work sheets show the total reduction in Respondent's accounts in dollars and cents and the relationship of those reductions of the gallonage for the separate channels; that is, tank wagon reseller channels and tank wagon consumer channel. There were, with respect to two or three of those accounts slight reductions in the jobber, naphtha and gasoline column, but they were too small to have any appreciable effect in figures.

Q. Again referring you to pages 6733 and 6734 of your testimony about which I asked you earlier this morning, and which have to do with certain calculations and figures and a differential of 1.255 cents, I will ask you if the calculation that you have made reaches a different result from that and whether or not you care to make any correction with respect to your testimony on page 6733 and page 6734.

A. Well, as previously explained this morning, the calculations made as shown on pages 6733 and 6734 of the record, were calculations made by me here on the witness stand on July 16, and the calculations which I have just testified to on the record are calculations which I have made on the calculating machine this morning.

The calculations made this morning and just put in the record, of course, take the place of the calculation 6852 shown on page 6734 of the transcript.

Q. Then, as I understand it, Mr. Warmack, you are now abandoning the calculations and the result thereof as reflected on pages 6733 and 6734?

A. Yes, sir, I am putting in corrected figures which were actually calculated on the calculating machine and which are correct, arithmetically.

Q. Referring to page 6807 in which you were testifying in connection with account "Donations"—account No. 240.

A. Yes.

Q. You have indicated that your calculation would reduce the differential claimed by the Respondent company by approximately one five-hundredths of a cent; converting that to a decimal, do you mean two thousandths of a cent?

A. What page was that?

Q. 6807.

A. Yes, sir. I have just corrected that figure on the record, based upon calculations made this morning on the calculating machine; and this was an estimate made quickly on the witness stand, as is shown on page 6807.

Trial Examiner Ballinger: When you refer to calculation made rapidly on the witness stand, you are referring to what?

By Mr. Hanley:

Q. Mr. Warmack, referring to account 520 and the 6853 work sheets which you have now handed me, please explain exactly what figures you eliminated from account 520, and what they represent; first, and then secondly, indicate what figures you left in account 520, if any, and what it represents. Look at your notes if you desire.

A. I went into that particular matter extensively yes terday on the record, on pages 6839 and 6840 of the record, and I believe that the eliminations made there are explained, but if you would like that again in the record I will go into that matter further here.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Mr. Warmack, referring to your testimony on page 6839 and page 6840 in which you were discussing account 520; as I understand your answer you eliminated the amounts which relate to what you have denominated as "Parts 2 and 3" of the annuity plan, being respectively $108,508.83 and $22,279.06. Am I right thus far? It is my understanding furthermore that you have left in the account the amount attributable to Part 1, being the sum of $26,226.38; am I right in that?

A. Yes, you are right in both of those.

Q. When you made your allocation in your calculation of this amount which you left in of $26,226.38, did you
6854 allocate that on the basis of the thirteen salary accounts as the account was allocated by the Respondent in Exhibit 101, or did you make any change, and if so, what, in respect of your allocation to salary account of the sum of $26,226.38?

A. Yes, sir, I made a deduction in the account; that is, in the $26,226.38 of what I calculated to be the effect of the elimination of five of the thirteen salary accounts. I believe that is explained on pages 6486, 6488, 6489 of the record.

Q. Mr. Warmack, in connection with your last answer and the testimony to which you have referred, you have indicated that you have not allocated any of this $26,226.38 to five out of the thirteen accounts to which an allocation was originally made by Respondent on its Exhibit 101. What are those five salary accounts?

A. May I review my papers for a few minutes, your Honor?

Trial Examiner Ballinger: You may.

Mr. Hanley: If your Honor please, if the witness is going to review his papers, and he is going to take some time to do that, I think it would save some time if I ask another question, because he will probably need his papers.

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. What is the effect upon the ratio of allocation resulting from your calculation wherein you refrained from 6855 making any allocation to the five salary accounts which you are going to name in a moment? I think it would be helpful to you to have that question while you are looking at your papers.

Trial Examiner Ballinger: We will take a recess for five minutes or such longer time as may be necessary for the witness to prepare himself to answer the question.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

The reporter will read the two questions asked before the recess.

Read the first question and take the witness' answer then, read the second question.

(The reporter read the first question as follows:

"Q. Mr. Warmack, in connection with your last answer and the testimony to which you have referred, you have indicated that you have not allocated any of this $26,226.38 to five out of the thirteen accounts to which an allocation was originally made by Respondent on its Exhibit 101. What are those five salary accounts?")

The Witness: Those salary accounts are as follows:

First account 000, entitled "Salaries—Supervision."

Second account 001, entitled "Salaries—Supervision Others."

6856 Third account 004 entitled "Salesmen's Salaries."

Fourth account 007 entitled "Salaries—Advertising."

Fifth account 215 entitled "Expense—Salaries—Others."

I took 2 per cent off of the $26,226.38; that is the two per cent of the salaries of those accounts off from the $26,226.38 leaving a figure of $20,108.90.

Trial Examiner Ballinger: How did you arrive at the figure of 2 per cent that you took off?

The Witness: That figure is shown on or near the center of page 92 of Respondent's Exhibit 100 where it is stated that under account 520 the rate of 2 per cent is applicable to the first $250.00 per month and 5 per cent is applicable to any income over that amount. I only used the 2 per cent figure because I do not know what amount to apply the 5 per cent figure to.

Trial Examiner Ballinger: Read the second question.

(The reporter read the second question as follows:

"Q. What is the effect upon the ratio of allocation resulting from your calculation wherein you refrained from making any allocation to the five salary accounts which you are going to name in a moment? I think it would be helpful to you to have that question while you are looking at your papers.")

Mr. Hanley: I withdraw the second question for
6857 the time being.

Trial Examiner Ballinger: Question is withdrawn.

By Mr. Hanley:

Q. Mr. Warmack, I referred you to page 6840 this morning. I do so again, and call your attention to this language from your answer:

"It is my opinion that costs of No. 1—" parenthetically that refers to Part 1 earlier in your answer, —"as just outlined in the amount of $26,226.38 in the Detroit field for 1940 are proper costs which can be used in establishing a cost differential—" and so forth.

Then I asked you if the only eliminations you had made from account 520 were not the amounts pertaining to Part 2 and Part 3; and you said, "Yes."

Then, I asked you if you had left in account 520 the sum of $26,226.38 appertaining to Part 1, and you said, "Yes."

Now, as a matter of fact, you did not leave in and you did not allocate in your treatment of account 520 all of the $26,226.38; did you?

A. No, sir; not all of that amount appears. I had previously testified as—

Q. (Interposing.) All right.

A. —may I amplify that, your Honor? I think it requires an amplification at least to refer to my testi-
6858 mony on page 6488 and 6489, the record, which shows
that 2 per cent of that $26,226.38 was deducted in making my calculation.

Trial Examiner Ballinger: It would be more in the nature of an explanation than an amplification, would it not?

The Witness: That is what I mean, your Honor.

Trial Examiner Ballinger: Proceed.

The Witness: I would like to call attention also to a statement made by Respondent, to page 6840 which reads:

"It is my opinion that costs of No. 1 as justifying the amount of $26,226.38 in the Detroit field for 1940"—there is a point that in the statement I did not mean to say "justify" I meant to state as just stated—what I meant was Part 1 and Part 2 and Part 3 on page 6839 of the

By Mr. Hanley:

Q. (Interposing.) I am not interested in that, Mr. Warmack. What I asked you, and what I was interested in was whether or not—was that you did make the answer that you left in the amount of $26,226.38, do you remember that?

A. Left in where?

Q. Account 520.

A. I did leave it in.

Q. All right, now, you say you reduced it to $20,108.90 by reason of the fact that you did some kind of a manipulation with five salary accounts that—

A. (Interposing.) I am afraid you just do not
6859 understand what happened.

Q. I wonder if you do. I am trying to ask you.

A. I made certain figures that I had—

Trial Examiner Ballinger: (Interposing.) One moment. Counsel will ask the questions and the witness will answer them.

By Mr. Hanley:

Q. Now, I would like to make this request of you, Mr. Warmack:

First: That you explain what the ratio effect is of whatever you did in making the deduction from the $26,226.38 to $20,108.90;

Second: How you treated the allocations as to these five accounts which you say you eliminated from the thirteen salary accounts originally on Exhibit 101 of Respondent;

Third: What the effect of all of your treatment is of that account on the eight salary accounts and the five salary accounts on the differential, or as you call it "net reduction" on the work sheets handed me this morning, on account 520 which "net reduction" is .06366 cents;

Fourthly: I would like to request you now if you would supply me with a copy of all of your work sheets indicating the methods that you used as outlined in the above question and by preparing to answer the question, that you 6860 supply me with work sheets indicating your entire treatment of this account, and your method of allocation?

Now, I am not insisting that that be handed to me at this moment, if you do not have it before you, but I would like to have it within a reasonable time,—

Trial Examiner Ballinger: (Interposing.) Judge Hanley—

Mr. Hanley: —and just a moment, if your Honor please —I am willing to defer the time for the witness to answer the question that I asked if he prefers, to wait until he has his work sheets.

Trial Examiner Ballinger: Judge Hanley, your question embraces three questions, and also a request. The reporter will read the first question to the witness and the witness will answer it.

The Witness: Judge, may I ask you a question off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The reporter will read the first question.

(The reporter read the first question as follows:

"Q. Now, I would like to make this request of you, Mr. Warmack:

"First: That you explain what the ratio effect is 6861 of whatever you did in making the deduction from the $26,226.38 to $20,108.90;")

The Witness: I do not understand that question, your Honor.

Mr. Hanley: That portion of the question may be withdrawn.

Trial Examiner Ballinger: That portion of the question is withdrawn.

Read the next question.

(The reporter read the second question as follows:

"Second: How you treated the allocations as to these five accounts which you say you eliminated from the thirteen salary accounts originally on Exhibit 101 of Respondent:"

The Witness: I can answer that question, your Honor.

Trial Examiner Ballinger: Proceed.

The Witness: I applied 2 per cent to those salary accounts as just testified to—

Trial Examiner Ballinger: (Interposing.) Now, will you please designate the salary accounts to which you refer?

The Witness: Your Honor, I have just stated them in the record, five of them; do you wish them again?

Trial Examiner Ballinger: Not if they are accounts which you have designated in your previous testimony this day given. 6862

The Witness: That is true.

—which gave me a figure of $6,117.47. That amount was deducted from the $26,226.38 which represented contributions made by the company to match contributions made by employees engaged in the Detroit field for the year 1940. That gave me a figure of $20,108.90.

Does that answer your question, Judge Hanley?

By Mr. Hanley:

Q. I really do not know, Mr. Warmack, if that is what you did?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Read question 3.

(The reporter read question 3 as follows:

"Third: What the effect of all of your treatment is of that account on the eight salary accounts and the five salary accounts on the differential, or as you call it 'net reduction' on the work sheets handed me this morning, on account 520 which 'net reduction' is .06366 cents;")

The Witness: I do not understand that. I was trying to answer step by step the procedure. If that is not what counsel desires then I would like the question to be a little further explained. 6863

By Mr. Hanley:

Q. If you do not understand it, I will reframe it.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. If you care to further answer the question that you were answering, Mr. Warmack, please proceed.

A. Now, I do not understand exactly what you wanted, Judge Hanley. I was endeavoring to give you a step by step procedure which was my first understanding of what you wanted when you asked—

Trial Examiner Ballinger: Give him a step by step procedure.

By Mr. Hanley:

Q. You are right, and I would like it from the standpoint of procedure and the figures used.

A. Well, I had arrived at the manner by which I had calculated the figure of $20,108.90 in my answer just given. The total salary accounts of the eight accounts we have just been talking about, after eliminating the five accounts that I have identified in the record as taken from
6864 Respondent's Exhibit 101, in figures, amount to $285,314. for the tank wagon reseller column and $2,783.23 for the jobber naphtha and gasoline column. The total of all of these salary accounts as spread through all of the columns by distribution channels in Respondent's Exhibit 101 amount to $893,672.

Mr. Austin: Still referring to those eight accounts?

The Witness: To those eight accounts, yes, sir.

The relationship or the ratio of the total amount of these salaries in the tank wagon reseller column to the total of the salaries; that is, of the eight accounts is 31.8141 per cent. The same for the jobber, naphtha and gasoline column .3114 per cent. These two respective percentages were then related to or applied to the figure of $20,108.90, arrived at as just stated, which gave me a figure of $6,397.47 which would apply to the tank wagon reseller channel in Commission's Exhibit 133, for the tank wagon reseller column of $62.62 which would apply or was applied in Commission's Exhibit 133 to the jobber, naphtha and gasoline column. I believe that is the step by step procedure as to what was done in making the calculations.

Mr. Austin: Did you say 31.8141 and .3114 per cent?

The Witness: Yes.

By Mr. Hanley:

Q. What is the influence upon the allocation ratios
6865 as used by the Respondent in allocating this expense item by omitting the five salaried accounts?

The Witness: May I have the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: In the case of tank wagon reseller column, the percentage of salaries as shown in Respondent's Exhibit 101 for the thirteen accounts will be slightly reduced after eliminating the five accounts.

The percentage in the jobber, naphtha and gasoline column—

Mr. Hanley: (Interposing.) Just a moment. Tell us how much you mean by "slightly reduced."

The Witness: Will be reduced from 33.019 per cent to 31.8141 per cent.

In the jobber, naphtha and gasoline column, the percentage will be slightly increased. It will be increased from .301 to .3114.

By Mr. Hanley:

Q. Now, will you please give us, Mr. Warmack, the ratios for each channel so that they will balance to one hundred per cent?

A. I can give them only for the thirteen accounts. I have not made them for the right or the five accounts.

Q. Well, the thirteen accounts were the ratios
6866 originally outlined on Respondent's Exhibit 101?

A. The ratios were not shown on the exhibit. I have made the calculation to determine what the ratios would be if they had been shown.

Q. But you did not make any calculation for the accounts that you eliminated or the accounts that you left in, in your allocation?

A Yes, sir, for the two respective channels I did.

Q. Then, you have just given those?

A. Tank wagon reseller column and jobber, naphtha and gasoline column only. You will understand that this was worked out hurriedly, and we did not go to the extent of determining in this calculation what ratios applied to the other columns.

Q. Have you finished your answer?

A. Yes, sir.

Q. Adverting to my request of a few moments ago, will you now please furnish me with work sheets which will indicate the various steps, procedures and calculations to which you have been testifying concerning your treatment of account 520, and the thirteen salary accounts.

the eight salary accounts, and the five eliminated salary accounts?

A. I am in position to make them available to you.

Q. That is what I mean, Mr. Warmack.

A. I rather think that we want to keep the work sheets.

Q. I am only asking for the opportunity to exam-
6867 ine them, Mr. Warmack, so that we may have some means of following this great maze of figures.

A. Yes, sir.

Q. We just want to borrow them.

A. Sure.

Mr. Austin: What does that request involve? Of course, the work sheets will be available here, and inasmuch as Respondent made their work sheets available to us in Detroit, I assume that we will be perfectly glad to allow them to have copies, but whether we will want to lend them or let them go out of the office, that is another question. We made a similar request and I know Mr. Boatwright made the point that he did not want them to go out of his possession. This, I thought, was perfectly right.

Trial Examiner Ballinger: We will make them available in the hearing room.

Mr. Hanley: Can you give us copies, as we gave you copies?

Mr. Austin: I will be glad to.

The Witness: You required us to go to the extent of incurring a cost of $60 in copying the work sheets.

Mr. Hanley: All right; we will bear the expense of copying, we will be glad to do that if we may have copies.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

6868 Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. When may we have the copies?

A. That is up to Mr. Austin.

Trial Examiner Ballinger: Have you the copies in your possession?

The Witness: Yes, sir. They are right here all the time.

Trial Examiner Ballinger: When can you furnish counsel for the Respondent with copies?

The Witness: Well, your Honor, he can look at them right now or at any time he so desires. I thought that question was directed to Commission's attorney.

By Mr. Hanley:

Q. Well, I am asking now when you can have copies. I understand there is some disinclination to permit the originals to leave the possession of yourself and your counsel, and I am not requesting that we be supplied with the originals here or elsewhere.

What I want to know, Mr. Warmack, is something in the way of the work sheets, or some kind, that will indicate the answers, in procedures, in figures, in results, along the lines of the questions that I have been asking you, and along the lines of the steps that you have been taking and using as an expert accountant, Mr. Warmack. I think 6869 you, as an expert accountant really know what I want.

A. Judge Hanley, the work sheets are here and as far as I am concerned you can have the originals, or you can take the originals and have them copied, but I have no discretion about giving up any papers that belong to this Commission.

Mr. Austin: Well, there is no question about the papers being here, and Mr. Boatwright can sit down with Mr. Warmack and look at them at any time he wants to, and if you want to have any of them copied we will be glad to use our facilities to have that done, and we will do it now, or this afternoon, or at any time.

Mr. Hanley: May it be understood that Mr. Boatwright have whatever Mr. Warmack has in the way of work sheets and then request copies of any such work sheets that he may desire, and if you will supply such copies as he may request—

Trial Examiner Ballinger: It is so understood: Proceed.

By Mr. Hanley:

Q. I need to summarize this to some extent, Mr. Warmack.

Again adverting to your testimony on page 6839 where you are answering in connection with Part 2 and Part 3 of the annuity plan, account 520, are we now to understand definitely that you eliminated in its entirety $108,508.83 appertaining to Part 2?

A. Yes, that is correct.

6870 Q. Did you eliminate in its entirety the sum of $22,279.06 appertaining to Part 3?

A. That is correct, and when you say "eliminate" you mean from the figures as shown on Commission's Exhibi 133, I understand.

Q. No, I mean from the figures shown on Respondent' Exhibit 101.

A. And is reflected by Commission's Exhibit 133?

Q. No, you changed those figures on Commission' Exhibit 133.

What I am trying to find out is what you eliminated fro the figures as shown on Respondent's Exhibit 101.

Mr. Austin: The elimination has to be made for something—I want to place that before Judge Hanley—i arriving at the figures on Commission's Exhibit 133.

The Witness: Eliminated for what? It has to be fo something.

By Mr. Hanley:

Q. Well, let me put it this way, Mr. Warmack: Yo eliminate the figures or amounts appertaining to Part and Part 3 so far as the same made any basis for the cos differential?

A. In my opinion, Judge Hanley, they should b eliminated.

Q. Did you so treat those accounts in your calculations?

A. In my calculations, yes, sir.

Q. Now, you have stated that you gave credit an
6871 left in the account the sum of $26,226.38 appertaining to Part 1 of the account.

I now understand your testimony to be that in fact yo gave credit to the Respondent for the purpose of calculating the cost differential, the sum of only $20,108.9 appertaining to Part 1.

Is that correct?

A. In my calculation, as just explained, the answer is— yes, sir.

Q. Well, is it to be understood that you are correctin your testimony on page 6840 when you said you left tha in, $26,226.38, and your testimony this morning when yo told me that you had left it in, and gave the Responden credit for—

A. (Interposing.) The testimony is clear on that. made a step by step explanation as to just what was don whether it is left in or left out, why, the testimony wi show the step by step procedure as just explained wi show an answer what I did.

Q. Well, then, you do not care to say anything further in answer to my present question?

A. I stated that I have answered it over five times this morning already.

Q. Very well.

A. Yes.

Q. A few questions in connection with Commis-
6872 sion's Exhibit 129 which have to do with the year
1937, and the differential set up on Respondent's Exhibit 31 having to do with Ned's Service Station, Mr. Warmack.

Did you prepare Commission's Exhibit 129?

A. I do not have a copy of it, Judge, before me. I will just have to look at it.

Q. Are not those in your books—I mean, the exhibit books?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: Yes, sir. I prepared that exhibit.

By Mr. Hanley:

Q. Were the gasoline percentages, as shown thereon, taken from Commission's Exhibits 88, 89, 102, and 103?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: May I have the question, please?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Your Honor, I will just have to look that up.

(The witness examines documents.)

They were not taken, as such, from those exhibits, but they were calculated from figures shown on those exhibits.

6873 Q. Were the estimates of time devoted to gasoline by the reseller group constant on all of those exhibits?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: I can give you the figures and then you can judge if that is so. Here we go—

By Mr. Hanley:

Q. (Interposing.) I wonder if you cannot answer th question. I just want to know if it is constant, is it th same thing all the way through?

A. No, sir. It is not the same, but it is not so fa different.

Q. Are the figures of 52.8 per cent shown on Commission's Exhibit 129 the average for the four quarterl periods of 1940?

A. Yes, sir.

Q. Why did you leave out the special reseller salesmen group on that exhibit, Mr. Warmack?

A. Special reseller-salesmen group?

Q. Yes.

A. For the same reason that I left out all the rest o them.

Q. Are they not engaged primarily in selling gasoline and supervising the efforts of reseller salesmen who are also selling gasoline?

6874 A. Yes, sir. It is my understanding that the have some work which involves the traveling, I believe, with these salesmen occasionally, I believe that ther is testimony that will show that.

Q. Are you aware of what the percentage of time o the average was of the reseller special salesmen for th year 1940?

A. That is shown in the exhibit mentioned.

Q. I did not hear you.

A. That is shown in the exhibits mentioned.

Q. Yes, sir, and I think it took some calculation, however. Is it or is it not the fact that it was an average o 62 per cent?

A. Oh, I do not know. I have not made the calculation I can make it.

Q. Mr. Warmack, while you were in Chicago an Detroit this spring, did you trace the history of the gasoline ratios of the reseller gasoline group for the Detroi field over a period of years, or any period of years?

A. May I have the question read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I do not just exactly understand you question, Judge Hanley.

By Mr. Hanley.

6875 Q. I am referring to the ratios of time spent by this group on the sale of gasoline.

A. I reviewed many of the distribution time reports that the Respondent uses to allocate its salesmen's costs; that is, the salesmen's costs as appearing in account 004, and I secured copies of many of those distribution of time reports of which the exhibits mentioned are some of them.

Q. You have now stated what you looked at and what you did in Detroit and Chicago; are you now able to answer the question as to whether you did make a review relative to whether that gasoline ratio of the reseller group was traced by you over any period of years?

A. I did not do any more than I just stated that I did.

Q. Well, then, are you able to answer this question: Did the ratios, if you found any ratios, or studied any ratios, or calculated any ratios, tend to remain constant?

A. If my understanding of what you mean by "constant" is that they run relatively close together for the year 1940, they did run relatively close together; that is, the company's estimate of what portion of this class of expense was engaged in connection with the sale of naphtha and gasoline; those are estimate figures, you understand.

Q. What I think I really mean by "constant" is what you put in your Exhibit 129 for all the salesmen that you have treated on that exhibit, and for the year 1937

6876 you have used one figure 52.8 per cent. Now, I just understand the word "constant" to mean just that.

A. Well, then, that means "average."

Q. Well, it is a constant figure?

Trial Examiner Ballinger: Well, did the average remainconstaint or continuous?

The Witness: Well, Judge, I would just love to put these figures in the record, and then you can let anyone, Judge, see whether they are constant or not.

By Mr. Hanley:

Q. They are in the record; they are in the record, Mr. Warmack.

A. Then anybody can judge whether they are constant or not.

Trial Examiner Ballinger: Strike that from the record, not physically, of course.

The Witness: Excuse me, your Honor, if I did not answer the question properly. It was my intention to do so.

By Mr. Hanley:

Q. What is the fact as to whether 1940 ratios of time, upon which you have now testified that Commission's Exhibit 129 was based, represent 1937 conditions in the Detroit field?

A. I only know what I have read in the record, and what I understood as the result of discussions on that point with your people in the Detroit office. I can answer that.

Q. Well, answer it the best way you can, if you
6877 think you know the answer to the question.

A. I do not know of my own knowledge—

Q. Go ahead.

Trial Examiner Ballinger: Well, answer the question.

The Witness: Well, your Honor, it is my understanding from this record the conditions with respect to these accounts and the handling of accounts run very closely in 1940 with 1937. In 1940, it is understood of course that the company distributed a considerable amount of its naphtha and gasoline, and some of its other petroleum products to tank wagon reseller customers, at least one of which, namely, Ned's Auto Supply Company, was, in 1940, getting in direct shipments. Ned's Auto Supply Company, as I understand it, received its supplies from bulk plants in Detroit in 1937.

As to the effect of your switching away, how much more time reseller salesmen devoted to the sales of naphtha and gasoline in 1940 than in 1937, or vice versa, I do not have information which will show that.

By Mr. Hanley:

Q. You may not have understood my question, Mr. Warmack, but do you not know as a fact that the reseller salesmen rarely if ever called upon the jobber customer?

A. That is my understanding, yes, sir.

Q. Now, I will—I am referring primarily to your exhibit 129 which you built up on 1940.

6878 A. It is the only information I had with which to build it up on, Judge Hanley.

Q. You built it up on 1940?

A. Yes, sir.

Q. And you have already testified you did not study Exhibit 31 to any extent for the year 1937?

A. I studied the exhibit, Judge, but not the underlying data, the underlying data.

Q. The underlying data?

Trial Examiner Ballinger: Referring to Exhibit 31?

Mr. Hanley: Covering the year 1937.

Trial Examiner Ballinger: Whose exhibit is that, Respondent's or Commission's?

Mr. Hanley: That is the Respondent's Exhibit.

The Witness: That is right.

By Mr. Hanley:

Q. Now, Mr. Warmack, do you regard it as sound accounting practice to distribute costs for the year 1937 by using 1940 figures without determining whether the 1940 figures are representative of conditions in 1937?

A. It is O.K. to make a calculation on this basis, you can make a calculation on any basis, but you should go to the best information when you are coming down to something that must be correct. I consider this as good as the cost time estimates that is shown in Respondent's Exhibit 31-L.

6879 Q. Do you regard that as a guess and not a study—Respondent's Exhibit 31?

A. I certainly regard it as a guess of what men thought that happened three or four years prior to that time, without having any record in their files to show what happened, if I made it, it would be a guess.

Q. Do you regard your Exhibit 129 as a guess and the result that it shows so far as it has any in it as to any influence at all on the differential shown on Respondent's Exhibit 31?

A. Well, I would not say that it is the most accurate figure that could be determined for 1937, if 1937 records are available from which this could be compiled, but I will say this, that it is based upon some documentary evidence.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: The question can be answered "yes" or "no."

The Witness: Do you want to strike the other answer?

Trial Examiner Ballinger: No. But answer the question.

The Witness: My answer is—no.

By Mr. Hanley:

Q. Inasmuch as you made no study of the underlying data, facts, and records whatever that went—that went into Exhibit 31, which ~~do~~ you regard as the more
6880 reliable, the calculation of those who did make a study of the underlying facts and figures in Exhibit 31, or your calculation as reflected in Commission's Exhibit 129?

A. Between the two, I certainly think that the figures shown on Commission's Exhibit 129 are much more reliable. I made inquiry as to that "study" you are talking about and I was never able to get any documentary evidence with respect to those estimated time percentages as shown on Respondent's Exhibit 31-L.

Q. You are willing to stand on that answer?

A. That is my answer.

Mr. Austin: I think it should be pointed out, your Honor, that Commission's Exhibit 129 is not a calculation of the same costs which were calculated on Respondent's Exhibit 31. The calculation was made for the entire Detroit field there whereas this calculation was put in for the purpose of comparison, being directed only to a particular sales territory in the City of Detroit. I think that should be pointed out.

Mr. Hanley: That will be pointed out.

Mr. Austin: Yes?

Mr. Hanley: Right away.

By Mr. Hanley:

Q. Does Commission's Exhibit 129 apply to all but a part of one territory, sales territory?

6881 A. That is my understanding, Judge Hanley, a part of it.

Q. And does that territory—and you chose that territory, did you not, as to which you would apply your Exhibit 129?

A. I picked up these three salesmen, Robinson, Moulenberg, and Couchie, and made the calculations based on their activities so far as the record shows.

Q. Well, then, the answer is—yes?

A. Well, I did not select any territory.

Q. But you determined it by using these three salesmen?

Mr. Austin: I requested the witness to make the calculation covering the territory of these salesmen, so I will take the burden myself of choosing the territory if this will aid the inquiry any.

By Mr. Hanley:

Q. Of course, it was understood by you, Mr. Warmack, that the complaint and charge in this case was not limited to any particular geographical territory other than as it was confined and limited finally in the lawsuit to the Detroit metropolitan area?

A. That is my understanding.

Q. Now, was that salesman's territory or the salesmen's territory representative of other reseller territories in the Detroit field, or in the metropolitan area of Detroit, or do you know?

A. I really do not know; I did not make a study of that.

6882 Q. Did you try to find out?

A. I made no inquiry with reference to that.

Q. In point of fact, you just made a calculation that Mr. Austin told you to make; is that right?

A. I made a calculation—

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: Answer the question.

The Witness: I stated, your Honor, that I made a calculation. Mr. Austin's ideas have no influence on me as an accountant and they never will—or any one else's.

Trial Examiner Ballinger: And that does not properly answer the question. Read the question again.

(The reporter again read the question.)

The Witness: Mr. Austin requested me to make a calculation. He did not tell me how to make the calculation. He discussed the things with me. As a result of that I did make a calculation.

Trial Examiner Ballinger: That answers the question.

By Mr. Hanley:

Q. Do you know now, or did you know when you made the calculation whether any other reseller salesmen in the entire Standard Oil of Indiana Company carried a sales load which aggregated as much as 6,500,000 gallons of gasoline per year?

6883 A. No.

Q. Do you know now or did you know in 1941 or whenever you made this calculation whether any salesman, any other salesman in Detroit, carried a load of as much as 2,308,606 gallons a year?

A. What do you mean by "carried a load", Judge?

Q. I mean handling that many sales, that much volume, calling on the people that bought that much gasoline.

A. I am sure I do not know.

Q. Did you not regard it as important to determine whether or not these salesmen were handling representative volume in the territory which they served when you undertook to make a calculation as to the cost per unit of selling that gasoline through those salesmen?

Mr. Austin: I object to that, your Honor, this is a question solely of the weight to be given the exhibit. It is argument. I am arguing one way, and Judge Hanley may argue another way, based on the record, as to the weight of this exhibit, but the exhibit was put in to show the calculation based on the territory sold by these salesmen.

Trial Examiner Ballinger: The objection is overruled.

By Mr. Hanley:

Q. I am asking you as an accountant, Mr. Warmack, these questions—from the standpoint of sound accounting.

The Witness: May I have the question, your Honor?

6884 Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: We are not trying to prove a cost justification; we are just trying to make some calculation.

Trial Examiner Ballinger: Strike the answer of the witness, not physically, of course, and read the question.

(The reporter read the question.)

The Witness: I do not understand the question, then, your honor.

Trial Examiner Ballinger: Counsel may reframe it.

By Mr. Hanley:

Q. To aid in your understanding of the questions that I am going to ask you, Mr. Warmack, your exhibit, Commission's Exhibit 129 attacks the claimed cost differential as set up by the Respondent in Respondent's Exhibit 31, and undertakes to demonstrate a lesser unit cost applicable to reseller salesmen in selling gasoline than was indicated in Respondent's Exhibit 31.

Now, do you not regard it as proper from a sound accounting standpoint that when you choose any territory upon which to determine or calculate the unit cost of selling gasoline through reseller salesmen, that it is important to give consideration to the fact of whether or not the territory you are choosing is a representative territory from the cost standpoint? Is that clear to you?

6885 Mr. Austin: I object to that question, your Honor; it is based upon a false premise as to the purpose of the exhibits. I would like to have the first sentence read over again.

Trial Examiner Ballinger: Read the first sentence—in fact, read the statement and the question.

(The reporter read the following:

"Q. To aid in your understanding of the questions that I am going to ask you, Mr. Warmack, your exhibit, Commission's Exhibit 129 attacks the claimed cost differential as set up by the Respondent in Respondent's Exhibit 31—")

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

The Witness: The answer would be—yes, I certainly would subscribe to making a study of the points that you have just outlined, Mr. Hanley, as well as possibly many other points in the event that the Commission or the Commission's accountants were instructed to undertake to prove the cost justification.

We have not done that.

We set out to make a calculation from the figures shown, at hand, to compare with the figures that Respondent put in, without undertaking or going to the extent of making a field study of these things.

6886 By Mr. Hanley:

Q. Very well, Mr. Warmack, you have said the answer would be—"yes." If you did undertake to set about making a cost justification. I now ask you as an expert accountant what you have to say as to whether this is sound accounting procedure when you have set about, as an accountant, to destroy the claimed cost differential or justification? Is there any difference or distinction, and if so, what is it, from a sound accounting standpoint?

The Witness: Your Honor, I think that question properly should be directed to the Commission itself.

Trial Examiner Ballinger: Strike that portion of the witness' answer—not physically—from the record. You may proceed to answer the question.

The Witness: I just do not understand it. I was trying to answer it, your Honor.

By Mr. Hanley:

Q. I will try to simplify it. Do you think there is no difference from a sound accounting standpoint in the procedures adopted by a sound accountant when he undertakes to set up a cost justification as distinguished from a time when he undertakes to bear down on and destroy an already established cost differential and justification?

A. Well, you have two separate problems there altogether.

Q. You have answered one. You have answered
6887 the first one, namely, that you think it would not be
sound accounting if you were trying to establish a cost justification.

I am asking you just one other thing: Do you not think the same responsibility is upon a good accountant to take the same precautions and observe the same sound accounting principles when he is trying to destroy somebody else's cost differential and justification as he would take when he was building a cost justification himself?

A. Most assuredly he should be careful and he should make a proper study and review, but I would like to explain that in connection with our work here in the Commission.

Trial Examiner Ballinger: If it is with reference to this case.

The Witness: Yes, sir.

Trial Examiner Ballinger: You may do so.

The Witness: Yes, sir.

Trial Examiner Ballinger: If it is the general work of the Commission—no.

The Witness: As far as it relates to this case, and it is particularly with reference to Exhibit 31—Respondent's Exhibit 31. Respondent made a bunch of calculations in those exhibits. Many of the calculations are what I consider to be pretty rough.

Well, in my work I was required to review that exhibit,
especially with respect to the methods employed and
6888 the way that the calculations were made, and further
studies along that line. In my study of this particular

item in question, namely, Respondent's Exhibit 31-L, we were confronted with a group of estimates made by supervisory officials in the Detroit field three or four years after the occurrence of the things against which those estimates were going to apply, and my field work, and in my study of Respondent's work for 1940, which is Respondent's Exhibits 99, 100, and 101, I did make inquiry as to those estimates, and I was not shown any documentary evidence of any kind, so I did not go to the extent of trying to work out that which would absolutely be an ironclad and would be considered as the very best thing that you could have, but we made a calculation, and that is what we did to offset the calculation made by the Respondent—that is my answer.

(Witness temporarily excused.)

Trial Examiner Ballinger: One moment.

Mr. Hanley: Mr. Examiner, it is now ten minutes of one. I request, your Honor, that we take a recess until 2:15 o'clock this afternoon.

Trial Examiner Ballinger: The motion is granted and now at 12:50 o'clock p. m., the hearing will stand in recess until 2:15 p. m.

(Whereupon, at 12:50 p. m., a recess was taken until 2:15 p. m., this day.)

6889 Afternoon Session.

2:15 P. M.

Trial Examiner Ballinger: Come to order. You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination by Mr. Hanley (Continued).

Q. So far as you know, Mr. Warmack, from your investigation and studies prior to making Commission's Exhibit 129, is it not true that it may represent an entirely sport case in that it is unusual as in comparison with any other territory or any other situation, is it not, around Detroit and Vicinity.

7

A. Judge, I just would inquire what you mean by "sport case"?

Q. I mean an unusual case, not representative, unique.

Trial Examiner Ballinger: An unusual case.

The Witness: Yes, sir. The figures on that Commission's Exhibit 129 may not be the same as they would be in any other situation. Of course, I do not know that. They may be the same.

By Mr. Hanley:

Q. Just a few questions to summarize this matter, and then to go to something new.

6890 As I understand your testimony given frequently you did not make any studies of the underlying data that went into or support Respondent's Exhibti 31?

A. Relatively none.

Q. You do know that the territory around or upon which Commission's Exhibit 129 is based is a restricted, limited area somewhere within the City of Detroit?

A. Yes, sir.

Q. And that territory, Mr. Warmack, I presume you understand was in no wise contemplated by itself in the charge in this proceeding, in that the discrimination charged, and the cost differential sought to be justified by the Respondent was the difference between the price accorded Ned's in 1937 as distinguished from the tank wagon price accorded other reseller customers in the general Detroit vicinity?

Trial Examiner Ballinger: Judge, is that a fair question to ask this witness?

By Mr. Hanley:

Q. Is it not the fact?

Trial Examiner Ballinger: Well, did this witness know what territory was embraced in this complaint?

Mr. Hanley: Well, I assume he is familiar with the complaint.

Mr. Austin: That is a question of law, your Honor.

6891 By Mr. Hanley:

Q. If you do not know, why, all right, Mr. Warmack.

Trial Examiner Ballinger: This witness is not presumed to know anything about the pleadings. He is an accountant.

By Mr. Hanley:

Q. Well, if you do not—I do not insist upon an answer if you do not care to answer, or do not feel that you can, Mr. Warmack.

Mr. Austin: I object to the question on the ground that it calls for a conclusion of law on the part of the witness.

Trial Examiner Ballinger: The objection is sustained.

By Mr. Hanley:

Q. I understand it to be your testimony, Mr. Warmack, that you have no knowledge as to whether or not the territory upon which Commission's Exhibit 129 is predicated is representative of any other territory in the vicinity of Detroit or elsewhere in the Standard Oil Company of Indiana territory in respect of either gallonage, density of population, size of territory, or any other factors.

Mr. Austin: I object to the question so far as it embraces territory beyond the metropolitan area of Detroit, because anything outside of the metropolitan area, I 6892 think, is outside of the bounds of the cross-examination. The question is too broad.

Trial Examiner Ballinger: The objection is overruled.

The Witness: No, sir, Judge Hanley, I do not know. I have not made any intensive study and analysis; that is, cost study and analysis of this particular question, and, therefore, I could not know.

By Mr. Hanley:

Q. Have you any knowledge as to whether or not the territory on which Exhibit 129—Commission's Exhibit 129 is predicated and the circumstances which it represents is not an entirely unique case and wholly untrustworthy for purposes of comparison from any standpoint with any other situation or territory?

The Witness: I will have to have that question read.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I will have to ask you to explain that a little for me, Judge Hanley.

Mr. Austin: Can you not answer that as to whether you have or have not such—

The Witness: (Interposing): It seems like two or three questions bound up in it—maybe I do not understand it correctly.

6893 Trial Examiner Ballinger: Read the question again to the witness.

(The reporter again read the question, as follows:

"Q. Have you any knowledge as to whether or not the territory on which Exhibit 129—Commission's Exhibit 129 is predicated and the circumstances which it represents is not an entirely unique case and wholly untrustworthy for purposes of comparison from any standpoint with any other situation or territory?")

The Witness: No, sir, I do not have any knowledge as to whether it is unique or whether it is not unique. Only a cost study would afford that information.

By Mr. Hanley:

Q. There has been a good deal of testimony, Mr. Warmack, in connection with gallonage allocations, in this lawsuit. I will ask you now if you have not testified repeatedly that you undertook to obtain documentary evidence of any studies which might support both gallonage and other types of allocations and separations of cost made by Respondent in its Exhibit 101. You have so testified, have you not?

A. Yes, sir.

Q. Did you not make this statement in your testimony:

"I was not given any information of any kind; that is,
documentary information in the Detroit field to sup-
6894 port the accuracy of these methods or the results to
be obtained from the use of these methods. And that
goes to all of the accounts accounted for in form 189 in
the Detroit field?"

You made that statement, did you not?

A. May I inquire where that is in the record?

Q. Pages 5935 and 5936, beginning with the last line on page 5935.

The Witness: Can I see that?

(The witness examines the documents.)

The Witness: Yes, sir. I made that statement. I was speaking, however, with especial reference to all of the accounts on form 189 in the Detroit field which were supported or separated on a basis of gallonage; that is, where gallonage was used as a factor.

By Mr. Hanley:

Q. I just wanted to know if you made the statement.

A. I did not mean that I did not receive any documentary evidence.

Trial Examiner Ballinger: You have answered the question.

By Mr. Hanley:

Q. You are familiar with the sales promotional costs and allocations?

A. Which account is that, Judge Hanley?

6895 Q. I do not know, Mr. Warmack, and I will have to hunt it up. I really do not know as much about this, even, as you do—002.

A. I believe I have already stated in this record that I made little, if any, study of that particular account.

Q. Well, you, I think, have testified that you know how it was allocated—surely, you know that; do you not?

A. I have information in this record that I reviewed; yes, sir; and I might have looked at that particular information in the Detroit field, but as I stated, I did not devote any particular time to a study of sales promotion. The account is rather small in comparison with some of the accounts and I just did not go into that thing in great detail.

Q. Well, did you ask for any documentary evidence in connection with this account?

A. I do not remember if I did, Judge Hanley.

Q. Well, did you ask for any documentary evidence in connection with it that you did not get? Do you remember that?

Mr. Austin: Well, I think it was stipulated between counsel and the witness that they were discussing here accounts which were allocated on a gallonage basis, that was the original premise, wasn't it?

Mr. Hanley: No, sir.

Mr. Austin: Your questions to the witness, I think

6896 the record will show, you previously had referred to that.

Mr. Hanley: If you think that I did I want the record because I am going to ask about other things than gallonage. Perhaps it was my introductory statement.

(The reporter read the question as follows:

"There has been a good deal of testimony, Mr. Warmack, in connection with gallonage allocations, in this lawsuit. I will ask you now if you have not testified repeatedly that you undertook to obtain documentary evidence of any studies which might support both gallonage and other types of allocations and separations of cost made by Respondent in its Exhibit 101. You have so testified, have you not?")

Mr. Austin: There you said "both" but the witness is only referring to his testimony.

Trial Examiner Ballinger: The witness can answer the question?

Mr. Austin: Yes, sir.

Mr. Hanley: I want to know.

Trial Examiner Ballinger: Read the question pending.

(The reporter read the question as follows:

"Q. Well, did you ask for any documentary evidence in connection with it that you did not get? Do you remember that?")

6897 The Witness: Your Honor, inasmuch as I did not study the question, I made no notes of the account.

Trial Examiner Ballinger: Well, now, you can answer according to the best of your memory.

The Witness: With respect to the account?

Trial Examiner Ballinger: Did you ask for any documentary evidence which was not furnished?

The Witness: I do not remember that I asked for any that I was not furnished, or any that was furnished me.

By Mr. Hanley:

Q. Do you recall account 006? Did you ask for any documentary evidence in connection with that account?

A. No, sir, I certainly did not.

Q. You were not concerned with it in connection with that account; is that correct?

A. According to the studies made as to all the information contained in Respondent's Exhibits 99 and 100, I could not imagine of any better way of making the allocation than the Respondent did make, and I accepted it for its face value, and I still think it is correct.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

898 Q. Did you inquire for any documentary evidence in connection with account 008?

A. No, sir.

Q. Referring to account 021 in connection with commissions, did you inquire or request any documentary vidence?

A. Yes, sir.

Q. Did you get it?

A. Yes, sir.

Q. All that you asked for?

A. Yes sir.

Q. And in connection with account 070 ELA expense, did you ask for any documentary evidence?

A. I do not recall that I did ask for any, Judge Hanley, rather think that I did not.

Q. You criticized that account—or did you?

Mr. Austin: Well, the record shows that there was no direct examination on that account, Judge. There was some direct examination on account 111, which is also ELA, and which you have in mind, no doubt.

Trial Examiner Ballinger: If it was not in his direct examination—was this in his direct examination?

Mr. Austin: Your Honor, I was thinking of 1940, because I was looking at Exhibit 101. There was some examination on equipment loan for 1937.

Trial Examiner Ballinger: The witness may an-
899 swer the question.

The Witness: What is the question?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I object to this unless it is confined to 1937, because the direct examination was confined to that.

Trial Examiner Ballinger: The Examiner is of the opinion that the cross-examination should be confined to the direct, and if the direct examination was confined to 1937, your cross-examination should be confined to that.

Mr. Hanley: I will pass from that for the moment.

By Mr. Hanley:

Q. I refer you to account 200. I will ask you about that because I am sure you gave some testimony about that.

Did you inquire for documentary evidence in connection with that account?

A. Yes, sir.

Q. Did you get it?

A. Yes, sir.

Q. Did you ask for any and were you refused anything?

A. No, sir. I might further qualify that by saying, your Honor, that the company helped me make that. I made further calculations, if I might add, on which the company's men helped me.

6900 Q. Referring you to account 243, Taxes on Federal Insurance. I am sure you testified about that.

A. Yes, sir.

Q. Did you ask for documentary evidence in connection with it?

A. No, sir, I did not go into great detail of that account that is account 243?

Q. Yes.

A. I might have inquired as to how it was handled, and I certainly did not question the fact that the company had incurred the expense. I made inquiry with respect to rates and so forth.

Q. You did not question—you did question the propriety of the allocation; did you not?

A. Only to the extent of this, that we had questioned the allocation of some of the accounts on which that expense was paid, and that naturally was the extent of the questioning of the allocation of this account.

Q. Referring you to account 244—Unemployment Insurance Taxes—you criticized the Respondent's treatment of that account; did you not?

A. Yes, sir.

Q. Did you request any documentary evidence in connection with that?

A. No, sir. I did not, and my sole—I might say that the answers which I gave in connection with account 6901 No. 243 will apply equally in answer to questions in connection with account 244.

Q. Did you get everything that you asked for?

A. Yes, sir.

Q. Do you think that you asked for anything and everything that you were under any obligation to ask for, if you were going to question the account?

Mr. Austin: I object to any answer to that question as the question being incapable of an answer which would have any relevancy. It is more argumentative than anything else.

Trial Examiner Ballinger: The objection is overruled.

The Witness: I think I went into it sufficiently, yes, sir.

By Mr. Hanley:

Q. I refer you to account 520, Annuities account; did you ask for any documentary evidence in connection with that?

A. Yes, sir.

Q. Did you get it?

A. Yes, sir.

Q. You got all the facts about that—you got a book about it?

A. Several of them, Judge Hanley.

6902 Q. You did, did you not, Mr. Warmack?

A. Yes, sir. I got a whole lot.

Q. Did you ask for anything in connection with that account that you did not get?

A. No, sir.

Q. State then just exactly what do you mean by your repeated statements, one of which was just read to you a few moments ago, that you did not get any documentary evidence in connection with any of the accounts on form 189?

A. I meant the accounts which were allocated on form 189 on the basis of a gallonage factor.

Q. Now, is it not true that some of these leased accounts—well, let us go further than that—some of these last accounts that we have just mentioned are allocated partly on all methods of allocation used by the Respondent including gallonage?

A. I do not understand your question.

Q. Perhaps it was a little confused: I will repeat it. Is it not true that some of these last accounts I just mentioned are allocated partly on all methods of allocation used by the Respondent including gallonage?

A. That is true, as I understand it. I am not questioning any of those accounts that we have been just speaking about except account 520.

Mr. Hanley: Will you read the question to the 6903 witness again, please?

Trial Examiner Ballinger: You may answer the question.

(The reporter read the question.)

The Witness: Was my answer not sufficient, Judge?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Back on the record.

No, you did not answer the question sufficiently.

The Witness: Perhaps I did not understand the question.

Trial Examiner Ballinger: Read the question again to the witness.

Mr. Hanley: I will repeat the question.

By Mr. Hanley:

Q. Is it not true that some of these last accounts I have just mentioned are allocated partly on all methods of allocation used by the Respondent, including gallonage, Mr. Warmack? You can answer it "yes" or "no"?

A. I am sorry, I will have to have the question read again.

Trial Examiner Ballinger: Read the question again.

(The reporter read the question.)

The Witness: Yes, in some part.

By Mr. Hanley:

Q. Well, that is true specifically of accounts 243, 6904 244, and 520; is it not?

A. Yes, sir.

Q. And you have just said that you got quite a little documentary evidence in connection with those accounts?

A. Yes, sir.

Q. All you asked for?

A. Yes, sir.

Q. And were refused none?

A. That is correct.

Q. And they were, in substantial part, allocated on a gallonage basis, were they not?

A. Not directly as such, no; they followed the allocation of the other accounts which had been allocated on a gallonage basis.

Q. Well, it follows that they were supported by a gallonage allocation procedure; is that true?

A. No. It just happened to be allocated on the basis of other salary costs which they, themselves, the other salary costs had been allocated on a basis of gallonage, and that basis of gallonage is the thing that I have been all of the time asking for and never did get any facts to support it with.

Trial Examiner Ballinger: That is not an answer to the question.

Read the question to the witness.

6905 (The reporter read the question.)

Trial Examiner Ballinger: Proceed.

Mr. Hanley: Perhaps I had better ask the witness the question in another way.

Trial Examiner Ballinger: Question withdrawn.

By Mr. Hanley:

Q. I do not want to argue this with you, Mr. Warmack, but from an accounting standpoint, if part of these accounts were allocated because that allocation followed another account which was allocated on a gallonage basis, would not it necessarily and arithmetically follow that a part of these accounts was allocated on a gallonage basis?

A. Yes, sir.

Q. Now, if you can explain your testimony, I wish you would do it, to the effect that you did not get any documentary evidence supporting or giving information about any of these accounts on form 189; you have testified to that a good deal, a good many times, categorically. Now, if you want to correct it, all right, Mr. Warmack.

A. Only if such a statement appears inadvertently in the record. I never secured any documentary evidence of any kind which supports, on form 189,—I fail to understand your statement, Judge Hanley. I most assuredly did receive much documentary evidence supporting many of the allocations made of accounts on Respondent's form 6906 189, and there was much documentary evidence requested which would support allocation factors for the separation of accounts on form 189, which I did not get, which I requested many times.

Q. Now, in respect of gallonage and many other things in the way of allocations treated in the study of the Respondent as represented by exhibits—Respondent's Exhibits 99, 100, and 101, I will ask you to just take a look at this folder of forms, and ask you if you recognize any of them as having been supplied to you in filled out condition in Detroit and in Chicago or both?

A. May I see the accounts?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The reporter will mark the documents handed him by counsel for the Respondent as Respondent's Exhibits Nos. 109-A to and including 109-Z-20.

(The documents referred to were marked Respondent's Exhibits 109-A to and including 109-Z-20 for identification.)

By Mr. Hanley:

Q. Mr. Warmack, the bundle of blank forms which you have been examining and which has been marked by the Reporter, Respondent's Exhibits 109-A to Z-20, inclusive, for identification, have you examined those documents

6907 sufficiently now to answer the question?

The Witness: May I have the former question read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I do.

By Mr. Hanley:

Q. From an accounting standpoint when forms of that character, and of the character of any of those exhibits, are filled out with the material which they are designed to receive, would you call them documentary evidence?

A. Yes, sir.

Q. Mr. Warmack, you are familiar, are you not—Mr. Warmack—with the account series 3,000 and 7,000 used in the Respondent's regular accounting form 189?

A. Yes, sir.

Q. Where there are several accounts on form 189 where part of the charges were made direct to channel, part to account 3,000, and split between tank wagon reseller and tank wagon consumer, and part to the 7,000 series of account, which was allocated on an all-gallonage basis—

A. Is that a question or a statement?

Mr. Hanley: I was going to ask, were there?

The Witness: I am afraid I have lost the trend of your thought.

Mr. Hanley: All right. I will repeat the question.

6908 By Mr. Hanley:

Q. Were there several accounts on form 189 where part of the charges were made direct to channel, part to account 3,000, and split between tank wagon reseller and tank wagon consumer, and part to the 7,000 series account, which was allocated on an all gallonage basis?

The Witness: May I have that again, please?

Trial Examiner Ballinger: Read the question to the witness again.

(The reporter read the question.)

The Witness: Yes, that is correct. You used the term "all gallonage"; in that instance, with respect to the separation of the 7000 account, to mean bulk plant gallonage, not including direct shipment gallonage?

By Mr. Hanley:

Q. That is right, Mr. Warmack, that is right.

A. Yes.

Q. Did you review such accounts and such classifications of expense items thereunder?

A. Some of them, yes, sir.

Q. Did you differ with any of the direct charges?

A. No, sir. I never did.

Q. Or did you differ with any?

A. No, sir. I never made any analysis. I naturally assumed that they were applied properly.

6909 Q. Did you differ with any of the charges made in the 3,000 series?

A. I questioned the propriety of the gallonage allocation factor in separation because of the fact, as I have stated, that I have seen no documentary evidence which would or will substantiate the gallonage factor as the basis for separation of the accounts, or the accuracy of the results of the use of such a factor.

Q. What class of expense items are to be found in the so-called "7000 series of accounts"?

A. Those are what the company terms "general pro rata accounts" which are separated between the tank wagon reseller column and the tank wagon consumer column, and other methods, on Respondent's form 189, on a basis of all gallonage; that is, the gallonage falling—that is the ratio of the gallonage falling in each of those columns to the total bulk plant gallonage.

Q. Did and do the field offices of the Respondent company follow the code of accounts in their bookkeeping methods?

A. Yes, sir.

Q. Where, if you know, are those codes of accounts written and prepared?

Mr. Austin: I object to that, your Honor—I withdraw the objection.

Mr. Hanley: It is a foundation question.

6910 The Witness: It is my understanding that they are prepared in the general office, Judge Hanley.

By Mr. Hanley:

Q. Did you meet the manager of the marketing department—of the marketing accounting department while you were in Chicago?

A. Do you remember his name?

Q. King; F. L. King.

A. Yes, sir. I met him.

Q. Did you ask Mr. King for what you have termed a factual and objective cost study or analysis in respect of any of these series of accounts?

A. I remember contacting Mr. King on two or three occasions. The requests made of Mr. King, of course, were made through Mr. Houghton. I do not remember that I personally asked Mr. King for this particular material, in person. I might state that all of the requests, your Honor, made for this information, for the most part, were requested through Mr. Houghton, who was the accountant from the Chicago office, and who stayed with me almost continuously during my field investigation.

Trial Examiner Ballinger: He was placed at your disposal, was he not, to assist you?

The Witness: Yes, sir, and practically every request was made to Mr. Houghton.

In many instances, Mr. Houghton would contact
6911 others in securing the requested information which I had requested, but in some of those instances I would discuss with the other people of the company whom I contacted in that manner, the matter. Mr. Houghton was always present when such discussions, as they came up in Chicago, took place, but he was not present at all times in Detroit, due to the fact that Mr. Houghton could not be in Detroit quite all of the time that I was there making the study that I spent, making there, at least.

By Mr. Hanley:

Q. Mr. Warmack, is it not true that you have and do question the propriety of a gallonage allocation for each account so segregated where the Respondent has used that account as a part of or as a basis for a cost differential as represented by Respondent's Exhibit 101?

A. I question the use of it, Judge Hanley.

There are a few of those accounts that were small which I just did not go into materially, but I think the question of usage of the gallonage factor in separating costs between the three bulk plant channels, and where the bulk plant gallonage is used, in view of the fact that I have not as yet been able to find any information which, in my opinion, will substantiate the use of the gallonage factor.

Q. From your knowledge as an accountant, what is your judgment as to whether or not the gallonage method
6912 of allocation is always subject to confirmation or
lack of confirmation by a so-called "factual and objective cost study"?

The Witness: May I have that question, Judge?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Judge Hanley, I just do not exactly understand what you are meaning there. Will you please—?

Trial Examiner Ballinger: (Interposing) Do you not understand the question?

The Witness: Not exactly.

By Mr. Hanley:

Q. In answering the previous question, Mr. Warmack, you stated that you questioned and criticized the method of the Respondent—that you criticized the practice of the Respondent in its use of a gallonage allocation in respect of accounts, which accounts were used as the basis for the cost differential; that is the question you just answered.

A. Yes, sir.

Q. Now, I am asking you if, in your judgment as an accountant, it is always possible to confirm the propriety of such an allocation by an objective and factual cost study? I will split this question now. I am just asking you if it is always possible to confirm.

A. Well, I would still think I would have to interpolate
the question, Judge Ballinger, if I may ask a question
6913 of counsel—?

Trial Examiner Ballinger: You may, to clear your mind.

The Witness: Is it your question, Judge Hanley,— is it always possible to establish the accuracy of a gallonage basis factor, or the accuracy of the result by the use of some one, in other words, of the same, when used in the separation of costs by an objective and factual cost study?

By Mr. Hanley:

Q. I think that would be certainly one of the factors included in the word "confirm" and you may answer the question on that basis if you can.

A. The answer is that I do not know. Every case would have to stand on its own.

Q. Do I understand your answer to mean that you do not know, as an accountant, whether or not it is always possible to establish the accuracy of the method and the accuracy of the results—that is all inclusive, Mr. Warmack.

A. Well, you are asking me always—

Q. That is the point of the question.

A. That involves every industry in the world?

Q. Yes.

A. I could not answer the question, Judge Ballinger. If he will confine his question to one particular group.

Q. I am asking you, as an accountant if you can
6914 always confirm the accuracy of a gallonage method of allocation, and confirm the accuracy of the results obtained by that method of allocation.

Trial Examiner Ballinger: Do you mean where the product is being sold by the gallon?

Mr. Hanley: By the gallon, surely.

The Witness: My answer to that would be: In my opinion, ordinarily yes; I cannot conceive of a situation where that would be—I will put it this way, I can conceive of a situation where that would be quite a difficult problem.

By Mr. Hanley:

Q. I will ask you, to just reverse it. I will ask you just the reverse of that, now. Can you always confirm the lack of accuracy of the method and accuracy of the result obtained by the use of the gallonage allocation process?

A. The same answer just given would apply to that situation.

Q. Would not both of your answers just given be true in connection with expense items of the following character, we will take first, the president's salary.

A. I certainly do not know.

Q. Do you know this, whether you know or could not—

A. (Interposing): Not if it were made to state—

Q. —definitely confirm the accuracy of that method of allocation in connection with the president's salary?

Trial Examiner Ballinger: Off the record.

6915 (There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Read the question.

(The reporter read the question.)

Mr. Hanley: I will withdraw that question.

Trial Examiner Ballinger: Read the previous question to that.

(The reporter read the question as follows:

"Q. Would not both of your answers just given be true in connection with expense items of the following character, we will take first, the president's salary.")

The Witness: That means?

By Mr. Hanley:

Q. That means with a study.

A. May I say this, your Honor, do you mean the all-gallonage sold by your company including direct shipment gallonage, or does that mean only the bulk plant gallonage which we are quarreling with here?

Q. Well, take it first—bulk plant gallonage.

A. I do not know. I certainly do not think you could apply all of his salary on the basis of bulk plant gallonage and say that no part of it would apply to direct shipments.

Q. I am sorry, but that is not an answer to the question.

A. I am sorry.

6916 Q. The question is: Can you, with a study definitely confirm the accuracy or the lack of accuracy of the gallonage method of allocation, and the results of that method of allocation—and the accuracy of the results?

A. Not having made the study, I am unable to answer your question. Only a study would afford information with which the question could be answered.

Q. Mr. Warmack, I am examining you now as an expert accounting witness. You can forget the Standard Oil Company, if you want to use, in the use of gallonage, think of vinegar being made by some pickling company, or anything sold on a gallonage basis.

Can you always, as an expert accountant, in your judgment, confirm the accuracy or the inaccuracy of the method and the accuracy or inaccuracy of the results of the gallonage method by a study, even if you made it?

A. I certainly do not know in any given instance. You asked me always, that would mean every industry in the world, and I could not know that.

Q. Do you not know—

Trial Examiner Ballinger: (Interposing) Within your knowledge.

The Witness: Knowledge of what, your Honor?

Trial Examiner Ballinger: Knowledge of existing industries.

6917 By Mr. Hanley:

And knowledge of accounting.

A. I answered—I do not know—and that is my answer.

Q. Then, if I understand your answer, if some accountant were to say to you:

"Well, you can always establish the accuracy of the method and the accuracy of the results or the inaccuracy of the method and the inaccuracy of the results,"

You would not dispute it, you would say:

"I do not know whether you are right or wrong."

Would that answer mean just that, is that what you intend to testify?

A. I was asked this hypothetical, conjectural question, and in answer to this statement that you have just made, I would say that I would ask that person:

"Did you make a study of every situation in the world?"

Q. Well, this is rather fruitless, I am afraid, Mr. Warmack, but perhaps I am not making this clear.

I will try, or at least I am trying to find out what you believe and what your judgment is as to whether it is possible to judge of the accuracy of these methods and their results, always, even if you make a study, as I am sure you will agree it is possible to judge of the accuracy of the 6918 addition of two and two equalling four—do I make it any more clear to you?

A. Excuse me just one minute, Judge.

(The witness examined the documents.)

Mr. Hanley: Is that a confusing question, Judge?

Trial Examiner Ballinger: It is clear to the Examiner.

The Witness: Now, will you please read the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. Well, this is rather fruitless, I am afraid, Mr. Warmack, but perhaps I am not making this clear.

"I will try, or at least I am trying to find out what you believe and what your judgment is as to whether it is possible to judge of the accuracy of these methods and their results, always, even if you make a study, as I am sure you will agree it is possible to judge of the accuracy of the addition of two and two equalling four—do I make it any more clear to you?")

The Witness: Judge, you may understand it, but I do not. I do not understand it.

By Mr. Hanley:

Q. Very well. We will abandon it for the time being, Mr. Warmack. Perhaps we can get back to it some other way.

6919 A. Yes.

Q. Mr. Warmack, you were asked at page 5941 by counsel for the Commission the following questions:

"Q. Can you name or give us an example of an expense of a nature which may, in your opinion, properly be allocated on a gallonage basis between channels for the purpose of a cost study such as that prepared by respondent in this case, covering 1940?").

And you answered:

"A. Certain classes of managerial cost may be allocated there; they may be. Certain classes of advertising cost may be allocated there, properly, and it may be the very best allocation that you can arrive at regardless of how many studies you may make."

Did you ever hear that question and did you give that answer to that question?

A. Yes, sir. I was asked that question and I certainly did give that answer.

Q. What have you to say to such things as the salary of the president, vice-president in charge of sales, general manager of sales, and assistant general manager of sales, and field manager, assistant field manager, and plant agents of A-Stations in the organization of the Respondent company, in the light of your testimony, when their salaries are allocated on a gallonage basis?

6920 A. That depends upon what gallonage you are talking about. If you are talking about an all-gallonage, every gallon that the company sells, if you are, it affords no cost differential and there is no need to put it in. Now, if you are talking about bulk plant gallonage, that is a different matter. I would just have to know what you are talking about.

Q. Are you prepared to say that the gallonage used in the allocations by the respondent company in allocating those salaries may be the best allocation that can be arrived at regardless of how many studies may be made, and that latter is paraphrasing your own language.

A. That is very correct, and I subscribed to it, but for you to know that, you have to make the study.

Q. Are you prepared to say they were not?

A. I am prepared to say that I have no documentary evidence and I asked for it many times, and I did not get it. I asked for evidence and I got nothing.

Q. You still say you got no documentary evidence?

A. Not on gallonage allocation. That is what I am talking about. Whenever I have said I did not get any documentary evidence I mean supporting the gallonage allocation. I simply did not get anything whatsoever. I drew a blank.

Q. Did you inquire whether studies of possible alternate methods of allocation had been made and rejected in an effort to find better methods or means of allocation
6921 than the gallonage basis?

A. I asked many times for documentary evidence, I asked for anything. I asked them to give me anything you have done of any kind whatsoever, and I got nothing with respect to gallonage.

Q. Mr. Warmack, has nothing in this case convinced you of anything in connection with Respondent's accounting, and would nothing in this case convince you of anything in connection with Respondent's accounting except something which was, you say, written on a piece of paper? You have used the phrase "documentary evidence" so often that I just wonder if you got any information while out in Detroit except what you read; is that true?

A. No, sir. I got much information.

Q. Did you discuss this gallonage question with Mr. Boatwright and Mr. Houghton and other people, in Detroit?

A. Certainly I did, but the mere fact that they may have stated to me that they thought it was the company's best judgment would not be convincing to me. I asked them to give me something that was definite, something that I could put my hands upon—I got nothing.

Q. Did you talk to them hours at a time about it, Mr. Warmack?

A. I do not know how long I discussed it with them.

6922 Q. Do you not know that over the course of many weeks you discussed this matter with them hour upon hour upon hour?

A. I should imagine that we discussed it at considerable length, but as to the identical amount of time that we discussed it, that I could not tell you.

Q. Did not they explain to you what the practices of the company had been and were?

A. Yes, sir.

Q. With respect to constantly making studies?

A. Well, I was always saying: "Show me something, some information in the way of a report, in the way of tabulations, anything that was written on paper, a piece of paper with some writing, or many pieces of paper," and I got nothing with respect to the gallonage allocation factor.

Q. Have you, yourself, ever made two or more studies of means of allocating a given expense item, getting different results for each method, and then exercising your own judgment as to which method is the most appropriate?

A. Yes, sir. I have done that, but I always had papers to show what I had done.

Q. You always have papers to show what you have done?

A. Well, I have them at some time, if I make the calculations, yes, sir.

Q. I hope you can find the papers that support the calculations that you made this morning, and which we have asked you to supply us with, Mr. Warmack.

6923 A. They are here. (Indicating certain papers.)

Q. Was it not explained to you by the gentlemen in Chicago and Detroit that they were constantly testing alternate methods?

A. Yes, sir. I asked them to show me the papers that they used for testing just one, and they could not show me them—on the basis of gallonage allocation factor.

Q. Is it possible, Mr. Warmack, that they do their accounting rather differently from what you do, yourself, and that they just were not showing you what seemed to be convincing to you?

A. No. They did not show me anything in the way of supporting the gallonage allocation factor. But I know that they were making plant records and all sorts of records—plenty of records in both Detroit and Chicago. Now, what kind of records they were, I am not prepared to say.

Q. Did you not look at them?

A. No.

Q. Was there any record in Detroit that you wanted to look at that was not immediately shown to you?

A. I was furnished, Judge Hanley, with everything I asked for, except what Mr. Houghton and others of the company stated were non-existent, and I certainly believed that everything they insisted upon was so; that everything that existed was furnished to me that I requested.

6924 Q. Is it not possible, Mr. Warmack, that the documentary evidence in respect of gallonage was in the records and current accounts of the company, and it just took an accountant to figure out what they meant?

A. Well, will you show me which one of these exhibits you refer to?

Q. Will you answer the question?

A. If you will show me there on any one of them where they appear, I would like to see it.

Q. Will you please answer the question?

A. I—

Trial Examiner Ballinger: (Interposing.) Strike that answer.

The reporter will read the question to the witness and the witness will answer the question.

(The reporter read the question.)

The Witness: May I have it again?

Trial Examiner Ballinger: Read the question again to the witness.

(The reporter again read the question.)

The Witness: Yes, sir. They may have been in the records of the company, if they were there Mr. Houghton knew nothing about it, and I am convinced that he knew nothing about it; in the current accounts of the company, I am convinced that they were not there.

6925 By Mr. Hanley:

Q. You looked?

A. I looked.

Q. Is it possible that you did not recognize what you were hunting for?

A. Well, I am sure that I would have recognized any information worked up to support a gallonage factor if it had been in any records reviewed by me; and I am sure Mr. Houghton would have recognized it.

Q. Out of the many, many records that were in Detroit—all of which you had an opportunity to look, and many of which you say you did look at—did you undertake, yourself, to make any test at all as to the propriety of this method of allocation?

A. Naturally, in my cost studies I was endeavoring to make every test possible with respect to those things; that is, tests that could be made with the information available to me.

I could only make a test of a gallonage factor—that is, a test of the propriety of the use of a gallonage allocation if I had something to test it against. In view of the fact that I did not hear the Respondent offer or indicate any alternate measuring factor, I certainly did not undertake, in my studies, to establish a measuring factor. Whatever tests that may have been made certainly were very limited, either made here or there, or in Detroit.

6925 Q. Did you not do any independent work out there? Did you depend on Houghton for everything, Mr. Warmack?

A. I did not go out there to prove the company's case on a cost differential.

Q. You went to disprove it, did you not?

A. No. I went out there to see if you were doing this right, and to check up on two or three of the accounts, and I arrived at a decision here, even before I went to Detroit—I am speaking to you very frankly.

Q. Mr. Warmack, will you answer my question, please?

Trial Examiner Ballinger: Read the question to the witness and the witness will answer the question.

(The reporter read the following question to the witness:

"Q. Out of the many, many records that were in Detroit—all of which you had an opportunity to look at, and many of which you did look at—did you undertake, yourself, to make any test at all as to the propriety of this method of allocation?")

The Witness: No, I did not go out there to disprove it, which I take to be the basis of the question you are asking me—I went out there to get the facts.

By Mr. Hanley:

Q. Did you do any independent work in your effort to arrive at conclusions on facts after you got there?

6927 A. Independent of what?

Q. Independent of Houghton. Did you take the records of the company as they were offered to you and have been offered to you since this lawsuit, and do any arithmetical work of your own?

A. Yes, sir. I analyzed many of the accounts myself.

Q. Now, have you determined upon any better method from the standpoint of sound accounting—from a sound accounting standpoint, in respect of all these accounts where the company has used the gallonage method, or where the company has used other methods, and have you a factual and objective cost study to support it if you did do that?

A. No, sir; I certainly did not do that. I just undertook in my study to determine how you made your separations. As far as establishing a proper measuring factor for the company that was not what I undertook in my study in the field, in this case, to do.

Q. You said a moment ago, Mr. Warmack, that you had had experience in making two or more studies with reference to allocating an expense item and getting different results from different methods, and then exercising your judgment as to which method you thought was most proper; do you remember that?

A. Yes, sir.

6928 Q. Do you remember that question and your answer?

A. Yes, sir.

Q. And your answer was, yes, that you had?

A. Yes, sir.

Q. Now, Mr. Warmack, do you regard that method that you used as a proven method even though another accountant might have reached another conclusion based on his judgment, the results of his study being different from the results of your study?

A. Yes, sir.

Q. That is a fact?

A. Yes, sir.

Q. That is to say, that if you decided it was appropriate, that it was proven, that is what your answer would intend?

A. Yes, sir, but I would like to explain that answer a little.

Q. I am not asking for an explanation. I just want an answer.

A. The record stands blank if I do not explain my answer.

Q. You have answered my question to my satisfaction.

Mr. Austin: But not to the satisfaction of the witness.

Trial Examiner Ballinger: The witness may explain his answer.

The Witness: The study that I had reference to, and that I have in mind, and that I had in mind a moment
ago was a study with respect to an allocation made
6929 of manufacturing costs when I was engaged in the
public practice of accounting.

There were some of those costs that were so broad that they were spread one way, and some that were spread another way. Sometimes we used man hours to spread some certain costs. Again, we would use machine hours. Sometimes we would use the combination of the two. We came down to just the most accurate thing that we—and when I say "we" I mean the group of accountants that had this thing under consideration there—that was the most accurate.

Trial Examiner Ballinger: Who is going to determine the accuracy of this, which accountant? Each accountant as he goes along?

The Witness: Your Honor, the accountants discuss these things, if your Honor please, if they want an accurate result, among themselves, and come down to the most accurate thing in the opinion of the group of accountants, considering the cost situation.

Trial Examiner Ballinger: Well, has this question as to the allocation upon a gallonage basis or upon a per-hour basis, one whichever has been decided by accountants?

The Witness: Yes, sir.

Trial Examiner Ballinger: And was any decision or conclusion ever arrived at?

The Witness: Well, Judge, we have — I think maybe the situation is wholly misunderstood. For the 6930 purpose of establishing an accurate figure, from an accounting standpoint, it is a—

Trial Examiner Ballinger: (Interposing.) Mr. Warmack, are you going to answer my question?

Read the question.

(The reporter read the question as follows:

"Well, has this question as to the allocation upon a gallonage basis or upon a per-hour basis, one whichever has been decided by accountants?")

The Witness: I would like to hear it again.

Trial Examiner Ballinger: Read it again.

The Witness: I was trying to answer that, your Honor.

Trial Examiner Ballinger: Has there ever been a study of that kind?

The Witness: That has been studied and studied and studied and is still being studied.

Trial Examiner Ballinger: Then a conclusion has not been arrived at?

The Witness: With respect to what conclusion?

Trial Examiner Ballinger: As to what was the most accurate.

The Witness: With what?

Trial Examiner Ballinger: Whether or not the 6931 adoption of a gallonage basis or a per-hour basis would arrive at the most accurate conclusion.

The Witness: The cost study will only show, your Honor, and that was what I was trying to explain. I am sorry, we just cannot, as accountants, your Honor, pick up some ready factor and say, "This is it," and feel that we have the actual accurate result. The problem has got to be studied, the measuring factor must be established. It may be that the study will show that the gallonage factor is the right factor, it may not.

Trial Examiner Ballinger: Mr. Warmack, what is bothering me and what I cannot understand is this, just who is going to decide.

Mr. Hanley: That is my question, when it is finished, then who is going to decide?

Trial Examiner Ballinger: Just what accountant is going to decide it, if he must, who is going to establish the rule among these various accountants, or is there an established rule among accountants which governs cases of this kind?

The Witness: There is an established rule, I believe, among all accountants that a reasoned study or studies are much better than guess work or rough estimates.

Mr. Hanley: Or what?

The Witness: Rough estimates.

Trial Examiner Ballinger: Forgetting about your
6932 rough estimates, if you have accurate facts as to
time, accurate facts as to gallonage, who is going
to determine which would arrive at the most accurate conclusion as to the allocation of cost?

The Witness: Well, in this case it will be the Federal Trade Commission.

Trial Examiner Ballinger: I did not ask you that. I asked you if that was not dependent solely upon the conclusion of the accountant that made the, or prepared the account.

The Witness: Well, I would say it would seem that it would. If I prepared the cost statement, why, I am sure that that cost statement would reflect my views as to the extent that I had covered the particular situation.

Trial Examiner Ballinger: Mr. Warmack, take the case at bar. Suppose you had actual facts disclosing the actual number of hours each man in connection with the organization worked in each particular channel, and on the other hand you had the actual gallonage basis and gallonages, and one line led to one conclusion and another line led to another conclusion, who would determine which conclusion was the correct one?

The Witness: Well, I assume, Judge, that is why they have accountants. They have to make a study based upon their experience and talent as accountants to determine by
reasoning, giving effect to the application of sound
6933 accounting principles just how to make these separa-
tions and the only point that I have been trying to make throughout this case with respect to this gallonage allocation factor is that it is just used here and I have never been able to learn why it has been used, and what the basis for it is, except that they just use it and that is that.

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Mr. Warmack, you made a long hypothetical—or a long answer to a question which I asked you some little time ago in which you undertake to explain what you did at one time when you were a public accountant working with other accountants in some machine company, and you said you finally got down to a point where your group decided, after investigating different methods, that you had found the one that was most accurate.

Do you recall you made that statement?

A. Yes, sir, when they were through, the one that they thought was the most accurate.

Q. That, you did?

A. Yes, sir.

Q. Were you intending to explain your answer to me when I asked you when you thought the thing was proven by saying that you then thought that was a proven conclusion?

A. That is what I had in mind, yes, sir.

6934 Q. Would you so regard it?

A. I would regard the analyses and studies that were made. I would regard that as sufficient evidence of the allocation factor to base the allocation factor upon, and any figures resulting from the use of that allocation factor, I would think would be proven as correct as it is possible for accountants to make them correct.

Q. Now, how many accountants worked on that?

A. Oh, I do not know, a group, a large group.

Q. How many, roughly?

A. Four or five or six.

Q. How many and how long did you work?

A. All of them, and they worked on this thing, we made a study in our office of the system to be installed in the company.

Q. Well, a week or two weeks, or a month or two months?

A. I would say about a month.

Q. You were satisfied and regarded it as proven, as you use the word, that you had found the most accurate and best method of allocation when you rendered your opinion finally?

A. Yes, sir. We thought we did.

Q. Now, assuming a business—this is another question assuming you discussed among your own group the propriety of these various methods and their accuracy as to which would give the better results and more illuminating facts—

6935 A. (Interposing.) Well, those things are always discussed, of course.

Q. —in the Respondent's company, which had some fifty years of age, and in which some two thousand accountants work handling these accounts all the time, based upon what you have just said about your own experience, and as to the actual time that you put in; if those same two thousand accountants over a period of many years have discussed the affairs and accounting business of one organization and have agreed upon a method as being the best, having discussed it, as you say accountants do when they are confronted with alternate methods of solving the problem, would you then say that that method, as arrived at by that group of accountants, was proven or was not proven?

A. Well, I would have to inquire. Do you mean that they would talk about these things without ever having made a study whereby tabulations were made, and comparisons were made, but they would just talk about this matter all among themselves?

Q. No. Examine their records and handle their records. You saw the accounting department of the Standard Oil Company in Detroit; you saw it in Chicago, you saw the research department?

A. I did not see them, Judge Hanley, making any comparisons of the factor either of a gallonage allocation or some other allocation.

Q. You do not think they all loaf all the time, do you?

6936 A. Oh, no, indeed.

Q. Well, now, won't you answer the question fairly and honestly, Mr. Warmack?

A. I certainly will try.

Q. If they concluded, that group of accountants, and based on their knowledge of their company's business, and on the basis of attempting different methods of allocation, that the particular method was the soundest and most productive of accurate results, in your judgment as an accountant, is that proven or is it not?

A. Well, the extent to which they went to make these checks, and the checks would depend largely upon whether, in my opinion, it was proven or whether it was not proven.

What I am interested in is just what tests were made, and that is the one point that I have never been able to learn.

Q. Well, the extent to which they went, the amount of work that they have done, the attention that they have given it, these two thousand odd men over many years, do you think is comparable to the work that your group of four or five accountants did in perhaps one month?

A. We had a specific case, and it was not even comparable at all, the two situations are not comparable.

Q. Do you know what I am asking you, Mr. Warmack?

A. I know, yes, Judge, and if you have an answer to the question coming to you, let me say to you frankly

6937 that you have many, many accountants in your department in Detroit and Chicago that do not have a single thought in their minds about whether you are using a gallonage allocation or some other allocation. I doubt if, they, certainly, if they know what you are doing about it now, and they are just going along day in and day out without discussing it at all. I doubt if they know that you even have such a proposition, many of these accountants. Let us be fair about it.

Q. Oh, I doubt it also.

A. This allocation factor—

Q. I doubt it, too, if you please, Mr. Warmack, but this all goes into the research department of the general accounting office, from these accountants in the open, who are constantly keeping records and making reports, you understand it, do you not, Mr. Warmack, and you know what I have in my question, you understand what I mean.

A. Well, I understand that they are making reports, Judge, but they are not all studying this gallonage allocation factor all night and all day and tearing their hair.

Q. My question now is: Would you regard that as a proven thing?

A. Regard what?

Q. Their settled conclusion as to what is the most accurate method of allocation to produce the most accurate accounting results?

A. Why, if your company never made a comparison of a study to determine that the gallonage allocation is

6938 proper, I certainly could not say that it is accurate, or that it would afford accurate results.

Q. Do you just say that they just did not make any studies, do you not know that they did make many of these studies?

A. I do not know anything of that kind at all. As a matter of fact, I do not believe they ever did. I know positively that I asked for it and they never showed it to me.

Trial Examiner Ballinger: Judge Hanley's question presupposes that they did make such a study.

Mr. Hanley: I have been presupposing that, Judge, for days, and I can only say that they have made those studies and that we have proved it.

Trial Examiner Ballinger: If they did make the study and reached the conclusion, would you say that that was a proper study and a proper conclusion to be followed by the company?

The Witness: I do not know, Judge, just what is meant by "study" as he is now using it.

Mr. Hanley: You should know.

Trial Examiner Ballinger: Judge Hanley's question presupposes that they have gone into all the different ramifications, and as a result of that, had reached the conclusion and his question was as to whether or not you would consider that conclusion a proper conclusion for the company to adopt, and a proper conclusion for the United 6939 States Government to respect.

The Witness: Judge, Judge Hanley, if the Respondent company will produce information showing what they did, I will be in a position to answer the question, but up until this time I have never been able to get any information. I have never seen one thing.

Trial Examiner Ballinger: Just forget about what they did, and assume that they did a proper job.

The Witness: In my opinion, a proper, thorough, factual and objective cost study to prove that the gallonage allocation factor was correct and the results to be used, if it were accurate, if we assume that they did that, and they arrived at the fact that the gallonage allocating factor was correct and could be used in every instance that it has been used, I certainly would say that that is satisfactory.

By Mr. Hanley:

Q. All right. Now, assuming you looked at it and disagreed with it, as you have, what do you say as to whether or not it is proven?

A. Well, if I do not agree with that, I most certainly would say so and I think I would have to see it before I could agree or disagree with it. I have never seen it.

Q. You have been looking at a substantial part of it for six months, Mr. Warmack.

6940 A. If there is any part of this Respondent's Exhibit 100 that proves or substantiates the gallonage allocation factor, then I certainly do not know what page it is on, and I have read every page in there many times.

Q. Going back to this "proven" thing in just one more question, assuming that you arrive at a conclusion after considering different methods, just a conclusion as to the method being the appropriate one to use, and assuming further that another accountant looks at your studies and he concludes that a different method is more appropriate and accurate to use, and there are just two of you, and you are in disagreement, which of the methods is proven?

A. Not necessarily either one.

Q. Which do you regard as being proven?

A. We have just stated—you do not like the "we," I have just stated I could not say either one. You are talking about a hypothetical situation.

Q. How would you go about proving the method in that situation?

A. And we have all of the basic material before us?

Q. Yes, assume that.

A. On which to make all of the numerous tests and calculations, then we would have to sit down and reason it out between us.

Q. Suppose you have done that, suppose you have made
the tests and actually made a study and do not fall
6941 in with him at all, but that you are really trying to
build up a study, and reach a conclusion, and you are not trying to tear down something as you were when you were in Detroit—

A. (Interposing.) I was not trying to tear down something in Detroit. I was trying to study this so-called allocation of yours.

Q. You were trying to reach a conclusion, now, assuming all of that, now, you are in disagreement—is it proven?

A. Is what proven?

Q. I say, either of those methods, is your answer the same—you said not necessarily.

A. Well, I do not know how to answer that.

Q. After assuming all of these things you want to assume that you reached a conclusion and the other fellow reaches a conclusion different from yours, which of those methods is proven?

A. Well, not necessarily either one of them.

Q. How do you go about it from there on to prove it?

A. Assuming the hypothetical situation which you have just told us of two accountants, the two accountants should sit down and reason the situation out, and if they cannot do it, then they will have to call in some other accountant and have him study the whole thing, because of those two accountants could not agree, then they would have to call in another accountant to settle the matter, and that is
5942 exactly what was never done in the case here. They never made the study.

Trial Examiner Ballinger: Is not the conclusion in part an arbitrary solution?

The Witness: I rather think not, Judge, I would not call that arbitrary. I think it is just a sound reasoning between men who have made a life work of these things to the extent of learning how other men do them.

By Mr. Hanley:

Q. Would it be a matter of reasoning and give and take, and more or less the adoption of arbitrary formulae and more or less cut and try until you found the best result; is that not true?

A. The last part of your statement is very true. I certainly do not subscribe to anything arbitrary, going out and picking up something. I think you just cut and try until you get the problem solved.

Q. Now, can you state what you did? I will make it clear; in your study and in your effort to find out something about gallonage in Detroit and in Chicago, Mr. Warmack, did you inquire into the standards of the methods used by the Respondent to increase or decrease its sales personnel?

A. I think that was gone into by some of the supervisors in Detroit. I believe Mr. Hamer told us something about that.

5943 Q. Well, what was the method or standard used?

A. I do not remember, Judge Hanley.

Q. Did it have anything to do with gallonage?

A. I think that the point that I gleaned from what was discussed on those things was to find a good man, and then to test him and see that he did good work, and if he did not do good work, another man would have to be assigned to his job.

Q. Oh that is not what I am asking you and you know it. I am asking you as to the basis as to how much they would use in the method of employment as to personnel; certainly, I am not asking you as to the basis on which the individual man would be hired, advanced, or fired. I am asking you what standard or method or control is used by the company in determining company policy as to whether the sales force will be increased or decreased in the case of a given locality, or overall.

A. Oh, I never inquired into that matter.

Q. Did you not think it was of some importance to learn whether that had any relationship to the gallonage volume?

A. If I had been undertaking to make your justification cost justification, I certainly would have inquired into it.

Q. Did you make any inquiry into, and do you know anything about the correlation between the number of salesmen in the various twenty-eight fields and gallonage?

6944 A. No. I did not study that.

Q. Well, do you know anything about it?

A. Judge Hanley, if I did not study it I could not know anything about it, except in the Detroit field.

Q. Did you not think that of some importance on this question as to the propriety of the use of gallonage as an allocation factor?

A. I asked your company over and over again to give me that information and if they wanted to give it to me they could have.

Q. Will you please answer the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: It might have. I would have been glad to have that information if the company would have given it to me.

Trial Examiner Ballinger: Mr. Warmack, you say it might have, can you not be definite?

The Witness: Well, I do not know whether it would or not. I did not make a study, I did not go out to prove their case of cost justification. He is talking about their case.

By Mr. Hanley:

Q. Did you make any study or inquiry into comparative size of sales load carried by different salesmen in the same field?

6945 A. Oh, I went into some discussion of those things with some of the officials in the Detroit office.

Q. Do you know what the policy or method or standard or practice is of the Respondent company with respect to trying to balance the sales load among salesmen on a gallonage basis?

A. No.

Q. Do you think that might be of some importance in determining the propriety of the use of gallonage as a measuring factor and as an allocating factor?

A. I think it would, and I would certainly investigate into this matter if I were attempting to prove your cost justification.

Q. What standards of methods do the Respondent apply to determine whether one or more or one less truck shall operate out of a given station?

A. I do not know what standards it applies.

Q. Would, in your judgment, gallonage have anything to do with it, and if the company uses gallonage, would you say that the company was wrong because they use gallonage?

A. In the establishing of these standards, do you mean?

Q. Yes.

A. Well, I think gallonage would have all to do with it—and distance.

Q. What standard or method does the company apply to determine whether an additional driver shall be kept on, and whether a driver shall be let out?

6946 A. I did not make inquiry.

Q. Would you think a gallonage would have any effect on that sort of thing, in your judgment?

A. I rather think it should, yes, sir.

Q. What standards, if you know, are used to gauge the efficiency of truck operations out of the salaried stations?

A. I do not know.

Q. Would you think volume would have anything to do with that?

A. I should imagine.

Q. Would you not think it a proper thing to be considered?

A. I think so, and—you just asked me about the hiring of truck drivers. I want to call your attention to the fact that you did not allocate that in your Respondent's Exhibit 101 on a gallonage factor.

Q. What standard is applied to determine, if you know, whether the additional storage tank should be made available at a bulk plant?

The Witness: May I have the question read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I do not know.

By Mr. Hanley:

Q. Would you figure that gallonage would have anything to do with that?

6947 A. I rather think it would.

Q. Irrespective of how a driver is paid, irrespective of what accounting you find is used, irrespective of what account you find is used for his salary to be allocated to, still, does not the fact that he is there related to the volume of the company?

A. Yes, I should think it should be.

Q. Do you think that you can fairly say from a sound accounting standpoint that because in some instances the company has determined to use a gallonage factor rather than a time factor for the truck driver, or some other employee, that the company is just wrong because it uses one method as distinguished from the other?

A. I certainly do not.

Q. Well, what do you mean by asking me that question again and again, then?

A. I had no objection as to how the company keeps its records if and for its own use, but there again, there is another question when you start to try to support a gallonage factor for the purposes of this case.

Q. What determination if any have you made as to the amount of equipment made available to a 461 account as distinguished from a leased account?

A. What is the account—what is the question?

948 Q. What is the determination or what determines the amount of equipment is made available to a 461 ccount, or to a leased account?

A. 461 is the non-leased account?

Q. That is right.

A. I think that is in the record. I do not recall that ight at this moment.

Q. Do you not recall that gallonage has a good deal o do with it?

A. I should think that it should.

Q. What, Mr. Warmack, determines the amount of rent eceived for a service station?

A. Well, Judge, I have no idea, I have not gone into hat. I could not answer your question, except I could nswer your question in this manner, if I owned a service tation and it was a valuable piece of property, it would e the valuation of the property, and how desirable it was or service station usage, that would be the general sitation. I do not know how your company calculates the mount that it is going to charge for rent. It is my undertanding—

Q. (Interposing.) On the basis of the valuation of he station, assuming it to be a very high evaluation, and ssuming further that it is so located that they cannot sell ny gasoline, how would you then regard the question of allonage as being a basic factor which controlled rental for the service station?

949 A. I think that that would have to be considered.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: Judge, I would like to modify one of the ther answers that I made just now, or amplify—it was y understanding that some of the 461 stations—that is, he non-lessee stations—do not borrow any equipment at ll from the Respondent company. That is my understandng. If that is true, and if it is, then I believe it is in the ecord, and I just wonder how gallonage may have to do ith such a situation as that.

y Mr. Hanley:

Q. Well, might it not also be true as to the—might it ot also be a factor in that situation as to the ability of the perator to put in his own equipment?

A. Well, I would think that would have something to do with it, yes, sir.

Q. And in the event he were, Mr. Warmack, does it not occur to you that it would be less of a burden for the Respondent company?

A. Oh, I think so. I have not seen any segregation of any account giving effect to that point.

Q. Is that a situation exactly in connection with Ned's?

6950 A. What?

Q. Is that not the situation exactly in connection with Ned's?

A. Well, the records will show.

Q. Do you not know? You have made a study of Ned's.

A. I think in 1937 those records show that you were leasing some equipment to Ned's, and I do not know just exactly what the records show with respect to non—to 1940 on that point.

Q. Is that not also the fact in connection with a very substantial number, if not all, of the service stations served by the other jobbers in Detroit?

A. I believe that has been testified to by Respondent's witnesses.

Q. Is that one reason, in your judgment as an accountant and an observer of the industry, why the Respondent can afford to sell gasoline more cheaply to that class of operator than to the class of 461 non-lessee stations, to whom equipment must be supplied?

A. Yes, sir. I would rather think that that would go to that point; that is, if it costs less in the way of renting equipment of this jobber, and if it is cheaper, to let it go to Ned's; that would be an influence on this case, but to go into that matter, I think that you would want to take into consideration that if there were any other retail customers that you did not lend it to, I think that is a
6951 matter that would have to be explored.

Q. Would you mind repeating your answer, it was not clear to me.

A. I said that I would rather think that that would go to that point; that is, if it costs less in the way of lending equipment to this jobber, or to Ned's, that would be an influence on this case, but to go into that matter; I think that if there were any other retail customers that you did not lend it to. I think that is a matter that would have to be explored into.

Q. We will reach that. We will reach that. Has the Respondent resorted to a gallonage allocation factor in any case where the expense item—I should have said—

A. What is that?

Q. Repeating the question, Mr. Warmack, has the Respondent resorted to a gallonage allocation factor in any case except where the expense item was of an overall nature?

A. Will you explain what your mean by that, Judge Hanley?

Q. I would mean—

Trial Examiner Ballinger: (Interposing.) Do you mean the words "over all"?

Mr. Hanley: I see.

By Mr. Hanley:

Q. I would mean things like the president's salary, 6352 and that list of things that I asked you about a while ago, and did not get along with very well.

A. It would seem to me like the president's salary

Trial Examiner Ballinger: (Interposing.) Now, read the question.

(The reporter read the question.)

Mr. Austin: I object to that question unless Respondent's counsel makes clear what he means by "overall."

Trial Examiner Ballinger: He has illustrated it by reference to the president's salary.

The Witness: I tried to answer, your Honor, with special reference to that point.

Mr. Hanley: I will reframe it this way:

By Mr. Hanley:

Q. You have studied every account on Respondent's Exhibit 101; have you not?

A. No, sir.

Q. What?

A. No, sir.

Q. You have studied Respondent's Exhibits 99, 100 and 101; have you not?

A. Yes, sir.

Q. And you have undertaken to testify in respect of all the accounts on Respondent's Exhibit 101, have you not?

A. I do not remember.

6953 Q. You just got through yesterday, have you not, with the list?

A. Well, you see, some of these accounts, your Honor, yesterday that I was not questioned on direct on, and there were some of these that I answered all three questions propounded to me in this way—that I have not made any study of this account.

That is shown in the record.

Q. All right. With respect to those accounts then that you studied on Respondent's Exhibit 101, if any, please state whether or not the Respondent has resorted to a gallonage allocation factor in any case except where the expense item was of an overall nature? Now, do you not know what an overall nature is?

A. Please tell me. Please tell me.

Q. I refer you to that class of account in which the president's salary would fall.

A. (There was no answer.)

Trial Examiner Ballinger: Can you answer the question?

The Witness: May I have the last question read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: It is my understanding that the president's salary falls in account 209, pro rata general
6954 administrative, and that particular account the Respondent uses all gallonage in the whole field including direct shipment gallonage, and the use of that gallonage factor does not make any—

By Mr. Hanley:

Q. (Interposing.) I am asking for the exceptions not the inclusion.

I asked you: Has the Respondent resorted to a gallonage allocation factor in any case except where the expense item was of an overall nature?

I referred you to the president's salary as an example of what I mean by overall nature, and now you have answered my question by telling me they were resorted to, they resorted to the gallonage method of allocation there. I know we did. That is the reason I referred you to the president's salary.

Please answer my question.

A. The question is not clear to me, Judge Hanley.

Trial Examiner Ballinger: Read the question to the witness.

Surely, that is understandable.

(The reporter read the question.)

The Witness: Now, the overall situation was explained. That same allocation factor, the gallonage allocation factor was used—.

Trial Examiner Ballinger: Now, one moment.

6955 The Witness: I do not understand the question.

Trial Examiner Ballinger: That is not a response.

The Witness: Well, I do not know what he is talking about.

Trial Examiner Ballinger: Answer the question.

Mr. Austin: That is not fair, your Honor, because the witness should be allowed to answer the question, because you do not know what the witness is going to say. If your Honor please, you do not know, I do not know, nobody knows what the witness is going to say, and whether it was going to be an answer to the question, and I demand on the record that the witness be permitted to answer this question, your Honor, because he is entitled to make an answer to it, and I do not think that any one in this room knows what he is going to say until he says it.

Trial Examiner Ballinger: We have just had an answer, and we have an answer that is not responsive, and then the witness has started on with another answer that was equally unresponsive.

The witness may start again, and the question may be reread to him, if he desires it to be reread to him.

Mr. Austin: I address your Honor most respectfully, but most urgently, that your Honor and I and no one else in this room knows what he was going to say, and we do not know whether it would be responsive or not until he says it.

6956 I think it would only be fair for the witness to be allowed to answer the question.

Trial Examiner Ballinger: The Examiner refers to what the witness said on the record, and further discussion of the matter is closed. The witness may have the question reread, and he may now answer the question.

(The reporter read the question as follows:

"Q. All right. With respect to those accounts that you studied on Respondent's Exhibit 101, if any, please state whether or not the Respondent has resorted to a gallonage allocation factor in any case except where the expense item was of an overall nature? Now, do you not know what an overall nature is?"

"A. Please tell me. Please tell me.

"Q. I refer you to that class of account in which the president's salary would fall.")

The Witness: The only two accounts that were allocated on an all-gallonage basis in Respondent's Exhibit 101 are accounts 290 and 295. I believe those are the only two accounts. Probably 515—I will just have to look it up; but those are on an overall gallonage basis.

By Mr. Hanley:

Q. Do you mean to say the company allocated on an all-gallonage basis in those accounts that you have now named?

A. Yes, sir.

6957 Q. Mr. Warmack,—I know that.

Trial Examiner Ballinger: The answer is not responsive to the question.

The Witness: Well, I just do not understand the question.

Trial Examiner Ballinger: The question was not what accounts were allocated, but what were not so allocated.

The Witness: Well, every one except those I named were not so allocated on an all-gallonage basis.

Trial Examiner Ballinger: That is more responsive.

By Mr. Hanley:

Q. It still does not answer the question.

A. Well, I am listening, Judge Hanley, and you will just have to explain it in some manner in which I can understand it. You have asked about twenty times.

Q. We have been talking about the allocation on a gallonage basis. Now, it may be gallonage other than direct gallonage, it may be all gallonage, but it is a gallonage basis.

Has the Respondent resorted to a gallonage allocation factor in any case except where the expense item was of an overall nature in any account on Respondent's Exhibit 101, which account you studied?

Do not answer if you do not know. If you studied the account and can answer, please do so. You have been criticizing gallonage allocations for weeks, so you
6958 must know surely some account. Now, is that explanation of the question clearer?

A. Not to me.

Q. I—

Mr. Hanley: Your Honor, I think the witness is just declining to answer the question.

The Witness: That is not true, your Honor. I will answer the question if I understand it.

Trial Examiner Ballinger: The question is very clear to the Examiner.

The Witness: Well, Judge, just tell me what he is talking about.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: What does he mean by "overall nature" in a case like the president's salary?

Trial Examiner Ballinger: Read the question to the witness.

(The reporter read the question.)

The Witness: In my opinion, the answer is—yes. That means that certain of these costs have been spread between two of the channels on a gallonage factor, other parts, maybe, of the same account is spread between three chan-
nels on a gallonage factor, and in other instances
6959 some of the accounts have been spread between all
six petroleum products columns including bulk plant and direct shipments, on an all gallonage basis.

By Mr. Hanley:

Q. Mr. Warmack, you said you were familiar with the series of accounts 1,000, 2,000, 3,000, 7,000.

A. Yes.

Q. This afternoon.

A. Yes.

Q. What is your understanding of this 7000 account?

A. It is my understanding that that account, or that series, is portions of these separate accounts, or places where portions are applied for allocation between reseller, consumer, and other methods columns on regular form 189.

Q. It may be other columns as well?

A. Well, it is my understanding that the 7000 account is, as distinguished from the 3000 account—that the 3000 account is to be allocated between the tank wagon reseller channel and the tank wagon consumer channel, and that the 7000 account is to be allocated between the tank wagon reseller, tank wagon consumer, and other methods channels. That is my understanding.

Q. Do you not understand that the 7000 account might also have in it something that was allocated to other channels?

A. I do not understand what you mean.

6960 Mr. Hanley: Well, I withdraw the question. It is not important here.

By Mr. Hanley:

Q. The 7000 is a clearing account, is it not, what the accountants commonly refer to as a clearing account?

A. Yes, sir, also 3000.

Q. Now, the things that go into the 7000 account, and finally are spread out there are of the nature of the overall expenses, are they not?

A. That is my understanding that they are in the nature of overall expenses, I would say.

Q. Has the Respondent resorted to a gallonage allocation factor in any case except where the expense items or item was of a nature as to have been running through 3000 and 7000 clearing expense accounts?

A. Yes, sir, that is my understanding, Judge, that if the cost could be assigned directly, it is so assigned.

Q. Yes?

A. And the remaining portion of cost then in each of these separate accounts on Respondent's Exhibit 101, that are shown on Respondent's form 189 in the regular accounting procedure, the portions of the accounts applicable to the tank wagon channels; that is, reseller and consumer channels which cannot be assigned directly and placed wholly in those two accounts, is placed in the 3000 account, and then is reallocated whereby a portion falls in the tank wagon and a portion falls in the consumer. 6961 Now, there is in addition costs which fall in the 7000 account of the same nature which is re-allocated to tank wagon reseller, tank wagon consumer, and other methods. That is my understanding.

(Witness temporarily excused.)

Trial Examiner Ballinger: At the request of the witness, and by consent of counsel, the hearing is, at 5:00 p. m., adjourned to reconvene at 9:30 a. m., July 23, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 5:00 p. m., July 21, 1942, the hearing in the above-entitled matter was adjourned.)

6962 Room 532, Federal Trade,
Commission Building,
Washington, D. C.,
Thursday, July 23, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., 910 South Michigan Avenue, Chicago, Illinois, appearing for the Respondent.

6963

PROCEEDINGS.

Trial Examiner Ballinger: Come to order. The hearing of Docket 4389, case entitled "In the Matter of Standard Oil Company (Indiana)" is reconvened pursuant to notice at 9:30 a. m., July 23, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held at the same place July 21, 1942.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination (continued) by Mr. Hanley.

Q. Mr. Warmack, supposing that you, as an accountant, were to make a cost study and you did so on three premises:

First: You allocated cost on the basis of gross margins upon sales.

Second: That you allocated cost on the basis of total selling man hours required to secure volume sold.

Third: That you allocated cost on the basis of gallonage sold to customers.

Assuming that you got a different result in each of 6964 those studies, which, in your judgment, would you regard as proven?

A. The nature of the study, of course, would have to govern.

The word "study" is quite all-inclusive, and a very elusive thing.

Just to make an allocation on those bases, without going to the extent of applying your study; that is, exploring every function involved, its influence on the case, if this were not done and the allocations were made as you just said, without that being done, without a proper exploration being made of everything which the accountant could consider, I would not consider that the costs in either instance had been proven.

Mr. Hanley: The Respondent moves to strike the answer of this witness as unresponsive.

Trial Examiner Ballinger: The motion is denied.

By Mr. Hanley:

Q. I will restate the question to you, Mr. Warmack.

You may assume that the study to which I referred in each of these three instances is of the type of study which you have been referring to as a factual and objective study.

With that premise, will you please answer the question as to which of the three results you would regard as proven.

6965 A. That question cannot be answered in the absence of the study itself. The study might disclose that a part of the cost could be allocated on either basis, and I doubt very seriously if a study would disclose that all of the cost could be allocated on any of the bases.

Q. Have you found that to be just exactly what the Respondent in this case did?

A. I found that it separated its costs on several bases—if that is what you mean, Judge Hanley.

Q. That is what I mean.

A. I see.

Q. Do you regard that as objectionable?

A. Oh, no, if your factors have been properly proven—which I contend they have not—in every instance.

Q. I am certainly undertaking to understand what you mean by "properly proven."

In this instance, I have left it entirely to your interpretation of what you mean by a study and I have asked you to assume these three studies which you, as an accountant, presumably have made, and you have gotten, presumably, a different result in each of those careful studies.

A. Yes, sir.

Q. Now, I wish you would please, Mr. Warmack, just tell us which of the three you would regard as proven.

A. Your Honor, that is impossible, to answer that question.

6966 The study will stand for itself. I just explained that a thorough and proper cost study of a situation or of the costs in this case would probably afford many measuring factors, probably more than Judge Hanley has just outlined, applicable to many of the separate classes of costs, and you just could not say which would be the best until you had made the study.

Trial Examiner Ballinger: Mr. Warmack, the question is a simple question. It is, in effect, that if you had made all the studies that you have described, made an exploration to the extreme limits—

The Witness: (Interposing.) Yes, sir.

Trial Examiner Ballinger: —and as a result you arrived at the same conclusion, the same figures, in each of the three different classifications—

The Witness: (Interposing) Than what?

Trial Examiner Ballinger: Which one of the studies would you consider as proven?

The Witness: We would have only made one study, if we had done that then we would have those comparable—those measuring factors, your Honor, outlined by Judge Hanley, and probably many others, and as a result of this thorough cost study which I have termed "factual and objective cost study" that would be the thing that would prove the cost, and the fact that you allocate all of the 6967 costs on one basis or all on another,—which I know you would not do—if you did it, why, it will be the first case I have ever known of, of all costs or where all costs could be allocated on one basis as a result of a study—because, your Honor, you cannot establish a measuring factor that I have ever known in which you could measure, or with which you could measure everything, every class of costs with it, it just cannot be done.

Trial Examiner Ballinger: The question did not include what you have known. It presupposes a situation—

Mr. Austin: (Interposing.) Well, he says that situation could not exist.

Trial Examiner Ballinger: He says in his opinion it would not. Suppose it does exist, then what?

The Witness: Then, we can answer it if you would your Honor, in the only way in the world we can answer it—the measuring factor, that is, the gallonage measuring factor, the time measuring factor, or the other measuring factor that the Judge used or spoke of may be established by a cost study—

Trial Examiner Ballinger: (Interposing.) Mr. Warmack,—

The Witness: I just cannot answer the question.

Trial Examiner Ballinger: Mr. Warmack, assuming all the conditions that you have just described existed,
6968 and you made three studies, and they all led to the
same result, the question is which one of the studies would have been—or you would consider as proven?

The Witness: Now, I will have to answer as to the nature of the three studies, if all three studies were factual and objective cost studies, as I have outlined, you could not arrive in any given case at all three.

By Mr. Hanley:

Q. As I understand, Mr. Warmack, you cannot answer the question?

A. I have answered your question over four times, in my opinion.

Q. I will now ask you this:

Assuming that you are dealing with one item of expense, and assuming that you made a study of the allocation of that one item of expense, a factual and objective cost study of the thorough nature, or of as thorough a nature as you think should be made as an accountant—

A. Yes, sir.

Q. And you made such a study of each of these three stated methods of allocation in respect of that one single item of expense, and you reached a different result in each of those three studies, which of the three would you regard as proven?

A. As far as I am concerned, that would be a physical impossibility. If you made a factual and objective
6969 cost you would arrive at some method for that one
item of expense, and that would be your method, and your factual cost study would point to that measuring factor, and that would be what you would use and nothing else.

Q. I understood you to say the other day, Mr. Warmack, that you, yourself, had an experience of investigating a problem and following it along two different lines to reach two different conclusions, and that you then had to exercise your judgment as to which result you would choose.

This is the same type of a problem that I am now presenting in this question. It is to be assumed that you, as an accountant, approached the problem of allocating some given cost item, and you undertook to determine how you would do that, and you chose these three different methods, and in each of them you reached a different result:

I will ask you again, Mr. Warmack, if you will please state which of those results is proven in your judgment as an accountant?

A. I could not answer that except by an example, the example you referred to, Judge Hanley, and I believe this will answer your question.

From my experience as a public accountant, I was dealing with overhead costs of manufacturing, such as depreciation of machinery, and that class of expense, in the opinion of accountants, should be allocated in, of
6970 course, the most reasonable and equitable manner. Each situation will have to stand on its own.

Depreciation of a machine may be allocated on several bases. Most, or many people, like machine hour rates: that is, based on the number of hours that the machine runs, when compared with the estimated hour-life of the machine. There may be varying factors coming in there, in considering that, like this, we may assume that the machine would run a large number of hours over a long number of years, but we have a problem in accounting of obsolescence to be considered. Various other factors, new inventions coming out that would necessitate that particular man that owned this machine to replace it in order to attain greater efficiency in his factory, long before the machine is worn out.

In situations, as I say, each must stand upon its own, the accountants set out in an effort to make an allocation of this general cost that is very elusive, and is very hard to determine where it should go, or at least how it should go to the product being manufactured, how the allocations are going to be made.

Now, in a situation of that kind, seldom do accountants quarrel with what another accountant does as long as he follows some reasonably equitable allocation. One man's idea of how it should go will not vary a great deal, generally, from what another man's will, in an ordinary situation.

6971 In the petroleum industry, it might be different. I have not explored the methods that you employ there. But I can show to you instances of the allocations on different bases of general overhead manufacturing costs, and I can show you where on several bases the allocation will be relatively the same in dollars. Now, when you come back to something in distribution cost accounting, that is of a general nature, for example, certain general office costs which may follow costs in the field of a similar nature, those costs in the field have, if a proper measuring factor is established for them, then I can see little objection to allocating the general costs in the home office on the basis of those costs, assuming, of course, that the same influencing factors of accounts in the field had to do with the general office costs which were of the same or of a very similar nature.

But, I do not see how in the world I can answer the question any better than using an example.

Mr. Hanley: If your Honor please, at this time the Respondent moves to strike the answer as totally unresponsive, this long speech of the witness, and respectfully requests that the Court have the question reread to the witness, and he requests that the witness be instructed to answer the question, and if he cannot, then, if he cannot, that he say so.

6972 Trial Examiner Ballinger: That portion of the motion to strike the answer is denied.

Mr. Hanley: I did not understand that, your Honor.

Trial Examiner Ballinger: That portion of the motion to strike the answer is denied.

The Examiner does not consider the question fully answered, and the witness may proceed.

Read again the question to the witness.

(The reporter read the question as follows:

"Q. I understood you to say the other day, Mr. Warmack, that you, yourself, had an experience of investigating a problem and following it along two different lines to reach two different conclusions, and that you then had to exercise your judgment as to which result you would choose.

"This is the same type of a problem that I am now presenting in this question. It is to be assumed that you, a-an accountant, approached the problem of allocating some given cost item, and you undertook to determine how you would do that, and you chose these three different methods, and in each of them you reached a different result;

"I will ask you again, Mr. Warmack, if you will please state which of those results is proven in your judgment as an accountant?").

6973 The Witness: I can answer this question, your Honor, in this way:

Any one of the results will be proven and properly substantiated if a thorough cost study and analysis, what I have termed in this record a "factual cost study and analysis" and not using the term loosely, has been made, and if that results in the allocation on a basis of any of these methods that Respondent's counsel has outlined, any one of them ~~will~~ be proven and properly, properly proven, and one will be proven just as good as the other if that study shows which one should be used; that is the best I can answer the question, your Honor.

Trial Examiner Ballinger: Supposing each study was made on what you would consider proper methods; that is, that is supported by reason, and each resulted in a different result; would you say that they were all proven, or would you say that only some of them were proven, and if so, which?

The Witness: I would say—

Mr. Austin: If your Honor please, I want to be sure that that question is understood by the witness as you asked it.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Mr. Austin: You are referring to a single item of expense, or are you referring to three studies, and three
6974 different items of expense?

Trial Examiner Ballinger: To a single item of expense.

The Witness: May I say this, your Honor, there would be only one study, and that would afford you information as to which separation factor or measuring factor to use, and that would be properly proven, irrespective, in my opinion, of which measuring factor came out to be the right factor as the result of the study, and you would not start right in again making another study after you had already proven one.

Trial Examiner Ballinger: That would depend entirely upon the opinion of the accountant making the study?

The Witness: Oh, yes, indeed.

Trial Examiner Ballinger: And might not that accountant be in disagreement with other accountants?

The Witness: Who made a separate study, yes, sir; yes, sir; oh, yes, that is, like any other professional men.

Trial Examiner Ballinger: And might not both conclusions be based upon reasonably sound reasoning?

The Witness: That is right. Yes, sir. Yes, sir.

By Mr. Hanley:

Q. In that situation, would you regard both as proven? A. Well, I would have to review, Judge Hanley, I 6975 would have to review, Judge Hanley, I would have to make a review of it, and I cannot come out and say that I would regard both as proven. Surely, I could not agree with both men's studies. If I saw them I could agree with one of them, or I might not agree with either one of them.

Q. Does it not finally and always go back to this, so far as you are concerned, Mr. Warmack, that that is proven with which you agree?

A. Well, I would use the word "proven" in this instance to mean substantiate and one may be fully substantiated, another study may be—the measuring factors I am speaking of—may be partially substantiated, in a further study that may not be substantiated at all, as in the case of your gallonage factor.

Trial Examiner Ballinger: Well, the question of substantiation depends entirely upon the opinion of the accountant, does it not?

The Witness: I would not say exactly upon the opinion of the accountant, I think most accountants will agree if you do not make a study you do not have any substantiation.

By Mr. Hanley:

Q. Mr. Warmack, all of these questions that you have been answering, both those propounded by the Examiner and by counsel for the Respondent, have presupposed and given you to assume that there was a factual and objec- 6976 tive and a careful analysis cost study, on that basis, will you please answer the question that I asked you, and I will ask, if your Honor please, that the question be reread to the witness.

Trial Examiner Ballinger: Read the question to the witness.

Mr. Austin: Which question, there are a lot of them?.

Mr. Hanley: The last question I asked as to what he thought about when the thing was proven if it were not his agreement or disagreement.

Trial Examiner Ballinger: Reread the basic question.

(The reporter read the following question:

"Q. Does it not finally and always go back to this, so far as you are concerned, Mr. Warmack, that that is proven with which you agree?")

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: May I make this request, that counsel restate his question or suggestion that he made to the witness off the record?

Mr. Austin: If the Examiner desires it.

The Witness: I would like to have the question
6977 restated anyhow.

Trial Examiner Ballinger: Do you press that?

Mr. Hanley: Not in view of the witness' statement.

The Witness: May I make this request, that counsel restate his question, if your Honor please unless he has it read right here in the record.

Mr. Hanley: I will do that.

By Mr. Hanley:

Q. Mr. Warmack, I asked you if in all of these answers you have given and if in your testimony relative to the cost studies and accounts that you have reviewed in this case, where you have used the word "proven" does not mean proven to your individual satisfaction, or proven to a point where you individually agree with the method or the result.

The Witness: Now, will you read that question again?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Mr. Austin: I object to that question on the ground that the witness has already fully answered it and explained what he means by "proven," and I think he has answered every other question that he has been asked.

Trial Examiner Ballinger: The explanations offered by the witness were not clear to the Examiner.

The Witness: I will be glad to answer this, your 6978 Honor.

Trial Examiner Ballinger: You may answer it. The objection is overruled. Read the question to the witness.

(The reporter read the question as follows:

"Q. Mr. Warmack, I asked you if in all of these answers you have given and if in your testimony relative to the costs studies and accounts that you have reviewed in this case, where you have used the word 'proven' does not mean proven to your individual satisfaction, or proven to a point where you individually agree with the method or the result.")

The Witness: When I say "proven," I mean, if and if made in my testimony, substantiated by studies which in my opinion were made in accordance with sound and accepted accounting practice, and that is what I have meant when I stated "proven."

Trial Examiner Ballinger: That is methods may have been used according to what you consider sound methods?

The Witness: Yes, sir; measuring factors must have been established by the use of those methods in accordance with the application of sound accounting practice.

By Mr. Hanley:

Q. That is to say what you believe to be sound accounting practice, Mr. Warmack?

6979 A. Yes, sir, what I believe to be sound accounting practice, Mr. Hanley.

Q. You have stated, Mr. Warmack, that many times studies will result in different results and that those studies may have been conducted on a careful and thorough basis and that the results of each are substantiated and supported by reasons and that some accountants will agree that one result is the better, and another accountant may think a different result is the better; is that true, is it?

A. Yes, sir. That is true and especially with respect to general costs.

Q. Permit me now to ask you if, in the final analysis, always, it does not essentially follow that the selection or the choice must be exercised by the accountants to determine just what method they will apply in any particular business, or to any particular problem?

A. I did not get your verb in that?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: That is correct, giving weight, of course, to all of the factors concerned and to the logic in the approach, and carry through of the study, and those things and of course, in each instance, there is always a question as to how far we should go—is this sufficient—should we care to go a little further, and is that sufficient, and 6980 that is all naturally up to the accountant, and in my case I always get somebody to bear me out on it, if I am going far enough and not going too far, what I mean is, conferring with my chief accountant, Judge, and several other competent accountants as may be around the Commission and available for discussions.

Trial Examiner Ballinger: Well, that is the method you employ to resolve and determine any question which may be before you?

The Witness: Well, I do not want to go too far, and I still want to go far enough in these studies, and I think these present too lareg a problem for one man to try and resolve.

By Mr. Hanley:

Q. Mr. Warmack, I was not asking you at all about the methods of the Commission's accounting staff in prosecuting cases that may be brought by the Commission.

I was simply asking you if, in the conduct of a business, the accounting staff of that business was confronted with different methods of arriving at a conclusion and followed out those methods and studies and analyzed and found that each resulted differently, isn't it just true, Mr. Warmack, that those accountants are forced to exercise their discretion and their best judgment, taking into consideration all of the factors which you have named, of course?

6981 A. Why, surely, they must exercise their best judgment in giving effect and consideration to all of these things.

The Witness: Your Honor, with reference—just a minute, if I may refer to the statement that the accounting staff of the Commission has to do with the prosecution of cases, we have nothing to do with them.

Mr. Hanley: Just a moment.

Trial Examiner Ballinger: Just a moment.

The Witness: He stated in that record that, and I thin the record should show that statement of mine that the ac counting division does not prosecute any cases. We d what we are told to do and that is all. We do not go beyon that.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: The Respondent moves to strike whateve portion of the witness' answer has to do with any attempte explanation of the activities of the accounting staff of th Commission. I do not know whether that is on the recor or not, your Honor, because there was an interruption a the time that the witness started making his statement.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Pleas 6982 make your objection again.

Mr. Hanley: The respondent now moves to strik that portion of the witness' answer beginning "just a moment, if I may," and so forth, as unresponsive an improper.

This motion takes the place of or is in lieu of the motio previously made.

Trial Examiner Ballinger: Motion is granted, and th matter is stricken, not physically, of course.

By Mr. Hanley:

Q. Mr. Warmack, you named a number of factors tha accountants who are under the obligation to choose a meth od of allocation would properly use in making that selec tion. Is it not true that one very important factor tha accountants would use would be the experience of the busi ness with which they were concerned?

A. Yes, indeed, it certainly would be.

Q. And the longer that that experience has existed, th more experiments that had been made in the course of thi business experience, would all be very compelling factors would it, in your judgment?

A. I rather think they would, but I would not say tha the longer would have so much to do with it because I se some businesses that have not been going so long that hav an enormous amount of information which some other busi nesses which have been in operation for 50 years or 6983 more do not; and that in my opinion is true of the thing down the line. I see some people hire young men and pay them high salaries, and hire old men and pay them low salaries. I think there is some merit to those things. That follows through with businesses.

Q. Now, Mr. Warmack, from your experience and observation of the affairs and business of the Respondent, do you understand it to be the fact that the Respondent company invests its capital on the basis of the accounting reports that it obtains from its accounting department?

A. I certainly did not make any inquiry to how the company invests its capital.

Q. Do you know whether or not that is true?

A. I should assume that any business would, any business of any particular size would of course have to have good accounting and know how it stood financially before it could make any large commitments. I am sure of that.

Q. Do you know it to be the fact that on the basis of the expense allocations and the reflections from the accounting standpoint as indicated by the marketing accounting of the Respondent company determine its policy with reference to investment?

The Witness: May I have that question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

6984 The Witness: No, sir. I do not know that to be the fact.

By Mr. Hanley:

Q. Would you regard that as a reasonable assumption?

A. I would rather think, just in my own opinion that the more information the company has with respect to its own business, the better the business can be managed.

Q. I am sorry, Mr. Warmack, I do not believe that answers the question.

Trial Examiner Ballinger: The question is not responsive.

Read the question.

(The reporter read the question.)

The Witness: Well, I just do not know.

By Mr. Hanley:

Q. I asked you for an opinion.

Trial Examiner Ballinger: Read the question again.

(The reporter again read the question.)

Trial Examiner Ballinger: Read the question befor that.

(The reporter read the following question:

"Q. Do you know it to be the fact that on the basis o the expense allocations and the reflections from the account-
ing standpoint as indicated by the marketing account-
6985 ing of the Respondent company determine its policy
with reference to the investment?")

(The reporter also read the following question:

"Q. Would you regard that as a reasonable assumption?")

The Witness: I stated, Judge, that I regarded it as an influencing factor. I do not know if it is a reasonable assumption or not.

By Mr. Hanley:

Q. Mr. Warmack, are you aware of the fact that the Respondent company frequently, and indeed constantly, is subject to investigation and inquiry by accountants from Federal Treasury Department for tax purposes?

A. I would like to hear the question read.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Yes, sir, I understand that the Treasury Department covers all companies and individuals also as to paying taxes.

By Mr. Hanley:

Q. You know that the Respondent company does business in fourteen states; do you not?

A. That is my understanding.

Q. Are you aware of the fact that in many if not all of those fourteen states there are various taxing and other au-
thorities which are frequently if not constantly making
6986 investigations and inquiry into the accounting meth-
ods and the results and the accuracy thereof, of the Respondent company?

A. Well, I know it to be a fact that they are making inquiries to the end of trying to get as many taxes as they can get out of the company; that is, to determine that their profits, if it is based on profits, are stated correctly in accordance with their theory of accounting, and if it is based on something else, that the calculations are made to give the municipal body the highest possible revenue.

Q. Both from the Federal and from the State standpoint: Mr. Warmack, would not what you have just said involve a broad analysis of the propriety and of the accuracy of the accounting methods used by the Respondent?

A. Some of the accounting, yes, sir. Those authorities are interested for the most ~~part~~ in the broad picture. Taxing authorities concerned with assessments and assessed value of property are concerned with that; taxing authorities concerned with income taxes are concerned with the overall picture. They do not care whether you put cost of selling against tank wagon reseller, tank wagon consumer, or other methods, or somewhere else, they only want to know what the final result is in dollars.

Q. Have you completed your answer?

A. I believe so. Did I answer your question?

6987 Q. Very well. I will repeat the question, Mr. Warmack. Just answer the question I asked you.

A. I tried to do it, Judge.

Q. Would not the taxing authorities be concerned with the accuracy and propriety of the methods and results of the accounting practices employed by the company whose growth or net profits the taxing authorities were undertaking to determine?

A. Well, now, I answered that question and gave you an example.

Mr. Hanley: If your Honor please, may the witness answer "yes" or "no"?

Mr. Austin: I object to that, I think it is repetitious fully answered, and of course if the witness is going to answer it yes or no, I have no objection, but I think that it is answered fully.

Trial Examiner Ballinger: The objection is overruled.

The Witness: Your Honor, a "yes" or "no" answer without explanation is worthless and valueless.

Trial Examiner Ballinger: You can offer any explanation you desire, but you can certainly answer the question "yes" or "no"?

The Witness: The answer is "yes," subject to all the qualifications and examples which I just gave in response to the same or similar questions. 6988

By Mr. Hanley:

Q. In your former response, as I understand it, you undertook to speak for the judgment and purposes and opinions of the accounting staffs of some fourteen states and the Federal Treasury.

A. It was not intended to do that. You first asked me to do that, and then I did it, and then you would question it because I did do it.

Trial Examiner Ballinger: Off the record. That is largely argumentative.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Are you aware of the fact, Mr. Warmack, that the Respondent company is required to make reports to the Securities and Exchange Commission?

A. It is my understanding, yes, sir.

Trial Examiner Ballinger: The hearing will stand in recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

By Mr. Hanley:

Q. Do you know it to be a fact, Mr. Warmack, that the stock of the Respondent Company is listed on the
6989 New York Stock Exchange; that is, what is commonly called the "Big Board"?

A. That is my understanding, Judge Hanley. I do not know that to be a fact. I have not looked it up.

Q. Do you know it to be a fact that annually the Respondent company is required to and does make a financial statement of condition?

A. Well, I do not know it to be a fact. It is my understanding that it does and that that information is the kind of information that is submitted to the Securities and Exchange Commission.

Trial Examiner Ballinger: Judge, you have been inquiring about this for some time, just how does this become material in the case which involves differential cost accounting?

Mr. Hanley: I will tie it up in a moment, Judge Ballinger.

Trial Examiner Ballinger: You may do so.

By Mr. Hanley:

Q. Do you know it to be the fact that the Respondent company is audited annually by the Price-Waterhouse auditing firm?

A. No, sir. I do not know it to be the fact.

Q. Assuming it to be the fact, please, Mr. Warmack, if you please, Mr. Warmack, and then tell me if in respect of all of these things, namely, reports to the Securities
6990 and Exchange Commission, reports and investigations made by Price-Waterhouse, if the accountants for those agencies would not be concerned with the accuracy of the methods and results obtained by the accounting practices of the Respondent?

Mr. Austin: I object to that as irrelevant, immaterial, and incompetent as to what the Securities and Exchange Commission or Price-Waterhouse are concerned with.

Trial Examiner Ballinger: The Examiner understands this is material leading up to something in a subsequent question that will connect it up with the case on trial.

On that basis, the objection is overruled subject to renewal.

The Witness: May I have the question, please?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: In the overall picture, yes, I assume that that would be true. I do not think that it would be or would have anything to do with the determination of a cost differential.

By Mr. Hanley:

Q. In your judgment, Mr. Warmack, as an accountant, if there were anything seriously wrong with the cost accounting methods of the Respondent company in respect of its marketing activities, would that not be criticized by the accountants for the Federal Government, and by as responsible an accounting firm as Price-Waterhouse?

6991 Mr. Austin: I renew the objection to that on the ground that it is irrelevant and immaterial as to whether or not criticism would be or has been made by Price-Waterhouse or by the Government for the purposes of this case.

Trial Examiner Ballinger: The objection is overruled, subject to renewal.

The Witness: In the overall picture, I would say, "yes" to your question, but in the separation of the company's costs in regular accounting procedure as to classes of customers or product, I certainly do not, and could not have an opinion as to just how extensively the public accounting firm of Price Waterhouse would be interested in those matters, or just how much they would be concerned with them, or go into them.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. I understand from your answer that you now understand what the term "overall" means?

A. Well, the way I used it means that accounting firm would look at the picture in a broad sense and not necessarily with respect to product classifications, customer classifications; that is what I mean, expense to one single item which might be termed an overall expense.

6992 Q. You spent considerable time, did you not, Mr. Warmack, examining into account 004 having to do with salaries?

A. Yes, sir, at the Detroit field for the year 1940.

Q. And at several points in your testimony you have questioned the manner of Respondent's allocation of salaries and other expenses, have you not?

A. Not necessarily the manner, I questioned the measuring factor, the accuracy of the measuring factor as developed by the Respondent company.

Q. Did you not state, page 5854—if you desire to follow me—state a criticism of the Respondent's methods of allocations of these expenses because of the fact that these allocations are made on a composite basis and not upon the basis of the time spent by any individual group of salesmen?

A. I stated that.

Q. In your judgment as an accountant, would you suggest that the allocations could more properly be based upon individual groups of salesmen?

A. In my opinion they can, assuming of course that the measuring factors for the individual groups were properly worked out.

Q. After allocating each individual group of salesmen's and expenses as you suggest, would you recapitulate the separate group allocations to secure a total for the particular expense classifications referred to under account 004—salaries—; account 032, traveling expense; ac-
6993 count 047, operation and maintenance of vehicles; account 102, depreciation on vehicles?

The Witness: Your Honor, I do not understand that. May I have the question read.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I do not just exactly understand that, Judge Hanley.

By Mr. Hanley:

Q. What do you not understand about it?

A. What do you mean by "recapitulate"?

Q. Just what the word means, Mr. Warmack. How would you handle the other accounts?

A. Which other accounts?

Q. The ones I named; 032, 047, 102, 004?

A Those accounts should follow the salesmen.

Q. Would you add them together, the individual group expenses, to get a composite total for those three accounts?

A. If I wanted an average I would; if I did not want an average, I would not.

Q. If you were allocating on form 189, would you do it?

A. I would determine what portion of that expense went to each class of salesman.

Q. Would the procedure that you suggested increase the amount of accounting work necessary and 6994 result in increased cost for the maintenance of records of the company?

A. Well, I do not mean in the regular accounting procedure. I do not quarrel with the way the company keeps its accounts. It can keep them in any way it likes, and I think it should be satisfactory to anybody if it is satisfactory to the company; but, for the purpose of proving a cost differential I think that is a different matter.

Mr. Hanley: The Respondent moves to strike the answer to the question as not responsive and asks that the question be reread to the witness.

Trial Examiner Ballinger: Before the Examiner passes on the motion, read the question and the answer.

(The reporter read the last question and the last answer.)

Trial Examiner Ballinger: The motion is granted. The witness may answer the question.

The Witness: May I hear the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. Would the procedure that you have suggested increase the amount of accounting work necessary and result in increased cost for the maintenance of records of the company?")

The Witness: Yes, sir, it would involve more costs
6995 but I think that needs an amplification, your Honor.

Trial Examiner Ballinger: You may offer an explanation.

The Witness: My answer to the previous question was intended; that is, the refinement was stated as being necessary, was intended if a study were made to determine the cost differential, but it was certainly not intended that the company should keep those records to such a degree of refinement.

By Mr. Hanley:

Q. Do you know whether or not as an accountant, Mr. Warmack, that any company could prove to your satisfaction a cost differential without keeping records to the degree of refinement which you have indicated in your testimony in this case?

A. It is my opinion that it could, but it would take a cost study to determine the cost differential. I know that it is not common practice for companies to keep costs in such a way at all times to determine cost differentials without making some greater refinement of the separation of those costs than are currently kept on their records.

Q. Assuming your practice were adopted or your suggested practice, would the end result be any different from that already reached by the Respondent in its present accounting?

A. In this case you mean, Judge Hanley?

Q. Yes.

6996 Mr. Austin: Referring to the same four or five accounts.

The Witness: A cost study would prove that and that is the only way that could be proven.

By Mr. Hanley:

Q. Do you know?

A. A cost study and analysis could prove it; that is the only way it could be proved in my opinion.

Q. Do you know?

A. Of my own knowledge?

Q. Yes, do you know? I am asking you.

A. I have not made such a cost study, and I am sure the company has no other studies; I have not seen any information along that line.

Q. You are sure the company has not made any such?

A. I am sure if they had been, Houghton would have given me the papers on it.

Q. That is your opinion, I assume?

A. I certainly do believe that Mr. Houghton would have given me anything in the world I asked for, and I asked him for that, and that information was not there.

Q. Mr. Warmack, is it not true that the end result would vary if the salaries of one group of salesmen failed to conform to the average of all groups?

The Witness: May I have that again?

6997 Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Oh, not necessarily. A study would show that, and that is the only way it could be developed, would be by a proper study.

By Mr. Hanley:

Q. Well, is not that question clear to you?

A. Yes, sir, and it has been answered. I answered it.

Q. You answered it but I understand from the question that no study is necessary; I will repeat the question.

A. Yes.

Q. Would not the end result vary only if the salaries in one group of salesmen failed to conform with the average for all groups?

A. Vary from what? Vary from what, Judge Hanley?

Mr. Austin: If I can help—maybe this should be off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Mr. Warmack, you have criticized this 004 account on the ground that it was kept on a composite basis for salaries. You have stated that you thought a group salary basis would be a more proper method of handling the account.

6998 Now, I asked you if the end result of that method or suggested method would be any different from the result obtained by the Respondent in its accounting, and you said you did not know.

Now, I am asking you would not the end result vary only; that is, would not the end result of your method vary from the method used by the Respondent only if the salaries of any one group of salesmen failed to conform with the average for all groups?

A. On the assumption that the—

Trial Examiner Ballinger: (Interposing.) There is no occasion for an assumption.

The Witness: I object to another thing in this, your Honor, that the company did not do.

Trial Examiner Ballinger: One moment, as to what you object to, that is immaterial.

Read the question.

(The reporter read the question.)

Mr. Hanley: That question can be answered "yes" or "no."

The Witness: No, sir, that implies an assumption only—

Trial Examiner Ballinger: (Interposing.) One moment.

The Witness: I cannot answer it then—

6999 Mr. Hanley: Very well.

Trial Examiner Ballinger: You may answer the question "yes" or "no" and then explain your answer.

The Witness: The answer is I do not know, Judge, for the reason of this, that the distribution of time cost sheets did not show—

Mr. Hanley: Just a moment. If your Honor please, if the witness does not know he does not know. The witness has given an answer that he does not know, that answers the question, and he can not explain that.

The Witness: That is not correct, and it leaves it without—

Mr. Hanley: One moment.

The Witness: Judge, I am entitled to put on the record—

Mr. Hanley: Mr. Warmack—

Trial Examiner Ballinger: One moment.

Mr. Hanley: Mr. Warmack—

Trial Examiner Ballinger: One moment, Judge Hanley.

Mr. Warmack, you have answered the question that you do not know. Now, do you desire to offer an explanation?

The Witness: Yes, sir, I certainly do.

Trial Examiner Ballinger: You may.

Mr. Hanley: This is for the record, if your Honor please, any attempt by the witness to add to the an-

7000 swer that he does not know, an answer to the effect that he does not know something, is objected to for the reason that no explanation is necessary. He has simply said he does not know. Why he does not know is of no importance.

Trial Examiner Ballinger: The Examiner thinks there is much substance to the objection, but for the purposes of this record, if the witness desires, he may offer an explanation.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Mr. Warmack,—

Mr. Hanley: First, Mr. Austin, will you please restate what you told the witness while he was off the record.

The Witness: I can answer the question.

Mr. Hanley: Please wait a moment, Mr. Warmack.

(There was a short pause.)

Mr. Austin: I am waiting for the direction of the Examiner.

Mr. Hanley: I repeat the question that counsel be directed to restate on the record what he told the witness while off the record.

7001 Trial Examiner Ballinger: While we were off the record?

Mr. Hanley: Yes.

Trial Examiner Ballinger: Will counsel be kind enough to do so?

Mr. Austin: What is that?

Trial Examiner Ballinger: Read the statement.

(The reporter read the statement.)

Mr. Austin: I said to the witness that he restrict his: it was my suggestion that he restrict his answer to the reasons why he does not know; the answer to the question and the reason why he is unable to answer it upon the a sumptions included in the question.

Trial Examiner Ballinger: Proceed.

The Witness: May I hear the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: The question by Respondent's attorne as I understand it, was based on the contention of the R spondent that the Commission's Exhibits 88, 89, 102, a 103 being distribution of time for all salesmen in the D troit field covering the year 1940 were accurate and corre and that I did subscribe to such contended accuracy a correctness, but I most assuredly do not. If those distrib tion of time sheets were correct, the answer to the R
7002 spondent's question would be—yes.

By Mr. Hanley:

Q. That is to say, that the end result would vary as b tween the composite and the group method of allocatin assuming that the exhibits to which you have referred a correct?

A. Yes, sir, it would vary.

Q. How much?

A. For each class of salesmen, Judge Hanley?

Q. Reseller.

A. I have given testimony on that, and I will be glad t look up the record.

Trial Examiner Ballinger: You may look up the re ord.

The Witness: On my sheet.

Trial Examiner Ballinger: You may look up the recor

The Witness: May I have that last question?

Trial Examiner Ballinger: Read the last question.

(The reporter read the following question:

"Q. That is to say, that the end result would vary a between the composite and the group method of allocatin assuming that the exhibits to which you have referred ar correct?")

The Witness: Your Honor, after reviewing m
7003 working papers I find that a test has not been com pleted which would show just how far it varies—i it would be it falls—the composite figures used in the se aration would make from the use of the figures, that i percentages for each of the separate groups of salesme

in Detroit for the year 1940 in this particular instance. In my answer to the previous question it was intended to state that if the composite figures varied from the separate group figures,—which they will for any particular group—and inasmuch as certain particular groups of salesmen were assigned to the direct shipment business in 1940 then the salary variations and the difference between the composite percentages and the group percentages would vary the figures of Respondents for this particular class of expense as shown on Respondent's Exhibit 101. That is assuming, of course, that the distribution of time reports shown in the records as Commission's Exhibits 88, 89, 102, and 103 were arrived at, and were the results of proper accounting study, which, in my opinion, they were not.

We do have the information which Respondent's attorney has requested, and that has been properly tested in connection with the 200 account, and they have not been thoroughly made for the 004 account—the tests have not been thoroughly made for the 004 account—

By Mr. Hanley:

Q. (Interposing.) Just a moment. Your answer,
7004 returning now to a question I asked you a moment
ago, when you said there would be some variation—
I will ask you again if the end result would not be subject to a variation only if the salaries in one group of salesmen failed to conform with the average for all groups.

A. Yes, sir. That is correct, assuming that the distribution of time reports are correct.

Q. Now, did the salary of reseller salesmen fail to conform with the average in the Detroit field in 1937?

A. I do not have the—

Q. That should be 1940, Mr. Warmack.

A. I do not have the average right at hand, Judge Hanley, for all of them, for that year,—rather, if I could make a calculation—well,

Q. (Interposing.) Well, you have not made it, have you?

A. Not for all the salesmen, I do not have it for the Detroit field, which are reflected in account 004.

Q. Mr. Warmack, in your judgment, would it be even more desirable from a sound accounting point of view to allocate all of the salaries and expense of salesmen individually rather than dealing with groups?

A. That brings us down to a great refinement, of course, that would be the most accurate thing to do, but from a practical standpoint, why, I just wonder if it is the thing that should be done I do not subscribe to splitting
7005 hairs, and I think that reasonable accuracy in determining a cost differential should be sufficient.

Q. Will you please return to the exhibits which you were examining, being Commission's Exhibits 88, 89, 102, 103?

A. Yes, sir.

Q. Have you them?

A. Yes, sir.

Q. Do you understand that each one hundred units indicated on each of these exhibits represents one salesman?

A. Yes, sir.

Q. When the units are added for a tank wagon reseller channel, is it not true that the combined component parts of all classes of salesmen who have worked in that channel are shown; is that not correct?

A. That is correct according to the way the distribution of time sheets are prepared.

Q. Now, looking especially at Exhibit 103, representing September 1940.

A. Yes, sir.

Q. Do you note that the total tank wagon reseller units are 1726 while the total units of classes of salesmen shown in that fifth column is 6300? Do you follow that, Mr. Warmack?

A. It is not on here.

Mr. Austin: It is on Exhibit 89.

7006 Mr. Hanley: Yes, it is on 89.

Trial Examiner Ballinger: Do you desire the question read?

The Witness: Yes, sir.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. Do you note that the total tank wagon/reseller units are 1726 while the total units of classes of salesmen shown in that fifth column is 6300? Do you follow that, Mr. Warmack?")

Mr. Hanley: And make that refer to 103.

By Mr. Hanley:

Q. Now, Mr. Warmack, when 1726 is divided by 6300, what is the result as shown by the exhibit?

A. 27.4 per cent.

Q. What is your understanding of how the Respondent uses that figure?

A. According to the examples of those varying expenses; that is, as shown on page 2 of Respondent's Exhibit 99,—

Q. (Interposing.) Very well, there is no occasion for you to read that, if that is all you know about it, Mr. Warmack.

If every salesman made exactly the same salary the process of adding the percentages without weighting would be all right, would it not, in your judgment?

A. For the purposes of determining a cost differential, do you mean, Judge Hanley?

7007 Q. Well, on the basis of your criticism of this account 004.

A. No, sir, if some groups of the salesmen were going to spend more time on one class of business than any other, and then if this class of salesmen were engaged in direct shipment business, and a portion of that time were assigned to direct shipment business, which is not given effect on Respondent's Exhibit 89, why, the question would arise there as to the accuracy in connection with the question you just asked.

Q. Mr. Warmack, we started out with a discussion of two different methods of allocating this expense; that used by the Respondent on a composite basis and that suggested by you on a group basis.

Now, let us stick to that premise and, with reference to the different channels as shown on Commission's Exhibits 88, 89, 102, and 103, if every salesman made exactly the same salary, the process of adding the percentage without weighting would be all right, or be the same, substantially, in every case, would it not?

A. Well, I could not answer that exactly, I would just have to see the figures and then I could answer the question.

Q. Well, assuming that each one of them made one hundred dollars per month, say,—

7008 Mr. Austin: (Interposing.) Judge Hanley, is that question directed to salaries on the computation on Exhibits 88, 89, 102, and 103, or does it go further in the segregation of direct shipment cost which is not included in this regular accounting form?

Mr. Hanley: No, my question goes to the exhibit to which I have just referred the witness, Mr. Austin, and which he has criticized because it deals with salesmen, reseller salesmen, on a composite instead of a group basis. Now I am trying to find out how much difference it would make, if any.

By Mr. Hanley:

Q. You said you would have this figure, Mr. Warmack, and to simplify it, I suggested to you that you assume that each salesman made one hundred dollars—my first question asked you was if every salesman made exactly the same.

A. My answer was that if every—every salesman does not make exactly the same, and if they did—

Trial Examiner Ballinger: (Interposing.) Mr. Warmack, that is not the question.

The Witness: I thought it was.

Trial Examiner Ballinger: You should answer the question based upon the assumption stated therein.

The Witness: Well, Judge, if we were to make an assumption for that, and if I might have the time to pick up all of these figures and run them out I could
7009 say that it would or would not, and I could not do it any other way.

By Mr. Hanley:

Q. Do I understand that you cannot answer the question?

A. I have answered the question.

Q. Do you know of the monthly salary represented

A. (Interposing.) I beg your pardon. I was looking at this book.

Q. Do you know the average monthly salary represented by these men, the reseller salesmen in Detroit in 1940?

A. I know that figure for the month of January, 1940.

Q. That is what?

A. That is the one month I made a detailed analysis for, of that particular account.

Q. Well, do you know this—whether or not the average salary for the reseller group is above or below the average salary for the entire group of salesmen?

A. Judge, may I make the computation?

Trial Examiner Ballinger: Do you desire to refresh your memory by examining records?

The Witness: I would have to do that in order to answer the question.

Trial Examiner Ballinger: If counsel desires an answer to the question, you will be afforded that opportunity.

Mr. Austin: The question was: Does this witness
7010 know; if that is all that counsel wants I should think
that it could be answered without a computation.

Mr. Hanley: It may be well to get that answer first, if your Honor please.

Trial Examiner Ballinger: Do you know now without refreshing your recollection?

The Witness: No, sir. I have all of the information in the working sheets or papers, though.

By Mr. Hanley:

Q. Mr. Warmack, I doubt very much if the computation will be of any value to you or to any of us unless you first answer the question that if every salesman made exactly the same salary, the process of adding the percentage without being weighted would result in the same thing; that is, your method and the Respondent's method would result the same way? If you do not know that, I do not know of any value of the computation.

A. It would take a computation to determine that.

Q. If they were made exactly the same thing?

A. you are asking me if I know of my own knowledge. I have not made the calculation and I cannot know.

Trial Examiner Ballinger: Mr. Warmack, the question did not ask you as of your own knowledge, but presupposed a situation, and you are asked to answer it on that supposition.

The Witness: Judge, I cannot know that unless I
7011 write down figures and determine that.

Trial Examiner Ballinger: You are not asked to know it.

The Witness: I cannot know it, and I cannot give an opinion on it.

By Mr. Hanley:

Q. I understand, Mr. Warmack, that you have been asked to, and you are entitled for the purposes of this answer to assume the accuracy of this series of exhibits, Commission's Exhibits 88, 89, 102, and 103. That is assumption No. 1.

You may also assume that each of the salesmen in all of the groups makes exactly the same salary. You may not think that is true, and perhaps that is not, but please assume it for the purposes of this question. That is assumption No. 2.

Now, on the bases of those two assumptions, please answer the question:

Would the putting of the two groups in on a composite basis, or putting them in on a group basis that you suggest, make any difference in the end result?

A. Well, in my opinion it would, but I would just have to see the figures written down, and then I could say yes or no definitely.

Q. How would it make any difference, then?

A. For the reason that in one group of salesmen you have twenty-six salesmen, and if those salesmen made
7012 one hundred dollars a month, we would have $2,600,
and we apply in Respondent's Exhibit 89 the ratio of $1357.00 to $2600.00—a portion of that expense, to the tank wagon reseller expense, while in the case of another group of salesmen it would be a very much less number, and maybe no portion of their salaries which would be one hundred dollars per month per salesman would go in the tank wagon reseller expense.

Now, you ask me there if it was—if that separation were made on that basis on the salesmen's percentages what the composite percentages would be, and whether if that separation were made on that basis of the composite percentages, would it come out the same as if it were made upon a group, and I answered—I do not know, but I can work out the figures.

Q. In view of your present answer, Mr. Warmack, I now call your attention to a question and an answer on the record a few moments ago.

I asked you: If the end result would vary only if the salaries of one group of salesmen failed to conform with the average of all groups?

And you answered me—yes.

Now, after I have not only given an equal average, but an exact salary figure equal for every salesman, you answer the same question—no. Now, please, what do you
7013 mean?

A. That is not true. That is not true.

Q. Just a moment, please, Mr. Warmack, if you please. Do you mean that is not true that you answered as to the end result of varying only if the salaries of only one group of salesmen failed to conform with all groups, by—yes?

A. I mean that the Respondent's statement is not complete, and does not cover everything that I have stated in this connection.

Q. Well, all right. Would not the end result vary only if the salaries in one group of salesmen failed to conform with the average for all groups? You have already answered that—yes.

Trial Examiner Ballinger: Mr. Warmack, these questions are susceptible of a definite answer "yes" or "no." You have said that you wanted to say something about them. You can tell us that and then if you want to or desire to do so you may offer an explanation.

The Witness: May I make a calculation, Judge, and answer the question—Judge—as the Judge has asked it?

Trial Examiner Ballinger: There is no necessity for a calculation.

The Witness: I cannot answer that question any better than I have answered it without making a calculation.

By Mr. Hanley:

7014 Q. I would like to have the record clear on this. Mr. Warmack: I said, did you or did you not say or is it or is it not true that a few moments ago you answered "yes" to the question as to whether the end result would vary only if the salaries in one group of salesmen failed to conform with the average for all groups?

A. (There was no answer.)

Trial Examiner Ballinger: Did you answer "yes" to that question?

The Witness: I do not remember, your Honor. That answer which, if I answered it "yes" should be this—that I could determine that as a fact and I would not know, without making the calculation.

By Mr. Hanley:

Q. Do you regard it as necessary to make a calculation to answer these questions if you are permitted to make two assumptions already stated, that you may make, namely, that assumption that Commission's Exhibits 88, 89, 102 and 103 are accurate; and secondly, that each salesman in all of the groups earns one hundred dollars per month?

A. To give you an accurate answer I would have to make a calculation—to give a correct answer, I mean.

Trial Examiner Ballinger: Judge, if the witness is satisfied with his answers, suppose we pass on to something else.

7015 Mr. Hanley: I am just hunting to where to go, Judge. I am just looking through these papers.

(There was a short pause.)

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Mr. Warmack, by reason of the Respondent having used the composite method in Commission's Exhibits 88, 89, 102, and 103, as distinguished from the group methods suggested by you, is the tank wagon reseller channel on Form 189 overcharged or undercharged?

Mr. Austin: Do you mean form 189 or Exhibit 101?

Mr. Hanley: Well, it may be Exhibit 101.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: Will you read the question now and I will try to straighten it out.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I want to object to that, your Honor, because I think 189 is material here only in so far as it forms the base for Respondent's Exhibit 101.

By Mr. Hanley:

Q. Form 189, Commission's Exhibit 119, was that 7016 overcharged or undercharged?

A. A test has not been fully made to show that information, Judge Hanley.

Q. Does that mean that you do not know?

A. That means that I do not know without making a test or completing the test.

Q. In your direct testimony, is it not a fact that you did arrive at some kind of a percentage based on your theory of how this group allocation should have been made?

A. No, sir.

Q. And did you not indicate the percentage of 29.19, as distinguished—

The Witness: May I have that read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I think you are mistaken about that. Look here. (The witness shows a document to Mr. Hanley.)

Mr. Hanley: Well, I think I am mistaken, Mr. Warmack. And I will withdraw that question until I find out what I am asking you here.

Trial Examiner Ballinger: Question withdrawn.

Mr. Hanley: Well, I will just have to proceed, if your Honor please, as to certain presumptions as to what the witness knows, I think.

Trial Examiner Ballinger: Off the record.

7017 (There was a discussion off the record.)

Trial Examiner Ballinger: On the record, proceed.

By Mr. Hanley:

Q. Have you made an examination of the worksheets prepared by Respondent's accountants upon which Respondent's Exhibits 100 and 101 are based?

A. Yes, sir. Most of them.

Q. Will you refer to page 6140 of the record. I am going to ask you a question about that, Mr. Warmack.

A. Yes, sir. (The witness examines the record.)

Q. Have you found that place, Mr. Warmack?

A. I am on page 6140, Judge Hanley.

Q. One moment.

A. Yes, sir.

Q. On that page of the record, 6140, you stated that 12.40 per cent of the industrial salesmen's time was spent on tank wagon consumer business. Will you now please turn to page 18 of Respondent's Exhibit 100 and tell the Court and the Commission what percentage of direct shipment selling time of this class of employees was taken from the tank wagon consumer channel.

A. Judge Hanley, do you mean that portion of the exhibit which was assigned to the tank wagon—to the direct shipment business, or taken from the tank wagon consumer channel—that is, 12.4 per cent of that expense?

7018 Q. On Page 6144 you stated that 87.09 per cent of industrial salesmen's salaries were charged to "other methods."

Please refer again to Exhibit—Respondent's Exhibit 100, page 18, and read the ratio of direct shipment costs taken out of this channel.

A. 87.09 per cent.

Q. On page 6145 you testified that .45 per cent of industrial salesmen's time was charged to auto supplies. Will you please read page 18 of Respondent's Exhibit 100 and state what the ratio of the take-out was?

A. .45 per cent.

Q. In other words, Mr. Warmack, is it not true that the take-out of direct shipment cost for industrial salesmen was exactly in accord with the ratios for that particular class of salesmen?

A. That is correct. That is the point we are quarreling with.

Q. Did you check the ratios for lubricating engineers?

A. Well, I have them here, Judge Hanley.

Q. Well, just, did you check them?

A. I did not go into that particular study while in Detroit.

Q. You have checked reseller salesmen?

A. Yes, sir.

Q. Did you check the B-Station salesmen?

A. No, sir.

7019 Q. And station reseller?

A. No, sir. I have the percentage of course on page 18, Respondent's Exhibit 100.

Q. And city salesmen?

A. No, sir. Again, I have the percentage on page 18, Respondent's Exhibit 100.

Q. That includes the sales classes that I have just named?

A. Yes, sir.

Q. As well as automotive salesmen—asphalt?

A. That column checks—we only made checks in Detroit,—

Q. (Interposing.) Well, do you know it to be a fact or does the exhibit show that very large group of salesmen on Respondent's accounting taking the direct shipment cost out of the direct shipment channel on the same basis that that particular group had been included in the original average?

A. That is correct, the particular group that went in to make up the composite percentages which were used for the original allocation in Respondent's form 189.

Q. Were any salesmen included in the distribution of time making up the allocation ratios as given on Commission's Exhibits 88, 89, 102, 103, which had nothing to do with direct shipments?

A. Well, I will have to check, Judge Hanley, in order to answer your question.

Q. Well, perhaps I can aid in that.

7020 Is it not true that there were such groups of salesmen and that they were known as "specialized salesmen"—"heating oil"—"domestic heating oil salesmen"—"specialized salesmen—reseller"?

A. Yes, sir. They were regarded as not having any connection with the direct shipment business of the Respondent company.

Q. That all appears on pages 18 and 19 of Respondent's Exhibit 100?

A. Yes, sir. The sales groups you have just mentioned did not appear on those pages which means that they had been worked in connection with the direct shipment business of the company, as I interpret Respondent's Exhibit 100.

Q. Are there any salesmen's positions shown on pages 18 and 19 of Respondent's Exhibit 100 which contain—which do not compose a part of the personnel used in the preparing of Commission's Exhibits 88, 89, 102, and 103?

A. Well, I will have to check that, Judge Hanley.

(Witness temporarily excused.)

Mr. Hanley: If your Honor please, it is now twelve, and I move that we rise for luncheon.

Trial Examiner Ballinger: Now, at twelve o'clock noon, the hearing stands in recess until 1:30 p. m.

(Whereupon, at 12:00 noon, a recess was taken until 1:30 p. m., this day.)

7021 Afternoon Session.

1:30 p. m.

Trial Examiner Ballinger: Come to order. You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Hanley.

Q. Now,—

Trial Examiner Ballinger: There was a pending question unanswered before adjournment. Is the witness prepared to answer the question?

The Witness: Yes, sir, I believe so.

Trial Examiner Ballinger: Do you desire the question read?

The Witness: If you will, please.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. Are there any salesmen's positions shown on pages 18 and 19 of Respondent's Exhibit 100 which contain—which do not compose a part of the personnel used in the preparing of Commission's Exhibits 88, 89, 102, and 103?")

The Witness: May I hear that again, please?

7022 Trial Examiner Ballinger: Read it again.

(The reporter again read the question.)

By Mr. Hanley:

Q. Can you answer the question?

A. Yes. The answer is yes.

Q. Would you name them, and please state the salary charge?

A. What is the question?

Q. Will you name them and please state the salary charge?

A. Do you mean the salary charged to direct shipment, Judge Hanley, please?

Q. Well, yes, if you can do that.

A. Yes, sir. That is shown on pages 18 and 19 of Respondent's Exhibit 100.

Q. Just name the salesmen that are omitted—that you state were omitted, I mean, by classes.

A. Agent salesmen are shown on page 19 of Respondent's Exhibit 100 with a charge of $495.54, the salaries as shown as applicable to direct shipment cost, the agent salesmen who are not shown on Commission's Exhibits 88, 89, 102, and 103;

There is a classification of salesmen on page 19 of Commission's Exhibit 100 entitled "White oil salesmen" on which the charge is $1,414.54, which is shown as applicable to direct shipment business. That group of salesmen is not shown on Commission's Exhibits 88, 89, 102, and 103.

Mr. Austin: A moment ago you said Commission's Exhibit 100. Did you mean Respondent's Exhibit 100? 7023

The Witness: Yes.

The classification of the group of salesmen shown on page 19 of Respondent's Exhibit 100 entitled "Candle Salesmen" for which the charge $2,767.89 is assigned to salesmen's salaries as Candle salesmen to direct shipment business, which is not shown on Commission's Exhibits 88, 89, 102, and 103, I do not believe—that is all I see, Judge Hanley.

By Mr. Hanley:

Q. What does this total, if you know?

A. A little over $4,600.

Q. To be exact is it not $4,677.97?

A. I believe that is correct.

Q. Is that a part of the total direct shipment charge of $13,639.17?

A. Yes, sir.

Q. How is the percentage figure of 2.67 at the bottom of page 19, Respondent's Exhibit 100, secured?

A. That percentage represents a percentage of the total of $13,639.17 which was assigned to direct shipment business taken out of the tank wagon reseller column; that is, $364.33 of the $13,639.17 was taken out of the tank wagon reseller column and assigned to the direct shipment business.

Q. You have now stated, Mr. Warmack, that 7024 there are component parts of personnel that is used in securing the distribution of salesmen which have nothing to do with direct shipment costs, and there are sales positions involved in direct shipment costs not included in the average of distribution of time; is that not correct?

The Witness: May I have that question again, please?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I wonder if counsel would please reframe that question, it is a little—just a little enlightenment, please.

By Mr. Hanley:

Q. Do you understand it, Mr. Warmack?

A. It is not clear, Judge.

Q. Referring you to Commission's Exhibits 88, 89, 102, and 103, you have testified, have you not, that includes salesmen, and classes of salesmen on their distribution of time which have nothing to do with direct shipment business?

A. (There was no answer.)

Trial Examiner Ballinger: Is that correct?

The Witness: I do not believe that I stated that, or else I did not understand the question.

By Mr. Hanley:

Q. Is it true, Mr. Warmack,—will you look at 7025 those exhibits and state now, again, if this is not true?

A. It is my understanding that some of these salesmen whose time is shown on Respondent's Exhibits 88,—Commission's Exhibits 88, 89, 102, and 103 are not concerned with direct shipment business.

Q. Did I not understand you to testify that heating oil salesmen, domestic heating oil salesmen, and specialized salesmen,—reseller, are not included in that time distribution, this morning just shortly before lunch, Mr. Warmack—they are not involved in direct shipment business?

A. That is my understanding, Judge Hanley.

Q. Now, you have just finished testifying to a list of salesmen who are involved in direct shipments, and which do not compose a part of the personnel of the salesmen appearing in Exhibits—Commission's Exhibits 88, 89, 102, and 103?

A. Yes, sir. That is correct, but it is my understanding that these—

Q. (Interposing) Well,—

A. —that the salesmen—that the salaries of these salesmen are assigned to channels in the company's regular accounting procedure on the basis of the percentages for the other groups of salesmen appearing on Commission's Exhibits 88, 89, 102, and 103.

Q. Do you know that?

A. May I review my records, your Honor?

7026 Trial Examiner Ballinger: You may do so. Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. If it suits you, Mr. Warmack, you might refer to Respondent's Exhibit 99, page 1. I believe it will aid you.

A. Thank you.

(The witness examines page 1 of Respondent's Exhibit 99.)

The Witness: Yes, sir. I believe the records will show that the candle salesmen and white oil salesmen are separated to channels on the basis of a different basis from the distribution time sheets.

However, I believe the records will further show that agent salesmen are separated on the basis—their salaries are separated on the basis of those time sheets.

By Mr. Hanley:

Q. I will restate the question I asked you a moment ago, now, Mr. Warmack.

A. Yes.

Q. You have now stated that there are component parts of personnel used in securing the distribution of salesmen's time which have nothing to do with direct shipment
costs and there are sales positions involving—or in-
7027 volved in direct shipment costs not included in the
averages of distribution of time. You have just now
so stated, have you not?

A. Well, I just did not follow you.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: That is my understanding, yes, Judge.

Hanley.—I believe, though, that they are involved in direct shipment cost.

By Mr. Hanley:

Q. So that there will be no mistake, I will repeat the question to you again: You have now stated that there are component parts of personnel used in securing the distribution of salesmen's time which have nothing to do with direct shipment costs, and there are sales positions involved in direct shipment costs not included in the averages of distribution of time. Is that not what you have now just stated?

A. That is my understanding, yes, Judge Hanley. That is clear.

Q. And you understand that question as I have just put it to you?

A. That is right. The other was slightly different, I think, but it meant the same thing.

Q. Then, Mr. Warmack, as a matter of fact, is the percentage of 2.67 as shown on Respondent's Exhibit 100, page 19, comparable with the 29 per cent as represented by tank wagon reseller portion of petroleum products selling cost as testified to by you on page 6133 of the record? 7028

A. I should think that it should be comparable, or at least reasonably comparable for this reason, that this class of expense that we are dealing with here; that is, the candle salesmen, white oil salesmen, and agent salesmen are rather small amounts; that is, the total salaries paid to those salesmen, I think, were rather small amounts in comparison with the salaries paid to all of the salesmen in the Detroit field for the year 1940.

Q. Do you regard it as a matter of sound accounting, Mr. Warmack, to compare two figures on the basis of similarity when those figures do not include similar—when your basis for those figures do not include similar component parts?

A. Well, the extent of the inclusion or the exclusion would have a bearing and would be the ultimate deciding point there, and if you do not have the actual figures some comparison might be made.

Q. Well, you had the actual figures here, Mr. Warmack, did you not?

A. Well, we went to the refinement and just a little different point of making the actual comparison. We went, as I say, to a refinement and just a little bit beyond that in the actual making of the comparison which we made.

Q. I wonder, Mr. Warmack, if you cannot answer
7029 that question, if not, I will try to reframe it.

A. Thank you.

Q. You have heard the questions which I have asked you in regard to this, have you not, Mr. Warmack?

A. Yes, sir.

Q. You have here a situation wherein you have one set of figures built up of component parts, namely, salaries of certain class; on the other hand, you have another figure built up of component parts being salaries of a different class.

You have undertaken to compare the percentage arrived at by using one of those totals with the percentage arrived at by using the other total.

Now, do you regard that as sound accounting?

The Witness: May I have that please?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

A. (There was no answer heard.)

By Mr. Hanley:

Q. Mr. Warmack, the question really means, and this is a homely example, and I mean it entirely respectfully, would you, as an accountant, add up oranges and lemons and get an answer in apples?

A. Well, I would not, but I do not think that your statement is exactly what happened in this instance.
7030 You said, Judge Hanley, that you took one class of salesmen, or one group of salesmen, including several component parts, and compared the cost with another group.

Now, in each one of these is a figure that we have here—or as each one of the figures which we have here—I will put it that way—we have a large group in there of the figures arrived at which would or at least which was included on both sides, for example, in your allocation of costs in the beginning, you had lubricating engineers, industrial salesmen, reseller salesmen, B-station salesmen, city salesmen, automotive engineers, asphalt products salesmen—

Q. (Interposing.) Well, you need not read the exhibit, Mr. Warmack, if you please.

A. Well, I am just straightening you out.

Mr. Hanley: If your Honor please, the witness is not straightening me out and his answer is not responsive to the question. I wonder if we may have the question read to the witness and get an answer from him.

The Witness: It is responsive, your Honor.

Trial Examiner Ballinger: Read again the question to the witness, and take the witness' answer.

You may start all over.

(The reporter read the question as follows:

"Q. You have here a situation wherein you have 7031 one set of figures built up of component parts, namely, salaries of certain class; on the other hand, you have another figure built up of component parts being salaries of a different class.

"You have undertaken to compare the percentage arrived at by using one of those totals with the percentage arrived at by using the other total.

"Now, do you regard that as sound accounting?")

The Witness: In the first place, the statement of counsel is not complete, and I have to show the counsel what was on the other side, and then I can answer the question, your Honor.

Trial Examiner Ballinger: Well, now, you do that without going to the books and records and pointing out the specific things. You can do that.

Mr. Hanley: I submit, your Honor, that it has been done. The witness has testified as to the classes of salesmen excluded on the one side and included on the other side in each of those instances and has given a figure.

Trial Examiner Ballinger: The Examiner is in complete agreement with counsel for the Respondent as to what the witness has done, but now when the direct question is put to him he evidently desires to change those answers.

The Witness: No, sir. That is not what I desire to do, your Honor.

7032 I desire to get the facts as to what was done and give them to Respondent's counsel, who has asked me a question whereby he would have my understanding of what was done, and what I said in the record that one group of costs was handled or set aside in one place, and another group of a different kind of costs was set aside in another, and then a comparison is made, and if the testimony is in my opinion that such a comparison is sound accounting—that is not what was done, and I am not going to state if it is my opinion that such a comparison is sound accounting. I did not say so before.

What was done was this, for the most part, the same groups of salesmen were on both sides. That is what happened.

By Mr. Hanley:

Q. What do you mean by "for the most part"?

A. I mean all except the salesmen whose time is not separated on the basis of distribution of time reports and that is by far the smallest group.

Q. Mr. Warmack—

A. Yes, it is.

Q. Mr. Warmack, one of these totals that is being dealt with is that portion of the expense allocated to the direct shipment channels being $13,639.17. That is right, is it?

A. That is correct.

Q. The component parts of those salesmen to whom 7033 you have been referring, and about whom you testified—candle salesmen, white oil salesmen, and agent salesmen, totaling $4,677.97, which is about 34 per cent of the total of one of these groups upon which the percentage figure is reached.

Would you regard that, from a sound accounting standpoint, as being so trivial as being proper to disregard it?

A. That is not the comparison that we made, not the complete comparison that we made.

Q. I will call your attention to your comparison, page 6133 of the record, and will ask you if you were not asked this question or questions, and if you did not make these answers:

"Q. Then, do I understand that in the company's regular accounting procedure, 29 per cent of the salaries of all salesmen were allocated to the tank wagon reseller channel, whereas only 2.67 per cent of the amount of salesmen's salaries charged to direct shipments was deducted from the tank wagon reseller channel?

"A. That is a correct assumption, sir; as a matter of fact, that is what was done."

Did you so testify?

A. I so testified and that is what was done.

Q. But you have now testified, Mr. Warmack, that the 2.67 per cent as deducted was made up of different
7034 component parts from what the 29 per cent was; is that not true?

A. It may have included—

Trial Examiner Ballinger: Now, Mr. Warmack, not what it may—state what it did.

The Witness: Well, it did, as I understand it, include two component parts; minor parts of the total salesmen's salary in the Detroit field, but that comparison is amplified by an actual figure of what the effect was in dollars and cents, and not of percentage, and I will be glad to give that for the record as exactly what was done.

By Mr. Hanley:

Q. I am not interested in those figures, and they appear in the record, Mr. Warmack; I want to know what your views are on the procedure or the comparison that you made, from the standpoint of sound accounting, in your judgment.

Will you please refer to that and answer "yes" or "no" as to whether you think that kind of a comparison is sound accounting?

A. It is not complete—in and of itself it is not sound accounting, in and of itself, but we went further than that and showed the facts and what happened, and that is proper accounting.

Q. Well, Mr. Warmack, I call your attention to the fact that these component parts of the amount assigned to the direct shipment channel which component parts are
7035 not a part of the reseller channel figures equal one third of the total, approximately, of the entire assignment of amount to the direct shipment channel. In view of that fact, do you insist or say now that an attempt to compare the percentage of 2.67 with the percentage of 29 is sound accounting, and will you please answer that "yes" or "no"?

A. Well, I can not answer your question yes or no without an explanation. With it I can answer your question yes or no.

Trial Examiner Ballinger: Please do so.

The Witness: The answer is "no" if no further comparison than that is made. We did make a further comparison, and that comparison is not complete in itself;

that is as to what we showed, your Honor, we showed the facts.

Trial Examiner Ballinger: In your opinion.

The Witness: No, sir. We showed what the books showed, what their own calculations showed.

By Mr. Hanley:

Q. Do I understand from that statement, Mr. Warmack, that the facts were not disclosed by the records and the exhibits submitted by the Respondent?

A. The particular fact as to the amount that was left in the tank wagon reseller column on Respondent's Exhibit 101 by the use of the methods employed by the Respondent was overstated in the extent of something
7036 over two thousand—is what I have in mind, Mr. Houghton and I made a thorough study of that—and I have the figures on it which go beyond the comparison of this 2.67 per cent, because my own chief accountant questioned that and said—

Q. (Interposing:) Mr. Warmack, we are not interested in what your chief accountant said or did. We are interested now in what you have to say.

A. Yes.

Q. Referring to this page 6133, the testimony which I read to you and which you say you gave—are you now changing that testimony?

A. No, sir. I am affirming that testimony.

Q. And you are affirming it, I take it, on the basis, Mr. Warmack, that you are comparing on the one hand a set of figures composed of entirely different component parts with another set of figures composed of different component parts?

A. That is incorrect, Judge, you have a misunderstanding altogether as to what happened.

Q. Well, I have the testimony and I think the testimony will speak for itself, Mr. Warmack, but to make very certain of it, however, I will summarize.

You have stated that candle salesmen, white oil salesmen, agent salesmen are not included in the reseller channel computation—

Mr. Hanley: I will withdraw that.

7037 By Mr. Hanley:

Q. —by distribution—time I should say, time distribution, from Commission's Exhibits 88, 89, 102, and 103; that is right, is it?

A. I do not understand your question.

Q. I will repeat the whole question.

You have stated that candle salesmen, white oil salesmen, agent salesmen are not included in the time distribution as made on Commission's Exhibits 88, 89, 102, and 103?

A. Yes, sir. That is correct.

Q. And attributable to those classes of salesmen and included in the item of salaries to the direct shipment column on Respondent's Exhibit 101 is the sum of $4,677.97, is that true, and you have so testified just a few moments ago?

A. Very well.

Q. And that amount just named is a part of the total and so assigned to direct shipment column of $13,639.17. That is true, is it?

A. You are speaking of the $495.54?

Q. Will you read the question again, please—I did not say anything about $495.54.

The Witness: What is the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

7038 Mr. Hanley: I will restate this to make it clear.

By Mr. Hanley:

Q. On this amount just named, being $4,677.97, that is a part of the total of $13,639.17 assigned to the direct shipment channel on Respondent's Exhibit 101?

A. Yes, sir, I assume your figures are correct. I have not added them.

Q. I think, Mr. Warmack, you had better do so right now, if you will, please. I do not want any questions about this testimony.

Trial Examiner Ballinger: We will take a recess for five minutes for that purpose.

(A short recess was taken.)

Trial Examiner Ballinger: Proceed.

Have you added the figures?

The Witness: Yes, sir, I have.

Trial Examiner Ballinger: Please state the result.

The Witness: $4,677.97—and, your Honor—

Trial Examiner Ballinger: One moment. Do not volunteer anything. Wait for a question.

By Mr. Hanley:

Q. Mr. Warmack, it is upon that figure of $13,639.17 that the percentage of 2.67 is based, is it not?

A. Yes, sir. That is my understanding.

Q. You have so testified, Mr. Warmack?

7039 A. I believe that is ~~correct, Judge~~ Hanley.

Q. The percentage of 29 per cent is based upon the figures as appearing in Commission's Exhibits 88, 89, 102, and 103; is it not?

A. Well, there are percentages, Judge Hanley, others—29 per cent is one of them.

Q. I think that is right, Mr. Warmack.

A. That means a little different for each part.

Q. I am referring to the one of the exhibits to which you referred in your testimony given at page 6133.

A. Yes, sir.

Q. And the figures upon which the 29 per cent is based is made up of the different and other component parts from the figure of $13,639.17; is it not—you can answer, if you will, please, "yes" or "no."

A. (The witness examines papers.) The answer is—no. The 29 per cent, to be exact, is 29.19 per cent, which represents the total salaries, including the salaries which you just stated in the Detroit field in 1940, which were assigned to the tank wagon reseller channel.

That does not mean that any portion of this—of those particular salaries was assigned to the tank wagon reseller channel, but it happens in the Detroit field in 1940 the total salesmen's salaries for account 004, which we are speaking of, amount to $220,826.71, of which $60,-
7040 545.87, or 29.19 per cent of that total was assigned to the tank wagon reseller channel.

Q. Is that the 29 per cent that you are talking about all the time?

A. That was the 29 per cent that I was talking about on page 6133 of the record about which or to which you have been referring. The correct percentage is stated on page 6132 of the record in the amount of 29.19 per cent for the year 1940.

Q. Then, that calculation that you made in arriving at the 29.19 per cent is independent of the time distribution ~~records—or exhibits you have been discussing~~—these exhibits you have been discussing, Mr. Warmack?

A. This is the result of the use of them, plus the result of the use of any other allocations which were made by the Respondent company in the year 1940 in the Detroit field.

Q. Well, if I understand you, you just made a calculation across the salary account on form 189, Exhibit 119.

A. Yes, sir, to determine what portion of all of this class of expense which is included in account 004 the expense of salaries the salesmen bore to it or the extent that the salaries of salesmen had been apportioned to each of the distribution channels on Respondent's Exhibit—rather, on Respondent's form 189.

Trial Examiner Ballinger: Instead of referring to the form, it is better to refer to the exhibit number.

7041 The Witness: Yes, sir.

By Mr. Hanley:

Q. Well, then, have you any criticism remaining of the time distribution forms, therefore, as reflected by Commission's Exhibits 88, 89, 102, and 103?

A. I do not believe that the figures shown on these three or four exhibits have been properly substantiated by thorough studies.

Q. Is it your testimony now that there is no difference in the component parts of the figures underlying what you were referring to by 29 per cent, and the component parts underlying the figures supporting the percentage of 2.67?

The Witness: May I hear that question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I think the component parts are the same except for the fact that some of this class of salesmen's salaries that go to make up the total salaries in the Detroit field for the year 1940 of which 29.19 per cent was assigned to tank wagon reseller column, a part of those salaries, as I understand it, were not for salesmen who were engaged in any way in direct shipment business.

By Mr. Hanley:

Q. All right, Mr. Warmack.

A. Yes, sir.

7042 Q. In your testimony you have criticized Exhibit 88 and that series of exhibits as representing estimates and as not representing daily tabulations of time by the respective salesmen, and that the estimates did not ctually represent these salesmen's estimates, but they epresent the estimate made by the salesmen's supervisors, nd that there was no documentary evidence in the company's records in Detroit, as far as you were able to find out, which would support those calculations of the salesmen's time or any other calculation of time; did you check he instructions to salesmen when you were in Detroit, Mr. Warmack?

A. I do not remember that I did, Judge Hanley.

Q. When you stated that there was no documentary vidence of any kind, did you mean to say that the automotive engineers did not maintain a time record?

A. No, sir.

Q. Did he, in fact?

A. I do not know.

Q. Did you find out?

A. I asked.

Q. Did you find out?

A. I asked for all the documentary evidence, and I was iven none.

Q. Do you not know it to be a fact that the automotive engineer does maintain a time record; that it was
043 there available in Detroit; now, did you ask for it?

A. I asked for all documentary evidence of any nd every kind supporting Commission's Exhibit 88.

Q. Did you ask, Mr. Warmack, for the time records f the automotive engineer?

A. I do not remember that I asked one on him specifically. I did ask for all documentary evidence concerning alesmen or groups of salesmen.

Q. You have stated that before, Mr. Warmack.

A. Yes.

Q. Did you ask for the time record on agent salesmen?

A. I do not remember that I asked for that specifically. included it in a request for all documentary evidence hich would support that.

Q. Do they maintain one?

A. I do not know. I asked for all documentary evidence upporting any such thing and I did not get any.

Q. Did you ask for the time record on reseller salesnen?

A. No. I asked for any and all documentary evidence n all of these men and I did not get any. I was told there as absolutely none.

Trial Examiner Ballinger: Strike the witness' answer. The witness may answer again.

The Witness: May I hear the question again?

Trial Examiner Ballinger: Read the question.

7044 (The reporter read the question.)

The Witness: I do not remember asking specifically, Judge, for any particular group of these salesmen, as I only asked for documentary evidence on all of them, in an inclusive request which I made many, many times.

By Mr. Hanley:

Q. Did you ask for any time records on lubricating salesmen?

A. I do not recall asking for that specifically, I asked for all the documentary evidence they had, and my request would include each and every one of these people to whom you have referred.

Q. Did you ask for any documentary evidence in connection with specialized reseller salesmen?

A. I do not remember that one. I asked for all documentary evidence concerning anything which would support this, and I was given none.

Q. Now, did you ask for a documentary evidence in connection with domestic salesmen—domestic fuel oil?

A. I do not remember specifically asking for that one. I did ask for any and all documentary evidence which would support any and all of these figures—I was given none.

Trial Examiner Ballinger: Mr. Warmack, it is not necessary, in view of your preivous statement, for you to add the additional statement that you have been adding to each one of your answers.

7045 The Witness: Just so that the record will show what I did.

Trial Examiner Ballinger: The record will show exactly what you have been testifying to. He is asking you only with reference to these specific items.

By Mr. Hanley:

Q. Did you ask for time records on B-Station salesmen?

A. I do not remember that I asked for them specifically.

Q. While you were in Detroit, did you ask to see any correspondence files between the Detroit office and the general office with respect to any changes in time distribution estimates for salesmen?

A. No, not as such, no, sir; I just asked for all documentary evidence.

Q. Did you go to Detroit and see Mr. Houghton and did you say to Mr. Houghton, in substance, "Mr. Houghton, I want documentary evidence to support this time study, or this study"; is that what you mean by your testimony?

A. To support the distribution of time reports of which Commission's Exhibit 88 is one.

Q. Is that all that you said?

A. Oh, no, I pleaded for it.

Q. But you did not ask for any particular one, you just said, "I would like to see documents"?

A. Oh, I rather think that I asked for some of 7046 them particularly.

Q. But you have not been able to remember one single one.

A. Well, I know I requested them, and I talked to Mr. Hamer, the man that dealt with reseller salesmen, because Mr. Hamer is the head of that group, as I understand it, and I spoke to him rather specifically about it.

Q. Can you remember a single specific request that you made?

A. Of Mr. Houghton?

Q. Of anybody in the company for documentary evidence of any specific character?

A. Yes, sir.

Q. Was any of it along the line that I have indicated?

A. I remember specifically asking Mr. Hamer with reference to the salesmen under his supervision, and one of those, and the principal one he stated was made up by these reseller salesmen, and I asked him specifically for the reseller salesmen, I do recall that, and I recall that I made a point of asking for that because he stated to Mr. Houghton to give me anything that the company had, and he also talked about specific special reseller salesmen, when I asked him what he had on that and he stated to me that occasionally they made notes of the time spent by the reseller salesmen when the special salesmen traveled with the reseller salesmen.

Trial Examiner Ballinger: Now you say "they"; whom do you mean by that?

7047 The Witness: Speaking of the special salesmen, special reseller salesmen, under Mr. Hamer. He had to do with that.

By Mr. Hanley:

Q. Mr. Warmack—
A. I would like to finish my answer.

Trial Examiner Ballinger: Let the witness finish his answer.

By Mr. Hanley:

Q. You have not finished your answer?
A. Not quite.

Q. I beg your pardon.
A. That is all right.

Trial Examiner Ballinger:. Proceed.

The Witness: I asked Mr. Hamer to furnish me with any notes that may have been made by this group of special salesmen whom he said traveled with the reseller salesmen, and he stated that none were available for 1940, and then I asked Mr. Hamer if he had any for December, 1941, which was the nearest date to the time when I was there, if he would make it available to me, and he stated that he had none.

By Mr. Hanley:

Q. Now, is that the only instance that you can recall talking about those things?
7048 A. I talked to Mr. Locke about those things. As a matter of fact, I think Mr. Houghton brought in almost everybody that would know anything about the situation; to talk to, and I talked to them. I do not recall every person that I talked to.

Q. Mr. Warmack, I will tell you that in the group of blank forms, Respondent's Exhibit 109 for identification, there were many time report forms. I just advise you of that now.
A. I do not recall.

Q. You said you recognized many of those forms. Do you mean to say now that you did not get any documentary evidence on this question of salesmen's time?
A. None was furnished me showing the time that the salesmen spent with customers or on products.

Q. Mr. Warmack, when you were out in ~~Detroit~~—
A. (Interposing.) Yes, sir, Judge, if I may add, which would support Commission's Exhibit 88.

Trial Examiner Ballinger: The latter is a conclusion.

The Witness: Well, Judge, I did not see any paper. I did not see any physical paper. That is not a conclusion.

Mr. Hanley: I move to strike it out.

Trial Examiner Ballinger: The conclusion is stricken out.

By Mr. Hanley:

7049 Q. You understood, did you not, Mr. Warmack, that you were to be given anything that was available that you wanted or needed or would interest you when you went down there, did you not?

A. Yes, sir.

Q. Is it your understanding now, that you were or were not given what you asked for?

A. It is my understanding that I was given everything that I asked for that existed.

Q. Then if these things existed, Mr. Warmack, it would follow, would it not, that you did not ask for them, if you never saw them?

A. It certainly would not.

Mr. Hanley: I ask that the question be read to the witness.

Trial Examiner Ballinger: Read the question to the witness.

(The reporter read the question.)

The Witness: It certainly would not.

By Mr. Hanley:

Q. Then is it not true, Mr. Warmack, that the only other alternative is that the employees of the Respondent company just refrained from giving them to you?

A. I do not think they refrained from giving anything to me that I asked for that was available.

7050 Q. Mr. Warmack, would you regard it as a sound accounting practice, or study, and a proper accounting approach to a criticism of any other's accounting study to simply ask for documentary evidence supporting the exhibit, an exhibit like Respondent's Exhibit 100, without, as an accountant, specifying what you wanted?

A. I certainly would not regard it as a proper coverage from the standpoint of sound accounting—and that is not the wa: I made the investigation.

Q. In your opinion, would it be better to allocate selling costs on the basis of salesmen's records?

A. Well, I certainly do not know.

Q. I am asking for your opinion.

A. I say I do not know.

Q. If you do not know, then, upon what foundation have you been for weeks criticizing the accounting methods employed by the Respondent?

A. For the reason that I have not seen any information that would convince me that the allocation factors and the distribution of time reports of which Commission's Exhibit 88 is one, had been properly established from the standpoint of sound accounting.

Q. Well, I am asking you now from the standpoint of sound accounting, in your opinion, would it be better to allocate selling costs on the basis of salesmen's rec-
7051 ords? That is a simple question.

A. Well, it certainly is not. I certainly do not know.

Q. You still continue to criticize the methods of allocation used by the Respondent in that regard?

A. Oh, no, that is not true. I have not. I have not, I have no criticism to make about the Respondent's allocation of its costs, but for the purpose of establishing a cost differential you have to do something more than that, and if you are going to arrive at proper methods for arriving at proper measuring factors, you are going to make a study, and if you do not make a study you are not going to arrive at the measuring factor or factors that are properly supported.

Q. Have you made any sufficient study in all of the time you have been working on this thing to give me any kind of an answer or information about whether it would be better to allocate selling costs on the basis of salesmen's records?

A. I certainly do not, you have a volume of salesmen's records out there and I certainly could not say that they would serve as a basis for the allocation of that class of expense.

Q. Is there a seasonal variation of duty of reseller salesmen?

A. I assume there would be.

Q. Do you not know?

A. No, I would not know.

7052 Q. Did you make any inquiry and did you find out?

A. Yes, sir. I talked to Mr. Houghton about those things.

Q. What did you learn? What did you find out?

A. He referred me to Mr. Hamer, and Mr. Hamer explained it and went into considerable detail in regard to it.

Q. Well, if you found out, will you please answer the question, Mr. Warmack, which is just this: Is there a seasonal variation of the duties of reseller salesmen?

Trial Examiner Ballinger: Based upon the information you received?

Mr. Hanley: Of course.

The Witness: Judge, I would just have to look up the records on that. I cannot remember all of those in my head.

By Mr. Hanley:

Q. Are you sure you never found out?

A. I am sure I discussed it with those people, your people.

Q. Well, you have no information now what the fact is, or what you learned?

A. Well, it was my understanding if my memory serves me correctly, that Mr. Hamer stated that there was a seasonal factor involved, and he particularly pointed out the things that you had to do in the spring, like the change over situation; and possibly in the fall of the year. And there
was some discussion, I remember, with reference to
7053 fuel oil activities. I rather think that they were not
discussed in connection with the reseller salesmen, although it might have been.

Q. Well, do you not know when the reseller salesmen devoted the largest portion of their time to tire salesmen, or the campaign for accessories, or they would take up with the people other matters of that kind, and they would speak to the tank wagon reseller, and the motor oil salesman, and engage in the selling of annual requirements of specialty products on some sort of a discount arrangement; do you know anything about the general field about which I have just given you a few ideas?

A. None.

Q. Did you go into it?

A. I may have discussed it, yes.

Q. Would it not be necessary from the standpoint of sound accounting for you to go in detail before you would be in a position to criticize the allocation method of salesmen's time as those methods are used by the Respondent?

A. No, sir. In my opinion it would not, but if you are proving a cost justification, it most certainly would. I did not start out to prove your case of cost justification or to disprove it. . .

Q. Just to find out if the methods were proper, and if the costs were properly allocated, Mr. Warmack, 7054 would not it be necessary for any accountant to investigate these problems?

A. Yes, sir, it certainly would, but whenever we—

Q. (Interposing.) And if you did not do it, then to that extent, your criticism lacks foundation, does it not?

A. That is not true. That is not true. I went out there to see what you did.

Q. Just one further question on that: If there be a seasonal variation wherein the sales group devoted an abnormal portion of their time during the month of December to any given line of merchandise, would not be sound accounting to adopt actual past time records for allocation of future expense items?

A. Right there—I would like to have that question again.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: It would not, assuming that the month of December was not a representative month for the next three succeeding months in which you would allocate your cost.

By Mr. Hanley:

Q. How would you allocate it, how would you make it up?

A. I would make a study—I would make a time study of a representative period for establishing a measuring factor, however, by which we could determine accurately and correctly what cost differentials should be used.

7055 Q. Well, while you were in Chicago did you meet and talk with Mr. R. E. Clark, the treasurer of the company, and to Mr. C. T. Bergeson, comptroller, and Mr. F. L. King, auditor, salesmen's department?

A. Yes, sir, I met Mr. Clark and Mr. Bergeson and Mr. King in the Chicago office.

Q. Did you inquire of any of these men what records were maintained over a period of years of the allocation of time of the various sales groups by field and by products?

A. I do not recall that I did, Mr. Hanley.

Q. Did you make any comparisons of estimates; that is, salesmen's time estimates submitted by the Detroit office over a period of years?

A. Yes, sir. I would not say a period of years, but they did take out of their records the distribution of time reports, of which Commission's Exhibit 88 is one, and I reviewed them. I do not know just how far that was—how far back that was. I saw some reports also for 1941, Judge Hanley.

Q. Did you make any comparisons or estimates or did you make any comparisons of the estimates submitted by Detroit over a period of years or for any substantial time?

A. I think I made some superficial review of those; yes, sir, Judge.

Q. Do you regard a superficial review as sufficient 7056 to entitle you to attack the accounting and allocation methods of the Respondent company?

A. A review of that kind would not be sufficient, or would not have been sufficient, and in fact would not have been necessary to state that the figures set forth in Commission's Exhibit 88 and other distribution of time reports were estimates—I went beyond that. I did not stop there.

Q. Did you see correspondence in the Detroit office wherein that office made any changes or suggested any changes, to the general office in connection with the estimates of time in connection with the estimates-of-time allocations for salesmen?

A. I did not.

Q. Did you do anything of that kind in the Chicago office?

A. I did not.

Q. Did you learn whether or not the Respondent once allocated its salesmen's salaries and expense on the basis of past activities?

A. It is my understanding that it does that now.

Q. Is that your present understanding?

A. It is my understanding that these distribution of time reports—as explained to me by Mr. Hamer—were based upon the company's experience of what the salesmen had been doing, and the estimated effort of what it expected them to do, and that that was the basis for the prep- 7057 aration of these distribution of time reports.

Trial Examiner Ballinger: Read the previous question.

(The reporter read the following question:

"Q. Did you learn whether or not the Respondent once allocated its salesmen's salaries and expense on the basis of past activities?")

Trial Examiner Ballinger: Did you or did you not?

The Witness: That was my understanding.

By Mr. Hanley:

Q. Do you now understand that the present system has in it a substantial element of future expectancy of the company?

A. Oh, yes, it has that in it.

Q. Is that a desirable method of allocating salesmen's time when their time is, on various products, subject to seasonal variations?

A. I think that is very well from the standpoint of general accounting practice to afford the management figures that it desires, but unless a cost study is made to establish these measuring factors as properly correct, or the accuracy of the result to be obtained by the use of that for the purpose of a cost justification—once that is done, it is all right, and, unless it is done in my opinion it is no good. In other words, you must have this foundational cost study and unless the cost study is made to establish these measuring factors, as I said before, as properly correct, 7058 or the accuracy of the results to be obtained from or by the use of them for the purpose of a cost justification for the company, then, in my opinion, it is no good whatever.

Q. Mr. Warmack, if the system of accounting accurately advises the management of its costs, then what criticism have you of that system of accounting as a basis for determining a cost differential?

The Witness: May I have that again?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I would have no criticism of it if the figures were accurate. They may be sufficiently accurate for managerial purposes, but they may not be sufficiently accurate for purposes of cost justification.

By Mr. Hanley:

Q. Mr. Warmack, I told you in the question that if the figures are sufficiently accurate, if the accounting system is sufficiently accurate to advise the management of its costs, would it not be sufficiently accurate to sustain a cost differential?

A. Not necessarily.

Q. Does that simply mean this, Mr. Warmack, that even though the figures are such, and the accounting procedures are such as to accurately advise the management of the Standard Oil Company (Indiana) as to its costs
7059 that those same figures which accurately advise them, that group of men, of costs would not equally accurately advise you of costs?

A. They certainly may not.

In the case at bar, this company has not even segregated its costs of direct shipment business. How on earth if that is not done can those same figures afford costs that would be sufficient to prove a cost differential?

Q. If—have they done it on Exhibit 101?

A. They have tried to treat it by breaking it up piecemeal.

Q. Has not it been done?

A. It has been partly done.

Q. Do you regard Respondent's Exhibit 100 as a cost study?

A. Yes, sir.

Q. You really think it is?

A. Yes, sir. It is not the kind of cost study that I think is sufficient to prove a case of cost justification.

Q. I wonder if you would answer this, please, Mr. Warmack:

If you think it would be possible, as an accountant, for any company doing a large volume of business in a number of different products and serving a number of different customers by different means to make any cost study or devise any system of accounting which would satisfy you as a basis for a cost differential?

A. I know of a fact that that has been done in the case of the Byrd case.

7060 Q. That is about the only one in Christendom.

A. No, we have many investigations made in which I thought that the companies had sufficiently proven their costs as a practical matter, why, from the standpoint of sound accounting, it might be entirely a presumption for a company to be asked to do it ordinarily, because it might be entirely too burdensome for a company to keep costs sufficiently accurate at all times to prove a case of cost justification.

Q. Does that mean that it has none there?

A. Oh, no; no, indeed.

Q. You say that it is not here in this case.

A. I did not mean that.

Q. Did you say it?

A. Do I understand—

Q. (Interposing.). Did you say that this cost differential does not exist in this case?

A. Oh, no. I certainly do not say that.

Q. Have you any opinion about it?

A. I certainly do not.

Q. Then you do not find very much out and did not when you were out in Detroit, did you?

A. I found and I have been testifying for three and a half weeks about what I have found out out there.

Q. Of course, about the matter of whether or not the cost differential exists.

7061 A. I did not study it because I did not start out to prove a case of cost justification of the cost differential.

Q. Mr. Warmack, as I understand this case, and as I assume you understand it, the purpose here is to determine whether or not this cost differential exists; is that not your understanding?

A. That is my understanding: that is what should be the purpose.

Q. But is not that the question also?

A. I do not know what you mean.

Q. Is not that the question you were trying to answer, to find out when you were in Detroit, whether this cost differential exists?

A. No, not necessarily. No, sir.

Q. Maybe not necessarily but is it not the primary question that you were interested in?

A. No, sir. I had no care as to whether or not it existed or not, and I do not now care as to whether or not it exists. That was not my assignment.

Q. Is it not a fact that the thing that you did care about was to find some means of criticizing the accounting of the Respondent company in such fashion as to make it appear that this differential did not exist?

A. Oh, no, why, that was not the purpose at all, I only wanted to find out why the Respondent had included in

their costs and in their attempted determination of
7062 a cost differential certain things and how those costs
had been separated, just the factual data, Judge, was
what I wanted.

Q. All right. How many specialized reseller salesmen are there in the Detroit field?

A. Certainly I do not know. I could not tell you.

Q. Is that not one thing that you would want to find out and that you were sent out there to find out? Is it not?

A. It is all over the record right here. Would you like for me to look it up, if you want it I will look it up.

Q. All right. Refer to Exhibit 103, please.

A. Yes, sir.

(The witness referred to Exhibit No. 103.)

Q. What is it? How many?

A. Special Salesmen—reseller, are shown on Commission's Exhibit 103 as three salesmen.

Q. Now, please outline their duties.

A. (The witness inspects the documents.)

Q. Just briefly, from your own knowledge.

A. The record will show this.

Q. Do not read the exhibits of the Respondent already in evidence, please.

A. I do not assume to remember everything.

Q. I am undertaking to find out, among other things,
what you know about this, as well as finding out
7063 facts, Mr. Warmack, so I would like your knowledge.

Trial Examiner Ballinger: Can you answer the question without reference to Respondent's Exhibit 100?

The Witness: I probably can give an answer to it, Judge, but I thought he wanted a full answer.

Trial Examiner Ballinger: That may be found in the answer.

By Mr. Hanley:

Q. I can read the Exhibit, Mr. Warmack, I just want you to tell me if you know what you know about it.

A. My knowledge goes no further than the source of it, the source of it is these records (indicating various records), and the information I got from them.

Q. All right. Do you know from these, or from any source, whether the reseller or whether the specialized salesmen, I should say, ride with the reseller salesmen, and observe them at work?

A. I was told by Mr. Hamer that they did.

The Witness: Your Honor, may we have a short recess?

Trial Examiner Ballinger: We will take a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

By Mr. Hanley:

7064 Q. Mr. Warmack, in addition to the specialized reseller salesmen, the number of whom you have given, were Messrs. Locke, Hawk, who are salesmanagers—resellers, did they ride with these salesmen to observe their work?

A. It is my understanding that they did occasionally, Judge Hanley. It was just occasionally.

Q. It is my recollection—let me ask you, does Mr. Hamer, whom you interviewed the assistant field manager—resellers—also ride with reseller salesmen and observe their work?

A. Well, he did not state to me that he did do that, but I assume that he does occasionally.

Q. Do you know that?

A. That is the only thing I know what I have told you.

Q. How many reseller salesmen are there—just give us the figure by referring to the exhibit.

A. (The witness referred to the exhibit.) Yes, sir, 26.

Q. Twenty-six?

A. Twenty-six.

Q. It would appear from what you have said, now, that there are seven supervisors over the activities of these twenty-six reseller salesmen. Is that right. The three special list of salesmen—is it there or four?

A. Those seven—that includes the special salesmen—leases, of which there is shown one, on the exhibit— Commission's Exhibit 103, I do not know, however, if
7065 those special salesmen can be considered as supervisors.

It is my understanding that they may exercise some degree of supervision.

Q. It would follow then, would it not, Mr. Warmack, that there are seven men in a supervisory capacity, irrespective of the work of these twenty-six men, who observe the work of these twenty-six men, these reseller salesmen?

A. It is my understanding, Judge Hanley, I understand that Mr. Hamer may be over some of the other group outside of the regular reseller salesmen. I think I can look that up.

Q. Is it not true that his primary duty as manager of the reseller group in the office is that very thing? Indeed, is not that his title "Manager of the Reseller Group in the Office"?

A. Yes, sir. I understand that his primary duty is acting as manager of the reseller group in the office.

Q. I believe the exact title is "Assistant Field Manager-Reseller".

A. Let me look. That is correct.

Q. Is that correct?

A. That is correct.

Q. I do not know, but I think you have fully answered this, Mr. Warmack, but I will ask you if you know, does the automotive engineer maintain a time record?

A. I do not know.

7666 Q. Would the company need an observer on this position? I assume you are familiar with his duties.

A. There is only one man and I should think he would know more about what he did than any other person could know, Judge Hanley.

Q. I should think so.

A. Yes.

Q. You have testified that Mr. Hamer advised you that reseller—that specialist salesmen reseller frequently prepared memoranda of salesmen's allocation of effort?

A. Yes, sir.

Q. He told you that?

A. Yes, sir, and he said that they rode with them—it is my understanding that that is correct, on the days that they rode with them, it is my understanding that that is correct, but not otherwise.

Q. Now, of these men in the supervisory capacity and who observe the twenty-six salesmen who are all fulltime employees—I will ask you that first—are they not?

A. That is my understanding, yes, that these seven men a e full time employees.

Q. Now, in your opinion, Mr. Warmack, are seven observers adequate to estimate the allocation of time of twenty-six employees?

A. Oh, in my opinion, they are quite adequate to
7067 make an estimate, yes, sir.

Q. Does the lubricating engineer make a daily call record report showing calls made, product causing the call, and the time spent on each call?

A. I do not know.

Q. You do not recall whether you know or whether you have gotten that particular documentary evidence?

A. I recall that I did not get it.

I should like for the record to show, your Honor, that when Mr. Hamer or Mr. Houghton stated to me that some of these higher officials did keep a time record—Mr. Houghton told me that and right at that moment Mr. Houghton had to leave very suddenly because of the illness, or because of the death of his father, and if those records did exist, I do not remember getting into that matter again.

You will recall that the hearing started on this case in Detroit about February 16 or 17, it seems to me, if my memory serves me correctly, and Mr. Houghton and I had to attend that hearing, and I do not recall that we again raised the question during the course of this field investigation made by me.

Q. You did not press that matter?

A. I did not press that particular one.

Q. All right, Mr. Warmack.

Mr. Austin: I would like to know what the witness
7068 meant when he said "higher officials."

The Witness: I think Mr. Houghton meant some of the employees of the—that is, salesmen who may have been classified as automotive engineers or of that class of employees, Mr. Austin. I do remember that discussion.

By Mr. Hanley:

Q. Now, Mr. Warmack, if you do not know, you can say so—and I believe you said you did not—that the lubricating engineer kept a time record—but will you assume that he does for the purposes of this question?

A. Yes, sir.

Q. Please refer to Exhibit 103 and tell me what percentage of the time of this class of salesmen is devoted to "other methods" channel?

A. 258 300ths, Judge Hanley.

Q. What?

A. The percentage would be something over 80 per cent.

Q. Would it not be eighty-six per cent?

A. The relationship of three hundred to 258 is 86 per cent; yes, sir.

Q. Did the industrial salesmen working under the lubricating engineers or do they?

A. I do not know.

Q. Assume that to be a fact, does the lubricating engi-
neer working with industrial salesmen on special
7069 problems—do you know that?

A. Yes, sir, it is my understanding that they do. I think Mr. Miller gave me that information in Detroit or Mr. Roth.

Q. Now, again referring to Exhibit 103, tell me what percentage of industrial salesmen's time is devoted to other methods?

A. Approximately 87 per cent.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Mr. Warmack, I asked you to assume, in the absence of your knowledge, and now ask you, that the lubricating engineers keep time records, and you have told me that their time allocation on "other methods" channel was 87 per cent.

A. Yes, 87 per cent.

Q. The industrial salesmen work under the lubricating engineers, you said, did you not, and if you said you did not know that was so, I will now ask you to assume that as a fact.

A. I will assume it.

Q. And you have indicated that the industrial salesmen's time on "other methods" is 87 per cent?

A. Yes, sir; that is on Commission's Exhibit 103.

Q. Now, assuming, if you do not know the fact
7070 to be, that the industrial salesmen do not keep time
records and that they keep only call records, and
assuming again that the lubricating engineers do keep time records and supervise the efforts of the industrial salesmen, would you say, as an accountant, what as to the responsible and reasonable accuracy of the relationship of 86 per cent of the time based on an actual record kept as to the 87 per cent of supervised employees, which 87 per cent is an estimate?

A. I would question that, I think the cart is before the horse.

It seems to me that the supervised time spent in supervisory activities should follow the time of the person supervised rather than the person supervised, that his time should follow the time of his supervisor, that is.

Q. Perhaps you do not understand the methods in use, as to the work of these men, Mr. Warmack. If you do not, assume it to be a fact, and it is, that these two groups of salesmen or employees work together to a very considerable extent.

A. Yes, sir.

Q. With that understanding would you not say that the estimated time allocation of 87 per cent is, from an accounting standpoint, reliable and reasonably accurate?

A. No, not just on its face, Judge Hanley. I would have to know more as to whether or not the activities of these
industrial salesmen, as to whether or not those activi-
7071 ties follow with the activities of the supervised's su-
pervisors, if they do, I would most certainly say that
is a proper method of separating the time.

Q. How many B-Station salesmen did you find, Mr. Warmack?

A. I find now six.

Q. How many supervisors work with these B-salesmen? Do you know that?

A. No, sir. I do not know that.

Q. Well, then, assume that to be—which is a fact—it is the assistant manager—wholesale, assistant manager—wholesale as well as the manager—wholesale, and assistant sales manager—wholesale.

Mr. Hanley: I withdraw that question and will start it over again.

By Mr. Hanley:

Q. Mr. Warmack, then assume it to be a fact—which is the fact,—it is the assistant manager—wholesale, sales manager—wholesale, assistant sales manager—wholesale, three of them; do you know whether those men ride with the B-Station salesmen and observe their work and methods of work?

A. No, sir. I do not know that they do. I assume that they do occasionally.

Q. Do you know whether or not it is true that these three men prepare a time allocation on these six B-Station salesmen?

7072 A. Did you give me their names?

Q. Names of what?

A. Of the supervisors.

Q. Of the supervisors?

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Do you know Mr. Blaugh, assistant manager—wholesale; Mr. Smith, sales manager—wholesale; I am sorry I do not know the name of the other assistant.

A. I am not—it is my understanding that Mr. Blaugh and Mr. Smith have to do with the allocation or the determining of the allocations of time of the persons whom they supervise.

Q. Now, assuming it to be a fact, if you do not know, that these three men in a supervisory capacity prepare the time allocations on these six B-Station salesmen, that they ride and whose work they observe—that they ride with and whose work they observe, would you regard those three men as a sufficient number of supervisors and consider them to be in a position to accurately prepare time allocations and make estimates for time allocation purposes?

A. I am sure that they could if they made proper notes as to the activities of the persons whom they super-
7073 vise, and if they were with them a sufficient amount of time.

Q. To what channel is all of the asphalt salesmen's time charged?

A. To the "other methods" channels. That is one man.

Q. Is it your understanding that his total sales would be classified in this channel?

A. That is my understanding, yes, sir.

Q. To what channel is all of the time of the special salesmen; heating oil and domestic heating oil charged?

A. That is charged to the tank wagon reseller channel column, or tank wagon consumer business.

Q. Is it not a fact that all of the gallonage sold by these men is also in the tank wagon consumer channel?

A. That is my understanding, Judge Hanley.

Q. Mr. Warmack, I want to ask you if you agree with the following quotation, which I think has already been put in the record, Mr. Warmack, but I can speed it up if I can, possibly, by just again asking you to listen while I make this quotation from page 38 of "Cost Studies and Distribution Cost Accounting for Manufacturers and Wholesalers," which is now Commission's Exhibit 134 for identification, the statement as follows; and the question is, do you or do you not agree with the statement?

Mr. Austin: Before you read that, have you a copy of that document here?

7074. Mr. Hanley: I only have the one copy.

Mr. Austin: Very well.

By Mr. Hanley:

Q. I will now ask you to listen to this quotation which I am going to read from page 38 of Commission's Exhibit 134 for identification, and ask you the question: Do you or do you not agree with it:

"It is obviously very difficult and frequently impossible even for observers to ascertain the actual time engaged in each of these direct selling activities applicable to each commodity the salesman handles numerous items. Perhaps one basis for ascertaining the estimated time applicable to each commodity would be for observers or the salesmen to report the approximate segregation of the interview time applicable to each commodity."

Do you or do you not agree with that statement?

A. That statement is taken as a part of the context of a study which we made here in the Commission and I believe I testified before that I agree with certain of the context, and this is still my opinion; that statement taken alone and by itself is not exactly all of what that particular context shows.

Q. No, this is taken from a book, 150 pages long, Mr.
Warmack, and I am just trying to get from you a
7075 statement as to whether or not you agree with the
principles that are enunciated in the paragraph which
I read.

Mr. Austin: Is not that the question which was asked repeatedly heretofore?

Mr. Hanley: It is.

Mr. Austin: And I have the particular paragraph to which you refer, which I believe was stated in the record repeatedly.

The Witness: That is correct.

Mr. Hanley: That is correct.

Mr. Austin: I do not see the purpose of it.

Mr. Hanley: I do not recall, if your Honor please, whether this was one of the statements which the witness modified by quoting other portions of the text or not; there was some such, but I would like to have this witness answer now if you agree with the principles as stated in the quoted language.

Trial Examiner Ballinger: You may answer.

The Witness: Your Honor, I agree with the context of the book from which this is taken—

By Mr. Hanley:

Q. (Interposing.) Mr. Warmack, this is a quotation, disregard the book now, if you will, and tell me as an expert accountant out of your own knowledge, observation, and experience, and out of your own head, whether or not 7076 you agree with the principles enunciated there.

A. They are stated in the quotation which you read?

Q. They are stated in the quotation which I read.

The Witness: May I have the question read, your Honor?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Tell me what is respondent's attorney referring to when he says "each of these direct selling activities"; what does he mean? He says "these" and I do not know what he means by that.

Mr. Austin: Your Honor, we got into this once before, and the same question is on the record twice, and the same quotation, and I think he was asked in connection with that book, and perhaps not in connection with it also, and the witness answered as follows—

Trial Examiner Ballinger: (Interposing.) Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: If there is pending a question by Respondent's counsel it may be withdrawn and I will ask another question.

Trial Examiner Ballinger: Question withdrawn.

Mr. Hanley: I will reframe the question.

7077 Trial Examiner Ballinger: The question will be reframed.

By Mr. Hanley:

Q. Mr. Warmack, tell me, out of your experience and observation as a cost accountant, whether or not you agree in principle with the following statement:

"It is obviously very difficult and frequently impossible even for observers to ascertain the actual time engaged in each direct selling activity applicable to each commodity when the salesman handles numerous items."

Do you agree or disagree with that statement?

A. I agree with it to the extent that that would be very true in some instances, it may not be true in others, each case will have to stand on its own.

Q. Do you agree with the principle enunciated in that statement? It will not do you any good, Mr. Warmack, to read the book.

A. I may read whatever I wish, but in some situations I think that is very true, in other situations I think that it may not be anything but impossible to determine that information.

Q. Now, do you agree or disagree with the following statement:

"Perhaps the only basis for ascertaining the estimated time applicable to each commodity would be for an 7078 observer or a salesman to report the approximate segregation of the interview time applicable to each commodity"?

A. That may be true, I agree with that in its application in some instances, and in some instances I think that that would be stretching the imagination to think that you could not come out with something more accurate.

Q. Mr. Warmack, do we understand that you do not know whether you agree or disagree?

A. I have given my answer.

Q. Please answer the question.

A. I have.

Mr. Hanley: May I have an answer to that, if your Honor please?

Trial Examiner Ballinger: Are you familiar with the question?

The Witness: Judge, I have answered it the best I know how.

Trial Examiner Ballinger: Are you familiar with the question, is my question to you.

The Witness: Yes, sir, I think I am. I would like to hear it.

Trial Examiner Ballinger: Read the question.

(The reporter read the following question:

> "Q. Mr. Warmack, tell me, out of your experience
> 7079 and observation as a cost accountant, whether or not you agree in principle with the following statement:
>
> "'It is obviously very difficult and frequently impossible even for observers to ascertain the actual time engaged in each direct selling activity applicable to each commodity when the salesman handles numerous items.'"
>
> "Do you agree or disagree with that statement?")

Trial Examiner Ballinger: Now, read the pending question.

(The reporter read the following question:

"Q. Mr. Warmack, do we understand that you do not know whether you agree or disagree?")

Trial Examiner Ballinger: Now you may answer.

The Witness: Yes, sir, I know.

By Mr. Hanley:

Q. Then, what is it, do you agree or disagree?

A. I agree with the question as put, subject to the qualifications which I have just enumerated.

Q. Mr. Warmack, I am going to ask you please just to be fair with me in connection with this question. I have asked you as an accountant if you agreed with these statements in principle. Now, as an accountant, I assume you know what is in your own mind. Will you please tell
7080 me whether in principle you agree or do not agree with these statements, and you can answer that "yes" or "no."

A. (There was no answer.)

Q. What is it?

A. I have already answered the question. I answered it previously. I answered it previously.

Mr. Hanley: May I have an answer?

Trial Examiner Ballinger: Apparently, the witness is incapable of giving you any better answer than he has already given you. He is testifying as an accountant, and he has given you the best answer he can.

Mr. Hanley: Well, of course, if your Honor please—

Trial Examiner Ballinger: Which he says he can give.

Mr. Hanley: It is extremely difficult for the Respondent to present its case if the Commission's expert witness simply refuses to answer, and sits silent.

The Witness: I am not refusing to answer the question, your Honor.

Trial Examiner Ballinger: Well, I cannot perceive any difficulty in answering the question.

The Witness: I have answered it, and properly, in my opinion.

Trial Examiner Ballinger: The statement is:

"It is obviously very difficult and frequently impos-
7084 sible even for observers to ascertain the actual time engaged in each of these direct selling activities applicable to each commodity when the salesman handles numerous items."

Is not that of necessity a fact that it is very difficult for the observer to observe the time of salesmen, of the salesman who is engaged in selling each of several commodities which he handles?

The Witness: Oh, sure, but it is not impossible—your statement was—impossible.

Trial Examiner Ballinger: Is it impossible to arrive at a technically accurate time?

The Witness: I certainly do not know. Each case will have to stand on its own. That is the idea.

Trial Examiner Ballinger: Is there a case possible of arriving at such an accurate situation?

The Witness: In many cases. Many of the accountants say that it has been done and have demonstrated it to me, have demonstrated to me figures which I consider to be rather accurate. That statement comes from a book and as I said before, I agree with the context as is stated in the book, I agree with that one hundred per cent. in full, but not just a paragraph here and there.

Trial Examiner Ballinger: Judge Hanley, you may proceed.

7082 By Mr. Hanley:

Q. Now, will you name the class of salesmen, Mr. Warmack, where the Respondent has failed to adhere to the practices and principles outlined in the quotation read to you from page 38 of Commission's Exhibit 134 for identification?

A. I do not understand the question.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I certainly could not answer that question. It is impossible of an answer. That book did not sit down and outline what study is to be made or at least that quotation certainly did ~~not~~

By Mr. Hanley:

Q. (Interposing.) You said you could not answer the question, is that true?

A. What do you think?

Trial Examiner Ballinger: Well, now,—

Mr. Hanley: If your Honor please—

Trial Examiner Ballinger: (Interposing.) Mr. Warmack, there must be no further repetition of questions back and forth, you must either answer the question of counsel for the Respondent, or you must state that you do not understand.

The Witness: I am sorry.

Trial Examiner Ballinger: Then they will be ex-
7083 plained to you.

The Witness: Well, Judge, when the Respondent treats me in the attitude that he has just been treating me, and addresses me that way, I am sorry, but I cannot tolerate it.

Trial Examiner Ballinger: The Examiner did not observe anything unusual in the attitude of Respondent's counsel.

Mr. Hanley: Will you read the question, please?

The Witness: Maybe you just were not looking, Judge. I am sorry.

Mr. Hanley: Read the question.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: Can you not give him an answer?

The Witness: I think I stated that, Judge. Of course, if I may have the question I will try to state it again.

Trial Examiner Ballinger: Read the question again to the witness.

(The reporter again read the question.)

Mr. Hanley: Now, if your Honor please, the question having been read again, I would like to make a motion to strike out all that has happened before, and perhaps
I can reach a more satisfactory conclusion by asking
7084 another question. Therefore, I move to strike out
all that has happened during the interim of time from

the last question, because I believe that will be a shorter way of getting at it.

I had asked this last question hoping that that would save time rather than make a motion to strike out. It did not do so.

Therefore, my last question may be withdrawn. I now move to strike the answer of the witness beginning with the words "It is impossible."

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The motion to withdraw the last question is granted.

That portion of the motion to strike from the record the answer of the witness is denied. It is the opinion of the Examiner it should remain on the record.

By Mr. Hanley:

Q. You have heard your answer read, Mr. Warmack. I ask you now if you meant by saying that that was an impossible question to answer, if you meant it was impossible for you to answer?

A. I certainly did not.

Q. For whom are you assuming to pronounce that judgment?

A. It would be impossible for any person to answer your question as framed.

7085 Trial Examiner Ballinger: Do you understand the question?

The Witness: Yes, sir.

Mr. Hanley: If your Honor please, we are not making any progress at all, and perhaps we should adjourn at this time.

Trial Examiner Ballinger: None whatever, and this witness can speak only for himself. He cannot go beyond. The Examiner suggests that you pass on to something else.

Mr. Hanley: If your Honor please, I would be glad to pass on to something else, but I assure your Honor that I shall have to have some cooperation of the witness if I am going to proceed at all, and this being an unusual jurisdiction in which I find myself, I do not know just what proceeding might be appropriate for me to take in order to compel that cooperation. I assume it to be within the province of the Examiner, but if it is not and does not reside there, then I earnestly request the Examiner to tell me if I should present the matter to the Commission.

Trial Examiner Ballinger: The Examiner considers the answer, while unsatisfactory, undoubtedly, nevertheless an answer.

Mr. Hanley: I think so.

The Witness: Your Honor, I will be glad to explain 7086 to Respondent's counsel why this question could not be answered.

Trial Examiner Ballinger: That is, why you could not answer the question?

The Witness: Yes, sir. I cannot speak for anybody except myself.

Trial Examiner Ballinger: All right.

Now, will you explain what you meant in answering the question?

The Witness: I should be just too happy to do so.

Mr. Hanley: Well, before the Examiner asks the question—

Trial Examiner Ballinger: The Examiner has directed the witness to explain to you why he cannot answer your question, if you desire that information you may have it, otherwise the Examiner will withdraw the question.

Mr. Hanley: The Respondent would prefer that the Examiner do withdraw the question for the reason that it will simply open up another interminable repetitious speech which will not be helpful to any one in the lawsuit.

Trial Examiner Ballinger: Question of the Examiner is withdrawn.

By Mr. Hanley:

Q. Mr. Warmack, are you acquainted with the complaint under which these hearings are being held?

7087 A. Yes, sir.

Q. Do you understand it to be a fact that the complaint is directed to the price differential between two classes of customers, namely, jobbers on the one hand and tank wagon reseller customers on the other hand?

A. That is my understanding, for the year 1940.

Q. As an accountant, would you say that the cost differential should reflect differences incurred in serving these two classes of customers?

A. I should think it should in the place where the complaint is drawn.

Mr. Austin: Your Honor, I think I had better move to strike that question and answer. I think that involves a conclusion of law as to what cost differential should be included, based upon a construction of the complaint. I was under the impression that counsel was leading up to something else, or I would have objected at the time. The question, as framed, is as to an opinion of the witness based upon his knowledge, as an accountant, of a legal matter, and I would like to object and move that the question and answer be stricken.

Trial Examiner Ballinger: The objection should have been made at the time the question was asked. The objection comes too late, and the answer is in. Motion is denied.

By Mr. Hanley:

7088 Q. You have, in the course of your testimony, criticized the fact, Mr. Warmack, that the Respondent did not keep separate cost accounts for leased out service stations on the one hand, and for 461 accounts on the other hand; have you not?

A. I did not get the question.

Mr. Hanley: May the question be read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: Answer the question.

The Witness: No, sir.

By Mr. Hanley:

Q. Then, I have misunderstood your testimony. I thought that you took the position, Mr. Warmack, that there was something faulty in Respondent's Exhibit 101 because there was no separation between leased out stations, and 461 accounts.

A. That is an entirely different question, you asked me if I questioned the way the company keeps its accounts. I certainly do not. That was in your other question.

Q. All right. You have made a criticism included in my last question, have you not?

A. I have questioned the propriety of grouping the lessee stations with the non-lessee stations in the absence of making a cost study to determine that they should be so grouped, and I feel that until that is done they should be separated.

7089 Q. While you were in Detroit did you ascertain whether the leased service station operators in the account 461 type of account paid the same price for gasoline delivered by tank wagons?

A. Did I inquire about that?

Q. Yes.

A. Yes, I inquired about that.

Q. What did you ascertain?

A. Well, I was told that they did.

Q. Did you understand that the record in this case establishes that to be true?

A. Yes, sir, that is why I did not look up the vouchers and the bills.

Q. Did the Respondent's accountants bring together the different expenses and rent income resulting from marketing gasoline through the 461 type of outlet, and the leased type of account?

The Witness: I will have to have that question.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: Do you understand the question?

The Witness: It is not exactly clear to me, Judge, I think I understand it; I will try to answer it on the way I understand it.

7090 By Mr. Hanley:

Q. Well, foundationally, let me ask you if you understand Respondent's Exhibit 101.

A. I think I understand that exhibit; that is, the facts set forth in that exhibit.

Q. Do you understand Commission's Exhibit 119, being Respondent's regular accounting form 189 for the year 1940, in Detroit?

A. Yes, sir.

Q. Then, Mr. Warmack, you could not possibly misunderstand anything about the question.

A. I certainly do not know if I understand your question, but I will answer it. I will answer it and if I do not, I do not want to try to answer it if I do not understand it—and—

Q. (Interposing.) You are not getting anywhere—is it not true that all of the expenses and rentals that are shown on the books of the Respondent company for both the 461 accounts and leased out accounts for the year 1940 are reflected separately so far as the rent account is concerned on Commission's Exhibit 119?

A. That is my understanding.

Q. And included in the figures on Respondent's Exhibi 101?

A. Yes, sir, that is my understanding.

Q. Then, will you please answer that question, Mr Warmack?

7091 A. Will you please restate it?

Q. All right, for the fifth or sixth time now, Mr Warmack, you are going to hear it, and will you please listen to it and answer it?

A. Just a second, that is the second time only that you have asked me that question.

Trial Examiner Ballinger: Counsel—

By Mr. Hanley:

Q. (Interposing.). Did the Respondent's accountant bring together all expenses and rent income resulting from marketing gasoline through the 461 type of outlet and the leased out type of account?

The Witness: Your Honor, I resent being addressed i any such manner by Respondent's attorney.

Trial Examiner Ballinger: The Examiner directs tha the remarks of counsel for Respondent as to the number o times that the question has been asked the witness, an the last remark of the witness be stricken—not physicall —from the record.

And he now requests counsel for the Respondent an the witness that counsel for Respondent address his questions to the witness and the witness to answer without an exchange of remarks between them.

The Witness: Thank you, your Honor.

Answering the question, they are thrown togethe 7092 in Respondent's Exhibit 101.

Trial Examiner Ballinger: Is that an answer?

Mr. Hanley: I move to strike the answer of the witnes as not responsive and request the Court to direct the witness to give a direct answer to the question.

Trial Examiner Ballinger: The motion is granted.

The answer to the question is stricken and the questio will be reread to the witness.

Mr. Austin: Your Honor, I object.

Mr. Hanley: If your Honor please, I wonder if we ar not making such slow progress that it would be worthwhil to recess at this time.

Trial Examiner Ballinger: We will take a five minute recess if you desire.

Mr. Hanley: No, I was thinking of recessing for the day.

Trial Examiner Ballinger: I think we should try to go on a little while longer.

The Witness: Your Honor, I stated that they did do that in Respondent's Exhibit 101, or that is my understanding of what was done in the preparation of Respondent's Exhibit 101 that that part of that class of expense and rental income was put together; that is my answer.

By Mr. Hanley:

7093 Q. Mr. Warmack, do you understand it to be a fact that that is the regular, general accounting procedure of the Respondent?

A. Not exactly that. In Respondent's regular accounting procedure, they have a column set aside for the leased service station business; that is, certain expense incurred with the leasing activities of the Respondent company; which are offset by the rental revenues on the column. (The witness indicates certain columns on an exhibit.)

Q. Is that not closed into and brought together with the selling cost as set out in the tank wagon reseller channels on the Respondent's regular accounting form 189?

A. Let me review the matter.

(The witness inspects certain papers for several moments.)

The Witness: It is my understanding that all of the costs shown on Commission's Exhibit 119, which is the Respondent's regular accounting form 189, are marketing costs in the Detroit field. There is a column provided on that sheet in which the landlord activities are set out showing the costs and the rent revenues, and that has to do with these leased service stations, and the net figure as shown on Commission's Exhibit 119, company's form 189, is the net cost for the year 1940 of $48,506.44, and I do not see on this form where that is closed into anything.

By Mr. Hanley:

7094 Q. Mr. Warmack, do you not know from your studies of the methods of the Respondent in keeping its marketing costs that when the unit cost of marketing is determined by the company; that is, the unit cost of marketing through the tank wagon reseller medium of outlet, that the loss or profit, or the amount gained or lost in this so-called landlord and tenant operation is closed into and becomes a factor in determining such unit cost of marketing through that particular medium of outlet?

A. Again, I will review the record. (The witness examines certain documents.)

Trial Examiner Ballinger: Do you understand the question?

The Witness: Yes, sir.

Mr. Hanley: I will withdraw that question.

By Mr. Hanley:

Q. Does this Exhibit 101, so far as this Exhibit 101 is concerned, it is true that that is brought together, is it not—you are satisfied of that, are you not, Mr. Warmack?

A. Yes, that is a fact, that is brought together; that means the leased service station cost and the landlord costs are brought together with the tank wagon reseller and a portion of it goes into the "other methods" column.

Q. Now, the result of that would be, would it not, that
the amount shown in the reseller column on Respond-
7095 ent's Exhibit 101 is a composite average cost of serv-
ing all classes of tank wagon reseller outlets paying
the same price for their gasoline?

The Witness: May I have the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Yes, sir, that is correct; that includes almost in fact all of the landlord expense that went—well, that we were just talking about.

By Mr. Hanley:

Q. You testified, Mr. Warmack, page 6782, if you care to look at it,—as follows:

"It is my contention that to study—"

There may be something missing here—

"—should have been made by the Respondent to determine the cost applicable to sales through leased service stations as against sales to independent operators. It could be possible from the standpoint of sound accounting that the study of this account may prove to be impractical, but at least in my opinion a study should be made to determine whether it is practicable to make such a separation."

You did so testify, did you not?

A. Yes, that is paraphrasing my testimony.

Q. It is, in part?

7096 A. Yes.

Q. Are you of the opinion now that such a separation would be practicable or impracticable?

A. Indeed, I certainly could not know that, Judge Hanley, and the only way that that point could be established would be by a study of the situation, a proper study.

Q. On the same page, I think, Mr. Warmack, you testified further, and you may find this is somewhat paraphrased:

"There is a question in my mind as to whether or not this class of expense which is offset by rentals received by the Respondent company from the lessees of the station has a place in determining a cost differential."

Did you so testify?

A. Yes, sir, I made that statement.

Q. What is your opinion now as to whether or not it is a proper item to be included in the expense of selling gasoline through the reseller column?

A. I certainly do not know.

Q. Have you any definite idea at this time as to whether it has any place in determining a cost differential?

A. I stated on direct examination I did not know, and that is still my opinion.

Q. You said there is a question in your mind?

A. Yes, sir.

7097 Q. Am I to understand when you say that there is a question in your mind that you are not sure whether it should or should not be used?

A. That it should or should not be used?

Q. You do not know in your own mind?

A. No, sir, and I could not know without going into the same more extensively than I have been required to go.

Q. Did you, while in Detroit, ascertain whether there was any net rent income for any of the months of 1940?

A. No, sir.

Q. Did you not learn that, Mr. Warmack?

A. I may have learned it, Judge Hanley, I received and reviewed each of these accounts on form 189, and the material, there was considerable material, but since the company was dealing wholly with their cost differential on the basis of the full year 1940—for the full year, I mean, not for any one month in it,—I did not concern myself materially with any particular month except from the standpoint of making tests.

Q. Where those accounts used to show the rent account on leased station is closed into the account which were or appears in the reseller channel, would not the result be, Mr. Warmack, that wherever there was an amount of rent in excess of real estate expense that, to that extent, the
cost of selling gasoline through the reseller channel
7098 would be reduced?

A. Yes, sir, according to the company's method of accounting. That is—that assumes, of course, that the landlord activities of the company on the other hand reflected cost of operations, was or should be credited as revenues to the cost of operations.

Q. And the reverse would be true, I presume, would it not; that is, any net rent cost when incorporated in the reseller channel would result in an increase in the net cost, and increase in the cost of selling gasoline through the reseller channel?

A. Any rent put out or paid would cause an increase and any rent received would reduce the cost.

Q. Well, you were in Detroit for about two months. While you were in Detroit did you at any time have a segregation of the tank wagon reseller cost between these stations, and the 461 accounts shown to you, or did you make it?

A. I did not attempt to make any such segregation, and none was shown to me.

Q. Did you discuss the practicability of this segregation, Mr. Warmack, with Mr. Houghton?

A. Yes, sir.

Q. At considerable length, Mr. Warmack?

A. Yes, sir. I believe I did.

Q. Was he not in a position to point out many in-
7099 tangibles that such analysis may have faced for past
periods, without maintaining records on this basis?

A. Yes, sir, he pointed out many difficulties in his mind that would arise in that attempted segregation. He did not show me that he attempted such a segregation, or that an attempt at such a segregation had ever been made by the company. He was just speculating as to what might happen.

Q. Now, in your judgment, Mr. Warmack, for those accounts which have been allocated on a time basis such as account 004, salaries—salesmen; account 006—salaries—drivers; account 008, salaries—warehouse labor; account 200, office expense—salaries—accounting, and so forth, would there not be, or would there be any standard for segregation between the two classes?

The Witness: I will have to have that again.

Trial Examiner Ballinger: Read that again.

(The reporter read the question.)

The Witness: I do not understand the question, Judge Hanley. I am sorry.

By Mr. Hanley:

Q. Can you tell me what you are having difficulty with?

A. With the word in there about would there be any standard of segregation between the two classes.

Q. The classes being the lessee stations group on the one hand, and the 461 group on the other hand.

7100 Mr. Austin: Your Honor, I am not objecting to the question, but I may be able to shorten this discussion a little.

I will stipulate on the record that it is not contended by the Federal Trade Commission that there is any difference in the unit cost of serving lessee stations and non-lessee stations as to the expense going into any of the four accounts just named by Judge Hanley.

During the direct examination several accounts were mentioned where the witness stated that a portion of the expense in such accounts, these leased service station expenses he thought should have been classified or separated as such, and of course, that goes to all of the A, B, C, accounts which, as I understand it, are already separated by the Respondent to the leased service station column, as neither accounts include the three mentioned at the beginning by Judge Hanley, and therefore, in an effort to save time, I am willing to stipulate, Judge Hanley, and it is stipulated for the purposes of this case that there is no difference in the cost of gasoline to the lessee service stations and the non-lessee service stations.

Mr. Hanley: Counsel states that he stipulates that there is no difference in the cost of gasoline to the lessee service stations and the non-lessee service stations. That is not the purpose of the question.

7101 Trial Examiner Ballinger: If there is no controversy over the question, what is the object of pursuing the question?

Mr. Austin: Maybe the Respondent contends there is some difference.

Mr. Hanley: The Respondent does contend that a certain situation exists, and that will be gone into later on. However, I am not asking this witness whether he attacks the position that there may have been no difference, or whether the Commission is now taking the position that there was a different cost on these particular items as between one class or the other; that is not the purpose of my question. I do not care whether that is agreed to or not. That is definitely not the purpose of the question.

Mr. Austin: May we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: As long as I made the statement on the record, I would like to state that that statement was, of course, confined to the metropolitan Detroit area, and the stipulation is based on the further idea that it would save time.

The Witness: He amplified that question just a little bit by clarifying it, and may I have the entire 7102 question?

Trial Examiner Ballinger: I will direct the reporter now to read the question.

(The question referred to was read by the reporter as follows:

"Q. Now, in your judgment, Mr. Warmack, for those accounts which have been allocated on a time basis such as account 004, salaries—salesmen; account 006—salaries—drivers; account 008, salaries—warehouse labor; account 200, office expense—salaries—accounting, and so forth, would there not be, or would there be any standard for segregation between the two classes?")

(And the reporter also read:

"Q. The classes being the lessee stations group on the one hand, and the 461 group on the other hand.")

The Witness: That "standards" is just a little bit confusing to me; just what does that mean, Judge Hanley, please?

By Mr. Hanley:

Q. I will have to ask you, as an accountant, what it means; that is the meat of the question, Mr. Warmack—what standards?

A. What do you mean by "standards"—your Honor, that is the thing I would like to know.

7103 Q. I am asking you if there are any standards and if there are, what are the standards for segregation of the expense?

A. That is the first time I have heard of the word "standards."

Trial Examiner Ballinger: Do you mean methods of accounting?

By Mr. Hanley:

Q. Yes. What treatment would you use there; what yardstick would you use?

A. I positively could not answer your question, and no one in the world could answer your question unless they had studied it, and they had made a study of the situation to find out what methods were used, and studied the logic behind those things, then your question could be answered, and, your Honor, then and only then could it be answered.

Q. Now, Mr. Warmack, you were familiar with the questions in the Detroit office, and I assume you know it to be a fact that so far as serving the reseller outlets is concerned, that the lessee stations and the 461 accounts are handled identically the same way from an accounting standpoint, and from the actual, physical delivery of gasoline, from the standards of salesmanship, standards of form, and everything standard except in one instance the operator owns his own station and in the other instance the operator leases his station.

7104 A. Yes, sir, that is my understanding.

Q. That is your understanding?

A. Yes, sir.

Q. Now, that being the case, I would like to have you reconsider this question that I asked you and to outline as an accountant what could be done, what conditions exist between the 461 and the lessee stations so that something could be done to handle them differently from the standpoint of costing, and if anything could be done, what standards or methods could be used?

A. Your Honor, Judge Hanley, I answered your question and told you that I could not say what should or could be done without going out there and employing methods, and testing methods, and studying the logic of their methods to see what could be done, otherwise I cannot answer the question.

Q. Take the one account 004, salaries—salesmen, you are familiar with the fact, are you not, that these salesmen—reseller salesmen make calls on operators that are in both 461 accounts and leased station accounts, you know that?

A. That is my understanding.

Q. And they call on these two classes indiscriminately?

A. That is my understanding.

Q. They may spend an hour with a 461 station and the next two hours with a lessee station, and maybe
thirty minutes with the 461 station and the next hour
7105 with the lessee station, and so on down the street
during the day; is that your understanding?

A. That is my understanding.

Q. Those salesmen are selling various commodities; that is, your understanding, is it?

A. Yes, sir, the company's products.

Q. And they are striving to sell those same commodities to each of this group?

A. Yes.

Q. Or either of these groups, both groups?

A. Yes, sir.

Q. They are?

A. Yes, sir.

Q. From time to time those same salesmen undertake to give instructions in sales methods to operators, do you understand that to be true?

A. Yes, sir. That has been testified to.

Q. That is done indiscriminately, is it not, as between the two groups, the 461 and the lessee stations?

A. I understand so, yes, sir.

Q. With that background and understanding, Mr. Warmack, what kind of a study, what approach by way of a study as you have said you thought one should be made, could you make what sort of a thing would you
do, as an accountant, to begin to study that situation
7406 to learn anything about it that you do not already
know?

A. I certainly could not tell you without going into it, but I certainly could go out and make many different kinds of studies.

Trial Examiner Ballinger: Can you answer the question?

The Witness: No, sir. I have told and told and told that I could not answer that question without making the study.

Trial Examiner Ballinger: He wants to know what you would do in making such a study.

The Witness: I would go out and study the situation. I recall that when the same question was asked of Mr. Boatwright in connection with another matter covering the company's business, he said he did not know.

Trial Examiner Ballinger: You may strike the witness' answer as to Mr. Boatwright.

The Witness: I am sorry.

By Mr. Hanley:

Q. I am hoping you do know when you say it should be separated.

A. I would—I was told that in the Detroit office what I know about it.

Q. All right, continue with that one account, Mr. Warmack; 604, what could you learn in the Detroit office?

7107 A. I could have interviewed these salesmen, I could have these salesmen keep time records, which, as I understand it, they have never done, showing the segregation of their time worked up in accordance with proper accounting methods. I would make a study to determine what sales resistance and just how much sales resistance was involved in connection with the two groups.

Q. Just a minute. Do you mean by "sales resistance" you think it might be well to find out whether it would be harder to sell an operator in a lessee service station than it would be in a 461 account, or vice versa?

A. I imagine you would, and I should imagine that would be very beneficial information to the company, if it does not already have it.

Q. Do you assume that any such difference in sales resistance exists?

A. I certainly do not know, but a study would show, that is just the beginning of how you would start. I can give you a little start there. There are many other things that would be done.

Mr. Hanley: If your Honor please, I move that we adjourn until tomorrow morning.

(Witness temporarily excused.)

Trial Examiner Ballinger: The motion is granted.

7108 And now, at 4:55 p. m., the hearing stands adjourned to be reconvened in Room 532, Federal Trade Commission Building, Washington, D. C., July 24, 1942 at 9:30 o'clock, a. m.

(Whereupon, at 4:55 p. m., July 23, 1942, the hearing in the above entitled matter was adjourned.)

7109

Room 532, Federal Trade
Commission Building,
Washington, D. C.
Friday, July 24, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Illinois,) appearing for the Respondent.

7110 PROCEEDINGS.

Trial Examiner Ballinger: Come to order. The hearing of Docket No. 4389, case entitled "In the Matter of Standard Oil Company (Indiana)" is reconvened pursuant to notice at 9:30 a. m., on the twenty-fourth day of July, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held at the same place, July 23, 1942.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

Mr. Hanley: Mr. Warmack, will you please resume the stand?

Mr. Warmack: Yes.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Hanley.

Q. Mr. Warmack, just at the close of the session yesterday you gave testimony in respect of what you called the "sales resistance" as applying to the 461 operators and lessee operators.

Tell me, please, just what you meant by the term 7111 "sales resistance"?

A. Well, my definition of "sales resistance,"—which will probably sound crude to a good salesman—but my idea of it is the difficulty which the customers offer, and the resistance which the customer may offer to a sales representative when he is trying to make a sale; this means when the sales representative is trying to sell a product to the customer and the customer is offering every excuse in the world why he should not buy that product, or probably not buy as much of it as the sales representative would want him to buy. That is what I mean, and that is probably crudely stated.

Q. Now, I think that is clear enough for our purposes.

A. Yes, sir.

Q. You made the suggestion in your testimony, or at least I think that is what you were doing, that there might be a greater so-called "sales resistance" on the part of lessee dealers than on the part of the 461 dealers, or perhaps vice versa; I am not just quite sure what you did mean, Mr. Warmack; is that the sense of your testimony yesterday?

A. Yes, sir. That is correct.

I think I was pointing out yesterday—I have not reviewed the testimony to which you refer—some of the things that would have to be considered and explored if a cost study were made to determine if it were possible to

separate this Respondent company's lessee business from
a non-lessee business. I was addressing myself to
7112 that particular point.

Q. Is there anything within your knowledge or observation of the company's business which leads you to believe that there may be greater sales resistance on the part of the lessee dealer than the 461 dealer?

A. Oh, I certainly do not know.

Q. Assuming this example, Mr. Warmack: Say that "X" who is a service station operator, is leasing his station from the Standard Oil Company and handles their products; assume that "Y" is a service station operator, and he owns his own station, and likewise obtains petroleum products from the Standard Oil Company.

What differences, if any, is there in your mind, from a sales resistance standpoint or otherwise, that exists in the treatment and handling, or cost of handling those two accounts from a sales standpoint or a marketing cost standpoint?

A. Well, Judge Hanley, I could not state what difference there would be. I believe you have several hundred stations, reseller stations that you serve in the Detroit field, and if you were to go into it with such refinement as to determine that point—sales resistance, it might be that there would be a different degree of sales resistance in every station, or there may not be.

That was just one point that I brought up we would
7113 have to explore in the study which I would consider
would be proper before you could determine just what separations could be made of these selling costs as applying between reseller customers.

Q. My question included sales resistance because you used the term, Mr. Warmack, and I included it and was meaning to make a little inquiry as to sales resistance. I mean to ask you—as I think I did—what, from any standpoint of handling the two accounts on a sales basis, would be the differences, what would create differences in marketing costs, in your judgment, basing your answer on your observation and on the fact that you saw fit to criticize the company's present method of handling the account.

A. I did not criticize that.

Trial Examiner Ballinger: The question relates to salaries and the sale of gas.

Mr. Hanley: No, petroleum products, whatever may be handled through the service station normally, your Honor.

By Mr. Hanley:

Q. What I am undertaking to find out from you, Mr. Warmack, is what, from your own viewpoint and from your observations, create these differences between the handling of a hypothetical dealer "X" and hypothetical dealer "Y" from a sales standpoint and marketing cost standpoint.

A. Well, Judge Hanley, a study would disclose that. We are getting into this fancied idea or conjecture
7114 as to what may be found in a study, without having made the study.

Q. Of course, Mr. Warmack, I am, I think, quite rightfully assuming that inasmuch as you saw fit to criticize the Respondent's method of handling these two classes or types of dealers, there must, of necessity, have been something that suggested itself to you as being of importance there that formed—or that you must have seen some differences—now, I am asking you what they are.

A. Well, I am trying to answer that for you, Judge Hanley, thank you for illuminating and explaining further to me.

Q. Proceed.

A. In the first place, the Respondent keeps its accounts as it desires, and I have no objection or argument with the way the company keeps its accounts.

It sees fit to separate some of these costs and earmark them as applying to the leased service station business, as identified from other, or distinguishing from other similar costs which do not apply to the leased service station business, for example, account 066. In that account we have miscellaneous expense. That is separated on Respondent's form 189, I believe into four separate parts in Respondent's Exhibit 101, and in the regular accounting form 189.

Account 066—miscellaneous operating expense, does
7115 not apply in any part to the leased service station business, according to my interpretations of what is kept in that account.

Account 066-A—miscellaneous operating expense (service station owned properties complete) has to do with leased service stations.

Account 066-B—Miscellaneous operating expense (service station owned buildings on leased ground) is kept separately. It has to do with leased service stations.

Now, account 066-C entitled "Miscellaneous operating expense (P.O.S.S.L., properties leased out)" has to do with leased service stations.

And the company sees fit to keep that separate.

Q. Now, Mr. Warmack, just at that point, is that not just a refinement of the general account—"miscellaneous operating expense"?

A. That is about the—

Q. (Interposing.) Now, just do you complain about that, that there was a refinement?

A. Oh, I should like to say, if your Honor please, that I am not complaining about the way the company keeps its books—any way it sees fit to keep them.

Q. Do you criticize the fact that the company did break up that sort of an overall miscellaneous expense account, and show a certain refinement in connection with it—

7116 A. Yes?

Q. —do you criticize that?

A. Judge Hanley, as I just stated, I certainly do not criticize that, and I do not criticize anything that the Respondent does in the way that it keeps its accounts.

It is the way that it separated its cost for the purpose of determination of a cost differential that I question.

Q. Well, is there anything in those four accounts of the 066 series that appears, that you question?

A. Yes, sir. There are some fingres in the 066 account, directly, that I question.

Q. First, let me say that my question is referring to this subject of leased service stations versus 461 stations. I do not want to get back into your general accounting criticism, but first, just this that is before us, Mr. Warmack—

A. (Interposing.) Yes, sir. That is right. Of course, I have not explored those four accounts sufficiently as to comment on what is in those accounts. I think the record is sufficient for our purposes as to showing what are in those accounts. There are some costs in those accounts that I would question as being used in a cost differential. But that goes back to the other point, Judge Hanley, the general question.

Q. Now, adverting to the example that I gave you a
moment ago, are you able to give me any definite
7117 suggestion, as an accountant, as to what specifically
as between those two types of dealers might give rise
to any possible difference in marketing costs?

A. Only this, if it is to be assumed that all of the costs which have not been separated between the two accounts; that is, lessee stations and non-lessee stations—of which we are speaking—if all of those costs applied equally according to the gallonage units of each group, then the landlord expense involved in the lessee group would cause a higher cost.

I cannot see that those costs would be equal. I am not saying that they would not be equal. And the only way that that could be determined would be by a study. And a study would also show if it could be determined.

Now, there is this question that arises in my mind: if the company saw fit to go to the refinement that it has gone to and that it currently goes to in breaking down some of these costs, then, I am at a loss to understand why, from a standpoint of sound accounting, that it did not go to the extent of applying its breakdown; applying its refinement in the case of the other accounts.

Q. Mr. Warmack, let us add to this illustration another dealer whom we will call "Z". He leases a station, but he does not lease it from the Standard Oil Company.
He leases it from Judge Ballinger, or yourself, or
7118 somebody else?

A. Yes, sir.

Q. And he likewise buys his petroleum products through the Standard Oil Company, as do "X" and "Y". Is there anything in that situation or in that type of a dealer that to your mind, as an accountant, differentiates him from the standpoint of the company's marketing costs from either "X", or "Y", or both?

A. We are again, Judge Hanley, in a field of conjecture, in the absence of a study. I do not know.

Q. Is it your contention that such a study should be made to determine that?

A. To determine if this separation could be made of costs of serving lessee stations and costs of serving non-lessee stations. If such a separation were possible or practicable that question should be determined by a study, in my opinion.

Q. Well, do you think it either possible or practicable to make a study relative to the so called "Z" class of operators who are leasing their stations from some one other than the Standard Oil Company; that is to say, how would the company get the information?

A. Oh, I am not going into the question of exploring the customer's cost at all.

Q. No, no. I am not asking you about that.

7119 A. I am sorry.

Q. How would the company even know, in some instances, whether a dealer owned ~~his~~ station or whether he was leasing it from some person unknown to the company?

A. As far as the company was concerned, or is concerned, it would be my opinion that it would not care whether he owned the station or he rented his station from somebody else, surely, he did not lease it from the Respondent company,—

Q. In those circumstances, would your study be complete?

A. Well, I just do not understand that, Judge Hanley.

Q. Well, you have indicated that there may be differences in marketing costs, including sales resistance and other elements which you have in mind between the 461 dealer, and the lessee dealer, arising just out of that relationship. Now I am asking you would your study be complete unless you also ferreted out what you might want to ferret out in connection with your study, in connection with the dealer who leased from somebody other than the Standard Oil Company?

A. Your cost study would show that if you went that far, but I think you are going in too great a refinement, however.

It is very difficult a problem to separate costs on the basis of averages or two principal groups. It may be possible to separate these costs, or some of these costs right down to determine what it costs to serve one single station.

7120 Q. I am going to ask you that, after a while, Mr. Warmack, but just tell me how:

A. You can not study—you can not say that without making a study. Make a study. Make a study. That is the only way.

Trial Examiner Ballinger: Judge, if it will not interrupt you. I would like to have Mr. Warmack dictate on the record the study that he thinks should be made.

The Witness: Judge, I could not do that, and no one in the world could do it without giving it a thorough and full study of the situation, see what methods should be employed, and the logic of the methods. Why, it would be absurd to, if an accountant could possibly do that, from the standpoint that it is just too broad a situation. I could not do that.

By Mr. Hanley:

Q. Well, do you think it practicable or possible for the Standard Oil Company to include in any such study lessee dealers who lease from others than the Standard Oil Company, assuming from the moment that they may make a lease of the station from others.

A. I would have to make a study to do that.

Q. How would you know whether the 461 dealers or one of the lessee—

A. (Interposing.) I suppose that the company's records would show which are lessees of the company.

7121 Q. I am not asking about that now. I am asking about this third person.

A. I do not know as I have put in any testimony to that effect, talking about the owner of a station or one who has leased from someone other than the company.

Q. I am trying to find out so far as you are concerned what does the suggestion that you suggest amount to, and what you want to do to make it.

A. I do not want to make it.

Q. Do your think it practicable or possible for the company to go to that extent and if you do, as an accountant, how would you suggest that the company go about it?

A. Just exactly like they would make any other study. And I should like for this record to show, if I might state, that I stated at the outset, when I was first asked about the lessee service stations and non-lessee service station expense, that I questioned the propriety of the usage of the landlord expense in determining cost differentials, and that if it were used, then, in my opinion, it will be necessary for the company to, at least, make some other effort to segregate lessee service station business against non-lessee service station business. And I am certainly sure that I did not say anything about the separation, the further separation of the non-lessee business, and I certainly could not see what effect further separation 7122 like that—what good purpose that any further separation like that would have.

Q. Well, we will get to that in a moment. Adverting to the lessees from the company; do you understand in some instances—I assume you know, as a matter of fact, that the company owns the station, the ground, and the building; do you know that to be a fact?

A. No, sir.

Q. Well, assume it to be a fact—it is—

A. (Interposing.) I do not doubt it, Judge.

Q. That would be one class of lessee, would it not, in that instance, a lessee that would be leasing the ground and the building from the company?

A. That is correct.

Q. In other instances the company leases from some third person, and re-leases the property to an operator.

That would constitute another class; would it not, Mr. Warmack?

A. Yes, sir.

Q. In some instances the company leases ground from a third person and puts it to use, and puts on it, at its own expense, a building on that ground; that would constitute yet another class; would it not?

A. That is correct.

Q. Now, what would you do about separating those various classes?

7123 A. I have never said anything about separating—

Q. (Interposing.) I am asking you now.

A. I think you are going into entirely too great a refinement, but it can be done in my opinion, but the cost would not be commensurate with the benefit obtained.

I could not see any useful purpose in it. If the management wanted it done, the accountant would have no alternative but to do it.

Q. In your opinion, as an accountant, when you are considering the costs as a foundation for a cost differential, Mr. Warmack, what have you to say about the need for doing it?

A. I would not see any useful purpose of doing that in this particular case.

I am sure I would not object to the company doing that if that is what they cared to do, it.

Q. Supposing you had never seen form 189, and that the company had abandoned the use of account 066-A, 066-B, 066-C for the purpose of cost control, would you then object to the use of accounts 088, 088-A, 088-B, 088-C having to do with station operated tools and equipment?

Mr. Austin: I object to that question, your Honor, it is a question asked the witness, what he would object to in an accounting procedure if it were different from what it is, and I think that is irrelevant and immaterial.

Trial Examiner Ballinger: This is cross examina-
7124 tion. The objection is overruled.

Mr. Austin: It seems to me we have enough to find out what did take place.

Trial Examiner Ballinger: No, but he has the right to test this witness' knowledge, in his opinion.

Read the question.

(The reporter read the question as follows:

"Q. Supposing you had never seen form 189, and that the company had abandoned the use of account 066-A, 066-B, 066-C for the purpose of cost control, would you then object to the use of accounts 008, 008-A, 008-B, 008-C having to do with station operated tools and equipment?")

The Witness: I do not understand your question, Judge Hanley.

By Mr. Hanley:

Q. Suppose you did not know anything about accounts 066-A, 066-B.

A. Then what?

Q. Would you then object to the use of accounts 088, 008-A, 008-B, 008-C?

A. I see no reason why I should not; inasmuch as the company designates those three expenses as shown in accounts 088-A, 088-B, and 088-C as "Landlord Expense," and by virtue of the fact that it might fail to show in
its accounting the proper segregation of some of
7125 that landlord costs, I would not see any reason why
we should not question it.

I might direct your attention, Judge Hanley, to account 506, and I might direct your attention to account 506 because account 506 has to do, I believe the records will show, entirely with leased service station expense; in the regular accounting form it did not even put it in there—

Q. (Interposing.) We will reach that in a moment.

A. Yes?

Q. In your judgment, where does the landlord expense stop and marketing expense begin?

A. I could only answer you a general answer to that. I could not specifically give it to you, Judge Hanley, without making a detailed study myself of this.

Q. Just give me your answer, whatever it is.

A. The costs involved in the landlord activities and offset by the revenues received in those activities, in my opinion, constitute a proper accounting for landlord activities.

And all other activities in the way of distribution costs separate from that point, your company has used the net of the landlord activities, which is the net cost, as shown by Commission's Exhibit 119, which is Respondent's form 189, as the cost of distributing the company's products in determining a cost differential. I do not know if this is correct or not. I have so testified several times
7126 here before.

Q. Mr. Warmack, assuming that you did make this segregation that you are talking about, would that not involve splitting these accounts on form 189?

A. I do not know. I do not think so.

Q. Which ones would it not involve splitting?

A. Any account on form 189 that would not apply to the landlord activities or to the cost of serving lessee stations.

There are several accounts on form 189 that do not even apply to tank wagon business at all.

Q. I am speaking of the reseller channel.

A. Oh. (The witness inspects the document.) I think that most of those accounts would have to be split. The company has already split several of them.

Q. Would it not involve splitting every single one of those accounts?

A. I do not know about that. A study would show that. Nothing else would. You would have to.

Q. Well, you would have to distinguish the group, would you not, Mr. Warmack?

A. Yes, sir.

Q. Would not that involve a splitting of every account?

A. I certainly do not know, and I have stated I do not know. I could not know. I have a little idea here, for

instance, we have a little account here called "rent
7127 revenues credit," $14.70, and you say every account,
now, that account should be split—how could I
know?

You have an item here "demarrage, railroad storage," $10.97. And you ask me could we split that. I do not know. I do not know.

Q. You would have to split it if it involved any part of the lessee group, and any part of the 461 group?

A. If it were an influencing factor it would be necessary to split it on a gallonage basis.

Q. If you made the segregation, you were suggesting, would it not be necessary from an accounting standpoint to split it?

A. I do not know if it would or would not. If it applied to it, yes; if it applied to it, yes, and if not, no.

Q. Assuming that it applied in part to the lessee station group and in part to the non-lessee station group, would it be necessary to split it?

A. It would be necessary to split, that was not the question that was asked me, as it was asked me if it would be necessary to split the accounts and the answer was—I do not know.

Q. The method of dealing with the lessee group, as you testified yesterday, is the same as dealing with the 461 group, from the standpoint of sales service?

A. That is my understanding; yes, sir.

Q. That being true, would it not be necessary to
7128 split every account that had to do with sales serving
and cost of marketing to these two groups which
are now included as one group in the reseller channel on
form 189?

A. It certainly would not. Take the ELA expense, account 070, that did not even apply to the leased station service.

Q. Is that the only one?

A. No, sir.

Q. How many others?

A. I do not know how many others, but I can point out a few that it would not be necessary on.

Q. All right. Please do so.

A. In the absence of any making of a detailed study with which to answer your question, I do know of a few accounts and I will call attention to them. I am sure that account 070, an account which you would not have to be splitting; account No. 514 is an account which you would not have to be splitting.

Q. What is account 514, Mr. Warmack?

A. Dismantling service stations other than ELA, I see.

Account 506, that account would not have to be split, and we are talking about splitting for the purpose of establishing a cost differential.

So far as account 290 is concerned, prorata general administrative, why, even this just would not make any difference, because it is separated on a gallonage 7129 basis, and if you were going to follow that through, you could either throw it out or you could leave it in and the cost differential would not be changed.

Account 295 would make no difference at all where you put it. You have already gone to the extent of splitting just a great number of these accounts, and why, I do not know, right off, which other accounts would have to be split. I would have to make a study to determine that.

Q. Mr. Warmack, if such expense items were allocated between the two classes of outlets on a gallonage basis, and those accounts now assigned to tank wagon reseller accounts directly were also split between two classes on a gallonage basis, would not the major business in marketing cost be largely the net no lease cost as shown in the column "income and expense leased service stations" regular form 189, $48,506.44, divided by gallonage through such account making 9/100ths of a cent as compared with the sum of account 070 ELA expense $15,233.46, and account 111 depreciation ELA of $3411.97, a total of $18,645.43 divided by ELA gallonage of approximately fifteen million, or an equal of 12/100ths of a cent per gallon?

A. That would not be exactly true, no.

Q. Well, what would be the fact if that is not true?

A. The records may show that account 506, and will show that account 506 is a leased service station expense.

7130 Q. 506?

A. Yes.

Q. Does not 506 include bulk plants?

A. We have an exhibit of that account here in the record.

Q. Do you not know?

A. We can look it up.

Q. Do you not know?

A. I do not know of anything of my own knowledge here (indicating). I will look up the record. I do not trust my memory so much.

(The witness examines papers.)

I think, Judge Hanley, Commission's Exhibit 130 which shows what they—

Q. (Interposing.) What is that exhibit, please, not just the number, but what is the title.

A. It is entitled "Statement showing analysis of charges to marketing expense account of losses by dismantling (other than E.L.A.) for the Detroit field for the year 1940."

And the figure as shown here, as stated by the exhibit: that is, the loss represents loss sustained on capital assets at service stations which were entirely dismantled and rebuilt into combination service stations and greasing stations during the year 1940, total expense was $24,156.57 of that account.

7131 Now, I believe, or it is my understanding, according to the information set forth on this exhibit that that is expense incurred in connection with the landlord activities of the company.

Q. Only?

A. That is my understanding.

Q. Do you know it to be a fact that since this lawsuit started, Mr. Warmack, that three of the bulk plants in Detroit have been dismantled, and that that expense has been put into account 506?

A. Well, if it has, then the costs that your company gave me and the allocations of these service stations numbers that are shown on this exhibit are incorrect.

Q. I did not say that. I do not know what the dates may be. But I asked you if you knew it to be a fact that since this lawsuit started three of the bulk plants of the Respondent in Detroit have been dismantled and that the cost has been put into account 506?

A. Does it appear in this figure of $24,156.57?

Q. I do not know that it does. Just answer the question, please.

A. I beg your pardon.

(The question was read by the reporter.)

The Witness: I do not know that of my own knowledge.

7132 By Mr. Hanley:

Q. You are familiar with, having studied as you say the code of marketing accounts of the company, and do you know it to be the fact therefore that in both account 506 and account 514 bulk plant dismantling expense is included?

A. Well, that was not so included in 1940, or else there was no such expense in 1940.

Q. That may be possible, Mr. Warmack, but I am asking you now about your testimony on accounts 506 and 514, which you say would be uninfluenced by the segregation of the leased accounts and the non-leased service stations.

A. Well, I was talking about 1940, Judge Hanley. I did not know we were talking about all years.

Q. I am talking, Mr. Warmack, about the influence on this accounting, if your suggestions were followed that non-leased and leased service stations be treated as separate and distinct groups. That is what I want to know, as to what is involved.

You have indicated that you are in some doubt as to whether it is practicable or possible. I want to know if you regard it as possible at all, and how practicable you regard it.

A. I certainly do not know, and no one could know until he attempted the study.

7133 Q. Now, in your study, as you suggest, Mr. Warmack, how would you go about that from the standpoint of the number of leased stations as distinguished from the number of 461 stations?

A. The study would do so.

Q. Any one of the following bases:

Would you do it on a gallonage basis?

Would you do it on the size of the station basis?

Would you do it on the basis of the number of operators in the station?

Would you do it based upon the location and distance from the main office?

Would you do it based upon the distance from a bulk plant?

Would you do it based upon the time that the salesmen and all other supervisors spent in connection with it?

Or, just how would you do it?

A. Well—

Q. Or would you do it by all of these things?

A. Would I do what by all of these things?

Q. Measure the difference in cost between serving the 461 account and the leased account.

A. No one that you named, Judge Hanley, could you pick up as being a support for all of those costs, because the thing would have to be tested out from the whole general field, and then no single one would be incorpo-
7134 rated and a proper study would probably develop
several measuring factors on which these separations could be made, rather than any particular one. In other words, the study would have to be a general one from the standpoint of the entire situation as it presented itself to you, and then as a result of that, you would probably wind up, as I said before, by developing several measuring factors on which the separations could be made.

Q. Will you please state what the several possible measuring factors would be?

A. Several of those you just named.

Q. I thought you said that it might be some of those and more, or that it would be only one.

A. If you only used one single one, I do not think you would arrive at a proper answer to the problem. You can not use one measuring stick when you are going to measure the distance from here to the moon, and the weight of a chunk of green cheese.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. All right. We have leased stations that fall within the 25,000 gallon class, and a couple of blocks away there is a 461 station that does five thousand gallons per month.
7135 The first is a super-station; the second is just an ordinary station that does nothing but pump gasoline.

How are you going to study what the difference in cost is as between serving those two stations; and if you can tell, then the fact that one is a leased station and the other is not, would that have anything at all to do with the costs, in view of the variation in gallonage handled?

A. I certainly do not know, and the only way would be by making a study.

Q. What is your best judgment about that?

A. I do not know. I have not made the study.

Q. Why have you made the suggestion, Mr. Warmack, that it is probably improper for the Respondent to carry these two accounts together, and to undertake a cost justification on the basis of that type of accounting, then?

A. I do not understand the question.

The Witness: May I hear the question, your Honor? May I hear the question again?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I have not made any such statement for this record.

By Mr. Hanley:

Q. Well, you have criticized the fact that the two types of accounts are treated as one and in the same way; 7136 now I am asking you why you made that criticism?

A. I said that in my opinion if you were going to use this landlord expense in determining a cost differential, then in my opinion, it would be necessary to separate your non lessee business from your lessee business; or, at least to make a study to determine if such were practicable. And I believe that was my statement.

Q. Mr. Warmack, is it your understanding that the Respondent company is in the real estate business, or, as distinguished from that, in the business of merely undertaking to obtain outlets for its products through the medium of leased stations?

A. I understand the latter, Judge Hanley.

Q. Is it your understanding, Mr. Warmack, that the company is not seeking primarily to profit from the real estate business, but rather seeking a means of distributing its products?

A. That is my understanding. It is farther my understanding that this is done by the company because of a keen competitive situation.

I have not inquired into that. I was told that by responsible people of the company.

Q. Now, assuming that to be the fact, that the company is seeking an outlet rather than seeking real estate profits, would it not be true, in your judgment and observation as an accountant, that the rental revenues would sub- 7137 stantially equal or be offset so far as the dealer is concerned, who is leasing, by substantially the same expense on the part of the 461 dealer, who owns his station to which expense the 461 dealer would be put in carrying his own investment?

The Witness: May I have the question?

Trial Examiner Ballinger: Do you desire the question read?

The Witness: Yes, sir.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Mr. Hanley, I just do not follow it. I am sorry. I wonder if you will explain it for me.

Mr. Hanley: Oh, I will withdraw it.

Trial Examiner Ballinger: Question withdrawn.

By Mr. Hanley:

Q. Supposing that the company is leasing stations primarily for the purpose of getting outlets, and not to obtain a profit on real estate: would the landlord and tenant feature of the business on a general overall basis, in your judgment as an accountant and from your observation of the company's business, result in any substantial addition or reduction of the marketing cost to the lessee dealers as compared to the marketing cost of the 461 dealers?

A. Well, I certainly could not know that, Judge Hanley, without making a study.
7138 In this particular instance, your real estate activity is segregated on Respondent's accounting form 189 which showed that the expense assigned to the landlord activity exceeded the revenues received from the lessees by around $48,000, but in at least one instance, in the case of account 506, and I believe 514, for the year 1940, it is my understanding that those accounts were for the lessee stations—if that understanding is correct, why, of course, your leased station expense would be a little bit greater than $48,000, as is shown. I just do not know what those things are and how they will run over a period of years, but they might offset completely, and they may not.

Q. You recall the testimony, do you not, Mr. Warmack, that at some times there is an over-plus in the landlord account, sometimes there is a loss shown in the landlord accounts which reflects in the final marketing cost one way or the other by either an upping of it, or a reduction of it, and that that happens not only from time to time, but from field to field: you remember that, do you not?

A. Oh, sure, in every field I assume, and I think it is reasonable to assume that those activities might show a net profit on the landlord business, as we term it, and have talked about it here, in one field, and not in another field where it might show a loss, and the next month this thing
might be vice versa.

7139 Q. Exactly, and I think that is what is disclosed.

A. Yes.

Q. Now, that being true, would you regard it practicable, as an accountant, to undertake a cost separation between these two groups in order to determine as at any given hour or minute what the situation is?

A. Well, I doubt very much if it can be determined as of any given hour or minute.

Q. Or as of the first of any month?

A. Now, you speak about what the situation was, Judge: just what do you mean by that, please, if you do not mind?

Q. I mean the question of whether there was any difference in the cost of marketing to the one group as distinguished from the other: that is, the lessee as distinguished from the non-lessee group.

A. I do think that it would not be practicable to undertake a study to determine that very thing for a period: I doubt if it can be determined for an hour or a minute.

Trial Examiner Ballinger: How long a period would you suggest?

The Witness: Whatever the records might show, your Honor, as being a representative period. I do not think that it should cover the peak or the low, unless you are going to take a year-round period; three months' period in
some businesses is sufficient; a six-months' period in
7140 some other business is sufficient; and I have seen one
month checked out and accepted as satisfactory.

By Mr. Hanley:

Q. Well, if you are establishing a cost differential, Mr. Warmack, your test is for the year 1940, for instance, in Detroit, might give you a particular result in that particular year in Detroit. The next year it might change, might it not?

A. You are very well right—I mean that is quite true, Judge Hanley.

Q. Then, from a practicable accounting standpoint, when we are undertaking to determine what is the real cost differential, what good would that kind of a segregation be; what useful purpose would it serve?

A. Well, a proper separation of all of your costs by sound and accepted accounting principles and procedure would certainly afford you a cost differential that could not be disputed, and if for future periods the cost study has been made, I certainly could not feel or subscribe to the fact that the company, or any company going to the extent of making another cost study as thorough as the cost study should be made, every year or every few months, or probably every year or two—the company, when it establishes a cost differential properly will know the various factors that will change—influencing factors which 7141 will change over the course of the years, and the next year and the ensuing years when tests are made to show what factors—and what influencing factors have come about and have arisen that you must now consider, and if there are any others that have been taken out; those that were there in the beginning that have passed away, and you can come to a pretty close calculation of what your cost surely is.

Q. Would you accept this, as an accountant for the Commission, if the Respondent were charged some years hence with an infraction against the Robinson-Patman Act?

A. If such a study were made now, do you mean, Judge Hanley?

Q. That is what I mean.

A. Yes.

Q. Assuming that could be made?

A. Yes, sir, as I have just outlined, where the cost differentials were established beyond question of doubt, and then in, we will say, three years, the company may be requested again to, or required again to show its cost differentials—test them again, Judge Hanley, so that they may be well supported.

Q. Would you accept it?

A. I would take such a study if presented to this Commission, and I were assigned to it, and study what influencing factors had come about or died in connection with the company's business, if the company presented all of that information in a proper and thorough manner, 7142 and then it could be determined whether the—

Q. (Interposing.) Statement of the landlord—

A. —the cost differential were still justified.

Q. Excuse me. I thought you had finished.

Trial Examiner Ballinger: Mr. Warmack, your answer is not responsive.

The Witness: Well, Judge, I could not say whether I would accept it, I would try to ascertain, but how would I know whether I could accept something that is theoretical and imaginary, and that I have never seen or heard of—it is just wild imagination.

By Mr. Hanley:

Q. It is your judgment, as an accountant, Mr. Warmack, that where there is any admitted slight fluctuation, at least in the influencing of the landlord business, that if those accounts are to be carried together, that there should be an annual study to determine the cost differential in order that the Respondent company may be safe from attack under the discrimination laws?

A. Not necessarily.

Q. What do you think is necessary, as an accountant?

A. I think if the company wishes to know at all times that its differences in price make no more than due allowances or differences in cost of manufacturing, sale, 7143 or delivery arising from different methods Respondent is handling, that it would have to keep some tab on its costs, but I certainly could not subscribe to continuously having to make detailed cost studies.

Such is not required, and in many instances, and in all probability your company, it may be just an impracticable thing to try to carry current records so that it would show that.

Q. Well, that would mean——

A. That is my opinion, Judge Hanley.

Q. ~~That it would be~~ impossible, in your judgment as an accountant, for the Standard Oil Company to justify a cost differential?

A. Oh, no; no indeed. That is not what I am testifying to at all.

Q. If it is impracticable in your judgment as an accountant, assuming that it is impracticable in your judgment as an accountant, the company would never be in a position to establish, to your satisfaction, that fact; is that not true?

A. If what were impracticable?

Q. Keeping what you call sufficient accounts to separate and support these factors in order to support a cost differential.

A. I do not understand.

Q. To keep what you call sufficient accounts to sup-
7144 port the cost differential?

A. It is not necessary to keep sufficient accounts: that is, to carry current costs to such a great refinement at all times as to within a moment's notice, so to speak, show a cost differential, but in the absence of that it would be necessary to make a cost study if you wanted a cost differential, or you wanted to know what your cost differential was. You could not just go back and rely on a bunch of records which might be quite sufficient for managerial purposes, because in many instances, especially in connection with—with certain stockholders they are not interested in what money is made on the sale of one product, they want to know what the overall situation is; that is, that is what the tax people want to know—is what the overall situation is.

Q. Well, we are going a little bit away from our topic. We are getting a little bit off the subject.

A. I beg your pardon.

Q. You said a moment ago you thought it would be necessary for the company to keep some tab on its costs if they wanted to know what its cost differentials were?

A. Yes, sir.

Q. Do you regard the accounting form 189 of the company, as kept, as producing a close tab on its costs of both the lessee group and non-lessee group, and keeping that currently?

A. Yes, sir, it keeps a tab on those things to a
7145 certain extent, but I rather think maybe for managerial purposes it keeps it quite sufficiently, as far as I know it has never made a study to determine just what it costs to serve either lessee or non-lessee customers, or if such a separation may be properly made. A study would determine and show it.

Q. Mr. Warmack, would it not require the Respondent to set up a duplicate set of offices in effect, if the lessee group were treated as a separate group from the non-lessee group of reseller buyers?

A. From the standpoint of determining a cost differential, Judge Hanley, please?

Q. From the standpoint of handling it as a separate group, from an accounting standpoint.

A. I certainly should not know, I should not think so.

Q. You saw the method of operation in the Detroit office?

A. Yes, sir.

Q. Did you not?

A. Yes, sir.

Q. Is it not true that from all of the sales effort and from an accounting effort, the whole operation, so far as the reseller group, including both lessee and non-lessee is concerned is identically the same?

A. It is my opinion that it is.

Q. Now, if you separated those two groups so that you kept accurate costs on each group, as distinguished 7146 from the other, would you not in effect have to run two offices to accomplish identically the same things except from an accounting standpoint?

A. I certainly could not know, but I cannot understand why that would be, I did not inject anything like that and I have not stated that it is my opinion that the company is not keeping its records correctly.

Q. I am asking you these questions, Mr. Warmack, as an accountant, and I wish you would answer them. I have a very excellent reason for asking them.

A. Yes.

Q. What would be the effect?

A. What would be the effect of what?

Q. What would be that effect?

A. I do not know—do you mean that it would cause you to set up two offices? I certainly did not mean that you would set up two offices.

Q. Or two separate sets of records; would they have to be kept?

A. I certainly do not know.

Q. If salesman Brown calls on a lessee dealer, and on a non-lessee dealer, and assuming that he keeps accurate time records, would not it be essential that there be two sets of records to receive his reports and records; that is:

First: In respect of lessee stations;

7147 Second: In respect of non-lessee stations?

A. Now, I do not know the procedure that could be followed. You could hire fifteen accountants and each one would probably put in a different kind of system for the keeping of that, and every one would probably be different—but I cannot understand what you would want that information for.

Q. I know, but I want your opinion on it.

Trial Examiner Ballinger: Mr. Warmack, how can the account be accounted for otherwise than as Judge Hanley has suggested?

The Witness: He has not suggested any way.

Mr. Hanley: I have suggested—

The Witness: I would certainly love to see his system.

By Mr. Hanley:

Q. Well, I am not going to write out a full system. I am trying to keep it as simple as I can. You tell us one way you would go at this thing would be to have the salesman keep a time record of what he did. That would mean, if I understand you at all, that if he called on a lessee dealer, he would include the hour or the time, whatever it may be, that he called on the lessee dealer, and then he would go down the street and talk with one of the non-lessee dealers and spent forty-five minutes there, and so forth and so on, throughout the day.

7148 Now, when he gets back to the office and his report is made, is it not necessary that there be two sets of books, one to receive his time in respect of lessee dealers, one to receive his time in respect of non-lessee dealers; and is that not true in respect of every case allocable to either group?

A. It most certainly is not on these accounts that you keep, you keep tank wagon reseller business, tank wagon consumer business, and tank wagon—other methods, and do you mean to argue here or state that your company keeps a separate and independent set of books for every one of those things—it does not.

Q. Do you mean to state that the books are set up to be used other than that? In other words, do you mean to say that the books are set up not just that way? Do you know how it can be otherwise done?

A. Well, I do not follow you there very well.

Trial Examiner Ballinger: He is asking you what would be required in order to establish the actual cost of these ~~two separate accounts.~~

The Witness: And I am supposed ~~to know,~~ without going out and making a study. I have said five times I

do not know what would be required, and that no accountant would state what he would do and that no accountant would set up a different system, unless he made a
7149 study he would not set ~~up~~ anything. And certainly any accountant that would go in there would not set up a different system and he would not need a separate set of books, and if that does not answer the question, I do not know how to answer it. If anyone went in there, the first thing that they would be doing would be to make a study of the situation and then they would take care of it. It would not take a different set of books. Of course, I did say that each accountant would probably approach it according to his individuality, to a certain degree, but he would be governed by sound and accepted principles and procedures of cost accounting.

Otherwise I do not know how to answer the question.

In the second place, I did not and do not subscribe to any such refinement. I have not urged in this record that any such refinement be gone into, but that a study be made to the end of establishing a cost differential upon a sound and reasonable basis, and not as the current operation. Even if the company wanted to do that, that would be their own business, but that would not be necessary in order to determine the matter which they have here to determine.

Trial Examiner Bailinger: A cost study to determine a cost differential this year, if the conditions changed next year would not portray the differential that would exist the following year, would it?

The Witness: It may or it may not.

7150 Trial Examiner Ballinger: Well, if the conditions changed it would not, would it?

The Witness: Well, Judge, you can give effect to the influencing factors that have changed. Maybe all of them did not change, only maybe one or two out of the lot, or maybe five of them might change and you would have to go back and pick up that factor, and if all of the rest of them ran out, all right, but as to those particular ones you would run out on the same tests and if it showed that the costs were running reasonably constantly as to those various items, they would be all right.

To give an amplification of that, I subscribe to carrying these things continuously if the company would be setting up, Mr. Hanley says, setting up two offices, and then have another office even beyond that in Detroit—that is what he says I subscribe to. I certainly do not subscribe to anything like that. I have never subscribed to anything like that and I do not subscribe to anything like that now.

I think it should be made clear on this record that whenever there is a change, after you have primarily established your costing factors one year, and then the next year you may have a change in, say, from one to five of them, you can give effect to those one or five as the case may be, and you can run out and make tests on them, and show whether or not your costs are running reasonably constant, 7151 and if they are not, you can make due allowances for them.

By Mr. Hanley:

Q. What accounts would have to be extended?

A. If the company would desire to go to such greater refinement, of course, there is a limit to how far they can go.

Q. I am sure that the company does not so desire. I am just asking you what would be necessary to carry out your suggestion.

A. I did not suggest that they go out and do anything like that.

Trial Examiner Ballinger: Judge Hanley, we have been running for an hour and a half continuously, and I think we will now take a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order. You may proceed.

By Mr. Hanley:

Q. Mr. Warmack, assuming—as is the fact—that there are large super-service stations doing 25,000 gallons, 30,000 gallons, 40,000 gallon volume per month, at both lessee stations and non-lessee stations class, and assuming also—as is the fact—that there are small service stations doing 4,000 gallons, 5,000 gallons, 6,000 gallons per month, sometimes less, in both lessee and non-lessee class. Per- 7152 haps you do not have to assume the fact; do you know that to be true?

A. No, sir. Not of my own knowledge.

Q. Well, then, assume it—it is a fact—you stated the other day that there was a tendency for costs per unit to reduce as volume increases.

Would it not be your judgment as an accountant that it is probably the fact that the cost would be less, that it cost less per unit in marketing service, to service a large group of accounts as distinguished from a small group of accounts?

A. Of course, a study would show that, Judge Hanley. I do not know whether it would be or not. Ordinarily, as volume increases, the cost per unit decreases.

Q. Would that be your judgment as an accountant?

A. That would be a reasonable assumption.

Q. What is your idea as to the propriety, as an accountant, of making the kind of a split, just as you have suggested, that split to be made between the lessee group and the non-lessee group?

A. Many companies over the country are doing that very thing. They have been doing it for some time.

Q. And where do you draw the line, Mr. Warmack?

A. That is up to the management of the company involved, and the desires of the persons employed coupled with the desires of the persons making the study. 7153

In other words, the two may, after discussing the point, elect somewhere to draw the line. It may be that they may draw several lines. They may set up several groups and make a study as in the case of Standard Brands Company. In that case, Judge Hanley, the company had prices per unit ranging from around fourteen cents per unit, in steps, up to twenty-five cents per unit.

Q. That was their accounting system, was it?

A. I assume they had several at several different prices.

Q. I am asking you now where the line should be drawn in the service station business.

A. Oh, I could not tell you.

Q. Well, where would it satisfy you, as an accountant for the Commission, if the Respondent were called to account for a claimed price differential or discrimination?

A. I certainly do not know.

Trial Examiner Ballinger: The witness can not answer for the Commission. He can only answer for himself.

Mr. Hanley: That is all I asked him. I asked him where it would satisfy him as an accountant.

The Witness. The answer is—I do not know. Each case has to rest on its own foundation, and be studied as such. In the absence of a sutdy or a review of the matter,

it is just a wild fancy, or a mere conjecture as to what
7154 would be done. You can not study at a desk and visualize what you will do unless you do it.

By Mr. Hanley:

Q. That being true, Mr. Warmack, in your judgment as an accountant, is there any way for the Respondent company other than keeping a detailed, continuous, running cost study of an almost daily nature, to provide against a charge of price discrimination, other than being called into Court to determine, or for a determination by the Court as to whether this company has been in conformity with the law?

A. I can not speak for the courts. I can give you my opinion.

Q. I am asking you for your opinion, Mr. Warmack. I am not asking you what the court may or may not do. I am asking you if there is any way that the company may know, in your judgment as an accountant, whether it is in conformity with price discrimination laws other than keeping a constant, running cost study in the greatest detail and refinement.

A. In my opinion, it can.

Q. Will you tell me how?

A. Make periodic cost studies to the refinement or to the extent or sufficient to prove beyond a reasonable doubt the accuracy of the cost studies.

Q. Prove that to you?

A. Prove that to the court, you were talking about. That is my opinion.

7155 Q. And how often would those studies have to be made, in your judgment as an accountant?

A. I do not know how often they would have to be made. That would depend upon many, many factors. If the company in question was continuously changing its prices and changing its methods of operation, I rather think that it would have to make those studies at such times and as in great detail, as any great changes of that nature were made.

I have special reference to the changes in prices. That means where a change of price that you are selling to one customer, and correspondingly changing the price that you are selling to another customer, but not, maybe, by the same degree. But, in view of the fact that distribution cost accounting is relatively—I really can say even at this

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date—in its pioneer stage, in many instances, it would not be a practicable thing. It just not would be keeping this information—current statements. In some cases it may be. I think that is—that is all.

Q. Have you finished your answer?

A. Yes, sir.

Q. Did you encounter any data or make any observations while in Detroit or Chicago which led you to expect any significant difference of marketing cost between this lessee and non-lessee group of dealers?

7156 A. I made no study of that matter.

Q. I understand. You have said that before, Mr. Warmack. But the question is before you: Did you encounter or make any observations that would lead you to expect any significant differences to be established if the most detailed study were made?

A. I did not encounter any data, in view of the fact, of course, that I did not make an independent study myself of the situation.

Q. Was there anything that flagged—that met you—that made you think that there may be any significant difference between the cost of marketing to those two groups?

A. Well, naturally, the question would come in there that would then make you think that some exploration should be made of the situation, in view of the fact that the larger portion of the tank wagon reseller business of the Respondent company in the Detroit field is carried on through lessee stations.

I think out of sixty-nine million gallons of gasoline and refined oil sold through the tank wagon reseller business in the Detroit field, in the year 1940, why, Commission's Exhibit 119 will show that fifty-four million gallons of that gasoline were sold through the lessee stations.

Q. All right, Mr. Warmack: Did you see anything in
that that leads you to believe that there would be any
7157 significant difference in the cost of marketing as be-
tween those two outlets?

A. No, Judge. But I think that question would have to be explored if I were going to make a cost study. I know I would explore it. And I think it would be incumbent upon any accountant if he undertook to make a cost study, and it was his responsibility to determine the cost differential, I think that matter should be looked into.

Q. But you did not, as I understand it, go far enough into it to see whether or not there was anything apparent on the face of the matters that would lead to any significant difference in the marketing cost between the two groups? Am I correct in that?

A. You are correct in that, inasmuch as I did not study it to prove the Respondent's case of cost justification, or to disprove it, Mr. Hanley.

Q. From your observation as an accountant, is it not a natural resultant of good business stewardship that if one class of outlet carried marketing expenses substantially lower than the other that there would be only one type of outlet?

A. I did not get that, Judge Hanley. I am sorry.

Q. In your observation as an accountant, what have you to say as to the fact of whether or not there were or would likely develop only one type of outlet if that 7158 type of outlet could be operated at a substantially lower cost than other types of outlets?

A. Oh, I certainly do not subscribe to that. I do not believe that is true.

Q. Do you believe it is true—

A. (Interposing): I mean generally. I am not speaking with respect to your company, Judge Hanley.

Q. Do you believe, Mr. Warmack, that if it were true that, we will say, for instance, the lessee type of outlet were a substantially more costly type of outlet to serve as distinguished from the 461 type of outlet, that there would be a marked tendency to gravitate through the 461, and towards it, and to abandon the more costly type of operation?

A. I—

Mr. Austin: (Interposing): I object to that question, your Honor. I wanted to object to the previous one, but the witness answered before I could do so.

Trial Examiner Ballinger: The objection is sustained.

By Mr. Hanley:

Q. Are you able to draw any conclusion, Mr. Warmack, as to the probability of substantially equal marketing costs in serving these two types of outlets, from the fact that both methods of operation are used by substantially all, both large and small, petroleum companies in the country?

7159 The Witness: May I have the question read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: No, sir. I am not able to draw any conclusion out of a generality of that kind.

By Mr. Hanley:

Q. I will try to simplify the question. I asked you just a moment ago this, and I want to get your opinion as to whether it is true or not, Mr. Warmack, that one of these methods of operation was much more costly than the other, in your judgment as an accountant and observer of business, would not the more costly type of operation be substantially abandoned in favor of the more economic type of operation?

Mr. Austin: I object to the question; also, as speculative, your Honor.

Trial Examiner Ballinger: The objection is sustained. This witness is an accountant; he is not an economist.

Mr. Hanley: Do you not regard him as qualified to answer that question, or that kind of question?

Trial Examiner Ballinger: The Examiner does not.

Mr. Hanley: Very well.

The Witness: May we be off the record for a moment, Judge?

Trial Examiner Ballinger: There is no cause for
7160 going off the record.

By Mr. Hanley:

Q. On page 6744 of the record, in response to a question on account 021, Commission's Exhibit—

Mr. Austin: (Interposing): What is the page?

Mr. Hanley: 6744.

Mr. Austin: May we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Back on the record. Perhaps you had better withdraw that question and start over again.

Mr. Hanley: I will withdraw the question and put a new question.

By Mr. Hanley:

Q. On page 6744, of the record in this case, in response to a question on account 021—Commission's' you stated that:

"It has no place in Respondent's Exhibit 101."

Again, at page 6753 for account 024,—expense of transferring fuel oil due to lack of storage—you stated:

"It is my contention that commission business should be separated from salary station business."

The Witness: What page is that?

Mr. Hanley: 6753.

7161 By Mr. Hanley:

Q. "I think that particular expense should be applied only to the commission agent business. If the expense is going to be used for the purposes of determining a cost differential."

That ends the quotation. There are other places in the testimony where you have referred to this segregation of cost between commissioned and salaried stations.

Now, do you recall this line of testimony?

A. Yes, sir.

Q. What do you mean, Mr. Warmack, by the statement that commission costs have no place in Respondent's cost justification as set up on Respondent's Exhibit 101?

A. Exactly that, Mr. Hanley. I do not think they have a place in there.

Q. Why not?

A. Well, there are two or three reasons.

First: The salaried station business referred to in this record as A Station business is a separate and distinct method of operation from the B Station business, or activities of the Respondent company.

Second: There is another point. It is my understanding that this complaint was drawn in Detroit, greater Detroit, and it is my understanding, further, that the principal portion of the company's products are distributed in Greater Detroit through the A Stations.

7162 Third: There is another point. If a comparison is going to be made in determining the cost differential, as has been done, then it is my opinion that the B Station business, which is commission business, should be separated from the A Station business because of the fact that, for the most part, the B Station business is rural business, carried on in rural communities. There may be an exception to that. I think there is an exception in the activities in Dearborn. However, for the most part the B Station business, as I understand it, represents that carried on in rural communities whereby the product is dispensed to customers in a method different from the way it is dispensed from the large A-stations which are located, as I understand it, for the most part in the larger cities served by the Respondent in the Detroit field, the largest of which, of course, is Detroit.

Q. Those were all of your reasons?

A. Yes, sir. I think that covers the situation.

Q. That is the answer, Mr. Warmack? I asked you if those are all of your reasons.

A. Yes.

Q. Mr. Warmack, when does a marketing cost have a place in a cost justification, in your judgment as an accountant?

A. When it varies from the units sold to the
7163 separate customers and classes of customers who
purchase the same unit at different prices.

Q. And what are the characteristics of marketing expense which have no place in a cost justification, in your judgment?

A. Those expenses which cannot be segregated except on a unit basis, which unit—each unit carrying an equal part thereof, such as advertising for consumer acceptance as between classes of customers for which the cost justification is to be determined for the purpose of establishing or justifying a price differential, and—

Q. Did you—

A. —some costs which are of such a general nature like "donations." I do not see how that class of expense could have a place in the cost justification. And a proper study would probably disclose others.

Q. Do you believe that your answer to the third preceding question now falls within the two definitions you have given in your—in that last question?

A. I do not remember the third preceding question. If I might have that question.

Q. That was the question in which you stated your reasons for saying that commissions should be excluded from the cost justification of the Respondent.

A. I gave the reasons why the commissions should be
excluded.
7164 If the Respondent company desires to determine
a cost differential between serving commission stations and serving jobbers, naphtha and gasoline, that is another matter.

However, they throw them all together—I object to doing that for the reasons stated. In my opinion the last answer given is in perfect accord with that.

Q. Now, you have defined, Mr. Warmack, what your views are as to what should be included and what should not be included in marketing cost. Purely from an accounting standpoint, will you tell the Court the definition of "cost" with particular reference to "marketing cost" as it occurs in the Robinson-Patman Act?

Mr. Austin: Just a minute. I object to that question referring to the meaning of the word as used in the statute. I do not object to the witness stating his definition of marketing cost when not related to the statute.

Trial Examiner Ballinger: The objection is overruled. This witness is constantly working under that law and preparing accounts under it.

The Witness: Well, I will do that if I can have the question again, your Honor.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: Do you understand the question?
7165

The Witness: I would like to hear it again.

(The reporter again read the question as follows:

"Q. Now, you have defined, Mr. Warmack, what your views are as to what should be included and what should not be included in marketing cost. Purely from an accounting standpoint; will you tell the Court the definition of 'cost' with particular reference to "marketing cost" as it occurs in the Robinson-Patman Act?")

The Witness: With reference to marketing cost, it is my idea that any cost pertaining to marketing of the company's goods is marketing cost. That does not mean that that cost must be used to determine a cost differential. There are many marketing costs that could not be used in determining a cost differential, your Honor.

By Mr. Hanley:

Q. All right, Mr. Warmack. You have now defined "cost" as any cost of marketing the company's products. However, you have stated that that does not mean that those costs could be used to determine a cost justification of a cost differential. That being true, how could you state some expenses, now, or expense items as falling outside of the pale of a cost differential justification?

A. Any cost will fall outside of that—that is, 7166 cannot be used in determining a cost differential which must be supported, such as: radio advertising would be a very excellent one; newspaper advertising is another one, Judge.

Q. Does that mean that it is just a question of your judgment as to which item of marketing cost may be used as a justification for a cost differential and which may not be used as a justification for the company's cost differential?

A. I answered it that in my opinion—

Q. (Interposing): Will you please answer "yes" or "no"?

A. In my opinion, the answer I gave is the answer to it, Judge Hanley. I am not speaking for any one else in the world but myself. My opinion was the answer I gave.

Q. I understand that. I do not believe you understand the question.

A. Perhaps not.

Mr. Hanley: Will you read the question?

Trial Examiner Ballinger: Read the question and the answer of the witness.

(The reporter read the question and the answer.)

Mr. Hanley: I move to strike the answer as unresponsive. I ask that the witness answer the question.

Trial Examiner Ballinger: The motion is granted. The witness may answer the question.

Mr. Austin: May I hear the question again?

Trial Examiner Ballinger: Read the question.

7167 (The reporter read the question.)

Mr. Austin: Now, I object to the question, your Honor. It has not been answered as the record stands now. It cannot possibly add to this record in any way at all. It is a question of the witness' judgment as to what this cost should be used to sustain a cost differential. That definitely is a question of law.

Trial Examiner Ballinger: He has expressed his views with reference to what he thinks should or should not be included in this account.

Mr. Austin: Yes, sir, but now this question is whether ultimately the matter of the witness' judgment as to what costs can be or cannot be used as the cost differential—

Trial Examiner Ballinger: (Interposing): I think that it would be well to have the question read. Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: That relates to all of his testimony.

Mr. Hanley: Surely, if he is not entitled to answer that question he has not been entitled to testify against the Respondent in this case.

Trial Examiner Ballinger: The objection is overruled. The witness may answer the question.

The reporter will read the question.

7168 (The reporter read the question as follows:

"Q. Does that mean that it is just a question of your judgment as to which item of marketing cost may be used as a justification for a cost differential and which may not be used as a justification for the company's cost differential?")

The Witness: Your Honor, I do not know how I can answer it any better than I have. I said that I gave my opinion. That was my opinion.

By Mr. Hanley:

Q. The question does not call for that.

A. Then I beg to be advised as to what the attorney wants.

Q. I want a "yes" or "no" answer to that question.

Trial Examiner Ballinger: Read the question again.

(The reporter again read the question.)

The Witness: Yes. That is my opinion. That is what I gave you.

By Mr. Hanley:

Q. Were any of the jobber outlets in 1940 located in territories served by commission employees?

A. I think the record will show that. I do not recall at this moment. However, if my memory serves me correctly one of the Ned's stations was or may have been served by the Dearborn station. The record will show that.

Q. Well, do you know what proportion?

7169 A. Oh, no indeed.

Q. Did you make any effort to determine that while you were in Detroit?

A. No, sir.

Q. Do you not regard that as of some importance and did you not, when you were considering criticizing this Respondent's Exhibit 101 by the suggestion of the elimination of all commissions?

A. I did not think that would be a material factor, as far as I was concerned. I pointed it out to Mr. Boatwright in August of 1941, I suggested that if you were going to make the study, in my opinion he should explore the question of commission agent business. He did not do so. He has stated in the record that it could not be done in retrospect. I am sure it could be done in prospect. In my opinion, it should be done.

Q. What good would that do?

A. You mean a study of some of your accounts of that character?

Q. Yes.

A. Well, you made a study of some of your salesmen's time in prospect, and then applied it back in retrospect, and if you can do that you can also do that with commission agent business.

Q. Would that satisfy you as an accountant?

7170 A. If it were done properly, yes, it would suit me.

Q. Do you think it could be done properly?

A. Why, certainly, all they would have to do would be to want to do it.

Q. Why?

A. All that would be required is that they want to do it.

Q. That is all that you would require?

A. It would require doing it, which they did not do, as far as I have been able to learn up to now.

Q. You know there were some jobber outlets in 1940, located in territory served by the commission method?

A. Oh, no, I do not know that of my own knowledge.

Q. You do know that Dearborn was the commission station?

A. I so understood that.

Q. That Dearborn is in the territory operated by this litigation?

A. I understand that; yes, sir.

Mr. Austin: Well, the record is perfectly clear, your Honor, that only a part of the outlying portion of Dearborn was served by commission stations, and I think that ought to appear and be taken into account.

The Witness: I have stated it in my understanding that by far the greater portion of the gallonage sold in Detroit was by A-station business.

By Mr. Hanley:

7171 Q. If there were any in Detroit, would not commissions have some place in the cost justification for testing the price level?

A. Oh, they might have, but we are speaking very probably about a very trivial thing. We do not split hairs in these things.

Q. Do you not?

A. We certainly do not.

Q. Have you not done so in connection with your criticism of this accounting, Mr. Warmack?

A. I certainly have not.

We do not accept guesswork either.

Q. Do you regard it as your function, as a cost accountant, and did you in these matters to decide what geographical area should be covered in the defense of a cost differential?

A. Not necessarily.

Q. Well, "not necessarily," but do you at all, whether necessarily or otherwise?

A. Well, the complaint has to do very much with the cost studies that are going to be made. I think in this particular case the complaint was drawn in Detroit at the outset. As an aid in deciding the cost justification, the Respondent put in cost defense for the State of Oklahoma. I certainly do not agree to that.

Q. I understand you do not. But you were not 7172 asked about that, Mr. Warmack.

A. I think—at least, I thought your question was only directed to that point. If not, I am sorry.

Q. Would not the cost differential justification you referred to require a complete segregation of costs within the Detroit field between the two geographical areas both of which would include some commission and some salaried stations?

A. Probably so. However, you are splitting hairs there. We do no not do that in this Commission.

Trial Examiner Ballinger: The answer after "probably so" is stricken.

The Witness: I am sorry.

Trial Examiner Ballinger: You can only speak for what you do as an accountant.

The Witness: That is correct.

Trial Examiner Ballinger: And not for what the Commission does.

The Witness: That is correct. I am sorry.

Mr. Austin: Answer the question. Do not volunteer.

By Mr. Hanley:

Q. You said "probably so." Do you not know it to be the fact that it is so, Mr. Warmack?

A. I understand there is some degree of overlapping.

Q. Do you think that you understand the com-
7173 pany's records well enough to know whether such a
breakdown could properly be made for any period in the past in its business?

A. Of the past?

Q. Yes.

A. Without going and giving any effect to a period of current operations, I rather think that it could not be.

Q. I do not follow you there.

A. Without giving any effect to a period of current operations, Mr. Hanley, I rather think that it could not be. The company made a study of current operations, and you have established a measuring factor and applied it back. If they can do that for one thing, they can do it for the other, in my opinion.

Q. Would a true study of its condition require studies by separate classifications and cost treatment which would accumulate costs by these two geographical areas as those costs were incurred?

A. Without making a cost study I cannot tell just exactly what it would entail. It would entail an accumulation of underlying material which is, at the present time, not being accumulated by the Respondent company. Just how much that material would be, I am not in a position to state.

Q. What is your judgment as to whether or not such a study would actually have to be based upon future develop-
ments, rather than attempting to make a segregation
7174 based upon records of past accomplishments?

A. I have in mind particularly the statement by Respondent's witness, Mr. Boatwright, who stated that it could not be done in retrospect.

Q. I did not ask you for Mr. Boatwright's judgment. I have the benefit of that. I asked you for your judgment.

A. Well, I rather doubt if it could be made in retrospect, in the absence of any study of current operations.

Q. Did you discuss the problem of separation of markets with Mr. Houghton, when you were in Detroit?

A. Separation of markets?

Q. Yes, Mr. Warmack, I refer to the segregation of commission and salaried drivers' segregation that we are talking about during this discussion.

A. A Station and B Station. I discussed that with Mr. Houghton—

Q. (Interposing): Not at all—oh, I beg your pardon. I thought you were restating the question.

A. No.

Q. Proceed with your answer.

A. I stated that we discussed the A Station business and B Station business.

Q. Do you think the segregation could be made?

A. Yes, sir, I rather think that such a segregation could be made. If it could be made, a proper study would show that it could. If it could not be made,
7175 a proper study would show that it could not. I think that it could be made.

Q. Do you think that the matter has not been given consideration by the accountants of the Respondent company?

A. Oh, no, indeed. I do not think that at all.

Q. Now, you say you think it probably could be made?

A. I think it could be made.

Q. I want you to tell the Court how you, when confronted with the matter of doing it, would meet the following problems.

A. Yes.

Q. Many of the accounts of the Respondent, as you know, are allocated among channels on the basis of time distribution. You know that?

A. Estimated time.

Q. That applies particularly to salesmen's salaries expense; accounting department salaries and expense.

A. Yes.

Q. Now, what would you recommend as a suitable means of allocating this expense as between the two geographical areas?

A. Just a moment. You made a little greater refinement of that separation in the case of your account 200—accounting department. If you have your salesmen make a time report of their activities if they were serving both classes of sales, and I understand you have 7176 many salesmen who serve one, and others who serve two, either the A-Station or B-Station, that would not entail anything very difficult.

Q. As I understand you now, you would have a salesman make a time report as to whether he would or was calling on a commission served or a driver served station; is that what your answer means, Mr. Warmack?

A. That is exactly what it means. Of course, I would conduct on that study, ahead of that, Judge Hanley—if I may, since you ask—I would conduct a study with the separations that already had been made on commissions paid. I do not question those things. I assume they are correct. I would accept them as correct, from the studies I did make in connection with account 025. It would not be a great deal of study. It might require a month. That would not require much of a study.

Now, account 050, that would not require much study:

Mr. Austin: Do you not mean account 055?

The Witness: 055. I am sorry.

And there are several of these separations that you have already made. So, since you went to that refinement here, why not carry it through with these others?

By Mr. Hanley:

7177 Q. It would be just easy, in your judgment?

A. It would be a little better than guessing at it.

Q. Mr. Warmack, we now have this salesmen's—as I understand you—marketing time report on a segregation as between salaried stations and commission stations?

A. For the class on each.

Q. Earlier this morning, we had a marketing segregation of time as to whether he was calling on a lessee station or on a non-lessee station.

A. If such greater refinement is desired.

Q. Well, you are requiring it, are you not?

A. No.

Q. You have criticized both of these inclusions in Respondent's Exhibit 101, have you not?

A. Yes. I criticized Respondent's Exhibit 101 in that respect to this extent, that I am saying that that refinement is required as a test, but not as a current proposition. I am not saying that that refinement is required as a current proposition.

Q. You are requiring it so far as you are concerned as an accountant in this case?

A. That is the point. I have got to explore if you are going to establish a cost differential which is accurate and correct, beyond any reasonable doubt.

Trial Examiner Ballinger: Can you establish such
7178 a result?

The Witness: I should hope so, your Honor.

Trial Examiner Ballinger: Establish an account that is absolutely accurate beyond a doubt?

The Witness: The best that the accountant can establish it, your Honor.

By Mr. Hanley:

Q. What accountants?

A. Any competent accountant or group of competent accountants who are willing to do it.

Q. Do you regard Mr. Houghton and Mr. Boatwright as competent accountants?

A. Yes, sir.

Q. Are you familiar with the fact that Mr. Boatwright has testified, and Mr. Houghton told you, that in their judgment this was an impossible thing to do? And do you disagree with that testimony and with that statement?

A. I could not. I certainly could not agree with it. If they did not show me anything more than just word of mouth that it could not be done. I could say that some things can not be done, but if I did not not try them I do not know.

Q. You went into this question in Detroit and you indicated—

A. (Interposing): No.

Q. —that you thought it would be quite an easy task, and referred to a number of accounts that you thought would not need much attention in the course of
7179 your stay there, so that you did give it some attention?

A. I gave it some thought. I did not study it or make a study.

Q. In view of your observations of the problem while you were there, do you or do you not disagree with Mr. Boatwright's testimony and Mr. Houghton's statement to you?

A. To the effect that what?

Q. That it could not be done—

A. (Interposing): I certainly—

Q. —with any degree of accuracy, or with a result that would have any reasonableness of result to it?

A. I do not think that Mr. Houghton stated any such thing to me. I am positive that Mr. Boatwright made the statement in the records that the records of the company, from them, such a cost study could not be made in retrospect. That certainly has not told me that it could not be done.

Q. Well, to do it in the future, in your judgment, would it require a complete analysis and segregation and restatement of the records so that there would be distinct segregation of all this type of business under commissions, as distinguished from the business under salaried drivers?

A. I do not know that such exactitude, even if it could be attained, would be required. I rather doubt that. But, a cost study, Judge Hanley, is a cost study. It can be thin or it can be in detail. That is left to the elec-
7180 tion of the making of such, or the persons in whom
that making is entrusted.

Trial Examiner Ballinger: And the accuracy depends entirely upon the extent to which the accountant has gone?

The Witness: Yes, sir. It depends upon the refinement to which he has gone, or to the coverage.

By Mr. Hanley:

Q. This study would be made for the purpose of satisfying you, as a representative of the accounting department of the Commission, and with that in mind as to the extent of refinement, how would you meet this difficulty of segregating salesmen's salaries and expense; and, accounting—salaries and expense?

A. In the first place, I would separate those salesmen that worked on B-Stations business as against those that worked on A-station business exclusively. I would then make a reasonable survey to determine if the per unit sale cost ran equally or reasonably equally. I would not necessarily go to such a great refinement of splitting hairs as you would have the record appear here. That would be impossible. Your own witness stated it could not be done in retrospect. That means, in my opinion, that it could be done in prospect. That means it could be done.

Q. Very well. You do start with your definition of your salesmen distinguished as between commission 7181 business and driver business. You have already indicated that that is an overlapping of territory.

A. Yes.

Q. Now, Mr. Warmack, if you make that separation of salesmen, would not it very probably follow that you would be sending two salesmen into the territory where one had prior to that time served that territory. Would not you start out your study with a distortion in time cost?

A. That is not correct. I do not know about why you would send two salesmen. If you do not want to do that, Judge, you just do not have to do it. And if you want to do it, you just do it. You asked me whether that would be a distortion.

Q. Will you answer that?

A. I said—no.

Q. Very well.

A. Now, the study that I would set up would be no such thing.

Q. Very well. Let us analyze that in a moment. Here is a territory, we will say, that is being served in part by commission drivers and in part by salaried drivers. Into that territory goes a salesman. The territory is one which that salesmen can cover. He calls upon both customers served by commission drivers and customers served 7182 by salaried drivers. At the outset of your study he will be immediately called off either one or the other of those groups. There would necessarily be another salesman assigned to take care of the group which he was required to refrain from selling. Hence, you would be having twice, or at least two salesmen in the territory where you formerly had but one.

Now, I ask you, Mr. Warmack, if it is sound and good accounting sense that that is an immediate distortion of your cost?

A. If such a thing were to happen—which I have never heard or imagined happening—your costs may be increased in both instances just by virtue of the fact that you wanted this salesman to keep a time book and he did not want to keep it, so the company says, "Well, we will hire two salesmen, then, and segregate it."

I think that is absurd.

Q. All right.

A. Yes.

Trial Examiner Ballinger: Now, your explanation is this: That the one salesman would keep an accurate account of his time spent at the different stations, Mr. Warmack?

The Witness: B-Station as segregated from A-Station.

Trial Examiner Ballinger: The A-Station and the B Station?

The Witness: Yes, sir. Yes, sir. And they are
7183 doing that all over the country, your Honor, not in
this particular identical case.

Trial Examiner Ballinger: You would spend some time in traveling from one station to the other?

The Witness: Yes, sir.

Trial Examiner Ballinger: How would you compute that time?

The Witness: We can take care of that situation if he kept a time record.

By Mr. Hanley:

Q. How would you take care of it?

A. Well, travel time is, in some instances, allocated in one way, and in some instances allocated in another way. In the case of Standard Brands, in that case, where the travel time was in question, that was segregated on the basis of the so-called "call time" of the drivers.

Trial Examiner Ballinger: In applying it to this case, how could you segregate it?

The Witness: I would have no objection to such an allocation.

Trial Examiner Ballinger: Would not it of necessity be an arbitrary segregation?

The Witness: No. Not necessarily. No, sir.

By Mr. Hanley:

Q. Going back, Mr. Warmack, to what you said a
7184 moment ago about this time allocation business, I
asked you if that is the way you would have those salesmen handle this thing in your study; that is, make a time segregation of his time calling on the commission

served customer and, on the driver served customer, and then segregate it further as to whether he was calling on a lessee customer or a non-lessee customer. You said that was just a little along in the study, and that you would start your study farther back than that.

A. Yes, sir.

Q. Then you would put—does that mean that you would start your salesmen on a separation as to the B Station business and the A Station business?

A. Yes, sir.

Q. Now, you are speaking of time segregation based upon the same salesmen—

A. (Interposing.) No.

Q. Just where would you separate your study? First, let me ask you where you would start out with it? Let us get to that first.

A. I would first make up my mind to make the study. After I had done that, Judge Hanley, I would set up a plan of procedure, and study the logic of it by application to determine if it were workable. I would explore the costs in that manner.

Now, to argue about the reason you did not do it,—make
the study—to say that you did not do it because you
7185 did not want to do it, or did not think it was prac-
ticable, without making such a study—I say, that is
absurd.

Q. You are, of course, assuming we did not make any study?

A. I did not see any such study. I asked for it.

Q. I understand that. But you are just assuming it, are you not?

A. Well, I asked if you had made such a study. I asked Mr. Boatwright. I asked some of the others here and there. And I also asked Mr. Houghton in Chicago.

Q. Very well. Will you please answer the question of a few moments ago which remains unanswered—as to whether you would put on these separate salesmen as you said you would once, or would you rely upon the time segregation by the salesman, himself; as you have said that you would do once or twice?

A. I do not understand your question.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: Would I put what on what? Would I put what on the salesmen? This additional work? Evidently, I do not understand your question, Judge Hanley.

Trial Examiner Ballinger: Well, now, which course would you adopt?

The Witness: Well, he said would I put on salesmen.

7186 Trial Examiner Ballinger: Would you put on two salesmen?

The Witness: Do you mean engage them?

Trial Examiner Ballinger: One for the A-Station, one for the B-Station, or would you rely upon one salesman making a proper and accurate allocation of his time between the A and the B stations?

The Witness: Oh, I understand now. I thought that the question was directed to putting additional work on them.

Trial Examiner Ballinger: Answer the question. Read the question to the witness.

(The reporter read the following question:

"Q. Going back, Mr. Warmack, to what you said a moment ago about this time allocation business. I asked you if that is the way you would have those salesmen handle this thing in your study; that is, make a time segregation of his time calling on the commission served customer and on the driver served customer, and then segregate it further as to whether he was calling on a lessee customer or a non-lessee customer. You said that was just a little along in the study, and that you would start your study farther back than that."

The Witness: I would have no option in that. I would not be the management of the company. I would have nothing to do with that. I would suggest that the 7187 proper course of procedure to be worked out, as I suggested to Mr. Boatwright in August of 1941, and then apply it to determine whether it was workable. That is the way I would do it.

By Mr. Hanley:

Q. Mr. Warmack, we are asking these questions now of you as an accountant.

A. Yes.

Q. The Respondent's management undoubtedly would be very happy to keep out of this type of proceeding, which is substantially criminal in nature.

Now, the management, as you say, has decided that it cannot do this thing and reach any reasonably accurate result. You say differently.

Now, please tell us what you would do.

A. Make a cost study.

Q. Which one of those methods would you use? Just to make it specific, which one of those methods would you use?

A. I certainly would not recommend to the management going out and hiring any additional group of salesmen. That would be up to the management. But I would work out a plan of procedure whereby salesmen's records would be studied and measuring factors would be prepared.

Trial Examiner Ballinger: You could not make a study without going out in the field.

5188 The Witness: Nobody said anything about that, your Honor.

Trial Examiner Ballinger: He is asking you to go out in the field: how would you make the study there?

The Witness: Judge, either it may be there without sending an extra agent out in the field or not. Sometimes salesmen will keep time details of their time, which I think would happen in this company, at least I thought so until I went out to Detroit and find out that they were not.

Trial Examiner Ballinger: Have you any further answer to that question?

The Witness: Judge, I have answered his question properly.

Mr. Hanley: If your Honor please, it is now almost half past twelve.

We have been running pretty steadily this morning. I suggest and therefore move you, sir, that we recess until two o'clock.

Trial Examiner Ballinger: The motion is granted.

And now, at 12:20 o'clock, p. m., the hearing stands in recess to be reconvened at 2:00 o'clock, p. m.

(Whereupon, at 12:20 p. m., a recess was taken until 2:00 p. m., this day.)

7189 Afternoon Session.

2:00 p. m.

Trial Examiner Ballinger: Come to order. You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Hanley.

Q. Mr. Warmack, just prior to the noon recess, you made the statement that certain cost studies should be made in connection with matters such as leased stations versus non-leased stations; commissioned drivers versus salaried drivers to a point where it would prove costs beyond a reasonable doubt.

I think I did not ask you at the time, and will now: To whom do you mean that cost should be proved beyond a reasonable doubt?

A. I mean that the cost would be proved to the satisfaction of any person who might be concerned with respect to the accuracy of the costs and the cost differential sought to be determined. And the term "beyond a reasonable doubt" might be from an accounting standpoint going further than the same accountant could consider that such a calculation could be made. However, what I mean to say, and what I intended to say was this, that
7190 studies should be made in accordance with sound and accepted accounting principles, and practices, in order to substantiate a properly determined cost, and to properly determine the correctness of the unit costs desired.

Q. Shortly before you gave that testimony, and when I was asking you questions as to how a company such as the Respondent company might proceed with studies in setting up records in connection with the lessee stations versus non-lessee stations, you made the statement that if we got fifteen accountants to do the work that we would probably get fifteen different systems.

Now, which out of the fifteen would be accurate beyond a reasonable doubt?

A. To design a system would not mean at all to establish accuracy, and it may be that either one of the systems that may be devised by the separate men may be quite sufficient to establish the accuracy desired if a cost study were made or if it were desired—which is seldom the case—by a company carrying current records sufficient to afford any figures that may be desired currently.

Q. Would it not be just as likely that if those—if each of those fifteen accountants made a cost study rather than set up a cost system that there might also be fifteen different results?

A. If they made a proper study being for the pur-
7191 pose of determining the unit cost, although they may have approached the subject from different angles, I doubt very seriously if they would come out at figures that would vary to any worthwhile extent at all as unit cost figures; that is, if the studies were properly carried through, sound principles were applied, and they did not resort to guesswork.

Q. Have you revised your ideas, Mr. Warmack, that the business of cost accounting is not an exact science?

Mr. Austin: Objected to until more specific reference is made as to what testimony is referred to, or what statement of the witness is referred to.

By Mr. Hanley:

Q. In view of counsel's objection, I am glad to advise the witness that I am referring to his testimony repeatedly given over many days of testimony, that cost distribution accounting is in the pioneering stage and is not susceptible of complete accuracy of results, and that he, himself, has had the experience of approaching a single problem from two angles and himself reached two different results, and has had the experience of working with other accountants on a single problem when each of the accountants reached a different result and a similar line of testimony permeating this entire record.

Trial Examiner Ballinger: The witness may answer. The objection is overruled.

7192 The Witness: I have not changed my ideas on that subject. The example that you just spoke of did not have to do with distribution cost accounting.

By Mr. Hanley:

Q. But that is all that I have been talking about, that and nothing but that. That is all I am talking about, Mr. Warmack.

Mr. Austin: He is referring to the example that he ha referred to. He is not referring to your question.

The Witness: The example that I referred to.

By Mr. Hanley:

Q. Is there any difference between distribution cost accounting and production cost accounting except, as yo have said, that distribution cost accounting is not in as we settled a condition; it is not as well settled in its variou principles as production cost accounting?

A. That statement is correct.

Q. Now, I asked you if you have revised your views Do you think that these fifteen men would reach the sam result, and that it would be an accurate result?

A. In my opinion, if they made proper studies, I do no
see that they would come out at the identical figure. I d
not see that in my mind's eye, and I do not believe I sai
that they would. But if they made proper studies, in a
probability they would come out at a figure that the
7193 would be so close on that there would be relativel
little difference. That is also true in the instances o
my own personal experience in the handling of manufacturing costs.

Q. Well, so much for the cost study by the fifteen accountants. Now, assume that they set up their fifteen systems of accounting—and you said that they would probabl be fifteen different systems—which would naturally follo that it would result in fifteen different results; which o the fifteen would prove beyond a reasonable doubt from a accounting standpoint to be the proper and accurate one

A. Your Honor, that question is impossible of answe It is purely a hypothetical situation that is posed.

Trial Examiner Ballinger: Well, you cannot answer th question?

The Witness: No, sir. I cannot answer the question.

By Mr. Hanley:

Q. Well, can you answer this question, Mr. Warmack That when these fifteen accountants, having set up the system, their respective system, each of which will get somewhat different result—

A. (Interposing.) I would not know that they woul get a different result, they might be exactly the same.

Q. —is it not probable that they would?

A. They might. They might not.

Q. I understand that, but what are the accounting 7194 probabilities as to whether or not they would?

A. I certainly do not know. I rather think that if they made a proper study; irrespective of their approach, if they made a proper study along the lines of sound accounting—

Q. (Interposing.) We are talking about system.

A. —well, if they set up their systems, it all goes to the same point, the greater the refinement that they go to in their studies the more correct and accurate is going to be the result. The more that they resort to these estimates and guesswork the more questionable the results will be.

Q. Well, these are your fifteen hypothetical accountants, they are not mine, Mr. Warmack. You understand that. You have testified that they would probably each have a different system.

Now, I think the whole force of your testimony, and understand this, I mean by that, try to recall your testimony, is that this is not an exact science, that different accountants reach different results working on the same problem, and if any one of those systems were used as a basis for a cost differential justification, how would you know which of the systems, and which of the resulting cost differentials was proved beyond a reasonable doubt?

A: By study. By a study.

Trial Examiner Ballinger: Mr. Warmack, would not that be merely a question of opinion?

7195 The Witness: Yes, sir; absolutely.

Trial Examiner Ballinger: You mean by that your opinion, and another accountant's opinion? In other words, you might have an opinion of your own?

The Witness: Yes, sir.

Trial Examiner Ballinger: Another accountant may have a different opinion?

The Witness: Yes, sir. Mr. Lundball would have his opinion. Mr. Boatwright would have his opinion. Another accountant might have his opinion. Mr. Houghton would have his opinion. Other accountants would have their opinions.

Trial Examiner Ballinger: And then it would be proved beyond any reasonable doubt one system in the opinion of one accountant, another system in the opinion of another accountant, and so on. Is that not correct?

The Witness: That is correct. Generally, I have found

that among accountants who concern themselves with distribution cost accounting, and the development of it that involves the matter of studies, your Honor, I have seen accountants go to the extent of starting a cost by same identical case—by two or three different methods—studies, make a study and start it, find out what the result is by that study, and set it aside; make another study on another premise and on another basis, set it aside, and make
7196 another study, and in the end it would of course be up
to this accountant or the management if it saw the results to elect which it thought, or they thought afforded the most accurate and correct picture.

Trial Examiner Ballinger: Well, if the management decided the matter, it would not be the opinion of the accountant?

The Witness: Well, it is up to the accountant to express his opinion to the management, and in many instances, the management of the business have a very good knowledge of accounting.

Trial Examiner Ballinger: Excuse me, Judge Hanley, for breaking in. Please proceed.

By Mr. Hanley:

Q. It all goes back, does it not, Mr. Warmack, that when you say "proved beyond a reasonable doubt," you mean proved beyond a reasonable doubt to your satisfaction?

A. Well, of course, I am speaking for myself, Judge Hanley. Of coarse, I am not speaking for any other person. I can not speak for any other.

Q. Now, do you believe, as an accountant, Mr. Warmack, that any question of cost distribution accounting which contemplates a large business, many customers, many methods of distribution, many commodities can be proved beyond a reasonable doubt to the satisfaction of yourself or any other accountant on earth?

7197 A. Well, as I stated once before, the term "proved beyond a reasonable doubt" may not mean the same thing to you or to others as it may mean to me.

My idea of "proved beyond a reasonable doubt" that term used in cost accounting, in my idea, means substantiating the accuracy of a figure, properly substantiating and supporting the determination of it, supported by the use and application of sound and accepted accounting principles and practices, and involved with no guesswork.

Q. Of course, you are dealing continuously, are you not, Mr. Warmack, as an accountant with these accounting questions under the Robinson-Patman Act, which is a criminal law?

Mr. Austin: I object to that. The Robinson-Patman Act is not a criminal law in whole. It may have criminal sections.

Mr. Hanley: Of course, if there is a criminal section in it, I say it is a criminal law.

Mr. Austin: Well, the part administered by the Federal Trade Commission is not the criminal part.

Trial Examiner Ballinger: Violations become criminal.

Mr. Hanley: Of course.

Mr. Austin: I do not believe so, your Honor, I do not believe there is any penalty prescribed in the Act, except for Section 3, which is not administered by the Federal 7198 Trade Commission.

Trial Examiner Ballinger: I appreciate that Section 3 is not administered by the Commission. It is administered by the Department of Justice. That deals with violations.

Go ahead.

Mr. Hanley: I am not sure that the question is complete. Will you read the question so far as it has gone?

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. Of course, you are dealing continuously, are you not, Mr. Warmack, as an accountant with these acounting questions under the Robinson-Patman Act, which is a criminal law?")

Mr. Hanley: That is a complete question.

Trial Examiner Ballinger: The witness is not asked anything about the criminal law.

By Mr. Hanley:

Q. I am asking him if he is continuously dealing with accounting questions under the Robinson-Patman Act, which is a criminal law. This is a question of fact.

Are you not dealing with those problems?

A. Yes, sir. I am engaged for the most part and have been for the past eight years in the Commission on 7199 studies which have to do with distribution cost accounting under the Robinson-Patman Act, and some of the fair trade acts, and distribution cost accounting generally.

Q. And you have repeatedly testified that you did not undertake to prove the cost study or prove the cost differential of the Respondent in your studies in this case, and that you did not make any studies of your own in the sense of a determination of what the differential was; is that true?

A. Yes, sir. I did not study it to prove the case of the company's cost justification, or to disprove it.

Q. Yet, you were satisfied so far as you were concerned?

A. I

Mr. Austin: I object.

Mr. Hanley: I withdraw that question.

Trial Examiner Ballinger: Question withdrawn.

By Mr. Hanley:

Q. You are familiar with the terms of the law which require the Respondent company, if it seeks to justify and to establish its justifications and assume the burden of establishing a justification, are you not?

A. That is my understanding.

Q. And your approach to these problems, and with particular reference to this case, is that that justification must be established beyond reasonable doubt to your satisfaction?

7204 A. It must be properly substantiated by the application of sound accepted accounting principles.

Q. Which, to your mind, means beyond a reasonable doubt, so far as you are concerned? Is that not what you have testified to?

A. Reasonably so. It might be impossible to establish something that would have no doubt about it.

Q. Reasonable doubt—is that the term you used?

A. I have explained that twice already on this record what I meant.

Q. I have said, Mr. Warmack, "reasonable doubt" as you understand it, which you have explained. The terms are interchangeable in your mind.

A. Very well.

Q. It is you I am talking about.

A. Yes?

Q. From your standpoint as an accountant, then, you take the position and approach the problem as an accountant that he who is charged, namely, the Respondent company, as the Respondent company in this case, is in effect required to prove his innocence beyond a reasonable doubt from an accounting standpoint, and as you have explained "reasonable doubt" and as you understand it? Is that not true?

Mr. Austin: I object to that on the ground that it goes into the question of proof and the opinion of the
witness as to what is required to justify an order
7201 of the Commission which is immaterial. That is
really what it amounts to.

Mr. Hanley: If your Honor please, I think it is of some importance to test the attitude and approach of this witness.

Trial Examiner Ballinger: Only for that purpose can it be considered at all.

Mr. Hanley: Yes, of course.

Trial Examiner Ballinger: The Examiner will allow the witness to answer.

The objection is overruled.

The Witness: I should like to have the question, if your Honor please.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. From your standpoint as an accountant, then, you take the position and approach the problem as an accountant that he who is charged, namely, the Respondent company, as the Respondent company in this case, is in effect required to prove his innocence beyond a reasonable doubt from an accounting standpoint, and as you have explained 'reasonable doubt' and as you understand it? Is that not true?")

The Witness: Your Honor, I work for the Commission and do what the Commission says. I actually do not ex-
ercise any control over what position is to be taken.
7202 What I am trying to do is to go out and determine
the facts. That is all I do.

Trial Examiner Ballinger: Do you approach these investigations with any thought in mind other than the ascertainment of facts?

The Witness: That is the only approach I make.

By Mr. Hanley:

Q. Mr. Warmack, you approach these problems with the end in view of expressing your opinions? Do you not do that, as an accountant?

A. Well, I am required to do that by the Commission, through my chief, who is the chief economist.

Trial Examiner Ballinger: Well, you expect when you get through with your work to express an opinion as to the report you have submitted? Do you not do that?

The Witness: Yes, sir. Of the studies I have made when I am required to do that by my chief, I do so.

By Mr. Hanley:

Q. And you do that on the basis of what satisfies you beyond a reasonable doubt?

A. I do that on the basis of what I may find in my studies. I report facts to this Commission and only facts. And then if required to do so, which I am often, as just stated, I give an opinion on the situation as I see it.

7203 Q. Well, do I now understand that you made no study out in Detroit?

A. Yes, I certainly made a study. I worked nights and days, week ends.

Q. Did you make what you referred to as a "factual and objective study" of any of these matters?

A. No, sir. No, sir, I did not. It would take a group of accountants six months, at least many accountants, to cover such a situation as you have in Detroit. I was in Detroit two months alone.

Trial Examiner Ballinger: Did you endorse or pass or approve any account about which you had any doubt?

The Witness: I did not approve of any account about which I had any doubt. I did not. No, sir.

By Mr. Hanley:

Q. Well, is there any account on earth in cost distribution accounting about which some accountant might not have some doubt?

A. Oh, I can only testify about my ideas. There are some accounts in here about which there are none at all.

Q. None at all?

A. Yes, sir; there are. I should like to point them out to you.

Q. No doubt at all?

A. No doubt at all. I just reviewed the method you
employed. I do not impugn any good faith with re-
7204 spect to sound accounting. I think that is O. K.

Q. Now, adverting to this commission drivers versus salaried drivers. How would you handle this difficulty if you were undertaking to make a segregation which you have indicated you thought proper?

During the course of a year employees and vehicles and dispensing equipment would be transferred from one area to another.

Would it not be necessary to trace expenses back to the individual, and to the position?

A. I would not know.

Q. You have made some investigation of this thing. How would you treat that situation?

A. If I were to make a cost study to determine what it cost the company to deliver its goods through B-Stations, which you are terming "commission drivers," and to deliver its goods through A Stations—

Q. (Interposing): Now, let me correct you, Mr. Warmack. I am not just confining this to commission drivers and B-Stations. I am talking about commission drivers versus salaried drivers, which is the accounts that you have attacked. It is you who has injected into this thing the A stations and the B-stations.

My questions are always directed to the commission 7265 drivers versus salaried drivers.

A. That is not the term, Judge Hanley, which we have used, and that I used in discussions with Mr. Gillis and Mr. Houghton, in talking about the matter of which I thought you had made reference, or to which I thought you had made reference, although that term is used in Respondent's Exhibit 100.

Q. Well, just now, Mr. Gillis and Mr. Houghton are not asking you questions.

A. Yes, but I wanted it clear in my mind.

Q. When I ask you the question I am referring to the accounts as they appear on Respondent's Exhibit 101, which is the account that you have criticized. I am talking about commission agents versus salaried drivers.

A. I am or was under the impression you have stated commission drivers—commission drivers versus salaried drivers. My understanding of the direct term "commission drivers" were the drivers that picked up certain of the company's products at the A-Stations and sold those products and received commissions thereon, as distinguished from the regular B-station agent.

Q. I am talking about account 006 and account 021 in Respondent's Exhibit 101.

A. Yes.

Q. That is what my questions referred to, Mr. Warmack.

A. Yes, sir. (The witness examines certain documents.)

7206 Q. Now, with that clear in your mind, and assuming that you are undertaking to make this segregation of those two classes of employees, will you please advise us how you would surmount the difficulty incident to this transference of dispensing equipment from one area to another?

A. I would make a study of the situation, and the material effect it would have on the cost differential from that type of procedure. You might have plenty of cost in order to establish the differential without even exploring that very item, which, in my opinion, may be a very small item of cost. We are not splitting hairs.

Q. Well, if it is a very small item of cost—

A. (Interposing.) I say, it might be.

Q. You say in your opinion it may be. Now, if it is, do you regard it as an easy thing to overcome?

A. No. That would probably be a difficult thing. But I wonder if we are not undertaking trifling things in this.

Q. I do not know. If we are, why, you say so, Mr. Warmack. Is that a trifling thing or not?

A. If you can point out the account, I think, the particular item of cost that it is carried in, I can give you an idea on that.

Q. Well, do you not know?

A. In account 189; will you please refer to the account to which you make reference?

7207 Q. I do not know what it is. I assume you know. You have gone into this thing sufficiently to criticize it to a considerable extent.

A. Well, you have asked the question, I assume you know what account you are referring to.

Q. I asked you how you would surmount that particular difficulty, whether it be a large part, or a small part, whether it referred to a large number or a small number.

A. I did not make a study to determine, and I just would not guess at it and let it go at that.

Q. Mr. Warmack, almost every question I ask you you answer that you would make a study. Is that all you know about whether or not there is any merit to your contentions that there should be a segregation of the commission account from the salaried drivers account?

A. Will you please explain that question?

Mr. Hanley: Will you read the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: No, sir. No, sir. That is not all.

By Mr. Hanley:

Q. Then, I assume that you do know something about it, Mr. Warmack, which inspired your criticisms, and have suggested an alternatve method to be used by the Respondent, to that used by the Respondent. On that
7208 assumption, I ask you how you would surmount
this difficulty to which I have just called your attention if you were to undertake that segregation.

A. I have not worked out any plan of procedure. I offered to sit with Mr. Boatwright on it. I did talk to him about that very thing in August, 1941. I suggested that he do it. He did not desire to do so, apparently.

Q. Well, do you not know, or do you know how this can be made, or do you not know?

A. A study would develop, Judge Hanley, the way, and that is the only way it could be done.

I cannot tell what I would do, and how I would do it, now. I cannot tell you how I would approach these costs or the procedure that has to be worked out. The procedure that is to be used has to be worked out from a very careful study and analysis of each situation. Why, I could not begin to sit down here and tell you how you are going to make a reparation or what obstacles you are going to encounter, without first going out and encountering them, and then I could tell you more about it.

Q. Do you know how you could overcome it?

A. No. I do not.

Q. Do you know that you could overcome it?

A. No, I do not know that, but many of them are
7209 overcome by accountants where a separation of costs
are involved.

Q. Is it not a fact that you are just assuming that something might be done, that you do not know anything about it, Mr. Warmack?

A. That is not my feeling about it at all.

Q. Then, tell us how you would meet that situation.

A. I cannot tell you how I would meet any situation.

Trial Examiner Ballinger: One moment. The question has not been fully stated.

By Mr. Hanley:

Q. Then tell us how you would meet that situation. Take this situation and tell us how you would meet this situation: Would not all averages and supporting data, such as construction work orders, individual plant expense vouchers, machine shop orders and the like have to be traced to each individual plant, and then classified according to location, and all such accounts as plant maintenance at both bulk plant and retail outlets, rent revenue, miscellaneous operating expense, station operative tools and equipment, water, light, and fuel other than main office, depreciation and taxes?

A. A study would show that there would be a good many
of those cases of expense that could be separated when they
were recorded on the records. There would be some of
them that would involve the necessity for the use of a meas-
uring factor. Then it would involve the use of a
7210 measuring factor for those, and then the problem is
to establish your measuring factor.

Q. What do you think would be a good one in this segregation?

A. They may require several.

Q. What are they?

A. I have not made a study.

Q. What are they?

A. I have not made a study to find out.

Q. What are they that would be satisfactory to you at all?

A. Anything that would develop or be developed from the standards of sound accounting; that is, by the application of sound accounting principles and procedure.

Q. ~~All right.~~ Mr. Warmack, you have indicated that our accounting is not sound.

A. I certainly have not.

Q. You have indicated a method that you think would be sounder?

A. Oh, no.

Q. Now, I ask you what factors would that measuring factor include that you would use to make this segregation to bring about that which you indicate in your judgment is a sounder method?

A. I had not, in the first place, questioned at all your method of accounting.

I have questioned the fact that you have not made any segregation of the costs of the serving your customers
7211 through B-Stations as against the cost of serving your customers through A-Stations, and the mere separation between account 006 drivers, as to which there is a question as to separating—although I have not studied the underlying data in the Detroit office to any worthwhile extent—and as between the cost of commission agents in account 021; that is, in a thorough separation.

Q. (Interposing): I did not hear the last.

A. That would be a thorough separation; that is, just to offset one against the other, something in account 021, here,—this is commission agents which have been referred to here as commission drivers, probably many, many services that are not performed by the employees represented in account 006 are performed by them.

I wonder if that is an answer to your question.

Q. No. It is not an answer to my question.

My question is as to what you suggest specifically, not simply by stating to me that a study would show, but specifically how you would meet some of these difficulties if you were undertaking this segregation which you say is better to establish a cost differential—I will put it that way—than the method shown by Respondent in Respondent's Exhibit 101.

A. I can only answer that, your Honor, generally. I have not made any study and it is my contention that
7212 it is or would be necessary in order to determine properly a cost differential, it will be necessary to separate B-station business from A-station business. The cost that could be applied directly should be so applied. The remaining cost would be necessary—it would be necessary to separate the remaining costs which are of a general nature on the basis of various measuring factors which I could not possibly know, which would be the best, I mean, without having a study, and could only be established by a study itself.

Now, I am asked what would be the best. Why, there would be many of them, and I could not possibly know without making a study.

Trial Examiner Ballinger: Mr. Warmack, how would you go about making the study of the costs of A-Stations and B-Stations?

The Witness: I would first study the company's plan of merchandising. That would be my first study.

My next step, I would study the functions involved separately as to each group, and jointly as to the two groups.

Then, I would carry the study next to determine where the influencing factors were that cause the incurrence of this cost.

Now, your Honor, that is a cost approach. From that standpoint, there would be various separations to be made of separate glasses of costs.

7213 But, to outline definitely which would be the best method to employ in the separation of costs, I do not know exactly which would be the best. It may be the study of the salesmen's time; that is, those serving both classes of trade may disclose the fact that salesmen's calls may be quite sufficient. It may disclose that some other measuring factor could be established without going to such refinement. A study of the other factors may show other things.

We have a separation here of just various kinds of cost, your Honor, and you could not separate the non-salary expense that would be susceptible to a separation based on cost analysis, on the basis of salesmen's time, probably. Therefore, you would have to establish a measuring factor for that.

And that is the story.

Now, am asked here by Respondent's counsel to tell just exactly what I would do. I would have to make a study and then I could tell what I would do.

By Mr. Hanley:

Q. I have not asked that broad a question. This is the question I have asked, and which I am going to ask you, and they are simple questions as to how you would meet these particular difficulties that I am outlining. For instance, to allocate ELA costs between two geographical areas, would you not have to trace each individual
7214 expenditure to each piece of equipment, and then trace each piece of equipment to allocations throughout the year?

A. If you were making a cost study or if you were keeping your current information?

Q. Either one or both.

A. If you were keeping that current information, you would tabulate it as it comes in. If you were making a cost study it might be necessary to follow the plan that you outlined or at least to follow it to some extent, to see how the cost curve would run.

Q. Does that occur to you as being a difficult situation?

A. I do not regard any of these separations which involve the establishment of a measuring factor and the separation of joint costs especially as being child's play.

Q. Well, in your judgment as an expert accountant, this matter of segregating these classes of accounts is child's play?

A. No, sir. It is anything except that.

Q. I understood or misunderstood, perhaps; what do you mean is child's play in connection with it?

A. I said that that work would not be child's play, Mr. Hanley.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

7215 By Mr. Hanley:

Q. How would you meet this difficulty, what would you do in regard to overlapping territories where station boundaries do not correspond with geographical areas; that is, like Detroit and Dearborn, or where Royal Oak plant is located at that point outside of the City of Detroit, and part of the territory is inside and part of it is outside?

A. With respect to what class of expense?

Q. With respect to a segregation between these two classes of accounts, commission and drivers; that is all we are speaking of.

A. What class of expense are you talking about would have to do with that particular problem?

Q. All of the expense that would need to be segregated.

A. I am sure that taxes would not overlap, and such things as that.

Q. I am talking about all expenses that you say should be segregated. Is not that clear?

Trial Examiner Ballinger: Mr. Warmack, he is talking about marketing expense; Judge Hanley is.

Mr. Hanley: Taxes are?

The Witness: Taxes are marketing expense.

Mr. Austin: Off the record, please, your Honor?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

7216 Trial Examiner Ballinger: On the record.

Mr. Austin: May we have a five minute recess?

Trial Examiner Ballinger: We will take a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: On the record, please. Read the pending question.

(The reporter read the question as follows:

"Q. How would you meet this difficulty, what would you do in regard to overlapping territories where station boundaries do not correspond with geographical areas; that is, like Detroit and Dearborn, or where Royal Oak plant is located at that point outside of the City of Detroit, and part of the territory is inside and part of it is outside?")

The Witness: I think I can answer that, maybe, in a general way—I was under the impression that counsel had been pointing out specific expense items. Generally there would be many classes of expense that would not overlap, irrespective of the overlapping of the territories, so there would be little overlapping expected.

Take in the case of salesmen who serve both A-Station business and B-Station business. If those salesmen kept time records, why, it would not be such a difficult problem to determine whom they called upon and whether they
7217 were A-Station customers or B-Station customers.

If you take the deliveries, if deliveries were made alternately to a customer from an A-Station or a B-Station, why, some little problem may be involved there. I do not know that such is the case.

With respect to the example given of salesmen, I think that fairly covers your question, Judge Hanley.

By Mr. Hanley:

Q. Well, from your observation of the problem, do you regard what I have incorporated in that question as being a difficult thing; making this segregation between commission accounts and drivers accounts?

A. Wel, surely, it is a difficult problem.

Mr. Austin: May we have a recess?

Trial Examiner Ballinger: We will take a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order. You may proceed.

By Mr. Hanley:

Q. I believe there is a question pending on the record. Are you ready to answer that question, Mr. Warmack?

A. I thought I had answered it, if not, I will.

Trial Examiner Ballinger: Read the last question on the record.

(The reporter read the following question:

7218 "Q. How would you meet this difficulty, what would you do in regard to overlapping territories where station boundaries do not correspond with geographical areas; that is, like Detroit and Dearborn, or where Royal Oak plant is located at that point outside of the City of Detroit, and part of the territory is inside and part of it is outside?")

The Witness: By segregating any costs that are involved jointly, but the problem is to establish a measuring factor. Without having made a study I could not tell you exactly how to establish a measuring factor. I have given you an example in the case of salesmen.

By Mr. Hanley:

Q. Would it not meet this difficulty if you agree that it is a difficulty?

A. What?

Q. First let me ask you this: What would you do in meeting this difficulty, if you should agree, Mr. Warmack, that it is a difficulty?

A. What is it?

Q. How would you treat the salaries of drivers and the operation and maintenance of trucks in the same vehicle and same driver when the same vehicle and same driver may be serving in both of the geographical areas?

A. I do not know that the geographical area has a
7219 lot to do with it. It is my understanding that the segregation would be made between the trade served by A Stations and the trade served by B-Stations. That is my understanding of the problems involved. I do not know that there was a twilight zone around where they are going and serving in other territories.

Q. I understand that you expected the segregation to be made between the geographical area of greater Detroit, as you have expressed it, and that area lying outside o greater Detroit area.

A. I think that such a study could be made.

Q. Well, is not that the one study you suggested?

A. I rather think that I stated that I suggested fo Mr. Boatwright's consideration, that Mr. Boatwright's consideration should be given to the possible separation of th commission agent business from the A-Station—the commission agent business being the B-Station business.

Q. Well, from your last answer I gather that you do no think that this question I have asked you poses any difficulties?

A. Oh no, indeed. I certainly did not mean to imply that. If I stated anything to indicate that I did not inten to. Certainly, all problems where the separation of join costs are involved, those things do involve difficulties

Sometimes the difficulty is great. Sometimes the difficulty is not so great. 7220

Q. Well, now.

Mr. Austin: (Interposing.) Mr. Hanley, now for th purpose of clarification, if I may ask a question of counsel counsel has been directing his questions toward separatio of A Station business and B-Station business. Is not counsel now directing his question to the separations of cost b territories regardless of whether the territory includes th A-Station or the B-Station?

Mr. Hanley: Both.

Mr. Austin: In other words—

Mr. Hanley: (Interposing.) Both of them were involved in the criticism. That is what is involved in th suggestion of the witness. I am directing my questions t the difficulties; if the witness sees any, in the separatio which necessarily involves the separation by geographica areas, and a separation by class of employees, commissio as distinguished from salaried driver.

By Mr. Hanley:

Q. Mr. Warmack, you gave this particular matter considerable attention while you were in Detroit, did you not

A. I made quite a study of these services that were performed by the B-Station agents; that is to say, commissio agents or commission drivers that are called sometimes tha

And I gathered considerable information with respe 7221 to the way that they were compensated for their services, and their activities; that is, the functions tha were performed for the company, and I actually visited a couple of the stations.

Q. Did you not give consideration in your studies to each of the problems that I have asked you about?

A. Not to the end of preparing a plan of procedure, no.

Q. As a matter of fact, did you not make a study?

A. I did not make such a study as I would be required to make if I were proving a case of cost justification.

Q. Did you not make a study which satisfied you at least as to the difference in cost, if any, between the salaried drivers and the commission employees?

A. Not between the business served by each, no. I reviewed how they paid the commission drivers, or what I believe is termed by the company in its Detroit office as "B-Station agents," and I also made a sufficient review coupled with my studies of Respondent's Exhibit 99 and 100 and 101 from which I learned how, or reasonably how, compensation was made to the salaried drivers, and how the separations of salaried driver costs included in account 006 is separated between channels on Respondent's regular accounting form 189, and which figures are also reflected in identical amounts, I believe, on Respondent's Exhibit 101.

Q. You have said you did not make any study to arrive at an answer as to a difference in cost between the
7222 two classes of business. Did you make any such study relative to any geographical areas, to any differences in geographical areas?

A. Oh, no, sir. That is something which was not included in my activities.

Q. Did you make a study, Mr. Warmack, which resulted in a figure which you arrived at as to the difference in cost per gallon as between commission employees and salaried drivers?

A. I do not understand the question. Back of the organization of the whole business of the B-Station men, and the A-Station men, I did not make any kind of a study. I just looked into the matter.

Q. Please answer the question.

A. I beg your pardon.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: No, sir, I have not. That would be a very simple matter to take these two accounts and divide by the gallonage and you have the figure.

By Mr. Hanley:

Q. Mr. Warmack, did you not tell Mr. Houghton i
Detroit when you and he were both there considering thi
matter of costs, that you had made calculations and tha
you had determined or concluded that there was only
different of two-one-hundredths of a cent between th
7223 gallonage handled by commission employees as distinguished from the salaried drivers?

A. I do not remember that. I remember this, that Mr Houghton and I took one of these forms and tried, wit what information was at hand, to make a separation bu the separations just did not come out, with the facilitie which we had, we did not have the information to make it

Q. Did Mr. Houghton undertake to make any such segregation in Detroit, in your presence, or within your knowledge?

A. He and I worked on it, to see if there was information sufficient to make it, and there was not.

Q. Did you not tell him that you were satisfied or ha concluded that there was only two one-hundredths of a cen difference in cost per gallon in handling gasoline in tho two groups?

A. As between what?

Q. You can answer that question "yes" or "no."?

A. No, I cannot. As between who?

Q. Commission employees on the one hand and salarie drivers on the other hand.

A. That means A-Station and B-Station.

Q. It means salaried drivers on the one hand and commission employees on the other hand.

A. I can make that calculation here if you restrict m to those two accounts.

7224 Q. Mr. Warmack, I did not ask you that questio

Mr. Hanley: Please read the question.

The Witness: Well, I do not know what he is askin then.

Trial Examiner Ballinger: One moment. Read th question to the witness.

(The reporter read the following question:

"Q. Did you not tell him that you were satisfied or ha concluded that there was only two one-hundredths of cent difference in cost per gallon in handling gasoline i those two groups?")

Trial Examiner Ballinger: You understand that he re fers to Mr. Houghton, and you understand the two groups referred to are the A Stations and B Stations?

Mr. Hanley: No, this first question refers to the commission employees as distinguished from the salaried drivers.

Trial Examiner Ballinger: That is right.

The Witness: And then it does not go any further than those two accounts; is that my understanding?

Mr. Hanley: Yes.

Trial Examiner Ballinger: Now you can answer the question.

By Mr. Hanley:

Q. It goes, Mr. Warmack,—if you do not under-
7225 stand it, do not attempt to answer it until you do.
Perhaps I had better reframe it.

Mr. Hanley: I withdraw the question.

Trial Examiner Ballinger: Question was withdrawn and will be reframed.

By Mr. Hanley:

Q. Did not you tell Mr. Houghton in Detroit last spring, when you and he were both there, that you had made some calculation or study and that you had determined or become satisfied that there was only two one-hundredths of a cent per gallon difference in marketing cost between the gallonage handled by commission employees on the one hand, and salaried drivers on the other hand?

Trial Examiner Ballinger: The question is: Did you or did you not tell him that?

The Witness: I certainly do not recall telling Mr. Houghton that there was any cost differential established for either of these two accounts; that is, account 006 or 021, or that there was any cost—unit cost established for the determining, that is, unit cost established as to cost of serving through B Station agents or through A Station agents. I was not clear, Judge, whether he means the two accounts or the whole business.

Trial Examiner Ballinger: Mr. Warmack, in your an-
swer you use the word "established."
7226 The Witness: Yes, sir.

Trial Examiner Ballinger: In the question you were asked whether or not you stated to Mr. Houghton that you were satisfied?

The Witness: And I have not yet understood what I was supposed to be satisfied about.

By Mr. Hanley:

Q. It does not make any difference about that, Mr. Warmack. I am trying to—I will try to explain the question a little more about this, then I will ask the reporter to reread it to you. I am asking you now—

A. (Interposing.) I will listen.

Q. —whether or not you made a statement to Mr. Houghton, and the only thing that you need to answer is whether you did or did not make that statement.

A. I see.

Mr. Hanley: Now, Mr. Reporter, please read the question.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. Did not you tell Mr. Houghton in Detroit last spring, when you and he were both there, that you had made some calculation or study and that you had determined or become satisfied that there was only two one-hundredths of a cent per gallon difference in market-
7227 ing cost between the gallonage handled by commission employees on the one hand, and salaried drivers on the other hand?")

The Witness: In answer to that, I can give this: The answer is no. Positively no. No such study had ever been completed. Mr. Houghton and I did make a calculation, or tried to,—

By Mr. Hanley:

Q. (Interposing): That is all I want to know is did you or did not you make such a statement?

A. I answer your question.

Q. Very well. Please answer identically the same question—

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Did you not tell Mr. Houghton in Detroit last spring when you and he were both there that you had made some calculation or study and that you had determined or become satisfied that there was only two one-hundredths of a cent per gallon difference in marketing cost between the gallonage sold and delivered out of A-Stations on the one hand, and out of B-Stations on the other hand? —Gallonage, referring to gasoline in the reseller channel, in both instances.

7228 A. The answer is—no. I should like to explain, your Honor, if I may.

Q. There is no explanation necessary.

A. I think an explanation is positively necessary.

Mr. Hanley: If your Honor please, this question is asked definitely as an impeaching question. I do not care to have any more explanation on the record. He either made the statement or he did not.

The Witness: Your Honor, I think I am entitled to show what Mr. Houghton and I did do.

Trial Examiner Ballinger: No. It is unnecessary, in view of the question and answer.

The Witness: Well, Mr. Houghton and I did a lot of—

Trial Examiner Ballinger (Interposing): Mr. Warmack, you will answer the question propounded by counsel.

The Witness: You do not want the whole story?

By Mr. Hanley:

Q. Mr. Warmack, you have indicated that you thought there should be a segregation of cost as between leased stations and non-leased stations, and you have indicated that you thought there should be a segregation of cost as between commission employees' gallonage and salaried drivers' gallonage.

Would it not be possible that there would be at
least as many as four times gallonage costs resulting
7229 from the adoption of that plan or those plans at any
conceivable time?

A. Yes, that is possible. I do not say that I—or at least I think your statement is a little bit off to the effect that I said that that must be done with respect to lessee and non-lessees.

Q. I just thought you had suggested that it be done, Mr. Warmack.

A. I beg your pardon. I can give you what I thought—

Q. (Interposing): You have. You have told us. Would not it be possible that you may not get one gallonage cost with reference to lessee stations served by commission drivers and another cost for lessee stations served by salaried drivers, and another cost by other stations served by—

A. (Interposing): I am sorry, I was looking at this document and I did not hear your question.

Mr. Austin: May we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: We will take a five minute recess.

(A short reces swas taken.)

Trial Examiner Ballinger: On the record. Is there a question pending?

Mr. Hanley: I will withdraw the question and ask 7230 it again.

Trial Examiner Ballinger: Question withdrawn.

By Mr. Hanley:

Q. You have told us, Mr. Warmack. Would it not be possible, if not probable, that you would get one gallon unit cost for lessee stations served by commission employees, another and different unit cost for lessee stations served by salaried drivers, another and different unit cost for non-lessee stations served by commission employees, and another and different unit cost for non-lessee stations served by salaried drivers?

A. All of those things are entirely possible. Any separation that you make may afford different costs and it may not.

Q. Now, assuming that you do get that kind of result, which one, if any, would you say is the basis for determining what cost differential you would adopt, or what the cost differential was, as between the tank wagon reseller customer, and the jobber customer?

A. You can say every one, although in that instance you can say each one of the unit costs per gallon arrived at to determine this differential would be any of the other group, if you want to go to that great refinement.

Q. I understand, as a matter of fact, that arithmetically, Mr. Warmack, a subtraction could be made, but as a matter of setting up a cost differential, or as a matter of cost 7231 justification for a cost differential, which of those four costs if any or, in your judgment, any group of them, as an accountant, would be the proper one to use to establish the cost differential?

A. I think you should use them all and then I should think you would take the costs of greater Detroit. You have established those costs—I do not know if that is the one that you have set up—and compared it with the cost of serving your jobber business. That would be your most proper comparison.

Q. How would you use them? By taking in a geographical area?

A. Well, that would be just a matter of simple arithmetic, of comparing one with the other, or one with all of the others, or each of the others, for that matter, rather.

Q. Which resulting figure would be the differential?

A. That would be for the Commission to decide.

Trial Examiner Ballinger: Well, you say it would be for the Commission to decide, but as to which method of accounting would be the proper method, would you say that it would also be for the Commission to decide?

The Witness: I am sorry. I do not understand the question.

Trial Examiner Ballinger: Also, would it be for the Commission to decide as to which method of accounting would be the proper method? 7232

The Witness: Yes, sir. That is correct.

Mr. Hanley: I did not hear the question and answer.

Trial Examiner Ballinger: Read the question and answer.

(The reporter read the question and answer.)

By Mr. Hanley:

Q. Well, now, suppose this, Mr. Warmack, that instead of the Respondent having done what it did do, and grouped all of these various accounts with a resultant single unit cost, suppose that it had some years ago adopted your theories, and it now came into court with the four different unit costs, would you then be expected to throw all of these accounts together just as we are now expected to, and are unable to unscramble the eggs and separate them all for your benefit, would you then state what would be the proper thing to do? What, then, would be the proper thing to do; that is, to establish the proper cost to use for the differentials?

A. Are we going into the theories of probabilities?

Q. I am asking you as an accountant.

A. Well, should think—

Trial Examiner Ballinger: (Interposing): The Examiner is of the opinion that the question addressed to this witness is too broad. He cannot speak for the Commission as to what it would do.

7233 Mr. Hanley: He can speak as an accountant as to what he thinks would be the proper justification for the differential. He can speak as an accountant.

Trial Examiner Ballinger: Certainly, he can speak that way. He can go at it from the basis of an accountant, but he can not speak for the Commission.

Mr. Hanley: I was asking the question of the witness as an accountant, which of the four unit costs, Mr. Warmack, as an accountant, would it be proper to use to establish the cost differential?

Mr. Austin: I object to this as incompetent and immaterial and irrelevant. I think to ask this witness as to what would happen if somebody representing the Respondent came in here with a different method of accounting from that which is presented here—

Trial Examiner Ballinger: Well, we have had a situation of that kind present here once or twice during the hearing.

The witness may answer.

The Witness: I would make a comparison of all of the costs. I would lean to the feeling that the cost of serving reseller customers in the place where the complaint is drawn; namely, Detroit, Michigan, would be the cost which should be compared for the unit cost of serving jobber customers when, as, and if that unit cost is established in examining the cost differential.

7234

By Mr. Hanley:

Q. Now, I do not understand what you mean by using all of the costs. You say you would do it.

A. In the grouping of them. You have named four separations that you have made, and that is what my answer was addressed to, each of those separate separations of cost.

Q. Do you mean you would have four differentials to justify?

A. I stated that I would make a comparison of each, but that I would run to the feeling that the cost of serving reseller customers in Detroit, Michigan, through whatever service or methods of handling that the company employs in serving its customers, that unit cost should be compared with the unit cost of serving the jobber customers, when, as, and if that unit cost of serving the jobber customer is established.

Q. All right, Mr. Warmack. Limit it for the purpose of this question to that Detroit area, and assume that four unit costs would be in it, because they would be there, because all of the elements are in that area; then, what would you say would be the proper unit cost to use to determine the differential?

A. Inasmuch as the commission agent business is limited materially in the City of Detroit, I certainly would not use that.

7235 That would leave the A-Station costs. There you have, if you can establish, you have, if it is possible and practicable, you have costs of serving reseller stations which are lessee stations, and costs of serving reseller stations which are not lessee stations. I would make a comparison of those—of each of those unit costs.

Q. Then, what?

A. Then, with the unit cost of serving these preferred customers who receive the price—the lesser price.

For a determination—

Q. (Interposing.) I understand. Have you finished your answer?

The Witness: I would like to hear my answer.

Trial Examiner Ballinger: Read the answer.

(The reporter read the answer.)

The Witness: Yes.

By Mr. Hanley:

Q. Well, certainly one of the unit costs in the reseller channel is that area under consideration would be low and another would be intermediate, and the third would be high.

A. I do not know that.

Q. Well, if they are all different, that would have to be true, would it not?

A. Well, I would make the comparison with each one of them.

7236 I am asking you, in fact I was going to ask you how you would get three different answers—you would, would you not?

A. I might, I might not.

Mr. Austin: The witness said two not three.

Mr. Hanley: All right. Two is enough.

By Mr. Hanley:

Q. One would have to be greater than the other?

A. I do not know. A study might develop that it might not.

Q. We are assuming, Mr. Warmack, that you got four different unit costs out of the use of your various studies. You have now said that you would not regard any but two of them, as an accountant.

A. That is because the complaint was prepared for Detroit.

Q. Now, necessarily, one of those unit costs would be greater than the other, if they are different?

A. If they are different, one would be larger than the other.

Q. You have now said you would compare the jobber price with each. If you do you would necessarily get two different answers?

A. Well, you would have two comparisons and I do not know exactly, just exactly what you mean by answers.

Q. I mean, if you subtracted five from eight you would get three, and if you subtracted five from seven you
7237 would get two; and there is a difference between two and three.

A. That is correct.

Q. Well, can you answer your question then?

A. I beg your pardon? I did not mean not to answer it.

Mr. Hanley: Read the question.

Trial Examiner Ballinger: Read the question.

(The reporter read the following question:

"Q. You have now said you would compare the jobber price with each. If you do you would necessarily get two different answers?")

The Witness: Yes, you would get two different answers, and in one instance on this assumption, Judge Hanley, that you have just given me, it might be that your price differential was greater than your cost differential in one instance, and in the other instance it may be just the other way.

By Mr. Hanley:

Q. Exactly.

A. That is correct.

Q. And then what would you do about it?

A. I would tell the Commission; that is all I would do.

Q. And from there on it is the Commission's problem?

Trial Examiner Ballinger: Mr. Warmack, as an ac-
ountant, would you not yourself decide which method of
accounting would produce the most accurate result?

238 The Witness: Why, Judge, I was under the as-
sumption that both methods [illegible] accounting—that the
ame method of accounting had been employed. That was
y assumption.

Trial Examiner Ballinger: Read my question.

(The reporter read the question.)

Trial Examiner Ballinger: That is assuming that you
xplored the question of differential on two different ac-
ounting methods, let us assume that.

The Witness: Yes, sir.

Trial Examiner Ballinger: And you had arrived at two
ifferent conclusions.

Would you not yourself choose and determine which
ethod would produce most accurate results, and adopt
hat method?

The Witness: Yes, that is not the question involved
ere at all. I am sorry, but that is not my understanding.

Trial Examiner Ballinger: What would be your action
nder those circumstances?

The Witness: Under those circumstances I would ac-
ept the figure that I thought had been most properly de-
eloped. That was not the question here at all.

Trial Examiner Ballinger: Well, you would not put that
uestion up to the Commission?

The Witness: No, sir, but that was not the ques-
239 tion.

The question was asked me by Judge Hanley if, by
he use of sound and accepted accounting principles, it
ere determined that it cost one unit cost to serve lessee
tations and one unit cost to serve non-lessee stations,
nd each one of those unit costs had been properly es-
ablished, and further than that that a proper study had
een made, according to sound accounting principles and
rocedure, whereby the unit cost of serving jobber cus-
omers had been established, which one would I compare
I would compare each with the other. That was the
uestion, your Honor.

Mr. Hanley: That was the question, I think, fairly
tated with this modification—I did not say "according

to sound accounting principles." I said if these accounts had been kept in accordance with the theories advanced by you in your criticism of Respondent's Exhibit 101—with that modification, I think your statement of what you were asked is fairly correct.

Trial Examiner Ballinger: Now, Mr. Warmack, I want to ask you whether it would be possible to make two investigations, both according to sound accounting principles, and along different lines, which would result in different results?

The Witness: Different lines of approach, you mean, your Honor?

7240 Mr. Austin: Your Honor, can we go off the record?

Trial Examiner Ballinger: No, I prefer to stay on the record at this time.

Mr. Austin: Why, then, I will have to say on the record that your Honor is completely under a misapprehension and have a complete misconception of the previous question. And I think these questions that you are now asking Mr. Warmack, are not in any way touching upon the questions asked by counsel.

Trial Examiner Ballinger: You may make your point, but the witness may answer the question.

Mr. Austin: I think the answer to your Honor's question was a perfectly good and relevant one, but I want to call your Honor's attention to the fact that it was not in line with the previous question. I am not in any way objecting to the question.

Trial Examiner Ballinger: Do you understand the question?

The Witness: Yes, sir.

Assuming, of course, your Honor, that you were speaking about for the purposes of determining a unit cost in this case.

Trial Examiner Ballinger: That is right.

The Witness: If both of the procedures were properly worked out.

7241 Trial Examiner Ballinger: Well, now, when you say "properly"; what do you mean by "properly"?

The Witness: In accordance with sound and accepted accounting principles. Some of the approaches would have to be of necessity identical; that is, of the same identical situation. Some would not. In the end, the figures may vary some tiny bit. I feel that they would come out almost the same.

Trial Examiner Ballinger: Mr. Warmack—

The Witness: (Interposing): Reasonably the same.

Trial Examiner Ballinger: Mr. Warmack, in the final analysis, would not the accountant be required to himself determine which was made upon the soundest basis?

The Witness: Oh, yes, indeed, your Honor. Yes, indeed, your Honor.

Trial Examiner Ballinger: All right.

The Witness: That is correct.

Mr. Hanley: If your Honor please, as mentioned to you earlier in the day, we have come to a point where we can perhaps make better progress if we were to recess at this time. And if it is agreeable to your Honor and to counsel and to the witness, I would like to adjourn at this time, if your Honor please. There is only less than an hour of the day to go.

7242 (Witness temporarily excused.)

Trial Examiner Ballinger: The request of counsel for the Respondent is granted.

And now, at 4:10 p. m., the hearing stands adjourned to be reconvened at 9:30 a. m., July 27, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 4:10 p. m., July 24, 1942, the hearing in the above-entitled matter was adjourned.)

7243 Room 532, Federal Trade
Commission Building,
Washington, D. C.,
Monday, July 27, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Illinois,) appearing for the Respondent.

7244 PROCEEDINGS.

Trial Examiner Ballinger: Come to order. The hearing of Docket No. 4389, case entitled "In the Matter of Standard Oil Company (Indiana)" is reconvened pursuant to notice at 9:30 a. m., July 27, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held at the same place, July 24, 1942.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Hanley.

Q. Mr. Warmack, you were in attendance at the hearing in this matter in Detroit last spring, I believe.

A. I attended most of them.

Q. Do you recall the incident where either you or your counsel made the request that Respondent furnish some documentary evidence, and about two truckloads of steel filing cases were delivered in the court room and remained there for approximately three days?

A. I remember that time that all of those records were brought in. Yes, sir.

245 Q. And there was a very large number of them, were there not, Mr. Warmack?

A. Yes, sir.

Q. Inside of the railing of the Courtroom? Did it not?

A. I believe that it did, yes, sir.

Q. And overflowed against the back wall?

A. I believe that is correct.

Q. Did you look at those records?

A. No, sir.

Q. While they were in court?

A. No, sir.

Q. You were in Detroit for some weeks thereafter? Vere you not?

A. Yes, sir.

Q. Did you examine those records after they were re-urned to the company's offices?

A. I saw—I was there some weeks. I say "some weeks"; robably I was there a week. I beg your pardon. I did not ean to interrupt you. What was the question?

Q. Did you examine those records after they were re-rned to the company's offices?

A. I may have looked at some of them. I am sure that did not look at the larger portion of them.

Q. In your judgment as an accountant would that be, or at least much of that material be regarded as 246 documentary evidence, Mr. Warmack?

A. Well, inasmuch as I did not look at any of it, could not vouch for what was in those records. How-ver, I ~~assume~~ that it contained vouchers and the like. f course, that is documentary evidence.

Q. Of course you had the opportunity to look at them? ou understand that you had that opportunity?

A. Yes, sir. I had the opportunity to look at them.

Q. That is the reason, is it not, in your understanding at they were delivered into the courtroom?

A. I do not know about any of these documents as to hat they were. I did not look at them.

Q. Well, of course, if you did not, that is because you id not elect to look at them? Is that not true?

A. Surely. I had no occasion to look at them.

Q. They were there?

A. Yes.

Q. And you understood that they were there at your request or at the request of your counsel?

A. They were not there at my request.

Q. For your examination?

A. They were not there at my request.

Q. They were brought in there, perhaps, at the request of counsel for the Commission?

7247 Mr. Austin: Your Honor, I object to any further continuation of this line of examination. I do not believe it serves any useful purpose. It is immaterial.

Trial Examiner Ballinger: I asked: What is the purpose of it?

Mr. Hanley: I did not hear your Honor's comment.

Trial Examiner Ballinger: What is the purpose of it?

Mr. Hanley: Simply, your Honor, to establish the fact that we had supplied a very large amount of documentary evidence. And it seems apparent that the witness did not examine it. It was supplied at the request of either Mr. Warmack or Mr. Austin. I do not recall who called for them. Either Mr. Warmack or Mr. Austin asked for certain information, and this material was furnished in the form of an answer to that request.

Trial Examiner Ballinger: Is it not true that the Commission asked for the submission of certain statements embodying the information contained in the documents? Further, that there was some question that arose as to whether or not the Respondent would furnish it in the breakdown form that the Commission desired it, and as a result of that, the documents were produced in the hearing room and then later—

Mr. Hanley: (Interposing.) Well, Judge—

7248 Trial Examiner Ballinger: —and later on the Respondent did furnish the information that was satisfactory to the Commission?

Mr. Hanley: As I remember it, there were several requests made. Some of them we could break down and furnish the information in statement form. On those we did so.

There was one request, as I recall it, that we could not break down. That was the request for furnishing the basic material. As I remember it, Judge, we never did furnish—we could not furnish all the information that was requested except by furnishing the original documents—that information in statement form. The reason we did not, as I say, was because we could not.

Trial Examiner Ballinger: Judge, as I understand it, after some inquiry, the Commission has not questioned the correctness of the figures of cost portrayed by the statements submitted by the Respondent. It has questioned only the allocation of the cost channels. Am I correct?

Mr. Austin: Yes, your Honor. We have not questioned the amount of costs actually incurred so far as the totals are concerned.

Trial Examiner Ballinger: The Commission has accepted the books of the Respondent company as actually portraying the actual cost of the operation of the Respondent company. It has only questioned the allocation of the costs as to the marketing channels.

7249 Mr. Hanley: Of course, I understand that to be the attitude of Mr. Austin on behalf of the Commission, your Honor. However, the witness has repeatedly said, many, many times, that he did not get any documentary evidence. I think it is important that it be shown that when he made this request that he got two truckloads right into the Courtroom.

I do not care to press the matter. He says that he did not examine them, and did not care to examine them. That is as far as I want it to appear, that he did not do so.

Trial Examiner Ballinger: Apparently from his testimony, it would not have afforded him anything if he did examine them. According to his testimony he would have to make an exploration along different accounting methods to have determined what he would have considered to have been a proper method to have employed. This he did not do, and probably he could not have done if all of the documents in the possession of the Respondent company had been submitted to him.

Mr. Hanley: Of course, that is what I think he was there for—was there to do, which he did not, and apparently he did not do so.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

7250 Q. Referring you to account 025, Mr. Warmack, truck rental expense. That is allocated on a commission gallonage basis. Is that your understanding?

A. Yes, sir. That is my understanding.

Q. Now, if you like you may refer to your testimony—I am going to quote it—at page 6166.

A. What page is that?

(The witness examines documents.)

Q. 6166.

A. Thank you.

Q. Have you that page?

A. Yes, sir.

Q. Did you not testify as follows:

"It is my opinion that a sounder method could have been used than the method used in the separation."

And further:

"I think that this particular class of expense; that is, truck rental expense, should following the compensation paid to the commission agents."

Did you so testify?

A. I—

Trial Examiner Ballinger: (Interposing.) Did you so testify?

The Witness: Yes, sir. That is a part of the statement shown on page 6166.

By Mr. Hanley:

7251 Q. Is that your view now?

A. Yes, sir.

Q. During your sojourn in Detroit, did you get acquainted with Respondent's method of compensating its commission agents and drivers?

A. Yes, sir.

Q. Does the method of compensation reflect different rates for different products?

A. For example, please, Judge Hanley?

Q. Well, just that, Mr. Warmack. I do not think I can clarify it much. "Different products" would be different products—gasoline, kerosene, heating oil, lubricating oil—just those different products.

A. There may be some separation between the different products, but it is my understanding as a result of my studies that that class of products just named, such as naphtha, gasoline, refined oil, and such like, carried the same pay rates; that is, pay gallon rates on which compensation is calculated for payment to the B-Station agents.

Q. You say you are acquainted with the system. Now, do you mean to say that the same pay applies to each product?

A. No. Not necessarily each product, but the named products I have just given, I believe, carry the same rates. I understand you have around six thousand products. I would not have you think that the same 7252 rate would carry each one of those products, but products of a similar nature, is what I am driving at.

Q. Does the method of compensation reflect different rates for different customers?

A. Yes, sir. It does.

Q. Will you explain, please?

A. I have given that in the record heretofore. I will be glad to explain it again.

Q. Do it very briefly, if you please, Mr. Warmack.

A. The company compensates its B-Station agents—which have been referred to in this record in some instances as commission drivers—on what it calls pay gallons. Where deliveries are made to a customer whose business is relatively near to the B-Station agent's plant; that is, the B-Station bulk plant, they carry one pay gallon rate. For example, for each gallon delivered the rate may be one pay gallon for each gallon delivered.

When deliveries are made at a distance, from several miles, we will say, from the B-Station agent's plant, he may receive for each gallon he delivers a pay gallon rate of, we will say, three gallons for each gallon delivered. In the end; that is, at the end of the month, the B-Station agent renders a report making calculations made and based upon the pay gallons that he is allowed for these separate activities. There is a number of pay gallon rates 7253 that means how many pay gallons will be allowed for the delivery of one gallon of the company's product in any given instance.

Q. As an accountant, do you regard that there is anything improper about that system of paying on the basis of effort?

A. No, sir. It appears to me to be a good system.

Q. Are sales of heater oil, furnace oil, Diesel fuel, kerosene, and tractor fuel included in the tank wagon consumer channel, as well as gasoline?

The Witness: What is the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Yes, sir.

By Mr. Hanley:

Q. And are different pay gallon factors awarded the commission employee for selling each of the above products and gasoline?

The Witness: What is the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I could not say just exactly the pay gallon rate applicable to each of those, or to the customers engaged—

Trial Examiner Ballinger: (Interposing.) You were not asked for that.

Mr. Hanley: No. I am not asking that, Judge.

The Witness: I mean—I am sorry.

7254 Trial Examiner Ballinger: Read the question again.

(The reporter again read the question.)

The Witness: Oh, yes. It is my understanding that the difference of the haul has to do with the pay gallon rate with respect to each of those products named.

By Mr. Hanley:

Q. Does the Respondent company's plan attempt to compensate the commission employee for variations of selling effort or solicitation time?

A. It is my understanding that the pay gallon rate is based primarily upon the distance of the haul. I cannot answer with respect to the selling effort, Judge Hanley.

Q. Well, you made a study of this matter? Did you not?

A. Well, I made a superficial review of everything out there, but you understand I was only there a very short time and I had no other accountant from the Commission to assist me.

Q. Well, you were there two months?

A. I had many hundreds and hundreds of things to cover during that one month or two months.

Mr. Hanley: Your Honor, I do not just thing this record out to be so frequently encumbered with statements of that kind.

Mr. Hanley: You Honor, I do not just think this record ought to be so frequently filled with questions as to 7255 what this witness should have done in Detroit. The witness may answer questions as to what he actually did. I therefore request your Honor to instruct the witness and counsel both on that point. I think there has been entirely too much of that sort of thing in the record.

Trial Examiner Ballinger: The record portrays the time that the witness was in Detroit and in Chicago.

It also portrays the volume of work that he was supposed or required to review. It would appear to the Examiner that it is unnecessary to keep on including that in the record.

Mr. Austin: I do not think the witness is called upon to justify how he spent his time, either.

Mr. Hanley: I—well, now, I am perfectly willing to accept the ruling of the Court. But if Mr. Austin cares to make that additional statement, then, I have something to say, your Honor.

Trial Examiner Ballinger: Well, the Examiner does not agree with the statement of counsel for the Commission. So, you may pass that over.

The Witness: I want to say that while I was in Detroit I attended hearings—

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

7256 By Mr. Hanley:

Q. Mr. Warmack, have you ever attempted to determine how much time those commission employees devoted to selling as distinct from delivery?

A. No, sir. I have not made any study of that matter. I was under the impression, inasmuch as they are spoken of as, by counsel for the Respondent—as commission drivers, that their activities are largely the delivery of the goods rather than the selling of them.

Q. Is not that the premise upon which you have undertaken to criticize the accounting of the Respondent company?

A. Not necessarily. No.

Q. Very well. Tell us, if you can, how much time approximately the commission employees devote to selling as distinct from just delivery?

A. That is in the record. I have no way of knowing. I do not know of my own knowledge. And I have made no study.

Q. Do you regard it as logical that the commission employee should be paid for his selling effort?

A. I should certainly think that he should.

Q. And from your study, whatever study you made, did you arrive at the conclusion that the commission employee was paid for his service in selling effort, as well as a purely mechanical employee effort?

A. Yes, sir. That is my understanding, that he
7257 was more than a commission driver..

The salaried driver, Mr. Warmack, is just a delivery man, is he not? In your contemplation of this setup, is that not so?

A. The salaried driver?

Q. Yes.

A. Yes. That is my understanding, Judge Hanley.

Q. And he has no selling responsibility at all. Is that your understanding?

A. Well, that is my understanding, with this qualification: I believe that it has been testified in the record that every employee of the Standard Oil Company (Indiana) is interested in the placement of the company's products in the hands of the consumer.

Q. Oh, well, yes, of course, Mr. Warmack. That, perhaps, is true in any company. However, with respect to specific duties of the salaried driver, as distinguished from the commission employee, is it your understanding that the salaried driver delivers a load of products that have already been sold and ordered, as distinguished from the purely selling effort?

A. Yes, sir. That is my understanding. It is further my understanding, in connection with the salaried driver, that he may drop a load of gasoline to a customer maybe
who has not ordered it if he happens to have that load
7258 on his return trip. And that is one of the situations
where he would serve those that wanted that.

Trial Examiner Ballinger: Generally, what Judge Hanley has asked you is true; is it not?

The Witness: Oh, yes. That is my understanding. But, you just can not make an ironclad statement.

Trial Examiner Ballinger: All right. With some exceptions.

The Witness: Yes, sir. That is my understanding. That is the reason that I have tried to get away from the combination of it, the B-Station agents with commission drivers, because they do more than drive, or that is my understanding.

By Mr. Hanley:

Q. Now, is selling by the commission employee much of a factor at service stations owned and leased to private operators, or owned privately and leased by the Respondent company, or served on a 461 contract for annual periods?

The Witness: Well, your Honor, I don't get the question.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Well, I certainly could not know that. I have not made a study of that situation. The records would have to speak for themselves

It is my understanding that he exercises certain
7259 responsibility in connection with the selling. It is my understanding that in a small village like or similar to the places I visited at Detroit, that the B-Station agent attends to most of the selling over in those villages. He is among a bunch of his friends and he promotes the activities of the company, and the company's business, to the best of his ability.

Trial Examiner Ballinger: Generally he performs the dual function of both salesman and delivery man? Does he not?

The Witness: Yes, sir. That is my understanding, your Honor. That is why it is my opinion that this is two separate classes or methods of dispensing the Respondent company's products.

By Mr. Hanley:

Q. All right. What company employees are primarily responsible for securing tank wagon seller outlets?

A. I certainly do not know; not of my knowledge.

Q. Well, from your study of the setup in Detroit, what is your best judgment.

A. It is my understanding that the salesmen for your company, and the B-Station agents have something to do with it in their territory.

Q. Passing from that, what company employees are primarily responsible for selling the products of the Re-
7260 spondent company to influence contract consumers,
farmers, and the like?

A. (The witness examines papers.)

Q. If you can, of course, Mr. Warmack, it would be more helpful if you could answer this out of your knowledge. It is your own knowledge that I want.

A. Well, I could not remember, possibly, all of this information, Judge Hanley. It is my understanding that the B-Station salesman has something to do with it; and, also, the B-Station agents who are engaged in that manner of activity.

Q. Very well.

A. I have not studied those things. I have not made a time analysis to cover all of these methods. I could not know of my own knowledge.

Q. Is truck rental expense in account 025 a compensation for the sale and delivery of products, or is it a cost for equipment operated by the commission employee?

A. It is the latter, according to my understanding.

Q. That is to say, it is a company operating cost?

A. Well, certainly all of those are company operating costs. It is my understanding that everything on Commission's Exhibit 119 is operating cost in the Detroit field.

Q. And are the commissions based on selling and making the delivery, both?

A. The commissions—now, you are speaking of 021 account?

7261 Q. I am speaking of the commission class of employees, and the compensation paid for classes of employees.

A. Yes, sir?

Q. I am not sure what the account was.

A. Yes, sir, I am sorry. I thought you were only speaking of truck rental expense.

Q. I mean in 025, but that applies, as I understand it—

A. (Interposing): I believe that the truck rental expense is a fixed rate per month to the agent for the use of his truck chassis, and the company furnishes along with that the tank which goes on that chassis. And that cost is in 055. Just to make clear my understanding on that, 025 account represents what were paid, fixed amount paid as fixed compensation, and 021 account represents commissions paid on the pay gallons.

Q. What I am really interested in learning, Mr. Warmack, is this: From whatever observations and studies you made, do you agree and is it your understanding that the compensation paid to commission employees—however payment be made—includes the compensation for both selling and delivery effort?

A. That is my understanding.

It is not my understanding that those are equal things. It is my understanding that the B-Station agent is compensated primarily for a delivery of the company's pro-
ducts; that is, in view of the fact that these pay gallon
7262 rates are in effect based upon the pay gallons deliv-
ered at different distances, but they were charged with the promoting of the Respondent company's business in his territory—at least to some extent they are charged with that.

Q. Did your studies or observations proceed to a point where you are able to tell the Court approximately what percentage of the time on the average, the B-Station agent devotes to selling as distinct purely from delivery or the care of the bulk plant?

A. No, sir. I have no such information as that. A cost study would be the only way that you could secure that information.

Q. I am just asking you if you did secure that?

A. Oh, I have not been required to make the time study, and I have not secured it.

Trial Examiner Ballinger: Well, the B-Station agent first has to obtain his customers before he can commence making deliveries? Has he not?

The Witness: It is my understanding, your Honor, and Judge Hanley.

Trial Examiner Ballinger: Well, then, would not that be his primary function?

The Witness: No, sir. He is not ~~having~~ a general turnover of customers all the time, I do not think. His biggest
job is running that truck and delivering the goods to
7263 the customers, I think.

By Mr. Hanley:

Q. That is your judgment?

A. That is my judgment, or my understanding, especially in view of the fact that these people are termed "commission drivers"; and there is a reason for that term.

Q. Have you any information—have you any information, Mr. Warmack, which enables you to alter the suggestion of an approximate thirty-five per cent of the time of the B-Station agent is used in selling as distinct from mere delivery and operation; that is, mechanical operation of the bulk plant?

The Witness: May I have that question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Oh, I certainly would not dispute that if they were ever established by any reasonable time study. I have not made any study. I would accept it if it were established by the company.

By Mr. Hanley:

Q. Do you agree, Mr. Warmack, that it is a proper operating and marketing cost of the Respondent company that pay gallons, as you have explained that term, should be based on elements of distance, profit, size of dump, selling effort, and like factors?

A. It is my opinion that they should be based on 7264 those things, especially on distance.

Q. Do you agree that that is a proper method of accounting?

A. I certainly would have no objection to it: I have not gone into that matter, Judge Hanley. There may be some things that I would object to, but in principle, I certainly do not object to it on my cursory study of it. I think it is reasonably satisfactory, or should be, in accordance with sound accounting on such study.

Q. Does it still appear to you, as an accountant, that total amounts paid would prove a more appropriate means of allocation of account 025 than commission gallons?

A. Yes, sir. That is right. That is my opinion, and that would be my opinion in the absence of information that will show that it should not be.

Q. Now, is your position on this account based on a factual and objective cost study as you have used that term heretofore?

A. No, sir. I have not made a factual or objective cost study of any item in Respondent's Exhibit 101.

Q. Will you please now refer to account 055—vehicle tank expense.

A. Yes, sir.

Q. You have testified that commission gallonage is not a correct and proper method of allocation of this expense. Is that true?

A. I do not believe that that statement is exactly correct.

7265 Q. Please refer to page 6181 ~~of the record~~.

A. (The witness examines document.)

Q. Have you got the page?

A. I have the page.

Q. Now, can you answer the question?

A. I have not read the page.

Q. Please do so, Mr. Warmack. Prepare yourself, please, to answer the question.

A. I am not prepared to answer the question.

Q. Please do so.

A. (The witness read the page referred to.)

The Witness: It is my ~~opinion~~ that that is not the correct way to do it unless and until some proper study is made to show that that is a correct way to do it if such study were made.

By Mr. Hanley:

Q. Mr. Warmack,—

Mr. Austin: (Interposing.). Wait a minute. You were not asked your opinion.

The Witness: Oh, I thought so.

By Mr. Hanley:

Q. The question was, did you—

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

By Mr. Hanley:

7266 Q. Will you please answer the question?

A. May I have it again?

Trial Examiner Ballinger: Read the question.

(The reporter again read the question.)

Mr. Hanley: Respondent moves to strike the answer of the witness beginning with "It is my opinion"; the question was simply asked whether that was true.

Trial Examiner Ballinger: The motion as made is granted to strike the testimony.

Now, you can answer that question. It does not call for an opinion.

The Witness: Evidently I misunderstood the question, your Honor.

Trial Examiner Ballinger: Do you want the question read again?

The Witness: I will have to have it read again. I evidently misunderstood it.

Trial Examiner Ballinger: Please read the question again.

(The reporter read the question as follows:

"Q. You have testified that commission gallonage is not a correct and proper method of allocation of this expense. Is that true?")

The Witness: I have said that that is not exactly correct. That is my answer. Is that satisfactory to
7267 counsel?

By Mr. Hanley:

Q. Now, I now refer you to page 6181—

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. I now refer you to page 6181 in the question referring to account 055, in part you were asked this:

"In your opinion, is that a correct and proper method of allocation of this expense, referring now to account 055, having in mind the purposes of this cost study?"

"A. In my opinion it is not."

Were you asked that question and did you give that answer?

A. Yes, sir. That is correct. That answer should state, "In my opinion it is not, in the absence of information which will prove positively otherwise."

Q. Is it your desire now to alter or explain or modify the answer that you have already given on page 6181?

A. It is my desire that the answer be shown as stated this moment.

I should be happy, your Honor, to explain these things—

7268 Q. You have explained for five weeks, Mr. Warmack. If you will just please answer the questions we will get along.

A. I am getting tired of this five weeks business, too.

Trial Examiner Ballinger: Mr. Warmack, this conversation between witness and counsel must stop. You must confine yourself to statements on the witness stand only to answers to the questions of counsel.

The Witness: Thank you, Judge. I intend to do so.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Mr. Warmack, you visited some Respondent bulk plants? Did you not?

A. Yes.

Q. Did you notice a large tank for storing gasoline and other of its bulk products at the bulk plants?

A. Yes, sir.

Q. Limiting your attention to the tank holding Standard "Red Crown Gasoline," for the moment. Do you understand it to be the fact that deliveries of Standard Red Crown Gasoline may be made to either the consumer or the reseller customers out of the same bulk plant tank?

A. That is my understanding.

Q. Assuming that the annual maintenance cost
7269 on that tank is $50. Just assume that, Mr. Warmack.

As an accountant, in your judgment, would it be proper to allocate this expense item between tank wagon reseller and tank wagon consumer channels on the basis of gallonage?

A. In my opinion that would be the proper method.

Q. Well, now, what is the difference between the stationary tank and the mobile tank, in your judgment as an accountant?

A. Well, in my opinion, the mobile tank; that is, the tank on the chassis moves from the point of being a piece of property that is fixed and in which all gallons move out of it. This tank is mobile, is on a chassis; it will move ten miles into the woods or somewhere else and deliver and come back, and it will get the rickets that the road may give it. Inasmuch as the life of a truck, or an automobile, or that kind of a vehicle is largely dependent upon the mileage that that vehicle is required to travel, I see no point in splitting hairs, or saying that a tank on a chassis should carry equal depreciation charges or maintenance charges when the chassis or the truck may move one block across the street and deliver a dump, and in the next instance, or the next delivery, a dump fifteen miles out in the woods. Now, it does not take an accountant, or an engineer, or any person to know that it costs more, and that the maintenance is more, and all of those things are more on this delivery vehicle if it delivers ten miles in the woods, than it does if it runs a delivery 7270 across the street. And that is my reasoning in the matter.

Q. How would you do it?

A. How what?

Q. What better way, Mr. Warmack, than the way just outlined in the way of handling a stationary tank? Now, you have given your opinion as to what should be done there. How would you handle a mobile tank which admittedly carries fungible property—gasoline—and carries it for both reseller and consumer channels? How could you do better than on a gallonage basis? Just exactly what would you do? And please, now, be specific, Mr. Warmack.

A. I will be glad to.

In the case of the depreciation on mantenance of the mobile vehicle, or the tank on such a vehicle, the distance, the wear and tear involved by that distance, is the governing factor and must be considered.

Q. You say you would consider it. What would you do? Would you treat every individual delivery as an individual delivery? Or would you undertake to determine the wear and tear on every single delivery?

A. No, indeed.

Q. Well, what would you do?

A. I would first study the situation from the standpoint of determining what functions involving the usage of that particular piece of property—

7271 Q. (Interposing.) We know that Mr. Warmack.

A. If you just will wait while I make my answer, Judge Hanley, I will figure out on this—.

Trial Examiner Ballinger: Strike the statement of the witness commencing with "If you will just wait while I make my answer, Judge Hanley—" from the record—not physically.

By Mr. Hanley:

Q. I want to ask you this question, Mr. Warmack. We know what the functions are. That truck is delivering to reseller customers in the reseller channels. It is delivering to consumer customers in the consumer channel. So, we know what the functions are.

My question is now: How are you going to split those functions on any better accounting basis than the gallonage basis? That basis you say is properly applicable to the stationary tank at the bulk plant.

Trial Examiner Ballinger: Answer the question.

The Witness: Your Honor, may I answer that question without interruption?

Trial Examiner Ballinger: You have not been interrupted thus far.

Proceed.

Mr. Austin: I think that he was interrupted.

The Witness: I was interrupted four times.

7272 Trial Examiner Ballinger: Go ahead and answer the question.

Mr. Austin: Well, I think he was interrupted.

Trial Examiner Ballinger: Now, no more or further remarks on the record.

Now, proceed to answer. The record will speak for itself.

The Witness: I would make a study of the functions involved in connection with the use of this class of property, this equipment.

I would determine what influence those functions have with the general classes of costs involved in the use of this equipment. I would determine in detail the distance that the truck has to travel.

As a matter of fact, that information is or could be readily shown on the separate sales tickets. With such information, it would certainly be possible to allocate in a reasonable and fair and equitable manner the expense incurred in connection with the maintenance and depreciation of that delivery equipment. That includes the truck chassis and the truck tank on that truck chassis. In the absence of such a study it would seem reasonable to me that, and it is my opinion that the allocation of this expense on the basis of total gallonage handled is not in accordance with sound accounting.

7273 Trial Examiner Ballinger: In order to determine depreciation, would you not have to first determine the life of the chassis?

The Witness: Surely.

Trial Examiner Ballinger: Would not that require a series of thing—

Mr. Austin: (Interposing.) Well, your Honor, depreciation is determined by referring—

Trial Examiner Ballinger: (Interposing.) I am asking the witness, not counsel.

Mr. Austin: I am not answering the question either.

Trial Examiner Ballinger: Well, let us take the witness' answer.

The Witness: Excuse me, Judge. May I hear your question now?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: The depreciation, your Honor, would be over a series of years. I presume that is what you mean by series of things.

Trial Examiner Ballinger: More than that. Would not the depreciation depend upon the life of the chassis?

The Witness: The estimated life of the chassis, which estimates, of course, will have to give effect to usage to which the chassis is to be put and various factors of
7274 that kind. Now, the question at bar, as I understand it—

Trial Examiner Ballinger: (Interposing.) And could that be determined by a mere estimate? Would you not have to have an accurate test?

The Witness: Yes, sir. You would have to couple past experience in the way of tests with expected life of the truck less salvage value and maybe other factors. Having established that, then you have to make a test to determine how that cost is to be assigned. It is absolutely erroneous in my opinion not to make some calculation, then as a result of not doing that, to just arbitrarily say, "We will allocate each gallon to this depreciation that we have determined."

While, in the very next account that would still be a different amount for the dispensing of this particular product. What I am trying to say, your Honor, is this: This truck, that is, chassis and truck is used for dispensing a particular product of, we will say, gasoline to a nearby filling station, we will say, one thousand gallons. Now, maybe we have a customer or two customers or three customers together ten miles in the woods who will take that same amount of this petroleum product.

Now, the truck, after it makes the short delivery, performs the long delivery. It seems inequitable to me, from the standpoint of sound accounting, to do that when the wear and tear on that truck in making the short 7275 delivery—and the tank on the truck—is certainly more than it is in making the long delivery—I mean, just the opposite of that—that is my contention.

Trial Examiner Ballinger: Do you not believe that the law of averages would apply in such a case?

The Witness: Well, if all of one class of customers; that is, the short delivery; and all of another class of customers; that is, the long delivery, I do no think the law of averages will apply.

By Mr. Hanley:

Q. Well, do you know that?

A. Of my own knowledge?

Q. Yes.

A. No, sir. I have never made a study, but it is certainly indicated by your Respondent's Exhibit 101.

Q. Did you make studies of any of these matters that you are talking about, as to the effect?

A. That question is not complete, I do not believe, Judge Hanley.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

By Mr. Hanley:

Q. Does that not seem complete to you?

A. Not complete.

Q. Can you answer it? Is that all right?

7276 Trial Examiner Ballinger: Do you understand the question?

The Witness: No, sir. In my mind it is not complete.

Trial Examiner Ballinger: Do you understand the question?

The Witness: Yes, I understand the wording of the question. I can inquire as to what counsel means, and answer it.

Trial Examiner Ballinger: You may.

The Witness: What kind of "studies" do you refer to, Judge? And what effect do you refer to?

By Mr. Hanley:

Q. I refer to studies as to whether or not it costs more to operate a truck to make delivery to consumer customers than it does to reseller customers, and if you have made such studies, what do you think would be the effect?

A. I did not make such studies. My answer is based upon common knowledge.

Q. Well, is it a fact that you only have to go across the street to deliver to reseller customers, and you have to go ten miles in the woods to deliver to a consumer customer?

A. I have not made any study of those things. That is my opinion—

Q. (Interposing.) You made that statement. I 7277 would like you to give me a direct answer.

A. I stated an example—

Q. (Interposing.) I asked you is that the fact?

Trial Examiner Ballinger: What is that example? Is that one of your own knowledge?

The Witness: No, sir. I have never made a study of this. I never made one of the B-Stations, taking a ride with the man. I spoke from my understanding as to what happened.

I did do this: when I visited one of these B-Stations, one of the reseller stations served by your agent was comparatively a short distance back up in a little village that we visited.

I asked Mr. Houghton then what about the pay gallon and he explained them to me. He stated either at that time or went into a greater detail at a later time that the reason that the heavy gallonage went into the consumer column on Respondent's Exhibit 101 as well as in Commission's Exhibit 119, which is the company form 189, that the reason that the larger proportion of the commission was in that column was in view of the fact that the gallonage talked about, and which column was comparatively more in the Detroit field, was because consumer customers, for the most part, were at quite a distance from the bulk plant, and that the B-Station agents were entitled to a greater compensation because of the 7278 fact that it costs more money to deliver to this class of trade—to serve that class of trade than it did to serve reseller stations. Now, that did not mean that some resellers may not be quite a distance from the B-Station plant.

By Mr. Hanley:

Q. Well, do you know?

A. Why, certainly I do not know.

Q. How many, how many bulk plants does respondent have?

A. I do not know.

Q. How many, or do you know how many it is in the Detroit field?

A. Not of my own knowledge. In the records is all of that information. I do not try to remember all of that stuff.

Q. You visited how many?

A. I visited two B-Stations and one A-Station. I walked through an A-Station and I walked through one of the B-Stations. I walked around the other B-Station. The agent did not happen to be there so I just could not go into his little dinky warehouse that he had there.

Q. Is that the experience upon which you based your criticisms of this account?

A. Oh, certainly not.

Q. Very well. How would you paint trucks in respect of allocation of the expense, Mr. Warmack?

A. How would I paint it?

7279 Q. What would you do with the expense of painting the truck?

A. Make an allocation according to your code of account.

Q. No. I am asking you how you would do it as an accountant on one of these trucks. What would you do with your expense item?

A. Charge it to the maintenance of the truck. Does that answer your question, Judge?

Q. No.

A. Do you want me to say I would get a bucket of paint and get out there and paint it?

Mr. Hanley: If your Honor please, I am undertaking to learn what this witness as an accountant would do with an item of expense extending to painting one of these trucks. I am sorry.

The Witness: I stated that I would charge that expense to the maintenance of that truck. Now the attorney says I did not answer his question.

Trial Examiner Ballinger: Would you put a separate expense account in connection with each truck?

The Witness: Oh, I do not know that that is necessary. It depends upon the refinement that the company wants. I would not do it myself.

Trial Examiner Ballinger: That is what the Judge evidently desires to know.

The Witness: I would not do it. I do not see any 7280 great benefit to be obtained by that, if you want that greater refinement you can keep it, and you could actually keep it by parts of the truck.

By Mr. Hanley:

Q. Is that part of account 055 or not, Mr. Warmack? That is the account we are discussing now.

(There was a short pause.)

Mr. Hanley: While he is looking at that, Judge, may we have a two or three minute recess?

Trial Examiner Ballinger: We will take a two or three minute recess.

(A short recess was taken.)

The Witness: It is my understanding that the painting of trucks, that means truck chassis owned by the B-Station agent are borne by that agent, and he would paint both, as such, but that the paint on the tank on that truck, which is owned by the Respondent company, that cost, in my opinion, would appear in account 055 entitled "Vehicle Tank Expense—Other Than Mounted on Company Chassis."

By Mr. Hanley:

Q. Now, I am asking you how you would allocate that

A. The painting of the truck?

Q. Yes.

A. I would put it all in to that account.

Q. Yes, but you have been criticizing the method of allocation.

7281 I am asking you now, Mr. Warmack, how in your judgment as an accountant it should be allocated.

A. In my judgment as an accountant it should be allocated according to the way that the truck rental expense should be allocated. And that, in my opinion, in turn should be allocated on the basis of effort in connection with the use in which the truck is put.

Q. Mr. Warmack, in your sojourn in Detroit and in Chicago, did you request of Mr. Houghton, or any one else representing the Respondent company, information as to the use of mileage applicable to these trucks as a factor for the purposes of allocation of expense?

A. I did.

Q. That is your criticism now? Is it not?

A. That I did not request it?

Q. No, no. That the allocation is made on a gallonage basis rather than on a mileage basis or effort basis. Is that not the gist of your criticism?

A. Yes, sir. For the purposes of this cost study, I think that the mileage basis would be a more equitable basis. For the purposes of keeping the records of the Respondent company, I would see no objection to the way of keeping that.

Q. However they may be keeping them, did you ask Mr. Houghton, or Mr. Boatwright, or Mr. Gillis, or anybody—or anybody representing the Respondent company, as to
the experience of the Respondent company in the
7282 matter of allocating these things on the basis of
mileage as distinguished from gallonage?

A. I do not remember requesting any information with respect to that particular point; that is, documentary information. I rather think that probably it was discussed by Mr. Houghton and I. We tried to discuss every one of these accounts, or most of them, and the propriety of the allocations used by the Respondent company in working up its cost differential of 1.51 per gallon—was the matter of discussion.

Q. (Interposing): Mr. Warmack, is that the most definite answer you can give?

A. I think that is a definite and true answer.

Trial Examiner Ballinger: You have no independent recollection of having requested information of him on this?

The Witness: Not with respect to that particular point. We discussed these things appertaining to commisison agents at length.

Trial Examiner Ballinger: You have answered the question.

By Mr. Hanley:

Q. I think a moment ago, Mr. Warmack, when I used the illustration of the maintenance cost of $50.00 on a bulk plant stationary tank that you agreed that that might be properly allocated on a gallonage basis. Am I correct in
my recollection about that?

7283 A. That is correct.

Q. Now, would you say salesmen's salaries is a basis for allocating that item?

A. Oh, no.

Q. You would not?

A. No, sir. I would not. I should like to state this, Judge: Your question previously, I believe, was along this line—that if Red Crown Gasoline were placed in this particular tank which we are talking about, and that a portion of that gasoline was dispensed to one customer or class of customers, and a portion dispensed to another customer or class of customers, then should not the cost of maintaining and the depreciation on that tank be allocated, for costing purposes, on the basis of gallonage—that was the question I think.

Q. That is right.

A. And if—to carry that just a little further—different products were stored in that tank and neither of those products are in—to say this—that one of those products were no more harmful to the tank than another product, why, the answer would stand the same.

Q. We are assuming for the purposes of these questions, Mr. Warmack, that there is just one product in the tank.

A. Yes, sir?

Q. Entirely Red Crown Gasoline.

A. Yes, sir.

7284 Q. Which is sold, as I think now, to both reseller customers and consumer customers?

A. Yes, sir. That is correct.

Q. Now, I think you have stated that you would not use salesmen's salaries as the basis for allocating that expense? Would you?

A. I would not.

Q. Would you use cost of delivery to allocate that expense item?

A. I would not.

Q. But you would put the mobile tank on a different basis from the bulk plant tank; that is to say, you would put it on a mileage basis?

A. Yes, sir. I think that that manner of allocation would probably be the most accurate.

You are asking me, Judge Hanley, exactly what I would do without my having the benefit of having made a study—detailed study—of the exact situation. That I have not done. I am giving you answers purely from an accounting standpoint, and generally what I think should be proper and acceptable from the standpoint of sound accounting.

Q. Well, of course, Mr. Warmack, I am asking you in each of these question for your very best judgment as an accountant. I am at a serious disadvantage of being criticized by you as an accountant, when you say that you
have not made a study and do not know about these
7285 things: Things, the handling of such you are assuming to criticize.

Now, you have in this particular account 055 recommended a change as being more proper a method of accounting. I want you to tell the Court, if you will, just briefly and in a summarized way, exactly what that change is, and what your reasons for it are. I refer you to the change you have recommended.

A. I stated that for this record two or three times already this morning. Do you want it again? I will be glad to try to give it again.

Trial Examiner Ballinger: Judge, is that not repetitious?

Mr. Hanley: I do not know. Maybe it is, Judge. If you think it is, I will withdraw the question.

Trial Examiner Ballinger: It is the recollection of the Examiner that you covered these same grounds.

Mr. Hanley: Very well.

By Mr. Hanley:

Q. Would you say the combination of salesmen's salaries and cost of delivery to allocate the expense item of $50 to the bulk plant tank would be proper?

A. Well, I do not know. I can only establish that as to exactly what I would do as a result of a study. If I were trying to so study it to prove the cost of a cost
justification or to determine a cost differential, I
7286 would not allocate it on any basis at all until I had
made a thorough study and analysis.

Q. Does the commission employee often deliver to both reseller outlets and to a consumer on the same trip and out of the same tank load?

A. I could not answer that of my own knowledge. It is my understanding that occasionally that is done.

Q. Now, as I understand you, Mr. Warmack, you are prepared to say and have said that you would allocate the stationary tank at the bulk plant on a gallonage basis as between the reseller and the consumer channels of distribution. Am I right, thus far?

A. That is correct. And that assumes, of course, that those are the only two classes of consumers served out of that tank.

Q. Yes.

A. Yes.

Q. I understand further that you criticized the use of the same allocation method in respect of the expense incident to mobile tanks out of which tanks both reseller and consumer customers are served? Am I right thus far?

A. Yes, sir. You are correct. I think that that class of expense should follow the depreciation of the vehicle itself.

Q. And I understand further that you have made no study of this in respect of that matter, but that you are just criticizing it nonetheless? Is that true?

7287 A. I have made a review and study of the records in this case. I have not made a study of the underlying data on these matters in the Respondent company's offices.

Q. I understand further that you have made no request of the Respondent company relative to any information the Respondent might have as to the propriety from an accounting standpoint of allocating the expense to these mobile tanks on a mileage basis?

A. I do not remember having requested that kind of information while I was in Detroit. That was primarily due to the fact—

Q. (Interposing): You have answered the question.

Trial Examiner Ballinger: You have answered the question.

The Witness: Well, I am entitled to state why.

Trial Examiner Ballinger: There is no explanation necessary. You have explained that once or twice previously.

The Witness: That is correct; but, it leaves the record blank if I cannot explain.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. May I now direct your attention to account 106, please, Mr. Warmack?

7288 A. Yes.

Q. This has to do with the depreciation expense —of vehicles, trucks, motor and horsedrawn.

You have testified in substance that that portion of account 106 which is applicable to equipment such as vehicle tanks on commission agent chassis should be separated between channels on Respondent's Exhibit 101 in exactly the same manner as prescribed for truck driver expense, namely, account 025.

Is that your present opinion?

A. I do not quite follow it. May I hear it, please?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Yes, sir. That is my opinion. Will you please give me the page in the record that you refer to, Judge Hanley?

By Mr. Hanley:

Q. 6183.

A. Thank you.

Q. Have you found the reference, Mr. Warmack?

A. Yes, sir.

Q. Is that your testimony?

A. Yes, sir.

Q. Now, without going into great detail, Mr. Warmack, is your testimony already given in connection with 7289 accounts 025 and 055 applicable to this account 106?

I am just skipping a lot of questions here if you agree that it is the same.

A. Yes, sir. It is the same. I think there is one point that should be brought out in connection with these, Judge Hanley, if you do not mind.

Q. Very well.

A. In all of these things, the refinement required, in my opinion, in determining a cost differential, will be governed to some extent by the amount of the money involved in these separate things. It is never my intention as an accountant to go to limitless ends in the separation of a small account that would just not make any difference anyway as to which allocation was made of it.

Q. Mr. Warmack, have you any knowledge as to how many of these truck tanks the Respondent company has and uses in its operations?

A. No, sir. I do not have any knowledge of that, Judge Hanley, as to my own knowledge.

Q. Well, the fact is—and you may assume it for the purpose of this question—that there are well over six thousand of such tanks.

Now, in your judgment as an accountant, in order to keep the books on the suggested theory that you have advanced, tell the Court what would be involved in the way of additional accou~~nting work.~~

7290 A. In the first place, I do not subscribed to that as such; that is, keeping the books in great detail.

In the second place, I think that if the record were kept showing all of the tanks of Respondent company which are loaned to B-Station agents, that would be one record, and all of the tanks used by the company otherwise—speaking of tanks on trucks or truck chassis—that would not involve in my opinion a great deal of records to have such information, to keep count of the depreciation on those trucks. The greatest thing that would be involved would be where there would be switches from an A-Station to a B-Station and vice versa. And if it were desired to keep information, that information, it would not be so difficult. I rather think that you have certain information of that kind already in your Detroit office.

Q. Are those tanks interchangeable, or these trucks?

A. Do you mean—may I inquire—do you mean, can they be used by the A-Station and then by the B-Station?

Q. I mean mechanically, Mr. Warmack. Can you take one of these tanks off of truck "X" and put it on truck "Y," just indiscriminately?

A. Well, it is my understanding that some changes are going on. For instance, a tank may become damaged and have to be taken off for repairs, and then another tank will have to be supplied immediately, and that

7291 this tank may not be returned to the truck chassis from whence it came.

Q. I think you are right in individual instances, Mr. Warmack. But, I am addressing my question to these six thousand plus tanks in operation by the Respondent company. Are those tanks interchangeable?

A. The only way I know I can answer your question is by the way I answered you.

Trial Examiner Ballinger: Can they be removed from one truck and placed in another truck?

The Witness: Yes, sir. I said they could be and that—

Trial Examiner Ballinger: (Interposing): Without change or alteration?

The Witness: Well, it is my understanding that when they are taken off, why, they are serviced before they go on another truck. But I do not know whether that is true in every instance.

Trial Examiner Ballinger: As a matter of fact, you do not have any personal knowledge in reference to the matter? Have you any, Mr. Warmack?

The Witness: No, sir. I just know what I talked about with employees of the company.

Trial Examiner Ballinger: Did any employee of the company ever tell you that they were interchangeable? 7292

The Witness: No, in using that term; no sir. The situation that I just told you about I have discussed that, and I certainly know I discussed that with Mr. Houghton and that is why it came into my mind as a true situation.

By Mr. Hanley:

Q. Just supposing that they are interchangeable or could be made interchangeable by the machine shop job, Mr. Warmack. If one were shifted from a salaried driver truck to a commission employee truck, it would follow, under your suggested method of accounting, that there should immediately be a new type of allocation of expense followed in the use of that tank? Is that not true? Notwithstanding it continues to serve customers in the reseller channel?

A. That certainly is not my opinion.

Q. What is your opinion about that?

A. I have—

Q. (Interposing): Supposing that one of these tanks is shifted from a salaried driver's tru[illegible] to a commission employee truck.

A. What is my opinion about that?

Q. Yes.

A. I have no quarrel whatever with the way that the company keeps its records.

Trial Examiner Ballinger: Now, for the purpose of determining a cost study, what is your opinion? That is what we are discussing.

7293 The Witness: For the purpose of a cost study, it would be necessary to determine what the depreciation on the two classes of equipment, or reasonably determine that, especially if the department did what in my opinion it should do—make a study to determine the cost of certain customers served by B-Station agents as compared with the cost of serving customers through A-Stations. I believe that answers the question.

By Mr. Hanley:

Q. I am not sure that it does. Is it not the sense of it, then, that if it were done by the Respondent company, namely, shifting of one of these tanks is made from one salaried driver's use to commission employee's use, under your suggested method of accounting a different allocation system would have to be used? Now, it does seem to me that you can answer that "yes" or "no" without any explanation.

A. Well, it takes—

Trial Examiner Ballinger: (Interposing): Can you not answer that question "yes" or "no"?

The Witness: No, sir. Not without an explanation.

Trial Examiner Ballinger: Answer it "yes" or "no." It is capable of a "yes" or "no" answer. And then if you desire to explain it you may explain it.

The Witness: I will try.

7294 Trial Examiner Ballinger: Read the question to the witness.

(The reporter read the question as follows:

"Q. I am not sure that it does. Is it not the sense of it, then, that if it were done by the Respondent company, namely, shifting of one of these tanks is made from one salaried driver's use to commission employee's use, under your suggested method of accounting a different allocation system would have to be used? Now, it does seem to me that you can answer that 'yes' or 'no' without any explanation.")

The Witness: No, sir. It would not. And—

Trial Examiner Ballinger: Now you may explain.

The Witness: And the reason that it would not have to be used is this. I think that the method of allocating this class of expense in other instances for the purposes of determining a cost differential—I have no argument about the way the company keeps its books—but for the purpose of determining a cost differential, I think the maintenance and depreciation of this class of property should be—in the absence of a cost study which will show otherwise—follow the depreciation of the truck chassis for that class of expense.

Trial Examiner Ballinger: Would you follow the depreciation from time to time, or up to the time of the 7295 shift, and from that time on?

The Witness: It should be on the same basis, I think, Judge, unless you can study it to determine that it should be on some other basis. Therefore, by the study you might show that the shift should be made or that a shift should not be made. If the study should show that the shift should not be made, then it should not be made.

Trial Examiner Ballinger: How could your study be made without some actual experimentation?

The Witness: It could not be.

Mr. Austin: I would like to call your Honor's attention to the fact that no deduction was made for that from the Respondent company's figures with regard to that account, which is one of the accounts included in Commission's Exhibit 133.

Mr. Hanley: That is one which bears the asterisk too, is it not, Mr. Austin?

Mr. Austin: No. It does not.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

(Witness temporarily excused.)

Mr. Hanley: I move, if your Honor please, that we adjourn until two o'clock, p. m. I have a pressing matter which I would like to attend to during the interim.

7296 Trial Examiner Ballinger: The motion is granted.

And now, at 11:40 a. m., the hearing stands in recess until 2:00 o'clock, p. m.

(Whereupon, at 11:40 a. m., a recess was taken until 2:00 p. m., this day.)

7297 Afternoon Session.

2:00 p. m.

Trial Examiner Ballinger: Come to order. You may proceed. Mr. Warmack, will you resume the stand?

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination (Continued).

By Mr. Hanley:

Q. Mr. Warmack, what is your understanding of the functions and duties and activities of the real estate and tax department in the Detroit office of the Respondent company?

A. I would have to refer to my notes, Judge Hanley.

Q. Please do so.

A. (The witness examines his papers.)

The Witness: It is my understanding that the real estate and tax department is concerned with that particular class of work in the Detroit field, Judge Hanley. The salaries of the people in account 215—

By Mr. Hanley:

Q. Interposing.) Well, is it your understanding, Mr. Warmack, that the real estate people, as designated in this account, do the work of leasing stations?

A. Oh, I do not know about what the person or persons in the Detroit office actually have to do with leasing

7298 of service stations.

Q. Is it not a fact that the marketing department undertakes that chore of finding lessees, and actually making the leases, and does the work and bears the expense?

A. Yes, sir., That is my understanding.

Q. So that the real estate department has nothing to do with the cost wherever it goes?

A. Of course, I do not think that they do. I think that they are concerned primarily with matters of real estate that may come into the picture in connection with some of these, but I do not know just who in the real estate office; that is, what persons have to do with the making of the leases or the finding of the lessees.

Q. Are you sufficiently familiar with the operations of the company to know that that activity is purely a marketing activity?

A. You say "that activity"; do you mean the finding of the lessee?

Q. I mean the finding of the lessee and the making of the deal with him, of the arrangements, the negotiations, the signing of the lease, the handling of the servicing of that lease.

A. It is my understanding that it is so regarded by the company.

Q. So that that is not in your concept a part of the 7299 duties of the real estate department?

A. Well, indeed I do not know. I did not make a thorough study as to what every man was engaged in in the Detroit field. I could not know unless I did make that review. I think these records show that information maybe several times.

Q. Well, Mr. Warmack, I am just asking you: Is it your understanding that that is not a function of the real estate department, but rather a function of the marketing department?

A. The marketing department represented by which account? We are talking about account 215, as I understand it. Now, the marketing department, as I understand it, is regarded by the company as embracing every account in form 189, including 215.

Q. That is true; and that is particular designated as the real estate department; and they have certain things to do.

A. Yes, sir.

Q. What I am asking you, Mr. Warmack, is: If you have made a sufficient observation of the operations of the company, so that you know whether or not it is a fact that the real estate department does not undertake the task of finding lessees, negotiate with them—

A. (Interposing): I—

Q. —and making the actual lease with them?

7300 A. I do not know of my own knowledge. The only knowledge I have on that score is what is in these records, Judge Hanley. (The witness indicates certain records.)

Trial Examiner Ballinger: What do the records show?

The Witness: These two Respondent's Exhibits do not

give the exact detail of what the employees in the re
estate and tax department do.

Trial Examiner Ballinger: What exhibits do you ref
to, and what pages?

The Witness: Respondent's Exhibit 99, page 25. Re
spondent's Exhibit 100 page 109. But if we can find it i
the record I believe that Mr. Boatwright's testimony wen
into that very point very materially.

Trial Examiner Ballinger: What was it in substanc

The Witness: Well, Judge, I will have to look it up.
cannot keep all of this stuff in my head.

Trial Examiner Ballinger: What is your recollectio
Do you not recall?

The Witness: No, sir. I understand those two depar
ments, real estate and tax departments, are concerned wit
real estate activities of the company.

The tax department is concerned with the taxes to b
paid by the company. And all things along that line. No
just the exact function, just what else they do, I do no
know that, I am sure. These records I think ar
7301 replete with it.

Mr. Hanley: If your Honor please, I do not thi
the matter is of great importance. The fact is, and I hope
he might be able to clear it up, that the actual leasin
of a station is regarded as a marketing function, and n
a matter for the real estate and tax department.

By Mr. Hanley:

Q. I am not sure whether you can subscribe to that o
not, from your own knowledge, Mr. Warnack.

A. That was my understanding—of—

Q. (Interposing): If you can, all right.

A. —that situation, to make it really clear in my mind,
should be happy to have the record show, if possible, ju
what account covers these particular expenses.

Q. Well, is the answer that you just do not know?

A. Not right off. No, sir. I think we can find it in th
record.

Q. Now will you please look at page 6775 of the recor
in this case, Mr. Warmack?

A. Yes, sir.

(The witness examined the record.)

Q. Have you found the reference, Mr. Warmack?

A. Yes, sir. I am on page 6775 of the record.

Q. During the morning you have criticized the metho used by the respondent in allocating expense in account 055.

7302 I now call your attention to page 6775 of the record, and your testimony in which you gave the following answer in part:

"I do not object to the allocation made between channels on Respondent's Exhibit 101 if it is to be used, and if those figures stand in determining the cost differential, they would not influence any change on the cost differential."

That refers to this particular account 055?

A. Yes, sir.

Q. I will now ask you if you rely upon that answer on page 6775, or whether you still are of the view that there is an impropriety of accounting—

A. Of course—

Q. —in the method used by the Respondent in its allocation under account 055?

A. I refer the Respondent's attorney to further statement made by me on page 6777 where that statement is corrected, and the correction was made:

"I am sorry that I overlooked that for a second. That is a correction. I stand corrected on the previous statement."

Q. I find that statement, Mr. Warmack.

Will you please tell me what it means? As I understand it, you had made some calculations and I think that is

7303 what your statement on page 6777 refers to. Am I in error about that?

A. I think it is perfectly clear what the statement on 6777 refers to.

Q. Well, now, will you please read the whole page 6777 and see if I am not right that the statement that you referred to has to do with certain calculations that you made, Mr. Warmack?

A. (The witness examines the document.)

Q. Take your time, whatever you need.

A. (The witness examines the document.)

The Witness: This statement has to do with calculations. And the calculations as given were a correction of the statement given on page 6775. I think that was fully understood at that time.

By Mr. Hanley:

Q. That is what I want to clarify.

A. Yes, sir.

Q. Do you wish now, Mr. Warmack, to make any clarifications or change of this statement; I refer to the one on page 6775:

"I do not object to the allocation made between channels on Respondent's Exhibit 101 if it is to be used and if those figures stand in determining the cost differential they would not influence any change on the cost differential."

A. Well, it was my understanding that that was fully corrected on page 6777, and if it was, I will be
7304 glad to have my statement appearing on page 6777 be inserted in the record at this point.

Trial Examiner Ballinger: Counsel has afforded you an opportunity to offer an explanation.

The Witness: Well, it is wholly repetitious, your Honor, but I will be glad to put it in again.

Trial Examiner Ballinger: Whatever you desire.

The Witness: It is my opinion that the figures appearing in account 055 entitled "Vehicle Tank Expense Other Than Mounted on Company Chassis" should follow the allocation made—or the allocation that is, that I have stated in my opinion should be made for account 025 entitled "Truck Expense—Truck Rental Expense." That was my statement on page 6777, and it is my opinion.

When I stated that I "stand corrected on the previous statement," that is the statement made by me on page 6775, which was just quoted by Respondent's counsel.

By Mr. Hanley:

Q. Is it to be understood now that you have changed your statement on page 6775 by the statement which you have just now made, Mr. Warmack?

A. The answer is—yes. It was modified on page 6777, and as I restated it again here, that statement is modified.

Q. Very well. Now, please refer to account 400—Bad Debts.

7305 A. Yes, sir.

Q. I refer you to page 6807 of the record, Mr. Warmack.

A. (The witness examines the papers.)

Q. Tell me when you have found that place.

A. Yes sir. I have found the page.

Q. As I understand it, you said in substance, referring to account 400—Bad Debts Collected:

"This is a credit account as shown on Respondent's Exhibit 101, and in my opinion it has no place in the exhibit. In my opinion the account would not influence in any way or was not by the operations of the company in the year 1940."

Referring you to page 6809 of the record, you continue in your discussion of this account by saying:

"It is my opinion that expense incurred during 1940 in connection with the collection of bad debts for prior year is not an expense which can be used for the determination of a cost differential."

Did you so testify?

A. In substance, yes, sir.

Q. In the year 1940, the income from bad debts previously written off was greater than the expenses of collecting bad debts incurred in prior years? Was it not?

A. Yes, sir.

Q. Is it not true that the net influence upon the differential of eliminating these two items would
7306 increase slightly the differential?

A. Just to make it clear, Judge Hanley, you are speaking of eliminating account 400, and eliminating account 512—yes, sir, it would slightly increase the differential. Did I not state that in my testimony?

Q. Well, Mr. Warmack, I would like to understand your theory of accounting wherein you think it necessary to eliminate these accounts in reference to the justification of the cost differential. Will you just please explain?

A. Well, transactions having to do with years other than 1940, I do not see how they have any influence on establishing a cost differential for the year 1940. That is the premise on which I approached it.

Q. Well, these things happened in 1940? Did they not, Mr. Warmack—

A. (Interposing): It is my understanding—

Q. —and what would you do with them as an accountant?

A. It is my understanding that these represented a transaction for prior years. In the case of account 400, bad debts collected written off prior years for the field in the amount of $5,481.45, the company was fortunate in being able to collect the expense that for some prior year or prior years prior to 1940 had been received during 1940. I just questioned because I cannot understand how that can have any bearing on the selling cost 7307 of gasoline in 1940.

Q. Well, it happened in 1940, Mr. Warmack? Is that true?

A. You happened to collect the bad debt in 1940. Now, if you collected it in 1942—I do not follow that kind of reasoning. I think—

Q. (Interposing): Will you please just answer the question: It happened in 1940? Did it not?

A. Yes, sir.

Q. Now, what would you do with it as an accountant?

A. Well, from an accounting standpoint, it could be handled in two or three different ways. Your company elects to throw it right into current income—or expense. I do not agree with that. It could be handled through a reserve account which would be a charge to operations giving effect to the proportions of this class of expense which would be applicable to a current year. When this was received, why, naturally it would be handled through a reserve account. As an alternative to that from the standpoint of accounting, many companies credit this to surplus. That is not an unusual thing to do.

Q. Do you object to the handling of it and the treatment of it to any such manner as will reduce the current marketing cost for the current year?

A. Frankly, I do not have any great deal of objection to it. It is a trifling amount. It would not amount to very much from the standpoint of the amount 7308 of all of the expenses incurred in this statement. If that were the only objection we had to this, I would not care how you did it.

Q. Will you answer the question?

A. I answered the question.

Trial Examiner Ballinger: Read the question.

The Witness: Does that not cover it?

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. Do you object to the handling of it and the treatment of it to any such manner as will reduce the current marketing cost for the current year?")

By Mr. Hanley:

Q. For the year 1940?

A. Yes, sir. Yes, sir. I do not see how you could apply it to 1940. I know if it were taken out of here it would increase slightly—and when I say slightly, it is very slightly—the differential not above 1.51; but somewhere along the line 1.51 plus several ciphers, it would be increased slightly.

Q. The fact is that it would, as it was treated by the Respondent, have the effect of reducing the cost differential? Is that not so?

A. Not the cost differential of 1.51. But if that cost differential were to go to, say, 1.5111119, why, it might reduce it to the last figure of 18.

7309 Q. I am not talking about the amount, but about the principle involved. The fact is that it was treated as it was by the Respondent has the effect of reducing the cost differential. Does it not do that, Mr. Warmack?

A. Oh, surely. If it is carried out far enough, why, you could absolutely identify it. To me, that is like splitting gnat bristles.

Trial Examiner Ballinger: You may strike the last sentence of the witness on the record—not physically, of course.

By Mr. Hanley:

Q. In the year 1940, Mr. Warmack, wha is the fact as to whether or not the income from bad debts previously written off was greater than expenses of collecting bad debts incurred in prior years?

The Witness: May I hear the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: May I inquire, Mr. Hanley, do you mean for the entire Detroit field—tank wagon reseller?

By Mr. Hanley:

Q. No, I mean for the Detroit field, just what the account shows.

A. Yes, sir?

7310 Trial Examiner Ballinger: The answer is "yes"; is that correct?

The Witness: I lost it. I thought he said what was the extent of it.

By Mr. Hanley:

Q. You asked me what area—I said the Detroit field—Mr. Warmack.

A. Well, the amounts shown are bad debts collected written off prior years it was $5,481.45. The expense $835.35. The excess of the bads debts collected over the expense of prior years is approximately $4,645.00. Does that answer your question?

Q. I do not know: Do you think so, Mr. Warmack?

A. Well, I have just forgotten what the question was.

Mr. Hanley: Will you read the question, please? And make sure that the witness is satisfied with his answer.

Trial Examiner Ballinger: Read the question.

Mr. Austin: He did not ask for amounts at all.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

(The reporter read the question again as follows:

"Q. In the year 1940, Mr. Warmack, what is the
7311 fact as to whether or not the income from bad debts previously written off was greater than expenses of collecting bad debts incurred in prior years?")

The Witness: Yes, sir. The fact is that the company collected an amount of bad debts above the cost of what was incurred in collecting them.

By Mr. Hanley:

Q. Is it not the fact that the net influence of that upon the differential is to increase—

Mr. Hanley: Strike that.

Trial Examiner Ballinger: Question withdrawn. Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: We will take a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: I will restate the question.

By Mr. Hanley:

Q. Is it not a fact that that inclusion of an account so far as its influence upon the differential is concerned, is to decrease the marketing cost of reseller gallons for the year 1940?

A. Yes, sir. That is true. But that would not be applicable to those figures that I just gave. The figures

7312 in the 400 account in the year 1940 applicable to tank wagon reseller, $705.37, the $705.37 is a portion of $5,400.00 plus, which is stated in the cost of collecting of bad debts written off in prior years in account 512 shown in tank wagon reseller of $262.44 as a portion of the $835.00 for the total.

Q. Well, now, do you have any complaint, Mr. Warmack, as an accountant, with the handling of the collection of those bad debts for the year 1940 as they were handled by the Respondent company?

A. For the purpose of establishing a cost differential, I do not think that they have any place in there.

Q. Even though they have an effect of reducing the cost differential?

A. Judge Hanley, I do not care whether they have the effect of increasing or reducing it, we are after facts here, as near as we can get them.

Q. Whatever you say as to whether or not the expense items entered in these accounts by the Respondent for the year 1940 should represent and are representative of the same types of costs for other years?

A. Oh, I do not know. You are speaking of account 400 and account 512?

Q. Yes.

A. I certainly do not know.

Q. Well, did you check them?

7313 A. For prior years other than that year?

Q. Any years.

A. No.

Q. Did you check them for 1940?

A. I do not think I went into that matter. If I may review just a moment, your Honor.

Trial Examiner Ballinger: Yes.

(The witness examines papers.)

The Witness: With respect to account 400, I said at page 6808 of the record, "Answering question No. 3," which inquires as to the extent that I studied the account, "I have not made any detailed study or analysis of this account."

Trial Examiner Ballinger: Why did you use the word "detailed"? Did you make a study of it?

The Witness: I looked over what is in these records, Judge. I did not look over anything further than that.

In connection with account 512, I said:

"This account has not been studied except in connection with my study of credit card costs as set forth in my answers to questions in connection with account 208."

By Mr. Hanley:

Q. Very well. Irrespective of your study or lack of it in connection with these two accounts, please answer this
as an accountant: Would such items as these ap-
7314 pearing here ever be a charge against current sales
even though they are or may be a normally expected income and take off these accounts X-dollars of sale?

A. Some accountants think so. I do not know. I think that each case would stand on its own.

Q. What do you think?

A. I do not lean toward the idea of mingling other years, past years, other years in with the present year, as an accountant, I think each one should stand alone. That is my opinion on this, Judge Hanley.

Q. Mr. Warmack, if you had a bad debt incurred in 1938 or 1939 and you were able to collect it in 1940—

Mr. Austin: May we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Were you referring to having these accounts written off in 1938 or 1939, Judge Hanley?

Mr. Hanley: Perhaps it would be better to revise that question.

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Hanley:

Q. Supposing you had accounts which result in bad debts and become known as such in 1938 or 1939 and they
are written off as such. And then by effort or by good
7315 fortune they are collected in 1940. And suppose that
in 1940 you sell goods to people who do not pay. They are written off as bad debts, but subsequently they are collected in 1941 or 1942.

Now, Mr. Warmack, as an accountant, what are you going to do with those collections?

A. In the first place, you do not handle them correctly. That is the whole confusion that is in this record here. They should have been made provision for all bad debt losses in the year in which they were incurred. Inasmuch as your company did not do it and did not elect to do it that way, we have this confusion. I have not calculated the exact figure there, because I have no quarrel with the way they elected to keep these records, but that is the business of handling this account, or the way that it is handled by your company.

Frankly, I do not think that is the best way of handling this account. In other words that is what we call in accounting the cash receipts and disbursements method, so to speak. You get the money and you pay out the money, it is cash receipts and disbursements.

Q. Well, I have asked you, Mr. Warmack, to tell me what you would do with it. You have not answered that yet.

A. I have stated two or three times.

Mr. Austin: Your Honor, I have hesitated to make objections to this line of questioning because I have not been clear in my own mind yet as to how far it was 7316 relevant and how far it was not. It seems to me that it applies largely to the general accounting of the company, of accounts of profits and losses of the accounts in question rather than the use of those expenses in a cost differential in this case. Now it seems to me that we are going far, very far afield when we discuss general principles of accounting except as they apply particularly to this cost study. I do not object to questions as to what he would do with this expense in preparing a cost study for the purpose of showing a cost differential in the year 1940.

I do not think we should get too far away from what we are driving at here.

Trial Examiner Ballinger: Counsel for the Respondent has been endeavoring to ascertain that from the witness for some time.

The Witness: I told him at least five times, I think, what I would do with it.

Trial Examiner Ballinger: I confess the Examiner does not understand what will become of it.

The Witness: I will be glad to state it again.

By Mr. Hanley:

Q. Mr. Warmack, you have not told me yet, and I will ask you specifically this question: Assume that the Standard Oil Company (Indiana) sold gasoline to customer "X" in 1938, and failed to collect the bill.

7317 Assume that in 1940, the Standard Oil Company (Indiana) was able to collect that bill or some part of it. Assume that it realized a certain amount of cash in 1940 for goods sold to that customer "X" in 1938.

Now, as an accountant, what would you do with that realization of cash in 1940?

A. Put it in the bank.

Trial Examiner Ballinger: That does not answer the question.

The Witness: Yes, I can trace this and tell him how to handle bad debts.

Trial Examiner Ballinger: One moment. It is a very simple question. Now, you would certainly make some disposition of it in your account?

The Witness: Yes, sir.

Trial Examiner Ballinger: Now, where would you put it?

The Witness: I would put it to surplus if I had no other place to credit it.

By Mr. Hanley:

Q. If you had no other place to credit it. Suppose you had the reseller channel dealing with the cost of handling identically the same kind of gasoline or identically that same type of general product?

A. Well, I would not put it there.

7318 Q. Why not?

A. Because it would not be the proper place to put it.

Q. Please. Why?

A. You are handling costs in that column. That is the reason. I will be glad to tell you again the plan or the two or three plans of handling bad debts.

Q. Well, you say you would not put it there, Mr. Warmack. Now, in 1938, when it was sold through that channel and lost, and charged off, in your judgment as an accountant, would it have been proper in 1938 to have charged it as a cost to doing business through that channel?

A. I lean to the feeling of regarding all bad debts as a cost, but I will call your attention to the fact that some very, very learned accountants have leaned to the feeling that it is not cost at all, it is reduction from sales.

Q. I am just asking one learned accountant his opinion, would you charge it as a cost in 1938?

A. I would, yes, sir.

Q. Now, if it is collected in 1940, do you regard it as improper accounting to reduce the cost in that year by the recovery of that amount which you formerly charged off in 1938 as a cost against that channel?

A. I regard it as an improper accounting operation, yes, sir. And, your Honor, I did not fully explain my answer with respect to that previous question. If I may I would like to:

7319 Trial Examiner Ballinger: What previous question do you refer to?

Mr. Hanley: Judge, I do not know that there is any occasion for an explanation. If the witness cares to talk to his counsel or anything of that sort, I am perfectly agreeable to that and for that purpose, I propose that we may have a recess.

The Witness: I just wanted to turn back, your Honor, and outline how I would handle bad debts from an accounting standpoint.

Trial Examiner Ballinger: That is not necessary at this point. If counsel for the Commission desires to ask you any question with reference to it, he may do so on redirect examination.

Mr. Hanley: May we have a five minute recess?

Trial Examiner Ballinger: We will take a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order. You may proceed.

By Mr. Hanley:

Q. Mr. Warmack, directing your attention—directing your attention to account 200 on Respondent's Exhibit 101 entitled "Office Expense—Salaries—Accounting" you have testified as follows:

7320 "In my opinion credit card costs cannot be used in determining a cost differential between tank wagon reseller business and jobber, naphtha and gasoline business."

If you care to check on that, the reference is page 6795 of the record, Mr. Warmack.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Have you found that reference?

A. Yes, sir.

Q. Is that your testimoy?

A. Yes, sir.

Q. In respect to account 201, office expense—stationery and office supplies, you have testified as follows:

"A considerable portion of this expense is incurred in connection with the handling of credit cards, and in my opinion credit card expense cannot be used in determining a cost differential."

A. What is the page?

Q. That reference is at page 6797 of the record in this case, Mr. Warmack.

A. Yes, sir, I see it.

(The witness read the document.)

7321 Q. Is it not true, Mr. Warmack, that you made suggestions similar to that and gave similar testimony in connection with account 206 having to do with office expense—light, fuel, water, etc.; account 208 having to do with credit information; account 510 having to do with losses by bad debts; account 511 having to do with expense of collecting bad debts; with account 202, which you have there; account 204, I believe that was the one here; account 066, this account is shown on this page here. I cannot accurately specify pages in respect of each of those, but I assume you know whether or not I am right in my assumption?

A. That is my feeling with respect to all of the accounts which have to do with credit card business.

The Witness: The reporter may read me those various numbers and I will check them.

Trial Examiner Ballinger: The reporter will read the numbers one by one.

The Reporter: Account 206.

The Witness: Account 206. I do not find account 206 in credit card costs. Account 200 is here.

The Reporter: Account 510.

The Witness: That is here.

The Reporter: Account 511.

The Witness: That is here.

7322 Mr. Austin: What exhibit is that?

The Witness: Commission's Exhibit 132.

The Reporter: Account 202.

The Witness: 202? I have that.

The Reporter: Account 204.

The Witness: 204. Yes, sir.

The Reporter: Account 066.

The Witness: 066. Yes, sir.

The Reporter: Account 201.

The Witness: 201—yes, sir.

The Reporter: Account 200.

The Witness: 200. I have that.

By Mr. Hanley:

Q. Referring you directly to account 206, which you say you did not testify about. I ask you if account 206 being office expense—all other—water, light, fuel, rent, and so forth, did not or does not have an influence on credit cards?

Mr. Austin: ~~Is that~~ not stated backwards?

Mr. Hanley: I believe it is clear either way.

The Witness: May I review that, your Honor?

Trial Examiner Ballinger: You may.

(The witness examines documents.)

Trial Examiner Ballinger: Read the pending question.

(The reporter read the question.)

7323 Mr. Hanley: May we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Read the question to the witness.

(The reporter read the question.)

The Witness: I will have to hear it again, if you do not mind.

Trial Examiner Ballinger: Read it again.

(The reporter again read the question.)

The Witness: It may be, Judge Hanley, but whatever costs that may be incurred in that class of expense in connection with credit cards would not be, or rather, was not taken up by Mr. Houghton and I when we went over to determine what the credit card expense was in the Detroit field. We did not make a study that could be said to be the most thorough study. We made the best study that we could in view of the time that we had at our disposal.

By Mr. Hanley:

Q. Mr. Warmack, I will ask you if you will please not undertake to speak for those in respect of the study beyond yourself, that was made in connection with credit cards. First, is not a clear study of the credit card situation set forth in Respondent's Exhibit 100?

A. I do not think that that is set forth in one place as such, Judge Hanley.

7324 Q. Irrespective of whether it is in one place or not, will you please answer the question as to whether or not there is a clear exposition of the credit card situation set forth in Respondent's Exhibit 100?

A. In my opinion, there is none.

Q. Are we to understand that you and Mr. Houghton jointly undertook the study of the credit card situation?

A. Well, undertook the study, I undertook the study and Mr. Houghton was there and assisted me as far as was possible to do so.

Q. Do you care to go any further than to say that, Mr. Warmack, that he answered the questions that you asked him?

A. Oh, yes, he helped me to make calculations, and he helped me to run the vouchers and do everything that he could to try to expedite the work that we were engaged on in Detroit.

Q. Are you prepared to go any further than that on the record with regard to respondent's account 206? Did you study that account in connection with credit card matters?

A. I do not believe that we did, Judge Hanley.

Q. I refer you to page 6799 of the record at which point you testified concerning account 206. You may refer to it to see if you care to amplify your answer in any degree.

A. That was 6207?

Q. No, no. 6799.

7325 A. What?

Q. 6799, Mr. Warmack.

A. Yes.

(The witness examines the document.)

The Witness: I do not know that that needs any amplification. I said in connection with 206 that the answer to these three questions would be the same as those given for account 205. In account 205, I call attention to the fact that some portion of expense may be applicable to credit cards. That is probably true with account 206, but I do not think we went into that subject of credit cards in connection with account 206. There may be some expense in there—

By Mr. Hanley:

Q. (Interposing): Well, we will go into that now.

Mr. Warmack, please tell the Court what your understanding is of the plan in use by the Respondent company is relative to these credit cards, the use made thereof, the service that the company must render credit card holders, and generally the whole subject of how you think the credit card setup is handled.

Please tell the Court your views on it.

A. I believe that is in the record but I will be glad to try to state it again.

It is my understanding that credit cards are issued to the public at large; that is, persons who when investigated for credit ratings would be established whereby 7326 such holders may receive the benefit of credits on the purchase of gasoline; that is, exercising the privilege of credit in the purchase of their requirements from the tank wagon customers of the Respondent or any reseller customers who sell Standard Oil gasoline or gasoline of various affiliated companies of the Standard Oil Company of Indiana.

It is my understanding that when the customer makes a purchase of the products from these reseller stations, that he has the privilege of signing a slip and that slip is accepted by the Standard Oil Company as though it were cash. In turn the Standard Oil Company undertakes to collect the payment for that purchase directly from the consumer that desired the product.

That is my general understanding of the situation, Judge Hanley.

Q. How does the application for a credit card originate, Mr. Warmack?

A. I rather think that it could originate in several ways, but I do not have any positive information on that.

Q. Well, your best judgment from whatever studies you made?

A. Well, I have not made any studies along that line. It is my understanding that the customer—that is, the automobile driver may ask the company to issue him a credit card and that after due investigation, he either will or will not receive a card.

7327 Q. Does he ask the company or does he ask the service station operator, which?

A. I imagine that he can ask either. I think if I were to write in to your company and ask for a card, after due investigation you would either issue or would not issue me a card.

Q. In your judgment, how do you think most of them arise?

A. I should imagine most of them arise from contacts of the reseller station with the consuming public.

Q. Assuming that such a request is made of a reseller operator, what happens?

A. I assume that an application is prepared whereby certain information is required by the company and is filled out by him, the—

Trial Examiner Ballinger: The applicant?

The Witness: The applicant, and either handed to the operator or the reseller station or mailed directly to the company.

By Mr. Hanley:

Q. What happens then?

A. It is my understanding that the credit investigation is made on that particular applicant.

Q. And then what happens?

A. And then the company either issues the card or does not issue the card. That is my understanding.

7328 Q. Supposing the company does issue the card. What happens then?

A. It is sent to the applicant.

Q. And what happens then?

A. From the standpoint of the company or the applicant?

Q. Both.

A. If the applicant so elects, why, he may buy gasoline. Assuming that he does buy gasoline from the reseller station, he signs a slip for the purchase of that, and if finds its way back to the company's offices. The company in turn sets about the collecting of the payment for the purchase of the holder of the card. That is my understanding.

Q. Do you agree or disagree, Mr. Warmack, that there is an expense to which the company is put in the matter of making the credit investigation first, and secondly in setting up the accounting record on a card if one is issued?

A. Yes, sir.

Q. Do you regard that as a proper marketing cost of gasoline?

A. Yes, sir.

Q. And if you so regard it, where do you think that it has a place, if any, in the accounting procedure of the Respondent company?

A. I certainly do not know. I would assume that the
cost of collecting would be charged to collection ac-
7329 count, and the cost of determining credit card infor-
mation would be charged to a credit information account. There may be many of these costs of collection incurred. They may be charged to several accounts.

Q. But you do believe that it is a proper marketing cost?

A. Yes, sir.

Q. Then, tell me what you mean by this—(counsel opens a record).

The Witness: What is the page?

By Mr. Hanley:

Q. 6797.

A. Thank you.

Q. A considerable portion of this—well I will just read it to you:

"A considerable portion of this expense is incurred in connection with the handling of credit cards and in my opinion credit card expense cannot be used in determining a cost differential."

A. That statement is perfectly clear. I can give you my reasons for it.

Q. Yes?

A. My reasons are that it is wholly and entirely upon the—it is wholly and entirely up to the user or the holder of a credit card as to when, where, and how he elects to purchase his gasoline requirements or other petroleum 7330 products which he may require in the conduct of his business and the operation of his automobile. Well, I just do not see how the company can claim a differential. I just do not see how that cost, that marketing cost can be assigned directly or indirectly to a class of customers in determining a cost differential.

For example, supposing I held a credit card of your company. I drive out a street in Detroit. I come to a traffic light. I am allowed maybe to turn left or to the right, but I could not go through—

Q. (Interposing.) Can't you get to the point, please, Mr. Warmack?

A. —that is where I contact a reseller station which is served by one of your jobbers, and I will drive in and buy a tank of gasoline. And I exercise the use of my car. Then again, there is a day when I drive along the same way, and I might happen to get to that street and I drive straight on, and I drive in on to one of your stations which is served directly, and I buy my requirements of gasoline and I exercise the use of the credit card. It happens that the change of that light, or my election as to how and which account gets the handling of the expense in connection with my credit card, and how on earth that kind of cost in the handling of that expense in connection with my credit card can serve to determine or to be used 7331 in arriving at any cost differential. I do not believe it can be done.

Q. Granting everything you say, Mr. Warmack, even including the change in the traffic light, does that make the slightest difference so far as the cost is concerned to which the Respondent company is put in handling any particular or given credit card?

A. No, indeed. No, indeed.

Q. Then what difference does it make?

A. Well, it has a considerable bit of difference because of this election of mine or because it just happens that that particular light is turned as you are going down the street. I think it is purely an absurdity to think that any such thing can ever be relied upon for the purpose of determining a cost differential.

Q. Well, Mr. Warmack, in the first place, is it not true that in the accounting of this Respondent company credit card expense is charged into the reseller channel of distribution?

A. That is my understanding.

Q. Just as the basic proposition. Is that not true?

A. It is my understanding, Judge Hanley.

Q. Well, is it not true that is where it belongs, in your judgment as an accountant?

A. Well—

7332 Q. (Interposing.) Is it not through that channel that credit card customers are served?

A. No, not necessarily. This will have to have an explanation going beyond "yes" or "no"—

Q. (Interposing.) Oh, my God. Again!

A. I cannot answer it with just "yes" or "no."

Trial Examiner Ballinger: But you have answered it "no"?

The Witness: Well, I will answer it "no" again, Judge Hanley, but it needs an explanation.

By Mr. Hanley:

Q. What other channels may there be any expense chargeable to, so far as credit cards are concerned?

A. To any channel where costs of serving reseller stations either directly or indirectly are concerned, and one of those channels is jobber, naphtha and gasoline column in Respondent's Exhibit 101.

Q. Well, to that, Mr. Warmack

A. (Interposing.) Very well, but I would like—I was asked where else could it be charged to on the reseller channel.

Q. But in the first place, is it not just the consumers of gasoline, the drivers of automobiles that use these credit cards?

A. That is my understanding.

7333 Q. And they go into any station? Do they not?

A. That is my understanding.

Q. And use their credit cards?

A. That is my understanding.

Q. Now, tell me just what difference does it make what station they go into so far as the cost to the company is concerned in reference to servicing from the accounting standpoint of that particular credit card customer.

A. It does not make one bit of difference. That is what I contend. You have no cost from which you can establish a cost differential.

Q. Then, Mr. Warmack, how can you say that this has no place as the marketing cost?

A. I did not say that at all.

Q. Is it not a fair setup to say that those credit cards which arise out of the jobber business and the cost incident thereto should be charged to the jobber business, and those credit cards which arise out of the ordinary reseller channel business should be charged to the reseller channel?

A. It is a wide stretch of the imagination. I do not think it should be charged in any such place. The company has no control—

Q. (Interposing.) Will you explain to the Court why you think that is an unfair division?

A. The example that I gave just now, your Honor,
7334 that it does happen that the customer drives into a station and he elects to drive into it, it does not make any difference.

Trial Examiner Ballinger: What difference does it make what station he goes in or whether he exercises the right of the card's credit on his card?

The Witness: Not any that I know of.

Trial Examiner Ballinger: What difference does it make? He is speeding by down the road, and he will turn in to any station at all and purchase some gasoline at any time he likes?

The Witness: Not one ounce of difference in the world. That is why I am cutting it out. That is what I am getting at. That is why I say there is no measuring factor that the Respondent can establish. The Respondent has no control over where he buys his stuff. He can buy his requirements from anybody that sells Standard Oil goods.

By Mr. Hanley:

Q. That is quite true, Mr. Warmack. Nonetheless, do you agree that the Respondent company has an obligation to discharge the cost of servicing the credit card irrespective of how or where or when it originates?

A. Oh, yes. They certainly would, yes.

Q. Now, suppose, Mr. Warmack, that it originates in a station that is served by one of our jobbers.

A. Yes, sir.

7335 Q. We will say that that is credit card "X."

A. Yes, sir.

Q. Now, another credit card originates in a reseller channel, the reseller channel of the Respondent company. We will say that that is credit card "Y."

A. Yes, sir.

Q. Do you agree that it is incumbent upon the Respondent company to bear the cost of servicing from an accounting standpoint of both of those cards, "X" and "Y"?

A. Why certainly, if they exercise the privilege—

Q. (Interposing) Very well, Mr. Warmack.

A. —of doing the business. That is why—

Q. (Interposing) Irrespective of where the holders of "X" and "Y" card buy their gasoline, is there any difference? Is that not a fair separation of the cost to charge that "X" card administration to the jobber business where it originated, and the "Y" card administration to the reseller channel where it originated, utterly irrespective of where the holder of those cards buy their gasoline and their petroleum derivatives?

A. No. It is not. That has absolutely nothing to do with it. That is absolutely nothing but an absurdity.

Q. All right. Tell us why.

A. Because of the fact that your company has no control whatsoever over where I or any one else who owns
7336 a credit card may buy their requirements.

Q. We granted that, Mr. Warmack. Tell us what difference that makes.

A. Yes—

Q. (Interposing.) If any? It does not change the cost? Does it?

A. Not in the aggregate. But how in the world, your Honor, can the cost of a credit card—

Trial Examiner Ballinger: (Interposing) One moment. You will answer the question. You are now answering the question with a question. Now, offer your explanation and stop. If you have any further explanation to offer, do so.

The Witness: I think I have stated this over and over again, Judge. I will be happy to do it again. I hope I have.

By Mr. Hanley:

Q. You have not yet, Mr. Warmack. Please explain that.

A. Explain what?

Q. Tell me, inasmuch as it costs the company just the same amount of money to service a card irrespective of where the holder of that card buys his product, why it makes any difference as a matter of cost to the company where that individual buys his product?

A. Well, in my opinion, it does not make any dif-
7337 ference where he buys it. That is my contention.

Q. What is your criticism of this account?

A. Because you have tried to use it to establish a cost differential. You have no control over it.

Q. What is wrong with that?

A. I think it is just wild imagination.

Q. Why?

A. Because you have no control over where this cost is being incurred. It is entirely a matter of election of the holder of the card.

Q. Mr. Warmack, does it make any difference in the cost to the company where the holder of the card buys his product?

A. It is my understanding that it does not.

Q. And it does not?

A. It is my understanding.

Q. Very well. Just what difference does it make where he buys his product so far as the cost of marketing is concerned?

A. It makes no difference.

Q. Then what is your criticism?

A. Because that is not a cost that will afford a cost differential. It just does not make any difference where he buys his stuff. How is a cost like that—

Trial Examiner Ballinger: (Interposing.) Mr. Warmack, you have been instructed by the Examiner several times not to attempt to answer the question with a question.

7338 The Witness: Well, I am sorry. I have stated my opinion on that.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. I refer you now to your exhibit—Commission's Exhibit 132, Mr. Warmack.

A. Yes.

Q. I will ask you if you know how account 208, credit information expense was prorated between tank wagon customers on the one hand and jobber customers on the other hand?

A. I can look that up.

(The witness examines documents.)

The Witness: What is the question again?

Trial Examiner Ballinger: Read the question.

The Witness: I will have to look that up.

(The reporter read the question.)

(The witness examines the papers.)

The Witness: That is shown in considerable detail on page 56 of Respondent's Exhibit 100.

By Mr. Hanley:

Q. Was there anything the matter with that separation, in your judgment as an accountant?

A. Surely. There was.

7339 Q. Tell the Court what it is.

A. You endeavored to make a separation of credit card expense on the basis of credit card tickets. And then you claim that that separation afforded a cost differential. It is absolutely absurd from the standpoint of sound accounting.

Trial Examiner Ballinger: Mr. Warmack, you used the word "absurd" and the words "absolutely absurd," repeatedly throughout your testimony. It is unnecessary to indulge in that kind of language, Mr. Warmack.

The Witness: Yes, sir.

Trial Examiner Ballinger: You can say "it is incorrect," and it will answer the same purpose.

The Witness: I see.

By Mr. Hanley:

Q. Just explain what is the matter with it, Mr. Warmack.

A. What I think is the matter is that you have set up to support a class of expense and separate it on some arbitrary basis, which class of expense is a marketing expense over which the Respondent company has no control and over which—that is, exercises no control as to where the holder of a credit card purchases his products, by virtue of the fact that he happened to drive in to the place.

Then you set about trying to arrive at a, by some tabulation or tabulations that you have made as explained 7340 on page 56 of Respondent's Exhibit 100—you have endeavored to separate that expense and determine a cost differential. This is general expense which will afford no cost differential.

Q. Mr. Warmack, let us use an example. Let us see if we can make it simple. Let us see if we can make this thing concrete. Just assume that the Respondent company issued 100 credit cards in the Detroit area. Let us assume that 90 of them were issued as the result of applications coming from service stations in the regular tank wagon reseller channel. Let us assume that 10 of them were credit cards which originated from applications coming from jobber stations.

It is true, is it not, that the Respondent company, in respect of all of those applications would make a credit investigation?

A. That is my understanding. Yes, sir.

Q. And incident to that investigation there would be some expense. Would there not be?

A. Oh, yes, indeed.

Q. Assuming that after the investigation is made and 90 credit cards are issued which originated in the reseller channel, and that 10 cards are issued which originated in the jobber business—assume that.

A. Yes.

Q. From month to month those holders of credit
7341 cards would be buying products. It would be income
by the company from that, and it would be incumbent
upon the company to bill that credit card holder for his
monthly purchases? Is that not true?

A. Yes, sir. That is my understanding of the procedure.

Q. That would be true would it not, irrespective of where the credit card holder in either class bought his merchandise?

A. That is my understanding; yes, sir.

Q. Now, Mr. Warmack, in your judgment as an accountant, does it make the slightest difference where one of that group of 10 credit card holders originated from the jobber group as distinguished from one of the 90 credit card holders in the reseller group buys his merchandise? Does that make any difference so far as the cost to the company is concerned in servicing from an accounting standpoint those two groups of credit cards?

A. It is my contention that it makes no difference.

Q. Right?

A. Right.

Q. Now, if it makes no difference where these people buy their products, and if, as you maintain, the company has to bear the expense of servicing the cards from an ac-

counting standpoint, is it not a fair separation of expense as between the reseller channel and the jobber channel to charge to the reseller channel those cards which origi-
7342 nated in the reseller channel and charge to the jobber channel those cards which arise in the jobber channel?

A. In my opinion that should not be for the purpose of establishing a cost differential.

Q. Just why.

A. Because of the fact that the place where the cards originated, in the first place, is not the controlling factor at all.

The tank wagon reseller serviced by the respondent company have, may have a credit card initiated through him, and when the holder receives his card he may exercise it wholly and entirely with a jobber, and there may be vice versa of that situation that may arise also.

Therefore, I certainly could not subscribe to the belief that where the card originated is proper as being an influencing factor from the standpoint of determining a cost differential.

Q. Well, Mr. Warmack—

Trial Examiner Ballinger: (Interposing.) Mr. Warmack, there is a difference in cost, is there not? In other words, part of the cost incurred by the reseller channel and part of which is incurred in the jobber channel? Is that not true?

The Witness: In my opinion, no, your Honor.

Trial Examiner Ballinger: No part of it?

7343 The Witness: No part of it. No, sir. That is my opinion.

Mr. Austin: Well, you do not mean any part of it, no part of it would be indicated in the jobber channel?

Mr. Hanley: That is objected to as being testimony on the part of counsel. If you want to ask him a question that would be all right.

The Witness: In the jobber channel, your Honor?

Trial Examiner Ballinger: Is it attributable to one channel, or should it be divided as between the two channels?

The Witness: For the purpose of what?

Trial Examiner Ballinger: I want to know.

The Witness: I will have to know for what? Not for the purpose of the cost differential.

Trial Examiner Ballinger: Do we get a division? There is a cost that is charged to some extent to both channels? Is there not?

The Witness: It is chargeable to every gallon of gasoline that is sold to car drivers either directly or indirectly.

Trial Examiner Ballinger: Well—

The Witness: (Interposing.) One each unit of gasoline, and each unit of gasoline is the governing factor.

If this company, as it has shown, sells fifteen million
7344 gallons of gasoline through the jobber, naphtha and gasoline channel, and 69-million gallons of gasoline through the tank wagon reseller channel, then this is the class of expense that will be separated on that type of gallonage.

By Mr. Hanley:

Q. Is that based on a factual and objective cost study, Mr. Warmack?

A. That is not. It is based on my opinion as to how, from the standpoint of sound accounting, this class of expense should be separated.

Q. Mr. Warmack, suppose that a credit card holder—that is, a credit card holder of a card issued by the Respondent company, was entitled to buy nothing on that card except the products of the company. Now that is not in accordance with the facts, but just assume that.

Would that change your opinion in any particular?

A. From the standpoint of determining a cost differential, it would not. Now, there might be some specific instances where the company elected to allow the purchasers or holders of credit cards to purchase several hundreds of dollars' worth of goods, and by some cost incurred in that, there may be some vague possibility of some part of the cards coming in for the possibility of a cost differential, but I think such a situation would be too remote to be considered.

Q. Well, Mr. Warmack, I fear I will have to pursue this subject at quite some length, but just to finish up
7345 this afternoon session before I ask the Court for a recess, I wish you would please, if you will, tell the Court what the relationship is between the fact that the credit card holder may purchase products hither and yon from various companies with the fact of a definite cost

to which the issuing company is put in servicing that credit card from an accounting standpoint?

Is the question clear to you?.

A. I am afraid it is not, Judge Hanley. I am sorry.

Q. All right. We have a situation of a company having, we will say the Respondent company in this action, issuing a credit card after an investigation.

A. Yes, sir.

Q. And then after that, month after month, that customer is serviced from an accounting standpoint; that is, he is billed on the basis of what he purchases and he pays his bill and the records are put through and kept and so forth.

A. Yes, sir.

Q. Now, he may buy at stations handling Standard of Indiana products or he may buy from British Columbia Company or Continental or somebody else.

A. Yes.

Q. But whatever he buys is charged on his account and he is billed by the Standard Oil Company of Indiana which issued the card.

7346 A. Yes, sir.

Q. That is your understanding is it?

A. Yes, sir.

Q. Now, tell me if you can what possible relationship there is between the fact that that customer may buy gasoline at a Continental station as distinguished from the Standard Oil Company of Indiana station and the cost to which the Standard Oil Company of Indiana is put in servicing that card and account from an accounting standpoint?

A. Well, from an accounting standpoint, naturally, it is a cost. It is a cost incurred in connection with the credit card, because of the fact that the company elects to do what we might say cinch its customers. And that is very closely, in my opinion, comparable to the cost incurred in connection with advertising for customer acceptance. And I do not see how, from an accounting standpoint, how they could have any relationship to the methods of sale or quantity sold in the Detroit area when this customer is purchasing his goods completely without the Detroit area, or such like.

Q. Mr. Warmack, I am sorry, you are not answering the question. Possibly it is my fault.

I did not make it entirely clear. I will try to simplify it.

A. I am sorry.

7347 Q. Suppose that credit card holder "X" who has a credit card issued from Standard Oil Company of Indiana buys during a given month fifty gallons of gasoline. Suppose he buys it at Continental stations.

A. Yes, sir.

Q. Now, under the plan he would be billed for that gasoline by the Standard Oil Company (Indiana)?

A. That is my understanding.

Q. That is your understanding?

A. Yes.

Q. And then there would be a company adjustment between Indiana and Continental?

A. That is my understanding, sir.

Q. Supposing that instead of buying that 50 gallons of gasoline at a Continental station, he bought that 50 gallons of gasoline from stations handling Standard of Indiana products—so, he would buy Standard, say, Standard Red Crown Gasoline.

A. Yes, sir.

Q. And he would be billed by the Standard Oil Company of Indiana for the 50 gallons of Standard Red Crown. Now, Mr. Warmack, so far as the cost is concerned to the Standard Oil Company of Indiana of the handling of that credit card account for that month, does it make the slightest difference whether that customer "X" bought 50 gallons of Continental gasoline or 50 gallons of Standard Red Crown Gasoline?

7348 A. In my opinion, it makes no difference at all. The cost is incurred. The only question I think is this of separation of the cost for determining a cost differential.

Q. Now—well, now, does the fact that he may have bought the Continental gasoline raise a question in your mind as to the propriety of using that as a basis for a cost differential?

A. Well, it raises that question but not necessarily. I think there are many other questions that are probably much stronger.

Q. You agree largely, do you not, Mr. Warmack, that there is a different marketing cost in handling that credit card or is not, for that month's business?

A. Absolutely, I think it would be the same. The very identical thing that there is a common cost, Judge Hanley.

of newspaper advertising. It runs hand in hand with newspaper and radio advertising.

Q. Now, suppose—suppose that that credit card originated from some station served by a jobber class of customer. Do you not regard it as an appropriate and fair method of accounting to allocate the cost of handling that credit card and servicing that account from an accounting standpoint to the jobber group of customers as differentiated from the whole reseller channel on the other hand: is that not a fair thing to do?

A. No, only to that extent in your refinement by 7349 your management that would be—I am sure that I would make no objection, however, but I certainly do not think it is proper to make any such segregation for the purpose of a cost differential. I am certain that it should not be done.

Q. Is that not what Mr. Boatwright set forth in his opinion as to what should be done?

A. It is my opinion that is what he did and that is why I objected to it.

Q. Do you think that is improper accounting?

A. For the purpose of establishing cost differential, I think it is improper accounting. That is because the costs of that kind do not afford a cost differential basis.

Q. Do you think it may not be given any consideration at all on either side of the ledger? Is that what you mean to say, Mr. Warmack?

A. No, I do not mean to say that. I just mean to say that you have this cost and several other costs that are costs of a general nature. They just do not afford any cost differential. They are costs, they are just costs, many of which are general costs, among which we have the general office costs. They do not afford a basis for a cost differential.

Trial Examiner Ballinger: Mr. Warmack, you say they do not afford any basis for separation or a differential; do you mean by that that the differences in the cost is not ascertainable?

7350 The Witness: Judge, not exactly. I do not mean that in connection with this account.

Trial Examiner Ballinger: What do you mean?

The Witness: This class of expense that is incurred at the pleasure of the company for the purpose of cinching the users of the company's products, and is not incurred in connection with the selling of their products either through the tank wagon reseller or jobber customer channels. Now, it must be cost. In other words, to afford a cost differential, it must be cost incurred directly or indirectly in connection with the serving of this company's customers. That class of cost is not what is incurred here.

By Mr. Hanley:

Q. Mr. Warmack, I am going to ask you one more question and then I am going to ask the Court to grant us an adjournment.

A. Yes.

Q. You grant that there is a cost incident to the handling of these credit cards?

A. Yes, sir.

Q. Do you not?

A. Yes, sir.

Q. If Respondent company elects to allocate all of its cost of handling all of the credit cards that arise out of the jobber business on the one hand, and elects to and does allocate that cost to the jobber business, and then over here on the other hand allocates all of the costs of 7351 those credit cards that arise out of the reseller channel to the reseller channels, and makes that division in a clear split; do you as an accountant regard that as unfair and improper accounting?

A. I do.

Mr. Austin: Judge—

Mr. Hanley: I wonder if we may have a recess or an adjournment as I previously suggested?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I would like to ask a couple of questions if I may.

Trial Examiner Ballinger: You may on the record.

Mr. Austin: Mr. Warmack, if we take account 208 as an example of an account which includes an aggregate expense, how is the aggregate expense in account 208 allocated by the Respondent between tank wagon reseller and tank wagon consumer or other methods channels in its regular accounting procedure on form 189?

The Witness: The expense therein referred to is allo-ated to the various channels on a gallonage basis, excluding direct shipment gallonage.

Mr. Austin: In your opinion, is that a correct method of allocation that I am speaking about?

7352 The Witness: In the regular accounting procedure, Mr. Austin, I have no objection to how they allocate it n the aggregate, as you speak of it, or any part thereof. I lo not think it is correct, however. I think that the consumer business is concerned with credit cards. That is my opinion.

Mr. Austin: Well, in your opinion, is the method of allocating correct as to tank wagon reseller and other methods channel?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I withdraw the question.

The Witness: I do not—

Mr. Austin: I will just ask you how in your opinion should the credit card expense be allocated on Respondent's Exhibit 101 between the six petroleum product channels?

The Witness: On the basis of the gallonages shown in the tankwagon reseller, other methods, jobber naphtha and gasoline, jobber other products—in the absence of a more detailed study—of the gallonage as shown in those four channels. I know of no other basis that it could be allocated on.

Mr. Hanley: Have you finished?

Mr. Austin: Yes.

By Mr. Hanley:

7353 Q. That means that you would put it on the same basis as account 075—Advertising? Is that so?

A. Yes, sir. And it would afford no cost differential. This is a class of expense that affords no cost differential.

Mr. Hanley: If your Honor please, I now move that we recess at this time to reconvene tomorrow morning, Tuesday, July 28, 1942, in this same room.

(Witness temporarily excused.)

Trial Examiner Ballinger: The motion is granted.

And now, at 4:30 p. m., the hearing stands adjourned to be reconvened at 9:30 a. m., July 28, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 4:30 p. m., July 27, 1942, the hearing in the above-entitled matter was adjourned.)

7354

Room 532, Federal Trade
Commission Building,
Washington, D. C.
Tuesday, July 28, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Illinois), appearing for the Respondent.

7355

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing of Docket No. 4389, case entitled "In the Matter of Standard Oil Company (Indiana)" is reconvened pursuant to notice at 9:30 a. m., July 28, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held at the same place on July 27, 1942.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Hanley.

Q. Mr. Warmack, there seems to be some confusion in respect of the mechanical method employed by oil companies in handling these credit cards.

I would like to clarify that, if you will, please:

A. Yes, sir.

Q. Is it your understanding that various companies have

MICRO CARD
TRADE MARK ®

328

-57

MATTHEW BENDER & COMPANY
MB

a reciprocal plan whereby they honor each other's credit cards?

A. That is not my understanding. No.

Q. What is your understanding?

7356 A. It is my understanding that companies of a group, such as the Standard Oil Company and its affiliated companies may have such a reciprocal arrangement, in view of the fact that on the back of the copy of the credit card which is in the record it states, I believe, that this record will show, the names of the companies where the cards—your card will be honored.

It is my understanding that those companies have some degree of affiliation with your company.

Q. I do not understand what you mean by "affiliation," Mr. Warmack. Will you please explain that?

Mr. Austin: I object to the question. The question of affiliation is unimportant. Now it is only a question of what the companies do or do not do in connection with honoring credit cards. This matter of affiliation, it seems to me, is immaterial.

Mr. Hanley: Your Honor, I am inclined to agree with counsel in his statement just made. I asked the question because of the first answer given by the witness. The fact is that there is no affiliation between many of the companies who honor each other's credit cards.

Apparently, the witness is not aware of that fact.

The Witness: Well, I naturally assumed that the companies listed on the back of your credit cards were affiliated companies. If they are not, then they are not.

By Mr. Hanley:

7357 Q. Well, Mr. Warmack, let us apply the suggestion of your own counsel in respect of that.

Is it your understanding that as between the companies listed on the credit card, entirely apart from questions of affiliation, there is a reciprocal arrangement between those companies whereby the one company honors the credit card of the other company?

A. Yes, sir. Those are the names of the companies on the backs of your credit cards. Some of those companies, I am sure, are affiliated with your company,—but that is—

Q. (Interposing.) Well, that may be, but as your counsel has said that is unimportant, and you may disregard that.

A. I see.

Trial Examiner Ballinger: Well, do each one of the companies listed on the back of the credit card issue like credit cards?

The Witness: I do not know. I assume they do, Judge. I do not know.

By Mr. Hanley:

Q. Mr. Warmack, assuming that the Standard Oil Company (Indiana), the respondent here, issues a credit card and suppose the holder of that credit card purchases gasoline in the State of California on some tour that he may be making.

A. Yes, sir.

7358 Q. What is your understanding of the mechanics of what happens in connection with this credit purchase?

A. Well, I have not made a study of that: I can give you my understanding or my assumption. It is my understanding that if this purchaser of petroleum products holds this credit card and makes a purchase in California and signs a ticket for that purchase at a station of a reseller station operator, that the reseller station operator turns in that card to his supplier, and that it ultimately finds its way back to the office of the company issuing that card. The collection is then made by such company issuing the card.

Q. Which would be in this instance, Standard Oil Company (Indiana)?

A. Yes, sir. If it had issued the card.

Q. Supposing, Mr. Warmack, the Standard Oil Company of California issues a card. Supposing that the holder of that card buys gasoline one day at some station in Detroit supplied through the regular reseller channel of the Respondent company. As a result of that transaction, there would be a ticket. Would there not?

A. It is my understanding that there would.

Q. That ticket would be handled by the Detroit office of the Respondent company? Would it not?

A. It would be turned in to them. That is my understanding.

7359 Q. And that then they would make the necessary bookkeeping entries, and give the local dealer the proper credit, as such, for the final collection with the Standard Oil Company of California?

A. It is my understanding that would be the transac tion. In many instances it would not be accounts with local dealers.

Q. Those credit cards?

A. I understood you to say that he would be given a local credit. It is my understanding that the local dealer turns it in for cash. There would be no account.

Q. The card that is given the local dealer has nothing to do with the credit card in such a case?

A. I answered your question. You said he gave credit. I understand it would be a cash transaction. There would be no credit.

Q. As between the company and the dealer?

A. Yes, sir.

Q. Is that your assumption?

A. Yes, sir.

Q. That has nothing to do with the holder of the credit card?

A. Not as far as the holder of the credit card is personally concerned.

Q. Is it true that it is ultimately billed by the company that issued the card?

A. That is my understanding.

Q. Supposing that the next day in Detroit that
7360 some credit card holder buys gasoline at one of the
jobber's stations handling the Standard Oil Company
products. What would be the mechanics of handling that
transaction?

A. It is my understanding that it would be handled in the same manner.

Q. Well, just what does that mean? What would happen?

A. Exactly the same thing as we just outlined in the other situation.

Q. Will you please outline it?

The Witness: Your Honor, must this repetition go on and on and on?

Trial Examiner Ballinger: Mr. Warmack, answer the question, unless there is an objection interposed by counsel for the Commission.

The Witness: It is my understanding that in the first place the holder of the credit card would issue or sign a ticket which would be picked up by the reseller station operator. The reseller station operator would, in turn, pass that ticket to his supplier. That would be one of the jobber stations or jobber customers in Detroit, unless it were one of the Ned's Stations, in which event Ned's would pass the card to the Standard Oil Company in Detroit.

In the case that it were one of the other jobbers, the jobber would pass it to the Standard Oil Company. The
Standard Oil Company would, in turn, forward the
7361 ticket through channels to the place where the card
was originally issued; and there the billing would be made. That is all an assumption. I do not know that to be a fact.

By Mr. Hanley:

Q. Just to summarize, Mr. Warmack, whether this credit card holder from California or Chicago or wherever he may be from, buys gasoline from a reseller station handling Standard Oil Company products in Detroit, or whether he buys it from a jobber station handling Standard Oil Company products in Detroit, the tickets get into the Detroit office of the Respondent company, and the accounting and bookkeeping work is done of those tickets in that office. Is that true?

A. That is my understanding.

Q. Now, I think we can get into the detail of that a little more in the future, Mr. Warmack.

A. Yes.

Q. I would like first now to refer you to Commission's Exhibit 132.

A. Yes.

(The witness examines Commission's Exhibit 132.)

Q. We have discussed account 208. Now, I want to direct your attention particularly to account 551.

A. Yes?

Q. You have listed on Commission's Exhibit 132 this
account 511 having to do with expense collecting bad
7362 debts current year, amounting to $1.50 for the full
year. That was found to be wholly applicable to credit card business.

Was that amount allocated between tank wagon and jobber channels on the basis of credit sales tickets received from each class of customers?

A. I can look that up in the record.

Q. Please do so.

A. (The witness examines records.)

The Witness: May I have the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: That is my understanding. Yes, sir.

By Mr. Hanley:

Q. Referring you now to the same Exhibit 132, account 512, being expense collecting bad debts prior years amounting to $2.50 for the year. How was that allocated between tank wagon and jobber customers?

A. It is my understanding it was allocated on the same basis as account 511.

Q. That is to say, on proportion of tickets handled?

A. Yes, sir.

Q. Again referring to the same exhibit, account 510, losses by bad debts. That account shows the total amount identified to credit card business of $3,109.83. Is that correct?

A. Yes, sir.

7363 Q. Did Respondent's accountants in this cost study, as reflected by Respondent's Exhibit 100, analyze each voucher to ascertain this amount?

A. I do not know.

Q. Did you make any study of that when you were in Detroit?

A. Yes, sir. I inquired. I could not know if they studied each voucher.

Q. Did you satisfy yourself as to the facts in connection with it?

A. That they studied each voucher?

Q. Yes, sir.

A. I was satisfied with the figures that they reported out. But I did not make any minute study of each voucher myself.

Q. Do you question the results?

A. No.

Q. How did the accountants of the Respondent allocate that amount between tank wagon and jobber customers?

A. (Witness examines document.)

The Witness: That information is shown at page 57 of Respondent's Exhibit 100. Would you like it read into the record?

By Mr. Hanley:

Q. No. There is no occasion for you reading an exhibit into the record; that is already in the record, Mr. Warmack.

I am asking you for your knowledge.

7364 A. I do not have any knowledge other than what is on this page.

Q. Whatever the source may be, will you please give us the benefit of your own knowledge?

A. I have no knowledge except what is on this page. And I doubt if I could say it as well as what is on this page. The page speaks for itself.

Trial Examiner Ballinger: Read the question.

(The reporter read the question and answer.)

Trial Examiner Ballinger: That can be answered very easily. How did they allocate it?

The Witness: Your Honor, they have got into it a big long description of how. I will be glad to paraphrase it the best I can. I cannot come out and make just one little word and explain it.

Trial Examiner Ballinger: Mr. Warmack, without any explanation, make the best statement that you are capable of, on the record.

The Witness: May I read this page, your Honor?

Trial Examiner Ballinger: Not into the record.

The Witness: Oh, no, indeed. I must inform myself on it.

Trial Examiner Ballinger: Certainly.

(The witness reads the page.)

The Witness: Your Honor, this is a very compli-

7365 cated situation, I would just have to—

Trial Examiner Ballinger: Did they make their separation in exactly the same basis?

The Witness: Yes, sir. I copied their separation.

By Mr. Hanley:

Q. There was a separation on the basis of tickets, was there not, Mr. Warmack; that is to say, number of sales tickets handled from the different classes of customers?

A. That is my understanding, Judge Hanley, but that is elaborated on materially here in Respondent's Exhibit 100. I think, essentially, that is what was done.

Q. Well, of course, Mr. Warmack, I am assuming, and if I am wrong please correct me, that inasmuch as you have seen fit to criticize the method of handling this account on the part of Respondents that you are familiar with the methods used by the Respondent in making these cost separations on credit card expense.

Am I wrong about that?

7366 A. In the first place, I do not question the handling of these accounts in the company's regular accounting procedure.

In the second place, I do not assume to remember all of these endless separations that were made. The records show them, and I have studied them.

Q. Well, my questions, Mr. Warmack, are not going primarily to the method of separation used in the ordinary accounting of the Respondent company. They go primarily now to this cost study, namely, the separation as between the reseller channel on Respondent's Exhibit 100, and the jobber channel on Respondent's Exhibit 101, and the methods used by the Respondent in allocating cost of handling this class of credit card business as between the one class of customers distinguished from the other.

Now, did you not make a study of that?

A. Surely. I reviewed what are in your exhibits, Respondent's Exhibits 99 and 100. That was about the extent of my study as far as determining how you made the separations.

Q. Well, now, are you able to answer definitely, then, whether or not that separation was made as to cost, based on the effort and time expended and expenses incurred in handling the tickets originating from the reseller channel on the one hand, and originating from the jobber channel on the other hand?

A. No sir. Not of my own knowledge. I accept

7367 what you have in these reports, Judge Hanley.

Q. I do not understand what you mean, Mr. Warmack.

A. Yes?

Q. I wish you would please try to answer the question. I do not know where you got your knowledge, but if you have a knowledge, will you please answer the question?

A. Well, Judge Hanley, I have answered the question and I have stated—

Trial Examiner Ballinger: (Interposing.) One moment. Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: Read the answer.

(The reporter read the answer.)

Trial Examiner Ballinger: The witness has apparently answered your question.

By Mr. Hanley:

Q. Did you

Mr. Hanley: May I understand, if your Honor please, from the witness whether or not he subscribes to the fact that this cost study was made by separating on the basis of tickets?

By Mr. Hanley:

Q. Is that your understanding?

A. That is my understanding, Judge Hanley.

7368 Q. Now, will you please look at account 400 on Commission's Exhibit 132, and tell the Court the amount of bad debts collected written off prior years and assignable to credit cards?

A. $70.82.

Q. Did the Respondent's accountants analyze each of the vouchers to ascertain this income amount?

A. I do not know.

Q. Do you question that figure?

A. No, sir.

Q. Tell the Court, please, how Respondent's accountants allocated that amount between tank wagon and jobber customers?

A. It is my assumption that they are separated on the same basis that they separated the account just above it, account 510, but I can look it up in these records.

Q. I will have to ask you to do so, if you do not have it in mind, Mr. Warmack.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: That information is shown, Mr. Hanley, at page 57 of Respondent's Exhibit 100. That goes into the detail of the mechanics employed by the Respondent's accountants in making the separation.

Trial Examiner Ballinger: And the statement 7369 there was accepted by you?

The Witness: Surely. I did not go into these things; that is, to the extent of examining those with a fine tooth comb, Judge; I accepted their figures.

By Mr. Hanley:

Q. Referring you, Mr. Warmack, to accounts 202 and 204, 206, 200, 201. Is it your understanding that the separation was made by Respondent's accountants between the reseller channel and the jobber channel on identically the same method, namely, effort and time expended in handling tickets originating from credit card business?

A. That is my understanding, Judge. There may be some tiny division. I do not know. These records will show it, but it is my understanding generally that that was done.

Q. Therefore, if I understand you correctly, the Respondent's accountants first isolated the cost of this particular class of sales for each of the accounts mentioned. And then split that expense between tank wagon customers and jobber customers on the basis of number of sales tickets? Is that correct?

A. Yes, sir. That is my understanding. There may have been some part of some of the expenses that the accountants may have assigned directly, but I do not question that, nor your statement. I think it is essentially correct.

Q. Each of these accounts of expense items have to do with the handling of the records incident to this type 7370 of credit sale? Do they not?

A. That is my understanding. I might elaborate on that just a little bit. It is my understanding that for credit reports you pay for those credit reports.

It is my understanding, also, that bad debts recovered would not necessarily represent particularly that record. (The witness indicates the document.)

They would represent money received. With respect to bad debt losses, which is one of the largest items that that represents actual amounts that the company is enabled to recover, or expects to be enable to recover for those things, that would represent money received.

In addition to that manner of expense it is my understanding that the remaining portion of the expense for the most part has to do with the keeping of records on those particular credit cards.

Trial Examiner Ballinger: Items of account?

The Witness: Credit cards, Judge.

By Mr. Handley:

Q. Yes.

A. The largest item on the sheet is credit reports $11,900 plus as against $30,700 plus dollars.

Q. Does the cost of maintaining accounting reports such as checking the accuracy of the price, filing the tickets, sum

nation of tickets to a monthly total, and billing of
7371 customers, and so forth, tend to vary with the number of tickets handled?

A. It is my understanding that it should.

Q. Is it not a fact, Mr. Warmack, that the collecting and filing of tickets having a value of five dollars is just as easy as one for one dollar?

A. I should assume that, Judge Hanley.

Q. Having analyzed these various accounts, Mr. Warmack, is it not true that the Respondent's accountants' method of handling credit card accounts is based upon the sales ticket filing system?

A. Not in its regular accounting procedure. It is my understanding that it is not. But in connection with this cost study that was made out of which came Respondent's Exhibits 100 and 101, it is my understanding that that is substantially correct.

Q. What is the system regularly in vogue in the regular accounting system in the Respondent company?

A. In the account 200, are you speaking, Judge Hanley?

Q. Just the method of the Respondent from an accounting standpoint in handling credit card accounts. Is it not done on the basis of the sales tickets filing system just regularly, entirely apart from this particular study?

A. It is my understanding that you make no provision in your regular accounting work for the segregation, but I will be glad to look that up. You may.

7372 Q. I am not interested in amounts, Mr. Warmack.

A. Yes.

Q. If you know the method, will you please tell me? Is it not the system in use by the Respondent in its regular accounting system to handle these credit card accounts on a ticket filing basis—

A. (Interposing.) I should be glad—

Q. —and then billing the customers monthly or periodically on the basis of tickets received evidencing his purchases?

A. Judge, I will be glad to answer your question, but I do not know exactly that I understand it. I was under the impression that you meant at the outset the allocation in your regular accounting procedure of the time spent by your office personnel in Detroit in connection with this manner of business. But I am afraid I misunderstood it. I wonder if you would explain it just a little further for me.

Q. I will try to, Mr. Warmack. I am sorry I am not making myself more clear to you.

Without reference to any allocation of time in the regular accounting procedure of the Respondent company, is it not true that the method of handling of credit card customers is on the basis of a ticket filing system, and that the effort expended by the Respondent company's accounting forces has to do with filing of these tickets, making a summation of them at the end of the month, and billing 7373 the customer and receiving his remittance, and maintaining a duplicate copy, and maintaining just whatever records are necessary to complete that credit transaction?

A. I should certainly assume that that is correct, Judge Hanley. I did not, of course, check into the actual procedure employed; that is, the mechanics employed in the handling of these credit cards at any time.

Q. Is it not a fact that the credit card customers in Detroit did not use their card privileges and jobber outlets to as great a proportion as was the jobbers purchases of gasoline to tank wagon reseller volume?

A. I am sure I have no knowledge with respect to that point.

Q. Did you make any investigation into the question at all?

A. I have read the record here, and have heard it testified, I believe, by witnesses of the Respondent that—

Trial Examiner Ballinger: (Interposing.) The question is: Did you make any investigation yourself of the matter?

The Witness: No, sir. I had no occasion to.

By Mr. Hanley:

Q. Do you know why businesses encourage their customers to establish a line of credit with their particular organization?

A. I have a general knowledge of those things, 7374 but not specifically in this case.

Q. Well, what is your idea, Mr. Warmack, on that subject—

A. (Interposing.) I do—

Q. —as to why these credit cards are used?

A. They are used for the purpose of cinching the user of the company's products, so to speak, to hold the users and keep them from purchasing petroleum products from other petroleum companies, so to speak. That is probably a rough explanation, but it is my feeling about it.

Q. Now, assuming that two distributors selling the Respondent's products, each having certain credit buyers, and one of these distributors has ample capital to finance the credit he extends, and the other does not, which would recommend to his customers the use of a credit card account with the Respondent supplying company?

The Witness: May I have that question, your Honor?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Certainly, I do not know. I could only give you a guess. I would be happy to guess, if you want that.

By Mr. Hanley:

Q. I want your best judgment, Mr. Warmack, as an accountant, irrespective of upon what it is based.

Mr. Austin: I object to the question, your Honor. 7375 I think it is too speculative, and that it would permit an answer which would have no evidentiary value, only.

Trial Examiner Ballinger: Well, unless the witness has some general knowledge derived from an examination of accounts and investigation of the business, and if he has not, he may so state.

The Witness: Your Honor, I—the only thing I could do here would be to guess.

I know people, I know instances where a man has very little capital, still he has credit accounts, and he is glad to have credit accounts. He arranges for his own financing.

Of course, I know of other instances where people have considerable capital and their businesses are well capitalized, and they do not go after certain classes of credit business. That is only conjecture. That is the only way I can answer.

By Mr. Hanley:

Directing your attention particularly to the situation in Detroit in this case, Mr. Warmack: Is it not true that in the Detroit market between the jobbers on the one hand that they carry a great deal of the financial credit load

A. Of whom?

Q. The jobbers on the one hand carry a great deal of their own credit load to customers as distinguished 7376 from the ordinary reseller service station operators on the other hand?

A. Well,—

Trial Examiner Ballinger: (Interposing.) Did you investigate the matter?

The Witness: No, sir. I certainly should assume that the jobbers would carry a certain credit load, but it is my understanding that gasoline is sold for cash, at least for the most part, to the reseller stations.

By Mr. Hanley:

Q. I am referring, Mr. Warmack, not to the arrangement between the supplying company and the reseller customer. I am referring to the consumer customer who is buying gasoline at a service station—the kind of a fellow who would be using a credit card, now.

A. That is, the driver of an automobile?

Q. Yes.

A. Yes?

Q. Now, with that explanation, do you have any knowledge that you think entitles you to answer the question as to whether the jobbers in Detroit carry a substantial part of their own credit extensions as distinguished from the reseller group of operators who are dependent upon the company, supplying company, to issue credit cards and carry the credit load if credit is extended to the consuming customers?

A. I—

7377 Trial Examiner Ballinger: Now, Mr. Warmack, if you have any knowledge which will enable you to answer, say, if your information is derived from reliable sources that will enable you to answer the question, proceed to do so.

The Witness: Judge, I know no more on that point than what is in these records.

From a general standpoint, however, I may state it is my understanding that by and large the automobile user pays cash for his gasoline; that there is not only—

Strike that.

Mr. Hanley: No, no.

The Witness: That is, the credit card activity of these companies is carried on to hold the users to a certain product. I am sure I do not have any credit card and I do not now single man who does have a credit card.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Come to order. You may proceed, Judge Hanley.

By Mr. Hanley:

Q. Mr. Warmack, are you familiar with the ratio of flow of credit card business in the tank wagon branch of Respondent's business as distinguished from the jobber business?

A. Judge, I am sorry, I did not hear the question.

Trial Examiner Ballinger: Do you understand 7378 the question?

The Witness: Yes, sir. I believe so. I should like to inquire if you mean tickets—represented by tickets—

By Mr. Hanley:

Q. Yes, by volume of tickets.

A. Yes, sir. That is shown in Respondent's Exhibit 100. I am familiar with that.

Q. I have been using the term "reseller outlets" as distinguished from "jobber outlets," Mr. Warmack, in my questions. I think you have yourself understood tank wagon business as distinguished from jobber business?

A. Yes, sir.

Q. You have so understood? Have you not?

A. Yes, sir. That has been my understanding, Judge Hanley.

Q. Now, just assuming, Mr. Warmack, that a credit card holder would normally purchase more frequently at stations served by tank wagon from the Respondent company as distinguished from purchases made by the same ticket or credit card holder at jobber supplied stations.

Would not that fact enhance the cost of the Respondent company in handling credit accounts as assignable to tank wagon sales?

A. I do not think that it should, necessarily.

Q. I do not mean ticket for ticket, Mr. Warmack.

Supposing that it is true—and I ask you if you 7379 do not think it is true from your studies in Detroit that a credit card holder in Detroit would normally buy more gasoline, or buy more frequently at stations served by regular tank wagon from the Respondent company than he would buy from stations served by the jobbers?

A. Of course, I could have no knowledge of that any more than what is shown in these records.

Trial Examiner Ballinger: Well, is it shown in the records?

The Witness: Yes, sir.

Trial Examiner Ballinger: Then can you answer the question?

The Witness: I can tell—

Trial Examiner Ballinger: Based upon what the records show?

The Witness: I can tell counsel what the records show. I do not see the number of tickets or the volume, Judge Hanley, here as between tank wagon reseller stations or jobber stations.

(Witness examines documents.)

By Mr. Hanley:

Q. Well, you are not at the moment, then, Mr. Warmack, familiar with the flow of tickets through the company's offices arising out of credit card purchases?

A. I do not have the information in my mind; no, sir.

7380 Q. You have stated, Mr. Warmack, that in your understanding the allocation of expense to credit card business in these various accounts which have been called to your attention and which are outlined on Commission's Exhibit 132 was made on the basis of time expended, effort, and actual out-of-pocket cost.

From an accounting standpoint, do you not regard that as a fair and proper method of allocation?

A. For the purpose, might I inquire, of determining a cost differential?

Q. For any purpose to determine cost of doing business.

A. For the purpose of determining a cost differential, it is my opinion that such a separation would be of no value.

In my opinion, this class of expense is a class of expense that should be separated on the basis of gallonage. That would not afford a cost differential. If it is the company's desire to make such a refinement or go to such a refinement in its endeavor to separate costs which it styles "credit card cost" for any purposes, I have no objection to that.

My objection goes to this one point that this class of expense, in my opinion, is not an expense that can be separated in any way whatsoever, which would afford a cost differential. The only and most equitable way for the purpose of determining a cost differential would
7381 be the separation on the basis of the gallonages involved. Naturally, that would not afford a cost differential. That is my feeling about the matter.

Q. I am going to ask now, Mr. Warmack, one summarizing question.

The Witness: (Interposing.) If my answer to one of those other questions—I find that on page 59—excuse me for interposing.

Trial Examiner Ballinger: Page 59 of what?

The Witness: Page 59 of Respondent's Exhibit 100. There is shown a group of percentages, and those percentages range from 10.07 per cent to 14.40 per cent applicable to the separate accounts shown on page 59 and applicable to the jobber business.

If those percentages are to represent the volume of the credit card sales through jobbers as compared with volume of credit card sales through the regular tank wagon resellers, why, naturally, the volume through the resellers would be considerably greater than the volume of credit card business through jobbers. I believe that answers your other question, Judge Hanley.

By Mr. Hanley:

Q. I do not know. Do you know? Is that what it means?

A. That was my understanding.

Trial Examiner Ballinger: Well was that your
7382 intent?

The Witness: Yes, sir. To give an answer to the other question.

By Mr. Hanley:

Q. Now, Mr. Warmack, have you testified that you have made no particular study of this credit card situation or the methods used by the Respondent in its handling of the credit card accounts, or of the method of the Respondent in handling tickets that originate from credit card purchases and that you have not studied the methods by which Respondent allocates the charges to various accounts, many of which have been called to your attention, and further, that you do not understand and have not studied the relative flow of business arising out of credit cards through the jobber-served stations as distinguished from the company-served tank wagon reseller stations.

All of that being true, I wish you would please just tell the Court as briefly as you can, on what basis and theory you assume to criticize the cost separations made by the Respondent in connection with the credit card expense.

Mr. Austin: Now, your Honor, that has been answered so many times.

Mr. Hanley: I just want it to go on—

Mr. Austin: (Interposing.) The witness has said—

Mr. Hanley: it may be that he feels that he has
7383 already answered the question in a former statement
that he made that he does not think that that has any place in the cost study at all, and if that is his answer, that is entirely satisfactory.

Trial Examiner Ballinger: Do you desire to amplify your previous statement in connection with this matter?

The Witness: No, sir. I think my previous statement covers the situation. I am not entirely in agreement with what was just said by Judge Hanley to the effect that I have made no studies of these various things.

I have made considerable studies, but I have not studied the underlying records of the company which support the information as set forth in Respondent's Exhibit 99 and Respondent's Exhibit 100, and possibly Respondent's Exhibit 101.

Trial Examiner Ballinger: Your conclusions are based solely upon the statements that have been submitted by Respondent.

The Witness: Yes, sir, and the very nature of this class of expense.

By Mr. Hanley:

Q. Adverting now, Mr. Warmack, to account 075 advertising.

A. Yes.

Q. You may want to refer to the record.

7384 A. Yes.

Q. It is page 6810, if you desire to do so.

A. Yes, sir.

Mr. Austin: What is that page?
Mr. Hanley: 6810.

By Mr. Hanley:

Q. You have stated in your testimony, as I recall, as follows:

"The major portion of costs included in this account—" referring to 075—"is for advertising for consumer acceptance, such as newspaper advertising, poster advertising, and direct mail, and so forth, which in my opinion should be allocated on the basis of gallonage sold through reseller stations, whether served by Respondent directly or indirectly. The purpose of this advertising is to create a demand in the mind of the public for the Respondent's products, and Respondent has no control over the consumer; that is, a driver of an automobile as to where he elects, or what station he elects to buy Standard Oil gasoline from. No part of this advertising cost for consumer acceptance has been assigned to jobber, naphtha and gasoline column in Respondent's Exhibit 101, which, in my opinion, is erroneous and unsound from the standpoint of sound accounting practice and procedure."

7385 Q. Do you recall that testimony, Mr. Warmack?
A. Yes, sir.

Q. Is that your present opinion?
A. Yes, sir.

Q. While you were in Detroit, did you see any of the advertisements of the four jobbers involved in this action?
A. I do not recall that I did, Judge Hanley.

Q. Did you make any investigation?
A. With respect to what?

Q. Whether or not those jobbers' advertising, and how they advertised, and under what brand names they advertised, and as to what extent they advertised?
A. I have seen several of their advertising cuts, some of which I believe are in this record; that is the extent of what I know about the newspaper advertising performed by the jobbers.

Q. Did you hear some of them testify in this case, in connection with the amount of advertising they did?
A. Yes, sir. I did.

Q. Is it not a fact, that you are familiar to a certain degree at least with the amount of advertising done by the several jobbers in Detroit?
A. Yes, sir.

Q. Did you ascertain whether they advertised Respondent's products under Respondent's brand name?

7386 A. Did I ascertain? Did you say?

Q. Yes, sir.

A. I saw only a newspaper cut which had on it a small crown, as I understand it, representing the Red Crown, very inconspicuously displayed among various other advertised products.

Q. Mr. Warmack, you know it to be a fact that the jobbers have been in business in Detroit for a number of years, and the record shows, does it not, that they have been purchasing Standard Oil Company products for a number of years, and their testimony shows that they have been advertising at their expense in newspapers, through the medium of billboards, and through the medium of radio?

A. Yes, sir.

Q. For a number of years?

A. It is my understanding.

Q. Now, that being your understanding, and is it your testimony that all you know about what their advertising of Respondent's company's branded name products is, is this one little cut that you saw with an insignificant crown? Is that your statement on the record as to what you know?

A. That is the only thing I know of my own knowledge. I have read this record with respect to these things, but of my own knowledge; that is all I know. I may have seen the crown more than once.

7387 Q. What is your understanding as to the fact as to whether or not these jobbers have over the past years, and presently, advertised their our businesses and advertised the Respondent's products under the Respondent's brand names?

Mr. Austin: Your Honor, I object to questions regarding the advertising done by the jobbers.

I did not question the witness on direct examination regarding any advertising done by the jobbers. The testimony which Respondent offered in Detroit in that regard was not admitted. And to the extent that such testimony was admitted, it was later stricken by your Honor on motion of counsel for the Commission. Therefore, I do not believe that any questions regarding the advertising done by jobbers for the purpose of claiming reciprocal benefit, should be permitted on this cross examination.

Mr. Hanley: If your Honor please, if your Honor has any notion at all of ruling adversely to the Respondent on that objection, I desire to be heard, your Honor.

Trial Examiner Ballinger: The Examiner will hear you in any event.

Mr. Hanley: Your Honor did strike certain testimony in Detroit in connection with the reciprocal advantage accruable to the Respondent by reason of jobber advertising. That is a matter which we are forced to go to the Commission with. We shall do so.
7388 It is of the utmost importance, in our view, in this litigation.

I think that this witness as an accounting witness, who has condemned our allocation of account 075, is entitled to be examined by the Respondent as to his views as an accountant, and as an expert witness, advanced here by the Commission as to the effect and influence of this reciprocal advertising.

He has made, and I propose to prove that he has made statements to the effect that he believes that there is a reciprocal benefit. It seems to me, if your Honor please, that it would be most unfair to Respondent to permit this record to remain silent in connection with this reciprocal advertising feature.

Now, as to whether or not the Commission agrees with Mr. Austin or agrees with your Honor's ruling in Detroit; that is something else.

But the Respondent, I earnestly submit to your Honor, is entitled to have in the record the candid judgment of this witness as to what he thinks, as an accountant, is the effect of this reciprocal advertising.

It just seems, your Honor, that it makes good sense that if the witness is right in his first premise, that this is just all consumer advertising, then it must follow, it just must follow that the advertising done by these
7389 jobbers has a reciprocal benefit.

Judge, I just think it is devastating to the Respondent if your Honor keeps this out of the record. I just cannot understand that.

Trial Examiner Ballinger: This is cross examination, Judge.

Mr. Hanley: Yes, sir. Certainly.

Trial Examiner Ballinger: It was not touched upon in direct examination.

Mr. Hanley: The whole advertising question was raised. The whole advertising question regarding this was gone into completely and thoroughly by Mr. Austin on his direct examination. This witness has stricken the entire account 075. He has condemned it to the last penny. And he has even taken out point-of-sale advertising which he admits may be a proper charge, but he has taken it out anyway.

Trial Examiner Ballinger: But it was not touched upon on direct examination.

Mr. Hanley: Oh, but it was, your Honor. I am sorry, but I am sure that it was.

Mr. Austin: No, your Honor, there was no direct testimony regarding any jobber advertising. Now, the situation is this: The witness testified regarding Respondent's advertising expenses. His testimony was limited
to that. This other question is an entirely separate
7390 one as to whether the Respondent is entitled to a
set-off against that cost. That has nothing to do with
the allocation of the cost, itself.

That is all he testified to.

Mr. Hanley: That is an argument for the Commission, Judge.

That has nothing to do with the propriety of asking this witness questions. That is an argument for the Commission, and we will meet that when the issue arises. We are now entitled to interrogate this witness on his judgment as an accountant.

Trial Examiner Ballinger: Judge, so that the record may be complete, and that you may be completely protected when the case goes to the Commission, the Examiner overrules the objection, reserving to counsel for the Commission, the right to renew the objection and a motion to strike, at the conclusion of the testimony.

And it is the present intention of the Examiner to sustain the motion. But, if you think that is important and that it should be before the Commission, the Examiner will afford you the benefit of having interrogated the witness and having it in the record.

Mr. Hanley: Well, Judge Ballinger, I am just deeply appreciative of that ruling, because I do regard it as
important that it be in the record whatever view
7391 your Honor and ultimately the Commission expresses
as to its relevancy.

Trial Examiner Ballinger: Proceed.

Mr. Austin: Well, if your Honor please, another point that when your Honor struck the testimony regarding jobber advertising and reciprocal benefits in Detroit, it was not on the theory that there was no reciprocal benefit. It was on the theory that the reciprocal benefits had not been proved, and no standard of proof had been laid; secondly, even if it were proved it was not something that the Respondent could take advantage of.

Trial Examiner Ballinger: Exceptions were taken to all of the Examiner's ruling. If the Commission should reverse the Examiner on his rulings in Detroit and also conclude that this is proper testimony to be considered in this case, why, it should all be before the Commission. While the Examiner does not think that it is proper, the Examiner will allow it.

Mr. Austin: On the question as to whether it is proper cross-examination, I move, your Honor, that if counsel for the Respondent desires to question this witness on advertising done by jobbers, since that subject was not touched on on direct examination, then the Respondent be required to make Mr. Warmack his witness.

Mr. Hanley: Oh, I was going to do that a few moments ago, but the Examiner has made his ruling. He has 7392 indicated he is against me, and probably is going to strike this testimony.

Trial Examiner Ballinger: In the present situation, the Examiner does not think it will make any large difference whether the witness was the witness of the Commission or a witness of the Respondent.

Proceed.

Read the question.

(The reporter read the question as follows:

"Q. What is your understanding as to the fact as to whether or not the jobbers have over the past years, and presently, advertised their own businesses and advertised the Respondent's products under the Respondent's brand names?")

The Witness: It is my understanding from this record that such has been the case; that is, the advertising of this company's products and other company's products all in the same newspaper advertisment, if that is what you are speaking of, Judge.

By Mr. Hanley:

Q. All kinds of advertising, Mr. Warmack?

A. Well, I—

Q. (Interposing.) Whether it should be newspaper, or radio, or any other type of advertising?

A. I should assume so.

7393 Q. I believe you have—

Mr. Austin: (Interposing.) Your Honor, I want to interrupt here. The witness has frequently said what he assumed.

Now, on this kind of question I request the witness to make no assumption, and that only what he knows of his own knowledge should he testify to. I do not believe, as long as he has not testified on this subject, that his assumptions are material.

Trial Examiner Ballinger: The Examiner does not care to assume the responsibility of stopping the witness heretofore, no objection on part of counsel having been interposed, and the Examiner has allowed the witness to proceed with assumptious. From now on, Mr. Warmack, you will testify only relative to those maters of which you have either personal knowledge or that you are sufficiently satisfied from your examination of the records to be the truth.

By Mr. Hanley:

Q. Did you personally call at varions of the Ned's Stores when you were in Detroit, Mr. Warmack?

A. No, sir. I never call at any one of them.

Q. But did you ever see any one of them?

A. Yes, sir.

Q. Do you know what kind of products they sell?

A. Not of my own knowledge; no, sir.

7394 Q. Do you think—

A. Pardon me?

Q. Did you think it was a matter of any importance that you should know, in view of the assignment that you had in Detroit last spring?

A. I did not.

Q. Do you know how much gasoline they sell annually?

A. Not of my own knowledge.

Q. Do you know of anything that developed in the course of any of your studies?

A. I may be able to look it up in these records, Judge Hanley. I am sure I can look it up for the year 1937.

Q. Well, suppose the year 1940, Mr. Warmack, the year that Respondent's Exhibit 101 centers upon. Have you any ideas as to the approximate amount?

A. No, sir.

Q. No ideas at all?

A. None at all. The records will show if it is. I cannot keep that information in my head; not all of it.

Trial Examiner Ballinger: That has been fully established heretofore, and it appears in the record.

By Mr. Hanley:

Q. Well, do you know whether or not it was one gallon or four million, Mr. Warmack? Let us try to get along about this thing.

7395 A. Well, the record—let the record show and speak for itself. I will look it up for you if you want it.

Q. I am not interested in the exact gallonage. I just want to know if your have in mind that it was around four million or five million or whatever you had in mind, Mr. Warmack. It is a foundational question.

The Witness: Your Honor, may I look that up?

Trial Examiner Ballinger: You may.

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Is it your understanding that Ned's Auto Supply, through its Detroit outlets, handled approximately four million gallons of Respondent company's gasoline a year?

A. Judge Hanley, they handled that in 1937. I just do not have that in my mind what it handled in other years.

Q. Is it not your recollection of the record that you said you read, that there was an increase yearly in the amount handled by Ned's Service Stations?

A. Judge, I do not remember particularly any. I do not remember except 1937. I will accept your statement, whatever it is.

Q. Well, assume that it is approximately four million gallons of gasoline. Do you know that that organization also handled other petroleum products supplied 7396 by the Respondent company, such as lubricating oils and greases?

A. That is my understanding, Judge Hanley.

Q. What is your understanding as to other types of commodities handled by Ned's?

The Witness: Your Honor, can I answer that previous question as to the number of gallons? I have the average gallonage of Ned's shown on Respondent's Exhibit 53 for the years 1936 to 1940, inclusive.

Trial Examiner Ballinger: You may incorporate that in the record.

The Witness: The figures as shown—

Trial Examiner Ballinger: (Interposing.) Commencing with the year 1937.

The Witness: For the year 1937—these are actual gallons instead of averages, 4,240,500.

1938, 4,880,600.

1939, 4,336,308.

1940, 4,320,672.

Now, your Honor, if I may have that last question?

Trial Examiner Ballinger: Read the last question.

(The reporter read the following question:

"Q. What is your understanding as to other types of commodities handled by Ned's?")

7397 Trial Examiner Ballinger: Do you mean in addition to grease and oils?

Mr. Hanley: Just anything they sell in their stores, if this witness knows anything about it.

The Witness: Your Honor, I can state by understanding, but I cannot state of my own knowledge.

Trial Examiner Ballinger: State what your understanding is.

The Witness: Tires, various kinds of sports goods, garden tools, and things of that nature, Judge Hanley. I know there are many others but I do not know what they are now. I think one is electrical goods.

By Mr. Hanley:

Q. What is your understanding or knowledge of the fact as to whether or not they advertise all of these various commodities through the media of newspapers, radios, and billboards, and do so under brand names of the various products including the brand names of the Respondent company's petroleum derivatives?

A. It is my understanding that they do that, as explained earlier. I stated that I had seen one newspaper cut which had "Red Crown" on the newspaper cut displayed, but not displayed prominently.

Trial Examiner Ballinger: Did that appear in connection with that advertisement of the products?

The Witness: Yes, sir. The principal product on 7398 that cut was Firestone Tires, on the cut that I saw.

By Mr. Hanley:

Q. Is it not true that Ned's at least represents in Detroit that it is the largest central Firestone tire dealer in the world?

A. Oh, I certainly do not know that, Judge Hanley, but they have a sign of Firestone tires quite prominently displayed around their stations, or the station I drove by.

Q. Perhaps you did not understand me. And it is perhaps my fault. I did not ask you if they are the largest Firestone dealers in the world. I asked you if you knew it to be a fact that they represented themselves as being the largest Firestone tire distributors in the world.

Mr. Austin: I object to that question on the ground it is incompetent and irrelevant as to what Ned's claims he is as to Firestone sales.

Trial Examiner Ballinger: The objection is sustained.

By Mr. Hanley:

Q. Are you familiar with the advertising done by the Wayne Oil Company from the newspaper and billboard standpoint, Mr. Warmack?

A. No, sir.

Q. Did you make any investigation?

A. Not of that, no.

7399 Q. Did you learn anything from your reading of this record, Mr. Warmack?

A. Yes, I remember reading the record.

Q. What is that?

A. Oh, I would have to look it up.

Q. Do you remember anything about the so-called "Blue Ribbon Stations"?

A. I remember reading about that, I believe, but I do not have any recollection as to the extent of the advertising performed.

Q. Without going into any detail as to the extent of it, do you recall as a fact that the Wayne Oil Company does have an advertising program centered around the so-called "Blue Ribbon Stations"?

A. That is my understanding, Judge Hanley.

Q. Did you see the large neonized billboards maintained by Ned's advertising Red Crown gasoline?

A. I am not positive that I did see that sign exactly. I saw all of the neon signs which were lighted at night, at least one or more of the Ned's Service Stations. The only sign that I can remember seeing was the Firestone sign.

Q. Did you see the six large neon identification signs maintained by the Citron Kolb advertising of Standard products at their more prominently located outlets?

A. No, sir. I do not remember seeing any of those stations but I may have seen them, but I do not remem-
7400 ber seeing those stations.

Q. Did you not drive around and look at these places while you were in Detroit, Mr. Warmack?

A. Not as a part of this investigation; that is, the jobber station or stations of the preferred customers.

Q. You looked at one bulk plant?

A. I looked at three bulk plants.

Q. All right. Three bulk plants. Was that the extent of your physical examination of the operation of the company at Detroit while you were there?

A. What do you mean by "physical"?

Q. I mean going out and looking at the type of outlets, these jobber outlets, and seeing what they were doing, and how they were doing it.

Trial Examiner Ballinger: Judge, the witness, as the Examiner recalls it, has testified pretty fully with reference to exactly what he did, and what the investigations were that he made, and when he made them.

Mr. Hanley: I do not know, Judge, how intensively he made that, or may have gotten around and seen these things. I am trying to find out. Certainly, he was asked to do a job out there, and we are entitled to know how he did it, and what he did.

Trial Examiner Ballinger: Well, if he did not con-
7401 sider it necessary to go out and make a personal inspection of all of the different establishments, that is one thing.

Mr. Hanley: If he did not do it, he can say he did not do it. That is the fact that I am asking you for.

Trial Examiner Ballinger: Can you answer the question?

The Witness: May I hear the question?

(The reporter read the question as follows:

"Q. I mean going out and looking at the type of outlets, these jobber outlets, and seeing what they were doing, and how they were doing it.")

The Witness: I certainly did not include that as a part of my study; that is, looking at the jobber outlets.

By Mr. Hanley:

Q. Now, assume, Mr. Warmack, if you do not know, that there were these large neon signs maintained by Ned's, and by Citron Kolb advertising Standard Oil products. What is your judgment as an accountant, as to whether or not the Respondent would derive a benefit therefrom, from an advertising standpoint?

A. In my opinion, such signs having the Respondent's products prominently displayed, would naturally be an inducement to a driver of an automobile, if he needed gasoline, to drive in and fill up his tank. But, of course, that is a benefit to the station that sells the gasoline, and 7402 ultimately to the person who sells the station the gasoline, and all back along the line.

Trial Examiner Ballinger: Well, now, I understood your testimony to be that such advertisement displayed as the Judge has indicated resulted in some benefit to the Respondent company.

The Witness: I should think so.

It tells the car driver, the public at large, so to speak, this, your Honor—here is a petroleum product.

If the car driver elects to avail himself of the situation at hand, and drives in and fills up his tank, somebody is going to make a profit, somebody is going to be benefited. Naturally, the supplier is going to be benefited to some extent.

By Mr. Hanley:

Q. Would not the same thing be true in respect of newspaper and radio advertising, Mr. Warmack, as done by these jobbers?

Mr. Austin: I object to that question. It is too indefinite. I think there should be something more specific as to what type of advertising is alluded to.

Mr. Hanley: Perhaps, if you do not like my question, I will withdraw the question and reframe it, Mr. Austin.

Trial Examiner Ballinger: The question is withdrawn.

7403 By Mr. Hanley:

Q. Assuming that radio and newspaper advertising was done by these jobbers at their expense in which the brand names of the Respondent company's products were used. Would that not also result in a benefit, an advertising benefit to the Respondent company, in your judgment?

A. In my judgment, Judge Hanley, if that influences one single consumer of the product advertised to come in and buy that product, the supplier of that product would, to some extent, it might be small, it might be large, be benefited.

Q. You have testified that it is your understanding that Ned's handled a considerable line of commodities not related directly to petroleum products. You have said that you saw advertisements dealing with those outside products.

A. Yes, sir. Like Firestone tires.

Q. Yes?

A. Yes.

Q. Supposing that the advertisment which Ned's makes of their bicycles and sporting goods and Firestone tires and garden tools, and what not, induces people to come into Ned's stores and those people purchase petroleum derivatives supplied by the Respondent company. Would you regard that as a fact, that the Respondent company had derived some benefit from the advertising of Ned's, even though that advertising was not pointed directly to
7404 the brand products of the Respondent company?

A. Well, that is getting into economics a long ways. I think that the Respondent company is interested in selling its products and if one customer, irrespective of who he is, one who is a car driver drives into Ned's station or anybody else's station, and buys a gallon of gasoline, the Respondent company has benefited. Irrespective of why he drove in, he may have broken down up the road and may have driven in, there may have been a dozen different reasons why he drove in, and when he drove in and got the gallon of gasoline, or when he walked in and bought a gallon of gasoline, the Respondent company would have benefited, in my opinion.

Q. Did the Respondent company pay any part of the maintenance of these various neon signs, newspaper space charges, or radio advertising time utilized by any of the Respondent company's jobber customers?

A. Oh, I would have to look that up in these records.

Mr. Austin: Do you know?

The Witness: No, not of my own knowledge. No. I cannot remember.

By Mr. Hanley:

Q. Do you not know that it has been testified to, Mr. Warmack, that the Respondent company does not make any advertising allowances or payments of any kind to any of these jobbers?

Mr. Austin: I object to that question, your Honor. 7405 That is something the Respondent knows perfectly well and it is perfectly obvious that this witness cannot know it. I do not think it is a proper question.

Trial Examiner Ballinger: The objection is sustained.

By Mr. Hanley:

Q. You have read this record, have you not, Mr. Warmack?

A. Yes.

Q. And you have testified out of your knowledge derived from a reading of this record?

A. Yes, sir.

Q. Now, do you not know it as a fact from the record if not from other sources—

Mr. Austin: (Interposing.) Same objection.

By Mr. Hanley:

Q. —that the Respondent does not pay any advertising allowances or any part of the advertising cost whatever they may be of these various jobber customers in Detroit?

Mr. Austin: Same objection.

Mr. Hanley: It is a foundational question, if your Honor please. It is in the record of course. It has been testified to largely, before, Judge. It is just a foundational question to ask another question upon. I would like to have this witness, if he does not know it, he may assume it.

Trial Examiner Ballinger: He has answered the 7406 question and said that he does not know, but he said he would look it up in the record if you so desire. Is that right?

The Witness: That is correct. I cannot assume to remember all of this material.

By Mr. Hanley:

Q. Well, Mr. Warmack, I do not want to put you to the trouble of looking up the testimony on that point.

Mr. Hanley: May we not agree, Mr. Austin, that there has been testimony in this case in that respect?

Mr. Austin: Surely. I will agree that that has been a subject of testimony.

Mr. Hanley: All I want to have Mr. Warmack understand is that to be a fact before I ask some further questions.

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Are you acquainted with the practice rather generally used, Mr. Warmack, of a supplying company making an advertising allowance to its customers; that is, its reseller customers?

A. I have known of it being done, Judge Hanley.

Q. Is it not a rather common practice?

A. I do not know just how common it is. But I say I have known of it being done.

Q. Now, supposing that the Respondent company had paid 50 per cent of the cost of newspaper advertise- 7407 ments and billboard operation, and maintenance cost, or radio advertising time used in advertising its products under its own brand names, would that, in your judgment, have been a direct advertising expense against the jobber, naphtha and gasoline?

Mr. Austin: I would like to have the question read.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Mr. Austin: I object to the question. It does not state by whom the advertising was made.

Mr. Hanley: All right.

Mr. Austin: It does not.

Mr. Hanley: All right. It does—

Trial Examiner Ballinger: (Interposing.) Well, Judge there is a more serious objection to it in the opinion of the Trial Examiner. That is this, that unless that was incorporated in the contract between a jobber and the Respondent company, how could the Respondent company claim any benefits in differentials?

Mr. Hanley: Well, if your Honor please, that question has been raised heretofore in this case. I will confess I do not clearly understand it. If the Respondent company actually makes a payment to a jobber, for instance, for advertising, the fact of the payment and the benefits, if any, exist entirely apart from whether or not there is any
contract obligation to make that payment or whether
7408 there is not. It is just identically the same thing as
if the salesman goes out and smashes up an automobile. You do not anticipate that. It happens. There is an expense incident to it. It becomes a part of your marketing cost. I do not understand what difference the contract makes. It may prospectively have fallen into an undertaking, Judge, to determine in advance what your costs were going to be over a year ahead, that if you had a contract obligation to make an allowance of so much money per month or periodically to a jobber for advertising purposes, you would set that up in your budget of expense, as an expense in prospect for that period of time. But, if at the end of the year entirely apart from the contract you have spent the money you have given that amount of allowance and he has spent it. It is a cost to you.

Mr. Austin: There is no allowance in this case. Take for instance, Ned's. Ned advertises unquestionably. Undoubtedly it is primarily to enhance sales at Ned's stores.

Mr. Hanley: Surely.

Mr. Austin: From which he derives an immediate profit.

Mr. Hanley: Surely. That is true.

Mr. Austin: It seems to me that clearly covers that situation.

Trial Examiner Ballinger: Yes. I think that is
7409 something which has to be given consideration in this
case. Now, a payment incidentally benefiting the Respondent company where Ned's is handling Respondent company's goods, it would seem to me that that is in the nature of a gratuity. There is no compensation from the Respondent company to Ned's for the advertisement, as Mr. Austin has indicated.

tion, and I think that in all fairness we are entitled to present it to the Commission:

We spent so much money in advertising in the Detroit field. That is set up in account 975. With us that is a marketing cost. There is no disposition on the part of Mr. Warmack, as I understand it, to say that we did not spend that money or to say that it is not a marketing cost. He simply says, "You are not entitled to set that up as a basis for a cost justification on this differential."

Now, I believe I am accurately stating his position.

Trial Examiner Ballinger: Now, let us see if I understand now the exact difference. As I understand, Mr. Warmack's position is this: That your advertising does not enter into this actual cost differential between the retailer and the jobber; in other words, that these sales to the jobbers are not superinduced or accelerated by your advertising—

7410 Mr. Hanley: (Interposing.) Not—

Trial Examiner Ballinger: —and that there it stops. The gallonage sale to the reseller stations and the gallonage sale to the jobbers, and that that alone fixes the sole basis for determining the differential.

Mr. Warmack, am I correct with reference to that? Am I, Mr. Warmack?

The Witness: Your Honor, can I hear that read? I tried to follow it, but I got lost.

Trial Examiner Ballinger: Yes. If I am wrong about it I want to get corrected.

The reporter will read it back.

Mr. Hanley: Judge, I just want—I just want to do this, and I will say to the reporter that before he reads it, I want to make this statement. I want to make it entirely clear to your Honor that this is a very vital thing from the Respondent's standpoint. It goes clear to the heart of this question of price differential. I say that the jobber assumes certain functions and discharges certain obligations that we, as a supplying company, otherwise have to discharge ourselves at our own expense.

Now, it goes far and beyond and above that figure of two one-hundredths of a cent and so forth.

Trial Examiner Ballinger: Judge, in order for you to present that to the Commission, the Examiner has

7411 overruled the objection to this line of examination.

Now, Mr. Reporter, read my statement to Mr. Warmack and see if I have correctly understood his position.

Mr. Austin: I think it ought to show here just what you said so there will be no doubt about it in the record.

Trial Examiner Ballinger: Of course.

(The reporter read the statement of the Trial Examiner as follows:

"Now, let us see if I understand now the exact difference. As I understand, Mr. Warmack's position is this: That your advertising does not enter into this actual cost differential between the retailer and the jobber; in other words, that these sales to the jobbers are not superinduced or accelerated by your advertising—and that there it stops. The gallonage sale to the reseller stations and the gallonage sale to the jobbers, and that that alone fixes the sole basis for determining the differential.

"Mr. Warmack, am I correct with reference to that? Am I, Mr. Warmack?")

The Witness: Your Honor, that I believe covers and portrays my feeling with respect to this class of advertising which is for consumer acceptance.

Mr. Austin: Now, if your Honor please, I have been waiting to make a further objection to the pending question.

7412 The question was whether the witness would consider it a cost to the Respondent if the Respondent made advertising allowances to its jobbers.

The question is indefinite and does not say to whom the payment would be made. So, I object to it on that ground first.

But if it were corrected so as to refer to advertising allowances to jobbers, I would then object to the question upon the ground that since no such allowances are made, which it assumes, and which is not in the case, and that it is an improper question because if the Respondent make advertising allowances and even if that were a cost, that would be immaterial because it would raise legal questions which are not present in this case and which would relate to whether the advertising allowances could be made as to one customer unless made to all customers.

Therefore, the whole question, it seems to me, is not properly phrased.

It is based upon an assumption for which there is no that assumption, it would serve no useful purpose in this case.

Mr. Hanley: Of course, the counsel for the Commission is objecting to a question which has never been asked.

7413 I said I would amend the question in answer to his first objection, and would reframe it. Now counsel is just speculating as to what I am going to ask this witness. I have withdrawn the question to which counsel was addressing himself.

Trial Examiner Ballinger: You may reframe your question.

Mr. Hanley: I will do so, your Honor. May we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

By Mr. Hanley:

Q. Assume, Mr. Warmack, that the Respondent company had paid to the four Detroit jobbers 50 per cent of the cost of which those jobbers were put in the matter of newspaper advertising, billboard operation, and maintenance and cost of radio time used in advertising the products of the Respondent company under the Respondent's brand names. Would you from your observation and experience as an accountant, regard that as a direct advertising expense against jobber, naphtha and gasoline?

Mr. Austin: Now, I object to that question upon all the grounds stated in my objection to the previous question.

Trial Examiner Ballinger: Objection sustained.

7414 Mr. Hanley: May I ask upon what grounds, if your Honor please?

Trial Examiner Ballinger: Because it embodies a factual situation that does not exist in this case so far as the Examiner knows.

Mr. Hanley: Well, I am asking the witness to assume that factual state.

Trial Examiner Ballinger: Why would you indulge in assumptions that have no application to the pending issues?

Mr. Hanley: Well, I will try to explain it by a question.

By Mr. Hanley:

Q. Mr. Warmack, you have testified that you understand that a certain amount of advertising was done by the Detroit jobbers of Respondent's products under Respond-

A. Yes, sir. That is my understanding.

It is further my understanding that I believe one of them did not do any of that advertising. Is that right?

Q. Well, perhaps that is true. I believe perhaps there was one of them that did none, or if he did any it was quite negligible.

A. Yes, sir.

Q. Is it not also your understanding that whatever cost was incident to that advertising, that the jobbers paid
7415 it and were not reimbursed to any extent by the Respondent company?

A. That is my understanding.

Q. Now, Mr. Warmack, suppose that the Respondent company had made allowances or made a reimbursement to the jobbers in respect of their advertising cost in so far as it dealt with Respondent's branded products. Would you regard the sum so paid by the Respondent to the jobber in defrayment of this advertising expense a direct advertising expense against jobber, naphtha and gasoline?

Mr. Austin: Same objection. And further objected to upon the ground that even if the Respondent had made additional advertising expenditures or paid advertising allowances, it would have no effect whatever upon their allocation of the money actually spent by the Respondent as shown in this case, or upon the benefit received by the Respondent from the jobbers advertising.

Mr. Hanley: May I suggest to your Honor that whether your Honor agrees that this is a proper charge or otherwise, that consistent with your Honor's permission to the Respondent to get into this record for final presentation to the Commission, that we ought to be permitted to have the witness' judgment on this question, or whether the fact is or is not so. And whether the Examiner or the Commission will regard it as of merit in the last analysis, I
7416 do not know, but just consistent, Judge, with your first ruling, it seems to me that we ought to get this on the record, because if the witness is not permitted to answer it, it is just forever lost.

Mr. Austin: If your Honor please, this is going beyond the scope of your prior ruling.

If we are to go into the question of jobber advertising and the benefits received by the Respondent from that advertising, I think we ought to stick to that. I think we have just gone far afield as to the effect of some expenditure which the Respondent never made. It is clearly outside any point which will be within the confines of cross-examination.

Trial Examiner Ballinger: I think we have gone far afield already. I do not know that any serious damage can be done by going a little further off into the brush. The objection is overruled with the right reserved to counsel for the Commission to renew his objection and motion to strike when the answer is in.

The Witness: May I hear the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. Now, Mr. Warmack, suppose that the Respondent company had made allowances or made a reimbursement to the jobbers in respect of their advertising cost in so

7417 far as it dealt with Respondent's branded products. Would you regard the sum so paid by the Respondent to the jobber in defrayment of this advertising expense a direct advertising expense against jobber, naphtha and gasoline?")

The Witness: Your Honor, before I can answer that question I would have to make a study of all of the facts in a real situation and I could not possibly answer the question of a hypothetical situation unless all of these facts were presented that would be covered in a real situation. There are many points that would have to be looked into.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I move that the question and answer be stricken on the grounds previously asserted.

Mr. Hanley: I resist the motion so far as my question is concerned. I am certainly entitled to ask the question. You may move to strike the answer.

Trial Examiner Ballinger: The objection and the motion to strike is sustained and granted respectively.

(Witness temporarily excused.)

Mr. Hanley: I move that we adjourn until 1:45 o'clock, p. m.

Trial Examiner Ballinger: The motion is granted.

7418 And now, at 12:15 p. m., the hearing stands in recess until 1:45 p. m., of this day.

(Whereupon, at 12:15 p. m., a recess was taken until

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of Volume V of the printed transcript of the record, filed in this office on July 12, 1948, in:

Cause No. 9215.

Standard Oil Company,
Petitioner,
vs.
Federal Trade Commission,
Respondent,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 25th day of May, A. D. 1949.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

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TRANSCRIPT OF RECORD

IN THE

Supreme Court of the United States

October Term, 19~~48~~ 1957

No. 24

STANDARD OIL COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.

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Petitioner,

vs.

FEDERAL TRADE COMMISSION,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TRANSCRIPT OF RECORD

In the

United States Circuit Court of Appeals

For the Seventh Circuit

No. 9215

STANDARD OIL COMPANY,
Petitioner,
vs.
FEDERAL TRADE COMMISSION,
Respondent.

Petition for Review of Order of the Federal Trade Commission.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

TRANSCRIPT OF RECORD FILED NOV. 7, 1946.
PRINTED RECORD.

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12 schedules giving account numbers and explanations as to each:

1. Salesmen and Sales Promotion Expense.
2. Advertising Costs.
3. Delivery and Warehouse Cost.
4. Income and Expense Incurred at Leased Retail Outlets Served by Tank Wagon.
5. Marketing Expense Items Incurred at Privately Owned Stations Not Leased But Engaged in the Distribution of Our Products.
6. Credit Information—Bad Debts and Recovery.
7. Field Office and Accounting Cost.
8. Supervision Cost Incurred in Sales Field.
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7419 Afternoon Session.

1:45 p. m.

Trial Examiner Ballinger: Come to order. You may proceed.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Hanley.

Q. Mr. Warmack, do you feel that point-of-sale advertising may properly be segregated between tank wagon business customers on the one hand and jobber customers on the other hand? Do you, Mr. Warmack?

A. Yes, sir.

Q. And all the rest of the account 075, you would allocate on an all-gallonage basis. Is that correct?

A. I would not say that. No, sir.

Q. Well, how would you allocate it, if at all?

A. There may be some advertising costs in there susceptible of direct allocation. You said "all the rest."

Q. I mean all the rest aside from point-of-sale advertising.

A. Well, that point-of-sale advertising is a pretty broad term, Judge.

Q. Well, you are familiar, of course, are you not, Mr. Warmack, with the items of advertising that comprise 7420 account 075?

A. I am familiar with the general classifications.

Q. That is what I meant.

A. Yes, sir.

Q. In that general classification, there is a classification which has been referred to in this lawsuit as "point-of-sale advertising." Is that not so?

A. I should like to review the classifications, your Honor.

Trial Examiner Ballinger: Can you not answer that question? Did you get the question?

The Witness: Yes.

Mr. Austin: Well, this is a question directed to the record, your Honor. I do not think there is any such classification. I think there are certain classifications which Mr.

Boatwright has referred to as "point-of-sale advertising," but I do not believe that the classification was made as suggested by Mr. Hanley.

The Witness: That is the exact idea, your Honor. That is the reason I was having some question about looking it up without knowing more definitely what they had in mind. I think Mr. Austin has put it clearly.

Trial Examiner Ballinger: Is that an objection on your part, Mr. Austin?

Mr. Austin: I was just trying to clarify the situation, your Honor.

7421 Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: If no such classification has been described in the record, the witness can so state.

The Witness: Your Honor, I would still have to review the classifications. I do not keep those things in my mind. The record shows.

By Mr. Hanley:

Q. Well, you keep some things in your mind, I am sure. Do you not do that, Mr. Warmack?

A. Yes, sir.

Q. We are now discussing advertising, account 075. This has to do, among other things, with newspaper advertising and billboard advertising, and perhaps some radio advertising, and possibly other types of advertising. You have assumed to eliminate the entire account in your criticisms. Now, surely, I take it you know what kinds of advertising compose that account. Is that not true?

A. I know or I am familiar with the general classifications of advertising, classifications made by the Respondent of the advertising contained in account 075. I should certainly be happy if I am allowed or may be allowed to refer to that classification if they are in this record and look at them.

Q. If it would be a means of refreshing your recollection, certainly there is no objection to your doing 7422 so, Mr. Warmack.

(The witness referred to the record.)

The Witness: May I hear the question again?

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. In that general classification, there is a classification which has been referred to in this lawsuit as 'point-of-sale advertising.' Is that not so?")

The Witness: Well, the item "point-of-sale advertising" has been used oftentimes in this lawsuit. The general classification of advertising contained in account 075 as portrayed by Commission's Exhibit 84-A, that of course covers the field for 1937, does not contain any such general classification. But in some of the classifications shown on that exhibit there is contained "point-of-sale advertising."

By Mr. Hanley:

Q. What is your understanding—

A. (Interposing.) That is my understanding.

Q. —of "point-of-sale advertising"?

A. What?

Q. Just outline what you understand that classification to contain.

A. I understand point-of-sale advertising, such advertising as occurs at the points where sales of the company's products are made.

7423 Q. Now, adverting to the original question: Do you feel that point-of-sale advertising may properly be segregated between tank wagon customers on the one hand and the jobber customers on the other hand?

A. Yes, sir. I feel that it can properly be done that way and that it may afford some cost differential basis if it were done that way.

Q. In view of the answer, why do you eliminate that entire account, inasmuch as there is much of it which contains point-of-sale advertising?

A. Because your company did not go to the extent of, in their analysis of the advertising account, to my satisfaction, analyzing what portion of that expense would be properly allocable to the separate channels of Respondent's Exhibit 101.

Q. I refer you to Respondent's Exhibit 100 which refers to point-of-sale advertising in detail. I will ask you, first: Have you studied it? If you have, what are your criticisms of it?

A. What page?

Q. I do not know. Respondent's Exhibit 100, in reference to advertising.

A. I find that it begins at page 25 of Respondent's Exhibit 100. May I review that, your Honor?

Trial Examiner Ballinger: You may.

7424 (The witness examines ~~the document~~.)

The Witness: Now, may I have the question, if your Honor please?

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. I refer you to Respondent's Exhibit 100 which refers to point-of-sale advertising in detail. I will ask you, first, Have you studied it?—")

The Witness: I have studied it.

(The reporter read the following:

"If you have, what are your criticisms of it?")

The Witness: My criticism of it is that the account has not been properly broken down whereby it can be determined from these records, Respondent's Exhibit 99, 100, and 101, what portion of the point-of-sale advertising is properly applicable to tank wagon reseller customers.

I believe that covers the situation.

By Mr. Hanley:

Q. Referring you to "photos given away at jobber served stations," in the amount of $344.13, Respondent's Exhibit 100. What is your criticism of that breakdown of accounts?

A. What page, Mr. Hanley?

Q. 26.

A. Thank you.

Q. Please examine it.

7425 A. Yes.

(The witness examined the document at the page referred to.)

The Witness: It is not carried through.

By Mr. Hanley:

Q. What do you mean "It is not carried through"?

A. I mean that all of those accounts in which "photos given away," are included have not been properly carried through to show what portion of the expense is applicable to the separate classes of customers to which they apply.

Q. Mr. Warmack, on page 26 of the Respondent's Exhibit 100, under the item "Photos given away $344.13," is that not an exact breakdown of the exact expense to which the Respondent company was put in point-of-sale advertising in relation to jobber stations having to do with photos given away? If it is not, what is the right answer?

A. I think you are confused, very confused. I will endeavor to enlighten you. That item of $344.13 marked "photos given away," as shown on page 26 of Respondent's Exhibit 100 is one of a group of several expenses which Respondent company has calculated to be applicable equally to each of the retail outlets in the Detroit field. Of that total group of expenses which include photos given away, $344.13, Respondent company allocates $636.48 to jobber outlets.

The exhibit is silent as to what part of that class 7426 of expense it regards as applicable to tank wagon reseller.

One further point: It is my understanding that the item of photos given away in the amount of $344.13, as set forth on page 26 of Respondent's Exhibit 100, that that is not a breakdown at all. It is my understanding that that actually represents the cost of these photos which were given away.

Q. Well, assume that it does.

And assume further that your construction is correct, Mr. Warmack, and that the list of accounts including "photos given away," 24 by 44 cards, station banners, display cards, window stickers, decalcomania for pumps, booklets, leaflets, and so forth, and miscellaneous printed matter having to do with this classification of advertising is applied to all reseller stations including the regular tank wagon business of the Respondent and the jobber business of the Respondent.

What complaint or criticism have you as to the method of allocating the proportion of that expense to the jobber stations as explained on pages 26 and 27 of Respondent's Exhibit 100 on the outlet basis?

A. I have no objection to it.

Q. Then why do you take it out of account 075 in Respondent's Exhibit 101 when you are criticizing the differential as disclosed by Respondent's Exhibit 101?

A. Because of the fact that I did not know what portion of that class of expense the company assumed to leave 7427 in the tank wagon reseller column of Respondent's Exhibit 101.

Q. Would not that be the difference between the total and that which was taken out and charged to the jobber channel, Mr. Warmack?

A. Oh, not necessarily, no.

Q. Was it not that, as a matter of fact?

The Witness: May I review, your Honor?

Trial Examiner Ballinger: You may.

(The witness examines certain documents.)

The Witness: Because of the fact that in the beginning when these expenses were originally incurred, as set forth on pages 5 and 6 of Respondent's Exhibit 99, in the company's regular accounting procedure, there is not provided any column where such costs are shown separately for the direct shipment business.

And this class of expense, as I understand your exhibit and other information in these records, is separated in whole or in part on a basis of gallonage between channels as shown thereon. That information is set forth on page 6 of Respondent's Exhibit 100 and does not assume to carry the allocation through to show what portion of this expense is actually in the tank wagon reseller column on Respondent's Exhibit 101, or if a portion of it remains in some of the other columns.

That is my objection.

7428 Mr. Hanley: Respondent moves to strike the answer of the witness as not responsive to the question and asks that the question be read to the witness.

Trial Examiner Ballinger: The Examiner reserves ruling on the motion until the question is read and the answer as given thereto.

(The reporter read the question and answer.)

Mr. Austin: The witness explained that at length, and quite clearly, in my opinion, why he does contend that the total expense on page 26, Respondent's Exhibit 100, is not properly applied for the purpose of the cost differential.

Trial Examiner Ballinger: He was not asked for an explanation. The question does not call for an explanation.

Mr. Austin: Well, I agree with that, but I think that while I agree with your Honor's comment that the question did not call for an explanation I think the explanation is quite proper.

Trial Examiner Ballinger: The witness' answer, "Oh, not necessarily, no," may stand. The rest is stricken.

By Mr. Hanley:

Q. Can you now give an answer to the question, Mr. Warmack? Do you know?

The Witness: I would like to hear the question again.

7429 (The reporter read the following question:

"Q. Would not that be the difference between the total and that which was taken out and charged to the jobber channel, Mr. Warmack?")

The Witness: I only know from the information set forth in these records. And from that information set forth in these records, my answer is—no.

By Mr. Hanley:

Q. Directing your attention to page 26 of Respondent's Exhibit 100, and the list of accounts there appearing which refer to point-of-sale advertising costs. Does it not appear from those pages 26, 27, and 28 of Respondent's Exhibit 100, that there was an allocation made by the Respondent's accountants of point-of-sale advertising costs to jobber served stations?

A. That is my understanding.

Q. Then, does not the balance of the account apply to other tank wagon reseller accounts?

A. It certainly should apply there, yes, sir, in my opinion.

Q. Very well. What is the matter, in your judgment as an accountant, with the allocation used by the Respondent's accountants of this point-of-sale advertising directly to jobber served stations as explained on pages 26, 27, and 28 of Respondent's Exhibit 100?

The Witness: Your Honor, I have answered that 7430 fully with respect to the information on page 26. I should hope that that answer should stand.

Trial Examiner Ballinger: You may answer it unless there is objection.

Mr. Hanley: There has been no answer to that question yet, Judge.

The Witness: Can that answer be recopied here?

Trial Examiner Ballinger: Answer the question.

Mr. Austin: If your Honor please, this question is directed to pages 26, 27, and 28.

The Witness: I have already answered that.

Mr. Austin: I suggest that the witness go ahead with page 27, having previously answered, if your Honor please, most fully with regard to page 26.

Mr. Hanley: If your Honor please, may I have an answer to my question, if it is proper? If it is not a proper question I am sure your Honor will refuse the answer.

Trial Examiner Ballinger: Do you understand the question?

The Witness: I think I do, Judge Ballinger.

Trial Examiner Ballinger: You may proceed to answer it.

The Witness: I will start with page 27, Judge Ballinger. Before I answer that I will have to examine records. May I review?

7431 Trial Examiner Ballinger: Certainly. You may review.

(The witness examines certain documents.)

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: Now, your Honor, may I have the question read?

(The reporter read the following question:

"Q. Very well. What is the matter, in your judgment as an accountant, with the allocation used by the Respondent's accountants of this point-of-sale advertising directly to jobber served stations as explained on pages 26, 27, and 28 of Respondent's Exhibit 100?")

The Witness: I have no objection to the way this class of expense was assigned to the jobber outlets, as explained on those pages.

By Mr. Hanley:

Q. Why, then, Mr. Warmack, did you take out of Exhibit 100 the entire account 075 without giving any consideration at all to the point-of-sale advertising?

A. I did not do that.

Q. Did you not eliminate the entire account?

A. No, sir,—yes, sir.

7432 Q. Does that not mean that you did not give consideration to point-of-sale advertising, as between the general tank wagon business and the jobber business?

A. It most certainly does not.

Q. Do you not think as an accountant that point-of-sale items of expense are allocable to various points of sale?

A. Yes, sir. Most assuredly they are.

Q. Then, why, Mr. Warmack, did you eliminate that entire account?

A. Because your exhibits, Respondent's Exhibits 99 and 100 contain no information showing what portion of this class of expense you had assigned to the tank wagon reseller column in Respondent's Exhibit 101. I had no information.

Q. Now, Mr. Warmack, adverting to a question I asked you a little while ago. From purely an accounting standpoint after the elimination of the allocations made to the jobber channels are given consideration, do not the other point of sale costs apply to the tank wagon business of the Respondent company?

A. They surely do.

Q. Then why do you say that you do not know from these exhibits what that expense was and where that expense was?

A. Because that information is not set forth in Respondent's Exhibits 99 and 100. Those exhibits are entirely silent on what portion of expense of the point-of-sale
7433 advertising should be assigned to in the tank wagon reseller column. I believe that answers your question.

Q. Mr. Warmack, did you not know it as a fact, and could it be otherwise found that it was assigned to the tank wagon business of the Respondent?

A. There is no figure here showing what it is. How can I know how much it is?

Q. Did you do any arithmetic about it?

A. Please explain what you mean.

Q. I mean did you study it? Did you find out? Do you know?

A. I do not know. I could not know.

Q. You have just stated that it must be the balance after the jobber assignments are made, the balance must be assignable to the tank wagon business of the Respondent company.

Now, how did you find that out, Mr. Warmack?

A. In the first place, I do not know what the total was to take this amount that you have assigned to the jobber business from.

Q. Well, you read pages 26, 27, and 28 of Respondent's Exhibit 100? Did you not?

A. Yes, sir.

Q. As I understand it, you do not dispute those figures?

A. Oh, certainly not.

Q. Then you do know what the total was? Do you not?

A. I certainly do not know. I should like to respect-
fully direct your attention, if I may, to the figures
7434 appearing on pages 27 beginning with the second
paragraph, with advertising signs and jobber outlets
which are shown in the amount of $1,358.48. Now, I would
like to know if anywhere on that page, anyone can show
me what the total of that expense for all of the company
is. I do not know. I could not know. It is not there.

Q. Did you undertake to find out?

A. Why, I certainly undertook to find out.

Q. Did you?

A. I did not.

Q. Why not, Mr. Warmack?

A. Because the information is not in these reports.

Q. Did you make any inquiry when you were in Detroit for six or seven or eight weeks?

A. I required of the Respondent company's accountants. I asked them to furnish me with information as to the breakdown of those advertising accounts, particularly account 075.

Q. Did you ask any one in the Respondent company for the total expense of point-of-sale advertising?

A. Nothing that I recall as such.

Q. Do you think as an accountant that you could fairly eliminate the entire account 075 including point-of-sale advertising until you had that information?

A. I certainly could. It is proper to do it. It would
be improper to leave it in there in piecemeal form.

7435 Q. Do you feel you had no obligation as an ac-
countant to ascertain the facts before you eliminated
the facts?

A. Yes, I did. I made the effort.

Q. Did you make the effert?

A. Yes, sir.

Q. How did you?

A. I asked Mr. Boatwright and Mr. Houghton in Chicago.

Q. What did you ask?

A. I asked if the company were able to furnish me with an analysis or breakdown of account 075. I was informed that it could not.

Q. Did you ask them or either of them at any time to give you the total expenditures of the company applying to the pages, so-called, point-of-sale advertising, as this item or items are defined on page 26 of Respondent's Exhibit 100?

Mr. Austin: If your Honor please, there is an exhibit in the record which is a letter which counsel for the Commission addressed to the Respondent asking the Respondent to produce a breakdown of this account, and also specify the matter to which counsel is now referring; that is, the total of the expense of the Respondent point-of-sale advertising of the nature to be found on pages 26 and 27 of Respondent's Exhibit 100.

That request was not complied with. I never had 7436 anything in the way of a breakdown from them about it. Therefore, I object to any farther questions of this witness regarding any request that he made. Such request, if made by the witness, would have been futile because requests made by the counsel for the Commission had already been denied by the Respondent.

Mr. Hanley: They were not denied.

Mr. Austin: They were not complied with.

Mr. Hanley: That is not a fair statement to the Court. They were not denied. I am asking this witness questions as to what he did and what he was able to find out to get the answers. I do not know the answers. I confess I could not tell you what the answer is. I could not tell you because I do not know.

Trial Examiner Ballinger: Well, if he relied upon that request and went no further, he can so state.

By Mr. Hanley:

Q. I will ask you first, Mr. Warmack, if you knew that that request was made by your counsel?

A. Yes, sir.

Q. And before you called there?

A. Yes, sir.

Q. And did you quit there?

A. No, sir.

7437 Q. What did you do to follow it up?

A. I made a trip from Detroit to Chicago.

Q. What did you do in Chicago?

A. With respect to this particular account?

Q. Yes.

A. I did a lot of things other than this.

Q. Yes?

A. I asked your accountants in your Chicago office for a breakdown of this account.

Q. Well, just state what you said to them. They are both here. I would like to have you state for the record exactly what you said.

A. I said essentially what I stated for the record just one second ago.

Trial Examiner Ballinger: You said in substance that?

The Witness: Yes, sir.

By Mr. Hanley:

Q. What did they say to you?

A. Mr. Boatwright told Mr. Houghton to inquire and determine positively if such a segregation had been made or attempted—as my memory—

Q. (Interposing.) What segregation?

A. —an analysis of this account. That is what we are speaking about? Is it not?

7438 The Witness: If your Honor please, may I go ahead and answer the question?

By Mr. Hanley:

Q. (Interposing.) Mr. Warmack, is not an analysis of this account so far as the jobber situation is concerned and do you not grant that and do you not regard this Exhibit 100 as an analysis of this account "point-of-sale advertising"; so far as the jobber situations are concerned?

The Witness: Your Honor, I have never completed my answer to the previous question. Shall I pick up here? I do not question that.

Mr. Austin: Now, your Honor, the witness was in the middle of stating what the conversations were in Chicago.

Trial Examiner Ballinger: Very well. He may refer to the previous question and finish his answer.

By Mr. Hanley:

Q. What did they say to you?

Trial Examiner Ballinger: Are you familiar with it?

The Witness: Yes, sir. I am familiar with it. I am endeavoring to complete my answer.

Trial Examiner Ballinger: Proceed.

The Witness: Mr. Houghton did take occasion to inquire and determine if such an analysis had been made and study had been made, and he found that the company 7439 had gone through considerable study and made considerable study and such a breakdown, a general breakdown of account 075, which is this account, for the year 1937.

It is my memory that he found that no segregation; that is, analysis of this account, had been made for the year 1940 other than the studies as outlined and portrayed in Respondent's Exhibit 100.

Trial Examiner Ballinger: You said that Mr. Houghton found this. Is that what he reported to you?

The Witness: Yes, sir. I was with the man all of the time. We were going around the departments and reviewing the working papers. We were working together almost the entire time that I was in Chicago, and for a good portion of the time we worked in the same manner while I was in Detroit.

By Mr. Hanley:

Q. Was that a study that you regarded as a competent accounting job, Mr. Warmack?

A. Do you mean Mr. Houghton's inquiry about these papers?

Q. I mean the study that you said that he found.

Trial Examiner Ballinger: I understand that was a study for 1937.

Mr. Austin: That is Commission's Exhibit 84.

Mr. Hanley: I see.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

7440 The Witness: Will counsel please explain?

By Mr. Hanley:

Q. I cannot explain beyond the question, Mr. Warmack. I am asking you for your judgment as an accountant and you saw it. I have not. I do not know what it was.

Trial Examiner Ballinger: Are you referring now to account 075 for the year 1937?

The Witness: May I review, your Honor?

Trial Examiner Ballinger: Yes.

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: I have before me Commission's Exhibit

84-A, 84-B, 84-C, which is entitled "Analysis of Advertising Expenditures by Media Chargeable to Reseller Channels, Detroit field, 1937."

I certainly do not dispute the figures that appear on that exhibit. It was prepared by the Respondent and presented to Commission's attorneys, as I understand it.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: It may be that a more thorough analysis is possible. I do not question that. I do not question the good faith of the Respondent or its accountants, but 7441 such a separation as appears here, as far as I have ever been able to determine, was not made for the year 1940. And I was told that while I was in the Chicago office.

By Mr. Hanley:

Q. Just one more question on this phase of account 075, Mr. Warmack.

A. Yes.

Q. Irrespective of the amount of the account 075 that might be represented by point-of-sale advertising allocable to tank wagon business, and in view of the fact that a special allocation of point-of-sale expense was made to jobber outlets, do you regard it as fair from an accounting standpoint that you should eliminate the entire account 075, inclusive of an allocation of some amount of point-of-sale advertising irrespective of whether or not that amount is accurately ascertainable or not from anything that you have seen in your studies?

Mr. Austin: Before the witness answers that, I would like to know what counsel means by "eliminate"? Eliminate from what?

Mr. Hanley: I mean by that, Mr. Austin, that Mr. Warmack has eliminated the entire account 075 as a predicate for the determining of any cost differential.

Mr. Austin: Well, I do not quite agree with that premise. There were two things which were done.

7442 Trial Examiner Ballinger: Well, Mr. Warmack should know.

Mr. Austin: Well, I do not see how Mr. Warmack can eliminate anything. He can state his opinion, and he has testified as to what costs he thinks afford a differential, and as to the accounting procedure of the Respondent, but I think there is a misconception here when we talk about Mr. Warmack eliminating something. What is there is there.

Now, I would like to say this, your Honor. There were two things done which I think counsel is referring to.

In the first place, Commission's Exhibit 133 was prepared. That exhibit includes no part of account 075. And I explained that that exhibit was prepared under my direction, and as to what accounts were included therein and what accounts were eliminated therefrom, that was entirely my responsibility. Mr. Warmack merely followed my direction. The only place Mr. Warmack's accounting experience came into play was in connection with the accounts marked with an asterisk in which he had had the responsibility of making the adjustment which he explained.

Secondly, in the testimony of Mr. Warmack, which he gave concerning computations as to the effect on the cost differential of 1.51 cents claimed by the Respondent that the elimination of this entire account would have.

Now, there again, Mr. Warmack did not eliminate

7443 the account, but he stated his computation and the effect on the cost differential that the elimination of the account would have.

Trial Examiner Ballinger: Well, as I understand, you cast some doubt about the usage of the word "elimination"?

Mr. Austin: I do.

Trial Examiner Ballinger: As to whether that is the proper word to use in that place?

Mr. Austin: I do not think that the question is a proper one that is asked the witness. Counsel has asked several questions of the witness as to whether he did eliminate something and why he eliminated something else.

I think the witness certainly may be asked in any way that counsel wishes to his reasons for contending that account 075 or any part thereof would or would not afford a cost differential or as to the method in which it was handled.

Mr. Hanley: Well, if your Honor please, I regret if my grammar was not acceptable to counsel for the Commission, but it must be apparent to your Honor that this witness has been testifying for four weeks that in his judgment certain things should be eliminated from this account and certainly account 075 is one of them.

Mr. Austin: He has been testifying to the effect that certain items could not be properly considered.

Mr. Hanley: Well, it is a distinction without a
7444 difference, so far as I am concerned.

Trial Examiner Ballinger: You may use the word "elimination"; it is perfectly plain to the Examiner.

Mr. Hanley: I think it is perfectly plain to the witness.

Trial Examiner Ballinger: They both mean about the same.

Mr. Hanley: I do not think the witness has had any difficulty understanding it. I have asked him dozens of questions of that character.

Trial Examiner Ballinger: Let the witness answer the question.

Read the question to the witness.

(The reporter read the following question:

"Q. Irrespective of the amount of the account 075 that might be represented by point-of-sale advertising allocable to tank wagon business, and in view of the fact that a special allocation of point-of-sale expense was made to jobber outlets, do you regard it as fair from an accounting standpoint that you should eliminate the entire account 075, inclusive of an allocation of some amount of point-of-sale advertising irrespective of whether or not that amount is accurately ascertainable or not from anything that you have seen in your studies?")

The Witness: It is my opinion that the whole
7445 account; that is, account No. 075 entitled "Advertising," should be eliminated or removed from Respondent's Exhibit 101, or else separated therein on the basis of gallonage which would afford no cost differential unless and until information is at hand to make a proper segregation of the portion of advertising contained in that account which represents point-of-sale advertising, and which may afford to some extent a cost differential.

There is a possibility that some small portion of advertising cost included in account 075 which was incurred in connection with point-of-sale advertising may afford some cost differential.

But that portion of point-of-sale advertising which is included in the account has not been separated from the advertising expense incurred for consumer acceptance by the Respondent. That is, all of it has not been properly separated and segregated, in my opinion.

There are separations made on pages 26, 27, and 28 of Respondent's Exhibit 100 which show portions of point-of-sale advertising which Respondent assigned to direct shipment business. But there is insufficient information on the exhibit as to what portion of this class of advertising should be properly assigned to the tank wagon reseller business of the Respondent.

That is my opinion.

7446 By Mr. Hanley:

Q. All right. That is your opinion. Now, let us get to the fact. When you were in Detroit, did you check the allocations as made to the jobber channel on that class of point-of-sale advertising?

A. Will you explain what you mean by "check"?

Q. Did you follow through and see if that was the amount of advertising that was allocable to the jobber channel?

A. Certainly not. I did not study the underlying records in that particular account. I did not question it—these three pages.

Q. Did you check to see what point-of-sale advertising was allocable to the tank wagon reseller business or tank wagon business of the Respondent company?

A. No, sir. I was not required to do so.

Q. And without doing that—that is, without having done that and other of those things, you condemn the entire account 075? Is that true?

A. That certainly is true. I was not required to prove the company's case of cost justification.

Q. As an accountant, have you ever given consideration as to why organizations spend money on advertising?

The Witness: What is the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

7447 The Witness: I never made a general study of advertising activities as such.

By Mr. Hanley:

Q. Is that a difficult question?

A. I can give you an assumption, Judge.

Q. Is that a difficult question, Mr. Warmack?

A. No, sir. But I was directed not to answer assumptions.

Q. I am asking you no assumption.

Mr. Hanley: Will you read the question?

Trial Examiner Ballinger: Have you ever considered that question?

The Witness: I have considered it in connection with these Robinson-Patman cases especially when it has been urged that it should be used in determining cost differentials. I believe that is about the extent to which I have gone into that matter.

By Mr. Hanley:

Q. All right. If you have given it some consideration, Mr. Warmack, why do they do so? What, in your mind, is the end object? What is the purpose?

A. It has always been my general idea that that advertising; that is, advertising activities of the company is to promote the sales of their products and create the demand for their products, and to further the sale of them in every way possible, to create a good will in the public mind,
7448 and various and sundry other things for the promotion and sale of its products.

Q. Why do these firms employ salesmen?

A. To sell the products, I assume. I have never been a salesman.

Q. Have you not advocated at some points in your testimony that it is sound accounting to allow the indirect to follow the direct expenses?

A. That is often done. And I believe I have so testified in this record.

Q. Is it not correct, Mr. Warmack, that advertising is a mass selling effort, while the work of a salesman is a personal selling effort, and that both have the same objective?

A. Well, it is my testimony, or rather, it is my understanding that every effort made by the company to place its products in the hands of a consumer, is a selling effort. It is my understanding that every employee of your company is, in fact, a salesman pushing the products to the public for consumption.

I believe that has been so testified to here.

Q. Is that an answer to the question, in your judgment?

A. Well, unless I misunderstood your question, Judge.

Mr. Hanley: Will you read the question?

(The reporter read the question.)

7449 By Mr. Hanley:

Q. Will you answer the question?

Trial Examiner Ballinger: Apparently that is not a very satisfactory answer.

The Witness: It is my understanding that they both have the same objective; at least, that is what I tried to state in my answer.

Trial Examiner Ballinger: How about the advertising being a mass selling effort?

Read the question again.

(The reporter again read the question.)

The Witness: Well, the question contains three parts. I only thought it contained one part. I will ask the reporter to read each part and I will answer each part as it is read.

Trial Examiner Ballinger: That may be done.

(The reporter read the following:

"Q. Is it not correct, Mr. Warmack, that advertising is a mass selling effort * * *")

The Witness: It is my understanding that general advertising is performed for the purpose of selling a company's products and generally may be considered as a mass selling effort.

Trial Examiner Ballinger: Read the next part.

(The reporter read the following:

7450 "* * * while the work of a salesman is a personal selling effort * * *")

The Witness: That is my understanding.

Trial Examiner Ballinger: Read the last part.

(The reporter read the following:

"* * * and that both have the same objective?")

The Witness: That is my understanding.

By Mr. Hanley:

Q. Would it be acceptable to you, therefore, to allocate an indirect cost, such as advertising sales effort on the basis of the direct effort; that is to say, the salesmen's salaries?

A. Each case would have to stand on its own.

In the case of advertising, we have several classes of advertising. And for the purposes of establishing a cost differential, I certainly could not subscribe to the use of general newspaper advertising following anything except the per unit basis in the absence of a study showing that it should not follow that basis for the determination of a cost differential.

Q. Well, in this case, to make it specific.

A. In this case, it is my opinion that it certainly should not follow the selling effort of any salesmen for the purpose of establishing a cost differential.

Q. Then, so far as sales effort from advertising
7451 is an indirect effort you abandon any principle that
the indirect cost should follow the direct cost?

A. I most certainly do not. In the first place, this word "indirect" cost is a very elusive term.

Q. Is it elusive in the way you have been using it, Mr. Warmack, in your testimony?

A. The term "indirect cost" without stating what those indirect costs are is elusive in any instance.

Q. And that is true throughout your testimony? Is it not?

A. That is true anywhere that term is used if you do not state what it includes.

Mr. Hanley: May we have a five minute recess?

Trial Examiner Ballinger: We will take a recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order. You may proceed.

Mr. Hanley: I would like to have the last question and answer read.

Trial Examiner Ballinger: Read the last question and answer.

(The reporter read the last question and answer.)

By Mr. Hanley:

Q. Now, Mr. Warmack, assume that there were to be an
allocation of an indirect cost; that is, advertising on
7452 the basis of direct cost; that is, salesmen's salaries.
I am not asking you to agree with that. I am just asking you to assume that sort of a situation.

Would not such a practice result in creating a substantial differential in a selling effort when the jobber, naphtha and gasoline is $210.68, and there is $207,455.16 salesmen's salaries for petroleum products as evidenced by Respondent's Exhibit 101?

A. Yes, sir. That would be true assuming further, of course, that your salesmen's salaries and expenses had been properly allocated to the separate channels.

Trial Examiner Ballinger: That is embraced in the question.

By Mr. Hanley:

Q. Yes. They were not, in your judgment?

A. They were not, in my judgment.

Q. That would be about one tenth of one per cent of the total? Is that right?

A. I do not know. I have not made that calculation.

Q. Well, just roughly, $210.00 to $207,455.16, Mr. Warmack?

A. I will take your calculation on it.

Q. How much—perhaps you will desire to refer to Respondent's Exhibit 101—how much of account 075 is chargeable to advertising jobber, naphtha and gasoline?

A. I have Respondent's Exhibit 101 before me.

7453 Q. Now, answer the question, Mr. Warmack.

A. May I have the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: $3,325.24 of the advertising included in account 075 is charged to the column entitled "Jobber, Naphtha and Gasoline" on Respondent's Exhibit 101.

By Mr. Hanley:

Q. Referring to account 675. What is the total of that account applicable to petroleum products, Mr. Warmack?

A. I do not know, but I can tell you what the figure is as shown on Respondent's Exhibit 101.

Q. That will be satisfactory.

A. The figure is $199,827.88.

Q. Is it not true then that the process used by the Respondent's accountants results in a charge of one per cent of advertising, approximately one per cent of advertising—to jobber customers as compared with one-tenth of one per cent of salaries of salesmen?

A. May I inquire, Judge Hanley, do you mean the total of each of those costs after eliminating those portions which were assigned to the automobile supplies?

7454 Q. I mean just the allocation to the jobber or direct sales column, Mr. Warmack.

A. Yes, the relation of that to the total which you have applied to petroleum products or the total of the field?

Q. That is in reference to total petroleum products.

A. With reference to the total petroleum products. The percentage would represent the relationship which $3,275.24 bears to $199,827.88 for account 075.

Now, may I inquire which was the other one, please?

Q. As compared to one-tenth of one per cent of salesmen's salaries or approximately that.

A. May I inquire if you are referring to the figures as shown in account 004 entitled "Salesmen's Salaries"?

Q. Yes.

A. That is correct. Approximately one-tenth of one per cent, or the relationship of $210.68 bears to $207,455.16.

Q. In all fairness, do you think it equitable to charge consumers advertising on a straight gallonage basis?

A. I would have to inquire there, Judge Hanley, do you mean all gallon sold by the Respondent company including all the gallonage as represented by these six petroleum product channels in Respondent's Exhibit 101?

Q. I mean it as you have testified to it, Mr. Warmack. Whatever you mean by "gallonage" is what I mean.

A. Well, I have used the term in many different 7455 instances as bulk plant gallonage, total gallonage, gallonage of tank wagon reseller, tank wagon consumer, gallonage of jobber, naphtha and gasoline. It would cover all of that range. The term "gallonage," simply gallonage, varies with other gallonages. Now, I would like to inquire just which gallonage do you mean?

Q. Well, permit me to ask you—

A. Yes, sir.

Q. If you have not taken the position that account 075 should be charged on a straight gallonage basis, over-all gallonage?

A. No, sir.

Q. What gallonage would you eliminate from consideration in account 075 if any?

A. I would have to make a study to determine just what gallonage I would eliminate. For example, in newspaper advertising, if you are advertising Red Crown gasoline to the automobile driver, it seems to me that the gallonage used in the tank wagon reseller column and the gallonage used in the jobber, naphtha and gasoline, representing, as I understand, the gallonages to be sold by reseller stations, should be your measuring factor for allocating that particular advertising cost. That is advertising for consumer acceptance to that class of consumer for the most part, the automobile driver.

Q. That would include all of the customers for that
7456 gasoline that you have?

A. Yes, sir. That would include all automobile drivers.

If you have consumer customers both, or, we will confine it just for that gasoline then a study would have to be made to determine if that advertising influenced your consumer business or if it were made for the purpose of making or creating a demand on the part of the consumer customer. What I am speaking about is tank wagon consumer business of the customer.

Q. Well, is there any gasoline indicated on Respondent's Exhibit 101 to which you would not spread account 075 in your testimony that it should be done on a gallonage basis?

A. I certainly do not see how in the world that could spread to the other direct shipment customers channel or column on this Respondent's Exhibit 101. I am speaking there directly of advertising for consumer acceptance.

Q. Do you know then that the newspaper advertising, for instance, has a bearing on consumer acceptance from the standpoint of a consumer who may buy, the direct shipment consumer customer?

A. It might.

Q. Well, if it does, is there any reason for eliminating that gallonage, according to your theory?

A. A proper investigation of that entire situation would
disclose that fact. And I could not answer from the
7457 witness stand as to that particular point, not having
made such a study or having such a study, if any,
ever been made available to me.

Q. Do you think a study would disclose it?

A. A proper review would at least afford some information there. I am not sure of that as to whether or not that particular factor is involved.

Q. Do you think that studies result in any accurate results as to what particular customers and in what amount customers are induced to buy, by any particular advertising campaign?

A. I certainly do not know. And I would have to know the extent of the study or the coverage. But I do know this, that the study would afford better information than guesswork.

Q. Have you ever made an advertising study in your entire life, Mr. Warmack?

A. No, sir.

Q. So you really do not know anything about that question; that is the fact. Is it not?

A. Oh, I know a little something about it. Yes.

Q. But you have never done any work along that line?

A. No. I cannot say that I have.

Q. Have you ever heard of allocating those expenditures, advertising expenditures among customers, on the basis of dollar value of sales?

A. Yes, sir.

7458 Q. Do you regard that as a sound accounting procedure?

A. Highly arbitrary.

Q. That is your opinion?

A. There may be some instances where it would be a proper method. We are talking about things generally, I understand.

Trial Examiner Ballinger: He merely asked you if you would express your opinion on it.

By Mr. Hanley:

Q. Is your answer complete as you now want to leave it?

A. I did express an opinion.

Q. If the Respondent had done that, there would have been a resultant cost differential between the tank wagon and the jobber customers? Would there not? I am referring now to the advertising account, of course, Mr. Warmack.

A. Yes, there would have been a differential to the extent of, or at least influenced by the one and a half cent price differential which the preferred customers receive.

Q. Did you give any consideration to the possible influence of that kind of an allocation in your study of this matter?

A. In my opinion, such an allocation would not be proper in this matter. And I have known about it. But I have not made any intensive study of it.

Q. Have you ever heard of allocating advertising according to benefits secured as reflected by gross profit margin, or marketing expense?

7459 A. I have heard of it, yes.

Q. Do you regard that as a sound accounting procedure?

A. If it is properly established by a study.

Q. Supposing that the Respondent company had done that in this instance, would there have been a cost differential?

A. I could not answer that question. I do not know what the gross margin was.

Q. Mr. Warmack, is it not true that any of the customary means of allocating advertising expenditures as used by various accountants except unit of sale, as you have suggested, would result in a cost differential between sales to tank wagon customers and to jobber customers?

A. I have to have some information. Please explain what you mean by "customary."

Q. Mr. Warmack, I am going to leave that to you. You are an accounting expert and I mean by "customary" procedures, those procedures which are understood among expert accountants to mean customary procedures. I regard myself as far less well informed than you should be on that subject.

A. Do you regard "customary" procedures the procedure you have just outlined, if so, in some instances, there would be a cost differential. To familiarize myself with all of the procedures used, or the principle procedures used in the allocation of cost by various companies or their accountants, would require a review of some of

7460 the records of this Commission, your Honor. I know that advertising has been separated in many instances and for many purposes. But just what effect separations, various separations would have as made by others in the case at bar of this particular class of expense, the answer would have to be—I do not know.

Q. Adverting to account 520 on Respondent's Exhibit 101, Mr. Warmack. You have testified at length in regard to that. In your testimony you first limited the cost under this account as having any bearing on cost differential to $26,226.38. You referred to that in your testimony on page 6488. You further reduced that amount to $20,108.90. Is that not correct?

A. No, sir. That is incorrect. It is my opinion, if I might state, that the $26,226.38 is—

Q. (Interposing.) There is no question pending, Mr. Warmack, please. I will ask you a question now.

Trial Examiner Ballinger: One moment. Is there a question or not? Was the witness afforded an opportunity to answer the question?

Mr. Hanley: He did answer it, as I understand it.

Trial Examiner Ballinger: Do you desire to amplify or explain?

The Witness: Yes, sir. I was trying to do so. I was interrupted by Respondent's counsel. May I?

Trial Examiner Ballinger: You may do so.

7461 The Witness: It is my opinion that $26,226.38 in this account representing contributions by the company to match the contributions by the employees for the purpose of annuity and retirement in the Detroit field for 1940 is a proper charge from which to arrive at a cost differential.

By Mr. Hanley:

Q. Very well, now; will you just please answer these questions as to whether you said these things or whether you did not say them, Mr. Warmack, without any explanation.

I refer you to page 6488, and will ask you if you did not make the following statement:

"In the case of account 520, the total in that account of $157,014.35, as shown on Respondent's Exhibit 161, was not used in making the calculation, and in lieu thereof a figure of $26,226.38 was used representing the contributions by the company to match the contributions by employees for the purposes of annuities and retirement in the Detroit field for the year 1940. Using that figure the same procedure was used in arriving at the figure shown on Commission's Exhibit 133, as just described for account 244."

Trial Examiner Ballinger: Did you make that statement?

The Witness: Yes, sir.

By Mr. Hanley:

7462 Q. I now ask you, Mr. Warmack, to refer to page 6863 of the record referring to the same account 520.

I ask you if you were not asked this question and if you did not make this answer:

"Q. You are right, and I would like it from the standpoint of procedure and the figures used.

"A. Well, I had arrived at the manner by which I had calculated the figure of $20,108.90 in my answer just given * * *"

I ask you if you were asked that question and did you make that answer?

A. Yes, sir. That is part of the answer that I gave.

Q. Now, Mr. Warmack, by reducing this amount to $20,108.90, as I understand it, you eliminated the following portions from Respondent's account 520:

(a) $6,117.48 being a part of the company's contributions to match employees' contributions. Is that right?

A. Will you refer me to the page in the record?

Q. I am just asking you the question.

A. I have not any figures in my head on that subject. I gave them all to you. I do not have them with me.

Q. I refer you to page 6488 and page 6863 to which I have just asked you to refer, Mr. Warmack.

A. Page 6488 has no six thousand dollar figure shown on it.

7463 Q. Well, Mr. Warmack, you can subtract twenty thousand dollars from twenty-six thousand dollars, can you not?

A. I think so.

Q. Or could you?

A. I could.

Q. If you can, please do so, and verify that figure.

A. Thank you.

(The witness made certain computations.)

The Witness: I would like to hear the question.

Trial Examiner Ballinger: Read the question to the witness.

(The reporter read the following question:

"Q. Now, Mr. Warmack, by reducing this amount to $20,108.90, as I understand it, you eliminated the following portions from Respondent's account 520:

"(a) $6,117.48 being a part of the company's contributions to match employees' contributions. Is that right?")

The Witness: Yes, sir. That was done in my calculation.

By Mr. Hanley:

Q. Is it true that you also eliminated $108,508.83 being the company payment to a trust fund for retirement of employees?

A. It was eliminated from the account? That was
7464 not eliminated from the first item referred to.

Q. I am asking you if it was eliminated from account 520?

A. Yes, sir. It was.

Q. Did you not also eliminate the amount of $22,279.06 being annuities paid to retired employees in the Detroit field?

A. I did. And I should like to inquire what "eliminated" to? What is the elimination referred to?

Q. I do not know. I am asking you.

A. You say "eliminate." I would like to inquire where, how, and why?

Q. Well, eliminate, the way I have used it, Mr. Warmack, means to take it out of the account.

A. Eliminate it for what purpose? I just do not understand this line here. I do not think it should go in there, that $108,508.83 has a place in your cost differential in determining it, and I do not think $22,279.06 I just referred to has a place in it, but when you say "eliminate", I wonder for what purpose.

Trial Examiner Ballinger: From the cost study.

The Witness: Well, Judge, that does not answer it.

By Mr. Hanley:

Q. Well, you took them out. If you do not like the word "eliminate" or do not understand it, I wish you would say so.

Mr. Austin: Your Honor, I object.

7465 By Mr. Hanley:

Q. You took them out, and refrained from giving them any consideration as a support for the Respondent's claimed cost differential. Does that make it any more clear?

A. In your preparation of what?

Mr. Austin: Your Honor, I think it may be understood that Judge Hanley is directing to the witness' attention calculations in determining how much of account 520 may properly be used in his opinion for the purpose of establishing a cost differential.

Now, if the witness will accept that and counsel for the Respondent will accept it, perhaps it will facilitate answering the question.

Trial Examiner Ballinger: That is what Judge Hanley evidently referred to.

Mr. Hanley: Well, I thought I did, Judge, and I am willing to accept the testimony of both Mr. Warmack and Mr. Austin on the question if I can just get it established; that is, that they have kicked out everything in that account except $20,108.90. Now, having got over that, if the witness can answer the question, I will accept it.

The Witness: Any calculation made by me I calculated —when you say "kicked out," I certainly do not subscribe to Commission's Exhibit 133, if that is what you are driving at.

7466 By Mr. Hanley:

Q. You made that? Did you not?

A. Yes, sir. I made it.

Q. Do you not subscribe to it?

A. No. There are a lot of figures in there that I do not subscribe to. They were not even covered in my study, but if they were studied, I certainly would not want to say that you could do otherwise than kick those out.

Trial Examiner Ballinger: In other words, Commission's Exhibit 133 gives credit to the company for items that you would have eliminated? Is that correct?

The Witness: That I would have eliminated had I made a study of them. Yes, sir, your Honor. So, when counsel says I "eliminated," I have not eliminated anything.

I have made calculations to meet his questions here at various times. But I have never arrived at a figure which I thought is Respondent's cost differential for the reason that the information just is not available with which to do it. I have stated in this record, your Honor, repeatedly, what would have to come out of there. That had to do directly with account 075 and account 502. And I made calculations to meet the request of the Respondent's counsel. And that is all I did.

By Mr. Hanley:

Q. Now, Mr. Warmack, to get back to this thing if 7467 we can. Account 520, as reflected on Respondent's Exhibit 101 is $157,104.35. Are you prepared to say now that the only portion of that amount of money that should be given consideration as a basis for calculating a cost differential is the sum of $20,108.90?

A. I certainly am not, and—

Q. (Interposing). Well, just what would you do—

A. —I made a few calculations to meet your requests on this record.

Q. I am not asking you to make any calculations, Mr. Warmack, and I have not asked you to.

A. The record will show that you have asked me many, many times to make calculations in this record.

Q. I am asking you this question now. I will ask—

Mr. Hanley: I will ask the reporter to read it, please.

(The reporter read the question as follows:

"Q. Now, Mr. Warmack, to get back to this thing if you can. Account 520, as reflected on Respondent's Exhibit 101 is $157,104.35. Are you prepared to say now that the only portion of that amount of money that should be given consideration as a basis for calculating a cost differential is the sum of $20,108.90?")

By Mr. Hanley:

7468 Q. I certainly wish you would answer that.

A. No, sir. I certainly am not.

Q. Mr. Warmack, I refer you to page 6839 of the record: I will ask you if you did not make the following statements on that and the following page in respect of account 520, annuities and retirement plan expense.

A. What is the page number, again?

Q. 6839.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. "Account 520, Annuities and Retirement Plan Expense.

"Answering question 1: This account consists of three separate parts as follows:

"Part 1. Contributions made by the company to match contributions made by employees engaged in the Detroit field, amount $26,226.38.

"Part 2. Portion of trust fund contributed by the company for the retirement of employees in the Detroit field in 1940 to cover services of such employees prior to January 1, 1939, $108,508.83.

"Part 3. Annuities paid to retired employees in the Detroit field for the year 1940, $22,279.06.

"It is my opinion that parts 2 and 3, as previously 7469 defined, are expenses which were not incurred in marketing activities in the Detroit field for the year 1940, hence, they are not costs which can be used in determining cost differentials."

Will you please reconcile that answer with the answer you have just given, Mr. Warmack?

A. I would be happy to. In my opinion, contributions made by the company to match contributions made by employees engaged in the Detroit field, amounting to $26,226.38, is a proper cost on which a cost differential, in part, can be based.

There are two items of cost, namely, $108,508.83 and $22,279.06 which, in my opinion, are not costs on which a cost differential could be based.

The $26,226.38 which I think can be used in determining a cost differential should follow a proper and sound separation of the compensation of the employees to whom that cost applies in determining a cost differential.

Q. Now, you have been discussing the amount of $26,226.38. If you did it and why you did it—I understand that that figure has been justified by you and adjusted to the reduced figure of $20,108.90. Are you clear on that, Mr. Warmack?

A. I am clear that I did that in a calculation. What you mean by the rest of the question I do not know.

Q. Very well. My question was: Is there any part of account 520 which should remain in the account for 7470 consideration in the calculation of a cost differential? Is there any amount other than this $20,108.90?

A. I understood you to say that is what I did. That is not what I said. Is that what you think? That it is not stated exactly clearly is evident. I will ask you, if you will kindly restate the question. That is not stated exactly, as you have it there, as to what I have stated heretofore.

Q. If there are any amounts that you think should be given consideration and if so, state further whether or not you did give them consideration in your calculations.

A. It is my opinion that $26,226.38 of this account is a cost on which a cost differential could be determined. Any calculations made for the Commission's attorneys at their request in the preparation of Commission's Exhibit 133 and to meet your request as to how those calculations were made; that is, the amount of $26,226.38 was reduced to $20,108.90 for the reason that many of the salary accounts to which a portion of that class of expense applied could not, under any theory of probabilities in its present form, be used in determining a cost differential.

Therefore, if those salaries which were eliminated and a percentage factor was applied, you would arrive at the figure of $6,117.48 which was thus arrived at, Mr. Hanley. That was deducted from the $26,226.38, leaving a balance of $20,108.90 in the account which, for the purpose 7471 even of the calculations of Respondent's Exhibit 133 was overstated.

Trial Examiner Ballinger: Do you mean Commission's?

The Witness: Commission's Exhibit 133 was overstated, but for the reason that we did not have the information with which to make the calculation eliminating the proper amounts, that is where the $20,108.90 comes in.

But, your Honor, I should like for this record to show that it is my opinion that $26,226.38 is a proper portion of this account—that and only that amount—which can properly be used by the Respondent company in establishing a cost differential.

By Mr. Hanley:

Q. Now, Mr. Warmack, the question I am asking you is a simple arithmetical question. It may be that the reasons for your opinion are very complicated. I am not concerned about that.

I am trying to find out if the net influence of the adjustment which you made is to reduce the total amount of account 520 from $150,014.35, as paid out by the Respondent company, to the sum of $20,108.90?

A. The calculations were made on that basis, as just explained in my previous answer.

Q. And when you gave an answer some days ago in respect of your judgment as to how, or your views of the

treatment of account 520 should effect the claimed cost
7472 differential, it was on the basis of that kind of an adjustment and calculation. Was that not so?

A. It was on the basis of that exact calculation as just explained which had the effect of leaving in that account the amount which was overstated, because of the fact that the salary accounts to which that total account applies had to be thrown out in part because of the fact that they had not been properly analyzed and studied, and the separations made on Respondent's Exhibit 101 were not properly separated, as far as those accounts are concerned, from the standpoint of sound accounting.

Q. Mr. Warmack, I am going to ask you the same question and I really request you to please answer it.

When you made your statement of a few days ago in respect of your opinion as to how the differential claimed by the Respondent company should be affected in view of your opinions as to the proper treatment of account 520, that differential was predicated, was it not, upon your calculation of reducing the amount paid out by the Respondent company in account 520 of $157,014.35 to the amount of $20,108.90.

Now, that is just arithmetical, Mr. Warmack.

Can you answer it without expressing any opinion on it?

Mr. Austin: The question has already been asked and answered, your Honor. I object to the repetition.

7473 Mr. Hanley: I do not know. Maybe there is an answer somewhere buried in all of that verbiage.

Trial Examiner Ballinger: The answer is not clearly set forth in the record, as far as the Examiner recalls.

I think the witness can give a direct answer.

Mr. Austin: I think he has.

The Witness: I have.

Mr. Hanley: What is it?

Trial Examiner Ballinger: Turn back and read the witness' answer.

Mr. Hanley: We can save time if he would just answer it long before you can read all of this explanation.

Trial Examiner Ballinger: Read the question and the answer.

(The reporter read the following question and answer:

"Q. Now, Mr. Warmack, the question I am asking you is a simple arithmetical question. It may be that the reasons for your opinion are very complicated. I am not concerned about that.

"I am trying to find out if the net influence of the adjustment which you made is to reduce the total amount of account 520 from $150,014.35, as paid out by the Respondent company, to the sum of $20,108.90?

7474 "A. The calculations were made on that basis, as just explained in my previous answer.")

Trial Examiner Ballinger: The witness may answer the question.

The Witness: May I have it read, your Honor?

(The reporter read the following question:

"Q. Mr. Warmack, I am going to ask you the same question and I really request you to please answer it.

"When you made your statement of a few days ago in respect of your opinion as to how the differential claimed by the Respondent company should be affected in view of your opinions as to the proper treatment of account 520, that differential was predicated, was it not, upon your calculation of reducing the amount paid out by the Respondent company in account 520 of $157,014.35 to the amount of $20,108.90.

"Now, that is just arithmetical, Mr. Warmack.

"Can you answer it without expressing any opinion on it?")

(Witness temporarily excused.)

Mr. Hanley: I move that we adjourn until tomorrow morning.

Trial Examiner Ballinger: The motion of counsel for the Respondent is granted.

7475 And now, at 4:15 p. m., the hearing stands adjourned to be reconvened at 9:30 a. m., July 29, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 4:15 p. m., July 28, 1942, the hearing in the above entitled matter was adjourned.)

7476

Room 532, Federal Trade
Commission Building,
Washington, D. C.
Wednesday, July 29, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Illinois,) appearing for the Respondent, Standard Oil Company of Indiana.

7477

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing in Docket No. 4389, case entitled "In the Matter of Standard Oil Company (Indiana)" is reconvened pursuant to notice at 9:30 a. m., July 29, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held at the same place, July 28, 1942.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

Mr. Hanley: I will ask Mr. Warmack to resume the stand, please.

Mr. Warmack: Yes, sir.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Hanley.

Q. At the adjournment last evening, Mr. Warmack, you had been asked a question, and you requested permission to make some research that you desired to make.

Now, I will ask you if you will please answer the question which is pending on the record.

The Witness: May I hear the question?

7478 Mr. Hanley: I suggest that it be restated in the record at this point.

Trial Examiner Ballinger: That may be done.

(The reporter read the following question:

"Q. Mr. Warmack, I am going to ask you the same question, and I really request you to please answer it.

"When you made your statement of a few days ago in respect of your opinion as to how the differential claimed by the Respondent company should be affected in view of your opinions as to the proper treatment of account 520, that differential was predicated, was it not, upon your calculation of reducing the amount paid out by the Respondent company in account 520 of $157,014.35 to the amount of $20,108.90.

"Now, that is just arithmetical, Mr. Warmack.

"Can you answer it without expressing any opinion on it?")

By Mr. Hanley:

Q. Can you answer that question?

A. Yes, sir, I can.

Q. Please do so, Mr. Warmack.

A. Yes, sir. In the calculations made the amount was reduced to $20,108.90 in making the calculations or the approximations which I have made, and as explained at length previously in the record.

7479 Q. You also, did you not, reduce the amount in Respondent's Exhibit 101, account 520, by the sum of $108,798.83, being a company payment to a trust fund for retirement of employees?

A. Yes, sir. That was included in the reduction whereby the total amount was reduced from $157,014, plus to twenty thousand dollars plus for the calculation.

Q. You also reduced that account by the sum of $22,279.06 being annuities paid to retired employees in the Detroit field. Did you not?

A. Yes, sir. That amount was included in the reduction just referred to.

Q. Now, is it not true, Mr. Warmack, that the net influence of all these adjustments that you made is to reduce the total of account 520 from $157,014.35, as paid out by the Respondent company, to the sum of $20,108.90?

A. Yes, sir. That was done for the purpose of the calculation as just stated.

Q. Now, let us take up each of these amounts eliminated, separately.

We will discuss first the $6,117.48 eliminated from company current contributions for the insurance premium.

By saying that this item cannot be used in the cost justification, is it not the equivalent of charging it equally 7480 on a per-unit basis to both the tank wagon and direct shipment business?

Mr. Austin: If your Honor please, I object to that because the witness did not state what the question says. I would like to have it reread.

Trial Examiner Ballinger: Read it.

(The reporter read the question.)

Mr. Austin: That is what I mean, the witness said just the contrary yesterday. The witness said that was a part of the amount which was available for the establishment of the cost differential. The record is clear on that.

I do not see that the question is proper, being a question which is contrary to the words of the witness.

Mr. Hanley: If your Honor please, I have been trying for hours to ascertain whether this witness used in his calculation the sum of $26,226.38 or the sum of $20,108.90.

The witness this morning has testified that he used the sum of $20,108.90.

The Respondent now objects to the testimony given on the part of counsel for the Commission that the testimony given by the witness is inaccurate. It is the witness who is on the witness stand. He says he used $20,108.90 in his calculation. It is entirely improper, if your Honor please, that counsel for the Commission should undertake to testify that another or different figure was used.

7481 Trial Examiner Ballinger: Well, the witness has had the benefit now of the discussion. The Examiner will permit him to answer the question with proper explanation.

Mr. Austin: Your Honor, I would like to go off the record.

Mr. Hanley: If your Honor please, there is an objection on the part of the Respondent to counsel for the Commission going off the record so that the witness can have him—

Mr. Austin: (Interposing.) One moment. I shall be very glad to state it on the record. I would like to read into the record the testimony which the witness gave yesterday, so that your Honor can determine whether the statement made by counsel for the Respondent in his question is correct or not correct.

Mr. Hanley: That is objected to for the reason that this testimony of this witness on the subject has been read into the record, I think, at least three times.

Trial Examiner Ballinger: ~~It is~~ the contention of the counsel for the Respondent, apparently, that the witness has given conflicting testimony upon this point. The witness has been fully apprized of the situation by the discussion that has preceded his answer.

The Examiner feels that the witness is fully capable of taking care of himself.

7482 Mr. Austin: My original point was an objection as to the question. I do not know whether that has been ruled on. It was an objection on the ground that the question states that the witness said something; and the witness actually said the contrary.

Trial Examiner Ballinger: Apparently at that point in the record the witness' testimony was different from that included in the question; but also apparently at other points in the record, the witness testified differently from that.

Now, the question is, which testimony is correct?

Mr. Austin: Your Honor, since that statement appears on the record, your Honor, I would like to be recorded also as not conceding that the witness testified to the contrary.

Trial Examiner Ballinger: The witness is on the stand and I am sure he is fully capable of taking care of himself. If he has not so testified he can so state.

Mr. Hanley: May we have an answer to the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q: Now, let us take up each of these amounts eliminated, separately.

"We will discuss first the $6,117.48 eliminated from company current contributions for the insurance premium.

"By saying that this item cannot be used in the

7483 Cost justification, is it not the equivalent of charging it equally on a per unit basis to both the tank wagon and direct shipment business?")

The Witness: I should like for counsel to explain, please, exactly what he means. I do not think that I understand it.

By Mr. Hanley:

Q. What do you not understand about it, Mr. Warmack? You are eliminating the six thousand dollars.

The Witness: Your Honor, the step-by-step procedure of exactly what I did is in these records at least two or three times.

Trial Examiner Ballinger: Well, now, if there is any question about what you did you may restate it.

The Witness: No, I would like to have the record speak for itself.

Mr. Austin: Your Honor, I would object seriously to that. I can assure your Honor, and I think that he should look through at least some of these pages which I have here, which run for some at least ten pages, going over this very question at least three times in the record, before your Honor rules that this should be restated in the record again.

Trial Examiner Ballinger: I know, but it will take much longer to review that than it will to permit the witness to make a restatement at this time.

7484 Mr. Hanley: If your Honor please, let the record show that the Respondents request an answer to this very simple question. This accounting witness, advanced by the Commission, has made a calculation. I have now asked him the question as to the effect of the calculation which he made. And the Respondent earnestly requests that it may have an answer.

Trial Examiner Ballinger: Judge, the Examiner has ruled, and the witness will answer. No further argument will go on the record.

Mr. Austin: I would like to have the question reread, your Honor. I do not believe that question can be answered.

Trial Examiner Ballinger: Now, Mr. Warmack, if you do not understand it you may so state.

The Witness: I have already stated so, your Honor.

Trial Examiner Ballinger: Read the question to the witness again.

(The reporter read the following part of the question to the witness:

"Now, let us take up each of these amounts eliminated, separately.

"We will discuss first the $6,117.48 eliminated from company current contributions for the insurance premium.")

7485 Trial Examiner Ballinger: Right there. Was that eliminated?

The Witness: In the calculation; yes, sir.

Trial Examiner Ballinger: Proceed.

(The reporter read the following:

"* * * By saying that this item cannot be used in the cost justification, is it * * *")

The Witness: (Interposing.) I never said that in my life.

Trial Examiner Ballinger: Well, we cannot go outside of this record.

(The reporter read the following:

"* * * is it not the equivalent of charging it equally on a per unit basis to both the tank wagon and direct shipment business?")

The Witness: Now, if counsel will please explain that part, I will appreciate it.

By Mr. Hanley:

Q. You made the calculation, Mr. Warmack. Are you able to answer the question or are you not?

A. If you will kindly explain that, I will be glad to answer the question.

Q. What do you want to explain?

A. That last portion.

Trial Examiner Ballinger: He desires the last one.

7486 Read the last part of the question.

(The reporter read the following:

"* * * is it not the equivalent of charging it equally on a per unit basis to both the tank wagon and direct shipment business?")

By Mr. Hanley:

Q. All right. You did eliminate the $6,117.48 in your calculation. Did you not?

A. I did in the calculation made for you and for the Commission's attorney.

Q. Now, I ask you—

A. If you will kindly allow me to complete my answer without interfering.

Q. Have you finished?

A. I have finished.

Q. Having eliminated that in your calculation, I am asking you this: That being so that this item cannot be used—and you did not use it—

A. (Interposing.) And I did not use it.

Q. —in the cost justification, is it not the equivalent of charging it—the amount of $6,117.48 equally on a per unit basis to both tank wagon and direct shipment business?

A. It may have that effect. I see no reason why it should be so charged under any point raised in this case.
And I have not testified, your Honor, that that
7487 particular part of that class of expense cannot be
used in the determination of a cost differential. I have explained many times on this record in the step-by-step procedure the reason that it had to be eliminated in the calculation requested by Respondent's attorney, and also requested previously by the Commission's attorney.

Mr. Hanley: Respondent moves to strike the answer of the witness as not responsive. Respondent requests that the question be reread to the witness. Respondent requests that the Court admonish the witness to answer the question.

Trial Examiner Ballinger: In what respect has not the witness answered the question?

Mr. Hanley: I did not hear your Honor's question.

Trial Examiner Ballinger: In what respect has not the witness answered the question?

Mr. Hanley: He has not stated whether or not by his calculation in eliminating this item it is the equivalent of charging it equally on a per unit basis to both tank wagon and direct shipment business. And that, if your Honor please, is the question, and that is all of the question.

Trial Examiner Ballinger: Read the question and the answer.

(The reporter read the question and answer referred to, as follows:

"Q. Having eliminated that in your calculation,
7488 I am asking you this: That being so that this item
cannot be used—and you did not use it—

"A. And I did not use it.

"Q. —in the cost justification, is it not the equivalent of charging it—the amount of $6,117.48 equally on a per unit basis to both tank wagon and direct shipment business?

"A. It may have that effect. I see no reason why it should be so charged under any point raised in this case.

"And I have not testified, your Honor, that that particular part of that class of expense cannot be used in the determination of a cost differential. I have explained many times on this record in the step-by-step procedure the reason that it had to be eliminated in the calculation requested by Respondent's attorney, and also requested previously by the Commission's attorney.")

Trial Examiner Ballinger: He has stated, as the Examiner understands, that that may be the effect.

Mr. Hanley: Well, if he has stated that, it may be the effect I will now ask the witness.

By Mr. Hanley:

Q. Is it the effect?

A. If it were allocated on any such basis, that would afford no cost differential; and if it were taken out
7489 of there, it would afford no cost differential, therefore, take it or leave it.

Q. Well, on the basis of your calculation—and you made the calculation, Mr. Warmack—is that the effect?

A. The elimination of any item, that item or any other from the account, or the allocation of that item generally on the basis of gallonage as between the two classes of customers in which the cost differential is sought would have no effect whatsoever.

And I made that calculation, and explained it in the record several times. And I—

Trial Examiner Ballinger: That is not necessary.

Mr. Hanley: The Respondent moves to strike the answer of the witness as not responsive. The Respondent requests the Court to have the question reread to the witness. The Respondent requests the Court to admonish the witness to answer the question "yes" or "no", or to say "I do not know."

Trial Examiner Ballinger: Read the answer just given by the witness.

(The reporter read the answer.)

Trial Examiner Ballinger: Is that not the answer?

Mr. Hanley: No, your Honor, it is not.

Trial Examiner Ballinger: Is that not the equivalent of an answer, "Yes"?

Mr. Hanley: I would like to respectfully request
7490 your Honor to require the witness to answer this question "yes" or "no" if he knows. He made the calculation.

Mr. Austin: I do not think the question is susceptible of a "yes" or "no" answer.

Mr. Hanley: The witness by saying that this item cannot be used—and understand, gentlemen, that he refrained from using it in the cost differential justification, is that not the equivalent of charging it equally on a per unit basis to both tank wagon and direct shipment business?

If your Honor please, that question is susceptible of a "yes" or "no" answer.

Trial Examiner Ballinger: Well, his answer is that it is.

Mr. Hanley: It is what?

Trial Examiner Ballinger: Well, his answer is that it would have no effect whatsoever.

By Mr. Hanley:

Q. Well, is that your answer?

A. The record shows. I stated it four times. I wish—

Mr. Hanley: Well, that is all.

Mr. Austin: Well, if your Honor please—

The Witness: (Interposing.) Well, Judge Ballinger, that is my answer. And I was going to say also that Respondent's counsel's statement that I said that this amount of $6,117.48 could not be used in determining a cost
7491 justification, is a misstatement of fact.

Mr. Hanley: The Respondent moves to strike the voluntary statement of the witness. The record shows amply that the witness did reduce the sum of $26,226.38 to the sum of $20,108.90 in the calculation which he made.

Trial Examiner Ballinger: The Examiner will strike both the voluntary statement of the witness and also the comment of counsel, not physically, of course.

Mr. Hanley: The comment of counsel is a motion, if your Honor please.

Trial Examiner Ballinger: Well, the motion is granted so far as it relates to the voluntary statement. The balance of the motion is stricken.

By Mr. Hanley:

Q. Mr. Warmack, what per cent of the total Detroit volume is represented by direct shipment sales?

A. I do not know.

Q. Could you determine?

A. Yes, sir.

Q. Well, will you do so, please?

A. I would be glad to.

(The witness examines documents for several moments.)

The Witness: May I have the question, your Honor, please?

Trial Examiner Ballinger: Read the question.

7492 (The reporter read the question as follows:

"Q. Mr. Warmack, what per cent of the total Detroit volume is represented by direct shipment sales?")

The Witness: For the year 1940 direct shipment sales in the Detroit area represent about 50.3 per cent of the total volume in gallons.

By Mr. Hanley:

Q. Would you now turn to page 87 of Respondent's Exhibit 100.

A. Yes, sir.

(The witness turned to that page of the Exhibit.)

Q. Tell the Court what the total dollar cost for salaries included in account 000—supervision, for handling direct shipment sales amounted to?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Answer the question.

The Witness: Referring to page 87 of Respondent's Exhibit 100?

By Mr. Hanley:

Q. That is right.

(The witness examined the document for several moments.)

Trial Examiner Ballinger: Can you answer the 7493 question?

The Witness: I believe I can answer the question but not from the information set forth on that page.

By Mr. Hanley:

Q. Could you answer it from any information which you have? Have you—If you cannot, just say so, Mr. Warmack, and I will ask you another question.

A. I could probably make a calculation here and determine that but I do not believe that information is set forth on page 87 of Respondent's Exhibit 100.

Q. I will ask you if, as a matter of fact, it is not $641.46?

A. As I understand it that is a portion of the Triple O account which Respondent has assigned to the direct shipment business, but the percentage or the relationship of that to the total expense in the identical year are not shown on page 87 of Respondent's Exhibit 100.

Q. I did not ask you that. I asked you if the amount is not $641.46?

A. That is correct.

Q. Please refer to Respondent's Exhibit 101 and state for the record what the total charge to this Triple O account is.

A. For the year 1940 the total charge for the Triple O account entitled "Salaries—Supervision" shown on Respondent's Exhibit 101 is $51,360.21.

7494 Q. Now, Mr. Warmack, will you divide the direct shipment cost, $641.46 by the total cost, $51,360.21 and tell the Court what the resultant percentage ratio is.

A. I should be glad to made the calculation if it is not shown.

(The witness made certain figures.)

The Witness: In Respondent's Exhibit 100? Do you know if it is shown in there?

By Mr. Hanley:

Q. I believe not.

A. Approximately 1.24 per cent, according to the calculation made here on the witness stand.

Q. Mr. Warmack, in your judgment as an accountant, do you regard it as sound accounting practice to charge 30.3 per cent of an expense for but 1.24 per cent of the effort for which this expense was incurred?

The Witness: I will have to have that read, your Honor.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I think it would be quite unusual if any charge were made like that if you knew what the other was.

By Mr. Hanley:

Q. Is that not what you have done?

7495 A. I have not. No.

Q. Is not that what you recommend?

A. No, sir.

Q. Have you not indicated that 30.3 per cent of this account should be charged to the direct shipment business?

A. I have never said any such thing as that in my life.

Q. Is not that the force of all of your criticism of the Respondent's accounting?

A. It most assuredly is not.

Q. I now ask you to consider this, Mr. Warmack:

(a) Referring you to account 001, which indicated a percentage of actual expense of approximately 6.8 per cent;

(b) Account 004, which indicates a percentage of actual expense of approximately 6.6 per cent;

(c) Account 005, which indicates a percentage of actual expense of approximately 2.8 per cent;

(d) Account 215, which indicates a percentage of actual expense of approximately .6 per cent;

(e) and ask you if, in your judgment as an accountant it is sound accounting practice to charge approximately 30.3 per cent of the expense incident to the totals in these accounts for the respective and indicated percentages of effort for which the expense was incurred?

(f) Before you answer that, Mr. Warmack, I as-
7496 sume you wish to verify those percentages. And I am
sure that the Examiner will accord whatever time you need to do so.

Trial Examiner Ballinger: If he desires to examine the percentages stated he may do so.

The Witness: Your Honor, if this is going to be required, I think we ought to call somebody up here, one of the accountants with a calculating machine to make this calculation. I do not think it is proper and appropriate to have me make all of those calculations here on the witness stand.

I am not questioning the percentages, however, I think the question is much broader than that, and if I may answer the question, I would like to answer it with respect to each of the accountants separately.

Trial Examiner Ballinger: Do you understand the question?

The Witness: Yes, sir.

Trial Examiner Ballinger: Well, if you do not question the percentages, you may proceed to answer it, adopting the percentages stated by counsel.

The Witness: I do not question the Respondent's calculation of the percentages.

I do not know as they have any weight whether I accept them or do not accept them.

For the purpose of answering the question, I will 7497 accept them.

Trial Examiner Ballinger: Proceed.

The Witness: Now, if I may answer it—with respect to each account separately—I shall be glad to do so.

By Mr. Hanley:

Q. Answer the question any way you see fit, Mr. Warmack.

Trial Examiner Ballinger: Now, read the question to him.

(The reporter read the question as follows:

"Q. I now ask you to consider this, Mr. Warmack:

"(a) Referring you to account 001, which indicates a percentage of actual expense of approximately 6.8 per cent.;

"(b) Account 004, which indicates a percentage of actual expense of approximately 6.6 per cent.;

"(c) Account 005, which indicates a percentage of actual expense of approximately 2.8 per cent.;

"(d) Account 215, which indicates a percentage of actual expense of approximately .6 per cent.;

"(e) and ask you if, in your judgment as an accountant it is sound accounting practice to charge approximately 30.3 per cent of the expense incident to the totals in these accounts for the respective and indicated percentages 7498 of effort for which the expense was incurred?

"(f) Before you answer that, Mr. Warmack, I assume you wish to verify those percentages. And, I am sure that the Examiner will accord whatever time you need to do so.")

Mr. Austin: That does not make any sense to me at all.

Trial Examiner Ballinger: One moment. The witness stated that he understood the question.

Mr. Austin: The witness may have said so but I do not.

Trial Examiner Ballinger: No?

Mr. Austin: Well, I do not.

Trial Examiner Ballinger: Well, if the witness understands it he may answer it.

The Witness: Well, your Honor, the question, I do understand it, but you have about five or six questions there incorporated in one. And I wonder if I might not answer these questions separately?

Trial Examiner Ballinger: You have been advised by the Examiner that you may do so.

The Witness: Well, then, may these questions appear separately, with the answer, so that I may give it?

Trial Examiner Ballinger: Proceed. The Examiner has instructed the reporter to read the question piecemeal.

7499 The Witness: Thank you.

Trial Examiner Ballinger: So that you may answer each and every part that you desire to separate.

The Witness: Thank you.

Now, I should like to hear it read.

Trial Examiner Ballinger: Now read the question.

The Witness: To make sure that I do understand it.

(The reporter read the following:

"Q. I now ask you to consider this, Mr. Warmack:

"(a) Referring you to account 001, which indicates a percentage of actual expense of approximately 6.8 per cent.;

* * *

"(e) and I ask you if, in your judgment as an accountant it is sound accounting practice to charge approximately 30.3 per cent. of the expense incident to the totals in these accounts for the respective and indicated percentages of effort for which the expense was incurred?")

The Witness: That is so complicated, your Honor, may not these be stated separately, and then let me answer them separately? I would like to hear again the very first part of it. I think I have the question, but I think I have a question there of qualification.

7500 (The reporter again read the following:

"Q. I now ask you to consider this, Mr. Warmack:

"(a) Referring you to account 001, which indicates a percentage of actual expense of approximately 6.8 per cent.; * * *

"(e) and ask you if, in your judgment as an accountant it is sound accounting practice to charge approximately 30.3 per cent of the expense incident to the totals in these accounts for the respective and indicated percentages of effort for which the expense was incurred?")

Trial Examiner Ballinger: Will it simplify things, Judge, if you will restate the question?

Mr. Hanley: I cannot simplify these questions to suit this witness, if your Honor please. I do think this question, if it accords with your view as being proper, perhaps, if we take a short recess, the reporter may write this question up, and then the witness will be able to look at it.

Trial Examiner Ballinger: For that purpose we will take a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

You may proceed.

7501 Mr. Hanley: Inasmuch as the Examiner adopted the suggestion of Respondent's counsel that the question be written for the witness, it is now requested that the written question submitted to the witness be set forth in extenso in the record.

Trial Examiner Ballinger: Request granted.

(The question referred to is as follows:

"Q. I now ask you to consider this, Mr. Warmack:

"(a) Referring you to account 001, which indicates a percentage of actual expense of approximately 6.8 per cent.;

"(b) Account 004, which indicates a percentage of actual expense of approximately 6.6 per cent.;

"(c) Account 005, which indicates a percentage of actual expense of approximately 2.8 per cent.;

"(d) Account 215, which indicates a percentage of actual expense of approximately .6 per cent.;

"(e) and ask you if, in your judgment as an accountant it is sound accounting practise to charge approximately 30.3 per cent. of the expense incident to the totals in these accounts for the respective and indicated percentages of effort for which the expense was incurred?

"(f) Before you answer that, Mr. Warmack, I 7502 assume you wish to verify those percentages. And, I am sure that the Examiner will accord whatever time you need to do so.")

The Witness: Before I answer this, your Honor, I should like to request counsel to tell me the figures which he used in arriving at 6.8 per cent applicable to the 001 account entitled "Salaries—Supervision—Others."

By Mr. Hanley:

Q. If it will aid you, Mr. Warmack, in response to your request, the percentage figures relating to actual expense in respect of subdivisions (a), (b), (c) and (d) of the question have to do with the actual expense as determined by the cost study of the Respondent as reflected in Respondent's Exhibit 100 and Respondent's Exhibit 101.

Mr. Austin: May I ask a question?

Trial Examiner Ballinger: You may.

Mr. Austin: I am going to ask counsel for the Respondent whether those percentages are the percentages of total direct shipment charges on Respondent's Exhibit 101 to the total expense in the account? It is not clear to me,—

Mr. Hanley: (Interposing.) Well, I think that is it—.

Mr. Austin: (Continuing) of what the percentages are.

Mr. Hanley: Will you read me the request of counsel?

7503 Trial Examiner Ballinger: Read it.

(The reporter read the statement of Mr. Austin.)

Mr. Hanley: If your Honor please, I do not know whether I can answer counsel's question any more than or any more fully than by referring him to the answer which I just immediately above gave the witness.

The percentage figures are the expense, the actual expense in handling petroleum products arrived at by an analysis of effort in connection with jobber direct shipment (in connection with direct shipment) as reflected by Respondent's Exhibit 100 and Respondent's Exhibit 101.

Trial Examiner Ballinger: From the information that has been furnished you, Mr. Warmack, can you now answer the question?

The Witness: Your Honor, I should like to ask counsel one other question:

For example, in account 004, entitled "Salaries—Salesmen" on Respondent's Exhibit 101 in which the percentage of 6.6 is shown—does that percentage represent the relationship of the cost set forth under the three direct shipment customer channels to the total petroleum product expense for that account, or to the total petroleum products and automobile supplies account?

With that information I believe I can answer the question.

7504 Mr. Hanley: If your Honor please, I believe that that question is fully answered by the two statements I have already made.

I will restate it this way if it will be helpful, that the 6.6 per cent pertinent to account 004 is the percentage based on the effort expended as disclosed by Respondent's cost study in connection with the jobber direct shipment in relation to the total petroleum products. Now, I just do not think I can state it any more clearly. It may be that—

Mr. Austin: I would like to speak to counsel for the Respondent off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: If your Honor please, it may be that I used the words "jobber direct shipment," in some of the explanation alluded to, and in such instances you may disregard the word "jobber" and let it remain as though the statement were "in connection with direct shipments" as reflected by Respondent's Exhibit 100, and Respondent's Exhibit 101; and also as used by me in saying "in connection with jobber direct shipments in relation to total petroleum products." In both of those instances the word "jobber" should be eliminated, and regard "direct shipments," as including all direct shipments. 7505

Trial Examiner Ballinger: That may be done. With that qualifying statement, are you prepared to answer, Mr. Warmack?

The Witness: Yes, sir. I believe so, your Honor. Just for the sake of clarity, I want to state this, that in the account 004 entitled "Salaries—Salesmen," the total direct shipment costs as set forth on Respondent's Exhibit 101, are approximately thirteen thousand six hundred dollars. And it is my understanding that the 6.6 per cent represents the relationship of that total to the total petroleum products costs in this account of, roughly, two hundred and seven thousand four hundred dollars.

Is that correct?

Mr. Hanley: That is right, Mr. Warmack.

The Witness: Thank you, Judge Hanley. Thank you.

Trial Examiner Ballinger: Proceed to answer the question.

Read the question.

(The reporter read the question as follows:

"Q. I now ask you to consider this, Mr. Warmack:

"(a) Referring you to account 001, which indicates a percentage of actual expense of approximately 6.8 per cent.;

7506 "(b) Account 004, which indicates a percentage of actual expense of approximately 6.6 per cent.;

"(c) Account 005, which indicates a percentage of actual expense of approximately 2.8 per cent.;

"(d) Account 215, which indicates a percentage of actual expense of approximately .6 per cent.;

"(e) and ask you if, in your judgment as an accountant it is sound accounting practice to charge approximately 30.3 per cent of the expense incident to the totals in these accounts for the respective and indicated percentages of effort for which the expense was incurred?

"(f) Before you answer that, Mr. Warmack, I assume you wish to verify those percentages. And, I am sure that the Examiner will accord whatever time you need to do so.")

The Witness: In connection with sub-question (a) of this question which reads as follows:

"Q. I now ask you to consider this, Mr. Warmack:

"(a) Referring you to account 001, which indicates a percentage of actual expense of approximately 6.8 per cent.; * * *"

In answering this question, I should like for the record to show that I do not agree that 6.8 per cent representing the figures for account 001 as set forth in Respond-
7507 ent's Exhibit 101 is actual expense.

On that basis, I will answer the question—

By Mr. Hanley:

Q. (Interposing.) If you do not agree with the figure, Mr. Warmack, I will ask you please to make a calculation as to what the figure should be. I was under the impression that you did agree with the accuracy of the figures as disclosed in Respondent's Exhibit 99, Respondent's Exhibit 100, and Respondent's Exhibit 101.

If you do not, then I ask you now to indicate to the Court what the figures should be in your judgment.

A. I do not question the mechanical (mathematical?) accuracy of these figures nor the 6.8 per cent applicable to account 001 as set forth in counsel's question.

Trial Examiner Ballinger: Mr. Warmack, does not your objection run to the accounting methods by which those figures were arrived at?

The Witness: That is correct, your Honor.

Trial Examiner Ballinger: Well, now, dealing with that and on the basis of the system that was used by the Respondent, and treating that as correct, will you proceed to answer the question?

The Witness: Yes, sir. I will now answer this question, your Honor, which reads—

Trial Examiner Ballinger: Interposing.) That
7508 is the question you have previously read? Is it?

The Witness: No, sir. I will read the question now.

That was a statement previously, which read:

"Q. I will now ask you to consider this, Mr. Warmack:

"(a) Referring you to account 601, which indicates a percentage of actual expense of approximately 6.8 per cent.; * * *"

That which I wish to read now is as follows:

"* * * (e) and ask you if, in your judgment as an accountant it is sound accounting practice to charge approximately 30.3 per cent of the expense incident to the totals in these accounts for the respective and indicated percentages of effort for which the expense was incurred?"

The answer to that question is this:

That if a proper study had ever been made by the Respondent whereby it could be definitely determined what is the actual time applicable to each of the six channels as set forth on Respondent's Exhibit 101, if that were done, and if it were found by that study that 6.8 per cent of the actual time of this class of employees were devoted to direct shipment business, it certainly, in my opinion, as an account-
ant, would not be sound accounting practice to charge
7509 approximately 30.3 per cent to the direct shipment
business.

By Mr. Hanley:

Q. Mr. Warmack, do you not regard it as a fact that Respondent's Exhibit 99, Respondent's Exhibit 100, and Respondent's Exhibit 101 reflect the account relative to the actual effort expended by the company in handling jobber business?

A. I do so regard that, Mr. Hanley. But the cost studies as outlined in those exhibits which you mentioned, in my opinion, have not been carried through to a proper completion, but in my opinion, are what may be termed a "piecemeal analysis."

Q. Mr. Warmack, is it not true that the percentage applicable to subdivision (a) of the question referring to account 001, of 6.8 per cent is derived from the cost study as reflected by Respondent's Exhibit 100 and Respondent's Exhibit 101.

A. It is a fact that it was so derived, but my quarrel is with the point that the cost study was never properly carried through to a completion.

Q. Irrespective of your quarrel with the general accounting system of the Respondent, Mr. Warmack, do you dispute the percentage of 6.8 in reference to account 001 as reflected by Respondent's Exhibit 100?

A. In the first place, I do not quarrel with the general accounting system or methods of the Respondent in the keeping of its regular accounting. I do not dispute the facts that the figures, as set forth under the direct
7510 shipment channels on Respondent's Exhibit 101 represent 6.8 per cent of the total of this class of expense.
However, the figures as set forth under the direct shipment customers column were arrived at by a piecemeal study, and the figures under the distribution through company bulk plants for those particular accounts represent by far the larger portion of this class of expense, and in my opinion, those figures have never been established by any accurate measuring factor; that is, that the measuring factor has never been properly substantiated.

Q. Mr. Warmack, entirely apart from what you term having a quarrel with the regular accounting procedure of the company, would you please make it definite now for all time, on this record, whether you dispute the accuracy of the figures relative to the expense incurred by the Respondent company in handling direct shipment business as disclosed by Respondent's Exhibits 000 and 001?

A. I certainly cannot. I certainly question their accuracy as I have stated throughout these hearings.

I do not quarrel with the regular accounting procedure of the company.

Q. Of course, you understand, Mr. Warmack, that that changes the entire testimony for the last four or five weeks.

A. I understand that it does not.

Q. You have heretofore, as I understand you, or
7511 have understood you, have repeatedly stated on this record that you did not question the accuracy of the computations of the Respondent.

If you do, and with particular reference to account 001, I now ask you to state what is wrong with it? What is the proper figure that should be used?

A. I cannot state what the proper figure should be. But I can state this, that the figures in each of the six distribution channels on Respondent's Exhibit 101 for that account and for each of the other accounts set forth in this question, namely, account 004, account 005, account 215, have not been established in my opinion for each of those channels by a proper study. In other words, the measuring factors used for the separations have never been substantiated, as far as I have been able to learn, by a thorough cost study and analysis.

Q. Very well, Mr. Warmack. Do you regard the work of Mr. Boatwright and Mr. Houghton, and their assistants, in preparing Respondent's Exhibit 99, Respondent's Exhibit 100, and Respondent's Exhibit 101 as an incompetent accounting job of making a cost study?

A. I certainly do not, but in my opinion—

Q. (Interposing.) That is a sufficient answer.

The Witness: Well, if I may explain, your Honor. I have to.

7512 By Mr. Hanley:

Q. (Interposing.) If that is true—

The Witness: (Interposing.) I have the right to explain I believe.

Trial Examiner Ballinger: One moment.

Mr. Hanley: Yes.

Trial Examiner Ballinger: Do you desire to make an explanation?

The Witness: I was trying to offer one when I was interrupted.

Trial Examiner Ballinger: I asked you a simple question, Mr. Warmack.

The Witness: Yes, sir.

Trial Examiner Ballinger: You may explain it if you desire.

The Witness: I think that that study was a good piece of work as far as it went, but it was not carried through to a proper completion.

By Mr. Hanley:

Q. Well, now, Mr. Warmack, was it not a good enough piece of work, so that so far as account 001 is concerned, it determined the percentage of actual expense on the basis of effort used by the Detroit office in handling direct shipment business?

A. In my opinion, it certainly did not. If you did not
explore the complete account, make a full coverage of
7513 this whole question as well as the rest of the accounts,
and make a separation of all the costs by measuring
factors which had been properly substantiated by thorough
accounting studies, then the whole separation falls of its
own weight.

Q. Did you look at the vouchers?

A. No.

Q. Let us take account 001. Did you follow the tracks of the Respondent's accountants? Did you know what they looked at?

A. I reviewed their work.

Q. Did you look at the vouchers?

A. I do not recall in that particular account that I looked at the vouchers. Looking at the vouchers would certainly not constitute a cost study in this situation.

Q. Did you arrive at any conclusion that the direct expense of the Respondent company was any different in dollars and cents on account 001 from the amount arrived at by the Respondent's accountants? If you did, state how you did it. Also, state how much the difference was.

A. Will you kindly explain to me with respect to account 001 exactly what you mean by "direct"?

Q. I mean the actual expense, Mr. Warmack. Look at the account. It was tabulated so that you could read it.

A. I was under the impression, your Honor, in the last
question—

7514 Trial Examiner Ballinger: (Interposing.) Well,
now, it is not necessary to go into explanations. Do
you understand the question?

The Witness: No, sir. I was asking counsel.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. Did you arrive at any conclusion that the direct expense of the Respondent company was any different in dollars and cents on account 001 from the amount arrived at by the Respondent's accountants? If you did, state how you did it. Also, state how much the difference was.")

Trial Examiner Ballinger: By "direct expense," do you mean expense of handling the products in the direct shipment channel?

Mr. Hanley: The actual expense of handling the direct shipments. That is what Respondent's Exhibit 100 discloses.

The Witness: May I hear the question again?

Trial Examiner Ballinger: Yes. Read the question.

(The reporter again read the question.)

By Mr. Hanley:

Q. The question is simply this: What is your criticism of that? Did you follow it up? Have you had that experience, and if you did, how did you do it? What is
7515 the basis of your objection? Make your answers in dollars and cents, Mr. Warmack.

A. You can not make any answer in dollars and cents. I have not made a cost study of this Respondent's costs for the purpose of determining a cost differential, or a cost justification.

I have reviewed each of these accounts, and I have determined to my own satisfaction which accounts have not been properly explored for the purpose of determining a cost differential, and this is one of those accounts.

This is one of the accounts which, as I have explained, this was separated in part by one method, and the other proration or portion representing by far the larger part was separated by a measuring factor which, as far as I have been able to learn, has never been substantiated.

That is my answer. I think it is the correct answer.

Q. Mr. Warmack, let us try to simplify this thing. Let us look at the direct shipments. What have you to say as to this—as to the accuracy of the results obtained by the Respondent's accountants in determining the actual expense applicable to direct shipments under account 001?

The Witness: May I have that question, your Honor?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

7516 The Witness: I think that is highly arbitrary inasmuch as the whole account was not explored, or rather, that account 000 was not explored, and the expense of this account follows the triple 0 account.

By Mr. Hanley:

Q. How do you know that they were not explored?

A. Because I have explored this account—

Q. (Interposing.) Did you look at the vouchers?

A. Yes, sir. I saw a few vouchers.

Trial Examiner Ballinger: Judge Hanley, the witness has repeatedly stated that he made inquiry as to what had been done and—

Mr. Hanley: (Interposing.) Judge Ballinger—

Trial Examiner Ballinger: —and his testimony now is based solely upon the statements made to him, and the evidence produced in response to his requests.

Mr. Hanley: I do not know whether the record shows that or not. The fact is that Mr. Boatwright has sworn, in his testimony, that he pulled all the vouchers, and that these expenses were determined on the basis of an examination of all the vouchers.

Now, if your Honor please, this witness comes on the stand and says he did not follow the tracks of these Respondent's accountants, and he did not look at the vouchers. And he says that the results are inaccurate.

7517 Now, I am entitled, if your Honor please, to establish the lack of credibility and weight of this witness' testimony. He does not know what he is talking about because he did not do the work.

Trial Examiner Ballinger: Now, that is a matter of proof that is within the sole possession of the Respondent company. The witness has repeatedly stated the basis of his conclusions. And I think that is so clearly portrayed on the record that it seems to me that it is impossible to go any further with it.

Mr. Hanley: Is it on the record that he, this witness has testified and stated that he did not look at the figures?

Trial Examiner Ballinger: Why, his testimony is very clear that his examination of the records, except in some few instances, was superficial, that he accepted the figures of the Respondent company.

He further says that he had reason to believe, however, after that superficial investigation, to conclude that the records of the company were being accurately kept for their purposes, and that he accepted that.

Mr. Hanley: Very well.

By Mr. Hanley:

Q. Now, Mr. Warmack, you have testified as has been summarized by the Examiner, that you did not make any personal investigation of how this actual expense in

7518 account 001 was allocated to direct shipments?

Mr. Austin: The Examiner did not say that.

The Witness: Why, certainly, the Examiner did not say that, and I never did say that in my life.

By Mr. Hanley:

Q. Is it a misstatement?

Trial Examiner Ballinger: Why, the Examiner's information is, and as I recall the witness' testimony, it is to the effect that the witness made inquiry of the officials and employees of the Respondent company as to what had been done by them, both the type of accounting methods employed in arriving at the conclusions stated with reference to this account, and that he made some superficial examination of the records. And upon their statement to him and upon his limited examination of the records, he bases his conclusions.

Is that correct, Mr. Warmack?

The Witness: That is correct, your Honor, with this, I should like to say I made a study into the methods employed in the separation of these classes of expenses.

I do not question the fact that the company incurred the expense. I do question the methods employed in the separation for the purpose of arriving at a cost differential.

Mr. Austin: You did make such a study, did you not, Mr. Warmack, as that?

7519 The Witness: I most assuredly did. Yes, sir.

Mr. Austin: You did study those? Did you not study those, Mr. Warmack?

The Witness: I certainly did study those. There is no question about that. I studied them very carefully.

Trial Examiner Ballinger: Judge Hanley,—

Mr. Hanley: (Interposing.) I move to strike the volunteer statement of the witness—

The Witness: (Interposing.) It is a statement of the facts. I do not see why it cannot be made.

Mr. Hanley: —as not in reply to any pending question, and not pertinent to the subject under consideration.

We are discussing account 001, and what this witness knows about the method, and the facts underlying the conclusion of Respondent's accountants that there was an actual expense of approximately 6.8 per cent, and that is all that is under discussion in these questions.

Trial Examiner Ballinger: Read the question of the Examiner to the witness and the witness' answer.

(The reporter read the question to the witness, and the witness' answer as follows:

"Trial Examiner Ballinger: Why, the Examiner's information is, and as I recall the witness' testimony, it is to the effect that the witness made inquiry of the officials and employees of the Respondent company as to what 7520 had been done by them, both the type of accounting methods employed in arriving at the conclusions stated with reference to this account, and that he made some superficial examination of the records. And upon their statement to him and upon his limited examination of the records, he bases his conclusions.

"Is that correct, Mr. Warmack?

"The Witness: That is correct, your Honor, with this, I should like to say I made a study into the methods employed in the separation of these classes of expenses.

"I do not question the fact that the company incurred the expense. I do question the methods employed in the separation for the purpose of arriving at a cost differential.")

Trial Examiner Ballinger: The motion to strike is denied.

By Mr. Hanley:

Q. Now, just to summarize this, Mr. Warmack?

A. Yes.

Q. As I understand it, you did not yourself make any examination into the costs or the actual expense of the Respondent company in handling direct shipments in reference of account 001?

A. I did not and do not question the total expense. I did not make an analysis of the account.

7521 Q. Mr. Warmack, that is not the question.

A. I am sorry.

Mr. Hanley: Will you please read the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: Read the answer.

(The reporter read the answer and the question.)

By Mr. Hanley:

Q. Can you not answer that "yes" or "no", Mr. Warmack? Either you did or you did not.

A. Well, in the first place, I made a study which involved this account. And I have the information right here showing the amount of salary paid to each one of these people in this account. That I secured in the office at Detroit.

Mr. Hanley: At this time the Respondent moves to strike the answer of the witness as non-responsive. The Respondent requests the Court to admonish the witness to answer the question directly.

Trial Examiner Ballinger: It is the opinion of the Examiner that the witness has made an answer. It may not be entirely satisfactory to counsel for the Respondent, and if not, he may pursue it further.

Mr. Hanley: If your Honor please, I am entitled to an answer to these questions because this is a "yes" or "no" question.

7522 Trial Examiner Ballinger: I—

Mr. Hanley: (Interposing.) Either the witness made this examination or he did not make the examination.

Trial Examiner Ballinger: Judge Hanley, if you had included in your question the further statement as to whether he adopted and used the figures furnished him by the Respondent, you may have been entitled to a direct answer.

Mr. Hanley: No. I am not going to ask that question. I am going to ask him a very simple question.

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Did you, Mr. Warmack, determine by an examination of the records of the Respondent company what the expense was in reference to account 001 to which the Respondent company was put in handling direct shipments? Now, I believe that can be answered "yes" or "no". Either you made that examination of the records or you did not.

The Witness: Your Honor, a "yes" or "no" answer is not appropriate. I have stated what I did for this record —exactly what I did.

Mr. Hanley: The Respondent requests the Court to admonish the witness that the question is susceptible of a "yes" or "no" answer. The Respondent requests that the witness be required to give a "yes" or "no" answer.

7523 Trial Examiner Ballinger: Well, the Examiner is of the opinion that the witness can give an answer "yes" or "no."

The Witness: Well, the question would imply that I did not study this account. If I can make inquiry of the counsel as to exactly what he means, I will be glad to give him a "Yes" or "No" answer.

By Mr. Hanley:

Q. I did not ask you about a study.

Mr. Hanley: Will you read the question again, please?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Mr. Hanley: May we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Have you made a personal study? If you have made a personal study the counsel does not desire for you to portray it on the record but prefers that you state it "yes" or "no," and therefore you may answer that question "yes" or you may answer it "no."

The Witness: May I hear the question read, your Honor?

Trial Examiner Ballinger: Read the question.

7524 (The reporter read the question as follows:

"Q. Did you, Mr. Warmack, determine by an examination of the records of the Respondent company what the expense was in reference to account 001 to which the Respondent company was put in handling direct shipments?

"Now, I believe that can be answered 'yes' or 'no.' Either you made that examination of the records or you did not."

The Witness: Yes. I made a review of those records. I have a copy of those and they are a part of the record for this particular expense.

By Mr. Hanley:

Q. Very well, Mr. Warmack.

The Witness: May I explain, your Honor?

Trial Examiner Ballinger: Very well.

By Mr. Hanley:

Q. What is the result in dollars and cents?

The Witness: May I explain?

Trial Examiner Ballinger: You have explained repeatedly what study you made.

The Witness: Well,—

By Mr. Hanley:

Q. (Interposing.) Will you answer?

The Witness: I have made a "yes" or "no" an-
7525 swer. I would like to be able to make an explanation of it.

By Mr. Hanley:

Q. You have explained that you made the calculation.

Trial Examiner Ballinger: You have explained that fully in the record heretofore, Mr. Warmack.

The Witness: Well, not to my satisfaction.

By Mr. Hanley:

Q. Having made that study, will you now tell us what the result was? What in dollars and cents was the result?

A. The result of my study in dollars and cents was that I found that you made an expenditure applicable to this account of $13,019.63. And that is portrayed on Respondent's Exhibit, regular accounting form 189, for the year 1940, which is Commission's Exhibit 119, and if you would like to know the names of the salesmen, and the salaries of each employee, added to that, I will be glad to read them into the record—.

Q. (Interposing.) What is your figure?

Mr. Austin: What is what figure?

By Mr. Hanley:

Q. What is that figure?

A. $13,019.63.

Mr. Hanley: $13,019.63.

Mr. Austin: $13,019.63?

The Witness: That is right.

By Mr. Hanley:

7526 Q. You have now stated the result of your calculation, Mr. Warmack, which is identical with the calculation or the result of the calculation as appears on Respondent's Exhibit 101.

That being true, on what theory or basis do you question the accuracy or the propriety of the percentage in subquestion (a) of 6.8 per cent as applicable to direct shipment business on account 001?

A. In the first place, I have not stated that I subscribe to the separations of account 001, but that I know, or at least I found out that the total expense was $13,019.63

Q. (Interposing.) I am not asking you—

A. —with the separations which you have made on Respondent's Exhibit 101 in which you assign 6.8 per cent of this class of expense to direct shipment business and the remaining percentage, which is 93.2 per cent to your bulk plant business, is mostly assuredly wrong, and I most assuredly question those separations.

Q. Well, Mr. Warmack, I intended to ask you and perhaps I am not without guilt of not making it sufficiently clear. I intended to ask you, and I now ask you this: If you did not make a calculation? I am not asking you now about the procedure. I am asking you if you made a calculation, if you made an accurate calculation.

A. A calculation of what, may I inquire?

7527 Q. As to the amount of expense to which the Respondent company was put in handling direct shipment business in connection with account 001.

A. I certainly do not understand your question. If I may inquire—

Trial Examiner Ballinger: (Interposing.) Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: Did you make such a calculation?

The Witness: Your Honor, I checked the calculations of the figures as set forth on Respondent's Exhibit 101, but the counsel is asking me if I established figures. I did not do that.

Trial Examiner Ballinger: Then you did not make any calculation, did you?

The Witness: Your Honor, you can calculate any figures in the world. I can calculate the figures that are shown on here.

Trial Examiner Ballinger: Did you make any independent calculation, based upon your own methods of accounting, of these items?

The Witness: No, sir.

Trial Examiner Ballinger: Well, that is what he wants to know.

The Witness: That is not the way I understood it.

7528 It was just that I made the calculation.

By Mr. Hanley:

Q. That being true, Mr. Warmack, I assume that you are not prepared to say that as a matter of figures of the per cent of 6.8 per cent—that is, that the percentage of 6.8 per cent is right, or high, or low? Is that true?

A. I am not in a position to say. I do know this, that I question—

Trial Examiner Ballinger: (Interposing.) Now, Mr. Warmack, that question is susceptible of a "yes" or "no" answer.

The Witness: O. K. I question the figures. I do not know whether they are correct or incorrect, not having been established by a proper study.

By Mr. Hanley:

Q. Well, now, Mr. Warmack, since we have that established, let us go back to the original question.

A. I do not know what original question you mean.

Mr. Hanley: Then I will withdraw that, your Honor.

Trial Examiner Ballinger: Question withdrawn.

By Mr. Hanley:

Q. Is what you have just said in connection with making a calculation in respect of account 001 equally true in respect of account 004, account 005, and account 215?

7529 A. Yes, sir. Now, what did you say—just calculating? May I hear that, Judge?

Trial Examiner Ballinger: Read the question to the witness.

(The reporter read the question.)

The Witness: The answer is—yes, sir.

By Mr. Hanley:

Q. That being true, are you now able to answer the typewritten question in respect of sub-divisions (b), (c), and (d), being respectively pertinent to accounts 004, 005, and account 215?

A. The answer given for account 001 applies equally to those three accounts.

Q. And that is to say, as I recall your answer, that you do not regard it as a sound accounting practice to charge approximately 30.3 per cent of the expense incident to the totals in these three accounts for the respectively indicated percentages of effort for which the expense was incurred?

A. That is the part of my answer, but the other part of my answer is that that is my opinion, as just stated, provided that the proper accounting study has never been made which would show and substantiate the Respondent's allocations to direct shipments business for these accounts, as shown on Respondent's Exhibit 101, whereby the percentages applicable to account 004, account 005, and account 215, as set forth in your question, were arrived at.

7530 Mr. Hanley: Respondent now moves to strike that portion of the witness' answer beginning "The other part of my answer is" and so forth, for the reason that it is unresponsive, a volunteer speech having no pertinency to the question.

It assumes that no cost study was made, it being apparent from the affirmative testimony of this witness that he does not know whether any cost study was made, and it being further the fact that it appears affirmatively in this record that such cost studies were, in fact, made;

And it further appearing that the remarks of the witness have no relevancy inasmuch as he has affirmatively testified that he made no studies to test the accuracy mathematically of the percentages applicable to account 004, account 005, and account 215.

Hence, he is not in a position to say that they are either exact, or too high, or too low.

He has referred his answers in respect of account No. 004, account 005, and account 215, to his answer in respect of account 001, in which he affirmatively testified that he did not know whether the percentage was high, mathematically, or right, or too low.

Trial Examiner Ballinger: The motion to strike is denied.

By Mr. Hanley:

7531 Q. Referring you to that portion of account 520, amounting to $108,508.83 being the company payment to a trust fund for future annuities. What year was the payment actually made in, Mr. Warmack?

The Witness: May I review, your Honor?

Trial Examiner Ballinger: You may.

(The witness examines certain documents.)

Mr. Hanley: May we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: May I have the question, please?

Trial Examiner Ballinger: You may. The reporter will read the question.

(The reporter read the question.)

The Witness: It is my understanding that it was made in the year 1940. I did not review all of the cash vouchers. I did review records showing that this $108,508.83 was included in the total of $3,411,014.34 paid by the company applicable to the year 1940, but I have information in the working sheets here to show that of that $3,411,014.34 one million dollars of it was paid as of August 31, 1940. It is my understanding—it is my understanding that the remaining portion of it was paid up to, say, around the end of the year 1940.

7532 By Mr. Hanley:

Q. Does that represent an expense item?

A. I beg your pardon?

Q. Does it represent an expense item?

A. I think that I have testified that in my opinion it represents a charge against accumulated earnings of the company.

Q. Mr. Warmack, I did not ask you that. I do not care where you, as a bookkeeper or as an accountant, want to charge it.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. Does it represent an expense item?")

Trial Examiner Ballinger: It either does or it does not. Which, in your opinion, does it represent?

The Witness: I should think it represents an expense item which is properly chargeable to accumulated earnings.

Trial Examiner Ballinger: It does not make any difference where it is properly chargeable.

The question is: Does it represent an expense item?

The Witness: I know—

By Mr. Hanley:

Q. What is your answer?

Trial Examiner Ballinger: What is your answer?

The Witness: May I review, your Honor, the record? 7533

Trial Examiner Ballinger: What does this just represent, an expense item, or does it not?

The Witness: I stated in my opinion that it does. I think the record will show that and—

Trial Examiner Ballinger: (Interposing.) Now, one moment. You have answered the question.

Mr. Hanley: May we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

By Mr. Hanley:

Q. Is it a marketing expense?

A. Not for the year 1940. No, sir.

Q. I did not ask you that, Mr. Warmack.

Is it a marketing expense?

A. I do not know. That is my answer.

Q. You have stated that it is an expense item. If you do not know whether or not it is a marketing expense, state, in your judgment as an accountant, what kind of an expense it is.

A. It is an expense which is of an extraneous nature.

Q. Well, that is very helpful. Is it a production expense, Mr. Warmack?

A. I certainly should not think so.

Q. Is it an expense of selling goods?

7534 A. I would not so regard it. I certainly would not regard it for the year 1940—

Q. (Interposing.) I am not asking you about the time I am asking you about the fact.

A. I stated I would not so regard it. That is my opinion.

Q. If you do not regard it as the marketing expense, would you regard it as—and be specific—would it be a production expense? Or what kind of an expense would it be?

A. It would be an extraneous expense. It would be an unusual expense. It would be a proper charge against accumulated earning for handling any such costs.

Q. Is it not incident, Mr. Warmack, to the selling of goods?

And are not the funds represented by that pay-out on the part of the company, paid to employees in the marketing department?

A. I certainly do not understand your question.

Mr. Hanley: Will you read the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: There are two questions there. May I answer those separately, Judge?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: Proceed. The reporter will read the first part of the question.

7535 (The reporter read the following:

"Q. Is it not incident, Mr. Warmack, to the selling of goods?")

By Mr. Hanley:

Q. Now, stop right there, and put the question there, and take the answer to it.

A. In my opinion it is not applicable to the selling of goods for the year 1940.

Mr. Hanley: I move to strike the answer.

The Witness: Well, I will have to complete my answer—

Trial Examiner Ballinger: Mr. Warmack, you must not go beyond the answer.

Mr. Hanley: I move to strike it as definitely not applicable to the year 1940. I move to strike that.

Trial Examiner Ballinger: You have moved to strike that. Your motion is granted. Mr. Warmack, you must not volunteer that way.

The Witness: Well, I have to answer it. I can answer it two ways—.

Trial Examiner Ballinger: You may answer it.

The Witness: For the year 1940—

Trial Examiner Ballinger: (Interposing.) Now, Mr. Warmack.

The Witness: I cannot answer it any other way.

7536 Trial Examiner Ballinger: Now, Mr. Warmack, you must answer the question.

The Witness: I cannot.

Trial Examiner Ballinger: Well, now, you may not want to answer it without the inclusion of the year 1940, but you can answer it, and if you are asked as to what year it is to apply, you can then state that.

Read the question to the witness.

(The reporter read the following:

"Q. Is it not incident, Mr. Warmack, to the selling of goods?")

The Witness: I do not know. I certainly would say it does not for 1940.

Trial Examiner Ballinger: Now, Mr. Warmack, that is not proper.

The Witness: Well, Judge, if I cannot answer the question properly I will not answer it at all.

Trial Examiner Ballinger: Now, just a moment. This is simply a repetitious statement; unless you are asked about the year, do not contribute anything about that.

Mr. Hanley: For the sake of the record, if you please, I have to make a motion again, to strike the volunteer statement made by the witness.

Trial Examiner Ballinger: The motion to strike the statement of the witness is granted.

7537 (Witness temporarily excused.)

Mr. Hanley: If your Honor please, I now move that we be in recess for luncheon until 1:45.

Trial Examiner Ballinger: The motion of counsel for the Respondent is granted.

And now, at 12 o'clock noon, the hearing stands in recess until 1:45 p. m.

(Whereupon, at 12:00 noon, a recess was taken until 1:45 p. m., this day.)

7538 Afternoon Session

1:45 p. m.

Trial Examiner Ballinger: Come to order.

Read the pending question.

Mr. Austin: I suggest that it appear on the record at this time so we may know what it is.

(The reporter read the following question:

"Q. Is it not incident, Mr. Warmack, to the selling of goods?

"And are not the funds represented by that pay-out on the part of the company, paid to employees in the marketing department?")

Mr. Hanley: Mr. Warmack, will you please resume the stand?

Mr. Warmack: Yes, sir.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Hanley.

Q. Mr. Warmack, you have just heard the reading of the question.

A. Yes, sir.

Q. Can you answer it?

A. Yes, sir.

7539 Trial Examiner Ballinger: You may answer it.

The Witness: Your Honor, I would like to have the answer in two parts and I would like to have the question read to me in two parts and then I will endeavor to answer each part.

Trial Examiner Ballinger: You may do that.

The reporter will read each section and the record will indicate what is read.

(The reporter read the following:

"Q. Is it not incident, Mr. Warmack, to the selling of goods?")

The Witness: The answer to the first part of the question is—I do not know.

(The reporter read the following:

"And are not the funds represented by that pay-out on the part of the company, paid to employees in the marketing department?")

The Witness: The answer to the second part of the question is—it is my understanding that no part of that expense is paid to the employees—payments go into the fund.

By Mr. Hanley:

Q. So that we may be clear on this, Mr. Warmack, your answer to the first section of the question is to the effect that you do not know whether it is a marketing expense. Am I right thus far?

7540 A. Well, that has been my answer. That is not the complete answer. I will be glad to give the complete answer.

Q. Mr. Warmack, I am expecting you to make complete answers to these questions, of course.

A. Then, the answer is: I do not know, but I do know that it is not a marketing expense for the year 1940.

Q. Now, just a moment, please.

A. Yes.

Mr. Hanley: The answer of the witness in respect of the year 1940 is moved to be stricken by the Respondent inasmuch as he was asked as to no particular time period. The question goes simply to the matter of whether or not this particular expense is a marketing expense.

Trial Examiner Ballinger: The motion is granted. And the witness is requested hereafter to answer these questions without referring to any particular year unless a year is included in the question.

The Witness: Well, I am handicapped there. I am incapable of giving a better answer than the answer I have just given, a part of which was stricken.

By Mr. Hanley:

Q. Are you unable to state, Mr. Warmack, whether or not this expense is a marketing expense?

A. No, sir. I am not unable to state it.

7541 Q. If you are not unable to answer it, will you please answer it: Is it or is it not a marketing expense?

A. The answer is: I do not know—but that is not a complete answer.

Trial Examiner Ballinger: Now, Mr. Warmack, you have made that statement as least once before. Now, will you incorporate in the record at this point your complete answer?

The Witness: The answer to the question is: I do not know if this expenditure could be classified as a marketing expense for any year. I do know that it is not a marketing expense for the year 1940.

Mr. Hanley: If your Honor please, I just feel like apologizing for continually making a motion in respect of striking this testimony.

Trial Examiner Ballinger: The Examiner will save you the trouble. Hereafter, when an answer such as has just been made, the Examiner will strike it out of his own motion.

Mr. Austin: If your Honor please, the witness was asked whether this was a marketing expense. While you may answer those questions generally, supposing it was a marketing expense in 1938 and was not in 1939, the witness would have to explain that otherwise he could not make a truthful and correct answer.

Trial Examiner Ballinger: If it was a marketing expense in any year it would be a marketing expense.

7542. Mr. Austin: Well, I do not know whether that is so or not.

Trial Examiner Ballinger: Well, the witness may state.

Mr. Austin: It seems to me that this would all be solved if the witness were just given a chance to state what, in his opinion, the nature of the expenses were.

Trial Examiner Ballinger: The witness has stated on this record now at least two or three different times that it was not a marketing expense in the year 1940.

Mr. Austin: I agree with that.

Trial Examiner Ballinger: And he undertakes to include that same statement in every answer given, which is wholly unnecessary and repetitious. We understand the position of the witness perfectly with reference to it.

Mr. Hanley: Is there a pending question?

(The reporter read the following question:

"Q. Is it not incident, Mr. Warmack, to the selling of goods?

"And are not the funds represented by that pay-out on the part of the company, paid to employees in the marketing department?")

The Witness: I have answered it the very best way I can. I have answered it in the very best way I know how. I do not know how to give a better answer than I have already given.

7543 By Mr. Hanley:

Q. Are you unable, Mr. Warmack, as an expert accounting witness, to testify as to whether or not that item of expense is a marketing expense without, in your answer, making reference to some definite time period?

A. No, sir. I am not capable of giving that. Without that information, the answer, in my opinion, is incomplete, blank, and valueless.

Q. Are we to understand—

Trial Examiner Ballinger: (Interposing.) Just one moment. It is not necessary for the witness to give what he considers the effect of his answer. He is asked a definite question. And he may either answer it or he may decline to answer it. If he does not know he may so state. The explanations and statements such as just made are improper.

The Witness: Well, my answer, your Honor, is that I do not know, subject to the qualifications just stated in this record.

Mr. Hanley: Respondent moves to strike the answer of the witness beginning with "subject to the qualifications . . . ."

Trial Examiner Ballinger: The motion is granted.

The Witness: That is not the whole truth then.

Trial Examiner Ballinger: Mr. Warmack, you must not volunteer statement on this record.

7544 The Witness: Well, Judge, may I ask a question off the record?

Mr. Hanley: The Respondent requests that no conversations take place off the record. Those are usually the ones that we want on the record.

Trial Examiner Ballinger: It is not necessary.

Mr. Hanley: Anything that the witness says, I think, should be on the record.

The Witness: I am willing for it to be. I want to say—

Trial Examiner Ballinger: (Interposing): Mr. Warmack, please. There will be no repetition of these interruptions. You will answer the questions that are asked.

The Witness: May we have a five minute recess?

Trial Examiner Ballinger: Do you desire that?

The Witness: Yes, sir. Thank you.

Trial Examiner Ballinger: Any objection?

Mr. Hanley: No objection on the part of Respondent.

Trial Examiner Ballinger: We will take a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order. You may proceed.

By Mr. Hanley:

Q. As I now understand your testimony, Mr. Warmack, you have said that you do not know whether this item of $108,000 plus is a marketing expense. You have stated that, in your judgment, it is not a marketing expense in any event for the year 1940. Am I correct in that?

A. Yes, sir. For the purpose of qualifying, however, I may inquire

Q. (Interposing.) May I ask, am I just correct about my understanding of your testimony? If you don't understand that question, I will ask the reporter to read it to you, please.

A. (There was no answer.)

Trial Examiner Ballinger: Do you understand the question?

The Witness: I am not exactly clear on that, and all of that which went before. I would like to inquire, your Honor, on the technical point: What does Respondent's attorney mean when he says, "Expense"? What is the usage or the definition that he attaches to that?

By Mr. Hanley:

Q. I am sorry I cannot explain that to you. You are an expert accounting witness, Mr. Warmack. I am asking you the questions. I asked you if this item was a marketing expense. Your answer was that you did not know. You did say definitely that in your judgment it was not a marketing expense for the year 1940. All I am doing in this question now is summing up your testimony. Is that not your testimony up to now?

A. That is my testimony up to now, but I think that this technical point should be straightened out. There can be

Q. (Interposing.) Very well.

A. —items of accounting which can be construed charges which would not of themselves in the general terminology be regarded as expenses. Was this one of that kind of charges? is my question.

Mr. Hanley: The Respondent moves to strike the volunteer statement of the witness as non-responsive to the question.

The Witness: That was the inquiry, your Honor.

Trial Examiner Ballinger: The motion is granted.

By Mr. Hanley:

Q. Now, I refer you to page 6380 of the record, Mr. Warmack.

A. What page?

Q. 6380.

A. Yes.

(The witness examines page 6380 of the record.)

Q. Do you find it?

A. Yes.

Q. I ask you now, Mr. Warmack, if at that point you did not make the following statement, in part:

> "The amount of $108,508.83 assigned to the Detroit field as a portion of the trust fund established by the
> 7547 company for the retirement of employees in the Detroit field covering services of such employees prior to January 1, 1939, is in my opinion, a current marketing expense—"

A. No, sir.

Q. "—No, sir!—"?

A. No, sir. I did not make that statement or at least that is not my complete statement.

Q. Well, let us get the page.

Mr. Austin: If your Honor please, I have that page. I previously have read that testimony. There was an error in the stenographic report to my knowledge and recollection. The word "not" was left out of the witness' answer. I read it and had marked it in my copy.

Mr. Hanley: That is objected to, if your Honor please. If they are going to question now the stenographic accuracy of the reporting in this record, that is nothing new.

Mr. Austin: No, sir. I will question that in many cases. I have hundreds of corrections to make in the record, taking the record from page 1 down to where we are now.

Trial Examiner Ballinger: Further discussion of the matter is off the record.

Mr. Hanley: What?

Trial Examiner Ballinger: Further discussion of the matter is off the record.

7548 Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The witness has answered that he did not make that statement.

By Mr. Hanley:—

Q. Referring you to page 6380, Mr. Warmack, do you find the statement reflected on that page as just quoted in my last question?

A. Yes, sir. I find the statement, line 18 of that page, and it should read: "Is not."

Q. Do you find that statement as I quoted it?

A. Yes, sir.

Q. Do you dispute the accuracy of the reporting of your answer?

A. Yes, sir. Line 18 only, on page 6380 of the record.

Trial Examiner Ballinger: What inaccuracy appears there?

The Witness: Well, let us read it, your Honor.

"Is not in my opinion a current marketing expense."

By Mr. Hanley:

Q. You said line 18, referring to page 6380, Mr. Warmack?

A. That is correct.

Q. If I count correctly, line 18 refers to the amount of $22,279.06, and has nothing whatever to do with 7549 the amount of $108,508.83.

Am I incorrect in that?

A. According to the copy of the record which I have before me opposite the figure 18—which is the line number—is a statement, "Is in my opinion a current marketing expense." That line should be changed to read "Is not in my opinion a current marketing expense."

Q. Well, is it to be understood now that you desire to change that testimony—

A. (Interposing.) It certainly is not.

Q. —as it is reflected presently on page 6380 in reference to the item of $108,508.83?

A. It is my desire that line 18 of page 6380 of the record be corrected, and that this stenographic change should be made whereby the last line, or that line will read: "Is not in my opinion a correct marketing expense."

Q. Mr. Warmack, are you now changing your testimony?

A. No, sir.

Q. Or are you disputing the accuracy of the reporting when that testimony was originally recorded by the reporter?

A. I am not changing my testimony, and I am saying that the stenographic omission of the word "not" should be corrected.

Mr. Hanley: Respondent moves to strike that as 7550 not responsive to the question and if your Honor please, I will ask two questions rather than one.

Trial Examiner Ballinger: One moment.

By Mr. Hanley:

Q. Did you take the—.

Trial Examiner Ballinger: (Interposing.) One moment. If you are going to withdraw the question and divide the question up into two questions, the motion is granted, and the matter is stricken.

By Mr. Hanley:

Q. Do you take the position, Mr. Warmack, that you are now changing your testimony from that which appears at page 6380 in reference to the amount of $108,508.83?

A. I am not changing my testimony. I am only stating that a stenographic omission of the word "not" be inserted in line 18 of page 6380 of the record.

Q. Do you take the position that the stenographic record of the testimony, as given by you and as reflected on page 6380 in respect of this item of $108,508.83 is an erroneous reflection of your testimony then given?

A. Yes, sir. There is an incorrect—

Mr. Hanley: I object.

Trial Examiner Ballinger: You have answered it.

The Witness: I will have to tell what it was.

Trial Examiner Ballinger: Wait for the next question, Mr. Warmack.

By Mr. Hanley:

Q. Mr. Warmack, in your judgment as an accountant, does the Respondent derive any current benefits from that payment? Referring to this $108,508.83 item to the trust fund for future annuitants in terms of added contentment of present employees, greater loyalty, and greater efficiency?

A. It may. Yes, sir.

Q. Well, in your judgment as an accountant, does it?

A. I should certainly like to inquire just—you say greater. Greater than what?

Trial Examiner Ballinger: Greater than it would enjoy if the fund were not available.

The Witness: Well, I do not know. My thought with respect to that is this, Mr. Hanley, that had the company inaugurated the plan and set aside these funds, as it did, before, it already had in operation a plan whereby—

Mr. Hanley: I object.

Trial Examiner Ballinger: I do not think the witness has completed his answer.

The Witness: I had not. I will continue. I think I will just start all over again. I do not know. My thought with respect to that is this, Judge, that before the company inaugurated the plan and set aside these funds it already had in operation a plan whereby its employees
7552 expected or knew that they would be retired and
given a pension at the end of a certain time. Therefore, if the setting aside of that fund created any greater cooperation and effort on the part of the employees than they had already given because of the fact that they knew or reasonably expected to receive this pension, I just do not knew whether there was any greater cooperation given to the business or whether there was not by the employees.

By Mr. Hanley:

Q. Well, what is your best judgment as an accountant, if you have any judgment about it?

A. It is my opinion that inasmuch as the employees already expected to receive this pension at the end of a certain number of years of employment, that this setting aside of the fund, or rather, having the company carry it on as it has been carried, would have little if any effect to the extent of creating greater cooperative feeling among the employees.

Q. Very well, Mr. Warmack.

Irrespective of the method employed by the company in paying these benefits to the employees, what is your judgment as an accountant as to whether or not the fact that the benefit was to be paid or accorded to employees by some method a thing which would contribute to the greater contentment of the employees, and their greater loyalty, and their greater efficiency?

7553 The Witness: May I hear that, Judge, please?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: May I hear it again?

Trial Examiner Ballinger: Read it again.

(The reporter again read the question.)

The Witness: I think that it is a fair assumption that a thing of that kind should cause greater cooperation, loyalty, and efficiency of employees than if the employee expected to receive no pension of any kind whatsoever.

By Mr. Hanley:

Q. Then are these payments purely for benefits received prior to January 1, 1940, rather, January 1, 1939?

A. It is my understanding that the records show that.

Q. I am sure you misunderstood the question, Mr. Warmack.

A. I beg your pardon.

Q. The question is:—in view of your last answer—this: Are these payments purely for benefits received by the company prior to January 1, 1939?

A. It is my understanding that that is correct inasmuch as the Respondent company have other plans to cover benefits applicable to current years.

Q. Mr. Warmack, does not the fact, in view of your second preceding answer, that employees are given consideration through these benefit plans for services 7554 prior to 1939, have any bearing on their loyalty, efficiency, and greater contentment subsequent to January, 1939?

A. I think that is a fair assumption, yes, sir.

Q. Will you refer to page 6381 of the record, please?

A. Yes.

Q. Have you found it?

A. Yes.

(The witness read page 6381 of the record.)

By Mr. Hanley:

Q. Is it not true that you have testified that this payment, in your opinion, was a proper charge against accumulated earnings of the company?

A. Referring specifically to the $108,000 plus item which we have been discussing?

Q. Yes.

A. Yes, sir.

Q. Is the practice you have there recommended in keeping with your opinion of sound accounting?

A. Yes, sir.

Q. Is that practice generally followed by distribution cost accountants?

A. In my opinion; yes, sir.

Q. Have payments to the trust fund been made each year since the annuity plan was adopted?

A. According to my review and studies, and the
7555 information thereby in the company's offices, the
answer is yes, sir. Yes, sir. Or this, I found that they were paid during the years 1939, 1940, 1941. I have no knowledge with respect to the current year 1942. I will limit my answer that way.

Q. Have the payments been made each year insofar as the years are concerned with which you are familiar upon the same basis and have they been for the same amount?

A. I did not hear your question. I am sorry.

Q. Have the payments made each year insofar as the years are concerned with which you are familiar, been the same amount?

A. No, sir. It is entirely optional with the Board of Directors.

Q. Are the payments to the trust fund subject to approval by the Board of Directors?

A. That is my understanding.

Q. And the plan, can the plan be discontinued by the stockholders if desired?

A. That is my understanding, if desired.

Q. Is the total amount the company will have to pay into the trust fund definitely and actually fixed provided the plan is continued?

A. That is my understanding. Yes, sir.

Q. Is the total subject to variation because of death,
resignations, discharge, modification of retirement
7556 age, and so forth, and so on?

A. Well, it was my understanding, or it is my understanding that actuaries had been engaged by the company to study those things, and to give effect to those very things of which you speak, if variations are to be made, I do not know, however.

Q. Would it be sound accounting to charge an indefinite sum to accumulated earnings?

A. For example, please?

Q. I do not have any example. I am asking you. You are an expert accountant, Mr. Warmack.

Mr. Hanley: Will you read the question, please?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: May I inquire—over a period of years?

Mr. Hanley: Respondent requests the Court to admonish the witness to answer the question.

The Witness: Your Honor, I am trying to find out so I can.

Trial Examiner Ballinger: Do you understand the question?

The Witness: No, sir. I am just trying to inquire so I can answer.

Trial Examiner Ballinger: The latter comment of the witness may be stricken physically from the record.

7557 Mr. Hanley: The Respondent requests that there be nothing physically stricken by the Court said by this witness on the record.

The Respondent again requests that the question be read to the witness and the Respondent requests that the witness be admonished to answer the question.

Trial Examiner Ballinger: In view of the objection of counsel for the Respondent, the reporter will incorporate in the record the matter which the Examiner directed should be physically delineated.

The witness has stated, Judge Hanley, that he does not understand the question. If he does not understand it, he can hardly be expected to answer.

By Mr. Hanley:

Q. Do I understand, Mr. Warmack, that you as an expert accounting witness are stating to this Court that you do not understand the following question:

Would it be sound accounting to charge an indefinite sum to accumulated earnings?

A. I do not understand the question as put. It will have to be amplified more than the broad, general statement. That, to me, means nothing.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

7558 Trial Examiner Ballinger: On the record. Proceed.

By Mr. Hanley:

Q. Now, referring to this trust fund item we have been discussing, as an accountant would you make the charge to accumulated earnings each month as the annual amount is billed upon the books, or annually as voted by the directors?

A. I would not make it monthly.

Q. Why not?

A. If you—thank you for letting me explain. For the reason that the amount to be contributed for each of these years, as I understand it, has and is never definitely determined prior to or around the last day of the year.

Q. Are payments as made by the Respondent in respect of this account, Mr. Warmack—

Mr. Austin: May we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: I have lost my connection there. Will the reporter read my statement as far as made?

Trial Examiner Ballinger: Read it.

(The reporter read the question of counsel as far as given.)

By Mr. Hanley:

7559 Q. Are payments as made by the Respondent in respect of this account, Mr. Warmack, regarded as proper charges for the purposes of income tax purposes by the Department of Internal Revenue?

A. May I review, your Honor?

Trial Examiner Ballinger: Do you know?

The Witness: No. Not of my own knowledge. No, sir. But these records may show that.

By Mr. Hanley:

Q. Did you not undertake to learn that before you criticized this account, Mr. Warmack?

A. Mr. Hanley, I wrote down information that I received. I did not try to keep it all in my head.

Trial Examiner Ballinger: Do you desire time in which to examine your memoranda?

The Witness: I would have to, to determine if this information is here, your Honor.

By Mr. Hanley:

Q. Very well. Refer to any memoranda that you may have, Mr. Warmack.

Trial Examiner Ballinger: You may examine your memoranda. For that purpose we will take a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

7560 Mr. Hanley: I think there is a pending question. Will you please read it to the witness?

(The reporter read the following question:

"Q. Did you not undertake to learn that before you criticized this account, Mr. Warmack?")

Trial Examiner Ballinger: Did you review your records?

The Witness: Yes, sir. This information is not contained in the records as far as I have been able to learn.

By Mr. Hanley:

Q. Do you know?

A. I do not know.

Q. Did you find it when you were investigating this account?

A. No, sir.

Q. Or did you not regard it as important to learn that fact before you condemned the use of this item—

A. (Interposing): Not that.

Q. —in the accounting of the Respondent for the purpose of establishing a cost differential?

A. No, sir. I did not regard it as necessary.

Q. Are you familiar with the publication known as "The Journal of Accountancy"?

A. Yes, sir.

Q. Will you tell the Court what that publication is, please?

A. It is a publication by "The American Institute of Accountants." In other words, a monthly booklet 7561 that is published by The American Institute of Accountants.

Q. Do you regard it as an authentic accounting publication?

A. Just what do you mean by "authentic" there, Judge Hanley?

Q. In your judgment as an expert accounting witness, do you regard it as authentic from an accounting standpoint?

A. It appears to me to be a question of authenticity. Please explain what you mean by that.

Q. Are you unable to answer the question?

A. I do not understand what you mean by "authentic," there. And I cannot answer the question unless you tell me.

Q. Do you regard the accounting opinions expressed in this journal as being reasonably reliable from an accounting standpoint?

A. Some of them I agree with. Some of them I certainly do not agree with.

Q. I did not ask you that, Mr. Warmack.

Mr. Austin: I think the witness answered the question, because it can only relate to his opinion, and he stated what his opinion was.

Mr. Hanley: If your Honor please, it is entirely immaterial as far as this question is concerned whether this witness agrees with the opinions or not.

Trial Examiner Batfinger: But if he does not agree with them, how can they be reliable in his opinion?

7562 Mr. Hanley: I think it is just the same kind of a question, Judge, as though you or I were asked about the American Bar Association Journal.

Mr. Austin: I agree with that.

Mr. Hanley: I am not trying to find out whether this witness agrees with anything in it or not.

I am trying to find out what his opinion is as to the authenticity of this publication.

Apparently he does not understand the meaning of that word, and I have tried to reframe the question so that it will be understandable to the witness. I think I am entitled to an answer.

Trial Examiner Ballinger: Is it a publication of high standing?

The Witness: In my opinion it is, your Honor.

Trial Examiner Ballinger: In general use by accountants? Is it not?

The Witness: Yes, sir. Or, at least, many of them subscribe to it. I think all of the members of the American Institute of Accountants get it free, or they used to. That was my understanding.

Trial Examiner Ballinger: And the opinions as therein appear as a rule are generally sound, there being exceptions?

The Witness: Yes, sir; there being exceptions.

7563 I should like to call attention to a grand fight that I saw published in the Journal of Accountancy some several years ago where they had a reputable accountant, a Mr. Finney, take great issue with a Mr. Esquerre, who was also and likewise a very prominent accountant. And they fought it out in The Journal of Accountancy, their own views with respect to many or to several or to some problems, very difficult problems of accounting.

By Mr. Hanley:

Q. Were they in disagreement?

A. They certainly were.

Q. It is true then that accountants do disagree?

A. They certainly do disagree.

Q. Incidentally, Mr. Warmack, did you follow that controversy?

A. Yes, sir. With great interest.

Q. Did you understand the questions involved?

A. I think I did.

Mr. Austin: Your Honor, I think the witness is in the same dilemma that you and I would be if we were asked to establish the authenticity of the American Bar Association Journal as suggested by counsel for the Respondent. I would dislike to have to answer that question.

Mr. Hanley: There is a difference here.

Trial Examiner Ballinger: That may be stricken physically from the record.

7564 Mr. Hanley: I would prefer to have it on, if your Honor does not object.

Trial Examiner Ballinger: Very well. Let it stay.

By Mr. Hanley:

Q. Is it not true, Mr. Warmack, that The American Institute of Accountants conduct a "accounting questions" section each month through its publication, "The Journal of Accountancy?"

A. Well, I do not remember just at this time, Judge Hanley. I have not reviewed the Journal for some time. I am sorry.

Q. Well, is it corect in your understanding that practicing accountants present questions and other practicing accountants submit answers?

A. I think that has been done. And it still may be in practice.

Q. I hand you a copy of the "The Journal of Accountancy" for the month of May, 1940, and refer you to pages 388, 389, and the top of page 390.

And I ask you, first, if the question ther posed is not substantially in line with the accounting procedure and practice of the Respondent in handling its annuity plan?

I then ask you to read the five answers submitted by the practicing accountants and tell the Court whether or not you agree, in principle, with the answers submitted by those accountants.

Mr. Hanley: For the benefit of the witness, Court, 7565 and counsel, permission is requested to have spread upon the record, the question posed as referred to, and the five answers of practicing accountants also referred to.

Mr. Austin: If your Honor please, I object to the inclusion on the record of the question referred to.

Any question that somebody else may be asked in an accounting journal, I submit is immaterial and irrelevant, and could not be a proper inclusion in this record. I think that counsel for the Respondent should ask his own questions. If he wants to ask the witness as to his opinion regarding these other statements but as a part of a question put by counsel for the Respondent and in his question, then and in that event, I have no objection.

Mr. Hanley: That has been done. Counsel for the Respondent has adopted the question as appearing therein as his own question, if your Honor please, for the purpose of this question.

Trial Examiner Ballinger: It was my understanding that counsel for the Respondent, Mr. Hanley, had adopted the question as appearing in the Journal at the pages set forth as his own question for the purpose of this question. Is that not right?

Mr. Hanley: That is right, as I just stated. I had my question indicate that the question posed in the Journal was the question I was asking him, in so far as his studies are concerned of the situation in the case at 7566 bar, and its relevancy thereto.

Mr. Austin: I do not think that comment means very much of anything. It is not clear as to just what counsel has in mind by that statement.

Trial Examiner Ballinger: It is clear to me.

Mr. Austin: That was a question that was divided into two parts. Suppose that the witness answers the first question in the negative. Then that would eliminate and obviate the necessity of answering the other part of the question, or the second question.

Trial Examiner Ballinger: Further discussion will be off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Is there an objection to the incorporation of the question posed and the five answers given appearing in the document?

Mr. Austin: Yes, your Honor. I object to the question being incorporated in the record unless it is adopted by and as counsel for the Respondent's question; and my objection to the inclusion of the opinions referred to is urged unless and until it appears that the question itself is properly directed to the evidence in this case.

Trial Examiner Ballinger: As the witness has 7567 stated that it would require some time for him to make an examination into both of the questions that are presented by the questions propounded by counsel for the Respondent, in a discussion off the record, and as it is desirable that the proceeding proceed without further delay, the Examiner overrules the objection of counsel for the Commission, permits the inclusion of the matter in the record, which will be considered as a question posed by counsel for the Respondent, irrespective of the fact that it appears in the publication.

Likewise, the same will be true with reference to the conclusions arrived at by the five separate accountants, reserving, however, to counsel for the Commission his objection to the question and a motion to strike both the question and the answer.

Mr. Austin: Your Honor is allowing the second question before the first question is answered, and the second question may not be relevant, or it may be completely stricken out automatically by reason of the answer given by the witness to the first question.

Trial Examiner Ballinger: That is true, in which case it may be reached by motion to strike. The matter is closed so far as it is an incident on this record.

Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the *record.*

7568 Mr. Hanley: That is perfectly agreeable to the respondent, but in view of the discussion, may it now be understood that the material referred to is in the record just as though counsel for the Respondent had incorporated that material in a direct question to the witness and had dictated all of that material as a part of such question, and that this is being done more largely for the purpose of mechanical convenience than anything else.

Mr. Austin: I do not object to that providing that the two questions are not combined into one.

Trial Examiner Ballinger: I think that matter is perfectly clear on the record.

The reporter at this point will include the material in the record.

The material referred to is as follows:

"Payments to Insurance Company for Employee Retirement.

"Question.

"A client has asked us the proper accounting treatment to be accorded with respect to payments made to an insurance company under the following conditions:

The payments in question have been made under a plan independent and in addition to old-age-benefit provisions of the federal security act. They are made for the purpose of
providing a retirement allowance such as would have
7569 been payable had the security act been in force at the
date of employment of each individual covered. The plan contemplates the continuance of these payments to the insurance company for approximately twenty years, but the

corporation is not obligated by agreement with the employees or with the insurance company to continue them. They may be stopped at any time. In the event that the payments are stopped, the employees will receive the benefits prescribed by the plan. No refund will be made by the insurance company to the corporation.

"The client wishes to know which of the following procedures are permissible and which is preferable:

"1. The establishment of a reserve by a charge to surplus in an amount representing the estimated total which the corporation will be obliged to pay over the entire twenty years. Payments as made would then be charged against the reserve so set up.

"2. No provision to be made on the books for the total amount to be paid, surplus, however, to be charged at the end of each year with the payments made during that year.

"3. Current income to be charged with payments as made.

"It will be noted that the amount which will be
7570 paid to the insurance company each year will change
by reason of the death, discharge, or change of employment of those covered and, therefore, an estimate of the total amount under plan 1 might present some difficulty.

"The client wishes to follow good accounting procedure, but believes that it is not necessary to charge current income as the payments do not represent an item which must, in all events, be paid at recurring intervals and because the board of directors have the right to stop such payments at any time.

"It should be noted that the payments to the insurance company are spread over twenty years only as a matter of convenience to the corporation. A lump-sum payment could have been made at the time the plan was put in force of an amount which would have purchased the deferred annuities called for by the plan. In that event, however, the corporation would be entitled to a refund of the amount paid in respect to any employees who, by reason of death, resignation, or otherwise, lost their right to receive annuities when they reached the required age.

"Answer No. 1

"In reply to your letter regarding the proper accounting treatment to be accorded with respect to payments made to an insurance company, we believe method 3 should
7571 be followed. We do not know of any accounting practice which would support method 2. We do not believe method 1 would be in accord with the facts, which we understand are to the effect that the corporation is not obligated to continue the payments.

"Answer No. 2

"This is in reply to your question as to the proper accounting treatment to be accorded with respect to payments made to an insurance company under certain stated conditions.

"In our opinion, the proper treatment for the payments in question is to charge current income account with the payments as made. The payments are charges which are expected to recur annually for a period of twenty years; the fact that the payments are voluntary on the part of the directors and not in settlement of legal obligations does not justify their omission from the income account. Although the computation of the amounts may be based on past services of employees, it does not necessarily follow that the charges are applicable to such prior periods; presumably, in authorizing the payments the directors have given consideration to the benefits currently derived therefrom by the corporation, such as the added contentment and efficiency of the employees.

7572 "Had the directors chosen to make a lump payment of the total estimated required amount, and at the same time, gone on record that such payment was in recognition and settlement of past services rendered, then a permissible treatment would have been to charge the payment to earned surplus.

"Answer No. 3

"The payments to be made to the insurance company are for the purpose of supplementing the old-age benefits to the employees under the social-security act, so that the retirement allowances prescribed shall be equal to the amounts which would have been payable had the social-security act been in force from the date of the commencement of employment of each individual.

“Thus the basis of the payments is apparently related
to services rendered by the employees prior to the inception
of the social-security act. Having regard to this retroactive
feature, it might therefore be asserted that the
annual payments to be made should be charged to the
earned surplus account now in an estimated lump sum or
annually as the actual payments are made and not to the
current and future annual income accounts; we think that
procedure is permissible. On the other hand, we are of the
opinion it is preferable to take the view that, inasmuch as
the corporation only now puts into effect a plan for
7573 supplementary benefits to the employees at the date
of retiral, the annual insurance payments should be
regarded as in effect the current cost of a supplementary
reward or bonus, for services rendered and to be rendered,
to be payable at a specified date and that, therefore, regardless
of the basis of computation to determine the
annual cost, these annual payments should be charged to the
current income accounts from the date of the inception of
the plan, when the obligation is actually incurred, to the
respective retiral date or for twenty years, or so long as
the corporation maintains the plan. Had a lump-sum payment
been made a deferred charge could have been established,
to be equitably apportioned to the income accounts
of future years.

“Answer No. 4

“Regarding the procedure to be adopted in charging
off the payments to be made to the insurance company,
to provide retirement allowances or annuities to employees
we believe the first and second procedures outlined in
your letter do not reflect good accounting practice since
there is no indication that the payments to be made include
any amounts for funding the annuities in respect
of prior periods and in consequence such payments should
be charged currently to income. Therefore, in our
7574 opinion, the third period outlined is the one which
should be adopted.

"Answer No. 5.

"1. In spite of the evident intention of the present board of directors to continue over a period of twenty years the insurance payments referred to, it would appear to be incorrect to make any allocation of surplus for the purpose of establishing a reserve to meet payments which may never be made.

"2. It would not appear to be correct to charge the annual payments direct to earned surplus in view of the fact that, while these payments may be discontinued, they are in the nature of an expense in connection with the compensation of employees and as such would appear to be operating charges similar to the cost of medical services, recreational facilities, etc.

"3. As stated above, the annual charge would appear to be in the nature of an expense properly chargeable to operations; in this connection it may be noted that expenditures of this nature are deductible for federal income tax purposes.

"It might be noted also that, should the corporation arrange with the insurance company at some future date to make a lump-sum payment in lieu of remaining annual payments, such lump sum should not be charged
7575 to operations during the year in which made, but only that part thereof which might be considered to be fairly chargeable to the then current year and the balance deferred to future operations, to be taken up annually over a reasonable period. This method also would be allowable for federal income-tax purposes."

Mr. Hanley: I will ask the reporter to identify this if I may. I request that the book be marked as Respondent's Exhibit No. 110-A, that page No. 388 be marked as Respondent's Exhibit No. 110-B, that page No. 389 be marked as Respondent's Exhibit No. 110-C, and that page No. 390 be marked as Respondent's Exhibit No. 110-D for identification.

Trial Examiner Ballinger: They may be so marked.

(The documents referred to were marked Respondent's Exhibits 110-A, 110-B, 110-C, 110-D," for identification.)

Trial Examiner Ballinger: Now that that has been disposed of, is there any objection to the question as such?

Mr. Austin: Yes. If your Honor please, I object to this question, in the first place because it is not necessary to prove the Respondent's accounting method in connection with this case by showing something set up in that book, because that is the best proof.

And there is ample evidence in the record already as to the Respondent's accounting procedure with re-
7576 spect to these facts.

Secondly, and more important, any opinions expressed in that book would clearly be inadmissible and incompetent. It would be in the nature of hearsay. The person who gave the opinion is not here, and would not be subject to cross examination. Any opinion offered by a person not present and not qualified to testify, I say, would be a secondary piece of evidence, and in any event, the person not being present even though they could be qualified, would not be subject to cross examination, and their opinion would be entirely inadmissible and incompetent for any purpose whatsoever.

Mr. Hanley: I am not offering the opinion of any expert witness.

Trial Examiner Ballinger: It is not necessary to argue the question.

The objection is overruled. The witness is merely being asked his own opinion with reference to the opinions therein expressed.

Mr. Austin: I would just like to have the question reread, if I may.

Trial Examiner Ballinger: Reread the question.

(The reporter read the question as follows:

"Q. I hand you a copy of the 'The Journal of Accountancy' for the month of May, 1940, and refer
7577 you to pages 388, 389, and the top of page 390.

"And I ask you, first, if the question there posed is not substantially in line with the accounting procedure and practice of the Respondent in handling its annuity plan?

"I then ask you to read the five answers submitted by the practising accountants and tell the Court whether or not you agree, in principle, with the answers submitted by those accountants.")

The Witness: Your Honor, to advise this Court with respect to the opinions set forth—

Trial Examiner Ballinger: Mr. Warmack, you are evidently not answering the question. The first one is a question as to: Is the question therein posed substantially the same question now presented in this particular accounting procedure before us?

The Witness: Your Honor, I do not know. I would have to read and study this book for some hours before I could give my opinions on these things. That is what I was trying to state.

By Mr. Hanley:

Q. Suppose you read it, Mr. Warmack. That is what I intended you to do and that is what I handed you the book to do.

7578 A. I certainly could not read it and make a satisfactory reply because this involves a very intricate thing, highly technical, and must be studied.

I cannot read all of this data here on the witness stand and give any answer that would be any better than, I think, than snap judgment would be. I do not propose to give any such answer, and I wish to study the document.

Mr. Hanley: The Respondent now requests the Court to admonish the witness to read the material referred to in the question and then give his answer. It is, of course, perfectly obvious that the witness can answer the question not until and unless he does read the material submitted which consists of two and one-fifth pages in a small book.

Trial Examiner Ballinger: If counsel for the Respondent insists upon his answer, the Examiner will certainly afford the witness ample time to read the booklet.

Mr. Hanley: The Respondent does so insist, if your Honor please.

Trial Examiner Ballinger: The Examiner will give the witness sufficient time to give it sufficient consideration to enable him to give a dependable answer.

Mr. Hanley: That is what I have asked him.

Trial Examiner Ballinger: How long should it take you to read and digest the article, Mr. Warmack?

7579 The Witness: I certainly do not know, your Honor. I have not read one word of it but I rather think that it will take some time.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

By Mr. Hanley:

Q. Let us now consider the item of $22,279.06 representing annuities paid to retire employees in the Detroit field. You may want to refer, Mr. Warmack, to page 6382 of your testimony.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

The Witness: I have it.

By Mr. Hanley:

Q. Is it not correct that you stated that this was properly a charge against accumulated earnings and that if placed on the books at the time applied it may have been properly charged as an operating expense? Do you find that testimony?

Mr. Austin: May we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

The Witness: Yes, sir. I find that.

By Mr. Hanley:

7580 Q. Does that statement on page 6382 as made by you represent and refer to both the item of $108,000 plus as well as the sum of $22,279.06?

A. Yes, sir.

Q. Did the company pay out those amounts of money?

A. It is my understanding that it did.

Q. And with particular respect to the $22,279.06 for annuities during the year 1940, did the company pay that amount of money out during that year?

A. It is my understanding that it did.

Q. Did the Respondent company charge it as a marketing expense during the year that it was paid, namely, 19[illegible]?

A. Yes, sir.

Q. Does the amount so paid in connection with this branch of the annuity plan of the Respondent change with the passage of time due to deaths?

A. It is my understanding that it does.

Q. Would you recommend as an accountant that the Respondent company make a charge to accumulated earnings twice a month as payments are actually made?

A. That is not the way that I would handle the situation on a set of books.

Q. Very well. Would you explain just how this particular expense item could be charged, as you say in your testimony, and I quote, "to the books at the time 7581 it * * *" referring to the expense—"applied."

unless the same were charged only at the time payments were actually made?

A. I do not understand that exactly, Judge Hanley. I will be glad to tell you how I would handle it on the books, or would suggest handling it.

Q. All right. Go ahead, Mr. Warmack.

A. It is my opinion that the company in anticipation of the payment of pensions; that is, the $22,000 odd item should have charged to the current expense of the years in which this particular class of expense would have occurred, and should have closed that charge to current expense, and on its regular profit and loss account, that would be entered, and that the credit for that charge should be reflected in the reserve account or the liability account.

Later, when the payments are made a proper accounting procedure, in my mind, would be to charge the payments against the reserve account which would have been set up as just explained.

Q. Well, granting your shibboleth of the reserve account as something to charge it against, Mr. Warmack, I am concerned about this—not so much as to wherever you charge it, against the reserve account, or wherever you charge it—but, how much then of this twenty-two thousand odd dollars in your judgment as an accountant would be properly chargeable to marketing expense in 1940?

7582 A. None.

Q. Would it be properly chargeable to marketing expense at any time?

A. It may be as I just explained, yes.

Q. Is it a marketing expense in your judgment?

A. I said that it may be so considered. I rather think that it is or would be a marketing expense.

Q. Are you prepared now to state whether or not you now regard the item of one hundred and eight thousand plus dollars as a marketing expense?

A. Not for the year 1940.

Q. The question had no reference to a year. I am asking you again if you so regard that item as a marketing expense, and refer you to your testimony on page 6382 where you classified that item along with the twenty-two thousand plus dollar item?

A. If it had been recorded back over the years it may have been so regarded. In other words, if they regarded it that way and so recorded it, it may have been so regarded.

Q. Well, how do you regard it?

Trial Examiner Ballinger: What do you mean by "so recorded"? Do you mean recorded on the books as a marketing expense?

The Witness: Yes, sir. That was the question I was asked, your Honor.

7583 By Mr. Hanley:

Q. Do you so regard it?

A. I stated that I did not know. I have no way. I have not considered that point in this case. It does not apply to 1940, and that is the extent of my studies in this case.

Q. Well, you are satisfied that the twenty-two thousand dollar plus item is a marketing expense some place. You have just so testified. Have you not?

A. It may have been, yes. It may have been so regarded.

Q. Of course, Mr. Warmack, I say this to you very respectfully—I am doing it for illustrative purposes—I may be able to swim up Niagara Falls backwards, but that does not answer any question.

I am asking you: How do you as an accountant regard this? Now, how it may be regarded by somebody else is of no importance, but how do you regard it as an accountant?

A. I regard it as an extraneous charge properly chargeable to surplus in the event that the company has not made any provisions to take care of it otherwise in those previous years.

Q. In an extraneous charge as distinguished from a marketing expense?

A. The extraneous charge is a charge that may not be regarded as one occurring in regular operations or current operations of the company. It may not be influenced 7584 by the current operations of the company.

For example, if you were to sell a piece of machinery for ten thousand dollars loss, that would be an extraneous charge. It would be comparable to that. It may be that no provision was made in the case of this piece of machinery to cover this ten thousand dollar loss, although in the case of machinery you may have made some arrangement. Maybe you did not make any. So, that will leave you with that.

Q. If you lost the ten thousand dollars on the sale of machinery would it make any difference in your cost whether you charged it to reserve or to a liability account or to accumulated earnings or to profit and loss, or to current operating expense?

A. Cost of what?

Q. Cost of doing business.

A. In the final end that you would have a certain amount of net earnings or net worth, in the final conclusion as to your net worth, net worth would not be affected regardless of how it was handled on the account.

Q. That is what I thought.

A. That also is true with respect to each and every one of these other items. The net worth of the company is not going to be affected, as reflected by the books of account in the final analysis.

7585 Q. Now, when you refer to an item of cost or expense as an extraneous cost, if no part of that cost applies to the cost of marketing the products of the company, does it make any difference whether you call it extraneous or call it something else? Is it not in fact and finally a marketing cost?

A. As stated on page 6382 of the record, it may have been properly charged as an expense item in previous years. I have not studied anything but the year 1940 and I cannot tell you about, and I cannot talk about anything in there except as to 1940.

Q. Well, will you please disregard time elements, Mr. Warmack. I am asking you if the cost, if it had been incurred, and if the company pays out the money; is that not a marketing cost? Forget for the moment, or disregard for the moment where, when, and how it may be charged in the accounts of the company. The question is simple. Is it or is it not a marketing cost?

A. Actually, are you now speaking directly with regard to this $108,060 plus? May I inquire?

Q. I am addressing myself to any cost that is incurred relative to the marketing of products of the company. But you may, for the purposes of this question, regard the question as being addressed to two things, the $108,000 plus item and the $22,000 plus item.

7586 The Witness: I am not just exactly clear, your Honor, with respect to the question. May I have it read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I have already stated that for the record on page 6382 where I said if that—these two items of cost had been placed on the books at the time that they applied, then they may have been properly charged as operating expenses.

I have not made a study of any year except 1940, and I know this did not apply to 1940. I believe that answers your question, Judge Hanley.

Mr. Hanley: At this time, the Respondent requests the Court to instruct the witness to answer the question either to the effect that the costs referred to in the question are a marketing cost, or they are not, or that the witness does not know, whichever may be in accordance with the fact so far as the witness is informed.

And if your Honor please, I have asked that question I do not know how many times and I just never have as yet gotten an answer. The Respondent is entitled, in my judgment, either to an answer "yes" or an answer "no," or an indication of the witness that he is unable to answer the question.

Trial Examiner Ballinger: The Examiner agrees with counsel for the Respondent and so instructs the witness.

7587 The Witness: Your Honor, if these costs are in fact proper marketing costs—I do not know if they are or if they are not—if they are, they certainly should be treated as marketing costs. I have not made a study for other than 1940. I know they are not marketing costs for 1940. I have made a study for 1940.

Trial Examiner Ballinger: Well,—

Mr. Hanley: Respondent moves to strike the answer of the witness as not responsive to the question. Respondent requests the Court to admonish the witness to answer the question.

Mr. Austin: If your Honor please, this is similar to a line of questions which came up on the same subject on direct examination in which counsel for the Respondent was permitted to interpose some questions and at that time the Examiner ruled—at page 6388—

"The Examiner considers that the witness has answered the question so far as it relates to the matter under inquiry."

At that time I objected on the ground that 1940 was the only year that was material to the inquiry. I have not made this same objection on cross examination, but I do think that the witness has fully answered the question. Certainly, he has completely stated, as completely as he can, what his opinion is on the matter. I do not think 7588 the record should be further encumbered.

Mr. Hanley: At that time the Examiner, during the course of the questioning on the part of Respondent's counsel, quite properly, I think, because it was interposed into the then direct examination of the witness, interposed, and your Honor indicated that it was more properly a matter for cross examination and should be reserved for cross examination.

The question is now being asked on cross examination. All I want, your Honor, is for this witness to say either yes, it is a marketing cost, or no, it is not a marketing cost, or thirdly—I do not know whether it is a marketing cost.

Trial Examiner Ballinger: As the Examiner understands the testimony of the witness, it is in substance this: that he did inquire into that item so far as it related to the year 1940, and his investigation satisfied him that in that year it seemed to be and in fact formed no part of the marketing cost: that he has made no inquiry relative to the other years and different years, and therefore he cannot say whether in those other and different years or any one of them it would form any part of the marketing cost or any portion of the same could have been included in the marketing cost.

It seems to the Examiner that that is about as far 7589 as the witness can go.

Mr. Hanley: I will ask another question.

By Mr. Hanley:

Q. You have stated, Mr. Warmack, that you investigated the year 1940, and that you did not think that these items—referring to the one hundred and eight thousand and twenty-two thousand dollar items are properly marketing costs for the year 1940.

Now, without reference to 1940 or any other year, or any other time period, and understanding that the company spent that money, I am asking you as an expert accounting witness: How those items of expense should be classified? Are those items of expense marketing expense? And do not try to fix it to any particular time or period.

Mr. Austin: I object to the question, your Honor, as just indicated, ~~the~~ witness has already answered it several times. Your Honor has just indicated that very clearly on this record.

Trial Examiner Ballinger: Can you answer the question?

The Witness: Yes, sir. I have answered it several times. I will endeavor to do it again.

By Mr. Hanley:

Q. Answer it "yes" or "no", please.

A. That is not a complete answer.

7590 Trial Examiner Ballinger: Do you know?

The Witness: No, sir, I do not know. I have only studied 1940.

By Mr. Hanley:

Q. All right. Why do you —

A. I have said it fifteen times.

Q. Do you not knew?

A. I have said I do not know.

Q. I have tried to ask you several times. If you do not know your business, just say so, and that is all.

A. I know my business but I do not understand that I have to memorize the entire proposition of this company's accounting procedures and accounts. I did not study anything beyond 1940.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Strike from the record the remark of counsel and the remark of the witness.

Mr. Hanley: I would like for them to be on, your Honor.

Trial Examiner Ballinger: If counsel desires it to remain on the record it may remain.

By Mr. Hanley:

Q. In your opinion as an accountant, did the Respondent derive any benefit from the persons employed by
7591 the company in the year 1940 because it paid annuities to past employees?

A. I have previously answered that question that in my opinion it has—again, I will answer—or that it does.

Q. Did and do the accountants for the Internal Revenue Department, if you know, regard annuity payments as a legitimate charge to current expenses—

A. (Interposing): I do not know.

Q. —for the purpose of income tax returns?

A. I do not know.

Trial Examiner Ballinger: Judge, that is a question that has been previously asked of the witness, has it not?

Mr. Hanley: On a different subject, ~~your Honor.~~

Mr. Austin: I think not.

Mr. Hanley: If the witness does not know, that is the end of it.

The Witness: I should be glad to find it if it is of any value here.

Mr. Hanley: No, I do not think you can find it, Mr. Warmack.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

Mr. Hanley: If your Honor please, with the exception of the matter which the witness desires to review, and
perhaps a few summarizing questions, I think I am
7592 just about ready to excuse the witness on cross-
examination.

I will say to you now, Mr. Austin, if it will be of any aid to you, that I propose to use both Messrs. Houghton and Boatwright for what I hope will be a rather short surrebuttal. In the morning if we can clear those pending matters with the witness, I shall release him to you for your further examination or excusing, whichever it may be.

That is the status of the thing so far as my program has any concern.

Trial Examiner Ballinger: Do you desire an adjournment?

Mr. Hanley: I am through so far as tonight is concerned. I can go on with the witness but the witness has the book to read tonight, and consequently, I do not think that I could carry on any further this evening to any benefit.

Trial Examiner Ballinger: Do you desire to take the witness on redirect examination, until he has answered the questions that have been reserved for tomorrow morning, Mr. Austin?

Mr. Austin: No, your Honor.

(Witness temporarily excused.)

Trial Examiner Ballinger: Such being the situation, the hearing is now, at 4:10 p. m., July 29, 1942, adjourned to be reconvened at 9:30 a. m., July 30, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C. 7593

(Whereupon, at 4:10 p. m., July 29, 1942, the hearing in the above-entitled matter was adjourned.)

7594

Room 532, Federal Trad
Commission Building,
Washington, D. C.
Thursday, July 30, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Illinois,) appearing for the Respondent, Standard Oil Company of Indiana.

7595 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing of Docket No. 4389, case entitled "In the Matter of Standard Oil Company (Indiana)" is reconvened pursuant to notice at 9:30 a. m., July 30, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held in this same building, July 29, 1942.

The reporter will note counsel for the Commission and Respondent present.

The hearing is recessed until 10:15 a. m., to afford the witness further opportunity to inquire into the question pending at the time of the adjournment.

(Whereupon, a recess was taken until 10:15 o'clock a. m.)

Trial Examiner Ballinger: Come to order. Reconvened at 10:15.

All parties present at the beginning of the recess and the witness are now present. You may proceed.

Mr. Austin: If your Honor please, before we commence this morning, your Honor, I would like to make a motion regarding certain testimony which was incorporated in the record on July 28, 1942. The testimony, your Honor will recall, had to do with certain advertising expenditures made by the so-called "jobbers" in Detroit.

7596 This witness was questioned in regard to advertising expenditures made by jobbers, although he had not been questioned on that subject on direct examination.

The testimony was admitted by the Examiner, reserving to counsel for the Commission leave to move to strike, at the conclusion of that testimony. That ruling of the Examiner appears at page 7390 of the record.

Counsel for the Commission now moves to strike from the record all of the testimony, both questions and answers, beginning at the middle of page 7392 and extending to and including the general answer of the witness at the top of page 7415 of the record.

I believe that is all of the testimony having to do with the subject to which I have just referred.

Mr. Hanley: Well, if your Honor please, the Respondent I think has presented its views to the Court in respect of this matter. Unless your Honor particularly desires it, I do not believe the Respondent cares to be heard on this motion.

However, I will be glad to state the position of the Respondent again, if your Honor should think it would be of any aid.

Trial Examiner Ballinger: No. It is not necessary.

Mr. Hanley: Of course, should your Honor grant the motion as just made, I assume that it would be granted 7597 as a legal matter, and that the record would stand, and there would be nothing physically stricken.

Trial Examiner Ballinger: The record will stand as it is on the record, except that it will be disposed of as the Examiner directs.

Mr. Hanley: Thank you.

Trial Examiner Ballinger: The motion is granted. And the matter is stricken—not physically—from the record.

Mr. Hanley: May I proceed?

Mr. Austin: I desire to make another motion.

Trial Examiner Ballinger: Proceed, Mr. Austin.

Mr. Austin: Now, if your Honor please: I have here a copy of the record for yesterday, July 29, 1942.

Trial Examiner Ballinger: Let us go off the record for a moment. We may save some time.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

Mr. Austin: Beginning at page 7568 of the record, there has been copied into the record, at the direction of the Examiner, certain material in the form of a question and five answers thereto. Those appear from the previous pages of the record to have been copied from a publication known as "The Journal of Accountancy," for May,
7598 1940. This particular material comes from a section of that magazine entitled "Accounting Questions."

I wish at this time to move to strike from the record the material commencing at the foot of page 7570 and extending to the top of page 7575, including the first six lines on that page. That material is headed "Answer No. 1,"—"Answer No. 2,"—"Answer No. 3,"—"Answer No. 4,"—"Answer No. 5." It appears that those answers are answers which appeared in "The Journal of Accountancy," in the "Accounting Questions," section in answer to the question also appearing in this section of the May, 1940 issue of that magazine.

It is my belief that the purpose of introducing these questions and answers into the record; that is, the purpose of counsel for the Respondent, is to show that a question was posed in "The Journal of Accountancy," which presented the same or a similar question of accounting as that presented here in connection with the trust fund set up by the Respondent for the payment of annuities for services of employees prior to January 1, 1939;

Further to show that five accountants answered that question in that magazine, and that each of the five accountants gave an opinion that the payments into the fund should be charged to current income;

That that opinion is and being at variance with
7599 the opinion given by the witness Warmack.

Before proceeding with my objection, I would like to ask counsel for the Respondent if that is a fair statement with regard to the matter therein referred to.

Mr. Hanley: The Respondent declines to answer.

The Respondent has asked a question upon which the Examiner ruled before the recess yesterday afternoon. It is assumed that the same ruling will obtain in connection with this motion, in the event that he should not, counsel for the Respondent will ask a question.

Trial Examiner Ballinger: The Examiner has ruled.

Mr. Austin: In the first place, if it is desired that the witness be asked to answer the question posed on page 388 of "The Journal of Accountancy," for May, 1940, then I should submit that the witness be asked to answer that question. I have no objection to the question being phrased in the language stated in "The Journal of Accountancy."

I have no objection to that question being included in the record as it is now.

But I submit that the witness' answer to that question, if desired, should be given to the question.

It is entirely unnecessary, in order to obtain the witness' answer to that question, to set forth all the five others, which are, in fact, the five other unidentified, supposedly public accountants, as to what they have 7600 said about it.

Trial Examiner Ballinger: Unnecessary to do what? I did not follow you there.

Mr. Austin: It is entirely unnecessary in order to obtain the witness' answer to that question to set forth what five other unidentified, supposed accountants, have said about it. That will in no way enable the witness to answer the question, nor will it make it possible for him to answer the question more definitely, or conveniently, than if the five answers were not included in the record.

Secondly, I think it is quite obvious, from the standpoint of the law of evidence, and I understand your Honor conceded yesterday, that the opinions of five other unidentified, supposed accountants, if we may even term them that, or any one of them, are inadmissible and have no evidentiary value since the persons are not known, have not been qualified, and any opinion that may have been asked to or have given, is not subject to cross-examination.

Certainly, any answers therein given have no pertinency to this case.

That being true, and since those five answers are not a part of the record in the sense that they have evidentiary value, it must be, of necessity, irrelevant and immaterial as to whether or not the witness agrees with those opinions.

Now, the only question posed with respect to those
7601 five answers is whether the witness agrees with
them. I think that whether the witness agrees or does not agree with something which is now in the record, and with an opinion which has no weight, cannot be considered, and must be incompetent and irrelevant.

Therefore, I can see no basis whatever for including in the record as a basis for the questioning of his opinions or otherwise the five answers which have been placed in the record and which were copied from "The Journal of Accountancy," for the month of May, 1940.

Trial Examiner Ballinger: Have you completed your objection and motion?

Mr. Austin: I have.

Trial Examiner Ballinger: No matter embraced in the question can now or at any future time have or be considered as having any evidentiary value whatsoever.

The question is propounded to the witness solely for the purpose of obtaining his views as an accountant.

His views as expressed by him, alone, can be considered now or at any future time as evidence.

The objection is overruled and the motion to strike is denied.

Are you now ready to proceed with the witness?

Mr. Hanley: I am.

Trial Examiner Ballinger: Will you take the
7602 stand again, please, Mr. Warmack?

Mr. Warmack: Yes, sir.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Hanley.

Q. Will you now answer the question, please, Mr. Warmack?

Mr. Austin: It may be recalled that there are two questions pending, I believe. I assume that counsel is referring now to both of them.

Mr. Hanley: Perhaps it would be well to obtain the precise question.

Trial Examiner Ballinger: At what page does it appear?

Mr. Austin: I think I have it here. 7564.

Mr. Hanley: 7564?

Mr. Austin: Yes.

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Mr. Warmack, please refer to page 7564, the last question on the page is the question you are expected to answer. Will you please answer it, Mr. Warmack?

A. What page was that?

Q. 7564.

7603 Trial Examiner Ballinger: Read the question and let it appear in extenso on the record here so that the record will be clear.

(The reporter read the question as follows:

"Q. I hand you a copy of the 'The Journal of Accountancy' for the month of May 1940, and refer you to pages 388, 389, and the top of page 390.

"And I ask you, first, if the question there posed is not substantially in line with the accounting procedure and practice of the Respondent in handling its annuity plan?

"I then ask you to read the five answers submitted by the practising accountants and tell the Court whether or not you agree, in principle, with the answers submitted by those accountants.")

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

The Witness: May I inquire, your Honor?

Trial Examiner Ballinger: Yes.

The Witness: May I ask if each of these five answers may be given separately? In other words, may I give my answer to each of the five answers, perhaps I should have said.

7604 Trial Examiner Ballinger: The first question the witness is called upon to answer is at page 7564 and is as follows:

"And I ask you, first, if the question there posed is not substantially in line with the accounting procedure and practice of the Respondent in handling its annuity plan?"

The Witness: In my opinion, the question is reasonably in line. (It does not embrace the exact features that the Respondent company's present annuity embraces, but I think that it is reasonably comparable to the situation at hand.

By Mr. Hanley:

Q. Very well, Mr. Warmack. You may now answer the second section of the question.

Trial Examiner Ballinger: Mr. Warmack, you may now answer the second section of the question which, for your convenience, reads as follows:

"I then ask you to read the five answers submitted by the practising accountants and tell the Court whether or not you agree, in principle, with the answers submitted by those accountants?")

The Witness: Your Honor, may I answer each of the five answers by the practising accountants separately?

Trial Examiner Ballinger: You may.

7605 The Witness: Thank you.

Trial Examiner Ballinger: Your answers, of course, would be confined to your view as to whether or not you agree in principle with the answers submitted by those accountants.

Mr. Austin: Your Honor, I object to the phraseology that has been used both in the question and by your Honor in restating it, there being no proof whatsoever in the record that any answers were given by any five practising accountants. The record as set forth in that pamphlet is very clear in that regard.

Trial Examiner Ballinger: The Examiner has ruled on several occasions in connection with this question that the fact that the questions came from some Journal is of no greater weight than if the questions had originated in the mind of counsel for the Respondent, and they will be so regarded.

Mr. Austin: Well, does the Examiner then—well, I take it that the Examiner does agree that there is no proof that any practising accountants submitted any answer.

Trial Examiner Ballinger: None whatsoever so far as this record discloses.

The Witness: Your Honor, may I inquire in answering these, if you please, these five answers which are submitted, which are supposed to have been submitted by perhaps, I had better say, five different practising 7606 accountants—in giving my answers to those may I answer, and then explain the reasons for my answer in connection with each of the five answers?

Trial Examiner Ballinger: You may.

The Witness: Thank you.

Trial Examiner Ballinger: Proceed.

The Witness: I do not agree with answer No. 1, shown on page 388 of the Journal of Accountancy for the month of May, 1940. That—

Mr. Austin: If your Honor please, I object to the reference to the book inasmuch as it is already spread upon the record. I think as a matter of convenience it would be better to have it shown as a reference to the record itself. I do not wish to have any record show any reference to "The Journal of Accountancy" when it is unnecessary to do so. I do not believe it can serve any useful purpose. It might only serve to confuse.

Trial Examiner Ballinger: The witness will refrain in the future from any reference to that.

The witness may restate his answer and, for the purpose of clarity, make reference to the pages of the record upon which it appears. I also instruct the witness to read the part with which he agrees or does not agree, so that the record will be clear at that point in the record, just exactly what he does agree with and what he does not agree with, in principle, as inquired into by the question.

7607 The Witness: Yes, sir.

Answer No. 1 as shown on pages 7570 and 7571 of the record, which purports to be an answer given by an unidentified public accountant

Mr. Austin: (Interposing): Your Honor, I object to any reference to any unidentified public accountant. There is nothing in the record upon which such a reference could be based. There is no suggestion that they were public accountants identified or unidentified. I think that the reference more properly may be made directly to the number of the so-called answer which is the subject of the witness' discussion here.

Trial Examiner Ballinger: That may be done.

The Witness: May we be off the record?

Mr. Hanley: I object to going off the record.

Trial Examiner Ballinger: Counsel for the Respondent objects to going off the record. Therefore, we will not go off the record. The reporter, however, may strike the witness' reference to page 388 and so forth of The Journal of Accountancy if there is no objection on the part of counsel for the Respondent.

Mr. Hanley: I do most vigorously object to that. I think whatever the witness says should be on the record.

Trial Examiner Ballinger: Then it will remain on the record. It is of no particular importance.

7608 The witness will proceed.

The Witness: I cannot identify what it is, if I cannot identify the question, or refer to it.

Trial Examiner Ballinger: Do you understand the conclusion stated in question No. 1?

The Witness: Yes, sir.

Trial Examiner Ballinger: Do you agree with it?

The Witness: Question No. 1 reads as follows:

"And I ask you, first, if the question there posed is not substantially in line with the accounting procedure and practice of the Respondent in handling its annuity plan?"

I certainly do not.

Trial Examiner Ballinger: You do not agree with it?

The Witness: I certainly do not agree with it.

Trial Examiner Ballinger: You may state your reason for disagreement.

The Witness: In the answer it was stated, "We do not know of any accounting practice which would support a method which would entitle any provision to be made on the books of the total amount to be paid, surplus, however, to be charged at the end of each year with the payments made during that year."

I most certainly do not agree with that statement from the standpoint of sound accounting.

7609 Trial Examiner Ballinger: If you disagree, you may state your reasons.

The Witness: For the reason that this is an extraneous item of cost.

Extraneous items of cost are properly chargeable against accumulated earnings.

The answer is wholly and entirely an unreasoned statement. It does not go to the effect of reasoning the accounting question at issue. The accounting question itself asks, in effect, which of the following procedures are permissible, and which one is preferable. And it names one procedure. "3.":

"Current income to be charged with payments as made.".

That question, in itself, is not clear to the witness.

Was the question, "should this class of cost be charged against operating income, or should it not?".

The question as posed to which this answer was offered, about which I am commenting, is silent indeed on that very point. Therefore, there is left in the mind of the witness a doubt as to whether or not the question posed was this: Should this class of an expenditure be charged against operating income? against non-operating income? in arriving at your net operating income, or is it to be charged
7610 or shown on the profit and loss statement as "other
deductions from income," in determining net income for the year. Such items, losses on capital assets especially, when they do not get into large amounts, are often placed by practising accountants as income deductions and are not carried to earned surplus as a deduction.

If the answer to No. 4 means that, I still disagree with it.

This answer to which I address myself is not clear. It is difficult to answer a question which is not clear.

Trial Examiner Ballinger: Well, if the answer is not clear to you, do you know whether you disagree or agree with it?

The Witness: I would disagree with him, Judge, in any event, for the handling of an item on a company's cost statement which runs into an amount of three million dollars at least, a year, in an income account which is a proper charge against earned surplus, irrespectively, but as I just stated, this answer is an unreasoned answer.

In my opinion, it is not a complete answer from the standpoint of sound accounting from which any accountant can gain anything, as it is shown on pages 7570 and 7571 of this record.

By Mr. Hanley:

Q. (Now, Mr. Warmack, you have just asked your-
7611 self a lot of questions which you say create a doubt
in your own mind. Those questions were not asked you by the Respondent. Those questions are not incorporated in the question referred to in Respondent's Exhibit 40-B for identification. Those questions are not dealt with in any answer appearing in this record, and particu

larly not in Answer No. 1, beginning at page 7570 and which answer reads as follows:

"Answer No. 1.

"In reply to your letter regarding the proper accounting treatment to be accorded with respect to payments made to an insurance company, we believe method 3 should be followed. We do not know of any accounting practice which would support method 2. We do not believe method 1 would be in accord with the facts, which we understand are to the effect that the corporation is not obligated to continue the payments."

Now, method No. 3 is given as follows:

"Current income to be charged with payments as made."

Having that now definitely in mind, will you please state briefly by "yes" or "no" whether or not you agree with the Answer No. 1 as referred to and as I have just read it to you?

A. I have answered that I do not, and I have given my reasons therefor.

7612 Q. Very well. Will you please continue with your answer.

A. Thank you.

Trial Examiner Ballinger: Proceed to Answer No. 2 appearing at the record page 7571 and 7572.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Warmack, the Examiner probably was in error in advising you to state your reasons why you either agreed or disagreed with question No. 1.

The question pending is solely as to whether or not you agree or disagree with it. And if counsel desires to know your reasons therefor, he may pursue the inquiry further.

In answering the remaining questions, please state merely whether you agree or disagree, if you can.

The Witness: If your Honor please, a "yes" or "no" answer would be an incomplete answer, but I shall abide by your directions.

Trial Examiner Ballinger: Proceed.

Mr. Austin: I assume, your Honor, that if there is any one of these answers with which the witness agrees in part or disagrees in part, that he is entitled to so state?

Trial Examiner Ballinger: Of course.

Mr. Austin: He may not be able to say "yes" or 7613 "no" that he is in agreement with the principle so far as the entire answer is concerned.

Trial Examiner Ballinger: I think it is perfectly clear. Now, proceed with your answer, Mr. Witness.

The Witness: I disagree entirely with the statement shown as "Answer No. 2," beginning on line 11 page 7571 of the record and continuing to the bottom of that page.

By Mr. Hanley:

Q. For convenience in reviewing the record, please read precisely that with which you disagree.

A. Answer No. 2 reads as follows:

"Answer No. 2.

"This is in reply to your question as to the proper accounting treatment to be accorded with respect to payments made to an insurance company under certain stated conditions.

"In our opinion, the proper treatment for the payments in question, is to charge current income account with the payments as made. The payments are charges which are expected to recur annually for a period of twenty years; the fact that the payments are voluntary on the part of the directors and not in settlement of legal obligations does not justify their omission from the income account. Although the computation of the amounts may be based on past services of employees, it does not necessarily 7614 follow that the charges are applicable to such prior periods; presumably, in authorizing the payments the directors have given consideration to the benefits currently derived therefrom by the corporation, such as the added contentment and efficiency of the employees."

I do agree in principle with the statements incorporated in that answer which begins on line 1, page 7572 and continues through line 6.

Q. Would you mind quoting again, please, the exact language with which you now agree, Mr. Warmack?

Mr. Austin: The witness has referred to it by reference in the record. It seems to me that this reading is an unnecessary taking of time.

Trial Examiner Ballinger: For convenience in the record, he may read the portion with which he agrees as well as the portion with which he disagrees.

Mr. Hanley: You have more time than I have, Mr. Austin.

The Witness: Your Honor, may I not say what I disagree with and why I disagree with it, to make this all complete?

Trial Examiner Ballinger: You may ~~read into the record~~ if you desire the portion with which you agree and the portion with which you disagree.

7615 The Witness: Thank you, your Honor.

Trial Examiner Ballinger: Proceed.

The Witness: The portion with which I disagree is the portion of the Answer No. 1 on page 7571 of the record, reading:

"In our opinion, the proper treatment—"

Trial Examiner Ballinger: That is Answer No. 2, is it not?

The Witness: I beg your pardon. No. 2.

Trial Examiner Ballinger: Suppose you start over again.

The Witness: The portion with which I disagree is that portion of Answer No. 2 on page 7571 of the record, reading:

"In our opinion, the proper treatment for the payments in question is to charge current income account with the payments as made. The payments are charges which are expected to recur annually for a period of twenty years; the fact that the payments are voluntary on the part of the directors and not in settlement of legal obligations does not justify their omission from the income account."

Up to that point, I should like to call attention specifically to this—that the answer is entirely silent on what part of the income account he would elect to place these 7616 charges.

Further quoting:

"Although the computation of the amounts may be based on past services of employees, ~~it does not~~ necessarily follow that the charges are applicable to such prior periods; presumably, in authorizing the payments the directors have given consideration to the benefits currently derived therefrom by the corporation, such as the added contentment and efficiency of the employees."

This is the same thing I read a while ago, your Honor.

I might say that quotation beginning with the words "Although the computation of the amounts may be based on past services of employees, * * *" in my opinion, is not even applicable to the present situation because of the fact that the employees of the Respondent company al ready knew in their own minds, because of the past practices of the company, that they were going to receive these pensions, as I understand it, and the mere fact that the company set aside now a fund, rather than keeping the money in its general fund to pay that, evidently this answer did not contemplate such.

Mr. Hanley: (Interposing) That last statement of the witness made by him as his own statement when he stopped quoting, is objected to. Respondent moves to strike it on the ground that it is a conclusion and opinion of the witness as to what was in the minds of the employees of the 7617 Respondent company;

Not the opinion as an expert accountant as to the general proposition of whether or not the establishment of these benefit funds have any effect on the greater contentment and efficiency of employees;

Further, that the expressed opinion of the witness as to what was in the minds of the company employees has nothing to do with the accounting procedures, or methods of handling, or the propriety of various accounting procedures and methods of handling of various pension or benefit funds.

Trial Examiner Ballinger: Motion is denied. Proceed.

The Witness: The portion of that quotation beginning on page 7571 of the record and carrying through line 6 on page 7572 of the record styled "Answer No. 2."

I do not agree with the following in principle:—

"This is in reply to your question as to the proper accounting treatment to be accorded with respect to payments made to an insurance company under certain stated conditions.

"In our opinion, the proper treatment for the payments in question is to charge current income account with the payments as made. The payments are charges which are expected to recur."

Trial Examiner Ballinger: You have already read 7618 that. Proceed to the point with which you do agree, if anything.

The Witness: I agree with the following in principle:

"Had the directors chosen to make a lump payment of the total estimated required amount, and at the same time, gone on record that such payment was in recognition and settlement of past services rendered, then a permissible treatment would have been to charge the payment to earned surplus."

I agree with that.

But I wish to call the Court's attention to this, that the statement is incomplete. It does not take various factors into consideration in this case, and—

Mr. Hanley: (Interposing) Now, just a moment, Mr. Warmack.

Respondent moves to strike the answer of the witness beginning with "I wish to call the Court's atention * * *" on the ground that it is unresponsive, it is not an explanation of anything that the witness has said, but is merely an analysis by the witness, or a criticism by the witness of a statement with which he has been asked a specific question as to whether or not he agrees or disagrees. It is entirely outside of the province of this inquiry for the witness to indicate what he thinks some accountant should have said which some accountant did not say.

7619 He is asked to agree or disagree with the material as it appears.

Trial Examiner Ballinger: The motion is granted on the sole ground that the question propounded to the witness is solely as to whether or not he agreed or disagreed. It did not call for any explanation. If an explanation is desired that may be obtained by either counsel for the Respondent or counsel for the Commission.

The Witness: Your Honor, a "yes" or "no" answer would be a very, very incomplete answer. I believe in each instance—

By Mr. Hanley:

Q. (Interposing): You have answered the question, Mr. Warmack.

A. Well—

Q. (Interposing): Will you please continue with your answer?

Mr. Austin: I would like to go back and find the state of the record. The last answer as to whether it was stricken, and what part of it was stricken.

The Witness: May we be off the record?

Mr. Hanley: No. I object to any off-the-record.

Trial Examiner Ballinger: No. Counsel for the Respondent does not wish to be off the record.

The Witness: Can we have a five minute recess?

7620 Trial Examiner Ballinger: No. That would serve the same purpose as an off the record. Therefore, there is no necessity for it that is apparent to the Examiner. We will stay on the record.

Mr. Austin: You were not required to give a "yes" or "no" answer, Mr. Warmack. The Examiner said that you could state whether you agreed or disagreed with it, and the Examiner has ruled that you may state as to what portion you agree or disagree with.

Mr. Hanley: Now, I suppose that counsel has served the purpose of the off-the-record, the recess, or what not that was attempted. In view of that, can we now go ahead?

Trial Examiner Ballinger: The witness has not been asked for any explanation.

Mr. Warmack, you may state whether you agree with this or cannot agree in all or in part. If you agree in part with that answer, you may state it right in the record as to the point with which you agree. If you disagree in part, you may read into the record the part with which you disagree. Of course, if you agree you may read that part in the record also. I wish the record to be clear as we go along as to precisely that with which you agree and that with which you do not agree.

The Witness: Thank you, your Honor. But some of the questions I must certainly agree with except for the 7621 fact that they are not complete.

Trial Examiner Ballinger: If they are not complete, then you would necessarily disagree with them? Would you not?

The Witness: Well, I think I would agree

Trial Examiner Ballinger (interposing): Well, now, Mr. Warmack, without any further discussion, proceed with the questions.

The Witness: That is the thing. I will have to read it.

Trial Examiner Ballinger: The next question is question No. 3, appearing at record page 7572, and extending over on to page 7573.

Mr. Austin: You mean "Answer No. 3"?

Trial Examiner Ballinger: That is right.

(The witness thereupon examined the document.)

Trial Examiner Ballinger: Do you understand, Mr. Warmack, that the question is whether or not you agree in principle with each answer, or the various parts of the answer as set forth therein?

The Witness: This is a long one. I will have to read it.

Trial Examiner Ballinger: All right. Proceed to do so.

(The witness examined the "Answer No. 3" further.)

Trial Examiner Ballinger: Are you now prepared 7622 to answer?

The Witness: Yes, sir.

Answering the question with respect to that part of page 7572 through line 15 of page 7573 of this record entitled "Answer No. 3," I wish to call the Court's attention—

Trial Examiner Ballinger: (Interposing): Now. Not that. Do you agree or disagree with the portion that you are about to—

The Witness: (Interposing): It will be split into parts that I agree with and parts that I do not agree with it. It is all in here together.

Trial Examiner Ballinger: Proceed.

The Witness: "* * * The basis of the payments is apparently related to services rendered by the employees piror to the inception of the social security act."

I agree with that.

Further quoting:

"Having regard to this retroactive feature, it might therefore be asserted that the annual payments to be made should be charged to the earned-surplus account now in an estimated lump sum of annually as the actual payments are made and not to the current and future annual income accounts; we think that procedure is permissible."

I agree with that. I think that is sound accounting. 7623 Even though the person answering—

By Mr. Hanley:

Q. (Interposing.) All right. Just go ahead, Mr. Warmack.

The Witness: Could I strike out "I agree with that". I mean after that?

Trial Examiner Ballinger: Strike that out, unless there is an objection by Judge Hanley.

Mr. Hanley: No. Whatever the witness says I think should properly appear upon the record.

Mr. Austin: I would like to inquire now as to the state of the record. I would like to hear the witness' answer read as given.

Trial Examiner Ballinger: Read it.

(The reporter read the following:

"I agree with that. I think that is sound accounting. Even though the person answering—")

Mr. Hanley: And I think that should appear on the record. If the witness said it should appear. Of course, I think it ought to have never gone on.

Trial Examiner Ballinger: Very well. It will be legally stricken but it will not be physically stricken from the record.

Mr. Hanley: If your Honor please, I was under the impression that Mr. Warmack was assigned to read this material at the recess last evening. If he has not read it,
7624 I suggest that there is no occasion for all of us to sit around while he does so. I would like to have a recess if he is going to study it. I think that is what your Honor had in mind last night that he should do.

The Witness: I assure your Honor that I have read it many times.

Trial Examiner Ballinger: Well, if we should take a recess, could you take a pencil, Mr. Warmack, and mark the portions with which you agree and the portions with which you disagree in the remaining questions?

The Witness: No, sir. I could not do that.

Trial Examiner Ballinger: No purpose would be served by a recess under those circumstances. Proceed.

The Witness: I do not agree with the remaining part of answer styled "Answer No. 3" as shown on page 7572 and continuing—

Trial Examiner Ballinger: It is not necessary to put the pages in. You have already indicated that in the record.

The Witness: Well, Judge, I do not think so. This is a new answer.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

7625 The Witness: Do you mean I cannot state just what it is?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: Your Honor, I think it should be read.

Mr. Austin: Your Honor, he did not intend to read it. He merely was giving the citations on the page so that it would not be necessary to read it.

Mr. Hanley: The Respondent objects to counsel for the Commission stating to the Court or the witness what the witness intended to do, or what he was going to testify, or the manner in which he was going to testify.

Trial Examiner Ballinger: The remarks of counsel for the Commission would appear to be harmless. Proceed.

The Witness: I do not agree with any of that portion of the answer styled "Answer No. 3," beginning with the sentence which begins on line 23 of page 7572 of the record and continues through line 15 at page 7573 of the record reading as follows:

"On the other hand, we are of the opinion it is preferable to take the view that, inasmuch as the corporation only now puts into effect a plan for supplementary benefits to the employees at the rate of retiral, the annual insurance payments should be regarded as in effect the current
7626 cost of a supplementary reward or bonus, for services
rendered and to be rendered, to be payable at a specified date and that, therefore, regardless of the basis of computation to determine the annual cost, these annual payments should be charged to the current income accounts from the date of the inception of the plan, when the obligation is actually incurred, to the respective retiral dates or for twenty years, or so long as the corporation maintains the plan. Had a lump-sum payment been made a deferred charge could have been established, to be equitably apportioned to the income accounts of future years."

By Mr. Hanley:

Q. Is that the entire balance of the answer, Mr. Warmack?

A. No, sir. I will be through in a minute.

Q. I mean, "Answer No. 3," what you are quoting from.

A. Yes, sir.

I agree with that part of the answer "Answer No. 3," beginning with line 8 of page 7572 down through line 14 of the same page, which sets up the payment, and which—

Mr. Hanley: (Interposing.) I wonder if we may not have him requote what he agrees with and what he disagrees with.

It takes up very little more time, if any, than to make these detailed references and it is much more convenient.

I understood that your Honor was so directing the witness.

7627 Trial Examiner Ballinger: That was the intention of the Examiner; that is, to have the witness incorporate in the record the portions with which he was in agreement, and the portions with which he was in disagreement.

The Witness: I understood that it was optional with the witness, your Honor, and I was just trying to expedite the matter.

Trial Examiner Ballinger: Well, now, will you proceed to read into the record the portions with which you are in further disagreement and agreement?

Mr. Austin: I think that we can get the reporter to copy them in, as far as he has gone. That will make the record complete.

Mr. Hanley: Very well.

Trial Examiner Ballinger: That may be done. From here on, the witness will read them as he goes along and there will be no question about the matter.

The Witness: "On the other hand, we are of the opinion it is preferable to take the view that, inasmuch as the corporation only now puts into effect a plan for supplementary benefits to the employees at the date of retiral, the annual insurance payments should be regarded as in effect the current cost of a supplementary reward or bonus for services rendered and to be rendered, to be payable at a specified date and that, therefore, regardless of

7628 basis of computation to determine the annual cost, these annual payments should be charged to the current income accounts from the date of the inception of the plan, when the obligation is actually incurred, to the respective retiral dates or for twenty years, or so long as the corporation maintains the plan. Had a lump-sum payment been made a deferred charge could have been established, to be equitably apportioned to the income accounts of future years."

From the standpoint of sound accounting—

By Mr. Hanley:

Q. (Interposing.) That is not the question.

A. —disagree with the statement or the statements contained in that quotation for many reasons.

Trial Examiner Ballinger: (Interposing.) Now, the reasons are unnecessary at this point.

The Witness: I feel the record would be incomplete without them and I would be—

Trial Examiner Ballinger: (Interposing.) You have not been asked for your reasons, Mr. Warmack.

The Witness: Quoting from page 7572:

"The payments to be made to the insurance company are for the purpose of supplementing the old-age benefits to the employees under the social-security act, so that the retire-
ment allowances prescribed shall be equal to the
7629 amounts which would have been payable had the so-
cial security act been in force from the date of the
commencement of employment of each individual."

I agree that that is a proper statement and understanding of the question previously posed to which these answers were given, but that does not take into account all of the questions in connection with the retirement plan of the Respondent company which was in effect prior to 1939, and is in effect since 1939.

Your Honor, can we have just a few minutes recess?

Trial Examiner Ballinger: Off the record if there is no objection.

Mr. Hanley: No, if it is not to discuss these matters.

The Witness: No.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: Now, if your Honor please, it appears from the off-the-record statement that it does change the statement of the witness if he leaves out the word "thus" which is in a part of this statement and appears at line 15 on page 7572. In view of that fact, I desire to ask the witness a question on that particular point at this time.

Trial Examiner Ballinger: Proceed.

7630 By Mr. Hanley:

Q. Do you agree or disagree with this statement: "Thus the basis of the payments is apparently related to services rendered by the employees prior to the inception of the social-security act."

Do you or do you not agree with that?

Trial Examiner Ballinger: If your include the word "thus"?

The Witness: You will have to explain what it means exactly.

Trial Examiner Ballinger: If you include the word "thus" in the quoted portion that you read, would that change your answer?

The Witness: No, sir. It would not change it. The only thing is, it relates back to something else in the record, without saying what it relates back to. But I do not think it makes any difference.

Trial Examiner Ballinger: And—

The Witness: May we have a five minute recess?

Trial Examiner Ballinger: The request for a five minute recess has been made. Is there any objection?

Mr. Hanley: None.

Trial Examiner Ballinger: There being no objection, the hearing will stand in recess for five minutes.

(A short recess was taken.)

7631 Trial Examiner Ballinger: Come to order.

Now, Mr. Warmack, proceed with your answer to "Answer No. 4," appearing on record pages 7573, and ending on 7574.

The Witness: In answer to the question with regard to "Answer No. 4," appearing on page 7573, and answering No. 5—

Trial Examiner Ballinger: Deal with them separately.

The Witness: 5—

Trial Examiner Ballinger: I suggest you deal with them separately.

The Witness: Very well, sir.

Trial Examiner Ballinger: Unless there is objection, you can strike off my instructions to the witness.

Mr. Hanley: I see no reason why the record should not stand as it is.

Trial Examiner Ballinger: Very well.

The Witness: The record carrying over to the top of page 7574 of the record, my answer is that I do not agree with the statement there entitled "Answer No. 4," which reads as follows:

"Answer No. 4.

"Regarding the procedure to be adopted in charging off the payments to be made to the insurance com-
7632 pany, to provide retirement allowances or annuities to employees we believe the first and second procedures outlined in your letter do not reflect good accounting

practice since there is no indication that the payments to be made include any amounts for funding the annuities in respect of prior periods and in consequence such payments should be charged currently to income. Therefore, in our opinion, the third procedure outlined is the one which should be adopted."

Trial Examiner Ballinger: Proceed to "Answer No. 5," appearing on record page 7574 and extending on to and into 7575.

The Witness: I do not agree with the statement there appearing under the title "Answer No. 5," reading as follows:

"Answer No. 5.

"1. In spite of the evident intention of the present board of directors to continue over a period of twenty years the insurance payments referred to, it would appear to be incorrect to make any allocation of surplus for the purpose of establishing a reserve to meet payments which may never be made.

"2. It would not appear to be correct to charge the annual payments direct to earned surplus in view of the fact that, while these payments may be discontinued, they 7633 are in the nature of an expense in connection with the compensation of employees and as such would appear to be operating charges similar to the cost of medical services, recreational facilities, etc.

"A. As stated above, the annual charge would appear to be in the nature of an expense properly chargeable to operations; in this connection it may be noted that expenditures of this nature are deductible for federal income tax purposes.

"It might be noted also that, should the corporation arrange with the insurance company at some future date to make a lump sum payment in lieu of remaining annual payments, such lump sum should not be charged to operations during the year in which made, but only that part thereof which might be considered to be fairly chargeable to the then current year and the balance deferred to future operations, to be taken up annually over a reasonable period."

I do agree with the one statement appearing on page 7575 which is the last line of that.

Trial Examiner Ballinger: Read that also.

The Witness: It reads as follows:

"This method also would be allowable for income tax purposes.".

Mr. Hanley: Do you not mean to read "This 7634 method also would be allowable for federal income tax purposes?"

The Witness: Yes. I omitted the word "federal." It should read: "This method also would be allowable for federal income tax purposes." I do not know with respect to that. I have not made a sufficient investigation to answer that.

By Mr. Hanley:

Q. That is according to your best information, is it?

A. As I say, I do not know with respect to that for the reason, as stated, I have not made a sufficient investigation to answer that point.

Q. Mr. Warmack, you have now indicated by quotation, as I understand it, all of the statements with which you do agree, in answers denominated Nos. 1, 2, 3, 4, 5, both inclusive.

Is it to be understood that in connection with any statements in any of those answers, or any of them which you did not specifically quote and state that you agreed with, that you disagree with such answers or statements in the answers?

Mr. Austin: I think that the answers of the witness being set forth on the record, sufficiently speak for themselves, your Honor.

Trial Examiner Ballinger: The witness may answer the question.

The Witness: Do you—may I have the answer? I 7635 mean the question?

Trial Examiner Ballinger: Do you mean that you desire to have the question read?

The Witness: Yes, sir. I would like to have the question read to me concerning those answers. That is what I had in mind.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. Mr. Warmack, you have now indicated by quotation, as I understand it, all of the statements with which you do agree, in answers denominated Nos. 1, 2, 3, 4, 5, both inclusive.

"Is it to be understood that in connection with any state ments in any of those answers, or any of them which you did not specifically quote and state that you agreed with, that you disagree with such answers or statements in the answers?")

The Witness: Yes, sir. That is correct. I think I should call your attention to the fact that I did quote some of those to which I did not agree, also, but not all of them, perhaps. I would have to have the reporter read all of the record for me to tell that.

By Mr. Hanley:

Q. That was the reason for the question, Mr. Warmack. I just wanted to clarify that, if there were some statements which you did not quote.

7636 A. Yes, sir. I intended to quote them all. It is my understanding that they are, but I could be in error about that.

Q. I understand that you disagree with anything that you did not quote; you agree with all that you did quote and state expressly that you did agree with it?

A. Yes, sir.

Mr. Austin: And so the record may be clear, I think that the witness quoted certain things and stated that he disagreed with them; he quoted other things and stated that he did not disagree with them.

Trial Examiner Ballinger: That is my recollection.

Mr. Hanley: Perhaps so.

Mr. Austin: May we be off the record?

Trial Examiner Ballinger: Off the record if there is no objection.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Mr. Warmack, yesterday we were discussing certain parts of account 520 having to do with annuities.

One of those parts involves an amount of something in excess of the one hundred and eight thousand odd dollars. That has to do with a payment into the trust fund to be expended or paid out by the company at some future time. Is that your understanding.

7637 A. It is not exactly my understanding.

It is my understanding that the payment goes into a trust fund, and that it is an irrevocable trust. That the trustee at some future time will make payments out of that fund, and for the benefit and relief of employees who were working for the company prior to January 1, 1939.

Q. Well, I am a bad accountant, Mr. Warmack. That is exactly what I was trying to ask you in my question. I thank you for correcting me.

A. That is the way I understand it, sir.

Q. The amount of twenty-two thousand odd dollars, which concerns another part of this plan, and which you condemn as an improper charge for the year 1940 has to do with certain past services. Is that correct?

A. Yes, sir. That is my understanding. And it is my understanding, just a little further, to go on and clarify that, that that has to do with employees who were retired prior to January 1, 1939, and that that is pensions or annuities being paid by the company, the Respondent company to those employees.

Q. Now, is it not the sense of your accounting thinking in connection with account 520 that if payments are to be made currently or in the future that those payments should be set up as a company cost along and made applicable to the periods to which the payments would fairly appertain?

7838 A. I do not just exactly understand just what you mean, Judge Handley.

Q. Well, do you not condemn the twenty-two thousand dollars plus item on the theory that it involves a payment made in the year 1940 by the company for services prior to that yearly period?

A. Well, sir, I do not condemn it. I do not think that it is applicable to operations for the year 1940; that is, that it is a charge to operatons for the year 1940, or that it should be so charged as expenses for the year 1940 in determining a cost differential for that year.

I should be glad to give you my reasons—

Q. (Interposing): Is it not your position, Mr. Warmack, from an accounting standpoint that it should have been charged for the years in which it may have been earned or applicable?

A. It is my opinion that that would have been a proper procedure.

Q. Mr. Warmack, is not that exactly what the company does and is doing in connection with that part of its annuity plan invoiving the one hundred and eight thousand odd dollars plus?

A. Not that thing exactly.

Q. All right. Explain "exactly".

A. I—

Q. (Interposing): Let me ask you this further question: Is it not true that the one hundred and eight thousand dollars involves a fund out of which future pay-
7639 ments are to be made?

A. Yes, sir, by a trustee to employees.

Q. Now, let me call your attention to page 7581 of the record.

A. Yes, sir.

Q. I will ask you if you did not make this statement

A. (The witness examined several documents.)

The Witness: This one?

By Mr. Hanley:

Q. Are you ready?

A. Yes, sir.

Q. I will ask you if you did not make this statement:

"It is my opinion that the company in anticipation of the payment of pensions; that is, the twenty-two thousand dollar odd item, should have charged to the current expense for years in which that particular class of expense would have occurred and should have closed that charge to current expense and on its regular profit and loss account, that would be entered, and that the credit for that charge should be reflected in the reserve account or the liability account."

"Later when the payments are made a proper accounting procedure, in my mind, would be to charge the payments against the reserve account which would have been set up as just explained."

7640 Did you make that statement?

A. Yes, sir. I made that statement.

Q. Now, Mr. Warmack, is that not the procedure in principle and substance that the Respondent company is using in connection with this part of its annuity plan involving the one hundred and eight thousand odd dollars?

A. Not exactly. No.

Q. All right. Explain.

A. That which the company is doing now with respect to the one hundred and eight thousand odd dollars which is a part of the total amount paid to a trustee for the retirement of employees who worked for the company prior to January 1, 1939, is made solely for the purpose, as I understand it, of providing a fund out of which employees will be paid independent of the company, when they retire; that is, that fund is applicable to the services rendered prior to January 1, 1939.

Q. They are future payments? Are they not?

A. Yes, sir. When these employees retire then they will receive the benefit independent of the company. The company cannot withdraw the money that it has paid into the fund, as I understand it.

Q. Does that make any difference from an accounting standpoint?

A. Not necessarily; but I did not finish my answer, Judge Hanley.

7641 Q. Proceed.

A. (Continuing): That fund is being set aside out of current funds of the company, and as I understand it, is being built up so that the company may relieve itself, as I understand it, of its obligation to employees which, as I understand it, is a moral liability, a potential liability, and is applicable to prior years; that is, prior to January 1, 1939.

Therefore, it could not be stated that by virtue of the fact that the company was trying to build up the fund applicable to this prior period or periods would be the same thing as building up the fund applicable to current periods to which I addressed myself when I made the answer just quoted by counsel for the Respondent, as shown at page 7581 of the record.

Q. Mr. Warmack, are you willing to state that there are no benefits derived by that by the Respondent Company and by employees current by reason of the fact that the company is building up this fund of one hundred and eight thousand odd dollars currently?

A. I do not believe that that is an accounting question at all.

Q. Well, if you cannot answer it, say so, Mr. Warmack.

A. It is a reasonable assumption.

7642 It seems to me that the company would certainly derive the benefit out of anything that it did to pacify, satisfy, create a good feeling on the part of its employees.

Q. Then what is the significant difference, if any, between the procedures which you recommend on page 7581 with reference to the twenty-two thousand odd dollars and the procedure actually being used by the company in reference to the fund of one hundred and eight thousand plus dollars?

A. The essential difference is this:

The company is now endeavoring, in connection with this one hundred and eight thousand dollars, to do something which it did not do prior to January 1, 1939.

Q. Well, suppose the company did not do it prior to January, 1939. What has that to do with the propriety or impropriety of the accounting principle—

A. (Interposing): Because—

Q. —involved in your recommenadtion

A. (Interposing): Because—

Q. —on page 7581 in reference to the twenty-two thousand dollar item?

A. Because of this very fact, Judge Hanley:

The company now has a plan whereby it matches contributions with employees for the purpose of retiring its employees and creating a fund for such retirement.

The cost of that plan is current operating cost 7643 of the company. Now, in view of the fact that such a plan was not in effect any more than the employee expected when he was retired to receive a pension, then the accrual of this fund for back years together with the accrual of the fund for current years would have the effect of putting a charge on the current years which may have properly been applicable to the prior years.

Now, in view of the fact with the prior years' income which had accumulated in the company should be charged with this item of expense which is not charged in prior years, if we charge the two for current years that appertain to current years, we burden the current years, thereby understating their operating profit.

If that is handled in accordance with the same way that the current accruals applicable to current time are being made for current operations, then the profits of those prior years would have been overstated. The extent of this overstatement should properly be charged with the accrual for those years made at this time.

Q. Mr. Warmack, I hope you understand that I am not discussing the amounts that may be payable to employees, or decrease, or increase of a pension.

In these questions I am discussing accounting principles.

Has the expectancy of an employee in any fund, by 7644 way of a pension—

A. (Interposing): I did not get

Q. Has the expectancy of an employee in any fund by way of a pension anything at all to do with the proper accounting principles applicable to the way that fund is charged and handled by the paying company?

The Witness: What is the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I would like to hear that question again.

Trial Examiner Ballinger: Read the question again.

(The reporter again read the question.)

The Witness: I do not just exactly understand what you mean.

By Mr. Hanley:

Q. Mr. Warmack, you have been criticizing the method of handling this one hundred and eight thousand dollar item for weeks, on the basis of the expectancy of the employees, on the basis of services—the services prior to 1939.

Now, I am asking you just this question, and if you want it read again, ask the reporter.

A. I have not been questioning this on account of the expectancy of the employees as such; that is, the accounting part of it.

7645 Q. Well, just answer—

A. (Interposing): I do not understand the question.

Q. —from an accounting standpoint.

A. I do not understand the question.

Q. Answer the question.

Trial Examiner Ballinger: If the witness does not understand the question, the answer would not be very satisfactory. Would it?

Mr. Hanley: Will you read the question, and we will try to find out if there is anything the matter with it, Judge. If there is, I will undertake to clarify it.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. Mr. Warmack, you have been criticizing the method of handling this one hundred and eight thousand dollar item for weeks, on the basis of the expectancy of the employees, on the basis of services—the services prior to 1939.

"Now, I am asking you just this question, and if you want it read again, ask the reporter.")

The Witness: I understand that part of it. I do not understand the other question which I thought this had reference to.

Trial Examiner Ballinger: Read the question prior to that.

7646 (The reporter read the following question:

"Q. Mr. Warmack, I hope you understand that I am not discussing the amounts that may be payable to employees, or decrease, or increase of a pension.

"In these questions I am discussing accounting principles.

"Has the expectancy of an employee in any fund, by way of a pension

"Has the expectancy of an employee in any fund by way of a pension anything at all to do with the proper accounting principles applicable to the way that fund is charged and handled by the paying company?")

The Witness: I think I understand the question. I think that the expectancy of the employee with respect to a fund definitely set up should have no effect with respect to how the company set up the fund and treated it on its records. It should just treat it in accordance with sound and customary accounting principles and practices.

By Mr. Hanley:

Q. Now, you have stated that in your opinion certain benefits would be derived by the company by reason of the fact that they had set up this trust fund?

A. I do not think I stated that.

Q. Well, I am sorry, Mr. Warmack, about that, and if you require the record, well, we will just have to get it.

7647 A. Well, if I stated it, I meant to state that I thought it was a reasonable assumption.

Mr. Hanley: I will ask that the record be read.

(The reporter read the following:

"I think that would be a reasonable assumption.")

Mr. Hanley: If your Honor please, I will withdraw the previous question, in order to save time, and ask the following question:

Trial Examiner Ballinger: The question is withdrawn. Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: We will take a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order. Is there a pending question?

Mr. Hanley: No. I withdrew the previous question. In order to save time, I will just restate it and incorporate it in the suggestion of the witness.

By Mr. Hanley:

Q. Now, you have stated that in your opinion it is a reasonable assumption that certain benefit would be derived by the company by reason of the fact that it had set up this trust fund. You have expressed it as your understanding that the payments out of that trust fund are to be made in the future irrespective of what services
7648 they may apply to—

A. (Interposing): No, sir. I have not stated that.

Q. —you have also—

A. (Interposing): No, sir. No, sir.

Q. —well, is it not a fact that these payments out of this trust fund will be made at a time in the future, and from time to time as employees retire? Did you not just get through saying that?

A. I did not state not applicable to any services. I think it is applicable to services performed prior to January 1, 1939. That is my understanding.

Mr. Hanley: That is just what I said in my question. Will you read the question, please?

(The reporter read the question.)

The Witness: Could I hear that read again?

Trial Examiner Ballinger: Read the question again.

(The reporter again read the question.)

The Witness: No. I did not say that. You said "these services that apply to." I did not say that.

By Mr. Hanley:

Q. Well, I am framing these questions, Mr. Warmack.

A. (Interposing): I am sorry.

Mr. Hanley: Your Honor, I wonder if I cannot frame a question here that will be simple enough so that it will express to the understanding of this witness what I am trying to ask him. It is now 12:15, and I will under-
7649 take that task if your Honor would now entertain a motion for the noon recess.

I am trying to get something, and will during the noon recess further try to get something together that the witness can understand.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

(Witness temporarily excused.)

Trial Examiner Ballinger: The motion is granted.

And now, at 12:17 p. m., the hearing stands in recess until 2:00 p. m.

(Whereupon, at 12:17 p. m., a recess was taken until 2:00 p. m., this day.)

7650 Afternoon Session.

2:00 p. m.

Trial Examiner Ballinger: Come to order. You may proceed.

Mr. Warmack, will you resume the stand?

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Cross Examination (Continued) by Mr. Hanley.

Q. At the noon recess, Mr. Warmack, we were discussing that part of account 520 which dealt with the one hundred and eight thousand dollar amount, and that other part which dealt with the twenty two thousand dollar amount.

I had asked you some questions which apparently were not clear to you.

I now ask you if it is not your position that you criticize the Respondent for not setting up a reserve account for the twenty-two thousand odd dollar item, and do criticize the Respondent for setting up a reserve account on the one hundred and eight thousand odd dollar item.

A. Is that a question?

Mr. Hanley: Will you read it? It was intended to be a question.

Trial Examiner Ballinger: Read the question.

7651 (The reporter read the question.)

The Witness: No, sir. That is not my position at all: I have no care as to how the company elects to keep its records. That is the company's own business.

Trial Examiner Ballinger: Well, for the purpose of this cost differential, in this case: is that a correct statement in that regard?

The Witness: For the purpose of the cost accounting that is my same feeling. I do not have any feeling about how the company wishes to handle these costs or what they do about them.

But it is my feeling that for the purposes of proving a cost differential, procedures as outlined by me be followed, or the effect of those procedures be taken into consideration in arriving at a cost differential for any given period.

Mr. Hanley: I would like to hear that answer read.

Trial Examiner Ballinger: Read the answer.

(The reporter read the answer.)

By Mr. Hanley:

Q. That is to say that unless the procedures as outlined by you are followed, a cost differential cannot be supported?

A. With respect to this account you are addressing yourself, Judge Hanley?

7652 Q. I am referring to your answer.

A. Well, I was addressing myself to this account; and your last question, I thought, was all-inclusive. If you are addressing yourself to this particular account, then that statement is correct.

Q. Well, now, will you please answer the question in respect of supporting the cost differential:

Is it not true that you are criticizing the accounting of the Respondent in respect of the twenty-two thousand dollar plus item for the reason that the Respondent did not set up the reserve you are criticizing?

Trial Examiner Ballinger: Let him answer that first.

Mr. Hanley: All right. Let him answer that.

The Witness: No, sir. That is not my position. I have no care as to how the company keeps its records, whether it wants to make a record of these things or not.

By Mr. Hanley:

Q. From the standpoint of supporting a cost differential, Mr. Warmack, please? Is that not your position?

A. That is my criticism from the standpoint of a cost differential?

Q. That is the question.

A. Thank you. Yes.

7653 Q. From the standpoint of a cost differential, is it not your criticism of the company that they did set up the reserve on the one hundred and eight thousand dollar item?

A. It certainly is not.

Q. Well, then, what is your criticism of the one hundred and eight thousand dollar item?

A. My criticism of the one hundred and eight thousand dollar item; as used by the Respondent in the determining of its cost differential as claimed and as set forth in Respondent's Exhibit 101, is that that class of expense applies to prior periods and is not applicable in any way or in any part to the cost of doing business in the year 1940 in the Detroit field. And that is my opinion.

Q. Is not the payment of the one hundred and eight thousand odd dollars by the Respondent company—is not that—

Mr. Hanley: I withdraw the question.

Trial Examiner Ballinger: Question withdrawn.

By Mr. Hanley:

Q. Is not the payment of the one hundred and eight thousand dollar item by the Respondent company equivalent to setting up a resrve for that purpose?

A. Yes, sir. It is. Setting up the reserve to cover cost of prior operations, probably.

Q. You have answered the question, Mr. Warmack.

A. I see.

Q. One more question in connection with credit cards?

7654 A. Yes?

Q. I have reviewed the record, Mr. Warmack, with my associates, and we are not clear on just what your theory is in respect to the credit card situation.

I just want to ask you one question, and I wish you would please answer it as briefly and expeditiously as you can.

A. Yes.

Q. As I understand your testimony, you placed credit card operations upon the same basis as newspaper ad vertising; that is, you have some conception that it is a consumer acceptance proposition.

Now, suppose that John Doe makes an application to receive a credit card. Just exactly how is that transaction, in your mind, analogous to a consumer acceptance conception?

A. I would not state that is exactly analogous.

The intentions, as I understand it, of the company when it issued this credit card to John Doe, whom I assume to be an automobile driver and user of gasoline and other petroleum products, was for the purpose of holding that user to the respondent's products as compared with a newspaper cut run in a local newspaper which the automobile driver might read, and might influence him to drive into one of the respondent company's reseller stations; that is,
a station supplied either directly or indirectly by the
7655 respondent company, and purchase his requirements
of the Company's products.

Now, to bring those two together, we have this situation: In the first place, this automobile driver in the beginning may have read the advertisement. That influenced him to drive in to secure his supply of gasoline from the reseller station. While he was in there, in some way he came to know about the credit card situation. Subsequently to that, the credit card was issued to this same person who, we will say, is this John Doe that you have just spoken of. That credit card served to hold him to the product. And the newspaper advertisement served in the beginning to bring him to the product.

Now, that is the way I see the situation.

Q. How is it comparable, Mr. Warmack, as a matter of expense of selling when the Standard Oil Company issues me a credit card as distinguished from buying and paying for a newspaper advertisement for Red Crown gasoline?

A. I certainly could not conceive of that being analogous; I could not imagine of you, as an employee of the company, buying or would buy anything except the company's product if it suits you.

Q. That is the point. It costs the company just as much to handle my credit card as anybody's else? Is that not so?

7656 A. It is a matter of convenience to you, not to the company, necessarily. They know you are going to buy their products.

Mr. Hanley: I move to strike the answer of the witness as non-responsive. I ask that the question be read to the witness. I further ask that the witness be admonished to answer it.

Trial Examiner Ballinger: The question is a rather simple one.

Do you wish it read to you?

The Witness: Yes, sir.

Trial Examiner Ballinger: Read to the witness the question just propounded by counsel for the Respondent.

(The reporter read the question.)

The Witness: I do not know.

By Mr. Hanley:

Q. Well, you have made a very careful and thorough study of the credit cards? Have you not done that, Mr. Warmack?

A. Yes, sir. I made a superficial study, as I have explained.

Q. Your did study this credit card thing? Did you not do that?

A. Oh, yes. I made a superficial study.

Q. All right. What is the difference in cost between handling my credit card and John Doe's credit card, or anybody else's?

A. You may buy twice a month, and John Doe may buy every day; or, vice versa, you may buy every day and
7657 John Doe may buy once a month. How in the world do I have any way of knowing how much it is going to cost to service one credit card as against another? I do not know how often they are used.

Q. Is there any difference in cost—

A. (Interposing.) Yes, sir,—

Q. —between handling the ticket of a purchase which I make and a purchase of John Doe that John Doe makes, on a credit card?

A. I should not think so.

Q. Well, I ask you, Mr. Warmack, what is the difference, if there is any difference—and you say there is—between the action of the company in granting me a credit card and handling the business on that credit card; and buying a newspaper advertisement?

A. When you say "me" do you mean "you" or any customer?

Q. I mean "me."

A. It may be—you mean you, as connected with the Standard Oil Company?

Q. I mean—me.

A. I certainly—

Q. (Interposing.) That is what I said.

A. I certainly should think that the company would be doing you a courtesy and kindness to handle your credit card. I do not think as far as issuing of a credit card to you, personally, is concerned, could be in any way 7658 comparable to the advantages which the company seeks to obtain by the running of a newspaper advertisement.

Q. Now, as a matter of fact, are not about eighty per cent of the credit cards which are issued, issued to customers who are already customers and purchasers of products of the Standard Oil Company (Indiana), or the company who may issue you the credit card?

A. You say eighty per cent?

Q. Approximately eighty per cent?

A. I certainly have not the least idea.

Q. Well, do you not think that—

A. (Interposing.) No, I do not have the slightest idea.

Q. Do you not think it would make any difference in this case?

A. No, sir.

Q. Did you make any investigation of this matter?

A. No, sir. I did not make any investigation. It was not pertinent to the question.

Q. Assuming that it is true, would that change your view at all that the issuance and servicing from an accounting standpoint of credit cards is comparable to newspaper advertising pointed to consumer acceptance of goods?

A. I cannot say.

Mr. Hanley: Read the question.

(The reporter read the question.)

7659 The Witness: Not necessarily.

Mr. Hanley: I move to strike the answer of the witness. I ask that the question be reread. I further ask that the witness be admonished to answer the question.

Trial Examiner Ballinger: Read the basic question, and then read the question which came thereafter.

(The reporter read the two following questions and the answer of the witness as follows:

"Q. Now, as a matter of fact, are not about eighty per cent of the credit cards which are issued, issued to customers who are already customers and purchasers of products of the Standard Oil Company (Indiana), or the company who may issue you the credit card?"

"Assuming that it is true, would that change your view at all that the issuance and servicing from an accounting standpoint of credit cards is comparable to newspaper advertising pointed to consumer acceptance of goods?"

"A. I cannot say." * * * "Not necessarily.")

The Witness: Now, what should I say, Judge?

Trial Examiner Ballinger: I do not know.

The Witness: I do not see either. I have answered the best I know how.

Trial Examiner Ballinger: He has asked you for 7660 your opinion.

By Mr. Hanley:

Q. Please answer the question, Mr. Warmack.

The Witness: May I have the question? Evidently I do not understand it.

Trial Examiner Ballinger: Read the question.

(The reporter read the following question:

"Q. Assuming that it is true, would that change your view at all that the issuance and servicing from an accounting standpoint of credit cards is comparable to newspaper advertising pointed to consumer acceptance of goods?")

The Witness: That would not necessarily change my view at all.

By Mr. Hanley:

Q. Well, if it would not "necessarily change your view," would it "change it otherwise"?

A. Otherwise to what?

Mr. Hanley: Will you read the question, please?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: The question is not clear to the Examiner.

Mr. Hanley: He says it is "not necessarily." I do
not care whether it is "necessarily" or not. I am
7661 asking him these questions on the theory that he is
an expert accountant.

By Mr. Hanley:

Q. I am asking you, Mr. Warmack, these questions on the theory that you are an expert accountant. If it does not "necessarily change them," does it change them in your view as an expert ~~accountant~~? Now, is that clear?

The Witness: Your Honor, may the counsel please reframe his question so I can follow it? I am sure I do not understand his question.

Trial Examiner Ballinger: Mr. Warmack, you gave an answer with a qualification. And you gave an answer without any limitations or qualifications to other questions.

Can you give an answer without any limitations or qualifications to this?

The Witness: The question now is separated into two or three different parts.

By Mr. Hanley:

Q. Answer it if you think it is. Answer them separately.

Trial Examiner Ballinger: Read the question to the witness.

(The reporter read the following question:

"Q. I am asking you, Mr. Warmack, these questions
on the theory that you are an expert accountant. If it
does not 'necessarily change them,' does it change
7662 them in your view as an expert accountant? Now, is
that clear?")

Trial Examiner Ballinger: Now, read the question preceding that.

(The reporter read the following question:

"Q. Assuming that it is true, would that change your view at all that the issuance and servicing from an accounting standpoint of credit cards is comparable to newspaper advertising pointed to consumer acceptance of goods?")

The Witness: I still don't think that is the basic question.

Trial Examiner Ballinger: Read the question which preceded that.

(The reporter read the following question:

"Q. Now, as a matter of fact, are not about eighty per cent of the credit cards which are issued, issued to customers who are already customers and purchasers of products of the Standard Oil Company (Indiana), or the company who may issue you the credit cards?")

Trial Examiner Ballinger: You have heard the three questions read. Now, can you answer it?

By Mr. Hanley:

Q. You said it did not necessarily change it. I am
asking you whether it changed it at all or not in
7663 your judgment as an expert accountant? Now, does
that explain the question?

A. In my opinion—no. May I state my reasons, your Honor?

Trial Examiner Ballinger: Not now.

By Mr. Hanley:

Q. Would it be sound accounting to charge all credit card cost to the advertising budget?

The Witness: Your Honor, I may not explain my answer to the other question?

Trial Examiner Ballinger: The Examiner has already ruled. You have not been asked for an explanation.

The Witness: My answer is not complete.

Trial Examiner Ballinger: The Examiner so considers it.

The Witness: I do not think so.

By Mr. Hanley:

Q. If it is on the same basis, from the consumer acceptance standpoint as newspaper advertising, why would it not be?

A. Why, any charge of this, why not charge it to machinery, that would be just about as reasonable.

Mr. Hanley: Respondent moves to strike the answer of the witness as not responsive. Respondent asks the Court to admonish the witness to answer the question.

Trial Examiner Ballinger: The motion is granted. The question will be reread to the witness.

(The reporter read the last question.)

7664 The Witness: For the reason that in accounting
it is customary, and in my opinion in accordance
with methods employed by accountants generally that

separations be made of classes of property, classes of expense, classes of all various kinds to whatever refinement may be considered necessary in any given situation.

I am certainly convinced that it would not be sound accounting to group these two classes of expense together, or to group them together with all other classes of expense, or any other class of expense if a separation were to be endeavored with respect to the different kinds of expense.

By Mr. Hanley:

Q. You have treated the two accounts, newspaper advertising and credit cards identically the same for identically the same reasons, namely, that they are appeals to consumer acceptance.

In your criticisms of the Respondent's accounting in support of its cost differential, you did that. Now, please tell the Court whether or not the two accounts should not be treated the same?

A. They should not.

Q. Then, state exactly why.

A. Yes, sir.

Q. And why you have criticized the different treatments of the two accounts in the Respondent's accounting.

5065 A. I have not done that. I do not care how you keep your books—

Q. (Interposing.) Just a moment. The answer is not proper.

Mr. Hanley: The answer of the witness, it is moved by Respondent, be stricken as non-responsive. The question was clearly directed to the criticisms of the witness in respect of the cost differential claimed by the Respondent.

Trial Examiner Ballinger: The motion is granted. The Examiner would suggest that you divide your question. Apparently there are two questions within one question.

Read the question.

(The reporter read the question.)

Mr. Hanley: I will ask the reporter to read the question slowly, and we will pick out a part of it.

The reporter read the following:

"Q. You have treated the two accounts, newspaper advertising and credit cards identically the same for identically the same reasons; namely, that they are appeals to consumer acceptance.")

Mr. Hanley: Stop there.

Will you answer that if you can?

The Witness: I beg your pardon?

By Mr. Hanley:

Q. Will you answer that if you can?

Trial Examiner Ballinger: Is that statement 7666 correct?

The Witness: I would like to hear that read again.

Trial Examiner Ballinger: Read it again.

(The reporter again read the excerpt from the question.)

The Witness: I certainly do not understand counsel, or what counsel means when he says "I treated them the same."

Mr. Hanley: I will repeat the question to you and I will change the word "treat" to the word "criticize." Then answer the question.

Trial Examiner Ballinger: Read the question as amended.

(The reporter read the question as follows:

"Q. You have criticized the two accounts, newspaper advertising and credit cards identically the same for identically the same reason, namely, that they are appeals to consumer acceptance.")

The Witness: I do not understand it any better now than I did before. It does not seem to me that it hooks together.

Mr. Hanley: All right. In order to save time I will restate the question.

I will withdraw the question presently pending.

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Hanley:

7667 Q. Did you not criticize the Respondent's handling and treatment of its newspaper advertising accounts and its credit card accounts wherein the Respondent used those accounts in separating or at least in the support of this cost differential, Mr. Warmack, on identically the same basis, namely, that you say that from an accounting standpoint both newspaper advertising and credit card expense are pointed to and are applicable to general consumer acceptance expense?

A. For the most part that is correct.

I have stated that it was my opinion that those two classes of expenses appear to be of a similar nature inasmuch as they were for the purposes of converting the public generally to the Respondent's products as far as advertising newspaper advertising is concerned; and that the credit card activities are carried on for the purpose of holding users of the company's products to those products.

Q. It all goes to consumer acceptance, in your view? In your opinion; is that so?

A. I have stated in my opinion what I thought it is; your Honor.

Q. All right. Would it be sound accounting to charge all credit card cost to the advertising budget?

A. I certainly do not think so. I think it would be silly and wrong.

Q. Then, if it goes to the same purpose as news-
7668 paper advertising, in your view, even if that be true?

A. I do not understand you. I was looking at this paper.

Q. Even though it goes to the same purpose as newspaper advertising, in your view, Mr. Warmack?

A. Well, I would not charge it there, Mr. Hanley.

Trial Examiner Ballinger: Well, that is hardly an answer.

By Mr. Hanley:

Q. Even though it goes to the same purposes you say you still would not charge it there?

A. It is a matter of keeping—

Q. (Interposing.) As a matter of sound accounting?

A. It is a matter of keeping books. What you want to do or what you do not want to do. I would not charge there myself.

Trial Examiner Ballinger: For the purpose of cost accounting, where would you charge it?

The Witness: For the purpose of cost accounting I would keep the two accounts or the two budgets, if they are to be regarded as budgets, as separately and for the purpose of determining a cost differential. I would omit the use of those two classes of expense.

By Mr. Hanley:

Q. Because, in your view, they are the identically same kind—

A. Not necessarily the same kind, but they par-
7669 take of the same or similar nature.

Q. Then, what is wrong with keeping them in the same account from an accounting standpoint?

A. Because it is not good bookkeeping.

Q. In your opinion?

Trial Examiner Ballinger: The witness is expressing only his opinion.

By Mr. Hanley:

Q. Now, Mr. Warmack, what administrative expense charged against marketing cost by the Respondent company as reflected by Respondent's Exhibit 101, in your opinion, is not a marketing cost?

A. I do not know.

Q. Well, take a look at Respondent's Exhibit 101 and see if you can figure it out, please.

A. I do not think that can be determined by just a review of Exhibit 101.

Q. Well, speaking for yourself, and please speak for yourself, Mr. Warmack. Do you mean by that that you cannot figure it out?

A. I can go into these records and find probably some items of cost that might be considered as not marketing cost. That would entail—

Q. (Interposing.) What would what?

A. That would entail some study.

7670 Q. Well, how? Just take a look at all the accounts which are denominated here and tell the Court which of them, in your judgment, as an accountant, is or are not marketing costs?

Trial Examiner Ballinger: You are referring to, dealing with, and giving consideration to Respondent's Exhibit 101 in that question?

Mr. Hanley: Yes, your Honor. I so designated it in the original question.

The Witness: Which accounts do you refer to, Mr. Hanley?

By Mr. Hanley:

Q. All of the accounts on Respondent's Exhibit 101.

A. There are many accounts on here. (Indicating Respondent's Exhibit 101.)

Trial Examiner Ballinger: You do not get the question, I am afraid, Mr. Warmack.

The Witness: There are many accounts on here. I wonder if counsel would be so kind as to tell me what accounts he has reference to.

By Mr. Hanley:

Q. No, the Respondent's counsel will not be so kind. The Respondent's counsel is asking you the question. I think they are all marketing costs. I am asking you, as an expert, which ones are not.

7671 A. I notice you have several revenue accounts on here. I do not consider them as marketing costs.

Q. What kinds of costs are they?

Trial Examiner Ballinger: Designate them with particularity.

The Witness: I would not think that revenue could be a cost of any kind. A revenue is not a cost, Judge Ballinger.

Trial Examiner Ballinger: Will you designate the number and the name of the account.

The Witness: Why, I was addressing myself to Judge Hanley, these accounts 065-A, 065-B, and 065-C. A revenue is not an expense. It may be used in some instances to offset an expense.

By Mr. Hanley:

Q. What are those numbers, please?

A. 065-A, 065-B, 065-C.

Q. All right. Continue with your answer.

A. A considerable part of account 520 is not a part of marketing cost; that is, for the year 1940. That is the year to which I am addressing my answers.

Q. You need not refer to account 520. You have already testified as to that. You have already testified as to that account. You may understand the question to be directed to all accounts other than account 520.

7672 The Witness: Your Honor, if counsel desires an answer, I will have to have a little time to review this.

Trial Examiner Ballinger: Are you not thoroughly familiar with it? With each and every account portrayed on Respondent's Exhibit 101?

The Witness: Well, sir, he has asked a question about every account on here. I will probably have to; for this record, pick up every account and run it down; I thought we were nearly through but this looks like another day.

Mr. Hanley: Well, if your Honor please, the witness has already had two years, and the Respondent is willing that we take a recess for a few minutes if it will help to get an answer to the question.

Trial Examiner Ballinger: How long will it take you to make an examination of the record in order to enable you to answer the question?

The Witness: I would say . . .

Mr. Austin: (Interposing.) If your Honor please, why cannot this be restricted if counsel wants an answer to that question, why cannot it be restricted to accounts not listed on Commission's Exhibit 133? Many of those accounts listed on Commission's Exhibit 133, as I understand it, have not been studied by the witness. Furthermore, we have said accounts listed on there were not taken whether we agree with them or not.

7673 Mr. Hanley: At this time, and in view of the remarks of counsel for the Commission, the Respondent moves that Commission's Exhibit 133 be stricken from the record for the reason that the present accounting witness has repudiated Exhibit 133, and has stated affirmatively that he does not agree with it.

Trial Examiner Ballinger: Motion is denied.

Mr. Hanley: Judge Ballinger, if the recess is necessary the Respondent is agreeable to it. We would like an answer to the question.

Trial Examiner Ballinger: If the recess will accomplish anything, the Examiner will grant it. But if it is going to require the rest of the afternoon to look up that information, I want to know that first.

Mr. Hanley: Judge Ballinger, it does not require five minutes. Any accountant can look at this thing and in five minutes he can make up his mind, as an accountant, whether or not he believes it is a marketing cost.

Trial Examiner Ballinger: Well, the witness ought to be able, in the opinion of the Examiner, to express his opinion with reference to the accounts without further research.

If there is any doubt in his mind, he may indicate the accounts to which he may have some doubt and about which he desires to make further inquiry.

The Witness: May we be off the record?

7674 Mr. Hanley: No. I insist that we stay on the record.

The Witness: Your Honor, there are about 125 odd accounts, and some of those accounts include many numbers. To go into those things will take time. If I omit one it would entail all manner of argument. I want this record complete as to what I say. And if this information is desired, then it will be necessary for me to take these accounts one by one and trace them out with my papers, my working papers.

Trial Examiner Ballinger: Is there any account on Respondent's Exhibit 101 of which any part of it is not a marketing expense?

The Witness: Yes, sir. They have revenue accounts on here.

Trial Examiner Ballinger: Can you designate the accounts that are revenue accounts?

The Witness: I have given them already.

Trial Examiner Ballinger: Not yet.

The Witness: Yes, sir, I have.

Mr. Hanley: Not yet, Mr. Warmack.

Trial Examiner Ballinger: You have named only one account.

The Witness: May the reporter please read back and see what I have said?

7675 Trial Examiner Ballinger: The reporter may read the answer of the witness.

(The reporter read the following:

"The Witness: Why, I was addressing myself to Judge Hanley, these accounts 065-A, 065-B, and 065-C. A revenue is not an expense. It may be used in some instances to offset an expense.")

Trial Examiner Ballinger: You have now referred to 065-A, 065-B, 065-C. Proceed.

Mr. Hanley: These are revenue accounts. They are conceded not to be expenses or expense accounts. Those are revenues coming into the company. It is conceded it is not an expense at all.

Trial Examiner Ballinger: And you named account 520?

The Witness: Yes.

Mr. Hanley: Which was excluded from the question.

Trial Examiner Ballinger: Which was then withdrawn from the question.

Now, are there any other accounts enumerated on the exhibit in this classification?

The Witness: Your Honor, I cannot answer without time to review each and every one of these accounts, over a hundred and twenty-five of them.

Mr. Hanley: The Respondent, in view of the state-
7676 ment of the witness, requests the Court to admonish
the witness that he must answer the question, and that he must do so within a reasonable length of time.

This lawsuit was started some two years ago.

This witness has been engaged in a study of the exhibits of the Respondent in reference to this cost study for many, many months. He has spent approximately two months in the Detroit offices and the Chicago offices of the Respondent Company. It is submitted that to grant any substantial length of time to this witness is an unreasonable and unfair hardship upon the Respondent. It is also represented to the Court that to permit the witness to evade this question is also an unfair and unreasonable hardship upon the Respondent company.

The Respondent at this time represents to the Court that it is agreeable to some short and reasonable recess if the witness desires to make a cursory review of Respondent's Exhibit 101 for the purpose of answering the question.

Trial Examiner Ballinger: Can you do it in half an hour?

The Witness: No, sir. I probably can do it in an hour.

Trial Examiner Ballinger: The hearing stands in recess
for one hour to afford the witness an opportunity to
7677 answer the question.

(Whereupon, a recess for one hour was taken.)

Trial Examiner Ballinger: Come to order.

Reconvened at 3:45 p. m.

By Mr. Hanley:

Q. After this hour's recess, Mr. Warmack, are you now prepared to answer the pending question, and if so, please do so.

Trial Examiner Ballinger: Do you desire the question reread?

The Witness: If you please.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Now, Mr. Warmack, what administrative expense charged against marketing cost by the Respondent company as reflected by Respondent's Exhibit 101, in your opinion, is not a marketing cost?")

Mr. Hanley: As stated, the revenue accounts are not expense items—account 065-, 065-A, 065-B, 065-C.

Mr. Austin: There are a lot of other revenue expenses in there.

Mr. Hanley: I do not know. That is all he has specified on there. That is what he said.

Trial Examiner Ballinger: Proceed to answer the question.

7678 The Witness: I do not believe that there is any account on here which could not be considered as being in part revenue expense except some of the accounts which may apply or which may be applied to leased service station business of the Respondent company—

By Mr. Hanley:

Q. (Interposing.) What do you mean—

A. —and I question whether those accounts are to be considered as landlord expenses or sales promotion expense.

Q. First, what do you mean by "revenue expense"? Quote revenue expense quote in that question, please.

A. Rents, received.

Q. Now, will you please specify by number what accounts on Respondent's Exhibit 101 you regard as not being marketing expense or cost, if there be any such?

A. Account 000, entitled "Salaries—Supervision" contains expenses which in part are applicable or should be applicable to landlord activities of the Respondent.

There is a question in my mind as to whether the landlord activities are marketing expense; that is, whether they are to be considered as landlord expenses or sales promotion expense.

Q. Is there a difference?

A. Yes, sir. There is a difference.

Q. What is the difference between the marketing
7679 cost and the sales promotion cost?

A. Those I regard as one and the same.

Q. Then explain what you mean by your answer.

A. I mean that a portion of that account should properly apply to the leased service station business. That means to the property activities and the landlord activities of the company incident to its handling of its service station properties which it either rents from others or owns and then sub-rents to operators.

Q. You have just referred to that activity on the part of the company, or that portion of the company as their sales promotional activity. Is that what you mean?

A. It may be so regarded—

Q. (Interposing.) Now, then, what is the difference between the sales promotional activity and the marketing cost?

The Witness: May I finish my answer?

Mr. Austin: Your Honor, I do not think the witness has answered the question.

Mr. Hanley: I thought he had. Did you?

The Witness: No. I had not finished.

Trial Examiner Ballinger: The witness did not make any complaint. You may finish your previous answer if you so desire.

The Witness: It may be so regarded but I have under-
stood that this cost incident to the leasing of service
7680 stations by the Respondent was a landlord expense,
and that is a term by which I have referred to it
here. It was my intention to state that some people, some accountants may regard that class of expense as sales promotion cost expense or sales promotion expense.

By Mr. Hanley:

Q. Well, supposing that we get your idea about it.

A. My idea is that the correct term for the expense is "landlord expense."

Q. And not "sales promotion", Mr. Warmack? Is that right?

A. If it is sales promotion I do not know.

Q. Well, I am asking you.

Trial Examiner Ballinger: Mr. Warmack, that does not answer the question.

The Witness: Well, I cannot say, Judge Ballinger.

Trial Examiner Ballinger: Read the question and answer just given by the witness.

(The reporter read the question and answer referred to.)

Trial Examiner Ballinger: What is your opinion? Is it or is it not a sales promotion?

The Witness: It may be so termed, Judge Ballinger, but I do not know.

Trial Examiner Ballinger: What, in your opinion, is it?

7681 The Witness: It is landlord expense.

By Mr. Hanley:

Q. Mr. Warmack, I will ask you one more question. You have had no difficulty in the last two answers in stating what other accountants might term this expense. I now ask you what you term it. Is it or is it not a marketing cost?

A. My answer—

Q. (Interposing.) I am asking you for your opinion.

A. —is—I do not know. I have said that to my counsel on my direct examination.

Q. Very well. Go ahead with the rest of the question.

Trial Examiner Ballinger: You may strike that portion of the answer "I have said that to my counsel on my direct examination."

Mr. Austin: I would like to ask the witness a question if permitted on that subject before we go on.

Trial Examiner Ballinger: If there is no objection.

Mr. Hanley: It is agreeable to counsel for the Respondent if you want to ask him a question—so long as you ask the question.

Mr. Austin: Mr. Warmack, if the expense incident to real estate activities of the company in connection with its leased service station property be considered as ex-
7082 pense of real estate operation, is it or is it not in your opinion a market expense?

Mr. Hanley: That is objected to as being identically the same question that was asked by counsel for the Respondent.

Mr. Austin: I did not so understand it.

Trial Examiner Ballinger: Read the question.

Mr. Austin: No, it is not.

Trial Examiner Ballinger: What portion of it is that the witness has answered heretofore?

Mr. Austin: If your Honor please, I would like to state the next question, and I think that will make my position more clear in this regard.

Trial Examiner Ballinger: No, let us take one question at a time.

Mr. Hanley: One at a time is too many sometimes.

The Witness: If this expense is regarded as a real estate expense, in my opinion then it could not be considered as a marketing expense.

By Mr. Hanley:

Q. Well, do you regard it? That is what I am interested in.

Mr. Austin: Well, just a moment now. I had one more question, Mr. Hanley, and I think I had the floor. I had two questions.

Trial Examiner Ballinger: Mr. Austin, you may ask
7683 your second question.

Mr. Austin: If this landlord function of expense be considered as a sales promotion expense, is it in your opinion then a marketing expense?

The Witness: Yes, sir.

Mr. Austin: That is all.

Trial Examiner Ballinger: Now, how do you consider it?

By Mr. Hanley:

Q. How does this thing add up? Is it or is it not, in your judgment, a marketing expense?

A. I do not know. I have stated that.

Q. All right. Please continue your answer with reference to the other accounts on Respondent's Exhibit 101.

A. The same answers given in connection with account 000 apply equally to account 001 entitled, "Salaries—Supervision—Others," inasmuch as that account follows the triple 0 account.

Q. Well, now, Mr. Warmack, I will ask you this question, and if you disagree with it you may restate what you said in your former question.

I understand what you mean by saying that these accounts which you have just enumerated follow your answer in respect of Triple Zero, in respect of which you said there was some part which you did not know whether or not it amounted to a marketing cost or constituted
7684 a marketing cost.

If I am incorrect in that interpretation of your answer, then I ask you to be explicit in this: What do you mean in respect of each of these accounts?

A. Yes, sir. It was my statement that a part of the Triple 0 account entitled "Salaries—Supervision," applied to the landlord activities of the respondent company; but that there was a question in my mind as to the proper way that that class of expense should be handled—

Q. (Interposing.) Mr. Warmack, it means more than a question in your mind? Is it not so, and did you not testify that you did not know—

A. (Interposing.) I did not quite finish my answer If I may finish.

Q. —whether or not it was a marketing expense?

The Witness: May I complete my answer, your Honor?

Trial Examiner Ballinger: You may.

The Witness: Will you read as much as I have stated so far?

Trial Examiner Ballinger: Read the witness' answer so far as given.

(The reporter read the witness' answer so far as given.)

The Witness: Carrying that thought through, it was my feeling that if that class of expense were going 7685 to be regarded as a marketing expense, then it would be necessary that a segregation be made to determine for the purpose of arriving at a cost differential, to determine what it cost to serve lessee stations as distinguished from non-lessee stations.

Mr. Hanley: The Respondent moves to strike the answer of the witness beginning with the word "Carrying through," for the reason that the same is unresponsive.

The witness has been asked nothing about procedures. The witness has been asked a very simple question as to what accounts on Respondent's Exhibit 101 he regards as marketing expense, and which he does not regard as marketing cost. It has nothing whatever to do with allocation or segregation or separation of expense.

Trial Examiner Ballinger: The motion to strike is denied.

Mr. Hanley: Judge, is there anything in my question that has anything to do with separation of costs?

Trial Examiner Ballinger: His answer may require a rather involved answer.

Mr. Hanley: I will try to simplify it then.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Now, Mr. Warmack, either say what was or was 7686 not a marketing expense in your opinion. If you are in doubt about it and you do not know, why, you can so state. However, you can give an answer one way or the other.

Mr. Austin: Your Honor, the last thing I think this witness said was that his answer was the same as to account 001 as it was to account 000, and that led Judge Hanley's question to arise as to what he meant by that. That is where we are now.

Mr. Hanley: Well, Judge, perhaps it will ease the situation if I restate the question now.

Trial Examiner Ballinger: You may do so.

By Mr. Hanley:

Q. Mr. Warmack, you have testified that in respect of any of the expense in account 000 that may be applicable to the landlord-tenant business of the Respondent company so far as you are concerned; you do not know whether that is a marketing expense or whether it is not. Is that not true of any similar expense in any other account on Respondent's Exhibit 101? If so, what accounts are they?

The Witness: Judge, may I review?

Trial Examiner Ballinger: Yes.

The Witness: Mr. Hanley, I think your statement is correct. I do not know whether cost which has been termed in this record as "landlord expense" should be properly classified as marketing costs or not. There are other 7687 accounts which are shown on Respondent's Exhibit 101 which represent landlord expense in their entirety.

Trial Examiner Ballinger: Designate those, please.

The Witness: Yes, sir. Account 060-A, 060-B, 060-C, 061-B, 061-C, 066-A, 066-B, 066-C; 088-A, 088-B, 088-C; 110-A, 110-B, 110-C; 112-A, 086-A, 086-B, 086-C. It is my understanding that accounts 506 and 514 represent that same class of expense in their entirety.

By Mr. Hanley:

Q. Mr. Warmack, now, is it to be understood that you do not know whether the item of expense represented by the accounts which you have just designated constitute marketing cost as you have testified relative to account Triple Zero?

A. Yes, sir. That part of account Triple Zero applicable to landlord activity; that statement is correct. I do not know.

Q. Are there any other items of cost other than those that you have now designated on Respondent's Exhibit 101 which you regard as not being marketing costs—

A. (Interposing.) No—

Q. —aside, of course, from account 520 which you are entitled to disregard in this question inasmuch as you have testified before about that individual account—

A. (Interposing.) Yes, sir.

Q. —and of course, the revenue accounts are out.

7688 A. Yes, sir. This account 030—entitled "Traveling Expense—Supervision," the same answer is given in connection with account 001 as pertains to the landlord activities applies equally to that account.

That is likewise true in account 045.

Whatever part of account 215 applies to or which may apply to the landlord activities, my answer in that connection in reference to account 000 entitled "Salaries—Supervision" would apply in connection with account 215 entitled "Expense—Salaries—Others."

That same thing would apply in connection with account 216.

That same thing also would apply in connection with account 217.

There is a question in my mind with respect to account 400, account 510, account 511, account 512, all being bad debts accounts. One of them represents bad debts collected—written off in prior years. I have no particular question with respect to that any more than—

Q. (Interposing.) Those revenue accounts, and that is a revenue account, is not account, Mr. Warmack, 400?

A. I do not quite follow your question there.

Q. Perhaps it was a little bit mixed up. That is a revenue account, is it not, Mr. Warmack, and is that not true of the 400 account series?

7689 A. Of course, if the others were going to be regarded as marketing expense that account—400—should properly—at least probably properly be offset against the expense accounts.

There is no particular question in connection with those accounts.

Q. Proceed.

A. It all deals with the way that the company accounts for its bad debts and its bad debt collections.

Q. Proceed.

A. Account 100, entitled "Depreciation Expense—Vehicles—Supervision," the same thing said with respect to account 000 applies to this account.

Q. Proceed.

A. Account 250, account 255, account 260, account 265, account 270, account 280, account 290, account 295 are general office expense accounts. I have no doubt but what some part of the expense included in those accounts are marketing expense properly applicable to the Detroit field.

I question the amounts of the accounts as shown—

Q. (Interposing.) Just a moment, please, Mr. Warmack.

A. Excuse me, Judge.

Q. It now appears that your answer has departed from the question relative to the landlord and tenant operations of the company when you referred to accounts 250
7690 and the following accounts. Is that right, Mr. Warmack?

A. Well, I was just going down the line as the accounts appear on the sheet so I would not miss one. There is one I want to go back to.

Q. I understand that. But is not my statement correct?

A. Yes, sir. Your statement is correct.

Q. Please understand, Mr. Warmack, that the question is not pointed to the amount or to the methods of procedures, or to the time.

It is simply pointed to the question of whether or not the item of expense indicated, the character of the expense, the class of the expense is, in your judgment, a marketing cost, or whether it is not a marketing cost.

Now, with that understanding of the question, do you care to make any revision of your answer?

You questioned the amounts. I would prefer not to make a motion to strike. I am not asking you about the amounts. I am asking you about the character of these expenses as to whether or not in your judgment they are proper marketing costs.

A. Mr. Hanley, I think that I can answer that question properly this way:

By stating that if—or, by stating that I think at least some parts of those accounts are marketing costs.

Q. You are now referring to your last answer
7691 beginning with account 250 and following numbers? Is that right?

A. Yes, sir.

Q. Go ahead with your answer, Mr. Warmack.

A. That same answer will apply to account 515. Some part of that account may possibly be considered as marketing expense. That is one account, I do not believe that I have made a close study of.

Trial Examiner Ballinger: Mr. Warmack, Judge Hanley has asked you for your opinion. When you say that some portion of that account may apply to marketing expense, are you not expressing your own opinion?

The Witness: Well, your Honor, if I have not studied the account I would not know.

Trial Examiner Ballinger: Are you expressing it in your opinion? You say it may. That is my point.

The Witness: Yes, sir. That is right.

Trial Examiner Ballinger: Have you reached any decision as to whether or not any part of that account does apply?

The Witness: Naturally, if I have not studied it I could not reach a decision.

By Mr. Hanley:

Q. Have you studied it? If you have studied it, please say so.

A. I am able to say that I have not studied account 515.

7692 Q. Are you able to state whether or not account 515 is a marketing cost or if it is not a marketing cost, in your judgment as an accountant, what it is?

A. In my judgment from the very nature of the account, as stated; that is, account 515, an account entitled "Experimental—Development and Research Expense," I should think that that class of expense should apply at least in part to the marketing activities of the company. I do not know exactly what experiments are made or what research is made.

Q. Is there anything about it that you question?

A. No, sir.

Q. Continue with your answer, Mr. Warmack.

A. I passed over account 654 entitled "Operation and Maintenance of Vehicles—All Other (other than Office)." I just do not remember about that account. I have got to look it up if I am to give an answer.

Q. Well, in any event, if you have a criticism of it, it does not arise out of the landlord-tenant difficulty which you have expressed here?

A. Well, I am under the impression that that is true, Judge Hanley, but I placed a question mark by that account when I went over it. I do not remember exactly about that account. I will be happy to look it up.

Q. Well, it is not very large, Mr. Warmack.

A. No, sir.

7693 Mr. Hanley: It is only $221, your Honor, in this column, and I do not believe we are justified in taking up any time on it.

Trial Examiner Ballinger: All right.

Mr. Hanley: Not for him to look that up.

Trial Examiner Ballinger: Then you may proceed with your answer, Mr. Warmack.

The Witness: I believe that I have completed my answers. I mean that I have outlined which expenses may not in whole or in part be regarded as marketing expenses.

By Mr. Hanley:

Q. If I understand your answer correctly, Mr. Warmack, you have now indicated that you do not know whether those expenses incident to or that we have been terming here the "landlord-tenant" operations of the company is a marketing cost? That is right. Is it not?

A. Yes, sir. That is correct.

Q. Do you know how much that cost amounts to in these various accounts that you have referred to?

A. ~~I believe that the net of that expense is shown on~~ Commission's Exhibit 119. If it is your desire, I will be glad to look that up.

Q. No. I just wondered if you knew of your own knowledge. Do you know what the influence, if any, is on the claimed differential of Respondent company?

7694 A. No, sir, I do not.

Q. There is one other class of expense which begins with account No. 250, and some further accounts which you named.

A. Yes, sir.

Q. Concerning those, you have said that perhaps a part of those accounts were marketing cost?

A. That was disregarding the figures which are shown here, Judge Hanley.

Q. Well, again understand, I am not asking you about amounts.

A. Yes, sir.

Q. I am asking you about the character of the account, Mr. Warmack.

A. Yes, sir.

Q. You understand that?

A. Yes, sir.

Q. I now ask you what part of those accounts, as shown on Respondent's Exhibit 101, are not and should not be regarded as marketing cost, if any part thereof is shown which should not be so regarded?

A. I certainly do not know.

Q. Do you know the influence, if any, upon the cost differential of the Respondent as claimed in Respondent's Exhibit 101 by virtue of any part, if there be any part of those accounts that ought to be eliminated as marketing cost?

A. No, sir.

7695 Mr. Hanley: That is all.

You may take your witness.

(Witness temporarily excused.)

Mr. Austin: Your Honor, it is now 4:30. I would like to adjourn until either 1:30 or 2:00 o'clock tomorrow afternoon so that I may have a half day to prepare the redirect examination of this witness.

I will have to consult with the witness to some extent regarding the matters which should be taken up.

I hoped that we might get through in time to do what we could about that this afternoon, but we cannot.

Trial Examiner Ballinger: In the absence of objection, the request is granted.

And now, at 4:30 p. m., July 30, 1942, an adjournment of this hearing is taken to reconvene at 1:30 p. m., July 31, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 4:30 p. m., July 30, 1942, the hearing in the above entitled matter was adjourned.)

7696

Room 532, Federal Trade
Commission Building,
Washington, D. C.
Friday, July 31, 1942.

Met, pursuant to adjournment, at 1:30 p. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Illinois,) appearing for the Respondent, Standard Oil Company of Indiana.

7697 Trial Examiner Ballinger: Come to order.

The hearing in Docket No. 4389, case entitled "In the Matter of Standard Oil Company (Indiana)" is reconvened pursuant to notice at 1:30 p. m., July 31, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held at this same place, July 30, 1942.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

Mr. Austin: Mr. Warmack, will you resume the stand?

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Redirect Examination by Mr. Austin.

Q. Mr. Warmack, you have testified that in January of 1942 you went to Detroit, being sent there by the Federal Trade Commission in connection with this case, after Respondent's Exhibit 99, Exhibit 100, and Exhibit 101 had been introduced into evidence, for the purpose of studying the methods and procedures used by the Respondent in preparing those exhibits, and in arriving at an alleged cost differential of 1.51 cents.

698. Will you state just whom you contacted upon your arrival in Detroit? What was your initial procedure nd activity there?

A. Yes, sir. On my arrival in Detroit in January, I vent to the offices of the Respondent company, Standard il Company (Indiana), and went directly to the office of Mr. Rupagh. Mr. Rupagh is the manager of the Detroit ield. There I contacted Mr. Rupagh and Mr. Houghton. Mr. Houghton is the accountant of the company who was ent to Detroit from the Chicago office to work with me in ny studies.

Trial Examiner Ballinger: What do you mean "work with" you? Do you mean to afford you any information you desired?

The Witness: Yes, sir. And in that way to expedite the work as much as possible. On that first morning there, I held conferences with Mr. Houghton and Mr. Rupagh in Mr. Rupagh's office. At that time, I stated, in general, the outline of the work that I contemplated doing in connection with studying the methods employed by the Respondent company in the separation of costs as shown in Respondent's Exhibit 101, and whatever other inquiries were to be made.

I pointed out, at the conference, generally, the coverage that I expected to make; that is, in general, the study and the extent of it that I was planning to make in the company's offices.

7699 Trial Examiner Ballinger: Did you at that time have Respondent's Exhibit 101?

The Witness: Yes, sir.

Trial Examiner Ballinger: And it was in connection with that that you made that statement?

The Witness: Yes, sir. And also in connection with Respondent's Exhibit 99 and Respondent's Exhibit 100.

I outlined there that we were interested especially in the measuring factors used by the Respondent in the separation of its costs; that is, the measuring factors used in the separation of joint costs which were included in many of the accounts on Respondent's Exhibit 101.

I outlined that that involved going into measuring factors such as those used for salesmen—which I understood were on the basis of time studies; that is, established on the basis of time studies.

Mr. Hanley: Well, if your Honor please, are we to go derstand that these are the things that the witness said at that time to Mr. Houghton and Mr. Rupagh?

The Witness: That is correct.

Mr. Hanley: Very well. Go ahead.

By Mr. Austin:—

Q. And you can limit yourself as to what you said. At least, the substance of what you said.

A. Thank you.

7700 Q. The substance of what was said will be sufficient.

A. Yes, sir. That is the general substance of what was stated by me.

I outlined also, or explained also that it would be necessary to go into measuring factors, such as gallonage, which had been used, and it was my opinion and, perhaps I should say it was my intention and purpose to determine, as far as the Respondent company was able to furnish me with information, to determine if those factors had been arrived at and properly determined by the Respondent company in accordance with what I considered to be sound accounting practice.

That, in general, Mr. Austin, was what was studied by me in connection with the work.

Mr. Rupagh assigned a room to Mr. Houghton and myself where we worked and which was our headquarters during the course of the examination made at the Detroit office.

I believe that constitutes my approach to the situation when I arrived in Detroit.

Mr. Hanley: Mr. Examiner, I should like at this moment to ask a qualification question, if there is no objection.

Mr. Austin: I have no objection.

Trial Examiner Ballinger: Without objection, you may.

7701 Mr. Hanley: Mr. Warmack, as I understand it, the conversation you have just been talking about with Mr. Houghton and Mr. Rupagh was just a general exposition on your part of what you proposed to do?

The Witness: Yes, sir.

Mr. Hanley: And that you did not at that time make any specific requests for any specific information?

The Witness: Not more than to talk to Mr. Rupagh, with the understanding, or to the end or the understanding that what I was to have access to was any records available in the Detroit office.

Mr. Hanley: Very well. Thank you.

By Mr. Austin:

Q. Did you make specific requests later to Mr. Houghton for specific information?

A. Oh, yes, sir. I made many such requests.

Q. Was Mr. Houghton continuously in the Detroit office during most of your stay there, and was he available—

A. (Interposing.) Yes, sir.

Q. —for conferences and more requests when you wished to talk with him?

A. Yes, sir. Most of the time. Mr. Houghton had to be absent from Detroit on two occasions because of the illness and ultimate death of his father.

Q. Did you, either independently or with Mr. Houghton; that is, with his help and assistance make any 7702 effort to determine whether or not the separation of unit costs could be made as between commission agent business and salaried station business in the Detroit field on the basis of material at hand?

A. Yes, sir. We spent considerable time in an effort to determine if such a separation could be made with the information at hand.

Q. What was the result of that effort?

A. The result was that there was insufficient information at hand with which to make a separation of all of the accounts that would have to be separated as those accounts on Respondent's Exhibit 101, which would have to be separated contain just all classes of business; that is, commission agent business and salaried station business, commonly referred to in this record as B-Station business and A-Station business.

Q. At that time or at the conclusion of your studies, do you recall any statements which you made to Mr. Houghton or which Mr. Houghton made to you regarding your results or conclusions in respect of those studies?

A. Yes, sir.

Q. What were they?

Trial Examiner Ballinger: Now, are you speaking of the studies of the A-Stations and B-Stations?

7703 Mr. Austin: Yes, sir.

The Witness: Yes, sir.

By Mr. Austin:

Q. What is it?

A. I remember specifically on one occasion when we had gone into several different matters and we came across the work that we had performed in trying to separate this class of business from the information at hand.

Mr. Houghton at that time asked me if I felt that we should devote more time to that work. I stated to Mr. Houghton that I thought possibly we had already spent too much time on that particular work because of the pressure under which we were working, and the large amount of work to be covered that we had just best not spend any more time on that work.

We did at that time review some of the separations which we had attempted. That review showed that, by and large, the separations were for the most part arbitrary, guesswork, and such like, in view of the fact that the information was not available with which to make these separations.

I stated to Mr. Houghton that it was my conclusion that the best thing to do would be to abandon that particular work or attempt at separating the costs of those two methods of marketing, and to devote our time to other work that we had to cover at that time.

Q. Is it your opinion that a comparison of the unit
1704 costs of those two methods of marketing could be
achieved by a prospective properly conducted cost
study?

A. Yes, sir. That could. A proper study would show that those two methods of marketing could be properly separated; that is, the costs of the same could be properly separated. I am convinced of that.

Q. I want to be sure that your studies were based upon past information, and were not of the nature of a study of present expense.

A. No, sir.

Q. I probably should say "current expense".

A. No, sir. They were not studies of current expense.

We simply endeavored to pick up the separate accounts, as shown on Respondent's Exhibit 101, and separate them, if possible, between A-Station business and B-Station business. And we found out that, as a result of our attempt, that you could not arrive at any figure which you could say or even consider as being accurate or correct.

Trial Examiner Ballinger: As the Examiner remembers, you have previously stated that if such a cost study was made, you could not at this time state whether or not it would affect the differential shown by Respondent's Exhibit 101. Is that correct?

The Witness: That is quite correct. Only a study could give that information.

7705 By Mr. Austin:

Q. On your cross examination, Mr. Warmack, you were referred to a statement appearing on page 38 of Commission's Exhibit 134 for identification, which is a booklet entitled "Case Studies in Distribution Cost Accounting for Manufacturing and Wholesaling," compiled by the Federal Trade Commission.

You were particularly asked a question about the following statement appearing on page 38 of that booklet—parenthetically, I might say here that I am not reading all of the material which was read by counsel for the Respondent at the time, but I will read sufficient upon which to base the present question:

"When time studies are conducted through the use of sales representatives' reports or observers to ascertain the time applicable to each commodity-customer cost objective for each salesman who sells a variety of commodities and calls on various classes of customers, it is frequently necessary to make certain more or less rough calculations. In complex situations of that kind, there are often no alternatives except to obtain part of the needed data on an estimated basis."

I wanted to ask you in that connection, Mr. Warmack, whether, in your opinion it was necessary for purposes of this cost study,—referring to Respondent's Exhibits 99, 100, and 101,—to obtain the necessary data for the
7706 allocations of salesmen's salary expense as included account 004 "on an estimated basis"?

A. In my opinion—

Mr. Hanley: (Interposing.) Now, just a moment. How does that link up with the quotation? I just confess I do not understand.

Mr. Austin: May we be off the record just a moment, if your Honor please?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: If your Honor please, I have no objection if the witness understands the question. I have no objection to his answer.

The Witness: May I have it read now?

(The reporter read the question.)

The Witness: In my opinion, it would not be.

By Mr. Austin:

Q. What, if any, alternative method—

Mr. Hanley: (Interposing.) Now, just a moment. That is objected to as not responsive to the question. The question is directed to a point retrospectively. The witness has answered "it would not be." He is asked whether or not it was. I ask that the answer be given to that
7707 question.

Trial Examiner Ballinger: You can answer the question "yes" or "no."

Read the question to the witness.

(The reporter read the question as follows:

"Q. On your cross examination, Mr. Warmack, you were referred to a statement appearing on page 38 of Commission's Exhibit 134 for identification, which is a booklet entitled 'Case Studies in Distribution Cost Accounting for Manufacturing and Wholesaling,' compiled by the Federal Trade Commission.

"You were particularly asked a question about the following statement appearing on page 38 of that booklet—parenthetically, I might say here that I am not reading all of the material which was read by counsel for the Respondent at the time, but I will read sufficient upon which to base the present question:

" 'When time studies are conducted through the use of sales representatives' reports or observers to ascertain the time applicable to each commodity-customer cost objective for each salesman who sells a variety of commodities and calls on various classes of customers, it is frequently necessary to make certain more or less rough calculations. In complex situations of that kind, there
7708 are often no alternatives except to obtain part of the needed data on an estimated basis.'

"I wanted to ask you in that connection, Mr. Warmack, whether, in your opinion it was necessary for purposes of this cost study,—referring to Respondent's Exhibits 99, 100, and 101,—to obtain the necessary data for the allocations of salesmen's salary expense as included in account 004 'on an estimated basis?'")

The Witness: I can answer it—no.

By Mr. Austin:

Q. Now, will you state, Mr. Warmack, whether in your opinion—

A. I beg your pardon, sir?

Mr. Austin: You may strike that.

By Mr. Austin:

Q. In your opinion, Mr. Warmack, if estimates were—

Mr. Hanley: What was that? I did not hear it.

Mr. Austin: I will repeat it.

By Mr. Austin:

Q. In your opinion, Mr. Warmack, if it was not necessary for the Respondent company to allocate salesmen's salaries on the basis of estimates for the purpose of this cost study, and you have so described the method used, what alternative, in your opinion, better method was available to the Respondent?

A. The alternative or the better method would be

7709 to have the separate salesmen keep daily reports of their time showing the customers called upon, the time spent with those customers, in order to make these separations, if a separation or an allocation of this class of expense is had as between the separate channels as shown on Respondent's Exhibit 101.

Q. And in your opinion, would it have been practical for the Respondent to make such a time study for the purposes of this cost study?

A. In my opinion, it most certainly would.

Q. Was it then necessary—

Mr. Hanley: (Interposing.) I would object to that.

Mr. Austin: Very well. Strike that.

By Mr. Austin:

Q. I have another question regarding salesmen's salaries, Mr. Warmack.

I want to refer to your testimony on pages 6137 and 6138 of the record.

A. Yes, sir.

Q. You were cross examined to some extent, Mr. Warmack, about the percentage figures appearing on page 6137 which is a part of your direct testimony:

In order to clear that point up a little further, you stated at the foot of page 6136, and at the top of page
7710 6137:

"* * * Respondent's regular accounting procedure in the Detroit field for the year 1940, which would mean that 29.19 per cent of this class of expense had been assigned by respondent in its regular accounting procedure to the tank-wagon reseller column."

Just what is in that figure 29.19 per cent? From where was it derived?

A. That figure represents the ratio of the amount of salesmen's salaries assigned by Respondents to the tank wagon reseller business.

Q. Where?

A. On Respondent's form 189, to the total of the salesmen's salaries appearing in the account. I refer to account 004.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: May I proceed?

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Now, actually in the Respondent's regular accounting procedure, in charging salesmen's salaries to the three channels; that is, tank wagon reseller, tank wagon consumer, and other methods, is not part of the salaries
7711 of the candle oil or white oil salesmen charged to the tank wagon reseller channel?

A. No, sir.

Q. Now, in the middle of page 6137 of the record you said:

"* * * I found that by removing from the tank-wagon reseller channel in Respondent's regular form 189 only 2.67—"

Mr. Austin: Judge Hanley, I notice here that when this was written up, apparently they did not put the per cent mark here. Obviously, this was intended to be a 2.67

per cent. I suppose in reading it I might as well read it as 2.67 per cent?

Mr. Hanley: No. Read it to him as it appears in the record. If he wishes to question the stenographic record, Mr. Austin, that is something else.

Mr. Austin: All right.

By Mr. Austin:

Q. I will repeat the question to you. In the middle of page 6137 of the record you said:

"* * I found that by removing from the tank-wagon reseller channel is respondent's regular form 189 only 2.67 of this class of cost which had been in the late study assigned to the direct shipments, instead of removing 29.19
per cent had the items originally gone into that tank
7712 wagon-reseller channel in the regular accounting pro
cedure, I found that for those particular three months the tank-wagon channel in Respondent's Exhibit 101 for Account 004 had been overstated by the amount of $581.42."

Then you multiplied that figure of $581.42 by 4 to bring it up to an annual basis, which gave you a result of $2,325.68, which figure appears at the top of page 6138 of the record.

Now, as I read your testimony, Mr. Warmack, it would mean to me that if you deducted 2.67 per cent from 29.19 per cent and applied the difference of 26.52 per cent to the total amount of direct shipment charged on Respondent's Exhibit 101 for this account, you should arrive at a result of $2,325.68.

Now, I will ask you if that is correct?

A. No, sir.

Mr. Hanley: (Interposing.) I do not think so.

By Mr. Austin:

Q. If that is incorrect, will you please make a computation as I have suggested for the purpose of showing what result would be reached?

A. Multiply it?

Q. Yes.

A. (The witness made certain calculations.)

The Witness: Multiplying $13,639.17

7713 By Mr. Austin:

Q. (Interposing.) Now, just a minute. What is that figure of $13,639.17?

A. Representing the amount of this class of expense which would apply to direct shipment business—I was going to tell you—by the percentage you gave of 26.52 per cent, which represents the difference between 29.19 per cent and 2.67 per cent, we get a result of $3,617.10.

Q. Now, will you explain the discrepancy between the figure of $3,617.10 and the figure of $2,325.68 which appear on page 6138 of the record?

A. Yes, sir.

Mr. Hanley: Now, just a minute. That is objected to because no proper foundation has been laid. The witness has made an arithmetical calculation applying 26.52 per cent against the figure, and he has arrived at a result. But it does not anywhere appear in the record that that figure means anything.

Until and unless that is explained, there is no proper foundation for the present question. You can do arithmetic all day, if your Honor please, and it does not make any sense in this record unless it has some pertinency.

Trial Examiner Ballinger: What is the pertinency of this question?

Mr. Austin: I will be glad to explain that more
7714 fully, your Honor, although I thought it had been by quoting from the record.

It appears at page 6137 of the record; that is, it appears that Mr. Warmack's testimony was 29.19 per cent of salesmen's salaries total salesmen's salaries were charged to the tank wagon reseller channel in the Respondent's regular accounting procedure;

Secondly, that Respondent in this case, in this cost study, only deducted from the tank wagon reseller channel 2.67 per cent of the amount of salesmen's salaries charged to direct shipment business.

Mr. Warmack says as a result of this, that the 29.19 per cent of these salaries went into that channel and only 2.67 per cent came out, which resulted in an overcharge in this cost study to the tank wagon reseller channel of $2,325.68.

Now, what I have just shown is that in making the computation indicated by his testimony, it would result in a larger figure of $3,617.16 overstatement whereas Mr. Warmack says it was only an overstatement of $2,325.68.

I think there is a discrepancy which should be explained.

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

The Witness: May I have the question, please?

7715 Trial Examiner Ballinger: Read the question to the witness.

(The reporter read the question as follows:

"Q. Now, will you explain the discrepancy between the figure of $3,617.10 and the figure of $2,325.68 which appear on page 6138 of the record?")

The Witness: May I have my answer read as far as I have given it?

Trial Examiner Ballinger: You may.

(The reporter read the witness' answer as far as given as follows:

"A. Yes, sir.")

The Witness: That is brought about by the fact that the candle oil salesmen and domestic heating oil salesmen are—that is, the salaries and compensations of those employees having not been assigned by the use of the distribution of time reports in the Detroit field, and having been assigned on another basis to the other channels on Respondent's regular form 189; that is, other than the tank wagon reseller channel, that allocation in the Respondent's regular accounting form was taken into consideration in arriving at the figure of $2,325.68, and not arriving at the figure of $3,617.10.

The percentages quoted of 29.19 per cent and 2.67 per cent were the results of amounts going into or coming out of the respective channels in the Respondent's regular accounting procedure and late cost study and were

7716 not the percentages used in the allocation of the accounts.

By Mr. Austin:

Q. Then, do I understand, Mr. Warmack, that the amount of $2,325.68, as shown on page 6138 of the record, is the correct amount by which, in your opinion, the tank wagon reseller channel was overstated as the result of the method by which the direct shipment cost was withdrawn?

A. Yes, sir. That is correct. That assumes, of course, that it had originally gone into the respective channels on Respondent's form 189 in accordance with proper methods of allocation for the purposes of the establishment of a cost differential—

Mr. Hanley: (Interposing.) Now, if your Honor please—

Mr. Austin: (Interposing.) Just one more question—do you want to object to something that has been said? If not, I want to ask one more question, Mr. Hanley.

Mr. Hanley: Go right ahead.

By Mr. Austin:

Q. Well, your computation here is based upon the actual allocations made by the Respondent? Was it not so done, Mr. Warmack? It was not any supposed, different, or other method?

A. Oh, that is quite correct. Yes, sir. My computation here is based upon the actual allocations made
7717 by the Respondent. They are not made upon any
supposed allocations, different allocations, or other method of allocation.

Mr. Hanley: Now, may I ask a question? This will be a qualifying question.

Trial Examiner Ballinger: You may do so.

Mr. Hanley: It now appears from the last two answers of the witness that the amounts of two thousand plus dollars, as indicated on page 6138 is adhered to by the witness rather than the computation indicated by counsel of some three thousand plus dollars.

I do not know whether it is the intention of the witness to change this testimony around. I am not very much concerned about that. But I would like to now know, and I think it would be helpful in the record if the witness would state what the effect on the claimed differential of 1.51 cents is of either of those two figures.

Mr. Austin: Well, I think the only figure in question is the one that appears in the record.

On cross examination, it was brought out that these oil salesmen's salaries did not, in any part, go into the tank wagon reseller channel. And the only purpose of the examination was to show that the witness took them into account in arriving at the figure.

Trial Examiner Ballinger: As the Examiner un-
7718 derstands the testimony just given by the witness,
it is solely for the purpose of correcting an arithmetical computation?

Mr. Hanley: I do not know.

Mr. Austin: Not for the purpose of correcting the record. It was for the purpose of showing that certain facts brought out on cross examination had been taken into account by the witness in arriving at the figure.

Mr. Hanley: This relates back to the controversy which went on at some length because the witness shows a percentage based on a certain group of factors as comparable to a certain percentage group on another set of factors.

Now, my question has not been answered at all.

I think I am entitled to an answer.

Whatever this witness did appears in the record. Irrespective of the result whether it is as a calculation, of the way Mr. Warmack wants to calculate it, of two thousand odd dollars plus, or of the way Mr. Austin wants to calculate it of three thousand odd dollars, I am asking this witness what the effect is in an influence on the differential as claimed by the Respondent of 1.51 cents, if he knows, if any.

Trial Examiner Ballinger: Do you know?

The Witness: No, sir. I can make a calculation for counsel.

By Mr. Austin:

Q. You can make it in about five minutes. Can you not?

7719 A. Yes, sir. It is just simply a matter of dividing $2,325.68 by sixty-nine million odd gallons of gasoline.

Trial Examiner Ballinger: You may make the computation.

(The witness made the computation.)

The Witness: According to my calculation, it would reduce the differential of 1.51 cents per gallon calculated by the Respondent company by the amount of .00332.

Mr. Hanley: What does that amount to in thousandths of a cent, Mr. Warmack, or ten thousandths of a cent, as the case may be?

The Witness: Do you want that answer?

Trial Examiner Ballinger: Is that a necessary question, Judge Hanley?

The Witness: I can do it.

Mr. Hanley: I am not a mathematician, Judge Ballinger. I would like to have these things put in the record in a way so I may understand them.

The Witness: (After making a calculation.) A little over three one-thousandths.

Mr. Hanley: A little over three one-thousandths?

The Witness: Yes, sir.

By Mr. Austin:

Q. I am going to ask you a couple of questions about bad debts accounts Nos. 400, 510, 511, 512.

7720 A. Yes, sir.

Q. I think it has been brought up, has it not, that for the purpose of this cost study, and also in the Respondent's regular accounting procedure, for the purpose of determining field marketing costs, the Respondent treats bad debts written off during the year, and the expense of collecting bad debts collected during that year as marketing expense, and credits against marketing expense any collections of bad debts previously written off.

Have you investigated or do you know whether the respondent consistently handled its bad debt losses and collections in this manner for the purpose of its general accounting procedure, or for the purpose of preparing its annual statements, on that at its home office?

A. It is my understanding that it does not.

I have not reviewed the records of the company with respect to that very point, * * *

Mr. Hanley: Well, just a moment, that is the Standard Oil Company accounting?

The Witness: On that point.

Mr. Hanley: Well, now, if your Honor please, if there is some statistical data that has been available to this witness in the Federal Trade Commission and that is not a part of this record or before the Court, I think we are
entitled to know just what this witness did, in fact,
7721 base his opinion upon. I further object to the question and move to strike his answer on the ground that
it is improper redirect examination.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: I think perhaps I can clear this matter up.

By Mr. Austin:

Q. What is the source of your information on that point, Mr. Warmack?

A. I have reviewed a large manual here, "Moody's Industrials," for 1942, and information contained in that on this company, Standard Oil Company (Indiana).

Mr. Hanley: I move to strike the answer of the witness to the preceding question on the ground that it now appears that ~~his last answer shows clearly~~ that his information is purely hearsay.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Before the Examiner rules on the motion he will ask the witness if the information obtained from Moody's Manual is the only source of the witness' information.

7722 Mr. Hanley: Well, that question I object to—no, I withdraw my objection. I think that is a proper question.

Trial Examiner Ballinger: Without objection, then, answer the question.

The Witness: Your Honor, I have reviewed the printed statements, the annual reports of this company for—that is for the Standard Oil Company (Indiana), but I would have to review them again to determine that. I do not remember just exactly what they show on that particular point.

Trial Examiner Ballinger: The motion is granted and the answer to the just preceding question is stricken.

Mr. Austin: On what ground?

Trial Examiner Ballinger: On the ground that the witness has now stated, in effect, that he has answered the question on information which is based upon Moody's Manual, and that is hearsay.

Mr. Austin: And that it is hearsay?

Trial Examiner Ballinger: Yes. It is the opinion of the Examiner that before any statement appearing in Moody's Manual would be admissible in this record, it must be first shown that originally the original manuscript appearing in the manual was furnished to the Moody's Company by the Respondent company.

Mr. Austin: Your Honor, the witness has said that he got his information in part from the annual report

7723 of the Standard Oil Company.

Mr. Hanley: He said he did not remember that. Can we not now proceed without arguing the Examiner's ruling on interminably?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Austin: May we have five minutes' recess, your Honor? I want to look at something.

Trial Examiner Ballinger: We will take a five minutes recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order. Proceed.

By Mr. Austin:

Q. Referring to page 7689 of the record, Mr. Warmack,—

Mr. Hanley: May I read that first?

Mr. Austin: Certainly.

(There was a short pause.)

By Mr. A[illegible]tin:

Q. Referring to accounts 400, 510, 511, 512, you made the following statement:

"There is no particular question in connection with those accounts."

Now, you made that statement that there was no
particular question in connection with these accounts,
7724 and when you did that, to what were you referring?
I wish you would elaborate that because I do not think it is clear in the testimony.

A. That was in response to a question by Respondent's attorney as to which accounts were or were not marketing expenses; that is, which accounts on Respondent's Exhibit 101 were or were not marketing expenses.

Trial Examiner Ballinger: Does that not plainly appear on the face of this record?

Mr. Austin: I do not think so, your Honor.

By Mr. Austin:

Q. When you said that there is no particular question in connection with those accounts, do you mean that there was no particular question in your mind as to whether or not the expense groups in those accounts may properly be used by the Respondent for the purpose of establishing a cost differential?

A. No, sir. That was not what the answer was intended to be for; that is, I did not mean that there was no particular question with respect to whether or not those expenses could be used in connection with determining a cost differential.

I meant that there was no particular question as to whether or not those costs could be considered as marketing expenses.

Q. Just what is your opinion, referring particu-
7725 larly to accounts 400 and 510, as to whether the
expenses and credits in those accounts are proper
expenses and credits to current marketing expenses of the
Respondent company?

A. Of course, account 400, entitled "Bad Debts Collected—Written Off Prior Years" is a revenue account, and of course, that is not an expense.

Q. Well, that was not my question.

A. I beg your pardon.

Mr. Austin: May the question be read?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

By Mr. Austin:

Q. You see, I referred to credits as well as expenses.

A. Well, according to the way that the company **keeps** its accounting, as I understand it, in the Detroit field, why, one of those accounts offsets the other. That is the purpose of it. And assuming that, why, those accounts may properly be designated as marketing expenses. Does that answer your question, Mr. Austin?

Q. If that is your opinion?

A. That is based upon the method that the company accounts for its bad debts in the Detroit field. I do not particularly subscribe to that method or manner of accounting for bad debts. I do not believe that bad debts
are accounted for in this particular manner in the
7726 company's regular accounting procedure at its main
office. But, it was on that idea that I answered your
question.

Trial Examiner Ballinger: Do I understand that you made no particular objection to the method employed by the Respondent company with reference to those accounts?

The Witness: With reference to **keeping** of its accounts? No, sir.

Trial Examiner Ballinger: No. With reference to the appearance of those two accounts in **Respondent's** Exhibit 101.

The Witness: Well, I do question them, Judge.

Mr. Austin: That is just what I am driving at, your Honor. **He has** said the answer was limited to solely as to whether they were marketing expense and not as to whether they should be used for the purpose of a cost differential.

Mr. Hanley: I wish to now move on behalf of the Respondent that the answer of the witness beginning "I do not believe" to be stricken on the ground that the witness stated expressly that he had made no study of the matter and does not know anything about it.

Mr. Austin: I do not think the witness said that at any time.

The Witness: No.

Mr. Hanley: Read his answer.

Trial Examiner Ballinger: Read the answer.

7727 (The reporter read the answer.)

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr Hanley: May I have the answer read again?

Trial Examiner Ballinger: Read the answer again.

(The reporter read the answer.)

Trial Examiner Ballinger: The motion to strike is denied.

Mr. Hanley: I would like to be off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. You may proceed.

By Mr. Austin:

Q. On your cross examination regarding credit card expense, Mr. Warmack, you stated that in your opinion credit card expense is a proper marketing expense of the Respondent company.

That being true, how, in your opinion, should such expense be allocated for the purpose of this cost study as between reseller gallonage and in "reseller gallonage" I include both tank wagon reseller gallonage and jobber reseller gallonage.

Trial Examiner Ballinger: Off the record.

7728 (There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Are you familiar with the question?

The Witness: Yes, sir.

Trial Examiner Ballinger: You may answer the question.

The Witness: If that class of expense is going to be included in the group of expense used or attempted to be used in the cost justification, then the only way in my opinion it can be separated, and separated properly, would be on a basis of gallonage, and that of course would afford no cost differential.

By Mr. Austin:

Q. When you say "on the basis of gallonage," are you referring to, now, to all reseller gallonage including jobber reseller gallonage?

A. Yes, sir. That is what I would mean. That is what I meant.

Q. Well, that is what I asked for. I wanted to be sure that your answer was responsive.

A. I am sorry.

Q. How was the expense in account 208 entitled "Credit Information Expense," allocated between bulk plant channels by the Respondent in its regular accounting procedure?

Mr. Hanley: There is no objection to the question, 7729 your Honor, so long as the witness can answer it, but there is an objection to the witness reading from any exhibit, what it contains, into the record.

The Witness: I do not wish to read from any exhibit. I was just going to look it up. I do not presume to remember all of this information in my head.

By Mr. Austin:

Q. Proceed.

A. It is allocated on an all-gallonage basis exclusive of direct shipment gallonage.

Q. How was the amount of the expense of that account charged to jobber, naphtha and gasoline, in Respondent's Exhibit 101 arrived at?

A. I did not hear your question. I am sorry. I was looking at this paper.

Q. How was the amount of the expense of that account charged to jobber, naphtha and gasoline, on Respondent's Exhibit 101 arrived at, Mr. Warmack?

A. The portion assigned to direct shipment business was determined on the basis of number of credit card tickets received from the jobbers.

Q. Are you referring now to the entire expense in account 208 or only to the credit card portion of that expense?

A. Only to the credit card portion of that expense.

Q. What portion of the expense of account 208
7730 is credit card expense?

Mr. Hanley: Well, that is objected to because of the fact that the witness has prepared an exhibit which the Court has received in evidence, being Commission's Exhibit 132, which discloses in detail the amounts.

Trial Examiner Ballinger: For the convenience of the record, the witness may answer. The objection is overruled.

(There was a short pause.)

Trial Examiner Ballinger: You may proceed.

The Witness: $11,960.97.

By Mr. Austin:

Q. Out of a total expense in the account of what?

A. $14,111.30.

Q. I would like to call your attention now, Mr. Warmack, to an answer given by you at page 5957 of the record in which you stated as follows:

"That is, at least 40 per cent, I believe, of the company's tank wagon reseller business in the Detroit field is carried on through commission agents of the company. * * *"

I wish you would look at that portion of the answer which I read, Mr. Warmack, and I would like to know whether that is what you actually said or intended to say at the time you made the statement?

7731 A. I intended to say:

"At least 40 per cent of the company's tank wagon business in the Detroit field is carried on through commission agents of the company * * *"

and I did not intend to say:

"40 per cent of the company's tank wagon reseller business."

I did not intend to include in my answer the word "reseller."

Mr. Hanley: Your Honor, that is just for the purpose of making a correction in the record.

Trial Examiner Ballinger: Let the reporter read to the witness the answer just given by the witness.

(The reporter read the answer as above set forth.)

Trial Examiner Ballinger: Is that correct now?

The Witness: It is.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. I would like to ask you this, Mr. Warmack—

Mr. Austin: Before I go further with that, I would like to call counsel for the Respondent attention to page 6126 of the record and ask him whether counsel will stipulate
that the words "The Witness," preceding the state-
7732 ment in the center of the page be deleted together with
the colon (:) immediately following.

Mr. Hanley: May we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Are you ready to proceed?

Mr. Hanley: I am now ready to make my statement.

It may be understood that on page 6126 beginning on line 9, it may be understood that lines 9, 10, 11, 12, 13, 14, 15, and 16, appearing as shown there, appear as a statement by "Mr. Hanley," and that none of it is a statement by the witness.

By Mr. Austin:

Q. Now, Mr. Warmack, I would like to call your attention to an answer given by you at page 6810 in the record as follows:

"Answering question 1: The charges to this account, excluding charges directly applicable to automobile supplies, were allocated to channels on Respondent's regular accounting form 189 in creating a ratio of gallons sold by each channel to total gallons sold by all channels, excluding direct shipment gallonage during each month for the year 1940."

Is that what you—does that statement in the sten-
7733 ographic transcript correctly represent what you
said, or that you intended to state at the time you made the answer?

A. No, sir. It does not. I should like to state for the record what I intended to say.

Trial Examiner Ballinger: You may do so.

The Witness: I intended to say:

"The charges to this account, excluding charges directly applicable to petroleum channels and to automobile supplies, were allocated to channels on Respondent's regular accounting form 189 by a ratio of gallons—"

Mr. Hanley: (Interposing.) By what?

The Witness: By a ratio of gallons.

Mr. Hanley: Thank you.

The Witness: (Continuing.) "sold by each channel to total gallons sold by or through all channels—"

Mr. Hanley: (Interposing.) "Through," instead of "by"?

The Witness: By or through.

Mr. Hanley: Thank you.

The Witness: (Continuing.) "excluding direct shipment gallonage during each month of the year 1940."

By Mr. Austin:

Q. Mr. Warmack, turn to account 506, account 514, on Respondent's Exhibit 101.

A. Yes, sir.

7734 Q. Account 506 is entitled "Losses By Dismantling—Abnormal—Other than ELA."

Account 514 is entitled "Losses by Dismantling—Out of Pocket Expense—Other than ELA."

I believe you testified on direct examination that there was a connection between those accounts, and that in your understanding the cash expenditures of account 514 were made in connection with the dismantling operation which gave rise to the expense in account 506—on your cross-examination, I believe you stated that there was a question in your mind as to whether, or, to put it differently, that you did not know whether the expense in those two accounts was or was not a marketing expense.

I would like to know, Mr. Warmack, whether in your opinion expenses going into those two accounts are similar to the expenses in the (A), (B), (C) accounts on Respondent's Exhibit 101 in that they are current operating expenses of the Respondent company in connection with its landlord and tenant function—

Mr. Hanley: (Interposing.) What account?

Mr. Austin: The A, B, C, accounts on Respondent's Exhibit 101.

By Mr. Austin:

Q. —or are they, or is there a difference between the current landlord and tenant expenses and the ex-
7735 penses in these two accounts?

Mr. Hanley: What number of A, B, C, accounts?

Mr. Austin: I refer to the A, B, C, accounts generally, because all of, or at least all of the accounts on Respondent's Exhibit 101 which represent, or rather, which include expense segregated by the Respondent to the lessee operations of the company are the (A), (B), (C), accounts, and carry the (A), (B), (C) after them.

Mr. Hanley: Then it may be understood that the question refers to all of the (A), (B), (C), accounts on Respondent's Exhibit 101?

Mr. Austin: That is right; as a class.

The Witness: I think these two particular items of expense; that is, account 506 and account 514 are somewhat different from the regular (A), (B), (C), expense accounts shown on Respondent's Exhibit 101; the (A), (B), (C) expense accounts representing a cost in each instance applicable to landlord activities of the company, as I understand it.

In the case of account 506, entitled "Losses by Dismantling—Abnormal—other than ELA," it is my feeling that that class of expense might properly be capitalized by the company. In other words, that—

By Mr. Austin:

Q. (Interposing.) Mr. Warmack, it might be—but should it be?

7736 A. Well, it in my opinion should be, Mr. Austin. We have an exhibit in the record that covers that particular item which amounts to $24,156.57. Largely it would not be a recurring item over the years unless the company were to engage continuously in the dismantling of its filling stations.

Q. Well, did you make an investigation into the expense going into this account as to whether it was an expense of a continuing nature or not?

A. Yes, sir. I inquired into that. This expense; that is, the expense in account 506, represents the difference between the capital investment of the company in filling stations dismantled during 1940 less depreciation already claimed by the company on those particular stations. In other words, it is a different—

Mr. Hanley: (Interposing.) Do you mean—

The Witness: (Continuing.) it is a difference in the investment—

Mr. Hanley: I would like to ask a question for clarification.

Mr. Austin: I would like to continue. I just have one more question on this particular line. I do not think it would assist very much to interrupt at this moment.

Mr. Hanley: Go ahead.

By Mr. Austin:

Q. Did you make any investigation, or did you
7737 have any information obtained by you in Detroit as
to whether or not there was any special program of remodeling filling stations being carried on by the Respondent company in 1940 or any other factual reason why this expense would be, if it was, higher in 1940?

A. Yes, sir. I made inquiry into that while I was in the company's offices in Detroit, Michigan. It was my understanding—

Trial Examiner Ballinger: No, no. What were you told?

The Witness: I was told, your Honor, that the company built during 1939 and 1940 especially a number of large filling stations, service stations which it in turn rents out to operators. I was told also that it was necessary for the company to engage in this activity of remodeling and rebuilding this kind of property in order to meet the competitive conditions; that is, competition of other petroleum companies.

Mr. Houghton showed me one of the stations that had been remodeled; that is, we passed by one large streamlined station, as I would call it.

Trial Examiner Ballinger: Is that not an expense that is recurring annually?

The Witness: Well, your Honor, it was my under-
standing that this was a rather large program,
7738 probably, during that particular time, say, coming
over from 1939 through 1940, and there would not be a large dismantling charge during other years.

Trial Examiner Ballinger: Would it not be of necessity fluctuating from year to year?

The Witness: I rather think that it would be incurred in a very minor way in some years. For example, if you build one hundred stations or twenty stations, and the next year you build two, or dismantle two, I mean, why, your cost would be quite abnormal, which the account shows. It is an abnormal cost. I think that is true of this account. I think that this particular class of expense might properly be capitalized.

By Mr. Austin:

Q. In your opinion, is the expense entered into these two accounts for 1940 a marketing expense of the Standard Oil Company (Indiana) for that year?

A. Mr. Austin, to answer your question, I have just stated that I thought that these two items should be capitalized, and that would mean that they are not expense at all. So, if they are not an expense, if they are a capital item, they could not be any kind of an expense.

Q. Now—

Mr. Hanley: (Interposing.) Now, a moment ago, I was not permitted to ask a clarification question, 7739 which your Honor finally did ask the witness, your Honor, but, I think I would like to tie it up if I may ask one further question?

Trial Examiner Ballinger: You may.

Mr. Hanley: Did you or did you not know whether these items of expense which you say should be capitalized are recurring expenses in the Standard Oil Company (Indiana)? Now, you can answer that "yes" or "no."

The Witness: Not of my knowledge.

Mr. Hanley: Do you know that?

The Witness: I—

Mr. Austin: (Interposing.) I want to know what counsel means by "recurring expenses"; does that mean the same kind of expense one year as another year?

Mr. Hanley: I adopted the language of the witness. He said they were not recurring expenses. I simply adopted his language.

Mr. Austin: He also told the Examiner that they might well differ in different years.

Trial Examiner Ballinger: He does not know any more about that than he does about the original proposition.

Mr. Austin: About what?

Trial Examiner Ballinger: About whether they will recur, and as to the amount.

Mr. Austin: Oh, I do not think that is important at all.

7740 Mr. Hanley: Of course, that merely represents counsel's opinion.

Mr. Austin: That is right.

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. Now, Mr. Warmack, you have stated that in your opinion these expenses should be treated as capital expenditures. That being true, would it not follow that there would be depreciation expenses upon the buildings—upon the remodeled stations from year to year?

A. Yes, sir.

Q. How would you treat that depreciation expense as to whether it is or is not a marketing expense?

A. I would treat it as a landlord expense. There is some question in my mind as to whether landlord expense is a marketing expense.

Q. That is what you explained yesterday?

A. That is correct. And I could not settle that question in my mind without making myself or reviewing a thorough study of this situation, if it were ever made; that is, of these non-lessee stations and lessee stations businesses.

Q. Mr. Warmack, have you made any investigation to determine what the procedure or practice of these large industrial corporations is in handling an expense such as
that included by the Respondent in its account 520?
7741 You will recall that there were three types of expense going into that account as described by you.
My question is, having testified as to how that expense was handled by the Standard Oil Company (Indiana), you have made any inquiry or have any information as to how it is handled by other companies?

Mr. Hanley: Now, please answer that "yes" or "no", Mr. Warmack.

By Mr. Austin:

Q. That is right. Answer it "yes" or "no."

A. Yes, sir. I have.

Q. What has been the nature of the investigation which you have made?

A. I have studied information in this Commission which has been received from several large companies which shows how they handled this particular class of expense.

Mr. Austin: I would like to have this document marked for identification, your Honor.

Trial Examiner Ballinger: The reporter will mark the document Commission's Exhibit No. 135 for identification.

(The document referred to was marked Commission's Exhibit 135 for identification.)

By Mr. Austin:

Q. I show you Commission's Exhibit 135 for identification, Mr. Warmack—

7742 Mr. Hanley: (Interposing.) May I have a copy of it?

Mr. Austin: I do not have it at the moment, but I will have it marked for identification and then you may look at it.

Mr. Hanley: The Respondent requests a copy of the exhibit.

Trial Examiner Ballinger: The exhibit has not been offered in evidence. Until it is, it is not necessary to furnish a copy to counsel for the Respondent.

Mr. Hanley: Perhaps not, your Honor. Maybe he is not going to ask any questions about it, but I just assumed he was. I will postpone my request until a more appropriate time.

By Mr. Austin:

Q. Mr. Warmack, I show you Commission's Exhibit No. 135 for identification and ask you if you will please describe it, and its contents, and what it is, if you know.

A. Commission's Exhibit No. 135 for identification is a document entitled "Forty-first Annual Report to the Stockholders of the United Fruit Company for the Fiscal Year 1940."

Q. Was that a report furnished to the Federal Trade Commission by the United Fruit Company, Mr. Warmack?

A. Yes, sir.

Q. Will you let me have it, please?

7743 A. Yes, sir.

Mr. Austin: I now hand this to you, Judge Hanley, so that you may inspect it. It is the only one that I have at hand at the moment. You are welcome to inspect it.

Mr. Hanley: No. I will wait until I am furnished with a copy so that I may inspect it as the examination proceeds. This would be of no service to me whatever.

Mr. Austin: I would like to know whether on the basis of the testimony already given by the witness in identifying this particular document, whether or not Respondent's counsel will concede that this document, Commission's Exhibit No. 135 for identification, is a copy of the "Forty-first Annual Report" of the United Fruit Company. If it is going to be questioned, why, it may be necessary for me to bring someone here to identify the report. On the other hand, if counsel is satisfied after making an examination of this, of its identity, that will save time.

Mr. Hanley: Respondent concedes nothing. I do not know what is in it. I have never seen it. I do not know anything about it. I have not made any investigation of the matter. It is purely a hearsay matter, in my opinion, so far as this case is concerned. I do not think it has any place in this case whatsoever."

I have asked for a copy and I have been denied the reception of a copy of the Exhibit.

7744 Mr. Austin: I show you this one. A copy is not as good as the original. The exhibit is better than the copy.

Mr. Hanley: Oh, I cannot keep the exhibit. That serves no purpose whatever.

Trial Examiner Ballinger: I do not think anything except the exhibit which has been presented and identified, but which has not been offered in evidence, has come before us as yet.

What is the present situation?

Mr. Austin: Well, my position would be that that is the annual report of the United Fruit Company which has some authenticity, and if it is not conceded, why, I apparently will not have to pursue the matter now, but at some later time.

Mr. Hanley: It is definitely not conceded, your Honor.

Mr. Austin: I cannot prove it at the moment.

Mr. Hanley: I think if counsel can ask his question, we can probably dispose of it before then.

Off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. You may proceed.

7745 By Mr. Austin:

Q. Now, another question, Mr. Warmack. This is a very general question which is suggested by some questions which were directed to you on cross examination, I believe, by both counsel for the Respondent and by the Examiner.

Assuming that a study was made of a particular market ing expense or class of expenses of a given company for a given year of several different accountants;

Assume that each of those accountants, after making his own cost study, decided upon a different method of allocating the expense in question;

Assume further that each different method of allocation if applied to the expense would produce a different result; which result would you accept, as, in your opinion, the most sound and correct?

A. I may not accept any of them.

Mr. Hanley: Probably not.

The Witness: But the one that I would probably accept would be the one that went to the greatest refinement in the studies made.

By Mr. Austin:

Q. What do you mean by "refinement"?

A. For example—I can give it best by an example—salesmen's salaries is a very excellent example, I think.

One of these accountants may have secured some
7746 estimates from the management;

One of the accountants may have secured some estimates by the sales supervisors;

One of them may have secured some estimates from the salesmen themselves;

Another one of the accountants may have, after securing all those things, tried to see and use all of the estimates in working out some measuring factor;

Another accountant may have had the salesmen make a tabulation of the number of calls that he made;

Another accountant may have had the salesmen make a tabulation of the number of calls, keeping information with respect to their travel time;

Another accountant may have had that tabulation made of calls together with information with respect to travel time, and in addition to that, information with respect to promotional activities that these salesmen carried on—in the instances I have given you, there would be a slight degree of greater refinement in each of the studies than would have been undertaken by the first accountant that I spoke of—;

Another accountant in addition to all these things I have just named, may have had all salesmen keep a time report with respect to customers, or to groups of products;

and in addition, secure information with respect to travel time and to customers—

7747 Mr. Hanley: (Interposing.) If your Honor please, I just do not mind the witness answering the question—

The Witness: May I finish the answer?

Trial Examiner Ballinger: Let the witness finish his answer.

Mr. Hanley: Do you regard that as responsive, your Honor?

Trial Examiner Ballinger: Let him finish his answer.

The Witness: (Continuing.) The last outline given as to what probably would be done by that accountant, the result in my opinion that he would arrive at by his studies would have gone, in my opinion, to a greater refinement. He would have gone to a greater extent in his effort to determine the true result and, in all probability, it would be the figure that he arrived at that I would accept as an accountant.

Trial Examiner Ballinger: Mr. Warmack, is not the final analysis, after he pursued any of these studies that you have outlined, that the result would be at best an approximation? Would it not?

The Witness: Well, that is an opinion, your Honor, but I certainly do not think that it could be regarded as an approximation if you want to and went to as great a
refinement as I have outlined in the last instance
7748 just now. I think that is the closest approach to that
that accountants can get at in such a study.

Mr. Hanley: Respondent's counsel now moves to strike the answer of the witness to the second preceding question after the first sentence thereof, on the ground that it is not responsive;

That it is purely a voluntary statement;

That the examples used by the witness in defining what he thinks an indeterminate number of accountants might do, distorts the entire question;

And that the whole answer to the question may be and is included in the first statement made by the witness.

Trial Examiner Ballinger: The motion to strike is denied.

Mr. Austin: May we be off the record, if your Honor please?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Mr. Warmack, commencing at page 6951 of the record, you were asked a question which was answered in piecemeal, and I believe there was considerable colloquy and argument between the witness and counsel regarding your understanding of the question and what counsel for the Respondent meant.

7749 The question was as follows:

"Q. * * * Has the Respondent resorted to a gallonage allocation factor in any case except where the expense item was of an overall nature?"

The question, of course, referred to the allocations used on Respondent's Exhibit 101.

Mr. Austin: I believe that is conceded, is it not, Judge Hanley, that you were referring to that cost differential?

Mr. Hanley: It is conceded that both the witness and I were talking about the cost study.

Mr. Austin: Yes.

By Mr. Austin:

Q. I would like to ask you, Mr. Warmack, whether you, having read this testimony—have you read it?

A. Yes, sir.

Q. Whether you feel that the testimony as given sets forth your answer to the question or whether you would like to answer the question any further at this time?

A. Well, I do not remember what I said.

Mr. Austin: May we be off the record in order to give the witness time to examine the record?

Trial Examiner Ballinger: For that purpose we will be off the record.

(There was a discussion off the record.)

7750 Trial Examiner Ballinger: On the record.

The Witness: I do not think that the question was ever properly answered, due to the fact that I did not exactly understand what Respondent's counsel meant exactly by the term "overall nature," when he gave his example of the president's salary.

In my opinion, some of the accounts on Respondent's Exhibit 101 were spread on a gallonage basis, and which accounts were not and could not be, in my opinion, considered as overall accounts.

I will give you an example of what I mean, by referring you to the very account that we were talking about some minutes ago. That is account 506—"Losses by Dismantling—Abnormal—Other Than ELA." I certainly do not think that is an account of an overall nature.

By Mr. Austin:

Q. Is account 111 allocated in part on a gallonage basis?

A. Yes, sir.

Q. Do you consider that an account of an overall nature?

A. No, sir. I do not. And there may be several others on here. I do not remember just which ones they are—

Q. (Interposing.) If you can remember, state them. If not, we will pass along.

A. —they may, or that may be a—that may be of an overall nature or may not be.

7751 Q. Look at it.

A. Well, I was just trying to run down there to see if I could get an answer to your question there, but there are some on here that are of an overall nature, and there are also some on here of an overall nature that were allocated on the basis of gallonage.

Q. That is the only thing I wanted to find out.

A. Yes, sir.

Q. In answer to that question.

A. Yes, sir.

Trial Examiner Ballinger: Will not those accounts that he has not mentioned already, portray in the record; were they not and are they not at the present time portrayed in this record?

Mr. Austin: I am not sure that I understand your Honor. You say "are not those accounts that he has not mentioned already portrayed in the record." I am not sure.

Trial Examiner Ballinger: He has not mentioned all of the accounts in that record that are not based upon an all gallonage basis?

Mr. Austin: No, your Honor. That is the question which was asked by Judge Hanley which was whether there were any accounts which the Respondent had allocated on an all-gallonage basis which were not expenses of an

7752 overall nature, to which I was addressing myself here, rather than that question.

Now, the witness now says, yes, there were some accountants not of an overall nature. He has not made a list of those accounts, and as far as I am concerned I do not care whether he has or not.

Trial Examiner Ballinger: I am sure that Judge Hanley will want to know.

Do you, Judge?

Mr. Hanley: I struggled, as I note now from looking at this record for many pages trying to get an answer to this question. So, as far as I am concerned, I think the whole record up to this minute just simply proves that the witness does not know what is meant by "expense of an overall nature." And I think I am going to be content with that. I will prove that with my own witnesses.

Trial Examiner Ballinger: Proceed.

Mr. Hanley: Anything else?

Mr. Austin: Your Honor, those are all the questions that I have for Mr. Warmack at the moment.

The witness tells me that some of the most recent volumes of his testimony on cross-examination which he has not had the opportunity to read over yet—I think there are one or two or three of them, and inasmuch as we are pausing for Mr. Houghton for tomorrow, I would not 7753 want to be precluded from putting Mr. Warmack back on the stand for one or two more questions if it should be desired, although at the present time I have nothing in mind, and I do not think there will be anything.

Trial Examiner Ballinger: With that reservation, the redirect examination is concluded?

Mr. Austin: Yes, sir.

Mr. Hanley: Judge, I do not have any objection to the announcement of counsel, but I do want Mr. Warmack concluded before Mr. Houghton takes the witness stand. I am of the opinion that there will not be any recross examination. I have one question which, by way of clarification, I would like to ask, if I may ask it as an interposing question?

Trial Examiner Ballinger: Proceed.

Mr. Hanley: But I do want it understood that Mr. Warmack will be finished tomorrow morning before Mr. Houghton takes the witness stand, if he is going to be interrogated further.

Trial Examiner Ballinger: Proceed.

Mr. Hanley: Mr. Warmack, you stated that you would allocate credit card costs between tank wagon and jobber, naphtha and gasoline columns on a gallonage basis.

Is that based upon a factual and objective cost study of the manner in which these costs are incurred?

The Witness: That is not.

7754 Mr. Hanley: That is all.

Mr. Austin: I do not have anything further.

Mr. Hanley: If I may have just a few moments, your Honor, I can tell you perhaps whether we will have anything further for the witness.

Trial Examiner Ballinger: We will be off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: I will not announce that there will be no further recross examination.

Trial Examiner Ballinger: Since tomorrow is Saturday, what time do you gentlemen desire to start in the morning?

Do you now desire this witness excused?

Mr. Hanley: Yes, sir.

(Witness excused.)

Mr. Hanley: If your Honor please, I now move you, sir, that the hearing adjourn to reconvene tomorrow morning in this same room at nine o'clock a. m.

Mr. Austin: Did you say nine o'clock?

Mr. Hanley: Yes.

Trial Examiner Ballinger: The motion is granted.

And now, at 4:30 p. m., the hearing is adjourned to reconvene at 9:00 a. m., in Room 532, Federal Trade
7755 Commission Building, Washington, D. C., August 1, 1942.

(Whereupon, at 4:30 p. m., July 31, 1942, the hearing in the above-entitled matter was adjourned.)

7756

Room 532, Federal Trade
Commission Building,
Washington, D. C.,
Saturday, August 1, 1942.

Met, pursuant to notice at 9:00 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Illinois), appearing for the Respondent Standard Oil Company of Indiana.

7757

PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing in Docket No. 4389, case entitled "In the Matter of Standard Oil Company (Indiana)" is reconvened pursuant to notice at 9:00 a. m., August 1, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held at this same place, July 31, 1942.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

Mr. Austin: Your Honor, there are one or two matters which I have to discuss with the witness, Mr. Warmack, before I can determine whether further testimony is necessary, I am willing to do that now, if your Honor please, or I am willing to wait until Monday, but in any event, of course, the witness is not dismissed. I am perfectly willing to accommodate Mr. Houghton, and to interrupt to take the testimony of Mr. Houghton.

Mr. Hanley: Respondent objects to any further continuances on behalf of the Commission. The Respondent requests the Court to instruct counsel for the Commission either to rest his case or to put the witness on the stand and finish.

Mr. Austin: Oh, well, I am not resting my case
7758 with this witness. I have several other witnesses to
call. You asked if your could interrupt our case now to put Mr. Houghton on today as a matter of accommodation to Mr. Houghton. I was willing to accede to your request for that purpose only. I am by no means finished with our case.

Mr. Hanley: Well, I do not want to put Mr. Houghton on until you finish with Mr. Warmack. I am putting Mr. Houghton on in surrebuttal in connection with the testimony of Mr. Warmack.

Trial Examiner Ballinger: How long will it require for the conference with Mr. Warmack?

Mr. Austin: Well, I should judge fifteen or twenty minutes, I think. It would take about that time. I request a recess for that purpose.

Trial Examiner Ballinger: The request is granted. We will take a recess for fifteen minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order. You may proceed.

Mr. Austin: I will recall Mr. Warmack for further redirect examination.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

7759 *Redirect Examination (Continued) by Mr. Austin.*

Q. Mr. Warmack, referring to page 7349 of the record, the statement appears beginning at line 19 of that answer:

"They are costs, they are just costs, many of which are general costs, among which we have the general office costs. They do not afford a basis for a cost differential."

I would like to know whether the meaning of that sentence is, or whether you intended to state that the general office costs of the Respondent did not afford a basis for the cost differential?

Mr. Hanley: That is objected to as an improper question. The statement speaks for itself. The question does not alter the meaning of the statement made by the witness.

Trial Examiner Ballinger: The question asked is merely for the purpose of clarification or possible correction.

The objection is overruled.

The Witness: Line 20; that is, line 19, 20 and 21—line 19 beginning with "They are costs—" I will read the way—

Trial Examiner Ballinger: (Interposing.) The counsel for the Commission has just read that. Will you state your corrections?

7760 The Witness: I was going to read it the way it should sound.

By Mr. Austin:

Q. Read it as it should be.

A. "They are costs, they are just costs, many of which are general costs, among which we have some of the general office costs." I believe that corrects it.

Mr. Hanley: Now, is it to be understood that you are changing your answer?

The Witness: No, sir.

Mr. Hanley: Well, if your Honor please, what are we to understand from this kind of testimony?

The Witness: I am just stating that that is the way I intended to state it in the beginning. I have not changed anything.

By Mr. Austin:

Q. Mr. Warmack, your answer is what appears on here.

A. I see.

Q. And that just dictated is the way that it should be?

A. I am changing the answer as shown at page 7349 to the way that it was intended that it should be.

Mr. Hanley: All right.

Trial Examiner Ballinger: Now, in substance, just what is the change?

The Witness: Well, your Honor, line 20 reads:

7761 "among which we have the general office costs."

It should read, in part:

"Among which we have some of the general office costs."

Mr. Hanley: Well, just a moment. Let me see what that question is.

Trial Examiner Ballinger: Very well.

(There was a short pause.)

Mr. Hanley: May I ask a question now, your Honor?

Trial Examiner Ballinger: You may.

Mr. Hanley: You have now changed your answer on page 7349 where you referred to general office costs, by modifying that term to "some general office costs"?

Does that mean that you now grant that certain of the general office costs are costs which afford a basis for a price differential?

The Witness: Yes, sir. It is my opinion and has been right along that some of the general office costs, if separated properly, should afford and in all probability would afford a cost differential.

I misunderstood your comment just now, Mr. Hanley, when you asked me if I were changing my answer. I thought that you asked if I was changing my opinion.

Trial Examiner Ballinger: Any further questions?

By Mr. Austin:

7762 Q. Regarding credit cards, Mr. Warmack. One of the Respondent's credit cards is produced in evidence as Commission's Exhibit No. 21. On it it has listed, in addition to the name of the Respondent, the names of a number of other oil companies at whose outlets the credit card may be presented and honored.

I believe you stated on your cross-examination that one of the purposes of the Respondent in issuing the credit card was to hold the customer to the issuing company.

Does that mean that the customer is held or retained as a customer by all of these companies, or just by the issuing company, or can you elaborate that statement a little further?

Mr. Hanley: That is objected to unless the witness knows. He has already testified that he does not know the mechanics of the handling of credit cards.

Trial Examiner Ballinger: Have you any knowledge with reference to the mechanics of handling credit cards?

The Witness: Not of my own knowledge, your Honor. I have a general knowledge. I believe that I have stated on many, many pages of the record my understanding of the situation.

Trial Examiner Ballinger: The Examiner sees your point.

Mr. Austin: I have asked the witness' opinion, 7763 anyway upon the effect of credit cards on consumer acceptance; at least, that is the purpose of the question. It is not directed to any particular practices of Respondent in handling credit cards.

Trial Examiner Ballinger: Have you any personal knowledge with reference to that matter?

Mr. Hanley: Just a moment.

Trial Examiner Ballinger: Yes?

Mr. Hanley: That is further objected to as calling for the conclusion and opinion of the witness as to whether the customer would be held by any particular company.

The witness has already testified and has based his opinion in respect of credit cards upon the statement of opinion that the credit card holder is at liberty to and does purchase from anybody, and he cannot possibly answer this question in view of that expression of opinion unless he changes that opinion.

Trial Examiner Ballinger: The ruling upon the objection will be deferred until the witness answers the question directed to him by the Examiner.

The Witness: May I hear that question, your Honor?

Trial Examiner Ballinger: Read the question.

(The reporter read the following:

"Trial Examiner Ballinger: Have you any per-
7764 sonal knowledge with reference to that matter?")

The Witness: Not of my own knowledge, your Honor, no more than I have reviewed, and heard in these records and hearings.

Trial Examiner Ballinger: The objection is sustained.

Mr. Austin: Your Honor, I will try to frame the question again.

By Mr. Austin:

Q. Mr. Warmack, did you make an investigation of credit card costs while you were in Detroit?

A. Yes, sir.

Q. Did you go into that with Mr. Houghton while you were out there?

A. Yes, sir.

Q. Did you study the expense of the company in that connection, in the way in which they were handled?

A. Yes, sir.

Q. Are you familiar with the nature of the credit cards issued by the Respondent company?

A. Yes, sir.

Q. Are you familiar with the way in which the credits arising from the use of those credit cards are handled by the Respondent company in their accounting procedure?

A. I do not understand what you mean by "credits arising".

7765 Q. Are you familiar with what happens when a customer presents a credit card and that charge ultimately reaches the books of the Respondent company?

A. Yes, sir. That is, I have a general knowledge of it.

Q. Well, you went into the subject? Did you not? Did you go into that subject while you were in Detroit, Mr. Warmack?

A. Yes, sir.

Q. Then I would like to have your opinion as an accountant regarding the effect of the use—rather, regarding the effect of the use of the credit cards as handled by the Respondent, and the nature of that expense in connection with the effect of the credit cards upon the Respondent's business.

Mr. Hanley: Well, now, just a moment, Mr. Warmack.

That is objected to as repetitious and not proper redirect examination, the witness already having fully expressed an opinion—unless this question is intended to elicit an answer from the witness which indicates a change of opinion on the part of the witness.

Trial Examiner Ballinger: The objection is sustained.

Mr. Austin: And on what ground?

Trial Examiner Ballinger: Unless he desires to express an opinion different from that previously given.

Mr. Austin: Do I understand, your Honor, that I 7766 am not entitled to examine this witness on matters which were raised by the Respondent counsel on cross-examination?

Trial Examiner Ballinger: The witness has heretofore testified fully with reference to this.

Mr. Hanley: He has testified to that on direct examination.

Mr. Austin: Your Honor, I would like to have a fifteen minute recess. I want to refer to the testimony and read it into the record.

Mr. Hanley: The Respondent objects to any recess, as requested by counsel for the Commission, on the ground that it is an unfair, prejudicial and unjust hardship upon the Respondent.

Trial Examiner Ballinger: The Examiner will ask the witness a question or two:

Mr. Warmack, are you familiar with the testimony you have previously given upon this point?

The Witness: Yes, sir. I believe that I am, your Honor.

Trial Examiner Ballinger: Have you not fully covered this matter in your previous testimony?

The Witness: Well, sir, I believe there are some matters that were not fully covered. I can only answer questions propounded, your Honor.

Trial Examiner Ballinger: That is one of the mat-
7767 ters that was not fully covered?

The Witness: In my opinion, yes, sir.

Trial Examiner Ballinger: The Examiner will then reverse his previous ruling and permit the witness to answer.

The Witness: Now, may I hear the question, your Honor?

Trial Examiner Ballinger: Before you answer the question, the Examiner would like to inquire of counsel how this witness, merely because of the fact that he is an accountant, is in any better position to express an opinion that any one else would be with reference to this matter?

Mr. Austin: Well, the reason I wanted to look up the testimony, your Honor, is that I think that we had a considerable lot of cross-examination as to the witness' reasons with regard to these matters. It is into that particular matter that I wish to inquire.

Trial Examiner Ballinger: Do you think that the mere fact that this witness is an accountant enables him to give a better or more dependable opinion than any layman?

Mr. Austin: Well, I do not know, your Honor, but I do know that he was cross-examined as to his reasons and as to his theories about credit cards, and their effect as consumer advertising, and his reasons for stating that this cost would not afford a cost differential. I think that some
7768 of that was not clear.

As a matter of fact, the witness, as I understand it, did say that he wanted to be given a chance to clarify that testimony.

Trial Examiner Ballinger: It does not appear to the Examiner that this is a question upon which any expert can express an opinion except and unless he had been out in the field and had actual experience. However, the witness may answer.

The Witness: May I hear the question, if your Honor please?

Trial Examiner Ballinger: Read the question.

(The reporter read the following question:

"Q. Then I would like to have your opinion as an accountant regarding the effect of the use—rather, regarding the effect of the use of the credit cards as handled by the Respondent, and the nature of that expense in connection with the effect of the credit cards upon the Respondent's business.")

Mr. Hanley: I will add to my objection that the affirmative testimony that was given by the witness demonstrated his legal incompetency to answer that question as to the effect of the Respondent's handling of credit cards.

Trial Examiner Ballinger: The Examiner is of the opinion that the witness' opinion when expressed is of
7769 little or of no evidentiary value in view of the fact
that he has been asked similar questions before.

The witness may answer.

By Mr. Austin:

Q. Do you recall the question?

A. No, sir.

Mr. Austin: This goes to his reasons for his accounting testimony in the distribution of the expense.

Trial Examiner Ballinger: You have said that you were not familiar with the question. Do you desire it read?

The Witness: Your Honor, I should like to hear the question read again.

Mr. Hanley: Just what question is that?

Mr. Austin: It is the pending question before this discussion took place.

Trial Examiner Ballinger: Read the pending question.

(The reporter read the pending question as follows:

"Q. Then I would like to have your opinion as an accountant regarding the effect of the use—rather, regarding the effect of the use of the credit cards as handled by the Respondent, and the nature of that expense in connection with the effect of the credit cards upon the Respondent's business.")

The Witness: May I hear that again, please?

7770 (The reporter again read the question.)

The Witness: I think I would like to have that again, slowly.

(The reporter again read the question.)

The Witness: It is my opinion that the effect of the use of the credit cards by the Respondent would be for the purpose of tying customers to the company's products, and inviting, in addition to that, the customers of other companies who reciprocate in the issuance of these credit cards, to the use of the Respondent's products."

It is my understanding, and I believe that the records show that some other oil companies; that is, petroleum companies reciprocate with the Respondent company in the issuance of credit cards.

It seems to me that there is an additional benefit to the company in the issuance of these credit cards.

I feel and it is my opinion that when credit privileges are afforded to the buying public, the automobile driver, that it serves to increase the sales of the companies generally. I know as a matter of fact that in some instances where credit privileges are afforded, many people take advantage of those credit privileges.

For example, on Saturday afternoon, before pay-day on Monday, why, a credit card holder may buy five gallons of
gasoline on the credit card that, if they did not have
7771 the credit card, they may not buy. In other words,
if they did not have the credit card they may not buy that gasoline. That is a very simple illustration, I think, but it goes to the benefit that accrues to the company issuing the credit card.

Does that answer your question, Mr. Austin?

By Mr. Austin:

Q. I—

Mr. Hanley: (Interposing.) Respondent now moves to strike the entire answer to the question for all of the reasons stated in the several objections to the question;

And for the further reasons that it does not appear that the statement made by the witness is explanatory or in amplification of the opinions, or in modification of the opinions which he has heretofore expressed, and that the matter as stated by the witness is purely repetitious of matter already stated by him on both his direct examination and his cross-examination:

Further that his answer has no probative value;

Further for the reason that it is not proper redirect examination.

Further, that the affirmative testimony of the witness has been to the effect that he made no objective and factual cost study or any cost study at all about credit cards, and that he is not legally entitled to express any opinion.

7772 Trial Examiner Ballinger: The motion to strike is denied.

Mr. Austin: That is all I have, if your Honor please.

Trial Examiner Ballinger: Counsel for the Commission now rests his redirect examination of this witness?

Mr. Austin: Yes, sir.

Mr. Hanley: Does that rest your case?

Mr. Austin: No. Definitely, I do not rest my case.

Mr. Hanley: There is no cross-examination.

Trial Examiner Ballinger: The witness is excused.

(Witness excused.)

Mr. Austin: If your Honor please, I would like to make a motion at this time.

Trial Examiner Ballinger: Proceed.

Mr. Austin: Yesterday, I offered some information through the witness Warmack, the information being the facts and figures appearing in "Moody's Industrial Manual."

Your Honor ruled that such testimony was inadmissible, and stated that the information as given in Moody's Industrial Manual would not be admissible unless and until it was proved and shown that the information came from the Respondent, the information in this case being information regarding the Respondent, Standard Oil Company (Indiana).

7773 In view of that ruling, I am encouraged to ask your Honor, and do now so move to strike Respondent's Exhibit No. 3.

Respondent's Exhibit No. 3 is a chart purporting to show automobile production for the years 1936, 1937, 1938, 1939, 1940. It was introduced through Mr. Boatwright, who testified that the information which was used for compiling the chart was obtained from some Federal Reserve Board or Federal Reserve Bank publication.

There was no proof offered whatsoever that the information in the Federal Reserve publication was obtained from the automobile manufacturers.

In my opinion Moody's Manual is just as well recognized as a source of information as the Federal Reserve publication which was used as the basis for this exhibit.

However, although I objected upon that ground at the time the exhibit was admitted by your Honor over my ob jection with leave, or at least the right saved to me to check the chart against the figures in the Federal Reserve publication. Anticipating a similar ruling yesterday, I had the Moody's publication right here, although the information offered yesterday in regard to the Respondent, I felt that the Respondent would have ample opportunity to check the correctness of that information.

However, I wish to say that in my personal opinion, 7774 I think your Honor's ruling yesterday was correct, and I believe that the same ruling should have been made in connection with Respondent's Exhibit No. 3.

Therefore, since the information used as the basis for the production of this chart was never substantiated and never even offered, I now move to strike Respondent's Exhibit No. 3 from the record.

Trial Examiner Ballinger: The Examiner will take the motion under advisement.

Mr. Hanley: If your Honor has the slightest idea of ruling favorably on the motion of counsel for the Commission, the Respondent desires to be heard.

Trial Examiner Ballinger: The Respondent will be afforded an ample opportunity to be heard.

Mr. Hanley: I assume now, your Honor, that this is just like the objection to the exhibit when it was put in, that nothing has been changed as a matter of record?

Trial Examiner Ballinger: The Examiner is merely taking it under advisement so that he may examine the record as to what it is.

Mr. Hanley: We do not want to try this whole lawsuit all over again. We do not want to have counsel explore each one of the Examiner's rulings. If so, I doubt if we will ever get done.

Have you finished, Mr. Austin?

7775 Mr. Austin: Yes, sir. I think the rulings are inconsistent. I think that the Examiner should be consistent one way or the other.

Trial Examiner Ballinger: It was agreed that the Respondent might interrupt the Commission's surrebuttal this morning in order to put on a witness.

You may call your witness.

Mr. Hanley: Before doing so, if your Honor please, the witness Warmack having been finally excused, the Respondent renews all of its several motions to strike all of the testimony of the witness Warmack, and renews all of its several motions to strike such testimony in part for all of the reasons assigned at the time the motions were made.

Now, for the further reasons that the affirmative testimony of the witness Warmack discloses that he made neither a factual nor objective cost study, nor any study at all of any substantial character of the accounting problems involved, and that his affirmative testimony indicates that whatever survey of the accounting problem involved may have been that he made was so scanty, lax, and superficial as to give him no knowledge of the factual situation.

Further, that this motion does not go merely to the weight or credibility that should be accorded the witness' testimony, but goes to the legal competence of the witness to testify.

7776 It is earnestly urged by the Respondent that the affirmative testimony of the witness discloses that he lacks knowledge of the accounting problem involved to a point where he becomes legally incompetent to express any opinions at all relative to the accounting problems involved in this proceeding.

It is understood that the objection and motion going to the legal competence is properly directed and addressed to the Examiner as distinguished from the Commission.

Trial Examiner Ballinger: The several rulings of the Examiner on motions by counsel for the Respondent during the course of the testimony of the witness Warmack are reaffirmed, and the motion to strike in its entirety is denied.

You may proceed.

LEONARD W. HOUGHTON was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Hanley.

Q. Please state your name.
A. Leonard W. Houghton.
Q. Please give your residence address.
A. 8939 South Throop Street.
Q. And the city?
7777 A. Chicago, Illinois.
Q. Mr. Houghton, by whom are you employed?
A. I am employed by the Standard Oil Company (Indiana).

Q. Mr. Houghton, are you an accountant?

A. Yes, sir.

Q. Have you had formal training as an accountant?

A: I have.

Q. In what school?

A. I graduated from the School of Business of the University of Wisconsin.

Q. How long have you been associated with the Respondent company, Standard Oil Company of Indiana?

A. Approximately twelve years.

Q. During that time, has your work involved the accounting business of the company?

A. Generally, yes.

Q. During the early part of 1942, did you have an assignment in the Detroit office of the Respondent company in connection with the accounting problems involved in this lawsuit? If so, what was it?

A. Yes. I received an assignment to go to Detroit to meet Mr. Warmack, accountant for the Federal Trade Commission, and there to explain to him to the best of my ability the procedures used in establishing this cost study and differential.

7778 Q. Did you do that?

A. I did.

Q. How long were you there while Mr. Warmack was there?

A. Oh, approximately six weeks.

Q. During that time did Mr. Warmack ask you questions about the company's accounting procedure?

A. He did.

Q. Did you answer them?

A. Yes, sir. To the best of my ability, I did.

Q. Have you read the testimony of Mr. Warmack, that Mr. Warmack gave in this proceeding?

A. I have.

Q. Have you noted the numerous times that Mr. Warmack said that he asked you for documentary evidence, and that it was refused him?

A. I have.

Q. Was there any occasion when Mr. Warmack made a request of you for documentary evidence that it was refused him? If so, please state what that incident was.

A. Well, Mr. Warmack asked me for documentary evidence relative to the establishment of the distribution of time as applied to allocating salesmen's cost. I did not have any documentary evidence of that kind, therefore I was unable to furnish it to him.

Q. Is that the only instance?

7779 A. That is the only one to my recollection.

Q. Do you remember the incident in the Detroit hearing, in the spring of 1942, when, at the request which was made either by Mr. Warmack or Mr. Austin, a couple of truckloads of filing cases were taken into the court room?

A. I do.

Q. Do you recall that they were later returned to the offices of the company in Detroit?

A. Yes, sir.

Q. Did Mr. Warmack, at any time, so far as you know, look at any of that documentary evidence?

A. To my knowledge, Mr. Warmack did not.

Q. Mr. Warmack was asked this question and gave the following answer:

"Q. Mr. Warmack, in your sojourn in Detroit and in Chicago, did you request of Mr. Houghton, or any one else representing the Respondent company, information as to the use of mileage applicable to these trucks as a factor for the purposes of allocation of expense?

"A. I did."

What is the fact as to whether or not Mr. Warmack ever asked you for that kind of information, documentary or otherwise?

Mr. Austin: What page of the record is that on?

Mr. Hanley: 7281.

7780 By Mr. Hanley:

Q. Proceed with your answer:

A. Well, of course, I cannot speak for any one else, but to my knowledge Mr. Warmack never discussed this basis of allocation with me.

Q. On the same page, Mr. Warmack was asked this question:

"Q. However they may be keeping them, did you ask Mr. Houghton or Mr. Boatwright, or Mr. Gillis, or anybody—or anybody representing the Respondent company, as to the experience of the Respondent company in the matter of allocating these things on the basis of mileage as distinguished from gallonage?

"A. I do not remember requesting any information with respect to that particular point; that is, documentary in formation. I rather think that probably it was discussed by Mr. Houghton and I. We tried to discuss every one of these accounts, or most of them, and the propriety of the allocations used by the Respondent company in working up its cost differential of 1.51 per gallon—was the matter of discussion."

Were there any discussions between you and Mr. Houghton relative to that subject?

Mr. Austin: I think the record should state what the subject is. I do not know that that is clear.

Mr. Hanley: Mileage.

7781 Mr. Austin: Well—

Mr. Hanley: As distinguished from gallonage.

Mr. Austin: On the contrary, I think this part of the record refers specifically to the mileage of trucks operated by commission agents. I think that is shown clearly that discussion is of account 055 and account 025.

Therefore, I would like to know whether that is understood by the witness, and was understood by the witness in his previous answer to this.

By Mr. Hanley:

Q. Well, now, Mr. Houghton, after you have heard the question fixed up by Mr. Austin, can you answer it?

A. That was my understanding, Mr. Hanley, that this mileage question of allocating costs applied to these accounts mentioned by Mr. Austin.

Q. Was there any such discussion?

A. To my knowledge there was none.

Q. He just did not ask you anything about it? Is that true?

A. That is my recollection.

Mr. Hanley: Page 5936 of the record, if you want to see it, Mr. Austin.

Mr. Austin: Thank you.

By Mr. Hanley:

Q. At page 5936 of the record, Mr. Warmack was asked the following question by the Trial Examiner, and
7782 made the following answer:

"Trial Examiner Ballinger: Do you mean that you were not furnished any information either documentary or oral?—"

Mr. Austin: Just a moment.

Mr. Hanley: All right.

By Mr. Hanley:

Q. (Continuing.) "The Witness: I was not. I would get a lot of arguments, Judge, but what I wanted to know was if the gallonage allocation is sufficient, either gallonage between tank wagon reseller, tank wagon consumer, and other methods or if a part of the costs are allocated in them what part of them between tank wagon reseller and tank wagon consumer, which I believe will be the case of this triple naught account.

"'Well, why?'

"'Well, why? We do it that way.'

"'Well, why? What did you ever do to prove that that is the right way to do it, from a cost accounting standpoint?'".

"Mr. Hanley: Prove it to you.

"The Witness: 'And if you did do anything where is the documentary evidence of what you did?'

"And I got nothing."

Did anything like that ever happen?

7783 A. Well, Mr. Hanley, to the best of my recollection, Mr. Warmack did not ask me for documentary evidence as the basis of allocating cost.

He did ask me for an explanation, and I gave it to him to the best of my ability, however, I do not presume and did not then presume it was going to take the form of an argument, as I merely tried to explain why we used that method of allocation.

Q. Did it take the form of an argument?

A. I do not think so. In my opinion it did not.

Q. Did you understand that you answered his questions sufficiently and satisfactorily to him?

A. Well, of course, I cannot answer as to whether it was satisfactory to him or not. At the time I thought I did.

Q. Did you understand that you were giving him all the information he asked for, whether the information was satisfactory or not?

A. That is correct.

Q. Mr. Warmack was asked this question and made the following answer—

Mr. Hanley: This appears at page 6604 of the record, if you wish to follow it, Mr. Austin—

By Mr. Hanley:

"Q. Mr. Warmack, I do not want your conclusions about what you asked. Please state exactly what you 7784 said.

"A. I said:

"'Mr. Houghton, will you please furnish me with any documentary evidence which you may have here, or documentary information which will support your statement on Respondent's Exhibit 31-L, which reads:

"'"However, not all the time of these individuals was spent on calling on Ned's accounts. It was estimated by Mr. Rupagh and Mr. Blough that Robinson spent 35 per cent of his time at Ned's, of which 7 per cent was on gasoline; Moulenberg spent 25 per cent, of which 5 per cent was on gasoline; Coutchie spent 25 per cent, of which 5 per cent was on gasoline."'"

"'After calling Mr. Houghton's attention to that, I asked him the question:

"'"What do you have in the way of documentary information which will support those estimates?"'"

Did Mr. Warmack ever ask you that question?

A. Mr. Hanley, that conversation is entirely foreign to me. As a matter of fact, that subject to the best of my recollection was not discussed between Mr. Warmack and myself.

As a matter of fact, the working papers on that exhibit were in the Chicago office on Mr. Boatwright's desk, or at least in Mr. Boatwright's office. I would not have even had that with me in Detroit.

7785 Q. That is, relating to Exhibit 31?

A. That is correct.

Q. Exhibit 31, being the half cent differential set up in Ned's service stations?

A. Yes, sir. That is correct.

Q. Mr. Warmack was asked the following question and made the following answer—

Mr. Hanley: Mr. Austin, that is at page 7226 of the record.

By Mr. Hanley:

Q. "Q. Did not you tell Mr. Houghton in Detroit last spring, when you and he were both there, that you had made some calculations or study and that you had determined or become satisfied that there was only two one-hundredths of a cent per gallon difference in marketing cost between the gallonage handled by commission employees on the one hand, and salaried drivers on the other hand?

"A. In answer to that, I can give this: The answer is—no. Positively no. No such study had ever been completed. Mr. Houghton and I did make a calculation, or tried to."

Did or did not Mr. Warmack tell you in substance that he had determined or become satisfied that there was only two one-hundredths of a cent per gallon difference in
7786 marketing costs between the gallonage handled by
commission employees on the one hand, and salaried drivers on the other hand?

A. He did.

Trial Examiner Ballinger: Did he tell you that after he had made the computation?

The Witness: After he had made the computation.

By Mr. Hanley:

Q. He said further in this answer:

"Mr. Houghton and I did make a calculation, or tried to."

Did you ever make any calculation of that kind with Mr. Warmack?

A. I did not make a calculation, myself. Mr. Warmack made a calculation in which he asked me about each account on form 189 as to whether it would be most applicable to a commission delivery cost or a salaried delivery cost. In order that Mr. Warmack may be more familiar with the operation of our business, or might be more familiar with the operation of our business perhaps I should say, I took him to one of our stations which was a commission station, and to one of our salaried stations, and he himself talked to the agent of the salaried station, and at the commission station also, so that he would be better able to determine just where those things should be allocated.

7787 Q. Do you know what he put in or left out of his calculations?

A. No, sir.

Q. Do you know what the result of his calculation was? Did he tell you that?

A. To the best of my memory on that, he came to the figure of 1.62 on salaried delivery cost and 1.60 on commission delivery cost. That is my memory.

Q. Is that what he told you?

A. Yes, sir.

Q. You do not know how he reached that result?

A. No.

Q. That was an amount, then, that he had arrived at?

A. That was the amount that he arrived at himself.

Q. That would mean then that he arrived at the conclusion, so far as the figures are concerned, that he told you about—

A. (Interposing.) I did not make any of the calculations.

Q. —that commission drivers or employees, was a cheaper method of marketing than salaried drivers?

A. Yes, sir. That is what those figures would mean.

Q. Now, you said he told you these things while you and he were both in Detroit and he was doing something with his cost study?

A. That is correct.

Q. Did Mr. Warmack ever tell you, or ever ask
7788 you specifically for—

A. I did not—hear the question—

Q. Did Mr. Warmack ever ask you specifically for any documentary evidence as to the propriety of allocating costs on a gallonage basis?

A. To the best of my memory he did not.

Q. Not all of the time that you and he were together?

A. That is right.

Q. Did there come a time when Mr. Warmack went to Chicago?

A. That is correct.

Q. That was after his stay in the Detroit office?

A. That is correct.

Q. And were you in Chicago at that time?

A. I was.

Q. And did you continue with your assignment to give whatever assistance you could to Mr. Warmack?

A. Well, just part of the time.

When Mr. Warmack was in Chicago, I was sick, I believe, for approximately three days or so, in which case he worked with Mr. Boatwright and Mr. Russell in the sales research department.

Q. Who is Mr. Russell, by the way? I do not think that appears in this record, Mr. Houghton.

A. Well, Mr. Russell is a cost accountant in the sales research department.

7789 Q. One of Mr. Boatwright's staff?

A. That is right.

Q. What did you do with Mr. Warmack in Chicago?

A. I principally served to take him to the various departments so that he could get the information that he desired while he was in Chicago.

Q. Did he make any request for documentary evidence or for information while in Chicago either to you or in your hearing, of any documentary evidence or other information that was not furnished to him?

A. None. No, sir. He did not request any documentary evidence or any information while in Chicago in my hearing that was not furnished to him. Now—

Q. (Interposing.) Was everything that he asked for from you or that he asked for in your hearing furnished to him?

A. There might be. Of course, there is one case that I cannot say definitely. For example, he asked for documentary evidence from certain officials and they were to prepare it for him. Then I was sick and I do not know whether he obtained it or not.

Q. Do you know what that was?

A. Well, in one case in question it had to do with annuity, with the annuity question.

Q. He asked that, to whom?

A. Well, I think that he talked to Mr. Anderson in
7790 connection with that matter.

Q. He spoke to Mr. Anderson?

A. Yes.

Q. Do you mean Anderson or Bergeson?

A. Bergeson.

Mr. Hanley: Will it be conceded that the memorandum, Commission's Exhibit blank, is the documentary evidence that Mr. Warmack so requested from Mr. Bergeson?

Mr. Austin: No. Mr. Warmack says that he asked for a great deal more than that.

Mr. Hanley: Well, will it be conceded that he got that from Mr. Bergeson in response to a request?

Mr. Austin: Well, it already appears in the record, your Honor, that that statement came from Mr. Bergeson, your Honor, otherwise it would not have been admitted.

Mr. Hanley: That is sufficient.

By Mr. Hanley:

Q. Is that all that you know of that was requested that you do not know about being furnished to Mr. Warmack?

A. To my knowledge.

Q. Was everything else that he asked for of you or in your hearing supplied to him?

A. That is correct.

Q. Did you take him to see Mr. King, the chief of the marketing auditing department?

7791 A. I did.

Q. Did he talk to Mr. King?

A. Yes sir.

Q. Did he ask him questions?

A. Yes, sir.

Q. Did Mr. King answer them?

A. He did.

Q. Did you take him to see Mr. Clark, the treasurer of the company?

A. I did.

Q. Did he talk to Mr. Clark?

A. He did.

Q. Did he ask questions?

A. Yes, sir.

Q. And Mr. Clark answered them?

A. He did.

Q. Did he or did you take him to see Mr. Bergeson, the comptroller of the company?

A. No. I do not think that I talked to Mr. Bergeson.

Q. That was the incident that happened while you were gone?

A. Yes, sir.

Q. Did you take him to the seventeenth floor, and show him the general cost accounting department of the company?

A. Yes, sir.

Q. Did you tell him what it was?

7792 A. Yes, sir.

Q. Did he ask any questions about it?

A. He might have asked some general questions. I do not recall specifically.

Q. If he did, did you answer them?

A. To the best of my ability.

Q. Do you remember the last time when Mr. Warmack was in Chicago, the very last day he was there?

A. I do recall the last day Mr. Warmack was in Chicago.

Q. Was there a conversation at which Mr. Warmack, Mr. Boatwright, and you were present?

A. There was.

Q. Prior to his leaving that last day?

A. Yes.

Q. Did Mr. Warmack say anything at that time in your presence, or in Mr. Boatwright's presence, as to whether he had received all of the information, data, and the like, that he desired or not? If he did, so state, state as nearly as you can recall what Mr. Boatwright said.

A. As I remember it, we were just getting together and Mr. Boatwright asked Mr. Warmack:

"Now, is there anything else that we can give you that you want?"

To the best of my remembrance, Mr. Warmack replied:

"No. I have got everything I want."

7793 Mr. Hanley: You may take the witness.

Trial Examiner Ballinger: We will recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Cross-Examination by Mr. Austin.

Q. Mr. Houghton, I understood you to testify that while Mr. Warmack was in Detroit in the early part of this year that he asked for certain time reports of salesmen, if any, which were used for the purpose of preparing the quarterly distribution of time reports for salesmen, and that you were unable to supply him with any time reports such as that. Is that correct?

A. That is correct as supplying to the salesmen themselves.

Q. Now, I will quote one sentence from the first page of Respondent's Exhibit 99, as follows:

"A memorandum was maintained by each salesman showing the amount of time spent in selling products applicable to each channel of distribution during the last month of each quarter."

Is that the memorandum for which Mr. Warmack asked you gentlemen to supply and which you did not supply?

Mr. Hanley: Answer if you know.

The Witness: I do not know. My recollection is 7794 that Mr. Warmack did not ask for any specific memorandum.

By Mr. Austin:

Q. Well, did Mr. Warmack ask you for any time reports or memoranda kept by the salesmen which were used as the basis for the preparation of the quarterly distribution of time reports?

A. Yes. He did ask me for any tests or checks that had been made at any time in the office.

Q. Or any reports of the salesmen?

A. Or reports of the salesmen testing that distribution of time.

Q. Did you supply him with any such reports?

A. No, sir, I did not.

Trial Examiner Ballinger: And your reason was, as I understand it, that no such reports were in existence?

The Witness: Well, I was unable to locate any.

By Mr. Austin:

Q. Now, you were asked some questions with regard to Mr. Warmack's testimony at page 6604 of the record. That related to Respondent's Exhibit 31-L. There it states that:

"It was estimated by Mr. Rupagh and Mr. Blaug that Robinson spent 35 per cent of his time at Ned's, of which 7 per cent was on gasoline; Moulenberg spent 25 per cent of his time, of which 5 per cent was on gasoline; Cont-
7795 chie spent 25 per cent, of which 5 per cent was on gasoline."

Did Mr. Warmack discuss with you or do you recall whether he discussed with you while he was in Detroit these estimates or the methods used in arriving at the distribution of time by these salesmen in connection with Ned's, in 1937?

A. No, sir. He did not.

Q. You do not recall him discussing—

A. (Interposing.) I do not recall him—

Q. —with you that exhibit at all?

A. No, sir.

Q. Regardless of where Mr. Boatwright's worksheets were, do you recall Mr. Warmack asking you any questions regarding the distribution of salesmen's time in 1937?

A. As applying to these particular salesmen?

Q. Yes, or as applying to any reseller—well, I will not say any reseller salesman, but as applying to reseller salesmen in the metropolitan Detroit area.

Mr. Hanley: Do you limit that question to 1937?

Mr. Austin: Yes.

The Witness: I will answer this way: There was no discussion as to any distribution of time relative to Exhibit 31-L. Now, Mr. Warmack may have asked questions regarding 1937 distribution of time as it applies to this previous question that you asked me relative to separate data.

7796 By Mr. Austin:

Q. But you do not recall now any conversation or discussion with Mr. Warmack regarding time spent at Ned's by any salesman in 1937?

A. No, sir.

Q. Regarding the various accounts on Respondent's form 189 which are allocated between bulk plant channels on a gallonage basis in Respondent's regular accounting procedure.

I understand you to have testified that Mr. Warmack did ask you regarding those gallonage allocations and as to the support for them, and that you explained to him to the best of your ability the company's reasons for allocating those accounts, or at least the principal expense in those accounts on a gallonage basis.

Mr. Hanley: Now, just a moment, Mr. Houghton. I am not sure whether that is a proper question or not. If counsel means this: Did Mr. Warmack ask you about the tests or studies in connection with gallonage distribution? Then, I think your question is a proper question.

Mr. Austin: Well, I have not quite gotten to that point, Judge. I was just asking this as a basis for another question.

Mr. Hanley: This question is not proper unless that is
what it means. That is what was gone into and with this
suggestion that it is objected to unless it was confined
7797 to the question which was asked of the witness about
the gallonage distribution.

Mr. Austin: I am referring to a gallonage distribution.

Trial Examiner Ballinger: The objection is sustained. The question may re reframed.

By Mr. Austin:

Q. Mr. Houghton, Mr. Warmack did discuss with you the gallonage allocations used by the company in its regular accounting procedure in allocating many of its expense ac counts between bulk plant channels on form 189. Did he not?

A. Yes, sir. He did.

Q. And did I understand you to testify that you explained the company's reasons for using that gallonage method of allocation, to Mr. Warmack, to the best of your ability?

A. No, sir. I explained what was in the account; what kind of expenses went into that account, sir.

Q. Did not Mr. Warmack ask you what the reasons were, or what the company's reasons were, or the company's accounting theory was in using these gallonage allocations?

A. Yes, he did. May I amplify that answer?

Q. Yes.

A. When I previously said that I told him what was in each account, I was referring to those salary and commission splits.

Q. No. I was not talking about that.

A. Yes, sir.

Q. I am just asking you whether Mr. Warmack asked you for any support or reasons for the use of the gallonage method in the distribution of expense in the company's regular accounting procedure where that method is used.

A. Yes, sir. Mr. Warmack did.

Q. And did you explain to him the reasons for the use of the gallonage method where that method is used?

A. To the best of my ability.

Q. Did not Mr. Warmack ask you whether the Respondent company had any documentary support or analysis supporting that gallonage allocation?

A. To my memory, he did not.

Q. I am asking you now whether he asked you for any specific document, or I might ask you whether Mr. Warmack did not ask you whether respondent had any documentary support or any cost study which would support the use of the gallonage method?

A. No, sir.

Q. When you explained to Mr. Warmack the reasons for the use of the gallonage method, did you, in connection with that explanation, state that there was no study or no documentary evidence that you could produce in support thereof?

A. No. I do not remember that I did. I just gave
7799 the explanation of why we used that basis of allocating costs.

Q. Did Mr. Warmack discuss specific accounts with you in that connection?

A. You are referring now to what?

Q. Use of the gallonage.

A. Use of gallonage as the basis of allocation?

Q. Yes.

A. Well, I would say generally that we discussed many of the accounts that went into that.

Q. Can you name one of the accounts which was discussed?

A. (There was no answer.)

Q. I will ask you if you did discuss account 086, taxes real estate—personal property?

A. Well, I cannot say definitely, but it is very probable that we did discuss that account.

Q. Can you state now the reasons that you gave Mr. Warmack for the allocation of that account on a gallonage basis?

A. Well, the general explanation of using gallonage basis is the fact that our company has used that method for many years, and it has been testing it and checking it up with accountants who are in our office. As a matter of fact, it has been checked up by many of the accountants in the office. Furthermore, as a matter of fact, when we hire a new fellow, new help, or an accountant comes in to the concern, one of their first assignments is to check our
7800 allocation of cost. Over this period of time we have as yet been unable to find a better way of separating our costs and studying them, and setting them up.

Q. What do you mean by "checking and testing" the gallonage allocation?

A. By examining the various accounts, by checking alternative methods, and applying those methods to these various accounts.

Q. And do you have the records of those tests and checks in your office?

A. No. I do not have them.

Q. Are they in the Chicago office?

Mr. Hanley: Answer if you know.

The Witness: Well, I was just going to say I do not know whether they are there or not. I said that is one of the assignments that the new accountant has to do with.

By Mr. Austin:

Q. Who gives them that assignment?

A. Well, it would be the auditor of sales, or the comptroller.

Q. But you do not know whether any of those tests or checks are in existence or not?

A. No. I do not.

Mr. Austin: I would like to have this sheet marked for identification, your Honor.

Trial Examiner Ballinger: The reporter will mark the paper Commission's Exhibit No. 136 for identification.

7801 (The document referred to was marked Commission's Exhibit 136 for identification.)

By Mr. Austin:

Q. Mr. Houghton, I show you this sheet marked Commission's Exhibit No. 136 for identification. I ask you whether this is in your handwriting, or whether those figures were written by you.

A. That is correct. That is my handwriting. Those figures were written by me.

Q. Do you recall when that sheet was prepared by you?

A. No, I cannot recall the exact date of this thing.

Q. Was it done while Mr. Warmack was in Detroit, and while you were working with him on this cost study?

A. That is correct.

Q. Does that relate to one of the accounts on Respondent's Exhibit 101?

A. Yes, sir, this relates to the commission payments on Respondent's Exhibit 101.

Q. Does it have anything to do with

A. (Interposing): Sub-account 021, Commission Paid.

Q. Then you did assist Mr. Warmack, did you, to some extent in making the calculations in connection with this account?

A. Well, yes, I do not mean to say that I did all of his calculations, but I did help him to make calculations, in order to expedite the work.

7802 Q. You did work with him on this account and other accounts in making tests and explaining the methods of allocation you used?

A. Yes, sir. I would make some figurations to show him how it was handled, if it would clarify the explanation, also the same way with sub-account 200-2.

Q. (Interposing): Also true with account 004, I believe. Is that true, Mr. Houghton?

A. I believe that is true.

Mr. Hanley: May Respondent see that exhibit, if you please?

Mr. Austin: Certainly. I hand it to Respondent's counsel.

Mr. Hanley: Thank you.

Well, there is nothing there on that.

Mr. Austin: May we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

By Mr. Austin:

Q. Now, when Mr. Warmack went to Chicago, I guess that was around the end of February. Is that not so, Mr. Houghton?

A. I think it was somewhere along the first of March. It was somewhere in that.

7803 Q. Well, around the end of February or the first of March. And you were in Chicago, in the Chicago office, were you not, most of the time when Mr. Warmack was there?

A. I do not believe it was most of the time.

Q. Well, did you assist Mr. Warmack in Chicago in making his investigations?

A. To some extent, yes.

Q. Do you recall Mr. Warmack asking you, or asking Mr. Boatwright in your presence, for an analysis or breakdown of the expense in account 075 for the Detroit field for 1940?

A. No, sir. I do not think that was handled through me. I know Mr. Warmack did discuss it. I do not remember any specific requests that he made.

Q. Do you—you do remember discussing that account?

A. I think that was discussed.

Mr. Austin: That is all.

Trial Examiner Ballinger: Redirect examination.

Redirect Examination by Mr. Hanley.

Q. One question, Mr. Houghton, in regard to this discussion about Commission's Exhibit 136 for identification. I believe you testified on your direct examination, but I want it clear in the record:

Did you at any time participate with Mr. Warmack in making calculations and arriving at conclusions?

A. Not as to any final analysis. My work with Mr. 7804 Warmack was to demonstrate how these accounts were spread or how they were handled and shown on form 189.

Q. He put his figures together to suit himself? Is that not true?

Mr. Austin: I object to that as leading and also calling for a conclusion of the witness as to what Mr. Warmack did with his own figures.

Trial Examiner Ballinger: The objection is overruled.

The Witness: Well, of course, I have no information as to what Mr. Warmack did with the final figures. All I know is that in any of these accounts to explain them, why, oftentimes I would do some of the arithmetic showing how the figures were arrived at.

By Mr. Hanley:

Q. Specifically, as I understand your testimony, you do not know how he arrived at the conclusions he did arrive at in relation to commission drivers as distinguished from salaried drivers?

A. That is correct.

Mr. Hanley: That is all.

Re-cross Examination by Mr. Austin.

Q. Mr. Houghton, Mr. Warmack did explain to you, did he not, frequently while he was in Detroit, and in fact, 7805 continuously as to the problem in which he was interested, and which he wished to investigate?

A. Yes, sir. Mr. Warmack asked about them. He was trying to find out what was in the various accounts.

Q. Then you knew what Mr. Warmack was working on, and working to try to develop while you were working with him in Detroit?

A. Generally, I knew pretty well what he was striving to get at. But I did not know the actual mechanics that he went through to get it.

Q. Will you just refer to that particular period of time again, and tell me this:

From the time that he arrived in Detroit until the time that he left, you had a pretty good idea as to what he had in mind doing?

A. Yes, sir. That is correct. I will not say in every instance I did not know. On some of these items that he checked, what his final answer was I do not know.

Q. As a matter of fact, you were just referring them to commission agents versus A-Stations?

A. That is true. I will not say as I said before that in every instance I did not know. On some of these items that he checked what his final answer was, I may have had some idea what he had in mind on these things. Just how far, I would have to refer to the particular item to tell you.

7806 Q. As a matter of fact, you did know what he was trying to find out and in many instances the results that he reached? Did you not know that, Mr. Houghton?

A. That is correct.

Q. I thought that was what you meant by your two last preceding answers but they were not very clear.

A. I am sorry. That is correct.

Mr. Austin: That is all.

Mr. Hanley: That is all.

Trial Examiner Ballinger: The witness is excused.

(Witness excused.)

Mr. Hanley: Is that all?

Trial Examiner Ballinger: Anything further today?

Mr. Austin: I think it is a little late to call another witness, your Honor.

Therefore, I move that we adjourn until 9:30 Monday morning, August 3.

Mr. Hanley: If your Honor please, I wonder if it would be possible to get some idea of what the future progress of this hearing is going to be and what length of time is going to be consumed.

I will say to your Honor that I have been in communication, or rather Chicago has been in communication with me since the middle of this week.

7807 I was indeed directed to ask for a recess, to come back home, to release Mr. Houghton and Mr. Boatwright and myself, and to do so at once. I at the time thought that, your Honor, that we could conclude this thing in a day or two next week. I persuaded my people to let us close this record on the theory that it was desirable from everyone's standpoint to get the job done.

Trial Examiner Ballinger: How long will it take the Commission?

Mr. Austin: Your Honor, I will finish up Monday morning unless there is an extended cross-examination.

I have two witnesses. I am going to call them only on a very limited field of questioning. I do not believe I will be over half an hour apiece with those two witnesses. Unless there is an extended cross-examination, I should be able to finish with them by noon on Monday.

Mr. Hanley: Well, will that close your case, Mr. Austin, when you have exhausted those witnesses?

Mr. Austin: That will close my case.

Mr. Hanley: Very well.

Mr. Austin: And may I ask you, will you take very much time as to your witnesses that you have to follow mine?

Mr. Hanley: Well, if it may be understood that I am going to go ahead with my surrebuttal—

Mr. Austin: Yes.

7808 Mr. Hanley: I am going to go ahead as soon as you finish yours.

Mr. Austin: Now, may I ask how long you expect to take?

Mr. Hanley: I will not be very long, Mr. Austin. I cannot tell you exactly, but I am sure that my direct examination, all told, will not be over a few hours at the most.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The motion is granted of counsel for the Commission.

And now, at 11:47 a. m., the hearing stands adjourned to be reconvened at 9:30 a. m., Monday, August 3, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 11:47 a. m., August 1, 1942, the hearing in the above entitled matter was adjourned.)

7809 Room 532, Federal Trade
Commission Building,
Washington, D. C.
Monday, August 3, 1942.

Met, pursuant to adjournment, at 9:30 a. m.

Before: Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq., (910 South Michigan Avenue, Chicago, Illinois,) appearing for the Respondent, Standard Oil Company of Indiana.

7810 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing of Docket No. 4389, case entitled "In the Matter of Standard Oil Company (Indiana)" is reconvened pursuant to notice at 9:30 a. m., August 3, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held at this same place, August 1, 1942.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

Mr. Austin: I will call Mr. Lundvall.

ARTHUR E. LUNDVALL was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Austin.

Q. Please state your name.
A. Arthur E. Lundvall.
Q. Where do you reside, Mr. Lundvall?
A. Baltimore, Maryland.
Q. What is your present position?

A. Chief accountant for the Federal Trade Commission.

Q. Will you outline your past experience as an 7811 accountant, and training, and so forth, briefly?

Mr. Hanley: Well, Mr. Austin, I should be glad to concede the general and formal qualifications of Mr. Lundvall as an accountant.

Mr. Austin: All right. Thank you.

By Mr. Austin:

Q. Mr. Lundvall, let me ask you, are you a certified public accountant?

A. I am, in the State of Maryland.

Q. Have you, in the course of your duties as chief accountant for the Commission, kept yourself familiar generally with the progress of this case, Commission's Docket 4389, in the matter of Standard Oil Company of Indiana?

A. In a general way, I have.

Q. Have you been present at a number of the hearings in this case?

A. I have.

Q. I believe you sat in on most of the testimony given by Mr. Boatwright, which was given here last spring; and by Mr. Warmack, given this year?

A. I do not know about most of it. I did sit in on a good deal of the testimony of those two gentlemen.

Mr. Austin: Your Honor, may Mr. Warmack speak to Mr. Lundball off the record?

Trial Examiner Ballinger: Off the record.

7812 (There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Are you familiar with the exhibit known as Respondent's Exhibit 101, Mr. Lundball? I show you a copy of that exhibit.

A. Yes. I am generally familiar with it.

Q. One of the accounts listed on that exhibit is account 520, which is entitled "Annuities and Retirement Plan Expense."

A. Yes.

Q. Are you familiar with the nature of the expense which is included in that account as shown by Respondent's Exhibits 99, 100, and by Commission's Exhibit 108, which is this little booklet entitled "Retirement Plan for the Employees of the Standard Oil Company"?

A. Yes.

Q. Have you seen that?

A. Yes, sir.

Q. Have you read it?

A. I have read it.

Q. Are you familiar with the description of the expense in account 520 given by Mr. Warmack?

A. I am.

Q. In his testimony?

A. I am.

Q. On the basis of those descriptions of the expense
7813 in this account, as shown in the record by the exhibits,
and by Mr. Warmack's testimony, what is your opinion as to whether the expense in that account, being the Respondent's expense for the Detroit field in 1940 entered on that account, may properly be treated as a selling cost of the Respondent for the year 1940?

Mr. Hanley: Now, just a moment.

May I ask a question for the purpose of clarification?

Trial Examiner Ballinger: You may.

Mr. Hanley: Have you made that study of the account 520, Mr. Lundball, and the plan of the Respondent company, and the underlying data and facts in respect thereof?

The Witness: I have read the plan and am fairly familiar with the testimony in the case.

I have not made a detailed study.

Mr. Hanley: The question is objected to by the Respondent for the reason that the witness has not made any study of the plan, or the underlying data, and his only source of information is, apparently, what Mr. Warmack has said, and the exhibit 108 of the Commission, which was called to his attention.

He is not legally competent to render an expert, critical opinion in connection with the Respondent's treatment of account 520.

7814 It will, of course, be understood by the Court that this objection goes to the immediate and specific problem, the general qualifications having been conceded.

Trial Examiner Ballinger: Have you studied all of the underlying data upon which your opinion about to be expressed is predicated?

The Witness: I think I have, your Honor. I have read the plan. I have read the testimony, Mr. Warmack's testimony.

I am generally familiar with the accountant treatment by the company of this type of expense.

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

Mr. Hanley: May it be understood, if your Honor please, that that objection may stand as to any opinion questions that are asked the witness?

Trial Examiner Ballinger: It will be understood to be a continuing objection to the entire line of examination of this witness.

The Witness: Judge, may I have that question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. On the basis of those descriptions of the expense in this account, as shown in the record by the exhibits, and by Mr. Warmack's testimony, what is your opinion as to 7815 whether tthe expense in that account, being the Respondent's expense for the Detroit field in 1940 entered on that account, may properly be treated as a selling cost of the Respondent for the year 1940?")

Trial Examiner Ballinger: First, have you arrived at an opinion?

The Witness: Yes, sir, I have.

Trial Examiner Ballinger: You may express it.

The Witness: Well, as I understand it, it is in the amount of a hundred fifty-seven thousand dollars plus charged to the account 520 for the year 1940 covering these annuities and retirement account expenses.

Of the total amount, it is my opinion that twenty-six thousand plus dollars of the amount is properly applicable to the year 1940; approximately one hundred and thirty thousand dollars plus is not applicable to the Detroit field.

By Mr. Austin:

Q. When you say "applicable"; what do you mean?

A. I am speaking of the marketing expense for the year 1940.

Q. Now, of course, I would like to have you describe first, what the nature of expense is in each instance.

A. Well, the last item on that account, making up a hundred and thirty thousand plus dollars, one part, namely, one hundred and eight thousand plus dollars represents a

portion of a trust fund contributed by the company
7816 for the retirement of the employees in the Detroit
field in 1940 to cover the services of its employees for
the period prior to January 1, 1939.

As I understand the plan, the amount with respect to this one hundred and eight thousand dollars—

The Witness: Strike that.

A. (Continuing:) The amount is for services performed by the employees prior to January 1, 1939, and as such does not constitute cost of doing business in 1940.

The item of twenty-two thousand dollars plus of the hundred and thirty-thousand dollar item is to cover annuities paid to retired employees in the Detroit field for the year 1940; that is, those employees who were retired prior to the year 1940.

Obviously, that amount is for services performed prior to the year 1940, and as such, does not constitute an expense of marketing for the purposes of a cost differential for the year 1940.

By Mr. Austin:

Q. What is the twenty-six thousand plus item that you refer to?

A. That represents contributions made for the company to match contributions made by employees engaged in the Detroit field. Since that is for the year 1940, and it is for
services performed in that year, I would think that
7817 that that is properly included as a marketing expense
in 1940 for the purpose of this case.

Q. Have you the exact amounts you referred to, Mr. Lundball? You gave them in thousands of dollars.

A. I have the exact figures.

Q. Would you mind first stating them in the record, and again state in the record what you regard as marketing expense and what, in your opinion, is not, so that we may have the exact amounts?

A. That total charge for the year 1940 for the annuities and retirement plan expense is $157,014.27.

$26,226.38, I understand, represents the contributions made by the company to match the contributions by employees engaged in the Detroit field for the year 1940.

$108,508.83 of the total represents the portion of a trust fund contributed by the company for the retirement of employees in the Detroit field to cover services performed prior to January 1, 1939.

$22,279.06 is the amount of annuities paid to retired employees in the Detroit field for the year 1940 to cover the services of the employees performed prior to 1940.

I think I have said that the first item of $26,226.38, I believe, is a proper charge to 1940 business as a marketing expense, and that the other two items I would not consider proper charges to marketing expense for
7818 the year 1940 for the reason that they are paid to cover the services performed prior to the year 1940.

Q. Is it your opinion that any such payments, either into the trust fund or actual annuity payments for services performed in 1940 are not selling cost to the Respondent for the year 1940?

A. I do not regard them as such.

Mr. Austin: That is all.

Cross-Examination by Mr. Hanley.

Q. You have stated, Mr. Lundall, that you regard the part of account 520 represented by matched payments or payments into an annuity fund in the amount of $26,226.38—

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. —is a proper marketing cost of the Respondent company? That is true, is it not?

A. Yes, sir.

Trial Examiner Ballinger: For the year 1940?

The Witness: That is right.

By Mr. Hanley:

Q. For the year 1940?
7819 A. That is right.

Q. Are you familiar with the testimony of Mr. Warmack to the effect that in his calculations he reduced that figure to approximately $20,108, plus?

A. I—I do not think I am familiar with that.

Q. Well, do you agree that it should be done? And assuming that it was done—do you agree that it should be done?

A. That it should be reduced?

Q. Yes, sir.

Do you think that the entire sum of $26,226.38 is a proper marketing cost for the year 1940?

Mr. Austin: Now, your Honor, there are two questions.

I have no objection to this latter question.

I do object to the former question, and I think they are both pending. I would like to know which one counsel is pressing.

Mr. Hanley: I do not think the former one requires any answer because he said he did not know.

Trial Examiner Ballinger: Read the former questions and answers.

(The reporter read the following:

"Q. Are you familiar with the testimony of Mr. Warmack to the effect that in his calculations he reduced that figure to approximately $20,108, plus?

7820 "A. I—I do not think I am familiar with that?

"Q. Well, do you agree that it should be done? And assuming that it was done—do you agree that it should be done?

"A. That it should be reduced?")

Trial Examiner Ballinger: Now read the pending question.

(The reporter read the pending question as follows:

"Q. Yes, sir.

"Do you think that the entire sum of $26,226.38 is a proper marketing cost for the year 1940?")

The Witness: I do not have any opinion now otherwise than that the entire amount is a marketing expense for the year 1940.

By Mr. Hanley:

Q. Very well. Thank you, Mr. Lundball.

If you will permit me, Mr. Lundball, I am going to use round figures here. I think we will understand each other all right.

There is one item of approximately one hundred and eight thousand dollars. There is another of twenty-six thousand odd, and another of twenty-two thousand odd. Is that right?

A. That is right.

7821 Q. Do you regard the items of a hundred and eight thousand dollars plus and twenty-two thousand dollars plus as a market charge—

Mr. Hanley: Strike "charge."

By Mr. Hanley:

Q. As a marketing cost—I am not asking you a question relative to the year 1940, or any period of time, I am simply asking you, in your judgment, is it a marketing cost?

A. Judge, I would have to answer that in this way: That I think it would be a marketing expense for the year in which the cost was incurred for the services rendered. I think that that has everything to do with it.

Q. You stated that you were familiar with Mr. Warmack's testimony in respect of this account?

A. Yes.

Q. As I recall it, he testified that it was not good accounting to charge the twenty-two thousand dollar plus item to 1940, because of the fact that applied to payments actually made for services in years prior to 1940. Is that your recollection of his testimony?

A. It is.

Q. As I understand his testimony, and as I now understand yours: your thought is that some kind of a current fund should be kept up, so that these things are made payable as they come along?

7822 A. That is right, according to the accrual system of accounting.

Q. Yes; sir. Mr. Lundball, referring you to the one hundred and eight thousand dollar item, which is the trust fund item, is not that exactly what the company is doing, namely, building up currently a fund which will be applicable on date of retirement to the services of employees who continue in the employment of the company?

A. Well, as I understand, it is to build up this fund to compensate the employees for the services performed prior to January 1, 1939. As I understand the plan, it simply gives formal recognition to a plan that had been in effect for a good many years.

Q. And you understand, do you not, Mr. Lundball, that the employees who will ultimately participate in that fund, continue to work for the company?

A. I do.

Q. And that in 1939 or thereabouts there was a change in the form of annuity, plan, or pension plan, of the company?—

A. I—

Q. —And that this trust fund just gave recognition to that change?

A. That is right.

Q. Is that your understanding?

A. Yes, sir.

7823 Q. Do you regard it as bad accounting to give recognition to that pre-existing annuity plan in reference to continuing employees of the company and charging it currently against the accumulated fund of amount necessary to discharge the obligations of the company as incurred under the pre-existing plans?

A. I think the better procedure would be to charge this amount, such as this one hundred and eight thousand dollar item to surplus, rather than to the current year's operations, because it obviously applies to services performed in prior years, and to whatever extent the payment is made in 1940 it is made to correct, in a sense, the understatement—or the overstatement, rather, of prior years' earnings by reason of the fact of the failure to provide an accrual to cover this portion of the plan for services performed in the years prior to 1939.

Q. Mr. Lundball, as I understand the plan, assuming that it had been continued, and if there had been no change in the method of paying annuities, would you then regard the amounts of money necessary to care for that plan in 1940 and subsequent years, as a current, marketing charge?

The Witness: Could I have that question again, please?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

7824 Mr. Austin: Mr. Hanley, do you mean that if the Respondent had set up no trust fund and no insurance fund at all, and had just gone on paying these things as they came due?

Mr. Hanley: Well, perhaps nobody understands this question. I am sorry.

By Mr. Hanley:

Q. I will tell you what I mean, Mr. Lundball. You understand that there was a change in the plan of the company which was in 1939, whereby a new system was put into effect to pay annuities to employees upon retirement?

A. Yes, sir.

Q. And the plan that was in effect up until 1939 was abandoned, but there was a certain accrued liability, at least, moral ones under the plan in effect up until 1939 when this new insurance plan went into effect.

A. Yes.

Q. Now, my question contemplates this: Suppose that the company had not changed the plan in effect up until 1939, but had just continued along that same old plan; would you regard the amounts of money necessary to satisfy the requirements of that plan from year to year as current marketing costs?

A. Well, I think if there had not been any other features to this plan, and it was a payment from year to year, or provision made from year to year to take
7825 care of the retirement of employees, I would regard that as a marketing expense from year to year with respect to the pro rata amount.

Q. If that be true, Mr. Lundball, why do you object, from an accounting standpoint, to the payment of the twenty-two thousand plus dollars which was simply a continuation of the old plan in connection with employees—in connection with employees that did not shift over to the new plan?

A. Well, my answer had in mind those employees that were still with the company.

These employees for which the twenty-two thousand dollar payment was made, as I understand, had been retired, and it is not for services performed in this current year.

Q. Now, Mr. Lundball, I am asking you if that old plan had continued, and that amount of twenty-two thousand dollars, under the operation of that plan, had fallen due in 1940—which it did, notwithstanding it was applicable to retired employees who may have retired in 1939, I do not know—would that not still be a current, 1940, marketing expense under that old plan?

A. I think with respect to employees that would be retired in any one year, that any payments made for that purpose would apply for services in the past, and some portion of which would apply pro rata for those past years, and no part thereafter.

Q. Well, do you not think, Mr. Lundball, that the
7826 1940 charge of twenty-two thousand dollars is a proper charge for 1940—

A. (Interposing): Well—

Q. —you understand, I assume it was not due, it was not payable—could not be until 1940 under the old plan.

A. My answer would have to be there, Judge, that was for services performed by the employees prior to those years, and as such, should have been spread or applied back over those years.

Q. Now, Mr. Lundball, you have said that you thought these are charges to surplus rather than marketing expense.

This may be a silly question from an accounting standpoint, but it has been very much in this case:

Would you tell us, please, what the difference in cost to a company, or the character of the cost, assuming that you charged up the same total of money over a five year period to surplus, or whether you charged up the same total of money over the same period of time to marketing expense?

A. Well, it is still a cost to the company.

Q. That is the trouble I am having, Mr. Lundball. It is still a cost. I cannot get an idea about this charging to surplus and charging to marketing expense—

A. (Interposing): Maybe I can explain it this way. According to good accounting, you are supposed to provide for all of the current costs of doing business, and all of the income applicable to doing business within the 7827 year in order to show the net income from doing business for a current year.

And any charges that would apply to prior years, by reason of the failure to provide for them in those years, would be a charge to surplus, on the theory of the only way you could correct the prior condition would be to take it out of accumulated earnings over prior years, as it would be.

Q. Now, Mr. Lundball, suppose that we did not, as a matter of bookkeeping, and instead of this current payment being so charged, it was charged to marketing expense. You have already said, as I understand you, that it is a cost to the company.

A. Well, it is a cost to the company.

Q. For the purposes of establishing a cost differential, does it make the slightest difference whether you take the pro rata charge to surplus, or whether you take the current marketing expense, if it amounts to substantially the same amount?

A. I think so, Judge, because what you are concerned with are the costs of doing business for a very definite period of time, in connection with this case, the year

1940. I think that the year's operations ought to include only those costs and expenses that are applicable to doing business in that year.

Q. All right. We are charged with having given
7828 an improper and illegal price differential in the year
1939. That is what we are trying in this case, Mr. Lundball.

For the purposes of expediency, and as I understand, agreement between accountants for both the Commission and Respondent, it was determined to use the year 1940 as the period upon which to predicate the cost study.

Assuming that you confine everything to the year 1940, on your restricted theory of using these current costs applicable to that particular period:

Does then your condemnation of this charge in 1940 prove or disprove anything from an accounting standpoint as to whether or not the cost differentials being accorded by the Respondent in any current period are right or wrong?

Mr. Austin: I would like to have that question read.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Mr. Austin: Well, if your Honor please, in the first place, you are not just concerned with the price differential in 1939. There is a misstatement of that there.

And I also object to the question upon the ground that it calls for the conclusion of the witness as to whether or not the evidence in the case justifies or does not justify the price differential, while he was asked whether it proves
it from an accounting standpoint.
7829 I do not see how the witness can answer that
question, particularly in view of the fact that the direct examination here has been upon one account. There has only been a question here about one account.

Trial Examiner Ballinger: Is that objected to on that ground? If so, is that the object and purpose of the question, Mr. Hanley?

Mr. Hanley: I do not understand, Mr. Austin, and therefore I cannot answer your question.

Read Mr. Austin's objection and statement.

(The reporter read the objection and statement of Mr. Austin.)

Mr. Hanley: Of course, as to that last objection, your Honor, I can answer that. I am asking this witness only as to the effect of this particular account that he has been examined upon. I am not expanding the scope of the direct examination, of course.

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

The Witness: Well, I am still of the opinion that whatever year is involved in the cost differential, the total cost of doing business should reflect just those costs and expenses that apply to the year in question.

By Mr. Hanley:

Q. Getting at it this way, Mr. Lindball: Supposing that your theory were adopted to charge these two
7830 classes; that is, the past employees and the trust fund employees groups to reserve on a pro rata basis over the years, rather than on a current yearly marketing cost basis.

When you were determining the actual cost of doing business, would it make any difference over a substantial period of time—period of years, three years, four years, five years, how you did that bookkeeping?

A. Well, I think it would, Judge, for this reason: that these payments as they build up become increasingly smaller than those. This one hundred and eight thousand dollar item becomes increasing smaller with the increase in the time period.

Q. Would it make any difference, Mr. Lundball, assuming it will become increasingly smaller; that maybe this amount for 1940 is a little more costly in that account than, perhaps, 1941 would be? Is that the meaning of what you are saying?

A. Well, no. The services for which the payment is made were performed prior to this date; January 1, 1939. No part of the payment is for, or could in no way be considered as additional compensation for the employees for the year 1940; that is, under my theory of accounting. I believe that is a cost that applies to the doing of business in the prior years.

Q. Why are you of the view that those payments are going to get smaller?

7831 A. I do not believe I said that they would get smaller.

Q. Maybe I misunderstood you. I thought you said that those trust fund payments would grow smaller.

A. I certainly did not have that in mind if I said it.

Trial Examiner Ballinger: Read the question and answer referred to.

(The reporter read the following question and answer:

"Q. Getting at it this way, Mr. Lundball: Supposing that your theory were adopted to charge these two classes; that is, the past employees and the trust fund employees groups to reserve on a pro rata basis over the years, rather than on a current yearly marketing cost basis.

"When you were determining the actual cost of doing business, would it make any difference over substantial period of time—period of years, three years, four years, five years, how you did that bookkeeping?

"A. Well, I think it would, Judge, for this reason: that these payments as they build up become increasingly smaller than those. This one hundred and eight thousand dollar item becomes increasingly smaller with the increase in the time period.

7832 "Q. Would it make any difference, Mr. Lundball, assuming it will become increasingly smaller; that maybe this amount for 1940 is a little more costly in that account than, perhaps, 1941 would be? Is that the meaning of what you are saying?

"A. Well, now. The services for which the payment is made were performed prior to this date, January 1, 1939. No part of the payment is for, or could in no way be considered as additional compensation for the employees for the year 1940; that is, under my theory of accounting. I believe that it is a cost that applies to the doing of business in the prior years.")

By Mr. Hanley:

Q. It was to those questions and answers that I had reference in my last question, Mr. Lundball.

A. I see.

The Witness: What was the last question that was asked me?

Trial Examiner Ballinger: Read the pending question to the witness.

(The reporter read the following question:

"Q. Why are you of the view that those payments are going to get smaller?")

The Witness: Well, when I answer the other question I did not fully understand it.

7833 I do not have any particular reason to expect that they would get smaller except as these employees die off, and there were fewer employees than that would participate in this one hundred and eight thousand dollar item.

By Mr. Hanley:

Q. Well, that will also adjust itself by picking up all of these new employees under this new plant, would it not, Mr. Lundball? Is not that all that this amounts to?

A. Well, if you mean with respect to the matched contributions?

Q. Yes, sir.

A. The employees for those currently employed?

Q. Yes.

A. Well, I do not know whether it would be picked up because this twenty-six thousand dollar plan is in effect for the employees now with the company, and it is to cover the services from January 1, 1939, on.

Q. Twenty-six thousand dollars?

A. Yes, sir.

Q. Now, Mr. Lundball, is not the fact this, that the Standard Oil Company had an annuity plan which was continuing on year after year, and which was taking care of current employees, past employees, future employees, and that in 1939 for reasons best known to the management, they decided to change the form of that plan, which they did by taking out insurance annuity policies,
7834 which is the current plan;

And that these two other parts of this account, namely, the one hundred and eight thousand dollar part, and the twenty-two thousand dollar part, are just simply a clean-up and continuance and a switch-over of the old plan to dovetail it in to and fit it in with a new plan;

And that when those amounts are paid out that the entire load which is now being carried by both will be carried by the new insurance annuity plan?

Is not that really the practical situation, and the way they kept the books?

A. Well, with the advent of the Social Security legislation to this contribution plan, this—we will call it the "twenty-six thousand dollar plan,"—plan that we have spoken of, I suppose the company wanted to give recognition to the services of its employees who had been with the company prior to the time when this social security and the twenty-six thousand dollar pension fund part of the plan went into effect, and that they simply gave formal recognition to that, and it was specifically for services performed in the past; whereas, the social security payment and these contributions made by the company to match contributions made by the employees were to cover present and continuing services of the employees; that is, for that part of their compensation.

Q. Mr. Lundball, I do not want to pursue this very
much further, but you understand, do you not, that
7835 these plans were in effect long before there was any
social security legislation?

A. Yes, sir.

Q. And that this plan never did have anything to do with the social security legislation?

A. It is my understanding that it is independent of that.

Q. Now, can you not just give me an answer to that question that I asked you, that this thing and the happenstance of these three different types of figures in account 520 is a result of a shifting of one system of annuity to another, and that the system of annuity just continues on and has continued on for years? I should say, instead of "system," the last time, I should say the fact of annuities has continued on for years?

A. Well, I understand that it is a continuing plan, Judge. It has been going on for years, and I suppose with the advent of social security legislation, it brought about this whole change in the plan. It gives formal recognition to employees that have been with the company for a good many years. It is to provide for their current services through the current contribution of the company matching those that are made by the employees.

I think there is a definite distinction there.

Q. Mr. Lundball, the social security thing is entirely
apart from this. It has not a thing in the world to
7836 do with it. I hope you understand that.

A. Well, you can leave that out of the discussion.

Q. The fact is—I am trying to find out this—that the social security and old age pension insurance under the Federal statutes or any other thing applicable to such statutes are paid in addition to the entire fund here, entirely apart from this 520 account, pension fund.

A. That is my understanding, Judge.

Q. So the social security has not a thing to do with it.

A. That is right.

Q. What have you to say as to this that, assuming, Mr. Lundball, that the reason for the existence of three different groupings of accounts in account 520 is the result simply of a change in the plan of paying annuities, that recognition of past obligations to the employees under preexisting plans as well as recognition of future obligations to employees under the plan resulting in current benefits, redound to the benefit of the company from the marketing standpoint where those payments are applicable to marketing department employees?

A. Well, I think this, that the present employee who has been with the company a good many years, he knows that he is going to participate to the extent of his current services through this part of the plan, that this twenty-six thousand dollar item that we are talking about is a part, and that the one hundred and eight thousand dollar part of the plan represents the payments for services that he has performed in the past and which he knows he will get just so long as he stays with the company.

Now, of course, any loyal employee is going to feel stronger towards the company by virtue of anything that the company does for his well-being, and I think to that extent there is some benefit to the company, but how much that benefit would be, I do not know.

Q. Referring you specifically, Mr. Lundball, to the two classes of account, twenty-two thousand dollars and one hundred eight thousand dollars, what is your answer as to whether or not in your judgment there are any current benefits to the company from paying those two items of expense?

A. Now, with respect to the twenty-two thousand dollar item, I do not see that there is any benefit to the company because the employee is no longer with the company, he is not performing any service with the company.

Q. Just on that point, Mr. Lundball. Do you think it is any benefit to the company to have those employees who are still with the company have knowledge of the fact that the company is keeping faith with the employees who may be retired?

A. Well, as I said before, if he is a loyal and conscientious employee, he cannot help but have a feeling of loyalty to the company.

7838 Q. Well, is not that a current benefit?

Mr. Austin: Your Honor, I feel that I should interrupt and interpose an objection to this line of questions.

The question here is whether or not these costs are selling costs to the company.

Such questions as are now being asked about whether the company gets any intangible benefit in the form of loyalty or confidence of employees, it seems to me is something that are, on their face, matters that cannot be measured, if it does have any value, obviously, it does not have any value so far as the selling expense is concerned.

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

The Witness: May I hear the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: I think it is a current benefit. How much of a benefit it is, I do not know.

By Mr. Hanley:

Q. Well, Mr. Lundball, in keeping this account in the way it has been kept by the Respondent company, is the Respondent company in accord with the Federal Income Tax regulations in respect of its expenses?

A. Well, I think maybe it is. I have not examined the company's records and the particular features of this plan with respect to its tax situation, but I think that those payments are generally allowable deductions for tax purposes. But, as you know—
7839

The Witness: Strike that out.

By Mr. Hanley:

Q. Mr. Lundball, I refer you to page 7568 of the record.

A. Yes?

Mr. Hanley: I asume that Mr. Lundball will want to look at the record before he answers the question.

Mr. Austin: Page 7568?

Mr. Hanley: Yes.

By Mr. Hanley:

Q. At that point, there was set forth, or there was begun to be set forth in extenso a question and five answers by practising accountants extending through to the top of page 7575.

The statement of facts and the five answers were taken from "The Journal of Accountancy," for the month of May, 1940, being Respondent's Exhibit for identification 110-A, 110-B, 110-C, 110-D.

It has been testified to by Commission's witness Warmack that the statement of facts referred to is substantially the same as the state of facts in the Respondent company to which account 520 applies.

7840 I will now ask you whether or not you agree, as an accountant, in principle with the five answers which are set forth in respect of the way in which the account should be handled.

Mr. Austin: I object to that question for various reasons, as follows:

In the first place, your Honor, there is no proof in the record that any accountants gave any answers or opinions. I make that objection because that is a part of the question.

Secondly, he stated that the opinions appeared in "The Journal of Accountancy," and I contend that that is wholly improper, and as I understand it, the question was only allowed to be in on the ground that your Honor found it to be adopted by Judge Hanley, and there was no reference made or reliance based on the fact that it had come from "The Journal of Accountancy," or any other place.

Third, I think it is entirely immaterial whether this witness or any other witness for the Commission agrees with some hypothetical statement that is not substantiated.

Fourth, I am not under the impression that Mr. Warmack testified to the fact that the facts upon which these questions were based are the same as those posed in this case, and I do not think the facts are the same.

You can satisfy yourself on the facts by an examination of the record. It is identical, and of course
7841 applies to the same thing.

Trial Examiner Ballinger: The Examiner considers your question objectionable in view of the statement that this was a question as propounded to five practising accountants, and the accountants had expressed their views.

If you eliminate the accountants and present this as a mere hypothetical question, the Examiner will allow the question.

By Mr. Hanley:

Q. I am just asking you, Mr. Landvall, if you agree in principle with the five answers set forth in the record, which have been called to your attention as to their setting forth a proper method of accounting?

Trial Examiner Ballinger: The witness may answer.

Mr. Austin: The same objection, your Honor.

Trial Examiner Ballinger: The objection is overruled.

Mr. Austin: I should say, if your Honor please, just so that my objection will appear as the question is now framed, that I do object to the question upon the ground that it is irrelevant and immaterial;

That the question as it is now framed amounts to this, that if a certain answer were given to a certain question, would you agree with it?

The witness has already stated his opinion regard-
7842 ing the direct question.

Now, as to the hypothetical question, we are presented with this situation: I think that the question if it were to be asked, your Honor, whether the witness agrees with certain posed answers to that hypothetical question, if your Honor please, I think it is too remote to be of any value whatsoever. I object to it on the ground that it is incompetent, immaterial and irrelevant. I think it can only serve to confuse and encumber the record. It can serve no useful place in this record whatsoever.

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

The Witness: With respect to the first answer on page 7569 of the record, I think that that procedure is permissible, but not preferable.

I also think

Mr. Hanley: (Interposing.) Well, now, just a minute. You said 7569. The answer began not there, the first answer begins on page 7570. Are you talking about the answer or the statement?

The Witness: Well, the question here was—

Mr. Hanley: May we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.
7843 That portion of the witness' answer following "preferable" is physically stricken.

By Mr. Hanley:

Q. Please begin your answer now beginning with the answer No. 1 which appears at page 7570.

A. With respect to Answer No. 1, appearing at page 7570 of the record, I do not agree with the answer to Answer No. 1.

I do not agree with the answer to Answer No. 1 so far as it refers to procedure.

Q. Do you mean that you do not agree with the procedure in Answer No. 1?

A. That is correct. I do not agree with the procedure as set forth in Answer No. 1.

Q. Do you mean that you do not agree with the procedure set forth in Answer No. 1 in its entirety or in part?

A. Yes. I do not agree with the accountants' reasons given as set forth in Answer No. 1.

Q. What about Answer No. 2?

A. Well, I agree with that part of the answer which reads:

"Had the directors chosen to make a lump payment of the total estimated required amount, and at the same time, gone on record that such payment was in recognition and settlement of past services rendered, then a permissible treatment would have been to charge the payment to earned surplus."

7844 That appears at the top of page 7572.

Q. Is that all of the answer No. 2 with which you agree?

A. Yes, sir.

Q. What about Answer No. 3?

A. I agree with that part of the answer that begins with:

"Thus the basis of the payments is apparently related to services rendered by the employees prior to the inception of the social security act. Having regard to this retroactive feature, it might therefore be asserted that the annual payments to be made should be charged to the earned surplus account annually as to the

Q. (Interposing): Just a moment.

A. I am leaving out part of it.

Q. "To be charged to the earned surplus account annually?"

A. Which one? That, Judge?

Q. Well, are you leaving out language now? Are you deliberately leaving out language, now? Are you deliberately leaving that out?

A. Yes, sir.

Q. What are you omitting?

A. I am omitting the following:

"now in an estimated lump sum or," I am leaving that out.

Q. You are leaving out, "now in an estimated lump sum or,"?

7845 A. Yes, sir.

Q. Proceed.

A. Continuing:

"annually as the actual payments are made and not to the current and future annual income accounts; we think that procedure is permissible."

Trial Examiner Ballinger: Does the Examiner understand that you are in agreement with the provision you have read, with the portions extracted as stated by you?

The Witness: Yes, sir.

By Mr. Hanley:

Q. Proceed.

A. Now

Trial Examiner Ballinger: You are in disagreement with the remainder of the answer?

The Witness: Well, I am to the extent that I think that the whole of the last part of Answer No. 3 of the procedure for the reason that I gave for the last part of Answer No. 3

Trial Examiner Ballinger: I did not hear that.

Mr. Hanley: I did not hear you, Mr. Witness.

By Mr. Hanley:

Q. Please repeat your answer. You spoke so low I did not hear you.

A. As to the last part of Answer No. 3, the procedure described may be permissible for the reasons 7846 given in that answer, but I do not agree that it is preferable because it is logical and in accord with an accrual system of accounting to apply such payments to the years for which the services were rendered.

Q. Well, then the fact is, Mr. Lundball, that you disagree with all of Answer No. 3 except that portion which you quoted and stated affirmatively that you agreed with?

A. Yes, sir.

Q. How about Answer No. 4?

A. I do not agree with the No. 4 answer.

Q. Very well. Please refer to Answer No. 5.

A. Well, there are three parts to that answer.

Q. They are numbered.

A. They are numbered 1, 2, 3, on page 7574.

Q. Well, do you agree with No. 1?

A. I agree with No. 1.

Q. You do?

A. Yes, sir.

Q. I did not hear.

A. I do.

Q. No. 2?

A. I do not agree with No. 2.

Q. No. 3?

A. No.

7847 Q. You have either heard or read the testimony of Mr. Warmack in connection with this same group of answers? Have you not done that, Mr. Lundball?

A. I heard him.

Q. In view of your testimony just now given, it is a fact, is it not, that you are not in agreement with him as to his views of the accounting principle set forth in Answers 1 to 5, both inclusive?

Mr. Austin: I object to that, your Honor. It is immaterial if he agrees with Mr. Warmack or not. They both have gone on the stand and given their opinions and the record will speak for itself as to whether they agree or disagree as to any part of this matter or not.

Mr. Hanley: The whole question is: What is good accounting?

The Witness: Well, Judge Hanley, I do not recall just what Mr. Warmack said. I do not know whether I am in agreement in, entirely with Mr. Warmack or not. I would have to look at the record in order to find out whether I am in complete agreement with him or in complete disagreement with him.

By Mr. Hanley:

Q. Well, perhaps we will have to rely on the record, Mr. Lundball.

A. Perhaps so, sir.

7848 Mr. Hanley: You may take your witness.

Trial Examiner Ballinger: Redirect examination.

Redirect Examination by Mr. Austin.

Q. Mr. Lundvall, you were asked a question on cross-examination as to whether the method of handling this expense in account 520 particularly with respect to the one-hundred and eight thousand dollars plus item was in accord with Federal Income Tax regulations.

I think you answered that, perhaps, it was or that it might be. I am not sure exactly how positive your answer was in that respect.

But I wanted to ask you whether you could tell us what you understood counsel to mean by, "being in accord, with Federal Income Tax regulations," and whether it is your understanding that Federal Income Tax regulations provide any method for handling this class of expense?

A. Well, I think my answer to Judge Hanley's question, that I sufficiently qualified my answer to indicate that while I thought that generally speaking such payments were properly deductible for tax purposes, I would not know what the company situation was, because I had not studied the tax records of the company.

Trial Examiner Ballinger: Mr. Austin, is that material to this case? I refer to the income tax situation.

7849 Mr. Austin: I doubt it, but the question was asked and the answer given.

Trial Examiner Ballinger: The Income Tax Bureau determines the profit and loss of the operations. In this case we are now trying, we are ascertaining a cost differential. Are they not separate and distinct propositions?

Mr. Hanley: It is the position of the Respondent, your Honor, this, that your Honor is quite right in saying that the Government determines profit and loss, but in so doing they permit only proper expenses and costs for the period involved.

That is the whole point of whether or not it is a properly deductible cost for the period involved.

Trial Examiner Ballinger: There is no question in the world but what it is a cost?

Mr. Hanley: And for the period involved, so far as the Federal Government is concerned.

Trial Examiner Ballinger: And if determined a profit and loss of the company, it is a cost that was incurred; that is, paid in a certain year. It may very well present an entirely different proposition from the question present in this case. That is a matter, I think, of argument.

The Witness: The question of the statute of limitations may run, so that they may want to afford relief to the taxpayers.

7850 Trial Examiner Ballinger: Let us not get into the statute of limitations.

We will take a three minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order. You may proceed.

By Mr. Austin:

Q. Mr. Lundball, are profits on sales of capital assets taxable under the Income Tax Laws?

Mr. Hanley: What is the question?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Mr. Hanley: That is objected to as immaterial. I have never heard of that before in this lawsuit. I think I have heard of everything, but I have not heard of that.

Trial Examiner Ballinger: Where does that become material?

Mr. Austin: It is contended by counsel for the Respondent that if the Income Tax people charge these annuity payments or allow them as charged against income that that has some materiality.

Mr. Hanley: That has not anything to do with capital. Nobody has ever contended yet in this lawsuit that account 520 was capital.

Trial Examiner Ballinger: To save time, let the

7851 witness answer the question.

The Witness: I—

Mr. Hanley: That is objected to. I want to pursue that just a moment further. I object to that as incompetent, irrelevant, and immaterial. It has nothing to do with this case. It has never heretofore been suggested by anyone else in this lawsuit. It is improper rebuttal, for, referring to account 520, that part of the account 520 has never been referred to as a capital account, and it is not a capital account, and can have no relevancy at all with reference to any account that has so far been indicated in the case;

And further, that it is improper indirect examination, because the subject, on account 520 or any other account, was not gone into on the cross-examination of this witness.

Mr. Austin: Your Honor, the sole purpose is just this:

To show that the fact, if it be a fact, that the Internal Revenue Bureau taxes certain items of income or profit, or allows certain other things as credits, does not prove anything.

I just want to bring out, if I can, that profit and loss and/or capital loss in internal revenue income tax computations, entering into income tax pictures, do not have anything to do with the current income or expense. Of course, there may be a lot of other items. This is just an example.

7852 Trial Examiner Ballinger: The Examiner would under normal conditions sustain the objection to the question on the ground that it is utterly immaterial to the case, but he has let in a lot of other material in this record broadening the scope of the examination.

The Examiner overrules the objection and if the witness can answer, he may do so.

Read the question.

(The reporter read the question as follows:

"Q. Mr. Lundball, are profits on sales of capital assets taxable under the Income Tax Laws?")

The Witness: I understand that they are.

By Mr. Austin:

Q. Are capital losses deductible from—

A. (Interposing): I think so.

Q. —from the gross income in determining net income?

A. I think the tax concept of profit—of accounting as distinguished from—

Trial Examiner Ballinger: (Interposing): Mr. Lundball, unless you know with reasonable certainty, why, you are not in a position to answer the question. If you do know, you may answer.

Mr. Austin: Well, he did answer the question and he gave a further opinion, or was giving it.

Mr. Hanley: Have you finished your answer, Mr. 7853 Lundball?

The Witness: Well, I was going to say that the accounting for tax purposes is influenced by the statute in the collection of taxes, and to some extent, it differs from the accounting for management purposes.

By Mr. Austin:

Q. Well, are profits and losses from the sales of capital assets, in your opinion, income or expense from current operation?

Mr. Hanley: Same objection. We are just taking a flight to the moon here, Judge.

Trial Examiner Ballinger: The objection is overruled, but the Examiner is not going to permit a continuation of this line of examination.

By Mr. Austin:

Q. I would like to amend that, to a "current marketing operation"?

A. No. I do not think so, because they are outside of the normal business operations of the company; that is, they do not result from the sale of the company's products but they result from the sale of property with which the company does business.

Mr. Austin: That is all.

Recross Examination by Mr. Hanley.

7854 Q. One question, if you know: Under the accounting procedure of the Respondent company, is account 520 a capital account?

A. No, sir.

Mr. Hanley: In view of the answer of the witness, the Respondent now moves to strike all of the redirect examination for all of the reasons indicated in the objections to the question.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The motion is granted and the testimony is stricken

Mr. Austin: Well, then, your Honor, I now move t strike out the question and answer of Mr. Hanley and th witness respectively, regarding whether or not Respondent's procedure in connection with account 520 was i accord with Federal Income Tax regulations.

Mr. Hanley: Well, that motion is certain resisted. Tha was asked on the basis of the nature of the account, whic is not a capital account.

Trial Examiner Ballinger: The motion of counsel fo the Commission is denied.

Mr. Austin: Then, your Honor, as I understand i you leave in the testimony of the Respondent that is i response to questions of the Respondent's counsel i

regard to Federal income tax and you strike from the
7855 record my redirect examination on exactly the same subject.

Trial Examiner Ballinger: No.

Mr. Austin: That is the effect of your Honor's ruling.

Mr. Hanley: That is objected to as polling the ruling of the Examiner.

Trial Examiner Ballinger: That is a question which is not presented in this case, and it is in no wise connected with account No. 520. For that reason it was excluded.

Mr. Austin: Your Honor, I would like to go into that further—

Trial Examiner Ballinger: (Interposing): The record speaks for itself. The matter is closed.

Mr. Austin: I would like to be off the record, if there is no objection.

Mr. Hanley: No objection.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: If your Honor please,—

Mr. Austin: (Interposing): If your Honor please, right at this stage of the case, I am sorry, but unless your Honor will read the testimony over, in which event I will accept your Honor's ruling, but I think that you are under a misconception of the witness' testimony that you
7856 struck out, in that you struck out testimony which directly relates to Respondent's questions.

Trial Examiner Ballinger: Go back and read the cross-examination by Judge Hanley.

Mr. Austin: If you will do that, I will not say another word.

Mr. Hanley: Well, first take this:

The Respondent objects to counsel for the Commission directing the Trial Examiner as to what testimony or ruling shall stand.

Trial Examiner Ballinger: It is immaterial to the Trial Examiner whether that appeal is taken from his ruling or not, but in order to clarify the record at this point, I will permit that to be read.

Mr. Hanley: Your Honor is permitting it to be reconsidered?

Trial Examiner Ballinger: In order that the Trial Examiner may satisfy himself as to the correctness of the ruling, the reporter is instructed to turn to the question of Judge Hanley, and read the question and answer.

Mr. Hanley: That was my last recross examination question, as I understand it.

Trial Examiner Ballinger: The reporter is directed to read the entire recross examination and redirect examination of this witness.

7857 Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: This procedure is objected to on the part of the Respondent as being highly prejudicial to the rights of the Respondent in that counsel for the Commission has persistently argued with the Court, and has polled the rulings of the Court after the Court has distinctly said that a ruling had been made.

Mr. Austin: I think that the Court is under a misapprehension, and if that is true, I think I am only aiding justice in asking that the matter be corrected at the time.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Examiner overrules counsel for the Respondent and directs the reporter to read the redirect testimony thus far given.

(The reporter read the redirect testimony of the witness thus far given.)

Trial Examiner Ballinger: The Examiner modifies his previous ruling and limits the testimony to strike that portion of the redirect commencing with the question:

7858 "Mr. Lundball, are profits on sales of capital assets taxable under the Income Tax Laws?"

The remainder of the testimony is stricken.

Any further questions of the witness?

Does either counsel desire to ask any further questions of the witness?

Mr. Hanley: No, sir.

Mr. Austin: No, sir.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Trial Examiner Ballinger: We will take a five minute recess.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

Call your next witness.

Mr. Hanley: At this time, the Respondent moves to strike from the testimony all of the testimony of the witness Lundball for all the reasons assigned in the objections to this testimony.

Trial Examiner Ballinger: The Motion is denied.

Mr. Austin: I will call Mr. Depue as my next witness.

CARL HARMON DEPUE, was thereupon called as a witness for the Commission and, having first been duly sworn, testified as follows:

7859 *Direct Examination by Mr. Austin.*

Q. Please state your name.

A. Carl Harmon Depue.

Q. Where do you reside, Mr. Depue?

A. Washington, D. C.

Q. Are you employed by the Federal Trade Commission?

A. I am.

Q. What is your position with the Federal Trade Commission?

A. Well, supervisor of investigations.

Mr. Hanley: If you will speak a little bit louder, please, Mr. Depue, I have a little difficulty in hearing you.

The Witness: I said—supervisor of investigations.

By Mr. Austin:

Q. In what capacity?

A. Examiner-in-charge.

Q. Are you concerned with accounting matters?

A. Yes. Many of them involve cost studies. Most of them do.

Q. Are you an accountant, Mr. Depue?

A. I am a certified public accountant.

Q. You are a certified public accountant?

A. Yes, sir.

Q. What state?

A. Indiana.

Trial Examiner Ballinger: What state?

7860 The Witness: Indiana.

By Mr. Austin:

Q: How long have you been in the employ of t Federal Trade Commission?

A. Thirteen years.

Q. Have your dealings involved accounting question and matters of accounting during all of that period?

A. Yes, sir.

Q. Will you explain a little more in detail the nature your work with the Federal Trade Commission in co nection with accounting practice, and particularly in rel tion to the Robinson-Patman Act matters, if you have bee so concerned?

A. Well, the investigations are mostly industry-wide-

Mr. Hanley: What was that?

The Witness: Industry-wide.

Mr. Austin: Industry-wide?

The Witness: Yes.

By Mr. Austin:

Q. Continue.

A. And most of them deal with cost studies, but son of them are financial. I was responsible for considera tion and review of all cost studies submitted for four five years, submitted under the Robinson-Patman Act.

I believe, not in answer to your question, but perhap I should state this:

7861 I have had a great many years of public practice and also during the last war, in the War Departmen in cost studies—studies of claims arising under the subjec of cancelled contracts. I have been particulary concerne to a large extent, with every aspect of accounting, mor or less directly.

Q. You say you have been concerned to a certai extent with practically every aspect of accounting?

A. Yes. I have been directly concerned, I would sa to a very large extent with every aspect of accountin

Q. What was the last part of your answer?

A. I say, I have been directly concerned, to a larg extent, with every aspect of accounting.

Mr. Hanley: What was the last?

The Witness: I said, I have been concerned direc to a large extent with every aspect of accounting.

Mr. Austin: Directly concerned to a large extent wit every aspect of accounting.

Trial Examiner Ballinger: How long were you a public accountant before you came with the Commission?

The Witness: Eight years.

By Mr. Austin:

Q. How many years was that?

A. Eight years.

Trial Examiner Ballinger: In Indiana?

7862 The Witness: No, Cincinnati, Ohio.

Trial Examiner Ballinger: Of what societies are you a member, if any?

The Witness: I was a member of the American Institute of Accountants;

National Association of Cost Accountants;

Indiana Society of Certified Accountants.

By Mr. Austin:

Q. Are you familiar with Mr. Warmack's testimony in this case regarding Respondent's Account No. 520, entitled "Annuities and Retirement Plan Expense"?

A. Yes, sir. I heard it.

Q. I am referring particularly to Mr. Warmack's testimony regarding the nature of the expense going into this account.

A. Yes, sir. I heard it.

Q. Have you seen the Commission's Exhibit 108, which is the booklet setting forth the Respondent's annuity and retirement plan?

A. Yes, sir.

Q. Have you read it?

A. Yes, sir.

Q. Did you hear Mr. Lundball's testimony this morning?

A. I did.

Q. The expense in the amount of $157,014.35 entered in account 520 in Respondent's Exhibit 101 has been 7863 described by Mr. Warmack and Mr. Lundball as comprising three parts, as follows:

The first item of $26,226.38, being contributions made by the company to match contributions made by employees engaged in the Detroit field.

Second: The item of $108,508.83, being a portion of the amount contributed by the Respondent company in 1940 to a trust fund set up for the purpose of covering the retirement benefits to employees for services performe to January 1, 1939.

The third item of $22,279.06, being payments made b the Respondent company for the year 1940 to employees that is, former employees of the Respondent who retire prior to January 1, 1939.

I would like to have you take each of those three items o expense, Mr. Depue, and state whether or not in you opinion those items, or any of them, are selling costs o the Respondent company for the year 1940?

A. I—

Mr. Hanley: (Interposing): Now, just a moment, Mr Depue. May I ask a foundational question, your Honor?

Trial Examiner Ballinger: You may.

Mr. Hanley: Have you read Respondent's Exhibit 99?

The Witness: No.

7864 Mr. Hanley: Have you read Respondent's Exhibit 100?

The Witness: No.

Mr. Hanley: Have you read and studied Respondent's Exhibit 101?

The Witness: I glanced over it.

Mr. Hanley: Why, I did not hear your answer. I am sorry.

The Witness: I glanced over it.

Trial Examiner Ballinger: He said, he glanced over it.

Mr. Hanley: Oh, thank you.

Have you read all of the testimony of Mr. Boatwright?

The Witness: I have not read any of it.

Mr. Hanley: Did you hear it?

The Witness: I heard some of it.

Mr. Hanley: Have you heard or read all of the testimony of Mr. Warmack?

The Witness: Did you say "all"?

Trial Examiner Ballinger: All.

Mr. Hanley: Have you heard or read all of the testimony of Mr. Warmack?

The Witness: No.

Mr. Hanley: Have you ever been in any office of the Respondent company?

The Witness: No.

7865 Mr. Hanley: Have you ever examined any of the records and files, data, and accounting matter of the Respondent company?

The Witness: Nothing except that which was or would pertain to account 520.

Mr. Hanley: That is to say, this booklet, Commission's Exhibit No. 108?

The Witness: Yes, sir. And the figures that were stated just now I heard.

Mr. Hanley: Is that all that you know about this matter, Mr. Depue?

The Witness: That is all that I have. I think that describes the figures referred to.

Mr. Hanley: The Respondent now objects to the witness giving any expert, critical opinion as to anything in respect of Respondent's accounting or the Respondent's case so far as it refers to the Respondent's cost study here submitted, for the reason that his affirmative testimony has demonstrated that he is legally incompetent to testify in respect of any critical, expert opinion, not having made any study of any of the matters involved to any sufficient extent to enable him or qualify him as a competent, expert witness on this particular problem.

Trial Examiner Ballinger: I will hear from counsel for the Commission.

7866 Mr. Austin: May I ask a question, please of the witness, before answering your Honor?

Trial Examiner Ballinger: You may.

By Mr. Austin:

Q. I believe I understood you to say that you were familiar with Mr. Warmack's testimony as to the description of the nature of these three various types of expense entering into account 520.

A. I did. I read it.

Q. You also stated that you heard Mr. Lundball's testimony this morning?

A. Yes, sir.

Q. In regard to the account?

A. Yes, sir.

Mr. Austin: If your Honor please, this question goes solely to whether the expense going into this account; that is, these various payments to trust funds and for annuities, and so forth, are marketing expense for the year in which they were paid.

It does not involve or require any knowledge of why or how or where the Respondent allocated these costs because you do not get to the question of allocation if they are not proper marketing costs.

So, Exhibit 99 and Exhibit 100, and any examination of the Respondent's books to determine whether the expense was actually paid, or how the amount of the
7867 payment was arrived at, is entirely beside the point. The witness is being asked, as an expert accountant, whether these payments did or did not constitute marketing expense for the year 1940.

All that he had to know to answer the question is the nature of the expense itself and the purpose for which it was made, and when it was made. And that he does know, according to his testimony, both from having read the record on the subject, and from having listened to Mr. Lundball this morning.

Trial Examiner Ballinger: The testimony is purely cumulative? Is it not that?

Mr. Austin: It is cumulative to that of Mr. Warmack and Mr. Lundball with regard to this same account. I think his qualifications are exactly the same as those of Mr. Lundball for giving his answer.

Trial Examiner Ballinger: No, Mr. Lundball qualified himself much better than this witness.

However, as the objection, in the opinion of the Examiner, runs to the weight of the witness' evidence, rather than its admissibility, the objection is overruled and the witness may answer.

Mr. Hanley: May it be understood formally that the objection is a continuing one to the opinion evidence by this witness?

7868 Trial Examiner Ballinger: It is so understood, and in addition thereto, the right of counsel to, at the conclusion of the witness' testimony, move to strike his answer.

Read the question to the witness.

(The reporter read the question as follows:

"Q. Did you hear Mr. Lundball's testimony this morning?

"A. I did.

"Q. The expense in the amount of $157,014.35 entered in account 520 in Respondent's Exhibit 101 has been described by Mr. Warmack and Mr. Lundball as comprising three parts, as follows:

"The first item of $26,226.38, being contributions made by the company to match contributions made by employees engaged in the Detroit field.

"Second: The item of $108,508.83, being a portion of the amount contributed by the Respondent company in 1940 to a trust fund set up for the purpose of covering the retirement benefits to employees for services performed to January 1, 1939.

"The third item of $22,279.06, being payments made by the Respondent company for the year 1940 to employees; that is, former employees of the Respondent who retired prior to January 1, 1939.

"I would like to have you take each of those three
7869 items of expense, Mr. Dupue, and state whether or
not in your opinion those items, or any of them, are
selling costs of the Respondent company for the year
1940?")

The Witness: In my opinion, the item of twenty-six thousand dollars plus is a marketing expense for the year 1940.

The other two items of one hundred and eight thousand dollars plus and twenty-two thousand dollars plus properly apply against the operations of the company for the years prior to 1939—prior to 1940.

By Mr. Austin:

Q. What other reasons—what are your reasons, Mr. Depue?

A. Because of an accrual theory, which is customary with most companies, and certainly the larger ones, and has been for a great many years, it would require them to apportion their expense properly against each year's operation so that they would accrue at the end of each year anything that pertains to that year's expense which might not have been paid, and would defer at the end of the year, anything which may have been paid for but properly applied to future years, the object being to determine as exactly as you can reasonably determine, the actual cost of operation, and net profit for each calendar year, or fiscal years, and that goes even for months in many cases so far
as operating statements are concerned.
7870 Therefore, that portion of the pension or contribu-
tions to a pension which are predicated upon prior
years' services should have been accrued in those years

had they followed good accounting practice, and inasmuc as they did not do so, should now be applied against earne surplus prior to 1940.

Q. Does that statement apply to both the one hundre and eight thousand dollar item and the twenty-two thousand dollar item?

A. Yes. They should both apply against earnings fo prior years because they are based upon services rendere during prior years.

Mr. Austin: You may have the witness.

Mr. Hanley: The Respondent now moves to strike all o the testimony beginning with the first undertaking to express an opinion as to the accounting practices of th Respondent, of the validity of the accounting soundness o any of the procedures of the Respondent company for a of the reasons indicated in the objection to the question

For the further reason that it is purely cumulative;

And for the additional reason that the witness, after having said that he made no study, is and has assumed t
say that the Respondent company failed to pursu
7871 good accounting practices in 1939 and prior year
when his affirmative testimony indicates that he jus
does not know anything about it.

Trial Examiner Ballinger: The motion to strike is denied.

Mr. Austin: Any cross-examination?

Mr. Hanley: Yes.

Cross-Examination by Mr. Hanley.

Q. Are the items of one hundred and eight thousan dollars and the twenty-two thousand dollar item marketin costs?

A. Yes.

Q. Is the force of your testimony simply that they ar not applicable in any part to the year 1940?

A. That is right.

Q. If the Respondent company or any company has plan of pensions or annuities spreading over the years retirement of any employee or group of employees, in yo judgment as an accountant, is it not proper that from yea to year that company may make provision for that indef nite liability by spreading from year to year currently th cost of building up the fund to care for such liability?

Trial Examiner Ballinger: Do you understand the question?

The Witness: Can I have the question again?

7872 Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

(There was a short pause.)

Trial Examiner Ballinger: Do you understand the question?

The Witness: I think it would have been proper for them to accrue the burden determined actuarily which would apply to each of those years.

By Mr. Hanley:

Q. Do you think it improper accounting to accrue the burden of paying present employees for past services by applying the funds currently toward the trust fund to take care of that obligation, as for instance in the case of the one hundred and eight thousand dollar item?

A. There is nothing wrong about that. If I understand your question, it is as to whether or not those contributions may be made in 1939 or 1940 in contemplation of future years. If I understand the question, it goes to whether or not those contributions should be treated as current expense of this year—of each of those years in which the contribution is made.

Is that the question may I ask?

Q. The question is, Mr. Depue, that John Jones is working for the company today. In all probability he will be working for the company for some years to come. There will come a time when he will retire. He was working
7873 for the company in 1939 and prior years. In 1939,
the plan of the company—if you do not know it, it is a fact—was changed in reference to annuities, but the obligation of the company in respect of the annuities of that employee were given consideration on the basis of the old plan in effect up to 1939.

Now, I am asking you if it is bad accounting on an accrual basis, or any other kind of a basis, to give consideration currently to applying to a fund as the company goes along, as a continuing cost into these various funds to ultimately take care of the obligation to pay the annuity to this hypothetical employee, John Jones?

A. There is nothing wrong about building up a fund. It is only a question of into what years the expenses are going to be put, or you are going to charge your contributions.

Q. Well, how would you do it? If you have the problem, and if you were going to build up the fund, one year along with another, just how would you do it?

A. It would be just like your twenty-six thousand dollar item was handled, so should each of the others be handled, and for the prior years the cost would apply against the operations of the prior years.

Q. That is to say that no part of any obligation of the company in reference to annuities which may be pay-
able for services performed in 1939 can be charged
7874 up from that time on forever during the operations of
this company?

A. That is right, in my opinion, it is not a charge against a subsequent period.

Q. Very well. You heard Mr. Lundball's testimony.

A. Yes.

Q. I refer you to page 7569 of the record through to the top of page 7575, which is a statement of facts testified to here by Mr. Warmack as being comparable to the practice of the Respondent company in respect of its annuity plan; also five opinions or answers denominated as Answers 1 to 5, inclusive.

I will ask you to state whether or not you agree in principle with the method of accounting there outlined in answers 1 to 5, inclusive.

A. I do not agree with Answer No. 1.

Q. How about Answer No. 2?

A. I agree with only that portion which says:

"Had the directors chosen to make a lump payment of the total estimated required amount, and at the same time, gone on record that such payment was in recognition and settlement of past services rendered, then a permissible treatment would have been to charge the payment to earned surplus."

Q. How about No. 3? By the way, Mr. Depue, are you
reading the things here from notes you prepared or
7875 that some other accountant, in part, prepared?

A. I prepared them myself.

Q. Just adverting to your last answer for the moment, before you proceed to answer No. 3, you have quoted some language with which you agree?

A. Yes, sir.

Q. What difference from an accounting standpoint does it make, if any, that the directors had gone on record as doing this, or that, or something else?

A. Well, it establishes and gives recognition to the obligation that you are dealing with, and to the charge to which it pertains.

Q. Suppose they go on record every year, currently?

A. Well, that is all right.

Q. How does that affect the one hundred and eight thousand dollar item?

A. I would make my answer this way:

That the language to which you referred helps to establish the facts which must govern and to determine what is the proper procedure and how it should be treated. Anything and everything that contributes to establishing the facts, all help in determining the practice which would be proper.

Q. Did the Standard Oil Company go on record by its management or Board of Directors—

7876 A. (Interposing): Yes.

Q. —or stockholders?

A. Yes, Exhibit 108, I think it is in the plan which you published, it is stated that the trust fund was created to pay pensions based upon past services.

Q. And the only objection you have is that they did not put it all at once into the fund, but spread it out over the future years? Is that correct?

A. From an accounting standpoint, it does not matter when they are paid. It is only a question of when the pension was earned, and when the services were rendered to the company by reason of which it is paid.

Q. Mr. Depue, when is a pension earned, if a man works twenty-five years, when is a pension earned?

A. The amount of his pension, in that case, and in most cases, depends on the length of service, so much every year, and he is earning it in a sense, the pension that he will ultimately receive and the company is receiving services of which it is going to benefit and for which it is going to pay the pension year by year.

Q. Actually. Now, will you proceed to Answer No. 3, Mr. Depue? Please, Mr. Depue.

A. Yes.

Q. You have that?

7877 A. I agree with that part of Answer No. 3, appearing at page 7572, which reads as follows:

"Thus the basis of the payments is apparently related to services rendered by the employees prior to the inception of the Social Security Act. Having regard to this retroactive feature, it might therefore be asserted that the annual payments to be made should be charged to the earned surplus account."

I disagree with the part expressed in the next few words which read as follows: "* * * now in an estimated lump sum or"—the remainder with which I do agree reads as follows:

"annually as the actual payments are made and not to the current and future annual income accounts; we think that procedure is permissible."

I do not subscribe in full to the remainder of No. 3.

Q. How much?

A. (The witness examined the remaining part of No. 3.)

The Witness: I disagree with the remainder of it. I do not agree with the remainder of it.

By Mr. Hanley:

Q. How about No. 4?

A. I disagree with No. 4.

Q. How about No. 5?

A. I agree with the first paragraph, numbered one. I do not agree with the remainder—not with the remainder.

7878 Q. Did you supply Mr. Lundvall with a copy of the memorandum which you prepared in connection with these five answers, and from which he testified this morning?

A. No.

As a matter of fact, the memorandum you refer to was prepared by both of us jointly. We went over and considered these questions and it just happened that we were in entire agreement, in our opinions, in our own opinions, and it is only a reminder to help us find what we agree with and what we do not.

Q. Did you discuss it before you agreed?

A. No. We were in agreement, because we both held the same opinions concerning the only questions involved.

Q. Mr. Depue, the first time you discussed it, did you both independently delete from answer No. 3, the words:

"now in an estimated lump sum or * * *"

Did you discuss this problem?

Mr. Austin: Your Honor, I object to that question. It is immaterial whether they did or did not discuss it before or after. The witness has testified that he and Mr. Lundvall discussed these answers to these questions together and arrived at their conclusions, and that they were in agreement.

Trial Examiner Ballinger: This is cross-examination. 7879

Mr. Austin: That is all right.

Trial Examiner Ballinger: It is permissible.

Mr. Austin: Is the objection overruled.

Trial Examiner Ballinger: The objection is overruled.

By Mr. Hanley:

Q. The Court says you may answer, Mr. Depue.

Trial Examiner Ballinger: Read the question to the witness.

(The reporter read the question as follows:

"Q. Mr. Depue, the first time you discussed it, did you both independently delete from answer No. 3, the words:

" 'now in an estimated lump sum or * * *'

"Did you discuss this problem?")

The Witness: Well, I think it would be helpful if I answered your question this way, that we had before us a copy of these various answers that were made, and one of us would read, and if there seemed to be an occasion to pause, we would, and each would express his thoughts paragraph by paragraph, or sentence by sentence as the case may be. We were in accord from beginning to end. That is all there is to it:

By Mr. Hanley:

7880 Q. Did you discuss it with Mr. Warmack?

A. No.

Q. Ever?

A. No.

Q. You are familiar with the testimony in connection with these five answers given by Mr. Warmack?

A. I have heard it, but I do not recall it. I do not believe I remember it very well.

Q. Were you in agreement with his answers?

A. I do not know because he was referring to the various lines, and I do not know to just what he was referring.

Q. Did you hear him quote various portions with which he stated he was in agreement or disagreement?

A. Yes, sir.

Q. Do you or did you agree with his answers at that time?

A. The only impression I had was that I thought I could not be specific, I do not know whether I was completely or not.

Q. Do you know whether you are in agreement with him now?

A. I do not know.

Q. Do you know whether you are now agreeing with him?

A. I do not know that either.

Mr. Hanley: Take the witness.

Redirect Examination by Mr. Austin.

Q. Mr. Depue, in your opinion, are current contributions to annuity funds for marketing services prop-

7881 erly applicable to current marketing costs?

A. Yes, sir.

Q. In your opinion, are current contributions to annuity funds for past years' services applicable to current marketing costs?

A. No.

Mr. Austin: That is all.

Mr. Hanley: That is all.

Trial Examiner Ballinger: Proceed.

Mr. Hanley: The Respondent now moves to strike the entire testimony of the witness in respect of any opinions expressed by the witness relative to the accounting of the Respondent company ~~or its procedures~~, or in connection with this cost study, for all the reasons assigned in its objection to the witness' testimony, and in the motion at the close of its direct testimony;

And for the further reason that it now affirmatively appears that if the witness has heard anything about this matter, it is a matter of pure hearsay so far as this witness is concerned;

That he has made no study whatever independently of any one in connection with this matter.

Trial Examiner Ballinger: The motion to strike is denied.

7881-A Mr. Depue, you are excused.

(Witness excused)

Mr. Austin: If your Honor please, I move that we be in recess for lunch to reconvene at two o'clock p. m.

Trial Examiner Ballinger: Motion is granted.

And now, at 12:25 p. m., the hearing stands in recess until 2:00 p. m.

(Whereupon, at 12:25 p. m., a recess was taken until 2:00 p. m., this day.)

7882 Afternoon Session

2:00 p. m.

Trial Examiner Ballinger: Come to order.

The Examiner is prepared to rule on the motion of counsel for the Commission to strike Respondent's Exhibit No. 3 from the record, it being contended by counsel for the Commission that if Respondent's Exhibit No. 3 is permitted to remain in the record, then evidence based upon Moody's Industrial Manual is admissible.

The Examiner disagrees with the contention of counsel for the Commission.

Respondent's Exhibit No. 3 is based upon a publication issued by the Federal Reserve Board or Federal Reserve Bank. As the Examiner recalls, this was printed at the Government Printing Office, and is a public document.

The Examiner conceives a plain distinction between the document referred to by counsel for the Commission and the document admitted in evidence as Respondent's Exhibit No. 3.

The motion is denied.

Mr. Austin: Well, the Commission rests its case on rebuttal at this time.

Trial Examiner Ballinger: Is the Respondent ready to proceed?

Mr. Hanley: I understand that means that the 7883 Commission rests its case. Am I right in that understanding, your Honor?

Trial Examiner Ballinger: That is what the Examiner understands.

Mr. Hanley: The Commission having finally rested its case, Respondent renews all of its motion for dismissal of this action in whole or in part;

Respondent reserves and renews all of its objections to evidence and motions in respect of evidence received against the Respondent and over the objection or against the motions of the Respondent for all of the reasons at the time set forth;

Respondent specifically renews its motions to strike from the record the testimony of Messrs. Warmack, Lundball, and Depue, for the reasons as set out in the objections to such testimony, and in the motions to strike.

Trial Examiner Ballinger: That portion of the motion relating to the dismissal of the proceeding is a matter over which the Examiner has no jurisdiction and should be addressed to the Commission.

All of the remaining portions of the motion are denied.

Mr. Hanley: Mr. Boatwright, will you take the stand, please?

7884 JOHN W. BOATWRIGHT was thereupon recalled as a witness for the Respondent and, having been previously duly sworn, testified further as follows:

Direct Examination by Mr. Hanley.

Q. You are Mr. J. W. Boatwright?

A. Yes.

Q. Mr. Boatwright, you have heretofore been sworn in this case, and have testified at considerable length? Is that correct?

A. Yes, sir.

Q. I direct your attention now to Commission's Exhibit 129. Does the six one-hundredths of a cent per gallon selling cost for gasoline as set forth in that exhibit provide a sound comparison with the selling cost of .079 cents, as set forth in Respondent's Exhibit 31?

After you have given your answer, please explain your reasons for that answer, Mr. Boatwright.

A. .06 cents per gallon, as indicated on Commission's Exhibit 129 is not comparable with the selling cost of .079 as presented in Respondent's Exhibit 31.

There are two reasons for this:

In the first place, the calculation, as made in Commission's Exhibit 129 is predicated upon a single salesman's territory, which is the sport case in a true sense of the

word, because there is not another salesman's terri-
7885 tory comparable therewith in either the Detroit metropolitan area, or in the Detroit field.

Secondly, it is predicated upon time ratios determined and set forth for the year 1940, which have not been checked with the year 1937, and which may or may not represent the 1937 time allocations.

Incidentally, had it been desired by the accountant for the Commission to compare these, it would have been an easy matter to have checked the ratios in there, in either the Detroit office or the Chicago office.

Q. Did he make any inquiry in that regard?

A. Not to my knowledge.

Q. Referring, Mr. Boatwright, to gallonage as an allocation factor. Were you at any time requested by Mr. Warmack or by anyone on behalf of the Commission to provide any documentary evidence which would substantiate the use of gallonage as an allocation factor?

A. Not to my recollection, but if so, it would have been an easy matter to have supplemented many of the reasons given by Mr. Houghton for the use of the allocation factor.

Q. What are some of those reasons?

Mr. Austin: Objected to unless the witness knows what the reasons were as given by Mr. Houghton. It does not appear that he was in Detroit and heard or saw what Mr. Houghton said or submitted to the witness.

7886 Trial Examiner Ballinger: What have you to say to that?

Mr. Hanley: I will lay a foundation for that.

By Mr. Hanley:

Q. You heard Mr. Houghton's testimony, did you not, Mr. Boatwright?

A. I did.

Q. Now, will you please answer the question?

Mr. Austin: I still object. I do not believe Mr. Houghton's testimony set forth the reasons given by him for the use of the gallonage allocation, except as to the extent that he said that certain checks and tests were made.

Mr. Hanley: Very well, I will proceed a little further.

By Mr. Hanley:

Q. You heard Mr. Warmack's testimony?

A. Yes.

Q. As to what he and Mr. Houghton checked?

A. Yes, sir.

Q. Your did?

A. Yes, sir.

Q. And his answers to the questions as to what Mr. Houghton said?

A. Yes, sir.

7887 Q. Very well. Now, will you please answer the former question.

Trial Examiner Ballinger: The question is now renewed, and the reporter will insert it at this time.

(The reporter read the question as follows:

"Q. Referring, Mr. Boatwright, to gallonage as an allocation factor, were you at any time requested by Mr. Warmack or by anyone on behalf of the Commission to provide any documentary evidence which would substantiate the use of gallonage as an allocation factor?

"A. Not to my recollection, but if so, it would have been an easy matter to have supplemented many of the reasons given by Mr. Houghton for the use of the allocation factor.

"Q. What are some of those reasons?")

Mr. Austin: I object to that question, your Honor, because I think it is based upon a conversation between Mr. Warmack and Mr. Houghton in Detroit at the time Mr. Warmack was in Detroit. And Mr. Warmack simply said that he asked for documentary support for the gallonage allocation and did not get it.

And Mr. Houghton says that, to the best of his ability, he explained to Mr. Warmack the reasons of the Respondent for using the gallonage allocations.

What these reasons are does not appear, and I do 7888 not see how Mr. Boatwright could testify that he could have added to that unless he knows what Mr. Houghton told Mr. Warmack, and he was not present at Detroit at the time, and could not know.

Trial Examiner Ballinger: Well, if the reasons were available and could have been obtained at that time, the witness can testify to them.

Mr. Austin: Well, I am objecting to this on the ground that he says that he could have added to what Mr. Houghton told Mr. Warmack. Perhaps Mr. Warmack told Mr. Houghton what he wanted, and perhaps Mr. Houghton told

Mr. Warmack all there is to know. I do not know, and I do not see how Mr. Boatwright can know either.

If he, the witness, is simply to be asked what the Respondent had in support of a gallonage allocation, that is another thing.

By Mr. Hanley:

Q. Well, let me ask you this—

Mr. Hanley: Mr. Austin, I do not care to be technical about it. I think it is a proper question.

By Mr. Hanley:

Q. In addition to what I have asked you, Mr. Boatwright, you have heard Mr. Houghton's testimony, Mr. Warmack's testimony, and are you now in a position to and will you now state what reasons there are that substantiate the use by the Respondent company of a gallonage
7889 factor as an allocation factor?

A. Yes.

Q. Please do so.

A. May I present my answers in an outline form?

Q. You may.

A. First: The question of gallonage as an allocation factor is one of the most discussed and most studied parts of our entire accounting practice. I know that separately several different men have analyzed the use of this allocation factor. I shall enumerate the men:

(1) is Mr. C. B. Bergeson, the comptroller of the company.

(2) is Mr. Lawrence Hanna, who is a traveling representative of the auditor of the sales accounting department.

(3) and another, is Mr. George Anderson, who has been greatly interested in this problem in connection with the Respondent company;

The fourth one is W. B. Haas, the auditor of the manufacturing accounting department.

Each of these four men have attempted to find allocation factors which, in their judgment, would result in a more true reflection of costs in individual channels than might be afforded by the gallonage basis, and each individually has returned to the conclusion that the use
7890 of the gallonage factor was correct.

Second: Price-Waterhouse, who audits the books of the Respondent company, and they have been asked and have been consulted about the use of the gallonage factor as an allocation procedure on many of our accounts.

As yet they have been unable to suggest a procedure which would more accurately reflect the true costs than that currently obtained by the use of the gallonage factor.

Third: In many of the studies conducted by the sales research department results have been secured which tend to substantiate and support the use of the gallonage factor.

Fourth: There are twenty-eight sales fields in our marketing territory.

If we take the selling cost as represented by salesmen's salaries as one series of data, and if we take the direct gallonage resulting from the effort of these sales representatives, there is a mathematical relationship between the movement of the two series of data which approaches a unit.

We speak in statistics of correlation of two series of data and that more or less means a monthly concurrence of the movements of two series of data.

If the correlation is perfect, it represents a unit of one.

7891 If there is a partial correlation, it may be represented by .6 or .7 or .8.

The higher we can get as we approach unity, the more clearly there is a dependability of the inter-relationship of the movement of the two series. With the salesmen's salaries and gallonage there is a correlation factor in excess of .92.

Fifth—

Q. (Interposing.) Just a moment. Would 100 be perfect?

A. One would be perfect. .92 would be a part of one. The unit is one.

Q. That would be 92/100 of one?

A. That is correct.

Q. I see. I am sorry. Go ahead.

A. Fifth: The next that I was going to mention was office expense, salaries—accounting; another large expense item.

Again taking the series of office expense—salaries—accounting for each of the twenty-eight fields, and taking as a related series of data the gallonage sold and handled on our books in each of those fields, we can come to a very high and significant correlation factor, being in this case .94.

Now, these two are merely mentioned as representative of the high degree of relationship.

I shall continue:

7892 Sixth: The next reason is that from many studies that the sales research department has conducted, we have established as beyond a reasonable doubt, I think that purchases of petroleum products, such as gasoline, motor oil, and so forth, are made by customers each in its turn supplementing the other.

They are used concurrently. They are frequently purchased concurrently.

In the retail channel, approximately 50 per cent of the gasoline purchasers, namely, the motorists will tell us that the reason they buy a specific brand of motor oil is because it is sold at the point where they buy their gasoline. That is based upon interviews with literally tens of thousands of customers.

(a) Another thing we have done, we have taken the actual sales tickets for a full year at 150 of our stations, and placed each of those sales tickets on tabulating cards, and then studied the concurrent sales results which has established again and again that if a farmer, as a means of illustration, buys a year's supply of motor oil in the spring, that our possibilities and our actual sales complement of the Standard fuels which are represented by gasoline, Standard tractor fuel, heavier oil, truck oil, kerosene, and so forth, are much higher than is the case where the farmer is not a purchaser of his annual requirement of motor 7893 oil.

Now I mentioned this picture because it is important to understand that policies are determined upon the basis of customers. Policies being determined upon the basis of customers, you determine that for the various petroleum products required.

Seventh: The next point in the answer is that a large part of our decisions are of necessity predicated upon a gallonage consideration. I need to mention only a few to illustrate the point:

(a) If there is a question as to whether we should build an additional storage tank at a bulk plant, the amount of gallonage which moves through that plant is an important consideration.

(b) If we wish to check the efficiency of our fleet of trucks operating, it is predicated upon the gallonage that they move.

(c) If we wish to determine whether we should lease an outlet, gallonage is given important consideration.

(d) Or, for a leased outlet, if we wish to predicate a decision on the amount of equipment that should be alloted to that outlet, gallonage is an important factor.

(e) Or, if we wish to ascertain whether to open a new outlet, or to close an outlet, then gallonage is an important factor.

7894 (f) In each of these, naturally other things are taken into consideration, but gallonage is an important part of our thinking.

Eighth: There yet remains a very important part of the answer.

Not only have the various heads of our accounting departments considered the question of gallonage;

Not only have many studies of the research department contributed to the support of that factor;

Not only have we asked and sought and met with outside certified public accountants;

Not only have we constantly consulted with new men that are added to our staff;

Not only that, but we have a set of checks and balances which are used which are conducive to the introduction of many new accounting efficiencies.

I think I can best illustrate that by merely outlining the method by which we check one against the other at all times.

The head of the sales accounting department is Mr. F. L. King. He is assisted by Mr. Herman Rummelhoff. These two gentlemen have their offices in Chicago. They have three traveling efficiency experts representing them in their contact with the field offices. These men are Mr. Hanna, Mr. Ness, Mr. Walters. They travel back and forth, and are constantly on the alert to ascertain:

7895 First: how the various field offices' accounting staffs are following the auditing code of accounts;

Second: to ascertain and determine any new or more efficient means of handling the various accounts, and the allocation of those accounts among the trade channels.

Ninth: In addition to that, each of these twenty-eight office managers of each of the twenty-eight sales fields, and their respective assistants and staff, are parts of what we regard as a chain system of checking as one of three office stations, shall we say, in three different fields, and in three different sections of the territory.

Now, let us assume that the office manager and staff in Kansas City feel that they have a more efficient way of handling a given cost item. It may be an allocation, or it may be a method of entering the expense item to our books. They try that new method out in their own field. After they have tried it out to the point where they become satisfied that it offers an important thing in efficiency, they write up their suggested change of method, and submit it to a second field.

Let us assume that they submit it to Peoria field, which is in an entirely different division of our company. The Peoria field would then attempt, on their records, the suggested modifications suggested by the Kansas City field. After having thoroughly tested and becoming convinced
as to the workability of the plan—if Peoria did so
7896 become convinced—they would submit it to still a
third field.

In this case, we will assume that it may be Grand Rapids, Michigan, which is in another section or division of our sales department. Whereupon, it would again go through the same process.

Now, if all three of the office managers and their assistants become convinced that such procedure offers a major improvement in efficiency, or a more accurate method, it would then be forwarded to the general office for the consideration of the general office accounting department for general adoption.

If, however, any one of the chain reached the conclusion which was contrary to the opinion of the first field, then they in turn would turn it rght back, after they had written up their opinion as to why it was contrary, and it would then be sent back to the field originating the proposal to ascertain whether or not the difficulty then encountered could be eliminated and make workable in all fields throughout the entire company.

Now, then, this very process of chain checking has developed a great deal of competition among the offices of the Respondent company, and we feel has thereby substantially increased the efficiency of our accounting procedures.

I think those various points are the principal one 7897 that would support and substantiate the use of a gallonage factor.

Q. One other—

Mr. Austin: One moment, please.

Your Honor, may the reporter read back the secon reason given by the witness?

Trial Examiner Ballinger: The reporter will read th second reason given by the witness.

(The reporter read the second reason given by the witness, as follows:

"Second: Price-Waterhouse, who audits the books o the Respondent company, and they have been asked an have been consulted about the use of the gallonage facto as an allocation procedure on many of our accounts.

"As yet they have been unable to suggest a procedur which would more accurately reflect the true costs than tha currently obtained by the use of the gallonage factor."

Mr. Austin: Now, I move to strike that portion o the witness' answer just read by the reporter on the groun that it is nothing more than pure hearsay on the part o the witness;

Furthermore, the witness cannot possibly know what th Price-Waterhouse people might be able to do.

Mr. Hanley: If your Honor please, it is not 7898 offered as a matter of the propriety of the Price-Waterhouse's judgment.

It is offered as evidence of what this Respondent company has undertaken to do to improve its accounting procedure. Maybe Price-Waterhouse is completely haywire That is not the point. The point is that this company ha made the effort.

Mr. Austin: The witness testified that Price-Waterhous was unable to suggest better methods.

Mr. Hanley: Well, let me ask the witness a questio before your Honor rules?

Trial Examiner Ballinger: You may.

By Mr. Hanley:

Q. When you said that Price-Waterhouse was unable t offer a better method, Mr. Boatwright, do you mean tha Price-Waterhouse just did not offer any better method?

A. That is exactly what I meant.

Trial Examiner Ballinger: The motion to strike is denied.

Mr. Hanley: I might say this—

Trial Examiner Ballinger: (Interposing): The Examiner understands the object and purpose of the statement was to indicate what the Respondent had done, or was doing in an effort to improve its accounting system.

Mr. Hanley: Exactly.

7899 Mr. Austin: That may be, but in this case he attempted to speak for what Price-Waterhouse could do.

By Mr. Hanley:

Q. In connection with this subject, Mr. Boatwright, what is the fact as to the practice of the Respondent company in making a charge of a cost direct to a channel whenever that can be done?

A. Well, over the passage of years, account after account after account has been opened wherever it was possible to make a direct charge; that is, a charge we could make direct to a channel. Wherever this cost, which is incurred only in the tank wagon reseller and tank wagon consumer occurs, the charge is made to the three thousand series, allocated just between those two.

However, if the cost is purely of an overall nature, then it is made to the seven thousand series, and allocated on an all-gallonage basis.

Q. Referring you, Mr. Boatwright, to salesmen's salaries, of which there are several accounts on the regular accounting form 189, Respondent's Exhibit 101.

A. Yes?

Q. Are you able to state from your knowledge of what the Respondent company has done in the matter of attempting various and different methods of allocating salesmen's salaries, and what the experience of the company has been in respect of those accounting efforts.

7900 Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Read the question.

(The reporter read the question.)

The Witness: Referring to that question, Account 004 represents salaries—salesmen. There are other expense accounts which are incident to the operation of it, which are carried separately as expense classifications.

Our experience in an effort to determine an equitable and proper means of allocating this cost has been one of the most difficult problems with which we have wrestled, and our history is quite complete back through 1929, and the testimony in accounting, of the accountant that the Commission put on, which brought out—

By Mr. Hanley:

Q. Do you mean Mr. Warmack?

A. The testimony of the accountant Warmack, for the Commission, which was brought out in this record, in that testimony it was brought out that perhaps more accurate results could be obtained provided all salesmen maintained records of the past allocations of their efforts.

We tried that. We did, in fact, have that method
7901 in practice for quite a period of years. After it had
been in practice for some years, we discontinued it. We found several things wrong with it:

First: We found a tendency on the part of salesmen, the salesman, to prepare his estimates of the time which were submitted to the office as an actual distribution of time, at the last day of the month without maintaining records from day to day throughout the month. We found that salesmen are quite loathe to maintain detailed records.

Second: We found next a tendency on the part of salesmen to crystallize at given percentage levels in their preparation of these allocation factors whether they were or were not related to actual distribution of effort.

Third: We found that if we allocated our expense for a period of coming months according to the past records of the accomplishments, even though your salesman may have been extremely conscientious, and even though he may have maintained a careful record, it still was a very poor allocation factor, because of the highly seasonal nature of our merchandise.

Now, one of our principal sales programs and policies is predicated upon the seasonal value and flow of our merchandise. That is necessary.

To illustrate: Tires are usually sold in the month of
December. During that month even an accurate allo-
7902 cation of time predicated upon accurate records of
the salesman, if it were possible for him to make it,

would reflect a heavy proportion of his time devoted to tires. The would be improper to allocate the expense during the month of January, because your tires drive is over in December, and in January you start stocking you resellers with the needed merchandise to take care of the spring change in their motor oil.

Then, suppose we took January as accurate to the last degree. That would be improper for use in March, because during March you have your drive on for specialized products.

If your record for March were completely accurate, it would not be for April, because your reseller salesmen, during April, are devoting their time to developing and training your drive-way personnel in getting the maximum benefits for the change over of motor oil requirements of the customer.

And so on and so forth as we go throughout the year.

Now, that experience, and the analysis that was made was adequate enough to convince the Respondent company personnel that a better means could be found for allocating salesmen expense.

Our next effort was to prepare estimates in the general office with the executive of the sales department in the general office, in view of the contemplated sales plans and
programs, who would establish estimates to be used
7903 by the accounting departments for the allocation of
these cost items. That plan was tried for a year or two, but it had to be stopped, because it had several pronounced weaknesses.

First, there was a tendency on the part of the executives in the home office to crystallize at given levels.

Secondly, there was a definite error in our thinking because we did not provide for variations of the seasonal demand in these territories from north to south and from east to west.

The seasonal influence of the Duluth field, by way of illustrating, is decidedly different from the seasonal influence of the Wichita, Kansas field, and these variations were not reflected.

And there were weaknesses in the plan beyond that.

Third, the third weakness of the plan was that the sales campaigns in different fields are frequently varied according to the judgment and the dictates of the field managers.

You must leave your respective division managers with

a fairly high degree of initiative if you are going to secure the most satisfactory sales accomplishments. Salesmen do not work on a code of accounts. Correspondingly, one field may have a different campaign, say, a tire campaign in this month, and another field may not have its tire campaign until two months later, or a month later. And by the use of the general office allocation factor, that
7904 was just ironed out; and it was given no consideration
whatsoever.

Obviously, another field may have their tire campaign in a different month, and furthermore, tires generally may require quite a different promotion of time in the different reseller territories in one as distinguished from the other; and furthermore, in a rural territory, than they do in a metropolitan territory.

The nature of the competition is quite different.

So that your reseller operation in one section would be different, for instance, your reseller operation would be quite different in North Dakota from what it would be in Chicago or St. Louis. And in the general office estimates they fail to recognize this, and accordingly we felt, after a preliminary examination, that this method was unsatisfactory.

Subsequent to that it was felt advisable that we should place the allocation factors under the direct supervision of the men who supervised the efforts of these men in the field. The instructions provided that they should maintain a memoranda of past accomplishments. This permitted only a varying degree of accuracy in the various fields; that is apparent. In some fields they did adhere to this suggestion and operation quite accurately, in others they base it on the action of certain supervised men, in others they base it on accurate time records for certain classes of salesmen.

7905 Now, let us take our last policy which was introduced in 1936, and which remains in effect today, and let us take the various analyses of various classes of salesmen and people that we apply that policy to, and see what the success of that has been.

These classes of salesmen are indicated, I believe, on Commission's Exhibit 88, 89, 102, and 103, as I recall the numbers.

Q. That is right.

A. If you start with lubricating engineers, your lubricating engineer maintains a weekly time report which he submits of the customer, the product, the time when called, which accordingly gives them time by product.

The lubricating engineers are the supervisors and are the directors of the efforts of the industrial salesmen. The industrial salesmen maintain a call record, but do not submit detailed information on time as do the lubricating engineers.

The lubricating engineers, predicated upon their own distribution of time and their knowledge of the class of men that they supervise, prepare estimates for the industrial salesmen. As a rule those two move in almost identically the same channels and methods.

Now, let us take the next class of salesmen. I may not name them in the order that they are on the
7906 exhibits, but let us take the reseller salesmen in the Detroit field.

In the Detroit field, the reseller salesmen, numbering twenty-six, are observed by four specialized salesmen. It is the duty of the four specialized salesmen to ride with the reseller salesmen, to observe their work, to observe their effort, and to help them on unusually complex and difficult problems that they may encounter.

In addition to the specialized salesmen, there is a sales promoter, who not only follows the activities of the four specialized men, but the twenty-six reseller men. He rides with them, he observes them, he attends their dealer meetings, and field meetings, and he watches them in their work. He has an assistant, who is an assistant promoter, and he does likewise.

Q. Did you mean "dealer"?

A. No. I meant that he attends their field meetings. To continue, then, the assistant field manager in charge of reseller operations, works in a similar capacity.

Accordingly, in Detroit there are seven observers watching the activities of twenty-six men. These seven observers do not maintain formal company records, but they do maintain memoranda that do maintain their records that they make, and they do maintain these checks against the distribution of effort.

7907 Now, the checks against past distribution of effort are then modified and adjusted for the future sales plans of this group.

The next class is the automotive engineer.

The activity of the automotive engineer is not subject to the same fluctuations as are the activities of the reseller salesmen. It is perfectly possible for him to thus maintain a time record of the distribution of his efforts. That is used in the allocation of his expenses.

Next, the B-Station salesmen.

In Detroit I think there are some six or seven B-Station salesmen. These men are watched and are followed by three observers; the assistant manager, wholesale; the sales promoter, wholesale; the assistance sales promoter, wholesale. These three observers in their respective turns prepare the estimates for the distribution of time of these six men which are predicated upon our observation of what the men are doing, modified as they deem necessary to reflect their future sales campaigns.

The asphalt salesman works entirely in one sales channel. His time is charged direct to that channel. His expense is charged direct, and his effort is entered in that channel directly.

The specialized salesmen, fuel oil, fuel oil salesmen work directly in the one channel, the same channel.
7908 Their time is charged directly thereto. There is no need for allocations thereof.

The white oil salesman works out of Chicago and covers several fields. His time is allocated as among the fields according to the amount—his expense is allocated against the various fields according to the time that he spends in each field; that is, that is charged to an account every month. Finally, his volume is also included in that total.

The same idea with regard to the candle salesman.

Finally, we come down to the class of agent salesman. An agent salesman is a combination man that operates a bulk plant and serves in the capacity of an agent, while part of his time is devoted to selling. He maintains a time card of the period that is spent in the operations of the plant. The residual amount of his time is charged to selling, for he is charged with the heavy responsibility of maintaining the sales by the Respondent company in the little geographical area, limited geographical area in which he operates.

His time is then allocated upon the basis of the estimates prepared by the supervisors in the district offices.

Now, this plan has been in effect since 1936.

We know of fields where they have checked the estimates after having been made to ascertain the accuracy of the estimating process.

We likewise follow and pass to a general book in the Chicago office the estimates by class of salesmen, by salesmen channel, and by products. That record is complete for 1936 to date. It permits a charting of the estimates as submitted.

Any time that a field changes an estimated allocation factor from one to another by which as much as three per cent is changed, it is a requirement that the management of that field direct a letter to the Chicago office explaining in detail exactly the reasons why that allocation factor has been changed.

In addition, each of the allocation factors is charted and is compared with similar estimates and similar division of time from time of adjacent fields.

Likewise, separate estimates are secured on the part of the salesmen as a class, and the sales promotion group as a class. This permits a comparison between the allocation factors used in the salesmen's salaries, and the sales promotional salaries, wherein we are able to compare them and to compare to see whether the allocations of the salesmen and the allocations of the effort of the promotional group tend to move concurrently.

They do so tend to move, and there is very high degree of correlation between these two.

Now, all of this information was available in the
7910 general office of the Respondent company, and could
have been examined had it been desired.

Q. Well, did Mr. Warmack ask for it?

A. Not to my knowledge.

Q. He got what he did ask for?

A. To the best of my knowledge.

Q. Did he not?

A. Yes, sir, to the best of my knowledge.

Q. Mr. Boatwright, I am going to read you a quotation beginning from the bottom of page 38 and the top of page 39 from a publication of the Federal Trade Commission directed to the 77th Congress, First Session, and denominated, "House Document No. 287," which has been marked I think heretofore as an exhibit. I think this question has heretofore been put in the record in a question to Mr. Warmack.

I would like, after I have made this quotation, to have you state to the Court whether you agree or disagree with it in principle. If you can do so without referring to all of the rest of the book, please do so.

Quoting:

"It is obviously very difficult and frequently impossible even for observers to ascertain the actual time engaged in each of these direct selling activities applicable to each commodity when the salesman handles numerous
7911 items.

"Perhaps the only basis of ascertaining the estimated time applicable to each commodity would be for the observers or the salesmen to report the approximate segregation of the interview time applicable to each commodity. The balance of the salesmen's time exclusive of the interview time would then have to be prorated to commodities on some reasonable basis according to the circumstances such as ratio to direct time.

"The portion of the salesmen's time represents time in their own office, in travel, and in waiting for customers, and other working time not actually consumed in the direct selling activities. The basis for such prorations naturally must be established in accordance with the circumstances of each particular costing problem in the light of the statistical data available for sound judgment."

A. I do agree with that.

Q. Mr. Boatwright, do you recall some testimony on the part of Mr. Warmack to the effect that he made a calculation in arriving at a ratio of 29.19 per cent in connection with salesmen's salaries as the figures were reflected on Respondent's Exhibit 101, and then made another calculation whereby he arrived at a figure of 2.67 per cent, predicated upon the amount allocated to selesmen's salaries, and placed in the direct shipment channel on Respondent's Exhibit 101?
7912 Do you remember that testimony?

A. Yes, sir, I remember the second figure of 2.67 is taken directly from Respondent's Exhibit 100. It was not calculated by Mr. Warmack.

The other figure was calculated by Mr. Warmack.

Q. I see. Do you recall the evidence of Mr. Warmack wherein he undertook to compare his calculated figure of 29.19 per cent with the percentage of 2.67 per cent derived from Respondent's Exhibit 100?

A. I do.

Q. Will you please explain what your judgment is from an accounting standpoint as to the propriety and sound accounting of that attempted comparison, and give your reasons for your conclusions?

A. Well, it is not necessarily an accounting question that gave rise to the difficulties as much as it is purely a mathematical question.

When the 2.67 per cent, which is based on one figure, was subtracted from the 29.19 per cent, which is based on a second and different figure, the subtracted percentages having different bases, then the component parts result in a mathematical absurdity.

Q. I think I have gone over this enough to understand what you mean, but just to make sure of it, and to explain fully in a homely way, Mr. Boatwright, is not the attempt to compare the 2.67 per cent and the 29.19 per cent just 7913 like adding up tomatoes and potatoes and getting lemons?

A. Well, I think of the little book, and the averaging of horses and apples, and then applying the result to cows, when it was done.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

Mr. Hanley: I request a five minute recess.

Trial Examiner Ballinger: The request is granted. We will recess for five minutes.

(A short recess was taken.)

Trial Examiner Ballinger: Come to order.

You may proceed.

By Mr. Hanley:

Q. Now, just before leaving this question of salesmen, Mr. Boatwright. Do you recall the testimony of Mr. Warmack wherein he criticized your methods of pulling salaries out in your cost study as reflected by Respondent's Exhibits 100 and 101, amounting to a difference of approximately two thousand dollars?

A. Yes, sir. I remember that matter to which you refer.

Q. Do you know approximately what that difference would amount to on the differential in cost as claimed by the Respondent?

7914 A. Well, I have checked Mr. Warmack's figures.

Q. What is it?

A. And the figure that he introduces for the quarter is quite representative of the year, it varies only a few dollars when multiplied by the four quarters. It was inadequate to change the adjustment that he introduced in the record by any material degree, because that, if we would regard that as proper to adopt that method of accounting, as I recall the figure, it was thirty-three ten-thousandths of a cent.

Mr. Austin: That is correct.

The Witness: And the two dollars difference did not change the ratio or that adjustment to several decimal points.

By Mr. Hanley:

Q. I take it from our accounting standpoint that we are willing to accept that thirty-three ten-thousandths of a cent?

A. Well, I do not quite gree that it should be done on that basis, however I have no objection to the thirty-three ten-thousandths of a cent.

Q. You do not agree with Mr. Warmack?

A. No. But it is all right.

Q. Even though it only adds up to thirty-three ten-thousandths of a cent?

7915 A. That is right.

Q. Now, Mr. Boatwright, do you recall that Mr. Warmack, in his testimony, criticized the policy or procedure of the Respondent company in allocating salaries on a composite basis as disclosed by the calculated estimates of time shown in Commission's Exhibits 88, 89, 102, and 103, referring to those calculated estimates of time allocations?

A. I recall that testimony.

Q. Supposing that his method of accounting salesmen an allocation of time, as I recall it was his recommended method that there would be an effect in respect of the following and related accounts like expense accounts, automobile expense, and things of that kind?

A. Well, I cannot say that your recollection of the testimony is exactly in accordance with mine, but I know to what you are referring.

Q. Maybe I am not right in my statement of it, Mr. Boatwright, but you recall his criticisms of those named exhibits?

A. Yes, sir. I recall the criticism based largely upon the fact that it did not give recognition to variations in salaries of the various salesmen. Specifically he mentioned the point that the man who received $400 a month received entirely the same weight as the man who received $200 a month when they added up the units of time and allocated on that basis.

7916 Q. That is right.

A. Now, it just so happens that there are only two fields in any of the territories where that would make any difference in, one being Detroit and the other being Chicago, because we have very few lubricating engineers in other fields.

In the Detroit field, it would make a slight difference. However, if we weigh the salaries then we can not use the same allocation factor for the traveling expenses of salesmen, for the maintenance of the cars, for the depreciation of cars, because—

Q. (Interposing.) Just a moment. So we will all be able to understand you, Mr. Boatwright—

A. Yes, sir.

Q. —was it not the sense of Mr. Warmack's testimony that all of these other expenses follow—

A. (Interposing.) Yes, sir.

Q. —the salary accounts?

A. Yes, sir. But if that method of allocation be used, then you must use different methods to allocate on the supporting expense accounts, because depreciation on cars does not vary in accordance with the salesman's salary paid to the man who drives one of the cars which would be involved in this matter.

Q. Do you mean by that that a four hundred dollar a month salesman could drive a car and it does not wear out any more rapidly than a two hundred dollar a month salesman?

7917 A. That is right.

Q. Proceed.

A. If his method of allocation be used, then a different method of taking care of the operation and maintenance of vehicles, traveling expense—salesmen—depreciation of salesmen's cars, all having used this method on the three accounts other than salesmen's salaries, it would tend to introduce a compensating error to the three supporting accounts, so that it would require the company, if this be accepted, that the allocation factor be set up separately on the salaries, well, they would have to have quite a different allocation factor to be used for the three other accounts unless you wanted to introduce an error in your allocation.

Q. Might not that error be compensated; that is, be a compensating one, once you figured it out?

A. It might be.

Mr. Austin: Do you know whether it is?

The Witness: I would have to figure it out.

By Mr. Hanley:

Q. Did Mr. Warmack, in his testimony, or in any conversation with you, ever tell you whether he had figured it out?

A. No. He did not. I do know this, without making any calculation, that if you weigh your salaries then you must adopt a different allocation factor for your three separate supporting accounts or you are in error.

7918 Q. Adverting to a new topic, Mr. Boatwright, namely, segregation of markets.

A. Yes.

Q. Do you recall the testimony of Mr. Warmack, wherein he stated that some time or other during or prior to your activities in developing the cost study of the Respondent company, as reflected by Respondent's Exhibit 100, he suggested to you a segregation of the commission's employees' territory outside of metropolitan Detroit area, as distinguished from the salaried drivers' area in the metropolitan Detroit area?

A. I recall that such was discussed at a meeting that I had with the counsel for the Commission, and the chief accountant, and Mr. Warmack in August—I think it was in August of 1941—although the segregation which you mentioned is not quite exactly my recollection.

Q. Just what did you understand from any suggestions which may have been set forth or made by Mr. Warmack or any one else at that time?

A. My understanding was—it was in reality a request that the Respondent give consideration to the segregation of two geographical areas, one of them representing the Detroit metropolitan area, which included part sales salary and part commission sales, as segregated and distinct from the rest of the Detroit field, likewise including some salary and some commission points.

7919 Now, that was a request that was first made. There was later on a modification as to distinguish the salary points versus the commission points, I do not recall definitely as to that, but I do recall that this subject was under discussion at the August meeting with the Federal Trade Commission's representatives. As I say, and I want it to be clear, whether or not that was modified as to distinguish the salaried points versus the commission points, I do not recall.

Q. Now, Mr. Boatwright, if you did do anything about it, I wish you would tell the Court, please, exactly what you did do, what happened, and what your conclusions were?

A. Well, we did. We did considerable about it. Throughout that conference I took rather careful notes. And upon my return to Chicago, I requested a meeting of the department heads and the accounting personnel of the company for a discussion of the results of my discussion with the Federal Trade Commission representatives.

We came to this question as to the segregation of the market between the Detroit metropolitan area as distinguished from the rest of the field.

Q. Now, did you go into that? Will you please tell the Court just what and who these people were?

A. Yes, sir.

Q. That you talked to?

7920 A. Yes, sir.

Q. Please do so.

A. At this meeting there was Mr. O. M. Perrenot, who is the assistant comptroller, Mr. F. L. King, who is the auditor of sales; Mr. Herman Rummelhoff, who is the assistant auditor of sales, accounting department; Mr. D. E. Jones, the office manager of the general office accounting department; Mr. Lawrence Hanna, traveling representative and auditor of the sales accounting department; Mr. L. W. Houghton, office manager of the sales research department; and myself; and I think you were present at a part of the discussion. But the aforementioned were present and gave consideration to all of the problems.

Q. Well, I do not count as an accountant anyhow. I was present part of the time.

A. Yes, you were there.

Q. What did you discuss at this meeting—I do not mean what was said, Mr. Boatwright, but what was the subject under consideration?

A. Well, the entire object of the meeting under discussion was in regard to a report as to the results of my conference with the Federal Trade Commission's representatives. Each of the various notations that I had taken at this conference were discussed.

We came to this question of the segregation of the
7921 market, which was one of the most difficult ones under
consideration. That was discussed for a period of some hours in which we took account by account and attempted to outline what we would have to do to comply with such a request.

Following that discussion, and with the minutes of that meeting, Mr. Houghton went to Detroit. He there examined the actual records in the field.

He returned to Chicago at a later date with a description of the nature of the records in the field, and exactly what would be required to provide us with what we would regard as a defendable or a true cost segregation. The most outstanding result of that was the conclusion that there were so many of the accounts that would have to be broken down, individual work orders, individual articles, individual pieces of dispensing equipment, and the tracing of the individual pieces of dispensing equipment—so, why, we just could not do it.

It was then considered as to whether or not we could set up a separate unit which would maintain for a period of future time the record irrespective of the fact that it would have meant the employing and the setting up of a smaller, similar duplicate office staff. This was given consideration, but we decided that one month would not do it because of the seasonal operation of our costs and the
seasonal variation of those costs, and that the only
7922 way that we could provide the Federal Trade Com-
mission with an accurate and defendable analysis of the two component parts of the sales division, would be to set up two offices for a year's full flow of business.

Q. How long was Mr. Houghton engaged in that particular survey in Detroit?

A. Well, when Mr. Houghton was in Detroit, he maintained a staff of seven people who worked with him all of the time. He called upon the regular accounting department to supply him with many breakdowns. He spent the better part of four weeks working and giving consideration to this problem, or at least wherein consideration of this problem was one of his major thoughts.

Q. What was the fact, Mr. Boatwright, in connection with the ability to get agreements on various points of procedure upon the several accounting members of the Respondent company's personnel to whom you have referred in connection with this question?

A. We could not reach an agreement on many of these accounts.

Q. Even among yourselves?

A. That is correct.

Q. It is true, is it not, that every one of those men that you have named has been for years engaged in the accounting business in the petroleum industry?

A. Yes, sir. In fact, they have been engaged for 7923 years in the accounting business of the Respondent company.

Q. Just to make sure of this, Mr. Boatwright, I think that on your direct examination—and you may recall it—you outlined some of these specific difficulties that would confront an accountant in any effort to make this kind of a segregation?

A. Yes, sir. I did so outline.

Mr. Austin: You made it on his cross-examination, did you not?

The Witness: I think it was on my cross-examination.

By Mr. Hanley:

Q. Well, in your testimony—I will reframe the question to say in your testimony. I do not remember whether it was on your direct examination or not.

A. I think it was on the cross-examination. The difficulties which were outlined while on cross-examination constituted the basis of many of the difficulties for which you requested the opinion of the accountant of the Federal Trade Commission as to how he would handle it.

Q. I think that is sufficiently in the record.

You are familiar with the cross-examination of Mr. Warmack on this particular study and subject; are you not?

A. Yes, I am familiar with the cross-examination of Mr. Warmack on this particular subject.

7924 Q. You have heard the questions propounded to that witness in respect of how he would meet certain problems?

A. Yes, sir. I did.

Q. Do those problems present themselves to you as difficult ones from an accounting standpoint?

Mr. Austin: Well, just a moment. I will have to object to that question, your Honor, unless the particular problems which are referred to are stated with some particularity. The question is too broad and too indefinite.

Trial Examiner Ballinger: Yes, the question is too broad and indefinite.

Mr. Hanley: Well, perhaps that is true. I shall endeavor to shorten it, your Honor, but perhaps I tried to shorten it too much.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Hanley:

Q. Mr. Boatwright, in view of the objection of counsel, I will ask you to briefly outline what you mean by some of the paramount difficulties in making this cost segregation concerning which Mr. Warmack was questioned on and testified?

Mr. Austin: If your Honor please, I would like to know whether counsel is referring to segregation of A-station cost or B-station cost when he refers to cost segregation.

7925 Mr. Hanley: Well, counsel for the Respondent is very much in doubt as to what kind of segregation is being referred to, because the cost segregation is the conception in the mind of Mr. Warmack which varies from time to time; sometimes he talks about segregation between A-Stations and B-Stations. Sometimes he talks about segregation between commission employees other than or versus salaried employees; sometimes he talks about geographical segregation between the Detroit metropolitan area as distinguished from everything else.

Now, it does not make very much difference, your Honor, which one of the three or all three if he has them in mind. It is difficult from an accounting standpoint and they are substantially similar.

Mr. Austin: Are you referring to all three things? Is that correct?

Mr. Hanley: I am referring to all three or any one of them.

Mr. Austin: That limits it sufficiently, your Honor, I think.

Trial Examiner Ballinger: You may proceed.

The Witness: May I hear the question?

Mr. Hanley: Do not start that, now.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

7926 "Q. Mr. Boatwright, in view of the objection of counsel, I will ask you to briefly outline what you mean by some of the paramount difficulties in making this cost segregation concerning which Mr. Warmack was questioned on and testified.")

The Witness: Mr. Warmack was questioned relating to several different classes of expense items. One class of expense items had to do with those accounts on Respondent's Exhibit 101 which are allocated on the basis of time records and estimates. Specific reference was made to salesmen's salaries and office expense. Salaries—accounting is more or less illustrative of the type of accounts referred to. On these particular expense items we did not have and do not have the proper means of determining what part of the time was devoted in any one of the geographical areas as distinguished from that portion of the time devoted to the second geographical area.

The second principal classification of difficulties encountered had to do with expense records incident to the employees, vehicles, dispensing equipment, which might be transferred from one geographical zone to the second geographical zone, or from one customer to the second customer.

Now, to determine the cost we would not only have to trace the work order, the repairs, the item, and so forth, to the individual vehicle, dispensing equipment, and
7927 possession, but we would have to trace the allocation of that particular piece of equipment throughout the twelve month period because it might have been transferred between the two different geographical areas.

The third difficulty that was encountered had to do with the vouchers and supporting data, and all working orders, individual plant expense, machine shop orders which we would have had to trace first to the individual plant. Then we would have had to classify those expense items according to the plant location.

Now, this class of expense would cover vouchers, work orders, machine shop orders, and so forth, under the plant maintenance account representing these bulk plant expenses. It would cover retail outlets.

It would cover rent revenues received.

It would cover miscellaneous operating expense.

It would cover station operating tools and equipment.

It would cover water, light, fuel—other than main office.

It would cover depreciation and taxes.

The fourth difficulty that we encountered had to do with the ELA expense, with the individual piece of dispensing equipment, where that individual piece of dispensing equip-
ment may have been painted; where it may have been
7928 repaired; where it may have been transferred be-
tween a geographical area; where it may have been
transferred between different classes of customers, and so forth.

On that particular expense item we would have had to trace each one of the pieces of equipment and then trace the location of the dispensing equipment, by month, throughout the year.

Fifth, a still more complicated difficulty that we had was overlapping territories.

I think in your question you referred to the Royal Oak bulk plant, which is located outside of the city of Detroit, but which nevertheless, serves as a part of its regular sales territory a part of the City of Detroit and a part outside of the City of Detroit. It is not only at bulk plants, but also sales territories, and here salesmen may cover in part one section of the geographical area of metropolitan Detroit, and his territory may overlap. It is the truck driver, again, that is in this zone of operation, where his zone of operation may be both inside and outside of the territory. And yet, it would be a question that we would have to establish as to some rather arbitrary means of segregating and breaking down between the two geographical areas.

Now, with that in mind that those are the ones that were
covered in your questioning of Mr. Warmack when he
7929 was on the stand. I think in the main that they were
answered by the statement that the cost study would
be required—that was his answer. I agree. A detailed and tremendous cost study would be required almost to the effect of re-enacting the year's business.

By Mr. Hanley:

Q. And those are at least some of the problems that were considered by these accountants in striving to arrive at an aswer to the problem, and which were discussed?

A. Yes, sir. Oh, yes. And each and every one of these, plus several others, were analyzed and considered and discussed at quite some length.

Trial Examiner Ballinger: Have you any idea of the force that would be required, or that would have been required to keep such an accounting?

The Witness: We have somewhat over one hundred and twenty employees in the Detroit accounting department at the present time, I think, including all positions. To maintain a record for a calendar year, I think would have meant the addition of conservatively forty employees for a calendar year.

By Mr. Hanley:

Q. Had you done that, Mr. Boatwright, it would have meant, of course, that if it were to be used in this allocation, that everything would have to stop in this allocation for at least a year?

7930

A. Yes, well, that is not the only thing that would happen. It would have had to stop or at least be in this state; certainly, everything would have had to stop as far as this litigation is concerned for at least a year.

Q. Well, you say that is not the only thing. That much is true, is it not?

A. Yes, that much is true that everything would have had to stop in this litigation for at least a year, but what we would have had to do would be to bring about a correction of many of these accounts or at least a segregation of many of these accounts merely to prove the basis for segregating cost incurred in the preceding year. It would be impossible to use the costs incurred with the handling of a situation of that magnitude because that introduced ratios that would tend to a distortion of our figures. But what we would have had to do would be to establish percentage figures which we could apply to the various expense items now on our Exhibit 101, on Respondent's Exhibit 101.

Q. And that whole question, Mr. Boatwright, deals with the segregation which Mr. Houghton testified about as having been reported to him by Mr. Warmack as resulting in two one-hundredths of a cent differential?

A. That is correct.

Mr. Austin: May I hear the question and answer
7931 read?

Trial Examiner Ballinger: Read the question and answer.

(The reporter read the question and answer.)

The Witness: I neither accept nor condemn the calculation of the Commission's accountant, Mr. Warmack.

By Mr. Hanley:

Q. I understand you did not do anything about it and do not know anything about what went into that or what was left out of it?

A. No, I do not.

Q. But what I am trying to ask you is this, what you would say would be necessary in the way of determining accurately, or as accurately as possible, the cost as represented by the commission employees on the one hand as distinguished from the salaried drivers on the other hand, as the set up that Mr. Houghton said was figured out by Mr. Warmack resulting in the two one-hundredths of a cent less for total marketing cost by commission employees as distinguished from salaried drivers?

Mr. Austin: I object to that question, your Honor. There is no materiality as to whether or not the thing that Mr. Houghton said Mr. Warmack said something about.

It is quite clear, or it is from previous testimony, that we are talking about the segregation of these commission costs and salary costs. There is a conflict of testi-
7932 mony regarding whether Mr. Warmack ever made any such computation. And I do not think it adds one bit to Mr. Boatwright's testimony to say that he is talking about what Mr. Houghton referred to about Mr. Warmack having made a statement about.

In other words, the subject of Mr. Boatwright's testimony is entirely clear without that question.

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Trial Examiner Ballinger: The objection is overruled. The witness may answer.

The Witness: These are the difficulties which would be incident to any such problem. These difficulties would be incident to a problem of the segregation of A-Stations versus B-Stations; of salaried drivers versus commission drivers; or, as of two geographical areas wherein part salary and part commission is found in each of the geographical areas.

Mr. Hanley: Well, now, can you arrive at an accurate conclusion?

The Witness: In my judgment, you could not.

By Mr. Hanley:

Q. Referring you, Mr. Boatwright, to accounts 025—truck rental; 055, maintenance of vehicle tanks; 106, depreciation—vehicle—tank, you are familiar with the
testimony of Mr. Warmack on behalf of the Com-
7933 mission wherein he criticizes the Respondent's
method of handling allocations of expense in respect
of those named accounts? Are you not?

A. Yes, sir.

Q. Is it your understanding that this is the same, or that he has the same notion of applying a mileage basis to the allocation of these accounts?

A. Well, it is my understanding that he felt that the allocation of these accounts could be more equitably made or properly made if we tended to let the allocations follow the commission rates—the commission compensation or position which, according to his statement, contained the full effort and mileage.

Q. Now, what is wrong with his theory, if any, in your opinion?

A. I think his—I think it is just unfortunately based upon a lack of understanding of the facts in regard to commission compensation. I think that can best be clarified by just pointing out where this misunderstanding is, and what that misunderstanding, if projected, would produce.

I can do it by a very simple illustration:

If a commission driver were to deliver to a farmer gasoline he would receive five pay gallons for making that delivery;

If he delivered kerosene to this farmer he would receive
five pay gallons;
7934 If he delivered tractor fuel to the same farm, he
would receive four pay gallons;

If he delivered standard motor oil to this same farmer, he would receive three pay gallons;

If he delivered furnace oil to the farmer he would receive two pay gallons.

If he delivered Diesel fuel to the farmer, he woul receive two pay gallons.

So, the first difficulty becomes apparent when it is recog nized that the amount of compensation varies distinctl with many things other than mileage, because in eac case these deliveries have been made to the identica customer; these same rates would apply to the farme whether the farmer lived a half a mile out of town, o ten miles out of town.

In some of our western areas, some of the farmers ma be living one hundred miles out of town, and those ar the commission areas that we would get for makin delivery to the farmer, and after those rates that we woul receive, or the driver would receive for making tha delivery to the farmer.

Secondly: The man has a compensation for that employ
ment of representing the Standard Oil Company in
restricted area. It represents the overall compensatio
for a certain function of warehouse maintenance;
7935 certain function of warehouse labor; a certain func
tion of selling cost; a certain function of deliver
cost.

Now, in our particular marketing setup, our statio agents are the rural salesmen. We know from time studie that have been made that a part—that a large portion their time is spent in purely selling functions. That ha to be reflected in the overall compensation.

The third part of the difficulty with the suggeste allocation procedure is that the maintenance of tank which was one of the accounts referred to, it definitel does not follow mileage.

The principal item of cost entering into that account i painting. It is done on a time basis irrespective of th miles traveled.

The second principal unusual part of that expense ite would be minor modifications or modernization of tank Now, that might mean the addition of one more compar ment, or something like that, an expense item too sma to capitalize. That has nothing to do with mileage. would have been a simple matter, if requests had been ma for me to demonstrate the failure of the proposed alloc tion method by showing our tank maintenance cost, fie by field, from the western part of Montana, Colorado, a Wyoming, to the eastern part of our territory, and c

tainly the mileage traveled in the western portion are
7936 far and wide above and out of proportion to the more concentrated territory around Detroit.

Q. That would have been in reference to the gallons delivered?

A. Yes, sir. And there just has been no relationship, it just had no relationship.

Now, the fourth part of the difficulty that this suggested allocation procedure has is that the tanks are company owned. He is correct in his statement that when one of these company owned tanks is repaired, one is taken off of a tank chassis, and another tank is put on that tank chassis, and the tank that is taken off may be moved and placed upon an entirely different type of chassis. For instance, sometimes a tank will be taken off of one of the commission trucks, and perhaps repaired or modernized, or changed in some manner or another, and the remainder of its life will be spent on a salaried truck. The tanks are interchangeable to a certain extent. I do not mean by that that our commission agents, as a rule, have 2,200 gallon tanks, but a tank which is used on a Chevrolet truck by a commission agent is equally adapted for use on a Chevrolet truck which would be used by one of the salaried stations, and certainly it could be used by that just as well.

Q. Those actually are done? Such changes as that are actually made?

A. Yes, sir. That is the reason I feel that the
7937 suggested plan is more or less projected and predicated upon a lack of understanding of the compensation plan in effect by the Respondent company.

Q. Mr. Boatwright, will you please try and tell the Court that which I do not think has ever been adequately expressed heretofore; and that is, the nature of the credit card operations.

A. Yes, sir. Credit cards were introduced for several reasons.

The accountant for the Commission stated—

Q. (Interposing.) Do you mean Mr. Warmack?

A. Mr. Warmack stated it was a freezing of a customer—supplier relationship. That is true in part. It is broader than that. On interviewing thirteen thousand customers, we found that very interesting situation prevailed, and that was this: We found that those that had credit relations established with a given supplier had the regular product used in their tanks X proportion o the time; those that did not have credit relations established had X minus about ten per cent of the regula product in their tanks. Therefore, it has a tremendou influence in reducing the shopping tendency.

Mr. Austin: Reduce what?

The Witness: Shopping tendency.

By Mr. Hanley:

7938 Q. Do you mean a fellow going around from on place to another to try to find out what he wants t buy?

A. Yes, sir. Merely because of the convenience facto due to an extension of credit led to the use of the regula product, because of the convenience being afforded t him.

Furthermore, necessarily, when a man has a line o credit established, he buys more.

That is true whether it is a department store or whethe it is a petroleum company—he just buys more. So tha the particular supplier of a particular product, whe those conveniences are offered to the purchaser, thos are among the predominant reasons for doing that.

Now, maybe, the accountant for the Commission, M Warmack, intended to cover or to encompass both o those items.

Now, having established a line of credit which is convenient factor offered to the consumer, this credi card privilege becomes affected by and with the actu transaction.

I wonder if, before I come to the sales ticket, if ther is some question in your mind that your Honor has rela tive to the reciprocal nature of these credit cards? If s I will be glad to explain them.

Trial Examiner Ballinger: I would like to have yo fully explain it.

7939 The Witness: I shall cover that before goin into the ticket aspect of the transaction.

Various petroleum companies which are primarily i distribution in given sections of the country recogni the desirability of their customers being able to exerci credit privileges outside of their geographical territories.

Accordingly, they have a credit purchase extended t other petroleum companies irrespective of whether the is an affiliation there or not.

That is, the Standard Oil Company of California will issue a credit card to a customer of theirs who might buy a car in Detroit, and wishes to utilize his credit privileges rather than carry a large sum of money in traveling, in driving that car from Detroit to California. It is a very common occurrence, prior to when we ceased to make automobiles. We merely honor his credit privileges for the California company as long as he is in our territory. When he gets out of our territory he gets into the Utah territory, and then they honor his card while he is in that territory, and then the California company comes in, when he gets to California, because then he is back in his own home area.

Extending eastward this credit card may be reciprocated with the Standard Oil Company of Ohio, as far as Philadelphia and Pittsburgh, and then the Humble Oil Company, and when we get into the Dominion of Canada,
7940 with the various oil companies in Canada.

Now, in each case the various issuing companies seek to establish and secure the benefits of the credit privileges entitling their particular customers to purchase, and which are extended to their particular customers, and they would like to know that upon the return to that territory, they will continue to receive the benefits of the credit privileges that they extended. Therefore, it is merely a convenience factor which has been extended beyond the convenience of their own geographical territory, through a reciprocal understanding with other petroleum distributors.

Is that clear?

Trial Examiner Ballinger: It is.

The Witness: All right.

Having established a line of credit, the line of credit becomes a cost to the company as the sales flow to that particular credit card account, and as the sales flowing to that particular credit card account come into the company itself.

Now, I think you can best understand our system of accounting if I explain the means established by which we undertake to handle the labor incident to each individual credit card account.

We handle them under a rather simple system. As a matter of fact, we handle the entire matter by a
7941 ticket filing system. It works something like this:

A ticket comes in from a reseller, and it goes immediately to the checking department. The checkin department checks the accuracy of the extension of th value. From the checking department, it goes to the filin department. The file clerks file it according to the customer's name, or code marks, because each credit car has a code designation.

Then, at the end of the month, the tickets that have bee filed under John Doe's name are taken from the file an recapped. The customer is billed and the bill is attache to or has attached to it a carbon copy of each of th sales tickets so that he can check the accuracy of th figures, and a second group of tickets is retained in ou file. Upon receipt of the payment of the bill, we merel take the copy; that is, our copy of the tickets and we stor them in our inactive file, that is the copy of the ticket still in our active file, and we transfer those to the dea file, as having been paid.

Now, the whole set is predicated upon and is base upon the thought of the flow of tickets, and it is the tickets and the handling of those tickets, wherein we incur ou accounting cost.

Now, irrespective of control or lack of control of wher
the man utilizes his credit, we know it to be the fac
predicated upon an actual count of tickets tha
7942 approximately 10.2 per cent of those credit car
tickets were used by the customers at outlets serve
by jobbers. Inasmuch as our costs are predicated upo
tickets, and inasmuch as 10.2 per cent of the tickets originated with jobbers, then 10.2 per cent of our cost wa
incident to jobber business.

Now, there is another factor which should be give consideration and which, I fear, has not been completel understood.

And that is the tendency on the part of any individua to desire, in view of the advantages of credit privilege to retain his credit account. Not only are our reselle jobbers or any one else of that type reluctant, if they ca carry the credit load, to turn over their credit customer to the supplier, which they are, but they hold on to them as long as they can possibly finance their credit load i connection therewith.

Now, there is a tremendous difference in the financia responsibility in credit represented by the four jobber that we serve there, and the independent tank wago resellers in the main, or the lessees in the main.

As a consequence, there is a far smaller percentage of the regular customers of the company to the jobbers accounts requesting and being furnished credit cards by the Respondent company, in spite of the fact that we would like, because we know the advantages, to have
7943 them, because they do not want to surrender them
to us, and accordingly do not. These jobbers hold on to them as hard as they can. Therefore, there is just a simply smaller proportion of our costs incurred on the credit card accounting procedure on business through jobber outlets than it is on that gallonage represented to total gallonage moving through reseller outlets.

I think that there is one other thing that should be mentioned here. We ran a test check in which over 11,000 sales tickets were compared, as to the size of the purchase, jobber versus tank wagon, and established the dependability of the size of purchase, and so forth, and we reached a stability level that we utilize in standardizing the allocation of these tickets, in other words, determining how we shall allocate these tickets as a practice.

By Mr. Hanley:

Q. Did you—

A. (Interposing): Does that answer your question?

Q. I think it does, Mr. Boatwright. I have one thought by way of clarification.

You have indicated in your answer the fact on the reasons that you gave as to why on a gallonage basis there is not so much credit card business originating from jobber customers as from regular tank wagon reseller customers. That is right, is it not?

A. Well, I have indicated that if we divided the
7944 cost incurred on all sales tickets originating from
jobbers by their total gallonage, we get a smaller resultant cost than we do from the regular resellers.

Q. You have stated in the reverse what I intended to ask you, Mr. Boatwright. In the matter of gallons sold, there is the fact that there will not be as many credit card extended gallons sold through the jobber outlets as there will be through the regular reseller channels?

A. That is absolutely correct. That is absolutely correct in Detroit, your Honor.

Q. You have explained the reasons for that?

A. Yes, sir.

Q. So far as this cost study; so far as the costs of the

Respondent company are concerned, that does not make any difference. Does it? As I understand, you have given the effect, ticket for ticket, wherever it originated, whether it be in the jobber channel, or in the regular reseller channel?

A. That is right.

Q. So the cost to the company has been given complete consideration? Is that right?

A. Yes, sir.

Mr. Austin: May I ask a question for clarification?

Trial Examiner Ballinger: You may.

Mr. Austin: You made mention a minute ago, Mr. Boatwright, about keeping some track of the relative size of
7945 purchases of customers buying from jobbers and customers who buy from tank wagon resellers?

The Witness: Yes.

Mr. Austin: Would you mind carrying that a little further? I am not quite clear as to what you mean when you say you used the result. Just what kind of a result are you referring to? What kind of a result was it? What was it derived from? I want to know whether it has any bearing on the cost study.

The Witness: The size of the purchase would have no influence on the cost incurred. I think that is what you are getting at. That is the result about which I was referring to some extent. We counted every ticket originating from the jobber outlets, to ascertain the exact number of tickets which originated from that branch of our activities. It was our desire to know the number of tickets from every branch which originate and come in to our accounting department. We could have weighed them, or we could have counted them, or done what we did do and what was done with them. That was this, we took approximately 11,000 tickets and recapped the tickets in groups of 100. Then, the second group and the fourth group, and so on until we had established irrefutably stabilized levels. Then, knowing the total value of the tickets which originated from the jobbers, which we applied to the tickets from the total value of all sales tickets made on
7946 credit cards, rather than counting the individual credit card tickets from each one of the tank wagon reseller outlets, we divided the group by the value factor to reach the number which was then checked by weighing the tickets to establish completely the number of tickets to the tank wagon channel.

Mr. Austin: Was that the means used to obtain the total number of tickets for the period? Was that used for obtaining this figure of 10.2 per cent?

The Witness: The 10.2 per cent is predicated upon the actual counting of every ticket.

Mr. Austin: That is what I am not clear where the other factor comes in. I am sorry.

The Witness: You see, we counted every one of those to which I have referred. Of course, you see, to count every one of those sales tickets would have meant to count literally thousands upon thousands upon thousands of little slips of paper. So, having counted all those which originated from jobbers, because as they came in from jobbers to receive credit, they are shown listed on the back of the slip which type of outlet they originate from.

Mr. Austin: Do you mean counting the total number that came in from jobbers?

The Witness: We counted them, every one of the tickets that came in from jobbers, month by month. Then we 7947 ascertained the number in total and from sources of origin other than jobbers, by dividing the volume per ticket into the same total—I mean volume in money—perhaps I should say divided the value per ticket into the sum total value to get the number of tickets in total.

Mr. Austin: I am sorry. Maybe when I sit down and read that I can get it a little better.

You say you divided the value per ticket into the total of what?

The Witness: Into the total value.

Mr. Austin: Of all credit cards?

The Witness: Of credit card sales tickets.

Mr. Austin: How did you get that total value without making a count?

The Witness: Oh. That is recorded each month.

Mr. Austin: Does that involve an assumption that the average value of the ticket of the jobber was the same? Is that the way that you arrived at it, from the 11,000?

The Witness: The first figure is the grand total.

The second figure is the total sales tickets originating from jobbers.

The third figure is the total value of the tickets originating from jobbers.

The fourth figure is the average value of sales tickets emanating from tank wagon customers which we di-

7948 vided into the difference between the grand total and the total value of the jobber sales tickets which gave us the ticket flow from the other reseller channels.

Mr. Austin: Then, this was done to give you the value of the tank wagon reseller tickets?

The Witness: Yes.

Mr. Austin: There was no test made by way of comparison of the ticket value of the tank wagon as compared to the jobber?

The Witness: It would make no difference.

Mr. Austin: That is to say, it is just the same thing from an accounting cost standpoint? A ticket selling five gallons of gasoline is just as easy to handle as a ticket selling ten gallons of gasoline? Is that the idea?

The Witness: Yes, sir. It is merely a ticket file, and any other ticket would be the same, the recapping just the same.

Mr. Austin: Did you find this, or do you remember whether there was any appreciable difference in the average value of the tickets which came from jobber outlets and those which came from tank wagon reseller outlets?

Mr. Hanley: May I inquire what you mean by "value"? You have been using this word in a few questions to the witness, and I would like to know what it means. I take
it that it must mean the customer's purchases as to
7949 whether they are adequate, and represent about the
same amount of purchase?

The Witness: Yes, the value of the tickets would represent the value of the purchases, as you have indicated there.

Trial Examiner Ballinger: So as to represent the value of the purchases made, you say. Or would that be to ascertain whether the purchases from the jobber outlets were larger or smaller than those which came from the retail outlets?

Mr. Austin: Was there any difference?

The Witness: There is no significant difference at all.

Mr. Austin: Thank you, your Honor.

Mr. Hanley: Shall I proceed?

Trial Examiner Ballinger: Proceed.

By Mr. Hanley:

Q. Mr. Boatwright, if there were, is it not still true that the cost to the company is on the basis of handling the ticket, irrespective of the amount of sales—

A. (Interposing): Yes.

Q. —referred to in the ticket?

A. Yes, sir.

Q. As I recall the testimony of Mr. Warmack, he made some criticism of the Respondent's method of handling bad debts.

I may be in error about this, but I assume you will 7950 recall his testimony, Mr. Boatwright.

I think he, well, in one instance, he thought it would be good accounting to charge off bad debts as an operating cost; then, in another case, he thought it would be better accounting to adjust surplus by collection of bad debts.

As I understand it, this bad debt thing is quite closely related to this credit card question, since that is usually where it arises.

What have you to say as to the consistency of those two methods, or the one or the other method of handling bad debts? Just tell us about it.

A. Well, as I understand the testimony as given by Mr. Warmack, the Commission's accountant, it is my recollection that he testified that he would lean to the theory that the bad debt should be charged as an operating cost. Subsequently in his testimony, he stated that the collection of a bad debt previously written off should, in his judgment, be handled as an adjustment to surplus, or an adjustment of reserve.

Q. Do you regard that as consistent accounting?

A. Well, I think either that bad debts should be handled on a cash and disbursement basis, where both, if your bad debts are charged off as an operating cost, then the collection of the bad debt should be entered as a credit; 7951 if your bad debt is charged to surplus, then the collection of the bad debt should be credited the same. I think that it is consistent accounting when an account is entered in that manner, that you should erase it with a similar item coming the other way.

In other words, if you charge a bad debt to a certain account, and that bad debt is collected, or some other bad debt is collected, it should be credited to that account.

Q. That is your accounting judgment as to the method of handling bad debts?

A. Yes, sir. Many firms handle them one way, many firms handle them another way, but I am not sure that my interpretation of the testimony is correct, but that is my interpretation that it is either strictly on a reserve basis, or it is strictly on a cash and disbursement basis. In other words, it should be on either one basis or the other, it cannot be, properly, from a good accounting standpoint, on both.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

By Mr. Hanley:

Q. Mr. Boatwright, I refer you to page 6387 of the record where there is set out in extenso a copy of a letter or a memorandum given by Mr. C. T. Bergeson of the 7952 Respondent company to Mr. Warmack when he was in Chicago.

I direct your attention particularly to the last sentence of that memorandum which is as follows:

"The contribution is obviously not considered an expense item before the calculation is made of the net profits."

This whole memorandum from which the sentence referred to is taken has to do with account 520 on Respondent's Exhibit 101, having to do with annuities.

Will you explain what is meant, if you know by the explanation of the comptroller of the company as to the handling of this account in relation to whether it is regarded as an expense?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

Mr. Austin: I object to that question. That goes to the meaning of the comptroller, and I do not know how this witness, Mr. Boatwright, could have any knowledge, and if he did have any knowledge, it would be hearsay, as to just what the comptroller meant. I doubt if there is any suggestion in this record anywhere that the comptroller ever told him anything about it.

I think if there is any question about this item, 7953 that the witness might be asked directly his opinion of it.

Mr. Hanley: I am asking as to what the practice of the company is in treating this item as an expense.

Trial Examiner Ballinger: That is what the Examiner understood the object and purpose of the question was.

Mr. Austin: Then I suggest that the question be restated.

Mr. Hanley: He may not know as much about it as Mr. Boatwright does.

Mr. Austin: Yes. He may not know as much about it as Mr. Boatwright does, but I do not think that would entitle Mr. Boatwright to attempt to speak for the operations of another man's mind.

Trial Examiner Ballinger: Do you understand the question as modified by the subsequent statement of counsel?

The Witness: I do.

Mr. Austin: Do I understand he is now to answer the question as restated and not as originally stated?

Trial Examiner Ballinger: That is right. As modified and as explained by the statement of counsel for the Respondent.

Mr. Austin: Do I understand that your Honor has ruled as to whether or not this witness may state what was in the mind of the comptroller of the company?

Trial Examiner Ballinger: It might be better for
7954 you to restate the question.

Mr. Hanley: I will withdraw the question, and restate it.

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Hanley:

Q. Referring you, Mr. Boatwright, to the memorandum appearing at page 6387 referred to in the question just above asked you, and particularly referring you to the language quoted in that last sentence thereof, I will ask you now to please explain to the Court just what the practice and accounting procedure of the Respondent company is in connection with charging up the items in account 520 as expense items.

A. There are three component parts of account 520, as has been demonstrated repeatedly in the testimony:

One part of which has to do with current contributions of the company to match contributions made by employees and so charged on the books of the company as incurred.

Mr. Austin: What is that?

The Witness: And so charged on the books of the company as incurred.

The second part, representing payment of annuities to employees likewise enters the books of the company when incurred, in exactly the same manner.

7955 The third component part represents the company contributions towards a trust fund.

Our practice with respect to that particular part of account 520 is as follows:

First: We accrue monthly on our books the amount of $200,000 representing part of our anticipated contribution to the trust fund. As soon as the results of our operations for the first six months are available, we make an adjustment of the accrual that we have set up during the first six months to represent the sum which will approximate 10 per cent of the earnings of the company prior to income tax payments.

As we proceed into the second six months of the year, we continue to accrue on the basis of $200,000, and set it up on that basis. At the end of our year, or as we approach the end of December of each year, the profits before and after Federal income tax for the year are again studied and a second adjustment is made in the accrual that we have set up to meet that expense. This second adjustment being that amount which is necessary to bring the total payment of the Respondent company in keeping with the total actual cash turned over to the trustee.

The method of accrual that we follow on this is somewhat similar to the setup of accrual to meet future tax payments, that is, we take the past payments and approximate the amount that we will set up which means 7956 we then adjust our books as soon as we determine our actual tax burden, or when it becomes apparent to us.

We then allocate this expense to the various sales fields, the refineries, and so forth, on the basis of the current contributions to match contributions of the employees.

The only employees that are eligible to participate in this future annuity plan are those who are themselves participants in the plan and make some contribution to that plan. This is not a blanket annuity. It applies not to every one. As I say, it is not a blanket annuity that applies to every employee irrespective. It applies to those who are participating in the plan.

By Mr. Hanley:

Q. Mr. Boatwright, do you recall the testimony of Mr. Warmack and Messrs. Lundball and Depue criticizing the accounting methods of the Respondent in connection with the twenty-two thousand dollar plus item in account 520?

A. Yes.

Q. Do you recall that that treatment was criticized on the basis that the Respondent company had not set up a reserve to take care of the so-called twenty-two thousand dollar item?

A. It was my interpretation that was the primary objection to the handling of the account.

7957 Q. Do you recall that the so-called one hundred and eight thousand dollar group or item was also criticized?

A. Yes, sir.

Q. By these same people?

A. Yes, sir.

Q. Is it not a fact that that was criticized for the reason that it was being currently cared for and the reserve was being set up to take care of that type of payment?

A. Well, there are two shades of meaning to the testimony given as I followed the three witnesses referred to, each being an accountant for the Federal Trade Commission.

As I interpret Mr. Warmack, his testimony was that the twenty-two thousand dollar plus item was objected to because a reserve had not been established.

The one hundred and eight thousand dollar plus item which is in fact a payment and credit to reserve against future requirements, was criticized because it applied to services prior to 1939.

I think that the criticism of Mr. Lundball and Mr.—

Q. Depue?

A. —Depue, was predicated entirely as far as the one hundred and eight thousand dollars was concerned upon the thesis that this item of expense was in fulfillment of obligations which had been incurred prior to the year 1940.

7958 That was my interpretation of their criticism.

Q. In effect, is it not true that the company is setting up a reserve in so far as the one hundred and eight thousand dollar group or item is concerned?

A. Oh, yes, the payment to this trust is being spread over a period of years. The exact amount of the trust required cannot be ascertained at this date, due to the many actuarial influences which will determine the element governing the ultimate spread and amount of the trust to be set up, but it is being spread over a period of from twelve to fifteen years. It merely represents one of those annual payments.

Q. Referring, Mr. Boatwright, to page 7568 of the record in this case, and running from there through to the top of page 7575, wherein is set forth in extenso a certain question and five accounting answers in Respondent's Exhibit No. 110-A, 110-B, 110-C, 110-D, for identification, being the Journal of Accountancy for May, 1940:

First, is the question there posed comparable in a statement of facts to the method employed by the Respondent in its annuity plan?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

The Witness: I would like to have that question read.

7959 Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: It is.

Mr. Austin: Your Honor, I object to that question and any further questions about this statement for all of the reasons that I stated in my objection to the same question asked Mr. Warmack, commencing on page 7597 of the record.

Trial Examiner Ballinger: Your objections as to the questions asked Mr. Warmack were overruled, were they not?

Mr. Austin: Yes, sir.

Trial Examiner Ballinger: The Examiner adopts the same course here. Objection is overruled.

Mr. Hanley: I believe the witness answered the question.

Mr. Austin: He did.

Mr. Hanley: Perhaps his answer should appear after the ruling of the Court.

Mr. Austin: I think it would be just as well to leave it.

The Witness: I repeat: It is.

By Mr. Hanley:

Q. Mr. Boatwright, I refer you to the accounting answers designated Nos. 1 to 5, both inclusive.

I will ask you if you have read them? Do you agree
7960 or disagree in principle with the accounting methods
expressed in the five answers?

A. I have read them. I have studied them carefully. Inasmuch as all five of them reach and recognize comparable principles of treatment, I agree in those principles with the five answers. Some of the answers do point out that a second method of treatment may be permissible. That is correct.

Firms do not all follow identical practices with respect to this particular problem. But it seems to me that the procedure recommended and the principles advocated by the five answers is good accounting practice.

Q. Mr. Boatwright, there has been many hours of testimony devoted to account 520 in connection with annuities. Is it your recollection of the testimony that Messrs. Lundball and Depue both said that the item of twenty-six thousand two hundred some odd dollars was a proper charge?

A. Yes, sir. They did.

Q. Is it your recollection also that Mr. Warmack reduced that amount to something in the neighborhood of twenty-thousand one hundred and eight dollars odd, and then made a calculation as to the effect of his treatment of account 520 by eliminating the twenty-two thousand dollar item and the one hundred and eight thousand dollar item,
and the sum of six thousand dollars off of the twenty-
7961 six thousand dollar item, which resulted in a certain
reduction in the differential? If you recall that testimony, please state what your recollection is as to the amount that the differential would be affected?

A. Well, I do recall the testimony.

First, with respect to the testimony of Mr. Lundball, Mr. Depue, and likewise I recall the testimony of Mr. Warmack, as well as the calculation that he made.

If my recollection serves me correctly, he arrived at an influence upon the cost differential named by the Respondent—being 1.51 cents per gallon—by reducing, by the magnitude of zero point 06 cents per gallon as a result of his adjustment of account 520.

Q. What was the per gallon reduction in cents as a result of his adjustment of this account?

A. I think it was 6 100ths of a cent.

Q. Then, it was after giving consideration to the reduction of the twenty-six thousand dollars?

A. Yes, sir. That is after giving consideration to the reduction of the twenty-six thousand dollars, or adjustment, which was, as I have indicated in the testimony of the other accountants for the Federal Trade Commission, considered in its entirety.

Q. Mr. Boatwright, I think I asked you this at the outset of your examination, but I want to be very sure that I have it on the record.

7962 A. Yes?

Q. Were you asked by Mr. Warmack for any documentary evidence, or studies in connection with allocations on a gallonage basis? It seems to me that I asked you that before.

A. You asked me that. I was not asked for documentary evidence in support of the gallonage method of allocation of the different expense items, to the best of my recollection.

Q. Do you recall the last day that Mr. Warmack was in Chicago in connection with this matter in the spring of this year?

A. Yes. I recall that.

Q. Was he in your office?

A. Yes, he either came in my office or Mr. Houghton's, or else I went into Mr. Houghton's office where the two of them were seated. I do not remember where the two of them were seated.

Q. It was the time when the three of you were together; that is, Mr. Warmack, Mr. Houghton and yourself?

A. Yes, sir. There was a time when we were together and I requested prior to Mr. Houghton's departure that he go over—pardon me, prior to Mr. Warmack's departure, that he review with me the information that he had requested and received. And there was such a review held. I think it lasted a little better than an hour.

7963 Was there any conversation at that time between the three of you gentlemen relative to whether or not Mr. Warmack had received all of the information that he desired, and if there was, please tell the Court as best you recall what it was.

A. Well,—my memory of the events in that particular time period is that Mr. Warmack reviewed information secured, data obtained, and in many cases provided me with copies of data and information secured.

The conference approached an end, and as it approached the end, I asked Mr. Warmack whether there was anything more that we could do, or any further information that we could give him. And he said "no," there had been one class of information that he had requested, that Mr. Austin had requested, that had not been furnished him, but aside from that, I think his answer covered all other parts of the information accounted for.

Q. Well, let us take up that class of information if it was discussed, and what was said about that, one way or the other.

A. Well, in the case of the information that Mr. Austin's letter referred to—it had to do with the breakdown of account 075, which he requested originally in a letter addressed to you, as counsel for the Respondent, which was
discussed on the record in the hearing at Detroit, and
7964 which at that time the difficulties of complying with
the request were pointed out.

Those difficulties remained real, and remained exactly in the same condition after Mr. Warmack came to Chicago. When he requested a breakdown of account 075, I had one of the same results in that one of our cost analysts examined and went into entries.

Q. Who was that?

A. That was Mr. Russell, who was one of our cost analysts. He examined the entries in that account and went into considerable detail, the detail originally requested by Mr. Austin's letter.

As the result of the examination, I had to tell Mr. Warmack that he was safe in assuming that corresponding ratios of the 1940 expenditures in account 075 represented consumer advertising as that account had been broken down for the year 1937; and had been introduced as an exhibit in this case.

I think Mr. Warmack testified similarly as to that account. Aside from that, I know of no information that he requested that he did not get.

Q. Did he so state?

A. Yes, sir. He so stated.

Q. In that last conversation?

A. Yes, sir. He said he knew of nothing more we
7965 could give him.

Q. Mr. Boatwright, you have been concerned with the accounting angles of this case since its inception. Have you not?

A. I have.

Q. And you either prepared or participated in the preparation of, or directed the preparation of Respondent's Exhibits 99, 100, 101? Did you not?

A. Yes, sir.

Q. You have prepared numerous other items which have been supplied to the Federal Trade Commission in connection with this case. Have you not?

A. Many of them.

Q. You have prepared many schedules of figures which have gone into this case as exhibits. Have you not?

A. Yes, sir.

Q. You have, yourself, testified at length. Have you not?

A. That is correct.

Q. You have heard all the testimony and read all of the testimony of Mr. Warmack?

A. I did not hear quite all of it. I read and studied carefully all of the testimony of Mr. Warmack, and have heard a great deal of it.

Q. You have not only read it, Mr. Boatwright, but is it not true that you have critically analyzed it?

7966 A. Yes, sir.

Q. You have heard all of the testimony of Mr. Landball and Mr. Depue. Have you not?

A. Yes, sir. I have.

Q. Is it not true that, from an accounting standpoint, and from the standpoint of an economist, you have given serious thought over many, many months of time to the accounting features and problems involved in this litigation?

A. I have.

Q. Have you been able to conclude, and are you now able to conclude, Mr. Boatwright, in your own mind, as to when your company, your employing company, the Respondent company here, would ever be safe in granting any kind of a price differential, after your experience in this lawsuit?

Mr. Austin: That is objected to, your Honor, as incompetent, immaterial, and speculative as to what the Respondent would be safe in doing.

The Witness: I reached a conclusion.

Trial Examiner Ballinger: One moment. The witness may answer.

The Witness: I reached a conclusion.

By Mr. Hanley:

Q. What was your conclusion?

Trial Examiner Ballinger: It is of no value.

The Witness: It was just this: I can only state 7967 that after hearing all of this testimony, and after analyzing carefully all of the testimony, and considering the accounting problem incident to a conformity with the various interpretations of the word "costs," as having been evidenced in this case, I just do not know yet how I could recommend to the management of our company whether any given price differential would be or would not be in conformity with the provisions of the law.

Mr. Hanley: You may cross-examine.

Mr. Austin: Your Honor, I would like to adjourn until 11:15 a. m., tomorrow.

I do not get my copy of this record until early in the morning, and I will not be able to prepare a review of this testimony for the purpose of cross-examination before that hour.

Mr. Hanley: I have no objection so long as it is understood that we may leave here tomorrow afternoon at three o'clock.

Trial Examiner Ballinger: The motion is granted.

(Witness temporarily excused.)

Trial Examiner Ballinger: And now, at 4:55 p. m., the hearing is adjourned to reconvene at 11:15 a. m., August 4, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 4:55 p. m., August 3, 1942, the hearing in the above entitled matter was adjourned.)

7968 Room 532, Federal Trade
Commission Building,
Washington, D. C.
Tuesday, August 4, 1942.

Met, pursuant to adjournment, at 11:15 a. m.

Before:

Webster Ballinger, Trial Examiner.

Appearances:

Cyrus B. Austin, Esq., attorney for the Federal Trade Commission.

Harold R. Hanley, Esq. (910 South Michigan Avenue, Chicago, Illinois), appearing for the Respondent Standard Oil Company of Indiana.

7969 PROCEEDINGS.

Trial Examiner Ballinger: Come to order.

The hearing of Docket No. 4389, case entitled "In the Matter of Standard Oil Company (Indiana)" is reconvened pursuant to notice at 11:15 a. m., August 4, 1942, in Room 532, Federal Trade Commission Building, Washington, D. C.

The last hearing was held at this same place, August 3, 1942.

The reporter will note counsel for the Commission and Respondent present.

You may proceed.

Mr. Hanley: Mr. Austin, I have just one further question of Mr. Boatwright before turning him over on cross-examination.

JOHN W. BOATWRIGHT resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Hanley.

Q. Mr. Boatwright, do you recall the testimony of Mr. Houghton in respect of a conversation which he had with Mr. Warmack while they were in Detroit last spring in connection with some calculations by Mr. Warmack, and told by him to Mr. Houghton, having to do with marketing costs of salaried drivers as distinguished from commission employees?

7970 A. Yes. I do recall it.

Q. Did Mr. Houghton at that time report the fact to you that there had been such a conversation?

A. He did.

Mr. Hanley: That is all. You may take the witness.

Cross-Examination—by Mr. Austin.

Q. Mr. Boatwright, I believe you are familiar with Commission's Exhibit 129?

A. Yes, sir.

Q. That exhibit is entitled "Statement showing calculation of average salesman's cost per gallon of gasoline sold to Standard Oil stations in Detroit other than Ned's stations and served by the same salesmen who called on Ned's Stations in 1937"?

A. Yes.

Q. Do you understand that exhibit to be a computation of the - -eller salesmen's expense for the sales territory in which the Ned's Auto Supply Stations were located in 1937?

A. I understand it to be the computation of the selling expense for one salesman's territory only with respect to residual amount of the time of the salesman-representative serving that territory after taking care of Ned's.

Q. Yes. And that single salesman's territory was the territory which included the four Ned's Auto Supply outlets?

7971 A. Well, it included the headquarters of the Ned's Auto Supply Company. The salesman, naturally, he calls on and conducts his business at the headquarters. Actually the geographical area outlined by that territory does not encompass all of the locations of Ned's, but all of the selling was done at the headquarters of Ned's Auto Supply Company.

Q. Were you present when Mr. Blaugh testified in Detroit?

A. Yes.

Q. Do you not recall Mr. Blaugh testifying that these salesmen called on all four of Ned's outlets from time to time?

A. No. I do not so recall.

Q. Was the territory served by Robinson, Mulenberg, and Coutchie in 1937 the territory surrounded by the red line on Commission's Exhibit 109-A?

A. I do not recall that, Mr. Austin.

Trial Examiner Ballinger: Could you tell from an examination of the exhibit?

The Witness: I think I could.

Trial Examiner Ballinger: You may examine the exhibit.

(The witness examined Commission's Exhibit 109-A.)

The Witness: After looking at the exhibit, that appears to be the territory covered by these salesmen.

By Mr. Austin:

7972 Q. In your opinion, Mr. Boatwright, does Commission's Exhibit 129 set forth the correct computation of Respondent's selling costs for that particular sales territory for 1937?

A. No.

Q. Was the same method of computation used in computing the selling cost for that territory that was used by the Respondent in computing its selling cost for Ned's Auto Supply Company in 1937 on Respondent's Exhibit 31-L?

A. Not quite.

Q. What is the difference in method?

A. You apply 1940 figures to secure a breakdown. We did not apply the 1940 figure.

Q. When you say "1940 figures"; what do you mean, Mr. Boatwright?

A. The percentage of time devoted to gasoline was taken from exhibits representing 1940.

Q. Were those percentages used as the percentages of the salesmen's time spent on gasoline taken from the quarterly distribution of time reports of the salesmen for the year 1940? Is that correct?

A. That was my understanding of the testimony.

Q. What did you use in place of those figures in arriving at the percentage of time spent at Ned's Auto Supply Company by these salesmen in 1937?

A. We used the estimates of the management.

7973 Q. When were those estimates made?

A. I do not recall the exact date. It was early in the process of these calculations—early in the process of the trial.

Q. It was not earlier than 1940, was it? As a matter of fact, was it not in 1941 that those estimates were made?

A. It is entirely possible.

Q. Is that not so?

A. Well, I am not sure whether it was in 1940 or 1941. It was either the latter part of 1940 or the early part of 1941.

Q. Do you recall when the complaint in this case was served in December 1940?

A. I will take your word on that. I do not know just when it was served.

Q. Now, have you any other objection to either the method of calculation or the accuracy of the result reached on Commission's'' Exhibit 129, other than the fact that the percentages of time ascribed to three salesmen for gasoline were taken from the 1940 quarterly distribution of time reports?

A. Yes, sir. There is one small thing here that I did not feel it worth mentioning yesterday, but if we are going to enter into detail, in that first column you have designated as "Salary," and I think that is the sum total of salary, traveling expense, car expense, including depreciation.

7974 You merely have a misnomer on the exhibit. This first column is broader than the designated heading.

Q. Yes. But that should be so, should it not, Mr. Boatwright, if we are trying to find out the selling cost?

A. It is the wording in the heading.

Q. But that is not an error in the method or in the result?

A. No.

Then, my other objection was mentioned yesterday which did not go to the calculation. It went only to the representativeness of the territory.

Q. Of course, my question now is directed as to whether this was a correct calculation for that single territory.

A. I would have no objection other than the fact as stated.

Q. Is it not true, Mr. Boatwright, that for the purposes of this calculation, all of the time of these salesmen which was spent in sales promotional work at the outlets served by other companies was included, and that none of that time which included or was included in your calculation of the cost of serving Ned's?

A. No, I do not know that that is true. In our estimates of time we made I do not know whether the time devoted to calling on competitive accounts that the salesmen desired to secure is included in any part of the estimate, or another part, whether it is in one part or another. I just do not know where it is.

7975 Q. Well, is it not a fact that on Respondent's Exhibit 31-L, the estimate of time spent at Ned's meant time spent at Ned's, and does not include the sales promotional time spent at other outlets?

A. To the best of the ability of the management, we assume that—in other words, to the best of the ability of the management to estimate that.

Q. Let me get that clear now. To the best of the ability of the management to estimate that?

A. Yes, to the best of the ability of the management to estimate that.

Q. So that if that time spent at Ned's, as is shown on Respondent's Exhibit 31-L was deducted from the total time of the salesman, does it now follow that all of the salesmen's promotional time spent at other companies' outlets is included in the residue of the time which was used in the computation for Commission's Exhibit 129?

A. That would follow.

Q. Referring to page 7885 of the record, Mr. Boatwright, I would like to show you that page, particularly the third paragraph, and ask you whether or not that represents exactly what you said.

A. Well, I do not know whether it is exactly what I said. It certainly conveys the meaning that I had in mind.

7976 Q. Well, answer it in your own way if you can.

A. Well, what do you want?

Mr. Austin: If we could be off the record. If so, I can show you the way I think it should read.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

The Witness: The sentence should read:

"Incidentally, had it been desired by the accountant for the Commission to compare these, it would have been an easy matter to have checked the ratios there, either in the Detroit office or in the Chicago office."

I think it means the same, however, as it is here.

By Mr. Austin:

Q. Do you mean by that statement, Mr. Boatwright, that the quarterly distribution of time reports for the year 1937 for the Detroit field were still on file both in Detroit and in Chicago in the winter of 1940-1941?

A. I know that they should be on file in Detroit. I know that they are on file in Chicago. I have examined them in Chicago.

Q. Well, I tried to look it up this morning, and did not have time to. I was under the impression that I had asked you a year ago in the spring of 1941 about that very point, and that you had given some testimony or
7977 stated, in fact, that it was not available?

A. I am sorry. I do not recall any testimony to that effect. If you could point the testimony out to me I would be glad to give you my opinion on it. I do not believe you will find any such testimony.

Q. Mr. Boatwright, * * *

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. You may proceed.

ByMr. Mr. Austin:

Q. Mr. Boatwright, do you recall me going into that subject with you on your cross-examination in Washington in the spring of 1941, and your expressing at least a doubt as to whether the 1937 quarterly distribution of time reports were still available?

A. No. I do not recall that specifically.

Mr. Hanley: What became of that other question which was discussed off the record?

Mr. Austin: That was stricken physically.

Mr. Hanley: Well, there was another one just prior to that. What became of it?

Mr. Austin: It is still on the record. I was just
7978 trying to pursue this a little further, in an effort to clear up this matter.

Mr. Hanley: I see.

The Witness: May I hear the question again now?

Trial Examiner Bailinger: Read the question to the witness.

(The reporter read the question as follows:

"Q. Mr. Boatwright, do you recall me going into that subject with you on your cross-examination in Washington in the spring of 1941, and your expressing at least a doubt as to whether the 1937 quarterly distribution of time reports were still available?")

The Witness: No, I do not recall that specifically. You asked for several records of 1937, Mr. Austin, but you may or may not have asked about that particular record. I do not recall.

By Mr. Austin:

Q. Well, I have not been able to check it up this morning, but I want to ask you this:

You said that the Commission's accountant could have compared the 1940 quarterly reports and the percentages shown thereon with the similar report and percentages for 1937 had he desired to do so, in the spring of 1942. Did you at any time inform him that the 1937 quarterly distribution of time reports were still in existence?

7979 A. I do not know that I did. I did not know that he was going to make this calculation.

Q. Yes. I assume that. And I am not assuming that he asked you for them. I assume that if he had, you would have given them to him.

A. Yes. I could.

Q. I am merely asking these questions subject to a check as to your former testimony regarding their availability.

In your testimony of yesterday at page 7890 of the record, you referred to studies conducted by the sales research department in which results have been secured tending to substantiate and support the use of the gallonage factor.

Can you enumerate the particular accounts regarding which such studies have been made?

A. Well, I think the criticism was directed toward gallonage applying to all accounts. I can enumerate some of them where the bearing was direct on the individual account.

Q. Where what?

A. The bearing was direct on the particular account. I think I did that yesterday, in mentioning salesmen's salaries, account 004; office expense—salaries—accounting. And—

Q. (Interposing): Neither—

A. —which has many fields, and tends to substantiate the use of the gallonage for the allocation of general 7980 office expense to the field.

Q. Well, account 004 is not allocated on the basis of gallonage by the Respondent in its regular accounting procedure.

A. Both of those particular accounts which, as I mentioned yesterday, tended to indicate the validity of allocation of the general office expenses to the fields on a gallonage basis; those two specific accounts I mentioned on yesterday, Mr. Austin.

Q. I do not think you specified that yesterday. How, for instance, did your study of salesmen's salaries tend to justify or support the use of a gallonage basis for general office expenses, and for these general office expenses?

A. Well, account 004 and office expense—salaries—accounting, are two of the major items of expenditure on form 189. They are, likewise, two of the larger groups of personnel.

Now, if there is a direct correlation which is quite significant between the concurrent movements of those two items of cost and the gallonage sold in a given field, then certainly there is a logical justification of the use of gallonage as an allocation factor of general office expenditures to the field.

When I refer to general office expenditures, I refer to those which are allocated to the field on a gallonage basis.

7981 Q. Now, do you mean, Mr. Boatwright, now, the allocation of general office expenditures between the various fields on a gallonage basis, or do you mean the allocation between channels on a gallonage basis after you get part of the expense to the field?

A. I mean allocation of the general office expenditures among the various 27 or 28 fields.

Q. That has nothing to do with the allocation between channels after the expense reaches the field?

A. No, but there was a blanket criticism of gallonage as a factor of allocating cost, indicating that we had merely grabbed at the chandelier. I do not think that we did that that way, or that that could be quite so, because we have done many things to test the accuracy of the allocation factor, and I merely mentioned those as two of them with which I was personally acquainted where they had been made on the basis of proper investigation and study.

Q. Now, if I understand you correctly, Mr. Boatwright, you said that your studies had shown that the expenses in account 004 and account 200 follow gallonage, or their fluctuations, if any, followed fluctuations of gallonage.

I am not quite clear on this matter of correlation. You said there was a correlation, for instance, of .92 in account 004; a correlation of .94 in the case of account 200. Is that not right?

7982 A. Yes, sir. That is correct.

Q. Now, let me ask you a specific question, and you in your answer to that can explain what I do not now understand, which I think will then be clear.

A. Yes?

Q. Does the allocation of expense in account 004 as between tank wagon reseller, tank wagon consumer, and other methods channels follow or very closely approximate the distribution of product gallonage between those channels in the Detroit field?

A. I do not know. I do not think that it does.

Q. It is a fact then, is it not, that the allocation of expense may be an allocation differing very widely from the distribution of gallonage between channels?

A. Yes, sir. It does.

Q. And the same is true of account 200?

A. Yes, sir.

Q. Now, in view of that, will you please explain this correlation of .92 and .94 to which you referred yesterday?

A. Well, I was speaking of the sum total of the accounts in a given field as compared with the sum total of the gallonage in any given field which gave me a pair of figures. It would, would it not? If you take from the bottom of the exhibit the sum total of the gallonage in the field, and then you take the sum total of the selling cost in account
7983 004, and you do that for each of the twenty-eight fields, you have twenty-seven pairs of figures.

Now, the correlation process is merely a mathematical process of measuring the degree of relationship between these two figures for each of the twenty-eight fields, and in that manner you would have twenty-eight pairs of figures. It is an averaging process. If there is a perfect movement, as I said yesterday, it would have a correlation effect of one. That is so rare that it seldom happens with ordinary business data. I say "seldom." It just does not happen to ordinary business data. And that correlation factor indicates that I have, for instance, in a certain field, a selling cost under salesmen's salaries of $150,000—that is, to just take a figure out of the air—then, of course, with a reasonably accurate degree, I can estimate the gallonage there without knowing the gallonage.

Q. Well, then, the correlation procedure in these percentages that you are referring to is a support for the allocation of and distribution of general office expense between fields on the gallonage basis, and that only? Is that correct?

A. Yes, sir. Those two illustrations were used—

Q. (interposing) Now, just taking one of these accounts merely at random from Respondent's Exhibit 101 which are allocated upon a bulk plant channel, or, rather, between the bulk plant channels on a gallonage basis—referring to account 201—perhaps a little larger one would be better. Account 202 would be a better one. That is entitled "Office Expense—Postage." The expense in that account is allocated between bulk plant channels on a gallonage basis in the company's regular accounting procedure. Is that not correct, Mr. Boatwright? 7984

A. I think that is correct.

Q. Has the sales research department ever conducted any study which tended to substantiate and support the use of the gallonage factor for that account?

A. No. I do not recall that any of our studies have had a bearing on that specific account.

Postage is incurred largely in the billing of your customers, or upon the handling of your transactions of that nature, and so such billing or such correspondence and mail transactions covering all of your petroleum products would follow that rather closely. However, we have made no study in an effort to substantiate that particular allocation in the sales research department.

Q. I will ask you about one other account.

Turn now to account 086—Taxes—Real Estate and Personal Property. Has the sales research department conducted any study the result of which tended to substantiate and support the use of the gallonage factor for the allocation of that account between channels?

7985 A. The nearest thing that we have come to that in connection with this account is that in one of our analyses, we were analyzing tax payments and we were analyzing investment.

We took the investment and a sample of fields in tanks used for storage of our standard fuels which again are the gasoline, kerosene, heating oil, furnace oil, and so forth. And then we took the investment in the bulk storage for motor oil. And the motor oil storage, as you probably know, or at least as the Commission's accountant, Mr. Warmack knows, is not available at all plants. It is only available in a comparatively few of them. There is a tendency for the spread of your investment to follow and represent the only comparable ratio of the gallonage in the other methods channels to the other gallonage.

That is the nearest thing.

Your taxes are placed on an overall basis, as you are well aware, and the nearest analysis that we have made to that is an analysis of the investment aspect.

Q. Is not the tax or taxes assessed on real estate improvements and buildings on the property separately on each building?

A. I do not know.

Q. I thought that was the usual procedure of taxing authorities?

7986 A. I just do not know. I just do not know.

Q. Mr. Boatwright, can you refer to any specific studies which have been made by either the sales research department or other departments of your company which were made for the purpose of substantiating and supporting the use of gallonage factors in connection with any specific account on Respondent's Exhibit 101, between the various channels in the company's regular accounting procedure?

Mr. Hanley: May we be off the record a minute, your Honor?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

The Witness: May I hear the question again?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

The Witness: Well, you request that I refer to specific accounts.

I think I pointed out yesterday the number of individuals who had made analyses of the dependability of gallonage as an allocation factor. I do not think of this problem as being purely a single account problem.

Wherever a gallonage factor is used, it is what in our judgment is an overall cost.

Accordingly, if you make a study of gallonage as an
7987 allocation factor, you may direct your energy to one
or two or three parts of individual accounts. But
as a rule, you are studying a broader topic than that.

Q. Well, in applying the gallonage factor, you applied it specifically; you applied it to a particular expense, a particular account, as you have broken them down on your form 189; do you not do that, Mr. Boatwright?

A. Surely.

Q. It is also true that the nature of the expense in different accounts varies and that is why you have those different accounts?

A. That is right.

Q. Is not that the reason for having all of these one hundred-odd accounts the very reason that the company feels that the accounts vary sufficiently to justify that expense?

A. Frankly, I think we have too many accounts.

Q. At least you have them.

A. We have them.

Q. What is the theory upon which they were set up? Is not the theory that which I have just stated?

A. I presume it must have been. I do not know.

Q. Is it not true that while the use of a gallonage
factor in one account might result in approximately a cor-
rect distribution between channels of the expense in
7988 that account, that the use of the gallonage factor for
a different account might produce a result which was
quite incorrect?

A. That might be.

Mr. Hanley: One moment. I object to that question. As the ground for my objection I would like to state that—

Mr. Austin: To save time I will strike the question and restate the question.

Trial Examiner Ballinger: The question is withdrawn. It may be stricken physically.

Mr. Hanley: Oh, I think it should stand on the record.

Trial Examiner Ballinger: Very well.

By Mr. Austin:

Q. Would it follow from that that gallonage may properly be used in allocating the expense in one account • • •

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record.

By Mr. Austin:

Q. Would it follow from the fact that gallonage may properly be used in allocating the expense in one account that it may be properly used and would produce as correct a result when applied to the expense in a different account?

7989 A. That would be correct. You would have to take the situation there and determine it. It could happen either way. In one instance, it might produce a correct result in one instance, and if applied to another account it might also produce a correct result, which I take to be the point in your last question.

On the other hand, it might be properly used in one account and might not be properly used in another account, as you pointed out in your previous question.

I am just summarizing my understanding of your two questions.

Q. Then, do I understand your answer to be, Mr. Boatwright, that you could not refer to any specific studies which had been made by the Respondent which tend to support and substantiate the use of a gallonage factor as a means of allocating expense in any particular account on Respondent's Exhibit 101 between the regular accounting channels?

A. I have the question but I do not believe that some of the terminology is correct. Do you mean by "accounting channels," the regular sales channels in the field?

Q. The sales channels. That is correct.

A. No. I do not. I do not know that I could go any further in the description of the contention given as to this gallonage question than I went in my direct testimony. It
is something that we have discussed many times. I
7990 do not know of an accounting problem that has received the attention of our company that that one has. I would say annually, at least, some one account on 189, form 189, is broken down and examined in detail to see if

we can find a better substitute than gallonage for that part which is allocated on a gallonage basis.

I recall specifically that for three years on a row, we broke down account 066, and examined it in a careful effort to determine if we could arrive at a better method of handling it.

Q. You picked a very hard one there?

A. It is one of our most difficult ones. I know that we are constantly studying, just as any group of accountants would do, in an effort to improvement upon the accuracy of our allocations. Our accounting system is just the same as with any one else, it is subject to change, it is in a constant condition of flux as we adjust it to meet changing conditions. I could not go down on this form 189 and say that we have done this with that or with the other one, so far as gallonage is concerned on this account, on that account, and on this other account.

However, I can say that we have given it continuous attention. I could not, as I said before, take this form 189, which I have before me, go down it with you and say that we have done this, we have done that, we have
7991 done the other thing. I would not attempt to make any such statement as that, Mr. Austin.

Q. Now, at page 7893 of your testimony yesterday, Mr. Boatwright, you stated there under "Seventh:" part of your statement regarding gallonage, that:

"* * * a large part of our decisions are of necessity predicated upon a gallonage consideration." Then, you proceeded to state a number of examples.

When you referred there, Mr. Boatwright, to "gallonage consideration," and as you have referred to gallonage in various examples, were you not referring to total gallonage rather than to any ratio of gallonage between sales channels?

For instance, in your first example, you stated:

"If there is a question as to whether we should build an additional storage tank at a bulk plant, the amount of gallonage which moves through that plant is an important consideration."

While that was referring to a matter of gallonage, that was in fact referring to the total gallonage moving through the plant, was it not; that did not refer to that particular portion of gallonage that may move through a particular sales channel?

A. It was referring to the gallonage of that particular product moving through that plant.

Q. That refers to all products in your example?

7992 A. In that particular case the tank would be built for one standard fuel, let us say, or again, it might be referring to the matter of heating oil.

Q. Additional storage?

A. It would be a question of the amount of heating oil sold.

Q. My point is that when you say that a large part of your decisions are of necessity predicated upon a gallonage consideration, were you or were you not referring there in those examples to methods of allocating costs between different sales channels?

A. Well, I was referring to the significance that gallonage plays in decisions which the company must render. I was referring specifically to the allocation of cost for maintaining, let us say, this tank. We have been discussing many channels here, however, in this case I was referring to the significance in this particular case of a gallonage factor in ascertaining the course of action to be pursued at that plant.

Q. Were you not really referring to volume rather than to gallonage?

A. I do not know what the difference is between volume and gallonage. To me, they are the same.

Q. Do you—

Mr. Hanley: (Interposing). What is the differ-
7993 ence?

Mr. Austin: Well, volume is the overall.

Mr. Hanley: I would not know.

By Mr. Austin:

Q. Well, volume is quite a different thing from, in my opinion, from gallonage, as it was used here. We have been talking about gallonage as a basis for allocating between channels; whereas, as I understand your example, here you are merely referring to total volume of products moving through a particular bulk plant or retail outlet, or whatever it may be, without reference to the channel gallonage, if I may put it that way?

Trial Examiner Ballinger: Well, are not gallons used merely for the purpose of measuring volume?

Mr. Austin: They are, your Honor, the general volume of petroleum products rather than channel volume, which is the distinction that I am trying to make.

Mr. Hanley: I do not know whether there is a question pending or not.

Trial Examiner Ballinger: Read the last question and answer.

(The reporter read the last question and answer.)

Trial Examiner Ballinger: Proceed.

By Mr. Austin:

Q. All right. Mr. Boatwright, take the first ex-
7994 ample that I just mentioned, and you referred there
to the amount of gallonage which moves through that plant.

Does that have any reference to the allocation of costs as between sales channels?

A. Your question is so broad, Mr. Austin. You say it does not have any; yes, it has considerable. It has a definite and a significant bearing on the question of depreciation.

It has a definite and significant bearing on the question of allocation of taxes. So, on some accounts it would have a bearing. On others it would not have a bearing.

That is true of so many of these.

(The witness indicates the accounts on Form 189.)

By Mr. Austin:

Q. Your question here is whether you are going to build an additional storage tank at this plant, and you say the gallonage that moves through that plant is an important consideration.

Now, let us assume that you decide to build the storage tank.

A. Yes, sir. For simplicity, let us assume that we are considering a question of whether we should or should not build an additional tank in which to store standard Red Crown gasoline which would be sold in both reseller channels and consumer channels.

7995 Is that particular product satisfactory for purposes of illustration?

Q. Surely.

A. All right. Now, the product is placed in this tank. It is co-mingled, and we have a question of the depreciation of that tank.

We have the question of maintenance of that tank. And, well, let us say that on the annual basis there is the sum total that moves through that tank of 30,000 gallons, 40,000 gallons, or anything that you may wish to assume. A part of that goes to one channel and a part of that goes to the other channel.

Now, the gallonage factor which I mentioned in my consideration had determined the construction of the tank is a significant thing and is reflected in the depreciation account, and is likewise reflected in the tax account.

Now, when the product moves through there, it is one and the same product. The gallonage unit is used for the allocation of the maintenance of that being charged up to the 3,000 series.

Therefore, that illustration has an effect on these particular accounts. You would have to test each of these illustrations there, Mr. Austin, in order to get at, to see what they would do.

Q. The method of allocation has nothing to do with 7996 your decision to build the tank?

A. Not the method of allocation, but many decisions are based on gallonage, which of necessity influences subsequent accounts which may then—

Q. (Interposing). But the same gallonage will, of course, be allocated some place?

A. Which may have been or be allocated on a gallonage basis; yes, that is true.

Q. For instance, under "(c)" you say as follows: "If we wish to determine whether we should lease an outlet, gallonage is given important consideration."

A. Yes.

Q. I suppose you mean by that that gallonage that you think can be sold or that is being sold at that outlet? It is that gallonage to which you refer?

A. That is correct.

Q. And that again is something entirely apart from what you are going to do with your costs after you make your lease? Is that not true?

A. I suppose—

Q. (Interposing). What I am trying to say, Mr. Boatwright, I want to pursue this only a little further. It seems to me that these examples represent cases where gallonage in the sense of total volume may influence deci- 7997 sions such as just referred to here, but it does not seem to me that those decisions are decisions which have anything to do with allocation of costs between channels.

Now, if you cannot state that I am either correct or incorrect on that, I will not pursue it any further.

A. Mr. Austin, I am afraid that this just reaches the borderland of knowledge when two authorities fail to agree.

Q. I do not believe—when you said at page 7893, in the same paragraph that I referred to as follows:

"* * * that a large part of our decisions are of necessity predicated upon a gallonage consideration."

Does the gallonage which is considered include direct shipment gallonage, or is direct shipment gallonage excluded for the purpose of this consideration?

A. Well, none of these particular illustrations that we have mentioned was included in the group that would include direct shipment gallonage. None of these would include direct shipment gallonage. I think practically all of those illustrations is either applicable or restricted to reseller illustrations.

Q. Is it not true, Mr. Boatwright, that all of the studies, considerations, and checks which you mentioned in your statement yesterday about gallonage, were made and have been made by the company in the course of its regular accounting procedure over a period of years?

7998 A. No. That is not true.

Q. Well, perhaps I can state that a little differently from that.

A. Yes?

Q. Have any of those—

Mr. Hanley: (interposing) Just a minute.

Mr. Austin, did the witness finish his answer?

The Witness: Well, yes. He would have to reframe his question because that just is not true.

By Mr. Austin:

Q. Well, have all of these various checks and considerations which you have described been made for the purpose of checking or testing or adjusting the company's regular accounting procedure? That is what I meant when I said "in connection with it"; I mean that is what they were directed to. That is what they were trying to do.

A. Many of the studies have been directed to that. Many of the studies which have resulted in findings having a bearing on that did not start off with that as the major objective. It was merely incident to the development of another study.

Q. Does the company's regular accounting procedure recognize the direct shipment business?

A. No, sir.

7999 Q. And is direct shipment gallonage given any effect in the company's regular accounting procedure?

A. In the sales department, no.

Q. Well, the sales department is the department in which are included all of the costs in the Detroit field, as we have been concerned with them in this case?

A. Yes; it includes all of the marketing costs in the Detroit field, but there are times, and this is one of them when I am answering ~~your~~ question, when to answer it without a limitation, well, it will be simply not a correct statement. In other words, while it is quite correct that the sales department in the Detroit field includes all of the marketing costs, there is just this point that I said, if I were not to answer your question except with a limitation, why, it will not be a correct statement.

Q. Yes. I understood you. But I just wanted it to be clear on the record.

A. Yes.

Mr. Austin: May we take a recess for five minutes, your Honor?

Trial Examiner Ballinger: The hearing will stand in recess for five minutes.

(A short recess was taken.)

By Mr. Austin:

Q. Now, for the purpose of this cost study, Mr. Boatwright, when you were preparing your exhibits 99, 100, and 101, was the purpose of the cost study to make a 8000 comparison of unit costs as between tank wagon reseller channels and jobber, naphtha and gasoline channels, as shown on Respondent's Exhibit 101?

A. Certainly.

Q. And when you made this cost study, you attempted to make and did make a separation of direct shipment costs from bulk plant costs? Is that correct?

A. Yes, sir.

Q. When you proceeded to make your computations to arrive at the amount of expense charged to the various accounts in the jobber, naphtha and gasoline channel, did you—

A. (Interposing): I am sorry, Mr. Austin, but I did not hear your question. Would you mind restating it?

Mr. Austin: I will withdraw the question.

Trial Examiner Ballinger: The question is withdrawn.

Mr. Austin: I will put it this way:

By Mr. Austin:

Q. Referring now, Mr. Boatwright, to the field expenses as distinguished from the general office expense as shown on Respondent's Exhibit 101.

A. Yes.

Q. When you made your computation to determine the amount of expense in the various accounts which you charged in this cost study to jobber, naphtha and gas-
8001 oline, did you use an all gallonage method of allocation including direct shipment gallonage in arriving at any of the costs, or rather, expense entered in the jobber, naphtha and gasoline column?

A. I did not with reference to the field costs.

Q. Is there not just one, and only one exception to that, that exception being road maps issued through service stations, being a part of the expense in account 075?

A. Well, I was thinking of road maps as a general office cost, because they are purchased centrally, but they are allocated out to the field, and with that exception—I do not know, it seems to me also that there is a very small part of account 066, is there not?—I [illegible] just trying to recall, but it seems to me that there was some part of account 066 that would be in that category, but I may be wrong.

Q. I will accept that as ~~a~~ fact.

A. I just do not know.

Q. In general, Mr. Boatwright, is it or is it not true that the expenses charged to jobber, naphtha and gasoline, on Respondent's Exhibit 101 were not reached by the usual—well, perhaps I had better not say usual—by the use of a gallonage method of allocation?

A. In general that is correct.

Q. So that where the allocation factor is used in arriving at the direct shipment expense and particularly
8002 in the jobber, naphtha and gasoline expenses as shown on Respondent's Exhibit 101—well, let me ask you:

What were the allocation factors used in arriving at the direct shipment expense and particularly with regard to jobber, naphtha and gasoline expense, as shown on Respondent's Exhibit 101, Mr. Boatwright?

A. Wherever possible we predicated direct shipment cost upon the effort measure.

Q. That, in general, means time, does it not?

A. That is right.

Q. I believe that applies to salary expense additionally, does it not?

A. Yes, sir.

Q. As to non-salary expenses, what measure was used?

A. Well, there are so many different accounts, Mr. Austin:

The operation and maintenance of the car;

Depreciation on the car;

The traveling expense of the individual involved.

These usually follow the allocation of effort of the operator of the vehicle.

In other cases, we had to trade individual work orders, but the central theme of our thought was to allocate on the basis of the sum total of effort devoted to the jobber, naphtha and gasoline business.

8003 Q. If you had used total gallonage, Mr. Boatwright, including direct shipment gallonage as a basis of allocation, no cost differential would have resulted between tank wagon reseller and jobber, naphtha and gasoline?

A. That is correct. But it would have been an absurdity.

Q. I am not arguing that it should be done. I am just asking as to the fact.

A. That is correct.

Q. Now, in the course of your cost study and for the purposes of your cost study or at any other time, did you make any study to determine or substantiate the accuracy of the result obtained by the use of the gallonage method of allocation as between bulk plant channels for the purpose of reaching a cost in the tank wagon reseller channel for comparison with direct shipment cost obtained, as you have stated, on a basis of effort?

Mr. Hanley: Will you read that, please?

Trial Examiner Ballinger: Read the question.

(The reporter read the question.)

Mr. Hanley: I assume, Mr. Austin, that your question is pointed to this particular cost study reflected by Respondent's Exhibits 99, 100, and 101?

Mr. Austin: That is correct.

The Witness: Then your question is broader than that, as I recall it.

8004 Mr. Hanley: I do not know whether you remember the question or not.

Trial Examiner Ballinger: Read the question to the witness at this point.

(The reporter read the question as follows:

"Q. Now, in the course of your cost study and for the purposes of your cost study or at any other time, did you make any study to determine or substantiate the accuracy of the result obtained by the use of the gallonage method of allocation as between bulk plant channels for the purpose of reaching a cost in the tank wagon reseller channel for comparison with direct shipment cost obtained, as you have stated, on a basis of effort?")

The Witness: I believe that question is broader than that, after having heard it read again.

Mr. Austin: I will try to restate it.

Trial Examiner Ballinger: The question is withdrawn.

By Mr. Austin:

Q. I will restate the question to you, Mr. Boatwright.

A. Thank you.

Q. You used in many accounts as shown on Respondent's Exhibit 101 a gallonage factor for allocating the expense in those accounts between bulk plant channels.

You used exclusively or almost exclusively the effort 8005 factor, or at least not the gallonage factor in determining jobber, naphtha and gasoline, cost.

Have you made any study in any of these accounts which will support the use of the gallonage factor for arriving at tank wagon reseller costs for the purpose of comparison with the direct shipment costs arrived at by a different method—

A. (Interposing): In preparing—

Q. Just a minute—I believe that is all.

Mr. Hanley: That is objected to for the reason that the witness has been testifying two days now that studies of that exact character have been continuous in the course of the company's accounting affairs;

Further, that the exhibit speaks for itself as to the comparison that was made between a reseller channel and the jobber channel resulting in the claimed differential of 1.51 cents.

Trial Examiner Ballinger: The objection is overruled. The witness may answer the question.

The Witness: In connection with the preparation of Respondent's Exhibit 101, we did not make additional studies tending to verify or substantiate the use of the gallonage factor in the allocation of costs among the three sales channels shown under the caption, "Bulk Plant."

By Mr. Austin:

8006 Q. Is it not true, also Mr. Boatwright, that such studies and tests as the company may have made to support the use of the gallonage factor in its regular accounting procedure, were not made for the purpose of or with a view to comparing tank wagon reseller costs to jobber, naphtha and gasoline cost?

A. Yes. That is true.

Q. Now, if you will turn, please, to page 7904 of the record.

A. Yes.

Q. You were discussing, at that point, the various methods which have been applied to time records.

A. Yes.

Q. And further, you were discussing at that point, to be more particular, the accuracy of the use of time records maintained by salesmen for the purpose of allocating salesmen's salary expenses and the desirability of that method of allocating such expense.

I think that is correct, is it not, Mr. Boatwright? If you will just look at the bottom of page 7900 and the top of page 7901.

A. Yes. That is a correct statement.

Q. Now, on page 7901, you stated:

"Third: We found that if we allocated our expense for
a period of coming months according to the past records
8007 of the accomplishments, even though your salesman
may have been extremely conscientious, and even
though he may have maintained a careful record, it still was
a very poor allocation factor, because of the highly seasonal
nature of our merchandise."

That simply means, does it not, Mr. Boatwright, in your opinion, that salesmen's records and memoranda of time spent as between different customers and products would not be an accurate basis for allocating his expense for the following months?

A. Certainly. That is what it means.

Q. Well, is there any reason why such a time record kept by salesmen would not be a proper basis for the allocation of his salary and expenses—well, I do not think it would apply to expenses—during the month or months for which the record was kept?

A. No. Limiting my answer now to this one component part that you just quoted for the—

Q. (Interposing). What do you mean by "component part"—salary?

A. Oh, no. But you were simply quoting one paragraph—

Q. (Interposing). Yes?

A. —out of a series of difficulties that we encountered with that allocation procedure.

Q. Yes.

8008 A. As far as that one paragraph is concerned, if you have a conscientious salesman and he does maintain reasonably good records, records of the distribution of his time between customers and between products, then that record obviously could be used to allocate his past salary for the month to which the record applied.

Q. Now, I understand, of course, that your present procedure is to use quarterly distribution of time reports for allocation of salary during the following months. It is for the following quarter?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. But for the purpose of—

Mr. Hanley: May we be off the record?

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. You may proceed.

By Mr. Austin:

Q. Is it not true time records may accurately be used, assuming that they were properly kept, for the allocation of expense for the time for which the records were kept? Is there any reason why that could not be done? In

other words, why must you assume that the time rec-
8009 ords kept by a salesman must be used for allocating
following months salaries instead of past months?

A. The magnitude of the task of keeping your records and in bringing them together and making your allocations applicable to past operations would so delay your closing of your books, that it just does not strike me personally as delay that would be justified by the improved accuracy that you might obtain.

The book that we have frequently referred to here which has been marked as Commission's Exhibit for identification, a publication of the Federal Trade Commission, has in there a statement which is absolutely true, that it is difficult even for the salesman, when he is selling a line of products, and calling on a group of customers for him to ever by a time record or estimate prepare a strictly accurate allocation. It is just difficult to do.

Q. Well, assume that you might have that difficulty, and I am not urging that it be followed in the company's regular accouting procedure, but for the purpose of a cost study, such as this, Mr. Boatwright, would it not be true, in your opinion, that assuming that time records would be used, that they should apply to salaries and expense incurred during the course of the cost study; and is it not your opinion, also, that that might be done for the purpose of a cost study?

8010 A. Well, if you did that, Mr. Austin, you would
have to maintain a time record for a year period. You could not maintain a time record for, say, a month, and then say, "This establishes a time allocation which we will use."

That would not be representative at all, because of the seasonal nature of our merchandise. You see, most any problem that confronts us is a problem wherein we are confronted with an annual problem as far as salesmen's efforts are concerned.

Q. Assume that you kept such time records; assume in the course of your regular accounting procedure you use them in the following month if you so chose, it would nevertheless be possible to use those same time records as a basis of allocation of past time when confronted with the problem of making a cost study for prior years, would it not?

A. I am not sure that question is just exactly clear to me. May I give my interpretation of it to see whether it agrees?

Assuming that instead of the estimates of the company, it requested of its salesmen, and they had maintained careful and conscientious time records which, in our regular accounting procedure, we had applied to future months, but for the purpose of the preparation of this study, we had reversed the application of those time records and applied them to past months.

Is that the idea?

Q. Yes.

8011 A. Now, that being a statement of the condition, will you restate the question that you would apply to that condition?

Q. Well, I am really only wanting to find out whether, in your opinion, the following:

First, that would not be a more accurate method of allocating salesmen's time than any estimate could be;

Secondly, whether that use of the salesmen's report would not overcome the objection you stated here as the third objection on page 7901.

A. No. I do not think it would, Mr. Austin, I do not think it would be more accurate.

Q. You do not think that the salesman's time report would be more accurate than estimate for future months than you now use?

A. I do not believe it would.

Q. Even though the time report by the salesman would apply to all the time for which the report was made?

A. I do not think it would, based upon my experience.

Q. Why not?

A. Because I know salesmen. I know salesmen do not like to maintain detailed records, and they will not do it. They wait until they go to their hotel room on Saturday night, and they make up the week's reports.

Mr. Austin: Off the record.

Trial Examiner Ballinger: Off the record.

8012 (There was a discussion off the record.)

Trial Examiner Ballinger: On the record. You may proceed.

By Mr. Austin:

Q. You stated, Mr. Boatwright, that at one time you tried this practice of having salesmen keep and submit reports of the allocation of their time. Where was that done and when?

A. Well, it was done throughout our territories. It was done prior to my joining the company, and I think it was in the late 1920's that we were on that policy.

Q. When that was done, however, were the composite percentages made up from those reports used for the allocation of expense in future months or in past months?

A. I just do not know.

Q. Have you yourself or your department, since you have been in the department, made any study of the accuracy of the use of time reports by salesmen in allocation of expense for the time for which the reports were kept?

A. No. I have not made a study of that.

Q. This experience with those reports, then, is simply based upon what you have learned about the company's past procedure?

A. Review of the files, and going through the historical experience of the company on some of these different accounts, and discussion with men who were with the 8013 company and who are in charge of the accounting activities at that time, giving me their experience first hand.

Q. At page 7916 of the record, Mr. Boatwright, you stated:

"However, if we weight the salaries then we can not use the same allocation factor for the traveling expenses of salesmen, for the maintenance of the cars, for the depreciation of cars, * * *"

In referring to the different classes of salesmen in allocating their salaries between various channels in the company's accounting procedure—and I assume also for the purpose of this cost study—that a different allocation would have to be used for the supporting accounts; that is, for the traveling expense and the maintenance and depreciation on their cars, as I just read.

Is that correct?

A. Yes.

Q. Mr. Boatwright, those supporting accounts that you have referred to are accounts 032, 047, and account 102, are they not?

A. Yes, sir.

Q. Mr. Boatwright, the salesmen's salary account is account 004?

A. Yes.

Q. Is it not true, Mr. Boatwright, that the amount of expense in account 032, account 047, account 102 is
8014 quite small in total as compared with the expense in account 004?

A. Looking at the petroleum products channel, it represents approximately fifty-two thousand dollars as compared with approximately two hundred thousand dollars, the sum of those three.

Q. I believe your testimony was that while the difference in the average salaries paid different classes of salesmen affects to some extent the composite percentages of the quarterly distribution of time reports, or rather, would affect those percentages if salaries were weighted, that the amount of salary of the salesman has nothing to do in general, at least, with the amount of his traveling expense and the maintenance and operation and depreciation of his car?

A. Yes. That is right.

Q. Let us suppose now that in preparing the quarterly distribution of time report that instead of taking a composite percentage based upon the estimates of time for all salesmen, that a separate group of percentages for—that is, those channels were obtained for each separate class of salesmen, and then the salaries for that class of salesmen were allocated according to the time estimates for the particular class. That would be entirely possible, would it not?

A. Yes. Are you ignoring the differences of salary within the group?

8015 Q. Yes.

A. Then, you would prepare your allocation factor by groups of salesmen, and allocate all salaries of individual groups separately?

Q. Yes: That would be entirely possible—

A. (interposing) It would be possible—

Q. —on the basis of information that you would now have? Is that not true?

A. It would be possible. It would just increase your accounting cost.

Trial Examiner Ballinger: Have you any idea to what extent it would increase the accounting cost?

The Witness: Oh, it would not be a large factor, your Honor. Instead of making the one allocation as we do, we would then break it up into six or seven, and then you would have to re-cap that six or seven.

By Mr. Austin:

Q. Well—

Mr. Austin: I will take just a moment to look this up.

Mr. Hanley: While he is looking that up, will you tell us if there would be any benefit in doing that, that you know of?

The Witness: The only benefit that would be derived,
would be in case the salaries in one group failed to
8016 conform to the average salaries of the other groups.

Mr. Hanley: Off the record.

Trial Examiner Ballinger: Off the record.

(There was a discussion off the record.)

Trial Examiner Ballinger: On the record. Proceed.

By Mr. Austin:

Q. There would be some benefit in it, would there not, Mr. Boatwright, for the purposes of a cost study, for the allocations considered here, if allocations of salaries for each class were made separately as to each class?

A. It depends on whether you carried that back, the effect of that, back to a very low decimal point. In other words, you would have to carry that effect back to a rather distant decimal point.

Q. My only point here is in connection with your testimony; in connection with that statement in which you stated that it would require a different method of allocation for the three separate supporting accounts, which, as I recall, are accounts 032, 047 and 102.

A. That is right. It would.

Q. Now, if the salaries of each class of salesmen were handled as just suggested, and as you have stated is possible, it would still be possible to handle and use those percentages just as you do now, for the supporting accounts;
would it? In other words, you would still use your
8017 composite percentages for your supporting accounts,
which would not give an error in your determination there?

A. I am not at all certain that I understand your question. You are going to allocate salaries separately. Then, you are going to allocate your supporting accounts on a composite percentage basis? Is that the idea?

Q. Yes, simply because the composite would give the same result to the supporting accounts?

A. Yes. That is possible. And that is, I think, completely in keeping with what I suggested, when I said that it would be necessary to handle these accounts differently. You could not handle the salaries except on one basis, and the supporting accounts, except on a secondary but unrelated basis, as you have indicated here. You could not handle the salaries on one basis and the supporting accounts as a secondary to that. Do I make myself clear?

If you make the allocation by individual groups of salaries as appertaining to salaries from six or seven or eight groups, you are going to have six or seven or eight allocations instead of one; then, if you recapitulate your percentages by groups to reach the composite percentages for the overall class and apply your composite percentages to your supporting accounts, that would be all right.

Q. That would not involve the burden of getting new or additional information from what you do at the

8018 present time?

A. That is correct. It would only mean that you would apply it by component parts which may represent seven groups instead of one.

Q. That may have been done for the purposes of this cost differential from the information then at hand? At least, it could have been done for the purposes of this cost study from the information which was at hand at that time?

A. It could have been done provided we had broken down the component parts of the account.

Q. And you did break down the component parts for the purpose of obtaining direct shipment costs, Mr. Boatwright; did you not?

A. Yes. We had to do that.

Q. And I now refer you to pages 7920 and 7921 of your testimony, Mr. Boatwright. This goes over into the question of the possibility of a segregation between A-Station cost and B-Station cost.

A. Yes.

Q. At the top of page 7921, you stated that you had some discussion with other officials of the Respondent company on this point, and that following the discussion, Mr. Houghton went to Detroit and examined the actual records in the field; that he then returned to Chicago at a later date with a description of the nature of the records in the field, and he described what would be required to pro-

8019 vide you with what you would regard as a defendable or a true cost segregation.

At page 7922, you stated further that Mr. Houghton was in Detroit and maintained a staff of seven people who worked with him all the time, and that he gave consideration to this problem over the better part of four weeks.

A. Yes.

Q. So, Mr. Boatwright, I will now ask you as to what were the results of Mr. Houghton's study, and by that I do not want you to go into what you recall the result to be, I am rather asking whether there was any concrete results reported, whether there were any reports submitted, or whether Mr. Houghton reached the conclusion, any conclusion, regarding comparisons, whether he made any comparisons with which you did or did not agree, and whether or not he made any study.

A. First, I will say, no, he did not make a study.

He looked into the feasibility of making a study.

He did not make a study. It would take a tremendous amount of time, Mr. Austin, to get out all of these various and sundry accounts out of the files, and out of the vaults, out of the warehouses, and examine them to see what you are going to have to do. That was more the nature of what he did.

Q. When you refer to these four weeks in Detroit, are you referring to this whole cost study, or did he use four
weeks there with a staff of seven people studying the
8020 separation of commission agent business?

A. No. I think that my testimony is quite clear on that, if I recall it, as given. I was asked how much time he spent on it, and I said I did not know exactly. I stated the staff that we maintained there for the entire problem, for working on the question of the cost analysis, but I think I said that Mr. Houghton had devoted consideration to this problem for the better part of four weeks.

I do not know that he worked on it all the time for four weeks, or whether he worked on it for the time remaining after he had gotten the work outlined for the other six people.

In fact, I do not know just how much of the total time was devoted to this particular problem. It was considered during this four weeks' operation there.

Mr. Hanley: Just to clear this up, I think the record may be confused. This entire cost study that is represented by exhibits, Respondent took much in excess of four weeks?

The Witness: Yes, sir.

Mr. Hanley: It took some three months?

The Witness: Yes. I mean that in the time period that he went there that that was a part of his assignment, and that upon his return to Chicago, he reported not only
8021 on other parts of the cost study, but on this part of
the cost study, and a four-weeks' period of time had elapsed from the time that he was assigned to and did go to Detroit to work on it, and the time that he came back and made his report in Chicago as to the result of his examination.

By Mr. Austin:

Q. I think it is clear now. When he came back to Chicago, did he submit to you any studies or estimates indicating what the difference in the B-Station and the A-Station cost would be in any account or accounts?

A. No. What he did was this: He reviewed with this group the problems involved, and as stated yesterday, we could not reach a concurrence that if his course of procedure, as he saw it, was followed to its ultimate end—we could not reach a concurrence as to the dependability of the results.

Q. Did Mr. Houghton express his own opinion as to what the result would be?

A. I do not recall that he did.

Q. Now, you stated at the bottom of page 7921 and the top of page 7922, that you did not think that a one month study would be sufficient to establish unit costs as between commission agent business and salaried station business, "because of the seasonal operation of our costs and the seasonal variation of those costs, and that the only way we could provide the Federal Trade Commission with an accurate and dependable analysis of the two component
8022 parts of the sales division, would be to set up two
offices for a year's full flow of business."

In your opinion, Mr. Boatwright, would it not be practical to make such a study for the purpose of segregating A-Station and B-Station costs for a period of a month or two months during a part of the year most nearly representative of the year as a whole?

In other words, you have seasonal variations, but in your own experience, I should think that it would be entirely possible to pick out a portion of the year which would represent the average for the year, or perhaps pick a month at one time and a month at some other time so that you would get a period which would be reasonably representative of the year as a whole.

A. Well, I do not know whether that would be possible or not. You see, you have a seasonal variation in your consumer business quite marked and apart from the seasonal effect in your reseller; you are affected by a seasonal variation in your products moving in your products as well as in your periods of the year, on a time basis.

Again, your products moving in your handling of your merchandising, in any month, move and correspond and concur with neither of the other seasons.

What I am trying to make clear here is that you
8023 have a seasonal variation in your consumers which varies quite markedly from the seasonal variation in your reseller.

Furthermore, as I have indicated, your products moving in any month move and correspond and concur with neither of the other seasonal variations.

I have tried to state that one or two different ways, because I wish that to be quite clear on the record.

Now, then, with the movement of these three sales channels, you might strike a norm in these months, I do not know, nor do I know whether it would be possible to find a month which even for the volume flow might represent the norm, or represent the norm on the cost. I just do not know. There are too many variables there.

Mr. Hanley: You would have to run your study for a full year to find it out, would you not?

The Witness: Well, I am afraid it does not alter the problem very much.

Trial Examiner Ballinger: Well, is it not a fact that you would have to run it a year in order to determine?

The Witness: I am afraid you would. Yes, sir.

By Mr. Austin:

Q. Well, I did not know how that could be stated as a fact. I should think that when you have seasonal variations that the company must have a pretty good knowledge as to what months are borderline, and that would repre-
8024 sent an average.

A. For any one channel, or any one product, it would not be difficult, but in the aggregate it would be very difficult.

Q. Do I understand then, that you consider such a study might be made, but as far as you are able to testify now, you feel that it might be not dependable unless it were made over a period of a year?

A. That is my testimony, yes. I believe that it would not be dependable unless it were made over the period of a year.

Q. As far as seasonal variations are concerned, seasonal variations for A-Stations will change along the same lines as seasonal variations for B-Stations, will they not?

A. No.

Q. That is not so?

A. No. It is not so.

Q. You just stated that there was a difference between consumer and reseller?

A. Yes.

Q. Channels?

A. Yes.

Q. But I assume there that the channels would run through both classes of stations the same?

A. No. It varies by area as well as by product. For instance, a farmer buys his motor oil, which would be in the "other methods" channel during a month which would be quite different from a big month of motor oil sales 8025 in the reseller channel. Therefore, your rural aspect on your commission station would give you one season as defined and distinguished from the season of the same product in the A-Station. It varies both as to the market, the product, and the usage to which the product is put.

Q. Well, is it not true, Mr. Boatwright, also, that there are certain accounts, in fact, a good many accounts listed on Respondent's Exhibit 101 where your experience would indicate that there would be a very slight, if any, difference in unit cost as between A-Station business and B-Station business?

A. Well, my experience would indicate the fact I could depend on my experience, if I could depend on my experience to have any value in this period.

Q. I am afraid I did not understand your answer.

A. I said that my experience would indicate that if I could depend on my experience to have any value in this field.

Q. I see. I was just asking that preliminary to asking this question as to whether or not any attempt was made to make a separation of the costs in the accounts which, in your opinion, would provide a substantial difference or measurable difference in unit cost?

A. Well, your foundation question is quite different. You said my experience would indicate certain accounts in which there was no substantial difference in cost,
8026 as I understand it.

Q. Yes.

A. Now, you are changing it to accounts where there would be a substantial difference.

Q. That is right. In view of the difficulty which you say that you felt confronted you there in making these separations of cost, did you make any effort to make separations of costs in the accounts where there obviously would be a difference in unit cost? Now, there are other points, but will you please just answer that "yes" or "no" first?

A. Yes. I can answer that that we made no partial studies.

Q. It is true, is it not, that there is a number of accounts which you can pick out which would afford a measurable difference, and by that I mean a measurable difference between A-Station and B-Station business?

A. Well, I thought that would be true until I got into conference with these seven or eight men at the home office. I thought I could pick out some of these accounts, but they did not agree with me. There is always a situation in any of these questions of this type where you go from the quite apparent to the less apparent to the doubtful, and then to the feature of each type of account where you can turn either way.

A. I am not urging or saying that you should have jumped at any conclusions on these accounts as to
8027 what accounts would afford a cost differential and what accounts would not.

If you were to have said that you had, perhaps we would have attacked that. I am just asking as a matter of fact whether or not you did make any partial study or attempt to go even part of the way in that regard as to commission costs versus other costs.

A. I have answered that. We made no partial study.

Q: If you did make such a study, I want to know what results were obtained even though they were partial.

A. We made no such partial study.

Q. At page 7933 of the record, you said that: "If a commission driver were to deliver to a farmer gasoline he would receive five pay gallons for making that delivery; * * *"

A. I have the place.

Q. If a commission driver delivers a gallon of gasoline, and in that connection, Mr. Boatwright, I just notice here that the sentence that I quoted simply says "gasoline." Do you know what amount of gasoline, Mr. Boatwright, you had in mind when you said that a driver would receive five pay gallons?

A. Yes. That is the basis for one gallon delivery.

Q. Now, if a commission driver delivers a gallon of
gasoline to a tank wagon reseller station in his terri-
8028 tory, how many pay gallons does he receive for that?

A. For a reseller station, if the reseller station is located in a town, I think it is one and a half pay gallons; if the reseller station is located outside of the city limits in which the plant is located, my memory is that it is two pay gallons per gallon of gasoline delivered.

Q. What is the reason for the difference in the number of pay gallons allowed for delivery to the tank wagon reseller station and for delivery to the farmer?

A. Well, there are many reasons, which I thought I explained yesterday.

In the first place, we have to depend upon the B Station agent to do our selling for us in the rural area.

Q. Do you mean that it takes more selling to sell a gallon of gasoline to a farmer by a B-Station agent than it does for the driver to sell a gallon of gasoline to a reseller station?

A. In the first place, answering the first part of your question, the answer is yes.

Secondly, the commission agent has his own customer control records on the rural customer.

Thirdly, the agent maintains and carries his own line of credit on his farmer business.

Fourth, there is—

Q. (Interposing): Pardon me just a moment.

A. I have not completed giving my reasons.

8029 Q. Perhaps so. However, let us refer to those first two things, first, the tank wagon reseller customer, what are the things that are involved there?

A. He has to carry a line of credit? Is that what you mean?

Q. Yes.

A. Oh, no, not with the tank wagon reseller customer.

Q. But he does with the farmer? Is that the point?

A. Yes.

Q. How about your customer control?

A. He does not maintain customer control on reseller accounts. They are maintained by the salesmen.

Q. As far as selling activities are concerned, of course, he does, as you said at page 7935, spend a large portion of his time in the selling function but does not the selling function involve the use of his truck?

A. Not necessarily. A large part—

Q. (Interposing): Is it not so that when he delivers gasoline, that is when he tries to sell it?

A. Oh, yes, that is quite true, but he also frequently sells when he does not have his truck with him. You are asking for, unfortunately, just a broad generalization. I think I would answer it this way: That in the main, when he has his selling to do and when he actually sells, he has the truck with him, although there are many exceptions to that general statement. I think that is the best I can
8030 do with that.

Q. Is it not true that on the average the B-Station agent must drive his truck more miles to sell and deliver a gallon of gasoline to a farmer than he does to a reseller station?

A. Yes.

Q. Is not that reflected by the difference in pay gallonage allowed by the company on consumer sales as against reseller sales?

A. Well, I think that we are absolutely agreeable that distance is one of the factors. I think I so stated yesterday. But it is not the only factor. If you select that one and say, "Let's say that that is our allocation," it seems to me that you would have been equally logical in saying, "Well, let's select selling time," or in saying, "Well, let us select some other factor," or some other part of the many duties, and so forth, and so on. But if you select any part, I think you should check your selection against the record and see that it is proper, and it is not in this case.

Q. Is it your opinion that actual gallons as sold to tank wagon reseller is definitely a more accurate means of allocating this truck expense than by pay gallons?

A. Yes. It is better than pay gallons, but I mean—

Q. (Interposing): Why do you say it is better than pay gallons if you concede that the truck must be 8031 used more miles for the delivery of the consumer gallon than the delivery of the reseller gallon?

I think I will put it this way, Mr. Boatwright, have you made any studies to determine which gallonage ratio most accurately reflects the use of the truck in connection with that class of business?

A. I have not made that study, although quite by accident I have made the study which would ascertain the validity of the mileage factor which was advocated in connection with another analysis that we made, and that just does not represent the fact. That just does not fit.

Q. Are you referring now to the painting of trucks?

A. Yes. The painting of trucks.

It does not relate, for instance, to account 055, which is an account which takes care of the tank, to allocate that on a mileage basis would be an error, and that I know, having made comparisons of the cost of that account in the various twenty-seven fields and in the different geographical areas served by this company.

Q. Let us restrict this to account 025, truck rental expense. Would you consider that mileage would be the most accurate method of allocating that expense, assuming that you could actually check the mileage? Would you not concede that?

A. No. I would not concede that.

8032 Q. Would not the use to which the truck is put determine the allocation of the maintenance expense of the truck?

A. Yes, but Mr. Austin, are you thinking now of mileage as being comparable in the allocation of this—frankly, I am confused as to just what you do have reference to.

Q. I am thinking of allocating the truck expense which is in your cost of rental which you pay the commission agent.

A. Yes.

Q. Charging that expense to the sales channels according to the mileage devoted to the delivery of the products in one channel as against the other.

A. Well, in stating your question, frankly, I did not get that import from it.

Q. Then, let me carry it a little further. If a truck drove five miles for delivery of a certain number of gallons to a tank wagon reseller outlet and two hundred miles for delivery to a certain number of tank wagon consumer outlets, then it would seem to me that four-fifths of the time and of the expense of the truck should be charged to the tank wagon consumer and one-fifth to the tank wagon reseller. That does not involve unit cost, of course, if you know your expense you would divide that by gallonage by unit cost, but I am simply talking about dividing the expense of that truck as between the two channels.

A. Well, I understand, but that is a new theory,
8033 now. That is not the one that was advocated by Mr.
Warmack as the Commission's witness.

Q. Well, I believe it is. Mr. Warmack simply assumed that the pay gallons, from his study of how pay gallons were awarded, assumed that the pay gallons represented the ratio of mileage as between the two channels rather than actual gallonage.

A. Well, the assumption is wrong. It is not in conformity with the facts because it is not just mileage that is reflected by the pay gallons.

Q. Yes, I understand, but just what is it?

A. There are four or five other things.

Now, if you are asking me whether if each agent submitted a record of the mileage that he drove in making deliveries, and let us assume that he pulls out of a yard with a full tank of gasoline, and that he makes a stop and delivers one hundred gallons to a reseller and then drives on down a certain route and unloads gradually among six or seven of his rural customers.

Now, I think this in that connection, that the witness for the Commission, Mr. Warmack, suggested we might enter the mileage on the sales tickets.

In the first place, he, the commission agent, owns the truck and he controls his activities pretty largely and they
just—well, you would have a very difficult problem,
8034 I am sure, if we attempted to get that type of in-
formation.

Secondly, it would require and mean recapping of the mileage of each of these tickets, and then it would be assuming that the indirect mileage followed the direct mileage. And there are just hundreds of thousands of sales tickets that come in, and I do not know, I just do not know, Mr. Austin, how you could handle such a thing.

Q. I am not urging it, Mr. Boatwirght. It goes back to the original question of whether or not the larger distances driven by the truck in the delivery, as I understand it, in making delivery to the tank wagon consumer, are not reflected largely by the pay gallonage which is, in turn, reflected by the amount of commissions paid. You have conceded that—

A. I—

Q. Have you not?

A. I have never once conceded that.

Q. You have conceded that the truck drives farther in making deliveries to tank wagon consumer customers than it does in making deliveries to tank wagon reseller?

A. I have conceded that the truck drives farther, but I have never conceded that the difference in the commissions is purely a mileage factor. I want that clear.

Q. Yes, I understand that. Well, is it your opinion that there is an actual basis there; that is, that either the actual gallons or the pay gallons is an accurate measuring factor in dividing the expense in account 025? 8035

A. Well, I think the actual gallons would have to receive my vote there, Mr. Austin.

Q. I am not asking that.

A. They would have to receive my vote. That is my thought.

Q. Which is the better? I am asking you whether one is better than the other. I am not asking you whether either one is an accurate method.

A. Mr. Austin, again, when you speak of accurate, when you speak in terms of allocation, you are talking about all fields?

Q. Just which one of these methods approaches more closely to accuracy? First, does either one of those methods approach accuracy?

A. I think that the better of the two, as I started to say, would be the gallonage; that is just my opinion, based on this experience I have had.

Q. Is it your opinion that a different method of allocation should be used for the tank expense on those trucks from that for the truck rental expense?

A. No. I do not think so.

Q. Mr. Boatwright, just one more question on this subject.

A. Yes.

Q. Supposing a B-Station agent starts out in the morning with a full load of Red Crown gasoline in his truck, 8036 and he drives fifty miles making deilveries of that gasoline to various consumers. Then he comes back and in the afternoon he takes another full load and delivers that full load to a tankwagon reseller station in the town where he is located which, we will say, requires him to drive a total of two miles.

In your opinion, should as much of the expense of his truck-rental and maintenance expense be charged to the truck load delivered to the consumers as to the truck load delivered to the tank wagon reseller station?

He has the same amount of gasoline in both cases. He drove fifty miles in one case. He drove the truck two miles to deliver the tank load in the second case.

A. If that were our truck, and our operating costs, I would very readily agree with you. But this is a flat, lump sum amount to an agent. He operates his own chassis, his own truck, and he directs and plans his activities. Now, if he prepared the form 189, then I think that probably mileage should be used. But we do not prepare and handle the cost statement on his truck. The only thing we do is that we pay him an overall compensation in the form of a commission for the various functions that he performs. Then we pay him a flat rental.

Now, there may be some situation where a B-Station agent may not have but one small reseller outlet to 8037 whom he delivers gasoline. There may be another B-Station agent who will have a larger reseller outlet for his gasoline that he handles through his B-Station. Another and different situation may exist in the case of a third B Station agent.

I do not know. I believe and I think that it might be desirable if he maintained a cost record, probably, for him to establish some basis like that.

Q. I just asked what your opinion was.

A. Well, I will have to just tell you as far as your hypothetical situation is concerned, that I just do not think that your assumed condition is apt in determining what the company should do in the allocation of its costs.

Q. I assumed the condition.

A. Yes, and based on your assumed condition that you mentioned, then I will just tell you that I do not know.

Q. Do you not—

Mr. Hanley (Interposing): Just a moment.

On that hypothetical question, do you understand that the question, Mr. Boatwright, has the meaning that there should be a mileage allocation on the basis of two miles and on the basis of fifty miles for this particular account? Just what account or accounts is it?

Mr. Austin: 025 and 055.

Mr. Hanley: 025 and 055, on Respondent's regular 8038 accounting form 189.

Mr. Austin: The question speaks for itself. I would like to have the reporter read it.

Mr. Hanley: Well, from the statement it is not clear on what that assumption is based.

Trial Examiner Ballinger: Read the question.

(The reporter read the question as follows:

"Q. Supposing a B-Station agent starts out in the morning with a full load of Red Crown gasoline in his truck, and he drives fifty miles making deliveries of that gasoline to various consumers. Then he comes back and in the afternoon he takes another full load and delivers that full load to a tank wagon reseller station in the town where he is located which, we will say, requires him to drive a total of two miles.

"In your opinion, should as much of the expense of his truck-rental and maintenance expense be charged to the truck load delivered to the consumers as to truck load delivered to the tank wagon reseller station?

"He has the same amount of gasoline in both cases. He drove fifty miles in one case. He drove the truck two miles to deliver the tank load in the second case.")

The Witness: I would like to hear my answer re: l to that.

8039 (The reporter read the witness' answer.)

Mr. Hanley: I want to be sure that that is clear in this record.

Trial Examiner Ballinger: You have heard the question read. You have also heard your answer read. Do you care to amplify your answer?

The Witness: No.

By Mr. Austin:

Q. Does truck rental expense mean what it indicates, Mr. Boatwright? By that I mean this, does the Respondent rent these trucks from the commission agent?

A. Yes.

Q. Then, the truck being driven by the B-Station agent is the Respondent's truck, is it not, being operated by a B-Station agent as an employee?

A. It is a truck on a lease.

Q. Well, that is what I mean. The Respondent leases the trucks from the commission agents. Is that right?

A. Yes, sir.

Q. In this example that I put, the Respondent would be paying the commission agent a rental for it, I assume, it would be on a time basis?

A. It is on a monthly basis.

Q. So that there would be a certain amount of rental
time, being the time that it took the truck to make
8040 this delivery which consumes fifty miles to get rid of
one load of gasoline, and this amount of rental would
be chargeable to the amount of time it took him to deliver
the second tank of gasoline to the tank wagon reseller?

A. If we had the time factors, it would be. That is not the situation. It is a flat monthly rental.

Q. On page 7936 of the record, in which you were referring to commission agents, you referred to a twenty-two hundred gallon tank and indicated that your commission agents, as a rule, do not have tanks of that size. Is that correct?

A. That is correct.

Q. What is the size of the tanks used by B-Station agents in the Detroit field, if you can give any range or reasonably definite answer to that question?

A. Yes. I can give you the range. I think most of them in the Detroit field would be between five hundred gallons and seven hundred gallons. However, there may be a few that are as small as four hundred gallons. There may be a few that are as high as one thousand.

But the seven hundred gallon capacity would probably be nearer to the major group.

Q. Mr. Boatwright, how are bad debts written off and accounted for by the Respondent in its general office for the entire company?

A. I would have to look up as to how that is handled.

8041 Q. Do you set up a reserve for bad debts in the general offices of the company?

A. On the general books?

Q. Yes.

A. I think we do.

Q. Is it not true that your company charges bad debts written off against reserve and credits to your reserve any collections made of bad debts previously written off?

A. Speaking of the general office, I do not know our general office books like I know our market expense system. And we are going far afield here on general books. I would have to go into our code of accounts for that, in other words, I would have to go into another code of accounts and look into all of those things because we have discussed this at no time in this hearing prior to today; either at Detroit or any place here prior to this moment.

Q. We have discussed the bad debts situation, and as I understand it, it is handled entirely differently on the general books of accounts from what it is in the field.

A. I will just have to answer your question that I do not know the general books of the company.

Q. You made one other statement that I wish to refer to, Mr. Boatwright, and I cannot give you the exact page in the record at the moment. But in your testimony yesterday, I believe you said that one of your annuity
8042 funds was handled, or that annuity applies only to
employees who are participants in the plan, and not to all employees.

Then you were referring to the trust fund which was contributed to through an item of expense of one hundred and eight thousand dollars plus, as we have referred to so many times in connection with account 520.

Is that what you were referring to in that testimony?

A. Yes.

Q. Will you explain what you meant when you said that the benefits of this plan were participated in only by employees who had—if I understood you correctly—had made some voluntary contribution to that?

A. Yes. Those who are participants in the plan. There is a part of account 520 which represents payments that the company makes matching payments that the employees make. Therefore, I certainly think that if I wish to participate in the plan, I have to have the company deduct from my check periodically payments as the case may be.

Q. Is that optional with the employees whether they participate or not in the plan?

A. It is.

Q. Is that true prior to 1939?

A. Prior to 1939 there was no annuity contribution on the part of the employees of the company at all.

8043 Q. Do you mean this became effective after that?

A. Yes.

Q. How about this trust fund set up with the Chase National Bank for the payment of annuities for periods of service prior to January 1, 1939?

A. That trust fund is available and will constitute payment of annuities of those who are currently participants in the plan.

Q. But were all employees who were in the employ of the company prior to January 1, 1939, participants?

A. A very high ratio. There may be exceptions. I do not know.

Q. Iu understood you to state just now that there was no contribution of salaries prior to January 1, 1939. What I am trying to understand here is whether all employees participated or why all employees would not have participated in that plan and be present participants if they did not have to make any contributions prior to January 1, 1939?

A. Prior to 1939, they would have been participants in the fund, in the then effective annuity plan of the company. The plan was changed in 1939 and based on an actuarial and insurance basis. Now, the building of this reserve is to take care of the services of those employees who are participants in the plan for such time periods as they have been in the employ of the company prior to January, 1939.

8044 Q. Well, is the participation of the particular employee in the trust fund dependent upon or affected by his participation in the insurance plan?

A. That is my understanding.

Q. But the deductions from his salary go entirely into the insurance fund, do they not?

A. Why, certainly, the deductions from his salary for insurance premiums go in the insurance fund and the annuity fund.

Q. There are no deductions from salary which go into the irrevocable trust for the time prior to 1939?

A. No. That is true. But there are deductions made from employees' salaries which go to defray the insurance premium.

Q. What I am trying to find out is whether all employees who were in the service of the company prior to

January 1, 1939, and were subject to the plan then in effect are now participants in the benefits of the trust fund which represents the one hundred and eight thousand dollar item—

A. (Interposing.) When they—

Q. —regardless of whether or not they voluntarily participate in the insurance fund in their deductions from their salaries to that fund?

A. Well, Mr. Austin, I have answered that to the best of my ability. I said it was my understanding that the participation in the present plan is a prerequisite to a future participation in the annuities which will be
8045 paid out of the current contributions plus the reserve that is being built.

Q. Well, I am sorry, but when you refer to current contributions, please, Mr. Boatwright, as I recall it, this fund that is being built, are you referring now to the insurance fund, the twenty-six thousand dollar item, or are you referring also to the one hundred and eight thousand dollar item?

A. I am assuming that particiption in the twenty-six thousand dollars is a prerequisite to future participation in the one hundred and eight thousand dollars, to the best of my understanding. In other words, the company is willing that if I decide that I do not want to take my insurance through this plan, that they have made available, I can authorize them to discontinue any subtractions from my pay check, and they would so do, but by that action I forego my anticipated annuities at the age of sixty-five if I were to stay with the company until that time, as far as this plan is concerned.

Q. Even though they had been with the company for several years? Even as to that period of service prior to January 1, 1939, I mean?

A. That is my understanding.

Trial Examiner Ballinger: Would not the employee who had been retired prior to 1939 receive a part of his retire pay out of the contributions made by the company in
8046 1940 to the fund?

The Witness: No. The payment of the annuity to the individual retired prior to 1939, on that he receives his annuity out of this amount which we have designated as twenty-two thousand dollars plus. In other words, these men have fulfilled the contractual part of their employment with the company except for agreeing to certain things when they go upon the annuity. They will continue to be paid by the company during the remaining lives of those employees. But this does not come out of either the twenty-six thousand dollars or the one hundred and eight thousand dollars.

Trial Examiner Ballinger: Frequently throughout your testimony you have referred to "pay gallonage," allowed commission salesmen.

Will you please explain just what that is?

The Witness: Yes, sir. "Pay gallonage" bears a constant rate in terms of cents per pay gallon. The various weightings given by it, one through five is merely a process whereby we weight the different actual gallons according to the pay gallons allowances which results in a different payment per actual gallon according to the point of delivery, or customer, or selling effort, or realization. All these factors go into the making up of the total weighting significance of each sale.

Trial Examiner Ballinger: Now, I believe you referred to five pay gallons being allowed a salesman
8047 for a sale to a farmer.

The Witness: Yes, sir.

Trial Examiner Ballinger: All right. Now, what does that five pay gallons mean?

The Witness: Well, let us assume that these five pay gallons' delivery that we are referring to was made by a commission agent who received four-tenths of a cent per pay gallon, that would mean that for each gallon which he delivered to that farmer, that the employee would receive five times four-tenths of a cent, or a total of two cents. It is merely a weighting factor which is applied by [illegible] company.

By Mr. Austin:

Q. Is that weighting factor used in determining the amount of commissions the B-Station agent receives from the Respondent?

A. Yes.

Mr. Hanley: Does that mean that the amount of his commission may be determined by the amount of pay gallons that he has earned?

The Witness: I do not think that either question is clear to me. Can you restate the question, Mr. Austin?

By Mr. Austin:

Q. Is not the commission which the B-Station agent receives the result of multiplying the number of pay gallons that he sells by his commission rate?

8048 A. His base rate?

Q. Yes.

A. Yes, sir. That is correct.

Q. If he sells a gallon of gasoline to a farmer, he is credited with five pay gallons?

A. Yes, sir.

Q. If he sells a gallon of gasoline to a reseller station in the town where he is located, he is credited with one and a half pay gallons?

A. Yes, sir.

Q. Then, in determining the amount of commission that he receives, is it not true that the company simply multiplies the number of pay gallons of each product by the commission rate for that product?

A. The commission rate per pay gallon is uniform for all products. In other words, one pay gallon resulting from the sale of heating oil carries exactly the same weight as one pay gallon resulting from the sale of gasoline.

Q. I did not know that.

A. So that it is actually the same, and it accumulates the same total of pay gallons for each product, to the extent that it pays the base rate per gallon; that is, per pay gallon.

Q. The charge to sales channels; that is, tank wagon reseller, tank wagon consumer, and other methods is a direct charge, is it not, Mr. Boatwright, based upon

8049 the report of the B-Station agent himself as to the product which he sold and the customer whom he sold?

A. You are speaking now of the 021—commissions? That account?

Q. Yes.

A. That is correct.

Trial Examiner Ballinger: Prior to the granting of the differential to Ned's and to the other three jobbers in Detroit area, did the Respondent company make any survey, study, or investigation to determine whether the differentials to be granted fairly represented the difference in the cost of marketing gasoline to the jobbers and to the reseller outlets?

The Witness: Well, these differentials, to the best of my knowledge, your Honor, have been effective for quite an extended period of time with all of the accounts except Ned's: I think Ned's, when they were converted from tank wagon to the jobber channel, were extended the prevailing differential in that community that was already in existence to the other three jobber customers.

Trial Examiner Ballinger: My recollection of the testimony is that these differentials arose since 1935 or 1936. Is that correct?

Mr. Hanley: No, I think the differential accorded
8050 the jobber accounts has been substantially the same
ever since they became accounts of the Respondent company. Some of them—I may be wrong about these dates, Judge,—but it just runs in my mind that some of these people have been dealing since back in the 1920's.

Mr. Austin: If your Honor please, at this time I move to strike from the record Respondent's Exhibit 33-A, 33-B, 33-C, 33-D, and 33-E for all of the reasons stated at pages 4676 through 4683 of the record, and for additional reasons which I will state in a moment.

The reason for renewing this motion is that those exhibits were the first attempt at cost justification for the years 1940 and 1939, which the Respondent put in the record. And your Honor will recall that the last three or four pages of that exhibit referred to the so-called Oklahoma survey.

That exhibit for all intents and purposes, I submit, has been superseded by exhibits 99, 100, and 101 of the Respondent. I believe it may be fairly considered as abandoned, but whether the Respondent abandons it or not, it seems to me that that exhibit is no longer the best evidence of the Respondent's cost in the Detroit field, since the Respondent has since then; that is, since that exhibit was introduced in evidence, made a cost study which is reflected by Respondent's Exhibit 101.

Therefore, I believe that all of the reasons which
8051 I cited at pages 4676 to 4683 of the record are more
pertinent now than even they were then and should be reconsidered in connection with the fact that the Respondent is now relying on its Exhibits 99, 100, and 101 as set forth in this record, as setting forth its comparison of costs in the Detroit area, between tank wagon reseller on the one hand, and the jobber situation on the other hand.

I do not believe that this Exhibit 33 can fairly be said to be of any corroborative value so far as Respondent's Exhibit 101 is concerned because it shows higher costs in Oklahoma than the Respondent now claims for its justification in Detroit.

I do not have any further argument on it, but I do believe that this exhibit should be stricken from the record, and we should be relieved of any further concern with it.

Trial Examiner Ballinger: That motion runs to the three exhibits, does it?

Mr. Austin: No. It just runs to Exhibit 33-A, 33-B, 33-C, 33-D, 33-E. There were five pages of the one exhibit.

Trial Examiner Ballinger: I will hear from counsel for the Respondent.

Mr. Hanley: That motion is, of course, resisted by the Respondent for the very same reasons that it was
8052 resisted when it was made originally.

There is no abandonment of that or any other evidence put in this record by the Respondent.

It is not regarded as superseded by the so-called Detroit cost study, but, on the contrary, it is regarded that the Detroit cost study supplements and corroborates the first testimony that this Respondent put in in justification of these costs.

Simply because the attorney for the Commission does not like it, or does not want to be bothered with it, or thinks that the Detroit study is better, maybe, may go to the question of the weight which it has, but it does not go to the competency of this testimony in this record.

Mr. Austin: If your Honor please, I request that before your Honor passes on that motion that you do re-read the reasons stated at length on the pages of the record just referred to, namely, 4676 to 4683, and with this end in view that many of those reasons, while at the time given were perhaps argumentative in not being supported by facts in the record, I believe now your Honor will find that many of those arguments in support of the motion to strike have since been supported by the actual facts put in the record in the testimony regarding the Detroit costs.

And I believe that while I thought at the time and still think those arguments were sufficient, I believe that
8053 they should have more weight because I believe that
they have been supported additionally by testimony put in the record since that argument was set forth.

Therefore, I think the argument now should be re-read in connection with this motion.

Trial Examiner Ballinger: If the Exhibit should be stricken, should not all of the testimony relating to the Exhibit be stricken?

Mr. Hanley: No.

Mr. Austin: Well, I do not think that that follows because a great deal of the testimony which came in under that exhibit was testimony regarding the accounting procedures and methods of operation of the company, and therefore, was not repeated, and it was not necessary therefore to repeat them in connection with the late Detroit cost study.

But of course it would be entirely possible to pick out portions of the testimony relating strictly to the Oklahoma territory which no doubt should be stricken if the Exhibit is stricken.

But I do not think it would be worth while to go over the record to try to pick out those bits of the testimony piecemeal.

Trial Examiner Ballinger: The Examiner is quite familiar with the past motion made by counsel to strike, and the reasons which actuated the Examiner at that time
8054 in denying the motion.

The Examiner is still of the same opinion, while in view of the subsequent exhibits offered by the Respondent, the exhibit referred to in the motion may have been reduced in importance, it still may have some evidentiary value, and that is for the Commission and not for the Examiner to determine.

The motion is denied.

Mr. Austin: The Commission rests.

Mr. Hanley: I have just one question, if your Honor please, that was suggested by a statement made off the record by your Honor.

Trial Examiner Ballinger: Proceed.

Redirect Examination by Mr. Hanley.

Q. Mr. Boatwright, did you and your staff give consideration to the advisability or feasibility of differentiating in cost to the Respondent of selling and marketing premium gasoline and third grade gasoline, and pulling out or attempting to separate costs on those two grades of gasoline, and distinguishing them from each other and from Red Crown?

A. It was considered.

Q. Just go ahead and state what your conclusions were, and what you found the facts to be in so far as you analyzed the facts.

8055 A. Well, consideration was given to that problem, but inasmuch as all of our costs on gasoline are set up on gasoline as a class, and not by brand, it would have been an extremely difficult, if not impossible thing, to allocate our costs according to the brand of gasoline.

The next thing that I did was to weight the differential which was allowed jobbers of one and three-quarters cents on Ethyl, one and one half cents on Red Crown, and one cent on Stanoline for the third grade, to ascertain whether in the aggregate the three grades of gasoline approach one and a half cent differential on Red Crown, which they do.

The percentages were applied to the differentials of the three grades which resulted in an average differential on the three grades of gasoline which was found to be a plus or minus of one-hundredth or two-hundredths of a cent and a half.

I do not recall the exact figures, but it was almost a cent and a half.

Q. I believe the exhibits are quite clear on it, but just to button this thing down: It is true that the gallonage involved in both the reseller channel and in the jobber channel on Respondent's Exhibit 101 of the Respondent company is overwhelmingly Red Crown gallonage?

A. Yes, sir.

8056 Mr. Hanley. Do you have any further questions on that?

Mr. Austin: No.

Mr. Hanley: That is all I have for the witness.

Mr. Austin: I have nothing further for the witness.

Trial Examiner Ballinger: You are excused.

(Witness excused.)

Mr. Hanley: Do you now rest?

Mr. Austin: I now rest.

Mr. Hanley: Respondent rests.

Both sides having rested, Respondent renews all of its motions to dismiss this action in whole and in part; from time to time;

And renews all of its objections and motions to strike testimony received over the objection of the Respondent for all of the reasons then assigned for such objections or motions, or both.

Trial Examiner Ballinger: The Examiner has no jurisdiction over the first portion of the motion which should be addressed to the Commission, namely, to dismiss the proceedings;

As to the remaining portions of the motion, they are denied.

8057 The taking of testimony and receipt of evidence is concluded.

The record, however, will not be formally closed until opportunity is afforded counsel to submit to the Examiner any suggested corrections in the typewritten transcript they may deem important.

The Examiner requests respective counsel to furnish him at the earliest practicable date a statement in writing setting forth in concise outline their contentions as to the evidence relating to each question put in issue by the pleadings.

And now, at 2:40 p. m., August 4, 1942, the hearing is adjourned.

(Whereupon, at 2:40 p. m., August 4, 1942, the hearing in the above-entitled matter was adjourned.)

8058 UNITED STATES OF AMERICA.

Before Federal Trade Commission.

In the Matter of
Standard Oil Company. } Docket No. 4389

ORDER CLOSING TAKING OF TESTIMONY.

The taking of testimony and receipt of evidence in the above entitled proceeding having been concluded, all motions filed with the Federal Trade Commission having been acted upon, and the time allowed respective counsel by the Federal Trade Commission in which to file with the Examiner statements of facts deemed to have been proven, having expired; it is by the Examiner this 23rd day of April, 1943,

Ordered, that the record for the receipt of testimony and other evidence in the above entitled proceeding be, and the same is hereby closed as of this date.

Webster Ballinger,
Trial Examiner.

575 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—9215) * *

STIPULATION FOR PRINTING DESCRIPTIVE LIST OF EXHIBITS.

Subject to the approval of the Court, it is hereby stipulated and agreed by and between the undersigned counsel for Petitioner Standard Oil Company and for Respondent Federal Trade Commission that for the convenience of all concerned a descriptive list of all exhibits received in evidence before the Commission shall be printed immediately preceding the particular exhibits which have been designated for printing by the respective parties. The printing of such list, however, and of any incidental interpretation in the descriptions contained therein shall be without prejudice to the right of either party to interpret the exhibits in brief or argument otherwise than as interpreted in said list. Subject to such limitation and for purposes of reference only the following descriptive list is to be printed:

Com. Ex. No. Date Witness	Description
1-A to D 3-10-41 Raupagh	Photostatic copy of Standard Oil Lease Form 342, dated June 28, 1939, with Charles Dameron for service station owned by the company, being a two-page printed lease with a two-page rider attached containing inventory of all equipment, each page of the lease and schedule being alphabetically designated in the 1 series.
2 3-10-41 Raupagh	Photostatic copy of Standard Oil Form 461, being a Dealer's Agreement for gasoline between the company and Joseph Leerhuber dated August 31, 1938.
3-A and B 3-10-41 Raupagh	Being statements of the dealer tank wagon prices, the jobber tank car prices and the prevailing retail service station prices in effect from January 1, 1937 to March 6, 1941, in cents per gallon, exclusive of taxes, for Standard Red Crown (3-a) and the same information for Solite with Ethyl (3-B).

Com. Ex. No. Date Witness	Description
4 3-10-41 Raupagh	Statement of posted retail prices on Red Crown and Solite with Ethyl at retail service stations directly operated by the Stikeman Oil Co. from January 1, 1937 to February 14, 1938.
576	
5-A to 5-J 3-10-41 Raupagh	Prepaid freight bill and bills of lading of Elgin, Joliet and Eastern Railway Co.
6 3-10-41 Raupagh	Michigan gasoline tax data compiled and distributed in printed form by the Gasoline Tax Division of the Department of State for April, 1937, showing the total number of gallons of gasoline reported by each licensed wholesale distributor and deductions claimed by each for sales to other registered distributors and deductions to cover evaporation and losses, exempt sales to the Government and refund on gas not used for motor vehicles on the highway for each of the months, January to April, 1937, inclusive.
7 to 17, incl. 3-10-41 Raupagh	These are, respectively, reports similar to Ex. 6 for each four-month period commencing August, 1937, and including November, 1940.
18 3-10-41 Raupagh	Standard Oil printed Form No. 342, being photostatic copy of lease between the Company and Lester Goldberg, dated September 26, 1939, including a rider dated November 23, 1940.
19 3-10-41 Raupagh	Photostatic copy of Form 342 Lease between Standard Oil and Marvin Goldberg, dated December 6, 1939, with a rider dated November 23, 1940.
21 3-11-41 Raupagh	Sample copy of Standard Oil Company National Credit Identification Card.
22 3-11-41 Gershenson	Showing Ned's posted prices on Standard Red Crown for various periods from September, 1936, to November 24, 1939.
23 3-11-41 Gershenson	Sample of Ned's savings stamps and statement.

Com. Ex. No. Date Witness	Description
26 3-11-41 Gershenson	Picture of Ned's station at Grand River and Chicago showing posted ad. Statement on back of photo shows the same was taken September 6, 1939.
27 3-11-41 Gershenson	Printed envelope container of Ned's Auto Supply Company for gasoline saving stamps, with instructions printed thereon.
29 3-11-41 Gershenson	Mimeographed letter addressed to dealers under date of August 6, 1937, under signatures of James J. Bright & Son, Firestone, Ned's and Stark Hickey.
30 3-11-41 Gershenson	Newspaper ad of the four dealers signing the letter (Ex. 29).
31 3-11-41 Gershenson	Receipt of Ned's Auto Supply Company dated May 9, indicating 2 oz. Pyroil free.
32-A to C 3-11-41 Biber	3-page statement showing retail prices at stations operated by Citrin-Kolb Company, exclusive of 3¢ tax, during various periods.
577	
33-A and B 3-11-41 Biber	2-page letter from Citrin-Kolb Company to Mr. Austin of FTC, dated March 8, 1941, furnishing information requested in a subpoena relative to prices charged for Red Crown to certain designated dealers during the period from 1-1-38 to 12-31-40.
34 3-11-41 Biber	Card issued by Citrin-Kolb at Jefferson and Nottingham station.
35 3-11-41 Biber	Same card for station at Linwood and D.T.R.R.
36 3-11-41 Biber	Same type of card for station at 8620 Linwood, Jack Katz, Manager.
38 3-17-41 Ferguson	Special discount card issued by station at 9705 Dexter and Chicago Boulevard—Maurey Scholnick.

Com. Ex. No. Date Witness	Description
40 3-12-41 Biber	Invoice of Citrin-Kolb dated August 3, 1940, for sale of gasoline to Fisher and Suskin.
41 3-12-41 Biber	Invoice dated August 31, 1940, same parties and same type of transaction as Ex. 40.
42 3-12-41 Biber	Citrin-Kolb invoice dated August 6, 1940, for sale of Red Crown and Ethyl to Dexter Cortland.
43 3-12-41 Biber	Invoice August 16, 1940, to same person and showing same type of transaction as Ex. 42.
44 3-12-41 Biber	Invoice dated August 1, 1940, to Hy. Chateen showing same type of transaction as Ex. 42.
45 3-12-41 Biber	Invoice dated August 2, 1940, to same party and same type of transaction as Ex. 44.
46 3-12-41 Biber	Invoice dated August 3, 1940, to Ed. Clark showing sale of Red Crown.
47 3-12-41 Biber	Invoice dated August 13, 1940, to same party showing same type of transaction as Ex. 46.
48 3-12-41 Biber	Invoice dated August 1, 1940, to B & B Auto Supply showing sale of Red Crown at posted price.
49 3-12-41 Biber	Citrin-Kolb invoice dated August 3, 1940, to B & B showing sale of Red Crown and Ethyl at posted prices.
50 3-12-41 Chandler	Gasoline savings container envelope issued by Ned's Auto Supply Co.
578	
51 3-12-41 Chandler	Receipt from Ned's for purchase of gas Oct. 18 with 12¢ saving stamp attached.

Com. Ex. No. Date Witness	Description
52-A to F 3-12-41 Chandler	Six separate receipts from Ned's for purchases of gasoline.
54 3-12-41 Ledbetter	Statement of Wayne Oil Co. covering retail service station price on Red Crown and Ethyl at all stations directly operated by Wayne from September 8, 1939 to December 31, 1940.
55 3-13-41 Leake	Monthly gasoline sales for the years 1937 to 1940, inclusive.
56 3-13-41 Martoglio	Similar statement to Ex. 55 for Chet's Service Station at Collingwood and Hamilton.
57 3-13-41 Hawley	Same information for Hawley's Super Service at Grand River and Warwick.
58 3-13-41 Ruehle	Same type of information as previous exhibits showing monthly station gallonage.
59 3-13-41 Tanski	Monthly gallonage figures at witness' station.
60-A and B 3-14-41 Tapert	2-page statement containing monthly gallonage volume similar to preceding exhibits.
61 3-14-41 Ward	Monthly gallonage for station at Fourth and Warren similar to other exhibits.
63-A and B 3-17-41 Lefstad	Exhibit A shows daily sales during July and August, 1938, at Harold's Super Service, 13100 Livernois, and B shows monthly gallonage from October, 1936, through December, 1940.
64 3-17-41 Ferguson	Monthly gallonage of station from June, 1936, to May, 1940.
66 3-18-41	Invoice dated 3-31-39 showing shipment by rail to Wayne Oil Company at Dearborn, f.o.b. destination, one tank car shipment.

Com. Ex. No. Date Witness	Description
67 3-18-41	Invoice dated 3-25-38 to Merchants Supply Co., Detroit (Ned's) showing shipment of four tank cars of Red Crown, f.o.b. destination.
68 3-18-41 579	Invoice dated 3-28-38 showing shipment to Wayne Oil Company at Dearborn, f.o.b. destination, one tank car of Red Crown.
69 3-18-41	Invoice dated 7-22-38 showing shipments of three tank cars Red Crown to Ned's at Michigan Terminal Warehouse, Brandt and Wyoming, f.o.b. destination.
70 3-18-41	Invoice dated 12-19-38, Wayne Oil Co., showing shipment to Brandt and Wyoming, f.o.b. destination, one tank car Red Crown.
71 3-18-41	Invoice dated 4-7-38 to Merchants Supply Co. (Ned's) to Michigan Terminal Warehouse, Brandt and Wyoming, f.o.b. destination, one tank car Ethyl.
72 3-18-41	Invoice dated 8-3-38 to Wayne Oil Co., destination c/o Allegheny Oil Co., Michigan Terminal Warehouse, Brandt and Wyoming, f.o.b. destination, one tank car Ethyl.
73 3-18-41	Invoice dated 12-19-38 to Stikeman Oil Co., f.o.b. destination, one tank car Ethyl.
74 3-18-41	Invoice dated 4-14-39 to Stikeman Oil Co., Detroit, f.o.b. destination, one tank car Ethyl.
75-A, B and C 4-8-41 Taggart	Original and duplicate of blank marketing cost survey form, and instructions for filling out the same, used by Professor Taggart in obtaining information for his survey on the cost of retailing gasoline in the vicinity of Detroit as of May, 1938, together with envelope addressed to Mr. Taggart in which to enclose said form when filled out.
76 4-9-41 Taggart	25-page mimeographed survey on gasoline retailing costs in Wayne County, Michigan, by Herbert F. Taggart, containing explanation of the survey, mechanics, coverage and numerous tables and charts.

Com. Ex. No. Date Witness	Description
77 4-9-41	Being a reprint from Michigan Business Studies, Vol, VIII, No. 3, containing a 182-page printed article by Herbert F. Taggart entitled "The Cost Principle in Minimum Price Regulation."
78-A to E 6-16-41	Being a 5-page statement entitled "Miscellaneous Expenses for 1940" and listing for each month therein the items making up such miscellaneous expenses of Citrin-Kolb Oil Company.
80 5-8-41 Raupagh	Standard Oil Company Form No. 385 Equipment Loan Agreement of the Sales Department, in blank.
81 6-17-41 Boatwright	Breakdown of Account 1066 "Miscellaneous Operating Expense" of Standard Oil submitted in Respondent's Ex. 31-H.
82-A 6-18-41 Boatwright	Breakdown of Account 1004 "Salary Salesmen, Detroit Field—June 1937" and explanation of method.
82-B 6-18-41 Boatwright	Breakdown of Subaccount 7004 being salary expense, salaries of salesmen for June 1937 in the Detroit field.
580	
83 6-26-41 Boatwright	Statement of Standard Oil showing distribution of time—salesmen—method—class of product, showing hours and percentages of various types of salesmen and allocation between tank wagon reseller, tank wagon consumer, other methods, and as to the various products.
84-A to C 6-18-41 Boatwright	3-page statement on breakdown of Account 1075, advertising for the year 1937, with explanatory material as to allocation of various types of advertising costs to the various products and channels.
85 6-19-41 Boatwright	Printer's proof of Standard Oil Company newspaper advertisement.

Com. Ex. No. Date Witness	Description
86-A to R 6-20-41 Boatwright	List of all Standard Oil reseller accounts in the Detroit field for the year 1937, showing name and address of dealer and total gallonage for the year 1937, consisting of 18 pages of listings designated alphabetically in the 86 series.
87 6-23-41 Boatwright	Statement showing total gallonage for the year 1940 to tank wagon resellers, to tank wagon consumers, to the four jobbers, and all other methods; also showing sales of motor oils and grease to the four jobbers for 1940.
88 6-26-41 Boatwright	Statement showing distribution of time of the various kinds of salesmen as to method and class of products for June 1940 (same form as Commission Ex. 83, which was for the month of March 1941).
89 6-26-41 Boatwright	Same information as Ex. 88, except it shows this information for the month of September 1940.
90 6-26-41 Boatwright	Same information as Ex. 88, except this is for the month of December 1940.
91 6-27-41 Boatwright	Statement of Standard Oil types of reseller service station accounts in Detroit metropolitan area for 1937.
92-A to D 6-27-41 Boatwright	4-page photostatic copy of contract between Standard Oil Company and L. A. Smith & Co., dated May 20, 1939, for transportation from the Company's tank farms at River Rouge and Muskegon, Michigan, to its bulk storage plants.
93-A 6-27-41 Boatwright	Rider No. 2 to contract, Ex. 92, dated January 16, 1940, modifying rates in contract.
93-B to F 6-27-41 Boatwright	Photostatic copy of 4-page contract and one-page rider between Standard Oil and L. A. Smith & Co., dated November 22, 1939, superseding previous contract, providing new schedule of rates per gallon.

Com. Ex. No. Date Witness	Description
100 2-16-42 Boatwright	Statement of gasoline gallonage sold to each of the four Detroit jobbers for the years 1937 to 1940, inclusive, as to each of the three Standard grades of gas.
581	
102 2-16-42 Boatwright	Standard Oil statement of distribution of time of salesmen, same form as Ex. 88, and following, except that it is for the month of December, 1939.
103 2-16-42 Boatwright	Same as Ex. 102, except for the month of March, 1940.
104-A to C 2-17-42 Boatwright	Copy of letter from Commission's Attorney Austin to Mr. Hanley of Standard Oil Co., dated January 24, 1942, requesting production of additional documents, information and accounting breakdowns at the hearing scheduled for February 16, the same being a 3-page letter.
105 2-17-42 Boatwright	Additional letter from Mr. Austin to Mr. Hanley dated January 27, 1942, making certain of the requests in the letter, Ex. 104, more specific.
106 2-17-42 Boatwright	Standard Oil Co. mimeographed form, in blank for ascertaining distribution of time by method of delivery form designated D-106.
107 2-18-42 Boatwright	Eleven-page printed pamphlet of Standard Oil Co. entitled "Employees' Death Benefit Plan," revised September 17, 1928.
108 2-23-42 Boatwright	Standard Oil Co. 28-page printed pamphlet covering its retirement plan for employees, revised as of September 1, 1939.
109-A 2-19-42 Blough	Map of Detroit and environs with locations of stations indicated in red in sales district designated as No. 65, which territory includes Ned's and was assigned to the salesmen Robinson, Mealanberg and Coutchie.
109-B 2-19-42 Blough	Statement of account numbers, name of dealer and address, in territory covered by the aforesaid three salesmen, in District 65, Detroit, 1937.

Com. Ex. No. Date Witness	Description
110 ~~2-19-42~~ Blough	Organization chart of Sales Department, Detroit field, October 23, 1941.
111 2-19-42 Blough	Organization chart of the Accounting Department, Detroit office.
112-A to D 2-20-42 Fineberg	Photostatic copy of 3-page contract, and 1-page rider, between the Ohio Oil Company and the Argo Oil Corp., for the period from March 1, 1940 to March 1, 1941, for the purchase of Marathon gasoline by the Argo Oil.
116 2-23-42 Boatwright	Breakdown of expenses, "Salaries and Commissions", in Detroit field for the year 1940 as between tank wagon reseller, tank wagon consumer, and other methods.
117-A to D 2-23-42 Boatwright	Separate statement of Standard Oil Sales Department on "Distribution of Time Accounting—Method" in the Detroit field for the months of December, 1939; March, 1940; June 1940 and September, 1940.
582	
119 2-23-42 Boatwright	Standard Oil Company Form G. O. 189 "Comparative Statement of Expense" filled out for the year 1940.
120 2-23-42 Boatwright	Recapitulation of tank wagon reseller volume delivered by commissioned agents and drivers, Detroit field, 1940.
121-A to G 2-24-42 Boatwright	Consisting of printer's proof on 7 newspaper advertisements of Standard Oil Company with reference to Standard Oil dealers.
122-A to D 2-24-42 Boatwright	Photostatic copies of four N. Y. Central Railroad collection bills showing switching charges on tank car shipments, respectively, to Ned's, Citrin-Kolb, Stikeman Oil and Wayne Oil.
123 2-24-42 Boatwright	Map showing marketing costs at various locations for 1939 and 1940 in the tank wagon reseller channel (including income and expense on leased service stations).

Com. Ex. No. Date Witness	Description
124 2-26-42	Invoice of Ogden and Moffett to Standard Oil, dated July 16, 1940, for hauling charges to the 4 jobbers for the period from July 1 to July 15.
125 2-26-42	Same as Ex. 124, except it covers billing dated August 16,. 1940, and includes some shipments in addition to the 4 jobbers.
126 2-26-42	Same as Ex. 124, except invoice dated October 4, 1940.
127 2-26-42	Same as Ex. 124, except invoice dated November 5, 1940.
128-A to B 6-30-42	Two-page letter from Mr. Hanley of Standard Oil to Mr. Austin of the Commission, dated March 18, 1942, clarifying the information in Commission's Exhibits 91 and 98 as to the number of outlets served by Standard Oil Company and the four jobbers in December, 1937; and December, 1940.
129 7-1-42 Warmack	Calculation of average salesman's cost per gallon of gasoline sold to Standard Oil stations in Detroit other than Ned's and served by same salesmen as called on Ned's stations during 1937.
130 7-2-42 Warmack	Statement showing analysis of charges to marketing expense account of losses by dismantling (other than E.L.A.) for the Detroit field for the year 1940.
131-A to C 7-4-42 Warmack	Three-page statement showing the methods of allocating salesmen's salaries and expenses.
132 7-8-42 Warmack	Tabulation of credit card expense (including coupon book expense) in Detroit field for 1940.
133 7-14-42 Warmack	Re-listing of a large number of accounts taken from Respondent's Ex. 101, purporting to show average unit or gallonage cost on all of such accounts for the tank wagon reseller channel and for the jobber channel.

Com. Ex. No. Date Witness	Description
3 4-29-41 Boatwright	Graph showing automobile production, seasonably adjusted for the years 1936 to 1941.
5 4-29-41 Boatwright	Graph showing total gasoline consumption in the State of Michigan for the years 1933 to 1940, inclusive.
6 4-21-41 Biber	Operating set-up of Citrin-Kolb Company as of 12-31-40 showing by addresses stations owned and operated—owned and leased—leased and operated—leased and subleased—dealer contracts.
7 5-5-41 Biber	Schedule of costs per gallon to Citrin-Kolb to distribute gasoline at wholesale for the years 1937-1940, inclusive.
8 5-5-41 Biber	Actual operating costs of Citrin-Kolb for distributing gas at wholesale for 1937 to 1940, inclusive, being a breakdown of costs such as advertising, discounts, insurance, etc. (a total of 15 items).
9 5-5-41 Biber	Schedule of overhead costs chargeable by Citrin-Kolb for distribution at wholesale of gasoline from 1937 to 1940, incl.
10 5-5-41 Biber	Being a further breakdown and explanation of the item "Depreciation Real Estate" appearing in Exhibit 9.
11 5-5-41 Biber	Being a further explanation and breakdown of the item "Depreciation Equipment" shown on Exhibit 9.
12 5-5-41 Biber	Being explanation and breakdown of item "Obsolescence" appearing on Exhibit 9.
13 5-5-41 Biber	Being explanation and breakdown of item "Interest on Cash Capital Invested," appearing in Exhibit 9.
14 5-5-41 Biber	Being explanation and further breakdown of item "Interest on Personal Property Invested" appearing in Exhibit 9.

Com. Ex. No. Date Witness	Description
15 5-5-41 Biber	Being explanation of further breakdown of item "Interest on Real Estate Invested" appearing in Exhibit 9.
16 4-21-41 Biber	Computation of gasoline sold from 1936 to 1940, inclusive, by Citrin-Kolb at retail and wholesale and percentages of each.
17 4-21-41 Biber	Schedule of gallonage of gasoline per pump and per station as distributed by the outlets of Citrin-Kolb for the years 1936 to 1940, inclusive, showing number of stations each year, total gallonage, rate per station, number of pumps and average per pump.
584	
18-I 5-1-41 Biber	Photostat of "Special Consideration" card given out by Hoffman & Levine (Texaco dealer) in 1936.
18-J 5-2-41 Biber	Receipt for purchases from Hoffman & Levine on 9-8-36 showing purchase under prevailing retail price.
18-K 5-2-41 Biber	Picture of station with Texaco pumps, at Davidson and Conant, showing gasoline price advertised 5-17-38.
18-L 5-2-41 Biber	Promotional Advertising "How to Win Free Gasoline" by Wilson Oil Corp. and Highland Oil Corp. on Hi-Speed gas.
18-O 5-2-41 Biber	Premium advertisement of Liberty Service Stores (Fleet Wing dealers in three locations).
18-Q 5-2-41 Biber	Advertisement of March 19, 1940, of Fleet Wing dealers on how to win a new 1940 auto.
18-R 5-5-41	Separation sheet labeled "East Jefferson and Nottingham."
18-S 5-2-41 Biber	Two pictures of Chas. E. Austin Station at Kercheval and Chalmers taken on 8-31-39 showing advertisement for Joy gasoline.
18-T 5-2-41 Biber	Two views of Puritan Station at Kercheval and Ashland taken 8-31-39 showing Zip gasoline advertised.

Com. Ex. No. Date Witness	Description
18-U 5-5-41	Separation sheet headed "Dexter and West Chicago."
18-V 5-2-41 Biber	Two views of Cities Service Station at Chicago and Dexter taken 8-31-39 showing signs.
18-W 5-2-41 Biber	Picture of Cities Service Station at Linwood and Glendale taken 9-24-39, showing advertising.
18-X 5-2-41 Biber	Picture of Cities Service Station at Dexter and Elmhurst taken 11-14-39.
18-Y 5-2-41 Biber	Picture of Fleet Wing Station at Dexter and Longfellow taken 11-14-39 showing advertised prices.
18-Z 5-2-41 Biber	Picture of Puritan Station at Dexter and Boston taken 11-14-39 showing advertisement of Zip gasoline.
18-Z-1 5-2-41 Biber	Profit Sharing Coupon issued by Dexter-Buena Vista Service Station (Sun dealer).
585	
18-Z-3 5-2-41 Biber	Receipt from Chicago Dexter Service dated 1-9-41.
18-Z-4 5-2-41 Biber	Receipt from Frank J. Carey Super Service Station at 2304 Vernor Highway.
18-Z-5 5-2-41 Biber	Receipt from Station at Dexter and Tuxedo.
18-Z-7 5-2-41 Biber	Picture of Cities Service Station at Chicago and Dexter taken 1-9-41 advertising gas.
18-Z-8 5-2-41 Biber	Picture of Fleet Wing Station at Dexter and Tuxedo taken 1-9-41.

Com. Ex. No. Date Witness	Description
18-Z-9 5-2-41 Biber	Two views of Fleet Wing Station at Linwood and Clements taken 1-29-41 showing advertising.
18-Z-10 5-2-41 Biber	Profit sharing coupons issued by Dexter—Buena Vista Service (Shell gasoline) and also receipt of 3-28-41.
18-Z-11 5-5-41	Being separation sheet labeled "John R. and Euclid."
18-Z-12 5-2-41 Biber	Picture of Charles E. Austin (Joy) Station, Second at Blaine, taken August 31, 1939.
18-Z-13 5-2-41 Biber	Two views of Charles E. Austin (Joy) Station at Woodward and Taylor, taken 8-31-39.
18-Z-14 5-2-41 Biber	Two views of Puritan Station (Zip at Woodward and Mt. Vernon taken August 31, 1939.
18-Z-15 5-2-41 Biber	Pictures of two Charles E. Austin Stations selling Joy gasoline taken 3-29-40.
18-Z-16 5-2-41 Biber	Picture of Charles E. Austin Station (Joy) at Second and Blaine, taken 1-8-41.
18-Z-17 5-5-41	Separation sheet labeled "West Warren and Brooklyn."
18-Z-18 5-2-41	Photo of James J. Bright (Sinclair) Station, at Second and Willis, taken 8-31-39.
18-Z-20 5-2-41 Biber 586	Photo of station at 1650 West Warren taken 1-29-41 selling unbranded gas.
18-Z-21 5-5-41	Separation sheet labeled "Linwood and Pingree."
18-Z-22 5-2-41 Biber	Photo of Mobilgas Station at Linwood and Rochester dated 5-17-38.
18-Z-23 5-2-41 Biber	Photo of Fleet Wing Station at Linwood and Clements 9-7-39.

Com. Ex. No. Date Witness	Description
18-Z-24 5-2-41 Biber	Photo of Cities Service Station at Linwood and Glendale 9-24-39.
18-Z-25 5-2-41 Biber	Photo of Puritan Station (Zip) at Dexter and Boston 11-14-39.
18-Z-27 5-2-41 Biber	Cash discount card on Blue Sunoco issued by Linwood Tire and Battery Service, Linwood at Grand, March, 1940.
18-Z-28 5-2-41 Biber	Photo of Cities Service Station at Glendale and Linwood 1-29-41.
18-Z-29 5-2-41 Biber	Two photos of Fleet Wing station at Linwood and Clements 1-29-41.
18-Z-30 5-5-41	Separation sheet labeled "Linwood and D.T.R.R."
18-Z-31 5-2-41 Biber	Photo of Sunoco Oil Station at Davison and Lawton 5-17-38.
18-Z-32 5-2-41 Biber	Photo of Fleet Wing Station at Linwood and Clements 5-17-38.
18-Z-33 5-2-41 Biber	Photo of Texaco Station at Livernois and Clements 5-17-38.
18-Z-34 5-2-41 Biber	Photo of Gulf Station at Linwood and and Doris 5-17-38.
18-Z-35 5-2-41 Biber	Photo of Sun Oil Station at Linwood and Oakman 5-17-38.
18-Z-36 5-2-41 Biber	Photo of Sun Oil Station at Linwood and Grand 9-6-39.
18-Z-37 5-2-41 Biber	Two photos of Sun Oil Company Station at Davison and Lawton 8-31-39.

Com. Ex. No. Date Witness	Description
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18-Z-39 5-2-41 Biber	Photo showing White Star (Mobilgas) Station at Linwood and Waverly 9-20-39.
18-Z-41 5-2-41 Biber	Photo of Hi-Speed Station at Linwood and Tyler 9-24-39.
18-Z-42 5-2-41 Biber	Photo of Texaco Station at Davison and Lawton 9-24-39.
18-Z-43 5-2-41 Biber	Photo of Shell Station at Linwood and Tyler 9-25-39.
18-Z-44 5-2-41 Biber	Photo of Duro Oil Station at Hamilton and Oakman 2-23-40.
18-Z-46 5-2-41 Biber	Benz Oil Station at Hamilton and Davis 3-29-40.
18-Z-47 5-2-41 Biber	Photo of Jerry's Station at Livernois and Lyndon 1-17-41 advertising unbranded gasoline.
18-Z-50 5-2-41 Biber	Texaco Station at 14046 Hamilton 1-29-41.
19 4-22-41 Dyer	Flow chart of gasoline from refiner to consumer—describes the various methods employed in distributing gasoline.
20 4-23-41 Ledbetter	Operating set-up of Wayne Oil Company as of 12-31-40 showing by street addresses and names stations leased and operated, those leased and subleased and those with dealer contracts.
23 12-28-42 By Order of Commission	Chart compiled by Mr. Marshall on 4-15-41 showing dual operations of the following supplying companies: Standard Oil, Socony Vacuum, Texas Co., Phillips, Shell and Mid-Continent, and showing percentage of

Com. Ex. No. Date Witness	Description
	distribution both direct and through jobbers and/or resellers in various cities.
24 4-28-41 Boatwright	Chart and map showing refineries, terminals and pipelines serving Michigan, Indiana and Illinois.
25-A 4-28-41 Boatwright	Graph of Michigan refinery capacity prepared U. S. Bureau of Mines charting thousands of barrels per day for the years 1935 to 1940.
25-B 4-28-41 Boatwright	Accompanying figures on Michigan refineries showing in figures the information portrayed by the graph (Ex. 25-A).
588	
26 4-28-41 Boatwright	Chart showing Standard Red Crown tank wagon consumer price in the City of Detroit from 1-1-31 to 4-19-41, excluding State and Federal taxes.
27 4-28-41 Boatwright	Chart showing volume of Zip and Joy gasoline and price differential below price maintained by Standard dealers from 1936 to 1940.
28 4-28-41 Boatwright	Chart showing (1) gasoline prices maintained by Standard Oil Company dealers compared with those maintained by leading cut-price marketers in Detroit from March 1938 to March 1941 and (2) Standard Oil Company's retail market position compared with the per gallon price advantage maintained by leading cut-price marketers.
29-A 4-28-41 Boatwright	Chart showing Standard Oil Co. retail market position as related to differential between its retail price and that of cut-price and local brand marketers in metropolitan Minneapolis-St. Paul during same period as in Ex. 28.
29-B 4-28-41 Boatwright	Similar chart for City of Milwaukee.

Com. Ex. No. Date Witness	Description
29-C 4-28-41 Boatwright	Similar chart for City of Chicago.
30 4-29-41 Boatwright	Table showing gasoline volume (from Michigan Tax Inspection Report) for the years 1935 to 1940 for Sunny Service, Puritan and Charles E. Austin companies.
31-A 4-30-41 Boatwright	Table showing difference in marketing costs between distribution through regular reseller outlet versus distributing through Ned's Auto Supply Company for 1937.
3-B through 31-Q 4-30-41 Boatwright	Being a table of 16 pages, each page marked as a separate alphabetical 31 exhibit, all dated 4-30-41, with further explanations and breakdowns of respondent's cost justification on the ½¢ differential allowed Ned's from September 1936 to March 1938 on tank wagon deliveries off the tank wagon price.
32 4-29-41 Boatwright	Blank form of Standard Oil Sales Department on Comparative Statement of Expense, being Form G.O. 189 Long.
33-A 4-30-41 Boatwright	Cost of justification of the ½¢ differential between jobbers and tank wagon dealer price in Detroit per gallon for the years 1939 and 1940.
33-B 4-30-41 Boatwright	Explains the method used in arriving at a tank wagon reseller marketing cost in Detroit for the year 1940.
33-C to 33-E 4-30-41 Boatwright	Three separate sheets, each marked as an exhibit, explaining the procedure in reaching the jobber marketing costs on the basis of the 1939 Oklahoma jobber survey.
34-A 5-1-41 Boatwright	Standard Oil Co. Sales Department Form 018, etc., being a delivery ticket on tank truck deliveries.
589	
34-B 5-1-41 Boatwright	Standard Oil Co. Sales Department blank addition to Form 018, etc. ticket.

Com. Ex. No. Date Witness	Description
35 5-1-41 Boatwright	Standard Oil Co. Sales Department Form 028 blank form of Employee's Expense Account.
36-A 5-1-41 Bradshaw	Department of State, State of Michigan, Gasoline Tax Department printed booklet listing registered wholesale distributors of gasoline as of February 1, 1941, the same being a 67 page printed booklet.
36-B, C & D 5-1-41 Bradshaw	These are pages 62, 63 and 64 of said printed booklet containing the Wayne County list of registered wholesale gasoline distributors.
37-A to D 5-1-41 Bradshaw	Being a 4-page typewritten list of Wayne County wholesale distributors as of February 1, 1941, showing for each the date of his registration of record, each page being a separate alphabetical exhibit of Series 37.
38-A to E 5-2-41	Being a 5-page typewritten list, each page having an alphabetical exhibit number of the 38 series, listing information as to 42 Wayne County gasoline wholesale distributors, compiled from the records of the Gasoline Tax Department for the year 1941 as to retail stations and bulk plants and for the month of March, 1941, as to gasoline suppliers.
39 5-5-41 Gershenson	Picture of Ned's Station at John R and Nevada.
40 5-5-41 Gershenson	Picture of Ned's station at Michigan and Maple.
41 5-5-41 Gershenson	Picture of Ned's Station at East Jefferson and Manistique.
42 5-5-41 Gershenson	Picture of Ned's Station at Grand River and West Chicago.
43 5-5-41 Gershenson	Picture of Ned's Station at Woodward and Calvert.

Com. Ex. No. Date Witness	Description
44 5-5-41 Gershenson	Picture of Ned's Station at Gratiot and Maddelein.
45 5-7-41 Raupagh	Letter from Ned's dated August 27, 1936, to Standard Oil Company at Detroit regarding intention to accept a competitive offer carrying a larger margin.
46 5-7-41 Raupagh	Copy of letter dated February 14, 1938, from Ned's to Standard at Detroit advising of offer from Red Indian Oil Company and from Shell Petroleum Company, requesting tank car price or threatening to accept competitive offers.
590	
47 5-6-41 Gershenson	Letter from Red Indian Oil Company to Ned's dated April 30, 1941, confirming proposed price on Fleet Wing gasoline of discount off tank wagon price and additional advertising and hauling allowances.
48 5-7-41 Raupagh	Letter from Ned's to Standard, Detroit, dated December 23, 1940, confirming quotation from Gulf Refining Company on their brand name gas delivered at Ned's bulk plant.
49-A 5-6-41 Gershenson	Photostat of letter from Ned's to Standard Oil at Detroit dated March 23, 1940, requesting opportunity to discuss situation at earliest convenience.
49-B 5-6-41 Gershenson	Photostat of promotional letter from Langer's Auto Supply enclosing two pennies and offering saving of 2¢ a gallon.
50 and 51 5-6-41 Raupagh	Picture of truck train; additional picture of truck train.
52-A 5-6-41 Raupagh	Statement of dealer tank wagon prices—jobber tank car prices—jobber margins—prevailing retail prices—retail dealer margins on Solite with Ethyl from 1-1-37 to March 6, 1941.

Com. Ex. No. Date Witness	Description
52-B 5-6-41 Raupagh	Same information as 52-A except this is for Standard Red Crown gasoline during same period.
53 5-6-41 Raupagh	Chart showing total gasoline sales volume in gallons and ratio of retail and wholesale sales to total sales of each of the four Standard Oil jobbers for the years 1936 to 1940, inclusive.
54 5-6-41 Raupagh	Chart showing volume of gasoline in gallons of the four Standard Oil Jobbers for the years 1936 to 1940 with number of retail outlets supplied by each.
55-A and B 5-6-41 Raupagh	Gasoline sales in the Detroit area of wholesale licensed jobbers and distributors of branded gasoline, being a 2-page statement for the years 1936 to 1940, inclusive, showing the name of the jobber, when he received his wholesale distributor license, his supplier and his gallonage for each of said years.
56 5-6-41 Raupagh	Standard Oil Company Michigan Road Map showing the extent of the Detroit Division marked on said map in green.
57-A and B 5-7-41 Raupagh	Two-page statement showing the gasoline sales in gallons in the Detroit area of licensed wholesale jobbers and distributors handling non-brand gas for the years 1936 to 1940. This is substantially the same type as Ex. 55-A and B, except it covers non-brand instead of branded gas and does not show the source of supply nor the year when the distributor became a licensed distributor.
58 5-7-41 Raupagh 591	Chart showing for the years 1936 to 1940, inclusive, the total sales in the Detroit area, the total Standard Oil in said area and its percentage of total sales, Standard Oil sales exclusive of jobbers and percentage, Standard Oil jobber sales and percentage, sales of licensed jobbers other than Standard Oil handling branded gas and percentage, sales of licensed jobbers handling non-brand and

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MATTHEW BENDER & COMPANY
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Com. Ex. No. Date Witness	Description
	percentage, sales of all licensed jobbers and percentage and sales of all other companies and percentage.
59 5-7-41 Raupagh	Table showing yearly increase or decrease in gasoline sales for the years 1937 to 1940, inclusive, for the State of Michigan and the Detroit area, showing total Standard Oil sales, Standard Oil jobbers, branded jobbers, non-brand jobbers, all jobbers, and all others.
60-A to D 5-7-41 Raupagh	Four-page statement, each page marked alphabetically in the 60 series, showing continuous record from June, 1936 to November, 1940, of the retail gasoline price situation in Detroit as reflected by Standard Oil Co. surveys on the date indicated, on each of premium, house brand and third grade gasolines, showing for each the prevailing retail service station price, the dealer tank wagon price, the margin, the number of service stations selling below prevailing retail price and the average amount below the prevailing retail market price.
61 5-7-41 Raupagh	Map of Detroit area showing location of 68 Zip, Joy and Speedway stations in red, six Ned's stations in green and fifty-seven Citrin-Kolb in blue and listing each of said stations as to street address.
62 5-7-41 Raupagh	Map showing same information as Ex. 61, except in slightly different form, with blue stars showing Citrin-Kolb locations and gold stars showing Ned's locations.
63-A to C 5-8-41 Raupagh	Three-page list, each page alphabetically marked as an exhibit in the 63 series, showing the brand names for gasoline marketed in the Detroit area for premium, house brand and third grade by the various companies.
64-A to H 5-7-41 Raupagh	Eight-page issue of "Joy News" for March, 1940, put out by Charles E. Austin, each page given separate alphabetical marking in the 64 series, containing a chart, pages

Com. Ex. No. Date Witness	Description
	4 and 5, comparing purported scientific te of the Detroit Testing Laboratory on J Grade No. 1 compared to Sunoco, Red Cro Shell, Sinclair, Mobilgas, Texaco, Hi-Sp and Gulf.
65-A to H 5-7-41 Raupagh	May, 1940, issue of "Joy News" of same general nature and containing co parable chart on pages 4 and 5 purporting show superior quality of Joy gasoline to major gasolines, being the same as listed Ex. 64.
66-A to H 5-7-41 Raupagh	August, 1940, issue of "Joy News" c taining on pages 4 and 5 further comparis favorable to Joy based on further Detr Testing Laboratory report.
67-A to H 5-7-41 Raupagh	November, 1940, issue of "Joy News" same general nature as preceding exhib containing on pages 4 and 5 further ch comparing Joy favorably to quality of jor brands on basis of further report fr Detroit Testing Laboratory.
68 5-8-41 Raupagh 592	Bound volume of 55 pages of photogra for the year 1939, filed separately, show photographs listed under stations by br name, each showing a picture of the stat with advertised prices visible, the addres the station, the date of the picture, the br of gasoline, the prevailing price per gal and the difference below the prevailing p as indicated by the advertising in the pict This exhibit has a further F.T.C. desig tion "$\frac{2-1}{4389-1}$".
69 5-8-41 Raupagh	This is a separate book of photogra containing 50 pages giving the same infor tion and using substantially the same se as in Ex. 68, except that this shows the c petitive conditions for the year 1940. It also a marking "$\frac{2-2}{4389-1}$".

Com. Ex. No. Date Witness	Description.
70 5-8-41 Raupagh	Separate bound volume of photographs, same form and setup as the two preceding exhibits, except that it shows the competitive situation in the early part of 1941. This volume contains 115 pages. It also includes a section on non-brand distributors and non-brand dealers. It is also marked “$\frac{2\text{-}3}{4389\text{-}1}$”.
71 5-8-41 Raupagh	This is a separately bound volume of photographs containing 56 pages. It shows competitive stations tributary to each of Ned's stations; otherwise the same type of information as in the three preceding exhibits. It covers a period from 1938 to 1941 and also has a marking “$\frac{2\text{-}4}{4389\text{-}1}$”.
76 5-8-41 Raupagh	Map of Detroit area similar to maps, Exhibits 61 and 62, showing locations of dealers selling at cut prices as per pictures in 1941 book, Ex. 70. This exhibit excludes all Joy, Zip and Speedway stations.
92 6-16-41 Boatwright	Map of Detroit and environs with special markings.
95 6-26-41 Boatwright	Standard Oil Co. Sales Department Form 474 20 M Analysis of Tank Truck Deliveries of Salaried Driver.
96-A 6-26-41 Boatwright	Modification of Ex. 31-A to exclude newspaper and billboard advertising.
96-B, C & D 6-26-41 Boatwright	A three-page explanation of this modification.
97 6-26-41 Boatwright	Standard Oil Company Sales Department blank Form 439 2500 Report of Sales to and Classification of Leased Service Station and Form 335 Gasoline Account.
98 6-26-41 Boatwright	Modification of Respondent's Ex. 33-A, excluding the influence of newspaper, billboard and radio advertising.

Com. Ex. No. Date Witness	Description
99 1-6-42 Boatwright	Supplement to distribution cost analys tank wagon reseller channel versus jobb gasoline sales, explaining regular costi procedure in the Detroit field for 1940. Th exhibit contains 33 typed pages, explaini
593	and giving examples of the company's reg lar accounting procedure and method of a locating costs between channels under t following 12 schedules giving account nu bers and explanations as to each: 1. Salesmen and Sales Promotion Expen 2. Advertising costs 3. Delivery and Warehouse Cost 4. Income, and Expense Incurred Leased Retail Outlets Served by Tank Wag 5. Marketing Expense Items Incurred Privately Owned Stations Not Leased b Engaged in the Distribution of Our Produc 6. Credit Information—Bad Debts a Recovery 7. Field Office and Accounting Cost 8. Supervision Cost Incurred in Sal Field 9. Losses—Taxes—Insurance and Ad tional Salary considerations 10. Miscellaneous Marketing Expen Items 11. Marketing Expense Items on Lub cating Oils 12. General Office Marketing Costs.
100 1-6-42 Boatwright	Distribution cost analysis, tank wagon seller channel versus jobber gasoline sal Detroit field, 1940. This exhibit contains 1 pages showing the actual allocations and fi ures in carrying out the work explained Ex. 99 under each of the 12 schedules ferred to therein, with numerous sub-sche ules under each and explaining exactly wh was done in each case.

Com. Ex. No. Date Witness	Description
101 1-6-42 Boatwright	Standard Oil Company Form G.O. 189 Long, being the Sales Department Comparative Statement of Expense, Detroit field, year 1940, completely filled out and reflecting the results and processes set forth in Ex. 99 and 100.
103-A to C 2-17-42 Boatwright	A 3-page letter dated February 2, 1942, from Mr. Hanley of Standard Oil to Mr. Austin of FTC.
111 3-17-43	Being a photostatic copy of the Michigan Fair Trade Act (Public Acts 1937—No. 282).

By Order of
Trial Examiner

Dated January 24, 1947.

Walter B. Wooden,
Counsel for Respondent, Federal Trade Commission,

Weymouth Kirkland,
Howard Ellis,
W. H. Van Oosterhout,
Arthur J. Abbott,
Counsel for Petitioner, Standard Oil Company.

Approved 1-25-47.
William M. Sparks, *J.*

594 Endorsed: In the United States Circuit Court of Appeals for the Seventh Circuit. * * (Caption—9215) * * Stipulation For Printing Descriptive List of Exhibits. Filed Jan 25 1947 Kenneth J. Carrick, Clerk.

Cust-5048

Lease.

This Lease made this 28th day of June, 1939, between Standard Oil Company, an Indiana corporation, with its principal office at 910 South Michigan Avenue, Chicago, Illinois, hereinafter called Lessor, and Charles Dameron whose address is 12715 Robson St., Detroit, Michigan hereinafter called Lessee:

Witnesseth: That

The Lessor hereby demises and leases to the Lessee the premises situated in the City of Detroit, County of Wayne, and State of Michigan, more particularly bounded and described as follows, to-wit:

Lot 542 in Schoolcraft allotment of the west half of the southeast quarter of Section 19, Greenfield Township, Wayne County, Michigan, according to the plat thereof, recorded in Vol. 30 of plats, page 23, said premises being located at the northwest corner of Grand River Avenue and Schoolcraft Rd. in the City of Detroit, subject to certain building restrictions contained in the deed recorded in Vol. 1067 of Deeds, Page 364, as No. 539392 together with the buildings, fixtures, equipment, machinery and appliances located thereon, including among others the following:

Type 352 BLR—Spec. SS Bldg. & Driveway
1 air compressor, DeVilbiss #27846
1 ceiling reel, air, ECO 35
6 floodlights
2 gas. dispens. pumps, Tok. meter
1 York chest #1837 with inner compartment
1 mer. display cabinet
1 pedestal pump-alcohol Opako
1 SS desk top, steel 2278
2 comp. sets gas. price cards
2 large funnels
5 steel bushings
1 wood tool & display box
1 air comp. motor, 2 h.p. G.E. KL 8343
4 comb. water & light Stds.
2 grs. buckets, 25#
1 Arco steam boiler S-282

1 heat radiation system
1 kerosene O/F, Ben. 60 gal.
2 stor. tanks, undergrd. 20 bbl.
1 stor. tanks, undergrd. 40 bbl.
1 stor. tanks, undergrd. alc. 2 bbl.
1 stor. tanks, undergrd. dr. oil 10 bbl.
1 stor. tanks, undergrd. naphtha 2 bbl.
1 mtl. tool & display box
2 swivel type 28x44 lawn signs
2 metal rest room signs
8 enam. light reflectors
1 air standard, US 8971
1 air standard, Model 35
1 elec. motor, 1½ h.p. Wagner P-8-D
3 grid. elec. unit heaters 2 #1200; 1 #1500
3 lockers, steel 2283-2284-2285
9 Lub. O/Fs, Ben. 60 gal. Hiboys
4 Lub. O/Fs, 30 gal.
1 Curtis hyd. car washer 201 A 33
4 motor oil baskets
50 ft. garden hose
2 galv. rag containers
1 AC sparkplug cleaner
Equipment checked

To Have And To Hold unto the Lessee for the term of 12 months, commencing on the 1st day of August 1939, and ending on the 31st day of July 1940.

The Lessee agrees to pay to the Lessor as rent for the above described premises, equipment and appliances (if any be included), a cash monthly rental, as set forth in Paragraph "A" below, plus a rental based upon gasoline gallonage, as set forth in Paragraph "B" below, and in any event Lessee agrees to pay monthly a sum equal to the minimum cash amounts set forth in Paragraph "C" below:

"A." For each month of the term a cash rental as follows:

For January	$174.97	For July	$174.97
For February	$174.97	For August	$174.97
For March	$174.97	For September	$174.97
For April	$174.97	For October	$174.97
For May	$174.97	For November	$174.97
For June	$174.97	For December	$174.97

"B." In addition to the cash monthly rental (A), the Lessee also agrees to pay to the Lessor as rent for the above described premises, equipment and appliances, a sum equal to one half cent ($\frac{1}{2}$¢) per gallon on all gasoline delivered to said service station for sale.

"C." In event the total amount of rent paid by Lessee under Paragraph "A" and Paragraph "B" above, or under Paragraph "B" singly if Paragraph "A" shall be inoperative in this lease, shall be less for any month of the term than the minimum amount hereinafter set forth in this Paragraph for such month, then for such month Lessee shall pay as additional cash rent any deficiency necessary to bring the total rent for said month up to said stipulated minimum amount for said month. The total rent due to be paid in any month shall never be less than the minimum herein stipulated for such month. In any month that the total amount paid under Paragraph "A" and Paragraph "B" (or under Paragraph "B" singly if Paragraph "A" be inoperative in this lease) shall equal or exceed the minimum rent for said month, as set forth herein, this Paragraph "C" shall be inoperative.

For each month of the term the minimum rental referred to in this Paragraph "C" is as follows:

For January	$235.00	For July	$235.00
For February	$235.00	For August	$235.00
For March	$235.00	For September	$235.00
For April	$235.00	For October	$235.00
For May	$235.00	For November	$235.00
For June	$235.00	For December	$235.00

All rent herein provided for shall be due and payable at the division office of Lessor at 1011 Fourth St., Detroit, on the 1st and 15th of each month. The rental provided for in Paragraph "A" shall be for one-half month in advance, and the rental provided for in Paragraph "B" shall be due at the termination of each one-half month, and each such payment shall be accompanied by Lessee's affidavit showing the date and amount of each delivery for sale of gasoline made to such service station for the preceding one-half month; Provided, however, that if gasoline delivered for sale to such service station be supplied by Lessor, then the rental provided for in Paragraph "B" shall be due as and when deliveries for sale are made to such service station and paid by Lessee to individual making such delivery.

Provided further, that if in any month there shall be a deficiency due to bring the rental up to the specified minimum as provided in Paragraph "C" above, such deficiency shall be due and payable on the last day of the month so involved.

10. That the waiver of any breach of covenant, condition or stipulation contained herein shall not be taken to be a waiver of any subsequent breach of the same or any other covenant, condition or stipulation, nor shall any failure of the Lessor to enforce rights or seek remedies upon any default of the Lessee with respect to the obligations of the Lessee hereunder, or any of them, prejudice or affect the rights or remedies of the Lessor in the event of any subsequent default of the Lessee.

11. That should the Lessee at the expiration of this lease, or in the event of the extension of the period hereof, then upon the expiration of such extension period, hold over for any reason, it is hereby agreed that in the absence of a written agreement to the contrary, the tenancy of the Lessee thereafter shall be for subsequent periods of six (6) months each, provided, however, that either party may cancel this lease at its termination of any six (6) months extension period by giving to the other party notice of his or its intention to do so at least ten (10) days prior to any such expiration.

12. That no obligation, agreement or understanding on the part of either party to be performed shall be implied from any of the terms and provisions of this lease, all obligations, agreements and understandings being expressly set forth herein.

13. Any notice provided for herein shall be considered as properly given as of the date of mailing if sent by registered mail duly addressed to either of the parties at their address as shown in Paragraph 1 of this lease.

In witness whereof, the parties hereto have caused these presents to be executed the day and year first above written.

Standard Oil Company,
By P. A. Raupagh, Manager,
Lessor.

Charles Dameron,
Lessee.

Signed in presence of:

W. Henis,
W. E. Hazel.

597 COMMISSION'S EXHIBIT NO. 1-B.

The Lessee hereby covenants and agrees as follows:

1. That Lessee has examined and knows the condition of said premises and the buildings, equipment, machinery and appliances situated thereon, acknowledges that he has received the same in good order and repair (except as otherwise specified), and that no representation as to the condition or repair thereof have been made by the Lessor.

2. That Lessee will pay all water, light and other operating expenses and will keep said premises, buildings, equipment, machinery and appliances, together with the adjoining sidewalks and entrance driveways in good order and repair; that he will keep said premises and appurtenances, including adjoining areas, alleys and sidewalks in clean, safe and healthful condition, and will comply with all Federal, State and municipal laws, rules, regulations and ordinances with regard to the use and condition of the demised premises; and that at the expiration of this lease, or upon sooner cancellation or termination thereof, Lessee will surrender the premises to the Lessor in substantially as good condition as when received, ordinary wear and tear, damage by fire, the elements or other unavoidable casualties excepted.

3. That Lessee will not carry on or permit upon the demised premises any offensive, noisy or dangerous trade, business, manufacture or occupation, or any nuisance, nor use the same nor allow the same to be used for any illegal or immoral purposes; it being contemplated that all times during the period of this lease said premises shall be devoted mainly to the operation thereon of a gasoline service station and the handling, storage and dispensing thereon and therefrom of motor fuels, motor oils and greases and other petroleum products, and such other products as are customarily handled, sold and distributed at a gasoline filling station. That Lessee will not erect, maintain nor permit any sign, insignia, or other advertising device upon or near the premises herein described which would in any wise indicate that Lessor is the owner or operator of the business conducted upon the premises herein described.

4. That Lessee will not commit or suffer waste to be committed upon the said premises and will make no perma-

nent alterations in or additions to the buildings, structures or equipment thereon without the written consent of the Lessor first had and obtained; except that, if any equipment included in this lease and used for dispensing petroleum products be used for the purpose of dispensing products supplied by someone other than Lessor, then Lessee may and hereby agrees before such use to remove from such equipment all globes, decalcomanias, or other things identifying the products and/or name of the Lessor.

5. That Lessee will not assign, mortgage or encumber this lease, or sublet the said premises, buildings, equipment, machinery and appliances or any part thereof, nor shall Lessee suffer any lien or encumbrance to be placed upon the leasehold interest hereby created or any part thereof, without the written consent of the Lessor first had and obtained.

It is further mutually covenanted and agreed as follows:

6. That none of the provisions of this lease shall be construed as reserving to the Lessor any right to exercise any control over the business or operations of the Lessee conducted upon the leased premises or to direct in any respects the manner in which any such business and operations shall be conducted, it being understood and agreed that so long as the Lessee shall use said premises in a lawful manner as herein provided, the entire control and direction of such activities shall be and remain with the Lessee.

It is further understood and agreed that Lessee shall have no authority to employ any persons as agents or employees for or on behalf of the Lessor for any purpose, and that neither the Lessee nor any other persons performing any duties or engaging in any work at the request of the Lessee upon the leased premises shall be deemed to be employees or agents of the Lessor.

7. That the Lessee may, upon the expiration of this lease or upon its sooner termination or cancellation, remove any and all equipment, tools, fixtures, containers or machinery belonging to the Lessee and placed or installed by the Lessee upon the leased premises.

8. That the Lessor may enter upon said premises at all reasonable times to examine the condition thereof, and to make such changes or repairs to any of the structures on the leased premises as the Lessor may see fit, provided that such right shall not be exercised in such manner as to

interfere unreasonably with any business of the Lessee conducted thereon.

9. That if the Lessee shall fail to pay the rent in the amounts and at the times and in the manner herein provided and or shall fail to keep and perform or shall violate any of the covenants, conditions and stipulations of this lease on the part of the Lessee to be kept and performed, or if Lessee shall be adjudicated a bankrupt or make an assignment for the benefit of creditors, or if the interest of the Lessee under this lease, shall be levied upon and/or sold upon execution, or shall by operation of law become vested in another person, firm or corporation, or if a Receiver shall be appointed for the Lessee or for the interest of the Lessee under this lease, then, and in any such event, the Lessor at any time thereafter shall have the right, at the Lessor's election, to enter upon the premises herein demised and take possession of the same, together with all buildings, machinery, equipment and appliances situated thereon, and from the time of such entry this lease shall terminate and become void and of no effect and shall be forfeited, and the Lessor, in addition thereto, may sue for and recover all damages accrued or accruing under this lease or arising out of any violation thereof; or Lessor may so sue and recover without declaring this lease void or entering into possession of the said premises; or Lessor may pursue any other remedies for the violation of this lease or any of its covenants by the Lessee. The above enumerated remedies are concurrent and are at the option and discretion of the Lessor, and the pursuit of any one shall not amount to an election and bar the pursuit of any other additional remedies not enumerated above.

Cust-5048

Schedule C.

—Rider—

Complete Inventory of Physical Equipment.

Sheet 2.

At Schoolcraft & Grand River—Detroit.

2 grs. pump & dolly with meter
2 100# grs. pumps & dollys
4 ornamental globes
3 mtl. disp. win. reflectors
2 Bennett barrel pumps
3 gauge sticks
2 1 gal. sw. spout measures
1 ¼ gal. sw. spout measures
1 ½ gal. sw. spout measures
1 ea. 1, ½ gal. galv. measures.
1 letter file
1 enam. Iso Vis sign
5 rad. hose & nozzles
4 price sign brackets
2 2½ gal. fire extinguishers
1 5 gal. test bucket
1 Champion sparkplug tester
3 rubber bushings
2 10 qt. galv. pails
1 metal file box
1 quick change interlock. coupler
6 Jewel globes
2 mirrors
1 wood file box
2 enam. light shades
4 price & data books
2 enam. light reflectors
2 waste paper baskets
4 motor oil basket brackets
4 1 gal. red loan cans
1 set sparkplug socket wrenche 1 rat. handle, 5 sockets
1 mop pail with wringer

32 motor oil bottles
32 bottle spouts, 32 caps
1 mtl. quixpray sprayer
2 radiator buckets.

Enclosed Grs. Facilities, Tools, Equip., etc.

2 Auto Service Lifts, Curtis
1 fibre grs. gun
1 steer. gear gun
1 5 oz. oil gun less flex. hose
1 ea. #23, 25, 31, 34 end wrenches
1 6″ offset screw driver
1 8″ offset screw driver
2 pr. lift safety blocks
1 Reda drain plug wrench
1 metl. tool box with tray
1 clothes wringer
1 wringer stand
1 Alemite fitting wrench
1 Plewes oiler
1 Blow heat gun—Tornado
1 wet clutch gun
1 pump oiler
1 8″ Crescent wrench
1 12″ Crescent wrench
1 2# machinist hammer
1 Zerk adapter
1 Breuer round portable vac. cleaner
1 creeper
2 Alemite drive tools
2 R.O.K. arm chairs
1 spoon shovel
1 grs. gun-air, Alemite H-1
1 Tryon shackle gun
1 std. lub. cart
1 Ampco spring spray gun
1 grease clamp
1 14″ Stilson wrench
1 10″ screw driver
1 24″ carpenter bar
1 click chart stand
1 hub cap wrench
1 whip end for hand guns
1 wood work bench
1 power nozzle for wash. machine

1 Combination water & Coca Cola Cooler #591K
2 computer Gasoline Dispens. Pumps, Tok. 39 #7-937, #7-938
2 computer Gasoline Dispensing Pumps, Display G&B M-85-3
1 Standard Service Neon Sign

This rider covering inventory of equipment is herewith made a part of that certain lease dated June 28, 1939, attached hereto and is subject to all the terms and conditions therein set forth.

Dated this 19th day of July, 1939.

Charles Dameron,
Lessee.
Standard Oil Company
By P. A. Raupagh,
Manager,
Lessor.

599 COMMISSION'S EXHIBIT NO. 1-D.

Cust 5048

Schedule C.

—Rider—

Complete Inventory of Physical Equipment.

Sheet 3.

At Schoolcraft & Grand River—Detroit.

1 Bell System for Driveway

Battery Charger, Tools & Equipment.

1 M-88 Battery Charger
1 syringe
1 term. puller
1 batt. carrier
1 batt. hydrometer
1 end wrench
1 term. spreader
1 batt. cable display rack
1 Atlas water servicer
1 battery pliers
1 pos. post cleaner

Tire Tools & Equipment.

1 stitcher
1 tire tool rack
1 wire brush
1 Dill valve wrench
20 ft. metal tire rack
21 ft. tire chain
25 ft. inside tire rack
1 Marq. hydr. jack
1 rim wrench
1 shears
1 center punch
1 truck tire gauge
1 tube test tank
27 ft. tire chain
1 hammer
1 rim lifter
1 roller type tire spreader
1 cold chisel
32 ft. tire rack
3 4 ft. shelves for Tire rack
15 ft. 4 high outside rack and chain

This rider covering inventory of equipment is herewith made a part of that certain lease dated June 28th, 1939, attached hereto and is subject to all the terms and conditions therein set forth.

Dated this 19th day of July, 1939.

Charles Dameron,
Lessee.
Standard Oil Company,
By P. A. Raupagh,
Manager,
Lessor.

Dealers Agreement.

(Gasoline)

This Agreement, made at Detroit, Mich., on August 31, 1938, by and between Standard Oil Company, an Indiana Corporation, hereinafter styled Company and Joseph Leerhuber of 17100 E. Warren at Cadieux, Detroit, Mich.; Residence 5725 Guilford, hereinafter styled Dealer, Witnesseth:

1. The Company does hereby agree to sell and does sell to the Dealer, and the Dealer does hereby agree to purchase and does purchase from the Company all the Dealer's requirement of Solite with Ethyl, Standard Red Crown and Stanolind Gasoline, which shall be taken to mean all such gasoline used, handled and sold by Dealer, at the above place of business of the Dealer, from October 8, 1938, until October 7, 1939, inclusive, and from year to year thereafter; provided, however, that the Dealer may terminate this agreement at the date last above mentioned or any succeeding anniversary thereof by giving written notice to the Company thirty (30) days prior to the date upon which the Dealer desires such termination to become effective.

2. The Company agrees to make deliveries of Solite with Ethyl Gasoline, Standard Red Crown Gasoline, and Stanolind Gasoline by tank wagon to the above place of business of the Dealer in such amounts (not less than 50 gallons at any one time) and at such times (during business hours) as the Dealer may direct. The Company reserves the right to change the name or to discontinue the sale in Dealer's territory of any product named herein. Should the Company discontinue sale of said products or any of them, Company shall not thereafter be obligated to make deliveries hereunder of such product.

3. The Dealer agrees to pay to the Company for Solite with Ethyl Gasoline, Standard Red Crown Gasoline and Stanolind Gasoline, the Company's posted dealer price therefor.

As herein used, the words "Company's posted dealer price" mean the Company's dealer price for the product sold and delivered hereunder, as posted and displayed at

Company's bulk plant from which deliveries hereunder are made at time of delivery.

4. The Dealer agrees to pay cash at time of delivery of all such gasoline. If the Company shall extend credit to the Dealer the Company reserves the right to withdraw such credit and demand cash payments on delivery without assigning any cause for such action. The failure or refusal by the Dealer to comply with the requirements which the Company may impose hereunder as to payment shall entitle the Company to suspend deliveries pending such failure or refusal or to terminate this agreement forthwith. The suspension or termination of this agreement because of the failure of the dealer to perform any of the agreements herein contained shall not in any wise prejudice the Company's other rights hereunder.

5. All orders hereunder will be filled with reasonable promptness, but it is mutually agreed that the Company shall not be obligated to furnish goods hereunder, nor be liable in damages for failure to do so, in the events acts of God, strikes, difficulties with its workmen, lockouts, fires, foreign or domestic governmental authority, war conditions in this or any foreign country, accidents, delays by railways or other methods of transportation, or other causes beyond its control, shall render it impossible for Company so to do. This agreement shall be subject to revision should any of its provisions be found to conflict with any existing or future law, rule or regulation.

6. The Dealer agrees that Dealer will handle, distribute, and sell gasolines containing tetraethyl lead in accordance with the rules and regulations now in existence or which may be hereafter issued from time to time by the Ethyl Gasoline Corporation, or any governmental agency having jurisdiction in the premises, and that Dealer will have its employees properly instructed in respect to said rules and regulations. Company reserves the right to cancel this agreement insofar as it affects gasoline containing tetraethyl lead in the event the Dealer does not comply with all of the foregoing requirements.

7. This agreement is made upon the express condition that the Company shall have and does hereby reserve the right to cancel and terminate this agreement, or any renewal or extension thereof, at any time upon giving at least ten (10) days' prior written notice thereof to the Dealer.

8. All notices provided for herein shall be considered as properly given if delivered in writing personally or sent by mail duly addressed to the Company at 1011 W. Fourth, Detroit, Mich. or to the Dealer at the place of business herein described. The date of service of a notice served by mail shall be the date on which such notice is deposited in the Post Office of the United States Post Office Department.

Dated this 31st day of August, 1938.

New acc't (New Sta.)
J. D. Beagle #62
Lycaste Cust. #2885-1

Standard Oil Company
By P. A. Raupagh,
Manager.

Joseph Leerhuber,
Dealer.

601 COMMISSION'S EXHIBIT NO. 3-A.

STATEMENT OF—DEALER TANK WAGON PRICES—JOBBER TANK CAR PRICES—PREVAILING RETAIL PRICES ON STANDARD RED CROWN GASOLINE FROM JANUARY 1, 1937 TO MARCH 1, 1941.

(All Prices Shown Are Cents Per Gallon Exclusive of All Taxes.)

Period	Dealer Tank Wagon Prices in Effect	Jobber Tank Car Price in effect at which purchases of four named jobbers were billed	Prevailing Retail Service Station Prices in effect on "Regular" Brand of Gasoline of Major Companies including Standard Oil Company	
Jan. 1, 1937 to Feb. 2, 1937	9.0	7.6	13.0	
Feb. 2, 1937 to May 12, 1937	9.6	8.1	13.0	
May 12, 1937 to Nov. 3, 1937	9.9	8.4	14.1	
Nov. 3, 1937 to March 28, 1938	9.6	8.1	14.1	
Mar. 28, 1938 to July 22, 1938	9.6	8.3	14.3	Mar. 28, 1938 to May 10, 1938
			13.8	May 10, 1938 to June 21, 1938
			12.3	June 21, 1938 to July 22, 1938
July 22, 1938 to Dec. 9, 1938	8.8	7.3	12.3	July 22, 1938 to Sept. 6, 1938
			12.1	Sept. 6, 1938 to Dec. 9, 1938
Dec. 9, 1938 to April 10, 1939	7.6	6.35	10.0	Dec. 9, 1938 to Feb. 20, 1939
			10.7	Feb. 20, 1939 to Apr. 10, 1939
April 10, 1939 to June 17, 1939	7.6	6.1	10.7	
June 17, 1939 to Oct. 31, 1939	8.1	6.6	11.4	
Oct. 31, 1939 to Nov. 11, 1939	7.4	6.15	9.3	
Nov. 11, 1939 to Nov. 18, 1939	6.4	5.4	9.3	
Nov. 18, 1939 to Current Date 3-6-41	8.1	6.6	11.4	

602 COMMISSION'S EXHIBIT NO. 3-B.

STATEMENT OF—DEALER TANK WAGON PRICES—JOBBER TANK CAR PRICES—PREVAILING RETAIL ON SOLITE WITH ETHYL GASOLINE FROM JANUARY 1, 1937 TO MARCH 1, 1941.

(All Prices Shown Are Cents Per Gallon Exclusive of All Taxes.)

Period	Dealer Tank Wagon Prices in Effect	Jobber Tank Car Price in effect at which purchases of four named jobbers were billed	Prevailing Retail Service Station Prices in effect on "Premium" Brand of Gasoline of Major Companies including Standard Oil Company
Jan. 1, 1937 to Jan. 9, 1937	11.0	9.5	15.0
Jan. 9, 1937 to Feb. 2, 1937	10.5	8.75	15.0
Feb. 2, 1937 to May 12, 1937	11.1	9.35	15.6
May 12, 1937 to Nov. 3, 1937	11.4	9.65	16.1
Nov. 3, 1937 to Mar. 28, 1938	11.1	9.35	16.1
Mar. 28, 1938 to July 22, 1938	11.3	9.55	16.3 Mar. 28, 1938 to May 10, 1938 15.8 May 10, 1938 to June 21, 1938 14.3 June 21, 1938, to July 22, 1938
July 22, 1938 to Dec. 9, 1938	10.3	8.55	14.3 July 22, 1938 to Sept. 6, 1938 14.1 Sept. 6, 1938 to Dec. 9, 1938
Dec. 9, 1938 to Apr. 10, 1939	9.1	7.6	12.3 Dec. 9, 1938 to Feb. 20, 1939 13.1 Feb. 20, 1939 to Apr. 10, 1939
Apr. 10, 1939 to June 17, 1939	9.1	7.35	13.1
June 17, 1939 to Oct. 31, 1939	9.6	7.85	13.1
Oct. 31, 1939 to Nov. 15, 1939	8.9	7.4	11.3
Nov. 15, 1939 to Nov. 18, 1939	7.9	6.65	11.3
Nov. 18, 1939 to Current Date 3-6-41	9.6	7.85	13.4

Note

Page 4717 to 4726 are on Card 67

603 COMMISSION'S EXHIBIT NO. 4.

Statement of Posted Retail Prices on "Red Crown" Gasoline and "Solite With Ethyl" Gasoline at Retail Service Stations Directly Operated by the Stikeman Oil Company.

From January 1, 1937 to February 14, 1938 inclusive.

Period	Red Crown Gasoline	Solite With Ethyl Gasoline
January 1, 1937 to February 2, 1937	13.0	15.0
February 2, 1937 to May 12, 1937	13.6	19.6
May 12, 1937 to February 15, 1938	14.1	16.1

Above prices in cents per gallon exclusive of all Taxes. Since February 15, 1938 no retail service stations have been directly operated by the Stikeman Oil Co.

637 COMMISSION'S EXHIBIT NO. 22.

Posted Prices on Standard Red Crown Gasoline

For Periods Indicated Below.

Sept. '36	14.2¢	
Feb. '37	16.0¢	
Aug. '37	16.5¢	
Jan. '38	~~16.0¢~~	16.5¢ C.N.G.
July '38	15.3¢	
July 9, 1938	15.3¢	
Sept. 17, 1938	15.0¢	
Nov. 29, 1938	14.3¢	
June 21, 1939	15.8¢	
Mon. Aug. 28, 1939		2¢ trading stamp issued to the purchaser with each gallon of gasoline
Nov. 4, 1939	13.6¢	Discontinued on Nov. 7, 1939
Nov. 13, 1939	12.5¢	
Nov. 24, 1939	15.7¢	

638 COMMISSION'S EXHIBIT NO. 25.

Forces beyond our control are compelling us to withhold issuing saving stamps, for the time being.

Please keep your gasoline receipt. Should this condition change, it will have the same value as though the stamps were on it when it was issued.

Ned's Auto Supply Co.

CHG:C
10/7/39.

(Two 2¢ Merchandise Stamps—Ned's Auto Supply.)

640 COMMISSION'S EXHIBIT NO. 27.

Name ....

Street & Number ....

City ....

Year & Model Car .... License No. ....

Ned's Auto Supply Company.

Gasoline Savings Stamp Container

(Cut)

Stamps and receipts must be kept and redeemed in this container.

The store cashier will issue you a new envelope each time you redeem your stamps.

Good for purchases on all merchandise, car services or payments on account at all Ned's stores.

Valid only if affixed to cash receipt issued at the time of the sale—non-transferable.

641 COMMISSION'S EXHIBIT NO. 29.

August 6, 1937.

Dear Fellow Dealer:

At a joint meeting held on July 27th the undersigned dealers agreed to be the leaders in a movement to discontinue all gasoline discounts as a gesture of good faith to the industry, and in a sincere attempt to permanently eliminate the practice.

We were given definite assurance, and it was mutually agreed that by noon of the following day all dealers would be on the same program or we would be obliged to go back on the old basis.

We have now waited for Ten Days, and not only have other dealers failed to adopt this program, but competitive conditions have become so bad that it is imperative for us to follow suit.

We are writing to you as a further gesture of good faith and with the sincere promise to co-operate in the future on any program that will be Fair To All.

It has cost us a great deal to pioneer this move, and we sincerely regret that the others did not follow suit.

Yours very truly,

James J. Bright & Son
Firestone Auto Supply and Service Stores
Ned's Auto Supply Company
Stark Hickey, Inc.

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642 COMMISSION'S EXHIBIT NO. 30.

Gasoline Discounts.

The undersigned dealers are again selling their respective brands of gasoline at prices in effect before July 26.

All customers are invited to return and receive the same savings as they have had in the past.

James J. Bright & Son
Vernon Highway at Brooklyn
Fort Street at Green
East Grand Boulevard at Hastings
Second Avenue at Willis

Firestone Auto Supply & Service Stores
Vernor Highway at Trumbull
Cass Avenue at Antoinette

Ned's Auto Supply Co.
John R at Nevada
Grand River at Chicago
East Jefferson at Manistique
Michigan Avenue Near Schaefer Rd.

Stark Hickey, Inc.
Grand River at Plymouth Rd.
Grand River at Maplewood

643 COMMISSION'S EXHIBIT NO. 31.

May 9

2 oz. Pyroil Free.
Ned's Auto Supply Co.
—6 4 B 1.00 I 115

Report Errors To Manager

No. 4

644 COMMISSION'S EXHIBIT NO. 32-A.

Price Schedule Showing Retail Price at Stations Operated by Citrin-Kolb Oil Co.

Note: 3 cents State tax and Mich. Sales Tax are to be added to prices shown.

February 27, 1941.

Livernois & Lyndon—Started Operation March 8, 1939

March 8, 1939-June 16, 1939:	.116
June 17, 1939-June 19, 1939:	.121
June 20, 1939-Sept. 11, 1939:	.123
Sept. 12, 1939-Oct. 7, 1939:	.107
Oct. 8, 1939-Oct. 30, 1939	.123
Oct. 31, 1939-Nov. 11, 1939:	.104
Nov. 12, 1939-Nov. 18, 1939:	.93
Nov. 19, 1939-June 30, 1940:	.123
June 30, 1940-Dec. 22, 1940:	.129

Leased out Dec. 22, 1940.

Jefferson & Nottingham—Started Operating Jan. 1, 1939

Jan. 1, 1939-Feb. 19, 1939:	.1095
Feb. 20, 1939-June 16, 1939:	.1165
June 17, 1939-June 19, 1939:	.121
June 20, 1939-Sept. 11, 1939:	.124
Sept. 12, 1939-Sept. 14, 1939:	.107
Sept. 15, 1939-Oct. 30, 1939:	.124
Oct. 31, 1939-Nov. 11, 1939:	.104
Nov. 12, 1939-Nov. 18, 1939:	.92
Nov. 19, 1939-June 30, 1940:	.123
June 30, 1940-Feb. 27, 1941:	.129

Vernor & Brush—Started Operating June 2, 1939
June 2, 1939-June 16, 1939: .116
June 17, 1939-June 19, 1939: .121
June 20, 1939 .116
June 21, 1939-Sept. 11, 1939: .123
Sept. 12, 1939-Oct. 7, 1939: .107
Oct. 8, 1939-Oct. 30, 1939: .123
Oct. 31, 1939-Nov. 11, 1939: .104
Nov. 12, 1939-Nov. 18, 1939: .925
Nov. 19, 1939-June 30, 1940: .123
June 30, 1940-Feb. 27, 1941: .129

Woodward & Westminster—Started Operating July 27, 1939
July 27, 1939-Sept. 9, 1939: .123
Sept. 10, 1939-Sept. 12, 1939: .107
Sept. 13, 1939-Oct. 8, 1939: .123
Oct. 9, 1939-Oct. 10, 1939: .1025
Oct. 11, 1939-Oct. 30, 1939: .123
Oct. 31, 1939-Nov. 11, 1939: .1025
Nov. 12, 1939-Nov. 18, 1939: .93
Nov. 19, 1939-June 19, 1940: .123
June 30, 1940-Dec. 29, 1940: .129
Leased out Dec. 29, 1940.

645

COMMISSION'S EXHIBIT NO. 32-B.

Retail Price Schedule—cont'd.

Page 2.

6 Mile & Jos. Campau—Started Operating Aug. 17, 1939
Aug. 17, 1939-Sept. 11, 1939: .123
Sept. 12, 1939-Oct. 9, 1939: .123
gave sugar with 8 gals. gas
Oct. 10, 1939-Oct. 30, 1939: .123
Oct. 31, 1939-Nov. 11, 1939: .104
Nov. 12, 1939-Nov. 18, 1939: .94
Nov. 19, 1939- .123
June 30, 1940-Feb. 27, 1941: .129
Leased out Feb. 27, 1941.

Wyoming Eaton—Started Operating July 1, 1940
July 1, 1940-Feb. 27, 1941: .129
Linwood & Pingree—Started Operating Sept. 27, 1940
Sept. 27, 1940-Feb. 27, 1941: .129
14445 Linwood—Started Operating Oct. 15, 1940
Oct. 15, 1940-Feb. 27, 1941: .129

646 COMMISSION'S EXHIBIT NO. 32-C.

Price Schedule Showing Retail Price at Stations Operated by Citrin-Kolb Oil Co.

Note: Add three cents Sales Tax, one cent Federal Tax and .004 cents State Sales Tax.

January 1, 1937 to February 3, 1937	.13
February 4, 1937 to May 12, 1937	.136
May 13, 1937 to May 15, 1937	.139
May 16, 1937 to September 19, 1937	.141
September 19, 1937 to December 31, 1937	.121
January 1, 1938 to March 29, 1938	.121
March 29, 1938 to August 12, 1938	.123
August 13, 1938 to November 2, 1938	.109
November 2, 1938 to December 20, 1938	.12
December 21, 1938 to December 31, 1938	.11

Note: Commencing November 2, 1938 add three cents State Tax and .004 cents State Sales Tax.

647 COMMISSION'S EXHIBIT NO. 33-A.

(Letterhead of Citrin-Kolb Oil Company,
Detroit, Michigan.)

March 8, 1941.

Cyrus B. Austin,
Attorney-at-law
Federal Trade Commission
Detroit, Michigan

Dear Mr. Austin:

In response to your request for certain information regarding the matter of Federal Trade Commission vs. Standard Oil Company, we believe the following will cover all items requested by you in the subpena duces tecum served on Mr. Citrin.

The invoice price for Red Crown gasoline to the dealers at

4200 Third
1309 W. Warren
11301 Van Dyke
Chicago & Dexter
8501 Gratiot

from January 1, 1938 to December 31, 1940, was identical and the prices were as follows:

1/1/38-3/28/38	.136
3/28/38-7/22/38	.138
7/22/38-12/9/38	.128
12/9/38-6/17/39	.116
6/17/39-10/31/39	.121
10/31/39-11/11/39	.114
11/11/39-11/18/39	.104
11/18/39-7/1/40	.121
7/1/40-12/31/40	.126 (this rise is the additional ½ cent Federal Tax)

The above schedule of prices includes State and Federal Tax.

On the above mentioned locations we gave the following rebates off of the invoice price as above shown:

4200 Third	1¢ per gallon
1309 W. Warren	1¢ per gallon
11301 Van Dyke	1¢ per gallon
Chicago & Dexter	none (see next paragraph)
8501 Gratiot	½¢ per gallon

Cyrus B. Austin—2

For the year 1939 the invoice price to all dealers was the same and they conformed with the above schedule except, that we gave the above-mentioned rebates.

We have no control or interest in the rentals of the above locations except the location at Chicago and Dexter. We lease this location at a rental of $235.00 per month and sublease the premises at the same rental. For the months of August, September, and October of 1939 the rent was waived for the reason that the station across the street instigated a price war against our town. Before meeting this competition our tenant filed a complaint with the Prosecutor for Wayne County and with Mr. Rankin Peck, of the Retail Gasoline Dealers Association; all of which resulted in an action before the Wayne County Circuit Court against the competitor of our town. While this was pending our tenant lost considerable of his business. He then had to meet the competition because the courts gave no relief. In order to keep our tenant in business after the punishment of this competition we waived three month's rent as our contribution in assisting our tenant to carry on against his competitors price cutting activity.

Our records are complete and are available to you for what information you desire.

Very truly yours,
Citrin-Kolb Oil. Co.
Max Biber

MB/ew

---

649 COMMISSION'S EXHIBIT NO. 34.

Jefferson-Nottingham Service

(Cut)

Special! Save on Gas
This card will save you
2c per Gallon
on each gallon of Standard Red
Crown or Ethyl Gasoline

Ask attendant about Saving Stamp Plan

Citrin-Kolb Products
Jefferson-Nottingham Service

(On reverse side.)

Special Savings Card

Issued to ....
Of ....

Citrin-Kolb Products
Jefferson-Nottingham Service
By ....

(over)

COMMISSION'S EXHIBIT NO. 35.

Linwood at D.T.R.R. Service

(Cut)

Special! Save on Gas
This card will save you
2c per Gallon
on each gallon of Standard Red
Crown or Ethyl Gasoline

Ask attendant about Saving Stamp Plan

Citrin-Kolb Products
Linwood at D.T.R.R. Service

(On reverse side.)

Special Savings Card

Issued to ....
Of ....

Citrin-Kolb Products
Linwood at D.T.R.R. Service
By ....

(over)

651 COMMISSION'S EXHIBIT NO. 36.

Citrin-Kolb Oil Products

(Cut)

Special Discount Card

This card when presented, entitles bearer to a 2c Per Gallon discount on Standard Red Crown Gasoline and other privileges obtainable.

Jack Katz, Mgr.

8620 Linwood—Corner Pingree
for Tire & Battery Service—call TYler 4-9001

(On reverse side.)

Special Discount Card

(Cut)

Issued to ....
Of ....

Citrin-Kolb Oil Products
8620 Linwood corner Pingree
By Jack Katz, Mgr.
(over)

for Tire & Battery Service—call TYler 4-9001

652 COMMISSION'S EXHIBIT NO. 38.

Standard Oil Products
Special Discount Card

This Card When Presented Entitles Bearer To A
2c Discount Per Gallon

— on —

Standard Red Crown Gasoline
5c Off on Each Quart of Oil

9705 Dexter and Chicago Blvd.
TY. 4-9624 "Maurey" Scholnick

663 COMMISSION'S EXHIBIT NO. 50.

Gasoline Savings Container

Name ....

Street & Number ....

City ....

Year & Model Car.................... License No. ....

Ned's Auto Supply Co.
Department Stores for Motorists
Detroit, Michigan

(Cut)

North End
John R
Cor. Nevada Ave.
TOwnsend 8-4400

W. Side—Dearborn
Michigan
Near Schaefer Road
ORegon 4400

East Side
E. Jefferson
Cor. Manistique
LEnox 4400

Northwest
Grand River
Cor. Chicago Blvd.
TYler 4-4400

Northeast
Gratiot
At 7 Mile Road
ARlington 4000

Central
Woodward
Cor. Calvert
TOwnsend 6-4400

664 COMMISSION'S EXHIBIT NO. 51.

Oct 18

Ned's Auto Supply Co.
—6 3 N 1.00 H 443

Report Errors To Manager
No. 3

(One 12¢ Merchandise Stamp—Ned's Auto Supply Co.)

COMMISSION'S EXHIBIT NO. 54.

RETAIL SERVICE STATION PRICES ON STANDARD RED CROWN AND "SOLITE WITH ETHYL" GASOLINES AT STATIONS DIRECTLY OPERATED BY THE WAYNE OIL CO. FROM SEPT. 8, 1939 TO DEC. 31, 1940.

	8400 West Chicago		13100 Livernois		Wyoming & Brandt		2945 So. Fort		Schaeffer & Tueman		10618 West Jefferson		Grd. River & Mendota	
	Red Crown	Ethyl	Red Crown	Ethyl	Red Crown	Ethyl	Red Crown	Ethyl	Red Crown	Ethyl	Red Crown	Ethyl	Red Crown	Ethyl
Sept. 8, 1939	14.7	16.3	14.1	16.1										
October 1939	13.7	16.3	14.1	16.1									15.0	
Nov. 1, 1939					15.0	16.6								
Nov. 15, 1939							12.5	16.6					12.5	
Nov. 17, 1939	12.5	14.3	12.5	14.5	12.5	16.6								
Nov. 18, 1939					15.7	17.5	15.7	17.1						
Nov. 19, 1939	15.7	16.3			15.7	17.5	15.7	17.1						
Nov. 20, 1939			15.8	17.8	15.7	17.5	15.7	17.1						
Dec. 1939	15.8	17.6	15.8	17.8	15.7	17.5	15.7	17.1	15.7	17.5				
Jan. 1940	15.8	17.6	15.8	17.8	15.7	17.5	15.7	17.1	15.7	17.5				
Feb. "	15.8	17.6	15.8	17.8	15.7	17.5	15.7	17.1	15.7	17.5				
Mar. "	15.8	17.6	15.8	17.8	15.7	17.5	15.7	17.1	15.7	17.5				
Apr. "	15.8	17.6	15.8	17.8	15.7	17.5	15.7	17.1						
May "	15.7	17.5			15.7	17.5	15.7	17.5						
June "	15.7	17.5			15.7	17.5	15.7	17.5			15.7	17.1		
July "	16.3	18.0			16.3	18.0	16.3	18.3			16.3	17.6		
Aug. "	16.3	18.0			16.3	18.0					16.3	17.6		
Sept. "	16.3	18.0			16.3	18.0					16.3	17.6		
Oct. "	16.3	18.0									16.3	17.6		
Nov. "	16.3	18.0									16.3	17.6		
Dec. "	16.3	18.0									16.3	17.6		

667 COMMISSION'S EXHIBIT NO. 55.

Gasoline Sales.

	1937	1938	1939	1940
Jan.	22482	18493	28513	24608
Feb.	21336	14678	25240	22386
Mar.	23985	18756	26263	23561
April	23926	19344	26943	22762
May	26433	18845	29379	24272
June	25179	16666	28059	24747
July	26006	19167	27952	24512
Aug.	24428	24017	27168	25612
Sept.	24142	22263	25677	21611
Oct.	25689	22131	26342	24099
Nov.	21086	20645	23967	24215
Dec.	21757	26901	26680	26059
Totals	286,449	241,906	322.183	288,444

668 COMMISSION'S EXHIBIT NO. 56.

Statement

Townsend 6-9301

Detroit, Mich. .... 19........

M ....

Address ....

....

Chet's Service
Deluxe Standard Station
Collingwood at Hamilton

(Over)

	1937	1938	1939	1940
Jan.	16590	15024	24854	21139
Feb.	15363	21964	21031	18013
Mar.	17714	17906	22799	18931
Apr.	16706	15574	22896	20533
May	19612	19912	24890	21753
June	17475	16463	23563	22099
July	17555	27648	22406	21391
Aug.	18992	23516	22837	21059
Sept.	16251	26571	21126	21498
Oct.	13880	26715	22027	21366
Nov.	14334	35098	21961	21307
Dec.	16555	33337	22784	20644
Total	201027	279728	273174	249733

669 COMMISSION'S EXHIBIT NO. 57.

(Cut) Hawley's Super Service (Cut)
19111 Grand River at Warwick
Phone Redford 2472
Detroit, Mich.

	1936	1937	1938	1939	1940
Jan.	15,679	16,136	12,500	14,237	14,994
Feb.	15,422	14,652	10,558	14,402	13,564
Mar.	16,736	16,855	12,870	16,607	16,369
Apr.	18,196	15,527	13,414	17,013	16,513
May	19,555	16,349	13,002	17,161	18,320
June	18,436	16,175	12,889	17,504	17,891
July	19,271	16,036	15,891	17,049	18,300
Aug.	17,622	16,488	15,412	16,815	18,490
Sept.	18,000	16,545	15,174	16,210	18,197
Oct.	18,659	16,894	15,793	17,819	19,543
Nov.	18,163	15,170	14,193	16,958	17,815
Dec.	18,140	13,690	15,082	16,487	17,477
	213,879	190,517	166,778	198,262	207,473

670 COMMISSION'S EXHIBIT NO. 58.

	1937	1938	1939	1940	1941
Jan			16083	16054	12955
Feb.		17328	19537	Feb. 14066	12339
Mar.		23452	19977	14730	
Apr.		25432	17986	14323	
May		40000	17452	15940	
June		32439	16942	14278	
July		19311	15804	14611	
Aug.		24268	15323	14455	
Sept.		26634	15695	14583	
Oct.		23802	15587	15219	
Nov.		19207	16164	14851	
Dec.		17100	16738	14206	

671 COMMISSION'S EXHIBIT NO. 59.

	1937	1938	1939	1940
Jan.	13970	16176	13620	16224
Feb.	13711	13159	14571	15158
Mar.	17783	14733	16330	16486
Apr.	18942	15106	18097	16553
May	22713	15443	20589	18462
June	21780	14514	20204	18070
July	23605	15025	21034	18216
Aug.	21582	15685	19214	18300
Sept.	21274	15929	17497	16580
Oct.	21706	15959	17345	17455
Nov.	19588	15639	16172	17234
Dec.	18168	15937	16826	17136
Total	234822	183305	211599	205874

672 COMMISSION'S EXHIBIT NO. 60-A.

E. J. Tapert.

1936	
Apl.	18398
May	21823
June	20353
July	23985
Aug.	22508
Sept.	22937
Oct.	23943
Nov.	21316
Dec.	20598
1937	
Jan.	16407
Feb.	19231
Mar.	19494
Apl.	19815
May	22473
June	24599
July	25545
Aug.	22049

1937	
Sept.	18094
Oct.	21436
Nov.	17649
Dec.	19674
1938	
Jan.	19089
Feb.	23897
Mar.	27253
Apl.	26334
May	29545
June	30560
July	25024
Aug.	24591
Sept.	27500
Oct.	30531
Nov.	25745
Dec.	22508
1939	
Jan.	15612
Feb.	12193
Mar.	13327
Apl.	14568
May	15215
June	13430
July	14412
Aug.	13041
Sept.	12784
Oct.	13765

1939	
Nov.	13119
Dec.	13465
1940	
Jan.	10829
Feb.	10990
Mar.	12953
Apl.	11941

1940	
May	12693
June	12214
July	10825
Aug.	12272
Sept.	11498
Oct.	12345
Nov.	12194
Dec.	11901
1941	
Jan.	9877
Feb.	10361
Mar.	

674 COMMISSION'S EXHIBIT NO. 61.

Form 41-S 600M 2-40

Standard Oil Company

Statement of Sales Acc't. #297 4th & Warren

	1936	1937	1938	1939	1940
Jan.	6900	7212	8172	7221	11087
Feb.	8086	7208	4775	8360	10471
March	8343	10991	7522	9253	10172
April	8991	7830	8329	10766	11555
May	9599	8732	8144	11114	12896
June	9616	10168	7200	11376	14214
July	9891	10777	7302	12553	11437
Aug.	10571	9857	8260	11423	11768
Sept.	9256	10972	8043	10692	11271
Oct.	9555	9849	7432	12228	12669
Nov.	8841	10181	9137	10477	14012
Dec.	9545	8267	7975	10788	12081
Total	109194	112044	92291	126251	143633

675 COMMISSION'S EXHIBIT NO. 63-A.

Want Book
Harold's Super Service
13100 Livernois

	Quantity				Description	
	1938				1938	
July	1	465	Aug.	1	327	
	2	388		2	286	
	3	331		3	293	
	4	290		4	319	
	5	280		5	565	Beginning of Lower Prices
	6	254		6	577	
	7	355		7	502	
	8	412		8	537	
	9	411		9	408	
	10	324		10	425	
	11	266		11	431	
	12	307		12	601	
	13	227		13	451	
	14	346		14	542	
	15	357		15	405	
	16	303		16	465	
	17	321		17	516	
	18	289		18	401	
	19	338		19	622	
	20	307		20	573	
	21	255		21	566	
	22	419		22	449	
	23	431		23	467	
	24	305		24	416	
	25	265		25	468	
	26	227		26	586	
	27	323		27	638	
	28	352		28	501	
	29	380		29	380	
	30	329		30	462	
	31	250		31	423	
Total		10107	Total		14502	

(Reverse side)

Want Book

Quantity		Description
1936		
October	8481	
November	7804	
December	8370	

COMMISSION'S EXHIBIT NO. 63-B.

Want Book

Quantity		Description	
1937		1938	
January	8206	January	7144
February	7716	February	6187
March	9064	March	7863
April	8509	April	7731
May	9149	May	7876
June	8430	June	8138
July	8968	July	10107
		Beginning of price cutting Aug. 4th	
August	9726	August	14502
September	9190	September	14000
October	9543	October	15296
November	8926	November	13592
December	8107	December	12158

(Reverse Side)

Want Book

1939		1940	
January	11730	January	10901
February	10644	February	10205
March	12135	March	11697
April	11992	April	10981
May	13161	May	12278
June	12808	June	13231
July	12630	July	13817
August	11875	August	13597
Price Cut Price Change			
September	16513	September	12509
October	15929	October	12642
Price Raise Nov. 17			
November	12852	November	12329
December	11801	December	12901

Bingham & Ferguson

	1936	1937	1938	1939	1940
January		24181	19692	24337	22785
February		22931	15463	21489	20948
March		23728	20154	25454	22804
April		26352	20867	26360	22838
					May 21st
May		29406	20144	26797	16556
June	31532	26590	24758	28562	
July	28963	26443	25996	24644	
August	29345	25954	23863	23639	
September	33283	25664	22375	22761	
October	29086	26658	22031	22623	
November	27387	23153	24325	23072	
December	25542	22954	25696	24724	
		304014	265364	294462	

685 COMMISSION'S EXHIBIT 74.

Standard Oil Company (Indiana) 74

Sales Department 1011 Fourth Street
Detroit, Michigan

#58 R

Warehouse Shipping Order
Rec'd at W. H. ....
Shipped ....

Invoice No. U 73150
Invoice Date 4/14/39 em
Contract No. Vendor's Nos. Inv. 13

Sold to
Stikeman Oil Co.
6630 Desmond
Detroit, Mich.
Shipped to and Destination

Priced by ....
Prices Checked by P.
Extended by ....
Extension Checked by Ka
Date Posted ....

Prepaid ( )
Collect ( )

Date Shipped 4/14/39 From Muskegon
Car Initials and No. UTL 7689 F. O. B. Destination
How Shipped and Route PM MUSK GT B/L Attached

Discount Allowed Only as Indicated in Terms Column Below.

(A) 1% 10 Days: Net 15th Prox.
(B) 1% 10 Days: Net 30 Days
(C) Net Cash
(D) Net 30 Days from Date of Shipment
(E) Net 15th Prox.
(F) Net 30th Prox.
(G) 1% 10 Days: Net 30th Prox.

Cust. Order & Req. No.	Terms	Items	Description	Quantity	Price	Amount
305	1% 10da	1 T/C	Solite With Ethyl	6546	7.6¢	$497.50
			Federal Excise Tax		1.0¢	65.46
						$562.96

Purchased For Resale

Summary ~~R.G.~~ or S.A. 4 8
~~06~~ or 04 Number U 83913
Amount $16.37

Cash Discount of $4.98 Will Be Allowed From 4/17/39 (Freight, Taxes or Barrels Are Not Subject to Cash Discount.)

(Received the Above in Good Order)

....

Per..

689 COMMISSION'S EXHIBIT NO. 76.

Gasoline Retailing Costs In Wayne County, Michigan

by Herbert F. Taggart

* * *

Copyrighted, 1939

by Herbert F. Taggart

This is a copy number .... of an edition limited to 12 copies, prepared for private circulation and use by refiners and others interested in the retailing of gasoline.

690 Gasoline Retailing Costs In Wayne County, Michigan

by Herbert F. Taggart

This report, derived from data gathered as of May, 1938, has been prepared in a limited edition for private circulation and use by refiners of petroleum products and others with a special interest in the retail branch of gasoline marketing. It deals with the following topics: (1) the mechanics of the survey, (2) the coverage and representation of the survey, (3) the accounting procedures and methods used in the survey, (4) the results of the survey, and (5) conclusions.

1. The Mechanics of the Survey.

This survey was undertaken in an effort to comply with the requirements of Section 8 of Act 282 of the public acts of Michigan of the year 1937, commonly known as the "Fair Trade Act." This section reads as follows: "Where a particular trade or industry, in which the person complained against is engaged, has an established cost survey for the locality and vicinity in which the offense is committed, such cost survey shall be deemed competent evidence to be used in proving the cost to such person." The purpose of the survey was that of determining the "overhead expense of the distributor or vendor" which is one of the elements of cost specified in Section 5 of this Act.

It seemed necessary for practical reasons to conduct the survey by means of a questionnaire, a copy of which is attached to this report. The making of a survey by means of personal visitation to gasoline stations would have been an extremely costly and time-consuming task, and it would have resulted in no more reliable figures than the survey conducted by the questionnaire method. The questionnaire was prepared in duplicate in order that each station operator might keep a copy, if he wished, of the figures
691 which he sent in. The questionnaire blanks, together with self-addressed envelopes, were distributed in person throughout Wayne County by individuals who were familiar with the retail gasoline trade and who undertook to make sure that every gasoline station in the entire county was furnished with a copy of the questionnaire. This distribution was made to a total of 2,442 individual gasoline stations in Wayne County.

Completed returns were received covering the operations of 555 individual gasoline stations. The returns were first given serial numbers, roughly in order of their receipt, and were then carefully checked to see whether they had apparently been properly made out. All those with obvious defects such as lack of notarization, failure to answer certain vital questions, or obvious arithmetical errors were marked for field inspection and audit. Also, certain other returns were similarly marked for audit in order to obtain assurance that the returns had been carefully and conscientiously made out by the gasoline station operators in accordance with their actual operating costs. Approximately one-third of all returns received were checked in the field. In some cases it was necessary for the station operator to make out a complete new return which was duly notarized and used in place of the original return, but in most cases it was necessary only to fill in missing figures or to alter figures which were faulty. In many cases the field check showed every figure to be exactly right, and no changes were necessary.

In the course of checking the returns it was found necessary to eliminate 66 of the returns completely from the final analysis. The reasons for such elimination were as follows: inability to audit return, 41 cases; lack of notarization, 19 cases; wrong period, 6 cases. The weighted average cost of selling gasoline by those stations whose returns were not used, as well as it could be computed from the 692 inadequate and unsatisfactory figures given, was 5.3¢ per gallon. The final computations are based on satisfactory returns from 489 individual gasoline stations in Wayne County.

After the returns had been completely checked, computations were made of the cost of selling gasoline by each individual gasoline station. Extensive tabulations of these cost computations and of other figures from the returns were compiled, the results of which are given hereafter.

2. The Coverage and Representation of the Survey.

As indicated above the questionnaire was distributed to 2,442 individual gasoline stations in Wayne County. This is believed to be all of the stations in the county at the time the survey questionnaires were distributed. The 555 stations which returned completed survey blanks were found in all parts of the county. As an indication of this wide geographical representation, the county was divided arbitrarily into five sections, using Grand River Avenue, Woodward Avenue, Gratiot Avenue, and the Detroit city limits as the boundaries. In District 1, bounded by the Detroit River and Grand River Avenue, were 107 of the 489 stations used in the final tabulation. In District 2, bounded by Grand River and Woodward Avenues, were 121 of these stations. Eighty-two were in District 3, bounded by Woodward and Gratiot Avenue, and District 4, bounded by Gratiot Avenue and the Detroit River, contained 99 stations. District 5, which included all of Wayne County outside the city of Detroit, was represented by 80 stations.

The stations whose figures were used in the final computations ranged in size from 1,049 gallons sold during the month of May, 1938, to 30,844 gallons. They represented every major brand of gasoline sold in the area as well as some unbranded varieties. A tabulation of the brands represented by all stations from which returns were received

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Table 1

Brands of Gasoline Represented in the Survey

Brand	Number of Stations
Mobilgas	102
Standard	82
Sunoco	52
Hi-Speed	42
Sinclair	40
Shell	39
Texaco	31
Gulf	29
Cities Service	9
Miscellaneous Brands	22
Brand Unreported	107
All Stations	555

is given above as Table 1.

The 489 stations whose returns were used in the final computation constituted slightly more than 20% of the 2,442 stations to which copies of the questionnaire were distributed. This percentage, although it might seem small to those unacquainted with the usual results of the questionnaire method of obtaining information, is actually a highly satisfactory numerical representation. As a matter of fact, many fewer stations would have given a result equally representative of the retail gasoline trade. This statement is thoroughly demonstrated in Table 2 below. The weighted average cost of selling gasoline in the 489 stations was found to be 4.8¢. The location of stations in the county did not appear to have any appreciable influence on cost. Table 2 shows all stations grouped according to the districts which have been described above. It will be noted that the weighted average cost in each district does not vary more than two-tenths of a cent from the general weighted average cost.

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TABLE 2.

Analysis of Cost Data by Districts.

	Number of Stations	Total Gallonage, May, 1938	Average Gallonage	Gasoline Marketing Expense	Weighted Average Cost, Cents
District 1	107	787,031	7,355	$ 37,163.94	4.7
District 2	121	976,328	8,069	46,563.58	4.8
District 3	82	579,679	7,069	28,881.42	5.0
District 4	99	844,496	8,530	39,809.78	4.7
District 5	80	683,921	8,549	31,669.79	4.6
All Stations	489	3,871,455	7,917	$184,088.51	4.8

Both leased and owned stations were well represented, the number of owned stations being approximately 14% of the total. The stations varied widely in the proportion of business done in fields other than gasoline, the proportion of gasoline business to total business ranging from 19.78% to 98.80%.

Thus it is seen that the representation in the survey was very complete as to geographical distribution, size, brands of gasoline sold, number of returns, status of ownership, and character of business carried on.

3. The accounting procedures and methods used in the survey.

The thing to be aimed at in a cost survey is a figure which represents the cost of sustained operation over a substantial period. If possible, such period should be not less than a year. It is possible for costs for a shorter period to be either higher or lower than a stable cost based on a full year's operations. The obtaining of detailed cost figures from any large number of gasoline stations for a period of an entire year, however, was consid-
695 ered to be impracticable both on account of
the very large expense of such an undertaking and the amount of time it would consume. The best substitute which could be divsed was the obtaining of cost information for one month only with sufficient additional information to assure that such cost information was fairly representative of the conditions under which each station operated. The month of May was chosen for this purpose for two reasons: first, because it was the most recent month for which information could be

obtained, and second, because May was considered to be a month in which the gallonage sold was at least as high as the average for the entire year. The correctness of the latter assumption is fully borne out by the fact that in the 489 stations used in the final tabulation the May gallonage was 3,871,455 gallons as compared to an average monthly gallonage for the same stations during the first five months of 1938 of 3,666,310 gallons. Thus the May gallonage was more than 5% higher than the average monthly gallonage for the first five months of the year 1938. Furthermore, from 369 returns which reported the monthly gallonage for the entire year 1937 it was ascertained that the gallonage for May of that year was 9.22% higher than the average monthly gallonage for the entire year. From this fact it may be concluded that May of 1938 was a month which from the standpoint of gallonage resulted in a conservative statement of unit costs.

The expenses included in the computation were all of the ordinary and necessary expenses of doing business and included specifically wages, rent, electricity and other utilities, advertising, supplies, social security taxes, depreciation, repairs, insurance, property taxes, licenses, bad debt losses, heating, and miscellaneous expenses. In order to recognize the fact that the station operators' own working time has a value and therefore is a cost to the business, the station operators' hours of labor as reported on the
696 questionnaires were put into the computation at the
uniform minimum rate of 40¢ an hour. This rate was chosen because it is universally recognized as a fair minimum wage and because it roughly corresponds to the wages actually paid to those employed in gasoline stations in Wayne County. Another item of cost included in the computations was interest at the rate of five per cent per annum on any investment which the station operator reported in land, buildings, and equipment. This item was included both because interest on investment is a well-recognized factor of cost and also in order that leased stations and owned stations might be placed on a comparable cost basis.

In the questionnaire the items of wages, rent, utilities, advertising, supplies, and social security tax, together with miscellaneous expenses, were obtained on the basis of the actual amounts applicable to the month of May, 1938. The other items of expense were obtained on a yearly basis and divided by twelve in order to arrive at the amount applicable to May. In the case of bad debts, it was decided that 1/12 of the annual bad debts might not be a fair figure for the month of May, 1938, because conditions as to the granting of credit might have changed since the year 1937, for which the figure of annual bad debts was obtained; therefore, the questionnaire requested a figure of credit sales for May, 1938, and in the computations there was used as bad debts either 2% of this credit sales figure or 1/12 of the bad debts for 1937, whichever was the lower. The 2% figure is recognized by those conversant with the retail gasoline trade as being an extremely modest percentage to be applied to credit sales in order to allow for bad debts. The result of this handling of bad debts is that there is included in the costs of the 489 stations which make up the final report a total of bad debts of $2,259.28, which is approximately 1/25 of the total bad debts reported by the same stations for the year 1937.

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Table 3.

Computation of Cost per Gallon—An Actual Typical Station.

Monthly expenses:		
1. Wages—employees		$133.39
2. Wages—owners (312 hours at 40¢)		124.80
3. Rent		100.00
4. Utilities		29.96
5. Advertising		5.00
6. Supplies		13.50
7. Social security tax		1.33
8. Miscellaneous		4.00
9. Bad debts		2.52
Total monthly expense		$414.50
Yearly expenses:		
1. Depreciation on building	$200.00	
2. Depreciation on equipment	140.00	
3. Interest on cost of land, building, and equipment (5% on $5,100)	255.00	
4. Repairs	120.00	
5. Insurance	20.33	
6. Taxes	....	
7. Licenses	26.50	
8. Heating	40.00	
Total yearly expenses	$801.83	
Divided by 12		66.82
Total expenses per month		$481.32
Ratio of gasoline sales to total sales	79.33%	
Expenses applicable to gasoline		$381.83
Gallons sold in May, 1938	7,808	
Expenses per gallon		4.9¢

After total expenses were ascertained it was necessary to divide them between those which pertained to the sale of gasoline and those which pertained to other activities of the gasoline stations. For this purpose the only practicable device was the utilization of the respective dollar sales. In each case a ratio was established between the sales of gasoline and all sales and revenue of the station. This ratio was applied to total cost in order to obtain the

698 Table 4.

Computation of Cost per Gallon.
(489 Stations).

Monthly expenses:		
1. Wages—employees		$ 65,555.05
2. Wages—owners (176,051.5 hours at 40¢)		70,420.60
3. Rent		39,428.17
4. Utilities		11,225.63
5. Advertising		4,617.88
6. Supplies		8,062.82
7. Social security tax		981.12
8. Miscellaneous		4,106.44
9. Bad debts		2,259.28
Total monthly expense		$206,656.99
Yearly expenses		
1. Depreciation on building	$ 25,442.85	
2. Depreciation on equipment	34,454.58	
3. Interest on cost of land, building, and equipment (5% on $1,494,333.73)	75,716.72	
4. Repairs	20,787.59	
5. Insurance	21,546.81	
6. Taxes	23,826.16	
7. Licenses	14,177.10	
8. Heating	32,509.73	
Total yearly expenses	$248,461.54	
Divided by 12		20,705.13
Total expenses per month		$227,362.12
Ratio of gasoline sales to total sales	80.99%	
Expenses applicable to gasoline		$184,140.58
Gallons sold in May, 1938	3,871,455	
Expenses per gallon		4.8¢

cost applicable to the selling of gasoline. In order to get the cost per gallon this figure was in turn divided by the station's gallonage for May, 1938. A typical computation of cost for a single station is shown above as Table 3, and a composite cost calculation embracing the costs and gallonage of all 489 stations is shown as Table 4.

699 The following specific comments on each item of cost will throw additional light on the methods used and the character of the figures shown in Tables 3 and 4. In all cases it will be noted that emphasis was laid on conservatism in stating costs, so that the result is, if anything, an understatement rather than an overstatement of costs.

Employees' wages were taken as reported.

Owners' wages were computed at the rate of 40¢ per hour on the number of hours worked by the station operators. Owners of profitable stations actually draw and consider as wages a much larger amount, but it was thought best, to avoid all possibility of argument that the item of owners' wages contained an element of business profit, to put all operators on the same minimum wage level. The withdrawals by owners of cash and merchandise reported on the questionnaires were of course eliminated from the computations.

The items of rent, utilities, advertising, and supplies were used as reported on the returns.

The item of social security tax was accepted as reported if it was equal to either one or two per cent of the item of employees' wages. One per cent is of course the amount which the employer is required to pay for old age security benefits. Many employers however pay the employee's contribution as well, so that this item was often reported as two per cent of the wage item. Many returns contained no social security tax, or reported a percentage other than one or two per cent. In practically all of these cases one per cent of the employees' wage item was used in the final computation. In a few cases however no social security tax was included, and in a small number of cases where the employer reported that he was required to pay the state unemployment benefit tax a rate of four or five per cent was used.

700 Miscellaneous expenses were accepted as reported with the exception of certain cases where they appeared to be obviously too high. In some cases also the explanation of the miscellaneous expense item indicated

that it was not a proper charge against the business done in May, 1938.

The treatment of bad debts has already been fully indicated. This was a very small item in total expense as it finally turned out, and could well have been completely eliminated.

Depreciation on buildings was included only where buildings were owned. Generally speaking, the figure reported on the return or 5% of the cost of the building was used, whichever was lower. The only exceptions to this rule were in case no depreciation was reported, in which case 5% of the cost of the building was used, and those cases in which a higher rate was reported and substantiated. Such cases occurred, for example, when the building was on leased land and had to be returned to the owner of the land when the ten or fifteen year lease expired. In other instances our audit disclosed that the station operator was actually claiming and receiving credit on his income tax return for a rate of depreciation higher than 5%.

Exactly the same procedure was followed in the case of depreciation on equipment except that the standard rate here was 10% of the cost. Both the 5% rate on buildings and the 10% rate on equipment are very conservative rates. Gasoline station operators seldom claim lower rates for income tax purposes and often claim higher ones.

Interest was computed only on the cost of land, building, and equipment owned by the operator. No attempt was made to compute interest on other assets, such as accounts receivable and inventories, although such interest would have been a fully justifiable part of cost. The rate used, namely 5%, was thought to be conservative and was also very convenient for purposes of computation.

701 The items of repairs, insurance, taxes, licenses, and heating were accepted as reported on the returns. It must be remembered however that wherever there appeared to be any reason for believing that these and the other figures which were similarly accepted were unreliable, they were either eliminated from the computations entirely or were confirmed by field audit.

Thus it is seen that the costs of operation were reported conservatively by the station owners, were obtained for a month in which the gallonage was sufficiently high to make the unit cost relatively low, and were computed with the strictest regard for assurance that no unit cost would be higher than the facts warranted.

4. The Results of the Survey.

One result of the survey has already been mentioned namely, that the weighted average cost per gallon of selling gasoline was found to be 4.8¢. This weighted average cost is simply the total costs of selling gasoline divided by the total number of gallons sold. As was to be expected, individual stations showed a wide variance from this average cost. The lowest cost computed for any station was 2.3¢ per gallon. The highest cost was 22.7¢ per gallon. The cost per gallon was found to vary chiefly according to the number of gallons sold in the month. Table 5 indicates the influence of gallonage on unit costs. In this table the stations are divided into four groups according to gallonage in the month of May, 1938, the first group being that 25% of the total number of stations which had the lowest gallonage, and the fourth group being that 25% of the total number of stations which had the highest gallonage. The average gallonage of Group 1 was 3,746 gallons per station while the average gallonage of Group 4 was 13,541 gallons per station. It will be noted that the unit cost for the lowest gallonage group was 6.6¢ whereas that for the highest gallonage group was 4.3¢.

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TABLE 5.

Relationship of Gallonage to Marketing Cost per Gallon.
(In Quartiles)

	Number of Stations	Total Gallonage, May, 1938	Average Gallonage	Gasoline Marketing Expense	Range of Unit Costs, Cents	Median Unit Cost, Cents	Weighted Average Cost, Cents
25% of Stations Having Lowest Gallonage	122	456,957	3,746	$ 29,944.09	3.6—22.7	6.45	6.6
25% of Stations Having Next to Lowest Gallonage	122	748,558	6,136	38,224.81	3.4— 8.7	5.05	5.1
25% of Stations Having Next to Highest Gallonage	122	1,000,449	8,200	45,047.06	3.0— 7.4	4.4	4.5
25% of Stations Having Highest Gallonage ..	123	1,665,491	13,541	70,872.55	2.3— 7.3	4.2	4.3
All Stations	489	3,871,455	7,917	$184,088.51	2.3—22.7	4.7	4.8

703 Table 6, in which the stations are divided into 16 groups with 2,000-gallon intervals, gives the same information in somewhat greater detail. There is included in this table a column of figures showing the cost range, that is, the highest and lowest unit costs to be found in the particular group of stations. It will be noted that the decline in costs from the very small stations to the very large

ones is not entirely steady or consistent, but is nevertheless clearly present. It is important to note that the decline in cost per gallon is very rapid between the smallest stations and those in the medium-sized classes, but the decline slows down as the stations become larger, so that a point is reached at which increased gallonage no longer appears to result in lower costs.

Chart 1 shows the gallonage and station cost per gallon for every one of the 489 stations included in the survey. The tendency toward cost reduction as the size of the station increases is clearly shown by the cost curve which has been mathematically fitted to the observed data. The slowing down of the decrease is clear, the tendency of cost per gallon to decrease being almost completely absent at about 18,000 gallons. A very slight upward trend in the curve, observable above 24,000 gallons indicates, indeed, that as stations get beyond an optimum gallonage their efficiency declines and the cost per gallon begins to rise. This tendency is very slight and should not, perhaps, be taken too seriously.

Special attention was given in the compilation of figures to those stations which exhibited the highest operating efficiency as indicated by having the lowest operating costs. Tables 7 and 8 divide the stations into four groups according to unit cost. In Table 7 the groups are based on the number of stations so that each group has the same number of stations. This table shows that the weighted

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TABLE 6.

Relationship of Gallonage to Marketing Cost per Gallon.
(In 2,000-Gallon Classes).

Gallons Gasoline Sold	Number of Stations	Total Gallonage, May, 1938	Average Gallonage	Gasoline Marketing Expense	Range of Unit Costs, Cents	Median Unit Cost, Cents	Weighted Average Cost, Cents
0- 2,000	5	7,533	1,507	$ 888.97	5.8—22.7	13.8	11.8
2,001- 4,000	58	185,540	3,199	13,811.24	4.6—12.6	7.2	7.4
4,001- 6,000	112	562,601	5,023	30,766.80	3.6—14.0	5.4	5.5
6,001- 8,000	127	885,464	6,972	42,976.28	3.0— 8.1	4.7	4.9
8,001-10,000	68	604,316	8,887	26,639.74	3.0— 7.4	4.3	4.4
10,001-12,000	49	536,770	10,954	23,834.52	2.6— 7.3	4.4	4.4
12,001-14,000	34	439,160	12,916	18,020.43	2.3— 6.8	4.0	4.1
14,001-16,000	16	241,473	15,092	9,775.31	2.9— 5.5	4.3	4.0
16,001-18,000	7	117,210	16,744	5,390.71	4.0— 5.7	4.6	4.6
18,001-20,000	4	74,574	18,644	3,582.50	3.8— 7.1	4.2	4.8
20,001-22,000	3	63,096	21,032	2,514.46	3.2— 4.5	4.3	4.0
22,001-24,000	3	70,972	23,657	2,621.33	3.7— 3.8	3.7	3.7
24,001-26,000	1	25,150	25,150	1,093.69	4.3	4.3	4.3
26,001-28,000	1	26,752	26,752	892.16	3.3	3.3	3.3
28,001-30,000	...	.....	.....	....	...	...	...
30,001-32,000	1	30,844	30,844	1,280.37	4.2	4.2	4.2
All Stations	489	3,871,455	7,917	$184,088.57	2.3—22.7	4.7	4.8

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TABLE 7.

Cost and Gallonage Data for Stations Grouped in Quartiles, According to Unit Cost.

	Number of Stations	Total Gallonage, May, 1938	Average Gallonage	Gasoline Marketing Expense	Range of Unit Costs, Cents	Median Unit Cost, Cents	Weighted Average Cost, Cents
25% of Stations Having Lowest Unit Costs...	122	1,251,592	10,259	$ 45,243.71	2.3— 4.1	3.7	3.6
25% of Stations Having Having Next to Lowest Unit Costs.......	122	1,123,855	9,212	50,028.24	4.1— 4.8	4.5	4.5
25% of Stations Having Having Next to Highest Unit Costs.......	122	902,054	7,394	47,170.38	4.8— 5.7	5.2	5.2
25% of Stations Having Highest Unit Costs..	123	593,954	4,829	41,646.18	5.7—22.7	6.9	7.0
All Stations	489	3,871,455	7,917	$184,088.51	2.3—22.7	4.7	4.8

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TABLE 8.

Cost and Gallonage Data for Stations Grouped in Quartiles, According to Gallonage.

	Number of Stations	Total Gallonage, May, 1938	Average Gallonage	Gasoline Marketing Expense	Range of Unit Costs, Cents	Median Unit Cost, Cents	Weighted Average Cost, Cents
25% of Gallonage Sold at Lowest Unit Cost..	89	966,934	10,864	$ 33,716.35	2.3— 3.9	3.6	3.5
25% of Gallonage Sold at Next to Lowest Unit Cost	103	967,039	9,389	40,956.88	4.0— 4.5	4.2	4.2
25% of Gallonage Sold at Next to Highest Unit Cost	120	973,711	8,114	47,445.02	4.5— 5.3	4.9	4.9
25% of Gallonage Sold at Highest Unit Cost.	177	963,771	5,445	61,970.26	5.3—22.7	6.4	6.4
All Stations	489	3,871,455	7,917	$184,088.51	2.3—22.7	4.7	4.8

707 average cost of the 25% in number of stations having the lowest unit costs was 3.6¢ per gallon. At the other end of the scale the 25% of stations having the highest unit cost averaged 7.0¢ per gallon. Table 8 deals with gallonage rather than with the number of stations so that the first group contains 89 stations which sold approximately one-fourth of the total number of gallons. From this table it can be seen that the one-fourth of total gallonage sold at the lowest unit cost was sold at an average unit cost of 3.5¢

whereas the one-fourth of total gallonage sold at the highest unit cost required an expenditure of 6.4¢ per gallon.

A special tabulation was made to compare the cost of selling gasoline by leased and owned stations. The dividing line between leased and owned stations was taken with respect to the ownership of land. A leased station was considered to be one in which the land was leased, and if the land were owned the station was considered to be an owned station. Table 9 shows that the 419 leased stations showed a weighted average cost of 4.74¢ while the 70 owned stations showed a weighted average cost of 4.85¢. This computation confirms the propriety of including interest on investment as a means of equalizing the cost computations as between leased and owned stations.

TABLE 9.

Comparison of Leased and Owned Stations.

	Number of Stations	Total Gallonage, May, 1938	Average Gallonage	Gasoline Marketing Expense	Weighted Average Cost, Cents
Leased Stations	419	3,223,783	7,694	$152,652.77	4.74
Owned Stations	70	647,672	9,252	31,435.74	4.85
All Stations	489	3,871,455	7,917	$184,088.51	4.8

708 A special study was made in order to discover the relationship, if any, between the percentage of gasoline sales to total sales and the unit cost of selling gasoline. No such relationship was found to exist. Table 10 shows all stations divided into groups with a 5% interval, the unit cost varying from a low of 4.6¢ in the third and ninth groups, in which gasoline sales constituted from 85 to 90% and 55 to 60%, respectively, of the total business done, to a high of 7.0¢ in the tenth group in which gasoline business constituted 50 to 55% of total business done. The variations in cost from group to group follow no particular pattern, apparently depending a great deal more on the average size of station in the groups than on any other one factor. This table seems to be a reasonably good confirmation of the propriety of using the relative dollar-sales method of allocating costs as between gasoline sales and other sales.

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TABLE 10.

Relationship of Percentage of Gasoline Sales to Total Sales to Unit Cost Per Gallon.

Percentage, Gasoline Sales to Total Sales	Number of Stations	Total Gallonage, May, 1938	Average Gallonage	Gasoline Marketing Expense	Range of Unit Costs, Cents	Median Unit Cost, Cents	Weighted Average Cost, Cents
95.01-100.00	24	143,315	5,971	$ 8,612.47	3.7—14.0	5.85	6.0
90.01- 95.00	87	586,667	6,743	28,513.22	2.5—12.6	5.1	4.9
85.01- 90.00	111	911,134	8,208	41,477.99	2.3—15.4	4.6	4.6
80.01- 85.00	116	889,167	7,665	41,734.70	3.1—22.7	4.65	4.7
75.01- 80.00	85	799,297	9,403	37,272.37	2.9— 8.9	4.8	4.7
70.01- 75.00	31	229,939	7,417	11,035.96	2.9— 8.9	5.0	4.8
65.01- 70.00	20	183,906	9,195	8,672.52	2.6— 7.3	4.65	4.7
60.01- 65.00	5	57,436	11,487	2,699.15	3.4— 7.0	4.9	4.7
55.01- 60.00	5	27,604	5,521	1,279.50	3.1— 7.5	5.1	4.6
50.01- 55.00	4	32,360	8,090	2,249.47	5.6— 7.4	7.15	7.0
Below 50.01*	1	10,630	10,630	541.16	5.1	5.1	5.1
All Stations	489	3,871,455	7,917	$184,088.51	2.3—22.7	4.7	4.8

Special attention was directed in the course of the survey to the stations which exhibited exceptionally low costs in order to discover whether the extraordinarily low costs were typical of the station or were due to special conditions which may have existed only in May, 1938. For this purpose the total cost of selling gasoline in all stations which showed a cost of less than 3.5¢ per gallon was divided by the average gallonage for the first five months of 1938. The result was that while these 30 stations with a total gallonage of 361,042 showed an average cost of 3.1¢ per gallon when May gallonage was used as a base, they showed an average cost of 3.5¢ per gallon when their total operating costs were divided by their average monthly gallonage for the first five months of 1938. Seven of the 489 stations showed a cost of less than 3¢ per gallon. Careful study of their figures indicated that in every case the cost was as low as it was because May, 1938, produced an extraordinary 710 high gallonage, considering these stations' normal business. Specifically, the station which had a unit cost of 2.3¢ was found to be one in which the May gallonage was more than twice as high as its average gallonage for the year to date. Its cost based on the average gallonage was 4.7¢ per gallon. Similarly, the May gallonage of the one station which showed a cost of 2.6¢ per gallon was 22.5% higher than the average gallonage for the year to date. Its cost based on average gallonage was 3.2¢ per gallon. The other five stations whose costs were less than 3¢ a gallon likewise sold in May very substantially greater amounts of gasoline than their averages for the year to date. Their costs on the basis of average gallonage in all except one of the five cases were 3¢ or more. In the exceptional case, the cost on such a basis was 2.9¢. From this study it may be concluded that it is almost impossible that the normal operating cost of any gasoline station, no matter how large or efficient, could be less than 3¢ per gallon.

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TABLE 11.

Gasoline Price and Cost Data for the Average Station.

	Total	Cents Per Gallon	Percentage of Net Proceeds
Gasoline Sales (7,917 gallons)	$1,438.12	18.16	132.4
Less Gasoline and Sales Taxes	351.65	4.44	32.4
Net Proceeds from Gasoline	$1,086.47	13.72	100.0
Cost of Gasoline Sold	798.92	10.09	73.5
Gross Margin on Gasoline	$ 287.55	3.63	26.5
Station Expenses Applicable to Gasoline	376.46	4.76	34.6
Net Loss on Gasoline Sales	$ 88.91	1.13	8.1

Other results of the survey may best be shown by taking a look at the average station. This hypothetical station is not really representative in some senses, but a picture of its operations does throw some light on the gasoline station business in Wayne County in May, 1938. The operator of the average station owned land, buildings and equipment which cost him $3,056 and in addition paid rent of $80.63 per month for other fixed assets required. He worked 360 hours himself, or 11.6 hours per day (sometimes there were partners, of course) and employed other help to the extent of 366 hours, paying therefor $134.06, or 36.6¢ per hour. His own drawings in cash and merchandise amounted to $128.66, or 35.7¢ per hour for the time he put in. During the month he sold 7,917 gallons of gasoline for $1,438.12 and received $337.48 for other sales and services. The details of the gasoline part of his business are shown in Table 11, which indicates that if he made any money it must have come from the non-gasoline part of the business. It should be remembered, of course, that a substantial portion of his expenses did not involve immediate expenditures of

cash, so that he actually did have a net cash income. The chief items of non-cash expense were owners' wages and depreciation, which amounted to $124.90 of the total expense or 1.58¢ per gallon. Deducting these items from his expenses leaves $35.99 of cash income above out-of-pocket costs, or 12.3¢ per hour for the time devoted to gasoline sales. Out of this he must pay $3.32 of interest on indebtedness, leaving $32.67 per month on which to live and out of which to save the price of new buildings and equipment when the old ones wear out. As to the rest of the business done by the station the information is not so complete. From the $337.48 of such business must be deducted $88.39 of allocated expenses, but the questionnaires did not call for the cost of goods sold, such as oil, grease, accessories, and so forth, so that the $249.09 of difference between sales and expenses cannot further be analyzed. Certainly it is not
net income, and it seems most unlikely that it provides
712 the operator with enough of a surplus to enable him
to earn the minimum wage and minimum interest on investment with which his gasoline operations have been charged.

Table 12 contains a miscellaneous assortment of data as reported on the questionnaires, not included in any previous table. Most of these figures are not particularly significant, but some are interesting. Substantial differences will be noted between some of the figures as reported (particularly depreciation and proprietors' wages) and the figures actually used in the cost computations. The reasons for these differences are explained heretofore.

TABLE 12.

Additional Data Obtained from Survey.

Hours Worked—Employees		178,850.25
Hours Worked—Owners		176,051.5
Owners' Drawings Reported		$ 62,913.05
Investment:		
Land (70 stations)	$512,561.84	
Buildings (98 stations)	574,318.01	
Equipment (354 stations)	407,453.88	
		$1,494,333.73
Building Depreciation Reported		34,852.65
Equipment Depreciation Reported		39,196.33
Cost of Gasoline Sold		545,530.23
Gasoline Sales in May, 1938		703,238.74
Other Sales and Income		165,030.00
Credit Sales in May, 1938		196,171.49
Bad Debts Reported for 1937		58,072.63
Interest Paid—Annual		24,076.20

5. Conclusions from the Survey.

The final conclusions to be derived from this survey of the cost of doing business by retail gasoline dealers in Wayne County may be summarized as follows: first,
713 that the average cost of selling a gallon of gasoline in Wayne County is 4.8¢; second, that the cost of selling gasoline tends to vary inversely with the number of gallons sold in a given period; third, that there seems to be a rather definite lower limit to the cost of selling gasoline per gallon, which limit is in the neighborhood of 3¢ per gallon; fourth, that the average cost of selling gasoline by the stations which are most efficient in that they fall within the lowest 25% in unit cost is 3.5¢; fifth, that factors other than gallonage sold, such as location within the county, status of ownership, and proportion of gasoline business to total business done, have no appreciable or determinable effects on the unit cost of selling gasoline.

720 COMMISSION'S EXHIBIT NO. 80.

Sales Department

Standard Oil Company

Equipment Loan Agreement

This Agreement made at .... this .... day of ...., A. D. 19...., between the Standard Oil Company, a corporation of the State of Indiana, hereinafter referred to as the Company and .... of ...., hereinafter referred to as the Dealer.

Whereas, the Dealer is now purchasing Petroleum products from the Company and has requested the Company to loan to him in equipment for the storage and distribution thereof, and

Whereas, the Company has consented to loan such equipment to the Dealer for use in the Dealer's business upon the terms and conditions hereinafter mentioned.

Now, Therefore, in consideration of the above the Company does hereby agree to loan to the Dealer the following equipment:

Serial No.	Description of Equipment	Capacity

Dealer hereby acknowledges receipt of all of the above described equipment.

It Is Expressly Understood and Agreed That: Said equipment and all the appliances connected therewith, or used in connection with the same, furnished by the Company shall at all times be and remain the property of the Company. In event Dealer should at any time store or distribute petroleum products in or through any of such equipment other than petroleum products of this Company, Dealer agrees to remove from such equipment all insignia, marks, names, brands, advertising and identifying matter owned by or which refers to this Company or its products, and a breach of this clause on the part of the Dealer shall forthwith nullify this agreement and immediately confer upon Company the right to enter upon the premises and remove all of such equipment and do such work and in such manner as shall be necessary to effect such removal.

In event Dealer shall at any time cease to use any of the items of equipment herein mentioned for the handling of petroleum products supplied by company, it is understood that Dealer shall from the date of such discontinuance pay as rental for the use of such item or items of equipment in cash monthly rental payable on the first day of each month in advance as follows:

Serial No.	Description of Equipment	Capacity	Reference	Monthly Rental Rate

In event Dealer elects to retain the equipment and pay rent as aforesaid, failure on the part of the Dealer to pay such rent as above specified shall give to Company the right to immediately terminate this agreement and remove the equipment.

And In Further Consideration of the premises, the Dealer, for himself, his heirs, executors, administrators, successors and assigns hereby agrees to indemnify and save harmless the Company, of and from any and all claims for liability for any and all loss, damage, injury or other casualty to persons or property caused or occasioned by any leakage, fire or explosion of or from said equipment or the appliances connected or used therewith, or through any imperfection in the construction, installation or operation of the same, whether due to negligence of the Company, or otherwise, and further agrees to procure and pay any and all licenses, license fees, taxes, or like charges levied or imposed during the term of this lease on any equipment of the Company, furnished under this agreement, or upon the operation and maintenance thereof.

And Also, the Dealer, for himself, his heirs, executors, administrators, successors, and assigns, does hereby expressly agree to keep the above described equipment in good order and repair.

And Also, for himself, his heirs, executors, administrators, successors and assigns, does expressly waive, relinquish, exonerate, discharge and protect the Company from any and all liability for damages which may be suffered by him or others by reason of leakage, fire, explosion or other casualty occurring through any imperfection in said equipment or the appliances connected therewith or from any other cause whatsoever.

Standard Oil Company

By ....

.... (Seal)

Witnesses

....

....

The undersigned, owner.... of the premises upon which the above equipment is to be or has been installed, hereby consents to the installation thereof and agree.... to be bound by the terms and conditions of the foregoing agreement with reference to the removal of said equipment of the Standard Oil Company.

.... (Seal)
(Name) (Address)

.... (Seal)
(Name) (Address)

721 COMMISSION'S EXHIBIT NO. 81.

Account 1066—Detroit—1937.

The amount of "Miscellaneous Operating Expense" submitted on Exhibit 31-H was equal to $40,142.68. The breakdown of this amount was as follows:

Expense Item	Allocation to Account	
	$	%
Junked Pumps & Tanks	$9,623	24.0%
Dealer Conferences	6,429	16.0
Forms 187—Sample Bottles & Cans—Replacement Pkgs. Gen. Supply Items under 5¢, etc.	3,857	9.6
Charges from Account 9944—Gauging Tanks—Transfer Equip., Cleaning & Re-arranging Equip., Checking Equip. —etc.	3,215	8.0
Charges for 9941—Repairs to Equip., Dealers Signs, Meeting Equip., etc.	2,700	6.7
Non-Capital Expense from appropriations—Re-arranging Loading Facilities at Bulk Stations, etc.	2,186	5.4
General Supplies Used	1,929	4.8
Cleaning Bulk Sta. Driveways, Office, etc..	1,672	4.2
Construction Items allocated to Account 1066 by General Office	1,667	4.2
Club Dues—Chamber of Commerce—Subscriptions, etc.	1,286	3.2
Transferring Employees	964	2.4
Painting Customers Pumps & Equip.	772	1.9
Decals for Motor Equip.	579	1.4
Preparing Sales Meeting Equip.—by Burrowes	386	1.0
Repairs to Customers' Pump & Equip.	354	.9
Freight on Surplus Storage Tanks	322	.8
Postage Mailing Dealer Stencil Letters (Sales Promotion)	289	.7
"B" Agents Meetings	256	.6
Films & Developing	258	.6
Painting Dealers' Bldgs.	244	.6

Expense Item	Allocation to Account $	%
Wiring Customers' Pumps	242	.6
Cleaning Surplus Storage Tanks	168	.4
Prizes—Sales Contests	154	.4
1900 Contract Cards	128	.3
Painting, Comm. Agents Truck Chassis	130	.3
Products Signs	77	.2
Physical Exams.	65	.2
Reseller Salesmen Meetings	64	.2
Tickets—Benefits, Dances, etc.	64	.2
Price Evidence	63	.2
Total	$40,143	100.0%

722 COMMISSION'S EXHIBIT NO. 82-A.

Account 1004—Salary Salesmen

Detroit Field—June 1937.

The payroll of the Standard Oil Company is divided into a number of sections—numbered from 1 through 11. Sections 5 and 6 apply directly to salesmen's salaries while the other lists have to do with accounting, clerical sales promotion, and other salary costs.

Employees spending 100% of their time calling on trade are entered on payroll No. 5 and the proportion of their time used for selling petroleum products is used to determine the proportion of expense charged to general Account 7004. In June, 1937, in the Detroit field this cost amounted to $14,757.90. In addition to these men we have another class of employees, shown on payroll # 6, who spend part of their time calling on the trade in a sales capacity, and the remainder on supervisory activities. These men keep a daily record of the time spent in sales work, and a proportion of their salary represented by time spent on sales is charged to Account 7004. In June, 1937, the amount applicable to this account was $1,221.24.

The total of Account 7004 is then allocated to the following sales channels on a distribution of time basis.

Tank Wagon—Reseller
Tank Wagon—Consumer
Other Method

As we have previously explained each salesman keeps a record of time one month out of every quarter, segregated to sales channel. An average is then obtained for all employees shown on payrolls 5 and 6 and the total amount charged into Account 7004 is allocated to the sales channels listed above, on Form 189 on a weighted average basis.

This selling expense, for June, 1937, chargeable to the tank wagon—reseller method, therefore, was 20.5% of $15,979.14, or $3,275.72. The ratios referred to together with the names of the salesmen and their salaries are shown on the attached sheet.

723 COMMISSION'S EXHIBIT NO. 82-B.

Detroit, Mich. Field.

Salary Expense—Salaries Salesmen Sub Acct. 7004

For the Month of June, 1937.

1. Salaries of Salesmen Payroll # 5 (List Attached)	$15,551.00	
Expense applicable to Non-Petroleum Merchandise	793.10	
Salaries Salesmen charged directly to Sub 7004—Petroleum Products		$14,757.90
2. Salaries of Agents and Agent-Salesmen Payroll # 6. Charged to Sub 7004 on basis of individual Time Cards Maintained by these Employees (List Attached)		1,221.24
Total Salesmen Salaries for Distribution of Petroleum Products		$15,979.14

Percentages Used in Distributing of Salaries Salesmen for June, 1937, as to Method of Delivery and Products.

Method of Delivery Distribution	
Tank Wagon Reseller	20.5%
Tank Wagon Consumer	21.2
Other Method	58.3
	100.0%

Memorandum.

Distribution of Time by Product Not Reflected on "Comparative Statement of Expense"—Form 189.

Naphtha and Gasoline	29.6%
Refined Oils	13.0
Gas Oil, Distillate, Fuel Oils, Asphalt & Misc. Mdse.	3.7
Motor Oils	24.1
Other Lubricating Oils	21.1
Petrolatums, Wax—Parowax, Candles & Greases	8.5
	100.0%

These ratios apply to the various products sold through all channels but are not applicable to any one channel of sales.

SCHEDULE #4
DETROIT
Field
MARCH 1941
Month

COMMISSION'S EXHIBIT NO. 83

STANDARD OIL COMPANY
SALES DEPARTMENT
DISTRIBUTION OF TIME—SALESMEN
METHOD—CLASS OF PRODUCT

Class of Salesmen	T.W. Res.	T.W. Cons.	O.M.	Auto Supp.	Total	Ref. Oils & Tr. Fuels	Naph. & Gaso.	Mtr. Oils	Lubr. Oils	Grses.	Waxes & Petro.	G.O., Dist., F.O. & Asph. Prod.	Misc. Mdse.	Auto Supp.	Total
Industrial Salesmen		137	958	5	1100	35	102	122	654	72	67	43		5	1100
Lubricating Engineer		42	258		300	14	28	46	138	33	17	24			300
Automotive Engineer	5	54	40	1	100	25	34	30		10				1	100
City Salesmen	126	162	301	11	600	62	226	111	90	61	39			11	600
Reseller Salesmen	1063		1249	288	2600	26	1037	1065	63	121				288	2600
"B" Sta. Salesmen		175	511	14	700	84	91	280	105	119	7			14	700
Asphalt Prod. Salesmen			100		100							100			100
Spec. Salesmen—Reseller	233		133	34	400	3	230	108	8	17				34	400
Spec. Salesmen—Heating Oil		100			100	100									100
Domestic Heating Oil Salesmen		400			400	400									400
Total	1427	1070	3550	353	6400	749	1748	1762	1058	433	130	167		353	6400
Percentage	22.3	16.7	55.5	5.5	100%	11.7	27.3	27.6	16.5	6.8	2.0	2.6		5.5	100%
Distribution of Percentage	23.6	17.7	58.7		100	12.4	28.9	29.1	17.5	7.2	2.1	2.8			100

725 COMMISSION'S EXHIBIT NO. 84-A.

Account 1075—Advertising—Year 1937.

Analysis of Advertising Expenditures by Media Chargeable to the Reseller Channel Detroit Field—1937.

Newspaper Advertising	$ 76,120.34
Printed Matter & Direct Mail	18,937.87
Motion Pictures	12,371.72
Outdoor Posters	11,256.99
Dealer Trade Papers & Magazines	6,468.92
Signs at Dealer Outlets	2,920.89
Misc. Items too small to show by separate classifications	26,558.31
Total Account 1075 as submitted on Exhibit 31-O	$154,635.04

Explanatory Notes.

Product Distribution

In our accounting set-up no allocation of advertising cost to products is made. Any distribution that we might have occasion to make to a certain product would be solely for the purpose of determining the profitability of that one product regardless of the channel in which it might be sold. In our books of account our allocation of advertising expenditures is directed to an allocation by channels rather than by products within channels. Inasmuch as gasoline represents the greater proportion of the volume moving through the reseller channel, advertising charges so allocated primarily reflect the advertising charge assignable to gasoline.

Sub A. Newspaper Advertising

In 1937 each field was charged with the newspaper advertising cost originating in that field. For example, the attached advertisement was run in the newspapers in the Detroit field, July, 1937, incurring a cost of $1,920.00.

726 Because of the unfairness to some fields in allocating newspaper advertising costs on the basis existing in

1937, such allocations were made on a circulation basis commencing with January 1, 1938. This was particularly true of fields, such as Chicago, Kansas City, St. Louis, having a large metropolitan newspaper circulation going into adjacent field territories. Because the incoming circulation in the Detroit field was offset by the circulation going out of the field, there was less than 3% difference resulting from the different methods of allocation in the Detroit area.

Advertising expenditures are allocated to sales channels, Form 189, according to the ratio of gallons sold through each channel to the total gallons sold. For example, in July, 1937, reseller tank wagon gallons represent 78.8% of the total gallonage. Therefore, this per cent of $1,920 gives a cost item of $1,512.96 applicable to the reseller channel on Form 189 for the Detroit field in 1937.

Sub B. Billboard Advertising

Sub C. Dealer Sign Expense

As stated above, distribution to the sales channel is made on the basis of gallonage sold through that channel and, therefore, expenses incurred in advertising through these media are spread to channel on this basis.

Sub D. Radio Advertising

No expense incurred.

Sub E. Transportation Expense

Charged to Account 1075—Year 1937 .... $752.63

Any transportation expense incurred in the shipment
of advertising material, such as signs, printed matter,
727 etc., is charged to that media. Therefore, transportation
expense as an individual item does not appear separately on our books of account. However, an analysis of our advertising expenditures indicates that of the total charged to Account 1075, year 1937, in Detroit $752.63 was represented by transportation expense.

Sub F. Other Major Items

Other items of advertising expenditure are spread on a gallonage ratio basis to sales channels shown on Form 189, as outlined for newspapers. Major items making up Account 1075 are indicated in the table at the top of page 1.

-99682 2-38

Form 645 W

238-ELG[illegible] JOLIET AND EASTERN RAILWAY COM[illegible]ANY-238

PREPAID FREIGHT BILL—ORIGINAL

Comm. Ex. 5-A

41

CAR INITIALS AND NUMBER UTLX 16290	DATE 4/3/39	FREIGHT BILL No. IR. 210
TO DET[illegible]OIT MICHIGAN	FROM WHITING, INDIANA, 69	84
	SHIPPER STANDARD OIL COMPANY	
ROUTE HARTSDALE MC	APR 5 1939	
CONSIGNEE AND ADDRESS ~~STANDARD OIL COMPANY~~ STYREMAN OIL CO WATERMAN & DESMOND STS	TO THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, DR. For Charges on Articles Waybilled	
INSTRUCTIONS (Regarding Icing, Ventilation, Milling, Weighing, Etc. If Iced, Specify to Whom Icing Should be Charged.) GFG		

PAID CRFCA 4-6-39 4-039

FEDERAL TRADE COMMISSION

Docket No. 4389 ~~COMMISSION'S~~ RESPONDENTS Exhibit No. 5-A

IN THE MATTER OF Standard Oil

DATE 3/10/41 WITNESS Ranpagh

REPORTER French

INDICATE BY SYMBOL IN COLUMN PROVIDED ★ how weights were obtained for L.C.L. Shipments only. R—Railroad Warehouse Scale. S—Shipper's Agreement or Tested Weights. E—Estimated—Weigh and Correct.

DESCRIPTION OF ARTICLES AND MARKS	Commodity No.	★	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
6500 GALS. GASOLINE NOIBN.			42900	27	115 83		115 83
GALS. PET. REFINED OIL					FULLY PREPAID		
GALS. PET. FUEL OIL, DIST. NSFIP.					42 ASA 101658		
GALS. PET. LUBRICATING OIL							
GALS.							
GALS. LOADED IN DOME							
TEMP. GRAVITY							
6/6 LBS. PER GALLON							

5 1939

WHITING

EXHIBIT 7-B

TOTAL

Interview with B. Jones

File 25-2-2551 Date DEC 5 1939

RECEIVED PAYMENT ________ 19__

[illegible]ALD MACDONAL[illegible] Attorney

~~Federal Trade~~ Commission. Pusche

DRAW CHECKS TO THE ORDER OF THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

B 131-A-4 "55M Sets" 30T 4-38

Uniform Domestic Straight Bill of Lading adopted by carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930.

5-B

UNIFORM STRAIGHT BILL OF LADING

Shipper's No. ____________

ORIGINAL—NOT NEGOTIABLE

Agent's No. ____________

ELGIN, JOLIET & EASTERN RAILWAY COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Original Bill of Lading,

at WHITING, IND., 4/3/39 ap 193

FROM

STANDARD OIL COMPANY

(INDIANA)

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

______________ Signature of Consignor

If charges are to be prepaid, write or stamp here, "To be Prepaid." to be prepaid

Received $ ______ to apply in prepayment of the charges on the property described hereon.

______________ Agent or Cashier

Per ______________
(The signature here acknowledges only the amount prepaid)

Charges Advanced:
$ ______

(Mail or street address of consignee—for purposes of notification only.)

Consigned to STRIKEMAN OIL CO - WATERMAN & DESMOND STS
Destination DETROIT State of MICH County of ______
Route MC
Delivering carrier ______ Car Initial U. T. L. X. Car No. 16290
Car Cardboarded "Leased to STANDARD OIL COMPANY (Indiana)."

No. Tank Cars	Description of Articles, Special Marks, and Exceptions	*Weight (Subject to Correction)	Class or Rate	✓
1	Gasoline, N. O. I. B. N. (Inflammable Placards Applied)			
	Naphtha (Inflammable Placards Applied)			
	Naphtha, (Oleum Spirits)			
	Naphtha			
	Pet. Refined Oil			
	Pet. Lubricating Oil ______ Gals. loaded in dome			
	Pet. Oil, N. O. I. B. N. ______ Gals. loaded in dome			
	Pet. Cordage Oil ______ Gals. loaded in dome			
	Pet. Fuel Oil, distillate, not suitable for illuminating purposes			
	Pet. Fuel Oil, residual ______ Gals. loaded in dome			
	Pet. Asphaltum, Liquid			

No. Tank Cars	Description of Articles, Special Marks, and Exceptions	*Weight (Subject to Correction)	Class or Rate	✓
	Pet. Asphaltum, Liquid ______ Gals. loaded in shell ______ Gals. loaded in dome ______ Gravity ______ °. Temp. Fahrenheit			
	Pet. Asphaltum Loaded in a heated condition over 150° Temp. Fahrenheit and loaded dome full Gross Tare Net			
	Pet. Asphaltum, Liquid ______ Gals. loaded in shell Gross ______ Gals. loaded in dome Tare ______ Gravity Net ______ °. Temp. Fahrenheit			
	Pet. Road Oil ______ Gals. loaded in shell ______ Gals. loaded in dome ______ °. Temp. Fahrenheit			

FEDERAL TRADE COMMISSION
Docket No. 4389 COMMISSION'S / RESPONDENT'S Exhibit No. 5-B
IN THE MATTER OF Standard Oil
DATE 3/10/41 WITNESS R. [illegible]
REPORTER [illegible]

EXHIBIT 7-C
Interview with B. Jones
File 28-1-1667 Date DEC 5 1939
[illegible]LD MACDONALD Attorney
Federal Trade Commission

Weights are shown on this bill of lading by the shipper for the convenience of the carrier and can be verified at any time by an examination of the records on file in the shipper's office.

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."
Note—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ______ PER ______

FEDERAL TRADE COMMISSION
Docket No. ______ COMMISSION'S / RESPONDENT'S Exhibit No. ______
IN THE MATTER OF ______
DATE ______ WITNESS ______
REPORTER ______

1

This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.

STANDARD OIL COMPANY, Shipper,
(INDIANA)
Per ______________

______________ Agent
Per ______________

Permanent post-office address of shipper—Standard Oil Company (Indiana), 910 S. Michigan Ave., Chicago, Ill.

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

605

A-93682 2-38

238-ELG[illegible], JOLIET AND EASTERN RAILWAY COM[illegible]ANY-238

Form 645 W

PREPAID FREIGHT BILL—ORIGINAL

5-C

58

CAR INITIALS AND NUMBER UTL 43106	DATE 4/13/39	FREIGHT BILL No. IF 1317
T[illegible] DETROIT MICHIGAN	FROM WHITING, INDIANA, 69	84

SHIPPER

STANDARD OIL COMPANY

FEDERAL TRADE COMMISSION
Docket No. 4389 COMMISSION'S / RESPONDENT'S Exhibit No. 5-C
IN THE MATTER OF Standard Oil
DATE 3/10/41 WITNESS Rampagh
REPORTER Finland

ROUTE

CROCKER WABASH

TO THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, DR.
For Charges on Articles Waybilled.

CONSIGNEE AND ADDRESS XXXXXXXXXXXXXXXXXXXXXXXXXXXX STANDARD OIL COMPANY

CITRIN & KOLB _ 14445 LINWOOD AVE

R F CA

+4-13-39

INSTRUCTIONS (Regarding Icing, Ventilation, Milling, Weighing, Etc. If Iced, Specify to Whom Icing Should be Charged.)

+4-13-39

FEDERAL TRADE COMMISSION
Docket No. .... COMMISSION'S / RESPONDENT'S Exhibit No. ....
IN THE MATTER OF ....
DATE .... WITNESS ....
REPORTER

INDICATE BY SYMBOL IN COLUMN PROVIDED ★ how weights were obtained for L.C.L. Shipments only. R—Railroad Warehouse Scale. S—Shipper's Agreement or Tested Weights. E—Estimated—Weigh and Correct.

DESCRIPTION OF ARTICLES AND MARKS	Commodity No.	★	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
12293 GALS. GASOLINE NOIBN.			81134	27	219 06		219 06
GALS. PET. REFINED OIL							
GALS. PET. FUEL OIL DIST. NSFIP						FULLY PPD	
GALS. PET. LUBRICATING OIL							
GALS.							
GALS. LOADED IN DOME							
TEMP. GRAVITY							
6.6 LBS. PER GALLON							

RECEIVED
1939
PAID
WHITING

EXHIBIT 7-D
Interview with B. Jones
File 28-2-2877 Date DEC 5 1939
DONALD MACDONALD Attorney
Federal Trade Commission. Mack

TOTAL

RECEIVED PAYMENT 19

.... Agent

DRAW CHECKS TO THE ORDER OF THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

6063

B 131-A-4 55M Sets 30T 4-38

Uniform Domestic S[illegible]ght Bill of Lading adopted by carriers in Official, Southern, [illegible]ern and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930.

5-D

UNIFORM STRAIGHT BILL OF LADING
ORIGINAL—NOT NEGOTIABLE

Shipper's No.

Agent's No.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Original Bill of Lading,

at WHITING, IND., 4/10/39 ap 193

FROM
STANDARD OIL COMPANY
(INDIANA)

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—for purposes of notification only.)

Consigned to CITRIN & KOLB - 14445 LINWOOD AVE.

Destination DETROIT State of MICHIGAN County of

Route WABASH

Delivering carrier Car Initial U. T. L. X. Car No. 48166

Car Cardboarded "Leased to STANDARD OIL COMPANY (Indiana)."

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Signature of Consignor

If charges are to be prepaid, write or stamp here, "To be Prepaid."

to be prepaid

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per

(The signature here acknowledges only the amount prepaid)

Charges Advanced:

$

No. Tank Cars	Description of Articles, Special Marks, and Exceptions	*Weight (Subject to Correction)	Class or Rate	√
1	Gasoline, N. O. I. B. N. (Inflammable Placards Applied)			
	Naphtha (Inflammable Placards Applied)			
	Naphtha, (Oleum Spirits)			
	Naphtha			
	Pet. Refined Oil			
	Pet. Lubricating Oil _____ Gals. loaded in dome			
	Pet. Oil, N. O. I. B. N. _____ Gals. loaded in dome			
	Pet. Cordage Oil _____ Gals. loaded in dome			
	Pet. Fuel Oil, distillate, not suitable for illuminating purposes			
	Pet. Fuel Oil, residual _____ Gals. loaded in dome			
	Pet. Asphaltum, Liquid			

No. Tank Cars	Description of Articles, Special Marks, and Exceptions	*Weight (Subject to Correction)	Class or Rate	√
	Pet. Asphaltum, Liquid _____ Gals. loaded in shell _____ Gals. loaded in dome _____ Gravity _____ °. Temp. Fahrenheit			
	Pet. Asphaltum Loaded in a heated condition over 150° Temp. Fahrenheit and loaded dome full Gross Tare Net			
	Pet. Asphaltum, Liquid _____ Gals. loaded in shell Gross _____ Gals. loaded in dome Tare _____ Gravity Net _____ °. Temp. Fahrenheit			
	Pet. Road Oil _____ Gals. loaded in shell _____ Gals. loaded in dome _____ °. Temp. Fahrenheit			

COPY

FEDERAL TRADE COMMISSION
Docket No. COMMISSION'S RESPONDENT'S Exhibit No.
IN THE MATTER OF
DATE WITNESS
REPORTER

EXHIBIT 7-E
Interview with B. Jones
File AT-2-2889 Date DEC 5 1939
DONALD MACDONALD Attorney
Federal Trade Commission

Weights are shown on this bill of lading by the shipper for the convenience of the carrier and can be verified at any time by an examination of the records on file in the shipper's office.

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight." Note—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding PER

1

This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.

STANDARD OIL COMPANY, Shipper.
(INDIANA)

Per

FEDERAL TRADE COMMISSION
Docket No. 4389 COMMISSION'S RESPONDENT'S Exhibit No. 5-D
IN THE MATTER OF Standard Oil
DATE 3/10/41 WITNESS Raupagh
REPORTER

Agent

Per

Permanent post-office address of shipper—Standard Oil Company (Indiana), 910 S. Michigan Ave., Chicago, Ill.

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

A-93652 2-38 Form 645 W

238-ELGIN JOLIET AND EASTERN RAILWAY COMPANY-238

PREPAID FREIGHT BILL—ORIGINAL

5-E

51

CAR INITIALS AND NUMBER UTLX 43010	DATE 4/4/39	FREIGHT BILL No. 1F 404
TO DETROIT MICH	FROM WHITING, INDIANA, 69	84
	SHIPPER STANDARD OIL COMPANY (INDIANA) STANDARD OIL COMPANY	
ROUTE CROCKER WABASH	PAID APR 6 1939 DISBURSING DIVISION CHICAGO	
CONSIGNEE AND ADDRESS [redacted]ANY [illegible] & [illegible] 14445 LINWOOD AVENUE	TO THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, DR. For Charges on Articles Waybilled	

FEDERAL TRADE COMMISSION
Docket No.____ COMMISSION'S / RESPONDENT'S Exhibit No.____
IN THE MATTER OF____
DATE____ WITNESS____
REPORTER____

INSTRUCTIONS (Regarding Icing, Ventilation, Milling, Weighing, Etc. If Iced, Specify to Whom Icing Should be Charged.)
[illegible]

INDICATE BY SYMBOL IN COLUMN PROVIDED ★ how weights were obtained for L.C.L. Shipments only. R—Railroad Warehouse Scale. S—Shipper's Agreement or Tested Weights. E—Estimated—Weigh and Correct.

DESCRIPTION OF ARTICLES AND MARKS	Commodity No.	★	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
12271 GALS. GASOLINE NOIBN.			80989	27	218 67		218 67
____ GALS. PET. REFINED OIL					FULLY PREPAID		
____ GALS. PET. FUEL OIL, DIST. NSFIP.							
____ GALS. PET. LUBRICATING OIL							
____ GALS.							
____ GALS. ____ IN DOME							
TEMP.____ GRAVITY____							
6/3 LBS. PER GALLON							

RECEIVED APR 6 1939 PREPAID WHITING

FEDERAL TRADE COMMISSION
Docket No. 4389 COMMISSION'S Exhibit No. 5-E
IN THE MATTER OF Standard Oil
DATE 3/10/41 WITNESS Raupagh
REPORTER F[illegible]

EXHIBIT 7F

Interview with B. Jones TOTAL
File 28-1-2889 Date DEC 5 1939
DONALD MACDONALD Attorney
Federal Trade Commission. Wendl

RECEIVED PAYMENT ____ 19____
____ Agent

DRAW CHECKS TO THE ORDER OF THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

608

B 131-A-4. 55M Sets. 30T 4-38

Uniform Domestic Straight Bill of Lading adopted by carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, [illegible]0.

UNIFORM STRAIGHT BILL OF LADING

ORIGINAL—NOT NEGOTIABLE

Shipper's No. 5-F

Agent's No. ______

ELGIN, JOLIET & EASTERN RAILWAY COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Original Bill of Lading,

at WHITING, IND., 4/4/39 ap 193

FROM

STANDARD OIL COMPANY

(INDIANA)

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

______ Signature of Consignor

If charges are to be prepaid, write or stamp here, "To be Prepaid."

to be prepaid

Received $ ______ to apply in prepayment of the charges on the property described hereon.

______ Agent or Cashier

Per ______ (The signature here acknowledges only the amount prepaid)

Charges Advanced:

$

(Mail or street address of consignee—for purposes of notification only.)

Consigned to CITRIN & KOLB - 14445 LINWOOD AVE.

Destination DETROIT State of MICHIGAN County of ______

Route WAB

Delivering carrier ______ Car Initial U. T. L. X. Car No. 48010

Car Cardboarded "Leased to STANDARD OIL COMPANY (Indiana)."

No. Tank Cars	Description of Articles, Special Marks, and Exceptions	*Weight (Subject to Correction)	Class or Rate	√	No. Tank Cars	Description of Articles, Special Marks, and Exceptions	*Weight (Subject to Correction)	Class or Rate	√
1	Gasoline, N. O. I. B. N. (Inflammable Placards Applied)					Pet. Asphaltum, Liquid ______ Gals. loaded in shell ______ Gals. loaded in dome ______ Gravity ______ °. Temp. Fahrenheit			
	Naphtha (Inflammable Placards Applied)								
	Naphtha, (Oleum Spirits)					Pet. Asphaltum Loaded in a heated condition over 150° Temp. Fahrenheit and loaded dome full Gross Tare Net			
	Naphtha								
	Pet. Refined Oil								
	Pet. Lubricating Oil ______ Gals. loaded in dome					Pet. Asphaltum, Liquid ______ Gals. loaded in shell Gross ______ Gals. loaded in dome Tare ______ Gravity Net ______ °. Temp. Fahrenheit			
	Pet. Oil, N. O. I. B. N. ______ Gals. loaded in dome								
	Pet. Cordage Oil ______ Gals. loaded in dome					Pet. Road Oil ______ Gals. loaded in shell ______ Gals. loaded in dome ______ °. Temp. Fahrenheit			
	Pet. Fuel Oil, distillate, not suitable for illuminating purposes								
	Pet. Fuel Oil, residual ______ Gals. loaded in dome								
	Pet. Asphaltum, Liquid								

COPY

FEDERAL TRADE COMMISSION
Docket No. ______ COMMISSION'S / RESPONDENT'S Exhibit No. ______
IN THE MATTER OF ______
DATE ______ WITNESS ______
REPORTER ______

EXHIBIT 7-G
Interview with B. Jones
File 28-2-2884 Date DEC. 5 1939
DONALD MACDONALD
Attorney
Federal Trade Commission.

Weights are shown on this bill of lading by the shipper for the convenience of the carrier and can be verified at any time by an examination of the records on file in the shipper's office.

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight." Note—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ______ PER ______

FEDERAL TRADE COMMISSION
Docket No. 4389 COMMISSION'S / RESPONDENT'S Exhibit No. 5-F
IN THE MATTER OF Standard Oil
DATE 3/10/41 WITNESS ______
REPORTER ______

1

This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.

STANDARD OIL COMPANY, Shipper,
(INDIANA)
Per ______

Agent
Per ______

Permanent post-office address of shipper—Standard Oil Company (Indiana), 910 S. Michigan Ave., Chicago, Ill.

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

[illegible] 2-30

238-ELGIN, JOLIET AND EASTERN RAILWAY COMPANY-238

PREPAID FREIGHT BILL—ORIGINAL

Form 645 W

5-G

CAR INITIALS AND NUMBER UTLX 14931	**DATE** 4/3/39	**FREIGHT BILL No.** IF 2[illegible]2
TO [illegible]ETROIT MICH	**FROM** WHITING, INDIANA, 69	84
	SHIPPER STANDARD OIL COMPANY	
ROUTE HARTSDALE MG		
CONSIGNEE AND ADDRESS [redacted] STIKEMAN OIL CO WATERMAN & DESMOND	TO THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, DR. For Charges on Articles Waybilled	
INSTRUCTIONS (Regarding Icing, Ventilation, Milling, Weighing, Etc. If Iced, Specify to Whom Icing Should be Charged.) NL		

STANDARD OIL COMPANY (INDIANA)
PAID
APR 5 1939
DISBURSING DIVISION
CHICAGO

FEDERAL TRADE COMMISSION
Docket No. .... COMMISSION'S / RESPONDENT'S Exhibit No. ....
IN THE MATTER OF ....
DATE .... WITNESS ....
REPORTER ....

*INDICATE BY SYMBOL IN COLUMN PROVIDED ★ how weights were obtained for L.C.L. Shipments only. R—Railroad Warehouse Scale. S—Shipper's Agreement or Tested Weights. E—Estimated—Weigh and Correct.

DESCRIPTION OF ARTICLES AND MARKS	Commodity No.	★	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
6488 GALS. GASOLINE NOIBN.			42821	27	115 62		115 62
______ GALS. PET. REFINED OIL					FULLY PPD		
______ GALS. PET. FUEL OIL, DIST. NSFIP.							
______ GALS. PET. LUBRICATING OIL							
______ GALS. ______							
______ GALS. LOADED IN DOME							
______ TEMP. ______ GRAVITY ______							
______ LBS. PER GALLON							
						TOTAL	

RECEIVED
APR 5 1939
PREPAID
WHITING
6/6

FEDERAL TRADE COMMISSION
Docket No. 4389 COMMISSION'S / RESPONDENT'S Exhibit No. 5-G
IN THE MATTER OF Standard Oil
DATE 3/10/41 WITNESS Raupagh
REPORTER F [illegible]

EXHIBIT 7-H.
Interview with B. Jones
File 28-2-2889 Date DEC 5 1939
DONALD MACDONALD Attorney
Federal Trade Commission.
Mcdl

RECEIVED PAYMENT ______ 19__

______ Agent

DRAW CHECKS TO THE ORDER OF THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

B 131-A-4 55M Sets 30T 4-38

Uniform Domestic Straight Bill of Lading adopted by carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930.

UNIFORM STRAIGHT BILL OF LADING

Shipper's No. 5-H

ORIGINAL—NOT NEGOTIABLE

Agent's No.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Original Bill of Lading,

at WHITING, IND., 4/3/39 ap 193

FROM

STANDARD OIL COMPANY

(INDIANA)

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Signature of Consignor

If charges are to be prepaid, write or stamp here, "To be Prepaid."

to be prepaid

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per

(The signature here acknowledges only the amount prepaid)

Charges Advanced:

$

(Mail or street address of consignee—for purposes of notification only.)

Consigned to STRIKEMAN OIL CO - WATERMAN & DESMOND

Destination DETROIT State of MICH County of

Route MC

Delivering carrier Car Initial U. T. L. X. Car No. 14931

Car Cardboarded "Leased to STANDARD OIL COMPANY (Indiana)."

No. Tank Cars	Description of Articles, Special Marks, and Exceptions	*Weight (Subject to Correction)	Class or Rate	√
1	Gasoline, N. O. I. B. N. (Inflammable Placards Applied)			
	Naphtha (Inflammable Placards Applied)			
	Naphtha, (Oleum Spirits)			
	Naphtha			
	Pet. Refined Oil			
	Pet. Lubricating Oil ________ Gals. loaded in dome			
	Pet. Oil, N. O. I. B. N. ________ Gals. loaded in dome			
	Pet. Cordage Oil ________ Gals. loaded in dome			
	Pet. Fuel Oil, distillate, not suitable for illuminating purposes			
	Pet. Fuel Oil, residual ________ Gals. loaded in dome			
	Pet. Asphaltum, Liquid			

No. Tank Cars	Description of Articles, Special Marks, and Exceptions	*Weight (Subject to Correction)	Class or Rate	√
	Pet. Asphaltum, Liquid ________ Gals. loaded in shell ________ Gals. loaded in dome ________ Gravity ________ °. Temp. Fahrenheit			
	Pet. Asphaltum Loaded in a heated condition over 150° Temp. Fahrenheit and loaded dome full Gross Tare Net			
	Pet. Asphaltum, Liquid ________ Gals. loaded in shell Gross ________ Gals. loaded in dome Tare ________ Gravity Net ________ °. Temp. Fahrenheit			
	Pet. Road Oil ________ Gals. loaded in shell ________ Gals. loaded in dome ________ °. Temp. Fahrenheit			

COPY

FEDERAL TRADE COMMISSION
Docket No. .... COMMISSION'S RESPONDENT'S Exhibit No.
IN THE MATTER OF
DATE .... WITNESS
REPORTER

EXHIBIT 7-L
Interview with B. Jones
File 28-2-2889 Date DEC 5 1939
DONALD MACDONALD
Attorney
Federal Trade Commission

Weights are shown on this bill of lading by the shipper for the convenience of the [illegible] same by an examination of the records on file in the shipper's office.

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

Note—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding.

PER

FEDERAL TRADE COMMISSION
Docket No. 4389 COMMISSION'S RESPONDENT'S Exhibit No. 5-H
IN THE MATTER OF Standard Oil
DATE 3/10/41 WITNESS Raupagh
REPORTER

1

This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.

STANDARD OIL COMPANY, Shipper,
(INDIANA)
Per

Agent
Per

Permanent post-office address of shipper—Standard Oil Company (Indiana), 910 S. Michigan Ave., Chicago, Ill.

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

A-93682 "2-38

238-ELGIN, JOLIET AND EASTERN RAILWAY COMPANY-238

Form 645 W

PREPAID FREIGHT BILL—ORIGINAL

5-J

CAR INITIALS AND NUMBER UTLX 91792	DATE 4/3/39 — FREIGHT BILL No. IF 281
TO DETROIT MICH	FROM WHITING, INDIANA, 69
	SHIPPER STANDARD OIL COMPANY
ROUTE HARTSDALE MC C/O DT AT [illegible]	APR 5 1939 DISBURSING DIVISION CHICAGO
CONSIGNEE AND ADDRESS [redacted] NY NEDS AUTO SUPPLY CO - MICHIGAN TERMINAL WHSE BRANDT & WYOMING	TO THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, DR. For Charges on Articles Waybilled
INSTRUCTIONS (Regarding Icing, Ventilation, Milling, Weighing, Etc. If Iced, Specify to Whom Icing Should be Charged:) N.	INDICATE BY SYMBOL IN COLUMN PROVIDED ★ how weights were obtained for L.C.L. Shipments only. R—Railroad Warehouse Scale. S—Shipper's Agreement or Tested Weights. E—Estimated —Weigh and Correct.

84

FEDERAL TRADE COMMISSION
Docket No.______ COMMISSION'S / RESPONDENT'S Exhibit No.______
IN THE MATTER OF______
DATE______ WITNESS______
REPORTER______

DESCRIPTION OF ARTICLES AND MARKS	Commodity No.	★	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
10169 GALS. GASOLINE NOIBN.			67115	27	181 21		181 21
______ GALS. PET. REFINED OIL					FULLY PPD		
______ GALS. PET. FUEL OIL, DIST. NSFIP.							
______ GALS. PET. LUBRICATING OIL							
______ GALS.							
______ GALS. LOADED IN DOME							
______ TEMP. ______ GRAVITY							
6/6 LBS. PER GALLON							

RECEIVED
APR 5 1939
PREPAID
WHITING

EXHIBIT 7-J
Interview with B. Jones
File 25-2-2889 Date DEC 5 1939
DONALD MACDONALD
Attorney
Federal Trade Commission.

FEDERAL TRADE COMMISSION
Docket No. 4389 COMMISSION'S / RESPONDENT'S Exhibit No. 5-J
IN THE MATTER OF Standard Oil
DATE 3/10/41 WITNESS Rampagh
REPORTER

RECEIVED PAYMENT ______ 19__

DRAW CHECKS TO THE ORDER OF THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

612 9

3 131-A-4 55M Sets 30T 4-38

Uniform Domestic Straight Bill of Lading adopted by carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930.

UNIFORM STRAIGHT BILL OF LADING

ORIGINAL—NOT NEGOTIABLE

Shipper's No. 5-J

Agent's No.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Original Bill of Lading,

at WHITING, IND., 4/3/39 ap 193

FROM

STANDARD OIL COMPANY

(INDIANA)

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Signature of Consignor

If charges are to be prepaid, write or stamp here, "To be Prepaid."

to be prepaid

Received $
to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per
(The signature here acknowledges only the amount prepaid)

Charges Advanced:

$

(Mail or street address of consignee—for purposes of notification only.)

Consigned to NED'S AUTO SUPPLY CO - MICHIGAN TERMINAL WAREHOUSE

Destination DETROIT, MICH State of BRANDT & WYOMING County of

Route MC % DT @ DESTN

Delivering carrier Car Initial U. T. L. X. Car No. 31752

Car Cardboarded "Leased to STANDARD OIL COMPANY (Indiana)."

No. Tank Cars	Description of Articles, Special Marks, and Exceptions	*Weight (Subject to Correction)	Class or Rate	√	No. Tank Cars	Description of Articles, Special Marks, and Exceptions	*Weight (Subject to Correction)	Class or Rate	√
1	Gasoline, N. O. I. B. N. (Inflammable Placards Applied)					Pet. Asphaltum, Liquid ____ Gals. loaded in shell ____ Gals. loaded in dome ____ Gravity ____ °. Temp. Fahrenheit			
	Naphtha (Inflammable Placards Applied)								
	Naphtha, (Oleum Spirits)					Pet. Asphaltum Loaded in a heated condition over 150° Temp. Fahrenheit and loaded dome full Gross Tare Net			
	Naphtha								
	Pet. Refined Oil					Pet. Asphaltum, Liquid ____ Gals. loaded in shell Gross ____ Gals. loaded in dome Tare ____ Gravity Net ____ °. Temp. Fahrenheit			
	Pet. Lubricating Oil ____ Gals. loaded in dome								
	Pet. Oil, N. O. I. B. N. ____ Gals. loaded in dome					Pet. Road Oil ____ Gals. loaded in shell ____ Gals. loaded in dome ____ °. Temp. Fahrenheit			
	Pet. Cordage Oil ____ Gals. loaded in dome								
	Pet. Fuel Oil, distillate, not suitable for illuminating purposes								
	Pet. Fuel Oil, residual ____ Gals. loaded in dome								
	Pet. Asphaltum, Liquid								

COPY

FEDERAL TRADE COMMISSION
Docket No. COMMISSION'S / RESPONDENT'S Exhibit No.
IN THE MATTER OF
DATE WITNESS
REPORTER

EXHIBIT 7-A
Interview with B. Jones
File 28-2-2889 Date DEC 5 1939
DONALD MACDONALD Attorney
Federal Trade Commission Mack

Weights are shown on this bill of lading by the shipper for the convenience of the carrier and can be verified at any time by an examination of the records on file in the shipper's office.

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight." Note—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding PER

This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.

1

STANDARD OIL COMPANY, Shipper,
(INDIANA)
Per

FEDERAL TRADE COMMISSION
Docket No. 4389 COMMISSION'S / RESPONDENT'S Exhibit No. 5-J
IN THE MATTER OF Standard Oil
DATE 3/10/41 WITNESS Rampagh
REPORTER Timen

Agent

Per

Permanent post-office address of shipper—Standard Oil Company (Indiana), 910 S. Michigan Ave., Chicago, Ill.

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

613

COMMISSION'S EXHIBIT NO. 119.

STANDARD OIL COMPANY
SALES DEPARTMENT
COMPARATIVE STATEMENT OF EXPENSE

DETROIT FIELD
YEAR 1940

		Avge. Per Unit		Tank Wagon		Income and Expense Leased Service Stations	Other Method	Total Petroleum Products	Automobile Supplies	Total Petroleum Products and Automobile Supplies	Increase (Black) or Decrease (Red) This Period Over Same Period Last Year	
		Last Year	This Year	Reseller	Consumer							
	Direct Field Expense											
000	Salaries—Supervision	.06	.05	31,533.91	15,888.99		3,937.31	51,360.21		51,360.21	*11,378.36	000
001	Salaries—Supervision—Others	.01	.01	8,634.78	3,792.31		592.54	13,019.63		13,019.63	6,377.41	001
002	Salaries—Sales Promotion	.03	.02	4,768.91	7,136.32		10,817.86	22,723.09	454.72	23,177.81	*10,710.04	002
003	Salaries—Sales Promotion—Others	.02	.02	5,781.76	11,636.46		7,562.46	24,980.68	2,998.75	27,979.43	8,727.22	003
004	Salaries—Salesmen	.19	.20	60,545.87	32,966.62		113,901.98	207,414.47	18,412.24	220,826.71	22,710.43	004
005	Salaries—Advertising	.01	.01	4,778.70	1,884.49		1,113.84	7,777.03	660.59	8,437.62	1,072.05	005
006	Salaries—Drivers	.12	.11	55,481.56	33,677.60		23,334.66	112,493.82	4,984.16	117,477.98	*2,107.19	006
008	Salaries—Warehouse Labor	.06	.05	15,567.80	7,111.05		29,690.65	52,169.50	6,473.15	58,642.65	*5,420.84	008
021	Commissions	.38	.39	110,300.46	252,360.71		46,501.14	409,162.31	282.20	409,444.51	34,856.47	021
024	Exp. of Trans. Standard Fuels Due to Lack Of Stge.	.01	.01	5,386.90	5,822.71			11,209.61		11,209.61	2,541.70	024
025	Truck Rental Expense	.07	.07	37,793.36	37,804.43			75,597.79		75,597.79	3,572.31	025
030	Traveling Expense—Supervision			2,372.73	1,113.09		168.12	3,653.94		3,653.84	*343.00	030
031	Traveling Expense—Sales Promotion			552.62	781.26		1,193.48	2,527.36	49.23	2,576.59	663.09	031
032	Traveling Expense—Salesmen	.03	.03	8,019.89	4,371.88		15,202.90	27,594.67	1,907.12	29,501.79	2,227.27	032
033	Traveling Expense—Advertising			481.29	232.14		34.09	747.52		747.52	110.24	033
045	Oper. And Maint. Of Veh.—Supervision	.01		2,064.52	986.80		147.48	3,198.80		3,198.80	*915.59	045
046	Oper And Maint. Of Veh.—Sales Promotion			137.32	199.13		304.39	640.84	11.47	652.31	*103.20	046
047	Oper. And Maint. Of Veh.—Salesmen	.02	.02	6,066.71	3,300.88		11,546.35	20,913.94	1,167.17	22,081.11	740.87	047
048	Oper. And Maint. Of Veh.—Advertising—Passenger Cars & Trucks			291.65	131.16		20.62	443.43		443.43	*4.04	048
053	Oper. And Maint. Of Veh.—Trucks, Motor & Horse-drawn (Excl. Adv.)	.06	.06	33,995.75	19,219.80		13,135.17	66,350.72	1,808.59	68,159.31	4,527.15	053
054	Oper. And Maint. Of Veh.—All Other (Other Than Office)			222.41	172.13		15.62	410.16		410.16	*87.82	054
055	Vehicle Tank Exp.—Other Than Mounted On Co. Chassis	.01	.01	4,021.19	3,785.82			7,807.01		7,807.01	172.98	055
060	Plant Maintenance	.02	.03	16,894.81	7,893.40		1,440.19	26,228.40	.26	26,228.66	5,632.66	060
060A	Plant Maintenance (Serv. Sta. Owned Properties Complete)	.05	.05			48,864.99		48,864.99	88.64	48,953.63	1,694.05	060A
060B	Plant Maintenance (Serv. Sta. Owned Building on Leased Ground)					1,372.60		1,372.60		1,372.60	*52.42	060B
060C	Plant Maintenance (P.O.S.S.L. Properties Leased Out)	.01	.01			5,448.68		5,448.68		5,448.68	623.15	060C
061	Rental Expense			1,361.77	623.32		95.91	2,081.00		2,081.00	*18.45	061
061B	Rental Expense (Leased Ground Used For Owned Serv. Sta. Bldgs.)	.02	.02			15,738.89		15,738.89		15,738.89	*354.39	061B
061C	Rental Expense (P.O.S.S.L. Properties Leased Out)	.07	.09			91,224.41		91,224.41		91,224.41	21,487.41	061C
062	Water, Light, Fuel (Other Than Main Office)	.02	.02	14,369.31	8,008.11		1,089.15	23,466.57		23,466.57	1,960.70	062
063	Telephone And Telegraph (Other Than Main Office)	.01	.01	6,777.33	3,637.58		481.58	10,896.49	298.04	11,194.53	436.34	063
064	Maint. Expense—Rented Out Property (Other Than Serv. Sta.)										*92.60	064
065	Rent Revenue			*14.70	*6.88		*1.13	*22.71		*22.71	*3.71	065
065A	Rent Revenue (Serv. Sta. Owned Properties Complete)	*.29	*.30			*321,905.45		*321,905.45	*6,735.55	*328,641.00	*36,502.06	065A
065B	Rent Revenue (Serv. Sta. Owned Buildings On Leased Ground)	*.01	*.01			*9,880.18		*9,880.18	*155.95	*10,036.13	1,763.67	065B
065C	Rent Revenue (P.O.S.S.L. Properties Leased Out)	*.07	*.08			*82,155.34		*82,155.34	*12.97	*82,168.31	*16,728.95	065C
066	Miscellaneous Operating Expense	.04	.04	21,281.63	10,861.63		10,554.92	42,698.18	1,396.23	44,094.41	1,057.23	066
066A	Misc. Oper. Exp. (Serv. Sta. Owned Properties Complete)	.02	.04			45,917.77		45,917.77	395.87	46,313.64	23,434.12	066A
066B	Misc. Oper. Exp. (Serv. Sta. Owned Buildings On Leased Ground)					1,016.33		1,016.33	3.73	1,020.06	818.38	066B
066C	Misc. Oper. Exp. (P.O.S.S.L. Properties Leased Out)	.01				3,500.35		3,500.35	26.99	3,527.34	*2,700.82	066C
070	ELA Expense	.03	.02	15,242.41	6,385.90		2,081.54	23,709.85		23,709.85	*5,541.69	070
076	Barrel Expense	.01	.01				13,259.67	13,259.67		13,259.67	6,760.96	076
077	Freight On Empty Steel Barrels And Containers	.01	.01				13,687.95	13,687.95		13,687.95	6,513.70	077
078	Losses On Containers—Lost						898.74	898.74		898.74	857.62	078
079	Losses On Containers—Junked						1,939.37	1,939.37		1,939.37	*84.93	079
080	Drayage Outside											080
081	Demurrage And Railroad Storage			10.97	6.84		2.13	19.94	3.15	23.09	1.84	081
082	Personal Injury Expense—Company Employees			1,603.69	1,007.28		110.52	2,721.49		2,721.49	889.65	082
083	Samples			1.84	.62		866.14	868.60	44.09	912.69	58.69	083
084	Safety Expense—Salaries And All Other Exp.			809.74	372.08		56.71	1,238.53		1,238.53	5.79	084
087	General Supplies Used			1,323.41	618.75		94.32	2,036.48		2,036.48	152.96	087
088	Sta. Oper. Tools & Equip.	.02	.02	10,113.79	6,965.57		1,516.03	18,595.39	127.72	18,723.11	3,082.43	088
088A	Sta. Oper. Tools & Equip. (Serv. Sta. Owned Properties Complete)	.01	.01			9,555.19		9,555.19	4,793.08	14,348.27	*9,189.36	088A
088B	Sta. Oper. Tools & Equip. (Serv. Sta. Owned Bldgs. On Leased Ground)					152.59		152.59	231.71	384.30	*59.88	088B
088C	Sta. Oper. Tools & Equip. (P.O.S.S.L. Properties Leased Out)					1,806.93		1,806.93	*156.31	1,650.62	*655.36	088C
200	Office Expense—Salaries Accounting	.21	.21	84,167.59	39,975.05		93,473.66	217,616.30	19,808.15	237,524.45	10,522.23	200
209	Office Expense—Tabulating Machines											209
201	Office Expense—Stationery And Office Supplies	.01	.01	8,567.45	4,049.93		609.92	13,227.30	329.26	13,556.56	2,269.86	201
202	Office Expense—Postage	.02	.02	12,668.64	5,801.08		902.37	19,372.09		19,372.09	4,824.11	202
203	Office Expense—Telephone And Telegraph	.01	.01	8,140.02	3,719.22		574.58	12,433.82		12,433.82	40.89	203
204	Office Expense—Exchange	.01	.01	5,508.03	2,611.73		389.62	8,509.38		8,509.38	*1,333.23	204
205	Office Expense—Oper. & Maintenance Of Vehicles—Office Automobiles			233.69	105.55		253.71	592.95		592.95	51.15	205
206	Office Expense—All Other—Water, Light, Fuel, Rent, etc.	.03	.02	7,119.00	3,557.20		8,011.81	18,688.01		18,688.01	*10,270.55	206
207	Outside Collection Expense			*12.85	*8.40		*.75	*22.00		*22.00	*22.00	207
208	Credit Information Expense	.01	.01	9,061.06	4,383.86		666.38	14,111.30		14,111.30	342.50	208
215	Expense—Salaries—Others	.01	.01	7,892.33	3,764.87		572.64	12,229.84		12,229.84	*1,396.95	215
216	Expense—Traveling Expense—Others			433.62	217.58		29.72	680.92		680.92	*56.08	216
217	Expense—Oper. & Maintenance Of Vehicles—Automobiles—Others			410.72	195.88		31.43	638.03		638.03	*11.74	217
220	Expense—Empl. Dept.—Salaries & All Other Expense	.01		2,504.10	1,204.52		180.61	3,889.23		3,889.23	*739.75	220
225	Expense—Salaries—Sub-Station Auditors	.01	.01	5,360.38	2,478.04		377.32	8,215.70		8,215.70	*653.04	225
226	Expense—Trav. Exp.—Sub-Station Auditors			753.93	335.84		52.53	1,142.30		1,142.30	207.82	226
227	Expense—Oper. & Maintenance Of Vehicles—Sub. Sta. Aud.			590.39	291.46		42.91	924.76		924.76	*232.14	227
240	Donations			1,423.96	725.99		102.56	2,252.51		2,252.51	*10.24	240
400	Bad Debts Collected—Written Off Prior Years			*713.18	*668.79		*3,750.98	*5,132.95	*348.50	*5,481.45	*2,218.12	400
410	Profit And Loss On Resale Barrels						*107.84	*107.84		*107.84	*71.87	410
431	Budget Plan Income And Expense								*1,058.17	*1,058.17	*887.67	431
500	Losses By Accident—Property And Other Than Co. Emp'l.	.01		1,582.09	625.17		68.79	2,276.05		2,276.05	*9,300.79	500
501	Losses By Property Damage—Co. & Other Than Co. Prop.			1,239.33	504.04		46.81	1,790.18		1,790.18	382.12	501
502	Losses By Fire			193.96	47.41		10.64	252.01		252.01	71.17	502
507	Losses—Miscellaneous			*1,489.26	*1,010.32		*31.36	*2,530.94		*2,530.94	*926.90	507
508	Losses—Uncollected Charges For Stock Losses										*207.18	508
510	Losses By Bad Debts	.01	.01	2,819.77	2,672.81		1,434.16	6,926.74	594.14	7,520.88	*7,448.93	510
511	Expense Collecting Bad Debts—Current Year			62.88	132.89		17.33	213.10	10.00	223.10	*6.87	511
512	Expense Collecting Bad Debts—Prior Years			262.80	210.32		326.19	799.31	36.04	835.35	50.32	512
	Total Direct Field Expense			647,156.54	566,672.87	*189,342.24	431,679.16	1,456,166.33	54,029.04	1,510,195.37	45,402.95	
	Average Per Unit This Year	—	1.37	.93	1.76	*.35	8.77					
	Average Per Unit Last Year	1.42	—	.99	1.81	*.36	9.86					
	All Other Expense											
075	Advertising—Other Costs (Including ELA)	.19	.19	128,240.60	58,874.31		12,528.59	199,643.50	11,730.82	211,374.32	13,452.80	075
100	Depr. Exp.—Vehicles—Supervision			653.14	296.42		45.89	995.45		995.45	*3.02	100
101	Depr. Exp.—Vehicles—Sales Promotion			34.54	54.86		82.67	172.07	3.26	175.33	21.75	101
102	Depr. Exp.—Vehicles—Salesmen	.01	.01	1,643.46	893.96		3,198.48	5,735.90	258.50	5,994.40	698.15	102
103	Depr. Exp.—Vehicles—Advertising			114.35	47.13		7.87	169.35		169.35	49.80	103
106	Depr. Exp.—Vehicles—Trucks, Motor & Horse Drawn (Incl. Veh. Tanks & Excl. Adv. Trucks)	.03	.03	16,258.54	7,381.42		3,475.61	27,115.57		27,115.57	893.66	106
107	Depr. Exp.—Vehicles—All Other (Other Than Office)			255.57	114.31		17.88	387.76		387.76	1.26	107
228	Depr. Exp.—Vehicles—Office—Others & Sub. Sta. Auditors			405.38	185.17		28.28	618.83		618.83	74.74	228
110	Depr. Exp.—Plant (Bldg., Mach., Equip., Furn. & Fixt.)	.10	.09	63,419.69	29,190.95		4,492.22	97,102.86		97,102.86	6.44	110
110A	Depr. Exp.—Plant (Bldg., Mach. & Equip., Furn. & Fixt.) (Service Station Owned Properties Complete)	.09	.08			87,396.51		87,396.51		87,396.51	2,401.01	110A
110B	Depr. Exp.—Plant (Bldg., Mach. & Equip., Furn. & Fixt.) (Service Station Owned Buildings On Leased Ground)					2,210.94		2,210.94		2,210.94	11.77	110B
110C	Depr. Exp.—Plant (Bldg., Mach. & Equip., Furn. & Fixt.) (P. O. S. S. L. Properties Leased Out)					3,615.68		3,615.68		3,615.68	735.67	110C
111	Depr. Exp.—Plant—ELA		.01	3,483.88	1,597.32		245.63	5,326.83		5,326.83	715.64	111
112	Depr. Exp.—Real Estate Improvements	.01	.01	4,208.06	1,935.79		297.96	6,441.81		6,441.81	*5.79	112
112A	Depr. Exp.—Real Estate Improvements (S. S. Owned Props. Comp.)	.04	.04			43,121.63		43,121.63		43,121.63	823.86	112A
115	Depr. Exp.—Equipment Steel Barrels						510.43	510.43		510.43	94.42	115
116	Depr. Exp.—One Gallon Cans											116
086	Taxes—Real Estate & Personal Property	.06	.05	35,793.19	16,393.52		2,535.57	54,722.28		54,722.28	*81.57	086
086A	Taxes (Service Station Owned Properties Complete)	.10	.09			100,178.64		100,178.64		100,178.64	1,864.96	086A
086B	Taxes (Service Station Owned Buildings On Leased Ground)					1,087.56		1,087.56		1,087.56	*56.37	086B
086C	Taxes (P.O.S.S.L. Properties Leased Out)					237.72		237.72		237.72	108.67	086C
243	Taxes—Federal Insurance Contributions	.01	.01	4,237.76	4,434.13		3,572.71	12,244.60		12,244.60	317.44	243
244	Taxes—Unemployment Insurance	.04	.04	14,000.80	14,649.61		11,789.56	40,439.97		40,439.97	1,022.88	244
245	Taxes—All Other	.04	.04	28,290.85	11,663.69		1,927.61	41,882.15		41,882.15	2,486.02	245
235	Insurance			572.55	374.51		33.34	980.40		980.40	691.48	235
250	General Office Expense—Accounting Department	.03	.02	16,928.29	8,244.43		1,211.18	26,383.60		26,383.90	876.99	250
255	General Office Expense—Gen'l Managers Department	.05	.05	27,447.04	14,729.25		8,996.45	51,172.74	1,527.37	52,700.11	1,794.98	255
260	General Office Expense—Advertising Department	.01	.01	3,585.92	1,680.98		254.26	5,521.16		5,521.16	*61.06	260
265	General Office Expense—Lubricating Department	.03	.03	591.94	656.88		27,681.48	28,930.30		28,930.30	3,767.97	265
270	General Office Expense—Asphalt And Fuel Oil Dept.						1,978.58	1,978.58		1,978.58	*1,492.62	270
280	General Office Expense—Construction & Maint. Dept.			1,929.07	879.20		136.01	2,944.28		2,944.28	860.18	280
290	General Office Expense—Pro Rata Gen. Administrative	.07	.07	47,533.21	23,338.41		3,417.21	74,288.83		74,288.83	3,062.23	290
295	General Office Expense—Law Expense	.02	.03	22,791.09	10,822.87		1,550.70	35,164.66		35,164.66	10,732.30	295
503	Losses By Storm And Flood			195.83	119.90		13.03	328.76		328.76	305.27	503
505	Losses By Dismantling—Abnormal—ELA											505
506	Losses By Dismantling—Abnormal—Other Than ELA	.02	.02	14,151.79	9,170.37		834.41	24,156.57		24,156.57	2,506.00	506
513	Losses By Dismantling—Out Of Pocket Exp.—ELA			3.75				3.75		3.75	3.75	513
514	Losses By Dismantling—Out Of Pocket Exp.—Other Than ELA			1,865.55	848.97		127.72	2,842.24		2,842.24	1,320.31	514
515	Experimental, Development, And Research Expense			1,393.54	668.84		100.25	2,162.63		2,162.63	*150.34	515
520	Annuities And Retirement Plan Expense	.16	.15	53,791.91	58,116.37		45,106.07	157,014.35		157,014.35	1,931.56	520
525	Death Benefits	.01	.01	4,421.30	2,178.95		349.75	6,950.00		6,950.00	950.00	525
	Total All Other Expense			498,242.59	279,542.52	237,848.68	136,547.40	1,152,181.19	13 519.95	1,165,701.14	52,733.19	
	Average Per Unit This Year	—	1.08	.72	.88	.44	2.78					
	Average Per Unit Last Year	1.12	—	.74	.88	.46	3.14					
	Grand Total All Expense	2.54	2.45	1,145,399.13	846,215.39	48.506.44	568,226.56	2,608,347.52	67,548.99	2,675,896.51	98,136.14	
	(1) Total Units Including Direct Shpts.						51,391,592.6	152,958,667.9				
	(2) Deduct Direct Shipments						46,471,455.6	46,471,455.6				
	(3) Total Units Item (1) Less Item (2)			69,301,586.	32,265,489.3	54,255,291	4,920,137	106,487,212.3	$544,215.80			
	Average Per Unit On (1) Above	1.77	1.71				1.11					
	Average Per Unit On (3) Above	2.54	2.45	1.65	2.62	.09	11.55		12.41 Cost per Dollar			

Detroit Sales Field

Year of 1940

Gasoline Tank Wagon Reseller Sales	67,829,912 gallons
Gasoline Tank Wagon Consumer Sales	12,177,709 gallons
Gasoline Tank Car Jobber Sales (Ned's Auto Supply Co.—Citron-Kolb Oil Co. Wayne Oil Co.—Stikeman Oil Co.)	13,661,105 gallons
All other Gasoline Sales (Includes all other method and Tank Car Sales)	39,098,141 gallons
Motor Oil Reseller Sales	1,272,848 gallons

1940 Sales of Motor Oils and Greases to 4 named Jobbers

Jobber	Motor Oil	Grease
Ned's Auto Supply Co.	109,985 gallons	177,314 pounds
Citron-Kolb Oil Co.	79,916 gallons	44,016 pounds
Wayne Oil Co.	31,577 gallons	12,567 pounds
Stikeman Oil Co.	26,164 gallons	11,429 pounds
	247,642 gallons	245,326 pounds

COMMISSION'S EXHIBIT NO. 88.

SCHEDULE #4
DETROIT
Field
JUNE 1940
Month

STANDARD OIL COMPANY
SALES DEPARTMENT

DISTRIBUTION OF TIME—SALESMEN
METHOD—CLASS OF PRODUCT

Class of Salesmen	T.W. Res.	T.W. Cons.	O.M.	Auto Supp.	Total	Ref. Oils & Tr. Fuels	Naph. & Gaso.	Mtr. Oils	Lubr. Oils	Grses.	Waxes & Petro.	G.O., Dist., F.O. & Asph. Prod.	Misc. Mdse.	Auto Supp.	Total
Industrial Salesmen		137	958	5	1100%	35	102	122	654	72	67	43		5	1100%
Lubricating Engineers		42	258		300	14	28	46	138	33	17	24			300
Automotive Engineer	9	43	47	1	100	10	42	40		7				1	100
City Salesmen	94	148	347	11	600	18	224	172	98	30	47			11	600
Reseller Salesmen	1392		1000	208	2600	26	1366	804	63	107	26			208	2600
"B" Station Salesmen		150	438	12	600	60	90	300	78	48	12			12	600
Asphalt Pro. Salesmen			100		100							100			100
Spec. Salesmen—Reseller	256		121	23	400	3	253	100	4	14	3			23	400
Spec. Salesmen—Heatg. Oil		100			100	100									100
Dom. Htg. Oil Salesmen		400			400	400									400
Total	1751	1020	3269	260	6300%	666	2105	1584	1035	311	172	167		260	6300%
Percentage	27.8	16.2	51.9	4.1	100%	10.6	33.4	25.2	16.4	4.9	2.7	2.7		4.1	100%
Distribution Percentage	29.0	16.9	54.1		100%	11.0	34.9	26.2	17.1	5.1	2.9	2.8			100%

COMMISSION'S EXHIBIT NO. 89.

SCHEDULE #4
DETROIT
Field
SEPTEMBER 1940
Month

STANDARD OIL COMPANY
SALES DEPARTMENT

DISTRIBUTION OF TIME—SALESMEN
METHOD—CLASS OF PRODUCT

Class of Salesmen	T.W. Res.	T.W. Cons.	O.M.	Auto Supp.	Total	Ref. Oils & Tr. Fuels	Naph. & Gaso.	Mtr. Oils	Lubr. Oils	Grses.	Waxes & Petro.	G.O., Dist., F.O. & Asph. Prod.	Misc. Mdse.	Auto Supp.	Total
Industrial Salesmen		137	958	5	1100%	35	102	122	654	72	67	43		5	1100%
Lubricating Engineers		42	258		300	14	28	46	138	33	17	24			300
Automotive Engineers	5	47	47	1	100	20	32	40		7				1	100
City Salesmen	125	148	316	11	600	19	254	155	82	33	45		1	11	600
Reseller Salesmen	1357		1035	208	2600	26	1331	780	52	162			41	208	2600
"B" Station Salesmen		168	420	12	600	78	90	300	78	30	12			12	600
Asphalt Pro. Salesmen			100		100							100			100
Spec. Salesmen—Reseller	239		135	26	400	3	236	105	4	20			6	26	400
Spec. Salesmen—Heatg. Oil		100			100	100									100
Dom. Htg. Oil Salesmen		400			400	400									400
Total	1726	1042	3269	263	6300%	695	2073	1548	1008	357	141	167	48	263	6300%
Percentage	27.4	16.5	51.9	4.2	100%	11.0	32.9	24.6	16.0	5.7	2.2	2.6	.8	4.2	100%
Distribution Percentage	28.6	17.3	54.1		100%	11.5	34.4	25.6	16.7	5.9	2.3	2.8	.8		100%

Commission's Exhibit No. 89.

COMMISSION'S EXHIBIT NO. 90.

SCHEDULE #4
DETROIT
Field
DECEMBER 1940
Month

STANDARD OIL COMPANY
SALES DEPARTMENT

DISTRIBUTION OF TIME—SALESMEN
METHOD—CLASS OF PRODUCT

Class of Salesmen	T.W. Res.	T.W. Cons.	O.M.	Auto Supp.	Total	Ref. Oils & Tr. Fuels	Naph. & Gaso.	Mtr. Oils	Lubr. Oils	Grses.	Waxes & Petro.	G.O., Dist., F.O. & Asph. Prod.	Misc. Mdse.	Auto Supp.	Total
Industrial Salesmen		137	958	5	1100	35	102	122	654	72	67	43		5	1100
Lubricating Engineers		42	258		300	14	28	46	138	33	17	24			300
Automotive Engineers	5	47	47	1	100	20	32	40		7				1	100
City Salesmen	125	139	325	11	600	17	247	160	83	36	45		1	11	600
Reseller Salesmen	1373		979	248	2600	26	1347	771	46	136			26	248	2600
"B" Sta. Salesmen		140	546	14	700	70	70	385	84	70	7			14	700
Asphalt Prod. Salesmen			100		100							100			100
Spec. Salesmen—Reseller	239		129	32	400	3	236	105	4	17			3	32	400
Spec. Salesmen—Heating Oil		100			100	100									100
Domestic Heating Oil Salesmen		400			400	400									400
Total	1742	1005	3342	311	6400	685	2062	1629	1009	371	136	167	30	311	6400
Percentage	27.2	15.7	52.2	4.9	100	10.7	32.2	25.5	15.8	5.8	2.1	2.6	.4	4.9	100
Distribution of Percentage	28.6	16.5	54.9		100	11.2	33.9	26.8	16.6	6.1	2.2	2.7	.5		100

734 COMMISSION'S EXHIBIT NO. 91.

Types of Reseller Service Station Accounts—1937

Detroit Metropolitan Area
Detroit Area, including
Detroit, Hamtramck,
Highland Park and Dearborn

Company owned Service Stations Leased out	—	229
Service Stations Leased by Standard Oil Company and released to Individuals	—	9
Form 461 Accounts	—	192
Total	—	430

745 COMMISSION'S EXHIBIT NO. 100.

Statement of Gasoline Gallons Sold to the Four Detroit Jobbers

			Detroit Field	
	1937	1938	1939	1940
Stikeman Oil Co.				
Solite with Ethyl	177,060	185,423	187,567	176,508
Standard Red Crown	2,273,665	2,061,561	1,802,973	1,571,153
Stanolind	—	42,792	32,430	25,250
Total	2,450,725	2,289,776	2,022,970	1,772,911
Wayne Oil Co.				
Solite with Ethyl	116,488	130,289	196,748	175,146
Standard Red Crown	1,570,149	1,694,749	2,029,429	2,166,248
Stanolind	—	—	—	—
Total	1,686,637	1,825,038	2,226,177	2,341,394
Citrin-Kolb Oil Co.				
Solite with Ethyl	337,845	468,350	504,883	447,315
Standard Red Crown	5,163,320	5,404,717	4,454,370	4,618,115
Stanolind	—	86,803	199,791	160,700
Total	5,501,165	5,959,870	5,159,044	5,226,130
Ned's Auto Supply Co.				
Solite with Ethyl	268,535	362,934	460,564	446,015
Standard Red Crown	3,817,911	4,517,621	3,875,751	3,874,657
Stanolind	—	—	—	—
Total	4,086,446	4,880,555	4,336,315	4,320,672

756 COMMISSION'S EXHIBIT NO. 109-B.

Reseller Accounts in Territory #65

Detroit—1937

No.	Name	Location
2126	Ned's Auto	Michigan & Maple, Dearborn
2127	Ned's Auto	W. Chicago & Grand River, Detroit
2128	Ned's Auto	Manistique & Jefferson, Detroit
2139	C. J. Dahmon	Prairie & Ewald Circle, Detroit
2140	Jameson & George	14445 Fenkell, Detroit
2143	Chevillot Bros.	Tracy & Fenkell, Detroit
2146	H. Gardiner	25049 Grand River, Detroit
2150	G. Jones	8945 Eight Mile Road, Detroit
2697	G. Scanlon	19906 Fenkell, Detroit
2712	R. F. Sheldon	13251 Grand River, Detroit
2815	Ned's Auto	Grand River & Greenway, Detroit
2824	J. R. Dudley	20300 Grand River, Detroit
5030	M. C. DeGroat	21511 Grand River, Detroit
5048	C. Dameron	14401 Grand River, Detroit
100	C. Page	9800 American, Detroit
138	Ned's Auto	18023 John R, Detroit
141	R. McAuley	11742 Indiana, Detroit
253	W. A. McIntyre	11600 Livernois, Detroit
5254	V. B. Schultz	6300 Fullerton, Detroit
260	L. E. Alford	12100 Washburn, Detroit
266	A. J. Ginelli	Fenkell & Welland, Detroit
275	H. Wilkes	Livernois & Midland, Detroit
287	J. Barclay	10003 Schoolcraft, Detroit
288	H. Ziegel	12805 Plymouth, Detroit
5[illegible]93	E. A. Peters	16960 Monica, Detroit
295	W. Sokol	9442 Wyoming, Detroit

No.	Name	Location
609	E. M. Cummings	7501 Fullerton, Detroit
616	R. D. Sherman	13001 Fenkell, Detroit
5617	J. C. Johnson	10715 Fullerton, Detroit
618	L. L. Coons	14508 Wyoming, Detroit
620	A. E. White	10004 Northwestern, Detroit
1048	C. A. & W. J. Walsh	Grd. River & Rutherford, Detroit

Above territory in 1937 was assigned to salesmen:
L. L. Robinson, January 1 to April 16 (Resigned)
T. G. Meulenberg, April 16th to August 15th (Resigned)
P. F. Coutchie, August 15th to December 31st

In addition to above Standard Oil Company reseller outlets, these salesmen were obliged to call on approximately fifty other reseller accounts handling petroleum products.

Detroit, Mich.
January 30, 1942
WSL/mgs

Note

Page 4783 is on Card 67

DETROIT FIELD

*SALARIES & COMMISSIONS

			Year 1940		
			Tank Wagon		
		Total	Reseller	Consumer	Other Method
000	Salaries—Supervision	$ 51,360.21	$ 31,533.91	$ 15,888.99	$ 3,937.31
001	Salaries—Supervision—Others	13,019.63	8,634.78	3,792.31	592.54
002	Salaries—Sales Promotion	22,723.09	4,768.91	7,136.32	10,817.86
003	Salaries—Sales Promotion—Others	24,980.68	5,781.76	11,636.46	7,562.46
004	Salaries—Salesmen	207,414.47	60,545.87	32,966.62	113,901.98
005	Salaries—Advertising	7,777.03	4,778.70	1,884.49	1,113.84
006	Salaries—Drivers	112,493.82	55,481.56	33,677.60	23,334.66
008	Salaries—Warehouse Labor	52,169.50	15,367.80	7,111.05	29,690.65
021	Commissions	409,162.31	110,300.46	252,360.71	46,501.14
024	Exp. of Trans. Standard Fuels Due to Lack of Stge.	11,209.61	5,386.90	5,822.71	—
200	Office Expense—Salaries Accounting	217,616.30	84,167.59	39,975.95	93,473.66
215	Expense—Salaries—Others	12,229.84	7,892.33	3,764.87	572.64
225	Expense—Salaries—Sub-Station Auditors	8,215.70	5,360.38	2,478.00	377.32
	Total	$1,150,372.19	$400,000.95	$418,495.18	$331,876.06
			34.8%	36.4%	28.8%

* Salaries and Commissions used to spread account #520 Annuities and Retirement Plan Expense.

767 COMMISSION'S EXHIBIT NO. 120.

Standard Oil Co.—Detroit Field, 1940*

Recapitulation of tankwagon reseller volume Delivered by Commissioned Agents and Drivers

Naphthas	3,095	gallons
Gasolines	19,829,342	gallons
Standard Tractor Fuel	858	gallons
Standard Heater Oil	326,013	gallons
Stanolex Furnace Oil	15,226	gallons
Other Refined Oils	1,093,126	gallons
Total tankwagon volume	21,267,660	gallons

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* **Data obtained from Form 3-C.**

784 COMMISSION'S EXHIBIT NO. 128-A

(Letterhead of Standard Oil Company, Chicago, Ill.)

March 18, 1942.

Federal Trade Commission
Washington, D. C.

Attention: Mr. Cyrus B. Austin

Dear Mr. Austin:

Re: Standard Oil Company
Docket No. 4389

Supplementing our discussions and correspondence relative to Commission's Exhibit No. 91 and Commission's Exhibit No. 86, and the testimony of Mr. Raupagh,—all having to do with the number of reseller accounts in the area designated as Detroit, Highland Park, Hamtramck and Dearborn, served by the Standard Oil Company, the Detroit office has made an extensive check of the record and Mr. Raupagh has advised me today as follows:

Outlets served by Standard Oil Company and by the four jobbers involved in this action are tabulated below:

	December 31, 1937	December 31, 1940
Served by Respondent	358	357
Served by Jobbers	94	106
Total	452	463

It appears that there is a misleading inclusion in Commission's Exhibit No. 91 in that the total figure of 430 reseller accounts gives consideration to the jobber outlets. I think the above tabulation will entirely clarify this situation.

785 COMMISSION'S EXHIBIT NO. 128-B.

Federal Trade Commission
March 18, 1942—
p. #2

It may be that the Commission's Exhibit No. 86 will not reconcile in absolute detail even with the above tabulation. This arises out of the fact that in Exhibit 86 outlets are listed which may have been occupied by a particular operator for a month, two or three months, or some short period, and the occupancy may have changed from time to time.

I do feel able to assure you at this time that the above tabulation accurately reflects the actual number of reseller accounts being served by Standard Oil Company and by the jobbers of Standard Oil Products as of the respective dates indicated.

I trust that this will clarify the whole situation,—and I assume that this letter may be considered on the record as an amplification or explanation of the present exhibits in the record. If that does not concur with your views of propriety in making the record, I shall be very glad to prepare an affidavit form, but would, of course, dislike to require Mr. Raupagh to take the stand again simply for the purpose of expressing as a witness that which he has expressed to me and I am reflecting in this letter as the facts, as developed by his office.

In any event, I shall be glad to correct the record in any way that you think is essential, but ask your indulgence in respect of relieving us from the burden of another hearing or asking Mr. Raupagh to again take the stand, if that is possible.

With best personal regards, I am

Sincerely yours,

H. R. Hanley.

Harold R. Hanley w

COMMISSION'S EXHIBIT NO. 129.

STATEMENT SHOWING CALCULATION OF AVERAGE SALESMEN'S COSTS PER GALLON OF GASOLINE SOLD TO STANDARD OIL STATIONS IN DETROIT OTHER THAN NED'S STATIONS AND SERVED BY THE SAME SALESMEN WHO CALLED ON NED'S STATIONS DURING 1937.

		Time Spent on Business Other Than Ned's		Time Spent on Gasoline	
	Salary	Percent	Amount	Percent	Amount
Robinson	$ 958.72	65%	$ 623.17	52.8%	$ 329.03
Meulenberg	1,329.24	75%	996.93	52.8%	526.38
Coutchie	1,336.76	75%	1,002.57	52.8%	529.36
Total......	$3,624.72		$2,622.67		$1,384.77

Total Gallonage (gasoline) sold to Standard Oil

Stations—other than Ned's—Served by the 3 Salesmen.. 2308606 gallons

Average Salesmen's Cost per Gallon—other than Ned's.... .06¢

787

COMMISSION'S EXHIBIT NO. 130.

Standard Oil Company

Sales Department

Statement Showing Analysis of Charges to Marketing Expense Account of Losses by Dismantling (Other Than E. L. A.) for the Detroit Field for the Year 1940.

Ser. Sta. Number	Location	Original Cost of Capital Investment	Amount of Depreciation Charged Off	Net Loss to Marketing Expense
	Michigan			
3	Detroit	$ 127.94	$ 40.34	$ 87.60
191	Harthville	3,041.08	2,095.82	945.26
805	Belleville	2,895.82	1,631.04	1,264.78
106	Detroit	4,725.35	3,240.68	1,484.67
267	Detroit	2,778.16	1,622.46	1,155.70
150	Highland Park	3,137.87	1,966.15	1,171.72
18	Detroit	4,845.55	4,057.93	787.62
131	Detroit	35.00	23.10	11.90
36	Detroit	4,077.62	2,816.64	1,260.98
45	Detroit	3,721.08	2,799.82	921.26
284	Detroit	3,314.16	1,858.97	1,455.19
38	Highland Park	48.42	36.96	11.46
73	Hamtramck	2,924.80	2,091.78	833.02
79	Detroit	3,190.65	2,255.89	934.76
620	Detroit	5.73	.67	5.06
72	Detroit	3,133.13	2,160.76	972.37
280	Detroit	3,217.00	1,964.76	1,252.26
33	Detroit	3,193.64	2,195.88	997.76
236	Dearborn	2,485.60	1,403.26	1,082.34
615	Detroit	2,857.59	1,162.09	1,695.50
281	Detroit	2,593.22	1,451.98	1,141.24
297	Detroit	2,490.58	1,402.90	1,087.68
178	Romeo	3,444.56	2,513.62	930.94
102	Detroit	2,916.12	2,000.39	915.73
6	Highland Park	6,785.26	6,105.03	680.23
19	Detroit	5,915.49	3,845.95	1,069.54
	Total	$76,901.42	$52,744.85	$24,156.57

This Loss represents loss sustained on Capital Assets at Service Stations which were entirely dismantled and rebuilt into Combination Service and Greasing Stations during the Year 1940.

COMMISSION'S EXHIBIT NO. 131-A.

Standard Oil Company

Docket No. 4389

Methods of Allocating Salesmen's Salaries and Expenses

In the months of December, March, June and September of each year, the Company sets up percentage factors which are used for the allocation of salesmen's salaries and expenses by the channels of outlets, ie: Tank Wagon Reseller, Tank Wagon Consumer, Other Methods, and Automobile Supplies on the Company's Form 189 for the next three ensuing months in each instance. The percentage factors set up by the Company purport to show the percentage of time to be expended by each of the separate employees, by channels, during the three ensuing months.

The separate groups of salesmen as classified by the company and the number of salesmen in each group were shown by the records of June 1940 to be as follows:

Class of Salesmen	Number of Salesmen
Industrial Salesmen	11
Lubricating Engineers	3
Automotive Engineers	1
City Salesmen	6
Reseller Salesmen	26
B. Station Salesmen	6
Asphalt Pro. Salesmen	1
Spec. Salesmen-Reseller	4
Spec. Salesmen Htg. Oil	1
Domestic Htg. Oil Salesmen	4
Total	63

The foregoing tabulation does not include Sales Managers, Assistant Sales Managers or persons engaged in Promotional Activities.

As shown above, out of a total of 63 salesmen in the month of June, 1940, there were 26 Reseller Salesmen.

789 COMMISSION'S EXHIBIT NO. 131-B.

In setting up the percentage factors for the allocation of salaries and expenses of Reseller Salesmen, Mr. Clifford O. Bath, Utility Supervisor of the Accounts Departments, and Mr. William S. Locker, Reseller Sales Manager, of the Standard Oil Company in the Detroit field: sit together and prepare sheets showing the percentage of each man's time which is expected to be expended in sales efforts in the separate trade channels during the three ensuing months. For guidance in setting up the percentages, these gentlemen have before them the percentage allocations set up for preceding periods, together with information as to sales campaigns, etc. for the three months in which percentages are to be used as allocating factors. The percentages thus set up are then submitted to Mr. J. M. Hamer, Asst. Mgr. Reseller of the Detroit field for review and approval. In checking and reviewing the percentages, Mr. Hamer has at his disposal certain information obtained from special salesmen, whose duty it is to travel the field with the regular Reseller Salesmen. It was stated in conference with Mr. Hamer that these special salesmen occasionally make personal notes of the actual time devoted to the separate channels and products by the Reseller Salesmen on those days when they accompany the Reseller salesman.

All of the above information is said by Messrs. Bath, Locke and Hanter to serve as basis for the setting up of the percentage factors for the allocation of Reseller Salesmen's time. In case of other salesmen, the percentage factors are similarly set up giving effect to the opinion of the salesmen or the supervisors and other known pertinent facts which may have a bearing on the situation.

790 COMMISSION'S EXHIBIT NO. 131-C.

As set forth in Respondent's Exhibit 100, Page 7, salesman submit a daily call record report indicating the customer called on and the nature of the call as to outlet channel. However, these daily call reports do not show time spent on each call, or the time spent on the separate channels covered by each call and they do not serve as a basis for setting up the percentage factors.

It will be noted that the call record reports were used as an underlying basis for the assigning of a portion of this class of expense to the Direct Shipment business in the

COMMISSION'S EXHIBIT NO. 132.

STANDARD OIL CO. DOCKET 4389

CREDIT CARD EXPENSE (INCLUDING COUPON BOOK EXPENSE)
DETROIT FIELD—1940.

						Direct Shipments			
			Distribution Through Bulk Plants			Jobbers			
		Total	Tank Wagon Reseller	Tank Wagon Consumer	Other Method	Naphtha and Gasoline	Other Products	Other Customers	Auto
Credit Reports	(Acct. 208)	$11,960.97	$ 6,997.28	$3,257.80	$ 496.73	$1,090.94	$ 119.12	—	$ —
Collection Expense	(Acct. 511)	1.50	1.32	—	—	.16	.02	—	—
Collection Expense (Prior years)	(Acct. 512)	2.50	2.14	—	—	.32	.04	—	—
Bad Debt Losses	(Acct. 510)	3,109.83	2,763.50	—	—	312.22	34.11	—	—
Bad Debts—Recovered	(Acct. 400)	*73.82	*66.01	—	—	*7.04	*.77	—	—
Postage	(Acct. 202)	3,168.61	1,852.41	862.45	131.50	290.52	31.73	—	—
Exchange	(Acct. 204)	1,317.21	799.44	372.21	56.75	80.07	8.74	—	—
Miscellaneous Operating Expense	(Acct. 066)	740.83	624.64	29.77	4.52	73.82	8.08	—	—
Office Expense—Accounting	(Acct. 200)	6,743.68	2,192.41	1,047.73	2,441.04	442.67	45.93	—	573.90
Stationery	(Acct. 201)	3,747.03	2,189.34	1,019.32	155.42	345.22	37.73	—	—
Total		$30,718.34	$17,356.47	$6,589.28	$3,285.96	$2,628.00	$ 284.73	—	$ 573.90

* Indicates red in original.

COMMISSION'S EXHIBIT NO. 133.

STANDARD OIL COMPANY (INDIANA)

DOCKET NO. 4389

Account Number	Account Name	Tank Wagon Reseller	Jobbers Naphtha and Gasoline
002	Salaries—Sales Promotion	$ 4,482.78	$ 185.93
003	Salaries—Sales Promotion—Others	5,441.79	345.21
006	Salaries—Drivers	55,481.56	
008	Salaries—Warehouse Labor	15,367.80	
021	Commissions	110,300.46	
024	Expense of Transportation Standard Fuels due to lack of storage	5,386.90	
*025	Truck Rental Expense	22,992.31	
031	Traveling Expense—Sales Promotion	542.87	3.62
046	Operating and Maintenance of Vehicles—Sales Promotion	132.26	1.10
053	Operating and Maintenance of Vehicles—Trucks, Motor and Horsedrawn (Excl. Adv.)	33,981.90	1.29
*055	Vehicle Tank Expense—Other than mounted on Company Chassis	2,374.42	
060	Plant Maintenance	16,894.81	
062	Water, Light, Fuel (Other than Main Office)	14,369.31	
*066	Miscellaneous Operating Expense	19,995.52	453.13
081	Demurrage and Railroad Storage	10.97	
082	Personal Injury Expense—Company Employees	1,603.43	.12
083	Samples	1.84	
084	Safety Expense—Salaries and All Other Expense	807.06	4.09
087	General Supplies Used	1,323.41	
088	Station Operating Tools and Equipment	10,113.79	
*200	Office Expense—Salaries Accounting	80,229.97	1,809.42
205	Office Expense—Operating and Maintenance of Vehicles—Office Automobiles	227.06	8.33
206	Office Expense—All Other—Water, Light, Fuel, Rent, Etc.	6,777.09	228.61
*208	Credit Information Expense	1,281.59	
225	Expense—Salaries—Sub-Station Auditors	5,360.38	
226	Expense—Traveling Expense Sub-Station Auditors	753.93	.02
227	Expense—Operating and Maintenance of Vehicles—Sub-Station Auditors	590.35	3.05
500	Losses by Accident—Property and Other than Company Employees	1,571.00	
501	Losses by Property Damage—Company and other than Company Property	1,225.29	

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* Note: All of the above account expense figures are taken from the tank wagon reseller and jobber gasoline columns on Respondent's Exhibit 101, except figures opposite accounts marked "*", which have been adjusted.

** Denotes red figures.

Account Number	Account Name	Tank Wagon Reseller	Jobbers Naphtha and Gasoline
502	Losses by Fire	287.92	
507	Losses—Miscellaneous	1,495.55**	8.51
101	Depreciation Expense — Vehicles — Sales Promotion	32.69	.45
106	Depreciation Expense — Vehicles — Trucks, Motor Horsedrawn (Incl. Veh. Tanks and Excl. Adv. Trucks)	16,254.88	.33
228	Depreciation Expense — Office Others and Sub-Station Auditors	400.04	2.53
*243	Taxes—Federal Insurance Contributions	4,043.04	36.86
*244	Taxes—Unemployment Insurance	9,917.09	97.07
245	Taxes—All Other	25,155.49	1,577.94
235	Insurance	572.55	
*255	General Office Expense—General Manager's Dept.	7,875.23	23.16
265	General Office Expense—Lubricating Dept.	552.72	21.60
503	Losses by Storm and Flood	195.83	
513	Losses by Dismantling—Out of Pocket Expense—Ela.	3.75	
*520	Annuities and Retirement Plan Expense	6,397.47	62.62
*525	Death Benefits	2,294.83	20.92
	Total	$492,179.23	$4,877.91
	Total Units (Gallons)	69,301,586	15,296,828
	Average Per Unit (Gallons)	.7102 Cents	.0318 Cents

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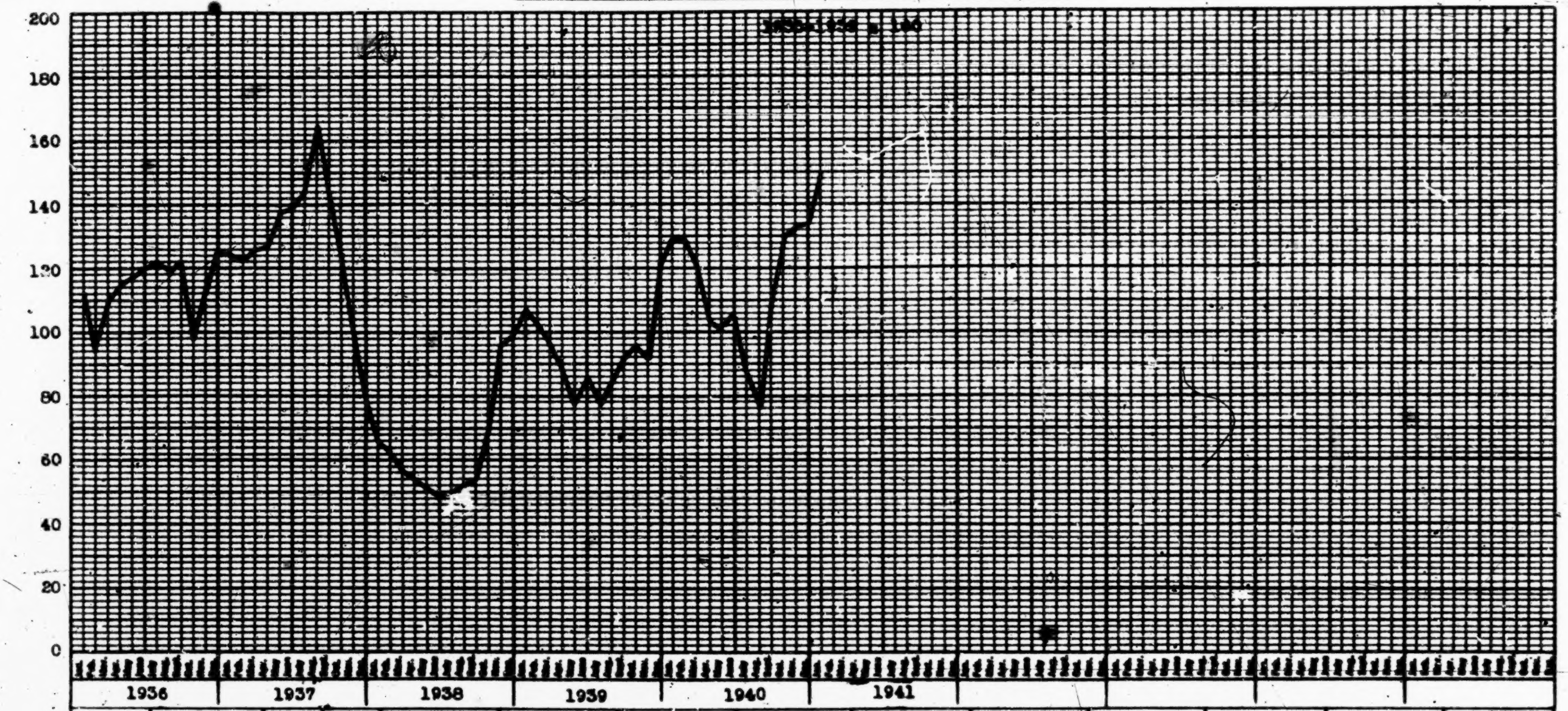
AUTOMOBILE PRODUCTION - SEASONALLY ADJUSTED



	1936	1937	1938	1939	1940	1941
January	112	124	65	107	129	149
February	94	122	63	102	129	
March	110	126	57	96	120	
April	115	127	54	88	103	
May	117	138	51	77	101	
June	120	139	49	86	106	
July	122	144	50	77	87	
August	119	165	52	84	76	
September	122	142	54	92	109	
October	97	124	69	96	130	
November	113	98	96	91	133	
December	125	78	99	121	134	

FEDERAL TRADE COMMISSION
Docket No. 4389 RESPONDENT'S Exhibit No. 3
IN THE MATTER OF Standard Oil Co.
DATE 4/29/4 WITNESS [illegible]
REPORTER [illegible]

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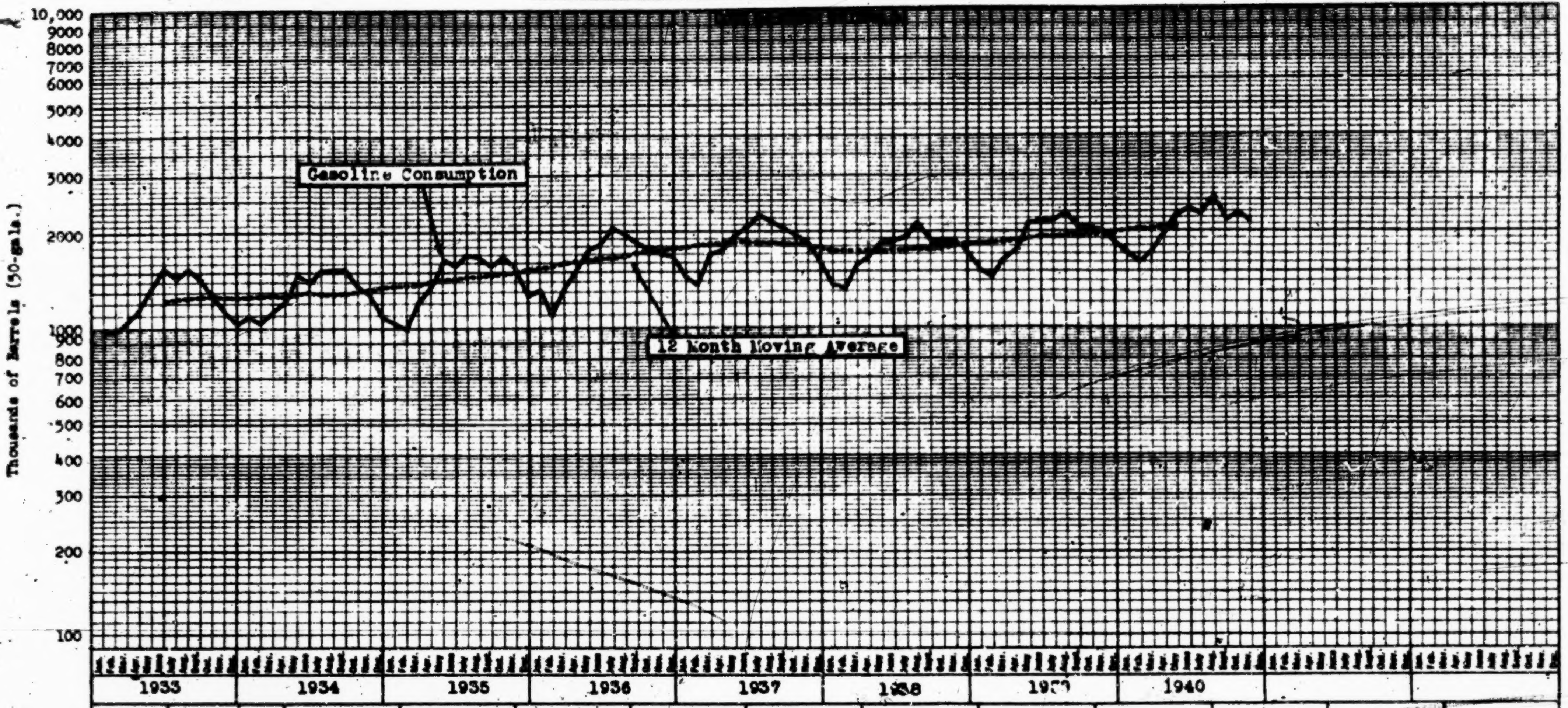
5

TOTAL GASOLINE CONSUMPTION - STATE OF MICHIGAN



	1933	1934	1935	1936	1937	1938	1939	1940
January	991,440	1,097,740	1,047,180	1,315,600	1,451,680	1,385,000	1,512,800	1,716,980
February	835,320	1,038,960	978,660	1,093,080	1,385,940	1,322,080	1,448,260	1,604,120
March	1,057,360	1,137,300	1,209,120	1,348,540	1,712,480	1,579,940	1,632,200	1,729,840
April	1,151,440	1,216,380	1,359,640	1,514,440	1,753,300	1,691,660	1,725,340	1,987,980
May	1,365,320	1,465,800	1,616,980	1,776,920	1,973,080	1,843,380	2,101,780	2,247,800
June	1,550,380	1,395,740	1,580,380	1,836,620	2,084,580	1,895,500	2,162,840	2,320,140
July	1,435,820	1,524,700	1,701,280	2,040,440	2,234,480	1,916,380	2,170,800	2,288,140
August	1,556,080	1,524,640	1,694,380	1,958,120	2,178,460	2,130,620	2,294,240	2,552,820
September	1,425,260	1,522,020	1,565,300	1,833,780	2,049,360	1,850,280	2,044,880	2,151,860
October	1,282,660	1,341,560	1,682,840	1,797,560	1,947,160	1,848,560	2,032,940	2,293,960
November	1,129,020	1,284,400	1,543,600	1,700,100	1,837,380	1,886,720	2,009,280	2,166,620
December	1,027,900	1,090,760	1,267,580	1,697,380	1,604,180	1,741,180	1,877,000	

50-gallon barrels

FEDERAL TRADE COMMISSION
Docket No. [illegible] Exhibit No. 5
IN THE MATTER OF Standard Oil Co.
DATE [illegible] WITNESS [illegible]
REPORTER [illegible]

Detroit, Mich.
Feb. 6, 1941.

(p. 4797)

Resp. Ex. 6

OPERATING SET-UP
AS OF 12-31-40
CITRIN - KOLB OIL CO.

OWNED AND OPERATED

8620 Linwood
14445 Linwood
14685 Wyoming

OWNED AND LEASED

3443 Fenkell
14481 Livernois
18610 Grand River
7340 John R.
9401 Conant (Hamtk)
7201 Livernois
14085 Gratiot

LEASED AND OPERATED

15407 E.Jefferson
2400 Brush
17100 Jos. Campau

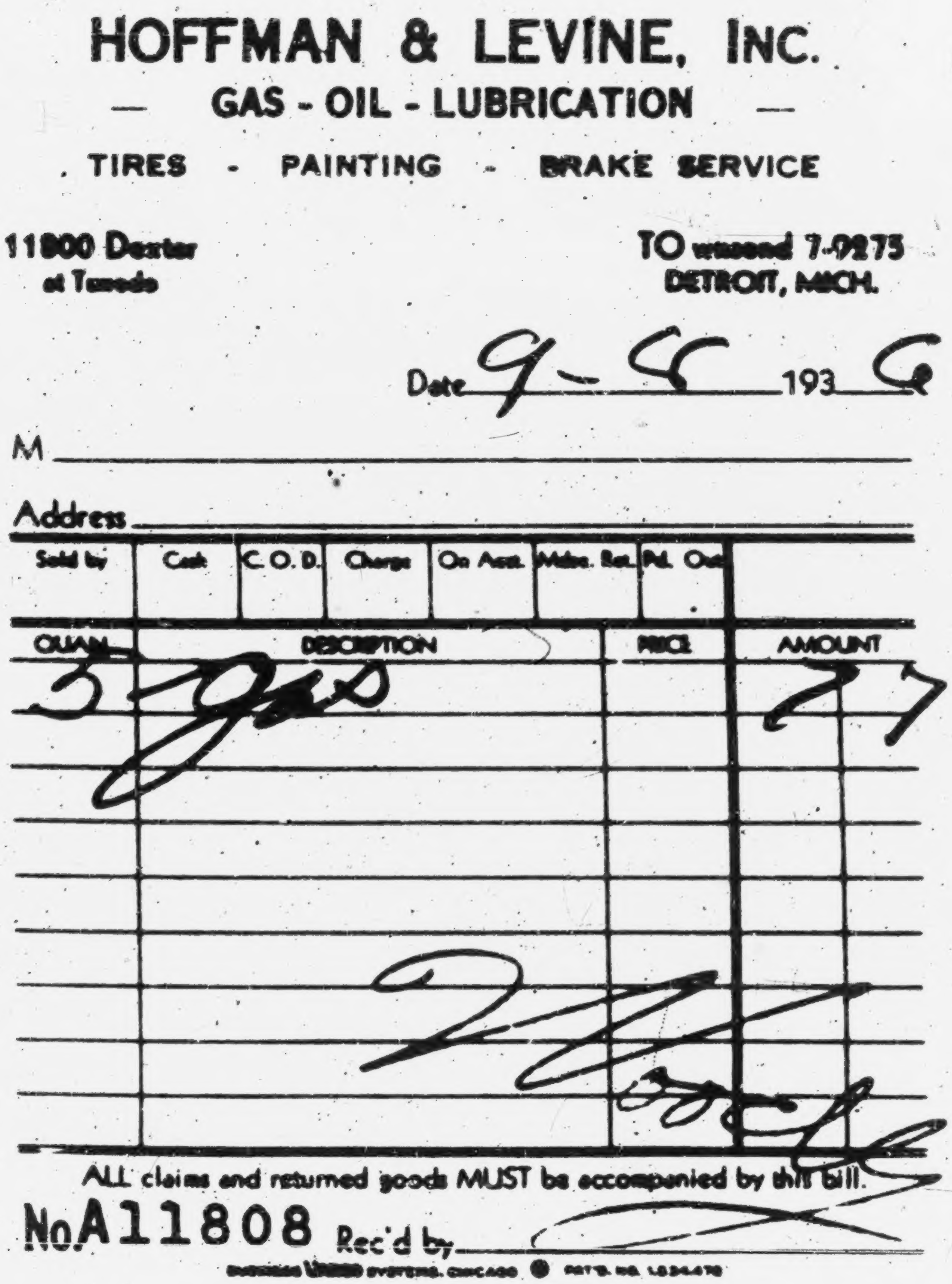
LEASED AND SUB LEASED

10252 Chalmers
4277 Cass
8716 Linwood
12847 Linwood
12300 Dexter
16585 James Couzens
1900 Cass
8540 Brush
9705 Dexter
16667 Livernois
9504 Woodward
9881 Livernois
4200 Third

DEALER CONTRACTS

2704 Carpenter
7740 St.Aubin
8921 John R.
RFD #1, Birmingham
2700 E. Vernor
1541 E. McNichols
329 E. Baltimore
1785 E. McNichols
3941 E. 7 Mile Rd.
8501 Gratiot
9041 Brush
6500 Cass
2505 St.Jean
11301 Van Dyke
13244 Dexter
8340 John R.
1309 W.Warren
14245 Plymouth
13555 Van Dyke
11567 Mt.Elliott
11010 E. McNichols
2430 Crane
2800 E. Davison
6926 Jos.Campau (Hamtk)
3776 Second
30 Seward
541 W.Fort
2810 Harper
14700 Grand River
13645 Woodrow Wilson
9603 Harper
2400 Woodward

FEDERAL TRADE COMMISSION
Docket No. 4389 ~~COMMISSION'S~~ RESPONDENTS EXHIBIT NO. 6
IN THE MATTER OF Standard Oil
DATE 4/24/41 WITNESS Kile
REPORTER Brandenburg



(p. 4806)

HOFFMAN & LEVINE, INC.

— GAS - OIL - LUBRICATION —

TIRES - PAINTING - BRAKE SERVICE

11800 Dexter
at Tuxedo

TOwnsend 7-9275
DETROIT, MICH.

Date 9-8 1936

M

Address

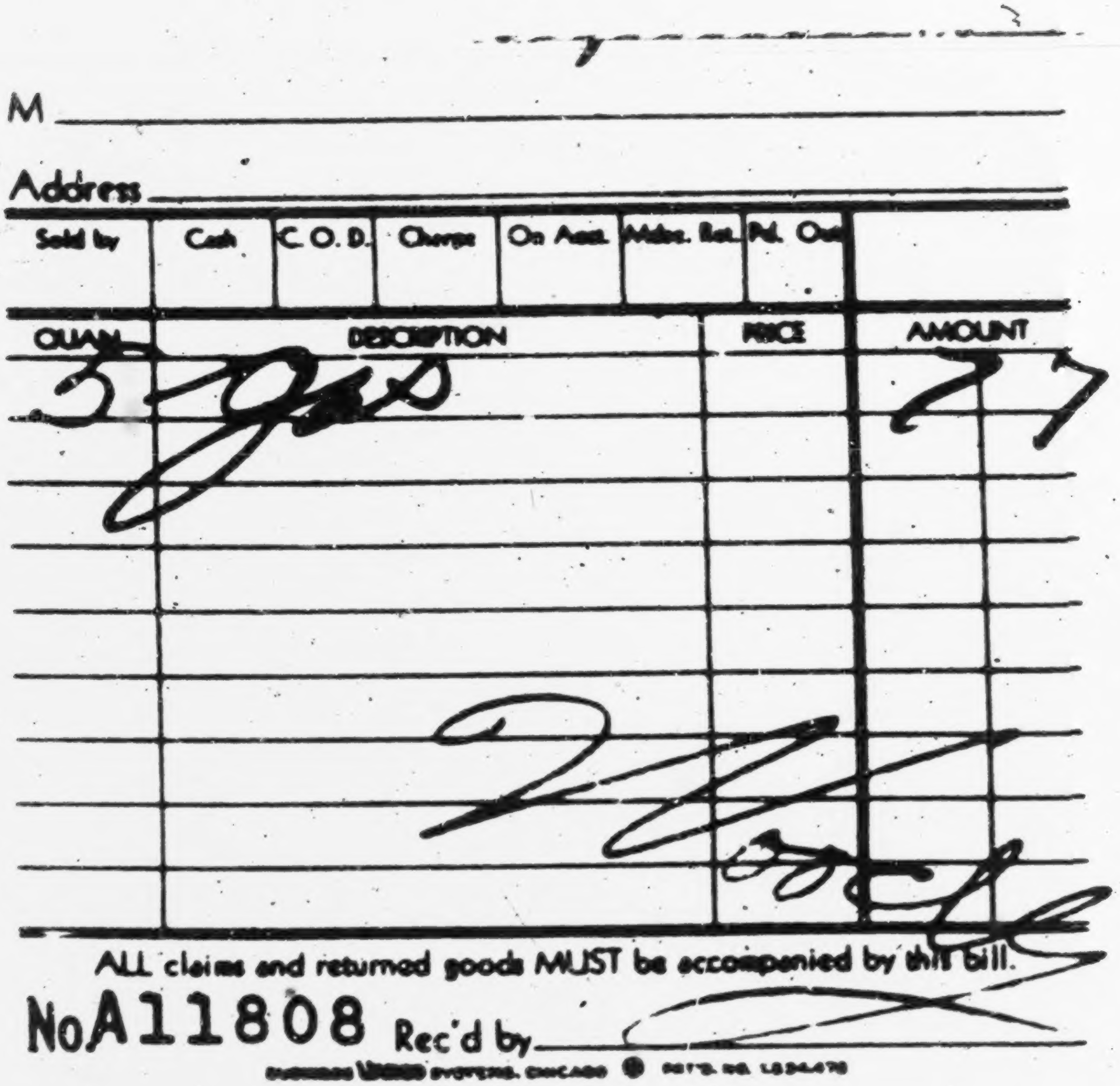
Sold by	Cash	C.O.D.	Charge	On Acct.	Mdse. Ret.	Pd. Out

QUAN.	DESCRIPTION	PRICE	AMOUNT
5	gas		77

ALL claims and returned goods MUST be accompanied by this bill.

No. A11808 Rec'd by

Prevailing Retail Price	Prevailing Retail Price per Gal.	Price per Receipt	Price per Gal.	Per Gal. Difference
5 Gals. 87¢	17.4¢	5 gals. 77¢	15.4¢	2¢



M

Address

Sold by	Cash	C.O.D.	Charge	On Acct.	Mdse. Ret.	Pd. Out

QUAN.	DESCRIPTION	PRICE	AMOUNT
5	Gas		77

ALL claims and returned goods MUST be accompanied by this bill.

No A11808 Rec'd by

Prevailing Retail Price	Prevailing Retail Price per Gal.	Price per Receipt	Price per Gal.	Per Gal. Difference
5 Gals. 87¢	17.4¢	5 gals. 77¢	15.4¢	2¢

FEDERAL TRADE COMMISSION
DOCKET NO. 4389 ~~COMMISSION'S~~ RESPONDENT'S EXHIBIT No. 18-J
IN THE MATTER OF Standard Oil Co.
DATE 5/2/41 WITNESS Biber
REPORTER Brandenburg

S J

(pg 4798 is blank)

797 RESPONDENT'S EXHIBIT NO. 7.

SCHEDULE I

SCHEDULE OF COST PER GALLON TO THE CITRIN KOLB OIL COMPANY TO DISTRIBUTE GASOLINE AT WHOLESALE

Item	Year	Operating Cost	Overhead Cost	Total	Gallons Handled	Rate Per Gallon
	1936				2014358	
1.	1937	35,347.39	48,084.94	83,432.33	5435419	.0154
2.	1938	48,605.08	48,553.38	97,158.46	5967636	.0166
3.	1939	42,221.57	51,887.41	94,108.98	5172992	.0182
4.	1940	45,568.71	52,661.56	98,230.27	5305880	.0185

798 RESPONDENT'S EXHIBIT NO: 8.

SCHEDULE II

ACTUAL OPERATING COST TO THE CITRIN-KOLB OIL COMPANY OF DISTRIBUTING GASOLINE AT WHOLESALE

No.	Item	1937	1938	1939	1940
1.	Advertising	1,445.98	675.98	801.48	788.75
2.	Discounts	2,121.18	390.50	293.45	207.32
3.	Insurance	1,693.52	2,990.61	2,365.44	2,365.44
4.	Gas—Company use		2,084.26	2,195.26	2,801.28
5.	Interest	1,821.58	3,499.33	3,120.70	2,670.76
6.	Heat & Water	)	501.47	396.97	607.77
		)			
7.	Electric Current	2,245.83)	316.79	362.63	488.46
8.	License	223.59	746.96	747.80	487.10
9.	Miscellaneous	5,240.23	9,795.30	5,028.76	5,352.27
10.	Repair	2,451.95	1,728.38	2,633.79	3,880.28
11.	Supplies	870.26	829.33	552.66	728.95
12.	Telephone	893.80	1,198.09	1,059.03	985.99
13.	Wages	15,966.75	19,691.49	18,278.66	18,028.45
14.	Taxes	3,522.72	6,711.37	5,955.12	8,790.90
15.	Bad Debts	600.00	1,195.22	2,179.82	1,134.49
	Total	39,097.39	52,355.08	45,971.57	49,318.71
	Less Oil @ .05 75000	3,750.00	3,750.00	3,750.00	3,750.00
		35,347.39	48,605.08	42,221.57	45,568.71

799 RESPONDENT'S EXHIBIT NO. 9.

SCHEDULE III.

SCHEDULE OF OVERHEAD COSTS PROPERLY CHARGEABLE BY THE CITRIN-KOLB OIL COMPANY FOR THE DISTRIBUTION AT WHOLESALE OF GASOLINE

No.	Item	1937	1938	1939	1940
1.	Jacob A. Citrin, Partner-in-charge of Sales contracts and deals...	10,000.00	10,000.00	10,000.00	10,006.00
2.	Nathan Kolb, Partner-in-charge of Maintenance, delivery & property	10,000.00	10,000.00	10,000.00	10,000.00
3.	Barney Citrin, Partner-in-charge of office, orders & collections...	10,000.00	10,000.00	10,000.00	10,000.00
4.	Depreciation Real Estate........	975.29	1,450.54	1,450.54	1,450.54
5.	Depreciation Equipment	1,899.42	2,382.25	3,958.98	4,315.12
6.	Obsolescence	4,884.84	4,884.84	5,645.79	5,645.79
7.	Int. on Cash Capital Invested....	1,912.61	1,648.16	2,849.79	3,222.50
8.	Int. on Personal property Invested	882.77	921.62	1,076.25	1,179.57
9.	Int. on Real Estate Invested....	5,492.31	5,405.28	5,318.25	5,231.21
10.	Reserve for contingencies 1½ per cent of gross sales.............	2,037.70	1,860.69	1,587.81	1,616.83
		48,084.94	48,553.38	51,887.41	52,661.56

800 RESPONDENT'S EXHIBIT NO. 10.

SCHEDULE IV.

EXPLANATION OF ITEM 4 SCHEDULE III DEPRECIATION SCHEDULE AS RETURNED BY CITRIN-KOLB OIL COMPANY IN ITS INCOME TAX RETURN AS APPLICABLE TO THE DISTRIBUTION OF GASOLINE AT WHOLESALE

Item	Location		Rate	1937	1938	1939	1940
1.	Livernois & Lyndon						
1-A.	Land	30,000.00	0				
1-B.	Building ...	12,620.00	4%	500.04	500.04	500.04	500.04
2.	Warehouse						
2-A.	Land	20,000.00	0				
2-B.	Building ...	23,762.28	4%	475.25	950.50	950.50	950.50
3.	Meyers & Lyndon						
	Land	6,904.30	0	0	0	0	0
	Total			975.29	1,450.54	1,450.54	1,450.54

801 RESPONDENT'S EXHIBIT NO. 11.

SCHEDULE V

EXPLANATION OF ITEM 5, IN SCHEDULE III DEPRECIATION OF EQUIPMENT USED BY CITRIN-KOLB OIL COMPANY IN THE DISTRIBUTION OF GASOLINE AT WHOLESALE

No.	Item	Cost	Rate	Depreciation 1937	Depreciation 1938	Depreciation 1939	Depreciation 1940
1.	Machinery & Equipment....	12,214.82	6%	1,221.48			
2.	Trucks & Auto............	10,826.27	6%	454.02			
3.	Furniture & Fixtures.......	2,239.21	6%	223.92			
		25,280.30		1,899.42			
4.	Machinery & Equipment....	15,149.21	6%		1,519.50		
5.	Trucks & Auto............	11,332 23	6%		596.62		
6.	Furniture & Fixtures.......	2,666.13	6%		266.13		
		29,147.57			2,382.25		
7.	Machinery & Equipment....	19,589.85	6%			1,955.67	
8.	Trucks & Auto............	12,595.46	6%			1,661.76	
9.	Furniture & Fixtures.......	3,456.94	6%			341.55	
		35,642.25				3,958.98	
10.	Machinery & Equipment....	23,684.94	6%				2,463.67
11.	Trucks & Auto............	14,501.44	6%				1,508.10
12.	Furniture & Fixtures.......	3,492.99	6%				343.35
		41,679.37					4,315.12

802 RESPONDENT'S EXHIBIT NO. 12.

SCHEDULE VI.

EXPLANATION OF ITEM 6 SCHEDULE III. OBSOLESCENCE ESTIMATE OF ITEMS USED IN THE DISTRIBUTION OF GASOLINE AT WHOLESALE

Item	Location	Cost	Income Tax Rate	Actual Rate	Added Depreciation 1937	1938	1939	1940
1.	Dexter & Fenkel....	10,000.00	2½%	10%	750.00	750.00	750.00	750.00
2.	Wyoming & Eaton...	5,647.10	2½%	10%	423.53	423.53	423.53	423.53
3.	Linwood & Pingree..	6,287.21	2½%	10%	471.54	471.54	471.54	471.54
4.	Gratiot & Saratoga..	4,267.00	2½%	10%	320.02	320.02	320.02	320.02
5.	#17, 14445 Linwood.	8,212.25	2½%	10%	615.92	615.92	615.92	615.92
6.	Livernois & Sparta..	1,567.58	2½%	10%	117.57	117.57	117.57	117.57
7.	John R. & Horton...	10,146.00	2½%	10%			760.95	760.95
8.	Warehouse	36,437.72	0	6%	2186.26	2186.26	2186.26	2186.26
	See note in Explanation				4884.84	4884.84	5645.79	5645.79

803 RESPONDENT'S EXHIBIT NO. 13.

SCHEDULE VII.

EXPLANATION OF ITEM 7. SCHEDULE III.
INTEREST ON USE OF MONEY INVESTED BY CITRIN-KOLB OIL COMPANY TO OPERATE THE BUSINESS OF DISTRIBUTING GASOLINE AT WHOLESALE

Item	1937	1938	1939	1940
1. Cash on Hand	2,720.27	2,866.05	3,636.02	2,643.77
2. Cash in Bank	669.78	480.24	30.18	65.52
3. Accounts Receivable	32,826.19	27,337.35	30,690.49	26,642.33
4. Investing of Merchandise	27,209.75	27,823.63	29,800.92	27,413.46
5. Personal Property	25,280.30	29,147.57	35,642.25	41,679.37
6. Prepaid Items	2,780.02	2,357.98	2,006.40	1,567.16
	91,486.41	90,012.82	101,806.26	100,011.61
Less				
7. Accounts Payable	44,896.45	40,614.77	43,405.39	44,674.06
8. Lease Deposits	8,074.00	14,586.90	5,736.90	1,436.90
9. Coupons for Gasoline	639.08	341.82	167.45	192.33
10. Notes Payable	6,060.00	7,000.00	5,000.00	
	59,609.53	62,543.49	54,309.94	46,303.29
	31,876.88	27,469.33	47,496.52	53,308.52
Net charges @ 6%	1,912.61	1,648.16	2,849.79	3,222.50

804 RESPONDENT'S EXHIBIT NO. 14.

SCHEDULE VIII.

EXPLANATION OF ITEM 8. SCHEDULE III.
COST OF MONEY INVESTED FOR THE PURCHASE OF PERSONAL PROPERTY BY THE CITRIN KOLB OIL COMPANY AND USED IN THE DISTRIBUTION OF GASOLINE AT WHOLESALE.

	Item	Cost	Less Depreciation	Int.	Rate	Net
1.	1937	25,280.30	14,712.79	6%	882.77	
2.	1938	29,147.57	15,360.32	6%	921.62	
3.	1939	35,642.25	17,937.57	6%	1,076.25	
4.	1940	41,679.37	19,659.57	6%	1,179.57	

805 RESPONDENT'S EXHIBIT NO. 15.

SCHEDULE IX.

EXPLANATION OF ITEM 9 SCHEDULE III
INTEREST ON INVESTMENT FOR REAL ESTATE USED BY CITRIN-KOLB OIL COMPANY IN THE DISTRIBUTION OF GASOLINE AT WHOLESALE.

Item	Location	Year	Cost	Less Depreciation Charged	Net	Rate	Charge
1.	Livernois & Lyndon	1937	42,620.00				
2.	14445 Linwood		43,762.28				
3.	Meyers & Lyndon		6,904.30	0			
			93,286.58	1,705.10	91,538.53	6%	5,492.31
	Established cost of	1938	91,538.53	1,405.54	90,087.99	6%	5,405.28
	Established cost of	1939	90,087.99	1,450.54	88,637.45	6%	5,318.25
	Established cost	1940	88,637.45	1,450.54	87,186.91	6%	5,231.21

806 RESPONDENT'S EXHIBIT NO. 16.

SCHEDULE X.

COMPUTATION OF GASOLINE SOLD FROM 1936 TO 1940 INCLUSIVE, AT RETAIL AND WHOLESALE, AND THE PERCENTAGES OF EACH.

	1936	1937	1938	1939	1940
1. Retail Sales Thru Outlets operated by the Company	593,834	840,502	466,593	579,906	374,399
2. Wholesale Sales to Retail Outlets	1,276,310	4,383,526	5,238,207	4,283,762	4,736,160
3. Wholesale Sales to Consumers	144,214	211,391	243,136	309,324	195,321
4. Total Wholesale Sales, #2 plus #3	1,420,524	4,594,917	5,501,243	4,593,086	4,931,481
5. Total Sales, #1 plus #4	2,014,358	5,435,419	5,947,836	5,172,992	5,305,880
6. % of Retail Sales thru Outlets operated (Item #1) to Total Sales (Item #5) (#1 Divided by #5)	.2948	.1546	.0727	.1008	.0650
7. % of Total Wholesale Sales (Item #4) to Total Sales (Item #5) (#4 Divided by #5)	.7052	.8454	.9273	.8992	.9350

807 RESPONDENT'S EXHIBIT NO. 17.

SCHEDULE XI.

SCHEDULE OF GALLONAGE OF GASOLINE PER PUMP AND PER STATION AS DISTRIBUTED BY THE OUTLETS OF THE CITRIN KOLB OIL COMPANY.

Total # Stations	Year	Total Gallonage	Rate Per Station	No. of Pumps	Average Per Pump
14	1936	2,014,358	143,883	48	41967
32	1937	5,435,419	169,860	118	46063
41	1938	5,947,836	145,069	154	38622
52	1939	5,172,992	99,480	242	21376
51	1940	5,305,880	104,037	280	18949

MOTOR VEHICLE LICENSE

No.

●	Week Ending Sept. 14, 1939	Week Ending Dec. 7, 1939	●
●	Week Ending Sept. 21, 1939	Week Ending Dec. 14, 1939	●
●	Week Ending Sept. 28, 1939	Week Ending Dec. 21, 1939	●
●	Week Ending Oct. 5, 1939	Week Ending Dec. 28, 1939	●
●	Week Ending Oct. 12, 1939	Week Ending Jan. 4, 1940	●
●	Week Ending Oct. 19, 1939	Week Ending Jan. 11, 1940	●
●	Week Ending Oct. 26, 1939	Week Ending Jan. 18, 1940	●
●	Week Ending Nov. 2, 1939	Week Ending Jan. 25, 1940	●
●	Week Ending Nov. 9, 1939	Week Ending Feb. 1, 1940	●
●	Week Ending Nov. 16, 1939	Week Ending Feb. 8, 1940	●
●	Week Ending Nov. 21, 1939	Week Ending Feb. 15, 1940	●
●	Week Ending Nov. 30, 1939	Week Ending Feb. 22, 1940	●

Be sure your card is punched in proper blank space above before [illegible] day of award.

ANUFFL Spencer

W/C

Station Attendant.

Void If Purchase or Consideration is Required

MOTORIST'S

Qualifying Card

• • •

All You Have To Do To Be Eligible To Win

FREE GASOLINE

Is To Have This Card

PUNCHED EACH WEEK

At Any

HI-SPEED GAS STATION

— in —

WAYNE COUNTY

Awards Made Locally Each Week by

Wilson Oil Corp. — Detroit
Highland Oil Corp. — Detroit

(p 4807)

HOW TO WIN FREE GASOLINE

Every Motorist Has An Equal Opportunity To Win A Weekly Award Simply By Driving Carefully and Keeping This Card Punched

ANY GOOD DRIVER MAY WIN!

808

RESPONDENT'S EXHIBIT NO. 18-A.

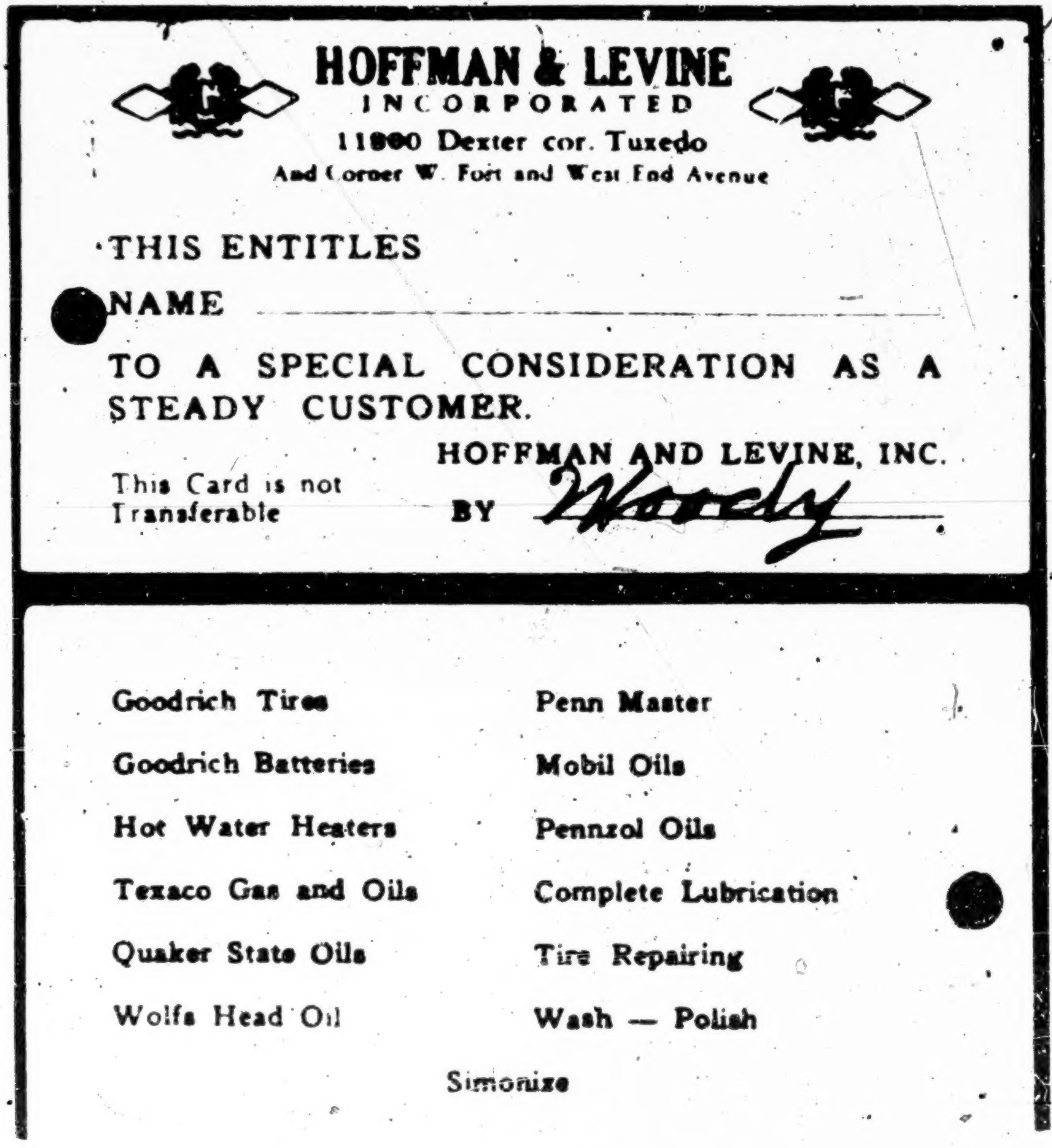
Competitive
All Stations

FEDERAL TRADE COMMISSION
Docket No. 4389 RESPONDENT'S Exhibit No. 18-I
IN MATTER OF Standard Oil Co
DATE 5/1/41 WITNESS Biber
REPORTER Brandenburg

(p 4805)

1936
TEXACO GASOLINE

Cards similar to this photostat given out by Hoffman & Levine Inc. in early 1936.



HOFFMAN & LEVINE
INCORPORATED
11000 Dexter cor. Tuxedo
And Corner W. Fort and West End Avenue

THIS ENTITLES

NAME

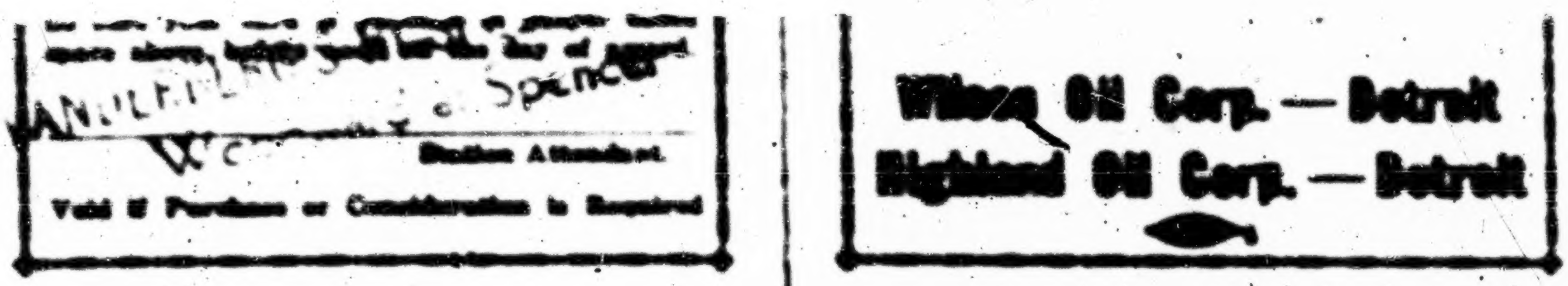
TO A SPECIAL CONSIDERATION AS A STEADY CUSTOMER.

HOFFMAN AND LEVINE, INC.
BY Woody

This Card is not Transferable

Goodrich Tires	Penn Master
Goodrich Batteries	Mobil Oils
Hot Water Heaters	Pennzol Oils
Texaco Gas and Oils	Complete Lubrication
Quaker State Oils	Tire Repairing
Wolfs Head Oil	Wash — Polish

Simonize



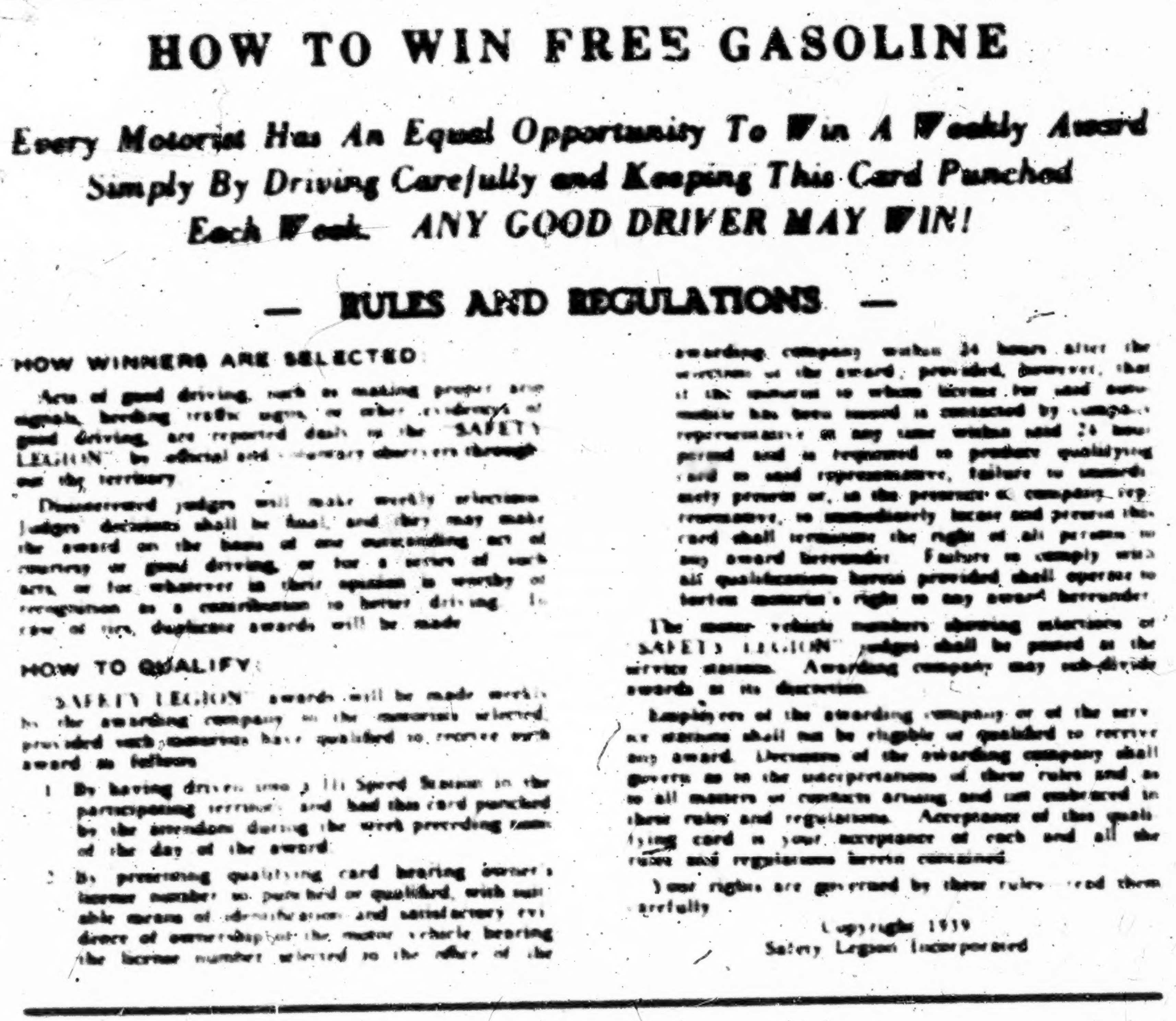
[illegible] space above, before [illegible] day of award

HANDLER[illegible] Spencer

W[illegible]
Station Attendant

Void if Purchase or Consideration is Required

Wilson Oil Corp. — Detroit
Highland Oil Corp. — Detroit



HOW TO WIN FREE GASOLINE

Every Motorist Has An Equal Opportunity To Win A Weekly Award Simply By Driving Carefully and Keeping This Card Punched Each Week. ANY GOOD DRIVER MAY WIN!

— RULES AND REGULATIONS —

HOW WINNERS ARE SELECTED

Acts of good driving, such as making proper arm signals, heeding traffic signs, or other evidences of good driving, are reported daily to the "SAFETY LEGION" by official and voluntary observers throughout the territory.

Disinterested judges will make weekly selections. Judges' decisions shall be final, and they may make the award on the basis of one outstanding act of courtesy or good driving, or for a series of such acts, or for whatever in their opinion is worthy of recognition as a contribution to better driving. In case of ties, duplicate awards will be made.

HOW TO QUALIFY:

"SAFETY LEGION" awards will be made weekly by the awarding company to the motorists selected, provided such motorists have qualified to receive such award as follows:

1. By having driven into a [illegible] Speed Station in the participating territory and had this card punched by the attendant during the week preceding noon of the day of the award.
2. By presenting qualifying card bearing owner's license number so punched or qualified, with suitable means of identification and satisfactory evidence of ownership of the motor vehicle bearing the license number selected to the office of the awarding company within 24 hours after the selection of the award; provided, however, that if the motorist to whom license for said automobile has been issued is contacted by company representative at any time within said 24 hour period and is requested to produce qualifying card to said representative, failure to immediately present or, at the pleasure of company representative, to immediately locate and present this card shall terminate the rights of all persons to any award hereunder. Failure to comply with all qualifications herein provided shall operate to forfeit motorist's rights to any award hereunder.

The motor vehicle numbers showing selections of "SAFETY LEGION" judges shall be posted at the service stations. Awarding company may sub-divide awards at its discretion.

Employees of the awarding company or of the service stations shall not be eligible or qualified to receive any award. Decisions of the awarding company shall govern as to the interpretations of these rules and as to all matters or contacts arising and not embraced in these rules and regulations. Acceptance of this qualifying card is your acceptance of each and all the rules and regulations herein contained.

Your rights are governed by these rules—read them carefully.

Copyright 1939
Safety Legion Incorporated

4389
Standard Oil Co
18-I
5/1/41
Biber
Brandenburg

Fleetwing dealers - three locations.

YOUR CHOICE OF 1001

PREMIUMS *Free*

Unusually beautiful items. Nationally advertised merchandise such as: Sessions Clocks, General Electric Clocks, Silex Coffee Makers, Oneida Silverware, Nesco Enamelware. All our premiums are the very best money can buy. Yours absolutely free with the purchase of gasoline.

PREMIUMS *Free*

Unusually beautiful items. Nationally advertised merchandise such as: Sessions Clocks, General Electric Clocks, Silex Coffee Makers, Oneida Silverware, Nesco Enamelware. All our premiums are the very best money can buy. Yours absolutely free with the purchase of gasoline.

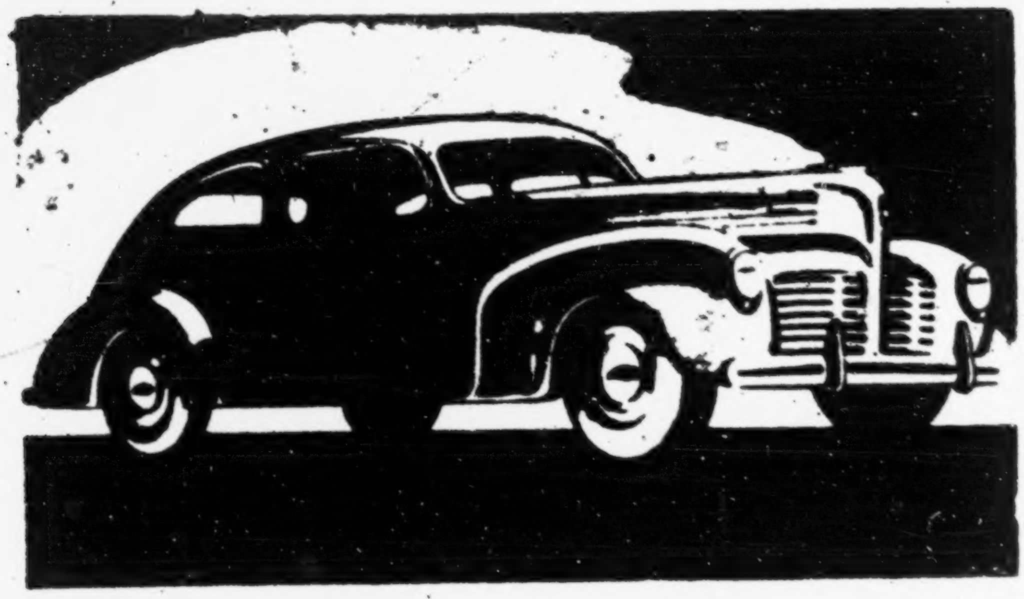
LIBERTY SERVICE STORES

[illegible] AVE. COR. ST. JEAN
[illegible] OPP. FORD HOSPITAL
[illegible] JUST EAST OF LIVERNOIS

4389 ——— 18-O
Standard Oil Co
5/[illegible]/41 Biber
Brandenburg

FLEETWING DEALERS

Detroit Metropolitan Area.



Here's how you may

WIN

A NEW

1940

4389 ——— 18-Q
Standard Oil Co
5/2/41 Biber

Here's how you may

WIN

A NEW

1940

Automobile!

4389 ——— 18-Q
Standard Oil Co
5/2/41 Biber
Brandenburg

Note

Page 4810 is blank.

815 RESPONDENT'S EXHIBIT NO. 18-R.

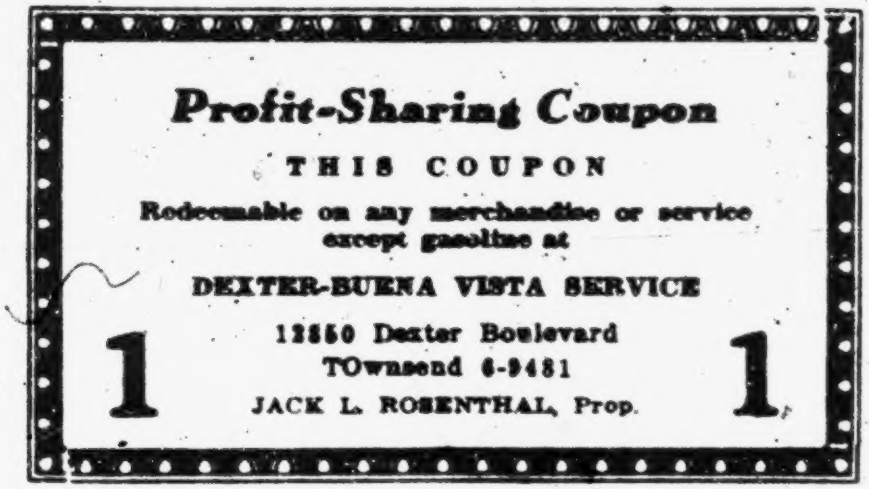
E. Jefferson & Nottingham

818 RESPONDENT'S EXHIBIT NO. 18-U.

Dexter & W. Chicago

DEXTER - BUENA VISTA SERVICE

12850 Dexter Boulevard - Sun dealer.



Profit-Sharing Coupon

THIS COUPON

Redeemable on any merchandise or service except gasoline at

DEXTER-BUENA VISTA SERVICE

12850 Dexter Boulevard
TOwnsend 6-9481
JACK L. ROSENTHAL, Prop.

1 1

Note

Page 4812 is blank.

~~The above shown coupon is given, one with each gallon of gasoline purchased and is redeemable at the above dealer's place of business as stated on the coupon.~~

~~This is a Sun Oil Company leased station.~~

4389 —— 18-2-1
Standard Oil Co
5/2/41 Bibey
Brandenburg

MAR 19 1940

COMPLETE BRAKE AND ELECTRICAL SERVICE

CHICAGO DEXTER

SERVICE

CORNER CHICAGO & DEXTER BLVD.

WE NEVER CLOSE PHONE TYLER 4-7979

NAME Cash DATE 1-9-41

ADDRESS PHONE

CAR MAKE	LICENSE NO.	MILEAGE

7 Ga 8/10c

FEDERAL TRADE COMMISSION

Docket No. 4389 ~~COMMISSION'S~~ RESPONDENT'S Exhibit No. 18-2-3

IN THE MATTER OF Standard Oil Co.

DATE 5/2/41 WITNESS Biber

REPORTER Brandenburg

Barry

65847

Nº 6837

CHECKED BY 18-2-3 ATTENDANT 825

NP-1001

(p. 4815)

FRANK J. CAREY

2304 VERNOR HIGHWAY E. CLIFFORD 1736

US TIRES US

SUPER SERVICE

Silver Edge Raybestos BRAKE LINING

DETROIT, MICH.

No. 12400 CUST. ORDER NO. **Date** 1-30 19 41

Name

Address

Cash	Charge	Rec'd on Acc't	Paid Out	Sold by

Qty.		DESCRIPTION	Amount:	
	7	Ethyl Gas	1	04
		TAX		
		TOTAL	1	0

FEDERAL TRADE COMMISSION
Docket No. 4389 ~~COMMISSION'S~~ RESPONDENT'S Exhibit No. 18-2-4
IN THE MATTER OF Standard Oil Co.
DATE 5/2/41 WITNESS Biber
REPORTER Brandenburg

Gale

Received by 18-2-4

N. C. C. P. Co. Pat. Nos. 1,372,460-1,418,481—A. M. Richards & Co., Trinity 1-2770, Detroit, Mich.

(p:4816)

Date 1-29 1941

M

No. FEDERAL TRADE COMMISSION

Docket No. 4389 ~~COMMISSION'S~~ RESPONDENT'S Exhibit No. 18-2-5

Reg. No. Clerk

ACCOUNT FORWARDED

IN THE MATTER OF Standard Oil Co.

DATE 5/12/41 WITNESS Bibel

REPORTER Brandenburg

Gas - 100

Paid

41 Devita + Tar

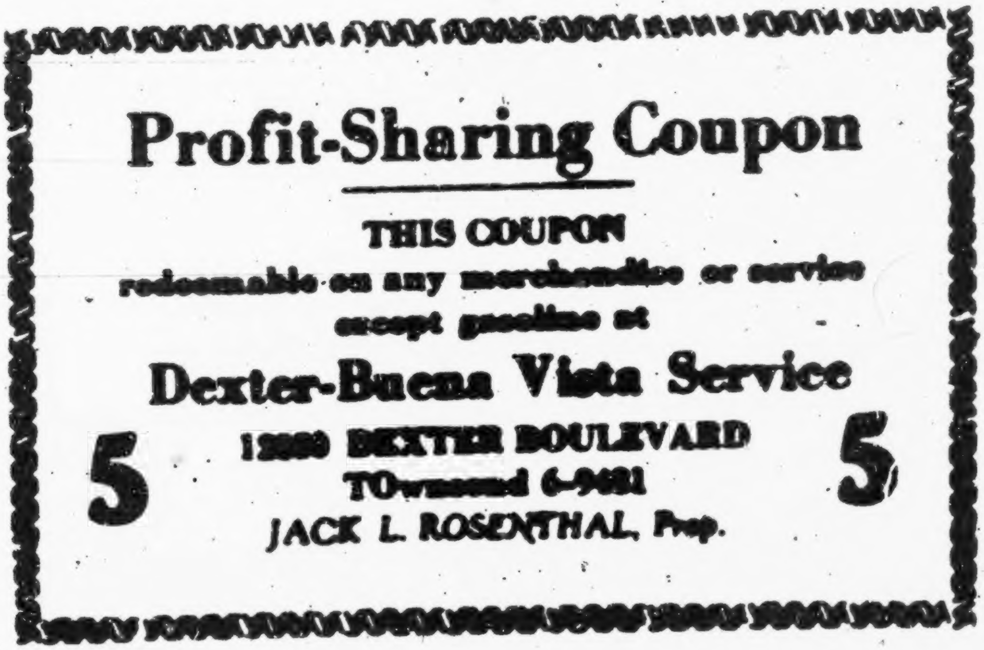
82

Your account stated to date. If error is found, return at once.

18-2-5

P. 4877

Profit Sharing Coupons issued at this station.

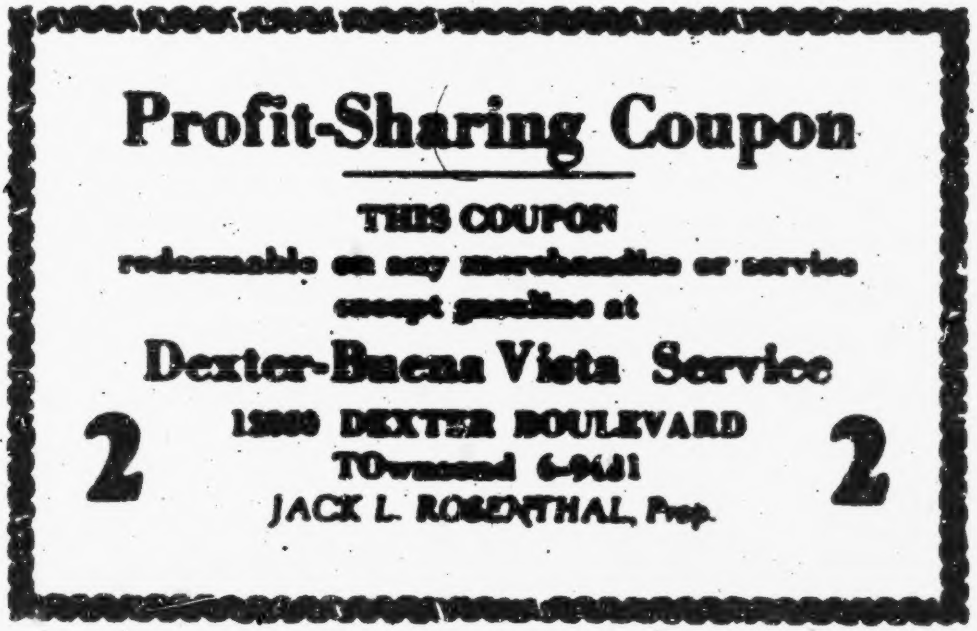


Profit-Sharing Coupon

THIS COUPON
redeemable on any merchandise or service
except gasoline at

Dexter-Buena Vista Service

5 12880 DEXTER BOULEVARD 5
TOwnsend 6-9681
JACK L. ROSENTHAL, Prop.



Profit-Sharing Coupon

THIS COUPON
redeemable on any merchandise or service
except gasoline at

Dexter-Buena Vista Service

2 12880 DEXTER BOULEVARD 2
TOwnsend 6-9681
JACK L. ROSENTHAL, Prop.

Profit-Sharing Coupon

THIS COUPON
redeemable on any merchandise or service
except gasoline at

Dexter-Buena Vista Service

2 12800 DEXTER BOULEVARD **2**
TOwnsend 6-9481
JACK L. ROSENTHAL, Prop.

SHELL

TOwnsend 6-9481

Dexter-Buena Vista
SUPER SERVICE

12800 DEXTER BLVD.

Detroit, Mich. 3/28 1941

M

Address

1/14

GALS. GASOLINE
QTS. OIL
LBS. GREASE
COMPLETE LUBRICATION
WASH
TIRE REPAIR
ALCOHOL & ANTI-FREEZE
ACCESSORIES

41

RECEIVED

BY

FEDERAL TRADE COMMISSION
File No. 4389 Exhibit No. 18-2-10
In the matter of Standard Oil Co.
Date 5/2/41 Witness Biber
Brandenburg

Note

Page 4818 is blank

Respondent's Exhibit No. 18-Z-21.

832 RESPONDENT'S EXHIBIT NO. 18-Z-11.

John R & Euclid

838 RESPONDENT'S EXHIBIT NO. 18-Z-17.

W. Warren & Brooklyn

841 RESPONDENT'S EXHIBIT NO. 18-Z-21.

Linwood & Pingree

THIS CARD ENTITLES BEARER TO

1½¢ Cash Discount

ON EACH GALLON OF

BLUE SUNOCO

Special Discount on all Standard Make Tires, Batteries Etc.

LINWOOD TIRE & BATTERY SERVICE

13842 LINWOOD AT GRAND

OPEN ALL NIGHT TOWNSEND 7-8588

(p. 4820)

FEDERAL TRADE COMMISSION

Docket No. 4389 COMMISSION'S RESPONDENT'S Exhibit No. 18-Z-27

IN THE MATTER OF Standard Oil Co.

DATE 5/2/41 WITNESS Biber

REPORTER Brandenburg

(18-Z-27)

(846)

MARCH, 1940)

849

RESPONDENT'S EXHIBIT NO. 18-Z-30.

Linwood & D. T. R. R.

Note

Page 4822 is blank.
Page 4823 is on Card 70.

Detroit, Michigan
February 6, 1941

FEDERAL TR
Docket No. 4389 RESPONDENT
IN THE MATTER OF Standard Oil 20 ⑤
DATE 4/23/41 WITNESS Ledbetter
REPORTER Goldstein

OPERATING SET-UP
AS OF 12-31-40
WAYNE OIL COMPANY

LEASED AND OPERATED

Dobsons S.S.
8400 W. Chicago
Coy's S.S., 10618 W
Jefferson, River Rouge

LEASED AND SUB LEASED

Tracey's S.S.
20000 W.McNichols
Hawley's S.S.,
19111 Grand River
Reeve's S.S.,
8001 Schaefer
Harold's S.S.,
13100 Livernois
C. & P. S.S.,
19606 Fenkell
Wilson's S.S.,
15140 Greenfield
Wyoming & Brandt Serv.,
6470 Wyoming
McCoskey's S.S.,
2945 S. Fort
Laymons S.S.,
10141 Puritan

DEALER CONTRACTS

Cora's S.S.
13241 Fenkell
John V. S.S.,
1826 S.Fort
West's Standard Serv.,
1245 E. 8 Mile
Tuck's Standard Serv.
22151 Fenkell
Lucas S.S.
12841 Puritan
Zenith S.S.,
18241 Schoolcraft
S.& W.Serv.,
2782 Ewald Circle
Joe Theys Serv.,
Livernois & Eaton
J.W. Motor Sales,
14700 Michigan Ave.
Winder Service
75 Winder St.
Cloutier's S.S.
Harper & Buckingham
Ed's Super Serv.,
Buchanan at Maybury
Rins Stan.Serv.
7 Mile & Tracey

(P. 4824)

Resp. Ex. 2x

Resp. Exh. #23 for Iden.

DUAL OPERATIONS BY SUPPLYING COMPANIES

	(1) Standard Oil				(2) Socony-Vacuum			(3) Texas Co.			(4) Phillips			(5) Shell			(6) Mid-Continent		
		Branded		Unbranded		Branded			Branded			Branded			Branded			Branded	
wn	Direct	Jobbers	Resel-lers	Jobbers	Direct	Jobbers	Resel-lers	Direct	Jobbers	Resel-lers	Direct	Jobbers	Resel-lers	Direct	Jobbers	Resel-lers	Direct	Jobbers	Resel-lers
icago	84.8%	11.0%	1.4%	2.8%	18.3%	39.6%	42.1%	34.8%	24.9%	40.3%	49.7%	44.7%	5.6%	52.6%	-	47.4%			
rgo	53.0	-	47.0	-	67.0	-	33.0	76.0	-	24.0									
neapolis-St.Paul	92.7	-	0.[illegible]	6.[illegible]	73.4	10.0	7.6	86.5	8.[illegible]	4.9	83.1	16.9	-	75.4	20.2%	4.4			
. Louis	66.9	33.1	-	-	42.3	56.4	1.3	96.8	0.6	2.6	65.5	34.5	-	84.6	15.4	-			
troit	81.7	18.3						75.6	11.4	13.0	(7) GULF (Branded) 53.4	17.3 (unbranded) 17.3	12.0	96.6	-	3.4			
lwaukee	92.0	-	-	8.0	85.2	13.2	1.6				(4) PHILLIPS 56.8	43.2	-	(8) CITIES SERVICE 95.3	4.7	-			
rand Rapids	83.1	15.8	1.1	-				83.3	16.7	-				50.0	50.0	-			
ohita	97.0	-	3.0	-	54.0	46.0	-	86.0	-	14.0	83.0	17.0	-	(9) CONTINENTAL 53.0	47.0	-			
nsas City	51.4	49.6	-	-	55.0	32.0	13.0	(10) SKELLY 58.0	42.0	-	54.0	22.0 24.0 (Unbranded)	- -	26.0	74.0	-			
s Moines	87.4	7.6	5.0	-				72.4	27.6	-	97.6	-	2.4				91.0%	9.0%	-
ioux City	100.0	-	-	-	83.0	6.0	11.0							48.0	-	52.0	98.7	-	1.3

mpiled by:
C.Marshall
15-41

~~[illegible]~~

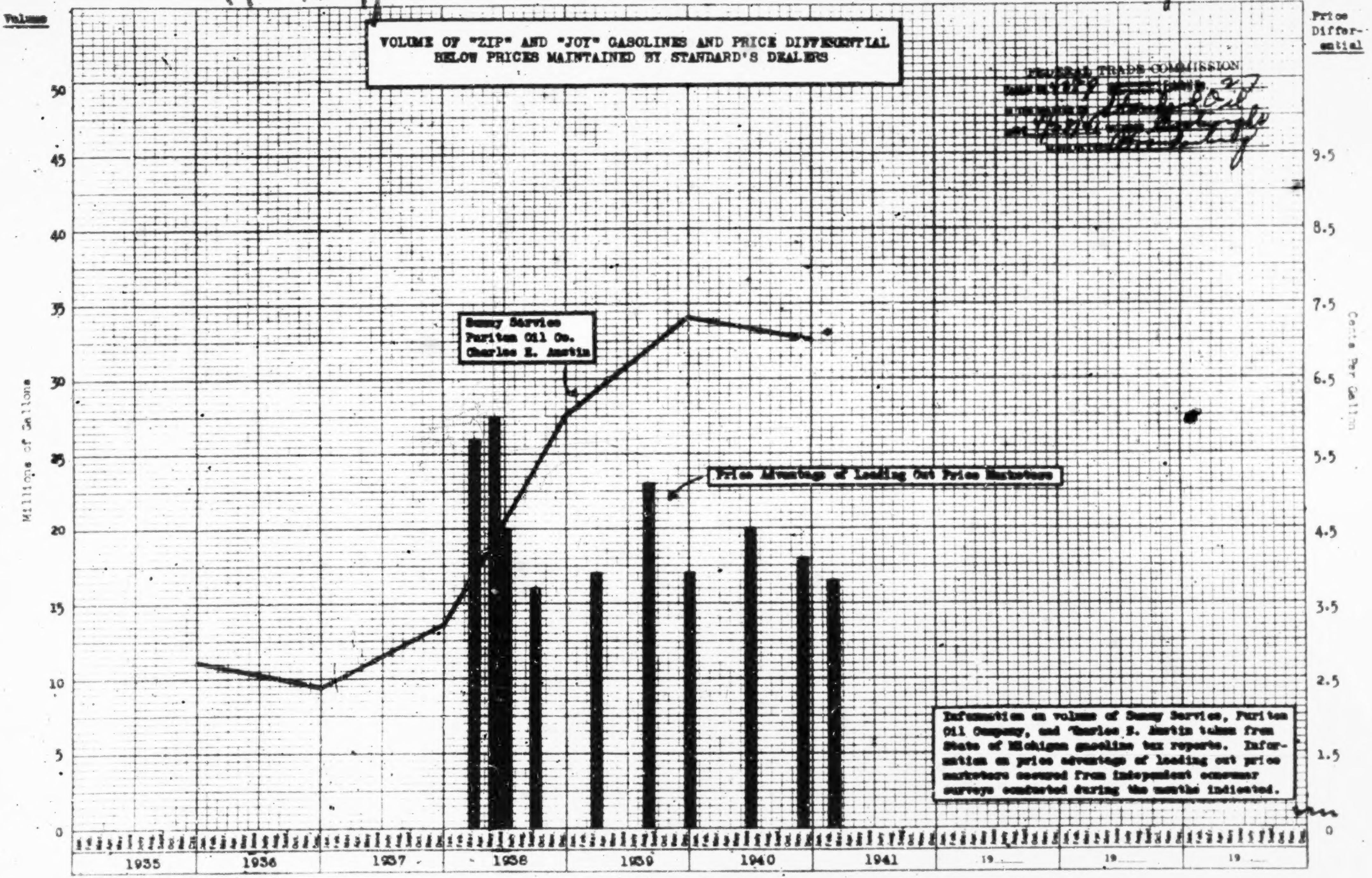
~~Resp. Ex. 23~~

Note: Pages 4826-4828 are on Card 70

(p. 4829)

Reg. Ex 27

VOLUME OF "ZIP" AND "JOY" GASOLINES AND PRICE DIFFERENTIAL BELOW PRICES MAINTAINED BY STANDARD'S DEALERS



Sunny Service
Puritan Oil Co.
Charles E. Austin

Price Advantage of Leading Cut Price Marketers

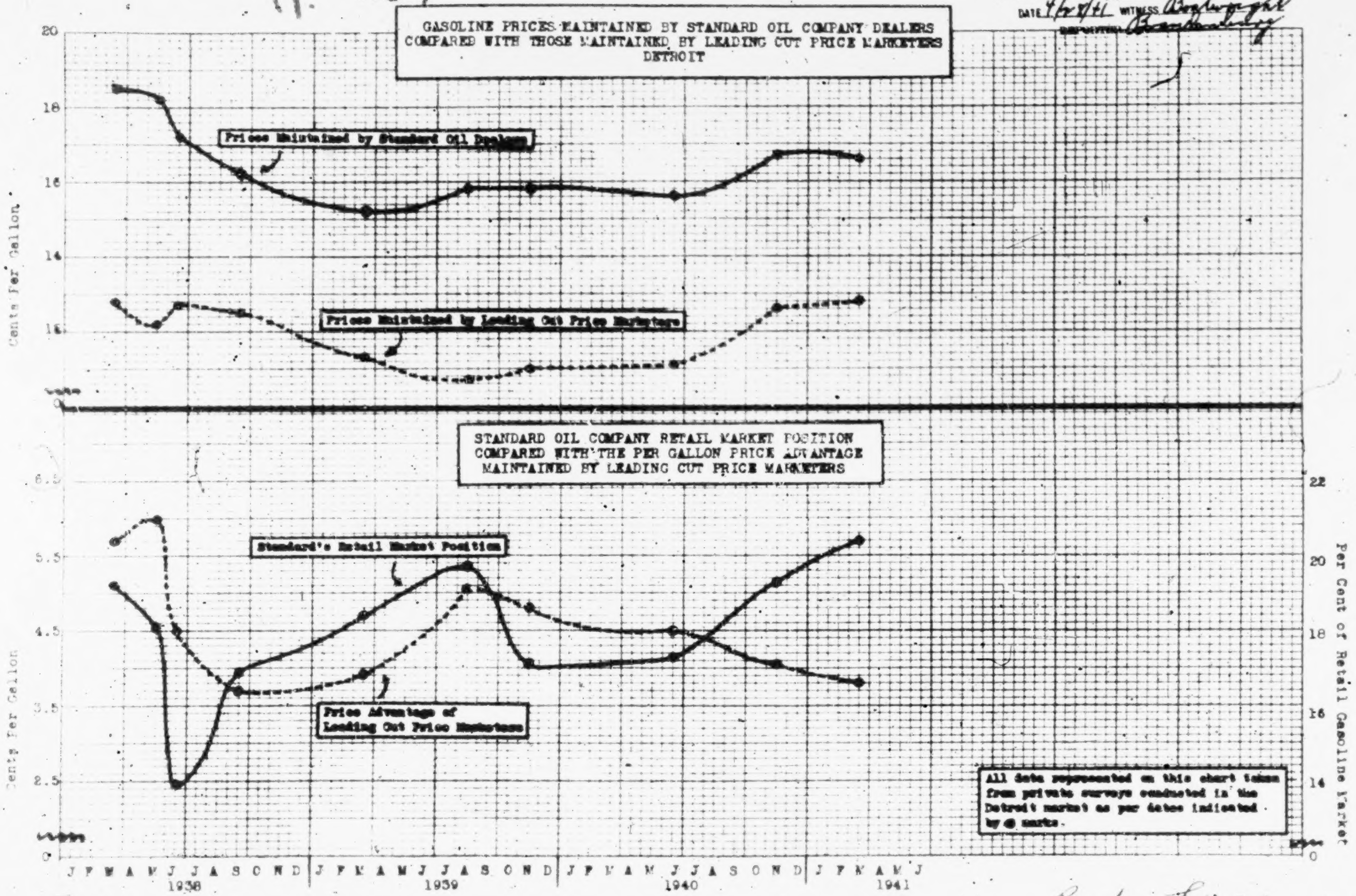
Information on volume of Sunny Service, Puritan Oil Company, and Charles E. Austin taken from State of Michigan gasoline tax reports. Information on price advantage of leading cut price marketers secured from independent consumer surveys conducted during the months indicated.

FEDERAL TRADE COMMISSION
[illegible] 27
Standard Oil

* 1940 - Estimated on Basis of 11 Months actual.

(p. 4830)

FEDERAL TRADE COMMISSION
Docket No. 4389 Respondent's Exhibit No. 28
IN THE MATTER OF Standard Oil
DATE 4/28/41 WITNESS Boatwright



All data represented on this chart taken from private surveys conducted in the Detroit market as per dates indicated by ◆ marks.

Resp. Ex. 28

Note

Page 4831 and 4832 are on Card 70;

Page 4833 is on Card 71;

Page 4834 is blank.

877 RESPONDENT'S EXHIBIT NO. 30.

Gasoline Volume

State of Michigan Tax Inspection Reports

Gallons

	Sunny Service	Puritan	Chas. E. Austin	Total
1935	11,103,649	—	—	11,103,649
1936	9,360,529	—	—	9,360,529
1937	12,809,433	692,050	—	13,501,483
1938	—	12,225,571	15,335,530	27,561,101
1939	—	11,988,340	22,209,168	34,197,508
1940	—	12,972,583*	19,677,323*	32,649,906*

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* Estimated on basis of 11 months gain or loss.

878 RESPONDENT'S EXHIBIT NO. 31-A.

SCHEDULE "A."

Differences in Certain Marketing Expense Items Incurred By Distributing Through Regular Reseller Outlets Versus Distributing Through Ned's Auto Supply Company—1937.

	Regular Reseller Business	Ned's Auto Supply Company	Difference of Marketing Costs
	¢ Gal.	¢ Gal.	¢ Gal.
1. Delivery Cost			
(a) Salaries—Drivers	.114¢	.076¢	.038¢
(b) Equipment	.049	.038	.011
2. Marketing Expense Items Not Influenced by Ned's Auto Supply Company			
(a) Sales Promotion	.016	—	.016
(b) Other	.084	—	.084
3. Semi-Direct Expense Items Not Incurred in Handling the Volume of Ned's Auto Supply Company	.017	—	.017
4. Selling Cost	.079	.005	.074
5. Dispensing Equipment Loaned	.092	.016	.076
6. Advertising Cost	.238	.025	.213
Total	.689	.160	.529

879 RESPONDENT'S EXHIBIT NO. 31-B.

Explanation and Procedure Used in Determining Differences in Marketing Cost Incurred by the Standard Oil Company of Indiana in Serving Ned's Auto Supply Units With Our Equipment—September, 1936 Through February, 1938.

I. Delivery Cost Differences

1. Coal per delivery on a full load basis.

A. Labor Cost Differences

a. Source of information: Forms 018 showing size of dump and time for delivery by trucks No. 34270 and 29525, year 1940. The cost per hour of 95.2¢ was obtained from the Detroit Division which reflects maximum under union contract.

b. Procedure: A sample of Form 018 tickets for full load deliveries on which time consumed in making the delivery could be determined accurately, was studied to measure driver's time per load. Any questionable time periods, such as those that might include a lunch period, were omitted. On this basis, the following calculations were made:

Truck Number	34270	29525	Average
Number of 018's studied	94	200	
Number of gallons	143,162	308,400	451,562
Time in minutes	6,043	14,925	20,968
Gallons per hour	1,421.4	1,239.6	1,292.4
Cost per hour—Driver's Salary	95.2¢	95.2¢	95.2¢
Cost per gallon	.0670¢	.0768¢	.074¢
Plus 3% Federal Insurance and Unemployment Tax			.002
			.076¢

880 RESPONDENT'S EXHIBIT NO. 31-C.

2. Cost per delivery on an average reseller dump basis.

a. Source of information: Tank truck efficiency reports maintained in the Detroit Division for the months of December, 1939 and March, June, and September, 1940. These months were used because the reports indicated above were compiled only on a quarterly basis.

b. Procedure: In order to obtain driver's salary cost per gallon for delivering gasoline to the average reseller in Detroit in the year 1940, the total delivery time of trucks used for gasoline only out of Scotten, Lycaste, and North Detroit plants was used. These plants were selected because they were the source of supply for Ned's Outlets in 1937. This time was extended by 95.2¢ per hour the prevailing wage to tank truck drivers in Detroit, and divided by the volume delivered to secure a labor cost per gallon.

	Scotten Avenue	Lycaste	North Detroit	Total
Hours (1006-2006)	4,510	2,085	1,398	7,993
Hourly cost—Driver's salary	95.2¢	95.2¢	95.2¢	95.2¢
Cost for total time	$4,293.76	$1,984.92	$1,330.90	$7,609.58
Gallons delivered	3,918,796	1,763,060	1,195,109	6,876,965
Cost per gallon	.110¢	.113¢	.111¢	.111¢
Plus 3% Federal Insurance and Unemployment Tax				.003
				.114¢
Savings in Driver's Salary Cost for Delivery to Ned's				.038¢

881 RESPONDENT'S EXHIBIT NO. 31-D.

B. Equipment Cost Differences

1. Source of information: Maintenance costs were obtained from Machine Shop records.

Depreciation rates used are those established by the Company.

Goods used—consolidated manufacturing cost, actual transportation and State and Federal taxes.

2. Procedure: The operating and maintenance costs on the same two trucks, Nos. 34270 and 29525, were compiled from the above sources for the full year 1940. Annual costs divided by hours of operations gave an equipment cost per hour. The per-hour cost of operation was divided by hourly outputs to obtain the per-gallon cost on a full dump delivery basis and the per-gallon cost while serving all resellers.

Truck Number	34270	29525
Investment—Chassis	$2,437.49	$3,007.37
Investment—Tank	738.73	550.97
Depreciation on chassis @ 12%	292.50	360.88
Depreciation on tank @ 5%	36.94	27.55
Gasoline used—1,887 gal. @ 9.84¢ per gal.	185.68	
2,589 gal. @ 9.84¢ per gal.		254.76
Motor Oil used—77 qts. @ 3.77¢ per qt.	2.90	
112 qts. @ 3.77¢ per qt.		4.22
License	139.75	152.25
Casing, Tube, and Battery repairs	37.89	40.13
Machine Shop repairs	225.04	243.21
Miscellaneous expense	20.46	39.73
Total Cost	$ 941.16	$1,122.73

882 RESPONDENT'S EXHIBIT NO. 31-E.

Analysis of Form 018 indicated that the time per ticket by Truck No. 34270 was 64.3 minutes on full dump deliveries and 87.8 minutes on multiple dumps. Comparable time consumed by Truck No. 29525 in making a full dump delivery was 74.6 minutes; on multiple dumps, 107.8 minutes. Calculations were as follows:

Truck Number	34270	29525	Average
Single Dumps			
Number of tickets	94	200	
Time consumed, minutes	6,043	14,925	
Time per ticket, minutes	64.3	74.6	71.3
Multiple Dumps			
Number of tickets	130	210	
Time consumed, minutes	11,412	22,654	
Time per ticket, minutes	87.8	107.8	100.2
Total Time for Deliveries			Total
Single dump			
34270—190 @ 64.3 min.	12,217		12,217
29525—618 @ 74.6 min.		46,103	46,103
Multiple dump			
34270—1172 @ 87.8 min.	102,902		102,902
29525—872 @ 107.8 min.		94,002	94,002
Total minutes	115,119	140,105	255,224
Total hours	1,919	2,335	4,254

883 RESPONDENT'S EXHIBIT NO. 31-F.

Total Equipment Cost.

Truck No. 34270

$$\frac{\$\ 941.16}{1{,}919}\ 49.04¢\text{ per hour.}$$

Truck No. 29525

$$\frac{\$1{,}122.73}{2{,}335}\ 48.08¢\text{ per hour.}$$

Total

$$\frac{\$2{,}063.89}{4{,}254}\ 48.52¢\text{ per hour.}$$

The average equipment cost per hour on the above trucks was divided by the average hourly output for single dump deliveries as determined from our sample analysis, which resulted in a cost-per-gallon as follows:

Average Hourly Cost	48.52¢
Average Hourly Output	1,292.40 gallons
Average Cost per Gallon	.038¢

To secure the equipment cost per gallon for delivery to the rank and file of retail outlets, the annual cost for the two trucks was divided by the total annual output.

Annual Cost	$2,063.89
Total Annual Output	4,228,839 gallons
Average per Gallon Cost	.049¢

Savings in Equipment Cost for Delivery to Ned's . . . .011¢

884 RESPONDENT'S EXHIBIT NO. 31-G.

II. Marketing Expense Items Not Influenced By Ned's Auto Supply Company.

A. Sales Promotion.

Our business association with Ned's Auto Supply Company was such that this Company assumed no responsibility for sales promotion activity. Accordingly, the following expense items which are allocated to our various channels of marketing upon a distribution of time basis were taken from Form 189, "Comparative Statement of Expense," for the year 1937 and divided by tank wagon reseller gallonage, excluding volume sold to Ned's Auto Supply Company, to secure the marketing cost saving on a per gallon basis.

Account No.	Explanation	Amount
1002	Salaries—Sales Promotion	$ 6,597.25
1003	Salaries—Sales Promotion Others	3,294.42
1243 & 1244	Federal Insurance and Unemployment Insurance Taxes (3% of the above salary items)	296.75
1031	Traveling Expense—Sales Promotion	235.92
1046	Operation and Maintenance of Vehicles—Sales Promotion	161.41
1101	Depreciation Expense—Vehicles—Sales Promotion	80.00
	Total Expense	$10,665.75
	Total Reseller Gallonage, excluding the volume of Ned's Auto Supply Company	66,388,527 gallons

Sales Promotion Expense Not Incurred .... .016¢

885 RESPONDENT'S EXHIBIT NO. 31-H.

B. Other.

In addition to the Sales Promotion items of expense, there are certain other marketing expense items of an overhead nature not influenced by Ned's Auto Supply business. These are:

Account No.	Explanation	Amount
1001	Salaries—Supervision—Others	$ 4,550.06
1215	Expense—Salaries—Others	8,912.32
1243 & 1244	Federal Insurance and Unemployment Insurance Taxes	403.87
1054	Operation and Maintenance of Vehicles—All Other (Other Than Office)	280.89
1066	Miscellaneous Operating Expense	40,142.68
1084	Station Safety Expense—Salaries and All Other Expenses	1,343.24
1205	Office Expense—Operation and Maintenance of Vehicles—Office Automobiles	221.63
1216	Expenses—Traveling Expenses—Others	372.22
1217	Expenses—Operation and Maintenance of Vehicles—Automobiles—Others	534.22
1220	Expenses—Employment Department—Salaries and All Other Expenses	2,231.16
1107	Depreciation Expense of Vehicles—All Other (Other Than Office)	193.86
	Total-Expense	$59,186.15

The Federal Insurance and Unemployment Insurance taxes of 3% were not applied to items 1084 and 1220 as these expenses include cost other than salary expense.

886 RESPONDENT'S EXHIBIT NO. 31-I.

Wherever possible any of the above expense items are charged directly to the channels affected. However; the major portion of these expense items are prorated on a straight gallonage basis among channels. The tank wagon volume delivered to Ned's Auto Supply was included in the gallonage used to prorate these items to our marketing expense statement, Form 189, therefore the above items were divided by the sum total of the reseller gallonage in the Detroit field for the year 1937, or 70,629,027 gallons.

Other Marketing Expense Items Not Influenced by Ned's Auto Supply Company .... .084¢

III. Semi-Direct Expense Items Not Incurred in Handling the Volume of Ned's Auto Supply Company.

In addition to the above marketing expense items, there are others of a semi-direct nature tending to vary with gallonage which are not influenced by sales to Ned's Auto Supply Company. These expense items are charged direct wherever possible, however, in the case of sub-account #1087, 1088 and 1204 some portion is of necessity handled on a pro rata basis. For this reason these expense items are divided by total reseller gallonage of 70,629,027 gallons.

Account No.	Explanation	Amount
1087	General Supplies Used	$ 1,258.94
1088	Station Operating Tools and Equipment	6,013.23
1204	Office Expense Exchange	6,181.50
	Total	$13,453.67

$$\frac{\text{Saving } \$13,453.67}{70,629,027} \ldots\ldots\ldots\ldots .019¢$$

887 RESPONDENT'S EXHIBIT NO. 31-J.

The following items, also of a semi-direct nature, are charged direct to the various sales channels, no one of which would be influenced in its magnitude by volume sold to Ned's Auto Supply. Our divisor in this case, therefore, should be the volume of the reseller channel excluding sales to Ned's Auto Supply.

Account No.	Explanation	Amount
1510	Losses by Bad Debts	$2,782.73
1511	Expense Collecting Bad Debts—Current Year	139.69
1512	Expense Collecting Bad Debts—Prior Years	437.31
1400	Bad Debts Collected—Written Off Prior Years	*4,900.73
	Total	*$1,541.00

$$\frac{\text{Saving }{*}\$1{,}541.00}{66{,}388{,}527} \ldots\ldots\ldots\ldots {*}.002¢$$

Net Saving from Semi-Direct Items.................. .017¢

---

* Denotes red figures.

IV. Selling Cost.

In order to determine the savings in selling expense incurred in serving Ned's Auto Supply Outlets, information was obtained from the Detroit Division covering the salesmen calling on Ned's Auto Supply during the year 1937; together with the expense incurred. The names of the salesmen, together with salary and traveling expense incurred while on the territory covering Ned's Outlets, were obtained from the Detroit office.

888 RESPONDENT'S EXHIBIT NO: 31-K.

1. Source: Salary—payroll records.

Traveling expense—Form 028, Expense Books.

Salesman	Salary Including 3% Insurance and Unemployment Tax	Traveling Expense	Total
L. L. Robinson—3½ months	$ 767.87	$ 50.75	$ 818.62
T. G. Meulenberg—4 months	1,060.90	108.25	1,169.15
Pau Coutchie—4½ months	1,017.38	139.27	1,156.65
Total	$2,846.15	$298.27	$3,144.42

This total was added to car expense, which was obtained as follows:

The investment in salesman's cars in the Detroit Division, year 1937, according to investment records, was $43,085.

Number of salesmen, W. H. Tell's records	69
Average investment per car	$624.42
Total (account #047 taken from Detroit 189, year 1937	$24,525.71

$$\frac{\$24{,}525.71}{\$43{,}085.00} = \text{Maintenance cost per } \$1.00 \text{ investment} \quad 56.92¢$$

Depreciation rate equals 20%, computed according to the Company depreciation rates: Therefore, maintenance cost of each car equals:

$624.42 x 20%	$124.88	Depreciation
$624.42 x 56.92¢	355.42	Operating and Maintenance
Total Operation cost per vehicle	$480.30	

889 RESPONDENT'S EXHIBIT NO. 31-L.

This amount, extended by the time for each individual, is as follows:

L. L. Robinson 3½ mo., 29.17% x $480.30	$140.10
T. G. Meulenberg 4 mo., 33.33% x $480.30	160.09
Paul Coutchie 4½ mo., 37.50% x $480.30	180.11
	$480.30

Total for each salesman:

Salesman	Salary Including 3% Insurance and Unemployment Tax	Traveling Expense	Car Expense	Total
L. L. Robinson	$ 767.87	$ 50.75	$140.10	$ 958.72
T. G. Meulenberg	1,060.90	108.25	160.09	1,329.24
Paul Coutchie	1,017.38	139.27	180.11	1,336.76
Total	$2,846.15	$298.27	$480.30	$3,624.72

However, not all the time of these individuals was spent on calling on Ned's accounts. It was estimated by Mr. Raupagh and Mr. Blough that Robinson spent 35% of his time at Ned's, of which 7% was on gasoline; Meulenberg spent 25%, of which 5% was on gasoline; Coutchie spent 25%, of which 5% was on gasoline. Using these percentage figures against expenses for each of the individual salesman's expense shown above results in a total selling expense for covering Ned's Auto Supply Outlets of $200.41. This expense, divided by Ned's gallonage of 4,240,500 gallons, equals a selling cost at Ned's Outlets amounting to .005¢ per gallon.

Selling Expense Incurred on Reseller Gallonage Other Than Ned's.

1. Source: Reseller channel Form 189, Detroit field, year 1937.

Account No.	Explanation	Amount
1004	Salaries—Salesmen, including 3%	$42,115.74
1032	Traveling Expense—Salesmen	3,988.70
1047	Operation and Maintenance of Vehicles—Salesmen	4,740.65
1102	Depreciation Expense—Vehicles—Salesmen	1,646.00
	Total	$52,491.09

Deducting Ned's expense of $200.41 leaves a total selling expense for reseller gallonage amounting to $52,290.68. This amount, divided by tank wagon reseller gallonage other than Ned's, amounting to 66,388,527, equals .079¢ per gallon.

The saving in selling expense equals...... .079¢ per gallon
Less .005

Saving per gallon.............................. .074¢

V. Dispensing Equipment Loaned.

1. Source: (Obtained from the Detroit Office Form 16)

Total capital investment in equipment at Ned's		$2,878.60
Company depreciation rates at 4%	$115.14	
Detroit Personal Property tax rate of $3.0146 per $100	86.78	

In order to obtain the maintenance cost per dollar of investment, the depreciation expense shown on Equipment Loan Agreement equipment—Detroit Form 189—of $4,305.86 was expanded to 100% to represent the investment in E.L.A. equipment, which amounted to $107,646.50. On this investment, $17,144.69 was spent for maintenance repairs, etc. This equals 15.9¢ cost per dollar of investment. Ned's investment of $2,878.60 extended by this maintenance cost equals $457.70.

891 RESPONDENT'S EXHIBIT NO. 31-N.

These three items total $659.62, which when divided by Ned's gallonage of 4,240,500 gallons, equals .016¢ ~~per~~ gal.

Average Reseller Equipment Cost.

1. Source: Form 189, Detroit Division, year 1937.

Account No.	Explanation	Amount
1070	E.L.A. Expense	$17,144.69
1111	Depreciation Expense—E.L.A.	*4,305.86
1513	Losses by Dismantling—Out of Pocket Expense—E.L.A.	672.31
	Personal Property Taxes $107,646.50 x $3.0146	3,245.11
	Total	$25,367.97
	Less Ned's	*659.62
	Net Total Expense	$24,708.35

---

* Denotes red figures.

This expense was incurred on accounts signed on agreements Nos. 461 and 385. The gallonage distributed by these outlets was secured by deducting the volume sold by Ned's Auto Supply Company, Company Owned Service Stations—Leased, and Privately Owned Service Stations—Leased from the total tank wagon sales through the reseller channel. The residual volume was 26,987,052 gallons.

Cost per gallon $\frac{\$24,708.35}{26,987,052}$ .... .092¢

Saving .... .076¢

VI. Advertising Cost.

The following expense items, taken from Form 189, tank wagon reseller channel, were divided by tank wagon reseller gallonage for the year 1937. The advertising expense incurred at Ned's Outlets, together with the gallonage sold at these outlets, were deducted from both the cost and volume figures. The results were as follows:

Account No.	Explanation	Amount
1005	Salaries—Advertising $3,637.34 plus 3%	$ 3,746.46
1033	Traveling Expense—Advertising	246.61
1048	Operation and Maintenance of Vehicles—Advertising—Passenger Cars and Trucks	360.16
1103	Depreciation Expense—Vehicles—Advertising—(Excluding Advertising Trucks)	107.90
	Total	$ 4,461.13
1075	Advertising Costs—Other Costs (Including ELA)	154,635.04
	Total	$159,096.17
	Deduct: Cost of Advertising at Ned's	1,065.42
	Net Cost	$158,030.75

Divided by reseller gallons, excluding Ned's Auto Supply Company, 66,388,527 .238¢ per gal.

Advertising Expense Incurred at Ned's Outlets.

1. Procedure: A list of dealer signs and other advertising material was obtained from the Advertising Representative in the Detroit Division. It was considered that all the expense occasioned by this equipment was chargeable to gasoline except the 28 x 44 frames, and to some extent, therefore, our figures are over-estimated due to

the fact that some of the expense should have been charged to other products. The cost on these items was obtained from Mr. Bay in the Advertising Department. The computation is as follows:

4 Standard Service signs @ $75.00	$300.00
1 Standard Service Sign @ $50.00	50.00
2,000 maps x 4 @ 1.79¢ each	143.20

Point of sale material, according to the Advertising Department, was allotted to each field on an outlet basis.

Therefore:

Banners	$15,504.95
Games	97,424.76
Displays	30,463.81
Total Field	$143,393.52

This figure, divided by the total outlets in the Company, equals $6.33 per outlet:

$6.33 x 4		$ 25.32	applicable to Ned's
$750.00 sign, period 19 months, 12/19 x $750.00		473.68	
Jewel Globes			
3 pumps at 3 outlets	9		
5 pumps at 1 outlet	5		
	14 @ $5.23 per globe	73.22	
Total Advertising Expense at Ned's		$1,065.42	

Divided by Ned's gallonage of 4,246,500 equals .... .025¢ per gal.

Saving on Advertising Expense .... .213¢

894

RESPONDENT'S EXHIBIT NO. 31-Q.

VII. Schedule of Marketing Expense Items Incurred on Both Ned's Auto Supply Volume and Regular Reseller Channel But to a Lesser Extent on Ned's Volume Than on Regular Tank Wagon Reseller Business.

No exact allocation of these items can be made. It is our opinion, based on knowledge of the functions for which these items of expenditure were incurred, that our regular reseller business is responsible for a greater portion of this cost than would be represented by the proportion of gallonage done through these regular outlets. They are enumerated separately to show the conservative nature of the cost comparison set forth in Exhibit "A".

Account Number	Explanation of Expense	Amount
1006	Salaries—Supervision	$ 33,760.06
1008	Salaries—Warehouse Labor	21,913.36
1030	Traveling Expense—Supervision	3,154.13
1040	Misc. Expense—Agents and Drivers	1,394.17
1045	Oper. and Maint. of Vehicles—Supervision	2,582.96
1060	Plant Maintenance	14,658.41
1062	Water, Light, Fuel (Other than Main Office)	15,298.57
1082	Personal Injury Expense—Company Employees	808.31
1200	Office Expense—Salaries Accounting	81,481.10
1201	Office Expense—Stationery and Office Supplies	6,469.24
1202	Office Expense—Postage	9,329.83
1203	Office Expense—Telephone and Telegraph	7,116.15
1206	Office Expense—All Other—Water, Light, Fuel, Rent, etc.	5,601.61
1208	Credit Information Expense	2,505.05
1225	Expense—Salaries—Sub-Station Auditors	4,723.97
1226	Expense—Trav. Exp.—Sub-Station Auditors	616.28
1227	Expense—Oper. & Maint. of Vehicles—Sub-Station Auditors	867.15
1100	Depr. Exp.—Vehicles—Supervision	1,134.64
1228	Depr. Exp.—Vehicles—Office and Sub-Station Auditors	910.46
1110	Depr. Exp.—Plant (Bldg., Mach., Equip., Furn. & Fixt.)	67,176.09
1112	Depr. Exp.—Real Estate Improvements	4,367.09
1530	Employees Stock Purchasing Plan—Co. 50% Deposit	9,962.51
	Total	$295,831.14

$$\frac{\$295,831.14}{70,629,027 \text{ gals.}} = .42¢ \text{ per gal.}$$

NO. 4389 EXHIBIT NO. 19
Standard Oil Co.
4/22/41 WITNESS Dyer
Goldstein

FLOW CHART OF GASOLINE — FROM REFINER TO CONSUMER

(1) REFINER
(2) CARGO OR BULK TERMINAL OPERATOR
(3) BULK TERMINAL
(4) JOBBER WITH BULK PLANT FACILITIES
(5) BULK DISTRIBUTING PLANT
(9) RETAIL OUTLET
(4) JOBBER WITH BULK PLANT
(6) "JOBBER" WITHOUT BULK PLANT
(5) BULK DISTRIBUTING PLANT
(7) TRUCK DRIVERS (8) & PEDDLERS
(11) COMMERCIAL CONSUMER
(9) RETAIL OUTLET
(10) S/S CONSUMER

EXPLANATION OF FLOW CHART AND REMARKS CONCERNING SALE AND DISTRIBUTION OF GASOLINE

The gasoline marketing structure of the oil industry is an intricate pattern of individuals and concerns, large and small, engaged in one or more of the numerous functions of taking the product from the refiner to the consumer. There are numerous methods of distribution and numerous operations within these methods and there are distributing set-ups in which the functions overlap. Working from the refiner to the consumer, these functions, from the standpoint of the individual or concern performing the function, are as follows:

(1) REFINER	Some refiners dispose of their gasoline f.o.b. the refinery, while others own and operate bulk distributing stations. Others add the operation of retail outlets to their distributing functions. Others sell their gasoline through brokers, or direct to bulk distributors. Tanker, tank car, barge, and transport truck are used in this movement.
(2) CARGO OR BULK TERMINAL OPERATOR	This type of operator owns or operates only the bulk terminal and purchases in large quantities, such as cargo lots and pipe line tenders and generally resells to bulk distributors (jobbers) usually making deliveries by tank car or transport truck.
(3) BULK TERMINALS	Gasoline is received at bulk terminals usually in cargo lots or through pipe line tenders. These facilities may be owned by a fully integrated company, or a semi-integrated company, or jobber. From the bulk terminal the gasoline may be loaded into tank cars, barges or transport trucks for shipment to bulk plants, jobbers, trackside service stations, or commercial consumers.
(4) JOBBER WITH BULK PLANT FACILITIES	A marketer maintaining bulk storage of tank car or barge lots and purchasing gasoline in barge, tank car or transport truck quantities for resale through retail outlets and commercial consumers. This is the most widely accepted definition of Jobber (sometimes called Bona-Fide Jobber).
(5) BULK DISTRIBUTING PLANTS	Gasoline is received at bulk distributing plants in tank cars, barges and transport trucks direct from the refinery or bulk terminal. These facilities may be owned by a fully integrated company, or a semi-integrated company, or a jobber. From the bulk distributing plant gasoline is usually delivered to retail outlets or commercial consumers in tank wagon lots.
(6) "JOBBER" WITHOUT BULK PLANT FACILITIES	This type of jobber is a marketer purchasing gasoline in tank truck or transport truck lots from bulk distributing plants for delivery or resale to retail outlets and commercial consumers. As a usual thing, this type of jobber either owns or controls a group of retail outlets and because of the ownership of these facilities buys his gasoline on a jobber basis. He may market the gasoline under an independent brand name, or may market under the brand name of the company from whose bulk plant he is drawing his supplies, notwithstanding the fact that the supplying company is also marketing in the same locality. He may also own bulk plant facilities, while drawing his gasoline supplies from another company's bulk distributing plant. The term "Jobber Without Bulk Plant" is a contradiction in terms but is here so stated because of the prevalence of this classification with some marketers. Other marketers may class such operators as "Peddlers" (8).
(7) TRUCK DRIVER	This function is generally carried on by the bulk plant operator or jobber and includes the delivery of gasoline direct to retail outlets and commercial consumers by salaried truck drivers and commission truck drivers. In some cases, the commission truck driver owns or controls retail outlets and in other cases he functions primarily as a peddler in rural territories.
(8) PEDDLER	Usually an individual who owns his own tank trucks and purchases his gasoline requirements in truck loads from bulk distributing plants. Gasoline is resold by him (peddled) to commercial consumers and retail outlets.
(9) RETAIL OUTLET	The dealer operating the retail outlet receives his gasoline usually in tank wagon lots from the bulk distributing plant; in other cases he is supplied in transport truck lots direct from the refinery or terminal and in the case of trackside outlets, gasoline is received in tank car quantities. Some retail outlets are operated on a so-called company basis, i.e., the operators are compensated by salary or commission. From the retail outlet, gasoline is delivered into automobile tanks of S/S consumers (10).
(10) SERVICE STATION CONSUMER	Usually an automobilist who purchases his gasoline direct from the retail outlet. Other service station consumers are individuals or companies engaged in commercial activities and buying through retail outlets.
(11) COMMERCIAL CONSUMER	Usually large commercial consumers operating fleets of auto trucks in the transportation or delivery of passengers, merchandise, freight or express and having underground storage facilities for the handling of gasoline and who purchase their requirements in tank wagon lots. There are some commercial consumers who maintain tank car storage and purchase their gasoline requirements direct from refinery in tank car or transport lots. Farmers and other individuals buying from tank wagons are also classified as commercial consumers.

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(7) TRUCK DRIV as cargo
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(8) PEDDLER jobbers,
(9) RETAIL OUT nk car or
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(10) SERVICE ntegrated
TION CONS s or com-
(11) COMMERCIA k distri-
CONSUMER this type
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BROKER: The broker is occasionally an intermediary in transactions between marketers, functioning in one or the other marketing operations. This function is the usual function of a broker — namely, to bring the buyer and seller together.

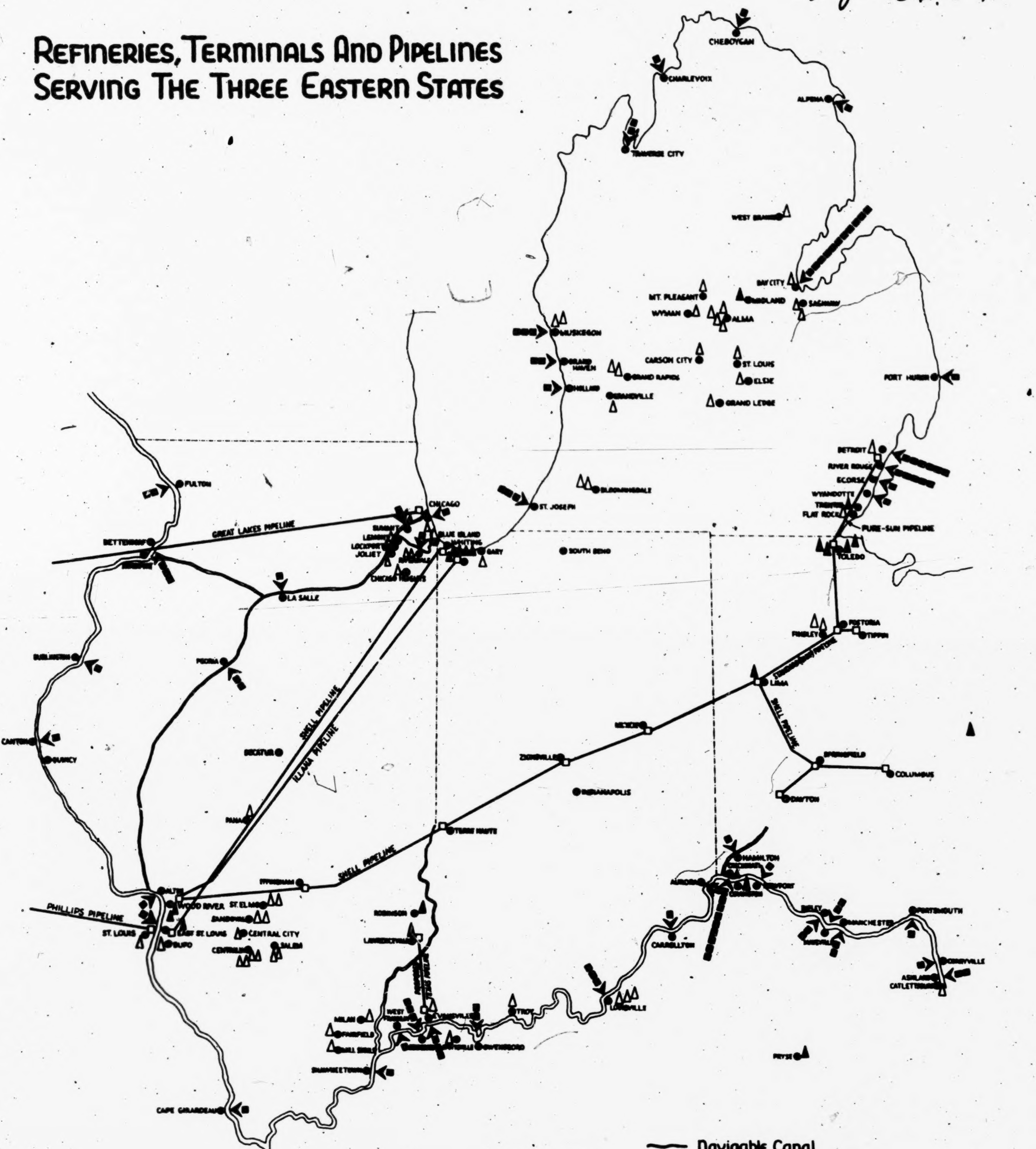
NOTE: *Many of the functions in the flow under (2), (3), (4) and (5) which are identical are repeated in full for the purpose of clarity.*

PREPARED MAY 26, 1939.

CHART V

Resp. Ex. 24

REFINERIES, TERMINALS AND PIPELINES SERVING THE THREE EASTERN STATES


CHEBOYGAN
CHARLEVOIX
ALPENA
TRAVERSE CITY
WEST BRANCH
BAY CITY
MT. PLEASANT
MIDLAND
SAGINAW
WYMAN
ALMA
MUSKEGON
GRAND HAVEN
CARSON CITY
ST. LOUIS
GRAND RAPIDS
ELSIE
HOLLAND
GRANDVILLE
GRAND LEDGE
PORT HURON
DETROIT
RIVER ROUGE
ECORSE
WYANDOTTE
TRENTON
FLAT ROCK
PURE-SUN PIPELINE
TOLEDO
FULTON
BLOOMINGDALE
ST. JOSEPH
CHICAGO
GREAT LAKES PIPELINE
BETTENDORF
SUMMIT
LEMONT
LOCKPORT
JOLIET
BLUE ISLAND
WHITING
GARY
CHICAGO HEIGHTS
SOUTH BEND
LA SALLE
FOSTORIA
FINDLEY
TIFFIN
BURLINGTON
PEORIA
LIMA
SHELL PIPELINE
SHELL PIPELINE
CANTON
QUINCY
DECATUR
ILLANA PIPELINE
SPRINGFIELD
COLUMBUS
ZIONSVILLE
INDIANAPOLIS
DAYTON
PANA
TERRE HAUTE
SHELL PIPELINE
HAMILTON
ALTON
WOOD RIVER
ST. ELMO
AURORA
CINCINNATI
NEWPORT
PHILLIPS PIPELINE
SANDOVAL
ROBINSON
ST. LOUIS
EAST ST. LOUIS
CENTRAL CITY
DUPO
CENTRALIA
SALEM
LAWRENCEVILLE
MANCHESTER
PORTSMOUTH
CARROLLTON
KENOVA
ASHLAND
CATLETTSBURG
WEST
MILAN
EVANSVILLE
TROY
LOUISVILLE
FAIRFIELD
OWENSBORO
SHAWNEETOWN
PRYSE
CAPE GIRARDEAU

Navigable Canal
Navigable River or Creek
Gasoline Pipeline Terminal
Boat Terminal, 2 Terminals, etc.
▲ Major Company Refinery
△ Other Than Major Company Refinery

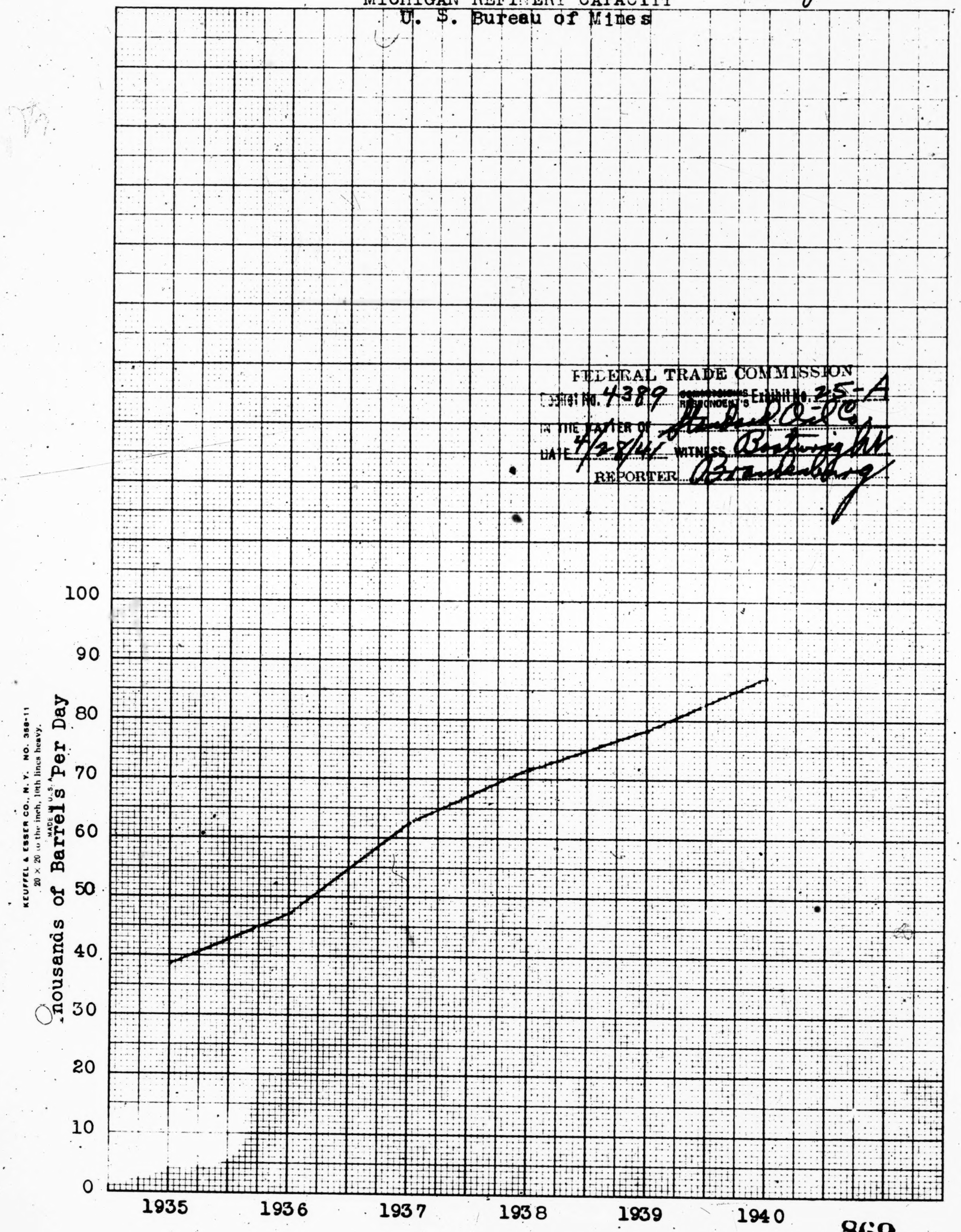
ERAL TRADE COMMISSION
O. 4389 ~~COMMISSION'S~~ RESPONDENT'S Exhibit No. 24
HE MATTER OF Standard Oil
ATE 4/28/41 WITNESS Bostwright
REPORTER Brandenburg

868

Resp. Ex. 25-A

MICHIGAN REFINERY CAPACITY

U. S. Bureau of Mines



FEDERAL TRADE COMMISSION
Docket No. 4389 Respondent's Exhibit No. 25-A
IN THE MATTER OF Standard Oil Co.
DATE 4/28/41 WITNESS Bartwright
REPORTER Brandenburg

Resp. Ex. 25-B

MICHIGAN REFINERIES

Year	Number	Capacity Straight Distillation Bbls. per day	Cracking
1935	17	38,550	7,400
1936	19	47,100	15,300
1937	23	62,500	17,200
1938	26	71,350	11,050 *
1939	24	78,100	12,604
1940	29	87,050	17,020

* Prior to 1938 the figures represent cracking stock charged; subsequent years represent cracked gasoline produced.

U. S. Bureau of Mines

FEDERAL TRADE COMMISSION

No. 4389 RESPONDENT'S Exhibit No. 25-B

IN THE MATTER OF Standard Oil Co.

DATE 4/28/41 WITNESS Boatwright

REPORTER Brandenburg

METROPOLITAN MINNEAPOLIS-ST.PA · NEAPOLIS-ST.PAUL

THE STANDARD OIL COMPANY'S RETAIL MARKET POSITI· L MARKET POSITION. AS RELATED TO
THE DIFFERENTIAL BETWEEN THE RETAIL PRICE OF S· RETAIL PRICE OF STANDARD'S GASOLINES
AND THE RETAIL PRICE OF CUT PRICE & LOCA· CUT PRICE & LOCAL BRANDS

Resp. Ex. 29-A

FEDERAL TRADE COMMISSION
Docket No. 4389 ~~COMMISSION'S~~ RESPONDENT'S Exhibit No. 29-A
IN THE MATTER OF Standard Oil Co.
DATE 4/28/41 WITNESS Boatwright
REPORTER Brandenburg

MARKET POSITION
PER CENT
PRICE DIFFERENTIAL
CENTS PER GALLON
35
30
25
20
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4.0
3.0
2.0
1.0
0
STANDARD'S MARKET POSITION
PRICE DIFFERENTIAL BETWEEN STANDARD'S GASOLINES AND C.P.&.L BRANDS
JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
1938
1939
1940
1941

Resp. Ex. 29-B

CITY OF MILWAUKEE F MILWAUKEE

THE STANDARD OIL COMPANY'S RETAIL MARKET POSITION AS "TAIL MARKET POSITION AS RELATED TO
THE DIFFERENTIAL BETWEEN THE RETAIL PRICE OF STANDARD'S E RETAIL PRICE OF STANDARD'S GASOLINES
AND THE RETAIL PRICE OF CUT PRICE & LOCAL BRA OF CUT PRICE & LOCAL BRANDS

FEDERAL TRADE COMMISSION
Docket No. 4389 COMMISSION'S/RESPONDENT'S Exhibit No. 29-B
IN THE MATTER OF Standard Oil Co.
DATE 4/28/41 WITNESS Boatwright
REPORTER Brandenburg

MARKET POSITION PER CENT
PRICE DIFFERENTIAL CENTS PER GALLON
30
25
20
15
0
4.0
3.0
2.0
1.0
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STANDARD'S MARKET POSITION
PRICE DIFFERENTIAL BETWEEN STANDARDS GASOLINES AND C.P.&L. BRANDS
JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
1938
1939
19
1940
1941

Resp. Ex. 29-C

CITY OF CHICAGO

THE STANDARD OIL COMPANY'S RETAIL MARKET POSITION AS RELAT
TO THE DIFFERENTIAL BETWEEN THE RETAIL PRICE OF STANDARD
GASOLINES AND THE RETAIL PRICE OF CUT PRICE & LOCAL BRANDS

CITY OF CHICAGO

COMPANY'S RETAIL MARKET POSITION AS RELATED
NTIAL BETWEEN THE RETAIL PRICE OF STANDARD'S
D THE RETAIL PRICE OF CUT PRICE & LOCAL BRANDS

FEDERAL TRADE COMMISSION
Docket No. 4389 RESPONDENT'S Exhibit No. 29-C
IN THE MATTER OF Standard Oil Co.
DATE 4/28/41 WITNESS Boatwright
REPORTER Bransfield

MARKET POSITION PER CENT
PRICE DIFFERENTIAL CENTS PER GALLON
35
30
25
20
0
4.0
3.0
2.0
1.0
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STANDARD'S MARKET POSITION
PRICE DIFFERENTIAL BETWEEN STANDARD'S GASOLINES AND C.P.&L. BRANDS
NTIAL BETWEEN
OLINES AND C.P.&L. BRANDS
JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
1938
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9
1940
1941

STATEMENT OF GASOLINE SALES VOLUME (GALLONS) FOR THE YEARS OF 1936 - 37 - 38 - 39 and 40 IN THE 1936 - 37 - 38 - 39 and 40 IN THE DETROIT AREA (INCLUDES HIGHLAND PARK-HAMTRAMCK AND DEARBORN) BY THE FOLLOWING CLASSIFICATIONS - "TOTAL S.O.CO. SALES" - "S.O.CO "TOTAL S.O.CO. SALES" - "S.O.CO. SALES EXCLUDING S.O.CO. JOBBER SALES" - ".O.CO. JOBBER SALES" - "SALES OF LICENSED WHOLESALE JOBBERS AND DISTRIBUTORS OF BR ALE JOBBERS AND DISTRIBUTORS OF BRANDED GASOLINES" - "SALES OF LICENSED WHOLESALE ~~OUT-PRICE~~ JOBBERS AND DISTRIBUTORS OF NON-BRAND GASOLINES" - "TOTAL SALES OF RAND GASOLINES" - "TOTAL SALES OF ALL LICENSED WHOLESALE JOBBERS AND DISTRIBUTORS" AND "SALES OF ALL OTHER COMPANIES" SHOWING PERCENTAGE THAT TOTAL VOLUME FOR EA RCENTAGE THAT TOTAL VOLUME FOR EACH CLASSIFICATION IS TO THE TOTAL VOLUME FOR THE AREA. A.

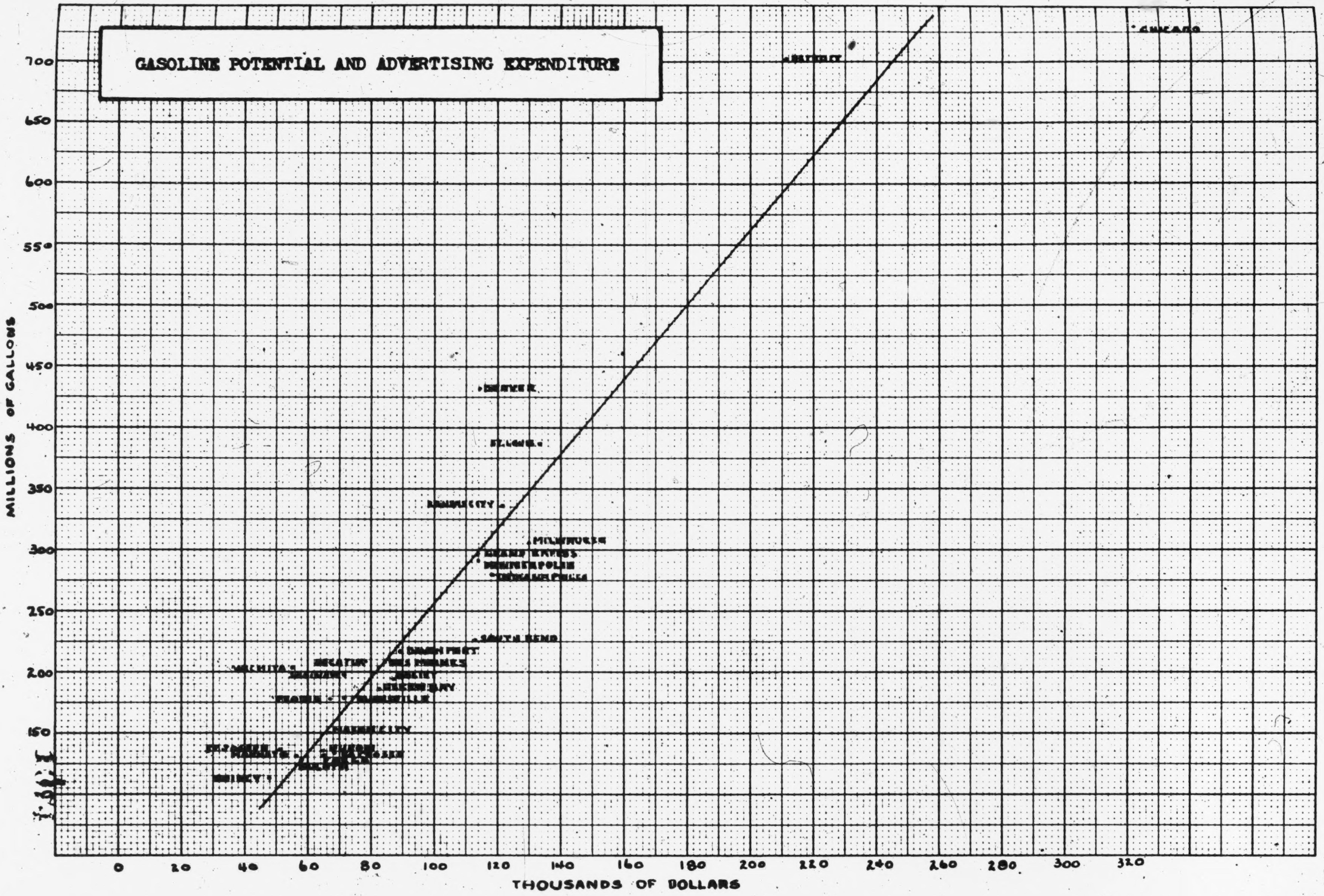
FEDERAL TRADE COMMISSION
Docket No. 4389 ~~COMMISSION'S~~ RESPONDENT'S Exhibit No. 58
IN THE MATTER OF Standard Oil Co.
DATE 6/7/41 WITNESS Rampish
REPORTER Brandehling

Resp. Ex. 58

1 YEAR	2 TOTAL SALES DETROIT AREA * % of TOTAL SALES	3 TOTAL S.O.CO. SALES % of TOTAL SALES	4 S.O.CO. SALES EXCLUDING JOBBERS % of TOTAL SALES	5 S.O.CO. JOBBER SALES % of TOTAL SALES	SALES WHOLE DISTR BRAND (EXCL % of	5 S.O.CO. JOBBER SALES % of TOTAL SALES	6 SALES OF LICENSED WHOLESALE JOBBERS & DISTRIBUTORS OF BRANDED GASOLINE ** (EXCLUSIVE S.O.CO. JOBBERS) % of TOTAL SALES	7 SALES OF LICENSED WHOLESALE ~~OUT-PRICE~~ JOBBERS & DISTRIBUTORS OF NON-BRAND GASOLINE ** % OF TOTAL SALES	8 TOTAL SALES OF ALL LICENSED JOBBERS & DISTRIBUTORS (INCLUDING S.O.CO. JOBBERS) TOTAL OF COLUMN 5-6-7) % OF TOTAL SALES	9 SALES ALL OTHER COMPANIES (INCLUDES MAJORS) COLUMN #2 LESS COLUMNS #4 and 8. % OF TOTAL SALES
1936	363,735,380 100%	62,198,750 17.1	54,102,778 14.9	8,095,972 2.2	89.	8,095,972 2.2	89,850,578 24.7	24,679,904 6.8	122,626,454 33.7	187,006,148 51.4
1937	409,445,610 100%	70,015,200 17.1	56,136,063 13.7	13,879,137 3.4	96	13,879,137 3.4	96,247,565 23.5	30,095,380 7.4	140,222,082 34.3	213,087,465 52.0
1938	368,586,580 100%	60,448,200 16.4	45,493,562 12.3	14,954,638 4.1	78	14,954,638 4.1	78,827,579 21.4	48,445,809 13.1	142,228,026 38.6	180,864,992 49.1
1939	403,907,000 100%	70,279,818 17.4	56,749,698 14.1	13,530,120 3.3	86,	13,530,120 3.3	86,483,462 21.4	61,291,087 15.2	161,304,669 39.9	185,852,633 46.0
1940	460,664,890 100%	74,627,712 16.2	60,966,605 13.2	13,661,107 3.0	90,	13,661,107 3.0	90,122,875 19.6	64,716,210 13.9	168,500,192 36.5	231,198,093 50.3

* Estimated

** Official Michigan State Gasoline Tax Department Reports.



GASOLINE POTENTIAL AND ADVERTISING EXPENDITURE

RESPONDENT'S EXHIBIT NO. 101.

STANDARD OIL COMPANY
SALES DEPARTMENT
COMPARATIVE STATEMENT OF EXPENSE

Detroit Field—
Year 1940

Petroleum Products

		Distribution Through Company Bulk Plants			Direct Shipment Customers						
		Tank Wagon			Jobbers						
	Account Name	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers	Total Petroleum Products	Auto Supplies	Total Petroleum Products and Auto Supplies	
	Direct Field Expense										
000	Salaries—Supervision	31,114.25	15,696.90	3,907.60	320.20	16.49	304.77	51,360.21		51,360.21	000
001	Salaries—Supervision—Others	8,057.73	3,523.01	551.82	46.32	4.47	836.28	13,019.63		13,019.63	001
002	Salaries—Sales Promotion	4,482.78	6,726.63	9,885.58	185.93	148.00	1,305.85	22,734.77	443.04	23,177.81	002
003	Salaries—Sales Promotion—Others	5,441.79	10,973.88	6,881.64	345.21	18.11	1,322.81	24,982.84	2,996.59	27,979.43	003
004	Salaries—Salesmen	60,181.54	32,115.95	101,118.10	210.68	115.80	13,312.69	207,455.16	13,371.55	220,826.71	004
005	Salaries—Advertising	4,567.25	1,787.36	1,098.99	233.19	90.24		7,777.03	660.59	8,437.62	005
006	Salaries—Drivers	55,481.56	33,677.60	23,334.66				112,493.82	4,984.16	117,477.98	006
008	Salaries—Warehouse Labor	15,367.80	7,111.05	29,690.65				52,169.50	6,473.15	58,642.65	008
021	Commissions	110,300.46	252,360.71	46,562.64				409,162.31	282.20	409,444.51	021
024	Exp. of Trans. Standard Fuels Due to Lack Of Stge.	5,386.90	5,822.71					11,209.61		11,209.61	024
025	Truck Rental Expense	37,793.36	37,804.43					75,597.79		75,597.79	025
030	Traveling Expense—Supervision	2,325.28	1,090.95	164.79	38.63	1.82	32.47	3,653.94		3,653.94	030
031	Traveling Expense—Sales Promotion	542.87	770.33	771.74	3.62	16.62	423.67	2,528.85	47.74	2,576.59	031
032	Traveling Expense—Salesmen	7,987.80	4,303.64	12,919.13	16.31	19.09	2,353.31	27,599.28	1,902.51	29,501.79	032
033	Traveling Expense—Advertising	460.51	221.86	32.59	20.30	12.26		747.52		747.52	033
045	Oper. And Maint. Of Veh.—Supervision	2,037.04	973.86	145.55	19.73	1.29	21.33	3,198.80		3,198.80	045
046	Oper. And Maint. Of Veh.—Sales Promotion	132.26	196.32	254.54	1.10	8.59	48.71	641.52	10.79	652.31	046
047	Oper. And Maint. Of Veh.—Salesmen	6,034.31	3,234.77	10,291.80	16.60	12.97	1,327.33	20,917.78	1,163.33	22,081.11	047
048	Oper. And Maint. Of Veh.—Advertising—Passenger Cars & Trucks	281.48	126.54	19.89	10.52	5.00		443.43		443.43	048
053	Oper. And Maint. Of Veh.—Trucks, Motor & Horse drawn (Excl. Adv.)	33,981.90	19,215.16	13,134.53	1.29	.22	17.82	66,350.72	1,808.59	68,159.31	053
054	Oper. And Maint. Of Veh.—All Other (Other Than Office)	221.36	171.82	15.56	.79	.06	.57	410.16		410.16	054
055	Vehicle Tank Exp.—Other Than Mounted On Co. Chassis	4,021.19	3,785.82					7,807.01		7,807.01	055
060	Plant Maintenance	16,894.81	7,893.40	1,440.19				26,228.40	.26	26,228.66	060
060A	Plant Maintenance (Serv. Sta. Owned Properties Complete)	48,049.10		815.89				48,864.99	88.64	48,953.63	060A
060B	Plant Maintenance (Serv. Sta. Owned Building on Leased Ground)	1,351.50		21.10				1,372.60		1,372.60	060B
060C	Plant Maintenance (P.O.S.S.L. Properties Leased Out)	5,373.96		74.72				5,448.68		5,448.68	060C
061	Rental Expense	1,361.77	623.32	95.91				2,081.00		2,081.00	061
061B	Rental Expense (Leased Ground Used For Owned Serv. Sta. Bldgs.)	15,447.20		291.69				15,738.89		15,738.89	061B
061C	Rental Expense (P.O.S.S.L. Properties Leased Out)	89,978.67		1,245.74				91,224.41		91,224.41	061C
062	Water, Light, Fuel (Other Than Main Office)	14,369.31	8,008.11	1,089.15				23,466.57		23,466.57	062
063	Telephone And Telegraph (Other Than Main Office)	6,777.33	3,637.58	481.58				10,896.49	298.04	11,194.53	063
064	Maint. Expense—Rented Out Property (Other Than Serv. Sta.)										064
065	Rent Revenue	*14.70	*6.88	*1.13				*22.71		*22.71	065
065A	Rent Revenue (Serv. Sta. Owned Properties Complete)	*316,699.36		*5,206.09				*321,905.45	*6,735.55	*328,641.00	065A
065B	Rent Revenue (Serv. Sta. Owned Buildings On Leased Ground)	*9,730.98		*149.20				*9,880.18	*155.95	*10,036.13	065B
065C	Rent Revenue (P.O.S.S.L. Properties Leased Out)	*81,031.83		*1,123.51				*82,155.34	*12.97	*82,168.31	065C
066	Miscellaneous Operating Expense	20,626.16	10,612.13	9,874.68	508.95	13.55	1,068.71	42,698.18	1,396.23	44,094.41	066
066A	Misc. Oper. Exp. (Serv. Sta. Owned Properties Complete)	45,218.67		699.10				45,917.77	395.87	46,313.64	066A
066B	Misc. Oper. Exp. (Serv. Sta. Owned Buildings On Leased Ground)	999.97		16.36				1,016.33	3.73	1,020.06	066B
066C	Misc. Oper. Exp. (P.O.S.S.L. Properties Leased Out)	3,452.12		48.23				3,500.35	26.99	3,527.34	066C
070	ELA Expense	15,233.46	6,124.71	2,019.14	8.95	2.89	320.70	23,709.85		23,709.85	070
076	Barrel Expense			13,259.67				13,259.67		13,259.67	076
077	Freight On Empty Steel Barrels And Containers			11,946.26		149.39	1,592.30	13,687.95		13,687.95	077
078	Losses On Containers—Lost			756.23		6.51	136.00	898.74		898.74	078
079	Losses On Containers—Junked			1,688.84		32.49	218.04	1,939.37		1,939.37	079
080	Drayage Outside										080
081	Demurrage And Railroad Storage	10.97	6.84	2.13				19.94	3.15	23.09	081
082	Personal Injury Expense—Company Employees	1,603.43	1,007.09	110.49	.12	.01	.35	2,721.49		2,721.49	082
083	Samples	1.84	.62	768.59			97.75	868.60	44.09	912.69	083
084	Safety Expense—Salaries And All Other Exp.	807.06	370.85	56.53	4.09			1,238.53		1,238.53	084
087	General Supplies Used	1,323.41	618.75	94.32				2,036.48		2,036.48	087
088	Sta. Oper. Tools & Equip.	10,113.79	6,965.57	1,516.03				18,595.39	127.72	18,723.11	088
088A	Sta. Oper. Tools & Equip. (Serv. Sta. Owned Properties Complete)	9,403.71		151.48				9,555.19	4,793.08	14,348.27	088A
088B	Sta. Oper. Tools & Equip. (Serv. Sta. Owned Bldgs. On Leased Ground	150.82		1.77				152.59	231.71	384.30	088B
088C	Sta. Oper. Tools & Equip. (P.O.S.S.L. Properties Leased Out)	1,780.57		266.66				1,806.93	*156.31	1,650.62	088C
200	Office Expense—Salaries Accounting	82,492.38	39,199.18	91,404.58	2,252.09	271.29	2,506.73	218,125.75	19,398.70	237,524.45	200
209	Office Expense—Tabulating Machines										209
201	Office Expense—Stationery And Office Supplies	8,297.55	3,925.78	590.81	349.07	38.28	25.81	13,227.30	329.26	13,556.56	201
202	Office Expense—Postage	12,353.99	5,662.43	880.16	321.44	31.73	122.34	19,372.09		19,372.09	202
203	Office Expense—Telephone And Telegraph	7,748.07	3,540.51	546.85	154.03	21.31	423.05	12,433.82		12,433.82	203
204	Office Expense—Exchange	5,419.14	2,570.05	383.26	94.87	9.36	32.70	8,509.38		8,509.38	204
205	Office Expense—Oper. & Maintenance Of Vehicles—Office Automobiles	227.06	102.60	246.56	8.33	.90	7.50	592.95		592.95	205
206	Office Expense—All Other—Water, Light, Fuel, Rent, etc.	6,777.09	3,386.81	7,627.25	228.61	31.89	636.36	18,688.01		18,688.01	206
207	Outside Collection Expense	*12.85	*8.40	*.75				*22.00		*22.00	207
208	Credit Information Expense	8,278.87	3,985.54	606.19	1,090.04	119.12	31.54	14,111.30		14,111.30	208
215	Expense—Salaries—Others	7,840.76	3,739.56	568.94	15.48	.02	65.08	12,229.84		12,229.84	215
216	Expense—Traveling Expense—Others	429.40	215.80	29.42	.65		5.65	680.92		680.92	216
217	Expense—Oper. & Maintenance Of Vehicles—Automobiles—Others	409.08	195.04	31.29	.25		2.37	638.03		638.03	217
220	Expense—Empl. Dept.—Salaries & All Other Expense	2,461.62	1,184.29	177.54	14.80	2.17	48.81	3,889.23		3,889.23	220
225	Expense—Salaries—Sub-Station Auditors	5,360.38	2,478.00	377.32				8,215.70		8,215.70	225
226	Expense—Trav. Exp.—Sub-Station Auditors	753.93	335.84	52.53				1,142.30		1,142.30	226
227	Expense—Oper. & Maintenance Of Vehicles—Sub. Sta. And	590.35	291.42	42.91	.02		.06	924.76		924.76	227
240	Donations	1,423.96	725.99	102.56				2,252.51		2,252.51	240
400	Bad Debts Collected—Written Off Prior Years	*705.37	*668.79	*2,407.02	*7.04	*.77	*1,343.96	*5,132.95	*348.50	*5,481.45	400
410	Profit And Loss On Resale Barrels			2.41		*13.25	*97.00	*107.84		*107.84	410
431	Budget Plan Income And Expense								*1,058.17	*1,058.17	431
500	Losses By Accident—Property And Other Than Co. Emp'l.	1,571.00	621.72	68.02	3.05	.26	12.00	2,276.05		2,275.05	500
501	Losses By Property Damage—Co. & Other Than Co. Prop.	1,225.79	499.24	45.91			19.24	1,790.18		1,790.18	501
502	Losses By Fire	193.96	47.41	10.64				252.01		252.01	502
507	Losses—Miscellaneous	*1,495.55	*1,013.07	*31.76	8.51	.93		*2,530.94		*2,530.94	507
508	Losses—Uncollected Charges For Stock Losses										508
510	Losses By Bad Debts	2,473.44	2,672.81	1,434.16	312.22	34.11		6,926.74	594.14	7,520.88	510
511	Expense Collecting Bad Debts—Current Year	62.70	132.89	17.33	.16	.02		213.10	10.00	223.40	511
512	Expense Collecting Bad Debts—Prior Years	262.44	210.32	326.19	.32	.04		799.31	36.04	835.35	512
	Total Direct Field Expense	453,487.37	561,586.36	406,364.75	6,839.43	1,223.28	27,239.74	1,456,740.93	53,454.44	1,510,195.37	
	Average Per Unit This Year										
	Average Per Unit Last Year										
	All Other Expense										
075	Advertising—Other Costs (Including ELA)	126,225.04	57,949.09	12,331.58	3,275.24	46.93		199,827.88	11,546.44	211,374.32	075
100	Depr. Exp.—Vehicles—Supervision	638.56	289.74	44.85	11.16	.50	10.64	995.45		995.45	100
101	Depr. Exp.—Vehicles—Sales Promotion	32.09	53.78	80.27	.45	4.10	1.76	172.45	2.88	175.33	101
102	Depr. Exp.—Vehicles—Salesmen	1,628.26	863.44	2,652.31	7.36	4.84	581.23	5,737.44	256.96	5,994.40	102
103	Depr. Exp.—Vehicles—Advertising	107.60	44.13	7.41	6.91	2.86	.44	169.35		169.35	103
106	Depr. Exp.—Vehicles—Trucks, Motor & Horse Drawn (Incl. Veh. Tanks & Excl. Adv. Trucks)	16,254.88	7,380.16	3,475.38	.33	.08	4.74	27,115.57		27,115.57	106
107	Depr. Exp.—Vehicles—All Other (Other Than Office)	254.85	114.04	17.85	.63	.08	.31	387.76		387.76	107
228	Depr. Exp.—Vehicles—Office—Others & Sub. Sta. Auditors	400.04	182.84	27.91	2.53	.25	5.26	618.83		618.83	228
110	Depr. Exp.—Plant (Bldg., Mach., Equip., Furn. & Fixt.)	63,172.00	29,077.01	4,474.68	96.63	13.51	269.03	97,102.86		97,102.86	110
110A	Depr. Exp.—Plant (Bldg., Mach. & Equip., Furn. & Fixt.) (Service Station Owned Properties Complete)	85,975.02		1,421.49				87,396.51		87,396.51	110A
110B	Depr. Exp.—Plant (Bldg., Mach. & Equip., Furn. & Fixt.) (Service Station Owned Buildings On Leased Ground)	2,178.25		32.69				2,210.94		2,210.94	110B
110C	Depr. Exp.—Plant (Bldg., Mach. & Equip., Furn. & Fixt.) (P. O. S. S. L. Properties Leased Out)	3,565.35		50.33				3,615.68		3,615.68	110C
111	Depr. Exp.—Plant—ELA	3,411.57	1,564.26	240.33	16.56	55.68	37.80	5,526.63		5,526.63	111
112	Depr. Exp.—Real Estate Improvements	4,207.15	1,935.37	297.90	.35	.05	.99	6,441.81		6,441.81	112
112A	Depr. Exp.—Real Estate Improvements (S. S. Owned Props. Comp.)	42,416.48		705.15				43,121.63		43,121.63	112A
115	Depr. Exp.—Equipment Steel Barrels			444.12		8.02	58.29	510.43		510.43	115
116	Depr. Exp.—One Gallon Cans										116
086	Taxes—Real Estate & Personal Property	35,635.00	16,320.86	2,524.36	55.52	36.30	150.24	54,722.28		54,722.28	086
086A	Taxes (Service Station Owned Properties Complete)	98,539.73		1,638.91				100,178.64		100,178.64	086A
086B	Taxes (Service Station Owned Buildings On Leased Ground)	1,070.98		16.58				1,087.56		1,087.56	086B
086C	Taxes (P.O.S.S.L. Properties Leased Out)	234.60		3.12				237.72		237.72	086C
243	Taxes—Federal Insurance Contributions	4,158.95	4,352.58	3,507.46	37.45	6.73	181.43	12,244.60		12,244.60	243
244	Taxes—Unemployment Insurance	13,739.43	14,378.52	11,574.15	121.56	21.62	604.69	40,439.97		40,439.97	244
245	Taxes—All Other	25,155.49	10,222.40	1,705.70	1,577.94	9.28	3,211.34	41,882.15		41,882.15	245
235	Insurance	572.55	374.51	33.34				980.40		980.40	235
250	General Office Expense—Accounting Department	16,416.07	7,996.20	1,174.65	364.71	39.16	393.11	26,383.90		26,383.90	250
255	General Office Expense—Gen'l Managers Department	27,009.17	14,220.99	8,852.95	136.47	21.79	932.99	51,174.36	1,525.75	52,700.11	255
260	General Office Expense—Advertising Department	3,529.47	1,654.70	250.25	86.28	.46		5,521.16		5,521.16	260
265	General Office Expense—Lubricating Department	552.72	613.38	26,806.38	21.60	4.71	931.51	28,930.30		28,930.30	265
270	General Office Expense—Asphalt And Fuel Oil Dept.			1,576.39			402.19	1,978.58		1,978.58	270
280	General Office Expense—Construction & Maint. Dept.	1,922.57	876.24	135.54	9.93			2,944.28		2,944.28	280
290	General Office Expense—Pro Rata Gen. Administrative	32,844.37	16,499.56	2,374.46	7,429.63	40.12	15,100.69	74,288.83		74,288.83	290
295	General Office Expense—Law Expense	15,838.12	7,585.70	1,057.11	3,516.82	18.99	7,147.92	35,164.66		35,164.66	295
503	Losses By Storm And Flood	195.83	119.90	13.03				328.76		328.76	503
505	Losses By Dismantling—Abnormal—ELA										505
506	Losses By Dismantling—Abnormal—Other Than ELA	14,151.79	9,170.37	834.41				24,156.57		24,156.57	506
513	Losses By Dismantling—Out Of Pocket Exp.—ELA	3.75						3.75		3.75	513
514	Losses By Dismantling—Out Of Pocket Exp.—Other Than ELA	1,865.55	848.97	127.72				2,842.24		2,842.24	514
515	Experimental Development And Research Expense	965.94	469.76	69.90	216.26	1.17	439.60	2,162.63		2,162.63	515
520	Annuities And Retirement Plan Expense	52,651.27	56,922.91	44,159.64	533.67	93.97	2,652.89	157,014.35		157,014.35	520
525	Death Benefits	4,370.80	2,126.10	307.84	23.63	4.17	117.46	6,950.00		6,950.00	525
526	Military Pay Allowances										526
	Total All Other Expense	701,891.69	264,207.51	135,048.37	17,549.62	435.37	32,236.55	1,152,369.11	13,332.03	1,165,701.14	
	Average Per Unit This Year										
	Average Per Unit Last Year										
	Grand Total All Expense	1,155,379.06	825,793.87	541,413.12	24,389.05	1,658.65	60,476.29	2,609,110.04	66,786.47	2,675,896.51	
	(1) Total Units	69,301,586	32,265,489	4,920,137	15,296,828	82,263	31,092,364	152,958,667	$554,215.80		
	(2) Deduct Direct Shipments										
	(3) Total Units Item (1) Less Item (2)										
	Average Per Unit On (1) Above	1.67¢	2.56¢	11.00¢	.16¢	2.02¢	.19¢	1.71¢ Cost per Dollar			

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RESPONDENT'S EXHIBIT NO. 33-A.

Schedule "B".

Cost Justification of a Jobber Differential Price 1.5¢ Below Tank Wagon Dealer Price Detroit.

		Cost per Gallon 1940	Cost per Gallon 1939	
1. Tank Wagon Reseller Marketing Cost		1.72¢	1.81¢	per gal.
2. Jobber Marketing Costs				
a. Accounting Cost	.10¢			
b. Credit Cost	.03¢			
c. Supervision and Selling Cost	.06¢			
d. General Office Expense	.01¢			
e. Advertising (Point of Sale)	.05¢	.25	.25	
3. Differential Cost		1.47¢	1.56¢	

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RESPONDENT'S EXHIBIT NO. 33-B.

Schedule "B"—Cost Justification of a Jobber Differential Price 1.5¢ Below Price to Dealers.

Schedule "B" is set up on the basis of Form 189 costs, tank wagon reseller channel, for the year 1940. It represents distribution costs incurred in the entire Detroit field at both salaried and commission points.

1. Tank Wagon Reseller Marketing Cost Year 1940 1.72¢ per gal.

Source: Form 189, Detroit Field, 1940
Form 439, Year 1940

Procedure: The total reseller tank wagon expense for the year 1940 amounted to $1,145,399.13. To this amount the direct leased service station expense applicable to tank wagon reseller gallons was added. This expense was obtained as follows:

Total Leased Service Station Gallons	54,255,291
Leased service station tank wagon gallons (excluding motor oil and grease gallonage) Form 439	53,406,269
Per cent to total	98.44%

The leased service station expense for the year 1940 amounting to $48,506.44 times 98.44% = $47,749.74 expense applicable to the tank wagon reseller channel.

Total expense:

Reseller tank wagon	$1,145,399.13
Leased service station	47,749.74
Total	$1,193,148.87

This amount divided by total reseller tank wagon gallons of 69,301,586 results in a cost per gallon amounting to 1.72¢.

2. Jobber Marketing Costs

At the termination of the year 1939, this department was given an assignment of determining the profitability of jobber operation in the State of Oklahoma. To the best of our knowledge there is no other time and cost analysis of doing business through jobber outlets. Inasmuch as our accounting, selling, and other marketing procedures are comparable among the various fields, we see no reason why expenses of distributing through Oklahoma jobbers do not result in a fair evaluation of costs of doing business through this type of account.

This study was based on actual time spent with various jobbers on the part of managers, assistant managers, special representatives, and other members of the supervisory staff as reported on expense statements, Form 028. Accounting costs were determined on the basis of estimates by various accounting department heads of time required in handling the sales tickets representing this volume.

a. Accounting Costs

Total accounting cost in the Kansas City and Wichita fields for the year 1939, according to a separate analysis of sales tickets and time estimates by department heads, equalled $2,226.32. This expense was divided by 2,166,168 gallons, the volume moving through these accounts, resulting in an accounting cost per gallon of .10¢.

b. Credit Cost

Credit cost was handled in much the same manner. Actual cost of securing credit reports for the various accounts, time spent by the Credit Department in analyzing

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the credit risks of the various jobbers, collection costs, etc., totalled for the Kansas City and Wichita fields $604.45. This amount was again divided by the volume of 2,166,168 gallons for a resultant cost per gallon of .03¢.

c. Supervision and Selling Cost

Actual time expended by management, expenses as shown on Form 028 plus salesmen's salaries, car and traveling expenses were secured from the Kansas City and Wichita fields. This total expense was allocated according to the field's estimate of time devoted to each product to secure the cost of this marketing function. Total product cost for gasoline and refined oil was then divided by these gallons sold to obtain a cost per gallon.

		Supervision and Selling Cost Gasoline and Refined Oil	
	Total	%	Cost
Kansas City	$4,922.38	15	$ 738.36
Wichita	5,822.62	32	1,863.24
Total			$2,601.60
Total Refined Oil and Gasoline Sales Volume			4,206,686

$$\frac{\$2{,}601.60}{4{,}206{,}686} = .06¢$$

Cost per Gallon .06¢

d. General Office Expense

Cost for the Sales Promotion—Tank Car Sales—Refined Oil and Gasoline Department of the General Office was available for the first six months of 1939 after which time it was combined with the Refined Oil, Tractor Fuel, and Gasoline Price Department. The costs for the first six months, therefore, were doubled and divided by the annual sales volume of Refined Oils, Tractor Fuel, Gasoline and Naphthas to secure a per gallon cost.

Cost for first 6 months, 1939	$ 9,223.08
Cost for full year	18,446.16
Volume of sales for year	190,845,750
Cost per gallon	.01¢

e. Point of Sale Advertising

An itemization of all advertising signs, jewel globes, and maps used was supplied by the General Office and fields' Advertising Departments. The calculations were:

	Kansas City	Wichita	Total
Signs, Jewel Globes, etc.	$ 851.15	$ 583.35	$1,434.50
Maps	247.33	329.09	576.42
	$1,098.48	$ 912.44	$2,010.92
Sales of Gasoline and Refined Oil	2,520,543	1,686,143	4,206,686
Cost per Gallon			.05¢

RESPONDENT'S EXHIBIT NO. 36-B.

Name	Street Address	City	License No.
WAYNE COUNTY:			
Jacox Oil Corp.		Belleville	670
Apex Oil Co.	22370 Michigan Ave.	Dearborn	950
Darling & Co.	Box 36	Dearborn	652
Dearborn, City of	Michigan and Schaefer	Dearborn	810
Dearborn Coach Co.	13530 Michigan Ave.	Dearborn	828
Ford Motor Co.	3674 Schaefer Road	Dearborn	405
Wayne Oil Co.	8747 Brandt Ave.	Dearborn	790
Alger, Geo. F. Co.	3050 Lonyo Road	Detroit	868
Argo Oil Corp.	2703 Junction	Detroit	717
American Carloading Corp.	983 E. Larned St.	Detroit	651
Aurora Gasoline Co.	15911 Wyoming Ave.	Detroit	1011
Baker & Collinson	6545 Georgia	Detroit	665
Beecher, Peck & Lewis	1313 E. Milwaukee Ave.	Detroit	431
Berry Bros.	211 Leib St.	Detroit	60
Boydell Bros. White Lead & Color Co.	432 E. Lafayette Ave.	Detroit	701
Briggs Mfg. Co.	11631 Mack Ave.	Detroit	788
Bright, James J. & Son Co.	1255 W. Vernor Hwy.	Detroit	674
Brown, The R. J. Co.	1900 E. Jefferson Ave.	Detroit	169
Budd, Edw. G. Mfg. Co.	12141 Charlevoix Ave.	Detroit	391
Buhl Sons Co.	Foot of Adair St.	Detroit	793
Bulk Stations, Inc.	1900 Gratiot Ave.	Detroit	794
Cadillac Oil Co.	7180 E. McNichols Road	Detroit	254
Central Greyhound Lines, Inc.	3511 W. Fort St.	Detroit	543
Central Service Co.	8335 St. Aubin St.	Detroit	664
Chrysler Corp.	341 Massachusetts Ave.	Detroit	471
Citrin & Kolb Oil Co.	14445 Linwood Ave.	Detroit	721
Collins, A. W. Oil Co.	6460 E. Vernor Hwy.	Detroit	110
Consumers Petroleum Co.	13507 Auburn	Detroit	122
Cook Paint & Varnish Co.	3301 Bourke Ave.	Detroit	43
Cooper, Wm. & Nephews, Inc.	6545 Georgia Ave.	Detroit	399
Crowley, Milner & Co.	Farmer, Monroe & Gratiot Sts.	Detroit	112
Detroit, City of, Motor Transportation Division	2650 E. Jefferson	Detroit	219
Detroit, City of, Dept. of Street Railways	11200 Shoemaker Ave.	Detroit	276
Detroit City Airport	11201 Conner Ave.	Detroit	41
Detroit Edison Co.	2000 Second Ave.	Detroit	205
Devoe & Raynolds Co., Inc.	8501 Brandt St.	Detroit	645
Dibble Color Co.	1497 E. Grand Blvd.	Detroit	78
Ditzler Color Co.	8000 W. Chicago Ave.	Detroit	624
Dixie Fuel & Supply Co.	301 S. Cavalry Ave.	Detroit	115
Donahue, F. J. Varnish Co.	10586 Knodell Ave.	Detroit	765

WAYNE COUNTY—Con.

Name	Street Address	City	License No.
Duro Oil Co.	8000 W. Warren	Detroit	117
Eastern Michigan Motorbuses	1407 Washington Blvd.	Detroit	544
Ethyl Gasoline Corp.	723 E. Milwaukee Ave.	Detroit	565
Evening News Ass'n.	615 Lafayette Blvd.	Detroit	172
Fairmont Creamery Co.	608 E. Milwaukee Ave.	Detroit	531
Falcon Oil Co.	17201 Van Dyke Ave.	Detroit	968
Federal Motor Truck Co.	5780 Federal Ave.	Detroit	126
Firestone Tire & Rubber Co.	Vernor and Trumbull Blvd.	Detroit	47
Fruehauf Trailer Co.	10940 Harper Ave.	Detroit	275
General Motors Corp.	12-143 General Motors Bldg.	Detroit	1120
Goodrich, B. F. Co.	7351 Woodward Ave.	Detroit	1002
Gordon Baking Co.	2363 E. Vernor Hwy.	Detroit	632
Great American Oil & Refining Co.	12950 Evergreen Rd.	Detroit	145
Great Lakes Oil Co.	13001 Eaton Ave.	Detroit	201
Graham Paige Motors Corp.	8505 W. Warren Ave.	Detroit	796
Grow Solvent Co., Inc.	8747 Brandt	Detroit	264
Hartman, Sam	7150 W. Vernor	Detroit	738
Highland Oil Corp.	15091 LaSalle Blvd.	Detroit	526
Hollywood Cartage Co.	5858 Plumer Ave.	Detroit	327
Hudson, J. L. Co.	1206 Woodward Ave.	Detroit	876
Hudson Motor Car Co.	12601 E. Jefferson Ave.	Detroit	143
Jeffers & Co.	7350 Jos. Campau	Detroit	806
Johnson, Wm. K.	124 Sproat St.	Detroit	733
Kelsey-Hayes Wheel Corp.	3600 Military Ave.	Detroit	151
Keystone Oil Refining Co.	12800 Northampton Ave.	Detroit	949
Lincoln Oil Co.	5860 Plumer Ave.	Detroit	604
Meurer Bros., Inc.	2503 St. Aubin	Detroit	445
Michigan Bell Telephone Co.	1365 Cass Ave.	Detroit	368
Michigan Consolidated Gas Co.	415 Clifford	Detroit	401
Miller's Tank Car Co.	12541 Grand River	Detroit	660
Minnesota Mining & Mfg. Co.	411 Piquette Ave.	Detroit	1069
Montgomery Ward & Co., Inc.	Gratiot and Lappin	Detroit	984
Motor Products Corp.	11801 Mack Ave.	Detroit	607
Murray Corp. of America	7700 Russell St.	Detroit	637
National Garage, Inc.	1009 Cass Ave.	Detroit	251
National Petroleum Products Co.	2225 Howard St.	Detroit	762
Ned's Auto Supply Co.	9465 Grand River Ave.	Detroit	706
O'Connor & O'Connor	13900 Rochelle Ave.	Detroit	646
Packard Motor Car Co.	1580 E. Grand Blvd.	Detroit	117
Paper Mills Trucking Co., Inc.	1580 Dallas Ave.	Detroit	1076
Parke, Davis & Co.	Foot of Jos. Campau	Detroit	262
Peerless Distributing Co.	8720 Livernois Ave.	Detroit	456
Peoples Outfitting Co.	150 Michigan Ave.	Detroit	388
Petroleum Service, Inc.	7720 W. Chicago Blvd.	Detroit	730
Plymouth Oil Co.	14105 Plymouth Road	Detroit	303
Premier Tank Car Stations, Inc.	9000 Livernois Ave.	Detroit	764

Name	Street Address	City	License No.
WAYNE COUNTY—Con.			
Puritan Stations, Inc.	403 W. Baltimore	Detroit	1108
Red Indian Oil Co., Inc.	12401 Cloverdale Ave.	Detroit	265
Reliable Oil Co.	14445 Schaefer Road	Detroit	1005
Rinshed-Mason Co.	5935 Milford St.	Detroit	735
Seibert Varnish Co.	6455 Strong Ave.	Detroit	301
Shell Oil Co., Inc.	904 Griswold Bldg.	Detroit	454
Socony-Vacuum Oil Co., Inc.	902 W. Grand Blvd.	Detroit	16
Speedway Petroleum Corp.	17289 Mt. Elliott Ave.	Detroit	718
Star Products Coal & Oil Co.	13750 Mt. Elliott Ave.	Detroit	1025
Stikeman Oil Co., Inc.	6630 Desmond Ave.	Detroit	666
Stinson Aircraft, Div. of Vultee Aircraft, Inc.		Wayne	743
System Equipment Co.	2866 Penobscot Bldg.	Detroit	513
Terminal Oil Co., Inc.	8484 W. Jefferson Ave.	Detroit	1023
Texas Gas & Oil Co.	6109 Michigan Ave.	Detroit	182
Titan Refining Co.	Box 36	Detroit	231
Transamerican Freight Lines, Inc.	751-15th St.	Detroit	716
U. S. Truck Co., Inc.	2290-24th St.	Detroit	711
United Service Oil Co.	12606 Grand River	Detroit	1040
United States Rubber Co.	6600 E. Jefferson Ave.	Detroit	903
Valspar Corp. & Subsidiary Cos.	550-12th St.	Detroit	734
Victor Oil Co.	11511 E. Warren Ave.	Detroit	841
Vroom, Henry & Sons, Inc.	5470 Hecla Ave.	Detroit	539

RESPONDENT'S EXHIBIT NO. 36-D:

Wayne County Road Comm.	3800 Barlum Tower	Detroit	463
Wayne Soap Co.	Copeland and M.C. R.R.	Detroit	464
Western Rosin & Turpentine Corp.	6472 Selkirk Ave.	Detroit	816
Wilson Oil Corp.	3307-29th St.	Detroit	466
Wings Petroleum Products Co.	9209 McGraw	Detroit	921
Woodall Industries, Inc.	7565 E. McNichols Road	Detroit	233
Young, L. A. Spring & Wire Corp.	9200 Russell	Detroit	234
Zieve Oil Co.	7750 Joy Road	Detroit	514
Great Lakes Steel Corp., Detroit	Tecumseh Road	Ecorse	457
Acme White Lead & Color Works	8250 St. Aubin Ave.	Hamtramck	671
Hamtramck, City of	8251 Jos. Campau Ave.	Hamtramck	1127
Benz-Oil Co.	13518 Hamilton Ave.	Highland Park	338
Benzol Stations, Inc.	14318 Woodward Ave.	Highland Park	432
Bull Dog Oil Co.	14046 Hamilton Ave.	Highland Park	715
Highland Park, City of	30 Gerald Ave.	Highland Park	748
Smith, L. A. Co.	28 Hawks St.	River Rouge	1059
Whitehead & Kales Co.	58 Haltiner St.	River Rouge	55
Austin, J. Oil Co.	4094 S. Biddle St.	Wayne	238
Weed Oil Co.	4438 Monroe Ave.	Wayne	497
Michigan Alkali Co.	Biddle Ave.	Wyandotte	444

939 RESPONDENT'S EXHIBIT NO. 37-A.

List of Wayne County Wholesale Distributors
As of February 1, 1941

Name of Distributor	Date of First Registration of Record
Jacox Oil Corporation	1930
Apex Oil Company	1932
Darling & Company	1933
Dearborn, City of	1935
Dearborn Coach Company	1934
Ford Motor Company	1930
Wayne Oil Company	1935
Alger, George F. Company	1936
Argo Oil Corporation	1932
American Carloading Corp.	1940
Aurora Gasoline Company	1933
Baker & Collinson	1936
Beecher, Peck & Lewis	1931
Berry Brothers	1930
Boydell Bros. White Lead & Color Co.	1932
Briggs Manufacturing Company	1930
Bright, James J. & Son Company	1941
Brown, The R. J. Company	1935
Budd, Edw. G. Manufacturing Company	1930
Buhl Sons Company	1930
Bulk Stations, Inc.	1931
Cadillac Oil Company	1935
Central Greyhound Lines, Inc.	1936
Central Service Company	1931
Chrysler Corporation	1930
Citrin & Kolb Oil Company	1932
Collins, A. W. Oil Company	1930
Consumers Petroleum Company	1934
Cook Paint & Varnish Company	1934
Cooper, Wm. & Nephews, Inc.	1930

Name of Distributor	Date of First Registration of Record
Crowley, Milner & Company	1932
Detroit, City of, Motor Transportation Div.	1930
Detroit, City of, Dept. of Street Railways	1931
Detroit City Airport	1934
Detroit Edison Company	1940

Devoe & Raynolds Co., Inc.	1940
Dibble Color Company	1934
Ditzler Color Company	1932
Dixie Fuel & Supply Company	1930
Donahue, F. J. Varnish Company	1932
Duro Oil Company	1930
Eastern Michigan Motorbuses	1930
Ethyl Gasoline Corporation	1934
Evening News Association	1934
Fairmont Creamery Company	1930
Falcon Oil Company	1941
Federal Motor Truck Company	1930
Firestone Tire & Rubber Company	1935
Fruehauf Trailer Company	1939
General Motors Corporation	1938
Goodrich, B. F. Company	1936
Gordon Baking Company	1940
Great American Oil & Refining Co.	1934
Great Lakes Oil Company	1935
Graham Paige Motors Corporation	1930
Grow Solvent Company, Inc.	1934
Hartman, Sam	1941
Highland Oil Corporation	1931
Hollywood Cartage Company	1940
Hudson, J. L. Company	1939
Hudson Motor Car Company	1930
Jeffers & Company	1933

Name of Distributor	Date of First Registration of Record
Johnson, Wm. K.	1941
Kelsey-Hayes Wheel Corporation	1930
Keystone Oil Refining Company	1932
Lincoln Oil Company	1930
Meurer Brothers, Inc.	1940
Michigan Bell Telephone Company	1930
Michigan Consolidated Gas Co.	1940
Miller's Tank Car Company	1934
Minnesota Mining & Mfg. Company	1936
Montgomery Ward & Company, Inc.	1939
Motor Products Corporation	1932
Murray Corporation of America	1930
National Garage, Inc.	1934

National Petroleum Products Co.	1940
Ned's Auto Supply Company	1938
O'Connor & O'Connor	1940
Packard Motor Car Company	1930
Paper Mills Trucking Company, Inc.	1937
Parke, Davis & Company	1932
Peerless Distributing Company	1933
Peoples Outfitting Company	1931
Petroleum Service, Inc.	1930
Plymouth Oil Company	1930
Premier Tank Car Stations, Inc.	1931
Puritan Stations, Incorporated	1937
Red Indian Oil Company, Inc.	1930
Reliable Oil Company	1933
Rinshed-Mason Company	1932
Seibert Varnish Company	1934
Shell Oil Company, Inc.	1930
Socony-Vacuum Oil Co., Inc.	1930
Speedway Petroleum Corporation	1938
Star Products Coal & Oil Company	1934
Stikeman Oil Company, Inc.	1932

Name of Distributor	Date of First Registration of Record
Stinson Aircraft Div. of Vultee Aircraft, Incorporated	1930
System Equipment Company	1940
Terminal Oil Company, Inc.	1934
Texas Gas & Oil Company	1940
Titan Refining Company	1938
Transamerican Freight Lines, Inc.	1935
U. S. Truck Company, Inc.	1935
United Service Oil Company	1940
United States Rubber Company	1930
Valspar Corp. & Subsidiary Cos.	1938
Victor Oil Company	1931
Vroom, Henry & Sons, Incorporated	1931
Wayne County Road Comm.	1930
Wayne Soap Company	1932
Western Rosin & Turpentine Corp.	1936
Wilson Oil Corporation	1930
Wings Petroleum Products Company	1932
Woodall Industries, Incorporated	1930
Young, L. A. Spring & Wire Corp.	1930
Zieve Oil Company	1938
Great Lakes Steel Corp. Detroit	1938
Acme White Lead & Color Works	1930

Hamtramck, City of	1938
Benz-Oil Company	1934
Benzol Stations, Inc.	1932
Bull Dog Oil Company	1935
Highland Park, City of	1930
Smith, L. A. Company	1938
Whitehead & Kales Company	1932
Austin, J. Oil Company	1930
Weed Oil Company	1935
Michigan Alkali Company	1932

RESPONDENT'S EXHIBIT NO. 38-A.

INFORMATION AS TO 42 WAYNE COUNTY GASOLINE WHOLESALE DISTRIBUTORS, COMPILED FROM RECORDS OF GASOLINE TAX DEPARTMENT OF STATE OF MICHIGAN, FOR YEAR 1941 (AS TO RETAIL STATIONS AND BULK PLANTS) AND FOR MONTH OF MARCH, 1941, (AS TO GASOLINE SUPPLIERS).

Name of Distributor	Operate retail sta.	Operate bulk plant	Gasoline supplied by	By trucks	By tank car
Apex Oil Co.	1	No	Plymouth Oil Co.	Yes	
			Midwest Refineries	Yes	
Argo Oil Corp.	1	No	Ohio Oil Co.	Yes	
			Theisen-Clements Co.	Yes	
			Roosevelt Oil Co.		Yes
Chas. E. Austin, Inc.	24	1	Natural Gasoline Products Co., Pennsylvania		Yes
			Midwest Refineries		Yes
			Producers Gasoline Corp.	Yes	
			Roosevelt Oil Co.		Yes
J. J. Bright & Son	5	No	Argo Oil Corp.	Yes	
Bulk Stations Inc.	No	No	Wilson Oil Corp.	Yes	
Benz Oil Co.	5	No	Aurora Gasoline Co.	Yes	
Benzol Stations Inc.	1	No	Ford Motor Co.	Yes	
Bull Dog Oil Co.	2	1	Petroleum Services Inc.	Yes	
			Red Indian Oil Co.	Yes	
			Argo Oil Corp.	Yes	
			Victor Oil Co.	Yes	
			Texas Co.	Yes	
Central Service Co.	No	1	Highland Oil Corp.	Yes	

Name of Distributor	Operate retail sta.	Operate bulk plant	Gasoline supplied by	By trucks	By tank car
A. W. Collins Oil Co.	3	3	Peerless Distributing Co.	Yes	
			Globe Oil & Ref. Co.	Yes	
			Victor Oil Co.	Yes	
Dixie Fuel & Supply Co.	2	1	Aurora Gasoline Co.	Yes	
			Theisen-Clements Co.	Yes	
			Benzol Stations, Inc.	Yes	
Duro Oil Corp.	12	No	Globe Oil & Ref. Co.	Yes	Yes
			Aurora Gasoline Co.	Yes	Yes
			Trans-American Pet. Corp.	Yes	
Falcon Oil Co.	1	1	Aurora Gasoline Co.	Yes	
			Trans-American Pet. Corp.	Yes	
Firestone Tire & Rubber Co.	16	8	Cornell Wholesale Oil Co.	Yes	
			Texas Co.		Yes
			Kalamazoo Diamond Oil Co.	Yes	
			Gulf Ref. Co.		Yes
			Firestone Store, Inc. (Toledo)	Yes	
			Benzol Stations, Inc.	Yes	
B. F. Goodrich Co.	8	4	Texas Co.		Yes
			Gulf Ref. Co.		Yes
Great American Oil & Ref. Co.	1	No	Argo Oil Corp.	Yes	
Great Lakes Oil Co.	No	No	Plymouth Oil Co.	Yes	
			Reliable Oil Co.	Yes	
Sam Hartman	1	No	Red Indian Oil Co.	Yes	
			Aurora Gasoline Co.	Yes	
Highland Oil Co.	29	2	Hickok Oil Corp.	Yes	Yes
			Western Rosin & Turpentine Co.	Yes	
			The Barrett Co.	Yes	
			Wilson Oil Corp.	Yes	

RESPONDENT'S EXHIBIT NO. 38-C.

Name of Distributor	Operate retail sta.	Operate bulk plant	Gasoline supplied by	By trucks	By tank car
Jeffers & Co.	2	No	Patterson Gas & Oil Co.	Yes	
			Roseline Oil Co.	Yes	
			Plymouth Oil Co.	Yes	
			Petroleum Services, Inc.	Yes	
			Cities Service Oil Co.	Yes	
Lincoln Oil Co.	10	1	Theisen-Clements Co.	Yes	
Meurer Bros., Inc.	1	No	Argo Oil Corp.	Yes	
Miller Tank Car Co.	1	No	Argo Oil Corp.	Yes	
			Argo Oil Corp.	Yes	
Montgomery Ward & Co.	3	No	Aurora Gasoline Co.	Yes	
National Garages, Inc.	13	No	Theisen-Clements Co.	Yes	
National Pet. Products Co.	11	2	National Pet. Products Co., Toledo, Ohio	Yes	
O'Connor & O'Connor	2	No	Leonard Refineries, Inc.	Yes	
Peerless Distributing Co.	No	1	Lakeside Ref. Co.	Yes	
			Natural Gasoline Products Co., West Va.		Yes
			Barrett Co.	Yes	
			J. B. Throop Pet. Co.	Yes	
Petroleum Services, Inc.	No	2	Barrett Co.		Yes
			Cities Service Oil Co.	Yes	Yes
			Aurora Gasoline Co.	Yes	Yes
Plymouth Oil Co.	1	1	Ohio Oil Co.	Yes	
			Aurora Gasoline Co.	Yes	
			Bay Refining Co.	Yes	
			Reliable Oil Co.	Yes	
			Roseline Oil Co.	Yes	

RESPONDENT'S EXHIBIT NO. 38-D.

Name of Distributor	Operate retail sta.	Operate bulk plant	Gasoline supplied by	By trucks	By tank car
Premier Tank Car Stations	3	3	Petroleum Services, Inc.	Yes	
			Benzol Stations, Inc.	Yes	
			Victor Oil Co.	Yes	
Purifan Stations, Inc.	35	1	S. B. Cantelou Pet. Products Co., W. Va.		Yes
			Natural Gasoline Products Co., W. Va.		Yes
			Aurora Gasoline Co.		Yes
Red Indian Oil Co.	6	4	Fleet-Wing Corp.	Yes	
			Great Pet. Co.	Yes	
			Victor Oil Co.	Yes	
			Western Rosin & Turpentine Co.	Yes	
Reliable Oil Co.	4	1	Aurora Gasoline Co.	Yes	
			Bay Ref. Co.	Yes	
			Barrett Co.	Yes	
			Argo Oil Corp.	Yes	
Speedway Pet. Corp.	12	No	Aurora Gasoline Co.	Yes	
			Trans-American Pet. Co.	Yes	
Star Products Coal & Oil Co.	3	No	Plymouth Oil Co.	Yes	
			Aurora Gasoline Co.	Yes	
			Trans-American Pet. Co.	Yes	
Terminal Oil Co.	1	1	Theisen-Clements Co.	Yes	
Texas Gas & Oil Co.	2	No	Victor Oil Co.	Yes	
			Plymouth Oil Co.	Yes	
Victor Oil Co.	No	1	Producers Ref. Co.	Yes	
			Theisen-Clements Co.	Yes	
			Red Indian Oil Co.	Yes	

RESPONDENT'S EXHIBIT NO. 38-E.

Name of Distributor	Operate retail sta.	Operate bulk plant	Gasoline supplied by	By trucks	By tank car
Wilsen Oil Corp.	13	1	Hickok Oil Corp.	Yes	Yes
			Highland Oil Corp.	Yes	
Wing's Pet. Products Co.	1	No	Red Indian Oil Co.	Yes	
			Aurora Gasoline Co.	Yes	
Zieve Oil Co.	1	No	Petroleum Services, Inc.	Yes	
			Keystone Oil & Ref. Co.	Yes	

954 RESPONDENT'S EXHIBIT NO. 45.

World's Largest Independent Firestone Dealer
Ned's Auto Supply Company
Office 905 Hudson Avenue

Madison 4114 Detroit, Michigan

August 27, 1936

Standard Oil Co.
Detroit, Michigan

Attention: Mr. P. A. Raupagh

Dear Sir:

This is to advise you that a competitive major oil company recently submitted to us a gasoline contract carrying a substantially larger margin of profit that we now enjoy from your company.

It is our present intention to act upon this offer and accept same.

Cordially yours,
Wm. Gershenson
for Ned's Auto Supply Co.

WMG:O

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955 RESPONDENT'S EXHIBIT NO. 46.

February 14, 1938.

Standard Oil Company
1011 Fourth Avenue
Detroit, Michigan

Gentlemen: For some time past, we have felt that our volume entitled us to tank car prices. Our ideas on the subject were given added impetus and confirmation when, as you remember, we were approached in August, 1936, by representatives of the Red Indian Oil Company with tank car prices, at truck delivery, and Shell Petroleum with a better deal; both with a view to changing to their respective brands. Because of our long association, we naturally advised you of the situation and the ensuing discussions resulted in our letter agreement of August 27, 1936, and your promise to give consideration to our receiving tank car prices at an early date.

Present plans for expansion, when consummated, will result in a substantial increase in our volume, and we feel that in view thereof, to expect us to continue on the present basis, involves an unreasonable sacrifice on our part.

We, therefore, request that you give immediate consideration to the desirability of continuing as our gasoline supplier, but at tank car prices. Otherwise, we shall be compelled to re-open negotiations with other suppliers.

Very truly yours,
Ned's Auto Supply Company
Wm. Gershenson.

WG:C

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956 RESPONDENT'S EXHIBIT NO. 47.

Red Indian Oil Company, Inc.
12401 Cloverdale Avenue
Detroit, Michigan

April 30, 1941.

Neds Auto Supply,
9465 Grand River,
Detroit, Mich.

Atten: Mr. Getterman

Gentlemen:

Confirming our conversation, we had discussed the matter of supplying you with gasoline with our source of supply, and we were authorized to offer you the following jobbers proposition on Fleet Wing gasoline last fall.

The tank wagon price on Fleet Wing, Golden Motor, Regular, was then .081 per gallon. Off this tank wagon price we were to allow you jobbers discount of .017, which would bring your price to .06225 per gallon.

In addition thereto, we would allow you .001 per gallon to haul gasoline out of our pipe line terminal and also an advertising allowance of .25 points per gallon on all regular and Ethyl gasoline purchased from us. Our Ethyl gasoline is shipped from Toledo refinery, and if you wish to haul that product from Toledo the hauling allowance would be .004 per gallon.

Very truly yours,
Red Indian Oil Company
I. B. Dworman.

IBD/kw

957 RESPONDENT'S EXHIBIT NO. 48.

Phone Tyler 4-4400

Ned's Auto Supply Co.
Department Stores for Motorists
9465 Grand River Corner Chicago Boulevard
Detroit, Michigan

December 23, 1940.

Mr. P. A. Raupagh
Standard Oil Company
1011 Fourth Avenue
Detroit, Michigan

Dear Sir:

This is to confirm the oral information I gave you this morning:

That, as of today (December 23), we received a quotation from the Gulf Refining Company, on tank car prices, of their brand name gasoline of 6.6¢ per gallon, delivered at our bulk plant.

Very truly yours,
C. H. Gershenson
Ned's Auto Supply Co.

CHG:O

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958 RESPONDENT'S EXHIBIT NO. 49-A.

Phone Tyler 4-4400

Ned's Auto Supply Co.
Department Stores for Motorists
9465 Grand River Corner Chicago Boulevard
Detroit, Michigan

March 23, 1940.

Mr. P. A. Raupagh
Standard Oil Company
1011 Fourth Avenue
Detroit, Michigan

Dear Sir:

Would appreciate an opportunity to discuss this situation with you at your earliest convenience.

Very truly yours,
C. H. Gershenson
Ned's Auto Supply Co.

CHG:O
Inc.

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959 RESPONDENT'S EXHIBIT NO. 49-B.

Langer's Auto Supply and Service
7929 West Fort St. at West End, Detroit, Mich.
14340 Michigan Ave. at Schlaff, Dearborn, Mich.

Dear Friend:

Its an old saying "That a penny saved is a penny earned" we are going one better—here's (two pennies) and its just what you save every time you get a gallon of gasoline at our station.

Yes sir, 2¢ off the price of every gallon of gasoline and a big discount on all other items, if you display the red sticker on your windshield. Trusting to see you soon, we are,

Sincerely yours,
Langers.

Detroit, Mich.
5-6-41

RESPONDENT'S EXHIBIT NO. 52-B.

STATEMENT OF—DEALER TANK WAGON PRICES—JOBBER TANK CAR PRICES—JOBBER MARGINS—PREVAILING RETAIL PRICES—RETAIL DEALER MARGINS—ON STANDARD RED CROWN GASOLINE FROM JANUARY 1, 1937 TO MARCH 6, 1941

(All Prices Shown Are Cents Per Gallon Exclusive of All Taxes)

(Jobber and Retail Dealer Margins Shown in Cents Per Gallon)

Period	Dealer Tank Wagon Prices in Effect	Jobber Tank Car Prices In Effect at which purchases of four named Jobbers were billed	Jobber Margin, ie.: Difference between Dealer Tank Wagon Prices and Jobber Tank Car Prices in Effect	Prevailing Retail Service Station Prices in Effect on "Regular" Brand of Gasoline of Major Companies including the Standard Oil Company		Retail Dealer Margin Difference between Dealer Tank Wagon Prices & Prevailing Retail S.S. Prices in Effect
Jan. 1, 1937 to Feb. 2, 1937	9.0	7.5	1.5	13.0		4.0
Feb. 2, 1937 to May 12, 1937	9.6	8.1	1.5	13.6		4.0
May 12, 1937 to Nov. 3, 1937	9.9	8.4	1.5	14.1		4.2
Nov. 3, 1937 to Mar. 28, 1938	9.6	8.1	1.5	14.1		4.5
Mar. 28, 1938 to July 22, 1938	9.8	8.3	1.5	14.3	Mar. 28, 1938 to May 10, 1938	4.5
				13.8	May 10, 1938 to June 21, 1938	4.0
				12.3	Jun. 21, 1938 to July 22, 1938	2.5
July 22, 1938 to Dec. 9, 1938	8.8	7.3	1.5	12.3	July 22, 1938 to Sept. 6, 1938	3.5
				12.1	Sept. 6, 1938 to Dec. 9, 1938	3.3
Dec. 9, 1938 to April 10, 1939	7.6	6.35	1.25	10.0	Dec. 9, 1938 to Feb. 20, 1939	2.4
				10.7	Feb. 20, 1939 to Apr. 10, 1939	3.1
April 10, 1939 to June 17, 1939	7.6	6.1	1.5	10.7		3.1
June 17, 1939 to Oct. 31, 1939	8.1	6.6	1.5	11.4		3.3
Oct. 31, 1939 to Nov. 11, 1939	7.4	6.15	1.25	9.3		1.9
Nov. 11, 1939 to Nov. 18, 1939	6.4	5.4	1.0	9.3		2.9
Nov. 18, 1939 to Current Date 3-6-41	8.1	6.6	1.5	11.4		3.3

Respondent's Exhibit No. 52-B.

DETROIT, MICH
FEB 6, 1941

(P. 4873)

FEDERAL TRADE COMMISSION
Docket No. 4389 ~~COMMISSION'S~~ RESPONDENT'S Exhibit No. 53
IN THE MATTER OF Standard Oil Co.
DATE 5/6/41 WITNESS Rampage
REPORTER

TOTAL GASOLINE SALES VOLUME IN GALLONS AND RATIO OF RETAIL AND WHOLESALE SALES TO TOTAL SALES OF STANDARD OIL CO JOBBERS FOR YEARS 1936-1940

STIKEMAN OIL CO

YEAR	TOTAL SALES	RETAIL SALES	WHOLESALE SALES
1936	2,255,000	626,890 27.8%	1,628,111 72.2%
1937	2,451,000	223,041 9.1%	2,227,959 90.9%
1938	2,290,000	6,870 0.3%	2,283,130 99.7%
1939	1,822,960	NONE	1,822,960 100%
1940	1,772,911	NONE	1,772,911 100%

WAYNE OIL CO

YEAR	TOTAL SALES	RETAIL SALES	WHOLESALE SALES
1936	1,948,348	NONE	1,948,348 100%
1937	1,686,657	NONE	1,686,657 100%
1938	1,625,038	NONE	1,625,038 100%
1939	2,226,177	169,189 7.6%	2,056,988 92.4%
1940	2,341,394	332,478 14.2%	2,008,916 85.8%

CITRON-KOLB OIL CO.

YEAR	TOTAL SALES	RETAIL SALES	WHOLESALE SALES
1936	2,095,026	618,761 29.4%	1,476,265 70.6%
1937	5,501,000	847,154 15.4%	4,653,846 84.6%
1938	5,959,000	436,607 7.3%	5,522,393 92.7%
1939	5,146,675	519,612 10.1%	4,627,063 89.9%
1940	5,226,130	338,698 6.5%	4,887,432 93.5%

NEDS AUTO SUPPLY CO.

YEAR	TOTAL SALES	RETAIL SALES	WHOLESALE SALES
1936	2,491,600	2,491,600 100%	NONE
1937	4,240,500	4,240,500 100%	NONE
1938	4,880,600	4,869,673 99.6%	10,927 0.4%
1939	4,336,308	4,250,946 98.0%	85,362 2.0%
1940	4,320,672	4,290,963 99.3%	29,709 0.7%

DETROIT, MICH
FEB 6, 1941

(p. 4874)

FEDERAL TRADE COMMISSION
Docket No. 4389 ~~COMMISSION'S~~ RESPONDENT'S Exhibit No. 54
IN THE MATTER OF Standard Oil Co.
DATE 5/6 WITNESS Rumpsch
REPORTER Brandenburg

STATEMENT OF VOLUME OF GASOLINE IN GALLONS OF STANDARD OIL CO JOBBERS IN THE DETROIT AREA (DEARBORN, HAMTRAMCK, AND HIGHLAND PARK) IN YEARS 1936-1940, AND NO OF RETAIL OUTLETS SUPPLIED

STIKEMAN OIL CO

YEAR	GROSS VOL IN GALS	NO OF RETAIL OUTLETS AS OF DEC 31
1936	2,155,660	21
1937	2,451,000	20
1938	2,290,000	18
1939	1,622,960	18
1940	1,712,311	18

WAYNE OIL CO

YEAR	GROSS VOL IN GALS	NO OF RETAIL OUTLETS AS OF DEC 31
1936	1,392,846	15
1937	1,686,637	19
1938	1,625,038	21
1939	2,226,177	24
1940	1,346,556	24

CITRON-KOLB OIL CO

YEAR	GROSS VOL IN GALS	NO OF RETAIL OUTLETS AS OF DEC 31
1936	2,091,696	43
1937	5,501,000	51
1938	5,959,000	57
1939	5,144,675	52
1940	5,228,130	58

NEDS AUTO SUPPLY CO.

YEAR	GROSS VOL IN GALS	NO OF RETAIL OUTLETS AS OF DEC 31
1936	2,401,600	4
1937	4,290,500	4
1938	4,680,000	6
1939	4,336,308	6
1940	6,320,672	6

RESPONDENT'S EXHIBIT NO. 55-A.

Detroit, Michigan

GASOLINE SALES (GALLONS) IN THE DETROIT AREA (INCLUDES HIGHLAND PARK-HAMTRAMCK-DEARBORN) OF WHOLESALE LICENSED JOBBERS AND DISTRIBUTORS OF BRANDED GASOLINE

Jobber or Distributor	Date Rec'd Whol. Dist. Lic.	Supplier	1936	1937	1938	1939	1940
Highland Oil Corp.	1-18-32	Pure Oil-Hickok	38,803,503	31,128,354	24,495,272	26,152,510	27,872,927
Wilson Oil Corp.	1-11-32	Pure Oil-Hickok	15,410,387	18,926,669	13,107,097	13,846,499	14,774,377
Bulk Stations, Inc.	3-19-32	Pure Oil-Hickok	929,291	1,393,460	1,196,203	663,482	483,229
Sub Total			55,143,181	51,448,483	38,798,572	40,662,491	43,100,533
Dixie Fuel & Sup. Co.	1- 1-32	Mid Cont.-Thiesen-Clemens	1,870,163	1,840,020	1,323,264	1,371,465	1,346,533
Lincoln Oil Co.	1-27-32	Mid Cont.-Thiesen-Clemens	149,945	363,543	170,478	18,066	911,208
National Garages, Inc.	5- 2-34	Mid Cont.-Thiesen-Clemens	868,679	742,004	706,761	929,696	1,000,860
Sub Total			2,888,784	2,945,567	2,200,503	2,319,227	3,258,601
*Red Indian Oil Co.	1- 4-32	So. Ohio-Fleetwing	6,171,038	6,939,008	6,753,057	7,552,204	8,968,140
*Victor Oil Co.	8-14-35	So. Ohio-Fleetwing	1,165,136	618,247	533,118	568,280	689,924
Terminal Oil Co.	1- 1-37	So. Ohio-Fleetwing	—	160,802	1,506,179	482,122	334,067
Sub Total			7,336,174	7,718,057	8,792,354	8,602,606	9,992,131
*Argo Oil Corp.	2-18-32	Ohio Oil Co.	3,266,607	3,054,051	2,916,746	4,219,577	1,930,901
*Plymouth Oil Co.	1- 4-32	Ohio Oil Co.	3,219,486	3,961,812	3,580,078	3,947,846	4,936,604
Sub Total			6,486,093	7,015,863	6,496,824	8,167,423	6,867,505
Firestone Tire & Rubber Co.	1- 1-35	Gulf & Texas	1,511,437	1,793,176	1,359,980	1,273,130	1,732,435
B. F. Goodrich Co.	9-11-36	Gulf & Texas	793,678	6,440,638	6,084,305	5,505,254	3,714,269
Sub Total			2,305,115	8,233,814	7,444,285	6,778,384	5,446,704

Respondent's Exhibit No. 55-A.

RESPONDENT'S EXHIBIT NO. 55-B.

Detroit, Michigan

Jobber or Distributor	Date Rec'd Whol. Dist. Lic.	Supplier	1936	1937	1938	1939	1940
Petroleum Service, Inc.	2-18-32	Cities Service	2,264,803	3,960,312	3,833,797	8,115,270	8,835,373
Bensol Stations, Inc.	1- 1-32	Sinclair-Ford	13,426,428	14,925,469	11,261,244	11,838,061	12,592,028
Grand Total			89,850,578	96,247,565	78,827,579	86,483,462	90,122,875

Sales figures of the major companies such as Socony-Vacuum Oil Co.-Texas Oil Co.-Sun Oil Co.-Shell Oil. Co.-Cities Service Oil Co.-Mid-Cont. Peters Co. (Thiesen Clemens Co.)-Sinclair Ref. Co. and Gulf Ref. Co. in the Detroit area are not available.

Neither are such sales as are made by any supplier thru commission agency arrangements, etc. as such operators are not licensed as wholesale distributors, i.e.:

Carnick Oil Co.—Supplied by Gulf Ref. Co.
J. J. Bright & Son—Supplied by Sinclair Ref. Co.
National Petro Products—Supplied by Sinclair Ref. Co.
Bernard Albert—Supplied by Texas Oil Co.
Arthur Adams—Supplied by Texas Oil Co.
William Baser—Supplied by Texas Oil Co.
D. J. Horte—Supplied by Texas Oil Co.
Dearborn Oil Co.—Supplied by Cities Service Oil Co.
Miller Auto Supply Co.—Supplied by Cities Service Oil Co.

Red Indian Oil Co.)
*Victor Oil Co.) are the source of supply for a large number of cut-price non-brand distributors and dealer, the portion of
Argo Oil Corp.) their gallonage going to such cut price non-brand operators cannot be determined.
Plymouth Oil Co.)

No record of the date on which wholesale distributors licenses were issued prior to 1932 is available, undoubtedly many of these companies had such licenses prior to 1-1-32.

* Sales for each Company taken from official Michigan State Gasoline Tax Department Reports.

Respondent's Exhibit No. 55-B.

RESPONDENT'S EXHIBIT NO. 57-A.

Detroit, Michigan March 28, 1941

GASOLINE SALES (GALLONS) IN DETROIT AREA (INCLUDING HIGHLAND PARK-HAMTRAMCK-DEARBORN) OF LICENSED WHOLESALE NON-BRAND JOBBERS AND DISTRIBUTORS

Name of Distributor	Address	1936	1937	1938	1939	1940
All American Avia Gasolines.......	Detroit	—	—	—	50,240	—
Apex Oil Co......................	Detroit	—	—	—	968,199	2,088,871
Austin, Chas. E..................	Detroit	—	—	14,840,138	21,607,373	17,964,589
Benz Oil Co......................	Highland Park	—	—	—	1,071,172	1,586,243
Buffalo Grey Auto Stas., Inc.......	Buffalo	655,495	847,994	667,433	430,876	538,587
Bull Dog Oil Co..................	Highland Park	322,026	545,186	457,455	597,050	740,850
Collins, A. W., Oil Co.............	Detroit	700,502	591,183	518,292	697,468	661,354
Duro Oil Corp.....................	Detroit	3,751,352	4,726,539	5,506,161	6,864,257	8,074,770
Filco Oil Co......................	Detroit	731,249	996,326	1,561,386	730,945	495,563
Great American Oil & Ref. Co......	Detroit	174,982	177,529	421,591	255,988	209,498
Great Lakes Oil Co................	Detroit	46,738	23	280,390	191,312	144,462
Jeffers & Co......................	Detroit	428,766	391,338	277,455	292,670	432,341
Meurer Bros.	Detroit	—	—	—	—	369,910
Millers Tank Car, Inc..............	Detroit	227,202	215,743	243,130	219,723	239,879
Montgomery Ward & Co..............	Chicago	—	—	—	217,183	1,088,513
O'Connor & O'Connor...............	Detroit	—	—	—	—	47,820
Peerless Distributing Co...........	Detroit	2,601,140	1,014,600	2,535,393	1,431,343	739,939
Premier Tank Car Sta., Inc.........	Detroit	743,695	879,038	836,053	596,993	441,548

Respondent's Exhibit No. 57-A.

RESPONDENT'S EXHIBIT NO. 57-B.

Detroit, Michigan

March 28, 1941

Name of Distributor	Address	1936	1937	1938	1939	1940
Sunny Service Oil Co.	Detroit	8,516,839	12,141,037	—	—	—
Puritan Oil Stations (Successor to Sunny Serv. Oil)	Detroit	—	690,178	12,225,571	11,988,840	12,495,572
Real Seal Oil Co.	Ferndale	10,483	9,630	13,668	11,817	9,527
Reliable Oil Co.	Detroit	1,574,588	1,290,216	2,129,200	1,748,728	1,285,799
Royal Petroleum Co.	Detroit	—	—	253,265	630,525	669,863
Speedway Petroleum Corp.	Detroit	—	—	364,105	4,721,580	7,195,802
Star Products Coal & Oil Co.	Detroit	—	2,763,199	2,246,194	3,138,565	3,070,553
Tank Car Stations, Inc.	Buffalo	3,344,918	2,649,705	2,897,735	2,123,673	2,120,108
Taylor, F. Paul	Highland Park	—	—	—	539,585	642,047
Texas Gas & Oil Co.	Detroit	—	—	—	—	677,405
Wings Petroleum Prod. Co.	Detroit	—	—	—	25,969	104,086
Zieve Oil Co.	Detroit	849,929	165,916	171,194	138,833	235,711
Grand Total		24,679,904	30,095,380	48,445,809	61,291,087	64,716,210

Sales for each company taken from official Michigan State Gasoline Tax Department Reports.

Note

Page 4879 is on Card 71

RESPONDENT'S EXHIBIT NO. 59.

YEARLY INCREASES OR DECREASES IN GASOLINE SALES (GALLONS AND PERCENT) YEARS 1937-38-39-40 FOR STATE OF MICHIGAN—DETROIT AREA—TOTAL S.O. CO.—S.O. CO. JOBBERS—BRANDED JOBBERS—CUT-PRICE NON-GRAND JOBBERS—ALL JOBBERS—ALL OTHER

	1936	1937			1938			1939			1940		
	Gallons	Gallons	Increase or Decrease	% of Increase or Decrease	Gallons	Increase or Decrease	% of Increase or Decrease	Gallons	Increase or Decrease	% of Increase or Decrease	Gallons	Increase or Decrease	% of Increase or Decrease
*Consumption—State of Michigan	1,007,384,050	1,115,308,491	107,924,441	10.7	1,055,093,917	†60,214,574	†5.4	1,154,719,595	99,625,677	9.1	1,255,912,240	101,192,646	8.8
**Consumption—Detroit Area	363,735,380	409,445,610	45,710,230	12.6	368,586,580	†40,859,030	†10.0	405,907,000	35,320,420	9.6	460,664,890	56,757,890	14.1
***Total S.O. Co. Sales (Includes Jobbers) (Detroit Area)	62,198,750	70,015,200	7,816,450	12.6	60,448,200	†9,567,000	†13.7	70,279,818	9,831,618	16.3	74,627,712	4,347,894	6.2
***S.O. Co. Jobbers (Detroit Area)	8,095,972	13,879,137	5,783,164	71.4	14,954,638	1,075,501	7.7	13,530,120	†1,424,518	†9.5	13,661,107	130,987	1.0
*Branded Jobbers (Detroit Area)	89,850,578	96,247,565	6,396,987	7.1	78,827,579	†17,419,986	†18.1	86,483,462	7,655,883	9.7	90,122,875	3,639,413	4.2
*Cut Price Non-Brand Jobbers (Detroit Area)	24,679,904	30,095,380	5,415,476	21.9	48,445,809	18,350,429	61.0	61,291,087	12,845,278	26.5	64,716,210	3,425,123	5.6
*All Jobbers Including S.O. Co. (Detroit Area)	122,626,454	140,222,082	17,595,628	14.3	142,228,026	2,005,944	1.4	161,304,669	19,076,643	13.4	168,500,192	7,195,523	4.5
**All other Companies (Detroit Area)	187,006,148	213,087,465	28,081,317	13.9	180,864,992	†32,222,473	†15.1	185,852,633	4,987,641	2.8	231,198,093	45,345,460	24.4

† Denotes red in original.
* Official Michigan State Gasoline Tax Department reports.
** Estimated.
*** Actual Sales.

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RESPONDENT'S EXHIBIT NO. 60-A.

RETAIL GASOLINE PRICE SITUATION
DETROIT

PRICES ARE EXCLUSIVE OF ALL TAXES THIRD GRADE

						HOUSE BRAND					PREMIUM GRADE				
Date	Prevailing Retail Ser. Sta. Price	Dealer T.W. Price	Margin	No. S.S. Selling Below Prevailing Retail Market	Avg. Amt. Below Prevailing Retail Market	Prevailing Retail Ser. Sta. Price	Dealer T.W. Price	Margin	No. S.S. Selling Below Prevailing Retail Market	Avg. Amt. Below Prevailing Retail Market	Prevailing Retail Ser. Sta. Price	Dealer T.W. Price	Margin	No. S.S. Selling Below Prevailing Retail Market	Avg. Amt. Below Prevailing Retail Market
1936															
June 16	11.0¢	None	None	139	1.45¢	12.5¢	None	None	92	1.17¢					
Aug. 11	11.5	None	None	133	1.58	13.0	None	None	106	1.35					
Aug. 18	11.5	None	None	131	1.82	13.0	None	None	106	1.39					
Sept. 25	11.5	9.0	2.5	129	2.00	13.0	9.5	3.5	110	1.52					
Oct. 23	11.5	9.0	2.5	136	2.13	13.0	9.0	4.0	113	1.51					
Nov. 10	11.5	9.0	2.5	143	2.25	13.0	9.0	4.0	111	1.47					
Dec. 8	11.5	9.0	2.5	159	2.50	13.0	9.0	4.0	110	1.50					
1937															
Jan. 5	11.5	9.0	2.5	149	2.45	13.0	9.0	4.0	97	1.59					
Feb. 9	12.1	9.6	2.5	147	2.73	13.6	9.6	4.0	95	2.03					
Mar. 23	12.1	9.6	2.5	146	2.65	13.6	9.6	4.0	86	1.94					
Apr. 27	12.1	9.6	2.5	145	2.45	13.6	9.6	4.0	85	1.87					
May 13	12.6	9.9	2.7	146	2.80	14.1	9.9	4.2	100	1.96					
June 1	12.6	9.9	2.7	145	2.37	14.1	9.9	4.2	92	1.71					

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RESPONDENT'S EXHIBIT NO. 60-B.

	THIRD GRADE					HOUSE BRAND					PREMIUM GRADE				
Date	Prevailing Retail Ser. Sta. Price	Dealer T.W. Price	Margin	No. S.S. Selling Below Prevailing Retail Market	Avg. Amt. Below Prevailing Retail Market	Prevailing Retail Ser. Sta. Price	Dealer T.W. Price	Margin	No. S.S. Selling Below Prevailing Retail Market	Avg. Amt. Below Prevailing Retail Market	Prevailing Retail Ser. Sta. Price	Dealer T.W. Price	Margin	No. S.S. Selling Below Prevailing Retail Market	Avg. Amt. Below Prevailing Retail Market
Aug. 17	12.6	9.4	3.2	151	2.91	14.1	9.9	4.2	145	1.80					
Sept. 7	12.6	9.4	3.2	145	2.57	14.1	9.9	4.2	184	2.04					
Oct. 29	12.6	9.4	3.2	140	2.66	14.1	9.9	4.2	199	2.06	16.1¢	11.4¢	4.7¢	72	2.97¢
Nov. 23	12.6	9.1	3.5	145	2.69	14.1	9.6	4.5	228	2.03	16.1	11.1	5.0	93	2.00
Dec. 27	12.6	9.1	3.5	148	2.79	14.1	9.6	4.5	247	2.02	16.1	11.1	5.0	111	1.99
1938															
Jan. 18	12.6	9.1	3.5	149	2.76	14.1	9.6	4.5	649	2.03	16.1	11.1	5.0	183	1.98
Jan. 25	12.6	9.1	3.5	161	2.76	14.1	9.6	4.5	721	2.02	16.1	11.1	5.0	230	1.99
Feb. 1	12.6	9.1	3.5	167	2.98	14.1	9.6	4.5	853	2.02	16.1	11.1	5.0	429	2.00
Feb. 15	12.6	9.1	3.5	164	3.13	14.1	9.6	4.5	913	2.04	16.1	11.1	5.0	647	2.02
Mar. 4	12.6	9.1	3.5	121	3.34	14.1	9.6	4.5	79	2.43	16.1	11.1	5.0	7	2.27
Mar. 15	12.6	9.1	3.5	142	3.52	14.1	9.6	4.5	119	2.28	16.1	11.1	5.0	25	1.98
Apr. 5	12.8	9.3	3.5	152	3.73	14.3	9.8	4.5	151	2.30	16.3	11.3	5.0	42	2.06
Apr. 26	12.8	9.3	3.5	163	3.84	14.3	9.8	4.5	193	2.26	16.3	11.3	5.0	66	2.08
May 10	12.3	9.3	3.0	173	3.30	13.8	9.8	4.0	250	1.78	15.8	11.3	4.5	106	1.62
May 17	12.3	9.3	3.0	181	3.30	13.8	9.8	4.0	301	1.76	15.8	11.3	4.5	139	1.57
May 24	12.3	9.3	3.0	185	3.30	13.8	9.8	4.0	364	1.69	15.8	11.3	4.5	177	1.54

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RESPONDENT'S EXHIBIT NO. 60-C.

	THIRD GRADE					HOUSE BRAND					PREMIUM GRADE				
Date	Prevailing Retail Ser. Sta. Price	Dealer T.W. Price	Margin	No. S.S. Selling Below Prevailing Retail Market	Avg. Amt. Below Prevailing Retail Market	Prevailing Retail Ser. Sta. Price	Dealer T.W. Price	Margin	No. S.S. Selling Below Prevailing Retail Market	Avg. Amt. Below Prevailing Retail Market	Prevailing Retail Ser. Sta. Price	Dealer T.W. Price	Margin	No. S.S. Selling Below Prevailing Retail Market	Avg. Amt. Below Prevailing Retail Market
May 31	12.3	9.3	3.0	187	3.30	13.8	9.8	4.0	457	1.68	15.8	11.3	4.5	254	1.56
June 7	12.3	9.3	3.0	189	3.30	13.8	9.8	4.0	519	1.67	15.8	11.3	4.5	294	1.56
June 14	12.3	9.3	3.0	195	3.26	13.8	9.8	4.0	674	1.63	15.8	11.3	4.5	405	1.53
June 21	11.0	9.3	1.7	189	2.40	12.3	9.8	2.5	119	1.03	14.3	11.3	3.0	17	.91
July 19	11.0	9.3	1.7	241	2.48	12.3	9.8	2.5	267	.99	14.3	11.3	3.0		
July 26	8.2	7.5	0.7	40	1.04	12.3	8.8	3.5	299	1.05	14.3	10.3	4.0		
Aug. 9	8.2	7.5	0.7	72	1.15	12.3	8.8	3.3	375	1.15	14.3	10.3	3.8		
Aug. 30	8.2	7.5	0.7	77	1.17	12.3	8.8	3.3	450	1.25	14.3	10.3	3.8		
Sept. 6	8.2	7.5	0.7	71	1.21	12.1	8.8	3.3	506	1.05	14.1	10.3	3.8		
Oct. 11	8.2	7.5	0.7	78	1.30	12.1	8.8	3.3	723	1.22	14.1	10.3	3.8		
Nov. 8	8.2	7.5	0.7	88	1.37	12.1	8.8	3.3	817	1.34	14.1	10.3	3.8		
Nov. 15	8.2	7.5	0.7	95	1.36	12.1	8.8	3.3	869	1.41	14.1	10.3	3.8		
Dec. 13	8.2	7.1	1.1	75	1.34	10.4	7.6	2.4	79	.62	12.3	9.1	3.2		
Dec. 20	8.2	7.1	1.1	93	1.37	10.0	7.6	2.4	152	.60	12.3	9.1	3.2		
1939															
Jan. 13	8.2	7.1	1.1	94	1.64	10.0	7.6	2.4	234	.65	12.3	9.1	3.2		
Feb. 3	8.2	7.1	1.1	131	1.23	10.0	7.6	2.4	278	.72	12.3	9.1	3.2		

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RESPONDENT'S EXHIBIT NO. 60-D.

	THIRD GRADE					HOUSE BRAND					PREMIUM GRADE				
Date	Prevailing Retail Ser. Sta. Price	Dealer T.W. Price	Margin	No. S.S. Selling Below Prevailing Retail Market	Avg. Amt. Below Prevailing Retail Market	Prevailing Retail Ser. Sta. Price	Dealer T.W. Price	Margin	No. S.S. Selling Below Prevailing Retail Market	Avg. Amt. Below Prevailing Retail Market	Prevailing Retail Ser. Sta. Price	Dealer T.W. Price	Margin	No. S.S. Selling Below Prevailing Retail Market	Avg. Amt. Below Prevailing Retail Market
Feb. 24	8.2	7.1	1.1	101	1.25	10.7	7.6	3.1	157	1.13	13.1	9.1	4.0		
Mar. 17	8.2	7.1	1.1	106	1.04	10.7	7.6	3.1	82	1.39	13.1	9.1	4.0		
June 16	8.2	7.1	1.1	126	1.24	10.7	7.6	3.1	117	1.29	13.1	9.1	4.0		
Sept. 18	8.9	7.6	1.3	173	1.50	11.4	8.1	3.3	225	1.50	13.1	9.6	3.5		
Oct. 27	8.9	7.6	1.3	125	1.78	11.4	8.1	3.8	108	1.99	13.1	9.6	3.5		
1940															
June 14	8.2	7.1	1.1	126	.08	11.4	8.1	3.3	105	1.59	13.1	9.6	3.5	84	1.71
Nov. 18	8.2	7.1	1.1	58	.89	11.4	8.1	3.3	173	2.39	13.4	9.6	3.8	86	2.18

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RESPONDENT' EXHIBIT NO. 63-A.

BRAND NAMES FOR GASOLINE MARKETED IN THE DETROIT AREA BY THE FOLLOWING COMPANIES

	Premium	Housebrand	Third Grade
Standard Oil Co.	Solite	Red Crown	Stanolind
Socony-Vacuum Oil Co.	Mobilgas Special	Mobilgas	Metro
Sinclair Refining Co.	Ethyl	H.C. Regular	Pennant
Texas Co.	Texas Sky Chief	Texaco Fire Chief	Indian
Shell Petroleum Corp.	Shell Premium	Shell	Silver Shell
Sun Oil Co.	—	Blue Sunoco	—
Gulf Refining Co.	Gulf No-Nox Ethyl	Good Gulf	Traffic
Highland Oil Corp.	Hi-Speed Ethyl	Hi-Speed Ex-Carbon	Charm
Wilson Oil Corp.	Hi-Speed Ethyl	Hi-Speed Ex-Carbon	Charm
Bulk Stations, Inc.	Hi-Speed Ethyl	Hi-Speed Ex-Carbon	—
Dixie Fuel & Supply Co.	D-X Ethyl	D-X	Power
Lincoln Oil Co.	D-X Ethyl	D-X	Power
National Garages, Inc.	D-X Ethyl	D-X	—
Red Indian Oil Co.	Fleetwing Ethyl	Fleetwing Golden	—
Victor Oil Co.	Fleetwing Ethyl	Fleetwing Golden	—
Terminal Oil Co.	Fleetwing Ethyl	Fleetwing Golden & Spee Dee 80	—
Plymouth Oil Co.	Dixie Ethyl	Dixie	Dixoline
Firestone Tire & Rubber Co.	See listing for Gulf Refining Co. and Texas Co.		
B. F. Goodrich Co.	See listing for Gulf Refining Co. and Texas Co.		
Petroleum Service, Inc.	Cities Service Ethyl	Cities Service Koolmotor	Motor
Benzol Stations, Inc.	—	Benzol	—

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RESPONDENT'S EXHIBIT NO. 63-B.

Brand Names For Gasoline Marketed In The Detroit Area By The Following Companies: Page #2

Argo Oil Corporation	Marathon Ethyl	Marathon	Gem
Apex Oil Co.	Ethyl	Super Regular	Arrow 70
Charles E. Austin, Inc.	—	Joy	—
Benz Oil Co.	Ethyl	Benz 80	—
Buffalo Grey Auto Stations, Inc.	Mercury Ethyl	Regular	—
Bull Dog Oil Co.	Ethyl	Bull Dog 80	—
A. W. Collins Oil Co.	Ethyl	Super Test	—
Duro Oil Corp.	Ethyl	Duro Streak	U. S. Motor
Philco Oil Co. (Now Falcon Oil Co.)	Ethyl	Hi-Test	Regular
Great American Oil & Refining Co.	Ethyl	Regular	No Name
Great Lakes Oil Co.	—	—	—
Jeffers & Co.	Cities Service Ethyl	Koolmotor	Jeffers
Meurer & Co.	Ethyl	Regular	—
Miller Tank Car Co.	—	Miller's High Life	—
Montgomery Ward & Co.	Wards Ethyl	Wards Regular	Wards Rambler
O'Connor & O'Connor	—	—	—
Peerless Distributing Co.	Ethyl	Super Test	—

	Premium	Housebrand	Third Grade
Premier Tank Car Stations, Inc.	Cities Service Ethyl	Premier Regular & Cities Service Koolmotor	Harmony
(Puritan Stations, Inc.)	—	Zip	—
(Sunny Service Oil Co.)	—	Zip	—
Red Seal Oil Co.	—	—	—
Reliable Oil Co.	Globe Ethyl	Bonded 70	No Name
Royal Petroleum Co.	Ethyl	—	—
Speedway Petroleum Co.	—	Speedway 79	—
Star Products Coal & Oil Co.	Ethyl	Hi-Test	No Name

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980 RESPONDENT'S EXHIBIT NO. 63-C.

Brand Names For Gasoline Marketed In The Detroit Area By The Following Companies: Page #3

	Premium	Housebrand	Third Grade
Tank Car Stations, Inc.	Ethyl	White Fire	—
I. Paul Taylor	Marathon Ethyl	Major-Gas	No Name
Texas Gas & Oil Co.	Ethyl	Hi-Test	Economy
Wings Petroleum Pro. Co.	Ethyl	Regular	Swan
Zieve Oil Co.	Cities Service Ethyl	Cities Service Koolmotor	Motor

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992 RESPONDENT'S EXHIBIT NO. 96-A.

Schedule "A"—Respondent's Exhibit 31 "A"—Modified to Exclude Newspaper and Billboard Advertising

DIFFERENCES IN CERTAIN MARKETING EXPENSE ITEMS INCURRED BY DISTRIBUTING THROUGH REGULAR RESELLER OUTLETS VERSUS DISTRIBUTING THROUGH NED'S AUTO SUPPLY COMPANY—1937

	Regular Reseller Business	Ned's Auto Supply Company	Difference of Marketing Costs
	¢/Gal.	¢/Gal.	¢/Gal.
1. Delivery Cost			
(a) Salaries—Drivers	.114¢	.076¢	.038¢
(b) Equipment	.049	.038	.011
2. Marketing Expense Item Not Influenced by Ned's Auto Supply Co.			
(a) Sales Promotion	.016	—	.016
(b) Other	.084,	—	.084
3. Semi Direct Expense Items Not Incurred In Handling the Volame of Ned's Auto Supply Company	.017	—	.017
4. Selling Cost	.079	.005	.074
5. Dispensing Equipment Loaned	.092	.016	.076
6. Advertising Cost	.106	.025	.081
Total	.557¢	.160¢	.397¢

Respondent's Exhibit 31 "A" Modified to Exclude the Influence of Newspaper and Billboard Advertising

It is our contention that advertising in the form of newspapers and billboards should be regarded as a direct charge against regular tank wagon re-seller gallonage, no part of which should be allocated against business which might be secured in a given community through wholesale distributors such as Ned's Auto Supply Company because:

(a) Ned's Auto Supply Company does its own newspaper advertising from which our products receive a direct benefit. Actually, Ned's Auto Supply Company does derive a benefit from our newspaper insertion. However, we derive a reciprocal benefit from their emphasis of our merchandise.

(b) A study of the allocation of our advertising expenditures among the various fields indicates that our expenditures in the Detroit area bears a lower relationship to potential than any other field.

(c) Because Ned's Auto Supply Company outlets are large and popular distributors of many other lines of merchandise calling for and resulting in a heavy traffic across their driveways, the presence of our merchandise on those driveways results in a derived advertising benefit to both our gasolines and motor oil in the Detroit area.

(d) Our advertising expenditures are to convince customers in the merits of our products and services. Custom-

ers are associated with a company and brands. An outlet allocation is a practical impossibility.

(e) To the best of my knowledge we have never, either by newspaper or billboards, advertised to acquire wholesale outlets.

(f) Expenditures for newspaper and outdoor advertising were not increased with the acquisition of this account nor would they be reduced with the loss of this account. The loss would be more likely to result in an increase of expenditures than a decrease.

If, however, in the opinion of the Commission it be necessary to take out of advertising cost figures all expenditures through newspapers and outdoor billboards, the cost per gallon of point-of-sale type advertising in the regular tank wagon re-seller channel would be modified as follows:

Newspapers	$76,120.34
Posters	11,256.99
Total	$87,377.33

If this cost were removed from the net cost of advertising as shown on Respondent's Exhibit 31 "O" equalling $158,031.75 the residual amount of $70,653.42 would be chargeable to the tank wagon reseller volume of $66,388,527. The cost of advertising for the regular tank wagon reseller business, therefore (excluding newspaper and billboards) would be .106¢.

Advertising cost incurred at Ned's Auto Supply Company .025.

995 RESPONDENT'S EXHIBIT NO. 96-D.

Savings on this basis of computation..... .081¢

997 RESPONDENT'S EXHIBIT NO. 98.

Respondent's Exhibit 33-A
Modified to Exclude the
Influence of Newspaper,
Billboard and Radio
Advertising

		Cost Per Gallon	
		1939	1940
1. Tank Wagon Reseller Marketing Cost		1.81¢	1.72¢
2. Deduct Above Type of Consumer Advertising		.13	.12
		1.68	1.60
3. Jobber Marketing Costs			
(a) Accounting	.10¢		
(b) Credit Cost	.03		
(c) Supervision and Selling Cost	.06		
(d) General Office Expense	.01		
(e) Advertising (Point of Sale)	.05	.25	.25
		1.43¢	1.35¢

998 RESPONDENT'S EXHIBIT NO. 99.

Supplement To

Standard Oil Company (Indiana)
Distribution Cost Analysis

Tank Wagon Reseller Channel Versus Jobber Gasoline Sales

Explaining Regular Costing Procedure
Detroit Field—1940

1001 Explanation of Allocation of Marketing Expenses to Channels Shown on Comparative Statement of Expense Form 189.

Schedule #1.

Salesmen and Sales Promotion Expense

Salesmen

Account 004—Salaries—Salesmen
Account 032—Traveling Expense—Salesmen
Account 047—Operation and Maintenance of Vehicles —Salesmen
Account 102—Depreciation Expense—Vehicles—Salesmen

A memorandum is maintained by each salesman showing the amount of time spent in selling products applicable to each channel of distribution during the last month of each quarter. This time record is reviewed and approved by the Sales Manager, Assistant Field Manager, or Field Manager. Upon approval, it is used in allocating field expenses to the various sales channels on our Comparative Statement of Expense, Form 189, for the succeeding three-month period. Review by supervisory personnel is to insure that distribution of effort is properly reflected in costs assessed. General Office salesmen expense applicable to salesmen carried on General Office payroll is allocated to each field based on the number of days worked in the field and is distributed directly to channel applicable.

All accounts listed on Schedule #1 were allocated to the various channels on the above basis. For example: Percentages taken from the December, 1939, and the June, 1940, distribution of time reports used to distribute salesmen's salaries to channels for the following quarterly periods were:

1002	December, 1939	June, 1940
Tank Wagon Reseller	29.7%	27.8%
Tank Wagon Consumer	14.5	16.2
Other Method	51.0	51.9
Automobile Supplies	4.8	4.1
Total	100.0%	100.0%

Total salaries paid to salesmen in the months of January and July were distributed to the various channels as follows:

	—January—		—July—	
Field Expense	% of Effort	Costs Allocated	% of Effort	Costs Allocated
Tank Wagon Reseller	29.7%	$ 4,799.83	27.8%	$ 4,955.43
Tank Wagon Consumer	14.5	2,343.35	16.2	2,887.70
Other Method	51.0	8,242.13	51.9	9,251.33
Automobile Supplies	4.8	775.73	4.1	730.84
Sub Total	100.0%	$16,161.04	100.0%	$17,825.30
General Office		365.50		348.58
Total		$16,526.54		$18,173.88

Sales Promotion

Account 002—Salaries—Sales Promotion
Account 031—Traveling Expense—Sales Promotion
Account 046—Operation and maintenance of Vehicles —Sales Promotion
Account 101—Depreciation Expense—Vehicles—Sales Promotion

The allocation of sales promotion expense is handled in the same manner as that applicable to salesmen, no expense

being charged to the fields by General Office. This means
that a distribution of time report is made up for sales
1003 promotion employees at the same time and on the
same basis as salesmen's distribution of time report
is made.

Example: Total salaries paid to sales promotion employees for the months of January and July were distributed to channel in accordance with the following:

	January		July	
	% of Effort	Costs Allocated	% of Effort	Costs Allocated
Tank Wagon Reseller	24.6%	$ 714.63	16.3%	$ 310.92
Tank Wagon Consumer	28.8	836.64	33.4	637.11
Other Method	44.3	1,286.92	48.4	923.23
Automobile Supplies	2.3	66.81	1.9	36.24
Total	100.0%	$2,905.00	100.0%	$1,907.50

Account 003—Salaries—Sales Promotion—Others

The distribution of expense applicable to this account was made in exactly the same manner as that applied to salesmen and sales promotion costs, no expense being charged to the fields by General Office. An example showing a breakdown of total salaries paid employees classified as Sales Promotion—Others—for the months of January and July is as follows:

	January		July	
	% of Effort	Costs Allocated	% of Effort	Costs Allocated
Tank Wagon Reseller	17.3%	$ 281.89	24.1%	$ 482.01
Tank Wagon Consumer	51.0	831.00	30.7	614.01
Other Method	20.0	325.88	35.5	710.01
Automobile Supplies	11.7	190.64	9.7	194.00
Total	100.0%	$1,629.41	100.0%	$2,000.03

Schedule #2

Advertising Costs

Account 005—Salaries—Advertising
Account 033—Traveling Expense—Advertising
Account 048—Operation and Maintenance of Vehicles—Advertising—Passenger Cars and Trucks
Account 103—Depreciation Expense—Vehicles—Advertising.
Account 240—Donations

All charges to the above accounts, excluding charges directly applicable to automobile supplies, were allocated to channels shown on Comparative Statement of Expense, Form 189, according to the ratio of gallons sold by each channel to total gallons sold by all channels (excluding direct shipments) during the month in which the expense was charged.

Example: Any work done by advertising painters on advertising pertaining solely to the automotive line was charged direct to the automobile supplies channel on Form 189. Such individuals maintain a daily time card from which such direct costs are determined. Other painting expense and other advertising salaries not directly chargeable to the automobile supplies channel are prorated to tank wagon reseller, tank wagon consumer, and other methods on a gallonage basis.

An example of the procedure used in prorating advertising expenditures applicable to the above accounts is as follows: Total advertising salaries for the months of January and July were $473.18 and $771.34, respectively.

1005

	January		July	
	% of Gallons	Costs Allocated	% of Gallons	Costs Allocated
Tank Wagon Reseller	53.4%	$252.68	76.4%	$589.30
Tank Wagon Consumer	40.1	189.74	19.3	148.87
Other Method	6.5	30.76	4.3	33.17
Total	100.0%	$473.18	100.0%	$771.34

Account 075—Advertising—Other Costs (Including ELA)

When allocating charges to Account 075, distribution is made directly to each channel when possible.

Example: Costs involved in installing Jewel Globes on gasoline pumps at a reseller outlet and costs of advertising signs installed at reseller outlets which refer to a particular brand of gasoline are charged directly to tank wagon reseller channel (1075). Similarly, advertising signs installed at reseller outlets which refer to motor oils are charged directly to other method channel (4075).

When a direct charge to a particular channel cannot be made, but the expense affects the tank wagon channel as a whole, distribution is made on the ratio of reseller and of consumer tank wagon gallons sold to total tank wagon sales.

Example: Red Crown decalcomania transfers affixed to tank trucks and gasoline handout folders affect both the tank wagon reseller and tank wagon consumer channels.

Similarly, when allocation to a particular channel cannot be made and the item of expense affects all channels, other than automobile supplies, allocation is made on an all gallonage basis, excluding direct shipments.

1006 Example: Handling charges involving Standard Service signs, highway approach signs, and cost of display floats used in parades.

If an item of expense of a general nature affects all channels, including automobile supplies, allocation to automobile supplies and to petroleum products is made on the basis of sales realization for the current month. Allocation of expense charged to petroleum products is then allocated to the various channels applicable on a gallonage basis.

Example: Newspaper advertising relative to services offered at reseller outlets and radio program—Auction Quiz.

1007

Schedule #3

Delivery and Warehouse Cost

Salaried Drivers

Account 006—Salaries—Drivers

Each salaried driver maintains a daily time card showing the distribution of his effort. Allocation of salaries is made direct to each channel based on these time cards.

Account 053—Operation and Maintenance of Vehicles—Trucks, Motor and Horse-drawn (excluding Advertising)

Account 106—Depreciation Expense — Vehicles — Trucks, Motor and Horse-drawn (Including Vehicle Tanks and excluding Advertising Trucks

When possible, distribution of charges to these accounts is made directly to each channel. In all other instances, allocation is based on the ratio of gallons sold by each channel to total gallons sold by all channels.

Example: Repairs to a fuel oil truck are charged to tank wagon consumer channel on Account 053; while repairs on a truck delivering gasoline to reseller outlets only would be charged to the tank wagon reseller and expenses for stake trucks are charged to other methods.

When direct allocation cannot be made but expense affects both the tank wagon reseller and consumer channels, distribution is made on a gallonage basis.

Example: Repairs to tank truck used to make deliveries to both reseller and consumers.

1008 In the same manner, when a particular item of expense affects all channels, other than automobile supplies, allocation to all channels is based on the ratio of gallons sold by each channel to total gallons sold by all channels.

Example: Repairs to construction man's truck.

Commission Drivers

Account 021—Commissions

Allocation of expense incurred in the payment of commissions for the sales of products is made directly to each channel affected, based on classification of sales reported by commission agents and drivers.

Account 024—Expense of Transferring Standard Fuels Due to Lack of Storage

Account 025—Truck Rental Expense

Account 055—Vehicle Tank Expense—Other Than Mounted on Company Chassis

Allocation of this type of expense is based on the ratio of reseller and of consumer tank wagon gallons sold on commission to total tank wagon sales on commission.

Bulk Plant Cost

Account 008—Salaries—Warehouse Labor

Account 060—Plant Maintenance

Account 062—Water, Light, Fuel (Other Than Main Office)

Account 087—General Supplies Used

Account 088—Station Operating Tools and Equipment

When possible, distribution of charges to Accounts 008,
060, 087, and 088 are made directly to each channel. In all
other instances, when this type of expense is applica-
1009 ble to tank wagon channel, allocation to reseller and
consumer channels is made on the ratio of reseller
and consumer tank wagon gallons sold to total tank wagon
sales. However, if this type of expense cannot be allocated
to tank wagon channel, distribution is made to all channels
on the ratio of gallons sold by each channel to total gallons
sold by all channels.

Example:

	Direct Charge		Tank Wagon Pro Rata	General Pro Rata
	Channel	Item		
008 (based on daily time record)	Other Method	Unloading box cars	Loading tank trucks	Servicing Company cars with gasolines and motor oils
060	Tank Wagon Consumer	Repair to furnace oil storage tank	Repair overhead loading apparatus at bulk station	Painting bulk station
062			Water, light and fuel expense at bulk stations stocking only tank wagon products	Water, light and fuel expense at bulk stations stocking all products
087	Tank Wagon Consumer	General Supplies used in connection with fuel oil truck making only consumer deliveries	General Supplies used at bulk plant stocking only tank wagon products	General Supplies used at bulk station stocking all products, such as rags, soap, etc.
088	Other Method	Expense in connection with pump and dolly outfit, milk cans,etc.	Hose installed on tank trucks making deliveries to both reseller and consumer channels	Shovels, rakes, etc., disbursed to construction men

1010

Account 061—Rental Expense

Account 063—Telephone and Telegraph (Other Than Main Office)

Account 110—Depreciation Expense—Plant (Building, Machinery, Equipment, Furniture and Fixtures)

Account 112—Depreciation Expense—Real Estate Improvements

Account 086—Taxes—Real Estate and Personal Property

This type of expense is allocated to channel on a gallonage basis, excluding direct shipments

1011

Schedule #4

Income and Expense Incurred at Leased Retail Outlets Served by Tank Wagon

Account 060A—Plant Maintenance (Service Station Owned Properties Complete)

Account 060B—Plant Maintenance (Service Station Owned Buildings on Leased Ground)

Account 060C—Plant Maintenance (P. O. S. S. L. Properties Leased Out)

Account 061B—Rental Expense (Leased Ground Used for Owned Service Station Buildings)

Account 061C—Rental Expense —(P. O. S. S. L. Properties Leased Out)

Account 065A—Rent Revenue (Service Station Owned Properties Complete)

Account 065B—Rent Revenue (Service Station Owned Buildings on Leased Ground)

Account 065C — Rent Revenue (P. O. S. S. L. Properties Leased Out)

Account 066A—Miscellaneous Operating Expense (Service Station Owned Properties Complete)

Account 066B—Miscellaneous Operating Expense (Service Station Owned Buildings on Leased Ground)

Account 066C—Miscellaneous Operating Expense (P. O. S. S. L. Properties Leased Out)

Account 088A—Station Operating Tools and Equipment (Service Station Owned Properties Complete)

Account 088B—Station Operating Tools and Equipment (Service Station Owned Buildings on Leased Ground)

Account 088C—Station Operating Tools and Equipment (P. O. S. S. L. Properties Leased Out)

Account 110A—Depreciation Expense—Plant (Building, Machinery, and Equipment, Furniture and Fixtures) (Service Station Owned Properties Complete)

Account 110B—Depreciation Expense—Plant (Building, Machinery, and Equipment, Furniture and Fixtures) (Service Station Owned Buildings on Leased Ground)

Account 110C—Depreciation Expense — Plant (Building, Machinery, and Equipment, Furniture and Fixtures) (P. O. S. S. L. Properties Leased Out)

Account 086A—Taxes (Service Station Owned Properties Complete)

Account 086B—Taxes (Service Station Owned Buildings on Leased Ground)

Account 086C—Taxes (P. O. S. S. L. Properties Leased Out)

Account 112A—Depreciation Expense—Real Estate Improvements (Service Station Owned Properties Complete)

1012 This type of income and expense by class of station, exclusive of that applicable to automobile supplies, was allocated to tank wagon reseller and other method channels on the basis of current month reseller gallonage.

Example: The total expense charged to Account 060A for the month of January represented $2,945.71, and was allocated to channel as follows:

	Sales Gallons	Percentages	Allocation
Reseller Tank Wagon .	3,056,456	95.84%	$2,823.17
Other Methods..........	132,793	4.16	122.54
Total	3,189,249	100.00%	$2,945.71

Similarly, the total expense charged to Account 060B for the month of January amounted to $49.34 and was allocated to channel as indicated below:

	Sales Gallons	Percentages	Allocation
Reseller tank Wagon ..	80,866	91.1%	$47.42
Other Method	3,282	3.9	1.92
Total	84,148	100.0%	$49.34

In the same manner, total expense charged to Account 060C for the month of January amounted to $252.70 and was allocated to channel as below:

	Sales Gallons	Percentages	Allocation
Reseller Tank Wagon ..	909,106	96.76%	$244.51
Other Method	30,431	3.24	8.19
Total	939,537	100.00%	$252.70

1013 Schedule #5

Marketing Expense Items Incurred at Privately Owned Stations Not Leased but Engaged in the Distribution of Our Products.

Account 570—ELA Expense.

Equipment Loan Agreement expense is charged directly to the channel to which the cost is applicable. An example of such expense would be the repairing of a gasoline pump at one of our dealer outlets, the charge going direct to the tank wagon-reseller channel.

Again, if repair work was required on a grease pump loaned to one of our small dealer accounts, such expense would be chargeable to the other method channel of distribution. Because no general pro rata account is provided for this type of expense, no proration is made at the end of the month. For this reason all expenses charged to the tank wagon reseller channel are actual expenses incurred.

Account 111—Depreciation Expense—Plant ELA

The depreciation cost on Equipment Loan Agreement items is set up on the value of the equipment involved. This amount is charged to a general pro rata account and allocated to the three petroleum product channels each month on a gallonage basis, excluding direct shipments.

Example:	7 Hi-boys	@ 4.97 each	$ 34.79
	4 60-Gallon Lubsters	@ 16.65 each	66.60
	7 Bennett Lubsters	@ 12.77 each	89.39
	1 Computing Pump—Gasoline		181.02
			$371.80

$371.80 x .333% (monthly rate) = $1.24—monthly charge.

1014

	January %	$
Tank Wagon Reseller	53.4%	$ .66
Tank Wagon Consumer	40.1	.50
Other Method	6.5	.08
Total	100.0%	$1.24

Account 513—Losses by Dismantling—Out of Pocket Expense—ELA.

Charges to this account are made direct to channel, no segregation being made for a general pro rata grouping.

1015

Schedule #6

Credit Information—Bad Debts and Recovery

Account 431—Budget Plan and Income and Expense

Items of income and expense in this account affect only the automobile supplies channel.

Account 510—Losses by Bad Debts

Account 511—Expense Collecting Bad Debts—Current Year

Account 512—Expense Collecting Bad Debts—Prior Years

When possible, distribution of charges to these accounts is made directly to the channel involved. When direct distribution is not possible, and charges involve tank wagon channel as a whole, allocation to channels applicable is made on the ratio of reseller and of consumer tank wagon gallons sold to total tank wagon sales. In the same manner, when allocation to a particular channel cannot be made and the expense affects all channels, other than automobile supplies, distribution to all channels is based on the ratio of gallons sold by each channel to total gallons sold—all channels.

Example:

	Direct Charge		Tank Wagon Pro Rata	General Pro Rata
	Channel	Item		
510	Other Method	Motor Oil account charged to bad debts	Gasoline account charged to bad debts. (Gasoline purchased both for resale and consumption by customer)	Coupon book account charged to bad debts.
511 and 512	Tank Wagon Consumer	Expense collecting fuel oil account	Expense collecting above account	Expense collecting mixed account containing gasoline and motor oil charges

1046 Account 208—Credit Information Expense

Expense incurred to obtain credit information is allocated to the various channels, on an all gallonage basis, excluding direct shipments.

Account 400—Bad Debts Collected—Written Off Prior Years

Recoveries on bad debts written off in prior years are allocated directly to the channel originally charged with the bad debt expense. Thus, if tank wagon reseller channel was charged in prior years with a bad debt amounting to $100, any recoveries thereon would be credited to tank wagon reseller channel.

1017 Schedule #7

Field Office and Accounting Cost

Account 200—Office Expense—Salaries Accounting

Account 205—Office Expense—Operation and Maintenance of Vehicles—Office Automobiles

Account 206—Office Expense—All other—Water, Light, Fuel, Rent, etc.

This expense is distributed to the various channels shown on Form 189 on the basis of a distribution of time report which is prepared for all accounting employees. Information for preparation of distribution of time report is prepared for accounting employees by summarizing individual memorandum records of work actually performed by such employees. Memorandum records are reviewed and approved by administrative employees, such as, the Office Manager, the Assistant Office Manager, etc., prior to the preparation of report. Distribution of time report is prepared for the third month of each quarter and is used in allocating expenses applicable for the succeeding three-month period. Expense for casual help, when possible, is charged directly to channel affected, based on daily record of time maintained by such casual help.

Example: Account 200—$20,019.36—January.

	Tank Wagon Reseller	Tank Wagon Consumer	Other Method	Automobile Supplies	Total
% of Time Spent	29.9%	21.8%	38.4%	9.9%	100.0%
Field Office	$5,475.26	$3,992.00	$7,031.78	$1,812.88	$18,311.92
General Office	375.16	273.46	481.38	—	1,130.00
Casual Help	194.13	140.51	242.80	—	577.44
Total	$6,044.55	$4,405.97	$7,755.96	$1,812.88	$20,019.36

1018

Account 201—Office Expense—Stationery and Office Supplies

Account 202—Office Expense—Postage

Account 203—Office Expense—Telephone and Telegraph

Account 204—Office Expense—Exchange

This type of expense is distributed to the various channels, other than automobile supplies on the basis of total gallons sold during the current month.

Example: Account 202—$1,570.03—January

	%	Cost
Tank Wagon Reseller	53.4%	$ 838.40
Tank Wagon Consumer	40.1	629.58
Other Method	6.5	102.05
Total	100.0%	$1,570.03

1019

Schedule #8

Supervision Cost Incurred in Sales Field

Account 000—Salaries—Supervision

Account 030—Traveling Expense—Supervision

Account 045—Operation and Maintenance of Vehicles—Supervision

Account 100—Depreciation Expense—Vehicles—Supervision

The above accounts cover costs incurred by individuals acting in a supervisory capacity. As such, these costs are general in nature and cannot be changed directly to a particular channel. For this reason these costs are prorated on a gallonage basis each month to the three petroleum product channels.

Example: Employees whose expenses are allocated in this manner are

Field Manager
Assistant Field Manager
Maintenance Superintendent
Plant Agent

The only exception to the above rule is tank wagon superintendent, whose costs are charged to Account 3000. This expense is then prorated each month by the ratio of tank wagon reseller gallons to total tank wagon gallons.

Account 001—Salaries—Supervision—Others

Salaries charged to this account are those paid to employees acting as secretaries or stenographers for those individuals in a supervisory capacity. These costs are prorated to channel on a gallonage basis at the end of each month.

1020 Schedule #9

Losses—Taxes—Insurance and Additional Salary Considerations

Account 500—Losses by Accident—Property and Other Than Company Employees

Account 501—Losses by Property Damage—Company and Other Than Company Property

Account 502—Losses by Fire

Account 503—Losses by Storm and Flood

Account 507—Losses—Miscellaneous

The titles of these accounts explain the nature of the expenses charged thereto. Such expenses are charged direct to the channel applicable if possible. Some charges are made to tank wagon pro rata, 3000 series, and distributed to tank wagon reseller and tank wagon consumer on the basis of total tank wagon gallons while those charges of a general nature are charged to general pro rata, 7000 series, and distributed on the basis of all gallons, excluding direct shipments. These expenses are incurred in the field and allocations on field reports.

Example: An accident involving a tank wagon, resulting in the loss of refined oils, tractor fuels, naphthas, and gasoline, would bring about a charge to tank wagon pro rata. Likewise, the loss of motor oil or grease would cause a charge to other methods. Repairs to a construction man's truck caused by an accident would represent a charge to general pro rata.

Account 243—Taxes—Federal Insurance Contributions
Account 244—Unemployment Insurance
Account 520—Annuities and Retirement Plan Expense

The charges to these accounts, representing additional salary consideration, is allocated to channel on the basis of all salaries and commissions in each channel to total all salaries and commission for the corresponding month. For the month of January these percentages by channel were:

1021	Tank Wagon Reseller	29.3%
	Tank Wagon Consumer	37.8
	Other Method	32.9

Account 245—Taxes—All Other

This expense represents the Detroit field's proportion of
State of Michigan Sales Tax
Michigan Consumers Use Tax
Michigan Privilege Fee
Federal Capital Stock Tax

These taxes are paid by the General Office and the amounts of the first two charged to Detroit result from business in the Detroit field. The distribution to channel is made on the basis of all gallons, excluding direct shipments.

The Michigan Privilege Fee is charged to the fields operating in the state of Michigan on the basis of the value of assets held in each field. The distribution to channel is made on a gallonage basis, excluding direct shipments.

The Federal Capital Stock Tax is allocated among fields on the basis of the value of assets held in each field and distributed to channel on a gallonage basis, excluding direct shipments.

Account 235—Insurance

Account 525—Death Benefits

Account 506—Losses by Dismantling—Abnormal—Other than ELA

Account 514—Losses by Dismantling—Out of Pocket Expense—Other than ELA

These expenses do not apply directly to any channel and accordingly, are charged to the general pro rata sub account. The allocation to channel of sale is made on the basis of all gallons, excluding direct shipments.

1022 Schedule #10

Miscellaneous Marketing Expense Items.

Account 054—Operation and Maintenance of Vehicles—All Other (Other Than Office)

Account 107—Depreciation Expense—Vehicles—All Other (Other Than Office)

Expenses in the above accounts are allocated to tank wagon reseller, tank wagon consumer, and other methods channels on a gallonage basis (excluding direct shipments). Thus, during January the operation and maintenance of the car furnished the Superintendent of Construction amounted to $12.63, which when allocated to channels resulted in the following charges:

Tank Wagon Reseller	$6.75
Tank Wagon Consumer	5.06
Other Methods	.82

Account 107 included a total charge on this vehicle of $9.68 for January, which was allocated in the same manner.

Account 065—Rent Revenue

Rent revenue usually arises from surplus property. Such marketing expense credit is allocated among channels on an all gallonage basis (excluding direct shipments). The total rent revenue of $22.71 is shown allocated on Schedule #10, page 99.

Account 081—Demurrage and Railroad Storage

Any demurrage charge on shipments of automobile supplies is charged direct to this channel while similar expense incurred on barreled merchandise would be charged to other methods. Where such expense is incurred
1023 on tank cars of gasoline or refined oils, it is allocated between tank wagon reseller and consumer channels on a gallonage basis.

Account 082—Personal Injury Expense—Company Employees

These costs are either allocated between tank wagon reseller and consumer channels on a gallonage basis or are allocated among the tank wagon reseller, consumer, and other methods channels on an all gallonage basis, excluding direct shipments. The individual expense item determines the method of treatment. Thus, accident No. 2944 occurred on January 22, resulting in an expense of $7.00. The employee responsible was the janitor of the main office. This cost was allocated to the reseller, consumer, and other methods channels on a gallonage basis. On the other hand an accident caused by a tank wagon driver would be allocated only to the reseller and consumer channels on a gallonage basis.

Account 083—Samples

Practically all samples are of products included in the other methods or automobile supplies channels. These are charged direct to these channels. In some few cases samples may be given away, which is difficult to charge to a given channel and is prorated among all channels on an all gallonage basis, excluding direct shipments.

Account 066—Miscellaneous Operating Expense

These miscellaneous expense items are either charged direct to tank wagon reseller, consumer, other methods, or automobile supplies; or are allocated between tank wagon reseller and tank wagon consumer channels on
1024 a gallonage basis; or are allocated to tank wagon reseller, consumer, and other methods channels on an all gallonage basis, excluding direct shipments. The nature of the expense determines the method of treatment.

To illustrate: Representative types of expenditure included in this account are:

Charged Direct

Tank Wagon Reseller Channel

- a. Paint for Dealer Gasoline Price Signs
- b. Color for Dealer Gasoline Price Signs
- c. Lumber for Crating Pumps

Tank Wagon Consumer Channel

- a. Cleaning Fuel Oil Tanks
- b. Oil Burner Mechanic
- c. Traveling Expense—Oil Burner Mechanic

Other Methods Channel

- a. Prizes to Tank Wagon Drivers for Motor Oil Sales
- b. Freight on Lubricating Oil
- c. Freight on Hi-boys (Motor Oil Containers)

Automobile Supplies Channel

- a. Dealers' Tire School

Allocated Between Tank Wagon Reseller and Consumer Channels on Gallonage Basis

- a. Tank Wagon Faucet Tags
- b. Calibrating Tanks
- c. Freight on Pumps
- d. Paint for Truck Chassis
- e. Freight on Tanks—Transfer
- f. Tank Wagon Faucet Holders
- g. Decals for Tank Wagons
- h. Product Tags
- i. Tank Wagon Faucet Clips

1025 Allocated Among Tank Wagon Reseller, Consumer and Other Methods on an All Gallonage Basis, Excluding Direct Shipments

- a. Subscription to Chicago Journal of Commerce
- b. General Supplies costing less than 5¢
- c. Blue Prints
- d. Salesmen's Portfolios
- e. Insurance Manager's Car
- f. Club Dues
- g. Product Tags for Plants
- h. Lead Warning Signs
- i. General Supplies Junked
- j. Cleaning at Bulk Plant
- k. Appraisal of Property
- l. Medical Examination
- m. Octane Test of Gasoline
- n. Reseller Sales Meeting Expense
- o. Meals—Dealer Conference
- p. Orchestra—Dealer Conference

Account 084—Safety Expense—Salaries and All Other Expense

Typical expenses included in this account are safety signs, salaries, traveling expense, car expense, and clerical assistance in the Safety Department. These charges are allocated among the tank wagon reseller, consumer, and other method channels on an all gallonage basis, excluding direct shipments.

Account 215—Expense—Salaries—Others
Account 216—Expense—Traveling Expense—Others
Account 217—Expense—Operation and Maintenance of Vehicles—Automobiles—Others

All of the above expense items are allocated among the tank wagon reseller, consumer, and other method channels on an all gallonage basis, excluding direct shipments. These costs are incurred for salaries of individuals doing real estate, tax work; their cars and traveling expenses.

1026 Account 220—Expense—Employment Department—Salaries and All Other Expense

Total charges incident to the operation of an employment department, including salaries, traveling expense, and car expense, are charged to this account and allocated among the tank wagon reseller, consumer, and other method channels on an all gallonage basis.

Account 225—Expense—Salaries—Sub-Station Auditors
Account 226—Expense—Traveling Expense—Sub-Station Auditors
Account 227—Expense—Operation and Maintenance of Vehicles—Sub-Station Auditors
Account 228—Depreciation Expense—Vehicles—Office—Others—and Sub-Station Auditors

An audit of books at each bulk plant is made at regular intervals. This requires a staff of auditors, each furnished with automobiles and each incurring certain traveling expense. All products move through our bulk stations and hence, the above expense is allocated among the tank wagon reseller, consumer, and other method channels on an all gallonage basis, excluding direct shipments.

Account 207—Outside Collection Expense

The credit to this account was found to be an error of classification of income or expense by the Accounting Department for the month of December, 1940. Normally, such costs as are paid to Brinks Express are included under this account and are allocated among the tank wagon reseller, consumer, and other method channels on an all gallonage basis. The charges which should have gone to this account were made to 066, Miscellaneous Operating Expense, and were then allocated to channels on the correct basis.

1027

Schedule #11

Marketing Expense Items on Lubricating Oils (Shown Only for Reconciliation of Total Marketing Expense)

Account 076—Barrel Expense

Account 077—Freight on Empty Steel Barrels and Containers

Account 078—Losses on Containers—Lost

Account 079—Losses on Containers—Junked

Account 115—Depreciation Expense—Equipment Steel Barrels

Account 410—Profit and Loss on Resale Barrels

None of the above expense items are vital to this complaint and were included in our Distribution Cost Analysis—Tank Wagon Reseller versus Jobber Gasoline Sales—Detroit Field—1940—only for reconciliation purposes. They are all direct charges to the other method channel of marketing.

1028

Schedule #12

General Office Marketing Costs

The expense of each General Office department represents the sum total of salaries, traveling expense, miscellaneous department expense, federal insurance contribution, state unemployment insurance contribution, company annuity and retirement plan expense and the proportionate share of the expense incurred in the operation and maintenance of the General Office building locating at 910 South Michigan Avenue.

Account 250—Accounting Department

This department represents the total expenses of the General Office Credit and Collection and Accounting Departments. The functions of these departments include the handling of all final monthly reports from each field office as well as the preparation of monthly statements and reports submitted to the General Accounting Department for the preparation of company statements. The total monthly expense of these departments is charged to General Pro Rata, sub account 7250. This total is allocated to fields on the basis of total gallons, excluding direct shipments, and in turn is distributed to the tank wagon channels on the same basis.

For example: Detroit expense of the combined departments for the month of January and July, 1940, and the allocation to channels was as follows:

1029

	January		July	
	% of Effort	Costs Allocated	% of Effort	Costs Allocated
Tank Wagon Reseller	53.4%	$1,411.07	76.4%	$1,412.18
Tank Wagon Consumer	40.1	1,059.62	19.3	356.74
Other Method	6.5	171.76	4.3	79.48
Automobile Supplies	—	—	—	—
Total	100.0%	$2,642.45	100.0%	$1,848.40

Account 255 General Manager's Department

The allocation of expense of the General Manager's Department is handled on a departmental basis.

	Detroit Field Cost Year 1940
Supervision	$16,679.29
Sales Research	6,172.79
Statistical and Personnel	3,828.19
Real Estate	1,918.52
Operating	7,987.29

The total cost of these departments is allocated to fields on an all gallonage basis, excluding direct shipments, and is in turn allocated among channels within a field on the same basis.

Gasoline and Refined Oil Department

The expense of this department is first split between the Manufacturing and Sales Departments on a 25-75 ratio, respectively. The 25% is charged to the Manufacturing Department for the time and effort consumed in the disposal of various products not credited to the Sales Department such as casinghead gasoline, coke, railroad fuel oil, and various spot sales, or exchanges of gasolines and refined oils with other refineries.

1030 The proportion charged to the Sales Department is first allocated to the tank wagon reseller, tank wagon consumer, and other method channels on the basis of total sales in gallons, excluding direct shipments, of refined oils, tractor fuels, naphthas and gasoline, in each channel. The allocation of the channel expense to fields is based on the proportion of sales of these products by fields in each channel to total channel sales. The Detroit field's proportion of the Sales Department charge was $3,924.53 for the year 1940.

Sales Promotion—Wholesale—1940 Detroit Cost, $4,448.11.

The expense of this department is first allocated between the tank wagon consumer and the other method channels on the basis of semi-annual time studies. Ratios so determined are used to allocate expenses to these channels by months for the following six months. Expenses in the tank wagon consumer and other method channels are then allocated direct to these channels by field on the basis of the gallonage in each channel to the total channel sales for all fields. The gallonage for each channel is the sales volume, excluding direct shipments, of those products to which time is devoted as reported on the distribution of time reports.

Sales Promotion—Reseller—1940 Detroit Charge, $3,020.15.

The expense of this department is first allocated among tank wagon reseller, other method, and automobile supply channels on the basis of semi-annual time analyses.

1031 The average proportion of the charges to tank wagon reseller was 47.3%, other method 35.4%, and automobile supplies 17.3% for the year 1940. Having first spread the total department expense to the channels of sale, the total channel cost is then allocated to the same channel in the fields on the basis of the ratio of gallons in that channel to the total channel gallons for all fields. The gallonage for each channel is the sales volume, excluding direct shipments, of those products to which time is devoted as reported on the distribution of time reports.

Sales Promotion—Specialties

This expense was charged entirely to the other method channel. The allocation to fields is based on the sales of those products, excluding direct shipments, to which time is devoted as reported on the semi-annual distribution of time reports.

Sales Promotion—Automobile Supplies

This expense was charged entirely to the automobile supply channel. The allocation to fields is based on sales value of automobile supplies.

Account 260—Advertising Department

The expense of this department is allocated to fields on the basis of the preceding months' to date net charges to sub accounts 005, 033, 048, 075, and 103. The distribution to channels is on the basis of total sales gallons, excluding direct shipments.

1032 Account 265—Lubricating Department

This cost represents the total of the Lubricating, Technical, New York Office, and Railway Sales Departments. Of these the first three are handled in an identical manner.

	Other Method	General Pro Rata
Lubricating Department	$7,839.19	$3,789.83
Technical Department	7,182.21	4,271.73
New York Office	309.71	878.54

The expenses of these departments are allocated to the other method and general pro rata expenses on the basis of semi-annual distribution of time reports. The charge to general pro rata is distributed to tank wagon reseller, tank wagon consumer, and other method channels on the basis of total sales, excluding direct shipments, for the preceding six months' period. The allocation of this channel expense to the individual fields is made on the basis of gallonage, excluding direct shipments, of the products in each channel to which effort was devoted as reported on the distribution of time reports.

Railway Sales

The expense of this department is charged entirely to the other method sales channel and is allocated to fields on the basis of sales, including direct shipments, of those products reported in the semi-annual distribution of time reports.

Account 270—Asphalt and Fuel Oil Department

The Expense of this department is charged directly to the other method channel of distribution and is allocated to fields on the basis of sales, excluding direct shipments, of those products reported in the semi-annual distribution of time reports.

1033 Account 280—Construction and Maintenance Department

Account 290—Pro Rata General Administrative

Account 515—Experimental, Development and Research Expense

All expense in the above departments is charged to general pro rata and allocated among fields on the basis of all gallons, excluding direct shipments, and allocated among channels within a field upon the same basis.

Account 295—Law Expense

Law expense is either charged direct to a field or is charged to general pro rata. All law expense charged direct is prorated among channels within a field on an all gallonage basis, excluding direct shipments. All law expense charged to general pro rata is allocated among fields on the basis of all gallonage, excluding direct shipments, and is then allocated to channels within a field on the same basis.

1034 RESPONDENT'S EXHIBIT 100.

1038 Standard Oil Company (Indiana).

Analysis of Distribution Costs
Detroit, Michigan—Sales Division.

The Federal Trade Commission charges the Standard Oil Company (Indiana), Docket No. 4389, with following discriminatory price practices under the Robinson-Patman Act, because it makes tank car sales of gasoline to jobbers in the City of Detroit at a price 1.5¢ per gallon below the price for the same product when delivered by tank wagon to reseller accounts for resale to the consumer. One of the justifications for this action by the respondent is that its marketing costs for jobber sales of gasoline are below its marketing costs on tank wagon reseller sales by an amount equal to this price differential.

Expenses hereinafter set forth by sales channel do not represent a continuous coating process employed by the respondent. The entire cost analysis is predicated on the necessary time and cost study required to modify present accounting procedures to conform with the sales channels cited in the complaint. This detailed analysis was made in the Detroit Sales Office during the period August 11 to October 31, 1941. The analysis covers operations for the year 1940 which was the period agreed to by the Federal Trade Commission and the respondent.

Company Distribution System.

The Standard Oil Company (Indiana) markets petroleum products in fourteen midwestern states. The total territory is divided among twenty-seven local field offices, the boundaries of which are determined on the basis of economic interest and similarity of marketing problems. Within each local sales field there are bulk stations operated by commission employees, and others operated by salaried employees. Each division office directs sales to the various classes of customers in its sales territory.
1039 In turn, the operation of each of the local offices is directed from a central office located in Chicago, Illinois.

The primary objective of preparing a "Comparative Statement of Expense" (Form 189) monthly, for each of the 27 local sales fields is to provide information for proper expense controls. The needs of the company in this respect are adequately fulfilled by maintaining costs according to channels of distribution. Channels regularly recognized in the distribution of expenses are:

Tank Wagon Reseller

Marketing expenses shown under this channel apply to sales of gasolines, naphthas, and refined oils delivered by tank wagon method to reseller customers for resale.

Tank Wagon Consumer

Marketing expenses shown under this channel represent the cost of distribution by tank wagon to consuming customers. These costs are incurred on the marketing of gasolines, naphthas, kerosenes, heating oils, diesel flues, and tractor fuels.

Income and Expense—Leased Service Stations

Marketing expenses and income amounts in this channel represent those items directly and wholly applicable to sales of all petroleum products through company owned and leased service stations arising out of real property income and expense.

Other Method Sales

Marketing expense incident to distributing petroleum products other than those delivered by tank wagon are included under this channel. These expenses are incurred largely on motor oils, lubricating oils, greases, specialty products, and asphalts.

1040 Automobile Supplies

Marketing expenses incident to the distribution of this line of merchandise are maintained separately and charged direct to sales of these products.

The above classifications of sales channels and corresponding expenses are considered adequate to meet our needs for proper current expense controls. It has not been deemed advisable to maintain a separate allocation of costs on sales of gasolines to jobbers, sales of other products to jobbers, or expenses incident to direct shipments from our supply terminals to customers buying in carload quantities.

A separate classification of expenses to these added channels has been considered unnecessary because of the small amount of expense applicable to sales to these classes of customers. Accordingly, any expense chargeable to these classes of customers will be found scattered throughout the various channels on our "Comparative Statement of Expense—(Form 189) Detroit Field—Year 1940." The expense of isolating each marketing cost accurately to these additional classes of customers would be prohibitive in terms of benefits received, and would load our sales with excessive accounting costs.

In answer to this particular complaint, the various marketing expense items incident to distribution in the Detroit area have been re-allocated, giving recognition to the following channels:

Tank Wagon Reseller

Expenses included hereunder represent costs incurred on tank wagon sales of gasolines, naphthas, and refined oils to reseller customers for resale purposes.

Tank Wagon Consumer

Expenses hereunder set forth are incurred upon tank wagon sales direct to consumers of gasolines,
1041 naphthas, kerosene, heating oils, diesel fuels, and tractor fuels.

Other Method Sales

Expenses under this channel represent those costs incurred in marketing petroleum products not delivered by tank wagon or direct shipment method. They represent expenses incident to the distribution of motor oils, industrial oils, greases, and specialty products through our field bulk plants and are delivered by stake truck method of delivery or from the side-rack of our tank wagons.

Jobber—Gasolines and Refined Oils

Expenses entered hereunder are those applying directly to sales of gasolines to jobber accounts in the Detroit field.

Jobber—Other Products

Expenses under this caption represent those chargeable to the sale of petroleum products other than gasolines and refined oils to jobbers located in the Detroit field.

Other Direct Shipment Customers

Expenses allocated to this channel represent the cost of marketing all petroleum products to consumers buying in quantities adequate to receive direct shipments from our terminal supply point to destination.

Automobile Supplies

Expenses incident to distribution of this line of products have been maintained separately in our accounting procedure and apply only to such merchandise.

All income or expense items shown under the column
Income and Expense—Leased Service Stations, have been
allocated on a gallonage basis between the Tank Wagon
Reseller channel and the Other Method channel of distribution on the revised Form 189. These items of in-
1042 come and expense are solely applicable to the Tank
Wagon Reseller channel and as such, are a part of
our tank wagon reseller costs of distribution.

It will be shown hereinafter how the amounts of expense chargeable to each of these channels of distribution were secured by classification of functions of our system of distribution. A brief explanation of each Sub-Account will be given following each schedule of expenses.

Respondent's Exhibit No. 100.

SCHEDULE #1.

Salesmen and Sales Promotion Expense
Detroit Field—1940

Account No.	Distribution Through Company Bulk Plants			Direct Shipment Customers			Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
	Tank Wagon			Jobbers					
	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers			
Salesmen									
004—Salaries—Salesmen	$60,181.54	$32,115.95	$101,518.50	$210.68	$115.80	$13,312.69	$207,455.16	$13,371.55	$220,826.71
032—Traveling Expense — Salesmen	7,987.80	4,303.64	12,919.13	16.31	19.09	2,353.31	27,599.28	1,902.51	29,501.79
047—Operation and Maintenance of Vehicles—Salesmen	6,034.31	3,234.77	10,291.80	16.60	12.97	1,327.33	20,917.78	1,163.33	22,081.11
102—Depreciation Expense—Vehicles—Salesmen	1,628.26	863.44	2,652.31	7.36	4.84	581.23	5,737.44	256.96	5,994.40
Sales Promotion									
002—Salaries—Sales Promotion	4,482.78	6,726.63	9,885.58	185.93	148.00	1,305.85	22,734.77	443.04	23,177.81
003—Salaries—Sales Promotion—Others	5,441.79	10,973.88	6,881.04	345.21	18.11	1,322.81	24,982.84	2,996.59	27,979.43
031—Traveling Expense — Sales Promotion	542.87	770.33	771.74	3.62	16.62	423.67	2,528.85	47.74	2,576.59
046—Operation and Maintenance of Vehicles—Sales Promotion	132.26	196.32	254.54	1.10	8.59	48.71	641.52	10.79	652.31
101—Depreciation Expense—Vehicles—Sales Promotion	32.09	53.78	80.27	.45	4.10	1.76	172.45	2.88	175.33
Total	$86,463.70	$59,238.74	$145,254.91	$787.26	$348.12	$20,677.36	$312,770.09	$20,195.39	$332,965.48

1044 Explanation of Schedule #1

Salesmen and Sales Promotion Expense
Detroit Field—1940

Salesmen's Costs

Account 004—Salaries—Salesmen
Account 032—Traveling Expense—Salesmen
Account 047—Operation and Maintenance of Vehicles—Salesmen
Account 102—Depreciation Expense—Vehicles—Salesmen

Most of our salesmen submit a daily call record report indicating the consumer called upon and the object of the call. A complete analysis of all such calls was made to determine the proportion of selling effort devoted to direct shipment customers, jobbers and regular tank wagon reseller business. Details of over 50,000 salesmen's calls were examined in determining the allocation of effort of this class of employees.

In addition to the daily call report, an estimate of time devoted to each product is prepared quarterly by classes of salesmen to be used in allocating costs among various products. These quarterly estimates of time for the year 1940 were used to allocate the expense to individual products.

Expenses incident to all types of salesmen are grouped together in our marketing cost statement. The classifications of these employees and the method of segregating expenses incident to jobbers and other direct shipment customers are explained in the following paragraphs. Complete data on the breakdown of expenses by class of salesman are presented in Sub-Schedule #1-A, supporting Schedule #1, page 6.

1045 1. Lubricating Engineers

The Lubricating Engineer is charged with the responsibility of giving engineering service to our customers and analyzing operations of prospective customers in an effort to reduce operating costs. The Lubricating Engineer does not contact jobber accounts but does some work with other direct shipment customers.

Each day the engineer submits a report (Form 264), listing the name of the customers called on, the products involved, and the time consumed in making the call. These reports were recapitulated by individual engineer by months for the year 1940 to determine the amount of time spent on direct shipment customers by products. Ratios thus determined were applied to salaries and other expense charges incident to their employment to segregate the cost of direct shipment volume. The monthly ratios of time thus determined were applied to costs of each engineer on the payroll.

2. Industrial Salesmen

These individuals call upon various manufacturing, processing, and servicing accounts and are charged with the responsibility of selling petroleum products to these consumers. This class of employee does not call on jobbers and has no responsibility for this type of outlet.

Reports submitted by this group of employees are not in sufficient detail to permit an isolation of time spent on direct shipment customers. For this reason a record of time so spent was maintained daily during the month of August, 1941, to establish a ratio of direct shipment 1046 time to total time. Ratios of effort so determined were applied to the monthly salaries and expenses of each salesman in this classification.

3. Reseller Salesman

The Reseller Salesman is assigned a territory covering a number of retail outlets served by this Company as well as those served by competitive oil companies. He is required to sell our entire line of merchandise to these accounts in addition to giving as much merchandising assistance as possible to our dealers. Some few make calls on jobber accounts headquartering in their territory but do not call on industrial consuming accounts.

This class of salesman makes out a daily report giving the total calls made, the name of the customer called on, and the product on which sales emphasis was placed. It was first determined that a call on a jobber was approximately equal in point of time with calls made on tank wagon reseller accounts. When selling on jobber and tank wagon accounts the average was 8.6 calls per day, as compared with 8.5 calls per day when calling on tank wagon reseller accounts only. These calls were recapped for a 12-month period and the percentage of calls on jobber accounts to the total calls was used to allocate salaries and other expense to determine the cost chargeable to jobber sales.

1047 4. "B" Station Salesmen.

The "B" Station Salesman supervises "B" Station agents and directs his selling efforts among consumer accounts. For this reason this class of salesman is only slightly affected by direct shipment customers but does not call on jobber accounts.

The "B" Station Salesman also submits a Form 029 daily call record listing calls made and object of call. These daily reports were analyzed for the first seven months of 1941 (reports for 1940 were not available), and all calls on direct shipment customers were tabulated as well as total calls for all customers. From this analysis a ratio of direct shipment customers' calls to total calls was determined, which was applied to the salesman's salary and monthly expenses to determine a direct shipment cost.

5. City Salesmen

City Salesmen are charged with the sale of petroleum products to consumer and reseller accounts and operate almost exclusively in the larger metropolitan areas.

These salesmen make out a daily report of calls (Form 029), and the procedure used in obtaining their direct shipment cost was the same as that outlined above for "B" Station Salesmen.

6. Automotive Engineer

The Automotive Engineer calls on automotive fleet accounts and is charged with the responsibility of handling complaints, doing educational work, and selling our line of gasoline, motor oils, and greases. A small part of his time was spent with jobber accounts.

1048 This individual makes out a daily activity report showing the customers called on, time consumed, and the product involved. An analysis of these reports for the year 1940 gave the account of time devoted to jobbers and other direct shipment customers. The ratio of this time to total was applied to his salary and monthly expense to determine the allocation among channels and products.

7. Asphalt Products Salesman

The Asphalt Salesman is charged with the responsibility of making sales of road oils and all asphalts to large private consuming accounts or governmental agencies. These sales are almost invariably in large amounts due to he nature of the product involved, and for this reason the entire time was charged to direct shipment—other customers.

8. Special General Office Salesmen

These individuals spend only a part of their time in the Detroit field as they work out of the General Office in Chicago. Their duties are concerned with the sale of candles, tree spray oils, and other similar specialty products. As such, their time is charged 100% to direct shipment customers—other accounts.

9. Agent Salesmen

The Agent Salesman is responsible for sales . . metropolitan areas which are not sufficiently large to support a City Salesman but which require the entire time of one individual. This individual spends his time calling on reseller, consumer, and jobber customers.

1049 Each day a report is made showing the customers called on and the time consumed in making the call, together with the product involved. These calls were tabulated for the first seven months of 1941 and the ratio was used to distribute the monthly expenses.

Sales Promotion Costs

Account 002—Salaries—Sales Promotion
Account 003—Salaries—Sales Promotion—Others
Account 031—Traveling Expense—Sales Promotion
Account 046—Operation and Maintenance of Vehicles—Sales Promotion
Account 101—Depreciation Expense—Vehicles—Sales Promotion

Our sales promotional effort is classified along similar lines as are the salesmen. Again it was necessary to break this total classification down into subdivisions for proper allocation.

1. Sales Promotion—Industrial

The Sales Promoter—Industrial—and the Assistant Sales Promoter are responsible for handling sales promotion check-ups on individuals that have been called on by the Industrial Salesmen, complaints, and handling of quotations, bids, and specifications on product to both regular and prospective customers. The Sales Promoter is more directly connected with the handling of correspondence and direct contacts with industrial concerns; therefore, a separate time card was maintained on this position for August, 1941, from which the ratio of expense chargeable to direct customer business was determined.

Inasmuch as the assistant handles the routine reports and other material submitted by salesmen, his monthly expense was spread on the ratio of the aggregate time spent by industrial salesmen on direct shipment customers to total time for the year 1941.

1050 2. Sales Promotion—Wholesale

The Sales Promoter and Assistant Sales Promoter—Wholesale—are charged with the responsibility of seeing that the salesmen under their supervision spend their time in the most efficient manner in which to increase sales. The monthly expense of salesmen was charged to direct shipment business according to the proportion of calls made. The total effort of the salesmen provided the allocation factor for the Sales Promotion—Wholesale—expense.

3. Sales Promotion—Reseller

The duties of the Sales Promoter—Reseller—are twofold. He is charged with the responsibility of calling on jobber customers for their requirements of motor oil, and with the supervision of the salesman calling on reseller trade. During the first eight months of 1941 the Sales Promoter—Reseller—made 22 calls requiring 44 hours, or 3.255% of his total time for direct sales of motor oil to jobbers. The ratio so obtained was applied against his 1940 expense which gave the cost chargeable to direct selling effort. This was deducted from total. His remaining monthly expense, together with that of the Assistant Sales Promoter—Reseller, was charged to direct shipment business on the basis of the distribution of effort of the salesmen under his supervision.

1051 Sales Promotion—Others

The group of people who are carried under the classification, "Sales Promotion—Others," are those individuals who assist the sales promotion group in maintaining records, carrying on correspondence, and in general, doing the detail work necessary for the promoting of sales. Generally, these individuals are assigned separately to the three major sales promotion groups, Industrial, Wholesale, or Reseller. Where their time has not been specifically at the disposal of a certain individual, time cards were maintained during August, 1941, which record was used as a basis to allocate monthly expenses to direct shipment customers and products. In instances where an individual's time, such as a stenographer, was directly at the disposal of a Sales Promoter, then the monthly expense chargeable to direct shipment customers was made on the same basis as the individual's under whom worked.

SUB-SCHEDULE #1-A.

(Supporting Schedule #1, page 6)

Salesmen	.004 Salaries—Salesmen			.032 Traveling Expense—Salesmen			047 Oper. & Maint.—Vehicles Salesmen			102 Deprec.—Vehicles Salesmen		
	Direct Shipment Customers			Direct Shipment Customers			Direct Shipment Customers			Direct Shipment Customers		
	Jobbers			Jobbers			Jobbers			Jobbers		
	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers
Lubricating Engineering Cost 12 Mos.	—	—	$ 1,486.64	—	—	$ 79.66	—	—	$ 78.08	—	—	$ 41.89
Lubricating Engineering Ave. %	—	—	11.74	—	—	12.27	—	—	13.32	—	—	11.26
Industrial Salesmen Cost 12 Mos.	—	—	3,030.26	—	—	320.50	—	—	265.02	—	—	117.79
Industrial Salesmen Ave. %	—	—	8.93	—	—	9.34	—	—	8.41	—	—	8.59
Reseller Salesman Cost 12 Mos.	32.16	117.84	—	6.07	18.91	—	3.32	12.59	—	1.56	4.80	—
Reseller Salesman Ave. %	.58	2.02	—	.62	1.94	—	.55	2.07	—	.63	1.94	—
"B" Station Salesmen Cost 12 Mos.	—	—	27.52	—	—	8.32	—	—	3.96	—	—	1.32
"B" Station Salesmen Ave. %	—	—	.26	—	—	.27	—	—	.30	—	—	.28
City Salesmen Cost 12 Mos.	50.76	3.96	465.42	1.18	.11	33.24	4.64	.38	46.08	.76	.04	19.79
City Salesmen Ave. %	.51	.04	4.69	.20	.02	5.53	.47	.04	4.69	.23	.01	5.95
Automotive Engineer 12 Mos.	13.56	—	139.08	.42	—	4.24	.83	—	8.62	.36	—	3.96
Automotive Engineer Ave. %	.33	—	3.39	.33	—	3.38	.33	—	3.40	.31	—	3.33
Asphalt Products Salesman 12 Mos.	—	—	3,600.00	—	—	1,213.52	—	—	319.42	—	—	158.79
Asphalt Products Salesman Ave. %	—	—	100.00	—	—	100.00	—	—	100.00	—	—	100.00
Candle Salesmen Cost 12 Mos.	—	—	2,767.89	—	—	174.80	—	—	338.02	—	—	131.72
Candle Salesmen Ave. %	—	—	100.00	—	—	100.00	—	—	100.00	—	—	100.00
White Oil Salesmen Cost 12 Mos.	—	—	1,414.54	—	—	493.51	—	—	239.49	—	—	90.14
White Oil Salesmen Ave. %	—	—	100.00	—	—	100.00	—	—	100.00	—	—	100.00
Agent Salesmen Cost 12 Mos.	114.20	—	381.34	8.47	—	25.43	7.81	—	28.64	1.68	—	16.43
Agent Salesmen Ave. %	.98	—	3.27	.79	—	2.36	.91	—	3.32	.90	—	3.15
Clerk Reseller 003 Salary	—	—	—	.17	.07		—	—	—	—	—	—
Clerk Reseller Ave. %	—	—	—	3.66	1.51		—	—	—	—	—	—
Total	$210.68	$115.80	$13,312.69	$ 16.31	$ 19.09	$ 2,353.31	$ 16.60	$ 12.97	$ 1,327.33	$ 7.36	$ 4.84	$ 581.23

Respondent's Exhibit No. 100.

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Respondent's Exhibit No. 100.

SUB-SCHEDULE #1-A (Continued).

(Supporting Schedule #1, page 6)

Sales Promotion Expense	002 Salaries			031 Traveling Expense			046 Oper. & Maint.—Vehicles			101 Deprec.—Vehicles		
	Direct Shipment Customers			Direct Shipment Customers			Direct Shipment Customers			Direct Shipment Customers		
	Jobbers			Jobbers			Jobbers			Jobbers		
	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers
Sales Promotion Industrial	$161.48	$ —	$ 1,196.20	$ .13	$ —	$ 8.07	$ —	$ —	$ .11	$ —	$ —	$ —
Sales Promotion Ave. %	2.11	—	15.65	.13	—	7.91	—	—	7.91	—	—	—
Sales Promotion Wholesale	18.96	1.32	105.32	2.99	.21	14.43	.90	.05	4.30	.36	—	1.65
Sales Promotion Ave. %	.26	.02	1.46	.29	.02	1.40	.29	.02	1.40	.31	—	1.41
Sales Promotion Reseller	5.49	146.68	4.33	.50	16.41	.45	.20	8.54	.24	.09	4.10	.11
Sales Promotion Ave. %	.07	1.96	.06	.07	2.26	.06	.07	3.07	.09	.07	3.29	.09
Asphalt Representative—G.O.						400.72	—	—	44.06	—	—	—
Asphalt Representative Ave. %						100.00	—	—	100.00	—	—	—
Total	$185.93	$148.00	$ 1,305.85	$ 2.62	$ 16.62	$ 423.67	$ 1.10	$ 8.59	$ 48.71	$ .45	$ 4.10	$ 1.76

[redacted]

	003 Salaries		
Sales Promotion—Other Expense	$345.21	$ 18.11	$ 1,322.81

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Sub-Schedule #1-B

Illustrating Adjustment of Comparative Statement of Expense (Supporting Schedule #1, page 6)

The preceding explanation and schedule gave in detail the processes of determining direct shipment charges included in our Comparative Statement of Expense (Form 189) for the year 1940, Detroit field. As previously brought out by testimony, amounts shown on Sub-Schedule 1-A are found in varying amounts throughout the different channels in our marketing expense statement.

These amounts were allocated to the various channels according to distribution of effort determined quarterly for each class of employee. Each quarterly estimate forms the basis of cost allocation for the subsequent three-month period. Accordingly, adjustment was made to the 189 of these amounts on a monthly basis, which when recapitulated, gave the annual adjustment in dollars by channel. The total direct shipment charge by sub account and the annual proportion by which this amount was removed from the original channel allocation on the Comparative Statement of Expense and the amount to be deducted from each channel is shown in Sub-Schedule 1-B.

SUB-SCHEDULE #1-B.

ILLUSTRATING ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #1, page 6)

	Annual Direct Shipment Cost	Allocated to Original Statement According to Following Annual Ratios: Tank Wagon Reseller %	Tank Wagon Consumer %	Other Method %	Auto. Supplies %	Adjustment "189" Channels: Tank Wagon Reseller $	Tank Wagon Consumer $	Other Method $	Auto. Supplies $
Lubricating Engineers									
004—Salaries	$1,486.64	—	14.00	86.00	—	—	$208.12	$1,278.52	—
032—Traveling Expense	79.66	—	14.00	86.00	—	—	11.14	68.52	—
047—Oper. & Maint. of Vehicles	78.08	—	14.00	86.00	—	—	10.93	67.15	—
102—Deprec. Expense—Vehicles	41.89	—	14.00	86.00	—	—	5.87	36.02	—
Industrial Salesmen									
004—Salaries	3,030.26	—	12.46	87.09	.45	—	377.59	2,639.05	13.62
032—Traveling Expense	320.59	—	12.46	87.09	.45	—	39.94	279.20	1.45
047—Oper. & Maint. of Vehicles	265.02	—	12.46	87.09	.45	—	33.02	230.82	1.18
102—Deprec. Expense—Vehicles	117.79	—	12.46	87.09	.45	—	14.68	102.59	.52
Reseller Salesmen									
004—Salaries	144.00	53.85	—	37.50	8.65	77.55	—	54.00	12.45
032—Traveling Expense	24.98	53.72	—	37.71	8.57	13.42	—	9.42	2.14
047—Oper. & Maint. of Vehicles	15.91	53.74	—	37.84	8.42	8.55	—	6.02	1.34
102—Deprec. Expense—Vehicles	6.36	53.77	—	37.74	8.49	3.42	—	2.40	.54
"B" Station Salesmen									
004—Salaries	27.52	—	24.38	73.84	1.78	—	6.71	20.32	.49
032—Traveling Expense	8.32	—	23.92	74.04	2.04	—	1.99	6.16	.17
047—Oper. & Maint. of Vehicles	3.96	—	23.74	74.49	1.77	—	.94	2.95	.07
102—Deprec. Expense—Vehicles	1.32	—	22.73	77.27	—	—	.30	1.02	—
City Salesmen									
004—Salaries	520.14	24.57	21.15	51.86	2.42	127.81	119.02	269.74	12.57
032—Traveling Expense	34.53	23.52	21.92	52.27	2.20	8.12	7.57	18.05	.79
047—Oper. & Maint. of Vehicles	51.10	23.89	21.86	52.02	2.23	12.21	11.17	26.58	1.14
102—Deprec. Expense—Vehicles	20.59	25.06	20.88	51.73	2.33	5.16	4.30	10.65	.48
Automotive Engineer									
004—Salaries	152.64	7.96	44.01	47.01	1.02	12.15	67.17	71.76	1.56
032—Traveling Expense	4.66	6.44	45.06	47.21	1.29	.30	2.10	2.20	.06
047—Oper. & Maint. of Vehicles	9.45	7.72	44.34	46.77	1.17	.73	4.19	4.42	.11
102—Deprec. Expense—Vehicles	4.32	7.64	45.14	47.22	—	.33	1.95	2.04	—
Asphalt Products Salesmen									
004—Salaries	3,600.00	—	—	100.00	—	—	—	3,600.00	—
032—Traveling Expense	1,213.52	—	—	100.00	—	—	—	1,213.52	—
047—Oper. & Maint. of Vehicles	319.42	—	—	100.00	—	—	—	319.42	
102—Deprec. Expense—Vehicles	158.79			100.00				158.79	

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Respondent's Exhibit No. 700.

SUB-SCHEDULE #1-B (continued).

		Allocated to Original Statement According to Following Annual Ratios				Adjustment "189" Channels			
	Annual Direct Shipment Cost	Tank Wagon Reseller %	Tank Wagon Consumer %	Other Method %	Auto. Supplies %	Tank Wagon Reseller	Tank Wagon Consumer	Other Method	Auto. Supplies
Candle Salesmen						$	$	$	$
004—Salaries	$ 2,767.89	—	—	100.00	—	—	—	2,767.89	—
032—Traveling Expense	174.80	—	—	100.00	—	—	—	174.80	—
047—Oper. & Maint. of Vehicles	338.02	—	—	100.00	—	—	—	338.02	—
102—Deprec. Expense—Vehicles	131.12	—	—	100.00	—	—	—	131.12	—
White Oil Salesmen									
004—Salaries	1,414.54	—	—	100.00	—	—	—	1,414.54	—
032—Traveling Expense	493.51	—	—	100.00	—	—	—	493.51	—
047—Oper. & Maint. of Vehicles	239.49	—	—	100.00	—	—	—	239.49	—
102—Deprec. Expense—Vehicles	90.14	—	—	100.00	—	—	—	90.14	—
Agent Salesmen									
004—Salaries	495.54	29.63	16.36	54.01	—	146.82	81.06	267.66	—
032—Traveling Expense	33.90	29.74	16.22	54.04	—	10.08	5.50	18.32	—
047—Oper. & Maint. of Vehicles	36.45	29.93	16.08	53.99	—	10.91	5.86	19.68	—
102—Deprec. Expense—Vehicles	21.11	29.80	16.20	54.00	—	6.29	3.42	11.40	—
Clerk Reseller 003 Salary									
032—Traveling Expense	.24	70.83	—	29.17	—	.17	—	.07	—
Total									
004—Salaries	$13,639.17	2.67	6.24	90.79	.30	$364.33	$850.67	$12,383.48	$40.69
032—Traveling Expense	2,388.71	1.34	2.86	95.61	.19	32.08	68.24	2,283.77	4.61
047—Oper. & Maint. of Vehicles	1,356.90	2.39	4.87	92.46	.28	32.40	66.11	1,254.55	3.84
102—Deprec. Expense—Vehicles	593.43	2.56	5.15	92.03	.26	15.20	30.52	546.17	1.54

Respondent's Exhibit No. 100.

SUB-SCHEDULE #1-B (continued).

	Annual Direct Shipment Cost	Allocated to Original Statement According to Following Annual Ratios: Tank Wagon Reseller %	Tank Wagon Consumer %	Other Method %	Auto. Supplies %	Adjustment "189" Channels: Tank Wagon Reseller $	Tank Wagon Consumer $	Other Method $	Auto. Supplies $
Sales Promotion Industrial									
002—Salaries	$ 1,357.68	14.58	25.77	59.65	—	$198.00	$349.80	$ 809.88	—
031—Traveling Expense	8.20	—	20.49	79.51	—	—	1.68	6.52	—
046—Oper. & Maint. of Vehicles	.11	—	27.27	72.73	—	—	.03	.08	—
101—Deprec. Expense—Vehicles	—	—	—	—	—	—	—	—	—
Sales Promotion Wholesale									
002—Salaries	125.60	—	47.68	51.10	1.22	—	59.89	64.18	1.53
031—Traveling Expense	17.63	—	52.47	45.94	1.59	—	9.25	8.10	.28
046—Oper. & Maint. of Vehicles	5.25	—	52.95	45.14	1.91	—	2.78	2.37	.10
101—Deprec. Expense—Vehicles	2.01	—	53.73	43.28	2.99	—	1.08	.87	.06
Sales Promotion Reseller									
002—Salaries	156.50	56.31	—	37.20	6.49	88.13	—	58.22	10.15
031—Traveling Expense	17.36	56.16	—	36.87	6.97	9.75	—	6.40	1.21
046—Oper. & Maint. of Vehicles	8.98	56.35	—	37.19	6.46	5.06	—	3.34	.58
101—Deprec. Expense—Vehicles	4.30	56.98	—	35.58	7.44	2.45	—	1.53	.32
Asphalt Representative—G.O.									
031—Traveling Expense	400.72	—	—	100.00	—	—	—	400.72	—
046—Oper. & Maint. of Vehicles	44.06	—	—	100.00	—	—	—	44.06	—
Total									
002—Salaries	$ 1,639.78	17.45	24.98	56.86	.71	$286.13	$409.69	$ 932.28	$11.68
031—Traveling Expense	443.91	2.20	2.46	95.01	.33	9.75	10.93	421.74	1.49
046—Oper. & Maint. of Vehicles	58.40	8.67	4.81	85.36	1.16	5.06	2.81	49.85	.68
101—Deprec. Expense—Vehicles	6.31	38.83	17.12	38.03	6.02	2.45	1.08	2.40	.38
Account 003—Salaries—Sales Promotion—Others	$ 1,686.13	20.16	39.30	40.41	.13	$339.97	$662.58	$ 681.42	$ 2.16

Respondent's Exhibit No. 100.

1058 Sub-Schedule #1-C

Final Adjustment of Comparative Statement of Expense (Supporting Schedule #1, page 6)

Sub-Schedule #1-C shows the amounts originally charged on our Comparative Statement of Expense, Detroit field, 1940, to the various channels. The deductions made therefrom are taken from Sub-Schedule #1-B and the allocation of these deductions to the new channels established are taken from total shown on Sub-Schedule #1-A. The final row for each account is to be found on Schedule #1, page 6.

SUB-SCHEDULE #1-C.

FINAL ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #1, page 6)

	Distribution Through Company Bulk Plants			Direct Shipment Customers					
	Tank Wagon			Jobbers					
Account No.	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers	Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
004—Salaries—Salesmen									
1940 Form "189"	$ 60,545.87	$32,966.62	$113,901.98				$207,414.07	$13,412.24	$220,826.71
Deduct Sub-Schedule B	*364.23	*850.67	*12,383.48					*40.69	
Revised Allocation to Channel	60,181.54	32,115.95	101,518.50	$ 210.68	$115.80	$13,312.69	207,455.16	13,371.55	220,826.71
032—Traveling Expense									
1940 Form "189"	8,019.89	4,371.88	15,202.90				27,594.67	1,907.12	29,501.79
Deduct Sub-Schedule B	*32.09	*68.24	*2,283.77					*4.61	
Revised Allocation to Channel	7,987.86	4,303.64	12,919.13	16.31	19.09	2,353.31	27,599.28	1,902.51	29,501.79
047—Oper. & Maint.—Vehicles									
1940 Form "189"	6,066.71	3,300.88	11,546.35				20,913.94	1,167.17	22,081.11
Deduct Sub-Schedule B	*32.40	*66.11	*1,254.55					*3.84	
Revised Allocation to Channel	6,034.31	3,234.71	10,291.80	16.60	12.97	1,327.33	20,917.78	1,163.33	22,081.11
102—Deprec. Exp.—Vehicles									
1940 Form "189"	1,643.46	893.96	3,198.48				5,735.90	258.50	5,994.40
Deduct Sub-Schedule B	*15.20	*30.52	*546.17					*1.54	
Revised Allocation to Channel	1,628.26	865.44	2,652.31	7.36	4.84	581.23	6,737.77	256.96	5,994.40
002—Salaries—Sales Promotion									
1940 Form "189"	4,768.91	7,136.32	10,817.86				22,723.09	454.72	23,177.81
Deduct Sub-Schedule B	*286.13	*409.69	*932.28					*11.68	
Revised Allocation to Channel	4,482.78	6,726.63	9,885.58	485.93	148.00	1,305.85	22,734.77	443.04	23,177.81
003—Salaries—Sales Promotion—Others									
1940 Form "189"	5,781.76	11,636.46	7,562.46				24,980.68	2,998.75	27,979.43
Deduct Sub-Schedule B	*339.97	*662.58	*682.42					*2.16	
Revised Allocation to Channel	5,441.79	10,973.88	6,881.04	345.21	18.11	1,322.81	24,982.84	2,996.59	27,979.43
031—Trav. Exp.—Sales Promotion									
1940 Form "189"	552.62	781.26	1,193.48				2,527.36	49.23	2,576.59
Deduct Sub-Schedule B	*9.75	*10.93	*421.74					*1.49	
Revised Allocation to Channel	542.87	770.33	771.74	3.62	16.62	423.67	2,528.85	47.74	2,576.59
046—Oper. & Maint.—Vehicles									
1940 Form "189"	137.32	199.13	304.39				640.84	11.47	652.31
Deduct Sub-Schedule B	*5.06	*2.81	*49.85					*.68	
Revised Allocation to Channel	132.26	196.32	254.54	1.10	8.59	48.71	641.52	10.79	652.31
91—Deprec. Exp.—Vehicles									
1946 Form "189"	34.54	54.86	82.67				172.07	3.26	175.33
Deduct Sub-Schedule B	*2.45	*1.08	*2.40					*.38	
Revised Allocation to Channel	32.09	53.78	80.27	.45	4.10	1.76	172.45	2.88	175.33

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* Denotes red figures in original.

SCHEDULE #2.

ADVERTISING COSTS
Detroit Field—1940

	Distribution Through Company Bulk Plants			Direct Shipment Customers					
	Tank Wagon			Jobbers					
Account No.	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers	Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
005—Salaries—Advertising	$ 4,567.25	$ 1,787.36	$ 1,098.99	$ 233.19	$ 90.24	$ —	$ 7,777.03	$ 660.59	$ 8,437.62
033—Traveling Expense—Advertising	460.51	221.86	32.59	20.30	12.26	—	747.52	—	747.52
048—Operation and Maint. of Vehicles—Advertising—Passenger Cars & Trucks	281.48	126.54	19.89	10.52	5.00	—	443.43	—	443.43
075—Advertising—Other Costs (Incl. ELA)	126,225.04	57,949.09	12,331.58	3,275.24	46.93	—	199,827.88	11,546.44	211,374.32
103—Depreciation Expense—Vehicles—Advertising	107.60	44.13	7.41	6.91	2.86	0.44	169.35	—	169.35
240—Donations	1,423.96	725.99	102.56	—	—	—	2,252.51	—	2,252.51
Total	$133,065.84	$60,854.97	$ 13,593.02	$ 3,546.16	$157.29	$ 0.44	$211,217.72	$12,207.03	$223,424.75

1061 Schedule #2

Advertising Costs

Account 005—Salaries—Advertising

Account 033—Traveling Expense—Advertising

Account 048—Operation and Maintenance of Vehicles—Advertising—Passenger Cars and Trucks

Account 103—Depreciation Expense—Vehicles—Advertising

In a sales field such as Detroit the Standard Oil Company maintains an advertising representative with the necessary clerical assistance to secure a proper distribution of our advertising effort and to insure that advertising is properly merchandised to our various sales representatives. This individual is furnished with a company owned car, while an advertising truck for the installation of signs, repairs and other purposes is maintained. All expense items above are incident to field merchandising of our advertising effort.

Proper allocation of these expenses among channels must reflect either the allocation of effort of the advertising representative or work orders issued by the advertising representative calling for the utilization of the advertising truck. Accordingly, a complete review of the files of the advertising representative on his various duties and activities during 1940 was made to secure the proportion of his time devoted to direct shipment customers.

No time of the advertising personnel in the Detroit field in 1940 was devoted to direct shipment—other customers. An examination of the records indicated, however, that a small proportion of the effort of the advertising personnel should logically be charged against jobber business, either naphtha and gasoline or other products. Most of such time was found to be incident to sign installations or permits or preparing for dealer meetings which were attended in part by jobber representation.

1062 Advertising Representative

An analysis of the files of the advertising representative revealed a total of 63 hours devoted to jobber naphtha and gasoline or 3.076%, and 44 hours or 2.148% of his total time was chargeable to jobber other products. These same ratios were used to allocate salaries of clerical or stenographic time charged to the Advertising Department. Annual cost for this individual is shown on Sub-Schedule #2-A.

Advertising Painters

Two painters in the Detroit field spend a portion of their time on advertising work. Such time chargeable to advertising is based upon time cards maintained by the employees.

A review of work records of the painters indicated a few cases where signs had been painted at jobber outlets. Such time amounted to 3.93% of their total time chargeable to advertising painting. The number of hours worked each month on signs at jobber outlets was extended by the average hourly rate to secure the salary cost chargeable to jobber naphtha and gasoline, amounting to $103.95. Details are shown on Sub-Schedule #2-A.

Account 240—Donations

Account 075—Advertising—Other Costs (Including E.L.A.)

Donations are made by the field office to various worthy causes in the name of the Standard Oil Company and are designed to improve the good-will toward this organization. It is a cost which is purely assignable to our various tank wagon channels of distribution.

Account 075 represents advertising expenditures made in the Detroit field for consumer advertising and point of sale merchandising. A part of the charges to this account result from costs incurred by construction men making repairs on advertising signs at retail outlets or sign
1063 installations. The first step in breaking this account
down required a review of all work orders, Form 0133, for the year 1940 to indicate the work done at all jobber outlets, the materials used, and the time involved on the part of construction employees. From the nature of the work, most of the charges could be made direct either to jobber naphtha and gasoline or jobber other products. Where the work was on signs having an institutional character and not incident to a specific product, it was allocated among products on the basis of gallonage. The number of hours thus determined times the hourly rate plus cost of materials used resulted in charges by channel to jobber

product classifications as is shown on Sub-Schedule #2-A, amounting to $270.01 naphtha and gasoline, and $30.77 jobber other products.

During the year 1940 the following specific expenditures were made at point of sale in the Detroit field:

Photos given away	$ 344.13
24 x 44 Cards	988.03
Station Banners	2,095.73
Display Cards—Window Stickers	103.24
Decalcomanias for Pumps	775.07
Booklets, leaflets, etc.	1,326.39
Miscellaneous printed matter	140.88
Average Cost per Outlet	5.44

Extending the cost per outlet by the number of jobber outlets results in the charge to jobbers of $636.48.

The above types of expenditures can most logically be allocated on an outlet basis.

1064 Road Maps $5,578.45

There is a tendency for this type of advertising material to follow gasoline volume. Therefore, 18.4% of the total reseller gasoline moved through jobber channels. This proportion of the charge was assessed against jobber naphtha and gasoline, amounting to $1,026.43.

It is our practice to charge off all signs installed during the year in which the installation occurred. Records of date of installation are maintained only on Standard Service signs. For the residual signs that may be installed at jobber outlets, the total number of signs or jewel globes installed was amortized on the basis of estimated life. This resulted in the following:

18	Standard Service Signs installed during 1940	$1,068.30
8	Standard Oil Product Signs—estimated life 22½ years—annual charge 25¢ per sign Total	2.00
8	Iso-Vis Signs—estimated life 12½ years—annual charge 24¢ per sign—Total	1.92
12	28 x 44 Frames—estimated life 4½ years—annual charge $1.34 each—Total	16.08

249	Red Crown and Stanolind Jewel Globes—estimated life 6 years—annual charge 87¢ Total	216.63
119	Solite Jewel Globes—estimated life 6 years—annual charge 45¢—Total	53.55
	Total—Advertising Signs at Jobber Outlets	$1,358.48
1065	Jobber Costs Detroit 1940	
	Dealer Point of Sale Material	$ 636.48
	Station Signs	1,358.48
	Road Maps	1,026.43
	Total	$3,021.39

Allocating the above charge on a gallonage basis between gasoline and other products, we find that 99.465% of the gallonage sold to jobber accounts is gasoline. Therefore, jobber naphtha and gasoline advertising cost is $3,005.23, and jobber other products advertising cost is $16.16.

The allocation of depreciation expense on vehicles used by the Advertising Department to jobber naphtha and gasoline and other products was predicated upon the ratios of effort used for the allocation of salaries.

SUB-SCHEDULE #2-A

(Supporting Schedule #2, page 2)

	005 Salaries—Advertising			033 Traveling Expense—Advertising			048 Oper. & Maint. of Veh.—Advertising			075 Advertising—Other Costs			103 Depr. Exp.—Veh.—Advertising		
	Direct Shipment Customers			Direct Shipment Customers			Direct Shipment Customers			Direct Shipment Customers			Direct Shipment Customers		
	Jobbers			Jobbers			Jobbers			Jobbers			Jobbers		
	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers
Advertising	$ 129.24	$90.24	—	$ 17.56	$12.26	—	$ 7.34	$ 5.00	—				$ 5.47	$ 2.86	$0.44
Average %	3.08	2.15	—	3.07	2.15	—	3.06	2.09	—				2.27	1.19	0.18
Painters	103.95	—	—	2.74	—	—	3.18	—	—				1.44	—	—
Average %	3.93	—	—	1.79	—	—	1.53	—	—				1.48	—	—
Total	$ 233.19	$90.24	—	$ 20.30	$12.26	—	$ 10.52	$ 5.00	—				$ 6.91	$ 2.86	$0.44
Field Charges										$ 270.01	$30.77	—			
General Office Charges										3,005.23	16.16	—			
Total										$3,275.24	$46.93	—			

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Sub-Schedule #2-B

Illustrating Adjustment of Comparative Statement of Expense (Supporting Schedule #2, page 23)

This schedule shows the annual amounts chargeable to direct shipment business for advertising, taken from Sub-Schedule #1-A; the ratios on an annual basis that such charges were originally included in the Comparative Statement of Expense, Form 189, Detroit 1940, and the adjustment necessary for each channel on Form 189 to remove the influence of direct shipment charges from tank wagon and other method marketing costs.

SUB-SCHEDULE #2-B.

ILLUSTRATING ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #2, page 23)

	Annual Direct Shipment Cost	Allocated in Original Statement According to Following Annual Ratios				Adjustment "189" Channels			
		Tank Wagon Reseller %	Tank Wagon Consumer %	Other Method %	Auto. Supplies %	Tank Wagon Reseller $	Tank Wagon Consumer $	Other Method $	Auto. Supplies $
Advertising									
005—Salaries	$ 219.48	65.38	30.03	4.59	—	$ 143.49	$ 65.91	$ 10.08	—
033—Traveling Expense	29.82	63.82	31.57	4.61	—	19.03	9.41	1.38	—
048—Oper. & Maint. of Vehicles	12.34	65.53	29.77	4.70	—	8.09	3.67	.58	—
103—Depr. Exp.—Vehicles	8.77	66.11	29.38	4.51	—	5.80	2.57	.40	—
Painters									
005—Salaries	103.95	65.38	30.03	4.59	—	67.96	31.22	4.77	—
033—Traveling Expense	2.74	63.82	31.57	4.61	—	1.75	87	.12	—
048—Oper. & Maint. of Vehicles	3.18	65.53	29.77	4.70	—	2.08	.95	.15	—
103—Depr. Exp.—Vehicles	1.44	66.11	29.38	4.51	—	.95	.43	.06	—
Total									
005—Salaries	$ 323.43	65.38	30.03	4.59	—	$ 211.45	$ 97.13	$ 14.85	—
033—Traveling Expense	32.56	63.82	31.57	4.61	—	20.78	10.28	1.50	—
048—Oper. & Maint. of Vehicles	15.52	65.53	29.77	4.70	—	10.17	4.62	.73	—
103—Depr. Exp.—Vehicles	10.21	66.11	29.38	4.51	—	6.75	3.00	.46	—
Account 075—Advertising—Other Costs (Incl. ELA)									
Field Charges	$ 300.78	60.67	27.85	5.93	5.55	$ 182.48	$ 83.77	$ 17.85	$ 16.69
General Office Charges	3,021.39	60.67	27.85	5.93	5.55	1,833.08	841.45	179.17	167.69
Total	$ 3,322.17	60.67	27.85	5.93	5.55	$2,015.56	$925.22	$ 197.01	$184.38

Respondent's Exhibit No. 100.

[Page 4944 is BLANK]

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Sub-Schedule #2-C

Final Adjustment of Comparative Statement of Expense (Supporting Schedule #2, page 23)

This Sub-Schedule reflects the final adjustment of expense items shown on our Comparative Statement of Expense, Detroit Field 1940, Form 189. Advertising costs incident to direct shipment are first removed from previous charges and are allocated among the direct shipment channels. The final line under each sub account on this Sub-Schedule #2-C will be found on Schedule #2, page 23.

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SUB-SCHEDULE #2-C

FINAL ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #2, page 23)

	Distribution Through Company Bulk Plants			Direct Shipment Customers					
	Tank Wagon			Jobbers					
Account No.	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers	Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
005—Salaries—Advertising									
1940 Form "189"	$ 4,778.70	$ 1,884.49	$ 1,113.84				$ 7,777.03	$ 660.59	$ 8,437.62
Deduct Schedule B	*211.45	*97.13	*14.85						
Revised Allocation to Channel	4,567.25	1,787.36	1,098.99	$ 233.19	$ 90.24	$ —	7,777.03	660.59	8,437.62
033—Traveling Exp.—Advertising									
1940 Form "189"	481.29	232.14	34.09				—	—	747.52
Deduct Schedule B	*20.78	*10.28	*1.50						
Revised Allocation to Channel	460.51	221.86	32.59	20.30	12.26	—	747.52	—	747.52
048—Oper. & Main. of Veh.—Advertising—Passenger Cars & Trucks									
1940 Form "189"	291.65	131.16	20.62				—	—	443.43
Deduct Schedule B	*10.17	*4.62	*.73						
Revised Allocation to Channel	281.48	126.54	19.89	10.52	5.00	—	443.43	—	443.43
075—Advertising—Other Costs (Incl. ELA)									
1940 Form "189"	128,240.60	58,874.31	12,528.59				199,643.50	11,730.82	211,374.32
Deduct Schedule B	*2,015.56	*925.22	*197.01				—	*184.38	—
Revised Allocation to Channel	126,225.04	57,949.09	12,331.58	3,275.24	46.93	—	199,827.88	11,546.44	211,374.32
103—Depr. Exp.—Veh.—Advertising									
1940 Form "189"	114.35	47.13	7.87				—	—	169.35
Deduct Schedule B	*6.75	*3.00	*.46						
Revised Allocation to Channel	107.60	44.13	7.41	6.91	2.86	0.44	169.35	—	169.35
240 Donations	1,423.96	725.99	102.56	—	—	—	2,252.51	—	2,252.51

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* Denotes red figures.

1071 Reciprocal Advertising Benefits

In the foregoing analysis of advertising costs directed to determining the charge against direct shipment business, all consumer advertising has remained wholly as a charge against tank wagon and other method business. No part of this should be considered as a charge against jobber or other direct shipment business. The respondent contends that this is the only logical position that can be taken on such charges for the following reasons:

The respondent supplying company secures a reciprocal advertising advantage from jobber distribution which it does not and cannot secure from tank wagon reseller outlets. During 1940 the four Detroit jobbers spent the following quantities on advertising:

	Wayne Oil Co.	Citrin-Kolb Oil Co.	Ned's Auto Supply	Stikeman Oil Co.	Grand Total
Direct Mail	$ 443.54	$ —	$ —	—	$ 443.52
Newspapers	932.38	395.40	77,486.94	—	78,814.72
Posters	8.24	1,290.00	5,580.00	—	6,878.24
Radio	90.00	—	16,280.00	—	16,370.00
Signs	408.80	1,359.63	617.73	—	2,386.16
Hand Bills	521.65	43.25	15,903.59	—	16,468.49
Novelties	903.84	325.61	—	—	1,229.45
Donations, etc.	96.02	547.50	1,269.00	—	1,912.52
Paint	459.90	—	—	—	459.90
Miscellaneous	552.84	—	1,263.31	—	1,816.15
Grand Total	$4,417.19	$3,961.39	$118,400.57	—	$126,779.15
Gasoline					
% Realization	70.1%	81.06%	19.3%	—	
Cost	$3,096.45	$3,211.10	$ 22,851.31	—	$ 29,158.86
Gallons	2,340,671	5,221,996	4,310,465	—	13,640,303
¢ Gal.	.13¢	.06¢	.53¢	—	.21¢

1072 The grand total advertising expenditure for each jobber was extended by the proportion of gasoline realization, excluding tax, or total sales. This resulted in an allocation of advertising expenditure to gasoline of $29,158.86 which, when divided by total gasoline volume, results in a per gallon expenditure of .21¢.

During this same period total advertising expenditures in the Detroit field tank wagon reseller channel by the Standard Oil Company, including sub accounts:

005—Salaries—Advertising
633—Traveling Expense—Advertising
048—Operation and Maintenance of Vehicles—Advertising
075—Advertising—Other Costs

103—Depreciation Expense—Vehicles—Advertising amounted to $131,641.88, or .19¢ per gallon. The per gallon advertising expenditures on the part of the jobbers, therefore, are almost identical with advertising expenditures by the respondent company, and whereas it is obvious that jobbers receive a benefit from our expenditures, we in turn receive a compensating benefit from expenditures by jobbers. This same reciprocal relationship does not exist between the supplying company and the tank wagon reseller outlets.

What advertising expenditures would be required in Detroit if it were not for the benefit of this reciprocal advertising on the part of jobbers, of course, is a matter 1073 that would have to be decided by management. That an increase would be necessary is quite likely as is indicated by the following chart showing the relationship between advertising expenditures during 1940 and the potential market in each of our various sales fields. Notice that according to the potential Detroit and Denver are the fields most under-expended of our entire group of sales divisions. Because of jobber expenditure and representation in these two fields it is unnecessary for the Standard Oil Company to make the advertising expenditure which otherwise would be required in this market.

The Standard Oil Company does not make any advertising allowance to its jobbers. Many other large suppliers recognize the advertising value of such distributors by defraying a part of the distributor's advertising expenditures. This is not done by the Standard Oil Company although an advertising value is recognized.

The amounts of money spent by jobbers advertising is not a matter of contract as the Standard Oil Company exercises no influence over such expenditures. Such expenditures are incurred in the daily conduct of their business.

Note

Page 4849 is on Card 71.

[pages 4950 and 4952 are blank]

SCHEDULE #3.

DELIVERY AND WAREHOUSE COST. DETROIT FIELD—1940.

	Distribution Through Company Bulk Plants			Direct Shipment Customers					
	Tank Wagon			Jobbers					
Account No.	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers	Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
Salaried Drivers									
006—Salaries—Drivers	$ 55,481.56	$ 33,677.60	$ 23,334.66	$ —	$ —	$ —	$ 112,493.82	$ 4,984.16	$ 117,477.98
053—Oper. & Maint. of Veh.—Trucks, Motor & Horse Drawn (Excl. Adv.)	33,981.90	19,215.16	13,134.33	1.29	0.22	17.82	66,350.72	1,808.59	68,159.31
106—Depr. Exp.—Veh.—Trucks, Motor & Horse Drawn (Incl. Veh. Tanks & Excl. Adv. Trucks)	16,254.88	7,380.16	3,475.38	0.33	0.08	4.74	27,115.57	—	27,115.57
Commission Drivers									
021—Commissions	110,300.46	252,360.71	46,501.14	—	—	—	409,162.31	282.20	409,444.51
024—Exp. of Trans. Standard Fuels due to Lack of Stge.	5,386.90	5,822.71	—	—	—	—	11,209.61	—	11,209.61
025—Truck Rental Expense	37,793.36	37,804.43	—	—	—	—	75,597.79	—	75,597.79
055—Vehicle Tank Exp.—Other than Mounted on Co. Chassis	4,021.19	3,785.82	—	—	—	—	7,807.01	—	7,807.01
Bulk Plant Cost									
008—Salaries—Warehouse Labor	15,367.80	7,111.05	29,690.65	—	—	—	52,169.50	6,473.15	58,642.65
060—Plant Maintenance	16,894.81	7,893.40	1,440.19	—	—	—	26,228.40	.26	26,228.66
061—Rental Expense	1,361.77	623.32	95.91	—	—	—	2,081.00	—	2,081.00
062—Water, Light, Fuel (Other Than Main Office)	14,369.31	8,008.11	1,089.15	—	—	—	23,466.57	—	23,466.57
063—Telephone & Telegraph (Other Than Main Office)	6,777.33	3,637.58	481.58	—	—	—	10,896.49	298.04	11,194.53
087—General Supplies Used	1,323.41	618.75	94.32	—	—	—	2,036.48	—	2,036.48
088—Sta. Oper. Tools & Equip.	10,113.79	6,965.57	1,516.03	—	—	—	18,595.39	127.72	18,723.11
110—Depr. Exp.—Plant (Bldg., Mach., Equip., Furn. & Fixt.)	63,172.00	29,077.01	4,474.68	96.63	13.51	269.03	97,102.86	—	97,102.86
112—Depr. Exp.—Real Estate Improvements	4,207.15	1,935.37	297.90	.35	.05	.99	6,441.81	—	6,441.81
086—Taxes—Real Estate & Personal Property	35,635.00	46,320.86	2,524.36	55.52	36.30	150.24	54,722.28	—	54,722.28
Total	$432,442.62	$442,237.61	$128,150.28	$ 154.12	$ 50.16	$ 442.82	$1,003,477.61	$13,974.12	$1,017,451.73

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Schedule #3

Delivery and Warehouse Cost

Salaried Drivers

Account 006—Salaries—Drivers
Account 053—Operation & Maintenance of Vehicles—Trucks
Account 106—Depreciation Expense—Vehicles—Motor and Horse-drawn

Deliveries in all of the major metropolitan markets to tank wagon reseller and consumer accounts are made largely by salaried drivers operating company owned trucks. Such employees maintain a time card which is used in the distribution of their salaries among channels. The expenses incident to trucks operated follow the distribution of effort of the drivers except for the minor exceptions noted below. The salaried driver makes no delivery of a direct shipment nature either to jobbers or other direct shipment customers as such accounts are served from terminals in carload quantities.

Sub Accounts 053 and 106 show a small charge against jobber and direct shipment customers for the operation, maintenance, and depreciation of trucks utilized by company employees. These small charges were incurred on truck operation employed in part in the maintenance of dispensing equipment loaned to jobbers and direct shipment customers. The proportion so charged was predicated upon the actual time in which each construction man's truck was utilized on maintaining equipment loaned to these customers during the year.

The total cost for the operation and maintenance of construction men's trucks for 1940 was divided by the construction men's hours of work to secure a truck cost per hour amounting to 18.43¢. The actual time of the construction men employed on equipment loaned to jobbers was taken from Form 0133 which showed the hours devoted to each maintenance job by each construction man. This indicated a total of seven hours of the construction 1077 men's time was utilized for maintaining gasoline equipment loaned to jobbers during 1940. This was extended by the 18.43 cents per hour, resulting in a cost of $1.29.

Depreciation costs on our books are determined by applying a rate agreed upon with the Department of Internal Revenue. Procedure followed for spreading this cost was the same as that for operations.

Commission Drivers

Account 021—Commissions
Account 024—Expense of Transferring Standard Fuels Due to Lack of Storage
Account 025—Truck Rental Expense
Account 055—Vehicle Tank Expense—Other than Mounted on Company Chassis

These marketing expenses are incurred in the distribution of our products by employees compensated on a commission basis. Expense of transferring Standard Fuels due to lack of storage, truck rental, and vehicle tank expense—other than mounted on company chassis—are each allocated between the tank wagon reseller and the tank wagon consumer channel on the basis of commission tank wagon gallonage in these two channels. Inasmuch as commission employees make no deliveries to jobbers or other direct shipment customers, this expense is solely chargeable to tank wagon business.

Bulk Plant Cost

Account 008—Salaries—Warehouse Labor
Account 069—Plant Maintenance
Account 061—Rental Expense
Account 062—Water, Light, Fuel (Other than Main Office)
Account 063—Telephone and Telegraph (Other than Main Office)
Account 087—General Supplies Used
Account 088—Station Operating Tools and Equipment
Account 110—Depreciation Expense—Plant (Building, Machinery, Equipment, Furniture, & Fixtures)
Account 112—Depreciation Expense—Real Estate Improvements
Account 086—Taxes—Real Estate & Personal Property

In the main, all of the above items of expense are incurred at bulk plants used in the regular conduct of serving tank wagon reseller, tank wagon consumer, and
1078 method sales channels. All such items of expense incurred solely at the bulk plant are in no manner

affected by direct shipment customers or jobbers. As such, the expenses thus incurred are chargeable solely to tank wagon business. The exceptions to the above general treatment of expenses are indicated in Accounts 110, 112, and 086, resulting from the field office being included as a part of these expense classifications.

The depreciation expense on the Main Office, the real estate improvements incident to the Main Office and taxes were allocated to direct shipment channels on the ratio of the man hours devoted to direct shipments in the Main Office to total man hours of the Main Office. Thus, the depreciation on investment other than real estate improvements amounted to $7,901.15 for the year. Total Main Office employees' time devoted to jobber gasoline sales equalled 1.22% of the total man hours worked by all employees in the office. Applying this ratio to the depreciation costs results in a charge for this product and channel equal to $96.63.

Depreciation on real estate improvements and taxes were handled in exactly the same manner.

Sub-Schedule 3-A given annual charges to direct shipment business by channel and the unit cost per hour or the annual percentage of such charge to the total marketing expense item. Only those items influenced by direct shipments are detailed on Sub-Schedule 3-A. Costs shown on the last line are found on Schedule #3 under direct shipment customers.

[Pages 4956 and 4958 are blank]

SUB-SCHEDULE #3-A

(Supporting Schedule #3, page 38)

	053 Oper. & Maint. of Veh.—Trucks, Motor & Horsedrawn (Excl. Adv.)			106 Deprec. Exp.—Vehicles			110 Depr. Exp.—Plant (Bldg. Mach., Equip., Furn. & Fixt.)			112 Depr. Exp.—Real Estate Improvements			086 Taxes—Real Estate & Personal Property		
	Direct Shipment Customers			Direct Shipment Customers			Direct Shipment Customers			Direct Shipment Customers			Direct Shipment Customers		
	Jobbers			Jobbers			Jobbers			Jobbers			Jobbers		
	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers
Exp. Construction Men's Trucks	$1.29	$0.22	$17.82	$0.33	$0.08	$4.74									
Aug. Cost per hour	18.43¢	14.74¢	18.86¢	4.71¢	5.02¢	5.02¢									
Exp. Main Office							$96.63	$13.51	$269.03	$0.35	$0.05	$0.99	$49.16	$ 6.78	$134.76
Average %							1.22	.17	3.41	1.22	.17	3.41	1.22	.17	3.41
ELA. Expense													6.36	29.52	15.48
Average %													2.88	3.30	3.31
Total	$1.29	$0.22	$17.82	$0.33	$0.08	$4.74	$96.63	$13.51	$269.03	$0.35	$0.05	$0.99	$55.52	$36.30	$150.24

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Sub-Schedule #3-B

Illustrating Adjustment of Comparative Statement of Expense Supporting Schedule #3

This schedule shows the annual amount charged to direct shipment channels in total for each sub account affected; the ratios by which these charges have originally been included in the Comparative Statement of Expense, Form 189 Detroit Field 1940, and the adjustments necessary to the original Form 189 channel costs to take such direct shipment charges out of the original expense charged by channel.

SUB-SCHEDULE #3-B.

ILLUSTRATING ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #3, page 38)

	Annual Direct Shipment Cost	Allocated to Original Statement According to Following Annual Ratios				Adjustment "189" Channels			
		Tank Wagon Reseller %	Tank Wagon Consumer %	Other Method %	Auto. Supplies %	Tank Wagon Reseller $	Tank Wagon Consumer $	Other Method $	Auto. Supplies $
Expense Construction Men's Trucks									
053—Oper. & Maint. of Veh.—Trucks, Motor & **Horse-drawn** (Excl. Adv.)	$ 19.33	71.65	24.00	4.35	—	$ 13.85	$ 4.64	$ 0.84	—
106—Depr. Exp.—Veh.—Trucks, Motor & Horse-drawn (Incl. Veh. Tanks & Excl. Adv. Trucks)	5.15	71.07	24.47	4.46	—	3.66	1.26	0.23	—
Expense Main Office									
110—Depr. Exp.—Plant (Bldg., Mach., **Equip., Furn. & Fixt.**)	379.17	65.32	30.05	4.63	—	247.69	113.94	17.54	—
112—Depr. Exp.—Real Estate Improvements	1.39	65.47	30.21	4.32	—	.91	.42	.06	—
086—Taxes—Real Estate & Personal Property	190.70	65.36	30.01	4.63	—	124.64	57.23	8.83	—
ELA Expense									
086—Taxes—Real Estate & Personal Property	51.36	65.32	30.04	4.64	—	33.55	15.43	2.38	—
Total									
053—Oper. & Maint. of Veh.	$ 19.33	71.65	24.00	4.35	—	$ 13.85	$ 4.64	$ 0.84	—
106—Depr. Exp.—Veh.	5.15	71.07	24.47	4.46	—	3.66	1.26	0.23	—
110—Depr. Exp.—Plant	379.17	65.32	30.05	4.63	—	247.69	113.94	17 54	—
112—Depr. Exp.—R. E. Improvements	1.39	65.47	30.21	4.32	—	.91	.42	.06	—
086—Taxes—R. E. & Personal Property	242.06	65.35	30.02	4.63	—	158.19	72.66	11.21	—

Respondent's Exhibit No. 100.

Sub-Schedule #3-C

Illustrating Final Adjustment of Comparative Statement of Expense Supporting Schedule #3

This Sub-Schedule reflects the final adjustment of expense items shown on our Comparative Statement of Expense Detroit Field 1940, Form 189, for the sub accounts affected by direct shipment business shown on Schedule #3. The indicated necessary adjustment taken from Sub-Schedule #3 is deducted from the original channel cost entry to secure a new cost for tank wagon reseller, tank wagon consumer, and other methods channels, and redistributed to direct shipment channels according to Sub-Schedule #3-A. In each case the revised allocation to channel is balanced out against the original charges to the individual sub account.

SUB-SCHEDULE #3-C

FINAL ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #3, page 38)

	Distribution Through Company Bulk Plants			Direct Shipment Customers					
	Tank Wagon			Jobbers					
Account No.	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers	Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
053—Oper. & Maint. of Veh.									
1940 Form "189"	$ 33,995.75	$19,219.80	$ 13,135.17				$ 66,350.72	$ 1,808.59	$ 68,159.31
Deduct Sub-Schedule B	*13.85	*4.64	*.84						
Revised Allocation to Channel	33,981.90	19,215.16	13,134.33	$ 1.29	$ 0.22	$ 17.82	66,350.72	1,808.59	68,159.31
106—Depr. Exp.—Veh.									
1940 Form "189"	16,258.54	7,381.42	3,475.61						27,115.57
Deduct Sub-Schedule B	*3.66	*1.26	*.23						
Revised Allocation to Channel	16,254.88	7,380.16	3,475.38	0.33	0.08	4.74	27,115.57	—	27,115.57
110—Depr. Exp.—Plant									
1940 Form "189"	63,419.69	19,190.95	4,492.22						97,102.86
Deduct Sub-Schedule B	*247.69	*113.94	*17.54						
Revised Allocation to Channel	63,172.00	29,077.01	4,474.68	96.63	13.51	269.03	97,102.86	—	97,102.86
112—Depr. Exp.—R. E. Improvements									
1940 Form "189"	4,208.06	1,935.79	297.96						6,441.81
Deduct Sub-Schedule B	*.91	*.42	*.06						
Revised Allocation to Channel	4,207.15	1,935.37	297.90	0.35	0.05	0.99	6,441.81	—	6,441.81
086—Taxes—R. E. & Personal Property									
1940 Form "189"	35,793.19	16,393.52	2,535.57						54,722.28
Deduct Sub-Schedule B	*158.19	*72.66	*11.21						
Revised Allocation to Channel	35,635.00	16,320.86	2,524.36	33.52	36.30	150.24	54,722.28	—	54,722.28

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* Denotes red figures.

SCHEDULE #4

INCOME AND EXPENSE INCURRED AT LEASED RETAIL OUTLETS SERVED BY TANK WAGON

Detroit Field—1940

Account No.	Distribution Through Company Bulk Plants			Direct Shipment Customers					
	Tank Wagon			Jobbers					
	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers	Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
060A—Plant Maintenance (Serv. Sta. Owned Properties Complete)	$ 48,049.10		$ 815.89	—	—	—	$ 48,864.99	$ 88.64	$ 48,953.63
060B—Plant Maintenance (Serv. Sta. Owned Buildings on Leased Ground)	1,351.50		21.10	—	—	—	1,372.60	—	1,372.60
060C—Plant Maintenance (P. O. S. S. L. Properties Leased Out)	5,373.96	—	74.72	—	—	—	5,448.68	—	5,448.68
061B—Rental Expense—Leased Ground Used for Owned Serv. Sta. Bldgs.)	15,447.20	—	291.69	—	—	—	15,738.89	—	15,738.89
061C—Rental Expense (P. O. S. S. L. Properties Leased Out)	89,978.67	—	1,245.74	—	—	—	91,224.41	—	91,224.41
065A—Rent Revenue (Serv. Sta. Owned Properties Complete)	*316,699.36	—	*5,206.09	—	—	—	*321,905.45	*6,735.55	*328,641.00
065B—Rent Revenue (Serv. Sta. Owned Buildings on Leased Ground)	*9,730.98	—	*149.20	—	—	—	*9,880.18	*155.95	*10,036.13
065C—Rent Revenue (P. O. S. S. L. Properties Leased Out)	*81,031.83	—	*1,123.51	—	—	—	*82,155.34	*12.97	*82,168.31
066A—Misc. Oper. Exp. (Serv. Sta. Owned Properties Complete)	45,218.67	—	699.10	—	—	—	45,917.77	395.87	46,313.64
066B—Misc. Oper. Exp. (Serv. Sta. Owned Buildings on Leased Ground)	999.97	—	16.36	—	—	—	1,016.35	3.73	1,020.06
066C—Misc. Oper. Exp. (P. O. S. S. L. Properties Leased Out)	3,452.12	—	48.23	—	—	—	3,500.35	26.99	3,527.34
088A—Sta. Oper. Tools & Equip. (Serv. Sta. Owned Properties Complete)	9,403.71	—	151.48	—	—	—	9,555.19	4,793.08	14,348.27
088B—Sta. Oper. Tools & Equip. (Serv. Sta. Owned Bldgs. on Leased Ground)	150.82	—	1.77	—	—	—	152.59	231.71	384.30
088C—Sta. Oper. Tools & Equip. (P. O. S. S. L. Properties Leased Out)	1,780.57	—	26.36	—	—	—	1,806.93	*156.31	1,650.62
110A—Depr. Exp. Plant (Bldg. Mach. & Equip., Furn. & Fixt.) (Service Station Owned Properties Complete)	85,975.02	—	1,421.49	—	—	—	87,396.51	—	87,396.51
110B—Depr. Exp. Plant (Bldg. Mach. & Equip., Furn. & Fixt.) (Service Station Owned Buildings on Leased Ground)	2,178.25	—	32.69	—	—	—	2,210.94	—	2,210.94
110C—Depr. Exp. Plant (Bldg. Mach. & Equip., Furn. & Fixt.) (P. O. S. S. L. Properties Leased Out)	3,565.35	—	50.33	—	—	—	3,615.68	—	3,615.68
086A—Taxes—(Service Station Owned Properties Complete)	98,539.73	—	1,638.91	—	—	—	100,178.64	—	100,178.64
086B—Taxes—(Service Station Owned Buildings on Leased Ground)	1,070.98	—	16.58	—	—	—	1,087.56	—	1,087.56
086C—Taxes—(P. O. S. S. L. Properties Leased Out)	234.60	—	3.12	—	—	—	237.72	—	237.72
112A—Depr. Exp.—Real Estate Improvements (S. S. Owned Props. Comp.)	42,416.48	—	705.15	—	—	—	43,121.63	—	43,121.63
Total	$ 47,724.53	—	$ 781.91	—	—	—	$ 48,506.44	*$ 1,520.76	$ 46,985.68

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* Denotes red figures.

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Schedule #4

Income and Expense Incurred at Leased Retail Outlets Served by Tank Wagon Detroit Field—1940

Account 060A—Plant Maintenance (Serv. Sta. Owned Properties Complete)

Account 060B—Plant Maintenance (Serv. Sta. Owned Buildings on Leased Ground)

Account 060C—Plant Maintenance (P. O. S. S. L. Properties Leased Out)

Account 061B—Rental Expense (Leased Ground Used for Owned Serv. Sta. Bldgs.)

Account 061C—Rental Expense (P. O. S. S. L. Properties Leased Out)

Account 065A—Rent Revenue (Serv. Sta. Owned Properties Complete)

Account 065B—Rent Revenue (Serv. Sta. Owned Buildings on Leased Ground)

Account 065C—Rent Revenue (P. O. S. S. L. Properties Leased-Out)

Account 066A—Misc. Oper. Exp. (Serv. Sta. Owned Properties Complete)

Account 066B—Misc. Oper. Exp. (Serv. Sta. Owned Buildings on Leased Ground)

Account 066C—Misc. Oper. Exp. (P. O. S. S. L. Properties Leased Out)

Account 088A—Sta. Oper. Tools & Equip. (Serv. Sta. Owned Properties Complete)

Account 088B—Sta. Oper. Tools & Equip. (Serv. Sta. Owned Bldgs. on Leased Ground)

Account 088C—Sta. Oper. Tools & Equip. (P. O. S. S. L. Properties Leased Out)

Account 110A—Depr. Exp. Plant (Bldg. Mach. & Equip. Furn. & Fixt.) (Service Station Owned Properties Complete)

Account 110B—Depr. Exp. Plant (Bldg. Mach. & Equip. Furn. & Fixt.) (Service Station Owned Buildings on Leased Ground)

Account 110C—Depr. Exp. Plant (Bldg. Mach. & Equip. Furn. & Fixt.) (P. O. S. S. L. Properties Leased Out)

Account 086A—Taxes—(Service Station Owned Properties Complete)

Account 086B—Taxes—(Service Station Owned Buildings on Leased Ground)

Account 086C—Taxes—(P. O. S. S. L. Properties Leased Out)

Account 112A—Depr. Exp.—Real Estate Improvements (S. S. Owned Props. Comp.)

All of the above items of marketing expense are incurred in maintaining retail outlets served by the tank wagon method of distribution. As such the expense and income is entirely a charge or credit against tank wagon business. None of this expense is applicable to, or influenced by, jobber or other direct shipment customers.

The expenses and income incident to automobile supplies at all such outlets are isolated and charged direct to this merchandise. The residual amount repre-
1086 senting income and expense incident to the distribution of petroleum products through these outlets is allocated between the tank wagon reseller and the other methods channel of distribution on a gallonage basis.

In the course of our regular treatment of these expenses and income items any surplus of rent income over expenses is handled as a credit against other marketing expenses, and for any field having a surplus of expense over an income, these items are regarded as a part of our marketing expense through the tank wagon reseller channel in that particular field.

[Page [illegible]

SCHEDULE #5

MARKETING EXPENSE ITEMS INCURRED AT PRIVATELY OWNED STATIONS NOT LEASED BUT ENGAGED IN THE DISTRIBUTION OF OUR PRODUCTS

Detroit Field—1940

	Distribution Through Company Bulk Plants			Direct Shipment Customers					
	Tank Wagon		Other Method	Jobbers		Other Customers	Total Petroleum Products	Auto Supplies	Total Petroleum Products and Auto Supplies
	Reseller	Consumer		Naph. & Gaso.	Other Prod.				
070—E. L. A. Expense	$ 15,233.46	$ 6,124.71	$ 2,019.14	$ 8.95	$ 2.89	$ 320.70	$ 23,709.85	—	$ 23,709.85
111—Depreciation Expense—Plant—E. L. A.	3,411.97	1,564.26	240.56	16.56	55.68	37.80	5,326.83	—	5,326.83
505—Losses by Dismantling—Abnormal—E. L. A.	—	—	—	—	—	—	—	—	—
513—Losses by Dismantling—Out of Pocket Expense—E. L. A.	3.75	—	—	—	—	—	3.75	—	3.75
Total	$ 18,649.18	$ 7,688.97	$ 2,259.70	$ 25.51	$ 58.57	$ 358.50	$ 29,040.43		$ 29,040.43

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Schedule #5

Marketing Expense Items Incurred at Privately Owned Stations Not Leased But Engaged in the Distribution of Our Products

Account 070—E. L. A. Expense
Account 111—Depreciation Expense—Plant—E. L. A.

Property records indicated the exact pieces of dispensing equipment loaned to jobbers and other direct shipment customers. An analysis of Forms 0133, being a record of time of construction men devoted to each individual maintenance job for the year 1940, gave the time spent repairing equipment loaned to jobbers and direct shipment customers. No repair materials or installation costs were incurred on any such equipment loaned to jobbers during 1940. The construction men spent a total of seven hours repairing our gasoline dispensing equipment loaned to jobbers, which was extended by the hourly rate resulting in a cost of $8.95. This item and others similarly calculated are shown on Sub-Schedule No. 5-A.

The record of our equipment at direct shipment customers' locations was taken from our books together with the value of each piece of equipment. Thus the value of equipment loaned to jobbers for dispensing naphtha, gasoline, and refined oil amounted to $414.49. This was depreciated at four per cent (4%), giving a total depreciation figure chargeable to jobber gasoline of $16.56 (See Sub-Schedule No. 5-A).

513—Losses by Dismantling—Out-of-pocket Expense—E. L. A.

No such item of expense was incurred during the year 1940 on any jobber or other direct shipment customer.

All supporting Sub-Schedules 5-A, 5-B, and 5-C, showing the necessary adjustments of our channel marketing costs, follow.

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SUB-SCHEDULE #5-A

(Supporting Schedule #5, page 50)

	070 ELA Expense			111 Depreciation Exp. Plant—ELA		
	Direct Shipment Customers			Direct Shipment Customers		
	Jobbers			Jobbers		
	Naph. & Gaso.	Other Prod.	Other Customers.	Naph. & Gaso.	Other Prod.	Other Customers
ELA Expense—Sub Account 070						
Salary	$ 8.95	$ 2.89	$133.53			
Average Hourly Rate....	1.28	.96	1.26			
Material			59.90			
Installation Cost			127.27			
Depreciation Expense				$ 16.56	$ 55.68	$ 37.80
% Depreciation				4.00	4.00	4.00
Total	$ 8.95	$ 2.89	$320.70	$ 16.56	$ 55.68	$ 37.80

SUB-SCHEDULE #5-B

ILLUSTRATING ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #5, page 50)

		Allocated to Original Statement According to Following Annual Ratios				Adjustment "189" Channels			
	Annual Direct Shipment Cost	Tank Wagon Reseller %	Tank Wagon Consumer %	Other Method %	Auto. Supplies %	Tank Wagon Reseller $	Tank Wagon Consumer $	Other Method $	Auto. Supplies $
ELA Expense—Sub Account 070									
Salary ....$	145.37	6.16	91.86	1.98	—	$ 8.95	$133.53	$ 2.89	—
Material	59.90	—	100.00	—	—	—	59.90	—	—
Installation Cost	127.27	—	53.24	46.76	—	—	67.76	59.51	—
Total ELA Expense—Sub Account 070..........$	332.54	2.69	78.54	18.77	—	$ 8.95	$261.19	$ 62.40	—
Depr. Exp.—Plant—ELA—Sub Account 111....$	110.04	65.35	30.04	4.61	—	$ 71.91	$ 33.06	$ 5.07	—

[Pages 4972 and 4974 are blank]

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SUB-SCHEDULE #5-C

FINAL ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #5, page 50)

	Distribution Through Company Bulk Plants			Direct Shipment Customers					
	Tank Wagon			Jobbers					
Account No.	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers	Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
070—ELA Expense									
1940 Form "189"	$ 15,242.41	$ 6,385.90	$ 2,081.54						$ 23,709.85
Deduct Sub-Schedule B	*8.95	*261.19	*62.40						
Revised Allocation to Channel	15,233.46	6,124.71	2,019.14	$ 8.95	$ 2.89	$ 320.70	$ 23,709.85	—	23,709.85
111—Depr. Exp.—Plant—ELA									
1940 Form "189"	3,483.88	1,597.32	245.63						5,326.83
Deduct Sub-Schedule B	*71.91	*33.06	*5.07						
Revised Allocation to Channel	3,411.97	1,564.26	240.56	16.56	55.68	37.80	5,326.83	—	5,326.83

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* Denotes red figures.

1092

SCHEDULE #6

CREDIT INFORMATION—BAD DEBTS AND RECOVERY

Detroit Field—1940

	Distribution Through Company Bulk Plants			Direct Shipment Customers					
	Tank Wagon			Jobbers					
Account No.	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers	Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
208—Credit Information Expense	$ 8,278.87	$ 3,985.54	$ 606.19	$ 1,090.04	$119.12	$ 31.54	$ 14,111.30	$ —	$ 14,111.30
400—Bad Debts Collected—Written Off Prior Years	*705.37	*668.79	*2,407.02	*7.04	*.77	*1,343.96	*5,132.95	*348.50	*5,481.45
431—Budget Plan Income and Expense				—	—	—	—	*1,058.17	*1,058.17
510—Losses by Bad Debts	[illegible]73.44	2,672.81	1,434.16	312.22	34.11	—	6,926.74	594.14	7,520.88
511—Expense—Collecting Bad Debts—Current Year	62.70	132.89	17.33	.16	.02	—	213.10	10.00	223.10
512—Expense—Collecting Bad Debts—Prior Years	262.44	210.32	326.19	.32	.04	—	799.31	36.04	835.35
Total	$ 10,372.08	$ 6,332.77	*$ 23.15	$ 1,395.70	$152.52	*$ 1,312.42	$ 16,917.50	*$ 766.49	$ 16,151.01

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* Denotes Red Figures.

1093 **Explanation of Schedule #6**

Credit Information—Bad Debts and Recovery
Detroit Field—1940

Account 208—Credit Information Expense

Sub-Schedule #6-A shows the procedure followed in allocating various types of credit information expense to direct shipment customers. Actual costs applicable to each class of direct shipment customer were taken from the accounting records. In addition to this, amounts chargeable to credit card customers were prorated to the jobber channel on the basis of the number of credit card tickets handled.

For example: The credit card information expense in 1940 amounted to $11,960.97. During the year the proportion of total credit card tickets received from jobbers was applied monthly to the credit information expense incurred. By applying these ratios a charge to jobber accounts of $1,203.90 was obtained, to which $5.26 was added, representing direct jobber report expense. The total of these two was then spread to product on a realization basis, i. e., 90.148%, or $1,090.04, was charged to jobber—naphtha and gasoline, and 9.852%, or $119.12, to jobber—other products.

Costs incurred by direct shipment customers—others—were obtained by extending the number of reports (36) secured during the year by 87.5¢, the average cost per report. This charge amounted to $31.54.

1094 Account 400—Bad Debts Collected—Written Off Prior Years

Account 510—Losses by Bad Debts

Each entry to the above sub accounts made during 1940 was analyzed to determine the proper means of entering these expense credits or debits by channel, by product. A review of the individual items of bad debts collected showed both the customer and the product on which the bad debt had been incurred. As indicated on Sub-Schedule #6-A, $1,343.96 was credited to direct shipment customers—other—as a result of this review.

The jobber portion of this account was made up entirely of bad debt collections on credit card accounts, some part of which may have represented original sales by jobbers. To allocate a part of this cost to jobber channels a proportion of tickets received from this source was again used. The ratio of dollar value of realization of gasoline (excluding tax) to total value of jobber sales to credit card accounts was used to prorate the jobber channel expense to product. This channel cost amounted to $7.81, of which $7.04 was spread to naphtha and gasoline, and 77¢ to other products.

No losses by bad debts were incurred on direct shipment customers—others—during the year 1940. The expense charged to the jobber channel and product was made up of bad debt losses occasioned by credit card accounts which were allocated on a ticket and realization basis as in Account 400.

1095 Account 511—Expense—Collecting Bad Debts—Current Year

Account 512—Expense—Collecting Bad Debts—Prior Year

The total amount of Account 511 was $1.50 in 1940, made up entirely of credit card customer expense. Again tickets and realization were used as a basis of allocation, resulting in a charge to jobber—naphtha and gasoline of 16¢ and to jobber—other products—of 2¢.

Account 512 amounting to $2.50 was handled in exactly the same manner as Account 511, the jobber charge in this case amounting to 32¢ on gasoline and 4¢ on other products.

The residual amount of expense incurred in any of these accounts was charged direct to tank wagon reseller and consumer, and other methods sales channels; or, was allocated between tank wagon reseller and consumer channels; or, was allocated among tank wagon reseller, tank wagon consumer, and other methods channels on an all gallonage basis (excluding direct shipment sales).

SUB-SCHEDULE #6-A

(Supporting Schedule #6, page 55)

		Jobbers					Direct Shipment Customers		
			Value %				Jobbers.		
	Credit Card Cost	% Credit Card Sales Tickets	Naph. & Gaso.	Other Prod.	Credit Card Sales Cost	Direct Cost	Naph. & Gaso.	Other Prod.	Other Customers
208—Credit Information Expense	$11,960.97	10.07%	90.148%	9.852%	$1,203.90	$5.26	$ 1,090.04	$119.12	$ 31.54
400—Bad Debts Collected—Written off Prior Years	*73.82	10.58	90.148	9.852	*7.81	—	*7.04	*.77	*1,343.96
510—Losses by Bad Debts	3,109.83	11.14	90.148	9.852	346.33	—	312.22	34.11	—
511—Expense Collecting Bad Debts—Current Year	1.50	12.00	90.148	9.852	.18	—	.16	.02	—
512—Expense Collecting Bad Debts—Prior Years	2.50	14.40	90.148	9.852	.36	—	.32	.04	—

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* Denotes Red Figures.

Respondent's Exhibit No. 100.

1097

Sub-Schedule #6-B

Illustrating Adjustment of Comparative Statement of Expense (Supporting Schedule #6, page 55)

In adjusting the channels shown on Form 189 for the year 1940 each individual expense item incident to:

208—Credit Information Expense
400—Bad Debts Collected—Written Off Prior Years
510—Losses by Bad Debts
511—Expense Collecting Bad Debts—Current Year
512—Expense Collecting Bad Debts—Prior Years

was traced to the books to see how it was originally charged and removed from the channel on the basis of its original treatment.

To illustrate: Charges resulting from credit information expense had originally been charged to the various channels on a gallonage basis. Therefore, the proportion of these charges incident to direct shipment business was removed from the original channel allocation on Form 189 on a gallonage basis.

Sub-Schedule #6-C shows the adjustment made to the marketing channels shown on Form 189.

SUB-SCHEDULE #6-B

ILLUSTRATING ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #6, page 55)

	Annual Direct Shipment Cost	Allocated to Original Statement According to Following Annual Ratios				Adjustment "189" Channels			
		Tank Wagon Reseller %	Tank Wagon Consumer %	Other Method %	Auto. Supplies %	Tank Wagon Reseller $	Tank Wagon Consumer $	Other Method $	Auto. Supplies $
208—Credit Information Expense	$ 1,240.70	63.04	32.11	4.83	—	$782.19	$398.32	$ 60.19	—
400—Bad Debts Collected—Written off Prior Years	*1,351.77	.58	—	99.42	—	*7.81	—	*1,343.96	—
510—Losses by Bad Debts	346.33	100.00	—	—	—	346.33	—	—	—
511—Expense Collecting Bad Debts—Current Year	.18	100.00	—	—	—	.18	—	—	—
512—Expense Collecting Bad Debts—Prior Years	.36	100.00	—	—	—	.36	—	—	—

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* Denotes Red Figures.

Respondent's Exhibit No. 100.

1099

SUB-SCHEDULE #6-C

FINAL ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #6, page 55)

Account No.	Distribution Through Company Bulk Plants			Direct Shipment Customers					
	Tank Wagon			Jobbers					
	Reseller.	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers	Total Petroleum Products	Auto Supplies	Total Petroleum Products and Auto Supplies
208—Credit Information Expense									
1940 Form "189"	$ 9,061.06	$ 4,383.86	$ 666.38						$ 14,111.30
Deduct Sub-Schedule B	*782.19	*398.32	*60.19						
Revised Allocation to Channel	8,278.87	3,985.54	606.19	$ 1,090.04	$119.12	$ 31.54	$ 14,111.30		14,111.30
400—Bad Debts Collected—Written off Prior Years									
1940 Form "189"	*713.18	*668.79	*3,750.98				*5,132.95	*$ 348.50	*5,481.45
Deduct Sub-Schedule B	7.81	—	1,343.96						
Revised Allocation to Channel	*705.37	*668.79	*2,407.02	*7.04	*.77	*1,343.96	*5,132.95	*348.50	*5,481.45
510—Losses by Bad Debts									
1940 Form "189"	2,819.77	2,672.81	1,434.16				6,926.74	594.14	7,520.88
Deduct Sub-Schedule B	*346.33	—	—						
Revised Allocation to Channel	2,473.44	2,672.81	1,434.16	312.22	34.11	—	6,926.74	594.14	7,520.88
511—Expense Collecting Bad Debts—Current Year									
1940 Form "189"	62.88	132.89	17.33				213.10	10.00	223.10
Deduct Sub-Schedule B	*.18	—	—						
Revised Allocation to Channel	62.70	132.89	17.33	.16	.02	—	213.10	10.00	223.10
512—Expense Collecting Bad Debts—Prior Years									
1940 Form "189"	262.80	210.32	326.19				799.31	36.04	835.35
Deduct Sub-Schedule B	*.36	—	—						
Revised Allocation to Channel	262.44	210.32	326.19	.32	.04	—	799.31	36.04	835.35

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* Denotes Red Figures.

1100

SCHEDULE #7

FIELD OFFICE AND ACCOUNTING COST

Detroit Field—1940

Account No.	Distribution Through Company Bulk Plants			Direct Shipment Customers					
	Tank Wagon.			Jobbers					
	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers	Total Petroleum Products	Auto Supplies	Total Petroleum Products and Auto Supplies
200—Office Expense—Salary Accounting	$ 82,492.38	$39,199.1[illegible]	$ 91,404.08	$ 2,252.09	$271.29	$ 2,506.73	$218,125.75	$19,398.70	$237,524.45
201—Office Expense—Stationery and Office Supplies	8,297.55	3,925.78	590.81	349.07	38.28	25.81	13,227.30	329.26	13,556.56
202—Office Expense—Postage	12,353.99	5,662.43	880.16	321.44	31.73	122.34	19,372.09	—	19,372.09
203—Office Expense—Telephone & Telegraph	7,748.07	3,540.51	546.85	154.03	21.31	423.05	12,433.82	—	12,433.82
204—Office Expense—Exchange	5,419.14	2,570.05	383.26	94.87	9.36	32.70	8,509.38	—	8,509.38
205—Office Expense—Opera. & Maint. of Vehicles—Office Automobiles	227.06	102.60	246.56	8.33	.90	7.50	592.95	—	592.95
206—Office Expense—All Other—Water, Light, Fuel, Rent, Etc.	6,777.09	3,386.81	7,627.25	228.61	31.89	636.36	18,688.01	—	18,688.01
Total	$123,315.28	$58,387.36	$101,678.97	$ 3,408.41	$404.76	$ 3,754.49	$290,949.30	$19,727.96	$310,677.26

1101 Explanation of Schedule #7

Field Office and Accounting Cost
Detroit Field—1940

Account 200—Office Expense—Salaries Accounting

In our regular costing procedure no effort is made to segregate time and expense incident to direct shipment sales. The accounting work necessary is absorbed by the regular personnel. In this analysis it was necessary to isolate the time required in maintaining such records and charge direct shipments accordingly. Such expenses were segregated to channels and products according to various standards to be explained under each outline of procedure.

1. Time Study in Direct Shipment Tickets

From August 11 through September 10, each member of the Accounting Department having any association with direct shipment sales maintained a time card showing his time devoted to direct shipment business segregated as to jobber naphtha, gasoline and refined oil; jobber other products; and other direct shipment customers. This record was posted daily by each employee. A full month was used to establish such time standards as the flow of work does not remain constant in all departments each day of the month. A record of direct shipment tickets handled during this period also was maintained. The record of time devoted to direct shipment business for each position was divided by the number of direct shipment sales tickets handled to secure a time per 100 tickets.

A count of all direct shipment tickets was taken from Form 27 by months for the year 1940. The number of direct shipment tickets by month was as follows:

1102

January	350	July	334
February	294	August	449
March	281	September	722
April	339	October	846
May	349	November	425
June	368	December	427

The number of tickets was extended by the time required for each position, giving monthly effort in minutes, which was extended by the compensation per minute to secure the total cost of direct shipment business for that position for each month of the year.

This total direct shipment cost for each position by month was then allocated between jobber, naphtha, gasoline and refined oil; jobber, other products; and other direct shipment customers, on the basis of the time split found to exist during the month the time study was conducted.

All individuals in the following departments having any activity touching upon direct shipment business were handled on this basis:

Federal and State Tax Clerk
Check Record Department
Accounts Receivable (Other than dealer assigned sales)
Order and Price Department
Billing Department
Credit Department (Other than dealer assigned sales)
General Accounts Department
Stock Department

In addition to the regular employees of these various departments, there were four utility clerks whose time was divided among the various departments. Accordingly, their salary was allocated on the ratio of direct shipment time to the total time worked of all of the departments combined in which they worked.

1103 2. Mailing Department

It was necessary to handle the mail room costs on a slightly different basis. The individual time sheets maintained by employees showed time spent mailing statements to credit card accounts, and time spent preparing and mailing stationery to jobbers. They also maintained a record of statements mailed which, when divided by the number of sales tickets, gave a cost for handling per 100 sales tickets. The total number of dealer assigned sales tickets originating from jobbers, by months for 1940, was extended by this cost per 100 to secure a mailing cost incident to the operation of the mail room.

The time spent preparing and mailing stationery to jobbers during the month in which the time card was maintained was charged each month of 1940.

Time in minutes thus determined was extended by the cost per minute to secure a cost incident to salaries of mail room operation, which was then allocated between jobber naphtha and gasoline and other products on the basis of value of sales tickets involved.

3. Time Study Based on Number of Invoices

General file clerks have as a part of their duties the filing of all invoices of sales. Accordingly, they were requested to maintain a record of that part of their time devoted to filing invoices and the number of invoices filed covering sales to jobber and other direct shipment customers. Such sales are reported on Form 82-D. The time divided by number of invoices equals rate per invoice. Thus, a full time file clerk filed 824 invoices in 352 minutes, or an average time per ticket of .427 minutes. Each sale made
1104 to a direct shipment customer results in an invoice.
Therefore, this time was extended times the number of invoices issued by month for 1940 for total time in this department. This time in minutes was extended by the date per minute to secure total cost of filing direct shipment invoices, which was then split between jobber naphtha and gasoline and other customers on the basis of number of invoices issued.

4. Time Study and Number of Sales to Credit Card Accounts

Certain file clerks spend all their time filing sales tickets (Form 090-D) resulting from sales on credit card accounts. Some such sales originate with jobber outlets and throughout this analysis have received a proportionate share of expense incident to handling such sales. These individual file clerks maintained a time sheet showing the number of hours spent filing and the number of sales tickets filed. The record of time and the number of tickets results in establishing a standard for filing per 100 tickets. This time standard per 100 tickets was applied to the number of jobber sales to credit card accounts to secure a cost for this function. The charge was allocated to product on a realization basis.

5. Time Allocation of Remittance Clerks

Remittance clerks handle remittances received from all classes of customers and coupons redeemed from coupon books. These individuals maintained time sheets showing the time spent on total remittance, number of remittances handled, and time spent handling jobber coupons redeemed. Total time recorded for handling remittances was split according to the number of remittances received from credit card accounts, other direct shipment customer remittances, and total jobber direct remittances.

1105 The charge for handling direct shipment business of remittance clerks is made up of the total of the following three items:

(a) The proportion of remittances received from credit card accounts, reflecting the proportion of sales made by jobber outlets split between jobber naphtha, gasoline and refined oil, and other products according to the ratio of the value of the sales tickets, plus

(b) Time spent in handling jobber direct remittances, split according to the value of sales, plus

(c) The time spent handling coupons redeemed, again split according to the percentage of value of sales as reflected by credit card sales.

6. Study of Effort of Creditmen, Junior Creditmen, and Clerks Handling Credit Card Business

The time of all these individuals is devoted 100% to credit card accounts. The total time was reduced to a ticket basis and applied to the number of credit card sales tickets originating from jobber outlets. Time so determined was extended by the rate per minute to secure cost for each position for each month of 1940. This was then split between jobber naphtha and gasoline and jobber other products channels on the basis of value as shown by the tickets.

7. Direct Shipment Time of Cashier

The cashier maintained a time record showing time spent writing customers checks, number of checks written, and time spent handling direct remittances. That portion of his time handling direct remittances was treated in the same manner as were the remittance clerks. Time
1106 incident to writing checks was handled on a per check basis, which was extended by the number of checks issued to jobbers and other direct shipment customers by months, which was then allocated to channel on a value basis based upon purchases made during the month of August 1941.

8. Allocation of Effort of Index Clerk.

The index clerk sorts all invoices for credit sales, except regular credit card account sales, and sales tickets on credit card accounts where interfield billing is necessitated. This sorting is to prepare tickets for machine bookkeeping. The time spent sorting Form 082 invoices was divided by the number of invoices handled to arrive at a rate per minute. This rate was then applied against the number of jobber and other direct shipment customer invoices by month and the resulting minutes times the salary rate per minute gave a direct shipment cost for this function. The product split of the jobber portion of this time was based on the product distribution shown on time sheets prepared by machine bookkeepers.

The time spent handling sales tickets resulting from credit card accounts was allocated on the basis of time per ticket applied to the number of jobber credit card sales tickets by months for the year 1940. This resulted in total time chargeable to jobber credit card sales, which was then allocated between channels on the percentage of value as reflected by the tickets.

9. Check Operator—Other

This employee maintained a record showing the number of direct shipment sales tickets and the time required
1107 for handling. The time and number of tickets was
used to establish a cost per ticket which was applied to the number of tickets handled each month during 1940. This was then split according to the ratio of time, by product, of machine bookkeepers.

10. Miscellaneous Accounting Employees

The following individuals' allocation of time between tank wagon and direct shipment business was predicated upon analyses of individuals dealt with in the above subclassifications:

(a) Accounts Receivable Supervisor—Time of this individual was allocated to direct shipment channel and product according to the ratio of direct shipment time of employees supervised to their total time worked.

(b) Check and Record Department Supervisor—Assistant Check and Record Department Supervisor—The time of these employees was allocated to direct shipment channel and product on the basis of distribution of effort secured from the time sheets of the employees whom they supervised.

(c) Payroll Clerks—Distribution of the salaries of these employees to direct shipment channel and product was made on the basis of the proportion of man hours applicable to direct shipment customers to the total man hours for all field employees.

(d) Telephone Operators—The salaries incurred for telephone operators were allocated on the basis of direct shipment man hours to total man hours of all employees in the field office. The distribution to product was based 1108 on the effort proportions for total direct shipment charges of all main office employees.

(e) Stenographic Department—The distribution of salaries of the Stenographic Department serving the Accounting Department was based on the ratios of direct shipment salary cost to total salary cost of the accounting payroll.

(f) Utility Supervisor—Salary of this individual was allocated on the basis of the sum total distribution of effort in the various departments supervised, including order, price, billing, tank car, traffic, mail and stationery.

(g) Assistant to Office Manager—The salary of this individual was allocated to direct shipments on the basis of the distribution of effort of all individuals working in the various departments supervised, including check and record, stenographic, utility clerks, and file clerks.

(h) Assistant Office Manager—The salary of this individual was allocated to direct shipments on the basis of the distribution of effort of all individuals in the various departments working under his supervision, including general accounts, accounts receivable, stenographic, payroll, construction, real estate and tax.

(i) Office Manager—The salary of this individual was allocated on the basis of the distribution of effort of all employees in departments supervised, including the total accounting and credit departments.

The net influence of the distribution of costs of the Accounting Department as above outlined are shown on Sub-Schedule #7-A.

1109 Account 201—Office Expense—Stationery and Office Supplies

A study was made of all stationery forms used by items for a twelve-month period. The quantity of each item so determined was extended by the cost to secure an annual charge. By this process we were able to isolate $13,213.25 out of a total of $13,556.56, the difference representing miscellaneous stationery items. All forms were then classified as to those not affecting direct shipment business; those

[Pages 4996 and 4998 are blank]

1117

SUB-SCHEDULE #7-C

FINAL ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #7, page 63)

Account No.	Distribution Through Company Bulk Plants			Direct Shipment Customers			Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
	Tank Wagon			Jobbers					
	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers			
200—Office Expense—Salaries Accounting									
1940 Form "189"	$ 84,167.59	$39,975.05	$ 93,473.66				$217,616.30	$19,908.15	$237,524.45
Deduct Sub-Schedule B	*1,675.21	*775.87	*2,069.58					*509.45	
Revised Allocation to Channel	82,492.38	39,199.18	91,404.08	$ 2,252.09	$271.29	$ 2,506.73	218,125.75	19,398.70	237,524.45
201—Office Expense—Stationery and Supplies									
1940 Form "189"	8,567.45	4,049.93	609.92				13,227.30	329.26	13,556.56
Deduct Sub-Schedule B	*269.90	*124.15	*19.11						
Revised Allocation to Channel	8,297.55	3,925.78	590.81	349.07	38.28	25.81	13,227.30	329.26	13,556.56
202—Office Expense—Postage									
1940 Form "189"	12,668.64	5,801.08	902.37				19,372.09		19,372.09
Deduct Sub-Schedule B	*314.65	*138.65	*22.21						
Revised Allocation to Channel	12,353.99	5,662.43	880.16	321.44	31.73	122.34	19,372.09	—	19,372.09
203—Office Expense—Telephone and Telegraph									
1940 Form "189"	8,140.02	3,719.22	574.58				12,433.82		12,433.82
Deduct Sub-Schedule B	*391.95	*178.71	*27.73						
Revised Allocation to Channel	7,748.07	3,540.51	546.85	154.03	21.31	423.05	12,433.82	—	12,433.82
204—Office Expense—Exchange									
1940 Form "189"	5,508.03	2,611.73	389.62				8,509.38		8,509.38
Deduct Sub-Schedule B	*88.89	*41.68	*6.36						
Revised Allocation to Channel	5,419.14	2,570.05	383.26	94.87	9.36	32.70	8,509.38	—	8,509.38
205—Office Expense—Oper. & Main. of Veh.—Office Automobiles									
1940 Form "189"	233.69	105.55	253.71				592.95		592.95
Deduct Sub-Schedule B	*6.63	*2.95	*7.15						
Revised Allocation to Channel	227.06	102.60	246.56	8.33	.90	7.50	592.95	—	592.95
206—Office Expense—All Other—Water, Light, Fuel, Rent, etc.									
1940 Form "189"	7,119.00	3,557.20	8,011.81				18,688.01		18,688.01
Deduct Sub-Schedule B	*341.91	*170.39	*384.56						
Revised Allocation to Channel	6,777.09	3,386.81	7,627.25	228.61	31.89	636.36	18,688.01	—	18,688.01

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* Denotes red figures in original.

1118

SCHEDULE #8

SUPERVISION COST INCURRED IN SALES FIELD

Detroit Field—1940

Account No.	Distribution Through Company Bulk Plants			Direct Shipment Customers			Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
	Tank Wagon			Jobbers					
	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers			
000—Salaries—Superivision	$ 31,114.25	$15,696.90	$ 3,907.60	$ 320.20	$ 16.49	$ 304.77	$ 51,360.21	—	$ 51,360.21
001—Salaries—Supervision—Others	8,057.73	3,523.01	551.82	46.32	4.47	836.28	13,019.63	—	13,019.63
030—Traveling Expense—Supervision	2,325.28	1,090.95	164.79	38.63	1.82	32.47	3,653.94	—	3,653.94
045—Operation & Maintenance of Vehicles—Supervision	2,037.04	973.86	145.55	19.73	1.29	21.33	3,198.80	—	3,198.80
100—Depreciation Expense — Vehicles — Supervision	638.56	289.74	44.85	11.16	.50	10.64	995.45	—	995.45
Total	$ 44,172.86	$21,574.46	$ 4,814.61	$ 436.04	$ 24.57	$ 1,205.49	$ 72,228.03	—	$ 72,228.03

affecting direct shipment business only; and those affecting both tank wagon and direct shipment sales. Cost of individual items included in the last classification was reclassified according to—

(a) Cost incurred on stationery affecting both tank wagon and direct shipment business in general	$ 962.52
(b) Cost of stationery used in maintaining records on credit card sales	3,747.03
(c) Cost of stationery used affecting lubricating business whether handled on a direct shipment basis or through our bulk plants	107.10

Procedures used in allocating these expenses to direct shipment business by channels were as follows:

(a) Affecting Both Types of Business Generally

Stationery and forms are used by individuals maintaining records of sales accomplishments by the Standard Oil Company. All forms included in this classification should be chargeable to direct shipments on the basis of distribution of effort of individuals working on these forms. It seemed, therefore, that the most logical means of allocation
1110 would be to use the ratio of the distribution of total field effort for the allocation of that part incident to direct shipment business.

(b) Forms Used for Credit Card Sales

This expense item was first allocated between tank wagon and jobber business on the basis of number of sales made through each respective classification of outlet. Thus, 10.22% was charged to jobber business. This was allocated between gasoline and other products on the basis of the realization as shown by the tickets.

(c) Forms Used on Lubricating Sales

The allocation of the expense of these forms to product and channel of direct shipment business was predicated upon a distribution of effort of the sales promoter in charge of industrial salesmen.

In addition to the above three means of allocating expense for stationery, direct charge was made to other direct shipment customers for forms used on such accounts only, amounting to $5.42. Detail on all of the above items is to be found on an annual basis on Sub-Schedule #7-A.

Account 202—Office Expense—Postage

A large part of this expenditure is incurred in handling correspondence with credit card accounts. Such postage is maintained separately on Form 421-A by months throughout the year. This total postage expense was multiplied by the proportion of the sales to credit card accounts made by jobber outlets to secure a cost per month, which was then allocated to jobber naphtha and gasoline and other products on the ratio of the realization shown by such sales.

1111 In addition to the jobber cost thus calculated, the number of invoices, number of statements and the number of letters written to jobbers and other direct shipment customers during the year 1940 was counted from our files. Each of these mailings was assessed a uniform postage cost of 2 cents. Total direct shipment cost, therefore, is made up of the sum total postage expense as above prepared. The amount on an annual basis is shown on Sub-Schedule #7-A.

Account 203—Office Expense—Telephone and Telegraph

Total cost for this function was taken from Form 189 by months for the year 1940 and was split to direct shipments on the basis of total hours devoted to direct shipment business by all employees in the Main Office as a proportion of total hours of all employees in the Main Office. This calculation was carried through on a monthly basis.

Account 204—Office Expense—Exchange

A record of all remittances received from each class of customer was kept during the month of August 1941. From this record it was found that 64.293% of the remittances were from credit card customers, .985% from jobbers, and 2.453% from other direct shipment customers.

The remittances received each month in 1940 were counted, numbering 101,755 for the year, together with the checks issued to jobbers and other direct shipment customers, amounting to 244 and 38 respectively. The average exchange cost was obtained for each unit of the year.

The credit card cost was determined by applying 64.923% to the total number of remittances, 101,753, and extending by the cost per unit, 1.293 cents. This result was then spread to the jobber channel on the basis of the number of sales tickets received and to products according to realization returned.

1119 Explanation of Schedule #8

Supervision Cost Incurred in the Field Office

Account 000—Salaries—Supervision
Account 030—Traveling Expense—Supervision
Account 045—Operation and Maintenance of Vehicles—Supervision
Account 100—Depreciation Expense—Vehicles—Supervision

Expenses entering into these accounts are the salaries and expenses incident to the position of manager, two assistant field managers, superintendent of construction, assistant superintendent of construction, superintendent of equipment, superintendent of maintenance, superintendent of tank wagon, and plant supervisors. In the allocation of this expense it was necessary to study the distribution of effort of each of the individuals involved.

A review of the field manager's file and expense book throughout the entire year 1940 revealed the number of contacts and direct selling time put in by the field manager. This was regarded as direct selling time against jobber operations and was calculated for each month during the year and deducted from the total salary of the field manager. The residual amount of the salary was allocated among the various channels of distribution according to the ratio of the sum total of hourly effort devoted to direct shipment customers to the total field hourly effort put in by all individuals working under the manager's supervision.

The same procedure outlined above was used in allocating the ratio of effort of each of the assistant field managers among the various channels of sales in each case based on the supervision ratio of the distribution of effort of individuals supervised.

1120 The superintendent of construction and the assistant superintendent of construction spent practically no time on jobber accounts. A complete review of each sketch of any plant layout or project undertaken by the construction department in 1940 did indicate, however, that the superintendent of construction had spent a small amount of time in a consulting capacity with jobbers on some of their proposed modernization of outlets or new outlets. The complete record on each project exists in the

1112 Direct shipment costs were obtained by applying .985% and 2.453% to the total number of remittances and extending by the cost per unit. The jobber cost was again spread on a realization basis according to the products sold to the jobbers.

The number of checks to jobber and other direct shipment customers were counted for the year and extended by the exchange rate, allocation of jobber costs to product being made again on a realization basis.

Account 205—Office Expense—Operation and Maintenance of Vehicles—Office Automobiles

A company owned car is furnished the Office Manager in each of our sales divisions. This car is used wholly by the Office Manager and accordingly was allocated to product and channel of marketing on the basis of the distribution of the sum total effort of the Accounting Department.

Account 206—Office Expense—All Other—Water, Light, Fuel, Rent, Etc.

All man hours spent on jobber and direct shipment business in the field office were recapitulated and expressed as a proportion of the total man hours worked in the field office. In all of our previous calculations a distribution of effort was carried through by channels; therefore, the recapitulation of the effort of the individual employee resulted in an effort factor for each direct shipment product or sales channel. These ratios were applied direct to this expense item to secure an allocation.

Sub-Schedules #7-B and #7-C, supporting Schedule #7 and illustrating adjustments made to previous charges on our Comparative Statement of Expense Form 189, Detroit field, 1940, follow.

construction department from which it was possible to determine the proportion of effort devoted to this class of business. Effort so measured was used to determine the allocation ratios among the various channels of distribution.

The superintendent of equipment is in charge of our machine shop and maintains our automotive equipment. The cost of the machine shop expense was calculated upon an individual vehicle basis and then allocated according to the distribution of effort of the individual to whom the car was furnished. This cost was then expressed as a proportion of the total machine shop cost per month and the ratio thus determined used to allocate the salary of the superintendent of equipment to the respective sales channels.

The superintendent of maintenance is in charge of maintaining our distributive equipment. A complete analysis of all work orders maintained on Form 0133 (time record) numbering several thousand, revealed the amount of work on equipment at jobber accounts. Time of the various employees spent on jobber and direct shipment customers so determined was expressed as a percentage of total for this class of employees, and the salary of the superintendent of maintenance was spread on the basis of the allocation of effort of men working under his supervision.

1121 The superintendent of tank wagon has charge of tank wagon distribution out of our various bulk plants. Inasmuch as all jobbers secured their supplies of gasoline on a tank car basis, no change from our present method of distribution of this expense was made. This expense is incurred only on tank wagon operation. This is likewise true of the bulk plant superintendent.

The above outline by individual positions presents in complete detail procedure followed without revealing individual ratios, salaries, etc. Expenses incident to supervision had to be handled on an individual position basis. If the explanation of this account were given in similar detail to that of other sub accounts, it would necessitate making part of public record individual salaries and other expenses incident to individual employees. The respondent is reluctant to do this.

Ratios of time devoted to direct shipment business for each individual whose salary and expense are included

SUB-SCHEDULE #7-A

SUPPORTING SCHEDULE #7, PAGE 63

Account No.	Annual Total	Direct Shipment Customers — Jobber — Naph. & Gaso.		Direct Shipment Customers — Jobber — Other Prod.		Direct Shipment Customers — Other Customers	
	$	$	%	$	%	$	%
200—Office Expense—Salaries Accounting Departments:							
Accounts Receivable	$ 16,216.47	$ 547.42	3.38%	$ 49.75	.31%	$ 179.84	1.11%
Check—Record	14,339.50	166.41	1.16	10.65	.07	240.79	1.68
Credit	19,298.47	352.26	1.83	75.08	.39	285.09	1.48
General Accounts & Construction Clerks	20,501.50	24.63	.12	3.21	.02	24.84	.12
Order, Tank Car, Traffic & Billing	28,648.64	309.09	1.08	11.96	.04	843.74	2.95
Stock	8,538.00	44.02	.52	18.67	.22	77.18	.90
Stenographic	8,454.01	131.57	1.56	14.18	.17	117.38	1.39
Mail and General File	11,586.27	112.81	.97	10.14	.09	47.79	.41
Supervision	26,603.00	516.87	1.94	71.98	.27	565.35	2.13
Office Miscellaneous	7,450.53	47.01	.63	5.67	.08	124.73	1.67
Total	$161,636.39	$2,252.09	1.39%	$271.29	.17%	$2,506.73	1.55%

Respondent's Exhibit No. 100.

under supervision costs, determined according to the above outline, were as follows:

Position	Jobber Naph. & Gaso.	Jobber Other Products	Other Direct Shipment Customers
Field Manager	1.73%	.06%	1.23%
Asst. Manager Wholesale	.41	.04	1.36
Asst. Manager Reseller	.59	.06	.31
Construction Superintendent	.25	.02	.02
Equipment Superintendent	.03	.01	.57

The above ratios represent the annual proportion of expense chargeable to direct shipment business, which amount had previously been determined by the application of monthly ratios to monthly costs. The application of such ratios to salaries and expenses of the individuals in 1122 this classification resulted in a reallocation of these expense items as is shown on Sub-Schedule #8-A.

Account 001—Salaries—Supervision—Others

Salaries shown under this classification of expense represent the stenographic and clerical assistance afforded to the men working in a supervisory capacity. In each case the allocation of time of the individual for whom they work was used to allocate the time of their stenographic and clerical assistants.

The usual sub-schedules #8-B and #8-C illustrating the method of removal of direct shipment costs from regular channels of expense on our Comparative Statement of Expense, Form 189, Detroit Field 1940 follow.

Account No.	Total Cost	Direct Shipment Customers					
		Jobber				Other Customers	
		Naph. & Gaso.		Other Prod.			
		$	%	$	%	$	%
201—Office Expense—Stationery and Supplies							
Total	$ 13,556.56	$ 349.07		$ 38.28		$ 25.81	
Section A	8,734.49	—		—		—	
Section B	5.42	—		—		5.42	
Section C	4,816.65	349.07		38.28		20.39	
Class A	$ 962.52	3.71	.385%	.55	.057%	11.99	1.246%
Class B	3,747.03	345.22	9.213	37.73	1.007	—	—
Class C	107.10	.14	.131	—	—	8.40	7.847
202—Office Expense—Postage							
Total		$ 321.14		$ 31.73		$ 122.34	
Credit Card Expense	3,168.61	290.52	9.169	31.73	1.001	—	—
Direct Shipment Average %	10.17%						
Other Cost		30.92		—		122.34	
Number of Direct Shipment Invoices		1,546		—		6,117	
203—Office Expense—Telephone and Telegraph							
Total	12,433.82	$ 154.03	1.239	$ 21.31	.171	$ 423.05	3.402

Respondent's Exhibit No. 100.

SUB-SECTION #7-A (continued)

Respondent's Exhibit No. 100.

Account No.	Total Cost	Direct Shipment Customers					
		Jobber				Other Customers	
		Naph. & Gaso.		Other Prod.			
		$	%	$	%	$	%
204—Office Expense—Exchange							
Total		$ 94.87		$ 9.36		$ 32.70	
Number of Remittances	101,753						
Cost Per Unit	1.293¢						
Credit Card							
% of Total Remittances	64.923%						
Number of Remittances	66,061						
Cost	$ 854.17	80.07	9.374%	8.74	1.023%	—	—
Other Than Credit Card Accounts							
% of Total Remittances			.945%		.040%		2.453%
Number of Remittances		962		40		2,496	—
Cost		$ 12.44		$ .52		$ 32.27	
Checks Issued							
Number of Checks		234		10		38	
Cost		$ 2.36		$ .10		$ .43	
205—Office Expense—Oper. & Main. of Veh.—Office Automobiles							
Total	$ 592.95	$ 8.33	1.405%	$ .90	.152%	$ 7.50	1.265%
206—Office Expense—All Other—Water, Light, Fuel, Rent, etc.							
Total	18,688.01	228.61	1.223	31.89	1.71	636.36	3.405

SUB-SCHEDULE #7-B

ILLUSTRATING ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #7, page 63)

Account No.	Annual Direct Shipment Cost	Allocated to Original Statement According to Following Annual Ratios				Adjustment "189" Channels			
		Tank Wagon Reseller %	Tank Wagon Consumer %	Other Method %	Auto. Supplies %	Tank Wagon Reseller $	Tank Wagon Consumer $	Other Method $	Auto. Supplies $
200—Office Expense—Salaries Accounting Departments:									
Accounts Receivable	$ 777.01	38.45	18.68	31.99	10.88	$ 298.79	$145.18	$ 248.52	$ 84.52
Check—Record	417.85	42.43	17.60	36.73	3.24	177.29	73.56	153.47	13.53
Credit	712.43	42.70	19.98	24.55	12.77	304.22	142.33	174.87	91.01
General Accounts & Construction Clerks	52.68	33.94	13.23	40.53	12.30	17.88	6.97	21.85	6.48
Order, Tank Car, Traffic, & Billing	1,164.79	15.50	6.30	64.93	13.27	180.49	73.39	756.33	154.58
Stock	139.87	24.85	10.67	44.17	20.91	34.75	14.09	61.78	29.25
Stenographic	263.13	26.30	11.88	43.10	18.72	69.20	31.26	113.42	49.25
Mail and General File	170.74	42.36	17.68	32.71	7.25	72.33	30.19	55.85	12.37
Supervision	1,154.20	38.80	19.61	36.36	5.23	447.87	226.34	419.62	60.37
Office Miscellaneous	177.41	40.81	18.35	36.28	4.56	72.39	32.56	64.37	8.09
Total	$ 5,030.11					$1,675.21	$775.87	$2,069.58	$509.45
201—Office Expense—Stationery and Office Supplies	$ 413.16	65.33	30.05	4.62	—	$ 269.90	$124.15	$ 19.11	—
202—Office Expense—Postage	475.51	66.17	29.16	4.67	—	314.65	138.65	22.21	—
203—Office Expense—Telephone and Telegraph	598.39	65.50	29.87	4.63	—	391.95	178.71	27.73	—
204—Office Expense—Exchange	136.93	64.92	30.44	4.64	—	88.89	41.68	6.36	—
205—Office Expense—Oper. & Main. of Veh.—Office Automobiles	16.73	39.63	17.63	42.74	—	6.63	2.95	7.15	—
206—Office Expense—All Other—Water, Light, Fuel, Rent, etc.	896.86	38.12	19.00	42.88	—	341.91	170.39	384.56	—

Respondent's Exhibit No. 100.

1123

SUB-SCHEDULE #8-A

(Supporting Schedule #8, page 81)

	000 Salaries—Supervision			001 Salaries—Supervision—Others			030 Traveling Expense Supervision			045 Oper. & Maint.—Vehicles Supervision			100 Deprec.—Vehicles Supervision		
	Direct Shipment Customers			Direct Shipment Customers			Direct Shipment Customers			Direct Shipment Customers			Direct Shipment Customers		
	Jobbers			Jobbers			Jobbers			Jobbers			Jobbers		
	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers	Naph. & Gaso.	Other Prod.	Other Customers
Supervision Costs	$320.29	$ 16.49	$304.77	$ 46.32	$ 4.47	$836.28	$ 38.63	$ 1.82	$ 32.47	$ 19.73	$ 1.29	$ 21.33	$ 11.16	$ 0.50	$ 10.64

1124

SUB-SCHEDULE #8-B

ILLUSTRATING ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #8, page 81)

		Allocated to Original Statement According to Following Annual Ratios				Adjustment "189" Channels			
	Annual Direct Shipment Cost	Tank Wagon Reseller %	Tank Wagon Consumer %	Other Method %	Auto. Supplies %	Tank Wagon Reseller $	Tank Wagon Consumer $	Other Method $	Auto. Supplies $
Supervision Costs									
000—Salaries	$ 641.46	65.42	29.95	4.63	—	$419.66	$192.09	$ 29.71	—
030—Traveling Expense	72.92	65.07	30.36	4.57	—	47.45	22.14	3.33	—
045—Oper. & Maint. of Vehicles	42.35	64.89	30.55	4.56	—	27.48	12.94	1.93	—
100—Deprec. Expense—Vehicles	22.30	65.38	29.96	4.66	—	14.58	6.68	1.04	—
Supervision Costs—Other									
001—Salaries	887.07	65.05	30.36	4.59	—	577.05	269.30	40.72	—

1125

SUB-SCHEDULE #8-C

FINAL ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #8, page 81)

Account No.	Distribution Through Company Bulk Plants			Direct Shipment Customers			Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
	Tank Wagon			Jobbers					
	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers			
000—Salaries—Supervision									
1940 Form "189"	$ 31,533.91	$15,888.99	$ 3,937.31						$ 51,360.21
Deduct Sub-Schedule B	*419.66	*192.09	*29.71						
Revised Allocation to Channel	31,114.25	15,696.90	3,907.60	$ 320.20	$ 16.49	$ 304.77	$ 51,360.21	—	51,360.21
001—Salaries—Supervision—Others									
1940 Form "189"	8,634.78	3,792.31	592.54						13,019.63
Deduct Sub-Schedule B	*577.05	*269.30	*40.72						
Revised Allocation to Channel	8,057.73	3,523.01	551.82	46.32	4.47	836.28	13,019.63	—	13,019.63
030—Traveling Expense—Supervision									
1940 Form "189"	2,372.73	1,113.09	168.12						3,653.94
Deduct Sub-Schedule B	*47.45	*22.14	*3.33						
Revised Allocation to Channel	2,325.28	1,090.95	164.79	38.63	1.82	32.47	3,653.94	—	3,653.94
045—Oper. & Maint. of Veh.—Supervision									
1940 Form "189"	2,064.52	986.80	147.48						3,198.80
Deduct Sub-Schedule B	*27.48	*12.94	*1.93						
Revised Allocation to Channel	2,037.04	973.86	145.55	19.73	1.29	21.33	3,198.80	—	3,198.80
100—Depr. Exp.—Veh.—Supervision									
1940 Form "189"	653.14	296.42	45.89						995.45
Deduct Sub-Schedule B	*14.58	*6.68	*1.04						
Revised Allocation to Channel	638.56	289.74	44.85	11.16	.50	10.64	995.45	—	995.45

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* Denotes red figures in original.

1126

SCHEDULE #9

LOSSES—TAXES—INSURANCE AND ADDITIONAL SALARY CONSIDERATIONS

Detroit Field—1940

Account No.	Distribution Through Company Bulk Plants			Direct Shipment Customers			Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
	Tank Wagon			Jobbers					
	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers			
500—Losses by Accident—Prop. & Other than Company Employees	$ 1,571.00	$ 621.72	$ 68.02	$ 3.05	$ .26	$ 12.00	$ 2,276.05	—	$ 2,276.05
501—Losses by Property Damage—Co. & Other than Co. Property	1,225.79	499.24	45.91	—	—	19.24	1,790.18	—	1,790.18
502—Loss by Fire	193.96	47.41	10.64	—	—	—	252.01	—	252.01
503—Losses by Storm and Flood	195.83	119.90	13.03	—	—	—	328.76	—	328.76
507—Losses—Miscellaneous	*1,495.55	*1,013.07	*31.76	8.51	.93	—	*2,530.94	—	*2,530.94
243—Taxes—Old Age Benefits	4,158.95	4,352.58	3,507.46	37.45	6.73	181.43	12,244.60	—	12,244.60
244—Taxes—Unemployment Insurance	13,739.43	14,378.52	11,574.15	121.56	21.62	604.69	40,439.97	—	40,439.97
245—Taxes—All Other	25,155.49	10,222.40	1,705.70	1,577.94	9.28	3,211.34	41,882.15	—	41,882.15
235—Insurance	572.55	374.51	33.34	—	—	—	980.40	—	980.40
529—Annuities & Retirement Plan Expense	52,651.27	56,922.91	44,159.64	533.67	93.97	2,652.89	157,014.35	—	157,014.35
525—Death Benefits	4,370.80	2,126.10	307.84	23.63	4.17	117.46	6,950.00	—	6,950.00
506—Losses by Dismantling—Abnormal—Other than ELA	14,151.79	9,170.37	834.41	—	—	—	24,156.57	—	24,156.57
514—Losses by Dismantling—Out-of-Pocket Expense—Other than ELA	1,865.55	848.97	127.72	—	—	—	2,842.24	—	2,842.24
Total	$118,356.86	$98,671.56	$ 62,356.10	$ 2,305.81	$136.96	$ 6,799.05	$288,626.34	—	$288,626.34

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* Denotes red figures in original.

1127

Explanation of Schedule #9

Losses—Taxes—Insurance and Additional Salary Considerations
Detroit Field—1940

Account 500—Losses by Accident—Property & Other Than Company Employees
Account 501—Losses by Property Damage—Company & Other Than Company Property
Account 502—Losses by Fire
Account 507—Losses—Miscellaneous

All individual losses in the above accounts and full information thereon was taken from the files to determine the proper allocation of each individual expense item. Where the cost was incident to the activity of one of our employees, the allocation among channels was based upon the distribution of that employee's efforts. Thus total charges to Account 500 amounted to $2,276.05. An examination of the individual losses revealed that $927.59 was associated with individuals having a connection with jobber and other direct shipment customers. Individual charges, therefore, were split according to the ratio of the effort of the individual involved, as reflected in Sub-Schedule #9-A.

Under Account 501 an expense item of $108.89 was found to be incident to the activities of an industrial salesman and the proportion of his effort was applied to this loss, resulting in a charge to direct shipment—other customers—to the extent of $19.24.

No loss by fire was incurred on any business other than tank wagon in the Detroit field in 1940. Our losses—Miscellaneous, representing a net income through the tank wagon reseller, consumer, and other method channels resulted from realization upon losses previously written 1128 off. The small charges indicated under this account as expense against jobber business resulted from small monthly charges to Account 1308, being minor adjustments incident to lack of balance of credit card sales against book entry. This minor expense was allocated on the basis of jobber sales to credit card accounts as a ratio of total sales to credit card accounts and then allocated to product on the basis of gasoline value (excluding taxes) as a percentage of total value of jobber sales to credit card accounts.

Account 503—Losses by Storm and Flood

This is a direct field charge resulting from either dismantling, repairs, or product losses incurred in the field due to either storm or flood. Inasmuch as no such loss was incurred on the field main office, there would be no charge against direct shipment customers. This charge is incident only to tank wagon operation and is either a direct charge to channel or is allocated among channels either on the basis of tank wagon gallonage or all gallonage basis excluding direct shipments

Account 243—Taxes—Old Age Benefits
Account 244—Taxes—Unemployment Insurance
Account 520—Annuities and Retirement Plan Expense.

The entire analysis of the distribution of effort of individuals on the payroll was conducted on an individual person or position basis. For all such expenses as those covered by the above items they were handled in exactly the same manner as we handled the salaries of the individual positions. Such payments are, in fact, a part of the salary consideration of employees in the company.

1129 Under Account 243 the rate applicable was applied only to the first $3,000 annual income for any position. Thus, total salary charges to jobber—gasoline and refined oil—amounted to $3,635.34. The application of the one per cent to the monthly accumulation of all such minor charges by individual positions resulted in a total charge of $37.45, averaging 1.03% against total salary charges.

Under Account 244 the rate established in the state of Michigan for the year 1940 for 3.03%, which was applicable to the entire earnings of each individual. Again this rate was applied to the monthly charges to direct shipment by channel for each individual for each month of the year, resulting in an annual charge to jobber—gasoline and refined oil—of $121.56.

Under Account 520 the rate of 2% is applicable to the first $250 per month salary and 5% is applicable to any income over that amount. The rates were applied to individual salaries on this basis and allocated among channels according to the distribution of effort used in allocating salaries of the individuals involved. This resulted in a charge of $88.99 shown on Sub-Schedule #9-A under jobber—gasoline. This charge represented .34% of the total field cost of $26,226.38. Therefore, this ratio was applied to the General Office payment of past annuities and accumulation for future reserves, amounting to $130,787.89, resulting in an additional charge to jobber—gasoline—of $444.68, which when added to the direct charge of $88.99 resulted in a total charge of $533.67.

1130 Account 506—Losses by Dismantling—Abnormal—Other than ELA

Account 514—Losses by Dismantling—Out-of-Pocket Expense—Other than ELA

Individual Dismantling charges under these two sub accounts were analyzed and no dismantling expense was incurred at any jobber or direct shipment business entering into these accounts. They are, accordingly, charges direct to tank wagon reseller, tank wagon consumer, and other method sales channels, and are allocated among these channels on a gallonage basis.

Account 245—Taxes—All Other

The charge to this account represents the total of all taxes not specifically enumerated and handled in previous accounts. The total is the sum of differences between amounts collected from customers and payments to the state of Michigan for the State of Michigan General Sales Tax; the Michigan use Tax; the Michigan Privilege Fee; and the proportion of the Federal Capital Stock Tax paid by this company allocated to the Detroit field.

Collections and payments for the Michigan General Sales Tax resulted in a small credit balance of $75.38. We do not serve as a collecting agent on jobber sales; therefore, any credit or debit from this source would not apply to their volume.

The Michigan Use Tax law does not apply to any business with direct shipment customers, but is applicable to materials used in the conduct of our regular tank wagon business. This amounted to $3905.29 and is allocated among channels on an all gallonage basis excluding direct shipments.

The Michigan Privilege Fee represents the charge to this company for doing business in the state of Michigan and is based on the assets held in the state of Michigan, which basis also provided the means for allocation to the
1131 Sales Department and fields operating in the state.
The Detroit charge amounted to $22,331.62. The

charge to direct shipment customers for this tax was based on the amount of investment at the field main office to total investment in the Detroit field, representing 2.061%. This was then allocated among channels and product on the basis of proportion of effort devoted to direct shipments by all employees assigned to the Detroit main office.

The Federal Capital Stock Tax charged to this Detroit field was allocated to classes of customers and product on the basis of total sales of all products for the year 1940. This particular expense was not regarded as providing any basis for a differential in price among customers.

Account 235—Insurance

The expense charged to this account represents losses from defalcations arising from making sales from our bulk plants and as such, has no relation to direct shipment business.

Account 525—Death Benefits

This company makes payments to beneficiaries of active employees and employees who have been retired on annuity at the time of death of the employee. The nature of this expense is similar to the company contribution to the Employees' Annuity Plan. For this reason the distribution of expense to class of direct shipment customer and product was made on the same basis that company contributions to the retirement plan on salaries applicable to direct shipment business bear to total contributions on total all salaries.

1132 Sub-Schedules #9-B and #9-C, supporting Schedule #9 and illustrating adjustments made to previous charges on our Comparative Statement of Expense Form 189, Detroit field, 1940, follow.

SUB-SCHEDULE #9-A

(Supporting Schedule #9, page 89)

Account No.	Total Cost	Direct Shipment Customers					
		Jobber				Other Customers	
		Naph. & Gaso.		Other Prod.			
		$	%	$	%	$	%
500—Losses by Accident—Property & Other than Company Employees	$ 927.59	$ 3.05	.33%	$ .26	.03%	$ 12.00	1.29%
501—Losses by Property Damage—Co. & Other than Company Property	108.89	—	—	—	—	19.24	17.67
507—Losses—Miscellaneous	95.82	8.51	8.88	.93	.97	—	—
243—Taxes—Old Age Benefits		37.45	1.03	6.73	1.01	181.43	.91
Total Salary		3,635.34	—	669.30	—	19,831.82	—
244—Taxes—Unemployment Insurance		121.56	3.34	21.62	3.23	604.69	3.05
Total Salary		3,635.34	—	669.30	—	19,831.82	—
245—Taxes—All Other		1,577.94	—	9.28	—	3,211.34	—
Michigan Privilege Tax	22,331.62						
Main Office %	20.61%						
Main Office Cost	$ 460.25	5.72	1.243	.79	.172	15.81	3.435
Federal Capital Stock Tax	15,720.62	1,572.22	10.001	8.49	.054	3,195.53	20.327
520—Annuities & Retirement Plan Expense		533.67	- -	93.97	—	2,652.89	—
Field Cost	26,226.38	88.99	2.45	15.50	2.32	442.57	2.23
Total Salary		3,635.34	—	669.30	—	19,831.82	—
General Office Cost	130,787.89	444.68	.34	78.47	.06	2,210.32	1.69
525—Death Benefits	6,950.00	23.63	.34	4.17	.06	117.46	1.69

Respondent's Exhibit No. 100.

Respondent's Exhibit No. 100.

SUB-SCHEDULE #9-B

ILLUSTRATING ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #9, page 89)

Account No.	Annual Direct Shipment Cost	Allocated to Original Statement According to Following Annual Ratios: Tank Wagon Reseller %	Tank Wagon Consumer %	Other Method %	Auto. Supplies %	Adjustment "189" Channels: Tank Wagon Reseller $	Tank Wagon Consumer $	Other Method $	Auto. Supplies $
500—Losses by Accident—Property and Other Than Company Employees	$ 15.31	72.44	22.53	5.03	—	$ 11.09	$ 3.45	$ .77	—
501—Losses By Property Damage—Co. and Other Than Co. Property	19.24	70.37	24.95	4.68	—	13.54	4.80	.90	—
507—Losses—Miscellaneous	9.44	66.63	29.13	4.24	—	6.29	2.75	.40	—
243—Taxes—Federal Insurance Contributions	225.61	34.53	36.14	28.93	—	78.81	81.55	65.25	—
244—Taxes—Unemployment Insurance	747.87	34.95	36.25	28.80	—	261.37	271.09	215.41	—
~~245—Taxes—All Other~~	4,798.56	65.34	30.04	4.62	—	3,135.36	1,441.29	221.91	—
520—Annuities and Retirement Plan Expense	3,280.53	34.77	36.38	28.85	—	1,140.64	1,193.46	946.43	—
525—Death Benefits	145.26	34.77	36.38	28.85	—	50.50	52.85	41.91	—

1135

SUB-SCHEDULE #9-C

FINAL ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #9, page 89)

	Distribution Through Company Bulk Plants			Direct Shipment Customers					
	Tank Wagon			Jobbers					
Account No.	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Total Customers	Total Petroleum Products	Auto. Supplies	Petroleum Products and Auto Supplies
500—Losses by Accident—Property & Other than Co. Employees									
1940 Form "189"	$ 1,582.09	$ 625.17	$ 68.79						$ 2,276.05
Deduct Sub-Schedule B	*11.09	*3.45	*.77						
Revised Allocation to Channel	1,571.00	621.72	68.02	$ 3.05	$ .26	$ 12.00	$ 2,276.05	—	2,276.05
501—Losses by Property Damage—Co. & Other than Co. Property									
1940 Form "189"	1,239.33	504.04	46.81						1,790.18
Deduct Sub-Schedule B	*13.54	*4.80	*.90						
Revised Allocation to Channel	1,225.79	499.24	45.91	—	—	19.24	1,790.18	—	1,790.18
507—Losses—Miscellaneous									
1940 Form "189"	*1,489.26	*1,010.32	*31.36						*2,530.94
Deduct Sub-Schedule B	*6.29	*2.75	*.40						
Revised Allocation to Channel	*1,495.55	*1,013.07	*31.76	8.51	.93	—	*2,530.94		*2,530.94
243—Taxes—Old Age Benefits									
1940 Form "189"	4,237.76	4,434.13	3,572.71						12,244.60
Deduct Sub-Schedule B	*78.81	*81.55	*65.25						
Revised Allocation to Channel	4,158.95	4,352.58	3,507.46	37.45	6.73	81.43	12,244.60	—	12,244.60
244—Taxes—Unemployment Insurance									
1940 Form "189"	14,000.80	14,649.61	11,789.56						40,439.97
Deduct Sub-Schedule B	*261.37	*271.09	*215.41						
Revised Allocation to Channel	13,739.43	14,378.52	11,574.15	121.56	21.62	604.69	40,439.97	—	40,439.97
245—Taxes—All Other									
1940 Form "189"	28,290.85	11,663.69	1,927.61						41,882.15
Deduct Sub-Schedule B	*3,135.36	*1,441.29	*221.91						
Revised Allocation to Channel	25,155.49	10,222.40	1,705.70	1,577.94	9.28	3,211.34	41,882.15	—	41,882.15
520—Annuities & Retirement Plan Expense									
1940 Form "189"	53,791.91	58,116.37	45,106.07						157,014.35
Deduct Sub-Schedule B	*1,140.64	*1,193.46	*946.43						
Revised Allocation to Channel	52,651.27	56,922.91	44,159.64	533.67	93.97	2,652.89	157,014.35	—	157,014.35
525—Death Benefits									
1940 Form "189"	4,421.30	2,178.95	349.75						6,950.00
Deduct Sub-Schedule B	*50.50	*52.85	*41.91						
Revised Allocation to Channel	4,370.80	2,126.10	307.84	23.63	4.17	117.46	6,950.00	—	6,950.00

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* Denotes red figures in original.

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SCHEDULE #10
MISCELLANEOUS MARKETING EXPENSE ITEMS
Detroit Field—1940

Account No.	Distribution Through Company Bulk Plants			Direct Shipment Customers			Total Petroleum Products	Auto Supplies	Total Petroleum Products and Auto. Supplies
	Tank Wagon		Other Method	Jobbers		Other Customers			
	Reseller	Consumer		Naph. & Gaso.	Other Prod.				
054—Oper. & Main. of Veh.—All Other (Other Than Office)	$ 221.36	$ 171.82	$ 15.56	$ .79	$ .06	$ .57	$ 410.16	$ —	$ 410.16
107—Depr. Expense—Vehicles—All Other (Other Than Office)	254.05	114.04	17.85	.63	.08	.31	387.76	—	387.76
065—Rent Revenue	*14.70	*6.88	*1.13	—	—	—	*22.71	—	*22.71
081—Demurrage and Railway Storage	10.97	6.84	2.13	—	—	—	19.94	3.15	23.09
082—Personal Injury Expense—Company Employees	1,603.43	1,007.09	110.49	.12	.01	.35	2,721.49	—	2,721.49
083—Samples	1.84	.62	768.39	—	—	97.75	868.60	44.09	912.69
066—Miscellaneous Operating Expense	20,620.16	10,612.13	9,874.68	508.95	13.55	1,068.71	42,698.18	1,396.23	44,094.41
084—Safety Expense—Salaries and All Other Expense	807.06	370.85	56.53	4.09	—	—	1,238.53	—	1,238.53
215—Expense—Salaries—Others	7,840.76	3,739.56	568.94	15.48	.02	65.08	12,229.84	—	12,229.84
216—Expense—Traveling Expense—Others	429.40	215.80	29.42	.65	—	5.65	680.92	—	680.92
217—Expense—Oper. & Main. of Vehicles—Automobiles—Others	409.08	195.04	31.29	.25	—	2.37	638.03	—	638.03
220—Expense—Employment Dept.—Salaries & All Other Expense	2,461.62	1,184.29	177.54	14.80	2.17	48.81	3,889.23	—	3,889.23
225—Expense—Salaries Sub Station Auditors	5,360.38	2,478.00	377.32	—	—	—	8,215.70	—	8,215.70
226—Expense—Traveling Expense—Sub Station Auditors	753.93	335.84	52.53	—	—	—	1,142.30	—	1,142.30
227—Expense—Oper. & Main. of Vehicles—Sub Station Auditors	590.35	291.42	42.91	.02	—	.06	924.76	—	924.76
228—Depreciation Expense—Vehicles—Office Others—and Sub Station Auditors	400.04	182.84	27.91	2.53	.25	5.26	618.83	—	618.83
207—Outside Collection Expense	*12.85	*8.40	*.75	—	—	—	*22.00	—	*22.00
Total	$ 41,737.68	$20,890.90	$ 12,151.61	$ 548.31	$ 16.14	$ 1,294.92	$ 76,639.56	$ 1,443.47	$ 78,083.03

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* Denotes Red Figures.

1137

Explanation of Schedule #10.

Miscellaneous Marketing Expense Items

Account 054—Operation and Maintenance of Vehicles—All Other (Other than Office)

Account 107—Depreciation Expense—Vehicles—All Other—(Other than Office)

Expenses incident to the operation of vehicle furnished to, and operated by the superintendent maintenance are shown under these expense items. The allocation of these costs among the various channels of distribution was predicated upon the distribution of effort of the employee, to whom the vehicle was assigned. The distribution of effort used in this allocation was the same as that used in allocating salary under Account 000—Salaries—Supervision. The charge by products and channel to direct shipment business and the proportion on an annual basis are to be found in supporting Sub Schedule #10-A.

Account 065—Rent Revenue

There was no rent income from properties rented to jobbers or other direct shipment customers. The income shown under this account was from surplus property which came into our possession because of tank wagon business and hence, is a credit against expense in the tank wagon and other method channels.

Account 081—Demurrage and Railway Storage

The Standard Oil Company does not pay charges of this nature incurred on shipments to jobbers or other direct shipment customers. Expenses shown under this account were incurred on deliveries to our bulk plants and are shown under the various channels of distribution after being allocated on a gallonage basis, except as charged direct against automobile supplies.

1138 Account 082—Personal Injury Expense

During the year 1940 only three minor accidents occurred in the Detroit field to individuals having any association with direct shipment business. These three injuries resulted to the manager's chauffeur, the janitor at the Main Office, and a construction man, amounting in total to $16.50 for the three. Each of these three individual expense items was allocated among channels and product according to the distribution of effort of the individuals involved, the expense incurred on the manager's chauffeur being allocated on the basis of the distribution of total effort of the entire Detroit field. Sub-Schedule #10-A gives the detail on the calculation.

Account 083—Samples

All samples given away are shown on Form 091, "Report of Goods Used." Records for 1940 were reviewed and an accumulation made of all products by brand and quantity given to direct shipment customers. No samples were given to jobber customers. Samples given to direct shipment customers amounting to $97.75 were charged direct to this channel. The residual amount of expense was either:

(a) charged direct to other method channel provided the sample was of a product included in this channel or

(b) allocated among tank wagon reseller, tank wagon consumer, and other method channels on an all gallonage basis, excluding direct shipments.

Account 066—Miscellaneous Operating Expense

The name of this account is descriptive of its content. It is a collection of miscellaneous expense items too small to carry under separate classifications. To determine 1439 that part of these expense items which were influenced by direct shipments either to jobbers or other customers required an examination of each individual expenditure. This could only be done by pulling the expense vouchers from the file securing a description of the expenditure, and then determining the method that that particular expense item had been treated with in our regular costing procedure. Because of the tremendous volume of work involved in tracing literally thousands of expense vouchers, it was essential that the work be done on some sampling basis.

All expense vouchers of $5.00 or more included under this marketing expense classification during 1940 were taken from the files and work sheets prepared showing the voucher number a description of the expense the amount of the expense, and supporting data incident to the expense item. By dealing with all vouchers of $5.00 or more our sample represented $36,275.49 out of a total charge of $42,698.18, or 84.958% of all of the expense in this sub account. A sample of this magnitude provides an accurate basis for allocation of the entire amount. The sample was first allocated and then expanded to equal the whole.

Our first step was to classify the vouchers and then reclassify some portions thereof so that allocation procedures entirely consistent with the nature of the expense could be adopted.

Classification #1—Miscellaneous Operating Expense Not Influenced by Direct Shipment Business

In this classification were placed all expenses not influenced in any way by direct shipment customers. The greater portion of these items were found to be incurred at our tank wagon bulk plants. Expenditures in this
1140 classification totaled $21,472.92 of our sample of $36,-
275.49, or 57.74%. Therefore, 57.74% of the original charges to this account are uninfluenced by direct shipment business.

These items had originally been charged direct to tank wagon reseller, tank wagon consumer, or other methods channels, or were prorated among tank wagon reseller and tank wagon consumer channels; or were prorated among tank wagon reseller, tank wagon consumer, and other methods channels on an all gallonage basis (excluding direct shipments). The nature of the individual item determined the allocation used. Inasmuch as all of these expense items had been properly allocated in our original costing procedure, no change was made.

Classification #2—Expenses Applicable to Jobber Sales

Two expense items were found which affected jobber business only. One was for a meeting place and the other was for meals at a jobber dealer meeting. Total expenses thus incurred during 1940 were $139.70, or .38% of our sample. These two expense items were expanded to 100% and charged direct to jobber naphtha, gasoline and refined oil costs.

Classification #3—Expenses Applicable to Other Direct Shipment Customers

Several small expenditures were found entirely due
1141 to other direct shipment customers. For the year
1940 these amounted to $389.48, or 1.07% of the total sample. This amount was expanded and charged direct to direct shipment other customers sales channel.

Classification #4—Expenses Applicable to Both Tank Wagon and Direct Shipment Business

The second largest classification of expense items applied to both types of sales, tank wagon and tank car, amounting to $14,802.57, or 40.81% of the sample which had to be allocated before expanding to 100%. The proper allocation of these expenses presented several difficulties. No one method of allocation seemed appropriate for the entire list as some expenditures had to do with over-all field operations, some with individuals, some with credit cards, etc. All expenses in this classification, therefore, were re-grouped so as to permit a selection of the most logical allocation among products and channels.

1142

Group A

Expenses of an Over-All Nature

All miscellaneous operating expense incident to supervision such as subscription to magazine, service pins, insurance on manager's car, club dues, annual sales meetings, etc. were included in this group. Total expense items included in our sample so grouped amounted to $2597.11.

The sum total distribution of effort of all employees in the Detroit field as recapitulated from the record of distribution of effort of individual employees established the allocation ratios used for this group of expenditures.

Group B

Expenses Incident to National Credit Cards

All miscellaneous operating expense incident to national credit card costs and coupon book sales were included in this group. The annual amount as reflected by our sample was $740.83.

The jobber portion of this expense was segregated on the basis of jobber sales to credit card accounts to total sales to credit card accounts. The allocation to product was based on gasoline value (excluding tax) to total value of sales as shown by jobber sales tickets to these accounts.

Group C

Lubricating Department

All miscellaneous operating expense incident to the Lubricating Department such as sales meetings, educational work, etc. was isolated under this group. The total amount thereof included in our sample was $6090.01.

The allocation of these expenses among products and channels was predicated upon the distribution of effort of the industrial sales promoter.

1143

Group D.

Dealer Meeting Expense

All miscellaneous operating expenses incident to preparing and holding spring and fall dealer meetings were included in this group. The total amount of such expenditures during 1940 as reflected by our sample was $3065.95.

A review of registration of individuals attending the meetings revealed that operators of some outlets served by jobbers were in attendance. These expenses were first split between tank wagon and jobber on the basis of the number of jobber employees attending to total attendance at the meetings. Inasmuch as practically all of our sales to jobbers are gasoline and refined oil, this entire portion of this expense was charged to jobber naphtha and gasoline sales channel. The residual amount is allocated among tank wagon and other methods channels of distribution according to our regular accounting instructions.

1144

Group E

Reseller Salesmen's Meetings

All miscellaneous operating expense incident to holding periodical meetings of the reseller salesmen were included in this classification. The annual expenditures thus incurred as reflected by our sample amounted to $858.55.

The allocation of this group of expenditures among products and channels was predicated upon the recapitulation of the distribution of time of all reseller salesmen predicated upon number of calls. The allocation to product of the amount incident to jobber operations was also based on an analysis of calls made.

Group F

Wholesale Salesmen's Meeting Costs

All miscellaneous operating expenses incurred in holding periodical meetings of wholesale salesmen were included in this group. Annual expenditures for such purposes as revealed by our sample amounted to $137.06.

The allocation of these expenses to product and channels was predicated upon the distribution of effort of all wholesale consumer salesmen as based upon the distribution of their calls.

Group G

Expenses Incident to Individual Employees

All miscellaneous operating expenses such as moving expenses of individual employees were included under this group. The annual amount included in our sample for such expense items amounted to $1089.88.

Such expenses were allocated to product and channel according to the distribution of effort of the individual involved, as had previously been determined and used in the allocation of salaries and other expense items incident to that particular position.

1145 Group H

Stationery Expense

All miscellaneous operating expense items that are incurred in Chicago for warehouse space and handling charges against stationery items were included in this group. This cost is first allocated to fields on the basis of all gallonage sales, excluding direct shipments. The Detroit proportion of this cost included in our sample analysis under this grouping amounted to $223.18.

This expense was allocated among the various sales channels on the basis of rates established in allocating sub account 201, "Stationery and Office Supplies," which was predicated upon actual cost of forms used for sales in the various channels.

1146 Account 084—Safety Expense—Salaries and All Other Expense

The files of the Safety Department were reviewed carefully and no operation of this department touched upon or was concerned with jobber or other direct shipment business during the year 1940 on any product other than gasoline. It is the responsibility of the manager of this department during the course of a year to ascertain that a lead content sign is on each pump marketing leaded gasoline. This responsibility applies to outlets served by tank wagons and outlets served by jobbers. Special trips into the sales territory are not made to secure this information, but each time a safety representative passes one of these outlets he pulls over to the curb and ascertains the desired information and continues on his trip. In the course of a year two hours of the time of the manager of the safety department was consumed in such brief inspections. This was expressed as a ratio of his total time, equalling .351% which was used for allocation of his salary and the stenographic time, the operation, the maintenance, and the depreciation of the safety supervisor's automobile. Total cost thus determined of $4.09 was made direct to Jobber Naphtha and Gasoline volume.

Account 215—Expense—Salaries—Others

Account 216—Expense—Traveling Expense—Others

Account 217—Expense—Operation and Maintenance of Vehicles—Automobiles—Others

A complete review of all files covering real estate transactions affecting jobber and direct shipment business was made with the head of the Real Estate and Tax Department. As a result of this analysis time applicable to direct shipment type of accounts was obtained separately for jobber business and other direct shipment customers. Time so determined was found to be 90 minutes for jobbers and 810 minutes for other direct shipment customers, which were expressed as ratios of the total hours of the individual in charge of this department, amounting to .073% and .659% respectively. These ratios were applied to total expenses represented by the above accounts and applied direct
1147 to jobber gasoline and other direct shipment customers.

In addition, a part of the Safety Supervisor's time is included in Account 215. Time spent investigating accidents was determined and allocated to channels on the basis of the split of effort of the individual involved in the accident. This resulted in an allocation of 83 minutes to direct shipment business which when extended by the rate per minute, was allocated to channel and product. Charges resulting from safety expense were as follows:

Jobber—Naphtha and Gasoline	$ .10
Jobber—Other Products	.02
Other Direct Shipment Customers	2.18

Account 220—Expense—Employment Department—Salaries and Other Expense

The expense of this department is allocated on the basis of the direct shipment hours for the field expressed as a proportion of the total man hours of all employees in the field by months.

1148 Account 225—Expense—Salaries—Sub Station Auditors

Account 226—Expense—Traveling Expense—Sub Station Auditors

Account 227—Expense—Operation & Maintenance of Vehicles—Sub Sta. Auditors

The responsibility of sub station auditors is to audit company records at bulk plants owned and operated by the Standard Oil Company. Such activity does not touch upon or have any relation to jobber and direct shipment business, and, therefore, remains entirely a charge against Tank Wagon Reseller, Tank Wagon Consumer, and Other Method sales and is allocated to these three channels on an all gallonage basis. The minor charge of eight cents to direct shipment business under Account 227 resulted from the temporary loan of a sub station auditor's car to a member of the credit department and accordingly the cost incurred was allocated on this individual's direct shipment time ratio. Although the cost remains in this sub account, it was incurred to this extent on direct shipment business.

Account 228—Depreciation Expense—Vehicles—Office—Others—Sub Station Auditors

All depreciation charges against these individual vehicles were obtained and allocated among the various channels according to the distribution of effort of the individuals to whom the cars were assigned.

Account 207—Outside Collection Expense

The credit appearing to this account on Form 189 for the year 1940 was found to be an error of classification of income or expense by the field Accounting Department for the month of December 1940. This particular amount of $22 was found to be an income due to a refund from a previous overcharge which should have been credited to Account 208. Such refund was entirely applicable to tank wagon business and accordingly should be allocated among the channels of Tank Wagon Reseller, Tank Wagon Consumer and Other Method sales on all gallonage basis, which it now is.

1149 Sub-Schedules #10-B and #10-C, supporting Schedule #10 and illustrating adjustments made to previous charges on our Comparative Statement of Expense Form 189, Detroit field, 1940, follow.

SUB-SCHEDULE #10-A

(Supporting Schedule #10, page 99)

Account No.	Total Cost		Direct Shipment Customers					
			Jobbers				Other Customers	
			Naph. & Gaso.		Other Prod.			
	$	%	$	%	$	%	$	%
054—Oper. & Maint. of Veh.—All Other (Other than Office)								
Supt.—Maint.	$ 142.27		$ .79	.56%	$ .06	.04%	$ .57	.40%
107—Depr. Exp.—Veh.—All Other (Other than Office)								
Supt.—Maint.	116.82		.63	.54	.08	.07	.31	.27
082—Personal Injury Expense—Company Employees	16.50		.12	—	.01	—	.35	—
Janitor	7.00		.08	1.082	.01	.158	.25	3.505
Chauffeur	7.50		.03	.334	—	.052	.10	1.275
Construction Man	2.00		.01	.539	—	.033	—	—
083—Samples							97.75	100.00
066—Miscellaneous Operating Exp.	42,698.18		508.95	—	13.55	—	1,068.71	—
Sample %	84.958%							
Sample Cost	$36,275,49	100.00%	432.39	—	11.51	—	907.96	—
Class 1	21,472.92	57.74	—	—	—	—	—	—
Class 2	139.70	.38	139.70	100.00	—	—	—	—
Class 3	389.48	1.07	—	—	—	—	389.48	100.00
Class 4	14,802.57	40.81	292.69		11.51		518.48	
Group A	2,597.11		9.82	.378	1.47	.057	32.73	1.260
Group B	740.83		73.82	9.964	8.08	1.091	—	—
Group C	6,090.01		7.93	.130	—	—	477.87	7.847
Group D	3,065.95		189.40	6.178	—	—	—	—
Group E	858.55		.61	.071	.76	.089	.80	.093
Group F	137.06		.39	.285	.03	.022	1.92	1.401
Group G	1,089.88		4.97	.456	.55	.050	4.74	.435
Group H	223.18		5.75	2.576	.62	.278	.42	.188

Respondent's Exhibit No. 100.

SUB-SCHEDULE #10-A (Continued)

Account No.	Total Cost		Direct Shipment Customers					
			Jobbers				Other Customers	
			Naph. & Gaso.		Other Prod.			
	$	%	$	%	$	%	$	%
084—Station Safety Expense—Salaries & All Other Exp.	1,166.66		4.09	.351	—	—	—	—
215—Exp.—Salaries—Others	13,510.31		15.48	—	.02	—	65.08	—
Real Estate	9,553.74		6.94	.073	—	—	62.90	.658
Safety	2,604.57		.10	.004	.02	.001	2.18	.084
Construction	1,352.00		8.44	.624	—	—	—	—

1151

Account No.	Total Cost $	%	Naph. & Gaso. $	%	Other Prod. $	%	Other Customers $	%
216—Exp.—Traveling Exp.—Others	$ 922.41		$ .65	.070%	—	—	$ 5.65	.613%
217—Exp.—Oper. & Maint. of Veh.—Automobiles—Others	530.10		.25	.047	—	—	2.37	.447
220—Exp.—Empl. Dept.—Salaries & All Other Expense	3,887.03		14.80	.381	$ 2.17	.056%	48.81	1.256
227—Exp.—Oper. & Maint. of Veh.—Sub. Sta. Aud.	3.25		.02	.615	—	—	.06	1.846
228—Depr. Exp.—Veh.—Office & Sub. Sta. Auditors	798.50		2.53	.317	.25	.031	5.26	.659

SUB-SCHEDULE #10-B

ILLUSTRATING ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #10, page 99)

Account No.	Allocated to Original Statement According to Following Annual Ratios: Annual Direct Shipment Cost	Tank Wagon Reseller %	Tank Wagon Consumer %	Other Method %	Auto. Supplies %	Adjustment "?89" Channels: Tank Wagon Reseller $	Tank Wagon Consumer $	Other Method $	Auto Supplies $
054—Operation and Maintenance of Vehicles—All Other (Other Than Office)	$ 1.42	73.94	21.83	4.23	—	$ 1.05	$ .31	$ .06	—
107—Depr. Expense—Vehicles—All Other (Other Than Office)	1.02	70.59	26.47	2.94	—	.72	.27	.03	—
082—Personal Injury Expense—Company Employees	.48	54.17	39.58	6.25	—	.26	.19	.03	—
083—Samples	97.75	—	—	100.00	—	—	—	97.75	—
066—Miscellaneous Operating Expense	1,591.21	41.57	15.68	42.75	—	661.47	249.50	680.24	—
084—Safety Expense—Salaries and All Other Expense	4.09	65.53	30.00	4.40	—	2.68	1.23	.18	—
215—Expense—Salaries—Others	80.58	64.00	31.41	4.59	—				
216—Expense—Traveling Expense—Others	6.30	66.99	28.25	4.76	—	51.57	25.31	3.70	—
						4.22	1.78	.30	—
217—Expense—Oper. & Main. of Veh.—Automobiles—Others	2.62	62.60	32.06	5.34	—	1.64	.84	.14	—
220—Expense—Employment Dept.—Salaries & All Other Expense	65.78	64.58	30.75	4.67	—	42.48	20.23	3.07	—
227—Expense—Oper. & Main. of Veh.—Sub. Sta. Auditors	.08	50.00	50.00	—	—	.04	.04	—	—
228—Depr. Expense—Vehicles—Office—Others—and Sub. Sta. Auditors	8.04	66.42	28.98	4.60	—	5.34	2.33	.37	—

Respondent's Exhibit No. 100.

to allocate this expense to classes of direct shipment customer and product on the same ratios as used for field expense of these departments. Accordingly, Schedule #12-A shows the ratios of direct shipment time by these two departments together with the amount of money chargeable to jobber—naphtha, gasoline, and jobber—other products, together with that allocated to other direct shipment customers.

Account 355—General Manager's Department

This expense is the sum of several departments working under the supervision of the General Manager. The activities of each department were analyzed to determine the basis on which charges should be made to direct shipment customers.

Supervision
Sales Research
Statistical and Personnel

The allocation to classes of direct shipment customer and product was based on ratios representing the effort in the Detroit field chargeable to jobbers by product and to other direct shipment customers.

1160 Real Estate Department
Operating Department

The activities of these departments are confined wholly to the operation of our bulk plants and tank wagon distribution. Therefore, no part of this expense should be charged to direct shipment customers.

Gasoline and Refined Oil Department.

This department handles all work in connection with bulk station prices and sales to customers buying in large quantities for shipment direct from our terminals. The allocation of expense to classes of direct shipment customers and product was based on ratios representing the combined selling efforts of the Detroit field, excluding any charges on jobber—other products. Inasmuch as this department has no connection with products other than gasoline and refined oil, no charge should be placed against any product other than these two. The reason for charging the direct shipment customer—others channel with a portion of this expense is because a large part of this direct shipment gallonage is made up of gasoline and refined oils.

Sales Promotion—Wholesale

This department handles the promotion of sales to consuming customers and as such has no activity chargeable to jobber accounts. The proportion chargeable to other direct shipment customers was based on the ratios representing efforts of the Wholesale Department in the Detroit field.

Sales Promotion—Reseller

This department supervises all sales promotion activity through reseller accounts. The proportion of expense chargeable to jobber distribution by the Reseller Department in the Detroit field was used to allocate a portion of this expense to jobber business.

.1161 Sales Promotion—Specialties.

All of the expense of this department is chargeable to sales other than jobbers. The total expense is charged to the Other Method channel of distribution.

Sales Promotion—Automobile Supplies

The total expense of this department is charged to the Automobile Supplies channel of sale. Therefore, no part of this expense is applicable to jobber distribution.

Account 260—Advertising Department

The General Office Advertising Department supervises the distribution and merchandising of all advertising material. The expense of this department applicable to jobber was obtained by applying the ratio of jobber costs in Account 075 to total advertising expense in Account 075. The allocation between jobber gasoline and jobber other products was made on the basis of sales volume to these accounts.

Account 265—Lubricating Department

This cost represents the total of the Lubricating, Technical, New York Office, and Railway Sales Departments, whose activities largely represent sales effort to large industrial and consuming accounts. A large part of the expense of these departments is charged direct to the Other Method channel on Form 189 because their efforts are, to a large extent, confined to this channel. For this reason, such charges were not considered as being applicable to any jobber gasoline or refined oil costs. In making the allocation of expense for these departments; therefore, only those costs classified as pro rata were distributed to the direct shipment channels of marketing.

1162 Lubricating Department

Most of the expense of this department is charged direct to the Other Method channel of distribution, representing effort on sales made for Other Method delivery. The allocation to classes of direct shipment customer and product was based on ratios covering sales activity of the Lubricating Sales Department in the Detroit field.

Technical Department
New York Office

The work of these departments relates to all classes of customers to a somewhat greater degree than other departments in this group. Therefore, the distribution of expense to classes of direct shipment customer and product was based on the combined selling efforts of the Detroit field.

Railway Sales

This department handles the promotion of sales to railroad accounts, and therefore no portion of the expense should be considered applicable to jobber distribution.

Account 270—Asphalt and Fuel Oil Department

The entire amount of expense for this department is applicable to consumer accounts and is charged directly to the Other Method channel of distribution. Therefore, no part of the expense of this department is applicable to jobber distribution. A charge to other direct shipment customers was made on a gallonage basis.

Account 280—Construction and Maintenance Department

This General Office Department supervises the activities of the field Construction Department and furnishes information on construction work to the Detroit field. The allocation of expense to classes of direct shipment customer and product was based on the ratios applicable to activities of the Detroit field Construction Department.

1153

SUB-SCHEDULE #10-C
FINAL ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #10, page 99).

	Distribution Through Company Bulk Plants			Direct Shipment Customers					
	Tank Wagon			Jobbers					
Account No.	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers	Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
054—Oper. & Main. of Veh.—All Other (Other Than Office)									
1940 Form "189"	$ 222.41	$ 172.13	$ 15.62	—	—	—	$ 410.16	—	$ 410.16
Deduct Sub-Schedule B	*1.05	*.31	*.06						
Revised Allocation to Channel	221.36	171.82	15.56	$ .79	$ .06	$ .57	410.16	—	410.16
107—Depr. Expense—Vehicles—All Other (Other Than Office)									
1940 Form "189"	255.57	114.31	17.88	—	—	—	387.76	—	387.76
Deduct Sub-Schedule B	*.72	*.27	*.03						
Revised Allocation to Channel	254.85	114.04	17.85	.63	.08	.31	387.76	—	387.76
082—Personal Injury Expense—Company Employees									
1940 Form "189"	1,603.69	1,007.28	110.52	—	—	—	2,721.49	—	2,721.49
Deduct Sub-Schedule B	*.26	*.19	*.03						
Revised Allocation to Channel	1,603.43	1,007.09	110.49	.12	.01	.35	2,721.49	—	2,721.49
083—Samples									
1940 Form "189"	1.84	.62	866.14	—	—	—	868.60	$ 44.09	912.69
Deduct Sub-Schedule B	—	—	*97.75						
Revised Allocation to Channel	1.84	.62	768.39	—	—	97.75	868.60	44.09	912.69
066—Miscellaneous Operating Expense									
1940 Form "189"	21,281.63	10,861.63	10,554.92	—	—	—	42,698.18	1,396.23	44,094.41
Deduct Sub-Schedule B	*661.47	*249.50	*680.24						
Revised Allocation to Channel	20,620.16	10,612.13	9,874.68	508.95	13.55	1,068.71	42,698.18	1,396.23	44,094.41
084—Safety Expense—Salaries and All Other Expense									
1940 Form "189"	809.74	372.08	56.71	—	—	—	1,238.53	—	1,238.53
Deduct Sub-Schedule B	*2.68	*1.23	*.18						
Revised Allocation to Channel	807.06	370.85	56.53	4.09	—	—	1,238.53	—	1,238.53
215—Expense—Salaries—Others									
1940 Form "189"	7,892.33	3,764.87	572.64	—	—	—	12,229.84	—	12,229.84
Deduct Sub-Schedule B	*51.57	*25.31	*3.70						
Revised Allocation to Channel	7,840.76	3,739.56	568.94	15.48	.02	65.08	12,229.84	—	12,229.84

1154

	Distribution Through Company Bulk Plants			Direct Shipment Customers					
	Tank Wagon			Jobbers					
Account No.	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers	Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
216—Expense—Traveling Expense—Others									
1940 Form "189"	$ 433.62	$ 217.58	$ 29.72	—	—	—	$ 680.92	—	$ 680.92
Deduct Sub-Schedule B	*4.22	*1.78	*.30						
Revised Allocation to Channel	429.40	215.80	29.42	$ .65	—	$ 5.65	680.92	—	680.92
217—Expense—Oper. & Main. of Vehicles—Automobiles—Others									
1940 Form "189"	410.72	195.88	31.43	—	—	—	638.03	—	638.03
Deduct Sub-Schedule B	*1.64	*.84	*.14						
Revised Allocation to Channel	409.08	195.04	31.29	.25	—	2.37	638.03	—	638.03
220—Expense—Employment Dept.—Salaries & All Other Expense									
1940 Form "189"	2,504.10	1,204.52	180.61	—	—	—	3,889.23	—	3,889.23
Deduct Sub-Schedule B	*42.48	*20.23	*3.07						
Revised Allocation to Channel	2,461.62	1,184.29	177.54	14.80	$ 2.17	48.81	3,889.23	—	3,889.23
227—Expense—Oper. & Main. of Vehicles—Sub Station Auditors									
1940 Form "189"	590.39	291.46	42.91	—	—	—	924.76	—	924.76
Deduct Sub-Schedule B	*.04	*.04	—						
Revised Allocation to Channel	590.35	291.42	42.91	.02	—	.06	924.76	—	924.76
228—Depr. Expense—Vehicles—Office—Others—and Sub Station Auditors									
1940 Form "189"	405.38	185.17	28.28	—	—	—	618.83	—	618.83
Deduct Sub-Schedule B	*5.34	*2.33	*.37						
Revised Allocation to Channel	400.04	182.84	27.91	2.53	.25	5.26	618.83	—	618.83

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* Denotes Red Figures.

1163 Account 290—Pro-Rata General Administrative
Account 295—Law Expense
Account 515—Experimental, Development and Research Expense

The cost of these departments is considered general and not applicable to any particular department or function of marketing. The expense applicable to each class of direct shipment customer and product was distributed on a gallonage basis.

Sub-Schedules #12-B and #12-C, supporting Schedule #12 and illustrating form 189, Detroit field, 1940, follow.

SCHEDULE #11

MARKETING EXPENSE ITEMS ON LUBRICATING OILS

(Shown Only for Reconciliation of Total Marketing Expense)

Detroit Field—1940

	Distribution Through Company Bulk Plants			Direct Shipment Customers					
	Tank Wagon			Jobbers					
Account No.	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers	Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
076—Barrel Expense	$ —	—	$ 13,259.67	—	—	—	$ 13,259.67	—	$ 13,259.67
077—Freight on Empty Steel Bbls. & Containers	—	—	11,946.26	—	$149.39	$ 1,592.30	13,687.95	—	13,687.95
078—Losses on Containers—Lost	—	—	756.23	—	6.51	136.00	898.74	—	898.74
079—Losses on Containers—Junked	—	—	1,688.84	—	32.49	218.04	1,939.37	—	1,939.37
115—Depreciation Expense—Equipt. Steel Bbls.	—	—	444.12	—	8.02	58.29	510.43	—	510.43
410—Profit and Loss on Resale Barrels........	—	—	2.41	—	*13.25	*97.00	*107.84	—	*107.84
Total...........................			$ 28,097.53		$183.16	$ 1,907.63	$ 30,188.32		$ 30,188.32

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* Denotes Red Figures.

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Schedule #11

Marketing Expense Items on Lubricating Oils (Shown Only for Reconciliation of Total Marketing Expense)

The above marketing expense items have to do with packaging cost of motor oils and lubricating products and accordingly, are not vital to the complaint. This schedule is presented only so that the total marketing expense for the Detroit field can be reconciled with information furnished on Form 189 in previous testimony. None of this expense was applicable to tank wagon reseller or jobber gasoline and refined oil sales, and accordingly, no charge is shown under either of these channels of distribution.

Respondent's Exhibit No. 100.

[Pages 5028 and 5030 are blank]

SCHEDULE #12

GENERAL OFFICE MARKETING COSTS

Detroit Field—1940

Account No.	Distribution Through Company Bulk Plants			Direct Shipment Customers			Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
	Tank Wagon			Jobbers					
	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers			
250—Accounting Department	$ 16,416.07	$ 7,996.20	$ 1,174.65	$ 364.71	$ 39.16	$ 393.11	$ 26,383.90	$ —	$ 26,383.90
255—General Manager's Department	27,009.17	14,220.99	8,852.95	136.47	21.79	932.99	51,174.36	1,525.75	52,700.11
260—Advertising Department	3,529.47	1,654.70	250.25	86.28	.46	—	5,521.16	—	5,521.16
265—Lubricating Department	552.72	613.38	26,806.38	21.60	4.71	931.51	28,930.30	—	28,930.30
270—Asphalt & Fuel Oil Department	—	—	1,576.39	—	—	402.19	1,978.58	—	1,978.58
280—Construction & Maintenance Department	1,922.57	876.24	135.54	9.93	—	—	2,944.28	—	2,944.28
290—Pro Rata General Administrative	32,844.37	16,499.56	2,374.46	7,429.63	40.12	15,100.69	74,288.83	—	74,288.83
295—Law Expense	15,838.12	7,585.70	1,057.11	3,516.82	18.99	7,147.92	35,164.66	—	35,164.66
515—Experimental, Development & Research Expense	965.94	489.76	69.90	216.26	1.17	439.60	2,162.63	—	2,162.63
Total	$ 99,078.43	$49,916.53	$ 42,297.63	$11,781.70	$126.40	$25,348.01	$228,548.70	$ 1,525.75	$230,074.45

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Schedule #12

General Office Marketing Costs

General Office marketing costs are first allocated among the various fields on the basis of total gallonage excluding direct shipments. The Detroit field for 1940 received 7.16% of the total general office charges as a result of this procedure. Had the allocation been made on the basis of all gallonage including direct shipment, the ratio chargeable to Detroit would have been 7.25%. We believe the practice followed in apportioning general office expenditures to the fields is more acceptable from sound accounting cost procedure than would result from using all gallonage including direct shipments. This position, we believe to be justified because:

(a) Direct shipment business is responsible for a relatively small proportion of effort, although it is responsible for a larger proportion of volume. General office expenses follow distribution of effort rather than gallons.

(b) Effort required for tank wagon distribution through Reseller, Consumer, and Other Method sales channels is uniform among the various sales divisions. The Sales Department setup working procedure, reports, and accounting procedure are uniform for all fields.

(c) If direct shipment gallonage were included in the allocation factor the Chicago field in particular would receive an abnormal portion of general office expenditure because of the large quantity of direct shipment business moving through our Chicago sales field office. The proportion of General Office expenditures thus allocated would be out of all reasonable relationship with costs
1159 actually incurred.

For these reasons we have accepted the allocation of the General Office expenditure to the Detroit field as being the best cost applicable to sales made in that division.

Account 250—Accounting Department

The expense charged to this function represents the cost of the General Office Credit and Accounting Departments. Since these departments supervise the activity of similar departments operating in the field offices and handle reports submitted by the field offices, it was considered logical

SUB-SCHEDULE #12-A

(Supporting Schedule #12, page 120)

Account No.	Total Cost		Direct Shipment Customers					
			Jobbers				Other Customers	
			Naph. & Gaso.		Other Prod.			
	$	$	$	%	$	%	$	%
250—G. O. Exp.—Accounting Dept.								
Total	$ 26,383.90		$ 364.71		$ 39.16		$ 393.11	
Credit & Collection	2,704.20		111.38	4.119%	12.56	.464%	31.12	1.151%
Accounting	23,679.70		253.33	1.070	26.60	.112	361.99	1.529
255—G. O. Exp.—General Manager's Dept.	-							
Total	52,700.11		136.47		21.79		932.99	
Supervision	16,679.29							
Sales Research	6,172.79							
Statistical—Personnel	3,828.19							
Sub-Total		$ 26,680.27	100.67	.385	15.03	.057	332.93	1.246
Real Estate	1,918.52							
Operating Dept.	7,987.29							
Sub-Total		9,905.81	—		—		—	
Gasoline & Refined Oil	3,924.53		12.64	.329	—		204.33	5.242
Sales Promotion—Wholesale	4,448.11		20.39	.475	.16	.004	395.73	8.961
Sales Promotion—Resale	3,020.15		2.77	.092	6.60	.219	—	
Sales Promotion—Specialties	3,717.41							
Sales Promotion—Auto. Supplies	1,003.83							
Sub-Total		4,721.24	—		—		—	
260—G. O. Exp.—Advertising Dept.	5,521.16							
Average %	1.571%		86.28	99.465	.46	.535	—	

Respondent's Exhibit No. 100.

SUB-SCHEDULE #12-A (Continued)

Account No.	Total Cost		Direct Shipment Customers Jobbers Naph. & Gaso.		Other Prod.		Other Customers	
	$	$	$	%	$	%	$	%
265—G. O. Exp.—Lubricating Expense	$ 28,930.30		21.60		4.71		931.51	
		Pro Rata						
Lubricating Dept.	11,629.02	3,789.83	4.93	.130	—		297.38	7.847
Technical Dept.	11,453.94	4,271.73						
New York Office	1,188.25	878.54						
Sub-Total		5,150.27	16.67	.324	4.71	.091	268.53	5.214
Railway Sales	4,659.09		—		—		365.60	7.847

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Account No.	Total Cost		Naph. & Gaso. $	%	Other Prod. $	%	Other Customers $	%
270—G. O. Exp.—Asphalt & Fuel Oil Dept.	$ 1,978.58		—		—		$ 402.19	20.327%
280—G. O. Exp.—Construction & Maintenance Dept.	2,944.28		$ 9.93	.337%	—		—	
290—G. O. Exp.—Pro Rata General Administrative	74,288.83		7,429.63	10.001%	$ 40.12	.054%	15,110.69	20.327
295—G. O. Exp.—Law Expense	35,164.66		3,516.82	10.001	18.99	.054	7,147.92	20.327
515—Experimental, Development & Research Expense	2,162.63		216.26	10.001	1.17	.054	439.60	20.327

Respondent's Exhibit No. 100.

SUB-SCHEDULE #12-B

ILLUSTRATING ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #12, page 120)

		Allocated to Original Statement According to Following Annual Ratios				Adjustment "189" Channels			
Account No.	Annual Direct Shipment Cost	Tank Wagon Reseller	Tank Wagon Consumer	Other Method	Auto. Supplies	Tank Wagon Reseller	Tank Wagon Consumer	Other Method	Auto. Supplies
		%	%	%	%	$	$	$	$
250—G. O. Exp.—Accounting Dept.	$ 796.98	64.27	31.15	4.58	—	$ 512.22	$ 248.23	$ 36.53	—
255—G. O. Exp.—General Manager's Dept.	1,091.25	40.13	46.58	13.15	.14	437.87	508.26	143.50	$ 1.62
260—G. O. Exp.—Advertising Department	86.74	65.08	30.30	4.62	—	56.45	26.28	4.01	—
265—G. O. Exp.—Lubricating Dept.	957.82	4.09	4.54	91.37	—	39.22	43.50	875.10	—
270—G. O. Exp.—Asphalt and Fuel Oil Dept.	402.19	—	—	100.00	—	—	—	402.19	—
280—G. O. Exp.—Construction and Maintenance Department	9.93	65.46	29.81	4.73	—	6.50	2.96	.47	—
290—G. O. Exp.—Pro Rata General Administrative	22,570.44	65.08	30.30	4.62	—	14,688.84	6,838.85	1,042.75	—
295—G. O. Exp.—Law Expense	10,683.73	65.08	30.30	4.62	—	6,952.97	3,237.17	493.59	—
515—Experimental Development and Research Expense	657.03	65.08	30.30	4.62	—	427.60	199.08	30.35	—

Respondent's Exhibit No. 100.

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SUB-SCHEDULE #12-C

FINAL ADJUSTMENT OF COMPARATIVE STATEMENT OF EXPENSE

(Supporting Schedule #12, page 120)

	Distribution Through Company Bulk Plants			Direct Shipment Customers					
	Tank Wagon			Jobbers					
Account No.	Reseller	Consumer	Other Method	Naph. & Gaso.	Other Prod.	Other Customers	Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
250—G. O. Exp.—Accounting Dept.									
1940 Form "189"	$ 16,928.29	$ 8,244.43	$ 1,211.18				$ 26,383.90		$ 26,383.90
Deduct Sub-Schedule B	*512.22	*248.23	*36.53						
Revised Allocation to Channel	16,416.07	7,996.20	1,174.65	$ 364.71	$ 39.16	$ 393.11	26,383.90	—	26,383.90
255—G. O. Exp.—General Manager's Dept.									
1940 Form "189"	27,447.04	14,729.25	8,996.45				51,172.74	$ 1,527.37	52,700.11
Deduct Sub-Schedule B	*437.87	*508.26	*143.50					*1.62	
Revised Allocation to Channel	27,009.17	14,220.99	8,852.95	136.47	21.79	932.29	51,174.36	1,525.75	52,700.11
260—G. O. Exp.—Advertising Department									
1940 Form "189"	3,585.93	1,680.98	254.26				5,521.16		5,521.16
Deduct Sub-Schedule B	*56.45	*26.28	*4.01						
Revised Allocation to Channel	3,529.47	1,654.70	250.25	86.28	.46	—	5,521.16	—	5,521.16
265—G. O. Exp.—Lubricating Dept.									
1940 Form "189"	591.94	656.88	27,681.48				28,930.30		28,930.30
Deduct Sub-Schedule B	*39.22	*43.50	*875.10						
Revised Allocation to Channel	552.72	613.28	26,806.38	21.60	4.71	931.51	28,930.30	—	28,930.30
270—G. O. Exp.—Asphalt and Fuel Oil Department									
1940 Form "189"			1,978.58				1,978.58		1,978.58
Deduct Sub-Schedule B			*402.18						
Revised Allocation to Channel	—	—	1,576.39	—	—	402.19	1,978.58	—	1,978.58
280—G. O. Exp.—Construction and Maintenance Department.									
1940 Form "189"	1,929.07	879.20	136.01				2,944.28		2,944.28
Deduct Sub-Schedule B	*6.50	*2.96	*.47						
Revised Allocation to Channel	1,922.57	876.24	135.54	9.93	—	—	2,944.28	—	2,944.28
290—G. O. Exp.—Pro Rata General Administrative									
1940 Form "189"	47,533.21	23,338.41	3,417.21				74,288.83		74,288.83
Deduct Sub-Schedule B	*14,688.84	*6,838.65	*1,042.75						
Revised Allocation to Channel	32,844.37	16,499.56	2,374.46	7,429.63	40.12	15,100.69	74,288.83	—	74,288.83

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295—G. O. Expense—Law Expense									
1940 Form "189"	$ 22,791.09	$10,822.87	$ 1,550.70				35,164.66		$35,164.66
Deduct Sub-Schedule B	*6,952.97	*3,237.17	*493.59						
Revised Allocation to Channel	15,838.12	7,585.70	1,057.11	$ 3,516.82	$ 18.99	$ 7,147.92	35,164.66		35,164.66
515—Experimental Development and Research Expense									
1940 Form "189"	1,393.54	668.84	100.25				2,162.63		2,162.63
Deduct Sub-Schedule B	*427.60	*199.08	*30.35						
Revised Allocation to Channel	965.94	469.76	69.90	216.26	1.17	439.60	2,162.63	—	2,162.63

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* Denotes red figures.

Respondent's Exhibit No. 100.

RECAPITULATION OF ALL MARKETING COSTS SCHEDULES

Detroit Field—1940

Account No.	Distribution Through Company Bulk Plants			Direct Shipment Customers			Total Petroleum Products	Auto. Supplies	Total Petroleum Products and Auto. Supplies
	Tank Wagon		Other Method	Jobbers		Other Customers			
	Reseller	Consumer		Naph. & Gaso.	Other Prod.				
# 1—Salesmen and Sales Promotion Exp.	$ 86,463.70	$ 59,238.74	$145,254.91	$ 787.26	$ 348.12	$20,677.36	$ 312,770.09	$20,195.39	$ 332,965.48
# 2—Advertising Costs	133,065.84	60,854.97	13,993.02	3,546.16	157.29	.44	211,217.72	12,207.03	223,424.75
# 3—Delivery and Warehouse Cost	432,442.62	442,237.61	128,150.28	154.12	50.16	442.82	1,103,477.61	13,974.12	1,017,451.73
# 4—Income and Expense Incurred at Leased Retail Outlets Served by Tank Wagon	47,724.53	—	781.91	—	—	—	48,506.44	*1,520.76	46,985.60
# 5—Marketing Expense Items Incurred at Privately Owned Stations Not Leased But Engaged in the Distribution of Our Products	18,649.18	7,688.97	2,259.70	25.51	58.57	358.50	29,040.43	—	29,040.43
# 6—Credit Information—Bad Debts & Recovery	10,372.08	6,332.77	*23.15	1,395.70	152.52	*1,312.42	16,917.50	*766.49	16,151.01
# 7—Field Office & Accounting Cost	123,315.28	58,387.36	101,678.97	3,408.44	404.76	3,754.49	290,949.30	19,727.96	310,677.26
# 8—Supervision Cost Incurred in Sales Field	44,172.86	21,574.46	4,814.61	436.04	24.57	1,265.49	72,228.03	—	72,228.03
# 9—Losses—Taxes—Insurance and Additional Salary Considerations	118,356.86	98,671.56	62,356.10	2305.81	436.96	6,799.65	288,626.34	—	288,626.34
#10—Miscellaneous Marketing Exp. Items	41,737.68	20,890.90	12,151.61	518.31	16.14	1,291.92	76,639.56	1,443.47	78,083.03
#11—Marketing Expense Items on Lubricating Oils	—	—	28,097.53	—	183.16	1,907.63	30,188.32	—	30,188.32
#12—General Office Marketing Costs	99,078.43	49,916.53	42,297.63	11,781.70	126.40	25,348.04	228,518.70	1,525.75	230,074.45
Total Expense	$1,155,379.06	$825,793.87	$544,413.12	$24,389.05	$1,658.65	$60,476.29	$2,609,110.04	$66,786.47	$2,675,896.51
Total Volume	69,301,586	32,265,489	4,920,137	15,296,828	82,263	31,092,364	152,958,667	$554,215.80	
Cost Per Unit for Marketing	1.67¢	2.56¢	11.00¢	.16¢	2.02¢	.19¢	1.71¢		
**Net Cost Differential	1.51¢								

* Denotes red figures.

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Conclusion

Throughout the entire conduct of the study every possible precaution was taken to insure the highest degree of accuracy possible to attain. Procedures adopted have been conditioned by cooperative consultation with examiners of the Federal Trade Commission as well as by all printed material made available by that governmental body.

Wherever any portion of the cost was predicated upon a sample analysis, the proportion of total represented by our sample was carried to an extent far beyond that which is necessary to establish stability levels. Thus, 85% of all expense included under the classification 066—Miscellaneous Operating Expense—was analyzed by individual vouchers. In determining the comparability of calls upon jobbers and upon tank wagon reseller accounts every call for a full year period by certain salesmen having jobber accounts within their territory was used.

In determining ratio of gasoline value (excluding taxes) to total dollar value of credit and card sales tickets, a sample in excess of 11,000 tickets was used. The accounting time necessary to handle 1000 sales tickets was checked by weeks, and whereas almost identical ratios were secured for the first two weeks this examination was carried for two full additional weeks to ascertain that our standard thus established was beyond possible controversy. In each of these cases stability levels were reached with samples of less than one-half those actually used. It is the respondent's position, therefore, that costs presented in this portion of its defense are as accurate as it is possible to obtain short of a complete reenactment of every event in the Detroit field during the year 1940. This is an obvious impossibility.

Note

Page 5042 is blank;

Page 5043 is on Card 71;

Page 5044 is blank.

1172 RESPONDENT'S EXHIBIT NO. 103-A.

Federal Trade Commission February 2, 1942.
Washington, D. C.

Attention: Mr. Cyrus B. Austin, Trial Attorney.

Dear Mr. Austin:

Re: Standard Oil Company
Docket No. 4389

I am sorry to be so long delayed in answering your letter of January 21, 1942, responding to mine of January 19, 1942.

While you indicated in your letter that February 22nd fell on a Monday, it in fact falls on a Sunday. I assume that makes no difference in your conclusions as to the desire to start on February 16th. In view of your letter, I do not want to press the matter of starting on Tuesday, as distinguished from Monday. It is not a matter of first importance anyway, but rather one of convenience, and we shall plan to be in Detroit and ready to resume the hearing on February 16th, in accordance with your plan and Judge Ballinger's notice.

I also have for acknowledgement your letter of January 24, and your letter supplementing that one under date January 27, 1942. Again, I am sorry I have been so long delayed in answering, but I have necessarily been much out of the office on problems arising out of the war disturbance and have not had an earlier opportunity.

So that the accountants' efforts on these letters might be as little delayed as possible, I did send a copy of your letter of January 24 to Detroit and to Mr. Boatwright's office, and have since supplied Mr. Boatwright with a copy of your letter of January 27, and am today doing likewise for Detroit.

1173 RESPONDENT'S EXHIBIT NO. 103-B.

In connection with these two last letters, I was frankly astounded at the volume and extent of your requests.

It occurs to me that some of the information which you have requested is either already in evidence, or has been heretofore supplied to the Commission.

Conformably to the position which the Respondent has consistently taken and has repeatedly stated, we will make available to you and your accountants any records of this company which may be at all pertinent to your inquiry,—

irrespective of where such records may be. Insofar as your additional requests involve just that, we will, of course, arrange to make the records available to you. Indeed, I surmise that they have always been available to Mr. Warmack during the weeks he has been spending in Detroit, insofar as such records are in Detroit.

I am sure you will appreciate that we cannot undertake to make any calculations or break-downs or build-ups involving any discretion on the part of our accounting staff. Some of your requests are of this latter character.

It was my understanding that anything of that character that was desired by the Commission would be undertaken by Mr. Warmack and his assistants and, as above stated, the records from which he might make any calculations desired by him or by you are available to him.

No doubt Mr. Warmack has acquired a very considerable familiarity with the records with which he has been now working so long, but we are sure that some of your requests would take us many weeks with many accountants to build up, and I assume that while Mr. Warmack might accomplish the task in an equally short time he would not be able to shorten it greatly.

In such time as I have had to discuss the matter with our accounting personnel, I understand from them that certain of the requests in your letter of January 24 needed considerable clarification, even in connection with having existing records available. I apprehend that some of such requests will be clarified in the minds of our people by your explanatory letter of January 27.

So that there may be no misunderstanding of this letter, and our position on the matter,—I reiterate that, insofar as your requests deal with existing records, they are either now available to you and to Mr. Warmack, who is on the ground, or will be made so, as you suggest. However, we are not undertaking anything involving the build-up, break-down calculations of or discretionary treatment of figures wherever such is involved in the requests.

For his information, I am sending a copy of this letter to Judge Ballinger.

With best personal regards, I am

Sincerely yours,

Harold R. Hanley/w

cc—Messrs. Ballinger Raupagh
Boatwright Abbott

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of Volume VI of the printed transcript of the record, filed in this office on July 12, 1948, in:

Cause No. 9215.

Standard Oil Company,
Petitioner,
vs.
Federal Trade Commission,
Respondent,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 25th day of May, A. D. 1949.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

Vol. VII

TRANSCRIPT OF RECORD

(Pages 5047 to 5315)

Supreme Court of the United States

OCTOBER TERM, 19[redacted] 1957

No. [redacted] 24

STANDARD OIL COMPANY, PETITIONER,

vs.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 9, 1949.

CERTIORARI GRANTED NOVEMBER 7, 1949.

Office - Supreme Court, U. S.
FILED
JUN 9 1949
CHARLES ELMORE CROPLEY
CLERK

VOL. VII, pp. 5047 to 5315.

TRANSCRIPT OF RECORD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 107

STANDARD OIL COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.

STANDARD OIL COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TRANSCRIPT OF RECORD

In the

United States Circuit Court of Appeals

For the Seventh Circuit

No. 9215

STANDARD OIL COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

U. S. C. A.-7
FILED
JUL 1 2 1948
KENNETH J. CARRICK
CLERK

Petition for Review of Order of the Federal Trade Commission.

THE GUNTHORP-WARREN PRINTING COMPANY, [illegible] WEST JACKSON, CHICAGO

TRANSCRIPT OF RECORD FILED NOV. 7, 1946.
PRINTED RECORD.

In the

United States Circuit Court of Appeals

For the Seventh Circuit

No. 9215

STANDARD OIL COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

Petition for Review of Order of the Federal Trade Commission.

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12 schedules giving account numbers and explanations as to each:

1. Salesmen and Sales Promotion Expense.
2. Advertising Costs.
3. Delivery and Warehouse Cost.
4. Income and Expense Incurred at Leased Retail Outlets Served by Tank Wagon.
5. Marketing Expense Items Incurred at Privately Owned Stations Not Leased But Engaged in the Distribution of Our Products.
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423. In the matter of
Standard Oil Company. } Docket 4389.

TRIAL EXAMINER'S REPORT AND EXCEPTIONS.

(Seal)

(Filed Nov. 7, 1946, Kenneth J. Carrick, Clerk.)

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UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION.

In the Matter of
Standard Oil Company (Indiana). } Docket No. 4389.

TRIAL EXAMINER'S REPORT UPON THE EVIDENCE.

Preliminary Statement.

Pursuant to the provisions of an Act of Congress, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, (the Clayton Act), as amended by an Act of Congress approved June 19, 1936, (the Robinson-Patman Act), the Federal Trades Commission, alleging its reason to believe that the respondent named therein had violated said Act, did on the 29th day of November, 1940, issue its complaint in this proceeding, amendments to which were later allowed by order dated April 23, 1941.

Issues Deduced From the Pleadings.

(a) Synopsis of Amended Complaint:

The amended complaint charges, in substance, that:

Respondent, Standard Oil Company, a corporation, organized under the laws of the State of Indiana, is now, and has been since June 19, 1936, engaged in the business of refining, selling and distributing gasoline with its principal office in Chicago, Illinois, and its refinery at Whiting, Indiana.

During the period mentioned respondent has sold, and does now sell and deliver its different brands of gasoline to about 450 retail gasoline dealers operating stations located in the Detroit area in Michigan, under contracts obligating respondent to furnish each of said dealers,
428 during the period named in each contract, a sufficient
quantity of each of the brands of gasoline made by it to meet his requirements.

In making delivery respondent has, and does ship its gasoline from its refinery at Whiting, Indiana, to a terminal maintained by it at River Rouge, Michigan, from which point the gasoline is transported to said customers in tank-cars or tank-wagons, thereby causing a continuous stream of trade and commerce in its gasoline between Whiting, Indiana, and the retail dealers purchasing the same in the Detroit area in Michigan.

Among respondent's said customers were and are four dealers, to-wit, Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., Wayne Oil Company and Ned's Auto Supply Company, to whom respondent has, since June 19, 1936, sold, and does now sell its gasoline of the same grade and quality, at prices substantially lower, to-wit, from ½¢ to 1¾¢ per gallon, than the prices charged its other customers operating retail stations in the same area. Each of said four dealers has, since June 19, 1936, owned or operated, in the Detroit area, one or more gasoline stations where a part of said gasoline has been resold, and with the exception of the Stikeman Oil Company, Inc., is now resold at retail to consumers thereof, in competition with other retail gasoline stations supplied by respondent or other manufacturers. Three of said dealers—Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., and Wayne Oil Company—are also engaged in the business of reselling at wholesale, a large part of the gasoline purchased from respondent, to dealers in the Detroit area who are likewise engaged in the resale thereof at retail, and have knowingly received the benefits in their retail operations of said lower prices.

The effect of said discrimination in price, "*has been, and may be, to injure, destroy and prevent competition with* *each of said four dealers * * *, and with their respective customers, in the resale of gasoline*". (Italics Examiners)

Service being made, respondent in seasonable time answered.

(b) Synopsis of Answer:

Respondent's answer

Admits

(1) its corporate entity; (2) the business in which 429 it was and is engaged; (3) the locations of its principal office, refinery, terminal and theater of its operations; (4) the sale of its gasoline to operators of retail service stations in the Detroit area, in Michigan, with some of whom—but not all—it had and has contracts; (5) the sale of the different grades of gasoline to the four dealers at the reduced prices and its resale by them; and (6) competition;

Denies

all other material averments, and set up the following affirmative and alternative defenses, alleging with particularity, the factual basis for each:

Affirmative Defense

(1) Claimed Absence of Jurisdiction—Interstate Commerce:

That its gasoline made at its Whiting, Indiana, refinery is transported to its terminal at River Rouge, Michigan, where it is unloaded into storage tanks, comes to rest in the State of Michigan and is commingled and becomes a part of respondent's general chattel property within said state and as such becomes and is subject to the jurisdiction and laws of the State of Michigan and amenable to levy and subject to payment of state and local property taxation therein; that the sale and delivery thereafter of said gasoline, in the usual, ordinary and customary conduct of its said business, to the retail gasoline service stations and wholesale operators in the Detroit area in Michigan, were, and are, initiated and fully consummated within the State of Michigan; were and are strictly intrastate in character, and over which the Federal Trade Commission has no jurisdiction; that if there has been at any time since June 19,

1936, any interstate transaction between respondent and any of its gasoline customers in the Detroit area in Michigan (which does not now exist) such transaction or
430 transactions were isolated instances and independent and apart from the usual, ordinary and customary intrastate course of commerce between the parties and constitute no basis for assumption of jurisdiction of this proceeding by the Commission. (Ans. Pars. 2-10, inc.)

(2) Alternative Affirmative Defenses:

That if the Federal Trade Commission has jurisdiction over respondent and the subject matter of the complaint, then respondent's acts and practices (Clayton Act, Sec. 2) were and are lawful:

(a) In that in the exercise of its lawful right to select its own customers, it selected the four dealers referred to in the complaint, each of whom has, and does purchase large quantities of gasoline from respondent—from two to five million gallons each per annum—take delivery in tank car lots, have and maintain their own bulk storage and distribution facilities and each are entitled to and are properly classified by respondent as "wholesalers" or "jobbers", as distinguished from the "retail reseller" or "service station operator" who buys and takes delivery in smaller quantities; that such distinction has for many years been universally recognized by the oil and other industries in Michigan and throughout the United States;

(b) In that with but one exception (a price differential of ½¢ per gallon accorded Ned's Auto Supply Company from September, 1936, through February, 1938, made necessary to meet unusually low or lower prices being offered this customer by competing gasoline suppliers), respondent has, and does now sell its different brands of gasoline of the same grade and quality to said four wholesale dealers at a uniform lesser price than the price charged its retail station customers, which it has a lawful right to do, (Ans. Pars. 12-18, inc.), as;

431 (aa) The difference in the prices charged the said four dealers and the prices charged the retail gasoline service station operators, for the same grade and quality of gasoline, was, and is the difference in the cost of sale and delivery resulting from the differing quantities in which

the gasoline was, and is sold and delivered (Ans. Pars. 19-25, inc.);

(bb) All of the lower prices granted the four dealers since June 19, 1936, were made to them in every instance in good faith to meet an equally low or lower price and equally or more favorable sales arrangements in respect of services, facilities or benefits made or furnished by a gasoline supplier or suppliers which were, and are competitors of respondent (Ans. Pars. 26-33, inc.). And,

(3) Neither the price differentials accorded, and the extent and use made thereof by said four dealers, or any of them, has, or may hereafter have *the effect of injuring, destroying, or preventing competition with each of the said four dealers and with their respective customers in the resale of gasoline.* (Ans. Pars. 37-45, inc.) (Italics Examiners)

Thereafter and by order dated February 25, 1941, Webster Ballinger, a duly commissioned Examiner, was appointed with instructions to hold hearings for the receipt of testimony and other evidence in this proceeding. Hearings were thereafter held at which testimony and other evidence was introduced by Cyrus B. Austin, Esq., Attorney at Law, on behalf of the Commission, and by Harold R. Hanley, Esq., Attorney at Law, Chicago, Illinois, and Arthur J. Abbott, Esq., Attorney at Law, Detroit, Michigan, on behalf of the respondent.

The testimony has been reduced to writing and filed in the office of the Commission together with all exhibits received in evidence.

432 The record was closed April 23, 1943. In view of the importance of the case, your Examiner requested Counsel for the Commission and respondent to submit statements in writing setting forth their respective contentions as to the facts proved, which were received and duly considered, copies being filed in the Secretary's Office, and your Examiner now submits the following

Report Upon the Evidence

I

Definitions

As hereinafter used with reference to the Detroit Metropolitan area in Michigan, the terms:

"Tank-Wagon" means a "motor vehicle having a maximum tank gasoline capacity of from 600 to 1500 gallons" (R. 4033), ordinarily 1500 gallons (R. 5177, 5721).

(Note: Subsequent to July 7, 1941, and after the amended complaint issued, the maximum tank-wagon capacity was increased to 3,000 gallons (R. 5177).

"Tank-Car" means a railroad car, and

"Transport Truck" means a motor truck, operated as a common carrier, having maximum gasoline tankage capacity of from 6,500 to 12,000 gallons (R. 45, 511, 3228-9; Resp. Exs. 50, 51).

"Posted Tank-Wagon Price" means the tank-wagon sale price fixed by the principal office in Chicago, Ill. (R. 37) and daily posted at the bulk plants and in the office of the supplying company in Michigan on tank-wagon deliveries of full or partial loads (R. 37, 59-60).

"Tank-Car or Transport Truck Prices" means a differential in the amount stated under the posted tank-wagon price.

II

What the Evidence Consists of

Description of Evidence. The evidence may be described as "factual" and "conclusory". The factual is re-
433 markably free from conflict—a tribute to the intellectual standard and honesty of all witnesses called by both the Commission and respondent. The conclusory is confined to opinions of experts—all concededly well qualified by education and experience in their respective fields to give expert opinions deserving careful consideration—drawn from the factual, relates largely to cost of sale and distribution, and is in sharp conflict.

The Commission called 36 witnesses (R. 2, 204, 294, 342, 363, 386, 441, 462, 492, 543, 560, 583, 624, 637, 651, 673, 724, 728, 750, 765, 778, 802, 847, 859, 900, 992, 1329, 5117, 5202, were received in evidence, 117 documentary exhibits, (1 thru 19, 21-22, 25-27, 29-36, 38, 40 thru 52, 54 thru 61, 63, 64, 66 thru 78, 80 thru 93, 100, 102 thru 112, 116, 117, 119 thru 127, 133, and subletters).

Of the 36 witnesses called by the Commission 4—

Carl Hamon Depue, for 21 years a Certified Public Accountant, employed by the Federal Trade Commission for the past 13 years, specializing in cost accounting under the Robinson-Patman Act since its enactment, and now Supervisor of Investigations for the Commission (R. 7859-62);

Arthur E. Lundvall, Certified Public Accountant and Chief Accountant for the Federal Trade Commission, whose qualifications were conceded by counsel for respondent (R. 7810-11);

Herbert F. Taggart, Professor of Accounting at the University of Michigan who had specialized in and taught cost accounting at universities for 21 years, and was the author of two treatises on cost accounting, one of which was published by the Department of Commerce (R. 9992-6); and

William J. Warmack, a college graduate, a Certified Public Accountant since 1933, an employee of the Federal Trade Commission since 1929, engaged largely in cost accounting work for the Commission under the Robinson-Patman Act since 1935, investigating some of the important cases that have since been prosecuted under said Act, and who was familiar with Respondent's Exhibits 31-A thru Q, 99, 100, and 101, having examined said exhibits, heard substantially all the testimony relating thereto, and made a
personal investigation of many, but not all, of the
434 foundational records upon which the exhibits rest and
the accounting methods employed in compiling them
(R. 5755-73)—

all experts in their respective professional lines, gave the principal opinion or conclusory testimony offered on behalf of the Commission.

The respondent called 17 witnesses (R. 934, 1425, 1472, 1570, 1617, 1712, 2058, 2280, 2671, 2694, 2702, 2760, 3072, 3221, 3225, 4801, 7776) and offered, which were received in evidence, 77 documentary exhibits, (3, 5 thru 20, 23 thru 71, 76, 92, 95 thru 101, 103, 111, and subletters).

Of the 17 witnesses called by the respondent 3—

John W. Boatwright, college and university graduate, receiving his LL. D. degree from the Northwestern University in 1932, lecturer on Economics at the Northwestern

University from 1929 to September 6, 1932, experienced in Economic Research, a part of which he acquired while connected with the Economic Division of the Federal Trade Commission, and for more than four years before he testified; in charge of respondent's Budget and Sales Research Department comprising several hundred technically trained economists and accountants (R. 2280);

Frederick Emerson Clark, Professor of Economics and Marketing, Chairman of the Department of Marketing and Director of the Graduate Division of the School of Commerce at the Northwestern University, received the degrees of Bachelor of Arts from Albion College in 1912, Doctor of Philosophy in Economics in 1916 and Master of Arts in Economics in 1930, both from the University of Illinois, author of "The Principles of Marketing" published in 1922 and revised in 1932, rather widely used among teachers; also author of two other books on marketing and co-editor with L. D. H. Well of the book entitled "Marketing Agricultural Products in the United States" published in 1932, very widely used as a text and reference book; author of articles written for scientific magazines on marketing, and possessing other distinctive qualifications (R. 1617-23);

Leonard W. Houghton, a graduate of the School of Business of the University of Wisconsin where he took a course in Accounting, employed by the respondent company for the past 12 years, his work involving the accounting business of the company (R. 7776-8)—all experts in their
435 respective professional lines, gave the principal opinion or conclusory testimony offered on behalf of the respondent.

III

Questions for Decision and Related Matters

A. Questions for decision.

Six major questions are presented for decision by respondent's answer, viz.:

1. Were the transactions complained of in interstate commerce?

2. Did the .5¢ per gallon differential respondent accorded Ned's Auto Supply Company from September 1, 1936 to March 1, 1938 on tank-wagon deliveries of gasoline, under the price it charged its other retail reseller tank-

wagon customers for gasoline of like grade and quality, make only due allowance for differences in costs of sale and delivery resulting from differing methods or quantities in which the gasoline was sold and delivered to Ned's Auto Supply Company and to respondent's other tank-wagon customers in the Detroit Metropolitan area in Michigan?

3. Did the differentials of 1¢ per gallon on Stanolind, 1.5¢ on Red Crown and 1.75¢ on Solite with Ethyl gasolines, accorded the four dealers, recognized by respondent as jobbers, or tank-car, or transport truck customers, under respondent's posted tank-wagon prices charged its retail reseller customers for gasoline of like grade and quality, make only due allowances for differences in cost of sale and delivery resulting from differing methods or quantities in which the gasoline was sold and delivered to respondent's jobber or tank-car customers and to its retail reseller or tank-wagon customers in the Detroit Metropolitan area in Michigan?

4. Was the .5¢ per gallon differential respondent granted Ned's Auto Supply Company from September 1, 1936 to March 1, 1938 on tank-wagon deliveries, under the prices
it charged its other retail reseller tank-wagon cus-
436 tomers in the Detroit Metropolitan area in Michigan,
for gasoline of like grade and quality, granted in good faith to meet an equally low price of competitor? If so, did it constitute price discrimination, the effect of which was, is, or may be, substantially to lessen competition; or tend to injure, destroy or prevent competition between Ned's Auto Supply Company's retail gasoline service stations and those operated by customers of respondent?

5. Was the selection by respondent of the four dealers and their recognition by respondent as jobbers bona fide and not in restraint of trade?

6. Were the differentials in price accorded the four dealers, recognized by respondent as jobbers, made in good faith to meet equally low prices of competitors, or the services or facilities furnished by competitors?

7. Do the differentials in price accorded the four dealers constitute price discrimination, the effect of which is, or may be, substantially to lessen competition, or tend to injure, destroy, or prevent competition with said four dealers, or with the customers of either respondent or the said four dealers?

B. Separate and related questions.

Questions 1, 2 and 3 are independent. If the 1st question is answered in the negative, dismissal of the complaint necessarily follows; if answered in the affirmative, consideration of questions 2 and 3 become necessary.

If questions 2 and 3 are answered in the affirmative the differentials granted were lawful and the remaining questions become immaterial.

If question 2 is answered in the negative it will be necessary to consider both questions 4 and 7.

If question 3 is answered in the negative it will be necessary to consider questions 5, 6 and 7.

Questions 4, 5 and 6 are each interrelated with question 7, and the answer to each depends in part on the answer to question 7.

437 C. Only cost of sale or delivery to be considered.

Respondent makes no claim of any difference in cost of manufacture. Its cost differential defenses are based solely on claimed difference in costs of both sale and delivery.

D. Grade and quality of gasoline:

That the quality of all of respondent's three grades (brands) of gasoline—Stanolind, Red Crown and Solite with Ethyl—sold to all customers were identical, is conceded.

IV.

Factual Matters Not in Dispute.

Factual matters, not in dispute, will be first reviewed, mere reference to which, when necessary, will be made later in this report to avoid unnecessary repetition.

(a) Corporate Entity: Respondent, Standard Oil Company (Indiana) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana.

(b) Business Engaged in: Respondent is now, and has been at all times since June 19, 1936, engaged in the business of refining, selling and distributing three standard brands of gasoline—"Red Crown", "Solite with Ethyl", and "Stanolind" (R. 35-6—the bulk of its sales (approximately 90 per cent) being of its popular brand, "Red Crown" (R. 108), about 7 per cent Ethyl, and 3 per cent Stanolind. To meet seasonal demands respondent makes four volatile grades of each brand (R. 160).

(c) Location of Principal Office, Refinery and Terminal: Respondent's principal office and place of business is located at 910 South Michigan Avenue, Chicago, Illinois; its refinery (the only one here material) at Whiting, Indiana, and its marine terminal (for use in supplying its trade in Michigan) at River Rouge, Michigan (Comp. & Ans. Pars. 1 and 2; R. 4-5).

(d) Theater of Operations: Respondent's theater of operations embraces fourteen states located chiefly in the Middle West (R. 4-5, 1714-15), which territory is divided into "divisions" or "districts" with a branch office in charge of a manager or superintendent in each division. One division, designated and known as the "Detroit Division" embraces all or a part of thirteen counties situated on the Southern Peninsula of Michigan (R. 4, 3301-5, Resp. Ex. 56). Within this division is the area referred to in
438 the complaint as the "Detroit Area"—the situs of the acts and practices complained of—which is co-extensive with the exterior boundaries of the City of Detroit and the adjoining towns of Hamtramck, Dearborn and Highland Park, in Wayne County, Michigan (R. 9-10, Resp. Ex. 56), and is frequently referred to in the record as the "Detroit Metropolitan Area."

(e) Respondent's Customers, and Contractual Relations Therewith, in Detroit Metropolitan Area: Prior to September 10, 1936, respondent operated all retail service stations owned or leased by it in the Detroit Metropolitan Area; but on that date it discontinued all retail operations and leased or sub-let all stations owned or leased by it to independent operators.

During the period mentioned in the complaint, respondent regularly supplied gasoline to approximately 358 retail service stations; and to four dealers, recognized by it (one since March 7, 1938) as jobbers who supplied from 94 (in 1937) to 106 (in 1940) retail service stations (Com. Ex. 128-A, R. 29). Of the 358 stations directly served by respondent, approximately 200 (less than 60%) were and are owned, and 8 leased, by it (R. 10-11) all, or substantially all of which were and are equipped with driveways, buildings, storage tanks, pumps, fixtures, machinery and other appliances for the receipt and sale of gasoline (Com. Exs.

1-A-C-D). These 208 stations were and are leased or sublet to tenant operators, each lease being on a standard form (Com. Exs. 1-A-B-C-D), in use since 1936 (R. 197). The leases usually run for one, but in some cases for as much as three years (R. 15). Leases were and are automatically extended for a period of six months when the lessee remains in possession beyond the lease period (Com. Ex. 1-B). The leases require payment of a certain sum monthly plus "a sum equal to" (usually one-half cent) "per gallon on all gasoline delivered to said service station for sale," with a further provision that the minimum rental for any one month should not be less than a stated sum. The rental charged is based upon natural considerations such as investment, location, sales volume and financial responsibility of the lessees (R. 116-17). While not required by the terms of the lease to so do, all of the lessees have regularly purchased all gasoline from respondent resold by them during the term of the lease (R. 3591).

With the remaining approximately 150 retail stations, serviced directly by it (R. 114), respondent had and now has contracts for stated terms (usually for one year, R. 16), each being on a standard form in use since 1936 (R. 197), known as "Form 461" (Com. Ex. 2), and containing the following provision:

"The Company does hereby agree to sell and does sell to the Dealer, and the Dealer does hereby agree to purchase and does purchase from the Company all the Dealer's requirement of Solite with Ethyl, Standard Red Crown 439 and Stanolind gasoline, which shall be taken to mean all such gasoline used, handled and sold by Dealer, at the above place of business" to be paid for at "the company's posted dealer price" in "cash at the time of delivery."

All deliveries of gasoline to the leased and contract service stations were made by tank-wagon, payment being made at the "posted tank-wagon price" in cash or its equivalent on delivery (R. 165-A-6), with one exception—from September 1, 1936 to March 1, 1938 Ned's Auto Supply Company received a price of one-half cent per gallon less than the posted tank-wagon price (R. 52).

Respondent has no contract or agreement with any of the four dealers (R. 33, 3760). They constitute respondent's only tank-car or transport truck customers in this area (R. 28). Each maintains its own bulk plant, orders and takes delivery in full tank-car loads (R. 33) and maintains its own equipment for distribution. Tank-car sales are made on credit and a discount of one per cent for payment within ten days is allowed (R. 108-9).

(f) Retail Stations Supplied, and Those Operated by Each of the Four Dealers and Percentage of Gasoline Marketed Through the Respective Channels: The number of service stations supplied and operated by each of the four dealers, recognized by respondent, and licensed by the State of Michigan as jobbers, during the period referred to in the complaint, and the percentages of gasoline marketed through each of the two channels, were as follows:

Ned's Auto Supply Company: Recognized as a jobber March 7, 1938, (R. 4852-3; Resp. Ex. 37-C); thereafter purchased from respondent more than 4,200,000 gallons per annum (R. 3082, Resp. Ex. 54), substantially all of which it resold at retail through four, in 1936, increased to 6, in 1937, retail gasoline service stations owned and operated by it. It made no sales to other retail stations (R. 213-15).

Wayne Oil Company: Stations supplied: This company was recognized by respondent as a jobber in 1935 (Resp. Ex. 37-A); during the following years it annually supplied gasoline purchased from respondent to the following number of retail outlets: 1936, 15; 1937, 19; 1938, 21; 1939, 24; 1940, 24; (R. 503-4), a part of which it leased to the operators (Resp. Ex. 20).

Stations operated: Between June 19, 1936, and September 8, 1939, the company operated no retail outlets.
440 Subsequent to September 8, 1939, some of the stations owned or controlled by it became vacant and the company temporarily operated 7 retail stations previously leased by it to independent operators until suitable tenants could be found, the number of stations operated by the company and the period each station was so operated, being as follows:

From September 8, 1939 to date, 1; from September 8, 1939 to May 1, 1940, 1; from November 1, 1939 to October 1, 1940, 1; from November 15, 1939 to July 1, 1940, 1; from December 1, 1939 to April 1, 1940, 1; from June 4, 1940 to the present time, 1; for about two weeks prior to September 9, 1939; and from December 1, 1939 to April 1, 1940, 1 (Resp. Ex. 20; R. 508-9).

The volume of gasoline sold direct and through stations operated by company: In 1936, 1937 and 1938 the company purchased from respondent between 1,348,000 and 1,825

000 gallons of gasoline (Resp. Ex. 53); in 1939 it purchased 2,226,177 and in 1940, 2,541,394 gallons. In 1936, 1937 and 1938 all gasoline purchased was sold at wholesale; in 1939, 7.6 per cent and in 1940, 14.2 per cent of the total gasoline purchased was sold at retail (Resp. Ex. 53).

Citrin-Kolb Oil Company: This company began retail operations in 1922 (R. 295). In 1929 it was recognized by respondent as a jobber (Resp. Ex. 37-A), and thereafter engaged largely in the wholesale business.

Stations supplied: As of January 1 of each of the calendar years 1936 to and including 1940 it supplied gasoline to the following number of retail gasoline stations: 1936, 29; 1937, 51; 1938, 57; 1939, 66; 1940, 52 (R. 296), a part of which it owned and leased, or leased and sub-let (Resp. Ex. 6) to independent operators, and which in 1940 numbered 20 (Resp. Ex. 6, R. 304).

Stations operated: When stations owned or controlled by
it and leased to tenant operators became vacant they
441 were temporarily operated by the company until suit-
able tenants could be found, the number so operated by
it and the period of operation of each being as follows:

From January 1, 1937 until sometime in the month of February 1938, 1 station; from January 1, 1937 to October 6, 1937, 1; from January 1, 1937 to October 1938, 1; from December 15, 1937 to January 21, 1938, 1; from January 1, 1938 to the present time, 1; from March 8, 1939 to December 22, 1940, 1; from June 2, 1939 to the present time, 1; from July 27, 1939 to December 29, 1940, 1; from August 17, 1939 to February 27, 1941, 1; from July 1, 1940 to the present time, 1; from September 27, 1940 to the present time, 1; from October 15, 1940 to the present time, 1; (R. 299-300).

Gallonage sold direct and through stations operated by company: Since the calendar year 1936 the company has annually purchased from respondent in excess of 5,000,000 gallons of gasoline (R. 296, Resp. Ex. 54, R. 8-9) which it resold at wholesale and retail, the percentage sold at retail being as follows: in 1937, 15.4%; in 1938, 7.3%; in 1939, 10.1%, in 1940, 6.5% (Resp. Ex. 53).

Stikeman Oil Company, Inc.: This company was organized in 1931, acquired bulk storage and was recognized by respondent as a jobber in 1932 (Resp. Ex. 37-C). In 1935 the company decided to discontinue retail operations and did completely withdraw from the same on February 15, 1938, since which time it has purchased approximately

2,000,000 gallons annually of respondent's branded gasolines, all of which it has sold at wholesale (Com. Ex. 4, Resp. Ex. 54; Ans. pp. 9, 10).

(g) Percentage of all gasoline marketed in the Detroit metropolitan area supplied by respondent, and percentage marketed by all major companies: Respondent markets in this area the greatest volume of gasoline of any one 442 company (R. 3655). During the years 1936 to and including 1940, respondent supplied in 1936, 17.1; in 1937, 17.1; in 1938, 16.4; in 1939, 17.4; and in 1940, 16.2 per cent of all branded and non-branded gasoline sold in the "Detroit Area", its sales in 1936 aggregating 62,198,750 and in 1940, 74,627,712 gallons (R. 3315-16; Resp. Ex. 58).

Approximately 87 per cent of all gasoline marketed in this area was made by the major companies and sold under their brands (R. 417; for list of all companies see Resp. Exs. 63-A-B-C; for list of major and non-major companies see R. 3251-5).

(h) Amount of gasoline marketed by respondent in the Detroit metropolitan area sold to the 4 "jobbers": Of the 74,627,712 gallons of gasoline marketed by respondent in the Detroit area in 1940, 13,661,107 gallons, or more than 18 per cent, were purchased by the four dealers (Resp. Ex. 58).

(i) Price differentials accorded the four "jobbers" on tank-car or transport truck deliveries: To the four dealers who took delivery by tank-car or transport truck, and who were recognized by it as "jobbers", respondent has, since June 19, 1936, on its different brands of gasoline purchased by them, accorded price differentials under the prices charged its retail tank-wagon customers as follows:

To Ned's Auto Supply Company, at all times subsequent to March 7, 1938; on Red Crown 1½¢, on Solite with Ethyl 1¾¢ (Resp. Ans. pp. 11-12, 32-47; R. 35, 52);

To Citrin-Kolb Oil Company, at all times subsequent to June 19, 1936: on Red Crown 1½¢, on Solite with Ethyl 1¾¢, and on Stanolind 1¢ (R. 299, 296, 3247, 35-6);

To Wayne Oil Company, at all times subsequent to June 19, 1936; on Red Crown 1½¢ on Solite with Ethyl 1¾¢ (R. 1934, 498, 3247, 35-6);

To Stikeman Oil Company, at all times subsequent to June 19, 1936: on Red Crown 1½¢, on Solite with Ethyl 1¾¢ (Resp. Ans. p. 19; R. 35-6, 42-3, 3247, Com. Ex. 4).

443 (j) Cost of marketing each of the three grades of gasoline: The cost of marketing each of the three

brands per gallon is substantially the same, and was considered and treated as identical (R. 2501-2, 8054-5).

(k) Competition: Within the Detroit Metropolitan area there are from 3,000 to 4,000 retail gasoline service stations (R. 353, 371, 409). Respondent in its answer represents that competition in the sale of gasoline at retail in this Detroit Metropolitan Area "has been, and is extremely keen, vigorous and aggressive" (Resp. Ans. Par. 2), and admits, as alleged in the complaint, (Comp. Par. 3) that the gasoline sold by it to the four jobbers was resold by them largely at wholesale (Resp. Ans. Pars. 13-A-B-C-D, pp. 7-13) to retail service station operators, and the remainder (Resp. Ans. 13-A-B-C-D, pp. 7-13) through retail service stations owned or controlled, and, from time to time, operated by them, which, when operating, as well as the stations supplied by the four jobbers, were and are in competition with other retail stations in the Detroit Metropolitan area supplied by respondent and other producers or distributors of gasoline (Resp. Ans. Par. 13, 42), all of which the record abundantly confirms (R. 3255).

V.

First Question.

Were the transactions complained of in interstate commerce?

This question presents largely one of law, there being but slight, if any, controversy as to the facts.

The related evidence:

The gasoline supplied its customers in the Detroit Metropolitan area (Resp. Ex. 58), as well as in the entire Detroit Division—the greater portion of which was in fulfilment of its contracts with the service station operators and to meet the requirements of its lessees both hereinbefore referred to in sub-paragraphs (e) of Section IV—was and is made from crude oil produced in the mid-continent fields—Kansas, Oklahoma, Texas and Wyoming—and transported by pipe line to Whiting, Indiana, on the south short of Lake Michigan, where it is refined in respondent's refinery, and then transported in tankers through Lake Michigan, Lake Huron, St. Clair River, Lake St. Clair and Detroit
444 River, to a terminal maintained by respondent at
River Rouge, on the Rouge River in Michigan, about six miles southwest of the City of Detroit, where it is

pumped into terminal storage tanks maintained by respondent having a maximum capacity of 1,500,000 barrels of 42 gallons each (R. 153-55). Prior to the close of each navigable season, and to provide a supply of gasoline during the winter months for the Detroit District, the River Rouge terminal bulk storage tanks are filled to capacity (R. 155).

Within the Detroit Division respondent maintains two branch offices: one, in Detroit, with a superintendent in charge, who was and is directly under and responsible to the "Sales Department" of the Chicago office (R. 162), and who has, and does act for respondent generally in all matters pertaining to the marketing of the products of the respondent in his district, without first submitting them to the Chicago office, including such matters as the negotiation and execution, in respondent's name and as its agent, on standard forms approved by the Chicago office, of leases of service stations owned or leased and released by respondent (R. 10-11, 195-6; Com. Exs. 1-A-D) and contracts for the sale of gasoline (R. 163; Com. Ex. 2) at prices fixed by the Chicago office (R. 36-7, 122-3); and the other at River Rouge, with a superintendent in charge who is directly under and responsible to respondent's "Manufacturing Department", and whose duties are largely ministerial, consisting principally of the receipt of gasoline at the Marine Terminal and the delivery of same to tank-wagons, transport trucks and tank-cars upon orders from the Superintendent of the Detroit office (R. 5171-4, 5720).

Throughout the Detroit District respondent maintains additional bulk storage plants, strategically located for the convenient and expeditious servicing of its retail trade, six such plants being maintained within the Detroit Metropolitan area (R. 152; Com. Exs. 92-A-B, for location see R. 24). The storage tanks located in the entire Detroit District were and are filled and replenished as occasion requires from gasoline stored in the terminal tanks at River Rouge (R. 1515).

From the River Rouge or Marine Terminal storage the gasoline was, and is distributed in the Detroit Metropolitan area as follows:

To the six bulk storage plants, the four jobbers and to some consumer customers by tank-car or transport truck
(Common carrier) (R. 21, 30, 33, 51, 71; Com. Exs. 92-
445 A-D, 93 A-E): and from 10 to 15% prior to 1941, and
approximately 35 to 40% thereafter, by tank-wagons;

owned and operated by respondent, to the retail stations and consumer customers (R. 23, 152, 5720).

From the six bulk storage plants the gasoline was and is transported by tank-wagon, owned and operated by respondent, to the retail stations supplied by it and to other consumer customers (R. 154).

Prior to April 1940 and during the winter months when navigation was closed, emergency requests were infrequently received for gasoline of a particular volatile grade or grades, not in stock at the River Rouge terminal, and the orders were filled by direct shipment by rail from the refinery at Whiting, Indiana, to customers in Michigan in tank-car lots (R. 33). In 1938 and 1939 such shipments were made to each of the four jobbers in the Detroit Metropolitan area (R. 180, 964; Com. Exs. 5-A-J; 66, 67, 68, 69, 70, 71, 72, 73, 74). No such direct shipment has been made since April 1940 (R. 180-1).

The price of all gasoline marketed by respondent in the Detroit District was and is fixed at the Chicago office (R. 36-7). All contracts with common carriers for the removal of gasoline from the River Rouge terminal storage plant were, and are signed by the officials of the company in the Chicago office (R. 46-7; Com. Exs. 92-A-D, 93-A-E).

The money received from the sale of gasoline and other products in the Detroit District was, and is deposited in a national bank in Detroit, Michigan, and withdrawn on the check of the manager of the Detroit Division (R. 166). All original contracts, together with all records of sales and collections in the Detroit District, are kept in the Detroit office, and the greater portion of the salaries of the employees in the Detroit District are paid from the Detroit office (R. 168), a limited number only being paid from the Chicago office, such as the superintendent of the Detroit Division, his two assistant superintendents (R. 4946), and the salary of the superintendent in charge of the Marine terminal.

A personal property tax is levied by the State of Michigan, and paid by respondent, on the inventories of
446 gasoline in the terminal and bulk storage plants (R. 170-1). All other property, personal and real, of respondent situated in the State of Michigan, is subject to taxation by the state, and is so taxed (R. 170).

Conclusion of Fact:

The gasoline was refined in respondent's refinery at Whiting, Indiana, was shipped by respondent to River Rouge, Michigan, where it was placed in storage tanks owned and operated by respondent, and was withdrawn as needed to supply the requirements of respondent's customers in the Detroit Division, which embraced the Detroit Metropolitan area in Michigan, and in fulfilment of respondent's contracts with many of said customers. From the time of manufacture at Whiting, Indiana, until delivered to the purchasers thereof in the Detroit Metropolitan area in Michigan, the gasoline was, and remained, the exclusive property of respondent, and every contract touching the same was made in its name by its officers and agents, acting within the scope of their delegated authority.

Conclusion of Law:

The transactions complained of were in interstate commerce, *Midland Oil Company* v. *Wallace*, 41 F. Supp. 436; *Alabama Independent Service Station Assn., Inc.*, v. *Shell Petroleum Corporation*, 28 F. Supp. 386; *Stafford* v. *Wallace*, 258 U. S. 495.

The answer to the first question is "Yes".

VI.

Second Question.

Did the .5¢ per gallon differential respondent granted Ned's Auto Supply Company from September 1, 1936, to March 1, 1938, on tank-wagon deliveries of gasoline under the price it charged its other retail reseller tank-wagon customers, make only due allowance for differences in cost of sale and delivery resulting from differing methods or quantities in which the gasoline was sold and delivered to Ned's Auto Supply Company and to respondent's other tank-wagon customers in the Detroit Metropolitan area in Michigan?

Preliminary to a review of the related evidence attention is invited to a procedural situation requiring consideration. While the record conclusively establishes that the one-half cent differential accorded Ned's commenced September 1,

1936 (R. 4852-3) and was permanently discontinued March
1, 1938 (R. 3742-3), 3745-6, 3748), respondent asserts in its
answer, and offered evidence which it claims establishes
that the granting of the differential was not only not
prohibited,, but was expressly sanctioned by the
447 statute, thus putting squarely in issue and apparently
requiring decision of the Second Question (*Sears,
Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307,
310).

The related evidence: The record affirmatively discloses that no attempt was made by respondent to determine at, or prior to September 1, 1936—the date when the differential was granted—or at any subsequent time prior to the issuance of the complaint, what relation the one-half cent differential bore to the actual difference in the cost of marketing gasoline to Ned's and to its other tank-wagon retail customers, either individually or collectively in the Detroit Metropolitan area.

Subsequent to the issuance of the complaint and during the hearings in March, 1941 (R. 2446), respondent decided to have a survey made to determine the cost differential. The work was assigned to its economist, then, and for more than four years theretofore in charge of its Budget and Sales Research Department (R. 2280-85, 2446), and was rendered difficult by the absence of records of what had transpired more than three years theretofore. The economist made recourse to all available sources of information, sought and obtained the assistance of the heads and members of the various departments of the respondent company (R. 2446-7), caused a survey to be made to determine certain items of cost (R. 2455-7), and after diligent effort completed and submitted a marketing cost statement or account for the calendar year 1937 embodying his conclusions based upon the information he obtained, as to the approximate cost differential during that year in selling and delivering gasoline to Ned's and the average cost of selling and delivering gasoline to all of respondent's other tank-wagon reseller customers in the "Detroit Division" (R. 2449), which statement was offered, admitted in evidence (R. 2440; Resp. Ex. 31-A), and is here reproduced:

448 Differences in Certain Marketing Expense Items Incurred by Distributing Through Regular Reseller Outlets Versus Distributing Through Ned's Auto Supply Company—1937

	Regular Reseller Business	Ned's Auto Supply Company	Difference of Marketing Costs
	¢/Gal.	¢/Gal.	¢/Gal.
1. Delivery Cost			
(a) Salaries—Drivers	.114¢	.076¢	.038¢
(b) Equipment	.049	.038	.011
2. Marketing Expense Items Not Influenced by Ned's Auto Supply Company			
(a) Sales Promotion	.016	—	.016
(b) Other	.084	—	.084
3. Semi-Direct Expense Items Not Incurred in Handling the Volume of Ned's Auto Supply Company	.017	—	.017
4. Selling Cost	.079	.005	.074
5. Dispensing Equipment Loaned	.092	.016	.076
6. Advertising Cost	.238	.025	.213
Total	.689	.160	.529

This marketing cost account was accompanied by an explanation of each item appearing thereon wherein the factual basis used, and the accounting methods employed, were fairly set forth (Resp. Exs. 31-B thru Q), and explained in greater detail and with commendable frankness in oral testimony (Direct 2446-2640; Cross, 3720-4254).

Respondent's claimed justification for granting the differential is pivoted upon its Exhibit 31-A, which was admitted in evidence by your examiner, as this is a pioneer case, to enable the Commission in the light of all related evidence to determine its evidentiary character.

449 Analysis of Items Making Up Respondent's Cost Account

Respondent's cost account (Resp. Ex. 31-A) is made up of six classified cost items—(1) "delivery cost" divided into (a) "salaries—drivers", (b) "equipment"; (2) "marketing expense items not influenced by Ned's Auto Supply Company", divided into (a) "sales promotion", (b) "other"; (3) "semi-direct expense items not incurred in handling the volume of Ned's Auto Supply Company"; (4) "selling cost"; (5) "dispensing equipment loaned"; (6) "advertising cost".

The correctness of the mathematical computations are not questioned, but the basis adopted for determining the difference in the cost of sale and delivery (a) to Ned's; and (b) to respondent's other tank-wagon customers, resulting from differing methods or quantities in which the gasoline was sold and delivered; and (c) the factors used and accounting methods employed, are challenged by counsel for the Commission, particularly with reference to items (1) "delivery costs"; (2) "marketing expense items not influenced by Ned's"; and (6) "advertising costs", consideration of which in the order named follows:

"1. Delivery Costs."

The differential claimed on this item is .049¢ per gallon (Resp. Ex. 31-A).

Basis used for determining costs of deliveries to Ned's and that used for determining costs of deliveries to respondent's other tank-wagon customers. Full tank-wagon loads, or dumps, was adopted and used as a basis for determining the costs of deliveries to Ned's (Com. Ex. 31-B). The average cost of making multiple dump deliveries to all of respondent's other tank-wagon customers was adopted and used for determining the costs of deliveries to them (Com. Ex. 31-B thru F). The two results obtained were then compared and the difference is the amount claimed.

Ned's was one of respondent's 358 tank-wagon reseller customers in the Detroit Metropolitan area, a part of whom (R. 4181, 5176, 4042, 5181, 5190) including Ned's

(R. 3108, 4019-20, 4048, 3780) took a part of all deliveries of gasoline in full tank-wagon loads. All were supplied from the same bulk plants and by the same equipment. No records of deliveries to any single station made during the period from September 1, 1936 to March 1, 1938 were in existence when Respondent's Exhibit (34-A) was prepared (R. 4621). The testimony with reference to the deliveries to Ned's and to respondent's other tank-wagon customers is here summarized:

450 Deliveries to Ned's. Respondent's claim that all deliveries to Ned's were in full tank-wagon loads stems from a verbal contract (R. 3108, 5072, 4019-20, 4048) which provided for full or partial tank-wagon loads, whichever was most convenient to respondent, the presumption that the terms of the contract were adhered to, supplemented by the testimony of respondent's economist that, based upon his knowledge gained from an analysis of the business, and information obtained from superintendents and drivers who made deliveries (R. 4042), all deliveries to Ned's were full dumps, except where a partial dump was made on a return trip rather than bring the gasoline back to the yard (R. 4019-20) but the witness frankly admitted that he did not know of his own knowledge or knowledge gained from records, either the number or percentage of full and partial dump deliveries made to Ned's during the year 1937 (R. 3817).

Deliveries to other tank-wagon reseller customers. The record fairly establishes that in 1937 full dumps to a part of the other 357 tank-wagon customers in the Detroit Metropolitan area were not uncommon. Most of the stations served had storage for more than 1500 gallons, particularly the stations leased to tenants by respondent, and the quantity delivered in a single load depended upon the amount of gasoline in the tanks when delivery was made (R. 5181-4, 1937-8, 2502). Those stations having sufficient tankage to take full dump deliveries (R. 4118-20) were urged by respondent to do so (R. 5176, 4042) and many of them did (R. 5181, 5190), it being the policy of respondent when orders for full tank-wagon dumps were received to deliver the amount in one load (R. 5182), certain of its trucks (tank-wagons) making only full, and others only multiple dump deliveries. The tank-wagon then in use ranged from 600 to 1500 gallon capacity (R. 4033) and the majority of the deliveries averaged between 700 and 800 gallons (R. 26-7), or more than the capacity of the smaller tank-wagon. Whether any of the other 357 customers took all or substantially all of the deliveries in full tank-wagon loads, and if so, how many, is not shown by the record, but that a substantial part of the deliveries made to a part of them were made in full dumps is fairly established.

Delivery costs based on survey made in 1940. There being no records available for the period, September 1, 1936, to March 1, 1938, from which any difference in cost of deliveries to Ned's and to respondent's other tank-wagon customers resulting from differing methods or quantities could be determined, and proceeding upon the assumption that all deliveries to Ned's were of full, and all other deliveries were of partial dump deliveries, respondent's economist used records of deliveries of
451 two trucks (tank-wagons) made in 1940 (Resp. Ex. 31-B; R. 2461), one making 94 full, and the other 200 multiple dump deliveries (R. 2455-6; Resp. Ex. 31-B thru F). In 1940, Ned's had ceased to be a tank-wagon customer, but it was testified that the type of full, and of multiple dump deliveries made in 1940 were typical of the deliveries of full dumps to Ned's and of multiple dumps to other tank-wagon customers in 1937 (R. 2461) and that all costs pertaining to investment, operation, maintenance, insurance and taxation, including depreciation of the two tank-wagons were substantially the same in 1937 and 1940 (R. 2456-72). From the record of the operation of the two trucks (tank-wagons) the per gallonage cost of salaried drivers and equipment used in making full, and multiple dump deliveries was computed (for procedure see R. 2464-72; Resp. Exs. 31-B thru F), and the conclusion reached that the delivery cost of salaried drivers and equipment in the Detroit Metropolitan area of making full load deliveries to Ned's was .049¢ per gallon less than the average cost of making multiple dump deliveries to other tank-wagon customers (Resp. Ex. 31-A).

Cost of full dump deliveries to Ned's and of like dumps to other retail customers, identical. There is no evidence establishing or tending to establish that it cost less to make a full dump delivery to any of Ned's stations than to make like delivery to the stations of any one of the other 357 customers. The method of delivery was identical. No reduction in price was offered or allowed any of the other 357 tank-wagon customers on full dump deliveries (R. 5184).

Costs of Sale.

All remaining costs are costs of sale.

"2. Marketing Expense Items Not Influenced by Ned's."

(a). Sales Promotion—Costs of Sale. The differential claimed on costs of sale is .016 and the justification for the item appears on Respondent's Exhibit 31-G. The item of sales promotion cost totaling $10,665.75 is taken from respondent's accounting form 189 for the entire "Detroit Division" (Resp. Ex. 32) and which it is claimed were not influenced by Ned's business. No part of this cost is charged to Ned's. All is charged to the remaining reseller stations in the entire Detroit Division on a gallonage 452 basis, and the average gallonage for all stations used as a basis for determining the cost of each station.

Respondent's reseller business in Detroit in 1937 was in charge of F. McK. Blough, at that time Assistant Manager-Reseller in the Detroit Division. Mr. Blough testified that the time spent by salesmen at reseller service stations (of which Ned's was one) in 1937 was spent largely on sales promotional work. Once a gasoline account was established but little or no time was thereafter consumed in soliciting further sales (R. 5140). While no sales promotional work, or work in connection with the sale of gasoline at the respective stations, was done at Ned's, the reason was that Ned's did not desire such service (R. 5145). If it had, this same service afforded other service stations would have been available to Ned's (R. 5148). Ned's was not the only reseller outlet supplied by respondent that did not avail itself of this service, there being others (R. 5145). The reason why Ned's did not receive this service was not because of any different method of sale or quantity of delivery, but because Ned's like other service stations, did not desire the sales promotional assistance provided by respondent (R. 5180).

(b) "Sales Promotion". "Other". Under this heading (Resp. Ex. 31-H) are listed certain other marketing expense items "of an overhead nature", and the differential claimed is .084¢ per gallon.

The first item of $4,550 was taken from respondent's regular accounting form 189, for the entire Detroit Division, item 1001 "Salaries—Supervision—others" (See Resp. Ex. 32). This account was made up chiefly of salaries of clerks and stenographers to the supervisory officials whose salaries were entered in respondent's regular accounting form 189, item 000. No part of this cost is charged to Ned's. The allocation of the salaries of these employees between customers and products followed the allocation of the salaries of the officials for whom they worked (Resp. Ex. 99, p. 19). These officials supervised sales to Ned's in 1937 as well as sales to other tank-wagon customers, all of such customers being served from the same bulk plants. These costs are general in their nature and cannot be charged directly to a particular channel of distribution (Resp. Ex. 99, p. 19). Witness Warmack, Commission's accountant, testified that this item of expense could not be segregated between customers (R. 5791).

453 The two largest remaining items (Resp. Ex. 31-H) are

Acct. 1215, Expense—Salaries—Others	$ 8,912.32
Acct. 1066, Miscellaneous Operating Expense	40,142.68

These two items totaling more than $49,000 are made up in large part of expenses incurred by respondent in connection with the operation of its leased service station properties (R. 3891, 5846). In 1940 more than two-thirds of respondent's miscellaneous operating expense in the Detroit field were leased service station expenses (Com. Ex. 119). The leased stations numbered 208 and the non-leased stations numbered 150, supra (Sec. IV-"e"). Most of this leased service station expense is recouped by respondent in the form of rentals collected from lessees. No effect is here given to these rentals in reducing the net costs in these accounts. The leased service station expense entering into these two accounts is not chargeable to the cost of selling gasoline to non-lessee stations. No attempt was made to separate the selling cost of leased and of non-leased stations. If these expenses are to be applied in reaching an average per gallon cost for all retail stations the leased service station expense, in the opinion of witness Warmack, Commission's accountant, should have been eliminated or reduced in proportion to the relation of total rentals to total expense of that nature (R. 5794-6; 5848).

"6. Advertising Cost."

The differential claimed under this item is .213¢ per gallon, or nearly one-half of the total differential of .529 per gallon claimed by respondent (Resp. Ex. 31-A). Respondent's justification for this item is set forth in its Exhibits 31-O-P.

With the exception of "point of sale advertising"—meaning advertising at the point of sale (service station) such as banners, games, globes and displays—which aggregated a small sum (the exact amount not being shown by the record), all advertising expense in the Detroit Division was charged against the service stations other than Ned's (Resp. Exs. 31-O-P).

The first item, totaling $4,550.06 (Resp. Ex. 31-O), was taken from respondent's accounting Form 189 for the entire Detroit District, supra (Sec. IV-"d") and represented agents' salaries, traveling expense, operation and maintenance of vehicles used and vehicle depreciation expense, all in connection with advertising. No part of this expense was charged to Ned's. The advertising manager's responsibility was the same for Ned's as for all the other service station outlets (R. 5018-21). He had charge of installation and maintenance of all point of sale
454 advertising at all Standard Oil outlets, including those
supplied by jobbers (R. 5019-20) and in the opinion of Mr. Warmack, Commission's accountant, some part of this expense should have been charged to Ned's (R. 5901-2).

All of the second item of $154,635.04 (Resp. Ex. 31-O—broken down in Com. Ex. 84-A, R. 4199-4200) with the exception of $2,920.89 and some part of $26,558.31 (not shown by the record) representing the cost of point of sale advertising, was charged to service stations other than Ned's in the Detroit Division (Resp. Exs. 31-O-P). The kind of advertising and cost of each, no part of the expense of which was charged to Ned's, consisted of newspaper advertising; $76,120.34; printed matter and direct mail, $18,937.87; motion pictures, $12,371.72; outdoor posters, $11,256.99; dealer trade papers and magazines, $6,468.72; and a substantial part of "miscellaneous items too small to show separate classifications", $26,558.31 (Com. Ex. 48-A), the purpose of which was to create consumer acceptance and increase the sale of gasoline at all Standard Oil stations (R. 4222, 4333, 4335). No dealers were mentioned by name in such advertising (R. 4219), and Ned's Company received the benefit thereof with all other retail stations selling respondent's gasoline.

Mr. Boatwright testified that the reasons why no part of the items—newspaper, $76,120.34 and outdoor posters—

were charged to Ned's were: (a) Ned's Company does its own newspaper advertising from which respondent's products receive a direct benefit, and while Ned's Company undoubtedly derived a benefit from respondent's advertising, respondent received a reciprocal benefit from Ned's emphasis of respondent's merchandise; (b) that a study of the allocation of respondent's advertising expenditures among the various fields indicated that respondent's expenditures in the Detroit area bears a lower relationship to potential expenditures than any other field; (c) that Ned's Company outlets are large and popular distributors of many other lines of merchandise calling for and resulting in a heavy traffic across their driveways and the presence of respondent's merchandise on those driveways results in a direct advertising benefit to both respondent's gasoline and motor oil in the Detroit area; (d) that respondent's advertising expenditures are to convince customers of the merits of respondent's products and services, that customers are associated with a company and brands, and an outlet cost of advertising allocation is practically impossible; (e) that to the best of his knowledge respondent had never, either by newspaper or billboards, advertised to acquire wholesale outlets; and that expenditures for 455 newspaper and outdoor advertising were not increased with the acquisition of Ned's account, nor would they be reduced with the loss of that account, and that the loss of the account would be more likely to result in an increase in expenditures than a decrease (R. 4550-5; Resp. Ex. 96-B-C).

Mr. Warmack, Commission's accountant, testified that there is no sound method by which such costs can be allocated between different service stations selling Standard Oil products except on the basis of gallonage (corroborated by Boatwright, supra (d)), which would afford no cost differential (R. 5906).

Mr. Boatwright further testified that if the Commission concluded it was necessary to charge a proportionate part of the newspaper and billboard advertising cost to Ned's on a per gallonage basis it would reduce the advertising cost differential shown in Respondent's Exhibit 31-A from .213 to .081 of a cent per gallon and reduce the total differential from .529¢ to .297¢ per gallon, substantially less than the .5¢ differential accorded Ned's (R. 4550-5; Resp. Ex. 96-A-C-D). If the entire item of $154,635.04, except such part as related to point of sale advertising, were distributed on a per gallonage basis between Ned's and the other reseller outlets, the claimed advertising cost differential would be reduced to a negligible amount.

Conclusions of Fact:

1. Respondent's claim that there was a difference of .529¢ per gallon, or of .5¢ per gallon—the differential allowed—in the cost of sale and delivery of gasoline to Ned's Auto Supply Company and to respondent's other tank-wagon customers in the Detroit Metropolitan area in Michigan, resulting from differing methods or quantities in which the gasoline was sold and delivered, lacks evidentiary support.

2. The basis adopted and used for determining the costs of sale and delivery in the Detroit Metropolitan area, to Ned's Auto Supply Company—all full dump deliveries—and that adopted and used for determining costs of sale and delivery to respondent's other tank-wagon customers—all partial dump deliveries—had no factual foundation, and the comparison of the results neither establishes nor tends to establish any differential in the cost of sale and delivery of gasoline to Ned's Auto Supply Company and to respondent's other tank-wagon customers in that area.

456 3. The evidence conclusively establishes that a part of respondent's tank-wagon customers took a part of the gasoline delivered to them in full loads or dumps. There is no evidence of any difference in cost of sale or delivery in full tank-wagon loads to them and of sale and delivery in full tank-wagon loads to Ned's, resulting from differing methods or quantities in which the gasoline was sold and delivered. The methods of sale and quantities delivered were identical.

Conclusion of Law.

The differential of .5¢ per gallon respondent allowed Ned's Auto Supply Company from September 1, 1936, to March 1, 1938, on sales and deliveries of gasoline by tank-wagon, under the prices it charged its other tank-wagon customers, did not represent the true difference, if any difference in fact existed, in cost of sale and delivery resulting from differing methods or quantities in which the gasoline was sold and delivered to Ned's Auto Supply Company and to respondent's other tank-wagon customers in the Detroit Metropolitan area in Michigan.

The answer to the second question is "No".

VII.

Third Question.

Did the differentials of 1¢ per gallon on Stanolind, 1.5¢ on Red Crown and 1.75¢ on Solite with Ethyl gasolines accorded the four dealers recognized by respondent as jobbers, or tank-car or transport truck customers, under respondent's posted tank-wagon prices charged its retail reseller customers for gasoline of like grade and quality, make only due allowance for differences in cost of sale and delivery resulting from differing methods or quantities in which the gasoline was sold and delivered to respondent's jobber or tank-car customers and to its retail reseller, or tank-wagon customers, in the Detroit Metropolitan area in Michigan?

Differential of 1.75¢ per gallon on Ethyl gasoline admittedly not justified. The per galloinage cost of sale and delivery of respondent's three brands of gasoline—Red Crown, Solite with Ethyl and Stanolind—is the same, supra (Sec. IV-"i"). The per gallonage marketing cost differential claimed by respondent is 1.51¢ (Resp. Ex. 457 101). No attempt was made to justify the differential of 1.75¢ per gallon allowed each of the four dealers on Solite with Ethyl gasoline, supra (Sec. IV-"h") on the ground that it represented the difference in the cost of sale and delivery of this brand to its retail reseller, and to its jobber customers. Of the total volume of gasoline marketed by respondent in the Detroit Metropolitan area in Michigan only approximately 7 per cent is Solite with Ethyl gasoline, supra (Sec. IV-"b").

Differential allowed on Stanolind gasoline. There is no evidence specifically relating to the cost of marketing Stanolind gasoline. It is conceded by counsel that the per gallonage cost of sale and delivery of each of the three kinds or brands of gasoline was the same, supra (Sec. IV-"j"). Stanolind gasoline represented only 3 per cent of respondent's total volume of gasoline sold in Michigan, supra

(Sec. IV-"b"). If a difference in cost of sale and delivery of as much as 1¢ per gallon is established the differential granted on Stanolind was lawful.

The related evidence:

Respondent made no attempt to ascertain and determine cost differentials until nearly four years after the approval of the Robinson-Patman Act. It was not until four years after the effective date of the Robinson-Patman Amendment to the Clayton Act that respondent made any effort to determine the jobber cost differential. Its first move in that direction was in 1940 (R. 2662) (shortly before the complaint issued in this proceeding) when respondent caused a survey to be made to determine the "profitability of jobber operations". The survey was made in 1940, was based on respondent's records for the year 1939, was confined largely to the Oklahoma part of its Kansas-Oklahoma Division (Resp. Ex. 33-C)—the only field in which respondent's operations were exclusively by tank car or transport truck (R. 4359)—was made for respondent's information and had no relation to any pending or threatened litigation (R. 2669). The factual basis for, and accounting methods employed in this survey are set forth in Respondent's Exhibits 31-C-D-E, and the per gallonage cost of sale and delivery of gasoline by tank car or transport truck to the Kansas-Oklahoma jobbers as therein computed was ¼ of a cent.

Survey made to determine sale and delivery cost by tank-wagon. Early in 1941, and after the complaint in this proceeding issued, respondent made a cost accounting study to determine the per gallonage cost of sale and delivery of gasoline by tank-wagon in the entire Detroit Division, for the years 1939 and 1940, the result of which is set forth in Respondent's Exhibit 33-A, and the conclusion reached that the per gallonage cost by tank-wagon delivery for the year 1939 was 1.81¢, and for the year 1940 was 1.72¢ (Resp. Exs. 31-A-B).

458 Results of surveys used for comparison. The .25¢ per gallon, determined to be the cost of sale and delivery of gasoline by tank-car in the Kansas-Oklahoma Division, and the 1.81¢ and 1.72¢ per gallon determined to be the cost of sale and delivery by tank-wagon in the entire Detroit Division, supra (Sec. IV-"d") for the years 1939 and 1940, were adopted as establishing the cost of sale and

delivery of gasoline to the four dealers by tank-car and to respondent's retail tank-wagon customers in the Detroit Metropolitan area, the results compared and a differential of 1.47¢ for 1940 and 1.56¢ for 1939, claimed to have been established in the cost of sale and delivery to the four dealers by tank-car and to respondent's retail customers by tank-wagon in the Detroit Metropolitan area (Resp. Exs. 33-A thru E).

The correctness of the mathematical computations (Resp. Exs. 33-A thru E) is not questioned, but the basis adopted, factors used and accounting methods employed for determining the cost of sale and delivery to (a) the four dealers, and (b) to respondent's retail tank-wagon customers, are challenged.

Factual basis used for surveys. For the purpose of determining per gallonage tank-wagon delivery costs for the Detroit Metropolitan area, the tank-wagon marketing cost records of the respondent company kept in the regular course of its business on its Form 189 for the entire Detroit Division were used (Resp. Ex. 33-B), the average cost of sale and delivery to all retail tank-wagon customers in the entire Detroit Division computed, and the result adopted as establishing the average gallonage cost of sale and delivery to those stations in the Detroit Metropolitan area. Only a small part of the territory in the Detroit Division is embraced in the Detroit Metropolitan area, the remainder being rural supra (Sec. IV-"d"). In populous areas (such as the Detroit Metropolitan area) the cost of marketing gasoline is usually less on a per gallonage basis than in rural sections (R. 1516). Rural territory is generally a contributing factor to high cost of sales but there are exceptions (Boatwright, R. 5657; Com. Ex. 123).

For the purpose of determining the per gallonage tank-car delivery cost for the Detroit Metropolitan area the results shown by the Kansas-Oklahoma survey were used. This survey was limited to jobbers operating in the Oklahoma portion of the field (Resp. Ex. 33-C) and the factual basis used and results arrived at were as follows:

Accounting costs (first item) were computed from estimates made by department heads of time spent with various jobbers in Oklahoma by officials and employees of
459 respondent, reduced to a gallonage basis (Resp. Ex. 33-C); the accounting cost of two of the jobbers—Gibson Oil Company and Kramer Oil Company (R. 4410-11,

4439)—whose business was unprofitable (R. 4388-9) but who handled nearly one-half the gallonage sold by respondent in the Oklahoma field (R. 4428-30) was eliminated and the gallonage of the remaining jobbers—2,166,168 gallons—used for determining the gallonage cost which was computed as .10¢ (Resp. Ex. 33-C):

Credit costs (second item) were computed in the same manner and the per gallonage cost for this item computed as .03¢ (Resp. Ex. 33-C).

Supervising and selling costs (third item) were computed in the same manner except that the total gallonage—4,206,686 gallons—which included the gallonage of the Gibson and Kramer Companies, was used for determining the per gallonage cost which for this item, was computed as .06¢ (Resp. Ex. 33-D; R. 4429-30).

General office expense (fourth item) was determined by taking the estimated cost in dollars and cents, as shown by respondent's records, for the first six months of the year 1939, and doubling that cost so as to get an approximate cost for the full year and then determining the per gallonage cost based on the total gallonage—4,206,686 gallons—for the Oklahoma field, which for this item was computed as .01¢.

Point of sale advertising (fifth item) was determined by taking the cost of signs, jewel globes, maps, etc., supplied the Oklahoma stations, including Gibson and Kramer, and determining the per gallonage cost therefrom, using the total gallonage—4,206,686—sold in Oklahoma as the basis therefor, which, for this item was computed as .05¢ (Resp. Ex. 33-E).

The total of the five items is .25¢ per gallon (Com. Ex. 33-A), the amount claimed by respondent as the cost of marketing gasoline by tank car in Oklahoma.

The total gallonage used in determining a part of the costs in this survey—2,166,168 (Resp. Ex. 33-C) was slightly more than 2/5 of the gallonage sold Citrin-Kolb and slightly more than one-half of the gallonage sold Ned's Auto Supply Company (two of the Detroit dealers) the same year, and the gallonage delivered to at least one during the entire year was only 5,108 gallons (Resp. Ex. 54).

460 Costs of sale and delivery incurred by Citrin-Kolb Company. As tending to support its claim that the cost of sale and delivery by tank wagon in the Detroit Metropolitan area was 1.5¢ per gallon, respondent introduced

evidence designed to show the cost of sale and delivery by the Citrin-Kolb Company, one of the four dealers. This consisted of the testimony of Max Biber which will be found in the record at pages 1330-78, 3034-66 and Respondent's Exhibits 7 thru 17. This witness was not an expert accountant, but an attorney at law, and General Manager for the Citrin-Kolb Company (R. 294) and as such he supervised the keeping of the records of that company. His testimony is in substance that from his computation the approximate cost was 1.5¢ per gallon (R. 1357). This computation (Resp. Exs. 7 thru 17) contains many items of expense relating solely to the service stations owned and operated by the company (R. 2977-3022, 3035-6; for service stations so operated see, supra Sec. IV-"f"). The record conclusively shows that this company, during 1938, 1939 and 1940, annually sold more than a million gallons of gasoline purchased from respondent at .5¢ per gallon above the purchase price, making delivery by tank-wagon to five retail stations owned and operated by Langer and Cohen (R. 3218-19, 1387) and made "money" (R. 3218-19).

No factual basis established by the evidence for Respondent's Exhibits 33-A thru E. The record contains no factual evidence based upon any cost study or investigation that the costs of sale and delivery of gasoline by tank-car in the Kansas-Oklahoma field were the same or substantially the same as, or have any relation to, the costs of sale and delivery of gasoline by tank-car in the Detroit Metropolitan area in Michigan.

The testimony relating to Respondent's Exhibits 33-A thru E is extensive and will be found in the record, Direct pp. 2461-80, Cross pp. 3212-4490, Redirect pp. 4557-4617, Recross 4617-75. Your ~~Examiner~~ has only called attention to what he considers inherent defects in the comparative basis adopted and used for this cost study and rendering it of no evidentiary value. To review them at length would unduly extend this report, and reference is here made, for additional reasons, to the motion of counsel for the Commission to strike the exhibits appearing in the record of pages 2676-83.

These exhibits were admitted in evidence subject to motion to strike (R. 2640-1). Thereafter counsel for the
Commission twice moved to strike them stating with
461 particularity the underlying reasons therefor (R. 2676-
83, 8051-4), which motions were denied by the Ex-

aminer who, realizing that this is a pioneer case, and that the exhibits represented respondent's only evidence in support of the claimed differential, believed the Commission should be afforded opportunity to pass upon the question with the complete record before it (R. 4685).

Upon denial of the motion to strike, counsel for the Commission gave notice, in view of a previous statement of respondent's counsel, that respondent would rely upon its Exhibits 33 A thru E as justification for the differential granted the four dealers, he (counsel for the Commission) intended to take the position before the Commission, and before the Courts, if necessary, that respondent had not sustained its burden of proof (R. 4685-6). Counsel for respondent thereupon requested opportunity to determine whether to rest respondent's case, and after consideration decided to have a detailed cost survey made and requested time in which to make the study. The request was granted and on June 27, 1941, the hearings were arrested to afford respondent opportunity to make the survey (R. 4701).

Preliminary to commencing work on the survey, Mr. Boatwright, respondent's economist, conferred with counsel for the Commission and with the Commission's Chief Accountant and his assistant, Mr. Warmack, and it was agreed that the year 1940 should be used for the purpose of the survey (R. 4714-15).

Respondent's Exhibits 99, 100, 101.

Hearings were reconvened November 17, 1941, (R. 4702) and the results of the survey made by, or under the direction of respondent's economist, were portrayed in a document entitled "Comparative Statement of Expense—Detroit Field—Year 1940" which was, after explanation, offered, marked Respondent's Exhibit 101, and admitted in evidence (R. 4731). Two other documents, one entitled "Explanation of Allocation of Marketing Expense to Channels Shown on Comparative Statement of Expense Form 189" (containing 33 pages), and the other entitled "Standard Oil Company (Indiana) Analysis of Distribution Costs Detroit, Michigan—Sales Division" (containing 133 pages) were, after explanation, offered and received in evidence as Respondent's Exhibits 99 (R. 4767) and 100 (R. 4849). Thereafter on motion of counsel for the Commission (R. 5703) that portion of Respondent's Exhibit 100, commenc-

ing on page 34 with the paragraph beginning with the words: "The Respondent's supplying Company", all the remainder of page 34, all of page 35, all of page 36, and all of page 37 down to and including the first paragraph thereof, was stricken. Exhibits 99 and 100 are explanatory of
the factual basis used and accounting methods em-
462 ployed in determining items of cost appearing in Ex-
hibit 101, and which items were further explained in detail, and with commendable frankness by Mr. Boatwright in oral testimony (R. 4714-85, 4848-5113, 5434-5661).

Thorough investigation made by Mr. Warmack, Commission's accountant. Prior to the cross-examination of respondent's economist and before offering rebuttal evidence, Mr. Warmack, Commission's accountant, made a thorough examination and study of Respondent's Exhibits 99, 100 and 101 (R. 5766) and went to Detroit and Chicago where he examined and studied respondent's records and data used as a basis for the survey, the factors used and the methods employed in the separation of costs as set forth in Respondent's Exhibit 100, and reviewed all evidence relating thereto appearing in the record (R. 5767).

Basis of Survey and Factors Used are Challenged.

The differential shown in Respondent's Exhibit 101 and that claimed is 1.51¢ per gallon. The correctness of the mathematical computations made are not questioned, but, as in the cost accounts hereinbefore referred to, the basis adopted for computing the sale and delivery cost (a) to the four dealers by tank-car; (b) to respondent's retail customers by tank-wagon; and (c) the factors used and accounting methods employed, are challenged.

Basis used for survey. Respondent's cost survey is not restricted to the costs of sale and delivery of gasoline to respondent's customers in the Detroit Metropolitan area, but embraces the entire Detroit Division (Resp. Ex. 101), which includes not only the Detroit Metropolitan area, but a large rural territory, supra (Sec. IV-"d"). No factual cost study or investigation to determine the relation of sale and delivery costs in the entire Detroit Division to those in the restricted Detroit Metropolitan area was made (R. 5958-60). The uncontradicted record evidence is that the rural section of the Detroit Division is served by respondent through 178 small bulk plants operated by commission agents (R. 3726-7) and known as "B Stations", as distinguished from the large bulk plants used to serve the Metropolitan area operated by salaried employees, and known as "A Stations" (R. 3739, 3798). The average territory of a reseller salesman operating in areas served by B stations is roughly 1600 square miles (R. 5133). Much of the time of the B Station commission agent is spent in calling on farmers and other customers (R. 3739; 3798).

The normal capacity of B Station trucks is 300 to 500
463 gallons (R. 1793), as compared with 600 to 1500 (us-
ually 1500) gallon trucks, used in the Metropolitan area. In the Detroit Metropolitan area the salesman calls on approximately the same number of outlets in a much smaller area (R. 5133), and deliveries consume less time and expense. Rural territory is generally a contributing factor to higher cost of sale but there are exceptions (R. 5657; Com. Ex. 123). In populous areas, the cost of marketing is usually less on a per gallonage basis (R. 1516). The lowest cost per gallon in the 27 territorial divisions in which respondent operates is in the Chicago and Detroit fields (Com. Ex. 123) which embrace the largest metropolitan areas.

Analysis of respondent's cost study. If respondent's cost study affords any evidentiary basis for determining costs of sale and delivery in the Detroit Metropolitan area, then the only questions for decision are whether the costs charged to the tank-wagon reseller and to the jobber, naphtha and gasoline channels, respectively, as depicted on Respondent's Exhibit 101, fairly reflect the cost properly allocable to each of those two channels.

Respondent's marketing costs for the year 1940 for the Detroit Division as shown on Commission's Exhibit 119 were used as a basis for the survey. The sale and delivery costs of marketing all petroleum products in the Detroit Division are included therein (except the costs of maintaining the River Rouge terminal and the transportation of the gasoline by tank-car from the River Rouge terminal to respondent's bulk plants and to the bulk plants of the four dealers), and distributed through five channels under the following headings: (1) Tank-wagon Reseller, (2) Tank-wagon Consumer, (3) Income and Expense—leased Service Stations, (4) Other Method, and (5) Automobile Supplies. No account was kept of the cost of marketing any single product (Resp. Ex. 100, p. 3).

The general marketing expense for 1940, and shown on Commission's Exhibit 119, is not questioned—only the allocation to the tank-wagon reseller and to the jobber channels is questioned.

To isolate from the various channels all costs of sale and delivery properly chargeable to marketing naphtha and gasoline to (1) the tank-wagon reseller, and (2) the jobber trade, and thereby establish basic costs for each to be used for comparison was the purpose of the survey.
464 The methods by which this was accomplished are set forth in Respondent's Exhibit 100, and the results portrayed on Respondent's Exhibit 101.

The accounting form on which is portrayed the total petroleum marketing cost for the Detroit Division (Com. Ex. 119) distributes the cost of marketing between three channels—"Tank-wagon Reseller", "Tank-wagon Consumer" and "Other Method". The "Other Method" includes sales of gasoline to jobbers, sales of other products to jobbers and expenses incident to direct shipments from respondent's supply terminals to customers buying in carload quantities (Resp. Ex. 100, p. 3). It became desirable in the cost study to segregate from the "Other Method" channel (Com. Ex. 119) all expenses therein chargeable to direct shipment customers, and then segregate therefrom all expenses chargeable to the sale and delivery of gasoline to the four jobbers. To effectuate this, three additiona' channels were added to Respondent's Exhibit 101 under the general heading "Direct Shipment Customers" and broken down into three channels headed respectively, "Jobbers Naphtha and Gasoline", "Jobbers Other Products" and "Other Customers", showing the computed naphtha and gasoline sale and delivery cost of each.

The result of the cost accounting was to increase the total cost of sale and delivery of 69,301,586 gallons of naphtha and gasoline to the tank-wagon reseller customers from $1,145,399.13 as shown in its regular account on Form 189 (Com. Ex. 119) to $1,155,379.06, or an increase of $9,989.93 (Compare Com. Ex. 119 with Resp. Ex. 101), and to determine the cost of sale and delivery of 15,296,828 gallons of naphtha and gasoline to the four jobbers as $24,389.05 (Resp. Ex. 101). These costs reduced to a gallonage basis are computed respectively as 1.67¢ per gallon to the tank-wagon reseller customers and .16¢ per gallon to its jobber customers, resulting in a claimed differential of 1.51¢ per gallon (Resp. Ex. 101).

Items in cost account not disputed and those disputed. Without conceding the proper allocation and accuracy of 44 of the items listed on Respondent's Exhibit 101, but for the purposes of this proceeding only, counsel for the Commission makes no objection to the expense allocation of 44 of the 118 items enumerated on Respondent's Exhibit 101 (R. 4460-78, Com. Ex. 133). The items thus conceded bear the following account numbers on Respondent's Exhibit 101:

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The allocation of the expense of the remaining 74 items listed on Respondent's Exhibit 101 are challenged on the following grounds: (a) incorrect and improper factors used or accounting methods employed; (b) insufficiency of investigation to justify the conclusions reached; and (c) no investigation (R. 5958-6494, 6674-6844). The related evidence which is voluminous is confined almost entirely to the testimony of respondent's economist, Dr. Boatwright, and to the Commission's accountant, Mr. Warmack, and will be found in the record: Boatwright, Direct 4714-85, Cross 4848-5113, 5434-5661, Redirect 5376-97, 5661-2, Recross 5388-97; Warmack, Direct 5671-89, 5923-6493, Cross 5690-1, 6500, 6995, Redirect 7697-7808.

To review the record evidence relating to each of the 74 items would unnecessarily encumber this report, and only the more important items will be hereinafter considered.

Cost of transporting gasoline from River Rouge terminal to bulk plants of the four dealers omitted while identical costs are charged to the tank-wagon trade. The cost of delivering gasoline commences at the River Rouge terminal. The cost of maintaining the River Rouge terminal is defrayed by respondent's Manufacturing Department, supra (Sec. V, R. 4283), no part of which appears in Respondent's Exhibit 101. The transportation of the

gasoline from the River Rouge terminal to the bulk plants of the four dealers is by common carrier, supra, (Sec. V), no part of which appears in Respondent's Exhibit 101. Prior to January 1941 substantially all deliveries to the bulk plants of the four dealers was by tank-car (R. 4311-12) for which respondent paid a local shipping charge to the railroads. The capacity of the average tank car was 10,000 gallons. The charge per car on these shipments as shown on freight bills for separate shipments in 1939 to Ned's Auto Supply Company was $24.20; to Citrin-Kolb Oil Company, $26.40; to Stikeman Oil Company, $17.60; to Wayne Oil Company, $24.20 per car, which resulted in a cost of
delivery to Ned's of approximately .242¢, to Citrin-
466 Kolb of approximately .264¢, to Wayne Oil Company
of approximately .242¢, and to the Stikeman Oil Company of approximately .176¢ per gallon (Com. Ex. 122). This cost was paid by respondent (R. 4312) but no part was included in computing the cost of marketing gasoline to the four jobbers (Resp. Ex. 101). Subsequent to January 1941, delivery to the four jobbers was by transport truck, the cost of which was paid by respondent (R. 4311-12) and was approximately .155¢ per gallon (Com. Ex. 93), no part of which was included in computing the costs of marketing gasoline to the four jobbers (Resp. Ex. 101).

The transportation of naphtha and gasoline to respondent's tank-wagon reseller customers was by tank-wagons owned and operated by it, supra (Sec. V), and all items of cost, except the cost of transporting gasoline from the River Rouge terminal to the six bulk plants in the Detroit area, were paid by the Detroit office and are included in the costs of marketing gasoline on Form 189 for the Detroit Division, supra (Sec. V). Prior to July 7, 1941, approximately 10 to 15 per cent (R. 5719) and thereafter approximately 35 to 40 per cent (R. 5720) of the gasoline served the tank-wagon trade was delivered direct from the River Rouge terminal by tank wagon to the Service Stations, supra (Sec. V). The 85 to 90 per cent delivered prior to 1941 and the 60 to 65 per cent thereafter delivered was from respondent's bulk plants in the Detroit Metropolitan area. In Respondent's Exhibit 101 the tank-wagon trade is charged with all costs of delivery from both the six bulk plants and from the River Rouge terminal to the Service Stations. In 1942 three of the six bulk plants theretofore maintained by respondent in the Detroit area were dismantled (R. 7131).

Income and Expense—Leased Service Stations. The third column on Commission's Exhibit 119 is entitled "Income and Expense—Leased Service Stations", which reflects all expenses incurred by respondent in connection with the maintenance and leasing of approximately 208 service stations it owns and leases, or leases and sublets, supra (Sec. IV-"e"), and all revenue received therefrom (R. 4327-9). This column is omitted from Respondent's Exhibit 101. (Compare Exhibits) In 1940, the charges to this column exceeded credits by $48,506.44 (Com. Ex. 119; R. 4329) In the allocation of this expense, respondent's economist charged all of the $48,049.10 to the sale and delivery of naphtha and gasoline to all of the 358 stations served by respondent, supra (Sec. IV-"e") and the small remainder to the "Other Method" column. (Compare Item 060A on Com. Ex. 119 and Resp. Ex. 101, and see Resp. Ex. 99, p. 12.) Of the total gallonage sold to 467 the respondent's tank-wagon reseller customers a substantial part was sold to the 150 non-leased and independently owned service stations, supra (Sec. IV-"e") for which they were charged their proportionate share of this cost (R. 600-3).

In the opinion of witness Warmack, Commission's accountant, no part of this cost should have been charged to the cost of marketing naphtha and gasoline to the 150 non-leased and privately owned stations (R. 5996, 6003, 6782, 6787)

Cost of Marketing Kerosene and Tractor Fuels Charged in Tank-wagon Reseller Channel. Costs of marketing kerosene and tractor fuels sold to the tank-wagon trade were included in the cost of marketing naphtha and gasoline to the tank-wagon reseller customers (R. 257), and appear in the tank-wagon reseller column in the cost account (Resp. Ex. 101). These costs, concededly improperly charged to the tank-wagon reseller channel, amount to about 1 per cent of the total volume shown in that channel (R. 4257).

Different methods of computing tank-wagon reseller and jobber costs. Respondent's direct shipment business in the Detroit Division in 1940 amounted to approximately 46,000,000 out of a total of approximately 152,000,000 gallons for all petroleum products (R. 4314). In its regular accounting procedure respondent does not recognize direct shipment gallonage and where expenses are allocated between classes of customers or products on a gallonage basis, direct shipment gallonage is not included in the gallonage used for that purpose (R. 7998-9, 4306). In its cost study the expenses of marketing to jobbers were not determined by the use of a gallonage method of allocation, but all direct shipment costs, including the costs to jobbers, were determined on the basis of effort of employees devoted to that class of business (R. 8001-02). The allocation on the basis of effort was not carried through to the tank-wagon reseller column except in accounts where the allocation is made on the basis of effort in respondent's regular accounting procedure (R. 5949). As a result in many accounts appearing on Respondent's Exhibit 101 expense charged is allocated between the three tank-wagon channels on a per gallonage basis, and between the three direct shipment channels on an effort basis. This is true of the following accounts:

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(R. 6024, 6185-6, 6676, 6690, 6718, 6771, 6794, 6801, 6805, 6819, 6822, 6825-7, 6829-34, 6836, 6840).

Before adopting the gallonage factor in the allocation of costs among the three bulk plant channels shown on Respondent's Exhibit 101, respondent's economist made no study "tending to verify or substantiate the use of the gallonage factor in the allocation of costs among the three sales channels" (Boatwright, R. 8005), and theretofore no study or tests had been made to support the use of the gallonage factor with a view to comparing the cost of sale and delivery of naphtha and gasoline to respondent's tank-wagon reseller and its jobber customers (Boatwright, R. 8006).

Witness Warmack, Commission's accountant, testified that he was told by respondent's accountant that no study had been made to support the gallonage method of allocation or the accuracy of the figures obtained by using this method. He spent six weeks in Detroit reviewing the factual basis for Respondent's Exhibits 100 and 101, and while there he requested that he be furnished any information which would support the use of gallonage used in respondent's cost study as a measuring factor, and was told that respondent had no such information (R. 4934, 5941).

A comparison of the total gallonage figures on Respondent's Exhibit 101 with the salary figures on Commission's Exhibit 116 discloses that the percentage of effort of respondent's employees devoted to tank-wagon reseller business is not nearly as large as the percentage of total gallonage accounted for by that branch of the business (Compare Resp. Ex. 101 and Com. Ex. 116). If the gallonage factor had been used in determining respondent's costs of sale and delivery of naphtha and gasoline to its tank-wagon reseller and its jobber customers, there would have been no differential (Boatwright, R. 8003).

Advertising—Other Costs. The largest single item of expense appearing on Respondent's Exhibit 101 is the expense listed opposite Account 075,—"Advertising—Other Costs", in the amount of $211,374.32. Of this amount $3,322.17 is charged to the Direct Shipment channels of which $3,275.24 is charged to the jobber channel, and the balance of $208,052.15 is distributed among the three company bulk plant channels. The $3,275.24 charged to
469 the jobber channel represents point of sale advertising at the four jobber stations and is concededly properly charged to the jobber channel. The balance of the $208,052.15, with the exception of $43.93 charged to the Other Products Direct Shipment channel, is distributed among the three bulk plant channels as follows: $126,225.04 to the Tank-Wagon Reseller channel; $57,949.09 to the Consumer channel and $12,331.58 to the Other Method channel (Resp. Ex. 101).

An explanation of the allocation of advertising costs to the different channels is set out in Respondent's Exhibit 100, pp. 24-38. The major portion of the expense in this account was commonly known as Consumer Advertising; such as newspapers and billboard advertising (See Com. Ex. 84, listing advertising expense for 1937; R. 6221-2). Counsel for the Commission requested an itemization of the expense entered in this account for 1940 (Com. Ex. 104-C) but the request was overlooked and not complied with. The advertising charges were mainly for newspaper and billboard advertising (Com. Ex. 121 A-G) and did not contain the name of any service station, the products therein advertised being sold at all Standard Oil stations including those operated by the jobbers and those supplied by the jobbers.

Witness Warmack, Commission's accountant, testified ~~that~~ consumer advertising costs cannot properly be separated between gasoline sold through jobber supplied and jobber operated retail stations and gasoline sold through other retail stations supplied by respondent except on a gallonage basis, which, if used, would afford no cost differential (R. 6221-2, 6810).

Annuities and Retirement Plan Expense. Account No. 540 on Respondent's Exhibit 101, headed "Annuities and Retirement Plan Expense" for the year 1940 is in the sum of $157,014.35, of which $52,651.27 is charged to tank-wagon reseller business and $533.67 to jobber gasoline business.

Of the total, $157,014.27, the sum of $26,226.38 represents contributions made by respondent to match contributions made by employees to the Retirement Plan (R. 6379) described in Commission's Exhibit 108; $108,508.83 represents the portion of respondent's contribution to a trust fund for the retirement of employees, covering services of such employees prior to July 1, 1939 (R. 6380), also described in Commission's Exhibit 108; the remaining portion, $22,279.06, represents annuities paid by respondent to employees who had retired prior to January 1, 1939 (R. 6380). Mr. Warmack, Commission's accountant, testified that the item of $26,226.38 should be considered as additional compensation to the employees and treated as a current
470 marketing expense of the company during the year
1940 (R. 6380); and Witness Warmack (R. 6380-88), Lundvall, Commission's Chief Accountant (R. 7815-18) and Depue, Commission's Supervisor of Investigations (R. 7869-70) testified that the item of $108,508.83 assigned to the Detroit field as a portion of the trust fund contributed by the company for the retirement of employees in the Detroit field to cover services of such employees prior to January 1, 1939, was not a current marketing expense; and that the item of $22,279.06, representing annuities paid to retired employees in the Detroit field for the year 1940, was not in the nature of a marketing expense.

Conclusions of Fact:

1. The average costs of sale and delivery of gasoline by tank-wagon to respondent's retail reseller customers in the entire Detroit Division, as depicted in Respondent's Exhibit 33-A, of 1.72¢ per gallon, for the year 1940, and 1.81¢ per gallon for the year 1939, are not shown by the evidence to have been the average costs of sale and delivery by tank wagon to respondent's retail reseller customers in the Detroit Metropolitan area in Michigan in either year, 1939 or 1940. The costs of sale and delivery of gasoline by tank car to respondent's jobber customers in the Kansas-Oklahoma field, as depicted in Respondent's Exhibit 33-A of .25¢ per gallon for either the years 1939 or 1940, are not shown by the evidence to have been the average costs of sale and delivery by tank-car to the four dealers or jobbers in the Detroit Metropolitan area in Michigan in either the year 1939, or 1940.

2. The average costs of sale and delivery of gasoline by tank-wagon to respondent's retail reseller customers in the Detroit Division in Michigan in the year 1940 as depicted in Respondent's Exhibit 101 of 1.67¢ per gallon are not shown by the evidence to have been the average costs of sale and delivery by tank-wagon to respondent's retail reseller customers in the Detroit Metropolitan area in Michigan in 1940.

3. The record affirmatively shows that certain items of cost (specifically hereinbefore referred to in the review of "The Evidence") appearing in Respondent's Exhibit 101, are charged in their entirety to the tank wagon reseller channel, whereas a part thereof (specifically hereinbefore referred to in the review of "The Evidence") should have been charged to the tank-car, or jobber channel, with the result that costs in the tank-wagon reseller channel are over-weighted and those in the tank-car, or jobber channel are under-weighted; further that items of cost properly chargeable to the costs of sale and delivery to the jobbers (specifically hereinbefore referred to in the review of "The Evidence") were omitted, and that correction of the account in the items referred to would reduce the differential to less than 1¢ per gallon.

471 Conclusions of Law:

1. The difference in the average costs of sale and delivery of gasoline by tank-wagon to respondent's retail reseller customers in the Detroit Division, and the averag costs of sale and delivery of gasoline by tank-car to respondent's jobber customers in the Kansas-Oklahoma fiel as depicted in Respondent's Exhibit 33-A, did not represent the difference in costs of sale and delivery to the tw classes of customers in the Detroit Metropolitan area i Michigan, and provided no factual basis for determinin such costs.

2. The average costs of sale and delivery of gasoline b tank-wagon to respondent's tank-wagon reseller customer in the Detroit Division, as depicted in Respondent's Exhibi 101, provided no factual basis for determining the averag of like costs in the Detroit Metropolitan area in Michigan

3. The over-weighting of the sale and delivery costs i the tank-wagon reseller channel, and the under-weightin of the costs in the tank-car or jobber channel, in Respondent's Exhibit 101, and the omission of items of cost properly chargeable to the costs of sale and delivery to the fou dealers of jobbers, precludes the use of the per gallonag costs therein shown for each cost channel as a basis fo determining the per gallonage difference in costs of sal and delivery through the two channels shown in Respondent's Exhibit 101, and claimed by respondent.

4. Respondent has failed to establish its claim that th differentials it granted Ned's Auto Supply Company, sinc March 7, 1938, and the Wayne Oil Company, Citrin-Koll Oil Company and Stikeman Oil Company, since June 19 1936, of 1.¢ per gallon on Stanolind, 1.5¢ per gallon on Re Crown, and 1.75¢ per gallon on Solite with Ethyl gasolines under the prices respondent charged its tank-wagon reselle customers in the Detroit Metropolitan area in Michiga for gasolines of like grade and quality, were not in exces of the true differences in the costs of sale and delivery o the three brands of gasoline resulting from differing methods or quantities in which the gasolines were sold and delivered to respondent's jobber (four dealer) or tank-car customers, and to its tank-wagon retail reseller customers i said area.

5. The answer to the third question is "No".

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VIII.

Fourth Question.

Was the *5c* per gallon differential respondent granted Ned's Auto Supply Company from September 1, 1936, to March 1, 1938, on tank-wagon deliveries under the prices it charged its other reseller tank-wagon customers in the Detroit Metropolitan area in Michigan for gasoline of like grade and quality granted in good faith to meet an equally low price of a competitor? If so, did it constitute pri[illegible] discrimination, the effect of which was, is, or may be, substantially to lessen competition, or tend to injure, destroy, or prevent competition between Ned's Auto Supply Company's retail gasoline service stations and those operated by customers of respondent?

This question requires two separate findings, the first part being here considered.

The related evidence:

The business in which Ned's Auto Supply Company is now engaged was established by Ned Gershenson in 1918 (R. 213, 3073). On his death it passed to his widow and children, and on the widow's death to their five children (R. 204-5), who continued its operation as co-partners under the trade name, Ned's Auto Supply Company, until September 1, 1938, when it was incorporated under the trade name theretofore in use and the five children thereafter remained the exclusive owners. From the inception of the business the Gershenson family had continuously purchased gasoline from respondent and resold it through retail gasoline stations owned and operated by them (R. 37-8, 3075-9). By 1936 Ned's had become respondent's most valuable tank wagon customer, its gasoline purchases that year aggregating approximately 2,400,000 gallons (R. 3081-3). Prior to September 1, 1936, all deliveries of gasoline to Ned's were under respondent's standard form contract, Form 461, supra (Sec. IV-"c") which provided for tank wagon deliveries of "not less than 50 gallons at any one time" to be paid for at "the company's dealer price" (posted price) in "cash at the time of delivery" (Com. Ex. 2).

From 1930 to 1936 Ned's had received offers from responsible companies handling branded gasolines comparable in quality to those furnished by respondent at substantially lower prices—one cent per gallon less by tank-wagon 473 (R. 3089, 3091), and from two (R. 3100) to five cents per gallon (R. 3094-6) less by tank-car than the price respondent was charging Ned's. Some of these offers were communicated to respondent's District Manager with the request that Ned's be accorded a lower price (R. 3094; 3097) but respondent's District Manager refused to allow an increased margin (R. 3099). Each time Ned's requested respondent to accord it a lower price respondent's District Manager would stress the long private and public association of Ned's with respondent and its branded gasolines which had acquired wide public acceptance, and the volume of business developed; that a change to another competitive brand would result in loss of customers and decrease in volume, which would off-set in profits the difference in the cost of the gasoline. Charles H. Gershenson, President of Ned's Company, testified that he appreciated the force of the argument advanced by respondent's District Manager and that in addition thereto his company did not want to change its supplier of gasoline for sentimental reasons—his father started with the Standard Oil Company; his father had passed away, and the family entertained "a superstition that the last thing we wanted to do was change from the Standard Oil Company" (R. 3098-9).

As a final effort to obtain a lower price from respondent, Ned's Company by letter dated August 27, 1936 (Resp. Ex. 45) advised respondent's District Manager that it had received an offer from a competitive major oil company to supply it gasoline at a lower price than it was then receiving from respondent and it was then its intention to accept the offer. This was followed by a conference between Charles H. Gershenson, President of Ned's and P. A. Raupagh, respondent's District Manager, at which Gershenson informed Raupagh that the letter dated August 27 was an ultimatum and that Ned's Company had definitely decided to accept the lower offer from the competing company unless it "got a better deal from the Standard Oil Company" (R. 3105-6). Gershenson further insisted that unless Raupagh was prepared to give Ned's a better price, he be accorded the privilege of going to Chicago and conferring with the Standard Oil officials before the final break occurred (R. 3106).

As a result of this interview it was arranged that Gershenson should go to Chicago and confer with Mr. Lewis

(an official of the respondent company) at its general offices in that city (R. 3106). A few days later Gershenson went to Chicago and conferred with Mr. Lewis. At this in-
474 terview Gershenson told Lewis that if respondent did
not grant Ned's a better price, either a better tank-wagon price or a tank-car price, that Ned's was going to stop doing business with Standard (R. 3107). At that interview Gershenson requested a reduction of one cent a gallon off the tank-wagon price which he claimed was the price available from other suppliers of gasoline (R. 3107). The day following Gershenson's return home from Chicago he was advised by Raupagh that Ned's would be accorded a one-half cent margin off the tank-wagon price.

Raupagh testified that based upon Gershenson's representations he came to the definite conclusion that respondent would lose Ned's business unless respondent met, at least part way, the offers of competitors (R. 3408-14).

The one-half cent per gallon differential was granted by oral agreement (R. 3108, 5072) which became effective about September 1, 1936, whereby respondent agreed to furnish Ned's Company its branded gasolines at

1. A price differential of one-half cent per gallon less than its posted tank-wagon price (R. 3108);
2. A monthly credit, settlement to be made when monthly bills were submitted, delivery to be made by tank-wagon (R. 4020, 4048); but in full or partial loads, whichever was most convenient to respondent (R. 3780, 4019-20, 4048).

It is clear from the evidence that the monthly credit extended Ned's Company was not given or intended as conferring upon that company any financial benefit, but was in the interest of respondent. Ned's Company was financially responsible—an exceptionally good credit risk (R. 4056-7)—and the credit given provided a more convenient and economical method of collection (R. 4020).

This verbal arrangement continued in full force and effect from September 1, 1936, to March 1, 1938, (R. 4852-3) when it was permanently discontinued (R. 2643, 3742-3, 3745-6, 3748). Six days later, and on March 7, 1938, respondent recognized Ned's Company as a jobber and the company commenced, and has ever since taken delivery by tank-car or transport truck (R. 4852-3; Resp. Ans. Pars. 13-D, 16).

475 Ned's was respondent's only tank-wagon customer
allowed or afforded an opportunity to obtain a one-half cent per gallon differential below the tank-wagon

posted price and a monthly credit, all others being required to pay cash for the gasoline as and when delivered at the posted tank-wagon price (R. 52, 4048).

Conclusion of Fact:

The differential of .5c per gallon on Red Crown gasoline respondent granted Ned's Auto Supply Company on tank-wagon deliveries from September 1, 1936, to March 1, 1938, was made to meet an equally low or lower price of a competitor or competitors for branded gasolines of comparable grade and quality and to retain Ned's Company's business.

Conclusion of Law:

Unless the granting of the .5c per gallon differential to Ned's Auto Supply Company constituted price discrimination, the effect of which was, is, or may be substantially to lessen competition between Ned's Auto Supply Company's retail gasoline service stations and those operated by customers of respondent; its granting was lawful. The evidence relating to this question, to avoid repetition, is reviewed in connection with the effect of the granting of differentials to the four dealers, infra (Sec. XI), to which reference is here made.

IX.

Fifth Question.

Was the selection of the four dealers and their recognition by respondent as jobbers bona fide and not in restraint of trade?

The related evidence:

Long prior to the effective date (June 19, 1936) of the law under which this proceeding was instituted, the jobber system of distribution was widely employed in the oil industry, and the term "jobber" was generally understood to mean one who was engaged in the purchase and sale of petroleum products (and particularly with reference to gasoline), who had sufficient storage to take delivery in tank-car quantity and resold a substantial part to resellers and the remainder direct to the public through retail service stations operated by him (R. 1484-5, 1623-5).

As early as June 12, 1931, and while Section 2 of the Clayton Act (38 Stat. 730) was in effect, the Federal Trade Commission approved a National Code of Practice for Marketing Refined Petroleum Products wherein the 476 term "jobber" was defined as "One who carries a stock of petroleum products to sell to retail dealers or others for resale, but who may sell direct to consumers" (R. 1480-1). Respondent, as did some other suppliers of gasoline, adopted its own standard which required a greater showing of financial stability but dispensed with any showing as to the manner or method of resale (R. 40), its requirements being that the applicant (1) owned or leased its own exclusive bulk plant of sufficient capacity to take delivery in maximum tank-car quantity; (2) had facilities for distribution to its customers; (3) had an established business sufficient to insure purchase of from one to two million gallons per annum; and (4) that it had credit responsibility justifying the risk of delivery of large quantities of gasoline in a single month.

Respondent, like other producers of gasoline, does not police the activities of any of its jobber customers (R. 173). Its customers have no contracts for continuous supply but buy upon order at the then tank-car price. When any of them orders a tank car or transport truck load of gasoline, they take absolute title to it upon delivery. The price which the jobbers fix for the resale of gasoline is a matter entirely within the control and discretion of the individual jobber (R. 173-5).

Three of the four dealers were recognized by respondent, and registered with the Gasoline Department of the State of Michigan as jobbers, prior to the effective date (June 19, 1936) of the law under which this proceeding was instituted—Citrin-Kolb Oil Company in 1929, Stikeman Oil Company in 1932, and the Wayne Oil Company in 1935, supra (Sec. IV-"f"). Each, at the time of recognition and at all times thereafter, possessed all the qualifications for classification as a jobber exacted by (1) the generally understood meaning in the oil industry of the term "jobber"; (2) the definition of the term "Approved by the Federal Trade Commission"; and (3) respondent's own standard, supra (Sec. IV-"f"). Following the enactment of the amendment to the Clayton Act under which this proceeding was instituted, their recognition as jobbers was continued without inquiry into the question of any possible infraction of the law (R. 8049).

The fourth dealer—Ned's Auto Supply Company—received recognition as a jobber nearly two years after the effective date of the law, at which time it conformed in all respects to respondent's requirements for recognition, but not with the requirements generally recognized in the oil industry and those of the National Code of Practice for Marketing Refined Petroleum Products in one respect, 477 namely, it resold almost exclusively (Resp. Ex. 53) through retail stations operated by it, supra (Sec. IV-"f"). For twenty years prior to its recognition by respondent as a jobber, Ned's had been one of respondent's tank-wagon customers, supra (Sec. IV-"f") and its recognition on or about March 1, 1938, by respondent as a jobber was a forced recognition rendered necessary in order to retain its business which had reached large volume, infra (Sec. X, Q. 6).

The uncontradicted opinion testimony of those familiar with the oil industry is that each of the four dealers were at the time of their recognition, ever since have been, and are now, under industry practice and contemplation, bona fide jobbers (R. 1722).

Conclusions of Fact.

1. The selection and recognition by respondent of the Citrin-Kolb Oil Company, the Stikeman Oil Company and the Wayne Oil Company as jobbers or wholesalers, made and given prior to the effective date of the statute under which this proceeding was instituted, and continued at all times since the statute has been in force, were and are in conformity with industry practice, were made, given and ever since continued in transactions between respondent and said three companies, believed by them at all times to be bona fide in all respects, and which was never questioned until this proceeding was instituted.

2. The recognition by respondent of Ned's Auto Supply Company as a jobber or wholesaler, was a forced recognition given to retain that company's business. Ned's Company at the time of recognition, and ever since, has possessed all qualifications required by respondent for recognition as a jobber and the recognition was given and has ever since been continued in transactions between the

parties, believed by them to be bona fide in all respects, and which was never questioned until this proceeding was instituted.

Conclusion of Law.

Unless the effect of the recognition by respondent of Ned's Auto Supply Company, at all times subsequent to March 7, 1938, and the Citrin-Kolb Oil Company, the Wayne Oil Company, and the Stikeman Oil Company, at all times subsequent to June 19, 1936, as jobbers, and the granting to each of them during said periods, as a result of said recognition, of jobber differentials of 1c per gallon on Stanolind; 1.5c per gallon on Red Crown, and 478 1.75c per gallon on Solite with Ethyl was, is, or may be, substantially to lessen competition, or tend to injure, destroy, or prevent competition with said four dealers or with the customers of either respondent or said four dealers, their selection and recognition by respondent as jobbers were lawful. The answer to this question is dependent upon the answer to Question 7, and to avoid repetition, reference is here made to Section XI of this report.

X.

Sixth Question.

Were the differentials in price accorded the four dealers, recognized by respondent as jobbers, made in good faith to meet equally low prices of competitors, or the services or facilities furnished by competitors?

The related evidence:

Ned's Auto Supply Company: During the period this company received the .5c differential its gallonage increased from approximately 2,400,000 to approximately 4,800,000 gallons (R. 3082). It was not satisfied with the .5c differential it obtained September 1, 1936, supra (Sec. VIII) and under date of February 14, 1938, Charles Gershenson, President of Ned's Company, dictated a letter to the Standard Oil Company which was signed by his brother William (R. 3112) (Resp. Ex. 46), the body of which was as follows:

"For some time past, we have felt that our volume entitled us to tank car prices. Our ideas on the subject were given added impetus and confirmation when, as you remember, we were approached in August, 1936, by representatives of the Red Indian Oil Company with tank car prices, at truck delivery, and Shell Petroleum with a better deal; both with a view of changing to their respective brands. Because of ~~our long~~ association, we ~~naturally advised~~ you of the situation and the ensuing discussions resulted in our later agreement of August 27, 1936, and your promise to give consideration to our receiving tank car prices at an early date.

"Present plans for expansion, when consummated, will result in a substantial increase in our volume, and we feel that in view thereof, to expect us to continue on the present basis, involves an unreasonable sacrifice on our part.

479 "We, therefore, request that you give immediate consideration to the desirability of continuing as our gasoline supplier, but at tank car prices. Otherwise, we shall be compelled to re-open negotiations with other suppliers."

This letter was received by the respondent company and forwarded to its Detroit District Manager, Mr. Raupagh, which resulted in several conferences between Charles Gershenson and Raupagh (R. 3113). At these conferences Gershenson informed Raupagh that the available offer from the Red Indian Company quoted a price ⅜ of a cent lower on tank-car deliveries than respondent's price, and had an additional advantage in that it would be unnecessary for Ned's to have and maintain its own bulk plant (R. 3114-17); that the price quoted by the Shell Oil Company was .5c lower than respondent's tank-car price (R. 3120); and that the offer from the Texas Company (R. 3122-3) was 2.5c lower on the house brand and 3.25c lower on Ethyl gasoline (R. 3094). At their last conference held prior to March 7, 1938, (R. 3124), Gershenson stated that his letter dated February 14, 1938 was an ultimatum (R. 3113) and that unless respondent granted Ned's a tank-car price Ned's would accept one of the three offers (R. 3113).

Some time prior to March 7, 1938, Ned's acquired by lease a bulk plant (R. 3119) and entered into a contract with Benzol Stations, Inc., to haul the gasoline from its bulk plant to its six retail service stations at .45c per gallon (R. 3125).

On March 7, 1938, respondent acceded to Ned's demands and granted Ned's Company its regular tank-car differential on its house and Ethyl brands (R. 3124), supra (Sec. IV-"i").

Respondent's Detroit District Manager, Mr. Raupagh, testified that, prior to March 1938, Ned's Company, through William and Charles Gershenson, informed him that unless respondent met, at least part-way, the competitive offers of the Shell, Red Indian and Texas Companies, which offers were of differentials as much as 2c per gallon, Ned's would quit purchasing from respondent and accept a competitive offer (R. 3419-21); that he, Raupagh, was convinced that if respondent did not meet, or approximate, such competitive offers, Ned's would be lost as a customer (R. 3421); that knowing the market, as he did, he was of the definite opinion that the threats made by Charles and William Gershenson were made in earnest and would be acted upon unless respondent placed Ned's on a competitive basis (R. 3422).

480 Wayne Oil Company: Respondent recognized this company as a jobber and accorded it tank-car prices in 1935, supra (Sec. IV-"f").

For three or four years prior to 1940, the Aurora Gasoline Company solicited the gasoline business of this company a half dozen times (R. 1908). On December 10, 1940 (twelve days after the complaint issued), the Wayne Company received an offer from the Aurora Company to supply it by transport truck 80 octane gasoline at a price .5c per gallon less than respondent was charging for Red Crown (R. 1885; 3450). The Aurora Company is a local (Detroit) company operating refineries at Detroit and Elsie, Michigan (R. 1886), and in 1940 had a gallonage capacity of from forty to fifty million gallons of gasoline (R. 3450). It is not recognized as one of the first group of twelve major oil companies (R. 3251-2, 3255), but comes within the list of second major companies (R. 3274). Eighty octane gasoline is, however, recognized as comparable if not superior, to respondent's house brand gasoline, Red Crown (R. 1883).

On December 13, 1940 (fifteen days after the complaint issued), the Wayne Company received an offer from the National Refining Company (R. 1888) operating in a large part of the United States and in Canada (R. 1889-90), and which furnishes a considerable quantity of gasoline sold in the Detroit area (R. 1891), to supply its branded gasoline "White Rose" (R. 1905) which it represented as of better quality than Standard Red Crown (R. 1907) at a price more than .5 cent per gallon less than respondent was charging for Red Crown (R. 1892). For several months theretofore the National Refining Company had been attempting to get the business of Wayne Company (R. 1910).

Citrin-Kolb Oil Company: Respondent recognized this company as a jobber and accorded it tank-car prices in 1929 (R. 2083), supra, (Sec. IV-"f"). At that time other jobbers were receiving larger differentials from other suppliers (R. 2085) but the company continued to purchase gasoline from respondent thereafter even though its tank-car price differential was not as favorable as that of other supplying companies (R. 2086).

Offers received by the company from other suppliers were as follows:

From the Hickok Oil Company of Toledo, Ohio, to sell its "Hi-Speed" (a major company) gasoline at 6½ cents below the retail price, conditioned upon the formation
481 of a corporation in which the Hickok Oil Company was to receive 51 per cent of the stock (R. 2090-8, 3437-8).

Shortly thereafter from the Shell Oil Company to give Citrin-Kolb and the Middleton Oil Company (a second major company) an exclusive sales agency for all of Wayne County, Michigan, for its branded gasoline "Silver Flash" at a margin between .5c and .75c under the price respondent was charging (R. 2104-7). At the time, Middleton Oil Company was a jobber of Standard Oil Company gasoline in the Detroit area. The Citrin-Kolb Company communicated the Shell offer to Mr. Raupagh, respondent's Detroit manager, with the request that the differential then accorded it by respondent be increased, but Mr. Raupagh refused (R. 2110-12, 3439). The Middleton Oil Company accepted the Shell offer and ceased to be a jobber for the Standard Oil Company (R. 2108-9).

In 1936 from the Gulf Refining Company (a major company) offering to furnish its gasoline at the regular tank-car price, which was the same price Citrin-Kolb was paying respondent, but offered the following additional advantages—to allow Citrin-Kolb to use its bulk plant thereby eliminating the expense of operating their own bulk plants, and to furnish pumps and other station equipment, including repairs to pumps, painting the dealer stations, and equipment used in connection therewith, all without cost (R. 2118-23). The Gulf offer was presented to Mr. Raupagh, respondent's manager of the Detroit Division, with the request that he meet it, but Mr. Raupagh refused saying that it was impossible for respondent either to change the method of delivery so as to eliminate bulk plant expense, or to furnish, maintain and repair pumps and other station equipment (R. 2144, 34-9).

From the Texas Oil Company in 1936, to furnish its gasoline by tank-car delivery at .5¢ less than respondent was charging, and to also furnish advertising, paint and globes (R. 2126-32), a contract was drawn up and executed. Before Citrin-Kolb delivered the contract to the Texas Company it exhibited the contract to Raupagh, respondent's Detroit manager, so as to afford respondent an opportunity to meet its terms. Raupagh stated it was a good deal,
482 but the Standard wouldn't meet it. Raupagh pointed out that Citrin-Kolb had established its business with Standard Oil products and that a change to Texas would result in the loss of some business. The executed contract was never delivered by the Citrin-Kolb Company to the Texas Company (R. 2132-7, 3141-2).

December 10, 1940, from the Aurora Gasoline Company (a second major company) to furnish its gasoline in tank-car quantity at 1.5¢ per gallon less than the differential respondent allowed. This offer was submitted to Mr. Raupagh, respondent's District Manager, with a request that Standard meet it, which Raupagh declined (R. 3451-2). This offer was still under consideration by the Citrin-Kolb Company when the testimony was taken, not having been recalled or rejected (R. 2164-77).

Stikeman Oil Company: Respondent recognized this company as a jobber and accorded it tank-wagon prices in 1932, supra (Sec. IV-"f").

No representative of this company was called as a witness. Mr. Raupagh, respondent's District Manager, testified that Mr. Stikeman had discussed with him two attractive offers the company had received from competing companies, offering a greater margin than that accorded by the respondent company (R. 3450).

Mr. Raupagh further testified with reference to the general condition existing in the Detroit Metropolitan area in substance: That the jobber customer market is subject to intense competition and frequent attempts by Standard

Oil Company's competitors to proselyte accounts by offering more advantageous terms and service. All jobbers of respondent buy on a day to day basis and on identically the same terms (R. 3454). They have no contracts and the continuation of their patronage is subject to competition from day to day. Being under no obligation to buy, any one of them could quit tomorrow or the next minute. (R. 3455). He was asked the following question and made the following answer:

"Q. Suppose that for any reason the Standard Oil Company ceased to sell to the four jobbers involved in this case on a tank-car basis; what is your judgment as to whether these four jobbers could purchase gasoline of comparable quality on equally good or better terms than they are now purchasing from the Standard Oil Company?

483 A. They could purchase from many other sources, immediately, a gasoline of comparable quality and at a better price than they are paying at the present time. By better price, I mean a lower price" (R. 3243-4).

Mr. Raupagh further testified that all of the many jobbers or distributors operating in the Detroit Metropolitan area and listed on Respondent's Exhibit 55-A and B, and 57-A and B are comparable in their operations to the operation of one or more of the four jobbers of respondent; and that all of them purchase their gasoline requirements substantially below the prevailing tank-wagon price, and, as a matter of fact, that many of them purchase even below the prevailing tank-car price. In addition many of them are not required to maintain their own bulk storage and their own trucks to receive the benefit of such lower prices. Standard Oil Company, he stated, is in competition with all the companies listed in both of said exhibits (R. 3373).

Conclusion of Fact:

The differentials on its branded gasolines respondent granted Ned's Auto Supply Company, at all times subsequent to March 7, 1938, and Stikeman Oil Company, Citrin-Kolb Oil Company and the Wayne Company, at all times subsequent to June 19, 1936, were granted to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality.

Conclusion of Law:

Unless the differentials granted the four dealers, abovenamed, constitute price discrimination, the effect of which was, is or may be, substantially to lessen competition, or tend to injure, destroy, or prevent competition with said four dealers, or with the customers of either respondent or said four dealers, the granting of the differentials was lawful. The answer to this question is found in Section XI, to which reference is here made.

XI.

Seventh Question.

Do the differentials in price accorded the four jobbers constitute price discrimination, the effect of which is, or may be, substantially to lessen competition, or tend to injure, destroy, or prevent competition with said four dealers, or with the customers of either respondent or the said four dealers?

484 The review of the evidence relating to this question will include a review of the evidence relating to the last part of Question 4, supra (Sec. VIII) and the final answers to Questions 5, supra (Sec. IX), and 6, supra (Sec. X).

The injury to competition claimed to have resulted from the granting of the differentials relates to the resale of Red Crown gasoline purchased from respondent, by Ned's Auto Supply Company, following the granting of the .5¢ per gallon differential, through the retail service stations operated by it, at less than the prevailing retail price in competition with the retail service stations supplied by respondent and by three of the four dealers at the posted tank-wagon price; to the sale by one of the dealers of said gasoline to service stations at less than the posted tank-wagon price, and to the resale of said gasoline by the service stations receiving the differential, at retail at less than the prevailing retail price; and to the resale through retail service stations operated by two of the four dealers at less than the prevailing retail price, in competition with more than 400 retail service station customers of respondent, and of three of the four dealers, supra (Sec. IV-"f"), purchasing gasoline at the posted tank-wagon price.

The Related Evidence:

Solite with Ethyl and Stanolind gasoline: There is but slight evidence in the record relating to the underselling by any of the four dealers at either wholesale or at retail, or by their retail reseller customers, of Solite with Ethyl, or Stanolind gasolines; the volume of Solite with Ethyl being approximately 7 per cent and of Stanolind approximately 3 per cent of the total volume of gasoline sold by respondent in the Detroit Metropolitan area (R. 108). Substantially all the evidence relates to the underselling of Red Crown and other competitive house brand gasolines, Red Crown representing approximately 90 per cent of the gasoline marketed by respondent in this area.

1. Kinds of gasoline marketed and competitive situation: In the Detroit Metropolitan area, as elsewhere, there are two distinct kinds of gasoline marketed, (1) gasoline made by the major companies, nationally known, and sold under their separate brands, and (2) gasoline made by secondary companies, some of which is sold under local brands, and which is commonly known as off-brand gasolines (R. 402). The gasolines sold by the four dealers were branded gasolines made by respondent.

(a) Major Oil Companies. Nine oil companies, conceded by all witnesses to be major oil companies (R. 403, 519, 3251-2), of which the respondent company is the largest, market their naphtha and gasoline products in the Detroit Metropolitan area. These nine companies are as
485 follows: Standard Oil Company (Indiana), Sun, Shell,
Sinclair, Socony-Vacuum, Texas, Gulf, City Service and Pure Oil (Hi-Speed).

(b) Doubtful Major Companies. Three additional companies were listed by respondent's Detroit District Manager as major companies (R. 3251-2). As they were not listed as major companies by other witnesses (R. 403, 519) they are herein clased as doubtful major companies. These three are: Mid-Continent Petroleum, Ohio-Oil Company, and Standard Oil Company of Ohio.

Six of the major companies—Texas (R. 3556-7); Gulf (R. 3558); Sinclair (R. 3560); Shell (R. 3563); Pure Oil (Hi-Speed) (R. 3346); and respondent—sell branded gasolines to retail outlets at tank-wagon prices, and to buyers in tank-car quantity and at tank-car prices who resell to the public, as does Ned's and are in direct competition with the retail reseller stations selling branded gasolines who take delivery by tank-wagon and pay the posted tank wagon price which is usually 1.5¢ or more above the tank car price (R. 389).

Eighty-seven per cent of the total volume of gasoline marketed in the Detroit Metropolitan area is sold by major oil companies under their own brands (R. 417). The house brands of all are of substantially the same quality in the public mind (R. 400). The posted tank-wagon price of the house brands of all is generally, but not always the same (R. 52-3). The products of all the other major companies are in immediate and direct competition with those of respondent (R. 3339).

(c) **Secondary Oil Companies.** At least ten other oil companies, conceded by all witnesses as not coming within the major group (R. 3151-2; 403; 519), and generally classified as second major companies, operate in the Detroit Metropolitan area. These ten companies are as follows: Charles E. Austin, Inc., Puritan Stations, Sunny Service Oil Company, Speedway Petroleum, Globe, Duro, Keystone, Aurora, Leonard, and Roosevelt (R. 3251-2).

The volume of gasoline of this group, together with the third grade gasoline sold by all the major and doubtful major companies, in the Detroit Metropolitan area is between 12 and 13 per cent of all gasoline marketed in that area (R. 405; 421).

The sale of gasoline in the Detroit Metropolitan area by the doubtful major and by the second major group to tank-car customers at or below the prevailing tank-car price (R. 3374) who resell a part or all direct to the
486 public, is a common practice (R. 3346-47, 3350-51, 3353, 3354, 3355, 3356, 3358, 3360-1, 3369; Resp. Ex. 38 A thru E) and the tank-car customers are almost always price cutters (R. 3296).

The gasoline products of the secondary group are known as off-brand gasolines; some of it is sold under local brands (R. 402). Off brand gasoline is a term denoting a gasoline other than that sold under the brand name of a major oil company (R. 402) and generally sells at a lower price than major brands in the Detroit Metropolitan area (R. 519), at times as much as 6¢ per gallon (R. 3296). Major brands have a better public acceptance (R. 4520). While Mr. Raupagh, respondent's Detroit District Manager, testified that each of the non-brand companies was in competition with the respondent company (R. 3374), your examiner assumes that he meant, as the evidence clearly indicates, that under normal conditions and when the price differential between gasolines of the major and non-major companies was not more than 2¢ per gallon, there was but littl or no competition (R. 404) but that a competitive situatior arose when the normal difference in price between th branded and non branded gasolines rose above 2¢ per gallon, grew more intense as the spread increased, and practically disappeared when the normal difference in price wa restored.

(d) Prevailing tank-car dealer price and retail price fo branded gasolines. At and prior to February, 1937, th normal posted tank-wagon price paid by the retail servic stations for house brand gasolines of the major companie was 9.6¢ per gallon and the prevailing retail price postec at the service stations was 13.6¢ per gallon, which gav the station operators a margin of profit of .4¢ per gallor exclusive of all taxes. The tank-car differential was usually 1.5¢ below the tank-wagon price, infra (See table thi Section).

2. What the Four Dealers did:

(a) Stikeman Company. There is no evidence connecting or tending to connect the Stikeman Oil Company witl the sale at any time of gasoline either to service station or at retail through its own stations at prices below th posted tank-wagon price and the prevailing retail price There is no testimony in the record as to the prices chargec resellers, or the prices at which the Stikeman Company sold at retail through the few stations it temporarily operated prior to February 15, 1938, since which time it ha sold strictly at wholesale, supra (Section IV-"f").

487 (b) Wayne Oil Company. There is testimony tha this company has never sold gasoline to resellers a a price lower than the posted tank-wagon price at th time of sale (R. 1859, 1894-5); and no testimony to the contrary; and there is no evidence that this company sol any gasoline at retail through stations temporarily operated by it, supra (Section IV-"f") at less than the prevailing retail price.

(c) Citrin-Kolb Oil Company. This company annuall sold at retail from 6.5 per cent to 29.4 per cent of the gasoline purchased from respondent through gasoline station operated by it during the years 1936-1940 (Resp. Ex. 53 There is conclusive evidence that the Citrin-Kolb Oil Com pany in 1938 or 1939 gave discount cards to purchasers of gasoline at one of the stations it temporarily operated, supra (Section IV-"f"), entitling the holder to discount of 2 cents a gallon on Standard Red Crown and Ethyl gasoline (R. 312, Comm. Ex. 34). These cards were given to anyone and distributed in parked automobiles for a period of about three weeks (R. 314). Two stations supplied by Citrin-Kolb also issued like discount cards to their customers during 1938 or 1939 (R. 316, 317; Comm. Exs. 35, 36).

There is also conclusive evidence that this company sold to one customer (Langer & Cohen) from January 1, 1938 to December 31, 1940, a million gallons of gasoline per annum at 1 cent per gallon less than the posted tank wagon price, and during all or the greater portion of that time made delivery to five retail stations operated by the purchaser, and made "money" hauling the gasoline at .5c per gallon (R. 3218-19; Comm. Ex. 33-A). To another retail service station during the years 1938, 1939 and 1940 it gave a discount of ½c per gallon (Comm. Ex. 33-A; R. 302-3); and to another retail service station the rent was waived for the months of August, September and October, 1939 (R. 302-3; Comm. Ex. 33-B) for the reason that a station operating immediately opposite and across the street cut its price and the rent was waived during the pendency of a proceeding instituted by the service station owner, under a state law, to prevent his competitor from selling at cut-rate prices (Comm. Ex. 33-B).

(d) Ned's Auto Supply Company: The operations of this company were and are very different from the operations of the Stikeman, Citrin-Kolb and Wayne companies in that two of these companies—Citrin-Kolb and Wayne—sell the bulk of their gasoline at wholesale and the other—Stikeman—entirely at wholesale, to retail reseller service stations, supra (Section IV-"f"); whereas Ned's Com-
488 pany sells none of its gasoline to retail reseller stations but markets substantially all direct to the public, supra (Section IV-"f").

Next to Citrin-Kolb, Ned's is respondent's largest tank-car customer, purchasing in excess of 4,000,000 gallons per annum (Resp. Ex. 54), substantially all of which it sells through six retail service stations (owned and operated by it) strategically located throughout the Detroit Metropolitan area (for location, see R. 213-4, and map, Resp. Ex. 76). Its retail gasoline stations are operated in connection with a mercantile business confined largely to the sale at retail of mechanical household appliances, sporting goods, and automobile accessories conducted at each of the six locations (R. 3080).

That Ned's Company, following the granting to it by respondent of the .5¢ differential, on September 1, 1936, reduced its price on Red Crown gasoline to the public, at its retail stations, below the prevailing retail market price, and following the granting of the 1.5¢ differential made a further reduction, is conclusively shown by the record.

The following table shows respondent's posted tank-wagon price, its jobber tank-car price, the prevailing retail service station price, and Ned's posted price, for Red Crown gasoline, on each of the various dates from 1937-1940, inclusive. This table is compiled from Commission's Exhibits 3 and 22, and testimony at pages 240-42. Prices shown are cents per gallon exclusive of all taxes. Taxes amounting to 4.4¢ per gallon (R. 65-7) are deducted from Ned's prices which include taxes of approximately that amount.

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Date	Dealer Tank-wagon Price	Jobber Tank-car Price	Prevailing Retail Serv. Sta. Price	Ned's Posted Price
Feb. 1, 1937	9.6¢	8.1¢	13.6¢	11.6¢
Aug. 1937	9.9	8.4	14.1	12.1
Jan. 1938	9.6	8.1	14.1	12.1
April 1938	9.8	8.3	14.3	12.1
June 1, 1938	9.8	8.3	13.8	12.3
July 1, 1938	9.8	8.3	12.3	12.3
Aug. 1938	8.8	7.3	12.3	10.9
Oct. 1938	8.8	7.3	12.1	10.6
Nov. 29, 1938	8.8	7.3	12.1	9.9
Jan. 1939	7.6	6.35	10.0	9.9
March 1939	7.6	6.35	10.7	9.9
May 1939	7.6	6.1	10.7	9.9
July 1939	8.1	6.6	11.4	11.4
Nov. 1, 1939	7.4	6.15	9.3	9.1
November 15, 1939	6.4	5.4	9.3	8.1
Dec. 1939	8.1	6.6	11.4	11.3
July 1940	8.1	6.6	11.4	11.3

(Federal Tax increased from 1¢ to 1½¢ per gallon July 1, 1940.)

During the periods in late 1939 and in 1940 when Ned's posted price was approximately the same as the prevailing retail price, Ned's gave various "under cover" discounts and premiums. Ned's has from time to time given "commercial discounts" varying from 1¢ to 2¢ per gallon to so-called commercial customers. These discounts were off the posted price. The classification as to who was regarded a commercial customer varied from time to time depending upon the competitive situation. Ned's definition of a commercial buyer was very broad at times (R. 254-57). People getting commercial discounts at Ned's did not have to have an identification card (R. 260).

During August to November 1939 Ned's issued trading stamps (Comm. Ex. 25). Every purchaser of gasoline was given one of these stamps (2¢ face value) for every gallon of gasoline purchased, which were redeemable in merchandise at Ned's stores. These stamps were later redeemable in gasoline (R. 262). Trading stamp envelopes served to identify the holder as a person buying at a commercial discount (R. 266). This was off the posted price.

Premiums were given by Ned's to all customers at the opening of a new store or on an anniversary (R. 276).

490 It has been Ned's practice for several years to give a newspaper to every customer (R. 277).

During 1938, 1939 and 1940 Ned's gave a 2-ounce bottle of Pyroil to gasoline buyers. The Pyroil was put in the gasoline tank free. Ned's bought the Pyroil in barrel lots (R. 279-81, 345).

Receipts were given in 1940 for gasoline purchased at Ned's with a notation stamped on the back "sold for commercial use" Such receipts were given on purchases of 6 gallons of gasoline and when presented entitled the holder to a "commercial discount" of 2¢ per gallon (R. 285). This was off the posted price.

Price cutting at Ned's stations has been almost continuous. This has been true over a long period. "If Ned's stopped one scheme they started another" (R. 707, 748). Most retail price cutting in major brand gasoline in Detroit over a period of years has been started by Ned's (R. 720, 722, 476, 480, 483). See also corroborative testimony of five salesmen for Sun Oil Company (R. 342-62; 363-85; 441-51; 452-61; 462-89) and ten service station operators (R. 543-59; 560-81; 583-623; 624-36; 651-68; 673-723; 728-49; 778-99; 947-58; 859-77).

Ned's Company claims price cutting was necessary to meet competition. The President of Ned's Company testified that before it went on a tank-car basis in 1938 it sold gasoline to commercial customers on a commercial discount basis (R. 3152); and that after it went on a tank-car basis it offered no greater concessions to the public (R. 3154); that commercial discounts were available at other stations when Ned's first went into business, and Ned's merely met that competition (R. 3152).

With reference to the competitive situation surrounding each of the company's six retail stations, its President testified in substance as follows: that in competition with each of the six stations there were, in 1938 and 1939, stations selling off-brand gasoline at from 4 to 5½ cents below the prevailing retail price of the branded gasolines of the major companies, and there were also stations selling branded gasolines of the major companies (all purchasers in tank-car quantities) at from 1.5 cents to 2.6 cents below the prevailing retail branded gasoline price (R. 3152-491 3193). The witness named the competitive stations, gave their locations, and the prices at which he testified they were selling.

This witness further testified that Ned's Company had never been able to meet the prices of its competitors (R. 3183); that at the present time (1941) Ned's Company allowed no price concession to the public from the sale of gasoline except commercial discounts for commercial vehicles (R. 3193), and it has allowed no other concessions since the gas war in 1938 and 1939 (R. 3193).

3. Competitive Sale Inducements:

Volume of gasoline sold through service stations dependent upon automobile consumption. The volume of gasoline business in Detroit through retail gasoline stations depends almost entirely upon the number of automobiles in use. The volume of this retail gasoline business is more or less constant, such fluctuations as occur being chiefly due to a variation in the number of cars in use from year to year.

Principal factors that attract customers. The principal factors that attract automobile owners to a service station to purchase gasoline are the elements that go to make up public acceptance, and include advertising, the personality of the operator of the station, the type of service given, the appearance of the station, and confidence in the quality of the gasoline that the dealer is selling. On the basis of comparable quality, price is a very important factor.

Price is a potent factor in inducing purchase. Price is the most potent factor in gaining and regaining customers at a service station (R. 423). A lower price at one service station than at another is a very important factor in the purchasing public's mind. A difference in price of 2¢ per gallon between two stations selling major brands of gasoline would be very important and very potent in influencing the flow of business. It is not as potent in the case of non-major and third-grade brands as it is between major brands (pp. 415-16).

The buying public became very price conscious during the years prior to 1941. A general fluctuation in the price of gasoline, below 2¢ per gallon either way, has little, if any, effect upon public demand; but a 2¢ a gallon differential in price as between two stations selling gasoline of comparable quality has a tremendous influence upon purchasers (R. 401-2).

Competition intense. Detroit is a highly competitive market as far as the oil industry is concerned (R. 3255).

492 4. Underselling culminates in price war and its effect upon competition:

(a) Cause of price war. In the latter part of 1936 and early in 1937 five tank-car customers of the major oil companies operating in the Detroit Metropolitan area,—Ned's Auto Supply Company, supplied by respondent; Langers, supplied by the Texas Company (R. 749); Brights, supplied by the Sinclair Company (R. 3560-1); Hickeys, supplied by the Shell Company (R. 3563, 512-14); and Firestone Auto Supply and Service Stores, supplied by the Gulf Oil Company (R. 3357; Comm. Exs. 29, 30)—and some smaller customers, were selling through their retail stations house brand gasolines of major companies below the then prevailing retail market price (R. 512-14; Comm. Exs. 29, 30). Of these five Ned's was the only Standard Oil station. The underselling by these five stations continued during 1937 and 1938 (R. 512-14; Com. Exs. 29, 30). Price cutting by other stations followed and increased progressively throughout the entire area during 1937, 1938 and into January 1939 (R. 515-17), when it subsided. Later in 1939 price cutting by retailers evidently was resumed for it extended to the major oil companies. Commencing in August 1938, the respondent company (presumably with others) reduced its price to its tank-wagon customers and gave further reductions in January, May and November 1939 (Comm. Ex. 3-A). On August 27, 1939, after a study of the competitive situation throughout the Detroit Metropolitan area, it was established to the satisfaction of the officials of the Sun Oil Company that their dealers were being forced to sell at a point which did not allow them a 2¢ gross profit, which, in the opinion of the company, was necessary to enable them to survive, and in response to an appeal from its retail customers it allowed them a 2¢ differential below their selling price. This was granted to all retail purchasers of Sun gasoline (R. 456). This move on the part of the Sun Oil Company evidently changed the course of the major companies, for within six weeks thereafter and on November 18, 1939, the tank-wagon prices of the Sun and of the respondent companies, on their house brand gasolines (and presumably those of the other major companies) were brought back to substantially normal (R. 406; Comm. Ex. 3-A), and open price cutting among the retail resellers of branded gasoline practically ceased.

(b) Effect of underselling by Ned's Auto Supply Company and the Citrin-Kolb Company on service stations supplied by respondent and those supplied by two of the four tank-car dealers purchasing from respondent. The record evidence conclusively establishes that the effect 493 of the underselling by Ned's and by the Citrin-Kolb Company was to divert trade from retail service stations supplied by respondent and by two—Stikeman and Wayne—of the tank-car customers supplied by respondent, to those retail stations operated by Ned's and Citrin-Kolb, and those supplied by the latter, until those stations from which trade had been diverted were forced to meet the cut-rate prices which resulted in increasing their volume but not their profits.

Fifteen retail station operators were called by counsel for the Commission and testified. Eight of them purchased direct from the respondent company (R. 544-60; 560-81; 637-50; 651-68; 750-63; 765-78; 779-99; 878-89); three from the Wayne Oil Company (one of the four dealers) (R. 583-622; 847-59; 859-77); one from the Stikeman Oil Company (one of the four dealers) (R. 624-36); one from the Highland Oil Company (R. 673-723), a tank-car purchaser of

Hi-Speed gasoline (R. 3545); one from the Wilson Company (R. 724-28), a tank-car purchaser of Hi-Speed gasoline (R. 3545); and one from the Socony-Vacuum Company (R. 729-49). Twelve of these witnesse testified that they lost customers, some many customers, who told them that they were buying their gasoline at Ned's because Ned's was giving them a discount of 2¢ per gallon (R. 548-52; 566; 588-92; 644-5; 683-5; 725-6; 743-4; 781-2; 783-4; 854-6; 866-8; 882-3).

Four of the fifteen witnesses testified that they lost customers who told them they were buying their gasoline at Citrin-Kolb stations, (stations operated and stations supplied by Citrin-Kolb) where they were getting it for 2¢ less per gallon (R. 683-5; 755; 772; 781-2).

5. Differentials Were in Excess of Costs of Sale and Delivery. The Citrin-Kolb Oil Company maintains two bulk plants and has purchased all of its gasoline from respondent since 1936 (R. 298). It maintains its own trucks. It has, since 1937, sold a million gallons of Red Crown gasoline annually to Langer and Cohen, making delivery by tank-wagon at 1¢ per gallon below respondent's posted tank-wagon price. Its margin of profit on sales to this customer is .5¢ per gallon, out of which it pays all cost of sale and of hauling the gasoline from its bulk plants to the five Langer & Cohen stations, and makes money (R. 306, 3219).

Prior to March 1938 Ned's purchased gasoline from respondent by tank-wagon delivery, the gasoline being delivered at Ned's stations in respondent's tank trucks
494 (wagons) at a price ½¢ per gallon below the tank-wagon
price charged other retail stations. Ned's requested respondent that it be placed on a tank-car basis because it felt that by buying at tank-car prices it could, with its large volume, operate a bulk plant and make its own deliveries and still make an additional profit (R. 220-22). During March and April 1938, Ned's employed Benzol Stations, Inc., to transport their gasoline from their bulk plant to their stations for .45¢ per gallon (R. 903). Thereafter Ned's acquired its own trucks and did its own hauling (R. 229).

The cost to the Sun Oil Company of delivering gasoline from its bulk plants to its service stations in the Detroit area including the cost of operating the bulk plants, is less than ½¢ a gallon. This includes all costs of operating the bulk plant, including ordinary evaporation and spillage losses, labor, operation of the warehouse, personnel, cost of truck operations, the accounting going along with the operation and a cost element for the amount of capital invested in the plant (R. 437).

If a retailer, who has been getting delivery by tank-wagon changes over to tank-car delivery, his natural objective is to make more profit or to gain more personal advantage. The natural assumption is that the tank-car buyer who sells at retail would not be purchasing in tank-car quantities unless there was more profit in that than in buying by tank-wagon. Otherwise, there would be no reason for his going to the expense of maintaining bulk storage and making his own deliveries (R. 1834-35).

Note: Reference to the claimed costs of sale and delivery by Citrin-Kolb (Resp. Exs. 7 thru 17, R. 1330-70, 1334-66) is omitted for the reasons hereinbefore stated, supra (Sec. VII, sub-par. headed "Costs of sale and delivery incurred by Citrin-Kolb").

6. Effects of Differentials, When Utilized, to Increase Trade Volume.

(a) Ned's Company's gasoline volume during years 1936-1940. In 1936 Ned's had four retail stations, and its gasoline volume was 2,401,000 gallons (Resp. Ex. 53). September 1, 1936, Ned's Company was granted a differential of .5¢ per gallon. In 1937 it opened two additional service stations (R. 213-15), and that year, and during the price war, its gasoline volume increased to 4,440,500 gallons (Resp. Ex. 53). March 7, 1938, respondent extended to Ned's Company its customary tank-car differential of 1.5¢ per gallon. In 1938 the gasoline war had reached its peak, a general business depression existed, causing a demoralized retail situation (R. 3262), but that year
495 Ned's gasoline volume increased to 4,880,600 gallons
(Resp. Ex. 53). In 1939, when Ned's openly ceased selling below the prevailing posted retail price, its gallonage decreased to 4,336,308 and in 1940 it further decreased to 4,320,672 gallons (Resp. Ex. 54).

(b) Citrin-Kolb Company's gasoline volume during years 1936-1940. This company was recognized by respondent as a jobber in 1930, and thereafter purchased and took delivery by tank-car and received the regular tank-car differential, supra (Sec. IV-"f"). In 1936 the gasoline volume of the Citrin-Kolb Company was 2,091,024 (Resp. Ex. 53). In 1937 and during the gasoline war, it rose to 5,501,000 gallons (Resp. Ex. 53). In 1938 it sold gasoline both at wholesale and at retail below the prevailing prices, and notwithstanding the fact that the gasoline war was at its height and a general business depression existed, it increased its gasoline volume to 5,959,000 gallons (Resp. Ex. 53). In 1939 its gasoline volume decreased to 5,144,675, and in 1940 it increased to 5,226,138 gallons (Resp. Ex. 54).

(e) Volume of gasoline sold by the Stikeman and by the Wayne Oil companies during years 1936-1940. Neither the Stikeman nor the Wayne Oil Company participated in any price cutting. Their gasoline volume during the years 1936-1940 (Resp. Ex. 54) was as follows:

Stikeman Company 1936—2,255,000 gallons,
1937—2,451,000 gallons,
1938—2,290,000 gallons,
1939—1,822,960 gallons,
1940—1,772,911 gallons.

Wayne Oil Company 1936—1,348,448 gallons,
1937—1,686,637 gallons,
1938—1,825,938 gallons,
1939—2,226,177 gallons,
1940—2,541,394 gallons.

7. Retail marketing costs: A survey of retail gasoline marketing costs in Detroit made in 1938 by Prof. Herbert F. Taggart, Professor of Accounting at the University of Michigan, shows that there is a rather definite lower limit to the cost of selling gasoline at retail, which limit is in the neighborhood of 3¢; that the average cost of sale by the 25 per cent of retail stations in Detroit, selling at the lowest unit cost, was 3.5¢ per gallon (R. 1021; Comm. Ex. 76).

496 8. Preferential Prices Lead to Underselling and Price Cutting: The Western Regional Manager of the Sun Oil Company, whose district embraces 18 states, including the State of Michigan, and who had been in the oil business for 20 years, was called as a witness by counsel for the Commission. This witness evidenced an intimate knowledge of the marketing conditions in Detroit. His testimony will be found in the Record at pages 386-439. Extracts from his testimony, summarized, follow:

The practice of the suppliers of gasoline of selling to tank-car buyers gasoline at tank-car prices who resell all or part through their own retail stations, and of selling to independent retail service stations at tank-wagon prices, creates a very difficult competitive condition and usually leads to retail price cutting by the stations receiving the preferential price, either openly or through some method of "undercover" discounting (R. 391-93).

Such price cutting forces the other dealers who are paying the posted tank-wagon price to lower their retail price, either by direct price posting or other means of discounting, in order to meet the competition established for them in their respective trade areas. The tank-car buyer who resells at retail has a wider margin of profit than the ordinary dealer who buys at the tank-wagon price, and consequently, if the latter reduces his retail price to meet the price set by the former, his gross return is less than that of the tank-car operator. If the tank-wagon buyer does not reduce his price he will lose volume, and the trade in his neighborhood will flow away from the station to another station where the price is lower, to an extent depending upon the proximity of the competition (R. 396-8).

Price cutting orgies in Detroit in nearly all cases are attributable to the fact that some marketeer is able to buy at a wider differential between his cost price and the current prevailing retail price than most retailers and so has a wider margin of profit, and being anxious to expand and desiring to get more gallonage, he reduces his price to the public. That is always the start of the price cutting orgies which occur periodically (R. 431).

If all the major oil companies were prevented from selling to retail operators at tank-car prices in the Detroit area it would improve the competitive situation in Detroit (R. 435).

497 Mr. Raupagh, respondent's Detroit manager testified that:

When certain stations start to cut prices, that spreads among other stations and a general price cutting situation ensues (R. 3652).

Professor Clark, Chairman of the Department of Marketing, and Director of the Graduate Division of the School of Commerce of Northwestern University, was called as a witness by respondent (R. 1617). He displayed an intimate knowledge of marketing conditions generally and had given consideration to the marketing of petroleum products (R. 1623). His testimony will be found in the Record, pages 1617-1712, a few relevant portions of which are here partly set out verbatim and partly summarized:

The use of the jobber (referring to jobbers generally R. 1682), brings into the marketing picture a competitive factor which leads away from monopoly—certainly not toward it. "Without the jobber you would have a very much smaller number of competitors in the field" (R. 1642).

Witness was shown Resp. Ex. 19, which he had previously examined and testified that it fairly depicted the flow of gasoline from the refineries to the consumers by the different methods of marketing now in use (R. 1644). Among the various methods depicted are those of sale by the producer to the jobber who sells both at wholesale and at retail, and by the same producer to retail outlets. If the channels of distribution were so fixed that a producer of gasoline could not sell in a given territory to different types of buyers at different prices, it would, in the opinion of the witness "very likely lead to higher costs of marketing". It would also, in the opinion of the witness, be very unfortunate because it is through selling to different types of buyers that competition is continued and methods of marketing are improved (R. 1645).

The differential accorded the four dealers on Red Crown gasoline purchased in tank-car quantities below the tank-wagon prices charged the retail outlets; the storage and distribution equipment maintained by the four dealers, the sale of gasoline annually handled by them, were explained to the witness (R. 1646-7), and his opinion requested as to whether "there is anything economically unsound in
498 that set-up and system of distribution". The witness
answered: "Well, the set-up seems entirely sound to me. All of these organizations, as you enumerate them are performing what we call the wholesale function, and would be justified—in fact they would have to obtain a functional discount on that basis because of the expense of operation, and it is quite possible also that they might be justified in some or all of that lower price because of the quantities in which they purchase"" (R. 1647). The witness was then asked his opinion as to whether there was anything in the set-up of the four dealers as outlined that "tends to create a monopoly, tends to restrict or injure

competition, or tends to lessen competition, or restrain trade in any particular, or injure competitors'' (R. 1648), and answered: that there was nothing in the set-up of the four dealers that tended to restrict competition; that it had a tendency to increase competition. Whether it resulted in injury to their competitors depends on what is meant by the word ''injure''; that if a company distributes more effectively than a competitor distributing in the same way, it will outsell its competitors on the market. He could not, however, see anything in the set-up of the four dealers that could be construed as unfair (R. 1648).

The jobber who sells both at wholesale and at retail, performs a dual function (R. 1657), frequently combined in one operation (R. 1658-9). The normal function of a jobber is to resell to retailers (R. 1660). When the jobber sells at retail he is performing a retail function which commences when the goods reach the retail store, (R. 1661) and are charged to the store (R. 1678).

A functional discount is one given to a middleman because of his position in a channel, upon the assumption that he performs certain operations ''and the discount is for the purpose of covering his expense of doing that thing'' (R. 1663), and has no relation to his retail functions (R. 1665-6). Benefit to the public from a jobbers' operation of retail stores flows from more efficient and economical operation (R. 1680-1).

A jobber who buys gasoline in tank-car quantities, taking delivery at his bulk plant at a differential of 1.5¢ per gallon under the price paid by his competitor who takes delivery by tank-wagon at his retail service station, and delivers the gasoline at his expense from his bulk plant to his retail service stations, if the cost of distribution is less
499 than 1.5¢ per gallon, profits to the extent of the difference, even though he is not a more efficient retail service station operator, and to that extent has a competitive advantage which results in injury to his tank-wagon competitor. Any benefit to the public flows from efficiency, producing reduced costs in operation (R. 1683-97).

Conclusions of Fact:

1. At all times subsequent to June 19, 1936, respondent has made three brands of gasoline—Stanolind, Red Crown and Solite with Ethyl. During said period, respondent has annually marketed from 61,198,750 gallons in 1936 to

74,627,712 gallons in 1940 of said branded gasolines in the Detroit Metropolitan area of Michigan, which embraces all of the area within the limits of the cities of Detroit, Hamtramck, Dearborn and Highland Park in the State of Michigan: Respondent is the largest producer and distributor of gasolines operating in said area. Of the branded gasolines sold by respondent in said area, approximately 3 per cent was Stanolind; 7 per cent Solite with Ethyl; and 90 per cent Red Crown.

2. During all the time mentioned in paragraph 1, respondent has sold all of said branded gasolines, to be by the purchasers resold, to two classes of customers in said area known as (1) tank-wagon reseller, and (2) tank-car customers. The tank-wagon reseller customers, operators of retail service stations, took delivery by tank-wagon, and, with but one exception, paid respondent's posted tank wagon prices and resold said gasolines at retail through their stations. Before purchase of said gasolines for resale could be made in tank-car quantity the applicant had to possess certain qualifications prescribed by respondent as entitling him to recognition as a "jobber" or "wholesaler", and then selected and recognized by respondent as a jobber or wholesaler, was granted more favorable terms of purchase, usually 1¢ per gallon on Stanolind, 1.5¢ per gallon on Red Crown, and 1.75¢ per gallon on Solite with Ethyl, below respondent's posted tank-wagon prices for said gasolines, delivery being made at the bulk or storage plant of the jobber; said price differentials being no larger than differentials granted by other competitive oil companies, operating in said area, to their customers selected and recognized by them as "jobbers" or "wholesalers" for gasolines of like grade and quality similarly delivered. The jobber or wholesaler was at liberty to resell said gasoline either at wholesale or at retail at prices to be fixed by him.

3. Between September 1, 1936, and March 1, 1938,
respondent, to meet an equally low or lower price,
500 offered by a competitor for gasolines of comparable
grades and qualities and to retain the business of a
valuable customer, granted one of its tank-wagon customers—Ned's Auto Supply Company—on tank-wagon
deliveries at its retail stations, a price of .5¢ per gallon on
its branded gasolines, Red Crown and Solite with Ethyl,
below its posted tank-wagon prices for said gasolines.

4. Prior to June 19, 1936, respondent recognized three dealers as jobbers—the Stikeman Oil Company, the Wayne Oil Company and the Citrin-Kolb Oil Company—and on March 7, 1938, respondent recognized Ned's Auto Supply Company as a jobber, and ever since their said recognition as jobbers, to meet equally low or lower grade and quality similarly delivered, and to retain their business, has accorded said companies its usual jobber differentials on its branded gasolines.

5. Ned's Auto Supply Company has resold none of said gasolines purchased from respondent at the differentials referred to in paragraphs 2 and 3, to retail service stations, but has resold substantially all at retail through service stations operated by it, the volume of gasoline so resold being, in 1936, 2,401,600; in 1937, 4,240,500; in 1938 4,880,500; in 1939, 4,336,508; and in 1940, 4,290,965 gallons. The volume of branded gasolines annually purchased by the Stikeman, Wayne and Citrin-Kolb companies during the years 1936 to and including 1940, and the amount resold at retail through service stations operated by each of them was as follows:

Company	Year	Total Amount Purchased	Amount Sold at Retail
Wayne Oil Co.	1936	1,348,345	None
" " "	1937	1,686,637	None
" " "	1938	1,825,038	None
" " "	1939	2,226,177	169,189
" " "	1940	2,541,394	332,478
Stikeman Oil Co.	1936	2,255,000	626,890
" " "	1937	2,451,000	223,041
" " "	1938	2,290,000	6,870
" " "	1939	1,822,960	None
" " "	1940	1,772,911	None
Citrin-Kolb Oil Co.	1936	2,091,024	614,761
" " "	1937	5,501,000	847,154
" " "	1938	5,959,000	435,007
" " "	1939	5,144,675	519,612
" " "	1940	5,226,150	339,698

501 6. All of the branded gasolines purchased from respondent by the Wayne Oil Company and the Stikeman Oil Company and resold at retail service stations, was resold at respondent's posted tank-wagon prices. A part

of the Red Crown gasoline purchased from respondent by the Citrin-Kolb Oil Company was resold to service stations at prices of .5¢ to 1.¢ per gallon less than respondent's posted tank-wagon prices, and in 1938 and 1939 said sales exceeded one million gallons per annum; a part of which was resold by those stations, receiving lower price, at less than the prevailing retail price. A large part of the Red Crown gasoline purchased from respondent by Ned's Auto Supply Company, and a part of that purchased by the Citrin-Kolb Company, was resold by said companies through retail stations operated by them at 2.¢ per gallon or more under the prevailing retail price for said gasoline.

7. All of the retail service stations supplied by respondent and those operated and those supplied by the four dealers within said area, are in competition with each other.

8. The average operating margin—difference between cost, and sale, prices—of the retail service stations handling Red Crown gasoline and paying the posted tank wagon price in said area is, and has been, during all the period referred to in the complaint, approximately 4.¢ per gallon. During the period from September 1, 1936, to March 1, 1938, the operating margin of Ned's Company was approximately 4.5¢ per gallon which gave it a marginal advantage of .5¢ per gallon in the resale of Red Crown gasoline over its competitors purchasing at the posted tank-wagon price. The Stikeman, Wayne and Citrin-Kolb companies, during all the time mentioned in the complaint, and Ned's Auto Supply Company at all times subsequent to March 7, 1938, on all Red Crown gasoline purchased from respondent and resold through retail stations operated by each of them, had an operating margin of 5.5¢ per gallon, less the cost of maintaining their bulk or storage plants and transporting the gasoline therefrom to their retail service stations, which was approximately .5¢ per gallon, leaving them an operating margin to cover costs of sale of approximately 5.¢ per gallon, and giving each of them a marginal sales advantage of approximately 1.¢ per gallon over their competitors purchasing at the posted tank-wagon price.

9. The differentials respondent granted Ned's Auto Supply Company on its branded gasoline, Red Crown, conferred upon that company competitive price advantages

which were used by that company to greatly enlarge the volume of its retail gasoline business, by offering for sale at retail, and selling said gasoline at a price of 2¢ or more per gallon below the prevailing retail price at which competitive retail service stations, purchasing Red Crown gasoline at respondent's posted tank-wagon price, were offering said gasoline for sale, which diverted gasoline trade in substantial volume from the retail service stations of its competitors to its own stations.

10. The differential respondent granted the Citrin-Kolb Company on its branded gasoline, Red Crown, conferred upon that company competitive price advantages which were used by that company to greatly enlarge the 502 volume of its gasoline business by (a) offering for sale and selling and delivering to certain of the retail service stations supplied by it, said gasoline at from .5¢ to 1¢ per gallon below the posted tank-wagon price; a part of which was resold through the stations receiving the differentials at less than the prevailing retail price at which their competitors, purchasing their gasoline at the posted tank-wagon price, were offering and selling said gasoline, with the result that a substantial volume of gasoline business was diverted to their stations from the stations of their competitors; and, (b) offering for sale and selling, a part of said gasoline through retail service stations operated by it at 2¢ per gallon less than the prevailing retail price at which those stations, paying the posted tank-wagon price for said gasoline, were offering the same for sale, with the result that a substantial volume of gasoline business was diverted to Citrin-Kolb stations from the stations of its competitors.

11. To regain the business of their gasoline customers in whole or in part it was necessary for the competitors of Ned's, Citrin-Kolb and stations supplied by Citrin-Kolb to correspondingly reduce their prices on Red Crown gasoline which reduced their operating margin to approximately 2¢ or less per gallon,—an amount insufficient to enable them to continue in business unless each increased its sales volume of gasoline, while the beneficiaries of said price advantages could operate with a profit on the margin they had established without increasing their business.

Conclusion of law:

1. The effect of the granting by respondent to Ned's Auto Supply Company of .5¢ per gallon on tank-wagon deliveries below its posted tank-wagon price for its branded gasoline, Red Crown, from September 1, 1936, to March 1, 1938, was to substantially lessen competition and tended to injure, destroy or prevent competition with the retail service stations operated by Ned's Auto Supply Company by those retail service stations purchasing Red Crown gasoline at the posted tank-wagon price from respondent, the Stikeman Oil Company, the Wayne Oil Company and the Citrin-Kolb Oil Company; and the granting of said differential was in violation of Section 2 of the Clayton Act as amended.

2. The effect of the granting by respondent to Ned's Auto Supply Company, and to the Citrin-Kolb Oil Company, following their selection and recognition by respondent as jobbers, of a differential of 1.5¢ per gallon on its branded gasoline, Red Crown, below its posted tank-wagon price for said gasoline, was, is or may be, substantially to lessen competition or tend to injure, destroy or prevent competition with the retail service 503 stations operated by Ned's Auto Supply Company, those operated by the Citrin-Kolb Oil Company and a part of those stations supplied by the Citrin-Kolb Oil Company, by those service stations purchasing Red Crown gasoline from respondent, the Wayne Oil Company, the Stikeman Oil Company and the Citrin-Kolb Oil Company at respondent's posted tank wagon price; and the granting of said differential was in violation of Section 2 of the Clayton Act as amended.

3. The effect of the granting by respondent to the Stikeman Oil Company and the Wayne Oil Company, following their selection and recognition by respondent as jobbers, of a differential of 1.5¢ per gallon on its branded gasoline, Red Crown, below the price respondent charged its tank-wagon customers was and is to give those companies competitive advantages in the resale of said Red Crown gasoline through the retail service stations operated, or that may be operated, by them and each of them, over those service stations purchasing Red Crown gasoline from respondent and the Citrin-Kolb Oil Company by tank-wagon at respondent's posted tank-wagon price, and may

result in substantially lessening competition or tending to injure, destroy or prevent competition with those stations now, or that may be, operated by them, or either of them, by those service stations purchasing Red Crown gasoline by tank-wagon and paying the posted tank-wagon price therefor; and the granting of said differential was in violation of Section 2 of the Clayton Act as amended.

4. The effect of the granting by respondent to Ned's Auto Supply Company, the Stikeman Oil Company, the Wayne Oil Company and the Citrin-Kolb Oil Company, or either of them, following their selection and recognition by respondent as jobbers, of differentials of 1¢ per gallon on Stanolind and 1.75¢ per gallon on Solite with Ethyl, below the posted tank-wagon prices respondent charged its tank wagon customers for said gasolines, was to confer upon each of said companies competitive advantages in the sale of said gasoline through service stations operated by them, or either of them, over those service stations purchasing the same brands of gasolines at respondent's posted tank-wagon prices, which may result in substantially lessening competition, or tending to injure, destroy or prevent competition with each of the stations operated by each of said four companies, by those service stations purchasing said gasoline at respondent's posted tank-wagon prices; and the granting of said differentials was in violation of Section 2 of the Clayton Act as amended.

XII.

Informative Evidence.

The record contains a large amount of testimony and some exhibits, which have no bearing upon any question of fact alleged in the complaint and which constitute no
504 legal nor equitable defense to this proceeding. It is, however, informative as to marketing conditions generally existing in the oil industry throughout the United States and was admitted in evidence for the information of the Commission. This evidence is designed to show that the acts and practices of the respondent, against which the complaint is levelled, have been for years and are now sanctioned and approved by a large part of the oil industry and generally recognized as proper and lawful. It indicates with reasonable certainty that certain of the major oil companies do not sell to jobbers in fields in which they

sell direct to the retail trade; while other major oil companies, like respondent, sell to both jobbers and to retailers in the same field, granting their jobber customers the usual jobber differential, which in rural sections is as high as 3¢ or more per gallon. Some of the jobbers resell entirely at wholesale, while others resell both at wholesale and at retail, and some entirely at retail, in competition with the retail trade purchasing at higher prices and supplied by the same oil company (See Resp. Exs. 23, 19, and testimony of Marshall, R. 1712-1840, Dyer, R. 1472-1567; 2760-77). With the non-major oil companies such is a common practice.

XIII.

Recommendation as to Form of Order.

Your examiner recommends that an order issue directing the respondent to cease and desist from—

(a) Selling its gasolines to any of its retailer tank-wagon customers in the Detroit Metropolitan area in Michigan, at a price less than its regular posted tank-wagon price, unless the difference in price makes only due allowance for differences in cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the gasoline is to such purchaser sold or delivered; and where any preferential price terms are granted any one customer by reason of differing methods or quantities in which the gasoline is to such customer sold or delivered, like terms shall be granted to any of respondent's other tank-wagon customers who may purchase and take delivery by the same methods and in like quantities.

(b) Granting any dealer, jobber, or wholesaler, who resells at retail through service stations operated by said dealer in competition with retail service stations purchasing respondent's branded gasolines at its posted tank-wagon price, and within the Detroit Metropolitan area in Michigan, any differential on any of its branded gasolines to be by said dealer, jobber or wholesaler resold at retail through its service stations, unless the
505 difference in the price makes only due allowance for differences in cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the gasoline is to such purchaser sold and delivered.

(c) Granting any dealer, jobber, or wholesaler who resells to retail service stations in the Detroit Metropolitan area in Michigan, any differential on its branded gasolines, under the posted tank-wagon price, to be resold by said dealer, jobber or wholesaler to retail service stations at less than the posted tank-wagon price, unless the difference in price makes only due allowance for differences in cost of manufacture, sale or delivery resulting from the differing methods or quantities in which the gasoline is to such purchaser sold and delivered.

Respectfully submitted,
Webster Ballinger,
Trial Examiner.

June 25, 1943.

Note: The Trial Examiner's report is not a report or finding of the Commission. Such report is advisory only, and is not binding upon the Commission.

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* * (Caption—4389) * *

EXCEPTION TO TRIAL EXAMINER'S REPORT UPON THE EVIDENCE.

The undersigned, attorney for the Federal Trade Commission in the above-entitled matter, hereby excepts to the Trial Examiner's report upon the evidence herein, filed July 2, 1943, in the following respects:

I.

Exception is taken to the statement appearing at pages 44 and 45 of the Examiner's report, as follows:

"From 1930 to 1936 Ned's had received offers from responsible companies handling branded gasoline comparable in quality to those furnished by respondent at substantially lower prices—one cent per gallon less by tank-wagon (R. 3089, 3091), and from two (R. 3100) to five cents per gallon (R. 3094-6), less by tank-car than the price respondent was charging Ned's."

There is no evidence that any major oil company was offering to sell Ned's gasoline at a price lower than the prevailing tank-wagon price in 1936, at or prior to the time when respondent began to give Ned's a ½c differential on tank-wagon deliveries. There is no evidence that the one offer to sell to Ned's at less than the tank-wagon price which was effective in 1936 related to a gasoline "comparable in quality" to Red Crown gasoline, and it is affirmatively established that the one brand so offered was not a major brand and did not have the public acceptance of Red Crown.

The first so-called "offer" testified to by the witness Gershenson, president of Ned's Auto Supply Company, is said to have been made about 1930 by the Argo Oil Company. (It was agreed between counsel that the word "offer" when used in questions and answers on this subject
507 was used without legal significance and not as supporting a conclusion that any conversation or negotiation so referred to amounted to an offer in the legal sense.) This offer related to Dixie gasoline (not a major brand). Argo was then just starting to sell gasoline, and there is no evidence that it was a "responsible" company at that time. Mr. Gershenson told Argo "that we weren't interested in that offer and that died right there" (R. 3089).

The next offer referred to is one from the Red Indian Oil Company, which the witness said "has continued right up to today." That was also in 1930 (R. 3090). Red Indian at that time was selling Phillips 66 (R. 3091). However, in 1934 or 1935 the Red Indian Oil Company discontinued Phillips 66 and took on Fleetwing gasoline (R. 5337), and the subsequent testimony of Mr. Gershenson shows that the "continuing offer" from Red Indian thereafter referred to Fleetwing. Fleetwing was not a major brand, and did not have the public acceptance of respondent's gasoline in Detroit (R. 5345). There is no evidence that Fleetwing was "comparable in quality" to Red Crown.

Mr. Gershenson next testified regarding a conversation with a Mr. Dodge, representing the Texas Company, at Akron, Ohio in 1933 (R. 3094). There is testimony (purely hearsay) that Texas was then selling house brand gasoline to the Firestone Tire and Rubber Company in Detroit in tank-car quantities under a contract at 4c off tank-wagon price. Mr. Gershenson asked Mr. Dodge if Ned's could get the same kind of a contract. Ned's did not have a bulk plant at that time, and Mr. Gershenson returned to Detroit to see whether he could obtain bulk plant facilities, and he told Mr. Dodge that he would communicate with him further. Mr. Gershenson thereafter told Mr. Raupagh, respondent's Detroit manager, that "We wanted to buy and we were negotiating to buy gasoline from Texas on the same type of contract that Firestone had" (R. 3097). There is no evidence that Texas ever offered to sell to Ned's at 4c off tank-wagon price, or at any other price. All that appears is that Ned's had some negotiations with Texas with regard to buying in tank-car quantities. Ned's had no bulk plant at that time, and did not obtain one until February 1938 (R. 3120). Mr. Gershenson admitted that he had no offer in writing or any letter submitting any definite proposition from Texas (R. 3098).

The next offer described by Mr. Gershenson was from Shell Oil Company in 1933 or 1934. Shell was looking for a single jobber in Detroit, and according to Mr. Gershenson a representative of the Shell Oil Company told
508 him that Shell would sell to Ned's as a tank car jobber
at 2c less than the prevailing tank-wagon price, but "it might have been only a cent and a quarter" (R. 3100-01). The Shell representative said that if Ned's didn't accept the offer they would get somebody else and it wouldn't be available; later Gershenson was told that Shell had made the deal with Stark Hickey (R. 3101), and that the offer was no longer open (R. 3198). Mr. Gershenson said further that "Jack Reed kept me posted on what they were doing, and he said they had signed up somebody else, and I told him not to feel badly. We didn't intend to change from Standard Oil Company" (R. 3104).

Mr. Gershenson didn't recall whether or not he specifically mentioned the Shell Oil Company in communicating with Mr. Raupagh (R. 3104), and that "I didn't disclose the company" (R. 3105).

While the authority of Jack Reed to represent the Shell Company in this capacity does not appear, it is clearly evident that such an offer, if made, expired shortly thereafter, and that Mr. Gershenson knew that no such offer was in effect in 1936.

Regarding Mr. Gershenson's conferences with respondent's representatives in Detroit and Chicago just prior to the time Ned's was given the ½c differential, Mr. Gershenson was asked by respondent's counsel whether he told respondent from whom he could get a lower price at that time. Mr. Gershenson replied, "I don't recall anything then. It is contrary to our practice to name a competitive price, as to whom it comes from; the supplier, because a competitive thing—there are too many arguments directly, and too many things to spoil them" (R. 3109). He said further that the only "offer" which he specifically had in mind at that time was the one from the Red Indian Oil Company (R. 3107, 3110).

The record is devoid of any evidence that any supplier of a major brand of gasoline was offering to sell to Ned's Auto Supply Company in 1936 at a lower price than the prevailing major tank-wagon price at which Ned's was then buying from respondent. Furthermore, it was Ned's "sincere business judgment" that the loss of volume which would result from a change from Standard to some other competitive brand would more than offset the additional margin that Ned's might make on the other brand, so that it would be a stand-off (R. 3099). Ned's was merely
509 trying to get a lower price from respondent so that they could make more profit (R. 3099), and we have Mr. Gershenson's direct admission that at this time (1936) he did not consider any change that he could make to another brand to be more favorable to his company than the continued purchase of respondent's brands at tank-wagon prices.

II.

Exception is taken to the following "Conclusion of Fact" at page 47 of the Examiner's report:

"The differential of .5c per gallon on Red Crown gasoline respondent granted Ned's Auto Supply Company on tank-wagon deliveries from September 1, 1936 to March 1, 1938 was made to meet an equally low or lower price of a competitor or competitors for branded gasolines of comparable grade and quality."

There is no evidence that any major competitor of respondent was offering Ned's an equally low or lower price on branded gasoline in 1936. There is evidence of an offer from Red Indian Oil Company to sell Fleetwing gasoline to Ned's at a price lower than respondent's price for Red Crown, but Fleetwing was not a major brand and there is no evidence that Fleetwing was a gasoline comparable in grade and quality with Red Crown. (See discussion under Exception I, supra.)

III.

Exception is taken to the "Conclusion of Fact" appearing at page 55 of the Examiner's report, as follows:

"The differentials on its branded gasolines respondent granted Ned's Auto Supply Company, at all times subsequent to March 7, 1938, and Stikeman Oil Company, * * * and the Wayne Company, at all times subsequent to June 19, 1936, were granted to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality."

a. Ned's Auto Supply Company.

There is no evidence that any major oil company was offering to sell gasoline to Ned's at tank-car prices in February or March of 1938, or in fact at any other time prior to the issuance of the complaint in this case.

510 Within a month prior to March 7, 1938, Mr. Gershenson had confirmed the fact that Ned's could buy gasoline from the Red Indian Oil Company on a tank-car basis (R. 3115-6). Ned's then made arrangement to acquire bulk plant facilities (R. 3119-20), and Mr. Gershenson told Mr. Raupagh that unless respondent would sell to Ned's on a tank-car basis, Ned's would buy from someone else (R. 3113, 3121). Mr. Gershenson mentioned three companies—Shell, Texas and Red Indian—to Mr. Raupagh as available sources of supply (R. 3113).

Mr. Gershenson well knew that he could not purchase gasoline from Shell and at that time, the 1934 offer having long since expired (R. 3104, 3198). It does not appear that Ned's ever received an offer from the Texas Company to sell Texaco gasoline at tank-car prices (page 2, supra). Evidently, the names Shell and Texas were merely used by Mr. Gershenson for added weight in his attempt to persuade respondent to give Ned's a tank-car deal. Actually the only offer which Ned's had and relied upon at that time was from the Red Indian Oil Company, sellers of Fleetwing gasoline, a non-major brand in Detroit (R. 5345).

In November or December of 1940, "in anticipation of being called to testify," Mr. Gershenson contacted five companies in an effort to obtain evidence or competing offers for the respondent's use (R. 3140). Aside from Red Indian, he was able to testify to an offer to sell at tank-car prices by only one company—Gulf. Gulf's price at this time, according to Mr. Gershenson, was the same as respondent's price (R. 3141). Respondent did not call as a witness any one representing Gulf or any other supplier, to confirm any alleged competitive offer.

b. Wayne Oil Company.

There is no evidence in the record that any competitor of respondent, major or non-major, offered to sell gasoline to Wayne Oil Company at tank-car prices prior to the issuance of the complaint herein. There is no evidence that any major company offered tank car prices to Wayne at any time.

Mr. Ledbetter, president of Wayne Oil Company, testified regarding two alleged offers made to his company in December, 1940, after the issuance of the Commission's complaint against respondent. He stated that on December 10, 1940, a salesman representing the Aurora Gasoline Company offered to sell Wayne 80 octane gasoline delivered by transport truck at 6.1c per gallon. Aurora is a Michigan refiner (R. 5276); its gasoline is unbranded and it does no advertising (R. 5278). Its president testified that Aurora makes no long term contracts on gasoline and will not quote a price for a period longer than thirty
511 days (R. 5279-80). An Aurora salesman could not bind the company for the sale of any large quantity of gasoline over a longer period of time (R. 5284); Aurora does not make any sales at a fixed margin below the major tank-wagon price (R. 5303).

It conclusively appears, therefore, that if any such "offer" as testified to by Mr. Ledbetter was made by the Aurora salesman, the salesman had no authority to make such an offer and the price quoted was not the price of, and was not binding upon, the Aurora Gasoline Company. Furthermore, unbranded gasoline regularly sells at a lower price than major brands in Detroit, retail competition from non-major brands at 2c per gallon less than the major price not being considered very severe (R. 404, 520).

Mr. Ledbetter also testified to an "offer" made by the National Refining Company in December, 1940. This offer was a joint offer made to Wayne Oil Company and Stikeman Oil Company, and was not available for acceptance by either company alone (R. 1912). National Refining Company was not selling gasoline in Detroit at this time (R. 1906), and had no distribution in the Detroit area (R. 1890). Its "White Rose" brand was not a major brand.

There is no evidence that Wayne considered accepting either of these offers. Mr. Ledbetter communicated them to respondent only because respondent told him, after the complaint herein was served, that they wanted to know about any competitive offers that had been made to him (R. 1886, 1903). The trial examiner struck from the record all of the testimony regarding these alleged offers, but it was reinstated by the Commission upon motion of the respondent after hearings were closed.

c. Stikeman Oil Company.

There is no evidence that any competitor of respondent offered to sell to Stikeman at tank-car prices, except the testimony of Mr. Ledbetter, just above referred to, that a joint offer was made to Stikeman and Wayne in December, 1940, by National Refining Company involving a non-major brand having no distribution in the Detroit area. There is no evidence that Stikeman could have purchased at tank-car prices from any major company other than respondent on June 19, 1936, or at any time thereafter.

IV.

Exception is taken to the statement of the examiner at page 54 of his report that Citrin-Kolb Oil Company received an offer from Aurora Gasoline Company on December 10, 1940, to furnish gasoline in tank-car quantities
512 at 1.5c per gallon less than respondent's price.

Testimony to that effect was given by Mr. Citrin. The date referred to was after the issuance of the complaint herein. According to Mr. Citrin's testimony, the offer was made by a Mr. MacGready, a salesman of Aurora Gasoline Company.

As above pointed out under Exception III-b, the president of Aurora testified that Aurora never makes any long term contracts on gasoline, never agrees to maintain a price for more than thirty days, and does not make any sales at a fixed margin below the prevailing major price (R. 5279-80, 5303). Mr. MacGready was called as a witness by the Commission, and he directly contradicted Mr. Citrin's testimony. He stated that at Mr. Citrin's request that he quoted to Mr. Citrin Aurora's then current price, but did not tell Mr. Citrin that Aurora would sell him gasoline at a fixed margin below the prevailing major price (R. 5326-29). While there is a conflict of testimony between Mr. MacGready and Mr. Citrin, the testimony of Mr.

Slaughter, president of Aurora, is uncontroverted to the effect that Mr. MacGready had no authority to make any such offer as described by Mr. Citrin, and that the records of the company indicate that no such deal was ever presented for consideration (R. 5283-6).

It will be recalled that about this time respondent asked its jobber customers to supply it with evidence of offers by respondent's competitors (R. 1886, 1993, 3140).

Respectfully submitted,

Cyrus B. Austin,
Trial Attorney.

July 12, 1943.
CBA:lva.

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515 Before Federal Trade Commission.

* * (Caption—4389) * *

EXCEPTIONS TO TRIAL EXAMINER'S REPORT.

(Figures in parentheses, unless otherwise explained, refer to pages of the official record.)

* * * * *

Now comes Standard Oil Company, an Indiana corporation, Respondent herein, appearing by Arthur J. Abbott, of the law firm of MacMahon, Abbott and Roberts, and excepts to the report upon the facts of Honorable Webster Ballinger, Trial Examiner of Federal Trade Commission, filed with the Commission on the 2nd day of July, 1943, and served upon Respondent on the 6th day of July, 1943,* in the following particulars, to-wit:

516 I.

To Paragraph V, on Page 15 to 18 (inclusive) of said Report, wherein it is stated that the transactions complained of were in interstate commerce.

Respondent further specifically excepts to said Paragraph V on the following grounds:

(The following specific exceptions are not inclusive nor substantial of the foregoing general exception to said Paragraph V).

(a) To the references, on Pages 15 and 16 thereof, to

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* An order of the Commission was subsequently made, extending the time to file the within Exceptions to and including August 5, 1943.

the execution of written contracts for the furnishing of gasoline by Respondent, which references are irrelevant and redundant; likewise, to the references therein relative to the maintenance, in the Detroit area, of six bulk storage plants; inasmuch as such contracts and facilities relate solely to transactions wherein gasoline is sold by Respondent to customers other than the four jobber customers involved in this case, and are wholly separate and distinct therefrom, having no bearing whatsoever on the
517 question as to whether the transactions complained of were in interstate commerce; and, furthermore, inasmuch as there never were and are not now any written contracts between Respondent and said four jobber customers, covering tank car shipments of gasoline (34).

(b) To the reference on Page 17 of said Paragraph V, relative to certain cases of emergency jobber shipments made in interstate commerce, which have no bearing on the question of whether the transactions complained of were in interstate commerce; inasmuch as such shipments were atypical and constituted isolated and unusual transactions (182) due to emergencies occurring in the years 1938 and 1939, and one instance in April 1940, when Respondent, being out of stock of a particular grade of gasoline at River Rouge, Michigan, shipped the same by railroad direct from Whiting, Indiana,—it appearing from the testimony that in the closed lake navigation period Respondent sometimes ran short of gasoline at River Rouge and ordered cars from the refinery at Whiting to supply its jobbers, but that no such instance has occurred
518 since April 1940 (180).

(c) To the failure of the Trial Examiner to report that the storage tanks of Respondent at the River Rouge, Michigan, marine terminal are filled to their maximum capacity of one million five hundred thousand barrels of gasoline during the summer open lake navigation season, and that the gasoline stored therein comes to rest, often for several months (192), before being shipped wholly in Michigan to Respondent's jobber customers (155); and that none of such gasoline so stored is earmarked, when stored, to be sold to any of such jobbers (156),—the latter being supplied solely on day to day orders, all executed wholly in Michigan, without any contract whatsoever; and that none of such gasoline so stored and later sold to such jobbers is withdrawn from storage

in fulfillment of any contract with any jobber customer involved in this proceeding; and that all of such transactions happen wholly within the State of Michigan (165-167); and that when the tank car shipment of gasoline from the River Rouge, Michigan, marine terminal of Respondent is delivered to the bulk plants of the jobbers
(all situated in the State of Michigan), that terminates
519 the transaction, insofar as the physical handling of
the gasoline is concerned; and that thereafter the
jobber pays the Detroit Office of Respondent for the shipment (167).

(d) To the conclusion of law stated on Page 18 of said Report, and to the answer "yes" made by the Trial Examiner to the question as to whether the transactions complained of were in interstate commerce; which conclusion and answer Respondent contends are incorrect, as a matter of law.

520 II.

To Paragraph VI, on Pages 18 to 28 (inclusive) of said Report, wherein it is stated that the .5¢ per gallon differential which Respondent granted Ned's Auto Supply Company, from September 1, 1936 to March 1, 1938, on tank wagon deliveries of gasoline under the price charged other retail reseller tank wagon customers did not make due allowance only for differences in cost of sale and delivery resulting from different method and quantity in which said gasoline was sold and delivered, as between Ned's Auto Supply Company and Respondent's other tank wagon customers in the Detroit metropolitan area in the State of Michigan.

Respondent further specifically excepts to said Paragraph VI on the following grounds:

(The following specific objections are not inclusive nor substantial of the foregoing general exception of said Paragraph VI).

(a) That the issue presented by said Paragraph VI
is moot, and should have been so reported by the
521 Examiner; the practice complained of having been
permanently* discontinued as of March 1, 1938
(3742-3) (3745-6-8).

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* In view of the express finding that the practice was permanently discontinued on March 1, 1938, it is submitted that *Sears Roebuck & Co. v. F. T. C.*, 258 Fed. 307, 310, is not applicable.

(b) That the statement by the Trial Examiner to the effect that Respondent's witness, John W. Boatwright, "frankly admitted that he did not know, of his own knowledge or knowledge gained from records, either the number or percentage of full and partial dump deliveries made to Ned's during the year 1937" (Report, p. 22, 1st Paragraph) is contrary to the testimony of said witness,—he having testified that:

"I know that most of them were on full load basis, except as when it became necessary for our truck to operate out of our plants to make deliveries to stations in the nearby neighborhood, they were privileged at any time, upon report to the plant, to dump one or two compartments in Ned's tanks. That responsibility of keeping the tanks filled enabled us to operate our trucks on a full load basis to a greater extent than they could have been operated in serving other retailer accounts, had it not been for the Ned's outlets". (3818)

522 (c) That the statement by the Trial Examiner to the effect that "whether any of the other 357 customers took all or substantially all of the deliveries in full tank wagon loads, and, if so, how many, is not shown by the record, but that a substantial part of the deliveries made to a part of them were made in full dumps is fairly established", is contrary to the testimony, and constitutes an incorrect conclusion of fact therefrom. (3817-8) (5181)

(d) That in rejecting Respondent's testimony relative to sales promotion expenses claimed by Respondent as not chargeable to Ned's Auto Supply Company, the Trial Examiner (Report, pp. 23-25) unjustifiably adopts the opinion of the Commission's Accountant, William J. Warmack, to the general effect that such items of expense could not be allocated as between different classes of customers (5791); which opinion is contrary to the weight of the testimony. (2651-2) (4331) (5140-5)

(e) That in rejecting Respondent's testimony relative to advertising costs claimed by Respondent as not chargeable to Ned's Auto Supply Company, the Trial Ex-523 aminer (Report, pp. 25-27) again adopts the opinion of the Commission's Accountant, William J. Warmack, and states:

"In the opinion of Mr. Warmack, Commission's Accountant, some part of this expense should have been charged to Ned's". (5901-2) (Report, p. 26).

"Mr. Warmack, Commission's Accountant, testified that there is no sound method by which such costs can be allocated between different service stations selling Standard Oil products, except on the basis of gallonage corroborated by Boatwright (supra) (d), which would afford no cost differential". (Report, p. 27).

There is no factual basis in the record for stating that Mr. Warmack's opinion, as stated, was "corroborated by Boatwright".

As for the opinion of Commission's Accountant, which was permitted by the Trial Examiner to prevail over all of Respondent's testimony as to costs not attributable to gasoline sold and delivered to Ned's Auto Supply Company, the record shows that Mr. Warmack admitted on the record that he had no conception of what constitutes proper cost accounting procedure under the Robinson-Patman
524 Act,—his testimony being as follows:

Q. "As far as you know, Mr. Warmack, has there been, either by great degree or otherwise, any norm or yardstick established as to what is the proper cost accounting procedure under the Robinson-Patman Act?"

A. "I do not know if there has been, Judge Hanley."

Q. "If there has been, you don't know about it; is that what you mean to say?"

A. "I do not know about it." (6526).

It further appears from the record that the Trial Examiner, in allowing the testimony of Commission's accountant to prevail over all of Respondent's testimony justifying the one-half cent differential granted to Ned's Auto Supply Company, ignored testimony establishing that Mr. Warmack did not examine the work sheets of, or accounting procedure followed by, Respondent in its study of the costs applicable to this differential (5779) (6617) (7784).

(f) That the Conclusions of Fact and Conclusion of Law arrived at by the Trial Examiner in relation to the
525 one-half cent differential accorded Ned's Auto Supply
Company, from September 1, 1936 to March 1, 1938, on tank wagon sales of gasoline (Report, pp. 27-28) are erroneous; particularly insofar as the Trial Examiner concludes that the testimony "neither establishes nor tends to establish any differential in the cost of sale and delivery of gasoline to Ned's Auto Supply Company and to Respondent's other tank wagon customers in that area"—which

conclusion of the Trial Examiner disregards both facts and economics, and is contrary to the great weight of the testimony.

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III.

To Paragraph VII, on Pages 28 to 43, (inclusive) of said Report, wherein it is stated that the answer is "no" to the question:

> "Did the differentials of 1¢ per gallon on Stanolind, 1.5¢ on Red Crown and 1.75¢ on Solite with Ethyl gasolines, accorded the four dealers recognized by Respondent as jobbers, or tank car or transport truck customers, under Respondent's tank wagon prices charged its retail reseller customers for gasoline of like grade and quality, make only due allowance for differences in cost of sale and delivery resulting from differing methods or quantities in which the gasoline was sold and delivered to Respondent's jobber, or tank car, customers, and to its retail reseller, or tank wagon, customers, in the Detroit metropolitan area in Michigan?"

Respondent further specifically excepts to said Paragraph VII on the following grounds:

(The following specific exceptions are not inclusive nor substitutional of the foregoing general exception to said Paragraph VII.)

(a) To the statement made in the last paragraph on Page 28 of said Report to the effect that the differential 527 of 1.75¢ per gallon on Ethyl Gasoline is admittedly not justified.

The impossibility of the segregation of marketing costs as between the different brands of gasoline is discussed twice in the record (2501-2) (8054-5). A calculation was made between counsel which showed that the average differential based on brand ratios and discount allowance of 1.75¢ per gallon on Solite with Ethyl, 1.50¢ per gallon on Standard Red Crown, and 1.0¢ per gallon on Stanolind, revealed a weighted average differential on the three grades of gasoline of approximately 1.5¢ per gallon. This calculation was referred to in the closing of the taking of testimony (8055), and had been used in conferences between attorneys for Respondent and the Commission, which resulted in a gentlemen's agreement, whereby it was stipulated and understood that the issue should be decided on the basis of the differentials of 1.5¢ per gallon allowed on Standard Red Crown gasoline, which represents approximately 90% of the gasoline gallonage involved in the proceeding. The existence of this gentlemen's agreement will, no doubt, be confirmed by Cyrus B. Austin, Attorney for the Commission.

528 (b). To the statement of the Trial Examiner, made in the last paragraph on Page 29 of the Report, and repeated several times thereafter, to the effect that the jobber price differential justification was based on operations in the entire Detroit Division, instead of on operations in the so-called Detroit metropolitan area; and that, according to the testimony, populous areas show a lower marketing cost than rural sections (Report, p. 30).

The citations to the record on p. 30 of the Report do not substantiate the Trial Examiner's conclusion that the marketing cost in the Detroit Division is, or may be, less than in the Detroit metropolitan area, so-called. The testimony of Mr. Boatwright, alluded to by the Examiner, only pointed out that the fields of Minneapolis, Kansas City and St. Louis contained metropolitan areas and reported high costs. (5657-8). The testimony of Mr. Dy of Sinclair, alluded to by the Trial Examiner, does not substantiate the conclusion that the cost of marketing 529 gasoline is usually less on a per gallonage basis in populous areas than in outlying sections. (1516).

Mr. Warmack, Commission's Accountant, stated that he made no objective factual study of costs in the Detroit metropolitan area, as distinguished from the rest of the Detroit field (5958).

In this case, Respondent used as the basis for its cost analysis the smallest geographical area for which records had been maintained and within which the complaint was lodged. Nothing more was humanly possible.

The testimony referred to by the Trial Examiner has reference only to general distribution costs incurred from serving all types of customers. The testimony of Respondent's witness, Dyer, contains no statement to the effect that it relates directly to the reseller volume.

(c) To the statement of the Trial Examiner (Report, p. 32) to the effect that there is no factual basis established for Respondent's Exhibit 33-A to E (inclusive).

530 This conclusion is not justified by the record. The testimony of Mr. Boatwright shows clearly that ac-

counting costs reflected by said Exhibit was comparable, and even identical, as between the Kansas-Oklahoma field and the Detroit field: accounting, selling and marketing procedures being exactly the same (2663-4).

(d) To the statement of the Trial Examiner (Report, p. 34), to the effect that Mr. Warmack, Accountant for the Commission, made a thorough examination and study of Respondent's Exhibits 99, 100 and 101, and reviewed all the testimony relating thereto in the record.

The testimony shows that Mr. Warmack had never previously made any study or investigation relative to distribution cost accounting involving the sale and distribution of petroleum products (5774); and as to the thoroughness of his examination and study of these exhibits, and of Respondent's Exhibits 31 and 33-A to E (inclusive), and of the records underlying them, we refer to the record, which falls far short of substantiating the Trial Examiner's statement (5756) (5776-7) (5779) (6510) (6617). 531

(e) To the statement of the Trial Examiner on p. 36 of the Trial Examiner's Report, to the effect that "The 'other method' includes sales of gasoline to jobbers, sales of other products to jobbers, and expenses incident to direct shipments from Respondent's supply terminals to customers buying in carload quantities."

This statement is erroneous,—conflicting directly with the quotation on p. 3 of Respondent's Exhibit 100, which is as follows:

"It has not been deemed advisable to maintain a separate allocation of costs on sales of gasoline to jobbers, sales of other products to jobbers, or expenses incident to direct shipments from our supply terminals to customers buying in carload quantities. A separate classification of expense to these added channels has been considered unnecessary because of the small amount of expense applicable to sales to these classes of customers. Accordingly, any expense applicable to these classes of customers will be found scattered throughout the various channels on our 'Comparative Statement of Expense—Form 189, Detroit Field Year 1940'. The expense of isolating each marketing cost accurately to these additional classes of customers
532 would be prohibitive in terms of benefits received, and would load our sales with excessive accounting costs." (Resp. Ex. 100, p. 3)

There was no testimony to the contrary.

(f) To the statement of the Trial Examiner (Report, p. 37) to the effect that the cost of transporting gasoline from the River Rouge terminal of the four dealers was omitted from the cost analysis, while identical costs were charged to the tank wagon trade.

This involves an infinitesimal factor. Respondent's contention throughout the trial was that transportation costs from the River Rouge Terminal to jobbers' bulk plants should not be computed as a part of the cost differential. However, in order to forestall objection to this position by the Attorney for the Commission, a study was made of the difference in differential which would have been caused by including transportation costs to Respondent's bulk plants and transportation costs to jobbers' bulk plants, and it was shown by uncontradicted evidence (4607),
533 that the differential would be reduced thereby by only 8/1000 of a cent (.008 of a cent); so that the differential for 1940, as shown by Respondent's Exhibit 33-A, would be reduced only from 1.47 cents to 1.462 cents (4607).

(g) To the statements of the Trial Examiner, on p. 39 of the Trial Examiner's Report; wherein:

(1) He adopts the opinion of the witness Warmack and rejects that of Respondent's Economist, Boatwright, and his corps of assistants, who make a business of cost accounting in relation to the merchandising of petroleum products exclusively; whereas the witness Warmack never previously made any study or investigation relative to cost accounting involving the sale and distribution of petroleum products (5774).

(2) He states that the costs of marketing kerosene and tractor fuels sold to the tank wagon trade are "concededly improperly charged" to the tank wagon reseller channel, and amount to about 1 percent of the total volume
534 shown in that channel. (Citing Record, p. 4257).

The reference cited (4257) is not a concession on the part of Respondent that any costs are improperly included in the channel distribution of costs on Form 189 (Resp. Ex. 101).

(h) To the statement of the Trial Examiner (Report, p. 40) to the effect that "Before adopting the gallonage factor in the allocation of costs among the three bulk plant channels shown on Respondent's Exhibit 101, Respondent's economists made *no study* tending to verify or substantiate the use of the gallonage factor in the allocation of costs among the three sales channels * * *' (Boatwright, R. 8005), and therefore *no study* or tests had been made to support the use of the gallonage factor with a view to comparing the cost of sale and delivery of naphtha and gasoline to Respondent's tank wagon reseller and its jobber customers." (Italics ours.)

The record does not show that "no study" was made, as stated by the Trial Examiner.

The question of the use of a gallonage as an allo-
535 cation factor is dealt with at great length throughout the testimony. On page 8005 of the record, the witness Boatwright stated only that "we did not make additional studies to verify or substantiate the use of the gallonage factor in the allocation of costs among the three sales channels * * *." (8005)

This is far different from testifying that no study was made.

The great detail to which Respondent's Economist and staff have gone in analyzing the use of gallonage as an allocation factor is fully explained in the record. (7889-7897.) In the testimony referred to, Mr. Boatwright states that not only himself and staff, but the Comptroller of Respondent Company, C. T. Borgeson, and many of its other technical experts, and also Price, Waterhouse & Company, its Auditors, have given this problem long and close study, with the result that the use of the gallonage factor is substantiated without question. Mr. Boatwright's testimony on this point is clear and convincing.

536 (i) To the statement of the Trial Examiner (Report, p. 40) to the effect that "Witness Warmack, Commission's Accountant, testified that he was told by Respondent's Accountant that no study had been made to support the gallonage method of allocation or the accuracy of the figures obtained by using this method. He spent six weeks in Detroit, reviewing the factual basis for Respondent's Exhibits 100 and 101, and while there he requested that he be furnished any information which would support the use of gallonage used in Respondent's cost study as a measuring factor, and was told that Respondent had no such information." (R. 4934-5941.)

Mr. Warmack's testimony, when closely examined (5941), shows that he did not testify that the gallonage basis of alplocation is inadequate, or that any other or better method exists.

"Q. That being true, Mr. Warmack, does it follow that in connection with some accounts and expenses that the gallonage basis may not be the best available method of allocation?

537 "A. It may not be.

"Q. It may not be.

"A. It may not be, or it may be." (5941)

"A. * * * It may be the very allocation that you can arrive at regardless of how many studies you may make." (5942)

(The above questions were propounded by the Attorney for the Commission.)

As to Mr. Warmack's claim that he asked for and received from Respondent no information which would support the gallonage measuring factor, the record amply shows, both from the testimony of Leonard W. Houghton, Accountant for Respondent, (7788-7792), and of John W. Boatwright, Economist for Respondent, (7885), that such information could have been supplied but was never asked for by Mr. Warmack, and that Mr. Warmack advised both Houghton and Boatwright that "I have got everything I want". (7792—bottom.)

There is no testimony to the effect that Mr. War-

538 mack was told by Respondent's accountants that no study had been made by Respondent to support the gallonage method of allocation or the accuracy of the figures obtained by this method. On the other hand, the evidence amply establishes the long and exhaustive study given by Respondent to substantiate the gallonage method. (7889-7897)

539 (j). To the statement of the Trial Examiner (Report, p. 40) to the effect that:

"If the gallonage factor had been used in determining Respondent's costs of sale and delivery of naphtha and gasoline to the tank wagon resellers and its jobber customers, there would have been no differential." (Boatwright, R. 8003.)

The testimony referred to by the Trial Examiner is as follows:

"Q. If you had used total gallonage, Mr. Boatwright, including direct shipment gallonage, as a basis of allocation, no cost differential would have resulted between tank wagon reseller and jobber, naphtha and gasoline?

"A. That is correct. But it would have been an absurdity." (8003.)

The "absurdity" referred to is revealed by the testimony on the preceding two pages, wherein it appears that in Respondent's Exhibit 101, the expenses charged to jobber naphtha and gasoline were arrived at not by the gallonage method of allocation, but were predicated upon the
effort measure; the allocation being based upon "the
540 sum total of effort devoted to the jobber, naphtha and
gasoline, business." (8001-2.)

(k) To the statements of the Trial Examiner (Report, pp. 40-42), relative to the propriety of allocation of (1) advertising costs and (2) annuities and Retirement Plan expense, as between tank wagon resellers and jobber channels of gasoline distribution.

These items concern allocations made by Respondent's Economist and accountants, which the Trial Examiner rejects in favor of the opinions of the Commission's experts (Report, p. 42). Substantiation of these allocations is amply supported by the record. (5381) (5445-59) (7568) (7960) (7961) (Resp. Exhibit No. 101, pp. 24-36) (Resp. Exhibit No. 101, pp. 90-99). It is respectfully submitted that it is improper to adopt the opinions of accountants employed by the Commission, when their opinions are at variance not only with Respondent's experts, but also with practices followed by the Internal Revenue Department
in calculating income tax, and by other non-interested
541 experts. The advertising costs reflected in these items
are substantial, and are primarily and almost exclusively attributable to operations other than those affecting the jobber channels.

The claim (Report, p. 42) that Annuities and Retirement Plan expenses do not properly constitute marketing expense, is, it is respectfully submitted, not supported by the record.

The record shows that wherever an allocation of costs was found to be necessary, Respondent's experts accepted what they regarded as the most logical method of cost allocation. To quote Respondent's Economist, John W. Boatwright:

"In any detailed cost study, you go down to certain points where it is a matter of judgment. In the exercise of this judgment, we have attempted to adopt procedures which would throw all possible costs against the jobber." (4773.)

(I) To the Conclusion of Fact of the Trial Examiner (Report, p. 42), and particularly to subdivision 3 thereof, wherein it is stated that:

542 (1) Costs in the tank wagon reseller channel are over-weighted and those in the jobber channel are under-weighted; and,

(2) Items of cost properly chargeable to the costs of sale and delivery to the jobbers were omitted; and

(3) Correction of the account in the items referred to would reduce the cost differential to less than 1¢ per gallon.

It is mathematically impossible to take the accounts discussed by the Trial Examiner, trace his steps by calculation, and arrive at a differential of less than one cent per gallon—even assuming that the opinions expressed by witnesses for the Commission be accepted in their entirety, insofar as they conflict with the expert opinions of Respondent's witnesses.

In this connection, the record shows, without contradiction, that the differential accorded by this Respondent to tank car customers is the lowest in the entire petroleum industry. (1515-16.) This fact lends additional credence to the rejected testimony of Respondent's expert witnesses.

543 As to the claim of the Trial Examiner that costs in the jobber channel are over-weighted, it is submitted that this conclusion is contrary to the great weight of the testimony. John W. Boatwright, Respondent's Economist, definitely testified that, in the interest of conservatism, his cost study "added a burden of cost to the jobber gallon to which it is not entitled" (4775), and that:

"Q. Is it definitely your judgment that the method you have used overburden the jobber gallon as contrasted with the reseller channel gallon?

"A. That is true." (4776).

The claim of the Trial Examiner that "costs * * * in the jobber channel are under-weighted" is answered by Dr. Boatwright in the following testimony:

"Q. Basing your answer on your knowledge of the Respondent's business, on your training and knowledge as an economist and accountant, do you believe that it actually costs the Respondent as much as 16/100 of a cent a gallon to sell gasoline to the Detroit jobbers?

"A. I know that is the outside top figure." (4778-9).

544 (m) To the Conclusions of Law of the Trial Examiner (Report, p. 43) in their entirety.

It appears to Respondent that, if it has not justified the differential in question, there never can be a case of this kind in which a differential justification can be established. This is for the reason that the justification depends, to a large extent, upon expert opinion testimony as to the propriety of allocation of costs as between various channels of distribution. It is a matter of common experience that experts often disagree. The Robinson-Patman Act requires only that price differentials make due allowance for differences in cost of sale and delivery—but if a Respondent is held to mathematical exactness, his analysis of costs is invariably subject to a variance of expert opinion, which fact renders the justification of a price differential onerous. (7967). It is, therefore, respectfully submitted that a reasonable administration of the Robinson-Patman Act suggests in this case that the Commission should carefully review the question of the propriety 545 of the rejection by the Trial Examiner of the economic views and opinions of Respondent's expert witness, which, as the record shows, were arrived at only after many months of investigation and study. (7922) (7966).

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IV.

This question is presented by Paragraph VIII of the Trial Examiner's Report, on Pages 44 to 47 (inclusive) thereof. It involves the inquiry as to whether the 5¢ per gallon differential granted Ned's Auto Supply Company, from September 1, 1936 to March 1, 1938, on tank wagon deliveries of gasoline, under the price charged other reseller tank wagon customers in the Detroit area for gasoline of like grade and quality, was granted in good faith to meet an equally low (or lower) price of a competitor of Respondent.

Respondent takes no general exception to the Report of the Trial Examiner, as stated upon this question, nor to the Conclusion of Fact included on Page 47 of said Report; but makes specific exceptions thereto as follows:

(a) That the question presented by said Paragraph VIII is moot, and should have been so reported by the Trial Examiner.

547 (b) That the statement by the Trial Examiner on Page 44, to the effect that this question requires the separate findings, is erroneous, as a matter of law.

(c) That the Trial Examiner, in the Conclusion of Fact, reported on page 47, should have included, in addition to the finding reported therein, that the differential in question was granted in good faith by Respondent.

(Respondent notes, in this connection, that the Trial Examiner, under the heading "Conclusion of Law" (Report, p. 47) finds (with the qualification noted in the following paragraph) that the granting of such differential "was lawful", which finding doubtless implies that it was "granted in good faith by Respondent", as a matter of law).

(d) Respondent specifically excepts to that part of the Conclusion of Law, on Page 47 of said Report, insofar as it incorporates the proviso "Unless the granting of the .5¢ per gallon differential to Ned's Auto Supply Company constituted price discrimination, the effect of which was, is or may be substantially to lessen competition be-
548 tween Ned's Auto Supply Company's retail gasoline
service stations and those operated by (other) customers of Respondent * * *". This specific exception is taken by Respondent upon the ground that, the Trial Examiner having expressly found that said differential "was made to meet an equally low or lower price of a competitor or competitors (of Respondent), for branded gasolines of comparable grade and quality, and to retain Ned's (Auto Supply) Company's business", as a matter of law, the question appended by the Trial Examiner as the last paragraph of "Fourth Question" (Page 44 of Report) is redundant and immaterial.

549 V.

To Paragraph IX on Pages 47 to 50 (inclusive) of said Report, Respondent takes no general exception, insofar as the Trial Examiner reports that the selection of the four dealers (Ned's Auto Supply Company, Citrin-Kolb Oil Company, Wayne Oil Company, and Stikeman Oil Company) and their recognition by Respondent as jobbers, were lawful.

Respondent does, however, specifically except to certain portions of said Paragraph IX, in the following respects and on the following grounds:

(a) To the statements incorporated in said Paragraph IX on Page 48 of said Report, to the effect Respondent disregarded the Federal Trade Commission definition of the term "jobber" and "adopted its own standard, which required a greater showing of financial stability but dispensed with any showing as to the manner or method of resale * * *"; also to the reference in the second paragraph on Page 48 of said Report, wherein it is 550 stated that Respondent's definition of a "jobber" is different than that promulgated by Federal Trade Commission.

Respondent contends that there is no testimony in the record to substantiate these findings.

(b) To the statements twice occurring in the Report of the Trial Examiner, on Page 49 thereof, to the effect that the recognition by Respondent of Ned's Auto Supply Company as a jobber was a "forced recognition". (In taking this specific exception, Respondent does not in any respect waive its claim that the recognition of Ned's Auto Supply Company as a jobber was done to meet competition; but Respondent excepts only to the finding that said recognition was "forced" or the result of coercion.)

There is no testimony in the record to substantiate such a finding.

(c) To the conclusion of law, on Page 49 of said Report, insofar only as it purports to qualify the finding that the selection by Respondent of the four jobber dealers in question, and their recognition by Respondent as jobbers 551 was bona fide; Respondent submitting, in that regard, that the qualification of the Trial Examiner's finding, as stated in said Conclusion of Law, is unwarranted and improper.

(d) That the Trial Examiner failed specifically to answer the Fifth Question, as to whether the selection of the four jobber dealers in question and their recognition by Respondent as jobbers was bona fide; the answer being that "their selection and recognition by Respondent as jobbers was lawful"; which conclusion doubtless implies, however, as a matter of law, that their selection and recognition by Respondent as jobbers was "bona fide."

552 VI.

To Paragraph X on Pages 50 to 55 (inclusive) of said Report, Respondent takes no general exception, insofar as the Trial Examiner answers "yes" to the Sixth Question, to-wit:

"Were the differentials in price accorded the four dealers, recognized by Respondent as jobbers, made in good faith to meet equally low prices of competitors, or the services or facilities furnished by competitors."

Respondent does, however, specifically except to certain portions of said Paragraph X, in the following respects and on the following grounds:

(a) To the statement on Page 50 of the Report, to the effect that during the period in which Ned's Auto Supply Company received the .5¢ differential, its gallonage increased from approximately 2,400,000 to approximately 4,800,000 gallons; the record showing that its gallonage of gasoline was as follows: 1936,—2,400,000; 1937,—4,240,000; 1938,—4,800,000; 1939,—4,200,000; 1940,—4,200,000 (3082); and that after it went on the tank car 553 delivery basis its gallonage decreased.

(b) To the failure of the Trial Examiner to report that, according to the uncontroverted testimony of the Respondent's witness, James E. Dyer, of Sinclair Refining Company, the universal practice of the oil industry throughout the United States is to grant a differential margin in price as between tank wagon and tank car deliveries of gasoline ranging from 1½¢ minimum to 3¢ maximum, with an average of more than 2¢,—the amount depending upon location, and population density, and that a differential of 1½¢ is about as low as the differential ever becomes. (Record,—pp. 1515-16).

(c) To the failure of the Trial Examiner to report that the competitive offers of National Refining Company made to Wayne Oil Company were also made to Stikeman Oil Company (1888) (1892); which competitive offer was to furnish its branded gasoline (1905) which it represented as of better quality than Standard Red Crown (1907) at a price more than .5¢ less per gallon than Respondent was charging for tank car deliveries (1892).

554 (d) To the failure of the Examiner to report that in 1935, Wayne Oil Company, while receiving gasoline from Respondent on a tank wagon delivery basis at regular

tank wagon prices, operated one station in Detroit,—at the corner of Vinewood Avenue and Grand Boulevard,—at which gasoline was furnished by Highland Oil Company, distributors of Hi-Speed Gasoline, a major brand gasoline, by tank wagon delivery, at a price of one cent lower than Standard Oil Company's price (1893).

(e) To the Conclusion of Law, on Page 55 of said Report, insofar only as the same contains the proviso to the effect that:

"Unless the differentials granted the four dealers, above named, constitute price discriminations, the effect of which was, is or may be, substantially to lessen competition, or tend to injure, destroy, or prevent competition with said four dealers, or with the customers of either Respondent or said four dealers * * *:"

(f) To the failure of the Trial Examiner, in the Conclusion of Fact on Page 55 of said Report, specifically
to answer in the affirmative, or at all, the question as to
555 Respondent's good faith, as propounded in the Sixth
Question on Page 50 of said Report:

(Respondent notes, in this connection, that the Trial Examiner, under the heading "Conclusion of Law", on Page 55 of said Report, finds that "the granting of the differentials was lawful", which finding doubtless implies as a matter of law, that the differentials were "made in good faith".)

556 VII.

To Paragraph XI on Page 55 to 71 (inclusive) of said Report, wherein the Trial Examiner answers "yes" to the question identified as Seventh Question and appearing on Page 55 of said Report, in form as follows:

"Do the differentials in price accorded the four jobbers constitute price discrimination, the effect of which is, or may be, substantially to lessen competition, or tend to injure, destroy or prevent competition with said four dealers, or with the customers of either Respondent or the said four dealers."

Respondent further specifically excepts to said Paragraph XI of said Report on the following grounds:

(The following specific exceptions are not inclusive nor substitutional of the foregoing general exceptions to said Paragraph XI).

(a) That consideration of and answer to said Seventh

Question are unwarranted and improper, in view of the Trial Examiner's answers to the Fourth, Fifth and Sixth Questions.

557 (b) That in view of the Trial Examiner's report relative to Wayne Oil Company and Stikeman Oil Company (Report, pp. 58 and 59), Respondent is entitled to a forthwith dismissal of the complaint, insofar as it concerns said two jobbers.

(c) To the failure of the Examiner to report the uncontroverted testimony as to the reasons why Citrin-Kolb Oil Company, and certain of its reseller customers, gave discounts of 2¢ per gallon on gasoline in 1938 or 1939, as referred to on Page 59 of the Report; also as to the reasons why it (Citrin-Kolb Oil Company) was able to "make money" on the Langer & Cohen contract, referred to on Page 59 of the Report; also as to the reasons why Citrin-Kolb Oil Company gave price and rent concessions to certain of its reseller customers in 1938, 1939 and 1940. (Reasons appear in the undisputed testimony of Max Biber, —record, pp. 3218),—(1384-1425).

(d) To the statement of the Trial Examiner in Paragraph 2, Page 60 of the Report, to the effect that Ned's Auto Supply Company, following granting by Respondent of both the .5¢ differential on September 1, 1936, and
558 the 1.5¢ differential on March 7, 1938, reduced its price on Red Crown gasoline to the public (Record, p. 240-2 and Commission's Exhibits 3 and 22).

(e) To the statement of the Trial Examiner, on Pages 61, 62 and 63 of the Report, to the effect that in 1938, 1939 and 1940, Ned's Auto Supply Company granted discounts and premiums on retail sales of gasoline, without stating with particularity the competitive conditions in the Detroit area which made such concessions necessary if Ned's Auto Supply Company was to maintain even a semblance of competition with nearby retail gasoline competitors (Record, pp. 3153-3189); also without stating the uncontroverted testimony that no other or different price concessions on retail sales were made by Ned's Auto Supply Company after it went on a tank car delivery and price basis than existed, or were made, before it went on said basis. (Record, p. 3154).

(f) To the statement of the Trial Examiner, on Page 64 of said Report, to the effect that the retail gasoline price war of 1937-8-9 was caused and contributed to by

Ned's Auto Supply Company, Langer's, Bright's,
559 Hickey's, and Firestone; without reporting the testimony of Paul A. Raupagh, Manager of the Detroit Division of Respondent, wherein, at great length, an analysis of the causes of the Detroit price war of 1937-1939 were discussed and analyzed, and whereby it was established that Ned's Auto Supply Company and Citrin-Kolb Oil Company were, neither one of them, even a contributing factor in such "price war",—which was the result of fundamental economic conditions prevailing in the entire industry (Record, pp. 3262-3274); and that in 1939 economic conditions in the gasoline industry became stabilized (Record, p. 3274).

(g) To the statement of the Trial Examiner in the Report to the effect that the price differentials accorded Citrin-Kolb Oil Company were in excess of its cost of sale and delivery (Paragraph 5, on p. 65, of Report); without, however, reporting that a detailed cost analysis of Citrin-Kolb Oil Company's sale and delivery costs showed a per gallon cost on gasoline sold and delivered at wholesale, as follows:

560 1937—1.30 cents per gallon
1938—1.41 cents per gallon
1939—1.69 cents per gallon
1940—1.53 cents per gallon

Average—1937-1940 (inclusive) 1.4825 cents per gallon. (Record, p. 3031).

And, whereas, in the case of Wayne Oil Company, the comparable cost figures, based on wholesale operations only (Record, p. 2042, 2046), were as follows:

1938—1.501 cents per gallon
1939—1.451 cents per gallon
1940—1.489 cents per gallon

Average—1938-1940 (inclusive) 1.480 cents per gallon. (Record, p. 2010.)

(Note: It should be stated that this testimony as to Wayne Oil Company was stricken by the Trial Examiner (2049). A motion made by Respondent to the Commission was denied on December 28, 1942. In view of
561 statements of the Trial Examiner, made in the Report,
to the effect that the differentials accorded jobbers were in excess of cost of sale and delivery when con-

sidered from the standpoint of the jobbers' operations, it is respectfully submitted that this data as to sale and delivery costs of Wayne Oil Company should now be considered by the Commission, as well as the corresponding data as to the sale and delivery costs of Citrin-Kolb Oil Company).

(h) To the statement of the Trial Examiner in the Report, to the effect that "price cutting at Ned's stations has been almost continuous. It has been true over a long period", (Report, p. 62); whereas the testimony abundantly shows that Ned's Auto Supply Company was and is not a price-cutting marketer of gasoline (Record, p. 3472) (Record, p. 3187-93) (Record, p. 3217).

(i) To the statement of the Trial Examiner in the Report to the effect that "the cost to the Sun Oil Company of delivering gasoline from its bulk plants to its service stations in the Detroit area, including the cost of operating the bulk plants, is less than ½¢ a gallon (Report, p. 66, Paragraph 2); whereas, the Trial Examiner omits to 562 report the testimony to the effect that Sun Oil Company delivers only one grade of gasoline, instead of three grades, as in the case of Respondent (1381); that Sun Oil Company's figure included no administrative costs for executives' services (1382); that Sun's deliveries are made on route schedule (1382); that Sun's trucks operate 18 hours a day (1382); that Sun delivers a minimum of 2000 gallons of gasoline to a customer (1382), whereas Citrin-Kolb Oil Company's minimum is 250 to 400 gallons (1382) and Respondent's minimum by tank wagon is 200 gallons (26).

(The testimony of P. H. Harrison, of Sun Oil Company, relied upon by the Trial Examiner as the basis for the above statement, covers only hauling costs and not the additional costs of selling gasoline by the tank wagon method—whereas, the cost differential established by Respondent reflects the difference in the cost of both sale and delivery.)

(j) To the statement of the Trial Examiner (Record, p. 67), quoting with approval the testimony of Professor Herbert F. Taggart, relative to the average cost of sale of gasoline at retail in Detroit; which testimony, as the record discloses (Record, p. 1021; Comm. Ex. 76) 563 is unreliable,—being based upon a so-called "cost survey", compiled upon hearsay, and reflecting widely varying reported sales costs of retail station operators,

(k) To the statements of the Trial Examiner in the Report, (p. 68 thereof); to the effect that the practice of selling on a tank car delivery and price basis to jobbers who are also retailers causes a "difficult competitive condition" in the Detroit area, which ultimately forces other dealers to lower their price to the public; which statement indicates that the Trial Examiner erroneously bases his report and recommendations on the basis of injury to competitors, as distinguished from injury to competition. (Vide testimony of Professor Fred Emerson Clark, of the School of Commerce of Northwestern University,—wherein he distinguishes between "injury to competitors" and "injury to competition".) (Record, p. 1647-8).

The theory of the Trial Examiner is reflected in the testimony of Professor Clark, as follows:

564 "Q. Is there anything in that set-up as it has been outlined in the preceding question, which, in your judgment as an Economist, tends to create a monopoly, tends to restrict or injure competition, or tends to lessen competition or restrain trade in any particular?"

Trial Examiner Ballinger: "*or injure a competitor?*"

"A. Why, the answer to the first part of the question is definitely 'no'. That tends to increase competition, having these various methods of selling. Now, as to injuring a competitor, it depends upon what you mean by 'injure'. If a company in this way distributes more effectively than a competitor that distributes in some other way, probably they will outsell him on the market." (Record, p. 1648). (Italics ours.)

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VIII.

Respondent excepts to the Conclusions of Fact (Report, pp. 71 to 74 inclusive), insofar only as Subdivisions 6, 8, 9, 10 and 11 thereof are concerned, upon the ground that the same are not substantiated by the testimony, and upon the further ground that there is no evidence in the entire record to show that competition was injured, destroyed or prevented as the result of the granting by Respondent of the differentials in price here complained of; there being no testimony that a single one of the competitors of Ned's Auto Supply Company or Citrin-Kolb Oil Company was forced to discontinue business, but only that they were, in some instances, required to reduce their prices to the public so as to be competitive, and thereby foster and increase competition in the public interest, without in any manner promoting or creating monopoly (396-8).

"It leads away from monopoly,—certainly not toward it". (Record, p. 1642).

This exception to the Trial Examiner's Report is 566 based upon consideration of the meaning of the word "competition", as used in the Robinson-Patman Act. Injury to "competitors", we submit, is one concept; injury to "competition" is another and wholly different concept. Testimony relied upon by the Trial Examiner to sustain the above Conclusion of Fact relates wholly to claimed injuries to competitors of Respondent's four jobber customers in the Detroit area.

Yet the Trial Examiner, at Pages 54-55 of his report, finds as a matter of absolute fact (which is uncontradicted upon the record) that the four jobbers "*could purchase from many other sources, immediately, a gasoline of comparable quality and at a better (lower) price than they are paying at the present time.*" (Italics ours.)

The Trial Examiner also finds that the jobber customer market is subject to intense competition (Report, p. 54); that Respondent's jobber customers have no contracts and the continuance of their patronage is subject to competition from day to day. (Report, p. 54).

The Trial Examiner also quotes with approval (and 567 finds accordingly) that "all of the many jobbers or distributors operating in the Detroit Metropolitan Area and listed in Respondent's Exhibit 55-A and B, and 57-A and B, are comparable in their operations to the operations of one or more of the four jobbers of Respondent; and that all of them purchase their gasoline requirements substantially below the prevailing tank wagon price, and, *as a matter of fact, that many of them purchase even below the prevailing tank car price.* In addition, many of them are not required to maintain their own bulk storage and their own trucks to receive the benefit of such lower prices * * *". (3373) (Italics ours.)

The Trial Examiner also finds that Respondent is in competition with all the suppliers listed in Respondent's Exhibits 55-A and B and 57-A and B, quoting with approval the testimony to that effect of Paul A. Raupagh, Manager of Respondent's Detroit Division (3373).

It thus appears that the Trial Examiner's Conclusions of Fact as to injury to competition are effectually rebutted by his own findings. For, if Respondent should, for any reason, discontinue selling gasoline to its four jobber 568 customers in the Detroit area, according to the findings of fact above mentioned, such jobbers could and would immediately purchase comparable gasoline from the suppliers mentioned in said exhibits at a price either equal to or lower than they (the said jobbers) are paying to Respondent.

The evidence is uncontradicted in this proceeding that there are literally thousands of situations in the middle west, and in the entire United States, comparable to the operations of the four jobbers of Respondent in Detroit (1723). It is also established by the record (1764) that the system of price differentials in the gasoline industry is economically sound and fundamentally essential in the conduct of the business. If, in this proceeding, a cease and desist order were issued against Respondent, restraining it from selling gasoline by the tank car method and at regular tank car prices to the four Detroit jobbers, or any of them, the testimony is uncontradicted that they could and would secure their requirements of gasoline in tank cars (or transport trucks) at as favorable or possibly a more favorable price than they are securing today (1776). Respondent would, in that case, be pro- 569 hibited from selling on the same basis and to the same classes of trade as its competitors were permitted to do (1778). This would result in a restraint of competition (1782). It would result in bringing about a less economical system of distribution than now exists (1783).

Respondent, therefore, specifically excepts to the Conclusion of Fact, insofar as the Trial Examiner finds that, notwithstanding the lower prices offered by Respondent's competitors, its trade practices tend to injure, destroy or prevent competition. By the standard applied by the Trial Examiner, the alternate suppliers of gasoline mentioned in Exhibits 55-A and B and 57-A and B are the ones which are creating the conditions complained of by competitors of Respondent's jobber customers.

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IX.

To the failure of the Trial Examiner to report on the following questions necessary to the decision of this case, to wit:

(a) Is the trade practice complained of in these proceedings one which is widespread throughout the whole oil trade or industry in the United States, as well as in the Detroit, Michigan, area?

This exception is made upon the ground that testimony was introduced to show that in the oil industry (1504, 1717, 1723, 2766, 2768, 2771), and in industry generally (1651), the dual type of merchandising operation here complained of is universal throughout the United States; thereby indicating the propriety of a Trade Practice Conference, in lieu of this proceeding.

(b) Is this proceeding prosecuted in the public interest?

This exception is made upon the grounds that Respondent contends this proceeding is not prosecuted in the public interest.

All of Respondent's Exhibits for Identification (Exhibits 77, 78, 79, 80, 87, 88, 89, 90 and 91 for Identification), relating to this issue, were ordered excluded by the Trial Examiner, with the statement that, "The Federal 571 Trade Commission acts only in the public interest" (3542), and "The Commission acts only in the interest of the public" (3623), and "The Examiner is of the opinion, and so rules, that the documents tendered are not relevant to this proceeding or any matter in issue herein * * *" (3681).

Respondent renews its motion that all of these Exhibits for Identification offered in evidence by Respondent and excluded by the Trial Examiner, be received in evidence and considered by the Commission upon submission of this case upon the merits; to the end that the Commission may be definitely advised as to the truth and validity of Respondent's contention that this proceeding is not prosecuted in the public interest, but is diametrically opposed to the public interest.

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X.

To the statement of the Trial Examiner in Paragraph XII, Page 75 of the Report, wherein it is averred that a large amount of testimony and some exhibits were included in the record, upon being offered by defendant, which are, however, classified as "Informative Evidence," which "have no bearing upon any question of fact alleged in the complaint and which constitute no legal nor equitable defense to this proceeding". As to the balance of said Paragraph, Respondent takes no exception, inasmuch as it answers the question propounded in Subdivision (9) (a), supra.

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XI.

To Paragraph XIII, on Pages 76 and 77 of the Report, which paragraph is headed "Recommendation as to Form of Order", and to Subdivision (a), (b) and (c) thereof, in their entirety.

This exception is made upon the grounds that:

Subdivision (a) of said Paragraph XIII proposes that the Commission legislate upon matters involving Respondent's trade practices, and that Respondent be deprived, without warrant of any existing law, of the right to select and classify its customers.

Subdivision (b) of said Paragraph XIII proposes that the Commission impose upon Respondent, without warrant of any existing law, the duty of policing its products after the same are sold to jobber customers, so as to restrict the manner in which the same shall be resold,—thereby, in effect, recommending that Respondent be deprived, without warrant of law, of its right to sell gasoline at competitive tank car prices to any jobber customer who may resell the same at retail direct to the public; there being no
574 existing law imposing such last mentioned restriction.

Subdivision (c) of said Paragraph XIII proposes that the Commission impose upon Respondent, without warrant of any existing law, the duty of policing its products, after the same are sold to jobber customers who are not retailers, so as unlawfully to control the price at which the same shall be sold by said jobber to its reseller customers.

Respondent respectfully requests that oral argument be permitted in support of the foregoing exceptions.

Respectfully submitted,
Standard Oil Company,
an Indiana corporation.
By Arthur J. Abbott,
Its Attorney.
Business Address:
2230 Buhl Building,
Detroit, Michigan.

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219 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 9th day of October, A. D. 1945.

Commissioners:

Ewin L. Davis, Chairman,
Garland S. Ferguson,
William A. Ayres,
Robert E. Freer.

* * (Caption—4389) * * *

FINDINGS AS TO THE FACTS AND CONCLUSION.

Pursuant to the provisions of an Act of Congress entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act), the Federal Trade Commission on November 29, 1940, issued and subsequently served its complaint in this proceeding upon the respondent, Standard Oil Company, a corporation, charging it with violation of the provisions of subsection (a) of Section 2 of the said Clayton Act as amended. After the issuance of said complaint, the filing of respondent's answer thereto, and the taking of partial testimony and other evidence in support of the com-

plaint, the Commission, on April 23, 1941, issued and subsequently served upon the respondent an order amending said complaint, which order further provided that the testimony and other evidence heretofore taken be adopted and considered as having been taken in support of the allegations of the complaint as amended and that the answer
220 of the respondent filed to the original complaint be adopted as respondent's answer to the complaint as amended. Thereafter, testimony and other evidence in support of and in opposition to the allegations of said complaint as amended were introduced before a trial examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon said complaint as amended, answer thereto, testimony and other evidence, report of the trial examiner upon the evidence and exceptions filed thereto, briefs filed in support of and in opposition to the complaint, and oral argument of counsel; and the Commission, having duly considered the matter and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom:

Findings as to the Facts.

Paragraph One: The respondent, Standard Oil Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 910 South Michigan Avenue, Chicago, Illinois.

Paragraph Two: The respondent is engaged in the business of refining and distributing gasoline and other petroleum products among and between the various states of the United States. Respondent sells three brands of gasoline—"Solite with Ethyl," "Red Crown," and "Stanolind." Red Crown is respondent's regular house-brand gasoline and constitutes approximately 90 percent of its sales in the Detroit metropolitan area, while Solite with Ethyl constitutes 7 to 10 percent and Stanolind, 3 or 4 percent. Respondent has several refineries, one of which is located in Whiting, Indiana. Crude oil to supply its refineries is derived from various sources but principally from the so-called Mid-Continent fields in Kansas, Oklahoma, Texas and Wyoming. Respondent sells its products throughout a territory consisting of 14 states, principally located in the Middle West. This territory is divided into 27 divisions or fields; with a branch office in each 221 field in charge of a manager or superintendent.

One of such divisions or fields is known as the "Detroit Field," which embraces all or part of thirteen counties in southern Michigan, including the Cities of Detroit, Lansing, Pontiac, Jackson, and Ann Arbor. The "Detroit Area,"as distinguished from the "Detroit Field," includes only the City of Detroit and its suburbs, Hamtramck, Dearborn, and Highland Park in Wayne County, which is also referred to as the "Detroit Metropolitan Area."

The respondent has no refinery in the State of Michigan. Gasoline and other petroleum products sold and distributed by the respondent in the Detroit Field are transported from its refinery at Whiting, Indiana, by tankers through the Great Lakes to respondent's marine terminal at River Rouge in the outskirts of Detroit. This marine terminal has a storage capacity of about 1,500,000 barrels of 42 gallons each. During the summer months, deliveries are made from the Whiting refinery every week and sometimes twice a week. In the fall sufficient gasoline is delivered and stored to take care of estimated requirements during the winter months when navigation through the Great Lakes is closed.

During the years from 1936 to and including 1940 respondent supplied from 16.2 percent to 17.4 percent of all the branded and unbranded gasoline sold in the Detroit Metropolitan Area. The total sales made by respondent in said area during that period amounted to 62,198,750 gallons in 1936, 70,015,200 gallons in 1937, 60,448,200 gallons in 1938, 70,279,818 gallons in 1939, and 74,627,712 gallons in 1940.

During the periods of time herein mentioned respondent operated six bulk plants in the Detroit Metropolitan Area. Delivery of gasoline to these bulk plants was made from the River Rouge marine terminal by tank car or transport truck. Tank-car delivery by railroad was for the most part discontinued about February 1, 1940. Transportation of gasoline by transport truck was accomplished by transportation companies employed by the respondent. The capacity of a transport truck is approximately the same as a tank car. In some instances the respondent has shipped gasoline and other petroleum products from its refinery at Whiting, Indiana, directly to purchasers thereof located in the Detroit Metropolitan Area. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce among and between the various states of the United States.

222 Paragraph Three: Prior to September 10, 1936, respondent operated all retail service stations owned or leased by it in the Detroit metropolitan area, but on that date it discontinued all retail operations and leased or sublet all stations owned or leased by it to independent operators.

In the course and conduct of its business in the Detroit metropolitan area, the respondent, since September 10, 1936, has regularly supplied gasoline to approximately 358 retail service stations. Respondent owned approximately 200 and leased 8 of these stations. The remaining 150 stations which were supplied directly by the respondent were owned or operated by independent operators, with whom the respondent entered into written agreements known as "Dealer's Agreement, Form 461," by which agreements respondent agreed to sell, and the dealers agreed to purchase, all of their requirements of Solite with Ethyl, Standard Red Crown, and Stanolind gasoline for the period of time specified in said agreements. These latter stations were known as contract service stations as distinguished from the leased service stations hereinabove described.

Deliveries of gasoline to the leased and contract service stations in the Detroit metropolitan area were made from respondent's bulk plants by tank trucks owned by respondent and operated by its salaried employees. This method of delivery is known as "tank-wagon" delivery. The price at which respondent sold its gasoline to said leased and contract service stations was its "posted tank-wagon price," which was fixed from time to time by the general office of the respondent in Chicago.

In addition, the respondent also supplied gasoline to four dealers in the Detroit metropolitan area—Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., Wayne Oil Company, and Ned's Auto Supply Company, which were classified by respondent as jobbers and which, with the exception of Ned's Auto Supply Company, supplied respondent's gasoline to from 94 to 106 retail service sta-

tions. Deliveries to these dealers were generally made by tank car, and after February 1, 1940, by transport truck, direct from respondent's River Rouge terminal. During the periods of time hereinafter described, the
223 Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., and Wayne Oil Company sold a substantial portion of the gasoline purchased by them from the respondent direct to the public through retail service stations owned and operated by them. Ned's Auto Supply Company was engaged entirely in the retail sale of gasoline to the public through its own stations.

A third class of customer in the Detroit Metropolitan area to whom the respondent supplied gasoline was large commercial users of gasoline, who were usually sold on contracts made by the general office of the respondent in Chicago. The gasoline so purchased was usually delivered either direct from the Whiting refinery or the River Rouge terminal by tank car or transport truck.

Paragraph Four: In the course and conduct of its business, since June 19, 1936, respondent has discriminated in price by selling its gasoline for resale direct to the purchasing public to Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., and Wayne Oil Company, and subsequent to March 7, 1938, to Ned's Auto Supply Company, at prices which were substantially lower than the prices charged by respondent to its other retailer-purchasers in the Detroit metropolitan area for gasoline of the same grade and quality. Each of the aforesaid purchasers has, since said date, owned or operated in the Detroit metropolitan area one or more gasoline stations where said respondent's gasoline so purchased has been resold at retail to consumers thereof in competition with other retailers of gasoline purchasing the same from the respondent or from other manufacturers. The respondent sold its largest selling brand, Red Crown gasoline, to said four jobbers at its tank-car price, which was 1½ cents per gallon lower than the prices charged by it for the same gasoline to its other retail dealers in the Detroit metropolitan area.

Paragraph Five: In allowing jobber classification in the Detroit metropolitan area to the four jobbers hereinbefore named, the respondent required only that said jobbers purchase substantial quantities of gasoline, own or control bulk plants where gasoline in large quantities

224 could be delivered, and have sufficient financial standing or credit rating to warrant the extension of credit. There was no requirement that said jobbers should sell only at wholesale.

The Citrin-Kolb Oil Company, although selling the respondent's gasoline direct to the consuming public, was nevertheless classified by the respondent as a jobber in 1928 or 1929 and since that it has been allowed the tank-car price on gasoline purchased from respondent. It operated from 1 to 5 retail stations from 1936 to 1939, from 5 to 8 stations in 1940 and 1941, and is operating 5 retail service stations at the present time. During this time it purchased from the respondent in excess of 5,000,000 gallons of gasoline annually. The percentage of gasoline so purchased which was sold at retail by Citrin-Kolb Oil Company through its retail service stations was 29.4 percent in 1936, 15.4 percent in 1937, 7.3 percent in 1938, 10.1 percent in 1939, and 6.5 percent in 1940. During the period from January 1, 1938, to December 31, 1940, Citrin-Kolb Oil Company sold a million gallons of gasoline annually to Langer and Cohn, retail service station operators, at 1 cent per gallon off tank-wagon price and in addition sold another retail service station operator at ½ cent per gallon off tank-wagon price. For a short period of time Citrin-Kolb Oil Company issued "Special Savings Cards," which entitled the holders to a 2-cents-per-gallon discount on the purchase of gasoline from one of the retail service stations operated by it.

The Wayne Oil Company, although selling the respondent's gasoline direct to the consuming public, was nevertheless classified by respondent as a jobber in 1935 and since that time it has been allowed the tank-car price on all gasoline purchased from respondent. Prior to September 8, 1939, the Wayne Oil Company operated no retail service stations but subsequent thereto has operated from 2 to 6 stations and is operating 2 stations at the present time. During this period its annual purchases of gasoline from respondent have ranged from 1,348,348 gallons in 1936, to 2,341,394 gallons in 1940. The percentage of gasoline so purchased which was sold at retail by the Wayne Oil Company through its retail service stations was 7.6 percent in 1939 and 14.2 percent in 1940. There is no evidence that the Wayne Oil Company ever sold gasoline to resellers at

a price lower than the posted tank-wagon price charged
225 by respondent to its dealers or that any discount was
allowed to purchasers by any retail service station operated by it.

The Stikeman Oil Company, Inc., although selling the respondent's gasoline direct to the consuming public was nevertheless classified by respondent as a jobber in 1932 and since that time it has been allowed the tank-car price on all gasoline purchased from respondent. In 1938 the Stikeman Oil Company, Inc., discontinued the operation of retail service stations. Since 1936 its annual purchases of gasoline from the respondent have ranged from 2,255,000 gallons in 1936 to 1,772,911 gallons in 1940. The percentage of gasoline so purchased which was sold at retail by the Stikeman Oil Company, Inc., through retail service stations operated by it was 27.8 percent in 1936, 9.1 percent in 1937, and 0.3 percent in 1938. There is no evidence that this company ever sold gasoline to resellers at a price lower than posted tank-wagon price charged by respondent to its dealers or that any discount was allowed to purchasers by any retail service station operated by it.

Ned's Auto Supply Company was classified by respondent as a jobber on March 7, 1938, and since that time it has been allowed the tank-car price on all gasoline purchased from the respondent. Ned's Auto Supply Company does not sell other resellers of gasoline but has at all times sold the gasoline purchased from the respondent to the public through its own service stations. In 1938 Ned's Auto Supply Company operated 5 retail service stations, which was increased to 6 in 1940. In addition, Ned's Auto Supply Company operates a station known as "Charley's Service Station," which is owned by Ned's Auto Supply Company and operated by an individual on a salary-and-commission basis. At all times since March 7, 1938, it has been the practice of Ned's Auto Supply Company to sell its gasoline below the prevailing retail service-station price or to give premium and discounts from its posted price.

Paragraph Six: In addition to the discriminations in price hereinabove described, the respondent, in the course and conduct of its business during the period from Septem-
ber 1, 1936, to March 7, 1938, sold its gasoline to Ned's
226 Auto Supply Company at .5 cents per gallon less than
the price that it was charging for the same gasoline to its other retail dealers in the Detroit metropolitan area.

Since 1918 Ned's Auto Supply Company has been a customer of respondent and until March 7, 1938, received its gasoline from respondent by regular tank-wagon delivery. In 1936 Ned's Auto Supply Company purchased 2,401,600 gallons of gasoline from the respondent, which it resold to the public through its four retail outlets or service stations. On September 1, 1936, respondent allowed Ned's Auto Supply Company a price of .5 cents off regular tank-wagon price, which was allowed on all gasoline purchased from September 1, 1936, until March 7, 1938. When respondent allowed this price differential, it made no change in its form of delivery of gasoline to Ned's Auto Supply Company but continued to sell it on the regular tank-wagon basis, ~~making~~ delivery from respondent's bulk plants direct to Ned's Auto Supply Company service stations.

Paragraph Seven: Citrin-Kolb Oil Company, Wayne Oil Company and Stikeman Oil Company, Inc., sell the respondent's gasoline at both wholesale and retail. Citrin-Kolb Oil Company, Wayne Oil Company and Stikeman Oil Company, Inc., although selling a substantial portion of respondent's gasoline direct to the consuming public were nevertheless arbitrarily classified by the respondent as jobbers and as such received from the respondent a lower price on gasoline than the respondent charged its other retail customers in the metropolitan Detroit area who purchased gasoline of like grade and quality direct from the respondent.

Ned's Auto Supply Company, although selling all of its gasoline purchased from the respondent at retail direct to the consuming public was nevertheless arbitrarily classified by the respondent as a jobber and as such received from the respondent a lower price on gasoline than the respondent charged its other retail customers in the metropolitan Detroit area who purchased gasoline of like grade and quality direct from the respondent.

Paragraph Eight: The volume of gasoline sold in the Detroit metropolitan area through retail gasoline stations is more or less constant, and fluctuations that occur are chiefly due to variation in the number of cars in use from year to year. A lower price at one service station than at another is an important factor in the purchasing public's mind, particularly when the difference in price occurs in the major brands of gasoline. Any difference in price between two stations selling the same gasoline or major brands of gasoline is very important in influencing the flow of business.

227 The margin of profit of the retail service-station operator between the tank-wagon price which he pays and the prevailing retail service-station price on the regular brand of gasoline of major companies is small. The retailer's margin between respondent's posted tank-wagon price and prevailing retail selling price on its Red Crown gasoline has been only 3.3 cents a gallon in the metropolitan area of Detroit since November 19, 1939. Consequently, any reduction allowed to a retail service-station operator below the regular tank-wagon price gives such operator a material advantage over other retail operators who pay the full tank-wagon price.

In 1936 Ned's Auto Supply Company had four retail stations and its gasoline volume was 2,401,000 gallons. On September 1, 1936, respondent began to sell gasoline to Ned's Auto Supply Company at .5 cents per gallon below posted tank-wagon price by tank-wagon delivery. In 1937 Ned's Auto Supply Company was openly advertising cut prices, and its volume increased to 4,240,500 gallons.

On March 7, 1938, Ned's Auto Supply Company began to purchase from respondent in tank-car quantities at tank-car prices. Although the total volume of gasoline sold in the Detroit metropolitan area during the year 1938 was 10 percent less than the volume sold in 1937, the volume of gasoline sold by Ned's Auto Supply Company increased from 4,240,500 gallons in 1937 to 4,880,500 gallons in 1938.

In 1937 Ned's Auto Supply Company was selling respondent's Red Crown gasoline to the public at approximately 2 cents per gallon below the prevailing retail service-station price, which continued, with variations, until the latter part of 1939. In 1939 and 1940, when Ned's Auto Supply Company's posted price was approximately the same as the prevailing retail price, it gave various undercover discounts and premiums. It has from time to time given commercial discounts varying from 1 to 2 cents per gallon off the posted price. The classification as to who was regarded a commercial customer varied from time to time, depending upon the competitive situation. During August to November 1939 Ned's Auto Supply Company issued trading stamps of a value of 2 cents for each gallon purchased, which were redeemable in merchandise or in gasoline at Ned's Auto Supply Company's stores. Price cutting at Ned's Auto Supply Company's stations has been almost continuous; and this company has been responsible in starting most of the retail price cutting in major-brand gasoline in Detroit over a period of several years. This practice on the part of Ned's Auto Supply Company has caused substantial damage to other retail service-station operators selling respondent's Red Crown gasoline and also to retail service-station operators 228 selling other brands of gasoline, and the ability of Ned's Auto Supply Company to continue the price-cutting practice was greatly enhanced through the discriminations in price allowed it by the respondent while at the same time limiting other retailer-customers to a margin of profit of approximately 3.3 cents per gallon.

The Citrin-Kolb Oil Company annually sold at retail from 6.5 percent to 29.4 percent of the gasoline purchased from respondent, through service stations operated by it during the years 1936 to 1940. In 1938 or 1939 the Citrin-Kolb Oil Company gave discount cards to purchasers of gasoline at one of the stations operated by it entitling the holder to a discount of 2 cents a gallon on respondent's Red Crown gasoline.

The Commission finds that the price discriminations granted by the respondent to Ned's Auto Supply Company, both prior to March 7, 1938, and subsequent thereto, and the price discriminations granted to Citrin-Kolb Oil Company, Wayne Oil Company and Stikeman Oil Company, Inc., on gasoline sold by them at retail have given a substantial competitive advantage to these favored dealers in their retail operations over other retailers of gasoline, including retailer-customers of the respondent. This competitive advantage is capable of being used, and by Ned's Auto Supply Company and to some extent by Citrin Kolb Oil Company has been used, to divert large amounts of business from other retailers of gasoline, including customers of the respondent, with resultant injury to them and to their ability to continue in business and successfully compete with said dealers in the retailing of gasoline.

The Commission further finds that the discriminations in price allowed to Citrin-Kolb Oil Company permitted this dealer to sell a million gallons of gasoline annually to one

ailer-customer—Langer and Cohn—from January 1,
38, to December 31, 1940, at a delivered price of one cent
r gallon less than posted tank wagon price and to sell
other customer at a discount of one half cent per gallon.
e Citrin-Kolb Oil Company, by passing on in part to
nger and Cohn the benefits of the discriminatory prices
allowed by respondent, enabled said Langer and
9 Cohn to sell said gasoline to the consuming public at
discounts of as much as two cents per gallon, which
t only gave said Langer and Cohn a competitive advan-
ge over other retailers of gasoline, including retailer-
stomers of the respondent, but also had the effect of
verting business from such retailers to said Langer and
ohn and of substantially lessening competition and injur-
g, destroying, and preventing competition between said
nger and Cohn and other retailers of gasoline, including
tailer-customers of the respondent.

The Commission further finds that the effect of the dis-
iminations in price allowed by the respondent to the
ur dealers as herein described has been, and may be,
bstantially to lessen competition and to injure, destroy,
d prevent competition with each of said four dealers
d with their respective customers in the resale of gaso-
ne.

Paragraph Nine: As a defense to this proceeding the
spondent introduced a series of exhibits (Respondent's
xhibits 31-A to Q), with supporting testimony, to show
st justification for the price differentials allowed Ned's
uto Supply Company for the period from September 1,
36, to March 7, 1938.

The Commission finds that the evidence submitted by
e respondent fails to establish that the price differen-
al allowed by respondent to Ned's Auto Supply Company
.5 cents per gallon during the period from September 1,
36, to March 7, 1938, made only due allowance for differ-
nces in respondent's cost of sale and delivery, resulting
om the differing methods and quantities in which it sold
gasoline to Ned's Auto Supply Company during the
riod involved. The following are a few of the features
respondent's cost justification which warrant its com-
ete rejection as defense in the proceeding:

a. Respondent has attempted to make a comparison
tween the cost of doing business with Ned's Auto Supply
ompany and the cost of doing business with all of its

other reseller-customers as a group. This fails to take into consideration the fact that the respondent's reseller-customers fall into several groups, such as service stations owned by respondent and leased to operators, stations leased by respondent and sublet to operators,
230 and independently owned stations to which respondent supplied gasoline. The costs of doing business would vary between these various groups. Furthermore, there were independent stations, transactions of which with respondent were comparable to those of Ned's Auto Supply Company, and comparison of the costs of these stations and Ned's Auto Supply Company would necessarily show a different result than that shown through respondent's having combined all kinds and types of its reseller stations.

b. Respondent has attempted to make a comparison between the costs of single-dump and multiple-dump deliveries. This is based upon the assumption that all deliveries made to Ned's Auto Supply Company were by single-dump delivery and all deliveries to respondent's other reseller customers by multiple-dump delivery. However, the respondent did not make full-load or single-dump deliveries in all cases to Ned's Auto Supply Company during the period involved but, instead, made both single-and-multiple-dump deliveries. There were also a substantial number of retail service stations located in the Detroit metropolitan area with tank capacity sufficient to take single-load deliveries, and a substantial number of single-load deliveries were made to such stations at respondent's regular tank-wagon price during the period involved.

c. Respondent attempted to segregate certain items of sales expense as not being influenced by Ned's Auto Supply Company and allocated them among all of respondent's other reseller-customers, with no charge being made against Ned's Auto Supply Company; for example, it was contended that when an account, such as Ned's Auto Supply Company, has been established, no further promotional sales work is necessary and should not be charged to such account. Among such items which respondent did not charge to Ned's Auto Supply Company were certain sales promotional services, such as driveway training, which is furnished to reseller-customers but which was not desired by, or furnished to, Ned's Auto Supply Company.

1 addition to the fact that certain promotional advertising hould be charged to Ned's Auto Supply Company, it further appears from the evidence that there are other 31 reseller-customers of the respondent whose accounts have been established and who do not require drive-ay training.

d. Respondent attempted to segregate certain items of xpense of an overhead nature as not being influenced by ed's Auto Supply Company, on the theory that such xpenses would not be appreciably influenced by the acquiition or loss of a single account, such as Ned's Auto upply Company, and, consequently, that it is proper to harge no part of these expenses to the business of Ned's uto Supply Company. The reason for not charging any f such items to the business of Ned's Auto Supply Comany would apply equally to the business of any other ingle retail service station.

e. There were certain other items of cost on which it as claimed by respondent that no exact allocation could e made, and, as to such items, the respondent apporoned them among its retail customers, exclusive of Ned's uto Supply Company, instead of allocating these costs n the basis of gallonage, which would have afforded no ost differential.

f. Respondent has included in its cost items certain ems of expense in connection with stations owned or leased y the respondent which were leased or sublet to the staion operator. Many of these costs apply directly to the andlord activities of the respondent and are not properly hargeable to, or considered as, costs of sale or delivery.

g. In allocating the sales expense of certain salesmen ho called on Ned's Auto Supply Company and other reail service stations, respondent attempted to estimate the ime spent at Ned's Auto Supply Company and compare he costs so determined as against all salesmen's costs, inluding salesmen who did not confine their activities solely o the Detroit metropolitan area. Furthermore, in estiating the time of the particular salesmen who called on Ned's Auto Supply Company, no consideration was given o the time which such salesmen spent in calling on serice stations which were not customers of the respondent.

h. The respondent allocated advertising expense in 32 such a manner as to show an alleged savings of .213 cents per gallon, or better than 40 percent of the price lifferential. In doing this, the respondent allocated the items of point-of-sale advertising which were supplied to Ned's Auto Supply Company, such as service signs, globes, banners, gan[illegible]s, and displays, by charging the cost of some directly and assigning others on the basis of outlets and arrived at the cost per gallon of these particular items by relating it to gallonage sold at Ned's Auto Supply Company. All other advertising costs were allocated to the gallonage of all reseller-customers, exclusive of Ned's Auto Supply Company. The advertising so charged consisted principally of advertising issued by the respondent for the purpose of creating consumer acceptance and increasing the sale of gasoline at all Standard stations, such as newspaper advertising, printed and direct-mail advertising, motion pictures, and outdoor signs. Such advertising was for the benefit of Ned's Auto Supply Company, as well as all other customers, and should accordingly have been allocated to Ned's Auto Supply Company, as well as to other customers, on a gallonage basis, in which event there would have been no cost differential to such items.

Paragraph Ten: As a further defense to this proceeding, respondent contended that the differential between the price of 1½c per gallon off tank-wagon price charged Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., Wayne Oil Company, and Ned's Auto Supply Company and the tank-wagon price charged respondent's other retail dealers made only due allowance for differences in respondent's costs of sale and delivery resulting from the differing methods and quantities in which gasoline was sold and delivered to said jobbers.

Respondent first attempted to show justification of differential of 1½ cents per gallon between the tank-car and tank-wagon price by introducing evidence as to a survey made in the Kansas-Oklahoma field to show cost of selling jobbers, the results of which were compared with the cost of sale and delivery of gasoline by tank-wagon in the entire Detroit division. There is no evidence that the costs of sale and delivery by tank car to jobbers in the Kansas-Oklahoma field were the same or were substantially the same as, or have any relation to, the costs of sale and delivery of gasoline by tank car to jobbers in the De-
233 troit metropolitan area. In fact, the evidence indicates
that the costs of the jobber operations in the Kansas-Oklahoma field were not comparable with the jobber operations in the Detroit field. The volume sold was not comparable with the Detroit sales and the total annual sales to

obbers in the Kansas-Oklahoma field were less than the nnual sale to one jobber, Citrin-Kolb Company, in Detroit, nd several of these jobbers purchased less gasoline annually than is sold at an average service station in Detroit. The tabulation of jobber expense in the Kansas-Oklahoma eld includes no items of consumer acceptance advertising xpense charged to such jobber operations, which is substantial in the Detroit metropolitan area. Furthermore, the cost computations for the Kansas-Oklahoma field do not eflect the true conditions or give a factual result since the gallonage sold to two jobbers, Gibson Oil Company and Kramer Oil Company, that handled nearly one half the gallonage sold in that field, was excluded in computing accounting and credit costs and included in computing upervision and selling costs.

In determining the costs of tank-wagon deliveries in the Detroit metropolitan area for the purpose of comparison with jobber costs in Kansas and Oklahoma, respondent used the total marketing costs for the entire Detroit field which were allocated to the reseller channel and leased service stations in its "Comparative Statement of Expense," known as "Form 189." Respondent divided the total marketing costs so allocated by the total reseller gallonage to arrive at the cost per gallon of sale and delivery n tank-wagon deliveries. This Comparative Statement of Expense is an expense record for the Detroit field prepared from time to time in respondent's regular course of business. Said form represents a breakdown of marketing expense between the channels of distribution, which are reseller channel, consumer channel, leased service stations, and other methods. The consumer channel is also known as the "direct-shipment channel" and includes deliveries to large industrial users of gasoline made either direct from the Whiting refinery or the River Rouge terminal. Such shipments usually originate with sales contracts made by the general office of the respondent on a bid basis. Shipments to jobbers were included in the consumer or direct-shipment channel in respondent's usual ac-
234 counting procedure. The respondent did not consider it necessary for its purpose to isolate the cost of the direct-shipment channel, which included sales to jobbers. Consequently, none of the expense allocations made on Form 189 are charged to either the direct-shipment channel or to the business done with jobbers, but, instead, such expense is distributed or scattered over the various chan-

nels appearing on said form. While this Comparative Statement of Expense may be considered by the respondent as sufficient to reflect company operations, the figures taken therefrom cannot properly reflect the cost of tank-wagon sales as compared with jobber sales. There are numerous items of cost which have been allocated to the reseller channel, a substantial portion of which should have been charged to jobber gallonage and, if so charged, would have substantially reduced the cost of reseller operation and in turn reduced the differential in cost between tank-wagon and jobber costs.

The Commission find that the attempted comparison between cost of jobber operations in the Kansas-Oklahoma field with cost of sale and delivery to dealers in the Detroit field taken from its Comparative Statement of Expense has no probative value in determining the cost differential between tank-car sales to jobbers and tank-wagon sales to dealers in the Detroit metropolitan area.

Paragraph Eleven: In a further effort to show cost justification for the price differential of 1½ cents off tank-wagon price allowed to Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., Wayne Oil Company, and Ned's Auto Supply Company, the respondent attempted to segregate the cost appearing on its Comparative Statement of Expense and to reallocate such costs to the reseller and jobber channels. For this purpose respondent prepared a modified form of its regular Comparative Statement of Expense showing costs allocated to jobbers, as well as to tank-wagon resellers, which was introduced into evidence as Respondent's Exhibit 101, together with explanation as to methods used, which was introduced as Respondent's Exhibits 99 and 100.

After consideration of the modified form of re-
235 spondent's Comparative Statement of Expense and other exhibits and testimony submitted in connection therewith, the Commission finds that the evidence submitted by the respondent fails to establish that the price differential allowed by respondent to the above-named jobbers of 1½ cents per gallon off tank-wagon price made due allowance for differences in respondent's costs of sale and delivery resulting from differing methods and quantities in which it sold its gasoline to said jobbers. The following are a few of the features of respondent's cost justification which warrants its complete rejection as a defense in this proceeding:

a. In making this cost study the respondent did not
mit its survey to cost differences which resulted from
iffering methods or quantities in which gasoline was sold
r delivered to the two classes of customers nor was it
mited to determining savings, if any, which accrued by
eason of tank-car or transport-truck delivery as compared
ith tank-wagon delivery, but, instead, the respondent at-
empted to compare the cost of doing business with the
ne class as compared with the other by arbitrarily allo-
ating all of respondent's costs of every nature which could
e charged to the expense of doing business in the Detroit
eld, including Chicago general office costs allocated to that
eld.

b. Respondent has compared the cost of marketing to
e four jobbers located in the Detroit metropolitan area,
hose business was confined to that area, with the cost of
arketing gasoline to all its other dealers in the Detroit
eld. The Detroit metropolitan area includes the City of
etroit and the suburbs of Dearborn, Hamtramck, and
ighland Park. The Detroit field includes the rural section
ocated outside the Detroit metropolitan area, including
ansing, Pontiac, and Ann Arbor, where different methods
f delivery are involved since the rural section is supplied
y small bulk plants operated by commission agents known
s "B" stations as distinguished from the large bulk
lants used to serve the Detroit metropolitan area operated
y salaried employees and known as "A" stations. No
actual costs study or investigation was made to determine
the relation of sale and delivery costs in the entire
36 Detroit metropolitan field to those in the restricted De-
troit metropolitan area. In fact, there is substantial
vidence indicating that respondent's cost of marketing
asoline to service stations in the rural areas of the Detroit
ield through commission agents is higher than its cost of
arketing through it large bulk plants to service stations
n the Detroit metropolitan area.

c. In allocating cost items to the tank-wagon reseller
hannel and the jobber channel, the respondent charged to
he tank-wagon reseller channel a number of items which
hould not have been charged to that particular channel
nd failed to charge to the jobber channel cost items prop-
rly chargeable to that channel.

d. For the purpose of this cost study, respondent has
letermined the expense on leased service stations which
nvolve landlord operations only and has carried such ex-

pense, after deducting income from rentals, into the general tank-wagon delivery expense allocated to the tank-wagon reseller channel. In fact, the landlord expense incident to the operation of respondent's leased service stations was carried separately in respondent's regular accounting procedure, as this expense has no bearing on the cost of marketing gasoline through the regular reseller channel but represented cost of maintenance, taxes, etc., on company-owned or leased service stations less revenue received, without consideration of the sale of gasoline or the expenses incident thereto.

e. It further appears from respondent's cost study that direct-shipment expense has been allocated for the most part on the basis of effort, while the allocation to the tank-wagon reseller channel has been made for the most part on the basis of gallonage except in accounts where allocation was made on the basis of effort in respondent's regular accounting procedure. The use of these two methods of allocation appears to be inconsistent, and the comparative results obtained do not properly reflect the difference in cost of sale and delivery between the tank-wagon and jobber channel.

f. While advertising comprises the largest single item of expense, only a small proportion, consisting of point-of-sale advertising, has been allocated between the tank-
237 wagon and jobber channel. The remaining advertising expense, commonly known as "consumer advertising," such as newspaper and billboard advertising, was improperly allocated to the tank-wagon channel alone and no part charged to the jobber channel. Consumer advertising costs cannot properly be separated between gasoline resold through jobber-operated retail stations and gasoline sold through other retail stations except upon the basis of gallonage, which, if used, would afford no cost differential.

Paragraph Twelve: As a further defense the respondent contends that the differential of ½¢ off tank wagon price allowed Ned's Auto Supply Company from September 1, 1936, to March 7, 1938, and the differential of 1½¢ off tank wagon price allowed Citrin-Kolb Oil Company, Wayne Oil Company and Stikeman Oil Company since June 19, 1936, and the differential of 1½¢ off tank wagon price allowed Ned's Auto Supply Company from March 7, 1938, were all made in good faith to meet equally low or lower prices of competitors.

In support of this defense the respondent introduced evidence of competitive offers received by the four dealers from distributors of both major and minor brands of gasoline. Some of these offers were made prior to June 19, 1936, and some were made subsequent to June 19, 1936. Of those offers made subsequent to June 19, 1936, some were made after the filing of the complaint herein. In further support of this defense the respondent contended that the lower prices allowed the four dealers were made in good faith to meet an equally low price of a competitor for the reason that said four dealers could at any time herein involved have purchased gasoline of grade and quality comparable to that sold by the respondent at equally low or lower prices from other suppliers in Detroit.

Based on the record in this case the Commission concludes as a matter of law that it is not material whether 238 the discrimination in price granted by the respondent to the said four dealers were made to meet equally low prices of competitors. The Commission further concludes as a matter of law that it is unnecessary for the Commission to determine whether the alleged competitive prices were in fact available or involved gasoline of like grade or quality or of equal public acceptance. Accordingly the Commission does not attempt to find the facts regarding those matters because, even though the lower prices in question may have been made by respondent in good faith to meet the lower prices of competitors, this does not constitute a defense in the face of affirmative proof that the effect of the discrimination was to injure, destroy and prevent competition with the retail stations operated by the said named dealers and with stations operated by their retailer-customers.

Prior to June 19, 1936, the effective date of the Robinson-Patman amendment, Section 2 of the Clayton Act declared discriminations in price to be unlawful when the effect of such discriminations may be substantially to lessen competition or create a monopoly, with provisos permitting, among other things, discriminations in price "in the same or different communities made in good faith to meet competition". Under that proviso a discrimination in price made in good faith to meet competition might under proper circumstances have been a complete defense to a charge of unlawful price discrimination.

In framing the Robinson-Patman Act Congress recog-

nized that the provision in Section 2 of the Clayton Act permitting discriminations in good faith to meet competition was indefinite and uncertain and had the effect of weakening Section 2. Consequently Congress discarded the proviso in Section 2 which made the meeting of competition in good faith a complete or absolute justification and made price differences due to differences in cost, market changes and marketability of the goods the only absolute justifications now available to a respondent charged with unlawful price discrimination. Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act contains no reference to lower prices made in good faith to meet competition. That matter was covered by Congress
through a proviso in Section 2 (b), and such proviso
239 was "intended to operate only as a rule of evidence
in a proceeding before the Federal Trade Commission".*

A prima facie case of violation of Section 2(a) may be established by providing (1) jurisdiction, (2) goods of like grade and quality, and (3) discrimination in price. Discrimination in price here was shown by proving a difference in the prices charged competing customers. Based upon the prima facie case thus shown the Commission may draw from such prima facie case a rebuttable presumption that the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition. The burden then shifts to the respondent.

In rebuttal of the prima facie case the respondent under Section 2(b) may show that the respondent's lower price was made in good faith to meet an equally low price of a competitor. However, such a showing is not an absolute defense to a charge of unlawful discrimination and proof of meeting a competitor's equally low price can be availed of only to the extent it may rebut the prima facie case. The meeting of an equally low price of a competitor in good faith is not a defense to a charge of price discrimination where competitive injury is affirmatively shown and so replaces the rebuttable presumption of the prima facie case. This results from the difference between such a case and the prima facie case referred to in Section 2(b). Section 2(b) defines a prima facie case as "* * * proof * * * that there has been discrimination in price * * *".

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* Congressional Record, June 8, 1936, p. 9410.

This definition must be compared with the prohibitions of Section 2(a) which makes such a discrimination unlawful only in the event it injuriously affects competition. If proof of good faith in meeting an equally low price of a competitor is made, then Commission could no longer rely upon its prima facie case, but must show additional and affirmative evidence that the effect of the discrimination may be to substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition between respondent and its competitors or between customers of the respondent or with the customers of such customers. Where such injurious effect on competition is affirmatively proved, the proof made as to meeting an equally low price of a competitor under the proviso of Section 2(b) does not constitute a substantive justification or defense.

The respondent may also introduce evidence in support of its affirmative defense tending to establish that the effect of the differential in price is not to substantially
240 lessen competition or tend to create a monopoly or to
injure, destroy or prevent competition with customers of the person granting the discrimination or competition with persons knowingly receiving the benefit thereof. The respondent may also show in support of its justifications (1) that the differential proved makes only due allowances for differences in cost resulting from the differing methods or quantities sold or delivered; (2) that the differentials were the result of price changes in response to changing conditions affecting the market for or the marketability of the goods concerned. The establishment of any such contentions would preclude any ~~conclusion~~ that the law had been violated.

The provision for a showing of good faith to meet an equally low price of a competitor cannot be construed as a carte blanche exemption to a respondent to engage in discriminations in price which have the adverse effects on competition proscribed under Section 2(a). Such a construction would constitute recognition of the soundness of the principle that one competitor's violation of law justifies its violation by another. It would also justify discrimination by a chain organization to meet the equally low price of a single unit competitors who had not discriminated at all as well as discrimination to meet the price of any competitor whose discrimination is lawful because justified by cost differences. It would defeat the substantive purposes and requirements of Section 2(a) in such situations as well as in the present case, where discrimination to meet the equally low prices of a competitor has produced the adverse effects on competition which it was the main purpose of the section and of the Act to prevent.

Paragraph Thirteen: Since the record in this case affirmatively shows that the discriminations in price in favor of the named jobbers and in favor of Ned's Auto Supply Company as a tank-wagon purchaser from September 1, 1936, to March 7, 1938, and as a tank-wagon purchaser thereafter, have resulted in injuring, destroying, and preventing competition between said favored dealers and retail dealers in respondent's gasoline and other major brands of gasoline, the Commission is of the opinion, and so finds, that the defense of meeting an equally low price of a competitor as provided by subsection (b) of Section 2 of the Clayton Act is not available to the respondent on the basis of the present record.

Conclusion.

The aforesaid discriminations in price by the respondent,
as herein found, constitute violations of subsection (a)
of Section 2 of an Act of Congress entitled, "An Act
241 to supplement existing laws against unlawful restraints
and monopolies, and for other purposes" approved
October 15, 1914 (Clayton Act), as amended by an Act of
Congress approved June 19, 1936 (Robinson-Patman Act).

By the Commission.

Ewin L. Davis,
Chairman.

Dated this 9th day of October, A. D., 1945.

Attest:
Otis B. Johnson,
(Seal) *Secretary.*

242 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 9th day of October, A. D. 1945.

Commissioners:

Ewin L. Davis, Chairman,
Garland S. Ferguson,
William A. Ayres,
Robert E. Freer.

* * (Caption—4389) * * *

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission as amended, answer of the respondent, testimony and other evidence in support of the allegations of said complaint as amended and in opposition thereto taken before a trial examiner of the Commission theretofore duly designated by it, ~~report of~~ the trial examiner upon the evidence and exceptions filed thereto, briefs in support of the complaint and in opposition thereto, and oral argument of counsel; and the Commission having made its findings as to the facts and its conclusion that respondent has violated the provisions of subsection (a) of Section 2 of an Act of Congress entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by Act approved June 19, 1936 (Robinson-Patman Act):

It Is Ordered that the respondent, Standard Oil Company, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the sale of gasoline in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such gasoline of like grade and quality as among purchasers:

243 1. By selling such gasoline of like grade and quality

to competing purchasers at different prices in the manner and under the circumstances found in Paragraph Four of the aforesaid findings as to the facts and conclusion.

2. By continuing or resuming the discriminations in price referred to and described in Paragraph Four of the Commission's findings as to the facts herein.

3. By otherwise discriminating in price between purchasers of gasoline of like grade and quality in a manner and degree substantially similar to the manner and degree of the discriminations referred to in Paragraph Four of the Commission's findings as to the facts herein, and in any other manner resulting in price discriminations substantially equal in amount to such discriminations.

4. By selling such gasoline to some retailers thereof at prices different from the prices charged other retailers who in fact compete in the sale and distribution of such gasoline; provided, however, that this shall not prevent price differences of less than .5 cents per gallon which do not tend to lessen, injure, or destroy competition among such retailers.

5. By allowing a lower price to any dealer, jobber, or wholesaler on gasoline sold by such dealer, jobber, or wholesaler at retail, than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with such dealers, jobbers, or wholesalers in their retailing activity; provided, however, that this shall not prevent price differences of less than .5 cents per gallon which do not tend to lessen, injure, or destroy competition with such dealers, jobbers, or wholesalers in the sale of gasoline direct to the consuming public.

6. By selling such gasoline to any dealer, jobber, or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-
244 customers of such dealers, jobbers, or wholesalers;
where such dealers, jobbers or wholesalers resell such gasoline to any of its said retailer-customers at less than respondent's posted tank-wagon price or who directly or indirectly grant to any such retailer-customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer.

For the purpose of comparison the term "price" as used in this order takes into account discounts, rebates, allowances, and other terms and conditions of sale.

It Is Further Ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

* * (Caption—4389) * *

MOTION TO MODIFY ORDER TO CEASE AND DESIST.

Come Now W. T. Kelley, Chief Counsel, and Walter B. Wooden, Assistant Chief Counsel, of the Federal Trade Commission, and move that the order to cease and desist entered herein by the Commission on October 9, 1945 be modified so that it would read as follows:

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission as amended, answer of the respondent, testimony and other evidence in support of the allegations of said complaint as amended and in opposition thereto taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence and exceptions filed thereto, briefs in support of the complaint and in opposition thereto, and oral argument of counsel; and the Commission having made its findings as to the facts and its conclusion that respondent has violated the provisions of subsection (a) of Section 2 of an Act of Congress entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by Act approved June 19, 1936 (Robinson-Patman Act);

It Is Ordered that the respondent, Standard Oil Company (Indiana), a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the sale of

gasoline in commerce as "commerce" is defined in th
249 aforesaid Clayton Act, do forthwith cease and desis
from discriminating, directly or indirectly, in the pric
of branded gasoline of like grade and quality as amon
purchasers:

1. By selling such gasoline to competing purchaser at different prices in the manner and under the circumstances stated in the findings as to the facts herein.

2. By continuing or resuming the discriminations i price of such gasoline referred to and described in th Commission's findings as to the facts herein.

3. By otherwise discriminating in price between purchasers of such gasoline in a manner and degree substantially similar to the manner and degree of the discriminations referred to and described in the Commission's findings as to the facts herein.

4. By selling such gasoline to some retailers thereof at prices different from the prices charged other retailers who in fact compete in the sale and distribution of such gasoline; provided, however, that this shall not prevent price differentials which make only allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such gasoline is to such purchasers sold or delivered, and which do not tend to lessen, injure, or destroy competition among such retailers.

5. By allowing a price to any dealers, jobber, or wholesaler on such gasoline sold by such dealer, jobber, or wholesaler at retail lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with such dealers, jobbers, or wholesalers in their retailing capacity; provided, however, that this shall not prevent price differentials which make only due allowances for differences in the cost of manufacture, sale or delivery resulting from
the differing methods or quantities in which such gaso-
250 line is to such purchasers sold or delivered and which
do not tend to lessen, injure or destroy competition
with such dealers, jobbers, or wholesalers in the sale of gasoline direct to the consuming public.

6. By selling such gasoline to any jobber or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-

customers of such jobbers or wholesalers, where such jobber or wholesaler resells such gasoline to any of its said retailer-customers at less than respondent's posted tank-wagon price or directly or indirectly grants to any such retailer-customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer; provided, however, that nothing in this paragraph shall be construed as prohibiting differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such gasoline is to such purchasers sold or delivered.

For the purpose of comparison the term "price" as used in this order includes discounts, rebates, allowances and other terms and conditions of sale.

It Is Further Ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

Counsel for the Commission further move that the Commission issue an order on respondent to show cause, if any it has, by written brief to be filed with the Commission on or before February 11, 1946, why said motion should not be granted, and that a copy of this motion, together with a copy of the proposed order to show cause be served upon the attorneys of record for the respondent by registered mail.

W. T. Kelley,
Chief Counsel.
Walter B. Wooden,
Assistant Chief Counsel.

January 21, 1946.

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UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 23rd day of January, A. D. 1946.

Commissioners:

William A. Ayres, Chairman,
Garland S. Ferguson,
Ewin L. Davis,
Robert E. Freer,
Lowell B. Mason.

* * (Caption—4389) * *

ORDER TO SHOW CAUSE.

W. T. Kelley, Chief Counsel, and Walter B. Wooden, Assistant Chief Counsel, of the Federal Trade Commission, having filed with the Commission a motion that the order to cease and desist entered herein on October 9, 1945 be modified in manner and form as fully set out in said motion, and that notice of such motion be given respondent by serving a copy thereof and a copy of this order to show cause by registered mail addressed to attorneys of record for respondent, and the Commission having duly considered the matter and being now fully advised in the premises,

It Is Ordered that a copy of said motion to modify the order to cease and desist herein, together with a copy of this order to show cause, be served by registered mail upon attorneys of record for the respondent.

It Is Further Ordered that respondent show cause, if any it has, by written brief to be filed with the Commission on or before February 11, 1946, why said motion should not be granted.

By the Commission.

Otis B. Johnson,
Secretary.

253 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—4389) * *

MOTION FOR REHEARING AND FOR RECONSIDERATION OF ORDER TO CEASE AND DESIST.

The Standard Oil Company, respondent herein, respectfully submits that the Cease and Desist Order heretofore entered in this cause on October 9, 1945 is not in the public interest; that while the Order may temporarily bolster retail prices of certain gasolines in Detroit and hence be of brief aid to a small group of service station operators, it will overall eliminate competition, seriously disturb jobber operations, cause many jobbers to go out of business, and result in higher prices to the public. Respondent respectfully asks the Commission to reconsider the effect of this Order on all aspects of the petroleum business, the changes and developements in the industry since 1940, and the findings of fact upon which the Order is predicated. In support of this motion for rehearing and for reconsideration of the Order, respondent respectfully submits the following:

254 (Figures in parentheses refer to pages of the Record unless otherwise indicated.)

I. Far-Reaching Effect of Order.

Application of the principles enunciated in the Order throughout the Industry will lead to economic changes probably far beyond those envisaged by the Federal Trade Commission. It will result in higher prices to the consumer, it will hurt the jobber and others in the Industry, and it will restrain competition. The Order is not in the public interest.

The Order, as we understand it,

1. prohibits a supplier from allowing more than .499¢ per gallon off the suppliers' posted tank wagon price on gasoline sold "in commerce" to a "dealer, jobber or wholesaler" who resells such gasoline at retail, regardless of whether the jobber, wholesaler or dealer who resells at retail buys in tank car lots, stores in its own bulk storage facilities, delivers by tank wagon, and otherwise performs the jobber function, and

2. prohibits a supplier from selling gasoline "in commerce" to a "dealer, jobber or wholesaler" at less than

supplier's tank wagon price unless the "dealer, jobber
255 or wholesaler" resells such gasoline to the "retailer-customers" at not less than the supplier's tank wagon price.

The Commission has, we believe, overlooked the far-reaching effect of this Order upon individuals and businesses other than the fifteen or more service station operators in Detroit who complained of the competition of respondent's tank car customers and their resellers. The consumer, the jobber, many retailers, and the supplier will all be seriously affected if this Order stands and becomes the pattern for the petroleum industry.

Effect On Consumer.

The Trial Examiner, whose recommendations the Commission has largely followed in this case, frankly stated in his report that the vice of the Detroit situation lay in the fact that the price differential complained of forced other dealers (competitors of respondent's customers and their customers) "to lower their price to the public." (Trial Examiner's Report, p. 68.)

The Order proposes to change this situation by compelling respondent's tank car customers to pay a much higher price for gasoline sold through their
256 own service stations and to charge their reseller customers not less than respondent's tank wagon price.

Thus, the Order's objective is higher service station prices, and there is no doubt that this objective will be achieved with resultant injury to customers. As we understand it, this objective is contrary to the announced policy of the Commission hereafter quoted and to the purpose of the Clayton Act, as amended.

Recently the Commission filed its Annual Report to Congress, in which it condemned the Miller Tydings Act and urged its repeal, and stated its understanding of our competitive system to be that

"The consumer is not only entitled to competition between rival products but to competition between dealers of a single product."

It is hard to reconcile any part of the Order, and particularly subparagraph 6 which requires the jobber to resell at the supplier's tank wagon price, with this statement of

the Commission's views on resale price maintenance and our competitive system. Seemingly, the Order and these views and policies are in direct conflict with each other,
and those subject to the jurisdiction of the Commis-
257 sion are obviously entitled to a restatement of such
views and policies, or respondent is entitled to the vacation of this Order and a dismissal of the complaint herein.

These policies and views of the Commission cannot be effectuated unless the consumer obtains (a) the lowest possible price on every commodity in order that he may have the greatest purchasing power obtainable from a given income, and (b) the maximum of choice in the selection of goods either as to quality or quantity.

The Order does not assure the lowest possible price on gasoline. In fact, the Commission is admittedly striving to bring about a relative increaes in the price of gasoline moving through the tank car channel as compared with the tank wagon channel and thus increase the price to consumers. This is to be achieved by the following methods:

(1) By requiring suppliers to impose resale price maintenance upon jobbers, which will prohibit added economies achieved by jobbers from being passed on to dealers and by them to consumers. Thus, the average price to be paid by consumers will be raised.

(2) By depriving jobbers of the benefits of integra-
258 tion and mass merchandising. The inevitable tendancy
in petroleum distribution is to integrate operations, whether the distributor be a jobber or an original supplier. This action is taken to protect and insure economies incident to this course of action accruing to the distributor which are then frequently passed on to the consumer in the form of low prices to build increased volume. Both the mass merchandiser, representing various degrees of integration, and the unit neighborhood service station are desirable. Favoring one type against the other will injure a large segment of the consuming public and will force consumers to pay a higher price for gasoline.

Further, the Order fosters uneconomic methods of distribution which will ultimately increase prices to the public. This is so because:

(1) The jobber's intimate familiarity with (a) the people of his community and their wants and habits, (b)

the retail dealers, their methods of operation and their credit standing, and (c) a multitude of economic conditions which affect cost of distribution, such as real estate values, wages, and rent conditions, make him in many instances a low cost distributor. To eliminate or handicap this efficient distributor by arbitrary price disabilities will
259 introduce higher costs and hence higher prices.

(2) A strongly competitive system encourages improvements and technological advances in production and distribution. Where margins are low, as in the petroleum industry, every seller tries to improve his profits by reducing cost. In the long run, however, the new advances are disseminated throughout the industry and reduce costs to all operators. Obviously, an all round reduction in costs would tend to lower prices to the consumer. The guarantee of high margins by resale price maintenance reduces considerably the incentive and necessity for introduction of each possible economy and increased efficiency. The long run result of such a policy is low productivity of resources compared with that under unrestricted competition price-wise.

(3) Every method of distribution is always on trial. In the long run one method may prove more efficient than another under one set of circumstances while less efficient under different conditions. Every supplier must be given the full range of possibilities of distribution in order to insure the best mode of adaptation to changing conditions.

The Order of the Commission would result in stratifi-
260 cation of the market into a stratum of suppliers selling through jobbers and another stratum selling direct to dealers. This element of rigidity in the operation of every supplier would limit severely the possibilities of a trial-and-error search for low cost methods of distribution and would result in higher prices to the consumer.

The Order will not only result in higher prices to the consumer but it also fails to provide freedom of choice by the consumer in the selection of quality of goods to be purchased. An unrestricted competitive system tends to operate according to the dictates of consumer's choice. At present, many jobbers sell well-established brands of gasoline because they know that the free choice of their customers runs in that direction. However, the Order of the Commission will so restrict the jobber in the handling of well-established brands of gasoline as to make the

present marketing policies of many of them unprofitable and force them to sell other brands. The customers of these jobbers would then be forced to buy gasoline which
is less satisfactory to them than the gasoline they are
261 now purchasing. Those who would transfer their
patronage to continue to buy the gasoline of their
choice, would do so at a sacrifice of convenience or price.

It is obvious that if a jobber can buy and handle gasoline in a manner which permits or encourages him to reduce the price to the public, the public is thereby benefited. If a dealer has the ambition to expand, grow, and eventually invest his capital in a bulk storage plant and delivery equipment and thereafter supply his own service stations from that bulk plant by means of his own equipment at a reduced price, is not the public entitled to the benefits flowing from that lower price? Some people are price buyers while others are willing to pay a little more for service and attention, either real or imaginary. Both groups are entitled to the best bargain they can obtain. If the man who has a bulk plant and delivery equipment can buy at tank car prices and does so buy and as a result sells at a cheaper price to the public, has the public in any sense been injured? We think not.

It is no answer to say that such a buyer can procure supplies from some refiner that is not engaged in market-
ing directly to dealers in the Detroit area and thus con-
262 tinue selling at law prices to the public because, in
addition to buying at the lowest price, the public is
entitled to buy the kind or brand of product which it desires.

We can see no escape from the conclusion that the Order of the Commission is not in the public interest, is the result of a private dispute redressable in the courts, and will result in injury to the consumer in the form of higher prices and inability to secure the product of his choice.

Effect on Jobbers.

The future of thousands of petroleum jobbers throughout the United States will be jeopardized by this Order. Jobbers do not know or have any control over costs incurred by any supplier in distributing gasoline. Yet this Order imposes margins on the jobber which are determined by the cost and pricing policy of the suppliers in selling directly to retail outlets. The Commission has, we believe, overlooked many pertinent facts regarding the jobber's operations:

(a) A jobber may have so reduced his cost as to be in position to sell to his retail outlets at a cost which is less than the corresponding wholesale costs incurred by his supplier.

263 (b) The jobber may be willing to accept a lower margin for performing the wholesale function than is his supplier, preferring a narrow margin and increased sales to smaller sales at a higher margin.

(c) The jobber may be willing to sell at near cost, at cost, or even at less than cost in order to use gasoline as a leader, attracting consumers to his place of business for sale of other lines of merchandise.

(d) The jobber may be compelled to sell at prices which are lower than the tank wagon price of his supplier if he is to meet the competition of other outlets distributing products of other suppliers and of other jobbers. Even as there are traffic hubs in a large city, there are variations of intensity of competition in different sections of the city which may require recognition in prices adopted or the jobber may be forced to close his outlet.

(e) There is a tremendous difference in marketing costs in different geographical areas of the United States. Every state and urban and rural section within that state presents a myriad of variations in the methods and costs of distribution of individual companies or of the same company. The adherence to the policies set forth in
264 the Order of the Commission would, of necessity, require an inordinately large number of studies to fix and police literally thousands and thousands of prices in different communities.

(f) Even assuming that the Commission might be gifted with infallibility in determining costs for each of the different suppliers in each of the different communities, and thus impose "correct" margins for each jobber, its Order is bound to bring detrimental consequences in the long run. The jobbers in this country are operating in a dynamic economy which is changing continuously. Costs of distribution are also changing with volume of sales and changes of many other economic conditions, such as wages, transportation rates, real estate prices, and other similar factors bearing on cost of supplying the consumer. It is

folly to try to fix prices on the basis of a base year in past experience to be applicable to any future extended period of time, especially when there has been a whole war and five years' time intervene. The concept of a price fixation predicated upon a "1940 parity" is thoroughly repugnant to and completely nonrepresentative of present mar-
keting costs and conditions. Such fixed margins are
265 likely to be even less representative of future condi-
tions beclouded with many changes resulting from increased volume (due to an expected increase in total consumption) and a possible decline in unit cost of distribution.

Some light may be thrown on the situation created by the Order with respect to its restraining effect on competition and trade if consideration is given to the circumstances under which the ordinary jobber became a jobber. Generally, he is one who started with a service station. He acquired one or more additional service stations either by lease or purchase. When he had arrived at the point where his total gasoline purchases for all stations justified an investment in bulk plant facilities and tank wagons, in order to secure the economies of integrated operations, he made the investment and acquired the necessary facilities. Having done so, he was in a position to bid for the business of other dealers, which he did by meeting the price of his competitor jobbers. His own retail outlets remained, however, as an assured outlet for a minimum quantity of
gasoline. As his business grew with the acquisition of
266 dealer accounts, he began to lease out his own retail
outlets to others. As and when a turnover in lessees of his retail outlets occurred, he took over the operation of them until new lessees could be secured.

Such has been the experience of many jobbers in the past. What will be the situation in the future under the present Order of the Commission? There is nothing in the Order which will prevent an individual from acquiring one or more service stations. But when that individual has acquired a sufficient gallonage to justify an investment in bulk plant and delivery facilities in order to secure the economies of integrated operations, he is met with the proposition that even though he is willing and ready to undertake the jobber function with respect to his own retail outlets and those of others, he may not purchase gasoline at the jobber or tank car price on gasoline which he retails, but must continue to pay the tank wagon price less

a discount of not to exceed .499 cents per gallon. He is fully aware that such a narrow margin will not permit him to liquidate the investment required to engage in the jobber function and make a reasonable profit thereon. Consequently, he refrains from expanding further in
267 the direction of the transition from a retailer to a jobber.

But suppose he is willing to enter the jobber business on a margin of less than .5 cents per gallon on his retail business, in order to fully utilize his jobbing facilities he must acquire or normally would acquire other dealer accounts. This he can do in only one way. He must meet the price of his competitor jobber, who may be unrestricted under this Order. But he is faced with the necessity of agreeing with his supplier (if such supplier is one having dual distribution) that he will not resell to such other dealers at any price below the supplier's posted tank wagon price. Consequently, he is further discouraged in his desire to expand and either remains what he was in the beginning,—a retailer who must, regardless of the fact that he has become a mass merchandiser, pay the wholesale or posted tank wagon price and cannot take advantage of the economies in operation under the integrated jobber-dealer method of operation,—or seeks a supplier not having direct distribution in his area of operation, which would automatically exempt his operations from the price limitations imposed by this Order. Surely this is discrimination of the rankest sort against cer-
268 tain suppliers and consumers who desire to purchase their products, and any order or regulation imposing such a discrimination ought not to be permitted to stand.

The same situation faces the individual who is not a retailer and who has a desire to become a jobber marketing gasoline supplied by a refiner having direct distribution. In order to perform the jobber function, he must first make an investment in bulk storage and delivery equipment. If he is to utilize his facilities to the fullest extent, he must not only secure dealer accounts to which he will resell on a wholesale basis, but he will undoubtedly wish to secure some retail outlets of his own to assure for himself a core of outlets through which he can dispose of a minimum gallonage which will insure a profitable operation on a tank car price basis. While the Order will not prevent him from securing his own retail outlets by purchase or lease, he cannot perform his jobber func-

tion with relation to those outlets on the narrow margin of less than .5 cents per gallon fixed by the Order. Further, the Order will prevent him from securing any dealer accounts, since he cannot be competitive, i. e., he cannot offer to resell at less than his supplier's posted tank
269 wagon price, while a jobber who is supplied by a refiner not having direct distribution will be in a position to underbid him for such business.

Presently, jobbers bargain among the various suppliers in any given market for the best purchase price considering brand preference. Under past conditions, the bargaining was conducted with those having direct distribution and those desiring to penertate a new market via distribution through jobbers. Under the present Order, the potential suppliers are limited actually to those having no direct distribution, which tends to create monopolistic bargaining power on behalf of this class of privileged suppliers.

Thus, the Order not only has the avowed purpose of raising the retail price of gasoline to the consumer and of protecting existing dealers from the effect of competition, as pointed out elsewhere herein, but it is clear that the Order is in restraint of competition and trade because (1) it limits the ability of a retailer to expand and become a jobber and (2) it limits the ability of any individual who is not a retailer to enter the jobbing business.

Another fact which must not be overlooked in de-
270 termining the effect of the Order is that there are communities which are served only by suppliers having direct distribution as well as jobber distribution. In such cases, the jobber of a well-advertised brand must either retain his present supplier or accept an equally unsatisfactory arrangement with some other direct marketer or sell an unbranded gasoline. If he stays with his present supplier, he will be subject to resale price maintenance in spite of the Commission's public condemnation of such practice.

If a dealer can no longer invest in a bulk plant and delivery equipment and himself perform the jobber function and pass a part of all of such savings on to the public, or if a dealer or jobber cannot himself determine the price at which he will sell merchandise he has bought and paid for, then it is clear that the public, the jobber, and competition generally are adversely affected and to a very marked degree.

271 Effect on Suppliers.

Finally, we believe the Commission overlooked the fact that the Order would adversely effect the supplier in a way not intended by the Commission, because:

(1) The Order is vague, indefinite, and lacks clarity,—a fact apparently conceded by the Commission if news releases are to be believed,—and consequently the supplier remains in doubt as to whether any particular business practice or policy with respect to distribution of gasoline in a given market does or does not conform with the Order and the law. There is no standard in the Order by which a supplier can determine the propriety of his conduct. If the Order had been based on findings that price differentials had forced so many dealers out of business as to unreasonably restrain competition, it might have furnished an understandable criterion, but the Commission could make no such finding since not even a single dealer was forced out of business by the alleged discrimination. Hence the supplier has no means of ascertaining from the Order what practices the Commission would consider proper and what practices it condemns.

272 (2) The Findings and the Order criticize the accounting procedure of respondent but do not contain any formula or method which has the approval of the Commission. Thus, the supplier does not know which expense items are regarded by the Commission as contributing to a legitimate cost differential. He does not know the accounting procedure which would be acceptable in the treatment of the various items of expense, nor does he know what costs of distribution would be acceptable as contributing to a differential. Further, the supplier is uncertain about the frequency with which a cost justification should be prepared and an adjustment of price differentials introduced with varying changes of the differential. This imposes a tremendous burden of cost accounting on the supplier, introduces significant uncertainties concerning volume to be distributed, and utilization of terminal and marketing facilities. Price policies are subject to the vagaries of cost accounting, which in turn are dependent upon the volume of sales moving through the supplier's various facilities.

(3) Subparagraph 6 of the Order imposes on the supplier the obligation of policing resale prices of its jobbers.

This raises the following questions: (a) To what ex-
273 tent will the supplier be obligated to follow and de-
termine the practices of each of its jobbers? (b) Would there be any justifiable exception to the resale price maintenance provision when a jobber attempts to preserve and protect his distribution through a given outlet located in a highly competitive area? (c) When would the furnishing of "services" or "facilities" have the net effect of a reduction in price to the dealer? (d) How can the supplier insure resale price maintenance in states that have no Fair Trade law or the law in effect does not apply to a product like motor fuel, where agreements to maintain the resale price violate the Sherman Act?

(4) It limits diversification of selling methods by the supplier. Suppliers generally have carried the principle of diversification into their marketing activities. They endeavor to sell gasoline through several different channels, knowing that they cannot forecast accurately all future legal, economic and technological factors bearing on the profitability of the gasoline market. The exact portion of sales through the different channels is changing through time with the change of many economic conditions. It
274 is very likely that the future will require many addi-
tional adaptations to the changing circumstances which will manifest themselves in the varying importance of different distribution channels. It is obvious that diversified activities help a concern to cushion the brunt of most adverse change by orienting the concern to activities favored or unaffected by the change. The supplier will be put in a straight packet by the rigid distribution pattern imposed by this Order.

The Commission's recent Order is premised upon margins to jobbers and practices in effect five years ago and which have been continued in effect since then. If the margins and practices of which the Commission complains were adversely affecting competition, it would seem that long before now such adverse effect would be clearly apparent. A monopoly of some sort would be well on its way. The facts prove the opposite. Competition in Detroit among retailers of petroleum is as active and aggressive as ever. Ned's Auto Supply Company, which purchased at an allegedly discriminatory price, as referred to in the Findings and Order of the Commission, is actually selling far less gasoline today than it did in 1940.

275 Shortly before this Order was issued, the Commission revised its "Statement of Policy" in which it declared that

"It is the policy of the Commission not to institute proceedings against alleged unfair methods of competition or unfair or deceptieve acts or practices where the alleged violation of law is a private controversy redressable in the courts, except where said practices tend to affect the public. In cases where the alleged injury is one to a competitor only and is redressable in the courts by an action by the aggrieved competitor and the interest of the public is not involved, the proceeding will not be entertained."

In other words, it is the adopted and publicized policy of the Commission not to act or institute proceedings except where they are in the public interest and also that the Commission will not lend its offices to the settlement of competitive disputes unless the public is adversely affected. These are eminently sound policies, but it is difficult to place the Complaint in this proceeding and the Order of the Commission within these boundaries.

The Commission further asserts that it refrains from publishing or divulging the identity of the complaining parties, if any, who set in motion the Commission's
276 proceedings. This is also sound policy, but in this particular proceeding (if press releases are to be believed), the complaining party or parties desire no secrecy. The local secretary of an association purporting to represent certain gasoline service station dealers in 1939 or 1940 is quoted therein as stating that he and his associates made the complaint and "prosecuted the case." It was done, he is quoted as saying, "to protect the dealers against cut prices." We have yet to find one word in the Detroit press, in the Findings of the Commission, or elsewhere, which would indicate that any consumer—much less the public—had any complaint or actually did make or file any complaint that he was adversely affected by the gasoline prices established or methods of distribution employed by respondent and all other suppliers in Detroit between 1936 and 1940 or at any later date. We submit that insuring higher prices and greater profits for these service station dealers while injuring motorists, jobbers, suppliers, and others, is not in the public interest, and therefore the Order should be vacated and the Complaint herein dismissed.

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II. Jobber Function.

Whoever performs the jobber function is entitled to be classified as a jobber and buy at the jobber price; and no jobber should be restricted in the price at which he resells to his customers.

The Clayton Act, as amended by the Robinson-Patman Act, does not forbid the classification of customers according to their functions and does not forbid a lower price to jobbers than to retailers. Indeed, the Order in this case confirms this, since it places no restriction on the price which the supplier may charge a jobber and places a limitation only on the price which the jobber may charge its "retailer-customers". The jobber is not the agent of his supplier and frequently competes with his supplier for the business of service stations operators and other retailers. If the jobber is required to resell at not less than his supplier's tank wagon price (as stipulated in subparagraph 6 of the Order), the jobber will be unable to meet the competition of refiners, jobbers, dealers and others who are unrestricted in the price at which they may resell. Hence subparagraph 6 of the Order will not effectuate the purposes of the Clayton Act, but on the contrary will defeat those purposes and restrain competition.

278 Every gasoline jobber has a substantial investment in his bulk storage plant, tank wagons, and other equipment. He maintains a sales force, advertises, and runs all the risks that every other independent merchant runs. For these investments, expenses and risks in performing the jobber function, he must be compensated; otherwise he cannot continue in business.

Many jobbers operate no retail stations. They buy at the regular jobber price and through efficient operations are able to resell at less than their own and other suppliers' tank wagon prices. It is not only unjust and discriminatory to penalize these jobbers by restricting their resale prices, but it will restrain competition, resulting in higher prices to the service station operator and the consumer.

Jobbers who operate retail stations act in a dual capacity. This was recognized by the Federal Trade Commission itself when on June 19, 1931 it approved the following definition in the National Code of Practices for Marketing Refined Petroleum Products:

"C. Jobber, Distributor or Wholesaler. One who 279 carries a stock of petroleum products to sell to retail dealers or others for resale, but who may sell direct to consumers."

Such jobbers carry on the jobber function in receiving and storing the gasoline in their bulk plants and delivering it in their own equipment to service stations, whether operated by themselves or others. They carry on the retailer function in receiving and storing the gasoline in their service stations and vending it at the service station to the consuming public. Such jobbers have the same investment, incur the same risks and render the same economic service to society in carrying on the jobber function as all other jobbers. Hence they should be accorded the same treatment and should not be required to pay a higher price for their gasoline. The differential of less than one-half cent per gallon which the Commission has arbitrarily fixed by this Order is wholly inadequate to pay for performance of the jobber function. It is doubtful whether this differential will even pay the cost of delivery from the bulk station to the service station and clearly will not compensate the jobber for his investment, the expense of maintenance of his bulk station plant, his other expenses, and the risks he incurs in performing the jobber function.

280 III. The Order of the Commission Is, As A Matter of Law, Not Warranted by the Provisions of the Clayton Act, As Amended.

We respectfully submit that the Order of the Commission should be vacated and the Complaint dismissed for the following reasons:

(a) The Order of the Commission is not confined to the issues raised by the pleadings herein, and includes matters not regulated by the Clayton Act, as amended, and not within the jurisdiction of the Commission.

There is no allegation in the Amended Complaint which either directly or by implication charges any violation of the Clayton Act, as amended, arising out of or in connection with the resale of gasoline by the four customers of respondent named in the Complaint, or any other of its customers. Thus, to the extent that the Order prohibits the resale of such gasoline at other than respondent's posted tank wagon price, it is without the scope of the issues raised by the pleadings.

Subparagraph 6 of the Order provides that respondent
cease and desist from discriminating, directly or in-
281 directly, in connection with the sale of gasoline "in
commerce" in the price of such gasoline of like grade
and quality as among purchasers:

"6. By selling such gasoline to any dealer, jobber or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-customers of such dealers, jobbers, or wholesalers, where such dealers, jobbers, or wholesalers resell such gasoline to any of its said retailer-customers at less than respondent's posted tank wagon price, or who directly or indirectly grant to any such retailer-customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer."

This part of the Order is subject to the following objections, to-wit:

(1) It relates ~~to~~ a matter not regulated by the statute, and therefore wholly outside the jurisdiction of the Commission.

(2) It relates to transactions between jobbers and their own reseller customers, which are, admittedly, not transactions in interstate commerce, and, therefore, wholly outside of the power of the Commission to control.

(3) It relates to transactions consummated, after respondent has sold such gasoline to its jobber customers, between the latter and their own reseller customers, as to which respondent has no privity nor control.

282 Cyrus Austin, attorney for the Commission, at the
time of oral argument of this cause, in commenting
upon the effect and implications of the case of *Daly* v. *Citrin-Kolb Oil Company*, 53 F. Supp. 876, admitted that transactions between Citrin-Kolb Oil Company and its own vendees were and are not "in commerce".

The Commission by its Order now purports to regulate such transactions by compelling respondent to require its jobber-customers to maintain a minimum resale price at the level of respondent's posted tank wagon price or to discontinue business with them.

In the event such jobbers sell under such minimum or grant to their own customers any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer, then respondent is required to discontinue selling to such jobber at a price lower than the price which it charges its own retailer-customers.

This part of the Order is wholly unjustified either by the Complaint or by the statute; and it clearly relates to incidental matters admittedly not constituting interstate
commerce. The Commission, therefore, in including
283 subparagraph 6 in its Order, acted without jurisdiction.
It is, of course, unlawful for the Commission to make any order in relation to any matter not within the purview of the statute.

(b) The Order of the Commission disregards the provisions of the Clayton Act, as amended, relative to the requirement that injury to "competition" must be established in order to justify the issuance of a cease and desist directive; said Order being unsupported by any testimony in the record relative to any deleterious effect of the practices complained of upon "competition" as such.

There is no evidence in this record to support the claim made in the Complaint that the effect of the price differential allowed respondent's jobber-customers, is or may be substantially to lessen competition or tend to create a monopoly or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

The use of the words "may be" in the Clayton Act, as
amended, was not intended by Congress to prohibit
284 the mere possibility of the consequences mentioned,
but to prevent such practices as would probably lessen, injure, destroy or prevent competition.

Corn Products Refining Co. v. *F. T. C.*, 89 Law Ed. 977.

The testimony adduced by the Commission on the subject of effect on competition of the practices complained of is fully analyzed at pp. 128-134 of respondent's brief. We do not repeat that analysis here, but refer to the printed brief, at the pages indicated. As we said there, however, we repeat here—that there is not a scintilla of testimony even tending to establish any probability of deleterious effect on competition attributable to the differential in price

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accorded to respondent's tank car customers. As a matter of law, the record does not support the Findings and Order of the Commission; and the Order should, therefore, be vacated and the complaint dismissed.

Respondent contends, and its contention is supported by the expert testimony of Professor Fred Emerson Clark of Northwestern University, that proof of injury to "competitors" of respondent's vendees is not tantamount to 285 proving injury to "competition", as that word is used in the statute. (Record pp. 1647-8) His testimony establishes the inescapable conclusion that the practices complained of, and their effect, as proved by the testimony of the Commission's witnesses, actually foster and promote competition; and that their discontinuance would have the effect of preventing and stifling competition, and thereby cause the public to pay higher retail prices for gasoline in the Detroit area. In fact, the Trial Examiner's Report, which the Commission has generally adopted in its Findings of Fact, in several places refers to the fact that the practices complained of operate to lower the price charged the public for gasoline, which is erroneously cited as a result which the statute was intended to prevent. The Trial Examiner's Report and the Commission's Order, therefore, are apparently based on testimony bearing on alleged injuries to the competitors of respondent's jobber customers who either sell at retail or to resellers at less than the tank wagon price. Such testimony as was adduced to this effect is analyzed in respondent's brief at pages 131-132.

"Competition" cannot be regarded as "one or more competitors", but must be considered as a social and 286 economic institution—the state or condition of striving, in which a competitor seeks to furnish merchandise or render service better or less expensively than his rivals. Incidental injury to competitors is a usual and necessary element of competition (1655).

It is difficult to conceive that injury to "competition", as such, resulted from the alleged discriminatory prices, during the years under consideration, when one considers that there continued to exist such a substantial growth of new and rebuilt gasoline filling stations in the Detroit metropolitan area. The records of the Department of Buildings and Safety Engineering of the City of Detroit show, for the years 1936 to 1941, inclusive, that permits for the following number of new service stations and additions and alterations to existing stations were issued.

Year	New Service Station Permits	Alterations and Additions
1936	47	87
1937	76	77
1938	45	47
1939	67	55
1940	134	60
1941	78	68

287 The improvement of old outlets and construction of new competitive outlets does not indicate a development of monopolistic tendencies during the period covered by this litigation, or the first year thereafter, when construction was still permitted. The building of new service stations was stopped the latter part of the year 1941, because of the war.

Nor does the marked increase in gasoline gallonage sold by Ned's Auto Supply Company after it went on a tank car delivery and price basis (as referred to in the Commission's Findings of Facts) prove or tend to show "injury to competition". The records of respondent's Detroit Division show that many gasoline service stations, purchasing their supplies at regular tank wagon prices from respondent, and selling at their own retail prices, achieved an even greater increase of sales volume. This is illustrated by statistics of the following service stations:

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Service Station Respondent's Dealer Account Number	Volume in Gallons 1936	Volume in Gallons 1940	Percent Increase
43	30,760	65,512	112.6
92	34,703	84,090	142.3
5102	67,390	271,828	303.3
257	28,324	59,196	108.9
274	75,272	186,781	148.1
284	67,205	192,045	185.7
603	53,611	116,514	117.3
619	52,778	108,550	105.6
621	29,395	124,125	322.2

The above figures demonstrate that, during the years covered by the Complaint, the tank wagon purchaser's gallonage increased, as well as that of the jobber retailer who purchased on the tank car delivery and price basis.

To recapitulate, there is no evidence in this record to show that the public as a whole was injured, or was or is likely to be injured, by the practices complained of in the proceeding. On the contrary, the record shows that the effect of such practices was and is to enable the consumer to secure gasoline for a lower price. Absolutely the only testimony adduced by the Commission on this point 289 was to the effect that about fifteen so-called independent gasoline retailers, some of whom were reseller customers of respondent, found it necessary to reduce their gasoline prices to meet competition. (543, 560, 583, 624, 637, 651, 673, 724, 728, 750, 765, 778, 847, 859, and 878.)

As a matter of law, we respectfully maintain, therefore, that such testimony fails to establish any adverse effect on "competition", as that term is employed in the Clayton Act, as amended. It is, therefore, submitted that the Order of the Commission is unsupportable and should be reconsidered and vacated.

(c) The Order of the Commission is unwarranted in that it refuses to give effect to respondent's right to rebut a prima facie case by showing that its lower prices to its jobber customers were made in good faith to meet equally low or lower prices of its competitors.

The Commission, in its Order, holds that where an injurious effect on competition is affirmatively proved, then proof of meeting competition is immaterial; that the provision of the law allowing a respondent to show good faith in meeting equally low or lower prices of competitors 290 would recognize the principle "that one competitor's violation of law justifies its violation by another." This holding is based upon the unsound premise that the competitors in question are actually violating the law in offering such low or lower prices to respondent's jobber customers, which premise is valid only if such competitor is proved to be a law violator. It is entirely conceivable that such competitor's costs of sale and delivery would actually justify the competitive price differential offered by them to jobbers; and the law does not permit the Commission to presume otherwise in determining the rights and liabilities of respondent.

The Report of the Trial Examiner recites that:

"The differentials on its branded gasolines respondent granted Ned's Auto Supply Company, at all times subsequent to March 7, 1938, and Stikeman Oil Company, Citrin-Kolb Oil Company and the Wayne Oil Company, at all times subsequent to June 19, 1936, were granted to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality."

The Trial Examiner, at pp. 54-55 of his Report, finds as a matter of fact, uncontradicted upon the record, that the four jobbers "could purchase from many other sources, immediately, a gasoline of comparable quality and at a
291 better (lower) price than they are paying at the present time"; also that the jobber customer market is subject to intense competition; and that respondent's jobber customers have no contracts, and the continuance of their patronage is subject to competition from day to day.

Notwithstanding these findings of the Trial Examiner, the Commission holds that they are immaterial, saying:

"Based on the record in this case, the Commission concludes as a matter of law that it is not material whether the discriminations in price granted by the respondent to the said four dealers were made to meet equally low prices of competitors." (14)

The Commission bases this conclusion on two principal grounds:

(1) Because the Commission believed injurious effect on competition was affirmatively proved.

(2) Because the Commission believed the construction of the law claimed by respondent would constitute recognition of the scoundness of the principle that one competitor's violation of law justifies its violation by another.

The first of the above mentioned grounds represents an attempt on the part of the Commission to add a pro-
292 viso to Section 2 (b) of the statute. Does the justification accorded respondent by said section, depend upon whether, by respondent's act, competition was destroyed, injured or prevented? The statutes does not say so, and it is submitted that it constitutes a strained and unreasonable construction to so interpret the words of the statute. Moreover, as heretofore pointed out, there is no substantial evidence in the record establishing any injury to competition as such, by reason of any act of respondent.

The Commission assumes, as the basis for the second ground mentioned, that the other oil companies which of-

ferred respondent's jobber customers price differentials equal to or greater than those offered by respondent are, themselves, violators of the statute. This conclusion constitutes an invalid and unsupported presumption. For, every one of such competitors, as to which competitive price offers were proved, might conceivably be able to show that its price differential, so offered, is justified by its own savings in sales and delivery costs as between the tank car and tank wagon methods of delivery of gasoline, or that
the customer to which the offer was made was its only
293 actual or prospective customer in the area and hence
the offer could not be discriminatory.

The meeting of an equally low price of a competitor in good faith is available to respondent in rebutting any prima facie case established by the Commission, and, when such fact is established by uncontroverted evidence as in this case, it becomes a justification under the Act. In *F. T. C.* v. *A. E. Staley Mfg. Co.*, 89 L. Ed. 989, at page 991, the United States Supreme Court said:

"The principal question for decision is whether respondents, who adopted the discriminatory price system of their competitors, including the Corn Products Refining Company, have sustained the burden of justifying their price system under Section 2 (b) of the Clayton Act, as amended, by showing that their prices were made 'in good faith' to meet the equally low prices of competitors."

In deciding this question, the Court said, at page 997:

"Section 2 (b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's. The good faith of the discrimination must be
shown in the face of the fact that the seller is aware
294 that his discrimination is unlawful, unless good faith
is shown, and in circumstances which are peculiarly favorable to price discrimination abuses. We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."

In the cited case, the Supreme Court sustained the Commission's finding that respondent, Staley Mfg. Co., had not met and satisfied this burden because it never in fact had a higher price than its competitor's. But the undisputed evidence in the instant case is that respondent did have higher prices than its competitors were offering, and further that its prices were established in the face of bona fide offers to said customers by respondent's competitors to sell them at lower prices.

In the Staley case, the Supreme Court also held that:

> "Congress has left to the Commission the *determination of fact in each case* whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence *is for the Commission.*" (Italics ours.) (Opinion p. 996.)

295 In the case at bar the Report of the Trial Examiner, as heretofore noted, expressly recites that the differentials in question were granted by respondent to its jobber customers "to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality."

The Commission, however, in its Findings of Fact, at page 14 thereof, concludes as a matter of law that "it is not material whether the discriminations in price granted by the respondent to the said four dealers were made to meet equally low prices of competitors"; and the Commission, therefore, makes no finding of fact on the question of meeting competition and of respondent's good faith in doing so, saying that "the Commission does not attempt to find the facts regarding those matters, because even though the lower prices in question may have been made by respondent in good faith to meet the lower prices of competitors, this does not constitute a defense, in the face of affirmative proof that the effect of the discrimination was to injure, destroy and prevent competition with the retail stations operated by the said named dealers and with the stations operated by their retailer-customers."

296 (d) The Order of the Commission, in reducing the allowable differential on sales of gasoline to jobbers who engage in retail operations (to the extent of the gasoline so sold at retail) to less than one-half cent per gallon and basing such reduction wholly upon allowance for difference in respondent's cost of delivery, as between the tank car (or transport truck) and tank wagon delivery methods, wholly disregards Section 2 (a) of the Clayton Act, as amended, which recognizes a further allowable differential reflecting differences in the cost of sale as between such methods of marketing.

The difference in respondent's sales costs, as between said two methods of marketing, was wholly ignored by the Commission's Order, although many items thereof, as established by the testimony, were not even contested or drawn in question by the attorney for the Commission.

The Robinson-Patman amendment to the Clayton Act permits a respondent to justify differentials in price by showing that they "made only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." (Sec. 2 (a).)

297 The less than one-half cent differential is apparently based upon testimony adduced by the Commission to the effect that the gasoline supplier saves one-half cent per gallon, by the tank car method of delivery, being the testimony of the witness Paul Harrison to the effect that it cost that amount per gallon to haul gasoline from a bulk plant to a gasoline filling station within the Detroit area. (Record pp. 915, 923, 924.)

That Mr. Harrison's testimony related solely to savings in cost of delivery, without reference to saving in cost of sale, is shown by the fact that the Trial Examiner limited the cross-examination of Mr. Harrison in the following words:

"I don't understand that during the direct examination there was any testimony adduced running to the cost of sale, and the testimony related solely to the cost of delivery. Therefore, the examiner rules that your cross-examination will be limited to the cost of delivery." (Record p. 931.)

Accordingly, the entire differential permitted by the Order of the Commission is based upon evidence adduced by the Commission as to the cost of hauling gasoline from bulk plant to retail outlet; no additional allowance having been made for the difference in selling cost as between the tank car and tank wagon method of distribution. This constitutes manifest error.

The Trial Examiner recognized in his Report on the evidence that there had been substantial proof of saving in selling cost as between such varying methods of marketing; the Report reciting that the allowable jobber differential per gallon proven was "less than one (1¢) cent." (Trial Examiner's Report, p. 42.)

And it is particularly significant that the 1.51c differential testified to by Dr. John W. Boatwright, respondent's expert on costs, was not disproved nor controverted by Mr. Warmack, the Commission's expert, who testified on cross-examination as follows:

> "Q. Are you just unable to say whether 1.51 cents is a correct figure or whether any other figure is a correct figure?
>
> A. I am unable to say."
>
> (Record p. 6518.)

Respondent respectfully submits that the Commission's Findings of Fact and Order not only disregard the overwhelming weight of the evidence on the subject of
299 differential justification, but also misinterpret the legislative intent of Congress in the use of the words "due allowance" in Section 2 (a) of the Clayton Act, as amended, by the Robinson-Patman Act.

It certainly was not the intent of Congress to require such justification to be made with that mathematical exactitude which the Commission requires, as evidenced by said Findings of Fact. If so, then no respondent will ever succeed in establishing a cost differential justification. For example, the Commission on page 12 of its Findings of Fact apparently rejects respondent's entire cost study on the ground that it is based on costs in the Detroit Division instead of those in the Detroit metropolitan area. To that criticism we say that respondent used as the basis for its cost analysis the smallest geographical area for which records had been regularly kept, and within which the complaint was lodged; and that nothing more was humanly possible. Moreover, there was testimony adduced as to comparison of costs in the Detroit Division outside the Detroit metropolitan area compared to those inside said area, indicating that the difference did not exceed 2/100 of a cent per gallon, this being the difference in mar-
300 keting costs between gallonage handled by respondent's commission employees in rural areas of the Detroit Division, on the one hand, and that handled by its salaried drivers in the Detroit metropolitan area, on the other.

In other respects, the criticisms directed at respondent's cost differential justification were shown by the testimony of Dr. John W. Boatwright, respondent's expert, to involve infinitesimal changes in the allowable differential. These criticisms are analyzed at length in respondent's brief at pages 92 to 108, inclusive, and the analysis will not be repeated here.

Writers on the subject of oil economics recognize that a differential or "spread" of approximately two cents per gallon between the tank car and tank wagon prices on gasoline is ordinarily necessary to enable a gasoline jobber to meet his cost of operation and realize a reasonable profit.

Ball on The Oil Business, p. 266.

The evidence in this case shows that respondent accords its tank car customers the smallest differential in price,
as between the tank car and tank wagon method of sale
301 and delivery of gasoline, allowed in the entire oil in-
dustry; the minimum differential being one and one-half (1½¢) cents. (Record p. 1515-16.)

The average differential allowed by the entire industry is two (2¢) cents; and the maximum differential is three (3¢) cents. (Record p. 1516.) The generally prevailing differential allowed along the Atlantic Seaboard is two and one-quarter (2¼¢) cents. (Record p. 1516.) This was established by the uncontroverted testimony of John E. Dyer, of New York City, general sales manager of Sinclair Refining Company, who is so well recognized as a spokesman for the oil idustry that he had charge of the administration of codes for said industry under N. R. A. for the New York Division. (Record p. 1474.)

302 IV. The Interstate Commerce Question.

The Order of the Commission, and the Findings of Fact upon which the same is based, do not show that the transactions complained of were committed by respondent "in the course of commerce," or that either or any of the purchases involved in the alleged discriminations were "in commerce", as prescribed in the Clayton Act, as amended by the Robinson-Patman Act.

The statute, in Section 2 (a)* thereof, prescribes three criteria relative to the interstate character of a respondent's operations, and to the character of the transactions involved. These are:

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* The following is the text of Section 2 (a), insofar as it relates hereto:

> "Sect. 2. (a) That is shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade or quality, where either or any of the purchases involved in such discrimination are in commerce * * *"

(a) That the respondent shall be "engaged in commerce". This is admitted by this respondent and is supported by the record.

(b) That the transactions complained of shall be 303 committed "in the course of such commerce". This is denied by respondent, and there is no finding thereon in said Order, nor would such a finding, if made, be supported by the record.

(c) That the transactions complained of and involved in the alleged discriminations are "in commerce". This is denied by respondent, and there is no finding thereon in said Order, nor would such a finding, if made, be supported by the record.

The Findings of Fact of the Commission in this case fall far short of showing that the transactions complained of were committed in the course of interstate commerce, and that the transactions involved in the alleged discriminations are or were "in commerce". In Paragraph Two of said Findings of Fact the Commission determines only that respondent was, at the times complained of, engaged in interstate commerce.

Further than as above indicated, however, there is no finding on the commerce issue which can be said to support the Order of the Commission; and if there were such a finding, it would not be supported by any substantial evidence in the record.

The facts as supported by the record establish that 304 the case at bar presents the same factual and legal situation as was presented in *Lewis v. Shell Oil Company*, 50 F. Supp. 547, decided in 1943 by the District Court of the United States for the Northern District of Illinois. At the time of the argument of this case, Cyrus Austin, the attorney who presented the case on behalf of the Commission, frankly stated that if the Lewis case was correctly decided, then the respondent herein was entitled to an order of dismissal.

In the case of *Daly v. Citrin-Kolb Oil Company*, 53 F. Supp. 876, decided by the United States District Court for the Eastern District of Michigan, subsequent to the decision in the Lewis case, it was held that transactions involving the sale of gasoline by this respondent to Citrin-Kolb Oil Company (being one of the jobbers in the case at bar) and by the latter to its reseller and retail customers did not constitute interstate commerce, so as to bring such transactions within the purview of the Federal Fair Labor Standards Act (29 U. S. C. A., Secs. 206-207.)

In respondent's brief to the Commission, pages 75-87, there are cited and discussed other cases from which, we submit, it is perfectly clear that the "commerce" involved in respondent's transactions with its jobber customers
305 in Detroit is not "commerce" as defined in the Clayton Act, as amended. For reference purposes, those cases are as follows:

Schechter Corp. v. *U. S.*, 295 U. S. 495, 79 L. Ed. 1570, 55 Sup. Ct. 837.

Atlantic Coast Line Ry. v. *Standard Oil Company of Kentucky*, 275 U. S. 257, 72 L. Ed. 270, 48 Sup. Ct. 107.

Higgins v. *Carr Brothers Co.*, 317 U. S. 572, 87 L. Ed. 468, 63 Sup. Ct. 337.

Walling v. *Sanders*, 48 F. Supp. 9.

Loftler v. *First National Bank of Chicago*, 48 F. Supp. 692.

Ling v. *Currier Lumber Company* (Michigan), 50 F. Supp. 204.

Ouendag v. *Gibson* (Michigan), 49 F. Supp. 379.

Cron v. *Goodyear Tire Company*, 49 F. Supp. 1013.

Walling v. *Goldblatt Brothers*, 128 F. 2d 778.

Jewel Tea Company v. *Williams*, 118 F. 2d 202.

Gerdert v. *Certified Poultry & Egg Co.*, 38 F. Supp. 964.

Chicago, M. & St. P. Ry. Co. v. *Iowa*, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. Ed. 988.

Lipson v. *Socony-Vacuum Oil Corporation*, 87 F. 2d 265, 267.

Quincy Oil Co. v. *Sylvester, et al.*, 238 Mass. 95, 130 N. E. 217, 14 A. L. R. 111.

306 *Walling* v. *Jacksonville Paper Company*, 317 U. S. 564, 87 L. Ed. 460, 63 Sup. Ct. 332.

To the same effect we cite a most recent case, decided since the filing of respondent's brief:

Kantar v. *Carckell* (1945), 150 F. 2d 47.

The fact that there were some isolated transactions in which emergency carload lot shipments of gasoline were shipped by rail from Whiting direct to jobbers in 1938 and 1939, but not subsequent to April, 1940 (Record pp. 180-181), is not, of itself, sufficient to satisfy the statute. They do not change the basic nature of the dealings with jobbers involved in these proceedings, because they are governed by the maxim "de minimis non curat lex." *(Gold-*

berg v. *Worman*, 37 F. Supp. 778; *Spier* v. *Gulf Coast Beverages, Inc.*, 50 F. Supp. 653; *Daly* v. *Citrin-Kolb Oil Company*, supra.)

Respondent submits that the findings here in do not meet the requirements of the statute and are wholly insufficient to support the Order of the Commission; also that the evidence contained in the record herein (Record pp. 1-173) fails to present any substantial showing which would support any such findings, if they had been made by the Commission.

307 Conflict with Office of Price Administration.

The Order of the Commission cannot be complied with in connection with sales made by respondent to Ned's Auto Supply Company, Stikeman Oil Company, Citrin-Kolb Oil Company, and Wayne Oil Company, without at the same time violating the provisions of Maximum Price Regulation 88 issued by the Office of Price Administration, thereby subjecting respondent to the penalties imposed by the Emergency Price Control Act of 1942, as amended.

The Office of Price Administration issued Revised Price Schedule 88 on February 2, 1942, and reissued and redesignated the same as Maximum Price Regulation 88 on February 14, 1944. At all times subsequent to the original issuance of said Regulation on February 2, 1942, there was included therein a provision under which respondent's maximum prices for gasoline sold in the Lower Peninsula of Michigan by tank car and truck transport, were not permitted to exceed the price charged at a given shipping or delivery point by respondent on the last sale of the same product to a purchaser of the same class made by respondent within sixty (60) days prior to October 15, 1941 said provision being designated in the present Regulation (Maximum Price Regulation 88) as Section 5.2 (c).

308 Respondent's maximum prices in tank car and truck transport lots delivered at destinations in Detroit to each of the four customers above named, established pursuant to said Regulation, are 8.4 cents per gallon for Standard Red Crown Gasoline, and 9.65 cents per gallon for Standard White Crown Gasoline (Solite with Ethyl). Respondent is not permitted to exceed either of said prices on sales to any of said four customers regardless of whether or not any of the gasoline so sold by respondent is resold by said customers at their own service stations or is resold by them by tank wagon to other service station operators (dealers).

Respondent's present posted tank wagon price to dealers in the Detroit metropolitan area, exclusive of taxes, is 9.6 cents per gallon for Standard Red Crown Gasoline, and 11.1 cents per gallon for Standard White Crown Gasoline (Solite with Ethyl). If respondent should comply with the Order of the Commission, and charge its said four customers the posted tank wagon price for gasoline sold to said customers in tank car and truck transport quantities, it would thereby exceed its permitted Office of Price Administration ceiling price on Standard Red Crown Gasoline
309 by the sum of 0.8 cents per gallon, and on Standard
White Crown Gasoline (Solite with Ethyl) by the sum of 1.45 cents per gallon.

The Office of Price Administration has recognized, through its issuance of Maximum Price Regulation 88, the various customer classifications of respondent and of others similarly engaged in the sale of petroleum products. Section 5.2 (*c*) of said Regulation defines the term "purchaser of the same class" and reads as follows:

> "'Purchaser of the same class', as used in sections 5.2 and 5.3, refers to the practice adopted by the seller in setting different prices for a commodity for sales to purchasers performing different functions (for example, refiner; jobber, distributor; commercial, industrial or private consumer; service station tank car dealer; divided or undivided tank wagon dealer; etc.), or for purchasers performing the same function but located in different area or buying in different quantities or grades or under different conditions of sale. Price is prima facie evidence but not conclusive evidence to be considered in determining if a purchaser belongs to a particular class; however, a lower price to a particular purchaser which was to meet competition and otherwise was inconsistent with the seller's practice in setting the same price to the particular purchaser and one or more other purchasers, shall neither result in placing the particular purchaser in a lower price class nor be considered in determining a seller's maximum price."

310 The Office of Price Administration has further recognized the propriety of respondent's classification of its four customers in the Detroit Metropolitan Area by making provision in Section 6.5 (c) of said regulation for prices on delivered-at-destination sales "at the tank car level" to certain tank wagon or service station resellers, including Citrin-Kolb Oil Company, Stikeman Oil Com-

pany, Wayne Oil Company, and Ned's Auto Supply Company.

While the regulations of the Office of Price Administration permit respondent to file an application for adjustment in price in a case of this kind, the Office of Price Administration has uniformly held, in passing upon applications for price adjustment, that, unless the applicant shows that continuance of his existing maximum price would result in an overall loss in all of the seller's business, the application would be denied. If the Office of Price Administration would apply the same ruling to respondent it would be obliged to deny any application respondent might file on account of the Commission's order in this case.

311 VI. Change in Economic Conditions.

Economic conditions, since the time of the filing of the complaint herein,and since the taking of the testimony, have so changed that the Order of the Commission does not accord with the presently existing situation.

(a) Since the filing of the Complaint, five (5) years have intervened, during which the United States has commenced and finished its participation in World War II, which war has caused economic repercussions and in particular, influenced the cost of doing business, of which the Commission will take judicial notice. The great increase in wages, in costs of material, and in other items, has caused a marked increase in the cost of sale and distribution of all kinds of merchandise, including gasoline, and a widening of the cost differential as between the tank car and tank wagon channels of distribution of gasoline.

It is, therefore, respectfully submitted that respondent should be permitted to adduce further evidence upon the question of the reasonableness and legality of the price differential, as between said differing methods of sale and delivery.

312 (b) It is the contention of the Commission herein that the effect of the price differential complained of in the proceeding (i.e., during the years 1936 to 1940) *might in the future be* to lessen, injure, destroy or prevent competition or tend to create a monopoly. After the lapse of five years, it is now possible to show by testimony, in retrospect, that *this has not been the result* of the price differential accorded respondent's jobber customers. For exam-

ple, the evidence would disclose that no service station, dealer or other retailer of gasoline in the City of Detroit has been forced out of business as a result of the discriminations complained of in this proceeding; that Ned's Auto Supply Company's sales have substantially decreased in the years since the conclusion of the hearings in this proceeding, during which period respondent has continued to supply gasoline to it at the tank car price, so that today Ned's Auto Supply Company is selling far less gasoline than during the years 1936 to 1940 referred to in the Findings; that competition in the City of Detroit is today so aggressive that a substantial portion of the gasoline sold in the City of Detroit is sold at prices below the ceilings fixed therefor by the Office of Price Administration.

313 Section 11 of the Clayton Act provides that the Circuit Courts of Appeal have authority to order additional evidence to be taken "if either party shall apply to the Court for leave to adduce additional evidence and shall show to the satisfaction of the Court that such additional evidence is material, and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission," etc.

It would appear, therefore, to be reasonable for respondent to make this application to the Commission, for the purpose of showing changes in the factual situation which have occurred during the past five years, and also for the purpose of showing, in retrospect, that the price differential in question has not caused an injurious effect on competition or created monopolistic tendencies.

314 VII. Request for Clarification.

The Findings of Fact and Order to Cease and Desist issued by the Commission are, in many respects, ambiguous and uncertain and require clarification and revision by the Commission so as to render it possible for respondent, and others similarly situated, to understand the meaning and requirements thereof.

The following are the principal items which require such clarification and amendment:

(a) As to whether said Order applies to all transactions in which sales of gasoline are made to jobbers, or only to deliveries to jobbers across state lines, as mentioned in Paragraph Two of said Findings of Fact.

(b) As to whether said Order applies only to respondent's "Detroit area" marketing operations or to its operations, as well, in other areas and states in which it transacts business.

(c) As to whether said Order applies only to the sale of branded gasoline (i.e., gasoline marketed under the supplier's trade mark), or to all grades and types of gasoline —branded and unbranded.

(d) As to whether said Order establishes a pattern for the petroleum industry.

315 (e) As to whether said Order permits the granting of price differentials, without limitation as to amount, in the case of sales to jobbers who do not engage in retail operations, and who do not sell to resellers at less than respondent's posted tank wagon price.

(f) As to whether the less than one-half cent per gallon allowable differential mentioned in subparagraphs 4 and 5 of said Order applies to the sales mentioned in subparagraph 6 of said Order.

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VIII. Conclusion—Relief.

(a) Respondent, for all the reasons stated, respectfully submits that the Order to Cease and Desist dated October 9, 1945, should be vacated, and an order be issued dismissing the Complaint.

(b) Respondent further moves in the event said Order is not vacated, that it be modified (1) by deleting subparagraph 6 of the Order, and (2) by amending subparagraphs 1, 2, 3, 4 and 5 of the Order to exclude therefrom those who perform the jobber function, i. e., maintain and operate their own bulk station facilities and deliver from such facilities by tank wagon to service stations, whether operated by themselves or by others.

(c) Respondent further moves, in the event the foregoing relief should be denied, that this proceeding be reopened for the taking of additional testimony and evidence.

(d) Respondent further moves, in the event none of the relief requested above is granted, that an order be entered by the Commission allowing respondent a reasonable addi-

tional period, but not less than sixty (60) days, after denial of such relief, within which to file with the Commission its written report concerning compliance with the Order
317 to Cease and Desist herein, as required by the final paragraph of said Order.

Respectfully submitted,
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23. Before Federal Trade Commission.

* * (Caption—4389) * *

ANSWER AND BRIEF ON ORDER TO SHOW CAUSE.

(Stamped: Federal Trade Commission—Received Sept.
5, 1946—Secretary.)

Comes now Standard Oil Company (Indiana), respondent
erein, and, in accordance with the Order to Show Cause
ssued by Federal Trade Commission on January 23, 1946,
ubmits the following as its answer and brief in reference
o the Motion to Modify the original Order to Cease and
esist dated October 9, 1945:

24 I.

The Commission filed its Complaint in this pro-
eeding on November 30, 1940. The introduction of testi-
ony and other evidence before the Trial Examiner was
oncluded April 23, 1943, and the Order to Cease and Desist
as entered October 9, 1945 and served upon respondent
n October 26, 1945. Upon respondent's motion, the Com-
ission granted respondent until January 26, 1946 to file

a motion for rehearing and reconsideration of the Cease and Desist Order and until February 23, 1946 to file a report of compliance. On January 21, 1946, counsel for the Commission filed a Motion to Modify the Cease and Desist Order of October 9, 1945, and on January 23, 1946 an order was entered to show cause by February 11, 1946 why said motion should not be granted, such time being later extended to February 25, 1946. Respondent on January 25, 1946 filed its Motion for Rehearing and for Reconsideration of the Cease and Desist Order.

Thus, the status of the proceeding is that respondent's request for vacation of the original Cease and Desist Order or for the reopening of the proceeding for the taking
325 of additional testimony and evidence, and the Commission's counsel's motion to substitute a modified Order for the original Order are pending simultaneously.

With this preface, respondent hereby renews its objections to the original Cease and Desist Order for the reasons set forth in respondent's Motion for Rehearing and for Reconsideration of said Order. The relief sought and the points and arguments urged in said Motion are applicable to the proposed modified Order, and to avoid unnecessary repetition they are hereby urged with respect to said proposed modified Order as if repeated at length herein.

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II.

Additionally, respondent respectfully maintains that the proposed modified Order to Cease and Desist, as submitted by counsel for the Commission under date of January 21, 1946, should not be adopted as the Order of the Commission herein, for the following reasons, to-wit:

(a) Neither the proposed modified Order nor the original Order is expressly limited as to its area of applicability. Since any order entered by the Commission must be based on the Findings of Fact, which Findings are based on and relate solely to evidence of respondent's transactions in the Detroit metropolitan area, it is submitted that such order should state expressly that it is limited to transactions of respondent in that area.

(b) Neither the proposed modified Order nor the original Order is expressly limited to the four customers of respondent named in the Complaint. For example,
327 subparagraphs 1 and 3 of the proposed modified Order

prohibit respondent from discriminating in the price of branded gasoline by selling such gasoline "to competing purchasers" at different prices in the manner and under the circumstances stated in the Findings of Fact or by otherwise discriminating in price "between purchasers" of such gasoline in a manner and degree substantially similar to the manner and degree of the discriminations referred to and described in the Findings of Fact. Subparagraphs 4, 5 and 6 refer to "some retailers", "any dealer, jobber, or wholesaler", and "any jobber or wholesaler", respectively, and prohibit the sale by respondent to them in the manner described therein. Failure to limit the Order to the four customers named in the Complaint, is, respondent submits, erroneous and objectionable since the only transactions complained of in the Complaint, the evidence or the Findings were sales by respondent to these four customers. The Commission has no authority to issue a blanket order requiring respondent to obey the law. The Commission's jurisdiction and authority in cases of this kind is founded solely upon Section 11 of the Clayton Act, as amended, which gives to the Commission, if it shall be of the
328 opinion that any of the provisions of the Act have been or are being violated, authority to issue an order "requiring such person to cease and desist from such violations." Hence, the Commission is limited in its jurisdiction to the finding of specific violations and to the prohibition of such specific violations. It is not authorized to include in its order to cease and desist a prohibition of other violations as to which there has been no evidence submitted to it, nor to include in its order to cease and desist an injunction against any violation of the Act.

Thus, the proposed modified Order is objectionable and constitutes reversible error in that it attempts to prohibit respondent from selling to other customers in the Detroit metropolitan area than those named in the Complaint as to which the evidence in this case was taken. There is no finding that respondent discriminated in sales to any other customers than the four customers named in the Complaint. Hence, any order of the Commission in this case must be limited in its applicability to the four customers named in the Complaint.

329 The proposed modified Order is further objectionable since it is couched in the language of the Clayton Act, as amended, and purports to prohibit respondent from violating the Act as well as the Order. For example, sub-

paragraph 3 of the proposed modified Order prohibits discriminations "in a manner and degree substantially similar to the manner and degree of the discriminations referred to and described in the Commission's findings as to the facts herein." No respondent should be subjected to this type of order. In the language of Justice Holmes, "the words quoted are a sweeping injunction to obey the law" and are open to the objection in cases of this kind that the respondent ought to be informed as accurately as the case permits as to what it is forbidden to do.

Swift & Co. v. *United States*, 196 U. S. 375, 49 L. Ed. 518.

The Commission is bound by the same rules as those laid down by the United States Supreme Court for guidance of lower courts in the entry of injunctions. In *National Labor Relations Board* v. *Express Publishing Co.*, 85 L. Ed. 937, at page 937, the Court said:

330 "But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged." Citing,

New York, N. H. & H. R. Co. v. *Interstate Commerce Commission*, 200 U. S. 364, 404, 50 L. Ed. 515, 526.

National Labor Relations Board v. *Swift & Co.*, (CCA 7th) 108 F. 2d 988.

In *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission*, *supra*, the United States Supreme Court disposed of this issue in the following unequivocal language:

"The contention, therefore, is that whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular, it is the duty of the court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. In other words, the proposition is that by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier
331 ceases to be under the protection of the law of the land and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a gen-

eral injunction. To state the proposition is, we think, to answer it. *Swift & Company v. United States,* 196 U. S. 375. The contention that the cited case is inapposite because it did not concern the act to regulate commerce, but involved a violation of the anti-trust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was granted in the case of *In re Debs,* 158 U. S. 564, was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen."

See also,

> *Federal Trade Commission v. Beechnut Packing Co.,* 257 U. S. 440, 66 L. Ed. 307.

332 We submit that no order of the Commission should include any language which is subject to the construction that it constitutes a prohibition against any violation of the Act or against anything other than the specific violations found by the Commission in its Findings of Fact.

(c) Subparagraphs 1 and 3 of said proposed modified Order do not inform respondent, and others similarly situated, with reasonable definiteness and accuracy, what specific acts are prohibited. Said paragraphs all refer to the "circumstances" and "discriminations" stated, referred to, and described in the Findings of Fact, which Findings consists of 16 typewritten pages. Subparagraph 3 forbids discrimination "in a manner and degree substantially similar to the manner and degree of the discriminations referred to and described in the Commission's findings."

These two paragraphs are so vague and uncertain as to fail to afford an ascertainable standard or basis of conduct.

Similar language used by the Commission in its order
333 to cease and desist *in re Milk and Ice Cream Can Institute,* Docket No. 4551 was stricken by the circuit

court of appeals on a petition to review the order. (F. 2d , January 7, 1946.)

(d) Subparagraphs 1, 2 and 3 of the proposed modified Order are inconsistent with subparagraphs 4, 5 and 6 thereof, in that subparagraphs 1, 2 and 3 do not incorporate the provisos which are annexed to subparagraphs 4, 5 and 6, which provisos (if properly revised, as hereinafter pointer out) are necessary in order to bring such directives within the purview of the Clayton Act, as amended.

(e) If we understand subparagraph 1 and the law correctly, it can relate only to retail activities of the four customers of respondent named in the Complaint. The "competing purchasers" there referred to are apparently the jobbers who have retail activities, the retailer customers of such jobbers, and the retailer customers of respondent in Detroit. The Commission found as a fact that respondent
allowed a different price to its jobber customers in
334 Detroit who had retail activities than it did to its own
retailer customers. The Commission found as a fact that these differing prices were discriminatory in that they had or might have the effect of substantially lessening, injuring or destroying competition between said retailer customers. Based on such findings, subparagraph 1 commands respondent to cease selling at different prices to such jobbers for resale at retail than it sells to its own retailer customers.

This subparagraph goes beyond the Clayton Act, as amended, as does subparagraph 1 of the original Order, in that it prohibits different prices without reference to their effect upon competition, without reference to the possibility that such differing prices may be justified on the basis of differences in the cost of sale or delivery to such purchasers, and without reference to the possibility that such differing prices may be made in good faith to meet equally low or lower prices offered to such purchasers by competitors of respondent. Differing prices are not unlawful per se, but they become so only when they have the effect on competi-
tion prohibited by the Clayton Act, as amended, and
335 then only when they cannot be justified on the basis of
differences in cost of sale or delivery to different purchasers or on the basis of a bona fide meeting of competition.

(f) Subparagraph 2 of the proposed modified Order directs respondent to cease and desist from "continuing or resuming the discriminations * * * referred to and de-

scribed in the Commission's Findings." This language is vague and indefinite and does not sufficiently advise respondent what it may do or may not do under the Order. The Findings, for example, state that the Stikeman Oil Company, Inc., one of the four jobber customers of respondent involved in this proceeding, has carried on no retail activities since 1938 and that "there is no evidence that the company (Stikeman) ever sold gasoline to resellers at a price lower than the posted tank wagon price charged by respondent to its dealers." Hence, respondent's sales to Stikeman could not have constituted a violation of the Clayton Act, as amended, since it was impossible for those sales or Stikeman's resales to have had the adverse effect on com-
petition that is a necessary element of any discrimina-
336 tion under said Act. However, it cannot be determined
from the language of subparagraph 2 whether respondent may continue to sell the Stikeman Oil Company, Inc. in tank car lots at the tank car price or whether the proposed order prohibits such sales.

Similarly, the Findings state that there is no evidence that the Wayne Oil Company, another of the four jobber customers of respondent involved in this proceeding, "ever sold gasoline to resellers at a price lower than the posted tank wagon price charged by respondent to its dealers." The Wayne Oil Company is today carrying on no retail operations. Yet, it cannot be determined from the language of subparagraph 2 whether the proposed modified Order is designed to prohibit respondent from selling the Wayne Oil Company in tank car lots at the tank car price, or whether under the Order respondent may continue to make such sales.

The Findings also state that the Citrin-Kolb Oil Company, the third of the four jobber customers of respondent involved in this proceeding, sold, during the two-year period
ending December 31, 1940, less than 20% of its gaso-
337 line to its retail service station dealer customers at
prices below respondent's posted tank wagon price, and during this period operated a few service stations. Today, the Citrin-Kolb Oil Company operates no service stations, carries on no retail activities, and resells only at respondent's posted tank wagon price. Again, it cannot be determined from the language of subparagraph 2 whether the proposed modified Order, if entered, will prohibit respondent from continuing to sell the Citrin-Kolb Oil Company in tank car lots at the tank car price.

Ned's Auto Supply Company is the only one of the four customers of respondent involved in this proceeding which, according to the Findings, resold gasoline exclusively or principally through its own service stations. If the proposed modified Order is designed to prohibit respondent from continuing to sell Ned's in tank car lots at tank car prices, but as we assume, is not intended to prohibit such sales to Stikeman and the other jobbers who carry on no retail activities, then respondent submits that sales to Stike-
man and other jobbers who carry on no retail activi-
338 ties should be expressly excepted from subparagraph
2 of the proposed modified Order so that respondent will know it may continue to make such sales without violating the Order.

(g) Not only should any Cease and Desist Order entered in this proceeding contain appropriate language permitting respondent to sell to its jobber customers in tank car lots at the tank car price, as set forth in the preceding subparagraph (f) of this brief, but such Order should, respondent submits, include Ned's Auto Supply Company in the category of jobber customers and permit respondent to sell Ned's in like manner at such price. As pointed out by the United States Supreme Court in *Phillips* v. *Walling*, 89 L. Ed. Adv. Opinions 705, businesses such as Ned's "possess the essential characteristics of both the retailer and wholesaler. Their wholesale functions, which are integrated with but are physically distinct from their retail functions, are performed through their warehouses and central offices. That fact is the essential key to the problem presented by the case." Applying Justice Murphy's
language in the above case, Ned's "is composed of
339 (six) retail establishments and a single wholesale
establishment." Delivaries to Ned's bulk plant, its "wholesale establishment," are in exactly the same category as deliveries to the bulk plant of any other jobber customer of respondent, and respondent should not be prohibited from making such deliveries at the same price as to its other jobber customers, viz., in tank car lots at the tank car price.

(h) The provisos with respect to allowable differentials based on cost differences in subparagraphs 4 and 5 are qualified in the proposed modified Order by language making them inapplicable where such allowable differentials adversely affect competition. It is submitted that differentials based on cost differences are permitted by the law even though they may have an adverse effect on competition.

Both subparagraphs 4 and 5 prohibit differences in the selling price to competing purchasers without reference to the effect of such differing prices on competition, whereas as a matter of law such differing prices are not unlawful per se but become so only when they have the adverse effect upon competition prohibited by the Clayton Act,
340 as amended.

(i) Subparagraph 6 of the proposed modified Order does not give effect to the provisions of the statute which make unlawful only differences in price having the effect upon competition prohibited by the statute. Further, it is not clear from the language of the proviso whether the differences in cost there referred to are those of the supplier or of the jobber.

(j) Subparagraph 6 is further objectionable because it would impose an extra-legal obligation upon respondent. Under it, respondent may legally sell to a jobber who has no retail activities, in tank car quantities at the tank car price. If, after such wholly legal sale is consummated, the purchaser, having complete title to and possession of the product sold, undertakes to resell it at a price which the Commission conceives to be harmful to competition, the original legal sale in retrospect becomes unlawful and respondent is charged with liability therefor as a violation of the Commission's Order and is subjected to the penalty for such violation. It is submitted that there
341 is nothing in the Clayton Act, as amended, or in the pleadings, that affords a legal basis for such a provision in any order of the Commission.

(k) Respondent further states that the above objections to such proposed modified Order to Cease and Desist are made for the consideration of the Commission, without in any manner conceding that any order should be issued, except as outlined and stated at page 64 of its Motion for Rehearing and for Reconsideration heretofore filed.

342

III.

Respondent believes it has demonstrated in its Motion for Rehearing and for Reconsideration of the Cease and Desist Order of October 9, 1945 that said Order should be vacated and the Complaint dismissed; that neither said Order of October 9, 1945 nor the proposed modified

Order is in the public interest; that under either Order competition would be restrained, lessened and injured, jobbers would be forced out of business, motorists and other consumers would pay more for gasoline; that neither Order is based on transactions in interstate commerce; that neither Order is supported by the pleadings or the evidence in this case. Respondent trusts, therefore, that the Commission will enter an order of dismissal.

If, however, the Commission will not dismiss the Complaint, respondent respectfully urges that it is the duty of the Commission to reopen the proceedings for the introduction of up-to-date evidence. As set forth in *United Corporation* v. *Federal Trade Commission*, 110 F. 2d 473, orders of the Federal Trade Commission, like decrees in equity, should be based on the situation that exists when
the Order is entered, not on a situation that existed
343 when the complaint was filed or at some other date.

But the only evidence in this case depicts the situation that existed in 1936 to 1940, inclusive. For example, the Findings, which are dated October 9, 1945, state that the Citrin-Kolb Oil Company "is operating five retail service stations at the present time," that the Wayne Oil Company "is operating two services stations at the present time," that "Citrin-Kolb Oil Company, Wayne Oil Company and Stikeman Oil Company, Inc. sell the respondent's gasoline at both wholesale and retail." These may have been the facts in 1940, but they are not the facts today, nor were they the facts on October 9, 1945, the date of the Findings. Ten years have elapsed since the first of the transactions shown in evidence, more than five years since the last. A world war has since intervened, prices and costs have risen in an inflationary spiral. It is now necessary to conjecture whether the alleged discriminations might or might not have the detrimental effect on competition that is a prerequisite to a cease and desist order under the Clayton Act, as amended; sufficient time has elapsed so
that the facts with respect to the effect on competition
344 of the practices complained of are now readily ascer-
tainable. We submit that the evidence is too stale to support a cease and desist order in this proceeding.

345 ## IV.

It is, therefore, respectfully submitted by respondent that:

(1) The original Order to Cease and Desist herein should be vacated, and, in lieu thereof, an order should be issued by the Commission dismissing the Complaint.

(2) The proposed modified Order to Cease and Desist should not be issued by the Commission, but in lieu thereof an order should be entered dismissing the Complaint.

(3) In the event the relief asked for in (1) and (2) above should not be granted, the original Order to Cease and Desist or the proposed modified Order, if substituted for said original Order, should be modified by deleting subparagraph 6 thereof and by amending subparagraphs 1, 2, 3, 4 and 5 thereof so as to exclude from the operation thereof all those who perform the jobber function, i. e., who maintain and operate their own bulk station facilities and deliver gasoline from such facilities by tank wagon to service stations, whether operated by themselves or by others.

346 (4) In the event the relief prayed for in (1), (2) and (3) should not be granted, this proceeding should be reopened for the taking of additional and supplemental testimony and evidence.

(5) In the event none of the relief requested above is granted, an order should be entered by the Commission allowing respondent a reasonable additional period, but not less than sixty (60) days, after denial of such relief, within which to file with the Commission its written report concerning compliance with the Order to Cease and Desist heretofore entered herein or any modification thereof.

Chicago, Illinois, February 14, 1946.

Respectfully submitted,
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349 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—4389) * *

RESPONDENT'S ANSWER AND BRIEF IN OPPOSITION TO SECOND PROPOSED MODIFICATION OF ORDER TO CEASE AND DESIST.

Comes now Standard Oil Company (Indiana), respondent herein, and submits the following as its Answer and Brief in opposition to the second proposed modification of the Order to Cease and Desist dated October 9, 1945, as set forth in the letter of Counsel for the Commission dated February 15, 1946:

350 I.

The Commission filed its Complaint in this proceeding on November 30, 1940. The introduction of testimony and other evidence before the Trial Examiner was concluded April 23, 1943. An Order to Cease and Desist was entered October 9, 1945 and served upon respondent October 26, 1945. Since then three motions have been filed, all of which are now pending:

(1) Motion of respondent for rehearing and reconsideration of the Cease and Desist Order or for the reopening of the proceeding for the taking of additional evidence. This motion was filed by respondent January 25, 1946.

(2) Motion filed by Counsel for the Commission on January 21, 1946 to modify the Cease and Desist Order. Respondent filed its Answer and Brief in opposition to said motion, under date of February 14, 1946.

(3) Motion proposing a further modification of said Order to Cease and Desist as set forth in a letter from Counsel for the Commission dated February 15, 1946. By stipulation, the Commission on February 25, 1946 entered an Order providing that "respondent may have to and 351 including April 1, 1946 within which to prepare and file its Answer and Brief in response to the proposed modification of Order to Cease and Desist as submitted to respondent by letter of February 15, 1946, * * * and that all further proceedings herein be stayed until April 1, 1946." This Answer and Brief is submitted in accordance with the foregoing order.

Thus, the status of the proceeding is that respondent's request for a vacation of the original Cease and Desist Order, or for the reopening of the proceeding for the taking of additional evidence, and the two motions to substitute a modified order for the original Cease and Desist Order are pending simultaneously.

Inasmuch as respondent filed (1) its Motion for rehearing and for reconsideration of the Cease and Desist Order on January 25, 1946 and (2) its Answer and Brief in reference to the Motion to modify the original Order to Cease and Desist under date of February 14, 1946, and set forth at length in these documents its objections to the original Order to Cease and Desist and to the first proposed modification thereof, respondent (in order to avoid repetition) has set forth herein only additional objections to the 352 second proposed modification of the Commission's Order, but again renews its objections (a) to the original Cease and Desist Order for the reasons set forth in respondent's motion for rehearing and reconsideration of said Order, and (b) to the first proposed modification thereof for the reasons set forth in respondent's Answer and Brief in reference thereto and urges the points and arguments urged in said Motion and said Answer and Brief as if set forth at length herein.

353

II.

In addition to the reasons set forth in respondent's Answer and Brief in reference to the first proposed modification of the original Cease and Desist Order, respondent objects to the second proposed modification of the said Order, as set forth in the letter of Counsel for the Commission dated February 15, 1946, for the following reasons:

(a) The original Order to Cease and Desist entered October 9, 1945, by its terms, applied to the sales by respondent of "gasoline of like grade and quality." The first proposed modification of that Order, as set forth in the Motion to Modify filed by Counsel for the Commission, by its terms, applied only to the sale by respondent of "branded gasoline." The second proposed modification of that Order, as set forth in said letter of February 15, 1946, purports to apply to the sale by respondent of "gasoline of like grade and quality," as did the original Order. We assume that the addition of the word "branded" by Counsel for the Commission in their first proposed modification of the

Order, as set forth in their Motion to Modify, was made
354 for the reason that the evidence taken in this proceed-
ing dealt only with "branded" gasoline, and that accordingly Counsel for the Commission felt compelled to make any proposed modification of the Order conform with the evidence and the Findings of Fact. We are at a loss, therefore, to understand why, in the second proposed modification of the Order, Counsel for the Commission has seen fit to eliminate the word "branded" in describing the gasoline to which the Order shall apply.

Section 11 of the Clayton Act, as amended, vests the Commission only with authority to issue an order requiring a respondent to cease and desist from the violations included in the Complaint, covered by the evidence, and incorporated in the Findings of Fact. The only gasolines referred to therein are respondent's "branded" gasolines, known as "Solite with Ethyl", "Red Crown", and "Stanolind". (Findings of Fact, p. 2)

The Trial Examiner in his report on the evidence recognized that the only kinds of gasoline involved in the case are "branded" gasolines. For example, on the question of meeting competition; the Trial Examiner found as follows:

> "The differentials on its branded gasolines respond-
> 355 ent granted Ned's Auto Supply Company, at all times
> subsequent to March 7, 1938, and Stikeman Oil Company, Citrin-Kolb Oil Company and the Wayne Oil Company, at all times subsequent to June 19, 1936, were granted to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality." (underlining ours) (Trial Examiner's Report, p. 55)

Many other examples could be cited to show that only branded gasolines are involved in this case.

Therefore, it is respectfully submitted by respondent that any Order to Cease and Desist issued or permitted to remain in effect in this proceeding should be expressly limited to "branded" gasolines marketed by respondent.

(b) As indicated in respondent's Brief in answer to the first proposed modification of the Cease and Desist Order, if up-to-date evidence were taken by the Commission it would show that three of the four customers named in the Complaint are not now engaged in retail activities and that none of them resell to their dealers at less than respondent's posted tank wagon price. It was there pointed out that one of said customers had, according to the evidence

and Findings of Fact, discontinued its retail activities
356 in 1938; that "there is no evidence that the company (Stikeman Oil Company, Inc.) ever sold gasoline to resellers at a price lower than the posted tank wagon price charged by respondent to its dealers" (Findings, p. 5); that as to the second of said customers, there is no evidence that the company (Wayne Oil Company) "ever sold gasoline to resellers at a price lower than the posted tank wagon price charged by respondent to its dealers" (Findings, p. 5); and that the third of said customers (Citrin-Kolb Oil Company) resells only at respondent's posted tank wagon price. Under these circumstances, it would be impossible for respondent's sales to these customers to result in discriminations under the Clayton Act, as amended.

In other words, the Commission could not have produced evidence valid as of the date of said Order or as of today which would support any order affecting respondent's transactions with Stikeman Oil Company, Inc., Wayne Oil Company, or Citrin-Kolb Oil Company.

We repeat what was said in our Answer and Brief on Order to Show Cause: An order of the Federal Trade Commission, like decrees in equity, should be based on evidence with respect to the situation which exists when the order is entered; not on evidence of a situation which existed some
five years prior thereto.
357 *United Corporation* v. *F. T. C.*, 110 F. 2d 473.

We respectfully submit, therefore, that as of October 9, 1945, or as of today, the Commission is not authorized to enter any order affecting respondent's transactions with Stikeman Oil Company, Inc., Wayne Oil Company, or Citrin-Kolb Oil Company. Hencee, any Cease and Desist Order issued or permitted to remain in effect herein should expressly exclude from the prohibitions thereof transactions of respondent with said three customers.

(c) Stripped of everything but their essentials, subparagraphs 5 and 6 of the original Order and of the proposed modifications thereof are price-fixing in nature and result. Their effect is to fix directly the price at which respondent's jobber-customers who have no retail activities may resell to their dealer accounts, and to fix indirectly the price at which the retailer-customers of such jobbers may sell to the public.

The question arises as to whether it is within the power of the Commission so to do. It has been held that the

Commission "has no general authority to compel competitors to a common level, to interfere with ordinary
358 business methods, or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition." The purpose of both the Federal Trade Commission Act and the Clayton Act, as amended, "was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end, it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs." *F. T. C.* v. *Sinclair Refining Co.*, (1923), 261 U. S. 463, 67 L. Ed. 746.

Congress did not intend the Federal Trade Commission to control or impede competition, "to judge what is too fast a pace for some and to compel others to slow up. * * * It is not illegal for one competitor to do that which is beyond the financial power of the other; nor do we find anything that authorized the Federal Trade Commission to regulate competition for that reason." *Sinclair Refining Co.* v. *F. T. C.*, 276 F. 686.

Since the right to fix prices was never given to the Federal Trade Commission, subparagraphs 5 and 6 of the original Order and of the proposed modifications thereof, which are admittedly designed to fix respondent's job-
359 ber-customers' resale price and to stabilize the retail price of gasoline, are not only economically unsound for the reasons set forth in respondent's Answer and Motion heretofore filed, but are an attempt to exercise a power not granted to the Commission by Congress.

Subparagraph 6 is further without the scope of the authority of the Commission, because:

(1) It is not based upon any allegation of the Complaint.

(2) There is nothing in the Clayton Act, as amended, which authorizes the Federal Trade Commission to make a supplier liable for the acts of its customers.

(3) It requires respondent to police sales made by its jobber-customers, which sales are admittedly in interstate commerce.

(4) It would operate to compel a supplier to inspect the books and records of its jobber-customers and to supervise the operations of the jobber.

Respondent submits, therefore, that said subparagraphs

5 and 6 should be eliminated from any order entered by the Commission.

360 (d) If we understand the second proposed modification of the Commission's Order correctly, proviso (a) thereof limits the applicability of the prohibitions of the Order to transactions between respondent and its four customers named in the Complaint in this proceeding. If such is not the correct construction of said proviso (a), then we submit that any Order issued or permitted to remain in effect by the Commission in this proceeding should be expressly so limited in its application, inasmuch as there is nothing in the Complaint, the evidence, or the Findings that refers in any way to discriminatory prices allowed by respondent to other customers in the Detroit metropolitan area, or any other area, nor is there anything in the Complaint, the evidence, or the Findings from which an inference of the allowance of any such discriminatory prices could be drawn.

(e) There is no allegation in the Complaint with respect to jobbers who have no retail activities, and proviso (c) may have been included in the second proposed modification for the purpose of excluding sales to such jobbers from the prohibitions of the Cease and Desist Order 361 and thereby making the Order conform to the allegations of the Complaint. Yet, standing alone, proviso (c) seems to express the theory that respondent may not sell to a jobber at any different price than to a retailer, except where such differing price makes only due allowance for respondent's differences in cost of manufacture, sale or delivery resulting from the differing methods or quantities in which gasoline is to such purchasers sold or delivered. Other provisions of said proposed modification do not prohibit a different price to jobbers, as such, than to retailers. Indeed, all of the various Orders entered or proposed clearly contemplate the classification of customers by respondent and the establishment of prices to such customers based on quantity and method of delivery and on the function being performed by them. The statute contains no prohibition against such practice, which is universally followed in all trades and businesses in the country. So far as we know, there has never been any contrary contention advanced heretofore.

As indicated below, the constant demand of jobbers is that the margin between tank car and tank wagon prices be widened. These demands are based upon the increased

costs of the jobber and have no relationship to the costs
362 of the supplier. While the Commission did not indicate
what an appropriate method of cost accounting would be, it did criticize respondent's regular and customary methods. No matter what method of accounting is used, in order for the jobber to operate at a profit there must be an element of profit in the computation of the jobber price in addition to his costs, which costs have a tendency to be the same as the supplier's. Thus, assuming the supplier's and jobber's actual costs of sale and delivery by tank wagon to be the same, the differential allowable to jobbers on tank car sales under the Commission's theory would be measured by the difference between such costs and the supplier's costs of sale and delivery by tank car. This obviously eliminates any element of profit to the jobber. Indeed, in this proceeding, the Commission found that respondent's allocation of a return on its investment in facilities to the tank wagon cost of operation was not allowable, thus further restricting the allowable margin to jobbers.

Certainly under the theory of Counsel for the Commission, as expressed in proviso (c), it would be impossible for any supplier to grant a wider margin to jobbers as demanded in the resolution of the Illinois Petroleum Marketers Association, to which reference is hereinafter made.

363 Respondent would not be so concerned about proviso
(c) if it were not for the fact that proviso (b) covers the same ground without the specification of the classes of customers to which it applies. Such a proviso, in general terms, followed by the same proviso in specific terms designating the particular classes of customers to which it applies, impresses the latter with considerably more significance than would otherwise accrue to the general proviso standing alone.

We cannot escape the conclusion that Counsel for the Commission is expressing the theory that a supplier may not classify his customers on the basis of the quantity sold and the method of delivery to them and establish a price differential allowable to such customers based on such factors plus the function performed by them, that all purchasers, whether or not they are in competition with each other in the resale of the product purchased, must have the same price except for differentials justified solely by differences in supplier's costs of sale and delivery. If that is the theory of Counsel for the Commission in incorpo-

rating proviso (c) in the second proposed modification of
the Order, it would seem that, in all fairness, before it is
adopted by the Commission, trade generally should be ad-
vised by a wide publicity of the theory, so that it may
364 properly and promptly express its opposition thereto,
if any. It is obvious, of course, that the imposition by
enforcement proceedings of such a theory on trade generally
in this country would put the jobber out of business and
cause an upheaval in business practices.

Neither the Clayton Act, nor the Robinson-Patman amendment thereto, has changed the rule that a supplier of merchandise may classify his customers. Thus, in *Mennen v. Federal Trade Commission*, 288 F. 774 (certiorari denied, 67 L. Ed. 1219), it was held that the supplier was under no obligation to sell to retailers at the same price as it sold to wholesalers, the Court saying:

> "It did not discriminate as between retailers, but sold to all retailers on one and the same scale of prices. There is nothing unfair in declining to sell to retailers on the same scale of prices that it sold to wholesalers, even though the retailers bought, or sought to buy, the same quantity the wholesalers bought. * * * Whether a buyer is a wholesaler or not does not depend upon the quantity he buys. It is not the character of his buying, but the character of his selling, which marks him as a wholesaler, as the court pointed out in *Great Atlantic and Pacific Tea Company v. Cream of Wheat Company, supra.*" (227 F. 46)

We submit that the legality of a differential between
365 jobbers' and retailers' purchasing prices is not affected
at all by the Clayton Act, as amended, and that, there-
fore, if any Order to Cease and Desist is issued or per-
mitted to remain in effect in this proceeding, it should ex-
pressly exclude from the prohibition thereof all sales to
jobbers who have no retail activities.

(f) Proviso (d) of the second proposed modification of the Order is unwarranted by the provisions of the statute. It states:

> "That none of the provisions of the order shall be taken as inhibiting any price differentials by respondent that reflect differences in the grades and qualities of such gasoline." (underlining ours)

The Robinson-Patman Act forbids, in Section 2 (a), that any person engaged in commerce, in the course of such commerce, shall "discriminate in price between different purchasers of commodities of like grade and quality * * *." The statute does not provide that price differential shall be allowable if they "reflect differences" in the grades and qualities of such commodities.

There is, therefore, no warrant for the language used 366 in proviso (d). If respondent desired to do so, it might conceivably sell gasoline of superior grade and quality for a lesser price than that charged for gasoline of lower grade and quality, so long as there existed no discrimination as between purchasers of gasoline of the same grade and quality. The proviso, however, purports to require that gasoline be priced in proportion to its grade and quality; that gasoline of a superior grade and quality be priced proportionately higher than that of a lower grade and quality, regardless of the fact that, as between purchasers of the same grade and quality, no discrimination in price, as against the purchaser, is made by the supplier. It is, therefore, respectfully submitted that this proviso is technically incorrect and does not effectuate its apparent purpose; and that it should be drafted so as to state that the order is not to be taken as prohibiting price differentials by respondent, as between gasolines of different grades and qualities.

367. (g) The second proposed modification of the Commission's Order, by the addition of provisos (a), (b), (c) and (d), purports to give effect to those provisions of the statute permitting differences in price to different purchasers when such different prices have no tendency to substantially lessen, injure or destroy competition, or when they can be justified on the basis of differences in cost, or when different grades or qualities of gasoline are involved. Counsel for the Commission failed to include in said provisos any recognition of the right of respondent in good faith to meet competition. Such failure completely overlooks the effect of the decision of the United States Supreme Court in *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 71 L. Ed. 893, in which it was held that a state statute prohibiting the purchase of products at a higher price in one locality than in another was unconstitutional and void because it failed to preserve the right in good faith to meet competition.

Congress saved the Clayton Act and the Robinson-Patman Act from the stigma of unconstitutionality by expressly providing that the meeting of a competitor's lower

price in good faith constituted a defense to a charge of discriminatory conduct. Accordingly, any order entered
368 by the Commission herein should include a proviso expressly permitting respondent to establish prices in good faith to meet lower prices offered by its competitors.

There have been some important decisions rendered since his case was submitted to the Commission which indicate hat respondent is entitled to the incorporation of such a proviso. In fact, these decisions, in our opinion, require hat the Complaint be dismissed, in view of the recommendations of the Trial Examiner, who expressly found:

"The differentials on its branded gasolines respondent granted Ned's Auto Supply Company, at all times subsequent to March 7, 1938, and Stikeman Oil Company, Citrin-Kolb Oil Company and the Wayne Oil Company, at all times subsequent to June 19, 1936, were granted to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality." (underlining ours) (Trial Examiner's Report, p. 55)

The Commission, in its Findings of Fact, took the position that these facts were immaterial. It is now respectfully maintained that this position of the Commission is untenable, in view of the decision in the Moss case, in which the Supreme Court of the United States denied certiorari on October 8, 1945, one day prior to the issuance of the Commission's original Order to Cease and Desist herein.

369 In substantiation of this point, we present the following comments on and quotations from the Moss case, and also from other cases decided since the instant case was submitted to the Commission.

In *Moss* v. *Federal Trade Commission*, 148 F. 2d 378, 90 L. Ed. 41, 66 S. Ct. 44 (certiorari denied, October, 8, 1945), the Second Circuit Court of Appeals, in a per curiam opinion held:

"* * * Section 2 (a) makes price discrimination unlawful only in case it lessens, or tends to prevent, competition with the merchant who engaged in the practice; and that, no doubt, means that the lower price must prevent, or tend to prevent, competitors from taking business away from the merchant which they might have got, had the merchant not lowered his price below what he was charging elsewhere. * * * Congress adopted the common device in such cases of shifting the burden of proof to anyone who

sets two prices, and who probably knows why he has done so, and what has been the result? If he can prove that the lower price did not prevent or tend to prevent anyone from taking away the business he will succeed, for the accuser will not then have brought him within the statute at all. Nevertheless, he may succeed even though he fails to establish such a negative; for, although it will then appear that he has lessened, or prevented, competition, the proviso of Sect. 2 (b) will still excuse him, if he can show that his lower price did not undercut his competitors, but merely 'met' their 'equally low price.' In short, that is a
370 defense to the violation of Sect. 2 (a). * * *

The Commission appears to believe that, in order to prove the affirmative defense, anyone who sells at two prices must prove that he knew what was his competitor's price, must mean not to undercut it, and must offer to sell at what he knows to be no lower than his competitor's price. We agree that he must not undercut his competitor's price; but whether it is a condition upon the defense that he must know what that price is, is another question which we reserve. If in fact he does not undercut his competitor's price, he may escape, even though he does not know what the price is, though it is only by chance that he has not undercut it. That is to say, we need not now decide whether the phrase, 'in good faith', means more than that the offer shall be made with actual intent to sell at the price named. That question does not arise here, for the petitioner did not prove that in any of the instances its price was no lower than that of its competitors. For these reasons, we hold that the findings were supported by the evidence.'' (underlining ours)

In the instant case, the uncontroverted testimony shows that respondent, in order to meet the competitive offers made by other suppliers of branded gasoline of like grade and quality to the four jobbers named in the Complaint, granted to said four jobbers a price differential of one and one-half cents per gallon for tank car deliveries to the jobbers' own bulk storage plants, and that this price
371 allowance is the smallest differential allowed in the
Detroit metropolitan area, the customary price differential being two cents. It was testified by James E. Dyer, General Sales Manager of Sinclair Refining Company, of New York City, that gasoline jobbers throughout the United

States purchase gasoline by tank car delivery at price differentials ranging from one and one-half cents to two and one-half cents off the tank wagon price, the former differential being the minimum (1515-16).

Therefore, to use the language of the court in the Moss case, supra, respondent, in allowing the one and one-half cent differential to it four named jobber-customers, did not "undercut" its competitors' price, but merely "met" the minimum differential; and several large oil suppliers sold (and now sell) comparable gasolines in the Detroit metropolitan area to tank car customers at a margin or differential more than one and one-half cents off their posted tank wagon price. (53-4)

The Court held, in *Federal Trade Commission* v. *Staley Manufacturing Co.*, 89 L. Ed. 989, that Congress has left to the Federal Trade Commission the determination of fact in each case whether the person charged with making discriminatory prices acted in good faith to meet a competitor's
372 equally low prices. The determination of this fact from the evidence is for the Commission, and it was held that a respondent is entitled, as a matter of right, to a finding of the Commission as to the fact.

Citing:

Federal Trade Comm. v. *Pacific States Paper Trade Assoc.*, 273 U. S. 52, 71 L. Ed. 534, 47 S. Ct. 255.

Federal Trade Comm. v. *Algoma Lumber Co.*, 291 U. S. 67, 78 L. Ed. 655, 54 S. Ct. 315.

Quoting further from the Staley case, supra, the Court said:

> "The Commission's conclusion seems inescapable that respondent's discriminations, such as those between purchasers in Chicago and Decatur, were established not to meet equally low Chicago prices of competitors there, but in order to establish elsewhere the artificially high prices whose discriminatory effect permeates respondent's entire pricing system. The systematic adoption of a competitor's prices by including unearned freight in respondent's delivery price, or, what amounts to the same thing, the maintenance of a discriminatory and artificially high F. O. B. factory price in order to take advantage of the correspondingly high prices of a competitor, based on its higher costs of delivery, is not sufficient to justify the discrimination, for respondent fails to show, as the statute requires, the

establishment of a 'lower price' made in good faith to meet the equally low price of a competitor.'' (underlining ours)

373 In the case of *Corn Products Refining Co. v. Federal Trade Commission,* 89 L. Ed. 977, the Commission charged violation of Section 2 (a) of the Robinson-Patman Act, in that, inter alia, petitioners favored certain tank wagon customers by permitting them to book orders at the lower prices charged for tank car deliveries, and to take deliveries by tank wagon over extended periods of time. The Commission found, upon evidence held by the Supreme Court to be ample, that these discriminations were in fact made by petitioners.

Petitioners contended that these sales to favored customers were made to meet the competition of other sellers of glucose and were, therefore, excepted from the prohibition of Section 2 (a) by the proviso of subsection (b) of Section 2 of the Clayton Act, as amended, which provides:

''Provided, however, that nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor.''

Said the Supreme Court:

''The only evidence said to rebut the prima facie case made by proof of the price discriminations was given by witnesses who had no personal knowledge of the transactions, and was limited to statements of each wit-
374 ness's, assumption or conclusion that the price discriminations were justified by competition. Examination of the testimony satisfies us, as it did the court below, that it was insufficient to sustain a finding that the lower prices sustain a finding that the lower prices allowed to favored customers were in fact made to meet competition. Hence, petitioners failed to sustain the burden of showing that the price discriminations were granted for the purpose of meeting competition.'' (987) (underlining ours)

Moreover, it is respondent's claim that the right to meet the lower prices offered by its competitors is an inherent right which exists even independent of express statute. In other words, the right of self-defense is in the category of inherent, inalienable rights, and protected against deprivation by the Constitution of the United States.

To this point we cite *Fairmont Creamery Co. v. Minnesota,* supra, in which the Supreme Court of the United

States held that a denial by state statute of the right to meet competition was unconstitutional, by reason of the provisions of he Fourteenth Amendment. The same principle would apply to acts of Congress, in view of analogous provisions of the Fifth Amendment.

If, therefore, the amendment to the Clayton Act has (as the Commission's Findings of Fact herein state) rendered respondent's proof immaterial upon the question of 375 meeting the tank car gasoline prices of competitors, it is submitted that the amendment, in that respect, is invalid. However, the decision in the Moss case indicates that the 1936 amendment to the Clayton Act has not had that effect.

(h) All of the evidence taken in this proceeding and the Findings of Fact support the conclusion that the regular course of respondent's business in the Detroit metropolitan area involved only deliveries from its marine terminal at River Rouge, Michigan, where such gasoline has come to rest at the end of its interstate shipment, to its four jobber-customers in Detroit; that "in some instances the respondent has shipped gasoline and other petroleum products from its refinery at Whiting, Indiana, directly to purchasers thereof located in the Detroit Metropolitan Area." (Findings of Fact, p. 3) With respect to these incidental shipments across state lines to purchasers in Detroit, respondent has consistently asserted the applicability of the maxim of "de minimis non curat lex."

In addition to the cases cited on this point in respondent's Motion and Answer heretofore filed, reference to which is made, the United States Supreme Court, in the 376 case of *Mabee v. White Plains Publishing Co.*, 90 L. Ed. Adv. Op. 455, involving a construction and application of the Fair Labor Standards Act (an "in commerce" statute), held on February 11, 1946 that the trial court's application of the "de minimis" maxim to the facts in that case was error. It there appeared that one-half of one per cent of the newspapers printed by respondent were regularly shipped in interstate commerce. That Act prohibited the shipment in commerce of "any goods" in the production of which any employee was employed in violation of the the Act.

Justice Douglas, speaking for the Court, said:

"Though we may assume that sporadic or occasional shipments of insubstantial amounts of goods were not intended to be included in that prohibition, there is no warrant for assuming that regular shipments in commerce are to be included or excluded dependent on their size." (underlining ours)

Again, relying upon the authorities cited herein and in respondent's Motion and Answer heretofore filed, we assert the inescapable conclusion that the original Order of the Commission should be vacated and an order should be entered dismissing the Complaint, for the reason that there is no evidence and no Finding of Fact in this proceeding that the transactions complained of were "in commerce" as defined in the Clayton Act, as amended, which will support any Order to Cease and Desist.

377 (i) The Findings of Fact and the Commission's Order and the proposed modifications thereof in this proceeding are purportedly premised on the conclusion that with respect to the period from 1936-1940 respondent could not justify its difference in prices to its tank car and tank wagon customers in Detroit of one and one-half cents on its house brand gasoline on the basis of its differences in cost of sale and delivery. We have heretofore asserted that the jobbers' margin ought not to be fixed or regulated on the basis of their supplier's costs. Evidence of the conflict which arises when any such attempt is made is to be found in a resolution recently adopted by the Illinois Petroleum Marketers Association—a jobber organization—which reads, in part, as follows:

"Be it further resolved that this association again reaffirms its support of the 'small business man' who has been such a tremendously large factor in making petroleum products readily available at every cross roads in the United States and has demonstrated most clearly his economic essentiality. The Association asserts its readiness and desire to submit facts and figures supporting its contention that the normal operating margin between tank car and tank wagon market be increased from 2 to 2.5c per gallon." (See: National Petroleum News, Feb. 20, 1946, p. 16.)

378 This action on the part of a jobber organization is also supportive of respondent's request for a reopening of this proceeding to admit up-to-date evidence of costs and competitive conditions. It will be noted that the jobbers are asking for an increased margin between the tank car and tank wagon prices, undoubtedly due to increases in

their cost of operation which have occurred since the taking of evidence in this proceeding. It may be stated without fear of successful contradiction that similar increases in costs have been imposed upon or incurred by suppliers generally, so that present differentials allowed as between these two methods of distribution may be fully justified on the basis of evidence relating to the situation as it exists today as opposed to evidence upon which the Cease and Desist Order dated October 9, 1945 was based, namely, evidence relating to a situation which purportedly existed between 1936-1940.

379

III.

Respondent has heretofore pointed out that the Cease and Desist Order of October 9, 1945 and the proposed modifications of it are not in the public interest; that, on the contrary, the effect of any such order would be to restrain, lessen and injure competition, force jobbers out of business, and compel motorists and other consumers to pay higher prices for gasoline; that any such order would not be based on transactions in interstate commerce; that any such order cannot be supported by the pleadings or the evidence in this proceeding. Hence, the Commission should enter an order of dismissal in this case.

Respondent has also pointed out that if the Commission will not dismiss the Complaint, it is the duty of the Commission to reopen the proceedings for the introduction of up-to-date evidence, in view of the many changes in conditions that have occurred since the years 1936-1940, to which the evidence alone relates, and the rule of law that orders of the Federal Trade Commission, like decrees in equity, should be based on the situation that exists when the order is entered.

Hence, for the reasons stated in respondent's Motion
380 for rehearing and reconsideration of the Cease and Desist Order, in respondent's Answer and Brief in opposition to the first proposed modification of said Order, and in this Answer and Brief, it is respectfully submitted by respondent that:

(1) The original Order to Cease and Desist herein should be vacated, and, in lieu thereof, an order should be entered by the Commission dismissing the Complaint.

(2) The first proposed modification of said Cease and

Desist Order should not be entered by the Commission, but, in lieu thereof, an order should be entered dismissing the Complaint.

(3) The second proposed modification of said Cease and Desist Order, as set forth in said letter of February 15, 1946, should not be entered by the Commission, but, in lieu thereof, an order should be entered dismissing the Complaint.

(4) In the event the relief asked for in (1), (2) and (3) above should not be granted, then the original Order to Cease and Desist, or either of the proposed modifications thereof, if substituted for said original Order, should be modified by deleting subparagraph 6 thereof and by amending subparagraphs 1, 2, 3, 4 and 5 thereof so as to exclude 381 from the operation thereof all those who perform the jobber function, i. e., who maintain and operate their own bulk station facilities and deliver gasoline from such facilities by tank wagon to service stations, whether operated by themselves or others.

(5) In the event the relief prayed for in (1), (2), (3) and (4) should not be granted, then this proceeding should be reopened for the taking of additional and supplemental testimony and evidence.

(6) In the event none of the relief requested is granted, then an order should be entered by the Commission allowing respondent a reasonable additional period, but not less than sixty (60) days, after denial of such relief, within which to file with the Commission its written report concerning compliance with the Order to Cease and Desist heretofore entered herein or any modification thereof.

Dated March 27, 1946.

Respectfully submitted,

MacMahon, Abbott & Roberts,
By Arthur J. Abbott,
Attorneys for Respondent.
2230 Buhl Building,
Detroit (26), Michigan.

Buell F. Jones,
Albert L. Green,
Gordon E. Tappan,
Of Counsel for Respondent.
910 South Michigan Avenue,
Chicago (80), Illinois.

382 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—4389) * *

(Stamped: Federal Trade Commission—Received Apr. 8, 1946—Secretary.)

PETITION OF THE NATIONAL COUNCIL OF INDEPENDENT PETROLEUM ASSOCIATIONS FOR LEAVE TO INTERVENE.

Comes now your Petitioner, an unincorporated association consisting of duly elected officers of the various state organizations of independent petroleum jobbers throughout the United States who, in turn, represent a large majority of the individuals and companies engaged in the wholesale distribution of refined petroleum products in the United States, and states that it and those whom it represents, and for whom it is authorized to speak, have a substantial interest in the matters at issue in the above entitled proceeding and asks Leave to Intervene therein and, in support of its Petition, says:

I.

That approximately twelve thousand individuals and companies in the United States are engaged in the business of purchasing gasoline and other refined petroleum products from refiners thereof and jobbing or selling such products at wholesale to independent dealers and operators of
383 service stations and other retail outlets at which such
products are purchased by consumers; that, in addition thereto, many such jobbers or wholesalers, whom your Petitioner represents, and other jobbers or wholesalers of such products similarly situated, own, or lease, numerous service stations and similar outlets at which they sell at retail to consumers thereof gasoline and other refined petroleum products purchased by them from refiners.

II.

That in the above entitled proceeding the Federal Trade Commission has had under consideration the prices at which a large refiner of petroleum products may lawfully sell gasoline to jobbers or wholesalers thereof in the city of

Detroit, Michigan, who, in addition to selling such gasoline to retailers, also operate service stations at which they sell gasoline at retail to consumers in competition with retailers thereof who purchase gasoline of like grade and quality from the refiner from whom such jobbers or wholesalers also purchase their supplies of gasoline.

III.

That jobbers or wholesalers of gasoline customarily operate bulk storage facilities and plants to which gasoline is delivered by means of tank cars or similar transportation agencies from the refineries of those from whom such gasoline is purchased and that such jobbers customarily sell and deliver such gasoline in smaller quantities by tank wagon from such bulk storage tanks to the service stations operated by retailers who purchase supplies from such jobbers and also to service stations owned, or leased, 384 and operated by such jobbers; that such jobbers, in addition to performing the function of making tank wagon deliveries of such gasoline to such retail outlets of both classes or types, perform various other services of recognized value to the retail outlets thus supplied by them, all of which services are furnished and rendered at a material cost to such jobbers.

IV.

That it has long been the recognized and accepted practice in the petroleum industry for refiners to sell gasoline to jobbers at tank car prices; and for both refiners who sell direct to retailers and for jobbers to sell and deliver gasoline to retailers thereof operating service stations at tank wagon prices, such tank wagon prices being from one and one-half to two and one-half cents per gallon above the current tank car price, the amount depending upon operating conditions; and that no distinction has been made in the price charged by refiners to jobbers for gasoline sold and delivered by tank cars, or other transportation agencies, at the jobbers' bulk plants dependent upon whether such gasoline is to be resold to retailers operating service stations or is to be resold through service stations operated by such jobbers, since it has been recognized in the petroleum industry that the functions performed by the jobber, and the cost thereof to the jobber, are the same in each instance.

V.

That under the terms of the Cease and Desist Order entered by the Federal Trade Commission on the 9th day of
October, 1945, in the above entitled proceeding, the
385 respondent therein is prohibited from selling to jobbers at tank car prices any gasoline to be sold by the jobber at service stations owned and operated by him and said respondent is directed to cease selling to jobbers at less than tank wagon prices any gasoline to be sold by such jobbers at their own service stations in competition with the proprietors of service stations in the same marketing area to whom the respondent sells and delivers gasoline of like grade and quality at tank wagon prices, all in spite of the functions performed and the expenses incurred by the jobber in connection with supplying service stations owned or operated by him. That, furthermore, under the terms of such Cease and Desist Order, the respondent is required to guarantee that the jobber to whom gasoline is sold at tank car prices shall not resell any such gasoline to retailers thereof at less than the respondent's current tank wagon price at which gasoline of like grade and quality is sold by respondent to other retailers thereof competing in the same marketing area.

VI.

That counsel for the Federal Trade Commission has filed a motion with the Commission asking that said Cease and Desist Order entered herein on October 9th, 1945, be modified in certain respects, but that said modification, if granted, does not in any material respect alter the provisions of said original Cease and Desist Order with reference to the matters above outlined.

VII.

That although the Cease and Desist Order of the Commission entered in this proceeding relates only to the operations of the respondent herein and relates only to those
386 operations in the marketing area of Detroit, Michigan,
the fact is that unquestionably whatever order may be

finally entered in this proceeding may become the guide and pattern which will govern the marketing relations between refiners and jobbers of petroleum products throughout the United States in all areas where such jobbers resell to retailers who compete with other retailers to whom such refiners sell gasoline of like grade and quality, to the great and irreparable injury of thousands of established jobbers of petroleum products in whose behalf your Petitioner is authorized to present this petition.

Wherefore, your Petitioner, the National Council of Independent Petroleum Association, respectfully requests that it be permitted to intervene in the within proceeding; that oral argument be granted upon the motion of counsel for the Commission for modification of the aforesaid Cease and Desist Order of October 9, 1945, and that this Petitioner be permitted to participate by counsel of its selection in such oral argument.

Your Petitioner further respectfully requests the Commission to set aside the aforesaid Cease and Desist Order hereinbefore entered on October 9, 1945, and order the within proceeding reopened for further hearings and the taking of further testimony, including testimony as to jobbers' operations and costs, and that at such further hearing or hearings this Petitioner be permitted to present witnesses and testimony material to the issues raised in this proceeding and, by counsel, to cross-examine witnesses 387 presented by the Commission and by the respondent and that it further be permitted, by counsel, to file appropriate briefs and exceptions and to participate in oral argument thereon.

Dated at Chattanooga, Tennessee, this 5th day of April, 1946.

The National Council of Independent
Petroleum Associations,
By H. L. Thatcher,
Chairman.

Hubert B. Fuller,
602 Union Commerce Building,
Cleveland 14, Ohio,
Attorney for Petitioners.

397 UNITED STATES OF AMERICA.

Before Federal Trade Commission

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 9th day of August, A. D. 1946.

Commissioners:

William A. Ayres, Chairman.
Garland S. Ferguson.
Ewin L. Davis.
Robert E. Freer.
Lowell B. Mason.

* * (Caption—4389) * *

ORDER MODIFYING ORDER TO CEASE AND DESIST ISSUED OCTOBER 9, 1945, AND DENYING CERTAIN OTHER MOTIONS.

This matter coming on to be heard upon motion of counsel for the Commission dated January 21, 1946, and supplemental motion dated February 15, 1946, to modify the order to cease and desist entered herein by the Commission on October 9, 1945, and answers and briefs of the respondent in opposition thereto; motion of the respondent filed January 28, 1946, for rehearing and reconsideration of the order to cease and desist; petition of the National Council of Independent Petroleum Associations for leave to intervene and to set aside the order to cease and desist and reopen the proceeding for further hearings and the taking of further testimony; and upon oral argument of counsel in support of and in opposition to said motions; and the Commission having duly considered the various motions, answers, briefs, and oral argument of counsel and the record herein and being now fully advised in the premises:

It Is Ordered that the motion of respondent for rehearing and reconsideration of the order to cease and desist be, and the same hereby is, denied;

It Is Further Ordered that the petition of National Council of Independent Petroleum Associations for leave to intervene and to set aside the order to cease and desist and reopen the proceeding for further hearings and the taking of further testimony be, and the same hereby is, denied.

It Is Further Ordered that the motions of counsel for the Commission dated January 21, 1946, and February 15, 1946, to modify the order to cease and desist issued October 9, 1945, be, and the same hereby are, granted, and that said order to cease and desist be modified substantially in the manner and to the extent as set out in the supplemental motion of counsel for the Commission dated February 15, 1946;

It Is Further Ordered that a modified order to cease and desist incorporating the modifications provided for in the supplemental motion of counsel for the Commission be issued and served upon the respondent.

By the Commission.

OTIS B. JOHNSON, *Secretary.*

399 UNITED STATES OF AMERICA.

Before Federal Trade Commission

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 9th day of August, A. D. 1946.

Commissioners:

William A. Ayres, Chairman.
Garland S. Ferguson.
Ewin L. Davis.
Robert E. Freer.
Lowell B. Mason.

* * (Caption—4389) * *

MODIFIED ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission as amended, answer of the respondent, testimony and other evidence in support of the allegations of said complaint

as amended and in opposition thereto taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence and exceptions filed thereto, briefs in support of the complaint and in opposition thereto, and oral argument of counsel; and the Commission having made and entered its findings as to the facts and its conclusion that respondent has violated the provisions of subsection (a) of Section 2 of an Act of Congress entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by Act approved June 19, 1936, (Robinson-Patman Act) issued its order to cease and desist on October 9, 1945. Thereafter, this matter came on for hearing before the Commission upon motion and supplemental motion by counsel for the Commission, to modify said order to cease and desist issued on October 9, 1945,
400 answers and briefs of respondent in opposition thereto, motion of respondent for rehearing and reconsideration of said order and motion of National Council of Independent Petroleum Associations for leave to intervene and to set aside said order to cease and desist and reopen the proceedings for further hearings and the taking of further testimony, and the Commission having considered said motions, answers, briefs, and oral argument of counsel and the record herein, and being of the opinion that a modified order to cease and desist should be issued in this cause, and having entered its order modifying said order to cease and desist to the extent set out in said supplemental motion of counsel for the Commission, issues this its modified order to cease and desist:

It Is Ordered that the respondent, Standard Oil Company (Indiana), a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the sale of gasoline in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such gasoline of like grade and quality as among purchasers:

1. By selling such gasoline to competing purchasers at different prices in the manner and under the circumstances stated in the findings as to the facts herein.

2. By continuing or resuming the discrimination in price of such gasoline referred to and described in the Commission's findings as to the facts herein.

3. By otherwise discriminating in price between purchasers of such gasoline in a manner and degree substantially similar to the manner and degree of the discriminations referred to and described in the Commission's findings as to the facts herein.

401 4. By selling such gasoline to some retailers thereof at prices lower than the prices charged other retailers who in fact compete with them in the sale and distribution of such gasoline.

5. By allowing a price to any dealer, jobber or wholesaler on such gasoline sold by such dealer, jobber or wholesaler at retail lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with such dealers, jobbers, or wholesalers in their retailing capacity.

6. By selling such gasoline to any jobber or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-customers of such jobbers or wholesalers, where such jobber or wholesaler resells such gasoline to any of its said retailer-customers at less than respondent's posted tank-wagon price or directly or indirectly grants to any such retailer-customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer.

For the purpose of comparison the term "price" as used in this order includes discounts, rebates, allowances and other terms and conditions of sale.

The above specified requirements of this order are subject, however, to the following provisos:

(a) That none of the prohibitions of the order shall be taken as inhibiting any price differentials by respondent that were not found under the facts herein to have a tendency to injure, destroy or prevent competition with respondent's customers receiving the benefit of such differentials or with their customers.

402 (b) That none of the prohibitions of the order shall be taken as preventing any price differentials by respondent which make only due allowance for differences in respondent's cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such gasoline is to such purchasers sold or delivered.

(c) That none of the prohibitions of the order shall be taken as inhibiting a lower price to jobbers than to retailers where respondent thereby makes only due allowance for its differences in cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such gasoline is to such purchasers sold or delivered.

(d) That none of the provisions of the order shall be taken as inhibiting any price differentials by respondent that reflect differences in the grades and qualities of such gasoline.

It Is Further Ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

By the Commission.

Otis B. Johnson, *Secretary.*

A dissenting opinion by Commissioner Mason is attached.

403 Before Federal Trade Commission.

* * (Caption—4389) * *

DISSENTING OPINION OF COMMISSIONER LOWELL B. MASON TO MODIFIED ORDER TO CEASE AND DESIST.

There are four reasons for this dissent:

1. The modified order is too indefinite and obscure to be followed;
2. The failure of the Commission to consider the evidence offered under the proviso of Section 2 (b) of the Robinson-Patman Act;
3. The failure to prove injury to competition; and
4. The failure to establish jurisdiction.

First, in my judgment, the order is too indefinite and obscure to be followed. The first half merely says, "Look at what Standard did and don't do that." I refer specifically to those portions of the order which state that the respondent is ordered to cease and desist from discriminating

"1. By selling such gasoline * * * in the manner * * * stated in the findings * * *.

"2. By continuing or resuming the discriminations * * * described in the Commission's findings * * *.

404 "3. By otherwise discriminating * * * in a manner * * * similar to * * * the discriminations * * * referred to * * * in the Commission's findings * * *."

An order is a command to do or refrain from doing certain things, and thus should interpret the Robinson-Patman Act ideals into completely understandable, explicit directions.

To rely on the finding of facts to determine the command of an order is bad. How can business men determine the standard at which they must aim if the Commission will not set down in words and figures in the order what is illegal?

The order of the Commission, being of a negative quality, that is to say, an order to cease and desist, should ban specific acts and thus by a series of quasi-judicial exclusions, direct all men of enterprise toward the best practices of their trade.

The last half of the order is a paraphrasing of the general terms of the statute and thus in effect commands nothing specifically but counsels perfection generally.

I believe the primary burden rests on the Commission to present an understandable order so it can be obeyed. Otherwise, first the business man must guess what the law requires him to do, and then he must guess what the Commission requires he must do, to obey its order entered because he guessed wrong the first time.

405 In my opinion, the Federal Trade Commission should not swell that area of the law which cannot be known until litigated. A law that cannot be applied with certainty to the current affairs of everyday business is ex post facto in effect.

It simply means, instead of living in a country where a king declares today that what a citizen did yesterday should be a crime, the Federal Trade Commission declares what the business man did five years ago is interpreted as a violation of law today.

We have made a fetish out of "litigation to determine the law." And by obscure and unintelligible orders which rely on extraneous references to indicate their meaning, we will make a fetish out of "litigation to determine the litigation."

This may not be such a fault that our superior courts feel empowered to interdict. If so, there lies all the more reason for our diligence in protecting against it.

There is a parallel in Gulliver's Travels between the directions the tailors of Laputa use to measure Gulliver for a suit of clothes and the directions given by the Commission for the defendant to clothe itself with legality in this case.

Gulliver's tailors, immersed in the abstractions of life, used quadrants, angles and complicated formulae to determine a simple sleeve length. The result was a most ill-fitting suit.

Gulliver took some comfort out of the fact that at 406 least everyone else was as poorly dressed. But even this satisfaction is denied the defendant in this case, for here, only the defendant is subject to the obscurities of higher dialectics whilst his competitors roam the fields of competition secure in the knowledge that they don't have to guess how to carry out the order because it does not apply to them.

I shall exemplify what I consider the law and facts on the second and third points by illustrations, using fictitious characters and episodes.

This method is at odds with common legalistic austerity, but it suits the purpose of those who would care to know why there is a dissent in this case.

The case is about one distributor getting gas for less than another distributor.

There are many kinds of distributors—brokers, wholesalers, jobbers, retailers, etc., but in the gas business, two are most common:

The retailer who operates the corner filling station—the essential tools of his trade consist of a gas pump, rest-rooms, air for tires, and water for radiators.

The jobber—ordinarily has a railroad siding or delivery trucks that carry as much as a tank car, big storage tanks, a fat credit and enough retail distributors as customers to make the use of these facilities profitable.

These two types of distributors pay different prices for the gas they sell. The jobber—a cent and a half 407 less. It is easier to sell jobbers—they buy millions of gallons. The corner station buys thousands. The credit risks, the delivery costs, the storage costs, the sales costs are either less or entirely absent when selling to a jobber. Besides the saving of money, there are many other valid reasons which invite a producer to dispose of his stock at a lesser price to a jobber than to a retailer. In fine, it seems there is no quarrel over this generally accepted economic fact.

It is true the statute makes no references to classes of purchasers.[1] It bans any discrimination between purchasers without regard to class or function, provided competition is or tends to be injured. The point is, that competition is non-existent between different functions. The respondent claims that there is nothing in the Robinson-Patman Act to prevent different price scales based on the different functions of distributors. This claim is sound only because the function of a jobber is not in competition with the function of a retailer. To hold otherwise would be to ordain that the profit motive could no longer be legal in the distribution field except at two points, distribution 408 by the manufacturer and distribution by the retailer. All other intermediaries would be out of business unless they were willing to operate sans profit. If they should be out of business, that's up to Congress, not the Federal Trade Commission.

The trouble comes when the retailer function and the jobber function become joined—then we have a controversy such as in this instant case.

For the purpose of illustrating this point, let us assume:

You are a producer of gasoline. You sell gas to Jerry. Jerry pumps it out to the folks who drive up and say, "Fill 'er up." Jerry does a nice retail business. You sell him gas at the same price you sell all the other retailers in town. You are obeying the Robinson-Patman Act which says you mustn't give a cheaper price to one than another.

You also sell gas to Harold. Folks can't drive up to Harold's place and get five gallons. Harold won't mess around with the public—wiping windshields, putting water in radiators, etc. He buys from you in big batches and then resells it in smaller lots to retailers who have corner filling stations just like Jerry. Harold is a jobber. You sell him your gas at the same price you sell all the other jobbers in town, and that's O.K., too. Naturally, Harold's price is less than what you charge Jerry. In fact, it is one

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[1] The Senate and House bills originally contained references to classes of distribution. These were struck out before passage. See Senate Report 1502, page 5, 74th Cong., 2nd Session; see also House Report 2287 74th Cong., 2nd Session.

and a half cents less, because Harold takes the job of
409 distributing your gasoline off your hands. This is
worth something besides just the money you save.

Now nobody is in hot water yet because each person is being treated "Even Stephen" according to the line of work he is in. But take a look at Bill across the street. Bill has a retail gas station. Folks drive up and use Bill's washroom while he puts five gallons in their tank. That makes Bill a retailer. So you tell Bill you'll let him have your gas at your retailer's price.

Bill says, "Come with me."

He takes you around back and, lo and behold, Bill owns a side track for tank cars, delivery trucks for gas, and gigantic storage tanks. Then Bill takes you into his office. He shows you his books. Bill has plenty of money. He buys a million—two million gallons a year, not in little truck wagon loads, but in big batches. Bill can do this because he sells to a lot of other retail stations besides using some himself.

Then there is Martin. Martin has just as big a layout as Bill but he doesn't even bother to sell to other retailers. Martin has so many retail outlets of his own that he operates a wholesale establishment just for his own filling stations.

Are Bill and Martin retailers or wholesalers?

To tell the truth, they are like Pooh Bah in Gilbert and Sullivan's opera, the Mikado. It all depends on whether you look at them front or back.

But, being a big gasoline company, you can't afford
410 to take any chances on Uncle Sam suing you for price
discrimination.

So you say, "Bill and Martin, I'm sorry, old fellows, but you look like retailers to me. I'm going to have to charge you a cent and a half higher price than what I charge Harold, the jobber, who doesn't do any retail business of his own."

Bill and Martin, being vigorous American business men, resent this very much. Bill and Martin buy just as much as Harold buys. Their equipment is just as good. They take as much work off your hands as Harold does, and their money looks just as good as Harold's any day. They want the same treatment.

Now some folks think that because you are a big gasoline company, you can tell Bill and Martin to "take it or leave it." That's the way it used to be in the old days.

You used to be the big frog in the puddle. Nowadays the puddle is bigger, the frogs are bigger, and there are lots more of them.

Tell Bill he is a retailer and entitled only to a retailer's discount, and five seconds later all the other frogs put on their glasses and say, "Why, Bill, you look exactly like a jobber to me. We'll give you the jobber price!"

So you lose Bill to a competitor whose price you wouldn't meet, and maybe you lose a couple of more customers for the same reasons, about the same time.

This all makes life very complicated.

Million gallons customers don't grow on trees, and tomorrow Martin is going to be around to see you about
411 his cent and a half discount. Treat Martin like a retailer, you're out of business (at least, as far as Martin is concerned). Treat Martin as a jobber, Uncle Sam will sue you as a price discriminator (just as the Federal Trade Commission has done in this case).

When passing the Robinson-Patman Act, Congress had just such a dilemma in mind. So it added a proviso to the law (in Sec. 2 [b], Robinson-Patman Act) which said in effect: "If somebody else is offering Martin or Bill gas for a cent and a half less, then you can, too, and show as a defense in a suit by the Federal Trade Commission that you were only meeting your competitor's price."

That's what Congress says, and on the 26th day of February of this year, the Federal Trade Commission agreed with Congress.[1]

But that's not what the Commission says in the instant case.

Now the Commission says you can't offer such a defense, regardless of the statute, and if by chance such a defense is admitted into the testimony, and if by chance it is proven by a greater weight of the evidence, and if in fact no testimony is offered in opposition, still the Commission will disregard such a defense.

412 If you apply the order in this instant case to the example I have just given, you will have to give Martin and Bill the lower jobber's price on all gas that they sell to other retail stations, but charge them the higher retailer's price on all gas they use in their own stations. In

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[1] In the Ferro case, Docket 5155, the Commission provided that the order to cease and desist "shall not prevent the respondent manufacturers from showing that any lower price to any purchaser was made in good faith to meet an equally low price of a competitor."

other words, they pay two different prices for the same gas in the same barrel, depending on what they use the stuff for.

That is what is known as "determining price by use."

This is foreign to the free enterprise system observed in our country. For the Commission to administer prices by determining which users shall be required to pay higher prices for a commodity than other users, tends to divide the distributive functions of our economy into hostile groups, each striving for government favoritism rather than for consumer acceptance.

It is time we moved the area of competition back into the open marts of trade where service and price to the consumer are the arbiters of success.

It is of interest to note that the social economic ideology of "determining price by use" embodied in the Commission's order was once considered and flatly rejected by Congress. "Pricing by use" was included in the House Committee (Judiciary) Report 2287 of March 31, 1936, 74th Cong. 2nd Session. This is what it said:

> "For the purpose of such classification of customers as wholesalers or jobbers or retailers, the character of the
> 413 selling of the purchasers and not the buying shall determine the classification, and any purchaser who * * * does both a wholesale and retail business shall, irrespective of quantity purchased, be classified as a wholesaler on purchases for sale to retailers only * * * and as a retailer on purchases for sale to consumers."

This ideology Congress refused to adopt and before final passage of the Robinson-Patman Act, all such language was stricken from the bill.

There are those who feel this country requires such a channeling of a business man's field of activity. This is strong medicine for a free economy to swallow. If needed, it is up to Congress and not this Commission to write the prescription. As yet, Congress has not seen fit to pass such bills that have been introduced to accomplish this end. Nor has Congress enacted any law preventing one from meeting his competitor's price. The competitive system still contemplates that the seller will get as much as he can and that the buyer will pay no more than he has to.

I cannot subscribe to an order that embraces what Congress specifically rejected.

Not only did Congress reject the ideology of "pricing by use," but obviously contemplating just such a situation as the instant case presents, embodied in the Act a proviso in Section 2 (b) as follows:[1]

> "Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie
> 414 case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *."

These words cannot be denied, and it is difficult to see how they can be ignored, but the decision in this case waives them aside, and the findings of facts and order have completely evaded any discussion of what the respondent proved by greater weight of the evidence (in fact, I find the testimony uncontroverted). The respondent proved that it had granted a lower price in good faith to meet a competitor's price. The trial examiner who heard the case so held, and I as a Commissioner would so find.

The Commission concludes as a matter of law that it is unnecessary for it to determine this fact. In my opinion, this is not sound. So far as the Federal Trade Commission is concerned, I believe deliberate and intentional matching of a competitor's lower price is legitimate as long as the proviso on Section 2 (b) of the Clayton Act stays on the statute books.

It is lawful for a seller to meet a competitor's price, unless there is a showing that the meeting and matching is a planned, common course of action, resulting in a conspiracy in restraint of trade.

In the instant case, the respondent, having lost two customers because it would not meet the prices of its competitors, made up its corporate mind to hang on to what business it had left, and in good faith, and what appears to me only ordinary common sense, lowered its price to that of its competitors.

In my opinion, the rejection of this defense by the Commission is fatal to the validity of the order.

So much for the second point.

Let us next consider the findings of the Commission that "the effect of the discrimination * * * has been * * * substantially to lessen competition and to injure, destroy and prevent competition * * * in the resale of gasoline."

I take it, an injury to a competitor must be illegal before it can be banned. We mouth the phrase "injury to competition" so often that we confuse it with "injury to a competitor."

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[1] 49 Stat. 1526 (1936); 15 U. S. C. A. 13.

When you meet your competitor's lower price so as to keep a customer he sought to take away from you, he feels he has been injured. Of course he has, but that does not mean that competition has been injured. On the contrary, it may have improved.

In theory, it would be nice if one could do business without having people come along and meet his price. But in a free economy people are always trying to do that very thing; inveigling customers away by better services or cheaper prices. That's the customers' protection. The well established companies refer to these people as "chiselers." Those who are not well established, and who are trying to secure a foothold in the market place, refer to
the well established companies who meet their lower
416 prices as "monopolists" or "price discriminators."
It all depends on which foot the shoe is on.

The man who sells a customer something for less is entitled to his patronage, but he must not expect a monopoly on that patronage. As long as the proviso in Section 2 (b) stands, others are free to come in and take a shot at the goose, too.

In my opinion, the testimony showing injury to competitors in this case is in reality a demonstration of the existence of competition.

There is another phase of this order bearing on the question of competition which warrants scrutiny.

As long as a buyer can get goods of like grade and quality at the same price or even less, he cannot claim competition has been injured because you refuse to sell him your goods at the price he wants to pay. This prohibition against discrimination is specifically limited by the statute to the grade and quality of the products sold, and has nothing to do with the popularity of the merchant or his brand, or the public acceptance of trade names.

The Act makes no mention of "major brands" or "off brand" commodities. Its sole criterion, so far as the words of the statute are concerned, has to do with the physical properties of the commodity. The reason for this is obvious. Congress realized the impracticality of weigh-
ing the mercurial popularities of name acceptance in
417 determining discrimination. Hence, it set the stand-
ard of discrimination on a factual rather than on a
beauty contest basis.

Grade and quality are stable things, determinable with mathematical certainty. There is no danger in empowering a commission to ascertain grade or quality—but "public acceptance!" How are we to determine what is a major or a minor brand, and how much differential shall be justified from one to the other? When Congress gives us that power, there will be time enough to worry about the many possibilities of abuses which can grow out of such authority.

As the law now stands, a discriminatory price is lower than what others have to pay to obtain goods of "like grade and quality." It has nothing to do with the relative popularity of brand names.

To illustrate: Let's suppose you are producing a gasoline that is sold on name acceptance but which is of the same grade and quality as many other gasolines which have no trade names. The unbranded gas sells for from two to six cents under what you sell your branded gas for.

You call your product Kelley's Kreem Gas (fictitious name, of course). It is accepted everywhere; everybody knows the name. You sell it for twelve cents to Bill. That is one and a half cents under the retailer price Jerry pays.

Jerry runs to the Federal Trade Commission and complains he is being discriminated against.

"Does it hurt?" asks the Commission.

418 "Of course it hurts," says Jerry. "I want Kelley's Kreem Gas at the same price Bill, the jobber, pays."

The Federal Trade Commission looks at the law. "It doesn't say anything here in the statute about Kelley's Kreem Gas. In fact, the statute doesn't even mention brand names; it just says that discrimination in price of goods of 'like grade and quality,' if it tends to prevent competition, shall be unlawful.

"Now, can you get gas just as good in grade and quality as Kelley's Kreem from other folks for a lot less?"

"Sure," says Jerry. "There is plenty of competition willing to sell me gas of like grade and quality for even less than Kelley sells to Bill. But I want Kelley Kreem Gas."

"All right, all right," says the Federal Trade Commission. "Congress used the words, 'of like grade and quality.' I'll interpret it to read, 'of like grade, quality or brands.'

"Then I'll enter an order against Kelley's Kreem saying he mustn't sell such gas at different prices. This will let everybody else sell unbranded, but just as good, gas for any price you want."

Let us take a careful look at the order in the instant case to see if I have paralleled my example with the facts at hand.

The report of the Federal Trade Commission trial 419 examiner in the instant case lists nine "major" companies in the Detroit area. He lists three companies as "doubtful," using as his yardstick the fact that some witness did not list them as "major" and then he describes ten other companies as secondary. This cataloging has nothing to do with the quality of the gas sold but relates to the relative importance of the companies.

These secondary companies who merchandise relatively unknown brands, plus the unbranded gas sold by the "doubtful" major companies, amount to about twelve per cent of the total Detroit business. This gas is sold for as much as six cents off the branded price and always at least two cents off.

The sole difference, so far as the record indicates, is that 88 per cent of the gasoline sold in the Detroit area carries a ~~brand name,~~ while twelve per cent is unbranded. There is no distinction as to quality or grade. This would indicate that at no time were there any competitors shut out from buying gasoline of like grade and quality at prices ranging from two to six cents less than they were paying, and at a price always less than the respondent's so-called discriminatory price.

As long as the other gas of like grade and quality was offered for sale at a lower price, where could there be injury to competition except on a plane that was not contemplated by Congress, namely, on a plane between names and not qualities or grades?

420 In the Corn Products case,[1] the discriminations were in "feed and meal," not in "Joe Blow's Feed" or "Blue Plate Meal." In the Corn Products case there was no effort to add words to the statute so that the Commission could hold a popularity contest on public acceptance. There the determination only had to be that the feed and meal were of the same grade and quality. In the instant case, the facts are that at all times there were plenty of competitors offering gas of as good a grade ~~and~~ quality as

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[1] 65 Sup. Ct. 961.

the respondent at prices lower than respondent's so-called discriminatory prices.

I point this out because in the case under consideration, neither the respondent nor the trial attorney has seen fit to stress the point. Perhaps the respondent doesn't like to admit there is unbranded gas of the same grade and quality as its own product, and the trial attorney would find it difficult to prove injury to competition in like grades and qualities if it were shown that there was plenty of gas of like grade and quality available at much less than the alleged discriminatory price of the respondent.

The instant case has important public aspects and the Commission is entitled to consider all the facts involved before entering an order. There were two orders entered in this case, an original, entered prior to my membership on the Commission, and a modified order being considered. Let ~~us~~ look at them.

421 The original order referred to gasoline "of like grade and quality." This was subsequently changed so as to refer to only the gas described in the findings, namely, three brands—"Solite with Ethyl," "Red Crown" and "Stanolind," and all reference to the statutory language "of like grade and quality" was stricken.

There might be a moral if not a legal justification for this tinkering with an act of Congress if one considers that without such an amendment the unknown producers would be at a great disadvantage, but perhaps the reason for the change lies deeper. If the order were left in the words of the statute, it would be impossible to deny that there was plenty of gas of like grade and quality available at much less than the alleged discriminatory price of Standard. This being true, the charge of injury, or even potential injury, flies out the window—for no one was injured by being shut out from buying gas of like grade and quality.

Now let us consider the fourth reason for this dissent.

The findings do not disclose facts sufficient to warrant the Commission assuming jurisdiction. If the Commission felt the evidence supported a conclusion that the purchases involving discriminatory prices were in interstate commerce, it should have so found. The Commission did not so find. It found that the respondent was engaged in
interstate commerce. It avoided any reference to the
422 actual purchases which under the statute I believe must
be shown to have been in interstate commerce. This is

not enough. The statute is explicit that the "purchases involved, in such discriminations" must be in interstate commerce.

The inhibition does not include every action by a company engaged in interstate commerce, but is limited to those acts which themselves are in interstate commerce.

In my opinion, the Commission in this case has dealt with the facts and the law just as Procrustes dealt with the unfortunate guests who slept in his bed. The Commission has cut off the facts of the case that do not fit in with the order, and it has stretched out the statute until it is no longer the law Congress passed but becomes the law that the Commission would like to enforce. It requires private policing of one man's business by another. It freezes the avenues of the trade to set patterns. It eliminates the profit for one type of distributor and guarantees the profit to another. It subjects branded goods to restrictions not applied to unbranded goods. It attempts to settle a private struggle between enterprisers by opening a Pandora's box of governmental directives on a minutia of accounting and distributing practices that bear scant relation to what Congress sought to inhibit.

I am against it.

Lowell B. Mason,
Commissioner.

August 9, 1946.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Standard Oil Company, *Petitioner*, *vs.* Federal Trade Commission, *Respondent.*	No. 9215.

PETITION TO REVIEW AND SET ASIDE MODIFIED ORDER OF FEDERAL TRADE COMMISSION TO CEASE AND DESIST ENTERED AUGUST 9, 1946, AND STATEMENT OF POINTS.

(Filed Oct. 4, 1946. Kenneth J. Carrick, Clerk.)

To the Honorable Judges of the United States Circuit Court of Appeals, Seventh Circuit:

Your petitioner, Standard Oil Company, brings this action under the provisions of Section 11 of the Clayton Act (15 U. S. C. A. Section 21) to review and set aside the order of the Federal Trade Commission and respectfully shows:

I.

The petitioner is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 910 South Michigan Avenue, Chicago, Illinois. The petitioner is engaged, among other things, in the business of refining and distributing gasoline and other petroleum products, among and within various states, and intrastate distribution of such products within the Detroit, Michigan, metropolitan area.

II.

The respondent, Federal Trade Commission, is a federal administrative tribunal created by Act of Congress.

III.

This action is brought by the petitioner under the aforesaid Section 11 of the Clayton Act, as amended, and venue is based upon the provision of said statute permitting any person required by the order of the Federal Trade Commission to cease and desist from an alleged violation of said Act, to obtain a review of said Commission's order by filing a written petition, praying that the order of the Commission be set aside, with the Circuit Court of Appeals within the Circuit wherein such person resides or carries on business, or within the Circuit wherein the alleged violation is claimed to have been or is being committed. The petitioner's corporate domicile and its principal business office are both within the jurisdiction of the Circuit Court of Appeals, Seventh Circuit, and it carries on business within said Circuit.

IV.

On November 29, 1940, the Federal Trade Commission in a proceeding entitled "In the Matter of: Standard Oil Company, Docket 4389", issued its complaint charging that it had reason to believe that the petition has violated and is violating the provisions of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C. A. Section 13). Thereafter said complaint was amended and as amended charged in paragraph three, in effect, that since June 19, 1936, the petitioner sold and is selling its gasoline to four Detroit jobbers (referred to in the complaint as dealers), which paragraph reads as follows:

> "Paragraph Three: Since June 19, 1936, in the course and conduct of its business above described, respondent has sold, and now sells, its gasoline to four Detroit dealers engaged in reselling said gasoline at retail, at prices substantially lower than the prices charged by respondent to its other Detroit retailer purchasers for gasoline of the same grade and quality. Said four dealers are: Citrin-Kolb Oil Company; Stikeman Oil Company, Inc.; Wayne Oil Company; and Ned's Auto Supply Company. Each of said dealers has, since said date, owned or operated in the Detroit area one or more gasoline stations where said gas-

> oline so purchased has been resold (and, except as to Stikeman Oil Company, Inc., is now resold) at retail to consumers thereof, in competition with other retailers of gasoline purchasing the same from respondent or from other manufacturers. Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., and Wayne Oil Company, respectively, are also engaged in the business of reselling at wholesale, a large part of the gasoline so purchased by them from respondent, to other gasoline dealers in the Detroit area who are likewise competitively engaged in the resale thereof at retail. Said three named wholesalers have knowingly received the benefit of said lower prices. The prices at which respondent has sold its gasoline to the four dealers above named, from time to time since June 19, 1936, have ranged from one-half cent to one and three-quarters cents per gallon lower than the prices charged by it to other Detroit retailers for the same gasoline. Under normal merchandising conditions, during the greater part of that period, respondent's price to said four dealers for its 'Red Crown' gasoline (its largest selling brand) has been one and one-half cents below its price therefor to other retailers." (as amended)

Said complaint further charged in paragraph four:

> "Paragraph Four: The effect of the discrimination in price described in the preceding paragraph hereof has been and may be to injure, destroy and prevent competition with each of the four dealers named in said Paragraph, and with their respective customers, in the resale of gasoline." (as amended)

V.

Thereafter the petitioner, on January 14, 1941, filed its answer to said complaint denying any violation of the aforesaid Act or statutes, denying the jurisdiction of the Federal Trade Commission and setting forth its defenses to said alleged violations. Thereafter, upon the amendment of said complaint, this answer was allowed to stand as the petitioner's answer to the amended complaint.

VI.

Thereafter (from March 10, 1941 to August 4, 1942) Federal Trade Commission hearings were held before Webster Ballinger, the Trial Examiner appointed by said Commission in said proceedings, and evidence introduced by both parties is recorded and on file in the Commission's office. On September 22, 1942, the petitioner filed its separate motions before the Commission to dismiss the complaint, to strike portions of the record and to amplify the record. On June 25, 1943, said Trial Examiner issued his report upon the evidence, a copy of which was served upon petitioner, to which exceptions were filed by petitioner.

VII.

Thereafter briefs were filed by both parties with the Commission, oral argument was had on January 19, 1944, and on October 9, 1945, said Commission issued its "Findings as to the Facts and Conclusion" and also issued, under the same date, its original Order to Cease and Desist.

VIII.

Thereafter this matter came on for further hearing before the Commission upon motion and supplemental motion by the Commission's counsel to modify said Order to Cease and Desist issued on October 9, 1945, answers and briefs of petitioner in opposition thereto and motion of petitioner for rehearing and reconsideration and for leave to adduce additional testimony. Said Commission, without in any manner changing its Findings as to the Facts and Conclusion, denied the petitioner's motion and issued on August 9, 1946, its Modified Order to Cease and Desist, which modified order provides in part as follows:

> It Is Ordered that the respondent, Standard Oil Company (Indiana) a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the sale of gasoline in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such gasoline of like grade and quality as among purchasers:
>
> 1. By selling such gasoline to competing pur-

chasers at different prices in the manner and under the circumstances stated in the findings as to the facts herein.

2. By continuing or resuming the discriminations in price of such gasoline referred to and described in the Commission's findings as to the facts herein.

3. By otherwise discriminating in price between purchasers of such gasoline in a manner and degree substantially similar to the manner and degree of the discriminations referred to and described in the Commission's findings as to the facts herein.

4. By selling such gasoline to some retailers thereof at prices lower than the prices charged other retailers who in fact compete with them in the sale and distribution of such gasoline.

5. By allowing a price to any dealer, jobber, or wholesaler on such gasoline sold by such dealer, jobber or wholesaler at retail lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with such dealers, jobbers, or wholesalers in their retailing capacity.

6. By selling such gasoline to any jobber or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-customers of such jobbers or wholesalers, where such jobber or wholesaler resells such gasoline to any of its said retailer customers at less than respondent's posted tank-wagon price or directly or indirectly grants to any such retailer-customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer.

For the purpose of comparison the term "price" as used in this order includes discounts, rebates, allowances and other terms and conditions of sale.

The above specified requirements of this order are subject, however, to the following provisos:

(a) That none of the prohibitions of the order shall be taken as inhibiting any price differentials by respondent that were not found under the facts herein to have a tendency to injure, destroy or prevent competition with respondent's customers receiving the benefit of such differentials or with their customers.

(b) That none of the prohibitions of the order shall be taken as preventing any price differentials by respondent which make only due allowance for differences in respondent's cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such gasoline is to such purchasers sold or delivered.

(c) That none of the prohibitions of the order shall be taken as inhibiting a lower price to jobbers than to retailers where respondent thereby makes only due allowance for its differences in cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such gasoline is to such purchasers sold or delivered.

(d) That none of the provisions of the order shall be taken as inhibiting any price differentials by respondent that reflect differences in the grades and qualities of such gasoline.

Said modified order further provides that the petitioner shall, within sixty days after service of said order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with said order. No statement of compliance has been filed by this petitioner.

IX.

The said "Findings as to the Facts and Conclusion" of said Commission are, in material and controlling respects, without substantial support in the evidence received by said Commission in said proceeding, but are contrary to such evidence; that said "Conclusion" of said Commission in said proceeding is not supported by the findings nor by the evidence received by said Commission; that the order entitled "Modified Order to Cease and Desist", so made by the said Commission against your petitioner, is not supported by the record before said Commission in said proceeding and is beyond the authority and jurisdiction of said Commission.

X.

The said Commission erred in taking or purporting to take jurisdiction over your petitioner by the issuance of its complaint and that the said "Modified Order to Cease and Desist" is erroneous, contrary to law, and wholly void, all as is more particularly set forth in the following Statement of Points:

Statement of Points.

The Commission erred in the following respects:

1. In taking or purporting to take jurisdiction over petitioner by the service and filing of its complaint and by the issuance of its Modified Order to Cease and Desist in said proceeding; because

    (a) no finding was made by said Commission that any of the transactions complained of were "in commerce" as defined in the Clayton Act, as amended, and

    (b) there is no evidence in the record, nor was any evidence available, to support any such finding, if one had been made.

2. In failing to make a finding that the prices alleged in the complaint to be discriminatory were in fact made by petitioner in good faith to meet lower prices offered to its customers by competitors of petitioner, notwithstanding the fact that the Trial Examiner so found on uncontroverted evidence.

3. In erroneously concluding, as a matter of law, that uncontroverted proof of "the meeting of an equally low price of a competitor in good faith is not a defense to a charge of price discrimination where competitive injury is affirmatively shown."

4. In that the Commission's construction of Section 2 (b) of the Clayton Act, as amended, if upheld, would constitute an arbitrary and unreasonable infringement of petitioner's inherent and inalienable rights guaranteed by the Federal Constitution and would deprive it of liberty of contract and property in violation of the Fifth Amendment of the Constitution of the United States. Furthermore, if contrary to the petitioner's contention, the transactions complained of are held to be "in commerce" as defined in said Clayton Act, then said Commission's construction of Section 2 (b), if upheld, further creates an

unreasonable and discriminatory burden upon interstate commerce in violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

5. In finding, without any substantial evidence in the record to support such finding, that the effect of the transactions complained of "has been, and may be, substantially to lessen competition and to injure, destroy, and prevent competition with each of said four dealers" (jobbers) "and with their respective customers in the resale of gasoline."

6. In failing to confine its Modified Order to Cease and Desist to the issues joined by the complaint and answer in said proceeding, i. e., by attempting to regulate and control the prices at which petitioner's jobber customers, to whom petitioner sells and delivers branded gasolines, shall resell such gasolines.

7. In finding, without any substantial evidence in the record to support such finding, that petitioner "arbitrarily classified" its said customers in Detroit as jobbers for the purpose of allowing them the usual and customary functional discount allowed to jobbers in the industry and trade, and in failing to find upon the uncontroverted evidence in said record that "each of the four dealers were at the time of their recognition, ever since have been, and are now, under industry practice and contemplation, bona fide jobbers," which was the finding of the Trial Examiner upon such uncontroverted evidence.

8. In finding that "the evidence submitted by the respondent" (petitioner herein) "fails to establish that the price differential allowed by respondent to the above-named jobbers of 1½ cents per gallon off tank-wagon price made due allowance for differences in respondent's costs of sale and delivery resulting from differing methods and quantities in which it sold its gasoline to said jobbers" and in completely rejecting petitioner's evidence of cost justification.

9. In requiring petitioner, by its Modified Order to Cease and Desist, to regulate, police and control the prices at which its jobber customers shall resell gasoline (a) to retailer purchasers, and (b) at retail through their own retail outlets.

10. In failing expressly to limit the applicability of its Modified Order to Cease and Desist to

(a) sales by petitioner to its jobber customers in Detroit of its branded gasolines, there being no issue joined in the pleadings in said proceeding and no evidence in the record with respect to any sales of other grades or qualities of gasoline by petitioner, and

(b) sales by petitioner to the four jobbers named in the complaint, there being no issue joined in the pleadings in said proceeding with respect to any alleged discriminations in connection with petitioner's sales of gasoline to any other jobbers in Detroit or elsewhere.

11. In attempting, by its Modified Order to Cease and Desist, to maintain high and non-competitive retail prices for the sale of branded gasolines, contrary to the public interest.

12. In attempting, by its Modified Order to Cease and Desist, to regulate and control the terms and conditions of purely intrastate sales, to-wit, sales of branded gasolines by jobbers located and doing business wholly and exclusively within the State of Michigan to retailer-purchasers (service station dealers) located and doing business wholly and exclusively within the State of Michigan.

13. In denying petitioner's motion for rehearing and reconsideration and for the taking of supplemental testimony herein, upon the several grounds stated in said motion.

14. In that said Modified Order to Cease and Desist is not based upon facts existing at the time of the issuance thereof, but upon a finding of facts which related to a period of time approximately five years prior thereto.

15. In that said Modified Order to Cease and Desist is vague, indefinite and uncertain in the following particulars:

(a) It is couched in the language of the statute, and, without any specificity, purports to prohibit petitioner from violating the law.

(b) It purports to prohibit discriminations "in a manner and degree substantially similar to the manner and degree of the discriminations referred to and described in the Commission's findings as to the facts herein".

(c) It fails to inform petitioner, and others similarly situated, with reasonable certainty as to what specific act or acts are prohibited and, therefore, does not conform to the legal requirement of affording an ascertainable standard or basis of conduct.

(d) Proviso (d) of said order purports to require that price differentials shall "reflect" differences in grade and qualities of commodities sold.

Wherefore the petitioner prays that the court exercise its jurisdiction over the parties and subject matter herein and that the court review the aforesaid Findings as to Facts and Conclusion and the Commission's Modified Order to Cease and Desist and enter a decree setting aside said Modified Order of the Commission issued August 9, 1946, and dismissing the complaint against the petitioner and that such other and further decrees be made by this court as may be deemed just.

Dated: October 3rd, 1946.

Standard Oil Company,
Petitioner.

By Weymouth Kirkland,
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W. H. Van Oosterhoat,
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IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—9215) * *

CROSS PETITION OF FEDERAL TRADE COMMISSION.

To the Honorable United States Circuit Court of Appeals for the Seventh Circuit:

Comes now the Federal Trade Commission, respondent, and files this its cross petition against Standard Oil Company, petitioner, and respectfully shows unto the Court that:

1. On October 4, 1946, petitioner filed herein its petition praying this Court to review and set aside a certain modified order to cease and desist issued by respondent on August 9, 1946, in the matter of Standard Oil Company, Federal Trade Commission Docket No. 4389. Said order required petitioner to cease and desist from engaging in certain conduct and practices, therein specified, found by respondent to be in violation of the provisions of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act (49 Stat. 1526; 15 U. S. C. A. Section 13(a)).

2. Said modified order to cease and desist was duly served upon petitioner on August 12, 1946, and since said date has been and now is in full force and effect.

3. Respondent has certified and filed with the Court herein a transcript of the entire record of the proceeding in which said modified order to cease and desist was entered. Such proceeding was had in compliance with and in due conformity to all provisions of the law, and the findings as to the facts and conclusion and modified order to cease and desist made and entered therein by respondent are valid.

4. By virtue of the provisions of Section 11 of the Clayton Act (38 Stat. 734, 735-736; 15 U. S. C. A. Sec. 21), this Court has jurisdiction and power to make and enter upon the pleadings, testimony and proceedings herein a decree affirming said modified order to cease and desist and commanding petitioner to obey the same and comply therewith.

Wherefore, the Federal Trade Commission, respondent, prays that petitioner's petition to review be dismissed, and that the Court do make and enter herein a decree affirming the respondent's order to cease and desist and commanding Standard Oil Company, petitioner, to obey the same and comply therewith.

Respectfully submitted,
Federal Trade Commission,
By Walter B. Wooden,
Associate General Counsel,
Attorney for Federal Trade Commission.

Endorsed: In the United States Circuit Court of Appeals. * * (Caption—9215) * *. Cross Petition of Federal Trade Commission. Filed Nov. 18, 1946. Kenneth J. Carrick, Clerk.

In the United States Circuit Court of Appeals.

* * (Caption—9215) * *

STIPULATION.

1. It Is Hereby Stipulated And Agreed by and between the parties hereto, by their respective attorneys of record, that, subject to the approval of the court, the following exhibits filed by the Secretary of the Federal Trade Commission as a part of the transcript in these proceedings, and heretofore received in evidence by said Federal Trade Commission as original exhibits, shall be physical exhibits and as such they shall constitute, for all purposes, a part of the record, both upon review in this court and upon any petition for certiorari to the Supreme Court of the United States that may hereafter be filed in this cause and it shall not be necessary for either party to have copies of said exhibits printed or included in the printed record and such exhibits may be referred to by counsel in their respective briefs and may be presented to the court upon argument of this cause:

Respondent's Exhibits (Petitioner herein)

18-K, 18-S, 18-T, 18-V, 18-W, 18-X, 18-Y, 18-Z, 18-Z-7, 18-Z-8, 18-Z-9, 18-Z-12, 18-Z-13, 18-Z-14, 18-Z-15, 18-Z-16, 18-Z-18, 18-Z-20, 18-Z-22, 18-Z-23, 18-Z-24, 18-Z-25, 18-Z-28, 18-Z-29, 18-Z-31, 18-Z-32, 18-Z-33, 18-Z-34, 18-Z-35, 18-Z-36, 18-Z-37, 18-Z-39, 18-Z-41, 18-Z-42, 18-Z-43, 18-Z-44, 18-Z-46, 18-Z-47, 18-Z-50,

62
64-A to H, inclusive
65-A to H, inclusive
66-A to H, inclusive
67-A to H, inclusive

68 filed separately as $\frac{2\text{-}1}{4389\text{-}1}$

69 filed separately as $\frac{2\text{-}2}{4389\text{-}1}$

70 filed separately as $\frac{2\text{-}3}{4389\text{-}1}$

71 filed separately as $\frac{2\text{-}4}{4389\text{-}1}$

76

2. It Is Further Stipulated And Agreed that the following pleadings contained in Part 1, Pleadings (11-29-40 to 10-9-45), and in Part 2, Pleadings (10-10-45 to 8-9-46), of the transcript, filed by the Secretary of the Federal Trade Commission with the court herein, are not material to the consideration of this cause and that the same may be omitted from the printed record:

(1) Order extending time for filing answer, dated December 26, 1940, Part 1, page 52.

(2) Letter of H. R. Hanley dated April 14, 1941, Part 1, pages 56 to 58.

(3) Order for further hearing dated May 23, 1941, Part 1, page 59.

(4) Order fixing time and place for taking testimony, dated September 18, 1941, Part 1, page 60.

(5) Order setting further hearings dated January 17, 1942, Part 1, page 61.

(6) Order resetting case for hearing, dated March 21, 1942, Part 1, page 62.

(7) Motion of Respondent for suspension of proceedings, dated March 23, 1942, Part 1, pages 63 to 65.

(8) Affidavit of H. R. Hanley in support of Respondent's motion for suspension of proceedings, dated March 23, 1942, Part 1, pages 66 to 69.

(9) Affidavit of C. T. Bergeson in support of Respondent's motion for suspension of proceedings dated March 23, 1942, Part 1, pages 70 to 95.

(10) Supplemental affidavit of C. T. Bergeson on motion for suspension of proceedings, dated April 3, 1942, Part 1, pages 96 to 107.

(11) Order cancelling hearing dated April 17, 1942, Part 1, page 109.

(12) Order denying motion dated June 17, 1942, Part 1, page 110.

(13) Order setting case for further hearings, dated June 22, 1942, Part 1, page 111.

(14) Respondent's motion for time within which to submit statement of facts, dated September 22, 1942, Part 1, pages 185 to 187.

(15) Affidavit of H. R. Hanley in support of motion for time to submit statement of facts, Part 1, pages 188 to 192.

(16) Order providing for argument of interlocutory motions dated October 10, 1942, Part 1, page 195.

(17) Order extending time within which to file statement of facts, dated December 28, 1942, Part 1, page 200.

(18) Order further extending time within which to file statement of facts dated February 20, 1943, Part 1, page 201.

(19) Order extending time for filing Trial Examiner's report upon the evidence, dated May 8, 1943, Part 1, page 205.

(20) Order further extending time for filing Trial Examiner's report upon the evidence, dated June 9, 1943, Part 1, page 206.

(21) Order further extending time for filing Trial Examiner's report upon the evidence, dated June 30, 1943, Part 1, page 207.

(22) Order extending Respondent's time for filing exceptions to Trial Examiner's report, dated July 17, 1943, Part 1, page 208.

(23) Order extending time for filing brief in support of the complaint, dated July 17, 1943, Part 1, page 209.

(24) Motion for extension of time to file Respondent's brief, dated September 28, 1943, Part 1, pages 210 and 211.

(25) Affidavit of Arthur J. Abbott in support of motion dated September 30, 1943, Part 1, pages 212 to 214.

(26) Order extending time for filing Respondent's brief, dated October 9, 1943, Part 1, page 215.

(27) Order further extending time for filing Respondent's brief, dated November 22, 1943, Part 1, page 216.

(28) Notices re final argument dated December 17, 1943, Part 1, pages 217 and 218.

(29) Order extending time for filing Respondent's brief, etc., dated December 23, 1943, Part 1, page 219.

(30) Motion for extension of time, dated November 29, 1945, Part 2, pages 220 and 221.

(31) Order extending time for filing report of compliance dated December 11, 1945, Part 2, page 222.

(32) Stipulation for extension of time to answer order to show cause, dated February 4, 1946, Part 2, page 292.

(33) Order granting extension of time to answer order to show cause, dated February 7, 1946, Part 2, page 293.

(34) Stipulation dated February 19, 1946, Part 2, pages 294 to 296.

(35) Order extending time for further proceedings, dated February 25, 1946, Part 2, page 321.

(36) Order granting oral argument on motions dated April 8, 1946, Part 2, pages 361 and 362.

(37) Notices of change of time dated April 11, 1946, Part 2, pages 363 to 368.

(38) Order deferring decision on petition for leave to intervene, dated April 11, 1946, Part 2, page 369.

All portions of Part 1 and Part 2, designated Pleadings, and filed by the Secretary of the Federal Trade Commission as a part of the transcript in these proceedings, other than those specifically set forth above, shall be included within the printed record.

Dated December 27th, 1946.

W. T. Kelley,
Walter B. Wooden,
Counsel for Respondent, Federal Trade Commission.

Weymouth Kirkland,
Howard Ellis,
W. H. VanOosterhout,
Arthur J. Abbott,
Counsel for Petitioner, Standard Oil Company.

Approved & ordered
12-27-46
William M. Sparks, *J.*

Endorsed: In the United States Circuit Court of Appeals * * (Caption—9215) * * Stipulation Filed Dec 27 1946 Kenneth J. Carrick, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—9215) * *

DESIGNATION OF STANDARD OIL COMPANY, PETITIONER, OF PORTIONS OF THE TRANSCRIPT TO BE CONTAINED IN THE PRINTED RECORD.

Standard Oil Company, petitioner herein, designates the following portions of the transcript, filed by the Secretary of the Federal Trade Commission in this cause, to be contained in the printed record to be printed by the Clerk of this court pursuant to Rule 14 (c) of this court:

1. Certificate of Otis B. Johnson, Secretary of the Federal Trade Commission, concerning the transcript of proceedings had before the Federal Trade Commission, said certificate being dated November 5, 1946.
2. Complaint dated November 29, 1940.
3. Answer of Standard Oil Company dated January 14, 1941.
4. Order appointing Trial Examiner dated February 25, 1941.
5. Motion to amend complaint dated April 9, 1941.
6. Order amending complaint dated April 23, 1941.
7. Motion to dismiss complaint dated September 22, 1942.
8. Motion to Federal Trade Commission to strike portions of the record dated September 22, 1942.
9. Motion of Standard Oil Company to Federal Trade Commission to amplify record, dated September 22, 1942, with the exhibits attached thereto.
10. Order denying motion to dismiss complaint, dated October 10, 1942.
11. Order denying motion to strike portions of the record, dated December 28, 1942.
12. Order denying in part and granting in part Respondent's motion to amplify the record, dated December 28, 1942.

13. Order directing inclusion of certain documents in the record dated March 17, 1943.

(Evidence & Exhibits go here.)

14. Trial Examiner's report dated June 25, 1943.

15. Exceptions to Trial Examiner's report dated August 3, 1943.

16. Findings as to the facts and conclusion dated October 9, 1945.

17. Order to cease and desist dated October 9, 1945.

18. Motion to modify order to cease and desist dated January 21, 1946.

19. Order to show cause dated January 23, 1946.

20. Motion for rehearing and reconsideration of order to cease and desist filed January 28, 1946.

21. Answer and brief on order to show cause, dated February 14, 1946.

22. Respondent's answer and brief in opposition to second proposed modification of order to cease and desist, dated March 27, 1946.

23. Petition of the National Council of Independent Petroleum Associations for leave to intervene, dated April 5, 1946.

24. Order modifying order to cease and desist and denying certain other motions, dated August 9, 1946.

25. Modified order to cease and desist dated August 9, 1946.

26. Dissenting opinion of Commissioner Lowell B. Mason to modified order to cease and desist, dated August 9, 1946.

27. All of the transcript of the oral testimony, being pages 1 to 8,057, inclusive, contained in Parts 3 to 11, inclusive, of the transcript filed by the Secretary of the Federal Trade Commission.

28. The following numbered Commission exhibits contained in Part 12 of the aforesaid transcript:

1-A, B, C and D, 2, 3-A and B, 29, 30, 54, 87, 128-A and B.

29. The following numbered Respondent exhibits contained in Part 13 of the aforesaid transcript:

3, 5, 6, 7 to 17, inclusive, 18-A; 18-I, 18-J, 18-L, 18-O, 18-Q, 18-R, 18-U, 18-Z-1, 18-Z-3, 18-Z-4, 18-Z-5, 18-Z-10, 18-Z-11, 18-Z-17, 18-Z-21, 18-Z-27, 18-Z-30, 19, 20, 23, 24, 25-A and B, 27, 28, 29-A, B and C, 30, 31-A to Q, inclusive, 33-A to E, inclusive, 36-B, C and D, 37-A to D, inclusive, 38-A to E, inclusive, 45, 46, 47, 48, 49-A and B, 52-B, 53, 54, 55-A and B, 57-A and B, 58, 59, 60-A to D, inclusive, 63-A, B and C, 98, 99, 100, 101, 103-A, B and C.

Petitioner further designates the following documents to be contained in the aforesaid printed record:

30. Petition to review and set aside modified order of Federal Trade Commission to cease and desist and statement of points, dated October 3, 1946.

31. Cross petition of Federal Trade Commission, filed November 18, 1946.

32. Stipulation dated December 27th, 1946.

33. This designation.

34. Any order entered on Stipulation referred to in No. 32 above.

Dated: December 27th, 1946.

Standard Oil Company,
Petitioner,
By Weymouth Kirkland,
Howard Ellis,
W. H. Van Oosterhout,
Arthur J. Abbott,
Its Attorneys.

Filed Dec. 27, 1946. Kenneth J. Carrick, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—9215) * *

DESIGNATION BY RESPONDENT FEDERAL TRADE COMMISSION OF PORTIONS OF THE TRANSCRIPT TO BE CONTAINED IN THE PRINTED RECORD.

Comes now the Federal Trade Commission, respondent herein, and after taking into account the portions of the transcript designated for printing by the petitioner, hereby designates the following portions of the transcript filed by the Secretary of the Federal Trade Commission in this cause to be contained in the printed record to be printed by the Clerk of this Court pursuant to Rule 14(c) of this Court:

Commission Exhibits.

4
5 A-J
22
25
27
31
32 A, B, C
33 A, B
34
35
36
90
91
100
109 B
38
50
51
55
56
57
58
59
60
61
62
116
119
120
129
63
64
74
76
80
81
82 A, B
83
84 A, B, C
88
89
130
131 A, B, C
132
133

Exhibits Offered by Respondent before the Commission as follows:

96 A, B, C, D.

Respectfully,

Federal Trade Commission,
By Walter B. Wooden,
Associate General Counsel, and Attorney for Respondent.

Washington, D. C.
January 6, 1947.

Filed Jan. 8, 1947. Kenneth J. Carrick, Clerk.

LIBRARY
SUPREME COURT, U.S.

VOLUME VIII

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1957

No. [redacted] 24

FEDERAL TRADE COMMISSION, PETITIONER
vs.
STANDARD OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1956
CERTIORARI GRANTED DECEMBER 17, 1956

In the

United States Court of Appeals

For the Seventh Circuit

No. 11409

STANDARD OIL COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

Petition for Review of Order of the
Federal Trade Commission.

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1 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION, SS:

In the matter of
Standard Oil Company. } Docket 4389.

I, Robert M. Parrish, Secretary of the Federal Trade Commission and official custodian of its records, do hereby certify that transmitted herewith and hereby re-certified to the United States Court of Appeals for the Seventh Circuit are:

Part 12—Exhibits—Documentary—Commission.
Part 13—Exhibits—Documentary—Respondent.
and separate original physical exhibits marked:

2-1	2-2	2-3	2-4	2-5
4389-1	4389-1	4389-1	4389-1	4389-1

being parts of the record of proceedings by the Federal Trade Commission in its Docket 4389, in the matter of Standard Oil Company, which were certified to the Court November 5, 1946, and which were subsequently returned to the Commission; and

That there are also transmitted herewith and certified:
Part 14—Record after Remand—3-24-52 to 5-13-54.
Part 15—Record after Remand—5-14-54 to 1-7-55.

That these materials together with those previously certified to the Court constitute the full, true and complete record in this proceeding.

That this transcript is certified to the United States Court of Appeals for the Seventh Circuit, pursuant to the filing in said Court of a petition to review of a modified order to cease and desist, dated January 16, 1953, entered by the Federal Trade Commission in the above indicated proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 13th day of April, A. D. 1955.

Robert M. Parrish,
Secretary.

(Seal)

2 IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 9215. October Term, 1948, January Session, 1949.

Standard Oil Company,
Petitioner,
vs.
Federal Trade Commission,
Respondent.

Petition for Review of Order of the Federal Trade Commission.

March 11, 1949.

Before KERNER, MINTON, and DUFFY, *Circuit Judges.*

MINTON, *Circuit Judge.* The petitioner seeks to review a cease and desist order issued by the respondent ordering it to cease and desist from discriminating in the price of gasoline of the same grade and quality among its customers in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C. Sec. 13). The Commission asks the enforcement of its order.

The petitioner contends that the order should not be enforced because, first, the Commission failed to find and could not have found under the undisputed evidence in this case, that either or any of the purchases involved in such discrimination was in commerce; secondly, that the Commission treated as immaterial the petitioner's conclusive showing that the discrimination made in price was in good faith to meet an equally low price of a competitor, which showing the petitioner asserts is a complete defense. Third, the petitioner contends that:

> "Paragraph 6 of the Modified Order directs Standard at its peril to prevent jobbers to whom it sells 3 gasoline and who are in competition with Standard in the resale thereof from reselling to their retail dealers at prices less than Standard's price to its own retail dealers; requires Standard to police, maintain and regulate such competitor's prices on gasoline, title to

> which passed to the jobbers on delivery by Standard; and subjects Standard retroactively to punishment for contempt should a jobber-competitor fail to maintain such resale prices."

Substantial evidence in this record shows the following facts as found by the Commission. The petitioner's principal office and place of business is located in Chicago, Illinois. It is engaged in the business of refining and distributing gasoline and other petroleum products throughout fourteen states, principally in the Middle West. The petitioner has a refinery at Whiting, Indiana, to which it supplies crude oil from fields located in other states. One of the divisions in which it distributes its products is known as the Detroit Field, which embraces some thirteen counties in southern Michigan, including the city of Detroit. The Detroit Area, as distinguished from the Detroit Field, is confined to the city of Detroit and its suburbs. The petitioner has no refinery in Michigan, and almost all the gasoline it sells and distributes in the Detroit Field is transported by tankers from its refinery at Whiting through the Great Lakes to the petitioner's marine terminal at River Rouge, outside the city of Detroit. This terminal has a storage tank capacity of sixty-three million gallons. During the summer months, deliveries are made from Whiting weekly and sometimes twice weekly. In the fall, sufficient gasoline is delivered and stored to take care of the estimated requirements during the winter months when navigation on the Great Lakes is closed. The amount of gasoline used in Detroit is fairly constant and can be accurately estimated. During the years from 1936 through 1940, the years here in question, the petitioner supplied 16 to 17% of all the gasoline in the Detroit Area. In addition to the River Rouge tanks, the petitioner operated six bulk plants in the Detroit Area. Practically all of the gasoline sold in the Detroit Area passed through the River Rouge terminal, except that in some instances gas was delivered directly from Whiting by truck and also by the same means to commercial users. Deliveries were made from the River Rouge terminal by tank cars and tank trucks up
to February 1, 1940, and thereafter by trucks alone.
4 The delivery trucks were owned and operated or leased
and operated by the petitioner through its employees.

The petitioner supplied gasoline to approximately 358 retail service stations, approximately two hundred of which the petitioner owned and leased, and eight of which it leased and subleased. The remaining 150 were independent operators who owned or leased their stations from someone else. The latter had agreements to purchase their entire requirements of Standard Oil gasoline only from the petitioner. While the former had no such agreements, they did not buy gasoline from anyone except the petitioner. The delivery to the retail customers was known as "tank wagon delivery" and was made at a price fixed in Chicago by the petitioner from time to time, known in the trade as the "posted tank-wagon price." 8

In addition, the petitioner supplied gasoline to four dealers in the Detroit Area, Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., Wayne Oil Company, and Ned's Auto Supply Company, hereinafter sometimes referred to as Citrin, Stikeman, Wayne, and Ned's. These customers were also known as wholesale customers. They had their own storage tanks and trucks for delivery and met the credit qualifications of the petitioner.

During the time in question, Citrin, Stikeman, and Wayne sold a substantial portion of their gasoline purchased from the petitioner direct to the public through retail service stations owned and operated by them. Ned's was engaged entirely in the retail sale of gasoline to the public through its own stations. To these last four customers, known, as we have pointed out, as the wholesale customers, the petitioner has discriminated in price by selling its gasoline to them for resale at wholesale and through their own retail stations at a price substantially lower than the prices charged retail purchasers in the Detroit Area for gasoline of the same grade and quality. The petitioner's Red Crown gasoline, its largest selling brand and comprising about ninety per cent of its sales in the Detroit Area, was sold to those four wholesalers at 1½¢ a gallon lower than the prices charged by the petitioner for the same gasoline to other retail dealers in the Detroit Area.

Citrin, in addition to supplying its own stations which sold at retail, from January 1, 1938, to December 31, 1940, sold one million gallons of gasoline annually to Langer
5 and Cohn, who run a chain of service stations, at 1¢ a gallon less than the tank wagon price, and in addition sold another retail service operator at ½¢ a gallon less than the tank wagon price. For a time Citrin also issued

special service cards which entitled the holder to a 2¢ a gallon discount on the purchase of gasoline from one of the retail service stations operated by Citrin.

There is no evidence that Wayne ever sold gasoline to retailers at a price lower than the posted tank-wagon price charged by the petitioner to its dealers or that Wayne ever allowed any discounts. The same is true of Stikeman.

Ned's, however, sold at retail exclusively, and it has been its practice since March 7, 1938, to sell to its customers below the prevailing retail service station price or to give premiums and discounts which result in a price below its posted price.

A lower price at one service station than at another is an important factor in the purchasing public's mind, especially in the price of the petitioner's advertisd brands. Any difference in price between two stations selling the same brand of gasoline is very important in influencing the business. The margin of profit between the tank wagon price to a service station and the retail price is small, averaging since November 1, 1939, about 3.3¢ a gallon in the Detroit Area.

In 1937 Ned's was selling the petitioner's Red Crown gasoline to the public at approximately 2¢ a gallon below the prevailing retail service station price, which continued with variations until the latter part of 1939. In 1939 and 1940, when Ned's posted price was the prevailing retail price, it gave premiums and discounts under cover. It has from time to time given commercial discounts of 1 to 2¢ a gallon off the posted tank-wagon price. In 1939, Ned's also issued trading stamps with a value of 2¢ a gallon, which were redeemable in merchandise or gasoline at Ned's stores. Price cutting at Ned's stores has been almost continuous, and this company has been responsible for starting most of the retail price cutting in major brand gasolines in Detroit over a period of several years. This practice of Ned's has caused substantial damage to other retail service station operators selling the petitioner's Red Crown gasoline and also to retail service station operators selling other brands of gasoline.

The price discriminations granted to Ned's, Citrin,
6 Wayne, and Stikeman on gasoline sold by them at retail have given a substantial competitive advantage to these favored dealers in their retail operations over other retailers of gasoline, including retail customers of the peti-

tioner. This competitive advantage is capable of being used and has been used by Ned's and to some extent by Citrin to divert large amounts of business from other gasoline retailers, including customers of the petitioner, with resultant injury to them and to their ability to continue in business and successfully compete with Ned's and Citrin in the retailing of gasoline. The effect of these discriminations in price allowed by the petitioner to Ned's, Citrin, Wayne, and Stikeman has been and may be substantially to lessen competition and to injure, destroy, and prevent competition with each of these four dealers and with their respective customers in the retail sale of gasoline.

There is substantial evidence in this record, and we think it may be assumed to be conclusive, to the effect that the petitioner made its low price to Ned's, Citrin, Wayne, and Stikeman in good faith to meet the lower price of a competitor. The petitioner failed to show that the discriminatory price which it made these four dealers was justified on the basis of any cost savings.

The findings of the Commission based upon the substantial evidence above indicated are sufficient to support the Commission's conclusion of law that the discriminatory sales were in commerce. It is not disputed that the petitioner is engaged in commerce, but it is vigorously insisted that commerce ended at the River Rouge plant and the bulk plants in the Detroit Area and that the petitioner's transactions from there on were wholly intrastate. With this we are unable to agree. The break that occurred at River Rouge was a break in transportation but not in the constant stream of commerce that flowed from the Whiting refinery to the petitioner's customers in Michigan. The stream of commerce flowed continuously from the tanks at the refinery to the tankers on the lake; from the tankers to the tank at River Rouge and the bulk plants in Detroit; and from there into tank cars and tank trucks to the petitioner's customers. There may have been several breaks in transportation in getting from one vehicle or receptacle to the other in completing the commercial transaction of getting the petitioner's gasoline from Whiting into the Detroit territory, but the stream of commerce was never broken,
7 no matter how many receptacles were used on the way.

The rest at River Rouge was not like a warehouse where the goods awaited further sale and distribution. Although the gasoline was not brought to River Rouge pursuant to orders already taken, the demands of the Michigan territory were fairly constant, and the petitioner's customers' demands could be accurately estimated, so the flow of the stream of commerce kept surging from Whiting to Detroit.

We think this case quite analogous to *Stafford v. Wallace*, 258 U. S. 495, 42 S. Ct. 397, 66 L. Ed. 735. In that case, the livestock came by carrier interstate and intrastate into the receiving pens of the stockyards where the animals were fed, watered, and held until sales were consummated, either to the packers who drove them across the street to the packing house, or to the wholesale dealers or feeders who reshipped them. The transportation was broken at the yards. The animals came to rest, but the stream of commerce moved on to final destination; and the stockyards, with its holding pens, was held to be in commerce, just as here the various changes in the manner of movement may have slowed down the stream of commerce between Whiting and Michigan, but never stopped it. The tanks at River Rouge were similar to a "packaging house" on the way to market. The tank cars and trucks were the most convenient "packages" that could be used to complete the distribution of the gasoline. It is unlike *Walling v. Goldblatt Bros.*, 128 F. 2d 778, where the warehouse was only a detached stockroom for retail stores of a retailer. There the stream of commerce ended at the warehouse for the most part. Here it reached at River Rouge only an intermediate stage preliminary to its final disposition to the petitioner's customers.

We decline, as the Supreme Court did in *Stafford v. Wallace, supra*, p. 519, "* * * to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the noninterstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part." After all, as Justice Holmes said in *Swift and Company v. United States*, 196 U. S. 375, 398, 25 S. Ct. 276, 49 L. Ed. 518, "* * * commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." The
8 modern concept of commerce is one which gives full
sweep to the commerce clause of the Constitution within the limits of the implementing statute, a liberal view of

the Congressional purpose as expressed in the statute, and a realistic view of what business is doing as it moves across state lines to accomplish its purpose. The late cases support the view that the petitioner's operations are in commerce from the refinery to its customers. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 63 S. Ct. 332, 87 L. Ed. 460; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 309, 44 S. Ct. 96, 68 L. Ed. 308; *Mid-Continent Petroleum Corporation* v. *Keen*, 157 F. 2d 310, 314; *Republic Pictures Corporation* v. *Kappler*, 151 F. 2d 543, 545; *Walling* v. *American Stores Co.*, 133 F. 2d 840.

Now as to the contention that the discriminatory prices here complained of were made in good faith to meet a lower price of a competitor. While the Commission made no finding on this point, it assumed its existence but held, contrary to the petitioner's contention, that this was not a defense.

Prior to June 19, 1936, when the Robinson-Patman Act went into effect, the Clayton Act, Section 2,[1] provided:

> "That it shall be unlawful for any person engaged in commerce, * * * either directly or indirectly to discriminate in price between different purchasers of commodities * * * where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price betwen purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition * * *."

Thus it will be seen that a discrimination in price made in good faith to meet competition was a defense under Section 2 of the Clayton Act, as was a showing that the discrimination was made because of cost savings, or proof of the other defenses given by the Act. But since large buyers could always get such price meeting by suppliers to justify a discrimination in price in their favor, the purpose of the Act to avoid such discrimination was easily evaded. Congress sought to change this bypass by changing the discriminatory price, made in good faith to meet the low price of a competitor, from a defense, as it then was, to a procedural aid to enable a seller to overcome the prima facie case made by showing a difference in price to customers in the same community for goods of the same quality. This was done by amending Section 2 of the Clayton Act by Section 2(a), and (b) of the Robinson-Patman Act.[2] The amended Section 2(a) still made it unlawful to make a discriminatory price, as before, and it kept as a defense the cost savings and other defenses of the old Clayton Act, but took out of the defense category the provision for making a lower price to meet competition. As to this, it was provided in Section 2(b) as follows:

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[1] 38 Stat. 730 (1914), 15 U. S. C. Sec. 13 (1934).

> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

This amendment, it is clear, provided that if a discrimination in price were shown, the burden of justifying it was upon the party making the discriminatory price, and he could make this prima facie case by showing that he acted in good faith to meet the low price of a competitor. That it was not intended as a defense is apparent from the Conference Report resolving the disagreement of the two Houses. The purpose of Congress is so clearly set out in the Conference Report that we quote it as follows:

> "The Senate bill contained a further proviso: 'That nothing herein contained shall prevent discrimination in price in the same or different communities made in good in faith to meet competition.' This language is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the

present Clayton Act. The Senate receded, and the language is stricken. A provision relating to the question of meeting competition, intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission is included in subsection (b) in the conference text as follows:

> " '*Provided, however,* that nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.' " (Congressional Record, June 15, 1936, p. 9414.)

The Chairman of the House Conferees stated on the floor of the House as he presented the Conference Report:

> "It is to be noted, however, that this does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. This provision is entirely procedural.
>
> * * * * *
>
> "If this proviso were construed to permit the showing of a competing offer as an absolute bar to liability for discrimination, then it would nullify the act entirely at the very inception of its enforcement, for in nearly every case mass buyers receive similar discriminations from competing sellers of the same products." (Congressional Record, June 15, 1936, p. 9418.)

The intent of Congress is clear and the language used to express its intent, it seems to us, is not ambiguous. That Section 2(b) is as the Conference Report says it was intended to be, seems to be the view of the Supreme Court as expressed in *Trade Comm'n.* v. *Staley Co.*, 324 U. S. 746, 65 S. Ct. 971, 89 L. Ed. 1338, which reversed this Court in *A. E. Staley Mfg. Co.* v. *Federal Trade Commission*, 144 F. 2d 221, wherein we held the prima facie case had been rebutted. Chief Justice Stone said (p. 752):

> "It will be noted that the defense that the price dis-
> 11 criminations were made in order to meet competition, is under the statute a matter of 'rebutting' the Commission's 'prima-facie case.' Prior to the Robinson-Patman amendments, Sec. 2 of the Clayton Act pro-

> vided that nothing contained in it 'shall prevent' discriminations in price 'made in good faith to meet competition.' The change in language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination.''

The showing made here by the petitioner that it made the lower price in good faith to meet competition, we assume, as the Commission apparently did, was made out. The effect of it was to rebut the prima facie case made by the Commission's proof of the petitioner's discriminatory prices. If nothing further appeared in this record, the case might well have ended there. The reason for making the discrimination was effective to rebut the prima facie case in price discrimination, but it still remained a discrimination, and that discrimination affected competition on the retail level among the retail customers of the wholesalers to whom the petitioner has sold. The discrimination in price in favor of the parties in this case, which the petitioner had a right to make as against its competitors, was then used by the petitioner's customers to work havoc among competitors on the retail level. The petitioner had given a club to its wholesalers which they passed on to their retailers to bludgeon their competitors. This is what the Commission is trying to stop, and it is towards the elimination of this evil that the cease and desist order is directed.

The Commission here considered the other evidence as to the effect on competition of this continuing discrimination and found, and it was justified in finding, that the discrimination not only may but did affect competition. There is substantial evidence in this record that the petitioner's favored wholesalers were in a position to do and did do injury to competition. Where as here the discrimination is between purchasers who are in competition and the competition which is alleged and proved to be injured is among the retail customers of the favored purchasers and other retailers, the fact that the seller's discriminatory price
12 was made to meet his own competition is not controlling. The discrimination continued here and its effect was direct and harmful to competition and was properly condemned by the Commission's order, notwithstanding

the petitioner's discrimination in price was made in good faith to meet competition of its own.

The case of *Samuel H. Moss, Inc.* v. *Federal Trade Commission,* 148 F. 2d 378, does not, as we understand it, hold that Section 2(b) is a defense in all events. It holds only that a lower price discrimination made in good faith to meet competition, standing alone, may be a defense. If there were no further showing that the lower price lessens or tends to prevent competition, the justification in the discrimination would be made out. But in the instant case, the Commission went further and showed that the petitioner's discrimination in price to its wholesale customers did have the effect to substantially lessen competition or to injure, destroy, or prevent competition. Note, however, that it would have been necessary for the Commission to prove only that such discrimination in price *may* have that effect. *Trade Comm'n* v. *Morton Salt Co.,* 334 U. S. 37, 68 S. Ct. 822, 92 L. Ed. 948. It is not actual injury alone, but the prospect reasonably to be expected of injury to competition which the statute seeks to prevent.

We agree with the Commission that the showing of the petitioner that it made the discriminatory price in good faith to meet competition is not controlling in view of the very substantial evidence that its discrimination was used to affect and lessen competition at the retail level.

The petitioner objects to Paragraph 6 of the cease and desist order. This paragraph reads as follows:

> "6. By selling such gasoline to any jobber or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-customers of such jobbers or wholesalers, where such jobber or wholesaler resells such gasoline to any of its said retailer-customers at less than respondent's posted tank-wagon price or directly or indirectly grants to any such retailer-customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer."

13 This paragraph is intended to eliminate the effects of the discriminatory price made to these customers, Citrin, Wayne, and Stikeman, who do a wholesale business. To avoid the force of this paragraph, the petitioner may do

one of two things. First, discontinue selling to wholesalers at a price different than that made to retailers. The petitioner's three largest competitors in Detroit have found it agreeable to do so. The petitioner argues that this is an elimination of wholesalers. If this be true, it is elimination only where their existence cannot be justified except on the exploitation of a differential in price not justified by any cost savings to obtain that price. This does not impress us as either illegal, unwarranted, or unjust.

Secondly, the petitioner may under the right to choose its customers refuse to sell to wholesalers who sell to retailers below the price the petitioner makes to its own retailers. The petitioner does not have to make price control agreements with anyone. It has only to govern its own conduct to avoid the impact of an unlawful discrimination. To govern its conduct, the order makes the petitioner deal with its wholesalers at its peril as to what they might do with the gasoline in the future. The petitioner has no control and can have no control over the price of the gasoline after it is sold to the wholesalers. The latter may put any price on it they may choose. They may give it away if they like. The petitioner should not be required to police its wholesalers and to sell to them at the petitioner's peril. The petitioner should be liable if it sells to a wholesaler it knows or ought to have known is engaging in or intends to engage in the competitive practices condemned by this proceeding. Under the order as drawn, the petitioner would be liable if afterwards the wholesaler should resell at a price lower than the petitioner charged its retailers. If the petitioner is to be hailed into court for a violation of the Commission's order, the petitioner must be guilty of knowingly choosing a customer who is using or intends to use its price advantage to undersell the petitioner in its prices made to its retailers.

We would modify Paragraph 6 to read as follows:

> "By selling such gasoline to any jobber or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the 14 retailer-customers of such jobbers or wholesalers, where such jobber or wholesaler, to the knowledge of the respondent or under such circumstances as are reasonably calculated to impute knowledge to the respondent, resells such gasoline or intends to resell

> the same to any of its said retailer-customers at less than respondent's posted tank-wagon price or directly or indirectly grants to any such retailer-customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer."

The order as modified will be enforced, and judgment thereon will be entered accordingly.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

Friday, March 11, 1949.

Before:

Hon. Otto Kerner, Circuit Judge,
Hon. Sherman Minton, Circuit Judge,
Hon. F. Ryan Duffy, Circuit Judge.

Standard Oil Company,
Petitioner,
No. 9215 *vs.*
Federal Trade Commission,
Respondent.

Petition for Review of an Order of the Federal Trade Commission.

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that Paragraph 6 of the Modified Order of the Federal Trade Commission to cease and desist, en-
15 tered in this cause on August 6, 1946, be modified to read as follows:

> "By selling such gasoline to any jobber or wholesaler at a price lower than the respondent charges its retail customers who in fact compete in the sale and distribution of such gasoline with the retail customers of such jobbers or wholesalers, where such jobber or wholesaler, to the knowledge of the respondent or under such circumstances as are reasonably calculated to impute knowledge to the respondent, resells such gasoline or intends to resell the same to any of its said retailer customers at less than respondent's

posted tank-wagon price or directly or indirectly grants to any such retailer customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer."

The said order of the Federal Trade Commission, as modified above, will be enforced and a Decree thereon will be entered accordingly.

16 IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Standard Oil Company,
a corporation,
Petitioner,
vs.
Federal Trade Commission,
Respondent.
No. 9215.

FINAL DECREE MODIFYING FEDERAL TRADE COMMISSION'S ORDER TO CEASE AND DESIST AND AFFIRMING AND ENFORCING SAID ORDER AS MODIFIED.

The petitioner herein, Standard Oil Company, a corporation of the State of Indiana, having filed with this Court on the 4th day of October, 1946, its petition to review and set aside an order to cease and desist issued by the Federal Trade Commission, respondent herein, on August 9, 1946, under the provisions of the Clayton Act, as amended; and a copy of said petition having been served upon the respondent herein; and said respondent having thereafter, to wit: on the 7th day of November, 1946, certified and filed herein, as required by law, a transcript of the entire record in the proceeding lately pending before it, in which said order to cease and desist was entered; and the respondent herein, Federal Trade Commission, having filed with this Court on the 18th day of November, 1946, its cross-petition for affirmance and enforcement of its order to cease and desist, aforesaid, and a copy of said cross-petition having been served upon the petitioner; and the matter having been heard by this Court on briefs and oral argument of counsel; and this Court thereafter, to wit: on the 11th day of March, 1949, having rendered its decision modifying Paragraph 6 of said order to cease and desist and affirming and enforcing said order as modified;

17 Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed, that Paragraph 6 of the aforesaid order to cease and desist, issued by the respondent herein as aforesaid, be and the same is hereby modified so as to read as follows:

> 6. By selling such gasoline to any jobber or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-customers of such jobbers or wholesalers, where such jobber or wholesaler, to the knowledge of the respondent or under such circumstances as are reasonably calculated to impute knowledge to the respondent, resells such gasoline or intend to resell the same to any of its said retailer-customers at less than respondent's posted tank-wagon price or directly or indirectly grants to any such retailer-customer any discounts, regates, allowances, services or facilities having the net effect of a reduction in price to the retailer.

And, It Is Hereby Further Ordered, Adjudged And Decreed, that the said order to cease and desist issued by the Federal Trade Commission, respondent herein, on the 9th day of August, 1946, as aforesaid, and as herein modified by the decision of this Court on the 11th day of March, 1949, as aforesaid, be, and the same is, hereby affirmed and petitioner is commanded to obey the same;

And, It Is Further Ordered, Adjudged And Decreed, that the Standard Oil Company, a corporation of the State of Indiana, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of gasoline in commerce, as "commerce" is defined by the Clayton Act, as amended, shall forthwith cease and desist, as required by the terms of such affirmed and modified order set out below, from discriminating, directly or indirectly, in the price of such gasoline of like grade and quality, as among purchasers:

> 1. By selling such gasoline to competing purchasers at different prices in the manner and under the circumstances stated in the findings as to the facts herein.

2. By continuing or resuming the discriminations in price of such gasoline referred to and described in the Commission's findings as to the facts herein.

3. By otherwise discriminating in price between
purchasers of such gasoline in a manner and degree
18 substantially similar to the manner and degree of the
discriminations referred to and described in the Commission's findings as to the facts herein.

✓4. By selling such gasoline to some retailers thereof at prices lower than the prices charged other retailers who in fact compete with them in the sale and distribution of such gasoline.

5. By allowing a price to any dealer, jobber, or wholesaler on such gasoline sold by such dealer, jobber or wholesaler at retail lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with such dealers, jobbers or wholesaler in their retailing capacity.

6. By selling such gasoline to any jobber or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-customers of such jobbers, or wholesalers, where such jobber or wholesaler, to the knowledge of the respondent or under such circumstances as are reasonably calculated to impute knowledge to the respondent, resells such gasoline or intends to resell the same to any of its said retailer-customers at less than respondent's posted tank-wagon price or directly or indirectly grants to any such retailer-customer any discounts, rebates, allowances, services, or facilities having the net effect of a reduction in price to the retailer.

For the purpose of comparison the term "price" as used in this order includes discounts, rebates, allowances and other terms and conditions of sale.

The above specified requirements of this order are subject, however, to the following provisos:

(a) That none of the prohibitions of the order shall be taken as inhibiting any price differentials by respondent that were not found under the facts herein to have a tendency to injure, destroy or prevent competition with respondent's customers receiving the benefit of such differentials or with their customers.

(b) That none of the prohibitions of the order shall be taken as preventing any price differentials by respondent which make only due allowance for differences in respondent's cost of manufacture, sale, 19 or delivery resulting from the differing methods or quantities in which such gasoline is to such purchasers sold or delivered.

(c) That none of the prohibitions of the order shall be taken as inhibiting a lower price to jobbers than to retailers where respondent thereby makes only due allowance for its differences in cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such gasoline is to such purchasers sold or delivered.

(d) That none of the provisions of the order shall be taken as inhibiting any price differentials by respondent that reflect differences in the grades and qualities of such gasoline.

And It Is Hereby Further Ordered, Adjudged And Decreed, that this Court retain, and it does hereby retain, jurisdiction of this proceeding to the extent necessary to compel obedience to said order to cease and desist, as herein modified, but without prejudice to the right of the Federal Trade Commission to initiate such contempt proceedings or other proceedings for that purpose as may be warranted by law.

By the Court.

April 29, 1949.

Otto Kerner,
Sherman Minton,
F. Ryan Duffy,
United States Circuit Judges.

A True Copy.
Teste:

....
Clerk, United States Court of Appeals for the Seventh Circuit.

Approved as to form:
Weymouth Kirkland,
Howard Ellis,
W. H. Van Oosterhout,
Att'ys for Petitioner, Standard Oil Company.
4-27-49.

20 SUPREME COURT OF THE UNITED STATES.

No. 1.—October Term, 1950.

Standard Oil Company, *Petitioner,*
vs.
Federal Trade Commission.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 8, 1951.]

MR. JUSTICE BURTON delivered the opinion of the Court.

In this case the Federal Trade Commission challenged the right of the Standard Oil Company, under the Robinson-Patman Act,[1] to sell gasoline to four comparatively large "jobber" customers in Detroit at a less price per gallon than it sold like gasoline to many comparatively small service station customers in the same area. The Company's defenses were that (1) the sales involved were not in interstate commerce and (2) its lower price to the jobbers was justified because made to retain them as customers and in good faith to meet an equally low price of a competitor.[2] The Commission, with one member dissenting, ordered the company to cease and desist from making such a price differential. 43 F. T. C. 56. The Court of Appeals slightly modified the order and required its enforcement as modified. 173 F. 2d 210. We granted certiorari on petition of the company because the case presents an important issue under the Robinson-Pat-
21 man Act which has not been settled by this Court. 338 U. S. 865. The case was argued at our October Term, 1949, and reargued at this term. 339 U. S. 975.

For the reasons hereinafter stated, we agree with the court below that the sales were made in interstate commerce but we agree with petitioner that, under the Act, the lower price to the jobbers was justified if it was made to retain each of them as a customer and in good faith to meet an equally low price of a competitor.

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[1] Specifically under § 2 of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13. For the material text of § 2(a) and (b) see pp. 9-10, *infra.*

[2] The company contended before the Commission that the price differential allowed by it to the jobbers made only due allowance for differences in the cost of sale and delivery of gasoline to them. It did not, however, pursue this defense in the court below and does not do so here.

I. Facts.

Reserving for separate consideration the facts determining the issue of interstate commerce, the other material facts are summarized here on the basis of the Commission's findings. The sales described are those of Red Crown gasoline because those sales raise all of the material issues and constitute about 90% of petitioner's sales in the Detroit area.

Since the effective date of the Robinson-Patman Act, June 19, 1936, petitioner has sold its Red Crown gasoline to its "jobber" customers at its tank-car prices. Those prices have been 1½¢ per gallon less than its tank-wagon prices to service station customers for identical gasoline in the same area. In practice, the service stations have resold the gasoline at the prevailing retail service station prices.[3] Each of petitioner's so-called "jobber" customers has been free to resell its gasoline at retail or wholesale. Each, at some time, has resold some of it at retail. One now resells it only at retail. The others now resell it largely at wholesale. As to resale prices, two of the "jobbers" have resold their gasoline only at the prevailing wholesale or retail rates. The other two, however,
22 have reflected, in varying degrees, petitioner's reductions in the cost of the gasoline to them by reducing their resale prices of that gasoline below the prevailing rates. The effect of these reductions has thus reached competing retail service stations in part through retail stations operated by the "jobbers" and in part through retail stations which purchased gasoline from the "jobbers" at less than the prevailing tank-wagon prices. The Commission found that such reduced resale prices "have resulted in injuring, destroying, and preventing competition between said favored dealers and retail dealers in respondent's [petitioner's] gasoline and other major brands of gasoline . . . ." 41 F. T. C. 263, 283. The

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[3] About 150 of these stations are owned or leased by the customer independently of petitioner. Their operators buy all of their gasoline from petitioner under short-term agreements. Its other 208 stations are leased or subleased from petitioner for short terms.

distinctive characteristics of these "jobbers" are that each (1) maintains sufficient bulk storage to take delivery of gasoline in tank-car quantities (of 8,000 to 12,000 gallons) rather than in tank-wagon quantities (of 700 to 800 gallons) as is customary for service stations; (2) owns and operates tank wagons and other facilities for delivery of gasoline to service stations; (3) has an established business sufficient to insure purchases of from one to two million gallons a year; and (4) has adequate credit responsibility.[4] While the cost of petitioner's sales and deliveries of gasoline to each of these four "jobbers" is no doubt less, per gallon, than the cost of its sales and deliveries of like gasoline to its service station customers in the same area, there is no finding that such difference accounts for the entire reduction in price made by petitioner to these "jobbers," 23 and we proceed on the assumption that it does not entirely account for that difference.

Petitioner placed its reliance upon evidence offered to show that its lower price to each jobber was made in order to retain that jobber as a customer and in good faith to meet an equally low price offered by one or more competitors. The Commission, however, treated such evidence as not relevant.

II. The Sales Were Made in Interstate Commerce.

In order for the sales here involved to come under the Clayton Act, as amended by the Robinson-Patman Act, they must have been made in interstate commerce.[5] The Commission and the court below agree that the sales were so made. 41 F. T. C. 263, 271, 173 F. 2d 210, 213-214.

Facts determining this were found by the Commission as follows: Petitioner is an Indiana corporation, whose principal office is in Chicago. Its gasoline is obtained from

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[4] Not denying the established industry practice of recognizing such dealers as a distinctive group for operational convenience, the Commission held that petitioner's classification of these four dealers as "jobbers" was arbitrary because it made "no requirement that said jobbers should sell only at wholesale." 41 F. T. C. at 273. We use the term "jobber" in this opinion merely as one of convenience and identification, because the result here is the same whether these four dealers are wholesalers or retailers.

[5] Section 2(a) of the Clayton Act, as amended, relates only to persons "engaged in commerce, in the course of such commerce . . . where either or any of the purchases involved . . . are in commerce . . . ." 49 Stat. 1526, 15 U. S. C. § 13(a). "Commerce" is defined in § 1 of the Clayton Act as including "trade or commerce among the several States . . . ." 38 Stat. 730, 15 U. S. C. § 12.

fields in Kansas, Oklahoma, Texas and Wyoming. Its refining plant is at Whiting, Indiana. It distributes its products in 14 middle western states, including Michigan. The gasoline sold by it in the Detroit, Michigan, area, and involved in this case, is carried for petitioner by tankers on the Great Lakes from Indiana to petitioner's marine terminal at River Rouge, Michigan. Enough gasoline is accumulated there during each navigation season so that a winter's supply is available from the terminal. The gasoline remains for varying periods at the terminal or in nearby bulk storage stations, and while there it is under the ownership of petitioner and en route from peti-
24 tioner's refinery in Indiana to its market in Michigan.

"Although the gasoline was not brought to River Rouge pursuant to orders already taken, the demands of the Michigan territory are fairly constant, and petitioner's customers' demands could be accurately estimated, so the flow of the stream of commerce kept surging from Whiting to Detroit." 173 F. 2d at 213-214. Gasoline delivered to customers in Detroit, upon individual orders for it, is taken from the gasoline at the terminal in interstate commerce en route for delivery in that area. Such sales are well within the jurisdictional requirements of the Act. Any other conclusion would fall short of the recognized purpose of the Robinson-Patman Act to reach the operations of large interstate businesses in competition with small local concerns. Such temporary storage of the gasoline as occurs within the Detroit area does not deprive the gasoline of its interstate character. *Stafford* v. *Wallace*, 258 U. S. 495. Compare *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570, with *Atlantic Coast Line R. Co.* v. *Standard Oil Co.*, 275 U. S. 257, 268.[6]

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[6] The Fair Labor Standards Act cases relied on by petitioner are not inconsistent with this result. They hold that, for the purposes of that statute, interstate commerce ceased on delivery to a local distributor. *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572; *Walling* v. *Jacksonville Paper Co.*, *supra*. The sales involved here, on the other hand, are those of an interstate producer and refiner to a local distributor.

III. There Should Be a Finding as to Whether or Not Petitioner's Price Reduction Was Made in Good Faith to Meet a Lawfully Equally Low Price of a Competitor.

Petitioner presented evidence tending to prove that its tank-car price was made to each "jobber" in order to retain that "jobber" as a customer and in good faith to meet a lawful and equally low price of a competitor. Petitioner sought to show that it succeeded in retaining 25 these customers, although the tank-car price which it offered them merely approached or matched, and did not undercut, the lower prices offered them by several competitors of petitioner. The trial examiner made findings on the point[7] but the Commission declined to do so, saying:

> "Based on the record in this case the Commission concludes as a matter of law that it is not material whether the discriminations in price granted by the respondent to the said four dealers were made to meet equally low prices of competitors. The Commission further concludes as a matter of law that it is unnecessary for the Commission to determine whether the alleged competitive prices were in fact available or involved gasoline of like grade or quality or of equal public acceptance. Accordingly the Commission does not attempt to find the facts regarding those matters because, even though the lower prices in question may have been made by respondent in good faith to meet 26 the lower prices of competitors, this does not constitute a defense in the face of affirmative proof that the effect of the discrimination was to injure, destroy and pre-

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[7] The trial examiner concluded:

"The recognition by respondent [petitioner] of Ned's Auto Supply Company as a jobber or wholesaler [which carried with it the tank-car price for gasoline], was a forced recognition given to retain that company's business. Ned's Company at the time of recognition, and ever since, has possessed all qualifications required by respondent [petitioner] for recognition as a jobber and the recognition was given and has ever since been continued in transactions between the parties, believed by them to be bona fide in all respects . . . ." (Conclusion of Fact 2, under § IX, R. 5098-5099.)

"The differentials on 's branded gasolines respondent [petitioner] granted Ned's Auto Supply Company, at all times subsequent to March 7, 1938, and Stikeman Oil Company, Citrin-Kolb Oil Company and the Wayne Company [the four jobbers], at all times subsequent to June 19, 1936, were granted to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality." (Conclusion of Fact, under § X, R. 5104.)

> vent competition with the retail stations operated by the said named dealers and with stations operated by their retailer-customers." 41 F. T. C. 263, 281-282.

The court below affirmed the Commission's position.[8] There is no doubt that under the Clayton Act, before its amendment by the Robinson-Patman Act, this evidence would have been material and, if accepted, would have established a complete defense to the charge of unlawful discrimination. At that time the material provisions of § 2 were as follows:

> "Sec. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided, That nothing herein contained shall prevent* discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, 27 or *discrimination in price in the same or different communities made in good faith to meet competition*: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." (Emphasis added within the first proviso.) 38 Stat. 730-731, 15 U. S. C. (1934 ed.) § 13.

The question before us, therefore, is whether the amendments made by the Robinson-Patman Act deprived those facts of their previously recognized effectiveness as a de-

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[8] "Now as to the contention that the discriminatory prices here complained of were made in good faith to meet a lower price of a competitor. While the Commission made no finding on this point, it assumed its existence but held, contrary to the petitioner's contention, that this was not a defense. . . .

"We agree with the Commission that the showing of the petitioner that it made the discriminatory price in good faith to meet competition is not controlling in view of the very substantial evidence that its discrimination was used to affect and lessen competition at the retail level." 173 F. 2d at 214, 217.

fense. The material provisions of § 2, as amended, are quoted below, showing in italics those clauses which bear upon the proviso before us. The modified provisions are distributed between the newly created subsections (a) and (b). These must be read together and in relation to the provisions they supersede. The original phrase "that nothing herein contained shall prevent" is still used to introduce each of the defenses. The defense relating to the meeting of the price of a competitor appears only in subsection (b). There it is applied to discriminations in services or facilities as well as to discriminations in price, which alone are expressly condemned in subsection (a). In its opinion in the instant case, the Commission recognizes that it is an absolute defense to a charge of price discrimination for a seller to prove, under § 2 (a), that its price differential makes only due allowances for differences in cost or for price changes made in response to changing market conditions. 41 F. T. C. at 283. Each of these three defenses is introduced by the same phrase "nothing . . . shall prevent," and all are embraced in the same word "justification" in the first sentence of § 2 (b). It is natural, therefore, to conclude that each of these defenses is entitled to the same effect, without regard to whether there also appears an affirmative showing of
28 actual or potential injury to competition at the same or
a lower level traceable to the price differential made by the seller. The Commission says, however, that the proviso in § 2 (b) as to a seller meeting in good faith a lower competitive price is not an absolute defense if an injury to competition may result from such price reduction. We find no basis for such a distinction between the defenses in § 2 (a) and (b).

The defense in subsection (b), now before us, is limited to a price reduction made to meet in good faith an equally low price of a competitor. It thus eliminates certain difficulties which arose under the original Clayton Act. For example, it omits reference to discriminations in price "in the same or different communities . . ." and it thus restricts the proviso to price differentials ocurring in actual competition. It also excludes reductions which undercut the "lower price" of a competitor. None of these changes, however, cut into the actual core of the defense. That still consists of the provision that wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price. Actual competition, at least in this elemental form, is thus preserved.

Subsections 2 (a) and (b), as amended, are as follows:

> "SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided, That nothing herein contained shall prevent* differentials
> 29 which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . . *And provided further, That nothing herein contained shall prevent* price changes from time to time . . . in response to changing conditions affecting the market for or the marketability of the goods concerned . . .
>
> "(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, *the burden of rebutting the prima-facie case thus made by showing justification* shall be upon the person charged with a violation of this section, and *unless justification shall be affirmatively shown,* the Commission is authorized to issue an order terminating the discrimination: *Provided, however, That nothing herein contained shall prevent* a seller rebutting the prima-facie case thus made by *showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.*" (Emphasis added in part.). 49 Stat. 126, 15 U. S. C. § 13 (a) and (b).

This right of a seller, under § 2 (b), to meet in good faith an equally low price of a competitor has been considered here before. Both in *Corn Products Refining Co.*

v. *Federal Trade Comm'n*, 324 U. S. 726, and in *Federal Trade Comm'n* v. *Staley Mfg. Co.*, 324 U. S. 746, evidence in support of this defense was reviewed at length. There would have been no occasion thus to review it under the theory now contended for by the Commission. While this Court did not sustain the seller's defense in either
30 case, it did unquestionably recognize the relevance of the evidence in support of that defense. The decision in each case was based upon the insufficiency of the seller's evidence to establish its defense, not upon the inadequacy of its defense as a matter of law.[9]

In the *Corn Products* case, *supra*, after recognizing that the seller had allowed differentials in price in favor of certain customers, this Court examined the evidence presented by the seller to show that such differentials were justified because made in good faith to meet equally low prices of a competitor. It then said:

> "Examination of the *testimony* satisfies us, as it did the court below, that it *was insufficient* to sustain a finding that the lower prices allowed to favored customers were in fact made to meet competition. Hence petitioners *failed to sustain the burden* of showing that the price discriminations were granted for the purpose of meeting competition." (Emphasis added.) 324 U. S. at 741.[10]

In the *Staley* case, *supra*, most of the Court's opinion is devoted to the consideration of the evidence introduced in support of the seller's defense under § 2 (b). The discussion proceeds upon the assumption, applicable here, that if a competitor's "lower price" is a lawful individual price offered to any of the seller's customers, then the
31 seller is protected, under § 2 (b), in making a counteroffer provided the seller proves that its counteroffer is made to meet in god faith its competitor's equally low price. On the record in the *Staley* case, a majority of the Court

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[9] In contrast to that factual situation, the trial examiner for the Commission in the instant case has found the necessary facts to sustain the seller's defense (see note 7, *supra*), and yet the Commission refuses, as a matter of law, to give them consideration.

[10] In the *Corn Products* case, the same point of view was expressed by the Court of Appeals below: "We think the evidence is insufficient to sustain this affirmative defence." 144 F. 2d 211, 217 (C. A. 7th Cir.). The Court of Appeals also indicated that, to sustain this defense, it must appear not only that the competitor's lower price was met in good faith but that such price was lawful.

of Appeals, in fact, declined to accept the findings of the Commission and decided in favor of the accused seller.[11] This Court, on review, reversed that judgment but emphatically recognized the availability of the seller's defense under § 2 (b) and the obligation of the Commission to make findings upon issues material to that defense. It said:

> "Congress has left to the Commission the determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence
> 32 is for the Commission. See *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73. In the present case, the Commission's finding that respondents' price discriminations were not made to meet a 'lower' price and consequently were not in good faith, is amply supported by the record, and we think the Court of Appeals erred in setting aside this portion of the Commission's order to cease and desist.
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> . . . . .
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> "In appraising the evidence, the Commision recognized that the statute does not place an impossible burden upon sellers, but it emphasized the good faith requirement of the statute, which places the burden of proving good faith on the seller, who has made the discriminatory prices. . . .
>
> ". . . We agree with the Commission that the

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[11] The *Staley* case was twice before the Court of Appeals for the Seventh Circuit. In 1943 the case was remanded by that court to the Commission for findings as to wherein the discriminations occurred and how they substantially lessened competition and promoted monopoly and also "for consideration of the defense [under § 2(b)] urged by the petitioners, and for findings in relation thereto." 135 F. 2d 453, 456. In 1944, a majority of the court decided in favor of the seller. 144 F. 2d 221. One judge held that the complaint was insufficient under § 2(a) and that, therefore, he need not reach the seller's defense under § 2(b). He expressly stated, however, that he did not take issue with the basis for the conclusion that the seller's price was made in good faith to meet an equally low price of a competitior. *Id.*, at 227-231. His colleague held squarely that the seller's defense of meeting competition in good faith under § 2(b) had been established. *Id.*, at 221-225. The third judge found against the seller both under § 2(a) and (b). *Id.*, at 225-227. The important point for us is that the Court of Appeals, as well as this Court, unanimously recognized in that case the materiality of the seller's evidence in support of its defense under § 2(b): even though the "discriminations 'have resulted, and do result, in substantial injury to competition among purchasers . . . .'" *Id.*, at 222.

> statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor. Nor was the Commission wrong in holding that respondents failed to meet this burden." 324 U. S. at 758, 759-760.

See also, *Federal Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 721-726; *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 43; and *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 92. All that petitioner asks in the instant case is that its evidence be considered and that findings be made by the Commission as to the sufficiency of that evidence to support petitioner's defense under § 2 (b).

33 In addition, there has been widespread understanding that, under the Robinson-Patman Act, it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good faith to meet a lawful and equally low price of a competitor. This understanding is reflected in actions and statements of members and counsel of the Federal Trade Commission.[12] Representatives of the Department of Jus-

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[12] In cease and desist orders, issued both before and after the order in the instant case, the Commission has inserted saving clauses which recognize the propriety of a seller making a price reduction in good faith to meet an equally low price of a competitor, even though the seller's discrimination may have the effect of injuring competition at a lower level. See *In re Ferro-Enamel Corp.*, 42 F. T. C. 36; *In re Anheuser-Busch, Inc.*, 31 F. T. C. 986; *In re Bausch & Lomb Optical Co.*, 28 F. T. C. 186.

See also, the statement filed by Walter B. Wooden, Assistant Chief Counsel, and by Hugh E. White, Examiner for the Commission, with the Temporary National Economic Committee in 1941:

"The amended Act now safeguards the right of a seller to discriminate in price in good faith to meet an equally low price of a competitor, but he has the burden of proof on that question. This right is guaranteed by statute and could not be curtailed by any mandate or order of the Commission. . . . The right of self defense against competitive price attacks is as vital in a competitive economy as the right of self defense against personal attack." The Basing Point Problem 139 (TNEC Monograph 42, 1941).

In regard to the Commission's position on § 2(b), urged in the instant case, Allen C. Phelps, Assistant Chief Trial Counsel and Chief of the Export Trade Division of the Commission, testified before the Subcommittee on Trade Policies of the Senate Committee on Interstate and Foreign Commerce in June, 1949, that "This position, if upheld in the courts, in my judgment, will effectively and completely erase section 2(b) from the Robinson-Patman Act." Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 236, 81st Cong., 1st Sess. 66. See also, pp. 274-275.

tice have testified to the effectiveness and value of
34 the defense under the Robinson-Patman Act.[13] We see
no reason to depart now from that interpretation.[14]

The heart of our national economic policy long has been
faith in the value of competition. In the Sherman and
Clayton Acts, as well as in the Robinson-Patman Act, "Congress
was dealing with competition, which it sought to
protect, and monopoly, which it sought to prevent."
35 *Staley Mfg. Co.* v. *Federal Trade Comm'n,* 135 F. 2d
453, 455. We need not now reconcile, in its entirety,
the economic theory which underlies the Robinson-Patman

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[13] Herbert A. Bergson, then Assistant Attorney General, testifying for the Department, January 25, 1949, said: "The section [2(b)] presently permits sellers to justify otherwise forbidden price discriminations on the ground that the lower prices to one set of buyers were made in good faith to meet the equally low prices of a competitor." Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 236, 81st Cong., 1st Sess. 77. See also, report on S. 236 by Peyton Ford, Assistant to the Attorney General, to the Senate Committee on Interstate and Foreign Commerce. *Id.*, at 320. Mr. Bergson added the following in June, 1949: "While we recognize the competitive problem which arises when one purchaser obtains advantages denied to other purchasers, we do not believe the solution to this problem lies in denying to sellers the opportunity to make sales in good faith competition with other sellers." Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on S. 1008, 81st Cong., 1st Sess. 12.

[14] Attention has been directed again to the legislative history of the proviso. This was considered in the *Corn Products* and *Staley* cases. See especially, 324 U. S. at 752-753. We find that the legislative history, at best, is inconclusive. It indicates that it was the purpose of Congress to limit, but not to abolish, the essence of the defense recognized as absolute in § 2 of the original Clayton Act, 38 Stat. 730, where a seller's reduction in price had been made "in good faith to meet competition . . . ." For example, the legislative history recognizes that the Robinson-Patman Act limits that defense to price differentials that do not undercut the competitor's price, and the amendments fail to protect differentials between prices in different communities where those prices are not actually competitive. There is also a suggestion in the debates, as well as in the remarks of this Court in the *Staley* case, *supra*, that a competitor's lower price, which may be met by a seller under the protection of § 2(b), must be a lawful price. And see, S. Res. 224, 70th Cong., 1st Sess., directing the Federal Trade Commission to investigate and report to it on chain-store operators and F. T. C. Final Report on the Chain-Store Investigations, S. Doc. No. 4, 74th Cong., 1st Sess.

In the report of the Judiciary Committee of the House of Representatives, which drafted the clause which became § 2(b), there appears the following explanation of it:

"This proviso represents a contraction of an exemption now contained in section 2 of the Clayton Act which permits discriminations without limit where made in good faith to meet competition. It should be noted that while the seller is permitted to meet local competition, it does not permit him to cut local prices until his competitor has first offered lower prices, and then he can go no further than to meet those prices. If he goes further, he must do so likewise with all his other customers, or make himself liable to all of the penalties of the act, including treble damages. In other

Act with that of the Sherman and Clayton Acts.[15]
36 It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor. For example, if a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors, the seller may well find it essential, as a matter of business survival, to meet that price rather than to lose the customer. It might be that this customer is the seller's only available market for the major portion of the seller's product, and that the loss of this customer would result in forcing a much higher unit cost and higher sales price upon the seller's other customers. There is nothing to show a congressional purpose, in such a situation, to compel the seller to choose only between ruinously cutting its prices to all its customers to match the price offered to one, or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs. There is, on the other hand, plain language and established practice which permits a seller, through § 2(b), to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers.

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words, the proviso permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further." H. R. Rep. No. 2287, 74th Cong., 2d Sess. 16.

See also, 80 Cong. Rec. 6426, 6431-6436, 8229, 8235.

Somewhat changing this emphasis, there was a statement made by the managers on the part of the House of Representatives, accompanying the conference report, which said that the new clause was a "provision relating to the question of meeting competition, intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission . . . ." H. R. Rep. No. 2951, 74th Cong., 2d Sess. 7. The Chairman of the House Conferees also received permission to print in the Record an explanation of the proviso. 80 Cong. Rec. 9418. This explanation emphasizes the same interpretation as that put on the proviso in the *Staley* case to the effect that the lower price which lawfully may be met by a seller must be a lawful price. That statement, however, neither justifies disregarding the proviso nor failing to make findings of fact where evidence is offered that the prices met by the seller are lawful prices and that the meeting of them is in good faith.

[15] It has been suggested that, in theory, the Robinson-Patman Act as a whole is inconsistent with the Sherman and Clayton Acts. See Adelman, Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289, 1327-1350; Burns, The Anti-Trust Laws and the Regulation of Price Competition, 4 Law & Contemp. Prob. 301; Learned & Isaacs, The Robinson-Patman Law: Some Assumptions and Expectations, 15 Harv. Bus. Rev. 137; McAllister, Price Control by Law in the United States: A Survey, 4 Law & Contemp. Prob. 273.

In a case where a seller sustains the burden of proof placed upon it to establish its defense under § 2(b), we D find no reason to destroy that defense indirectly, merely because it also appears that the beneficiaries of the seller's price reductions may derive a competitive advantage from them or may, in a natural course of events, reduce their 37 own resale prices to their customers. It must have been obvious to Congress that any price reduction to any dealer may always affect competition at that dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory. Likewise, it must have been obvious to Congress that any price reductions initiated by a seller's competitor would, if not met by the seller, affect competition at the beneficiary's level or among the beneficiary's customers just as much as if those reductions had been met by the seller. The proviso in § 2(b), as interpreted by the Commission, would not be available when there was or might be an injury to competition at a resale level. So interpreted, the proviso would have such little, if any, applicability as to be practically meaningless. We may, therefore, conclude that Congress meant to permit the natural consequences to follow the seller's action in meeting in good faith a lawful and equally low price of its competitor.

In its argument here, the Commission suggests that there may be some situations in which it might recognize the proviso in § 2(b) as a complete defense, even though the seller's differential in price did injure competition. In support of this, the Commission indicates that in each case it must weigh the potentially injurious effect of a seller's price reduction upon competition at all lower levels against its beneficial effect in permitting the seller to meet competition at its own level. In the absence of more explicit requirements and more specific standards of comparison than we have here, it is difficult to see how an injury to competition at a level below that of the seller can thus be balanced fairly against a justification for meeting the competition at the seller's level. We hesitate to accept § 2(b) as establishing such a dubious defense. On the other hand, the proviso is readily understandable as simply continuing in effect a defense 38 which is equally absolute, but more limited in scope than that which existed under § 2 of the original Clayton Act.

The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded to that court with instructions to remand it to the Federal Trade Commission to make findings in conformity with this opinion.

It is so ordered.

MR. JUSTICE MINTON took no part in the consideration or decision of this case.

(See next page for opinion of
Mr. Justice Reed, dissenting.)

39 MR. JUSTICE REED, dissenting.

The Federal Trade Commission investigating practices of the Standard Oil Company of Indiana in selling its gasoline in the Detroit area at different prices to competing local distributors, in alleged violation of the Robinson-Patman (anti-price discrimination) Act. Standard's defense is not a denial of that discriminatory practice but a complete justification, said to be allowed by the Robinson-Patman Act, on the ground of trade necessity in order to meet an equally low price in Detroit of other gasoline refiners. On concluding the practice violated federal prohibitions against discriminatory sale prices, the Commission entered a cease and desist order against Standard's sale system. The order was enforced by the Court of Appeals after a minor modification. 43 F. T. C. 56; 173 F. 2d 210.

The need to allow sellers to meet competition in price from other sellers while protecting the competitors of the buyers against the buyers' advantages gained from the price discrimination was a major cause of the enactment of the 1936 Robinson-Patman Act. The Clayton Act of 1914 had failed to solve the problem. The impossibility of drafting fixed words of a statute so as to allow sufficient flexibility to meet the myriad situations of national commerce, we think led Congress in the Robinson-Patman Act to put authority in the Federal Trade Commission to determine when a seller's discriminatory sales price violated the prohibitions of the anti-monopoly statute, 40 § 2(a), 49 Stat. 1526, and when it was justified by a competitor's legal price.[1] The disadvantage to business of this choice was that the seller could not be positive before the Commission acted as to precisely how far he might go in price discrimination to meet and beat his competition. The Commission acted on its interpretation of the Act.[2] Believing it important to support the purpose of Congress and the Commission's interpretation of the Act, with which we agree, we state our reasons.

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[1] The difficulties of any other approach are illustrated by the attempt of Congress to clarify the Robinson-Patman Act. See President's veto message on S. 1008, Cong. Rec. June 16, 1950, p. 8844, and conference reports, House of Reps., 81st Cong., 1st Sess., No. 1422, October 13, 1949, and 2d Sess., No. 1730, March 3, 1950.

The Court first condemns the Commission's position that meeting in good faith a competitor's price merely rebuts the prima facie establishment of discrimination based on forbidden differences in sales price, so as to require an affirmative finding by the Commission that nevertheless there may be enjoinable injury under the Robinson-Patman Act to the favored buyer's competitors. The Court then decides that good faith in meeting competition was an absolute defense for price discrimination, saying:

> "On the other hand, the proviso is readily understandable as simply continuing in effect an equally absolute, but more limited, defense than that which existed under § 2 of the original Clayton Act."

Such a conclusion seems erroneous. What follows in this dissent demonstrates, we think, that Congress intended so to amend the Clayton Act that the avenue of escape given price discriminators by its meeting competition clause should be narrowed. The Court's interpreta-
41 tion leaves what the seller can do almost as wide open as before. See p. 12 *et seq., infra.* It seems clear to us that the interpretation put upon the clause of the Robinson-Patman Act by the Court means that no real change has been brought about by the amendment.

The public policy of the United States fosters the free-enterprise system of unfettered competition among producers and distributors of goods as the accepted method to put those goods into the hands of all consumers at the least expense.[3] There are, however, statutory exceptions to such unlimited competition.[4] Nondiscriminatory pricing tends to weaken competition in that a seller, while otherwise maintaining his prices, cannot meet his antagonist's price to get a single order or customer. But Congress obviously concluded that the greater advantage would accrue by fostering equal access to supplies by competing merchants or other purchasers in the course of business.[5]

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[2] Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on S. 1008, 81st Cong., 1st Sess., June 8 and 14, 1949, p. 61.

[3] *Associated Press* v. *United States*, 326 U. S. 1, 13; *United States* v. *Line Material Co.*, 333 U. S. 287, 309.

[4] *E. g.*, Interstate Commerce Act, § 5, 49 U. S. C. §5; Communications Act of 1934, § 221, 47 U. S. C. § 221; Miller-Tydings Act, 15 U. S. C. § 1. And see Mason, The Current Status of the Monopoly Problem in the United States, 62 Harv. L. Rev. 1265.

The first enactment to put limits on discriminatory selling prices was the Clayton Act in 1914, 38 Stat. 730, § 2. Section 11 enabled the Commission to use its investigatory and regulatory authority to handle price discrimination. Section 2 provided for the maintenance of competition by protecting the ability of business rivals to obtain commodities on equal terms. The Robinson-Patman Act moved further toward this objective. In the margin appear the applicable words of the Clayton Act followed by those 42 of the Robinson-Patman Act. Phrased summarily for this case, it may be said that the italicized words in the Clayton Act were the source of the difficulties in enforcement that Congress undertook to avoid by the italicized words of the Robinson-Patman Act.[6]

It will be noted that unless the effect is given the Robinson-Patman amendment contended for by the Federal Trade Commission, there is little done to overcome the difficulties arising from the meeting competition clause of the Clayton Act. Formerly "discrimination in price in the same or different communities made in good faith to meet competition." was allowed as a complete defense.

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[5] For a discussion of the merits of the legislation, see Adelman, Effective Competition and the Anti-Trust Laws, 61 Harv. L. Rev. 1289.

[6] Clayton Act:

"SEC. 2. That it shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities, . . . where the effect of such discrimination may be to substantially lessen competition, or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent . . . *discrimination in price in the same or different communities made in good faith to meet competition*: . . . .".

Robinson-Patman Act:

"SEC. 2.(a) That it shall be unlawful for any person engaged in commerce, . . . to discriminate in price between different purchasers of commodities . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, *or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them*; . . . .

"SEC. 2.(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, *the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown*, the Commission is authorized to issue an order terminating the discrimination: Provided, however, *That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor*."

43 Now it is "made in good faith to meet an equally low low price of a competitor." The Court says:

> "It thus eliminates certain difficulties which arose under the original Clayton Act. For example, it omits reference to discrimination in price 'in the same or different communities . . .' and it thus restricts the proviso to price differentials occurring in actual competition. It also excludes reductions which undercut the 'lower price' of a competitor. None of these changes, however, cut into the actual core of the defense. That still consists of the provision that wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price."

We see little difference. The seller may still, under the Court's interpretation, discriminate in sales of goods of like quantity and quality between buyers on opposite corners, so long as one gets a lower delivered price offer from another seller, no matter where located. The "actual core of the defense" remains intact.

I.

Legislative History. Upon the interpretation of the words and purpose of this last addition by the Robinson-Patman Act to curbs on discrimination in trade, the narrow statutory issues in this case turn. Though narrow, they are important if trade is to have the benefit of careful investigation before regulation, attainable under the Federal Trade Commission Act but so difficult when attempted by prosecutions in courts with the limitations of judicial procedure. As an aid to the interpretation of § 2(b) we set out applicable parts of its legislative history.

The Clayton Act created a broad exception from control for prices made in good faith to meet competition. This raised problems of which Congress was aware. In

44 reporting on a redrafted version of S. 3154, the Senate's companion bill to the House bill that became the

Robinson-Patman Act, the Senate Committee on the Judiciary, February 3, 1936, pointed out the weakness of § 2 of the Clayton Act in permitting discrimination to meet competition, and suggested a harsh remedy, the elimination of its italicized proviso in note 6 *supra*, without the mollifying the words of § 2 (b) of the Robinson-Patman Act.[7] In March, the House Committee on the Judiciary made its report on the bill that became the Act. Section 2 (b) was then in substantially its present form. The report pointed out the draftsmen's purpose to strengthen the laws against price discrimination, directly or indirectly through brokerage or other allowances, services or absorptions of costs.[8] It commented that the subsection that

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[7] S. Rep. No. 1502, 74th Cong., 2d Sess., p. 4:

"The weakness of present section 2 lies principally in the fact that: (1) It places no limit upon differentials permissible on account of differences in quantity; and (2) it permits discriminations to meet competition, and thus tends to substitute the remedies of retaliation for those of law, with destructive consequences to the central object of the bill. Liberty to meet competition which can be met only by price cuts at the expense of customers elsewhere, is in its unmasked effect the liberty to destroy competition by selling locally below cost, a weapon progressively the more destructive in the hands of the more powerful, and most deadly to the competitor of limited resources, whatever his merit and efficiency. While the bill as now reported closes these dangerous loopholes, it leaves the fields of competition free and open to the most efficient, and thus in fact protects them the more securely against inundations of mere power and size.

"Specific phrases of section 2(a), as now reported, may be noted as follows:

"One: '* * * where either or any of the purchases involved in such discrimination are in commerce * * *.'

"Section 2(a) attaches to competitive relations between a given seller and his several customers, and this clause is designed to extend its scope to discriminations between interstate and intrastate customers, as well as between those purely interstate. Discriminations in excess of sound economic differences involve generally an element of loss, whether only of the necessary minimum of profits or of actual costs, that must be recouped from the business of customers not granted them. When granted by a given seller to his customers in other States, and denied to those within the State, they involve the use of that interstate commerce to the burden and injury of the latter. When granted to those within the State and denied to those beyond, they involve conversely a directly resulting burden upon interstate commerce with the latter. Both are within the proper and well-recognized power of Congress to suppress."

[8] H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 3:

"The purpose of this proposed legislation is to restore, so far as possible, equality of opportunity in business by strengthening anti-trust laws and by protecting trade and commerce against unfair trade practices and unlawful price discrimination, and also against restraint and monopoly for the better protection of consumers, workers, and independent producers, manufacturers, merchants, and other businessmen.

"To accomplish its purpose, the bill amends and strengthens the Clayton Act by prohibiting discriminations in price between purchasers where such

became § 2 (b) let a seller "meet the price actually previously offered by a local competitor."[9] The language
46 used in regard to competition in the bills and in the Act seems to have been based on a recommendation of the Federal Trade Commission.[10] The Commission had been unable to restore the desired competition under the Clayton Act, and Congress evidently sought to open the way for effective action.[11]

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discriminations cannot be shown to be justified by differences in the cost of manufacture, sale, or delivery resulting from different methods or quantities in which such commodities are to such purchasers sold and delivered. It also prohibits brokerage allowances except for services actually rendered, and advertising and other service allowances unless such allowances or services are made available to all purchasers on proportionally equal terms. It strikes at the basing-point method of sale, which lessens competition and tends to create a monopoly."

[9] *Id.*, p. 16:

"This proviso represents a contraction of an exemption now contained in section 2 of the Clayton Act which permits discriminations without limit where made in good faith to meet competition. It should be noted that while the seller is permitted to meet local competition, it does not permit him to cut local prices until his competitor has first offered lower prices, and then he can go no further than to meet those prices. If he goes further, he must do so likewise with all his other customers, or make himself liable to all of the penalties of the act, including treble damages. In other words, the proviso permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further."

[10] Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess., p. 96: "A simple solution for the uncertainties and difficulties of enforcement would be to prohibit unfair and unjust discrimination in price and leave it to the enforcement agency, subject to review by the courts, to apply that principle to particular cases and situations. The soundness of and extent to which the present provisos would constitute valid defenses would thus become a judicial and not a legislative matter.

"The Commission therefore recommends that section 2 of the Clayton Act be amended to read as follows:

" 'It shall be unlawful for any person engaged in commerce, in any transaction in or affecting such commerce, either directly or indirectly, to discriminate unfairly or unjustly in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States.' "

This report was utilized by the House Committee dealing with the proposed Robinson-Patman legislation. H. R. Rep. No. 2287, 74th Cong., 2d Sess., pp. 3, 7.

[11] *Id.*, p. 64: "If the discrimination is 'on account of differences in the grade, quality, or quantity of the commodity sold,' or makes 'only due allowance for difference in the cost of selling or transportation,' or is 'made in good faith to meet competition,' it is not unlawful, even though the effect 'may be to substantially lessen competition or tend to create a monopoly in any line of commerce.' Discriminatory price concessions given to prevent the loss of a chain store's business to a competing manufacturer, to prevent it manufacturing its own goods, or to prevent it from discouraging in its stores the sale of a given manufacturer's goods, may be strongly

47 Events in the course of the proposed legislation in
the Senate and House have pertinence. The Senate
inserted the original ineffective language of the Clayton
Act in its exact form in the Senate bill. In the same draft
it adopted an amendment similar to the proviso ultimately
enacted. 80 Cong. Rec. 6426, 6435. In the House, Repsentative Patman explained his views of the dangers
in the original proviso.[12] It was taken out in Confer-
48 ence.[13] The Chairman of the House managers, Mr. Ut-
terback, before the Conference Report was agreed to

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urged by the manufacturer as 'made in good faith to meet competition.'" See p. 90, *id*.

Attention was called to this need. H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 7: "Some of the difficulties of enforcement of this section as it stands are pointed out in the [Final Report] of the Federal Trade Commission above referred to, at pages 63 and following."

[12] 80 Cong. Rec. 8235:

"Mr. Chairman, I would like to ask a question of the gentleman from Texas [Mr. Patman]. A great many of the industries in Ohio were very much in favor of the proviso in the Senate bill, appearing on page 4, and reading as follows:

"'And provided further, That nothing herein contained shall prevent discrimination in price in the same or different commodities made in good faith to meet competition.'

"I find that on page 9 of the Patman bill, beginning in line 14, there appear these words:

"'Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor.'

"Will the gentlman explain the difference between these two proposals?

"Mr. PATMAN. If the Senate amendment should be adopted it would really destroy the bill. It would permit the corporate chains to go into a local market, cut the price down so low that it would destroy local competitors and make up for their losses in other places where they had already destroyed their competitors. One of the objects of the bill is to get around that phrase and prevent the large corporate chains from selling below cost in certain localities, thus destroying the independent merchants, and making it up at other places where their competitors have already been destroyed. I hope the gentleman will not insist on the Senate amendment, because it would be very destructive of the bill. The phrase 'equally low price' means the corporate chain will have the right to compete with the local merchants. They may meet competition, which is all right, but they cannot cut down the price below cost for the purpose of destroying the local man.

"Mr. COOPER of Ohio. What does the gentleman's proviso mean?

"Mr. PATMAN. It means they may meet competition, but not cut down the price below cost. It means an equally low price but not below that. It permits competition, but it does not permit them to cut the price below cost in order to destroy their competitors. I hope the gentleman will not insist on the Senate amendment."

But see pp. 15 and 16, *infra*.

[13] H. R. Rep. No. 2951, 74th Cong., 2d Sess., pp. 6-7:

"The Senate bill contained a further proviso—

"'That nothing herein contained shall prevent discrimination in price in by the House, received permission to print an explanation of his understanding of the proviso. He explained that the proviso "does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. . . . It leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given. . . ." The pertinent parts of the statement appear in the margin.[14]

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the same or different communities made in good faith to meet competition.'

"This language is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act. The Senate receded, and the language is stricken. A provision relating to the question of meeting competition, intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission, is included in subsection (b) in the conference text as follows:

"'Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.'"

[14] 80 Cong. Rec. 9418:

"In connection with the above rule as to burden of proof, it is also provided that a seller may show that his lower price was made in good faith to meet an equally low price of a competitor, or that his furnishing of services or facilities was made in good faith to meet those furnished by a competitor. It is to be noted, however, that this does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. This provision is entirely procedural. It does not determine substantive rights, liabilities, and duties. They are fixed in the other provisions of the bill. It leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given, as one lying within the limitations laid down by the bill, and whether the way in which the competition was met lies within the latitude allowed by those limitations.

"This procedural provision cannot be construed as a carte blanche exemption to violate the bill so long as a competitor can be shown to have violated it first, nor so long as that competition cannot be met without the use of oppressive discriminations in violation of the obvious intent of the bill.

"If this proviso were construed to permit the showing of a competing offer as an absolute bar to liability for discrimination, then it would nullify the act entirely at the very inception of its enforcement, for in nearly every case mass buyers receive similar discriminations from competing sellers of the same product. One violation of law cannot be permitted to justify another. As in any case of self-defense, while the attack against which the defense is claimed may be shown in evidence, its competency as a bar depends also upon whether it was a legal or illegal attack. A discrimination in violation of this bill is in practical effect a commercial bribe to lure the business of the favored customer away from the competitor, and if one bribe were permitted to justify another the bill would be futile to achieve its plainly intended purposes."

49 II.

Statutory Interpretation. This résumé of the origin and purpose of the original § 2 of the Clayton Act and the amendments of the Robinson-Patman Act gives a basis for determining the effect of this section in a hearing before the Commission where the charge, as here, that a seller during the same period of time has sold the same commodities to various purchsers at different 50 prices, is admitted and the defense, the elements of which are likewise admitted, is that the discrimination was made in good faith to meet an equally low price of a competition. Does meeting in good faith a competitor's price constitute a complete defense under the proviso to § 2 (b)? Or does the fact of good faith reduction in price to a purchaser to meet a competitor's price merely rebut the prima facie establishment of discrimination, arising under the statute from proof of forbidden differences in price,[15] so as to require under § 2 (a) affirmative finding by the Commission that there may be injury to competition? Petitioner asserts that good faith meeting of a competitor's price is a complete defense. The Commission and the Court of Appeals take the opposite position, with which we concur.

This is our reason. The statutory development and the information before Congress concerning the need for strengthening the competitive price provision of the Clayton Act, make clear that the evil dealt with by the proviso of § 2 (b) was the easy avoidance of the prohibition against price-discrimination. The control of that evil was an important objective of the Robinson-Patman Act. The debates, the Commission's report and recommendation and statutory changes show this. The Conference Report and the explanation by one of the managers, Mr. Utterback, are quite definitive upon the point. Because of experience under the Clayton Act, Congress refused to continue its competitive price proviso. Yet adoption of petitioner's position would permit a seller of nationally distributed goods to discriminate in favor of large chain retailers, for the seller could give to the large retailer a price lower than that charged to small retailers, and could then completely justify its discrimination by showing that the large retailer had first obtained the same

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[15] See n. 6, *supra*.

low-price from a local low-cost producer of competitive
51 goods. This is the very type of competition that Con-
gress sought to remedy. To permit this would not seem consonant with the other provisions of the Robinson-Patman Act, strengthening regulatory powers of the Commission in "quantity" sales, special allowances and changing economic conditions.

The structure and wording of the Robinson-Patman Amendment to the Clayton Act also conduce to our conclusion. In the original Clayton Act, § 2 was not divided into subsections. In that statute, § 2 stated the body of the substantive offense, and then listed, in a series of provisos, various circumstances under which discriminations in price were permissible. Thus the statute provided that discriminations were not illegal if made on account of differences in the grade of the commodity sold, or differences in selling or transportation costs. Listed among these absolute justifications of the Clayton Act appeared the provision that "nothing herein contained shall prevent discrimination in price . . . made in good faith to meet competition." The Robinson-Patman Act, however, made two changes in respect of the "meeting competition" provision, one as to its location, the other in the phrasing. Unlike the original statute, § 2 of the Robinson-Patman Act is divided into two subsections. The first, § 2 (a), retained the statement of substantive offense and the series of provisos treated by the Commission as affording full justifications for price discriminations; § 2 (b) was created to deal with procedural problems in Federal Trade Commission proceedings, specifically to treat the question of burden of proof. In the process of this division, the "meeting competition" provision was separated from the other provisos, set off from the substantive provisions of § 2 (a), and relegated to the position of a proviso to the procedural subsection, § 2 (b). Unless it is believed that this change of position was
fortuitous, it can be inferred that Congress meant
52 to curtail the defense of meeting competition when it
banished this proviso from the substantive division to the procedural. In the same way, the language changes made by § 2(b) of the Robinson-Patman Act reflect an intent to diminish the effectiveness of the sweeping defense offered by the Clayton Act's "meeting of competition" proviso. The original provisos in the Clayton Act,

and the provisos now appearing in § 2 (a), are worded to make it clear that nothing shall prevent certain price practices, such as "price differentials . . . [making] . . . due allowance for differences in the cost of manufacture . . .," or "price changes . . . in response to changing conditions affecting the market for . . . the goods concerned . . . ." But in contrast to these provisions, the proviso to § 2 (b) does not provide that nothing "shall prevent" a certain price practice; it provides only that "nothing shall prevent a seller rebutting . . . [a] . . . prima facie case by showing" a certain price practice—meeting a competitive price. The language thus shifts the focus of the proviso from a matter of substantive defense to a matter of proof. Consistent with each other, these modifications made by the Robinson-Patman Act are also consistent with the intent of Congress expressed in the legislative history.

The Court suggests that former Federal Trade Commission cases decided here have treated the meeting-competition clause of the Robinson-Patman Act as being an absolute defense, not merely a rebuttal of the discrimination charge requiring further finding by the Commission. Reference is made to *Corn Products Refining Co.* v. *Federal Trade Comm'n*, 324 U. S. 726, and *Federal Trade Comm'n* v. *Staley Mfg. Co.*, 324 U. S. 746. In the *Corn Products* case, dealing with a basing point scheme for delivered prices, this Court merely said at p. 741:

> "The only evidence said to rebut the prima facie
> case made by proof of the price discriminations was
> 53 given by witnesses who had no personal knowledge
> of the transactions, and was limited to statements
> of each witness's assumption or conclusion that the
> price discriminations were justified by competition."

And then went on to use the language quoted at p. 12 of the Court's opinion. There was no occasion to consider the effect of a successful rebuttal. As authority for its statement, we there cited the *Staley* case at 324 U. S. 746.

That citation included these words at pp. 752-753:

> "Prior to the Robinson-Patman amendments, § 2 of the Clayton Act provided that nothing contained in it 'shall prevent' discriminations in price 'made in good faith to meet competition.' The change in language of this exception was for the purpose of making the defense a matter of evidence in each case, raising

> a question of fact as to whether the competition justified the discrimination. See the Conference Report, H. Rep. No. 2951, 74th Cong., 2d Sess., pp. 6-7; see also the statement of Representative Utterback, the Chairman of the House Conference Committee, 80 Cong. Rec. 9418."

After that statement, which it should be noted relies upon Mr. Utterback's interpretation quoted at note 14 of this opinion, the Court in the *Staley* case goes on to say that there was no evidence to show that Staley adopted a lower price to meet an equally low price of a competitor. Again there was no occasion for this Court to meet the present issue. We think our citation in *Staley*, quoted above, shows the then position of this Court.[16]

54 There are arguments available to support the contrary position. No definite statement appears in the committee reports that "meeting competition" is henceforth to be only a rebuttal of a prima facie case and not a full justification for discrimination in price. The proviso of § 2 (b) can be read as having the same substantive effect as the provisos of § 2 (a). The earlier provisos are treated by the Commission as complete defenses. Perhaps there is an implication favorable to the petitioner's position in Representative Patman's omission to state the Federal Trade Commission interpretation on the floor. See n. 12, *supra*.

The underlying congressional purpose to curtail methods of avoiding limitations on price discriminations, however, considered with the more specific matters discussed herein, satisfies us that we should adopt the conclusion of the Commission and the Court of Appeals.[17] We believe that good faith meeting of a competitor's price only rebuts the prima facie case of violation established by showing the price discrimination. Whether the proven price discrimination is of a character that violates § 2 (a) then becomes a matter for the determination of the Commission on a showing that there may be injury to competition.

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[16] The Court's opinion in this case refers, p. 12, notes 12 and 13, to the opinions of the Court of Appeals for the Seventh Circuit in *Staley* and *Corn Products*, 144 F. 2d 211 and 221. But that Court reversed its position in the opinion below, 173 F. 2d 210, 216. It is fair to assume that reversal was because of our opinions in *Corn Products* and *Staley*.

[17] It is hardly necessary to note that the wisdom of the enactment is not for the Commission nor the courts in enforcing the Act. The Commission recently has advised Congress that while "on balance it would be preferable to make the good faith meeting of competition a complete defense," it "does not strongly urge either view upon the Congress." Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on S. 1008, 81st Cong., 1st Sess., June 8 and 14, 1949, p. 61. Compare *Standard Oil Co. v. United States*, 337 U. S. 293, 311. This statement confirmed the Commission's position taken in this case. There were other officials of the Commission who have taken the view adopted by the Court.

55 III.

Conclusion. In view of the Court's ruling, we will not enlarge this dissent by discussing other problems raised by the case. We have said enough to show that we would affirm the decree below in principle, even though we should conclude some amendment might be required in the wording of the order.

The Chief Justice and Mr. Justice Black join in this dissent.

56 United States of America, ss:

(Filed Feb. 7, 1951. Kenneth J. Carrick, Clerk.)

(Seal)

The President of the United States of America, To the Honorable the Judges of the United States Court of Appeals for the Seventh Circuit Greeting:

Whereas, lately in the United States Court of Appeals for the Seventh Circuit, in a cause between Standard Oil Company, Petitioner, and Federal Trade Commission, Respondent, No. 9215, wherein the final judgment of the said Court of Appeals modifying the order of the Commission and affirming said order as modified was duly entered in said cause on the 29th day of April, A. D. 1949, which judgment is fully set out in the record of said cause in the office of the Clerk of said Court of Appeals and is incorporated herein by reference thereto;

as by the inspection of the transcript of the record of the said United States Court of Appeals which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

57 And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and fifty, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, reversed.

And it is further ordered, That this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Seventh Circuit with instructions to remand the cause to the Federal Trade Commission to make findings in conformity with the opinion of this Court.

January 8, 1951.

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, the fifth day of February, in the year of our Lord on ethousand nine hundred and fifty-one.

Charles Elmore Cropley,
Clerk of the Supreme Court of the United States.
By Hugh W. Barr,
Deputy.

Endorsed: U. S. C. A. #9215. Supreme Court of the United States, No. 1, October Term, 1950. Standard Oil Company, *vs.* Federal Trade Commission. Mandate. Filed Feb. 7, 1951. Kenneth J. Carrick, Clerk.

58 UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

February 14, 1951.

Before

Hon. Otto Kerner, Circuit Judge.
Hon F. Ryan Duffy, Circuit Judge.

Standard Oil Company, *Petitioner,*
No. 9215 *vs.*
Federal Trade Commission, *Respondent.*

Petition for Review of an Order of the Federal Trade Commission.

On consideration of the judgment of the Supreme Court of the United States entered in this cause on January 8, 1951, as set forth on the mandate of the Supreme Court which was filed in this Court on February 7, 1951, which said judgment and mandate provide that the judgment of this Court be reversed and that this Court remand the cause to the Federal Trade Commission with instructions to make findings in conformity with the opinion of the Supreme Court of the United States,

It is ordered and adjudged by this Court that the judgment of this Court entered in this cause on March 11, 1949 be, and the same is hereby, vacated and set aside, and that this cause be, and the same is hereby, remanded to the Federal Trade Commission with instructions to make findings in conformity with the opinion of the Supreme Court of the United States filed on January 8, 1951.

59 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

Commissioners:
James M. Mead, Chairman,
Lowell B. Mason,
John Carson,
Stephen J. Spingarn.

In the Matter of
Standard Oil Company, a corporation. } Docket No. 4389.

ORDER GRANTING RESPONDENT LEAVE TO PRESENT OBJECTIONS TO MODIFIED FINDINGS AS TO THE FACTS.

The Commission, acting pursuant to the mandate of the United States Court of Appeals for the Seventh Circuit filed on February 14, 1951, having made its modified findings as to the facts and its conclusion in this proceeding, in which it was found, among other things, that the respondent has not justified the discriminatory prices granted Ned's Auto Supply Company, Citrin-Kolb Oil Company, Wayne Oil Company and Stikeman Oil Company, Inc. by showing that such discriminatory prices were the result of lower prices granted in good faith to meet equally low prices of competitors within the meaning of subsection (b) of Section 2 of the Clayton Act, as amended; and

The Commission being of the opinion, however, that before said modified findings as to the facts and conclusion are finally issued the respondent should be afforded the opportunity of presenting its views with respect thereto for the Commission's consideration:

It Is Ordered that the respondent, Standard Oil Company, be, and it hereby is, granted thirty (30) days after service upon it of this order within which it may file with the Commission an appropriate memorandum or brief setting forth any objections it may have to the issuance of the attached document as the Commission's modified findings as to the facts and conclusion in this proceeding.

60 It Is Further Ordered that the respondent may, if it desires, request oral argument before the Commission in support of any such objections.

By the Commission.

D. C. Daniel,
Secretary.

(Seal)

Issued: March 24, 1952.

* * * * *

92 UNITED STATES OF AMERICA.

Before Federal Trade Commission.

Commissioners:
James M. Mead, Chairman,
Lowell B. Mason,
John Carson,
Stephen J. Spingarn.

* * (Caption—4389) * *

ORDER TO SHOW CAUSE WHY MODIFIED ORDER TO CEASE AND DESIST SHOULD NOT BE FURTHER MODIFIED.

The Commission having reconsidered its modified order to cease and desist in this proceeding in the light of its experience and the Court decisions which have been rendered in a number of price discrimination cases since said order was issued; and,

The Commission recognizing the desirability of making its orders as clear and explicit as possible and being of the opinion that the public interest and the interest of the respondent requires that the aforesaid modified order to cease and desist be further modified:

It Is Ordered that the respondent, Standard Oil Company, be, and it hereby is, granted leave to show cause, if any there be, by written memorandum or brief filed within thirty (30) days after service upon it of this order, why the modified order to cease and desist issued in this proceeding on August 9, 1946, should not be further modified to read as follows:

"It Is Ordered that the respondent, Standard Oil Company (Indiana), a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale or distribution of gasoline in commerce, as 'commerce' is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of gasoline of like grade and quality:

93 "By selling such gasoline to any retailer thereof at a lower price than to any other retailer who in fact competes with the favored purchaser in the resale of such gasoline to the public ('Retailer' as here used applies to that portion of the business of any purchaser which consists of the retail sale of gasoline to the public).

"For the purpose of comparison, the term 'price' as used in this order includes discounts, rebates, allowances and other terms and conditions of sale.

"It Is Further Ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order."

It Is Further Ordered that the respondent may, if it desires, request oral argument before the Commission in support of its position.

By the Commission.

D. C. Daniel,
Secretary.

(Seal)
Issued: March 24, 1952.

94 BEFORE FEDERAL TRADE COMMISSION.

• • (Caption—4389) • •

STATEMENT OF COMMISSIONER MASON WITH REGARD TO THE PROPOSED MODIFIED FINDINGS AS TO THE FACTS AND CONCLUSION, AND ORDER TO SHOW CAUSE WHY MODIFIED ORDER TO CEASE AND DESIST SHOULD NOT BE FURTHER MODIFIED.

I am in complete agreement insofar as the proposed order strikes out Paragraphs 1, 2 and 3 of the Commission's order of August 9, 1946. In this respect, the new Commission has adopted the points I raised before the old Commission in my dissent filed on August 9, 1946, namely:

"First, in my judgment, the order is too indefinite and obscure to be followed. The first half merely says, 'Look at what Standard did and don't do that.' I refer specifically to those portions of the order which state that the respondent is ordered to cease and desist from discriminating

'1. By selling such gasoline * * * in the manner * * * stated in the findings * * *.

'2. By continuing or resuming the discriminations * * * described in the Commission's findings * * *.

'3. By otherwise discriminating * * * in a manner * * * similar to * * * the discrimination * * * referred to * * * in the Commission's findings * * *.'

"An order is a command to do or refrain from doing certain things, and thus should interpret the Robinson-Patman Act ideals into completely understandable, explicit directions.

"To rely on the finding of facts to determine the command of an order is bad. How can business men 95 determine the standard at which they must aim if the Commission will not set down in words and figures in the order what is illegal?

"The order of the Commission, being of a negative quality, that is to say, an order to cease and desist, should ban specific acts and thus by a series of quasi-judicial exclusions, direct all men of enterprise toward the best practices of their trade."

As to the validity of the balance of the order and the modified findings proposed by the Commission pertaining to the issue of good faith meeting of competition, I reserve judgment until the matters have been developed through presentation of briefs and oral argument.

Lowell B. Mason,
Commissioner.

183 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

Docket No. 4389.

In the Matter
of
Standard Oil Company, a corporation.

STATEMENT OF RESPONDENT'S OBJECTIONS TO PROCEDURE, FINDINGS, CONCLUSION AND MODIFIED ORDER OF FEDERAL TRADE COMMISSION.

Weymouth Kirkland,
Howard Ellis,
Hammond E. Chaffetz,
John C. Butler,
W. H. Van Oosterhout,
of
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Attorneys for Respondent.

Thomas E. Sunderland,
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Gordon E. Tappan,
910 South Michigan Avenue,
Chicago 80, Illinois,
Of Counsel.

May 29, 1952.

* * (Caption—4389) * *

STATEMENT OF RESPONDENT'S OBJECTIONS TO PROCEDURE, FINDINGS, CONCLUSION AND MODIFIED ORDER OF FEDERAL TRADE COMMISSION.

Comes now Standard Oil Company, a corporation, respondent herein, and, in accordance with the order of the Commission of March 24, 1952, sets forth its objections to the issuance of the modified findings as to the facts and conclusion, and to the entry of the modified order, as promulgated by the Commission on March 24, 1952, and to the procedure followed by the Commission herein.

The Commission, to which this matter was remanded to make findings in conformity with the opinion of the Supreme Court, 340 U. S. 231, has considered the record of the prior proceedings, ex parte. Without hearing or considering any additional evidence, the Commission—to use its own words—"is convinced" that respondent's price reductions, which it admittedly made solely in order to keep its four tank-car customers in Detroit, were not made in good faith to meet the equally low price of a competitor within the meaning of Section 2(b) of the amended Clayton Act. This new adverse finding of the Commission is made in the face of past actions of the Commission which, under all the circumstances, foreclose any finding other than one of good faith.

I.

The Improper Procedure of the Commission.

At the outset, respondent objects to the arbitrary manner in which the Commission has acted upon the remand. Respondent was furnished with no notice or specification by the Commission, let alone afforded any opportunity to be heard, concerning the respects in which its heretofore virtually conceded good faith is now adjudged to be bad faith—a matter of which the Commission, following its private deliberations, is now "convinced". Respondent asserts that the Commission has proceeded most improperly and arbitrarily, and has denied respondent the rudiments of a fair hearing.

A. Respondent's Lack of Adequate Time.

The Commission had allowed itself approximately fourteen months, following the mandate of the Supreme Court, to fashion in its own councils its present revised findings. On March 26, 1952, respondent was suddenly served with the revised findings, conclusion and order of the Commission and was given thirty days to show cause, if any there be, why the order of the Commission to cease and desist should not be entered in the form promulgated by it. Coupled with this formal dispensation, a concurrent period of time was allotted to respondent within which to file with the Commission a memorandum or brief setting forth its objections to the issuance of the Commission's present findings and conclusion.

Respondent asked the Commission that it be accorded sixty additional days to respond to the present findings, conclusion and order, protesting that thirty days' time was not adequate. This request was renewed on May 15, 1952,[*] but the Commission granted extensions which afforded respondent to May 29, 1952—only thirty-five more days than originally were allowed for the preparation of its views. The time thus allotted to respondent is utterly inadequate in view of the size of the record, the complexity of the issues involved, and the novel interpretations of the law
that the Commission has made. Accordingly, in sub-
185 mitting this statement, respondent wishes to reiterate
that it has not had adequate opportunity to give detail to its objections to the action which the Commission is taking.

B. The Denial of a Fair Hearing.

Respondent objects also to the procedure followed by the Commission in revising the findings and modifying the order in advance of any opportunity on respondent's part to be heard.

On March 14, 1951, respondent made the request that it be heard both on procedure and on substance with respect to the further action of the Commission, and that such matters not be considered, *ex parte*, even provisionally. The Commission's response to respondent's request was made a year later—on March 24, 1952—promising respondent the opportunity of presenting its views "(I)n the event the Commission decides to modify its findings in the case adversely to the respondent."* Four days later, the Commission acted "adversely to the respondent"—and professes now to permit respondent "the opportunity of presenting its views", the Commission taking this action after it had become "convinced" of the findings and order it has fashioned.

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[*] This request was made by letter addressed to Commissioner Spingarn a copy of such letter being attached to this statement of objections

Proper conformance to the mandate of the Supreme Court, in the absence of additional evidence which the Commission has seen fit neither to adduce nor to desire, would require that the Commission adhere to the determination of respondent's good faith which its late counsel conceded.** Particularly under the circumstances of this case,*** it would have seemed appropriate, if not necessary, that the present Commission, before allowing itself to become "convinced" in any manner at variance with that of respondent's good faith, should hear from the respondent as well as from the Commission's staff.

Of the present members of the Commission, only one Commissioner was a member at the time that the original findings were made. That Commissioner explicitly supported respondent's defense of good faith. The others, in practical effect, conceded it. It is obvious that three of the present four Commissioners who now assume responsibility for a contrary determination have had no prior familiarity with the evidence and the record, and have acted entirely upon the basis of an *ex parte* determination designed to emasculate the Supreme Court's opinion. The opportunity afforded to respondent in this setting to attempt to persuade the majority of the Commission to revise either the findings or order does violence to basic concepts of fair hearing and fair play, and negatives objective judicial consideration or conflicting points of view.

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* Copies of this exchange of letters are attached to this statement of objections.

** The late Walter B. Wooden, counsel for the Commission, said in his argument before it on April 25, 1946:

> "Desiring to test the legal status of such defense, the Commission found that it was not material as a matter of law whether such defense could be sustained as a matter of fact under the circumstances of this case. Accordingly, it made no finding on the factual question.
>
> "The result, I suppose, is the same as though the existence of the respondent's good faith to meet an equally low price of a competitor has been conceded." (Pp. 100-101 of Official Report of Oral Argument before Federal Trade Commission.)

*** In the argument in the Court of Appeals, Judge Minton stated that, in view of the obvious good faith of respondent, any remand to the Commission on the good faith issue "would be an idle ceremony because you would just make it" (*i. e.*, the finding of good faith). *Standard Oil Co.* v. *F. T. C.*, 173 F. 2d 210 (7th Cir. 1949). Transcript of Oral Argument, p. 66.

In this case it is clear that the majority of the Commission have already considered the matters involved *ex parte.* In its order of March 24, 1952, the Commission recites that it has "made" its modified findings as to the facts and its conclusion that respondent did not act in good faith. Acknowledging it is already "convinced", the Commission states that before its findings and conclusion "are finally issued" respondent should be offered "the opportunity of presenting its views".

This does not suffice. In the prior proceedings, the Commission had conceded respondent's good faith in meeting the lower prices of competitors—a concession which it had to make in view of the uncontroverted evidence on the matter.* The Commission attempted to nullify respondent's meeting of competition defense by asserting a legal theory of its unavailability in the face of "affirmative proof" of injury to competition. The Commission's theory was wrong. 340 U. S. 231. The Commission now strains to reach the same end—the nullification of the meeting of competition defense—by a prejudged, *ex parte,* and unfounded determination of respondent's bad faith. This prejudgment, and the manner by which it was made, all serve to evidence the repudiation of standards of administrative conduct which it is to the Commission's interest to
186 maintain and which the Fifth Amendment to the Federal Constitution requires: that administrative agencies, in the performance of their quasi-judicial functions, must as a minimum act in accordance with the cherished judicial tradition embodying the basic concepts of fair play.

Respondent is accordingly forced to register its protest that the Commission's present action violates respondent's rights under the Fifth Amendment to the Federal Constitution and under the Administrative Procedure Act which was designed to impose higher standards of reasonableness and fairness upon administrative agencies than had formerly been the case.

The Commission's modified findings, which it has promulgated herein, are therefore fatally defective, in this denial of respondent's good faith, not only because (1) they are unsupported by essential findings of basic facts, and (2) the fundamental findings of fact therein are not supported by substantial evidence, and (3) they are based upon an erroneous conception of the law, and (4) they are in disregard of the mandate of the Supreme Court, but also because they are reached by a method which departs from recognized and accepted standards of procedure, required by the Constitution and by statute, and are arbitrarily made.

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* Commission counsel, in presenting the case to the Commission in the original proceeding, conceded that "apparently no evidence controverting" respondent's good faith was offered. (P. 101 of Official Report of Oral Argument before Federal Trade Commission).

II.

The Impropriety of the Commission's Findings.

A. As Judged by Prior Proceedings in This Case.

The United States Court of Appeals for the Seventh Circuit, at the time this proceeding was before it on the legal scope of section 2 (b) of the amended Clayton Act, stated:

> "There is substantial evidence in this record, and we think it may be assumed to be conclusive, to the effect that the petitioner (respondent) made its low price to Ned's, Citrin, Wayne and Stikeman in good faith to meet the lower price of a competitor." 173 F. 2d 210, 213 (7th Cir. 1949).

This statement is true in all respects and only reflects the theme of respondent's complete good faith which has been repeatedly reiterated in this proceeding from the Trial Examiner to the Supreme Court.

First, the Trial Examiner, in his conclusions of fact and of law on the question of respondent's good faith, found that the differentials in price which respondent had granted its four jobbers "were granted to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality" (R. 5104)* and that "the granting of the differentials was lawful" (R. 5105)—unless the meeting of competition defense, for legal reasons only, was not available to respondent. This can only mean—and no amount of argumentation by the Commission can result otherwise—that the Trial Examiner found that respondent was in good faith.

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* The references to the record, as used throughout this statement of objections, are to the printed transcript of record of this case in the Supreme Court, 340 U. S. 231 (1951).

It is thus improper to state, as the Commission now states, that the Trial Examiner, either "deliberately or inadvertently", did not find the lower prices to have been allowed by respondent in good faith. Necessarily the Trial Examiner did so find, for the question before him (which he denominated the sixth question) was whether the differentials in price which respondent accorded to its four jobbers were "made in good faith to meet equally low prices of competitors, or the services or facilities furnished by competitors" (R. 5099). The Trial Examiner answered this question, as Section X of his report discloses, in the affirmative.

The majority of the Commission at that time must have accepted respondent's good faith as having been established. If the respondent's good faith had not been clearly proved, the Commission would not have been pressed, as it obviously was, to devise the novel theory which made respondent's good faith immaterial. The extent to which the Commission had to go originally in order to circumvent respondent's good faith compels the conclusion that that good faith was not questioned, even though, at the risk of extending this litigation, the Commission saw fit not to make the express finding. Commissioner Mason, correctly dissenting from the now adjudged legal error of the Commission, made express that which the majority of the Commission had necessarily conceded in fact. He wrote:

> "* * * The respondent proved that it had granted a lower price in good faith to meet a competitor's price. The trial examiner who heard the case so held, and I as a Commissioner would so find." (R. 5264.)

187 Regardless of the fact that the Supreme Court appears to have felt that the express finding of good faith should be made by this Commission, both the majority and the minority opinions leave no doubt that the Court unanimously accepted respondent's good faith. Mr. Justice Burton, writing for the majority, said of the Trial Examiner's finding on good faith:

> "In contrast to the factual situation [in the *Corn Products* and *Staley* cases], the trial examiner for the Commission in the instant case has found the necessary facts to sustain the seller's defense * * *." 340 U. S. 231, fn. 9.

The further reaction of the majority to the question of respondent's good faith was phrased in the following language:

> "Petitioner presented evidence *tending to prove* that its tank-car price was made to each 'jobber' in order to *retain* that 'jobber' as a customer and in *good faith* to *meet a lawful* and equally low price of a competitor." (Emphasis supplied.) 340 U. S. 231, 238.

Mr. Justice Reed, writing for the minority, likewise concluded that the good faith of respondent was not in controversy, stating:

> "This resume of the origin and purpose of the original § 2 of the Clayton Act and the amendments of the Robinson-Patman Act gives a basis for determining the effect of this section in a hearing before the Commission where the charge, as here, that a seller during the same period of time has sold the same commodities to various purchasers at different prices, is admitted, and the defense, *the elements of which are likewise admitted*, is that the discrimination was made in good faith to meet an equally low price of a competitor." (Emphasis supplied.) 340 U. S. 231, 262.

Until now, everyone connected with this case, who has met the question of respondent's good faith, has answered that question in respondent's favor. Soley on the basis of every past determination of respondent's good faith in this case, the Commission's present attempt to deny this meeting of competition defense to respondent suggests a strained effort to break away from the previous conclusion of the Commission in favor of respondent on this issue, in order to reach an improper result.

B. As Judged by the Evidence on the Record.

No amount of theorizing, such as that indulged in by the Commission in its present findings, can get away from the fact that the Trial Examiner, the only officer of the Commission who heard the witnesses and who over a period of many months considered the testimony, found that respondent had acted in good faith.

Certainly the evidence of respondent's good faith, as presented to and considered by the Trial Examiner, would at the very least have to offer some minimum toe-hold of factual conflict to justify the Commission's reversal of the Trial Examiner's findings on this point,* particularly when all but one of the Commission's present membership are, in effect, reviewing the Commission's prior decision in this case. But the evidence in this case, as it has been noted through the remarks of the late Mr. Wooden, is uncontroverted and affords no such toe-hold. Respondent originally had seven jobber customers in Detroit, three of whom it lost to competitors—the acid test of the seriousness of competitive offers—through its failure to meet ~~their lower~~ prices. It cannot be denied—and we do not understand that it is denied—that the lower prices, which respondent did make to its four jobber customers, were made most reluctantly and only under the pressure of serious competitive offers, and only to retain these last remaining jobber customers in the face of the otherwise certain loss of their business.

III.

The Futile Effort To Defeat the Good Faith Finding of the Trial Examiner By Legalistic Devices.

The Commission, even in its present modified findings, confesses to the propriety of the Trial Examiner's finding of good faith by stating:

> "It may well be that respondent was convinced that if it ceased granting tank-car prices to Citrin-Kolb, Wayne, and Stikeman and continued to refuse the tank-car price to Ned's Auto Supply Company it would lose these accounts. It had substantial reasons for believing this to be the case, for all of these concerns, ex-
> 188 cept Ned's Auto Supply Company, had already been recognized as entitled to the tank-car price under the commonly accepted standards of the industry, and Ned's had achieved a volume of distribution which brought it within the range where it was likely to be so

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* See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474 (1951); *Folds* v. *Federal Trade Commission*, 187 F. 2d 658 (7th Cir. 1951); *Minneapolis-Honeywell Reg. Co.* v. *Federal Trade Commission*, 191 F. 2d 786 (7th Cir. 1951).

recognized by a major oil company at any time . . ."* (Paragraph 14, subparagraph 5.)

The Commission, however, makes an effort in the succeeding subparagraphs of Paragraph 14 to dissipate the effects of the foregoing finding by purely legalistic devices, none of which will bear even superficial scrutiny.

A. Good Faith Is Not Negatived by Alleged Probability of Injury to Competition.

First, it is suggested that respondent "knew or had the means of knowing and should have known" that by selling to its jobber customers at the tank-car price, it "continually created the probability of injury to competition between retail dealers who bought such gasoline at different prices and resold it in competition with one another." However, the suggestion—that good faith cannot exist when there is injury to competition**—is a mere reiteration of the Commission's now discredited theory. This suggestion is in the very teeth of the decision of the Supreme Court of the United States which squarely holds that asserted injury to competition does not rule out the meeting of competition defense. The Supreme Court expressly pointed out in its opinion that "any price reduction to any dealer may always affect competition at that dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory," 340 U. S. 231, 250. The present renewed attempt of the Commission to characterize a lower price as one made in bad faith because of injury to competition—or conversely, that "the probability of injury to competition" stamps with the label of bad faith the manner of pricing which is said to cause this injury—is but a poorly disguised effort to ignore the entire basis upon which the Supreme Court previously reversed the Commission.

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* This grudging recognition in the new findings, that respondent had no choice but to give the four jobbers the tank-car price or lose them as customers, confirms the Trial Examiner's conclusion (*supra*, p. 6) and renders unnecessary any detailed comment on the Commission's analysis of the specific offers. We point out, nevertheless, that the Commission's statement of the evidence with respect to specific offers is incomplete and its characterization of these offers gives something less than a fair picture of their impact upon respondent's dealings with its jobber customers. Apart from the scanty review of the testimony in the new findings, there is substantial, uncontroverted evidence that all during the period involved in this case each of respondent's four jobber customers could have purchased on a tank-car basis from respondent's competitors at a price as low as, or lower than, that accorded it by the respondent (R. 345, 947-8, 1018-9, 1062-3, 1892-3, 5104).

With respect to the particular offers mentioned in the new findings, respondent denies that offers made prior to the date of the Robinson-Patman Act, or offers made subsequent to the filing of the complaint in this case, have no materiality or relevancy and therefore are to be disregarded. Such offers are part of the overall picture to be taken into account by the Commission in judging whether respondent was justified in its belief that it had to offer a lower price in order to retain the particular customers. Similarly, the Commission is not justified in interpolating into the statutory phrase "commodities of like grade and quality" the amorphous concept of "public acceptance." This would be an improper enlargement of the Commission's powers and would amount to an unwarranted usurpation of authority. *Waite* v. *Macy*, 246 U. S. 606 (1918).

** Respondent, of course, denies emphatically that it caused any injury to competition, much less "that the manner in which it priced and sold its gasoline continually created the probability of injury to competition." What slight effect there may have been, if any, on competition at the buyer's level, arising from the ability of jobbers to buy at tank-car prices, is not attributable to respondent, and does not comprise injury to competition. 340 U. S. 231, 250; Adelman, *Integration and Anti-trust Policy*, 63 Harv. L. Rev. 27, 71 (1949). The theory that a jobber, buying gasoline at

B. Good Faith Is Not Negatived by Failure of the Cost Justification Defense.

Equally fallacious is the Commission's attempt to deny respondent's meeting of competition defense by the groundless assertion that respondent knew, or should have known, that it could not cost justify its lower price to its jobber customers. If this be the legal consequence of the failure to cost justify price differentials, then it is utterly futile for one whose prices are challenged by the Commission to couple a meeting of competition defense to one of cost justification. For although a respondent may actually have acted in perfect good faith in meeting competition, the unwarranted imputation of knowledge of inability to cost justify his lower price would, in the Commission's view, nullify his good faith. On the other hand, if the cost justification defense should be accepted by the Commission, the meeting of competition defense would be of no consequence. The availability to a respondent of the meeting of competition defense cannot

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tank-car prices $1\frac{1}{2}$ cents below the tank-wagon price, is thereby enabled to subsidize a reduced retail price is economically fallacious when it is borne in mind (1) that this differential must first be applied to the defrayment of the jobber's wholesaling costs and (2) that the very small amount, at most, remaining to the jobber after defrayment of costs applicable to his wholesaling operation, is too small to cause any effect on prices at the retail level. See also Adelman, op. cit., p. 63.

possibly be dependent on the acceptability of his cost justification defense. This would be statutory distortion with a vengeance.

Furthermore, the only inference from all of the facts is exactly to the contrary of that sought to be drawn by 189 the Commission. Adelman, *Integration and Antitrust Policy,* 63 Harv. L. Rev. 27, 66 (1949). Respondent would not have gone to all the trouble and expense entailed in making its cost justification defense unless it had reason to believe that it would prevail. Disagreement between accountants for the Commission and those of respondent as to the proper application of cost accounting principles, resulting in the ruling out of respondent's cost defense, in no way casts doubt on respondent's belief that its defense should have prevailed. Cf. 340 U. S. 231, 236. The sincere effort made by respondent to prove cost justification would seem to indicate its good faith rather than to negative the existence of such good faith.

C. The False Effort to Characterize the Giving of the Tank-Car Price to the Jobber as the Adoption of an Illegal Pricing System.

The Commission, in Paragraph 14, employs language taken directly from *Federal Trade Commission* v. *Staley Co.*, 324 U. S. 746 (1945). It seeks by the use of such language to create the aura of analogy of *Staley* to the facts of this proceeding, and to convey the impression of respondent's adoption of an illegal pricing system of its competitors.

In the first place, respondent clearly did not follow or adopt any pricing system, but dealt with each of its customers in the light of an individual competitive situation.

In the second place, however, if the giving of a tank-car price to a jobber is to be regarded as adopting a system, it is astounding for the Commission to assert that that system has been an illegal one since passage of the Robinson-Patman Act. The jobber function is clearly not illegal, and integration of wholesale and retail operations by the jobber is a wholly natural and economically-sound development. While the jobber operation long antedated the Robinson-Patman Act, nothing in that Act outlawed the jobber or curtailed his right to sell at both wholesale and retail. A retailer, as he grows and prospers, looks forward to the time when he can purchase his own bulk plant and become a jobber. A wholesaler who commences with the operation of a bulk plant looks forward to owning some, or all, of his own retail stations, and either operating them himself or leasing them to other operators, as economic conditions require or permit. Since it is perfectly lawful for a wholesaler to integrate forward into retailing, and for a retailer to integrate backwards into wholesaling, it is astounding to find the Commission questioning the legitimacy of such integrated operations.

The Robinson-Patman Act did not enact into law the separation of distributive occupations, which is condemned under the Sherman Act as a means of maintaining a rigidly uniform retail price structure. *Sugar Institute* v. *United States*, 297 U. S. 553 (1936). Even under the theory of the modified findings and under the precise terms of the modified order in this case, a jobber engaged in both wholesale and retail activities cannot be prevented from buying gasoline at tank-car prices from refiners or distributors who market in his area in tank-car quantities only—and this is a common practice. What the Commission is saying, in effect, is that only those refiners or distributors who sell in tank-car quantities may compete for the business of a jobber who both wholesales and retails, and that others may not meet their competition—but must stand helplessly by and watch their trade be taken away. The sole effect of such a fantastic application of the law is to limit the jobbers' sources of supply, to restrain competition for the jobbers' business, and to maintain an artificial price structure to the detriment of the consumer.

Since jobbers who both wholesale and retail are legitimately in business, and it is perfectly lawful for suppliers "X", "Y" and "Z" to sell them at tank car prices, it is absurd to say that respondent knew or had reason to know that it would injure competition by offering them such a price. Especially is this so where it is inevitable that they would buy at tank-car prices in any event, and the only question is whether they would continue to buy from respondent or shift to another source of supply. What the Commission is doing—whether deliberately or inadvertently—is attempting to reiterate its "arbitrary classification" theory which is now discredited both as a matter of economics[*] and of law.[**]

190 Clearly, respondent's reluctant recognition of four of its customers as jobbers, forced upon respondent by competition, does not impugn respondent's good faith.

D. Respondent's Alleged Failure to Pursue a Non-Discriminatory Price Scale.

The Commission, in the new findings, Paragraph 14, makes a desperate effort to negative respondent's good faith meeting of competition in individual instances by stating, without basis in fact, that respondent's lower prices "were not the result of departures from a non-discriminatory price scale which were made to meet lower prices of competitors, but represented only the continued application of the pricing standard previously adopted by respondent and followed by it since long before 1936."

Respondent flatly denies that it was engaged in any course of conduct prior to 1936 which had to be changed upon passage of the Robinson-Patman Act. Its conduct in the matters at issue was at all times, according to the record in this case, consistent with the standards of that Act. Its policy of recognizing former retailer customers as jobbers only in individual instances, only when it desired to keep them as customers, only when it was forced to give them the tank-car price in order to keep them as customers, and even then only when they met respondent's own minimum standards for a jobber customer, conforms to the most rigid standards of the Robinson-Patman Act.

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[*] See Adelman, *Integration and Antitrust Policy:* 63 Harv. L. Rev. 27, 63 (1949):

> "This is of course a perfect illustration of the "pig iron" fallacy. Standard was selling its retailer customers gasoline plus storage plus delivery. It was selling the jobbers net of these services Unless it charged these two classes of buyers different prices, it would be discriminating against the jobbers. * * *"

[**] "Not denying the established industry practice of recognizing such dealers as a distinctive group for operational convenience, the Commission held that petitioner's classification of these four dealers as 'jobbers' was arbitrary because it made 'no requirement that said jobbers should sell only at wholesale.' 41 F. T. C. at 273. We use the term 'jobber' in this opinion merely as one of convenience and identification, because the result here is the same whether these four dealers are wholesalers or retailers." 340 U. S. 231, fn. 4.

IV.

Lawfulness of Price Being Met.

Respondent considers that the question of the lawfulness of the prices which it met has been answered affirmatively and is therefore no longer in issue in this proceeding. The Trial Examiner, in examining the question of respondent's good faith (R. 5099), has concluded, with a now immaterial qualification, that the differentials which respondent granted were lawful (R. 5105). The Supreme Court stated that respondent's evidence tended to prove that its tank-car price was made in good faith to meet a lawful and equally low price of a competitor. 340 U. S. 231, 238.

The Commission has not raised the question of the lawfulness of the competitors' prices which respondent met except insofar as it has sought to insinuate that respondent has adopted an illegal pricing system. This insinuation has been disposed of. Accordingly, respondent maintains not only that the issue of good faith should be resolved in its favor but that the Commission should expressly find that respondent's price reductions were made in good faith to meet a lawful equally low price of a competitor. Respondent specifically requests the making of this finding as called for by the mandate of the Supreme Court.

V.

The Modified Order of the Commission Is Unwarranted and Improper.

The only proper course for the Commission is to find that the differentials in price, which the respondent allowed Ned's Auto Supply Company, Citrin-Kolb Oil Company, Wayne Oil Company, and Stikeman Oil Company, Inc., were made in good faith to meet lawful equally low prices of competitors. The only order which the present record can justify is an order of dismissal, respondent having established its meeting of competition defense. If the order promulgated by the Commission on March 24, 1952, is to be entered notwithstanding the fatal defects pointed out by respondent, it then objects to the form of the order in the following respects:

A. The Order Is Too Broad in Scope.

The complaint in this case concerned itself only with the Commission's charge that respondent had discriminated in price with reference to four of its customers in the Detroit, Michigan, area—and that the effect of such discrimination was to "injure, destroy and prevent competition with each of the four dealers * * * and with their respective customers, in the resale of gasoline" (R. 35).

191 This was the stated and restricted compass of the complaint, the testimony, the evidence, and, though less plainly, of the Commission's order to cease and desist of August 9, 1946.

The Commission now promulgates an order which is completely unrestricted in its geographic application to respondent's business. It does this without the benefit of any evidence, and in excess of the only function which the Commission was to perform on the remand: viz., to make a finding as to whether or not respondent's price reductions were made in good faith to meet a lawful equally low price of a competitor.

The geographically unlimited application of the Commission's order is highly improper in view of the absence of any allegation in the complaint, and any showing in this record, that there is any similarity, either close or remote, between respondent's conduct in the Detroit area and in the other sections or communities where it does business.

Furthermore, even with respect to the Detroit area, the complaint was limited to, and challenged only, respondent's sales of its gasoline at tank-car prices to four named jobbers who bought in tank-car quantities and who resold in whole or in part at retail in competition with retailer customers of respondent. But even narrower than this is the Commission's theory of the case: viz., only in the event any of such jobbers reduces his retail price below the prevailing level are respondent's sales to him at the tank-car price to be unlawful, because only then are they said to create the probability of injury to competition. In this setting, a Commission order may not lawfully be entered which (1) bars every possible form of price differential among all the thousands of respondent's retail customers everywhere, no matter how unrelated the differential may be to the price discrimination declared here to exist, and

(2) eliminates in every such situation the Commission's responsibility of proving that the differential is one which is declared unlawful by Section 2(a) of the Clayton Act.* The Commission on this record and without shouldering its responsibility may not lawfully require respondent to sell its gasoline without any price differential among all its retail customers. Yet this is what the Commission's modified order would compel respondent to do, despite the very limited scope of the complaint, the evidence, the recommended order of the Trial Examiner, and the Commission's own theory of the case.

The Commission is attempting to impose a modified order upon respondent which is beyond its power under the law to impose and which it is not authorized to make in the discharge of its present responsibilities: that is, to make a finding as to whether or not petitioner's price reduction was made in good faith to meet a lawful equally low price of a competitor.

B. The Order Should Be Addressed Only to Respondent.

The complaint in this case was addressed only to respondent. The evidence, again, was directed only to a particular course of conduct of respondent in the Detroit, Michigan area. Yet the order is directed not only to respondent but, as well, to "its officers, representatives, agents and employees," not only in Detroit but elsewhere. This, in face of the fact that none such was either identified or made a party to the proceeding, and in the absence of any evidence or finding as to any part which any individual took in the actions of respondent which are now condemned. The Commission is without authority indiscriminately to include unnamed parties in its order without complaint, evidence, finding, or opportunity to defend. This is true of orders issued under the Federal Trade Commission Act, *Reynolds Tobacco Co.* v. *Federal Trade Commission*, 192 F. 2d 535 (7th Cir. 1951), and is equally true of orders issued under the Clayton Act. The Commission cannot excuse its jurisdictional excess merely on the ground that a court may later exercise an equitable discretion.

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* Respondent, of course, recognizes that the modified order of the Commission need not expressly include the statutory provisos permitting price differentials which are cost justified or made in good faith to meet an equally low price of a competitor. Respondent understands that these provisos, together with those which state its right to select its own customers and to sell at different prices in response to changing conditions, are necessarily implicit in the Commission's order and are as much a part of such order as if set out in extenso. *Federal Trade Commission v. The Ruberoid Co.*, U. S. Sup. Ct., May 26, 1952. What respondent objects to is the attempt to stamp as illegal all price differences among its retail customers, thus relieving the Commission of its responsibility under the Act to establish whether such price differences fall within the ban of Section 2(a).

192 C. The Order Is Defective by Reason of Lapse of Time.

The evidence in the record of this proceeding concerned market conditions and actions of respondent with reference to four of its customers in the Detroit, Michigan, area during the years 1936 to 1940. Respondent suggests that the Commission, basing its action on a record twelve years old, is misapplying statutory procedures which are intended to be remedial and not punitive, prospective and not retrograde. A record made twelve years ago does not provide any substantial basis on which to predicate injunctive provisions effective in the future.

D. The Commission Is Without Power Under the Mandate to Enlarge Its Order.

The Commission cites no authority which would support the unlimited geographic and factual enlargement of its present modified order. The Commission makes no demonstration that every price differential which respondent may make at any time or any place under any set of circumstances is so reasonably related to the specific action examined in the present record as forever to be interdicted. It cannot factually make such demonstration. Moreover, in the absence of permission from the court, we are aware of no precedent which would authorize the Commission to enlarge its order in a manner unrelated to the mandate, much less enlargements of the excessive and improper nature which the Commission has now promulgated. No doubt the Commission may at any time cancel its order in whole or in part, but respondent submits that the Commission, without taking further evidence, may not utilize the occasion of compliance with the Supreme Court's mandate to make the form of the order more onerous.

Respectfully submitted,

Weymouth Kirkland,
Howard Ellis,
Hammond E. Chaffetz,
John C. Butler,
W. H. Van Oosterhout,
of
Kirkland, Fleming, Green, Martin & Ellis,
33 North La Salle Street,
Chicago 2, Illinois,
Attorneys for Respondent.

Thomas E. Sunderland,
Albert L. Green,
Gordon E. Tappan,
910 South Michigan Avenue,
Chicago 80, Illinois.
Of Counsel.

May 29, 1952.

193 Correspondence Exchanged Between Commission and Respondent on Respondent's Request for Hearing and Extension of Time.

194 Chicago, Illinois
March 14, 1951.

W. T. Kelley, Esq.
General Counsel
Federal Trade Commission
Washington, D. C.

Re: Federal Trade Commission v. Standard Oil Company Docket No. 4389

Dear Sir:

We are advised that the mandate of the Supreme Court in the above case has now been received by the Commission.

The last argument before the Commission in this case took place on April 25, 1946. Three of the present members of the Commission have been appointed since that date, and it would be remarkable if the other two Commissioners had any very distinct recollection of the record and the arguments made thereon some five years ago. In addition, it seems to us that the issue has now been greatly clarified by the Supreme Court.

The Commission, in determining how further to proceed and what finding to make, will be acting judicially. We therefore request, as is our right, that we be heard both on procedure and on substance, and that these matters not be considered, even provisionally, ex parte or in our absence. We believe, of course, with the Court of Appeals that the Trial Examiner's finding of respondent's good faith is incontrovertible.

If desirable, we would be glad to discuss this matter with you and your associates.

Very truly yours,

Hammond E. Chaffetz

HEC:LD

FEDERAL TRADE COMMISSION

Washington 25

Office of General Counsel

March 19, 1951

Hammond E. Chaffetz, Esquire,
Kirkland, Fleming, Green, Martin & Ellis,
33 North La Salle Street,
Chicago 2, Illinois.

Re: In the Matter of Standard Oil Company of Indiana, F. T. C. Docket No. 4389.

Dear Mr. Chaffetz:

This will acknowledge receipt of your letter of March 14, 1951, relative to the above matter; requesting the right to be heard by the Commission in determining how further to proceed and what findings to make, both on procedure and on substance, and that these matters not be considered, even provisionally, ex parte or in your absence.

Your letter has been transmitted to the Commission for consideration of your request and you will be advised by the Commission of its action thereon in due course.

Very truly yours,

W. T. Kelley,
General Counsel.

cc: Kirkland, Fleming, Green, Martin & Ellis,
World Center Building,
16th and K Streets, N. W.,
Washington 6, D. C.

195

FEDERAL TRADE COMMISSION
Washington

Office of the Secretary
and Executive Director

March 20, 1952

Hammond E. Chaffetz, Esq.,
Kirkland, Fleming, Green, Martin & Ellis,
33 North La Salle Street,
Chicago 2, Illinois.

In Re: F. T. C. Docket No. 4389,
Standard Oil Company of Indiana.

Dear Mr. Chaffetz:

This is in further reference* to your letter of March 14, 1951, requesting the right to be heard by the Commission in determining how to proceed and what findings to make in this proceeding in response to the mandate of the Court of Appeals for the Seventh Circuit filed on February 14, 1951.

Your request has received the Commission's careful consideration. In the event the Commission decides to modify its findings in the case adversely to the respondent, you will be afforded the opportunity of presenting your views with respect to such modification.

By direction of the Commission.

D. C. Daniel,
Secretary.

Copy to: Kirkland, Fleming, Green, Martin & Ellis,
World Center Building,
Sixteenth and K Streets, N. W.,
Washington 6, D. C.

*The Commission's counsel on March 19, 1951, acknowledged receipt of this letter of March 14, 1951; the further reference is the present letter.

May 15, 1952

The Honorable Stephen J. Spingarn
Federal Trade Commission
Washington 25, D. C.

Re: Standard Oil Company (an Indiana Corporation.)

Dear Commissioner Spingarn:

This is to confirm the request made orally to you this morning for additional time in which to file a brief on behalf of the respondent in the above case and for additional time beyond the five days now provided for in which to respond to the brief of the Commission's staff when filed.

The size of the record, the extraordinary importance of the case and the unusual number of novel and important legal questions that are involved make it impossible to conduct the necessary study of the record, legal research, preparation of brief and discussion with the client that would be required in order to assure the presentation of the respondent's position adequately to the Commission in the time presently allotted. Our original request for sixty days extension was made after consultation with counsel for Commission (not Mr. MacIntyre) and was the minimum time in which we thought it would be possible for us to be prepared. We find now that our original request was a modest one indeed. We have worked diligently in an effort to complete our work in the time allotted and we have not yet approached the stage of a first draft of the brief, with less than ten days remaining under the present schedule. If adequate time is not allotted to us, we will have no recourse other than to file a memorandum of our points and take an exception to the denial of our reasonable request for time to prepare.

We believe that our position will be one that will merit the very serious consideration of the Commission and that the Commission will wish to be fully informed before making any final determination in this important matter. Certainly, when the Commission required fifteen months from the date of the Supreme Court's decision in which to determine what its position would be, simple fairness would seem to require that we have a total of only ninety days to develop and present our views.

With respect to time to reply to the Commission's brief when filed, as I stated to you this morning, unless a reasonable time is provided before the oral argument we will have no alternative than to ask for time following the argument to make written reply so as to make certain that we have fully replied on all the legal issues involved. There are several vital procedural and substantive questions as
196 to which we will not know the position of the Commission's staff until we receive their brief. It seems to me here, too, that the Commission would prefer to have our reply to the Commission's brief at the time of the oral argument.

The Commission's consideration of our request will be greatly appreciated. In view of the pressure of time, may I request notification by telephone of the Commission's action?

Yours very truly,

Hammond E. Chaffetz.

cc: Everette MacIntyre, Esquire.
HEC:mme

* * * * *

301 UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION.

Commissioners:
James M. Mead, Chairman,
Lowell B. Mason,
John Carson,
Stephen J. Spingarn,
Albert A. Carretta.

* * (Caption—4389) * *

MODIFIED FINDINGS AS TO THE FACTS AND CONCLUSION.

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (the Clayton Act), as amended by an Act of Congress approved June 19, 1936 (the Robinson-Patman Act), the Federal Trade Commission, on November 29, 1940, issued and subsequently served its complaint in this proceeding upon the respondent, Standard Oil Company, a corporation, charging said respondent with having violated the provisions of subsection (a) of Section 2 of the said Clayton Act, as amended. After the issuance of said complaint, the filing of the respondent's answer thereto, and the taking of part of the testimony and other evidence in support of the complaint, the Commission, on April 23, 1941, issued and subsequently served upon the respondent an order amending said complaint, which
order further provided that the testimony and other
302 evidence theretofore taken be adopted and considered
as having been taken in support of the allegations of the complaint, as amended, and that the answer of the respondent to the original complaint be adopted as the respondent's answer to the complaint, as amended. Thereafter, further testimony and other evidence in support of and in opposition to the allegations of said complaint, as amended, were introduced before a hearing examiner of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and

filed in the office of the Commission. This proceeding then regularly came on for final hearing before the Commission upon the complaint, as amended, the respondent's answer thereto, the testimony and other evidence, the report of the hearing examiner upon the evidence and exceptions thereto, briefs in support of and in opposition to the complaint, as amended, and oral argument of counsel; and the Commission, having duly considered the same, on October 9, 1945, made its findings as to the facts and its conclusion drawn therefrom and issued its order to cease and desist (which order to cease and desist was, on August 9, 1946, modified in certain respects).

On October 4, 1946, the respondent filed with the United States Circuit Court of Appeals for the Seventh Circuit its petition for review of the Commission's modified order to cease and desist, and after hearing the cause on briefs and oral argument, said court, on April 29, 1949, issued its decree modifying Paragraph 6 of said order and affirming the order as so modified. The judgment of the Court of Appeals having been reversed by the Supreme Court, said Court of Appeals, on February 14, 1951, issued its decree vacating and setting aside its former judgment and remanding the case to the Commission "to make findings in conformity with the opinion of the Supreme Court of the United States filed on January 8, 1951".

Thereafter, the Commission, having further considered the matter, on March 24, 1952, issued, and on March 26, 1952, served upon the respondent, an order granting the respondent leave to present to the Commission any objections it might have to the issuance of a document 303 attached thereto as the Commission's modified findings as to the facts and conclusion in compliance with the aforesaid decree; and the Commission, having received and considered the respondent's objections and briefs on behalf of Retail Gasoline Dealers Association of Michigan, Inc., National Congress of Petroleum Retailers, Inc., Empire State Petroleum Association, Inc., Great American Oil Company, and counsel in support of the complaint, and having heard and considered oral argument of counsel in opposition to and in support of the proposed modified findings as to the facts and conclusion, now makes this its modified findings as to the facts and its conclusion drawn therefrom in this proceeding:

Findings As to the Facts.

Paragraph One: The respondent, Standard Oil Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 910 South Michigan Avenue, Chicago, Illinois.

Paragraph Two: The respondent is engaged in the busines of refining and distributing gasoline and other petroleum products among and between the various States of the United States. Respondent sells three brands of gasoline—"Solite with Ethyl", "Red Crown", and "Stanolind". Red Crown is respondent's regular housebrand gasoline and accounts for approximately 90 percent ~~of~~ respondent's sales in the Detroit metropolitan area, while Solite with Ethyl accounts for 7 to 10 percent and Stanolind, 3 or 4 percent. Respondent has several refineries, one of which is located in Whiting, Indiana. Crude oil to supply its refineries is derived from various sources, but principally from the so-called Mid-Continent fields in Kansas, Oklahoma, Texas, and Wyoming. Respondent sells its products throughout a territory consisting of 14 States, principally located in the Middle West. This territory is divided into 27 divisions or fields, with a branch office in each field in charge of a manager or superintendent.

One of such divisions or fields is known as the "Detroit Field", which embraces all or part of thirteen counties 304 in southern Michigan, including the cities of Detroit, Lansing, Pontiac, Jackson, and Ann Arbor. The "Detroit Area", as distinguished from the "Detroit Field", includes only the city of Detroit and its suburbs, Hamtramck, Dearborn, and Highland Park, in Wayne County, which is also referred to as the "Detroit metropolitan area".

The respondent has no refinery in the State of Michigan. Gasoline and other petroleum products sold and distributed by the respondent in the Detroit Field are transported from its refinery at Whiting, Indiana, by tankers through the Great Lakes to respondent's marine terminal at River Rouge in the outskirts of Detroit. This marine terminal has a storage capacity of about 1,500,000 barrels of 42 gallons each. During the summer months, deliveries are made from the Whiting refinery every week and sometimes twice a week. In the fall sufficient gasoline is delivered and stored to take care of estimated requirements during the winter months when navigation through the Great Lakes is closed.

During the years from 1936 to and including 1940, respondent supplied from 16.2 percent to 17.4 percent of all the branded and unbranded gasoline sold in the Detroit metropolitain area. The total sales made by respondent in said area during that period amounted to 62,198,750 gallons in 1936, 70,015,200 gallons in 1937, 60,448,200 gallons in 1938, 70,279,818 gallons in 1939, and 74,627,712 gallons in 1940.

During the periods of time herein mentioned respondent operated six bulk plants in the Detroit metropolitan area. Delivery of gasoline to these bulk plants was made from the River Rouge marine terminal by tank car or transport truck. Tank-car delivery by railroad was for the most part discontinued about February 1, 1940. Transportation of gasoline by transport truck was accomplished by transportation companies employed by the respondent. The capacity of a transport truck is approximately the same as a tank car. In some instances the respondent has shipped gasoline and other petroleum products from its refinery at Whiting, Indiana, directly to purchasers thereof located in the Detroit metropolitan area. Respondent maintains, 305 and at all times mentioned herein has maintained, a course of trade in said products in commerce among and between the various States of the United States.

Paragraph Three: Prior to September 10, 1936, respondent operated all retail service stations owned or leased by it in the Detroit metropolitan area, but on that date it discontinued all retail operations and leased or sublet all stations owned or leased by it to independent operators.

In the course and conduct of its business in the Detroit metropolitan area, the respondent, since September 10, 1936, has regularly supplied gasoline to approximately 358 retail service stations. Respondent owned approximately 200 and leased 8 of these stations. The remaining 150 stations which were supplied directly by the respondent were owned or operated by independent operators, with whom the respondent entered into written agreements known as "Dealer's Agreement, Form 461", by which agreements respondent agreed to sell, and the dealers agreed to purchase, all of their requirements of Solite with Ethyl, Standard Red Crown, and Stanolind gasoline for the period of time specified in said agreements. These latter stations were known as contract service stations as distinguished from the leased service stations hereinabove described.

Deliveries of gasoline to the leased and contract service stations in the Detroit metropolitan area were made from respondent's bulk plants by tank trucks owned by respondent and operated by its salaried employees. This method of delivery is known as "tank-wagon" delivery. The price at which respondent sold its gasoline to said leased and contract service stations was its "posted tank-wagon price", which was fixed from time to time by the general office of the respondent in Chicago.

In addition, the respondent also supplied gasoline to four dealers in the Detroit metropolitan area—Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., Wayne Oil Company, and Ned's Auto Supply Company, which were classified by respondent as "jobbers" and which, with the exception of Ned's Auto Supply Company, supplied respondent's gasoline to from 94 to 106 retail service stations. Deliveries to these dealers were generally made
306 by tank car, and after February 1, 1940, by transport
truck, direct from respondent's River Rouge terminal. During the periods of time hereinafter described, the Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., and Wayne Oil Company sold a substantial portion of the gasoline purchased by them from the respondent direct to the public through retail service stations owned and operated by them. Ned's Auto Supply Company was engaged entirely in the retail sale of gasoline to the public through its own stations.

A third class of customer in the Detroit metropolitan area to whom the respondent supplied gasoline was large commercial users of gasoline, who were usually sold on contracts made by the general office of the respondent in Chicago. The gasoline so purchased was usually delivered either direct from the Whiting refinery or the River Rouge terminal by tank car or transport truck.

Paragraph Four: In the course and conduct of its business since June 19, 1936, the respondent has discriminated in price by selling its gasoline for resale direct to the purchasing public to Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., and Wayne Oil Company, and subsequent to March 7, 1938, to Ned's Auto Supply Company, at prices which were substantially lower than the prices charged by respondent to its other retailer-purchasers in the Detroit metropolitan area for gasoline of the same grade and quality. Each of the aforesaid purchasers has, since said date, owned or operated in the Detroit metropolitan area one or more gasoline stations where said respondent's gasoline so purchased has been resold at retail to consumers thereof in competition with other retailers of gasoline purchasing the same from the respondent or from other manufacturers. The respondent sold its largest selling brand, Red Crown gasoline, to said four "jobbers" at its tank-car price, which was 1½ cents per gallon lower than the prices charged by it for the same gasoline to its other retail dealers in the Detroit metropolitan area.

Paragraph Five: In allowing "jobber" classification in the Detroit metropolitan area to the four dealers hereinbefore named, the respondent required only that said dealers purchase substantial quantities of gasoline, own or control bulk plants where gasoline in large 307 quantities could be delivered, and have sufficient financial standing or credit rating to warrant the extension of credit. There was no requirement that said dealers should sell only at wholesale.

The Citrin-Kolb Oil Company, although selling the respondent's gasoline direct to the consuming public, was nevertheless classified by the respondent as a "jobber" in 1928 or 1929 and since that time has been allowed the tank-car price on gasoline purchased from respondent. It operated from 1 to 5 retail stations from 1936 to 1939, from 5 to 8 stations in 1940 and 1941, and was operating 5 retail service stations at the time this case was submitted for decision. During this time it purchased from the respondent in excess of 5,000,000 gallons of gasoline annually. The percentage of gasoline so purchased which was sold at retail by Citrin-Kolb Oil Company through its retail service stations was 29.4 percent in 1936, 15.4 percent in 1937, 7.3 percent in 1938, 10.1 percent in 1939, and 6.5 percent in 1940. During the period from January 1, 1938, to December 31, 1940, Citrin-Kolb Oil Company sold a million gallons of gasoline annually to Langer and Cohn, retail service station operators, at 1 cent per gallon off tank-wagon price and in addition sold another retail service station operator at ½ cent per gallon off tank-wagon price. For a short period of time Citrin-Kolb Oil Company issued "Special Savings Cards", which entitled the holders to a 2-cents-per-gallon discount on the purchase of gasoline from one of the retail service stations operated by it.

The Wayne Oil Company, although selling the respondent's gasoline direct to the consuming public, was nevertheless classified by respondent as a "jobber" in 1935 and since that time it has been allowed the tank-car price on all gasoline purchased from respondent. Prior to September 8, 1939, the Wayne Oil Company operated no retail service stations but subsequent thereto has operated from 2 to 6 stations and was operating 2 stations at the time this case was submitted for decision. During this period its
308 annual purchases of gasoline from respondent ranged from 1,348,348 gallons in 1936, to 2,341,394 gallons in 1940. The percentage of gasoline so purchased which was sold at retail by the Wayne Oil Company through its retail service stations was 7.6 percent in 1939 and 14.2 percent in 1940. There is no evidence that the Wayne Oil Company ever sold gasoline to resellers at a price lower than the posted tank-wagon price charged by respondent to its dealers or that any discount was allowed to purchasers by any retail service station operated by it.

The Stikeman Oil Company, Inc., although selling the respondent's gasoline direct to the consuming public, was nevertheless classified by respondent as a "jobber" in 1932 and since that time it has been allowed the tank-car price on all gasoline purchased from respondent. In 1938 the Stikeman Oil Company, Inc., discontinued the operation of retail service stations. Since 1936 its annual purchases of gasoline from the respondent have ranged from 2,225,000 gallons in 1936 to 1,772,911 gallons in 1940. The percentage of gasoline so purchased which was sold at retail by the Stikeman Oil Company, Inc., through retail service stations operated by it was 27.8 percent in 1936, 9.1 percent in 1937, and 0.3 percent in 1938. There is no evidence that this company ever sold gasoline to resellers at a price lower than posted tank-wagon price charged by respondent to its dealers or that any discount was allowed to purchasers by any retail service station operated by it.

Ned's Auto Supply Company was classified by respondent as a "jobber" on March 7, 1938, and since that time it has been allowed the tank-car price on all gasoline purchased from the respondent. Ned's Auto Supply Company does not sell other resellers of gasoline but has at all times sold the gasoline purchased from the respondent to the

public through its own service stations. In 1938 Ned's
Auto Supply Company operated 5 retail service stations,
which was increased to 6 in 1940. In addition, Ned's Auto
Supply Company operates a station known as "Char-
309 ley's Service Station", which is owned by Ned's Auto
Supply Company and operated by an individual on a
salary-and-commission basis. At all times since March 7,
1938, it has been the practice of Ned's Auto Supply Com-
pany to sell its gasoline below the prevailing retail service-
station price or to give premiums and discounts from its
posted price.

Paragraph Six: In addition to the discriminations in price hereinabove described, the respondent, in the course and conduct of its business during the period from September 1, 1936, to March 7, 1938, sold its gasoline to Ned's Auto Supply Company at .5 cents per gallon less than the price that it was charging for the same gasoline to its other retail dealers in the Detroit metropolitan area.

Since 1918 Ned's Auto Supply Company has been a customer of respondent and until March 7, 1938, received its gasoline from respondent by regular tank-wagon delivery. In 1936 Ned's Auto Supply Company purchased 2,401,600 gallons of gasoline from the respondent, which it resold to the public through its four retail outlets or service stations. On September 1, 1936, respondent allowed Ned's Auto Supply Company a price of .5 cents off regular tank-wagon price, which was allowed on all gasoline purchased from September 1, 1936, until March 7, 1938. When respondent allowed this price differential, it made no change in its form of delivery of gasoline to Ned's Auto Supply Company, but continued to sell it on the regular tank-wagon basis, making delivery from respondent's bulk plants direct to Ned's Auto Supply Company service stations.

Paragraph Seven: During all of the time covered by
these findings Citrin-Kolb Oil Company, Wayne Oil Com-
pany, and Stikeman Oil Company, Inc., sold the respond-
ent's gasoline at both wholesale and retail. Citrin-Kolb Oil
Company, Wayne Oil Company, and Stikeman Oil Com-
pany, Inc., although selling a substantial portion of re-
spondent's gasoline direct to the consuming public,
310 were nevertheless arbitrarily classified by the respond-
ent as "jobbers" and as such received from the re-
spondent a lower price on gasoline than the respondent
charged its other retail customers in the metropolitan

Detroit area who purchased gasoline of like grade and quality direct from the respondent.

Ned's Auto Supply Company, although selling all of its gasoline purchased from the respondent at retail direct to the consuming public, was nevertheless arbitrarily classified by the respondent as a "jobber" and as such received from the respondent a lower price on gasoline than the respondent charged its other retail customers in the metropolitan Detroit area who purchased gasoline of like grade and quality direct from the respondent.

Paragraph Eight: The volume of gasoline sold in the Detroit metropolitan area through retail gasoline stations is more or less constant; and fluctuations that occur are chiefly due to variation in the number of cars in use from year to year. A lower price at one service station than at another is an important factor in the purchasing public's mind, particularly when the difference in price occurs in the major brands of gasoline. Any difference in price between two stations selling the same gasoline or major brands of gasoline is very important in influencing the flow of business.

The margin of profit of the retail service-station operator between the tank-wagon price which he pays and the prevailing retail service-station price on the regular brand of gasoline of major companies is small. This is illustrated by the fact that between November 19, 1939, and March 1, 1941, the retailer's margin between respondent's posted tank-wagon price and prevailing retail selling price on its Red Crown gasoline was only 3.3 cents a gallon in the metropolitan area of Detroit. Consequently, any reduction allowed to a retail service-station operator below the regular tank-wagon price gives such operator a material advantage over other retail operators who pay the full tank-wagon price.

311 In 1936 Ned's Auto Supply Company had four retail stations and its gasoline volume was 2,401,000 gallons. On September 1, 1936, respondent began to sell gasoline to Ned's Auto Supply Company at .5 cents per gallon below posted tank-wagon price by tank-wagon delivery. In 1937 Ned's Auto Supply Company was openly advertising cut prices, and its volume increased to 4,240,500 gallons.

On March 7, 1938, Ned's Auto Supply Company began to purchase from respondent in tank-car quantities at tank-car prices. Although the total volume of gasoline sold in the Detroit metropolitan area during the year 1938 was 10 percent less than the volume sold in 1937, the volume of gasoline sold by Ned's Auto Supply Company increased from 4,240,500 gallons in 1937 to 4,880,500 gallons in 1938.

In 1937 Ned's Auto Supply Company was selling respondent's Red Crown gasoline to the public at approximately 2 cents per gallon below the prevailing retail service-station price, which continued, with variations, until the latter part of 1939. In 1939 and 1940, when Ned's Auto Supply Company's posted price was approximately the same as the prevailing retail price, it gave various under-cover discounts and premiums. It has from time to time given commercial discounts varying from 1 to 2 cents per gallon off the posted price. The classification of commercial customers varied from time to time, depending upon the competitive situation. During August to November 1939 Ned's Auto Supply Company issued trading stamps of a value of 2 cents for each gallon purchased, which were redeemable in merchandise or in gasoline at Ned's Auto Supply Company's stores. During the time covered by these findings price cutting at Ned's Auto Supply Company's stations was almost continuous, and this company was responsible for starting most of the retail price cutting in major-brand gasoline in Detroit over a period of several years. This practice on the part of Ned's Auto Supply Company has caused substantial damage to other retail service-station operators selling respondent's Red
312 Crown gasoline and also to retail service-station operators selling other brands of gasoline, and the ability of Ned's Auto Supply Company to continue the price-cutting practice was greatly enhanced through the discriminations in price allowed it by the respondent while at the same time limiting other retailer-customers to a margin of profit of approximately 3.3 cents per gallon.

During the years 1936 to 1940 the Citrin-Kolb Oil Company annually sold at retail from 6.5 percent to 29.4 percent of the gasoline purchased from respondent through service stations operated by it. In 1938 or 1939 the Citrin-Kolb Oil Company gave discount cards to purchasers of gasoline at one of the stations operated by it entitling the holder to a discount of 2 cents a gallon on respondent's Red Crown gasoline.

The Commission finds that the price discriminations granted by the respondent to Ned's Auto Supply Company, both prior to March 7, 1938, and subsequent thereto, and the price discriminations granted to Citrin-Kolb Oil Company, Wayne Oil Company, and Stikeman Oil Company, Inc., on gasoline sold by them at retail have given a substantial competitive advantage to these favored dealers in their retail operations over other retailers of gasoline, including retailer-customers of the respondent. This competitive advantage is capable of being used, and by Ned's Auto Supply Company and to some extent by Citrin-Kolb Oil Company has been used, to divert large amounts of business from other retailers of gasoline, including customers of the respondent, with resultant injury to them and to their ability to continue in business and successfully compete with said dealers in the retailing of gasoline.

The Commission further finds that the discriminations in price allowed to Citrin-Kolb Oil Company permitted this dealer to sell a million gallons of gasoline annually to one retailer-customer—Langer and Cohn—from January 1, 1938, to December 31, 1940, at a delivered price of one cent per gallon less than posted tank-wagon price and to sell another customer at a discount of one-half cent per gallon.

The Citrin-Kolb Oil Company, by passing on in part
313 to Langer and Cohn the benefits of the discriminatory prices allowed by respondent, enabled said Langer and Cohn to sell said gasoline to the consuming public at discounts of as much as two cents per gallon, which not only gave said Langer and Cohn a competitive advantage over other retailers of gasoline, including retailer-customers of the respondent, but also had the effect of diverting business from such retailers to said Langer and Cohn and of substantially lessening competition and injuring, destroying, and preventing competition between said Langer and Cohn and other retailers of gasoline, including retailer-customers of the respondent.

The Commission further finds that the effect of the discriminations in price allowed by the respondent to the four dealers as herein described has been, and may be, substantially to lessen competition and to injure, destroy, and prevent competition with each of said four dealers and with their respective customers in the resale of gasoline.

Paragraph Nine: As a defense to this proceeding the respondent introduced a series of exhibits (Respondent's Exhibits 31-A to Q), with supporting testimony, to show cost justification for the price differentials allowed Ned's

Auto Supply Company for the period from September 1, 1936, to March 7, 1938.

The Commission finds that the evidence submitted by the respondent fails to establish that the price differential allowed by respondent to Ned's Auto Supply Company of .5 cents per gallon during the period from September 1, 1936, to March 7, 1938, made only due allowance for differences in respondent's costs of sale and delivery resulting from the differing methods and quantities in which it sold its gasoline to Ned's Auto Supply Company during the period involved. The following are a few of the features of respondent's cost justification which warrant its complete rejection as a defense in this proceeding:

a. Respondent has attempted to make a comparison between the cost of doing business with Ned's Auto Supply
Company and the cost of doing business with all of
314 its other reseller-customers as a group. This fails to
take into consideration the fact that the respondent's reseller-customers fall into several groups, such as service stations owned by respondent and leased to operators, stations leased by respondent and sublet to operators, and independently owned stations to which respondent supplied gasoline. The costs of doing business would vary between these various groups. Furthermore, there were independent stations, transactions of which with respondent were comparable to those of Ned's Auto Supply Company, and comparison of the costs of these stations and Ned's Auto Supply Company would necessarily show a different result than that shown through respondent's having combined all kinds and types of its reseller stations.

b. Respondent has attempted to make a comparison between the costs of single-dump and multiple-dump deliveries. This is based upon the assumption that all deliveries made to Ned's Auto Supply Company were by single-dump delivery and all deliveries to respondent's other reseller-customers by multiple-dump delivery. However, the respondent did not make full-load or single-dump deliveries in all cases to Ned's Auto Supply Company during the period involved but, instead, made both single-dump and multiple-dump deliveries. There were also a substantial number of retail service stations located in the Detroit metropolitan area with tank capacity sufficient to take single-load deliveries, and a substantial number of single-load deliveries were made to such stations at respondent's regular tank-wagon price during the period involved.

c. Respondent attempted to segregate certain items of sales expense as not being influenced by Ned's Auto Supply Company and allocated them among all of respondent's other reseller-customers, with no charge being made against Ned's Auto Supply Company; for example, it was contended that when an account, such as Ned's Auto Supply Company, has been established, no further promotional sales work is necessary and should not be charged to such account. Among such items which respondent did not charge to Ned's Auto Supply Company were certain
315 sales promotional services, such as driveway training,
which it furnished to reseller-customers but which was not desired by, or furnished to, Ned's Auto Supply Company. In addition to the fact that certain promotional advertising should be charged to Ned's Auto Supply Company, it further appears from the evidence that there are other reseller-customers of the respondent whose accounts have been established and who do not require driveway training.

d. Respondent attempted to segregate certain items of expense of an overhead nature as not being influenced by Ned's Auto Supply Company, on the theory that such expenses would not be appreciably influenced by the acquisition or loss of a single account, such as Ned's Auto Supply Company, and, consequently, that it is proper to charge no part of these expenses to the business of Ned's Auto Supply Company. The reason for not charging any of such items to the business of Ned's Auto Supply Company would apply equally to the business of any other single retail service station.

e. There were certain other items of cost on which it was claimed by respondent that no exact allocation could be made, and, as to such items, the respondent apportioned them among its retail customers, exclusive of Ned's Auto Supply Company, instead of allocating these costs on the basis of gallonage, which would have afforded no cost differential.

f. Respondent has included in its cost items certain items of expense in connection with stations owned or leased by the respondent which were leased or sublet to the station operator. Many of these costs apply directly to the landlord activities of the respondent and are not properly chargeable to, or considered as, costs of sale or delivery.

g. In allocating the sales expense of certain salesmen who called on Ned's Auto Supply Company and other retail service stations, respondent attempted to estimate the time spent at Ned's Auto Supply Company and compare
316 the costs so determined as against all salesmen's costs, including salesmen who did not confine their activities solely to the Detroit metropolitan area. Furthermore, in estimating the time of the particular salesman who called on Ned's Auto Supply Company, no consideration was given to the time which such salesman spent in calling on service stations which were not customers of the respondent.

h. The respondent allocated advertising expense in such a manner as to show an alleged savings of .213 cents per gallon, or better than 46 percent of the price differential. In doing this, the respondent allocated the items of point-of-sale advertising which were supplied to Ned's Auto Supply Company, such as service signs, globes, banners, games, and displays, by charging the cost of some directly and assigning others on the basis of outlets and arrived at the cost per gallon of these particular items by relating it to gallonage sold by Ned's Auto Supply Company. All other advertising costs were allocated to the gallonage of all reseller-customers, exclusive of Ned's Auto Supply Company. The advertising so charged consisted, principally of advertising issued by the respondent for the purpose of creating consumer acceptance and increasing the sale of gasoline at all Standard stations, such as newspaper advertising, printed and direct-mail advertising, motion pictures, and outdoor signs. Such advertising was for the benefit of Ned's Auto Supply Company, as well as all other customers, and should accordingly have been allocated to Ned's Auto Supply Company, as well as to other customers, on a gallonage basis, in which event there would have been no cost differential as to such items.

Paragraph Ten: As a further defense to this proceeding, respondent contended that the differential between the price of 1½ cents per gallon off tank-wagon price charged Citrin-Kolb Oil Company, Stikeman Oil Company, Inc.,
317 Wayne Oil Company, and Ned's Auto Supply Company and the tank-wagon price charged respondent's other retail dealers made only due allowances for differences in

respondent's costs of sale and delivery resulting from the differing methods and quantities in which gasoline was sold and delivered to said "jobbers".

Respondent first attempted to show justification of the differential of 1½ cents per gallon between the tank-car and tank-wagon price by introducing evidence as to a survey made in the Kansas-Oklahoma field to show the cost of selling jobbers, the results of which were compared with the cost of sale and delivery of gasoline by tank-wagon in the entire Detroit division. There is no evidence that the costs of sale and delivery by tank car to jobbers in the Kansas-Oklahoma field were the same or were substantially the same as, or have any relation to, the costs of sale and delivery of gasoline by tank car to "jobbers" in the Detroit metropolitan area. In fact, the evidence indicates that the costs of the jobber operations in the Kansas-Oklahoma field were not comparable with the "jobber" operations in the Detroit field. The volume sold was not comparable with the Detroit sales and the total annual sales to jobbers in the Kansas-Oklahoma field were less than the annual sale to one "jobber", Citrin-Kolb Company, in Detroit, and several of these jobbers purchased less gasoline annually than is sold at an average service station in Detroit. The tabulation of jobber expense in the Kansas-Oklahoma field includes no items of consumer acceptance advertising expense charged to such jobber operations, which is substantial in the Detroit metropolitan area. Furthermore, the cost computations for the Kansas-Oklahoma field do not reflect the true conditions or give a factual result since the gallonage sold to two jobbers, Gibson Oil Company and Kramer Oil Company, that handled nearly one-half the gallonage sold in that field, was excluded in computing accounting and credit costs and included in computing supervision and selling costs.

318 In determining the costs of tank-wagon deliveries in the Detroit metropolitan area for the purpose of comparison with jobber costs in Kansas and Oklahoma, respondent used the total marketing costs for the entire Detroit field which were allocated to the reseller channel and leased service stations in its "Comparative Statement of Expense", known as "Form 189". Respondent divided the total marketing costs so allocated by the total reseller gallonage to arrive at the cost per gallon of sale and delivery in tank-wagon deliveries. This Comparative State-

ment of Expense is an expense record for the Detroit field prepared from time to time in respondent's regular course of business. Said form represents a breakdown of marketing expense between the channels of distribution, which are reseller channel, consumer channel, leased service stations, and other methods. The consumer channel is also known as the "direct-shipment channel" and includes deliveries to large industrial users of gasoline made either direct from the Whiting refinery or the River Rouge terminal. Such shipments usually originate with sales contracts made by the general office of the respondent on a bid basis. Shipments to "jobbers" were included in the consumer or direct-shipment channel in respondent's usual accounting procedure. The respondent did not consider it necessary for its purpose to isolate the cost of the direct-shipment channel, which included sales to "jobbers". Consequently, none of the expense allocations made on Form 189 are charged to either the direct-shipment channel or to the business done with "jobbers", but, instead, such expense is distributed or scattered over the various channels appearing on said form. While this Comparative Statement of Expense may be considered by the respondent as sufficient to reflect company operations, the figures taken therefrom cannot properly reflect the cost of tank-wagon sales as compared with "jobber" sales. There are numerous items of cost which have been allocated to the reseller
channel, a substantial portion of which should have
319 been charged to "jobber" gallonage and, if so charged,
would have substantially reduced the cost of reseller operation and in turn reduced the differential in cost between tank-wagon and "jobber" costs.

The Commission finds that the attempted comparison between cost of jobber operations in the Kansas-Oklahoma field with cost of sale and delivery to dealers in the Detroit field taken from its Comparative Statement of Expense has no probative value in determining the cost differential between tank-car sales to "jobbers" and tank-wagon sales to dealers in the Detroit metropolitan area.

Paragraph Eleven: In a further effort to show cost justification for the price differential of 1½ cents off tank-wagon price allowed to Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., Wayne Oil Company, and Ned's Auto Supply Company, the respondent attempted to segregate the cost items appearing on its Comparative Statement of Expense and to reallocate such costs to the reseller and "jobber" channels. For this purpose respondent prepared a modified form of its regular Comparative Statement of Expense showing costs allocated to "jobbers", as well as to tank-wagon resellers, which was introduced into evidence as Respondent's Exhibit 101, together with explanation as to methods used, which was introduced as Respondent's Exhibits 99 and 100.

After consideration of the modified form of respondent's Comparative Statement of Expense and other exhibits and testimony submitted in connection therewith, the Commission finds that the evidence submitted by the respondent fails to establish that the price differential of 1½ cents per gallon off tank-wagon price allowed by respondent to the above-named dealers made only due allowance for differences in respondent's costs of sale and delivery resulting from differing methods and quantities in which it sold its gasoline to said dealers. The following are a few of the features of respondent's cost justification which warrant its complete rejection as a defense in this proceeding:

320 a. In making this cost study the respondent did not limit its survey to cost differentials which resulted from differing methods or quantities in which gasoline was sold or delivered to the two classes of customers, nor was it limited to determining savings, if any, which accrued by reason of tank-car or transport-truck delivery as compared with tank-wagon delivery, but, instead, the respondent attempted to compare the cost of doing business with the one class as compared with the other by arbitrarily allocating all of respondent's costs of every nature which could be charg... to the expense of doing business in the Detroit field, including Chicago general office costs allocated to that field.

b. Respondent has compared the cost of marketing to the four dealers located in the Detroit metropolitan area, whose business was confined to that area, with the cost of marketing gasoline to all its other dealers in the Detroit field. The Detroit metropolitan area includes the city of Detroit and the suburbs of Dearborn, Hamtramck, and Highland Park. The Detroit field includes the rural section located outside the Detroit metropolitan area, including Lansing, Pontiac, and Ann Arbor, where different methods of delivery are involved since the rural section is supplied by small bulk plants operated by commission agents known as "B" stations as distinguished from the large bulk plants used to serve the Detroit metropolitan area operated by salaried employees and known as "A" stations. No factual cost study or investigation was made to determine the relation of sale and delivery costs in the entire Detroit metropolitan field to those in the restricted Detroit metropolitan area. In fact, there is substantial evidence indicating that respondent's cost of marketing gasoline to service stations in the rural areas of the Detroit field through commission agents is higher than its cost of marketing through its large bulk plants to service stations in the Detroit metropolitan area.

321 c. In allocating cost items to the tank-wagon reseller channel and the "jobber" channel, the respondent charged to the tank-wagon reseller channel a number of items which should not have been charged to that particular channel and failed to charge to the "jobber" channel cost items properly chargeable to that channel.

d. For the purpose of this cost study, respondent has determined the expense on leased service stations which involve landlord operations only and has carried such expense, after deducting income from rentals, into the general tank-wagon delivery expense allocated to the tank-wagon reseller channel. In fact, the landlord expense incident to the operation of respondent's leased service stations was carried separately in respondent's regular accounting procedure, as this expense has no bearing on the cost of marketing gasoline through the regular reseller channel but represented cost of maintenance, taxes, etc., on company-owned or leased service stations less revenue received, without consideration of the sale of gasoline or the expenses incident thereto.

e. It further appears from respondent's cost study that direct-shipment expense has been allocated for the most part on the basis of effort, while the allocation to the tank-wagon reseller channel has been made for the most part on the basis of gallonage except in accounts where allocation was made on the basis of effort in respondent's regular accounting procedure. The use of these two methods of allocation appears to be inconsistent, and the comparative results obtained do not properly reflect the difference in cost of sale and delivery between the tank-wagon and "jobber" channel.

f. While advertising comprises the largest single item of expense, only a small proportion, consisting of point-of-sale advertising, has been allocated between the tank-wagon and "jobber" channel. The remaining advertising expense, commonly known as "consumer advertising", 322 such as newspaper and billboard advertising, was improperly allocated to the tank-wagon channel alone and no part charged to the "jobber" channel. Consumer advertising costs cannot properly be separated between gasoline resold through "jobber"-operated retail stations and gasoline sold through other retail stations except upon the basis of gallonage, which, if used, would afford no cost differential.

Paragraph Twelve: In further defense of the discriminations in price challenged in this proceeding the respondent contends that the lower prices allowed Ned's Auto Supply Company from and after September 1, 1936, and the lower prices allowed Citrin-Kolb Oil Company, Wayne Oil Company, and Stikeman Oil Company, Inc., from and after June 19, 1936, were all made in good faith to meet equally low or lower prices of competitors within the meaning of subsection (b) of Section 2 of the Clayton Act, as amended. The respondent argues that this is established (1) by the showing made respecting several offers to these dealers by some of respondent's competitors, which, it contends, demonstrates that the granting of the lower prices to these dealers was necessary to prevent the loss of their business by respondent, and (2) by evidence that during all of the time the lower prices were allowed by respondent the general competitive condition in Detroit was such that any of these dealers could have purchased from some of respondent's competitors gasoline of a grade and quality comparable with respondent's gasoline at prices equally low or lower than the prices charged by respondent. Although finding against the respondent on other grounds, the hearing examiner nevertheless expressed the opinion (not necessary to the decision which he recommended) that the lower prices allowed these four customers by respondent were in fact granted to meet equally low prices of competitors. Whether deliberately or inadvertently, the hearing examiner did not find that these lower prices were allowed "in good faith". In 323 any event, for reasons hereinafter stated, the Commission is convinced that these lower prices were not made in good faith to meet equally low prices of competitors within the meaning of Section 2(b) of the amended Clayton Act.

Paragraph Thirteen: As hereinabove indicated, the respondent's method of pricing its gasoline in the Detroit metropolitan area is to sell to its costumers generally at what is designated in the oil industry as the "tank-wagon price" and to sell to a much more limited number of purchasers at a "tank-car price", the latter being 1½ cents per gallon lower than the former (on the respondent's Red Crown gasoline). The "tank-car price" is also frequently referred to as the "jobber" price, although the granting of such price is not based upon any consideration of the method of resale by the purchaser. The respondent's standard for granting the tank-car price is that a purchaser make annual purchases of from one to two million gallons of gasoline, have storage facilities sufficient to accept delivery of a tank-car quantity of gasoline at one time, and have a credit rating satisfactory to assure payment for the gasoline purchased in the larger quantities.

The facts with respect to offers made by respondent's competitors to these four customers appear in detail in the record. In brief, these facts are as follows:

Ned's Auto Supply Company.

The lower prices granted Ned's Auto Supply Company were ½ cent less than the tank-wagon price from September 1, 1936, to March 7, 1938, and 1½ cents less than the tank-wagon price from and after March 7, 1938, this purchaser having acquired tank-car storage facilities on or about March 1, 1938. The offers made to this customer were from the Argo Oil Company, the Texas Company, Shell Oil Company, and Red Indian Oil Company.

In 1930 a vice-president of Argo Oil Company offered to sell Ned's Auto Supply Company its requirements of gasoline by tank-wagon delivery at a price 1 cent per gallon less than the tank-wagon price then paid by
324 Ned's for respondent's gasoline. The brand of gasoline offered by Argo Oil Company was "Dixie" gasoline, not a major brand. The offer was declined and the matter ended.

In 1933 Charles H. Gershenson, President, Ned's Auto Supply Company, went to Akron, Ohio, and discussed with a Mr. Dodge of the Texas Company the possibility of Ned's

Auto Supply Company buying gasoline from that company at the price at which that company then sold its gasoline to Firestone Tire & Rubber Company, which purportedly was 4 cents per gallon less than the tank-wagon price on regular gasoline and 4½ or 5 cents per gallon less than the tank-wagon price on premium or Ethyl gasoline. There is no evidence that the Texas Company or any of its representatives ever agreed to the proposal made by Gershenson or of any further discussions of the matter subsequent to 1933.

In 1933 or 1934 a representative of Shell Oil Company informed Gershenson that it was seeking a single "jobber" in Detroit and that if Ned's Auto Supply Company would arrange to handle, tank-car deliveries Shell Oil Company would sell gasoline to it at about 2 cents per gallon less than the prevailing tank-wagon price. Ned's Auto Supply Company did not accept the offer, and Shell Oil Company selected another dealer in Detroit.

Between 1930 and March 7, 1938, Red Indian Oil Company made repeated offers to sell gasoline to Ned's Auto Supply Company at prices varying from 1 cent to 1½ cents less than respondent's prices to that customer. In 1930 Red Indian Oil Company was selling Phillips 66 gasoline, which it offered to deliver to Ned's stations at 1 cent per gallon less than respondent's price or to sell to Ned's at 1½ cents less than respondent's price if Ned's took delivery at Red Indian's bulk plant. In 1934 or 1935 Red Indian Oil Company ceased selling Phillips 66 gasoline, and since that time has sold Fleet Wing gasoline, which it offered to Ned's at the prevailing tank-car price. Fleet Wing gasoline is not a major brand gasoline and did not have public acceptance comparable to that enjoyed by respondent's Red Crown gasoline.

325 As each of the above negotiations occurred Ned's Auto Supply Company notified the respondent of it, and on August 27, 1936, Ned's advised respondent by letter that a competitive major oil company had offered it a gasoline contract carrying a substantially larger margin of profit than it was able to realize under its arrangement with respondent and that it was the present intention of Ned's to accept that offer. Mr. Gershenson testified that the offer he had in mind was that made by the Red Indian Oil Company on Fleet Wing gasoline. After further negotiation between respondent and Ned's Auto Supply Company, a

reduction of one-half cent per gallon off the tank-wagon price ~~was allowed Ned's, with delivery~~ as theretofore by tank wagon. This lower price to Ned's was made effective September 1, 1936, and continued to March 7, 1938, when Ned's was allowed the tank-car price of 1½ cents per gallon less than the tank-wagon price.

Citrin-Kolb Oil Company.

The Citrin-Kolb Oil Company was first granted the tank-car price by respondent in 1928 or 1929 at a time when that company was engaged exclusively in the retail sale of gasoline through its own filling stations, and this price of 1½ cents less than the tank-wagon price has been continued by respondent to the present time.

Beginning about 1930 Citrin-Kolb received offers from three different suppliers to furnish gasoline at net prices lower than the tank-car prices it was paying respondent. Hickok Oil Company of Toledo, Ohio, proposed an arrangement under which Citrin-Kolb, then a partnership, would incorporate and assign to Hickok 51 per cent of the common stock of the new corporation. This offer related to a brand of gasoline known as Hi-Speed gasoline. Shell Oil Company made a joint offer to Citrin-Kolb and another dealer, Middleton Oil Company, involving a brand of gasoline not then sold in Detroit and known as Silver Flash gasoline. Gulf Refining Company offered its gasoline to Citrin-Kolb at the same price as respondent was then selling it, but in addition offered to waive any requirement that Citrin-Kolb supply its own bulk storage and agreed to allow Citrin-Kolb to take its requirements from Gulf's bulk storage plant, and in addition offered to furnish filling station pumps and other service station equipment without cost to Citrin-Kolb.

326 In August 1936 Citrin-Kolb Oil Company worked out a tentative arrangement with the Texas Company for a five-year contract under which Citrin-Kolb was to be allowed 2 cents per gallon off the tank-wagon price and certain other advantages. This proposed agreement was exhibited to respondent's Detroit manager, Mr. Raupaugh, presumably to afford respondent an opportunity to meet its terms, but this the respondent refused to do and the contract was never put into effect.

In 1939 a representative of Argo Oil Company, a gasoline jobber in the Detroit area, offered Citrin-Kolb Oil Company gasoline (either Marathon or Linco gasoline, the witness was not certain which) at 2 cents a gallon less than the prevailing tank-wagon price. Although this offer was mentioned to respondent's Detroit sales manager, apparently it was never seriously considered by Citrin-Kolb.

In December 1940 Citrin-Kolb was informed by a representative of Aurora Gasoline Company, a Detroit company, that its refinery was to be enlarged and that it would be in a position to furnish Citrin-Kolb with gasoline at 2 cents a gallon less than the prevailing tank-wagon price. Citrin-Kolb informed respondent's Detroit manager, who declined to meet the offer, and nothing further was done. 8

Wayne Oil Company.

In 1935 respondent granted Wayne Oil Company the tank-car price on gasoline, and since that time has continued to sell to it at such price. There was some evidence that the Aurora Gasoline Company solicited the business of Wayne Oil Company, but there is no showing of any definite offers made at prices as low as or lower than the price allowed Wayne by respondent until after the complaint in this proceeding was issued.

In December 1940 a representative of Aurora Gasoline Company discussed with Wayne a proposal similar to that made to Citrin-Kolb Oil Company, and there is also testimony relating to a tentative proposal made in December 1940 by National Refining Company of Cleveland to Wayne Oil Company and Stikeman Oil Company, Inc., jointly, upon a gasoline known as White Rose gasoline, which was not then sold in Detroit.

327

Stikeman Oil Company, Inc.

Respondent granted the tank-car price on gasoline to Stikeman Oil Company, Inc., in 1932, and has subsequently sold to it at that price. There is no evidence of any offers made to Stikeman by any of respondent's competitors at any time prior to the issuance of complaint in this proceeding.

Paragraph Fourteen: This proceeding was brought under Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936. Proof of discriminations in price by the respondent prior to June

19, 1936, could not be used to establish the violations of law alleged to have occurred. Except for the limited purposes hereafter considered, offers received by the four customers of respondent as heretofore recited, prior to June 19, 1936, and which were not continuing offers, are not relevant to show that the specific discriminations in price made by respondent subsequent to June 19, 1936, were made in good faith to meet equally low prices of competitors. This leaves for immediate consideration the continuing offer of the Red Indian Oil Company to Ned's Auto Supply Company and the two offers made to Citrin-Kolb Oil Company. The offer by Red Indian Oil Company was on Fleet Wing gasoline which, as has been previously found, was not a major brand of gasoline. In the trade sense, it was an off brand and generally sold at prices lower than major brands of gasoline.

There was no evidence as to whether or not Fleet Wing gasoline was of comparable grade or quality with respondent's gasoline. Regardless of this, in the retail distribution of gasoline public acceptance rather than chemical analysis of the product is the important competitive factor. Certain widely distributed and well advertised brands of gasoline have come to be known as major brands, and other brands are known as off brands. In the Detroit metropolitan area, as elsewhere, off-brand or local-brand gasoline sells at lower prices than major brands, and distributors of off-brand gasoline find it necessary to undersell major brands in order to secure some share of the market.

A dealer's purpose in purchasing gasoline is to resell it to his customers, and it is necessary, therefore, for him
328 to have a product his customers are willing to buy. The
dealer's overall success or failure may be governed largely by the extent to which his merchandise is acceptable to the public, and in the case of gasoline public acceptance is determined in large measure by factors other than actual grade and quality. A dealer cannot readily shift from one brand of gasoline to another without running the risk of losing many of his customers whom he may or may not be able to replace. Respondent has at all times been familiar with these competitive factors in the distribution of gasoline and could not have regarded the offer of Red Indian Oil Company to sell its Fleet Wing gasoline at a 1½ cents per gallon lower price as a serious competitive threat.

The offer of the Texas Company to Citrin-Kolb Oil Company in August 1936, and the offer of Argo Oil Company in 1939, could not have been relevant to the lower price respondent originally granted to Citrin-Kolb, for that lower price was first allowed in 1928 or 1929 and has continued since that time. Presumably, these offers were intended to show that continuance of the lower price to Citrin-Kolb was necessary to prevent respondent's competitors from securing the patronage of that customer.

It may well be that respondent was convinced that if it ceased granting tank-car prices to Citrin-Kolb, Wayne, and Stikeman and continued to refuse the tank-car price to Ned's Auto Supply Company it would lose these accounts. It had substantial reasons for believing this to be the case, for all of these concerns, except Ned's Auto Supply Company, had already been recognized as entitled to the tank-car price under the commonly accepted standards of the industry, and Ned's had achieved a volume of distribution which brought it within the range where it was likely to be so recognized by a major oil company at any time. Thus, the real question is whether or not the actions of the respondent in granting or continuing to these four dealers the tank-car price pursuant to and in accordance with its general policy can be said to have been made in good faith within the meaning of Section 2(b).

In dealing with this question, the Commission believes that consideration cannot be confined to such specific offers
as may have been made by competitors, but also must
329 include the setting and general conditions under which
such offers were made. In selecting the customers or prospective customers to whom it will grant the tank-car price on gasoline, the respondent's criterion is now, and for many years has been, that the customer or prospective customer make annual purchases of not less than from one to two million gallons of gasoline, have storage facilities sufficient to accept delivery in tank-car quantities, and have a credit standing assuring payment for large volume purchases. This is the same criterion which for many years has also been applied by the respondent's major competitors, and under it any question of the distributive function performed by the purchaser, that is, whether the purchaser is a retail dealer selling to the public or a wholesaler selling to retail dealers, is wholly immaterial.

Respondent has had long experience in the sale and distribution of gasoline, both through service stations which it owned or leased and operated and through its bulk plants to service station operators. It follows that respondent is thoroughly familiar with the costs of operating retail service stations and bulk plants, with the margins of gross profits available to retail service stations and to operators of bulk plants, and with the competitive results which may be expected when some retailers receive lower prices than competing retailers. At all relevant times, respondent knew or had the means of knowing and should have known that the manner in which it priced and sold its gasoline continually created the probability of injury to competition between retail dealers who bought such gasoline at different prices and resold it in competition with one another. It also knew or should have known that the price differences which it granted could not be justified on the basis of differences in the cost of manufacture, sale and delivery resulting from differing methods or quantities in which its gasoline was sold or delivered. These circumstances existed at the time the Robinson-Patman Amendment to the Clayton Act became law, and their existence imposed upon respondent the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute. Respondent neither did this nor made any bona fide attempt so to do.

330 With the exception of the ½ cent per gallon discrimination in favor of Ned's Auto Supply Company preceding the granting of the tank-car discount of 1½ cents per gallon to that purchaser, all of the discriminations in price involved in this proceeding were made pursuant to respondent's established method of pricing. They were not the result of departures from a non-discriminatory price scale which were made to meet lower prices of competitors, but represented only the continued application of the pricing standard previously adopted by respondent and followed by it since long before 1936. In the Commission's view, Section 2(b) of the statute does not contemplate justification being made for a method of pricing as exemplified by individual instances of price discrimination made pursuant to such pricing method.

It is also important that the respondent necessarily knew at the time of the passage of the Robinson-Patman Act, and at all times thereafter, that its standard for granting tank-car prices on its gasoline was in all substantial respects the same as the standard used by its major competitors. It was evidently then relying, as it is now relying, upon the position that so long as the pricing method in existence prior to the passage of the Robinson-Patman Act remains unchanged it can defend its price discriminations on the ground that its lower prices were granted in good faith to meet equally low prices of its competitors. Upon this same theory, respondent's competitors, including the three against whom similar charges of price discriminations are pending, might also defend their similar price differences on the ground of meeting respondent's equally low prices or the equally low prices of other competitors. The Commission does not construe the words "in good faith" in Section 2(b) as permitting that result. In the circumstances shown to exist, the Commission does not believe that the statute provides a means of effectively insulating any particular pricing pattern from attack or that it guarantees that so long as a pricing pattern in effect prior to 1936 remains undisturbed price discriminations made pursuant to that pattern may be lawfully continued.]

331 Paragraph Fifteen: For the reasons stated, the Commission is of the opinion that the respondent has not shown that the discriminatory prices allowed Ned's Auto Supply Company, Citrin-Kolb Oil Company, Wayne Oil Company, and Stikeman Oil Company, Inc., were lower prices granted in good faith to meet equally low prices of competitors. The Commission, therefore, finds that the burden imposed upon the respondent by Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, has not been sustained and that the price discriminations referred to in these findings have not been justified.

Conclusion.

The aforesaid discriminations in price by the respondent, as herein found, constituted violations of subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (the Clayton Act), as amended by an Act of Congress approved June 19, 1936 (the Robinson-Patman Act).

By the Commission.

Jas. M. Mead,
Chairman.

(Seal)

Issued: January 16, 1953.

Attest:
D. C. Daniel,
Secretary.

332 UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION.

Commissioners:
James M. Mead, Chairman,
Lowell B. Mason,
John Carson,
Stephen J. Spingarn,
Albert A. Carretta.

* * * (Caption—4389) * *

MODIFIED ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, as amended, the respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint, as amended, and in opposition thereto, taken before a hearing examiner of the Commission theretofore duly designated by it, report of the hearing examiner upon the evidence and exceptions filed thereto, briefs in support of and in opposition to the complaint, as amended, and oral argument of counsel, and the Commission, having considered the matter, on October 9, 1945, made its findings as to the facts and its conclusion drawn therefrom and issued its order to cease and desist (which said order to cease and desist was, on August 9, 1946, modified in certain respects).

Said modified order to cease and desist having been further modified by the United States Court of Appeals for the Seventh Circuit in the manner and to the extent set forth in the judgment of said Court issued April 29, 1949, which judgment was subsequently reversed by the United States Supreme Court, and the case having been remanded to the Commission on February 14, 1951, by the Court of Appeals with instructions "to make findings in conformity with the opinion of the Supreme Court of the United
333 States filed on January 8, 1951"; and the Commission having made its modified findings as to the facts and its conclusion that the respondent has violated the provisions of subsection (a) of Section 2 of an Act of Con-

gress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (the Clayton Act), as amended by an Act of Congress approved June 19, 1936 (the Robinson-Patman Act), and having afforded the respondent opportunity to show cause why the modified order to cease and desist issued in this proceeding on August 9, 1946, should not be further modified in the manner shown in its order issued March 24, 1952, and having considered the objections to such modification made by the respondent and briefs filed on behalf of Retail Gasoline Dealers Association of Michigan, National Congress of Petroleum Retailers, Inc., Empire State Petroleum Association, Inc., Great American Oil Company, and counsel in support of the complaint, and oral argument of counsel:

It Is Ordered that the respondent, Standard Oil Company (Indiana), a corporation, and its officers, representatives, agents and employes, directly or through any corporate or other device, in connection with the sale or distribution of gasoline in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of gasoline of like grade and quality:

1. By selling ~~such~~ gasoline to any retailer thereof at a lower price than to any other retailer who in fact competes with the favored purchaser in the resale of such gasoline to the public ("Retailer" as here used applies to that portion of the business of any purchaser which consists of the retail sale of gasoline to the public).

2. By selling such gasoline to any retailer at a price known by respondent to be higher than the price at which any wholesaler-purchaser is reselling such gasoline to
334 any retailer who competes with such direct retailer-customer of respondent, where respondent is selling to such wholesaler at a price lower than respondent's price to such direct retailer-customer.

For the purpose of comparison, the term "price" as used in this order includes discounts, rebates, allowances and other terms and conditions of sale.

It Is Further Ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

By the Commission, Commissioners Mason and Carretta dissenting.

D. C. DANIEL,
Secretary.

Issued: January 16, 1953.

Dissenting opinion of Commissioner Lowell B. Mason and dissenting opinion of Commissioner Albert A. Carretta are attached.

* * (Caption—4389) * *

DISSENTING OPINION OF COMMISSIONER LOWELL B. MASON.

Commissioner Mason joins with Commissioner Carretta in his dissent.

In this connection, reference is made to the following language contained in Commissioner Mason's previous dissent of August 9, 1946, in this same case:

> "* * * the respondent proved by greater weight of the evidence (in fact, I find the testimony uncontroverted). The respondent proved that it had granted a lower price in good faith to meet a competitor's price. The trial examiner who heard the case so held, and I as a Commissioner would so find.
>
> "The Commission concludes as a matter of law that it is unnecessary for it to determine this fact. In my opinion, this is not sound. So far as the Federal Trade Commission is concerned, I believe deliberate and intentional matching of a competitor's lower price is legitimate as long as the proviso on Section 2 (b) of the Clayton Act stays on the statute books."[1]
>
> "In the instant case, the respondent, having lost two customers because it would not meet the prices of its competitors, made up its corporate mind to hang on to what business it had left, and in good faith, and what appears to me only ordinary common sense, lowered its price to that of its competitors.

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[1] The Supreme Court sustained this view. *Standard Oil Company v. Federal Trade Commission*, October Term, 1950.

336 "In my opinion, the rejection of this defense by the Commission is fatal to the validity of the order."[2]

Lowell B. Mason,
Commissioner.

337 UNITED STATES OF AMERICA

Before Federal Trade Commission.

Commissioners:
James M. Mead, Chairman,
Lowell B. Mason,
John Carson,
Stephen J. Spingarn,
Albert A. Carretta.

* * (Caption—4389) * *

DISSENTING OPINION OF COMMISSIONER ALBERT A. CARRETTA.

I. History of Case.

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act), the Federal Trade Commission on November 29, 1940 issued and subsequently served its complaint in this proceeding upon the respondent, Standard Oil Company, an Indiana corporation, charging it with violation of the provisions of subsection (a) of Section 2 of the said Clayton Act, as amended. After the issuance of said complaint, the filing of respondent's answer thereto, and the taking of partial testimony and other evidence in support of the complaint, the Commission, on April 23, 1941, issued and subsequently served upon the respondent an order amending said complaint, which order also provided that the
338 testimony and other evidence theretofore taken be
adopted and considered as having been taken in support of the allegations of the complaint as amended, and that

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[2] The Supreme Court agreed with this interpretation.

the answer of the respondent filed to the original complaint be adopted as respondent's answer to the complaint as amended. The complaint, as amended, alleges that the respondent, since June 19, 1936, sold "its gasoline to four Detroit dealers engaged in reselling said gasoline at retail, at prices substantially lower than the prices charged by respondent to its other Detroit retailer purchasers for gasoline of the same grade and quality. Said four dealers are: Citrin-Kolb Oil Company; Stikeman Oil Company, Inc.; Wayne Oil Company; and Ned's Auto Supply Company. Each of said dealers has, since said date, owned or operated in the Detroit area one or more gasoline stations where said gasoline so purchased has been resold (and except as to Stikeman Oil Company, Inc., is now resold) at retail to consumers thereof, in competition with other retailers of gasoline purchasing the same from Respondent or from other manufacturers. Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., and Wayne Oil Company, respectively, are also engaged in the business of reselling at wholesale, a large part of the gasoline so purchased by them from respondent, to other gasoline dealers in the Detroit area who are likewise competitively engaged in the resale thereof at retail."

The complaint, as amended, further alleges that "the effect of the discrimination in price described in the preceding paragraph hereof has been and may be to injure, destroy and prevent competition with each of the four dealers named in said Paragraph, and with their respective customers, in the resale of gasoline."

Between March 1941 and August 1942, approximately 8,000 pages of testimony and other evidence in support of and in opposition to the allegations of said complaint as amended, were introduced before a trial examiner of the Commission.

In the "Trial Examiner's Report Upon the Evidence" in this case, filed on July 1, 1943, the Trial Examiner posed the following question:

> "Were the differentials in price accorded the four dealers, recognized by respondent as jobbers, made in good faith to meet equally low prices of competitors, or the services or facilities furnished by competitors?"

339 After reviewing the evidence in the record, the Trial Examiner further stated in his Report:

> "Conclusion of Fact:
>
> The differentials on its branded gasolines respondent granted Ned's Auto Supply Company, at all times subsequent to March 7, 1938, and Stikeman Oil Company, Citrin-Kolb Oil Company, and the Wayne Company, at all times subsequent to June 19, 1936, were granted to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality."

On October 9, 1945, the Commission published both its "Findings as to the Facts and Conclusion" in this matter, as well as its "Order" which requires the respondent to cease and desist from discriminating in the price of gasoline of the same grade and quality among its customers in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

Under dates of January 21, 1946 and February 15, 1946, counsel for the Commission filed motions seeking to modify the order to cease and desist entered herein by the Commission on October 9, 1945. Under date of January 28, 1946, respondent filed a motion seeking a rehearing and reconsideration of the order to cease and desist. Under date of August 9, 1946, the Commission ordered that the motions of counsel for the Commission be granted, and that said order to cease and desist be modified substantially in the manner and to the extent as set out in the supplemental motion of counsel for the Commission dated February 15, 1946. Under date of August 9, 1946, the Commission ordered that the motion of respondent for rehearing and reconsideration of the order to cease and desist be denied. Under date of August 9, 1946, the Commission published its modified order to cease and desist.

On October 4, 1946, respondent filed its petition in the United States Court of Appeals for the Seventh Circuit seeking a review of the aforementioned modified cease and desist order. In this proceeding, the Commission asked enforcement of its order. In its petition, the respondent contended that the modified cease and desist order should not be enforced because:

340 1. The Commission failed to find and could not have found under the undisputed evidence in this case, that either or any of the purchases involved in such discrimination was in commerce.

2. The Commission treated as immaterial the respondent's conclusive showing that the discrimination made in price was in good faith to meet an equally low price of a competitor, which showing the respondent asserted as a complete defense.

3. "Paragraph 6 of the modified order directs Standard at its peril to prevent jobbers to whom it sells gasoline and who are in competition with Standard in the resale thereof from reselling to their retail dealers at prices less than Standard's price to its own retail dealers; requires Standard to police, maintain and regulate such competitor's prices on gasoline, title to which passed to the jobber on delivery by Standard; and subjects Standard retroactively to punishment for contempt should a jobber-competitor fail to maintain such resale prices".

Under date of March 11, 1949, the United States Court of Appeals for the Seventh Circuit published its opinion which stated, among other things, that:

1. The respondent's operations are in commerce from the refinery to its customers.

2. The showing of the respondent that it made the discriminatory price in good faith to meet competition is not controlling in view of the very substantial evidence that its discrimination was used to affect and lessen competition at the retail level.

(In this connection, the following language is quoted from the opinion of the United States Court of Appeals for the Seventh Circuit:

> "There is substantial evidence in the record, and we think it may be assumed to be conclusive, to the effect that the petitioner made its low price to Ned's, Citrin, Wayne and Stikeman in good faith to meet the lower price of a competitor." 341
>
> * * * * *
>
> "Now as to the contention that the discriminatory prices here complained of were made in good faith to meet a lower price of a competitor. While the Commission made no finding on this point, it assumed its existence but held, contrary to the petitioner's contention, that this was not a defense."
>
> * * * * *

> "The showing made here by the petitioner that it made the lower price in good faith to meet competition, we assume, as the Commission apparently did, was made out.")

3. "We would modify Paragraph 6 to read as follows: 'By selling such gasoline to any jobber or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-customers of such jobbers or wholesalers, where such jobber or wholesaler, to the knowledge of the respondent or under such circumstances as are reasonably calculated to impute knowledge to the respondent, resells such gasoline or intends to resell the same to any of its said retailer-customers at less than respondent's posted tank-wagon price or directly or indirectly grants to any such retailer-customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer'."

The United States Court of Appeals for the Seventh Circuit concluded its opinion by stating:

342 "The order as modified will be enforced, and judgment thereon will be entered accordingly."

Subsequently, respondent filed a petition with the Supreme Court of the United States for a Writ of Certiorari, which was granted on November 7, 1949. Under date of January 8, 1951, the Supreme Court of the United States reversed the judgment of the United States Court of Appeals for the Seventh Circuit in this case, and remanded the case to that court with instructions to remand it to the Federal Trade Commission to make findings in conformity with the opinion of the Supreme Court.

With respect to the contention of respondent that the subject sales were not in "commerce", the Supreme Court stated in its opinion:

> "Such sales are well within the jurisdictional requirements of the Act."

With respect to the respondent's contention that its price discriminations were made in good faith to meet an equally low price of a competitor, the Supreme Court stated:

> "In addition there has been widespread understand-

> ing that, under the Robinson-Patman Act, it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good faith to meet a lawful and equally low price of a competitor. This understanding is reflected in actions and statements of members and counsel of the Federal Trade Commission. Representatives of the Department of Justice have testified to the effectiveness and value of the defense under the Robinson-Patman Act. We see no reason to depart now from that interpretation."

The opinion of the Supreme Court, therefore, stated that there should be a finding by the Commission as to whether or not petitioner's price reduction was made in good faith to meet a lawful equally low price of a competitor. It was for this purpose that the United States Court of Appeals for the Seventh Circuit was ordered to remand this case to the Federal Trade Commission. This was done on February 14, 1951.

343 II. Finding Required By the Supreme Court of the United States.

The Supreme Court, in its opinion of January 8, 1951, stated:

> "There Should Be A Finding As To Whether Or Not Petitioner's Price Reduction Was Made In Good Faith To Meet A Lawful Equally Low Price Of A Competitor."

From a reading of the entire opinion, it appears that the one and only purpose for which this case was remanded to the Commission was to direct the Commission to make a finding on the subject matter indicated in the above quotation. All other questions previously presented in this case were disposed of.

The Supreme Court discussed the "good faith defense" contained in Section 2 of the original Clayton Act, and in so doing compared it with the language now contained in Section 2(a) and 2(b) of the Clayton Act, as amended by the Robinson-Patman Act. The Court decided that the changes made in this section did not "cut into the actual core of the defense" ("good faith" defense). The Court further stated that such defense "still consists of the provision that wherever a lawful lower price of a competitor tends to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price. Actual competition, at least in this elemental form, is thus preserved." (Underlining supplied.)

Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, reads as follows:

> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the
> 344 prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." (Underscoring supplied.)

The question which immediately suggests itself upon reading this language of the statute concerns the intended meaning of the word "lawful", which was apparently added by the Supreme Court to the wording of the statute. Since January 1951, when the decision of the Court herein was published, many articles have been written and many speeches have been made questioning, first, the authority of the Supreme Court to add this words "lawful" to the words of the statute, and second, the meaning which the Court sought to convey by its use. Be that as it may, however, it is not within the province of the Federal Trade Commission to question a decision of the Supreme Court of the United States. Until such time as the Supreme Court should rule otherwise, or until such time as Congress might legislate upon this subject, the Commission is bound to read the proviso in Section 2(b) as though it contains the words "lawful". To do otherwise would be to flout the decision of the Supreme Court.

Speaking as only one of the Commissioners of the Federal Trade Commission, I can honestly say that I am not in disagreement with the majority of the Court when it ruled that there should be a finding as to whether or not petitioner's price reduction was made in good faith to meet a lawful equally low price of a competitor. The question of importance concerns the extent to which, if any, the respondent is to assume the burden of proving that the competitor's price which was being met was a lawful price.

The Supreme Court could have meant that the respondent must assume the burden of affirmatively proving that the competitor's lower price which was being met was a lawful price. If such were the case, the respondent would have the burden of proving to the satisfaction of the Commission that the lower price of a competitor which was being met was one which would be found by the Commission as being non-violative of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

To do this, it would be necessary for the respondent
345 to have access to facts and figures which ordinarily
are in the possession of only the competitor. For example, if a competitor's lower price were one based on "cost justification", the respondent would have to have the figures which would justify the granting of such lower price by the competitor to its customer. It is hardly reasonable to assume that any respondent could voluntarily obtain such information from a competitor. This would also mean that the respondent would have to have such information in his possession before he could meet the lower price. Otherwise, he would proceed at his peril. This interpretation is illogical in that it would place upon the party who was required to meet the lower price of his competitor an unreasonable burden. It would bundle him in an economic straight jacket and leave him incapable of exercising that flexibility of movement which is so necessary to compete successfully in the market place. While he was checking to determine whether the price he was required to meet was a lawful price, he would be losing his customer to his competitor.

Further, it must be remembered that it sometimes takes the Federal Trade Commission—even with its extensive investigative and subpoena powers—several years to establish that prices charged by certain respondents are "unlawful" as being in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. Conversely, it may be stated that the respondents in such cases also spend several years in attempting to establish that their own prices are "lawful" and not in violation of the aforementioned section. How much more difficult, therefore, would it be for a seller to establish that the prices of a competitor are "lawful" prices?

In connection with this matter, it would be well to quote from the "Final Report of the Select Committee on Small Business" of the House of Representatives, dated December 31, 1952.

> "A persistent problem faced by the Federal Trade Commission for many years has been the inordinate amount of time needed to complete its actions". (Report, page 285.)
>
> "A total of 64, about three-fourths of all pending antimonopoly cases, on June 30, 1952, had been active—if active is the word—for more than 3 years.
> 346 The average period as represented by the median was 61 months." (Underscoring added.) (Report, page 287.)

In consideration of the insurmountable problems which would confront a respondent if it were assigned the above-described unreasonable burden of affirmatively proving that the lower price of its competitor which was being met was lawful, it must be concluded that the Supreme Court could not have meant, and in fact, did not mean, that any such burden was to be assumed by the respondent. What, then, could the Court have meant?

The presumption of validity of prices is one which should be given consideration by the Commission in its determinations, and is not one to be lightly dismissed under our system of jurisprudence in the absence of evidence to the contrary.

If a seller knows that a competitor is offering a customer of the seller an unlawful price, can it ever be said that the seller—in meeting such price—is meeting a lawful price? Obviously not. Further, if a seller has reason to believe that the price which a competitor is offering a customer of the seller is an unlawful price, can it ever be said that the seller—in meeting such price—is meeting a lawful price? Here, if the seller ignores the danger signals of which he is cognizant and makes no attempt to dispel his doubts as to the "unlawfulness" of his competitor's price, then the answer must also be in the negative. If the seller meets the lower price of the competitor under such conditions without dispelling the doubts from his mind, he does so at his peril. On the other hand, if the seller does not know, or if the seller does not have reason to believe that the competitor's price to a seller's customer is or may be unlawful, may be, acting as a reasonable prudent man would act under the circumstances, meet such competitor's lower price? Here, I believe the answer is "yes". To require more of the seller would be to deprive him of the right to compete for the business of his customer.

Consequently, when a respondent seeks to avail itself of the defense provided in Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, such respondent must assume the burden of affirmatively proving to the satisfaction of the Commission that his lower price was
347 made in good faith to meet an equally low price of
a competitor (note the omission of the word "lawful" herein). As one of the tests in determining whether respondent lowered its price in good faith to meet the equally low price of a competitor, the Commission must be satisfied that the respondent did not know, or did not have reason to believe, that the competitor's lower price which he was meeting was or might have been unlawful, and that he acted as a reasonable prudent man would have acted under the circumstances.

III. Evidence of Record:

It must be remembered in reading this section that although the present tense is used in many instances, all statements refer to the testimony of witnesses given more than ten years ago.

Before proceeding to a consideration of the evidence relative to the competition which had to be met by the respondent in selling gasoline in the Detroit, Michigan, area, it would be well to cite from the record the uncontroverted testimony concerning the nature of the gasoline market in the City of Detroit and in the State of Michigan during the period covered in the complaint.

Mr. Raupagh, Manager of the Detroit Division of the re-

spondent, testified that Detroit is generally considered to be one of the most, if not the most, highly competitive areas insofar as the gasoline industry is concerned. This applies both to the competition among the suppliers of gasoline to resellers, and to the competition among resellers. Mr. Raupagh gave as some of the reasons for this condition that Detroit, being a large industrial city, has a large potential market for gasoline; it is so located that its distributors have both good water and rail transportation. He stated that some years ago, Detroit was considered as a sort of a dumping ground for gasoline because refineries from the mid-continent and other fields would dump their surplus in the Detroit market because transportation facilities were good—even though normally, such refineries did not enter the Detroit market (R. 3256-57). Mr. Raupagh stated that there has been a surplus of gasoline in the Detroit area during all the time he has been there—which has been since 1930 (R. 3259, R. 3431). The witness further testified that Michigan is a crude oil producing state and that there are approximately 30 refineries therein refining Michigan-produced gasoline, the greater part of
348 which is sold in the Detroit area. Thirty percent of
the gasoline consumed in Michigan is produced within the State. There was also a surplus of Michigan gasoline which Michigan refineries were offering to Michigan dealers at 3¢ below the prevailing tank-wagon price (R. 3269).

There are a number of marine terminals located in the Detroit area operated by such companies as Shell, Cities Service, Ohio Oil, Texas, Mid-Continent, Chas. Austin, Inc., Puritan Stations, Inc., Keystone Oil & Refining, Globe Oil & Refining, and Brownley, as well as by respondent. In addition, gasoline is brought into the City of Detroit by pipe line from Toledo. The witness further testified that Detroit is not too far distant from northern Indiana and northern Illinois, where numerous refineries, pipe line terminals and oil depots are located.

Prior to the date on which the complaint herein was issued (November 29, 1940), respondent sold its gasoline to seven jobbers in the Detroit, Michigan, area on a "tank-car" basis. These jobbers were:

Ned's Auto Supply Company
Citrin-Kolb Oil Company
Stikeman Oil Company
Wayne Oil Company

Carnick Oil Company
Middleton Oil Company
Dick Lock.

Mr. Raupagh, Manager of the Detroit Division of the respondent, testified that in 1933 or 1934 respondent lost the Carnick Oil Company account to Gulf Oil Corporation. This latter company permitted Carnick Oil Company to purchase at "tank-car" prices from Gulf Oil's bulk plant, thus enabling Carnick Oil to do away with the necessity of owning and operating a bulk plant (R. 3277-78).

Mr. Raupagh further testified that in 1933 respondent lost the Middleton Oil Company account to Shell Oil Company. At that time, Shell Oil made a lower offer to Middleton Oil, which respondent declined to meet (R. 3279-3282).

In 1933 or the early part of 1934, according to testimony of Mr. Raupagh, respondent lost the Dick Lock account to the Gulf Oil Company. At that time, Dick Lock 349 informed Mr. Raupagh that Gulf Oil had made a better offer to him and that he had accepted such offer (R. 3282-84).

As of the date on which the complaint herein was issued, respondent was selling its gasoline to the remaining four jobbers on a "tank-car" basis. Respondent was also selling its gasoline on a "tank-wagon" basis to retail service stations owned by it, and to retail service stations independently owned, in the Detroit area.

The basic, customary and prevailing standards for qualification as a "jobber" in the gasoline industry are that the applicant for this status must possess a bulk storage plant, must possess a good credit rating, and must have some established business enabling it to purchase from one million to two million gallons per year (R. 40; R. 1485-86).

Because the alleged price discriminations of which the respondent is charged pertain to respondent's dealings with the four jobbers not lost to competitors by the respondent prior to the date on which the complaint herein was issued, it will be necessary to review the record for the history of such dealings.

Ned's Auto Supply Company.

Ned's Auto Supply Company (hereinafter sometimes referred to as "Ned's") began operations in 1918 throug the establishment of a single service station. The secon service station was acquired in 1928, the third in 1933 o 1934, and the fourth in 1935. Between 1936 and 1940 tw other stations were acquired, making a total of six in al plus a service station known as "Charley's", which wa owned by Ned's but which was operated by an individua on a salary and commission basis. During all these year Ned's purchased its requirements from the respondent, an by 1936 was purchasing approximately 2,400,000 gallons o gasoline a year from the respondent at "tank-wagon" prices.

Ned's was classified by the respondent as a "jobber" o
March 7, 1938 (approximately two years after the enact-
ment of the Robinson-Patman Act) and since that date ha
been purchasing its gasoline requirements from the re-
spondent at "tank-car" prices. Ned's did not sell t
350 other resellers of gasoline, but did at all times sell th
gasoline purchased from the respondent to the publi
through its above-mentioned service stations.

Charles Gershenson and William Gershenson at the tim this proceeding began, were President and Vice-President respectively, of Ned's Auto Supply Company. At the hearing Charles Gershenson testified that prior to 1936, hi Company had received offers for the sale of gasoline to hi Company from various suppliers. In approximately 193 a representative of the Argo Oil Company inquired whethe Ned's would be interested in buying gasoline at a price 1 a gallon lower than the "tank-wagon" price Ned's was the paying the respondent. The brand name of the gasolin offered was either "Dixie" or "Shell" (R. 3088-89).

Mr. Charles Gershenson also testified that another offe was received at about the same time from the Red India Oil Company, and he stated that he remembered this offe very clearly because such offer had been continued to th date of the hearing in this matter. Red Indian Oil Company was then selling "Phillips 66", a brand of well-advertised gasoline. The representative of Red Indian, a Mr McLean, told Mr. Charles Gershenson that his compan would supply Ned's with gasoline—delivered to Ned's plac—at 1¢ a gallon lower than the "tank-wagon" price pai by Ned's to respondent, or, if the gasoline was picked up by Ned's at the bulk plant of Red Indian Oil Company and hauled by Ned's, Red Indian Oil Company would sell it to Ned's at approximately 1½¢ lower than the "tank-wagon" price paid by Ned's to respondent (R. 3089-91). Another offer was made to Ned's by Red Indian Oil Company in 1936. At that time, Mr. Dworman, President of Red Indian Oil Company, offered to deliver gasoline to Ned's at a price 1½¢ lower than the "tank-wagon" price paid by Ned's to respondent, or at a price 1.7¢ lower than the aforementioned "tank-wagon" price if the gasoline was picked up by Ned's at the bulk plant of Red Indian Oil Company (R. 3415, et seq.).

Mr. Charles Gershenson testified that either in 1933 or 1934, he had attended a "dealer jamboree" conducted by the Shell Oil Company in the Book-Cadillac Hotel in Detroit. There he met a Mr. Jack Read, a representative of Shell Oil Company, who advised him that Shell was looking for a distributor in Detroit, and that if Ned could set itself up to handle "tank-car" deliveries, Shell 351 Oil Company would sell to Ned's on a "tank-car" jobber basis. Subsequently, several meetings were held between Mr. Charles Gershenson and Mr. Read. The Shell Oil Company subsequently took on another company as its Detroit jobber (R. 3100-01).

Mr. Charles Gershenson testified that in May or June of 1933, he went to Akron, Ohio, where, at the Firestone Clubhouse he met a Mr. Dodge, who was then Vice-President and Sales Manager of The Texas Company. Mr. Gershenson informed Mr. Dodge that Ned's was then purchasing its gasoline requirements from respondent on a "tank-wagon" basis but that he wasn't satisfied with the price, and knowing of the contract Firestone Tire and Rubber Company had with The Texas Company, inquired whether Ned's could obtain a similar contract. Mr. Dodge asked whether Ned's had facilities for handling gasoline on a "tank-car" basis. Ned's did not have such facilities at that time. Terms of the Firestone Tire & Rubber Company contract were then discussed, and Mr. Charles Gershenson testified that to the best of his recollection, Firestone's differential was 4¢ lower than respondent's "tank-wagon" price on the house brand gasoline, and either 4½¢ or 5¢ a gallon lower than the respondent's "tank-wagon" price on premium gasoline. Mr. Charles

Gershenson informed Mr. Dodge that he would communicate with him as soon as Ned's had facilities to avail itself of "tank-car" deliveries. This offer by The Texas Company to Ned's was subsequently communicated to Mr. Raupagh by telephone (R. 3092-96).

Under date of August 27, 1936, a letter was addressed to respondent by William Gershenson in which it was stated:

> "This is to advise you that a competitive major oil company recently submitted to us a gasoline contract carrying a substantially larger margin of profit than we now enjoy from your company.
>
> "It is our present intention to act upon this offer and accept same."

(Attention is invited to the fact that the above letter was addressed to the respondent subsequent to the passage of the Robinson-Patman Act.)

Relative to this letter, Mr. Charles Gershenson testified that the offer of The Texas Company was in the nature of a continuing offer, and that it was the offer referred to 352 in the above-quoted letter. The record indicates that although the letter was signed by William Gershenson, it was actually dictated by the witness, Charles Gershenson (R. 3054). As a result of this communication, and subsequent meetings between respondent and Ned's, in approximately September 1936 the respondent began selling gasoline to Ned's at a price ½¢ below respondent's prevailing "tank-wagon" price (R. 3415-16). This arrangement continued until some time in March, 1938, when, as a result of a letter addressed to the respondent by Ned's under date of February 14, 1938 (Respondent's Exhibit No. 46), respondent began selling to Ned's on a "tank-car" basis at 1½¢ lower than respondent's prevailing "tank-wagon" price. At this time, Ned's had acquired bulk plant facilities, enabling it to purchase in larger quantities and to store such gasoline in its own facilities. Prior to Ned's having received the "tank-car" price, Charles Gershenson testified that he had had a number of conversations with Mr. Raupagh subsequent to the writing of the letter referred to as respondent's exhibit No. 46. At such meetings he mentioned to Raupagh the fact that his company could obtain gasoline from Shell, Red Indian or Texas at a lower price, and that this letter, respondent's exhibit No. 46, was in the nature of an ultimatum. Mr. Raupagh was advised that Ned's would take advantage of one of these other three offers if respondent did not start selling Ned's on a "tank-car" basis (R. 3113).

Mr. Raupagh, Detroit Division Manager of respondent company, also testified at some length relative to negotiations between respondent and Ned's Auto Supply Company. Mr. Raupagh testified that in 1936 the relationship between Ned's and respondent was so delicate as to raise a doubt as to whether respondent could retain Ned's business. In that year Charles and William Gershenson suggested to him that they go to Chicago to talk to respondent's officials. Mr. Raupagh made arrangements for this trip, and testified that the meeting in Chicago lasted several days (R. 3410). Mr. Raupagh further testified that at this Chicago conference the Gershensons advised respondent's officials that unless respondent agreed to sell to Ned's at a price lower than the prevailing "tank-wagon" price, Ned's would discontinue doing business with respondent. The Gershensons stated to respondent's officials that they no longer could afford to pay the prevailing price in view of offers Ned's had received from other suppliers. At 353 that time Ned's argued very strongly in favor of being placed on a "tank-car" basis (R. 3411). Mr. Raupagh testified that as a result of these Chicago meetings, he came to the conclusion that respondent would lose Ned's as a customer unless some price reduction was made (R. 3412-14), and that he was specifically told so by the Gershensons (R. 3414). Mr. Raupagh stated that some time later he informed Ned's of respondent's willingness to sell gasoline to Ned's at a price ½¢ lower than the prevailing "tank-wagon" price. There were extensive discussions with respect to this offer of respondent, and although Ned's was not completely satisfied, Ned's decided to accept it for the time being (R. 3415). This testimony of Mr. Raupagh corroborated the testimony of Mr. Charles Gershenson.

Continuing his testimony, Mr. Raupagh testified that some time during the early part of 1938, respondent received a letter from Ned's containing a demand that they be put on a "tank-car" price basis. This is in evidence as Respondent's Exhibit 46 (R. 3419). At meetings held between Ned's and the respondent, Ned's referred to offers made to it by other suppliers of gasoline (R. 3114, 3420, 3425).

Pursuing this line of questioning, Mr. Raupagh was asked by counsel for respondent to relate as many instances as he could where some offer was referred to him by Ned's as having been made to Ned's by other suppliers of gasoline. In this connection Mr. Raupagh testified in detail concerning the circumstances surrounding the offer received by Ned's from The Texas Company. Mr. Raupagh also testified that he had known of the offer made to Ned's by Red Indian Oil Company (R. 3422-25). Continuing, Mr. Raupagh stated that Ned's had informed him of an offer received by Ned's from the Gulf Refining Company in 1940 (quite some time after the enactment of the Robinson-Patman Act) through their manager, a Mr. Crawford. At that time, Gulf offered to sell Ned's the regular quality of gasoline at the same price being paid by Ned's to respondent. Respondent introduced in evidence Exhibit 48, which was a letter dated December 23, 1940, addressed to the respondent by Charles Gershenson, confirming the aforementioned offer made to Ned's by Gulf Refining Company (R. 3425-27).

Citrin-Kolb Oil Company.

Citrin-Kolb Oil Company was organized in 1923 as a partnership comprising Jacob A. Citrin, Nathan Kolb and Barney Citrin. At that time they were buying "Lin-
354 coln" gasoline. Some time prior to 1926 they began
buying gasoline from respondent. Between 1926 and 1928, they acquired a bulk storage plant. In 1929 respondent granted "jobber" classification to this company, and since that time has been selling to it on a "tank-car" basis.

Citrin-Kolb operated from one to five retail stations from 1936 to 1939; from five to eight stations in 1940-1941, and at the time this case was submitted to the Commission for decision, it was operating five retail service stations. During the latter period, Citrin-Kolb Oil Company purchased approximately 5,000,000 gallons of gasoline per year from respondent. Part of the gasoline so purchased was resold at its own retail stations, and part of it was sold to other distributors.

Jacob A. Citrin testified at the hearing that when his company was accorded "jobber" status by respondent in 1929 and purchased gasoline at "tank-car" prices, other jobbers at that time were paying less for gasoline from other suppliers. Notwithstanding this, the company continued to purchase gasoline from respondent (R. 2085-86). Mr. Citrin further testified that in 1930 Hickok Oil Company had offered to sell gasoline to his company at a price which would have netted Citrin-Kolb Oil Company 1¢ more than his company was netting on their purchases of gasoline from respondent. Mr. Citrin testified that under the terms of this offer, his company would have had to incorporate and, among other things, assign to the Hickok Oil Company 51% of the corporate stock (R. 2088-89).

Mr. Citrin further testified that in the early part of 1936, an offer was received by his company from a Mr. Chandler, of Gulf Refining Company, under the terms of which Citrin-Kolb Oil Company would not be required to buy and store large quantities of gasoline because they could use Gulf's storage facilities. This would not necessitate as much of an investment for Citrin-Kolb Company, and would eliminate shrinkage (R. 2118-20). The price offered by Gulf Refining Company was comparable to the price Citrin-Kolb Oil Company was getting from respondent, with the exception that Gulf Refining Company would furnish pumps, paint for oil stations, and equipment. Mr. Citrin testified that this offer of Gulf Refining Company was communicated to Mr. Raupagh, who refused to meet it (R. 2142-44). Mr. Citrin also testified that in August
355 1936 (subsequent to the enactment of the Robinson-Patman Act), an offer was received by his company from The Texas Company (R. 2126). This offer would have permitted his company to purchase gasoline from The Texas Company at a price approximately ½¢ less per gallon than respondent was charging his company. However, The Texas Company would also furnish advertising, paint, and globes. This offer was communicated by Mr. Citrin to Mr. Raupagh, but Mr. Raupagh advised him that respondent could not meet it (R. 2126-41).

Mr. Citrin testified that in 1939 (subsequent to the enactment of the Robinson-Patman Act), he received an offer from the Argo Oil Corporation, dealing in "Marathon" gasoline. This offer came from a Mr. Roy Fisher, who offered to sell this gasoline at a price ½¢ lower than Citrin-Kolb Oil Company was then paying respondent (R. 2145-56). This offer was communicated by Mr. Citrin to Mr. Love, Sales Manager of respondent's Detroit Division, who in turn advised Mr. Raupagh.

Mr. Citrin testified that on December 10, 1940 (more than four years after the enactment of the Robinson-Patman Act), he received an offer from a Mr. McCready of the Aurora Oil Company (R. 2163-64). This offer was ½¢ lower than the price Citrin-Kolb Oil Company was paying respondent (R. 2172). The record indicates that Mr. Raupagh, who was Detroit Division Manager of respondent, testified that the gasoline offered by Aurora Oil Company to Citrin-Kolb Oil Company was better gasoline than was being supplied by respondent to Citrin-Kolb Oil Company (R. 3447). This offer of Aurora Gasoline Company was communicated to Mr. Raupagh by Mr. Citrin, who advised Mr. Raupagh that the partners of his company had decided to accept such offer unless respondent agreed to meet it (R. 2174-75). Mr. Raupagh advised Mr. Citrin that he could not do anything about it (R. 2176), and as of the date of the hearings held in this matter, the offer of Aurora Gasoline Company was still being considered by Citrin-Kolb Oil Company (R. 2177).

With regard to the negotiations between Citrin-Kolb Oil Company and the respondent, Mr. Raupagh later was called as a witness by respondent and corroborated all of the testimony given by Mr. Citrin with regard to negotiations between Citrin-Kolb Oil Company and the respondent, as well as in connection with offers received by Citrin-Kolb Oil Company from other suppliers of gasoline, of which Mr. Raupagh had knowledge.

356 Stikeman Oil Company.

Stikeman Oil Company (hereinafter sometimes referred to as "Stikeman") was organized in 1931. It acquired bulk storage facilities and was recognized by respondent as a "jobber" in 1932. In 1935 the company decided to discontinue retail operations and did completely withdraw from that market on February 15, 1938. Since this later date, it has purchased approximately 2,000,000 gallons annually of respondent's branded gasoline, all of which it has sold at wholesale.

Mr. Raupagh, the Detroit Division Manager of respondent, testified that some time prior to 1936 respondent lost this account to the White Star Refining Company (which is now Socony-Vacuum Oil Company). Mr. Raupagh further testified that the reason for losing this account was that Stikeman was offered a better price by White Star

Refining Company than the price offered by respondent. He did not recall how much lower the White Star Refining Company price was, but stated that he believed it to have been from ½¢ to 1¢ per gallon lower than respondent's price (R. 3452). The record is not clear as to the date on which Stikeman Oil Company again began purchasing gasoline from respondent. However, Mr. Raupagh testified that subsequent to 1936, he learned that Phillips Petroleum Company was attempting to sell "Phillips 66" gasoline to Stikeman Oil Company. The Phillips Petroleum Company offer to Stikeman was along the lines of a contract offer, that is, Phillips desired to tie up the Stikeman Oil Company account for a number of years. Mr. Stikeman discussed this offer with Mr. Raupagh, who testified that the Phillips Petroleum Company offer would have allowed Stikeman a larger margin of profit than was possible under the price being paid to respondent (R. 3452).

Mr. Raupagh also testified that the next offer of which he had knowledge as having been made to Stikeman was made in December 1940, when the National Refining Company made a joint offer to sell gasoline to Stikeman Oil Company and to the Wayne Oil Company on a contract basis, by the terms of which each company would realize a greater margin of profit than would be possible under its purchases from respondent (R. 1998 and R. 3450). The testimony of Mr. Raupagh with respect to the offer from National Refining Company is corroborated by Mr. 357 Ledbetter, President of Wayne Oil Company, who was present in the office of the Stikeman Oil Company at the time the offer was made by Mr. Rickley, who represented the National Refining Company, to both Stikeman Oil Company and to Wayne Oil Company (R. 1888-89).

Wayne Oil Company.

The Wayne Oil Company is a family corporation which, in 1931, began operating a retail service station, buying its requirements therefor from the respondent at "tank-wagon" prices. In the same year, it acquired two additional service stations. In 1933 it leased its stations to the then operators, who continued to purchase their requirements from respondent.

By July 1935, Wayne Oil Company was operating twelve service stations, and its requirements increased to approximately one million gallons of gasoline per year. Prior to 1935, the Wayne Oil Company acquired bulk storage facilities. In 1935 the Wayne Oil Company began selling at wholesale, and also supplied gasoline, which it purchased from respondent, to the lessees of its service stations. Since 1935, when this company was recognized as a jobber by respondent, it has been purchasing from the respondent its gasoline requirements on a "tank-car" basis.

From August 1935 to September 1939, the Wayne Oil Company operated no retail service stations, but subsequent to the latter date, this company took over and operated from two to six of its service stations, and was operating two of such stations at the time this case was submitted to the Commission for decision. During this period, the annual purchases of gasoline by the Wayne Oil Company from respondent ranged from approximately 1,350,000 gallons in 1936 to approximately 2,240,000 gallons in 1940.

Mr. Ledbetter, President of Wayne Oil Company, testified as a witness in this proceeding. He stated that for three or four years prior to 1940, the Aurora Gasoline Company had, on different occasions, solicited his gasoline business (R. 1908). The Aurora Gasoline Company is a local Detroit Company, operating refineries at Detroit and at Elsie, Michigan (R. 1886). Although a local Detroit Company, in 1940 Aurora Gasoline Company had bulk
358 storage facilities capable of storing from forty to fifty
million gallons of gasoline (R. 3450). Mr. Ledbetter further testified that on December 10, 1940 (12 days after the complaint herein was issued and more than four years after the enactment of the Robinson-Patman Act), Wayne Oil Company received another offer from the Aurora Gasoline Company to supply his company with 80-octane gasoline at a price ½¢ per gallon below the price which his company was paying respondent for "Red Crown" gasoline (R. 1878-84). Relative to the quality of the gasoline being offered by the Aurora Gasoline Company, Mr. Ledbetter testified that such gasoline is recognized as being comparable, if not superior, to respondent's "Red Crown" gasoline (R. 1883). This latter offer was communicated by letter from Wayne Oil Company to respondent, which fact was confirmed by Mr. Raupagh when he testified concerning this same matter (R. 1885, R. 3450).

Continuing his testimony, Mr. Ledbetter testified that on December 13, 1940, his company received an offer from the

National Refining Company, which company operates in a large part of the United States and in Canada (R. 1888-90). He stated that for several months prior thereto, the National Refining Company had been attempting to supply his company with its gasoline requirements (R. 1910). In Mr. Ledbetter's opinion, the National Refining Company furnishes a considerable quantity of the total gasoline sold in the Detroit area (R. 1891). He stated that under the terms of this offer, which was made jointly to Wayne Oil Company and to the Stikeman Oil Company, the National Refining Company would furnish them with "White Rose" gasoline, which is represented as being of better quality than respondent's "Red Crown" gasoline at a price which would net each company a greater margin of profit than each would realize under its purchases from the respondent (R. 1892, R. 1905, R. 1907, R. 1998).

During Mr. Raupagh's testimony, he stated that the first conversation he had had with Mr. Ledbetter relative to offers from competing gasoline companies was in 1935, prior to the time Wayne Oil Company began purchasing gasoline on a "tank-car" price basis. At that time, one of Wayne's service stations was being supplied by the Highland Oil Corporation at a price which was 1¢ per gallon lower than the prevailing "tank-wagon" price. Wayne's other several stations were supplied by respondent, by Sun Oil Company, and by Gulf Refining Company at prevailing
"tank-wagon" prices (R. 1914). Mr. Raupagh also
359 testified that no other definite offers from competing
gasoline companies were reported to him by the Wayne Oil Company until the summer of 1940 (Mr. Ledbetter, during his testimony, had fixed this date as being December of 1940) when the Aurora Gasoline Company and the National Refining Company both solicited the gasoline business of the Wayne Oil Company (R. 3447). The details of these offers have already been set forth above in connection with Mr. Ledbetter's testimony.

IV. Comments Upon the Evidence.

Let us now appraise the evidence in connection with respondent's sales to Ned's Auto Supply Company; to Citrin-Kolb Company; to Stikeman Oil Company, and to Wayne Oil Company, and determine whether the prices charged to these companies were made in good faith to meet lawful equally low prices of a competitor or competitors of respondent.

First, it must be noted that respondent began selling to each of these four companies some time prior to the enactment of the Robinson-Patman amendment (June 19, 1936) to the Clayton Act. Regardless of this fact, if its pricing policies were not illegal prior to that date but became illegal by virtue of the provisions of the aforementioned Robinson-Patman amendment, the respondent was bound to revise such pricing policies. It is no defense for any respondent to defend on the grounds that it has continued doing business in exactly the same manner as it did prior to the effective date of the Robinson-Patman Act. In the subject case, the record discloses lower offers being made to each of these four companies *after* June 19, 1936. It was to compete with such other offerors that the respondent conducted its business as it did.

Consideration must be given to the setting and general conditions under which such offers were made and such competition was met. The record is replete with uncontroverted testimony that the Detroit gasoline market during the years covered in the complaint was of the "dog eat dog" variety. Detroit was described as the "dumping ground" for gasoline from the mid-continent and other fields. It was not a market of scarcity—rather, it was a market of abundance. Against this background we must appraise the practices of respondent and their effect upon competition. The record discloses that the respondent lost three of its seven jobbers in the years preceding the 360 issuance of the complaint herein. (It also lost a fourth jobber—Stikeman Oil Company—but later succeeded in recovering this customer from its competitors). It is clear that these accounts were lost because the respondent refused to meet the lower prices offered to such customers by respondent's competitors.

We might well examine the evidence to determine whether the respondent arbitrarily granted "jobber" status to the four jobbers hereinbefore referred to. The record shows that it was not an arbitrary classification by respondent in order to favor these four jobbers with lower prices, inasmuch as the companies were qualified for such status according to the commonly accepted standard in the industry.

Ned's Auto Supply Company.

Turning now to Ned's Auto Supply Company—which was at all times a retailer of gasoline—we learn from the record that respondent began selling gasoline to this company as far back as 1918. Until September 1936, respondent sold gasoline to Ned's at regular "tank-wagon" prices. Lower price offers were made to Ned's by respondent's competitors from time to time, and in August of 1936—after the Robinson-Patman amendment—Ned's wrote a letter to respondent in which it was stated that a "competitive major oil company" was offering a gasoline contract carrying a substantially larger margin of profit. To meet this competition, respondent lowered its price ½¢ per gallon. Respondent's witness testified that he had come to the conclusion that respondent would have lost this account unless some price reduction was made.

Early in 1938, Ned's acquired bulk plant facilities and received offers from Shell, Red Indian and Texas to sell its gasoline at "tank-car" prices. Ned's wrote another letter to respondent demanding to be placed on a "tank-car" basis. After some negotiation, respondent met the competition. There is no doubt, after a review of the record, that respondent would have lost Ned's as a customer if it had not met its competitors' offers.

Because of the higgling between respondent and Ned's, which is evident in the record, and because of the slowness and reluctance with which respondent reduced its gasoline price to Ned's, I am convinced that the respondent acted in good faith in meeting such competition.

361 Citrin-Kolb Oil Company.

This company began buying gasoline from the respondent in about 1926. In 1929, after acquiring a bulk storage plant, it was recognized as a "jobber" by respondent and purchased gasoline on a "tank-car" basis. Some of this gasoline was resold at its own retail service stations and some was sold to other distributors.

One of the partners of this company testified that in 1930, the Hickok Oil Company offered gasoline to his company at a lower price; in 1936, the Gulf Refining Company offered a more attractive contract to his company; in August 1936 (after the enactment of the Robinson-Patman

Act) the Texas Company offered it gasoline at a lower price; in 1939 (again after the enactment of the Robinson-Patman Act) the Argo Oil Corporation solicited his company's business with an attractive offer; and in 1940 (more than four years after enactment of the Robinson-Patman Act) the Aurora Gasoline Company sought his company's business with a lower price. At the time of the hearings in this matter, Citrin-Kolb Oil Company had this last offer under consideration.

Here, respondent had begun selling Citrin-Kolb Oil Company on a "tank-car" basis long before the enactment of the Robinson-Patman Act, and such policy had continued to the date of the hearings herein. Should respondent have ceased this practice in 1936 when the Robinson-Patman Act became effective? For many years after 1936, Citrin-Kolb Oil Company was being pressed by respondent's competitors with attractive offers. Although no new pricing policy was here engaged in after 1936 in order to meet competition, it is clear that a retention of the existing pricing policy was necessary and imperative to meet the competitive offers being made by respondent's competitors to this company.

The evidence is clear that respondent here retained its pricing policy in good faith to meet competition.

Stikeman Oil Company.

This company began buying gasoline from the respondent in about 1932 as a "jobber", paying "tank-car" prices. At that time, this company was engaged in retail operations but by February 15, 1938, it had withdrawn completely from such market. Because of competition, this account was lost by respondent some time prior to 1936. The 362 account was lost to the White Star Refining Company (which is now Socony-Vacuum Oil Company) because such company offered Stikeman Oil Company a better price than respondent was willing to offer to Stikeman Oil Company.

The record discloses that subsequent to 1936 (after the enactment of the Robinson-Patman Act) the Phillips Petroleum Company was attempting to sell Stikeman Oil Company its "Phillips 66" gasoline. The offer of Phillips Petroleum Company would have allowed Stikeman Oil Company a larger margin of profit than was possible under the price being paid to respondent.

There is also evidence in the record that in December 1940 (more than four years after the enactment of the Robinson-Patman Act) a joint offer was made by the National Refining Company to sell gasoline to Stikeman Oil Company and to the Wayne Oil Company on a contract basis, by the terms of which each company would realize a greater margin of profit than would be possible under its purchases from respondent.

Here, as in the case of Citrin-Kolb Oil Company, the practice complained of by the Commission was one instituted by the respondent prior to the enactment of the Robinson-Patman Act. However, subsequent to the passage of that Act, respondent's competitors were making strenuous efforts to take this customer away from respondent.

It appears that the decision of the respondent to retain its existing pricing policy was necessary to meet the competition of respondent's competitors and to prevent the loss of its customer. Consequently, it is my belief that respondent retained its pricing policy in good faith to meet the competition of its competitors.

Wayne Oil Company.

This company began buying its requirements from respondent in 1931 on a "tank-wagon" basis. In about 1935 it acquired bulk storage facilities and began buying from respondent on a "tank-car" basis. It sold most of the gasoline at wholesale and sold some gasoline to the lessees of its service stations.

After the enactment of the Robinson-Patman Act and
for about three or four years, the Aurora Gasoline
363 Company, on different occasions, solicited the business
of this company and offered to sell gasoline to it at
lower prices than charged by respondent.

In December 1940 (also after the enactment of the Robinson-Patman Act) a joint offer was made by the National Refining Company to sell gasoline to Wayne Oil Company and to the Stikeman Oil Company on a contract basis, by the terms of which each company would realize a greater margin of profit than would be possible under its purchases from respondent.

Here, as in the case of Citrin-Kolb Oil Company and the Stikeman Oil Company, the practice complained of by the Commission began before the enactment of the Robinson-

Patman Act, but it is evident that for many years thereafter competitors of the respondent had been seeking to take this customer from respondent by offering a lower price to such company.

The retention of its pricing policy was undoubtedly necessary to prevent the Wayne Oil Company from buying its requirements from some other supplier, and I am convinced that the respondent acted in good faith in so doing.

* * * * *

In reaching my conclusion in connection with respondent's treatment of each of the above four customers, I am satisfied that there is nothing in the 8,000 pages of evidence in this record which might cause me to suspect that the respondent knew, or that it had reason to believe, that the competitor's lower price which it was meeting was or might have been unlawful. With regard to Citrin-Kolb Oil Company, Stikeman Oil Company and Wayne Oil Company, wherein all that the respondent did was to *retain* its pricing policy which was in effect prior to the enactment of the Robinson-Patman Act, I am satisfied that there, too, the respondent did not know, or did not have reason to believe, that it was retaining its pricing policy against a price or practice which was or might have been unlawful. All in all, the record convinces me that the respondent—*in meeting some competitor's prices*—and *in refusing to meet the prices of others*—acted as a reasonable prudent person would have acted under the circumstances.

I cannot leave this subject without emphasizing the fact that—independently—both the Commission's Trial
364 Examiner and the United States Court of Appeals for the Seventh Circuit found that the respondent's lower prices were made in good faith to meet competition.

1. The Trial Examiner who presided at all of the hearings in this matter and who—first hand—heard all of the evidence and observed all of the witnesses, asked the following question in 1943 in his Report to the Commission:

> "Were the differentials in price accorded the four dealers, recognized by respondent as jobbers, made in good faith to meet equally low prices of competitors, or the services or facilities furnished by competitors?"

and answered it in the same Report as follows:

"Conclusion of Fact:

The differentials on its branded gasolines respondent granted Ned's Auto Supply Company, at all times subsequent to March 7, 1938, and Stikeman Oil Company, Citrin-Kolb Oil Company, and the Wayne Company, at all times subsequent to June 19, 1936, were granted to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality."

2. The United States Court of Appeals for the Seventh Circuit—in spite of the fact that it ordered enforcement of the modified order of the Commission against the respondent, stated in its opinion in 1949 as follows:

> "There is substantial evidence in the record, and we think it may be assumed to be conclusive, to the effect that the petitioner made its low price to Ned's, Citrin, Wayne and Stikeman in good faith to meet the lower price of a competitor."

* * * * *

365 "Now as to the contention that the discriminatory prices here complained of were made in good faith to meet a lower price of a competitor. While the Commission made no finding on this point, it assumed its existence but held, contrary to the petitioner's contention, that this was not a defense."

* * * * *

> "The showing made here by the petitioner that it made the lower price in good faith to meet competition, we assume, as the Commission apparently did, was made out."

V. Conclusion.

Contrary to the conclusion of the majority of the Commission, the finding in this matter should be:

> "The respondent's price reduction was made in good faith to meet a lawful equally low price of a competitor."

Relying upon such a finding, the complaint herein against the respondent should be dismissed.

/s/ Albert A. Carretta,
Commissioner.

January 16, 1953.

* * * * *

369 FEDERAL TRADE COMMISSION

Washington.

Office of the Secretary
and Executive Director

March 26, 1953

Mr. Kenneth J. Carrick, Clerk.
United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois.

Subject: Standard Oil Co., Petitioner,
vs.
Federal Trade Commission, Respondent
No. 9215

Dear Sir:

A decree of the Court issued on February 14, 1951: vacated and set aside its judgment in the above matter and remanded the case to the Commission "to make findings in conformity with the opinion of the Supreme Court of the United States filed on January 8, 1951" (340 U. S. 231). The Commission having further considered the matter, after having received and considered the briefs and heard and considered the arguments of opposing and supporting counsel and others, has made modified findings of fact and conclusion and has issued a modified order.

The Commission has today recertified to the Court that part of the record which was returned to the Commission at its request following remand of the case to the Commission together with the record of subsequent proceedings.

The modified findings of fact and conclusion and the modified order together with dissenting opinions are certified herewith by direction of the Federal Trade Commission for review by the Court. It is respectfully requested that the Court direct that this matter be placed on its calendar for rebriefing and reargument with such other procedure as the Court may deem appropriate.

The modified findings of fact and conclusion are being certified to the Court in accordance with the procedure followed in Case No. 8072, *A. E. Staley Manufacturing Co., et al.* v. *Federal Trade Commission*, 144 F. (2d) 221. The modified order of August 9, 1946, has been further modified by the Commission to render it more efficacious in enjoining the proscribed practices.

In *Ford Motor Company* v. *Labor Board*, 305 U. S. 364, where a case was remanded to the Board for the purpose of setting aside its findings and order and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case, the Supreme Court stated at page 374: "Such a remand does not dismiss or terminate
the administrative proceeding." Hence, in the instant
370 case, the modified findings and conclusion have been
made and the modified order has been issued in the same proceeding which was previously before the Court on the petition of the Standard Oil Company, filed with the Court on October 4, 1946, to review the Commission's modified order of August 9, 1946. The petition having neither been withdrawn nor dismissed and the Court's judgment in this matter having been set aside and vacated by its decree of February 14, 1951, the modified findings of fact and conclusion and the modified order pertain to issues which are still before the Court.

It is assumed that the Court will cause formal service to be made through your office upon opposing counsel, although the Commision has provided them with copies as a courtesy. Extra copies of the modified findings of fact and conclusion and the modified order are herewith enclosed with such formal service in mind.

Accompanying this letter is a statement by Commissioner Lowell B. Mason expressing his dissent to the action of the Commission in certifying to the Court the modified findings of fact and conclusion and the modified order in this matter.

By direction of the Commission.

s/ D. C. Daniel,
Secretary.

Endorsed: Filed May 19, 1953. Kenneth J. Carrick, Clerk.

371. Memorandum Stating Dissent of Commissioner Mason (To Accompany Request of Majority of Commission to the United States Court of Appeals for the Seventh Circuit to Review Modified Findings and Order Issued In Standard Oil Company, Docket No. 4389).

Believing that the request by the majority of the Commission that the Court now review the modified findings as to the facts and modified order to cease and desist issued by the Commission in the above proceeding on January 16, 1953, is without warrant in law, I feel obliged to state my reasons for this view.

In its decision of March 11, 1949 (173 F. 2d at p. 211), the Court stated the three issues raised by the petition to review filed by Standard Oil Company were: (1) Whether or not the sales made by Standard were in interstate commerce; (2) whether or not the Commission was correct in treating as immaterial the showing made by Standard as to good faith in granting discriminations to meet equally low prices of competitors; and (3) whether or not Paragraph Six of the order to cease and desist was justified. All three of these issues were decided by the Court, with the result that the order to cease and desist (as slightly modified by the Court) was ordered enforced. The Supreme Court granted certiorari, and in its decision of January 8, 1951 (340 U. S. 231), held: (1) That the sales by Standard were in interstate commerce; and (2) that the Court of Appeals erred in holding that the showing made with respect to good faith in meeting the equally low prices of competitors was immaterial. As a result, the Supreme Court reversed the decision of the Court of Appeals and remanded the case to that Court, with instructions to remand it to the Federal Trade Commission to make findings "in conformity with this opinion." Thereafter, the Court of Appeals vacated and set aside its judgment and remanded the case to the Commission to make findings pursuant to the Supreme Court's opinion.

In this situation there is no authority for the Court to grant the request of the majority of the Commission for review of its modified findings and modified order. This is because (1) the full power of judicial review upon the proceeding instituted by the petition to review filed by Standard Oil Company was exhausted when all the issues involved therein were reviewed and the error of law in the proceeding pointed out; (2) there is not now any issue before the Court upon which the power of judicial review may be exercised; and (3) the case is now in the same status as though it had never been in court, and there is no power in the Court and no statutory procedure for the Court to review the findings and order as requested by the majority of the Commission.

The only way in which the case, which is now entirely different in legal issues from the original case, may properly come before the Court for review is: (1) By application filed by the Commission under Section 11 of the Clayton Act, as amended, for affirmance and enforcement of its new order to cease and desist, and in support thereof show that violation of the order has occurred; or (2) by petition for review filed by Standard Oil Company under Section 11 of the Clayton Act, as amended. The majority of the Commission, however, rely upon the action taken pursuant to the remand by this Court in *A. E. Staley Manufacturing Company v. Federal Trade Commission* (135 F. 2d 453), as a precedent for the present 372 request for review. In the Staley case this Court, without affirming, modifying, or setting aside the Commission's order, remanded the matter to the Commission "for further consideration and hearings, if necessary, in order to show with more clarity, if the Commission can, wherein the discriminations occur and how they substantially lessen competition and promote monopoly, and for proper findings thereon; and for consideration of the defense urged by the petitioners, and for findings in relation thereto." Clearly, the Court found that before passing upon the issues presented by the petition for review it wanted more information. This was a situation, therefore, in which judicial review was incomplete and the case had to be returned to the Court for completion of such review.

The present request of the Commission that the Court review its modified findings and modified order is clearly an action of expediency. The request is inconsistent with the action which the Commission itself took. The case is being certified to the Court on the theory that it was remanded merely to enable the Commission to supply a deficiency in the record after which the Court would complete its judicial review. If this were true, then the Commission's jurisdiction over the case was strictly qualified, and it would have had no power or authority whatever to make a new order and its action in issuing the modified order to cease and desist would be void. It is perfectly apparent that the change in the order had nothing to do with the question of good faith or the findings made with respect thereto. The modified findings and modified order were issued January 16, 1953. The action taken, as well as the lapse of time between that action and the time of making the present request shows that the Commission in making the modifications proceeded on the theory that the power of judicial review vested in the Court by the statute had been exhausted and that the Commission upon remand once again acquired full jurisdiction. It is also clear that on a review of the modified findings and order, the legal issues will not and cannot be the same as in the review which was completed. A review which does not take account of the new issues which have been created by the Commission's action cannot do justice to either party.

/s/ Lowell B. Mason,
Commissioner.

March 18, 1953.

(The dissenting opinions of Mason and Carretta are not printed here as they are printed as part of the Certified Record.)

Endorsed: Filed May 19, 1953. Kenneth J. Carrick, Clerk.

373 UNITED STATES COURT OF APPEALS.

For the Seventh Circuit,

Chicago 10, Illinois.

May 19, 1953

Before:

Hon. J. Earl Major, Chief Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

Standard Oil Company,
Petitioner,
vs.
Federal Trade Commission,
Respondent.
No. 9215.

ORDER.

On August 9, 1946, the Federal Trade Commission, with one member dissenting, entered an order requiring that Standard Oil Company cease and desist from discriminating in the price of gasoline, among its customers in the Detroit, Michigan, area. 43 F. T. C. 56. Thereafter Standard Oil Company petitioned this court to review and set aside said order, and the Commission asked for enforcement of same. On October 11, 1949, this court directed that said order be modified and as thus modified ordered that same be enforced. 173 F, 2d 210. On appeal, the United States Supreme Court reversed the judgment of this court and remanded the case to us with instructions to remand same to the Federal Trade Commission to make findings in conformity with its opinion. 340 U. S. 231. On February 14, 1951, this court entered an order containing the following language: "It is ordered and adjudged by this Court that the judgment of this Court entered in this cause on March 11, 1949, be, and the same is, hereby vacated and set aside, and that this cause be, and the same is hereby remanded to the Federal Trade Commission with instructions to make findings in conformity with the opinion of the Supreme Court of the United States filed on January 8, 1951."

374 On March 26, 1953, the Federal Trade Commission re-certified to this court that part of the record which had been returned to said Commission, together with modified findings of fact and conclusions of law, a modified order, and dissenting opinions by two members of said Commission. The covering letter from the Commission stated: "It is respectfully requested that the Court direct that this matter be placed upon the calendar for re-briefing and re-argument, with such other procedure as the court may deem appropriate."

The petitioner objects to this court taking any action at this time, claiming that we are without jurisdiction so to do.

Now, Therefore, It Is Ordered: That the re-certified portion of the record, and the modified findings of fact and conclusions of law, together with the dissenting opinions of two members of the Federal Trade Commission be received and made a part of the official file of this case before this Court.

It Is Further Ordered: That, as the Federal Trade Commission, under the remand from this court, was without power or authority to issue its "modified order" dated January 16, 1953, the same is entirely void, but may be considered by this court as a suggestion by the Commission as to the form of a modification of the original order of said Commission dated August 9, 1946.

It Is Further Ordered: That the parties may proceed with the filing of briefs pursuant to the rules of this court, and that thereafter this case will be set for oral argument at some convenient date when this court is in session, and that thereafter, upon the record, and the modified findings of fact and conclusions of law of the Federal Trade Commission, this court will determine whether the cease and desist order of August 9, 1946, should be enforced, modified, or set aside.

378 IN THE UNITED STATES COURT OF APPEALS.

* * (Caption—9215) * *

PETITION TO REMAND CAUSE TO THE FEDERAL TRADE COMMISSION FOR FURTHER CONSIDERATION, OR TO VACATE THE ORDER OF MAY 19, 1953.

(Filed October 14, 1953.)

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

Petitioner, hereinafter designated as "Standard", prays that the above-entitled proceedings be remanded to the Federal Trade Commission for the reason that the Commission subsequent to "certification" of its Findings and Order to this Court has substantially revised its interpretation of the statute governing this controversy, and thus cannot consistently support its Findings and Order before this Court.

379 In the alternative, petitioner urges this Court to vacate its Order of May 19, 1953, because petitioner gravely doubts this Court's present jurisdiction to entertain the Commission's modified findings "certified" for the Court's statutory review. In support of this petition, Standard respectfully shows:

I.

Origin of the Proceeding.

Pursuant to the provisions of the Clayton Act, as amended by the Robinson-Patman Act, the Federal Trade Commission on November 29, 1940, issued a complaint against Standard, subsequently amended on April 23, 1941, charging it with violations of Section 2(a) of the amended Clayton Act.

II.

The Original Findings.

The Commission in the original proceeding found, in substance, that during the period covered by the complaint Standard sold its Red Crown gasoline in tank car lots to four jobber customers in the Detroit area at tank car prices one and one-half cents (1½¢) per gallon lower than its prices to retail service station customers in the same area who took delivery in the smaller tank wagon lots. The jobber customers took the tank car deliveries at their bulk plants and thereafter redelivered tank wagon quantities to retail service stations.

280 Each of the four jobbers at some time redelivered some of this gasoline to its owned retail service stations and there resold directly to the public; one resold exclusively through its own retail outlets; the other jobbers resold largely at wholesale to independently owned retail service stations. One or more of Standard's jobber customers operating their own service stations at times sold gasoline to the public at less than prevailing retail prices as did also other retail service stations which were supplied by one or more of these jobbers. Standard's lower prices to its four jobber accounts, the Commission found, resulted in "injuring, destroying and preventing competition" between these jobbers and retail dealers marketing Standard's and other major brands of gasoline, within the meaning of Section 2(a) of the Act. 41 F. T. C. 263, 276.

III.

Original Treatment of the Meeting of Competition Defense.

Among other defenses, Standard justified its price reduction as good faith meeting of the equally low price of a competitor, the statutory defense authorized by Section 2(b) of the Act. Despite its own trial examiner's conclusion that Standard's price concessions "were granted to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality," the Commission refused to acknowledge Standard's Section 2(b) meeting competition defense. It declined to enter pertinent findings because, even though Standard's lower prices
281 to the jobbers had been made in good faith to meet the
equally low price of competitors, in the Commission's view of the Act a Section 2(b) defense was a mere procedural device which could not avail when met with affirmative proof of so-called "injury to competition" at the resale level. 41 F. T. C. 263, 281-283. A cease and desist order was accordingly entered on October 9, 1945, modified by the Commission on August 9, 1946. 41 F. T. C. 263, 284; 43 F. T. C. 56.

IV.

Previous Review By This Court.

On October 4, 1946, Standard filed with this Court its petition for review of the Commission's order to cease and desist; the Commission cross-petitioned for affirmance and enforcement. After hearing the cause on briefs and oral argument, this Court on April 29, 1949, modified in part the Commission's cease and desist order but upheld its basic validity and decreed its enforcement. 173 F. 2d 210. The Court's opinion significantly recognized that "There is substantial evidence in this record, and we think it may be assumed to be conclusive, to the effect that (Standard) *made its low price (to the four jobbers) in good faith to meet the lower price of a competitor;*" that this *showing* "we assume, as the Commission apparently did, *was made out;*" and that "*While the Commission made no finding on this point, it assumed its existence* but held * * * that this was not a defense." *Id.* at 213, 214, 216. But the Court adopted the Commission's 382 statutory interpretation by which Standard's concededly good faith meeting of competition became immaterial:

> "The discrimination * * * was properly condemned by the Commission's order, *notwithstanding* the petitioner's discrimination in price was *made in good faith to meet competition of its own.*" *Id.* at 216.

This Court thus clearly recognized that Standard had established its good faith meeting of competitor's lower prices; on the other hand, the Court "agree(d) with the Commission that the *showing of the petitioner that it made the discriminatory price in good faith to meet competition* is not controlling * * *." *Id.* at 217. (All emphasis supplied.)

V.

Reversal By the Supreme Court.

The action of this Court and the Commission was reversed by the Supreme Court. 340 U. S. 231. The Supreme Court squarely upheld Standard's claim "that, under the Act, the lower price to the jobbers was justified if it was made to retain each of them as a customer and in good faith to meet an equally low price of a competitor." *Id.* at 234.

Noting in its opinion that the trial examiner "in the instant case has found the necessary facts to sustain the seller's defense, and yet the Commission refuses, as a matter of law, to give them consideration," *id.* at 243 n. 9, the Supreme Court outlined the proper interpretation of Section 2(b) as follows:

> 383 "* * * where a seller sustains the burden of proof placed upon it to establish its defense under § 2(b), *we find no reason to destroy that defense indirectly*, merely because it also appears that the beneficiaries of the seller's price reductions may derive a competitive advantage from them or may, in a natural course of events, reduce their own resale prices to their customers. It must have been obvious to Congress that any price reduction to any dealer may always affect competition at that dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory. Likewise, it must have been obvious to Congress that any price reductions initiated by a seller's competitor would, if not met by the seller, affect competition at the beneficiary's level or among the beneficiary's customers just as much as if those reductions had been met by the seller. The proviso in § 2(b), *as interpreted by the Commission*, would not be available when there was or might be an injury to competition at a resale level. So interpreted, *the proviso would have such little, if any, applicability as to be practically meaningless.* We may, therefore, conclude that Congress meant to permit the natural consequences to follow the seller's action in meeting in good faith a lawful and equally low price of its competitor." *Id.* at 250. (Emphasis supplied.)

Concluding that the Section 2(b) defense was "absolute," *id.* at 251, the Supreme Court reversed this Court's judgment; the case was remanded with instructions to remand further to the Federal Trade Commission for findings in conformity with the Supreme Court's opinion.

384

VI.

The Remand By This Court To the Commission.

In response to the Supreme Court's opinion and mandate, this Court on February 14, 1951, ordered that:

> "The judgment of this Court entered in this cause on March 11, 1949, be, and the same is, hereby vacated and set aside, and that this cause be, and the same is, hereby remanded to the Federal Trade Commission with instructions to make findings in conformity with the opinion of the Supreme Court of the United States filed on January 8, 1951."

VII.

The Commission's New "Findings."

The matter was held under consideration by the Commission from February 14, 1951, until March 24, 1952, when the Commission without prior notice or hearing issued modified findings of fact and conclusions of law impugning Standard's statutory "good faith," *primarily on legal grounds.* After oral argument on an order to show cause, the Commission on January 16, 1953, officially promulgated these findings and conclusions, together with a revised order to cease and desist. Dkt. No. 4389. Two of the five Commissioners dissented by comprehensive and detailed written opinion which meticulously retraced the evidence in the record to conclude, consonant with the Supreme Court's mandate and the opinions of every tribunal which had considered the case, that Standard had fully established
385 its price reductions as "made in good faith to
meet a lawful equally low price of a competitor." What had been obvious to the Trial Examiner, the Commission, this Court and the Supreme Court when the facts were originally appraised was conceded by even the three majority Commissioners, who made this finding after the remand:

> "It may well be that respondent was convinced that if it ceased granting tank-car prices to (the four jobber customers) it would lose these accounts. It had substantial reasons for believing this to be the case * * *." *Id.* at par. 14.

Nevertheless, and despite the Supreme Court's admonitions not "to destroy that defense indirectly" and not to degrade the "meeting competition" clause of the Act from an "absolute" to a hollow "dubious defense", 340 U. S. at 251, the majority Commissioners undertook once again to throttle the Section 2(b) meeting competition defense. No longer able to nullify the defense by dismissing Standard's good faith meeting of competitors' equally low prices as "immaterial," the three majority Commissioners this time effectively accomplished that same result by legalistic manipulation of the statutory term "good faith." They purported to refute Standard's "good faith," because (par. 14):

> (i). Standard, according to the Commission majority, had "reason to know that the manner in which it priced and sold its gasoline continually created the probability of injury to competition * * *."
>
> > [Note: But this so-called "injury to competition" 386 test was the very core of the Commission's argument before the Supreme Court, and is precisely the criterion rejected by the Supreme Court as nullifying the meeting competition defense.]
>
> (ii) Standard, according to the Commission majority, "had reason to know that the price differences which it granted could not be justified on the basis of" cost differences.
>
> > [Note: But this consideration is obviously irrelevant to a "meeting competition" defense. Cost differences can be pertinent only to "cost justification," an *alternative* defense authorized by the Act.]
>
> (iii) According to the Commission majority, Standard's knowledge of (i) and (ii), above, at the time of the enactment of the Robinson-Patman Act imposed on it "the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute."
>
> > [Note: But the record conclusively confirms that Standard long before adoption of the Robinson-Patman amendment had in the strictest sense conformed to its criteria as enunciated by the Supreme Court's decision in this case: Standard accorded the lower tank-car price in individual

cases and only in economic self-defense to retain a particular customer solicited by competing sellers.]

(iv) With one exception, according to the Commission majority, "all the discriminations in price involved in this proceeding were made pursuant to [Standard's] established method of pricing. They were not the result of departures from a non-discriminatory price scale * * * but represented only the 387 continued application of the pricing standard * * * followed by [Standard] since long before 1936."

[Note: But in fact Standard initially sold only to retail customers in Detroit, and at its established uniform tank-wagon price. Lower tank-car prices were secured, even prior to the Robinson-Patman amendment, only by a few retailer customers who grew into jobbers, acquired jobber facilities, and proved their ability to obtain tank-car prices from Standard's competitors, threatening to buy elsewhere unless Standard met the competition. Moreover, the one exception noted by the Commission in this proceeding (which concerns a total of only four jobber customers) in itself illustrates that Standard considered the competitive circumstances characterizing each individual case. In that particular instance Standard at first reduced its price only one half cent (½¢) to Ned's when it deemed this concession sufficient to retain that business; it later accorded Ned's the one and one-half cent (1½¢) lower tank-car price only when Ned's once again threatened to buy elsewhere unless Standard acceded.]

(v) Standard, according to the Commission majority, necessarily knew that its major competitors similarly granted tank-car prices to some jobber accounts.

[Note: But this observation is not relevant at all. For how can one meet a competitor's price if he has no knowledge of what the competitive offers are? Perhaps it is intended to imply a spurious analogy between Standard's *individual* price *reductions* and a seller's arbitrary adoption of an industry-wide unlawful pricing *system* which

foisted "phantom freight" and *higher* prices on
many buyers, as in *Federal Trade Commission* v.
388 *Staley Mfg. Co.*, 324 U. S. 746, 753, 756-757 (1945).
While the *Staley* case expressly cautions sellers
to verify the competitors' prices which they are
meeting, *id.* at 758-760, the Commission holds that
Standard lacks good faith, as a matter of law, if
it follows the Supreme Court's view.]

In sum, the three majority Commissioners—only one of whom is today a member of the Commission—again read the "meeting competition" defense out of the Act and on grounds substantially equivalent to those which the Supreme Court had expressly reversed. A passionate hostility to the Section 2(b) meeting competition defense pervades their findings in veritable definance of the Supreme Court's mandate.

This Court only recently in a not dissimilar situation admonished the Labor Board that once the applicable legal principles are established by the reviewing court,

> "* * * it behooves the inferior arbiter to exercise great care that 'the law of the case' is applied to the facts of the case when they have been precisely determined by it. This is so even when it finds itself in well founded disagreement with its reviewer." *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 204 F. 2d 529, 532 (1953).

VIII.

"Certification" to This Court.

A letter dated March 26, 1953, by the Secretary of the
Commission addressed to the Clerk of this Court advised
of the "certification" for this Court's review of the
389 Commission's modified findings of fact and conclusion
of March 24, 1952, and its newly modified order to
cease and desist. In addition, that letter requested "that
the Court direct that this matter be placed on its calendar
for rebriefing and reargument with such other procedure
as the Court may deem appropriate." Commissioner Mason dissented, maintaining that the statutory provisions prescribing procedures for review of Commission orders furnished no basis for the requested judicial review. Counsel for Standard on April 9, 1953, lodged a letter with the Clerk of this Court to suggest that jurisdiction of the

cause could not be conferred in such unorthodox manner. However, on May 19, 1953, this Court issued an order captioned in the original proceeding, directing that the matters "re-certified" by the Commission "be received and made a part of the official file of this case before this Court," although it struck the Commission's "modified order" of January 16, 1953 as void because promulgated "without power or authority." The Court further directed that the parties proceed with the filing of briefs; that the case be set for oral argument; and that the Court upon the record and the modified findings of fact and conclusions of law of the Federal Trade Commission would determine whether the cease and desist order of August 9, 1946, should be enforced, modified or set aside.

390 Supervening Change of Law.

IX.

Revised Views of Reconstituted Federal Trade Commission.

The Commission "certified" the cause to this Court on the very eve of its reconstitution culminating in the replacement of two of the three Commissioners comprising the majority which made the "certified" findings in this case. Subsequent to this "certification," the reconstituted Commission officially articulated revised criteria governing the "meeting competition" defense which were stated to be a departure from previous Commission policy:

On April 8, 1953, the Chairman of the Committee on the Judiciary, United States Senate, requested the Commission's views on pending legislation affecting the "meeting competition" defense of Section 2(b). In its reply of June 16, 1953, the Commission Chairman speaking for the new majority expressly reversed the Commission's former stand and declared:

> "We believe that the right to meet a lower price which a competitor is offering to a customer, when this is done in good faith, is the essence of competition and must be permitted in a free competitive economy, * * * If businessmen, large or small, cannot meet competition, the whole nature of our competitive economy would be recast or destroyed; business
> 391 in some areas would bloom and prosper, while in others it would wither and die."

The new Commission repudiated "The view recently, but no longer, urged by a majority of the Commission * * * that meeting the equally low price of a competitor should not be a defense whenever it injures competition"—"The view formerly expressed for the Commission * * * on March 16, 1953, is withdrawn to the extent that it is inconsistent with that here expressed." This "former" view of the Commission expressed on March 16, 1953, is that reflected in the findings "certified" to this Court by the Commission on March 26, 1953. Consonant with the new policy announced by the Chairman, the Commission approved S. 1377, 83rd Congress, 1st Session, which proposes to amend Section 2 of the Clayton Act by adding in relevant part:

> "(g) In any proceeding involving an alleged violation of this section, it shall be a complete defense to a charge of discrimination in price * * * if the seller shows that his lower price * * * was made, regularly or otherwise, in good faith to meet what the seller reasonably believed to be an equally low price of * * * a competitor * * * provided, that a seller shall not be deemed to have acted in good faith if he knew or should have known that the competitor's offer was unlawful."

This bill, declared the Chairman for the new Commission, "would restate the language of the Robinson-Patman Act to provide for what a majority of the Supreme Court
392 has held is the existing law." Two members of the
Commission dissented, expressly urging that the Supreme Court decision in this case be overruled. These members were two of the erstwhile majority of three which held against Standard after the remand.

The current draft of proposed Trade Practice Rules for the Athletic Goods Industry, for example, incorporates the revised criteria of the new Commission. Although perhaps a minor indication of the present Commission's views, these draft rules notably do not qualify the statute's meeting competition defense by the discarded "injury to competition" test, nor do they authorize resort to the other factors with which the former Commission majority's findings nullified Standard's good faith meeting of a competitor's equally low price. Instead they interpret the "good faith" element in the § 2(b) meeting competition defense as satisfied "when the industry member is free of knowledge of any fact which indicates that the competitor's price which he is meeting is discriminatory and unlawful." That construction accords with the relevant proviso in S. 1377 approved by the new Commission in its letter to the Chairman of the Senate Judiciary Committee as restating the Supreme Court's interpretation of the law.

Quite obviously, the Commission fundamentally revised its conception of the basic aims and philosophy underlying the meeting competition defense in the Robinson-Patman Act subsequent to its action in "certifying" this matter to
this Court. The former policy inevitably compelled
393 the destruction of the meeting competition defense;
today it is supplanted by the Commission's forthright
recognition of that defense as a keystone of the competitive system supporting a free economy. Even the findings "certified" to this Court recognize that Standard granted lower prices to the four jobbers solely to retain their patronage in the face of competing offers. And the legality of the prices met by Standard, never challenged by the Commission, necessarily stands established in this proceeding. Cf. *Automatic Canteen Co. v. Federal Trade Commission*, 346 U. S. 61, 69, 74, 78-79 (1953); *E. Edelmann & Co.*, F. T. C. Docket No. 5770 (May 21, 1953). Consequently, adherence by the Commission to its newly announced policy and criteria would compel validation of Standard's defense and dismissal of this proceeding.

X.

Remand Required to Enable Commission to Reconsider.

Standard cannot now effectively address itself to the Federal Trade Commission, nor can the present Commission *sua sponte* conform the actions of its predecessors to prevailing law. This Court having asserted jurisdiction by its order of May 19, 1953, the Commission may not be expected to act until this Court's disposition by way of remand, vacation of that order, or final adjudication. E. g., *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 368 (1939); *In re National Labor Relations*
Board, 304 U. S. 486, 496 (1938); *American Chain &*
394 *Cable Co. v. Federal Trade Commission*, 142 F. 2d 909
(4th Cir. 1944); 15 U. S. C. Sec. 21.

Accordingly, the supervening legal developments subsequent to the Commission's most recent action in this cause render it both equitable and in the public interest for this Court now to remand the cause for further consideration by the administrative tribunal.

XI.

Court Confronted With Repudiated Commission Interpretation.

This Court is confronted with a patently obsolete interpretation in a policy matter of cardinal significance in the administration of the law. The former Commission majority accomplished its most recent actions in this cause on the eve of the Commission's reconstitution. With two subsequently appointed Commissioners now supplanting two members of the majority which rendered the three-two decision adverse to Standard's "meeting competition" defense, the Commission's "certified" findings and conclusions at best represent the views of only one remaining Commissioner. On the other hand, two remaining Commissioners vigorously dissented from these findings and conclusions; and the new Commission Chairman has emphatically announced his interpretation of the Section 2(b) defense as departing radically from his predecessor's views.

As a result, the present Commission cannot, consist-
395 ent with its revised criteria, espouse the incongruous
findings and order which its predecessors "certified" for this Court's review. Nor are courts authorized or normally inclined to review an administrative policy which has become academic because later repudiated by the agency itself.

XII.

Probability of Court Determination Becoming Moot in View of Revised Commission Interpretation.

Any determination by this Court as to the findings "certified" by the former Commission majority may be rendered moot by the present Commission. Although the Commission is without authority to act while the matter is within the Court's jurisdiction, supervening changes of law or fact authorize the Commission in the public in-

terest to vacate its orders at any other time, even subsequent to their judicial approval. *American Chain & Cable Co.* v. *Federal Trade Commission*, 142 F. 2d 909 (4th Cir. 1944); *American Drug Co.* v. *Federal Trade Commission*, 149 F. 2d 608 (8th Cir. 1945); see Federal Trade Commission Rule of Practice XXVII. Standard believes that the Commission, in consonance with elementary principles of fair play and justice and in accord with its annourced conception of public policy, would be compelled to set aside the findings and order as presently framed. Cf. *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52, 55 (4th Cir. 1950). And a reviewing court obviously may di-
396 rect the Commission to reconsider its actions where that agency might do so of its own accord. *American Chain & Cable Co.* v. *Federal Trade Commission*, *supra*.

XIII.

Unfairness of Applying Discredited Interpretation Only to Standard and Not to Its Competitors.

If the Federal Trade Commission's modified findings of fact and conclusions of law were permitted to stand as presently framed, Standard would be materially and unfairly disadvantaged in its competition with rival sellers of gasoline. Complaints have been filed by the Federal Trade Commission against two competing gasoline sellers charging price discriminations banned by Section 2(a) of the amended Clayton Act. As the present Commission will test these asserted offenses with its revised legal criteria, Standard's pricing conduct will have been discriminatorily judged by a different application of the law than its direct rivals. Moreover, other competing sellers of gasoline may now price to meet competition, unfettered by the discarded legal interpretation of Section 2(b) applied to Standard's meeting competition defense. Indeed, the Federal Trade Commission itself recently recognized the elemental fairness of avoiding "unwarranted, unequal treatment of competing respondents." On a critical phase of adjudication it refused to enter findings or issue a cease and desist order against two sellers since their competitor who followed the identical trade practice had not been charged under the same controlling law. *Champion*
397 *Spark Plug Co.* Docket No. 3977, par. 12; *Electric Auto-Lite Co.*, Docket No. 5624, par. 7 (July 10, 1953).

XIV.

Administrative Reconsideration Granted in Analogous Cases.

Analogous circumstances have dictated the remand of administrative orders for reconsideration. Where a supervening change in controlling law occurs, sound administrative procedure requires the reconciliation of extant agency orders with the new governing principles—even over a litigant's objection and even after the orders enter the channels of judicial review. *E. g., Ford Motor Company* v. *National Labor Relations Board*, 305 U. S. 364 (1939). Reviewing courts accordingly remand proceedings to agencies for reconsideration to take account of intervening statutory change, *National Labor Relations Board* v. *Brown & Sharpe Mfg. Co.*, 169 F. 2d 331, 336 (1st Cir. 1948), and, squarely controlling here, to apply an agency's newly articulated criteria of law, *National Labor Relations Baord* v. *Service Trade Chauffeurs Local*, 191 F. 2d 65, 68 (2 Cir. 1951). In that case the Court of Appeals remanded because the agency subsequent to issuance of the order under review had "evolved criteria" pertinent to disposition of the legal issues. Because "those criteria had not yet been formulated when the Board decided the instant case [and] the Board did not here apply them or make findings pertinent thereto," the Court deemed itself "now in no position adequately to review its decision."

398 In the foregoing cases the reviewing courts, desiring the benefit of the agency's judgment in the new legal context, ordered administrative reconsideration. Significantly, these cases arose under the National Labor Relations Act whose judicial review provisions are in all relevant aspects identical with those governing the Federal Trade Commission's orders. See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 268-269 (1940); *Ford Motor Co.* v. *National Labor Relations Board*, *supra*, at 373; *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52, 55-56 (4th Cir. 1950); *American Chain & Cable Co.* v. *Federal Trade Commission*, 142 F. 2d 909, 911 (4th Cir. 1944); Davis, Administrative Law, 726 (1951).

The unfairness of agency treatment of one seller by a different standard of law than is accorded his rivals by subsequently revised administrative policy has precipitated full reconsideration of an agency order even *after* comple-

tion of statutory review. The Court of Appeals for the Second Circuit in *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. 2d 182 (1932), considered a Federal Trade Commission order to cease and desist which because of a supervening change in the Commission's view of the law subjected the respondent seller to more stringent marketing restrictions than its rivals. Because the Court viewed the situation as inequitably disabling the seller from competing freely on equal terms, it *directly* modified the Commission's order. Customarily, however, Courts remand for agency reconsideration in order to minimize
friction between judicial and administrative adjudica-
399 tions. *Federal Power Commission* v. *Idaho Power*
Co., 344 U. S. 17, 21 (1952); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 55 (1948); *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 614 (1946); *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 218 (1933); *American Chain & Cable Co.* v. *Federal Trade Commission*, *supra*, at 910-911.

Question of Jurisdiction.

XV.

Grave Doubt of Court's Jurisdiction.

Standard, moreover, gravely doubts this Court's present jurisdiction to entertain the merits of this cause. When this Court in 1949 modified and decreed enforcement of the Commission's cease and desist order, the "order of the Commission * * * merged in a decree of this Court." *United States* v. *Morton Salt Co.*, 174 F. 2d 703, 708-709 (7th Cir. 1949), reiterated in the opinion of the Supreme Court, 338 U. S. 632, 641 (1950); see also *L. B. Silver Co.* v. *Federal Trade Commission*, 292 Fed. 752, 753 (6th Cir. 1923); *Butterick Co.* v. *Federal Trade Commission*, 4 F. 2d 910, 913 (2d Cir. 1925). When this Court pursuant to the Supreme Court's mandate subsequently vacated and set aside its decree, necessarily the Commission's order was extinguished together with the judicial decree into which
it had merged. Consequently, since the Commission's
400 1946 order was modified by this Court itself, and this
Court's modified order was vacated, as compelled by the Supreme Court's decision, no presently subsisting order is now before this Court for review.

Furthermore, this Court's remand to the Commission exhausted the only power conferred on the Court by the Clayton Act. The Court is expressly confined by Section 11 of that act to "affirming, modifying, or setting aside the order of the Commission." Whether the language of the Supreme Court's opinion in reversing this Court dictates a remand "with instructions to make findings," as here, or compels a remand "for such further action as is open under the opinion of the Supreme Court of the United States," as in *Automatic Canteen Co.* v. *Federal Trade Commission,* order in Docket No. 10239 entered by this Court on August 1, 1953, the Court necessarily conforms to the third statutory course when it vacates its previous judgment in which the Commission's order is embedded. Nothing in the statute contemplates or supports any continuing jurisdiction in the Court once this statutory authority to affirm, modify, or set aside has been exercised. Having uncovered an error of law, the function of the reviewing court ended, and the matter once more devolved upon the Commission for reconsideration and findings consistent with the construction placed on the statute by the reviewing courts. *Federal Power Commission* v. *Idaho Power Co.,* 344 U. S. 17, 20-21 (1952); *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 145 (1940); see Vom Bauer, Administrative Law, § 791 (1942).

401 If the Commission found in favor of Standard on the remand, no one would contend that its favorable findings must be certified to the Court in order to enable *the Court* to dispose of litigation. Yet, if somehow the Commission's original order survived within the province of the Court even after judicial reversal and remand, then logically the litigation could not terminate unless and until the Commission's new findings were certified to the Court as supplying the basis for *judicial* dismissal of the action. Rather, it is clear that the Commission, once having made its new findings, must proceed to enter an order in conformity with the revised findings directed by the Supreme Court's mandate, ordering the complaint dismissed if the findings uphold Standard's defense, or ordering Standard to cease and desist if its efense is found wanting. Any subsequent judicial review would then be *de novo,* following the procedures provided in Section 11 of the Clayton Act.

XVI.

Staley Case Not Analogous.

The customary judicial practice of remitting a pending proceeding, *prior to adjudication*, back to the agency to clarify or amplify its findings obviously does not imply a judicial authority to exceed the Clayton Act's limitations by exercise, *post adjudication*, of a residual reviewing authority. Because courts reviewing administrative orders may not usurp the fact-finding duty of the administrative tribunal, a reviewing court confronted with unclear or inadequate findings has authority to refer the matter
402 back to the agency to perform its duty properly. The court does not thereby exhaust its statutory power because in such a case the validity of the order has not yet been passed upon. Instead, jurisdiction of the administrative order may correctly be retained by the court, with the agency directed to report back findings so that the reviewing court may proceed to adjudication. E. g., *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 196-197 (1941); *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. 2d 146, 155 (5th Cir. 1936). Similarly, reviewing courts may remit for further agency findings specific residual issues in pending cases, directing the administrative body to report back with findings enabling the court to complete the statutory reviewing process. Thus courts asked to enforce Federal Trade Commission orders to cease and desist may after affirming an order's validity remit the matter to the Commission for the finding of respondent's noncompliance held prerequisite to judicial enforcement under Section 11 of the Clayton Act. E. g., *Federal Trade Commission* v. *Whitney & Co.*, 192 F. 2d 746, 747 (9th Cir. 1951); *Federal Trade Commission* v. *Herzog*, 150 F. 2d 450, 452 (2d Cir. 1945); *Federal Trade Commission* v. *Baltimore Paint & Color Works*, 41 F. 2d 474, 476 (4th Cir. 1930); cf. *Federal Trade Commission* v. *Standard Education Society*, 14 F. 2d 947, 948 (7th Cir. 1926); see also *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 478-479 (1952), and cases cited *id.* at notes 15 and 19; *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61, 63 n. 1 (1953).
403 Analogously, courts affirming the National Labor Relations Board's orders to cease and desist from an unfair labor practice may remit to the Board for computation of employees' compensatory awards, then reported

back to the court prior to completion of judicial review. E. g., *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. 2d 681, 690 (1st Cir. 1940); *National Labor Relations Board* v. *New York Mdse. Co.*, 134 F. 2d 949, 953 (2d Cir. 1943); *Wallace Corp.* v. *National Labor Relations Board*, 159 F. 2d 952, 955 (4th Cir. 1947).

The crux of the matter is that a court *prior* to completing its adjudication may direct the agency first clearly to find the necessary facts. This Court adopted this practice in *A. E. Staley Mfg. Co.* v. *Federal Trade Commission*, 135 F. 2d 453, 456 (7th Cir. 1943), in proper reliance on the Supreme Court's decision in *Phelps Dodge, supra.* The Commission reported back as directed, though with inadequate findings once again. *A. E. Staley Co.* v. *Federal Trade Commission*, 144 F. 2d 221, 222 (7th Cir. 1944), *reversed*, 324 U. S. 746 (1945). The "Staley" procedure is manifestly impossible here. While in *Staley* this Court *prior* to exercise of its judicial reviewing power requested Commission to make itself clear, the Commission's actions in the instant case left neither this Court nor the Supreme Court in doubt—the Supreme Court held that the Federal Trade Commission's interpretation of the meeting competition defense fundamentally misconceived Section
404 2(b) of the Act. With the Commission's error of law
uncovered, the judicial reviewing function terminated. The proceeding was returned through this Court to the Commission for consideration afresh, and this Court upon executing the Supreme Court's mandate relinquished all jurisdiction of the cause. See XV, *supra.* The Court's proper procedure in *Staley*, in short, supplies no analogy for the wholly incomparable procedure here.

XVII.

Limitation of "Additional Evidence" Authority of Clayton Act, Section 11.

Nor does the "additional evidence" provision of the Clayton Act authorize the procedure for judicial review asserted here. The reviewing court, even after its exclusive statutory jurisdiction has attached, is empowered by Section 11 under certain circumstances and upon request of either litigant to order that additional evidence be heard by the Commission as a fact-finding tribunal which *on the basis of any newly found facts may recommend that the reviewing court modify or set aside the original* *order.* This procedure is "analogous to a motion for a new trial upon newly discovered evidence." *Fashion Originators' Guild* v. *Federal Trade Commission,* 114 F. 2d 80, 82 (2d Cir. 1940), *aff'd.* 312 U. S. 457 (1941); *cf. Automatic Canteen* v. *Federal Trade Commission,* 194 F. 2d 433, 439 (7th Cir. 1952). In such a proceeding the Commission may only recommend but not promulgate a 405 new order because it may not intrude upon the reviewing court's exclusive power over the original order once the filing of the record vests exclusive statutory jurisdiction in the court. Manifestly, this "additional evidence" provision of Section 11 is wholly beside the point in the present proceeding: (1) neither litigant ever applied to this Court for leave to adduce further evidence; (2) this Court never ordered that additional evidence be taken before the Commission; (3) the Commission upon remand in fact never took additional evidence. And no other provision of Section 11 remotely supports present jurisdiction in this Court.

The short of the matter is that Section 11 of the Clayton Act authorizes but two vehicles for judicial review of a Federal Trade Commission order: (1) the Commission's petition for enforcement; (2) a respondent's petition that the reviewing court set the order aside. To date neither party has, by means authorized in Section 11, properly invoked this Court's jurisdiction to review an extant order to cease and desist.

XVIII.

Court's Assumption of Jurisdiction Unprecedented.

Extensive research leads Standard to believe that this Court's apparent assumption of jurisdiction via the Commission's "certified" findings and "recommended" order is without precedent in the annals of administrative 406 law. The statutory review provisions governing cease and desist orders of the Federal Trade Commission served as the prototype for analogous provisions in some eighteen subsequent Congressional enactments prescribing procedures for the judicial review of orders issued by administrative agencies. The more prominent of these include the National Labor Relations Act, the Federal Power Act, the Federal Communications Act, the Public Utilities Holding Company Act, the Natural Gas Act, and the Securities Act. In examining the decisions in which the Supreme Court reversed a Court of Appeals' *affirmance* of an

administrative order and directed a further remand to the administrative agency, Standard has discovered not a single reported case involving any of these eighteen statutes in which post-adjudication jurisdiction via "certification" was asserted by a Court of Appeals. See, *e. g.*, *Jacob Siegel Co.* v. *Federal Trade Commission,* 150 F. 2d 751, (2d Cir. 1944), 327 U. S. 608, 614 (1946), 43 F. T. C. 256; *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 151 F. 2d 20 (D. C. Cir. 1945), 328 U. S. 152, 183 (1946), 6 F. P. C. 227, 7 F. P. C. 893, 179 F. 2d 421 (8th Cir. 1950); *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 142 F. 2d 943 (10th Cir. 1944), 324 U. S. 626, 635 (1945), 5 F. P. C. 332; *Ashbacker Radio Corp.* v. *Federal Communication Commission,* 326 U. S. 327, 334 (1945), 11 F. C. C. 515 (1946). Likewise, when the Supreme Court sustains a Court of Appeals' *reversal* of the agency, judicial review of any
407 post-remand agency proceedings has universally been invoked only by litigants' compliance with statutory review provisions, not by "certification". See, e. g., *Securities & Exchange Commission* v. *Chenery Corp.,* 318 U. S. 80 (1943), 128 F. 2d 303 (D. C. Cir. 1942), 13 S. E. C. 231 (1945), 154 F. 2d 6 (D. C. Cir. 1946), 332 U. S. 194 (1947). Certainly it appears to have been assumed heretofore that only a subsequent petition for review or enforcement as prescribed by the judicial review provisions of the governing Act can once again vest the Court with jurisdiction to review the administrative action. *No discretion has been recognized in the agency to proceed by certification.*

XIX.

Jurisdiction Not Conferrable by Consent.

Standard cannot lawfully acquiesce in this Court's assumption of jurisdiction. A court may not secure premature jurisdiction through means unauthorized by Section 11 of the Clayton Act. *Federal Trade Commission* v. *Ruberoid Co.,* 343 U. S. 470, 478-479 (1952); *Crown Zellerbach Corp.* v. *Federal Trade Commission,* 156 F. 2d 927 (9th Cir. 1946); *Chamber of Commerce* v. *Federal Trade Commission,* 80 Fed. 45 (8th Cir. 1922). Until jurisdiction is transferred from the Commission to the Court by procedures outlined in Section 11, the Court is utterly devoid of jurisdiction over the subject matter; it "must refrain from any adjudication of rights in connection there-

with." *In re National Labor Relations Board,* 304 U. S.
408 486, 494 (1938). So fundamental a defect in jurisdiction cannot be cured by waiver or consent. *American Fire & Casualty Co.* v. *Finn,* 341 U. S. 6, 17-18 (1951); *United States* v. *Griffin,* 303 U. S. 226, 229 (1938). In fact, a court is obliged on its own accord to vitiate a proceeding in which review jurisdiction is invalidly exercised. See, e. g., *Louisville & N. Ry.* v. *Mottley,* 211 U. S. 149, 152 (1908); cf. *Public Service Commission* v. *Wyckoff,* 343 U. S. 975-976 (1952).

Conclusion.

XX.

The best interest of public and private litigant alike demands that this worn and battered litigation reach a just and speedy end. Thirteen years have elapsed since the Commission first challenged Standard's price reductions to the four Detroit jobbers. In these circumstances, the Court should be naturally loath to exercise a highly dubious jurisdiction, inviting further delay in the final resolution of this controversy. Cf. *In re National Labor Relations Board,* 304 U. S. 486 (1938); *American Fire & Casualty Co.* v. *Finn,* 341 U. S. 6, 17-18 (1951).

409 To avoid the risks of delay inherent in jurisdictionally dubious proceedings, and because its revised legal criteria would doubtless compel the present Federal Trade Commission to set aside its predecessors' findings and conclusions, Standard respectfully petitions the Court to vacate the Court's order of May 19, 1953 or, alternatively, to remand the cause to the Commission for reconsideration.

Dated: October 14, 1953.

Standard Oil Company,
Petitioner.

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Hammond E. Chaffetz,
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410 UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Before:

Hon. J. Earl Major.
Hon. F. Ryan Duffy.
Hon. Walter C. Lindley.

* * (Caption—9215) * *

ORDER.

On August 9, 1946, the Federal Trade Commission entered a cease and desist order directed to Standard Oil Company. On October 11, 1949, this court directed that said order, as modified, be enforced. On appeal the United States Supreme Court reversed the judgment of this court and remanded the case to us with instructions to remand same to the Federal Trade Commission, to make findings in conformity with that court's opinion. On February 14, 1951, this court entered an order containing the following language: "It is ordered and adjudged by this Court that the judgment of this Court entered in this cause on March 11, 1949, be, and the same is, hereby vacated and set aside, and that this cause be, and the same is, hereby remanded to the Federal Trade Commission with instructions to make findings in conformity with the opinion of the Supreme Court of the United States filed on January 8, 1951."

On March 26, 1953, the Federal Trade Commission re-certified to this court "that part of record which had been returned to said Commission," together with modified findings of fact and conclusions of law, a modified order, and dissenting opinions by two members of the Commission. The Commission requested that this court place the matter on our calendar for rebriefing and re-argument.

411 On May 19, 1953, this court entered an order containing among others, the following provisions:

"* * * It Is Ordered: That the re-certified portion of the record, and the modified findings of fact and conclusions of law, together with the dissenting opinions of two members of the Federal Trade Commis-

> sion be received and made a part of the official file of this case before this court.
>
> "It Is Further Ordered: That, as the Federal Trade Commission, under the remand from this court, was without power or authority to issue its 'modified order' dated January 16, 1953, the same is entirely void, but may be considered by this court as a suggestion by the Commission as to the form of a modification of the original order of said Commission dated August 9, 1946."

On October 14, 1953, Standard Oil Company filed a petition with this court praying that this court vacate its order of May 19, 1953, on the ground that it was without jurisdiction to enter same, and that the cause be remanded to the Federal Trade Commission for further consideration. On November 10, 1953, the Federal Trade Commission filed an answer praying that said petition be denied. Thereafter Empire State Petroleum Association filed a petition asking for leave to intervene and to file a brief as amicus curiae; similar petitions were filed by National Congress of Petroleum Retailers, Inc. and Retail Gasoline Dealers Association of Michigan, Inc., by Citrin-Kolb Oil Company, and by National Oil Jobbers Council, Inc.

It Is Ordered: That the various petitions to intervene hereinbefore described be and the same are each hereby denied, but that the briefs filed by said petitioners as amici curiae be received and filed by the Clerk of this Court.

It Is Further Ordered: That the order of this court dated May 19, 1953, be and the same is hereby vacated and set aside, for the reason that this court was without jurisdiction to enter same. The Clerk of this Court is directed to return to the Federal Trade Commission the findings of fact and conclusions of law, orders, papers, and documents which said Commission "re-certified" to this court on March 26, 1953.

For the information of all concerned, this court is of the opinion that the only procedure by which it may in the future consider any modified findings of fact and conclusions of law or order of the Commission herein is in accordance with the provisions of Sec. 11 of the Clayton Act:

413 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

Docket No. 4389.

In the Matter of
Standard Oil Company,
a Corporation.
} Docket No. 4389.

PETITION OF STANDARD OIL COMPANY.

The Commission's repeated failures to abide by the commands of the Clayton Act for the third time bring this controversy here. In 1946 the Commission attempted a strained construction of the meeting competition defense in Section 2(b) of the Clayton Act. The Supreme Court in 1951 disapproved the Commission's novel interpretation and remanded the case for entry of proper findings conforming to the law as construed by the Court. In March, 1953, the Commission attempted to "certify" its revised "findings" and order to the Court of Appeals. That court on January 18, 1954, ordered the case returned to the Commission for compliance with Section 11 of the Clayton Act.

Petitioner respectfully prays the Commission to take steps to ensure once and for all, full adherence to established *procedural* and *substantive* legal principles under the Clayton Act. The Commission should consider (1) whether any valid cease and desist order is now in effect; if so, (2) whether the so-called revised "findings" promulgated in 1953 conform to the judicial mandates returning the case to the Commission, (3) whether those "findings" do not in fact clash with the Commission's own legal interpretations of the scope, meaning, and purpose of the meeting competition defense, and finally, (4) whether the Commission's disregard of its trial examiner's fact findings—noted by the Supreme Court as determinative of this case—can be reconciled with recently defined and directly applicable doctrine of administrative law.

In support of its petition, Standard respectfully shows:

I.

Concise Judicial History of This Proceeding.

Pursuant to a complaint issued in 1940, the Commission in 1946 held that petitioner had violated Section 2 of the Clayton Act by selling gasoline to four Detroit jobber customers at tank-car prices 1½¢ per gallon lower than prices charged for tank-wagon quantities to its retailer customers in the Detroit area. Petitioner, among other statutory defenses, invoked the "good faith meeting of competition" proviso in Section 2(b), justifying its price reductions to the four jobbers as a bona fide effort to retain their substantial business in the face of equally low or lower price offers by competing sellers of gasoline. The Commission's trial examiner unequivocally found that petitioner's price reductions were "granted to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality," and that "the granting of the differentials was *lawful*"*—unless that statutory defense was unavailable to petitioner on other grounds. The Commission, however, seeking judicial test of a novel legal theory, deemed petitioner's good faith meeting of competition "immaterial." It contended that Section 2(b) authorized a mere procedural rebuttal which was of no consequence when the price discriminations resulted in so-called "injury" to competition at the buyer level. On judicial review of the Commission's order to cease and desist, the Court of Appeals concluded that petitioner's price reductions constituted "good faith meeting of a competitor's equally low price" within the plain meaning of Section 2(b) of the Act. But the Court, persuaded by the Commission's legal theory, held the defense "immaterial" and unavailable to petitioner.

On January 8, 1951, the Supreme Court rejected that interpretation of the Act and approved petitioner's contention that "the lower price to the jobbers was justified if it was made to retain each of them as a customer and
414 in good faith to meet an equally low price of a competitor.'" 340 U. S. 231, 234. The Supreme Court's opinion expressly noted that the Commission's trial examiner "in the instant case has *found the necessary facts to sustain the seller's defense,* and yet the Commission refuses, as a matter of law, to give them consideration."

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* Italics supplied throughout unless otherwise noted.

Id. at 243, n. 9. The Court therefore remanded the case "to the Federal Trade Commission to make findings in conformity with this opinion."

II.

Post-Remand Proceedings by the Commission.

On January 16, 1953, the Commission issued revised, so-called findings that once again defeated petitioner's meeting competition defense by resort to the same theory that the Supreme Court disapproved—but now claiming that this discredited theory proved lack of "good faith". At the same time, in the face of warnings from petitioner and intervenors that it lacked such authority, the Commission promulgated a new order to cease and desist which materially broadened the scope of previous prohibitions. A bare majority of the Commission subscribed to the new "findings" and the revised order which failed to accord the required consideration to the examiner's report, and ignored the legal limitations imposed by the judicial mandates on the Commission's power to expand its order.

While petitioner was preparing to bring these matters to its attention, the Commission without warning undertook its abortive "certification" which purported to transfer sole jurisdiction over this proceeding to the Court of Appeals.

III.

Latest Judicial Action.

The Commission's broadened 1953 order was promptly set aside by the Court of Appeals. On May 19, 1953, the Court of Appeals for the Seventh Circuit held that the Commission "was without power or authority to issue its 'modified order' dated January 16, 1953"; consequently, that order was "entirely void."

But because the Court had accepted jurisdiction to review the new "findings," petitioner on October 14, 1953, requested the Court to remand the cause to the Commission or, alternatively, to vacate the Court's order of May 19, 1953, pointing out that the unprecedented "certification" could not confer jurisdiction in disregard of pertinent procedural provisions of Section 11 of the Clayton Act. On January 18, 1954, the Court in a memorandum decision sustained petitioner and vacated its previous order of May 19, 1953.

IV.

No Valid Order Presently Exists.

No effective cease and desist order presently exists, since (1) the Commission's original 1946 order is long defunct; and (2) its revised order of 1953, declared a nullity by the Court of Appeals, is wholly void as exceeding the judicial mandate.

(1) Apart from the Commission's own efforts to supplant its 1946 order as legally defective, that order has been obliterated through action by the courts. When the Court of Appeals decreed enforcement of the Commission's 1946 cease and desist order, the "order of the Commission * * * merged in a decree of this Court." *United States* v. *Morton Salt Co.,* 174 F. 2d 703, 708-709 (7th Cir. 1949), 338 U. S. 632, 641 (1950); *International Union* v. *Eagle-Picher Co.,* 325 U. S. 335, 339 (1945); cf. *L. B. Silver Co.* v. *Federal Trade Commission*, 292 Fed. 752, 753 (6th Cir. 1923); *Butterick Co.* v. *Federal Trade Commission,* 4 F. 2d 910, 913 (2d Cir. 1925). By later setting aside that decree, pursuant to the Supreme Court reversal and mandate, the Court extinguished the Commission's order which had "merged" into the decree.

In any event, the Commission's 1946 cease and desist order could not survive once the Supreme Court reversed the lower court's ruling; for "an order may not stand if the agency has misconceived the law." *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943). As in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U. S. 61 (1953), the Supreme Court's disapproval of the Commission's fallacious theories destroyed the statutory basis and, hence, the legal force of its order to cease and desist. See Petition for the United States, p. 14 and fn., *Federal Trade Commission* v. *Carter Products, Inc.,* No. 114, 1953 Term (U. S. Sup. Ct., Oct. 12, 1953).

415 (2) But while the Commission correctly recognized its duty to reenter a fresh order after re-examining the case in the light of the Supreme Court's opinion, its revised 1953 order exceeded the terms of the judicial mandate, and thus equally lacks legal force or effect. That the Commission's new order departs from the mandate is manifest:

(a) The 1953 order imposes entirely new legal and marketing burdens on petitioner. Paragraph 2 of this new order fantastically compels petitioner to charge its numerous retailers prices no higher than any of its wholesaler customers charge their retail buyers. If the original 1946 order—which in practical effect forced petitioner to police its wholesale customers' resale prices—is questionable (as the Commission evidently recognizes), far more objectionable is the new order in tying petitioner's prices to those set by its wholesalers. Such an arrangement for horizontal price fixing, if voluntarily devised by petitioner and its distributors, might well be held illegal *per se* under the Sherman Act. *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 720 (1944); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940). Even an incidental element of horizontal price-fixing in a fair-trade plan under the McGuire Act was recently deemed sufficient by the Commission itself to taint an otherwise lawful program. *Eastman Kodak Company*, F. T. C. Dkt. 6040 (Oct. 9, 1953); *Doubleday & Co.*, F. T. C. Dkt. 5897 (Sept. 25, 1953). Hence this prohibition of the new order is no more lawful than paragraph 6 of the previous order which it replaced.

Entirely apart from legal considerations, the new order contemplates a system of market surveillance by petitioner of unprecedented scope. The Commission's previous directive to police the pricing conduct of four Detroit jobbers is dwarfed by petitioner's duty under the revised order to adopt, in all its own sales to its retail customers, the prices set by others—thereby forfeiting its freedom to price in the open market.

(b) In addition, the revised 1953 order by deleting an express proviso in the previous order radically widens its scope and effect. The previous order was narrowly confined through a proviso which declared that none of the order's legal prohibitions could "be taken as inhibiting any price differentials by respondent that were *not found under the facts herein* to have a tendency to injure, destroy or prevent competition * * *." The previous order thus sought to regulate only petitioner's prices to its Detroit jobbers, and even then referred solely to the particular price differentials found objectionable by the Commission in the context of distinctive marketing facts prevailing in the Detroit area at that time. By eliminating this proviso, the new order imposes on petitioner a *universal* and *unqualified* system of price control by forbidding *all* price differentials *everywhere* and *in any amount*, irrespective of competitive "injury".

(c) Finally, the new order indirectly extends all previous prohibitions by striking out other provisos that expressly authorized, among other defenses, justification of differentials through savings in cost. Under the previous order, petitioner in any action instituted by the Commission could at all times justify any apparent violations of the order by a successful showing of cost savings in sales to jobbers, although having previously failed fully to make out this defense. It is, of course, true that *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470 (1952), holds that defensive provisos are necessarily implicit in each Commission order to cease and desist. However, the Commission's original order permitted petitioner to invoke the statutory defenses even when accused of price differentials substantially resembling those adjudicated in the instant proceeding. Elimination of the express provisos would bar such defenses under similar factual conditions, 343 U. S. at 476—thus, as recently recognized by the Commission itself, awarding the agency more extensive and broader relief. *Holtite Mfg. Co.*, Dkt. No. 5828 (October 30, 1953).

Since the reviewing court's mandate instructed the Commission only to enter findings—and did not empower the Commission to enlarge its order—the expanded 1953 order under traditional legal principles is "entirely void". The Supreme Court only recently reaffirmed the elementary rule that inferior tribunals have "no power or authority to deviate from the mandate issued by an appellate court." *Briggs* v. *Pennsylvania R. R. Co.*, 334 U. S. 304, 306 (1948). An established corollary of this principle holds that the inferior tribunal may award no relief beyond that expressly authorized in the mandate of the reviewing court. *E.g.*, *Ex parte Sibbald* v. *United States*, 12 Pet. 488, 492 (U. S. 1838); *Re Sanford Fork & Tool Co.*, U. S. 247, 255 (1895); *Kansas City S. R. Co.* v. *Guardian Trust Co.*, 281 U. S. 1, 11 (1930). These limitations upon the inferior tribunal's authority apply in full force to administrative commissions, whose status in this respect "is much akin to that of a United States District Court." *Morand Bros Co. v. National Labor Relations Board*, 204 F. 2d 529, 532 (7th Cir. 1953).[*]

416 These settled principles were disregarded by the Commission's action in entering an expanded cease and desist order in January, 1953. Without warrant in law, in the teeth of the mandate, and over petitioner's objections, the Commission proceeded to enlarge its order,[**] even though the intervenor supporting the Commission's findings warned that a "surgical operation" on the order would incur grave legal risks of invalidity. *E.g.*, Brief for Retail Gasoline Dealers Assn'n of Michigan, pp. 5, 11, 21; Transcript of Oral Argument before the Commission, p. 93.

The Court of Appeals in its order of May 19, 1953, declared that the Commission's 1953 order was "entirely void." Whatever the technical status of this declaration after the Court set aside its May, 1953, order on the jurisdictional grounds urged by petitioner, the Commission's new cease and desist order is in any event void as exceeding the restricted terms of the judicial mandate. Significantly, less than two weeks after its May 19, 1953, declaration nullifying the Commission's order, the Court castigated another administrative tribunal for ignoring the directions of a remand. *Morand Bros. Co. v. National Labor Relations Board*, 204 F. 2d 529, 532 (7th Cir. 1953).

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[*] Nor was anything different decided in *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134 (1940), which construed a judicial remand as implicitly authorizing the agency to consider those supervening factual developments essential for discharging its legislative mandate to award radio licenses to the applicant best qualified at the time of the award. See *Easton Publishing Co. v. Federal Communications Commission*, 185 F. 2d 987, 991 (D. C. Cir. 1950). No supervening *factual* issue is or could be involved here.

[**] This case thus differs from *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608, 613-614 (1946), in which the Supreme Court's opinion expressly required the Commission to reconsider its outstanding order. See 43 FTC 256, 259 (1946). And see *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 55 (1948); 45 FTC 328, 329 (1948).

V.

The Revised "Findings" Manifestly Conflict With the Commission's Present Interpretation of the Meeting Competition Defense.

The Commission's own recent declarations brand the revised "findings" as unacceptable to the Commission itself.

Subsequent to issuance of the revised "findings", a public statement by the Commission expressly repudiated the admittedly hostile attitude toward the meeting competition defense which animated the key "finding" of petitioner's "bad faith." The Commission's official policy declaration of June 16, 1953, accepted the right in good faith to meet a competitor's lower price as "the essence of competition" in a free economy, and expressly revoked "the view recently, but no longer, urged by a majority of the Commission * * * that meeting the equally low price of a competitor should not be a defense whenever it injures competition." The inconsistent "view formerly expressed for the Commission * * * March 16, 1953, [was] withdrawn." Yet this discredited "injury to competition" legalism is the mainstay of the 1953 revised "finding" which denied petitioner's "good faith" as a matter of law.

Since such conflicting interpretations cannot consistently stand, the Commission must necessarily disavow the 1953 "findings" which no longer comport with prevailing law. The Commission's current policy declaring the meeting competition defense unaffected by any incidental "injury" to competitors is fundamentally irreconcilable with the purported "finding" which viewed such "injury" as incompatible with "good faith"—thereby indirectly destroying the statutory defense. The supervening changes in the Commission's membership are entirely irrelevant. Whatever its composition, the Commission as a quasi-judicial tribunal cannot maintain that "injury" does not bar the defense, while at the same time lending its official authority to a "finding" predicated on precisely the opposite premise. The heart of the matter is that in its 1953 revised "findings" the Commission devised a new legal theory which destroyed petitioner's defense through equating "injury" with "bad faith"—a theory now displaced by the Commission's current policy.*

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* The close relationship between the previous view of the Commission which is now "withdrawn" and the purported "findings" of petitioner's "bad faith" is sharply demonstrated by the fact that those dissenting Commissioners who found petitioner's "good faith" later joined in the recent statement of Commission policy supporting the Section 2(b) defense.

Since the legal criteria applied to petitioner are today officially abandoned, the Commission's actions materially and unfairly prejudice petitioner in its competition with rival sellers of gasoline. For example, at least two major competitors stand charged by the Commission with price discriminations. These charges will doubtless be measured by the current interpretation of the "meeting competition" defense. Petitioner's pricing conduct accordingly will have been discriminatorily judged by a discarded legal interpre-
tation, a condition unfairly favoring its direct rivals
417 which now may freely price to meet competition. In
fact, in contrast to petitioner, the pricing freedom of all its business rivals is enhanced by the current construction of the law, unfettered by the repudiated philosophy which equates "injury" with "bad faith."

Actions by the Commission under such circumstances is not only essential but is supported by prior decisions guaranteeing equal legal treatment to all competitors. Precisely to avoid such manifest injustice, the Commission has in recent cases recognized the elemental fairness of refraining from that "unwarranted, unequal treatment of competing respondents" inherent in subjecting one competitor to legal restraints of which his rivals are free. *Champion Spark Plug Co.*, Dkt. No. 3977, par. 12 (July 10, 1953); *Electric Auto Lite Co.*, Dkt. No. 5624, par. 7 (July 19, 1953); cf. *Holtite Mfg. Co.*, Dkt. No. 5828, p. 3 (October 30, 1953). Similarly, the Commission only recently decided that "it cannot in good conscience do other" than dismiss a series of complaints charging Clayton Act violations, in frank recognition of the "injustice of entering an order to cease and desist upon a state of facts permitted" by subsequent Commission reinterpretation of the law. *Richard Hudnut*, Dkt. 2973 (January 9, 1953); *Elmo, Inc.*, Dkt. 2974 (January 9, 1953); *Charles of the Ritz, Inc.*, Dkt. No. 3017 (January 9, 1953); *Primrose House, Inc.*, Dkt. No. 3039 (January 9, 1953); *Coty, Inc.*, Dkt. No. 4435 (January 9, 1953); *Bourjois, Inc.*, Dkt. No. 4436 (January 9, 1953). In addition, the Commission has candidly conceded the necessity of revising prior Commission actions which, while in strict conformity with Commission policy when taken, no longer conform with prevailing law and thus impose restrictions on respondents "which would not be imposed on their competitors." *Book-of-the-Month Club, Inc.*, Dkt. No. 5572, p. 2 (March 18, 1954); see *Progress Tailoring Co.*, Dkt. No. 3747 (February 16, 1954). In fact, the Commission has recognized that its change of policy with respect to other Clayton Act interpretations should in all fairness permit a respondent even to withdraw a filed answer, an action permissible "only in the rarest of cases." *Beltone Hearing Aid Co.*, Dkt. No. 5825 (Feburary 18, 1954); cf. *Outboard, Marine & Mfg. Co.*, Dkt. No. 5882 (February 18, 1954).

Even more significantly, courts have remanded administrative proceedings in order to permit the agency to reconsider its determinations in the light of currently prevailing criteria of law. Thus in *National Labor Relations Board* v. *Service Trade Chauffeurs Local*, 191 F. 2d 65, 68 (2d Cir. 1951), the Court of Appeals remanded because subsequent to the proceedings under review the agency had "evolved criteria" which "had not yet been formulated when [it] decided the instant case and [thus] did not apply them or make findings pertinent thereto"—consequently the Court deemed itself "now in no position adequately to review its decision." Additionally, that Court in *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. 2d. 182 (2d Cir. 1932), directly modified a Commission order which subjected one competitor to legal prohibitions more onerous than subsequently revised Commission criteria accorded to rival sellers. And most recently, of course, the Court of Appeals, even after once affirming the Commission's action, remanded the *Book-of-the-Month Club, Inc.*, proceeding to the Commission for reconsideration "in the light of the present policy of the Federal Trade Commission regarding the use of the word 'free' in advertising"—as otherwise the petitioners might "be left at an unfair competitive disadvantage in the conduct of their business" through legal rules which the Commission would not in the future apply. Dkt. No. 22429 (2d Cir. Dec. 11, 1953). See also *Progress Tailoring Co.* v. *Federal Trade Commission*, Dkt. No. 8411 (7th Cir. December 9, 1953); *Standard Distributors, Inc.* v. *Federal Trade Commission*, Dkt. No. 22458 (2d Cir. March 23, 1954).

To be sure, several of these legal reinterpretations occurred in adjudications or formal rules rather than through a policy declaration such as that defining the present status of the "meeting competition" defense. But an "agency may announce policies in connection with deciding cases, or informally through press releases, or reports or speeches, or formally through regulations. The practical effect of each of these three courses is often almost the same * * *." Davis, Administrative Law, 186-187 (1951). "Announcements of general policies intended to be followed by administrative agencies" evidently can "take any one of various forms." Dissent of Mr. Justice Frankfurter in *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 431 (1942); see also Final Report of the Attorney General's Committee on Administrative Procedure, 26-27 (1941). And "whatever form such announcements may take, their nature and effect is the same." 316 U. S. at 431.

418 Clearly, the Commission must accommodate its processes to ensure their adherence to legal reinterpretations promulgated in any form. Judicial remands as in the *Service Trade Chauffeurs* and *Indiana Quartered Oak* decisions, *supra*, abundantly establish that courts may well insist that the Commission declare itself on significant issues of statutory interpretation, deferring judicial review until prior expression from the expert agency which Congress has entrusted with the primary and initial policy-making role. This duty of a policy-making tribunal such as the Federal Trade Commission becomes all the more pressing when the legal change goes to the heart of a statute which controls the price mechanism of a free economy—an issue at least matching in public significance the ruling as to use of the term "free" in advertising claims.

VI.

The Commission's Revised "Findings" Transparently Circumvent the Supreme Court's Ruling.

Although the obvious clash between the Commission's revised "findings" and its currently declared policy of itself demands administrative consideration, the Commission's action also flouts the Supreme Court's opinion in this very case. For the Commission's purported "findings" in truth constitute transparent legalistic theorizations designed to circumvent the Supreme Court's ruling.

The Supreme Court's opinion, establishing "good faith meeting of competition" as an absolute defense to a price discrimination charge *regardless of "injury"* at the resale level, noted expressly that the record reflected all factual elements essential to petitioner's defense. The Court commented on petitioner's "evidence tending to prove that its tank-car price was made to each 'jobber' in order to retain that 'jobber' as a customer and in good faith to meet a lawful and equally low price of a competitor". 340 U. S. 231, 238. And it stated that "the trial examiner for the Commission in the instant case has found the necessary facts to sustain the seller's defense * * *". *Id.* at 243, n. 9.

In view of the Court's directly pertinent observations, the Commission could not well avoid an express finding that

> "It may well be that respondent was convinced that if it ceased granting tank-car prices to [the four jobber customers] it would lose these accounts. It had substantial reasons for believing this to be the case * * *."

Though no greater "good faith" can be imagined, the 3-2 majority sought to evade the consequence of this controlling fact. In the guise of fact finding, they improvised a theory by which petitioner's defense could again be rejected—for want of "good faith". The touchstone of this theory was petitioner's alleged "reason to know that the manner in which it priced and sold its gasoline continually created the probability of injury to competition between retail dealers * * *". Yet this so-called "injury to competition" element constituted the core of the Commission's previous statutory interpretation which was examined and disapproved by the United States Supreme Court, because, "So interpreted, the proviso would have such little, if any, applicability as to be practically meaningless". 340 U. S. at 250.

Such flagrant intrusion by a lower tribunal into areas settled by the Supreme Court's opinion violates "a basic tenet in our federal system of administrative practice and review" which binds lower tribunals to comply with the law as declared by a superior reviewing court. See, *e.g.*, *Morand Bros. Co.* v. *National Labor Relations Board*, 204 F. 2d 529, 532 (7th Cir. 1953). There the Court excoriated another administrative agency for post-remand actions practically "on all fours" with the Commission majority's recent actions in this case. That Court declared (p. 532):

> "The pronouncements of the reviewing court are * * * known in the vernacular as 'the law of the case', *i.e.*, they are the rules to govern the particular dispute at hand. * * * In such a situation *it behooves the*

> *inferior arbiter to exercise great care that 'the law of the case' is applied to the facts of the case when they have been precisely determined by it.* This is so even when it finds itself in well founded disagreement with its reviewer * * *. In short, experience has taught that *causes are disposed of most expeditiously when the correction of errors is left to the superior tribunals and those enjoying judicial or administrative inferiority studiously endeavor to comply with the mandate issued to them.*"

See also *National Labor Relations Board* v. *Royal Palm Ice Company*, 201 F. 2d 667, 668 (5th Cir. 1953).

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VII.

The Revised "Findings" Violate Recently Established Law Defining the Weight to Be Accorded to a Trial Examiner's Report.

In entering its revised "findings", the Commission wholly disregarded the trial examiner's report which established petitioner's defense, and thus failed to apply recently established but unambiguous legal principles prescribing the weight that an agency *must* accord the examiner's determinations.

The Supreme Court's opinion in this case expressly noted that the Commission's trial examiner had resolved in petitioner's favor every essental element in its meeting competition defense. The Court observed that the Commission's "trial examiner made findings on [petitioner's Section 2(b) defense] but the Commission declined to do so," 340 U. S. 231, 238; in fact "the trial examiner for the Commission in the instant case has found the necessary facts to sustain the seller's defense * * *". *Id.* at 243, n. 9. Presumably because the Supreme Court could not sit as an administrative board initially entering those findings which an expert Commission erroneously omitted, *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 197 (1941); *Morand Bros. Co.* v. *National Labor Relations Board*, 204 F. 2d 529, 534 (7th Cir. 1953), the judicial mandate instructed the Commission to supply the missing findings in the light of the Court's opinion—and necessarily also the examiner's report.

But the Commission's revised "findings" accorded no weight whatever to the determinations of "an impartial, experienced examiner" who had "lived with the case". *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 496 (1951).

The rules defining the trial examiner's status and the respect due his findings arise from statutes and cases evincing "a purpose to increase the importance of the role of examiners in the administrative process." *Id.* at 495. Accordingly, the Court of Appeals for the Seventh Circuit has decisively held that when the examiner's findings "are supported by a preponderance of the evidence, the action of the Commission in rejecting them is arbitrary." *Minneapolis-Honeywell Regulator Co.* v. *Federal Trade Commission,* 191 F. 2d 786, 790 (7th Cir. 1951); see also *Folds* v. *Federal Trade Commission,* 187 F. 2d 658, 661 (7th Cir. 1951); *Motor Products Corp.* v. *National Labor Relations Board,* 33 LRRM 2757 (7th Cir. March 29, 1954). And only recently an agency decision which had rejected an examiner's finding of "good faith" was reversed by the Court of Appeals which reinstated the examiner's finding, cautioning that "few findings will not survive" the tests which the administrative agency may validly apply to an examiner's rulings. *National Labor Relations Board* v. *James Thompson & Co.,* 208 F. 2d 743, 746 (2d Cir. 1953). Only weeks ago, moreover, another court reversed and remanded a Clayton Act proceeding by this Commission, emphasizing the importance of fact finding by hearing examiners who have "lived with the case". *Gamble-Skogmo, Inc.* v. *Federal Trade Commission,* 211 F. 2d 106, 114 (8th Cir. 1954). This basic principle received recent firm recognition in the opinion of the Commission majority in *General Foods Corporation,* Dkt. No. 5675, p. 6 (April 27, 1954), as well as the minority opinion in *Metal Lath Manufacturers Association,* Dkt. No. 5449, p. 3 (March 3, 1954).

Not only are trial examiners' factual determinations based on intimate familiarity with the facts thus largely immune from reversal by the agency if supported by substantial facts in the record; an examiner's findings acquire even greater dignity when the agency's contrary conclusion also "fails to persuade an experienced member of the Commission who dissents from its findings and conclusions". *Minneapolis-Honeywell* v. *Federal Trade Commission,* 191 F. 2d 786, 789 (7th Cir. 1951). Here the bare Commission majority responsible for the revised findings and conclusions of January, 1953, is contradicted by a trial examiner's determination deemed entirely complete by the Supreme Court; this determination is enhanced in significance by the detailed dissent of *two* experienced commissioners who on the basis of an independent review of the record agreed with the examiner, the Court of Appeals, and the Supreme Court that all elements of petitioner's good faith meeting of competition defense were fully established. Consequently, the Commission's revised findings and conclusions when tested by the criteria of *Universal Camera*, *Thompson*, *Minneapolis-Honeywell*, and *Folds*, *supra*, encroach on the province of hearing examiners, and cannot stand.

In similar circumstances, agencies have taken prompt action to conform their administrative procedures to
420 governing legal principles promulgated by courts subsequent to a given agency ruling. After the Supreme Court in *Morgan* v. *United States*, 304 U. S. 1 (1938) had declared full and fair hearings before responsible agency officials a basic prerequisite to valid action, administrative tribunals readily recognized the impact of the decision and conscientiously accommodated their practices to the newly articulated procedural law. The National Labor Relations Board, for example, moved speedily to recall even orders already in the channels of judicial review, to cure all procedural deficiencies exposed by the supervening Supreme Court decision. See, *e.g., Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 366 (1939); *Inland Steel Co.* v. *National Labor Relations Board*, 105 F. 2d 246, 249-250 (7th Cir. 1939). And in the *Ford* case the Supreme Court expressly commended the agency's diligence and sense of responsibility manifested by its prompt efforts to conform its orders with the *Morgan* rule.

Peculiarly pertinent here are the Supreme Court's observations in the *Ford* case that relate to the duties of a responsible administrative agency: "Petitioner had raised a serious question as to the validity of the findings and order. The board properly recognized the gravity of the contention and sought to meet it by voluntarily doing what the court could have compelled". 305 U. S. at 375. That, the Court emphasized, "was in the interest of a prompt disposition." *Ibid.* Nothing could more forcefully point the path to duty and public responsibility in the present proceeding, which due to the Commission's past legal errors has been bounced back and forth between courts and the Commission for well-nigh 14 years.

VIII.

Conclusion.

As a direct result of the abortive action of the Commission in hurriedly "certifying" this proceeding to the Court of Appeals, petitioner was deprived of a reasonable opportunity to seek re-examination of the Commission's revised findings and conclusions. A sixty-day extension of the due date of any Report of Compliance was granted to petitioner by the Commission on March 23, 1953—and then, only three days later, on March 26, 1953, the Commission took the unprecedented step of "certifying" the proceedings for judicial review to the Court of Appeals, thereby purporting to transfer exclusive jurisdiction to the reviewing court and disabling the Commission from further action. *E.g., Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 368 (1939); *In re National Labor Relations Board*, 304 U. S. 486, 496 (1938). Petitioner's access to the Commission was thus blocked by the "certification" whose effects were only dissolved by the Court of Appeals' order of January 18, 1954.

Serious legal defects in this proceeding today threaten further judicial reversals and further remands. It is at best doubtful that any valid order is presently extant. The Commission's new cease and desist order faces the challenge that it radically exceeds the bounds fixed by the reviewing court's remand, and the original order is long defunct. Of equal importance, the Commission, entirely irrespective of its changes in membership, has unequivocally altered its official stand on the relation of competitive injury to "good faith", so that its revised "findings" represent a now repudiated legal view. Further, the evident design of the revised "findings" is to circumvent the Supreme Court's ruling. And the Commission in entering its revised "findings" has patently failed to accord proper weight to the trial examiner's findings favorable to petitioner, in utter disregard of unambiguous principles of administrative law.

Petitioner fully acknowledges the Commission's distinguished role as "an independent and continuing statutory body" which, "like the courts, operates prospectively, not retroactively". *Chain Institute, Inc.*, Dkt. No. 4878 (December 28, 1953). Petitioner does not seek reconsideration of the Commission's action because of a change in the agency's membership. However, a direct corollary of the quasi-judicial status occupied by the Commission is a continuing responsibility for official legal action undertaken in the Federal Trade Commission's name. Congress, evidently recognizing this duty, vested the Commission in Section 11 of the Clayton Act with express powers to rectify prior erroneous action.

Petitioner realizes that "the terms of [the Commission's] members were arranged by Congress in a manner
to prevent any abrupt dislocations in the discharge of its
responsibilities". *Chain Institute, Inc., supra.* Petitioner
as well as reviewing courts expect that the Commis-
421 sion's determinations at all times adhere to prevail-
ing law. Any change in the Commission's membership
is hence wholly immaterial—petitioner's request addresses itself to legal principles by whomsoever applied. But while changes in the Commission's membership might not legally warrant reconsideration of administrative action, they equally must not defeat a litigant's rights through "abrupt dislocation" or abdication by a continuing tribunal of its continuing duties.

Before this case is again subjected to judicial review, the Commission should consider whether it can in good conscience espouse its orders or "findings" before the reviewing court. Its duty is to entertain this petition, grant petitioner an opportunity to present oral argument, and then take such action as the law and the public interest demand.

Respectfully submitted,
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May 14, 1954.

434 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—4389) * *

ANSWER TO RESPONDENT'S PETITION FOR RECONSIDERATION OF THE COMMISSION'S MODIFIED FINDINGS AS TO THE FACTS AND CONCLUSION, AND MODIFIED ORDER.

I. Preliminary Statement.

Pursuant to the provisions of the Clayton Act, as amended, the Commission on November 29, 1940, issued its complaint in this proceeding charging respondent Standard Oil Company (Indiana), a corporation, with having violated the provisions of Section 2(a) of said Act. The complaint challenged the respondent's practice of granting its tank-car purchasers a lower discriminatory price of 1½c per gallon on the purchase of gasoline than it granted its tank-wagon service station customers in the same trade area. The respondent, among other defenses which are not material here, attempted to defend on the ground that it granted a lower price to its tank-car purchasers in order to meet in good faith equally low prices offered them by competitors.

On October 9, 1945, the Commission made findings as to the facts and conclusions and issued an order to cease and desist. This order was modified in certain respects on August 9, 1946. On October 4, 1946, the respondent filed a petition for review of the Commission's order with the Court of Appeals for the Seventh Circuit. On April 29, 1949, the court issued its decree modifying paragraph 6 of said order and affirmed the order as thus modified. The judgment of the Court of Appeals was vacated by the Supreme Court and the Court of Appeals was directed to; and did on February 14, 1951, issue a decree vacating and setting aside its former judgment and remanded the case to the Commission "to make findings in conformity with the opinion of the Supreme Court filed on January 8, 1951." The Commission, having further considered the matter of respondent's good faith meeting of competition as required by the Supreme Court opinion and in
435 compliance with the aforesaid opinion, issued its ten-

tative modified findings as to the facts and its conclusions drawn therefrom and its modified order on March 24, 1952. Prior to the issuance of final modified findings and order, the Commission issued orders affording the respondent and others an opportunity of presenting their views with respect to the tentative modified findings and order.

On May 29, 1952, respondent filed its brief in opposition to the tentative findings and order and on June 30, 1952 counsel supporting the complaint filed a brief in support of said findings and order. On July 7, 1952, respondent presented oral argument in opposition to the tentative findings and order and the brief of counsel supporting the complaint. On January 16, 1953, the Commission issued its modified findings as to the facts and conclusions in which it found that the price differentials allowed by the respondent were not made in good faith to meet equally low prices of competitors. At the same time it also issued an order to cease and desist which was identical to the order recommended in the brief of counsel supporting the complaint filed June 30, 1952.

On March 26, 1953, the Commission certified the modified findings of facts and conclusions and its modified order, together with dissenting opinions, to the Court of Appeals for the Seventh Circuit for review by that Court. On May 19, 1953, the court entered an order receiving the record as certified by the Commission. At this time it also ordered that under remand from the court, the Commission "was without power or authority to issue its 'modified order' dated January 16, 1953," and that such order was "entirely void, but may be considered by this Court as a suggestion by the Commission as to the form of a modification of the original order of said Commission dated August 9, 1946." On August 14, 1953, respondent filed a petition with the court praying that the court vacate its order of May 19, 1953, on the ground that it was without jurisdiction to enter such order and that the cause be remanded to the Commission, and on November 10, 1953, the Commission filed an answer to respondent's petition. Thereafter petitions were filed by other interested parties. On January 18, 1954, the Court of Appeals, denying the various petitions to intervene in this matter, vacated and set aside its order of May 19, 1953, "for the reason that this court was without jurisdiction to enter same."

136 On March 17, 1954, the Commission confirmed the

action of the Secretary in signing and dispatching, on March 15, 1954, a letter in answer to respondent's counsel's letter of March 9, 1954, advising that the Commission did not contemplate taking any further adverse action in connection with respendant's compliance report prior to May 15, 1954. On May 14, 1954, respondent filed the petition to which this answer is filed.

II. The Facts.

The respondent, from June 19, 1936, until the issuance of the complaint in this matter in 1940, supplied approximately 17% (R. 3315-16) of the gasoline sold in the Detroit metropolitan area (approximately 90% of which was sold under the brand name Red Crown, R. 108) directly to about 350 retailers, about 150 of which were parties to an exclusive dealing contract with respondent (Comm. Ex. 2), and three "jobbers," Citrin-Kolb Oil Company, Wayne Oil Company, and Stikeman Oil Company, and beginning March 7, 1938, to a fourth "jobber," Ned's Auto Supply Company, which had purchased respondent's gasoline at ½¢ per gallon off tank-wagon price from September 1, 1936, until March 7, 1938 (Comm. Ex. 128-A; Resp. Ex. 37 A-C; R. 29, 35-6, 52, 3081, 3247, 3742-3, 3745-6, 3748, 4852-3).

In order to qualify as a "jobber" of respondent it was necessary to: (1) maintain sufficient bulk storage to take delivery of gasoline in tank-car quantities (8,000 to 12,000 gallons) rather than in tank-wagon quantities (700 to 800 gallons) as is customary for service stations; (2) own and operate tank-wagons and other facilities for delivery of gasoline to service stations; (3) have an established business sufficient to insure purchases of from one million to two million gallons of gasoline per year; and (4) have adequate credit responsibility (R. 40). The "jobber" received a 1½¢ discount off the tank-wagon price on its purchases of gasoline from respondent (Comm. Ex. 3 A & B; R. 3230, 4849). The Commission found that this difference was not cost justified. This differential enabled one of these "jobbers," namely Ned's Auto Supply Company, a large gasoline retailer, to resell this gasoline at its own retail stations at substantially lower prices than the established prices at which the respondent's retail service station customers were able to sell such gasoline (R. 262-285, 3209). It enabled another "jobber," Citrin-

Kolb Oil Company, which sold both at wholesale and retail, to sell respondent's gasoline to consumers at a discount of 2¢ per gallon (R. 312) and to pass on as much as 1¢ per gallon of its favored price to independent retailers 437 who also undersold the respondent's retail service station customers (R. 315, 317). The respondent's two other "jobbers" in the Detroit area from time to time sold at both wholesale and retail but their retail sales were made at the standard tank-wagon prices. These four "jobbers" did not sell in competition with the respondent to respondent's retail service station customers, which, as a "captive market," were compelled to purchase their full requirements from the respondent (Comm. Ex. 2; R. 16, 197, 3587). These price discriminations by the respondent in favor of its four "jobbers" led to price-cutting and price-wars at the retail level in the gasoline market of the Detroit area because Ned's and the customers of Citrin-Kolb as well as others undercut the prevailing retail price of gasoline to customers by as much as 2¢ per gallon (Comm. Exs. 29, 30; R. 512-17). The Commission found in its initial findings that this price discrimination gave respondent's four "jobbers" a substantial competitive advantage over its retail service stations who were paying a 1½¢ higher price and that it had resulted and may result in serious injury to competition.

In its modified findings the Commission found that ~~the~~ respondent had not shown that the discriminatory prices allowed these four "jobbers" were lower prices granted in good faith to meet equally low prices of competitors. A principal basis for this finding was that the four criteria applied by respondent in determining those customers who were qualified to receive lower prices had no relation to respondent's competitors' prices.

III. Questions Presented.

The only new question presented by respondent is whether the Commission should reopen and reconsider a matter which has been previously adjudicated, upon the ground that there have been changes in the membership and the policy of the Commission. Respondent also argues, in opposition to the tentative modified findings and order, that the findings are not in compliance with the Supreme Court ruling and that the order is invalid.

IV. This Matter Has Been Adjudicated and Should Not Be Reopened.

A. The Modified Findings Are in Compliance With the Supreme Court's Ruling and Present Commission Policy.

The Supreme Court, in its opinion in this case (340 U. S. 231, 242) stated:

438 "* * * that wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price."

The Supreme Court held, in effect, that the proviso in Section 2(b) protected individual competitors at the expense of injuring competition generally where the seller could show that it had met its competitor's lawful lower price in good faith. It held, as it had in *F. T. C. v. A. E. Staley Manufacturing Company*, 324 U. S. 746, that a good faith showing of meeting a competitor's lower price was available only in individual competitive situations where the competitor's lower price was a lawful lower price and that the burden of showing that the competitor's price was lawful was upon the seller meeting that price.

Good faith includes all of the factors that enter into a business man's thinking and practices in dealing with his customers in relationship to competitive offers which these customers may receive from time to time. In the present case, the Supreme Court left the factors to be considered and the determination of good faith to the discretion of the Commission. The Commission, after much deliberation, determined that for the reasons stated in the modified findings of fact, this respondent had not acted in good faith in granting these lower discriminatory prices.

Respondent maintains that the Commission's modified findings were to the effect that when injury to competitors is shown to exist the good faith defense is barred. On the contrary, the Commission, in accordance with the mandate of the Supreme Court in this case, stated in paragraph 14 of its modified findings that:

"* * * The real question is whether or not the action of the respondent in granting or continuing to these four dealers the tank-car price pursuant to and in accordance with its general policy can be said to have been made in good faith within the meaning of Section 2(b)."

In paragraph 15 of these findings, the Commission stated that it was of

> "* * * the opinion that the respondent has not shown that the discriminatory prices allowed Ned's Auto Supply Company, Citrin-Kolb Oil Company, Wayne Oil Company and Stikeman Oil Company, Inc., were lower prices granted in good faith to meet equally low prices of competitors. * * *".

439 This finding was directed specifically to respondent's lack of good faith. At no time since the decision of the Supreme Court in this matter has the Commission indicated any doubt that the good faith defense to meeting a lawful lower price of a competitor, as provided by Section 2(b), is a complete and absolute defense when established by proof.

Respondent contends that the Commission's official policy as stated in a letter dated June 16, 1953, to Senator Langer, Chairman of the Senate Judiciary Committee, differs with the policy applied in deciding this matter. In that letter Chairman Howrey, with reference to the pending Capehart bill, stated that:

"The Capehart bill would restate the language of the Robinson-Patman Act to provide for what a majority of the Supreme Court held is the existing law, and it would apply the same standard for competitive pricing to the Federal Trade Commission Act. This bill would permit sellers to meet the lower prices their competitors are offering to their customers, when they do so in good faith, * * *." The Chairman's statement in this letter was in accord both with the Commission's findings and the Supreme Court's opinion in this case. Thus it is clear that the Commission's policy in this connection has not changed since the issuance of the modified findings herein.

Respondent contends that the Commission's findings and order materially and unfairly prejudice it in its competition with its competitors and particularly with its two competitors which are presently charged in complaints by the Commission with unlawful price discriminations similar to those charged in the complaint issued in this matter. Inasmuch as there is no supervening change of law or Commission policy since the issuance of the modified findings in this proceeding, there is no merit to respondent's argument.

B. The Commission's Modified Order is Valid.

Respondent contends that no valid order presently exists because the Court of Appeals, in its intermediate order of May 19, 1953, stated that the Commission was without authority to issue its modified order. The respondent's contention in this connection, however, is not well-founded. As stated by Commissioner Mason in his dissent to the Commission action opposing respondent's petition to remand or to vacate the Court of Appeals' order of May 19, 1953:

440 "* * * If the Commission and Standard saw eye to eye on any one thing when in 1952 this case was here, they agreed that the Commission must issue some order on the bases of its reconsideration of facts compelled by the Supreme Court's mandate. Thus, a finding by the Commission that Standard had met competition in good faith required an order of dismissal, just as a finding against Standard on this issue would have called for reentry of an order to cease and desist. I do not see, therefore, how it consistently can be contended that jurisdiction now lawfully rests in the Court of Appeals when (1) the Court of Appeals struck out our order, although (2) in 1952 everyone agreed that an order must issue; and (3) no one dreamed that the Commission's findings directed by the Supreme Court's remand were to support the Commission's long-buried 1946 order which had, in fact, not only been disapproved and modified by the Court of Appeals in 1949 but also reversed by the Supreme Court in 1951."

As a matter of fact, the respondent argued in its brief (page 4) that "* * * the Commission's 1946 cease and desist order could not survive once the Supreme Court reversed the lower court's ruling * * *." The respondent also admitted the propriety of a new order at page 5 of its brief where it stated that "* * * the Commission correctly recognized its duty to re-enter a fresh order after re-examining the case in the light of the Supreme Court's opinion, * * *." The Commission's modified order of January 16, 1953, was issued only after the Commission had deliberated and carefully considered the evidence of record, the briefs of counsel and oral arguments. In issuing this new order the Commission was cognizant of the arguments in opposition to such an order now reiterated by the respondent.

In any event, the Court of Appeals on January 18, 1954, ordered "That the order of this court dated May 19, 1953, be and the same is hereby vacated and set aside, for the reason that this court was without jurisdiction to enter same." Upon the entering of this order the court's order of May 19, 1953, became a nullity and cannot properly be considered in connection with the questions herein presented. The court's order of January 18 is a clear admission not only that the court was without jurisdiction but that juisdiction in this matter rested with the Commission for all purposes.

441 C. This Matter Has Been Adjudicated and Should Not be Reopened.

Modified findings as to the facts, conclusions and order to cease and desist were issued herein only after the Commission had deliberated and carefully considered the record and briefs of counsel and had heard oral arguments in support of an in opposition to the tentative modified findings, conclusions and order. During the course of such deliberation and careful consideration the Commission ruled upon and disposed of numerous contentions of respondent including its argument that the Commission had disregarded the examiner's recommended decision in which he found in effect that the respondent's good faith had been established.

The case was decided by the examiner upon the theory that the meeting of an equally low price of a competitor in good faith is not a defense to a charge of price discrimination where competitive injury is affirmatively shown. Any reference in the examiner's recommended decision that the respondent's price discriminations were made in good faith to meet competition was wholly immaterial to the issue and the theory of his decision. In its initial findings in this matter the Commission adopted the theory advanced by the examiner and concluded as a matter of law that Section 2(b) was not available to the respondent on the basis of the Commission's finding of competitive injury.

The only occasion on which the Commission considered respondent's good faith as a factual issue and made a finding of fact thereon was in the modified findings as to the facts. Having thus considered the facts of record relating to the issue to be resolved pursuant to the direction of the Supreme Court, and having made tentative findings upon that question and afforded respondent a hearing thereon, the Commission made the modified findings on the basis of the record herein in compliance with the Supreme Court's mandate. Thus respondent's objection to these modified findings have previously been thoroughly presented to and considered by the Commission.

Commissioner Mason, in his dissent to the Commission's opposition to respondent's petition to remand, stated that:

"Respondent alternatively wants us to consent to a remand because of a revised interpretation of 'meeting competition' announced by the new majority. The Commission has decided this would open up a floodgate of applications for revision of our cease and desist orders. My motion does not deal with that question. There can
442 be no public or judicial criticism of the Commission
when it acts in the sincere belief that what it did was consonant with the law and statute. * * *"

The Commission in effect adopted this statement of Commissioner Mason in the matter of *Chain Institute, Inc., et al.*, Docket 4878, wherein the respondents petitioned the Commission to modify or set aside its findings as to the facts, conclusions and order as previously entered therein upon the ground that there have been changes in the membership of the Commission. In that case Chairman Howrey, speaking for a majority of the Commission, stated:

"It appears to us that the controlling ground offered by respondents in support of the motion is this change in membership.

"We are not disposed to grant a motion predicated principally upon such a ground. The Commission is an *independent and continuing statutory body.* The terms of its members were arranged by Congress in a manner to prevent any abrupt dislocations in the discharge of its responsibilities.

"More importantly, the Commission, like the courts, operates prospectively, not retroactively. This principle is fundamental, we believe, to our system of law, both administrative and judicial. * * *

"The machinery of the quasi-judicial agency, like the courts, contemplates a continuing process; it looks to current litigation, not past litigation. If our procedures were otherwise, delay and inaction would surround enforcement of the statutes committed to the Commission's jurisdiction. To grant the present motion would be to require a third review of a voluminous record made many years ago." (Emphasis added.)

The Chairman continued by pointing out that although the questions raised by respondents therein were important, the above considerations were overriding. Likewise in this case, although the questions raised by respondent may seem important, the considerations stated by the Chairman override any importance these questions may have. The Commission's refusal to rehear this matter does not prejudice the respondent's right to receive a full hearing on the questions presented in the Court of Appeals.

In the Chain case Commissioner Carretta wrote a separate opinion dissenting in part and concurring in part, in which he pointed out that he could not reach the
443 same conclusion as the majority of the Commission
because he felt that at least one ground for appeal cited by the respondents entitled them the privilege of being heard in oral argument. The particular ground referred to was the inclusion of a paragraph in the order to cease and desist on which the respondents had no opportunity to submit arguments to the Commission opposing the inclusion of such a paragraph in the order. Commissioner Carretta pointed out that:

"* * * This opportunity not having been afforded to the respondents and to counsel in support of the complaint by the then existing Commission, it appears to me imperative that the existing Commission should correct such defect in the proceedings. This position I would hold whether or not any change in the personnel of the Commission had occurred between the date of the order of the Commission and the date of filing of the motion for review."

The reasoning applied by Commissioner Carretta in the Chain case is clearly not applicable here because in this case the merits of the proceeding and the proposed order were carefully considered by the Commission after briefs had been filed and respondent had had an opportunity to be heard. There is no change between the findings and order briefed and argued and the findings and order issued by the Commission. Therefore, there is no reason to reopen the proceeding. The Commission should deny respondent's petition for permission to be heard in oral argument in this case for the reason that it has presented no matters which were not before the Commission at the time it made its decision.

The respondent will not be prejudiced by the denial of this petition. Respondent's remedy, if it has one in this proceeding, is provided by Section 11 of the Clayton Act under which the respondent may petition the Court of Appeals for a review of this proceeding.

V. Conclusion.

It is submitted that, for the above stated reasons, the respondent in its petition for reconsideration of the Commission's modified findings as to the facts, conclusions
444 and order to cease and desist failed to make such showing as would justify the Commission to reopen or rehear this matter.

Respectfully submitted,
/s/ L. E. Creel, Jr.,
/s/ J. Wallace Adair,
Counsel Supporting the Complaint.

Everette MacIntyre,
Chief, Division of Investigation and Litigation.

Joseph E. Sheehy,
Director,
Bureau of Antimonopoly.

577 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

Commissioners:

Edward F. Howrey, Chairman
Lowell B. Mason
James M. Mead
John W. Gwynne
Robert T. Secrest

* * (Caption—4389) * *

ORDER DENYING RESPONDENT'S PETITION FOR RECONSIDERATION.

This matter coming on to be heard by the Commission upon the respondent's petition for reconsideration of the modified findings as to the facts, conclusion, and modified order to cease and desist issued in this proceeding on January 16, 1953, and the answer to said petition filed by counsel in support of the complaint, and upon briefs in support of the petition, filed on behalf of Empire State Petroleum Association, Inc., Ohio Petroleum Marketers Association, Inc., Citrin-Kolb Oil Company and National Oil Jobbers Council, Inc., and brief in opposition thereto, filed on behalf of National Congress of Petroleum Retailers, Inc., and Retail Gasoline Dealers Association of Michigan, Inc., and

The Commission being of the opinion that the principles and considerations set forth in its decision rendered December 28, 1953, disposing of certain motions for modification or setting aside of findings as to the facts, conclusion, and order to cease and desist in the matter of Chain Institute, Inc., *et al.*, Docket No. 4878, are equally applicable to and govern the disposition of the pending petition:

578 It Is Ordered that the respondent's petition for reconsideration of the modified findings as to the facts, conclusion, and modified order to cease and desist issued in this proceeding on January 16, 1953, be, and it hereby is, denied.

By the Commission.

Robert M. Parrish,
Secretary.

(Seal)

Issued: January 7, 1955.

580 IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. ....

Standard Oil Company, *Petitioner,* *vs.* Federal Trade Commission, *Respondent.*	No. 11409

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(Filed March 7, 1955. Kenneth J. Carrick, Clerk.)

To the Honorable Judges of the United States Court of Appeals, for the Seventh Circuit:

Your petitioner, Standard Oil Company, brings this action under the provisions of Section 11 of the Clayton Act (15 U. S. C. § 21) to review and set aside the order of the Federal Trade Commission, and respectfully shows:

I.

Jurisdiction and Venue.

Petitioner is a corporation, organized, existing and doing business under the laws of the State of Indiana, with its principal office and place of business located at 910 South Michigan Avenue, Chicago, Illinois. Petitioner is engaged, among other things, in the business of refining and distributing gasoline and other petroleum products.

Respondent, Federal Trade Commission, is a federal administrative agency created by Act of Congress.

This proceeding is brought by petitioner under Section 11 of the Clayton Act. Venue is based upon the provision of that section permitting any person, required by an order of the Federal Trade Commission to cease and desist, to obtain judicial review by filing a written petition with the Court of Appeals within the Circuit wherein such person resides or carries on business or wherein the violation is claimed to have been or is being committed. Petitioner's corporate domicile and its principal business office are both within the jurisdiction of the Court of Appeals for the Seventh Circuit, and it carries on business within this circuit.

II.

Preliminary Statement.

This petition follows upon the refusal of the Federal Trade Commission to reconsider its cease and desist order entered January 16, 1953, following receipt of the mandates of the Supreme Court and this Court.

The Commission in March, 1953, attempted to "certify" its order for this Court's review. Upon petitioner's showing that "certification" could not legally confer review jurisdiction, and that the Commission in any event must
581 re-examine its order in the light of its own change of
policy as to prevailing law, this Court in January, 1954, remanded the case to the Commission. The Commission now has refused to reconsider its order, although it publicly announced a vital change of policy with respect to the meaning and proper interpretation of the applicable statute after its order was issued and would not enter a similar order in a comparable case today. Hence petitioner must seek recourse to this Court.

This petition is chiefly directed at the refusal of the Commission to hold that petitioner fully established its meeting competition defense under Section 2 (b) of the Clayton Act, as amended (15 U. S. C., Sec. 13). The Commission made the factual finding that

> "It may well be that respondent was convinced that if it ceased granting tank-car prices to [the four jobber customers] it would lose these accounts. It had substantial reasons for believing this to be the case * * *"

But a majority of the Commission (Commissioners Mason and Carretta dissenting) deemed this showing inadequate, and once again nullified petitioner's statutory meeting competition defense on virtually the same legal grounds as those previously rejected by the Supreme Court.

III.

Concise History of the Proceedings.

The Federal Trade Commission initiated proceedings in 1940 to invalidate certain price reductions granted by petitioner in the 1930's to four jobber customers in Detroit, Michigan, alleging them to be illegal discriminations under Section 2 of the Clayton Act. These jobber customers took delivery in tank car quantities at their own bulk plants, and transported the gasoline in their own tank wagons to retail service stations owned and operated by themselves or others. The core of the Commission's complaint charged that between 1936 and 1940 petitioner sold gasoline to these four jobber customers in tank car quantities at prices 1½¢ per gallon lower than the tank wagon prices charged to Detroit retail dealer customers who purchased smaller quantities delivered by petitioner directly to their retail service stations.

The evidence showed that the lower prices granted to these four customers in every instance represented only good faith efforts to meet lower price offers of competing gasoline suppliers. On the basis of this evidence, petitioner contended that its price reductions were lawful under the provisions of Section 2 (a) and (b).

Hearings before a Federal Trade Commission trial examiner were held between 1941 and 1943. The examiner concluded that petitioner's challenged price reductions were at all times granted to meet equally low prices offered 582 by petitioner's competitors on branded gasoline of comparable grade and quality. The examiner, nevertheless, rejected petitioner's Section 2(b) defense, holding the defense unavailable, *as a matter of law,* due to supposed "injury to competition" among resellers. As a result, he recommended that an order should issue prohibiting such price reductions in the future.

The Commission sustained the examiner's legal theory. But whereas the examiner had squarely determined that petitioner's price reductions in fact constituted in each instance meeting of a competitor's equally low price in order to retain its customer's business, the Commission refused to enter findings on this issue on the theory that the "meeting competition" defense was not available to petitioner as a matter of law. A cease and desist order was accordingly entered against petitioner on October 9, 1945, and modified on August 9, 1946.

On March 11, 1949, this Court affirmed the Commission's order, though modifying it in some respects.

It is significant that this Court in its 1949 opinion concluded that "There is substantial evidence in this record, and we think it may be assumed to be conclusive, to the effect that [petitioner] *made its low price* [to the four jobbers] *in good faith to meet the lower price of a competitor*"; that this *showing*, "we assume, as the Commission apparently did, *was made out*"; and that "*While the Commission made no finding on this point, it assumed its existence* but held * * * that this was not a defense" (173 F. 2d 210, 213, 214, 216).* Nevertheless this Court upheld the Commission theory that the defense was not available as a matter of law.

The Supreme Court in 1951 reversed, squarely upholding the legal sufficiency of petitioner's defense "that, under the Act, the lower price to the jobbers was justified if it was made to retain each of them as a customer and in good faith to meet an equally low price of a competitor." The Supreme Court's opinion noted that the trial examiner "in the instant case has found the necessary facts to sustain the seller's defense, and yet the Commission refuses, as a matter of law, to give them consideration." Accordingly the Supreme Court remanded the case to this Court with instructions to remand further to the Federal Trade Commission for entry of the omitted findings on the issue of good faith meeting of competition, in conformity with its opinion.

Despite this judicial directive, the Commission on remand once again nullified the meeting competition defense, to all intents and purposes on the basis that it was not available to petitioner as a matter of law. After holding the judicial mandate under advisement from February 14, 1951, until Januar 16, 1953, the Commission reissued findings of fact and conclusions. Its previous legal supposition as to "injury to competition" was reaffirmed. However, the Commission expressly made the following finding of fact:

583 "It may well be that respondent was convinced that if it ceased granting tank-car prices to [the four job-

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* Emphasis added.

> ber customers] it would lose these accounts. It had substantial reasons for believing this to be the case * * *"

But the three majority Commissioners went on to announce a legal theory designed to circumvent this conclusive finding of fact so as again to nullify petitioner's meeting competition defense. As noted above, the Supreme Court had previously overruled the Commission's earlier interpretation that asserted "injury to competition" made the meeting competition defense unavailable as a matter of law. Yet the three majority Commissioners this time announced that their legal conclusion, of competitive "injury", was sufficient to negative petitioner's "good faith" in meeting its competitors' equally low prices, therefore making the meeting competition defense still unavailable as a matter of law. Although the factual showing of good faith was not controverted, the Commission, nevertheless, invalidated petitioner's statutory defense on substantially the same legal theory the Supreme Court had ruled out. In a detailed and comprehensive dissent two Commissioners concluded that petitioner's meeting competition defense was decisively made out on the factual record.

Simultaneously with this renewed effort to destroy petitioner's meeting competition defense, the Commission recast its order to cease and desist. It rephrased one paragraph of its order which this Court in 1949 had modified—apparently trying to meet anticipated objections that it compelled illegal resale price fixing. Further, whereas all previous orders reached only the particular pricing practices at issue in the proceedings, this most recent order deleted all prior provisos so as to proscribe *all* price differentials of *any kind* and *anywhere,* irrespective of market impact or competitive effect. Petitioner protested the arbitrariness of the Commission's actions as flouting the judicial mandate but to no avail.

The Secretary of the Commission by letter dated March 26, 1953, addressed to the Clerk of this Court advised of the "certification' for judicial review of the modified findings and order entered by the Commission on January 16, 1953. Petitioner objected to the Clerk that judicial review of agency action could not be had in such unorthodox manner.

This 1953 cease and desist order was promptly set aside by this Court. On May 19, 1953, the Court declared the

Commission "without power or authority to issue its 'modified order' dated January 16, 1953" under the judicial mandates. Consequently, this order was ruled "entirely void."

But because this Court retained jurisdiction to review the Commission's findings, petitioner requested the Court to remand the cause to the Commission or, alternatively, to vacate the Court's action of May 19, 1953. On January 18, 1954, the Court in a memorandum decision sustained petitioner's position and vacated its previous order of May 19, 1953, on jurisdictional grounds, admonishing
584 the Commission that future judicial review of its orders was obtainable only by strict adherence to the review provisions of the Clayton Act.

Petitioner again called upon the Commission to reconsider its rejection of the meeting competition defense in defiance of the judicial mandates. In addition, petitioner pointed out that this statutory interpretation was incompatible and irreconcilable with more recent policy pronouncements by the Commission itself. The Commission's new policy—expressly repudiating the views of the former three majority Commissioners who rejected petitioner's defense in this case—acknowledged that meeting a competitor's lower price in good faith "is the essence of competition and must be permitted in a free economy." Petitioner on these and other grounds urged the Commission to re-examine this case under prevailing legal standards, so as to accord petitioner equal legal treatment with its competitors, avert further judicial censure, and move this fifteen-year-old litigation toward a just and speedy end.

The Commission deliberated the matter nearly eight months, meanwhile having authorized interested parties to file briefs as to the merits. By order dated January 7, 1955, the Commission denied petitioner's request in its entirety, without oral hearing.

Hence this petition for judicial review and relief.

IV.

Grounds for Relief.

Petitioner's request for relief is based on the grounds that:

1. The Commission failed to sustain petitioner's meeting competition defense and dismiss the proceeding after it expressly found that

> "It may well be that respondent was convinced that if it ceased granting tank-car prices to [the four jobber customers] it would lose these accounts. It had substantial reasons for believing this to be the case * * *"

2. Notwithstanding this acknowledgment that petitioner's price reductions were in fact granted in a good faith effort to retain its customers, the Commission again resorts to virtually the same legal theory which the Supreme Court reversed. Such action by the Commission is invalid under the opinion and mandate of the Supreme Court.

3. The Commission's ruling is unsupported by the evidence, is contrary to the trial examiner's finding supported by two dissenting Commissioners, and is contrary to this Court's previous conclusion (quoted at page 5, *supra*) that the record established petitioner's good faith meeting of a competitor's equally low price.

4. This record can sustain no finding other than of petitioner's good faith in meeting its competitors' equally low prices.

585 5. Petitioner's price reductions did not have the effect of "injuring" competition within the meaning of the statute.

6. The Commission issued an enlarged order to cease and desist, in excess of its authority under the Clayton Act and the judicial mandates.

7. This enlarged order contains a provision which compels petitioner to engage in resale price fixing with independent jobber customers, thereby compelling conduct illegal under the anti-trust laws.

8. The Commission failed to dismiss these proceedings as based upon a fifteen-year-old record that is stale and no longer responsive to present conditions.

9. The Commission arbitrarily refused to apply currently prevailing legal interpretations to this pending case.

10. The Commission has once again misapplied the price discrimination provisions in the amended Clayton Act so as to conflict with the objectives of anti-trust policy expressed in the Sherman Act, and to deny to petitioner the right guaranteed to it under the Fifth Amendment to the Constitution to meet competition.

V.

Relief Prayed.

Wherefore, petitioner prays that this Court review the action of the Federal Trade Commission, enter a decree setting aside the agency's findings, conclusions, and order issued on January 16, 1953, as well as directing the Commission to dismiss its complaint against petitioner, and to award such further or alternative relief as the Court now deems equitable and just.

Dated: March 7, 1955.

Respectfully submitted,

Standard Oil Company, *Petitioner,*
Weymouth Kirkland,
Howard Ellis,
Hammond E. Chaffetz,
W. H. Van Oosterhout,
Frederick M. Rowe,
of Kirkland, Fleming, Green, Martin & Ellis,
33 North La Salle St.,
Chicago 2, Illinois,
Attorneys for Petitioner.

Thomas E. Sunderland,
Albert L. Green,
910 South Michigan Avenue,
Chicago 8, Illinois,
Of Counsel.

586 UNITED STATES COURT OF APPEALS.

* * (Caption—11409) * *

Thursday, June 2, 1955.

Before: Hon. H. Nathan Swain, Circuit Judge.

On consideration of the motion and affidavit of counsel for petitioner, not objected to by counsel for respondent, it is ordered as follows:

1. That upon petitioner filing with the Clerk of this Court a minimum of five sets of the printed record in the case of Standard Oil Company, Petitioner *vs.* Federal Trade Commission, Respondent, United States Court of Appeals for the Seventh Circuit, Case No. 9215, that said printed record in the aforesaid case No. 9215 be considered and made a part of the printed record in the instant and above-captioned case No. 11409, without the necessity of reprinting any portion of said printed record in case No. 9215; and that all parties be permitted to cite and refer to any portion of said printed record in their oral arguments, in their briefs and in any other proceedings in this Court or upon appeal or certiorari in the United States Supreme Court, the same as if said printed record in case No. 9215 had been reprinted as part of the printed record in the instant case.

2. That the Clerk of this Court be directed in the printing of any additional part of the record designated or to be designated by the parties hereto to print such additional record as may be designated by the parties in a separate volume designated as Volume 8, and paginated to continue the pagings of Volumes 1 to 7 of the printed record in case No. 9215.

587 3. That for the convenience of this Court, regardless of the order of designation of the additional record to be printed contained in the designations of the various parties hereto, the Clerk of this Court in supervising said printing cause such additional record to be printed in chronological order according to the filing dates of the various documents and proceedings designated.

588 In the United States Court of Appeals.

* * * (Caption—11409) * * *

DESIGNATION OF STANDARD OIL COMPANY, PETITIONER, OF ADDITIONAL PORTIONS OF THE RECORD TO BE CONTAINED IN THE PRINTED RECORD.

Standard Oil Company, petitioner herein, after taking into consideration the record heretofore printed in the former review of these proceedings in Case No. 9215 of this Court, designates the following additional portions of the recertified transcript of the record after remand filed by the Secretary of the Federal Trade Commission in this cause, to be contained in the printed record to be printed by the Clerk of this Court pursuant to Rules 14(b) and 14(f) of this Court:

1. Certification of Robert M. Parrish, Secretary of the Federal Trade Commission, relative to records recertified by said Commission in Federal Trade Commission case Docket No. 4389, said certificate being dated April 13, 1955.

2. Order granting respondent leave to present objections to modified findings as to the facts, issued March 24, 1952, appearing at page 1 of the recertified transcript.

589 3. Order to show cause why modified order to cease and desist should not be further modified, issued March 24, 1952, and appearing at page 34 of said recertified transcript.

4. Statement of Commissioner Mason with regard to the proposed modified findings as to the facts and conclusion, and order to show cause why modified order to cease and desist should not be further modified, appearing at page 36 of said recertified transcript.

5. Statement of respondent's objections to procedure, findings, conclusion, and modified order of Federal Trade Commission, filed May 29, 1952, and appearing at page 131 of said recertified transcript.

6. Modified findings as to the facts and conclusion, issued January 16, 1953, and appearing at page 284 of said recertified transcript. These modified findings as to the facts and conclusion are identical with those set forth

beginning at page 3 of said recertified transcript, and the latter have, therefore, not been designated in order to avoid duplication.

7. Modified order to cease and desist issued January 16, 1953, appearing at page 315 of said recertified transcript.

8. Dissenting opinion of Commissioner Lowell B. Mason issued January 16, 1953, and appearing at page 318 of said recertified transcript.

9. Dissenting opinion of Commissioner Albert A. Carretta issued January 16, 1953, and appearing at page 320 of said recertified transcript.

590 10. Petition of Standard Oil Company dated and filed May 14, 1954, appearing at page 351 of said recertified transcript.

11. Order denying respondent's petition for reconsideration issued January 7, 1955, and appearing at page 525 of said recertified transcript.

The petitioner further designates the following additional documents and portions of the record, not included in the recertified transcript of the Federal Trade Commission and not heretofore contained in the printed record in Case 9215, to be contained in and added to the printed record:

12. Opinion of the United States Court of Appeals for the Seventh Circuit in Case 9215, dated March 11, 1949 (173 F. (2d) 210).

13. Order of the United States Court of Appeals for the Seventh Circuit on the aforesaid opinion in Case 9215, dated March 11, 1949.

14. The final decree of the United States Court of Appeals for the Seventh Circuit in Case No. 9215, dated April 29, 1949.

15. Opinion and dissenting opinion of the Supreme Court of the United States issued January 8, 1951 (340 U. S. 231).

16. Mandate of the Supreme Court of the United States issued January 8, 1951, reversing the judgment of the United States Court of Appeals for the Seventh Circuit and remanding said cause to said Court with instructions to remand to the Federal Trade Commission.

17. Order of the United States Court of Appeals for
the Seventh Circuit dated February 14, 1951, in Case
591 9215, vacating its former judgment and remanding to
the Federal Trade Commission with instructions.

18. Attempted recertification of record to this Court in Case 9215 by letter of Secretary of Federal Trade Commission to the Clerk of this Court under date of March 26, 1953, together with dissent of Commissioner Mason to Commission's procedure. (This letter and Commissioner Mason's attached dissent were not a part of the transcript recertified by the Commission on April 13, 1955, and are therefore presumed to be a part of this court's record in Case 9215.)

19. Order of the United States Court of Appeals for the Seventh Circuit issued May 19, 1953, in Case 9215, relative to attempted recertification by the Federal Trade Commission.

20. Petition of Standard Oil Company filed with this Court on October 14, 1953, in Case 9215, to vacate the aforesaid order of May 19, 1953, and remand the proceedings to the Commission.

21. Order of the United States Court of Appeals for the Seventh Circuit issued January 18, 1954, in Case 9215,

22. Petition of Standard Oil Company to review and set aside order of the Federal Trade Commission filed in the United States Court of Appeals, Seventh Circuit, as Case No. 11409 on March 7, 1955.

23. Any order which may be issued by the United States Court of Appeals, Seventh Circuit, in Case No. 11409 relative to preservation and use of printed record in Case 9215, without necessity for reprinting of same.

592 24. This designation dated May 25, 1955.

Standard Oil Company,
Petitioner,
By Weymouth Kirkland,
Howard Ellis,
Hammond E. Chaffetz,
W. H. Van Oosterhout,
Frederick M. Rowe,
Its Attorneys.

Dated: May 25, 1955.

Proof of Service.

The undersigned W. H. Van Oosterhout, one of the attorneys for the petitioner herein, upon oath deposes and says that he served a true and correct copy of the above designation upon the Federal Trade Commission by depositing such copy in the United States mail chute at 33 North La Salle Street, Chicago, Illinois, on May 25, 1955, in an envelope, postage prepaid, addressed to Robert B. Dawkins, Counsel for Federal Trade Commission,

....

Washington 25, D. C.

Subscribed and sworn to before me this 25th day of May, 1955.

....

Notary Public.

593 Endorsed: In the United States Court of Appeals. * * (Caption—11409) * * Designation of Standard Oil Company, Petitioner, of additional portions of the record to be contained in the printed record. Filed May 26, 1955. Kenneth J. Carrick, Clerk.

594 IN THE UNITED STATES COURT OF APPEALS.

* * (Caption—11409) * *

DESIGNATION BY RESPONDENT FEDERAL TRADE COMMISSION OF ADDITIONAL PORTION OF THE TRANSCRIPT TO BE CONTAINED IN THE PRINTED RECORD.

(Filed June 2, 1955. Kenneth J. Carrick, Clerk.)

Comes now the Federal Trade Commission, respondent herein, and, after taking into account the portions of the transcript designated for printing by petitioner, hereby designates the following additional portion of the transcript filed by the Secretary of the Federal Trade Commission in this cause to be contained in the record to be printed by the Clerk of this court pursuant to Rule 14(b):

Answer by counsel supporting complaint to petition of Standard Oil Company for reconsideration of the Commission's modified findings and order, dated May 24, 1954, appearing at page 381 of the recertified transcript.

Respectfully submitted,

Federal Trade Commission,
By Robert B. Dawkins,
Assistant General Counsel.

Dated May 31, 1955.

5495 In the United States Court of Appeals for the Seventh Circuit

No. 11409. October Term, 1955, April Session, 1956

STANDARD OIL COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION

Before DUFFY, Chief Judge, MAJOR and LINDLEY, Circuit Judges

Opinion

May 3, 1956

MAJOR, Circuit Judge. This proceeding originated in a complaint filed by respondent against petitioner on November 29, 1940, charging a violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (49 Stat. 1526; 15 U. S. C. A. Sec. 13, as amended). The case is now here on petition by Standard to review a modified order to cease and desist, issued by the Commission against Standard January 16, 1953. The proceeding has long been before the Commission and the courts, and a number of the original contested issues have been adjudicated. In fact, on the present review there are only two contested issues which, as stated by the Commission, are: (1) whether the Commission correctly concluded that petitioner failed to establish that its lower price was made in "good faith" to meet the equally low price of a competitor within the meaning of Section 2 (b) of the Robinson-Patman Act, and (2) whether the revised order to cease and edsist is warranted by the findings and properly issued.

As subsequently shown, we conclude that the first issue
5496 must be decided adversely to the Commission, which
renders the second issue of no consequence.

The Commission's original cease and desist order was before this court for review, wherein its enforcement, with some modification, was allowed with judgment accordingly. Standard Oil Co. v. Federal Trade Commission, 173 F. 2d 210. On appeal, the Supreme Court reversed, with instructions to this court to remand the case to the Commission to make findings in conformity with its opinion. Standard Oil Co. v. Federal Trade Commission, 340 U. S. 231. A history of the proceeding has previously been set forth in detail both by this and the Supreme Court and need not be repeated here except insofar as it relates to the question now for decision. Also except for the same purpose, we need not be concerned with issues previously raised and decided by the Supreme Court.

Petitioner's sales of gasoline about which the "good faith" defense revolves were made to four customers, classified by petitioner as jobbers, namely, Ned's Auto Supply Company, Stikeman Oil Company, Citrin-Kolb Oil Company and Wayne Company. The Commission took the position originally that the "good faith" defense was not available to petitioner and, therefore, made no findings relative thereto. This court agreed with the Commissioner's position on that issue and affirmed. It was on this issue, however, that the Supreme Court reversed and remanded.

In response to the remandment the Commission from the original record made its modified findings, which conclude with the statement:

> "For the reasons stated, the Commission is of the opinion that the respondent has not shown that the discriminatory prices allowed [naming the four customers involved] were lower prices granted in good faith to meet equally low prices of competitors. The Commission, therefore, finds that the burden imposed upon the respondent by Section 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act, has not been sustained and that the price discriminations referred to in these findings have not been justified." [1]

5497 Whether the decision of the Commission under the attending circumstances represents a finding of fact or a conclusion of law is of importance. We are of the view that it falls within the latter category, and this notwithstanding the statement in Federal Trade Commission v. A. E. Staley Manufacturing Co. et al., 324 U. S. 746, 758:

> "Congress has left to the Commission the determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence is for the Commission."

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[1] Two Commissioners, based upon the findings of the Trial Examiner, dissented and expressed the view that the complaint against petitioner should be dismissed.

The Commission in its brief appears to recognize that its decision on this critical issue is a conclusion of law (for example, see Commission's statement of contested issues, supra). Certainly there is no dispute as to the evidentiary facts as found by the Examiner in the original proceeding. Referring thereto, the Commission in its brief states, "Here the facts as such are not in dispute, it is simply a matter of applying the law to the facts." Moreover, the Commission's decision on the "good faith" issue is the result of its process of reasoning, legal in nature, a portion of which, as we shall subsequently show, has been repudiated by the Supreme Court. Such being the case, the weight to be attached to its decision is dependent upon the reasoning by which it is reached.

Prior to a discussion of the Commission's findings now under review, we think it pertinent to observe that petitioner's good faith has been either recognized or assumed at all levels during the course of this protracted proceeding. Certainly the Examiner so found. (See footnote 7, page 238 of the Supreme Court opinion.) The Commission in its original findings took no issue with its Examiner on this score but concluded as a matter of law that the "good faith" defense was not available "in the face of affirmative proof that the effect of the discrimination was to injure, destroy and prevent competition with the retail stations operated by the said named dealers and with stations operated by their retailer-customers." In fact, there is good reason to think that the Commission at that time acquiesced in petitioner's contention that the sales in controversy were made in good faith. This court in reviewing that record (173 F. 2d 210, 216) stated:

"The showing made here by the petitioner that it made the lower price in good faith to meet competi- 5498 tion, we assume, as the Commission apparently did, was made out. The effect of it was to rebut the prima facie case made by the Commission's proof of the petitioner's discriminatory prices. If nothing further appeared in this record, the case might well have ended there."

This court also stated (page 213):

"There is substantial evidence in this record, and we think it may be assumed to be conclusive, to the effect that the petitioner made its low price to Ned's Citrin, Wayne, and Stikeman in good faith to meet the lower price of a competitor."

The Supreme Court stated (page 238):

"Petitioner presented evidence tending to prove that its tank-car price was made to each 'jobber' in order to retain that 'jobber' as a customer and in good faith to meet a lawful and equally low price of a competitor."

After quoting from the findings of the Trial Examiner (footnote on same page), the same court on the following page, referring to the evidence, stated that it, "if accepted, would have established a complete defense to the charge of unlawful discrimination."

Moreover, in the findings now under review the Commission does not expressly repudiate the findings of the Examiner in the original proceeding that petitioner's reduction in price was granted to meet the equally low prices offered by competitors. The Commission, after a detailed discussion relative to the situation existing between petitioner and each of the four jobbers in controversy, states:

"It may well be that respondent was convinced that if it ceased granting tank-car prices to Citrin-Kolb, Wayne, and Stikeman and continued to refuse the tank-car price to Ned's Auto Supply Company it would lose these accounts. It had substantial reasons for believing this to be the case, for all of these concerns, except Ned's Auto Supply Company, had already been recognized as entitled to the tank-car price under the commonly accepted standards of the industry, and Ned's had achieved a volume of distribution which brought it within
the range where it was likely to be so recognized by a
5499 major oil company at any time." It thus appears evident
even under this revised version of petitioner's situation that it was confronted with the problem of reducing its price to meet competitive offers or of forfeiting the business of the four jobbers.

An attempt to enter into a discussion of all of the ramifications contained in the Commission's reasoning and argument in support of its decision against the "good faith" defense would unduly prolong this opinion. We shall, therefore, limit our discussion to a few of the more salient points as contained in the modified findings. The Commission found:

"At all relevant times, respondent knew or had the means of knowing and should have known that the manner in which it priced and sold its gasoline continually created the probability of injury to competition between retail dealers who bought such gasoline at different prices and resold it in competition with one another."

This is the same theory upon which the Commission's previous order was bottomed and which was expressly repudiated by the Supreme Court (pages 249–250).

The Commission found:

"It [petitioner] also knew or should have known that the price differences which it granted could not be justified on the basis of differences in the cost of manufacture, sale and delivery resulting from differing methods or quantities in which its gasoline was sold or delivered."

We think this statement is irrelevant to the instant issue. A cost justification defense is available under Section 2 (a), but it is separate and distinct from the "good faith" defense provided in 2 (b). Both defenses were originally invoked by petitioner but the cost justification defense was abandoned (see footnote 2, Supreme Court opinion, page 234).

The Commission found that the Robinson-Patman amendment to the Clayton Act imposed upon petitioner "the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute." This reasoning also appears to have been dispelled by the Supreme Court, which discusses the changes produced by the amendment and concludes with the statement, "None of these changes, however, cut into the actual core of the defense." It would thus appear that a "good faith" defense available under the Clayton Act would still be available under the amended Act. If petitioner's pricing policy was lawful prior to the amendment the same policy was lawful afterward. Such being the case, the mere fact that it did not change its policy is of little, if any, consequence.

The sole contention of the Commission which has any semblance of merit, in fact the only contention which it is entitled to make in view of the Supreme Court decision, is that petitioner adhered to a pricing system in reducing its prices to the four jobbers and that as a result the "good faith" defense cannot prevail. We suspect, as petitioner asserts, that this contention was an afterthought on the part of the Commission, advanced in an attempt to bring the case within the rule of such cases as Federal Trade Commission v. A. E. Staley Manufacturing Co. et al., 324 U. S. 746, Corn Products Refining Co. et al. v. Federal Trade Commission, 324 U. S. 726, and Federal Trade Commission v. Cement Institute et al., 333 U. S. 683.

Apropos to this contention the Commission found that with one exception "all of the discriminations in price involved in this proceeding were made pursuant to respondent's established method of pricing. They were not the result of departures from a non-discriminatory price scale which were made to meet lower prices of competitors, but represented only the continued application of the pricing standard previously adopted by respondent and followed by it since long before 1936."

We are not persuaded as to the accuracy of the statement contained in this quotation. The Commission, after finding that petitioner had a "method" of pricing, proceeds in its brief to a "policy" and from that to a "system." In its brief it states that petitioner had a "pricing system," irrespective of the words used to describe it. Obviously this characterization by the Commission is designed to bring the case within the scope of the system condemned by the Supreme Court in Staley and kindred cases. This effort must fail. The system described and condemned in Corn Products, later in Staley, and still later in Cement, bears not the slightest resemblance to the pricing system which the Commission purports to detect in the instant situation. 5501 The basing point system under scrutiny in those cases was labeled by the Supreme Court as unlawful and was employed by many and in some instances all members of the same industry. The system involved freight absorption and the collection of phantom freight. The system was utilized to stabilize or increase but never to lower prices. The system as pointed out in the Cement case eliminated all price competition and resulted in the sale of the product by all dealers at any given point at identical prices and terms. The gist of the reasoning of the Supreme Court in those cases was that the pricing system being illegal all prices determined thereby were illegal. It follows, according to such reasoning, that the meeting by the seller of a competitor's unlawful price precludes the seller from reliance upon a "good faith" defense.

It is interesting and highly significant that the statute employs the language, "made in good faith to meet an equally low price of a competitor," but that the Supreme Court in the instant case adds the word "lawful," so that it reads, "made in good faith to meet a lawful and equally low price of a competitor" (pages 238 and 246). We do not know, of course, why the Supreme Court added the word "lawful," but we strongly suspect that it was for the purpose of giving emphasis to its previous decisions that a "good faith" defense was not available to a seller who had met an unlawful price. In this connection, it is also pertinent to note that in the instant situation there is no finding, no contention and not even a suspicion but that the competing prices which petitioner met were lawful. Moreover, we are unable to discern any basis for the conclusion that petitioner's prices "were not the result of departures from a non-discriminatory price scale." The record affirmatively demonstrates to the contrary. Petitioner sold invariably at its uniform tank-wagon price, except when at different times it reduced its price to meet competitive offers in order to retain a customer. Petitioner had 362 Detroit customers, only four of which purchased at prices reduced from its uniform tank-wagon price.

The bargaining and haggling which took place between petitioner and the four involved "wholesalers" prior to a reduction in prices to them is hardly consistent with the Commission's theory that prices were reduced pursuant to a system.
5502 For instance, petitioner over many years refused to give Ned's, its "most valuable tank-wagon customer," any reduction at all despite persistent demands based upon competitive offers. Its reluctant grant of a ½¢ reduction in 1936, increased to 1½¢ in 1938 in response to an "ultimatum" by Ned's, would appear to dispel completely any idea that such reduction in price was systematic, as urged by the Commission. The Commission appears to discern something sinister in the fact that a reseller might obtain the tank car price only if it maintained a bulk plant with facilities for accepting delivery of gasoline in tank car quantities; had a business in excess of one million gallons of gasoline annually; had distribution equipment and adequate credit standing. Relative to making a reduced price to a large customer, the Supreme Court in this case stated (page 249):

"For example, if a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors, the seller may well find it essential, as a matter of business survival, to meet that price rather than to lose the customer."

We think that a seller must be permitted in the exercise of a sound judgment to determine when and under what circumstances it will reduce its price in order to meet that of a competitor; and a right to require that a purchaser be possessed of the facilities for storing, handling and distributing the product. The law did not require petitioner to reduce prices in any instance, it only authorized it to do so under the limitation imposed. Petitioner had the same right to reduce its price in order to retain a customer as it did to refuse to reduce with the risk of losing a customer. The "good faith" defense would be meaningless if the seller was required, as the Commission appears to indicate, to reduce its price alike to all customers regardless of the quantity in which they buy, their facilities for handling the product and their ability to pay.

Finally, the Commission finds that the "good faith" defense is not available to petitioner because its "competitors, including the three against whom similar charges of price discriminations are pending, might also defend their similar price differences on the ground of meeting respondent's equally low prices or the equally low prices of other competitors. The Commission does not construe the words 'in good faith' 5503 in Section 2 (b) as permitting that result." We are not able to discern any logic in such reasoning. Evidently from the quoted statement the Commission does not know whether three of petitioner's competitors, against whom are pending charges of price discrimination, will invoke the "good faith" defense. If they should, it will be time enough to cross that bridge when it is reached. Moreover, we know of no reason why a competitor of petitioner should not have the right to meet petitioner's price or that of any other competitor providing, of course, it did so in good faith. It is strange reasoning that one seller should be deprived of the defense provided in 2 (b) because some other seller might also invoke its protection.

In our judgment and we so hold, petitioner's "good faith" defense was firmly established, and the Commission's reasoning by which it reached a contrary conclusion is untenable and must be rejected. A decree will be entered vacating and setting aside its findings, conclusions and order issued January 16, 1953.

5504 In United States Court of Appeals For the Seventh Circuit

Before Hon. F. RYAN DUFFY, Chief Judge; Hon. J. EARL MAJOR, Circuit Judge, Hon. WALTER C. LINDLEY, Circuit Judge

No. 11409.

STANDARD OIL COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION

Judgment

May 3, 1956

This cause came on to be heard on the Petition for Review of an Order of the Federal Trade Commission and the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the findings, conclusions and order issued by the Federal Trade Commission on January 16, 1953, be vacated and set aside.

5505 [Clerk's certificate to foregoing transcript omitted in printing.]

5506 Supreme Court of the United States

No. —, OCTOBER TERM, 1956

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD OIL COMPANY

Order extending time to file petition for writ of certiorari

July 21, 1956

Upon consideration of the application of counsel for petitioner,

5504

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 29, 195[illegible].

STANLEY REED,
Associate Justice of the Supreme
Court of the United States.

Dated this twenty-first day of July, 1956.

5508 Supreme Court of the United States

No. 465, OCTOBER TERM, 1956

[Title omitted.]

Order allowing certiorari

Filed December 17, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT, U.S.

No. 465

In the Supreme Court of the United States

P

October Term, 1956

Federal Trade Commission, petitioner
v.
Standard Oil Company

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
Department of Justice, Washington 25, D. C.

EARL W. KINTNER,
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ROBERT B. DAWKINS,
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Federal Trade Commission,
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No.

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD OIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment entered in the above case by the United States Court of Appeals for the Seventh Circuit on May 3, 1956, which set aside an order issued by the Federal Trade Commission.

OPINION BELOW

The opinion of the Court of Appeals (Appendix, *infra*, p. 18) is reported at 233 F. 2d 649.

JURISDICTION

The judgment of the Court of Appeals (Appendix, *infra*, p. 29) was entered on May 3, 1956. The time for filing a petition for writ of certiorari was extended by Mr. Justice Reed on July 21, 1956, to

September 29, 1956 (Appendix, *infra*, p. 29). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Under Section 2 (b) of the Robinson-Patman Act, a seller may defend against a charge of illegal price discrimination by showing that his lower price was granted in "good faith" to meet the equally low price of a competitor. The question presented is whether the "good faith" defense can be used to justify a lower price regularly granted to certain large customers pursuant to a long established and inherently discriminatory pricing policy maintained by the seller and by major competitors.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

* * * * *

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be sub-

stantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *

* * * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

* * * * *

STATEMENT

The complaint issued by the Federal Trade Commission in this case (R. 2–5) charged the respondent Standard Oil Company with price discrimination in the sale of gasoline in the Detroit metropolitan area in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. 13. It was alleged that Standard, since the date of the

Robinson-Patman Act, had regularly sold at "tank-car" prices to four large reseller accounts (each of which made substantial retail sales) while selling at higher "tank-wagon" prices to numerous other reseller accounts (approximately 350 retail service stations) in the same area. It was also alleged that the effect of the discrimination had been, and "may be," to injure, destroy, or prevent competition with each of the four reseller accounts who obtained the benefit of the lower prices (R. 3).

By its answer (R. 5–28), Standard admitted the price differential (R. 11), but sought to justify it on the ground that the function performed by the four large resellers—called "jobber" accounts by Standard—was essentially different from that performed by the other resellers (R. 12–13). The answer alleged that it was Standard's "general policy and practice of bona fidely selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail resellers" (R. 13); that Standard employed fixed criteria for making this classification (R. 13–14); that the four resellers receiving the "tank-car" price met these criteria (R. 14); and "that such system and practice of selection and classification of customers" was an integral part of the oil industry (R. 13). The principal requirements for a "jobber" status under this "system and practice" were stated to be: a large volume of distribution (usually one to two million gallons annually), a bulk plant capable of accepting deliveries in "tank-car" quantities, means of making deliveries from the bulk plant, and adequate credit rating (R. 13–14, 5388). Standard also alleged that the price differential between so-called "jobber" resellers and other resellers was justified on the basis of cost and that the lower prices accorded the "jobber" resellers were granted in good faith to meet the equally low prices of competitors.

At the conclusion of extensive proceedings, the Commission found that the classification of reseller accounts was arbitrary (R. 5168) [1]; that the various resellers, though differently classified, were actually in competition with each other (R. 5165); that the price differential occasioned competitive injury (R. 5170–5171); and that it was not justified by differences in cost (R. 5171–5178). Accordingly, the Commission issued an order to cease and desist (R. 5183–5185).

During the course of the proceedings, Standard had introduced evidence designed to show that its lower "tank-car" price had been granted in good faith to meet the equally low prices of competitors. The Commission found it unnecessary to determine this issue because of its view that under the statute the good faith defense was not available "in the face of affirmative proof that the effect of the discrimination was to injure, destroy, and prevent competition with the retail stations operated by the said named dealers and with stations operated by their retailer customers." After the Court of Appeals for the Seventh Circuit affirmed, with slight modification, the Commission's cease and desist order (173 F. 2d 210), this Court held that Section 2 (b) provides an absolute defense to a charge of illegal price discrimination (340 U. S. 231). This Court accordingly reversed the judgment of the Court of Appeals and remanded the case to the Commission to make findings as to whether or not Standard's lower prices were made in good faith to meet the equally low prices of competitors (340 U. S. at 238, 251).

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[1] Of Standard's four "jobber" customers in the Detroit area, three resold both at wholesale to service stations and at retail through owned or controlled service stations and the fourth resold exclusively at retail through its own service stations.

Pursuant to this remand, the Commission reviewed the evidence relating to the "good faith" defense and entered modified findings. It found that there was no evidence that the "tank-car" price was granted to any of the four "jobber" accounts in response to any specific competitive offer (R. 5387–5388). It found that under Standard's general method of pricing, which was established prior to the passage of the Robinson-Patman Act, the criteria used to determine (R. 5389) whether or not its "tank-car" price should be accorded to a particular customer took no account of the distributive function performed by the purchaser (R. 5388). The Commission found that this system of pricing was inherently discriminatory because based upon an arbitrary classification of competing customers (R. 5388). It found that the grant of the "tank-car" price to the four "jobber" customers was not a departure by reason of competition from Standard's established method of pricing but represented only the continued application of the pricing standard adopted by respondent and followed by it since long before 1936 (R. 5389).

In addition, the Commission found that Standard, by reason of its long familiarity with every phase of the refining and distribution of gasoline, knew or should have known that its method of pricing on sales of gasoline to reseller accounts would probably have the effect of injuring competition among its customers; that Standard knew or should have known that the lower "tank-car" price could not be justified on the basis of cost; and that accordingly Standard, following the passage of the Robinson-Patman Act, had the duty and obligation to bring its pricing policy into conformity with the new statute (R. 5389). The Commission concluded that Standard's failure to make any bona fide attempt to do this also negatived its claim that it had granted the "tank-car" price to its four "jobber" customers in good faith to meet the equally low prices of competitors (R. 5389).

On review, the court below set aside the Commission's order. The court, while observing that there was no dispute as to the evidentiary facts, rejected the Commission's conclusion that respondent had not established its "good faith."

REASON FOR GRANTING THE WRIT

The decision below, involving the construction of Section 2 (b) of the Robinson-Patman Act (*supra*, p. 3), is in conflict with the decisions of this Court on an important question in the administration of the Act.

1. It is now settled under Section 2 (b) that an otherwise illegal price discrimination is not prohibited by the statute if shown to have been made in good faith to meet an equally low price of a competitor. *Standard Oil Co.* v. *Federal Trade Commission,* 340 U. S. 231 (1950). It is also well established that the burden of showing such justification is on the price discriminator. *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726, 741 (1945).

This case is a sequel to *Standard Oil Company* v. *Federal Trade Commission, supra.*[2] There this Court, noting that the Commission had not made any findings as to whether or not Standard's ~~discount~~ to its so-called "jobber" customers had been granted in "good faith" to meet the equally low price of competitors (340 U. S. at 238–239), remanded the case to the Commission with directions to make those findings (340 U. S. at 238, 251).[3] The illegality of the discount, apart from the "good faith" defense, was undisputed since Standard regularly and contemporaneously denied the "tank-car" price to its many other Detroit customers, when both groups of customers in fact competed in reselling the gasoline, and since Standard did not seek review of the Commission's findings that the discount was not cost-justified and that Standard's "jobber" classification was arbitrary. Cf. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 475.

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[2] In that posture of the case, the Department of Justice did not join in defending the Commission's order because of the Department's view that the Commission's construction of Section 2 (b)—to the effect that it did not provide a complete defense—was erroneous as a matter of law. On the other hand, it is the Department's view that the decision below, setting aside the Commission's decision on remand, is similarly erroneous. Since in its decision the Court of Appeals did not reach any questions relating to the scope of the Commission's order, no discussion of those questions appears necessary or appropriate in the present petition.

[3] The court below (Appendix, *infra*, pp. 21–22) appears to suggest that the Commission and this Court, at prior stages in this proceeding, impliedly recognized Standard's "good faith." Any such suggestion is without foundation. As pointed out in the Statement (*supra*, pp. 5–6) and in the text above, the issue was not decided by either the Commission or this Court because of the nature of the Commission's construction of the statute, and this

On remand, relying principally on *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, and *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, the Commission concluded that Standard had failed to prove its "good faith". The correctness of this ruling, set aside by the court below, is the question now presented. The Commission's underlying findings, we submit, support its conclusion.

The Commission found that Standard, because major competitors used the same dual price formula,[4] had substantial reasons for believing that it might lose its four "jobber" accounts if it refused them the lower "tank-car" price. But this finding, the Commission held, was not determinative, particularly in view of

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Court remanded the case to the Commission for findings on that very issue. The court below (Appendix, *infra*, p. 21) is also in error in stating that the trial examiner ever recognized Standard's "good faith."

[4] Similar charges of illegal price discrimination in the Detroit area are now pending against three other gasoline companies—Gulf, Texas, and Shell. Proceedings thereon have been deferred until the disposition of this case.

its finding that the grant of the "tank-car" price to the four "jobber" customers was not a departure by reason of competition from Standard's established method of pricing but represented only the continued application of that method—a method, moreover, adopted by Standard and followed by it since long before passage of the Robinson-Patman Act in 1936 (R. 5389).[5] In short, not once did Standard, in granting the lower "tank-car" price, ever make a *reduction* from its pre-existing price scale; the discrimination lay in the regular use of the price scale itself. Such discrimination, the Commission concluded, did not satisfy the "good faith" test enunciated in this Court's *Staley* and *Cement* decisions.

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[5] On the question of Standard's "good faith," the Commission (Statement, *supra*, p. 7) also found: (1) that Standard knew or should have known of the probability of competitive injury resulting from its price policy; (2) that Standard knew or should have known that the price differential could not be cost-justified; (3) that passage of the Robinson-Patman Act imposed upon Standard the duty of reviewing its price policy. The court below (Appendix, *infra*, pp. 23–24) misconceived each of the three findings.

As to (1), *supra*, the court held that this theory had been repudiated by this Court in its 1949 decision. However, nothing in this Court's opinion (340 U. S. 231) even remotely indicates that knowledge of probability of competitive injury cannot be legitimately considered on the "good faith" issue. Presumably the court's reference is to the quite different matter of the completeness of the Section 2 (b) defense in the face of competitive injury.

As to (2), *supra*, the court below held that this finding was "irrelevant" because Standard had abandoned its defense of cost justification. The finding is not "irrelevant," however, on the issue of "good faith"; for example, if Standard reasonably believed the differential was cost-justified, this would help substantiate its "good faith" claim.

As to (3), *supra*, the court below held that this finding was of little consequence since "If petitioner's pricing policy was lawful prior to the [Robinson-Patman] amendment [to the Clayton Act] the same policy was lawful afterward." The court's statement, however, ignores the important changes brought about by passage of the Robinson-Patman Act.

In *Staley*, a similar question was presented. There, as in the instant case, the sellers involved "never attempted to establish their own non-discriminatory price system, and then reduce their price when necessary to meet competition. Instead they slavishly followed in the first instance a pricing policy which, in their case, resulted in systematic discriminations * * *" (324 U. S. at 754–755). There, too, the attempt was made under Section 2 (b) to justify this discriminatory pricing policy on the ground that the sellers' competitors maintained a similar pricing policy. In rejecting this defense, this Court pointed out (324 U. S. at 753):

> But § 2 (b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition.

The Court added (324 U. S. at 757): "We cannot say that a seller acts in good faith when it chooses to adopt such a clearly discriminatory pricing system, at least where it has never attempted to set up a non-discriminatory system * * *"

And, three years later in the *Cement* case, this Court said (333 U. S. at 725):

> Section 2 (b) permits a single company to sell one customer at a lower price than it sells to another if the price is "made in good faith to meet an equally low price of a competitor." But this does not mean that § 2 (b) permits a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others. We held to the contrary in the *Staley* case. There we said that the Act "speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition."

Accordingly, the seller's Section 2(b) defense was rejected since the pricing policy involved there was employed "as a practice rather than as a good faith effort to meet 'individual competitive situations'" (*ibid.*):

The court below sought to distinguish *Staley* and *Cement* by comparison of the pricing system involved in those cases—the so-called basing point system—with Standard's pricing formula. This attempted distinction is without basis in principle. Standard's pricing policy represented a general method of competition used not only by Standard but also by major competitors (R. 5388).[8] Standard's "tank-car" prices were granted pursuant to, and were not variations from, Standard's established pricing policy. Whether prices are determined by a basing point system, or by a system of classifying customers for pricing purposes, is immaterial; for, as this Court emphasized in *Staley* and *Cement*, Section 2(b) "does not concern itself with pricing systems" (*Staley*, p. 753; *Cement*, p. 725), does not permit a seller "to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others" (*Cement*, p. 725), and relates only to "individual competitive situations" (*Staley*, p. 753; *Cement*, p. 725). This rationale is equally applicable here.

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[8] See note 4, *supra*.

Nor can this case be distinguished on the ground, suggested by the court below, that the basing point system involved in *Staley* and *Cement*, "was utilized to stabilize or increase but never to lower prices." First, we believe the court's statement is inaccurate. With respect to many customers of a seller employing a basing point system, the effect of the system is to lower delivered prices. See *Corn Products Co.* v. *Federal Trade Commission*, 324 U. S. 726, 731, 732. Secondly, and in any event, there is completely lacking any showing by Standard—which has the burden of proving its "good faith" defense—that the result of its pricing method has been to lower prices. No such assurance can be deduced from the mere fact that a price discrimination exists. On the contrary, where the discrimination is a permanent part of a pre-existing system or formula, there is an inherent danger that a seller in Standard's position will attempt to manipulate its overall price scale (both the "tank-car" and "tank-wagon" prices) upward for the purpose of offsetting any reduction in its profits because of the relatively "lower" price granted to the "jobber" accounts. This danger is particularly serious where, as here, competitors employ the same dual price formula. On the other hand, where departures from a non-discriminatory price scale are made "in individual competitive situations", the probability that the consuming public will have to subsidize the price discrimination is considerably lessened.

Finally, although observing that there was no dispute as to the evidentiary facts, the court below asserted that it was "unable to discern any basis for the conclusion that petitioner's prices 'were not the result of departures from a non-discriminatory price scale'." This assertion, if it is intended to suggest that Standard did not maintain a dual price formula, is palpably erroneous. The fact is that Standard, in its answer to the Commission's complaint, frankly stated that it had a "general policy and practice" and "system and practice" "selecting and classifying customers as wholesale or jobber customers, as distinguished from retail resellers," listed what it required as qualifications for "jobber" customers, and conceded that the latter regularly received the lower "tank-car" price. See Statement, *supra*, p. 4. This was also the undisputed testimony of Standard's own witnesses.[7] And this was, moreover, the position taken by Standard in its brief in this Court when the case was last here.[8] At this point in the proceeding, the issue of whether Standard maintained such a price system can hardly be regarded as open.[9] The label applied to it is of little consequence—"system," "formula," "policy," "method," "practice." What is important is that it "constantly results in [Standard's] getting more money for like goods from some customers than [it] does from others" and that it is not directed to "individual competitive situations." *Cement, supra,* p. 725. Or, as this Court held in *Staley,* p. 757, "We cannot say that a seller acts in good faith when it chooses to adopt such a clearly

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[7] Standard introduced evidence showing that it had specific requirements for a "jobber" status (R. 1890–1891); that the four large reseller accounts involved here met those requirements (R.

1895); that it did not accord "jobber" status to any reseller that did not meet these requirements (R. 172–174, 2084–2088, 2124); that it would rather lose "jobber" accounts than depart from those requirements (R. 1912–1916); that it had but two prices for resellers' accounts—one for "jobber" accounts and one for ordinary resellers (R. 167–169, 1899). It was also emphasized by petitioner's witnesses that this system of pricing was used not only in Detroit (R. 1890, 1897, 2065) but elsewhere in the country (R. 943, 1060, 1064, 1075, 1890) and not only by petitioner but by some of petitioner's major competitors including Texas, Gulf, and Shell (R. 319–320, 941, 1072, 1897).

[8] See, *e. g.,* pp. 3, 4, 7, 8, 42, 43 of Brief for Petitioner, *Standard Oil Co.* v. *Federal Trade Commissioner,* No. 1, 1950 Term.

[9] Equally misleading is the court's statement (Appendix, *infra,* p. 26) that "The bargaining and haggling which took place between [Standard] and the four involved ["jobber" accounts] prior to a reduction in prices to them is hardly consistent with the Commission's theory that prices were reduced pursuant to a system." The answer to this assertion is two-fold. First, any evidence of any "bargaining and haggling" relates to a period *prior* to the customers' compliance with Standard's requirements for a "jobber" status. Second, it was never "the Commission's theory that [Standard's] prices were reduced pursuant to a system." On the contrary, it is the Commission's position that Standard did *not* "reduce" its prices to its "jobber" accounts but rather merely applied a pre-existing discriminatory price formula.

discriminatory pricing system, at least where it has never attempted to set up a non-discriminatory system * * *."

2. The practical implications of the decision below are serious and important. According to Standard's own witnesses, Standard's dual price system is used in the Detroit area not only by Standard but also by major competitors—Gulf, Texas, and Shell—against whom similar complaints are now pending.[10] Indeed, it was on this basis that the Commission found that Standard had good reasons for believing that a refusal to continue the discount to its "jobber" accounts would mean the loss of these accounts. Under the decision below, the Commission's complaint against Standard must fall because of the availability of an "equally low price" from Gulf, Texas, or Shell. Similarly, under the court's rationale, Gulf, Texas, and Shell can defend the validity of their "jobber" discount because of the availability of Standard's discriminatory low price. In other words, as long as competing sellers follow the same discriminatory price policies, each is protected. The result is to insulate from attack a price pattern deeply entrenched in the industry—not only in the Detroit area, but also elsewhere in the country (R. 319–320, 941, 943, 1060, 1064, 1072, 1075, 1897)—long prior to passage of the Robinson-Patman Act. Moreover, the decision below actually provides a positive incentive to competing suppliers to adopt parallel pricing systems so that each can defend its own system on the basis of similar systems used by others. The Act, we believe, precludes such consequences. Cf. *Federal Trade Commission* v. *Staley Co.*, 324 U. S. 746, 754.

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[10] See note 1, *supra*.

Since the Commission's decision on remand in this case, the Commission has denied "good faith" defenses under Section 2 (b) in a number of similar cases involving other industries. In these cases, two of which are now pending upon petitions for review in the court below,[11] the "good faith" defenses related to discounts, as in this case, which were not departures from an established price scale but instead merely represented a continued application of a discriminatory pricing scale used alike by the seller and by competitors of the seller. As in this case, the Commission denied the protection of Section 2 (b) to such price discrimination under the criteria enunciated by this Court in *Staley* and *Cement*. Review in the instant case, therefore, will have a controlling effect on pending litigation involving other industries, as well as on the future administration of the Robinson-Patman Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.

EARL W. KINTNER,
General Counsel,
ROBERT B. DAWKINS,
Assistant General Counsel,
Federal Trade Commission.

SEPTEMBER 1956.

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[11] *E. Edelmann & Co.*, Dkt. 5770, CCH Trade Reg. Rep., ¶ 25,415; *C. E. Niehoff & Co.*, Dkt. 5768, CCH Trade Reg. Rep. ¶ 25,467.

APPENDIX

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1. OPINION OF THE COURT OF APPEALS

No. 11409

May 3, 1956

United States Court of Appeals for the Seventh Circuit

STANDARD OIL COMPANY, PETITIONER,

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION

Before DUFFY, Chief Judge, MAJOR and LINDLEY, Circuit Judges.

MAJOR, Circuit Judge. This proceeding originated in a complaint filed by respondent against petitioner on November 29, 1940, charging a violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (49 Stat. 1526; 15 U. S. C. A. Sec. 13, as amended). The case is now here on petition by Standard to review a modified order to cease and desist, issued by the Commission against Standard January 16, 1953. The proceeding has long been before the Commission and the courts, and a number of the original contested issues have been adjudicated. In fact, on the present review there are only two contested issues which, as stated by the Commission, are: (1) whether the Commission correctly concluded that petitioner failed to establish that its lower price was made in "good faith" to meet the equally low price of a competitor within the meaning of Section 2 (b) of the Robinson-Patman Act, and (2) whether the revised order to cease and desist is warranted by the findings and properly issued. As subsequently shown, we conclude that the first issue must be decided adversely to the Commission, which renders the second issue of no consequence.

The Commission's original cease and desist order was before this court for review, wherein its enforcement, with some modification, was allowed with judgment accordingly. *Standard Oil Co.* v. *Federal Trade Commission*, 173 F. 2d 210. On appeal, the Supreme Court reversed, with instructions to this court to remand the case to the Commission to make findings in conformity with its opinion. *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231. A history of the proceeding has previously been set forth in detail both by this and the Supreme Court and need not be repeated here except insofar as it relates to the question now for decision. Also, except for the same purpose, we need not be concerned with issues previously raised and decided by the Supreme Court.

Petitioner's sales of gasoline about which the "good faith" defense revolves were made to four customers, classified by petitioner as jobbers, namely, Ned's Auto Supply Company, Stikeman Oil Company, Citrin-Kolb Oil Company, and Wayne Company. The Commission took the position originally that the "good faith" defense was not available to petitioner and therefore, made no findings relative thereto. This court agreed with the Commissioner's position on that issue and affirmed. It was on this issue, however, that the Supreme Court reversed and remanded.

In response to the remandment the Commission from the original record made its modified findings, which conclude with the statement:

> For the reasons stated, the Commission is of the opinion that the respondent has not shown that the discriminatory prices allowed [naming the four customers involved] were lower prices granted in good faith to meet equally low prices of competitors. The Commission, therefore, finds the the burden imposed upon the respondent by Section 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act, has not been sustained and that the price discriminations referred to in these findings have not been justified.[1]

Whether the decision of the Commission under the attending circumstances represents a finding of fact or a conclusion of law is of importance. We are of the view that it falls within the latter category, and this notwithstanding the statement in *Federal Trade Commission* v. *A. E. Staley Manufacturing Co., et al.*, 324 U. S. 746, 758:

> Congress has left to the Commission to determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence is for the Commission.

The Commission in its brief appears to recognize that its decision on this critical issue is a conclusion of law (for example, see Commission's statement of contested issues, *supra*). Certainly there is no dispute as to the evidentiary facts as found by the Examiner in the original proceeding. Referring thereto, the Commission in its brief states, "Here the facts as such are not in dispute, it is simply a matter of applying the law to the facts." Moreover, the Commission's decision on the "good faith" issue is the result of its process of reasoning, legal in nature, a portion of which, as we shall subsequently show, has been repudiated by the Supreme Court. Such being the case, the weight to be attached to its decision is dependent upon the reasoning by which it is reached.

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[1] Two Commissioners, based upon the findings of the Trial Examiner, dissented and expressed the view that the complaint against petitioner should be dismissed.

Prior to a discussion of the Commission's findings now under review, we think it pertinent to observe that petitioner's good faith has been either recognized or assumed at all levels during the course of this protracted proceeding. Certainly the Examiner so found. (See footnote 7, page 238 of the Supreme Court opinion.) The Commission in its original findings took no issue with its Examiner on this score but concluded as a matter of law that the "good faith" defense was not available "in the face of affirmative proof that the effect of the discrimination was to injure, destroy and prevent competition with the retail stations operated by the said named dealers and with stations operated by their retailer-customers." In fact, there is good reason to think that the Commission at that time acquiesced in petitioner's contention that the sales in controversy were made in good faith. This court in reviewing that record (173 F. 2d 210, 216) stated:

> The showing made here by the petitioner that it made the lower price in good faith to meet competition, we assume, as the Commission apparently did, was made out. The effect of it was to rebut the prima facie case made by the Commission's proof of the petitioner's discriminatory prices. If nothing further ap-

peared in this record, the case might well have ended there.

This court also stated (page 213):

> There is substantial evidence in this record, and we think it may be assumed to be conclusive, to the effect that the petitioner made its low price to Ned's, Citrin, Wayne, and Stikeman in good faith to meet the lower price of a competitor.

The Supreme Court stated (page 238):

> Petitioner presented evidence tending to prove that its tank-car price was made to each "jobber" in order to retain that "jobber" as a customer and in good faith to meet a lawful and equally low price of a competitor.

After quoting from the findings of the Trial Examiner (footnote on same page), the same court on the following page, referring to the evidence, stated that it, "if accepted, would have stablished a complete defense to the charge of unlawful discrimination."

Moreover, in the findings now under review the Commission does not expressly repudiate the findings of the Examiner in the original proceeding that petitioner's reduction in price was granted to meet the equally low prices offered by competitors. The Commission, after a detailed discussion relative to the situation existing between petitioner and each of the four jobbers in controversy, states:

> It may well be that respondent was convinced that if it ceased granting tank-car prices to Citrin-Kolb, Wayne, and Stikeman and continued to refuse the tank-car price to Ned's Auto Supply Company it would lose these accounts. It had substantial reasons for believing this to be the case, for all of these concerns, except Ned's Auto Supply Company, had al-

> ready been recognized as entitled to the tank-car price under the commonly accepted standards of the industry, and Ned's had achieved a volume of distribution which brought it with the range where it was likely to be so recognized by a major oil company at any time.

It thus appears evident even under this revised version of petitioner's situation that it was confronted with the problem of reducing its price to meet competitive offers or of forfeiting the business of the four jobbers.

An attempt to enter into a discussion of all of the ramifications contained in the Commission's reasoning and argument in support of its decision against the "good faith" defense would unduly prolong this opinion. We shall, therefore, limit our discussion to a few of the more salient points as contained in the modified findings. The Commission found:

> At all relevant times, respondent knew or had the means of knowing and should have known that the manner in which it priced and sold its gasoline continually created the probability of injury to competition between retail dealers who bought such gasoline at different prices and resold it in competition with one another.

This is the same theory upon which the Commission's previous order was bottomed and which was expressly repudiated by the Supreme Court (pages 249–250).

The Commission found:

> It [petitioner] also knew or should have known that the price differences which it granted could not be justified on the basis of differences in the cost of manufacture, sale and delivery resulting from differing methods or quantities in which its gasoline was sold or delivered.

We think this statement is irrelevant to the instant issue. A cost justification defense is available under

Section 2 (a), but it is separate and distinct from the "good faith" defense provided in 2 (b). Both defenses were originally invoked by petitioner but the cost justification defense was abandoned (see footnote 2, Supreme Court opinion, page 234).

The Commission found that the Robinson-Patman amendment to the Clayton Act imposed upon petitioner "the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute." This reasoning also appears to have been dispelled by the Supreme Court, which discusses the changes produced by the amendment and concludes with the statement, "None of these changes, however, cut into the actual core of the defense.". It would thus appear that a "good faith" defense available under the Clayton Act would still be available under the amended Act. If petitioner's pricing policy was lawful prior to the amendment the same policy was lawful afterward. Such being the case, the mere fact that it did not change its policy is of little, if any, consequence.

The sole contention of the Commission which has any semblance of merit, in fact the only contention which it is entitled to make in view of the Supreme Court decision, is that petitioner adhered to a pricing system in reducing its prices to the four jobbers and that as a result the "good faith" defense cannot prevail. We suspect, as petitioner asserts, that this contention was an afterthought on the part of the Commission, advanced in an attempt to bring the case within the rule of such cases as *Federal Trade Commission* v. *A. E. Staley Manufacturing Co. et al.*, 324 U. S. 746, *Corn Products Refining Co. et al.* v. *Federal Trade Commission*, 324 U. S. 726, and *Federal Trade Commission* v. *Cement Institute et al.*, 333 U. S. 683.

Apropos to this contention the Commission found that with one exception "all of the discriminations in price involved in this proceeding were made pursuant to respondent's established method of pricing. They were not the result of departures from a non-discriminatory price scale which were made to meet lower prices of competitors, but represented only the continued application of the pricing standard previously adopted by respondent and followed by it since long before 1936."

We are not persuaded as to the accuracy of the statement contained in this quotation. The Commission, after finding that petitioner had a "method" of pricing, proceeds in its brief to a "policy" and from that to a "system." In its brief it states that petitioner had a "pricing system," irrespective of the words used to describe it. Obviously this characterization by the Commission is designed to bring the case within the scope of the system condemned by the Supreme Court in *Staley* and kindred cases. This effort must fail. The system described and condemned in *Corn Products*, later in *Staley*, and still later in *Cement*, bears not the slightest resemblance to the pricing system which the Commission purports to detect in the instant situation. The basing point system under scrutiny in those cases was labeled by the Supreme Court as unlawful and was employed by many and in some instances all members of the same industry. The system involved freight absorption and the collection of phantom freight. The system was utilized to stabilize or increase but never to lower prices. The system as pointed out in the *Cement* case eliminated all price competition and resulted in the sale of the product by all dealers at any given point at identical prices and terms. The gist of the reasoning of the Supreme Court in those cases was that the pricing system being illegal all prices determined thereby were illegal. It follows, according to such reasoning, that the meeting by the seller of a competitor's unlawful price precludes the seller from reliance upon a "good faith" defense:

It is interesting and highly significant that the statute employs the language, "made in good faith to meet an equally low price of a competitor," but that the Supreme Court in the instant case adds the word "lawful," so that it reads, "made in good faith to meet a lawful and equally low price of a competitor" (pages 238 and 246). We do not know, of course, why the Supreme Court added the word "lawful," but we strongly suspect that it was for the purpose of giving emphasis to its previous decisions that a "good faith" defense was not available to a seller who had met an unlawful price. In this connection, it is also pertinent to note that in the instant situation there is no finding, no contention and not even a suspicion but that the competing prices which petitioner met were lawful. Moreover, we are unable to discern any basis for the conclusion that petitioner's prices "were not the result of departures from a non-discriminatory price scale." The record affirmatively demonstrates to the contrary. Petitioner sold invariably at its uniform tank-wagon price, except when at different times it reduced its price to meet competitive offers in order to retain a customer. Petitioner had 362 Detroit customers, only four of which purchased at prices reduced from its uniform tank-wagon price.

The bargaining and haggling which took place between petitioner and the four involved "wholesalers" prior to a reduction in prices to them is hardly consistent with the Commission's theory that prices were reduced pursuant to a system. For instance, petitioner over many years refused to give Ned's, its "most valuable tank-wagon customer," any reduction at all despite persistent demands based upon competitive offers. Its reluctant grant of a ½¢ reduction in 1936, increased to 1½¢ in 1938 in response to an "ultimatum" by Ned's, would appear to dispel completely any idea that such reduction in price was systematic, as urged by the Commission. The Commission appears to discern something sinister in the fact that a reseller might obtain the tank car price only if it maintained a bulk plant with facilities for accepting delivery of gasoline in tank car quantities; had a business in excess of one million gallons of gasoline annually; had distribution equipment and adequate credit standing. Relative to making a reduced price to a large customer, the Supreme Court in this case stated (page 249):

> For example, if a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors, the seller may well find it essential, as a matter of business survival, to meet that price rather than to lose the customer.

We think that a seller must be permitted in the exercise of a sound judgment to determine when and under what circumstances it will reduce its price in order to meet that of a competitor, and a right to require that a purchaser be possessed of the facilities for storing, handling, and distributing the product. The law did not require petitioner to reduce prices in any instance, it only authorized it to do so under the limitation imposed. Petitioner had the same right to reduce its price in order to retain a customer as it did to refuse to reduce with the risk of losing a customer. The "good faith" defense would be meaningless if the seller was required, as the Commission appears to indicate, to reduce its price alike to all customers regardless of the quantity in which they buy, their facilities for handling the product, and their ability to pay.

Finally, the Commission finds that the "good faith" defense is not available to petitioner because its "competitors, including the three against whom similar charges of price discriminations are pending, might also defend their similar price differences on the ground of meeting respondent's equally low prices or the equally low prices of other competitors. The Commission does not construe the words 'in good faith' in Section 2 (b) as permitting that result." We are not able to discern any logic in such reasoning. Evidently from the quoted statement the Commission does not know whether three of petitioner's competitors, against whom are pending charges of price discrimination, will invoke the "good faith" defense. If they should, it will be time enough to cross that bridge when it is reached. Moreover, we know of no reason why a competitor of petitioner should not have the right to meet petitioner's price or that of any other competitor providing, of course, it did so in good faith. It is strange reasoning that one seller should be deprived of the defense provided in 2 (b) because some other seller might also invoke its protection.

In our judgment and we so hold, petitioner's "good faith" defense was firmly established, and the Commission's reasoning by which it reached a contrary conclusion is untenable and must be rejected. A decree will be entered vacating and setting aside its findings, conclusions and order issued January 16, 1953.

2. JUDGMENT OF THE COURT OF APPEALS

United States Court of Appeals for the
Seventh Circuit, Chicago 10, Illinois

Thursday, May 3, 1956

No. 11409

STANDARD OIL COMPANY, PETITIONER.

vs.

FEDERAL TRADE COMMISSION, RESPONDENT.

PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION

Before Hon. F. RYAN DUFFY, *Chief Judge;* Hon. J. EARL MAJOR, *Circuit Judge;* Hon. WALTER C. LINDLEY, *Circuit Judge.*

This cause came on to be heard on the Petition for Review of an Order of the Federal Trade Commission and the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the findings, conclusions and order issued by the Federal Trade Commission on January 16, 1953 be vacated and set aside.

A True Copy:
Teste:

(Sgd) KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

3. ORDER EXTENDING TIME FOR FILING PETITION FOR CERTIORARI

Supreme Court of the United States

No. —, October Term, 1956

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD OIL COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 29, 1956.

[S] STANLEY REED,
Associate Justice of the Supreme Court of the United States.

Dated this twenty-first day of July, 1956.

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JOHN T. FEY, Clerk

No. ~~405~~ 24

In the Supreme Court of the United States

OCTOBER TERM, 1956

FEDERAL TRADE COMMISSION, PETITIONER
v.
STANDARD OIL COMPANY

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

J. LEE RANKIN,
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 465

FEDERAL TRADE COMMISSION, PETITIONER
v.
STANDARD OIL COMPANY

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Notwithstanding the Government's usual reluctance to file reply briefs in support of petitions for certiorari, we feel obliged to do so in the instant case because of a number of inaccurate and misleading statements appearing in Standard's brief in opposition. Three such statements, each of which the Government believes to be demonstrably without foundation, are particularly deserving of answer: (1) that the issue presented by the petition is "hypothetical" and "was not adjudicated below" (Br. Opp. 6); (2) that review of the decision below would require this Court "to plow through a voluminous record" and make "a *de novo* appraisal" of the evidence (Br. Opp. 7–8); (3) that the Department of Justice "at first publicly accepted the ruling below as a sound statement of law" but "For reasons that are not apparent, there has now been a change of mind" (Br. Opp. 5–6, 13).

1. The basic issue presented by the Government's petition is whether regular and systematic price discrimination, otherwise plainly unlawful under the Robinson-Patman Act, can be justified under Section 2 (b) (as a "good faith" meeting of competition) on the ground that the seller's competitors employ the same pricing policy. Stated otherwise, the issue is whether such a pricing policy falls within the scope of the doctrine of the *Staley* and *Cement* cases (*Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 753; *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 725), which ruled that Section 2 (b) "does not concern itself with pricing systems," does not permit a seller "to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others," and relates only to "individual competitive situations."

Standard does not seriously contend that this issue is not one of general importance warranting review by this Court. Rather, it argues that the issue is "hypothetical" and "was not adjudicated below" (Br. Opp. 6). This assertion, we submit, can not be supported. The issue which Standard terms "hypothetical" was the principal issue before the Commission in the proceedings after remand from this Court. And it was the principal issue before the court below. In these circumstances, it is surely not surprising to find that the court did in fact pass on the issue, as reference to the court's opinion will readily confirm. Indeed, the court was quite explicit as to what it conceived to be the scope of the *Staley-Cement* doctrine. The court, after setting forth the Commission's contention, stated (Pet. 25):

> * * * The basing point system under scrutiny in those cases was labeled by the Supreme Court as unlawful and was employed by many and in some instances all members of the same industry. The system involved freight absorption and the collection of phantom freight. The system was utilized to stabilize or increase but never to lower prices. The system as pointed out in the *Cement* case eliminated all price competition and resulted in the sale of the product by all dealers at any given point at identical prices and terms. The gist of the reasoning of the Supreme Court in those cases was that the pricing system being illegal all prices determined thereby were illegal. It follows, according to such reasoning, that the meeting by the seller of a competitor's unlawful price precludes the seller from reliance upon a "good faith" defense.

Given this restrictive interpretation of *Staley* and *Cement*, the Commission's contention was necessarily rejected since "The system described and condemned in *Corn Products*, later in *Staley*, and still later in *Cement*, bears not the slightest resemblance to the pricing system which the Commission purports to detect in the instant situation" (Pet. 25). The court added that "in the instant situation there is no finding, no contention and not even a suspicion but that the competing prices which [Standard] met were lawful" (Pet. 26).

Thus the opinion below (although the last-quoted statement is of dubious accuracy)[1] presents the issue squarely. It is the Government's position that the court below erred in holding (*supra*) that "The gist of the reasoning of the Supreme Court in [the *Staley* and *Cement*] cases was that the pricing system being illegal all prices determined thereby were illegal." In the Government's view, the *Staley-Cement* doctrine is not limited to cases involving basing-point systems and does not merely stand for the proposition (*supra*) "that the meeting by the seller of a competitor's unlawful price precludes the seller from reliance upon a 'good faith' defense." In short, it is the Government's position that the *Staley* and *Cement* decisions mean what they say—namely, that Section 2 (b) "does not concern itself with pricing systems," does not permit a seller "to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others," and relates only to "individual competitive situations." 324 U. S. at 753; 333 U. S. at 725.

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[1] It is true that in this proceeding the Commission did not adjudicate the legality of the competing prices which Standard allegedly met. In the Commission's view, such a finding is not required under the *Staley-Cement* doctrine. See text, *supra.* But the Commission has issued similar complaints against Gulf, Texas, and Shell. In addition, Standard has insisted that its pricing policies—which the Commission did find to be unlawful—were identical to those of its competitors, and in fact based its Section 2 (b) defense on that ground. In these circumstances, it cannot be said that there is "no contention and not even a suspicion but that the competing prices which [Standard] met were lawful." Moreover, the court's statement implies that the burden was on the Commission to establish the unlawfulness of such prices. Under the Act, the burden of making out a defense under Section 2 (b) is upon the party charged with violation.

2. Standard also is in error in asserting that review of the decision below would require this Court "to plow through a voluminous record" and make a "*de novo* appraisal" of the evidence (Br. Opp. 7, 8).

At the outset, it should be noted that the court below took quite a different view of the appellate function in this case. The court stated (Pet. 20–21):

> * * * Certainly there is no dispute as to the evidentiary facts as found by the Examiner in the original proceeding. Referring thereto, the Commission in its brief states, "Here the facts as such are not in dispute, it is simply a matter of applying the law to the facts." Moreover, the Commission's decision on the "good faith" issue is the result of its process of reasoning, legal in nature, * * *. Such being the case, the weight to be attached to its decision is dependent upon the reasoning by which it is reached.

The court might also have referred to the following statement in Standard's brief below (p. 6): "The controlling facts are not in dispute. The trial examiner's report * * * sets out the facts essential to a resolution of this case." We are unaware of any reason why this case—which the court below and both parties agreed was a "law" case—should now become a "fact" case on reaching the Supreme Court.[2]

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[2] Standard contends that the court below decided—as an issue of fact—that Standard had no such pricing system (Br. Opp. 6-8). "But 'issue of fact' is a coat of many colors. It

Actually, the pertinent facts are not only undisputed but are, for the most part, set forth in Standard's own answer to the complaint in this proceeding. In Paragraphs 16 and 17 (reproduced in the Appendix, *infra*,[4] pp. 12–15), Standard frankly stated: that it had a "general policy and practice of bona fidely selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail resellers"; that so-called "jobber" accounts must meet certain qualifications (*e. g.*, a certain annual volume): that "jobber" accounts, "as a result of such necessary selection and classification of customers, and as an integral and basically essential part thereof", regularly received the lower "tank-car" price; and "that such system and practice of selection and classification of customers" was a common one in the oil industry. Standard's 1950 brief in this Court,[5] as well as the testimony of its own witnesses before the Commission,[6] are to like effect. At this juncture in the

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does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment * * *". *Watts* v. *Indiana*, 338 U. S. 49, 51 (per Frankfurter, J.). Particularly is this so in the instant case where (1) the court's conclusions relied upon by Standard as being "factual" are basically inconsistent with Standard's express admissions (see note 6, *infra*) and (2) the court itself did not regard the issue before it as evidentiary (see text, *supra*, p. 5).

[4] In many respects, Standard's dual price formula bears a striking similarity to the practice condemned in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37. See also *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 475.

[5] See Brief for Petitioner, *Standard Oil Co.* v. *Federal Trade Commission*, No. 1, 1950 Term, pp. 3, 4, 43, 46.

[6] See petition for certiorari (note 7) in the instant case.

proceeding, Standard can scarcely be permitted to withdraw or disavow these admissions. And Standard can have no real objection to the Commission's reliance on these admissions. Thus, the fundamental issue presented by the Government's petition for certiorari is simply whether a pricing "system and practice" of the type admitted by Standard falls within the scope of the *Staley-Cement* doctrine. The resolution of this issue certainly does not require this Court "to plow through a voluminous record" (Br. Opp. 7) or to make "a *de novo* appraisal" of the evidence (Br. Opp. 8). Instead, as already pointed out, it requires only the drawing of certain inferences—essentially legal in nature—from the undisputed facts.[6]

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[6] See note 2, *supra.* Nor is any broader scope of review required by the assertion of the court below that Standard "sold invariably at its uniform tank-wagon price, except when at different times it reduced the price to meet competitive offers in order to retain a customer." This assertion, if it is intended to suggest that Standard did not maintain a dual price "system and practice" and did not *regularly* sell to its "jobber" customers at the lower "tank-car" price, is directly contradicted by Standard's admissions (see, *e. g.*, Appendix, *infra*, pp. 12-15).

Standard also relies (Br. Opp. 6-7) on the court's statement that "The bargaining and haggling which took place between [Standard] and the four involved 'wholesalers' prior to a reduction in prices to them is hardly consistent with the Commission's theory that prices were reduced pursuant to a system" (Pet. 26). As pointed out in the petition for certiorari (Pet. 15, n. 9), the quoted statement distorts "the Commission's theory" and ignores the fact that any evidence of "bargaining and haggling" relates to a period *prior* to the customers' compliance with Standard's "jobber" requirements. In this connection, it may be noted that the court below acknowledges

3. Also without basis is Standard's assertion that "The Government [*i. e.*, the Department of Justice] at first publicly accepted the ruling below as a sound statement of law in accord with this Court's 1951 decision" and that "For reasons that are not apparent, there has now been a change of mind" (Br. Opp. 5-6, 13). Contrary to this assertion, the Department of Justice, prior to petitioning for certiorari, took no position whatever on the correctness of the decision below.[7]

Standard's policy of refusing to grant its "tank-car" price to any customer who fails to comply with these requirements (Pet. 27).

[7] Equally misleading is Standard's description of the Commission's decision. According to Standard (Br. Opp. 2): "'Good faith' was denied due to (1) respondent's alleged knowledge that its prices would cause competitive 'injury'; (2) its inability to 'cost-justify' these prices; (3) the pricing 'policy' or 'method' pursuant to which it allegedly made the challenged reductions to its four 'jobber' customers in Detroit."

First of all, it was never the Commission's position that Standard made any "reductions" pursuant to a system; the exact converse is true (see petition for certiorari, note 9).

Secondly, what Standard labels "the first two grounds of the FTC ruling" (Br. Opp. 2) are but parts of a single ground which, in the Commission's decision, was ancillary to its *Staley-Cement* ground. See petition for certiorari, p. 7. With respect to this ancillary ground, the Commission found an absence of "good faith" because of Standard's failure to re-examine its pricing system after passage of the Robinson-Patman Act. In this connection, the Commission found that Standard *knew* its pricing system was not cost-justified and was inflicting competitive injury. For the treatment of this ancillary ground by the court below, see petition for certiorari, note 3. This matter was "relegated to a footnote" (Br. Opp. 2), not because it has been abandoned, but because of the relatively greater importance of the *Staley-Cement* issue.

Standard (Br. Opp. 13) relies wholly on a letter dated June 27, 1956, from Warren Olney III, Acting Deputy Attorney General, to the Chairman of the Senate Judiciary Committee. The letter is reprinted in *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee on Bills to Amend Section 2 of the Clayton Act*, 84th Cong., 2d Sess., pp. 688–689. As the letter makes abundantly clear, its purpose was only to advise the Committee that the decision below (and *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356 (C. A. 9), certiorari denied, 350 U. S. 991) did not cause the Department to withdraw its long-standing opposition to proposed legislation (then under study by the Committee) which would overrule this Court's decision in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, holding that Section 2 (b) provides a complete defense to charges of price discrimination. The letter states in pertinent part:

> We have carefully analyzed the decisions in these two cases and do not feel that these holdings indicate a need for the proposed legislation.
>
> * * * * *
>
> It is our position that neither of the above cases furnishes sufficient basis for the Department to change its position of opposition to the so-called equality-of-opportunity legislation. They do *not broaden the scope or adversely affect what we consider to be the merits of a Section 2 (b) defense.* [Emphasis added.]

The italicized language, out of its context, is quoted by Standard to show that the Department "accepted the ruling below as a sound statement of law in accord with this Court's 1951 decision."

It is quite true, as the letter points out, that the decision below is "in accord with this Court's 1951 decision".[7] The two cases simply involve two different issues. If Standard meets the requirements of a "good faith" defense, the defense is of course a complete one under this Court's 1951 decision. But the issue here is whether Standard has met those requirements.

On this issue, the Commission and the Department of Justice are, and have been, in full accord.[8] Mr. Olney's letter, we believe, is not fairly subject to an inference that the Department of Justice has "accepted the decision below as a sound statement of law * * *." In its context, and in the light of the letter's purpose, the italicized language (*supra*) does no more than reflect the Department's view that this Court's 1951 decision, irrespective of anything in the decision below, should continue to be controlling as to the scope of a Section 2 (b) defense.[9] For the reasons already stated, there plainly is no inconsistency between opposing a bill which would overrule this Court's 1951 decision and urging that the court below misapplied this Court's *Staley* and *Cement* decisions.[13]

---

[7] See also petition for certiorari, p. 8.

[8] See petition for certiorari, p. 8, n. 2.

[9] Similarly, Standard's (Br. Opp. 13) other quotation from the letter ("pricing differences may, we emphasize, be justified under existing law only in response to individual competitive situations and may not be extended beyond what is necessary to meet good faith offers of competitors") merely states the Department's understanding of the *Staley* and *Cement* decisions.

CONCLUSION

In the petition for certiorari (Pet. 16), it is pointed out that this case is of general importance, not only because of the ruling made by the court below in this proceeding against Standard, but also because of the direct impact of that ruling in proceedings against Standard's major competitors—Gulf, Texas, and Shell—against whom similar complaints are now pending. Standard's "meeting competition" defense is based squarely on a Commission finding (which in turn is based on Standard's own admissions) that major competitors use the same dual price formula as Standard (R. 5388). If Standard, on this basis, can defend its regular grant of a "tank-car" price to its "jobber" customers, it would seem to follow necessarily that Standard's competitors can defend their use of the same dual price formula on the ground that they were merely meeting Standard's "equally low price." As stated in the petition (Pet. 16): "In other words, as long as competing sellers follow the same discriminatory price policies, each is protected." This result is dismissed by Standard, without supporting reasons, as "wholly conjectural" (Br. Opp. 12, n. 13). We cannot agree. The problem, it is respectfully submitted, is a very real one which warrants review by this Court.

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[13] It should also be noted that Mr. Olney's letter refers only to analysis of "the decisions in these two cases". The serious nature of the decision below can be understood only in relation to Standard's admissions, which for the most part were ignored in the decision itself.

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Federal Trade Commission.

December, 1956.

APPENDIX

Paragraphs 16 and 17 of Standard's answer (R. 12–15) state:

> Respondent alleges that since the time each of the gasoline customers named in Paragraph Three of the Complaint acquired its own bulk storage, distribution equipment and wholesale facilities, that such customer is entitled to be classified as a wholesale or jobber buyer of gasoline as distinguished from a retail reseller or service station operator who purchases gasoline on an entirely different basis of taking frequent small deliveries by tank truck from a supplier who delivers into relatively small storage tanks in or upon the service station premises, which tanks are directly connected to the retail pumps. Further, that such wholesaler or jobber buyers perform a distinctly different service and function and operate upon a different basis from retail sellers, and that such differences and distinctions in services and functions and between methods of operation have been recognized for many decades last past and are presently recognized and have been so recognized since June 19, 1936 in Detroit and elsewhere throughout the entire United States by the entire oil industry as well as by other industries dealing in substantially all kinds of consumer goods, and that in consequence of such differences and distinctions in operations, functions and services, and the essential recognition thereof, the oil industry and other industries in Detroit and throughout the rest of the United States has and does classify and bona fidely select customers on the basis of functional services and of methods of opera-

tions entitling customers to be classified in distinctive and distinguishable classifications. Further, that such classifications are essential and necessary and appropriate to the existing and continuing business and commercial activity in consumer commodities, including oil products, in Detroit and throughout the United States, and that such system and practice of selection and classification of customers in the oil industry and other industries in Detroit and throughout the United States forms a necessary, indispensable and integral part of the commercial economy of this nation, and one which must be considered, recognized, met, and participated in by an operator engaged in the business of distribution and marketing of oil products if such business is to fairly and successfully survive in the market place in Detroit or elsewhere in the United States. Further, that as a result of such necessary selection and classification of customers, and as an integral and basically essential part thereof, and of the system of commercial economy which makes such classifications necessary, differences in prices of the same commodities are made to customers selected and falling within different classifications, and purchasers falling within the classification of wholesalers or jobbers of gasoline are entitled to purchase at tank car prices as distinguished from dealer tank wagon prices at which gasoline is sold to retail resellers.

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Respondent alleges that its general policy and practice of bona fidely selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail resellers, is as follows:

That such wholesale or jobber customer so classified shall have adequate bulk storage of his own; that he be equipped to receive bulk deliveries by tank car or truck train into such storage; that he have adequate distribution and delivery facilities; that he make tank car purchases in substantial volume and do a continuing substantial volume of business as a bona fide gasoline dealer maintaining and operating an established gasoline business; that he have satisfactory credit rating; that he maintain a sufficient personnel and all requisite facilities and equipment to adequately operate his business, service his customers, and perform his functions as a wholesaler or jobber, and assume the hazard and expense of fully operating his own business.

Respondent alleges that each of the four customers named in Paragraph Three of the Complaint fully, fairly, and reasonably falls within not only the requirements set forth in Paragraph 17 above but within all fair, reasonable, usual and proper requirements for classification as a wholesaler or jobber; and that each maintains its own adequate bulk storage, delivery tank trucks, salesmen and operating personnel; buys in substantial tank car or truck train lots; buys commodities other than gasoline in wholesale and carload lots; bears all expense of its own operations, no part of which are borne by Respondent; becomes immediately the absolute owner of the gasoline delivered into its storage by Respondent and controls its disposition; does not depend upon or desire that its customers be serviced by Respondent's salesmen, and Respondent's salesmen do not service or solicit such customers; assumes the risk of carrying its own inventories and of extending its own credits and making collections, and assumes all the hazards of its own operations. Further, that said four customers are each bona fidely qualified to be regarded and are regarded by the oil industry in Detroit as within the classification of wholesale or jobber customers, and they each are able to purchase as such from a great number of gasoline suppliers operating in Detroit competitively with Respondent. Further, that Respondent is without power to, and is neither entitled nor required to police, control or dictate the manner or method of disposition of such gasoline as may be employed by such customers, and that such gasoline becomes the absolute property of such customers upon their purchase thereof from Respondent. Further, that said four customers and each of them are legitimately and lawfully entitled to purchase gasoline, and Respondent is entitled to sell them gasoline, within their classification as wholesalers or jobbers and at prices which are or may be at the time different and lower than prices charged by Respondent for the same product to Respondent's retail reseller customers without regard to any other consideration and without regard to any relation which such price differential may or may not bear to Respondent's differing operating costs arising from differing costs of manufacture, differing costs arising out of different methods of sale or delivery, or otherwise, and that any such acts upon Respondent's part and the existence of any such facts have not and do not constitute a violation of the meaning and terms of Section 2 (A) of the Clayton Act as amended and are not unlawful thereunder or under any law.

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No. 24

In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL TRADE COMMISSION, PETITIONER
v.
STANDARD OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Court of Appeals (R. 5495–5502) is reported at 233 F. 2d 649.

JURISDICTION

The judgment of the Court of Appeals (R. 5503) was entered on May 3, 1956. The time for filing a petition for writ of certiorari was extended by Mr. Justice Reed on July 21, 1956, to September 29, 1956 (R. 5503–5504). The petition for certiorari was filed on September 28, 1956, and was granted on December 17, 1956 (R. 5504). 352 U. S. 950. The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Under Section 2 (b) of the Clayton Act, a seller may defend against a charge of illegal price discrimination by showing that "his lower price" was granted in "good faith" to meet an equally low price of a competitor. The question presented is whether a discount regularly granted to certain large customers pursuant to the seller's long established and inherently discriminatory pricing policy can be justified under Section 2 (b) (*i. e.*, as a "good faith" meeting of competition) on the ground that some of the seller's major competitors employ the same pricing policy.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

* * * * *

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to

injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *

* * * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section~~, and unless~~ justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

* * * * *

STATEMENT

PRIOR PROCEEDINGS

The complaint issued by the Federal Trade Commission in this case (R. 2–5) charged the respondent Standard Oil Company with price discrimination in the sale of gasoline in the Detroit metropolitan area in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. 13. It was alleged that Standard, since the date of the Robinson-Patman Act, had regularly sold at the "tank-car" price to four large reseller accounts (each of which made substantial retail sales)[1] while selling at the higher "tank-wagon" price to numerous other reseller accounts (358 retail service stations) in the same area.[2] It was also alleged that the effect of the discrimination had been, and "may be," to injure, destroy, or prevent competition between the two classes of resellers in selling directly to the consuming public (R. 3).

Standard's answer (R. 5–28) admitted the existence of the price differential (R. 5, 11–12) and the competitive relationship between the two classes of resellers (R. 9), but sought to justify the differential on three main grounds: (1) that the function performed by the four large resellers—called "jobber" accounts by Standard—was essentially different from that performed by the other resellers (R. 12–15); (2) that the differential was justified on the basis of costs (R. 15–17); and finally (3) that the lower price accorded the "jobber" resellers was granted in good faith to meet or partially meet the equally low or lower prices of competitors (R. 17–22).

---

[1] The four are: Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., Wayne Oil Company, and Ned's Auto Supply Company.

[2] Of these 358 retail service stations, approximately 60% are lessees of Standard under leases usually for one year (CX 1A to 1F, R. 104, 4702–4712; R. 107), which require that the lessees purchase their gasoline from Standard at the tank-wagon price (R. 2092, 2123–2124). Other service station operators purchasing gasoline from Standard are required by contracts to purchase all of their gasoline requirements from Standard at the tank-wagon price (CX 2, R. 106, 4713). All sales by Standard to service station customers in Detroit since 1936 have been under one of these leases or contracts (R. 210). See *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231, 235 n. 3.

In its answer, Standard described in some detail "its general policy and practice of bona fidely selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail sellers" (R. 13). Standard stated that "such system and practice of selection and classification of customers" was an integral part of the oil industry in Detroit (R. 13); that "* * * differences in prices of the same commodities are made to customers selected and falling within different classifications, and purchasers falling within the classification of wholesalers or jobbers of gasoline are entitled to purchase at tank-car prices as distinguished from dealer tank wagon prices at which gasoline is sold to retail resellers" (R. 13); that Standard employed fixed criteria for making this classification (R. 13–14); and that the four resellers receiving Standard's tank-car price met these criteria (R. 14). The principal requirements for "jobber" status under this "system and practice" were stated to be: a large volume of distribution (usually one or two million gallons annually), a bulk plant capable of accepting deliveries in tank-car quantities, means of making deliveries from the bulk plant, and an adequate credit rating (R. 13–14, 5388).

In the course of the hearings, Standard introduced evidence showing that "jobber" status and the tank-car price were first accorded to Citrin-Kolb in 1928 or 1929 (R. 1257); to Stikeman Oil Company about 1932 (RX 37–C, R. 1587, 4862; R. 5060); to Wayne Oil Company in 1935 (R. 379); and to Ned's Auto Supply Company in 1938 (R. 1895). Standard's witnesses testified that it had its own specific requirements for "jobber" status (R. 1890-1895); that the four large reseller accounts involved here met those requirements (R. 1895); that it did not accord "jobber" status to any reseller that did not meet those requirements (R. 172-174, 2084-2088, 2124); that it would rather lose "jobber" accounts than depart from those requirements (R. 1912, 1916); that it had but two prices for reseller accounts—the tank-car price for "jobber" accounts and the tank-wagon price for ordinary resellers (R. 167-169, 1899). According to Standard's witnesses, this method of pricing was used not only in Detroit (R. 1890, 1897, 2065) but elsewhere in the country (R. 943, 1060, 1064, 1075, 1890), and not only by Standard but by some of its major competitors, including Texas, Gulf, and Shell (R. 319-320, 941, 1072, 1897).[3] Standard also introduced evidence to show that, during the period involved, it departed from its dual pricing method in only one instance; its officials referred to this as an "exception" (R. 167-169).[4]

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[3] While some major oil companies sell and distribute in the Detroit area in a manner similar to the system employed by Standard, its two largest competitors in that area, Socony-Vacuum and Sun Oil Company, sell only at the tank-wagon price (R. 320, 2128-2130).

[4] The one exception is Standard's grant to Ned's on September 1, 1936, of a price one-half cent below the tank-wagon price. This arrangement continued until March 7, 1938, when Ned's, having acquired tank-car storage facilities, was designated a "jobber" by Standard and was granted the tank-car price (approximately 1½¢ below the tank-wagon price). (R. 5383.)

At the conclusion of the hearings, the Commission found *inter alia* that Standard's classification of these four reseller customers as "jobbers" was arbitrary (R. 5168);[5] that the four so-called "jobbers" were actually in competition with Standard's other reseller customers not so classified (R. 5165); that the differential in price accorded the two classes of accounts resulted in competitive injury (R. 5170–5171); and that the differential was not justified on the basis of cost (R. 5171–5178). Thereupon, the Commission issued an order to cease and desist (R. 5183–5185).

Although Standard had introduced evidence designed to show that its tank-car price had been granted in good faith to meet or partially meet the equally low or lower price of competitors, the Commission was of the view that, as a matter of law, the Section 2 (b) defense was not available to a seller "in the face of affirmative proof that the effect of the discrimination was to injure, destroy and prevent competition." Accordingly, no findings were made on the issue (R. 5179).

On petition for review in the Court of Appeals for the Seventh Circuit (R. 5270–5279), Standard contended that the Commission had erred in its ruling as to the availability of the Section 2 (b) defense. The Court of Appeals approved the Commission's findings and conclusion, and with but slight modification affirmed the Commission's order to cease and desist (173 F.2d 210).

---

[5] The Commission found that Citrin-Kolb, Wayne, and Stikeman sold a substantial portion of Standard's gasoline directly to the consuming public, and that Ned's Auto Supply Company sold all of the gasoline directly to the public (R. 5369–5371).

However, this Court held that Section 2 (b) did provide a complete defense to a charge of price discrimination, reversed the judgment of the Court of Appeals, and remanded the case to the Commission to make findings as to whether or not Standard's lower prices were made in good faith to meet the equally low prices of competitors (340 U. S. at 238, 251).

THE COMMISSION'S FINDINGS ON REMAND

On review of the evidence, the Commission concluded that Standard had failed to sustain its burden of proving that its lower price was accorded in "good faith" to meet the equally low price of a competitor. (R. 5390).

The Commission found that Standard's "method of pricing its gasoline in the Detroit metropolitan area is to sell to its customers generally at what is designated in the oil industry as the 'tank-wagon price' and to sell to a much more limited number of purchasers at a 'tank-car price', the latter being 1½ cents per gallon lower than the former" (R. 5383). It found that under this method of pricing, which was established prior to the passage of the Robinson-Patman Act, the determination of whether or not the tank-car price should be accorded to a particular customer took no account of the distributive function performed by the purchaser (R. 5388). Instead, "[i]n selecting the customers or prospective customers to whom it will grant the tank-car price on gasoline, the respondent's criterion is now, and for many years has been, that the customer or prospective customer make annual purchases of not less than from one to two million gallons of gasoline, have storage facilities sufficient to accept delivery in tank-car quantities, and have a credit standing assuring payment for large volume purchases. This is the same criterion which for many years has also been applied by the respondent's major competitors * * *" (R. 5388). Standard's four "jobber" accounts, "except Ned's Auto Supply Company, had already been recognized as entitled to the tank-car price under the commonly accepted standards of the industry, and Ned's had achieved a volume of distribution which brought it within the range where it was likely to be so recognized by a major oil company at any time" (R. 5388). On the basis of the latter finding, the Commission acknowledged that "[i]t may well be [Standard] was convinced * * * it would lose these accounts" if they were not accorded the tank-car price and that Standard "had substantial reasons for believing this to be the case" (R. 5388).

"Thus," the Commission stated (R. 5388), "the real question is whether or not the actions of [Standard] in granting or continuing to these four dealers the tank-car price pursuant to and in accordance with its general policy can be said to have been made in good faith within the meaning of Section 2 (b)."

In deciding this question, the Commission found that there was no evidence that the tank-car price was granted to any of the four "jobber" accounts in response to any specific competitive offer (R. 5387–5388).[6] Instead, with one exception,[7] "all of the discriminations in price involved in this proceeding were made pursuant to respondent's established method of pricing. They were not the result of departures from a non-discriminatory price scale which were made to meet lower prices of competitors, but represented only the continued application of the pricing standard previously adopted by respondent and followed by it since long before 1936" (R. 5389).

---

[6] Standard had introduced evidence of offers made by competitors to its four "jobber" accounts. The Commission made detailed findings as to these offers (R. 5383–5388):

The six offers made to Citrin-Kolb were made subsequent to the time Standard accorded "jobber" status to that reseller in 1928 or 1929. The Commission found that, although these offers were communicated to Standard, Standard in fact never responded thereto and never receded from its policy and requirements (R. 1287, 1291, 1301).

Any specific offers made to either Wayne or Stikeman were made either before the passage of the Robinson-Patman Act or after issuance of the complaint in this proceeding. The record contains no evidence that Standard's price to these "jobbers" was granted pursuant to such offers.

Standard accorded "jobber" status to Ned's in March 1938 (R. 1895). The record shows that, prior to 1936, four specific offers were made to Ned's, none of which was accepted (R. 1803–1804, 1806–1809, 1810–1811, 1866). Subsequent thereto, at the time Ned's was accorded the tank-car price and "jobber" status, the only subsisting offer open was that of the Red Indian Oil Company on a gasoline which was not a major brand (R. 3098). The Commission found that this offer did not represent a serious competitive threat to Standard (R. 327, 5387) and that Standard in fact did not meet this particular offer when it accorded the tank-car price to Ned's, but instead granted the lower price on the understanding that Ned's would conform to Standard's requirements for "jobber" status (R. 1821, 1995), the volume requirement having already been satisfied (R. 119, 5372).

[7] See note 4, *supra*.

In addition, the Commission found that Standard, by reason of its long familiarity with every phase of the refining and distribution of gasoline, knew or should have known that its pricing method would probably have the effect of injuring competition among its customers, and knew or should have known that the price differential could not be cost-justified (R. 5389). "These circumstances," the Commission stated (R. 5389), "existed at the time the Robinson-Patman Amendment to the Clayton Act became law, and their existence imposed upon respondent the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute." In the Commission's view, Standard's failure to make any bona fide attempt to do so further negatived its claim that it had granted the tank-car price to its four "jobber" customers in "good faith."

In conclusion, the Commission stated (R. 5389-5390):

> It is also important that the respondent necessarily knew at the time of the passage of the Robinson-Patman Act, and at all times thereafter, that its standard for granting tank-car prices on its gasoline was in all substantial respects the same as the standard used by its major competitors. It was evidently then relying, as it is now relying, upon the position that so long as the pricing method in existence prior to the passage of the Robinson-Patman Act remains unchanged it can defend its price discriminations on the ground that its lower prices were granted in good faith to meet

equally low prices of its competitors. Upon this same theory, respondent's competitors, including the three against whom similar charges of price discriminations are pending, might also defend their similar price differences on the ground of meeting respondent's equally low prices or the equally low prices of other competitors. The Commission does not construe the words "in good faith" in Section 2 (b) as permitting that result. In the circumstances shown to exist, the Commission does not believe that the statute provides a means of effectively insulating any particular pricing pattern from attack or that it guarantees that so long as a pricing pattern in effect prior to 1936 remains undisturbed price discriminations made pursuant to that pattern may be lawfully continued.

On the basis of these findings, the Commission issued a modified cease-and-desist order (R. 5391-5393).[8]

THE COURT OF APPEALS DECISION

On review, the court below set aside the Commission's order. The court held (R. 5502) that Standard's "good faith" defense "was firmly established, and the Commission's reasoning by which it reached a contrary conclusion is untenable and must be rejected."

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[8] Two Commissioners dissented. In their view, Standard's grant of "jobber" status to the four large resellers "was not an arbitrary classification * * * in order to favor these four jobbers with lower prices, inasmuch as the companies were qualified for such status according to the commonly accepted standard in the industry" (R. 5416; see also R. 5405). The dissenting Commissioners further concluded "that respondent would have lost Ned's as a customer if it had not met its competitors' offers" (R. 5417), and that, with respect to Citrin-Kolb, Stikeman, and Wayne, "the decision of the respondent to retain its existing [pre-1936] pricing policy was necessary to meet the competition of respondent's competitors and to prevent the loss of its customer[s]" (R. 5419, 5418, 5420).

The court acknowledged the "fact that a reseller might obtain the tank car price only if it maintained a bulk plant with facilities ~~for accepting delivery of~~ gasoline in tank car quantities; had a business in excess of one million gallons of gasoline annually; had distribution equipment and adequate credit standing" (R. 5501). The court also apparently recognized that this policy was in accord with "the commonly accepted standards of the industry" (R. 5498, 5502). The court, however, rejected the Commission's contention that the findings brought the case within the doctrine of *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, and *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683. The court stated (R. 5500): "The system described and condemned in [those decisions] bears not the slightest resemblance to the pricing system which the Commission purports to detect in the instant situation." In addition, the court stated that it was "unable to discern any basis for the conclusion that [Standard's] prices 'were not the result of departures from a nondiscriminatory price scale' " (R. 5501).

The court also rejected the Commission's determination that Standard's failure to review its pricing policy after enactment of the Robinson-Patman Act further negatived Standard's claim of "good faith." According to the court, "If [Standard's] pricing policy was lawful prior to the [Act] the same policy was lawful afterward" (R. 5499).

SUMMARY OF ARGUMENT

The illegality of Standard's price discrimination, apart from the Section 2 (b) defense, is undisputed. Section 2 (b) permits a seller to rebut a prima facie case against him "by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor."

In order to qualify for this defense, it must be shown, not only that the meeting of a competitor's lower price was necessary to prevent the loss of business, but, furthermore, that the discrimination was "in good faith." The burden of showing such justification is, of course, on the price discriminator. On the other hand, if the price discriminator sustains that burden, it is now settled that Section 2 (b) affords a complete defense. *Standard Oil Company* v. *Federal Trade Commission*, 340 U. S. 231.

This case is a sequel to the *Standard* case, *supra*. There, this Court, after holding that the Commission could not reject Standard's Section 2 (b) defense as a matter of law, remanded the case to the Commission with directions to make findings as to whether or not Standard's lower price to its so-called "jobber" customers had been granted in good faith to meet the equally low price of competitors. 340 U. S. at 238–239. On remand, the Commission concluded that Standard had failed to sustain its burden of proving its "good faith." The correctness of this ruling, set aside by the court below, is the basic question now presented.

The Commission based its decision on three related grounds: (A) Section 2 (b) affords no justification for Standard's use of a general pricing system; (B) in any event, the "good faith" requirement is not satisfied by a showing that Standard's pricing system is also used by some of its competitors; (C) Standard's failure to make a bona fide effort to establish a non-discriminatory pricing system further negatives its claim of "good faith."

A

Section 2 (b) affords no justification for Standard's use of a general pricing system. *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746; *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683; *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419.

1. a. As this Court held in *Staley* and *Cement*, Section 2 (b) "does not concern itself with pricing systems" (*Staley*, p. 753; *Cement*, p. 725), does not permit a seller "to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others" (*Cement*, p. 725), and relates only to "individual competitive situations" (*Staley*, p. 753; *Cement*, p. 725). This doctrine was reaffirmed by the Supreme Court as recently as last Term in *National Lead*, *supra*. There this Court held (p. 431) that a seller could not "plead this section in defense of the use of an entire pricing system."

b. The very phraseology of Section 2 (b) shows a limitation of the defense to "individual competitive situations" as distinguished from "pricing systems."

Moreover, the indispensable prerequisite for applying the Section 2 (b) defense is a *reduction* from the seller's customary price scale. There is no such reduction where (as here) the seller's price scale is itself discriminatory and where the discrimination consists merely of the regular use of the price scale.

In those circumstances, there is also an inherent danger that the seller will attempt to manipulate its over-all price scale upward for the purpose of offsetting any reduction in its profits because of the relatively "lower" price regularly granted to the preferred customers.

c. Here, the Commission found that none of the discriminations in issue represented a departure by reason of competition from Standard's established system of pricing—a system, moreover, adopted and followed by Standard long before the passage of the Robinson-Patman Act in 1936. In short, not once did Standard, in granting the lower tank-car price, ever make a *reduction* from its customary price scale; the discrimination lay in the regular use of the dual price formula itself.

Nevertheless, the court below sought to distinguish *Staley* and *Cement* by a comparison of the pricing system involved in those cases— the so-called basing-point system—with Standard's pricing method. The attempted distinction is without basis in principle. As the explicit holdings of *Staley* and *Cement* make clear, the controlling factor is that Section 2 (b) cannot be used in defense of the use of a pricing system, regardless of differences which may exist among various types of pricing systems.

Nor can this case be properly distinguished on the ground, suggested by the court below, that the basing-point system involved in *Staley* and *Cement* was "utilized to stabilize or increase but never to lower prices." Even apart from probable inaccuracy of this description of the basing-point system as to some situations, the record is completely devoid of any showing by Standard—which has the burden of proving the "good faith" defense—that the result of its pricing method has been to lower prices.

Nor can *Staley* and *Cement* be distinguished on the ground that the prices allegedly being met by the sellers in those cases were a part of a pricing system which had been adjudicated to be unlawful. The explicit holding of those decisions is not nearly so restrictive. If any doubt ever existed on the matter, it was dispelled by *National Lead, supra.* Of course, if the competitor's price is found to be illegal, that ends the matter. But such a finding is surely not indispensable.

Any argument to the contrary, moreover, necessarily collides with the well-settled rule that the burden of proof as to every element of the Section 2 (b) defense is on the price discriminator—not the Commission.

And, finally, it should be noted that, to the extent that the pricing policies of Standard's competitors are in fact identical to Standard's policies, they of course suffer from the same legal infirmities.

2. a. The court below further stated that it was "unable to discern any basis for the conclusion that [Standard's] prices 'were not the result of departures from a nondiscriminatory price scale.'" This statement, if it is intended to suggest that the granting of the tank-car price to the four so-called "jobbers" represented departures from a non-discriminatory price scale, is palpably erroneous.

Any such suggestion is flatly contradicted, not only by the Commission's findings of fact, but also by Standard's own admissions in the prior proceedings in this case. Indeed, the Commission's findings of fact rest almost exclusively on these admissions. See Statement, *supra*, pp. 5–7, 10. And Standard's 1950 brief in this Court is to like effect. At this point in the proceeding, Standard can scarcely be allowed to disavow these admissions or deny their truthfulness.

b. According to those admissions, Standard departed in only one instance from its "system and practice of selection and classification of customers." This one instance, however, is no longer in issue; and the court below erred in relying on that conceded "exception" as a basis for suggesting that Standard did not employ a general pricing system.

Furthermore, any evidence of "bargaining and haggling" between Standard and the four large resellers prior to their classification as so-called "jobbers" would be completely consistent with the Commission's determination—and Standard's admission—that the discriminations charged in the complaint were part and parcel of a "system and practice of selection and classification of customers." So long as an inherently discriminatory price scale is "an integral and basically essential part thereof," it is only inevitable that "non-jobber" customers (assuming they could meet Standard's fixed requirements) will seek to be classified as "jobbers" (and thus obtain the relatively lower tank-car price). The mere fact that over the years there may be some slight change in the beneficiaries of Standard's "system and practice" certainly does not disprove Standard's use of such a "system and practice."

B

There are also other compelling reasons for rejecting Standard's Section 2 (b) defense. Of primary importance in this regard is the nature of the competitors' prices allegedly met by Standard. In the Commission's view, the "good faith" requirement is not satisfied by a showing that Standard's pricing system is also used by some of its competitors.

On the basis of substantially the same "system and practice" followed by Standard, these competitors likewise classify certain customers as "jobbers" and accord them the tank-car price. And, since both Standard and these competitors select "jobbers" on the basis of "the commonly accepted standards of the industry," it may well be the Standard would (at least temporarily) lose its four "jobber" customers if it stopped granting them the tank-car price. The reason, of course, is the strong possibility that these four "jobber" customers could obtain "jobber" classification—and hence the tank-car price—from Standard's competitors employing the same "system and practice."

The Commission, however, refused to accept Standard's possible loss of the four "jobber" customers *under those circumstances* as justifying Standard's continued adherence to its dual price formula. As this Court held in *Staley*, the Section 2 (b) defense is concerned with the matching of prices "in individual competitive situations," not the matching of pricing systems. To make the loss of customers the *sole* criterion of "good faith" is to extract all meaning from the "good faith" requirement.

Moreover, if a discriminatory pricing system could be justified as a "good faith" meeting of a competitor's equally low price merely because competitors are using a comparable system, the Robinson-Patman Act would be effectively nullified in large measure. Such a construction would immunize from the Act's requirements every established industry-wide systematic and discriminatory method of pricing. The Act, the Commission properly held, precludes such consequences.

C

The Commission further found that the circumstances which existed at the time of the passage of the Robinson-Patman Act "imposed upon [Standard] the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute" and that Standard "neither did this nor made any bona fide attempt to do so" (R. 5389). In this regard, the Commission found that at all relevant times Standard knew or should have known of the probability of competitive injury resulting from its pricing policy (R. 5389) and knew or should have known that the price differential could not be cost-justified (R. 5389). Thus, despite knowledge of the discriminatory and injurious nature of its pricing system, Standard took no steps after passage of the Robinson-Patman Act to rid itself of that system but instead simply followed the industry pattern. Compare *Staley*, 324 U. S. at 757. Such conduct, in the Commission's view, further negatived Standard's claim of "good faith."

The court below, however, held that, "If [Standard's] pricing policy was lawful prior to the [Robinson Patman] amendment the same policy was lawful afterward." This holding, which flatly ignores the important changes brought about by passage of the Robinson-Patman Act, cannot be sustained.

ARGUMENT

A SELLER'S REGULAR USE OF AN INHERENTLY DISCRIMINATORY PRICING SYSTEM CANNOT BE JUSTIFIED AS A "GOOD FAITH" MEETING OF COMPETITION ON THE GROUND THAT COMPETITORS REGULARLY USE THE SAME DISCRIMINATORY SYSTEM

At the outset, it should be emphasized that the illegality of Standard's price discrimination, apart from the Section 2 (b) defense, is undisputed.

In the Detroit area, Standard sold gasoline to 362 dealers who resold at retail to the general public. Of these 362, four large dealers (three of whom also sold at wholesale) were granted the so-called tank-car price; Standard charged the other 358 dealers the higher tank-wagon price. Although Standard designated the first group "jobbers," the fact is that members of the two classes directly competed one against another in selling at retail; indeed, one of the so-called "jobbers" sold *exclusively* at retail. Cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473–475. Standard no longer challenges the Commission's findings that Standard's "jobber" classification was arbitrary, that the discrimination in favor of the four so-called "jobbers" was not cost-justified, and that the discrimination caused injury to competition. Cf. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37; *Federal Trade Commission* v. *Ruberoid Co., supra.* Thus, unless the Section 2 (b) defense is applicable here, Standard's grant of the tank-car price to the so-called "jobber" retailers is plainly unlawful under the Clayton Act.

Section 2 (b) provides in pertinent part:

> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price * * *, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing *that his lower price* * * * to any purchaser or purchasers *was made in good faith to meet an equally low price of a competitor* * * *. [Emphasis added.]

In order to qualify for the defense set forth in the proviso, it must be shown, not only that the meeting of a competitor's lower price was necessary to prevent the loss of business, but furthermore that the discrimination was "in good faith." *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 755, 757; *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, 244.[9]

The burden of proving such justification is, of course, on the price discriminator. See, *e. g.*, *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, *supra*, at 753; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 45. On the other hand, if the price discriminator sustains that burden, it is now settled that Section 2 (b) affords a complete defense. *Standard Oil Company* v. *Federal Trade Commission*, 340 U. S. 231.

This case is a sequel to *Standard Oil Company* v. *Federal Trade Commission*, *supra*.[10] There this Court, noting that the Commission had rejected Standard's Section 2 (b) defense as a matter of law and had not made any findings as to whether or not Standard's lower price to its so-called "jobber" customers had been granted in good faith to meet the equally low price of competitors (340 U. S. at 238-239), remanded the case to the Commission with directions to make those findings (340 U. S. at 238, 251).[11] On remand, relying principally on the doctrine of *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, and *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, the Commission concluded that Standard had failed to sustain its burden of proving its "good faith."

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[9] As this Court stated in *Standard* (340 U. S. at 234):

> * * * under the Act, the lower price to the jobbers was justified if it was made to retain each of them as a customer *and* in good faith to meet an equally low price of a competitor. [Emphasis added.]

With respect to the *Staley* case, there is no doubt that Staley, when it entered the glucose business, found it necessary to meet the prices of competitors already established in that field; yet the Court emphasized that any such meeting of competition had to be "in good faith" (p. 757).

[10] In that posture of the case, the Department of Justice did not join in defending the Commission's order because of the Department's view that the Commission's construction of Section 2 (b)—to the effect that it did not provide a complete defense—was er-

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roneous as a matter of law. On the other hand, it is the Department's view that the decision below, setting aside the Commission's decision on remand, is similarly erroneous.

Since in its decision the Court of Appeals did not reach any question relating to the scope of the Commission's order, no discussion of such questions appears necessary or appropriate at this stage.

[11] The court below (R. 5497-5498) appears to suggest that the Commission and this Court, at prior stages in this proceeding, impliedly recognized Standard's "good faith." Any such suggestion is without foundation. As pointed out in the Statement (*supra*, pp. 7-8) and in the text above, although Standard's "good faith" was *assumed* for argument purposes, the issue was not decided by either the Commission or this Court because of the nature of the Commission's construction of the statute. And this Court remanded the case to the Commission for findings on that very issue (340 U. S. at 238, 251).

The court below is also in error in stating that the trial examiner recognized Standard's "good faith." Such a finding, as the Commission noted (R. 5382), was not made by the examiner, although he did find that the discriminations were made to meet competition (R. 5104). Moreover, since the *Staley* case (1945) was decided *subsequent* to the examiner's report (1943), he could not possibly have considered the impact of that decision or the still later *Cement* decision (1948). In addition, under the Commission's rules then in effect, the examiner's report was only advisory, as the report itself states (R. 5128). 5 Fed. Reg. 2423, 2426, as amended, 6 Fed. Reg. 832, 833; 16 C. F. R. § 2.20 (Cum. Supp. 1938-1943). Such a report did not even have the effect of an initial decision, as is now the case under the Administrative Procedure Act, 5 U. S. C. 1007, enacted in 1946. See 11 Fed. Reg. 7069.

The correctness of this ruling, set aside by the court below, is the basic question now presented.

The Commission found that Standard, *because major competitors used the same dual price formula*, had substantial reasons for believing that it might lose its four "jobber" accounts if it refused them the lower tank-car price.[12] But this finding, the Commission held, was not determinative. In the Commission's view, "the real question is whether or not the actions of the respondent in granting or continuing to these four dealers the tank-car price pursuant to and in accordance with its general policy can be said to have been made in good faith within the meaning of Section 2 (b)" (R. 5388).

Resolving this question adversely to Standard, the Commission emphasized that the grant of the tank-car price to the "jobber" customers was not a departure by reason of competition from Standard's established method of pricing but represented only the continued application of that method—a method, moreover, adopted and followed by Standard long before the passage of the Robinson-Patman Act in 1936 (R. 5389). In short, not once did Standard, in granting the lower "tank-car" price, ever make a *reduction* from its pre-existing price scale; the discrimination lay in the regular use of the industry-wide dual price system itself.

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[12] The Commission's statement is as follows (R. 5388):

> It may well be that respondent was convinced that if it ceased granting tank-car prices to Citrin-Kolb, Wayne, and Stikeman and continued to refuse the tank-car price to Ned's Auto Supply Company it would lose these accounts. It had substantial reasons for believing this to be the case; for all of these concerns, except Ned's Auto Supply Company, had already been recognized as *entitled to the tank-car price under the commonly accepted standards of the industry*, and Ned's had achieved a volume of distribution which brought it within the range where it was likely to be so recognized by a major oil company at any time. Thus, the real question is whether or not the actions of the respondent in granting or continuing to these four dealers the tank-car price pursuant to and in accordance with its general policy can be said to have been made in good faith within the meaning of Section 2 (b). [Emphasis added.]

"Good faith", the Commission concluded, was lacking here for three related reasons: (A) Section 2 (b) affords no justification for Standard's use of a general pricing system; (B) in any event, the "good faith" requirement is not satisfied by a showing that Standard's pricing system is also used by some of its competitors; (C) Standard's failure to make a bona fide effort to establish a non-discriminatory pricing system further negatives its claim of "good faith." These three reasons are discussed in the succeeding three sections of this brief.

A. SECTION 2 (b) AFFORDS NO JUSTIFICATION FOR STANDARD'S USE OF A GENERAL PRICING SYSTEM

1. *The "good faith" defense applies only in individual competitive situations*

a. *The doctrine of the Staley and Cement decisions*

The *Staley* case presented the same basic question. There, as in the instant case, the sellers "never attempted to establish their own non-discriminatory price system, and then reduce their price when necessary to meet competition. Instead, they slavishly followed in the first instance a pricing policy which, in their case, resulted in systematic discriminations * * *" (324 U. S. at 754–755). There, too, the ttempt was made under Section 2 (b) to justify this iscriminatory pricing policy on the ground that the ellers' competitors maintained a similar pricing pol-y. In rejecting this defense, this Court pointed out 324 U. S. at 753):

> But § 2 (b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition.

'he Court added (324 U. S. at 757): "We cannot say hat a seller acts in good faith when it chooses to dopt such a clearly discriminatory pricing system, at east where it has never attempted to set up a non-iscriminatory system * * *."

And, three years later in the *Cement* case, this 'ourt said (333 U. S. at 725):

> Section 2 (b) permits a single company to sell one customer at a lower price than it sells to another if the price is "made in good faith to meet an equally low price of a competitor." But this does not mean that § 2 (b) permits a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others. We held to the contrary in the *Staley* case. There we said that the Act "speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' The Act

> thus places emphasis on individual competitive situations, rather than upon a general system of competition."

Accordingly, the seller's Section 2 (b) defense was rejected since the discriminations involved there were employed "as a practice rather than as a good faith effort to meet 'individual competitive situations'" (*ibid.*).

The *Staley-Cement* doctrine was reaffirmed by this Court as recently as last Term. In *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419 (decided subsequent to the decision below), it was contended that the Commission's order, forbidding *inter alia* use of a zone pricing system for the purpose (or with the effect) of matching competitors' prices, deprived the seller of the benefits of Section 2 (b). While pointing out that Section 2 (b) was necessarily read into every Commission order, this Court warned that Section 2 (b) "does not concern itself with pricing systems" (p. 426) and that "[t]his is not to say that a seller may plead this section in defense of the use of an entire pricing system. The section is designed to protect competitors in individual transactions" (p. 431).

b. *The reasons underlying the Staley-Cement doctrine*

As the Court pointed out in *Staley* (324 U. S. at 753), the very phraseology of Section 2 (b) shows a limitation of the defense to "individual competitive situations" as distinguished from "pricing systems." See *supra*, p. 27. While this fact, coupled with this Court's decisions in *Staley*, *Cement*, and *National*

Lead, would seem to be conclusive of the matter, it is nevertheless appropriate, we believe, to point out below some of the other reasons supporting this construction of the statute (see also *infra*, pp. 46–52).

The indispensable prerequisite for applying the Section 2 (b) defense is a *reduction* from a preexisting non-discriminatory price scale. See, *e. g.*, the *Staley* case, 324 U. S. at 754–755. Stated otherwise, the theory of the Section 2 (b) defense is that a seller whose price scale is otherwise lawful should not be precluded from making a discriminatory *departure* from its price scale if the exemption is deemed necessary in order to retain a customer in the face of a competitive raid. The result is to sanction a degree of price flexibility; the importance of this flexibility in harmonizing the various antitrust laws was emphasized by this Court in its 1951 *Standard* decision (340 U. S. at 248–250).

However, where (as in the instant case) the seller's price scale is itself discriminatory and where the discrimination consists merely of the regular use of the price scale, there has been no reduction or departure in response to a competitive offer, and Section 2 (b) accordingly affords no justification for the seller's future adherence to its discriminatory price scale. Nor would it be material if it could be shown that subsequently a competitor offered the seller's preferred customers a price comparable to the seller's "lower" price. Even assuming *arguendo* that the seller's future adherence to its discriminatory price scale in those circumstances could be said to constitute meeting competition, it could not be said to be in "good faith," at least in the absence of a bona fide effort by the seller to adopt a non-discriminatory price scale. *Staley*, 324 U. S. at 754, 757.

In addition, where the discrimination is a permanent part of a pre-existing system or formula, there is an inherent danger that a seller in Standard's position will attempt to manipulate its overall price scale (both the tank-car and tank-wagon prices) upward for the purpose of offsetting any reduction in its profits because of the discount regularly granted to the "jobber" accounts.[13] (This danger is particularly serious where, as here, competitors employ the same dual price formula.) On the other hand, where actual reductions from a non-discriminatory price scale are made "in individual competitive situations," the probability that the consuming public will have to subsidize the price discrimination is considerably lessened; as to those transactions, it is more likely that the seller will itself bear any "loss."

c. *The applicability here of the Staley-Cement doctrine*

The court below sought to distinguish *Staley* and *Cement* by contrasting the pricing system involved in those cases—the so-called basing-point system—with

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[13] Cf. Senator Logan's comment on the Robinson-Patman bill: "Discriminations not in accord with sound economy generally involve an element of loss, either of the necessary minimum of profits or perhaps of actual cost, and this loss of profits must be recouped from the business of customers which do not receive the benefits of such discriminations." 80 Cong. Rec. 3113.

Similarly, Congressman Utterback said: "Discriminations of the kind forbidden by this bill involve a loss to the seller of his necessary profit and cost on the favored customer's business; and that loss the seller is compelled to make up in higher prices to his other customers, or his business will land in the red." 80 Cong. Rec. 9416.

Standard's pricing method.[14] The attempted distinction is without basis in principle. Both systems were found to be inherently discriminatory. The discriminations arise in the one by reason of location of customers and in the other by reason of classification of customers. But this difference does not warrant any difference in application of the underlying doctrine that Section 2 (b) does not provide justification for *systems* of pricing.

Standard's pricing policy (like the system in *Staley* and *Cement*) represented a general method of competition used not only by Standard but also by major competitors (R. 5388). Standard's tank-car price was granted to those reseller accounts that were classified by it as "jobbers" but without regard to the manner in which they resold (*i. e.*, wholesale or retail).[15] This price was granted pursuant to, and was not a variation from, Standard's established pricing policy. Whether the discriminations arise from the use of a basing-point system, or from a system of arbitrarily classifying customers, is not controlling; for, as this Court emphasized in *Staley*, *Cement*, and *National Lead*, Section 2 (b) "does not concern itself with pricing systems" (*Staley*, p. 753; *Cement*, p. 725; *National Lead*, p. 431), does not permit a seller "to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others" (*Cement*, p. 725), and relates only to "individual competitive situations" (*Staley*, p. 753; *Cement*, p. 725; *National Lead*, p. 431). This rationale is equally applicable here.

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[14] But cf. three recent decisions by differently composed panels of the Seventh Circuit: *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, 155–156, pending on petition for certiorari, No. 101, this Term; *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253, 255, certiorari denied, 353 U. S. 938; *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37, 41, pending on writ of certiorari, No. 110, this Term.

[15] This Court has decided that discriminations cannot be disguised by classifications that do not follow real functional differences. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 474–475.

Nor can this case properly be distinguished on the ground, suggested by the court below, that the basing-point system involved in *Staley* and *Cement* "was utilized to stabilize or increase but never to lower prices." First, we believe the court's statement is probably inaccurate with respect to many customers of a seller employing a basing-point system. See *Corn Products Co. v. Federal Trade Commission*, 324 U. S. 726, 731, 732.[16] Secondly, and in any event, the record is completely devoid of any showing by Standard—which has the burden of proving its "good faith" defense—that the result of its pricing method has been to lower prices. Certainly, no such assurance can be deduced from the mere fact that a price discrimination exists. On the contrary, as already pointed out (*supra*, p. 30);[3] there is an inherent danger that a seller in Standard's position will attempt to manipulate its over-all price scale (both the tank-car and tank-wagon prices) upward for the purpose of offsetting any reduction in its profits because of the relatively "lower" prices granted to the "jobber" accounts.

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[16] The basing-point system commonly involves both "phantom freight" and "freight absorption." Where "phantom freight" is charged to the seller's nearby customers, the effect is to charge *more* than if the seller had charged on an "f. o. b. mill" basis. It is this type of discrimination which was emphasized by the *Staley* decision, 324 U. S. at 754. On the other hand, where there is "freight absorption" on sales to distant customers, the effect is to charge *less* than if the seller had charged on an "f. o. b. mill" basis. It was precisely this distinction which the court below, in the *Cement* case, relied upon in holding that systematic "freight absorption" was in "good faith." *Aetna Portland Cement Co. v. Federal Trade Commission*, 157 F. 2d 533, 560-561 (C. A. 7). This Court, however, rejected the suggested distinction, stating "Nor can we discern under these circumstances any distinction between the 'good faith' proviso as

Finally, the court below stated (R. 5500):

> The gist of the reasoning of the Supreme Court in those cases [*Staley* and *Cement*] was that the pricing system being illegal all prices determined thereby were illegal. It follows, according to such reasoning, that the meeting by the seller of a competitor's unlawful price precludes the seller from reliance upon a "good faith" defense.

As the *Staley* and *Cement* opinions themselves make clear, the "gist of the reasoning" of those cases is not nearly so restrictive. Moreover, the evils involved are essentially the same regardless of whether there has been an adjudication that the competitor's "equally low price" is illegal. The controlling factor, we emphasize, is that Section 2 (b) "does not concern itself with pricing systems," does not permit

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applied to a situation involving only phantom freight and one involving only freight absorption. Neither comes within its terms." *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 725.

It should also be noted that establishment of a "punitive base" may well result in lower delivered prices to certain customers. See, *e. g.*, 157 F. 2d at 564–565.

a seller "to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others," and relates only to "individual competitive situations." 324 U. S. at 753; 333 U. S. at 725.

If any doubt ever existed on the matter, it was dispelled by this Court's recent *National Lead* decision. No adjudication has been made in that case that the individual non-collusive use of a zone-pricing system was illegal; in fact, the Commission expressly reserved decision on that issue (see 352 U. S. at 424). The sellers argued that, since there had been no adjudication of illegality, they should be permitted to use zone pricing to meet competition and that Section 2 (b) gave them that right. As we have already noted, this Court (p. 431) pointed out that Section 2 (b) is incorporated in every Commission order, but added (p. 431): "This is not to say that a seller may plead this section in defense of the use of an entire pricing system. The section is designed to protect competitors in individual transactions."

Thus, a finding of illegality of a competitor's "equally low price" is not a prerequisite to application of the *Staley-Cement* doctrine; "good faith" under Section 2 (b) and "the use of an entire pricing system" are simply incompatible. Of course, if the competitor's price is found to be unlawful, that ends the matter.[17] But such a finding is surely not indispensable.

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[17] See also *infra*, pp. 46–52.

Any argument to the contrary, moreover, necessarily collides with the rule, well settled by both statute and decision, that the burden of proof as to every element of the Section 2 (b) defense is on the price discriminator—not the Commission.[18] See *supra*, p. 23. In this connection, it is significant, as the opinion below notes (R. 5500-5501), that this Court's 1951 opinion in *Standard* appears to suggest that proof of the *lawfulness* of the competitor's "equally low price" is an essential part of a seller's "good faith" defense. 340 U. S. at 238, 246, 247-249, n. 14. The Commission has not construed the 1951 decision in that manner, presumably in part because of difficulties which any seller might have in making such proof. But it certainly does not follow that the Commission should as a consequence be saddled with the contrary burden—*i. e.*, the burden of proving the *unlawfulness* of the competitor's "equally low price." As already pointed out, it is the price discriminator—not the Commission—which has the burden as to every element of the Section 2 (b) defense. If Standard does not have the burden of proving the *lawfulness* of the "equally low price" it allegedly met, then *a fortiori* the Commission does not have the burden of proving the *unlawfulness* of that price.

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[18] Obviously, as a practical matter, the price discriminator cannot be expected to adduce evidence of the unlawfulness of its competitor's price. Therefore, unless the Commission assumed that burden, there would be no evidence on which the Commission could make a finding that the competitor's price is unlawful. If such a finding were indispensable to application of the *Staley-Cement* doctrine, as the court below suggests, then the Commission would be required either to assume the burden in this regard or to let "good faith" defenses be established by default.

It should also be noted that, while it is true that in this proceeding the Commission did not actually adjudicate the legality of the competing prices which Standard allegedly met, the Commission issued similar complaints against three of Standard's competitors, and, after dismissal of those complaints without prejudice, initiated a new investigation based on essentially the same charges.[19] In addition, Standard has insisted that its pricing policies—which the Commission did find to be unlawful—were identical to those of its competitors, and in fact based its Section 2 (b) defense on that ground. In these circumstances, it cannot be said, as the court below remarked, that there is "no contention and not even a suspicion but that the competing prices which [Standard] met were lawful" (R. 5501). To the extent that the pricing policies of Standard's competitors are in fact identical to Standard's policies, they, of course, suffer from the same infirmities.

2. *Standard's admissions in the prior proceedings establish that its price discriminations were pursuant to a general pricing system*

In the *Staley* case, the court below had similarly set aside the Commission's order. In reinstating the Commission's order, this Court admonished reviewing tribunals that "Congress has left to the Commission the determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence is for the Commission." 324 U. S. at 758. The Court added (p. 760) that "[t]he appraisal of the evidence and the inferences to be drawn from it are for the Commission, not the courts."

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[19] See note 27, *infra*.

a. *Standard's alleged "reductions"*

In the instant case, after referring to the above-quoted statement, the court below found it inapplicable on the ground that "the Commission's decision on the 'good faith' issue is the result of its reasoning, legal in nature * * *" (R. 5497). Nevertheless, later in its opinion, the court stated (R. 5501):

> Moreover, we are unable to discern any basis for the conclusion that [Standard's] prices "were not the result of departures from a non-discriminatory price scale." The record affirmatively demonstrates to the contrary. [Standard] sold invariably at its uniform tank-wagon price, except when at different times it reduced its price to meet competitive offers in order to retain a customer. [Standard] had 362 Detroit customers, only four of which purchased at prices reduced from its uniform tank-wagon price.

This statement, if it is intended to suggest that the granting of the tank-car price to the four so-called "jobbers" represented departures from a non-discriminatory price scale or that the tank-car price was not an established part of Standard's price scale, is palpably erroneous. Any such suggestion is flatly contradicted, not only by the Commission's findings of fact, but also by Standard's own admissions in the prior proceedings in this case. Indeed, the Commission's findings of fact rest almost exclusively on these "judicial" admissions.[20]

Thus, in Paragraphs 16 and 17 of its answer (reproduced in the Appendix, *infra*, pp. 60–63), Standard described in some detail "its *general policy and practice* of bona fidely selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail resellers" (emphasis added). Standard stated "that such *system and practice* of selection and classification of customers" was a common one in the oil industry; "that as a result of such necessary selection and classification of customers, and *as an integral and basically essential part thereof,* and of the system of commercial economy which makes such classifications necessary, differences in prices of the same commodities are made to customers selected and falling within different classifications, and *purchasers falling within the classification of wholesalers or jobbers of gasoline are entitled to purchase at tank car prices as distinguished from dealer tank wagon prices at which gasoline is sold to retail resellers*" (emphasis added).[21] Standard further stated that a customer, in order to be accorded a "jobber" classification, must meet certain requirements (*e. g.*, a certain volume of business); that each of Standard's four "jobber" customers met those requirements; "that said four customers are each bona fidely qualified to be regarded and are regarded by the oil industry in Detroit as within the classification of wholesale or jobber customers"; and "that said four customers and each of them are legitimately and lawfully entitled to purchase gasoline, and Respondent [Standard] is entitled to sell them gasoline, within their classification as wholesalers or jobbers and at prices which are or may be at the time different and lower than prices charged by Respondent for the same product to Respondent's retail reseller customers without regard to any other consideration * * *."

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[20] "Judicial" admissions (as distinguished from extra-judicial admissions) include admissions made by a party in the course of any adjudicative proceeding. See IX Wigmore on Evidence (3d ed.) § 2590.

[21] And note Standard's repeated reference in its answer to the "regular tank car price" and "regular tank car basis" (R. 10–11).

The Commission's basic findings do little more than rephrase these admissions, except that the Commission rejected Standard's conclusory allegation that its "system and practice of selection and classification of customers" was a lawful one under the Act.

Nor did Standard ever disavow these admissions during the course of the extensive hearings in the case. On the contrary, Standard introduced voluminous evidence *supporting* its statements in the answer. Standard's witnesses testified that there were specific requirements for a "jobber" status (R. 1890–1891); that the four large reseller accounts involved here met those requirements (R. 1895); that it did not accord "jobber" status to any reseller that did not meet those requirements (R. 172–174, 2084–2088, 2124); that it would rather lose "jobber" accounts than depart from those requirements (R. 1912–1916); that it had but two prices for resellers' accounts—one for "jobber" accounts and one for ordinary resellers (R. 167–

169, 1899).[22] This testimony, it should be repeated, was offered by Standard itself (the Commission's evidence was merely corroborative). And Standard's 1950 brief in this Court is to like effect.[23]

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[22] For example, the manager of Standard's Detroit Division said of these four resellers: "We sell them on our regular reseller tank car basis * * *" (R. 116). And, Marshall, the manager of Standard's gasoline and refined oil department, explained that: "* * * In the oil industry we have a carload price [tank-car] and a tank wagon price and those who operate service stations have a service station price and these are the three units of purchase. We don't operate on the basis of a list price from which various deductions are made" (R. 1100).

It was also emphasized by Standard's witnesses that this system of pricing was used not only in Detroit (R. 1896, 1897, 2065) but elsewhere in the country (R. 943, 1060, 1064, 1075, 1890) and not only by Standard but also by some of its major competitors including Texas, Gulf, and Shell (R. 319-320, 941, 1072, 1897).

[23] Brief for Petitioner, *Standard Oil Co.* v. *Federal Trade Commission*, No. 1, 1950 Term: "This case concerns exclusively petitioner's sale of gasoline in the region of Detroit, Michigan, to two classes of customers: (a) to approximately 358 independent retail service stations buying in tank wagon quantities; and (b) to the four jobbers buying in larger tank car quantities.

"Petitioner sold to all its service station customers at the same price—*i. e.*: the tank wagon price (R. 5058, 131, 161). The deliveries made by tank wagon to these service stations averaged 700 to 800 gallons (R. 112).

"Petitioner sold to all its jobber customers at the same price—*i. e.*, the tank car price." (p. 3, footnote omitted.)

* * * * *

"Citrin, Wayne and Stikeman during 1936-40 and Ned's during 1938-40 'under industry practice and contemplation were bona fide jobbers' (R. 5098) because each of them maintained sufficient bulk storage to take delivery in tank car quantities, owned and operated tank wagons and other facilities for delivery to service stations, had an established business suffi-

At this point in the proceeding, Standard can scarcely be permitted to withdraw these admissions or deny their truthfulness. And Standard can have no real objection to the Commission's reliance on them. For, "it is fundamental that judicial admissions are proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them. A fact admitted by answer is no longer a fact in issue." *Hill* v. *Federal Trade Commission*, 124 F. 2d 104, 106 (C. A. 5). As Wigmore states, "The vital feature of a judicial admission is universally conceded to be its *conclusiveness* upon the party making it, *i. e.*, the prohibition of any further dispute of the fact by him, and of any use of evidence to disprove or contradict it" (italics in original). IX Wigmore on Evidence (3d ed.) § 2590 (citing numerous decisions).

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cient to insure purchases of from one to two million gallons a year, and had adequate credit responsibility (R. 5096-7-8), notwithstanding the fact that Ned's resold entirely at its own service stations to the consuming public and that the other three resold in part in the same way." (p. 4.)

* * * * *

"* * * these customers all belonged to a distinct class of buyers, so recognized throughout the industry." (p. 42.)

* * * * *

"It is patent that the Commission's Order strikes primarily at dual distribution in the same territory (see Point III, *infra*, p. 45). It is only because petitioner sells to two classes of customers in the same area, admittedly at the going price to each of them, that petitioner, to avoid the restrictions of Paragraph 6 of the Order, may find it necessary to discontinue dealing with one or the other." (p. 43.)

In this case, it was not until after the Commission's decision on remand that Standard attempted to deny what it had previously sought to prove—namely, that the granting of the tank-car price to its four "jobber" customers was pursuant to, and not a departure from, its "system and practice of selection and classification of customers." The label applied to it is of little consequence—"system," "formula," "policy," "method," "practice." What is important is that it "constantly results in [Standard's] getting more money for like goods from some customers than [it] does from others," and that it is not directed to "individual competitive situations." *Cement, supra*, p. 725; *National Lead, supra*, p. 431.

b. *Standard's alleged "bargaining and haggling."*

The court below further stated (R. 5501):

> The bargaining and haggling which took place between [Standard] and the four involved "wholesalers" prior to a reduction in prices to them is hardly consistent with the Commission's theory that prices were reduced pursuant to a system. For instance, [Standard] over many years refused to give Ned's, its "most valuable tank-wagon customer," any reduction at all despite persistent demands based upon competitive offers. Its reluctant grant of a ½¢ reduction in 1936, increased to 1½¢ in 1938 in response to an "ultimatum" by Ned's, would appear to dispel completely any idea that such reduction in price was systematic, as urged by the Commission.

This statement likewise ignores the Commission's evidentiary findings and Standard's admissions. The tatement also misconceives "the Commission's eory"; for it was never "the Commission's theory at prices were reduced pursuant to a system." On e contrary, as pointed out above, the Commission ound—as Standard had urged—that the discriminaions charged in the complaint did *not* represent *reuctions* but rather only the regular application of a ong-established industry-wide "system and practice."

According to Standard's answer (R. 11) and the estimony of its witnesses (R. 126, 130, 167–169), tandard departed from this "system and practice" only one instance—*i. e.*, when it granted Ned's a alf-cent reduction from the tank-wagon price in 936; its officials referred to this as an "exception" R. 167–169). This half-cent reduction to Ned's as accorded at a time when Ned's was still classified s a "non-jobber" dealer and is the only "lower price" this record which could possibly be construed to be "good faith" meeting of competition, since it does ppear to reflect a genuine effort to hold a customer nd it was not any part of Standard's regular sysem of pricing. However, this half-cent reduction is ot a matter now at issue in this proceeding, and the ourt below plainly erred in relying on the conceded "exception"—which is not material here—as a basis or suggesting that Standard did not employ a general ricing system. On the other hand, the tank-car price hich was later accorded to Ned's was found by the ommission to be granted, not in response to any ompetitive offer, but because Ned's at that time met he established requirements for classification as a jobber" by acquiring bulk storage facilities (R. 5389).

The Commission similarly found—as Standard had urged—that Standard's continuance of the tank-car price to the other three "jobbers" (Citrin-Kolb, Stikeman, and Wayne) merely reflected continued application of Standard's "system and practice." As to these three customers, each of whom had achieved "jobber" status and obtained the regular tank-car price some time before the passage of the Robinson-Patman Act, the record contains *no evidence* that Standard's "lower price" had been initially granted to meet a competitor's offer of an "equally low price."[24] In these circumstances, it is somewhat difficult to understand the reference of the court below (*supra*) to "bargaining and haggling which took place between [Standard] and the four involved 'wholesalers' prior to a reduction in price to them."

Moreover, any evidence of such "bargaining and haggling" would be completely consistent with the Commission's determination—and Standard's admission—that the discriminations now in issue were part and parcel of a "system and practice of selection and classification of customers." The principal vice of this "system and practice," according to the Commission, is the arbitrariness of the classification—*i. e.*, Standard's designation of certain customers as so-called

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[24] With respect to any offers made to these three customers subsequent to their being accorded "jobber" status but prior to the passage of the Act, the Commission was of the view that those "which were not continuing offers, are not relevant to show that the specific discriminations in price made by respondent subsequent to June 19, 1936, were made in good faith to meet equally low prices of competitors" (R. 5387). The two dissenting Commissioners concurred in this view (R. 5416). And see note 6, *supra*.

"jobbers" (with the resultant tank-car price on *all* sales to them) regardless of the scope of their retailing operations and in fact regardless of whether they performed any "jobber" function at all. Cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 474–475. In that economic situation, it would be most surprising indeed if Standard's larger "non-jobber" retailers did not actively seek to be classified as "jobbers." The natural result would be "bargaining and haggling" (*i. e.*, negotiation), provided, of course, that the "non-jobber" could meet Standard's fixed requirements for "jobber" status. This type of "bargaining and haggling," however, does not disprove the existence of a "system and practice of selection and classification of customers," but on the contrary is perhaps an inevitable manifestation of it. Such a "system and practice" presupposes, by definition, some process "of selection and classification of customers"; any negotiation by non-favored customers to obtain "jobber" status is thus within the framework of the "system and practice," not outside it.[25] The mere fact that over the years there might be some slight change in the beneficiaries of Standard's "system and practice" is immaterial so long as an inherently discriminatory price scale is "an integral and basically essential part thereof" (R. 73).[26]

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[25] In contrast, Standard's 1936 grant to Ned's of a half-cent reduction—which is not in issue here—was not pursuant to Standard's "system and practice." See *supra*, pp. 10, 43.

[26] This conclusion is reinforced by Standard's failure to make a bona fide effort to rid itself of this "system and practice." See *infra*, pp. 52–58.

B. IN ANY EVENT, THE "GOOD FAITH" REQUIREMENT IS NOT SATISFIED BY A SHOWING THAT STANDARD'S PRICING SYSTEM IS ALSO USED BY SOME OF ITS COMPETITORS

As already shown (*supra*, pp. 26–28), it is established by this Court's decisions that Section 2 (b) affords no justification for a seller's use of a general pricing system—*i. e.*, "a sales system which constantly results in his getting more money for like goods from some customers than he does from others." It is also established by Standard's own admissions in the prior proceedings (*supra*, pp. 36–45) that the discriminations in issue here were pursuant to precisely such a system. Accordingly, we believe the Court need go no further and may reverse on that basis alone.

There are, however, other compelling reasons for rejecting Standard's "good faith" claim. Thus, even assuming *arguendo* (contrary to *Staley*, *Cement*, and *National Lead*) that Section 2 (b) could in some circumstances be employed in defense of a seller's general pricing system, it does not follow that Standard has sustained its burden. Of primary importance in this regard is the nature of the competitors' prices allegedly being met by Standard. In the Commission's view, the "good faith" requirement is not satisfied by a showing that Standard's pricing system is also used by some of its competitors.

According to Standard's admissions, Standard's dual price formula is used in the Detroit area not only by Standard but also by major competitors such as Gulf, Texas, and Shell.[27] See *supra*, pp. 6, 28. In other words, on the basis of substantially the same "system and practice" followed by Standard, these competitors likewise classify certain customers as "jobbers" and accord them the tank-car price (R. 5388). And, since both Standard and these competitors select "jobbers" on the basis of "the commonly accepted standards of the industry" (R. 5388, 5416), it may well be that Standard would (at least temporarily) lose its four "jobber" customers if it stopped granting them the tank-car price. The reason, of course, is the strong possibility that these four "jobber" customers could obtain "jobber" classification—and hence the tank-car price—from Standard's competitors employing the same "system and practice."

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[27] Similar charges of price discrimination were filed against these three companies in 1940. Proceedings thereon, in view of the pendency of this litigation, were deferred until April 3, 1957. On that date, the three complaints were dismissed without prejudice. The Commission's order in each case stated:

> It appearing that the complaint in this proceeding was issued November 29, 1940, and that the acts and practices alleged to have been unlawful all occurred more than sixteen years ago; and
>
> It further appearing that trial of the case has been held in abeyance pending final disposition of the proceeding in the matter of *Standard Oil Company*, Docket No. 4389, which proceeding is now before the United States Supreme Court for the second time; and
>
> The Commission being of the opinion that irrespective of the final outcome of said proceeding in the matter of *Standard Oil Company*, Docket No. 4389, it will not now be practicable to try the issues raised by the pleadings in this case; and, accordingly:
>
> It Is Ordered that the complaint herein be, and it hereby is dismissed, it being understood, however, that no decision

The Commission, however, refused to accept Standard's possible loss of the four "jobber" customers

> has been made on the merits of the case, and this action is without prejudice to the right of the Commission to conduct a further investigation into the respondent's business practices and to take such further action against the respondent at any time in the future as may be warranted by the then existing circumstances.

On June 18, 1957, the Commission announced a new investigation of the present conduct of the three companies in connection with essentially the same charges of price discrimination. The announcement stated:

> A dual system of pricing used by some major oil companies is currently being investigated by the Bureau of Investigation of the Federal Trade Commission, Harry A. Babcock, Chief of the Bureau, announced today.
>
> He said his office is investigating the effects of a system whereby oil producers sell to regular filling stations at one price and to some large competing operators, classified by the producers as "jobbers," at a lower price.
>
> In his announcement Mr. Babcock referred to the Commission's recent dismissal of complaints charging three major oil companies, Texas, Gulf and Shell, with engaging in this practice.
>
> Mr. Babcock said these complaints had been pending since 1939 awaiting a final decision in the Commission's similar proceeding against the Standard Oil Company of Indiana. (A Court of Appeals decision setting aside the Commission's order in that case has been appealed to the Supreme Court.)
>
> Mr. Babcock said the complaints against Texas, Gulf and Shell were dismissed because many of the witnesses who had been scheduled to testify when the complaints were first issued were no longer available and because of difficulties other witnesses might have in testifying about events that took place in the 1930's. In the Standard case, Mr. Babcock pointed out, the evidence is already a matter of record. He also noted that the Commission's dismissal order, issued April 2, made no decision on the merits of the cases and was without prejudice to the Commission's right to conduct further investigations.

under those circumstances as justifying Standard's continued adherence to its dual price formula.[28] As this Court held in *Staley*, the Section 2 (b) defense is concerned with the matching of prices "in individual competitive situations," not the matching of pricing systems. See *supra*, pp. 26–27. To make the loss of customers the *sole* criterion of "good faith"—as Standard argued below [29]—is to extract all

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[28] Similar Commission rulings, although made on somewhat different facts, were recently upheld by another panel of the court below. *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, 155–156 (C. A. 7), pending on petition for certiorari, No. 101, this Term; *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253, 255 (C. A. 7), certiorari denied, 353 U. S. 938. Accord, *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37, 41 (C. A. 7), pending on writ of certiorari, No. 110, this Term. In all three of these cases, the Commission found that each seller's discriminations were only a reflection of its nation-wide pricing system formulated to meet competition generally.

[29] In its brief (pp. 14–15) in the Court of Appeals, Standard contended: "The Commission's own factual finding affirmatively demonstrates petitioner's good faith. The Commission did not attempt to overturn the finding of the trial examiner that petitioner's price reductions were granted solely to retain the business of four valuable customers. Instead, the Commission affirmed the examiner's factual analysis, and acknowledged that petitioner had 'substantial reasons for believing' that without reducing its prices 'it would lose these accounts' (R. 5388). This finding fully satisfies the tests of the Section 2 (b) defense as defined by the Supreme Court."

The finding in question is set forth in full in note 12, *supra*. As reference to the full finding will confirm, it does no more than recognize that, since Standard's pricing system is also used by Standard's competitors, Standard's failure to adhere to "*the commonly accepted standards of the industry*" (emphasis meaning from the "good faith" requirement.[30] The argument also ignores what inevitably would be the practical consequences of its adoption.

If a discriminatory pricing system could be justified as a "good faith" meeting of a competitor's equally low price merely because competitors are using a comparable system, the Robinson-Patman Act would be effectively nullified in large measure. Such a construction would immunize from the Act's requirements every established industry-wide systematic method of price discrimination. It would, moreover, actually provide a positive incentive to competing suppliers to adopt parallel pricing systems so that each can defend its own system on the basis of similar systems used by others. The Act, the Commission properly held, precludes such consequences. See *Staley*, 324 U. S. at 754.[31]

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added) might (at least temporarily) cause the loss of its so-called "jobber" customers. Under the *Staley-Cement* doctrine, such a loss is in no sense determinative of Standard's "good faith," as the Commission held.

[30] See note 9, *supra*.

[31] In *Staley*, the Court rejected a comparable interpretation, pointing out (324 U. S. at 753-754): "* * * If respondents' argument is sound, it would seem to follow that even if the competitor's pricing system were wholly in violation of § 2 of the Clayton Act, respondents could adopt and follow it with impunity.

"This startling conclusion is admissible only upon the assumption that the statute permits a seller to maintain an otherwise unlawful system of discriminatory prices, merely because he had adopted it in its entirety, as a means of securing the benefits of a like unlawful system maintained by his competitors. * * * We think the conclusion is inadmissible, in view

For example, under the decision below, the Commission's complaint against Standard must fall because of the availability of an "equally low price" from Gulf, Texas, or Shell. Similarly, Gulf, Texas, and Shell can presumably defend the validity of their dual price formula because of the availability of Standard's "equally low price" (the tank-car price involved in this proceeding).[32] In other words, as long as competing sellers follow the same discriminatory price policies, each is protected. The result would be to insulate from attack a price pattern deeply entrenched in the industry—not only in the Detroit area, but also elsewhere in the country (R. 319–320, 941, 943, 1060, 1064, 1072, 1075, 1897)—long prior to passage of the Robinson-Patman Act.

Conversely, the anomalous effect of such a construction would be to limit the impact of the Robinson-Patman Act to industries in which price discrimination is *not* as deeply entrenched—*i. e.*, industries where sellers do not follow parallel pricing policies. For example, in *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, this Court upheld a Commission cease-and-desist order against a seller's

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of the clear Congressional purpose not to sanction by § 2 (b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another."

In the instant case, Standard—which has the burden of proof on the "good faith" issue—did not undertake to show the lawfulness of the dual price formulas of its competitors. See *supra*, pp. 35–36.

[32] See note 27, *supra*. Indeed, Standard's competitors would probably argue that Standard's "equally low price" had been adjudicated to be "lawful" if the decision below were affirmed.

use of a discriminatory "quantity discount system" (p. 41); and in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, the Court upheld a Commission cease-and-desist order against an arbitrary system (as in this case) of classifying customers for functional discount purposes. But if Section 2 (b)—as the decision below apparently holds—immunizes a seller as long as his competitors employ the same pricing system, then it necessarily follows that the Morton Salt Company and the Ruberoid Company could also have avoided liability simply by showing that their discriminatory practices are common in their respective industries. There is no basis, we submit, for imputing to Congress an intention to exempt from the Act those industries where price discrimination is most rampant.[33]

C. STANDARD'S FAILURE TO MAKE A BONA FIDE EFFORT TO ESTABLISH A NON-DISCRIMINATORY PRICING SYSTEM FURTHER NEGATIVES ITS CLAIM OF "GOOD FAITH"

In *Staley*, as in the instant case, the sellers "never attempted to establish their own non-discriminatory price system, and then reduce their price when necessary to meet competition. Instead they have slavishly followed in the first instance a pricing policy which, in their case, resulted in systematic discriminations * * *" (324 U. S. at 754–755). The Court held in part (324 U. S. at 757): "We cannot say that a seller acts in good faith when it chooses to adopt such a clearly discriminatory pricing system, at least where it has never attempted to set up a non-discriminatory system * * *."

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[33] See note 31, *supra*, and note 34, *infra*.

Similarly here, in the course of its lengthy findings on the "good faith" issue, the Commission *inter alia* found that the circumstances which existed at the time of the passage of the Robinson-Patman Act "imposed upon [Standard] the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute" and that Standard "neither did this nor made any bona fide attempt so to do" (R. 5389). In this regard, the Commission found that at all relevant times Standard knew or should have known of the probability of competitive injury resulting from its pricing policy (R. 5389) and knew or should have known that the price differential could not be cost-justified (R. 5389). The Commission's exact language is as follows (R. 5388–5389):

> Respondent has had long experience in the sale and distribution of gasoline, both through service stations which it owned or leased and operated and through its bulk plants to service station operators. It follows that respondent is thoroughly familiar with the costs of operating retail service stations and bulk plants, with the margins of gross profits available to retail service stations and to operators of bulk plants, and with the competitive results which may be expected when some retailers receive lower prices than competing retailers. At all relevant times, respondent knew or had the means of knowing and should have known that the manner in which it priced and sold its gasoline continually created the probability of injury to competition between retail dealers who bought

such gasoline at different prices and resold it in competition with one another. It also knew or should have known that the price differences which it granted could not be justified on the basis of differences in the cost of manufacture, sale and delivery resulting from differing methods or quantities in which its gasoline was sold or delivered. These circumstances existed at the time the Robinson-Patman Amendment to the Clayton Act became law, and their existence imposed upon respondent the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute. Respondent neither did this nor made any bona fide attempt so to do.

Thus, despite passage of the Robinson-Patman Act and despite knowledge of the discriminatory and injurious nature of its pricing system, Standard took no steps to rid itself of that system but instead simply followed the industry pattern. Compare *Staley, supra.* Such conduct, in the Commission's view, further negatived Standard's claim of "good faith."

The court below, however, denied that Standard had "the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute." According to the court (R. 5499): "If [Standard's] pricing policy was lawful prior to the [Robinson-Patman] amendment the same policy was lawful afterward." This holding completely ignores the important changes brought about by passage of the Robinson-Patman Act and recognized repeatedly by this Court. *E. g., Staley, supra*, 324 U. S. at 752-753. The court below referred to this Court's statement in the 1951 *Standard* decision (340 U. S. at 242) that "None of these changes, however, cut into the actual core of the defense." But the obvious meaning of this remark is shown by the further statement in the same opinion (340 U. S. at 251) that "* * * the proviso [2 (b)] is readily understandable as simply continuing in effect a defense which is *equally absolute, but more limited in scope* than that which existed under § 2 of the original Clayton Act" (emphasis added). See also 340 U. S. at 248, n. 14. Indeed, a mere comparison of the language of the Act before and after the amendment is sufficient to establish beyond question that the requisites of the "good faith" defense were substantially changed; and, if any possible doubt remained, the legislative history is fully dispositive.[34]

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[34] As introduced, neither the House nor the Senate bill contained a provision similar to that in the original Section 2 of the Clayton Act, which read: "*Provided*, That nothing herein contained shall prevent * * * discrimination in price in the same or different communities made in good faith to meet competition." In the Senate, an amendment was adopted incorporating this provision. 80 Cong. Rec. 6426, 6435. In the House, the Judiciary Committee reported the bill with a provision substantially like that finally adopted, avoiding the vague phrase "to meet competition" and substituting the narrower criterion "to meet an equally low price of a competitor." 80 Cong. Rec. 8139. The House report on the bill stated in this regard: "This proviso represents a contraction of an exemption now contained in Section 2 of the Clayton Act which permits discriminations without limit where made in good faith to meet competition." H. Rep. 2287, 74th Cong., 2d Sess., p. 16.

The conference rejected the Senate version and approved the House provision. The conference report stated (H. Rep. 2951, As the above quotation from the Commission's findings (*supra*, pp. 53–54) makes abundantly clear, there were two principal "circumstances" whose "existence" at the time of passage of the Robinson-Patman Act "imposed upon [Standard] the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute." These two "circumstances" were: (a) that Standard knew or should have known of the probability of competitive injury resulting from its pricing policy; and (b) that Standard knew or should have known that its price differential could not be cost-justified.[35] In dealing with these subsidiary factual findings as to "circumstances," the court below treated each as if it had no connection whatever with the conclusion it was plainly designed to support.

74th Cong., 2d Sess., pp. 6–7; 80 Cong. Rec. 9414): "This language [of the Senate bill] is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act. The Senate receded, and the language is stricken. A provision relating to the question of meeting competition * * * is included in subsection (b) in the conference text as follows: [quoting the present provision]."

As a different panel of the Seventh Circuit, subsequent to the decision below, stated in a somewhat different context: "it must be remembered that in enacting the Robinson-Patman Act, 49 Stat. 1528 (1936), 15 U. S. C. A. § 13, Congress undertook to strengthen this phase of the Clayton Act which it thought had been too restrictive in practice by directing emphasis to individual competitive situations rather than competition in general." *E. Edelmann & Co. v. Federal Trade Commission*, 239 F. 2d 152, 155, pending on petition for certiorari, No. 101, this Term.

[35] Standard's extraordinary assertion that these two subsidiary factual findings constitute "the first two grounds of the FTC ruling" (Br. Opp. 2) is wholly without substance, as even cursory examination of the Commission's findings will confirm.

As to the Commission's finding that Standard knew or should have known of the probability of competitive injury resulting from its pricing policy, the court below held that (R. 5499) "This is the same theory upon which the Commission's previous order was bottomed and which was expressly repudiated by the Supreme Court (pages 249-250)" in the 1951 *Standard* decision. However, nothing in that decision (340 U. S. 231) even remotely indicates that *knowledge* of probability of competitive injury cannot be legitimately considered on the "good faith" issue, particularly (as here) in determining whether a seller had an obligation to review its pricing policy on passage of the Robinson-Patman Act. Presumably the reference of the court below is to the quite different matter of the completeness of the Section 2 (b) defense in the face of competitive injury.

As to the Commission's finding that Standard knew or should have known that its price differential could not be cost-justified, the court below held that this finding was "irrelevant" because Standard had abandoned its defense of cost justification (R. 5499). Standard's *knowledge* of the lack of cost justification, however, is not "irrelevant" on the issue of "good faith." Here, for example, it was material in considering whether Standard evidenced "good faith" when it failed to make any bona fide effort to change its pricing policy after passage of the Robinson-Patman Act. Conversely, if Standard had reasonably believed the differential was cost-justified, its "good faith" claim might thereby have been strengthened.

It is not necessary to determine whether the Commission's rejection of Standard's Section 2 (b) defense may be placed *solely* on Standard's failure, in the face of the "circumstances" discussed above, to make a bona fide effort on passage of the Robinson-Patman Act to establish a non-discriminatory pricing policy. Instead of constituting a wholly independent ground, the Commission's findings in this regard constitute another aspect of what it characterized (R. 5388) as "the real question"—namely, "whether or not the actions of [Standard] in granting or continuing to these four dealers the tank-car price pursuant to and in accordance with its general policy can be said to have been made in good faith within the meaning of Section 2 (b)." For the reasons set forth in this and preceding sections of the brief, this question must, we believe, be answered in the negative, as the Commission held.

CONCLUSION.

It is respectfully submitted that the judgment below should be reversed and the case remanded to the Court of Appeals for consideration of the appropriateness of the terms of the Commission's order.

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SEPTEMBER 1957.

APPENDIX

Paragraphs 16 and 17 of Standard's answer (R. 12–15) state:

> Respondent alleges that since the time each of the gasoline customers named in Paragraph Three of the Complaint acquired its own bulk storage, distribution equipment and wholesale facilities, that such customer is entitled to be classified as a wholesale or jobber buyer of gasoline as distinguished from a retail reseller or service station operator who purchases gasoline on an entirely different basis of taking frequent small deliveries by tank truck from a supplier who delivers into relatively small storage tanks in or upon the service station premises, which tanks are directly connected to the retail pumps. Further, that such wholesaler or jobber buyers perform a distinctly different service and function and operate upon a different basis from retail sellers, and that such differences and distinctions in services and functions and between methods of operation have been recognized for many decades last past and are presently recognized and have been so recognized since June 19, 1936, in Detroit and elsewhere throughout the entire United States by the entire oil industry as well as by other industries dealing in substantially all kinds of consumer goods, and that in consequence of such differences and distinctions in operations, functions and services, and the essential recognition thereof, the oil industry and other industries in Detroit and throughout the rest of the United States has and does classify and bona fidely select customers on the basis of functional services and of methods of opera-

tions entitling customers to be classified in distinctive and distinguishable classifications. Further, that such classifications are essential and necessary and appropriate to the existing and continuing business and commercial activity in consumer commodities, including oil products, in Detroit and throughout the United States, and that such system and practice of selection and classification of customers in the oil industry and other industries in Detroit and throughout the United States forms a necessary, indispensable and integral part of the commercial economy of this nation, and one which must be considered, recognized, met, and participated in by an operator engaged in the business of distribution and marketing of oil products if such business is to fairly and successfully survive in the market place in Detroit or elsewhere in the United States. Further, that as a result of such necessary selection and classification of customers, and as an integral and basically essential part thereof, and of the system of commercial economy which makes such classifications necessary, differences in prices of the same commodities are made to customers selected and falling within different classifications, and purchasers falling within the classification of wholesalers or jobbers of gasoline are entitled to purchase at tank car prices as distinguished from dealer tank wagon prices at which gasoline is sold to retail resellers.

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Respondent alleges that its general policy and practice of bona fidely selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail resellers, is as follows:

That such wholesale or jobber customer so classified shall have adequate bulk storage of his own; that he be equipped to receive bulk deliveries by tank car or truck train into such storage; that he have adequate distribution and delivery facilities; that he make tank car purchases in substantial volume and do a continuing substantial volume of business as a bona fide gasoline dealer maintaining and operating an established gasoline business; that he have satisfactory credit rating; that he maintain a sufficient personnel and all requisite facilities and equipment to adequately operate his business, service his customers, and perform his functions as a wholesaler or jobber, and assume the hazard and expense of fully operating his own business.

Respondent alleges that each of the four customers named in Paragraph Three of the Complaint fully, fairly, and reasonably falls within not only the requirements set forth in Paragraph 17 above but within all fair, reasonable, usual and proper requirements for classification as a wholesaler or jobber, and that each maintains its own adequate bulk storage, delivery tank trucks, salesmen and operating personnel; buys in substantial tank car or truck train lots; buys commodities other than gasoline in wholesale and carload lots; bears all expense of its own operations, no part of which are borne by Respondent; becomes immediately the absolute owner of the gasoline delivered into its storage by Respondent and controls its disposition; does not depend upon or desire that its customers be serviced by Respondent's salesmen, and Respondent's salesmen do not service or solicit such customers; assumes the risk of carrying its own inventories and of extending its own credits and making collections, and assumes all the hazards of its own operations. Further, that said four customers are each bona fidely qualified to be regarded and are regarded by the oil industry in Detroit as within the classification of wholesale or jobber customers, and they each are able to purchase as such from a great number of gasoline suppliers operating in Detroit competitively with Respondent. Further, that Respondent is without power to, and is neither entitled nor required to police, control or dictate the manner or method of disposition of such gasoline as may be employed by such customers, and that such gasoline becomes the absolute property of such customers upon their purchase thereof from Respondent. Further, that said four customers and each of them are legitimately and lawfully entitled to purchase gasoline, and Respondent is entitled to sell them gasoline, within their classification as wholesalers or jobbers and at prices which are or may be at the time different and lower than prices charged by Respondent for the same product to Respondent's retail reseller customers without regard to any other consideration and without regard to any relation which such price differential may or may not bear to Respondent's differing operating costs arising from differing costs of manufacture, differing costs arising out of different methods of sale or delivery, or otherwise, and that any such acts upon Respondent's part and the existence of any such facts have not and do not constitute a violation of the meaning and terms of Section 2 (A) of the Clayton Act as amended and are not unlawful thereunder or under any law.

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No. 24

In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD OIL COMPANY

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION, PETITIONER
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STANDARD OIL COMPANY

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

I. THE BRIEF OF STANDARD OIL COMPANY

The brief filed by Standard is, in large measure, unresponsive to the Government's contentions. By stating those contentions incorrectly (*infra*, pp. 13, 19–20), and by once again attempting to disavow its prior repeated admissions (*infra*, pp. 12–19), Standard now apparently seeks to obscure—under a haze of alleged "factual" questions—the issue on which certiorari was granted.[1] Standard (Br. 2, 14–15, 20, 24–28) argues that these alleged "factual" questions were the basis of the Court of Appeals' decision, that "This Court Should Accept the Conclusion Below That Respondent's Defense Was 'Firmly Established' by the Record" (Br. 64), and that "This Court Will Not Supplant the Court of Appeals as the Initial Reviewer of Administrative Action" (Br. 66). Therefore, Standard argues, this Court must affirm.

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[1] This issue, Standard contends (Br. Opp. 6), "was not adjudicated below". See the Commission's Reply Brief in Support of Petition for Certiorari, pp. 2–5.

"But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment * * *." *Watts* v. *Indiana*, 338 U. S. 49, 51 (per Frankfurter, J.). Particularly is this so in the instant case since the court below expressly denied that the case presented any "factual" question (*infra*, pp. 2–5). Moreover, the court's statements relied upon by Standard as being "factual" are either immaterial or clearly erroneous (*infra*, pp. 5–12).

Indeed, the only "factual" conflict in this case, we shall show, is between Standard's present version of the facts, on the one hand, and Standard's prior admissions (including its formal answer and the testimony of its key officials), on the other.

A. THE COURT BELOW EXPRESSLY DENIED THAT THE CASE PRESENTED A "FACTUAL" QUESTION

In determining whether the court below based its decision on "legal" or "factual" grounds, certainly the court itself would be in the best position to know its own intention. On this matter, the court was quite explicit. At virtually the outset of its opinion, after quoting the decision of the Commission that Standard had failed to meet its burden of proving "good faith," the court stated (R. 5496–5497):

> Whether the decision of the Commission under the attending circumstances represents a finding of fact or a *conclusion of law* is of importance. *We are of the view that it falls within the latter category*, and this notwithstanding the statement in Federal Trade Commission v. A. E. Staley Manufacturing Co., et al., 324 U. S. 746, 758:
>
> "Congress has left to the Commission the determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence is for the Commission."
>
> The Commission in its brief appears to recognize that its decision on this critical issue is a conclusion of law * * * Certainly there is no dispute as to the evidentiary facts as found by the Examiner in the original proceeding. Referring thereto, the Commission in its brief states, "Here the facts as such are not in dispute, it is simply a matter of applying the law to the facts." Moreover, the Commission's decision on the "good faith" issue is *the result of its process of reasoning, legal in nature*, a portion of which, as we shall subsequently show, has been repudiated by the Supreme Court. Such being the case, *the weight to be attached to its decision is dependent upon the reasoning by which it is reached.* [Emphasis added.]

The court might also have referred to the following statement in Standard's brief below (p. 6): "*The con-*

trolling facts are not in dispute. The trial examiner's report * * * sets out the facts essential to a resolution of this case." (Emphasis added.) In addition, Standard's brief below (pp. 3, 14–16) repeatedly emphasized that the Commission's "own factual findings * * * establish [Standard's] 'good faith' *as a matter of law.*" (Emphasis added.)

We are unaware of any reason why this case—which the court below and both parties agreed was a "law" case—should now become a "fact" case on reaching the Supreme Court. The only supervening development is the action of the court below (after being assured by Standard that the controlling facts are not in dispute and that the Commission's own findings established "good faith") in setting aside the Commission's order. Thus Standard is no longer petitioning for relief but is seeking to protect its victory below. But that difference surely is insufficient to change the basic nature of the case. If a "*de novo* appraisal of the record" (Br. 29) was not essential in the court below, it likewise is not essential now.

Moreover, as the above-quoted excerpt from the opinion makes clear, the court regarded the "fact"-or-"law" question as one of "importance" because the answer to that question was, in the court's view, largely determinative of its scope of review over the Commission decision on the "good faith" issue. Having concluded that the Commission decision on that issue was "a conclusion of law" and "the result of its process of reasoning, legal in nature," the court stated that "the weight to be attached to [the Commission's] decision is dependent upon the reasoning by which it is reached." The court thus found that it was unfettered by the limitations which would have been otherwise applicable and in particular rejected the pointed admonition in the *Staley* opinion (324 U. S. 746, 758) against judicial interference with the Commission's fact-finding function in connection with the "good faith" issue.[2]

But Standard's argument—an extraordinary one in the circumstances—is that the court then proceeded to dispose of the "good faith" issue on "factual" grounds. If Standard were correct in that argument, it would mean that the court treated the "good faith" issue as one of "law" for the purpose of justifying freer review and then treated the issue as one of "fact" in deciding the case. Such action would in itself constitute reversible error. Surely it would be difficult to conceive of a clearer abuse of judicial power calling for correction by this Court in the exercise of its supervisory power. But the Court of Appeals, we believe, cannot be charged with having taken such action.

B. THE ALLEGED "FACTUAL" HOLDINGS OF THE COURT BELOW AS TO SPECIFIC OFFERS MADE BY STANDARD'S COMPETITORS ARE EITHER IMMATERIAL OR CLEARLY ERRONEOUS

While there are doubtless some statements of an apparently "factual" nature in the latter part of the opinion, those statements cannot be read as anything more than ambiguous dicta. Certainly they cannot be accepted as findings based upon a "*de novo* appraisal of the record."

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[2] See also *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73. In *Algoma*, this Court held that it was error for a reviewing court, in passing on the validity of a Federal Trade Commission order, "to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision (*Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 61, 63) forbid that exercise of power."

For example, Standard (Br. 2, 25, 27, 48) places principal reliance on the following statement in the opinion: "[Standard] sold invariably at its uniform tank-wagon price, except when at different times it reduced its price to meet competitive offers in order to retain a customer." Standard (Br. 28) even argues that it is *"on the basis of these facts"* [Standard's italics] that the *Staley-Cement* doctrine was properly applied here. After quoting the court's statement, Standard asserts (*ibid.*) that "These price reductions made by [Standard] on widely separate occasions over a period of years to retain the business of four of its several hundred Detroit customers are surely 'individual competitive transactions' and 'situations' within the meaning of this Court's guides [in *Staley* and *Cement*]."

This contention can readily be shown to be clearly erroneous on three grounds.

1. Three of the four "jobbers" (Citrin-Kolb, Stikeman, and Wayne) were first granted the tank-car price by Standard prior to the enactment of the Robinson-Patman Act in 1936 (R. 5385-5386). Therefore, as was held by the hearing examiner (R. 1241) and by the *unanimous* Commission (including the two dissenting Commissioners on whom Standard relies) (R. 5387, 5416), any competitive offers on those "widely separate occasions" are wholly immaterial to

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prove justification for Standard's continuance of its discriminatory pricing policy *after* 1936.[3]

2. In any event, the record contains *no evidence* that Standard's tank-car price had been initially granted to these three "jobbers" to meet a competitor's offer of an "equally low price." Thus, Citrin-Kolb was initially granted "jobber" status and the tank-car price in 1928 (or 1929), but the first competitive offer was not made to Citrin-Kolb until 1930 (R. 1260–1269, 2003).[4] Stikeman was granted "jobber" status and the tank-car price in 1932, but there is no evidence of any competitive offer prior to that time.[5] More-

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[3] Inconsistently, Standard later (Br. 41) recognizes that it is the *post*-1936 price discriminations which must be justified.

[4] This offer was by the Hicock Oil Company after Standard ~~had ac~~corded "jobber" status and the tank-car price to Citrin-Kolb (R. 1261). Raupagh, Standard's Detroit Division Manager, testified concerning this "jobber" that "The first offer that I remember was about 1930" (*i. e.*, the Hicock offer) (R. 2002; see also R. 1321). Citrin testified that he had earlier questioned the Paragon Oil Company with respect to the availability of the tank-car price, but there is no evidence of any offer by Paragon to Citrin-Kolb (R. 1253–1254). As Citrin testified, "there was no price discussed at all" and Paragon's representative "was going to investigate" (R. 1254).

Nor is there anything in the record to indicate that the practice first got under way with the grant of the tank-car price to Citrin-Kolb. Raupagh testified that the "jobber" method had been an integral part of the gasoline marketing structure "ever since I have been in the oil business" (R. 1892). Dyer, another Standard witness, said the same (R. 940).

[5] The record does not show any competitive offer to Stikeman until after it had been accorded "jobber" status and the tank-car price. Standard subsequently lost this customer for a short time prior to 1936 (R. 2013). But its original classification as a "jobber" was apparently not preceded by any competitive offer.

over, as pointed out in Standard's answer (R. 9) and the *dissenting* Commission opinion (R. 5412), Standard granted Stikeman the tank-car price at the very inception of Stikeman's business. Standard therefore is quite in error in repeatedly asserting (Br. 2, 4, 6, 20, 27, 28, 31–32, 48, 65) that it only granted the tank-car price to retain a customer; for, with respect to Stikeman, Standard had no customer to retain when it granted the tank-car price. Similarly, there is no evidence of a competitive offer to Wayne prior to Standard's grant of "jobber" status and the tank-car price to Wayne in 1935.[6]

In these circumstances, it is apparent that the court below could not have made a "de novo appraisal of the record" as a basis for its assertion that "[Standard] sold invariably at its uniform tank-wagon price, except when at different times it reduced its price to meet competitive offers in order to retain a customer.[7] This assertion—which suggests that Standard accorded "jobber" status only involuntarily—is also in basic conflict with the extensive testimony of Standard's witnesses as to the commercial desirability of using "jobbers" (R. 1013–1023), including Marshall's acknowledgment that the question of whether to sell direct or through jobbers "was resolved on the economies and advantages of distribution, as the particular company viewed it at the time in the locality" (R. 1125; see also R. 1109). Another Standard witness,

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[6] Ledbetter, the president of Wayne, testified that his company "became a Standard Oil jobber" and thus obtained the tank-car price "when the volume increased to approximately 1,000,000 gallons per annum" (R. 983). He said (R. 984): "Well, the reason I got on that basis, or the principal reason, I believe, was the fact that I succeeded after two years' effort in selling them on the idea that I could do a better job for less money." Neither Ledbetter (R. 378–380, 982–985) nor Raupagh (R. 2011–2012) testified as to a competitive offer to supply the needs of Wayne's numerous stations.

It may also be noted that the record contains no evidence of any competitive offers to Stikeman or Wayne from the time of the passage of the Robinson-Patman Act to the filing of the complaint in this proceeding (R. 5386).

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[7] For the same reasons, there is no foundation for Standard's assertion (Br. 48) that "Respondent's Lower Prices, Granted in Sporadic Instances to Hold Its Own Customers, Could Hardly Be Relied on by Competitors to Defend *Their* Price Discriminations."

It may also be noted that Standard's argument in the court below was quite different. There, Standard (Br. 12, 14) vigorously contended that its "good faith" was "conclusively documented" and "affirmatively demonstrate[d]" by the Commission's finding (see *infra*, pp. 22–23) that Standard's denial of the tank-car price to the four "jobber" accounts might result in their loss as customers since all four qualified for "jobber" status "under the commonly accepted standards of the industry" (R. 5388). As pointed out in our main brief (pp. 49–52), adoption of Standard's argument would immunize from the Act's requirements every discriminatory price formula followed by two or more sellers in the same industry; for, in those circumstances, each seller could justify his price formula on the basis of the availability of "an equally low price" from his competitor. Conversely, as we pointed out, adoption of Standard's argument would limit the Robinson-Patman Act to industries where sellers do not follow parallel pricing policies.

Dyer, detailed the advantages to a supplier of selling through "jobbers" (R. 959-960).[8]

3. Finally, even assuming *arguendo* that pre-1936 offers were material and that each of the four "jobbers" had been initially granted the tank-car price in response to a competitor's offer of an "equally low

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[8] Among the advantages he enumerated were the following: "the local jobber is usually a long-time citizen in the community" and hence can buy or lease property more advantageously "than some large company that comes in from the outside"; "[h]e is usually able to make a better selection of his employees," "get a higher degree of loyal and cooperative response" from them, and "frequently works his employees longer hours than his larger competitor"; "[h]e frequently doesn't have to pay the general market level of wages; and frequently doesn't pay it"; "he is not amenable or answerable to many laws" such as "chain store tax laws"; "[t]he Robinson-Patman Act, which has been the bane of most marketers' lives since it was passed some years ago, rests very lightly upon the local independent jobber."

This list of advantages is corroborated in large part by Cassady, *Price Making and Price Behavior in the Petroleum Industry*, pp. 199-200 (published in 1954 by the Yale University Press on a grant by the American Petroleum Institute). Professor Cassady states the following reasons for using "jobbers":

"1. Extensive distribution can be effected without large capital investment. As a corollary, suppliers may be able to secure important distribution facilities at minimum development costs by taking over established distributors.

"2. The jobber frequently is a power in his own community and may produce more business than would a salaried employee.

"3. The use of a distributor system may result in valuable jobber good will.

"4. Local distributors who own their own businesses have greater incentive to work hard and hence may be more productive.

"5. Jobber operations are advantageous if the need for price

price," it certainly does not follow that Standard would thereby be justified in continuing to grant the tank-car price regularly for an indefinite period. Typically, competitive offers are of limited duration; once such an offer expires, Standard can hardly say that it is only "meeting competition" in "individual competitive situations" if thereafter it accords the tank-car price to the customer year after year after year. The Section 2 (b) defense does not provide a seller with an irrevocable license to discriminate after the "individual competitive situations" are past. Thus, if Standard (as its brief, pp. 28, 48, suggests) is now relying exclusively on specific competitive offers and not on "the mere 'availability' of lower prices" from competitors (Br. 48), then Standard must show that specific offers were kept open to each of the four "jobber" customers throughout the years in question. No such showing has been—or can be—made on this record.[9]

It should also be noted that, if Standard is now relying exclusively on specific competitive offers and not on "the mere 'availability' of lower prices" from

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cutting is indicated, since such operations can be utilized by suppliers as 'bargain basements.'

"6. Distributor operations eliminate the need for a great deal of accounting and sales supervision.

"It should be emphasized that no one plan of wholesale distribution is better than another under all circumstances. The question is, which one will deliver the highest overall realization under given circumstances? The answer is that companies are differently situated, with the result that different types of systems are called for depending on the circumstances."

[9] As to the alleged continuing offer of Red Indian to Ned's, see note 16, *infra*.

competitors (*ibid.*), then it necessarily follows that a reversal, without even the necessity of reaching the *Staley-Cement* issue, would be required in the event that the Court accepts the Commission's findings that Standard did not grant the tank-car price to any of the four "jobbers" in response to a specific competitive offer. The *Staley-Cement* issue arises from the Commission's further finding (R. 5388) that Standard had "substantial reasons for believing" that denial of the tank-car price to the four "jobbers" would result in their loss as customers; and that finding rests, not on any evidence of specific offers, but instead rests expressly and solely on the fact that all four qualified for "jobber" status "under the commonly accepted standards of the industry" and thus could probably obtain "recognition" as a "jobber" from a competitor following the same pricing policy (*ibid.*). Therefore, if we now are to confine ourselves to evidence of specific offers, this Court need go no further than decide (as we believe we have shown *supra*, pp. 5–11) that the court below clearly erred in stating that Standard "sold invariably at its uniform tank-wagon price, except when at different times it reduced its price to meet competitive offers in order to retain a customer" (R. 5501).

C. STANDARD'S USE OF A DUAL PRICE "POLICY," "PRACTICE," "SYSTEM" IS FULLY ESTABLISHED BY STANDARD'S ADMISSIONS THROUGHOUT THE PRIOR PROCEEDINGS

Equally without merit are the apparent assertions (R. 5500–5501) of the court below that the granting of the tank-car price to the four so-called "jobbers" represented departures from a non-discriminatory price scale and that the tank-car price was not an established part of Standard's price scale. As demonstrated in our main brief (pp. 36–42), these "factual" assertions are flatly contradicted by Standard's admissions in the prior proceedings in this case.

Nor are we relying in this connection, as Standard (Br. 39) suggests, only on its formal answer. Although obviously the admissions in that answer are of great importance, it is only one of many items in the record (including extensive testimony by Standard key officials and Standard's statements to this Court in its 1950 brief) which cannot be reconciled with Standard's present version of the facts. For example, see Appendix A, *infra,* setting forth Standard's Exhibit 52–B, which details the operation of Standard's dual price formula during the 1936–1940 period. So inflexible was this formula that Marshall, the manager of Standard's gasoline department (R. 1058), testified that the four "jobber" customers "under general industry practice [were] absolutely entitled to buy on the tank-car basis" (R. 1062); that "it would seem almost an absurdity for any supplier to approach such a purchaser on any other basis" (R. 1086); that such a purchaser "couldn't be sold on any other basis" (R. 1117); and that "he would just be silly to continue to pay us a higher price" (R. 1104).[10]

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[10] See also Marshall's testimony that "[i]n the oil industry we have a carload price and a tank wagon price and those who operate service stations have a service station price and these are the three units of purchase" (R. 1100). Again: "we have a tank wagon price, we have a tank car price, we don't have any

With respect to its answer, Standard does not, and cannot, deny that it made the detailed factual admissions concerning "its general policy and practice of bona fidely selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail resellers." But it argues (Br. 21, 39, 44) that those admissions were wholly directed to a separate defense of "functional customer classifica-

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service station price ourselves today because we don't operate service stations", (R. 1105; see also R. 1061–1062). And Raupagh, Standard's Detroit Division Manager, testified that Standard never departed from these two prices with the single "exception" (not material here) of the half-cent reduction to Ned's (R. 130, 167–169).

This testimony is in substantial accord with Fleming, *Oil Prices and Competition*, pp. 26–28 (published in 1953 by the American Petroleum Institute) (Italics in original):

"* * * another designation of prices is closer related to the retail or consumer-demand end. This includes the *tank-wagon price* and its usual corollary, the *tank-car price*.

"Competing methods long ago blurred the original meaning of these terms. But the *tank-wagon price* is still the established price of gasoline as delivered, originally by wagon, to the service station. It is, next to the price at the pump itself, the grass-roots price in the business, sensitive to all the influences which affect the ultimate consumer.

"Next before it, the *tank-car price* was originally, as the name indicates, the price in tank-car (that is, much larger) lots. Today the *tank-car price* is usually the contractual price made by suppliers to jobbers or wholesalers, regardless of whether the gasoline comes by rail, barge, pipeline or tanker.

* * * * *

"*Tank-wagon prices* have a powerful influence on *tank-car* prices. They usually move up and down fairly closely. The supplier's *tank-car* price to the jobber generally reflects what the supplier feels is a reasonable margin under the prevailing *tank-wagon* price."

See also Cassady, *supra* note 8, pp. 180–181, 198, 307.

tion." Even if this claim were so, it would have no significance; a respondent cannot adjust the facts to suit the requirements of various defenses. We need not concern ourselves with that problem, though, since the section of Standard's answer dealing with its "good faith" defense (R. 17) specifically "realleges by reference" those paragraphs dealing with Standard's defense of "functional customer classification." In addition, as pointed out above, the Government is relying here, not only on Standard's answer, but rather its admissions throughout the prior proceedings.

As we stated in our main brief (p. 42), it is immaterial what words are used to describe Standard's pricing of gasoline to its 362 Detroit customers (although Standard's present objections to "policy," "practice", "system" are somewhat surprising since it was Standard itself which first introduced those descriptions of its pricing).[11] The important factor, we repeat, is not the label but the content—namely, that Standard's pricing is not directed to "individual competitive situations" and that it "constantly results in

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[11] Its answer (R. 13) referred to "its general policy and practice of bona fidely selecting and classifying gasoline customers" and "such system and practice of selection and classification of customers." See also, *e. g.*, the testimony of Marshall, the manager of Standard's gasoline department (R. 1060—"system") (R. 1062—"practice"); Boatwright, a Standard economist (R. 1375—"system"); Suffert, an official of the Texas Company (R. 1622—"practice"); Raupagh, Standard's Detroit Division Manager (R. 1887, 2065—"practice"). And, even in its exceptions to the trial examiner's report, Standard defended "the system of price differentials in the gasoline industry" (R. 5158).

[Standard's] getting more money for like goods from some customers than [it] does from others." *Staley,* 324 U. S. at 753; *Cement,* 333 U. S. at 725; *National Lead,* 352 U. S. at 431.

In the instant case, the admitted facts establish that Standard's pricing of gasoline to its 362 Detroit customers was pursuant to a discriminatory "policy", "practice", or "system" within the meaning of the *Staley-Cement-National Lead* doctrine:

> 1. Standard had but two prices for resellers: a "tank wagon" price to retail service stations, and a "tank car" price to so-called "jobbers" which was 1½ cents per gallon less than the "tank wagon" price.
>
> 2. Standard had fixed standards for determining which resellers would be charged the tank wagon price and which the tank car price.
>
> 3. The requirements for classification as a "jobber" were: a large volume of distribution (1 to 2 million gallons annually), a bulk plant capable of accepting deliveries of gasoline in tank car quantities, means of making deliveries from the bulk plant, and adequate credit standing.
>
> 4. These requirements were inflexible and rigidly followed; Standard would lose a customer before it would depart in any way from them or before it would increase the 1½¢ differential.
>
> 5. Every price found to be discriminatory in this proceeding was in exact accord with this pricing formula.

These five elements can add up to nothing other than a pricing "policy", "practice", or "system".

As a corollary to its denial that its pricing was pursuant to a "policy", "practice", or "system," Standard (Br. 39–40) denies that such pricing is common in the oil industry. But this too is directly contrary to the testimony of Standard's officials (R. 1073–1074, 1887). It is also contrary to the examiner's report (see *infra,* pp. 22–23), which Standard accepted in the court below (see *supra,* pp. 3–4). And, not content with the examiner's findings in this connection, Standard filed an exception (R. 5159):

> To the failure of the Trial Examiner to report on the following questions necessary to the decision of this case, to wit:
>
> (a) Is the trade practice complained of in these proceedings one which is widespread throughout the whole oil trade or industry in the United States, as well as in the Detroit, Michigan, area?
>
> This exception is made upon the ground that testimony was introduced to show that in the oil industry (1504, 1717, 1723, 2766, 2768, 2771) and in industry generally (1651), the dual type of merchandising operation here complained of is *universal throughout the United States;* thereby indicating the propriety of a Trade Practice Conference, in lieu of this proceeding. [Emphasis added.]

In addition, Standard stated (R. 5158) that:

> The evidence is uncontradicted in this proceeding that there are literally thousands of

> situations in the middle west, and in the entire United States, comparable to the operations of the four jobbers of Respondent in Detroit (1723). It is also established by the record (1764) that the *system of price differentials in the gasoline industry* is economically sound and fundamentally essential in the conduct of the business. [Emphasis added.]

Even the Commission *dissenting* opinion, on which Standard (Br. 64–65) now places so much emphasis, recognized that the discriminations involved here were pursuant to an industry "policy." The dissent urged that Section 2 (b) entitled Standard to continue adhering to the "policy" (R. 5418, 5419, 5420)—not that no such "policy" existed. And the dissent stated (R. 5416): "it was not an arbitrary classification by [Standard] * * * to favor these four jobbers with lower prices, inasmuch as the companies were qualified for ["jobber"] status *according to the commonly accepted standard in the industry.*"[12] (Emphasis added.) The dissent also pointed out (R. 5405) that "The basic, customary and prevailing *standards for qualification as a 'jobber' in the gasoline industry* are that the applicant for this status must possess a bulk storage plant, must possess a good credit rating, and must have some established business enabling it to purchase from one million to two million gallons per year" (emphasis added).

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[12] The Commission majority, of course, rejected industry practice as a justification for Standard's alleged functional classification (R. 5371–5372). This Court has since confirmed the correctness of the Commission's conclusion that competition in reselling is the decisive factor. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 474–475. See p. 28, *infra.*

On the other hand, the Commission in this case has never charged, as Standard now intimates (Br. 39–40, 43–44), that all suppliers in the industry follow this practice,[13] or that those who do are in collusion, or that their prices are at all times precisely identical. By rebutting these fictitious contentions, Standard would presumably convey the impression of having undercut the Government's basic premise. But the Government has never made those contentions and does not make them now. Accordingly, Standard's arguments (Br. 29–35) that "The Competitive Turmoil in Detroit Tolerated No Pricing System" and "The Wide Range of Aggressive Competitive Offers Contradicts Any Systematic Industry Pricing" are directed at issues foreign to this case. We have set forth, both above (pp. 16–17) and in our main brief (pp. 36–42), those elements of Standard's pricing which preclude Standard's "good faith" defense here.[14]

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[13] Even the Commission's "Question Presented" (Br. 2) states only "that *some* of the seller's major competitors employ the same pricing policy". (Emphasis added.) See also p. 6, n. 3, of our main brief, pointing out that Socony-Vacuum and Sun sell in Detroit only at the tank-wagon price.

[14] Of course, if this Court affirms the Commission's decision and if other refiners thereafter presist in the same discriminatory practice, the Commission will take the necessary steps to enforce compliance. Standard (Br. 18–19), in attempting to treat the dismissal "without prejudice" of the three related com-

Standard's effort to impute a more drastic position to the Commission can only serve to becloud the real issues.

D. THE REPORT OF THE HEARING EXAMINER IS BASICALLY IN ACCORD WITH THE COMMISSION'S FINDINGS

Throughout Standard's brief (*e. g.*, pp. 13, 53) recurs the suggestion that there is a conflict on the "good faith" issue between the Commission's findings and the report of the hearing examiner. No such conflict exists, as we shall show.

But it should first be pointed out that, under the Commission's rules then in effect (1943), the examiner's report was "advisory only", *and the report itself so states* (R. 5128). 5 Fed. Reg. 2423, 2426, as amended, 6 Fed. Reg. 832, 833; 16 C. F. R. § 2.20 (Cum. Supp. 1938–1943). Such a report did not even have the effect of an initial decision, as is now the

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plaints (against Shell, Texas, and Gulf) as an abandonment of the proceedings, ignores the terms of the Commission's dismissal order and the fact of the Commission's initiation of an up-to-date investigation against the three companies. See our main brief, pp. 36, 47–48, n. 27. As there pointed out, it accordingly cannot be said, as the court below remarked (R. 5501), that there is "no contention and not even a suspicion but that the competing prices which [Standard] met were lawful." On the other hand, the court was obviously correct in stating that the Commission made "no finding" of illegality of competitors' prices. The Commission could not have done so since Standard—which has the burden of proof on the "good faith" issue—adduced no evidence as to the legality of its competitor's prices (although it did claim that its price policy was identical to the policies of some of its major competitors). See our main brief, pp. 6, 33–36.

case under the Administrative Procedure Act, 5 U. S. C. 1007, enacted in 1946. See 11 Fed. Reg. 7069. And Section 12 of the Administrative Procedure Act expressly provides that the Act's procedural requirements shall not apply retroactively to agency proceedings initiated prior to the effective date of those requirements. 5 U. S. C. 1011.[15]

In any event, the examiner's report is basically in accord with the Commission's findings. The examiner described Standard's "jobber" pricing policy (R. 5121), noted that each of the four "jobbers" met

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[15] See *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 583. See also the committee reports accompanying the Administrative Procedure Act: "The word 'initiated' in the final clause of the section means a proceeding formally begun as by the issuance of a complaint by the agency (irrespective of prior charges or investigations) or of notice of a rule-making hearing." S. Rep. No. 752, 79th Cong., 1st Sess., pp. 29–30; H. Rep. No. 1980, 79th Cong., 2d Sess., p. 47.

The decision in *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, on which Standard relies (Br. 65), is certainly not to the contrary. In that case, both the Taft-Hartley Act and the Administrative Procedure Act had supervened between the Board's order and the Court of Appeals decision; this Court did no more than hold "that the scope of the court's reviewing power was governed by the legislation in force at the time that power was exercised" (p. 500). By the same token, the scope of the hearing examiner's power in the instant case "was governed by the legislation in force at the time that power was exercised"—*i. e.*, before the Administrative Procedure Act. The mere fact of the remand after passage of that Act cannot retroactively change the status of the examiner's report under Section 8 any more than it could retroactively qualify the examiner under Section 11. Cf. *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 374.

Standard's criteria for the tank-car price (R. 5097-5098), and characterized all four (including Ned's, which resold exclusively at retail) as being, "*under industry practice* and contemplation, bona fide jobbers" (R. 5098). (Emphasis added.) As to the three "jobbers" other than Ned's, the examiner found that their selection and recognition by Standard as "jobbers" "were and are in *conformity with industry practice*" (R. 5098). (Emphasis added.) As to Ned's, the examiner was of the view that its recognition as a "jobber" was a "forced recognition given to retain that company's business" (R. 5098). The latter statement concerning Ned's was not accepted by the Commission, which found that the only subsisting offer open to Ned's— *i. e.*, from the Red Indian Oil Company on a gasoline ("Fleet Wing") which was a non-major "off brand"[16]—did not represent a serious competitive threat to Standard and that Standard did not meet this offer when it granted the tank-car price to Ned's (R. 5387). On the other hand, the Commission (R. 5388) recognized that Standard "had substantial reasons for believing" that it might lose the four "jobber" accounts if it did not regularly accord them the tank-car price, for the three other than

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[16] The president of Red Indian Oil Company testified (R. 3098): "My opinion is that Fleet Wing could not or is not considered a major brand gasoline and does not have the public acceptance of the four major brands previously mentioned." See also R. 1809 1810, 1815–1816, 1866.

Only nine bona fide "majors" operated in the Detroit area (R. 5106). See also Brief for Petitioner, *Standard Oil Co.* v. *Federal Trade Commission*, No. 1, 1950 Term, p. 6.

Ned's "had already been recognized as entitled to the tank car price *under the commonly accepted standards of the industry,* and Ned's had achieved a volume of distribution which brought it within the range where it was likely to be so recognized by a major oil company at any time." (Emphasis added.) "Thus," the Commission stated, "the real question is whether or not the actions of [Standard] in granting or continuing to these four dealers the tank car price *pursuant to and in accordance with its general policy* can be said to have been made in good faith within the meaning of Section 2 (b)." (Emphasis added.)

Standard (Br. 2, 10) somehow deduces a favorable answer to this question from the examiner's "Conclusion of Fact" that the price-differentials granted to the four "jobbers" were granted to meet equally low prices offered by competitors on branded gasolines of "comparable grade and quality" (R. 5104). But this "Conclusion of Fact," which is essentially the same as the last-quoted Commission finding (*i. e.,* that Standard "had substantial reasons for believing" that it might lose the four "jobber" accounts because all four qualified "under the commonly accepted standards of the industry"), says nothing of "good faith".[17] Moreover, since the *Staley* case (1945) was decided subsequent to the examiner's report (1943), he could scarcely have considered the impact of that decision or the still later *Cement* decision (1948). In these circumstances, attempting to divine the examiner's thinking on the "good faith" issue is of only academic interest. Suffice to say that his report is, as shown above, basically in accord with the Commission's findings.[18]

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[17] Standard (Br. 5–6, n. 3) apparently suggests that a "good faith" finding is implicit in the examiner's "Conclusion of Fact" because he recognized (R. 5105) the granting of the differentials as "lawful" except for his erroneous view that competitive injury precluded a Section 2 (b) defense. But if that argument shows anything, it suggests that possibly the examiner—as Standard now argues (Br. 28, n. 37)—believed the statutory language "in good faith" to be redundant in Section 2 (b). This Court's 1951 *Standard* decision, as well as *Staley,* holds

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to the contrary. See our main brief, p. 28. It appears, furthermore, that Standard itself doubted that the examiner had made any finding on the "good faith" issue; for Standard filed an exception "To the failure of the Trial Examiner, in the Conclusion of Fact on Page 55 of said Report, specifically to answer in the affirmative, *or at all*, the question as to Respondent's good faith, as propounded in the Sixth Question on Page 50 of said Report" (R. 5152). (Emphasis added.)

[18] Standard's argument (Br. 9–10) that the Commission itself had previously recognized Standard's "good faith" is merely a restatement of the argument which Standard made—unsuccessfully—when the case was last here in 1950. Standard then urged that no remand would be necessary because the Commission had allegedly recognized Standard's "good faith." Reply Brief for Petitioner, *Standard Oil Co.* v. *Federal Trade Commission*, No. 1, 1950 Term, pp. 1–5, 16. On the other hand, the Commission brief (pp. 44–46) stated:

"* * * we wish to emphasize that the Commission has not conceded as a fact that petitioner's discriminations in price were in good faith to meet equally low prices of competitors. If it is inferred that the Commission has conceded this fact, such concession must be considered only for the purpose of this decision and not as a concession of actual fact.

"The Commission has not considered petitioner's 'good faith' as a factual issue and has made no finding of fact thereof. If this issue had been considered, the Commission may well have

E. APART FROM THE SECTION 2 (b) DEFENSE, STANDARD'S DUAL PRICE "POLICY", "PRACTICE", "SYSTEM" IS CLEARLY UNLAWFUL

1. Notwithstanding Standard's suggestion to the contrary (Br. 61–63), its price discriminations involved here are clearly unlawful unless "good faith" has been established under Section 2 (b). Standard denies that there was "any competitive 'injury' cognizable under the Robinson-Patman Act" (Br. 61). But the "injury" issue is foreclosed by the earlier Court of Appeals decision on that issue (R. 5293–5294, 5300). Having failed to seek review of that portion of the decision when it petitioned for certiorari in 1949, Standard cannot reopen the issue now.[19] This was recognized by the opinion presently under review (R. 5495).[20] In any event, this Court's decision in *Fed-*

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made a vigorous interpretation of the 'good faith' proviso of Section 2 (b). * * *

* * * * *

"If this Court should conclude that the Commission erred in its interpretation of Section 2 (b) and that the judgment affirming its order should, therefore, be set aside, this should not result in a decision permitting the petitioner to continue its discriminations in price if, in fact, the petitioner is not in good faith meeting equally low prices of competitors. On the contrary, in that event, it is submitted that the Court should direct that this case be remanded to the Commission for determination of the issue of 'good faith' tendered by the petitioner under Section 2 (b)."

Rejecting Standard's argument to the contrary, this Court adopted the Commission's proposal and remanded the case to the Commission to make findings on the "good faith" issue (340 U. S. at 238, 251).

[19] See Petition for Certiorari, *Standard Oil Co.* v. *Federal Trade Commission*, No. 1, 1950 Term.

[20] The court below stated (R. 5495) that "a number of the original contested issues have been adjudicated. In fact, on the

eral Trade Commission v. *Morton Salt Co.*, 334 U. S. 37, holding that the Act requires only a "reasonable possibility" of competitive injury, is fully dispositive of the issue; here actual injury was found (R. 5168–5179, 5300).[21]

In fact, Standard's discriminatory policy bears a striking similarity to the cumulative volume "quota discount" involved in *Morton Salt*. On that phase of the case, this Court was unanimous in supporting the Commission's decision. The separate opinion of Mr. Justice Jackson, joined by Mr. Justice Frankfurter, states:

> * * * The quota discounts allowed a customer are not related to any apparent difference in handling costs but are based solely on the volume of his purchases, which in turn depends largely on the volume of his sales, and these in turn are surely influenced by his lowered costs which he can reflect in his retail prices.
>
> I agree that these facts warrant a *prima facie* inference of discrimination and sustain a finding of discrimination unless the Company, which best knows why and how these discounts are arrived at and which possesses all the data as to costs, comes forward with a justification. I agree, too, that the results of this system on

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present review there are only two contested issues"—*i. e.*, "good faith" and the terms of the order. The court did not reach the latter issue.

[21] In considering the question of injury, it should also be noted that salt—the commodity involved in *Morton Salt*—is but a relatively small item in the grocery business. In contrast, gasoline—the commodity involved here—represents the very foundation of a service station's business.

> respondent's customer list is enough to warrant the inference that the effects "may be substantially to lessen competition or tend to create a monopoly."
>
> Even applying the stricter test of probability, I think the inference of adverse effect on competition is warranted by the facts as to the quota discounts. It is not merely probable but I think it is almost inevitable that the further ten-cent or fifteen-cent per case differential in net price of salt between the large number of small merchants and the small number of very large merchants, accelerates the trend of the former towards extinction and of the latter towards monopoly.

334 U. S. at 59–60; see also p. 61.

In comparing Morton's "quota discount" and Standard's "jobber" discount, it is of course true that Standard, in addition to requiring a volume of at least one to two million gallons a year, also required its "jobbers" to maintain storage and hauling facilities. But such facilities, as Standard's witnesses testified (R. 152, 2089), are readily available.[22] Thus, for present purposes, the only material criterion for Standard's discount is the annual gallonage requirement. Moreover, as pointed out by the hearing examiner (R. 5115), the cost of maintaining storage and hauling facilities was less than a half-cent per gallon (see also R. 1124, 1818, 1821, 1879), whereas the differential regularly accorded the "jobber" customers was $1\frac{1}{2}$ cents per gallon—a discount of approximately 18.5% below the tank-wagon price Standard charged to its "non-jobber" customers.[23]

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[22] And Standard would not sell at the tank-car price to customers who had the facilities but lacked the gallonage (R. 179–180, 553, 557, 559). Nor would Standard permit tank-wagon customers to pool their purchases in order to meet the gallonage requirement (R. 147, 1256, 2084–2085).

2. Nor can this discount be justified on a theory of "functional classification" (Br. 18, n. 28, 34–35, n. 46). That defense too is foreclosed by Standard's failure to present the issue for review in petitioning this Court for certiorari in 1949. The defense, in any event, is patently without merit; for Standard's "classification of its customers did not follow real functional differences". *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 475.

As shown in the diagram set out in Appendix B, *infra,* Standard regularly sold at discriminatory prices to its 362 Detroit customers, all of whom competed in reselling to the consuming public. It is this factor of competition—rather than "ambiguous labels, which might be used to cloak discriminatory discounts to favored customers" (*Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 475)—which is controlling.[24] To the extent that the 362 customers do *not* compete (*i. e.,* with respect to wholesale sales to other retailers), the Commission's order (see *infra,* pp. 31–32) in no way precludes the continuance of the discount. The restraining effect of the order is, therefore, only on the gasoline which the "jobbers" themselves resell at retail.[25]

---

[23] This percentage is based on 1940 figures. See Appendix A, *infra.* According to Standard's witnesses, the "jobber" discount was much larger in other sections of the country (R. 127, 972, 1064, 1890).

[24] Standard (Br. 35, n. 46) is wholly in error in stating that this conclusion "appears repudiated by the Commission itself." As authority for that proposition, Standard quotes a single sentence from what it calls "the opinion of the Commission in *Doubleday & Co., Inc.*, Dkt. 5897." But, of the four Commissioners concurring in the decision in that case, only *one*—the author of the opinion—supported the sentence quoted by Standard. Two other Commissioners filed opinions expressly disagreeing; and the fourth Commissioner merely concurred in the

To reject this modest limitation on the ground that the so-called "jobbers" are entitled to a separate "functional classification", regardless of whether they resell at wholesale or retail, would be to defeat the very purpose of the Robinson-Patman Act. Almost any large buyer, after all, either maintains storage and hauling facilities or can easily obtain such facilities if it is to his financial benefit to do so. Congress, however, has decreed that a large buyer shall not have a price advantage over his smaller competitor "solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason

---

result, which in no way turned on the question of functional classification. CCH Trade Reg. Rep. Transfer Binder, par. 25,634 (1955). Moreover, six months later, the Commission unanimously rejected a similar argument in *General Foods Corporation,* Dkt. 6018, CCH Trade Reg. Rep. Transfer Binder, par. 25,888.

See Shniderman, *"The Tyranny of Labels"—A Study of Functional Discounts Under the Robinson-Patman Act,* 60 Harv. L. Rev. 571.

[25] And, even on this gasoline, the Act would not bar Standard from giving its "jobber" customers a discount commensurate to Standard's cost savings through selling in bulk. The defenses provided in the Act, including the cost justification and meeting competition defenses, are necessarily read into every order. See *Federal Trade Commission* v. *Ruberoid Co.,* 343 U. S. 470; *Federal Trade Commission* v. *National Lead Co.,* 352 U. S. 419.

of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 43.

II. THE BRIEF OF THE "JOBBER" *AMICI*

The brief of the "jobber" *amici* (Br. 8-16, 26–27) is principally devoted to an attack on the terms of the Commission's order (R. 5391–5393).[26] The answer is twofold.

1. As the "jobbers" themselves recognize (Br. 10), the terms of the Commission's order are not before the Court, since the court below expressly refrained from passing on that phase of the case (R. 5495). Even Standard (Br. 2, n. 2) "agrees that the validity of the Commission's cease and desist order, which the Court of Appeals had no occasion to adjudicate, is not now here."

2. In any event, the attack of the "jobbers" on the terms of the Commission's order is either without merit or without present significance.

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[26] The "afterthought" argument of the "jobber" *amici* (Br. 17–19, 26–27) rests *solely* on the Commission's use of the term "policy" instead of "system" in Paragraph 14 of its findings (see, *e. g.*, R. 5388). As we have repeatedly stated (*e. g.*, *supra*, pp. 15–16), either word is equally appropriate. Standard itself had no difficulty seeing the *Staley* doctrine in the Commission's decision. In its formal objections to the decision, even prior to its formal promulgation, Standard stated (R. 5351): "The Commission, in Paragraph 14, employs language taken directly from *Federal Trade Commission* v. *Staley Co.*, 324 U. S. 746 (1945). It seeks by the use of such language to create the aura of analogy of *Staley* to the facts of this proceeding * * *."

The heart of the Commission's order is paragraph 1 (R. 5392).[27] With respect to this paragraph, which limits the "jobber" discount to gasoline sold at wholesale to other retailers (as distinguished from gasoline which the "jobbers" themselves sell at retail), the "jobbers" charge that the result would be "snooping, deception, control and abuse" (Br. 13). No such result is even conceivable, since every gasoline retailer is required by law to maintain detailed records of retail sales for tax purposes (see, *e. g.*, R. 2094–2095). Nor is there any merit to the contention (Br. 12) that the order takes no cognizance of the distribution function performed by "jobbers" through their storage and hauling facilities. Section 2 (a) of the Act expressly allows "differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered"; and this Court's *Ruberoid* decision holds that the quoted proviso is read into every Commission order (343 U. S. at 475–476). Thus, Standard is free to grant a differential to the "jobbers" even on the gasoline which they themselves resell at retail; but the latter differential, based on Standard's cost savings, would necessarily have to be considerably smaller than the 18.5% discount involved here. See *supra*, pp. 27–28.

With respect to paragraph 2 (R. 5392), which would forbid Standard from discriminating "[b]y selling such gasoline to any retailer at a price known by [Standard] to be higher than the price at which any wholesaler-purchaser is reselling such gasoline to any retailer who competes with such direct retailer-customer of" Standard, the Commission has determined that it will not seek affirmance of that portion of the order. Paragraph 2 was included for the purpose of relieving what in essence was a "captive market" situation—that is, the inability of the "non-jobber" customers to obtain, either from Standard or from the wholesaler "jobbers," preferential prices which the wholesaler "jobbers" were granting in some instances to their sub-dealers. On the other hand, it was not the purpose of the Commission to require Standard to eliminate legitimate functional pricing or to make it responsible for the pricing practices of its wholesaler "jobbers." Because of the problems necessarily involved in the enforcement of paragraph 2, and in view of the need "to reconcile [an administrative] interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress" (*Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U. S. 61, 74), the Commission has now concluded that other methods (*e. g.*, a proceeding under Section 5 of the Federal Trade Commission Act or under Section 3 of the Clayton Act) would be more appropriate to reach the evil at which paragraph 2 was directed.[28]

---

[27] In fact, that portion of the complaint relating to paragraph 2 of the order was not part of the original complaint but was added by amendment (R. 34–36).

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[28] It should also be noted that the order, even without paragraph 2, forbids discrimination "directly or through any corporate or other device" (R. 5392). Thus, even without paragraph 2, the order is sufficiently broad to preclude Standard from using a subsidiary or "dummy" wholesaler to undercut Standard's tank-wagon customers.

The balance of the order is fully in accord "with the broader antitrust policies that have been laid down by Congress" (*ibid.*). In fact, it is difficult to see how the purpose of the Sherman Act, which also emphasizes price flexibility "in individual competitive situations", is much advanced by Standard's rigid adherence over the years to an inherently discriminatory pricing policy. Such a policy, on the other hand, cannot be reconciled with the commands of the Robinson-Patman Act, as we have sought to show above and in our main brief.

The judgment below, we respectfully submit, should be reversed.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
EARL E. POLLOCK,
Assistant to the Solicitor General.

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Federal Trade Commission.

NOVEMBER 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957

APPENDIX A

The following exhibit (R. 4872) was introduced by Standard in the administrative proceeding:

RESPONDENT'S EXHIBIT NO. 52-B

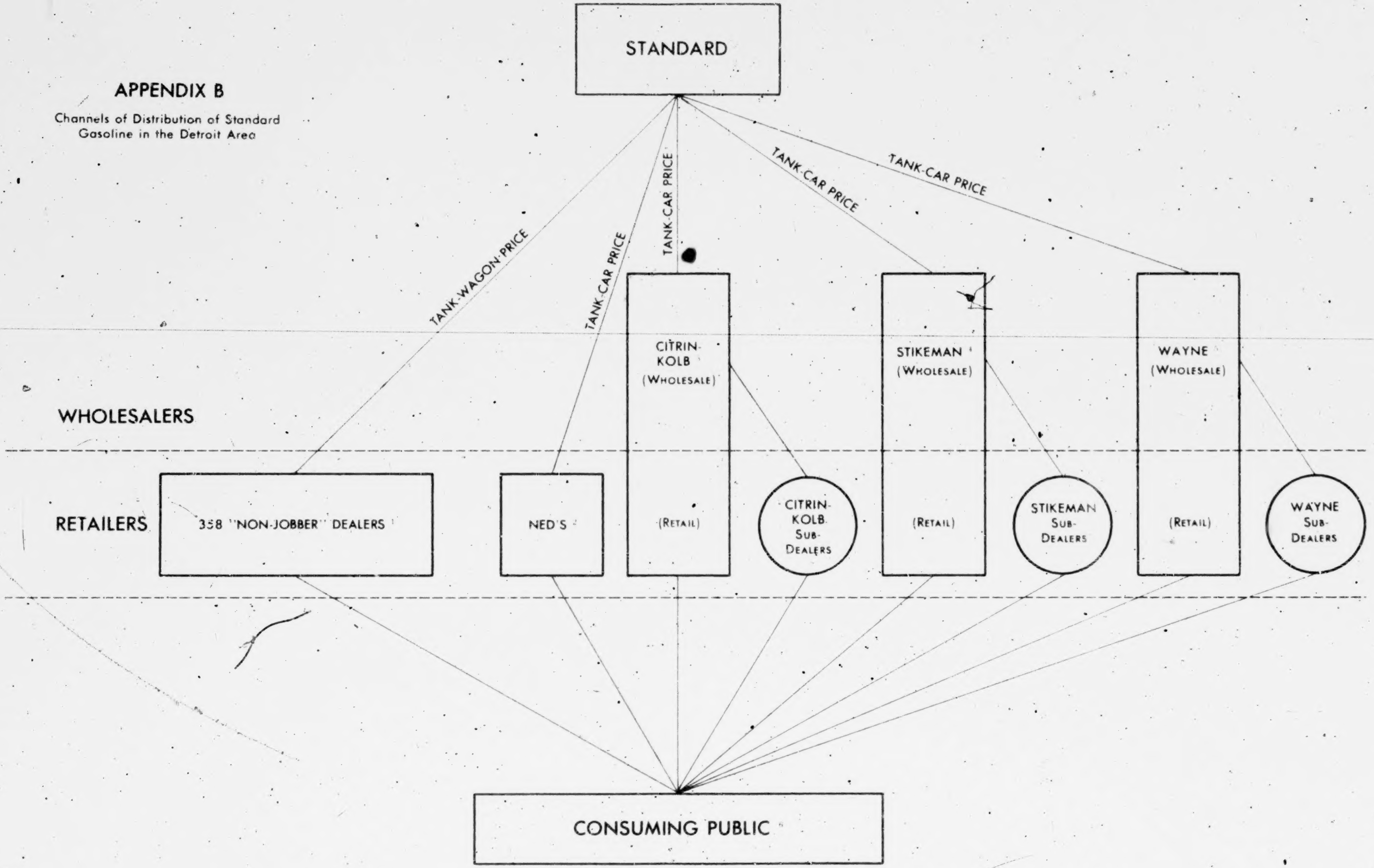
STATEMENT OF—DEALER TANK WAGON PRICES—JOBBER TANK CAR PRICES—JOBBER MARGINS—PREVAILING RETAIL PRICES—RETAIL DEALER MARGINS—ON STANDARD RED CROWN GASOLINE FROM JANUARY 1, 1937 TO MARCH 6, 1941

(All Prices Shown Are Cents Per Gallon Exclusive of All Taxes)
(Jobber and Retail Dealer Margins Shown in Cents Per Gallon)

Period	Dealer Tank Wagon Prices in Effect	Jobber Tank Car Prices In Effect at which purchases of four named Jobbers were billed	Jobber Margin, ie.: Difference between Dealer Tank Wagon Prices and Jobber Tank Car Prices in Effect	Prevailing Retail Service Station Prices in Effect on "Regular" Brand of Gasoline of Major Companies including the Standard Oil Company		Retail Dealer Margin Difference between Dealer Tank Wagon Prices & Prevailing Retail S.S. Prices in Effect
Jan. 1, 1937 to Feb. 2, 1937	9.0	7.5	1.5	13.0		4.0
Feb. 2, 1937 to May 12, 1937	9.6	8.1	1.5	13.6		4.0
May 12, 1937 to Nov. 3, 1937	9.9	8.4	1.5	14.1		4.2
Nov. 3, 1937 to Mar. 28, 1938	9.6	8.1	1.5	14.1		4.5
Mar. 28, 1938 to July 22, 1938	9.8	8.3	1.5	14.3	Mar. 28, 1938 to May 10, 1938	4.5
				13.8	May 10, 1938 to June 21, 1938	4.0
				12.3	Jun. 21, 1938 to July 22, 1938	2.5
July 22, 1938 to Dec. 9, 1938	8.8	7.3	1.5	12.3	July 22, 1938 to Sept. 6, 1938	3.5
				12.1	Sept. 6, 1938 to Dec. 9, 1938	3.3
Dec. 9, 1938 to April 10, 1939	7.6	6.35	1.25	10.0	Dec. 9, 1938 to Feb. 20, 1939	2.4
				10.7	Feb. 20, 1939 to Apr. 10, 1939	3.1
April 10, 1939 to June 17, 1939	7.6	6.1	1.5	10.7		3.1
June 17, 1939 to Oct. 31, 1939	8.1	6.6	1.5	11.4		3.3
Oct. 31, 1939 to Nov. 11, 1939	7.4	6.15	1.25	9.3		1.9
Nov. 11, 1939 to Nov. 18, 1939	6.4	5.4	1.0	9.3		2.9
Nov. 18, 1939 to Current Date 3-6-14	8.1	6.6	1.5	11.4		3.3

APPENDIX B

Channels of Distribution of Standard Gasoline in the Detroit Area


STANDARD
TANK-WAGON PRICE
TANK-CAR PRICE
TANK-CAR PRICE
TANK-CAR PRICE
TANK-CAR PRICE
WHOLESALERS
RETAILERS
358 "NON-JOBBER" DEALERS [1]
NED'S [2]
CITRIN-KOLB (WHOLESALE) [3]
(RETAIL)
CITRIN-KOLB SUB-DEALERS
STIKEMAN [4] (WHOLESALE)
(RETAIL)
STIKEMAN SUB-DEALERS
WAYNE (WHOLESALE) [5]
(RETAIL)
WAYNE SUB-DEALERS
CONSUMING PUBLIC [6]

---

[1] Approximately 81.7% of Standard gasoline sold in the Detroit area is sold through these 358 customers (RX23). 208 of the 358 are lessees of Standard under leases of a year or more (R. 5367; CX1A to 1D). The other 150 "non-jobber" customers are required by contracts to purchase all of their requirements of Standard gasoline at the tank-wagon price (R. 5367, CX2).

[3] Citrin-Kolb was first accorded "jobber" status and the tank-car price in 1928 or 1929 (R. 5369, 5385).

[4] Stikeman was first accorded "jobber" status and the tank-car price in 1932 (R. 5370, 5386). In 1938, Stikeman discontinued the operation of its own retail service stations (R. 5370).

[5] Wayne was first accorded "jobber" status and the tank-car price in 1935 (R. 5370, 5386).

[6] Throughout the proceeding, Standard has conceded that the "non-jobber" service stations [illegible] with the "jobber" stations in selling at retail to the consuming public (R. 9).

SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
NOV [illegible] 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956. 7

No. ~~465~~ 24

FEDERAL TRADE COMMISSION

vs.

STANDARD OIL COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Weymouth Kirkland,
Howard Ellis,
Hammond E. Chaffetz,
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November 28, 1956.

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Letter dated June 27, 1956 from the Acting Deputy Attorney General to the Chairman of the Senate Judiciary Committee, reprinted in Hearings Before the Antitrust Subcommittee of the House Judiciary Committee on Bills to Amend Section 2 of the Clayton Act, 84th Cong., 2d Sess., 688-89 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Appeals, rendered on May 3, 1956, is reported at 233 F. 2d 649, and is reprinted in the Appendix of the petition for certiorari.

QUESTION PRESENTED.

In 1951 this Court reversed the Federal Trade Commission's previous contention that respondent's defense of "good faith" meeting of a competitor's equally low price under the Robinson-Patman Act was defeated by the Commission's finding of competitive "injury." The case was remanded for the entry of appropriate findings on respondent's "evidence tending to prove that its tank car price was made to each 'jobber' in order to retain that 'jobber' as a customer and in good faith to meet a lawful and equally low price of a competitor." (R. 5311.)

On remand, a 3-2 decision of the Commission rejected respondent's "meeting competition" defense for lack of "good faith." "Good faith" was denied due to (1) respondent's alleged knowledge that its prices would cause competitive "injury"; (2) its inability to "cost-justify" these prices; and (3) the pricing "policy" or "method" pursuant to which it allegedly made the challenged price reductions to its four "jobber" customers in Detroit. (R. 5389.) This Commission's ruling was set aside by the Court of Appeals as unsupported legally and factually.

The Government here does not seriously contest the Court's reversal of the first two grounds of the FTC ruling against respondent. These elements in the Commission's decision were hardly defended by its counsel below, and are now relegated to a footnote in the Government's petition.[1]

Hence the question remaining is:

Whether the Court of Appeals correctly held that respondent's price reductions were granted as a defensive effort in individual competitive situations to hold four specified customers in the face of price raids by competitors, and therefore properly rejected the Commission's "afterthought" theory of a pricing "policy" or "method".

---

[1] Pet. 10, note 5. The Commission's lengthy brief below devoted less than a page to defending these two propositions. See note 8, *infra*.

STATEMENT

This sixteen-year old proceeding is here for the second time on the issue of the validity of respondent's "meeting competition" defense.

The Commission's complaint filed on November 29, 1940, charged that respondent's price reductions to four gasoline customers in Detroit between 1936 and 1940 constituted discriminations violative of the Robinson-Patman Act. Respondent defended its lower prices on several grounds, including its statutory defense that they were granted in good faith to meet a competitor's lower price. The Trial Examiner who heard the evidence found in 1943 that respondent's price reductions were in each instance made to meet a competitor's equally low price for gasoline of like grade and quality, and with the sole purpose of holding its four customers who were being actively solicited by rival suppliers at equally low or lower prices. (R. 5096, 5104.)

The Commission in 1945 evidently conceded the factual sufficiency of respondent's "meeting competition" defense, but declined to enter findings thereon. In its view, "even though the lower prices in question may have been made by respondent in good faith to meet the lower prices of competitors, this does not constitute a defense" in the presence of competitive "injury" on the customer level. (R. 5179, quoted by this Court at R. 5311.) The Court of Appeals in 1949 found that "There is substantial evidence in this record, and we think it may be assumed to be conclusive, to the effect that [respondent] made its low price to Ned's, Citrin, Wayne and Stikeman in good faith to meet the lower price of a competitor." (R. 5294.) But it accepted the Commission's legal theory and held that respondent's prices were "properly condemned by the Commission's order, notwithstanding [respondent's] discrimination in price was made in good faith to meet competition of its own." (R. 5299-5300.)

In 1951 that interpretation was reversed by this Court, which construed the "meeting competition" defense as "absolute" irrespective of alleged competitive "injury." (R. 5320-21.) This Court's opinion observed that respondent "presented evidence tending to prove that its tank-car price was made to each 'jobber' in order to retain that 'jobber' as a customer and in good faith to meet a lawful and equally low price of a competitor" (R. 5311); and noted that "the trial examiner for the Commission in the instant case has found the necessary facts to sustain the seller's defense, and yet the Commission refuses, as a matter of law, to give them consideration." (R. 5315).[2] Accordingly, the case was remanded for entry of appropriate findings by the Commission.

Two years after the remand, a 3-2 majority of the Federal Trade Commission issued "modified" findings which again disapproved respondent's "meeting competition" defense. These findings acknowledged that "It may well be that respondent was convinced that if it ceased granting tank car prices to Citrin-Kolb, Wayne, and Stikeman and continued to refuse the tank-car price to Ned's Auto Supply Company it would lose these accounts." (R. 5388.) Yet they ruled out respondent's defense for lack of "good faith." The two minority Commissioners independently reviewed the record and, upholding the Trial Examiner, concluded that "The respondent's price reduction was made in good faith to meet a lawful equally low price of a competitor." (R. 5421, 5393.)

The Court of Appeals unanimously set aside the majority findings. As the Court viewed the record, the evidence showed that respondent "was confronted with the problem of reducing its price to meet competitive offers or of forfeiting the business of the four jobbers." (App. to Pet. 23.)[3] The Court stressed that "there is no finding, no contention and not even a suspicion but that the competing prices which petitioner met were lawful." (App. to Pet. 26.)

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[2] The Government fails to overcome (Pet. 8, note 3) the observation of the Court below (App. to Pet. 21) that the factual sufficiency of respondent's defense was assumed on all levels of the previous review.

As for the first two grounds relied on by the Commission, the Court held that the Commission's renewed use of competitive "injury" to cut down respondent's defense was at odds with the prior decision of this Court, and that lack of cost justification—an alternative defense authorized by the Act—could not impair the "meeting competition" defense. (App. to Pet. 23-24.)

Finally, the Court rejected the Commission's theory that respondent's price reductions were granted pursuant to a preconceived discriminatory pricing method or system. The Court characterized this theory, which was advanced for the first time in 1953, as "an afterthought on the part of the Commission" (App. to Pet. 24) affirmatively contradicted by the evidence. The Court was "unable to discern any basis for the conclusion that [respondent's] prices 'were not the result of departures from a non-discriminatory price scale'." (App. to Pet. 26.) On the contrary, respondent "sold invariably at its uniform tank wagon price except when at different times it reduced its price to meet competitive offers in order to retain a customer." (*Ibid.*)

The Government at first publicly accepted the ruling below as a sound statement of law in accord with this Court's

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[3] The Court noted that "in the findings now under review the Commission does not expressly repudiate the findings of the Examiner in the original proceeding that petitioner's reduction in price was granted to meet the equally low prices offered by competitors." (App. to Pet. 22.)

1951 decision.[4] For reasons that are not apparent, there has now been a change of mind.

REASONS FOR OPPOSING GRANT OF THE WRIT

(1) The Government Raises a Hypothetical Legal Issue That Was Not Adjudicated Below.

As framed by the Government, the issue is whether the meeting competition defense "can be used to justify a lower price regularly granted to certain large customers pursuant to a long established and inherently discriminatory pricing policy maintained by the seller and by major competitors." (Pet. 2.) This statement of the issue presupposes that the decision below held that the "meeting competition" defense could be so employed. But such was not the holding of the Court of Appeals. That Court never reached and did not adjudicate the issue of whether a "long established and inherently discriminatory pricing policy" could be justified. What the Court held was that the record affirmatively disproved any such "policy" or "system." The Government thus presents a purely hypothetical issue for this Court's review.

The Court's emphatic rejection of the "system" theory resulted from examination of the record. The Court was "unable to discern any basis for the conclusion that [respondent's] prices 'were not the result of departures from a non-discriminatory price scale.' The record affirmatively demonstrates to the contrary. [Respondent] sold invariably at its uniform tank-wagon price, except when at different times it reduced its price to meet competitive offers in order to retain a customer." Besides, in the Court's view, "The bargaining and haggling which took place between [respondent] and the four involved 'wholesalers' prior to a reduction in prices to them is hardly consistent with the Commission's theory that prices were reduced pursuant to a system." (App. to Pet. 26.)[5]

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[4] See p. 13, *infra*.

In evaluating the record, the Court of Appeals concluded that the evidence contradicted the Commission majority's findings. The Court also accorded to the Trial Examiner's Report "such probative force as it intrinsically commands." *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, 495 (1951). That Report, which in this Court's view had "found the necessary facts to sustain the seller's defense" (R. 5315), held that respondent's differentials to its four jobber customers "were granted to meet equally low prices offered by competitors" and hence were "lawful"—except for the "competitive injury" theory which this Court later repudiated. (R. 5104-05.) The two dissenting Commissioners agreed with the Examiner on the basis of an independent study of the "8,000 pages of evidence in this record."[6]

To reach the issue which petitioner here seeks to raise, this Court would first have to plow through a voluminous record and overturn the lower court's conclusion that the pricing system theory was devoid of factual support. The Government's petition actually urges a *de novo* appraisal by this Court of the Commission majority's findings rather than a review of the correctness of the decision below which set them aside. (Pet. 9.)[7]

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[5] The Court remarked that respondent "over many years refused to give Ned's, 'its most valuable tank-wagon customer', any reduction at all despite persistent demands based upon competitive offers." (App. to Pet. 26-27.) The "reluctant grant of a ½¢ reduction to Ned's in 1936, increased to 1½¢ in 1938 in response to an 'ultimatum' by Ned's," appeared to the Court "to dispel completely any idea that such reduction in price was systematic, as urged by the Commission." (*Id.* at 27.)

[6] In the view of one Commissioner, "the respondent, having lost two customers because it would not meet the prices of its competitors, made up its corporate mind to hang on to what business it had left, and in good faith and what appears to me only ordinary common sense, lowered its price to that of its competitors." (R. 5393.) According to the other dissenting Commissioner, "All in all, the record convinces me that the respondent—in meeting some competitors' prices and in refusing to meet the prices of others—acted as a reasonable prudent person would have acted under the circumstances." (R. 5420.)

But this Court has consistently refused to undertake an evidentiary review of administrative findings. When agency rulings are set aside as unsupported, this Court will not duplicate the Court of Appeals' "conscientious consideration of the entire record." *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 503 (1951). This principle has been regarded as especially appropriate "where, as here, a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case." *Labor Board* v. *American National Insurance Co.*, 343 U. S. 395, 410 (1952).

(2) The Ruling Below Does Not Conflict With Decisions of This Court.

The Commission's rejection of respondent's "meeting competition" defense in 1953, following the remand, rested primarily on two untenable grounds that were virtually abandoned before the Court below, and to which only a footnote is devoted in the petition for certiorari. (Pet. 10, note 5.)[8] The ground relied on here—the only one which the Court below said "has any semblance of merit"—is that respondent's pricing is barred by this Court's *Staley* decision, 324 U. S. 746 (1945).

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[7] Petitioner even goes beyond the Commission majority's finding to draw support for its "system" theory from the answer filed by respondent to the original complaint. (See, *e.g.*, Pet. 4-5, 14-15.) But the averments of the answer (R. 14, 19) merely relate to respondent's policy of preferring to lose an account to a competitor rather than grant a tank car price to a customer who did not possess his own bulk storage and local delivery facilities, a minimum volume of business, and an adequate credit standing. Contrary to the Government's unsupported suggestions (Pet. 14-15), the record in no instance shows that respondent ever granted tank car prices *because* a customer met these requirements. Rather, respondent declined to reduce its prices even to hold a customer *unless* he met respondent's tests. The Court of Appeals thought that, consistent with the prior decision of this Court, "a seller must be permitted in the exercise of a sound judgment to determine when and under what circumstances it will reduce its price in order to meet that of a competitor, and a right to require that a purchaser be possessed of the facilities for storing, handling, and distributing the product." (App. to Pet. 27.)

Yet if the *Staley* ruling had any pertinence to this case, it is difficult to see why it was ignored by the Commission in its first disapproval of respondent's defense in 1945.

---

[8] The propositions that a respondent's "good faith" is impaired by alleged competitive "injury" and failure to cost-justify are obviously indefensible. To impugn "good faith" by reason of competitive "injury" is to reassert the former FTC theory disapproved by this Court in 1951 as rendering the "meeting competition" defense "practically meaningless." (R. 5320.) And clearly, failure to "cost-justify" cannot nullify the alternative "meeting competition" defense.

Also, respondent obviously had no obligation to revise its pricing after the passage of the Robinson-Patman Act in 1936. (See Pet. 10, note 5.) Its uniform price to all Detroit customers except as reduced in four instances to hold an established account against rivals' lower price offerings complied with the Clayton Act both before and after the 1936 amendments.

[9] (App. to Pet. 24.) The Commission majority's bias against the "meeting competition" defense as construed by this Court's 1951 decision has long been manifest. Almost simultaneously with its ruling against respondent, the same majority on March 16, 1953 advised Congress that "the present law, as interpreted by the majority decision of the Supreme Court in the Standard Oil of Indiana case (340 U. S. 231), is in the opinion of the Commission too weak to meet the problem to which the Robinson-Patman Amendment was originally addressed."

This FTC attitude toward the "meeting competition" defense has been criticized by numerous commentators. Dirlam & Kahn, *Fair Competition: The Law and Economics of Antitrust Policy*, p. 122 (1954) ["effort of the F.T.C. to emasculate this protective clause"]; Shniderman, *Federal Trade Commission Orders under the Robinson-Patman Act*, 65 Harv. L. Rev. 750, 752 (1952) ["considerable hostility"]; Note, *Functional Discounts Under the Robinson-Patman Act*, 67 Harv. L. Rev. 294, 298 (1953) ["unsympathetic attitude"]; Levi, *The Robinson-Patman Act—Is It in the Public Interest?*, ABA Antitrust Law Section Proceedings, pp. 60, 73 (Sept. 1952) ["notorious history"].

Then *Staley* was this Court's key and contemporaneous interpretation defining the scope of the "meeting competition" defense. The Commission would hardly have devised its novel "competitive injury" theory, later rejected by this Court as making the "meeting competition" proviso "practically meaningless" (R. 5320), if *Staley* invalidated respondent's defense. The Court of Appeals aptly labeled the Government's "pricing system" theory "an afterthought on the part of the Commission, advanced in an attempt to bring the case within the rule of the [*Basing Point decisions*]." (App. to Pet. 24.)

The *Basing Point Cases* have simply no relevance to the situation at bar. In *Staley* and the companion *Corn Products* decision[10] this Court outlawed nationwide "basing point systems" which were designed to raise glucose prices artificially by ensuring that all producers quoted identical prices to customers at every point of delivery—either through "freight absorption" or "phantom freight". Staley's meeting competition defense was disapproved because Staley failed "to show, as the statute requires, the establishment of a 'lower price' made in good faith to meet the equally low price of a competitor." 324 U. S. at 756. Instead, "they maintained their prices at the level of their competitors' high prices, based upon the competitors' higher costs of delivery, by including phantom freight in their own delivered prices." *Id.* at 754.[11]

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[10] 324 U. S. 726 (1945).

[11] The Government's umbrage at the statement of the Court below that the basing point systems served "to stabilize or increase but never to lower prices" (Pet. 13) is strange in view of this Court's quoted holding, as well as the recent analysis of *Staley* by the FTC's General Counsel: "In condemning a system which attached 'phantom freight' to certain sales, the Court held, positing the defense's availability in certain instances where prices were *lowered*, that it could not prevail in situations where prices had been *raised*." (Emphasis in original.) Kintner, *The Revitalized Federal Trade Commission: A Two-Year Evaluation*, 30 N. Y. U. L. Rev. 1143, 1165-66 (1955).

The *Basing Point Cases* thus did not concern the defensive effort of an individual seller to retain its customers by price reductions to cope with price raids of competitors. They condemned illegal pricing systems which produced artificial price uniformity and barred any competitive solicitation or customer shifts on account of price.[12] Indeed, when this case was here in 1951 the Court noted with reference to *Staley* that "In contrast to that factual situation, the trial examiner for the Commission in the instant case has found the necessary facts to sustain the seller's defense." (R. 5315.) And this Court read *Staley* as proceeding "upon the assumption, applicable here, that if a competitor's 'lower price' is a lawful individual price offered to any of the seller's customers, then the seller is protected, under § 2(b), in making a counteroffer provided the seller proves that its counteroffer is made to meet in good faith its competitor's equally low price." (*Ibid.*)

The Court of Appeals accurately perceived the difference between the *Basing Point Cases* and the situation at bar. It remarked that "The gist of the reasoning of the Supreme Court in those cases was that the pricing system being illegal all prices determined thereby were illegal. It follows, according to such reasoning, that the meeting by the seller of a competitor's unlawful price precludes the seller from reliance upon a 'good faith' defense." (App. to Pet. 25-26.) And the Court emphasized that "in the instant situation there is no finding, no contention and not even a suspicion but that the competing prices which petitioner met were lawful." (*Id.* at 26.)[13] Rather than conflicting with *Staley*, as petitioner urges, the decision below implemented *Staley* in every respect.

---

[12] As characterized by the Court in the *Cement Institute* case, the most recent of its *Basing Point* decisions, the system was a "handy instrument to bring about elimination of any kind of price competition." and resulted in cement being sold "in every given locality at identical prices and terms by all producers." 333 U. S. 683, 713 (1948).

(3) The Suggestion That the Ruling Below Will Govern Other Cases Is Baseless.

No basis exists for the Government's assertion that review of this case "will have a controlling effect on pending litigation involving other industries." (Pet. 17.) Three FTC rulings rejecting "meeting competition" defenses for discriminatory discount systems—not the meeting of individual competitive offers as here—are presently under review by the Court of Appeals that rendered the decision below. Despite the Government's professed fears, not one of those petitioners either in briefs or oral argument has urged or even cited the ruling in the instant case.[14]

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[13] Petitioner's insinuations concerning "parallel pricing systems" which respondent's competitors might defend as meeting respondent's prices are gratuitous and speculative. (Pet. 16.) The Commission's ruling adverted to pending proceedings instituted against three of respondent's competitors, but did not find that the prices quoted to respondent's customers by these three or numerous other competitors were unlawful or that respondent had any reason so to believe. (R. 5389-90.) Whether these three competitors would assert or could successfully invoke the "meeting competition" defense is wholly conjectural. Moreover, any *Staley*-type industry-wide pricing system is refuted by respondent's loss of valuable customers to two of these competitors as well as the active price solicitation and capture of its customers by numerous other gasoline suppliers. (*E.g.*, R. 1912-16, 489-90, 560-61, 2079, 5100-04.) Respondent's share of the Detroit market during the relevant years shrank substantially. (R. 5061.)

Petitioner's effort to taint respondent's pricing with such sinister nouns as "dual price formula" (*e.g.*, Pet. 14) as well as its allusions to potential attempts by respondent "to manipulate its overall price scale upward" which "the consuming public will have to subsidize" (Pet. 14) are unworthy and destitute of a single record reference. Each is belied by scholarly studies of the Detroit gasoline marketing background of these proceedings. See Note, *Functional Discounts under the Robinson-Patman Act: The Standard Oil Litigation*, 67 Harv. L. Rev. 294, 312-17 (1953); and esp. *id.* at 315 n. 91; McGee, *Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case*, 23 U. of Chi. L. Rev. 398, 462-66 (1956). Cf. Note, *The Swinging Door—Or How to Obey One Antitrust Law by Violating Another*, 59 Yale L. J. 158 (1949).

The reason is obvious: The decision below does not control the legality of discriminatory "pricing systems," but is predicated on the facts of this case which show defensive price reductions to individual customers quoted to meet competitors' lower offers.

The Government itself so analyzed the ruling below prior to petitioning for certiorari. According to the Department of Justice last June, that decision did "not broaden the scope or adversely affect what we consider to be the merits of a section 2(b) defense"; and "pricing differences may, we emphasize, be justified under existing law only in response to individual competitive situations and may not be extended beyond what is necessary to meet good faith offers of competitors."[15] Furthermore, a unanimous Federal Trade Commission in July approved a trial examiner's ruling because it "correctly held that respondents had failed to make out a defense of meeting competition in good faith through their practices of meeting competition generally rather than specifically, meeting a practice rather than a price, aggressive rather than defensive merchandising methods."[16]

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[14] *E. Edelmann & Co.* v. *Federal Trade Commission*, Dkt. No. 11500 (7th Cir. pending); *Whitaker Cable Corp.* v. *Federal Trade Commission* Dkt. No. 11494 (7th Cir. pending); *C. E. Niehoff & Co.* v. *Federal Trade Commission*, Dkt. No. 11526 (7th Cir. pending).

[15] Letter dated June 27, 1956 from the Acting Deputy Attorney General to the Chairman of the Senate Judiciary Committee; reprinted in *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee on Bills to Amend Section 2 of the Clayton Act*, 84th Cong., 2d Sess. 688-89.

[16] *Henry Rosenfeld, Inc.*, 3 CCH Trade Reg. Rep., par. 26,068 at p. 35,926 (FTC July 2, 1956). That decision also held the defense unavailable on other statutory grounds.

CONCLUSION

The decision below is clearly correct and fully supported by a bulky record which covers transactions dating back two decades. Its holding turns on the facts of the instant case and generates no legal principles of wider application capable of influencing other proceedings involving different situations.

For the above reasons, respondent respectfully submits that the petition for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 24

FEDERAL TRADE COMMISSION,
Petitioner,
vs.
STANDARD OIL COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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IN THE

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OCTOBER TERM, 1957.

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Petitioner,
vs.
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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 5495-5502) is reported at 233 F. 2d 649. The majority and dissenting findings of the Federal Trade Commission, before and after this Court's remand, appear respectively at R. 5161-82, 5257-69, and R. 5364-90, 5393-5421. The Hearing Examiner's Report appears at R. 5047-5128.

JURISDICTION.

The petition for certiorari was filed on September 28, 1956, and certiorari was granted on December 17, 1956 (R. 5504). The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

The essential matter at issue concerns the correctness of the Court of Appeals' unanimous decision, in accord with the detailed findings of the Hearing Examiner, that the record "firmly established" that respondent's lower prices were made in good faith to meet the equally low price of a competitor (R. 5502).

In so holding, the Court of Appeals decided that the record affirmatively disproved the existence of any pricing system. The court held that the record "affirmatively demonstrates to the contrary," since respondent "sold invariably at its uniform tank wagon price except when at different times it reduced its price to meet competitive offers in order to retain a customer" (R. 5501). Accordingly, the legal status of discriminatory pricing systems, asserted by petitioner as the issue, is actually not presented in this review.[1]

Related questions are whether asserted knowledge by respondent that its lower prices (1) could not be cost-justified, and (2) would cause competitive "injury", can, as a matter of law, defeat its meeting competition defense.[2]

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[1] The Question Presented by the Commission hypothesizes a meeting competition defense tendered by a seller to justify a regularly granted "discount" pursuant to its "inherently discriminatory" pricing policy "on the ground that some of the seller's major competitors employ the same pricing policy" (Br., p. 2). But respondent never rested its defense on such grounds (pp. 45, 71-76 *infra*), its defense was not sustained by the Examiner on such grounds (pp. 7-9 *infra*), nor did the decision below turn on such grounds (pp. 14-15, 24-28 *infra*).

[2] Respondent agrees that the validity of the Commission's cease and desist order, which the Court of Appeals had no occasion to adjudicate, is not now here (Pet. 8 n. 2; Br., p. 59). However, respondent does not waive the serious questions as to this modified order. See Brief for Petitioner before the Court of Appeals, p. 26 *et seq.*

STATUTE INVOLVED

Section 2(a) and (b) of the Clayton Act, as amended by the Robinson-Patman Act, in pertinent part provides:

> "(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * * *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade. * * *
>
> "(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his

lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U. S. C. § 13(a)(b) (1952).

STATEMENT.

At the time of the issuance of the Commission's complaint in 1940, respondent supplied several hundred dealer-customers in Detroit at its uniform tank wagon price, and sold to four "jobber" customers at its 1½¢ per gallon lower tank car price. At different times over the years, respondent had been compelled by competition to grant a competitive tank car price to these customers, after they had acquired bulk storage facilities, enabling them to receive gasoline in large tank car lots, and tank wagon delivery equipment, enabling them to supply service stations in tank wagon quantities. These customers, in other words, undertook to perform the various distributive operations known in the industry as the "jobber" function.

Competitors repeatedly solicited respondent's customers with offers of gasoline at lower prices. Having lost three other jobber customers through such competitive offers, respondent determined to defend itself by meeting its competitors' price offers in order to hold these four accounts. The resulting lower prices granted by respondent in self-defense to these individual customers after 1936 were challenged in the Federal Trade Commission's complaint as price discriminations violating the Robinson-Patman Act.

This review concerns the Court of Appeals' unanimous decision holding on the facts that respondent's lower prices were "made in good faith to meet an equally low price of a competitor", and that respondent had fully established its statutory defense under Section 2(b).

The Court of Appeals set aside the FTC order which had been entered by a divided Commission in 1953 subsequent to remand from this Court. That remand followed the 1951 decision in which this Court overruled the original position of the Commission majority that the meeting competition defense was not available whenever asserted competitive "injury" was present. Respondent's meeting competition defense was rejected this second time by the Commission majority notwithstanding its concession that respondent "was convinced" and "had substantial reasons for believing" that "it would lose these accounts" unless it granted the lower prices (R. 5388).

The Commission majority thus maintains that respondent had no choice but to let these customers go to its competitors.

The Essential Facts.

The Commission's complaint filed in 1940 challenged respondent's prices to four specified Detroit customers as discriminatory in violation of the Robinson-Patman Act (R. 3). The Examiner who presided over months of hearings filed a comprehensive Report in 1943 detailing the salient facts (R. 5047-5128). He framed the contested issues (R. 5054-56), summarized the relevant data in the voluminous record, reached specific Conclusions of Fact, and resolved each legal issue by reference to these factual findings. Although he acceded to the Commission's original legal theory—later overruled by this Court (R. 5320)—that the presence of so-called competitive "injury" made the Section 2(b) defense unavailable to respondent as a matter of law, the Examiner concluded that respondent's defense was established factually (R. 5096, 5104-5, 5125).[3]

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[3] The Commission's brief implies (p. 24 n. 11) that the Examiner, although finding that respondent's prices were made to meet competition, omitted to find that this was done in "good

Respondent was "set up primarily and fundamentally on a tank-wagon distribution basis" in Detroit, and typically delivered gasoline from its six bulk plants in the area to retail service stations in tank wagon quantities (R. 2623, 108-9).[4] Only four of respondent's approximately 360 Detroit customers purchased at the jobber tank car price. One commenced to buy on this basis in 1929, another in 1932, a third in 1935, and the last in 1938 (R. 5059-60)—in each case under circumstances where respondent was compelled to sell in tank car quantities at a tank car price or lose a long-time customer to a competitor.[5] Respondents could not hope to retain these four customers unless it granted them the tank car price (R. 1086, 1291-92, 1300, 1310, 1893).

The four Detroit jobber customers, Ned's Auto Supply Company, Citrin-Kolb Oil Company, Wayne Oil Company, and Stikeman Oil Company, had sold respondent's gasoline for many years.[6] Ned's, a family enterprise,

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faith." But the Examiner's Report itself is clear in resolving in respondent's favor the "Sixth Question" as to whether the prices at issue were "made in good faith to meet equally low prices of competitors" (R. 5099, 5104-5); the minority Commissioners on two separate occasions expressly adopted the Examiner's findings that respondent's lower prices were made in good faith to meet competition (R. 5420, 5264); the Court of Appeals so understood twice (R. 5294, 5299-5300, 5497, 5502); and this Court observed in 1951 that the Examiner had "found the necessary facts to sustain the seller's defense" (R. 5315).

[4] Respondent's Detroit retail dealers took delivery in 700-800 gallon tank wagon lots, and paid respondent's uniform tank wagon price in Detroit (R. 5058, 112). Contrary to the Commission's brief (p. 4 n. 2), retailers of Standard's gasoline frequently also handled a competing brand (R. 222, 266).

[5] See pp. 7-9, 31-39 *infra*. At various times in the past respondent had three other jobber customers in Detroit, which, despite respondent's sales to them at the tank car price, went over to competitors who offered more favorable prices (R. 1912-16).

[6] Both Wayne and Stikeman functioned essentially as wholesalers, not in competition with respondent's retail customers in Detroit. Wayne operated no retail service stations until 1939, and thereafter only on an "emergency" basis when it could not find a lessee for its station properties (R. 398, 5059). Stikeman had no retail operations since 1938 (R. 5060).

had purchased respondent's gasoline as a retailer since 1918. Even though Ned's at least since 1930 "had received offers from responsible companies handling branded gasolines comparable in quality to those furnished by respondent at substantially lower prices" (R. 5093-94, 1800-14), it was refused any price reduction by respondent until 1936. In that year Ned's received a ½¢ per gallon reduction when respondent finally yielded to an "ultimatum" stating that Ned's had "definitely decided" to accept a competitive offer unless it "got a better deal from the Standard Oil Company" (R. 5093-94, 1813). After a second "ultimatum" in 1938 threatening that otherwise Ned's "would quit purchasing from respondent and accept a competitive offer" (R. 5100-1, 1819-20), respondent agreed to sell to Ned's in tank car quantities at 1½¢ per gallon below respondent's tank wagon price.

Citrin, a retailer customer of respondent since approximately 1922, after first talking with another supplier and then negotiating for weeks with respondent, obtained its 1½¢ lower tank car price in 1929 (R. 5060, 1253-55, 265).[7] Subsequently Citrin received intermittent competitive offers for gasoline at equally low or lower prices than respondent's tank car price (R. 5102-3, 1260-1303). In one instance in 1936, a contract with a competing supplier at more favorable terms was actually drawn up and executed. Although Citrin was finally dissuaded from consummating the deal, respondent necessarily kept Citrin at its tank car price (R. 5103, 1282-92).[8]

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[7] Thereafter Citrin operated largely as a wholesale distributor, and only sporadically operated retail stations when no lessee was available (R. 5060, 1275-76, 859).

[8] Stikeman, organized in 1931, had switched its business temporarily when offered a better tank car price by a competitor (R. 2013), and respondent obviously could get Stikeman back only as a tank car buyer and by meeting that price. Wayne originated as a retail service station operator in 1931 supplied by respondent at its tank wagon price (R. 378, 404, 982-4), and for two years sought

Respondent in each instance only reluctantly departed from its uniform tank wagon price in Detroit, and never granted any reductions greater than 1½¢ per gallon. It preferred to, and actually did, lose customers to competitors rather than grant any greater concessions.[9] Furthermore, respondent would rather lose an account than grant this maximum 1½¢ reduction unless the customer acquired his own bulk storage plant and trucks—permitting delivery by respondent in tank car lots averaging 8,000-12,000 gallons, as contrasted with the average 700-800 gallon deliveries to tank wagon customers (R. 112, 122),—and demonstrated a substantial volume of business and adequate credit responsibility (R. 5058, 2086, 1891-97, 118-19). To this extent the 1½¢ reduction was offset by the customer's required expenditure in the acquisition and maintenance of plant and equipment and his performance of the wholesaling operation which respondent itself undertook for its tank wagon customers (R. 951, 1013-16, 1031, 1895-97).[10] These tank car customers were classified as "jobbers" by respondent and accredited as such by the Michigan licensing authorities (R. 5059).[11]

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the price reduction that respondent finally granted late in 1935 (R. 379, 983-4), after Wayne purchased Pure gasoline at 1¢ per gallon under respondent's tank wagon price (R. 5101, 1156, 985, 404).

[9] (R. 1912-16.) The 1½¢ per gallon spread between tank car and tank wagon deliveries was typical of respondent's prices during the relevant period, although the differential narrowed to 1¼¢ and even 1¢ at times in 1938 and 1939 (R. 5110, 4872). Respondent's 1½¢ price differential was the smallest quoted to tank car buyers by any supplier; other suppliers sold at a wider differential (R. 1890, 1064, 951).

[10] See p. 63 *infra*.

[11] This conservative exercise of respondent's statutory right to meet competition also furnished the basis for the "alternate affirmative defenses" asserted in its answer: that its challenged prices were granted pursuant to an appropriate functional customer classification; and also were cost-justified in view of the tank car buyer's assumption of the costs of performing the jobber function (R. 12-14, 16, 5050-51); pp. 45-47, 59 *infra*.

The Examiner's Findings Sustaining the Meeting Competition Defense.

The Examiner found that respondent throughout the period at issue was faced with the alternative of losing the four customers or continuing to grant the lower prices (R. 5104, 5121-22). As the Examiner reported respondent's uncontroverted testimony, they "buy on a day to day basis," and "the jobber market is subject to intense competition and frequent attempts by Standard Oil Company's competitors to proselyte accounts by offering more advantageous terms and service." They "could purchase from many other sources, immediately, a gasoline of comparable quality and at a better price than they are paying at the present time" (R. 5104).

Accordingly, the Examiner concluded as a fact that respondent's ½¢ per gallon reduction to Ned's between 1936 and 1938 "was made to meet an equally low or lower price of a competitor or competitors for branded gasolines of comparable grade and quality and to retain Ned's Company's business" (R. 5096, 5121); and that respondent's 1½¢ lower tank car price, obtained by Ned's after 1938 and by the three other customers before, was "at all times granted to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality" (R. 5104, 5122).[12]

The Commission's Original Assumption That the Defense Was Established.

In its original ruling in 1945, the Commission evidently conceded the factual sufficiency of respondent's meeting competition defense, but nullified its force by resort to the novel legal theory which this Court later reversed. Commission counsel expressly waived the factual issue in oral argument before the Commission.[13] The Commission's report declared that "even though the lower prices in question may have been made by respondent in good faith to meet the lower prices of competitors, this does not constitute a defense" in view of the finding of competitive "injury" on the customer level (R. 5179).

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[12] The Examiner, although finding respondent's defense factually established, acceded to the Commission's legal theory that proof of competitive "injury" ruled out the meeting competition defense (R. 5105, 5125).

The Commissioner writing the dissenting opinion stated that "the respondent proved that it had granted a lower price in good faith to meet a competitor's price. The trial examiner who heard the case so held, and I as a Commissioner would so find."[14]

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[13] Respondent in argument on motions for reconsideration in 1946 pointed out that reversal of the Commission's legal theory "must inevitably result in the dismissal of the complaint in this case, because proof adduced by the respondent on the point of self-defensive meeting of competition stands uncontroverted on this record." FTC counsel acknowledged that "apparently no evidence controverting it was offered. Desiring to test the legal status of such defense, the Commission found that it was not material as a matter of law whether such defense could be sustained as a matter of fact under the circumstances of this case. Accordingly, it made no finding on the factual question. *The result, I suppose, is the same as though the existence of the respondent's good faith to meet an equally low price of a competitor had been conceded.*" Transcript of Oral Argument before FTC, pp. 16-17, 101 (April 25, 1946). (emphasis added throughout.)

This waiver concerning the factual sufficiency of respondent's defense was avowedly designed and admittedly essential to permit a judicial determination of the Commission's novel construction of Section 2(b). *Id.* at 101-2. Also in this connection, in *A. E. Staley Mfg. Co. v. Federal Trade Commission*, 135 F. 2d 453, 456 (7th Cir. 1943), the Commission was directed to rule on the sufficiency of such a tendered defense.

[14] As he put it, "In the instant case, the respondent, having lost two customers because it would not meet the prices of its competitors, made up its corporate mind to hang on to what business it had left, and in good faith, and what appears to me only ordinary common sense, lowered its price to that of its competitors" (R. 5264).

The Defense Deemed Established on First Judicial Review.

On the first judicial review of this proceeding in 1949, the Court of Appeals confirmed that

> "There is substantial evidence in this record, and we think it may be assumed to be conclusive, to the effect that [respondent] made its low price to Ned's, Citrin, Wayne, and Stikeman in good faith to meet the lower price of a competitor" (R. 5294).

The court also observed that

> "The showing made here by [respondent] that it made the lower price in good faith to meet competition, we assume, *as the Commission apparently did*, was made out. The effect of it was to rebut the prima facie case made by the Commission's proof of [respondent's] discriminatory prices. If nothing further appeared in this record, the case might well have ended there" (R. 5299).

But the court agreed with the Commission "that the showing of the [respondent] that it made the discriminatory price in good faith to meet competition is not controlling" due to the finding of competitive "injury" at the retail level (R. 5300).

This Court's Reversal of the Commission's "Injury" Theory and Remand for Findings:

That legal interpretation was reversed in 1951 by this Court which construed the "meeting competition" defense as "absolute" irrespective of asserted competitive injury (R. 5320-21). Proof of such "injury" being a jurisdictional prerequisite to any prima facie violation of the Act, the Court declared that the Commission's doctrine would leave the meeting competition proviso with "such little, if any, applicability as to be practically meaningless" (R. 5320).

The Court commented on respondent's "evidence tenc
ing to prove that its tank car price was made to eac
'jobber' in order to retain that 'jobber' as a customer an
in good faith to meet a lawful and equally low price
a competitor" (R. 5311), and specially noted that "th
trial examiner for the Commission in the instant case ha
found the necessary facts to sustain the seller's defens
and yet the Commission refuses, as a matter of law, to giv
them consideration" (R. 5315).[15] The case was remande
for "a Finding as to Whether or Not [Respondent's] Pric
Reduction Was Made in Good Faith to Meet a Lawf
Equally Low Price of a Competitor" (R. 5311).[16]

The Commission's Post-Remand Rejection of the Defens

Upon remand, a 3-2 Commission majority in 1953 on th
identical record once again rejected respondent's mee
ing competition defense.[17] The Commission did not direct

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[15] The dissenting opinion also acknowledged that "the el
ments" of respondent's defense are "likewise admitted" (R. 532

[16] At the close of oral argument, the Court requested Comm
sion counsel to inform it as to the status of proceedings again
some of respondent's Detroit competitors. The three complaints
whose pendency the Commission advised the Court in a Mem
randum filed on October 13, 1950, were dismissed by the Comm
sion on April 3, 1957, on motion of its staff. See pp. 19, 56 *inf*
While counsel urge that respondent's tank car price was never
price "reduction" (Br., pp. 26, 29), this Court's prior opini
throughout viewed respondent's lower prices as reductions—m
prominently in the above-quoted caption of part III of the opini

[17] At that time, the same majority also recommended statuto
revision, and advised Congress on March 16, 1953 that the law
interpreted by this Court in the instant case was "too weak to m
the problem to which the Robinson-Patman amendment was or
inally addressed."
The persistently negative FTC attitude toward the "meeti
competition" defense has been criticized by numerous commen
tors. Dirlam & Kahn, *Fair Competition: The Law and Econom*
of Antitrust Policy, p. 122 (1954) ["effort of the F.T.C. to emas
late this protective clause"]; Shniderman, *Federal Trade Comm*
sion Orders under the Robinson-Patman Act, 65 Harv. L. Rev. 7

challenge the fact findings of the Examiner in respondent's favor. Significantly, in the face of this Court's remand, the Commission did not refer in any way to the legality of the competitive offers met by respondent. The majority conceded that respondent "was convinced" and "had substantial reasons for believing" that "it would lose these accounts" if it ceased granting the lower tank car price (R. 5388).

But respondent's meeting competition defense was rejected this time by reason of its alleged knowledge that its prices would create competitive "injury" (R. 5389),[18] and its inability to cost-justify (R. 5389). The Commission also, for the first time in the case, purported to discover a "policy" or "method," assertedly used by respondent's competitors as well, pursuant to which the prices were said to be made (R. 5389).[19]

The two minority Commissioners, on the basis of an independent review of the record and the Report of the

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752 (1952) ["considerable hostility"]; Note, *Functional Discounts Under the Robinson-Patman Act*, 67 Harv. L. Rev. 294, 298 (1953) ["unsympathetic attitude"]; Levi, *The Robinson-Patman Act—Is It in the Public Interest?*, ABA Antitrust Law Section Proceedings, pp. 60, 73 (Sept. 1952) ["notorious history"].

[18] Rather than an "extraordinary assertion" on respondent's part that these considerations constituted the first two grounds of the post-remand ruling (Com. Br., p. 56 n. 35), the primacy in the Commission majority's mind of the competitive "injury" ground was publicly reaffirmed by one of the three majority Commissioners. He testified that it was essentially the presence of competitive "injury" which prompted the post-remand rejection of respondent's meeting competition defense. Testimony of Stephen Spingarn, in *Hearings before the House of Representatives Select Committee on Small Business on Price Discrimination, The Robinson-Patman Act and Related Matters*, 84th Cong., 1st Sess. 853 (Nov. 1955).

[19] The majority findings disposed of the numerous competitive offers quoted to respondent's customers by ignoring some, disparaging others as involving gasoline of lesser public acceptance, and disqualifying the rest as stemming from the similar pricing "policy" or "method" of competitors. See discussion at pp. 40-44 *infra*.

Examiner, found that "The respondent's price reduction was made in good faith to meet a lawful equally low price of a competitor" (R. 5420-21, 5393). In the words of the Commissioner writing the elaborate minority opinion, "the record convinces me that the respondent—*in meeting some competitor's prices*—and *in refusing to meet the prices of others*—acted as a reasonable prudent person would have acted under the circumstances" (R. 5420).[20] He also observed that "there is nothing in the 8,000 pages of evidence in this record which might cause me to suspect that the respondent knew, or that it had reason to believe, that the competitor's lower price which it was meeting was or might have been unlawful" (R. 5420).

The Court of Appeals' Approval of the Defense as "Firmly Established."

Under review now is the unanimous decision of the Court of Appeals holding respondent's meeting competition defense "firmly established," and setting aside the Commission majority ruling as untenable legally and factually (R. 5501-2). The court observed that "the Commission does not expressly repudiate the findings of the Examiner in the original proceeding that [respondent's] reduction in price was granted to meet the equally low prices offered by competitors" (R. 5498), and saw "no dispute as to the evidentiary facts as found by the Examiner in the original proceedings" (R. 5497).

The court set aside, as factually unsupported and contradicted by the record, the Commission's newly developed theory that respondent's prices were granted pursuant to a preconceived discriminatory pricing "method" and "policy." The court was "unable to discern any basis for the assertion that [respondent's] prices were not the result of departures from a non-discriminatory price scale.'" In the court's view, "The record affirmatively demonstrates to the contrary" (R. 5501).

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[20] Emphasis in original.

The court referred to the "bargaining and haggling which took place" as "hardly consistent with the Commission's theory that prices were reduced pursuant to a system" (R. 5501). The court also noted that respondent's "reluctant grant of a ½¢ reduction in 1936, increased to 1½¢ in 1938 in response to an 'ultimatum' by Ned's, would appear to dispel completely any idea that such reduction in price was systematic, as urged by the Commission" (R. 5501).[21]

Lack of cost justification and alleged knowledge of competitive "injury," the first two specific reasons cited in the Commission's report as invalidating respondent's defense (R. 5389), were disapproved as a matter of law. Failure to cost-justify, the court noted, could not defeat the alternative statutory defense of meeting competition (R. 5499). The injury contention was dismissed by the court as reflecting the very reasoning rejected by this Court's 1951 decision (R. 5498-99).

The court also remarked "that in the instant situation there is no finding, no contention and not even a suspicion but that the competing prices which petitioner met were lawful" (R. 5501).

And since the court found that respondent's practice of lowering its price to meet competition in individual instances was equally valid under the Robinson-Patman tests, before as well as after that statute amended the Clayton Act in 1936, it disapproved the further claim that respondent was obligated to revise its pricing at that time (R. 5499).[22]

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[21] Significantly, the Commission majority's report had not used the term "system." Counsel's appellate brief first adopted the term in support of an analogy to the cases condemning industry-wide geographic pricing systems.

The Issues Here.

Before this Court, Commission counsel's argument focuses on the "admissions" of a pricing system allegedly contained in respondent's 1941 answer to the Commission's complaint.[23] Although no "admissions" had hitherto been claimed by the Commission in fifteen years of litigation, counsel now take the position that "the Commission's findings of fact rest almost exclusively on these 'judicial' admissions" of a pricing system, and "do little more than rephrase these admissions." (Br., pp. 18, 38-39).[24]

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[22] The Commission (Br., pp. 52-58) disputes the court's statement that "If [respondent's] pricing policy was lawful prior to the amendment the same policy was lawful afterward" (R. 5499). This Court's prior opinion stated that under the Clayton Act respondent's evidence, "if accepted, would have established a complete defense to a charge of unlawful price discrimination," and viewed the precise issue to be "whether the amendments made by the Robinson-Patman Act deprived those facts of their previously recognized effectiveness as a defense" (R. 5312-13). The court below did not misconceive the well-known changes in the law wrought by the 1936 amendments, for none of these have any bearing on the issues presented by the record at bar. As this Court said, the 1936 change "restricts the proviso to price differentials occurring in actual competition" and "excludes reductions which undercut the 'lower price' of a competitor. None of these changes, however, cut into the actual core of the defense. That still consists of the provision that wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price" (R. 5313-14).

[23] The Commission's brief repeatedly quotes excerpts from respondent's alternative defense of functional customer classification to spell out a pricing system (pp. 5, 18-19, 38-39, 43), and reprints as an Appendix those paragraphs of the answer. To permit a fair evaluation of respondent's alternative defenses, respondent has reprinted in Appendix A at pp. 71-76 *infra* the parts of its answer relating to its meeting competition defense, which rests entirely on lower prices in individual instances to retain old customers solicited by competitive offers.

[24] This assertion renders redundant the months of hearings, years of litigation, and volumes of record which bring

But the entire system issue, which the Court of Appeals deemed "an afterthought on the part of the Commission" (R. 5499), was not mentioned in this case until after the Commission's original "injury" theory was repudiated by this Court in 1951. The bulky record at bar was built during hearings in 1941 and 1942. Although the Examiner covered every relevant facet of the case, no challenge to any pricing system was even implied in his 80-page Report, the FTC staff's exceptions thereto in 1943, or the Commission's original findings in 1945. In fact, the Examiner characterized respondent's classification of its four customers as jobbers, from which Commission counsel today purport to detect a sinister system, as "bona fide in all respects". (R. 5098-99).

Significantly, the landmark pricing system cases, *Staley* and *Cement Institute*, were in litigation before the Commission simultaneously with this case. The *Cement* complaint, filed in 1937, from the outset attacked the prevalence of an industry pricing "system", while the instant case instituted in 1939 challenged only individual prices of the respondent.[25] Months prior to the Commission's original ruling against respondent in 1945, reaffirmed in 1946, *Staley* was decided by this Court on grounds which barred a Section 2(b) defense founded upon systematic industry pricing.[26] The Commission obviously saw no system issue in this record when it then ruled against respondent's defense on other, entirely novel, grounds which need not have been invoked if an indefensible pricing system really was present.[27]

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this case here. It also raises the fundamental question of why the Commission waited so many years if all the factual proof it needed was supplied by respondent's answer back in 1941.

[25] Compare 37 F.T.C. 87, 102-3, 117, 124, with R. 3, 35.

[26] 324 U. S. 746 (1945).

[27] Actually, in *Cement Institute* the Commission in July 1943 had already disapproved a meeting competition defense for "sys-

The system issue featured before this Court today is thus of conspicuously belated origin.[28]

Notably in this connection, the Commission's petition for certiorari pointed to the "controlling effect" of the decision below on "similar cases" involving "pricing systems" pending at that time before the same Court of Appeals (Pet. 16-17). But neither the court nor the parties in those cases so understood the ruling at bar, which was neither cited in the briefs nor mentioned in the later opinions which condemned the systematic pricing there held to exist.[29]

The Commission's request for certiorari also made much of the "direct impact" of the instant case on the still pending "similar complaints" filed in 1940 against three of

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tematic variations" in prices throughout the industry; and in September 1943 the Commission had barred the *Staley* defense designed to justify the adoption of the industry-wide basing point formula whereby the "respondents became an integral part of this pricing system." 37 F.T.C. 87, 256-57 (1943); Modified Findings as to the Facts and Conclusion, Dkt. No. 3803, par. 6(b) (Sept. 13, 1943). Again in 1944, the Commission had invalidated a meeting competition defense tendered to justify a systematic discriminatory practice. *Elizabeth Arden, Inc.*, 39 F.T.C. 288, 304 (1944). And respondent more than once brought this Court's ruling in *Staley* to the attention of the Commission at the time of its consideration of respondent's defense (R. 5209-10, 5243-44).

[28] Counsel incorrectly asserts (Br., pp. 21-22) that the illegality of respondent's prices, "apart from the Section 2(b) defense, is undisputed," and that respondent no longer "challenges" the Commission's findings that its jobber classification was "arbitrary" and that its prices caused "injury to competition." See notes 46 and 92 *infra*, and accompanying text.

[29] *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, 156 (7th Cir. 1956); *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37, 41 (7th Cir. 1957). Not even when petitioning for certiorari to review those decisions did those respondents find any basis for citing the instant case. Nos. 900 and 1125, 1956 Term.

Moreover, the writer of the opinion in the instant case joined in the *Niehoff* ruling, dispelling the implication in the Commission's brief (p. 31 n. 14) attributing the differing results to "differently composed panels" of the court below.

respondent's competitors in Detroit.[30] Yet at the very time of the Commission's petition here, the Commission had before it motions to dismiss those cases, filed by its own staff in January 1955. And after the grant of certiorari, these companion cases, listed in the Commission Memorandum filed on October 13, 1950, at this Court's behest, were dismissed by the Commission on April 3, 1957.[31]

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[30] Pet. 9 n. 4, 16; Reply in Support of Pet. 11.

[31] *Gulf Refining Co.*, Dkt. 4390; *Texas Co.*, Dkt. 4391; *Shell Oil Co., Inc.*, Dkt. 4392.

The self-serving Commission Press Release of June 18, 1957 quoted in its brief (p. 47 n. 27) was issued after expressions of surprise in the trade press at these dismissals in the wake of certiorari in the instant case. See, *e. g.*, *Petty's Oil Letter*, April 20, 1957.

SUMMARY OF ARGUMENT.

I.

Inasmuch as the decision below turned on the *factual* conclusion that the record at bar failed to demonstrate any pricing system, the *legal* issue as to the validity of discriminatory pricing systems posed by the Commission is purely hypothetical and gives rise to no controversy between the parties here. The unanimous decision of the Court of Appeals conformed strictly with this Court's governing precedents when it ruled, in accord with the Hearing Examiner's factual conclusions, that the statutory meeting competition proviso was satisfied by uncontroverted evidence that respondent's lower prices were granted in four individual instances over many years in order to retain established accounts in the face of competitors' lower price offerings.

II.

Should this Court, contrary to the *Universal Camera* rule and traditional practice, duplicate the evaluation of this record by the Court of Appeals, respondent's defense could only be reaffirmed.

The Detroit area of the 1930s, historically oversupplied with excess gasoline, was shaken by "price cutting orgies" and marketing chaos, and had none of the stability essential to the operation of any industry pricing system.

Respondent's lower prices to its four customers were wholly defensive responses to persistent price raids by competitors. Many rival suppliers in Detroit sought to capture respondent's valuable distributors, and had actually succeeded in taking away several of its accounts. The wide variety of offerings made to respondent's customers by these aggressive competitors confirms that *they* did not price pursuant to any industry system. Conversely, respondent's reluctance to depart from its uniform Detroit tank wagon price, and haggling over price with its own customers prior to any reductions, shows that *respondent itself* acted not according to a system. Rather respondent reacted in individual competitive situations, and gave the minimum concessions essential to hold the account.

III.

Counsel's references to three of the numerous important suppliers in Detroit cannot establish the asserted industry pricing system, particularly since many other suppliers marketed gasoline in Detroit in diverse ways differing from respondent and each other.

Since counsel's key contention of a pricing system can find no support in the evidence, primary reliance is now placed on the belatedly detected "admission" in respondent's 1941 answer to the Commission complaint. Actually, the asserted "admission" concerns respondent's alternate defense that its lower prices were made in line with a proper functional classification of its customers. Respondent's insistence that its maximum 1½¢ reduction be given only to customers performing valuable bulk storage and delivery functions effectively demonstrates its conservative exercise of the statutory right to meet competition. This surely enhances rather than impugns respondent's good faith in meeting competitors' prices.

Moreover, there is no basis for counsel's concern that acceptance of respondent's defense would validate the price discriminations of other suppliers. The decision below rests on the presence of actual competitive offers made by competitors and met by respondent to retain its customers.

Since the record contains not a single instance where respondent itself offered a discriminatory price to the customers of its rivals, approval of respondent's defense in this case can have no bearing on possible defenses raised by competitors to justify any price discriminations on their part.

The *Geographic Pricing* decisions, cited by counsel as dispositive, are not in point. As explained by the Commission itself, those cases concern industry-wide collusive pricing systems which prevented precisely the individual customer solicitations on account of price with which the instant case entirely deals.

IV.

Notwithstanding counsel's contrary insinuations, the legality of the competitive offers met by respondent is now confirmed. This Court's remand directing attention to that issue was ignored by the Commission, despite respondent's prompt request for a finding in conformity with the mandate. Even though respondent was prepared to document the requested findings as to legality, the Commission majority not only failed to go forward with any evidence impeaching legality, but actually declined to notice the issue. The minority Commissioners, after reappraising the record, proposed a finding that the competitive offers were lawful.

What is more, after certiorari was granted in the instant case, the Commission dismissed, *sua sponte*, the companion proceedings against three of respondent's Detroit competitors that had been brought to the attention of the Court in the course of prior oral argument in connection with the legality of the prices met by respondent. Surely counsel at this stage can no longer challenge the legality of the competitive offers by these three, let alone those of its numerous other competitors, which confronted respondent in the relevant years.

V.

The decision below properly reversed those aspects of the Commission's ruling which defeated respondent's meeting competition defense by reason of asserted competitive "injury" and respondent's inability to cost-justify in full. Cost-justification is a completely independent statutory defense. And resort to competitive "injury" would, as this Court observed in 1951, make the meeting competition defense "practically meaningless", since Section 2(b) does not come into play until a prima facie case of violation, including "injury", appears.

Besides, no "injury" was causally attributable to respondent's lower prices, which only defensively responded to equally low prices tendered repeatedly to its customers by competitors. Respondent's own prices, therefore, did not initiate or change the competitive situation on the resale level. Moreover, respondent's lower prices were minimized to the extent they were offset by the customer's performance of costly distribution functions. Hence they could not have any significant effect on his independently determined resale prices.

VI.

This Court should accept the Court of Appeals' factual evaluation of the evidence which comports fully with the *Universal Camera* doctrine, and decline to sit as an initial reviewer of the record *de novo*. Although the Commission's request for review may have stated a legal issue worthy of this Court's certiorari jurisdiction, the arguments of both petitioner and respondent highlight that the controversy here is basically factual. Accordingly, the "usual rule of noninterference" with appellate decisions centering on factual evaluations should govern here. *Federal Trade Commission* v. *American Tobacco Co.*, 274 U. S. 543 (1927).

ARGUMENT.

I.

THE HOLDING BELOW CONFORMS WITH THE DECISIONS OF THIS COURT CONFINING THE MEETING COMPETITION DEFENSE TO INDIVIDUAL COMPETITIVE SITUATIONS.

A. The Court of Appeals Did Not Sanction Any Discriminatory Pricing System.

The Commission rests its case before this Court largely on the erroneous premise that the decision below construed the Act as permitting a discriminatory pricing system to be justified under the meeting competition proviso. In the view of Commission counsel, the court below construed Section 2(b) as tolerating a general price "system" or "dual price formula" so long as it was not inherently *unlawful* and did not entail the meeting of *illegal* prices by competitors as in the case of a "basing-point system." On this false assumption, the decision is denounced as providing "a positive incentive to competing suppliers to adopt parallel pricing systems so that each can defend its own system on the basis of similar systems used by others."[32]

But the court below did not and *could* not have held any pricing system justifiable under Section 2(b), for it squarely decided that respondent's prices were *not* granted systematically. The opinion stressed the fact findings of the Hearing Examiner, accepted and confirmed by the two minority Commissioners, that respondent's price to its four jobbers “was granted to meet the equally low prices offered by competitors” (R. 5498). The court declared, moreover, that the “bargaining and haggling which took place” was “hardly consistent with the Commission's theory that prices were reduced pursuant to a system” (R. 5501). The facts were found “to dispel completely any idea that such reduction in price was systematic, as urged by the Commission” (R. 5501).

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[32] Br., p. 50. See also Br., pp. 33-34, 46-52. That respondent's lower prices, made solely to hold its own customers, could not possibly provide any basis for the defense by competitors of *their* price discriminations is demonstrated at pp. 48-49 *infra*.

Respondent's meeting competition defense was held “firmly established” (R. 5502), not on the basis of a pricing system, but on the factual premise that respondent “sold invariably at its uniform tank wagon price, except when at different times it reduced its price to meet competitive offers to retain a customer” (R. 5501).

As a matter of fact, the Department of Justice initially seemed to recognize that the decision at bar did not validate discriminatory pricing systems. The Deputy Attorney General, quoting the rejection by the court below of the “Commission's theory that prices were reduced pursuant to a system,” advised Congress in 1956 that the decision did not “broaden the scope or adversely affect what we consider to be the merits of a Section 2(b) defense.”[33]

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[33] Letter dated June 27, 1956 from the Acting Deputy Attorney General to the Chairman of the Senate Judiciary Committee, reprinted in *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee on Bills to Amend Section 2 of the Clayton Act*, 84th Cong., 2d Sess. 688-89. The letter, stating that the Justice Department had “carefully analyzed” the decision below, based its conclusions as quoted above on the following understanding of the decision:

> “In the *Standard Oil of Indiana* case the seventh circuit court appeared to place great weight on the fact that Standard Oil had apparently proved in the original proceeding that its lower prices were made in good faith to meet an equally low price of a competitor because of the fact that the findings of the Federal Trade Commission initial hearing examiner to this effect were never repudiated or disproved. The Court commented: ‘We think it is pertinent to observe that petitioner's good faith has either been recognized or assumed at all levels

B. The Holding Below Faithfully Applied This Court's Controlling Precedents.

Approval of a meeting competition defense in the factual circumstances on which the lower court based its decision conforms strictly with the law as enunciated by this Court.[34] With respect to the legal status of industry pricing systems, there is no real controversy between the parties here.

Since the *Staley* case in 1945, this Court has maintained that the meeting competition proviso "places emphasis on individual competitive situations, rather than upon a general system of competition." *Federal Trade Commission*

> during this proceeding.' The Court apparently was convinced that Standard Oil had proved that it was meeting a 'lawful' lower price of a competitor, stating 'in the instant situation there is no finding, no contention, and not even a suspicion but that the competing prices which petitioner met were lawful.' Finally, *the Court held that these price reductions, used as a defensive mechanism to retain the four existing customers, were based upon individual competitive situations rather than pursuant to a 'pricing system'* stating '[t]he bargaining and haggling which took place between petitioner and the four involved 'wholesalers' prior to a reduction in prices to them is hardly consistent with the Commission's theory that prices were reduced pursuant to a system.' "

For the Court's convenience, the letter is reprinted in full text in Appendix B, pp. 77-79 *infra*.

Rep. Patman, co-sponsor of the Robinson-Patman Act, also understood the decision below in like manner. As he viewed the decision, "the nub of the thinking, as it seems to me, is that Standard was doing no more than the Supreme Court said it could do under the law." Cong. Rec., June 11, 1956, p. 9016.

[34] This was the view also expressed recently by another Court of Appeals concerning the instant proceedings: "In reversing the judgment in favor of the Federal Trade Commission, the [Supreme] Court assumed that the Standard Oil Company had brought itself within the § 2(b) proviso. • • • The Supreme Court returned the case to the Federal Trade Commission to make its findings as to whether the Standard Oil Company had proven itself to come within § 2(b). The Commission reviewed the matter and failed to give full effect to the Supreme Court's opinion as to the availability of § 2(b) relief." *Standard Oil Co. v. Brown*, 238 F. 2d 54, 57-58 (5th Cir. 1956).

v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 753, 754 (1945).[35] On the other hand, a seller need only "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *Id.* at 760. For, in recognition of the realities of business, "the statute does not place an impossible burden on sellers." *Id.* at 759.

Moreover, this Court's opinion on its prior review of the instant case made clear that "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor," and emphasized the "plain language and established practice which permits a seller, through Section 2(b), to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers" (R. 5319).

In the case at bar, the Court of Appeals agreed that "respondent was confronted with the problem of reducing its price to meet competitive offerings or of forfeiting the business of the four jobbers" (R. 5498), and read the record to confirm that respondent "sold invariably at its uniform tank wagon price, except when at different times it reduced its price to meet competitive offers in order to retain a customer" (R. 5501).[36]

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[35] See also *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 43 (1948); *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 725 (1948). Most recently, the Court in an industry-wide zone pricing case reaffirmed that this proviso could not justify "an entire pricing system," but rather was "designed to protect competitors in individual transactions." *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 431 (1957).

[36] The Commission's brief throughout controverts the facts recited in the court's opinion—not by challenging the correctness of the court's evaluation of the record evidence under the *Universal*

These price reductions made by respondent on widely separate occasions over a period of years to retain the business of four of its several hundred Detroit customers are surely "individual competitive transactions" and "situations" within the meaning of this Court's guides. The Court of Appeals' validation of respondent's meeting competition defense *on the basis of these facts* thus adhered squarely to the legal principles established by this Court.[37]

Camera tests, but by disputing the court with the very Commission majority findings which were set aside as unsupported. In this way, counsel becloud the precise point at issue, *i.e.* whether the decision below properly evaluated the record in reversing the action of the Commission majority. See pp. 64-66 *infra*.

[37] Although the Commission in 1950 urged here "that the words 'good faith' really add nothing to Section 2(b)" (No. 107, 1949 Term, Com. Br., p. 42), the Commission today obscures the issue by suggesting that a seller who has in fact lowered his price solely to meet competitors' equally low and lawful prices may nonetheless lose his defense for lack of "good faith" (Br., pp. 29, 46, 52-57). The term "good faith," as the Commission correctly recognized in 1950, adds no special technical requirements to the law.

Actually, the "good faith" terminology softens the stringent requirements of the Section 2(b) defense. According to *Staley*, "Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's. * * * [T]he statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 759-60 (1945). The decisions construing analogous state enactments are in accord. *E.g.*, *Minnesota* v. *Wolkoff*, 1957 CCH Trade Cases, par. 68,826 (Minn. 1957) and cases cited.

In sum, the "good faith" factor serves to test merely whether the seller's lower prices constitute "bona fide attempts to meet competition" (*Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61, 71 (1953)), or a "good faith effort to meet a competitor's equally low price" (*Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 43 (1948)), rather than a collusive or predatory tactic. Cf. *Staley* at 758 ("price discriminations were not made to meet a 'lower price' and consequently were not in good faith"); *Samuel H. Moss, Inc.* v. *Federal Trade Commission*, 155 F. 2d 1016 (2d Cir. 1946) ("the offer shall be made without actual intent to undercut his competitors' price").

II.

DE NOVO APPRAISAL OF THE RECORD NEGATIVES ANY SYSTEMATIC PRICING.

If this Court, contrary to precedent and practice,[38] declined to accept the factual determination below that respondent's prices were not systematic, its own *de novo* evaluation of the whole "record including the examiner's report" would confirm that the pricing system theory is devoid of evidentiary support. Cf. *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 493-497 (1951).

A. The Competitive Turmoil in Detroit Tolerated No Pricing System.

The Detroit gasoline market in the recession years of the late 1930s bore no resemblance to the stable and orderly marketing conditions essential to systematic pricing within an industry. The Examiner found that "Detroit is a highly competitive market as far as the oil industry is concerned." and characterized competition there as "intense" (R. 5113).[39]

Detroit was the hub in one of the country's most competitive areas for the distribution of gasoline. By 1940 Michigan refineries alone had grown to twenty-nine from seventeen in 1935,[40] and Michigan's own crude production met 30% of its needs (R. 1380, 1901). Besides this growth in local capacity, Detroit as a gasoline market was accessible from all distant refining centers by lake tanker, pipeline and rail (Resp. Ex. 24, R. 4826, 1378, 1900). All told, over twenty large oil companies competed for the Detroit market during these years, in addition to numerous small refiners, distributors and even "yard haulers" (R. 1900-3, 1969, 4885-86, 5106-7, 5404).

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[38] *E.g.*, *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 491 (1951); *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502-3 (1951), discussed in detail at pp. 64-68 *infra*.

[39] For a comprehensive study of the Detroit gasoline marketing situation in the relevant years, see McGee, *Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case*, 23 U. of Chi. L. Rev. 398 (1956).

[40] (Resp. Ex. 25-B, R. 4828, 1378).

Competition was intensified in the price-conscious recession years relevant to this case (R. 5113, 414, 443, 540, 1904-5). The Detroit area had historically been oversupplied with excess gasoline from the Mid-Continent and other substantial refining centers (R. 1900-1). And while available supplies from Michigan fields and other refining centers mounted, gasoline consumption between 1937 and 1938 alone slumped by over 10% in Detroit where layoffs in the automobile industry curtailed consumer spending (R. 1904). The effect of this gasoline glut was a flare-up of price wars, customers raids and a "scramble for gallonage" at all marketing levels (R. 1904, 1683-84, 1908, 1975).[41]

As the Examiner reported, "In 1938 the gasoline war had reached its peak, a general business depression existed, causing a demoralized retail situation" shaken by periodic "price cutting orgies" (R. 5116, 5118).

Amid these upheavals in the chaotic Detroit gasoline market, no placid industry pricing system could or did prevail in the sale of gasoline. On the contrary, aggressive ingenuity rather than collusive conformity was at a premium in the competitive "scramble".

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[41] Price concessions were not the only weapon in the Detroit price wars. Other competitive inducements included premiums such as trading stamps, free cigarettes, china, clocks, eggs and lottery tickets (R. 1909).

B. The Wide Range of Aggressive Competitive Offers Contradicts Any Systematic Industry Pricing.

Respondent was on the defensive throughout. It merely sought to hold some of its established accounts, and is not charged with soliciting competitors' customers.

Respondent's gasoline sales suffered steady inroads during these years. In 1937, respondent sold 70 million gallons of gasoline in the Detroit area, accounting for 17.1% of the total (R. 5061, 4879). In the next year, respondent's sales dropped off almost 10 million gallons, while its share of the Detroit market shrank to 16.4% (R. 5061, 4879). Respondent's market position continued to decline after a recovery in 1939, so that by 1940—the last year covered by this record—its share had fallen to 16.2% of the Detroit market (R. 5061, 4879). By contrast, sales of private brand gasoline by jobbers in the Detroit area shot up 61% between 1937 and 1938 alone, and more than doubled over the period 1936-1940 (R. 4881, 1970-75).

Typical of the aggressive Detroit competition throughout the 1930s and refuting any pricing system were the successful price raids on respondent's valuable customers. The large number of respondent's customers owning their retail or bulk storage facilities were supplied on a short-term contractual or even informal day-to-day basis, and were free to negotiate with rival suppliers or switch to anyone offering more favorable prices or terms (R. 5104, 5058).[42]

Apart from the four customers which respondent retained by meeting competitors' prices, a number of accounts were lost because of competitive offerings which respondent failed to meet. Carnick and Dick Lock, two of respondent's jobber customers already receiving the lower tank car price, accepted better offers of another supplier which in one case permitted free storage at its bulk plant for the customer's benefit (R. 1912, 1915-16). A third customer, Middleton, also buying at respondent's lower tank car price, shifted to a competitor for "a better proposition" (R. 1913-15).

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[42] Respondent's Detroit tank car customers which maintained their own bulk plants were supplied on a day-by-day basis without any term contract or agreement (R. 5058, 5104, 115-16). Of the approximately 358 retail service stations supplied by respondent in Detroit, about 208 were company-owned and leased to operators ordinarily for a one-year term, and the remaining 150 stations, independently owned and operated, purchased on a one-year contractual basis (R. 5057-5058).

As the Examiner reported, "the 'jobber' customer market is subject to intense competition and frequent attempts by Standard Oil Company's competitors to proselyte accounts by offering more advantageous terms and service" (R. 5103-4).

In addition to losing these tank car accounts to more attractive competitive offers, respondent also lost several tank wagon customers. One dealer went over to Phillips 66 gasoline distributed by Red Indian Oil Company when offered a "concession" (R. 489-90). Another dealer went over to Argo Oil Company, a distributor of Ohio Oil Company's Linco and Marathon gasoline (R. 179-80, 567, 560-61), and a Montgomery-Ward service station did likewise after respondent failed to meet competitive offers which would have entailed giving its lower tank car price for tank wagon deliveries (R. 2079). Ned's, respondent's biggest Detroit dealer, was already purchasing motor oil from Red Indian when he seriously considered accepting Red Indian's offers of Phillips 66 and Standard of Ohio Fleet Wing gasoline (R. 1804, 3108-9).[43]

It was in this context of persistent price raids and actua lost accounts that respondent tried to hold its remaining valuable Detroit customers. Out of a total annual volume of 60 to 75 million gallons annually sold by respondent in the Detroit area, 8 to 15 million gallons were taken by the four customers: Ned's, Citrin, Wayne, and Stikeman. (R. 5061. 4879). Loss of these four could have sacrificed almost 20% of respondent's annual Detroit sales (R. 5061, 4879).

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[43] The record does not purport to cover all losses of customers for the Examiner excluded proof concerning the loss to other brands offered at lower tank wagon prices, including Gulf, Dixie Hi-Speed, and Fleet Wing, of numerous dealers supplied by respondent's jobber customers (R. 1686-95).

The variety of the competitive offers tendered to respondent's four tank car customers likewise dispels any trace of systematic industry pricing in Detroit.

Take, for example, the offers received by respondent's customer Citrin-Kolb (R. 5102, 5410-12, 1253-1310, 2002-10): Hicock Oil Company, a Pure Oil distributor, offered a proposition permitting Citrin to buy Hi-Speed gasoline at a 1¢ per gallon more favorable basis than his arrangement with respondent, and a share in a new jointly owned corporation with Hicock (R. 5102, 2002-5, 1259-69). Shell tendered to Citrin and Middleton Oil Company the exclusive Wayne County distributorship for Shell's Silver Flash gasoline at ½ to ¾¢ per gallon below respondent's price, coupled with free advertising and equipment (R. 5102, 2006, 1269-74.)[44] Gulf underbid respondent's price by tendering the free use of Gulf's bulk storage plant as well as "pumps and other station equipment, including repairs to pumps, painting the dealer stations, and equipment used in connection therewith" (R. 5102-3 5411, 2006, 1277-80). The Texas Company offered ½¢ a gallon below respondent's tank car price, together with free "advertising, paint and globes" and a guaranteed 5 year contract (R. 5103, 5411, 2008, 1282-90). Argo Oil Company, a distributor of Ohio Oil Company Marathon gasoline, offered Citrin 2¢ or more below respondent's tank wagon price (R. 2010, 5411, 1295-1301). Finally, Aurora, a local Michigan refinery with a heavy Detroit volume, tendered to Citrin gasoline with a guaranteed octane rating higher than respondent's gasoline at ½¢ per gallon less (R. 5103, 5412, 2010, 2013, 1301-10), and repeatedly made the same offer over a period of years to another customer of respondent. (R. 5101, 1147-52, 1165).

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[44] Middleton accepted this offer and thereafter ceased to be respondent's customer (R. 1272).

Equally varied were the bids to respondent's other tank car customers.[45] Red Indian Oil Company, distributor of Phillips 66, repeatedly offered gasoline at 1½¢ below respondent's tank wagon price, with free storage at Red Indian's bulk plant (R. 1804-5, 1988, 5406). One customer temporarily accepted a better offer by White Star Refining Company (R. 2013-14). Phillips Petroleum also bid for this customer with a price lower than respondent's (R. 2013-14). And National Refining Company, a substantial gasoline supplier in the United States and Canada already selling to jobbers just outside Detroit, over a period of months negotiated for the exclusive Detroit area distribution of its White Rose brand by two of respondent's customers jointly at ½¢ per gallon below respondent's tank car price (R. 5101-2, 5415, 1152-55, 1211, 1949-50, 2013-14).

This miscellany of competitive offerings tendered by respondent's rivals disproves any industry pricing system. For the wide range and diversity of their bids reflected no common industry-wide pricing formula, but rather showed individual efforts to capture respondent's valuable customers with a variety of inducements. It was at respondent's own insistence before granting its lower tank car price, and not because of any industry system; that respondent's customers possessed bulk storage and transportation facilities enabling them to take tank car delivery of gasoline so as to qualify as jobbers.[46]

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[45] See also additional offers made to Ned's, discussed at pp. 35-39 *infra*. Besides the detailed competitive offers to these customers, respondent's District Manager told of "being informed by them from time to time of other offers and inducements" (R. 2014).

[46] Counsel's assertion that respondent was "arbitrary" in classifying as jobbers customers performing the jobber function.

C. The "Tug of War" Preceding the Successive Lower Prices to Ned's, Respondent's "Most Valuable" Customer, Belies Any Systematic Pricing by Respondent.

The record's most prominent instance of lower prices illustrates the competitive rather than systematic nature of respondent's own pricing in Detroit. Ned's, "respondent's most valuable tank-wagon customer" whose aggressive resale pricing tactics were the Commission's prime target (R. 5093, 5111, 955), received respondent's lower price not pursuant to any formula or system, but only after a "constant tug of war" over several years.[47]

The Hearing Examiner's Report graphically portrays the individualistic character of respondent's pricing relationship with Ned's, which in 1936 received a ½¢ reduction and in 1938 the 1½¢ per gallon lower tank car price:

Ned's Auto Supply Company since its establishment in 1918 had bought gasoline from respondent on a tank wagon basis at the price quoted to other Detroit dealers. However,

> "from 1930 to 1936 Ned's had received offers from responsible companies handling branded gasolines comparable in quality to those furnished by respondent at substantially lower prices—one cent per gallon less by tank-wagon, and from two to five cents per gallon less by tank car than the price respondent was charging

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because they also sold at retail (Br., pp. 44-45), was not only discounted by this Court in 1951 (R. 5309 n. 4), but appears repudiated by the Commission itself. After discussing the instant proceedings, the opinion of the Commission in *Doubleday & Co., Inc.*, Dkt. 5897, declared: "In our view, to relate functional discounts solely to the purchaser's method of resale without recognition of his buying function thwarts competition and efficiency in marketing, and inevitably leads to higher consumer prices." CCH Trade Reg. Rep. Transfer Binder, par. 25,634 (1955).

For detailed refutation of counsel's system argument, see pp. 39-47 *infra*.

[47] Ned's president testified to the "constant tug of war between Standard Oil and us" (R. 1809).

Ned's. Some of these offers were communicated to respondent's District Manager with the request that Ned's be accorded a lower price but respondent's District Manager refused to allow an increased margin" (R. 5093-4).[48]

According to the Examiner,

> "as a final effort to obtain a lower price from respondent, Ned's Company by letter dated August 27, 1936 advised respondent's District Manager that it had received an offer from a competitive major oil company to supply it gasoline at a lower price than it was then receiving from respondent and it was then its intention to accept the offer. This was followed by a conference between Charles H. Gershenson, President of Ned's and P. A. Raupagh, respondent's District Manager, at which Gershenson informed Raupagh that the letter dated August 27 was an ultimatum and that Ned's Company had definitely decided to accept the lower offer from the competing company unless it 'got a better deal from the Standard Oil Company'" (R. 5094).

In the course of an interview requested by Ned's with an official at respondent's headquarters in Chicago "before the final break occurred," Gershenson insisted "that if respondent did not grant Ned's a better price, either a better tank-wagon price or a tank-car price, that Ned's was going to stop doing business with Standard" (R. 5094-95). And only after respondent's District Manager "came to the definite conclusion that respondent would lose Ned's business unless respondent met, at least part way, the offers of competitors" was Ned's accorded a ½¢ per gallon reduction on September 1, 1936 (R. 5095).

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[48] The efforts to dissuade Ned's were thus reported:

"Respondent's District Manager would stress the long private and public association of Ned's with respondent and its branded gasolines which had acquired wide public acceptance, and the volume of business developed; that a change to another competitive brand would result in loss of customers and decrease in volume, which would off-set in profits the difference in the cost of the gasoline. Charles H. Gershenson, President of Ned's Company, testified that he appreciated the force of the argument advanced by respondent's District Manager and that in addition thereto his company did not want to change its supplier of gasoline for sentimental reasons—his father had passed away, and the family entertained 'a superstition that the last thing we wanted to do was change from the Standard Oil Company'" (R. 5094).

In the Examiner's conclusion of fact, "the differential of .5¢ per gallon on Red Crown gasoline respondent granted Ned's Auto Supply Company on tank wagon deliveries from September 1, 1936, to March 1, 1938, was made to meet an equally low or lower price of a competitor or competitors for branded gasolines of comparable grade and quality and to retain Ned's Company's business" (R. 5096).[49]

Respondent was able to hold Ned's business with this ½¢ for a time. But, as the Examiner reported, Ned's "was not satisfied," and in a letter in February 1938 demanded "immediate consideration to the desirability of continuing as our gasoline supplier, but at tank car prices. Otherwise, we shall be compelled to re-open negotiations with other suppliers" (R. 5100).[50] At a final conference, "Gershenson stated that his letter dated February 14, 1938 was an ultimatum" and that unless respondent "met, at least part-way, the competitive offers of the Shell, Red Indian and Texas Companies, which offers were of differentials as much as 2¢ per gallon, Ned's would quit purchasing from respondent and accept a competitive offer" (R. 5100-01).[51]

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[49] If respondent had quoted its prices pursuant to a system, as the Commission's brief contends, surely Ned's, respondent's "most valuable" customer, should have been the first to get the full system price without having to haggle for months and then reluctantly settling for a mere ½¢ reduction as "better than nothing" (R. 1813-15, 1991-94).

[50] "Gershenson informed Raupagh that the available offer from the Red Indian Company quoted a price ⅜ of a cent lower on tank-car deliveries than respondent's price, and had an additional advantage in that it would be unnecessary for Ned's to have and maintain its own bulk plant; that the price quoted by the Shell Oil Company was .5¢ lower than respondent's tank-car price; and that the offer from the Texas Company for 2.5¢ lower on the house brand and 3.25¢ lower on Ethyl gasoline" (R. 5100).

Determined to get a tank car price, Ned's shortly thereafter acquired a bulk plant and made arrangements for hauling, "with the expectation of buying gasoline in tank cars from either Standard or somebody else" (R. 226-7, 1823; 1868, 5100). Only then, as the Examiner found, respondent on March 7, 1938 finally "acceded to Ned's demands" and granted Ned's its lower tank car price (R. 5101). The testimony of respondent's Detroit District Manager, adopted by the Examiner, was that he "was convinced that if respondent did not meet, or approximate, such competitive offers, Ned's would be lost as a customer; that knowing the market, as he did, he was of the definite opinion that the threats made by [Ned's] were made in earnest and would be acted upon unless respondent placed Ned's on a competitive basis" (R. 5101).[52]

Accordingly, the Examiner also reported that "The recognition by respondent of Ned's Auto Supply Company as a jobber or wholesaler was a forced recognition to retain that company's business" (R. 5098).

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[51] In addition to these specific propositions from Shell, Red Indian, and Texas Company, Standard's District Manager was also told of offers to Ned's by Sun Oil and Gulf, as well as "many more offers" (R. 1998, 2000, 2001). In this connection, he mentioned that his relations with Ned's "haven't been as nice as they should be, when these competitive offers would come up," and that "sometimes the air was kind of hot." (R. 2002).

[52] Several of the offers to Ned's were reaffirmed as late as 1940 (R. 1835-37, 3107). The record fully supports the Examiner as to the offers to Ned's (R. 1800-37, 1990-2002, 3107, 5406-10). Despite the fact that Ned's satisfied Standard's minimum criteria for jobber recognition prior to 1936 (R. 4873-74), its tank car price was withheld until the 1938 "ultimatum."

Contrast these record facts as reported by the Examiner with the Commission's assertion (Br., p. 10 n. 6, 43) that respondent in granting the lower prices to Ned's was not responding to competitive offers, "but instead granted the lower price on the understanding that Ned's would conform to Standard's requirements for 'jobber' status (R. 1821, 1995), the volume requirement having already been satisfied (R. 119, 5372)."

Such a "tug of war" for a price advantage is surely alien to any "dual pricing formula" or "system." It demonstrates price reductions granted reluctantly and in the minimum amounts essential to retain a valuable customer in "individual competitive transactions"—rather than systematically pursuant to any preconceived general plan or system.

III.

THE COMMISSION'S EFFORTS TO CONSTRUCT A PRICING "POLICY, METHOD, OR SYSTEM" ARE UNSUPPORTABLE.

Permeating counsel's brief is the charge that respondent's prices admittedly reflect an industry-wide, perhaps collusive, scheme.[53] Relying mainly on the asserted "admissions" in respondent's answer to the complaint in 1941, the Commission claims that respondent's designation of its tank car customers as "jobbers" corresponded with the practice of other gasoline suppliers—thereby establishing an inherently discriminatory "industry-wide dual price system' (pp. 26, 30, 36, 38-39, 50-52). In light of this assumption, the decision at bar purportedly carries the grave consequence that "as long as competing sellers follow the same discriminatory pricing policies, each is protected," which would "provide a positive incentive to competing suppliers to adopt parallel pricing systems so that each can defend its own system on the basis of similar systems used by others" (pp. 50, 51). Counsel thus conjure up an industry-wide concert whereby sellers practice parallel price discriminations in reciprocal reliance upon the meeting of each other's competition.

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[53] The brief's allusions to the dangers of a supplier's "attempt to manipulate its overall price scale upward" where "competitors employ the same dual price formula" (p. 30) are not only destitute of a trace of support from the record, but are belied by the Examiner's findings that competition was "intense" in Detroit, which was "a highly competitive market as far as the oil industry is concerned" (R. 5113)—a condition confirmed by scholarly studies of the Detroit market during those years. See McGee, *Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case*, 23 U. of Chi. L. Rev. 398 (1956); and Note, 67 Harv. L. Rev. 294 (1953).

Counsel's contentions cannot overcome the record and the facts.

A. The Record Contradicts Each Premise of the Pricing System Assertion.

The Commission's brief (pp. 10 n. 6, 25-26, 44 n. 24), interprets the findings of the majority Commissioners as supporting the pricing system contention on three premises: (1) that respondent's lower prices were initially granted prior to the Robinson-Patman Act, or prior to the customer's receipt of competitive offers and "never responded to" such offers;[54] (2) that respondent met the prices of gasolines of lesser public acceptance which could not pose a "serious competitive threat"; and (3) that respondent's lower prices merely reflected an industry wide discriminatory "dual price system".

The record refutes each of these premises:

(1) While now decrying the scarcity of competitive offers prior to the 1936 Robinson-Patman amendments, counsel ignore that evidence of pre-1936 competitive offers was ruled out as immaterial, thus preventing respondent

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[54] The brief also maintains that some of the competitive offers to respondent's customers occurred after the date the instant complaint was filed (P. 10 n. 6). But, as bearing on respondent's need to continue granting its lower prices, the relevancy of the recurrent offers to its customers, before as well as after the complaint was acknowledged by the Commission in 1942 when it restored precisely this evidence which the Examiner had stricken (R. 93-94, 1240-42). Besides, the very customers allegedly receiving offers *after* the complaint was filed had in fact been negotiating with the competitor for several months previously (R. 1211-12, 1166-67).

from making a fuller record for these early years (R. 1146, 1242, 1327). Even then, the evidence shows numerous pre-1936 negotiations and offers. Citrin negotiated with Paragon in 1928, and in 1930 had offers from Hicock Oil Company for Pure Oil Hi-Speed gasoline and from Shell for Silverflash (R. 1253-55, 1259-74). Ned's negotiated with Argo Oil Company and Red Indian Oil Company in 1930 for Phillips 66 and Ohio Oil Company Dixie gasoline (R. 1803-64). Wayne actually purchased Pure Oil Hi-Speed gasoline from Highland in 1935 (R. 984-85). Stikeman had purchased White Star in 1932, and actively negotiated with Phillips before 1936 (R. 2013-14).

Counsel's contention that respondent failed to "respond to" competitive offers misunderstands the purport of the evidence and the issue in this case. Counsel apparently assume that a seller "responds" to competitive offerings only if each particular offer is immediately followed by his price reduction. But the recurrent competitive offers to respondent's customers on this record demonstrate that respondent was forced *to continue* granting its lower tank car price or lose an account.[55] Respondent's evidence of pre-1936 offers was repeatedly ruled out as immaterial precisely because the basic issue was viewed throughout as whether the *continuation* of respondent's lower prices after the passage of the Robinson-Patman Act was essential to meet competitors' equally low prices.[56]

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[55] The Commission itself has recently disclaimed that prices made to meet competitor's equally low price must be "temporary." *C. E. Niehoff & Co.*, Dkt. 5768, CCH Trade Reg. Rep. Transfer Binder, par. 25,467 (1955).

[56] See especially the Examiner's ruling which required proof that as of the date of the Act "it was necessary for this respondent to continue to maintain those prices in order to meet competition." (R. 1241). Moreover, this was the predicate of the Examiner's Report which concluded that respondent's lower prices subsequent to the date of the Robinson-Patman Act were granted to meet competitive offers in order to retain its customers (R. 5104, 5122). The rationale of the minority Commissioners is to like effect (R. 5416-20).

(2) Counsel's disparagement of offers said to involve gasoline of lesser public acceptance is equally misconceived. Section 2(b) does not require that a seller meet lower price offers for gasoline of equal public acceptance. When the customer is earnestly considering a competitive bid for his business, a seller is surely entitled to retain that account by lowering its own price in good faith to meet the offer—regardless of abstract considerations of public acceptance.[57] The real test is whether his own price reduction is truly necessitated by competitive offers threatening to capture his customers.

The fact is that the gasolines of lesser "public acceptance" distributed by Red Indian Oil Company and Argo Oil Company, now belittled by the Commission, were branded products of such important refiners as Phillips (Phillips 66), Standard Oil of Ohio (Fleet Wing) and Ohio Oil Company (Marathon, Linco, Dixie) (R. 1349, 2080). Contrary to the Commission majority, which confused such offers with "off-brand gasolines" (R. 5387), the Examiner considered them "in immediate and direct competition" with respondent's and other major branded gasolines, and "of substantially the same quality in the public mind" (R. 5107).[58]

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[57] If the competitive offer involves gasoline which finds less favor with the public and hence can command only a lower price in the market, a seller may perhaps not reduce his own price far enough to meet exactly the price offer for the less popular product, since this may be tantamount to undercutting it in a marketing sense. *Cf. Samuel H. Moss, Inc. v. Federal Trade Commission*, 155 F. 2d 1016 (2d Cir. 1946). This does not mean, however, that the seller may never lower his price part way in order to hold his customers when they are solicited with such products at prices so low as to warrant their serious consideration.

[58] Actually, the Standard of Ohio Fleet Wing gasoline distributed by Red Indian, which the Commission majority singled out for special scorn (R. 5387), was posted at the same tank wagon price as respondent's gasoline (R. 2118), and was marketed through at least 100 outlets in Detroit (R. 1866-67).

The Commission's confusion may have stemmed from testimony concerning the cut-rate competition offered in Detroit by oil companies such as Charles E. Austin, Inc., Puritan, Sunny Service

They had forcefully demonstrated their competitive "threat" by taking several customers away from respondent (R. 489-90, 560-61, 2079).

Moreover, unless the suppliers and respondent's customers negotiating with respect to these gasolines seriously weighed their appeal as a competitive "threat" to respondent's product, why did they spend the time to negotiate?[59]

(3) The evidence does not disclose the "industry-wide dual price system" asserted throughout by Commission counsel (Br., pp. 26, 30-34, 36-39, 42-55).[60]

The claim of an "industry-wide dual price system" rests on the pricing of a small minority of the more than twenty substantial gasoline suppliers in the Detroit area—Shell, Gulf, and Texas, against whom the Commission filed its abortive complaints (Br., pp. 40 n. 22, 47, 51). But besides these three, there were many important suppliers in Detroit which counsel ignore entirely—such as Socony-Vacuum, Sun, Sinclair, Pure Oil, Phillips, Cities Service, Standard of Ohio, Ohio Oil Company, and Mid-Continent Petroleum. (Resp. Ex. 55-A & B, R. 4875-76, 1923). Of these, several marketed in Detroit through large distributors or jobbers

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Leonard and Roosevelt, which marketed off-brand gasoline such as Zip and Joy at prices up to 6¢ per gallon below the nationally known brands (R. 5107, 1686, 1398, 882, 1843-46, 1960-68).

[59] The Commission's efforts to minimize these offers is undercut by the concession that respondent's initial ½¢ reduction to Ned's is no longer challenged (Br., p. 13). For that lower price to Ned's met, among others, the very Red Indian gasoline offer for Fleet Wing which the findings undertake to disparage (R. 5387). Also, the Examiner excluded testimony that retailers of respondent's gasoline were actively solicited by distributors of Standard of Ohio Fleet Wing, Ohio Oil Company Dixie, as well as Pure Oil Company and Cities Service gasoline (R. 898-903, 1688-95).

[60] The system contention is not even reached unless the offers concerning gasolines of alleged lesser public acceptance are first properly ruled out. For the claim of a system is based on the assumption that the only offers at issue are those involving gasolines of admittedly equal public acceptance. Unless the other offers are disposed of, the system assertion is manifestly untenable.

purchasing on a tank car basis only (Cities Service, Stan
ard of Ohio, Ohio Oil Company, Phillips) (*Ibid.*, Resp. E
38-C, R. 4866, 3092-98, 1259, 1955, 1982, 1805, 2013).[61] N
tional Refining Company sought to invade the Detroit ma
ket on the basis of exclusive jobber sales (R. 1949, 2012
And respondent's three largest Detroit rivals sold only
a single uniform tank wagon price, either to dealers d
rectly (Sun, Socony-Vacuum) or through commissi
agents (Sinclair) (R. 5301, 2129-30, 2075, 977, 945, 32
Resp. Ex. 55-B, R. 4876, 1923).

Under these circumstances, counsel's references to thr
suppliers, not even ranking within the five largest in Detr
(R. 2129-30), hardly suffice to construct an industry-wi
dual price system[62]—particularly in view of the Commi
sion's own dismissal of these three cases.

B. The Claimed "Admission" in Respondent's Asserti in 1940 of an Alternate Defense of Functional Custom Classification Is Baseless.

The evidence does not support any "industry-wide du
price system," and Commission counsel's brief does n
make any serious contrary showing. Instead, the syst
claim today rests mainly on an asserted "admission" in r
spondent's answer filed in 1941 (Br., pp. 36-42).

This so-called admission had not been heretofore d
tected during many months of hearings and fifteen yea
of litigation. No claim of any admission is contained

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61. The pattern of distribution employed by the respective s
pliers in other communities varied. (Resp. Ex. 23, R. 93, 51, 332-
942-43, 971, 978, 1074-75, 1623, 2535). Phillips, for example, m
keted through both jobbers and retailers in Milwaukee and
Louis (Resp. Ex. 23, R. 93, 51, 1072).

62. The record's failure to indicate clearly how the other pr
cipal suppliers marketed in the Detroit area is doubtless due to
fact that the "system" issue was never raised while the record
being built.

the Commission's original 1955 or post-remand 1953 report. Although counsel assert that the "Commission's basic findings do little more than repurase these admissions" on which they "rest almost exclusively" (Br. pp. 38, 39), these findings profess to rest on the evidence of record and nowhere refer to admissions (R. 5382-90). Nor did the staff brief filed in support of the Commission's proposed findings in 1952 perceive any admissions on respondent's part.

The fact is, as the Examiner recognized, that respondent's answer asserted several alternate and entirely consistent defenses to justify its price differentials to the four Detroit customers. In addition to the meeting competition defense based entirely on lower prices made individually to retain its four accounts in separate instances,[63] respon-

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[63] The Commission's brief quotes heavily from the averments in respondent's answer relating to its functional classification defense, reprinted in a special Appendix (Br. pp. 60-63), but ignores respondent's specific averments relating to its meeting competition defense. For the Court's convenience, these are reprinted as Appendix A, pp. 71-76 *infra*. In most directly pertinent part, they state that:

> "Respondent alleges that said four dealers named in Paragraph Three Complaint, or their predecessors, have been continuously, for many years last past, the gasoline customers of Respondent; that at the time each of said customers went onto a tank car basis of purchasing gasoline that it could purchase on such basis, comparable gasoline to that sold by Respondent, from a number of Respondent's competitive gasoline suppliers for an equally low or lower price than from Respondent, and upon equally or more advantageous terms and arrangements in the matter of facilities, services, inducements and benefits than it could or did receive from Respondent, and each of said customers knew of such existing and current opportunities and offers from competitors of Respondent and had from such competitors specific offers equally as low or lower in price, and equally or more favorable in terms and the furnishing of services and facilities than it had from Respondent; that Respondent knew of the existence of such competitive offers to said customers from various sources and was advised of them by said customers and advised that Respondent must meet or approach meeting such offers to retain said customers; that had

dent's refusal, at the risk of losing a customer, to grant its tank car price unless the customer assumed the entire jobber function supported the separate statutory defense of cost justification.[64] The same circumstances indicated the preservation of the additional defense of functional customer classification, in the event that this justification, implicit in the original Clayton Act, had survived the Robinson-Patman amendments.[65] These averments supplied the basis for separate motions to dismiss (R. 845-46), and were throughout treated by the Examiner as "Alternative Affirmative Defenses". They were concisely summarized as such in his Report (R. 5050).

Far from vitiating its meeting competition defense, these alternate averments of legal justification confirm respondent's conservative exercise of its right to meet a competitor's lower price offer in good faith. It met competition only in circumstances where it also had the foundation for

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not Respondent at such time given to each of said customers the tank car basis and price for purchasing gasoline, each of said customers would have been lost by Respondent to a competitive supplier" (R. 19).

[64] Evidence by respondent's distributors confirmed that the 1½¢ per gallon differential approximately corresponded to their costs of performing the jobber function (R. 1771, 5154). Additional aspects of the jobber function included the responsibility on the part of a tank car customer for aiding his retail outlets with advertising, service station equipment such as pumps, tanks and insignia, as well as repairs and maintenance including the painting of buildings and paving of driveways (R. 1772, 1895-97).

[65] This customer classification, providing for lower prices to jobbers, rewarded them for assuming costly marketing functions—irrespective of whether they resold at wholesale or retail—which otherwise would have to be performed by the supplier (R. 951, 1013-16, 1031).

E. g., Chicago Sugar Co. v. American Sugar Refining Co., 176 F. 2d 1, 10 (7th Cir. 1949); Legis., 50 Harv. L. Rev. 106, 112-13 (1936); Van Cise, *How to Quote Functional Prices*, in CCH Antitrust Law Symposium, pp. 80, 84 (1957); Note, *Robinson-Patman Curtailments On Distribution Innovation: A Status Sought for Functional Discounts*, 66 Yale L. J. 243, 249 (1956), discussing the recent Commission precedents.

a claim of cost justification and, in addition, could assert the defense of functional customer classification if legally available. In this connection, the Examiner expressly commended respondent's jobber classification as "bona fide in all respects" (R. 5098-99). Surely no confession of a sinister system inheres in respondent's individual preference for losing customers rather than granting a tank car price to accounts not performing the additional bulk storage and delivery function.

In effect, Commission counsel urge the paradox that *a conservative exercise of the statutory right to meet competition forfeits that defense.* If respondent had met competitive offers indiscriminately—by granting tank car prices to customers buying merely in tank wagon lots, for example—counsel's objections would not apply. Under counsel's theory, therefore, a less moderate exercise of the meeting competition defense, entailing price concession unrelated to cost savings and functional customer distinctions, would be more likely to satisfy the law.

This Court's prior opinion in this case recognized that a seller in meeting competition may have to cope with functional pricing. The Court described the "distinctive characteristics" of jobbers, and noted the "established industry practice of recognizing such dealers as a distinctive group for operational convenience" (R. 5309). It quoted in detail from the Examiner's findings of respondent's "forced recognition" of Ned's as a jobber (R. 5311), interpolated that this "carried with it the tank-car price for gasoline" (R. 5311), and referred precisely to these findings as sufficient to sustain respondent's defense (R. 5315). Indeed, the opinion referred to the term "jobber" as merely one of "convenience and identification, because the result here is the same whether these four dealers are wholesalers or retailers" (R. 5309).

C. Respondent's Lower Prices, Granted in Sporadic Instances to Hold Its Own Customers, Could Hardly Be Relied on by Competitors to Defend Their Price Discriminations.

Counsel's assumption (Br., pp. 51-52) that approval of respondent's defense would "protect" the "same discriminatory price policies" when followed by competing sellers ignores the basis of the holding at bar.

Counsel argue that "under the decision below, the Commission's complaint against Standard must fall because of the availability of an 'equally low price' from Gulf, Texas, or Shell. Similarly, Gulf, Texas, and Shell can presumably defend the validity of their dual price formula because of the availability of Standard's 'equally low price' (the tank-car price involved in this proceeding)" (Br., p. 51).

But there is no occasion for counsel's professed concern that validation of respondent's defense would legitimize the discriminations of competitors who could claim to be meeting respondent's prices.[66] Rather than concerning itself with the mere "availability" of lower prices from Gulf, Texas, or Shell, the decision below expressly rested on evidence showing that "at different times" respondent "reduced its price to meet *competitive offers* in order to retain a customer" (R. 5501). But this record contains *not a single instance where respondent bid for a competitor's account with discriminatory price offers.* Because on the instant record, therefore, no rival supplier could show that its discriminatory prices were necessitated by any competitive offers on respondent's part, it could afford no competitor an opportunity to justify *his* price differential as meeting respondent's offers.[67]

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[66] There is even less warrant for counsel's extravagant statement that "deeply entrenched" price discriminations in entire industries can gain immunity by what the "decision below apparently holds" (Br., pp. 51, 52).

D. The Geographic Pricing Cases, Condemning Industry-Wide Systematic Discriminations, Are Not in Point.

The decisions which invalidated geographic pricing systems, cited as dispositive by the Commission's brief (pp. 26-34), cannot support counsel's argument. The Statement of Commission Policy Toward Geographic Pricing Practices nine years ago called attention to the economic and legal "peculiarities of the problems of geographic price differences," disclaimed any reliance "upon analogy to concepts elsewhere" in price discrimination cases, and concisely differentiated counsel's key precedents from the issues at bar. Significantly, the Commission's lengthy Statement did not include the instant proceeding in its case-by-case survey of the legal problems raised by such pricing systems. On the contrary, a footnote citation distinguished this case in describing the Commission's then pending efforts to obtain a judicial ruling as to whether a price discrimination creating the statutory "injury" was "*nevertheless lawful if it arose by meeting competition in good faith.*"[68]

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[67] Accordingly, the court below properly refused to speculate as to the effect of its ruling on other cases, and remarked that "it will be time enough to cross that bridge when it is reached" (R. 5502).

[68] 1 CCH Trade Reg. Rep. 5341, 5346 n., 5350 (1948). The principal cases cited by counsel, *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945); *Federal Trade Commission v. Cement Institute*, 333 U. S. 683 (1948); *Federal Trade Commission v. National Lead Co.*, 352 U. S. 419 (1957), were explained by the Commission in 1948 as follows:

> (1) In *Staley*, "the seller was not only systematically absorbing freight in certain localities but also matching prices with others in all localities, charging phantom freight in certain localities, and displaying obvious indifference to the question whether or not competition was actually encountered at

In sharp contrast to the intense competition that resulted in reduced individual prices in the Detroit gasoline market in the 1930s, this Court's *Staley, Cement Institute*, and *National Lead* decisions concerned industry-wide discriminatory plans conceived in collusion to stabilize an entire price structure. A far cry from respondent's price reductions in four isolated instances over the years to retain choice customers against price raids of aggressive competitors, those cases dealt with the maintenance of industry freight formulas which insured price uniformity among all sellers and minimized competitive solicitations on account of price. None of those industry pricing systems did, or could conceivably, contemplate a single seller's defensive efforts to retain individual customers against competitors' price attacks.[69]

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particular points where it was supposedly met." 1 CCH Trade Reg. Rep. at 5351.

(2) In *Cement Institute*, "the proof was that discrimination had been inherent in the collusive abandonment of competition," so that it was "consequently impossible to show that this same discrimination consisted merely in meeting competition." *Ibid.*

(3) In *National Lead*, "the heart of the complaint is a charge that the respondents participated in a broad price fixing conspiracy" and "the charge of price discrimination was based upon conspiracy by the defendants to establish price differentials between zones and to maintain uniform delivered prices within each zone." *Id.* at 5347-48.

From its analysis, the Commission concluded that "it appears improbable that the defense of meeting competition can be successfully offered in cases involving systematic matching of delivered price quotations through single or multiple basing point systems or the more complicated types of zone price systems." On the other hand, the Commission declared—years prior to this Court's 1951 decision in the instant case—that the "courts appear to have assumed, though the point has not been squarely decided, that a single seller has a substantive right in good faith to meet the equally low price of a competitor in individual transactions." *Ibid.*

Needless to add, conspiratorial or collusive practices were never alleged by the Commission, let alone found, in the case at bar.

In *Staley*, the respondent sought to justify under Section 2(b) by claiming that its adoption of the Chicago-plus pricing system pioneered by the Corn Products Refining Company constituted good faith meeting of a competitor's equally low price. But Staley had not *lowered* any prices to its nearby customers even when it enjoyed freight advantages over its rivals. As this Court observed, "Instead they maintained their own prices at the level of their competitors' high prices, based upon the competitors' higher costs of delivery, by including phantom freight in their own delivered prices." 324 U. S. at 753 (1945).

The Court rejected the *Staley* defense because it did not show "the establishment of a 'lower price'" in response to an "individual competitive situation," but rather amounted to a wholesale adoption of an industry-wide uniform pricing system designed for "establishing an artificially *high* price" throughout the industry. *Id.* at 756.[70]

This interpretation of Section 2(b) was reaffirmed by the *Cement Institute* decision which condemned an industry-wide basing point system. 333 U. S. 683, 713 (1948). "A handy instrument to bring about elimination of any kind of price competition," it resulted in cement being sold "in every given locality at identical prices and terms by all

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[69] Both *Cement Institute* and *National Lead* found price-fixing conspiracies in alternative counts. 333 U. S. at 713, 352 U. S. at 422. In *Staley* and its companion *Corn Products* proceeding, the Commission later issued orders based on uncontested charges of price-fixing conspiracy through concerted employment of the same delivered pricing system. *Corn Products Refining Co., et al.*, 47 F. T. C. 587 (1950).

[70] The Federal Trade Commission's General Counsel restated the holding of *Staley* thus: "In condemning a system which attached 'phantom freight' to certain sales, the Court held, positing the defense's availability in certain instances where prices were *lowered*, that it could not prevail in situations where prices had been *raised*." (Emphasis in original.) Kintner, *The Revitalized Federal Trade Commission: A Two-Year Evaluation*, 30 N. Y. U. L. Rev. 1143, 1165-66 (1955).

producers." *Ibid.*[71] The Court reaffirmed that Section 2(b) is concerned with "the seller's 'lower' price" and "places emphasis on individual competitive situations, rather than upon a general system of competition." *Id.* at 725. Hence it could not sanction "the employment of the multiple basing point system by the respondents as a practice rather than as a good faith effort to meet 'individual competitive situations.'" *Ibid.*

In *National Lead* the industry had adopted a zone pricing system providing for identical zones and uniform variations from the base price of lead pigments. The "highly artificial" zone boundaries sometimes led to "bizarre results" when purchasers nearer a plant paid high prices than more remote customers. 352 U. S. 419, 422, 424 (1957).[72] This Court sustained the Commission's order, drafted to thwart resumption of the old "pattern of collusion," which also prohibited all zone price quotations by an individual seller "systematically matching" all the delivered prices of rivals. *Id.* at 423, 425. This limited ban on "(1) *identical prices* with competitors (2) resulting from zone delivered pricing" was held to preserve for each seller all rights under the meeting competition proviso, since Section 2(b) was "designed to protect competitors in individual transactions" but did not justify "the use of an entire pricing system." *Id.* at 426, 431.

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[71] According to the Court, "thousands of secret sealed bids have been received by public agencies which corresponded in prices of cement down to a fractional part of a penny." *Ibid.* Contrast this with the range of offers by competitors to respondent's customers.

[72] The contrary is the case where, as here, the lower prices take account of the customer's performance of costly distributive functions. See, *e. g.*, Adelman, *Integration and the Antitrust Laws*, 63 Harv. L. Rev. 27, 63 (1949): "Standard was selling its retailer customers gasoline plus storage plus delivery. It was selling the jobbers gasoline net of these services. Unless it charged these two classes of buyers different prices, it would be discriminating against the jobbers." A practice whereby suppliers sought to avoid reflecting in their prices the economies of functional "integration" was an important element in the restraints of trade condemned in *Sugar Institute v. United States*, 297 U. S. 553, 588-89, 594-95 (1936).

Indeed, the Court has already distinguished the *Geographic Pricing* decisions. In comparing its earlier holdings in *Staley* and the companion *Corn Products* case, the Court's previous opinion in this case noted the "contrast to that factual situation" presented by this record (R. 5315). The *Staley* holding was considered not to alter "the assumption, applicable here, that if a competitor's 'lower price' is a lawful individual price offered to any of the seller's customers then the seller is protected, under § 2(b), in making a counteroffer provided the seller proves that its counteroffer is made to meet in good faith its competitor's equally low price" (R. 5315). And the Court compared the rejection of the Section 2(b) defense in those cases owing to "insufficiency of the seller's evidence" with the fact that "the Trial Examiner for the Commission in the instant case has found the necessary facts to sustain the seller's defense." *Ibid.*

IV.

THE COMMISSION'S FAILURE TO CHALLENGE THE LAWFULNESS OF THE COMPETITIVE OFFERS CONFIRMS THEIR LEGALITY.

Despite the opportunity afforded by this Court's remand in 1951, the Commission majority's post-remand findings, both as proposed in 1952 and as promulgated in 1953, did not question the legality of the offers met by respondent (R. 5336, 5354, 5364-90). The decision below stated that "in the instant situation there is no finding, no contention and not even a suspicion but that the competing prices which [respondent] met were lawful" (R. 5501). Furthermore, the

Commission's brief concedes that respondent need not prove the lawfulness of its competitors' prices.[73] Notwithstanding this concession and in the face of the Commission's deliberate failure to make such a finding, counsel gratuitously insinuate illegality (Br. 36).[74]

The legality of the competitive offers met by respondent was before this Court on the prior review. The Court's opinion observed that respondent "presented evidence tending to prove that its tank car price was made to each 'jobber' in order to retain that 'jobber' as a customer and in good faith to meet a *lawful* and equally low price of a competitor" (R. 5311), and referred to the failure "to make findings of fact where evidence is offered that the prices met by the seller are *lawful* prices and that the meeting of them is in good faith" (R. 5319 n.). Finally, in distinguishing *Staley*, the Court referred to "the assumption, applicable here, that if a competitor's 'lower price' is a *lawful* individual price offered to any of the seller's customers," the meeting of such a price in good faith was protected by Section 2(b) (R. 5315).[75]

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[73] That concession accords with ***Standard Oil Co. v. Brown***, 238 F. 2d 54 (5th Cir. 1956), and the Commission's own Initia Decisions in ***C. E. Niehoff & Co.***, Dkt. 5768, and ***E. Edelmann & Co.***, Dkt. 5770, affirmed in ***C. E. Niehoff & Co. v. Federal Trade Commission***, 241 F. 2d 37 (7th Cir. 1957) and ***E. Edelmann & Co. v. Federal Trade Commission***, 239 F. 2d 152 (7th Cir. 1956)

[74] In connection with the lawfulness question, the Commission's brief asserts that the Commission does "not have the burden of proving the *unlawfulness*" of the prices met, but urges that the identical "pricing policies" of respondent's competitors "suffer from the same infirmities" as respondent's prices (p. 36). See also Reply Br. in Support of Pet., p. 4 n. 1.

[75] One Justice remarked in the oral argument as to the riva offers met by respondent that "if it is not shown that they were illegal, you can assume that they were legal." Transcript of Ora Argument, October 9, 1950, p. 74.

Cf. also the immediately preceding colloquy between Mr. Justice Burton and FTC counsel:

> "Mr. Justice Burton: In this case we are assuming these competitive offers from the other companies are legal offers

In oral argument, Commission counsel had conceded that equally low prices were available to respondent's four customers from "at least five major companies," but had alluded to pending proceedings against three of those rivals. (Transcript, pp. 71-78). The Court at the close of the argument requested a special memorandum regarding those cases (*Id.* at 137-38). As filed by the Commission on October 13, 1950, this document cited the pendency of price discrimination complaints against Gulf, Texas, and Shell—three of the numerous Detroit competitors which had bid for respondent's four jobber customers (pp. 32-38, *supra*). Perhaps in cognizance of those cases, the Court's opinion directed that "There Should Be a Finding as to Whether or Not Petitioner's Price Reduction Was Made in Good Faith to Meet a *Lawful* Equally Low Price of a Competitor" (R. 5311).

Upon the remand and on the same record, the Commission majority took the initiative in issuing findings invalidating respondent's meeting competition defense on other grounds, without mention of the "lawfulness" issue (R. 5336).[76] This was done despite respondent's prompt request for a finding that its price reductions were made in

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is that not true? It has not been raised anywhere in the oral arguments or briefs that they are unlawful offers, as I understand it. * * *

"No point is being made against Standard in this case that they were not lawful offers that they could not meet under the statute.

* * * * *

"Is the Commission objecting to Standard's conduct on the ground that it was trying to meet an illegal offer?

"Mr. Cassedy: No, sir. It is not basing it upon that ground."

Id. at 72-73. A similar colloquy between Mr. Justice Frankfurter and Commission counsel ensued, *id.* at 77-78.

[76] The Commission ignored staff counsel's contention that respondent must affirmatively demonstrate the lawfulness of its competitors' prices. (Brief of Counsel Supporting the Complaint, pp. 10-11).

good faith to meet a competitor's lawful equally low pric “as called for by the mandate of the Supreme Court” (R. 5354).[77] On the other hand, the author of the minority opinion, expressing the views of two Commissioners, felt “satisfied that there is nothing in the 8,000 pages of evidence in this record which might cause me to suspect that respondent knew, or that it had reason to believe, that th competitor's lower price which it was meeting was or might have been unlawful” (R. 5399, 5420). Accordingly, the minority Commissioners proposed a finding that “The respondent's price reduction was made in good faith to mee a *lawful* equally low price of a competitor” (R. 5421).

The deliberate failure of the Commission majority to impeach the legality of the competitive offers surely preclude any further challenge here. This is especially so sinc the three proceedings placed before the Court by the Commission's Memorandum on October 13, 1950, were dismisse by the Commission on April 3, 1957, on motion of its staf in 1955.[78]

Furthermore, this Court's recent *Automatic Cantee* opinion declared that “antitrust policy and the ordinar requirements of fairness” dictate that no businessma should be charged with knowledge that price differentials without more, are illegal.[79] The rationale of *Automati*

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[77] The Commission declined to grant respondent's request fo a hearing until *after* it issued its proposed findings which it late promulgated (R. 5336, 5341-44, 5359).

[78] The three dismissed complaints in no event can supply retrospective inferences of illegality concerning the prices met in th 1930s by respondent as to these three, let alone the offers from th numerous other competitors. Moreover, recent Commission Initia Decisions held that no presumption of illegality as to a respondent or his competitors' prices could arise from the mere subsequen filing of a Commission complaint. *E. Edelmann & Co.*, Dkt. 577 (May 10, 1955), *C. E. Niehoff & Co.*, Dkt. 5768 (May 17, 1955).

[79] *Automatic Canteen Co. v. Federal Trade Commission*, 34 U. S. 61, 81 (1953). The Court did “not think that price differen tials, even as a matter of uncritical impression, come so often withi

Canteen,[80] requiring the Commission to go forward with any evidence as to unlawfulness, is *a fortiori* applicable here.[81] Thus, even though a respondent may have the burden of *proof* to establish every statutory element of the Section 2(b) defense, the legality of the prices met is assumed at least until the Commission *comes forward* with some record evidence indicating otherwise. Cf. *International Shoe Co. v. Federal Trade Commission,* 280 U. S. 291, 302 (1930).

Here the Commission has declined even to notice the issue, notwithstanding this Court's remand. Consequently, the legality of the competitive offers must now be deemed confirmed, once and for all. Cf. *Federal Trade Commission v. Curtis Pub. Co.,* 260 U. S. 568, 580 (1923).

Even so, respondent was always prepared to show that the record amply supported its requested findings of lawfulness of the relevant offers. In the case of most, the Commission itself would not regard them as subject to the Robinson-Patman Act. The products of Phillips (Phillips 66), Standard of Ohio (Fleet Wing), Pure Oil Co. (Hi-Speed) and Ohio Oil Company (Linco, Marathon) were offered by local Michigan distributors.[82] National Refining Co. offered gasoline at a single uniform price in Detroit (R. 1949-50). And Aurora, which aggressively solicited re-

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the prohibited range of price discriminations" as to warrant such knowledge on a businessman's part. *Id.* at 71.

[80] That case concerned the buyer's knowledge as to the legality of his own supplier's prices.

[81] For a seller in meeting his competitors' prices in good faith ordinarily cannot foretell their ultimate legality, which may depend on a host of factors and years of litigation, and should not be forced by the Commission into price and cost discussions with his competitors. Such collaboration, the Court observed, might "offend other antitrust policies." *Id.* at 69.

[82] The Commission has consistently taken the position that distributors who resell within a state gasoline purchased from an out-of-state refinery are not subject to the Robinson-Patman Act. See S. Rep. 2817, 84th Cong., 2d Sess. 21-22 (1956).

spondent's customers, was a local refiner selling wi
the state products made from Michigan crude oil (R. 1
52, 1354-56, 3058-59).[83]

V.

THE COMMISSION'S "COST JUSTIFICATION" AND "C PETITIVE INJURY" GROUNDS FOR VITIATING MEETING COMPETITION DEFENSE ARE LEGA UNTENABLE.

Besides properly setting aside the factually unsuppo
contention that respondent's prices were granted purs
to a "system," the Court of Appeals correctly disappr
the Commission's additional legal grounds for reje
respondent's meeting competition defense.[84]

A. Cost Justification Cannot Affect the Alternati Meeting Competition Defense.

The Court of Appeals held "irrelevant" to the me
competition defense the Commission's finding that res
ent "knew or should have known" that the lower pri
the four customers "could not be justified on the ba
differences in the cost of manufacture, sale and deli
(R. 5499).

In judging the legal sufficiency of respondent's me
competition defense, cost considerations are entirely
the legal point. The court below correctly observed
cost justification and meeting competition are

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[83] In 1940 alone, Aurora sold between 40 and 50 milli
lons in the area. Its product, represented as of a higher
rating than respondent's gasoline, was considered seriously
spondent's customers (R. 1147-52, 1308, 2013).

[84] These prime elements in the Commission majority's d
are now minimized as "ancillary" and "subsidiary" by
(Reply Br. in Supp. of Pet., p. 8 n. 7; Br., p. 56), notwithst
one majority Commissioner's subsequent characterization
injury finding as the key factor in the post-remand ruling. S
18 *supra*.

independent statutory defenses under Section 2 of the Act. The fallacy underlying the Commission's doctrine was exposed by one of the Justices during oral argument on this Court's previous review:

> "What good is it if they must justify the cost? Why waste time on the good faith?
>
> "If good faith is not enough, if it requires cost, then what purpose does this section have in the statute?"[85]

On the other hand, if the Commission were correct in asserting that cost justification has some bearing on the "good faith" of a seller in meeting competition, respondent's good faith would be confirmed by its policy of refusing to give its tank car price, even when necessary to meet a competitor's lower offer to an established account, unless the customer assumed certain costly distributive functions. For, as this Court's opinion also observed (R. 5309), obvious cost economies accrued to respondent in serving tank car customers. The only question concerned the precise amount of the saving.[86]

This proceeding began as a "pioneer case" in cost justification under the Act (R. 5068, 5081). Respondent's extensive cost studies, whose good faith was conceded, were rejected by the Commission on unforeseeable and complex grounds (R. 5171-78, 5374-82, 3771-72).[87] In view of the shifting content of costs in competitive pricing and the elusive nature of a statutory cost justification, as recently acknowledged by this Court,[88] respondent surely could not be charged from the outset with knowledge that the Commission's accountants might later disagree with its estimated cost savings.

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[85] Transcript of Oral Argument, October 9, 1950, p. 112.

[86] Independent studies established that the typical distribution cost between wholesaler and retailer is between 1½¢ and 2¢ per gallon. 2 Bain, *The Pacific Coast Petroleum Industry*, pp. 222-27 (1945), cited in Adelman: *Integration and Antitrust Policy*, 63 Harv. L. Rev. 27, 64 (1949).

[87] "The development of satisfactory bases of allocation has been the most difficult problem in analyzing distribution costs." Note, *Proof of Cost Differentials Under the Robinson-Patman Act*, 65 Harv. L. Rev. 1011, 1014 (1952).

B. The Meeting Competition Defense Is Unaffected by Findings of Competitive Injury.

Likewise, the Court of Appeals correctly held respondent's meeting competition defense unaffected by the Commission's finding that respondent "knew or had the means of knowing and should have known that the manner in which it priced and sold its gasoline continually created the probability of injury to competition between retail dealers who bought such gasoline at different prices and resold it in competition with one another" (R. 5498-99).

The Court of Appeals accurately perceived that this was "the same theory upon which the Commission's previous order was bottomed and which was expressly repudiated by the Supreme Court" (R. 5499). This Court previously reversed the Commission's contention that a finding of competitive "injury" made the defense "not material" and procedurally "unavailable" (R. 5179, 5182). For unless the Commission itself first proves competitive "injury," a Robinson-Patman Act proceeding must be dismissed for want of a prima facie case.[89] Thus, if competitive "injury" defeats the meeting competition defense, that proviso is wholly useless: *Without* competitive "injury" there would be no violation anyway—regardless of the defense; and *with* such "injury," the defense would fail.

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[88] This Court commented on "the intricacies inherent in the attempt to show costs in a Robinson-Patman Act proceeding," and concluded that "Proof of a cost justification being what it is, to often no one can ascertain whether a price is cost justified." *Auto matic Canteen Co. v. Federal Trade Commission*, 346 U. S. 61, 6 79 (1953).

The then Chairman of the Federal Trade Commission has als observed: "Cost accounting is by no means an exact scienc Methods of allocation and proration of distribution costs are i the evolutionary stage. * * * In none of the cases * * * has th Commission established adequate guiding principles or precedent for cost analysis * * * [T]here are no rules of the game." *Sy vania Electric Products, Inc.*, FTC Dkt. 5728, pp. 5, 6 (Oct. 2 1954).

In now impugning a meeting competition defense on the merits by reason of competitive "injury",[90] the Commission would—by a purely verbal change—resurrect the prior interpretation which this Court rejected as making Section 2(b) of "such little, if any, applicability as to be practically meaningless."[91]

C. No Genuine Competitive Injury Appears in This Case.

Finally, this case does not factually disclose any competitive "injury" cognizable under the Robinson-Patman Act.[92] Proof of the meeting of competitors' equally low prices to retain a customer rebuts any "injury" attributable prima facie to the respondent seller's differential, for it demonstrates that the same low prices were first offered to the same customers by other suppliers. In that event, the respondent's defensive counter-move cannot be held to cause any "injury" within the contemplation of the law.

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[89] *E.g., General Foods Corp.*, FTC Dkt. 5675 (April 27, 1954).

[90] Although playing down the importance of this aspect of the majority findings against respondent, the Commission's brief stresses the knowledge respondent should have had as to the injury created by its prices (p. 57). But if actual injury findings are immaterial, as held by this Court in 1951, imputed knowledge as to this same injury could have no greater bearing on the meeting competition defense. The *Staley* decision, as quoted by this Court, expressly recognized the availability of that defense to a seller "who has knowingly discriminated in price." 324 U. S. at 759; R. 5317. In any event, since respondent never granted a lower price unless it knew that the same or still lower prices were at all times available to the customer, it could surely not be charged with knowingly causing competitive injury when the customer was bound to get equally low prices, anyway.

[91] (R. 5320.) "Hence, by a narrow interpretation of 'good faith,' the Commission succeeded in obtaining the same result which had been sought in its 'procedural' arguments before the Supreme Court." Comment, *The Meeting Competition Defense Under Section 2(b)*, 49 Northwestern L. Rev. 261, 263, n. 11 (1954).

[92] Since the meeting competition defense concerns the rebuttal of a *prima facie* case of injurious discrimination, the injury issue is not closed until that defense is finally adjudicated.

Since on this record respondent's four customers could at any time have accepted lawful competitive offers at prices as low or lower than respondent's tank car price, the competitive situation on the dealer level would be the same—whether or not respondent met its competitors' prices. Disabling respondent from granting its tank car price would have merely shifted the customer's business over to another of the many Detroit suppliers.[93]

Judge Hansen, Chief of the Antitrust Division of the Justice Department, recently stated in testimony before Congress concerning the issues of the instant case: "The injury wasn't done by the lowering of the seller in good faith, the injury was done by the competitor that came in and offered to sell to his customer at a lesser price."[94]

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[93] See pp. 32-38, 55 *supra;* and R. 5104, 344-45, 371-74, 947, 971, 1018-19, 1062-63, 1086, 1092, 1093, 1118, 1127, 2097. According to the Commission's own chief witness, therefore, "it would not in any way cure or help to cure this competitive situation" if respondent's customers would simply transfer to other suppliers (R. 345).

This Court appropriately observed that "it must have been obvious to Congress that any price reductions initiated by a seller's competitor would, if not met by the seller, affect competition at the beneficiary's level or among the beneficiary's customers just as much as if those reductions had been met by the seller" (R. 5320).

[94] Judge Hansen summarized the situation in this case as follows: "We have four dealers that are all paying an equal price from one seller. The competitor comes in and goes to one of them and says, 'I will sell it for two cents less.' The damage certainly is done to the other three by virtue of their competitor getting it for two cents less, the damage is not by the original seller coming back and saying, 'I will sell it to you for the same amount that my

Furthermore, respondent's reductions to its four customers were minimized to the extent these were required to perform their own bulk storage and transportation.[95] No customer receiving the 1½¢ per gallon lower tank car price ever received a *net* price concession in that amount. While the record does not clearly show the precise benefit remaining for the customer after his expenditures for jobber facilities and equipment, that amount was obviously quite small. Accordingly, an impartial study of this case concluded that "any cutting of price with its consequent effect upon competition would be 'caused' not by the discount received but by the integrated retailer's willingness to operate at a lower profit margin."[96]

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competitor has offered it to you for.' So the seller acting in good faith wouldn't be the one causing the damage, the damage would be caused by the other competitor." *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee on Bills to Amend Section 2 of the Clayton Act*, 85th Cong., 1st Sess. 843 (March 1957).

[95] This factor differs from the statutory cost justification defense which relates only to seller's own costs that need not coincide with the costs incurred by a customer in performing a distributive function. See Note, 67 Harv. L. Rev. 294, 303-4 (1953); and notes 64 and 86 *supra*.

Thus, a detailed analysis of Citrin's operations revealed an average resale cost of 1.48¢ per gallon in the years 1937-1940, ranging from 1.3¢ in 1937 to 1.53¢ in 1940 (R. 1771). Comparable costs for Wayne averaged 1.43¢ per gallon between 1938-1940, but this evidence was stricken (R. 5154, 1234-39). Ned's resale costs were doubtless smaller, since its overhead was spread over a general merchandising business covering tires, small and major household and electrical appliances, sporting goods, radios and hardware, which were sold in conjunction with gasoline at its six retail outlets (R. 5109-10, 1799).

The contrary assertions by the Examiner (R. 5123) are obviously incorrect (R. 5147, 1771, 228).

[96] Note, *Functional Discounts Under the Robinson-Patman Act: The Standard Oil Litigation*. 67 Harv. L. Rev. 294, 303 (1953). According to this study, "The dealers who received a discount from Standard Oil were 'integrated retailers' in that they performed wholesaling functions for themselves, such as receiving delivery in large quantities, maintaining storage facilities, and delivering to the retail stations. If the discount received by

VI.

THIS COURT SHOULD ACCEPT THE CONCLUSION BELOW THAT RESPONDENT'S DEFENSE WAS "FIRMLY ESTABLISHED" BY THE RECORD.

A. Universal Camera Sustains the Reversal of the Divided Commission, in Light of the Examiner's Findings Confirmed by the Dissenting Commissioners' Independent Appraisal.

The court below in setting aside the Commission's key "system" contention as unsupported by the evidence acted entirely within the bounds of this Court's *Universal Camera* decision,[97] and its review of the record should not be duplicated here.

According to *Universal Camera*, the Administrative Procedure Act's directive that agency findings be supported

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the integrated retailers is no greater than his additional costs on the wholesaling operations, it seems clear that the discount would have no effect on competition among retailers." *Ibid.*

Actually, the sole proof as to adverse competitive effects on this record consists of complaints about gallonage losses by a handful of Detroit service stations. The only two recipients of respondent's lower prices charged with price cutting in many instances did no more than meet the cut prices of other stations amid a general price war and "demoralized retail situation" (R. 5112, 5116, 1783-91, 1843-59). Even then the sole injury to respondent's dealers found by the Examiner related to their "being forced to meet the cut-rate prices which resulted in increasing their volume but not their profits" (R. 5114). At the same time, the record reveals concerted efforts of dealers, under the aegis of the local gasoline retailers association, to agree upon retail prices (R. 461, 593, 597, 1784, 1870, 1877-78, 1905, 2125). Although the extent is not clear from the record, these attempts to fix artificial prices obviously caused a loss of business on the part of these dealers (Cf. R. 461-62).

[97] The court below had some doubts as to its power to set aside the administrative findings, due to its understanding of this Court's *Staley* decision (R. 5496). But under the broader review standards established subsequent to *Staley* by the Administrative Procedure Act, as explained by this Court's historic *Universal Camera* decision, the court's reversal of the Commission action was obviously correct.

by "substantial evidence" requires that "substantiality be determined in the light of all that the record relevantly presents." 340 U. S. 474, 488 (1951). And since Congress sought to "increase the importance of examiners in the administrative process," an agency ruling becomes less persuasive when a different result was reached by an "impartial, experienced examiner who has observed the witnesses and lived with the case." *Id.* at 495-96. Above all, "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function." *Id.* at 490.

The decision below properly reviewed the "record as a whole," including those parts detracting from the Commission majority's ruling. The court gave "the examiner's report such probative force as it intrinsically commands" (*id.* at 495) in confirming the evidence that respondent's prices were reduced to individual customers to retain their business and were "at all times" granted "to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality", rather than pursuant to a pricing system (R. 5104).[98] The court also noted that two dissenting Commissioners sustained the Examiner's findings on the basis of an independent reappraisal of the evidence (R. 5496).[99]

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[98] The Examiner's findings here at issue rested heavily on his appraisal of the oral testimony (R. 5052, 5094-95, 5100-4).

The Commission now belittles the Examiner's report as "only advisory" because filed in 1943 prior to the Administrative Procedure Act (Br., p. 24, n. 11). But the Commission's post-remand evaluation of this record in 1953, here at issue, is governed in all respects by the standards of the APA. *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 500 (1951).

[99] On judicial review of an agency's rulings, the "wide difference of opinion among the members may suggest doubts as to some basic findings of fact." *Baltimore & O. R. R. Co.* v. *United States*, 298 U. S. 349, 362 (1936); see also *Labor Board* v. *Ohio Calcium Co.*, 133 F. 2d 721, 724 (6th Cir. 1943); *Minneapolis-Honeywell Regulator Co.* v. *Federal Trade Commission*, 191 F. 2d 786, 789 (7th Cir. 1951).

Accordingly, the Court of Appeals in setting aside the Commission majority's ruling properly applied the guiding criteria established by this Court for the review of agency action.

B. This Court Will Not Supplant the Court of Appeals as the Initial Reviewer of Administrative Action.

The force of *Universal Camera* can hardly be escaped by counsel's effort to disregard the review below in favor of a direct review by this Court of the administrative findings.[100] The Commission's argument gives scant recognition to the unanimous decision of the Court of Appeals, and in effect urges this Court to weigh the Commission's actions against the evidence *ab initio.*

But this Court has consistently refused to bypass the intermediate reviewing court in order to undertake an initial review of findings by administrative bodies. "Congress has charged the Courts of Appeals, not this Court, with the normal and primary responsibility" for reviewing the actions of administrative agencies in the first instance. *Labor Board* v. *American Insurance Co.*, 343 U. S. 395, 409-

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[100] In seeking review here, Commission counsel obscured the *Universal Camera* rule by labeling the system issue a "law" rather than a "fact" question (Reply Br. in Supp. of Pet., p. 5). The *existence* of a pricing "system" motivating respondent's prices is obviously a factual issue. The legal issue—whether such a "system," *if extant*, could be justified under the meeting competition proviso—is hypothetical unless there *is* a system. The court below concluded from the record that there was no system, and Commission counsel now disagree with that factual evaluation (Br., pp. 37 *et seq.*).

In this connection, the Chairman of the Federal Trade Commission has twice declared that "the seventh circuit court in the recent Standard Oil decision was passing on a purely factual matter and neither added to nor subtracted from the law laid down by the Supreme Court in 340 U. S. 231." Statement of the individual views of Chairman John W. Gwynne in *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee on Bills to Amend Section 2 of the Clayton Act*, 84th Cong., 2d Sess. 233 (1956); 85th Cong., 1st Sess. 634 (1957).

410 (1952).[101] When administrative findings are set aside by the reviewing court as unsupported, this Court will "do no more than decide" whether there was a "fair assessment" of the record. *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502-3 (1951). For "whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 491 (1951).

Controlling here is this Court's unanimous affirmance of the Court of Appeals in *Federal Trade Commission* v. *American Tobacco Co.*, 274 U. S. 543 (1927): "The statement of the petition for certiorari that the judgment and opinion below might seriously hinder future administration of the law was grave and sufficiently probable to justify issuance of the writ." However, after argument and scrutiny of the issues, the Court perceived that "Proper decision of the controversy depends upon a question of fact," as to which the Commission's finding in the affirmative was set aside as unsupported by the Court of Appeals. *Id.* at 544. Although this Court believed that "The opinion of the Circuit Court of Appeals is of uncertain intendment and is not satisfactory as an exposition of the law,"[102] it unanimously affirmed the judgment by following "the usual rule of non-interference where conclusions of circuit courts of appeals depend on appreciation of circumstances which admit of different interpretations" *Id.* at 544.

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[101] See also *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U. S. 358, 365 (1955); *Labor Board* v. *Electrical Workers*, 346 U. S. 464, 478 (1953) (dissenting opinion).

[102] Counsel's quarrel with the opinion below at most concerns some ambiguous dicta suggesting that pricing "systems" when not intrinsically illegal may be justifiable under the meeting competition proviso (Br., pp. 33-36). Compare *Lawlor* v. *National Screen Service Corp.*, 352 U. S. 992, 995 (1957) (dissenting opinion).

Adherence to this "usual rule of non-interference" is *a fortiori* indicated in the instant case, where the factual conclusions of the court below are corroborated by the persuasive findings of the Hearing Examiner and two minority Commissioners.[103]

CONCLUSION.

The basic issue confronting the Court today is the same as on the first review of this case seven years ago: Whether the Robinson-Patman Act preserves the fundamental freedom of sellers in a competitive economy to meet realistically the prices of their competitors. To ensure effective competition, sellers must react promptly to the price moves of their rivals, and cannot postpone pricing responses pending lengthy accounting and legal studies. Now as before, the unnatural restrictions on pricing flexibility advocated by the Commission foster the very price rigidity that the antitrust laws proscribe. Yet, as this Court's prior opinion in this case declared, "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor" (R. 5319).

"Even if the Commission has, by virtue of the Robinson-Patman Act, been given some authority to develop policies in conflict with those of the Sherman Act in order to meet the special problems created by price discrimination," this Court recognized its overriding "duty to reconcile such interpretation * * * with the broader antitrust policies that have been laid down by Congress." *Automatic Canteen Co. v. Federal Trade Commission*, 346 U. S. 61, 74 (1953).

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[103] That principle was recently reiterated in ***Labor Board* v. *Pittsburgh S. S. Co.***, 340 U. S. 498, 503 (1951) where the Court unanimously affirmed a Court of Appeals decision which, as here, had set aside an agency ruling upon remand from this Court's reversal of an earlier erroneous legal interpretation. The opinion declared that this Court was "not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way." See also ***Labor Board* v. *American Insurance Co.***, 343 U. S. 395, 41 (1952).

Respondent respectfully requests that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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October 30, 1957.

APPENDIX A.

THE AVERMENTS IN RESPONDENT'S ANSWER RELATING TO ITS DEFENSE OF MEETING COMPETITORS' EQUALLY LOW PRICES IN GOOD FAITH (DEFENSE NO. IV). (R. 17-22)

26.

Respondent hereby realleges by reference all of the matter contained in Defense No. I, II, III, V and VI hereof.

27.

For further defense Respondent alleges that for many years last past, and since June 19, 1936, and presently, competition in all phases and branches and classifications of the gasoline marketing business in Detroit, has been, and ~~is~~ extremely keen, vigorous and aggressive; that many refiners, suppliers, wholesalers, jobbers and retailers of gasoline have been, and are, operating therein, and are constantly seeking new and additional outlets, markets and customers for their gasoline: that some of said marketers of gasoline continuously, and some periodically, attempt to invade, proselyte and raid the markets and customers had by other marketers; that competitive conditions and price conditions in relation to marketing of gasoline are and have been continuously chaotic, uncertain and disturbed in varying degrees for many years and are so now; that many devices, schemes, plans, concessions, premium offers, rebates, special deals, special discounts, inducements, preferential considerations, commercial bribery, special allowances, favorable contracts, preferential offers of services and facilities, and cut prices, are constantly being used and offered by a substantial number of marketers in all branches of gasoline marketing. Further, that the State of Michigan and City of Detroit are areas high in gasoline consumption and are well supplied with water, rail and pipeline transportation; that many water terminals for the handling of gasoline exist on the boundaries of the state and more particularly on the water boundaries of the lower peninsula thereof; that there exists a substantial amount of crude oil production within the state and there are numerous large and small refineries scattered through the lower peninsula thereof seeking outlets for their products; that immediately contiguous to the south of the state, and particularly in northern Ohio, Indiana and Illinois, there are many large and small refineries and crude oil and gasoline pipeline terminals which have ready and cheap means of transportation for gasoline into Michigan by means of water, rail and pipeline; that the State, and the cities within it,—particularly Detroit,—offer an attractive market to marketers of gasoline; that abundant supplies of gasoline are easily and readily available from many sources to supply that market; that all of these factors contribute to and stimulate the chaotic and disturbed competitive gasoline marketing conditions in all branches of said marketing in Detroit as referred to above.

28.

Respondent alleges that for many years last past it has operated a gasoline marketing business in Detroit under the conditions described in Paragraph 27 above; that since September, 1936 Respondent has not and does not engage in the operation of retail service stations; that Respondent's business in Detroit in gasoline marketing to resellers of gasoline is confined to (a) sales to retail resellers such as are described in Paragraph Two Complaint and who are supplied and serviced directly by Respondent through its own organization and distribution system in Detroit, and (b) to wholesale and jobber dealers such as those named in Paragraph Three Complaint; that presently, and for approximately three years last past, the four dealers named in Paragraph Three Complaint are the only wholesale or jobber customers in Detroit which Respondent has; that prior thereto Respondent had other such customers but lost them to competitive suppliers by reason of lower price offers and inducements given by Respondent's competitors, which Respondent could not meet or declined to meet.

29.

Respondent alleges that said four dealers named in Paragraph Three Complaint, or their predecessors, have been continuously, for many years last past, the gasoline customers of Respondent; that at the time each of said customers went onto a tank car basis of purchasing gasoline that it could purchase on such basis, comparable gasoline to that sold by Respondent, from a number of Respondent's competitive gasoline suppliers for an equally low or lower price than from Respondent, and upon equally or more advantageous terms and arrangements in the matter of facilities, services, inducements and benefits than it could or did receive from Respondent, and each of said customers knew of such existing and current opportunities and offers from competitors of Respondent and had from such competitors specific offers equally as low or lower in price, and equally or more favorable in terms and the furnishing of services and facilities than it had from Respondent; that Respondent knew of the existence of such competitive offers to said customers from various sources and was advised of them by said customers and advised that Respondent must meet or approach meeting such offers to retain said csutomers; that had not Respondent at such time given to each of said customers the tank car basis and price for purchasing gasoline, each of said customers would have been lost by Respondent to a competitive supplier.

30.

Respondent alleges that from the time each of said four customers began purchasing gasoline on a tank car basis and price there has never been a time, including the present, when each of said customers could not have purchased, and they could now purchase, comparable gasoline to that sold by Respondent at equally low or lower prices and on equally or more favorable arrangements and terms from competitors of Respondent than are granted to them from Respondent; that each of said customers have from time to time, since June 19, 1936, advised of and discussed with Respondent a number of such competitive offers; that in order to have retained, and to now retain, each of said customers it has been, and is now, necessary to continue it on said tank car basis and price, and that if such price or arrangement were made any less favorable to any of said customers by Respondent at the time such price and arrangement was made, or now, that Respondent would have then, or would now, immediately have lost, or would now lose, said customer to a competitive supplier; that Respondent is informed and verily believes, and on information and belief alleges, that in the face of more favorable offers from competitive dealers to said four customers frequently being made, that Respondent could not have heretofore, or could not now, retain said customers except for the existence of a long business association with them, established good will, and the public acceptance that Respondent and said customers have built for Respondent's gasoline.

31.

Respondent alleges that in respect of the reduction of the dealer tank wagon price by ½¢ per gallon of gasoline given to Ned's Auto Supply Company in September, 1936, which continued through February, 1938, that Respondent was forced to make said reduction in price by a specific offer or offers made to said customer in August, 1936, by a supplier of gasoline competing with Respondent; that said competitive offer was in connection with gasoline comparable to that supplied by Respondent and was offered to said customer at a price equally low or lower, and upon terms and arrangements with respect of facilities, services and benefits equally or more favorable to said customer, than were the said reduced price and arrangement that was offered by Respondent to meet such competitive offer; that Respondent was advised by said customer of said competitive offer and advised that said customer would accept it unless Respondent reduced its price; that Respondent agreed to make said reduction to partially meet said competitive offer and because of the compulsion of such competitive offer; that said customer advised Respondent that Respondent's reduced price was not fully competitive nor satisfactory, and did not fully meet said competitive offer, but that it would continue purchasing from Respondent thereunder for the time being; that had not Respondent made such reduction in price in said instance, fully as great as it did, Respondent would have at that time lost said customer and was so advised by it; that if Respondent had not continued said reduction in effect until early March, 1938, when said customer qualified to purchase in tank car lots and on a wholesaler basis, Respondent would have promptly lost said customer upon withdrawing the reduced price, and Respondent was constantly under pressure from said customer, induced by competitive offers to it, to make further reduction and to accord said customer more favorable purchasing arrangements, which matters were frequently discussed by said customer with Respondent; that as hereinbefore alleged said reduced price and basis has not been in effect or used since early March, 1938.

Further, that during the period said reduced price was in effect said customer took deliveries of gasoline in such relatively large quantities at such relatively few service stations compared to other retail resellers being serviced by Respondent, and such other facts and circumstances were existent, as to render such ½¢ per gallon of gasoline price reduction substantially commensurate with savings to Respondent arising from difference in the cost of sale and delivery of gasoline to said customer by Respondent resulting from the differing methods and quantities in which such gasoline was sold and delivered to said customer, and said ½¢ per gallon reduction in price to said customer made only due allowance for said savings accruing to Respondent as nearly as the same are fairly and reasonably calculable.

32.

Respondent alleges that at no time since June 19, 1936 has it offered or granted a preferential price below its established regular price, nor offered or granted concessions not regularly accorded all customers, to any of its customers, or classes of customers, except as the same was made necessary in order to meet an equally low or lower price offered by a competitor of Respondent, and Respondent has never made such preferential or reduced price offers to proselyte customers from other suppliers, and never have such preferential offers or any acts in relation thereto on Respondent's part, had the effect, or tended to have the effect, or were likely to have the effect, of substantially lessening competition in any line of commerce, nor did they tend to create a monopoly in any line of commerce (specifically including gasoline commerce), nor did they injure, destroy or prevent competition, or tend to do so, with Respondent or any of its customers, or any of its customers' customers, or with any person or persons whomsoever, or at all, in Detroit or elsewhere.

33.

Respondent alleges that as particularly set forth above, that by reason of competitive compulsion and offers made by competitors of Respondent, which offers were for lower prices and more favorable sales arrangements than those being offered by Respondent, that Respondent, in good faith and because of necessity therefor to retain its customers, met, or partially met, the lower prices and more favorable terms and arrangements in respect of services, facilities and benefits offered by Respondent's competitors to the four dealers named in Paragraph Three Complaint, and Respondent alleges that all of the lower prices alleged to have been granted since June 19, 1936, and all that were granted, to said four dealers, were made to them in every instance in good faith to meet an equally low or lower price and equally or more favorable sales arrangements in respect of services, facilities or benefits made or furnished by a gasoline supplier or suppliers which were and are competitors of Respondent, all in strict accordance with law; and, hence, all of the acts of Respondent in respect of differentials in gasoline prices granted by Respondent, as between that class of dealers described in Paragraph Two Complaint and that class named in Paragraph Three Complaint were fully and completely justified, and do not constitute a violation of Section 2 (a) of the Clayton Act as amended, and are not unlawful thereunder or under any law.

APPENDIX B.

June 27, 1956.

Hon. James O. Eastland,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

Dear Senator Eastland: It has recently come to our attention that Federal Trade Commissioners Sigurd Anderson and Robert T. Secrest have withdrawn their objections to the enactment of the proposed bill (S. 11) to amend the Robinson-Patman Act with reference to equality of opportunity and urged its support. In view of the fact that this action results in a majority of the Federal Trade Commissioners now favoring enactment of this proposed legislation and, in view of the fact that the companion House bill H. R. 1840 was passed by the House on June 11, it has been suggested that we reexamine our announced opposition to this legislation.

We understand that Commissioners Anderson and Secrest based their change of position on the recent seventh circuit court's opinion in the Standard Oil of Indiana case and the denial of certiorari by the Supreme Court in the Balian Ice Cream Co. case. We have carefully analyzed the decisions in these two cases and do not feel that these holdings indicate a need for the proposed legislation.

In the Standard Oil of Indiana case the seventh circuit court appeared to place great weight on the fact that Standard Oil had apparently proved in the original proceeding that its lower prices were made in good faith to meet an equally low price of a competitor because of the fact that the findings of the Federal Trade Commission initial hearing examiner to this effect were never repudiated or disproved. The Court commented: "We think it is pertinent to observe that petitioner's good faith has either been recognized or assumed at all levels during this proceeding." The Court apparently was convinced that Standard Oil had proved that it was meeting a "lawful" lower price of a competitor, stating "in the instant situation there is no finding, no contention, and not even a suspicion but that the competing prices which petitioner met were lawful." Finally, the Court held that these price reductions, used as a defensive mechanism to retain the four existing customers, were based upon individual competitive situations rather than pursuant to a "pricing system" stating "[t]he bargaining and haggling which took place between petitioner and the four involved 'wholesalers' prior to a reduction in prices to them is hardly consistent with the Commission's theory that prices were reduced pursuant to a system."

In the Balian Ice Cream Co. case (*Balian Ice Cream Company, Inc.* v. *Arden Farms Company*), the Supreme Court of the United States denied certiorari and thus refused to review the ninth circuit court's opinion. The Ninth Circuit Court of Appeals had affirmed a judgment for the defendants in this action. The district court had made extensive findings of fact and had held that Arden Farms by its blanket price cut in the Los Angeles area had not discriminated in price upon a territorial basis in violation of section 2 (a) of the Robinson-Patman Act. The plaintiffs in this action were independent manufacturers and distributors of dairy products in the Los Angeles area. The ninth circuit affirmed the case on the basis that the requisite competitive injury for a section 2 (a) Robinson-Patman Act violation was not present stating "[t]here was no evidence that trade or commerce, interstate or otherwise, was lessened or burdened by any action of defendants in this case. The findings of the trial court expressly negativing the existence of any such consequences or a possibility of such results were supported by substantial evidence." The ninth circuit then proceeded to discuss, at some length, the permissive scope of section 2 (b). Some of this 2 (b) language is disputable in light of the Supreme Court's decision in the Standard Oil of Indiana case; it is our belief that this language should be treated as dictum and, for that reason, should not be considered as precedent for future 2 (b) proceedings.

It is our position that neither of the above cases furnishes sufficient basis for the Department to change its position of opposition to the so-called equality-of-opportunity legislation. They do not broaden the scope or adversely affect what we consider to be the merits of a section 2 (b) defense.

As pointed out in the Department's letter of March 6, 1956, "[w]hile we recognize the competitive problems which arise when one purchaser obtains advantages denied to other purchasers, we do not believe the solution of the problem lies in denying sellers the opportunity to make sales in good faith competition with other sellers." These pricing differences may, we emphasize, be justified under existing law only in response to individual competitive situations and may not be extended beyond what is necessary to meet good faith offers of competitors. A seller's right to meet a competitor's lawful prices by granting price differentials to some customers without reducing his prices to all seems consonant with our national antitrust policy and should remain an essential qualification to any anti-price-discrimination law. A seller constrained by law to reduce prices to some only at the cost of reducing prices to all may well end by reducing them to none.

This proposed legislation would appear to limit the 2 (b) defense to those instances in which the effect of the discrimination would be "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination or with customers of either of them." As stated in the Department's letter of March 6, 1956, this anticompetitive effect has so rarely appeared as a basis for either a complaint or a decision involving price discrimination that the result of enactment of this proposed legislation would be to render 2(b) practically meaningless.

In view of the foregoing considerations, the Department of Justice opposes the enactment of S. 11 or its companion bill H. R. 1840.

Sincerely,

WARREN OLNEY III,
Acting Deputy Attorney General.

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IN THE

Supreme Court of the United States

October Term, 1956 7

No. 74

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

STANDARD OIL COMPANY.

MOTION FOR LEAVE TO FILE BRIEF IN BEHALF OF NATIONAL CONGRESS OF PETROLEUM RETAILERS, INC., AND RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN, INC., AS *AMICI CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1956

No. 465

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

STANDARD OIL COMPANY.

MOTION FOR LEAVE TO FILE BRIEF IN BEHALF OF NATIONAL CONGRESS OF PETROLEUM RETAILERS, INC., AND RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN, INC., AS *AMICI CURIAE,* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

National Congress of Petroleum Retailers, Inc., and Retail Gasoline Dealers Association of Michigan, Inc., respectfully move this Court for leave to file a brief, as *amici curiae,* in support of the petition for certiorari filed herein by the Solicitor General of the United States in behalf of the Federal Trade Commission. The Solicitor General has consented to the filing of such a brief; consent thereto has been requested but not received from Standard Oil Company.

Interest of *Amici Curiae*

National Congress of Petroleum Retailers, Inc. is a trade congress of State and local associations of retail gasoline dealers, national in scope, formed for the purpose of fostering and promoting the interests and welfare of the 275,000 petroleum retailers in the United States. Its membership is comprised of 67 state and local associations located in 34 states and the District of Columbia.

Retail Gasoline Dealers Association of Michigan, Inc., is a non-profit membership corporation serving the interests of the retail gasoline dealers of that State. It is a member of National Congress of Petroleum Retailers, Inc. The Association has more than 2600 members in the State of Michigan and more than 1500 members in the Detroit metropolitan area, where this case arose.

The retail gasoline dealers of Detroit and of the nation have a direct and vital interest in the outcome of this proceeding. This record shows that Standard Oil Company and other major oil companies have engaged in the practice of selling their branded gasolines to certain large volume purchasers, classified by them as "jobbers" but reselling in whole or in part at retail, at a price substantially lower than the price which they charge for the same gasolines to the many hundreds of smaller retail dealers whom they supply in the same marketing area. This discriminatory pricing practice is regularly engaged in by these oil companies not only in Detroit but in other areas in various parts of the United States. The Commission has found, and it is now undisputed, that this price discrimination has had and may have the effect of seriously injuring and destroying competition between the favored large volume purchasers and the other retailers who must compete with them in the resale of said gasolines. The purpose of the order issued by the Commission herein, which the Court below set aside, is to protect the retail gasoline dealers of Detroit and other areas served by petitioner from the injurious effects of such price discrimination. Said order, if affirmed by this Court, presumably will be respected and complied with not only by Standard Oil Company but by the other major oil companies. The dealers represented by these Associations, therefore, are directly concerned with the affirmance and enforcement of said order, and are, in fact, real parties in interest in this proceeding.

Questions Presented

This case presents two questions of great present importance. It is believed that the industry-wide significance of these questions, affecting the welfare and livelihood of retail gasoline dealers throughout the country, is not sufficiently emphasized in the petition for certiorari.

1. The first question may be variously stated as follows:

May a quantity price or discount, regularly granted to a few large volume purchasers by a major supplier of a commodity, and otherwise unlawfully discriminatory, be justified under the "good faith" proviso by showing that other major suppliers of such commodity regularly grant the same differential or discount to purchasers of like volume?

May adherence to a discriminatory pricing practice continuously employed by the dominant suppliers in an industry be justified under the "good faith" clause on the ground that it is an "industry practice" and that a particular supplier not adhering to it might lose customers?

Was it the intent of Congress, in inserting the "good faith" limitation in Section 2(b), to permit the *constant* allowance of unearned price differentials to large volume buyers by dominant suppliers or as an industry practice?

The above question is directly presented for disposition in this case, for the following reasons:

The assertion of the "meeting competition" defense in this case is an effort by the major oil companies, as represented by Standard Oil Company, to justify and obtain judicial sanction of a long used pricing practice whereby a quantity price differential based on annual volume is granted to a few large gasoline retailers in metropolitan areas, and to wholesalers reselling in part at retail, but is denied to the great number of smaller retail dealers who must compete in the resale of the same branded gasoline with the large volume purchasers.

The major oil companies who, like Standard, sell their gasoline at two prices in the same marketing area, quote these prices as a "tank car price" and a "tank wagon price." The lower or "tank car price" is offered only to those customers who are permitted to purchase in tank car quantities and who are classified by the oil companies as "jobbers." Actually, however, this lower price is neither a tank car price nor a functional price. It is not truly a tank car price since it is not available to any customer who wishes and is able to buy and take delivery in tank carloads. It is not a functional price because the large customers classified as jobbers are so classified without regard to whether they resell in part or in whole at retail. The major oil companies impose an annual volume requirement for "jobber" recognition, and this requirement is made so high that only the largest volume purchasers can qualify.

The tank wagon prices and the tank car prices of the major oil companies are almost always the same. This is true as a matter of common knowledge and is confirmed by this record. There is some testimony as to reports to Standard of "offers" by other major oil companies to sell in tank car quantities at less than the tank car price, or on better terms, but none of these reported offers was substantiated by testimony of any representative of the company involved. Standard never met any such reported offer and never reduced its tank car price below the customary differential; and there is no evidence that any other major oil company did so. It thus appears that there was in reality no price competition for the business of any of the jobbers.

The broad question presented, then, is whether the continuous employment of the same quantity price differential by major suppliers, on terms available only to the largest purchasers, can be justified by one of those suppliers on the ground of meeting its competitors' prices in good faith. The legislative history of the Robinson-Patman Act, as well as the subsequent decisions of this Court, require that this question be answered in the negative.

2. The second question presented is directly raised by the opinion of the Court of Appeals, going to the basic purposes of the Robinson-Patman Act and having an important bearing upon the future administration and enforcement of that Act.

Referring to the changes made in the meeting competition defense by the Robinson-Patman Act, the Court of Appeals cites the statement of this Court in its prior opinion in this case that "None of these changes, however, cut into the actual core of the defense," and thereupon concludes:

> "It would thus appear that a 'good faith' defense available under the Clayton Act would still be avail-

> able under the amended act. If petitioner's pricing policy was lawful prior to the amendment the same policy was lawful afterward."

The Court of Appeals thus has held that Congress, in enacting the Robinson-Patman Act, failed in its purpose to strengthen Section 2 of the Clayton Act by closing or at least narrowing the loopholes provided by the old defenses. The decisions of this Court are to the contrary.

In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, this Court said:

> "Furthermore, in enacting the Robinson-Patman Act Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased the less-than-carloads lots. To this end it undertook to strengthen this very phase of the old Clayton Act."

and in *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746, this Court found that

> "The change in language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination."

We submit that the construction given the meeting competition proviso by the court below, as well as its approval of the discriminatory quantity pricing practice above described, should be reviewed by this Court.

Your applicants request the Court's consideration of this motion and, if said motion be granted, that the foregoing statement in support thereof be accepted as their brief in support of the petition for certiorari.

Respectfully submitted,

APPELL, AUSTIN & GAY,
Attorneys for National Congress of Petroleum Retailers, Inc., and Retail Gasoline Dealers Association of Michigan, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. ~~465~~ 74

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

STANDARD OIL COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF IN BEHALF OF NATIONAL CONGRESS OF PETROLEUM RETAILERS, INC., AND RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN, INC., AS AMICI CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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December 11, 1956.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 465.

FEDERAL TRADE COMMISSION,
Petitioner,
vs.
STANDARD OIL COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF IN BEHALF OF NATIONAL CONGRESS OF PETROLEUM RETAILERS, INC., AND RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN, INC., AS AMICI CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice
and Associate Justices of the
Supreme Court of the United States:

Respondent, Standard Oil Company, respectfully prays this Court to deny the motion with supporting brief filed in behalf of National Congress of Petroleum Retailers, Inc. and Retail Gasoline Dealers ~~of~~ Michigan, Inc., and to exclude those papers from the docket of this case as filed in violation of this Court's Rules of Practice governing *amici curiae* and the contents of their briefs.

1. The Motion Was Not Timely Filed.

Unless this Court's Rules of Practice are construed to sanction the hit-and-run tactic of addressing the Court too late to permit effective rebuttal, the instant motion was clearly not submitted "a reasonable time" prior to the consideration of the petition for certiorari.

Although the petition was filed on September 28, the motion was not filed until November 26, only two days before Respondent's brief in opposition to certiorari was due and had already been printed. While its ostensible purpose is the presentation of issues not adequately covered by the Solicitor General's petition for certiorari, it was filed fully fifty-eight days after that petition—on the eve of the extended deadline for Respondent's brief in opposition to certiorari.

But Rule 42(1) provides that a prospective *amicus* who fails to secure the consent of both parties must submit his motion "a reasonable time prior to the consideration" of the petition for certiorari. Certainly fifty-eight days after filing of the petition and only two days before the due date of Respondent's brief is unreasonable and suggests a design to foreclose any response.

2. The Supporting Brief Also Flouts the Rules.

Although purporting throughout to speak from the evidence and record, the brief is bare of a single record citation where the truth of its numerous allegations can be checked. According to Rules 42(5) and 40(2), briefs may refer to the record of a case only if citing the pertinent record page number and must be especially "specific" when referring to "a part of the evidence."

Moreover, the brief hardly pretends to address itself to the bearing of the decision of the Court of Appeals on the facts at bar. Instead, the brief resorts to insinuation and innuendo against Respondent—and other oil companies not party to this proceeding—to which there is no opportunity for reply. Such undocumented accusations that stray far beyond the issues of this case are surely barred by this Court's directive against "burdensome, irrelevant, immaterial and scandalous matter." Rule 40(5).

Respectfully submitted,
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No. 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

STANDARD OIL COMPANY,
Respondent.

BRIEF IN BEHALF OF NATIONAL CONGRESS OF PETROLEUM RETAILERS, INC., AND RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN, INC., *AMICI CURIAE*

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No. 24

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Respondent.

BRIEF IN BEHALF OF NATIONAL CONGRESS OF PETROLEUM RETAILERS, INC., AND RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN, INC., *AMICI CURIAE*

Interest of *Amici Curiae*

National Congress of Petroleum Retailers, Inc. is a trade congress of State and local associations of retail gasoline dealers, national in scope, formed for the purpose of fostering and promoting the interests and welfare of the 275,000 petroleum retailers in the United States. It is the only trade association of retail dealers in petroleum products having a nationwide representation. Organized as a non-profit membership corporation under the laws of the State of Michigan, its membership is comprised of 57 state and local associations located in 36 states and the District of Columbia.*

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* A list of the affiliated gasoline retailer associations comprising the membership of National Congress of Petroleum Retailers, Inc., is set forth as an appendix to this brief.

Retail Gasoline Dealers Association of Michigan, Inc., is a non-profit membership corporation serving the interests of the retail gasoline dealers of that State. It is a member of National Congress of Petroleum Retailers, Inc. The Association has 2,785 members in the State of Michigan and more than 1500 members in the Detroit metropolitan area, where this case arose.

The retail gasoline dealers of Detroit and of the nation have a direct and vital interest in the outcome of this proceeding. This record shows that Standard Oil Company and other major oil companies have long engaged in the practice, in Detroit and other metropolitan areas, of selling their branded gasolines to a few large volume purchasers, classified by them as "jobbers" but reselling in whole or in part at retail, at a price substantially lower than the price which they charge for the same gasolines to the many hundreds of smaller retail dealers whom they supply in the same market areas and who must compete with the large volume buyers. The Commission has found that this price discrimination has had and may have the effect of injuring, destroying and preventing competition with the favored "jobbers" in the retail resale of said gasolines. The purpose of the cease and desist order issued by the Commission herein, which the court below has set aside, is to protect the retail gasoline dealers of Detroit and other areas served by Standard from the injurious effects of such price discrimination. Said order, if reinstated by this Court, presumably will be respected and complied with not only by Standard but by the other major oil companies as well. The dealers represented by these Associations, therefore, are directly concerned with the affirmance and enforcement of the Commission's order, and are, in fact, real parties in interest in this proceeding.

Questions Presented

As viewed by the retail gasoline dealers, the assertion of the "meeting competition" defense in this case is an effort by Standard Oil Company to justify and obtain judicial sanction of a discriminatory pricing practice long used by major oil companies, whereby a quantity price differential based on the customer's annual volume is granted to a few large gasoline retailers in metropolitan areas, and to wholesalers reselling in part at retail, but is denied to the great number of smaller retailers who must compete in the resale of the same branded gasoline with the large volume purchasers.

The major oil companies who sell their gasolines at two prices in the same marketing area quote these prices as a "tank car price" and a "tank wagon price". The tank car price, however, is not offered to any dealer who wishes and is able to buy and take delivery in tank car quantities (R. 146-7, 552-8, 2088-9, 1256). This lower price is available only to those dealers whom these oil companies choose to classify as "jobbers" (Answer, R. 12-14). It appears that by industry definition a gasoline jobber is any dealer, whether wholesaler or retailer or both, who buys in tank carloads, has bulk storage, and delivers to his own or other service stations (R. 934, 5096). The major oil companies, however, do not permit the rank and file of their retailer customers in metropolitan areas to qualify as jobbers even under this industry definition. They impose an arbitrary volume requirement of their own for jobber recognition, and this requirement (the purchase of 1,000,000 to 2,000,000 gallons or more of gasoline annually) is made so high that only the largest volume purchasers can qualify (R. 119, 1891).*

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* Mr. Raupagh, manager of Standard's Detroit division, testified:

"Q. What must the character of the business be? A. Well, he must have a bulk plant; he should have some established business; he should be able to purchase from a million to two million gallons a year.

"Q. Why do you make that volume requirement? A. I don't know of any particular reason excepting that for an in-

(*Footnote continued on following page*)

It is thus evident that the so-called "tank car price" actually is neither a tank car price nor a functional price, but is nothing more nor less than a quantity discount based on an arbitrarily high annual volume requirement. It is not truly a tank car price since it is not available to any customer who wishes to buy and is able to take delivery in tank carloads. It is not a functional price because the large customers classified as jobbers are so classified without regard to whether they resell at wholesale, or in part or in whole at retail. Any customer buying the required gallonage could qualify as a jobber and get the tank car price.

The Commission found that Standard's allowance of this quantity price to the four "jobbers" as retailers gave them a substantial competitive advantage over its direct retailer customers paying the higher price, which has resulted and may result in serious injury to competition (R. 5372-4). The Commission also found that the lower price to the jobbers was not justified by any cost savings to Standard in serving them. These findings are not now in disute.

Stripped of its non-essentials, then, this case boils down to the simple matter of one chain retailer and three wholesaler-retailers, who, because of the large volume of their purchases, were permitted to buy as "jobbers" at a price

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(Footnote continued from preceding page)

dividual or a concern to be a jobber there must be some volume involved, and that's what we consider as a proper volume.

"Q. Does the jobber, to you, simply mean somebody who buys in certain quantities? A. Who buys in certain quantities and performs a function of a jobber.

"What is your understanding—what is the function of a jobber? A. First, that he buy in sufficient quantity.

"Q. Is it necessary that he resell to other dealers? A. No."

As to the requirements for jobber qualification other than volume (storage and delivery facilities and good credit), tank storage and trucking are easily obtainable (R. 984, 395), and there is no indication that Standard was willing to sell gasoline in carload lots to smaller purchasers even for cash.

substantially lower than the price charged their smaller retailer competitors. The question here presented would be the same if Standard's practice had been to make deliveries to the large volume buyers directly to their service station tanks at the lower price.

The Issues

1. A single substantive issue remains for decision in this case. That issue is whether, upon the findings of fact of the Commission and other undisputed facts of record, Standard has established the defense that its discriminatory price to the four jobbers, on gasoline resold by them at retail, was made, in fact and *in good faith*, to meet the equally low prices of competitors, within the meaning of Section 2(b) of the Clayton Act.

As related to the pricing practice above described, this issue may be variously restated as follows:

> **May a quantity price or discount, regularly granted to a few large volume purchasers by a major supplier of a commodity, and otherwise unlawfully discriminatory, be justified under the "good faith" proviso by showing that other major suppliers of such commodity regularly grant the same differential or discount to purchasers of like volume?**
>
> **May adherence to a discriminatory pricing practice continuously employed by the dominant suppliers in an industry be justified under the "good faith" clause on the ground that it is an "industry practice" and that a particular supplier not adhering to it might lose customers?**
>
> **Was it the intent of Congress, in inserting the "good faith" limitation in Section 2(b), to permit the constant allowance of unearned price differentials to large volume buyers by dominant suppliers or as an industry practice?**

The Commission has answered these questions in the negative. The Court of Appeals refused to meet this issue, but instead substituted its own findings of fact for those of the Commission. In so doing it ignored the numerous admissions made by Standard in its answer to the complaint, in the testimony of its witnesses, and in its prior briefs that both its higher and its lower prices were fixed in accordance with a defined pricing policy based on customer classification. In fact, Standard's principal reliance at the trial, as to meeting competition, was upon its adherence to the same criteria for jobber classification and the same tank car—tank wagon price differential which was employed by its major competitors.

Referring to the charges made in the meeting competition defense by the Robinson-Patman Act, the Court of Appeals concluded:

> "It would thus appear that a 'good faith' defense available under the Clayton Act would still be available under the amended act. If petitioner's pricing policy was lawful prior to the amendment the same policy was lawful afterward."

The court below thus has held that Congress, in enacting the Robinson-Patman Act, failed in its purpose to strengthen Section 2 of the Clayton Act by closing or at least narrowing the loopholes provided by the old defenses. As will hereinafter be pointed out, this Congressional purpose abundantly appears from the legislative history of the Act, and has been recognized by this Court in prior decisions.

The basic question, therefore, is as to the proper construction to be given the "good faith" clause of Section 2(b), in the situation here presented.

The Facts in Detroit

We believe this brief will best serve the Court by presenting the factual background necessary to an understanding of Standard's price discriminations in Detroit, and of the dual pricing system there employed by most of the major oil companies.

The writer of this brief has been connected with this case since its inception in 1940. As trial attorney for the Federal Trade Commission he prepared the complaint, tried the case, briefed and argued it before the Commission. He has represented the retail gasoline dealers at all stages of the case before the Commission and in the courts since 1946. He is, therefore, thoroughly conversant with the record herein in all its aspects.

The impact of price discrimination on retail gasoline competition

There is no retail business in which competition is more immediately affected by discriminatory pricing practices of suppliers than the retail gasoline business. There are several reasons why this is true.

First, the gasoline trade is on wheels. In a large metropolitan area like the Detroit area the average driver of an automobile can without inconvenience buy gasoline at any one of hundreds of service stations throughout a territory of many square miles through which he drives regularly. At the time this case was tried there were 3700 or 3800 retail gasoline service stations in metropolitan Detroit (R. 298), of which some 450 stations (including those supplied by wholesalers) dispensed Standard's gasoline from Red Crown pumps (R. 5057-60). Price is the most potent factor in gaining and regaining customers at a service station (R. 338-9, 5113). An automobile owner can and will transfer his business from one station to another when he sees a sign advertising a cut of a cent a gallon or even less in the brand of his choice or another brand of equal public acceptance. For this reason, competition with a retail gasoline station is not limited to nearby stations, and a competitive advantage obtained by one station, particularly where located on a main artery of traffic, will be felt by other stations many miles away.

A second reason for the sensitivity of competition between retail gasoline dealers is that the volume of retail gasoline business is practically constant, except for seasonal variations, depending almost entirely upon the number of automobiles in use in the area from year to year (R. 153, 5372). There is no such thing as "new" gasoline business to be obtained by advertising salesmanship or price cutting. This means that when a gasoline retailer obtains a wholesale price advantage over other dealers and uses it to cut his retail price, the business attracted will be taken from other dealers to their immediate loss (R. 5114-5).

In a highly competitive area like Detroit the dealer's margin between the price he pays and the price at which he sells is very narrow (R. 5372). At the time this case was tried the margin in Detroit between the posted tank wagon price of the major oil companies and the prevailing retail selling price was only 3.3 cents a gallon (Comm. Ex. 3, R. 4715). A survey of retail gasoline marketing costs in Detroit made in 1938 by Herbert F. Taggart, Professor of Accounting at the University of Michigan, showed that the average cost of selling gasoline at retail service stations was 4.8 cents a gallon, and that the average cost of sale by the most efficient 25% of the stations was 3.5 cents a gallon (R. 674, 4748, Comm. Ex. 76). This explains why most retail dealers paying the tank wagon price cannot further reduce their narrow selling margin to obtain additional volume and why their ability to survive is seriously endangered when their customers are diverted to the stations of other dealers who are enabled to cut their price by reason of being permitted to buy in tank car quantities at a differential greater than their cost of distribution (R. 323-4).

Standard's tank car price to the four favored dealers for its Red Crown gasoline which they resold at retail was 1½ cents a gallon below the tank wagon price charged other retailers. This differential gave the tank car buyers a net price advantage over their competitors of something more than a cent a gallon. (Citrin-Kolb was able to resell to one customer at a cent below tank wagon price (R. 1878-9); and Ned's Auto Supply Company abandoned employing contract haulers to transport its gasoline to its service stations at .45 cents a gallon in favor of using its own trucks, which presumably cost less (R. 1825.) This meant that the four tank car buyers had a retail operating margin about 30 per cent greater than the margin available to other retailers at prevailing prices, which, of course, constituted an enormous competitive advantage.

Why the major oil companies refuse to sell to the rank and file of their retailer customers in tank car quantities at tank car prices

Eighty-seven percent of the total volume of gasoline sold in the Detroit area is sold by major oil companies under their own brands (R. 335). This business is established and has been built up as the business of selling gasoline direct to retail dealers by tank truck delivery to the service station. The success of this business depends upon maintaining the volume of gasoline sold by that method of tank wagon prices. Only about 18 percent of the gasoline sold by Standard under its brands in the Detroit area in 1940 was sold to tank car buyers (Res. Ex. 58, R. 4879).

Until 1936 the major oil companies operated their own retail service stations in the Detroit area, selling direct to the public. They then acquired, and have continued to acquire, many valuable and strategically located service station properties. In 1941 Standard owned about 200 such properties in Detroit, and nearly 80 percent of its tank wagon sales were to lessees of these properties (Comm. Ex. 119, R. 4783). Gasoline service station properties are not readily converted to other use since they are constructed with underground storage tanks, driveways, pumps and fixtures suitable only for dispensing gasoline.

Standard maintains six bulk plants in the City of Detroit for the purpose of supplying its tank wagon retailer customers (R. 108). Tank car sales are not made from its bulk plants, but from its marine terminal. Standard owns and operates a fleet of tank trucks in which the gasoline is delivered from its bulk plants directly to retail service station tanks. Standard also owns an office building in Detroit, and employs over 350 persons in the operation of its business of distributing and selling to retailers (R. 184).

Standard makes a greater profit per gallon on tank wagon sales than on tank car sales. This follows from the Commission's finding that its tank car differential is not justified by differences in cost of sale and delivery. Tank car sales are made on credit and a cash discount of 1% for payment within ten days is allowed, whereas gasoline delivered by tank wagon is sold for cash with no discount (R. 159).

The major oil companies thus have an enormous stake and investment in their business of selling gasoline by tank wagon delivery to retail service stations as above described. Obviously, the business so developed would be disrupted if any service station customer or group of customers desiring to do so were permitted to arrange to take tank car delivery and purchase at the tank car price. In this situation it is to be expected that these companies would adopt a sales policy designed to prevent their tank wagon customers from buying as jobbers or buying from jobbers. The record shows that that is in fact their policy, and that the policy is enforced.

In a number of instances retail service station operators have applied to Standard for permission to buy in tank car quantities at tank car prices, but such requests have been denied (R. 147, 552-558, 2088-9), in spite of the fact that bulk storage ~~and hauling~~ facilities could readily be secured by any dealer or group of dealers if permitted to purchase on a tank car basis (R. 984). There are a number of transportation companies in Detroit who make a business of hauling gasoline for hire (R. 395). Some service stations in Detroit have sufficient storage capacity to receive delivery of gasoline in 8,000 to 10,000 gallon quantities (R. 395): there is no reason why transport truck (tank car) deliveries could not be made to their tanks (R. 114). Standard even refused to permit one of its jobbers, Citrin-Kolb, to share joint storage facilities with another jobber, on the ground that it did not wish to set a precedent of allowing two or more dealers to buy in tank car lots by obtaining bulk storage (R. 1256).

The arbitrary and artificial nature of the major oil companies' Detroit annual volume requirements for tank car purchasing is further evident from the fact that the same requirement is not imposed by Standard in other areas, nor, insofar as appears, by non-major companies selling by tank car in Detroit. Of eighteen jobbers in Oklahoma supplied by Standard in 1939, only one bought over a million gallons, and eight bought less than 100,000 gallons during the year (R. 2575-6). This is less than the annual volume of the average Detroit service station.

The materiality of this annual volume requirement on the issue of "good faith" lies in the fact that it is imposed, not as a competitive measure, but as a protective measure to prevent diversion of the major oil companies' tank wagon business while at the same time meeting the demands of the largest volume purchasers for preferential price treatment. The regular adherence to such a sales policy by the dominant suppliers in an industry is designed not to promote, but to prevent, price competition for the business of individual customers.

This case notably presents the anomalous situation of the market leader in the Detroit area insisting that it should be permitted to sell to a large chain retailer (Ned's Auto Supply Company) at discriminatory tank car prices which have been used to take away gallonage from the very retail dealers whose sales are the lifeblood of Standard's business and the majority of whom are its lessees. The Court may well ask why the major oil companies are willing to give a preferential quantity price to *any* large retailers to be used as a competitive weapon against their bread-and-butter customers.

During the period covered by this record Ned's was the only dealer in the Detroit area reselling Standard's gasoline wholly or principally at retail who was permitted to buy as a jobber. Two of Standard's witnesses testified that throughout its entire territory Standard has very few jobber customers (R. 1064, 3230). The majority of these jobbers are wholesalers, but an occasional sole retailer, such as Ned's, is permitted to qualify. It appears that the practice of other majors is the same (R. 1072, 1897, 5113).

The explanation of this practice is that it results to the advantage of the major oil companies to have a limited number of retail operators in an area like Detroit who, by being given a lower price, are enabled to cut retail prices from time to time, thereby forcing other retailers to reduce their prices or lose business. The effect is to foment price wars at the retail level and depress the retailer's margin to cost of sale or below. The tank wagon and tank car prices of the oil companies in the meantime remain the same or can be raised, thereby assuring to these refiners the greatest possible share of the price paid by the public. Unfair competition at the retail level is thus fostered by giving an unearned advantage to a few, while price competition between major oil companies remains practically non-existent.

Prior to the spring of 1938 the retail dealer's margin in Detroit (difference between tank wagon price and prevailing service station price) was from 4¢ to 4.5¢ a gallon (Comm. Ex. 3; R. 4715). In March 1938 Standard began to sell to Ned's at tank car prices. Numerous witnesses testified that during this period Ned's was advertising discounts of from 1½¢ to 2¢ a gallon on Red Crown gasoline; that this price cutting spread and became prevalent in the Detroit market during that year, and that they lost business to Ned's (R. 5115). In the fall of 1939 the price cutting engendered by these "subsidized" jobbers reached a point where the tank wagon customers of other major companies were seriously affeeted. Sun Oil Company, which does not sell to jobbers in Detroit, retaliated by reducing its price to its dealers to enable them to meet competition (R. 328-9). This cut was promptly met by Standard and other majors, and the public benefited. Within six weeks the major tank wagon price was restored to its exact former level, and advertised price cutting by Ned's was stopped. The retail dealers' margin, however, became stabilized at only 3.3¢ a gallon, after having reached an even lower figure during the preceding months (Comm. Ex. 3; R. 447, 5114). This margin of 3.3¢ was below the average cost of sale of the most efficient 25 percent of Detroit service stations and far below the average selling cost of all stations, as established by the Taggart Survey (Comm. Ex. 76; R. 674, 4748).

No price competition among major oil companies

Both the tank wagon prices and the tank car prices of the major oil companies in a given marketing area are almost always the same. This is true as a matter of common knowledge and is confirmed by this record (R. 126, 129). The lower or tank car price to large buyers is not the result of a competitive reduction on a customer-to-customer basis. The record presents no instance where Standard reduced either its tank wagon price or its tank car price to any customer except in the single case of the tank wagon price reduction of $\frac{1}{2}$ cent a gallon allowed Ned's from September 1936 to March 1938.*

There is some testimony that one or two of the jobbers reported to Standard that certain major oil companies had offered to sell to them in tank car quantities at less than the tank car price, or on better terms, but none of these reported "offers" was substantiated by testimony of any representative of the oil company involved.** Standard never met any such reported offer and never reduced its tank car price below the customary differential; and there is no evidence that any other major actually sold to any jobber in Detroit at below the "going" tank car price. None of these companies could lawfully have sold at a lower price to one of Standard's jobbers without lowering its price to its other jobbers; and it is evident that Standard did not regard these "offers" as bona fide. It thus appears that there was in reality no price competition for the business of any of the jobbers, and that Standard's recognition of Ned's as a jobber was only a customer reclassification in recognition of Ned's annual volume, pursuant to the established pricing policy of Standard and the other majors.

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* As to that instance, the Commission has found that the only competitive offer which was then available to Ned's was for Fleet Wing gasoline, a non-major brand, and that Standard "could not have regarded the offer * * * as a serious competitive threat" (R. 5387). These findings are supported by testimony at R. 1809-10, 1815-16, 1866, 3098.

** It was agreed between counsel at the hearings that the word "offer" when used in the testimony on this subject would be regarded as used without legal significance and not as supporting a conclusion that any conversation or negotiation so referred to amounted to an offer in the legal sense (R. 1301-2, 1802-3).

The Factual Background of Paragraph 2 of the Commission's Order

Standard sold its branded gasolines to three wholesalers in Detroit. These wholesalers in turn resold at wholesale to about 100 retail service stations which competed at retail with Standard's 350 direct retailer customers. One of these wholesalers, Citrin-Kolb Oil Company, passed along a part of its tank car price advantage to certain of its retailer customers, thereby giving those customers a competitive advantage over the retailers buying from Standard direct. It is this situation which paragraph 2 of the Commission's order was designed to meet.

In other words, paragraph 2 of the order prohibits Standard from discriminating against its retailer customers indirectly through wholesalers, where the discrimination has the same effect on retail competition as the direct discriminations prohibited by paragraph 1. An understanding of the relationship which existed between Standard, its wholesaler customers and its retailer customers is essential to an understanding of the reasons and necessity for paragraph 2 of the order.

Standard's retailer customers cannot purchase their gasoline from wholesalers

As between Standard and its jobbers, Standard's tank wagon customers constitute a captive market. Not only are these customers not permitted to buy gasoline from Standard at the jobber price; they also are prevented through lessee relationship or by contracts from buying Standard's gasoline from wholesalers.

About 60% in number of the retail dealers purchasing gasoline from Standard in Detroit are Standard's lessees. Standard leases its 200 service station properties on the understanding that the operators will purchase their gasoline from Standard by tank wagon delivery at tank-wagon prices (R. 2123-4). Most leases are for one year periods (R. 107, 4702); none of these lessee stations have ever been serviced with gasoline by any other company (R. 2092).

Service station operators purchasing from Standard, but who are not its lessees, are required to enter into contracts with Standard requiring the dealer to buy from Standard all of his requirements of Standard's gasolines at tank wagon prices (R. 4713). Thus about 40% of Standard's retailer customers are prevented by contract from purchasing Standard's gasoline from any other source.

All business done by Standard with tank wagon customers in Detroit after 1936 was done under one of these leases or contracts (R. 210). The result is that Standard's tank wagon customers are not at liberty to shift all or part of their gasoline purchases to wholesalers dealing in Standard's brands, even if the wholesaler should offer them a price below Standard's tank wagon price.

The retail dealers purchasing at tank wagon prices from Standard are tied to Standard not only by leases and contracts, but by Standard's ownership of the tanks, pumps and tools used in service station operations and its control of the identification advertising used at the stations selling its gasoline. "Identification advertising" includes the Red Crown globes on the gasoline pumps, "Standard Service" signs, road maps and circulars. Such advertising is furnished by Standard to all retail service stations selling its branded gasolines, including stations supplied by wholesalers. The globes and signs are installed by Standard, remain its property, and can be removed by it from the service station at any time. They can be obtained from no other source, and without such identification the dealer would lose business (R. 157-8, 2107-8).

The major oil companies have almost equally effective means of controlling the operations and pricing policies of their wholesalers. Standard has no contracts with its wholesalers, and may refuse to sell to any of them at any time. Each of them sells only Standard's gasoline and has built up its business upon the public acceptance of Standard's brands. Standard does not sell in tank car quantities, for resale under its brand names, to jobbers or others who deal in other brands (R. 2086-7). It installs and retains ownership of the pump insignia, globes and signs at the service stations supplied by its wholesalers and can remove these insignia and signs at will (R. 157-8, 2914). It is obvious that these jobbers, in both their wholesale and their retail operations, are dependent from day to day upon Standard's good will and necessarily subject to its control.

If these wholesalers were in any true sense competitors of Standard, then Standard's exclusive dealing contracts with its non-lessee retailer customers, preventing them from buying its gasoline from wholesalers, would be unlawful under Section 3 of the Clayton Act. In no instance has a wholesaler openly reduced its price to its retail outlets even fractionally below Standard's tank wagon price, or offered such a price to a customer of Standard or of another wholesaler. If even sporadic instances of such competition had occurred in Detroit Standard would have been quick to put them in evidence. Citrin-Kolb, the largest of the wholesalers, never sold to a single customer who was formerly a direct customer of Standard (R. 1316).

ARGUMENT

I

The construction of the meeting competition proviso adopted by the Court below is contrary to the intent of Congress and in conflict with the prior decisions of this Court.

The decision of the court below appears to have been due in part to a refusal to accept the Commission's findings of fact, and in part to a misconstruction of this Court's prior opinion in this case (340 U. S. 231).

There can be no question but that Standard's allowance of its lower price to the four "jobbers" in Detroit was made pursuant to a policy of customer classification regularly followed by it and by other oil companies as an industry practice. In its answer Standard stated that after the time each of these four customers acquired bulk storage and distribution facilities "such customer is entitled to be classified as a wholesale or jobber buyer of gasoline as distinguished from a retail reseller" (R. 12); that it had a "general policy and practice of bona fidedly selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail resellers" (R. 13); and "that said four customers are each bona fidedly qualified to be regarded and are regarded by the oil industry in Detroit as within the classification of wholesale or jobber customers" (R. 14).

In its brief filed in the Court of Appeals in 1948 Standard asserted that "Subject to Standard's right to select its customers, anyone could qualify as a Standard jobber" if he conformed to Standard's requirements for tank car purchasing. In Standard's brief filed in this Court in 1950 it is stated (p. 3) that

> "Petitioner sold to all its service station customers at the same price—i. e., the tank wagon price. * * *
>
> "Petitioner sold to all its jobber customers at the same price—i. e., the tank car price."

and (at pp. 42, 43) that "these customers all belong to a distinct class of buyers, so recognized throughout the industry", and that "petitioner sells to two classes of customers in the same area, admittedly at the going price to each of them."

In its prior opinion in this case this Court held that the meeting competition defense under Section 2(b) extends only to a seller's lower price "made in good faith to meet a *lawful* and equally low price of a competitor" (emphasis supplied). The court below has stated that here "there is no finding, no contention and not even a suspicion but that the competing prices which petitioner met were lawful." Obviously, this is not true. The record abundantly shows that the other oil companies whose prices Standard claims to have met, including Texas, Gulf and Shell, sold their gasolines in Detroit and in other cities by the same dual pricing and distribution system used by Standard. (See, for example, R. 1072, 1897, Res. Ex. 38, R. 4864-7.) The prices of these other major oil companies to jobber-retailers, therefore, were discriminatory and *prima facie* unlawful: and this is also true of the price offered Ned's Auto Supply Company for Fleet Wing gasoline by Red Indian Oil Company (R. 3093-4). Standard offered no evidence to show that the prices which it claims to have met were lawful prices, or that it believed or had reason to believe that they were lawful prices.

Legislative history

The primary remedial objective of the Robinson-Patman amendment of the Clayton Act was the protection of the smaller independent merchants from injury to their competitive position resulting from discriminatory advantages extended by sellers to chains and other large distributors who were found to have been using their mass buying power to demand and obtain preferential prices, discounts and allowances. As stated by this Court in *Federal Trade Comm. v. Morton Salt Co.*, 334 U. S. 37, 43:

> "The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price."

In so referring to "the seller's good faith effort" we do not believe that this Court meant to imply that Section 2(b) permits a seller to give an unearned price advantage to a large buyer as a regular and continued practice wherever he can show, as he usually can, that other sellers offer the same price or discount to buyers of the same large quantities.

In summarizing the purpose of the Robinson-Patman bill, the Conference Report stated:

> "The object of the bill briefly stated is to amend Section 2 of the Clayton Act, so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them." (H. R. Rep. 2951, 74th Congress, 2nd Sess. (1936))

The Chairman of the House Conferees, in explaining the meeting competition proviso upon presentation of the Conference Report, said:

> "It leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given, as one lying within the limitations laid down by the bill, and whether the way in which the competition was met lies within the latitude allowed by those limitations."

He pointed out further that this provision should not be construed as permitting "oppressive discriminations in violation of the obvious intent of the bill" (80 Cong. Rec. 9418).

The Robinson-Patman Act grew out of the Federal Trade Commission's chain store investigation, completed in 1934.* The Commission's report showed that many large chains were receiving discounts, allowances and other advantages greatly in excess of those granted, not only to competing retailers, but even to wholesalers. Section 2 of the Clayton Act had been found insufficient to cope with these practices. With regard to the provisos of that section, the House Judiciary Committee stated in reporting the Patman bill in 1936:

> "These provisos have so materially weakened section 2 of that Act, which this bill proposes to amend, as to render it inadequate, if not almost a nullity." (H. R. Rep. 2287, 74th Cong. 2d Sess., p. 7.)

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* *Final Report on the Chain Store Investigation*, Sen. Doc. No. 4, 74th Cong., 1st Sess. See also: *Hearings before Special Committee on Investigation of American Retail Federation*, 74th Cong., 1st Sess. (1935), and *Investigation of Trade Practices of Big Scale Retail and Wholesale Buying and Selling Organizations*, 74th Cong., 1st and 2d Sess. (1935-1936).

In the Senate, Senator Logan stated:

> "The purpose of the bill is to stop up loopholes found in section 2 of the Clayton Act. Section 2 of the Clayton Act has been abated. There was a provision in it, as Senators will remember, allowing the granting of price differentials to meet competition in a particular community. That was perhaps unwise, although at the time of the passage of the Clayton Act it was well designed to remedy the evils then in existence. However, since then time has proved that there are ways to evade the Clayton Act, and therefore it is necessary to strengthen its provisions; and the bill seeks to do nothing else." (80 Cong. Rec. 3119)

While the congressional purpose to narrow the former meeting competition exception is thus clear, the court below has here held that "If petitioner's pricing policy was lawful prior to the amendment the same policy was lawful afterward."

In the *Morton Salt* case (*F.T.C.* v. *Morton Salt Co.*, 334 U. S. 37) this Court was unanimously of the opinion that a quantity pricing system such as that used by Standard runs directly contrary to the purposes of the Act. There the Morton Salt Company employed a carload discount available to all carload purchasers, and on top of that granted an allowance of 10 cents a case to customers purchasing 5,000 cases or more in a year, and an additional 5 cents a case to purchasers of 50,000 cases a year. These carload and volume discounts, like Standard's tank car price here, were offered to all purchasers buying in the required quantities, regardless of method of resale. Only the five largest retail grocery chains in the country were able to qualify for the 15 cents a case allowance. After pointing out that these allowances "were enjoyed by certain wholesalers and retailers who competed with other wholesalers and retailers to whom these discounts were refused", the Court said:

> "Furthermore, in enacting the Robinson-Patman Act Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased the less-than-carload lots. To this end it undertook to strengthen this very phase of the old Clayton Act." (334 U. S. 49)

Mr. Justice Jackson's dissenting opinion, agreeing with the majority as to the unlawfulness of the volume discounts, states:

> "On the one hand [the Act] recognizes that the quantity discount may be utilized arbitrarily and without justification in savings effected by quantity sales, to give a discriminatory advantage to large buyers over small ones. This evil it would prohibit. * * *
>
> "It is not merely probable but I think it is almost inevitable that the further ten-cent or fifteen-cent per case differential in net price of sale between the large number of small merchants and the small number of very large merchants, accelerates the trend of the former towards extinction and of the latter towards monopoly." (334 U. S. 58, 60)

The major oil companies' allowance of a quantity price to large buyers permitted to qualify as "jobbers", without regard to the competitive level at which they resell, is typical of the discriminations which Congress sought to reach and prevent in passing the Robinson-Patman Act. Since it is clear that the primary objective of that Act was to prohibit the constant allowance of discriminatory prices and discounts to large purchasers, a provisory exemption such as that contained in Section 2(b) should, if possible, be construed consistently with that objective.

The Commission's construction of the "good faith" clause is in accord with the prior decisions of this Court and with recent decisions of the Court below

The record shows that Standard has persistently employed a dual pricing policy based upon customer classification according to definitions so framed as to permit only the largest buyers to qualify for the lower price. In every case heretofore in which an attempt has been made to justify the use of a discriminatory pricing *system* under the meeting competition proviso, the attempt has failed.

This Court first had occasion to construe and define the scope of the 2(b) proviso in *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746 (1945). The Commission's present findings are in accord with the following statements from that opinion:

> "The change in language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination."
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> "Respondents have never attempted to establish their own non-discriminatory price system, and then reduced their price when necessary to meet competition. Instead they have slavishly followed in the first instance a pricing policy which, in their case, resulted in systematic discriminations, * * *".

Standard here is in a less favorable position to defend its pricing system than was the Staley Company. Standard is the market leader in Detroit and cannot argue, as did Staley, that it was a newcomer to the market and forced to adopt the pricing practices of its competitors.

In *Federal Trade Commission* v. *Cement Institute* (333 U. S. 683, 725), this Court reaffirmed that Section 2(b) is not to be construed as permitting justification of the continuous use of discriminatory pricing methods. It was there stated:

> "Section 2(b) permits a single company to sell one customer at a lower price than it sells to another if the price is 'made in good faith to meet an equally low price of a competitor'. But this does not mean that Sec. 2(b) permits a seller to use a sales system which constantly results in his getting more money for like goods from some esutomers than he does from others. We held to the contrary in the *Staley* case."

In three recent decisions the Federal Trade Commission has reaffirmed that "good faith" is not shown where the seller's lower prices are regularly made pursuant to an established pricing policy.

Matter of Whitaker Cable Corp., CCH 1955, Trade Reports Sec. 25,443; affd. 239 F. 2d 253 (7th Cir. 1956); cert. den. 353 U.S. 938;

Matter of Edelmann & Co., CCH 1955, Trade Reports Sec. 25,445; affd. 239 F. 2d 152 (7th Cir. 1956);

Matter of Niehoff & Co., CCH 1955, Trade Reports Sec. 25,467; mod. and affd. 241 F. 2d 37 (7th Cir. 1957).

In each of these cases the Court of Appeals upheld the Commission's denial of the meeting competition defense. In the *Whitaker* case it appeared that Whitaker used a dual pricing system similar to the system used by Standard here. Whitaker sold its automotive parts to oil and tire companies at a lower price than to automotive jobbers. Its price differential between these two classes of customers resulted primarily from the application of a rebate schedule based on total annual volume of purchases. Whitaker contended "that its pricing policies followed custom and trade practice in an attempt to meet equally low prices of competitors". The Court Appeals held that "the fact that petitioner adopted and followed the discount system employed by its competitors does not necessarily preclude a finding of Section 2(a) violation", citing this Court's decision in the *Staley* case.

In the *Niehoff* case the Commission found "that the net prices accorded by Niehoff were a reflection of its nationwide pricing system formulated to meet competition generally and not designed to meet any particular competitor's prices." The court sustained the Commission's conclusion that this defense was insufficient.

A purpose to retain customers is not the sole test of whether the seller's lower price is made "in good faith"

In the court below Standard asserted that this case depends on the "single proposition of law" that "price reductions to meet competitors' lower prices are in 'good faith' * * * when granted to established customers by a seller who 'was convinced' and 'had substantial reasons for believing' he would otherwise lose these accounts". Standard's position was that belief by the seller that its lower price is necessary to retain the customer is the sole test of statutory good faith, regardless of the purposes and pattern of the discrimination or the nature of the competition to be met.

This "proposition of law" is patently unsound. It is contradicted by the history and wording of the statute, and is at variance with this Court's statement of the requirements for "good faith" justification in its prior opinion in this case.

A seller will rarely, if ever, reduce his price to a particular customer, to the detriment of his other customers, except with his eye on his competitors' prices and in the belief that he might otherwise lose the customer. The words "in good faith" would be largely superfluous if they required no more than a showing of purpose to retain a customer. In any case where a preferential price is constantly granted large buyers by a number of competing suppliers of goods of equal public acceptance one supplier could always show reason to believe that customers might be lost if the preferential price were not given. . .

In its prior opinion herein this Court expressly referred to retention of customers and good faith as separate requirements for 2(b) justification. At the very outset of its opinion the Court said that

> "under the Act, the lower price to the jobbers was justified if it was made *to retain each of them as a customer* **and** *in good faith* to meet an equally low price of a competitor" (R. 5307-8; emphasis supplied).

Many examples come to mind of situations where statutory good faith would not be established by showing that the seller "had substantial reasons for believing" that the lower of his two prices was necessary to hold the customer. Such would be the case if several sellers by agreement adopted discriminatory price differentials favoring large buyers, or where it is the practice for a number of dominant suppliers to classify chain retailers distributing to their own stores as wholesalers and grant them the wholesaler price; or where sellers discriminate between purchasers at different points by the use of fictitious basing points because it is industry practice for competitors to do the same. In any such case an individual seller departing from the established pricing plan adopted by himself and his competitors might well expect to lose customers, yet certainly such regular and continuing patterns of discrimination could not be justified on the ground of meeting competition in good faith. Justification is equally lacking here, where the major oil companies regularly sold at the same discriminatory differential to two *classes* of customers classified arbitrarily to suit their own purposes, with no price competition for customers of either class.

While the facts in this case are old, the major issue presented is as important now as it was in 1940, and perhaps more important. Its importance, moreover, is national and not confined to Detroit. Standard's continued resistance to the enforcement of this order even on a factual basis is sufficient evidence of that importance. Affirmance of this order is needed to settle once and for all that the 2(b) proviso is not a loophole through which the objectives of the Robinson-Patman Act may be circumvented and defeated.

II

This Court presumably was of the opinion that the record herein contained substantial evidence indicating that Standard's lower price was not made "in good faith" within the meaning of Section 2(b); otherwise the Court need not have remanded for findings on this question. The Commission's findings of *fact* on such remand are conclusive.

The Commission has specifically found that Standard's lower price to at least three of the four "jobbers" was not made or continued to meet actual price offers of competitors (R. 5383-5388). It was found that the only offer open to Ned's Auto Supply Company (a chain retailer) was an offer by the distributor of Fleet Wing gasoline, a non-major or "off" brand selling at lower prices (R. 5387); and that during the period in question no major oil company offer was available to Ned's, Wayne or Stikeman (R. 5384, 5386). The evidence fully supports these findings.*

In the absence of probative evidence that any of its major competitors offered an equally low price to its

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* For an analysis of the testimony regarding these reported "offers", see the Exceptions to Trial Examiner's Report filed by the Commission's trial attorney (R. 5128-5134). These exceptions were not ruled upon by the Commission since at that time the Commission deemed it unnecessary to make factual findings as to the meeting of competitive prices.

"jobber" customers, Standard now has no alternative but to rely upon the general testimony of its marketing experts that it was industry practice to sell at tank car prices to anyone who purchased in the quantities in which these customers were purchasing and who otherwise qualified for tank car delivery. The Commission gave full recognition to such testimony in concluding that adherence to such an industry practice as an established pricing policy was insufficient to justify price discriminations otherwise unlawful (R. 5388).

Standard can not seriously claim that the Commission's findings of fact herein are not supported by substantial evidence. Nevertheless, it made some attempt in the court below to obscure the conclusiveness of the Commission's findings by reference to findings of the trial examiner, to excerpts from prior opinions, and to certain comments of judges and counsel gleaned from transcripts of previous oral arguments.

Of course, it is not true that Standard's "good faith" has heretofore been "documented" or "acknowledged." There has been no previous findings, and no previous determination, on this issue either by the trial examiner, by the Commission, or by this Court.

The trial examiner and the Commission both were originally of the opinion that the decision of this case depended upon evidence of substantial injury to competition, and that the 2(b) proviso did not afford a defense in any case where such injury was affirmatively shown. Relying upon this construction of the statute, both the examiner and the Commission expressly found it unecessary to make findings on the issue of good faith.

The trial examiner twice carefully posed the question whether Standard's differentials granted the four jobbers were "made in good faith" to meet equally low prices of competitors (R. 5093, 5099), and each time as carefully omitted any finding of good faith in answering these questions (R. 5096, 5104). In view of the care and detail exhibited by the examiner's findings as a whole, his failure to conclude that the lower prices were made in good faith was clearly deliberate.

The examiner found, as the Commission has found now, that following the enactment of the Robinson-Patman amendment Standard's recognition of the three wholesalers as jobbers without regard to retail resales "was continued without inquiry into the question of any possible infraction of the law" (R. 5097-8).

Further, it should be noted that under the Commission's Rules in effect when this case was tried the trial examiner's findings were advisory only. Such findings then did not have the effect of an initial decision, as is now the case under the Administrative Procedure Act.

In any event, the examiner's findings, the 1949 opinion of the Court of Appeals, and all of the off-the-record comments and remarks relied on by Standard, including this Court's own remarks, were before this Court when it decided to remand. If this Court had considered the evidence to be conclusive as to Standard's good faith, it need not have remanded for further findings. In that case the Court could and no doubt would have directed final disposition of the case to avoid further delay.

In *Federal Trade Comm.* v. *Curtis Publishing Co.*, 260 U. S. 568, 580 (1923), this Court said:

> "But as the statute grants jurisdiction to make and enter, upon the pleadings, testimony, and proceedings, a decree affirming, modifying, or setting aside an order, the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the commission. If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the

matter may be and ordinarily, we think should be remanded to the commission—the primary fact-finding body—with direction to make additional findings, but if, from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay the court has full power under the statute so to do."

See also: *Kidder Oil Co.* v. *F.T.C.*, 117 F. 2d 892, 896 (7th Cir.).

III

Standard's objections to paragraph 2 of the Commission's order are without merit. Retention of that paragraph or its equivalent is essential to the effectiveness of the order.

Standard sells its branded gasoline at tank car prices to three wholesalers in the Detroit metropolitan area each of whom resells to from fifteen to sixty retail gasoline service stations in that area. The price at which these wholesalers resell is normally the posted tank wagon price of their supplier. They make deliveries by tank truck to their customers' service station tanks in the same manner that deliveries are made by Standard to its retailer customers.

Standard also sells its branded gasolines at its posted tank wagon price by tank truck delivery to some 350 retail service station operators in the Detroit area, who are engaged in competition with the tank wagon customers of the wholesalers.

This record shows without dispute that at the time this case was tried the wholsaler's price differential was sufficient to enable wholesalers buying in tank car quantities to resell at a profit to their retailer customers, or to some of them, at prices lower than Standard's tank wagon price.

The best, but not the only, evidence of this is the fact that the largest of the wholesalers, Citrin-Kolb Oil Company, actually did so. Citrin-Kolb from 1936 to 1941 sold a million gallons of Standard's gasoline a year to the operator of a chain of five retail service stations in Detroit, delivered at the stations, at a cent a gallon below Standard's tank wagon price. The general manager of Citrin-Kolb Oil Company testified that "the only expense involved is the hauling and we can make money at hauling gasoline for a half a cent a gallon" (R. 1878-9). Citrin-Kolb Oil Company also gave a rebate of ½ cent a gallon off the posted tank wagon price to at least one other service station in Detroit during the period covered by the testimony in this case (Comm. Ex. 33, R. 4733).

We have shown at pages 15 and 16 of this brief that Standard's tank wagon customers are not at liberty to buy Standard's branded gasolines from wholesalers even if a wholesaler should offer them a price below Standard's tank wagon price. *All of these 350 dealers are prevented either by means of short term leases or by contracts from purchasing from wholesalers, and Standard does not permit them to purchase in tank car quantities at tank car prices.* In this situation, if a wholesalers passes along a part of his wholesale margin to certain of his retailer customers, selling to them below the price paid by Standard's direct retailer customers, the resulting competitive injury is the same as if the favored customers of the wholesaler purchased directly from Standard at the discriminatory price.

Section 2(a) of the Clayton Act prohibits discriminations in price in interstate commerce between purchasers of goods of like grade and quality, sold for resale, where the effect of the discrimination may be "to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, *or with customers of either of them*". The Commission has found that Standard's discrimination in price to Citrin-Kolb Oil Company had the effect of substantially lessening competition and injuring, destroying and preventing competition between the favored customers of Citrin-Kolb and other gasoline retailers. Upon the state of facts above outlined, this finding cannot be challenged, and Standard has not heretofore challenged it. Apart from its general defense of meeting competition, its objections to paragraph 2 of the Commission's order go only to the terms of that paragraph and amount at most to a plea for modification.

Paragraph 2 of the present order is the equivalent of paragraph 6 of the Commission's prior order as modified and affirmed by the court below in 1949.* The effect of the two paragraphs is the same, the difference in terminology being only one of emphasis. Both the old and new paragraphs offer Standard the same alternatives for compliance. Under either paragraph Standard might (1) discontinue selling to wholesalers and retailers in the same area at different prices, a practice which its two largest competititors in Detroit do not engage in; (2) narrow the differential between its wholesaler and retailer prices in such areas to the point where the differential can be cost justified; (3) reduce its tank wagon price when necessary to eliminate discrimination between its own retailer customers and those of its wholesalers; or (4) exercise its right to choose its customers by refusing to sell to a wholesaler *known* to be passing along part of its price differential to retailers competing with Standard's own retailer customers.

In the court below Standard made the same objections to paragraph 2 which it previouly raised here as to old paragraph 6. Its argument was, and still is, that this paragraph of the order would require resale price maintenance. The court below summarily dismissed this contention in 1949, and it has no more vitality now. As that court pointed out:

> "The petitioner does not have to make price control agreements with anyone. It has only to govern its own conduct to avoid the impact of an unlawful discrimination" (R. 5301).

Standard says that it should not have to be concerned with the prices at which its wholesalers resell because it cannot control those prices. It might as well argue that it should not have to be concerned with whether its jobber customers resell at retail because it cannot control the manner in which they resell.

Although paragraph 6 of the former order was the subject of some discussion in the briefs and argument in this Court in 1950, this Court in its opinion did not mention paragraph 6. If it had disapproved of this paragraph in substance or in terms it would almost certainly have made appropriate comment for the guidance of the Commission upon remand. The minority opinion suggested only that in the event of affirmance they *might* have concluded that "some amendment might be required in the wording of the order". If it be inferred that this reference was directed to paragraph 6, still there is no suggestion whatever that that paragraph was not approved in substance.

There is nothing startling about prohibiting a supplier from selling to wholesalers and retailers in the same sales area at a differential so great as to enable the wholesalers to undersell their supplier, where the retailer customers of the supplier cannot buy from wholesalers but are in direct competition with the wholesaler's customers. If the order did not include such a prohibition there would be nothing to prevent Ned's Auto Supply Company from transferring its business to Citrin-Kolb at a cent or more a gallon below the tank wagon price, delivered at Ned's stations. Ned's would obtain substantially the same competitive advantage over other retailers which it has obtained by purchasing in tank car quantities from Standard.

Standard would achieve the same result which it now obtains, merely using Citrin-Kolb as a conduit for sales to Ned's.

Contentions made by jobbers

Briefs filed in the court below by two jobber associations and by Citrin-Kolb Oil Company asserted that paragraph 2 of the Commission's order would place restrictions on them which they cannot accept "and still compete with other jobbers not similarly restricted".

Standard's three wholesalers, Citrin-Kolb, Wayne and Stikeman, supply about 100 service station customers in Detroit. The evidence is that except in only two instances (where Citrin-Kolb passed along part of its wholesale margin), each of these wholesalers has always resold to these retailer customers at Standard's tank wagon price. These 100 retailers, and the wholesalers as their suppliers, will be protected by the Commission's order against the injurious effects of Standard's price discrimination along with the 350 retailers purchasing direct from Standard. There is no evidence that any one of the three wholesalers ever lost a retailer customer through an offer of a lower price by a wholesaler of another major brand. Neither does it appear in the two instances where Citrin-Kolb resold to retailers at below the tank wagon price that it did so to meet such competition.

Another argument made by the jobbers is that enforcement of this order would simply result in these jobbers transferring their business to other suppliers at the same or lower prices, at some expense to themselves and loss to Standard, without any offsetting benefit to Standard's tank wagon customers. It is stated that they would still be able to buy "at the jobber price" from Michigan refiners or from some supplier selling only to tank car buyers in Detroit. This conjectured result does not find support in the facts of record.

The Michigan gasoline referred to is non-major or "off brand" gasoline which sells at a lower price, obviously has little public acceptance, and is a minor competitive factor. As to the claim that some suppliers sell exclusively to tank car buyers, the record shows no instance of a major oil company engaging in such operation in Detroit or other metropolitan areas. Standard's two largest competitors in Detroit (Sun and Socony-Vacuum) do not sell to jobbers.

It should not be forgotten that wholesaler associations were the principal lobbyists for the passage of the Robinson-Patman Act which was primarily directed against just the type of continuing preferential discounts to chains and other large buyers which the major oil companies have been granting here. The only wholesalers who might be adversely affected by this order are those who have been using their jobber price differential to gain an unfair competitive advantage in reselling at retail, or to discriminate among their own customers with the same result.

CONCLUSION

The judgment of the Court of Appeals should be reversed, with direction that a decree be entered affirming and enforcing the order of the Federal Trade Commission.

Respectfully submitted,

Appell, Austin & Gay,
Attorneys for National Congress of
Petroleum Retailers, Inc. and Retail Gasoline Dealers Association
of Michigan, Inc.

Cyrus Austin,
Of Counsel.

APPENDIX

Affiliated Member Associations
National Congress of Petroleum Retailers—1957

Arizona	Arizona Gasoline Retailers Association 3341 N. 16th Street Phoenix, Arizona
	Tucson Service Station Operators Association, Inc. 1500 E. Broadway Tucson, Arizona
California	California Gasoline Retailers 1589 N. Fruit Avenue. Fresno, California
Colorado	Petroleum Retailers Association of Colorado 2402 Curtis, Room 207 Denver, Colorado
Delaware	Delaware Gasoline Dealers Association 903 Delaware Avenue Wilmington, Delaware
Dist. of Columbia	Metropolitan Retail Gasoline Dealers Ass'n., Inc. 5200 New Hampshire Avenue, N. W. Washington 11, D. C.
Florida	Allied Gasoline Retailers Association of Florida 208 Guaranty Life Building Jacksonville, Florida
Georgia	Georgia Association of Petroleum Retailers, Inc. 551 E. College Avenue Decatur, Georgia

Idaho

Petroleum Retailers of Greater Idaho, Inc.
P. O. Box 2253
Boise, Idaho

Illinois

Illinois Retail Gasoline Dealers Ass'n., Inc.
8 N. Ogden Avenue
Chicago 7, Illinois

Gasoline Retailers Association of Metropolitan Chicago
8 N. Ogden Avenue
Chicago, Illinois

Central Illinois Gasoline Dealers Association
Carpenters Bldg., 234 N. Madison Avenue
Peoria, Illinois

Indiana

Gasoline Retailers of Indiana
P. O. Box 241
Fort Wayne, Indiana

Gasoline Retailers of Greater Indianapolis, Inc.
917 Circle Tower Building
Indianapolis, Indiana

Iowa

Iowa Petroleum Retailers Association
316 Walnut Street
Des Moines, Iowa

Kentucky

Kentucky Gasoline Dealers Association, Inc.
200 W. Main Street
Louisville, Kentucky

Louisiana

Louisiana Petroleum Retail Dealers, Inc.
3915 Gilbert, P. O. Box 3631
Shreveport, Louisiana

Maryland	Independent Gasoline Dealers Ass'n. of Maryland 7517 Marston Road Baltimore 7, Maryland
Massachusetts	Retail Gasoline Dealers Ass'n. of Massachusetts, Inc. 1105 Commonwealth Avenue Boston 15, Massachusetts
Michigan	Retail Gasoline Dealers Ass'n of Michigan, Inc. 325 Farwell Building Detroit 26, Michigan
Minnesota	Northwest Retail Gasoline and Service Ass'n. 1821 University Avenue St. Paul, Minnesota
Minnesota and North Dakota	Cass-Clay Retail Gasoline Dealers Association 922 Center Avenue Moorhead, Minnesota
Missouri	Associated Petroleum Retailers of Greater St. Louis 6223 Juniata Street St. Louis 9, Missouri
Montana	Gallatin Petroleum Dealers Association 136 W. Main Street Bozeman, Montana
Nevada	Nevada Association of Petroleum Retailers 201 E. 4th Street Reno, Nevada
New Hampshire and Vermont	Gasoline Retail Dealers Ass'n of New Hampshire, Inc. 653 Main Street, Masonic Temple Bldg. Laconia, New Hampshire

New Mexico	New Mexico Service Station Association P. O. Box 422 Albuquerque, New Mexico
New York	Gasoline Merchants of Brooklyn, Inc. 1640 Eastern Parkway Brooklyn 33, New York
	Buffalo and Suburban Gasoline Retailers Ass'n. 405 S. Union Road Williamsville 21, New York
	Suffolk County Gasoline Retailers Ass'n., Inc. 38 Oakdale Avenue Central Islip, New York
	Retail Gasoline Dealers Ass'n. of Monroe County 130 Franklin Square Rochester 5, New York
	Niagara Falls Gasoline Dealers Association 770 Main Street Niagara Falls, New York
	Inter-City Gasoline Dealers Association 101 Cedar Street New York 6, New York
North Carolina	North Carolina Service Station Association 2514 Farthing Street Durham, North Carolina
Ohio	Ohio Gasoline Dealers Association 970 Spitzer Building Toledo 4, Ohio

Ohio

Summit County Gasoline Dealers Ass'n., Inc.
229 Madison Avenue
Akron 20, Ohio

Independent Gasoline Dealers, Inc.
2319 McGuffey Road
Youngstown, Ohio

Ashland County Gasoline Dealers Association
141 Clarimont Avenue
Ashland, Ohio

Stark County Gasoline Dealers Association
624 S. Main Street
N. Canton, Ohio

Central Ohio Gasoline Dealers Association
1738 Ashland Avenue
Columbus 12, Ohio

Muskegum Gasoline Dealers Association
530 Commissioner Street
Zanesville, Ohio.

Northwestern Ohio Gasoline Dealers Association
970 Spitzer Building
Toledo 4, Ohio

Greater Cincinnati Gasoline Dealers Association
785 Clanora Drive
Cincinnati 5, Ohio

Cleveland Independent Gasoline Dealers Ass'n. Inc.
4730 Woodland Avenue
Cleveland, Ohio

Oklahoma

Oklahoma Gasoline Retailers Association, Inc.
208 Wright Building Annex
Tulsa 3, Oklahoma

Oregon

Portland Automotive Trades Association
1832 S. W. 11th Street
Portland 1, Oregon

Pennsylvania

Associated Retail Gasoline Dealers, Inc.
5991 Center Avenue
Pittsburgh 6, Pennsylvania

South Dakota

Gasoline Retailers Association of Sioux Falls
P. O. Box 396
Sioux Falls, South Dakota

Tennessee

Tennessee Service Station Association, Inc.
308 Cherokee Building, P. O. Box 303
Knoxville, Tennessee

Texas

Texas Service Stations Associated
1509 Guadalupe
Austin, Texas

Utah

Utah Association of Petroleum Retailers
202 Crandall Building, P. O. Box 1251
Salt Lake City, Utah

Virginia

Virginia Gasoline Retailers Association, Inc.
Peoples Federal Building
Roanoke, Virginia

Roanoke Valley Retail Gasoline Dealers Ass'n.
Peoples Federal Building
Roanoke, Virginia

Virginia	Tidewater Independent Gasoline Dealers Ass'n. 3119 Elm Avenue, P. O. Box 707 Portsmouth, Virginia
Washington	Washington Gasoline Dealers Association, Inc. 127 Mercer Street Seattle 9, Washington
West Virginia	West Virginia Gasoline Retail Dealers Ass'n., Inc. 1100 Fairmont Avenue Fairmont, West Virginia
Wisconsin	Retail Gasoline Dealers Ass'n. of Wisconsin, Inc. Route #3 Lake Geneva, Wisconsin

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 24

FEDERAL TRADE COMMISSION, *Petitioner*,

vs.

STANDARD OIL COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICI CURIAE

FOR

EMPIRE STATE PETROLEUM ASSOCIATION

NATIONAL OIL JOBBERS ASSOCIATION, INC., AND MEMBER ASSOCIATIONS IN APPENDIX A

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October 1957

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BRIEF AMICI CURIAE

FOR

EMPIRE STATE PETROLEUM ASSOCIATION

NATIONAL OIL JOBBERS ASSOCIATION, INC., AND MEMBER ASSOCIATIONS IN APPENDIX A

INTEREST OF AMICI CURIAE

Empire State Petroleum Association, Inc. is a trade association of the independent petroleum jobbers and wholesalers of New York State. The National Oil Jobbers Council, Inc. is a federation of similar state and regional jobber associations; its member groups, who join in this brief, are listed in Appendix A and represent thousands of independent petroleum jobbers.

Empire State has appeared, *amicus curiae,* at all stages in this litigation since 1949. National Oil Jobbers Council filed a separate brief, *amicus curiae,* in the court below, and several of its members joined Empire State in its brief before this Court in 1951.

These independent petroleum jobbers have a direct and vital interest in the disposition of this proceeding. They oppose the position of the Federal Trade Commission and have done so throughout this proceeding. If the Commission's view prevails, the independent jobber function in gasoline distribution will be seriously jeopardized.

This proceeding was initiated by the Commission seventeen years ago on a complaint filed in 1939 by retail gasoline dealers who appear here, *amici curiae,* in support of the Commission decision.[1] (Their present counsel was formerly the Commission attorney prosecuting the complaint.)[2] These retailers avowedly sought to use the 1936 Robinson-Patman Amendment to the Clayton Act and the 1937 Miller-Tydings Amendment to the Sherman Act, to achieve anti-competitive pricing of the character the antitrust laws were designed to prohibit.[3]

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[1] "Complaints to the FTC in 1939 by the Retail Gasoline Dealers Association of Michigan, among others, led to the Standard (Indiana) case." H. Rep. 2966, 84th Cong., 2d Sess. 167 (1956).

[2] See Retailers Brief, p. 7.

[3] The primary interest of these retailers is retail price fixing. During trial, Standard placed in evidence articles from the Retail Gas Dealers' News, the official journal of amicus Retail Gas Dealers of Michigan. These are typical:

> "PREPARE FOR STATE-WIDE STABILITY
>
> Federal Hearing Could "Cinch" Fair Trade for All Michigan Gas Dealers
>
> When will the Federal [Trade Commission] Hearing begin? . . .
>
> The ultimate result will benefit the entire State. With the proper follow-up as contemplated by the Association, all of Michigan will be rid of subsidy and chiseling and the illegitimate children of these ogres—price wars and lost sales."
>
> (Retail Gas Dealers' News, August, 1940, R. 76)

* * * * * * * * * * *

> "DEALERS ACCLAIM U. S. ACTION
>
> Simultaneous with the Federal Trade Commission's announce-

The brief of the retailer *amici* is based on the premise that reinstating the Commission's order will achieve (noncompetitive) price stability—a premise patently in conflict with national antitrust policy and contrary to the realities of gasoline marketing.

Historically, these retailers have sought to eliminate price competition. Their goal, however, can be accomplished effectively only through the use of "Fair Trade" by all sellers or by a price-fixing conspiracy. It cannot be accomplished through this Federal Trade Commission decision.

Retailers' expectations are accurate only to the extent that they anticipate the Commission's decision will effectively prevent Standard from selling simultaneously to both retailers and jobbers. But it would still not prevent jobbers from *lawfully* buying elsewhere at tank car prices: Many refiners sell gasoline only in tank car quantities at tank car prices. A number of major suppliers, who sell to retailers in some markets, sell only to jobbers in other markets. Still others market gasoline purely on an intrastate basis.

Notwithstanding the retailers' contrary statements, gasoline *is* freely available at the tank car price to any jobber who has the credit and the facilities to buy in tank car quantities. Despite these retailers' hopes for jobber liquidation, jobbers will continue to exercise their (unwelcome) competitive influence on gasoline distribution.

While achieving no benefits for retailers, the Commission's decision would have a harsh impact on jobbers. It would: (a) force jobbers (whose present suppliers also sell

---

ment of [complaints against Standard and others] came the news that the Battle-Creek-Kalamazoo area had responded to Association efforts. Market stability had been attained. . . ."

(Retail Gas Dealers' News, January, 1941, R. 87)

* * *

"DOOM AT HAND FOR SECRET REBATES

Combination of bright prospects for gasoline dealers: a favorable verdict in the Federal Trade Commission's complaint of price discrimination in Michigan; and passage of . . . the new improved fair trade law."

(Retail Gas Dealers' News, April, 1941, R. 85)

direct to retailers) to shift, at great expense, to other suppliers selling only to jobbers; (b) encourage suppliers to assume the distribution functions formerly performed by their jobbers in order to retain the retail customers of the ex-jobbers; and (c) reduce the number of suppliers competing for jobber business (as suppliers selling retailers abandon sales to jobbers).

1. Statement of the Case.

The Commission complaint, filed November 29, 1940, charged price reductions in the sale of gasoline to four Detroit jobber customers of Standard, resulting in an alleged injury to competition among gasoline retailers, in violation of Section 2(a) of the Robinson-Patman Amendment. Standard previously had lost 3 other jobbers to competitors offering lower prices (R. 1912-1916). This Court has previously noted, and the Commission tacitly concedes, that the price reductions at issue were made to retain those customers, in response to lower prices offered the four buyers by Standard's competitors.

The Commission expressly found that Standard had reason to believe it would lose those customers to competitors offering lower prices if it did not grant the lower prices. *The lawfulness of Standard's competitors' prices stand unchallenged on this record;* the Commission has persistently refused to make any finding as to their legality, despite requests by Standard and these *amici* to do so.

The evidence largely concerned 1936-38 sales of "distress" gasoline in the "demoralized" Detroit area (R. 5116)). The Examiner found the market characterized by "price cutting orgies" (R. 5118). Detroit was a "dumping ground" for surplus gasoline from the Mid-Continent fields. One Commissioner described competition as "dog-eat-dog" (R. 5416).

The market instability was pervasive: this Court found that the competitive effect would have been the same on the retailers whether or not Standard met the competitors' lower prices. But the Commission view here would prohibit a petroleum supplier—whether a major refiner or a jobber—from retaining a customer by meeting a price that is *already* lawfully available to the buyer from a competing supplier. This rule of law is, of course, applicable to 1957 commercial conduct, although based exclusively on evidence arising out of the depressed mid-30s. It would place independent petroleum jobbers in an ever tightening competitive vise; but it would in no way affect price competition among retailers.

In 1951, this Court held that "meeting competition" was a full defense and remanded the case to the Commission "to make findings *in conformity with the opinion of this Court.*" That decision required the Commission to find "good faith" unless the Commission found the competitors' lower prices unlawful, or produced additional evidence negativing "good faith." Yet the Commission offered no new evidence and declined to find that the competitors' lower prices were unlawful.

2. The Economic Function Performed by Jobbers in Gasoline Distribution.

An understanding of the function of independent jobbers in gasoline distribution is critical to an understanding of the impact this case will have on those jobbers.

Gasoline for motor vehicles originates in a "refinery" and is pumped ultimately from underground tanks in a retail service station into the gasoline tanks of vehicles. In simplest terms this case is about how gasoline gets from the refinery to the retailer's tank.

A retailer owns or leases his service station. Gasoline is delivered to his station in trucks called "tank wagons."[4] The storage capacity of a service station is limited. Frequent deliveries of gasoline are necessary to meet the demand. Tank wagon trucks delivering this gasoline may be owned by the supplier-refiner, in which case they are supplied out of the refiner's own storage facilities, or they may be owned and operated by an independent gasoline jobber, in which case they are supplied out of storage facilities owned by the jobber.

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[4] 700 to 800 gallons was the average tank-wagon delivery at the time of the hearing; modern tank-wagons are somewhat larger.

The jobber fulfills the intermediary distribution functions which the supplier would otherwise have to perform himself if he were to deliver directly to retailers. A jobber must own a "bulk plant" for storage of large quantities of gasoline shipped to him either directly from the refinery or from a storage terminal maintained by the refiner. The jobber is supplied in "tank-car" quantities or greater. A tank-car shipment, ordinarily 8,000 to 12,000 gallons, is many times larger than a tank-wagon shipment. Jobbers may receive deliveries, as well, by barge (20,000 barrels of 42 gallons each) or even by oil tanker (125,000 42-gallon barrels). Jobbers are also supplied by pipeline.

Jobbers function principally to maintain an even, continuing flow of distribution at the local level. They operate fleets of trucks for local deliveries to service stations and maintain bulk storage facilities to receive large-scale shipments of gasoline. The maintenance of adequate jobber facilities requires a large capital investment, and jobbers frequently extend a line of credit to their service station customers and finance all or a part of the local advertising of their products.

The evolution of independent gasoline jobbers is a typical story of American enterprise. Most gasoline jobbers start out as retailers. After nurturing one profitable service station, a dealer may acquire a second, a third, and more stations. He may, in time, acquire volume commercial accounts. Small retailers may purchase their gasoline requirements through him. With growth his total volume of business may expand to a point where it is prudent for him to invest in a bulk plant and in tank-wagon distribution facilities. At this point he becomes, in physical terms, a jobber as well as a retailer, meaning that he is capable of performing intermediary wholesale functions of storage and distribution between refiner and retailer. When he attains this status, gasoline is freely available to him from many sources in the industry at a jobber or tank-car price.

This growth from retailer to jobber is, in fact, the actual history of most gasoline jobbers. Few jobbers enter into business full-grown. Almost inevitably, the emergence of a jobber is through his former identity as a retailer. But it would be impossible for a retailer, however efficient and aggressive, to expand his operations and become a jobber if he were compelled, at that point where he first undertakes jobber functions, to abandon his retail operations.

Once established, jobbers prefer not to operate retail stations; generally they lease their stations to other operators. This tendency is confirmed by the record in this case which shows that, after 1936, Wayne, Stikeman, and Citrin-Kolb (3 of the 4 buyers whose purchases are here at issue) sold only from 0.3% to 15.4% of their gasoline purchases at retail. After 1938, Stikeman abandoned all retail selling, and by the time the Commission's complaint issued herein in 1940, Wayne and Citrin-Kolb had limited retail operations to those temporary periods when one or more of their stations were without a lessee.

ARGUMENT

I

THE COMMISSION'S DECISION DISREGARDS THE WHOLESALE FUNCTION IN GASOLINE DISTRIBUTION, ENCOURAGES ELIMINATION OF INDEPENDENT JOBBERS AND WILL NOT HELP RETAILERS.

The immediate impact of the Commission's decision will be felt primarily by gasoline jobbers, not by Standard.[5] It will have no effect upon competition among retailers. The Commission's decision, through circumvention, achieves precisely the same anti-competitive result rejected by this Court in 1951. If validated, the Commission's theory will drive many jobbers from business, will compel numbers of surviving jobbers to shift suppliers at great loss, will drastically weaken competition among suppliers for jobber business, and will spur displacement of independent jobbers by the major oil companies themselves.

This threat to jobbers was recognized during oral argument before this Court in the prior appeal. Mr. Justice Black said to Commission counsel: "Are you attacking the wholesale system and trying to put the wholesalers out of business . . . from what you have just said in your answer to the question of Justice Frankfurter it sounds like you are . . ."[6]

The threat remains.

The Commission and the retailer *amici* ignore the jobber function. They consistently describe the tank car price as a "quantity discount" or the "allowance of an unearned discount." They treat the issues here as though there were no distinction between a refiner's tank car deliveries to a jobber's bulk plant and its tank wagon deliveries to a retailer's service station pumps. (See, *e.g.*, Retailers Brief, pp. 34-5). They assume that the performance of wholesaling distribution functions cost the jobber nothing.

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[5] See generally, *Functional Discounts under the Robinson-Patman Act: The Standard Oil Litigation*, 67 Harv. L. Rev. 294, 312-317 (1953).

[6] Transcript of Oral Argument, pp. 101-102.

Yet the Commission found, as did this Court in 1951, that each of the customers whose purchases are here at issue maintained its own bulk plant, had fleets of tank wagons for local service station distribution, and had sufficient credit responsibility and physical facilities for wholesale operations. The trial examiner and the Commission both found that these customers would be granted a lower tank-car price by many suppliers.

The future of the independent jobber is at best uncertain. The weight of capital investment to establish a going concern is heavy. Jobbers of major-brand gasoline must invest heavily in the brand name of their supplier. They frequently must build and lease to retailers service stations conforming to an architectural style of the supplier. They must brand their stations and trucks with the colors and mark of the supplier and promote the supplier's brand on signs or billboards.

The jobber level of distribution is fiercely competitive. Jobbers compete not only with other jobbers but also with major suppliers. Not unusually, jobbers are compelled by supplier-competition to furnish pumps, to paint stations, even to pave driveways for service station customers.

The cost of performing the jobber function, plus a fair profit, is substantially equal to the margin between the tank-car and the tank-wagon prices. If the jobber function could be performed for less than this price spread, suppliers would perform it themselves, rather than permit jobbers to do so. This is simple commercial realism. As the retailer *amici* state, the major suppliers are not anxious to sell at lower tank car price, and do not when it is not to their advantage to do so (Retailers Brief, pp. 9-11).

Gasoline jobbers are, inelegantly, the goat of this proceeding. The likely result of an endorsement of the Commission view here will be the decline or outright elimination of the independent jobber function in oil distribution. The logical consequence of the modified decision pressed here by the Commission "favors rather than discourages monopoly" and would bring full circle "the tragic loss to the nation" foreseen by Mr. Justice Douglas in his dissent in *Standard Oil Company* v. *U. S.*, 337 U.S. 293. His words have an almost uncanny pertinence in 1957:

> "Today there is vigorous competition between the oil companies for the market. That competition has left some room for the survival of the independents. But when this inducement for their survival is taken away, we can expect that the oil companies will move in to supplant them with their own stations. There will still be competition between the oil companies. But there will be a tragic loss to the nation. The small, independent businessman will be supplanted by clerks. The oil companies will command an increasingly larger share of both the wholesale and the retail markets" 337 U.S. at 320-21.

There can be no inducement for the long-range survival of independent jobbers if the Commission's view prevails. As a matter of simple business pragmatics, the Commission's decision inevitably will accelerate the supplanting of independent jobbers by the oil companies themselves.

While the precise terms of the Commission's order may or may not, in a technical sense, be before this Court,[7] it is fundamental that the Court must concern itself with what the Commission seeks to accomplish through its decision. The order to cease and desist embodied in the Commission's 1953 modified findings is the fourth order drafted in the course of this proceeding. Yet, manifestly, it suffers from the same infirmities as its predecessor orders—so roundly censored by courts and commentators alike—and it would most surely have the same debilitating effect upon independent jobber competition as the earlier orders. The fact is that the Commission, so long as it persists in its present course, cannot draw an order which will not gravely injure jobbers.

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[7] The Commission contends that the only matter before this Court is the ruling of the Court of Appeals, and should this Court reverse that decision, it should then remand to the Court of Appeals for the consideration of the appropriateness of the Commission's order (Brief p. 24, n. 10).

The effect of the Commission's order before this Court in 1951 was clearly to sanction the outright purge of jobbers by Standard or else to compel unlawful resale price maintenance. The Court of Appeals, in its 1949 opinion affirming the Commission, stated frankly:

> "To avoid the force of [the order], the petitioner may do one of two things. First, discontinue selling to wholesalers at a price different than that made to retailers. . . .
>
> "Secondly, the petitioner may under the right to choose its customers refuse to sell to wholesalers who sell to retailers below the price the petitioner makes to its own retailers . . ." (173 F. 2d 210, 217)

It was presumably the restrictiveness of this anti-competitive option which led the dissenting Justices in this Court in 1951 to conclude:

> "We would affirm the decree below, in principal, *even though we should conclude some amendment might be required in the wording of the order*" (340 U.S. at 267).

The conflict of such an order with the basic purposes of other antitrust laws has been seriously attacked.[8]

The Commission's present order, though simplified, is essentially the same as the earlier orders.[9] The changes are semantic only. This fact is frankly conceded by the retailer *amici*. They state:

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[8] See, e.g., *The Swinging Door—Or How to Obey One Antitrust Law by Violating Another*, 59 Yale L. J. 158 (1949). Adelman, *Integration and Antitrust Policy*, 63 Harv. L. Rev. 27, 72-74 (1949).

[9] The 1953 order bars:

> ". . . selling such gasoline to any retailer thereof at a lower price than to any other retailer who in fact competes with the favored purchaser in the resale of such gasoline to the public ("Retailer" as here used applies to that portion of the business of any purchaser which consists of the retail sale of gasoline to the public.)

and

> ". . . selling such gasoline to any retailer at a price known by respondent to be higher than the price at which any wholesaler-purchaser is reselling such gasoline to any retailer who competes with such direct retailer-customers . . ." (R. 5392)

> "The present order is the equivalent . . . of the Commission's prior order as modified and affirmed by the Court below in 1949. The effect of the two paragraphs is the same, the difference in terminology being only one of emphasis. Both the old and new paragraphs offer Standard the same alternatives for compliance" (Retailer's Brief, p. 33).

The Commission's decision would: (1) deny jobbers (of suppliers who also sell to retailers) any compensation for the jobber distribution function they perform on gasoline ultimately resold through a station they operate; (2) compel many jobbers to shift suppliers at great financial loss without countervailing gain to competition, eliminating a major degree of competition among suppliers for jobbers sales; (3) compel unlawful resale price maintenance; and (4) encourage forward vertical integration by the major oil companies:

(1) Under the Commission's decision, the jobber is classified as a "retailer" and must purchase at the retail price all gasoline which he resells at retail, even though he performs all the wholesale distribution functions such as storage and delivery. In effect, *he* is discriminated against, for he must perform those functions himself without compensation.[10] And even if, as a technical matter, the jobber were permitted a lower price in the amount of the *supplier's* cost-savings in marketing through him, the jobber would *still* be discriminated against; he would receive only partial compensation. He would not be entitled to any interest on his investment, or profit, while the supplier would receive a phantom profit on the distributive functions performed by jobbers and a phantom return on the jobber's investment in facilities to perform the function.

Insofar as the Commission would theoretically permit suppliers, who sell to both dual-functioning jobbers and to retailers, to continue selling to the jobbers by segregating that portion of the jobber sales which will be resold at wholesale and apportioning a functional discount thereon, the whole concept of a seller requiring from his customers detailed accountings of what *they* do with their own property after purchase is, like resale price maintenance, totally alien to a system of independent enterprise and lends itself to snooping, deception, control and abuse.

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[10] See Adelman, op. cit., *supra*, 63.

(2) The basic theory of the Commission's case requires jobbers to resell to retailers *only* at Standard's tank-wagon price in order to maintain retail price uniformity. Jobbers cannot competitively accept such restrictions and still compete with other jobbers not similarly restricted. As a simple matter of business survival they must shift to other, unfettered suppliers, thus eliminating their former supplier as a source of supply. This necessarily reduces competition among suppliers for jobber business. And the necessity for jobbers to give up existing suppliers would destroy jobber investments in real estate, pumps, signs and other facilities carrying their supplier's trade banner.

Yet even then, as a practical matter, the Commission's decision would not foreclose jobbers from purchasing elsewhere at a tank-car price. The decision would only succeed in barring Standard's jobbers from preserving their investment in Standard's trade name and good will, and would compel them to shift to other suppliers at great physical burden and financial sacrifice.

(3) The sharpest criticism leveled at the Commission's early decision was that it would force Standard to engage in resale price maintenance if it were to continue selling to jobbers at all. The earlier order required Standard to discontinue selling to any jobber who resold to retailers below the price Standard charged its retail customers. In effect, it would have required each of Standard's jobber customers to maintain Standard's tank wagon price at the risk of being cut off by Standard. The Court of Appeals in 1949 denied that the order would compel resale

price maintenance on the ground that it did not technically require Standard to enter into resale price contracts; but this essentially ostrich-like response drew this comment from Mr. Justice Jackson, during oral argument:[11]

> "If Standard did just what they are ordered to do by this, they certainly would be in danger of prosecution, would they not, if they did it voluntarily without an order? * * * If I was enforcing the Sherman Antitrust Act and I thought they were making provision not to supply anybody who did not maintain their prices, I would give them some trouble. I do not see how the Department of Justice could fail to strike at that sort of a voluntary arrangement as a restraint of trade, holding up prices."

There is no substantive change in the Commission's present decision and order. It requires Standard to charge all of its 358 retail customers the lowest price that any of its four jobber customers may charge to any of their customers. It is difficult to believe that any supplier, with *four* jobber customers, would permit a jobber to depart from the *supplier's* price to its retailers—if the penalty for permitting that independent competitive action was that the supplier be required to reduce *its* price to 358 other customers.

Instead of requiring that the deviating jobber be cut off, as the earlier order did, the present order requires the supplier to reduce its price to all of its customers to meet the lowest price offered by any of the jobber customers. Even more effectively than before it insures that no jobber will resell gasoline at other than the supplier's price to its retailer customers, for the earlier order put the penalty on the jobber and this one puts it on Standard. The order was obviously intended to accomplish just that purpose, for the Commission must know that Standard, as a practical business matter, would not let a jobber reduce his price to so much as one station if doing so required Standard to lower its price to 358 other customers. Whatever the route followed, the result is the same: resale price fixing.

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[11] Transcript of Oral Argument, pp. 88-89.

(4) The Commission's decision invites eventual forward vertical integration by oil suppliers. The alternative to a heavily policed system of jobber surveillance and resale price maintenance, which the Commission would require if Standard continues selling to jobbers, is for Standard to assume the intermediary distributive role of the jobber and in time to cut off jobber sales entirely. While this, on its face, seems a drastic step, it is a development that may reasonably be expected under the Commission's order. The elaborate system of supplier supervision over the sales of dual-functioning jobbers, and the rigid supplier controls which would be required in order to maintain strict price conformity among jobbers would probably prove anathema to any business. Rather than assume this role and risk the hazards of non-compliance, a supplier, such as Standard, would seek to bypass the jobber and sell directly to the jobbers' retail customers.

Added to these pressures are the market restrictions which the order places upon Standard's jobbers themselves which would aid in disintegrating those jobber operations and would leave a distributive vacuum that only the supplier could fill. While this Court has held that Standard can reduce its price in good faith to meet a lower price of a competitor (although the Commission would seek to frustrate that ruling), the Commission would effectively bar Standard's jobber customers from meeting in good faith the lower price of *their* competitors.

There is no practical difference between the Commission's present decision and its earlier decision. Standard must force into price conformity any jobber known by it to be reselling to retailers below the tank-wagon price, or cut him off, without regard to the reasons, however justifiable in legal terms, for the jobber's lower price.

When a supplier cuts off a jobber, it may be assumed that the supplier will move into that gap and seek to retain the jobber's retailer customers by selling directly to them. Even if the jobber then finds a new supplier he will have to develop an entirely new retailer clientele in the face of aggressive, tightly-entrenched jobber and supplier competition.

II

THE COMMISSION REFUSES TO FOLLOW THIS COURT'S 1951 DECISION. IT NOW ADOPTS A THEORY UNSUPPORTED BY ITS OWN FINDINGS. CONTRARY TO THE UNDISPUTED FACTS. AND IN CONFLICT WITH THE LAW AS STATED BY THIS COURT.

A. The Commission's Historical Opposition to the Views Expressed in This Court's 1951 Decision and Its Request to Congress to Overturn the Decision.

This appeal represents the final attempt of the Commission to reach the result repudiated by this Court in 1951. The Commission's unrelenting position can best be understood in the light of its own public statements.

Unwilling to accept this Court's holding, the Commission majority (Commissioner Mason dissenting) in April, 1951 urged Congress to overturn the decision. The *Standard* decision, the Commission's chairman wrote, "reaffirmed the good-faith proviso as a complete defense regardless of the effects which may flow from discrimination" and, he said, "raises the anomaly of monopoly power being permitted to use the same weapons to maintain itself which are denied to others for fear of creating a monopoly." [12] In June 1951, another Commissioner, spokesman for the majority, again bitterly assailed the decision, before the House Judiciary Committee and urged nullifying legislation.[13]

In that context of strident philosophical opposition to the Court's decision the Commission, on remand, made its modified 1953 findings (two Commissioners dissenting). Two months later, in a letter to the Senate Judiciary Committee (the Commissioners who dissented from the modified findings also dissenting), the Commission Chairman wrote:[14]

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[12] Letter of FTC Chairman Mead, April 18, 1951, Sen. Rep. 293, 82d Cong., 1st Sess. 7 (1951).

[13] Testimony of FTC Commissioner Spingarn, Hearings before Subcommittee on Monopoly Power, House Judiciary Committee, 82d Cong., 1st Sess. 21 (1951).

> "The present law, as interpreted by the majority decision of the Supreme Court in the Standard Oil of Indiana case (340 U.S. 231) is in the opinion of the Commission too weak to meet the problem to which the Robinson-Patman Amendment was originally addressed."

Again, on April 19, 1956, speaking for a majority of the Commissioners before the House Judiciary Committee, a member of the Commission said:[15]

> "H. R. 11 would largely overturn the *Standard Oil of Indiana* decision. This would remove the grave potentialities for an impaired antitrust policy that are inherent in the Standard Oil holding, by reinstating the original concept of the Robinson-Patman Act. . . .
>
> "*I am frank to admit that I believe the Supreme Court's holding in Standard Oil of Indiana to have been founded on a misapprehension* of the legislative purpose behind the good-faith proviso and, indeed, behind the Robinson-Patman Act generally." (Emphasis added.)

The decision now under review is not responsive to this Court's 1951 mandate, but to long-held views of a Commission majority which has been, and is, bent on frustrating the directive of this Court.

B. The "Afterthought" Argument of an Alleged Illegal Pricing System of the Type Condemned in Staley and Cement.

In the Court of Appeals, Commission counsel argued, for the first time, that Standard "adhered to a price system in reducing its prices to the four jobbers." The court characterized this argument as an "afterthought" which was "designed to bring the case within the scope of the system condemned by the Supreme Court in the *Staley* and kindred cases." 233 F. 2d 649, 653.

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[14] Letter of FTC Chairman Mead to Chairman, Senate Judiciary Committee, March 16, 1953.

[15] Testimony of Commissioner Kern, Hearings before Antitrust Subcommittee, House Judiciary Committee, 84th Cong., 2d Sess. 206 (1956).

This "afterthought" pricing system theory, now the Commission's principal contention in this Court, depends wholly upon the existence of a "price system" of the type condemned in the *Staley* and *Cement* cases.[16] The argument was plainly improvised on appeal to circumvent this Court's 1951 decision. It is now presented to this Court as if it were the *basis* of the Commission's decision and order, although *no mention was made* of either *Staley* or *Cement* in the decision on remand.

The Commission's 1953 silence is understandable: both *Staley* and *Cement* were entirely distinct cases, involving the use of inherently discriminatory pricing systems.

The complaint in *Staley* charged the seller with having mechanically adopted in their entirety not only the lower but also the higher prices of its competitor, Corn Products Refining Company. In a companion case the Commission found, and this Court affirmed, that Corn Products' prices were unlawful.[17]

The complaint in *Cement* charged, and the Commission and this Court found, a conspiracy among *all* producers of cement to use a common multiple basing point system.

In contrast, the complaint in this case charged solely and specifically the granting of a lower price to four named individual customers. There was no charge in the complaint and no finding by the Commission of a pricing *system* or of unlawfulness in competitors' prices.

Nowhere in the complaint, in the Commission's detailed 1945 decision, nor in its modified 1953 findings is the term "pricing system" used in reference either to Standard's or to its competitors' prices. Yet, in its brief in this Court, we find nearly 100 references to "system," "pricing system," and "systematic pricing."

While the *Staley* case was decided by this Court several months prior to the Commission's original 1945 decision, and was the *sole* Supreme Court decision interpreting

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[16] *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948).

[17] *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726 (1945).

Section 2(b) at that time, the Commission made no reference to *Staley*. And the Commission's modified 1953 decision failed to refer either to *Staley* or to *Cement*—upon which cases the Commission now claims its decision was primarily founded. But the brief of the Commission before this Court abounds with references to the two cases: 43 times to *Staley* and 27 times to *Cement*.

In attempting to bring this case within the doctrine of the basing point decisions, the Commission makes essentially two arguments: *First*, that Standard used a "general pricing system" in granting price concessions to four of its 362 Detroit customers. *Second*, that Standard's price reductions to the four jobbers were made in response to lower prices made by competitors pursuant to their own general pricing systems. Both contentions must fail, for the record conclusively shows that Standard's lower prices to Ned's, Citrin-Kolb, Wayne and Stikeman were made as reductions from a pre-existing uniform price scale and were made in good faith, in individual competitive situations, to meet the equally low prices offered by competitors.[18]

The evidence compels the following conclusions (which the Commission has never contested): that from 1921-1940 Standard's share of the Detroit market gradually declined; that Standard had lost three jobber customers to competitors' lower-price offers; that the price reductions to the four jobbers were made in response to numerous and continuing specific offers from rival companies; that the price reductions were not below the competitors' offers; that if Standard had not granted the price reductions it would have lost the four jobbers; and that the price reductions were granted to retain and not to gain customers.

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[18] See McGee, *Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case*, 23 U. of Chi. L. Rev. 398 (1956). The article reviews all the evidence relating to offers by rival companies to Standard's four jobbers and concludes that "Standard's four remaining jobbers were not passive agents in the process of price-making at the wholesale level. They had to bargain for what they got, and they bargained hard and well. Their supplier was evidently unwilling to give them better terms than it had to give, and it calculated well just what it would take to keep their business" (p. 435).

In short, each of the price reductions made by Standard was in accordance with every requirement of the statutory defense of "meeting competition." Indeed, if anything is remarkable about Standard's use of the defense, it is the fact that it was used so conservatively in view of the competitive activity in the Detroit gasoline market.

According to the Commission's theory, a seller apparently must meet *all* competitive offers, for as soon as he exercises restraint he is, ipso facto, using a discriminatory general pricing system. This assertion is plainly without merit. The court below rightly rejected it, and declared that "a seller must be permitted in the exercise of a sound judgment to determine when and under what circumstances it will reduce its price in order to meet that of a competitor," 233 F. 2d at 654.

The other side of the Commission's pricing system argument is that Standard's price reductions were in response to prices of competitors who themselves were using a pricing system, a practice condemned by this Court's holding in its *Staley* and *Cement* decisions. But the analogy with *Staley* and *Cement* is inapposite, and the Commission's assumption that the prices of other suppliers selling to jobbers in Detroit were unlawful is unwarranted.

The Staley Company, entering the glucose market, adopted *in its entirety* the unlawful basing point system used by the market leader, Corn Products, and then sought to justify the illegal pricing system on the ground that it was simply matching the prices of a competitor. This Court rejected the argument.

Cement reiterated the *Staley* doctrine, holding that the meeting competition defense did not permit sellers to adopt a conspiratorial, industry-wide, multiple-price basing point system on the ground that they were simply meeting the lower prices of competitors using the same system.

This record provides no basis for an equation with *Staley* and *Cement*, ~~in each~~ of which cases this Court expressly found the competitors' prices illegal. Here the Commission persistently declined to find the competitors' prices unlawful.

The remarks of two Justices of this Court, during oral argument on the prior appeal, are significant. Commission counsel had said: "Now, if [the competitors' offers] were illegal offers then, of course, under the *Staley* case Standard had no justification in meeting these illegal offers with another illegal offer." Mr. Justice Jackson then said: "Of course, if they were illegal offers, you would not need to go into ~~the~~ question of good faith." Commission counsel replied: "That is right" (Mimeo. Transcript, p. 72). Later, Mr. Justice Frankfurter said that this Court could not "be shuttlecocked and battledored by the legal and illegal, because if this is meeting an illegal competition, all we have to do is cite the *Staley* case and then do no more" (Mimeo Transcript, p. 77).

In our *amici* brief to the Commission on remand, we urged the Commission to make a finding as to the legality of the competitors' prices, a request acknowledged only by the two dissenting Commissioners who stated that they were "satisfied that there is nothing in the 8,000 pages of evidence in this record which might cause [us] to suspect that the respondent knew, or that it had reason to believe, that the competitor's lower price, which it was meeting, was or might have been unlawful" (R. 5420).

In later testimony before the House Small Business Committee, one of the *majority* Commissioners, testifying as to this case, stated that the Commission found Standard not in good faith because it discriminated in price while its, "competitors [were] moreover, abiding by the statute."[19]

Lacking any finding of unlawfulness, the Commission, in its Petition for Certiorari, relied heavily upon its 1940 companion complaints against Gulf, Texas and Shell, to support its contention that Standard's competitors used discriminatory pricing systems. While the Commission brief merely suggests illegality, the retailer *amici* flatly state that the prices of those competitors are "prima facie" unlawful (Brief p. 19).

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[19] Testimony of Stephen Spingarn, Hearings before House Small Business Committee, 84th Cong., 1st Sess. 853 (1955).

Yet on April 3, 1957, following the granting of certiorari, the Commission (without publicity) dismissed those complaints. The Commission's brief now seeks to make light of the dismissals by grasping at a press release of June 18, 1957, announcing a *new* investigation into the pricing practices of Shell, Texas and Gulf. Surely the re-investigation and the press release are no more than transparent attempts to shore up the Commission's position before this Court.

The order dismissing those complaints was based upon a motion made in January 1955 by Commission counsel; the Commission waited until April 1957 to dismiss. In those 2½ years the Commission had ample opportunity to reinvestigate the complaints if basis existed.

Whatever the reason for the issuance of the June 1957 press release, the Commission, having dismissed the earlier complaints, is certainly not now reinvestigating 1936-39 pricing practices. And an investigation of *present* pricing practices in the Detroit area could have no bearing upon the legality of the 1936-39 prices involved here.

The issue as to the legality of these three competitors' prices, is, in any event, a smoke screen, for Standard lowered its prices in response to offers from many other competitors as well. There were 20 oil suppliers in the Detroit market. A number of these companies made offers of lower prices to the four jobbers who received Standard's reduced prices. The Commission does not impugn the validity of the prices used by *all* suppliers in the Detroit area and does not question the prices of other than those three suppliers.

Surely, there is *no* basis for attacking the legality of prices of the many suppliers who sell only to tank car buyers, who sell only in intrastate commerce, or who have a legal defense such as cost justification for their lower prices.

C. The Actual Grounds Assigned in the Commission's Decision for Not Finding Good Faith—Now Relegated to a Subsidiary Portion of the Argument—Were All Raised and Rejected in This Court's Prior Decision.

Subsidiary to its pricing-system argument, the Commission argues that the findings that Standard knew or should have known that its price reductions were not cost-justified and would result in an injury to competition, and its finding as to Standard's failure to revise its price scale at the time of the passage of the Robinson-Patman Act in 1936, negative the "good faith" defense. These were, in fact, the major bases for the Commission's rejection of Standard's defense in 1953. The Commission now suggests they simply constitute "another aspect" of that question (Brief, p. 58).

If Standard could have cost-justified its price reductions, or if the Commission had found no injury to competition, the lower price would have been lawful and there would have been no occasion to invoke the "good faith" defense. The court below, as had this Court earlier, pointed out that cost-justification and absence of injury are separate and distinct defenses from the "good faith" defense in 2(b). It noted: "This is the same theory upon which the Commission's previous order was bottomed and which was expressly repudiated by the Supreme Court," 233 F. 2d at 652.

Equally untenable is the Commission's newly improvised argument that Standard "knew or should have known" that its price reductions were not cost-justified and would injure competition, and that this "knowledge" impugned Standard's good faith. (Brief, p. 57)

This Court in *Staley* clearly suggested that such "knowledge" is irrelevant:

> "The statute at least requires the seller who has *knowingly* discriminated in price to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor" 324 U.S. at 759-60 (emphasis added).

Similarly there was nothing improper in the fact that Standard did not revise its prices after 1936. The passage of the Robinson-Patman Act narrowed the good faith defense to *meeting*, but not *undercutting*, competitors' prices. The amended statute, as this Court said in 1951, did not "cut into the actual core of the defense"; Standard still had the self-defensive right to *meet* a lower price offered by a competitor. But Standard *never* undercut the offers of competitors; its price reductions were lawful both before and after 1936. For this reason, as the court below noted, "the mere fact that [Standard] did not change its policy was of little, if any, consequence." 233 F. 2d 649, 653.

D. The Commission Persists in Equating Normal, Hard Competition With Theoretical "Injury" to Competition.

The sole aim of the Commission's complaint and decision (and of the original charges filed with the Commission by the retailers) is the elimination of retail price cutting.[20] The decision will have no such effect.

The Commission can bar Standard's tank-car sales to jobbers, but it cannot bar jobbers from lawfully obtaining the tank-car price from any one of many suppliers.

Unadorned, this is a case about Standard's prices to Ned's.[21] At trial, Commission counsel (now counsel for the retailer *amici*) conceded that "the testimony taken regarding injury to competition centered upon Ned's" (Brief of Counsel prosecuting the complaint, July 12, 1943, p. 20).[22]

But Ned's was a symptom of competition, not a cause of injury.

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[20] Cf. Retailers Brief, p. 2.

[21] The Commission found that "there is no evidence that any discount was allowed to purchasers by any retail service station operated by [Wayne and Stikeman]" (R. 5167). The only retail price reductions by Citrin-Kolb were de minimis: 2¢ discount cards offered for three weeks at one station in "1938 or 1939" (R. 5170).

[22] Ironically, while the Commission based its finding of injury largely on Ned's, it concedes Ned's to be an exception to the alleged system it claims precludes a finding of good faith (Brief 42-45).

The Hearing Examiner found that "in the latter part of 1936 and early in 1937 five tank-car customers of the major oil companies" were selling gasoline below the "prevailing retail market price" and this underselling continued in 1937 and 1938 (R. 5113). But four of the five so-called price cutters were supplied by major oil companies other than Standard. And Ned's, the one that was supplied by Standard, did not receive the tank-car (jobber) price from Standard until 1938.

The competitive struggle was intensified by "non-major" retailers. The hearing examiner found that:

> "When the price differential between gasoline of the major and non-major companies was not more than *two cents per gallon*, there was but little or no competition, but that a competitive situation arose when the normal difference in price between the branded and non-branded gasolines rose above two cents per gallon, [and] grew more intensive after the price spread increased" (R. 5180, emphasis added).

The evidence showed, and the examiner found, that non-major gasoline sold *as much as six cents a gallon below* the "prevailing major-brand retail price" (R. 5107). The prices of the Austin and Sunny-Puritan stations, selling Zip and Joy gasolines, were five to six cents a gallon below Ned's prices in 1938 and 1939 (R. 1843-46). The Austin stations sold 20 million gallons of gasoline a year (R. 4377) and the Sunny-Puritan stations over 12 million gallons (R. 4878). In contrast, Standard's largest customer sold only 5 million gallons a year.

To the extent then that retail service stations in the Detroit area were "injured" by Standard's lower price to Ned's—and to permit such an inference it is necessary to define "injury" in a way which equates it simply with hard price competition—Standard's tank-car price was *not* the proximate cause. At all times, Standard was meeting or partially meeting a lower price which competitors were making freely available to their own customers and were offering to Ned's.

Any retailer "injury" flowed not from Standard's prices but from the fact that Ned's and its competitors could freely and lawfully obtain the same prices from competitors of Standard selling branded gasoline of comparable quality and public acceptance, and from non-major competitors selling comparable quality gasoline at appreciably lower prices. Whether or not Standard sold at the lower price was immaterial; Ned's was bound to get the lower price in any event, and so were his competitors.

This Court recognized this fundamental market fact in 1951 when it stated:

> "It must have been obvious to Congress that any price reduction to any dealer may always affect competition at that dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory. Likewise, it must have been obvious to Congress that any price reductions initiated by a seller's competitor would, if not met by the seller, affect competition at the beneficiary's level or among the beneficiary's customers just as much as if those reductions had been met by the seller" 340 U.S. at 250.

The net effect of the Commission's decision will be a loss to jobbers and a spur to forward vertical integration by oil companies. Price competition at the retail level will continue as virulent as ever.

CONCLUSION

The Commission's decision is no more than an effort to circumvent the 1951 decision of this Court. The impact of the order will be felt primarily by independent gasoline jobbers and not by Standard. Restrictions placed upon jobber operations by the Commission's order will hobble competitive activities by jobbers, will reduce competition among suppliers for jobber business, will, at the least, require unlawful resale price maintenance, and will give impetus to forward vertical integration by major suppliers and to the elimination of independent jobbers.

The legal basis of the Commission's decision urged in this Court is a patent afterthought without support in the record of this proceeding or in the several earlier Commission decisions.

The Commission's decision will not prevent price cutting at the retail level of competition, the only relief which the complainant retailers seek. Standard's lower prices were not a causal factor of retail price cutting. They were merely a competitive response to lower prices already lawfully available to Standard customers from other suppliers.

We urge that the decision of the Court of Appeals be affirmed, that the Commission's antiquated complaint derived from another economic era be finally dismissed, and that independent gasoline jobbers be freed from the jeopardy which this proceeding has posed for nearly two decades.

Respectfully submitted,

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APPENDIX A

Alabama Petroleum Association, Inc.
Arkansas Independent Oil Marketers Association
Colorado Petroleum Association
Connecticut Petroleum Association
Florida Petroleum Marketers Association, Inc.
Georgia Independent Oilmen's Association
Illinois Petroleum Marketers Association
Independent Oil Men's Association of New England
Indiana Independent Petroleum Association, Inc.
Intermountain Oil Jobbers Association
Iowa Independent Oil Jobbers Association, Inc.
Kentucky Petroleum Marketers Association
Missouri Petroleum Association
Mississippi Oil Jobbers Association
Nebraska Petroleum Marketers Association, Inc.
North Carolina Oil Jobbers Association
Northwest Petroleum Association
Pennsylvania Petroleum Association, Inc.
South Dakota Independent Oilmen's Association
Tennessee Oil Men's Association
Texas Oil Jobbers Association
Virginia Petroleum Jobbers Association
Wisconsin Petroleum Association
Wyoming Oil Jobbers Association